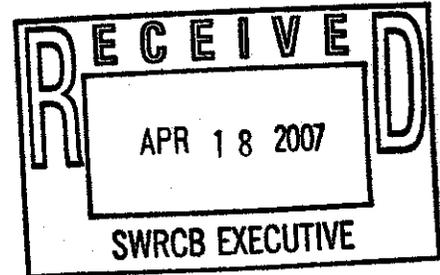




RIVERSIDE-CORONA RESOURCE CONSERVATION DISTRICT

VIA FACSIMILE AND MAIL (916) 341-5620

California State Water Resources Control Board
C/O Song Her
Clerk to the Board
P.O. Box 100,
Sacramento, CA 95812-0100



Re: Comment Letter – Wetland and Riparian Area Protection Policy

Dear Ms. Her, State Board members and staff:

The Riverside-Corona Resource Conservation District ("RCRCD") respectfully submits this letter to convey the RCRCD's formal written comments on the State Board's Proposed Wetlands and Riparian Area Protection Policy ("Proposed Policy"). Please also note that our sister RCRCD's in the area, namely the Inland Empire RCD and the San Jacinto Basin RCD also join in and agree with these comments. Once adopted, the Proposed Policy will govern discharges of dredge and fill material as well as other activities within the State's many wetland and riparian areas. As a government agency that routinely rehabilitates and maintains wetland and riparian environments, and which holds dozens of conservation easements encompassing hundreds of acres of these aquatic areas, RCRCD is very concerned with a number of the alternatives currently being considered for the Proposed Policy.

RCRCD is a small public agency charged with conserving the natural resources of portions of western Riverside and San Bernardino Counties in Southern California. (See Public Resources Code, § 9151 et seq.) RCRCD promotes sustainability and natural resource stewardship and is responsible for advising land users and others about natural resources and their conservation. Examples of RCRCD projects include: habitat restoration and invasive species removal; irrigation water management evaluations; and education programs concerning storm water, trees, soil, etc. In order to accomplish this important work, RCRCD works closely with a number of other agencies in Southern California. RCRCD routinely works with the Regional Water Quality Control Board, Santa Ana region, the United States Army Corps of Engineers, the USDA Natural Resources Conservation Service, the Resource Conservation and Development office for the South Coast bioregion, the California Department of Food and Agriculture's research project on the Glassy-winged Sharpshooter, and the California Department of Fish and Game. Indeed, our district regularly completes the mitigation requirement of Section 401 Water Quality Certifications, Streambed Alteration Agreements, Section 404 permits and other regulatory

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permits. These activities are conducted for the benefit of private parties, such as developers, and public agencies, such as Caltrans.

The State Board's proposed revisions to its Wetland and Riparian Area Protection Policy raise several concerns for RCRC. Chief among these concerns is the potential for the Proposed Policy to significantly interfere, and even prevent, RCRC from engaging in the important conservation and restoration work it now performs. Clearly, RCRC and the State Board share the goal of protecting California's wetland and riparian environments. However, RCRC has concerns about some of the measures the State Board is currently considering as means of achieving that goal.

A more thorough discussion of RCRC's comments on the Proposed Policy and the proposed alternatives is set forth below. RCRC would like to reiterate, however, that it is committed to the protection of wetlands and riparian areas, and that it views the comment letter process as an opportunity to bring the needs of resource conservation districts to the attention of the State Board. To that end, RCRC hopes that the State Board will consider each comment in this context, and will work with RCRC to develop a policy that both maximizes wetlands protection and allows conservation districts the flexibility that they need to operate in a highly regulated field.

COMMENTS

The State Board has requested comments identifying the range of actions, alternatives, mitigation measures, and potentially significant environmental effects to be analyzed in the development of the Proposed Policy. This request for comments included a description of the four alternatives that the State Board is considering. Of these alternatives, Alternative Four presents the greatest departure from the State Board's historical position with regard to wetlands protection. For that reason, and the reasons set forth below, RCRC strongly recommends that the State Board cease consideration of Alternative Four. Additionally, RCRC is very concerned about significant portions of Alternative Three, and requests that the State Board alter it to remove sections that may present problems for resource conservation districts throughout the state. RCRC's specific comments and concerns are discussed below.

I. GLOBAL COMMENTS

- A. WHEN DEVELOPING THE PROPOSED POLICY, THE STATE BOARD NEEDS TO CONSIDER AGENCIES SUCH AS RESOURCE CONSERVATION DISTRICTS.**

As the State Board moves forward with the next phase of the Proposed Policy, RCRCDD respectfully requests that the State Board consider the impacts that any changes to the existing policy will have on agencies such as RCRCDD. RCRCDD operates on limited funds and needs the flexibility to maximize the use of those funds. The State Board should therefore carefully consider how changes to its current wetlands policy will limit the ability of agencies such as resource conservation districts to continue to do the important work that they do.

B. THE "ONE SIZE FITS ALL" APPROACH IN PROPOSED POLICY ALTERNATIVES THREE AND FOUR WILL NOT PROVIDE ADEQUATE PROTECTION FOR WETLANDS AND RIPARIAN AREAS, AND WILL UNNECESSARILY INTERFERE WITH RCRCDD WORK.

Under Proposed Policy Alternatives Three and Four, the State Board will issue statewide definitions of the terms "wetland" and "riparian area." It will additionally define on a statewide level, the acceptable, "beneficial uses" of wetlands and riparian areas. Such blanket determinations of what constitutes an acceptable use of wetlands and riparian areas are very likely to unnecessarily interfere with RCRCDD's conservation efforts. This is because by their nature, blanket determinations are both under-inclusive, and over inclusive. Defining terms and uses in a manner that is intended to apply equally across the state will not take into account the need to protect some areas that may not exactly fit the promulgated definition. It will likewise prevent activities that may not need to be regulated.

Agencies such as RCRCDD need the flexibility to operate in what is already a highly regulated field. Adding another definition and sphere of regulation will only add to the bureaucratic maze of wetlands regulation. For that reason, RCRCDD strongly recommends that the State Board avoid promulgating any definitions or beneficial uses that fail to take into account the needs of agencies that do wetland and riparian restoration work.

II. ALTERNATIVE FOUR

Proposed Policy Alternative Four will require the State Board to take a number of steps to develop a new state policy to regulate a variety of discharges and activities that impact wetlands and riparian areas. These steps include among other things:

- (1) issuing waste discharge requirements ("WDRs") for activities that involve the discharge of any pollutant to wetlands or riparian areas, not just dredge or fill material;
- (2) issuing WDRs for activities that involve hydromodification, land and vegetation clearing activities, and activities involving invasive species in wetlands or riparian areas; and

(3) when issuing WDRs, requiring functional assessments, assessments of potential cumulative impacts, mitigation measures, and performance standards for all WDRs issued in wetland or riparian areas.

A. PROPOSED POLICY ALTERNATIVE FOUR WILL INTERFERE WITH RCRC'D'S EFFORTS TO ERADICATE INVASIVE SPECIES.

As an agency that spends a significant amount of time and resources eradicating invasive species, RCRC'D is very sensitive to any additional regulatory requirements that will be imposed on that field. This is for the simple reason that every dollar spent complying with permitting and other paperwork requirements is a dollar lost to RCRC'D's conservation efforts. Accordingly, RCRC'D is concerned that the portions of Alternative Four that will require WDRs for activities involving land and vegetation clearing, as well as activities involving invasive species in wetlands or riparian areas will unnecessarily interfere with RCRC'D's invasive species eradication efforts.

Under Alternative Four, it appears that any time RCRC'D engages in any invasive species eradication activities, including clearing the target species, it will be required to comply with State Board issued WDRs. The description of Alternative Four in the informational document provided by the State Board makes clear that these WDRs will require assessments of the activity's cumulative impacts, mitigation measures, and stringent performance standards. Requiring RCRC'D to obtain an additional permit every time it engages in invasive species eradication activities in wetland or riparian areas, which Alternative Four will basically require, will unnecessarily interfere with RCRC'D's operations. Ordinarily, RCRC'D only conducts eradication activities pursuant to the requirements of a Section 401 certification, or DFG or Army Corps permit issued to a developer or a public agency. These activities are virtually always completed pursuant to a Habitat Mitigation and Monitoring Plan specific to the site which is approved by the Regional Board, ACOE and/or DFG. These agencies also closely monitor RCRC'D activities through frequent site visits, review of periodic monitoring reports, review of conservation easements, scrutiny of meeting success criteria and other standards, and regular meetings.

RCRC'D maintains compliance with all relevant regulatory requirements, and more importantly, RCRC'D is careful and environmentally sensitive when it undertakes vegetation clearing and invasive species eradication activities. In light of these circumstances, requiring an additional permit that includes assessment of cumulative impacts, mitigation measures, and stringent performance standards beyond the multi-layered analysis already undertaken has the potential to so severely interfere with RCRC'D's invasive species eradication efforts that in some instances it

will be forced to halt them altogether. RCRCDD does not believe that the State Board intends the Proposed Policy to have this outcome. For that reason, RCRCDD strongly recommends that the State Board remove Alternative Four from consideration.

B. ALTERNATIVE FOUR'S MITIGATION REQUIREMENTS WILL HINDER RCRCDD'S EFFORTS TO PROTECT AND REHABILITATE WETLAND AND RIPARIAN ENVIRONMENTS.

Under Proposed Policy Alternative Four, the State Board will require mitigation measures for every activity that involves hydromodification, land or vegetation clearing, or invasive species in wetlands or riparian areas. As explained above, RCRCDD routinely engages in all of these activities as part of its ongoing rehabilitation, restoration, creation and maintenance efforts at a number of wetland and riparian sites. Because of the nature of RCRCDD's conservation work, RCRCDD should not be required to mitigate impacts to wetland and riparian environments under the Proposed Policy deriving from our conservation work. However, Alternative Four seems to suggest otherwise.

A strict interpretation of the policy changes proposed in Alternative Four could result in RCRCDD being forced to mitigate for its work of maintaining or rehabilitating existing wetlands or riparian areas. Conceivably, a wetland rehabilitation project that partially modifies the hydrological characteristics of the wetland to create a stream of other drainage feature could constitute hydromodification. In so doing, RCRCDD would potentially, but unreasonably trigger Alternative Four's mitigation requirements.

The same situation could occur when RCRCDD's engages invasive species eradication activities. In riparian areas RCRCDD cuts, sprays biodegradable herbicide, and monitors re-growth of *Arundo donax*, commonly called giant reed. This invasive member of the grass family can grow to over 30 feet in height and can consume up to 5 acre-feet of water each year. All relevant state and federal agencies have authorized RCRCDD to undertake these measures. Nevertheless, these activities would clearly require a permit under Alternative Four, and taken to the extreme, would require mitigation measures. We do not believe such an outcome is in keeping with protection of riparian areas.

RCRCDD often undertakes projects at the request of private parties who are mitigating the impacts of development elsewhere. Imposing mitigation measures on our activities would put RCRCDD in the odd position of having to mitigate its mitigation measures. Because RCRCDD also operates with limited funds, such measures could be cost prohibitive. A wetlands protection policy should not be written to hinder the efforts of organizations such as RCRCDD in this manner. For that reason, RCRCDD strongly recommends that the State Board remove Alternative Four from

consideration.

C. PROPOSED POLICY ALTERNATIVE FOUR WILL REQUIRE THE STATE BOARD TO REGULATE THE BIOLOGICAL ASPECTS OF WETLANDS AND RIPARIAN ENVIRONMENTS IN A MANNER THAT IS BEYOND THE SCOPE OF THE STATE BOARD'S MISSION.

The State Board and the nine Regional Water Quality Control Boards are the state's primary water quality regulatory agencies. Together, they are tasked with protecting the beneficial uses of the waters of the state under the California Water Code. To date this has included regulating certain types of discharge of dredged or fill materials to waters of the state, including wetlands.¹ Alternative Four proposes that the State Board abandon this traditional role in wetlands regulation and embark on regulatory path that is beyond the scope of the State Board's mission. Specifically, those portions of Alternative Four which propose that the State Board regulate vegetation clearing and invasive species seek to regulate land use and biological resources in a manner that is better left to the wildlife agencies.

The State Board's purpose, as stated in California Water Code section 13140, is to "formulate and adopt state policy for water quality control." The California Water Code defines the term "water quality control" to mean the regulation of any activity which may affect the quality of the waters of the state,² as it pertains to the chemical, physical, biological, and other properties of water which affect its use.³ While the State Board's mission therefore does include protecting the biological characteristics of the waters of the state, this does not, and should not, include the regulation of any plant or animal species in riparian or wetland areas unless such species are directly responsible for a discharge of regulated pollutants to the waters of the state.

D. THE BIOLOGICAL ASPECTS OF WETLANDS AND RIPARIAN AREAS ARE ALREADY HIGHLY REGULATED BY OTHER STATE AND FEDERAL AGENCIES.

Under Proposed Policy Alternative Four, the State Board will require WDRs for land and vegetation clearing activities, and activities involving invasive species in wetlands or riparian areas. This represents an excursion on the part of the State Board into the regulation of California's biological resources. In addition to being beyond the scope of the State Board's mission, this field is already highly regulated by other state and federal agencies. The State

¹ See e.g., Statewide General Waste Discharge Requirements for Dredged or Fill Discharges to Waters Deemed by the U.S. Army Corps of Engineers to be Outside of Federal Jurisdiction, State Board Order 2004-0004-DWQ.

² Cal. Water Code § 13050(i).

³ Cal. Water Code § 13050(g).

Board should therefore carefully consider the conservation value of adding more rules to the field of wetlands regulation.

The EPA, the Army Corps of Engineers, the California Department of Fish and Game, and the United States Fish and Wildlife Service all have units or divisions dedicated to protecting wetlands. Although the Supreme Court's recent *SWANCC* and *Rapanos* decisions limited the ability of federal agencies to regulate wetlands as waters of the United States, these decisions did not change the ability of federal agencies to regulate protected species and habitats. In addition to the above listed agencies, depending on the location of the wetland or riparian area, any activities that could result in harm to the environment may well be regulated by the California Coastal Commission, the California Department of Forestry, the California Department of Water Resources, and the State Lands Commission. Also, the California Department of Fish and Game is responsible for conserving, protecting, and managing California's fish, wildlife, and native plant resources. To meet this responsibility, the agency regulates any activity that will substantially modify a river, stream, or lake. If the California Department of Fish and Game determines that an activity could substantially adversely affect an existing fish and wildlife resource, the agency requires the project developer to alter the project and/or institute mitigation measures.

If the State Board begins regulating the biological aspects of wetlands and riparian areas, as contemplated by Alternative Four, it will merely add to the existing maze of bureaucratic agencies that exert regulatory authority over biological resources in wetland and riparian areas. It is also likely to interfere with the work of agencies such as RCRCDC by placing new, costly, duplicative regulatory limitations on their activities. The State Board should focus its resources on those areas that it has traditionally regulated, e.g. the quality of the water in the State's waterways, and leave the regulation of biological resources to those agencies that have been charged with it. RCRCDC therefore strongly recommends that the State Board remove Alternative Four from consideration.

III. ALTERNATIVE THREE

Proposed Policy Alternative Three would have the State Board take many of the same steps to that Alternative Four contemplates. The primary distinction between the two alternatives is that under Alternative Three, the State Board will only require WDRs, mitigation measures and other permit requirements for discharges of dredge and fill material in wetland and riparian areas. While RCRCDC views this as a much more reasonable course of action, than Alternative Four, Alternative Three still raises some of the same issues as Alternative Four. Specifically,

Alternative Three will also require mitigation measures for permits issued for dredge and fill material. If RCRC D is involved in wetlands reconstruction, it could easily trigger this requirement.

As stated above, RCRC D often undertakes projects at the request of private parties who are mitigating the impacts of development elsewhere. Imposing mitigation measures on RCRC D's activities would put RCRC D in the odd position of having to mitigate its mitigation measures. Because RCRC D also operates with limited funds, such measures could be cost prohibitive. RCRC D does not believe that the State Board intends the Proposed Policy to hinder the efforts of organizations such as RCRC D. For that reason, RCRC D strongly recommends that the State Board cease consideration of those portions of Alternative Three that would impose new mitigation measures on agencies such as RCRC D which perform conservation work.

CONCLUSION

We appreciate your attention to our comments. As stated above, RCRC D submits these comments as part of the ongoing, open dialogue between the public and the State Board to help develop an effective and efficient Wetlands and Riparian Area Protection Policy. RCRC D is committed to the goal of wetlands protection, and wants to work with the State Board in developing the best means of achieving that goal. We look forward to receiving your response to the above comments and concerns. If you should have any questions about our comments, please do not hesitate to contact me at (951) 683-7691 ext 202.

Very truly yours,

Shelli Lamb

Shelli Lamb
District Manager
Riverside-Corona Resource
Conservation District

cc: Jennifer Ares, Inland Empire RCD
Gayle Holyoak, San Jacinto Basin RCD
Mark Adelson, Santa Ana Regional Board
Jeff Brandt, DFG
Dan Swenson, ACOE