



Metropolitan Cases

Central Delta Water Agency, et al. v. Delta Wetlands Properties, et al. (Contra Costa County Superior Court)

During November, Metropolitan's attorneys fully briefed a demurrer, or motion to dismiss, the

causes of action alleged against it relating to Metropolitan's purchase of land in the Sacramento-San Joaquin Delta. A hearing on the demurrer is scheduled for December 8 and a report on the hearing will be given in closed session.

Matters Impacting Metropolitan

State Agencies Release Draft Report, "Making Water Conservation a California Way of Life"

On November 30, 2016, five State agencies released a draft report titled, "Making Water Conservation a California Way of Life, Implementing Executive Order B-37-16." The underlying premise of the plan is that efficient water use helps California better prepare for longer and more severe droughts caused by climate change. The plan represents a shift from statewide mandates to a set of conservation standards that are applied based on local circumstances, such as population, temperature, leaks, and types of commercial and industrial use. For example, communities in hotter and drier climates will receive irrigation allowances that take into account evaporation levels.

Some of the key water conservation efforts in the plan include: permanent bans on wasteful practices like hosing driveways and excessively watering lawns; technical assistance and financial incentives for water suppliers to implement leak prevention, detection, and repair programs; collecting information about innovative water conservation and water loss detection and control technologies; requiring agricultural water suppliers to quantify water use in their service areas and to describe measures to increase water use efficiency; and full compliance with water use targets for urban water suppliers by 2025. While some of the actions in the draft plan can be implemented under existing authorities, other actions will require working with the Legislature on new and expanded State authority.

The draft plan was prepared by the California Department of Water Resources, the State Water Resources Control Board, the California Public

Utilities Commission, the California Department of Food and Agriculture, and the California Energy Commission. These agencies solicited community and stakeholder input through a series of public listening sessions and by convening two stakeholder advisory groups: an Urban Advisory Group and an Agricultural Advisory Group. Metropolitan staff is preparing comments on the draft plan. The deadline is December 19, 2016. The draft plan may be accessed at: http://www.waterboards.ca.gov/water_issues/programs/conservation_portal/docs/2016nov/113016_executive%20order_report.pdf.

EPA Issues Drinking Water Action Plan

On November 30, 2016, the U.S. Environmental Protection Agency (EPA) issued its Drinking Water Action Plan (Plan) which urges all levels of government, water utilities, community organizations, and other stakeholders to work together to improve the safety and reliability of drinking water in the United States. The Plan is organized around the following six Priority Areas: (1) build capacity for water infrastructure financing and management in disadvantaged, small, and environmental justice communities; (2) advance oversight for the Safe Drinking Water Act; (3) strengthen source water protection and resilience of drinking water supplies; (4) address unregulated contaminants; (5) improve transparency, public education, and risk communication on drinking water safety; and (6) reduce lead risks through the Lead and Copper Rule. The Plan identifies a series of proposed actions for each Priority Area. The Plan is based on input from state, local, and tribal government officials; drinking water utilities; community groups; and environmental organizations.



Cases to Watch

Use of Referendum Power to Challenge Retail Water Rates

Two cases are currently pending before the Third and Sixth Districts of the California Court of Appeal addressing whether the referendum power applies to retail water rates: *Monterey Peninsula Taxpayers' Association, et al. v. Monterey Peninsula Water Management District*, Sixth District Case No. H042484; and *Howard Jarvis Taxpayers Association, et al., v. Amador Water Agency, et al.*, Third District Case No. C082079. Because the California Constitution does not authorize use of the referendum process to repeal “tax levies,” plaintiffs, seeking to challenge retail water rates, argue local fees and charges are not “taxes” exempt from the referendum process. However, the distinctions between “taxes” and other revenue measures relied upon by plaintiffs are relevant only for purposes of Propositions 218 and 26. Courts have already applied the term “tax levies” broadly to include all revenue measures of governmental entities within the referendum exception, whether, in other contexts, they are taxes or fees. Reliance upon judicial interpretation of Propositions 218 and 26 is not necessary to preserve the exemption of all governmental revenue measures from referendum.

On November 17, 2016, Metropolitan filed an amicus brief in the *HJTA v. Amador* case to request that the court continue to broadly apply the referendum exception to *all* local revenue measures, including retail water rates. Metropolitan further explained that in doing so, the court should not conclude that all local revenue measures are “taxes,” as that would further blur the development of case law regarding the applicability of Propositions 218 and 26 and could have adverse consequences for both retail and wholesale water agencies in other contexts.

Litigation Challenging the Clean Water Rule

EPA and the Corps jointly issued the Clean Water Rule (also known as the waters of the U.S. (WOTUS) rule) in June 2015. The Rule defines the scope of waters protected under the Clean Water Act. Many cases contesting the Rule were filed in various federal district courts and appellate courts. The federal appellate court cases were consolidated in the Sixth Circuit, except for a case in the Eleventh Circuit, which was stayed in

August 2016, and the Tenth Circuit *Chamber of Commerce* appeal. Most of the challenges filed in federal district courts have been dismissed voluntarily by the parties or for lack of jurisdiction by the courts. The nationwide stay of the rule, which the Sixth Circuit issued in October 2015, remains in effect. Also, while the stay is in place, the prior WOTUS regulations still govern. The following is a summary of the proceedings in various jurisdictions.

Proceedings in the Sixth Circuit:

On November 1, 2016, the following petitioners challenging the Clean Water Rule in the U.S. Court of Appeals for the Sixth Circuit filed their opening briefs: (1) state petitioners; (2) business and municipal petitioners; (3) Waterkeeper Alliance, Inc., et al.; and (4) National Wildlife Federation, et al.

The states, industries, and municipalities argued that the new Rule violates the Clean Water Act, the Administrative Procedure Act (APA), the Constitution, and the National Environmental Policy Act (NEPA) and asked that the entire Rule be vacated.

The environmental groups similarly contended that portions of the new Rule fail to comply with the Endangered Species Act, NEPA, the Clean Water Act, and the APA. They asked the Sixth Circuit to vacate and remand only those provisions of the Rule they allege are unlawful.

Shortly after petitioners filed their opening briefs, four amicus briefs were filed by: (1) the Association of California Water Agencies, the National Water Resources Association, Eastern Municipal Water District, Helix Water District, San Diego County Water Authority, Santa Fe Irrigation District, and Santa Margarita Water District; (2) members of Congress, including 21 Senators and 67 Representatives; (3) National Rural Water Association; and (4) Washington Legal Foundation. EPA and the Corps must file their brief responding to the opening briefs by January 18, 2017. Intervenor briefs have until February 8 to file briefs, and petitioners must file their reply briefs by March 8. All parties' final briefs are due by March 29. According to the Sixth Circuit, oral argument will be scheduled as soon as practicable after the briefing is complete.



Petition to the U.S. Supreme Court:

In the meantime, the National Association of Manufacturers asked the U.S. Supreme Court in early September to review and reverse the Sixth Circuit's decision that it has exclusive jurisdiction over challenges to the Clean Water Rule. Several groups filed briefs in support of the National Association of Manufacturers' petition. EPA and the Corps' response to the petition is due by December 7, 2016.

U.S.A. v. EPA, an appeal of two cases filed in the Northern District of Oklahoma. The Oklahoma district court dismissed the cases challenging the Clean Water Rule based on the Sixth Circuit's finding that the Courts of Appeals have exclusive jurisdiction. Although the Tenth Circuit has not yet issued its decision, one of the judges indicated during the hearing that the plaintiffs might have to wait for the U.S. Supreme Court to decide which court has jurisdiction.

Proceedings in the Tenth Circuit:

On November 17, 2016, the Tenth Circuit heard oral arguments in *Chamber of Commerce of the*

Metropolitan staff will continue to track this litigation. (See General Counsel's August 2016 Activity Report.)

Matters Received by the Legal Department

<u>Category</u>	<u>Received</u>	<u>Description</u>
Actions in which MWD is a party	1	Complaint filed in <i>Mark Brody v. MWD</i> , in San Diego County Small Claims Court, relating to alleged failure to issue rebate for plaintiff's turf removal application
Government Code Claims	3	Two claims for auto accidents involving MWD vehicles, and one claim for arm at entry gate striking claimant's vehicle at MWD facility
Subpoenas	1	Deposition Subpoena for Production of Business Records served by plaintiff in the case <i>Lily Chiang, et al. v. D.R. Horton, Inc., et al.</i> , filed in Orange County Superior Court – subpoena seeks records relating to the litigation against MWD concerning the allegation that corrosion to residential copper water pipes was caused by chloramines added to the water as a disinfectant
Requests Pursuant to the Public Records Act	12	<u>Requestor</u>
		Bank of China
		The Bernard Johnson Group
		Brownstein Hyatt Farber Schreck, LLP
		<u>Documents Requested</u>
		Records on Board decisions on MWD water rates
		Records on MWD request for qualifications for real estate support services
		Resolutions for water rates and charges
		Water quality data on raw water for all MWD plants



		<u>Requestor</u>	<u>Documents Requested</u>
		MIT Architecture and Planning School Student	Maps on structure locations and data on water flows
		Private Citizens (2)	(1) Photograph in MWD museum on Engineers' Camp along the MWD Aqueduct, and (2) Communications with Riverside County Regional Parks and Open Space District
		San Diego County Water Authority	Correspondence between MWD and the Delta Protection Commission
		City of Santa Clarita	Drawing and data for MWD outlet drain located in Santa Clarita
		UCLA Department of Environmental Health Sciences, Graduate Student	Data on energy to convey water from the State Water Project to Southern California
		Voice of San Diego Reporter	Records on MWD interest swap contracts and bond deals
		Wildermuth Environmental	Data on evaporation station located adjacent to Lake Mathews
Other Matters	3	Wage garnishment	