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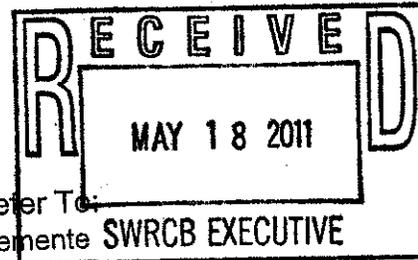
Public Cmt/Wrkshp (1/31 & 2/8)
CEQA-Wetlands Policy & Reg
Deadline: 5/20/11 by 12 noon



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TO: *Hi Vicky,*
Vicky Whitney
Deputy Director
Division of Water Quality

In Reply Refer To:
general:clemente

FROM:
James G. Smith
Assistant Executive Officer
SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD

DATE: May 18, 2011

SUBJECT: SAN DIEGO WATER BOARD COMMENTS ON THE WETLAND AREA
PROTECTION POLICY AND DREDGE AND FILL REGULATIONS

Thank you for the opportunity to comment on the Initial Study (IS) for the development of the "Wetland Area Protection Policy and Dredge and Fill Regulations" (Policy). We understand that development of this Policy is the first phase of a three phase effort, defined in the State Water Board Resolution No. 2008-0026, to develop a strong state-wide comprehensive policy that will provide needed guidance on the protection and restoration of wetland and riparian areas, as well as assessing and measuring net change in wetland and riparian area related functions. As part of this phase, the State Water Board is proposing to address 1) a wetland area protection policy that includes a wetland definition based on the US Army Corps of Engineers (USACOE) delineation methods and an assessment framework for collecting wetland data to monitor progress toward wetland protection and to evaluate program development; and, (2) necessary adjustments to the existing dredge and fill regulations to implement the wetland delineation methods, and to foster clarity and consistency in the permitting process.

The San Diego Water Board appreciates the State Water Board's recognition of the historic loss of aquatic resources due to dredge and fill projects, and willingness to undertake measures to improve the Clean Water Act (CWA) Section 401 Water Quality Certification (Certification) Program to correct for this loss. Further, the State Water Board's efforts in developing the Wetland and Riparian Area Monitoring Program (WRAMP) are a critical component in the development of the Policy, and we encourage the State Water Board to pursue that cause. A uniform monitoring methodology, coupled with a functional and public database will provide a useful tool to 1) evaluate program effectiveness over time, 2) evaluate individual projects as they relate to their surrounding waters, and 3) streamline and bring uniformity to monitoring requirements individual projects.

California Environmental Protection Agency



The San Diego Water Board CWA Section 401 Certification Program receives roughly 1 PY to evaluate approximately 120 applications for CWA Section 401 Water Quality Certification (401 Certifications) annually. The majority of these applications propose impacts to ephemeral or intermittent streams; many of which may not be classified as wetlands under the proposed definition. Over time, we have come to recognize the value of ephemeral and intermittent streams and the functions that they provide (i.e. habitat, pollutant assimilation, flood attenuation, etc.). **Ideally, our hope for this policy is that it will enhance protection of these areas; with the understanding that this may not occur until later phases of the Policy are implemented. Our minimum expectation for this phase of the policy is that it not result in further degradation of these areas in the interim.** With that in mind, our comments have been classified below as either "concerns," or "minor comments, questions, and/or recommendations" for consideration in the Policy's development.

CONCERNS

1. Our most fundamental concern is that **the activities proposed in the initial study (IS) project description do not align themselves with the basic project purpose¹** and may run counter to the apparent objective. Rather, the proposed changes appear to address various consistency and clarity issues between the Water Boards pertaining to CWA Section 401 Certification program implementation. Measures listed in the IS will likely accomplish consistency and clarity, but will probably not adequately protect *all* Waters of the State.
 - a. If the true objective of the Policy is to streamline the regulatory process and attain consistency throughout the State; then we suggest changing the stated purpose accordingly, in recognition that the activities proposed in this phase of regulation may not result in any direct benefit or protection to wetlands or non-wetland waters of the State (NWWWS).
 - b. If the objective is to protect wetlands, then we believe the broadest definition of wetlands possible would be the most protective. Since the ancillary objective is to develop a definition using existing agency terminology for the purposes of streamlining regulation, then we again² suggest that the State Water Board consider the broader definition used by California Department of Fish and Game (CDFG) and US Fish and Wildlife Service (USFWS), containing any one or more of the three wetland attributes (or parameters). The CDFG/USFWS definition is broad enough to ensure protection of wetlands, while streamlining requirements

¹ The project purpose stated is "to protect all waters of the State as defined by Water Code section 13050, including wetland areas and waters of the United States from dredge and fill discharges."

² Refer to September 8, 2008 San Diego Water Board comment letter on the proposed Wetland and Riparian Area Protection Policy.

for the applicants using existing terminology consistent with other State and Federal agency regulations. The currently proposed definition does not appear to streamline regulation. Rather, it appears to require a new process for confirming State wetlands, which will be an added resource burden on both the applicants and the Water Boards.

- c. If the objective of this phase of the policy is to protect *all* waters as stated, then the Policy should focus on identifying and protecting non-wetland waters of the State (NWS) first, since guidance is most lacking in this area. A simple way to do this would be to broaden the "No-Net Loss" Policy to these areas. As currently proposed, the policy may unintentionally shift impacts away from wetlands, at the cost of increased impacts to also valuable NWS.

2. The IS states that the Policy proposes to incorporate the Federal CWA Section 404(b)(1) guidelines, on a yet-to-be specified subset of 401 applications. Although an alternatives analysis (like that specified in 404(b)(1)) is a key step to adequately considering avoidance, minimization, and compensatory mitigation, **the 404(b)(1) requirement needlessly commit the State to a process that was not intended for evaluation of projects against State standards and objectives.**

- a. First, we understand that the Water Boards already have the discretion of asking for an alternatives analysis, or other relevant information, as part of the completeness review, pursuant to 23 CCR Section 3856.
- b. Consequently, the Policy would only define conditions when such an analysis is mandatory. Basing the requirement on just a few project specific conditions (e.g. acreage threshold or type of fill) will make it difficult to appropriately identify a subset of projects that consistently warrant such analysis. Rather, if the State Water Board elects to mandate the analysis, the discretion to apply the requirement to certain projects should be left to the Regional Water Boards.
- c. Finally, the Policy will do little to protect wetlands if it is not made abundantly clear that the Regional Water Boards retain the discretion of denying the "Least Environmentally Damaging Practicable Alternative" if the LEDPA will result in significant and/or unmitigable water quality impacts to State standards and objectives.

3. The Policy also proposes to align itself with the USACOE guidelines on compensatory mitigation (i.e. Mitigation Rule). We support the efforts to focus the Policy on watershed mitigation. In doing so, the State Water Board should bear in mind that not all watersheds and mitigation bank service areas are sized

alike. In the San Diego Region, many (smaller) watersheds lack mitigation banks, and many others lack banks with appropriate mitigation for the impacts proposed in that area. It is not clear how the hierarchy of the Mitigation Rule will be superimposed on the need to protect watersheds' beneficial uses and comply with Basin Executive Order W-59-93. Rather than incorporating a direct reference to the USACOE mitigation hierarchy, the State Water Board should consider including language that the mitigation be sufficient to conform to the Governor's No-Net-Loss policy; and as such, should require establishment and reestablishment for permanent impacts and rehabilitation, enhancement, and preservation for temporary impacts, both at no less than a 1:1 ratio, with additional consideration to temporal loss and the individual sites' functions provided. When that can be accomplished by purchasing credits from a Mitigation Bank, it shall be considered preferable to do so.

4. Finally, we are concerned that the administrative oversight of the new requirements in the Policy creates an additional resource burden on a program that is already insufficiently funded. The shifting of resources to State wetland identification and processing, will compromise Regional Water Board project reviews and the establishment of conditions to off-set impacts to NWWs; thereby resulting in further impacts to those areas.

COMMENTS, QUESTIONS, AND RECOMMENDATIONS

5. In order to provide meaningful comments on what the proposed policy should include, the Environmental Impact Report (EIR) should make clear what subsequent project phases outlined in State Water Board Resolution No. 2008-0026, intend to accomplish, along with the projected timeline of their implementation.
6. The EIR should include a thorough discussion of how the proposed definition and regulation will result in additional protection of wetland acres and functions.
7. The EIR should also include an evaluation of any direct and indirect impacts (positive and negative) that may occur to NWWs as a result of the proposed Policy.
8. At a minimum, the Policy should be clear that impacts to NWWs are still subject to evaluation pursuant to the Porter Cologne Water Quality Control Act.
9. If incorporating the 404(b)(1) process, the San Diego Water Board encourages the State Water Board to place more restrictive criteria on defining the project purpose (e.g. create housing, vs. create lakefront housing), and the term "practicable" (i.e. with regards to cost considerations).

10. If incorporating the USACOE JD manuals, the Policy should emphasize that the JDs conducted in the Arid West Region must be done during "normal circumstances" as defined in the manual (i.e. not in August, when the conditions are least likely to be manifested).
11. According to the proposed wetland definition, it appears that lakes and reservoirs will be considered State wetlands because they exhibit hydric soils and hydrology but not vegetation because they are inundated. Do recreational lakes and reservoirs fall into the constructed wetland exemption?
12. The Policy should address how to regulate 2 or 3-parameter wetlands that are above the OHWM (i.e. non-Federal wetlands).
13. The IS (P. 16-17) describes the criteria that warrant denial. We suggest adding further clarification that a project may be denied if the proposed mitigation is inadequate or inappropriate and adjusting the language to place the burden of proof on the applicant to demonstrate that the proposed project would not cause the effects listed in the Policy.
14. The Policy should consider clarifying language for projects where requested information is not provided for prolonged periods of time. What happens to projects one year following issuance of a "Denial Without Prejudice"? To avoid the practice of applicants submitting incomplete or premature applications, the Policy should clarify that the Regional Water Boards can withdraw projects that fail to provide all requested information within 1 year; whether or not they are deemed statutorily complete.
15. The Policy, and supporting documents, should be clear as to how the proposed regulations apply to Federal facilities and impacts.

The San Diego Water Board appreciates your consideration of the comments above. If you have any questions regarding the comments or would like to discuss them further, please contact Ms. Chiara Clemente of our office at 858-467-2359 or cclemente@waterboards.ca.gov.

JS:dtb:cmc

Enclosure

cc: