



## Metropolitan Cases

### **Copper Pitting Cases (Orange County Superior Court)**

Commencing in 2012 numerous cases were filed by plaintiffs in Orange County alleging that leaks in residential plumbing were caused by the corrosive nature of the water supplied by Metropolitan Member Agencies and subagencies in Orange County. Metropolitan has worked with the subagencies in the defense of these cases. The cases were consolidated and are generally referred to as the “Copper Pitting Cases”.

A legal issues trial was held in July 2015. The purpose of the legal issues trial was to obtain a ruling from the trial court on key legal issues. The subagencies and Metropolitan prevailed in the legal issues trial.

As reported previously, on December 29, 2015, several plaintiffs in the copper pitting cases filed a Notice of Appeal from the judgment in favor of the water district defendants. The parties have designated the record on appeal, and the reporter’s transcript must be filed by March 28, 2016. The next step in the appeal will be for the parties to file their appellate briefs, followed by oral argument.

In January 2016, Moulton Niguel Water District (MNWD) entered into settlement agreements with plaintiffs Briosa Owners Association and Cantora Community Association in the Copper Pitting Cases. These homeowner association plaintiffs agreed to waive any right to appeal the judgment in favor of the water district defendants in exchange for MNWD waiving its costs.

On December 21, 2015, Judge Colaw granted a Motion to Strike or Tax (challenge) Irvine Ranch Water District’s costs which was filed by the non-settling plaintiffs. On February 2, 2016, Judge Colaw granted in part a Motion to Strike or Tax MNWD’s costs which was filed by the non-settling plaintiffs.

Metropolitan filed and served its Memorandum of Costs on November 5, 2015. In January 2016, after the time had passed for a Motion to Strike or Tax Metropolitan’s costs, Metropolitan asked the Court to enter Metropolitan’s costs and served all parties.

Subsequently certain plaintiffs claimed they were not served with Metropolitan’s Memorandum of Costs. At a Status Conference on February 26, 2016, Judge Colaw directed plaintiffs to file a motion requesting leave from the Court for plaintiffs to file their late Motion to Strike or Tax Metropolitan’s costs. If Judge Colaw allows plaintiffs to file their motion challenging Metropolitan’s costs, that motion will be heard on May 20, 2016. The amount at issue is approximately \$34,000.

### ***Los Angeles Department of Water & Power v. Metropolitan* (Los Angeles Superior Court)**

As noted in the General Counsel’s February 26, 2016 memorandum to the Board and Member Agencies, on February 26 Judge Chalfant lifted the temporary restraining orders (TROs) in the *LADWP v. Metropolitan* case. The TROs prohibited Metropolitan from releasing the names and addresses of turf rebate recipients in the LADWP, Foothill, West Basin and Upper San Gabriel service areas. When the TROs were lifted, Metropolitan sent, via e-mail, spreadsheets with the applicants’ names and addresses, as well as the additional rebate information Metropolitan recently discovered to the persons and entities who had filed public records requests.

Due to the news coverage about the litigation, Metropolitan received five additional public records requests for the information at issue in the litigation. The additional requests were also responded to on Friday, February 26.

### ***Coziahr, et al. v. Otay Water District, et al.* (San Diego County Superior Court)**

On July 2, 2015, Mark Coziahr, a retail water service customer of Otay Water District, submitted a claim to Metropolitan demanding a refund of amounts for residential water service that allegedly exceeded limits imposed by Proposition 218. On August 21, Daniel Patz, a retail water service customer of the San Diego Public Utilities Department, submitted a class action claim to Metropolitan similar to Coziahr’s claim.



Coziahr filed a class action complaint for declaratory and injunctive relief on July 6, 2015, in San Diego Superior Court against Otay Water District, SDCWA, and Metropolitan.

Coziahr amended his Class Action Complaint on November 2 to add Patz, and the class of persons similarly situated, as plaintiffs and San Diego Public Utilities Department as a defendant. Coziahr also added a demand for compensatory damages for the alleged “excessive and unconstitutional fees, charges or taxes paid to Defendants.”

Metropolitan staff counsel conferred with plaintiffs’ attorneys regarding the lack of any legal basis for

the lawsuit against Metropolitan. When no resolution was reached, Metropolitan filed a demurrer (motion to dismiss) to the entire complaint and an alternative motion to strike portions of the complaint.

The hearing on the demurrers and motion to strike was scheduled for July 22, 2016. However, on February 23, 2016, plaintiffs submitted to the court a request to dismiss all claims against Metropolitan without prejudice. The dismissal brings this action to an end against Metropolitan. The action was handled by Metropolitan’s in-house counsel.

## Matters Involving Metropolitan

### ***Agua Caliente Band v. Coachella Valley Water District (United States District Court, Central District of California)***

In May 2013, the Agua Caliente Band of Indians (Tribe) filed suit in federal court alleging that Coachella Valley Water District (CVWD) and Desert Water Agency (DWA) have been interfering with tribal rights to the groundwater underlying the tribal reservation. In addition, the complaint challenges the importation of Colorado River water for groundwater recharge on the grounds that it is adversely affecting water quality. The United States intervened on behalf of the Tribe. (See General Counsel’s May 2013, June 2014 and March 2015 Monthly Activity Reports.)

The case is being tried in phases. Phase I was limited to whether the Tribe has reserved or aboriginal rights to groundwater. On March 24, 2015, the court issued its ruling that the Tribe has reserved rights, but not aboriginal rights, to groundwater based on the *Winters* doctrine that reservations of land for federal use include appurtenant water rights. The court rejected CVWD’s and DWA’s argument that the *Winters* doctrine is limited to surface waters. Because there is a split among state and federal courts over the applicability of the *Winters* doctrine to groundwater, the trial court certified its ruling on this issue as appropriate for interlocutory appeal. [An interlocutory appeal is an appeal of a ruling by the trial court that is made before all of the claims in the litigation are resolved for all of the parties. The general rule is that there can be no appeal until there is a final ruling on all pending issues as to all of the parties at the trial court.] The Ninth

Circuit Court of Appeals granted permission for the interlocutory appeal on June 10, 2015, and briefing is in progress.

While the interlocutory appeal is pending, the trial court proceeded with Phase II of the case. This phase involves the legal question of whether equitable defenses (equitable defenses raise questions of fairness) apply to the Tribe’s reserved water rights. CVWD and DWA argued that the Tribe has benefited for years from their replenishment of the groundwater basin with imported Colorado River water and therefore cannot now complain that tribal water rights are impaired by actions CVWD and DWA are taking to manage the groundwater basin. The court heard arguments in Phase II on December 14, 2015. On February 23, 2016, the court issued its ruling in favor of the Tribe. The court noted that the law generally protects Indian rights against loss by lapse of time or failure to assert them against adverse users. Furthermore, the federal government holds the reservation lands and reserved water rights in trust, and those rights can only be disposed of by Congress. Inaction by federal agencies in protecting the Tribe’s groundwater rights does not bar the present action to quantify and protect those rights.

The remaining proceedings in the trial court are stayed pending resolution of the interlocutory appeal. If the Ninth Circuit upholds the trial court’s ruling that the Tribe has reserved rights in the groundwater basin, the case will proceed to Phase III to adjudicate the scope of those rights. The ultimate outcome of the case may affect the agreements between Metropolitan and CVWD and



DWA for the delivery of Colorado River water in exchange for State Water Project water supplies.

For that reason, the Legal Department will continue to monitor this matter.

## Cases to Watch

### **NRDC Sues EPA for Failure to Regulate Perchlorate in Drinking Water**

On February 18, 2016, the Natural Resources Defense Council, Inc. (NRDC) sued the U.S. Environmental Protection Agency (EPA) in a New York federal district court seeking to compel EPA to set a drinking water standard for perchlorate. NRDC alleges that EPA determined on February 11, 2011, that perchlorate poses a threat to human health that could be meaningfully reduced by regulating its presence in public drinking water. Accordingly, under the Safe Drinking Water Act (SDWA), EPA was required to issue proposed maximum contaminant level (MCL) for perchlorate by February 11, 2013, and to finalize the MCL by August 11, 2014.

As reported last year, the Office of Environmental Health Hazard Assessment (OEHHA) of the California Environmental Protection Agency announced on February 27, 2015, its adoption of an updated Public Health Goal (PHG) of 1 part per billion (ppb) for perchlorate in drinking water. (See General Counsel's February 2015 Monthly Activity Report.) 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 MCLs. California's current MCL for perchlorate of 6 ppb was set in 2007. Metropolitan staff will monitor NRDC's lawsuit against EPA.

### **Sixth Circuit Decides it Has Jurisdiction Over Challenges to the Clean Water Rule**

On February 22, 2016, the U.S. Court of Appeals for the Sixth Circuit decided that it has jurisdiction to hear numerous challenges to the Clean Water Rule (also known as "the Waters of the U.S. Rule" or "WOTUS"). A three-judge panel for the Sixth

Circuit ruled 2 to 1 that the Clean Water Rule is subject to review at the circuit court level and not by district courts. The court reasoned that "recognition of our authority and our duty to directly review the Clean Water Rule in this multi-circuit case is in all respects consonant with the governing case law and in furtherance of Congress's purposes. Conversely, to rule that we lack jurisdiction would be to contravene prevailing case law and frustrate congressional purposes without substantial justification."

Due to the split in the court's decision on February 29, 2016, several industry groups asked the Sixth Circuit for en banc review. En banc review means that all of the active judges in the Sixth Circuit would hear the case and decide whether to rule differently than the three-judge panel that issued the original decision. En banc review is not favored and usually will not be ordered unless: (1) en banc consideration is necessary to maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance.

In the meantime, the Sixth Circuit's ruling means that the nationwide stay of the Clean Water Rule which the court issued in October 2015 remains in effect. Also, while the stay is in place, the prior WOTUS regulations still govern. In June 2015 the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers jointly published the Clean Water Rule which defines the scope of waters protected under the Clean Water Act. Numerous petitions challenging the Clean Water Rule have been filed in eight different appellate courts and consolidated in the Sixth Circuit, except for one case in the Eleventh Circuit. However, the Eleventh Circuit recently cancelled a hearing scheduled for February 23, 2016, on the same jurisdiction question decided by the Sixth Circuit. In addition, many cases contesting the Clean Water Rule have been filed in twelve district courts. If there is no en banc review, the Sixth Circuit will next rule on the merits of plaintiffs' claims and decide whether the Clean Water Rule is valid and lawful. Metropolitan staff will continue to track this litigation. (See General Counsel's October 2015 Monthly Activity Report.)



## Other Activities

Legal staff viewed a webinar regarding Active Shooter Events. The presenters recommended viewing a 5½-minute video entitled “*Run. Hide. Fight. Surviving an Active Shooter Event*” on the FBI’s website at <https://www.fbi.gov/about-us/office-of-partner-engagement/active-shooter-incidents/run-hide-fight-video>.

On February 25, Deputy General Auditor John Tonsick presented a program “The Magic of Fighting Fraud” to staff from Legal, staff dealing with contracts from Engineering Services Group, and Business Technology Group.

## Matters Received by the Legal Department

<u>Category</u>	<u>Received</u>	<u>Description</u>	
Requests Pursuant to the Public Records Act	27		
		<u>Requestor</u>	
		<u>Documents Requested</u>	
		Bloomberg Businessweek Magazine	Prior PRA requests regarding Turf Terminators, Pan American Carbon Venture Partners and Build Savings since January 2015, and any waivers granted to these companies
		Assistant Professor, Cal State University Fullerton	Data on resident surveys on Water Attitudes, Water Conservation as referenced in board presentation on 02/08/2016
		Coachella Valley Water District	Total number of SCADA alarms at Eagle Rock in 2015
		Earth Systems Southwest	Historic groundwater maps for the Rialto area
		Ellrod, Ramirez, Trester LLP	Documents relating to the litigation <i>Village Retail Center v. MWD</i> (resolved in 2012) and Perris Valley Pipeline, North Reach
		Student, Georgetown University	Monthly water consumption and pricing data
		H2bid, Inc.	MWD list of vendors and bidders, including their contact information
	Irvine Ranch Water District	GIS shapefiles for Orange County Feeder and OC-44 lines that are within IRWD’s service area	
	KCBS/KCAL TV	Information on DWP customers who received rebates paid directly to Pan American Landscaping	



<u>Category</u>	<u>Received</u>	<u>Description</u>
	Supplemental information was provided to 14 prior requesters and 5 new requesters (Adjunct Assistant Professor at UCLA Institute of the Environment and Sustainability, Southern California Public Radio, KFI AM-640, Associated Press, Specialized Consulting Service) on February 26 as a result of the lifting of the TROs on the same day in the <i>LADWP v. MWD</i> matter. The information provided included the additional information MWD discovered after the initial response.	Data on turf removal rebates
	Los Angeles Times (2)	(1) Updated data for turf removal rebate funds between 06/30/2012-02/17/2016, (2) documents from 01/02/2012-02/24/2016 relating to communications between Ronald Gastelum and Member Agencies or MWD relating to turf rebate program or Turf Terminators, and work performed by Ronald Gastelum for MWD
	Lynn Merrill and Associates, Inc.	Data on turf removed within the middle of the Santa Ana River watershed areas of San Bernardino and Riverside Counties
	MC Consultants, Inc.	MWD employee safety manual
	Private Citizens (2)	(1) MWD water quality data (Table D – General Mineral and Physical Analysis of MWD Supplies), (2) bid and contract information relating to PCtronics
	SDCWA	Documents, data, analyses, studies used to generate or support MWD's rates and charges proposed for calendar years 2017 and 2018, IRP Technical Update Issue Paper Addendum, and Integrated Water Resources Plan 2015 Update
	SDCWA	Breakdown of paid turf removal rebates by Member Agency
	S&P Capital IQ/SNL Financial	Asset totals for MWD's 401(k) and 457(b) Plans
	San Diego Union-Tribune	MWD PRA Log detailing requests from 01/01/2015-02/10/2016
	SmartProcure	Data on MWD purchase orders from 09/07/2015-02/03/2016



<u>Category</u>	<u>Received</u>	<u>Description</u>
		Tribune Publishing
		UltraSystems Environmental
Other Matters	2	Wage garnishments