

**DEPARTMENT OF FISH AND GAME**

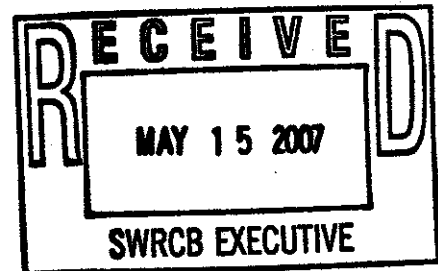
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Wetland/Riparian Policy  
Deadline: 5/15/07 12 noon



May 15, 2007

Ms. Glenda Marsh  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA. 95814



**CEQA Scoping Comments  
Proposed Wetland and Riparian Area Protection Policy**

Dear Ms. Marsh:

The Department of Fish and Game (Department) respectfully submits the following CEQA scoping comments on the State Water Resources Control Board's (State Board) Proposed Wetland and Riparian Area Protection Policy. Furthermore, the Department is interested in working closely with the State Board in the development of policy to enhance the protection of wetlands in California.

**Purpose of the Policy**

The proposed Wetland and Riparian Area Protection Policy (Policy) seeks to improve the WQC program through specific goals: 1) increasing staff resources, 2) promoting regulatory streamlining, 3) improving inter-agency coordination, 4) analyzing cumulative and watershed level impacts, and 4) requiring monitoring and enforcement of compensatory mitigation to achieve the "no net loss" objective of the State's 1993 Wetlands Conservation Policy. The CEQA scoping for the proposed Policy action is asking that comments on the 4 policy alternatives provide input on how the alternatives and corresponding mitigation measures will meet the above goals.

**General Comments**

The Department recommends that the State Board further evaluate the proposed alternatives in relation to protection of groundwater where it supports wetland systems. None of the proposed alternatives incorporate the need to address discharges to groundwater and the impact the changes in groundwater quality may have on vernal pools and other wetlands in areas where very shallow first encountered groundwater is an integral component of wetland hydrology. The U.S. Army Corps of Engineers describes the dominant hydrodynamics and geomorphic controls of California vernal

pools and wetlands as vertical from either groundwater or precipitation into depressions. These controls are responsible for maintaining many of the functional aspects of wetland ecosystems, including the chemical characteristics of waters, habitat maintenance, and water storage and transport.<sup>1</sup> In particular, constituents such as salts, nutrients, and pesticides discharged to groundwater from irrigated lands, confined animal facilities and cropland associated with these facilities could potentially impact the quality of these wetland waters and the plants and animals that utilize these habitat types. The policy alternatives should disclose and recognize that there needs to be a two pronged regulatory approach and assess the impacts, including cumulative, of discharges from both surface and ground waters that interface with wetlands.

The Department also recommends that under each of the policy alternatives that would increase wetland regulation, the State Board assess how more stringent regulation may affect the implementation of many private and public wetland restoration and wetland habitat management efforts conducted throughout the state, with both public and private funding. Increased regulation could discourage these types of projects, which presently contribute to an increased number of functional wetland acres, above and beyond what is required for individual project mitigations. As part of this analysis, the State Board should consider and evaluate the potentially beneficial environmental effects of appropriate regulatory exemptions or waivers for wetland / riparian restoration or enhancement projects and for routine vegetation management and infrastructure maintenance in managed wetland and riparian habitats (i.e. weed control, levee maintenance, water control structure replacement, etc.).

Under Section 1600 et seq. of the Fish and Game Code, the Department has regulatory authority to condition projects that may cause a substantial alteration to bed, bank or channel of a lake or stream, to ensure protection of the associated species and habitats. While for some projects, the Department's 1600 jurisdiction may apply to riparian and wetland habitats in close association with a bed, bank or channel, there is not a 1:1 correspondence between the Department's 1600 jurisdiction and wetlands. Thus there is not as much regulatory overlap between the Department's LSAA Program, Federal 404/401 jurisdiction, and State Board authorities as often cited, leaving important categories of wetlands in California unprotected. Furthermore, the fact that there is no uniform wetland definition or riparian area definition complicates the jurisdictional issues.

## **Analysis of the 4 Policy Alternatives**

### **1. No Action**

Under this alternative, the State and Regional Water Boards would continue to use existing authorities under the Federal Clean Water Act (CWA) - respectively Section 404 and 401 Water Quality Certification - and the California Water Code (CWC) to regulate fill and dredge activities of wetlands in tandem with the U.S. Army Corps of

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<sup>1</sup> Brinson, M. M. A. Hydrogeomorphic Classification for Wetlands. 1993.

Engineers. No new state policies would be adopted by the State Water Board to protect wetlands and riparian areas.

The specific limitation of implementing this alternative is that it does not address the lack of clarity regarding the regulatory framework and gap left by those wetlands that are no longer subject to permitting jurisdiction under the CWA – specifically so-called “isolated” waters as discussed in the SWANCC decision. Due to a lack of staffing resources at the Regional Boards, outside of the 404/401 program application process, Regional Water Boards (the implementation arm of the CWC) are not regulating discharges to wetlands. So basically, if no application is filed with ACOE under Section 404; most, if not all, dredge and fill activities of isolated wetlands are not addressed by the Regional Water Boards. The CEQA analysis should attempt to quantify the amount of wetlands that would continue to be adversely impacted under a limited and fragmented regulatory scheme.

In the no action alternative, the WQC program goals identified by the State Water Board are not being met and losses of wetlands are occurring with no compensatory mitigation. Much of the vernal pool and wetland conversion probably occurs on lands where these wetlands would be disclaimed as jurisdictional by ACOE in light of the SWANCC decision, but would most likely qualify as “waters of the State”. That having been said, while it would be impossible to provide a quantitative estimate of the acreage lost through the unregulated (no need for a 404 ACOE permit /401 state Cert) conversion of wetlands this should at least be mentioned in the CEQA analysis.

Further, as it stands today, there is no statewide consistency regarding the definition of wetlands and riparian areas; and consequently there are no statewide assigned beneficial uses (e.g.: freshwater habitat, rare T&E species, groundwater recharge, wildlife corridor or connectivity, etc.), or corresponding water quality objectives (numeric or narrative objectives such as specific conductance, ammonia, pH, three species toxicity indices, % vegetative cover, etc.) that are standardized requisites for evaluating whether wetlands and/or riparian habitat meet the conditions required to support beneficial uses. This is significant because it hinders a consistent regulatory approach (permitting) and gives no standard measurement in evaluating the need for an enforcement action pursuant to the CWC.

Where each of the other, more protective Policy alternatives provides for a State-wide framework and/or mandate consistent implementation of wetland protection, the CEQA analysis should quantify the potential environmental benefits from wetland retention, preservation and/or restoration under each of the various levels of protection and regulation provided.

Even beyond the nuts and bolts of permitting that is occurring under both Section 404 and the State’s 401 Certification, there are no coherent criteria or a mechanism for determining if compensatory and created mitigation wetlands required under the permitting process are functional, support like species complexes over time, and indeed do fully compensate in terms of quality on an acre for acre basis. In fact, in a study by UCLA conducted in 2006 through a contract with the State Board, it was demonstrated

that while on an acre for acre basis the State was meeting the "no net loss" portion of its Wetland Conservation Policy, ***it was not meeting this goal in terms of the compensatory wetlands having the same value and functions as the wetlands that are lost in the project execution process.*** Further, as mentioned above, the study focused solely on wetlands where mitigation was done under a 404/401 permit condition and did not reflect the loss of wetlands outside of the regulatory process. The CEQA analysis should address the potential environmental effects of a continued loss of functional wetlands under the current regulatory and policy framework.

2. Adopt the federal CWA 404(b)(1) Guidelines as the State Policy to regulate impacts of dredge or fill material discharges

Inherent in this alternative are the same deficiencies identified above for Alternative 1. In addition, this approach does not address the cumulative impacts of multiple projects occurring in the same general area or watershed. Alternative 2 would provide the State Board with the option to regulate under the Section 401 Cert program those waters that currently do not meet the definition of jurisdictional under Section 404 and would adopt the working definition for wetlands consistent with the federal CWA. This Alternative would also give the State Board a mechanism to engage in increasing the fee base and resources needed to set policy parameters for the Regional Boards to conduct a minimally protective regulatory program. However, Alternative 2 would not address the inconsistency of assigning beneficial uses for wetlands at the State and Regional Boards so that the problem of not meeting the intent of the "no net loss" policy in conserving acreage for quality and function of wetlands will be ongoing. The CEQA analysis should address the corresponding environmental effects to wetlands and from the loss of wetland functional values under this scenario.

3. Develop a new State Policy to regulate impacts of dredge or fill material discharges

This Alternative goes a step further than Alternative 2 and proposes to address through policy components the lack of statewide consistency in the definition of wetlands and riparian areas and provides a uniform framework to encourage Regional Boards toward assigning beneficial uses and requirements (water quality objectives) through the Basin Plan amendment process for wetlands. It would develop a minimum level of protection for both federal jurisdictional and non-jurisdictional waters that likely would be higher than the level of protection currently provided to those waters through the Section 401/404 programs and through existing state policies. Cumulative impacts would be considered during the permitting process and mitigation is proposed to be sequenced and determined based on the functions lost at the impacted site. Another aspect of value is the establishment of performance standards designed to improve mitigation success. This is very critical because those projects that rely on wetland creation for mitigation must be held to a measurable and enforceable standard which determines objectively that the mitigation is similar in function and quality to the lost site in perpetuity.

However, Alternative 3 does not extend beyond requirements for dredge and fill material discharges, and would continue to rely on the Regional Boards to regulate other types of discharges to wetlands through Section 13260 of the CWC. The lack of a statewide regulatory context applied to other non-point discharges that may contain constituents such as salts, nutrients, pathogens, or pesticides conveys little incentive to Regional Water Boards to elevate wetland and riparian protection to a higher priority from these very real threats. In the Central Valley, the most common potential sources of "pollutant/stressor" on the 303(d) list of impaired surface water bodies are discharges from non-point sources such as urban runoff/storm water sewers, agriculture (irrigated agriculture and dairies), and resource extraction. The most common pollutants identified are pesticides (organophosphates, carbamates, pyrethroids), pathogens (e-coli), and metals such as mercury and copper. It is reasonable to expect that upland non-point source discharges of these constituents to wetlands such as vernal pools, could have the same significant impacts in terms of water quality impairment, and on the species (vernal pool invertebrates, California tiger salamander) that rely on the quality of these waters, as these discharges have on identified impaired surface water bodies.

Alternative 3 would not allow for a robust probability of successfully protecting beneficial uses and/or properly functioning wetland and riparian resources from non-point source or other types of discharges. The CEQA analysis should address the corresponding environmental effects to wetlands and from the loss of wetland functional values under this scenario.

#### 4. Develop a new State Policy to regulate a variety of discharges

This Alternative would develop a new state policy to regulate a variety of discharges and activities that impact wetlands and riparian areas; including but not limited to, dredge or fill material, discharges of other pollutants from irrigated agriculture, urban storm water, or resource extraction; hydro-modification; land and vegetation clearing activities; and invasive species. This alternative would fill the regulatory policy gaps identified in the other three alternatives and advances State Board policy to use the best available practices and science currently available. Alternative 4 also calls for improving permitting coordination between agencies; however, it does not discuss who those agencies are and what permitting could be streamlined and/or evaluated for consistency.

Alternative 4 is predicated on the assumption that existing regulatory infrastructure at the Regional Boards could be used to administer the permitting of discharges outside of the Section 404 program/401 Cert process. Conversely, most, if not all, Regional Boards do not have a mechanism directly in place to permit a variety of discharges to wetlands and will require time to determine if existing regulatory programs can be modified to implement the new policy or they must craft new stand alone program(s). Couple this with the need to amend Basin Plans to include beneficial use assignment and associated water quality objectives for wetlands and the resource requirements/acquisition of the Regional Boards to accomplish these tasks, it becomes

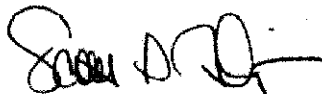
apparent the timeline could be protracted before any measurable progress toward meeting the Policy goals will be made. A phased approach that implements Alternative 3 in entirety and constructs a comprehensive schedule for meeting regulatory milestones to regulate other discharges as identified in Alternative 4 should be considered and analyzed, and may be more manageable to administer. This methodology would quickly advance the dredge and fill permitting priority for waters determined non-jurisdictional under the federal CWA, and would address the currently unmitigated wetland impacts associated with non-jurisdictional wetland loss.

Also, this could present an opportunity to establish a "consultation" process between Regional Boards and the Department. Specifically, to a great extent the beneficial use assignment for wetlands will directly affect biological resource protection under the jurisdiction of the Department. Similar to the Section 7 consultation process initiated by the ACOE with U.S. Fish and Wildlife Service; the Regional Boards could, and probably should, coordinate with the Department during the permitting application process to evaluate the associated impacts of projects on biological resources in the execution of the dredge and fill of wetland habitat, and provide input on appropriate avoidance and mitigation measures. Furthermore, the permitting process is conducted under a certified CEQA equivalent regulatory program; therefore, as a Trustee Agency for fish and wildlife resources, the Department is responsible for providing biological expertise to review and comment upon environmental documents (permit applications) and impacts arising from project activities, as those terms are used under CEQA (Division 13 (commencing with Section 21000) of the Public Resources Code).

The Department also has regulatory authority over projects that could result in the "take" of any species listed by the State as threatened or endangered (Section 2081) and has authority regarding some activities occurring in the riparian zone (Section 1600) and should be consulted to aid in streamlining the process by incorporating some of these provisions into a single discharge permit. A tiered approach as suggested above would facilitate the implementation of such a consultation process first under the 404/401 program then later into a more complex Regional Board regulatory progression that may include Waste Discharge Requirements or Waivers.

The Department appreciates the opportunity to comment on the CEQA scoping for the proposed Policy.

Sincerely,



Scott A. Flint  
Program Manager  
Environmental Review and Permitting