



## Metropolitan Cases

### **Delta Stewardship Council Cases (Sacramento Superior Court; Court of Appeal – Third Appellate District)**

On July 12, 2018, Metropolitan, the State Water Contractors, and various other named water agencies filed their opening brief on the merits of their appeals in the coordinated cases and joined in the opening brief of San Luis & Delta Mendota Water Authority and Westlands Water District. On appeal, the state and federal water contractors seek reversal of the trial court's 2016 rulings: (1) that the Delta Stewardship Council (Council) has the discretion to adopt the Reduced Reliance policy in the 2013 Delta Plan; and (2) upholding the Council's administrative appeal procedures, which allow for multiple successive appeals of certifications of consistency. The appeal procedures, as currently adopted, give the Council virtual veto authority over covered actions in the Delta.

The state and federal water contractors also seek to overturn the trial court's ruling in favor of certain non-water contractor parties finding that the Council must adopt regulations with quantified or otherwise measurable targets for achieving reduced reliance, reduced environmental harm from invasive species, restoring more natural flows, and increased water supply reliability.

The water contractors' next briefs are due October 30, 2018. Because of the number of appeals and cross-appeals, briefing will continue through April 2019.

### **CDWR Environmental Impact Cases – California WaterFix Litigation (Sacramento County Superior Court)**

The Department of Water Resources (DWR) filed an action to determine the validity of its adoption of bond resolutions and authorization of bonds to

finance the California WaterFix in Sacramento County Superior Court on July 21, 2017 (Case No. 34-2017-00215965) (validation action). DWR published a summons providing notice that all persons interested in the California WaterFix revenue bonds who wished to appear in the matter should file a written answer to DWR's validation complaint.

A number of public agencies and environmental groups filed answers and other responsive pleadings in the case, both in support of and in opposition to DWR's validation complaint.

Metropolitan filed an answer in support of DWR's position. The San Diego County Water Authority (SDCWA) filed an answer purporting to neither support nor oppose the complaint, but raising questions and "issues of concern." Some of the "issues of concern" relate to future actions by Metropolitan, such as the allocation of the cost of WaterFix among Metropolitan's member agencies. During the initial proceedings before a law and motion judge, SDCWA and some of the parties that opposed DWR also challenged Metropolitan's standing or right to file motions in support of DWR's authority to adopt resolutions to issue California WaterFix revenue bonds. After coordinating the validation action with the *CDWR Environmental Impact Cases* (Sacramento County Superior Court Coordinated Proceeding Case No. JCCP 4942), the coordination judge has recently ruled that Metropolitan is an "answering interested party" under the validation statutes, and that as such, Metropolitan can fully participate in support of DWR and the validation action.

The parties are currently meeting and conferring on the contents of the administrative record for the validation action, which will form the evidentiary basis for the court's ultimate ruling on the merits.



## Matters Impacting Metropolitan

### **USFWS and NMFS proposed revisions to the Endangered Species Act implementation regulations.**

On July 25, 2018, the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) (collectively “Services”) published three proposed rules revising the regulations implementing the Endangered Species Act (ESA). (Docket Nos. FWS-HQ-ES-2018-0006, FWS-HQ-ES-2018-0007 & FWS-HQ-ES-2018-0009) Comments on the proposals are due on September 24, 2018. A number of the organizations in which Metropolitan is active, including the Association of California Water Agencies (ACWA), are planning to comment on the proposals. Metropolitan is also considering separate comments. The proposals have received significant scrutiny, and while many of the changes are widely viewed as either beneficial or of minimal impact, a few have generated criticism from environmental organizations. These rule changes are important to Metropolitan and other water agencies because many of Metropolitan’s projects and activities are subject to regulation under the ESA.

The first two proposals affect the manner in which species are listed as threatened or endangered and critical habitat is designated pursuant to Section 4 of the ESA. The third proposal makes changes to the interagency consultation process conducted pursuant to Section 7 of the ESA.

In the first proposed rule, USFWS proposes to rescind the current rule under which species listed as threatened by USFWS automatically receive the protections against take that apply to species listed as endangered. Section 9 of the ESA only prohibits the take of endangered species. Currently, pursuant to a rule issued in 1975, USFWS automatically extends the full protection against take to species that are listed as threatened, unless USFWS instead issues a species-specific “4(d) rule” setting forth the specific types of activities that are prohibited or restricted or are determined not to result in take. NMFS, in contrast, does not have a blanket rule and instead prohibits take of threatened species through the issuance of specific 4(d) rules for each species. USFWS is proposing to leave the blanket take prohibition in place for species that are currently listed as threatened, but to change its practice going forward and apply the take prohibition to

threatened species only through species-specific 4(d) rules.

In the second proposal, the Services are jointly proposing a number of changes to the procedures for listing, delisting, and reclassifying species and designating critical habitat. Among other changes, the Services propose to remove the language that is currently in the regulations stating the Secretary will make listing, delisting, and reclassification determinations solely on the basis of the best available scientific and commercial information and “without reference to possible economic or other impacts.” The Services have stated that, as required by the statute, they will continue to make determinations based solely on biological considerations but that there may be circumstances where referencing economic information may be informative to the public.

The Services also propose to revise the regulations to clarify that the standard for delisting a species is the same as the standard for listing a species. The rulemaking explains that this means that if a species no longer meets the criteria for listing, it should be delisted. The Services also propose to clarify the circumstances under which it is appropriate to include unoccupied habitat in a designation of critical habitat. The Services explain that the changes will clarify that in designating critical habitat, they will first evaluate areas occupied by the species and will include unoccupied areas only if they are essential for the conservation of the species.

In the third proposed rule, the Services are jointly making a number of changes to the Section 7 consultation procedures that apply when a federal agency undertakes, funds, or approves an action that may affect a listed species or designated critical habitat. A number of these changes seek to increase the efficiency of the Section 7 consultation process by more specifically addressing programmatic consultations and adding provisions for expedited consultations for projects with a minimal impact or effects that are known and predictable and unlikely to cause jeopardy to species or destroy habitat.

In an effort to simplify the definitions and eliminate confusion regarding the manner in which the effects of a proposed action are considered in a Section 7 consultation, the proposal eliminates the current references to “indirect effects” and



“interrelated and interdependent actions” and instead specifies that “[a]n effect or activity is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur.” To clarify the determination of effects, the Services also propose to include a standalone definition of the “environmental baseline” and specify that the effects of action are measured from the environmental baseline. The

proposal also clarifies the scale at which a determination that an action “appreciably diminishes” the value of critical habitat for the species must be made.

As noted above, comments on the proposals must be submitted by September 24, 2018. Metropolitan will provide further updates as this rulemaking proceeds.

## Other Matters

### Finance

Legal Department staff worked with finance staff, bank counsel, outside bond counsel and disclosure counsel to prepare supplements to offering statements and other disclosure documents and to negotiate and provide the agreements, notices, certifications and opinions necessary for closing the following transactions:

- July 17, 2018, replacement of Stifel, Nicolaus & Company, Incorporated with Goldman Sachs & Co. LLC as remarketing agent for \$87,445,000 Special Variable Rate Water Revenue Refunding Bonds, 2013 Series D.
- July 17, 2018, replacement of Wells Fargo Bank, National Association with Morgan Stanley & Co. LLC as remarketing agent for \$94,450,000 Special Variable Rate Water Revenue Refunding Bonds, 2015 Series A-1 and replacement of Wells Fargo Bank, National Association with RBC Capital Markets, LLC as remarketing agent for \$94,450,000 Special Variable

Rate Water Revenue Refunding Bonds, 2015 Series A-2;

- July 20, 2018, replacement of RBC Capital Markets, LLC with Merrill Lynch, Pierce, Fenner & Smith Incorporated as remarketing agent for \$51,835,000 Special Variable Rate Water Revenue Refunding Bonds, 2016 Series B-1, replacement of US Bancorp with Merrill Lynch, Pierce, Fenner & Smith Incorporated as remarketing agent for \$51,835,000 Special Variable Rate Water Revenue Refunding Bonds, 2016 Series B-2. Also effective July 20, 2018, Metropolitan replaced standby bond purchase agreements with Landesbank Hessen-Thüringen Girozentrale, New York Branch with agreements with Bank of America, N.A. to provide the liquidity support for both series of bonds. The new liquidity facilities will terminate on July 19, 2021, unless extended or terminated sooner.

## Matters Received by the Legal Department

<u>Category</u>	<u>Received</u>	<u>Description</u>
Actions in which MWD is a party	3	(1) Two Complaints for Eminent Domain filed by the California Department of Transportation, Riverside County Superior Court Case Nos. MCC1800733 and MCC1800734, in which the State of California seeks property owned by MWD in Riverside County for a proposed state highway project  (2) Complaint for Damages for Breach of Contract to Enforce Stop Payment Notice, and to Enforce Payment Bond Claim filed in International Line Builders, Inc. v. Integrated Power & Lighting, Inc., et al., Los Angeles County Superior Court Case No. BC714366, alleging the contractor failed to pay plaintiff for electrical solar installation work at the Jensen Water Treatment Plant



<u>Category</u>	<u>Received</u>	<u>Description</u>	
Government Code Claims	7	(1) Claim for injury to marina employee while working at the marina at Diamond Valley Lake, (2) contractor claim for costs of alleged extra work and time-related overhead for work performed on the Palos Verdes Reservoir Cover and Liner Replacement Project, (3) claim for injury from slip and fall on debris from tree on MWD property up Newhall, CA, and (4) four claims for vehicle accidents involving MWD vehicles	
Subpoenas	2	Deposition Subpoenas for Production of Business Records for personnel-related records on two matters unrelated to MWD	
Requests Pursuant to the Public Records Act	19	<u>Requestor</u>	<u>Documents Requested</u>
		Bureau Veritas North America	Proposals submitted for Industrial Hygiene and General Safety Services
		County of Orange Procurement Office	Information on MWD's contract with PlanetBids
		Desert Pacific Properties	MWD easements on parcel in Riverside County
		DRMcNatty & Associates	Winning proposal for Implementation of MWD's Project Controls and Reporting System
		El Dorado Locators	List of uncashed checks
		Helix Water District	Records and data on MWD's monitoring and treatment program for algae blooms and cyanobacteria/cyanotoxins
		Integrated Marketing Systems	Awarded contracts for past solicitations
		Los Angeles County Department of Public Works	Data that shows conservation rebates by MWD's member agencies based on zip codes
		Los Angeles Department of Water and Power	List of bidders and pricing for Water Awareness and Conservation Advertising Services
PBLA Engineering	As-built drawings for any MWD structures in project area in Baldwin Park		
Private Citizen	Source for Talega water in San Clemente		
SmartProcure	Purchase order data for April 12, 2018 through July 2018		



<u>Category</u>	<u>Received</u>	<u>Requestor</u>	<u>Description</u>
			<u>Documents Requested</u>
		Springfield Data Recovery	Communications regarding services rendered or quoted by DriveSavers Inc. or other data recovery providers
		Teal Consulting Group (2 requests)	List of uncashed checks
		Tetra Tech	Winning proposals for Engineering Services for Water Treatment Facilities, Conveyance, Storage and Distribution Facilities, and Large Rotating Equipment
		Transparent California	MWD Employee Compensation Report for 2017
		Thermo Fisher Scientific	Bid information for Automated Gas Chromatograph Triple Quadrupole Mass Spectrometer System, Warranty and Support Service
		Unite Here Local 11	Water usage records or bills for property in downtown Los Angeles
Other Matters	1	Wage garnishment	



<b>California WaterFix Litigation</b>	
<b>Subject</b>	<b>Status</b>
<b>CDWR Environmental Impact Cases Sacramento Superior Ct. Case No. JCCP 4942 (20 Coordinated Cases – 1 Validation; 17 CEQA; 2 CESA) (Judge Culhane)</b>	
<p><b>All cases</b></p> <p><b>Validation</b> <i>DWR v. All Persons Interested</i> Sacramento County Superior Ct.</p> <p><b>CEQA</b> Sacramento County Superior Ct. 17 cases</p> <p><b>CESA/Incidental Take Permit</b> <i>Bay.org v. DFW</i> <i>North Delta Water Agency v. DFW</i> Sacramento County Superior Ct.</p>	<ul style="list-style-type: none"> <li>• Next Case Management Conference Oct. 4, 2018</li> <li>• Court ruled that validation will be decided based on the administrative record and that Metropolitan may participate as an answering interested party in support of validation</li> <li>• Parties meeting and conferring on the contents of the administrative record</li> <li>• DWR circulated draft 6000-page index of the administrative record (over 2.5 million pages in draft record)</li> <li>• Parties meeting and conferring on contents of administrative record</li> <li>• Metropolitan and SWC preparing motion to intervene</li> <li>• Answers/Motions to Dismiss due 30 days after administrative record is lodged</li> <li>• DFW anticipates completion of administrative record by early 2019</li> <li>• Metropolitan and SWC preparing motion to intervene</li> </ul>
<p><b>ESA/BiOps</b> <i>Golden Gate Salmon Ass’n v. Ross (NMFS)</i> <i>Bay.org v. Zinke (USFWS)</i> Eastern District of California (Judge O’Neill)</p>	<ul style="list-style-type: none"> <li>• <i>GGSA v. Ross (NMFS)</i> - Plaintiffs’ motion for summary judgment (MSJ) due Sept. 28, 2018; Defendants’ opposition/cross-motion for MSJ due Oct. 30, 2018; replies due Nov. 20, 2018 and Dec. 18, 2018</li> <li>• <i>Bay.org v. Zinke (FWS)</i> - Plaintiffs’ motion to augment the administrative record pending; Plaintiffs’ MSJ due Dec. 18, 2018; Defendants’ opposition/cross-motion for MSJ due Jan. 22, 2019; replies due Feb. 22, 2019 and March 5, 2019</li> </ul>
<p><b>Breach of Contract</b> <i>City of Antioch v. DWR</i> Sacramento County Superior Ct. (Judge De Alba)</p>	<ul style="list-style-type: none"> <li>• Discovery under way</li> <li>• Settlement conference set for Jan. 17, 2019 at 1:30 p.m. in Department 59 (Judge Davidian)</li> <li>• Trial set for March 11, 2019 at 8:30 a.m. in Department 47 (Presiding Judge David De Alba)</li> </ul>
<p><b>Change of Point of Diversion</b> <i>County of Sacramento, et al. v. State Water Res. Control Bd.</i> Sacramento County Superior Ct. (Judge Arguelles)</p>	<ul style="list-style-type: none"> <li>• Motion to halt the Change of Point of Diversion proceedings denied on March 5, 2018</li> <li>• Case <b>DISMISSED</b> April 3, 2018</li> </ul>





Subject	Status
<p><b>Delta Plan Amendments and Program EIR</b></p> <p><i>North Coast Rivers Alliance, et al. v. Delta Stewardship Council</i></p> <p><i>Central Delta Water Agency, et al. v. Delta Stewardship Council</i></p> <p><i>Friends of the River, et al. v. Delta Stewardship Council</i></p> <p><i>California Water Impact Network, et al. v. Delta Stewardship Council</i></p> <p>Sacramento County Superior Ct. (Judge Sumner)</p>	<ul style="list-style-type: none"> <li>• Cases challenge, among other things, the Delta Plan Updates recommending dual conveyance as the best means to update the SWP Delta conveyance infrastructure to further the coequal goals</li> <li>• Allegations relating to “Delta pool” water rights theory and public trust doctrine raise concerns for SWP and CVP water supplies</li> <li>• Cases related and assigned to Judge Sumner</li> <li>• Parties stipulated to extend time to prepare the administrative record to Sept. 21, 2018</li> </ul>

\*\*\*CESA claims also alleged in the CEQA petition filed by County of San Joaquin, et al.; California Sportfishing Protection Alliance, et al. allege violation of the fully protected species statutes.