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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

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By the Board of Directors of
The Metropolitan Water District
of Southern California
at its meeting held

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Dawn Chen
EXECUTIVE SECRETARY

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June 28, 1996

To: Board of Directors (Legal and Claims Committee--Information)
From: General Counsel *A. Gregory Taylor*
Subject: Legal Department Report for June 1996

RECOMMENDATION(S)

For information only.

EXECUTIVE SUMMARY

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

DETAILED REPORT

I. Recent Developments of Interest to Metropolitan

Central Delta Water Agency et al. v. United States Bureau of the Interior et al.

This action was filed in Federal District Court in Sacramento on June 13, 1996 by the Central Delta Water Agency, Reclamation District No. 2072 and R.C. Farms--all water users in the San Francisco-San Joaquin Delta--against the Department of the Interior, Interior Secretary Babbitt, the State Water Resources Control Board (SWRCB) and its individual members and the Department of Water Resources (DWR). It seeks to invalidate SWRCB's Water Right Order No. 95-96 (WR 95-96), which made slight interim amendments to D-1485 to make that decision consistent with SWRCB's May 1995 Water Quality Control Plan. Plaintiffs allege that WR 95-96 was prepared without adequate CEQA compliance and that it violates their asserted "area of

origin" rights. This action could result in the State Water Project being subject to inconsistent regulatory requirements, with a negative impact on water supply. Perhaps more importantly, it also could result in judicial determinations regarding the scope and meaning of the various area of origin statutes.

Plaintiffs in this action also were plaintiffs in *County of San Joaquin et al. v. SWRCB*, an action filed in state court which raised virtually the same allegations and issues raised in this new matter. As reported to your Board in February 1996, that earlier state court action was dismissed under Code of Civil Procedure section 389, because of the inability of plaintiffs to join as a defendant the United States Bureau of Reclamation, who could not be joined because of its sovereign immunity. An appeal has been filed in that earlier case and is still pending. It appears that this new case is an attempt to litigate in federal court issues plaintiffs were unable to litigate in state court, or perhaps to influence the pending appeal.

Staff is reviewing the case, along with the State Water Contractors and the State and Federal defendants, to determine how best to respond.

II. Litigation to Which Metropolitan is a Party

San Bernardino Valley Audubon Society v. Metropolitan Water District of Southern California; California Department of Fish and Game; (RCHCA), Riverside County Superior Court, (Case Number 274844)

San Bernardino Valley Audubon Society (Audubon) has filed a legal challenge to the approval of the Lake Mathews Multiple-Species Habitat Conservation Plan/Natural Community Conservation Plan (Lake Mathews MSHCP/NCCP). Audubon's lawsuit alleges that the Department of Fish and Game (DFG) was not authorized to issue a species take permit under section 2081 of the California Endangered Species Act (CESA), and also that Metropolitan was required by the California Environmental Quality Act (CEQA) to have prepared a full EIR rather than a mitigated negative declaration for the Lake Mathews MSHCP/NCCP.

On June 7, 1996, the Superior Court denied Audubon's motion to either reduce what it is required to pay for Metropolitan's costs in preparing the Administrative Record, or to apportion it among all the parties. More importantly, after a June 14, 1996 hearing, the Riverside County Superior Court denied Audubon's summary judgment motion which sought to invalidate the Lake Mathews MSHCP/NCCP on the ground that section 2081 of CESA does not allow take for development purposes of threatened or endangered species. In making that argument, Audubon relied primarily on the dicta contained in the recent appellate court decision in *San Bernardino Valley Audubon Society v. City of Moreno Valley et al.* The Legal Department previously reported on that published decision in which the Court of Appeal upheld the take authorization granted to the Riverside County Habitat Conservation Agency (RCHCA) but only because of Audubon's delay in initiating its legal action and extreme prejudice resulting to both

RCHCA and Metropolitan. However, that opinion also includes extensive language that, but for Audubon's delay, the Court would have ruled that DFG's take authorization for the Stephens' kangaroo rat was invalid.

In denying Audubon's motion for summary judgment, the trial court judge focused on the fact that, unlike in the *Moreno Valley* case, this case involves an NCCP which expressly authorizes the incidental take of state-listed candidate, threatened and endangered species for development purposes. The trial on Audubon's CEQA claim is set for January 10, 1997.

Planning and Conservation League v. Department of Water Resources and Central Coast Water Authority, Sacramento Superior Court Case No. 95CS03216

On June 20, 1996, Judge Cecily Bond of the Sacramento Superior Court issued her decision on the CEQA-related causes of action in this challenge to the validity of the Monterey Amendment to the State Water Contract. The court denied the petition for writ of mandate and thus rejected petitioners' argument that the Monterey Amendment was invalid because CEQA had not been properly complied with. The court held that Department of Water Resources, and not Central Coast Water Agency, should have been the lead agency. However, it went on to hold that the designation of Central Coast as the lead agency was not prejudicial. The improper designation of Central Coast did not cause vital information to be omitted from the environmental review process and the environmental impact report was adequate.

The cross-complaint filed by San Bernardino Valley Municipal Water District on the validation cause of action still remains to be disposed of. It is assumed that there will be motions for reconsideration by the trial court and a probable subsequent appeal to the Court of Appeal.

III. Resource Matters

Hayden v. California Fish and Game Commission

On June 12, 1996, State Senator Tom Hayden, the Natural Defense Council and the Environmental Protection Information Center, Inc. filed the above action regarding the California Fish and Game Commission's (Commission) determination not to consider listing the Sacramento River spring-run salmon as an endangered species under the California Endangered Species Act (CESA). The complaint requests the court to order the Commission to consider listing the spring-run or, alternatively, to reconsider its decision.

Senator Hayden had petitioned the Commission to consider listing the spring-run in October 1995. If the Commission had done so, the Department of Fish and Game would have then had up to one year to decide whether to recommend that the Commission formally list the spring-run. Significantly, during that time the spring-run would have been a "candidate species", subject to take prohibitions under CESA. Because this could have had a significant impact on operation of the State Water Project, the State Water Contractors joined several other parties in urging that the evidence did not justify considering the listing petition at this time. On April 4, 1996, the Commission voted to reject the petition and, on May 6, 1996, issued findings in support of that decision. The Commission did direct its staff to develop a regulation requiring monitoring and status reports on the spring-run.

Staff is reviewing the petition, along with other State Water Contractor members, to determine whether it would be appropriate to intervene or take some other active role in the action.

SWRCB Water Rights Scoping Workshops

The State Water Resources Control Board (SWRCB) held a final workshop to scope issues involved in preparing an Environmental Impact Report for its upcoming water rights proceeding to allocate responsibility for meeting outflow and other requirements in its 1995 Water Quality Control Plan. Staff participated in preparation of comments on behalf of the State Water Contractors and in a joint presentation of export interests and San Joaquin River interests on the proposed agreement for allocating responsibilities for meeting the Vernalis flow requirements on the San Joaquin River.

San Joaquin River Principles Agreement

The agreement among export interests, including Metropolitan, and certain water users on the San Joaquin River regarding obligations to meet the SWRCB's Vernalis flow requirements has been signed by all parties. This agreement, if accepted by the SWRCB and other relevant regulatory bodies, would require the San Joaquin parties to provide flows at Vernalis which are substantially greater than recent historic flows and would deem those additional flows to be full compliance by the San Joaquin parties with their responsibilities to meet SWRCB flows. The agreement is more fully described in the General Manager's letter to the Board dated March 26, 1996, in which the General Manager sought authority to enter into the agreement. The agreement will now be the subject of open discussion and analysis with other parties interested in implementation of Bay/Delta flow requirements, including likely SWRCB proceedings.

California Electric Industry Restructuring Filings At FERC

Metropolitan filed motions to intervene, protest and consolidate in each of the three active dockets commenced at the Federal Energy Regulatory Commission (FERC) by Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company ("Companies"). The Companies have filed proposals to sell energy at market-based rates through a power exchange and to authorize conveyance of operational control of certain transmission facilities to an Independent System Operator. Additionally, the Companies filed a Petition for Declaratory Order, which would designate the transmission facilities to be operated by the ISO. Metropolitan argued that the Companies have not produced sufficient evidence for the requested relief, and suggested that FERC allow discovery and technical conferences to proceed so that such proposals are developed in a more collaborative process. Metropolitan also included focused critique on, and suggested to, changes to the Companies' proposals.

Metropolitan also filed comments at FERC responsive to a supplemental report submitted by Edison and San Diego on the issue of market power, the absence of which they must establish in order to obtain authority to sell power at market-based rates. Finally, Metropolitan filed brief Reply Comments at the California Public Utilities Commission (CPUC) on recent filings by other parties addressing the three referenced filings by the Companies, which were simultaneously filed at FERC and the CPUC. Metropolitan anticipates that both regulatory bodies will adhere to an aggressive schedule in their attempt to achieve commencement of restructuring of the electric utility industry by the date established by the CPUC, January 1, 1998.

IV. Claims

Metropolitan received a Government Code claim from the Joint Venture of Hyman /JWP West in connection with its construction of Expansion No. 1 at the Joseph Jensen Filtration Plant. Although the claim does not state a sum certain, the Joint Venture previously submitted an administrative claim for approximately \$15 million. This figure will likely increase if litigation is filed. The Government Code claim was received in the wake of lengthy, but as yet unproductive settlement negotiations between Metropolitan staff and contractor personnel. Several subcontractors have already commenced litigation against the general contractor.

V. Financing

Nothing to report.

VI. Legislative Matters

SB 900

A member of the Legal Department continued to work with the General Manager's Department to obtain stakeholder consensus on, and draft language for, SB 900 (Costa).

VII. Administrative Matters

Nothing to report.