

**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

August 3, 1993

To: Board of Directors (Executive Committee--Action)
 (Water Problems Committee--Action)
 (Special Committee on Legislation--Action)

From: General Manager

Subject: Assembly Bill 1222 (Cortese-San Jose)

Report

On March 2, 1993, Assembly Bill AB 1222 was introduced by Assembly Member Cortese (D-San Jose). This legislation, last amended on July 15, 1993, is cited as Water Transfers: Instream Flows. The purpose of the legislation is to require the State Water Resources Control Board (State Board) to develop a system to account for water reserved for, and dedicated to, instream flows for protection and enhancement of fish and wildlife resources. This accounting system would be referred to as the Registry of Instream Flow Reservations and Dedications (Registry). The State Board would be required to establish and maintain this Registry within one year of enactment of this legislation. The State Board would also be required to establish a challenge procedure to allow any interested party to challenge the State Board's determination to make an entry, or not make an entry, into the Registry.

In addition to the establishment of the Registry, this legislation, if enacted, would amend the California Fish and Game Code to allow use of money in the Habitat Conservation Fund, created through the California Wildlife Protection Act of 1990, specifically for purchase of water to augment streamflows to restore and enhance aquatic habitat for anadromous salmon and trout resources. The Registry would be utilized to ensure that water that is voluntarily transferred for restoration of aquatic resources will augment instream flows already required by State or Federal law.

Further, AB 1222 would amend the Public Resources Code, requiring the Department of Fish and Game to refer to the Registry for determining the sufficiency of streamflow for each stream or watercourse when developing instream flow requirements. Through amendments of the Water Code, the State Board would be required to refer to the Registry to determine instream flow requirements when considering approval of a water transfer. The

State Board would also be required to take into account, when it is in the public interest, water required for recreation and the preservation and enhancement of fish and wildlife resources by referring to the Registry when determining the amount of water available for appropriation to applicants seeking additional water for other beneficial uses.

An earlier version of AB 1222 contained provisions which would open up all existing water rights permits and licenses under the authority of the State Board to condition water use on the permittee's or licensee's compliance with reservations and dedications of the Registry.

This legislation could provide positive water management benefits for California. However, staff recommends that Metropolitan seek three types of amendments.

First, the bill, as amended July 15, removed a provision that could benefit Metropolitan and staff recommends that Metropolitan seek its reinstatement. The provision called for a fast track approval process for water transfers, including water transfers for environmental purposes, consistent with types of water transfers determined appropriate for fast track approval in a State Board-approved programmatic environmental impact report originally required in earlier versions of AB 1222.

Second, the bill includes, in the term "instream flows reservations", water quality standards promulgated under the Porter-Cologne Water Quality Control Act and the federal Clean Water Act. This reference should be stricken because these statutes do not allow the direct imposition of flow requirements. In addition, the bill needs to be amended to specify that the Registry can only include requirements validly established in appropriate judicial and administrative proceedings.

Third, staff recommends seeking intent language in AB 1222 stating that the legislature views the voluntary purchase of water to enhance the environment preferable to the involuntary taking of water rights. Enhancement would be defined as water purchases for the environment above levels which the Registry accounts for as the baseline for compliance with regulations.

Board Committee Assignments

This letter is referred for action to:

The Executive Committee because it involves legislation which may affect the District, pursuant to Administrative Code Section 2417(a);

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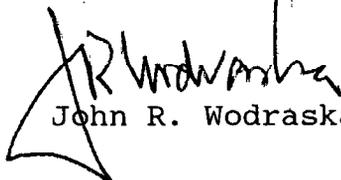
The Special Committee on Legislation because it involves a legislative matter that may affect the District, pursuant to Administrative Code Section 2581(a); and

The Water Problems Committee for action because of its authority to study, advise and make recommendations with regard to policies, sources, and means of importing water required by the District, pursuant to Administrative Code Section 2481(a).

Recommendation

EXECUTIVE, SPECIAL COMMITTEE ON LEGISLATION AND WATER PROBLEMS COMMITTEES FOR ACTION.

Support if amended as discussed in this letter.


John R. Wodraska

WWH/mb

AMENDED IN SENATE JULY 15, 1993
AMENDED IN SENATE JULY 1, 1993
AMENDED IN ASSEMBLY APRIL 12, 1993

CALIFORNIA LEGISLATURE—1993-94 REGULAR SESSION

ASSEMBLY BILL

No. 1222

Introduced by Assembly Member Cortese

March 2, 1993

An act to amend Section 2786 of the Fish and Game Code, to amend Section 10002 of the Public Resources Code, to amend Sections 386 and 1243 of, and to add ~~Chapters~~ Chapter 10.3 (commencing with Section 1710) and 10.4 (commencing with Section 1720) to Part 2 of Division 2 of, the Water Code, relating to water.

LEGISLATIVE COUNSEL'S DIGEST

AB 1222, as amended, Cortese. Water transfers: instream flows.

(1) Under existing law, the California Wildlife Protection Act of 1990, an initiative measure, there is the Habitat Conservation Fund, which is required to be used for, among other purposes, the acquisition, restoration, or enhancement of aquatic habitat for spawning and rearing anadromous salmonids and trout resources. The act generally requires a $\frac{2}{3}$ vote for amendment, which amendment is required to be consistent with, and further the purposes of, the act.

This bill would include the purchase of water to augment streamflows as a means of acquisition, restoration, or enhancement.

(2) Existing law requires the beneficial use of water, including, under specific circumstances, the reservation of water to instream uses to preserve and enhance fish and

wildlife resources. Existing law requires the Director of Fish and Game, in consultation with specified persons, to prepare proposed streamflow requirements for each stream or watercourse for which minimum flow levels need to be established to protect stream-related fish and wildlife resources. Existing law authorizes the State Water Resources Control Board to approve any change associated with a water transfer, as specified, only if the board finds that the change may be made without unreasonably affecting, among other things, fish, wildlife, or other instream beneficial uses.

The bill would require the board to establish and maintain a Registry of Instream Flow Reservations and Dedications to list all instream reservations and dedications, as specified. The bill would require the board to establish a procedure, as specified, to allow any interested party to challenge the board's determination to make, or fail to make, an entry into the registry. The bill would require the director, in developing the requirements for each stream or watercourse, and the board, in making a finding whether a water transfer will unreasonably affect fish, wildlife, or other instream beneficial uses, to take into account the sufficiency of streamflow for each stream or watercourse as reflected in the registry.

~~(3) Under existing law, the board issues and enforces the terms of all water right permits and licenses under its authority.~~

~~The bill would require the board to amend all existing water right permits and licenses, and include in all new permits and licenses, a term that conditions water use on the permittee's or licensee's compliance with the reservations and dedications entered in the registry. The bill would require the board to impose flow quantification and reporting requirements on permittees and licensees, as specified.~~

~~(4) Existing law authorizes permittees and licensees to transfer water under specified circumstances.~~

~~The bill would require the board, in consultation with specified state and federal agencies, to develop criteria for categories of water transfer appropriate for expedited approval, and establish a fast-track approval procedure, as specified.~~

~~(5) Existing law authorizes state agencies to cooperate, in various capacities, with federal agencies.~~

~~The bill would require the Governor to request the appropriate federal agencies to form, with the appropriate state agencies, a joint environmental water management authority to develop water for the protection and restoration of aquatic habitat, environmental enhancement, and other purposes.~~

~~Vote: $\frac{1}{5}$. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.~~

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature finds and declares that
2 a system to account for water reserved for, and dedicated
3 to, instream flows is necessary to ensure that water that
4 is voluntarily transferred for restoration of aquatic
5 resources will actually augment instream flows otherwise
6 required by state or federal law.

7 SEC. 2. Section 2786 of the Fish and Game Code is
8 amended to read:

9 2786. Except as otherwise expressly provided in
10 paragraph (3) of subdivision (a) of Section 2787, the
11 money in the Habitat Conservation Fund, which is
12 hereby created, shall be used for the following purposes:

13 (a) The acquisition of habitat, including native oak
14 woodlands, necessary to protect deer and mountain lions.

15 (b) The acquisition of habitat to protect rare,
16 endangered, threatened, or fully protected species.

17 (c) The acquisition of habitat to further implement
18 the Habitat Conservation Program pursuant to Article 2
19 (commencing with Section 2721) excepting Section 2722
20 and subdivision (a) of Section 2723, and Sections 2724 and
21 2729.

22 (d) The acquisition, enhancement, or restoration of
23 wetlands.

24 (e) The acquisition, restoration, or enhancement of
25 aquatic habitat, including the purchase of water to
26 augment streamflows, for the spawning and rearing of
27 anadromous salmonids and trout resources.

1 (f) The acquisition, restoration, or enhancement of
2 riparian habitat.

3 SEC. 3. Section 10002 of the Public Resources Code is
4 amended to read:

5 10002. The Director of Fish and Game shall prepare
6 proposed streamflow requirements, which shall be
7 specified in terms of cubic feet of water per second, for
8 each stream or watercourse identified pursuant to
9 Section 10001. In developing the requirements for each
10 stream or watercourse, the director shall take into
11 account the sufficiency of streamflow for each stream or
12 watercourse as reflected in the Registry of Instream Flow
13 Reservations and Dedications created pursuant to Article
14 2 (commencing with Section 1713) of Chapter 10.3 of
15 Part 2 of Division 2 of the Water Code. In developing the
16 requirements for each stream, the director shall consult
17 with the Director of Water Resources, the Director of
18 Boating and Waterways, the Director of Parks and
19 Recreation and with all affected local governments. The
20 Director of Fish and Game may also consult with any
21 private individuals, groups, or organizations as the
22 director deems advisable. Upon completion of the
23 proposed streamflow requirements for any individual
24 stream or watercourse, the Director of Fish and Game
25 shall transmit these proposed requirements to the State
26 Water Resources Control Board. The State Water
27 Resources Control Board shall consider these
28 requirements within a stream or watercourse as set forth
29 in Section 1257.5 of the Water Code. The Director of Fish
30 and Game shall complete the preparation of proposed
31 requirements for the initial streams or watercourses not
32 later than July 1, 1989.

33 The Department of Fish and Game may contract for
34 temporary services for purposes of preparing the
35 proposed streamflow requirements.

36 SEC. 4. Section 386 of the Water Code is amended to
37 read:

38 386. (a) The board may approve any change
39 associated with a transfer pursuant to this chapter only if
40 it finds that the change may be made without injuring

1 any legal user of the water and without unreasonably
2 affecting fish, wildlife, or other instream beneficial uses
3 and does not unreasonably affect the overall economy of
4 the area from which the water is being transferred.

5 (b) A petitioner requesting a change that is subject to
6 this section shall pay to the board a fee that shall be in an
7 amount determined by the board to cover the reasonable
8 costs of the board in evaluating and processing the
9 petition.

10 (c) In considering whether a change may
11 unreasonably affect fish, wildlife, or other instream
12 beneficial uses, the board shall take into account the
13 instream flow reservations and dedications in the
14 Registry of Instream Flow Reservation and Dedications
15 created pursuant to Article 2 (commencing with Section
16 1713) of Chapter 10.3 of Part 2 of Division 2.

17 SEC. 5. Section 1243 of the Water Code is amended to
18 read:

19 1243. The use of water for recreation and
20 preservation and enhancement of fish and wildlife
21 resources is a beneficial use of water. In determining the
22 amount of water available for appropriation for other
23 beneficial uses, the board shall take into account,
24 whenever it is in the public interest, the amounts of water
25 required for recreation and the preservation and
26 enhancement of fish and wildlife resources, including the
27 instream flow reservations and dedications in the
28 Registry of Instream Flow Reservations and Dedications
29 created pursuant to Article 2 (commencing with Section
30 1713) of Chapter 10.3.

31 The board shall notify the Department of Fish and
32 Game of any application for a permit to appropriate
33 water. The Department of Fish and Game shall
34 recommend the amounts of water, if any, required for the
35 preservation and enhancement of fish and wildlife
36 resources and shall report its findings to the board.

37 This section shall not be construed to affect riparian
38 rights.

39 SEC. 6. Chapter 10.3 is added to Part 2 of Division 2
40 of the Water Code, to read:

1
2 CHAPTER 10.3. REGISTRY OF INSTREAM FLOW
3 RESERVATIONS AND DEDICATIONS
4

5 Article 1. Definitions
6

7 1710. "Instream flow dedication" means water stored
8 or released for fish and wildlife resources or aquatic biota
9 by any legal water user pursuant to transfers approved by
10 the board pursuant to Section 1707, permitted
11 appropriations, or other means.

12 1711. (a) "Instream flow reservation" means any
13 final state or federal administrative or judicial action that
14 requires a legal user of water to allow, maintain, or
15 release a specified volume of water flow for a specified
16 period from a particular diversion point, gauging station,
17 or impoundment, or that requires a user to store water or
18 maintain a specified storage level in a reservoir, for the
19 benefit of fish, wildlife, or aquatic biota. Actions include,
20 but are not limited to, all of the following:

21 (1) The reservation of water for instream purposes
22 under Section 1243 or 1243.5, in connection with the
23 issuance of permits and licenses to use water by the
24 board.

25 (2) Determinations made by the board or a state court
26 pursuant to Sections 100, 275, or 1242.5, the public trust
27 doctrine, or Section 2 of Article X of the State
28 Constitution.

29 (3) Terms and conditions imposed by the board on a
30 water transfer during the term of the transfer.

31 (4) Determinations made pursuant to Section 1601,
32 1603, 5937, 5946, or 5947 of the Fish and Game Code.

33 (5) Terms and conditions respecting streamflow
34 requirements contained in permits and licenses issued by
35 the Federal Energy Regulatory Commission under the
36 Federal Power Act (16 U.S.C. Section 791a, et seq.).

37 (6) Terms and conditions respecting streamflow
38 requirements contained in special use permits issued by
39 the United States Forest Service or the United States
40 Bureau of Land Management.

1 (7) Rights exercised by federal agencies or federally
2 recognized tribal governments to reserve water for
3 maintenance of fish and wildlife.

4 (8) Terms and conditions respecting streamflow
5 requirements contained in permits issued by the United
6 States Army Corps of Engineers under the Clean Water
7 Act (33 U.S.C. Section 1251, et seq.) or the Rivers and
8 Harbors Appropriation Act of 1899 (33 U.S.C. Section 403,
9 et seq.).

10 (9) Streamflows dedicated to fish and wildlife
11 restoration pursuant to Title 34 of the Central Valley
12 Project Improvement Act (P.L. 102-575).

13 (10) Streamflows dedicated to instream purposes
14 pursuant to interstate compacts.

15 (11) Instream flows established by a court of
16 competent jurisdiction.

17 (12) Instream flows established by contract or
18 stipulation.

19 (b) The term includes water quality standards
20 promulgated under the Porter-Cologne Water Quality
21 Control Act (Division 7 (commencing with Section
22 13000)) or the federal Clean Water Act, and
23 requirements imposed under the federal Endangered
24 Species Act (16 U.S.C. Sec. 1531 et seq.) or the California
25 Endangered Species Act (Chapter 1.5 (commencing
26 with Section 2050) of Division 3 of the Fish and Game
27 Code) to the extent that the board determines that the
28 streamflow requirements associated with meeting the
29 standards or requirements can be quantified sufficiently
30 to constitute an instream flow reservation, as defined.

31 1712. "Registry" means the Registry of Instream Flow
32 Reservations and Dedications.

33
34 Article 2. Registry of Instream Flow Requirements
35

36 1713. (a) The board shall, within one year of the
37 enactment of this section, establish and thereafter
38 maintain a Registry of Instream Flow Reservations and
39 Dedications. The registry shall list all instream
40 reservations made by authorized administrative bodies or

1 courts and instream dedications approved pursuant to
2 Section 1707, regarding waters of the state.

3 (b) The board shall, when it lists an instream
4 reservation in the registry, reflect accurately the
5 regulatory judgment of the administrative or judicial
6 authority from which the reservation derives. Compiling
7 and updating the registry are ministerial, not
8 discretionary, actions within the meaning of the
9 California Environmental Quality Act (Division 13
10 (commencing with Section 21000) of the Public
11 Resources Code).

12 (c) To the extent that a cumulative accounting is
13 consistent with federal determinations under the Federal
14 Power Act, or the intent of any contracts on which the
15 dedication or reservation may be based, the registry shall
16 account for dedications and reservations of instream
17 flows that affect the same reach of a stream or
18 watercourse as cumulative.

19 (d) To the extent consistent with this section, the
20 registry shall incorporate DWR Bulletin 216 (December
21 1982) and shall be integrated into any information system
22 or database regarding water rights that the board may
23 subsequently establish and maintain.

24 (e) The registry shall specify the following
25 requirements for each affected reach of a stream or
26 watercourse:

27 (1) The volume and timing of flow required to be
28 allowed or maintained past, or through, specified
29 diversion points, gauging stations, or dams.

30 (2) The manner and extent to which each instream
31 flow requirement affects existing water rights.

32 (f) The board and any other state agency that
33 requires, or enters into, a contract for an instream flow
34 reservation shall, within 30 days after it becomes final,
35 report the action to the board for inclusion in the registry.

36 (g) The board shall monitor all actions by appropriate
37 federal and state regulatory and water management
38 agencies and courts and incorporate into the registry,
39 within 30 days after final adoption, unless stayed by a
40 court of competent jurisdiction, all actions directly or

1 indirectly affecting instream flows.

2 (h) Any interested party may petition the board to
3 include information regarding an instream reservation or
4 dedication in the registry. The board shall incorporate
5 the information if it determines that the information in
6 the petition accurately reflects an underlying action by
7 an authorized state or federal agency or a court of
8 competent jurisdiction, or a contract.

9

10 Article 3. Challenge of Registry Entries

11

12 1714. (a) The board shall establish a challenge
13 procedure to allow any interested party to challenge the
14 board's determination to make an entry, or fail to make
15 an entry, into the registry. A challenge shall be limited to
16 the question whether the board, in making, or failing to
17 make, an entry in the registry, accurately and correctly
18 interpreted the underlying administrative or judicial
19 action that created the reservation of instream flows, and
20 shall not extend to the merits of that regulatory or judicial
21 decision. The issues the challenge procedure may resolve
22 include, but are not limited to, all of the following:

23 (1) The appropriate measuring point for bypass flow.

24 (2) The reach of the stream or watercourse that is
25 subject to the reservation or dedication of flows.

26 (3) The water rights affected by the reservation or
27 dedication, and the manner and extent to which those
28 rights are affected.

29 1715. As the board deems necessary or desirable to
30 resolve issues raised by a challenge pursuant to Section
31 1714, the board may conduct evidentiary proceedings
32 pursuant to Title 23 of the California Code of Regulations
33 or may refer issues to the appropriate state or federal
34 agency with a request for clarification. State agencies
35 receiving such a request from the board shall respond to
36 the request within sixty days of its receipt.

1 Article 4. Amendment of Water Right Permits and
2 Licenses
3

4 1716. (a) The board shall, by July 1, 1994, adopt
5 regulations that do all of the following:

6 (1) Amend all existing water right permits and
7 licenses under the authority of the board to include, and
8 include in all new permits and licenses, a term that
9 conditions water use on the permittee's or licensee's
10 compliance with the reservations and dedications listed
11 in the registry.

12 (2) Prescribe bypass flow measuring, monitoring, and
13 reporting requirements, including frequency and format,
14 to be implemented by water rights permittees and
15 licensees, as the board deems necessary or useful to fulfill
16 the purposes of the registry.

17 (b) Regulations adopted pursuant to this section shall
18 not be subject to Article 6 (commencing with Section
19 11349) of Chapter 3.5 of the Government Code.
20

21 Article 6. Fast/Track Approval Process for Water
22 Transfers for the Environment and Other Purposes
23

24 1717. (a) By July 1, 1994, the board, in consultation
25 with the Department of Fish and Game, the department,
26 and the United States Department of the Interior, shall
27 commence a rulemaking proceeding to develop criteria
28 for categories of water transfer appropriate for expedited
29 approval, including transfers of water to environmental
30 purposes pursuant to Section 1707, and establish a
31 fast/track approval procedure. Under the fast/track
32 approval process, the board may approve a petition
33 expeditiously if it satisfies all applicable requirements of
34 law without the preparation of an environmental impact
35 report pursuant to the California Environmental Quality
36 Act (Division 13 (commencing with Section 21000) of the
37 Public Resources Code); other than the programmatic
38 environmental impact report required in paragraph (c).

39 (b) The rules shall do all of the following:

40 (1) Prescribe the information that must be included in

1 a petition for fast/track approval.

2 ~~(2)~~ Require simultaneous submission of a petition for
3 fast/track approval to both the Department of Fish and
4 Game and the board.

5 ~~(3)~~ Provide that the board shall, within 30 days after it
6 determines that a petition is complete, do all of the
7 following:

8 ~~(A)~~ Publish public notice of the completed petition.

9 ~~(B)~~ Evaluate the petition to determine whether it
10 contains the information required pursuant to paragraph
11 ~~(1)~~.

12 ~~(c)~~ Regulations adopted pursuant to this section shall
13 not be subject to Article 6 ~~(commencing with Section~~
14 ~~11349)~~ of Chapter 3.5 of the Government Code.

15 ~~(d)~~ The board, upon determining that a petition for
16 fast/track approval satisfies the rules promulgated
17 pursuant to subdivision ~~(a)~~, shall approve the petition
18 without hearing or other proceeding, unless a protest is
19 filed by any interested party or by the board staff within
20 30 days of the publication of notice by the board. In the
21 event of a protest, the protesting party shall have the
22 burden of demonstrating that the transfer as proposed is
23 not consistent with legal requirements.

24 ~~(e)~~ The board shall issue a programmatic
25 environmental impact report in connection with the
26 rulemaking procedure and the development of the
27 criteria for the categories of petition appropriate for
28 fast/track approval. The board may develop the fast/track
29 approval criteria and procedures and conduct the
30 environmental review jointly with the federal
31 Department of the Interior and the department.

32

33 **CHAPTER 10.4. CREATION OF A JOINT**
34 **STATE/FEDERAL ENTITY TO MANAGE AND DEVELOP**
35 **WATER FOR ENVIRONMENTAL PURPOSES**

36

37 1720. ~~(a)~~ The Legislature finds and declares that, in
38 the interests of coordination, efficiency, and consistency,
39 state and federal programs to protect and restore aquatic
40 habitat through the purchase and voluntary transfer of

1 water need to be managed by a joint state and federal
2 entity. The Legislature further finds and declares that the
3 joint management agency should be empowered to enter
4 into arrangements with other water users for the joint
5 development of, and the sharing of the yield from, water
6 development projects that augment available water
7 supplies.

8 (b) The Governor shall request the United States
9 Department of the Interior and other appropriate federal
10 agencies to participate with the appropriate state
11 agencies to create and administer a joint federal and state
12 environmental water management authority.

13 (c) The joint authority may perform any or all of the
14 following functions:

15 (1) Take custody of the funds authorized by Title 34 of
16 the Central Valley Project Improvement Act (Public
17 Law 102/575).

18 (2) Use the funds specified in paragraph (1) to acquire
19 and hold interests in water for the protection and
20 restoration of aquatic habitat consistent with the
21 determinations made by the Director of Fish and Game
22 pursuant to Division 10 (commencing with Section
23 10000) of the Public Resources Code.

24 (3) Enter into agreements, including funding
25 agreements, with governmental and nongovernmental
26 agencies for the joint development of water development
27 projects. A percentage of the water yield from the joint
28 water development projects shall be dedicated to
29 environmental enhancement. Joint water development
30 projects may include, but are not limited to, all of the
31 following:

32 (A) Water conservation.

33 (B) Water transfers.

34 (C) Conjunctive use projects.

35 (D) Water banking.

36 (E) Purchase of water.

37 (F) Purchase and fallowing of agricultural land.

38 (G) Purchase of water rights.