

RANCHO MISSION VIEJO

May 20, 2011

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000

Reference: Wetland Area Protection Policy and Dredge and Fill Regulations:
Notice of Preparation of Environmental Impact Report/Initial Study
Checklist

Subject: Rancho Mission Viejo Comments

Dear Ms. Townsend:

Thank you for the opportunity to review and provide comments on the Notice of Preparation ("NOP") for the proposed Wetland Area Protection Policy and Dredge and Fill Regulations ("Wetland Policy & Regulations"). Rancho Mission Viejo ("RMV") appreciates the additional time that the Water Board provided to interested parties, such as ourselves, to provide comments on the NOP. We have reviewed the Wetland Policy & Regulations NOP and provide the following comments for your consideration.

Background

Over the past several years, RMV in cooperation with the County of Orange ("County"), U.S. Army Corps of Engineers ("USACE"), U.S. Fish and Wildlife Service ("USFWS") and the California Department of Fish and Game ("CDFG") has undertaken three coordinated watershed-level planning efforts to determine the future land uses for south Orange County, including all RMV lands (approximately 23,000 acres). These planning processes have resulted in approval of:

1. A General Plan Amendment/Zone Change for RMV lands by the County (this approval is commonly referred to as "The Ranch Plan");
2. The San Juan Creek/Western San Mateo Creek Watershed Special Area Management Plan (SAMP) and Long Term 404 Permit by the USACE;
3. The Southern Subregion Habitat Conservation Plan (SSHCP) by USFWS; and
4. A Master Streambed Alteration Agreement (MSAA) for the Ranch Plan by CDFG.

In order to complete these lengthy and complex planning processes, the participating parties prepared several supporting technical studies including three delineations as follows:

- The USACE conducted a comprehensive landscape scale delineation and functional assessment of the streams and riparian zones within the study area. The USACE identified and mapped the extent of potential USACE jurisdiction and ranked the streams in terms of their overall hydrologic, biologic and biogeochemical integrity.
- RMV conducted a project level delineation to identify and quantify the extent of areas subject to the jurisdiction of (1) the USACE pursuant to Section 404 of the Clean Water Act and (2) the CDFG pursuant to Section 1600 of the Fish and Game Code.

These delineations were approved by the USACE and CDFG, respectively, during the planning processes for the SAMP and MSAA and were significant determining factors in the decisions regarding which RMV lands would be protected and which lands could be developed. *The result of the SAMP and MSAA planning processes is that 94% of all CDFG Jurisdictional Areas and 95% of all Waters of the U.S. on RMV lands are designated for permanent protection and identified as Aquatic Resource Conservation Areas.*

Comments:

The Wetland Policy & Regulations NOP described the Project's purpose as "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." The NOP further states that the Project "complements the existing regulatory framework and is intended to fill the gaps currently caused by separate federal and State regulations and programs by consolidating existing Water Board requirements in a coordinated framework." The gaps the Water Board is proposing to close via the Project are the U.S. Supreme Court decisions commonly referred to as "SWANCC" and "Rapanos" which excluded from federal jurisdiction isolated wetlands such as vernal pools, playas, potholes and alpine wet meadows.

RMV appreciates the goal advocated by the Water Board since these isolated wetlands are deserving of protection. Indeed, RMV has several vernal pools within its boundaries, all of which will be permanently protected through the approvals mentioned above. RMV believes that this situation is illustrative of the significant concerns that RMV has with the proposed Wetland Policy & Regulations which can be summarized as follows:

1. The Proposed Wetland Policy & Regulations do not include any "grandfathering" clauses for projects with existing permits.

2. The Proposed Wetland Policy & Regulations do more than "fill in the gaps" left by SWANCC and Rapanos resulting in inconsistencies between California and federal wetland definitions that will increase the regulatory burden on private landowners.
3. The Proposed Wetland Policy & Regulations increase demands on California regulatory agencies.
4. The Proposed Wetland Policy & Regulations will result in increased litigation.

Each of these concerns is more fully described in the following sections:

1. *The Proposed Wetland Policy & Regulations do not include any "grandfathering" clauses for projects with existing permits.*

The NOP states that the "Project" (i.e., the proposed Wetland Policy & Regulations) consists of two components (1) a wetland protection policy and (2) necessary adjustments to the existing dredge and fill regulations. Neither of these components address projects that have existing permits issued under existing wetland regulations. As noted above, RMV has spent many years and a considerable amount of money to develop a land use/open space plan for its property (i.e., the Ranch Plan). This effort involved the USACE, CDFG, USFWS and, at times, the San Diego RWQCB in addition to members of environmental organizations such as Natural Resources Defense Council, Endangered Habitats League, Sierra Club and many, many members of the general public. The result of this effort is a plan that protects 94% of all CDFG Jurisdictional Areas and 95% of all Waters of the U.S. on RMV lands, including such isolated wetlands as vernal pools. The EIR for the Wetland Policy & Regulations should address prior projects authorizations; and the Wetland Policy & Regulations should include a provision for grandfathering projects such as ours under the regulations in place at the time permits were issued. This is particularly important for projects like ours which have a multi-decade timeline for implementation. For example, the duration of our Long Term 404 Permit is 2082. Similarly our MSAA permit term extends until 2018.

Also, the proposed Wetland Policy & Regulations do not provide for projects that have permits issued under either Section 7 or 10 of the Federal Endangered Species Act (FESA) or 2081 permits issued under the California Endangered Species Act. The information contained in the Initial Study document states that Regional Water Quality Control Boards or the Water 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." It is not within the authority of the Water Board to make such determinations. The EIR for the Wetland Policy & Regulations should address prior project authorizations; and the Wetland Policy & Regulations should describe the manner in which prior project authorizations such as Incidental Take Permits issued under Section 10 of FESA will be recognized.

2. *The Proposed Wetland Policy & Regulations do more than "fill in the gaps" left by SWANCC and Rapanos resulting in inconsistencies between California and federal wetland definitions that will increase the regulatory burden on private landowners.*

The Wetland Policy & Regulations proposed by the Water Board in the NOP would depart from more than three decades of existing regulation of wetlands in California by CDFG, USACE and EPA. The proposed State wetlands definition differs dramatically from the federal definition by:

- Removing the vegetation criteria that exists in the federal definition;
- Departing 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;
- Eliminating certain exemptions provided by the federal definition, including for sedimentation ponds, farm or stock ponds, or irrigation ditches;
- Allowing 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;

This definition has the potential to result in the regulation of areas that were not regulated as wetlands by the Corps under Section 404 pre-SWANCC and pre-Rapanos. For example, the Water Board's revision of hydric soil to hydric substrate would result in, first, areas currently regulated as non-wetland waters under the Clean Water Act (e.g., unvegetated mudflats) *being regulated as wetlands by the state*. Second and more importantly, *areas that were never regulated as wetlands under the Clean Water Act, even pre-SWANCC, would now be regulated as wetlands (e.g., isolated unvegetated flats)*.

The Board's new definition appears to retain the concept that wetlands require "anaerobic" conditions. This is sound practice and the intention is consistent with accepted wetland science. Therefore, we question the need for revising the federal definition to create a definition that, while intended to capture the intent of the Clean Water Act, actually creates a competing definition. This would result in many instances of using two different wetland definitions for the same property which includes both federal and non-federal (i.e., isolated) waters. This would also create the situation where a specific feature would be considered a wetland under the state definition while a non-wetland water under the federal definition. This simply is not reasonable and will impose a substantial burden on property owners by requiring compliance with multiple permit programs, different mitigation requirements on the same feature, and the potential for significant confusion, dispute and ultimately litigation.

3. *The Proposed Wetland Policy & Regulations increase demands on California regulatory agencies.*

At a time of employee furloughs and significant budget cuts to State programs, the Water 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.

4. *The Proposed Wetland Policy & Regulations will result in 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.

Conclusion & Recommendations

Based on (a) the current level of protection afforded to the State's wetlands, (b) continuing evaluation as to the effectiveness of the newly adopted joint compensatory mitigation rule by the Corps and EPA, (c) efforts currently underway by the Obama Administration to address the "gap" issue, and (d) the current fiscal crisis affecting California, we believe that the Board should defer action on the development of a new wetlands definition and new State wetlands regulatory permitting program.

If, however, the Water Board continues to pursue the development of this program, RMV requests the Water Board implement the following:

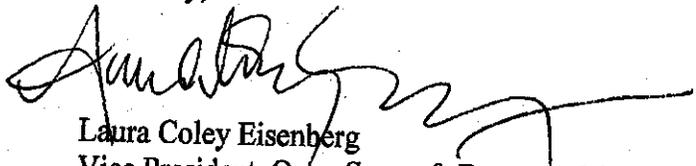
1. Develop a definition of State wetlands (binding on all Regional Boards) which is identical to the definition of wetlands used by the USACE in 33 CFR §328.4(b) and use the USACE's Wetland Delineation Manual, Wetlands Research Program, Technical Report Y-87-1 (January 1987) and applicable regional supplements 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 USACE 404 Program as needed to ensure that the scope of the California Wetland Gap Program is the same as the USACE 404 Program;
3. Require any person seeking to discharge dredged and fill materials into a State wetland which is not regulated by the USACE or CDFG ("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 should 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 provide for issuance of waste discharge requirements for Gap Wetlands that are consistent with and no more stringent than or more cumbersome than the USACE 404 Permits and that contain mitigation requirements that are consistent with and no more stringent than or more cumbersome than the Corps Mitigation Rule;
5. Limit the Regional Board's application of the Section 404(b)(1) guidelines to Gap Wetlands;
6. Adopt provisions that recognize prior authorizations, particularly for projects with multi-year implementation timeframes; and
7. Require that all personnel assigned to implement the California Wetland Gap Program be trained to administer that program so as to process applications in a timely and efficient manner.

Should you have any questions regarding these comments, please feel free to contact me at (949) 240-3362 Ext 297 or via email at lcoleyeisenberg@ranchomv.com

Sincerely,



Laura Coley Eisenberg
Vice President, Open Space & Resource Management