



Metropolitan Cases

***Food & Water Watch, et al. v. Metropolitan, et al.* (Los Angeles Superior Court)**

On September 7, 2018, Food & Water Watch and Center for Food Safety filed a reverse validation action and served it on Metropolitan on September 10. The complaint alleges that the authorization to fund up to 64.6% of WaterFix costs is invalid because: (1) it is unreasonable and disproportionate to the benefits provided to Metropolitan's ratepayers in violation of Proposition 26; (2) it violates Proposition 13 because it authorizes a property tax in excess of 1% that has not been approved by the voters and is not authorized by the Burns-Porter Act; (3) it is inconsistent with Metropolitan's State Water Contract; (4) it is inconsistent with certain limitations of Metropolitan's enabling act; (5) it

could exceed the common authority of Joint Powers Agencies; and (6) it does not disclose the outcome of other unresolved administrative proceedings relating to the authorization/approval of California WaterFix. The complaint also notes that California WaterFix is the subject of other pending legal challenges that have not been duplicated in the complaint.

On September 19, the court issued an order for publication of the summons in newspapers in Metropolitan's service area to all persons interested in the subject matter of the action. The summons sets November 26, 2018 as the deadline for any interested party to file an answer in the case. The parties have also agreed to set the same deadline for Metropolitan's response to the complaint.

Matters Impacting Metropolitan

Time Limits on Public Comments at Meeting

An August 2018 opinion of the California Court of Appeal upheld the right of the City of Long Beach to limit public comment on agenda items to three minutes. The court's opinion in *Ribakoff v. City of Long Beach* found that this rule did not violate either the Brown Act or the First Amendment right

to free speech because it reasonably balanced the right of the public to address the public entity while maintaining the efficient operation of the meeting. The Brown Act specifically authorizes a public entity to establish reasonable time limits on public comments. Metropolitan's Administrative Code section 2147 establishes a similar three minute time limitation on public comments at meetings.

Cases to Watch

6th Circuit Rulings Create Circuit Split on Whether the CWA Covers Discharges to Surface Waters Via Groundwater

On September 24, 2018, the U.S. Court of Appeals for the Sixth Circuit (6th Circuit) issued two decisions holding that the Clean Water Act's (CWA) permit requirements do not apply to discharges of pollutants that reach surface waters through groundwater. The decisions, *Kentucky Waterways Alliance v. Kentucky Utilities Co.* and *Tennessee Clean Water Network v. Tennessee Valley Authority*, create a split among the Circuits.

As previously reported, the 9th Circuit (*County of Maui*) and 4th Circuit (*Upstate Forever*) held that the CWA does prohibit discharges of pollutants

from a point source which reach surface waters through groundwater. In comparison, the 6th Circuit ruled in *Kentucky Waterways Alliance* and *Tennessee Clean Water Network* that the CWA does not cover discharges into groundwater that migrated via the groundwater to surface waters. The court rejected plaintiffs' theory that groundwater is a point source because groundwater is not "discernible," "confined," or "discrete." The court also held that for the CWA to apply, the discharge (which was from coal ash ponds) must be made directly into waters subject to the CWA, not released into a hydrologically connected water body. While the court did not reach the issue of whether the coal ash ponds are "point sources" (which is a required element for the



CWA's permit requirements to apply), it noted that the 4th Circuit in *Sierra Club v. Va. Elec. & Power Co.* recently held that a landfill and settling pond were not point sources. However, the court ruled that the releases from the coal ash ponds were subject to regulation under the Resource Conservation and Recovery Act (RCRA).

Petitions for certiorari seeking review of the 4th and 9th Circuits' decisions by the United States Supreme Court on this issue are currently pending. These decisions by the 6th Circuit creating a split among the Circuits make it more likely that the Supreme Court will review the decisions. Metropolitan staff will continue to monitor these cases and any further actions by EPA or Congress.

Matters Received by the Legal Department

<u>Category</u>	<u>Received</u>	<u>Description</u>	
Actions in which MWD is a party	2	<p>Complaint filed by subcontractor, Professional Piping Systems, in Los Angeles County Superior Court against the contractor, Kiewit Infrastructure West Co., relating to field welding work for MWD's second lower feeder PCCP rehabilitation project. The claims against the contractor include breach of contract, breach of implied covenant of good faith and fair dealing, and breach of implied warranty. The claims against MWD pertain solely to its withholding of contract funds pursuant to the subcontractor's stop payment notice.</p> <p>Complaint in Validation filed by Food & Water Watch and Center for Food Safety against MWD in Los Angeles County Superior Court relating to MWD's authorization on July 10, 2018 of financial support of the California WaterFix.</p>	
Government Code Claims	2	(1) Claim by relative for unpaid fees for services provided by attorney who worked on MWD's original formation, and (2) claim for damages caused by MWD vehicle driving onto landscape	
Subpoenas	1	Workers' Compensation Subpoena for personnel, claim and medical records for matter relating to employee of MWD's outside janitorial service	
Requests Pursuant to the Public Records Act	12	<u>Requestor</u>	<u>Documents Requested</u>
		BKF Engineers	Record drawings/maps for facilities within the San Gabriel River and Wilderness Park Restoration Project in the City of Downey
		Center for Contract Compliance	Certified payroll records and fringe benefit statements from Woodcliff Corporation for work on the Diemer Water Treatment Plant Administration Building Seismic Upgrades
		Donahoo & Associates	Certified payroll records from Precision Engineering Surveyors for work on Weymouth Water Treatment Plant Solar Power Facilities



<u>Category</u>	<u>Received</u>	<u>Description</u>
	<u>Requestor</u>	<u>Documents Requested</u>
	Henkels & McCoy	Underground utility maps for project area in the City of Norwalk
	Integrated Marketing Systems	Contract information for (1) Demand Monitoring, (2) Public Outreach Support Services for Water Infrastructure Projects, and (3) Owner's Engineer for Enterprise Microwave Network Upgrade
	Katz & Associates	Proposal submitted by Fiona Hutton & Associates in response to Request for Proposal for Public Outreach Planning for Potential Recycled Water Supply Program
	Keller, Fishback & Jackson	Procedure for obtaining employment records of past employees
	OpenGovBook.com	Records regarding MWD's investment and cash management portfolios, contracts with outside investment firms, and responses to request for proposals for investment management/consulting services
	RM Scott & Associates	Bidders list and bid results for Diemer Water Treatment Plant Filter Building Rehab Project
	San Diego County Water Authority (2 requests)	(1) Study by A & N Technical Services on weather-based irrigation controllers consumption data, and (2) SB 60 reports
	SIM Biological Consultants	Fish & Wildlife Services biological opinion for the Inland Feeder Project



California WaterFix Litigation	
Subject	Status
<p>CDWR Environmental Impact Cases Sacramento Superior Ct. Case No. JCCP 4942 (20 Coordinated Cases – 1 Validation; 17 CEQA; 2 CESA) (Judge Culhane)</p>	
<p>Validation Action <i>DWR v. All Persons Interested</i> Sacramento County Superior Ct.</p>	<ul style="list-style-type: none"> • Parties meeting and conferring on list of purely legal issues that the Court can decide without waiting for the administrative record • Parties meeting and conferring on the contents of the administrative record • October 1, 2018 Joint CMC Statement due identifying “purely legal issues” after meeting and conferring • October 4, 2018 Fourth CMC 10:00 a.m.
<p>CEQA 17 cases Sacramento County Superior Court</p>	<ul style="list-style-type: none"> • 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 • September 2018 - Metropolitan and SWC meeting and conferring with parties before filing motion to intervene
<p>CESA/Incidental Take Permit</p>	<ul style="list-style-type: none"> • Answers/Motions to Dismiss due 30 days after administrative record is lodged • DFW anticipates completion of administrative record by early 2019 • September 2018 - Metropolitan and SWC meeting and conferring with parties before filing 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"> • Two-week continuance in both cases granted. New dates below. • <i>GGSA v. Ross (NMFS)</i> - Plaintiffs’ motion for summary judgment (MSJ) due Oct. 12, 2018; Defendants’ opposition/cross-motion for MSJ due Nov. 13, 2018; replies due Dec. 11, 2018 and Jan. 15, 2019 • <i>Bay.org v. Zinke (FWS)</i> - Plaintiffs’ motion to augment the administrative record pending; Plaintiffs’ MSJ due Jan. 15, 2019; Defendants’ opposition/cross-motion for MSJ due Feb. 19, 2019; replies due March 12, 2019 and April 2, 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 temporarily stayed • 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)



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 Nov. 20, 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.