



Metropolitan Cases

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

This matter was filed in December 2004 by Orange County Water District (OCWD) against multiple industrial defendants for contamination of the North Basin groundwater basin, primarily by volatile organic compounds (VOCs). Subsequently OCWD advised the plaintiffs that the cost to construct and operate clean-up facilities had significantly increased due to the presence of perchlorate in the Basin. In January 2008, Northrop, followed by other defendants, filed cross-claims naming Metropolitan based on Metropolitan's delivery of replenishment water containing perchlorate to OCWD.

The trial was divided into phases, with the cross-claims against Metropolitan reserved for a later phase. At the conclusion of the initial phase of the trial, the court ruled in favor of the industrial defendants. Since the defendants were not liable to OCWD, the court dismissed all pending cross-complaints in the North Basin matter without prejudice on August 14, 2014, effectively resolving this matter as to Metropolitan pending a successful appeal. OCWD timely filed notices of appeal.

On August 12, 2015, OCWD filed its opening appellate briefs. In its opening briefs, OCWD argues that the court applied the wrong standard of causation regarding the statutory claims arising

under the Hazardous Substance Account Act and the OCWD Act. OCWD contends that the court improperly put the burden on OCWD to prove the defendants were the "but for" cause of the groundwater contamination that required installation of a centralized treatment system. Further OCWD argues that it should not have been required to trace defendants' contaminants to the groundwater contamination. OCWD asserts that once it had shown that defendants released hazardous substances to the basin, the burden should have shifted to them to disprove their liability for the cleanup costs.

Despite the trial court's rulings, OCWD has continued working on its proposed centralized treatment process. It has developed a process to ensure the project complies with CERCLA's National Contingency Plan in an effort to ensure any future cleanup costs are recoverable from parties responsible for the contamination. As part of this process, OCWD entered into discussions with the U.S. Environmental Protection Agency (EPA) and the California Department of Toxic Substance Control. As a result of these discussions, EPA notified OCWD by letter dated September 3, 2015, that it has decided to take the lead on the groundwater cleanup of the North Basin.

Legal Department staff will continue to monitor this matter.

Matters Impacting Metropolitan

Bay Delta Conservation Plan/California WaterFix Change Petition to SWRCB

On August 25 the Department of Water Resources and the Bureau of Reclamation submitted a "change petition" to the State Water Resources Control Board (SWRCB) for the Bay Delta Conservation Plan/California WaterFix. This is a petition for a change to the water rights necessary to allow for the implementation of key components of the California WaterFix. The petition requests SWRCB approval to add points of diversion and

rediversion to the existing water rights permits held by the State Water Project and Central Valley Project. The petition is limited in scope to the change in the point of diversion. The submittal of the petition starts a public process expected to include a hearing and opportunity for comment by interested parties meeting SWRCB standing requirements.



Request to Extend Review Period for Bay Delta Conservation Plan/California WaterFix Environmental Documents

On September 11, 2015, eleven members of the California Congressional Delegation submitted a letter to Governor Brown, the Secretary of the U.S. Department of the Interior, the Administrator of the EPA, the Secretary of the California Natural Resources Agency, and the Secretary of the U.S. Department of Commerce to request an additional 60 days to December 29, 2015 for review of the Recirculated Draft Environmental Impact Report and Supplemental Draft Environmental Impact Statement for the BDCP/California WaterFix. The period for review had previously been extended by sixty days to October 30, 2015. As of the date of this report no action to extend the time had been taken.

EPA Revises Water Quality Standards

For the first time in more than 30 years, the EPA has revised the federal Water Quality Standards (WQS) regulation that helps to implement the Clean Water Act (CWA). The WQS regulatory changes address the following key program areas: (1) the EPA Administrator's determinations that new or revised WQS for states and tribes are necessary; (2) designated uses of waters; (3) triennial reviews of state and authorized tribal WQS; (4) antidegradation provisions to protect water quality; (5) WQS variances; and (6) provisions authorizing the use of compliance schedules in permits. EPA first proposed the WQS regulation changes in September 2013, and then

published the final rule in the Federal Register on August 21, 2015. The revised WQS regulation becomes effective on October 20, 2015.

WQS serve a dual purpose: (1) WQS define the goals for a water body by designating its uses, setting water quality criteria to protect those uses, and establishing antidegradation policies to protect water bodies from pollutants; and (2) WQS serve as the basis for water quality-based limits in National Pollutant Discharge Elimination System (NPDES) permits, as the measure to assess whether waters are impaired, and as the target in a Total Maximum Daily Load (TMDL) to restore impaired waters. According to EPA, WQS are the foundation of the water quality-based pollution control program mandated by the CWA. Every state must adopt WQS to protect, maintain, and improve the quality of the nation's surface waters. EPA reviews states' WQS to determine whether the standards meet CWA requirements.

States and authorized tribal governments responsible for administering or overseeing water quality programs may be directly affected by this rulemaking. As a result of the WQS changes, states and authorized tribes may need to consider and implement new provisions, or revise existing provisions, in their WQS. Also, WQS may be used in determining NPDES permit limits or in implementing other CWA programs. Metropolitan staff will monitor the SWRCB's implementation of the final rule and the potential impacts on TMDLs, NPDES permits, designated uses, basin plans, antidegradation provisions, and other areas.

Cases to Watch

NRDC v. U.S. Bureau of Reclamation, NMFS, and Sacramento River Settlement Contractors, 60-day Notice of Intent to Sue

On August 10, 2015, NRDC issued a 60-day Notice of Intent to sue (60-day NOI) under the federal Endangered Species Act (ESA) to Reclamation, National Marine Fisheries Service (NMFS), and 28 Sacramento River Settlement Contractors. The 60-day NOI is a prerequisite to filing an ESA citizen suit. In the notice, the Natural Resources Defense Council (NRDC) alleges that

Reclamation and NMFS violated section 7 of the ESA for failure to consult on impacts of Sacramento River Settlement Contract renewals on listed salmon. It also alleges that Reclamation and 28 settlement contractors violated the ESA section 9 prohibition on unpermitted take of listed salmon in 2014 and 2015 due to Reclamation's operations of Shasta Dam and the SRS contractors' diversions. Unless the alleged violations are addressed to NRDC's satisfaction by Friday, October 9, 2015, NRDC may file an ESA citizen suit in federal court.



Matters Involving Metropolitan

Water Transfer Rule Litigation

On August 21, 2015, the Ninth Circuit Court of Appeals in *ONRC Action v. U.S. Bureau of Reclamation* affirmed an Oregon district court's ruling that the defendants do not need an NPDES permit to transfer water from the Klamath Straits Drain to the Klamath River. The Ninth Circuit held that because the waters flowing from the Klamath Straits Drain into the Klamath River were not "meaningfully distinct," as that term was used by the U.S. Supreme Court in *L.A. Cnty. Flood Control Dist. v. Natural Resources Defense Council*, 133 S. Ct. 710, 713 (2013), an NPDES permit was not required under the CWA.

The CWA makes unlawful the addition of any pollutant from a point source to navigable waters without a permit. The plaintiff in *ONRC* alleged that the defendants had violated the CWA by discharging pollutants from the Klamath Straits Drain into the Klamath River, a navigable water, without a permit. Arguing that a permit was not required to operate the Klamath Straits Drain, the defendants filed a motion for summary judgment. The district court adopted a magistrate judge's recommendation and entered summary judgment for the defendants. The magistrate judge's recommendation was based on conclusions that: (1) the discharge of water from the Klamath Straits Drain to the Klamath River was exempted from the permit requirement by the Water Transfers Rule, and (2) adoption of the Water Transfers Rule was properly within the EPA's authority. The Water Transfers Rule is EPA's regulation that exempts the transfer of water from one water body to another from the NPDES permit requirement under the CWA. The plaintiff appealed, and Metropolitan, the Imperial Irrigation District, San Diego County Water Authority, State Water Contractors, and 20 other western water agencies and water resource

associations filed a joint amicus curiae brief in support of the district court's judgment.

The Ninth Circuit did not reach the questions of whether the discharge was exempted by the Water Transfers Rule or the validity of the Water Transfers Rule. Instead, the court relied on the U.S. Supreme Court's ruling in *L.A. Cnty. Flood Control Dist.* that no pollutants are "added" to a water body when impacted water is simply transferred between different parts of that same water body. According to the Supreme Court, a water transfer that is not between "meaningfully distinct" water bodies does not involve the discharge of pollutants and therefore does not require an NPDES permit. The Ninth Circuit found that the Klamath Straits Drain and the Klamath River are not "meaningfully distinct" because there is a longstanding hydrological connection between the two water bodies and much of the water that flows through the Klamath Straits Drain originates from the Klamath River.

Although the Ninth Circuit did not rule on the validity of the Water Transfers Rule, there is ongoing litigation challenging the Rule in *Catskill Mountains Ch. Of Trout Unltd., Inc. v. EPA*, which is pending in the Second Circuit Court of Appeals. As previously reported, Metropolitan and other western water agencies (Western Water Providers) intervened in the consolidated *Catskill* cases and, along with EPA and others, appealed the decision of a New York district court which vacated the Water Transfers Rule and remanded it to EPA. The appeal has been fully briefed, but oral argument has not yet been scheduled. The Western Water Providers are represented in the *Catskill Mountains* case by Peter Nichols of Berg, Hill, Greenleaf & Ruscitti LLP of Boulder, Colorado. (See General Counsel's January 2015 Activity Report.)

Other Matters

Finance

On July 1, 2015, Metropolitan posted the official statement for \$94,450,000 Water Revenue Refunding Bonds, 2015 Series A-1 and \$94,450,000 Water Revenue Refunding Bonds, 2015 Series A-2 to refund two series of Water Revenue Bonds that were originally issued in 2000

and 2005 and a series of Water Revenue Refunding Bonds issued in 2012. Legal Department staff attorneys worked with finance, engineering and resources staff to prepare Appendix A to the official statement and assisted outside bond counsel with the bond documents and closing.



On August 19, 2015, Metropolitan confirmed the novation of an interest rate swap transaction, transferring all obligations under the transaction from Deutsche Bank AG to Wells Fargo Bank, NA. Metropolitan also entered into a master swap

agreement with Wells Fargo Bank, NA. Legal Department staff worked with outside bond counsel and tax counsel to document the novation and finalize the agreement.

Other Activities

Miscellaneous

John Schlotterbeck from the Legal Department and Sarah Bartlett from WRM presented a continuing legal education class on the history of the State Water Project and the State Water Contract.

Staff from Legal, IT and Contracts attended a webinar hosted by Legal on negotiating and drafting “SaaS” (software as a service) contracts.

Matters Received by the Legal Department

<u>Category</u>	<u>Received</u>	<u>Description</u>	
Actions in which MWD is a party	1	First Amended Verified Complaint and Writ of Mandate for Declaratory and Injunctive Relief filed in <i>LADWP v. MWD</i> , in Los Angeles County Superior Court, relating to the release of names and addresses of participants who applied for rebates or incentives from MWD’s Turf Removal Program	
Government Code Claims	4	Claims submitted by: a customer of the City of San Diego Public Utilities Department alleging payments for water service are an unconstitutional tax; two individuals for an accident involving an MWD vehicle; and one individual for a fall at Gene Camp	
Requests Pursuant to the Public Records Act	21	<u>Requestor</u>	<u>Documents Requested</u>
		Apis Capital Advisors	Correspondence and evaluations relating to the Cadiz Project
		California Department of Water Resources	GIS shapefiles for basins documented in MWD draft Groundwater Assessment Study dated March 2007
		KCBS/KCAL TV	TAC credit card expenses in 2015 and assets assigned to TAC
		Keker & Van Nest LLP	Attorneys’ fees and rates for MWD outside counsel assigned to the 2010 and 2012 rate litigation, <i>SDCWA v. MWD</i>
		Mazel Equities National Associates	List of unclaimed/outstanding checks that are \$5,000 and over



<u>Category</u>	<u>Received</u>	<u>Description</u>
	PMCS Group Inc.	Proposals for On-Site Inspection and Construction Contract Administration Services
	Private Citizens (2)	(1) Amount of water received through the SWP and CRA from 1985-2015, and data on water transfers between MWD and third parties from 2005-2015, and (2) geology and water table data for property in Pico Rivera, CA
	Transparent California	MWD Employee Compensation Report for calendar year 2014
	Requests from:	New and amended requests for data relating to applications for rebates or incentives from MWD's Turf Removal Program
	1. Fox 11 News	
	2. KCBS/KCAL TV (2 requests)	
	3. KPCC	
	4. Los Angeles Daily News	
	5. Los Angeles Times	
	6. Orange County Register (2 requests)	
	7. Private Citizens (2)	
	8. Southern California Water Committee	
	9. U-T San Diego (updated request)	
Other Matters	3	(1) Verified Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief filed in <i>Ten-Ninety, Ltd. v. Michael Cohen, Director of the California Department of Finance, et al.</i> , in Sacramento County Superior Court, naming MWD as one of the real parties in interest, relating to the Department of Finance rejection of payment obligation by the successor agency to the former Fontana Redevelopment Agency
		(2) Letter from Freight Forwarders Settlement to MWD regarding potential eligibility to receive benefits from the settlement fund for freight forwarding services
		(3) Wage garnishment