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 The Metropolitan Water District
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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Debra C. Man
 EXECUTIVE SECRETARY

June 25, 1996

To: Board of Directors (Committee on Legislation--Information)

From: General Manager *William H. Stone*

Submitted by: Debra C. Man, Chief
 Planning and Resources *Debra C. Man*

Subject: Update on Reauthorization of the Federal Endangered Species Act

RECOMMENDATION

For information only.

EXECUTIVE SUMMARY

The comprehensive proposals for reauthorization of the federal Endangered Species Act introduced in the House and Senate are not expected to receive further consideration in the 104th Congress. Discussions in both houses of Congress now target issues for which a bipartisan consensus may be reached. In the Senate, a bipartisan effort is underway to draft ESA legislation for introduction in the next few weeks. In the House of Representatives, two alternative efforts have been pursued. Congressman Saxton (R-NJ) has joined with several other Congressmen to prepare a moderate bill that may be introduced by the end of June 1996. A broader environmental consensus effort in the House may potentially propose ESA legislation by late summer 1996.

An informal ESA working group composed of moderate environmental, real estate, timber, and water interests represented by the Western Urban Water Coalition (WUWC) has developed a set of positive legislative proposals for reforming ESA that include a habitat-based, ecosystem alternative for conservation, termed natural systems conservation planning (NSCP). This set of proposals has been provided to both the Senate and House for consideration in ESA reauthorization efforts. Thus far, the Senate bipartisan effort has not addressed the NSCP proposal. The Saxton discussion draft bill in the House draws heavily from work of the informal ESA working group and does include the NSCP provisions.

Metropolitan has pursued inclusion of the NSCP in ESA legislation to provide an alternative to species by species conservation for application in the Bay-Delta and on the Colorado River. We have felt that this approach would greatly improve the ability to achieve a lasting solution in these two source water areas. Metropolitan has sent a letter to Senator Boxer requesting her support for inclusion of NSCP in the Senate bipartisan bill. While it is unclear that sufficient time remains in the 104th Congress to pass an ESA bill, inclusion of NSCP in the Senate bill would be beneficial to ESA reauthorization efforts in the 105th Congress.

DETAILED REPORT

At its March 1995 Board meeting, Metropolitan adopted policy principles to guide legislative activities for the federal ESA. The chief objective of these policy principles is to include a systems-based conservation alternative in the ESA for use at the discretion of regulated parties. Metropolitan's implementation strategy for these policy principles has focused on efforts with moderate coalitions. Metropolitan has worked with the Western Urban Water Coalition (WUWC) to develop an ESA policy statement. WUWC then joined in an informal ESA working group composed of moderate environmental, real estate, timber, and water interests (represented by the WUWC) to develop a set of positive legislative proposals for reforming ESA. This set of proposals includes a habitat-based, ecosystem alternative for conservation termed natural systems conservation planning (NSCP), consistent with Metropolitan's policy principles, and has been provided to both the Senate and House for consideration in ESA reauthorization efforts.

The comprehensive proposals for reauthorization of the federal Endangered Species Act introduced in the House and Senate, none of which contain a habitat-based ecosystem alternative, are not expected to receive further consideration in the 104th Congress. These proposals include S. 1364 introduced by Senator Kempthorne (R-ID) and HR 2275 introduced by Representatives Young (R-AK) and Pombo (R-CA). Discussions in both houses of Congress have moved toward issues over which a bipartisan consensus may be reached.

In the Senate, a bipartisan effort is underway to draft ESA legislation for introduction in the next few weeks. Participation in these discussions has included Senators Kempthorne, Reid (D-NV), Chafee (R-RI), and Baucus (D-MT). Senator Chafee, Chair of the Environment and Public Works Committee, has made ESA a primary focus of his committee at this time. Senator Barbara Boxer, while a member of the Senate Drinking Water, Fisheries and Wildlife Subcommittee, has not participated in the day-to-day ESA negotiations. The Senate discussions have addressed listings, recovery planning, and conservation plans, and there is ongoing discussion regarding section seven consultations. Draft Senate legislative language has been provided to interested parties for comment; Metropolitan has submitted comments through the Western Urban Water Coalition which has participated with the informal ESA working group. The Senate effort has not yet responded to the comments submitted to them, a number of which are quite substantial.

The Senate bipartisan effort has not addressed the NSCP proposal that is advocated by Metropolitan, the WUWC, and the ESA working group. NSCP is proposed as an alternative to species-by-species conservation that, in Metropolitan's view, is important to achieving lasting solutions in the Bay-Delta and on the Colorado River. Members of the WUWC have approached their legislators to request support of this provision. Metropolitan sent a letter to Senator Boxer requesting support with Senators Kempthorne and Reid (attached) for inclusion of NSCP in the Senate bill. While it is not clear that sufficient time remains for a bipartisan bill to be passed in the 104th Congress, inclusion of provisions for NSCP in the bill would be beneficial to future ESA reauthorization efforts in the 105th Congress.

In the House of Representatives, two alternative efforts are underway. Congressman Saxton (R-NJ) has joined with Congressmen Gilchrest (R-MD), Deal (D-GA) and Kingston (R-GA) to prepare moderate legislation that may be introduced by the end of June 1996. The Saxton discussion draft bill draws heavily from work of the informal ESA working group and includes provisions for NSCP. Moderate environmental support for the Saxton effort is beginning to wane, however, due largely to delays, election year politics, and criticisms from less moderate environmental interests. A broader environmental consensus effort in the House initiated by Speaker Gingrich is chaired by Representatives Pombo (R-CA) and Boehlert (R-NY), and may potentially propose focused ESA legislation by late summer 1996.

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Attachment

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ATTACHMENT

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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Office of the General Manager

June 13, 1996

Senator Barbara Boxer
United States Senate
Hart Senate Office Building
Room 112
Washington, D.C. 20510

Dear Senator Boxer:

Inclusion of Ecosystem Approach
in the Senate Bipartisan Endangered Species Act Bill

I am writing to request your assistance in a matter of great concern for California with respect to the reauthorization of the Endangered Species Act (ESA).

The Metropolitan Water District of Southern California (Metropolitan) is a member and has worked with the Western Urban Water Coalition (WUWC), an organization comprised of the major water supply utilities in the western states, to develop principles for the reform of the ESA. Other California members are the East Bay Municipal Utility District, San Francisco City and County Public Utility Commission, the Santa Clara Valley Water District, the Contra Costa Water District, and Central and West Basin Municipal Water District. Subsequently, WUWC worked with an informal group of environmental, real estate, and timber interests to develop legislative language for a consensus package of moderate and proactive ESA reforms. This legislative language was provided to the appropriate committees in the House and Senate.

I understand that an effort has been underway in the Drinking Water, Fisheries and Wildlife Subcommittee to draft a bipartisan bill to address needed ESA reforms. This Senate bipartisan effort for ESA reauthorization has addressed much of the consensus package, but has thus far failed to include the ecosystem approach for complying with the ESA. This ecosystem approach, termed natural systems conservation planning (NSCP), is critical to long-term resolution of biodiversity issues in the San Joaquin-Sacramento Bay-Delta and on the Colorado River.

The NSCP would be another tool, in addition to existing ones, for resolving species conservation issues in a comprehensive and lasting manner. NSCP would address ESA requirements by focusing conservation efforts on ecosystem habitats and functions, thereby correcting problems underlying conservation of all dependent species. Monitoring of such a

Senator Barbara Boxer

-2-

June 13, 1996


conservation program in a given area would focus on response of indicator and specialized species to restorations or maintenance of habitat and ecosystem functions. The purposes outlined in the existing ESA include "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved". NSCP would further the ability of the ESA to meet this purpose.

NSCP is an approach that would be selected at the discretion of the regulated party, and would require approval by ESA regulators. If an acceptable plan was developed, it would be paired with full exemptions from Sections 7 and 9 of the ESA for covered activities within the geographic scope of the approved plan. Where complexities and unknowns demand flexibility into the future, provisions for adaptive management within agreed-upon limits would be included. Unconditional "no surprises" would be provided to participants who abide by the terms of the plan. The legislative language for NSCP developed by the informal consensus group is enclosed.

We believe that NSCP should be a top priority for ESA reform. NSCP would allow water supply reliability to be achieved in exchange for significant contributions to restoration and maintenance of ecological integrity of source water systems. In California, a north-south urban coalition is working with other stakeholders in the Bay-Delta to address ESA requirements. NSCP is critical to the development of a comprehensive conservation plan that would forestall the need for additional species-by-species protections in the Bay-Delta, and thereby provide for reliable water supplies essential to California's economy. Further, NSCP would play a similar role for resolution of endangered species issues on the Colorado River.

We urgently need your support for NSCP. We would be most appreciative if you would communicate to Senator Kempthorne and to Senator Reid the importance of NSCP for California and request that it be included in the Senate bipartisan bill. Because the drafting effort is expected to be completed in the very near future, time is of the essence. Should you wish to discuss this, please do not hesitate to contact me at (213) 217-6211 or Mr. Brad Hiltcher at (202) 296-3551.

Very truly yours,


John R. Wodraska
General Manager

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Enclosure

ENCLOSURE

(From: ESA Working
Group Proposals
4/4/96 Draft)

3. Natural Systems Conservation Plans.

Add the following as subsection (b) of section 10 of the ESA and renumber existing subsections accordingly:

"(b)---Natural Systems Conservation Plans.

(1) General. Natural Systems Conservation Plans are intended to further the purposes of this Act by protecting, restoring, or enhancing identified ecosystems, natural communities, or habitat types upon which endangered, threatened, proposed, or candidate species depend within the area covered by the plan. The Secretary may, after entering into a planning agreement pursuant to paragraph (2), approve a Natural Systems Conservation Plan pursuant to paragraph (3).

(2) Planning Agreement. Upon the request of any person, the Secretary may, in cooperation with the state agency and after notice and an opportunity for public comment of not less than 60 days, enter into a planning agreement pertaining to the preparation of a Natural Systems Conservation Plan. Any planning agreement approved pursuant to this paragraph shall be based on existing information or on information that is reasonably available to the parties to the agreement. The Secretary and the other parties to the planning agreement may amend the agreement after notice and opportunity for public comment. Such planning agreement --

- (A) shall identify the participants in the planning effort, generally describe the planning process to be undertaken, and set forth a timetable for that process;
- (B) shall identify the geographic area to be encompassed by the plan, the particular ecosystems, natural communities, or habitat types within the plan area that are the focus of the plan, and the endangered, threatened, proposed or candidate species known or reasonably expected to occur in such ecosystems, natural communities, or habitat types in the plan area;
- (C) shall identify as "indicator species" those particular species (including one or more endangered, threatened, proposed, or candidate species) that collectively serve as general indicators of the well being of the ecosystems, natural communities, or habitat types that are the focus of the plan and the range of species typically associated therewith; such indicator species shall be chosen so as to minimize any additional species identified as specialized species under paragraph (D);

- (D) shall identify as a "specialized species" any endangered, threatened, proposed, and candidate species, any other species of comparable rarity or vulnerability according to the state natural heritage program or the relevant state fish and wildlife agency, and any species protected under a state endangered species law, that is known or reasonably expected to occur in the ecosystems, natural communities or habitat types that are the focus of the plan and that has ecological requirements not adequately met through the use of the indicator species;
- (E) shall generally describe the data needed to complete the plan and the measures to be undertaken to acquire such data; and
- (F) may authorize, under terms and conditions set forth in the planning agreement, and for a period not to exceed two years, the incidental taking of particular endangered or threatened species within the planning area provided that the Secretary determines that the terms and conditions ensure that such incidental taking --
 - (i) has a negligible impact on the prospects for survival or recovery of such species and
 - (ii) will not prejudice the timely completion of a Natural Systems Conservation Plan or preclude the consideration of any significant alternative thereto.

The Secretary may extend the authorization of incidental taking pursuant to this subparagraph for additional one year periods, but not to exceed a total of three additional years, provided that the Secretary determines that the participants in the planning process are making reasonable further progress toward the completion of a natural systems conservation plan in compliance with this subsection.

(3) Approval of Natural System Conservation Plan. Upon receipt of a request for approval of a Natural Systems Conservation Plan, the Secretary shall publish notice thereof in the Federal Register and invite public comment thereon for a period of not less than 60 days. The Secretary, in cooperation with the state agency, shall approve any such plan if he finds that the plan --

- (A) identifies, consistent with the planning agreement entered into pursuant to paragraph (2), the geographic area encompassed by the plan, the ecosystems, natural communities, or habitat types within the plan area that are the focus of the plan, and the endangered, threatened, proposed or candidate species known or reasonably expected to occur in such ecosystems, natural communities, or habitat

types in the plan area;

- (B) identifies those measures or actions to be undertaken to protect, restore, or enhance such ecosystems, natural communities, or habitat types within the plan area, a schedule for the implementation of such measures or actions, and an adequate funding source to ensure that such actions or measures are undertaken in accordance with such schedule;
- (C) describes the activities contemplated to be undertaken within the plan area with sufficient detail to allow the Secretary to evaluate the impact of such activities on the particular ecosystems, natural communities, or habitat types within the plan area that are the focus of the plan;
- (D) will not impede the accomplishment of the goals and objectives of any approved recovery plan for any endangered species or threatened species known or reasonably expected to occur in such ecosystems, natural communities, or habitat types in the plan area;
- (E) provides reasonable certainty that such ecosystems, natural communities, or habitat types will be maintained in the plan area throughout the life of the plan in sufficient quality, distribution, and extent to support within the plan area those species typically associated with such ecosystems, natural communities, or habitat types, including any endangered, threatened, proposed, or candidate species identified in the planning agreement under paragraph (2) as known or reasonably expected to occur in such ecosystems, natural communities, or habitat types within the plan area; the foregoing determination shall be based upon the effects of the plan on the indicator and specialized species identified in such planning agreement;
- (F) contains objective, measurable goals, the achievement of which will contribute significantly to the protection, restoration, or enhancement of such ecosystems, natural communities, or habitat types, time frames within which such goals are to be achieved, and provisions for monitoring and determining, quantitatively and qualitatively, progress in achieving such goals; and
- (G) provides for an adaptive management strategy that specifies actions, if any, to be taken in the event that the plan is not achieving its goals.

(4) Limits on Approval Authority. Notwithstanding paragraph (3), the Secretary shall disapprove a plan if he determines, based upon the best available scientific and commercial data, that implementation of the plan --

- (A) is likely to jeopardize the continued existence of any indicator or specialized species identified in the planning agreement; or
- (B) will cause any indicator or specialized species not endangered or threatened at the time of plan submission to become threatened or endangered.

The Secretary shall not, however, be required to disapprove a plan solely because the best available scientific and commercial data are insufficient to enable him to ascertain with reasonable certainty the likely effect of the plan upon any particular species, provided that such data are otherwise sufficient to make the determinations required by subparagraphs (D) and (E) of paragraph (3).

(5) Effects of Plan Approval. Notwithstanding sections 1533(d), 1538(a)(1)(B), and 1536 of this title, or any regulation promulgated to implement such sections --

- (A) any taking resulting from, or related to, an activity within the scope of a plan approved pursuant to this subsection shall not be considered to be a prohibited taking of the species concerned, whether or not such species is an indicator species, a specialized species, or is otherwise identified in the plan; and
- (B) the entry into a planning agreement, the approval of a plan, and any federal agency action authorizing, funding, or carrying out any activity within the scope of a plan approved pursuant to this subsection shall not be considered to be a federal agency action for purposes of the requirements of section 1536 of this title.

(6) Suspension and Revocation. Notwithstanding any other law, the Secretary shall not suspend or revoke the approval of any plan approved under this subsection unless the Secretary, in accordance with procedures specified in the plan, or in the absence of such procedures, the procedures generally applicable to the suspension or revocation of permits under this Act, determines that --

- (A) a party or parties to the plan, or their successors, have breached their obligations under the plan or under any agreement implementing such plan and has failed to cure such breach, and the effect of such breach is to diminish significantly the likelihood that the plan will achieve its goals within the time frames set forth in the plan; or
- (B) the plan no longer has the funding source specified in subparagraph (B) of paragraph (3) of this subsection to ensure that such measures or actions are undertaken in accordance with such subparagraph.

(7) Challenges to Planning Agreements and Natural System Conservation Plans. The Secretary's entry into a planning agreement, or any amendment thereto, under paragraph (2) and approval of a Natural System Conservation Plan under paragraph (3) shall be considered to be final agency actions for purposes of Chapter 7 of Title 5 of the United States Code. Notwithstanding any other law, no person may commence an action -

- (A) challenging the Secretary's entry into a planning agreement, any amendment to such planning agreement, the designation of indicator or specialized species in such planning agreement, the authorization of incidental taking in such planning agreement, or the approval of a natural systems conservation plan unless such person has --
 - (i) submitted written comments setting forth the basis for objecting to such action within the period allowed for public comment; and
 - (ii) filed the action in a United States District Court for the District within which the plan area occurs within 60 days of the Secretary's entry into a planning agreement, or amendment thereto, or approval of a Natural System Conservation Plan, as appropriate; or
- (B) with regard to any alleged noncompliance with a natural systems conservation plan --
 - (i) prior to sixty days after giving written notice of the alleged noncompliance to the Secretary and the party to the plan alleged to be in noncompliance; or
 - (ii) if the Secretary has commenced and is diligently prosecuting an action or proceeding
 - (I) in accordance with the plan to address a violation of the plan;
 - (II) to impose a penalty pursuant to this title; or
 - (III) in a court of the United States or a State to redress a violation of the plan.

The requirements of subsection (g)(2)(A)(i), (2)(B)(i) and (2)(C) of section 1540 of this title shall not apply to challenges brought pursuant to paragraph (7) of this subsection.

(8) NEPA Applicability. The entry into a planning agreement pursuant to paragraph (2) and the approval of a natural systems conservation plan pursuant to paragraph (3) shall be exempt from the requirements of the National Environmental Policy Act.

(9) Voluntary Nature of NSCP. Participation in any planning agreement entered into pursuant to section (b)(2) or natural systems conservation plan approved pursuant to section (b)(3) shall be voluntary. The rights and obligations under any such planning agreement or approved plan shall inure solely to the parties to the agreement and participants in the plan.

(10) No Effect on State or Local Land Use Planning Authority. Nothing herein shall be construed to reduce, enlarge, or affect in any way the land use or zoning authority of any state or local government entity.

(11) No Effect on Multi-Species or Habitat-Based Conservation Plans. Nothing in this section shall be construed to prohibit an applicant for an incidental take permit from submitting, or the Secretary from approving, a multi-species or habitat-based conservation plan under Section 10(a)(1)(A) of this Act.

4. Prelisting Agreements.

(a) amend section 4(b)(3)(C)(iii) to read as follows:

"(iii) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use of the authority under paragraph (7) to prevent significant risk to the well being of any such species. The Secretary may, with respect to any such species and in cooperation with the relevant state agency, enter into a pre-listing cooperative agreement with any non-federal person for any area under the ownership, jurisdiction, or control of such person, or with respect to the operation of any water project by such person, provided that the Secretary finds, after notice and an opportunity for public comment, that the agreement provides reasonable assurances that the species is likely to be maintained in sufficient numbers and extent in the area of the agreement, or the area subject to the influence of such water project, for the duration of the agreement so as to reduce the likelihood that the species will need to be listed as endangered or threatened during the term of the agreement.

(b) add a new subsection (h) to Section 10, as follows:

"(h) SPECIES SUBJECT TO PRE-LISTING AGREEMENTS. During the term of any agreement entered into pursuant to Section 4(b)(3)(C)(iii), any non-federal person who is a party to and in full compliance with such agreement shall, with respect to the incidental taking of any species subject to such agreement in the area