

APPROVED

By the Board of Directors of  
The Metropolitan Water District  
of Southern California  
at its meeting held

**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

JUN 13 1995

*Daren E. Duff* 8-6  
EXECUTIVE SECRETARY

May 30, 1995

**To:** Board of Directors (Legislative Committee--Action)  
**From:** General Manager  
**Subject:** Additional Policy Principle on California Endangered Species Act and Support SB 1120 (Costa)

**Recommendation:**

Adopt additional policy principle addressing accidental take of endangered species and authorize support of SB 1120 (Costa)

John R. Wodraska  
General Manager

Submitted by:

*Debra C. Man*

Debra C. Man, Chief  
Planning & Resources

Concur:

*John R. Wodraska*  
John R. Wodraska  
General Manager

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**Executive Summary:**

An additional California Endangered Species (CESA) policy principle is needed to address accidental take of protected species. It is recommended that Metropolitan:

- Support provisions decriminalizing accidental take of protected species that occurs in the course of otherwise lawful activities.
- Support SB 1120 (Costa) which provides that accidental take of candidate, threatened, or endangered species resulting from inadvertent or ordinary negligent acts that occur in the course of otherwise lawful activities shall not be penalized as criminal acts.

Currently, there are five important bills addressing reform of the California Endangered Species Act: SB 131 (Maddy), SB 1177 (Killea), SB 1120 (Costa), AB 137 (Olberg), and AB 350 (Bustamante).

The Maddy Bill was defeated in Senate committee, but was allowed reconsideration. This bill contains a provision for conservation partnerships that resemble Metropolitan's policy principle for voluntary natural systems management. Staff will pursue options to have this provision reconsidered.

The Killea Bill clarifies that incidental take associated with lawful activities is provided by CESA. Metropolitan is opposing this bill unless amended to be declaratory of existing law or provision added for grandfathering existing agreements and permits for incidental take.

Staff is recommending support of the Costa Bill, above.

The Olberg Bill provides that only the Legislature may list species, and that it must consider an economic assessment report in that decision-making. Further, Olberg requires compensation for CESA property takings.

The Bustamante Bill requires substantial information to list species including a recovery and de-listing plan accompanied by a program cost estimate and funding plan. This bill also requires scientific peer review, and consideration of species entire range during listing decisions.

Legislative hearings have been held to assist the CESA reform effort. Staff testified at a hearing regarding the Natural Community Conservation Plan (NCCP) on May 18, 1995. Testimony is attached.

**Detailed Report:**

This letter is written to add a legislative policy principle on the California Endangered Species Act (CESA) in order to support SB 1120 (Costa), and to update your Board on the status of CESA legislation and testimony at a legislative hearing.

Additional Policy Principle. Your Board adopted legislative policy principles for CESA in May 1994 and for the Federal Act in March 1995. Staff is applying these endangered species policy principles to both State and federal situations, as needed. A summary of the adopted endangered species policy principles is attached.

Senator Costa introduced SB 1120 in February 1995 to decriminalize accidental take of endangered species. As amended on May 23, the bill provides that accidental take of candidate, threatened, or endangered species resulting from inadvertent or ordinary negligent acts that occur in the course of otherwise lawful activities shall not be penalized as criminal acts. While decriminalizing accidental take, the language is sufficiently narrow to minimize abuse. As such, the bill proposes a reasonable solution to a practical problem. The accidental take provision of SB 1120 is of substantial benefit to Metropolitan for construction of capital projects and operations and maintenance activities.

A policy principle is needed to address this practical issue associated with protected species. This principle is proposed as follows:

- Support provisions decriminalizing accidental take of protected species that occurs in the course of otherwise lawful activities.

It is recommended that Metropolitan adopt the policy principle for accidental take and support Senator Costa's SB 1120.

Status of CESA Legislation. Currently, there are five important bills addressing reform of the California Endangered Species Act: SB 131 (Maddy), SB 1177 (Killea), SB 1120 (Costa), AB 137 (Olberg), and AB 350 (Bustamente).

**Senate Bill 131** introduced by Senator Maddy, is the Administration's proposal for reform. The bill repeals CESA and the California Native Plant Protection Act and rewrites those laws with the following provisions :

- Details process for listing species;
- Defines "take" to address species, but not habitat;

- Drops protection for candidate species, consistent with the federal ESA;
- Provides for voluntary Conservation Partnership Agreements that address areawide management, restoration, or enhancement of natural wildlife diversity and provide for management of listed and unlisted species. Also provides that during term of Agreement, that activities or projects in the covered area will not be subject to additional requirements for protection of species;
- Provides that any project affecting five acres or less is presumed not to take a listed species, unless the species in question is in imminent danger of imperilment;
- Specifically provides for lawful take of listed species incidental to a variety of conditions, and differentiates between threatened and endangered animal species and between animal and plant species;
- Specifies that CEQA lead agencies shall take the lead in mitigation requirements for take of listed species, and specifies that disagreements between the CEQA lead agency and the California Department of Fish and Game shall be resolved by a panel of arbitrators; and
- Provides for "a deal is a deal" with respect to pre-listing agreements and Conservation Partnership Agreements.

The Maddy Bill was not passed in the Senate Natural Resources and Wildlife Committee, but was allowed reconsideration. It is not clear at this time whether the Maddy Bill will be revised and resubmitted. The bill's provisions for Conservation Partnership Agreements resembles Metropolitan's policy principle for voluntary natural systems management. Staff is planning to pursue options for reconsideration of that provision of the bill. Alternatively, staff may work with the Bustamante Bill discussed below regarding that bill's Conservation Partnership Contract provisions.

**Senate Bill 1177**, introduced by Senator Killea, provides for the following:

- Specifically authorizes the California Department of Fish and Game to authorize take of candidate, threatened, and endangered species incidental to otherwise lawful activities;
- Provides for a process for authorization of incidental take; and

- Provides that any interested person may bring an action to compel the Department of Fish and Game to enforce provisions of take permits.

The Killea Bill addresses Metropolitan's policy principle for clarification of the incidental take provisions. Staff has determined to oppose SB 1177, unless amended to indicate that it is declaratory of existing law or to include a grandfather provision for existing incidental take permits and memoranda of understanding issued by the Department of Fish and Game. The bill was passed in the Senate Natural Resources and Wildlife Committee.

Certain provisions of the Killea Bill are the subject of pending litigation between the San Bernardino Valley Audubon Society, City of Moreno Valley, Riverside Habitat Conservation Agency and Metropolitan. The trial court sustained the authority of the California Department of Fish and Game to issue incidental take permits. This ruling had the effect of validating the conservation agency's permits to Metropolitan for Western Riverside County projects. The case has been appealed by Audubon.

The provisions of **Senate Bill 1120**, Costa, are discussed above. This bill has been passed in the Senate Natural Resources and Wildlife Committee, and is up for consideration on the Senate floor.

**Assembly Bill 137**, Olberg, provides the following:

- Specifies that after January 1, 1996, that only the Legislature may list species, and only with consideration of an economic assessment report outlining the costs and benefits of the listing; and
- Requires that just compensation be paid for "taking of private or public property" which reduces the fair market value by 20 percent or more as a result of implementation of CESA provisions.

This bill is currently in suspense regarding budgetary effects of implementation costs.

**Assembly Bill 350**, introduced by Bustamante, is supported by ACWA, and agriculture and industry groups. The bill provides the following:

Specifies substantial information to accompany listing petitions including a recovery and de-listing plan and program cost estimate and funding plan;

- Requires scientific peer review of listing petitions if requested by any person;
- Requires listing decisions to consider the species throughout its entire range;
- Requires listing/de-listing decision-making to consider any independent studies;
- Authorizes the California Department of Fish and Game to enter into long-term Conservation Partnership Contracts with specified parties to promote conservation of species; and
- Authorizes incidental take consistent Conservation Partnership Contracts and adopted recovery plans.

Ambiguities created by this legislation could result in significant litigation. This bill is currently in suspense regarding budgetary effects of implementation costs.

**Hearings.** The CESA reform process has included scheduling of three joint hearings before the Senate Natural Resources and Wildlife Committee and the Assembly Water, Parks and Wildlife Committee and co-chaired by Senator Hayden and Assemblymember Cortese. These hearings addressed the following topics (1) CESA and Native Plant Protection Act, (2) Natural Community Conservation Plan (NCCP), and (3) Recommendations for program reform.

Staff attended the CESA hearing on May 2, and testified for the Association of Water Agencies at the NCCP hearing on May 18. Staff will attend the third hearing on July 18. Metropolitan's testimony before the NCCP hearing is attached.

## Endangered Species Policy Principles

### California Endangered Species Act Policy Principles Adopted in May 1994

1. **Multiple Species Approach.** Support protection of declining species on a comprehensive, multiple species basis.
2. **Pre-listing Agreements.** Support continuation of pre-listing provisions provided in section 2800 of the Fish and Game Code.
3. **Clarify Validity of Take Permits.** Seek legislative clarification of the Code to ensure validity of take granted in connection with projects.

### Federal Endangered Species Act Policy Principles Adopted in March 1995

1. **Voluntary Natural Systems Management.** Proactively pursue inclusion of a voluntary natural systems management approach as an alternate track to single species protection. This ecosystems approach has replaced Metropolitan's focus on multiple species approaches. The ecosystems approach is broader than any type of species approach, and seeks to restore or improve overall natural processes (e.g. fluvial processes) and habitats as an alternate to measures focused on species.
2. **Pre-listing Agreements.** Continue to support banking pre-listing agreements that are subject only to review for adherence to terms at the time of any subsequent species listing. Metropolitan has continued its interest in providing a stronger, legal basis for pre-listing agreements since the capital improvement program is dependent upon such agreements.
3. **Mitigation Banking.** Support provisions for appropriate mitigation banking where it promotes conservation of natural systems.
4. **State Role.** Support provisions that would allow States greater leeway in the implementation of the ESA.
5. **State Water Law.** Continue to support provisions that specify that decisions of a State regulatory body pursuant to State water law would prevail over requirements of the ESA.
6. **Moderate Approach.** Continue to support a moderate approach to amending the ESA that improves its workability and ability to meet goals.

**MWD***METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA*

May 18, 1995

Good afternoon. My name is Kathleen Kunysz and I'm representing the Metropolitan Water District of Southern California. Metropolitan is a special district of the State of California charged with providing supplemental imported water to the southern California coastal plain extending from the Mexican border into Ventura County.

### Background

Metropolitan has participated significantly in multi-species and habitat-based planning in the course of planning its capital improvement program for regional water infrastructure. Since 1991, Metropolitan has contributed over 11,000 acres to ecological reserves in western Riverside County at the Santa Rosa Plateau, Shipley Reserve and Lake Skinner. These efforts involved mitigation banking agreements, a Multi-Species Habitat Conservation Plan (MSHCP) and a Natural Community Conservation Plan (NCCP). We are currently finalizing an MSHCP and NCCP at Lake Mathews which will contribute an additional 2,500 acres to double the size of an existing ecological reserve at Lake Mathews. Metropolitan's NCCP at the Shipley Reserve qualified under the Ongoing MSHCP category and was not part of a regional NCCP process, while the NCCP at Lake Mathews is being pursued as a subregional NCCP in western Riverside County.

The Santa Rosa Plateau program contributed to and maintained the viability of The Nature Conservancy's Santa Rosa Plateau Preserve. Protected were numerous habitat types including vernal pools, native grasslands, oak woodland, riparian habitats, sage scrub and chaparral, and 43 sensitive species including Englemann oak, southwestern pond turtle, red-legged frog, coastal rosy boa, American badger, and ferruginous hawk. The agreement for the Shipley Reserve and Lake Skinner addressed a similar array of habitat types and 30 sensitive species, such as Stephens' kangaroo rat, California gnatcatcher, San Diego horned lizard, and orange-throated whiptail. An inventory at Lake Mathews found habitat types such as sage scrub, chaparral, grasslands, riparian habitats, and juniper woodlands. These habitats at Lake Mathews included 50 sensitive species such as Stephens' kangaroo rat, California gnatcatcher, bald eagle, and San Bernardino ringneck snake.

Some of these sensitive species have been provided with protection under one or both the California Endangered Species Act (CESA) and the federal ESA. More are recognized as federal

candidate species. Others are recognized on the Audubon Blue List of bird species in decline, on the watch list generated by the California Native Plant Society, or are of local concern.

Metropolitan's partners in these endeavors have included the US Fish and Wildlife Service, the California Department of Fish and Game, the Wildlife Conservation Board, The Nature Conservancy, the Riverside County Habitat Conservation Agency, and the Riverside County Department of Parks and Recreation.

NCCP/CESA NEEDS TWO CHANGES:

- ECOSYSTEM, NOT SPECIES, MANAGEMENT IS REQUIRED.
- "A DEAL IS A DEAL" NEEDS STATUTORY AUTHORITY.

On the basis of these experiences, Metropolitan offers two comments. First, statutory provision for habitat-based ecosystem management is necessary to meaningful, comprehensive conservation. Second, the policy of "a deal is a deal" needs statutory authority to provide important positive incentives for voluntary conservation.

A. Habitat-Based Ecosystem Management

When conservation is focused on any individual species or its habitat, the result can be a fragmented effort. The focus of conservation becomes the acquisition of specific parcels of land because of their particular value to the species of concern, or because they contain the habitat of current interest. These approaches may not provide the desired long-term benefit for wildlife, however, because wildlife tend to use a variety of habitat types for breeding, cover, and foraging. The needs of one species may not overlap with the needs of others, and simply adding up the needs of various species of special concern does not ensure an appropriate plan either. In short, species-by-species, habitat-by-habitat approaches may not meet our long-term conservation goals.

We suggest that a habitat-based, ecosystem approach may be an effective means of meeting these long-term conservation goals. As we see it, this approach would focus on conservation of a variety of habitats in interconnected regional wildlife areas. Management of these lands would focus on the natural processes which form and maintain the variety of habitats required to meet the needs of the whole community of species from the lowest levels of the food chain to the top level predators such as eagles and mountain lions. The philosophy is simple: if you build and preserve a variety of interconnected habitats,

you'll provide for the natural variety of the wildlife that use them. Instead of fragmented, costly-to-manage wildlife areas, we therefore envision contiguous, cooperatively-managed areas such as the reserves we have worked on in western Riverside County.

Metropolitan believes that the NCCP Act (as well as the federal ESA) should broaden its commitment to "comprehensive management and conservation of multiple wildlife species" to explicitly provide that ecosystem management approaches, undertaken voluntarily as an alternative to species-by-species efforts, shall be recognized as means of accomplishing ecological conservation goals. Specifically, the NCCP Act should provide that areas managed pursuant to an approved ecosystem management plan will not be subject to the special requirements and procedures of CESA and federal ESA. Such an approach should be considered for resolving ecological issues in the Bay-Delta.

B. A Deal is a Deal

Second, it is critical that "a deal is a deal" be codified at both State and federal levels. Ecological conservation requires incentives to achieve meaningful participation. The CESA and the federal ESA provide a "stick" type incentive with their strong protections of listed species and conditions for incidental take. A "carrot" type incentive is offered by "a deal is a deal".

As such, mitigation agreements associated with NCCP's, ecosystem management plans, and MSHCP's should not be subject to increased mitigation requirements as a result of unforeseen circumstances. These unforeseen circumstances need to include attraction of new or unanticipated sensitive species to the plan area. Such events are a measure of the plan's success, and should not be penalized.

Thank you for the opportunity to provide input to your legislative hearing.

Endangered Species Policy Principles

California Endangered Species Act Policy Principle Proposed for Adoption in June 1995

1. **Decriminalization of Accidental Take.** Support provisions decriminalizing accidental take of protected species that occurs in the course of otherwise lawful activities.

California Endangered Species Act Policy Principles Adopted in May 1994

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