



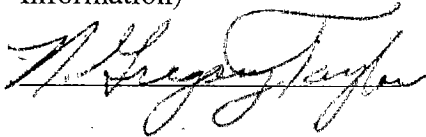
MWD

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

9-11

June 18, 1997

To: Board of Directors (Legal & Claims Committee -- Information)
(Water Planning & Resources Committee -- Information)

From: General Counsel 

Subject: Status of Regulations to Implement Amendments to the Federal Magnuson Fishery Conservation and Management Act to Include Provisions for Identification and Protection of Essential Fish Habitat

RECOMMENDATION:

For information only.

EXECUTIVE SUMMARY:

The National Marine Fisheries Service (NMFS) is engaged in a rule-making process to finalize regulations implementing 1996 amendments to the Magnuson Fishery Conservation and Management Act (MFCMA). These amendments added requirements for NMFS and regional commercial Fishery Management Councils (FMCs) to identify and protect "essential fish habitat" (EFH) for fish species managed under the MFCMA (see Board Letter 9-17, February 25, 1997, attached).

This new program could add costly and potentially controversial new consultation and reporting requirements on federal agencies, which could delay implementation of water-related infrastructure projects. Metropolitan staff, through the Bay-Delta Urban Coalition (Urban Coalition), Western Urban Water Coalition (WUWC), and California Urban Water Agencies (CUWA), is tracking this rule-making process and will provide formal comments to NMFS on its proposed regulations.

DETAILED REPORT:

Please refer to Board Letter 9-17, February 25, 1997 (attached) for a detailed report on the substance of the Magnuson Act amendments which create the new Essential Fish Habitat (EFH) requirements.

NMFS released draft regulations to implement the EFH amendments on April 23, 1997. The original deadline for comments to the draft regulations was May 23, 1997.

Through a coalition including timber, hydro-power, and development interests, the Urban Coalition and WUWC is supporting legal, policy, and strategic analysis by the law firm of Perkins Coie, which represents the Urban Coalition and WUWC in Washington, D.C. on several federal legislative and regulatory matters. The Urban Coalition's and WUWC's representatives were successful in securing an extension of the deadline for comments to July 8, 1997.

Though not yet completed, the Urban Coalition's and WUWC's comments likely will contain the following main points:

1. The regulations' probable impact on non-fishing interests goes beyond the intent of the EFH amendments;
2. The regulations' definition of EFH is overly broad and goes beyond legislative intent; and
3. The consultation processes set forth in the regulations is overly burdensome and in effect create enforceable decisions rather than advisory opinions (as intended in the legislation).

In conjunction with the Urban Coalition and WUWC, Metropolitan staff will continue to follow this rule-making process and promote implementation strategies that protect Metropolitan's interests regarding Central Valley water issues and the CALFED Bay-Delta Program.

In addition, Metropolitan is monitoring EFH implementation on a technical basis through California Urban Water Agencies (CUWA), whose Board recently approved modest funding for technical consulting services on the EFH issue. Many stakeholders are interested in the relationship between ocean-fishing and implementation of a comprehensive Bay-Delta plan.



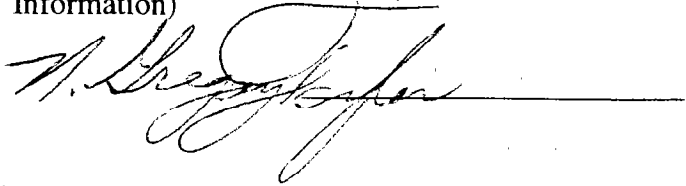
MWD

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

9-17

February 25, 1997

To: Board of Directors (Legal & Claims Committee -- Information)
(Water Planning & Resources Committee -- Information)

From: General Counsel 

Subject: Amendments to the federal Magnuson Fishery Conservation and Management Act to Include Provisions for Identification and Protection of Essential Fish Habitat

RECOMMENDATION:

For information only.

EXECUTIVE SUMMARY:

The 1996 Sustainable Fisheries Act, enacted on October 11, 1996, amended the federal Magnuson Fishery Conservation and Management Act (MFCMA) to add provisions requiring the National Marine Fishery Service (NMFS) and various existing regional commercial Fishery Management Councils (FMCs) to identify and protect "essential fish habitat" (EFH) for fish species managed under the MFCMA. The amendments further expand the influence of commercial fishing interests from the ocean environment to inland waters which provide spawning and rearing habitat for anadromous fish. These amendments require that whenever federal or state approval is required for any activity, including a "non-fishing related" activity, that may adversely effect EFH, a consultation similar to the consultation required under the federal Endangered Species Act (ESA), must be conducted with NMFS. If it is determined that the activity would adversely effect EFH, recommendations will be made on measures that the agency can take to conserve the habitat. While the amendments do not give NMFS and the FMCs the power to stop activities that can result in loss of fish spawning or feeding grounds, they do provide an added potentially time-consuming procedural hurdle before federal or state agencies can take or approve actions that can destroy these areas.

The amendments require NMFS to issue EFH regulation Guidelines within six months of the enactment of the Act to assist the FMCs in identifying EFH and incorporating EFH provisions into the fishery management plans (FMPs). A public comment period will be provided when the NMFS proposed EFH Guidelines are released.

DETAILED REPORT:

The 1996 Sustainable Fisheries Act, Pub.L.No. 104-297, 110 stat. 3559 (1996), amends the MFCMA to add provisions for identifying and protecting EFH for fish species managed under the MFCMA. The amendments define "essential fish habitat" as "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity." EFH can include coastal areas and oceans as well as rivers used by anadromous fish. These amendments require that whenever federal or state approval is required for any activity, including a "non-fishing related" activity, that directly or indirectly may adversely effect EFH, consultation similar to the consultation required under the federal ESA must be conducted. However, unlike the ESA, the amendments' consultation requirement is not limited to fish species that have been listed as threatened or endangered. A recently released framework that NMFS plans to use to develop its Guidelines indicates that non-fishing related activities include water diversions, timber harvesting activities, oil and gas explorations or other development activities. If it is determined that the activity will adversely effect EFH, recommendations will be made on measures that the agency can take to conserve the habitat. While the amendments do not give NMFS and various FMCs the power to stop activities that can result in loss of fish spawning or feeding grounds, they do provide an added potentially time-consuming procedural hurdle before federal or state agencies can take or approve actions that can adversely impact these areas. However, while the amendments will place an additional requirement on the Cal-Fed process for a long term solution for the Bay-Delta, the required consultation may be accomplished in coordination with and within the regulatory time frames of other applicable federal and state statutes such as the National Environmental Policy Act, the California Environmental Quality Act, and the federal and state ESAs.

The amendments require NMFS to issue EFH regulatory Guidelines within six months to assist FMCs in describing and identifying EFH in FMPs and in considering actions to assure the conservation enhancement of such habitat. After consulting with participants in a fishery and other interested parties, NMFS is required to provide each FMC with recommendations and information regarding EFH for each fishery under that council's authority to assist the council in identifying EFH, adverse effects on EFH and, actions that should be considered to ensure conservation and enhancement of the habitat.

There are three separate consultation or coordination processes as set forth under the amendments. First, federal agencies have a statutory duty to consult with NMFS on actions that may adversely effect EFH. Second, NMFS is mandated to provide EFH recommendations on both federal and state actions that could adversely effect EFH once the agency receives information on those activities. Third, FMCs are authorized to comment on federal and state activities that may effect EFH and must comment on activities likely to substantially effect habitat of anadromous fish.

NMFS will provide a public comment period when its proposed EFH Guidelines are issued.