

- **Board of Directors**
Legal and Human Resources Committee

January 8, 2008 Board Meeting

7-5

Subject

Report on Bay-Delta Conservation Plan; and authorize increase of \$350,000 for a total of \$650,000 in maximum amount payable under contract with Resources Law Group to assist in preparation of the Bay-Delta Conservation Plan

Description

Bay-Delta Conservation Plan

In October 2006, Metropolitan's Board authorized the General Manager to execute the Planning Agreement for the Bay-Delta Conservation Plan (BDCP). Pursuant to the Planning Agreement, Metropolitan staff and consultants have been participating intensively with the BDCP Steering Committee and staff and policy level representatives from other interested agencies in developing the BDCP. The participants estimate that the final BDCP will be completed late in 2008 and final California Endangered Species Act (CESA) and federal Endangered Species Act (FESA) compliance based on the BDCP would follow in 2009. Successful implementation of the BDCP will result in operational "assurances" for the State Water Project under both CESA and FESA, providing a more stable regulatory environment that allows future water supply and quality projects to proceed and to preserve and enhance Delta fisheries.

In the meantime, the United States Bureau of Reclamation will be working toward new biological opinions from the United States Fish and Wildlife Service and National Marine Fisheries Service dealing with operation of the Central Valley Project and State Water Project. The Department of Water Resources and Department of Fish and Game will also be participating with a goal of developing a "consistency determination" based on the federal Biological Opinions that will provide a take authorization for operation of the State Water Project under CESA.

In November 2007, for the first time, the State Water Contractors and the Central Valley Project contractors were authorized to participate directly in the Biological Opinion process as interested non-federal agencies. It is the intention of Metropolitan staff and the other participants to assure that the species protection and conservation and water supply goals of the Biological Opinions and BDCP are compatible, so that the BDCP can eventually take the place of the Biological Opinions as a Habitat Conservation Plan under FESA and a Natural Community Conservation Plan under CESA.

Also in November, the BDCP Steering Committee endorsed a "points of agreement" document for developing the BDCP. In December, the Steering Committee formally directed its consultant to begin developing the actual conservation plan consistent with the points of agreement. The most significant point endorsed by the Steering Committee is the determination that in developing the plan "the most promising approach for achieving the BDCP conservation and water supply goals involves a conveyance system with new points of diversion." This agreement that the basic focus of the BDCP plan should be a dual or even a fully isolated conveyance system is a significant step by the Steering Committee. The points of agreement also recognize that "the ultimate acceptability of" the dual conveyance approach "will turn on important design, operational and institutional arrangements that the Steering Committee will develop and evaluate through the planning process." The focus on a dual conveyance system is the result of significant staff and consultant work, and similarly intensive work on the BDCP, and now the Biological Opinions as well, will continue throughout 2008.

The Resources Law Group has been one of the most integral consultants for assistance on these state and federal endangered species and permitting issues. In November 2006, Metropolitan's Board authorized the General

Counsel to amend an existing agreement with the firm to increase the maximum amount to \$300,000 in anticipation of the intensive BDCP activity that occurred during the fall of 2006 through 2007. Mr. Christopher Beale from that firm has played an important role along with Metropolitan staff in the BDCP process and staff anticipates he will continue that role in upcoming BDCP activities, as well as in the Biological Opinion process.

The Sacramento-based Resources Law Group has high-level legal and policy expertise in natural resources and land use law, including CESA, FESA and the California Natural Community Conservation Planning Act. Mr. Beale has significant prior experience as an attorney representing the California Department of Fish and Game on CESA issues, helped develop the CALFED multi-species conservation strategy and has worked on the development of numerous habitat conservation plans and natural community conservation plans throughout California. In addition to Mr. Beale, Michael A. Mantell (former Under Secretary of the California Resources Agency), and Michael Valentine (former General Counsel for the California Department of Fish and Game and Chief of the California State Lands Commission's Land Management Division) are also available in the firm.

Legal Department staff with expertise in Delta and SWP water supply, water rights, ESA litigation and CEQA/NEPA issues also is directly involved in the development of the BDCP. Staff's participation provides the broader context in which the plan must be developed and assures that its development complements other Bay-Delta related processes in which the Department is involved. In addition to managing Mr. Beale's work on legal and regulatory issues, the Legal Department coordinates his interaction with Metropolitan technical staff and consultants and with those of other participating water contractors. Mr. Beale's specific expertise in development of natural community conservation plans and firsthand knowledge of the fishery agencies' internal processes fills out existing expertise within Metropolitan and provides needed additional resources.

Because of the key role the firm plays in assisting Metropolitan's staff in the BDCP process, staff recommends that the Board authorize the General Counsel to amend the existing agreement with Resources Law Group to increase the maximum amount payable by \$350,000 to \$650,000. The additional amount requested is intended to carry through the next 18 months and include adoption of the biological opinions in September 2008 and release of an administrative draft of the final BDCP in the summer of 2009.

Policy

The Board authorized the General Manager to execute the draft Memorandum of Agreement for supplemental funding to support near-term water supply, water quality, ecosystem and levee actions in the Delta (Minute Item 46747; July 11, 2006), and to execute a BDCP Planning Agreement in October 2006 and, adopted general principles related to the CALFED Bay-Delta Program (Minute Item 45753; May 11, 2004)

California Environmental Quality Act (CEQA)

CEQA determination for Option #1:

The proposed action is not defined as a project under CEQA because it involves continuing administrative activities (Section 15378(b)(2) of the State CEQA Guidelines). In addition, the proposed action is not subject to CEQA because it involves other government fiscal activities, which do not involve any commitment to any specific project, which may result in a potentially significant physical impact on the environment (Section 15378(b)(4) of the State CEQA Guidelines). The environmental analysis and CEQA documentation of the BDCP itself will be carried out and examined by the Board in a future board meeting.

The CEQA determination is: Determine that the proposed action is not subject to the provisions of CEQA pursuant to Sections 15378(b)(2) and 15378(b)(4) of the State CEQA Guidelines.

CEQA determination for Option #2:

None required

Board Options

Option #1

Adopt the CEQA determination and authorize the General Counsel to amend the existing agreement with the Resources Law Group for assistance on CESA and FESA issues, including development of the BDCP, to increase the maximum amount payable by \$350,000 to \$650,000.

Fiscal Impact: Up to \$350,000

Business Analysis: Improves water supply reliability and improves conditions supporting implementation of future water supply and quality projects

Option #2

Do not authorize the General Counsel to enter into the proposed agreement.

Fiscal Impact: None

Business Analysis: No change to existing conditions

Staff Recommendation

Option #1



Karen L. Tachiki
General Counsel

12/17/2007
Date