



- Board of Directors  
*Communications and Legislation Committee*

2/9/2016 Board Meeting

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**8-7**

## **Subject**

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Authorize staff to seek legislation to address California environmental laws relating to protection of fish and wildlife to facilitate Foothill Feeder maintenance and repairs

## **Executive Summary**

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Authorization is requested to seek legislation to allow for incidental take, if any, of the unarmored threespine stickleback (UTS) associated with dewatering Metropolitan's Foothill Feeder for critical maintenance and repair in light of a recent opinion issued by the California Supreme Court that prohibits the California Department of Fish and Wildlife (DFW) from authorizing live relocation of UTS as a means of avoiding incidental take. Under current law, the only way to obtain incidental take coverage for a fully protected species like UTS is by preparing and obtaining DFW approval of a Natural Community Conservation Plan (NCCP). However, it is unclear whether the NCCP approach is available for a single species, and the time required to prepare and obtain approval of an NCCP would leave Metropolitan exposed to potential liability in the meantime. Staff requests authorization to seek legislation to address the issue consistent with Metropolitan's mission to provide its service area with adequate and reliable supplies of high-quality water to meet present and future needs in an environmentally and economically responsible way.

## **Details**

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### **Background**

Metropolitan's Foothill Feeder is the primary conveyance pipeline for State Water Project supplies from Castaic Lake in Metropolitan's service area. Member agencies in Ventura and Los Angeles Counties, including Calleguas Municipal Water District, Central Basin Municipal Water District, Las Virgenes Municipal Water District, West Basin Municipal Water District, and the Cities of San Fernando, Burbank, Glendale, Beverly Hills, Compton, Glendale, Long Beach, Los Angeles, Santa Monica and Torrance are among the agencies that rely on this supply. Inspection, maintenance, and repairs require dewatering the pipeline approximately every five years into the Santa Clara River and tributaries.

Several of these drainages contain populations of UTS, a two-to-three-inch long fish which is listed as endangered under both state and federal Endangered Species Acts and is also designated as a California fully protected species. All three laws make it unlawful to take or possess UTS without a permit.

Take of UTS may occur during dewatering if the sudden changes in flows in the drainages cause the fish to be flushed downstream by increased flows and stranded on dry banks or isolated puddles as flows subside. Dewatering for maintenance usually occurs in the rainy season, which may avoid take if prior rain events have already flushed UTS downstream. However, dewatering cannot be timed to follow naturally occurring high flow events because of the extensive coordination required with member agencies and the critical need for urgent, unscheduled repairs. The last shutdown of the Foothill Feeder occurred in 2012. To avoid flushing or stranding the fish, Metropolitan reduced flow rates by prolonging the time necessary to dewater the pipeline. In addition, federally permitted biologists installed block nets, monitored dewatering around the clock, and were prepared to relocate stranded fish back into the stream to avoid take of UTS.

However, a recent California Supreme Court case held that live relocation is not an avoidance or conservation measure, but rather is a form of incidental take because it includes capture of UTS, even if it avoids physical harm to UTS. (*Center for Biological Diversity v. Cal. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 234.) The only way to obtain an incidental take permit for the fully protected UTS is to seek DFW approval of an NCCP. However, the NCCP planning and permitting process can take five years or more to complete, and an NCCP must conserve habitat on a landscape scale that would be out of proportion with the low effects of periodic dewatering of the feeder.

The Foothill Feeder is scheduled for a routine inspection during the upcoming fiscal year. However, dewatering to address unforeseen circumstances could be required at any time. Because the California Supreme Court has held that relocating UTS to avoid a project's impacts constitutes incidental take, Metropolitan cannot assure that dewatering of the Foothill Feeder would avoid incidental take of UTS. Left unaddressed, the prohibition on live relocation of UTS to avoid take poses a risk that Metropolitan could face liability for unauthorized take of UTS during the course of protecting reliable water supplies and public health and safety.

### **Existing Law Includes Recent Amendments to Allow DFW to Authorize Incidental Take of Fully Protected Species**

Over the years, the Legislature has enacted laws to allow take of fully protected species. For example, last year the Legislature enacted Assembly Bill 353 (Lackey, R-Palmdale) to amend the Fish and Game Code to permit DFW to issue a California Endangered Species Act (CESA) incidental take permit to the Los Angeles County Department of Public Works and Los Angeles Department of Water and Power to incidentally take UTS in relation to flood improvements in Bouquet Canyon. Those flood improvements are part of an environmental restoration project on U.S. Forest Service land. AB 353 was an urgency statute because it was "necessary for the immediate preservation of the public peace, health, or safety."

In addition, in 2012, AB 1973 (Olsen, R-Modesto) was enacted to authorize DFW to issue an incidental take permit for Caltrans for incidental take of a fully protected salamander that may result from permanent repairs to a landslide-damaged roadway.

These bills illustrate the Legislature's willingness to consider case-by-case exceptions to the fully protected species statutes. However, it is important to note that staff may seek bill language that addresses the Foothill Feeder's unique circumstances, so it may differ from prior bills.

### **Proposed Legislation**

Metropolitan staff proposes to seek the introduction of legislation to allow for incidental take of UTS associated with discharges from the Foothill Feeder, including monitoring, rescue, and relocation of UTS back into the stream. Metropolitan's need to appropriately and timely dewater the Foothill Feeder when maintenance or repairs are necessary poses the same immediate need as the flood improvements addressed in AB 353 and road repairs addressed in AB 1973. The bill would focus only on Foothill Feeder operations relative to incidental take of UTS. Only state law would be addressed in this bill; Metropolitan would still need to comply separately with the federal Endangered Species Act and would still mitigate to the extent required and feasible. Metropolitan would also make all feasible efforts to avoid discharges with other dewatering alternatives, if any are found to be prudent. However, such discharge avoidance alternatives may not be available in an emergency situation.

### **Benefits**

The benefits of legislation include giving Metropolitan long-term authorization for take of UTS which allow periodic dewatering of the Foothill Feeder for scheduled inspection, maintenance, and repairs, as well as for unplanned circumstances. It would also allow for incidental take in order to rescue and relocate fish out of harm's way, or to take other actions to minimize and mitigate UTS impacts.

### **Policy**

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By Minute Item 40817, dated February 13, 1996, the board adopted the Policy Principle on the CESA.

**California Environmental Quality Act (CEQA)**

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**CEQA determination for Option #1:**

The proposed action is not a project subject to CEQA because it involves legislative proposals and 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 (CEQA Section 21065, and Sections 15378(b)(1) and 15378(b)(4) of the State CEQA Guidelines).

The CEQA determination is: Determine that the proposed action is not a project subject to CEQA pursuant to CEQA Section 21065 as well as Sections 15378(b)(1) and 15378(b)(4) of the State CEQA Guidelines.

**CEQA determination for Option #2:**

None required

**Board Options**

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**Option #1**

Adopt the CEQA determination that the proposed action is not defined as a project under CEQA and is not subject to CEQA, and

Authorize staff to seek legislation to allow for incidental take, if any, of the UTS associated with dewatering Metropolitan’s Foothill Feeder for critical maintenance and repair.

**Fiscal Impact:** Staff time and legislative consulting fees.

**Business Analysis:** If successful, legislation authorizing incidental take of UTS resulting from maintenance of, or repairs to, the Foothill Feeder, including any avoidance and mitigation measures to protect UTS, would allow for needed distribution system maintenance and repairs without the risk of unauthorized take.

**Option #2**

Do not authorize staff to seek legislation to allow for incidental take, if any, of the UTS associated with dewatering Metropolitan’s Foothill Feeder for critical maintenance and repair.

**Fiscal Impact:** The costs incurred from lack of legislation permitting UTS incidental take could include the cost of an NCCP, if available, and costs of any violations resulting from a response to an emergency action.

**Business Analysis:** Absent legislation, Metropolitan may not be able to dewater the Foothill Feeder for critical maintenance or repairs without the risk of unauthorized take.

**Staff Recommendation**

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Option #1

  
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Dee Zinke  
Assistant General Manager/Chief External  
Affairs Officer

2/3/2016  
Date

  
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Jeffrey Kightlinger  
General Manager

2/3/2016  
Date