



BAY PLANNING
COALITION

Bay Coalition Briefs is a publication of the Bay Planning Coalition, a membership-based, non-profit organization which advocates a reasonable, prudent and balanced planning and permit process for uses and activities in the San Francisco Estuary and shoreline areas.

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BAY COALITION BRIEFS

CHAIRMAN'S REPORT

Last month the Ueberroth Commission released its report on the declining California economy. The report notes that, during the remainder of the century, the State is expected to grow at the rate of 600,000 people a year. In order to provide education, social services and infrastructure for those people, 250,000 new jobs must be created each year. But as the report noted, in 1991 the state lost 340,000 jobs. The villains, according to the report, are the State's workers compensation laws, its hyperactive litigation glands, and most of all a metastasized regulatory regime that Kafka would have coveted.

The next day State Controller Gray Davis, who sits on no fewer than 52 state boards and commissions (including the State Lands Commission) announced that in June California will run out of cash to pay its bills. That has not happened since the Great Depression.

There is an odd but ineluctable relation between these announcements and the environmental regulations the Coalition has addressed for ten years.

Several years ago, a prominent San Francisco politician, in a fit of pique with BCDC, quipped that if he could put every unemployed San Franciscan to work filling the Bay, he'd do it in a minute. The point may have been made grotesquely, but there is a disquieting truth in it. The truth is that, in the post-industrial world, a clean environment has proven to be a luxury afforded only after the essentials of life have been provided for.

An ever-worsening economy will create inexorable pressure to repeal or relax environmental protections that, today, every sensible person in Northern California can subscribe to. The environmental community must understand that its successes of the past twenty years came only as a consequence of a vigorous economy: The Clean Air Act, the Clean Water Act, the National Environmental Policy Act could never have been enacted during the 1930s. To preserve and enhance those successes, the environmental community must forge an alliance with the business community. If we continue to lose 340,000 jobs a year, when we need to be adding 250,000 jobs a year, we will simply be unable to afford the clean, wholesome environment that for the first time this century is within our grasp in California.

John Briscoe

BPC NEWS AND ANNOUNCEMENTS

SEDIMENT AMENDMENT THREATENS WRDA '92

The Mitchell Amendment to the federal Water Resources Development Act of 1992 (WRDA '92) adopted by the U.S. Senate Public Works Committee on April 29 would restrict dredging projects and the way dredging is regulated under the Marine Protection, Research and Sanctuaries Act.

The amendment, entitled "Contaminated Sediments and Ocean Dumping" would establish an extensive new contaminated sediments program based on scientifically questionable standards.

Please call California Senators Cranston and Seymour and tell them to oppose the radical Mitchell Amendment which would, among other provisions:

- shift permitting authority from the Corps to EPA;
- require new regulatory protocols including the development of numeric sediment quality (based on existing water quality) standards and ignores significant biological effects-based standards.

BPC WELCOMES NEW MEMBERS

Hart-Crowser, Inc. - Envir. & Geotech Consul.
Craig Holland - Regional Manager

Sea Engineering, Inc.- Coastal Engr.
John C. Anderson - Vice President

Ware & Friedenrich, P.C.
Beth D. Castleberry - Attorney

Weintraub, Genshlea & Sproul
Cynthia J. Patton - Attorney

Western States Petroleum Association
Scott Folwarkow, Regional Director

FISH & GAME POSITIONS OPEN

There are 4 Deputy Director Positions vacant in the State Department of Fish and Game. Also the president of the state Fish & Game Commission recently resigned, leaving a Commission post vacant. Any members and affiliates of BPC interested in any of the above positions, please contact Executive Director Johnck to discuss.

A recent policy initiative by the Fish and Game Commission to zone California for habitat protection has been tabled after reviewing challenges from industry and property owners to the Commission's authority to zone! BPC will keep its members up-to-date when another version of this proposal returns to the Commission agenda.

NEW FAX NUMBER FOR BPC

In addition to our new address and telephone number, the Coalition also has a **NEW FAX NUMBER- (415) 986-0694**. Please change your records to reflect this new number. Thank you!

Cal-EPA PERMIT STREAMLINING

Comments are still being accepted on the Cal/EPA report, "Draft Recommendations for Consolidating the streamlining the Cal/EPA Permitting Process" through May 31. BPC Executive Director Johnck provided comments on these proposals at a Cal-EPA hearing on May 20th.

BPC HOLDS SUCCESSFUL SIXTH ANNUAL DECISIONMAKERS CONFERENCE

On Thursday, April 30, the Bay Planning Coalition hosted over 200 attendees at its sixth annual S.F. Bay Decisionmakers Conference, "Water Connections: Charting a Course for the Public's Economic and Environmental Rights." Building upon the central theme of water, four panels addressed the issues of dredging, the Federal Wetland Manual, wetlands mitigation, and the media's role in shaping public opinion on environmental issues.

The Conference received high marks from attendees. We wish to thank the Decisionmakers Conference Committee - Bert Bangsberg, John Briscoe, Paul Shepherd, and Don Warren, Chairman - for all of the time and effort they expended in putting together this year's program. We would also like to thank our panelists and moderators for all of their work, and everyone who participated in making this year's conference a success.

BPC REPRESENTED AT INTERNATIONAL WETLAND PANEL

BPC Chairman John Briscoe was recently invited to speak before a multi-national group of foreign journalists on the subject of wetland issues in the United States. The program, sponsored by the International Visitors Center, included as speakers Paula Carreell of the Sierra Club, Jean Auer - Past President of the Commonwealth Club, and Marc Holmes of Save San Francisco Bay Association. Geoffrey Haynes, a partner in the firm of Washburn, Briscoe & McCarthy, represented Mr. Briscoe and discussed the work of the Bay Planning Coalition. He outlined BPC's strategy for effectively presenting its viewpoint to policy makers, the press and the public. The panel received high marks from all attendees.

BPC STAFF ACTIVITIES MAY-JUNE 1992

During the months of May and June, 1992, BPC staff has participated in/will participate in the following activities. For further information on dates, times, and agenda of the meetings listed below, please contact the BPC office.

May 4-8

- ✓ LTMS Ocean Studies Workgroup Meeting at EPA
- ✓ California Chamber of Commerce (Sacramento) Legislation, Natural Resources Committee Meeting
- ✓ BPC/LTMS Review with Corps Staff
- ✓ Bay Dredging Action Coalition Meeting with Half Moon Bay Fisherman's Marketing Association, Save S.F. Bay Association, and Sierra Club (Cynthia Koehler, Barry Nelson and David Nesmith)
- ✓ S.F. Estuary Project Management Committee meets in Sacramento to discuss Wetlands and Land Use Recommendations

May 11-15

- ✓ LTMS Policy Review Committee
- ✓ Bay Dredging Action Coalition Steering Committee
- ✓ S.F. Estuary Project Wetlands Work Group
- ✓ California Wetlands Consensus Workshop meets in Sacramento with government representatives from the states of Michigan, Oregon, New Jersey, Louisiana, Minnesota, and Washington
- ✓ S.F. Estuary Project Management Committee Review of Aquatic and Fish & Wildlife Actions

May 18-22

- ✓ California Building Industry Association's Environmental Quality Committee
- ✓ S.F. Bay Regional Water Quality Control Board Monthly Meeting
- ✓ Estuarine Association Seminar on "Toxics"
- ✓ S.F. BCDC Monthly Meeting—Public hearings on Bay Plan Dredging Amendments and Port of Oakland's 38' Dredging Project
- ✓ BPC Executive Director Panel Presentation at 1992 Pan Pacific Conference "Balancing the Economy and the Environment—North American Perspective"

May 25-29

- ✓ California Wetlands Consensus meets in Sacramento
- ✓ Resources Agency hosts workshop on Wetland Reserve Program in Sacramento

June 1-5

- ✓ BPC Board of Directors meets with incoming U.S. Army Corps of Engineers & S.F. District Engineer, Lt. Colonel Leonard Cardoza
- ✓ S.F. Estuary Project Wetlands Workgroup
- ✓ June 3 BPC Monthly Board of Directors Meeting
- ✓ S.F. Estuary Project's Management Committee meets in Fairfield to review Pollutants and Wildlife Program actions
- ✓ BPC Executive Director Johnck meets with local environmental health officials to review AB 2464

June 8-30

- ✓ Change of Command Ceremony at the Bay Model for outgoing S.F. District Engineer Colonel Stanley Phernambucq and incoming Lt. Col. Leonard Cardoza
- ✓ American Association of Port Authorities Seminar in Tacoma, Washington on dredged sediments and other port-related issues
- ✓ LTMS In-Bay Workgroup
- ✓ CalTrans-sponsored conference on Intermodal Transport of Goods in Sacramento
- ✓ California Wetlands Consensus Meets in Sacramento June 11 & 25
- ✓ S.F. Estuary Project's Management Committee meets June 19 and 26

July 20-23

- ✓ BPC Executive Director presents paper to the American Society of Civil Engineers/Permanent International Association of Navigational Congresses "Ports '92" Conference in Seattle, Washington ■

BCDC ITEMS

Vote on Bay Plan Amendment Fee June 18

The Commission will vote to charge a \$5,000 fee to applicants proposing an amendment to the Bay Plan or to any other Commission planning documents. The Coalition was able to secure changes to the original staff proposal to ensure a fair administration of the fee.

The final bill would be calculated on the basis of all costs associated with the processing and final action on the application, including: 1) staff time; 2) consultant costs (if any); and 3) overhead up to a ceiling of twice the staff estimate of the total cost. If an applicant believes a proposed amendment would serve a common public good, and therefore should be funded by BCDC, then he can submit the amendment to the Commission and ask that it consider funding through its yearly budget and work program.

Dredging Fees

Coalition staff member Mark Bartolini provided testimony at BCDC's March meeting concerning BCDC's proposed \$.10 per cu. yd. dredging fee, specifically citing its impact on small business and recreational boaters. Essentially, BPC believes the fee is an unnecessary burden, but agreed to live with it so that BCDC staff can participate in the LTMS dredging study process. Once OAL approves the fee regulation, State Lands Commission has indicated that it will stop collecting its \$.25/cu. yd. fee. BPC staff urged that the following be considered in any implementation of the proposed fee:

1. BCDC should aggressively follow the mandate of AB 1059 and seek alternative funding. The Commission should direct the staff to seek a grant under section 308 (b) (2) (formerly section 309) of the Coastal Zone Management Act covering special programs. This must be coordinated with the California Coastal Commission 1993 submission to tailor a specific program to meet the CZMA guidelines. The Coalition has already done some preliminary investigation into the CZMA grant program, and, although the option was open to BCDC this year, for some reason it did not pursue a grant application.
2. BCDC should immediately deduct the fee revenue received from the State Lands Commission from the total fee cap of \$650,000, which could allow a reduction of the fee to something less, such as \$.08 cu. yd.
3. The fee should not be collected at the time of permit application filing but should be made at the time of completion of dredging. There is no guarantee that an applicant will have received all necessary permits in order to dredge at the time of BCDC filing, nor can an applicant be absolutely certain of the total yardage dredged until the project is complete; so it would be unfair to collect the fee at any other time than project completion or when the applicant can submit absolute yardage calculations.

4. The fee should only be collected up to indicated for staff LTMS needs in BCDC's budget.
5. Any monies collected which are to be refunded should be returned proportionately (across the board) rather than in chronological order, as the staff proposes. It appears inherently unfair that those applicants who obtained a permit at an earlier date should bear the brunt of the fee, especially when modern computer filing systems could keep the paperwork to a minimum.

In response to our concerns BCDC staff has offered a point by point reply:

1. they are seeking alternative funding, but as yet none is forthcoming.
2. the amount received from State Lands is considerably less than the \$75,000 BPC has anticipated and will be deducted from the total of \$650,000 to be collected.
3. BCDC will collect the fee prior to issuance of a permit, but before completion of a project.
4. BCDC intends to collect the fee as applications are made for fear that a yearly collection limit might, at the end of the collection period, leave them short of the \$650,000 total approved by the legislature.
5. BCDC states that, in the events of excess fees collected, it would be too burdensome to refund the fees on any other than a chronological basis.

The vote on the fee increase has been postponed from the May 21 hearing to June. This is to allow more time for staff to consider the proposal that sand dredging is in a separate class from other types of dredging, and therefore, should be exempt from the fee.

May 21 Hearing on Proposed Interim Dredging Policies

BPC Executive Director Johnck has been participating in a long series of meetings which have culminated in agreed-upon language for interim BCDC dredging policies (pending completion of the LTMS). The Commission voted unanimously to incorporate these amendments into the Bay Plan on May 21.

Industry's objective was to ensure that the Bay Plan was fortified with policy language that would enable the Commission to be a part of the dredging solution, not be a part of the problem. Although some of the phraseology is not ideal, BPC believes it is about the best we can hope for at the moment given the need to move forward with positive action on 1992-93 projects.

Highlights of the Points of Agreement and Bay Plan Amendments are as follows:

Points of Agreement

1. **In-Bay Site Disposal Targets.** Same disposal targets adopted by the San Francisco Bay Regional Water Quality Control Board and included in the National Marine Fisheries Service's policy to be incorporated into the Bay Commission's regulations.

2. **Road Map.** The document entitled, *Interim Disposal Policy Road Map*, prepared by the U.S. Army Corps of Engineers (April 1992) will serve as the information base for the review of proposed Bay dredging projects. BCDC is asking that dredging applicants will need to justify the failure to use available alternative dredged material disposal sites included in the *Road Map*.

4. **New vs. Maintenance Dredging.** A distinction will generally not be made between new and maintenance dredging. However, in determining which dredging projects have priority in light of the in-Bay annual volume targets, consideration will be given to factors such as dredging need, project regional economic impact and other benefits, and the economic feasibility of alternative disposal sites.

5. **Funding For Additional Costs of Material Transport to Alternative Disposal Sites.** Public agencies and private organizations should make every effort to secure funding to assist in meeting the additional cost of transporting dredged material to non-tidal upland and other disposal sites.

6. **Two and one-half Year Permit Limit.** Bay Commission dredging permits to be issued for a period of 2.5 years. (This rescinds the current 1-year permit limitation.)

7. **Aquatic Containment of Disposed Dredged Materials Should be Addressed in the LTMS.** The LTMS should address the alternative disposal method of aquatic containment of dredged materials. (The Borrow Pit off of Alameda has been suggested as a possible site.)

BCDC's Administrative regulations would be amended to designate the following Bay aquatic disposal sites and volume targets for dredged materials:

Site	cubic yards (in millions)
(a) Off Alcatraz Island	4.0
(b) In San Pablo Bay	0.5
(c) In Carquinez Strait	2.0-3.0
(d) In Suisun Bay Channel	0.2

Exceptions (identical to the Regional Water Board policy) to the annual and monthly targets may be made for small projects in which: (1) the public benefits of the project clearly exceed any public detriment from the disposal of the additional material in the bay; (2) the project design depth does not exceed 12 feet Mean Lower Low Water (MLLW); and (3) the amount of material to be disposed does not exceed 20,000 cubic yards in one year, nor over 50,000 cubic yards over five years.

The subcommittee also recommended that BCDC:

- (1) adopt a resolution recommending the LTMS create an implementation committee
- (2) establish a joint hearing/permit application review procedure with other agencies (such as the Corps, State Lands and SFRWQCB).

Additions to Minor Permit Activities

The proposed changes to regulations Section 10601, Minor Repairs or Improvements, recently adopted by BCDC includes the following activities:

(a) an expansion of the type of residences that may be constructed along the shoreline; (b) an increase in the size of multiple boat docks; and (c) the placement of facilities required for environmental quality testing anywhere within the Commission's jurisdiction.

These are the minor repair activities which will now be handled administratively under 10601:

- (1) new multiple boat docks not larger than 5,000 square feet;
- (2) the construction of one-and two-family residences and ancillary residential structures on any parcel *except in cases where the parcel was subdivided between November 10, 1969 and June 17, 1987* and has frontage on the Bay of *more than 200 feet* including frontage of adjacent parcels that were under the same ownership as the parcel on which construction will occur;
- (3) the placement of facilities required for environmental quality testing that does not involve placement of fill, change in use or alteration of public access for a period of time longer than provided by the permit for completion of the work , and would not otherwise have a substantial effect on bay related resources.

HIGHLIGHTS OF STATE CHAMBER RESOURCES COMMITTEE

As a member of the California Chamber of Commerce and an appointee to its Natural Resources Committee, BPC Executive Director Johnck attends the Committee's quarterly meetings and special task force sessions on a regular basis. Some highlights of the May meeting are particularly worthy of mention.

Mr. Ward Connerly, leader of the Regulatory Streamlining Task Force of the Council on California Competitiveness (Council) gave a presentation on the efforts of that group. Undoubtedly many BPC members and *Bay Briefs* readers have seen the press stories announcing the publication of the Council's report, commonly referred to as the Ueberroth Report (after the Council's Chairman) entitled "**California's Jobs and Future**".

Mr. Connerly summarized the substance of the Council's 4-month deliberations, saying that the testimony from small business individuals and associations provided compelling evidence that California's economy is in deep trouble and the climate for doing business in the state is bleak.

The Council invited 12 environmental groups to their meetings in an effort to incorporate the broadest base of views regarding recommendations for the future direction of the state. Unfortunately, out of 12 invitations, only 1 or 2 groups attended—and they offered few constructive suggestions.

The report contains recommendations for action in areas such as regulatory streamlining,

land-use problems, CEQA, permitting and reporting requirements, uniform standards, and impact fees/exactions, and providing capital and economic incentives. The report proposes such novel ideas as forming a State Land-Use Court to address the refusal of agencies to follow existing law and administrative procedures. Moreover such a state-level court, the report advises, would be better able to deal with complex land-use issues which are regularly delayed because of criminal proceedings taking precedence.

The report mirrors much of what the BPC stands for and we welcome the support, involvement, and greater visibility of a wider statewide audience. In particular the regulatory streamlining proposals deserve BPC involvement to ensure that they are implemented.

Governor Wilson gave no direction to the Council regarding report distribution and implementation. Consequently, Kirk West, President of the State Chamber, has offered to sponsor the printing of 10,000 copies. The Natural Resources Committee voted to support the concepts in the report and urged the Chamber to take a leadership role in organizing the business community to develop a strategy for selective advocacy and implementation of the report's proposals through legislation.

Copies of the report are available from the BPC for a modest copying charge or from the California Chamber of Commerce. ■

WETLANDS RESERVE PROGRAM WORKSHOP

The Resources Agency will be sponsoring a day long workshop on the federal Wetlands Re-

serve Program (WRP), on May 29, 1992 in Sacramento. The event will be held at the Red Lion Inn, 1401 Arden Way from 10:00 a.m. - 4:00 p.m.

California is one of eight states that will share \$46 million for wetlands conservation and restoration. The program will pay landowners who voluntarily conserve wetlands and assist in the restoration of degraded wetlands.

The workshop will be divided into two main segments. The morning will address the final regulations governing the program—specifically the eligibility criteria, the process for signing up, and any other issues potential applicants may have. The afternoon session will focus on the easement document. It is suggested that landowners and their attorneys attend this session.

If you have any questions or are interested in attending, contact Will Shafroth at the Resource Agency at (916) 653-5672, or the BPC office. ■

S.F. BAY RWQCB's REGIONAL MONITORING PLAN UPDATE

The BPC supports the concept of regional monitoring on concentrations of pollutants in water, sediment and biota. However, our primary objective is that the Regional Monitoring program should be developed and managed to produce useful information that can be translated into meaningful policy and regulatory actions. At the present time the RWQCB staff proposal is vague, and as members of the public whose dollars support the existing sediment research program, we want to be sure our dollars are well-spent both now and for any new program.

Our recommendations are that:

- (1) The RWQCB staff should review its current research program and other state agency research and ambient monitoring efforts. Determine whether a re-allocation of existing Water Board and other state agency funds might better achieve the Board's monitoring objectives.
- (2) A working group of affected parties and Water Board Staff should be convened to deliberate and decide upon a clear set of objectives for monitoring and establishing a fair and equitable cost formula.

The Board directed its staff to develop a plan incorporating these and other constructive suggestions.■

NATIONWIDE PERMIT UPDATE

A coalition of supporters for nationwide permits (NWP) met with the State Water Resources Control Board Staff, including the executive director Walter Pettit, to discuss the merits of the system.

BPC and other organization supporters argue that NWPs are an important step in the process of permit reform which Governor Wilson has initiated at Cal-EPA. Two concerns raised by the Water Board staff were compliance with current water quality standards and the Wilson and Bush administration's policy of 'no net loss' of wetlands. According to supporters, both these objectives can be met under a system of nationwide permits, but it was argued that it would help if the State Board would better define its area and extent of statutory authority to protect such broad beneficial uses as recreation and species habitat.

It was also agreed at the meeting that a memorandum of law would be delivered to the State Board's legal staff concerning the application of CEQA in a nationwide permit system.

On another tack, a letter drafted by the CBIA in support of Nationwide Permits is currently being circulated for signatures by various individuals and organizations.

The re-institution of the NWP program is a top priority for BPC action this year.■

ENDANGERED SPECIES ACT UPDATE

Bay Planning Coalition has joined with a number of organizations such as the California Chamber of Commerce, the California Building Industry Association and the California Farm Bureau, to form the ESA reauthorization Coalition of California. Together, these organizations support responsible changes in the federal Endangered Species Act which is scheduled for re-authorization in 1992, and have made their voices heard by submitting a "talking paper" on the ESA reauthorization to the Bush Administration, the California Congressional Delegation, and the Wilson Administration, among others.

The inflexibility of the ESA has taken a great toll in the number of lost jobs and businesses in California. A wide-spread perception that California is no longer a place in which to locate or operate a business is endemic among the business community. Additionally, the Act has not been wholly successful in protecting the plant and animal species it seeks to protect. Flaws in the ESA process (listing, designation of critical habitat, developing recovery plans) have too often precluded comprehensive approaches that would more effectively resolve these environmental issues.

Because of the multitude of problems with the Act, the Bay Planning Coalition has made reform of the ESA one of its top priorities. As a part of the ESA reauthorization Coalition, BPC will work to support reforms to the ESA that will create a balance between the goal of protecting threatened or endangered species while at the same time providing for the continued well-being of California's citizens and economy. A few of the major reforms we support are listed below.

● **Improved Public Notice and Participation.** Currently, the notice provision regarding the receipt of petitions to list a species is haphazard, and there is very limited public participation in the listing process. The Coalition supports requirements for timely public notice to be given regarding the receipt of listing petitions, and requirements for public participation in the review of a petition to list, development of a status report, proposed designation of critical habitat, and formulation of a recovery plan.

● **Consideration of Direct and Indirect Social, Economic and Environmental Costs in the Development of Recovery Plans.** Currently, the ESA requires that the "cost" of recovery measures must be considered in the formulation of a recovery plan. The ESA should be amended to explicitly require that direct and indirect social, economic and environmental costs are considered in the development of recovery plans.

● **Protection Against the Uncompensated Taking of Property.** The application of the ESA has, in many cases, harmed the ability of state, local government and private landowners to place their lands into productive use. The Act should

be amended to re-affirm Fifth Amendment protections against the uncompensated taking of private property.

For a copy of this paper, please contact the Coalition office.■

S.F. ESTUARY PROJECT UPDATE

The San Francisco Estuary Project (SFEP) has headed into the "home stretch" as it enters its final year. Under the Clean Water Act's National Estuary Program, the EPA and the State of California, the SFEP was established in 1986 to address growing concerns about S.F. Bay and the Sacramento-San Joaquin Delta's environmental health. The major purpose of the SFEP is to develop a Comprehensive Conservation and Management Plan (CCMP) that recommends corrective actions and compliance schedules in the areas of Dredging and Waterway Modification, Flows, Land Use, Pollution and Wetlands.

As a member of the Management Committee (MC), Executive Director Johnck is attending meetings twice monthly in Oakland and Sacramento, where the MC is working to complete the CCMP. The Bay Planning Coalition has been active in the SFEP since its beginning, serving on the Wetlands, Dredging and Waterway Modification, and Land Use and Pollutant subcommittees. Although many of the MC participants, including BPC, continue to have concerns about the project's commitment to a realistic and balanced Plan, benchmarks have been reached in the following areas:

Pollution: The MC agreed upon a three-tiered approach: Prevention, Control and Remediation.

Dredging: The majority of actions approved thus far follow the LTMS program.

Flows: The designated Flow Workgroup has been meeting to develop an Aquatic Resources Management Plan, which will combine the “fish habitat” and “fish species” elements of the draft CCMP. A separate management plan for water use is under development for review by the Flows Workgroup.

Wetlands: Comments indicate that the specifics of the management program need to be revised because the proposed actions rely too much on expanding regulation and not enough on improving regulatory inefficiencies. Progress is being made, however, many items are still contentious, i.e. wetland definition, wetland classification proposal, and state role. Executive Director Johnck is part of an ad-hoc work group that will work with SFEP staff to revise the draft, based on these concerns, for a final version on July 10.■

LANDMARK DECISION IN HOFFMANN HOMES, INC. v. EPA

The Seventh Circuit Court of Appeals has handed down a landmark decision in the case of *Hoffmann Homes, Inc. v. Environmental Protection Agency*, ruling that the EPA and the U.S. Army Corps of Engineers have no authority under the Clean Water Act or the U.S. Constitution to regulate isolated wetlands — wetlands that are not adjacent to open bodies of water. This ruling, handed down in April, invalidates the EPA’s regulation defining waters of the United States to include isolated wetlands.

In the Hoffman case, the developer filled a 0.8 acre, isolated wetland while constructing a 48-acre residential project. Subsequently, the Corps issued a cease and desist order. Hoffmann applied for an after-the-fact permit, which was denied due to EPA’s objection. EPA ordered Hoffmann to restore the wetland and fined him \$50,000. Hoffmann appealed, contesting the EPA’s assertion of jurisdiction.

The EPA claimed jurisdiction on the grounds that “migratory birds could, potentially, use the wetland as a place to feed, or nest or as a stopover on the way to the Gulf States or for the winter months.” The Court rejected this argument, stating “Since creation (of the states), migratory birds have flown interstate..migratory birds do not ignite the Commerce Clause. The idea that the potential presence of migrating birds itself affects commerce is even more far-fetched.”

In its closing, the court also gave a spark of hope to landowners when it recognized that the outcome of *Lucas v. South Carolina Coastal Council* (a takings case pending decision by the U.S. Supreme Court) may lead to the federal government being forced to bear its share of national conservation effort, rather than such costs being imposed incidentally on landowners like Hoffmann.

(Thanks to David Ivester, Partner in the law firm of Washburn, Briscoe & McCarthy, for his contribution to this article.)■

LEGISLATIVE UPDATE

AJR 59 (Lempert) - Memorializes the President to not adopt the 1991 Federal Wetlands Manual.

Status: Assembly Rules Committee

BPC Position: Oppose

AB 3359 (Sher) - Proposes that BCDL Bay Plan and SWRCB plans and policies be exempt from OAL review.

Status: Passed out of Assembly Ways & Means 5/13

BPC Position: Oppose with priority

SB 1893 (Kopp) - Proposes to abolish OAL

Status: died in committee

BPC Position: Oppose with priority

AB 2464 (Lee) - Directs SWRCB to establish a separate classification of dredged material as distinguished from other classifications (of waste) and Board should adopt protocol for dredged material upland disposal.

Status: Senate Agriculture & Water Committee

BPC Position: Support with priority

SB 1866 (Johnston) - Create new government (BCDL-type) agency for the Delta.

Status: passed Senate Appropriations 8-1; no date yet for a floor vote.

BPC Position: Oppose with priority

AB 2391 (Moore) - Mandates that cities and counties give equal consideration to economic and environmental impacts when adopting air quality rules and regulations.

Status: Assembly Ways & Means Committee

BPC Position: Support

AB 3076 (Allen) - Effects a comprehensive revision of the California Environmental Quality Act (CEQA). Features include developing mitigation banks, increasing regulatory efficiency, and amending some of the more onerous provisions of CEQA.

Status: Assembly Committee on Natural Resources

BPC Staff Position: Support with priority

SB 1480 (Beverly) - Provides for an analysis of the effects to industry from the Oil Spill Prevention and Response Act.

Status: In Senate - 2nd Reading File

BPC Staff Position: Support with priority

SB 1596 (Maddy) - Creates the Office of Permit Oversight in Cal-EPA.

Status: In Senate - 2nd Reading File

BPC Staff Position: Support

SB 2039 (Bergeson) - Establishes a lead permit agency and stricter time limits on environmental permit review.

Status: Senate Committee on Governmental Organization

BPC Staff Position: Support

AB 3511(Jones) - This bill would expand the notice requirements on state agencies to include all business enterprises (not just small business) when analyzing regulations that may have a significant adverse economic impact.

Status: Assembly Ways & Means Committee

BPC Staff Position: Support with priority

AB 3765 (Mays) - Requires a permit coordinator when issuing a permit for projects that require a permit from two or more boards.

Status: Assembly Natural Resources

BPC Staff Position: Support with priority

AJR 40 (Jones) - Endangered Species. Memorializes the President and the Congress to adopt specified amendments during the re-authorization of the Endangered Species Act. These amendments include a provision that full consideration be given to the economic impact of listing decisions, and a determination of whether the listing would constitute a private property taking under the Fifth Amendment.

BPC Staff Position: Support with priority.

