



## Metropolitan Cases

### Conclusion of Delta Islands Contract Case:

#### ***Central Delta Water Agency, et al. v. Delta Wetlands Properties, et al. (Court of Appeal for the First District of California)***

On February 21, 2019, appellants filed a notice of settlement with Delta Wetlands Properties, the last remaining defendant and respondent, and requested that their appeals be dismissed. Once dismissed, this will conclusively end the contract case.

Shortly after Metropolitan's Board authorized the purchase of over 20,000 acres of land in the Sacramento-San Joaquin Delta, Central Delta Water Agency and the County of San Joaquin filed this case alleging that the seller, Delta Wetlands Properties, breached a settlement contract regarding a potential water storage project with Semitropic Water Storage District, and that Metropolitan intentionally interfered with the settlement. Metropolitan and the other defendants, including four reclamation districts that maintain levees and operate water infrastructure on Metropolitan's land, succeeded in getting the case dismissed early in the litigation, and were awarded their attorneys' fees.

The plaintiffs appealed their loss on the merits and the award of attorneys' fees. Last fall, before merits briefing in the court of appeal began, all the defendants and respondents except Delta Wetlands Properties entered settlement agreements with the plaintiff-appellants, and the appeals against them were dismissed. However, the appeals remained pending against Delta Wetlands Properties. As long as the appeals were pending, there was the possibility Metropolitan may be subject to costly third-party discovery, if appellants succeeded on the merits.

Of the four cases originally filed challenging the purchase, only one—a CEQA challenge brought by two NGOs and several public agencies, including the two plaintiff-appellants in the contract case—remains on appeal in the Third District Court of Appeal in Sacramento after Metropolitan prevailed at a trial on the merits. Briefing has begun in that case, and should be finished this spring.

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

As previously reported, Hearing Officer Doug Collins issued his decision on November 20, 2018, sustaining the appeal by AFSCME Local 1902 of a decision to terminate an employee involved in an altercation at the workplace. The hearing officer reduced the disciplinary action to a three-week suspension as (1) he believed the termination was disproportionate to the disciplinary action imposed on the other employee involved in the altercation; and, (2) he was not convinced that the aggravating circumstances cited by Metropolitan warranted an enhancement of the disciplinary action to a discharge.

Metropolitan disagrees with Mr. Collins' assessment that there are no substantial aggravating circumstances present. On February 12, 2019, Metropolitan filed a petition for writ of administrative mandamus seeking to overturn his decision. The petition alleges that Mr. Collins' findings are not supported by substantial evidence and that he did not proceed in the manner required by law. The Legal Department represents Metropolitan. (See General Counsel's November 2018 Activity Report.)

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

AFSCME Local 1902 appealed Metropolitan's denial of a grievance seeking triple overtime pay for six employees who worked at Metropolitan's Iron Mountain facility on Presidents' Day 2016. These employees did not receive triple overtime pay because they were not the assigned operator or responder at Iron Mountain on that holiday. These employees, who received two-and-one-half times pay for working that holiday, alleged that Metropolitan violated the MOU and past practice by failing to pay triple time.

After three days of hearing, Hearing Officer Kenneth A. Perea issued his decision on February 27, 2019, sustaining Metropolitan's denial of the grievance. Mr. Perea also determined that by altering a work schedule on a computer screen during the grievance process, Metropolitan violated the AFSCME MOU. Accordingly, while the



hearing officer determined that no triple pay was owed, he directed Metropolitan on a going forward basis to refrain from engaging in similar conduct

during the grievance process. The Legal Department represented Metropolitan in this matter.

## Matters Impacting Metropolitan

### **EPA and Army Corps of Engineers Publish New Proposed Definition of “Waters of the United States”**

On February 14, 2019, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (together, the Agencies) published a proposed revised definition of “Waters of the United States” (WOTUS) that clarifies the scope of the Clean Water Act (proposed 2019 definition). The Agencies last updated the definition of WOTUS in 2015 using Justice Kennedy’s “significant nexus” test in *Rapanos v. United States*, 547 U.S. 715 (2006) (2015 definition).

As previously reported, numerous cases were filed challenging the 2015 definition, and litigation is ongoing. Although the Agencies have proposed repealing the 2015 definition, it is still in effect in 22 states (including California). The Agencies published the proposed 2019 definition to implement an Executive Order issued by President Trump on February 28, 2017, directing the Agencies to review and rescind or revise the 2015 definition consistent with Justice Scalia’s opinion in *Rapanos*. Justice Scalia limited Clean Water Act jurisdiction to “relatively permanent, standing or flowing bodies of water.”

Under the Agencies’ proposed 2019 definition, traditional navigable waters, tributaries to those waters, certain ditches, certain lakes and ponds, impoundments of jurisdictional waters, and wetlands that abut or have a direct hydrological surface connection to another WOTUS would be subject to the Clean Water Act. It also details what are not WOTUS, such as features that only contain water during or in response to rainfall (e.g., ephemeral features), groundwater, many ditches, including most roadside or farm ditches, prior converted cropland, wastewater recycling facilities built in upland, stormwater control features, and waste treatment systems.

The main differences between the 2015 definition and the Agencies’ proposed 2019 definition are that the significant nexus test is no longer used, ephemeral tributaries will no longer be covered, fewer wetlands will be covered, and other features that do not have a direct hydrologic connection to

another WOTUS will not be covered under any circumstance.

The Agencies held two public hearings on the proposed “Revised Definition of Waters of the United States” on February 27 and 28, 2019. Public comments will be accepted until April 15, 2019. Following the public comment period, the Agencies are required to review the public comments and respond to “significant” comments received. The Agencies may make changes to the proposal based on those comments. Once this process is complete, the Agencies may publish the final rule in the Federal Register. If finalized, the new proposed 2019 definition will replace the 2015 definition. Metropolitan staff is evaluating the new proposed 2019 definition and the potential impacts it might have on Metropolitan.

### **U.S. EPA Releases Nationwide PFAS Action Plan**

PFAS are a group of man-made chemicals that have been used since the 1940s in various consumer products and industrial processes, including firefighting foams, food packaging, nonstick products (such as Teflon), and stain and water-repellant fabrics. PFAS are very persistent in the environment and the human body, and there is evidence that exposure to PFAS can lead to adverse human health effects.

In November 2017, PFOA and PFOS were added to California’s Proposition 65 list of chemicals that have evidence of reproductive toxicity. Although PFOA and PFOS are no longer manufactured in the United States, they are still produced internationally and can be imported into the United States in consumer goods such as carpet, apparel, paper and packaging, coatings, rubber, and plastics.

On February 14, 2019, the U.S. Environmental Protection Agency (EPA) issued its first-ever nationwide Per- and Polyfluoroalkyl Substances (PFAS) Action Plan. The Action Plan is the result of EPA discussions with experts.

In May 2018, EPA held a two-day National Leadership Summit on PFAS that brought together more than 200 federal, state, and local leaders from across the country to discuss steps to



address PFAS. EPA then hosted a series of visits in the summer of 2018 in communities impacted by PFAS. The Action Plan was developed based on feedback from these events, as well as information received from approximately 120,000 public comments. The Action Plan describes both short-term and long-term actions that EPA is taking to address PFAS. For example, this year EPA will propose maximum contaminant levels (MCLs) under the Safe Drinking Water Act for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS), two of the most well-known and prevalent PFAS chemicals. Also in 2019, EPA will develop new analytical methods so that more PFAS chemicals can be detected in drinking water, soil, and groundwater.

EPA has begun the regulatory process for listing PFOA and PFOS as hazardous substances and expects to issue this year interim groundwater cleanup recommendations for sites contaminated with PFOA and PFOS. Among EPA's long-term actions are to propose including PFAS in nationwide drinking water monitoring under the next Unregulated Contaminant Monitoring Rule (UCMR) program, and to consider listing PFAS chemicals in the Toxics Release Inventory to help identify where they are being released.

Metropolitan staff will monitor EPA's implementation of its PFAS Action Plan.

## Cases to Watch

### U.S. Supreme Court Grants Review of Conduit Theory Under The Clean Water Act

On February 19, 2019, the U.S. Supreme Court granted review in *County of Maui v. Hawaii Wildlife Fund*. The question at issue is whether the Clean Water Act (CWA) covers discharges of pollutants that reach surface waters through groundwater. In February last year, the Ninth Circuit affirmed a federal district court's ruling that the County violated the CWA by injecting wastewater, without a permit, into wells where it traveled through groundwater into the Pacific Ocean. The CWA requires National Pollutant Discharge Elimination System (NPDES) permits for discharges of pollutants to navigable waters (defined as "Waters of the United States" (WOTUS)) from any point source. Relying on the conduit theory, the Ninth Circuit found that the groundwater served as a conduit for the wastewater to get from the injection wells, a point source, to the Pacific Ocean, a navigable water. The County argues that the court's decision incorrectly expands the scope of NPDES permitting requirements.

Other federal Circuit courts have also considered this issue. In April 2018, the Fourth Circuit in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.* relied on *County of Maui* to find that

a discharge of pollutants which travels through groundwater and reaches navigable waters through a direct hydrological connection requires an NPDES permit. However, in a split from the Ninth and Fourth Circuits, the Sixth Circuit ruled in two cases in September 2018 that the CWA does not extend liability to pollution that reaches surface waters via groundwater. In *Kentucky Waterways Alliance v. Kentucky Utilities Co.* and *Tennessee Clean Water Network v. Tennessee Valley Authority*, the Sixth Circuit rejected the conduit theory: "for a point source to discharge *into* navigable waters, it must dump *directly* into those navigable waters – the phrase "into" leaves no room for intermediary mediums to carry the pollutants."

Kinder Morgan has asked the U.S. Supreme Court to review the Fourth Circuit's decision in *Upstate Forever*, but the justices have not yet indicated whether they will grant review. Also, although a split Sixth Circuit in January 2019 denied a petition to review its prior decision in *Tennessee Valley Authority*, no petition for review of this case has been filed with the U.S. Supreme Court.

Metropolitan staff will continue to monitor these cases. (See General Counsel's January 2019 Activity Report.)



## Matters Received by the Legal Department

<u>Category</u>	<u>Received</u>	<u>Description</u>	
Action in which MWD is a party	2	<p>Complaint for (1) Breach of Written Agreement, (2) Breach of the Implied Covenant of Good Faith and Fair Dealing, (3) Violation of California Labor Code §§ 227.3 and 2810.3, filed in Los Angeles County Superior Court, in the case <i>DMS Facility Services, LLC v. MWD</i>, Case No. 19STCV04653, in which DMS, a former vendor that provided MWD with engineers and other personnel, alleges that MWD failed to pay outstanding balances on invoices for salaries and leave time for DMS employees who worked at MWD</p> <p>Complaint for Damages filed in Riverside County Superior Court, in the case <i>Bruce Puckett v. MWD, et al.</i>, Case No. MCC1801473, alleging injuries to Plaintiff while working at the attenuator dock located in the marina at Diamond Valley Lake</p>	
Government Code Claims	1	Claim for damages to residence located in Yorba Linda, near MWD's Lower Feeder Pipeline and/or Olinda Pressure Control Structure	
Requests Pursuant to the Public Records Act	15	<u>Requestor</u>	<u>Documents Requested</u>
		Center for Contract Compliance	Contract information relating to the CRA Pumping Plants 6.9 kV Power Cable Replacement at various locations at Parker Dam
		City of San Diego	Positions/classifications that are authorized to perform cryptosporidium analysis in MWD's water quality lab
		Daily Breeze	Cost of January 8 reception relating to Installation of Chairwoman
		Dudek	Location of MWD utilities in the project area for March Air Reserve Base Gilley Street, Adams Avenue, Dekay Avenue Water Pipeline Replacement
		Equities National Associates	List of unclaimed or outstanding checks and unclaimed bonds
		Fyfe Company	Bid information for Second Lower Feeder Pre-Stressed Cylinder Pipe Rehabilitation Project
		Garden Studio	Substructure information near property in Newport Beach
		Integrated Marketing Systems	Contract information relating to Inspector of Record, Geotechnical Soils Inspections, and Mineral Testing



<u>Category</u>	<u>Received</u>	<u>Requestor</u>	<u>Description</u>
Requests Pursuant to the Public Records Act (cont'd.)		Private Citizen	Drawings and photographs for the original construction of the Railroad Canyon Reservoir built in 1927/1928
		Procopio	Documents relating to the Hinds and Eagle Mountain Pumping Plants Wastewater Treatment Project
		Rancho California Water District	MWD capitalization policy
		SmartProcure	Purchase order data for the period November 7, 2018 to February 27, 2019
		Southern California Brick, Tile, Marble & Terazzo Compliance Committee	Contract documents relating to Greg Avenue Pressure Control Structure Pump Modification and New Control Building
		Strategic Insight	Schedule of investment portfolio and list of service providers for MWD's 401(k) Savings Plan and Deferred Compensation Plan
		TAIT & Associates	Facilities information near street resurfacing project in the City of Bellflower
Other Matters	1	Wage garnishment	



<b>California WaterFix Litigation</b>	
<b>Subject</b>	<b>Status</b>
<p><b>CDWR Environmental Impact Cases</b>  <b>Sacramento Superior Ct. Case No. JCCP 4942</b>  <b>(20 Coordinated Cases – 1 Validation; 17 CEQA; 2 CESA) (Judge Culhane)</b></p>	
<p><b>Validation Action</b> <i>DWR v. All Persons Interested</i></p> <p><b>CEQA</b> 17 cases</p> <p><b>CESA/Incidental Take Permit</b> 2 cases</p>	<ul style="list-style-type: none"> <li>• DWR’s motion to dismiss Clarksburg Fire Protection District’s jurisdictional defenses granted without leave to amend</li> <li>• Motions to augment the administrative record scheduled for hearing on June 5, 2019</li> <li>• Opponents requested a 60-day stay in light of Governor Newsome’s state of the state address remarks; DWR and supporting water agencies objected</li> <li>• DWR agreed to a partial stay for 60 days, but asked to complete the court-ordered meet-and-confer process on contents of administrative record</li> <li>• Answers/Motions to Dismiss due 30 days after administrative record is lodged</li> <li>• DFW is not opposed to a 60-day stay, but plans to complete the administrative record, which is estimated at 430,000 pages</li> <li>• Answers/Motions to Dismiss due 30 days after administrative record is lodged</li> </ul>
<p><b>ESA/BiOps</b> 2 Cases Eastern District of California (Judge O’Neill)</p> <p><i>Golden Gate Salmon Ass’n v. Ross (NMFS)</i></p> <p><i>Bay.org v. Zinke (USFWS)</i></p>	<ul style="list-style-type: none"> <li>• Merits of cross-motions for summary judgment fully briefed.</li> <li>• DWR filed an unopposed motion for a 90-day stay in light of Governor Newsome’s state of the state remarks</li> <li>• Plaintiffs filed motion for summary judgment on January 15, 2019; Defendants’ opposition/cross-motion for summary judgment due March 26, 2019; Plaintiffs’ opposition and reply due April 23, 2019; Defendants’ replies due: May 14, 2019</li> <li>• DWR filed a motion for a 90-day stay on expedited time frame, which plaintiffs intend to oppose; briefing completed March 8, 2019</li> </ul>
<p><b>Breach of Contract</b> <i>City of Antioch v. DWR</i> Sacramento County Superior Ct. (Judge De Alba)</p>	<ul style="list-style-type: none"> <li>• Discovery temporarily stayed</li> <li>• Settlement conference set for September 12, 2019</li> <li>• Trial set for October 21, 2019</li> </ul>



Subject	Status
<p><b>Delta Plan Amendments and Program EIR</b>            4 Cases Sacramento County Superior Ct. (Judge Earl)</p> <p><i>North Coast Rivers Alliance, et al. v. Delta Stewardship Council</i></p> <p><i>Central Delta Water Agency, et al. v. Delta Stewardship Council</i></p> <p><i>Friends of the River, et al. v. Delta Stewardship Council</i></p> <p><i>California Water Impact Network, et al. v. Delta Stewardship Council</i></p>	<ul style="list-style-type: none"> <li>• Cases challenge, among other things, the Delta Plan Updates recommending dual conveyance as the best means to update the SWP Delta conveyance infrastructure to further the coequal goals</li> <li>• Allegations relating to “Delta pool” water rights theory and public trust doctrine raise concerns for SWP and CVP water supplies</li> <li>• Parties stipulated to extend time to prepare the administrative record to March 25, 2019</li> <li>• Petition to coordinate the cases filed</li> <li>• Answers or motions to dismiss due 30 days after administrative record is lodged</li> <li>• Cases reassigned to Judge Laurie Earl</li> </ul>
<p><b>SWP Contract Extension</b>            Sacramento County Superior Ct. (Judges Sumner and Gevercer)</p> <p><i>North Coast Rivers Alliance, et al. v. California Dept. of Water Resources</i></p> <p><i>Planning and Conservation League v. California Dept. of Water Resources</i></p>	<ul style="list-style-type: none"> <li>• Petitions for writ of mandate alleging CEQA and Delta Reform Act violations filed on January 8 &amp; 10, 2019</li> <li>• NCRA names State Water Contractors, but not individual contractors, as a real party in interest</li> <li>• Allege, among other things, that Contract Extension is part of California WaterFix, so DWR should have studied the impacts of both projects in a single EIR</li> <li>• Metropolitan preparing motions to intervene</li> </ul>