



Metropolitan Cases

Francia Elsa Fate v. Metropolitan and West Basin Municipal Water District **(Los Angeles County Superior Court)**

On March 21, 2016, Francia Elsa Fate filed a complaint against Metropolitan in Los Angeles County Superior Court. Metropolitan conferred with plaintiff's counsel regarding deficiencies in the complaint and plaintiff amended the complaint on May 3, 2016 to state one cause of action, dangerous condition of public property. Plaintiff alleges an injury sustained while ascending a set of stairs at Gene Camp. Plaintiff's counsel and Metropolitan have agreed to extend the time for Metropolitan to respond to the amended complaint in order to discuss potential resolution. This case is being handled by the Legal Department.

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

As previously reported, Hearing Officer Barry Winograd issued his decision on February 20, 2015, sustaining a grievance by AFSCME Local 1902 that challenged Human Resources' use of

comparative analysis testing for internal candidates during the recruitment and selection process. However, the parties had stipulated during the hearing that the comparative analysis testing being challenged was only applied to external candidates. Therefore, the challenged testing did not harm any AFSCME employee. On May 20, 2015, Metropolitan filed a petition for writ of administrative mandamus seeking to overturn the decision. Metropolitan's position is that the applicable MOU language authorizes the use of comparative analysis testing during the recruitment and selection process and that the grievance did not present a ripe controversy. On May 17, 2016, Los Angeles County Superior Court Judge Mary H. Strobel granted Metropolitan's petition on the basis that the Hearing Officer acted beyond the issue presented at the hearing and, in so doing, the Hearing Officer improperly issued an advisory opinion. On May 27, 2016, Metropolitan filed a proposed judgment and writ that will direct the Hearing Officer to set aside his decision. The Legal Department is representing Metropolitan in this matter. (See General Counsel's February and May 2015 Activity Reports.)

Cases to Watch

EPA Answers NRDC's Complaint Seeking Court Deadline for EPA to Regulate Perchlorate in Drinking Water

On May 10, 2016, the U.S. Environmental Protection Agency (EPA) filed its answer to the Natural Resources Defense Council, Inc.'s (NRDC) complaint seeking to compel EPA to set a drinking water standard for perchlorate. Although EPA admits that it has not proposed a maximum contaminant level goal (MCLG) or a national primary drinking water regulation for perchlorate, it denies that NRDC is entitled to any of the relief sought in its complaint. On February 18, 2016, NRDC sued EPA in a New York federal district court, alleging 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 a proposed maximum contaminant level (MCL) for perchlorate by February 11, 2013, and to finalize the MCL by August 11, 2014. Previously, in 2013, EPA's Science Advisory Board had recommended that EPA develop an MCLG for perchlorate by using pharmacokinetic/pharmacodynamic models to determine harmful exposure levels rather than by using the default MCLG approach. Pharmacokinetic/pharmacodynamic models are based on the impact of a drug or toxin on a living organism and the organism's response. MCLG is a maximum contaminant level goal below which there is no known or expected risk to health based on statistical analysis.

In March 2016, EPA announced it is seeking independent experts to peer review such modeling



as part of its procedure to set an MCLG for perchlorate.

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 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. 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 continue to monitor NRDC's lawsuit against EPA. (See General Counsel's February 2016 Activity Report.)

New Mexico Files Lawsuit Against EPA Over Gold King Mine Spill

On May 23, 2016, the State of New Mexico, on behalf of the New Mexico Environment Department, filed a lawsuit in the U.S. District Court against the U.S. Environmental Protection Agency (EPA), Gina McCarthy (EPA's Administrator), Environmental Restoration, LLC (EPA's contractor), Kinross Gold Corporation, Kinross Gold U.S.A., Inc., and Sunnyside Gold Corporation for the August 2015 Gold King Mine spill.

EPA's contractors accidentally caused the spill when they were excavating collapsed debris at the entrance of the abandoned mine. As a result of the spill, over 3 million gallons of acid mine drainage and 880,000 pounds of heavy metals, including lead, cadmium, copper, mercury, and zinc, were released into the Animas River which merges with the San Juan River in New Mexico, and ultimately flows into Lake Powell in Utah. New Mexico alleges that the plugging of the Sunnyside Mine, owned by Kinross Corporation, caused acidic wastewater to back up and flow into other nearby mines, including the Gold King Mine. The complaint includes causes of action for cost recovery and declaratory judgment under CERCLA, injunctive relief under RCRA, violation of the Clean Water Act, public nuisance, trespass, negligence, and gross negligence.

New Mexico's complaint is the first state lawsuit against EPA regarding the spill, which also affected Utah, Colorado, and the Navajo Nation.

However, Utah has notified EPA of its intent to sue under RCRA and the Clean Water Act. Metropolitan staff will continue to monitor New Mexico's lawsuit and any other actions filed against EPA as a result of the Gold King Mine spill.

Status of Challenges to the Clean Water Rule

In June 2015, EPA and the Corps jointly published the Clean Water Rule (also known as "the Waters of the U.S. Rule" or "WOTUS"), which defines the scope of waters protected under the Clean Water Act. Seventeen cases contesting the Rule were filed in twelve district courts. In addition, numerous petitions challenging the Clean Water Rule were filed in eight different appellate courts and consolidated in the Sixth Circuit, except for one case in the Eleventh Circuit which is on appeal from the Southern District of Georgia.

The Sixth Circuit held that it has jurisdiction to hear the challenge and that the district courts do not. The Eleventh Circuit is considering the same issue and similar threshold matters. Briefing by the parties in the Eleventh Circuit will be completed June 7, 2016. No date for oral argument has been set.

Although most of the challenges filed in federal district courts have been dismissed voluntarily by the parties or for lack of jurisdiction by the courts, EPA's and the Corps' motion to dismiss a case remains pending in the Southern District of Texas. Four other federal district courts (the Northern District of California, the Northern District of Georgia, the Southern District of Georgia, and the Western District of Washington) have yet to decide whether to allow their cases to proceed. The District of North Dakota has refused to dismiss the complaint filed there. The next step is for the Sixth Circuit to rule on the merits of plaintiffs' claims and decide whether the Clean Water Rule is valid and lawful. While it does so, the nationwide stay of the rule which the court issued in October 2015 remains in effect. Also, while the stay is in place, the prior WOTUS regulations still govern. Metropolitan staff will continue to track this litigation. (See General Counsel's April 2016 Activity Report.)

United States Army Corps of Engineers v. Hawkes Co. (2016) 578 US ___ (United States Supreme Court)

In a unanimous opinion issued May 31, the Supreme Court ruled that an "approved" jurisdictional determination from the Army Corps of



Engineers (Corps) regarding whether a water body meets the definition of “waters of the United States,” and is subject to the Clean Water Act, constitutes a “final agency action” that may be subject to judicial review.

At issue in *United States Army Corps of Engineers v. Hawkes Co.* was a challenge by three peat mining companies in Minnesota to a jurisdictional determination that certain wetlands were “waters of the United States.” The Corps argued that the companies had to first either attempt to obtain a

permit to discharge and challenge the denial in court or, discharge without a permit and then challenge a subsequent enforcement action. The Supreme Court held that a property owner did not need to either risk an enforcement action or, apply for a permit (which is a costly and lengthy process) before being able to seek judicial review. While this decision arises out of the private sector, it applies with equal force to jurisdictional determinations affecting property owned by public entities.

Other Activities

On May 23, Farid Achour, Senior Science Advisor at Ramboll Environ presented a program “Groundwater Forensic Analysis in Support of Litigation” to staff from Legal, and relevant staff from WSO and WRM groups. This session was for the benefit of staff dealing with groundwater issues.

Finance

On April 6, 2016 Metropolitan entered into two short-term revolving credit facilities for an

aggregate amount of up to \$400 million at any one time. Legal Department staff attorneys worked with bond counsel to prepare the authorizing resolution, agreements and closing documents.

Continuing Legal Education

The Legal Department invited David M. Axelrad and Mitchell C. Tilner from Horvitz & Levy for a continuing legal education class on Preserving Issues for Appeal and Appellate Brief Writing. The class was attended by staff from Legal and attorneys in the Ethics Office.

Matters Received by the Legal Department

<u>Category</u>	<u>Received</u>	<u>Description</u>
Actions in which MWD is a party	2	<p>1. Complaint for Declaratory Relief filed in <i>Kana Engineering Group, Inc. v. Meza Electrical Services LLC, et al.</i>, in San Bernardino County Superior Court, relating to subcontractor work on the Weymouth solar power facilities</p> <p>2. Complaint for (1) Intentional Interference with Contract, (2) Breach of Written Contract, (3) Declaratory Relief, (4) Specific Performance, and (5) Injunctive Relief filed in <i>Central Delta Water Agency and County of San Joaquin v. Delta Wetlands Properties, et al.</i>, in Contra Costa County Superior Court, relating to MWD’s purchase of approximately 20,000 acres of land from Delta Wetlands Properties</p>
Government Code Claims	3	Claims submitted by San Diego County Water Authority relating to MWD rates and charges for 2017 and 2018, and claims submitted by individuals relating to dirt left near a residence from MWD work site and auto accident involving an MWD vehicle



<u>Category</u>	<u>Received</u>	<u>Requestor</u>	<u>Description</u>
Requests Pursuant to the Public Records Act	15		<u>Documents Requested</u>
		Cal Poly Pomona Student	Summary report on total costs, deliveries and energy consumption for the Colorado River Aqueduct
		CDM Smith	Records relating to the proposals for Regional Recycled Water Demonstration Project
		Dodson & Associates	Records relating to DVL West Dam
		Erler & Kalinowski, Inc.	List of addresses for participants in the turf removal rebate program
		Hill Brothers Chemical Company	Records relating to water treatment chemical delivery and unloading of aqueous ammonia
		Los Angeles News Group	Records relating to blue-green algae at Silverwood Lake
		MB Public Affairs	Records relating to MWD's agreement with Greenberg Traurig
		Private Citizens (3)	(1) Turf removal records for homeowners association in Lake Forest, CA, (2) table on sources of water supply and map of MWD service area, (3) records relating to MWD's agreement with Greenberg Traurig
		Restore the Delta	Records relating to funding for the California WaterFix
		Salem Engineering Group	Records on stormwater infrastructure in San Jacinto, CA
		Water Audit California	Records relating to dam construction and dam flows at Copper Basin, Mathews Dam and Skinner Dam
		Waterfluence	Proposal and contract for Large Landscape Survey Program
West Valley Water District	MWD communications plan and legislative platforms		
Other Matters	1	Wage garnishment	