Metropolitan Water District of Southern California

# Office of the General Counsel

Monthly Activity Report – October 2013

## Metropolitan Cases

**_Foli v. Metropolitan_ (United States Court of Appeals for the Ninth Circuit)**

Plaintiffs filed their reply brief and a request for judicial notice with the Ninth Circuit on October 10, 2013. The case will likely be scheduled for oral argument next year. As reported in August, plaintiffs filed their opening brief with the Ninth Circuit on June 27, 2013, and Metropolitan filed its answering brief and motion for judicial notice on August 28. Plaintiffs are appealing the January 2013 order which granted Metropolitan's motion to dismiss plaintiffs' first amended complaint, as well as the April 2012 order which granted Metropolitan's motion to dismiss plaintiffs' original complaint. Plaintiffs alleged in their complaints that Metropolitan's fluoridation process is an unlawful and unconstitutional medication of the plaintiffs. (See General Counsel's August 2013 Activity Report.)

## Matters Involving Metropolitan

**Water Transfer Rule Litigation**

As previously reported, there is ongoing litigation challenging the Environmental Protection Agency's regulation that exempts the transfer of water from one water body to another from the National Pollutant Discharge Elimination System (NPDES). There are two legal challenges to the Rule that have been consolidated in federal district court for the southern district of New York.

Metropolitan joined other western water agencies and intervened in the New York suit in support of the Water Transfer Rule. Cross-motions for summary judgment have now been filed and are scheduled for hearing on December 19. Metropolitan has provided both legal review of the intervenors' motion and a declaration in support of the motion. The intervenors are represented by Peter Nichols of Berg, Hill, Greenleaf & Ruscitti of Boulder, Colorado. The cost of the litigation is being shared among Metropolitan, Los Angeles Department of Water and Power, San Diego County Water Authority, San Francisco, Santa Clara, Southern Nevada Water Authority, Central Arizona Project, Denver, Aurora, and Colorado Springs. (See General Counsel's February 2013 Activity Report.)

## Other Activities

***Mingo Logan Coal Company v. United States Environmental Protection Agency* (United States Supreme Court)**

Metropolitan, along with the Association of California Water Agencies and the National Water Resources Association, are filing an *amici curiae* brief in support of Mingo Logan Coal Company's (Mingo Logan) petition for writ of certiorari to the United States Supreme Court. The D.C. Circuit ruled in April 2013 that the Environmental Protection Agency (EPA) may modify or revoke a Clean Water Act (CWA) section 404 permit (dredge and fill/wetlands) "whenever" it determines that the permit will have an "unacceptable adverse effect." Mingo Logan's brief is due by November 13, 2013, and amici briefs must be filed by December 13, 2013.

After a 10-year permitting process in which EPA participated fully, the Army Corps of Engineers (Corps) issued Mingo Logan a CWA section 404 permit in 2007. Almost two years later, EPA requested that the Corps suspend, modify, or revoke the permit. The Corps rejected EPA's request, finding that there was no reason under the applicable regulations to take away the permit. A year later, EPA retroactively "vetoed" the 404 permit that the Corps had issued in 2007. Mingo Logan challenged EPA's actions, and on March 23, 2012, the U.S. District Court for the District of Columbia ruled that the CWA does not authorize EPA to act after a permit has been issued; instead, EPA must act, if at all, before the Corps issues a permit. Subsequently, the D.C. Circuit reversed the district court's decision. The

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D.C. Circuit held that section 404(c) of the CWA unambiguously gives EPA the right to withdraw a specification and practically overturn a Corps permit "at any time."

The Mingo Logan case is the first time that EPA has withdrawn specification of a disposal site (effectively nullifying the permit) 3 years after the Corps had issued the permit, and despite the permittee's compliance with and reliance on the permit. As the district court noted, EPA's veto in this case has caused widespread consternation and uncertainty because it threatens the finality of not only CWA section 404 permits related to mining, but all CWA section 404 permits, including permits issued to public and private sector entities engaged in construction activities.

***South County Citizens for Smart Growth v. County of Nevada, et al.*** **(Third District Court of Appeal)**

In October, the Third District Court of Appeal issued an unpublished opinion in this case concerning the formulation and adoption of project alternatives after circulation of a draft Environmental Impact Report (EIR). Legal Department staff believes that this opinion provides helpful and important CEQA compliance guidance where project revisions are made after circulation of a draft EIR, particularly with respect to recirculation of the EIR. Metropolitan has therefore sought a change in the status of this opinion from "unpublished" to "published."

**ACWA CLE Conference**

Legal Department staff participated in the Association of California Water Agencies' Continuing Legal Education conference on October 3 and 4 in Newport Beach. Adam Kear participated on a panel discussing the trial court's decision in the Quantification Settlement Agreement (QSA) coordinated cases. Robert Horton participated on a panel discussing the Delta Stewardship Council's approval of the Delta Plan, the Delta Plan legal challenges and the possible implications on water users.

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