Metropolitan Water District of Southern California

Office of the General Counsel

Monthly Activity Report – February 2015

Metropolitan Cases

***Foli v. Metropolitan* (United States Court of Appeals for the Ninth Circuit)**

The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of the above case challenging Metropolitan's use of hydrofluosilicic acid (HFSA) to fluoridate public drinking water. The Ninth Circuit issued its decision only one week after hearing oral argument. Plaintiffs have 14 days to file a petition for rehearing before the Ninth Circuit if they believe grounds for rehearing exist (such as if they think a material point of fact or law was overlooked in the decision). If plaintiffs file a petition for rehearing and it is denied, they then have 90 days after rehearing is denied to petition the U.S. Supreme Court for a writ of certiorari to review the Ninth Circuit's decision. If plaintiffs do not file a petition for rehearing, the petition for a writ of certiorari must be filed by May 20. (See November 2014 Activity Report.)

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

On February 20, 2015, Hearing Officer Barry Winograd issued his decision in response to AFSCME Local 1902's appeal of Metropolitan's denial of a grievance challenging the use of comparative analysis testing for internal candidates. Mr. Winograd's decision sustained the grievance. The practical impact of his decision is that, going forward, comparative analysis testing cannot be used to prevent internal candidates who meet minimum qualifications from proceeding through the more formal selection testing process. The Legal Department represented Metropolitan in this matter.

Matters Involving Metropolitan

New PHG for Perchlorate

On February 27, 2015, the Office of Environmental Health Hazard Assessment (OEHHA) of the California Environmental Protection Agency announced its adoption of an updated Public Health Goal (PHG) of 1 part per billion (ppb) for perchlorate in drinking water. A PHG is not a regulatory standard, but is a level of drinking water contaminant at which adverse health effects are not expected to occur from a lifetime of exposure. OEHHA lowered the PHG for perchlorate from 6 ppb to 1 ppb after considering recent information on exposures to and possible effects of perchlorate. However, a PHG does not consider the ability either to detect or remove the constituent, nor does it define a boundary between "safe" and unsafe." PHGs are considered by the State Water Resources Control Board in setting drinking water standards (Maximum Contaminant Levels or MCLs). The current MCL for perchlorate was set at 6 ppb in 2007. Any revision to the current MCL will likely take several years.

Pacific Gas & Electric Co.'s Topock Compressor Station, Needles, California

The Basis of Design/Pre-Final (90%) Design Report for the final groundwater remedy for the Topock site was submitted to the California Department of Toxic Substances Control (DTSC) and the U.S. Department of the Interior (DOI) in September 2014. The final groundwater remedy selected by DTSC and DOI involves creating an underground biological treatment zone where naturally occurring bacteria convert carcinogenic hexavalent chromium (chromium VI) in the groundwater to non-harmful trivalent chromium. The 90% design report includes responses to more than 800 comments on the Intermediate (60%) Design Report. In October 2014, DTSC and DOI directed Pacific Gas & Electric Co. (PG&E) to prepare a Supplemental (90%) Design Report to provide additional details on select design elements for review and comment. In addition, based on cultural concerns raised by tribal governments, DTSC and DOI provided further direction to PG&E in December 2014 regarding such issues as the locations of monitoring wells, injection wells, and construction staging areas, as well as groundwater capture zone monitoring.

Date of Report: March 2, 2015

PG&E submitted the Supplemental 90% Design Report to DTSC on February 2, 2015. Comments on the 90% Design documents are due by March 16, 2015. DTSC and DOI, in coordination with PG&E, tribal governments, Metropolitan, and other stakeholders, are expected to resolve comments on the 90% Design for the Topock final groundwater remedy by June 22, 2015. Approval of the Final (100%) Design is targeted for the end of July 2015. If there are no California Environmental Quality Act (CEQA) or other delays, construction of the groundwater remedy is anticipated to start in December 2015.

In January 2013, PG&E submitted to DTSC and DOI the Revised Final Soil Resource Conservation and Recovery Act Facility Investigation/Remedial Investigation Work Plan (Soil Work Plan). The purpose of the Soil Work Plan is to define potential contaminants in the soil at the site. Pursuant to CEQA, DTSC is evaluating possible environmental impacts associated with the proposed soil sampling activities. It is anticipated that the agencies will approve the Soil Work Plan by March 26, 2015. PG&E will then complete the soil investigation work within approximately one year.

As previously reported, PG&E owns and operates a natural gas compressor station located adjacent to the Colorado River near Needles, California. This site is approximately 42 miles up-river from Metropolitan's Whitsett Intake facility. From 1951 until 1985, the facility disposed of cooling tower water into percolation ponds or evaporation basins and by injection well. This disposal of the coolant water, which contained chromium VI to prevent rust in the cooling towers, resulted in a plume of contaminated groundwater that has migrated toward the river. Environmental investigation and cleanup activities have been ongoing at the site since 1997. Metropolitan will continue to monitor the remediation of PG&E's Topock Compressor Station to ensure that appropriate measures are taken to prevent groundwater containing chromium VI from impairing Colorado River water quality. (See General Counsel's February 2014 Activity Report.)

Cases to Watch

***M&G Polymers USA, LLC v. Tackett* (2015) 135 S.Ct. 926 (United States Supreme Court)**

In a recent unanimous decision, the United States Supreme Court overturned *UAW v. Yard-Man, Inc*., a Sixth Circuit federal case related to retiree health benefits. *Yard-Man* held that courts should infer that parties to a collective bargaining agreement intended retiree health benefits to continue until retirees' death or reemployment (the "*Yard-Man* inference").

In rejecting the *Yard-Man* inference, the Supreme Court set forth a few key principles. First, the Supreme Court established that retiree health benefits provisions are not entitled to a special presumption that they are intended to last indefinitely. As a result, general termination provisions in a collective bargaining agreement may be effective to terminate retiree health benefits. The Supreme Court also rejected the argument that retiree health benefits should be presumed to continue indefinitely because unions did not intend to risk these benefits being subject to cutback in later negotiations. The Supreme Court further noted that the Court of Appeal "failed to even consider the traditional principle that courts should never construe ambiguous writings to create lifetime promises" and "failed to consider the traditional principal that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.'" The Supreme Court did acknowledge that employers can and do create vested rights to retiree medical benefits where the collective bargaining agreement provides "'in explicit terms that certain benefits continue after the agreement's expiration.'" However, "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life." The Supreme Court remanded the case back to the Sixth Circuit Court of Appeals to interpret the relevant collective bargaining agreement according to ordinary contract principles.

While this decision arises out of the private sector, it will likely influence the outcome of cases involving public sector contracts that include retiree benefits provisions. The *M&G Polymers* decision is consistent with the California Supreme Court's holding in *Retired Employees' Association of Orange County v. County of Orange* (2011) 52 Cal.4th 1171, which concluded that retiree medical benefits contained in a collective bargaining agreement are to be interpreted according to ordinary contract principles. While public employers are affected by other legal principles not

applicable to the private sector (e.g. the Contracts Clauses of the United States and California Constitutions), and overriding public policy considerations (e.g. legislation is not presumed to create private contractual rights), *M&G Polymers* demonstrates that disputes over the existence of vested benefits will likely be resolved by the application of ordinary contract principles.

Matters Received by the Legal Department

Category	Received	Description	
California Labor Commissioner Complaint	1	Public Works – Public Complaint alleging labor violations relating to work by subcontractor Rosscrete Roofing on the La Verne Maintenance Shops Upgrade	
Requests Pursuant to the Public Records Act	10	Requestor	Documents Requested
		The Center for Investigative Reporting	Records relating to moneys received by Kimberly Clark through MWD's Industrial Process Improvement Program
		Inland Empire Utilities Agency	Finance and accounting job descriptions and salary ranges
		Labor Management Compliance Council	Certified payroll records for JF Shea Construction for work on MWD second lower feeder PCCP Phase 2
		NATEC International, Inc.	Winning bid for MWD industrial hygiene and general safety services
		Private Citizen	MWD water sales to LADWP from 1940-1969
		(1) RCE Consultants and (2) Kimley Horn	Maps of MWD facilities/substructures in Long Beach and Culver City
		Segment Returns LLC	List of uncashed checks and unclaimed funds greater than $999.99
		SmartProcure, LLC	List of MWD purchase orders from 10/30/2014-present
		UC Santa Barbara Graduate Student	GIS map of MWD service area and member agency boundaries

Category	Received	Description
Subpoenas	2	United States District Court subpoena served in the case *Digital Intelligence Systems Corp. v. CC-Ops, Inc.*, served by the plaintiff, seeking records relating to defendant CC-Ops, an IT professional services company, which has a contract with MWD San Diego Superior Court subpoena served in *Diestro, Inc. v. Strata Properties, LLC* by the defendant seeking records that appear to be unrelated to MWD, as the records pertain to work performed in the city of Vernon by Earth Support Systems