



Metropolitan Cases

California WaterFix Litigation Update

Since the report in September, two new lawsuits have been filed, and there have been some developments in the validation action, the CEQA litigation, and the two federal cases challenging the biological opinion. The two new cases are *City of Antioch v. California Department of Water Resources*, Sacramento County Superior Court Case No. 34-2017-00218154, alleging that the Department of Water Resources (DWR) violated a 1968 settlement agreement with Antioch, and *Bay.org, et al. v. California Department of Fish and Wildlife*, Sacramento County Superior Court Case No. 34-2017-80002695, alleging that the Department of Fish and Wildlife violated the California Endangered Species Act (CESA) in issuing the incidental take permit for the project.

In the validation action, *California Department of Water Resources v. All Persons Interested*, Sacramento County Superior Court Case No. 34-2017-00215965, Metropolitan filed its answer on September 15. To date, we are aware that 12 answers and one demurrer (motion to dismiss) have been filed. The motion to dismiss is currently scheduled to be heard on November 17. DWR is currently meeting and conferring with the various parties as required under the validation statute. The first case management conference is set for November 8.

In the 18 CEQA cases, the 15 that were filed in Sacramento County Superior Court have been ordered related and assigned to Judge Michael P. Kenny for all purposes. DWR's petition for coordination of 17 of the 18 cases is still pending with the Judicial Council, and the relation and assignment of the cases pending in Sacramento does not effectuate or pre-determine the outcome of the petition to coordinate all of the cases. In *North Coast Rivers Alliance et al. v. DWR*, Sacramento County Superior Court Case No. 34-2017-80002667, in which Metropolitan is named as a real party in interest, DWR held the mandatory CEQA settlement meeting with all parties, but no settlement was reached based on petitioners' position that DWR must revoke its project approval and decertify the Final Environmental Impact Report (EIR).

In the biological opinion cases, DWR recently filed motions to intervene. Its motions, as well as the motions by the State Water Contractors and Metropolitan, are pending before Judge O'Neill in the Federal District Court for the Eastern District of California in Fresno. The first scheduling conferences in the two cases occurred on October 3. The existing parties have proposed schedules for production of the administrative records and briefing cross-motions for summary judgment as the means to adjudicate the merits of the cases, which is typical in challenges to biological opinions.

Center for Food Safety, et al. v. Department of Water Resources (Sacramento County Superior Court) (Monterey Amendment Cases)

This case is the latest in a series of cases concerning the Monterey Amendments. The cases originated with a lawsuit filed over two decades ago challenging a 1995 EIR and approvals for this amendment to the State Water Project (SWP) contracts. The *Center for Food Safety v. DWR* case was filed a year ago and challenges the latest remedial EIR for the project. Following briefing and trial, on October 2, 2017 the Sacramento County Superior Court issued its decision rejecting petitioners' claims in this latest case.

The Monterey Amendments arose out of disputes between agricultural and urban SWP contractors principally over the allocation of SWP supplies in times of drought. To settle the disputes and avoid litigation, the SWP contractors and DWR entered into mediation leading to a settlement agreement that called for certain revisions to the delivery contracts. The Monterey Amendments implement the settlement agreement and consist of three general types of contract provisions: (1) water management provisions that promote more efficient and flexible use of the SWP facilities, including facilitation of transfers and storage programs; (2) water allocation provisions that simplify the contracts and allocate water among both agricultural and urban contractors on the same basis; and (3) financial provisions. Included in these provisions is the transfer of lands from the state to the Kern County Water Agency for the



development and operation of the Kern Water Bank.

The 1995 EIR was the subject of litigation filed by the Planning and Conservation League and two other petitioners. Although the trial court upheld the EIR, in 2000 the Third District Court of Appeal ruled the EIR process did not comply with CEQA and the EIR was decertified. After several years of negotiations, a settlement was reached in 2003 that called for preparation of a new EIR for the Monterey Amendments, as well as more detailed reporting of the SWP's delivery capability and public participation on future contract amendments. The 2003 settlement and court order allowed DWR to continue to operate the SWP according to the provisions of the Monterey Amendments.

In 2010 DWR certified the new EIR and filed a notice of determination. A new round of litigation was then filed in Sacramento County Superior Court.

One of the 2010 lawsuits, referred to as "*Central Delta I*," was brought against DWR by environmental organizations, including the Center for Biological Diversity and two Delta water agencies. This case raised multiple CEQA claims on wide-ranging aspects of the Monterey Amendments and also challenged the validity of underlying contracts. Metropolitan and the other SWP contractors were named as parties to this case because of the contractors' interests in the delivery contracts. Another case, the "*Rosedale*" case, was brought by two Kern County water storage districts and focused its EIR challenges on the analysis of the Kern Water Bank. In 2014, the trial court ruled in both cases concluding that a portion of the EIR was defective in its analysis of the Kern Water Bank. All other claims were dismissed. The petitioners in *Central Delta I* appealed; that case has been fully briefed and is now pending in the Third District Court of Appeal.

Meanwhile, DWR settled with the *Rosedale* petitioners by agreeing to conclude the litigation, settle an attorney fee claim, and prepare a revised EIR for the Kern Water Bank component. In April 2016, DWR issued its Draft Revised EIR for the project. In September 2016, DWR certified the Final Revised Draft EIR, recorded a Notice of Determination, and filed papers in the trial demonstrating compliance with the court's order for remedial CEQA review.

Then in October of 2016, the *Center For Food Safety v. DWR* case was filed challenging this

latest EIR for the Monterey Amendments. Petitioners in this case are essentially the same group from the *Central Delta I* case. Following briefing and an August 18, 2017 trial, on October 2, Sacramento Superior Court Judge Timothy Frawley issued his final ruling on the matter.

Judge Frawley rejected all of Petitioners' claims. Petitioners sought to re-litigate a number of issues from their earlier *Central Delta I* case that are now on appeal. Judge Frawley ruled that the court does not have jurisdiction to retry issues that are embraced in or affected by that appeal. Petitioners' claims specific to the remedial EIR were largely focused on the Kern Water Bank's role in the conversion from low value crops to higher value crops. Judge Frawley ruled that the remedial EIR adequately analyzed the issue and that DWR's conclusions were based on substantial evidence.

Although the original case challenging the Monterey Amendments was filed nearly 22 years ago, the cases are not yet over. Petitioners may file an appeal to the Third District Court of Appeal, where their appeal in the *Central Delta I* case is still pending, awaiting oral argument.

Orange County Superior Court Orders Coordination of Children's Dental Group Cases (Orange County Superior Court)

On September 15, 2017, an Orange County Superior Court judge granted a petition to coordinate 15 lawsuits against Children's Dental Group (CDG), its owners, several dentists, and others regarding the outbreak of bacterial infections at a CDG dental clinic in Orange County (collectively, "CDG Cases"). The judge designated the Court of Appeal, Fourth Appellate District, Division Three, as the reviewing court and recommended Orange County Superior Court as the appropriate venue for the cases. The judge noted that 14 additional cases were not included in the Petition because they were filed after the Petition, but they may also be appropriate for coordination. The cases are stayed until a coordination trial judge is appointed.

The Orange County Health Care Agency (OCHCA) was first notified in early September 2016 of several cases of oral bacterial infections being seen in children at Children's Hospital of Orange County. All of the children, ages 2 through 11, had received "baby root canals" at a CDG clinic in Orange County. Also, they all had the same type



of mycobacterial infection, which can result in loss of permanent teeth, bone loss, and disfigurement, as well as often requiring serious and invasive treatment lasting for months. According to the OCHCA, as of July 6, 2017, 73 children had been affected – 22 were confirmed, and 51 were probable. Water samples from the dental clinic indicated that the mycobacterium was inside the clinic’s on-site water system. However, the OCHCA stated, “It should be made clear that the municipal water supply in Anaheim meets all bacterial standards (and all other water quality standards) for use by the public.” The clinic, which was shut down twice while steps were taken to

ensure that the clinic’s internal, on-site water supply system was free from mycobacteria, reopened for business on April 24, 2017.

Metropolitan, along with other entities which supplied water ultimately used at the clinic, have received claims under the Government Claims Act from CDG clinic patients alleging that the water used at the clinic was contaminated and caused their injuries. Metropolitan denies any liability and will vigorously defend against these claims and any subsequent related lawsuits that might be filed. Metropolitan staff will also continue to monitor the CDG Cases.

Cases to Watch

U.S. Supreme Court Review Sought In Water Transfers Rule Litigation

On September 15, 2017, several states, a Canadian Province, and plaintiff-intervenors/ appellees’ groups each filed a writ petition in the U.S. Supreme Court regarding the Second Circuit Court of Appeals’ decision in *Catskill Mountains* to uphold the Water Transfers Rule.

The Water Transfers Rule is the U.S. Environmental Protection Agency’s (EPA) regulation that exempts the transfers of water between water bodies that are subject to Clean Water Act jurisdiction from the National Pollutant Discharge Elimination System (NPDES) permit requirements.

Petitioner plaintiffs - the States of New York, Connecticut, Delaware, Illinois, Maine, Michigan, and Washington, and the Province of Manitoba, Canada - filed one petition. (Although the States of Missouri and Minnesota were plaintiffs in the district court and appellees in the court of appeals, they are not petitioners.)

The other petition was filed by Riverkeeper, Inc., Theodore Gordon Flyfishers, Inc., and Waterkeeper Alliance, Inc. The public entity petitioners argue that the petition should be

granted because: (1) this case presents a question of great importance about whether “polluting water transfers” are subject to the Clean Water Act’s (CWA) permit program; (2) the 2nd Circuit’s decision conflicts with other courts’ decisions and is contrary to the plain language and purpose of the CWA; (3) the 2nd Circuit’s decision conflicts with Supreme Court and other federal court precedent in deferring to an agency’s invocation of a factual analysis it never conducted; and (4) this case is the ideal vehicle for the Court to determine whether “polluting water transfers” require permits.

The second petition makes two technical legal arguments regarding: (1) the 2nd Circuit’s application of *Chevron* deference to the EPA; and (2) the court’s interpretation of statutory terms.

Opposition briefs may be filed within 30 days after the case is put on the Supreme Court’s docket. The Western Water Providers are represented in the *Catskill Mountains* case by Peter Nichols of Berg, Hill, Greenleaf & Ruscitti LLP of Boulder, Colorado. Metropolitan provided legal review of the Western Water Providers’ appellate opening and reply briefs. (See General Counsel’s April 2017 Activity Report.)

Matters Received by the Legal Department

| <u>Category</u> | <u>Received</u> | <u>Description</u> |
|-----------------|-----------------|---|
| Subpoenas | 3 | Deposition Subpoena for Production of Business Records served in <i>Haydee Leon v. Allstate Insurance Company</i> for records relating to a |



| <u>Category</u> | <u>Received</u> | <u>Description</u> | |
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| | | residential property in Los Angeles, and two subpoenas for records for workers' compensation matters, one of which is unrelated to any MWD employee | |
| Requests Pursuant to the Public Records Act | 25 | <u>Requestor</u> | <u>Documents Requested</u> |
| | | Caltrans District 8 | Boundary and title information for road from Desert Center to Earp |
| | | Center for Contract Compliance (2 requests) | (1) Contractor records for Second Lower Feeder PCCP Rehabilitation, and (2) contractor records for Allen-McColloch Pipeline Service Connection Seismic Upgrade |
| | | CivilSource | Maps for any MWD utilities in project area for widening Laguna Canyon Road in the City of Laguna Beach |
| | | Contoural | Award information relating to the request for proposal for Digital Asset Optimization, Taxonomy Design and Thesaurus Development Project |
| | | County of San Diego, Department of Public Works, Watershed Protection Program | Data on award amounts and funding limit for MWD's Innovative Conservation Program |
| | | Desert Sun | List of participants in the following program in the Palo Verde Valley and amounts received |
| | | Donahoo & Associates | Contractor records for solar field at Weymouth Treatment Plant |
| | | EDF Trading North America | Scoring information relating to request for proposal for CAISO Scheduling Coordinator Services |
| | | Imperial College Business School, Graduate Student | Data on MWD turf removal rebates |
| | KCBS/KCAL TV | List of all charities, clubs, and/or non-profits who received money from MWD, and the amounts | |
| | Los Angeles Times (3 requests) | (1) Reports prepared by the Ethics Office, (2) documents relating to the September 2017 board meeting on the Ethics Office and the Recycled Water Supply Program, and (3) any consulting contracts between MWD and Marcie Edwards | |



| <u>Category</u> | <u>Received</u> | <u>Requestor</u> | <u>Description</u> |
|-----------------|-----------------|--|--|
| | | Micro Focus | Award information relating to the request for proposal for Digital Asset Optimization, Taxonomy Design and Thesaurus Development Project |
| | | Padre Associates | Information on presence of any water pipelines near project on Vermont Avenue in Anaheim |
| | | PlaceWorks | Water intake and treatment capacities of the Skinner and Mills Treatment Plants |
| | | Private Citizens (requests from 2 individuals) | (1) Inundation information for Skinner Dam, (2) MWD reports/publications on nano or reverse osmosis filtration at MWD's treatment plants |
| | | Robinson & Robinson | Documents relating to the Weymouth Solar Power Facility |
| | | San Diego County Water Authority | List of paid turf removal rebate applications |
| | | SmartProcure | Purchase order data from June 22, 2017 to the present |
| | | Vasquez & Company | 2013 Awarded proposal for External Audit Services |
| | | Valeo Partners | Data on hourly rates for law firms hired by MWD |
| | | Voice of San Diego | Results of the investigations by the Ethics Office |
| Other Matters | 2 | Notices of Commencement of Action Under CEQA by the City of Antioch and County of Butte relating to DWR's review and approval of the California WaterFix | |