



Matters Impacting Metropolitan

California Supreme Court Upholds “Pension Spiking” Restrictions

Over the years, California courts have held that a public employee is entitled to retirement benefits comparable to those in effect at the beginning of the employee’s career with a public entity employer. This doctrine is known as the “California Rule.”

In *Alameda County Deputy Sheriff’s Assn. v. Alameda County Employees’ Retirement Assn.*, the California Supreme Court ruled that changes imposed on the County Employees Retirement Law of 1937 (CERL) by the 2013 Public Employees’ Pension Reform Act of 2013 (PEPRA) were permissible even though the changes excluded some forms of compensation from employee retirement calculations and did not require alternative comparable compensation to impacted employees. The Supreme Court concluded that the changes to CERL did not run afoul of the California Rule or California law because PEPRA’s goal of eliminating “pension spiking,” was constitutionally permissible and could not be achieved if an alternative comparable benefit needed to be provided by an employer.

The result was somewhat of a split decision for unions and public employers. The Supreme Court declined to modify the California Rule despite the invitation to do so by impacted employers, and the decision appears to, at the moment, be limited to county retirement programs governed by CERL. On the other hand, the court upheld the exclusion of certain benefits from retirement calculations for some public employees despite objection from impacted unions.

Wilde v. City of Dunsmuir (Water Rates and Referendum Power)

On August 3, 2020, the California Supreme Court issued a decision in *Wilde v. City of Dunsmuir*, holding water rates, like all government utility rates, are exempt from referendum. The court explained the Constitution exempts, from the voters’ referendum power, all “tax levies or appropriations for usual current expenses.” Although water rates are not “taxes,” the term “tax levies” is intended to apply broadly to all revenue raised for public

government purposes. The court rejected all of plaintiffs’ arguments, including the argument that recent constitutional amendments governing certain revenue-raising measures (such as Propositions 218 and 26) distinguish water rates from “taxes.” The court held that distinction does not change the broad applicability of the preexisting constitutional referendum exemption. In 1919, when the voters added the referendum power and exemptions to the California Constitution, the term “tax levies” was understood to apply broadly. Recent constitutional amendments did not change that.

Howard Jarvis Taxpayers’ Association and their primary individual members joined Wilde as plaintiffs in the case. An individual, Jack Cohen, filed an amicus brief in support of plaintiffs. ACWA, California Association of Sanitation Agencies, California State Association of Counties, California Special Districts Association, and the California League of Cities submitted a joint amicus brief in support of the City of Wilde’s position.

Appellate Court issues significant decision on duty to retain electronic mail relevant to CEQA administrative records

On July 30, 2020, the Fourth District Court of Appeal issued a significant decision in *Golden Door Properties LLC v. Super. Ct.*, holding that public agencies are required to retain all official public records relevant to the California Environmental Quality Act (CEQA) administrative records for their project approvals, including electronic mail (email), even where the agency has a document destruction policy.

CEQA says that all correspondence about a project must be in the administrative record, but it is silent on whether an agency must retain all correspondence, even email that are deleted after 60 days in the ordinary course of business.

The underlying case involved the County of San Diego’s (County) consideration of a mixed-use project. Working with consultants, the County prepared an Environmental Impact Report (EIR). The County did not retain “all” such correspondence, nor all “internal agency



communications” related to the project. Email communications not flagged as “official records” were automatically deleted after 60 days. The County destroyed approximately 2.5 years of email related to the project. The plaintiff filed challenges under both CEQA and the Public Records Act (PRA), and extensive record and discovery disputes ensued.

The trial court concluded that although CEQA specifies the contents of the record of proceedings, it does not require that all documents relating to a CEQA project be retained. In effect, the trial court interpreted CEQA to require inclusion of all email relating to a CEQA project still in the County’s possession when preparing the administrative record in the litigation.

The appellate court rejected that interpretation holding that CEQA requires the lead agency to retain all email relating to the project. The appellate court also held, to the extent the email sought are required to be part of the CEQA administrative record, they are “official records” under the County’s email retention policies and should not have been destroyed, even under its own policies.

If the decision stands, it could also require all public agencies to proactively retain all email related to their CEQA analyses and determinations, removing these email from any relevant document destruction policies. This could impose a significant burden on public agencies. Metropolitan staff is assessing its obligations under the decision and monitoring the case for any requests for a stay or an appeal.

State Water Resources Control Board Proposes New Lowering of DLR for Perchlorate

On July 20, 2020, the State Water Resources Control Board (SWRCB) proposed a new two-step process to lower the detection limit for purposes of reporting (DLR) for perchlorate: (1) the SWRCB would first lower the DLR from 4 micrograms per liter ($\mu\text{g/L}$) to 2 $\mu\text{g/L}$; and (2) effective January 1, 2024, the SWRCB would lower the DLR from 2 $\mu\text{g/L}$ to 1 $\mu\text{g/L}$. Initially setting the DLR at 2 $\mu\text{g/L}$ is consistent with current laboratory analytical capabilities. According to the SWRCB, lowering the DLR to 1 $\mu\text{g/L}$ in a second phase effective January 1, 2024 would allow time for the laboratory industry to develop sufficient capacity at the lower concentration.

The SWRCB is proposing to lower the DLR for perchlorate as part of its process to review the Maximum Contaminant Level (MCL) for perchlorate. The SWRCB is required to set an MCL for a chemical as close to the Public Health Goal (PHG) as is technologically and economically feasible, and a revised PHG for perchlorate of 1 $\mu\text{g/L}$ was adopted in February 2015. Data collected from monitoring using the lower DLR will allow the SWRCB to evaluate the technological and economic feasibility of water treatment to reduce perchlorate levels to concentrations less than the current DLR. On April 30, 2020, Metropolitan submitted a comment letter to the SWRCB supporting the lower perchlorate DLR of 2 $\mu\text{g/L}$, which would allow for a more accurate and complete assessment of perchlorate occurrence across the state. Comments on the SWRCB’s new proposed two-step process to lower the DLR for perchlorate are due by August 7, 2020.

At the federal level, the U.S. Environmental Protection Agency (EPA) withdrew its 2011 determination to regulate perchlorate under the federal Safe Drinking Water Act on June 18, 2020, and issued a new determination that perchlorate does not meet the statutory criteria for regulation. Last year, EPA had proposed setting the MCL and Maximum Contaminant Level Goal (MCLG) for perchlorate at 56 $\mu\text{g/L}$. EPA also sought comment on three alternative regulatory options: (1) setting an MCL and MCLG for perchlorate at 18 $\mu\text{g/L}$; (2) setting an MCL and MCLG for perchlorate at 90 $\mu\text{g/L}$; or (3) withdrawing EPA’s 2011 determination to regulate perchlorate in drinking water. Metropolitan submitted a comment letter expressing various concerns and asking EPA not to withdraw its determination to regulate perchlorate in drinking water.

EPA’s issuance of an MCL for perchlorate is the subject of an ongoing lawsuit filed by the Natural Resources Defense Council (NRDC). Pursuant to a Consent Decree between the parties, EPA was to set a final MCL for perchlorate by June 19, 2020. On June 18, 2020, the same day that EPA withdrew its determination to regulate perchlorate, EPA filed a motion to terminate the Consent Decree and asked the court to stay the June 19 deadline pending a decision on EPA’s motion. The parties are currently briefing whether the court should enforce or terminate the Consent Decree.

Metropolitan staff will continue to monitor NRDC’s lawsuit against EPA, as well as EPA’s and California’s proposed drinking water standards for



perchlorate. (See General Counsel’s May 2020 Activity Report.)

Other Matters

Finance

On July 1, Metropolitan issued \$267,995,000 Water Revenue Refunding Bonds, 2020 Series C. The Refunding Bonds were issued to refund portions of five separate series of bonds and realize debt service savings. Total present value debt service savings for Metropolitan was \$80.2 million.

Legal Department staff attorneys worked with Finance, Engineering and Water Resources staff to prepare the official statement used to market the Refunding Bonds and assisted outside bond and disclosure counsel with the drafting and negotiation of several contracts and closing certificates.

Matters Received by the Legal Department

<u>Category</u>	<u>Received</u>	<u>Description</u>
Government Code Claim	1	Claim relating to accident involving an MWD vehicle
Requests Pursuant to the Public Records Act	13	<u>Requestor</u>
		Bowdoin College Student
		Center for Contract Compliance (4 requests)
		Hazelrigg Claims Management Services
		JME Project Management
		<u>Documents Requested</u>
		MWD's annual drinking water quality reports for 2010-2018
		(1) Contract records for landscape maintenance services - Jensen Water Treatment Plant; (2, 3) certified payroll records and fringe benefit statement for Summit Landcare Inc. (previously Ron Ubrun Farms) for landscape maintenance, tree trimming, herbicide applications, weed abatement, and trash removal services at MWD facilities; and (4) contract records for the furnishing of membrane filtration systems
		Agreement and amendments for third party administrator for liability/property claims
		Historical records for West Iron Mountain tunnel construction
		Documents relating to a March 18, 2019 incident of the Perris Valley siphon leak repair during a Colorado River Aqueduct shutdown involving an unplanned flow of water from member agency's facility into MWD's Perris Valley Siphon



	<u>Requestor</u>	<u>Documents Requested</u>
	Private Citizens (2 requests)	(1) Records on MWD easement on property in Montebello; and (2) records that show properties that have unpaid water and sewer utility liens
	Servexo Protective Services	Pricing information for current security services for MWD facilities
	Unispec Construction (2 requests)	Notice of completion and worksheets for pay requests for Jensen Plant Inlet Water Quality project
Other Matters	1	California Department of Fair Employment and Housing Notice of Filing of Discrimination Complaint against MWD



Bay-Delta and SWP Litigation	
Subject	Status
<p>DCP Revenue Bond Validation Action <i>DWR v. All Persons Interested</i> Sacramento County Superior Ct. (Judge TBA)</p>	<ul style="list-style-type: none"> • Filed Aug. 6, 2020
<p>SWP-CVP 2019 BiOp Cases <i>Pacific Coast Fed'n of Fishermen's Ass'ns, et al. v. Ross, et al. (PCFFA)</i> <i>Calif. Natural Resources Agency, et al. v. Ross, et al. (CNRA)</i> Federal District Court, Eastern Dist. of California, Fresno Division (Judge Drozd)</p>	<ul style="list-style-type: none"> • SWC intervened in both <i>PCFFA</i> and <i>CNRA</i> cases • Briefing on federal defendants' motion to dismiss CNRA's California ESA claim is complete; no hearing date set and may be decided on the papers • Parties stipulated to intervention by Friant Water Authority, Arvin-Edison Water Storage District, City of Folsom, City of Roseville, San Juan Water District, Oakdale Irrigation District, and South San Joaquin Irrigation District • Parties meeting and conferring on briefing schedule on the merits
<p>CESA Incidental Take Permit Cases <i>Metropolitan & Mojave Water Agency v. Calif. Dept. of Fish & Wildlife, et al. (CESA/CEQA/Breach of Contract)</i> Fresno County Superior Ct. (Judge Jeffrey Hamilton) <i>State Water Contractors & Kern County Water Agency v. Calif. Dept. of Fish & Wildlife, et al. (CESA/CEQA)</i> Fresno County Superior Ct. (Judge Jeffrey Hamilton) <i>Tehama-Colusa Canal Auth., et al. v. Calif. Dept. of Water Resources (CEQA)</i> Fresno County Superior Ct. (Judge Jeffrey Hamilton) <i>San Bernardino Valley Municipal Water Dist. v. Calif. Dept. of Water Resources, et al. (CEQA/CESA/ Breach of Contract/Takings)</i> Fresno County Superior Ct. (Judge TBA) <i>Sierra Club, et al. v. Calif. Dept. of Water Resources (CEQA/Delta Reform Act/Public Trust)</i> San Francisco County Superior Ct. (Judge TBA)</p>	<ul style="list-style-type: none"> • SF Baykeeper Case Management Conference August 28, 2020 • Metropolitan, SWC, Tehama-Colusa Canal Auth., and San Bernardino Valley Municipal Water Dist. Case Management Conferences September 16, 2020 • Tehama-Colusa Canal Auth. and DWR each filed petitions to coordinate all 8 cases; DWR moved for a stay of all cases pending outcome of the petitions to coordinate; no hearing date set on petitions and motion • SWC and Metropolitan have submitted Public Records Act requests seeking administrative record materials and other relevant information • On Aug. 5, 2020, Metropolitan filed an amended complaint to add the following parties: <ul style="list-style-type: none"> • Coachella Valley Water District • San Geronio Pass Water Agency and • MWDOC • On Aug. 6, 2020, SWC filed an amended complaint adding: <ul style="list-style-type: none"> • Kings County • Tulare Lake Basin Water Storage District • San Gabriel Valley Municipal Water District • Antelope Valley East Kern Water Agency • Santa Clarita Valley Water Agency • Palmdale Water District • Dudley Ridge Water District • Central Coast Water Agency • Oak Flat Water District



North Coast Rivers Alliance, et al. v. Calif. Dept. of Water Resources
 (CEQA/Delta Reform Act/Public Trust)
 San Francisco County Superior Ct.
 (Judge Cynthia Lee)

Central Delta Water Agency, et. al. v. Calif. Dept. of Water Resources
 (CEQA/Delta Reform Act/Public Trust/
 Delta Protection Acts/Area of Origin)
 Sacramento County Superior Ct.
 (Judge James Arguelles)

San Francisco Baykeeper, et al. v. Calif. Dept. of Water Resources, et al.
 (CEQA/CESA)
 Alameda County Superior Ct.
 (Judge Frank Roesch)

CDWR Environmental Impact Cases
Sacramento Superior Ct. Case No. JCCP 4942
(20 Coordinated Cases – 1 Validation; 17 CEQA; 2 CESA) (Judge Culhane)

Subject	Status
<p>Validation Action <i>DWR v. All Persons Interested</i></p> <p>CEQA 17 cases</p> <p>CESA/Incidental Take Permit 2 cases</p>	<ul style="list-style-type: none"> • Cases dismissed after DWR rescinded project approval, bond resolutions, decertified the EIR, and CDFW rescinded the CESA incidental take permit • January 10, 2020 – Nine motions for attorneys’ fees and costs denied in their entirety • Parties have appealed attorneys’ fees and costs rulings • Parties preparing the record for appeal in advance of briefing the merits
<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"> • Settlement reached to buy out the 1968 settlement agreement for \$27 million • Antioch City Council approved • DWR received governor’s office approval and executed the settlement on July 30, 2020
<p>COA Addendum/ No-Harm Agreement <i>North Coast Rivers Alliance v. DWR</i> Sacramento County Superior Ct. (Judge Gevercer)</p>	<ul style="list-style-type: none"> • Plaintiffs allege violations of CEQA, Delta Reform Act & public trust doctrine • USBR Statement of Non-Waiver of Sovereign Immunity filed September 2019 • Westlands Water District and North Delta Water Agency granted leave to intervene • Metropolitan & SWC Monitoring • Deadline to prepare administrative record extended September 23, 2020



Subject	Status
<p>Delta Plan Amendments and Program EIR 4 Consolidated Cases Sacramento County Superior Ct. (Judge Earl)</p> <p><i>North Coast Rivers Alliance, et al. v. Delta Stewardship Council</i> (lead case)</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>	<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 consolidated for pre-trial and trial under <i>North Coast Rivers Alliance v. Delta Stewardship Council</i> • SWC granted leave to intervene • Metropolitan supports SWC • Parties stipulated to extend time to prepare the administrative record. Due to recent shutdown orders, date is uncertain. • Parties stipulated that answers or motions to dismiss due 60 days after remittitur is issued in the Delta Stewardship Council Cases
<p>SWP Contract Extension Validation Action Sacramento County Superior Ct. (No judge assigned yet)</p> <p><i>DWR v. All Persons Interested in the Matter, etc.</i></p>	<ul style="list-style-type: none"> • DWR seeks a judgment that the Contract Extension amendments to the State Water Contracts are lawful • Metropolitan and 7 other SWCs filed answers in support of validity to become parties • Four answers filed in opposition denying validity on multiple grounds raised in affirmative defenses • Case deemed related to the two CEQA cases below and assigned to Judge Culhane
<p>SWP Contract Extension CEQA Cases Sacramento County Superior Ct. (Judge Culhane)</p> <p><i>North Coast Rivers Alliance, et al. v. DWR</i></p> <p><i>Planning & Conservation League, et al. v. DWR</i></p>	<ul style="list-style-type: none"> • Petitions for writ of mandate alleging CEQA and Delta Reform Act violations filed on January 8 & 10, 2019 • Deemed related to DWR’s Contract Extension Validation Action and assigned to Judge Culhane • Parties stipulated to DWR preparing the administrative record by February 28, 2020, after which a meet-and-confer process began that is still in progress • Answers due 30 days after administrative record is received



San Diego County Water Authority v. Metropolitan

Cases	Date	Status
2010, 2012	July 30	Hearing on proposed judgment
	July 31	Tentative judgment issued by the court
	August 3	Memo to Board transmitting tentative
		Final judgment anticipated any day
2014, 2016	August 25	Hearing on SDCWA's motion to lift stay and file amended complaints
2017	August 11	Dismissal entered
2018	July 30	Parties agree and stipulate to assign this case to Judge Massullo's court