



## Metropolitan Cases

### **Delta Stewardship Council Cases (Sacramento Superior Court)**

Shortly after the Delta Stewardship Council certified its EIR and adopted the Delta Plan in May 2013, Metropolitan, the State Water Contractors, and several other state and federal water contractors filed litigation challenging the validity of the EIR and some of the policies and regulations adopted as part of the Delta Plan that could threaten the reliability of State Water Project and Central Valley Project water supplies. Their cases, as well as cases brought by in-Delta and non-governmental interests have been coordinated in Sacramento Superior Court as the Delta Stewardship Council Cases (JCCP 4758).

On May 21, 2015, the state and federal water contractors filed a combined reply brief in response to the Delta Stewardship Council's opposition. The water contractors also filed an opposition to an amicus brief by former State Senator Joe Simitian because the proposed amicus brief merely states the former legislator's opinion that the Delta Plan is consistent with the Legislative intent behind the Delta Reform Act of 2009. The court should not consider that opinion because it was not presented to the Council before it adopted the Delta Plan, and it does not constitute legislative history.

Now that briefing is complete, the court will set a date for the hearing on the merits and calendar any pre-hearing motions, including the water contractors' joint motions to intervene in the non-contractor cases and several motions to augment the administrative record. (See General Counsel's March 2015 Activity Report.)

### **State QSA Case (Third District Court of Appeal)**

On May 26, 2015, the Third District Court of Appeal dismissed all remaining appeals filed by the County of Imperial (County) and the Imperial County Air Pollution Control District (Air District) challenging the validity of the Quantification Settlement Agreement (QSA). The court of appeal also dismissed as moot a protective cross-appeal filed by Metropolitan, Coachella Valley Water District and San Diego County Water Authority. Dismissal of these appeals effectively ends 12 years of litigation, in which Metropolitan has

staunchly defended the QSA and various related agreements.

As previously reported, in February of this year, the Imperial Irrigation District (IID) entered into a settlement agreement pursuant to which it agreed to pay \$750,000 to the County and Air District and committed to working with them to ensure that the State fulfills its obligations to restore the Salton Sea. In return, the County and Air District agreed to request dismissal of their pending appeals. This settlement follows one reached in September 2014, in which IID agreed to pay a total of \$500,000 to Cuatro del Mar, Protect Our Water and Environmental Resources, and the Barioni/Krutzsch parties in return for them dismissing their state court appeals. The Barioni/Krutzsch parties still have one appeal related to the award of post-judgment costs. However, with dismissal of the above-referenced appeals, it is anticipated that the parties will enter into a stipulation to dismiss this appeal as well. (See General Counsel's September 2014 Activity Report.)

### **AFSCME Local 1902 v. Metropolitan (MOU Hearing Officer Appeal)**

As previously reported, Hearing Officer Barry Winograd issued his decision on February 20, 2015, sustaining a grievance by AFSCME Local 1902 that challenged Human Resources' use of comparative analysis testing for internal candidates during the recruitment and selection process. On May 20, Metropolitan filed a petition for writ of administrative mandamus seeking to overturn the decision. Metropolitan's position is that the applicable MOU language authorizes the use of comparative analysis testing during the recruitment and selection process. The Legal Department is representing Metropolitan in this matter. (See General Counsel's February 2015 Activity Report.)

### **Peter Von Haam v. Metropolitan, et al. (Los Angeles County Superior Court)**

As previously reported, Peter Von Haam filed a complaint for damages and other relief on September 3, 2014 against Metropolitan and his former manager, the General Counsel. Plaintiff alleged ten causes of action, of which six allege



violations of the Fair Employment and Housing Act: discrimination based on disability; hostile work environment; failure to prevent discrimination; failure to accommodate; failure to engage in the interactive process; and retaliation. The remaining causes of action allege intentional infliction of emotional distress, defamation, retaliation under the Labor Code, and invasion of privacy. Metropolitan filed a motion to strike punitive damages and a demurrer to the causes of action for intentional infliction of emotional distress, defamation, and invasion of privacy. The court granted the motions on April 30, 2015. On

May 15, plaintiff filed a second amended complaint which removes the General Counsel as a defendant and deletes the cause of action for retaliation. Metropolitan will demur to the second amended complaint and seek a dismissal of the causes of action alleging failure to prevent discrimination, intentional infliction of emotional distress, and defamation. That demurrer will be heard on September 28, 2015. Trial has been set for May 4, 2016. The Legal Department retained the law firm Seyfarth Shaw LLP to represent Metropolitan. (See General Counsel's September 2014 Activity Report.)

## Cases to Watch

### **EPA and Army Corps of Engineers Release Final Rule Defining “Waters of the United States”**

On May 27, 2015, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (hereafter referred to jointly as the agencies) released a 297-page final rule defining the scope of waters protected under the Clean Water Act (CWA). The statutory definition of “waters of the United States” given in the CWA is vague and has generated significant confusion and litigation, including three U.S. Supreme Court decisions, and the agencies have previously issued guidance seeking to clarify the scope of waters covered under the CWA. According to the agencies, the scope of jurisdictional waters covered under the final rule is narrower than under existing regulations. Thus, the agencies assert that fewer waters will be defined as “waters of the United States” under the new rule, partly because it puts important qualifiers on some existing categories such as tributaries. Also, the agencies claim that the final rule clarifies which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities would need to make jurisdictional determinations on a case-specific basis. In the rulemaking process, the agencies have emphasized that the rule is only defining jurisdictional waters and is not establishing any new or different permitting requirements for discharges to “waters of the United States.” In other words, the rule defines the types of waters that are protected under the CWA, but it does not address the types of discharges or activities that require a CWA permit.

As explained in the preamble, the key to the agencies' interpretation of the CWA is the significant nexus standard, as established and refined in Supreme Court opinions: “waters are ‘waters of the United States’ if they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.” In this regard, the final rule defines “waters of the United States” to include six categories of jurisdictional waters: (1) traditional navigable waters; (2) interstate waters; (3) territorial seas; (4) impoundments of jurisdictional waters; (5) tributaries; and (6) adjacent waters. A seventh category identifies five types of waters which, after a case-specific analysis, may be found to have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas, either alone or in combination with similarly situated waters in the region: (1) prairie potholes; (2) Carolina and Delmarva bays; (3) pocosins (a type of wetlands); (4) western vernal pools in California; and (5) Texas coastal prairie wetlands. The eighth category of covered waters includes waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and waters within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundments, or covered tributary when they are determined on a case-specific basis to have a significant nexus to a traditional navigable water, interstate water, or the territorial seas.



Not only does the final rule keep all existing exclusions from the definition of “waters of the United States,” but it also adds several new ones. For example, the rule now excludes ditches with ephemeral or intermittent flow that are not a relocated tributary or excavated in a tributary, and ditches with intermittent flow that do not drain wetlands. The rule also does not regulate shallow subsurface connections or any type of groundwater, erosional features (including gullies, rills, and ephemeral features such as ephemeral streams that do not have a bed and banks and ordinary high water mark), or land use. In response to public comments, the agencies added exclusions for stormwater control features constructed to convey, treat, or store stormwater, and cooling ponds that are created in dry land. Furthermore, the agencies state that the rule does not affect either the existing statutory or regulatory exemptions from National Pollutant Discharge Elimination System (NPDES) permitting requirements or the status of water transfers, which are not regulated under the NPDES program.

EPA and the Corps originally proposed the rule clarifying the “waters of the United States” in

April 2014 and solicited comments for over 200 days. The agencies received more than one million public comments on the proposed rule and conducted over 400 meetings throughout the country. While environmental groups have welcomed the final rule, others (such as various industries and several state and local leaders) have opposed it because they feel they were not adequately consulted during the development of the rule, and they believe it increases federal control over private lands. Critics in Congress are pushing S. 1140 and H.R. 1732, both of which would require the agencies to withdraw the rule and to develop a new proposed rule subject to certain requirements. Opponents are also threatening litigation, which could be filed as soon as two weeks after the rule is published in the Federal Register (which is anticipated to happen in the next few weeks). Barring any successful challenges, the rule will be effective 60 days after it is published in the Federal Register.

Metropolitan staff is evaluating the potential impacts of the new rule on Metropolitan. (See General Counsel’s October 2014 Activity Report.)

## Matters Received by the Legal Department

| <u>Category</u>   | <u>Received</u>  | <u>Description</u>   |                  |                            |  |  |   |   |   |  |
|---|--|--|------------------|----------------------------|--|--|---|---|---|--|
| Government Code Claim   | 1  | Claim submitted by State Farm Insurance Company on behalf of its insured for alleged damage from MWD vehicle striking insured’s vehicle  |                  |                            |  |  |   |   |   |  |
| Requests Pursuant to the Public Records Act                             | 29   | <table border="0"> <thead> <tr> <th><u>Requestor</u></th> <th><u>Documents Requested</u></th> </tr> </thead> <tbody> <tr> <td>4x Forensic Engineering Laboratories<br/>Black &amp; Veatch Corporation</td> <td>Water pressure at property in Los Angeles, CA<br/>Water quality data for taste and odor issues for SWP water from Lake Silverwood</td> </tr> <tr> <td>Bureau of Land Management and Twenty-Nine Palms Band of Mission Indians</td> <td>2 requests for status of MWD right-of-way on Dillon Road, Indio, CA</td> </tr> <tr> <td>Council for Watershed Health, U-T San Diego, 2 Private Citizens</td> <td>4 requests relating to conservation incentives, including (1) rebate locations for turf removal programs, (2) data on applications and award of turf removal</td> </tr> </tbody> </table> | <u>Requestor</u> | <u>Documents Requested</u> | 4x Forensic Engineering Laboratories<br>Black & Veatch Corporation | Water pressure at property in Los Angeles, CA<br>Water quality data for taste and odor issues for SWP water from Lake Silverwood | Bureau of Land Management and Twenty-Nine Palms Band of Mission Indians | 2 requests for status of MWD right-of-way on Dillon Road, Indio, CA | Council for Watershed Health, U-T San Diego, 2 Private Citizens | 4 requests relating to conservation incentives, including (1) rebate locations for turf removal programs, (2) data on applications and award of turf removal |
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| Bureau of Land Management and Twenty-Nine Palms Band of Mission Indians | 2 requests for status of MWD right-of-way on Dillon Road, Indio, CA  |  |                  |                            |  |  |   |   |   |  |
| Council for Watershed Health, U-T San Diego, 2 Private Citizens         | 4 requests relating to conservation incentives, including (1) rebate locations for turf removal programs, (2) data on applications and award of turf removal |  |                  |                            |  |  |   |   |   |  |



| <u>Category</u> | <u>Received</u>                            | <u>Description</u>   |
|-----------------|--|--|
|                 |  | incentive funds, (3) records relating to grant application by San Diego Country Estates Association, (4) data on request for and payments of conservation incentives   |
|                 | Lighthaven Capital Management LLC          | Analysis of Cadiz project  |
|                 | London Economics International             | 9 requests relating to MWD rate and budget setting processes, elements within the budget, purchase orders, rate challenges, historical and forecasted water demand data                                      |
|                 | Marathon Sod                               | Video, minutes and presentation for MWD Special Board Meeting held on 05/26/2015   |
|                 | Meagher & Geer, P.L.L.P.                   | MWD agent for service of process   |
|                 | Northwestern University Journalism Student | Data on Los Angeles' water use by sector and sources   |
|                 | Pacific Advocates                          | Records relating to the construction, costs, financing of the Delta Conveyance Facility Design and Construction, Delta Habitat Conservation and Conveyance facility, BDCP from June 2014 through the present |
|                 | Property Owner                             | MWD easement on Dillon Road  |
|                 | Researcher from University of Melbourne    | Data on artificial groundwater recharge  |
|                 | SmartProcure, LLC                          | List of MWD purchase orders from 02/28/2015 through present  |
|                 | UC Berkeley Student                        | MWD cost for conveyance of water from SWP and CRA  |
|                 | USC Journalism Student                     | Conservation activity in South Los Angeles   |
|                 | Voice of San Diego                         | Costs to defend <i>SDCWA v. MWD</i> lawsuits   |



| <u>Category</u> | <u>Received</u> | <u>Description</u>   |
|-----------------|-----------------|--|
|                 |                 | Zappia Law Firm<br>Attorneys' fees and staff time spent on AB 646 fact finding   |
| Subpoena        | 1               | Out-of-state subpoena for records relating to a former temporary employee for litigation unrelated to MWD  |
| Other Matter    | 1               | Petition for Writ of Mandate and Complaint for Declaratory Relief filed in <i>Successor Agency to the Yorba Linda Redevelopment Agency v. State of California, et al.</i> , naming MWD as one of the real parties in interest, relating to proceeds from the former redevelopment agency for the City of Yorba Linda's town center |