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TO: State Water Resources Control Board Staff  
FROM: Karen Keene, CSAC Legislative Representative  
RE: Draft Wetlands and Riparian Policy Comments

On behalf of the California State Association of Counties (CSAC) I want to thank you for providing us with the opportunity to provide comments regarding the proposed draft Wetlands and Riparian Policy documents dated May 6, 2010.

While the proposed wetland regulatory program in many ways mimics the current Federal Clean Water Act (CWA) program, we share our members concerns that where differences exist project applicants will be faced with duplicative, contradictory and more burdensome regulatory process without any apparent environmental benefits.

Given the potential impacts of the proposed policy on the development, operation and maintenance of essential public works projects and facilities, we shared the draft documents with county public works departments and water resource agencies for technical input. The following comments and are based upon the input we received.

### **Wetlands Policy Summary**

#### Wetlands Definition:

While we appreciate the State Board staff's attempt to be more consistent with federal requirements pursuant to Section 404 of the Clean Water Act (CWA), the proposed wetland definition is still not fully consistent with the federal definition. The proposed definition is not inherently bad, but it will result in confusion and conflicts with the federal definition and ultimately cause many projects to be subject to different wetland jurisdictional determinations for Federal and State permitting needs.

CSAC believes that there is no reason for the State Water Board to adopt a California-specific wetlands definition given the existence of the Army Corps of Engineers (USACE) 1987 Delineation Manual and the 2008 regional supplements (Arid West Region and Western Valleys, Mountains and Coastal Regions).

#### Wetland Area Delineation:

State Board staff proposes to use the methods described in the current USACE wetland delineation manuals to determine the boundaries of wetlands. This would be fine if the State Board was going to rely upon the Federal definition of wetlands, and not a new State definition of "wetlands". The USACE wetland delineation methods are based on the federal definition of wetlands. Again, potential conflicts/discrepancies

with the State Board staff's proposed wetland definition should be resolved well in advance of any proposed policy/rulemaking.

### Wetland Monitoring and Assessment Framework

The policy summary states that the wetland monitoring and assessment framework are to be implemented as a component of the State Wetland and Riparian Area Monitoring Program (WRAMP) that is being developed by the California Wetland Monitoring Workgroup, implementing multi-agency resources. The end result will be the development of regulatory assessment standards that employ a watershed approach. According to one of our member counties, these workgroups often consist of regulators and academics whose experience may not give insight about the regulated community's ability to perform their monitoring recommendations. If the Water Board is giving any consideration to redefining the role of the workgroup, we encourage the Board to include individuals who have experience with the relevant capabilities.

### **Regulations Summary Document – Dredge and Fill Discharges**

Regulatory Procedures for Permitting "De Minimis" Discharges of Dredged and Fill Material:

Although counties are pleased that State Board staff plan to incorporate the CWA Section 404(f)(1)(A)-(F) exemptions, the proposed regulations fail to provide any expedited permitting procedures corresponding to the USACE Nationwide Permits (NWP) and Regional General Permits (RGPs). These processes allow expedited permitting for activities with minimal impacts. Such permitting procedures are critical to time-sensitive activities such as flood control maintenance/repairs, and emergency work. CSAC urges the Water Board Staff to include in the draft regulations a similar expedited permit process for activities with minimal impacts.

Complete, Incomplete and Valid Applications:

There is a reference that the Regional Boards have 30 days to respond on the determination of completeness of an application. It is unclear as to what the applicant's next step would be if they don't hear from the Regional Boards within the 30 days. This needs more clarification.

Alternative Analysis:

Under the proposed policy/regulations, it appears that all dredge and fill activities within "wetlands" will require a State alternative analysis that differs significantly from the alternative analysis to fulfill federal wetland permitting requirements. The State will always require applicants to refute the presumption that avoidance of wetlands is a practicable alternative. In contrast, the federal Section 404(b)(1) guidelines only require this step if the activity is not "water dependent". Flood control and drainage

projects are typically water dependent. The federal Section 404(b)(1) guidelines also allow the alternative analysis to be based on the “overall project purpose”, and the “basic project purpose” is only used to determine whether the project is "water dependent". Typically, the overall project purpose (e.g., convey flood waters from point A to point B) more specifically describes the applicant’s goals for the project, which allows a reasonable range of alternatives to be analyzed. Besides conflicting with Federal wetland requirements for alternative analysis, the proposed policy/regulations would unreasonably limit the alternatives to be evaluated to the basic project purpose (e.g., flood control).

As with the other areas of the proposed regulations, it’s unclear why the State is inconsistent with federal procedures that are based on many years of wetland regulation experience or what benefits will be achieved as a result of these differences. Besides the additional time and cost associated with preparing a State specific alternative analysis, the State’s proposal could result in permitting situations where applicants cannot meet the conflicting federal/state requirements. CSAC recommends that the proposed alternative analysis be deleted.

#### Mitigation – “On-Site” as Preferred Approach:

The proposed policy/regulations are also inconsistent with current federal procedures that give preference to mitigation measures that are considered to be "best" from an ecological function/watershed-wide perspective. The current federal approach is based on considerable evidence showing that small-scale "on-site" mitigation efforts are typically ineffective in achieving and sustaining wetland functions and values – particularly when they are located within an urbanized setting. Although the proposed wetland policy documents sporadically mention watersheds, State Water Board staff’s preferred approach, as expressed in the proposed sequential preference for mitigation alternatives, is for onsite mitigation irrespective of any consideration alternatives that may better serve the overall ecological values, wetland functions and beneficial uses within a watershed.

#### Mitigation – Watershed Approach:

The proposed determination of mitigation ratios appears to be for the purpose of forcing entities to conduct watershed assessments and watershed plans. This becomes problematic when watersheds cover multiple jurisdictional boundaries and not all jurisdictional entities have the financial means/resources to perform those assessments. For example, an entity needing to do a project may be penalized with higher mitigation ratios if the project occurs in a watershed where the other entities within the watershed could not or would not perform their part of the needed watershed assessment or plan. We believe that mitigation ratios should be based on science not arbitrary and tied to whether a document exists or not.

CSAC urges that the language added by the State Water Board staff be deleted. Further, we concur with the recommendation made by the Regional Council of Rural

Counties (RCRC) that the Water Board instead act in accordance with the federal Compensatory Mitigation for Losses of Aquatic Resources Final Rule which specifies that “In the absence of an appropriate watershed plan, the watershed approach should be based on a structured consideration of watershed needs and how wetlands and other types of aquatic resources in specific locations will address those needs”.

#### Temporary and Permanent Impacts:

The proposed regulations need to make a distinction between temporary and permanent impacts, with temporary impacts never exceeding a 1:1 ratio. For example, routine maintenance of flood control structures that impacts native vegetation periodically should only be required to be mitigated at a maximum ratio of 1:1 once every 10 to 15 years.

In concluding, CSAC respectfully requests your serious consideration of all of the comments and suggested changes outlined above, as well as those submitted by individual counties. Thank you again for providing us with the opportunity to share with you the county perspective.