



Metropolitan Cases

Sacramento Regional County Sanitation District v. Regional Water Quality Control Board and State Water Resources Control Board (Sacramento Superior Court)

As reported last month, on December 4, the State Water Resources Control Board (State Board) adopted a final order concerning the appeal petitions of Sacramento Regional County Sanitation District (SRCSD) and the California Sportfishing Protection Alliance concerning the discharge permit for SRCSD's wastewater plant.

The State Board's final order rejects SRCSD's arguments and upholds the substantive requirements of the Regional Board's permit order. Importantly, the State Board's order imposes new, more stringent limits on nutrients and pathogens.

Last December SRCSD brought litigation over the permit in Sacramento County Superior Court. That litigation was stayed until the State Board appeal process could be completed. That stay has now been lifted. Metropolitan is a party to the lawsuit and participated in a status conference before the court on December 14. The parties have agreed to an expedited trial schedule that should conclude the litigation in the fall of 2013. (See General Counsel's October 2012 Activity Report.)

Orange County Water District v. Northrop Corporation, et al.; Northrop Grumman Systems Corporation v. Metropolitan (Orange County Superior Court)

As previously reported, in December 2004, OCWD initiated this action against Northrop and other industrial defendants seeking cleanup costs and damages primarily from volatile organic compound contamination of groundwater within the North Basin of the Orange County Aquifer. In January 2008, Northrop brought a cross-complaint against Metropolitan, alleging that Metropolitan was responsible for any perchlorate cleanup costs that Northrop would incur, due to perchlorate found in water imported from the Colorado River and originating from industrial sites in Henderson, Nevada.

Phase 1 of the trial in this matter started on February 10, 2012. Phase 1 was completed on September 26, 2012 after 56 days of trial. Phase 1 was solely between OCWD and the six remaining industrial defendants, including Northrop Corporation (Northrop). If there is a phase 2, it will be a jury trial between the remaining industrial defendants on the tort claims of nuisance and trespass that are entitled to a jury trial. Metropolitan is not a party to phase 1 or 2.

On December 11, 2012, the court issued its tentative ruling in phase 1 of this action largely in favor of defendants. The court held that the Orange County Water District (OCWD) failed to prove defendants were liable under the statutory claims in OCWD's complaint (i.e., liability under the OCWD Act, the Hazardous Substance Account Act (HSAA), which is the state version of CERCLA, and declaratory relief). The court also found: "There was no evidence in the phase one court trial to establish, much less even suggest, that any defendant in this action is responsible for nitrate or perchlorate releases or contamination." If this tentative ruling is upheld, OCWD cannot hold the industrial defendants liable for perchlorate contamination under these theories and, thus, the industrial defendants cannot seek indemnification from Metropolitan.

The court granted parties the right to provide supplemental briefing on the tentative decision. It set a schedule for this briefing, and a hearing on these briefs for February 28, 2013. The court also ordered defendants to prepare a proposed statement of decision by February 4, 2013, set a briefing schedule for responses to the proposed decision, and a hearing on the decision for March 5, 2013. Thus, the parties do not anticipate a final ruling until at least March or April 2013.

Legal Department staff will continue to monitor the briefing and issuance of a final ruling on phase 1 and how it may affect Metropolitan. (See General Counsel's August 2012 Activity Report.)



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

These three lawsuits brought by environmental organizations, two Delta water agencies, and two Kern County water storage districts challenge the Monterey Amendments to the State Water Project (SWP) contracts. The cases include CEQA challenges to DWR’s May 2010 completion of a new Environmental Impact Report for the project. The *Central Delta I* and *Central Delta II* cases also bring reverse validation challenges to the underlying contracts, which threaten the validity of the Monterey Amendments and associated agreements executed some 17 years ago, including the transfer of lands from DWR for development of the Kern Water Bank.

A threshold legal issue concerning the reverse validation challenges is whether they are barred by the statute of limitations and therefore must be dismissed. Validation actions must be filed within 60 days from the date in which a matter such as a contract comes into existence. The question in this case is whether the contracts came into existence when they were executed, as the respondents maintain, or whether they did not come into existence until CEQA was finally completed in May 2010, as the petitioners maintain. If the former, all applicable statute of limitations periods would have long since passed because the Monterey Amendments and related agreements were executed in 1995 and 1996, and the Settlement Agreement for the original litigation was signed in 2003. If the latter, the reverse validation action could be considered timely.

On November 2, Sacramento Superior Court Judge Timothy Frawley held a “mini trial” in the

Central Delta I case to consider the statute of limitations and other time-bar defenses raised by the State, Metropolitan and the State Water Project Contractors, and the Kern Water Bank parties. On December 19, Judge Frawley issued a 39-page proposed statement of decision in which he found that the reverse validation action is time barred and must be dismissed. If left to stand, the decision is a significant victory that should greatly add to the certainty and finality of the Monterey Amendments executed by DWR and almost all the State Water Project contractors years ago. The Court provided until January 18, 2013 to file objections to the proposed statement of decision. Metropolitan will work with DWR and the other State Water Project contractors to determine if there are any comments we want to make, likely minimal or none at all given the extremely favorable decision.

What remains in the *Central Delta I* case now is only petitioners’ CEQA cause of action, which is expected to be litigated together with the *Rosedale* case in 2013. (See General Counsel’s August 2012 Activity Report.)

***Delta Smelt Cases; State Water Contractors v. Salazar* (Case No. 1:09-CV-422); *Metropolitan Water District v. United States Fish and Wildlife Service, et al.* (Case No. 1:09-CV-631); and consolidated matters**

On December 17, 2012 the Federal Defendants (U.S. Fish and Wildlife) provided notice to the court and the parties of the implementation of Component 1 of Action 1 of the Reasonable and Prudent Alternative (RPA) of the 2008 Delta Smelt Biological Opinion for up to 14 days due to the salvage of 26 adult Delta smelt on December 16, 2012. The action is to reduce Old and Middle River flows to no more negative than 2000 cfs for 14 days to protect pre-spawning adult Delta smelt from entrainment. This is the first imposition of RPA components since June 2012.

Items of Interest

***Neighbors for Smart Rail v. Exposition Metro Line Construction Authority, et al.* (California Supreme Court S202828)**

In August, the California State Supreme Court announced it will hear the case of *Neighbors for Smart Rail* (*Neighbors*), a coalition of West Los Angeles homeowners, community groups and

businesses, against Exposition Metro Line Construction Authority concerning the environmental analysis for Phase II of the Expo Line light rail project. *Neighbors* allege that the Environmental Impact Report (EIR) for the project used an improper traffic analysis because it determined impacts based on future projections of traffic instead of the current status on the street.



Two lower courts have already ruled that the EIR properly based its traffic analysis on future conditions instead of current conditions. However, Neighbors points to two cases, *Madera Oversight Coalition v. County of Madera* (2011) 199 Cal.App.4th 98 and *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale* (2010) 190 Cal.App.4th 1351, where state appellate courts have ruled that agencies cannot use future conditions as a baseline when evaluating the environmental impacts of proposed projects. When faced with conflicting opinions on major issues, the Supreme Court often takes cases to establish the correct rule of law for similar legal conflicts in the future.

The specific issue, whether the California Environmental Quality Act (CEQA) precludes the use of a future conditions baseline to evaluate a project's operational impacts, has a broad reach that extends well beyond an EIR's traffic analysis. For long-range water supply projects, for example, the use of a future condition baseline is often essential in isolating project-generated environmental effects from ambient effects that would occur regardless of the project. A future conditions baseline has been used in EIRs for arguably the three largest and most ambitious water supply programs undertaken in the state in recent history – the CALFED Bay-Delta Program, the Quantification Settlement Agreement concerning California's use of Colorado River water, and the Monterey Amendment to the State Water Contract.

On December 3, Metropolitan filed an amicus curiae, or friend of the court, brief on behalf of the Association of California Water Agencies in support of the future conditions baseline approach. The brief explained why the use of a future, predicted baseline often times is the best and only way to ascertain project impacts on dynamic bodies of water with independent influences that cause non-project related impacts. The brief was coauthored by Legal Department counsel and outside counsel for the San Diego County Water Authority.