



Matters Impacting Metropolitan

California WaterFix Delta Plan Certification of Consistency Appeals

On July 27, 2018, the Department of Water Resources (DWR) submitted to the Delta Stewardship Council (Council) a certification of consistency with the Delta Plan for the California WaterFix. The deadline to file appeals with the Council expired at midnight, August 27. On August 28, the Council accepted and posted on its website nine appeals challenging the certification filed by 26 parties, including all the Delta counties, various local public agencies, various non-governmental organizations, commercial and recreational fishing organizations, and an Indian tribe. The appeals must allege that California WaterFix is not consistent with the Delta Plan, and that the inconsistencies will significantly adversely affect achievement of the coequal goal of restoring, enhancing, and protecting the Delta ecosystem.

The Council will set a public hearing that must occur within 60 days, by the last week of October, absent an agreed extension. After the hearing, the Council will have 60 days, to late December, to issue a written ruling limited to the question of whether DWR's certification is supported by substantial evidence in DWR's administrative record.

Any interested party may submit written comments before, or comment in person at, the public hearing. If the Council issues a draft ruling, there will be an additional opportunity to comment before it is finalized. Metropolitan will coordinate with DWR and the State Water Contractors to defend the certification.

Under the Delta Reform Act, construction cannot begin until the appeals are either denied or until DWR submits a revised certification addressing the Council's finding that one or more aspects of the certification are not supported by substantial evidence in the record. Under the Council's appellate rules, if the Council grants any of the appeals, construction cannot begin until DWR submits a revised certification and either no further appeals are filed or the Council denies them. The State Water Contractors, Metropolitan, and other individual state and federal water contractors have

challenged that aspect of the Council's regulations in the *Delta Stewardship Council Cases* that are currently being briefed in the California Court of Appeal for the Third Appellate District. Briefing in those appeals will not be completed until April 2019, after which the court will set oral argument.

District Court in South Carolina reinstates 2015 Clean Water Rule in 26 states, including California

On August 16, 2018, the United States District Court for the District of South Carolina invalidated the EPA and the U.S. Army Corps of Engineers' (the Agencies) two-year nationwide delay of the 2015 Clean Water Rule (2015 Rule) which defines the scope of "waters of the United States" (or "WOTUS") protected under the Clean Water Act. (*S.C. Coastal Conservation League v. Pruitt* (D.S.C. Aug. 16, 2018, No. 2-18-cv-330-DCN) 2018 U.S. Dist. LEXIS 138595.)

In February 2018, the Agencies finalized a rule delaying the 2015 Rule from taking effect until February 2020. The delay was intended to give the Agencies time to reconsider the definition of WOTUS. In the meantime, the previous definition of WOTUS that was in place before the 2015 Rule would be in effect. The court held that the two-year delay violated the Administrative Procedures Act. As a result of this action, the 2015 Rule is in effect in 26 states, including California, but remains stayed in 24 other states because of action in two other federal courts.

On August 24, 2018, the Agencies filed motions giving notice of their intention to appeal the decision and requesting that the court stay its decision pending the appeal. If the stay is granted, the 2015 Rule will continue to be delayed. Various industry groups that intervened in the lawsuit also appealed the decision.

As previously reported, EPA and the Corps jointly published the Clean Water Rule in June 2015. Numerous lawsuits challenging the Rule were filed in both district courts and Courts of Appeals. Federal district courts in North Dakota and Georgia have issued preliminary injunctions that prevent the Rule from being implemented in 24 states.



In a separate proceeding (*State of Texas, et al. v. U.S. Environmental Protection Agency, et al.*), Louisiana, Mississippi and Texas recently asked a Texas federal judge to impose a nationwide injunction on the implementation of the 2015 Rule.

Meanwhile, the public comment period on the Agencies' proposal to repeal the 2015 Rule and to recodify the pre-2015 definition of WOTUS closed on August 13. The Agencies proposed taking these steps to provide for greater regulatory certainty, especially in light of the various court decisions. Metropolitan submitted a comment letter in support of the Agencies' repeal of the 2015 Rule. Metropolitan staff will continue to track this litigation and the Agencies' development of a new definition of WOTUS.

County Of Maui Asks U.S. Supreme Court to Review Clean Water Act Ruling

On August 27, 2018, the County of Maui (County) asked the United States Supreme Court to review the Ninth Circuit's decision in *Hawaii Wildlife Fund v. County of Maui* that the County violated the Clean Water Act (CWA) by injecting wastewater without a permit into wells where it traveled through groundwater into the Pacific Ocean. The CWA requires National Pollutant Discharge Elimination System (NPDES) permits for discharges of pollutants to navigable waters (defined as WOTUS) from any point source.

The Ninth Circuit found that the groundwater served as a conduit for the wastewater to get from the injection wells, a point source, to the Pacific Ocean, a navigable water. The County argues that the court's decision incorrectly expands the scope of NPDES permitting requirements.

Other federal courts are also considering whether the CWA applies to discharges to groundwater that reach WOTUS. On April 12, 2018, the Fourth

Circuit in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.* relied on *County of Maui* to find that a discharge of pollutants that travels through groundwater and reaches navigable waters through a direct hydrological connection requires an NPDES permit. Similarly, the Second Circuit heard oral argument in April in *26 Crown Street Assocs., LLC v. Greater New Haven Regional Water Pollution Control Auth.* as to whether an entity is liable under the CWA for untreated sewage backflows that reach the Long Island Sound through groundwater. Also, the Sixth Circuit recently heard oral arguments in two cases regarding whether discharges to groundwater that reach WOTUS are covered by the CWA. If the Second Circuit or the Sixth Circuit reaches a different result from the Ninth Circuit, the U.S. Supreme Court might be more inclined to review the *County of Maui* decision.

Although EPA had agreed in the *County of Maui* case that the County's discharges required an NPDES permit, EPA requested public comment in February 2018 regarding whether it should review and potentially revise its previous statements regarding whether pollutant discharges from point sources that reach WOTUS via groundwater may be subject to the CWA.

In April 2018, the U.S. Senate Committee on Environment and Public Works held a hearing to determine the appropriate role of states and the federal government in protecting groundwater. The Committee was divided along party lines: the Republican members expressed concern over the federal government exerting too much authority in an area where states already regulate; the Democrats expressed concern about the damage that groundwater pollution causes to the nation's waterways. Metropolitan staff will continue to monitor these cases and any further actions by EPA or Congress.

Other Matters

Finance

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

- August 1, 2018, entering into an \$86,000,000 Note Purchase and Continuing Covenant Agreement with Bank of America, N.A. in connection with the direct purchase by the bank of the Short-Term Revenue Certificates, Series 2018 A; and
- August 16, 2018, July 17, 2018, amendment to a Noteholder's Agreement with RBC Municipal Products, LLC



(extension to April 5, 2022) and amendment of the associated Paying Agent Agreement, both in connection with

the direct purchase by the bank of the Index Notes, Series 2016.

Matters Received by the Legal Department

<u>Category</u>	<u>Received</u>	<u>Description</u>	
Actions in which MWD is a party	1	Complaint against MWD, medical facility and medical personnel for (1) employment discrimination based on disability, (2) failure to accommodate, (3) failure to engage in interactive process, and (4) medical malpractice, filed in Los Angeles County Superior Court	
Government Code Claims	1	Vehicle accident involving MWD truck	
Requests Pursuant to the Public Records Act	12	<u>Requestor</u>	<u>Documents Requested</u>
		City of Corona	Map depicting Colorado River upper and lower pump stations that serve the City of Corona
		County of Los Angeles Audit Division	June 30, 2017 fiscal year end audited financial statements for the Colorado River Joint Powers Authority
		George Hills Company	Proposal submitted in response to request for proposal for Third Party Administrator for Liability/Property Claims
		Irvine Ranch Water District	As-built drawings for Allen McCullough Pipeline
		Kroner Environmental Services	Geotech reports for Mount Olympus Tunnel Project in San Diego
		Los Angeles County Museum of Art	Contact information and description of historical document collection
		Los Angeles Department of Water and Power	Agreement between MWD and Quigley-Simpson & Hepplewhite for water awareness and conservation advertising services
		McCord Environmental Engineering	Contact information for person responsible for MWD's reservoirs
Orange County Water District	Information on MWD's electronic records management system		
Peters & Freedman, LLP	Water quality data relating to water supply serving Talega Village Center in San Clemente		
Plante Lebovic LLP	Annual Water Quality Reports for 1985-2000		



<u>Category</u>	<u>Received</u>	<u>Requestor</u>	<u>Description</u>	<u>Documents Requested</u>
		Private Citizen		Records relating to MWD's conservation rebates
Other Matters	1	Wage garnishment		



California WaterFix Litigation	
Subject	Status
CDWR Environmental Impact Cases Sacramento Superior Ct. Case No. JCCP 4942 (20 Coordinated Cases – 1 Validation; 17 CEQA; 2 CESA) (Judge Culhane)	
<p>All cases</p> <p>Validation <i>DWR v. All Persons Interested</i> Sacramento County Superior Ct.</p> <p>CEQA Sacramento County Superior Ct. 17 cases</p> <p>CESA/Incidental Take Permit <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"> • Next Case Management Conference Oct. 4, 2018 • 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 • Parties meeting and conferring on the contents of the administrative record • DWR circulated draft 6000-page index of the administrative record (over 2.5 million pages in draft record) • Parties meeting and conferring on contents of administrative record • Metropolitan and SWC preparing motion to intervene • Answers/Motions to Dismiss due 30 days after administrative record is lodged • DFW anticipates completion of administrative record by early 2019 • Metropolitan and SWC preparing motion to intervene
<p>ESA/BiOps <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"> • <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 • <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
<p>Breach of Contract <i>City of Antioch v. DWR</i> Sacramento County Superior Ct. (Judge De Alba)</p>	<ul style="list-style-type: none"> • Discovery under way • Settlement conference set for Jan. 17, 2019 at 1:30 p.m. in Department 59 (Judge Davidian) • Trial set for March 11, 2019 at 8:30 a.m. in Department 47 (Presiding Judge David De Alba)
<p>Change of Point of Diversion <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"> • Motion to halt the Change of Point of Diversion proceedings denied on March 5, 2018 • Case DISMISSED April 3, 2018



Subject	Status
<p>Delta Plan Amendments and Program EIR</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"> • 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 • Allegations relating to “Delta pool” water rights theory and public trust doctrine raise concerns for SWP and CVP water supplies • Cases related and assigned to Judge Sumner • Parties stipulated to extend time to prepare the administrative record to Sept. 21, 2018

***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.