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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

*David E. Duff*  
EXECUTIVE SECRETARY

February 28, 1995

To: Board of Directors (Water Problems Committee--Action)  
(Committee on Legislation--Action)

From: General Manager

Subject: Legislative Policy Principles for the Federal Endangered  
Species Act

Report

**Legislative Background.** The federal Endangered Species Act (ESA) was required to be reauthorized in 1992. Since that time, Congress has authorized interim funding while discussions for modifying the ESA have continued. During the 103<sup>rd</sup> Congress, moderate bills were introduced in both the House (HR 2043-Studds) and Senate (S 921-Baucus/Chafee) and were supported by Metropolitan pursuant to the policy principles adopted in March 1993 by the Special Committee on Legislation (attached). More aggressive reforms were also proposed (HR 1490-Tauzin, HR 3978-Pombo).

Based on information obtained over the last several months, there is a strong possibility that significant reforms will be made to the ESA this year. Chair of the House Natural Resources Committee, Don Young (R-Alaska), has publicly stated that he will block funding for ESA implementation if major changes in its regulatory reach are not made. Chairman Young has created an ESA Task Force headed by Congressman Richard Pombo (R-Stockton) to draft a bill for his committee. In the Senate, Senator Kempthorne (R-Idaho) chairs a subcommittee with ESA jurisdiction and is also expected to propose significant reform.

Additionally, staff has participated with the Western Urban Water Coalition (WUWC) ESA Committee in its development of recommended legislative principles for the ESA reauthorization. The WUWC position paper includes many of Metropolitan's issues discussed below.

An informational ESA Issue Paper was discussed by the Legislative Committee at its February 14, 1995 meeting. At that time, staff was directed to return in March with a Board letter for action with updated policy principles. As result of Committee discussion, it is proposed that Metropolitan take proactive steps to seek inclusion of

voluntary natural systems management as a parallel, separate track from species protections. Metropolitan would seek additional provisions as discussed below.

#### **Primary Objective for ESA Reauthorization**

Inclusion of a voluntary natural systems management track in the ESA that exempts covered areas from species protections is fundamental to resolving ecological issues affecting Metropolitan's sources of supply and facilities planning and operations within its service area.

#### **Voluntary Participation in Natural Systems**

**Management.** Resolution of Bay-Delta and Colorado River endangered species situations will require a systems approach due to the number of species that are listed or are seriously declining. Because single species protections are piecemeal rather than comprehensive, they can create situations where protections are inadequate while the economic costs of listing are high. Additionally, the systems approach is consistent with a purpose of the ESA which is to "provide a means whereby the ecosystems upon which endangered and threatened species may be conserved..."

Staff are proposing that this natural systems approach would be voluntarily pursued, and to provide necessary incentives for more comprehensive protection, covered areas would not be subject to single species regulations. Ecosystems would need to be defined so that spatial areas and their functions and values could be identified. Guidance for determining levels of protection and sustainability would also need to be developed.

#### **Secondary Objectives for ESA Reauthorization**

Inclusion of the following principles in the ESA would also be beneficial to Metropolitan.

**Pre-listing Agreements.** While obtaining provisions for a natural systems management approach is Metropolitan's first priority, provisions for pre-listing agreements are necessary to support early conservation of declining species under the species-by-species approach. Because a portion of Metropolitan's capital improvement program is dependent upon a multi-species pre-listing agreement, it is necessary that one of these two approaches be provided for in law. There has been wide support for statutory authorization of binding pre-listing agreements for candidate endangered species, and language was included in the Baucus/Chafee bill (S 921) during the 103<sup>rd</sup> Congress.

**State Role.** State governments have limited control of the nature or timing of ESA decisions within their boundaries. Should a State assume implementation of the ESA, the Secretary is required to review the State's program on an annual basis. Thus, the ESA must be implemented in conformance with federal views regardless of administration. Inconsistencies between State and federal plans and policies have created significant dilemmas. To rectify this situation, consideration should be given to providing the States with greater leeway to uphold the basic purposes of the ESA.

**Mitigation Banking.** Mitigation banking has proven very useful in dealing with compensation for a variety of environmental impacts. In this context, banking allows large masses of real estate to be acquired with pre-established credits to be used as needed. This technique can be both ecologically and economically effective. Because a large area of land and/or water is set aside, it is much more likely to provide for the habitat needs of plants and animals from the bottom to the top of the food chain. In this respect, banking promotes the natural systems approach advocated above. However, concerns have been raised that mitigation banks and their ready availability of credits diminishes incentives to avoid and minimize impacts. Additionally, creation of habitat, sometimes associated with banking, has not always provided ecological values of natural habitats.

#### **Recommended Policy Principles**

Staff recommends that Metropolitan update its ESA policy principles and support legislative activities as follows:

- Proactively pursue inclusion of a voluntary natural systems management approach as an alternate track to single species protection.
- Continue to support binding pre-listing agreements that are subject only to review for adherence to terms at the time of any subsequent species listing.
- Support provisions for appropriate mitigation banking where it promotes conservation of natural systems.

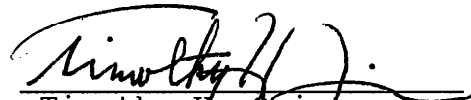
- Support provisions that would allow States greater leeway in the implementation of the ESA.
- Continue to support provisions that specify that decisions of a State regulatory body pursuant to State water law would prevail over requirements of the ESA.
- Continue to support a moderate approach to amending the ESA that improves its workability and ability to meet goals.

Recommendation

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

John R. Wodraska  
General Manager


Submitted by:

  
Timothy H. Quinn  
Deputy General Manager

KMK:cl

Attachment

Concur:

  
for John R. Wodraska  
General Manager

Attachment F

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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

January 8, 1993

(Executive Committee--Information)  
Board of Directors (Special Committee on Legislation--  
Information)  
General Manager

Federal Endangered Species Act Reauthorization Update

Report

The Federal Endangered Species Act (ESA) was required to be reauthorized in 1992. This was postponed until the present Congress with interim financing being provided.

Last February, the Board of Directors authorized staff to seek an amendment to the ESA to provide the United States Fish and Wildlife Service (USFWS) the flexibility to approve conservation plans for species in advance of listing and to commit to issue an incidental take permit upon any subsequent listing of those species. Such plans would insure that projects underway would not be halted upon a listing until a permit is obtained. This proposal has received good support. The provision will be included in some of the bills expected to be introduced in the new session of Congress. Continued work by staff is essential to insure that this is included in the bill ultimately enacted. (Exhibit A - Copy of February Board Letter; Exhibit B - MWD Legislative Proposal.)

Based upon recent meetings in Washington D.C. with Congressional staff, the USFWS and environmental representatives, the following is an update on the status of reauthorization legislation.

There is agreement that the ESA will be reauthorized during this session of Congress. However, it is anticipated that this will not occur until 1994. The environmental community agrees with this assessment although it will try to advance the date.

Neither of the Committees in the House or Senate which will hear this legislation have yet drafted a bill which will become a primary reauthorization vehicle. No estimate on when these bills will be introduced could be given.

January 8, 1993

It is presently anticipated that the bill ultimately enacted will reauthorize appropriations for the ESA and include provisions for assistance in development of plans to conserve species which are considered candidates for listing. This would be along the lines of H.R. 4045 introduced by Congressman Studts last session. There is virtually no support for extensive changes in the ESA and little likelihood of creating a coalition which could change this situation.

No specific environmental community position has been adopted. It strongly supports the reauthorization of the ESA essentially in its present form and will forcefully oppose any attempt to weaken its provisions.

The primary bill seeking to extensively weaken the ESA will probably be a reintroduction of H.R. 6134 introduced late last session by Representative Tauzin. The bill has been artfully drafted and on its face appears to be quite logical. The Tauzin Bill affects every essential provision of the ESA. In each instance, the Act would be substantially weakened. The result would be essentially the same as repealing the ESA. Given budget and time constraints placed upon the USFWS, any action by that agency would be paralyzed. Given the current political climate, it does not stand much of a chance of passage. (Exhibit C - Summary of H.R. 6134)

It is believed that the Tauzin Bill was drafted by a group headed by Mr. Zabo, an attorney in Washington D. C. He is currently seeking to create a coalition of interests to support the bill and is actively soliciting support in California. Mr. Zabo previously assembled the coalition seeking to weaken wetland legislation. The political base for wetland opposition is much broader than exists for endangered species matters.

Nothing in this letter is to imply that there are not substantial problems with the ESA. USFWS is grossly underfunded to properly administer the Act. There is a backlog of listing requests which will take years to handle. Procedurally, it is most difficult to get a permit for incidental take which causes inordinate delays and expense to project proponents. The standards for finding a species endangered need to be improved so that the determination is not left to the personal discretion of the reviewing USFWS personnel. Eventually, an overhaul of the Act will be required.

This may be precipitated by a series of lawsuits being brought by the environmental community to compel listings or designation of critical habitat. For example, the USFWS recently agreed in the settlement of a lawsuit brought by The Fund for Animals that by no later than September 30, 1996, it

January 8, 1993

will propose for listing all species that were officially categorized as C-1 as of September 1, 1992. Several hundred species are on the C-1 list. This probably will have a most adverse effect on the administration of the ESA in other areas. Another lawsuit brought by the Sierra Club Legal Defense Fund has required the USFWS to designate the critical habitat for the least Bell's vireo in Southern California. This designation is expected in the immediate future.

Metropolitan, given the political realities of support for the ESA, has sought to work proactively in making the process work for its projects in Southern California. Consequently, the Board decision was to work on the discrete measure to obtain authorization for pre-listing agreements. Northern California events eventually may cause a reevaluation of this position. However, from a realistic standpoint, proceedings under the ESA in that location are advanced to a point where changes in the Act may not affect the outcome.

A listing of ESA reauthorization issues, which the Board may wish to discuss and provide guidance to staff, is attached as Exhibit D.

#### Board Committee Assignments

This letter is referred for information to:

The Executive Committee because of its responsibility to study, advise and make recommendations with regard to legislation sponsored by Metropolitan or in any way affecting Metropolitan, pursuant to Administrative Code Section 2417 (a);

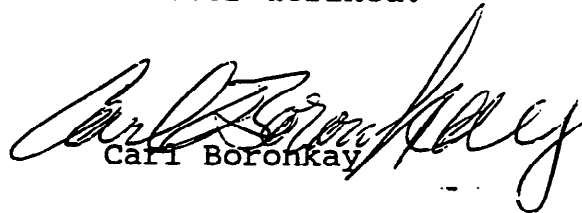
The Special Committee on Legislation because of its responsibility to review staff's recommendations for positions on legislation, pursuant to Administrative Code Section 2581(b).

January 8, 1993

Recommendation

**EXECUTIVE COMMITTEE AND SPECIAL COMMITTEE ON LEGISLATION FOR INFORMATION.**

This letter is for the information of the Board. Staff will continue to seek inclusion of the pre-listing provision in the ESA reauthorization bill. It will also continue to monitor the future developments, analyze legislation as it is introduced and develop recommendations for Board consideration when the situation is better defined.

  
Carl Boronkay

NGT/lf

Attachments



## Exhibit D

## Endangered Species Act Reauthorization Issues for Discussion

Issue: Should Metropolitan continue to support a limited amendment of the ESA as opposed to the Tauzin approach?

**Policy Options:**

1. Yes - Should continue to support those limited issues which appear to have a chance of adoption, will improve the operation of the Act and preserve the credibility of Metropolitan.
2. No - Policy of confrontation is the only way to obtain any significant change in ESA.

**Recommendation:** Continue to pursue option 1. - .

Issue: Should Metropolitan consider modifying its pre-listing legislative proposal to condition issuance of an incidental take permit for a species subsequently listed upon no changed circumstances at that time?

**Policy Options:**

1. Continue present position as changed circumstances requirement would constitute a penalty for being proactive.
2. Agree to inclusion of changed circumstances limitation provided it is severely limited in application.
3. Agree to inclusion of the limitation.

**Recommendation:** Continue to pursue option 1.

Issue: Should Metropolitan support inclusion of a provision in the ESA Reauthorization specifically endorsing multi-species conservation planning?

1. Yes - multi-species planning provides basis to comprehensively deal with an area rather than having to repeat the process for each species.
2. No - Raises a controversial issue which could detract from successfully obtaining pre-listing provision.
3. Yes - support if proposed by someone else.

**Recommendation:** Option 1.

Issue: Should Metropolitan support inclusion in the ESA Reauthorization of a provision that any decision of a State regulatory body pursuant to State Water Law shall prevail over the requirements of ESA?

1. Yes - this will prevent the imposition of conflicting requirements in trying to solve problems such as the Delta.
2. No - this is a controversial provision which will jeopardize the ability to obtain other amendments and has no chance of adoption.

**Recommendation:** Option 1.

Issue: Should Metropolitan support inclusion in the ESA Reauthorization of a provision that once a take permit has been issued for a particular species in a specific area no further permit for that area for that species need be obtained?

1. Yes - this will avoid any uncertainty about having to obtain a series of permits for the same area because of the reoccurrence of the species.
2. No - this is an area which should not be opened in this context.

**Recommendation:** Option 1.