



ACWA Water Quality Committee-Aquatic Resources Subcommittee

New State Regulations for Discharges of Dredged and Fill Material

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**Presented by Mary Lynn K. Coffee,
Environmental Partner**

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State Wetlands Permitting Program

Yesterday!

State Board adopted new regulations requiring Water Boards to issue permits (WDRs) for discharges of dredged and fill material (soil/sediment/dirt) to **Waters of the State (WOTS)**

- https://www.waterboards.ca.gov/water_issues/programs/cwa401/wrapp.shtml
- Effective 9 months after approved by OAL



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State Wetlands Permitting Program

- Draft Regulations issued for public comment: July 21, 2017
- Written Comments: Sept. 18, 2017 (108 letters)
- Revised Draft Regulations issued: January 3/4, 2019
- Workshops: 1/9; 1/22; 2/6; 3/5
- Adoption Hearing: April 2
- No written comments



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New State “404 Permits” Permits for Discharge of Soil

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State Wetlands Permitting Program

- Requires **Water Boards** to issue Waste Discharge Requirements (WDRs) for any ***Activities that release soil*** into jurisdictional “***Waters of the State***”
- Duplicates, and expands upon US Army Corps of Engineers § 404 Permits, Cal. Fish and Wildlife § 1602 Agreements

Activities Requiring a Permit

- Typical **Activities** that could release dredge or fill material to “**Waters of the State**”:
 - Construction of new / O&M of existing water, storm water, flood control facilities
 - Includes discharges of any size, even “incidental fallback” from removal of sediment and debris
 - Includes even minor alterations in bed, bank, dam, substrate, and associated habitat areas

Activities Requiring a Permit

If soft sides/bottom:

- Stormwater/flood control channel construction operations and maintenance
- Recharge and percolation pond and channel construction, operations and maintenance
- Bed, bank, berm maintenance for flood control, detention ponds, retention ponds, reservoirs
- Construction, operation and maintenance of “natural treatment” wetlands
- Water canal and conveyance construction, operations, maintenance

Scope of “Waters of the State”

- Broadly defined under Porter Cologne § 13050(e)
 - Any surface water or groundwater, including saline waters within state boundaries
- Regulation doesn't change the statute, but mandates a new permit for even small, incidental discharges of soil to any **Water of the State**

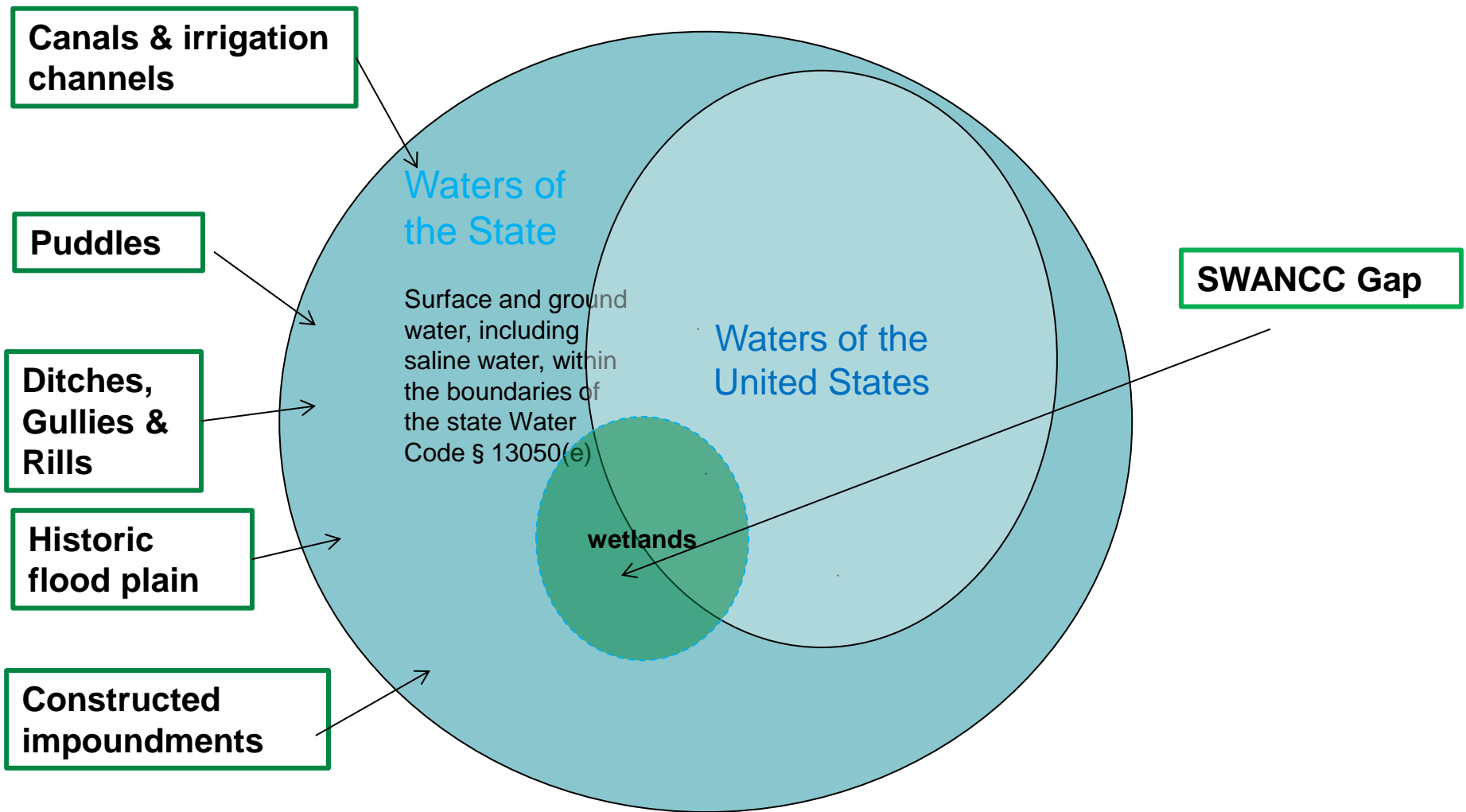
Scope of “Waters of the State”

- Scope of new State law Permitting Program as conceived from 2001 to ~2011
 - limited to wetland waters of the state no longer regulated by the Army Corps of Engineers due to Supreme Court cases limiting the scope of “Waters of the United States” subject to Army Corps of Engineers § 404 permitting jurisdiction, e.g., *SWANCC*, *Rapanos*, *Carabel*—the “**SWANCC gap**”
- Scope of new State law Permitting Program under current draft regulations:
 - Any **water of the state--wetland or non-wetland**

“SWANCC GAP” Waters—Isolated Features



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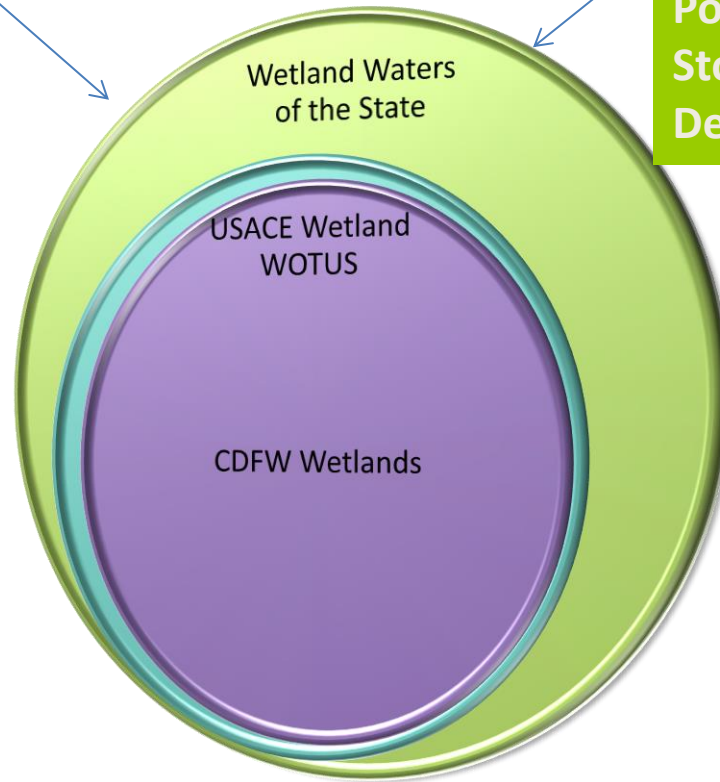
Draft Permitting Program for Fill

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Jurisdictional Test:

- Wetlands Hydrology *or* soils;
- Vegetated *or* non-vegetated

Includes: Constructed Treatment Wetlands, Stormwater and Wastewater Treatment Ponds, Percolation Ponds, Stormwater Retention & Detention Ponds,



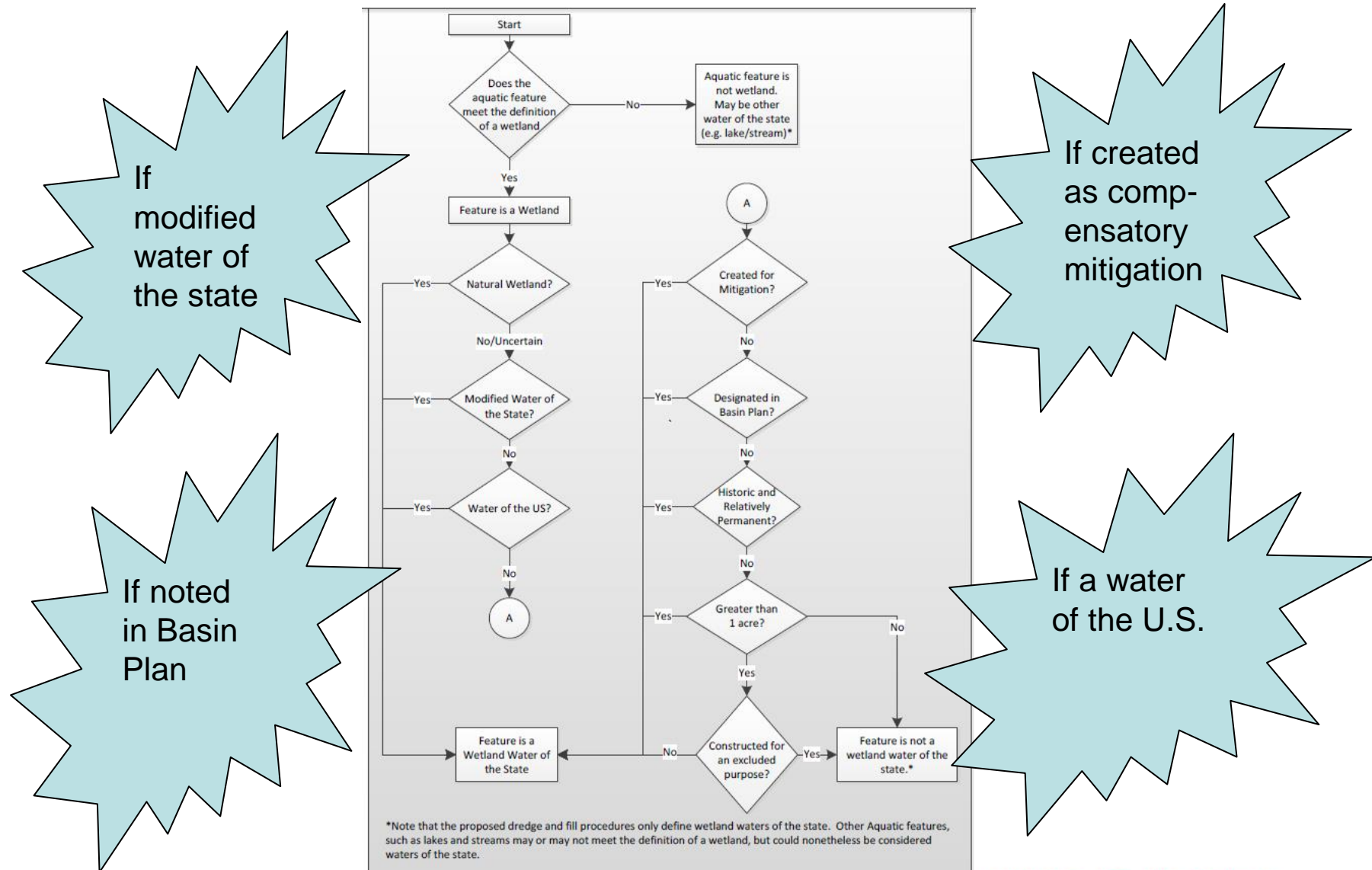
- New Test Intends to Encompass Special Aquatic Sites within Wetlands
- Actually Encompasses much more

Wetland Waters of the State (Only) Are Defined in a New Way by Regulations

Scope of “Waters of the State”

- All “**Artificial Wetlands**” greater than 1 acre are *Waters of the State*, except ??:
 - Exceptions for artificial wetlands greater than 1 acre are so narrow based on operation of wetland jurisdictional framework that none effectively exist. Draft Regs § II; Staff Report p. 69
 - Burden on applicant to prove exempt

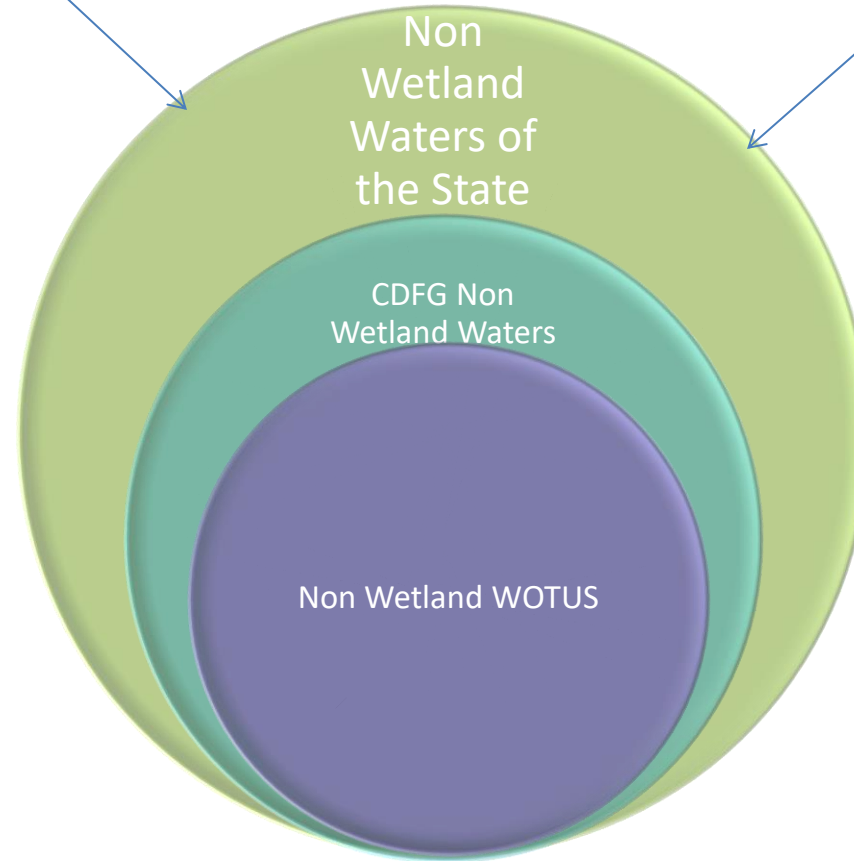
Artificial Wetlands are Waters of the State



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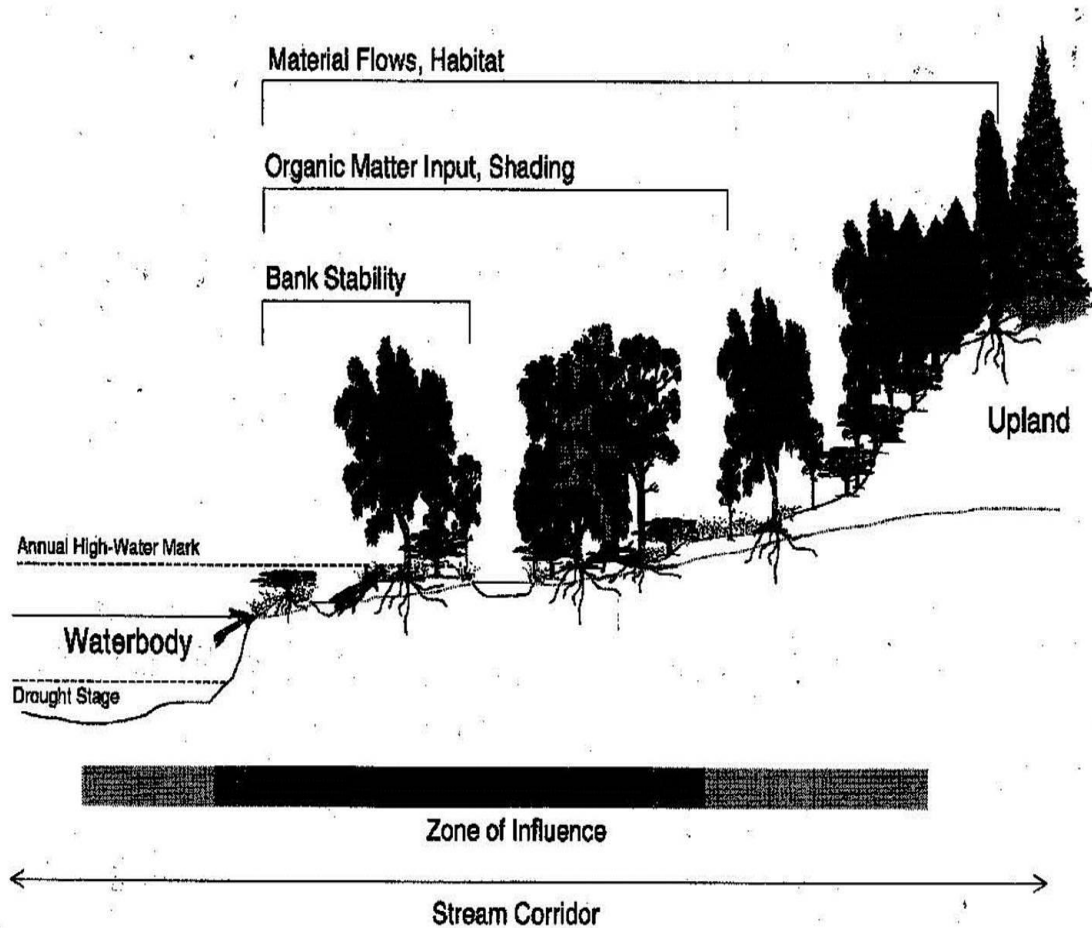
Not defined for
permitting purposes; up
to RWQCBs

Includes constructed un
improved or partially
improved: channels,
canals, ditches,
reservoirs, ponds, storm
drain channels, riffles,
erosion gullies , some
swimming pools



Non-wetland Waters of the State
Are not defined, but Regulated

Draft Permit Program for Fill



New/Supplemental Permitting Requirements

New “Waters of the State” delineation report

- Different definition than Corps and CDFW use
- New Wetland Jurisdictional Framework encompasses artificial and constructed features, and low value features as well as wetlands and special aquatic sites
- No guidance regarding for non-wetland waters features (defers to Regional Boards - eliminating statewide consistency), but permit mandated

New/Supplemental Permitting Requirements

Required “404(b)(1)” Alternatives Analysis

- Even small discharges dredge/fill
- Required for even impacts authorized by Corps Nationwide 404 Permits eliminating streamlining, unless:
 - No impacts to anything outside of Waters of U.S. and certified Nationwide Permit used
 - Impacts < .2 acre, <300 linear feet, no habitat, eelgrass, wetlands or special significance

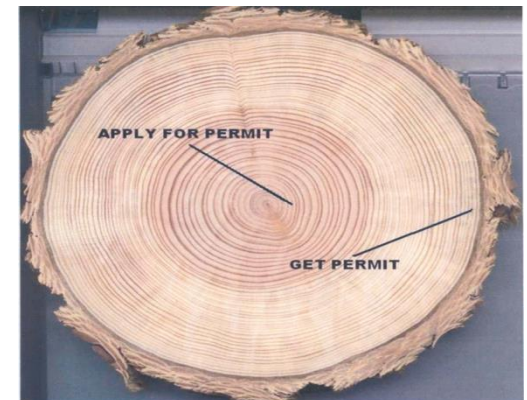
New/Supplemental Permitting Requirements

Supplemental Mitigation Requirements

- Submit new “Watershed profiles” encompass all lands within a watershed (e.g., privately owned and not subject to access)
- Higher state mitigation requirements for “wetland” impacts
- Mitigation floor of 1:1 area/feet even if “lift” in aquatic resource function/value
- Reduced mitigation if ‘watershed management plan’ but stormwater plans do NOT count
- Temporary impacts can require > 1:1 mitigation

Concerns for Municipalities

- Development, O&M of infrastructure (transportation, flood control, debris/settling basins, stormwater treatment)
- Increased cost/delay in permitting, but limited increase in environmental benefit



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ACWA/CSAC Revisions

- Provide an exclusion from procedures (not from existing 404/401 regs or Porter Cologne) for O&M of facilities currently used and maintained for flood control, sediment/debris collection, recharge, surface/stormwater treatment, recycled water-- § IV.D.1.c.
- Tier 2 Alternatives Analysis for O&M if exclusion does not apply-- § IV.A.1.h.ii

ACWA/CSAC Revisions

- Agreed with NGOs on exclusion from new regs (not existing 404/401 regs or Porter Cologne) for O&M of facilities currently used & maintained for flood control, sediment or debris collection, recharge, surface & stormwater treatment, recycled water-- § IV.D.1.c.
- Tier 2 Alternatives Analysis for O&M if exclusion does not apply-- § IV.A.1.h.ii

ACWA/CSAC Revisions

- Exclude renewals from new regs (but limited to renewals that solely to extend expiration date)
- General WDRs do not follow new regs
- Board will annually review permitting delays, costs, mitigation requirements and may consider streamlining in the future for new facilities

Coalition Opposition



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Recommendations

■ Track Stats

- Permitting time, permitting costs, type of project, extent of impacts, required mitigation. Provide data to:
 - ACWA Chelsea Haines: chelseah@acwa.com
 - Cal. Council for Environmental and Economic Balance (CCEEB) Dawn Koepke: dkoopke@mchughgr.com
 - Cara or Nick?
- General Orders



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