

● **Board of Directors**
Communications and Legislation Committee

October 11, 2005 Board Meeting

8-2

Subject

Adopt revised policy principles regarding federal Endangered Species Act legislation

Description

Metropolitan's Board last revised its policy principles on federal Endangered Species Act legislation in February 1997 ([Attachment 1](#)). Those principles called for Metropolitan to support legislation that endorsed:

- Voluntary natural systems management as an alternative to single species protection;
- Limited review for prelisting agreements;
- Mitigation banking that would promote conservation of natural systems;
- Allowing states greater authority in federal ESA implementation;
- The preeminence of state water law over provisions of the federal ESA;
- A moderate approach to amending the ESA to improve its workability and ability to meet its goals; and
- Statutory authorization for "No Surprises" compliance agreements.

Based on changes that have occurred in ESA interpretation and implementation by federal agencies over the last eight years, staff has developed a revised set of policy principles for board consideration ([Attachment 2](#)). Historically, Metropolitan has supported moderate efforts to amend the ESA, supporting changes that make the impact of the statute more predictable without impacting the fundamental goal of the Act to protect threatened and endangered species and their habitat. The proposed revised principles seek to support legislative, administrative, and judicial activities that will:

- Continue to support a moderate approach to amending the federal ESA that improves its workability and ability to meet its goals;
- Continue to support mechanisms that protect threatened and endangered species, their habitat, and ultimate recovery;
- Encourage development of regulations to provide consistent procedures to guide federal agency decision-making, particularly with respect to critical habitat designations and related economic analyses;
- Codify or otherwise strengthen regulatory incentives to non-federal landowners such as no surprises, safe harbor agreements, pre-listing agreements, candidate conservation agreements, and multi-species Habitat Conservation Plans;
- Encourage the provision of adequate funding for federal agencies to meet their obligations under cooperative recovery plans and making such agreements enforceable against all parties;
- Revise the critical habitat designation process in a manner consistent with the principles set forth in [Attachment 2](#);
- Clarify and resolve issues relating to recent judicial interpretations of the ESA; and
- Clarify the scope of indirect effects analyses required for federal ESA permits.

This matter was presented to the Board in September as an information item and was discussed at the Communications and Legislation Committee meeting. Staff recommends adoption of the revised policy principles and will continue to keep the Board apprised of the status of the federal legislation as the session progresses.

Policy

Board-adopted Federal Endangered Species Act Policy (last amended February 11, 1997)

California Environmental Quality Act (CEQA)

CEQA determination for Option #1:

The proposed action is not defined as a project under CEQA because the proposed action involves continuing administrative activities such as general policy and procedure making (Section 15378(b)(2) of the State CEQA Guidelines). In addition, where it can be seen with certainty that there is no possibility that the proposed action in question may have a significant effect on the environment, the proposed action is not subject to CEQA (Section 15061(b)(3) of the State CEQA Guidelines).

The CEQA determination is: Determine that the proposed action is not subject to the provisions of CEQA pursuant to Sections 15378(b)(2) and 15061(b)(3) of the State CEQA Guidelines.

CEQA determination for Option #2:

None required

Board Options/Fiscal Impacts

Option #1

Adopt the CEQA determination and the attached Federal Endangered Species Act Revised Policy.

Fiscal Impact: None

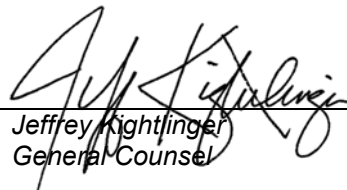
Option #2

Do not adopt the attached Federal Endangered Species Act Revised Policy

Fiscal Impact: None

Staff Recommendation

Option #1


Jeffrey Lightfinger
General Counsel

9/20/2005
Date


Dennis B. Underwood
CEO/General Manager

9/20/2005
Date

Attachment 1 – ESA Policy Principles

Attachment 2 – Proposed Revised Policy

ESA POLICY PRINCIPLES

Issue: Federal Endangered Species Act.

Policy Adopted: Update Metropolitan's federal ESA policy principles and support legislative activities as follows:

- Voluntary Natural Systems Management: Proactively pursue inclusion of a voluntary natural systems management approach as an alternate track to single species protection.
- Pre-listing: Continue to support binding pre-listing agreements that are subject only to review for adherence to terms at the time of any subsequent species listing.
- Mitigation Banking: Support provisions for appropriate mitigation banking where it promotes conservation of natural systems.
- State Role: Support provisions that would allow states greater leeway in the implementation of the federal ESA.
- State Water Law: Continue to support provisions that specify that decisions of a state regulatory body pursuant to State water law would prevail over requirements of the federal ESA.
- Moderate Approach: Continue to support a moderate approach to amending the federal ESA that improves its workability and ability to meet goals.
- "No Surprises:" Continue to support statutory authorization for binding ESA compliance agreements and permits that:
 - ◆ include a defined range of adaptive management measures to provide flexibility as appropriate to refine conservation commitments and to address unforeseen circumstances over the life of the permit; and
 - ◆ provide that any modifications to the conservation plan necessary to address future unforeseen or extraordinary circumstances will not impose additional costs (dollars, land or water) on the permittee without the consent of that permittee.

M.I. 41327 – March 14, 19958; additional "no surprises" principle added by M.I. 42287 – February 11, 1997.

Federal Endangered Species Act.

Proposed Revised Policy:

Update Metropolitan's policy principles on federal ESA issues to read:

- Continue to support mechanisms that protect threatened and endangered species and their habitat, and foster their ultimate recovery.
- Encourage the promulgation of regulations that provide uniform procedures to guide federal decision-making, especially listing decisions and critical habitat designations.
- Codify, or otherwise strengthen, regulatory incentives to non-federal landowners such as no surprises, safe harbor agreements, pre-listing agreements, candidate conservation agreements, and multi-species HCPs.
- Secure legislative or administrative changes in the Critical Habitat Designation process that:
 1. Ensure decision-makers have the best available scientific information on which to base their rulemaking.
 2. Require the promulgation of regulations that specify the methodology to be used to evaluate the direct and indirect economic impacts that would result from the critical habitat designation of a specific area, based upon cost-effectiveness principles.
 3. Exclude from critical habitat designations areas subject to conservation management tools, such as HCPs, safe harbor agreements, candidate conservation agreements, and state and local agency land use or water management plans, that include significant species conservation measures for the subject species.
 4. Clarify or otherwise resolve issues related to recent judicial interpretations of "adverse modification."
- Provide adequate funding for federal agencies to meet their own obligations under cooperative recovery plans and similar initiatives. Such agreements should be fully enforceable against all parties, and any necessary waivers of sovereign immunity should be provided for. If federal agencies fail to perform, other participants in such efforts should not be required to expand their own obligations to make up for the federal failure to perform.
- Clarify that the scope of indirect effects analyses required for federal ESA permits is limited to those effects that are within the legal authority of the permit applicant to control, would primarily be caused by the implementation of the proposed activity, are reasonably certain to occur, and for which specific effects on threatened or endangered species or designated critical habitat can be identified.
- Support administrative, judicial, and/or legislative efforts and cooperative programs for control of invasive, non-native species.
- Continue to support a moderate approach to the federal ESA and its implementation through participation in legislative, administrative, and judicial processes to improve its workability and ability to meet Metropolitan's mission.