

CEAC Meeting– Spring 2019 California State Association of Counties



New State Regulations for Discharges of Dredged and Fill Material

April 3, 2019

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State Wetlands Permitting Program

Yesterday!

April 2, 2019 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: Jan. 3, 2019
- Workshops: 1/9; 1/22; 2/6; 3/5
- Stakeholder Meetings
- Adoption Hearing: April 2
- No written comments



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New State Equivalent of “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

Flood Control Activities Requiring a Permit

Flood control facilities with “soft” components:

- Stormwater/flood control channel construction, operations & maintenance
- Recharge and percolation pond and diversion structure construction, operations & maintenance
- Bed, bank, berm construction, operations & maintenance for flood control, detention and retention ponds
- Construction, operations & maintenance of “natural treatment” wetlands

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, both “wetland” and “non-wetland” waters**

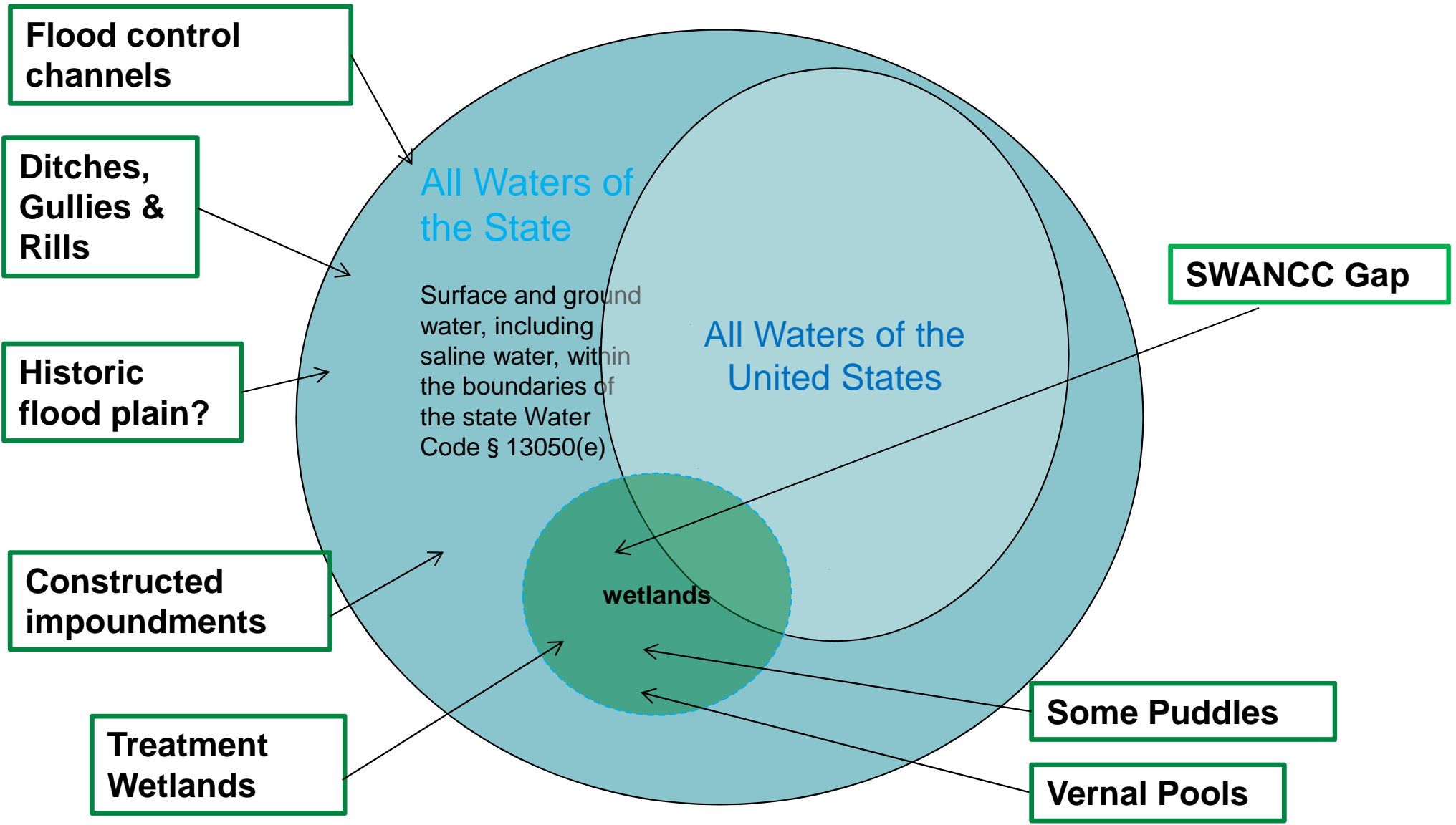
Scope of “Waters of the State”

- 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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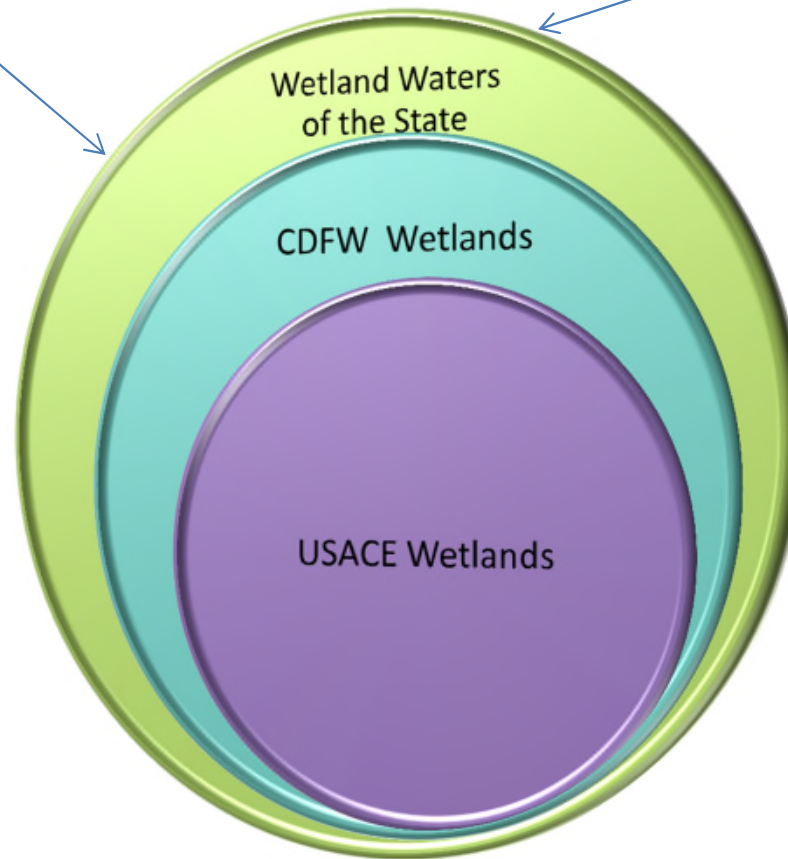


Draft Permitting Program for Fill

Jurisdictional Test:

- Recurrent saturation;
- Causing anaerobic conditions in soils;
- Hydrophytic vegetation *or* non-vegetated

- New Test intends to Encompass Special Aquatic Sites within Wetlands
- May actually Encompasses much more



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

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 narrow and subject to operation of wetland jurisdictional framework Draft Regs § II; Staff Report p. 68
 - Burden on applicant to prove exempt

Artificial Wetlands are Waters of the State

If a water of the U.S.

If modified water of the state

If created as compensatory mitigation

If noted in Basin Plan

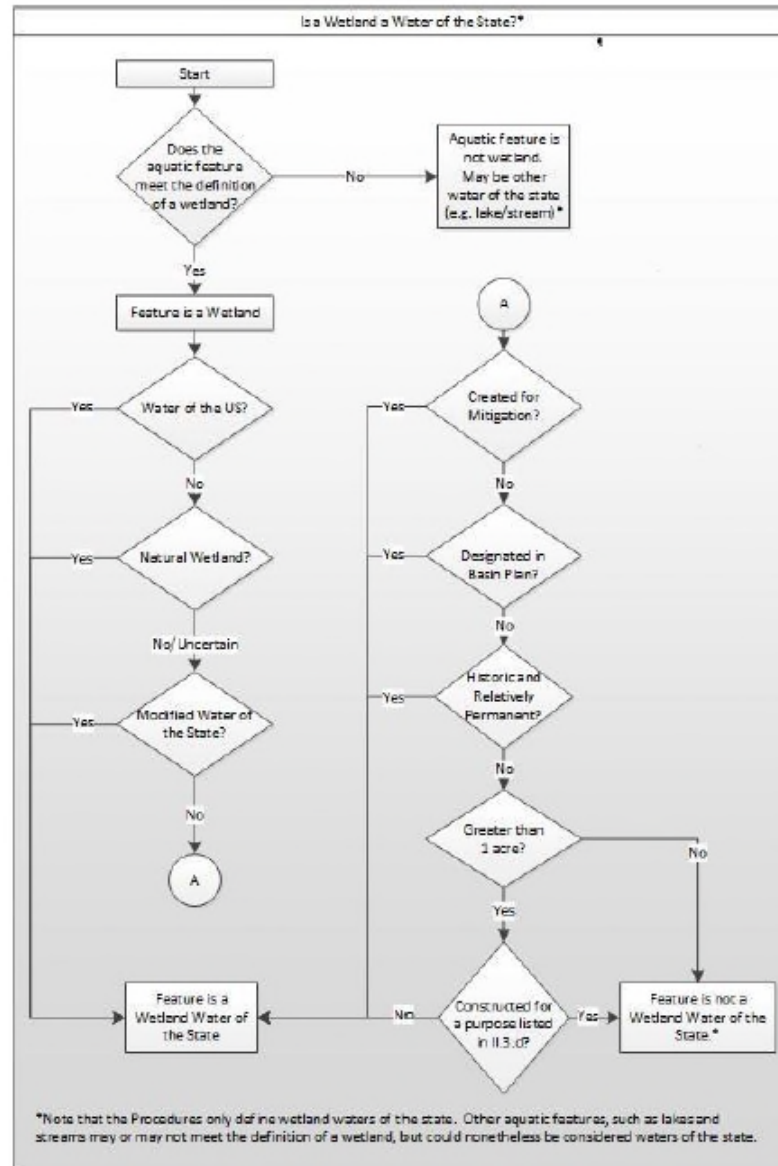
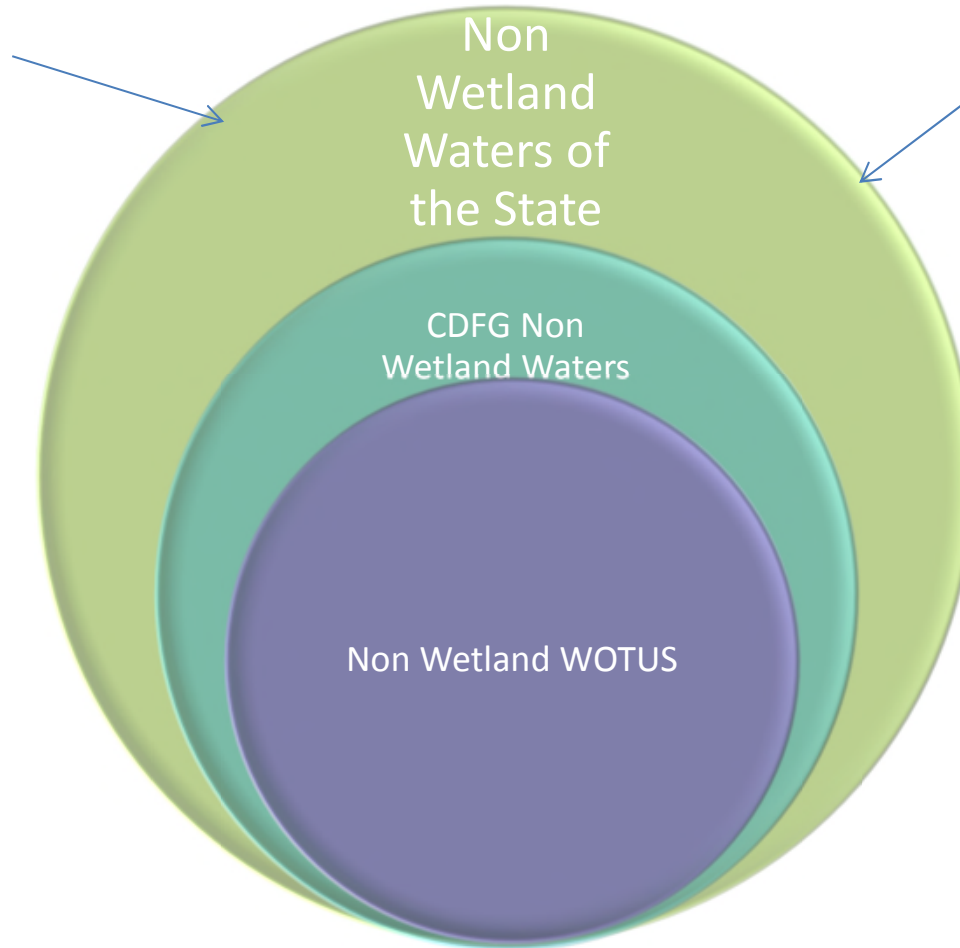


Figure 3: Informational Flowchart for Determining if a Wetland is a Water of the State.

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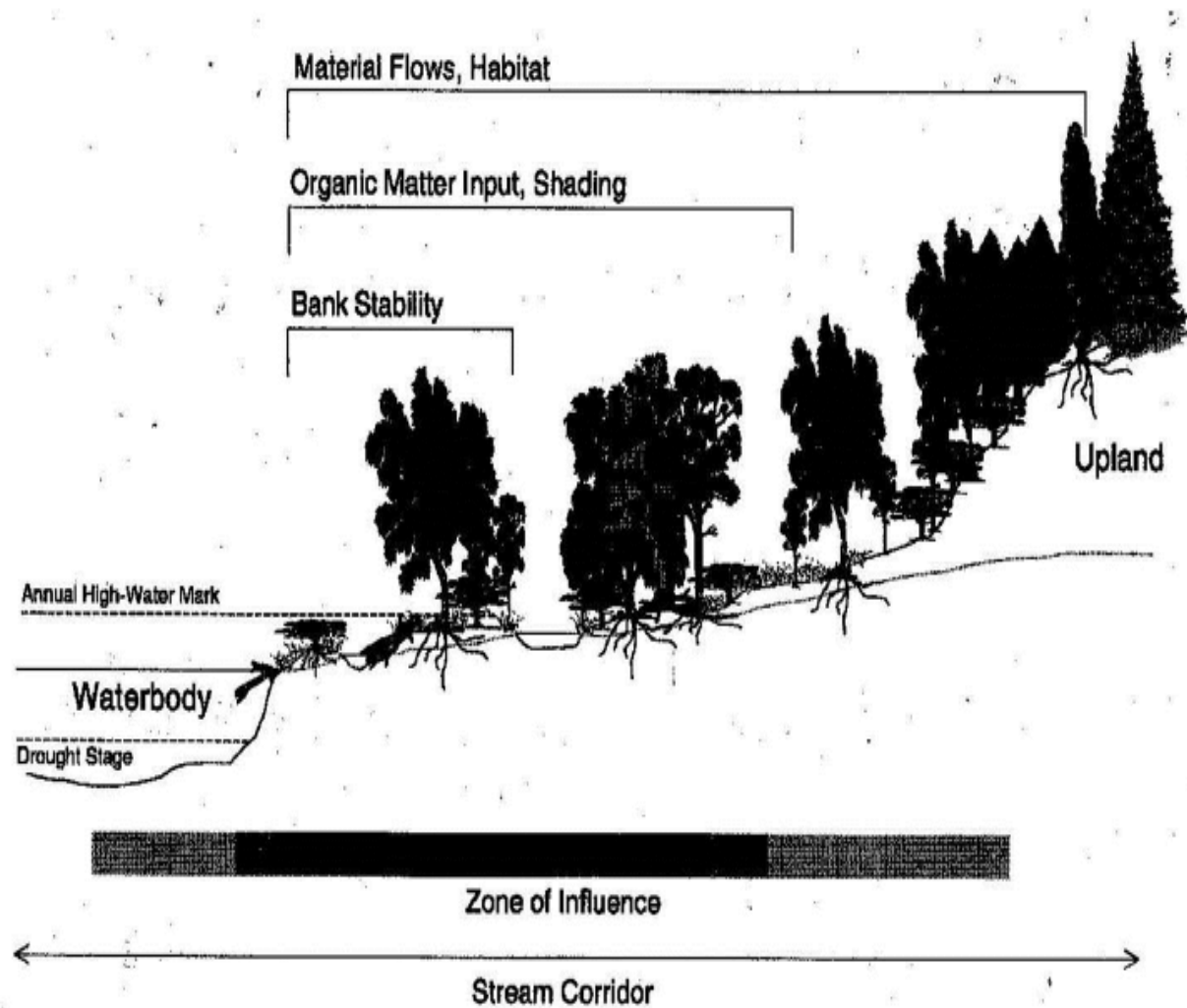
- Not defined for permitting purposes
- Not clear how to delineate
- Pre-application consultation with the RWQCBs (Staff Report p. 72)



Includes constructed unimproved or partially improved: canals, flood control channels, ditches, lakes, reservoirs, detention basins, retention basins, ponds, riffles, erosion gullies, some swimming pools

Non-wetland Waters of the State Regulated—Not Defined

Draft Permit Program for Non-Wetland Waters of the State?



Permitting Program Exclusions



If intentional or incidental discharge of fill, apply for individual WDRs under 23 Cal. Code of Regs § 3835 et. seq. *and* new “Procedures” adopted April 2, 2019, unless:

- Regional Board confirms no “waters of the state”
- Activity or area is excluded from Procedures (only) under Section IV.D
- Discharge complies with General Order

ACWA/CEAC Exclusions § IV.D.1.c.

- An exclusion from Procedures (*only*-not from Clean Water Act, Porter Cologne, 404/401 regs)
- for O&M of:
 - Existing facilities
 - Currently used/maintained
 - Flood control, stormwater conveyance sediment/debris collection, recharge, surface/stormwater treatment, recycled water purposes



If No Exclusion-Get a Permit



- For all discharges or incidental discharges of dredge and fill material



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ACWA/CEAC Exclusions § IV.A

- Exclude renewals of existing 401 certifications (issued as certifications or WDRs) from Procedures
 - limited to renewals that solely extend expiration date
- Exclude applications received before effective date



Additional or More Stringent 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

Additional or More Stringent Permitting Requirements

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

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

ACWA/CEAC Streamlining § IV.A.1.h.ii

- “Tier 2” Alternatives Analysis for O&M of existing facilities in the event a Regional Board determines the exclusion in § IV.D.1.c. does not apply
 - No alternative sites
 - Alternative methods of O&M to incorporate avoidance & minimization



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

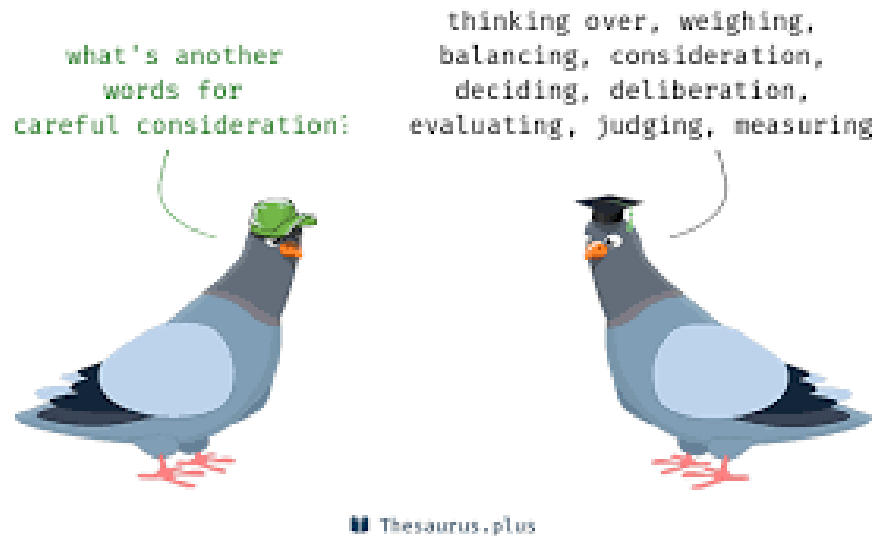
Concerns for Local Agencies

- Construction of new infrastructure (transportation, flood control, debris/settling basins, stormwater conveyance and treatment)
- Increased cost/delay in permitting may be disproportionate to increased environmental benefit



SWRCB Commitment to ACWA/CEAC

- Board will annually review permitting delays, costs, mitigation requirements and may consider streamlining in the future for new facilities



Recommendations

- Inventory O&M activities and USE the O&M exclusion
 - Determine with Regional Boards submission required to establish exclusion
- Inventory General Permits and amend them to incorporate similar activities
- Apply for new General Permits for similar activities/discharges

Recommendations

- Expedite new construction project permitting for critical health and safety projects where feasible
- Track permitting statistics
 - Create a simple stat tracking template
 - Collect information regarding permitting time, permitting costs, type of project, extent of impacts, required mitigation.

Recommendations

- Provide statistics collected to the following for SWRCB annual review:
 - ACWA Chelsea Haines: chelseah@acwa.com
 - Cal. Council for Environmental and Economic Balance (CCEEB) Dawn Koepke: dkoopke@mchughgr.com
 - CSAC Cara Martinson: cmartinson@counties.org

Adopted Over Objections



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