**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

*Office of the Board of Directors*

August 13, 2009

Senator Fran Pavley  
California State Senate  
State Capitol, Room 4032  
Sacramento, CA 95814

Assembly Member Jared Huffman  
California State Assembly  
State Capitol, Room 3120  
Sacramento, CA 95814

Re: 2009 Proposed Delta/Water Legislative Package

Dear Senator Pavley and Assembly Member Huffman:

On behalf of The Metropolitan Water District of Southern California, I wish to submit written comments in advance of the August 18 joint informational hearing on the package of legislative preprints.

Attached is a staff report prepared and distributed to the Metropolitan Board of Directors. The Board's Communications and Legislation Committee will review the staff report during their morning meeting on August 18.

Our overall assessment is that the draft legislative package can serve as a workable framework to devising a comprehensive solution to the Delta and related water policy matters for California. There are, however, numerous details in the preprints that need considerable attention in the weeks and legislative hearings ahead in order to create an achievable, workable package.

The staff report provides a detailed analysis and comments on each preprint. Overall, these comments point to several broad areas to address, including:

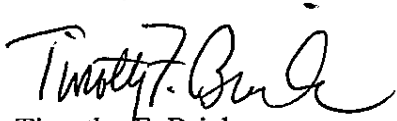
- **The Bay Delta Conservation Plan (BDCP) and its relationship to proposed new institutions, such as the Delta Stewardship Council and a Delta Conservancy.** It is vital to advance, not impede, the successful completion of BDCP as a cornerstone of a future Delta Plan.
- **The State Water Resources Control Board (SWRCB) and the timing of future reviews of instream flow requirements within and above the Delta.** It is vital to advance, not impede, the successful completion of the SWRCB's Delta Strategic Plan and its existing timetable to review future instream flow proposals from BDCP.

Senator Fran Pavley and Assembly Member Jared Huffman  
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- **Finance.** While Metropolitan and other water districts throughout California stand ready to invest billions of dollars in the Delta water delivery system and ecosystem improvements, public funding for broader public benefits to help recover the Delta estuary will be necessary. A successful legislative package will need to identify an equitable and achievable means of securing the public funds.

Metropolitan fully supports a comprehensive solution to the Delta and looks forward to working with you and your staff to create a historic package of legislation this session.

Sincerely,



Timothy F. Brick  
Board Chairman

Attachment



THE METROPOLITAN WATER DISTRICT  
OF SOUTHERN CALIFORNIA

## INFORMATION

### • Board of Directors *Communications and Legislation Committee*

August 18, 2009 Board Meeting

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9-5

#### Subject

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2009 Proposed Delta/Water Legislative Package:

Preprint Assembly Bill 1 (Huffman, D-San Rafael) – Sacramento-San Joaquin Delta: Delta Plan

Preprint Assembly Bill 2 (Feuer, D-West Hollywood and Huffman, D-San Rafael) – Water conservation: urban and agricultural water management planning

Preprint Senate Bill 1 (Simitian, D-Palo Alto) – Sacramento-San Joaquin Delta

Preprint Senate Bill 2 (Pavley, D-Santa Monica) – Water: diversion and use: groundwater

Preprint Senate Bill 3 (Wolk, D-Davis) – Delta Protection Commission: Sacramento-San Joaquin Delta Conservancy

#### Description

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##### Background:

The Democratic leadership of the State Senate and Assembly has released “preprints” of proposed Delta legislation that is expected to be heard later this month by a two-house conference committee tasked with crafting a comprehensive Delta and water use efficiency legislative package this session.

The subject matter and scope of each preprint reflects an earlier directive by the Senate and Assembly Democratic leaders to divide the initial drafting among specific authors in both houses.

It is anticipated that during the week of August 17 Senate President pro Tempore Darrell Steinberg (D-Sacramento) and Assembly Speaker Karen Bass (D-Los Angeles) will announce appointments to the conference committee.

The preprints will be the subject of joint informational hearings in Sacramento convened by the Assembly Water, Parks and Wildlife Committee and the Senate Natural Resources and Water Committee. The first hearing is scheduled for August 18 at the State Capitol and two additional hearings may be scheduled the following week. The preprints are in the public domain for discussion purposes and will not be subject to a vote.

After the informational hearings and prior to the interim recess deadline of September 11, the conference committee is expected to convene, consider the oral testimony from the informational hearings and written comments on the preprint package and take steps to develop a conference report for consideration and vote of the full Senate and Assembly. If the conference report is adopted by both houses, as is, the conference report moves on to the Governor for his approval or veto. If the conference report is rejected by either the Senate or Assembly, the conference committee can reconsider and revise the conference report or a new conference committee can be appointed.

In general, the legislative package reflects a comprehensive approach to addressing the water delivery system and ecosystem problems in the Bay-Delta that is shared by Metropolitan. In many respects, the package follows the general framework for a comprehensive solution set forth in the Delta Vision Cabinet Committee report, for which Metropolitan expressed support in January 2009. However, many specific approaches are not consistent with Delta Vision Cabinet Committee recommendations, Metropolitan’s Delta Action Plan and other policy principles adopted by the Board. There are, for example, proposed impediments to completing the Bay Delta Conservation Plan and new directives to changing Bay-Delta instream flow objectives prior to completing the plan, contrary to the existing Strategic Plan of the State Water Resources Control Board. The recommended

policy direction for each bill reflects both the quantity and the significance of necessary changes. While Metropolitan historically has not adopted positions on draft legislation in preprint form, it is important for Metropolitan to offer timely and constructive advice if the Legislature is to enact a Delta/Water package before adjourning in September.

**Description:**

The content of the legislative package reflects emerging issues that Metropolitan staff reviewed at the Board's Special Committee on Bay-Delta meeting on August 4. The following is a review of the emerging issues and how they relate to the specific preprints in the legislative package:

**Coequal Goals: Reliable Water Supply/Ecosystem Restoration:**

In the Delta Plan preprint (PAB 1), the Delta's coequal goals are described as "the goals of assuring a reliable water supply for California and protecting, restoring and enhancing the Delta ecosystem and the unique cultural, recreational and agricultural values of the Delta as an evolving place." In the Delta Governance preprint (PSB 1), the Delta's coequal goals are defined as "assuring reliable water supply for California and protecting, restoring and enhancing the Delta ecosystem and the unique cultural, recreational and agricultural values of the Delta as an evolving place." The definition in Preprint Senate Bill 1 (PSB 1) conflicts with the definition of coequal goals by Delta Vision. Cultural, recreational and agricultural values were to be recognized but not given equal status with ecosystem restoration and water supply reliability. In addition, while the policy goals in both preprints declare reliable water supply as one of the coequal goals, the specific objectives, actions and measures of success focus almost entirely upon environmental restoration.

PSB 1 also proposes to create a new water policy for California "to reduce dependence on water from the Delta watershed, over the long-term, for statewide water supply reliability." In addition, PAB 1 proposes new instream flows within the Delta and the Sacramento River watershed "for ecosystem and water quality purpose," a different standard than the coequal goals.

Both preprints cite the longstanding principles of reasonable use and the public trust doctrine but fail to recognize the constitutional principle that the waters of the state are to be used to the fullest extent possible in the "interest of the public." The glaring omission of this constitutional principle skews the proposals' underpinnings of coequal goals.

**Delta Stewardship Council:**

PSB 1 proposes a seven-member Council. Unlike the Delta Vision Strategic Plan, which called for a council appointed by the Governor to reflect the statewide significance of the estuary, PSB 1 calls for four gubernatorial appointees, two from the Legislature and one from the Delta Protection Commission. The Delta Stewardship Council would create a Delta Plan and determine the consistency of "all annual water project operation plans" within the Delta Plan. Given how State Water Project allocations can shift with rain and snowfall conditions, it is unclear how this consistency review process would be workable. In addition, the Council would have the authority to "identify those state agency plans that should be reviewed by the Council, and if necessary, amended to be consistent with the Delta Plan." The scope of this review process, as well as what defines a "state agency plan," is unclear.

PSB 1 calls for the Council to have diverse expertise and "reflect a statewide perspective." Specifically naming the Chair of the Delta Protection Commission an advocate for the Delta is directly contrary to the "statewide perspective" requirement.

In addition, provisions in PSB 1 would give authority to the council to "oversee" all other state agencies with responsibilities for implementing the Delta Plan. The council would develop a "consultation" process "with remedies" for any agency that the Council determines is acting contrary to the Plan or contributing to the failure to meet its objectives. This appears to trump all other existing statutory authorities.

**Approval of Conveyance:**

PSB 1 empowers the Delta Stewardship Council to authorize “any water conveyance facility proposed to be constructed within or around the Delta” if it can make a series of determinations: the State Water Resources Control Board would need to have adopted instream flow standards for the Sacramento River and Delta waterways that provide for a “healthy Delta ecosystem;” all water agencies relying on exports from the Delta watershed would have to submit to the Council a drought contingency plan and a long-term plan for reducing reliance on Delta exports; and the proposed operations of the conveyance facility would have to be consistent with achieving the coequal goals. It is unclear, for example, what jurisdiction the Council would have to review these drought contingency/regional self-sufficiency plans.

**Bay Delta Conservation Plan (BDCP):**

PAB 1 proposes to empower the Delta Stewardship Council as the state entity that would certify the BDCP. Metropolitan strongly supports the existing process in which the California Department of Water Resources is serving as the lead state agency in consultation with the Department of Fish and Game. PAB 1 imposes more than a dozen conditions that BDCP must meet in order to qualify for Council approval, including a new requirement to double salmon populations and meet or exceed recovery plans for all listed species and to submit BDCP to a review by the Delta Independent Science Board. The recovery plans are to be developed solely on actions thought necessary to recover species without any consideration of other uses of water. These provisions are contrary to meeting the coequal goals. The BDCP would also have to qualify as a state Natural Communities Conservation Plan, which is a goal of the current process, but not a legal requirement. Shifting the jurisdiction of this planning process mid-course and altering its goals are potential threats to its success.

**Federal Participation Options:**

PSB 1 and PAB 1 propose to engage federal agencies through the same consistency review process as used by the California Coastal Commission, via the Coastal Zone Management Act of 1972 (CZMA). If the Council creates a Delta Plan that is consistent with CZMA, PAB 1 calls for submitting the Delta Plan to the U.S. Secretary of Commerce for approval under CZMA. Alternate approaches to encouraging federal coordination, such as contractual arrangements via BDCP, were not identified in any legislation.

**Area of Origin Protections:**

PAB 1 and PSB 1 have identical language that states that the legislation “does not limit or otherwise affect the application of” the county and watershed of origin statutes. This is sufficient clarification and additional language contained in both preprints [“This division does not diminish, impair, or otherwise affect any area of origin, watershed of origin, county of origin, or any other water rights protections provided under the law”] is redundant and should be deleted as it could lead to conflicting interpretations of existing law.

**Geographic Scope of Delta Plan/Habitat Actions:**

PAB 1 calls for the Delta Plan to include ecosystem projects within and outside of the legal Delta, up to the first dam on tributaries throughout the watershed. Projects above the first dams could be included in the Delta Plan if the Council determines that the project “would contribute significantly to the restoration of the Delta estuary ecosystem.” This is a broad definition that creates flexibility in devising a Delta Plan, yet creates outreach/coordination challenges with local jurisdictions throughout the watershed.

**Delta Conservancy:**

PSB 3 proposes an 11-member Delta Conservancy with five appointees from Delta counties, four by the Governor (two being Cabinet members) and two from the Legislature (the Assembly Speaker and Senate Rules committee will appoint, respectively). Its scope of operations would be the legal Delta, Suisun Marsh, with individual exceptions based on conservancy board approval. The proposal does not envision the conservancy as a long-term manager of Delta habitat, requiring that any lands acquired by the conservancy be transferred to another public agency or a nonprofit organization within two years. This proposal conflicts with previous conservancy proposals supported by Metropolitan that seek to create an entity with long-term habitat management expertise in the estuary.

**Role of State Water Resources Control Board (SWRCB):**

As stated earlier, PAB 1 and PSB 1 direct the SWRCB to implement a new series of instream flow requirements within the Delta by June 30, 2010 "for ecosystem and water quality purposes." The preprints do not mention or direct the SWRCB to first clarify legal water uses within the Delta as part of this process. Under PAB1 the SWRCB may not approve petitions for change of use for the State Water Project or Central Valley Project until the SWRCB completes the instream flow process for the Sacramento River watershed. This could frustrate applications for changes in diversion points and applications to implement water exchanges or transfers.

Particularly problematic is a proposal in PSB 1 to create a new "Delta Watermaster" position within the SWRCB that would be empowered to enforce state public trust responsibilities, the California Endangered Species Act, direct daily export operations and "make judgments as to reasonable use" of water. Decisions by the Delta Watermaster could be appealed to an administrative law judge. This approach differs substantially from efforts within the BDCP process to empower state and federal wildlife agencies and the project operators to guide daily operations of the future water projects consistent with water supply and environmental objectives.

PSB 2 would give the SWRCB interim relief authority, increased fines and fees for failure to meet a monitoring or reporting requirement. In addition, it creates a new requirement for groundwater management that is new to many regions of the state but is likely consistent with ongoing practices within the Metropolitan service area.

**Independent Science:**

PAB 1 and PSB 1 call for creating the Delta Independent Science Board, with its 11 members appointed by the new Delta Stewardship Council. As stated earlier, PAB 1 calls for the Delta Independent Science Board to review the BDCP prior to its certification by the Council, an additional process beyond existing legal requirements for peer review. The proposals appear to replace many of the current duties of the CalFed Independent Science Program.

**Delta Protection Commission:**

PSB 3 calls for reducing the existing appointees to this five-county commission from 23 members to 15 and to continue to focus its jurisdiction on land use matters within the internal "primary zone" in the Delta.

**Early Action Mandates:**

PSB 1 and PAB 1 call for a series of actions prior to the adoption of a Delta Plan by the Delta Stewardship Council, including developing an interim finance strategy for the Plan and implementation of early actions. Both preprints call for the Council to commence a study of the transfer of the State Water Project to a separate public agency and for evaluation of the Middle River Corridor Two-Barrier and Three Mile Slough Barrier projects. The preprints also provide that the SWRCB approve new instream flow requirements for the Delta by June 30, 2010. Many restoration proposals are consistent with opportunities identified by Metropolitan staff, although identifying specific restoration projects, as is done in both preprints, may restrict restoration options and benefits.

**Finance:**

PSB 1 calls for an annual fee "on each person or entity who holds a right, permit or license to divert water within the watershed" of the Delta. Commencing in 2012, the Delta Stewardship Council would establish the fees. The funds would "pay the costs of facilities and program activities intended to mitigate damage...that are reasonably related to the diversion of water..." Specific fees by each person or entity would "bear a fair and reasonable relationship" to that entity's "environmental damage." By not clearly defining limits on the "beneficiaries pay" principle and with the potential exposure to mitigate past environmental damage, the potential for complexity and controversy is high. PSB 1 also gives the Delta Stewardship Council the ability to sell bonds to underwrite its activities, the bonds retired by fee payments from the Delta watershed users. Customers of the State Water Project and Central Valley Project, on the other hand, would be charged under PAB 1 and PSB 1 with underwriting the accelerated SWRCB process of setting new instream Delta flow requirements by June 30, 2010.

**Water Use Efficiency:**

PAB 2 closely follows Metropolitan-cosponsored legislation, AB 49, with some new language requiring all urban retail water suppliers to achieve a minimum five percent reduction; to establish the threshold for reporting and implementation of water management practices by agricultural water users; and to refine requirements for the commercial/industrial sectors.

**Evaluation of Proposed Legislation:**

The Senate and Assembly Democratic leadership has released bills in preprint form for the purpose of generating feedback prior to crafting formal legislation. Metropolitan does not customarily take formal positions on preprint legislation; however, the potential significance of these bills, combined with the potentially truncated period of deliberations, merits a proactive approach by Metropolitan to encourage a successful, comprehensive package of legislation. The following is a review of each proposal respectively, with general comments on each:

**PAB 1 (Huffman, D-San Rafael): Delta Plan** – Pursuant to board-adopted Delta policies, staff will express concerns on the preprint in its current form. To the extent that PAB 1 (**Attachments 1 and 1A**) tracks the recommendations of Delta Vision, it creates a potentially workable framework for creating a Delta Plan that can serve as a blueprint for ecosystem and water system improvements. However, PAB 1 presently undermines the efforts of six federal and state agencies to successfully complete the Bay Delta Conservation Plan. PAB 1, as an example, proposes to strip the authority away from two state agencies (the California Department of Fish and Game and Department of Water Resources) to certify BDCP's environmental review process, shifting the authority to a yet-to-be-created Delta Stewardship Council. Other provisions seek to add new review processes or requirements to BDCP. PAB 1 needs to support, not impede, BDCP as a cornerstone of a workable Delta Plan.

**PAB 2 (Feuer, D-West Hollywood and Huffman, D-San Rafael): Water Use Efficiency** – Pursuant to water use efficiency legislative principles adopted by Metropolitan's Board in April 2009, staff would continue to advance this water use efficiency legislation, in collaboration with the Natural Resources Defense Council, the co-sponsor on AB 49. PAB 2 (**Attachments 2 and 2A**) largely resembles the Metropolitan-cosponsored AB 49, with new refinements for defining a minimum efficiency target for urban water suppliers, agriculture water use efficiency and the commercial/industrial sector water use.

**PSB 1 (Simitian, D-San Rafael): Delta Stewardship Council** – Pursuant to Metropolitan's board-adopted Delta policies, staff will express concerns on the preprint in its current form. To the extent PSB 1 (**Attachments 3 and 3A**) tracks the recommendations of Delta Vision, it creates a potentially workable framework for appointing a Delta Stewardship Council that develops and oversees a new Delta Plan. However PSB 1 presently establishes a potentially unworkable process for approving the conveyance element of the Bay Delta Conservation Plan, for enforcing water rights in the Delta watershed and for financing the Delta Plan through new fees and new bonding authority to be held by the Council.

**PSB 2 (Pavley, D-Santa Monica): Water Use Reporting** – PSB 2 (**Attachments 4 and 4A**) is structured to address two policy areas of water management: groundwater reporting/monitoring and water rights/enforcement. The language for a broader groundwater management program in California is identical to previous legislation that Metropolitan has supported in past legislative sessions. As for the water use reporting component, staff will recommend, as an alternative, an approach similar to Metropolitan's sponsored bill this year, AB 900 (DeLeon), which mandates water use reporting by surface water users throughout California.

**PSB 3 (Wolk, D-Davis): Delta Conservancy/Delta Protection Commission** – Pursuant to Metropolitan's board-adopted Delta policies, staff will express concerns on the preprint in its current form. To the extent PSB 3 (**Attachments 5 and 5A**) tracks the recommendations of Delta Vision, it creates a potentially workable framework for creating a Delta Conservancy. However, PSB 1 presently establishes a potentially unworkable model for a conservancy with long-term expertise in habitat projects by requiring that any lands purchased by the conservancy be transferred to another government agency or nonprofit entity within two years. The framework for creating the conservancy needs to reflect a strategic plan that supports the implementation of the Bay Delta Conservation Plan and a long-term role for the conservancy in habitat management. Any changes in local land

use regulation via reforms of the Delta Protection Commission should not impose new impediments to successfully completing BDCP or the coequal goals of water supply reliability and ecosystem restoration.

### **Policy**

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By Minute Item 45753, dated May 11, 2004, and Minute Item 46637, dated April 11, 2006, the Board adopted a set of Delta policy principles to ensure a solid foundation for development of future Metropolitan positions and to provide guidance to Metropolitan staff.

By Minute Item 47135, dated May 25, 2007, the Board supported, in principle, the proposed Delta Action Plan, as set forth in the letter signed by the General Manager.

By Minute Item 47232, dated September 11, 2007, the Board adopted criteria for support of conveyance options in implementation of a long-term Delta improvement plan.

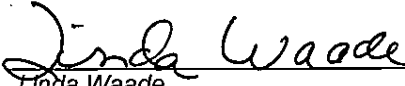
By Minute Item 47605, dated August 19, 2008, the Board approved Delta Governance Principles as outlined in the board letter.

By Minute Item 47900, dated May 12, 2009, the Board approved the water use efficiency policy principles with specific revisions.

### **Fiscal Impact**

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Unknown

  
 Linda Waade  
 Deputy General Manager, External Affairs

8/13/2009

Date

  
 Jeffrey Hightlinger  
 General Manager

8/13/2009

Date

**Attachment 1 – Preprint Assembly Bill 1 (Huffman, D-San Rafael)**

**Attachment 1A- Preliminary Analysis Preprint AB 1 (Huffman)**

**Attachment 2 – Preprint Assembly Bill 2 (Feuer, D–West Hollywood and Huffman, D-San Rafael)**

**Attachment 2A- Preliminary Analysis Preprint AB 2 (Feuer/Huffman)**

**Attachment 3 – Preprint Senate Bill 1 (Simitian, D–Palo Alto)**

**Attachment 3A- Preliminary Analysis Preprint SB 1 (Simitian)**

**Attachment 4 – Preprint Senate Bill 2 (Pavley, D-Santa Monica)**

**Attachment 4A -Preliminary Analysis Preprint SB 2 (Pavley)**

**Attachment 5 – Preprint Senate Bill 3 (Wolk, D-Davis)**

**Attachment 5A -Preliminary Analysis Preprint SB 3 (Wolk)**

cc: Senate President pro Tem Darrell Steinberg  
Assembly Speaker Karen Bass  
Senator Dennis Hollingsworth  
Assemblyman Sam Blakeslee

Members of the Senate Natural Resources and Water Committee  
Members of the Assembly Water, Parks and Wildlife Committee

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