



## Metropolitan Cases

### **Court awards Metropolitan's attorneys' fees in Delta Islands contract case: *Central Delta Water Agency v. Delta Wetlands Properties (Contra Costa County Superior Court)***

After hearing oral argument on January 11, 2018, the court adopted its tentative ruling granting Metropolitan \$393,030.75 in attorneys' fees, which is only \$1,925 less than Metropolitan requested. The award is based on the number of hours reasonably spent defending the case by Metropolitan's staff attorneys and a paralegal, as well as hours billed by special counsel with Best, Best & Krieger LLP multiplied by the hourly rate for Best, Best & Krieger for partner-level and paralegal work. The court rejected plaintiffs' arguments that Metropolitan's staff attorneys spent an unreasonable amount of time and ruled that the hourly rates sought by Metropolitan's in-house staff, given the level of experience and the marketplace in which they work, are not only reasonable, but "they may even be regarded as modest." The court only trimmed the \$1,925 amount attributable to one Best, Best & Krieger associate from Metropolitan's request. The court also awarded Delta Wetlands Properties \$561,740, Semitropic Water Storage District \$38,462, and Reclamation Districts 2025 and 2028 \$22,327.

### ***Shimmick/Obayashi, a Joint Venture v. Metropolitan (Los Angeles Superior Court)***

In October of 2014, Shimmick/Obayashi, a Joint Venture (SOJV) filed a complaint against Metropolitan in Los Angeles Superior Court (Case No. BC 559603), alleging breach of a construction contract related to SOJV's work on the Diemer

Oxidation Retrofit Program (DORP) project. SOJV sought approximately \$13 million plus interest for Metropolitan's alleged interference with SOJV's project work, failure to pay for extra work and extended overhead, and improper withholding of \$2.5 million in liquidated damages. Following an unsuccessful mediation of SOJV's claims in August 2015, the General Counsel retained the services of numerous experts and the law firm of Hunt Ortmann Palffy Nieves Darling & Mah, Inc. to assist with the litigation. From September 2015 to December 2017, the parties engaged in extensive discovery, which included Engineering and Legal staff reviewing over a million project documents and over 450,000 SOJV documents and the parties taking and defending 55 depositions.

Following the court's rulings on pre-trial motions on January 23, 2018, the parties reached a settlement of all of SOJV's claims prior to the trial scheduled to commence on January 30. Under the terms of the settlement agreement, SOJV agreed to relinquish all current and future claims against Metropolitan related to the DORP project, including a dismissal of the lawsuit with prejudice, in exchange for a payment from Metropolitan of \$4 million. The settlement agreement also contains a non-disparagement clause. Since the funds used to settle the litigation fell within the amount of the construction contract, the proposed settlement was within the General Manager's change order authority, with the agreement of the General Counsel, under Section 6433(c) of the Administrative Code, and Board approval of the settlement was not required.

## Matters Impacting Metropolitan

### **U.S. Supreme Court Decides Which Court Should Hear Clean Water Rule Challenges**

On January 22, 2018, the U.S. Supreme Court ruled in *National Association of Manufacturers v. Department of Defense*, that challenges to the Clean Water Rule (also known as the "waters of the United States" or "WOTUS" Rule) must be filed in federal district courts, rather than federal courts

of appeals. As previously reported, several parties challenged the Rule in United States District Courts across the country. These parties also filed "protective" petitions for review in various Courts of Appeals to preserve their challenges should their district court lawsuits be dismissed for lack of jurisdiction.



The circuit court actions had been consolidated and transferred to the Court of Appeals for the Sixth Circuit, and the Sixth Circuit issued a nationwide stay of the Rule. Various parties petitioned the Supreme Court to determine the proper venue for challenging the Rule. After ruling that federal district court is the proper venue, the Supreme Court remanded (returned) the case to the Sixth Circuit with instructions for the court to dismiss the petitions for review.

As a result of the ruling, the district court cases, which had been stayed, may be restarted. As a result, another impact is that the Sixth Circuit's nationwide stay of the Clean Water Rule will be lifted. However, the Rule is not expected to go into effect when the stay is lifted.

On January 31, 2018, EPA and the Corps finalized a rule adding an applicability date to the 2015 Clean Water Rule. The Rule will now become effective in February 2020. However, a lawsuit has already been filed by attorneys general from ten states (including California) and Washington, D.C. challenging the new rule. The outcome of this lawsuit and other potential challenges could affect if and when the Rule becomes effective.

Until the Rule goes into effect, permits under the Clean Water Act will continue to be governed by the previous regulatory definition of WOTUS which has been in place since the 1980s.

Metropolitan staff will continue to monitor this litigation and the EPA and the Corps' implementation of the Executive Order to rescind and revise the Clean Water Rule.

### **Ninth Circuit finds that discharges to groundwater may require Clean Water Act permits**

On February 1, 2018, a panel of the Ninth Circuit Court of Appeals ruled unanimously in *Hawaii Wildlife Fund v. County of Maui* that the County of Maui (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 (WOTUS) from any point source. The Ninth Circuit held the County liable under the CWA because: (1) the County discharged pollutants from a point source (the injection wells), (2) the pollutants are fairly traceable from the point source to a navigable water (the Pacific Ocean) such that

the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable waters are more than *de minimis*. The Ninth Circuit explained that the second element of its holding was important and that it disagreed with the district court that "liability under the Clean Water Act is triggered when pollutants reach navigable water, *regardless of how they get there.*" The Ninth Circuit expressly declined to decide "when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA."

The Ninth Circuit further found that CWA does not require that the point source itself convey the pollutants directly into navigable waters. Rejecting this "direct discharge" reading of the Clean Water Act, the Ninth Circuit noted that Justice Scalia's plurality opinion in *Rapanos v. United States* recognized that the CWA prohibits "the addition of any pollutant *to* navigable waters" rather than "the addition of any pollutant *directly* to navigable waters."

Finally, the Ninth Circuit rejected the County's argument that because its effluent injections involved the disposal of pollutants into wells, they were excluded from the CWA's permitting requirements. The Ninth Circuit found that the CWA does not categorically exempt all well disposals from NPDES permitting requirements. Notably, the Ninth Circuit also stated that it was "assum[ing] without deciding the groundwater here is neither a point source nor a navigable water under the CWA."

Two other federal appellate courts are also considering whether NPDES permits are required for wastewater and pollutants that travel through groundwater and ends up in WOTUS. The Second Circuit in *26 Crown Street Assocs., LLC v. Greater New Haven Regional Water Pollution Control Auth.* is reviewing whether an entity is liable for untreated sewage backflows that reach the Long Island Sound through groundwater. Similarly, the Fourth Circuit in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.* is considering whether Kinder Morgan is liable for a gasoline leak from a pipeline in South Carolina which contaminated groundwater that is hydrologically connected to a WOTUS. As noted previously, depending on the outcome of these two other cases, this issue could end up before the U.S. Supreme Court. (See General Counsel's October 2017 Activity Report.)



## Other Matters

### Finance

On January 30, 2018, Metropolitan filed its first annual debt transparency report (ADTR). Government Code section 8855(k) requires all state and local agencies to submit an ADTR to the California Debt and Investment Advisory Commission within seven months after the end of the reporting period for any issue of debt for which it has submitted a report of final sale during that reporting period. The reporting period for the report filed on January 30, 2018 was January 21, 2017 to June 30, 2017. In January 2019, Metropolitan will be required to submit an annual

report for any issue of debt for which it has submitted a report of final sale between July 1, 2017 and June 30, 2018. Legal Department staff attorneys assisted Finance staff in the preparation of the report.

### Bond Counsel

The Legal Department has issued an RFP for firms to serve as bond counsel and co-bond counsel. In 2015 the Legal Department qualified a pool of bond counsel firms for three years, terminating in June 2018. Staff from Legal and Finance will evaluate responses and may select firms to be interviewed to qualify a new pool of firms.

## Matters Received by the Legal Department

<u>Category</u>	<u>Received</u>	<u>Description</u>
Government Code Claims	1	Claim for injury that occurred at Diamond Valley Lake by an employee of Urban Parks Concessionaires
Requests Pursuant to the Public Records Act	23	<u>Requestor</u>
		<u>Documents Requested</u>
		Automation, Design & Engineering (ADE)
		Proposals prepared by Westin Engineering and Red Tiger Security
		Bloomberg
		Correspondence from the U.S. Securities and Exchange Commission and the U.S. Department of Justice from January 1, 2017 through January 30, 2018, seeking information from MWD
		Calvada Surveying
		Water network distribution plans for area in the City of Fontana
		Center for Contract Compliance (2 PRA requests)
		Contractor information for (1) Eagle Rock Operations Control Center Roof Replacement, (2) Eagle Mountain Pumping Plant Radial Gate Replacement
		Hicks and Hartwick
		Recorded copy of easement granted to Bear Valley Mutual Water Company



<u>Category</u>	<u>Received</u>	<u>Description</u>
	<u>Requestor</u>	<u>Documents Requested</u>
	Integrated Marketing Systems	Name of firm awarded the contract for As-Needed Environmental Services
	KPFF	As-built information for MWD facilities near project in Culver City
	Mazel Equities National Associates	List of unclaimed or outstanding checks and unclaimed bonds and bond proceeds that exceed \$5,000
	MCR Facility Services	Winning proposal for Building Operating Engineering Services at Headquarters and Diamond Valley Lake
	PBLA Engineering	As-built drawings for MWD structures in the City of Moreno Valley
	City of Perris	Map of Colorado River Aqueduct existing facilities between Ramona Expressway and Bradley Road
	Powerex Corporation	Percentage of the top five member agencies' water needs provided by MWD
	Private Citizens (3 Requestors)	(1) Data on land acquired by MWD between January 1, 2010 and January 1, 2018, (2) data on agricultural water customers, (3) data on outstanding rebates
	Restore the Delta	Records regarding an MWD employee
	SmartProcure	Purchase order data from September 26, 2017 to January 3, 2018
	Somach Simmons & Dunn (2 PRA requests)	(1) Documents and communications relating to MWD lease of land within Riverside County to Desert Milling, Inc., (2) documents relating to single tunnel alternative or separation of the two tunnels for the WaterFix Project, operation of the Project, evaluation of environmental effects, costs



<u>Category</u>	<u>Received</u>	<u>Description</u>
	<u>Requestor</u>	<u>Documents Requested</u>
	Southern Methodist University	January 1939 photograph taken at the Whitsett Plant dedication
	West Basin Municipal Water District	Data on paid rebates for ice machines and food steamers
	Wood	As-built tunnel geology maps and data for the construction of the Sepulveda Tunnel in 1969-1970
Subpoenas		Defendant's subpoena to take the deposition of MWD's person most knowledgeable in a matter before the Workers' Compensation Appeals Board for a claim filed by an employee of a subcontractor used by the janitorial services that MWD hired
Other Matters	1	California Public Employment Relations Board ("PERB") Unfair Practice Charge filed by an MWD employee against an MWD bargaining unit



<b>California WaterFix Litigation</b>	
Subject	Status
<p><b>Validation</b>  <i>DWR v. All Persons Interested</i>            Sacramento County Superior Ct.</p>	<ul style="list-style-type: none"> <li>• Hearing on DWR’s and MWD’s motions to dismiss/strike affirmative defenses from six answers held on Jan. 23, 2018. Motion granted re CWIN, et al.; sustained, in part, re Clarksburg Fire Protection District, dismissing seven defenses; all other motions overruled</li> <li>• Hearings on DWR’s and MWD’s motions to dismiss/ strike affirmative defenses from three answers Feb. 26, 2018</li> <li>• First Case Management Conference Feb. 8, 2018</li> <li>• DWR’s motion to dismiss/strike Westlands Water District’s Cross-Complaint Mar. 6, 2018</li> </ul>
<p><b>CEQA</b>            17 cases/4 County Superior Courts:            Sacramento (15), Alameda (1),            Placer (1), San Joaquin (1)</p>	<ul style="list-style-type: none"> <li>• Cases coordinated in Sacramento County Superior Court and assigned for all purposes to Hon. Judge Culhane</li> <li>• One case voluntarily dismissed with prejudice (Anderson-Cottonwood Irr. Dist.)</li> <li>• DWR completing administrative record (ETA early 2018)</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 (O’Neill)</p>	<ul style="list-style-type: none"> <li>• <i>GGSA v. Ross (NMFS)</i> - Plaintiffs’ motion for summary judgment (MSJ) due July 27, 2018; Defendants’ opposition/cross-motion for MSJ due Aug. 29, 2018; replies due Sept. 19, 2018 and Oct. 10, 2018</li> <li>• <i>Bay.org v. Zinke (FWS)</i> - Plaintiffs’ MSJ due Oct. 10, 2018; Defendants’ opposition/cross-motion for MSJ due Nov. 9, 2018; replies due Nov. 30, 2018 and Dec. 21, 2018</li> </ul>
<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>• Answers/Motions to Dismiss due 30 days after administrative record is lodged</li> </ul>
<p><b>Breach of Contract</b>  <i>City of Antioch v. DWR</i>            Sacramento County Superior Ct.</p>	<ul style="list-style-type: none"> <li>• DWR’s Motion to Dismiss granted with leave to amend; Antioch filed its first amended complaint on Jan. 29, 2018</li> <li>• First Case Management Conference Mar. 1, 2018</li> </ul>

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