



● **Communications and Legislation Committee**

January 10, 2000 Committee Meeting

C&L8b

Subject

Issue Papers

Description



For the last two months this Committee has been reviewing substantive amendments to Board-adopted legislative policy principles. To continue this discussion, two new issue papers are submitted for the Committee's consideration in January: **Wetlands** and **California Endangered Species Act**. Also attached is a revised **Watershed Management** issue paper that incorporates concerns expressed by the Committee at last month's meeting.

Policy

New policy.

Fiscal Impact

No fiscal impact.

 _____ Adán Ortega, Jr. Acting Manager of the Outreach Group	12/13/99 Date
 _____ Ronald R. Jester General Manager	12/28/99 Date

Attachment 1 – Wetlands Issue Paper

Attachment 2 – California Endangered Species Act Issue Paper

Attachment 3 – Revised Watershed Management Issue Paper

WETLANDS

Issue

Wetlands and other regulated waters such as ephemeral streams are well differentiated in the arid West, while such differences are significantly less marked in other parts of the Nation. The Clean Water Act applies to all waters of the United States, with section 404 governing permits for discharge of fill or dredged material into these waters. Section 404 has grown through regulation to provide protection to wetlands. These regulations have tended to treat wetlands and other waters in a similar manner, thereby resulting in loss of regulatory streamlining that is often unwarranted in the arid West. Legislation that clearly distinguishes the intent of section 404 with respect to regulatory streamlining for non-wetland waters could provide significant regulatory relief in the West without diminishing efforts to protect and enhance wetlands. This could provide significant cost and time savings to Metropolitan and its member agencies for capital improvements and operation and maintenance activities.

Analysis

The importance of the functions and values of wetlands have been well recognized over the last 20 years, and are protected from filling along with other waters pursuant to section 404 of the federal Clean Water Act. Prior to this, however, the extent of wetlands in the United States had been substantially diminished with California estimated to have lost over 90% of its original wetlands. As a result of concerns that wetlands acreage continues to decrease at a significant rate despite federal policies of 'no net loss', federal regulations have become increasingly stringent and regulatory streamlining has been substantially restricted for all waters. Further, judicial decisions have contributed to a patchwork of uneven and inconsistent protections. As a result of the general dissatisfaction on all sides with this situation, the urgency for legislative solutions has been heightened. This presents an opportunity to seek legislative clarification that would help to reinstate regulatory streamlining for non-wetland waters.

Metropolitan Position

Metropolitan has adopted legislative policy principles addressing wetlands issues as follows:

- Continue avoidance of wetlands whenever practicable and compensate for impacts.
- Support acceptance of and enter into wetlands mitigation banking agreements to expedite project implementation.
- Seek legislative exemptions from wetlands permitting for certain activities (maintenance of water conveyances, construction or maintenance of access roads, operation and maintenance of reservoirs) and areas (groundwater recharge spreading areas constructed on uplands). Obtain long-term (5 to 10 years) blanket permits for reasonably anticipated problem areas.

Recommended Policy Principle

It is recommended that Metropolitan adopt an additional wetlands legislative policy principle to address this issue:

Seek to distinguish wetlands from other non-wetland waters such as ephemeral streams in order to effect improved regulatory streamlining for less sensitive aquatic resources.

CALIFORNIA ENDANGERED SPECIES ACT

Issue

The California Fish and Game Code identifies 37 “fully protected species” and includes explicit provisions prohibiting any permitting for take of these species. The Lower Colorado River Multiple Species Conservation Plan (MSCP) is under preparation pursuant to the federal and California Endangered Species Acts and is addressing a number of species including two fish (humpback sucker and Colorado River squawfish) and three bird species (American peregrine falcon, California black rail, and Yuma clapper rail) that are included on the California list of fully protected species. The MSCP is being developed by the states of Arizona, California, and Nevada, in cooperation with federal agencies and other stakeholders. Upon completion of the MSCP, there will be in place a habitat conservation plan, which will create and conserve habitat areas along the Colorado River, and there will be incidental take permits for water and power users. Current planning also proposes to create nursery areas adjacent to the Colorado River to propagate 50,000 humpback suckers for release by 2001 to Lake Havasu where Metropolitan’s intake is located. Because California law forbids any permitting to allow take of these two fish and three bird species, it restricts the ability of the interstate planning group to develop an effective MSCP that would benefit these and other species found on the Lower Colorado River. It also limits the ability of California agencies to receive incidental take permits in the same manner as agencies from Arizona and Nevada.

Analysis

The California Fish and Game Code provides fully protected status to 37 species including fish, birds, mammals, reptiles and amphibians. This protection was provided to nearly all of these species prior to the enactment of the the California Endangered Species Act in 1984; one marine mammal was added to the list recently. Unlike the code provisions for fully protected species, the California Endangered Species Act allows for incidental take of species listed as threatened or endangered. Further, there is no federal counterpart to the fully protected species provisions. There appears to be no existing rationale for the level of protection required for the set of fully protected species.

The California Department of Fish and Game has advised non-federal parties that they must avoid take of any fully protected species in carrying out projects. Because the State code defines “take” to mean hunt, pursue, catch, capture, or kill or attempt to do so, the California Department of Fish and Game has indicated that in many circumstances even live trapping and relocation of animals and fish to avoid mortality is expressly prohibited. The Department of Fish and Game further indicates that this statutory inflexibility has been problematic for projects at the San Francisco International Airport, the San Francisco Bay marshlands, projects in Riverside County and the San Joaquin Valley, the Klamath Basin, and the Sacramento-San Joaquin delta.

Metropolitan Position

Metropolitan has adopted legislative policy principles addressing the California Endangered Species Act (CESA) as follows:

- Support protection of declining species on a comprehensive, multiple species basis.
- Support continuation of pre-listing provisions provided in Section 2800 of the Fish and Game Code.
- Seek legislative clarification of the code to ensure validity of take granted in connection with water supply facilities.

- Support provisions decriminalizing accidental take of protected species that occurs in the course of otherwise lawful activities.
- Proactively pursue inclusion of a voluntary natural systems management approach as an alternative track to single species protection.
- Support provisions for appropriate mitigation banking where it promotes conservation of natural systems.
- Support provisions for improved linkages between CESA and the California Environmental Quality Act to streamline regulatory processes.
- Support general provisions for public agencies to foster responsible management of the State's ecological resources in a manner consistent with the agencies' primary mission(s) in lieu of proposed provisions that would differentiate mitigation responsibilities for project impacts between State and non-State public agencies and the private sector.
- Support provisions that would require case-by-case application of CESA protections to candidate species for the one-year period each species is reviewed to determine whether listing is warranted.
- Continue to support a moderate approach to amending the CESA that improves its workability and ability to meet goals.

Recommended Policy Principles

It is recommended that Metropolitan adopt an additional CESA legislative policy principle to address the issue of fully protected species:

Seek legislation allowing incidental take of currently fully protected species in order to facilitate effective conservation plans that benefit numerous species.

WATERSHED MANAGEMENT *(REVISED)*

Background

In recent years, the watershed management approach has been incorporated into programs at the federal, state and local level for the purposes of achieving water quality improvement, ecosystem restoration, water management, flood management and other objectives. For example, at the federal level, the Clean Water Action Plan, initiated in 1998, includes a number of initiatives that reorganize existing restoration and water quality protection efforts on a watershed basis. At the state level, the State Water Resources Control Board and the Regional Water Quality Control Boards have developed a Watershed Management Initiative, for the purpose of addressing water quality problems and implementing water quality improvement strategies on a watershed basis. The CALFED Bay-Delta Program includes a Watershed Management Program to provide technical and financial support for the implementation of watershed projects that are consistent with CALFED's goals and objectives. In addition, many local watershed groups have formed throughout the state in an attempt to address watershed restoration needs in a comprehensive and collaborative manner. The increased attention to utilizing the watershed management approach has triggered an interest in state legislation establishing a watershed management framework.

Analysis

Although currently there is not a comprehensive state-wide legislative framework specifically authorizing or mandating the development of watershed management programs, existing laws and regulations do not preclude the implementation of the watershed approach. As many watershed management activities move forward, concerns are being raised regarding existing state and local government authorities for developing, approving and/or implementing watershed management plans. Furthermore, many groups involved in local watershed activities have expressed the need for a steady source of funding for watershed management planning and implementation.

The Water Bond, AB 1584 by Assemblyman Machado (D-Linden) and Senator Costa (D-Fresno), if approved by the voters in March 2000, will provide substantial funding for watershed management projects. Specifically, the water bond will provide \$468 million in funding for watershed protection activities, including statewide funding for the development and implementation of watershed management plans, watershed education, river protection and habitat restoration, and funding for specific watershed projects throughout the state, such as the Southern California Integrated Watershed Program for the Santa Ana Watershed. In addition, the Non-point Source Pollution Control Program will provide \$100 million in funding for non-point source control projects, including projects that are consistent with local watershed management plans.

There are currently two bills pending before the State Legislature that address state-wide watershed management issues. AB 730 (Dickerson, R-Redding), is a two-year spot bill sponsored by the Regional Council of Rural Counties (RCRC). As introduced, AB 730 would require the Secretary of the Resources Agency to carry out a watershed management and rehabilitation program, and would appropriate an unspecified amount of funds to the Resources Agency to implement the program. RCRC and the Sierra Nevada Alliance are developing draft legislative language to potentially amend AB 730, and are circulating the draft to interested parties for review. The RCRC and Sierra Nevada Alliance draft legislative language proposes water user fees and hydroelectric surcharges to provide funds for a watershed management funding program administered by the Resources Agency. The proposal also

addresses required elements for local watershed management plans and authorities for developing and implementing watershed plans.

SB 1088 (Poochigian, R-Fresno), which is currently pending in the Senate Environmental Quality Committee, would create the California Watershed Planning Act. The purpose of the bill is to establish a process for the development and adoption or rejection of watershed management plans by local and/or state agencies. The proposed process would take into account the jurisdictional boundaries and authorities of local agencies and the rights of private land owners.

Metropolitan Position

Metropolitan's Board of Directors adopted the following legislative policy principles addressing watershed management programs and Metropolitan's involvement in watershed management programs on January 10, 1995:

1. Support federal and state legislative and regulatory proposals to establish watershed management programs that are consistent with the following principles:
 - State-level implementation of watershed management laws and regulations;
 - Development of watershed management programs which recognize local primacy in basin management and land-use controls, and which facilitate cooperative working relationships among all watershed stakeholders;
 - Development of watershed management plans based on site-specific conditions, needs and objectives;
 - Development of watershed management plans which consider all water resources management objectives for the watershed, including source water quality protection and/or improvement, water supply availability, water supply storage, flood and erosion control, and aquatic ecosystem protection objectives;
 - Inclusion of public drinking water suppliers in the group of stakeholders involved in the development of watershed management plans;
 - Development of watershed management plans which address all discharges within a particular watershed, and consider their relative impacts on the watershed in the implementation of control measures; and
 - Development of watershed management plans which ensure no interference with the authority of the state to manage allocation of water supplies within their jurisdiction.
2. Support Metropolitan's involvement as a stakeholder in watershed management planning efforts for imported sources of supply (i.e., the Bay-Delta watershed and the multi-state Colorado River watershed), in order to work in cooperation with other interests throughout the watersheds, and ensure consideration of drinking water quality and water supply availability objectives.
3. Support Metropolitan's involvement as a stakeholder working cooperatively with others on watershed management planning efforts impacting the District's locally stored water supplies.
4. Support Metropolitan's coordination with Member Agencies to cooperatively participate in watershed management planning efforts impacting local sources of water supply, and to provide assistance to local primacy agencies.

Recommended Policy Principles

In addition to the above-listed principles, it is recommended that Metropolitan adopt the following additional principles on watershed management to address funding mechanisms for watershed management programs and accountability to those providing watershed funding:

- Support public financing for watershed management projects that provide broad public benefits, including environmental and water quality improvements.
- ~~Support funding mechanisms for watershed management projects that are based on the beneficiaries-pay principle and that directly link tangible benefits of watershed programs to those entities expected to provide funding. Funding for watershed management projects that provide water quality improvements should be equitably allocated among entities responsible for water quality degradation and project beneficiaries. The determination of beneficiaries of watershed management programs must be based on proven scientific information.~~
- Support funding mechanisms for watershed management projects that allocate costs to project beneficiaries only if (1) costs are also fairly allocated among entities responsible for water quality degradation, (2) the level of benefits project beneficiaries are expected to receive is commensurate with costs allocated to them, (3) the determination of watershed management program benefits is based on proven scientific information, and (4) the project beneficiaries agree with the cost allocation.
- Oppose watershed management funding mechanisms that impose mandatory water user fees or target water supply exporters, without agreements from those users.
- Watershed management programs should provide accountability to those entities, including the public, that provide funding. Accountable watershed management funding programs should include justification that funding levels represent actual needs, well-defined criteria for the distribution of funds, oversight for the funding program, and specific monitoring and reporting requirements for those entities receiving funding.