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The Metropolitan Water District
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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Dawn Chin
for EXECUTIVE SECRETARY

9-2

April 30, 1996

To: Board of Directors (Legal and Claims Committee--Information)
From: General Counsel *[Signature]*
Subject: Legal Department Report for April 1996

RECOMMENDATION(S)

For information only.

EXECUTIVE SUMMARY

This report discusses significant matters which the Legal Department was concerned with during the month of April.

DETAILED REPORT

I. Recent Developments of Interest to Metropolitan

Bennett v. Plenert

The United States Supreme Court granted plaintiffs' petition for writ of certiorari on March 25, 1996 and will review the decision of the Ninth Circuit Court of Appeals in this case. As reported earlier, the Ninth Circuit had held that parties regulated by the Endangered Species Act (ESA)--in this case, irrigators who asserted that a biological opinion under the ESA regarding operation of a reservoir had impaired their ability to receive their water supply from the reservoir--have no standing to sue the government over an action taken under that statute, even though their property or other economic rights may be harmed by that action. Petitions for certiorari are rarely granted; the Court's acceptance of the case is a hopeful sign that the Ninth Circuit's decision may be reversed. It is anticipated that the Association of California Agencies,

the State of California, other states and parties in the regulated community will file briefs in support of the plaintiffs.

II. Litigation to Which Metropolitan is a Party

Re-hearing in *San Bernardino Valley Audubon Society v. City of Moreno Valley, California Court of Appeal, Fourth District, Division Two (No. E015810)*

On April 15, 1996, the California Court of Appeal (Fourth District, Division Two) issued a very damaging published decision in the case of *San Bernardino Valley Audubon Society v. City of Moreno Valley* that will have highly significant ramifications for the administration of the California Endangered Species Act and the ability of the California Department of Fish and Game to permit incidental take for Metropolitan's activities and projects.

Specifically, the case focuses on City of Moreno Valley's approval of the Moreno Highlands development project which would impact the State endangered Stephen's Kangaroo rat (SKR). The City relied on the take authorization for SKR granted by the California Department of Fish and Game to a joint powers authority of city and county governments, the Riverside County Habitat Conservation Agency. The Audubon Society argued that granting of private development take violated the provisions of the California Endangered Species Act (CESA), and that CESA allows only management take for scientific purposes. The Court of Appeal (Court) upheld the take authorization granted to the Riverside County Habitat Conservation Agency, but only because of the Audubon Society's delay in initiating its legal action and the extreme prejudice resulting to the respondents.

However, the Court's opinion also includes extensive language that, but for Audubon Society's delay, the Court would have ruled that the Department of Fish and Game's take authorization for SKR was invalid. In other words, the Court has unnecessarily published "dicta" that incidental take of State-listed candidate, threatened, and endangered species is available only for educational, scientific, or scientific management purposes.

The respondents in this case are the City of Moreno Valley, California Department of Fish and Game, Southern California Edison Company, Metropolitan Water District, Southern California Gas Company, Riverside County Habitat Conservation Agency, et al., and San Diego Gas & Electric Company.

The Department of Fish and Game and Metropolitan will file a petition in the Court of Appeal requesting that the Court grant a rehearing to reconsider its dicta, or alternatively to modify its opinion by either deleting the dicta or depublishing the opinion. Although not legally binding on other courts, this decision raises significant concerns regarding future judicial interpretations of the validity of other take authorizations which are part of a Habitat Conservation Plan or Natural Community Conservation Plan.

Sebagh v. MWD

On April 9, 1996, Metropolitan was served with a Complaint for Damages by attorneys for two individuals and a business doing business as Paris-Go, a shoe and boot shop located on Sunset Boulevard in West Hollywood, California. The Complaint asserts damages arising from the break in the Santa Monica Feeder on August 12, 1994, which flooded or caused damage to several nearby businesses on Sunset Boulevard. All other claims have been settled except this claim, which asserts loss of business income, business inventory and emotional distress. It is likely that the Plaintiffs' insurance carrier will also join this action. Metropolitan has acknowledged responsibility for flood damage as a result of this incident, but thus far these Plaintiffs' demands have been unreasonable. The General Counsel's office is taking all steps to protect Metropolitan's interests.

III. Resource Matters**Colorado River Threatened and Endangered Species**

The Legal Department continued to work with the General Manager's staff on the development of a Lower Colorado River Basin Management plan for threatened, endangered and other sensitive species, which will also accommodate water and power needs. On April 15, 1996, the United States Bureau of Reclamation (Reclamation) published notice in the Federal Register of availability of its draft Biological Assessment of Operations, Maintenance, and Sensitive Species of the Lower Colorado River (Assessment). The draft document, required by Section 7 of the Endangered Species Act, assesses Reclamation's current and projected lower Colorado River operations and maintenance over the next five years and the potential effects of such operations and maintenance on sensitive species and their habitat. When completed, the Assessment will be submitted to the United States Fish and Wildlife Service for its biological opinion whether the proposed operations could jeopardize listed species. The Bureau has requested comments on the draft Assessment and has scheduled a May 15 public meeting on the document. Metropolitan staff is working with other interested agencies in California, Arizona and Nevada to submit comments on the draft.

Proposal to List Spring-Run Salmon as Endangered Species

The California Fish and Game Commission (Commission) denied a request (submitted by State Senator Tom Hayden) to list the Sacramento Spring-run salmon as an endangered species under the California Endangered Species Act (ESA) at its April 4, 1996 meeting. At that meeting, the Commission considered whether the request merited analysis by the Department of Fish and Game, which would then have had up to one year to determine whether to formally propose listing. The State Water Contractors, Department of Water Resources and others presented testimony indicating that Spring-run populations have been

relatively stable over the last several decades; that management measures such as the December 1994 Bay/Delta Agreement, the May 1995 Bay/Delta Water Quality Control Plan requirements and numerous habitat enhancement measures already have improved conditions for the Spring-run; and that there is some question whether the Spring-run qualify as a distinct species or subspecies of fish.

Water Rights Negotiations

A member of the Legal Department continues to work with the General Manager's staff on separate negotiations with upstream water users on the Sacramento and San Joaquin River systems. Tentative agreement has been reached on principles for settlement of water rights issues between export interests and the major water users on the San Joaquin River and its tributaries. In an April 10, 1996, letter, however, a number of environmental groups asserted that the tentative agreement is inconsistent with the December 1994 Bay/Delta Agreement. The settlement parties intend to meet with various interested groups over the next several weeks to explain the agreement and to discuss the science underlying existing flow requirements on the San Joaquin River.

Planning and Conservation League et al. v. Department of Water Resources and Central Coast Water Authority

This litigation, challenging the Monterey Amendments to the State Water Contract, is proceeding to a May 17, 1996 hearing on the CEQA-based causes of action as well as to a procedural hearing, on the same date, regarding the validation cause of action alleging that the Kern Water Bank properties cannot be transferred as part of the Monterey Amendment implementation. In regard to the validation cause of action, the Department and the Central Coast Water Authority intend to assert that, among other defects, petitioners failed to name Metropolitan and Kern County Water Agency as necessary and indispensable parties. Additionally, the Code of Civil Procedure requires that public notice of validation causes of action be given. Petitioners published a "revised summons" addressed to the public generally and, in an apparent effort to cure this party defect, also individually mailed it to the attention of the general managers of the various state water contractors, including Metropolitan and the Agency. Both Metropolitan and the Agency intend to make a special appearance for the purpose of asserting that they cannot be served through the "revised summons" and that it should be stricken by the court. This step will be of assistance in demonstrating that necessary and indispensable parties have not been served. Metropolitan will make the special appearance using the law firm of O'Melveny and Myers.

IV. Claims

Nothing to report.

V. Financing

Nothing to report.

VI. Legislative Matters

Nothing to report.