Metropolitan Water District of Southern California

Office of the General Counsel

Monthly Activity Report – January 2017

Metropolitan Cases

Orange County Water District v. Northrop Corporation, et al.; Northrop Grumman Systems Corporation v. Metropolitan, et al. **(California Court of Appeal, Fourth Appellate District, Division One)**

In this action, the appellate court is reviewing the trial court's phase 1 ruling against Orange County Water District (OCWD) on its claims against multiple industrial defendants for alleged contamination of the North Basin groundwater basin. The original complaint was filed by OCWD in December 2004, seeking to recover costs to investigate and study alleged groundwater pollution, and to construct and operate clean-up facilities. At the conclusion of the initial phase of trial, the court ruled in favor of the industrial defendants. As a result of this ruling, all claims against cross-defendants, which included Metropolitan, were dismissed and are not being appealed.

In August 2015, OCWD began briefing the rulings as to the industrial defendants for appellate review. 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 further argues that it should not have been required to trace defendants' contaminants to the groundwater contamination.

Although the appellate briefing was concluded in late 2016, the appellate court recently asked for supplemental briefing on the following two issues: (1) Did the trial court correctly interpret the requirement that any recoverable costs be "reasonable" under section 8 (c) of the Orange County Water District Act?; and (2) If the trial court incorrectly interpreted the Act, was this error prejudicial? OCWD submitted its letter brief on January 27, 2017, and respondents' letter brief(s) are due by February 10. Oral argument on the appeal is set for March 29. The matter was moved from Orange County to San Diego County and will be heard by the state appellate court in San Diego.

Legal Department staff will continue to monitor this matter.

Matters Involving Metropolitan

Pechanga and San Luis Rey Water Rights Settlements

On December 16, 2016, President Obama signed into law the Water Infrastructure Improvement for the Nation Act, P.L. 114-322, which includes the Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act and amendments to the San Luis Rey Indian Water Rights Settlement Act.

<u>The Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act</u>

The Pechanga Band of Luiseño Mission Indians Water Rights Settlement Act (Act) authorizes the United States' settlement of a longstanding water rights dispute between Pechanga and Rancho California Water District (Rancho) currently pending in federal court in California. Extension of the service areas of Metropolitan and Eastern Municipal Water District to provide water deliveries by Rancho to a portion of the reservation lands of the Pechanga is part of the overall settlement. In April 2016, the Board approved Metropolitan's entry into an extension of service area agreement contingent in part on passage of the Act. Based on this passage, the parties reconvened discussions on next steps to effectuate the settlement and extension of service areas, which may include court proceedings, federal appropriations, and local agency formation commission proceedings.

<u>Amendments to The San Luis Rey Indian Water Rights Settlement Act</u>

The San Luis Rey Indian Water Rights Settlement Act amendments approved and ratified a January 30, 2015 settlement agreement among the United States and the La Jolla, Pala, Pauma, Rincon, and San Pasqual Bands of Mission Indians, the San Luis Rey River Indian Water Authority (Indian Water Authority), the City of Escondido, and Vista Irrigation District. The

Settlement Agreement resolves a longstanding water rights dispute among the parties. Once proceedings before the federal District Court and Federal Energy Regulatory Commission have been finally disposed of, Metropolitan will disburse money it holds in trust to the Indian Water Authority for supplemental water used by Metropolitan since 2006 and for power to pump the supplemental water through the Colorado River Aqueduct for which Metropolitan is reimbursed by the Yuma Area Contractors. As of December 31, 2016, the total amount held in trust by Metropolitan to be paid to the Indian Water Authority was approximately $53 million for over 134,000 acre-feet of water received, and for power capacity and energy, including interest earned on the balance held. Going forward, the United States will continue delivering 16,000 acre-feet of water per year to Metropolitan for exchange for an equal amount of Metropolitan water at the terminus of our distribution system in San Diego County for conveyance by San Diego County Water Authority to the settlement parties.

Matters Impacting Metropolitan

"Tijuana Agreement" for Temporary Emergency Delivery of a Portion of the Mexican Treaty Waters of the Colorado River to Tijuana, Mexico

In November 2016, the Board authorized the General Manager to execute the Agreement for Temporary Emergency Delivery of a Portion of the Mexican Treaty Waters of the Colorado River to the International Boundary in the Vicinity of Tijuana, Baja California, Mexico, and for Operation of Facilities in the United States (Tijuana Agreement).

On January 18, 2017, after over five years of negotiation, the parties signed the Tijuana Agreement. That same day and the following day, the governments of the United States and Republic of Mexico, working through the International Boundary and Water Commission, signed the related Joint Engineers' Report and Minute 322 respectively. Both agreements were prerequisites to the effectiveness of the Tijuana Agreement. A treaty "minute" is a clarification of the authorities arising under an international treaty. Minute 322 clarifies and authorizes the governments to utilize the Tijuana Agreement pursuant to the *United States-Mexico Treaty for Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande*, Feb. 3, 1944, T.S. 994 (1944 Treaty). Mexico's apportionment of Colorado River water supplies is set forth in the 1944 Treaty. Along with the Joint Engineers' Report and Minute 322, the Tijuana Agreement provides for delivery of a portion of the "Mexican Treaty Waters" or Mexico's Colorado River water supplies to Tijuana.

Mexico normally diverts Colorado River water from the Mexicali Valley and has a pipeline that delivers some of that water to Pacific Ocean communities and other points along the way. Since 1972, the Republic of Mexico has periodically requested assistance from the United States for emergency water deliveries for the Tijuana region to respond to drought conditions, aqueduct construction and repairs, or water distribution infrastructure problems. The current agreements simply continue these existing emergency deliveries. Under the Tijuana Agreement, during times of capacity or maintenance constraints in Mexico's Colorado River water conveyance system and at Mexico's request, Metropolitan may divert up to 14,400 acre-feet per year (historic deliveries have been much lower), of Mexico's water at Lake Havasu and convey it to the San Diego County Water Authority for delivery from Otay Water District to Tijuana. Mexico pays the domestic parties for all costs of moving its water, and deliveries are subject to the discretion and available capacity of the domestic parties. There are no pending requests by Mexico for deliveries.

Cases to Watch

Water Transfer Rule Litigation

On January 18, 2017, the U.S. Court of Appeals for the Second Circuit in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA* upheld the EPA Water Transfers Rule. The Water Transfers Rule is EPA's 2008 regulation that exempts transfers of water between water bodies that are subject to Clean Water Act jurisdiction from National Pollutant Discharge Elimination System (NPDES) permit requirements. The January 18 decision reversed

the trial court's prior decision to vacate the Rule and remand it to the EPA.

The court applied the two-step analysis for judicial review of agency actions set forth in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Second Circuit concluded that the Rule is a reasonable interpretation of the Clean Water Act and is therefore entitled to deference.

As previously reported, Metropolitan and the other Western Water Providers intervened in the consolidated cases in federal District Court for the Southern District of New York and also filed a reply brief in the Second Circuit Court of Appeals in support of the appeal.

Plaintiffs in this case have indicated that they are likely to pursue additional litigation on this issue, including the possibility of seeking a rehearing with the Second Circuit and review by the U.S. Supreme Court. The Western Water Providers are represented in the case by Peter Nichols of Berg, Hill, Greenleaf & Ruscitti LLP of Boulder, Colorado. Metropolitan provided legal review of the Western Water Providers' opening and reply briefs.

***Ohio Valley Environmental Coalition v. Fola Coal Co.*, (United States Court of Appeals, Fourth Circuit)**

On January 4, 2017, U.S. Court of Appeals for the Fourth Circuit held that a National Pollutant Discharge Elimination System (NPDES) permit holder must comply with both the numerical and narrative terms of its permit to be shielded from liability for its discharges.

Compliance with an air or water permit creates a statutory defense under the Clean Air Act and Clean Water Act, referred to as the "permit shield." The defense applies against allegations that, for example, the permittee's operation is creating a nuisance, or is discharging or emitting pollutants disclosed to the agency, but not regulated in the permit. Prior to this decision, it was widely believed that permittees would not be liable for discharges that were disclosed to the permitting entity and did not exceed the numerical limits described in the permit. The Fourth Circuit held that both the numerical limits and the narrative terms describing water quality standards in a permit are enforceable, and the permit holder can only be shielded from liability for its discharges if it complies with both.

There is now a split between the Fourth Circuit and the Sixth Circuit as to the scope and applicability of the Clean Water Act's "permit shield" defense. In *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281 (6th Cir. 2015), the Sixth Circuit held that a discharger is not liable when it meets the disclosure requirements for its discharges and does not exceed the numerical limits of its permit. While the recent Fourth Circuit decision arises out of the private sector, public entities that hold Clean Water Act and Clean Air Act permits could be similarly affected.

U.S. Supreme Court Will Decide Jurisdiction for Challenges to the Clean Water Rule

There have been numerous cases filed challenging the revisions to the Clean Water Rule (also known as the waters of the U.S. (WOTUS) rule) issued by EPA and the U.S. Army Corps of Engineers in June 2015. The Clean Water Rule defines "Waters of the United States" for regulatory purposes.

The initial litigation has focused on which court has jurisdiction to hear the challenges. On January 13, 2017, the U.S. Supreme Court agreed to decide whether federal district courts or the Sixth Circuit Court of Appeals has jurisdiction to hear challenges to the Clean Water Rule. The National Association of Manufacturers and several other groups had asked the U.S. Supreme Court in September 2016 to reverse the Sixth Circuit's decision that it has exclusive jurisdiction over challenges to the Clean Water Rule and instead allow the litigation to proceed in the federal district courts. It is expected that oral arguments will be scheduled in April, and the Supreme Court will issue a decision by early July 2017.

On the same day that the Supreme Court granted review of the Sixth Circuit's decision that it has jurisdiction, the EPA and the U.S. Army Corps of Engineers (Corps) filed in the Sixth Circuit their 245-page brief responding to petitioners' opening briefs. EPA and the Corps asked the court to uphold the Clean Water Rule, arguing that the Rule is consistent with the Clean Water Act and Supreme Court precedent and is supported by an extensive administrative record. Soon after EPA and the Corps filed their brief, several groups filed amicus briefs in support of the federal agencies.

On January 25, 2017, the Sixth Circuit put a hold on further briefing while the Supreme Court determines which court has jurisdiction. Similarly, on January 19, 2017, the Tenth Circuit stayed the two cases on appeal in that circuit pending the

U.S. Supreme Court's decision. Metropolitan staff will continue to monitor this litigation. (See General Counsel's November 2016 Activity Report.)

EPA Refuses to Pay Gold King Mine Spill Tort Claims

The Gold King Mine water spill occurred on August 5, 2015. Mine waste was released into the Animas River near Silverton, Colorado. Although the waste moved downstream, it did not reach the Colorado River. The waste included heavy metals and other toxic contaminants. Multiple jurisdictions, including the Navajo Nation, could not use the water from the Animas River for extended periods due to the contamination.

Although EPA has taken responsibility for the spill, on January 13, 2017, EPA announced that it cannot pay for any tort claims filed under the Federal Tort Claims Act (FTCA) in connection with the spill. Tribes, farmers, river rafters, and local governments have filed 73 claims totaling $1.2 billion against EPA. The Navajo Nation's claim alone was more than $162 million.

EPA explained that the FTCA does not authorize federal agencies to pay claims resulting from government actions that are discretionary and which involve the exercise of judgment. According to EPA, because it was conducting a site investigation at the Gold King Mine under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the agency's work is considered a "discretionary function." Thus, EPA said it is barred from paying the claims because of sovereign immunity. However, entities whose claims have been denied may challenge EPA's decision with the United States District Court within six months of the date of the denial.

Previously in May 2016, New Mexico sued EPA, EPA's Administrator, EPA's contractor, and the owners of the nearby Sunnyside Gold Mine in federal court in New Mexico. New Mexico brought claims under CERCLA, RCRA, and the Clean Water Act, and various tort theories. One month later, New Mexico asked the U.S. Supreme Court for permission to sue Colorado. New Mexico alleges that Colorado allowed the owner of the nearby Sunnyside Gold Mine to plug up an abandoned mine tunnel, which pushed water into the connected Gold King Mine. The U.S. Supreme Court has invited the Acting Solicitor General to file a brief in the case "expressing the views of the United States."

In August 2016, the Navajo Nation sued EPA, its contractor and subcontractor, a prior owner and operator of the Gold King Mine, and the owners and operators of Sunnyside Mine in New Mexico federal court. The Navajo Nation's Complaint alleges CERCLA, negligence, trespass, and nuisance claims. The Navajo Nation's lawsuit has been consolidated with New Mexico's lawsuit in New Mexico federal district court. EPA's response to the two complaints is due by February 13, 2017.

In September 2016, EPA designated the Gold King Mine a Superfund site which will help to provide resources to study and clean up the area. Metropolitan staff will continue to monitor the lawsuits filed as a result of the Gold King Mine spill. (See General Counsel's May 2016 Activity Report.)

New Flint Lawsuit Against EPA Seeks $722 Million

On January 30, 2017, plaintiff Jan Burgess and more than 1,700 other people filed a lawsuit in federal court against the EPA under the FTCA seeking $722.4 million for personal injuries and property damage as a result of the high levels of lead in Flint's drinking water. The complaint alleges that EPA failed to follow several specific agency mandates regarding the lead contamination of Flint's drinking water. For example, EPA failed to: issue an emergency order requiring state and local officials to take action, provide technical assistance, obtain compliance, or bring a civil action against Michigan or Flint under the Safe Drinking Water Act. This case is one of many civil actions filed against state and federal officials. In addition, the Michigan Attorney General has brought criminal charges against state and local authorities. Metropolitan staff will continue to monitor the lawsuits resulting from the lead contamination of Flint's drinking water.

Other Matters

New State Program for Lead Testing of School Drinking Water

On January 17, 2017, the State Water Resources Control Board (State Board) announced a new program which requires community water systems to provide lead testing for schools. The State Board's Division of Drinking Water (DDW) is issuing amended permits to community water systems which require them to test school drinking water for lead when requested to do so in writing by school officials. Schools included in the program are public, private, charter, magnet, and non-public K-12 schools. Preschools, day-care centers, and postsecondary schools are not included. The testing is voluntary for the schools, but if schools make a written request, the community water systems must collect and analyze up to five water samples within three months. Sampling locations can include drinking fountains, cafeteria and food preparation areas, and reusable water bottle filling stations.

The community water systems are responsible for costs associated with collecting, analyzing, and reporting the results of the drinking water samples.

The DDW sampling protocol and permit action have established 15 parts per billion (ppb) as the action level for lead sampling in schools, the same concentration as the action level for residential tap sampling conducted by water systems under the Lead and Copper Rule. The community water system is not responsible for paying any maintenance or corrections needed at the school if elevated lead levels are found in the drinking water, but must conduct repeat sampling to confirm elevated lead levels and the effectiveness of any corrective action taken by the school. The State Board's Division of Financial Assistance will have some funding available to address lead found in tests, especially for schools in disadvantaged communities. The one-time school lead testing program runs until November 1, 2019.

Continuing Legal Education

The Legal Department arranged for a series of continuing education webinars: "Litigation Storytelling," "Rate Issues and Design: Prop 218 and Prop 26," and "In-House Counsel's Duty of Confidentiality and the Attorney-Client Privilege." Staff attorneys and legal analysts attended.

Matters Received by the Legal Department

Category	Received	Description	
Government Code Claim	1	Claim for auto accident involving MWD vehicle	
Subpoenas	2	(1) Subpoena served by plaintiffs in *Boulder Oaks Country Club v. Golf Properties Management*, for records relating to turf removal rebate program and Meadow Lake Golf Club, and (2) subpoena for employment-related records for a workers' compensation matter	
Requests Pursuant to the Public Records Act	18	Requestor	Documents Requested
		Brownstein Hyatt Farber Schreck	Board resolutions adopting rates
		Cal Poly Pomona Student	Data on water consumption, number of service connections, water pricing
		Center for Contract Compliance (2 requests)	(1) Bid, contract, compensation, payment bond records for Allen-McColloch Pipeline Service Connection Seismic Upgrade, and (2) contractor's certified payroll records for the Diemer

Category	Received		Description
			Water Treatment Plant Electrical Improvements-Stage 2
		Edge Point Contracting	List of uncashed checks or funds that remain outstanding for six months or more
		H2bid	List of needs of MWD dept. to help vendors match needs to potential solutions
		Newmeyer & Dillion	Records relating to North Perris Water System
		Onvia	Contract award information for Large Diameter Concrete and Metallic Pipeline Inspection Svcs
		Private Citizens (5 requests)	(1) Maps and images of Inland Feeder and Colorado River Aqueduct; (2) 2016 invoices for materials: common items purchased for daily use, projects and maintenance work; (3) classifications and salaries of Legal Department employees; (4) pesticide usage, application process and locations for the last six months; and (5) subcontractor list and scopes of work for the OC feeder extension relining reach 1 project
		Reeder Media	Annexation fees within MWD boundaries
		San Diego County Water Authority	Distribution list of local officials
		Santa Clara Valley Water District	Copies of professional services agreements
		Stratecon	Records re Palo Verde leases
		The Valley Chronicle	Employment and scheduling information relating to an MWD employee
Other Matters	2	(1) Notice to Responsible Agencies and Agencies with Jurisdiction Over Natural Resources Affected by the High Desert Corridor Project served in the lawsuit *Climate Resolve, et al. v. CA Dept. of Transportation* alleging CEQA violations relating to approvals of a freeway and transportation project called the High Desert Corridor Project in Los Angeles and San Bernardino Counties, and (2) wage garnishment	