

**AMERICAN COUNCIL OF ENGINEERING COMPANIES - CALIFORNIA
CALIFORNIA ALLIANCE FOR JOBS
CALIFORNIA BUSINESS PROPERTIES ASSOCIATION
CALIFORNIA CHAMBER OF COMMERCE
CALIFORNIA FORESTRY ASSOCIATION
CALIFORNIA STATE ASSOCIATION OF COUNTIES
CONSTRUCTION INDUSTRY COALITION ON WATER QUALITY
RESOURCE LANDOWNERS COALITION**

September 8, 2008

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

RE: State Water Resources Control Board Policy to Protect Wetlands and
Riparian Areas – Phase 1

Dear Jeanine Townsend:

The above-listed organizations appreciate the opportunity to comment on the scope and content of Phase 1 of a statewide policy to protect waters of the state, including wetlands, from dredge and fill activities, as described in State Water Resources Control Board Resolution No. 2008-0026.

Our organizations recognize the need to protect the state's wetlands while at the same time respecting the rights of public and private property owners. We support the goal of the State Water Resources Control Board ("Board") to develop a consistent wetlands definition to help streamline the regulatory process. However, we have significant concerns regarding the legal and policy aspects of Phase 1 which are discussed in greater detail below.

The Board Should Adopt the U.S. Army Corps of Engineers Wetlands Definition

Our organizations believe it is critical that the Board adopt a reasonable definition for wetlands as well as a clear methodology for delineating such features. We support the adoption of the U.S. Army Corps of Engineers wetlands definition for the following reasons:

- Use of the federal definition will ensure consistency with other state and federal agencies. Adoption of the federal definition will ensure consistency not only with the Corps program to the extent possible, but will also be consistent with the analysis all state jurisdictions are required to make under CEQA in considering whether a proposed project will have a potentially significant impact on biological and aquatic resources. Such an approach will significantly lessen the potential for contradictory analysis and regulatory requirements.
- The federal method for delineating wetlands is a well established and accepted methodology and has been developed to reliably delineate the extent of wetlands.
- Expanding the definition of wetlands beyond the Corps definition would likely result in the designation of areas as waters of the State which do not have ground or surface water present with such regularity that they can be classified as a water of the State under the California Water Code and would therefore exceed the Board's regulatory authority.
- Expanding the definition of wetlands beyond that provided under the Corps regulations would result in significant economic impacts on both regulated industries, public agencies, and the Board and regional water board staff. If the state adopts a wetland definition that is broader than that utilized by the Corps, an applicant would be required to undertake two separate delineations and the regional board staff would need to develop a method for and expertise in verifying the delineation. The cost of such a change would be significantly increased if the methodology for identifying wetlands criteria was changed from that utilized by the Corps. Before requiring the State and the members of the regulated community to incur such significant costs, the Board would need to demonstrate that the water quality benefits would be significant enough to justify such an action.

The Board Should Prepare an EIR to Fully Consider the Potentially Significant Impacts to the Environment Associated with Phase 1 of the Policy.

In the Notice of Public Workshops and CEQA Scoping Meetings, the Board recognized that implementation of the proposed Policy may result in potentially harmful impacts to the environment. The Board stated, however, that development of this Policy is exempt from the CEQA provisions that require preparation of an EIR because it is being undertaken pursuant to a

program that has been certified as exempt by the Secretary of the Resources Agency.

The Board has an alternative process for complying with CEQA for certified regulatory programs. 23 CCR §§ 3775 *et. seq.* Under this program, the Board is not required to complete an EIR but rather to prepare an alternative environmental review document which is considerably narrower in scope than an EIR and is not subject to the full public participation requirements. However, the Board's regulations list only the Water Quality Control (Basin)/208 Planning Program of the Board and regional water quality control boards as being an exempted regulatory program.

Even if not required under CEQA, completion of an EIR for Phase 1 of the Policy would have several advantages. Completion of an EIR would ensure that the Board considers the full range of potential impacts associated with the Policy and that feasible measures to avoid, minimize and mitigate such impacts are incorporated. It would also enable the Board to undertake additional regulatory actions at the same time as adoption of the Policy such as adoption of general WDRs authorizing classes of activities that impact the newly defined wetlands, waivers of WDRs for classes of activities such as on-going farming operations and potentially certification of the existing Corps Nation Wide Permits. Such regulatory actions, which require compliance with all of the CEQA provisions, have the potential of greatly reducing the cost and time associated with complying with the any policy adopted while at the same time ensuring adequate protection of aquatic resources. We therefore request that the Board instruct staff to complete an EIR for the Policy.

The Board Must Fully Consider the Potential Adverse Economic Impacts Associated with Phase 1 of the Policy.

Any state policy for water quality control adopted under Section 13140 of the California Water Code (CWC) must be consistent with policies established in Chapter 1 of Division 7 of the CWC (commencing with Section 13000). This Chapter requires that the Board regulate activities that affect the quality of the waters of the state to "attain the highest water quality which is *reasonable*, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." CWC § 13000. Accordingly, in considering the development and adoption of the Policy, the Board must consider and give weight to the detrimental affects that the proposal could have on the economy of the state and should only adopt the Policy upon a finding that the benefits of the Policy would outweigh these detriments. Because the Policy is likely to have significant adverse economic impacts on a number of industries including the building industry, agriculture, forestry, grazing, and public infrastructure,

the Board should only adopt the Policy upon a finding that *significant* water quality benefits necessitate and justify the action. We ask that the Board staff fully consider both the beneficial and detrimental affects of the proposed Policy.

Alternatives Analysis

Our organizations agree that impacts to aquatic resources should be avoided to the extent practicable where avoidance will result in an environmentally superior alternative. Our members have found, however, that implementation of the 404(b)(1) sequencing approach can frequently lead to preservation of low quality wetlands at a significant cost and preclude the development and implementation of environmentally superior regional planning efforts. Before creating a state policy which requires sequential avoidance, minimization and mitigation of impacts to aquatic resources akin to the 404(b)(1) program, the Board should consider the following:

- The sequencing approach, when utilized for individual project areas, often results in the creation of small, disjointed avoidance areas which provide limited functions and values and precludes broader regional planning efforts which often result in superior environmental protection.
- The information processing requirements of the 404(b)(1) analysis can be very complex and time consuming. Given the economic constraints placed upon regional board staff, we question whether there are adequate resources available to carry out such a program. Further, we do not believe that the limited additional protection that could be provided to water quality through such a program would justify the significant economic impacts.
- CEQA requires local jurisdictions to evaluate significant impacts to aquatic resources, including wetlands, and precludes approval of projects if there are alternatives or mitigation measures feasible that would lessen or avoid such impacts. As such, creation of such a regulatory mechanism is not necessary under state law.
- Replicating such a program in State law engenders the possibility of having conflicting decisions made by the regional boards, Corps and local agencies. After the San Francisco regional board incorporated the 404(b)(1) Guidelines into its basin plan, many projects have been subject to such conflicting decisions and the process has resulted in significant delay and additional permitting costs.

The Board Should Avoid Duplicative Regulatory Processes

Our organizations believe that the Policy is likely to result in duplicative regulatory processes for many resources that would engender significant costs

to the State and the regulated business community and public agencies without any significant benefits to water quality. Under existing state and federal law, the following regulatory programs address dredge and fill impacts to wetlands:

- Corps of Engineers: For wetlands that meet the federal definition of waters of the State, the Corps regulates any impacts associated with dredge or fill materials and requires that the applicant comply with the 404(b)(1) Guidelines. Adoption of the policy would entirely duplicate the existing process for these areas and would provide no additional water quality benefits while at the same time would involve significant additional costs for the regulated business community, public agencies, and the State. The Corps program includes a Nationwide Permitting Program that allows for expedited permitting for projects with minimal impacts. It is unclear whether the Board intends to create a similar expedited permitting process.
- Regional Water Quality Control Board: For wetlands regulated by the Corps, the regional boards evaluate any project that will result in dredge or fill to such a wetland and such a project can only go forward if the regional board determines that the project is consistent with state water quality standards. Further, regional boards have the authority to issue Waste Discharge Requirements if it finds that such requirements are needed to protect water quality. Creating an additional regulatory program for these features will not improve water quality, and will likely have significant economic impacts.

For wetlands that meet the federal definition but are exempt from federal regulation due to their isolated nature, the Board has clarified that such features are regulated either through the General WDR or through individual WDRs. The General WDR requires that a project demonstrate that it has avoided and minimized impacts to the extent practicable and that unavoidable impacts are fully mitigated. Individual WDRs generally include similar showing and are subject to more rigorous review by the regional boards. Additional regulation of these areas under the Policy is not likely to result in increased protection of water quality.

- State and Local Agencies: Pursuant to the requirements of CEQA, state and local agencies must evaluate a proposed project's impacts on aquatic resources and if any significant impact will occur, they must ensure that all feasible efforts to avoid and mitigate impacts to such resources are incorporated into the project. When a proposed project will impact a water of the State, including wetlands, the lead agency will provide notice to the Board and regional board with jurisdiction over the project site and request comments. The Policy is unlikely to increase

protection to aquatic resources beyond that which can be accomplished through the CEQA process.

Implementation Issues

Our organizations have had difficulty in assessing the full range of environmental impacts that may result from the Policy since the Policy did not include detail on how the Policy would be implemented. However, the following issues at a minimum should be analyzed prior to adoption of Phase 1:

- Potential Impacts on Agriculture. Under the CWA, regular farming activities are generally exempt from permitting requirements. Should the Board not include such an exemption in an adopted state program, the implications for ongoing farming and ranching activities could be tremendous. For example, requiring ongoing farming and ranching activities to avoid, minimize and mitigate impacts to wetland features, could lead to abandonment of such activities and consequently conversion of prime agriculture land to other uses.
- Potential Impacts on Flood Control. Maintenance of flood damage control features generally requires regular removal of vegetation from riparian areas and in channels. If additional regulation is placed on such activities, people and property could be exposed to flooding hazards. Additionally, if lack of maintenance results in flooding, significant environmental damage could occur.
- Potential Impacts on Land Use and Planning. If the Policy places significant new limitations on development activities, it would likely require alterations in planned land use in significant portions of California. The Board needs to evaluate and consider the impacts associated with relocating such planned land uses.
- Potential Impacts on Population and Housing. If the Policy expands State jurisdiction and limits potential development opportunities in areas not currently regulated by the State or Regional Boards, the Policy has the potential to significantly alter the location, distribution, density and growth rate in human population throughout the state. The Policy could also limit the amount new housing available throughout the state and thereby create additional unmet housing needs. This issues need to be evaluated and considered by the Board.
- Potential Impacts on Recreation. As many recreational facilities and parks are located near aquatic areas, the ability to establish and maintain parks and trails in such areas may be compromised by the Policy.
- Potential Impacts on Transportation. Wetlands and drainages are frequently found along major roadways due to runoff from such areas. Under the Policy, road maintenance activities could be limited or

prohibited. Further, the Policy could limit the areas where needed road construction could occur. Therefore, traffic impacts need to be thoroughly considered.

- Potential Impacts on Utilities and Sewer Services. If the Board's jurisdiction is expanded as proposed, it can be anticipated that many utilities will be located within or adjacent to regulated areas. Therefore, the ability to provide and maintain utilities may be effected by the Policy.

We appreciate the opportunity to provide the Board with our comments and concerns regarding the scope and content of Phase 1 of a statewide policy to protect waters of the state, including wetlands, from dredge and fill activities. We look forward to working with Board during the upcoming Stakeholder process and in Phases 2 and 3.

Sincerely,



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American Council of Engineering Companies – California



Jim Earp
California Alliance for Jobs



Rex S. Hime
California Business Properties Association



Valerie Nera
California Chamber of Commerce



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