

**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

August 16, 1993

To: Board of Directors (Executive Committee--Action)
 (Special Committee on Legislation--Action)

From: General Manager

Subject: Federal Wetlands Legislation (SB 1304--Baucus, SB 1195--Boxer,
 HR 350--Edwards, and HR 1330--Hayes)

Report

A number of wetland bills have been introduced in Congress this year. Four of these are of importance: SB 1304 (Baucus), SB 1195 (Boxer), HR 350 (Edwards), and HR 1330 (Hayes). The provisions of these bills are proposed to be joined with SB 1114, the Clean Water Act reauthorization bill. It is anticipated that hearings on these wetlands bills will commence in mid-September, 1993.

SB 1304, introduced on July 28, 1993, is anticipated to be the vehicle for addressing wetlands protection issues. It is the only moderate bill of the four, with the Boxer and Edwards bills proposing expansion of the scope of the wetlands regulatory program and the Hayes bill proposing controversial loosening of wetlands protection. Staff requests authorization to seek amendments to SB 1304 that will provide protection for Metropolitan's facilities and resources, and to oppose certain provisions of the Boxer and Edwards bills that would significantly expand the regulatory burden.

Key provisions of the four bills are summarized below. Attachment A provides a tabular comparison of the provisions of the bills.

SB 1304 (Baucus): Key provisions of the Baucus bill are:

(a) Substantially maintains existing provisions of law and regulations regarding scope of jurisdiction of section 404.

(b) Substantially maintains existing nationwide permit program.

(c) Allows applicants and project opponents to appeal a permit decision.

(d) Provides guidelines for development of mitigation banks.

(e) Codifies the Corps regulations definition of "discharge of dredged or fill material" with an important deletion of intent. This would result in incidental movement of soil (e.g. sticking of mud to tires) being considered a jurisdictional discharge. This has ramifications for routine maintenance activities.

SB 1195 (Boxer) and HR 350 (Edwards): These bills are substantially identical and provide for the following: Expand scope of 404 jurisdiction from discharge of dredged or fill material into navigable waters to include a wide variety of "other alterations" of navigable waters that would likely result in federal regulation of operation and maintenance of reservoirs.

Restrict the Corps' nationwide permit program so as to virtually eliminate its ability to expedite routine matters. Changes would likely require public review of all applications of nationwide permits.

Codify and substantially alter a portion of the section 404(b)(1) guidelines that requires a permitted activity to demonstrate that it is the least damaging practicable alternative to the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. The bills' language would require the activity to be least damaging to navigable waters (includes non-wet waters), and deletes qualification regarding effects on other resources thereby removing balancing with impacts of other alternatives on endangered species, cultural resources, etc. These modifications are likely to result in nonsensical decisions and additional permit denials.

Require the Corps to adopt recommendations made by the U.S. Fish and Wildlife Service and National Marine Fisheries Service, or present in writing the reasons for not adopting the recommendations and explaining how the Corps' determination is consistent with the goals of the Act and the section 404(b)(1) guidelines.

HR 1330 (Hayes) Key provisions of the Hayes bill are:

Requires establishment of a wetlands delineation methodology that would be more restrictive than the currently used 1987 delineation manual.

Requires classification of wetlands into three categories with activities restricted in the top (A) category and unregulated in the bottom (C) category. Requires U.S. Fish and Wildlife Service to delineate and classify all wetlands in the U.S. within ten years.

Requires that landowners be compensated for lands classified as type A wetlands.

Rewrites section 404 excluding participation by EPA.

Allows applicant to appeal denial of permit and requires Corps to "prove by clear and convincing evidence that granting the permit ... would be inconsistent with the Act."

Board Committee Assignments

This letter is referred for action to:

The Executive Committee because of its jurisdiction over legislation sponsored by the District or in any way affecting the District, pursuant to Administrative Code Section 2417(a); and

The Special Committee on Legislation because of its responsibility to review staff's recommendations for positions on legislation, pursuant to Administrative Code Section 2581(b).

Recommendation

EXECUTIVE COMMITTEE AND SPECIAL COMMITTEE ON LEGISLATION FOR ACTION.

It is recommended that your Board:

1. Oppose provisions of SB 1195 and HR 350, the Boxer and Edwards bills, that would: (a) expand the scope of section 404 jurisdiction, (b) require adverse changes to the nationwide permit program, and (c) make adverse changes to the section 404(b)(1) guidelines as discussed above.
2. Support SB 1304, the Baucus bill, with amendments, and authorize staff to seek amendments along the lines outlined in the alternatives presented in Attachment B.



John R. Wodraska

KMK/mdm

Attachments

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COMPARISON OF FEDERAL WETLANDS LEGISLATION

SUBJECT	H.R. 350 & S.B. 1195 EDWARDS AND BOXER	H.R. 1304 BAUCUS	H.R. 1350 HAYES
Title	Wetlands Reform Act of 1993	Wetlands Conservation and Regulatory Improvements Act	Comprehensive Wetlands Conservation and Management Act of 1993
Structure of Bill	Amends portions of the Clean Water Act and other laws.	Amends portions of the Clean Water Act.	Amends portions of the Clean Water Act and totally replaces existing Section 404.
Statement of Policy or Goals of Program	Codifies that national policy is to preserve and restore wetlands.	Same as Edwards and Boxer	Does not specifically make changes to goals of Clean Water Act but lists goals of bill, the most distinctive of which is to account for variations in wetland values.
Definition of "Wetlands"	Identical to current Corps regulations.	Substantially similar to current Corps regulations.	The definition of wetlands is virtually identical to that appearing in the current Corps regulations; however, the rules for delineating wetlands are much more strict and would eliminate many biological wetlands from jurisdiction.
Delineation of Wetlands	<p>No changes to wetland delineation methodology allowed until National Academy of Science has completed its study.</p> <p>Provides funds for wetland delineation training and mapping.</p>	<p>No changes to wetland delineation methodology allowed until National Academy of Science has completed its study.</p> <p>Specifies that 1987 Manual must be used until a new manual is developed.</p> <p>Codifies process of adopting new delineation manual.</p> <p>Requires funding for wetland delineation training and assisting small land owners with wetland delineations.</p>	<p>Requires the Corps to establish a wetland delineation methodology with the following limitations:</p> <p>All three criteria (vegetation, soils, and hydrology) must be present <u>at the time the delineation is performed</u>.</p> <p>Facultative species cannot be used to delineate wetlands.</p> <p>Obligate wetland species must be present in all jurisdictional wetlands.</p> <p>Water must be found at the surface for at least 21 consecutive days during the growing season.</p> <p>Temporary or incidentally created wetlands are not jurisdictional wetlands.</p>

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Classification of Wetlands	Does not address classification of wetlands.	Does not address classification of wetlands.	<p>Classifies wetlands as Type A, B or C.</p> <p>Activities cannot generally be permitted in Type A wetland and USFWS must purchase all Type A wetlands.</p> <p>Activities may be permitted in Type B wetlands on a case-by-case basis, much like the current permitting program.</p> <p>No permits will be required on Type C wetlands.</p> <p>Prior to application for a permit, an applicant must apply for a classification of wetlands (90 days, or 30 days if wetlands are subject to an advance classification).</p>
Takings	Does not address takings.	Does not address takings.	<p>Land owners must be compensated for lands classified as Type A wetlands.</p> <p>No compensation program is discussed for owners of Type B wetlands who are denied permits.</p>
Waters Exempt from Jurisdiction	Exempts the five categories of waters generally exempted in the preamble to Corps regulations with a minor change that limits the exemption of artificial ponds created on uplands.	<p>Identical to Edwards and Boxer except adds a sixth category of waters to be excluded: artificial stormwater detention areas and artificial sewage treatment areas that are not modifications of navigable waters.</p> <p>Provides for the exemption of "prior converted crop lands".</p>	Does not specifically exclude certain waters from jurisdiction; however, temporary or incidentally created wetlands would be excluded from the definition of wetlands and farmed wetlands would be exempt from jurisdiction.

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Regulated Activities	<p>Modifies definition of "discharge of fill material" in Corps regulations to eliminate "intent" as part of definition; thus, any discharge including disposal of waste material, accidental spills, dirt from wheels of all-terrain vehicle would be considered a jurisdictional discharge under Section 404.</p> <p>Expands jurisdiction beyond traditional discharge of dredged or fill material to include "other alteration" which is defined as "draining, dredging, excavation, channelization, flooding, clearing of vegetation, driving of a piling or placement of other obstruction, diversion of waters, or other activity in navigable waters that impairs the flow, reach, or circulation of surface waters, or that results in a more than minimal change in the hydrologic regime, bottom contour, or configuration of the waters, or in the type, distribution, or diversity of vegetation, fish, and wildlife that depend on the waters." This change in the law could potentially regulate operation and maintenance of reservoirs.</p>	<p>Modifies definition of "discharge of fill material" in Corps regulations to eliminate "intent" as part of definition; thus, any discharge including disposal of waste material, accidental spills, dirt from wheels of all-terrain vehicle would be considered a jurisdictional discharge under Section 404.</p> <p>Scope of jurisdiction limited to traditional discharge of dredged or fill material.</p> <p>Definition of "dredged or fill material" includes "any addition of dredged or fill material into navigable waters and includes, without limitation, any addition or redeposit of dredged or fill materials, including excavated materials, into the navigable waters which is incidental to any activity, including draining, mechanized landclearing, ditching, channelization, or other excavation that has or would have the effect of destroying or degrading any area of navigable waters."</p>	<p>In addition to the standard discharge of dredged or fill material, this bill would regulate "the draining, channelization, or excavation of wetlands".</p>
Activities within Jurisdictional Wetlands Exempt from Regulation	<p>Generally identical to exemptions provided in existing Corps regulations.</p>	<p>Generally identical to exemptions provided in existing Corps regulations.</p>	<p>Similar to existing Corps regulations plus many others among which are:</p> <p>Activities consistent with a state or local land management plan approved by the Corps.</p> <p>Activities excluded from regulation under a state coastal zone management program.</p> <p>Mining activities in wetlands permitted by the state or federal government and for which reclamation will be completed within five years.</p>

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Permit Processing Times	Provides for expedited processing (60 days) of permits affecting less than 1 acre of <u>wetlands</u> for applicants with 9 employees or less.	Corps to make final permit decision within 90 days of publication of a public notice unless: a federal agency or the governor requests an additional 60 days; an EIS is required; an endangered species or its critical habitat is affected; or the applicant agrees to a delay.	Requires that all permit applications be acted upon within 6 months unless the applicant agrees to a delay (no provisions for EIS or endangered species).
Examination of Alternatives	Codifies portion of 404(b)(1) requirement to avoid impacts to wetlands, but does so at expense of impacts to other important environmental factors.	Does not address alternatives.	Allows the Corps to examine alternatives when permitting in Type B wetlands but requires Corps to accept applicant's stated purpose of project unless clearly rebutted by Corps. Does not allow Corps to examine alternatives when monitoring activities in Type C wetlands.
Appeals of Permit Decisions	No provision for appeals.	Allows applicant, or anyone who commented on application, to appeal the permit decision.	Allows applicant to appeal denial of permit and requires Corps to "prove by clear and convincing evidence that granting the permit...would be inconsistent with the Act.
General Permits	Severely restricts nationwide permit program: Requires that nationwide permits be for narrowly defined categories of work (NWP 26 is for category of waters, not work). Nationwide permits must be reviewed/reissued every 2 years instead of the current 5 year cycle. All nationwide permits require a Predischarge Notification (PDN). PDN requires public notice and review. If state denies 401 certification for whole NWP, then NWP cannot be used in that state (regardless of ultimate issuance of individual certification).	No substantive changes to nationwide permit program.	No substantive changes to nationwide permit program.

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Mitigation Requirements	Does not specifically require mitigation for issuance of permit.	Does not specifically require mitigation for issuance of permit.	Virtually requires mitigation for permits in Types A and B wetlands. Corps is required to issue regulations governing requirements for mitigation of permits in Type B wetlands; these rules must allow for donation of Type A or B wetlands, enhancement, banking, and offsite compensation as mitigation.
Mitigation Banking	Does not address mitigation banking.	Requires the Corps and EPA to develop regulations for the establishment, use, maintenance, and oversight of mitigation banks. Provides some minimal guidelines for mitigation banks.	The Corps (in coordination with the USFWS and governor) shall set up a mitigation banking program in each state.
Federal Tax Incentives	Provides tax incentives for wetland conservation including tax treatment for donated wetlands and exclusion from gross income of money received for compatible use of wetlands.	Does not address tax incentives.	Does not address tax incentives.
Management Plans	Does not address management plans.	Allows the Governor to develop a Watershed Management Plan to be approved by the Corps and EPA. Wetland preservation and restoration projects, including mitigation banks, within the plan area are eligible for federal funding. Permit applications within a plan area are provided expedited processing (60 days unless an agency asks for an additional 30 days). Programmatic General Permits can only be issued within plan areas (after 1996).	Allows any state or political subdivision to develop a land management plan with respect to wetlands; activities consistent with such a plan are exempt from regulation under the Act.
Studies	Requires Corps to develop pilot program to test wetland restoration techniques.	Requires the Corps and EPA to study wetlands and watershed management.	Requires the USFWS to identify (delineate) and classify all wetlands in the United States within 10 years.

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Violations and Enforcement	Does not address violations and enforcement except as related to citizen suits.	Does not address violations and enforcement.	<p>Requires the Corps to issue orders (with copy to governor) regarding compliance with permit conditions or regulations.</p> <p>Requires the Corps to prosecute within 150 days of order or rescind the order and be estopped from further action on same alleged violation.</p> <p>Allows the Corps to commence a civil action (currently only EPA and the U.S. Attorney can enforce Section 404).</p>
Citizen Suits	Allows citizens to sue on unenforced 404 actions similar to other Clean Water Act citizen suits.	Does not address citizen suits.	Does not address citizen suits except to state that no person shall be entitled to judicial review of a Corps decision to approve or disapprove a land management plan.
Interagency Coordination	Requires the Corps to adopt recommendations made by USFWS or NMFS or explain, in writing, why not, in terms consistent with national policy of preserving and restoring wetlands and in terms consistent with 404(b)(1) Guidelines.	Requires EPA to establish an Intergovernmental Wetlands Coordinating Committee to guide the wetlands regulatory program.	Eliminates all mention of EPA from Section 404 (e.g., EPA vetos of permits pursuant to Section 404(c)).
Requirements for Corps to Develop Reports for Congress	Requires Corps to report to Congress every 2 years on permits issued, how those permits and nationwide permits affected national wetlands, and extent to which mitigation offset impacts to wetlands.	Same as Edwards and Boxer.	Requires USFWS to report to Congress each year on the status of wetland mapping.

Attachment B
Proposed Amendments to SB 1304

1. Amend section 6(c) "Administrative Appeal of Permit Decisions" to delete language as follows:

"(A)an applicant for a permit under paragraph (1) ~~or any person who participated in the public comment process regarding such permit application~~ may appeal a decision under this subsection with respect to such permit;"

2. Amend section 8(c) "Other Exempt Waters and Areas" as follows:

"(vi)artificial stormwater detention areas, spreading areas for groundwater recharge constructed on upland, and artificial sewage treatment areas that are not modifications of navigable waters."

3. Amend section 8(d) "Exempted Activities" as follows:

"(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, water conveyances"

"(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads ..., or other access roads, where such roads are constructed and maintained, in accordance with best management practices,"

4. Amend section 8(d) "Exempted Activities" along the lines proposed in the following alternatives:

"(G) for the purpose of construction, operations, or maintenance within drinking water reservoirs where such activities are specifically designed to promote protection of reservoir capacity, operations or water quality."

"(G) associated with the ("operation and maintenance of" or, alternatively,"clearing of vegetation from") manmade or improved flood control channels, or reservoirs used primarily for storage of drinking water which are authorized pursuant to Section 404 of this Act, or the construction of which predate the requirement for such authorization."