May 20, 2011

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

Re: Comments on the Initial Study for the Wetland Area Protection Policy and Dredge and Fill Regulations

Dear Ms. Townsend:

Our organizations appreciate the opportunity to provide comments on the Notice of Preparation ("NOP") for a Draft Program Environmental Impact Report for the proposed Wetland Area Protection Policy and Dredge and Fill Regulations (formerly known as Phase 1 of Board's most recently adopted Resolution 2008-0026). Most, if not all, of the organizations that are signatories to this letter have been involved in the State Water Resources Control Board (Board) wetlands policy process for nearly a decade. During this time, we have consistently registered our support for a streamlined and consistent regulatory process that protects the State's wetlands resources while providing regulatory certainty for public agencies and private property owners. However, after numerous meetings, CEQA scoping sessions, and Board Resolutions, the Board staff has released for public review and comment a proposed policy and regulatory program that would create additional and unnecessary regulatory burdens on stakeholders.

Purpose and Need

According to the Initial Study, the Board is considering the proposed project "due to the diminishing jurisdiction of the federal government," which is "excluding many California

wetlands from federal regulation, regardless of whether they otherwise meet the many technical requirements of the federal wetland definition and the Corps' delineation manual."
We have previously provided the Board with recommendations as to how the State can 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. In light of recent federal actions, we question the need for the proposed project.

The EPA and Corps recently released draft guidance and announced proposed rulemaking that "[t]he agencies believe that under this proposed guidance the number of waters identified as protected by the Clean Water Act will increase compared to current practice." 76 Fed. Reg. 24479 (May 2, 2011). Federal jurisdiction is likely to expand on its own, filling a part of the regulatory gap the proposed project is intended to address. The draft EIR should carefully consider the purpose of and need for the proposed project in light of the recent federal guidance. In fact, we believe a "no project" alternative consistent with the new federal guidance may show that there is no environmental benefit to having an additional and separate wetlands regulatory program administered by the Board.

Additionally, the Initial Study justifies the need for the proposed project on the basis of historic losses of aquatic resources and concludes that these "historic loses signal an urgent need to protect the remaining wetland resources in the state." As we have discussed in an earlier comment letter, the Resources Agency's draft report, State of the State's Wetlands (October 2009) and documents the significant gains in wetlands that have occurred after the State's 1993 California Wetlands Conservation Policy (Executive Order W-59-93) became effective. The draft EIR should put these losses in the context of the recent gains in wetlands.

Wetlands Definition

The proposed project includes a new State wetlands definition that is substantively different than the current federal wetlands definition used by the U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA).

For more than twenty years, the Corps and EPA have identified wetlands through the application of a three-part delineation criteria that requires all of the following indicators be present:

- Vegetation – prevalent vegetation consists of wetland species;
- Soil – wetland, e.g., hydric, soils (or indicators of such soils) are present; and
- Hydrology – the area is saturated, or permanently or periodically inundated with water.

The proposed state wetlands definition differs dramatically from the federal definition by:

- Removing the vegetation criteria that exists in the federal definition;
- Departs from the federal "hydric soil" definition, which relies upon specified indicators to meet the soil criteria, and instead extends regulation to any "hydric substrate," which prior regulatory statements indicate would apply to any substrate saturated for as little as seven consecutive days during the growing season;

- Eliminates certain exemptions provided by the federal definition, including for sedimentation ponds, farm or stock ponds, or irrigation ditches; and
- Allows for the inadvertent creation of a defined "wetland" by human activity, for example where drainage is changed during construction or where depressions are created and projects are subsequently delayed or stopped before completion.

Our organizations are concerned that the adoption of the proposed wetland definition will have significant consequences, including:

- Inconsistency between California and federal Wetland Criteria.

  Regulated entities will have to assess property for wetland characteristics under separate federal and State criteria, creating confusion and increased cost for stakeholders. The draft EIR should examine the significant effect on the environment such inconsistency and confusion will have by deterring public and private property owners from participating in large-scale, multi-species habitat conservation planning efforts when those efforts include wetland-dependent species. For example, the information contained in the Initial Study document states that Regional Water Quality Control Boards or the Board will deny the issuance of a permit for discharge of dredge or fill material if the proposed discharge would "jeopardize the continued existence of species listed as endangered, threatened, or candidate under CESA or FESA or would result in likelihood of the destruction or adverse modification of a critical habitat." This automatic permit denial does not take into account whether or not the entity seeking a permit has already secured authorization to impact a listed species by the California Department of Fish and Game or the U.S. Fish and Wildlife Service and goes well beyond the Board's statutory authority under Porter-Cologne. Public and private property owners will think twice about participating in such planning efforts if there is confusion between the regulatory agencies as to what type of property will be considered a wetland.

- Increased Regulatory Demands on California Regulatory Agencies.

  At a time of employee furloughs and significant budget cuts to State programs, the Board is set to dramatically expand its regulation of property through the expanded wetland definition. We believe the Regional Water Quality Control Boards do not have the staff, expertise, or budget to administer a new, broad permitting program that would be required by the new wetland definition. Likely delays in issuing permits for projects affecting only "State wetlands" will cause economic harm for stakeholders, including industry, municipalities, and property owners.

- Increased Litigation.

  There has been substantial litigation over the definition of wetlands under the federal Clean Water Act. A new California wetland definition will almost certainly lead to litigation over its breadth and implementation. This will create uncertainty for the regulated community and impose additional costs on property owners and the State.

Dredge and Fill Regulations

Our organizations have similar concerns with the dredge and fill regulations. The Initial Study provided only a very general description of the program, but other materials available on the Board's Wetland and Riparian Protection Policy website suggest that the proposed regulations could significantly deviate from the regulatory program as implemented by the Corps.

For instance, the "Wetland and Riparian Area Protection Policy Overview" presentation (June 21, June 30, and July 7, 2010) indicates that the Board would apply the Section 404(b)(1) Guidelines by defining practicable alternatives based on the basic project purpose (which is typically narrowly defined, such as "housing"), while the Corps makes its determination based on the overall project purpose (which is typically more broadly defined to account for an applicant's objectives). Not only would this subtle difference lead to potentially conflicting determinations of practicability by the Corps and the Regional Boards, it would invite Regional Boards to second-guess the local land use decisions of cities and counties by, for instance, questioning whether a site was suitable for residential development even if it has been zoned accordingly by a city or county.

Similarly, the presentation indicates that the proposed regulatory program would prefer restoration or establishment of ecological communities of similar type to those being impacted, and would allow Mitigation banks/in-lieu fee: may be used where on-site mitigation is unavailable. This is in contrast to the federal compensatory mitigation rule, which gives priority to mitigation banks and in-lieu fee programs. These conflicting requirements leads to confusion in the regulatory community. The Board's preference for on-site mitigation could also have environmental consequences. As the federal compensatory mitigation rule explained, on-site mitigation often leads to "postage stamp" preserves that provide less benefits to the watershed compared to larger, regional preserves that can be accomplished in mitigation banks and in-lieu fee programs. The draft EIR should consider the environmental effects of the preference for onsite mitigation in light of the Corps and EPA's findings and conclusions regarding the value of such mitigation.

Accordingly, we believe the scope of the proposed regulatory program also goes beyond merely filling the gap and instead creates a new program with different regulatory standards. Public and private property owners may need to apply for permits from both federal and State regulatory agencies, rather than solely through the Clean Water Act Section 404 program. The new regulatory program will impose substantial burden on property owners by requiring compliance with multiple permit programs. The draft EIR should consider alternatives to the proposed project that would eliminate the burden on stakeholders caused by dual regulatory programs. The Clean Water Act provides for a state administration of the Section 404 permit program. 33 U.S.C. § 1344(g). The draft EIR should consider an alternative that has the State administer the Section 404 permit program to eliminate the burden on stakeholders that would arise from compliance with multiple regulatory programs protecting the same resources but with different standards and requirements.

Recommendations

Based on the current level of protection afforded the State's wetlands, further evaluation as to the effectiveness of the newly adopted joint compensatory mitigation rule by the Corps and EPA, efforts currently underway by the Obama Administration to address the "gap" issue, and the current fiscal crisis affecting California, we believe that the Board should defer action on the development a new wetlands definition and new state wetlands regulatory permitting program and should not pursue implementation of a new regulatory program without express authority from the Legislature.

If, however, the Board continues to pursuit the development of this program, our organizations continue to advocate for the following:

1. 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;

2. 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;

3. 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;

4. 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 are consistent with and no more stringent than or more cumbersome than the federal compensatory mitigation rule;

5. Limit the Regional Board's application of the Section 404(b)(1) guidelines to Gap Wetlands and ensure that it is applied consistent with the Corps' application of the guidelines; and

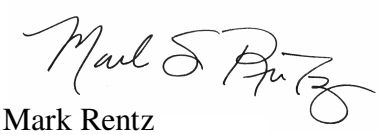
6. Require that all personnel assigned to implement the California Wetland Gap Program be trained to administer the California Wetland Gap Program so as to resolve applications in a timely and efficient manner.

In addition to the above comments and previously submitted comments on this issue (attached), our organizations also concur with the issues and concerns raised by the California Department of Transportation in their letter to the Board dated April 27, 2011.

We appreciate the opportunity to provide comments and look forward to working with the Board on this important issue.

Sincerely,

Paul Meyer
American Council of Engineering Companies California



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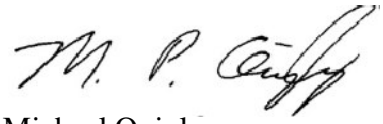

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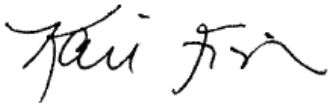

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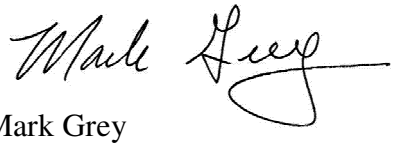

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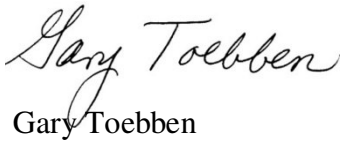

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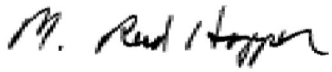

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