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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA
EXECUTIVE SECRETARY

MAY 10 1994

Revised 7-5

April 21, 1994

To: Board of Directors (Committee on Legislation--Action)
From: General Manager
Subject: California Endangered Species Policy Principles

Report

This letter presents recommendations for policy principles for the California Endangered Species Act and then discusses the status of legislation with detailed discussion and recommended amendments focusing on one key bill.

California Endangered Species Policy Principles

The Natural Community Conservation Planning Act (Section 2800 et. seq. of the Fish and Game Code, effective January, 1992) currently authorizes the California Department of Fish and Game (Department) to enter into conservation plans for multiple wildlife species not limited to those with threatened or endangered status. The Code also provides for the take of any species provided for in a Department approved conservation plan.

Issue 1: Multiple Species Approach. Species have traditionally been listed one at a time as threatened or endangered as data and procedural requirements have been met. The multiple species approach allows protection of many declining species associated with an area or region through one process relieving the need for individual listing of each species.

Policy Options:

1. Support protection of declining species on a comprehensive, multiple species basis.
2. Support continued listing of threatened and endangered species one at a time.
3. Remain neutral on this issue.

Recommendation: Adopt policy option 1.

Issue 2: Pre-listing Agreements. Traditionally, mitigation could not be approved for impacts to a threatened or endangered species until it was listed. Pre-listing agreements remove barriers to proactive planning important to projects with lengthy planning and construction time frames.

Policy Options:

1. Support continuation of prelisting provisions provided in section 2800 of the Fish and Game Code.
2. Oppose provisions for pre-listing agreements.
3. Remain neutral on this issue.

Recommendation: Adopt policy option 1.

Issue 3: Clarify Validity of Take Permits. The state Endangered Species Act Section 2081 of the Fish and Game Code specifies that the Department may authorize take of endangered, threatened or candidate species for scientific, educational, or management purposes. Longstanding interpretation of this provision by the Department is to allow take for development when this supports management of the listed species. Recently, this interpretation has been challenged.

Policy Options:

1. Seek legislative clarification of the Code to ensure validity of take granted in connection with projects.
2. Defer resolution of this challenge to the courts.

Recommendation: Adopt policy option 1.

California Endangered Species Act Legislation (NEW)

Overview. There are five bills which have been introduced to amend the California Endangered Species Act (CESA). These are SB 2091 (Maddy) which is expected to be amended as the Administration's bill, AB 3052 (Bustamente) supported by the Association of California Water Agencies and agricultural and building industry interests, SB 1549 (Hart) supported by the environmental community, SB 1352 (Kelley)

which is still a "spot" bill, and SB 1621 (McCorquodale) which reflects agricultural interests.

At the time of this writing, the bills are subject to significant amendment. Informal, consensus-building discussions have been hosted by staff to the Senate Natural Resources Committee in early May. Senator McCorquodale has indicated his needs in order to support the Hart bill (retain rare plant protection exemption for agriculture, clarify that habitat conservation agencies are not land use planning agencies, and delete habitat degradation from the new definition of "take"). The environmentalists have expressed willingness to compromise to gain his support.

The Bustamente bill currently presents a complex and ambiguous set of procedures for the listing of species as threatened or endangered that is likely to confuse rather than clarify issues, and which could be a source of protracted litigation. The Hart bill requires clarification to resolve significant concerns on the part of Metropolitan; these are discussed below.

Detailed Review of SB 1549 (Hart). Key proposals of this bill are outlined below:

Full protection for rare plant species;

Redefines "take" to include degradation of habitat;

Recognizes temporary and cyclical habitat values provided by agricultural and flood control practices and directs Department to develop guidelines for loss of such habitat and take of protected species;

Provides for scientific peer review;

Specifies requirements for habitat conservation agencies and their habitat management plans;

Specifies that development (including public service, transportation and facility expansions) shall not degrade habitat management areas and shall be compatible with maintaining biological diversity.

Specifies that a party may enter into a conservation plan and obtain a pre-listing agreement in the absence of a habitat conservation agency;

Requires State lead and responsible agencies to consult with the Department on State actions to ensure there is no jeopardy to threatened or endangered species; and

Requires Department to give priority to development and implementation of integrated multiple species recovery plans for listed or sensitive species.

Habitat Conservation Agencies. SB 1549 provides extensive discussion on the subject of habitat conservation agencies including formation, powers, and responsibilities. The bill also discusses habitat management plans including contents and approval by the California Department of Fish and Game. The Riverside County Habitat Conservation Agency (RCHCA) has prepared comments and suggested amendments (attached) on these provisions of SB 1549 in order to protect the status of the agency and its permits where they have not followed the requirements specified in the bill. Because Metropolitan has worked closely with the RCHCA to resolve Stephens' kangaroo rat issues associated with its capital improvement program, it is critical that the status of the RCHCA and its permits be upheld and staff recommends endorsement of the RCHCA's amendments.

Activities Within Habitat Management Areas. Metropolitan has also worked to include reservoir watershed areas within its ownership in multiple species reserves in exchange for pre-listing agreements for its projects with the U.S. Fish and Wildlife Service and the Department. Staff recommends further amendments to SB 1549 to specifically identify that construction, operation, and maintenance of water supply facilities within or adjacent to such reserves shall be allowable activities.

Pre-listing Agreements. SB 1549 creates disincentives for formation of habitat conservation agencies by specifying two parallel processes for obtaining take with differing requirements--one for habitat conservation agencies and one for parties operating in the absence of such an agency. Take permits issued to habitat conservation agencies would be re-evaluated in the instance of changed conditions with risk of revocation of the permit. However, pre-listing take permits issued to individual parties pursuant to a conservation plan would be subject only to review of compliance with the terms of the permit, and not to review of changed conditions. Given that both processes would be set up to proactively address conservation of habitats and

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listed/unlisted species, both should be awarded protection from subsequent review for changed conditions and possible revocation of permits.

Consultation. The Hart bill proposes that both State CEQA lead and responsible agencies would be required to consult with the Department to ensure that State actions do not jeopardize the continued existence of listed species. This discussion needs to be amended to avoid duplication of effort and re-evaluation of resolved issues by responsible agencies.

Board Committee Assignment

This letter is referred for action to:

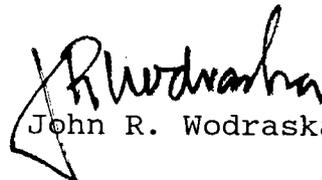
The Committee on Legislation because of its responsibility for District positions on legislation.

Recommendation

COMMITTEE ON LEGISLATION FOR ACTION.

1. It is recommended that your Board adopt legislative policy principles for the California Endangered Species Act as recommended above.

2. It is recommended that your Board support SB 1549 if it is amended as discussed above.


John R. Wodraska

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Attachment

Riverside County Habitat Conservation Agency**40817**

City of Corona ♦ City of Hemet ♦ City of Lake Elsinore ♦ City of Moreno Valley ♦ City of Perris
City of Riverside ♦ City of Temecula ♦ County of Riverside

April 28, 1994

Senator Gary Hart
4074 Capitol Building
Sacramento, CA 95814

SUBJECT: REQUEST FOR AMENDMENTS TO SB 1549

Dear Senator Hart,

The Riverside County Habitat Conservation Agency ("RCHCA") is a Joint Powers Agreement agency established in 1990 under authority of Section 6500 et seq of the Government Code. Formed by eight local governments in western Riverside County, the purpose of the RCHCA is to plan for, acquire, operate, and manage land and facilities for ecosystem conservation and habitat reserves. The RCHCA is implementing an approved Habitat Conservation Plan ("HCP") for the Stephens' kangaroo rat ("SKR"), a species listed as endangered under the federal Endangered Species Act and threatened under the California Endangered Species Act. This HCP is the largest local conservation effort being implemented in the nation; to date the RCHCA has raised more than \$30 million in local funds to finance this plan. Through this difficult endeavor the RCHCA has acquired a unique level of experience in the application of federal and state endangered species laws to a local environment.

I have reviewed with great interest your SB 1549 which seeks to amend the California Endangered Species Act ("CESA"). This is a forward thinking bill which would make a number of positive changes to CESA, and also provide some badly needed incentives for property owners and farmers to conserve habitat for sensitive species. While we certainly endorse the objectives of this legislation, certain provisions of the version amended on April 5, 1994 have prompted concern over its potential impacts to our agency's activities. Accordingly, the RCHCA respectfully requests your consideration of the following suggestions for amendments to the April 5, 1994 version of SB 1549:

1. Section 2110 apparently purports to establish authority for groups of local governments or special districts to form a habitat conservation agency. As evidenced by the existence of our Joint Powers Agreement entity, adequate authority for formation of habitat conservation agencies already resides in the provisions of Section 6500 et seq of the Government Code.

Additionally, since such agencies will be formed by local public entities for purposes deemed important to such bodies, it seems unnecessary to specify the "factors to consider" in establishing such an organization. Since SB 1549 does specify those factors, existing habitat conservation agencies whose enabling documents either do not cite such factors or contain language deemed inconsistent with those factors by State officials may be unnecessarily imperiled. We are specifically concerned over Sections 2110(a)(4) and (5) due to the fact that our eight member governments do not all share "similar land uses" and "common development issues" within their jurisdictional boundaries. What they *do* share is the challenge of resolving problems caused by the need to avoid take of species protected under the federal and state Endangered Species Acts.

In order to ensure that SB 1549 does not cause any State law, agency, or official to question the ability of the RCHCA to perform all functions and exercise all authority granted under its Joint Powers Agreement, we feel it imperative for this legislation to include a "grandfather" clause specifically recognizing that RCHCA qualifies as a habitat conservation agency as defined therein. This is an essential issue for the RCHCA; we cannot risk the possibility that SB 1549 may reduce our ability to exercise those powers established by our Joint Powers Agreement and necessary to implement our existing Habitat Conservation Plan.

- Requested Amendments:**
- a) **Modify the language of Section 2110(a) to state specifically that Habitat Conservation Agencies may be formed by local governments pursuant to provisions of Government Code Section 6500 et seq;**
 - b) **Include language that specifically recognizes the RCHCA as a habitat conservation agency pursuant to the provisions of Section 2110.**
2. Section 2110(c)(2) requires that a habitat conservation agency apply to the Department for certification. Such certification seems to be a necessary condition for the agency to initiate operations. Since the RCHCA has been operating successfully for almost four years and has a Habitat Conservation Plan and endangered species take permit approved by the Department, it is unnecessary for us to petition for certification in order to exercise the powers already granted by our Joint Powers Agreement.

Requested Amendment: **Include language in Section 2110(c)(2) which specifically waives the certification requirement for the RCHCA.**

3. Section 2110(d) specifies those duties habitat conservation agencies may perform. As noted in the preceding discussion, the RCHCA is vested with powers specified by our Joint Powers Agreement. We are concerned that the provisions of Section 2110(d) may be construed to modify or abridge those powers.

Requested Amendment: **Include language which states that nothing in Section 2110(d) shall modify the powers, duties, or functions of the RCHCA.**

4. Section 2111(b) specifies the content of habitat management plans. It is unclear how such documents relate to habitat conservation plans ("HCP") authorized under Section 10(a) of the federal Endangered Species Act; such HCP's are currently used by the Department as the basis for permits to take species protected under CESA. It is important for Section 2111(b) to ensure that habitat management plans are functionally equivalent to HCP's as defined in Section 10(a) of the federal Endangered Species Act.

Requested Amendment: **Include language in Section 2111(b) which provides that habitat management plans prepared under that section shall include those items required for Habitat Conservation Plans under Section 10(a) of the federal Endangered Species Act, and are intended to be the functional equivalent of such HCP's.**

5. As previously noted, the RCHCA has a Habitat Conservation Plan and take permits approved by the Department and the U.S. Fish and Wildlife Service ("USFWS"). We are concerned that the provisions of Section 2111(b) and (c) not be interpreted in a manner which will adversely affect the standing of any HCP or take permits approved by the Department and USFWS.

Requested Amendment: **Modify Section 2111 to specifically state that nothing in its provisions shall require any modification to, or additional approval process for, existing Habitat Conservation Plans approved by the Department and USFWS, or affect the standing of any related take permits issued by those agencies pursuant to such HCP's. Existing Habitat Conservation Plans which have been approved by the Department shall be considered as habitat management plans.**

6. As detailed in Section 2111 habitat management plans seem to focus on conservation of endangered and threatened species and planning for certain selected species. This seems to differ from the emphasis of the State's Natural Communities Conservation Planning ("NCCP") process on conservation of habitat types rather than specific species. By focusing on species already listed under CESA and the federal Endangered Species Act, Section 2111 also departs from the NCCP's emphasis on conserving habitat *before* its resident species become threatened or endangered.

Through its experience with the SKR the RCHCA has learned that focusing conservation efforts exclusively on one species is neither cost-effective nor biologically sound. It is necessary to approach this subject as comprehensively

as possible by seeking to conserve each significant habitat type in a given area in blocks of sufficient size and biological viability to ensure the continued existence of species residing therein.

Requested Amendment:

Modify Section 2111 to add language specifically authorizing and encouraging habitat management plans to include habitat types and species not presently listed as threatened or endangered under CESA in order to establish conservation measures which obviate the need for their listing in the future. Section 2111 also should note the importance of conserving not only individual species, but the habitats on which they depend. Finally, this section should specifically encourage the development of habitat management plans covering multiple habitat types and species.

7. Section 2111(c)(5) requires that habitat management plans provide that within certain habitat type areas development "...*shall* be sited and designated to prevent impacts that would degrade these habitat areas. Future development *shall* be compatible with maintaining the biological diversity and productivity of these habitat areas for the species identified under paragraphs..." (emphasis added) Use of the word "shall" in these contexts is inadvisable and may produce opposition not only from development interests, but from public agencies as well. Quite simply, it will never be possible to always ensure that "development" (which may be interpreted to include essential public facilities) does not degrade sensitive habitat; similarly, local governments never will be able to ensure complete compatibility of development with the maintenance of biological diversity in sensitive habitats.

This section seems to miss the fundamental purpose of habitat conservation plans, i.e., to conserve habitat in locations deemed essential for target species, and through the incidental take permits issued pursuant to that HCP, to allow development of occupied habitat in other locations deemed non-essential for the species. Although these HCP's result in conservation of essential habitat, they all involve some take of target species and habitat. It simply is not possible to completely avoid all development in sensitive habitat areas. Water treatment plants must be built, landfills must be sited, and housing must be built to accommodate growing populations.

By stating that development *shall* be sited to prevent habitat degradation impacts, and *shall* be compatible with the maintenance of biological diversity, Section 2111(c)(5) would preclude the types of activities which motivate local governments and individual developers to prepare habitat conservation plans. More flexibility is needed in this section to ensure that development can proceed when satisfactorily mitigated through approved habitat management plans.

Requested Amendment: **Modify the language of Section 2111(c)(5) to insert the phrase "to the maximum extent practicable" after the word "shall" in locations indicated above.**

8. Section 2074.6(b) specifically states that nothing in any provision of law requires the California Department of Fish and Game ("Department") or California Fish and Game Commission ("Commission") to include in the Department's written report concerning species listing petitions "a detailed recovery plan or analysis of the specific population, habitat, or other quantitative factors required for conservation of the species."

The RCHCA's experience has shown that disclosure of the type of information mentioned above, most specifically an analysis of population and habitat required for conservation of a species, actually is extremely beneficial to the development of conservation plans. In the absence of such information, local entities attempting to prepare such plans have absolutely no idea of the type and amount of habitat which must be conserved in order for a plan to be deemed acceptable by the Department. This greatly increases the cost and preparation time for a conservation document, as local entities develop plans only to be informed by the Department that their level of conservation is insufficient. This forces expensive and time consuming re-drafts until the Department finally decides what type of conservation is adequate. By that time the local agency has wasted many months (or years) and large sums which could have been better utilized for actual conservation activities.

The RCHCA has experienced this situation first hand with the SKR, and we can assure you that it frustrates local elected officials and infuriates the public. The development of habitat conservation plans would be far easier and quicker if local entities received written guidance from the Department as early as possible concerning the types of measures it considers necessary and adequate for protection of any candidate or listed threatened or endangered species. Although this guidance need not be a required part of the Department's report concerning listing petitions, it should be encouraged. The existing language of SB 1549 actively discourages the inclusion of such badly needed information.

Requested Amendment: **Include language in Section 2074.6(b) which encourages the Department, when feasible and appropriate, to include in its report concerning species listing petitions either a Recovery Plan as prescribed in Section 2100 et seq, or as much of its constituent information (as specified in Section 2102) as possible.**

I will contact appropriate members of your staff to discuss these amendment requests and respond to any questions they may have. The RCHCA sincerely appreciates your consideration of these requested amendments to SB 1549.

Sincerely,



Brian Loew
Executive Director
Riverside County Habitat Conservation Agency