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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA


*Debra C. Man*  
for EXECUTIVE SECRETARY

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June 25, 1996

**To:** Board of Directors (Engineering and Operations Committee--Action)

**From:** General Manager 

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

**Subject:** Authority for the General Manager to Enter into an Implementation Agreement for Metropolitan's Participation in the Orange County Natural Community Conservation Plan

## RECOMMENDATIONS

It is recommended that your Board certify that it has reviewed and considered the information contained in the Final Environmental Impact Report/Environmental Impact Statement (EIR/EIS) prepared by the County of Orange and the U.S. Fish and Wildlife Service for the Natural Community Conservation Plan/Habitat Conservation Plan (NCCP/HCP) for the Central/Coastal Subregion of Orange County and, as responsible agency, adopt the attached findings made by the County of Orange regarding impacts and mitigation measures.

It is recommended that your Board authorize the General Manager to enter into an Implementation Agreement and related documents, in the form approved by the General Counsel, for Metropolitan's participation in the NCCP/HCP for the Central/Coastal Subregion of Orange County.

## PROJECT DESCRIPTION

In 1991, the California Legislature enacted the Natural Community Conservation Planning (NCCP) Act establishing a program for long-term, regional protection of entire habitat communities. The program's objective was to provide an alternative to single-species, project-by project mitigation that had occurred previously under existing state and federal endangered species acts. As an early participant in the NCCP program, the County of Orange proposed two areas for development of Habitat Conservation Plans for conservation of coastal sage scrub, which is habitat for the now federally-listed California gnatcatcher and several other sensitive species. The northern most area, the Central and Coastal Subregion planning area, contained about 325 square miles, incorporating the central portion of Orange County from the coastline

inland to Riverside County. This area blanketed Metropolitan's planned facilities in Orange County for the Central Pool Augmentation Project (CPA Project), as well as existing facilities including the Allen-McColloch Pipeline, the Santiago Lateral, the Orange and East Orange County Feeders, and the San Joaquin Reservoir.

Establishment of the Central and Coastal NCCP had the potential to greatly impact Metropolitan's ability to carry out routine operations and maintenance activities for existing facilities and the ability to implement facility improvements. Recognizing this, and that the program could also benefit Metropolitan by providing needed mitigation for the CPA Project, Metropolitan joined with the County and several other agencies and major landowners to develop the Central and Coastal NCCP. Metropolitan's participation in the development of the NCCP has resulted in a program that ensures existing operations and maintenance activities can continue in areas of sensitive habitat while providing needed mitigation for future infrastructure improvements.

The final Central and Coastal NCCP, nationally recognized as a landmark conservation program, preserves 39,000 acres of natural habitat within the original planning area. The program also provides an endowment and system of mitigation fees to fund comprehensive long-term management of the reserve. For Metropolitan and the other participating agencies and landowners, the NCCP provides permits for impacts to the California gnatcatcher and 6 other species currently listed under the federal and state Endangered Species Acts. The NCCP also includes pre-listing authorizations for 36 other sensitive species that occur within the plan area, thereby allowing take of any of these species if and when they become listed in the future. For Metropolitan, the NCCP will provide mitigation and take permits for habitat and sensitive species impacts in Orange County resulting from the approved CPA Project and from the proposed parallel of the Allen-McColloch Pipeline, assurance that operation and maintenance of existing facilities within the reserve are permitted activities, and assurance that any necessary emergency operations activities can proceed without restriction.

The U.S. Fish and Wildlife Service, upon execution of the agreement, will issue a Section 10(a) permit under the federal Endangered Species Act for the take of federally listed species and the California Department of Fish and Game will issue a Section 2081 Management Authorization under the California Fish and Game Code and under Section 2835 of the NCCP Act for the take of state listed species for impacts within Orange County. Through execution of the agreement, Metropolitan's participation in the Central and Coastal NCCP will require a contribution of \$1 million to the management endowment fund through four annual payments of \$250,000 beginning in April of 1997. Authorization to provide this funding through an increase in Appropriation 556 for the CPA Project will be requested at that time.

The General Counsel previously reported to your Board in his monthly reports for April and May 1996 the recent Court of Appeal decision in San Bernardino Audubon Society, etc., et. al. v. City of Moreno Valley, etc., et.al., Case Number E 015810, 96 Daily Journal D.A.R. 4369 (April 15, 1996) which upheld a take authorization granted to the Riverside Habitat

Conservation Agency because of the Audubon Society's delay in initiating legal action and the resulting extreme prejudice to the respondents. However, the Court of Appeal opinion also includes extensive language that, but for this delay, the Court would have ruled that the Department of Fish and Game's take authorization was invalid as violating provisions of the California Fish and Game Code which it construed to allow only management take of State-listed endangered, threatened, and candidate species for scientific purposes. As this assertion has broad implications for the validity of several mitigation plans Metropolitan is pursuing, the General Counsel is participating in efforts to have the California Supreme Court overrule this decision. Although not legally binding on other courts, this decision raises significant concerns regarding future judicial interpretation of the NCCP/HCP's validity. The General Manager and General Counsel will only execute the Implementation Agreement and related documents when they are satisfied that Metropolitan's funding commitments are adequately protected.

**BENEFIT:**

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Assures that operation and maintenance of Metropolitan's existing facilities are authorized activities within the reserve,

Authorizes emergency operations within the reserve without restrictions,

Assures that construction of the CPA Project and the parallel of the Allen McColloch Pipeline are permitted within the reserve, and

Authorizes take of sensitive species habitat for the CPA Project, the parallel of the Allen McColloch Pipeline, and/or other projects inside and outside of the reserve.

**ALTERNATIVES TO PROPOSED ACTION**

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Alternatives to Metropolitan's participation in the Central and Coastal NCCP are to 1) not seek federal and state take authorizations for endangered species or 2) seek federal and state take authorizations independently.

The alternative of not seeking take authorizations could seriously compromise Metropolitan's ability to conduct essential operations and maintenance activities for existing facilities in Orange County. Furthermore, the ability to implement future infrastructure improvements such as the CPA Project and the parallel of the Allen McColloch Pipeline would not be possible because of the presence of protected species.

In general, the alternative of seeking take authorizations independently from the Central and Coastal NCCP would require several years to complete and likely result in far greater costs. However, the existence of the NCCP reserve in the same area as Metropolitan's facilities may obligate Metropolitan's eventual participation regardless, although operation and maintenance activities within the reserve may be significantly compromised. Also, establishment

of the reserve without acknowledgment of Metropolitan's facility plans may preclude the construction of the CPA Project and the parallel of the Allen McColloch Pipeline in their proposed alignments.

### **CEQA COMPLIANCE / ENVIRONMENTAL DOCUMENTATION**

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Metropolitan's participation in the Central and Coastal NCCP was described in the Final Environmental Impact Report (EIR) for the CPA Project and is contained as a mitigation element in the adopted Mitigation Monitoring and Reporting Program for that project. Your Board certified the Final EIR and approved the CPA Project at its meeting in August 1995.

In addition to the documentation prepared under the California Environmental Quality Act (CEQA) for the CPA, the County of Orange and the U.S. Fish and Wildlife Service, as the state and federal lead agencies for the NCCP, prepared a joint EIR/EIS (Environmental Impact Statement) for the program. The Orange County Board of Supervisors certified the Final EIR/EIS and approved the Central/Coastal NCCP at its April 16, 1996 meeting. In their written findings, the County determined that the Central/Coastal NCCP would not result in any significant adverse impacts.

As a Responsible Agency under CEQA and participant in the Central/Coastal NCCP, Metropolitan's Board must review and consider the information contained in the Final EIR/EIS and adopt findings prior to authorizing its participation in the program's implementation. The Executive Summary to the EIR/EIS and proposed findings are attached. A full copy of the Final EIR/EIS and related documents is available for review in the Executive Secretary's office, including the Draft EIR/EIS, comments on the Draft EIR/EIS and responses to those comments, the NCCP/HCP, the Implementation Agreement, and the Mitigation and Implementation Agreement Monitoring Program.

ACK:rbs

Attachment

aknccp/board