Metropolitan Cases

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

In November 2010, Metropolitan was served with a Complaint for Wrongful Death – Asbestos, and a related survival action, alleging causes of action for negligence, strict liability and premises liability. The complaint alleged that the decedent had developed mesothelioma as a result of exposure to asbestos while on Metropolitan property. Metropolitan responded to the complaint by filing a demurrer and motion to strike based primarily on plaintiff's failure to comply with the Tort Claims Act that requires a plaintiff to file a claim with the public agency before filing a lawsuit. In response, plaintiff dismissed Metropolitan without prejudice. Although the matter could potentially be refiled, it is unlikely that Metropolitan will be brought back into the litigation. (See General Counsel's December 2010 Activity Report.)

John Kitos. v. Metropolitan, et al. **(Los Angeles County Superior Court)**

As previously reported, Metropolitan employee John Kitos filed a complaint on May 27, 2010 in Los Angeles County Superior Court against Metropolitan and one manager. Plaintiff alleges four causes of action: wrongful demotion, wrongful demotion/retaliation in violation of public policy, discrimination based on age in violation of the Fair Employment and Housing Act; and intentional infliction of emotional distress. All causes of action are asserted against Metropolitan, and the wrongful demotion/retaliation in violation of public policy and intentional infliction of emotional distress causes of action are also asserted against the individual manager. On August 4, 2011, the hearing on Metropolitan's demurrer to the second amended complaint was held. The demurrer challenged three of the causes of action. The Los Angeles County Superior Court accepted Metropolitan's arguments on all grounds and sustained the demurrer without leave to amend. Consequently, the only portion of the lawsuit remaining is the age discrimination complaint against Metropolitan. A Case Management Conference is set for September 20, and the Legal Department continues to provide legal representation.

Delta Smelt Biological Opinion 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.)*** **(U.S. District Court, Eastern District of California)**

On July 26-29, 2011, Judge Wanger held an evidentiary hearing on the water contractors' motion to enjoin the Fall X2 "reasonable and prudent alternative" (RPA) this fall. At the beginning of the hearing, the judge denied the federal government's motion to strike most of the water contractors' expert testimony. Metropolitan then presented expert testimony from its outside consultants, Drs. Deriso and Burnham, and from Metropolitan's in-house engineer, Dr. Paul Hutton. Other water contractors, the Department of Water Resources (DWR), and the federal defendants also presented testimony from their expert witnesses.

Judge Wanger did not rule on the injunction request at the conclusion of the hearing on July 29. Instead, he asked both sides to submit by August 10, 2011 their version of findings of fact and conclusions of law that they would like the court to adopt. The judge also asked DWR and the Bureau of Reclamation (Reclamation) to analyze the water supply impacts of a "compromise" Fall X2 location, which is less onerous than the X2 location being proposed by the U.S. Fish and Wildlife Service. The judge was aware that Reclamation will have to start modifying project operations the last week of August if it is to comply with a Fall X2 requirement that begins on September 1, 2011. Presumably, with this operational requirement in mind, the judge will rule by the last week of August, although he did not set a deadline for issuing a ruling. (See General Counsel's June and July 2011 Activity Reports.)

Date of Report: August 9, 2011

Association of Confidential Employees v. Metropolitan **(MOU Hearing Officer Appeal)**

On July 18, 2011, Hearing Officer Mark Burstein issued his decision sustaining a grievance lodged by the Association of Confidential Employees (ACE). The grievance challenged Management's denial of ACE's request to receive the same salary increase provided to the Supervisors Association on July 1, 2009. This grievance was lodged by ACE while the parties were negotiating a successor Memorandum of Understanding (MOU). The grievance asserts the ACE membership is entitled to the July 2009 salary increase received by the Supervisors Association based on operation of the "most favored nation" salary provision contained in the ACE MOU as extended (ACE MOU, Article II, Section 1.2). In his decision, Mr. Burstein agreed the ACE MOU as extended provides authorization for the requested salary increase. Since the ACE membership had already received a salary increase for fiscal year 2009-2010 effective on January 1, the award by Mr. Burstein was limited to providing the ACE membership with a 2% salary increase from July 1, 2009 through December 31, 2009. Management is reviewing this decision and its options, including the filing of an appeal with the superior court. The Legal Department represented Metropolitan in this matter.

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 procurement contract under the master agreement with DWR to provide reimbursable services for the benefit of the State Water Project. Following delivery of the pump assembly, Metropolitan and DWR discovered multiple defects and deviations from specifications and rejected the pump. After AMP brought its lawsuit in Tennessee state court, Metropolitan removed the case to the U.S. District Court in Memphis, Tennessee. Metropolitan conducted initial written discovery and retained an expert to examine the alleged defects. The day before deposition of AMP's witness in Memphis, the parties engaged in lengthy negotiations through a neutral mediator. The parties agreed to revise the original purchase agreement to enable AMP to repair the alleged defects and complete the project. AMP agreed to conduct additional testing on the pump assembly and to make repairs pursuant to revised technical criteria approved by DWR. Metropolitan agreed to forward payment of $25,000 of the purchase price to AMP to enable it to perform the additional work and to transfer the balance of the purchase amount ($212,300) into an escrow account to be released only upon full performance by AMP. DWR executed a change order with Metropolitan to accept the revised testing and repair criteria and to reimburse Metropolitan for additional incurred costs. The original lawsuit will be dismissed, and the parties agreed that venue for any further litigation will be the U.S. District Court in Los Angeles. (See General Counsel's December 2010 Activity Report.)

Riverside County Flood Control, etc. District v. James Kroll, et al. **(Riverside County Superior Court)**

On July 19, 2011, Metropolitan was served with a complaint in an eminent domain action brought by the Riverside County Flood Control and Water Conservation District (Flood Control District). The action seeks to acquire property for a riverbank stabilization project on the Santa Ana River downstream of Prado Dam. Metropolitan's Lower Feeder pipeline and related facilities are located within the project area. Staff has been working with the Flood Control District and the Army Corps of Engineers to incorporate protection of Metropolitan's facilities into the project design. Metropolitan's in-house counsel will respond to the complaint and take the necessary legal steps to protect Metropolitan's interest in the property and continued operation of its facilities.

Matters Involving Metropolitan

Butte Environmental Council v. California Department of Water Resources **(Alameda Superior Court)**

On July 13, 2011, the Court of Appeals granted the parties' stipulated motion to reverse and vacate the trial court's judgment. The action resolves all outstanding litigation concerning the 2009 Drought Water Bank (DWB).

In February 2009, the Board authorized the General Manager to enter into an agreement with DWR to purchase up to 300,000 acre-feet of water from the DWB. The Board also approved making an initial payment of $1.5 million to cover DWR's administrative fees. Consistent with this authorization, the General Manager executed the 2009 Drought Water Bank Participant Agreement (Participant Agreement) on March 24, 2009.

In April 2009, Butte Environmental Council, California Sportfishing Alliance and California Water Impact Network (plaintiffs) filed a lawsuit challenging DWR's approval of the DWB. Among other things, plaintiffs argued that DWR had improperly relied on an emergency drought declaration issued by then-Governor Schwarzenegger in concluding that the DWB was exempt from environmental review under the California Environmental Quality Act (CEQA). The lawsuit named DWR, the California Natural Resources Agency and the Governor as defendants, and all participants in the DWB, including Metropolitan, as real parties in interest. Following a bench trial, the court ruled in favor of the plaintiffs and ordered DWR to complete the necessary environmental review. DWR and others, including Metropolitan, appealed.

While this appeal was pending, the parties reached a settlement on terms favorable to DWR and the DWB participants. Specifically, the settlement agreement requires DWR to pay $324,534.41 in attorneys' fees and costs, and $50,000 toward an environmental project related to the giant garter snake, but does not require DWR to conduct any remedial environmental review nor does it restrict its ability to engage in these types of water transfers in the future. Notably, the total amount of this settlement is less than the amount of attorneys' fees and costs that were being sought by the plaintiffs in court.

Under the terms of the Participant Agreement, all administrative costs, including litigation-related costs, are allocated to each participant based on the amount of its purchases relative to all purchases. As such, Metropolitan is responsible for roughly half of the settlement costs, which is below the maximum settlement amount previously approved by the Board.

State Water Contractors v. State Water Resources Control Board **(Sacramento Superior Court)**

On July 21, 2011, the State Water Contractors filed a lawsuit against the State Water Resources Control Board and Central Valley Regional Water Quality Control Board (Water Boards) alleging that the recently adopted Total Maximum Daily Load (TMDL) for methylmercury in the Delta violates the federal Clean Water Act and the state Porter-Cologne Water Quality Act. Metropolitan Legal staff assisted in drafting the complaint.

By regulation, a TMDL is a calculation of the maximum amount of a pollutant that a water body can receive and still meet water quality standards, and an allocation of that load among the various sources of that pollutant. Pollutant loads are allocated between point and non-point sources. The TMDL is adopted through a Basin Plan amendment.

As part of the methylmercury TMDL, the Water Boards assigned the generation of methylmercury within the Delta itself to an "open water" source, and then allocated that load to DWR, the State Lands Commission, and the Central Valley Flood Control Boards. Methylmercury generated in open waters of the Delta is largely the result of mercury in the sediment of Delta channels due to historic mining activities, as well as atmospheric deposition. The Water Boards' rationale for assigning the open water source to the three state entities is their responsibility for managing the flow of water through Delta channels and the management of lands underlying the channels. There is no evidence that DWR's operation of the State Water Project introduces mercury to the Delta or induces the generation of methylmercury from mercury that is already in the Delta. The assignment of the methylmercury load to DWR improperly exposes DWR and the State Water

Contractor members to potentially huge compliance costs.

FERC Relicensing of the Oroville Facilities (Yolo County Superior Court)

On July 11, 2011, the trial court issued a final order directing the ounties of Butte and Plumas to pay $675,087 to DWR for costs that were incurred in preparing the administrative record for two lawsuits brought under CEQA. DWR has given Butte and Plumas approximately 30 days to make payment. Should they fail to do so, DWR will move to dismiss the case.

On August 21, 2008, Butte and Plumas filed separate suits challenging the adequacy of the Final Environmental Impact Report (Final EIR) that was issued by DWR in conjunction with the relicensing of the Oroville Facilities by the Federal Energy Regulatory Commission (FERC). The recommended terms and conditions for the new license are set forth in a settlement agreement that was signed by over 50 stakeholders, including Metropolitan, other state water contractors, the city of Oroville, the town of Paradise, various business and recreation interests, and several key federal and state regulatory agencies. This settlement agreement, in turn, was identified as the "preferred alternative" in the Final EIR. These CEQA lawsuits name DWR as the primary defendant and all other signatories to the settlement agreement, including Metropolitan, as "real parties in interest."

In March 2009, these actions were consolidated and transferred to Yolo County Superior Court. The focus then turned to preparing the administrative record for this case, which spans an eight-year period. Although plaintiffs had the option to prepare the record themselves, they instead requested that DWR, as the lead agency, do so. On September 15, 2009, DWR lodged the record with the court and in February 2010 DWR submitted a bill to Butte and Plumas for $675,087 in record preparation costs, which they refused to pay. After many months of discussions, DWR filed a motion to compel payment. After holding two hearings on the matter, the court granted DWR's motion without making any reduction in the amount sought.