



## Metropolitan Cases

**Delta Smelt and Salmon Biological Opinions Litigation (*Metropolitan v. United States Fish and Wildlife Service; United States Bureau of Reclamation and California Department of Water Resources real parties in interest; San Luis & Delta Mendota Water Authority v. Salazar; State Water Contractors v. Salazar; Coalition for a Sustainable Delta v. U.S.F.W.S.; MWD v. U.S.F.W.S. and State Water Contractors v. Locke, et al; Kern County Water Agency, et al. v. Gary Locke, et al.*) (U.S. District Courts, Eastern District of California)**

### Delta Smelt BiOp Litigation

On December 14, 2010, Judge Wanger issued his 225-page decision on the motions for summary judgment in the Delta smelt Biological Opinion (BiOp) case, finding that the BiOp contained various legal and science-based flaws, and would have to be redone. The judge issued a subsequent Order on December 27, 2010 formalizing his ruling that the BiOp was "arbitrary, capricious, and unlawful," and remanding the BiOp to the U.S. Fish and Wildlife Service (FWS) for reconsideration. While Metropolitan and the other State Water Contractors did not prevail on all of their legal claims in the case, the judge agreed with Metropolitan that there were major flaws in the FWS' determination of jeopardy, in the Reasonable and Prudent Alternative (RPA) in the BiOp, which restricts exports and project operations, and in the Incidental Take Statement. Metropolitan's expert, Dr. Rick Deriso, was instrumental in convincing the judge that the use of a "raw salvage" methodology -- which was the basis for an Old and Middle River reverse flow ceiling of -5000 cfs in the BiOp -- was scientifically indefensible. At a January 4, 2011 status conference, the judge indicated that the water contractor plaintiffs could file a motion seeking permission to operate the projects under different criteria than those in the BiOp. The judge indicated that such a motion for interim remedies would be heard by the court sometime after mid-February 2011. The water contractors are preparing to file such a motion seeking relief from the adult Delta smelt salvage restrictions which generally come into effect at this time of the year. A detailed oral report will be provided at the January 11, 2011 Legal & Claims meeting. (See

General Counsel's April and May 2010 Activity Reports)

### Salmon BiOp Litigation

On December 16-17, 2010, Judge Wanger held a 2-day hearing on the motions for summary judgment in the salmon BiOp litigation. At the close of the hearing, the judge took the matter under advisement, and did not indicate when he might issue a ruling. (See General Counsel's April and May 2010 Activity Reports)

**Monterey II Cases: *Central Delta Water Agency, et al. v. Department of Water Resources; Rosedale-Rio Bravo Water Storage District, et al. v. Department of Water Resources; Central Delta Water Agency, et al. v. Kern County Water Agency* (all pending in Sacramento County Superior Court)**

Three lawsuits have been filed challenging the Department of Water Resources' (DWR) May 2010 completion of a new Environmental Impact Report (EIR) for the Monterey Amendment to the State Water Project contracts. "*Central Delta I*" is an EIR challenge and reverse validation suit brought by the Central Delta Water Agency, South Delta Water Agency, California Water Impact Network, California Sportfishing Protection Alliance, and the Center For Biological Diversity. "*Central Delta II*" is a reverse validation suit brought by these same parties against the Kern County Water Agency that targets the transfer of land from Kern County Water Agency to the Kern Water Bank, which was completed as part of the original Monterey Amendments. The third lawsuit is an EIR challenge brought by Rosedale-Rio Bravo Water Storage District and Buena Vista Water Storage District ("*Rosedale-Rio Bravo*"). Metropolitan is a party to the *Central Delta I* and *II* cases but not the *Rosedale-Rio Bravo* case.

While two of the cases were originally filed in Kern County, all three now reside in Sacramento County Superior Court. However, a judge for all purposes has yet to be permanently assigned. The cases had been related together and assigned to the Honorable Judge Connelly, but Kern County Water Agency filed a preemptory challenge dismissing him. Prior to the reassignment to Judge Connelly,



Sacramento Judge Frawley denied a motion filed by Metropolitan and other defendants to dismiss the reverse validation cause of action in *Central Delta I*.

Metropolitan staff has been coordinating with DWR and the other contractors in our efforts in these cases. (See General Counsel's May, June, and October 2010 Activity Reports)

***Langer, et al v. 3M Company, et al.***  
**(Los Angeles County Superior Court)**

Metropolitan was recently served with a Complaint for Wrongful Death – Asbestos, and a related survivor action, alleging causes of action for negligence, strict liability and premises liability. The complaint alleges that the decedent developed mesothelioma as a result of exposure to asbestos and that decedent was exposed to asbestos while on Metropolitan property. Some months ago, the law firm representing the plaintiffs filed a Public Records Act seeking records related to specific contractors that performed work for Metropolitan between 1966 and 1984. It is suspected that decedent may have performed construction-related work for one or more of the identified contractors. In addition to Metropolitan, the complaint names 85 other defendants, including several other public agencies. Metropolitan is evaluating the complaint and preparing a response.

***J-Line Co. (dba American-Marsh Pumps) v. Metropolitan***  
**(U.S. District Court, Western District of Tennessee)**

In July 2010, American Marsh Pumps (AMP) served a breach of contract lawsuit against Metropolitan arising from AMP's custom fabrication in Tennessee of a 30-cfs pump bowl assembly for DWR's South Bay Pumping Plant. Metropolitan entered into the \$237,300 purchase agreement with AMP under the contract with DWR for machining, fabrication, procurement, and engineering services for the State Water Project. On December 3, 2010, Metropolitan filed a counterclaim against AMP, alleging multiple violations of the California False Claims Act. The counterclaim alleges that AMP made five separate demands for payment of governmental funds with knowledge that the product did not meet contract specifications. It also alleges that on two occasions AMP made knowing misrepresentations of fact regarding adherence to contract specifications. The False Claims Act imposes damages of up to \$10,000 per violation plus three

times the damages the public entity sustained as a result of the false claims. Discovery in the case has begun and Metropolitan plans to ask the court to transfer venue of this case to the federal court in Los Angeles.

***Dewayne Cargill, et al v. Metropolitan***  
**(Los Angeles County Superior Court)**

As previously reported, temporary workers filed three class action lawsuits in 1998 challenging Metropolitan's use of District temporary employees, independent consultants and temporary agency workers. The three consolidated lawsuits sought regular employment status and full retroactive employee benefits for approximately 4,139 temporary workers, including retroactive enrollment into the California Public Employees' Retirement System ("PERS"). On February 26, 2004, in a case of first impression, the California Supreme Court ruled Metropolitan is required to enroll into PERS all temporary workers who would be considered Metropolitan employees under California's common law. The Supreme Court did not decide whether plaintiffs were in fact common law employees of Metropolitan, or whether plaintiffs were entitled to enrollment into PERS as of the first day they worked at Metropolitan. With the Board's approval, the parties entered into a settlement agreement in July 2007 that established an individual claim process for resolving plaintiffs' claims for PERS enrollment and retroactive benefits. The superior court approved this settlement. The settlement resulted in 2,058 claims for PERS enrollment and benefits. Recently, we completed processing those claims. Through the implementation process, we were able to reduce the number of eligible claims from 2,058 to 1,433. All claims have been processed and evaluated, and all eligibility disputes have been resolved. The total cost of the employee share for PERS enrollment under the settlement totaled \$9.88 million, of which the claimants paid \$2.69 million and Metropolitan paid \$7.19 million as set forth under the terms of the settlement. PERS is not directly charging Metropolitan for the cost associated with the employer share of the PERS contributions. Rather, adjustments will be made to MWD's overall contribution rate, if necessary. The estimated potential liability for PERS benefits remains in the range of \$15 million to \$30 million as previously reported to the Board. (Legal and Claims Committee, Item 8-7, March 2010.)



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

As previously reported, Hearing Officer David Hart issued a decision on February 26, 2010, denying Metropolitan's request to dismiss two Local 1902 grievances. The grievances seek CalPERS credit for certain overtime worked by a crew of Desert maintenance workers. The overtime resulted from the assignment of irregular 12.5 shifts for a period of 12 months in connection with the District's effort to eradicate Quagga mussels. Metropolitan objected to the hearing on the basis that CalPERS has primary jurisdiction to determine whether overtime hours can be credited towards a CalPERS retirement. On, May 25, 2010, Metropolitan appealed Hearing Officer Hart's decision by filing a petition for writ of administrative mandamus with the Los Angeles Superior Court. The petition alleges the Hearing Officer failed to proceed in the manner required by law by applying arbitration principles, which is contrary to an earlier Court of Appeal determination that the MOU hearing officer appeal procedure is not arbitration,

but rather an administrative proceeding. (*AFSCME Local 1902, AFL-CIO v Metropolitan Water District of Southern California* (2005) 126 Cal.App.4<sup>th</sup> 247.) In addition, the petition alleges the Hearing Officer improperly determined that MWD waived its objections on subject matter jurisdiction, because under well-established legal precedents it is axiomatic in the context of jurisdictional challenges that subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel. (*Mumaw v. City of Glendale* (1969) 270 Cal.App.2d 454, 459-460.)

On December 15, the parties settled this matter. Under the settlement, AFSCME agreed that CalPERS – and not a hearing officer – will make the determination whether the overtime in question qualifies for CalPERS credit. AFSCME also agreed that Mr. Hart's February decision will not be cited as precedent. Pursuant to this settlement, Metropolitan dismissed its appeal of Mr. Hart's decision on December 16. The Legal Department represented Metropolitan. (See General Counsel's April and May 2010 Activity Reports)

## **Matters Involving Metropolitan**

### **Sacramento Regional County Sanitation District NPDES Permit**

On December 9, following a 14-hour hearing, the Central Valley Regional Water Quality Control Board voted 5-0 to approve the recommendation of its staff for a new discharge permit for the Sacramento Regional County Sanitation District (SRCSD) wastewater treatment plant. The permit is an important milestone, signaling the Regional Board's recognition that the discharge of nutrients and ammonium from this plant plays a significant role in the overall health of the Delta ecosystem. The permit also reflects years of work by Metropolitan staff and other downstream water districts to focus regulatory attention on the public health and environmental issues of the Sacramento wastewater discharge. Metropolitan is a designated party in the permit proceedings and staff participated in the hearing along with other water agency partners and our scientific experts.

The new discharge permit will require nitrification/denitrification upgrades to reduce nitrogen that is currently being discharged into the Sacramento-San Joaquin Bay Delta. Nitrogen in the form of ammonium has been shown to be altering the food web to the detriment of native, endangered species. The permit will also require

tertiary filtration upgrades to remove pathogens and other constituents that are a public health concern to downstream water districts as well as the California Department of Public Health.

SRCSD is expected to appeal the Regional Board decision to the State Water Resources Control Board on or before January 10. The State Board is not likely to hear an appeal for several months and any decision on the appeal is subject to court challenge. (See General Counsel's August and October 2010 Activity Reports)

### **State Water Resources Control Board Review of Bay-Delta Water Quality Objectives**

Metropolitan staff contributed to comments submitted to the State Water Resources Control Board (SWRCB) jointly by the State Water Contractors and San Luis & Delta-Mendota Water Authority on December 6, 2010. SWRCB is required to adopt water quality objectives for the Bay-Delta Estuary and periodically review and revise them as appropriate. It is currently reviewing salinity objectives in the South Delta to protect agricultural uses and San Joaquin River flow requirements into the Delta to protect aquatic species. SWRCB released a "technical report"



describing the technical data and approaches it intends to use to develop alternative salinity objectives and flow requirements and to carry out associated environmental documentation. The contractors' comments focused on the need for SWRCB to consider a broader set of scientific data than proposed in its report, specifically including new science presented, and factual conclusions reached by the Trial Court, in the pending Endangered Species Act cases and the significant new data and analyses being developed in the Bay Delta Conservation Plan process. The comments

also described the importance of SWRCB presenting its ultimate analysis in a manner that transparently explains why one conclusion is being chosen over another, factors in the impact and control of other stressors and recognizes its responsibility to adopt objectives that "reasonably protect" beneficial uses of water, considering competing demands on the water including social and economic impacts. Staff will attend a SWRCB workshop on January 6 and 7, 2011 regarding the technical report and comments.

## Items of Interest

### Finances

On December 22, 2010, Metropolitan issued \$250 million Water Revenue Bonds, 2010 Authorization, Series A, to provide funding for capital investments. These bonds are Metropolitan's third series of Build America Bonds (BABs), which are taxable bonds authorized to be issued by tax-exempt entities under federal economic stimulus legislation. The federal government directly subsidizes these bonds by paying Metropolitan 35 percent of the semiannual interest costs. Legal Department staff worked with Finance staff, outside bond counsel and underwriters' counsel to prepare the Official Statement and closing documents and complete the transaction before the federal authorization for BABs expired on December 31, 2010.