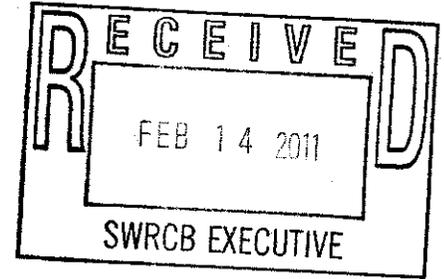




February 14, 2011



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Chief Executive Officer

Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95814-2000

Re: Wetland Area Protection Policy and Dredge and Fill Regulations

Dear Ms. Townsend,

The Orange County Transportation Authority (OCTA) appreciates the opportunity to comment on the Notice of Preparation (NOP) for a Draft Program Environmental Impact Report (DPEIR) on the proposed Wetland Area Protection Policy and Dredge and Fill Regulations. OCTA operates as the regional multi-modal transportation agency in Orange County; planning and implementing highway, road, rail and transit projects. While OCTA acknowledges the efforts of the State Water Resources Control Board (SWRCB) to create a more consistent statewide regulatory scheme for protecting wetlands, the Authority has concerns that the proposed expanded definition of "wetland", as outlined in the NOP, may adversely impact not only approved and permitted infrastructure projects but projects currently in project development. The proposed changes in the NOP could inadvertently create a disincentive for future mitigation actions, and create additional consistency and cost management issues. Although the NOP mentions potential impacts of the revised definition, OCTA encourages the SWRCB to consider and provide full cost implications associated with the proposed definition change, include a full discussion of other alternative definitions considered and their perceived shortcomings, provide the scientific reasoning for why the revised definition is necessary, and more completely support how the revised definition will create statewide consistency in wetland protection.

In 2006, Orange County voters approved Renewed Measure M (M2) which will provide \$14.4 billion in new funding for multi-modal transportation programs. The M2 Program includes two comprehensive environmental mitigation programs, the Environmental Cleanup Program (ECP) and the Mitigation and Resource Protection Program (MRPP). The ECP will provide approximately \$237 million to improve overall water quality throughout the county. Funding allocation is designated to improve upon and not replace existing pollution reduction efforts by eligible entities to improve water quality. This program will likely result in the construction of storm water retention/detention basins as well as constructed wetlands. These mitigation projects are designed to treat water quality and should be exempt from any new wetlands definition.

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The MRPP will provide approximately \$243.5 million for comprehensive, rather than piecemeal, mitigation of the environmental impacts of the M2 freeway improvements. As part of this endeavor, OCTA is currently mapping and defining wetlands throughout Orange County. OCTA, working in partnership with the United States Army Corps of Engineers (USACE), the United States Fish and Wildlife Service, and the California Department of Fish and Game, is going through an extensive process to ensure that all mapping is consistent with existing federal and state definitions of wetlands. If a new definition of "wetland," is adopted that differs greatly from existing definitions, it will require a complete revision of these mapping efforts. More specific technical information, as well as a detailed timeline for implementation is needed to ensure that OCTA can maintain compliance of such programs, and advance important mitigation projects. Without this information, delays in implementation will occur. Moreover, because the costs associated with additional wetland analysis and mitigation were not factored in when M2 was passed by voters, any additional costs associated with a revised "wetland" regulatory program will create additional financial constraints, leaving less funding for important environmental mitigation programs and infrastructure projects.

Another approach the SWRCB may want to consider in protecting wetlands is to develop a comprehensive mitigation framework, similar to that available for the protection of habitat. Comprehensive mitigation frameworks allow for programmatic environmental planning, inclusion of a wide variety of stakeholders, implementation of large-scale, important mitigation projects, and allow greater certainty for the needed mitigation of future infrastructure projects. If such avenue is pursued, OCTA, with its experience in creating comprehensive environmental mitigation programs, would like to be a participant in discussions surrounding the development of an appropriate framework.

SWRCB appears to be implementing the directives outlined in SWRCB's 2008 resolution in a piecemeal fashion. Consequently, it is difficult for entities wishing to comply with these policies to foresee how the overall, finished regulatory scheme will impact future projects. Currently, there are three phases outlined in the SWRCB resolution, with many sub-components to each phase. Only materials related to the proposed amended "wetland" definition have been released to date. This creates difficulty in understanding how future policies will interact and impact OCTA's mitigation efforts on existing and planned projects. The materials also do not detail how different types of wetlands will be treated, or whether exemptions will exist. For instance, there are existing exemptions

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under the Clean Water Act Section 404, for constructed wetlands. Future materials should clearly state whether these exemptions will continue to exist.

In addition, the NOP does not reference any alternative definitions that were considered for "wetland," and why existing definitions are not sufficient. According to the NOP, recent federal court cases have required clarity at the state level regarding the definition of wetland. Although SWRCP stated in its 2008 resolution that it would maintain a definition as close to the USACE definition as possible, the proposed definition in the NOP has features which could greatly broaden what is considered to be a wetland in California law. For example, the proposed definition eliminates the vegetation requirement that exists in the federal definition, broadening the likelihood that wetlands will be found. If wetlands are found in a coastal area, there can be no improvements; if found in a non-coastal area, more mitigation will be required. Furthermore, the proposed definition references "hydric substrate conditions," rather than the "saturated soil conditions" referenced in the USACE definition. Based on the information in the NOP, the scientific bases for these changes are unclear. Furthermore, recently the USACE published supplemental guidance for wetlands projects in the arid west. It is unclear if a more stringent definition than that provided by the USACE is needed.

The regulatory materials released thus far also do not provide enough background information on how this expanded definition will impact approved projects that already have relevant permits. Because the definition will likely expand what is considered a wetland, there is potential that near-term projects that previously did not impact wetlands, will later be deemed to have an impact. The SWRCB should consider a grandfather provision which will protect projects approved under the current framework. In addition, because this definition will be more expansive than that included under federal law, there is a risk to transportation projects due to the increase in mitigation that will be needed, time delays, and additional costs.

Finally, the NOP and associated materials clearly states that one of the primary reasons for pursuing a revised definition of "wetland," is to provide greater statewide consistency. However, based on the materials released thus far, it appears that this definition will only apply to SWRCB regulated activities. Thus, different definitions will continue to apply for activities regulated by the Department of Fish and Game and the California Coastal Commission. Furthermore, many regional water boards have pursued other wetland mitigation efforts, which may now be moot. It is thus unclear how the revised definition will provide greater consistency statewide. There is also increased

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potential for litigation with projects seeking to follow the various federal, state, and local directives. OCTA fully supports efforts to streamline and create consistency in these regulatory schemes. However, it is currently unclear how that will be accomplished with this rulemaking.

Again, we appreciate the efforts of SWRCB in providing the opportunity to comment. On behalf of the Orange County community, OCTA appreciates your time and consideration and we look forward to working with you to create a streamlined, comprehensive means of protecting state wetlands.

Sincerely,



Will Kempton
Chief Executive Officer

WK.ke

c: Cindy McKim, Director, California Department of Transportation
Cindy Quon, District Director, California Department of Transportation,
District 12
Lucy Dunn, Chief Executive Officer, Orange County Business Council
Keith Dunn, Executive Director, Self-Help Counties Coalition
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