



Metropolitan Cases

Arroyo, et al. v. Steele, et al. (Los Angeles Superior Court)

On March 25, 2016 plaintiffs Alma Rosa Arroyo and Alfredo Perez filed a complaint with causes of action for motor vehicle alleging property damage and personal injury of over \$65,000. Metropolitan was served on April 27, 2016. Pursuant to meet and confer discussions, plaintiffs filed a first

amended complaint on June 17, 2016. Then, Metropolitan conducted further investigations, including subpoenaing medical information and propounding written discovery. As a result, Metropolitan negotiated a settlement of \$9,830 for a full settlement and release of all claims subject to this lawsuit. On August 21, 2017, the court dismissed the entire case with prejudice.

Matters Impacting Metropolitan

EPA Schedules Public Meetings on the Definition of “Waters of the U.S.”

On August 25, 2017, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) announced they will hold 10 two-hour long teleconferences in the fall for stakeholders to provide recommendations on a revised definition of the “Waters of the U.S.” (WOTUS). Nine of the teleconferences are tailored for specific sectors: agriculture; conservation; small entities; construction and transportation; environment and public advocacy; mining; industry; scientific organizations and academia; and stormwater, wastewater management, and drinking water agencies. One of the teleconferences will be open to the general public. The agencies will also hold one in-person session for small entities. The stakeholder session with stormwater, wastewater management, and drinking water agencies will be held on November 14, 2017, from 1:00 p.m. to 3:00 p.m. eastern time. Information on how to register for the meetings is on EPA’s website.

EPA and the Corps are holding these sessions pursuant to President Trump’s February 28, 2017 Executive Order which directed the agencies to review and either rescind or revise the Clean Water Rule (also known as the WOTUS rule). The agencies are implementing the Executive Order in two steps. First, they have issued a proposed rule which would withdraw the Clean Water Rule and reinstate the regulation that was in place before they issued the Clean Water Rule. The comment period on this proposed rule closes on September 27, 2017. Second, they will propose a new definition of WOTUS that, as directed by the Executive Order, reflects the principles in Justice Scalia’s plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). The agencies will also be accepting from any member of the public written recommendations on the second step in the rulemaking effort. Written recommendations must be received on or before November 28, 2017. Metropolitan staff will continue to monitor EPA and the Corps’ implementation of the Executive Order. (See General Counsel’s June and July 2017 Activity Reports.)

Cases to Watch

Report on Ninth Circuit Opinion on the admissibility of expert testimony on isotopic analysis of perchlorate in water in *City of Pomona v. SQM*, filed August 7, 2017

On August 7, 2017, the United States Court of Appeals for the Ninth Circuit filed its opinion in *City of Pomona v. SQM North America Corporation*,

___F.3d___ (9th Cir. 2017). The Ninth Circuit vacated the district court’s judgment that the defendant fertilizer manufacturer, SQM North America Corporation (SQM), was not liable for causing perchlorate contamination in the City of Pomona’s (Pomona’s) water system because the district court abused its discretion by limiting the testimony of one of Pomona’s experts and failing



to make sufficient findings before admitting the testimony of one of SQM's experts. This opinion allows Pomona to pursue its product liability claims against SQM for alleged perchlorate contamination of its water system.

This is the second opinion by the Ninth Circuit in this action (the first was issued in December 2014), both of which concern the admissibility of the testimony of Pomona's expert witness, Dr. Neil Sturchio, an expert in isotopic analysis of perchlorate or "finger-printing" the sources of perchlorate.

Pomona filed this products liability action in 2010, alleging that SQM was liable for perchlorate contamination in Pomona's groundwater based on its manufacture, sale, and importation of perchlorate-containing fertilizer from the Atacama Desert in Chile from 1931 to 1968. This fertilizer was used for agricultural purposes in areas around Pomona's wells.

Pomona's key witness was Dr. Sturchio, then a professor at the University of Illinois at Chicago, who, based on his research, opined that roughly ninety percent of the perchlorate in Pomona's groundwater matched the isotopic fingerprint of perchlorate unique to the Atacama Desert; and thus, most of the perchlorate in Pomona's water had come from the Atacama Desert via SQM's importation and sales.

Prior to the first trial in January 2012, the district court excluded Dr. Sturchio's testimony based, in part, on the lack of additional independent laboratories verifying his analysis and the limited number of perchlorate groundwater samples in his database. In December 2014, the Ninth Circuit reversed the exclusion of Dr. Sturchio's testimony, holding that it should be admitted, and the fact finders or jury, and not the court, should determine the credibility of his testimony. The case was remanded to the district court and again set for trial in June 2015. Before trial, Pomona sought to reopen expert discovery and update Dr. Sturchio's expert testimony to include additional independent laboratory testing and additional samples in his database. The district court refused to reopen discovery or allow Pomona to update Dr. Sturchio's expert opinion, holding this would delay trial and the proposed updates were immaterial.

The district court also denied Pomona's motion to exclude testimony from SQM's key expert witness, Dr. Richard Laton, who proposed to opine on the

hundreds of other potential sources of perchlorate in Pomona's groundwater. The district court reached this decision with a one word ruling, "DENY," without making findings or explaining the decision.

After seven days of trial in June 2015, the jury returned a verdict in SQM's favor, finding that SQM was not a substantial factor in causing harm to Pomona.

On appeal, the Ninth Circuit reversed the decisions on both expert witnesses. First, the Ninth Circuit held that the district court erred in refusing to allow Dr. Sturchio to update his expert testimony, and that the exclusion was prejudicial. It found the district court's decision "illogical" because it caused the delay in not ruling on Pomona's motion more timely, and the proposed subjects of Dr. Sturchio's updated testimony--additional laboratories and samples--were directly relevant to his credibility and should have been admitted.

Second, the Ninth Circuit held that the district court "abdicate[d]" its role as "gate-keeper" as to expert testimony by denying Pomona's motion to exclude Dr. Laton's testimony without making the necessary findings. The decision was made "in two conclusory sentences and without analysis or explanation" and with a one-word ruling, "DENY." The Ninth Circuit found that this decision was an abuse of discretion and prejudicial because Dr. Laton's testimony was critical to SQM's defense.

In reaching this conclusion, the Ninth Circuit noted: "Dr. Laton's testimony, and that of Dr. Sturchio and Dr. Wheatcraft, went to the crux of the case—whether SQM's importation of fertilizer was a substantial factor in causing the perchlorate contamination in Pomona's water system."

Overall, the Ninth Circuit found that the combined erroneous exclusion of Dr. Sturchio's testimony, and the admission of Dr. Laton's without adequate findings, were so prejudicial they warranted vacating the district court's decision and remanding the case for a new trial.

The Ninth Circuit's opinion allows Pomona to pursue SQM for the perchlorate contamination of its water supply, and to introduce additional expert testimony and evidence by Dr. Sturchio to establish his claim that the sources of perchlorate in water may be traced with isotopic analysis.

Legal Department staff will continue to monitor this matter.



Matters Received by the Legal Department

| <u>Category</u> | <u>Received</u> | <u>Description</u> | |
|---|----------------------------|--|---|
| Actions in which MWD is a party | 2 | Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and Attorney’s Fees served in <i>North Coast Rivers Alliance v. California Department of Water Resources</i> , Sacramento County Superior Court, Case No. 34-2017-80002667, challenging DWR's approval of the California WaterFix | |
| | | Verified Petition for Writ of Mandate served in <i>Palo Verde Irrigation District v. MWD</i> , Riverside County Superior Court, Case No. RIC1714672, challenging MWD's determination that six leases it approved for parcels in Riverside and Imperial Counties were not “projects” subject to environmental review under CEQA | |
| Government Code Claim | 1 | Claim relating to MWD employee who passed away while driving in an MWD vehicle | |
| Subpoenas | 1 | United States District Court subpoena served by bond recovery agent in a criminal case filed in Arizona seeking information on access to a website through MWD's registered IP address | |
| Requests Pursuant to the Public Records Act | 18 | <u>Requestor</u> | <u>Documents Requested</u> |
| | | AECOM | Record drawings for MWD facilities |
| | | Center for Contract Compliance (2 PRA requests) | Contractor and bid information for (1) Landscape Maintenance Tree Trimming, and (2) Employee Housing Rehab: Iron Mountain and Gene Pumping Plants |
| | | Central Basin Municipal Water District | Shapefiles for water districts in Southern California |
| | | City of Riverside Public Utilities | Post-award information for MWD request for proposal for CAISO Scheduling Coordinator Services |
| | | Haley & Aldrich | Monthly data for water balance that support annual data in MWD Annual Reports |
| | | J. C. Heden and Associates | Map that shows MWD’s fee simple land and easements for the second aqueduct down to the delivery point to SDCWA |
| | | The Holt Group | Maps for Palo Verde Water Treatment Plant |
| Los Angeles Times | MWD contract with Mayorkas | | |



| | <u>Requestor</u> | <u>Documents Requested</u> |
|---------------|---|---|
| | MWD Director | Ethics Office report and related information |
| | Padre Associates | Location of pipelines near proposed school site in Anaheim |
| | Private Citizens (2 PRA requests) | (1) Information about temporary easement deed, (2) list of attendees and expenses incurred for water infrastructure tours with Yorba Linda Water District board members |
| | Red River Farms | Current lease agreement between MWD and lease holder for PVID farmland |
| | San Diego County Water Authority (2 PRA requests) | (1) 2016-2017 Certain PRA requests and MWD responses, and (2) DWR reimbursable agreement for SWP operations and maintenance |
| | Somach Simmons & Dunn | Documents relating to MWD farm leases and land acquisition in Palo Verde |
| | Thermo Fisher Scientific | Bid submitted in response to MWD request for proposal for Automated Liquid Chromatograph Triple Quadrupole Mass Spectrometer System, Warranty and Support Services |
| Other Matters | 2 | Wage garnishments |