APPROVED AS AMENDED *
by the Board of Directors of
The Metropolitan Water District
of Southern California
at its meeting held

NOV - 8 1994

EXECUTIVE SECRETARY

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

October 18, 1994

(Committee on Legislation--Information)

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

From: General Counsel

Subject: U.S. Supreme Court Review of Clean Water Act Criminal Liability Opinion in U.S. v. Weitzenhoff

At your September meeting, we reported on a recent Federal Appeals Court opinion (U.S. v. Weitzenhoff, __ F3d __, 9th Circuit, 1994 WL 411785) that significantly broadens criminal liability for violations of permits issued under the Federal Clean Water Act (33 U.S.C., 1251 ff). Those permits include waste water discharge permits and wetlands permits of the type which Metropolitan utilizes. The opinion may also extend to permits under other federal statutes such as the Clean Air Act (42 U.S.C., 7401 ff), and the Resources Conservation and Recovery Act (42 U.S.C., 6901 ff), which Metropolitan also utilizes.

The opinion allows imposition of criminal liability for exceeding the provisions of such permits even if the permit holder did not intend to exceed permit criteria and even if those criteria include complex variable parameters over extended periods of time. It represents the first judicial interpretation of a 1987 amendment to the Clean Water Act, which changed the key intent requirement for criminal liability from "willfully," to "knowingly." It also classifies permit violations as public welfare offenses which require only a general intent to do the permitted act, rather than a specific intent to violate the permit criteria.

Five appellate court judges wrote a strong dissent that Congress did not intend to impose criminal liability without specific intent to violate permit criteria. Indications are that the defendants, managers of a public sewage treatment plant in Honolulu, will ask the U.S. Supreme Court early in November to review the opinion and set it aside. That court allows only 30 days to file friend-of-the court briefs in support of such requests.

It appears prudent to provide such support of Supreme Court review because of the broad additional exposure to criminal liability the opinion would impose on Metropolitan staff for unintended permit violations. In light of the national impact of this opinion, we contemplate joining in a supporting brief of one of the national or regional water resource associations.

The court rules require that friend-of-the court briefs bring relevant matter to the court's attention which the parties to the case have not already noted. Consequently, a final decision on how to support the request for court review cannot be made easily until after the parties file a formal request and their supporting brief has become available. That will, however, need to be done before your Board's December meeting.

Recommendation

It is recommended that the General Counsel be authorized to support Supreme Court review of the Ninth Circuit Court of Appeals' opinion in United States v. Weitzenhoff, ___F3d___, 1994 WL 411785, filed August 3, 1993, amended August 8, 1994, in the manner he determines to best protect Metropolitan's interests.

N. Gregory Taylor

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*(In Recommendation, after the words "August 8, 1994", the following language was added:

and adopted a policy principle to support amending the Clean Water Act and Safe Drinking Water Act to include a "willful" standard in order to impose a criminal liability for violations of permits issued under those acts.