



MWD

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

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Baron E. Duff
EXECUTIVE SECRETARY **9-10**

September 26, 1995

To: Board of Directors (Legislative Committee--Information)
From: General Manager
Subject: Reform of the Endangered Species Act: Review of HR 2275 (Young-Pombo)

Recommendation:

For information only.

John R. Wodraska
General Manager

Submitted by:

Debra C. Man

Debra C. Man, Chief
Planning & Resources

Concur:

for
[Signature]
John R. Wodraska
General Manager

KMK:cl

Attachment

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Executive Summary:

H.R. 2275 titled, "Endangered Species Conservation and Management Act of 1995," was introduced on September 7, 1995 by Congressman Young, Chair of the House Resources Committee, to both reform and reauthorize the federal Endangered Species Act (ESA) of 1973. The bill is extensive in its reform of the ESA and addresses topics including protection of property and water rights, redefinition of "incidental take" to exclude habitat modification, required identification of a conservation objective for each listed species that may reject species recovery and opt instead for practicable conservation or no action, codification of "a deal is a deal" principle providing clear certainty that an ESA agreement is final, and provision for federal cost-sharing of ESA costs. It also relaxes protections for marine species other than fish (mammals, seabirds, turtles) and appears to complicate U.S. efforts to limit importation of foreign protected species.

Metropolitan's interest in ESA reform focuses in part on provision of certainty for multi-species plans entered into in support of the capital improvement program, and has largely been met by the bill.

Metropolitan has also sought inclusion of provisions for voluntary natural systems management in support of solutions in the Bay Delta and Colorado River. However, such provisions have been included only in part due to House Resources Committee reservations regarding habitat concepts. Of greater concern are provisions for property compensation, water rights protection, and redefinition of "incidental take" to exclude habitat modification. These provisions are likely to undermine the ESA to the extent that stakeholders in the Bay-Delta and Colorado River no longer feel the need or have the ability to reach solutions due to potential litigation regarding interpretation of bill provisions. For these reasons, discussion is needed in the development of a strategy for Metropolitan's response to Endangered Species Act reform.

As this letter is prepared, new information indicates that moderate Republicans in the House are planning to introduce an alternate ESA bill that may exclude some of the more troubling provisions of H.R. 2275. An update on this will be provided orally.

Detailed Report:

Overview of Provisions. H.R. 2275 titled, "Endangered Species Conservation and Management Act of 1995", was introduced on September 7, 1995 by Congressman Young, Chair of the House Resources Committee, to both reform and reauthorize the federal Endangered Species Act (ESA) of 1973. The bill is extensive in its reform of the ESA and addresses topics including protection of property and water rights, redefinition of "incidental take" to exclude habitat modification, required identification of a conservation objective for each listed species that may reject species recovery and opt instead for practicable conservation or no action, codification of "a deal is a deal" principle providing clear certainty that an ESA agreement is final, and provisions for federal cost-sharing of ESA costs. It also relaxes protections for marine species other than fish (mammals, seabirds, turtles) and appears to complicate U.S. efforts to limit importation of foreign protected species. The attached table provides a more detailed review of the provisions.

General Perspectives. H.R. 2275 includes both constructive and highly controversial provisions. Industry groups praise provisions for peer review and State participation, and believe that removal of habitat protections will provide positive incentives for property owners to cooperate with ESA. Environmental groups are opposed to numerous provisions of the bill including loss of protections for habitat, marine species, and foreign species. Environmentalists condemn the property compensation provisions of the bill and the loss of automatic recovery goals for listed species.

Metropolitan's Perspective. From Metropolitan's perspective, the "certainty" provisions for approved single and multiple species conservation plans would ensure that the such plans would not be reopened to impose any new requirements for any listed, proposed, or candidate species. Simple grandfathering language is needed to ensure that such provisions are applied to Metropolitan's existing conservation plans developed in support of the capital improvement program.

However, other provisions of the bill could have significant adverse ramifications for resolution of issues in the Bay-Delta and Colorado River. Three key provisions consisting of: property compensation, water rights protection, and redefinition of incidental take to exclude protection of habitat, could substantially diminish the ability to reach conclusions in these areas because stakeholders would no longer have the incentive or feel the need or ability to reach solutions and/or because permits cannot be achieved due to inadequate federal funding and substantial delays. Further, Metropolitan's principle of voluntary natural systems management is only partially included in the bill.

Property Compensation. Specifically, the bill proposes to compensate non-federal property owners for loss of property value associated with restrictions arising from the ESA if any portion of a property is devalued by 20 percent or more. Further, property owners may request Federal acquisition of property, or portions thereof, if it is devalued more than 50 percent. This amounts to a new entitlement program that is in addition to Constitutional requirements prohibiting unreasonable takings. While proposed Department of Interior appropriation levels in the bill are roughly 2 to 2 1/2 times those of the early 1990's (assuming five percent inflation), funding is likely to be inadequate to fully administer this proposed entitlement program. As a consequence, property compensation provisions may result in conservation objectives that focus on practicable conservation largely on federal and other public lands volunteered by states thereby relieving stakeholders of ESA responsibilities. Alternatively, permitting in the Bay-Delta or Colorado River could be complicated and delayed by lack of federal funds resulting in the necessity for non-federal funds to address property compensations and close deals. Such possible outcomes would significantly remove incentives for many stakeholders to participate in resolution of ecological issues.

Water Rights Protections. Further, bill provisions appear to protect water rights from reallocation pursuant to ESA and to shield on-going, routine operation and maintenance of facilities from Section 7 consultation. The water rights provisions are likely to result in lengthy litigation, thereby delaying the ability to reach conclusions. In addition, the combination of these provisions may further remove the need or initiative for stakeholders to participate in Bay-Delta and Colorado River ecological negotiations to gain water supply reliability.

Incidental Take. The bill also proposes to redefine "incidental take" of listed species to include only direct harm to listed species. Habitat modification is excluded from this protection despite species needs for food, shelter, and reproduction. This redefinition is at odds with Metropolitan's principle of natural systems management that proposes to focus on habitat improvements in lieu of conservation measures for each listed species. Metropolitan favors the habitat-based approach because it addresses underlying causes of species declines while avoiding inter-species management complexities and conflicts, and also prevents against setting of possible unachievable species population targets.

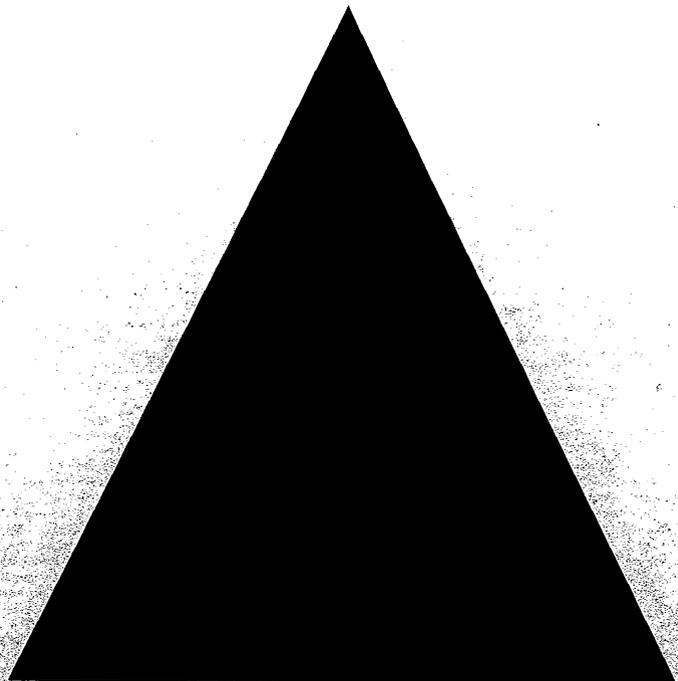
Voluntary Natural Systems Management. Metropolitan's principle of voluntary natural systems management is included in the bill only to a limited extent, due to House Resources Committee reservations with habitat protection concepts. The bill allows for management of habitat for species, but does not specify that such management would not be required to relate benefits to each species. As such, it is comparable to current requirements for conservation plans and is still species focused. However, its inclusion may not be meaningful, if other provisions of the legislation reduce the need or the ability to resolve ecological issues.

Need for Discussion. Discussion is needed in the development of Metropolitan's strategy for addressing ESA reform. An amendment is required to allow for certainty of multi-species agreements in support of the capital improvement program. More substantially, consideration is needed for voluntary natural systems management provisions in support of Bay-Delta and Colorado River solutions. Balanced against Metropolitan's needs are the controversial nature of the bill and the likelihood that other provisions of the bill will negate any gains made on the natural systems management side.

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