

## Five Counties Salmonid Conservation Program (5C)

P.O. Box 2819

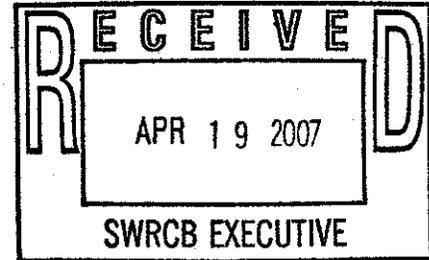
Weaverville, CA 96093

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email: mlancaster@trinitycounty.org

April 16<sup>th</sup>, 2007

Song Her  
Clerk of the Board  
Executive Office  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100



RE: Scoping Comments for Proposed Wetland and Riparian Area protection Policy

Dear Ms. Her:

The Five Counties Salmonid Conservation Program (5C) appreciates the opportunity to provide the attached written comments on the SWRCB proposed Wetland and Riparian Area Protection Policy Scoping document. These comments are intended to expand and compliment the 5C Directors comments provided to the SWRCB Board at its April 9<sup>th</sup> hearing on this matter.

The 5C was founded by the Boards of Supervisors of Trinity, Siskiyou, Mendocino, Humboldt and Del Norte Counties in response to the 1997 listing of the coho salmon and subsequent listings of other salmonids as federally Threatened Species as well as to address related water quality issues. The 5C Board consists of two Board of Supervisor representatives from each of the member counties. The 5C and member counties have developed, and continue to develop, conservation programs and restoration projects that maintain and improve fisheries habitat and water quality including:

- Low Impact to Hydrology (LITH) road standards for public and county regulated private roads;
- "A Water Quality and Stream Habitat Protection Manual for County Road Maintenance in Northwestern California Watersheds" which is currently being incorporated into the Federal Endangered Species Act Section 4(d) incidental take limits for listed salmonids;
- Regular water quality training programs for road crews, planners and policy makers;
- Direct Inventory of Roads and Treatments (DIRT) to survey 2,100+ miles of county roads for potential sediment sources. This is an on-going work program;
- Eight road drainage projects to reduce concentration of road runoff, hydrologically disconnect road segments, and reduce erosion. This is an on-going work program;
- 48 salmonid migration barrier removal projects to upgrade crossings to convey the 100

year storm flows, bedload and debris as well as restore full passage on approximately 119 miles of streams within the North Coast Regional Water quality Control Board region. This is an on-going work program;

- Demonstration projects including wetlands construction/restoration, bio-engineering of urban stream banks, and simple stormwater retention. This is an on-going work program;
- Several of the counties and 5C work products have been incorporated into the Sediment Total Maximum Daily Loads within the North Coast Regional Water Quality Control Board region as well as into Phase II storm water plans.

The 5C has contributed to the recovery of salmon stocks, shifting away from (greater) federal regulatory actions. As a result, the 5C received the US EPA Clean Water Partner for the 21<sup>st</sup> Century Certificate, 2003 Governor's Environmental and Economic Leadership Award, Certificates of Recognition from Congress and the California Assembly, as well as other awards.

Respectfully Submitted,

Mark Lancaster,  
Director



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The following written comments are provided to compliment Five Counties Salmonid Conservation Program Director Lancaster's, April 9<sup>th</sup> verbal comments at the SWRCB hearing on the Proposed Wetland and Riparian Area Protection Policy.

1. The 5C supports the SWRCB efforts to develop a statewide definition, within the existing regulatory framework, of wetlands and riparian areas, to provide clarity on SWRCB jurisdiction and to ensure protection of beneficial uses under the California Water Code. At a minimum the lack of a definition of wetland and riparian area makes it difficult to assess the effects of the Alternatives outlined in the Scoping document.

2. The SWRCB proposes the simultaneous development of a state-wide definition of wetlands and riparian areas as well as defining and broadening the extent of its authority as it relates to management of wetlands and riparian areas<sup>1</sup>. We believe that the SWRCB should uncouple these actions. It is not clear that the SWRCB has authority regarding beneficial uses of riparian area habitat connectivity and "protection of riparian areas"<sup>2</sup>. This authority to regulate the land and habitats is outside of the SWRCB existing authorities and is the responsibility of Fish and Game and local General Plans. While the SWRCB may regulate the waters of the state, Fish and Game regulates the plants, animals and habitats. Local governments regulate floodplain management and development through zoning.

If the Board asserts that it already has the authority to address management of habitats and lands within riparian areas, then the proposed range of alternatives is inadequate because only Alternative 4 addresses riparian area protection efforts that exercise that authority.

3. Analysis within all alternatives should address how federal or other state mandated, legislated, or judicial requirements will directly, or indirectly, affect the ability to meet the SWRCB's objectives of addressing wetlands and riparian areas. Potential conflicting regulatory processes should be identified and analyzed. Examples include:

- In 2006, the Legislature approved expansion of the "defensible" space fire safety and vegetation management requirements of CDF from a 30' radius to a 100' radius from a home (Public Resources Code §4291). Many existing homes, will need to reconcile the protection of riparian

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<sup>1</sup> "As recognized above, the California Water Code applies to a broader set of waters than does the federal CWA, but the full extent of these waters is not always clear, particularly with respect to wetlands and riparian areas." (P.6 of SWRCB Wetland and Riparian Area Protection Policy Scoping Document).

<sup>2</sup> The federal CWA does not explicitly define riparian areas. However, riparian areas that meet the criteria for wetlands or are located below the ordinary high water mark of a water body are considered to be waters of the United States and are regulated by the CWA. The State and Regional Water Boards concurrently protect these riparian areas through the section 401 water quality certification program. However, most riparian areas do not meet the federal wetland criteria and are not located below the ordinary high water mark. The State and Regional Water Boards protect these riparian areas as necessary to protect water quality and support beneficial uses, but the State Water Board has not established a statewide definition of riparian areas, which makes identification and protection efforts inconsistent. (P.6 of SWRCB Wetland and Riparian Area Protection Policy Scoping Document).

areas and compliance with vegetation management;

- CA Assembly Bill 1866 (2002) expanded state law to allow second dwelling units on parcels zoned for a single unit and mandated that this action shall generally be a ministerial, rather than a discretionary, action (Government Code §65852.2). This change allows development despite inconsistencies with local General Plans and Zoning and could affect implementation of SWRCB riparian area protection;
- The US Army Corps of Engineers' Readiness Branch requires flood control agencies to maintain Corps levees. This may include regular removal of trees, wood, and other habitat elements that will, in many instances, conflict with water quality, wildlife, and fisheries objectives that are common to some local, state, and federal agency policies. A June 2002 Appellate Court decision ordered Santa Cruz and Monterey Counties to pay for flood damages from the 1995 Pajaro River flood. The court found the counties were liable for damages for failing to keep the river channel clear enough to handle flooding. The county contended that the flood was an act of nature and that 27 other state and federal agencies have a role in managing the river;
- Many private properties lie entirely within areas with constrained land use. Local governments must consider the issue of regulatory "takings" when existing parcels lie entirely within these areas. This can occur on parcels within 100 year floodplains and critical habitat areas. While regulations for the protection of public resources will not necessarily result in a "taking" claim, they may contribute to such determinations.

4. The No Action Alternative's (# 1), discussion (p.8 *SWRCB Wetland and Riparian Area Protection Policy Scoping Document*) fails to include discussion or analysis of other existing regulatory or statutory, policies in assessing "Lack of statewide consistency in definitions of beneficial uses for wetland and riparian area functions". Without an adequate analysis of all existing relevant state and local authorities, the status of current wetland and riparian area protections and identification of additional needs to meet water quality objectives cannot be assessed. This lack of assessment also occurs within the related and parallel work of the North Coast Regional Water Quality Control Board.

5. A new alternative should be developed to include an assessment of the effectiveness of all existing regulatory, quasi-regulatory, and restoration efforts at all levels of government that address the wetland and riparian areas. "Gaps" that may occur within the existing efforts should be identified. It is clear that the SWRCB's 2003 assessment of gaps in wetland and riparian area protections did not include all state, local, or federal actions implemented to protect these areas<sup>3</sup>. The 2003 assessment also did not analyze the conditions that would exist with full implementation of regulatory programs that were not in place at the time.

In addition, the analysis should address how federal, other state, or local mandates or legislative requirements directly, or indirectly, affect the ability to meet the SWRCB wetland and riparian area objectives. Some examples of existing actions that may meet the SWRCB stated objectives include:

- EPA Phase II Stormwater Program for small municipal separate storm sewer systems (MS4s). This program has been established for many smaller communities but has not been fully implemented. Alternative I should assess the predicted change to water quality and quantity as it relates to wetland and riparian areas with the implementation of this existing regulatory

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<sup>3</sup> Governor Schwarzenegger's Action Plan for California's Environment directed state agencies to fill any gaps in wetlands protection. The State Water Board's 2003 Report to the Legislature on Regulatory Steps Needed to Protect and Conserve Wetlands Not Subject to the Clean Water Act (State Water Board 2003) identified several such gaps in wetland and riparian area protections. (P.5 of *SWRCB Wetland and Riparian Area Protection Policy Scoping Document*).

- requirement;
- Sediment, Temperature, and Other TMDL's: Many of these have been completed and not fully implemented. Alternative I should assess the predicted change to water quality and quantity as it relates to wetland and riparian areas with the implementation of this existing regulatory requirement;
  - The CA Fish and Game Commission's adopted Coho Recovery Strategy Range-Wide Recommendations, which have been only partially implemented. Alternative I should assess the predicted change to water quality and quantity as it relates to wetland and riparian areas with the implementation of this existing recovery strategy;
  - "Recommendations to Help Avoid Significant Fish, Wildlife and Native Plant Resource Impacts for the California Environmental Quality Act (CEQA) Projects in Del Norte, Humboldt, Trinity, Siskiyou, Shasta, Tehama, Lassen and Modoc Counties by California Department of Fish and Game, Northern California-North Coast Region (Region II.)" These were submitted to the counties in 1994 and again in 2003. Alternative I needs to include an assessment of the implementation of these recommendations (for projects that require CEQA) as it relates to wetland and riparian areas;
  - Federal regulatory review processes including federal Endangered Species Act compliance under Sections 7, 9, or 10;
  - Other regulatory agency programs that protect wetland and riparian area habitats including:
    - those of the Coastal Commission;
    - CA Department of Fish and Game Streambed Alteration Agreements;
    - "Streamside Management Area Ordinance of the County of Humboldt" and similar county and city ordinances regarding riparian and wetland habitats;
    - County Grading Ordinances;
    - General Plan policies, setbacks, and zoning districts that protect riparian area functions;
    - "Water Quality and Stream Habitat Protection Manual for County Road Maintenance in Northwestern California Watersheds," which is currently being incorporated into the Federal Endangered Species Act Section 4(d) incidental take limits for listed salmonids and the *Direct Inventory of Roads and Treatments*. Both 5C products have been incorporated into the Scott River TMDL.

6. A new alternative should be developed that includes the assessment of existing protections as described in #5 above and also evaluates the use of incentive and voluntary actions in combination with existing regulatory authorities in lieu of new regulations. The Fish and Game Commission, within the range of the coho salmon, has approved strategies to restore riparian habitat that utilizes cooperation and incentives with other agencies and landowners.<sup>4</sup> The 5C and many non-governmental organizations' work to develop incentive based approaches to habitat protection and restoration should also be considered.

7. Incorporate the comments from the North Coast and San Francisco Bay Regional Water Quality Control Boards' public scoping meetings regarding their parallel process. Much of the verbal comments provided to the SWRCB at its April 9<sup>th</sup> meeting were not scoping comments but rather were position statements on one, or more, of the draft alternatives.

8. The 5C believes that support for a particular alternative is pre-mature and that the purpose of the meeting was to determine a reasonable range of alternatives for addressing the protection of beneficial uses of wetlands and riparian area. Prior to the assessment described above, it is pre-mature to determine that additional regulations will be necessary.

<sup>4</sup> CA Coho Recovery Strategy Chapters 7 and 8.