



## Metropolitan Cases

### ***AFSCME Local 1902 v. Metropolitan (Public Employment Relations Board)***

As previously reported at the September 2014 Legal & Claims Committee, AFSCME Local 1902 filed an Unfair Practice Charge with the Public Employment Relations Board (PERB) on August 26, 2014. The charge alleges Metropolitan failed to fully implement the parties' earlier PERB settlement concerning the MyPerformance employee evaluation process. That settlement required Metropolitan to review the evaluations of 404 AFSCME employees to determine whether a documented basis existed for any drop off in performance for those employees who received a lower rating during fiscal year 2012/2013 when

compared to the prior fiscal year. For those evaluations that did not document any drop off in performance to support a lower rating, the settlement required Metropolitan to make appropriate adjustments. The charge seeks an increased performance rating and corresponding merit salary adjustments for twelve AFSCME members. On May 1, 2015, PERB issued a complaint and on June 2 an informal conference took place. The parties were unable to reach a settlement at the conference. Accordingly, this matter has been set for a formal hearing before an administrative law judge on September 29 and 30, 2015. The Legal Department is representing Metropolitan.

## Cases to Watch

### **EPA and Army Corps of Engineers Publish Clean Water Rule Defining "Waters of the United States"**

On June 29, 2015, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (collectively, the agencies) jointly published in the Federal Register the final Clean Water Rule which defines the scope of waters protected under the Clean Water Act (CWA). As explained in the General Counsel's May 2015 Activity Report, the statutory definition of "waters of the United States" in the CWA is vague and has generated significant confusion and litigation, including three U.S. Supreme Court decisions. According to the agencies, the Clean Water Rule clarifies which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities would need to make jurisdictional determinations on a case-specific basis. Nevertheless, there are still several provisions in the rule which remain ambiguous. The Western Urban Water Coalition is seeking clarification from the agencies as to many of these provisions.

Now that the final rule has been published in the Federal Register, it becomes effective on August 28, 2015. According to the agencies, for purposes of judicial review, the rule will be

considered issued on July 13, 2015. If a challenge to the Clean Water Rule is one that can be filed in the U.S. Circuit Court of Appeals, the lawsuit would have to be brought within 120 days of issuance of the rule, or by November 10, 2015. However, it is not clear that the rule is among the categories of actions that can be challenged directly in the Courts of Appeals. Several states have already filed lawsuits in the U.S. District Courts in Georgia, North Dakota, Ohio, and Texas seeking to block the implementation of the Clean Water Rule. Many of these states argue that the rule violates the CWA, the Administrative Procedure Act, and the U.S. Constitution.

In addition to the states, a group of plaintiffs, including the National Association of Home Builders, other building entities, and various agricultural and mining interests, have also filed litigation seeking to have the rule declared unlawful and vacated.

In addition, bills in Congress (such as S. 1140 and H.R. 1732) would require the agencies to withdraw the rule and to develop a new proposed rule pursuant to certain requirements. Riders to House and Senate appropriations bills would also prevent EPA from using funds to implement the final Clean Water Rule. Metropolitan staff is tracking these lawsuits and bills and is evaluating the potential



impacts of the new rule on Metropolitan. (See General Counsel's May 2015 Activity Report.)

### **BAY-DELTA RELATED MATTERS**

***Banta-Carbona Irrigation Dist. v. State Water Resources Control Board, Case No. 39-2015-00326421-CU-WM-STK (San Joaquin County Superior Court)***

***San Joaquin Tributaries Authority, et al. v. State Water Resources Control Board, Case No. CV- 2015366 (Stanislaus County Superior Court)***

***Patterson Irrigation District v. State Water Resources Control Board, Case No. CV-2015307 (Stanislaus County Superior Court)***

***Byron Bethany Irrigation District, et al. v. State Water Resources Control Board, Case No. MSN15-0967 (Contra Costa Superior Court)***

***West Side Irrigation District, et al. v. State Water Resources Control Board, Case No. 34-2015-80002121 (Sacramento Superior Court)***

In the last two weeks of June, five groups of water agencies and irrigation districts filed litigation and motions for temporary restraining orders challenging the State Water Resources Control Board's (State Board) authority to issue curtailment notices to senior water rights holders in the Sacramento and San Joaquin River watersheds, including the Bay-Delta.

The Legal Department and State Water Contractors are closely tracking these cases because if the plaintiffs prevail, it could enable senior water rights holders on Delta tributaries to continue to divert water when flows are too low to support the asserted water rights, and because some of the theories advanced in support of the causes of action are contrary to law and could impair water rights held by the Department of Water Resources (DWR) to divert State Water Project (SWP) water supplies.

Among other things, the plaintiffs in each case allege the State Board lacks the authority to curtail diversions by pre-1914 appropriative water rights holders, failed to support its determination of insufficient flows on substantial evidence, violated their due process rights, took their property without just compensation, and violated open meeting law. The first two motions for temporary restraining orders in the *Banta-Carbona Irrigation District* and *San Joaquin Tributaries Authority* cases were

denied because the courts determined that the cases should be transferred to a neutral venue. As of this update, there is a hearing on the motion for temporary restraining order in the *West Side Irrigation District* case scheduled for July 8, 2015 in Sacramento that may result in a ruling on the merits of the motion.

***California Sport Fishing Protection Alliance v. U.S. Bureau of Reclamation, et al., Case No. 1:15-cv-00912-LJO-BAM (United States District Court, Eastern District of California)***

In *California Sport Fishing Protection Alliance*, the plaintiffs challenge the State Board's granting, in part, the Temporary Urgency Change Petition (TUCP) filed by the Bureau of Reclamation and DWR in January 2015 and allege that the Bureau of Reclamation, which operates the federal Central Valley Project (CVP), is violating the federal Central Valley Project Improvement Act (CVPIA), the Clean Water Act, and state law because it is required to meet all water quality standards in the Delta regardless of whether the State Board grants a TUCP that modifies those standards.

The Legal Department and State Water Contractors are closely watching this case because a ruling against the State Board's authority to issue TUCPs for coordinated operations of the SWP and CVP could adversely impact already drastically limited SWP supplies in drought emergencies. San Luis & Delta Mendota Water Authority and Westlands Water District have filed a motion to intervene as co-defendants.

***Center for Environmental Science, Accuracy & Reliability (CESAR) v. DWR, Case No. 34-2015-80002085-CU-WM-GDS (Sacramento Superior Court)***

***CESAR v. Cowin (DWR), Jewell (Bureau of Reclamation) and Ashe (U.S. Fish and Wildlife Service), Case No. 1:15-cv-00884-LJO-BAM (United States District Court, Eastern District of California)***

In the last two months, CESAR filed litigation challenging DWR's construction of the Emergency Drought Salinity Barrier on West False River in the South Delta in both state and federal courts. The courts in both cases denied motions for temporary restraining orders that asked the courts to order DWR to stop construction or remove the barrier to avoid alleged unauthorized take of Delta smelt under the federal Endangered Species Act. In the



state action, CESAR also alleged that DWR violated CEQA by relying on Governor Brown's suspension of CEQA for drought emergency salinity barrier under the California Emergency Management Act instead of preparing an EIR or other CEQA document analyzing and mitigating any significant adverse environmental impacts. Both cases are still pending. CESAR has asked the state court to set a hearing on the merits of its CEQA and ESA claims at the earliest possible date.

The Legal Department and State Water Contractors are following this case because a ruling in CESAR's favor could impact the amount of water stored in Lakes Shasta and Oroville, which could adversely impact listed runs of salmon upstream of the Delta.

***CESAR v. Sacramento Regional County Sanitation District (Sac Regional), Case No. 2:15-cv-00342-KJM-AC (United States District Court, Eastern District of California)***

In this case, CESAR alleges that Sac Regional is causing an unauthorized take of the federally listed Delta smelt due to discharges of ammonia into the Sacramento River, which is designated critical habitat for the species. Sac Regional has filed its answer in the case, and the court has scheduled a status conference for July 16, 2015.

As previously reported in the September 2014 Monthly Activity Report, Sac Regional filed litigation challenging stringent discharge permit requirements imposed by the Central Valley Regional Water Quality Control Board dramatically reducing the plant's discharge of ammonia and nitrate and requiring tertiary filtration for pathogen

removal. Metropolitan and other water agencies intervened in the litigation to defend the permits. As part of the settlement of the litigation, Sac Regional agreed to the ammonia and nitrate levels and the parties agreed to increased filtration requirements. An amended permit was issued in August 2014.

If CESAR prevails, it is unclear what remedy could be imposed that would lead to greater water quality improvements than those already underway as a result of the settlement of the prior litigation. Further, the case could lead to a judicial re-examination of the science concerning the effects of ammonia of the Delta ecosystem. In the meantime, the Legal Department will continue to monitor.

***CESAR v. National Park Service, Case No. 1:14-cv-02063-LJO-MJS (United States District Court, Eastern District of California)***

CESAR alleges that the National Park Service failed to consult under ESA Section 7 and never completed environmental review under the National Environmental Policy Act for operations of the Hetch-Hetchy reservoir.

The City and County of San Francisco has intervened in the case, and the court set a briefing schedule that concludes on January 4, 2016 to decide the merits on cross-motions for summary judgment. No hearing date has been set.

The Legal Department is monitoring this case because it could have beneficial impacts on listed Delta fish species, which could indirectly benefit water supplies from the SWP.

## Other Matters

### Miscellaneous

Becky Sheehan organized a Bay-Delta tour for the Legal Department's two new attorneys and additional staff assigned to Bay-Delta matters. The staff was provided with an orientation by Curt Schmutte and USGS staff.



## Matters Received by the Legal Department

<u>Category</u>	<u>Received</u>	<u>Description</u>																						
Government Code Claims	2	Accidents involving MWD vehicles																						
Requests Pursuant to the Public Records Act	16	<table border="1"> <thead> <tr> <th><u>Requestor</u></th> <th><u>Documents Requested</u></th> </tr> </thead> <tbody> <tr> <td>AECOM</td> <td>Odor thresholds for reduced sulfur compounds</td> </tr> <tr> <td>City of Pasadena</td> <td>Weymouth water quality data</td> </tr> <tr> <td>eCivis, Inc.</td> <td>Winning grant application for Innovative Conservation Program (ICP)</td> </tr> <tr> <td>Government Services Group on behalf of Florida Governmental Utility Authority</td> <td>MWD key performance indicator information on water and sewer utility services to customers</td> </tr> <tr> <td>ICMA-RC, OPEN MINDs, SoCal Office Technologies</td> <td>Document relating to MWD requests for proposals for (1) third party administrator of MWD's 401(k) and 457(b) Plans, (2) workers' compensation third-party administration services, (3) multifunction copier contract</td> </tr> <tr> <td>Inland Empire Utilities Agency</td> <td>July 2009 letter agreement relating to temporary water service</td> </tr> <tr> <td>KCBS/KCAL TV, Investigative Reporter David Goldstein</td> <td>Metropolitan expenses related to retirement events for Gilbert Ivey</td> </tr> <tr> <td>Orange County Sanitation District</td> <td>MWD claim form and procedures</td> </tr> <tr> <td>Private Citizens</td> <td>(1) Number of permits for water connections, (2) MWD staff email address, (3) lease and easement records for property in Santa Clarita, CA, (4) policy on use of MWD vehicles, (5) copy of water bill for property in San Diego, CA</td> </tr> <tr> <td>UC Riverside, Graduate Student</td> <td>Water quality data</td> </tr> </tbody> </table>	<u>Requestor</u>	<u>Documents Requested</u>	AECOM	Odor thresholds for reduced sulfur compounds	City of Pasadena	Weymouth water quality data	eCivis, Inc.	Winning grant application for Innovative Conservation Program (ICP)	Government Services Group on behalf of Florida Governmental Utility Authority	MWD key performance indicator information on water and sewer utility services to customers	ICMA-RC, OPEN MINDs, SoCal Office Technologies	Document relating to MWD requests for proposals for (1) third party administrator of MWD's 401(k) and 457(b) Plans, (2) workers' compensation third-party administration services, (3) multifunction copier contract	Inland Empire Utilities Agency	July 2009 letter agreement relating to temporary water service	KCBS/KCAL TV, Investigative Reporter David Goldstein	Metropolitan expenses related to retirement events for Gilbert Ivey	Orange County Sanitation District	MWD claim form and procedures	Private Citizens	(1) Number of permits for water connections, (2) MWD staff email address, (3) lease and easement records for property in Santa Clarita, CA, (4) policy on use of MWD vehicles, (5) copy of water bill for property in San Diego, CA	UC Riverside, Graduate Student	Water quality data
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Other Matters	3	AFSCME Local 1902 Unfair Practice Charge filed with the California Public Employment Relations Board (PERB) relating to the 2008 Classification/Compensation Study and the resulting slotting of employees into the newly created classification of Instrumentation and Control Technician Specialist, and two wage garnishments