



Metropolitan Cases

Challenge of discovery ruling in Delta Islands CEQA case: *County of San Joaquin v. San Joaquin County Superior Court*, Case No. C085897

On November 14, 2017, Petitioners County of San Joaquin, Central Delta Water Agency, Food & Water Watch, and Planning and Conservation League (Petitioners) filed a Petition for Writ of Mandate, Prohibition or Other Relief (Petition) asking the Court of Appeal for the Third Appellate District to (1) reverse the trial court's August 30 ruling denying Petitioners' request to conduct discovery, and (2) stay the matter pending resolution of this challenge.

In its August 30 ruling, the trial court refused to allow Petitioners to conduct discovery, or to take the depositions of key Metropolitan staff, affirming that discovery is not generally allowed in CEQA actions because the court's review is limited to the actions taken by the Board in the administrative record. Then and in its current challenge, Petitioners erroneously argue that they were not provided adequate notice of or opportunity to publicly comment on the proposed purchase, when in fact there were over eight publicly noticed meetings where the public was invited to provide comment. And, in fact, a representative of Petitioner Food & Water Watch commented on the proposed purchase at the March 8, 2016 Board meeting.

On November 16, 2017, Metropolitan provided an initial letter response asking the appellate court to hold off staying the matter until it ruled on the underlying requests. And on November 22, Metropolitan, along with the other real parties in interest, filed a Preliminary Opposition to the Petition, disputing the merits of the Petition and correcting the record.

Petitioners requested a ruling by no later than December 14 so they can avoid preparing for trial, but to date, the appellate court has not issued any rulings on the Petition and does not have a deadline within which do so. Staff is monitoring the docket and will provide further reports.

***The Navajo Nation v. United States Department of the Interior* (U.S. Court of Appeals, Ninth Circuit)**

On December 4, the Ninth Circuit Court of Appeals issued its decision in this appeal by the Navajo Nation of a federal district court's dismissal of a complaint challenging Colorado River operating rules adopted by the Secretary of the Interior. The Ninth Circuit affirmed the Arizona District court's dismissal of the Navajo Nation's claim under the National Environmental Policy Act (NEPA), but reversed and remanded to the district court on a related breach of trust claim.

The Navajo Nation originally filed this litigation in March 2003 in federal district court in Arizona seeking to overturn the Colorado River Interim Surplus Guidelines. The Navajo subsequently amended to also challenge the Shortage Guidelines. The Navajo alleged that in adopting the Guidelines, the Secretary violated NEPA and breached trust obligations owed to the Navajo in the form of a right to Colorado River water. Settlement negotiations were conducted until May 2013, when a tentative settlement failed to gain the approval of the Navajo.

In July 2013, the Navajo Nation filed its First Amended Complaint and Metropolitan intervened along other water agencies in California, Arizona, Nevada, and Colorado. In July 2014, the district court dismissed the action on the ground that the Navajo did not suffer an injury with respect to their NEPA claim (that they lacked "standing") and that their breach of trust claim was barred by the sovereign immunity of the United States. After the district court subsequently denied a motion by the Navajo to further amend their complaint, the Navajo appealed to the Ninth Circuit.

The Ninth Circuit agreed with the district court that the Navajo did not have "standing" to bring their NEPA claims, because the Shortage and Surplus Guidelines did not present an injury to potential Navajo water rights, or to the Navajo's needs for Colorado River water. As stated by the Court, "[t]he Guidelines do not act directly upon the Nation's unquantified water rights, nor could they. So how could the Guidelines injure these rights?"



On the breach of trust claims, the Court held that the claim was not barred by sovereign immunity, and remanded the case back to the district court. In reaching this decision, the Court resolved an apparent conflict between two Ninth Circuit opinions on the application of sovereign immunity in barring claims of government inaction. The district court will now need to consider the Navajo's breach of trust claim on its merits.

As Metropolitan remains a party, Metropolitan will continue to participate in this case to protect its Colorado River water interests.

San Diego County Water Authority v. Metropolitan (San Francisco Superior Court)

On November 28, 2017, San Diego County Water Authority (SDCWA) filed a motion requesting that the San Francisco Superior Court order

Metropolitan to release its financial planning model under the California Public Records Act (PRA). A hearing on the motion is set for January 30, 2018. In August 2016, SDCWA filed in Los Angeles County Superior Court a Verified Petition for Writ of Mandate alleging Metropolitan violated the PRA in providing data used in and output from the model, but not the computer software itself. Metropolitan developed the software, which consists of formulas and programming code. Section 6254.9 of the PRA provides that "computer software developed by a state or local agency is not itself a public record under this chapter." The case was transferred to San Francisco Superior Court in November 2016. Metropolitan provided the software to SDCWA in 2013 under a protective order, and in 2016 offered to provide it again under a similar order.

Cases to Watch

EPA and the Corps Propose Delaying the Effective Date of the Clean Water Rule by Two Years

On November 22, 2017, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) proposed delaying the effective date of the Clean Water Rule (Rule) by two years. EPA and the Corps jointly published the Rule, which defines the scope of waters protected under the Clean Water Act, in June 2015. The effective date of the Rule was August 28, 2015. However, after numerous lawsuits were filed in various federal appellate courts and district courts, the Sixth Circuit Court of Appeals stayed the Rule nationwide in October 2015. A North Dakota district court also stayed the Rule in 13 states. The U.S. Supreme Court is currently deciding whether the Sixth Circuit or federal district courts have jurisdiction to hear challenges to the Rule.

By postponing the effective date of the Rule to two years from the date of final action on their proposal, EPA and the Corps intend to maintain the *status quo*. If the U.S. Supreme Court decides that challenges to the Rule should be heard in federal district court and the stay of the Rule is

lifted, the Rule will still not be in effect. Also, EPA and the Corps can continue their two-step process of rescinding the Rule and revising the definition of "waters of the United States" (WOTUS) pursuant to President Trump's February 2017 Executive Order.

As the first step, EPA and the Corps proposed in July to rescind the Rule and to re-codify the regulations defining WOTUS, which existed before the Rule. The comment period on that proposal ended on September 27, 2017, and almost 700,000 comments were submitted. For the second step, the agencies will propose a new definition of WOTUS. In preparation for this second step, the agencies held a number of public meetings in the fall of 2017 to hear stakeholder recommendations for revising the definition. EPA and the Corps also requested written recommendations by November 28, and they received 6,300 comments.

Comments on EPA and the Corps' proposal to delay the effective date of the Rule for two years are due by December 13. Comments should be submitted to <http://www.regulations.gov> and identified by Docket ID No. EPA-HQ-OW-2017-0644. Metropolitan staff will continue to monitor the agencies' implementation of the Executive Order and the litigation regarding the Rule.



Other Matters

Continuing Legal Education

On November 29, the Legal Department provided a continuing educational session titled, *SB 96: Department of Industrial Relations' New Prevailing Wage Penalties*. The one-hour recorded webinar

session was presented by Michael J. Maurer from the law firm of Best Best & Krieger. Legal Department staff and staff from Contracts Administration and Construction Contracts attended the session.

Matters Received by the Legal Department

<u>Category</u>	<u>Received</u>	<u>Description</u>																				
Actions in which MWD is a party	1	Notice to Responsible and Trustee Agencies of Commencement of CEQA Action in the matter <i>City of San Dimas v. Metro Gold Line Foothill Extension Construction Authority</i> , Los Angeles County Superior Court, case no. BS171326, relating to the City of San Dimas' CEQA petition challenging the approvals of the Gold Line extension from Azusa to Montclair based on potential impacts on the City																				
Requests Pursuant to the Public Records Act	9	<table border="1"> <thead> <tr> <th><u>Requestor</u></th> <th><u>Documents Requested</u></th> </tr> </thead> <tbody> <tr> <td>AFSCME</td> <td>Communications involving activities at the Desert facilities</td> </tr> <tr> <td>Albert A. Webb Associates</td> <td>Above ground and substructure information for any MWD facilities in Jurupa Valley near a sewer capital replacement project by the Jurupa Community Services District</td> </tr> <tr> <td>Better Bike</td> <td>Data on turf removal rebates within the City of Beverly Hills</td> </tr> <tr> <td>Center for Contract Compliance</td> <td>Contractor information for CRA Whitewater Siphons Erosion Protection project</td> </tr> <tr> <td>Karmine Construction Law Firm</td> <td>Soils report for the Inland Feeder Pipeline</td> </tr> <tr> <td>Krieger & Stewart</td> <td>Data relating to leakage into San Jacinto Tunnel</td> </tr> <tr> <td>Orange County Water District</td> <td>Water quality data for FY 2016-2017</td> </tr> <tr> <td>Private Citizen</td> <td>Easement information for property in Riverside</td> </tr> <tr> <td>Somach Simmons & Dunn</td> <td>Documents and communications relating to Tulare Lake Storage and Floodwater Protection Project</td> </tr> </tbody> </table>	<u>Requestor</u>	<u>Documents Requested</u>	AFSCME	Communications involving activities at the Desert facilities	Albert A. Webb Associates	Above ground and substructure information for any MWD facilities in Jurupa Valley near a sewer capital replacement project by the Jurupa Community Services District	Better Bike	Data on turf removal rebates within the City of Beverly Hills	Center for Contract Compliance	Contractor information for CRA Whitewater Siphons Erosion Protection project	Karmine Construction Law Firm	Soils report for the Inland Feeder Pipeline	Krieger & Stewart	Data relating to leakage into San Jacinto Tunnel	Orange County Water District	Water quality data for FY 2016-2017	Private Citizen	Easement information for property in Riverside	Somach Simmons & Dunn	Documents and communications relating to Tulare Lake Storage and Floodwater Protection Project
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Other Matters	3	2 Wage garnishments, a request for personnel and medical records relating to a claim filed by the estate of a former MWD employee																				



California WaterFix Litigation	
Subject	Status
Validation <i>DWR v. All Persons Interested</i> Sacramento County Superior Court	Hearing on Save the California Delta Alliance's & South Delta Water Agency's motion to dismiss December 4, 2017 Hearings on DWR's and MWD's motions to dismiss/motions to strike affirmative defenses December 14, 15, 2017 Case Management Conference February 8, 2018
CEQA 18 cases/4 County Superior Courts: Sacramento (15), Alameda (1), Placer (1), San Joaquin (1)	Hearing on petition to coordinate December 21, 2017 DWR completing administrative record (ETA early 2018)
ESA/BiOps <i>Golden Gate Salmon Ass'n v. Ross (NMFS)</i> <i>Bay.org v. Zinke (USFWS)</i> Eastern District of California (O'Neill)	<i>GGSA v. Ross (NMFS)</i> - Plaintiffs' motion for summary judgment (MSJ) due July 27, 2018; Defendants' opposition/cross-motion for MSJ due August 29, 2018; replies due September 19, 2018 and October 10, 2018 <i>Bay.org v. Zinke (FWS)</i> - Plaintiffs' MSJ due October 10, 2018; Defendants' opposition/cross-motion for MSJ due November 9, 2018; replies due November 30, 2018 and December 21, 2018
CESA/Incidental Take Permit <i>Bay.org v. DFW</i> <i>North Delta Water Agency v. DFW***</i> Sacramento County Superior Court	Answers/Motions to Dismiss due 30 days after administrative record is lodged
Breach of Contract <i>City of Antioch v. DWR</i> Sacramento County Superior Court	Answer or Motion to Dismiss due December 15, 2017 Case Management Conference March 1, 2018

***CESA claims also alleged in the CEQA petitions filed by County of San Joaquin, et al. and California Sportfishing Protection Alliance, et al.