



January 26, 2010

Mr. Charles R. Hoppin  
 Chair  
 State Water Resources Control Board  
 1001 I Street  
 Sacramento, CA 95814

Dear Chair Hoppin:

Our organizations are writing to express their collective concern about the State Water Resources Control Board's (the "State Board") development of a new Wetland and Riparian Area Protection Policy under Resolution No. 2008-0026 ("Resolution 2008-0026"). As we have previously expressed to the State Board during the various public workshops and hearings held during the resolution adoption process, we support the part of Resolution 2008-0026 that will fill the "gap" in wetland protections resulting from the 2001 U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("SWANCC") without adding new regulatory burdens. We do not support the provisions of the Resolution 2008-0026 that seek to do more than fill the SWANCC gap or that will increase the regulatory burden in doing so.

Although we did not support Resolution 2008-0026 because it goes beyond filling the SWANCC gap, we respect the State Board's professional judgment and concern for the environment embodied in Resolution 2008-0026 based on the record then before it. However, we now have new information which we think will lead the State Board to reconsider Resolution 2008-0026 and take a different direction. The new information comes from the Wetlands Development Team's ("Development Team") status report to the State Board on October 6, 2009 ("Status Report"), the Resources Agency's draft report, State of the State's Wetlands (October 2009)(the "Draft Report") and the continuing fiscal crisis facing the State of California ("Fiscal Crisis").

The Status Report demonstrates to us that the Development Team did not follow the direction in Resolution 2008-0026 regarding the development of a State wetland definition. The Draft Report invalidates the key premise in Resolution 2008-0026 that a change in the state's regulatory program is needed because "California continues to lose 'functional wetlands' at an increasing rate". The Fiscal Crisis shows that the State and Regional Boards should not use scarce resources to regulate wetlands and riparian areas which are already extensively regulated by the Regional Water Boards, the U.S. Army Corps of Engineers (the "Corps"), the U.S. Environmental Protection Agency (the "EPA"), the Department of Fish and Game ("DFG"), and cities and counties.

**I. The Status Report Shows that the Wetlands Development Team Is Not Following the Guidance in the Resolution In Developing a Definition of Wetlands**

Resolution 2008-0026 provided clear direction to the Wetlands Development Team to establish a state definition of wetlands based on the United States Army Corps of Engineers' wetland and delineation methods. Resolution 2008-0026 says:

Phase 1 – establish a Policy to protect wetlands from dredge and fill activities. The Development Team is directed to develop and bring forward for State Water Board consideration: a wetland definition that would reliably define the diverse array of California wetlands based on the United States Army Corps of Engineers' wetland delineation methods to the extent feasible.

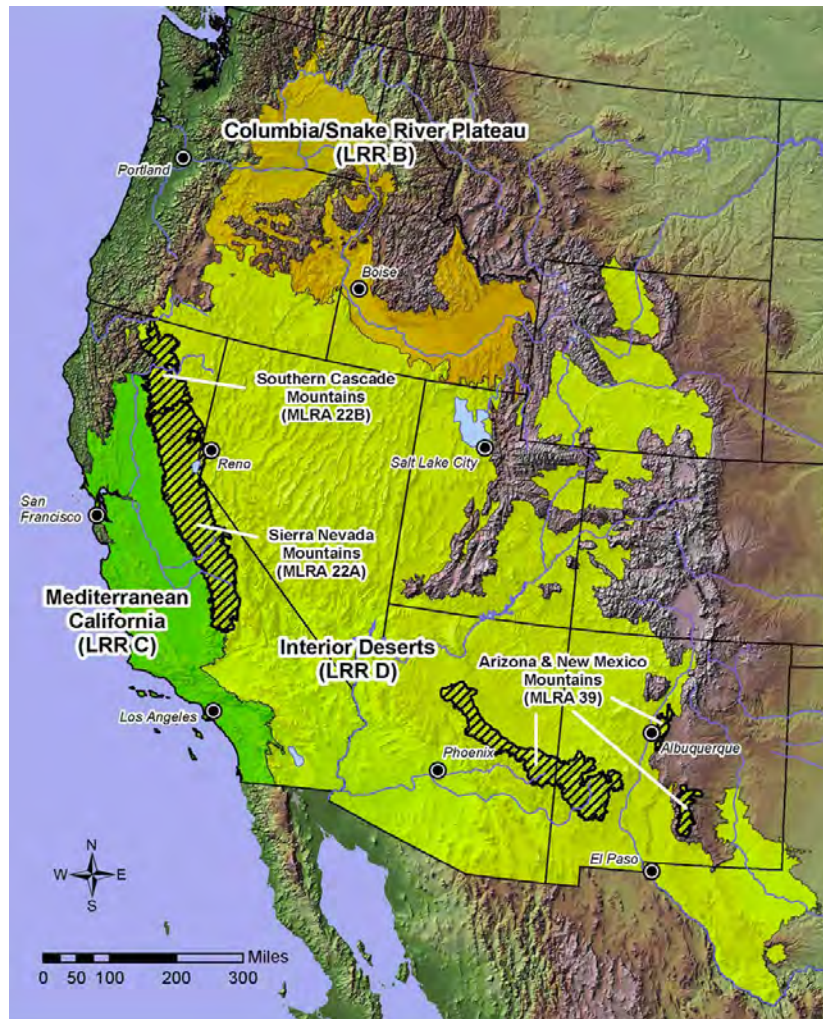
Under Resolution 2008-0026, the state definition should depart from the Corps' approach only if it is not feasible to use it. The plain meaning of feasible is "1. Capable of being accomplished or brought about; possible." The Free Dictionary; "1: capable of being done or carried out." Merriam Webster Online Dictionary.

The heart of the Corps long standing wetland delineation methods is the definition in 33 CFR 328.3(b) and the supporting delineation manuals. The primary manual is the national wetlands delineation manual, "Corps of Engineers Wetland Delineation Manual, Wetlands Research Program", Technical Report Y-87-1 (January 1987) ("Corps Wetland Manual"), online at <http://el.erdc.usace.army.mil/wetlands/pdfs/wlman87.pdf>. Regional Manuals address wetlands delineation issues that arise in different parts of the country, including California. The regional manuals were developed after the Corps prepared a technical report that identified the need for more detailed guidance based on regional differences, Wakeley, James S., "Developing a Regionalized Version of the Corps of Engineers Wetlands Delineation Manual: Issues and Recommendations" (August 2002) online at [http://www.usace.army.mil/CECW/Documents/cecwo/reg/dev\\_reg\\_wetlands.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/dev_reg_wetlands.pdf)

The Corps subsequently identified the areas for which regional supplements would be developed, online at [http://www.usace.army.mil/CECW/Documents/cecwo/reg/map\\_del\\_region.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/map_del_region.pdf). California falls into two of the regions. They are the Arid West Region and the Western Valleys, Mountains and Coast Regions. The Corps has now completed ten final or interim regional supplements

including both supplements that cover California. The other eight supplements are: the Alaska Supplement, Atlantic & Gulf Coast Supplement; Caribbean Islands Region Supplement, Eastern Mountains and Piedmont Supplement; Great Plains Supplement, Hawaii and Pacific Islands Supplement; Mid-West Supplement; and North-Central and Northeast Supplement. The Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0) U.S. Army Corps of Engineers (September 2008) can be found online at <http://www.usace.army.mil/CECW/Documents/cecwo/reg/trel08-28.pdf>. The Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Western Mountains, Valleys, and Coast Region U.S. Army Corps of Engineers (April 2008) can be found online at [http://www.usace.army.mil/CECW/Documents/cecwo/reg/west\\_mt\\_intersupp.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/west_mt_intersupp.pdf). These manuals both address California-specific conditions as well as those in other states. The Arid West Manual, for example, is "applicable to the Arid West Region, which consists of all or portions of 12 states: Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Texas, Utah, Washington, and Wyoming. See Figure 1 which follows.

**Figure 1**



Given the long-standing legal status of the Corps definition, the robust technical information in support of the definition and the California-specific nature of the regional supplements, the use of the Corps wetlands definition and supporting material is one hundred percent feasible for use as a state wetland definition. We see absolutely no basis for the Development Team to depart from its use.

Unexpectedly, the Status Report demonstrates that the Development Team did not use the Corps wetland definition as the basis for a state wetland definition. It identified a new hybrid definition of its own creation. The new definition varies greatly from the Corps definition. It is extremely problematic and will impose huge costs on the state and local governments and private parties to implement.

As shown below, the Development Team effectively ignored the direction in Resolution 2008-0026. The Policy Development Team used a highly qualified Technical Advisory Team ("TAT") to assist it in the development of a state wetland definition. However its guidance to the TAT was flawed. Technical Memorandum No. 1 (inexplicably formally issued five months after Technical Memorandum No. 2) fails to include any reference to the Corps wetlands definition or the Delineation Manual. Instead, it asked the TAT to develop a "recommendations based on science rather than regulatory, economic or political concerns." This misguided direction doomed the effort of the TAT.

The progression of guidance is shown below:

A. **State Water Resources Control Board Resolution No. 2008-0026 (April 15, 2008):**

Phase 1 – establish a Policy to protect wetlands from dredge and fill activities. The Development Team is directed to develop and bring forward for State Water Board consideration a wetland definition that would reliably define the diverse array of California wetlands based on the United States Army Corps of Engineers' wetland delineation methods to the extent feasible.



B. **Technical Memorandum No. 1: Technical Advisory Team (October 12, 2009):**

TAT's guiding principles for providing science support to the California Wetland and Riparian Protection Policy Development Team

- Recognizing the goal of wetlands protection, describe the wetland science needed to support the policy.
- To the extent possible, adopt a wetland definition that relies on existing approaches to wetland delineation, mapping, classification, and monitoring.
- To the extent possible, develop recommendations based on science rather than regulatory, economic, or political concerns.



C. **Technical Memorandum No. 2: Wetland Definition (Final June 25, 2009)**

Criteria for Selecting or Developing a California Wetland Definition

Defines unique features of landscapes that are neither terrestrial nor aquatic in terms of physical attributes, chemistry, ecology, and social values.

Encompasses the full range of all conditions of all wetlands of all types commonly recognized in California by regional, state, and national communities of wetland managers and scientists.

Can be translated into a standard approach to mapping and field-based delineation of wetland boundaries without unnecessarily limiting the scope or breadth of the maps or delineations.

Is the same as, or very similar to, an existing definition that has been proven appropriate through broad application by US States, Tribes, or federal agencies.

Refers to natural processes that account for the particular characteristics, functions, beneficial uses, or ecological services of California wetlands.

Neither Technical Memorandum 1 or 2 contain a single reference to the Corps wetland definition, the supporting manuals or to any basis for identifying why the use of the Corps definition is not feasible. The State Board needs to redirect the Development Team back to the standard in Resolution 2008-0026.

II. **The Draft Report Shows That The Premise Underlying Resolution 2008-0026 About Continuing Loss of Wetlands Is Not Correct.**

Resolution 2008-0026 goes far beyond filling the SWANCC gap. If fully implemented, it would create a new program to regulate wetlands and riparian areas over and above existing regulation by the Regional Water Boards, the Corps, the EPA, DFG and cities and counties under the California Environmental Quality Act and local ordinances that protect wetlands and riparian areas. The State Board did so based on a factual finding that "California continues to lose 'functional wetlands' at an increasing rate" and that "changes in the state's regulatory program are needed to reverse that trend". Resolution 2008-0026.

At the hearing on Resolution 2008-0026, we questioned whether functional wetlands were being lost at an increasing rate, but we did not have any reliable information to present to the Board on this issue. The Draft Report, prepared by the Resources Agency, provides compelling, reliable support for the view that the era of California losing wetlands has ended. The Draft Report explains that the 1993 California Wetlands Conservation Policy set a goal to "ensure no overall net loss and achieve a long-term net gain in the quantity, quality, and permanence of wetlands acreage and values in California in a manner that fosters creativity, stewardship, and respect for private property." (Executive Order W-59-93) (1993 Policy"). The Draft Report shows that since the 1993 Policy was adopted there have been large gains in

wetlands acres and functions. As a corollary to that conclusion, changes to the regulatory program are not needed.

**A. The Draft Report Shows That The Corps Regulatory Program Is Increasing Wetlands Acres And Changes Have Been Made to Improve Wetlands Functions of Mitigation Wetlands**

The Draft Report explains that between January 2007 and April 2009 the Corps permitted 300 to 400 acres of impacts per year to wetlands and other jurisdictional waters in California under the Clean Water Act ("CWA") Section 404 program. Activities permitted under Section 404 also require state water quality certification from the State Board under CWA Section 401. The Draft Report states that compensatory mitigation for these permits achieves more than 1:1 replacement of wetland and riparian acreage impacted by fill activities—often 3:1. Thus, compensatory mitigation ensures that permitted fill activities do not result in a net loss of the state's wetlands and riparian areas. The Draft Report states that some wetland mitigation projects were not meeting their performance goals for creating wetland conditions and functions. This means that compensatory mitigation can result in wetlands of lower quality than those that are impacted by permitted activities. The answer to this problem is not to create a new regulatory program with new requirements. Rather, the concerned agencies should implement measures to ensure that mitigation is more successful under the *existing* program. The Corps and EPA have already taken such measures.

In March of 2008, the Corps and the EPA adopted a joint compensatory mitigation rule ("Mitigation Rule"). The Mitigation Rule includes many new measures to improve the effectiveness of mitigation under the Section 404 program. These include new monitoring and performance standards for mitigation projects. The Mitigation Rule is too new for its beneficial effects to have been seen in the results of mitigation projects or to be reflected in the 2007 study of mitigation effectiveness that the Draft Report relies upon. The State Board should support these new mitigation measures and allow time for careful study of their effectiveness, rather than rushing forward with a new regulatory program based on outdated information. We support the Draft Report's recommendation that the state adopt the Mitigation Rule standards to integrate permitting among state and federal agencies, rather than creating new and separate state standards and programs that will increase regulatory burdens.

**B. The Draft Report Shows That Gains From Voluntary Restoration Efforts Resulted In Dramatic Gains In Wetland Acquisition, Restoration and Enhancement**

The Draft Report provides reliable information that the state's 1993 State Wetland Conservation Policy has resulted in dramatic gains in wetland acquisition, restoration and enhancement from voluntary efforts. The effects of these efforts dwarf the effects of the federal and state regulatory programs by orders of magnitude. Data included in the Draft Report show that "joint ventures" restored more than 400,000 acres of the state's wetlands between 1998 and 2008, while accounting for the acquisition or enhancement of hundreds of thousands of additional acres. These public/private partnerships have been supported by state bond measures and the State Wetland Conservation Policy.

The massive net gains of wetlands resulting from joint ventures and other actions across the past decade negate any argument that California continues to lose wetlands "at an increasing rate". The high percentage loss of California wetlands as a result of non-indigenous populations settling in the western United States remains an important consideration. However, these losses occurred when the current regulatory program and policies did not exist and the significance of these losses to the sustainability of the natural landscape was either not understood or ignored. While the losses occurring in a distant past are of interest, from a public policy perspective it is more important that the State Wetland Conservation Policy is dramatically increasing wetlands and riparian areas.

**C. Funds for New Programs are Limited by The Fiscal Crisis**

California's financial condition has markedly deteriorated since the State Board first set out to respond to SWANCC. The deterioration has continued since the State Board adopted Resolution 2008-0026. The California Legislative Analyst's Office ("LAO") recently released its fiscal outlook, The 2010-11 Budget: California's Fiscal Outlook (November 2009), online copy at [http://www.lao.ca.gov/2009/bud/fiscal\\_outlook/fiscal\\_outlook111809.pdf](http://www.lao.ca.gov/2009/bud/fiscal_outlook/fiscal_outlook111809.pdf). It showed the state's general fund deficit for the next fiscal year could be about \$20.7 billion. The LAO states that the budget problem "consists of a \$6.3 billion projected deficit for 2009-10 and a \$14.4 billion gap between project revenues and spending in 2010-11." The LAO notes that "the scale of the deficits is so vast that we know of no way that the Legislature, the Governor, and voters can avoid making additional, very difficult choices about state priorities." We do not have detailed information on the budget situation for the State and Regional Boards, but we do know that staff is subject to the furlough program and budgets are constrained. The State Board, like all other state agencies needs to consider these fiscal impacts as it decides what priorities to pursue. The only aspect of Resolution 2008-0026 worth retaining at this time is to fill the SWANCC gap and adopt the Mitigation Rule Standard. Both of these actions should improve the manner in which wetlands are regulated in California while at the same time creating a level of regulatory certainty for local and state agencies and private landowners.

**III. Requested Action Regarding Resolution 2008-0026**

Based on the foregoing information, we respectfully request that the State Board consider taking the following actions to amend Resolution 2008-0026 to be limited to filling the SWANCC gap ("California Wetland Gap Program") as follows:

A. Develop a definition of State Wetlands (binding on all Regional Boards) which is identical to the definition of wetlands used by the Corps in 33 CFR §328.4(b) and use the Corps of Engineers' Wetland Delineation Manual, Wetlands Research Program, Technical Report Y-87-1 (January 1987) and applicable regional supplements to reliably define the diverse array of California wetlands;

B. Adopt ancillary terms such as "discharge of dredged material" and "discharge of fill material" from the Corps 404 Program as needed to ensure that the scope of the California Wetland Gap Program is the same as the Corps 404 Program;

C. Require any person seeking to discharge dredged and fill materials into a State Wetlands which is not regulated by the Corps or DFG ("Gap Wetlands") to file a Report of Waste Discharge ("Gap RWD") with the appropriate Regional Board prior to discharging dredged and fill materials into Unregulated Wetlands, provided, that no RWD will be required for the discharge of dredge or fill material associated with any activity that is exempt under Section 404(f) of the Clean Water Act, 33 U.S.C. 1344(f) or with the maintenance or operation of any facility constructed for water quality treatment;

D. Adopt standards that provides for issuance of waste discharge requirements for Gap Wetlands that are consistent with and no more stringent than or more cumbersome than the Corps 404 Permits and that contain mitigation requirements that that are consistent with and no more stringent than or more cumbersome than the Corps Mitigation Rule;

E. Limit the Regional Board's application of the Section 404(b)(1) guidelines to Gap Wetlands;

F. Require that all personnel assigned to implement the California Wetland Gap Program be trained to administer the California Wetland Gap Program so as to resolve applications in a timely and efficient manner; and

G. Delete any inconsistent guidance from Resolution 2008-0026.

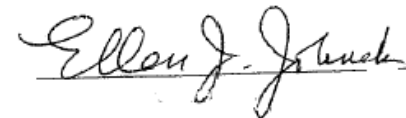
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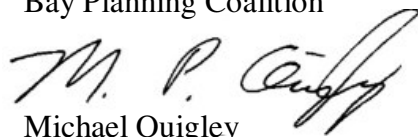
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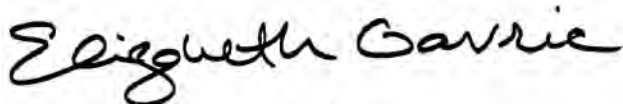
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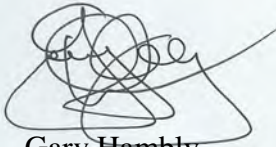
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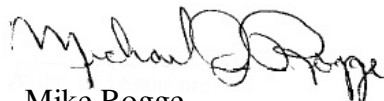
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Kari Fisher  
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David Bishcel  
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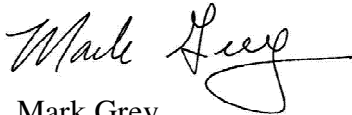


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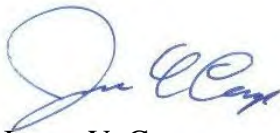
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California State Association of Counties



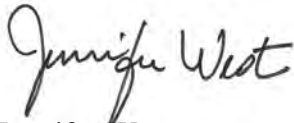
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cc: Ms. Frances Spivy-Weber, Vice Chair, State Water Resources Control Board  
Mr. Arthur Baggett, Jr., Member, State Water Resources Control Board  
Ms. Tam Doduc, Member, State Water Resources Control Board  
Mr. Walter Pettit, Member, State Water Resources Control Board  
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Ms. Cindy Tuck, Undersecretary, California Environmental Protection Agency  
Ms. Dorothy Rice, Executive Officer, State Water Resources Control Board