

Wetland and Riparian Area Protection Policy Phase 1 Implementation: Identifying Potential Barriers and Solutions

Regulatory Framework – Present and Proposed

Introduction

The State Water Resources Control Board (State Water Board) is developing statewide Wetland and Riparian Area Protection Policy. The policy will be rolled out in three phases. Staff are currently working on Phase 1 with a planned adoption date of November 2011. The focus of Phase 1 is to protect of all waters of the state, including wetlands, from impacts of discharges of dredged or fill material. The statewide policy will provide a consistent regulatory framework for permit writers. Phase 1 will include a wetland definition, a wetland delineation method, a wetland assessment framework, and regulations pertaining to the discharge of dredged or fill material.

Purpose of Policy

Implementation of this policy will help reverse historic trends in wetland loss, mitigate future risks to aquatic resources, and produce measureable improvement in the abundance, diversity and health of the state's wetland and riparian resource.

Purpose of Today's Meeting

The purpose of this meeting is to obtain staff comments on implementing this policy statewide through the Regional Boards. We would like to understand your assessment of potential needs and barriers related to carrying out the policy. We will structure our discussion as follows:

1. Discussion of Current Regulatory 401 Program
 - a. Review permitting process
2. Discussion of Proposed Policy
 - a. Discuss permit decision process under policy highlighting new elements of the permitting process.
3. Discussion of Proposed Policy Implementation
 - a. Identify any new tasks
 - i. Identify barriers to implementation of new tasks
 - ii. Identify resources to overcome barriers; leveraging resources in-house or other

Current Regulatory Framework

This section identifies the current framework for regulating discharges of dredged and fill material to waters, including wetlands. The current regulatory framework is the baseline we will use to determine the actual changes to the permitting process brought about by the proposed policy. Projects involving the discharge of dredged and fill material to waters, including wetlands, currently must comply with a variety of federal and state procedural, analytical, and discharge limitation requirements. The following points highlight some of the procedural requirements.

Federal Procedural

- National Environmental Policy Act (NEPA) requires environmental analysis of federal actions (e.g., Section 404 permitting decisions), including analysis of alternatives for proposed action.
 - NEPA does not require federal agencies to select the least environmentally damaging alternative; however, 40 CFR 230.10(a) prevents the Corps from issuing a permit if there are less damaging alternatives available.
- USACE evaluates alternatives to discharges of dredged and fill material to waters, including wetlands as part of the CWA Section 404 program.
 - Nationwide permits (NWPs) and regional general permits, USACE performs this analysis for the permit as a whole.
 - Individual § 404 permits, USACE performs this analysis for the individual project.
- USACE issues permits according to guidelines established under Section 404(b)(1).

State Procedural

- The California Environmental Quality Act (CEQA) requires an initial study of projects that may have a significant affect on the environment,
- Projects that may adversely affect habitat for threatened and endangered species (State and Federally listed) are subject to consultations with applicable federal and state agencies
- Projects must meet State water quality standards (§ 303 CWA) that include
 - beneficial uses for all water bodies within their jurisdictions,
 - water quality objectives sufficient to protect the most sensitive of the beneficial uses, and
 - an anti-degradation policy consistent with the regulations at 40 CFR 131.12.
- CWA, §401 Certification authority applies to all potential water quality impacts, direct or indirect over the life of the project.

Regulations, policies, and guidance specific to the permitting of discharges of dredged and fill material to waters, including wetlands, are shown in **Table 1** and **Table 2**.

TABLE 1. FEDERAL REGULATORY FRAMEWORK FOR DISCHARGE OF DREDGE AND FILL TO WETLANDS

Authority	Provisions and Requirements
Clean Water Act (1972)	<ul style="list-style-type: none"> • Protects quality of waters of the United States, including wetlands. • Requires permits for discharge of dredge or fill material to waters of the United States (Section 404). • Requires state water quality certification for Section 404 permits.
CWA Section 404(b)(1) Guidelines (40 CFR Part 230; 1980)	<ul style="list-style-type: none"> • Prohibits discharge of dredge or fill material if there is a practicable alternative that has less adverse impact on the aquatic environment and does not have other significant adverse environmental consequences. • Requires consideration of practicable alternatives, defined as activities that do not involve discharge of fill material into waters of the United States, or discharge at other locations. • Defines alternative as practicable if it is available and capable of being done considering cost, existing technology, and logistics in light of overall project purposes. • Prohibits discharges that will cause or contribute to significant degradation of the waters of the United States. • Requires consideration of cumulative and secondary effects on aquatic ecosystem.

TABLE 1. FEDERAL REGULATORY FRAMEWORK FOR DISCHARGE OF DREDGE AND FILL TO WETLANDS

Authority	Provisions and Requirements
MOU between Dept. of Army and USEPA on the Determination of Mitigation under CWA Section 404(b)(1) Guidelines (1990)	<ul style="list-style-type: none"> • Provides guidance for USEPA and Corps in use of discretion in implementing CWA Section 404(b)(1) guidelines in standard permits. • Sets policy of “avoid, minimize, compensate” sequence for impacts to wetlands.
USACE Wetlands Delineation Manual (Environmental Laboratory, 1987)	<ul style="list-style-type: none"> • General methods for delineating wetlands.
USACE Standard Operating Procedures (2009)	<ul style="list-style-type: none"> • Information for the Corps to consider in applying the 404(b)(1) guidelines in issuing permits.
Decision in Solid Waste Agency of Northern Cook County v. USACE (2001)	<ul style="list-style-type: none"> • Certain “isolated” waters, including wetland and riparian areas, do not fall under USACE’s jurisdiction as waters of the United States.
Decisions in Rapanos v. United States and Carabell v. United States (2006)	<ul style="list-style-type: none"> • Two definitions for waters of the United States: (1) the CWA covers “relatively permanent, standing, or continuously flowing bodies of water” that are connected to traditional navigable waters, as well as wetlands with a continuous surface connection to such water bodies and (2) the CWA covers wetlands that “possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”
USACE Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (2008a)	<ul style="list-style-type: none"> • Identifies California-specific plants, hydric soils, and wetland hydrology indicators.
USACE/USEPA Compensatory Mitigation Rule (April 10, 2008)	<ul style="list-style-type: none"> • Specifies requirements for mitigation when impacts are unavoidable; these requirements have been added to the 404(b)(1) Guidelines.

MOU = Memorandum of Understanding

USACE = United States Army Corp of Engineers

USEPA = United States Environmental Protection Agency

TABLE 2 CURRENT PERMITTING DECISION PROCESS FOR CERTIFICATION PROGRAM

Permitting Phase	Elements
Pre-application	<ul style="list-style-type: none"> • Consultation • CEQA review
Application Acceptance	<ul style="list-style-type: none"> • Initial review • Notice to applicant regarding complete application • Public notice • Request more information if incomplete
Application Review	<ul style="list-style-type: none"> • Public comment review • Background materials review • Request additional information if needed • Interagency coordination and review • Site visit • Technical review <ol style="list-style-type: none"> 1. Verify CEQA documentation 2. Determine discharge characteristics; 3. Identify and assess all individual and cumulative environmental impacts for life of project; 4. Identify impacted beneficial uses and waterbody types; 5. Determine compliance with water quality standards; 6. Identify other water quality concerns, i.e., effluent limits, CA Toxic Rule, and TMDLs; 7. Review and evaluate proposed avoidance, minimization and mitigation measures; 8. Evaluate any overriding economic, development, and watershed considerations;
Regulatory Action	<ul style="list-style-type: none"> • Method of regulation (WDR vs. certification) • Specific conditions • CEQA findings • WDR or certification
Follow up	<ul style="list-style-type: none"> • Monitoring • Enforcement • Compliance tracking

CEQA = California Environmental Quality Act

WDR = Waste discharge requirement

Regulatory Framework with Phase I of the Policy

Phase I contains a wetland definition, a wetland delineation method, a wetland assessment framework, and regulations pertaining to the discharge of dredged or fill material.

Wetland Definition

The policy defines an area as a wetland if, under normal circumstances, it:

1. Is saturated by ground water or inundated by shallow surface water for a duration sufficient to cause anaerobic conditions within the upper substrate
2. Exhibits hydric substrate conditions indicative of such hydrology
3. Either lacks vegetation or the vegetation is dominated by hydrophytes.

Wetland Delineation

Wetland delineation is to be performed using Corps of Engineers Wetland Delineation Manual (USACE, 1987) and two regional supplements: Arid West Region (USACE, 2008a) and Western Mountains, Valleys, and Coast Region (USACE, 2008b) (referred to as 1987 Manual and Supplements). The Water Boards will use the guidance provided by the 1987 Manual and Supplements to determine the presence of indicators of the three wetland characteristics in an area: hydrology, substrate, and vegetation. The technical methods shall be applied in their entirety except for where those methods are inconsistent with the State definition of wetland areas, including but are not limited to:

- Statements in the Manual that preclude non-vegetated wetlands
- Statements regarding federal jurisdictional limitations that do not apply to waters of the state
- Specifications for indicators of wetland characteristics that are found to be inconsistent with the indicators of wetland characteristics for all wetland areas of California.

Wetland Assessment Framework

The wetland assessment framework is a system for information gathering, management, interpretation and reporting for aquatic resource regulation and management. The information will assist the California Water Boards in making regulatory or other types of aquatic resource management decisions. The assessment framework consists of three levels of information ranging from broad to specific, each having a particular use in regulatory decision-making and management:

- Level 1: consists of wetland and riparian inventories from maps and photos and assessment of upstream and surrounding land use stressors to aquatic resources within watersheds.
- Level 2: consists of rapid assessment methods to assess the condition of wetland and riparian areas.
- Level 3: consists of intensive assessment to provide data to validate rapid methods, characterize conditions or diagnose causes of conditions.

Standard tools are being developed to assist with the implementation of the assessment framework. The tools include: 1) the California Rapid Assessment Method (CRAM) for routine assessment of wetland and riparian condition; 2) Wetland Tracker, which is an online data management system consisting of data and maps collected for projects impacting wetland and riparian resources; and 3) an online 401 application form that captures and stores 401 project data in Wetland Tracker, and includes a mapping tool to input project maps, including impact sites and mitigation sites.

The assessment framework supports a statewide wetland and riparian assessment strategy approved by the Water Quality Monitoring Council which is made up of Cal/EPA and Resource Agency departments. State agencies are to combine efforts to develop wetland and riparian inventory information including status and trends.

Proposed Regulations for Dredge and Fill Discharges based on 404 (b)(1) Guidelines

Regulations will be issued governing the discharge of dredged and fill material into waters of the State. These regulations are based on the joint USEPA/U.S. Army Corps of Engineers' 404(b)(1) guidelines including the recent compensatory mitigation rule. The regulations will require that projects with significant impacts develop an alternatives analysis to identify the "Least Environmentally Damaging Project Alternative (LEDPA)". The alternatives analysis identifies the LEDPA based on avoidance and minimization measures only in reducing environmental impacts. Once the LEDPA is determined, then mitigation measures are applied for impacts that could not be avoided or minimized. A formalized means of coordination with the Corps on this process will be put into place so that the applicant will have one set of requirements for this analysis meeting both agencies needs. Once the analysis is complete, then the project alternative will be evaluated as to Basin Plan requirements including the anti-degradation policy (see Table 4 below)

TABLE 3. PERMITTING DECISION PROCESS WITH POLICY

Permitting Phase	Elements
Pre-application	<ul style="list-style-type: none"> • Consultation • CEQA review
Application Acceptance	<ul style="list-style-type: none"> • Initial review • Notice to applicant regarding complete application • Public notice • Request more information if incomplete
Application Review	<ul style="list-style-type: none"> • Public comment review • Background materials review • Request additional information if needed • Interagency coordination and review • Site visits • Technical review <ol style="list-style-type: none"> 1. Verify CEQA documentation 2. Determine discharge characteristics; 3. Identify and assess all individual and cumulative environmental impacts for life of project; 4. Identify impacted BU's and waterbody types; 5. Develop alternatives analysis; <ol style="list-style-type: none"> a. identify project purpose b. identify LEDPA <ol style="list-style-type: none"> i. individual/cum effects 6. Determine compliance with WQS; 7. Determine other WQ concerns: effluent limits, CA toxic rule, TMDLs; 8. Review and evaluate proposed avoidance; minimization and mitigation measures; 9. Evaluate any overriding economic, development, and watershed consideration; 10. Mitigation decision for unavoidable impacts; <ol style="list-style-type: none"> a. new mitigation rule requirements <ol style="list-style-type: none"> i. verify wetland delineation ii. verify aquatic resources impacts to watershed iii. verify replacement of lost functions iv. assess mitigation site plan v. long-term management plan; financial assurances vi. monitoring; CRAM condition assessment over time; data input to Wetland Tracker 11. Anti-deg decision based on the preceding analysis.
Regulatory Action	<ul style="list-style-type: none"> • Method of regulation (WDR vs. certification) • Specific conditions • CEQA findings • WDR or certification
Follow up	<ul style="list-style-type: none"> • Monitoring • Enforcement • Compliance tracking

CEQA = California Environmental Quality Act
WDR = Waste discharge requirement

TABLE 4 DECISION PROCESS INTEGRATING ANTI-DEGRADATION AND ALTERNATIVE ANALYSIS

Step 1: Will the project affect waters, including wetlands?
Will there be any direct or indirect effects to waters

- **Yes** Proceed to step 2
- **No** A certification permit is not needed. You do not need to continue with the anti-degradation water quality standards process

Step 2: Are there reasonable alternatives that avoid or reduce impacts to waters?
Is there an affordable, reasonable, and available option which will not harm waters, including wetlands or cause other significant harm to the environment?

- **Yes** LEDPA requirements have not been achieved
- **No** Proceed to Step 3

Step 3: Will the project degrade or destroy the beneficial uses of waters including wetlands or have other significant environmental consequences?

After considering alternatives to avoid and/or minimize impacts, will there be a significant adverse impact upon beneficial uses, water quality, or other significant environmental consequences?

- **Yes** Compliance with water quality standards for project as planned has not been achieved; proceed to Step 4
- **No** Water quality standards are met, project is in compliance with State water quality standards.

Step 4: Is compensatory mitigation appropriate? If so, what kind of compensatory mitigation?
If project degrades or destroys the beneficial uses of waters, including wetlands, is the compensatory mitigation possible and appropriate? If so, has applicant provided an adequate mitigation plan?

- **Yes** Water quality standards are met including anti deg req.
- **No** Compliance with water quality standards for the project as planned has not been achieved.

