



## Matters Involving Metropolitan

### **California WaterFix, Additional Points of Diversion Petition**

On October 30, 2015, the State Water Resources Control Board (SWRCB) issued its Notice of Petition filed by the California Department of Water Resources (DWR) and United States Bureau of Reclamation (Reclamation) requesting additional points of diversion for their proposed north Delta water facilities (California WaterFix).

DWR and Reclamation seek to modify their current permits by adding three new points of diversion on the Sacramento River. No other changes have been requested in the Petition. The Petition states that the proposed changes will leave intact all existing places of use, manner of use, other existing points of diversion, quantities of diversion and other water rights terms and conditions.

The SWRCB established the following schedule for responding to the Petition:

The deadline for filing notices to appear is January 5, 2016.

The SWRCB has scheduled a pre-hearing conference for January 28, 2016.

Part I of the evidentiary hearings will address potential impacts of the proposed changes to other users of water. These hearings will commence on April 7, 2016. The deadline for filing proposed testimony, exhibits and witness qualifications for the April 7 hearing is March 1, 2016.

Part II of the evidentiary hearings will address the potential effects to the fishery and appropriate flow criteria. The Part II hearing will commence after the California WaterFix EIR/S and biological opinion are finalized currently scheduled for sometime mid-2016.

### **BDCP/California WaterFix Comments on the RDEIR/SDEIS**

Several Metropolitan attorneys worked with the Bay-Delta staff on Metropolitan's comment letter. They also worked with other state and federal

water contractor agencies on comments submitted jointly by the State Water Contractors and San Luis & Delta Mendota Water Authority.

### **CEQA Guidelines Update Comments**

The Legal Department worked with Metropolitan's Environmental Planning Team to submit comments on the Preliminary Discussion Draft of the Proposed Updates to the CEQA Guidelines issued by the Governor's Office of Planning and Research (OPR). OPR is currently engaged in a comprehensive update to the state's CEQA regulations known as the CEQA Guidelines. OPR intends to make implementation of CEQA more efficient, and to update the regulations to reflect statutory amendments and case law developments since the last major update over a decade ago. Once OPR has completed its proposed amendments, the California Natural Resources Agency will begin formal rulemaking proceedings under the California Administrative Procedure Act. Metropolitan will continue to monitor and comment consistent with Metropolitan's CEQA principles.

### **Comments on Proposed Nesting Birds and Birds-of-Prey Regulations**

The Legal Department worked with the Environmental Planning Team to submit comments on the California Department of Fish and Wildlife's (DFW) proposed regulations intended to clarify and improve enforcement of two important provisions of the Fish & Game Code that prohibit the needless destruction of native bird nests and take of birds-of-prey such as falcons and owls or the destruction of their nests. Overall, the proposed regulations would clarify the statutory prohibitions by defining key terms like "needless destruction," codify clear exceptions to the prohibitions, including exceptions where swift action is needed to avoid or mitigate impacts due to an emergency, and clarify DFW's role as a responsible agency in the CEQA process. If DFW does not substantively alter the proposed regulations, it could adopt them this year or early in 2016.



## Cases to Watch

### **Sixth Circuit To Hear Oral Argument On Clean Water Rule**

The U.S. Court of Appeals for the Sixth Circuit has scheduled oral argument for December 8, 2015, on the question of whether it has jurisdiction to rule on several challenges to the Clean Water Rule. On June 29, 2015, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jointly published revisions to the Clean Water Rule which defines the scope of waters protected under the Clean Water Act (CWA). Sixteen petitions challenging the revisions to the Clean Water Rule have been filed in eight different appellate courts and consolidated in the Sixth Circuit. In addition, sixteen cases contesting the Rule have been filed in twelve district courts. On October 13, 2015, a judicial panel ruled against consolidating the district court cases. This means that if the Sixth Circuit decides it does not have jurisdiction to rule on the substance of the changes, the lawsuits challenging the Clean Water Rule will go forward in twelve different district courts. Alternatively, if the Sixth Circuit determines that it does have jurisdiction, it will rule on the merits of plaintiffs' claims and decide whether the Clean Water Rule is valid and lawful.

Previously, on August 27, 2015, the U.S. District Court in North Dakota had issued a preliminary injunction blocking implementation of the Clean

Water Rule, stating that it appeared likely that the EPA had violated its authority in issuing the rule. However, the injunction only applied to the 13 states which filed that suit. Then on October 9, the Sixth Circuit stayed the Clean Water Rule nationwide, deciding that the plaintiffs had shown a good chance of winning on the merits of their claims. While the stay is in place, the prior "waters of the United States" regulations remain in effect. The court also said that the rulemaking process may have violated the Administrative Procedures Act. In issuing the stay, the Sixth Circuit found "of greater concern" the burden potentially imposed nationwide on governmental bodies and private parties, as well as the impact on the general public "implicated by the Rule's effective redrawing of jurisdictional lines over certain of the nation's waters."

Several bills in Congress would require the agencies to withdraw the rule and to develop a new proposed rule pursuant to certain requirements. In addition, a vote on a resolution of disapproval under the Congressional Review Act to overturn the Clean Water Rule is expected to take place in the next couple of weeks. Metropolitan staff will continue to track these lawsuits and legislative developments. (See General Counsel's June 2015 Activity Report.)

### ***NRDC, Defenders of Wildlife, and The Bay Institute v. EPA Administrator, 60-day Notice of Intent to Sue***

In a letter dated October 29, 2015, NRDC, Defenders of Wildlife, and The Bay Institute (TBI) notified EPA Administrator Gina McCarthy of their intent to file a citizen suit if EPA fails to cure multiple alleged failures to carry out its duties under the CWA. The letter alleges that EPA has a mandatory duty to review and the San Francisco Bay/Sacramento-San Joaquin Delta Estuary Water Quality Control Plan (Bay-Delta Plan) – which forms the basis for D-1641 governing SWP/CVP coordinated operations – at least once every three years. The SWRCB completed its last review of the Bay-Delta Plan in 2006. It is currently engaged in a multi-phase process to review and update the plan, which is a prelude to revisiting the requirements in D-1641. According to the notice, even if the SWRCB fails to complete the triennial review, the CWA required EPA to conduct its own review in 2009, 2012, and 2015.

In addition, the letter alleges that EPA has failed to carry out its mandatory duty to review the SWRCB's orders granting Temporary Urgency Change Petitions in 2014 and 2015 modifying water quality standards in D-1641 and D-1422 (Stanislaus River) to mitigate the drought emergency. According to the notice, modifying D-1641 and D-1422 is tantamount to modifying the water quality standards in the Bay-Delta Plan and the Water Quality Control Plan for the Central Valley Region, Sacramento River Basin and San Joaquin River Basin (Central Valley Plan). If so, the notice contends, the CWA requires EPA to review the modified water quality standards and "take appropriate action."



EPA review of either the Bay-Delta Plan or D-1641 could affect SWP water supplies. Thus, Metropolitan will closely monitor any action by EPA in response to the 60-day notice as well as any litigation filed.

**California Water Curtailment Cases, Judicial Council Coordination Proceeding Case No. 4838 (Santa Clara County Superior Court)**

As previously reported, five groups of petitioners filed lawsuits challenging the validity of the SWRCB’s curtailment notices issued to senior water rights holders in the Delta. (*Banta-Carbona Irrigation Dist. v. SWRCB*; *San Joaquin Tributaries Authority et al. v. SWRCB*; *Patterson Irrigation District v. SWRCB*; *Byron Bethany Irrigation Dist., et al. v. SWRCB*; and *West Side Irrigation Dist., et al. v. SWRCB*.) The five cases have been coordinated before the Honorable Peter H. Kirwan in the Santa Clara County Superior Court. The

SWRCB has filed demurrers in the coordinated cases scheduled for hearing on February 19, 2016.

Metropolitan and the State Water Contractors are closely watching the coordinated cases because some causes of action seeking a judicial declaration that the petitioners have the right to divert from south Delta channels regardless of natural or CVP/SWP inflows from upstream. Thus, the cases have the potential to impact SWP water supplies.

As reported in more detail below, the SWRCB has issued hearing schedules for a related Draft Cease and Desist Order against West Side Irrigation District for threatened unlawful diversions, and for a hearing on the State Board’s Administrative Civil Liability (ACL) Complaint against Byron-Bethany Irrigation District for alleged unlawful diversions in June 2015. The State Water Contractors have been granted party status in those proceedings.

**Matters Received by the Legal Department**

<u>Category</u>	<u>Received</u>	<u>Description</u>	
Government Code Claims	2	Subrogation claims submitted by insurance carriers for accidents involving MWD vehicles	
Requests Pursuant to the Public Records Act	9	<u>Requestor</u>	<u>Documents Requested</u>
		East Bay Municipal Utility District	Job description and current salary schedule
		Garmin International	Bathymetric data for Lake Perris and Lake Skinner
		Graduate Student, UC Irvine Department of History	MWD archives on history of water
		Private Citizens (3)	(1) MWD’s yearly totals for compensation and benefit expenditures from 2009-2014; (2) annual cost and quantity of water purchased by the city of Camarillo for the last 10 years; (3) water use agreements with the City of Sierra Madre
		San Diego County Citizen’s Water Academy	Water quality data for Lake Skinner for 2013/2014
		UCLA Luskin Center for Innovation	Data on rebates provided under MWD’s turf removal program



<u>Category</u>	<u>Received</u>	<u>Description</u>
		<u>Requestor</u> Valued Engineering, Inc.
		<u>Documents Requested</u> Drawings for MWD pipeline in city of Rancho Cucamonga
Subpoena	1	U.S. Bankruptcy Court Subpoena to Produce Documents, Information, or Objects relating to a residential property in Buena Park, CA
Other Matters	1	Letter from California Enterprise Development Authority re Notice of the pending formation of a Property Assessed Clean Energy Assessment District and financing program in counties and cities located within MWD's coverage area to assist counties and cities in financing distributed generation renewable energy sources and energy and water efficiency improvements within their jurisdictions