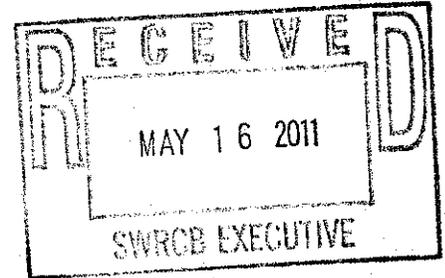


www.sws.org

## SOCIETY of WETLAND SCIENTISTS

*"an international organization dedicated to the conservation, management and scientific understanding of the world's wetland resources"*



Date: May 16, 2011  
TO: Jeanine Townsend, Clerk  
State Water Resources Control Board  
FROM: Sheri Emerson, President  
Western Chapter of the Society of Wetland Scientists  
SUBJECT: **COMMENT LETTER - CEQA - PROPOSED WETLAND AREA PROTECTION POLICY & REGULATIONS**

We are concerned that the direction of the proposed Policy appears to be deviating from the stated intentions of the Policy. This threatens to create confusion over the protection and status of non-wetland waters of the State. As proposed, the Policy risks losing crucial functions and values of state waters by facilitating mitigation that compensates acreage, but not ecosystem or public services of affected waters. Specific recommendations for the CEQA analysis are included at the end of this letter.

### I. SWS Membership and Interests

The Western Chapter of the Society of Wetland Scientists (Western SWS) is a professional organization representing scientists working on wetland ecology in California, Arizona, Nevada, and Hawaii. Western SWS members include some of the leading wetland professionals in California, and through the Chapter these members are available to provide technical support to the development of the State policy.

The Western SWS supports establishment of a State policy to protect wetlands from dredge and fill activities and to expand the scope of State policy to protect wetlands from other activities impacting water quality. Regardless of the federal regulatory process it is appropriate for the State of California to recognize the importance of vernal pools, headwater streams, and other remote or "isolated" wetlands that provide the functions and beneficial uses for California residents pursuant to state law.

Accordingly, the Western SWS would support a Policy that protects all waters of the State, including non-wetlands, and fosters clarity and consistency to the permitting process. However, the proposed Policy does neither.

The following comments are based upon a review of the Initial Study for the Wetland Area Protection Policy and Dredge and Fill Regulations, which is also known as Phase I of the Wetland and Riparian Area Protection Policy. Members of the Western SWS Executive Committee that have served on the State's

Technical Advisory Committee for development of the Policy were not involved in the development of these comments.

## **II. The Proposed Policy is Misleading and Will Not Achieve Its Stated Purposes**

### A. The Policy Should Provide Protection for All Waters of the State

The protective purposes identified in the Initial Study do not appear to be supported by the proposal. Specifically, the proposed Policy claims to protect all waters of the State,<sup>1</sup> but appears to intentionally omit, or at least fail to clarify the means of protecting, ephemeral, intermittent, or otherwise episodic streams. Such streams are both waters of the State as defined by Water Code section 13050 and cumulatively comprise the majority of waters of the state.

Stream elements that may only be present for limited periods play important roles in the aquatic ecosystem processes in the western United States, particularly in California. For ephemeral or intermittent streams, there is a preponderance of evidence that these resources provide ecological functions that benefit the State's waters at both the site-specific and landscape scales. Maintaining the physical, biological, and chemical integrity of these waters requires that they be considered as essential elements of the State's aquatic ecosystems.

The primary threat to water quality and beneficial uses of wetlands and particularly ephemeral and intermittent streams comes from modification of the physical habitat within and adjacent to the area. Such modification is often the subject of proposed projects that would be regulated by the State pursuant to the proposed Policy. Unfortunately, the proposed Policy fails to outline a means by which all waters would be protected.

Furthermore, without clarification regarding non-wetland waters, implementation will be problematic as the uncertainty will lead to confusion and conflict between and among members of the public, regulatory staff, and permit applicants.

### B. The Policy Should Provide Regulatory Consistency that Benefits California Waters

The Western SWS would support a Policy that fosters clarity and consistency if the outcome would improve protection, enhancement, and restoration of wetlands and non-wetland waters of the State. However, the proposed Policy seems to favor efficiency over other measures of consistency that would better serve the protection of wetlands and non-wetland waters of the State. Indeed, Western SWS members that are involved in the regulatory process (whether through consulting, advocacy, or government) support consistency in the permitting process because it provides transparency, accountability and proactive site planning.

---

<sup>1</sup> For example, the two stated purposes are 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" (page 2 of 57) and to "protect beneficial uses of the waters of the State, including wetlands, through the equitable and consistent regulation of dredge and fill activities" (page 22 of 57).

For instance, the use of federal delineation methods is a welcome approach to consistency because it was developed with broad scientific rigor for use in wetland environments in California. Since the delineation methodology is region specific, it compliments California's arid and mountain regions. Thus, its use achieves both efficiency and accountability. However, sole use of the federal mitigation guidelines may not be fully protective of the waters of the State of California because it was developed to serve the interests of the federal government.

Use of the federal mitigation rule may provide efficiencies for permit applicants and regulatory agencies, but it fails to provide accountability that the stated interests of the State are served. The CEQA analysis should either discuss alternatives to that approach or the proposed Policy should abandon its mandatory use. The proposed Policy should apply a logical, data-driven approach to choose among various mitigation methods, including avoidance, to prioritize sites for mitigation.

Of particular concern is that the federal mitigation rule does not provide for regional prioritization of mitigation strategies. Institutionalizing a federal approach across the whole of California wetlands will likely result in loss of diversity, ecosystem services, and recreational opportunities as the permitting process evolves toward the most efficient, rather than protective mitigation approach.

Consistency can recognize regional differences. The proposed Policy should provide for statewide consistency while recognizing and facilitating regional differences. The recent Water Quality Enforcement Policy is an example where a consistent approach to evaluating and responding to violations is established, but which provides regions to prioritize responses based on local conditions. A similar framework could be useful for wetland and riparian area protection and mitigation. Reliance on the federal mitigation rule serves the Federal rather than State interests, and in doing so it removes necessary regional discretion.

### **III. Streamline the Purpose to Clarify the Roles of Existing Policies and Orders**

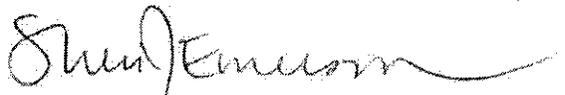
To achieve its stated purposes, the Policy could be streamlined to clarify roles of existing Policies and Orders. For instance, if a project involves discharge to wetlands, then the no-net-loss policy applies. If a project involves discharge to non-wetland waters of the State, then the discharge must protect water quality standards and objectives and achieve non-degradation. The proposed Policy could clarify that (1) compensatory mitigation is appropriate for achieving non-degradation; and (2) each regional board should develop procedures for deciding how to implement the policy (similar to the enforcement policy) based on guidance in the Policy for basing compensatory mitigation requirements on the findings of the state's mitigation studies, rather than the federal mitigation rule.

### **IV. Summary of Recommendations for the EIR**

1. The CEQA analysis should identify and quantify non-wetland waters of the State that are not subject to this phase of the Policy and identify and quantify the beneficial uses supported by those waters.
2. The CEQA analysis should discuss and evaluate alternatives to mandatory use of the federal mitigation guidelines.
3. The CEQA analysis should identify and summarize findings from state-funded studies of the section 404/401 compensatory mitigation program applied in California.

4. The CEQA analysis should provide more information on the use of "substrate" rather than "soils" for the proposed revised wetland definition and delineation. As proposed, wetlands would include areas with indicators of anaerobic conditions within the upper substrate. Since some reliable indicators of saturated conditions in episodic systems, such as accumulated decomposed organic matter, are themselves ephemeral, the CEQA analysis should provide the State's expectations for accuracy in delineating hydric substrate conditions.

Respectfully,



Sheri J. Emerson, MS, PWS

President

Western Chapter of the Society of Wetland Scientists