

**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

December 28, 1992

To: Board of Directors (Water Problems Committee--Action)
 (Executive Committee--Action)
 (Legal and Claims Committee--Action)

From: General Manager

Subject: State Water Resources Control Board Draft Water Rights
 Decision 1630

Report

Proposing dramatic actions to begin the restoration of Bay/Delta-related fisheries, the State Water Resources Control Board (SWRCB) has released draft Water Rights Decision 1630 (D-1630). D-1630 would significantly revise the operations of the State Water Project (SWP) and federal Central Valley Project (CVP), require pulse-flow contributions from other water exporters and diverters, and require water exporters and diverters to financially contribute to a sizable mitigation fund.

The SWRCB is accepting written comments on the proposed decision until January 15 and will consider adoption on January 25, 28, or 29. If adopted, D-1630 would replace the existing D-1485 standards for the Bay/Delta and would remain in effect for an interim period of up to five years during which time long-term standards are developed and the Bay/Delta Oversight Council completes environmental documentation on Delta water transfer facility alternatives.

After a careful review, staff believes that overall the decision would improve the Bay/Delta environment in the interim period until appropriate long-term protection, including Delta facilities, are provided to protect all beneficial instream and out-of-stream uses. However, as currently structured, the SWRCB decision could result in unnecessary and unacceptable impacts on water users and the Southern California economy and the environment. With some modifications, D-1630 could be implemented in a manner that achieves virtually all of its fish and wildlife objectives while protecting the state economy and Southern California environment from unnecessary costs and impacts. It is recommended that Metropolitan support the implementation of a program to achieve the objectives of D-1630, if modifications are included as described in this letter. If the SWRCB chooses to implement the decision as drafted, then

Metropolitan should consider all legal options to protect the interests of the Southern California economy.

While it appears that D-1630 would provide interim benefits to fish and wildlife, the natural resources that depend on the Bay/Delta estuary cannot be adequately protected until additional facilities are constructed to move the intakes for project pumps upstream and out of the sensitive Delta ecosystem. Moreover, until appropriate facilities are constructed, not only will the level of environmental protection be less, the economic costs of protection measures will be considerably higher. It is imperative that D-1630 be regarded as only an interim decision and that progress be made as rapidly as possible toward a comprehensive Delta solution.

Recently, the staffs of the member agencies of the California Urban Water Agencies (CUWA) have pooled their resources to review draft D-1630 and, if possible, develop common north-south urban comments regarding the decision. The draft CUWA comments identify several key changes which would not significantly threaten the achievement of the environmental recovery objectives of D-1630. Moreover, if implemented, these changes would help avoid higher-than-necessary economic costs and assure that the decision actually results in a fair balance between instream and out-of-stream uses that is currently only an assumption in the proposed water rights decision. The draft CUWA comments include the following major points:

Balanced Water Use. To assure the balance of water use upon which the draft decision is based, CUWA recommends that the SWRCB include a ceiling or "cap" on project supply impacts similar to that included in Title XXXIV of P.L. 102-575. (The Central Valley Project Improvement Act generally limits CVP supply impacts for the purpose of the Act to 0.8 million acre-feet (MAF) annually and to 0.6 MAF in certain shortage years). CUWA proposes that D-1630 include a cap such that total supply impacts on all affected projects compared to available supplies under D-1485 be no more than 1.1 MAF during any single year (including CVP losses resulting from P.L. 102-575). Such a cap would, in effect, dedicate 1.1 MAF of water primarily to fish and wildlife purposes, but protect existing water users against greater supply losses. Also, CUWA proposes that the relative responsibilities between the SWP and CVP for meeting the additional requirements of D-1630 be distributed at 29 percent to the SWP and 71 percent to the CVP, as was assumed in the water supply impact studies and balancing process for the draft decision. If, as a result of changes in the Coordinated Operations Agreement or other factors, the potential relative

supply losses of these two projects differ significantly from the division cited above, then the SWRCB must reconsider D-1630 with respect to the environmental, economic and social impacts.

Use of Funds. During years when additional water is required to meet environmental requirements, CUWA recommends that a portion of the \$300 million five-year mitigation fund created by D-1630 be used to purchase, on a voluntary basis, any additional environmental water needed. This revision would assure that the proposed impact cap would not interfere with the environmental objectives of D-1630.

Access to Water Transfers. To assure adequate access to a diversified water market, the SWRCB should provide virtually automatic approvals of transfers within the D-1630 requirements so long as a proposed transfer is otherwise consistent with state law. In addition, D-1630 should include variances in certain requirements, if necessary, to facilitate voluntary transfers from water-abundant areas upstream of the Delta to water-short areas downstream.

Fund Management. The draft CUWA comments strongly recommend the creation of an advisory committee including representatives of urban and agricultural water interests and environmental interests to oversee expenditures of the mitigation and monitoring funds.

Responsible Parties. CUWA argues that if balance and fairness is to be achieved, the group of responsible parties should be as broad as practicable. Accordingly, CUWA recommends that all water users who divert at a peak rate of 100 cubic feet per second (cfs) or more should be included immediately in actions to implement the decision. Further, as soon as possible, consideration should be given to including all parties who divert at a peak rate of 10 cfs or more.

Mandatory BMPs. While the CUWA comments do not oppose requiring universal participation in the urban water conservation Best Management Practices (BMP) process, they recommend that this provision be implemented through the existing California Urban Water Conservation Council. CUWA further argues for comparable significant conservation efforts in agricultural areas.

Metropolitan staff have been closely involved in the development of these proposed CUWA comments and agree that such changes are essential if the SWRCB decision is to effectively achieve its goals. Coordinated comments from CUWA could prove to be extremely important and valuable since some of the State Water

Contractors members, specifically the agricultural agencies, are opposed to many of the provisions in D-1630 that Metropolitan may support, and a coordinated CUWA effort could enhance chances for key revisions that are needed. Staff will continue to work with these agencies to develop comments on issues of common interest.

Staff is also developing written comments to be submitted independent of CUWA on draft D-1630 which specify revisions which we believe are necessary for a balanced decision and for Metropolitan to maintain a reliable water supply while at the same time protecting its legal position. In addition to the main comments included in CUWA's response, Metropolitan will provide the following comments: (1) A provision should be included in the decision which defines a process for immediate and aggressive action by the State to develop a comprehensive Delta solution including appropriate Delta transfer facilities. (2) The SWRCB is open to legal challenges under the California Environmental Quality Act (CEQA) unless the key changes described in the comments are made which would help mitigate any potentially significant environmental impacts of reduced supplies in our service area. (3) Just as the decision credits CVP contractors for payments to the federal Restoration Fund and does not require double payments to the State mitigation fund, Metropolitan and other non-CVP contractors who contribute to the federal fund pursuant to P.L. 102-575 should receive similar credits against contributions that would otherwise be required to the State fund. Detailed line-by-line comments will also be provided to the SWRCB by staff.

Should the SWRCB fail to make necessary changes to draft D-1630 which are necessary for Metropolitan's support, a number of litigation options are available. Litigation by one or more parties regarding D-1630 is a virtual certainty and Metropolitan should preserve its options to participate in any such litigation. Metropolitan could seek to intervene in cases filed by other parties that raise issues of importance. However, intervention is subject to permission of the court and Metropolitan's request could be denied. In addition, an intervening party is not allowed to expand the scope of the litigation. Alternatively, staff has identified at least three potential causes of action which Metropolitan could assert in an action filed on its own behalf. This action could assert the following: (1) the SWRCB must prepare an EIR along with its decision which would consider more comprehensive solutions to Delta problems; (2) errors in the SWRCB's analysis of impacts have caused it to make an unbalanced decision; and (3) parties other than the State and federal water projects do not bear their fair share of responsibility for environmental mitigation. In

any litigation regarding D-1630, a party could seek injunctive relief. The litigation could be filed in the Los Angeles Superior Court, although in all likelihood it would be transferred to Sacramento. Ultimately, it is likely that all actions challenging D-1630 would be coordinated in a single comprehensive proceeding.

Staff is hopeful that the SWRCB will be receptive to the comments of Metropolitan and CUWA and that D-1630 will be modified so that its implementation can be supported. However, any litigation challenging D-1630 will have to be filed within 30 days of the SWRCB's decision to adopt D-1630, probably in late January. In order to preserve Metropolitan's legal options, it is recommended that your Board authorize the General Counsel, at the request of the General Manager, to take all steps necessary, including initiating litigation or intervening in actions filed by others, to protect Metropolitan's interests with respect to D-1630.

Staff will continue to keep your Board fully informed of developments regarding Water Rights Decision 1630.

The proposed action is not subject to the provisions of the California Environmental Quality Act (CEQA) in that it is not a "project" as defined by CEQA and its implementing guidelines.

Board Committee Assignments

This letter was referred to:

The Executive Committee for action because of its authority to study, advise, and make recommendations with regard to policies and procedures to be considered by the Board under Administrative Code Section 2417(e);

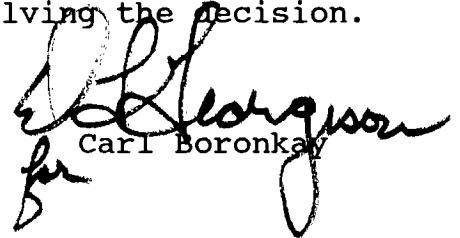
The Water Problems Committee for action because of its authority to study, advise and make recommendations with regard to policies, sources, and means of importing water required by the District, pursuant to Administrative Code Section 2481(a); and

The Legal and Claims Committee for action because of its authority to study, advise, and make recommendations with regard to litigation and claims brought about by or against the District, pursuant to Administrative Code Section 2461(a).

Recommendations

1. That Metropolitan support the implementation of a water rights decision by the State Water Resources Control Board to achieve the objectives of D-1630, if modifications to the draft decision are included as described in this letter, and alternatively, that Metropolitan take all necessary actions to protect its interests if necessary changes are not incorporated in draft D-1630.

2. That the Board authorize the General Counsel, at the request of the General Manager, to take all action to protect Metropolitan's interest with regard to D-1630, including initiating or participating in litigation involving the decision.



Carl Boronkay

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