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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

8-10

April 20, 1998

To: Board of Directors (Legal and Claims Committee--Action)
(Water Planning and Resources Committee--Action)

From: *for* General Manager Edward J. Meier III
General Counsel W. Gregory Taylor

Subject: Intervention in Natural Resources Defense Council, Inc., and League for Coastal Protection v. Togo D. West, Jr., Secretary of the Army, and United States Army Corps of Engineers (Conference with Legal Counsel - Existing Litigation; may be heard in closed session pursuant to Government Code Section 54956.9(c))

RECOMMENDATION(S)

It is recommended that your Board authorize the General Counsel to intervene and to take all actions necessary to protect Metropolitan's interests in the litigation entitled, Natural Resources Defense Council, Inc. and League for Coastal Protection v. Togo D. West, Jr., Secretary of the Army, and United States Army Corps of Engineers, United States Northern District Court Case Number 98-CIV-0560. To minimize costs, Metropolitan would participate in a litigation group which has budgeted approximately \$25,000 as the entire cost for the group intervention. Each participant would pay its proportional share, minimizing the cost to each.

EXECUTIVE SUMMARY

On February 11, 1998 the Natural Resources Defense Council (NRDC) and League for Coastal Protection (LCP) filed suit against the Secretary of the Army and the United States Army Corps of Engineers (Corps) alleging violations of the federal Endangered Species Act (ESA), the Clean Water Act (CWA), the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA) in the Corps' December 1996 issuance, reissuance, modification and implementation of the Nationwide Permit (NWP) Program under section 404 of the CWA.

The lawsuit alleges that the Corps was required to, but did not (1) undergo formal ESA section 7 consultation; (2) prepare an environmental impact statement (EIS) pursuant to NEPA; (3) demonstrate that NWP number 26 is limited to a discrete category of activities of a similar nature and that the environmental impacts from the entire NWP Program are minimal (CWA); and (4) provide adequate information to enable the public to evaluate the environmental impacts of the NWP Program (CWA and APA). This litigation challenges the validity of the Corps' entire NWP Program under which it has issued 41 NWPs allowing certain categories of activities to proceed, either immediately or after notice and a short waiting period, without requiring the filing of an individual permit application.

Metropolitan avoids wetlands whenever practicable. Many of Metropolitan's activities are routine and have insignificant effects on wetlands. However, some capital construction activities and other activities that are necessary to repair and maintain facilities require nationwide permits. All of the nationwide permits and quite possibly regional and local permits are at risk of being declared in violation of the ESA, the CWA, NEPA and the APA. Accordingly, staff recommends that the General Counsel be authorized to intervene in this case and to take all actions necessary to protect Metropolitan's interests.

DETAILED REPORT

Nationwide permits are regulatory mechanisms for authorizing the discharge of dredged or fill material into wetlands or other waters of the United States pursuant to section 404 of the Clean Water Act (CWA). In December 1996 the Army Corps of Engineers (Corps) published in the Federal Register its final notice of issuance, reissuance, and modification of its Nationwide Permit (NWP) Program under section 404 of the CWA. The NWP Program went into effect on February 11, 1997.

On February 11, 1998 the Natural Resources Defense Council (NRDC) and League for Coastal Protection (LCP) filed suit against the Secretary of the Army and the Corps alleging violations of the federal Endangered Species Act (ESA), the CWA, the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA) in the Corps' December 1996 issuance, reissuance, modification and implementation of the NWP Program.

This lawsuit calls in question the validity of the Corps' NWP Program under which it has issued 41 NWPs allowing certain categories of activities to proceed, either immediately or after notice and a short waiting period, without requiring the filing of an individual permit application. In addition, the Corps will shortly be proposing additional permits to replace the existing NWP number 26. All of these nationwide permits, and quite possibly regional and local permits, are at risk of being declared in violation of the ESA, the CWA, NEPA, and APA.

The primary claim in the NRDC and LCP complaint is that the Corps was required to, but failed to conduct, a formal ESA section 7 consultation with the U. S. Fish and Wildlife Service (USFWS) and the National Marine Fishery Service (NMFS) prior to issuing, reissuing, modifying, and implementing the NWP Program for wetlands altering activities under section 404. Section 7 of the ESA requires federal agencies to "insure that any action authorized, funded, or carried out...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of critical habitat. In support of this claim, NRDC and LCP cite various documents from USFWS, NMFS, the Department of Interior, and the U. S. Justice Department that they alleged state that the Corps should have completed a formal section 7 consultation on the NWP Program prior to its issuing, reissuance, modification, and implementation in December 1996.

In their complaint NRDC and LCP also contend that the Corps violated the CWA by failing to demonstrate that NWP number 26 is not limited to a discrete category of activities that are

similar in nature, and that the NWP Program will have no more than minimal adverse effects on either a cumulative or individual basis. The NRDC and LCP complaint also alleges that the issuance, reissuance, and modification of the NWP Program violates NEPA because an environmental impact statement should have been prepared for the entire NWP Program. Finally, NRDC and LCP contend that the Corps violated both the CWA and the APA because it failed to conduct an adequate public process to ensure a meaningful opportunity for the public to comment on the NWP Program. NRDC and LCP are requesting that the U.S. District Court issue a declaratory judgment that the Corps has violated ESA, CWA, NEPA, and APA; they have also requested that the Court issue a preliminary and/or permanent injunction mandating that the Corps bring the NWP Program into compliance with these acts.

This lawsuit calls into question the entire NWP Program and possibly could result in some form of an injunction against the use of some or all of the nationwide permits. NRDC and LCP will use its lawsuit as a vehicle to accommodate their ESA concerns either through a court decree or a settlement.

Metropolitan has a policy of avoiding wetlands whenever practicable. Moreover, many of Metropolitan's routine activities have insignificant effects on wetlands. However, some capital construction activities and other activities necessary to repair and maintain facilities require nationwide permits.

In the past Metropolitan has used, and will need to use in the future, NWPs 3 (maintenance), 6 (survey activities), 12 (utility line discharges), 13 (bank stabilization), 14 (road crossings), 18 (minor discharges), and 26 (headwaters and isolated water discharges). For example, Metropolitan has a continuing need for NWPs 12 and 26 for its Inland Feeder Project.

Other NWPs which might be used by Metropolitan include NWPs 4 (fish and wildlife harvesting devices and activities), 5 (scientific measurement devices), 7 (outfall structures), 11 (temporary recreational structures), 16 (return water from upland contained disposal areas), 19 (minor dredging), 20 (oil spill cleanup), 25 (structural discharges), 27 (wetland and riparian restoration and water activities), 33 (temporary construction, access, and dewatering), 38 (cleanup of hazardous and toxic waste) and D. (maintenance of existing flood control projects).

Any party which chooses to intervene in this lawsuit will have the standing to participate in the conduct of litigation and also participate in any settlement discussions. Accordingly, staff recommends that the General Counsel be authorized to intervene in this case and take all actions necessary to protect Metropolitan's interests. To minimize costs, Metropolitan would participate in a litigation group which has budgeted approximately \$25,000 as the entire cost for the group intervention. Five national trade associations, pipeline and electric utility companies, an electric utility transmission company, a large municipal water district, and an oil and gas exploration and development company also have expressed an interest in participating in the litigation group which will be represented by the Van Ness Feldman law firm.