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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

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

From: *for* General Manager

General Counsel

Edward J. Meo III

W. Kerang Taylor

Submitted by: Raymond E. Corley
Executive Legislative Representative

Ray E. Corley

Subject: Update on New Amendments to the California Endangered Species Act

RECOMMENDATION(S)

For information only.

EXECUTIVE SUMMARY

On September 26, 1997 Governor Wilson signed into law six bills amending the California Endangered Species Act (CESA). Three of these bills, SB 879, AB 21 and SB 231 contain important amendments to CESA relating to the authorization of incidental and accidental take of threatened, endangered and candidate species. The most significant of these bills is SB 879 (Johnston - Stockton) which amends CESA to expressly authorize the California Department and Fish and Game (DFG) to issue a permit for the take of endangered, threatened, or candidate species so long as the take is incidental to otherwise lawful activities; the impacts of the take are minimized and fully mitigated; and the permit applicant provides adequate funding to implement the necessary mitigation measures.

AB 21 (Olberg - Victorville) amends the Endangered Species Act to provide that no further authorization or approval is required for the take of an endangered, threatened or candidate species by a person who has already obtained authorization under the Federal Endangered Species Act.

SB 231 (Costa - Fresno) removes the current penalties for the accidental take of endangered, threatened and candidate species resulting from inadvertent or ordinary negligent acts that occur during otherwise lawful agricultural activities. It also requires DFG to adopt regulations authorizing the incidental take of endangered, threatened and candidate species incidental to routine, ongoing agricultural activities.

Three other CESA bills were signed into law. AB 1280 (Bustamante - Fresno) authorizes \$200,000 from the Environmental License Plate Fund for DFG to develop and implement a recovery strategy pilot program for the Greater Sandhill crane. AB 605 (Ashburn - Bakersfield) adds 30 days to DFG's current evaluation period for reviewing petitions to add or remove species from the endangered or threatened lists. AB 1505 (Ashburn) requires DFG to better coordinate with federal officials with regard to species preservation in the vicinity of the Isabella Dam and Reservoir in Kern County.

DETAILED REPORT

On September 26, 1997 Governor Wilson signed into law six bills amending the California Environmental Species Act (CESA). Three of these bills, SB 879, AB 21 and SB 231 contain important amendments to CESA relating to the authorization of the incidental take of threatened, endangered and candidate species. The most significant of these bills is SB 879 (Johnston) which amends CESA to expressly authorize the California Department and Fish and Game (DFG) to issue a permit for the take of endangered, threatened, or candidate species so long as the take is incidental to otherwise lawful activities; the impacts of the take are minimized and fully mitigated; and the permit applicant provides adequate funding to implement the necessary mitigation measures. The take permit cannot be issued if DFG finds, based on the best scientific and other information, that the continued existence of the species would be in jeopardy. The required mitigation cannot be more than that which is roughly proportional in extent to the impact of the authorized taking. Where various mitigation measures are available, the required measures must maintain the permit applicant's objectives to the greatest extent possible and those measures must be capable of successful implementation. These limitations on mitigation clarify that the State continues to have the obligation to provide for the recovery of endangered and threatened species and cannot shift that responsibility to others simply because they need an incidental take permit.

The legislation also is important because of its provisions that "grandfather" all take permits that were issued prior to April 10, 1997. The legislation also provisionally grandfathers any take permit applied for before April 10, 1997 but which is actually issued by the DFG between April 10, 1997 and January 1, 1998 so long as DFG certifies that the permit meets the conditions set forth in the legislation.

SB 879 is a compromise that resulted from intense negotiations among Senator Johnston and other key legislators, the Sierra Club, the National Audubon Society and the Planning and Conservation League representing the environmental community, and representatives of the regulated community and the Wilson Administration. Metropolitan staff were heavily involved in these negotiations. The April 10, 1997 ruling of the First Appellate District Court of Appeal in Planning and Conservation League, et al. v. the Department of Fish and Game (PCL) was an important catalyst in bringing about this compromise. In PCL the Court held that DFG lacked authority under CESA to issue permits allowing the "incidental take" of candidate, threatened, and endangered species. The Court also indicated that it was for the legislative rather than the judicial branch to provide an appropriate remedy. That ruling was superseded by a grant of review by the California Supreme Court. However, the Supreme Court would not have issued its ruling until at least the Spring of 1998. The uncertainty of what the Supreme Court would hold gave the negotiating parties an additional incentive to strike a

reasonable compromise which expressly authorizes incidental take for future projects and also "grandfathers" all previous take authorizations.

We previously reported that a trial court in the Riverside County had ruled that the incidental take authorization for Metropolitan's Lake Mathews MSHCP/NCCP was invalid because DFG lacked express incidental take authority under CESA. The legislation's grandfather provision will retroactively validate the Lake Mathews incidental take authorization and will make the trial court ruling and pending appeal moot.

AB 21 (Olberg) will streamline the incidental take permit process by eliminating "double review" of species listed under both state and federal law. It provides that no state permit is needed if an incidental take authorization has already been obtained under the federal Endangered Species Act and the DFG Director determines that issuance of the federal permit is consistent with CESA. Metropolitan supported this bill and assisted Assemblyman Olberg and the bill sponsor during the legislative process. Forty-three species are jointly listed under both laws and currently require two separate permits.

SB 231 (Costa) is aimed specifically at agricultural activities. It requires DFG to adopt regulations specifying the terms under which endangered, threatened, or candidate species may be taken incidental to routine, ongoing agricultural activities. The regulations would act as a general authorization for the activities so that farmers and ranchers would not need individual incidental take permits, so long as they comply with the regulations. The regulations are to be supported by best available scientific information and include management practices that, to the maximum extent practicable, avoid and minimize the taking of covered species, while encouraging the enhancement of habitat. However, the management practices shall not compromise the economics of agricultural operations. The bill has a separate section providing that the accidental take of species resulting from inadvertent or ordinary negligent acts that occur in the course of otherwise lawful routine and ongoing agricultural activities, is not unlawful. SB 231 directly benefits only farmers and ranchers. However, the enactment of this bill may justify future legislation which provides for the immunity of the entire regulated community from civil and criminal liability for accidental take of listed species.

Three other CESA bills were signed into law. These bills are of less overall importance than SB 879, AB 21 and SB 231, but nonetheless are significant.

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