



February 5, 2014

Ms. Felicia Marcus
 Chair
 State Water Resources Control Board
 1001 I Street
 Sacramento, CA 95814

Re: Revised Preliminary Draft Wetland Area Protection Policy

Dear Chair Marcus:

Our organizations have been engaged in the state's wetlands rulemaking process ever since the 2001 U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*. Over this period of time, our level of involvement has ranged from working with then-CalEPA Secretary Terry Tamminen and the State Water Resources Control Board (Board) on regulating of discharges to "isolated" waters to participating in two separate California Environmental Quality Act (CEQA) scoping processes (one prior to the adoption of Resolution No. 2008-0026 and the other after adoption of the resolution) to providing timely comments on numerous draft policy documents.

We appreciate the ongoing effort by Board members and staff to meet with stakeholders on this very important issue. During those meetings our comments, concerns, and recommendations have remained consistent throughout the process. While the proposed California wetland definition is -- and remains -- a primary concern for our organizations and the thousands of member companies we represent, we continue to have other significant concerns with the January 2013 draft that need to be resolved. They include:

- The establishment of a new program that applies to all discharges of dredge and fill activities including those that have already received Section 404 authorization, Section 401 water quality certification and streambed alteration authorization. To the extent this major new regulatory program corresponds to and duplicates the existing federal program under the federal Clean Water Act, it is unnecessary. To the extent the program differs

from the existing federal program, it would in addition substantially burden the regulated community with new processes, paperwork, restrictions, and costs;

- The establishment of a new state definition of wetlands substantially differing from the U.S. Army Corps of Engineers and Environmental Protection Agency definition. Specifically, the 2013 Draft allows non-vegetated areas to be classified as wetlands and applies different definitions for the soils and hydrology components. First, there is no need for a new, California definition of wetlands. Over several decades, the Corps has developed a sound definition refined with a well understood delineation method described in a detailed manual with regional supplements to account for geographical variations. California is served by two such regional manuals. Second, the proposed wetland definition would serve no useful purpose. The existing federal and state regulatory programs govern “waters” of which “wetlands” are a subset. The proposed definition would expand the definition of wetlands by shifting some existing waters into the wetland subset. The point of that is not apparent. Third, the proposed wetland definition would leave regulators and the regulated community uncertain about how many and which waters would be shifted to the wetland category unless and until regulators, biologists, hydrologists, lawyers, and courts sort out its meaning and scope and settle on delineation methods. Fourth, while serving no useful purpose, a new wetland definition would substantially burden the Regional Board staffs and the regulatory community by requiring site surveys employing both federal and state definitions and preparation, review, and use of two delineation maps—one for the federal program and one for state program.
- The proposal uses a watershed process to review applications to discharge dredge and fill material, but does not specify *how* to identify the watershed areas or *how* applicants are to gather and prepare information on watershed characteristics. While the intended meaning and effect of these provisions is not entirely clear, they could be read to call for Regional Boards to expand the scope of their review beyond that authorized by the California Environmental Quality Act (“CEQA”) or the Porter-Cologne Act.
- The proposal requires Regional Boards to make findings on avoidance and minimization, no significant degradation of water of the state, cumulative impacts and attainment of water objectives and compensatory mitigation. The new regulatory program unnecessarily duplicates the federal program in this regard, adding no substantial value while raising the risk of varying or even conflicting findings.
- The proposed regulatory program calls on Regional Boards to apply the procedures of the EPA’s Section 404(b)(1) Guidelines. First, the proposal leaves uncertain whether the Regional Boards would apply the substantive provisions and criteria of the Guidelines. Second, the proposed program unnecessarily duplicates the Corps’ application of the Guidelines and raises the risk that the Regional Boards may reach conclusions that vary from or conflict with those of the Corps. Third, the Boards’ use of the Guidelines to analyze project alternatives and select those they prefer may disrupt land use planning and regulation programs of cities and counties, the local agencies primarily responsible for such matters.

- The proposal establishes a mitigation requirement to sustain and improve the overall abundance, diversity and condition of aquatic resources in a project area watershed and achieve a no net loss (long term net gain) in the quality and condition of aquatic resources. The proposal prescribes many requirements for compensatory mitigation, some of which extend beyond and conflict with current policies and practices of the Corps and the State and Regional Boards. For instance, it converts the state’s current goal of “no overall net loss” of “wetlands” in California to a goal of “no net loss” of “aquatic resources” in each project area watershed—several substantial, unexplained policy shifts.
- Under the new regulatory program, the Boards will require buffer areas for mitigation sites and “shall presume” that a 1 to 1 acreage or length stream replacement is the minimum necessary to compensate losses. How this “presumption” would work, the proposal does not explain. In any event, decisions on appropriate mitigation should be based on project-specific findings of fact grounded in evidence, not on politically prescribed across-the-board presumptions. Moreover, it should be recognized, as the Corps does in its guidance documents, that in some circumstances replacement at less than one-to-one is appropriate. It bears noting that stream replacement can be very difficult, if not impossible to achieve in many instances.
- The proposal establishes a hierarchy of mitigation ratios based on whether the mitigation site is designated as an aquatic resource protection area in a watershed plan, is identified in an applicant prepared watershed analysis or is in an applicant proposed site. This provision prompts several concerns. First, the stated hierarchy of preferred types of mitigation differs from the preferences established under the federal program. Second, as few watershed or regional plans of the sort envisioned in the first preferred type of mitigation exist, the availability of that type is limited. Third, in establishing a hierarchy of preferred types of mitigation, the proposal does not even mention mitigation banks, which is the type most preferred by the Corps. Mitigation banks, indeed, appear not to fall within any of the proposal’s stated alternatives. Fourth, the proposal aims to promote its policy preferences by imposing greater burdens on project proponents who use a less preferred type—a mechanism deviating from constitutional standards that mitigation be roughly proportional to a project’s impacts.
- It requires preparation of a watershed profile for compensatory mitigation projects. Depending on the size of the mitigation project, the profile could be qualitative for smaller projects and quantitative for larger projects;

Our organizations have taken the very consistent position that the Board should limit any State wetlands policy to filling the SWANCC/Rapanos gap; should adopt a wetlands definition that is identical to the federal definition; should adopt procedures to fill the gap that are consistent with and no more stringent than the federal process; should maintain the same exemptions as found in the federal process and should not adopt a process that duplicates either the Army Corps Section 404 program or the Department of Fish and Wildlife’s Streambed Alteration Agreement Program.

To that end, we respectfully request that the State Board consider taking the following actions:

- 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's 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 DFW ("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 provide 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 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; and
- F. Require that all personnel assigned to implement the California program be trained to administer the program so as to resolve applications in a timely and efficient manner.

For information purposes, we are enclosing copies of our comments dating back to 2010 that highlights are concerns, comments, and recommendations on this important issue. We look forward to continuing our discussion in the future.

Sincerely,



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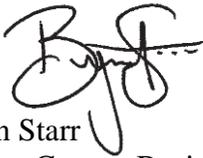
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