



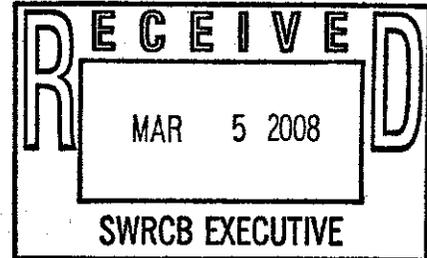
**Western States Petroleum Association**  
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Kevin Buchan  
Senior Coordinator, Bay Area and State Water Issues

**VIA ELECTRONIC MAIL**

March 5, 2008

Chair Doduc, and Members of the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814



RE: Comment Letter – Policy to Protect Wetlands and Riparian Areas:  
Comments of Western States Petroleum Association

This letter contains the comments of the Western States Petroleum Association (“WSPA”) to the State Water Resources Control Board (“State Board”) on its Draft Resolution No. 2008-\_\_\_, “Development of a Policy to Protect Wetlands and Riparian Areas in Order to Restore and Maintain the Water Quality and Beneficial Uses of the Waters of the State” (“Resolution”) which was issued for public comment on February 15, 2008. WSPA is a trade association that represents companies that explore, produce, transport, refine, and market petroleum and petroleum products in the western United States. By letter to the State Board dated April 19, 2007, WSPA previously commented on the State Board’s “Informational Document - Public Scoping Meeting for Proposed Wetland and Riparian Area Protection Policy” (“Informational Document”). Those comments are incorporated by reference herein.

The draft Resolution directs State Board staff to develop a state policy for wetlands and riparian areas (“Policy”) in three phases: Phase 1 – to establish a Policy regarding discharges of dredge and fill material to wetlands that are no longer subject to federal jurisdiction following recent U.S. Supreme Court decisions; Phase 2 – to expand the scope of the Policy to protect wetlands from “all other activities affecting water quality” beyond dredge and fill activities; and Phase 3 – to further expand the scope of the Policy to include riparian areas that were never federally jurisdictional. Resolution, paragraph 5. WSPA is concerned that Phases 2 and 3 go beyond the purported scope of the Policy, intended to implement the State Board’s 2003 Report to the Legislature, “Regulatory Steps Needed to Protect and Conserve Wetlands Not Subject to the Clean

Water Act" ("Report to the Legislature") and September 2004 "Workplan: Filling the Gaps in Wetland Protection" ("Workplan"). Moreover, in extending to purely terrestrial "riparian areas," Phase 3 goes beyond the State Board's regulatory authority under state law. Accordingly, WSPA recommends that State Board adopt a resolution directing staff only to pursue Phase 1 of the proposed Policy at this time, and to reconsider the appropriateness of the actions contemplated for the later phases.

**Comment 1 – The Policy Should Be Limited to "Gap Filling" Where Federal Wetland Jurisdiction Has Been Narrowed**

As indicated in the draft Resolution, recital paragraph 5, as well as the notice and agenda item description accompanying the draft Resolution, the proposed policy is being developed in response to two recent U.S. Supreme Court decisions reducing federal jurisdiction over wetlands under the Clean Water Act ("CWA"): *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 121 S. Ct. 675 (2001) ("SWANCC") and *Rapanos v. United States*, 126 S. Ct. 2208 (2006). Recital paragraphs 6 and 7 of the Resolution also refer to the State Board's Report to the Legislature and Workplan. As their titles suggests, the original scope of the Report to the Legislature and the Workplan was intended to address "regulatory gaps" in protection of wetlands. The Workplan itself (p. 3) states that it is intended to implement the measures identified in the State Board's Report to the Legislature which are "needed to restore the protection that was provided to 'isolated' wetlands before SWANCC." The intended scope of the State Board's actions was further characterized in a September 24, 2004 letter regarding the Workplan from Arthur G. Baggett, Jr., State Board Chair, to Terry Tamminen, California EPA Secretary. As that letter states, the original scope was intended "to adopt a detailed program to protect waters of the State no longer subject to federal regulation. Such 'isolated' waters have fallen out of federal jurisdiction as a result of the 2001 U.S. Supreme Court decision in [SWANCC]."

Thus, the policy direction was to "replicate the pre-SWANCC federal program." As presented in the proposed Resolution, Phases 2 and 3 go far beyond the stated intent to restore pre-SWANCC protection to isolated waters with "minimal revisions" from federal guidelines. Phase 2 is designed to extend regulation of wetland areas to activities beyond discharges of dredge and fill material, which were never part of the pre-SWANCC federal program. Phase 3 is designed to extend regulation still further, to riparian areas that were never subject to federal jurisdiction.

In fact, the draft Resolution and accompanying notice and agenda item description are clearly in error when they state that SWANCC and *Rapanos* "have reduced the jurisdiction of the Clean Water Act over wetland and riparian areas by limiting the definition of "waters of the United States." Resolution, recital paragraph 5, emphasis added; see also notice, p. 1, and agenda item description, p. 1. SWANCC and *Rapanos* have nothing to say on the subject of terrestrial riparian areas, which were never "waters of the United States" and therefore were not addressed in the jurisdictional analysis of those cases. Indeed, as the State Board's own Informational Document

acknowledged, riparian areas are waters of the United States *only* if they meet the criteria for wetlands or are located below the ordinary high water mark of a water body. Informational Document, p. 3.

Phases 2 and 3 greatly exceed the policy direction of the Workplan. Rather than directing the State Board staff to expand the Policy pursuant to Phases 2 and 3, the State Board should renew its focus on the purpose of this action and the specific issues raised by SWANCC.

### **Comment 2 – The State Board’s Regulatory Authority Does Not Extend to “Riparian Areas” Beyond “Waters of the State”**

The draft Resolution does not define “riparian areas.” However, the Informational Document notes that “most riparian areas do not meet the federal wetland criteria and are not located below the ordinary high water mark” and indicates that the Policy is intended to provide a “statewide definition of riparian areas” to assure protection of the broader class of such areas. Informational Document, p. 6.

It is a basic principle of administrative law that agencies cannot regulate beyond the reach of their statutory jurisdiction. Pursuant to the Porter-Cologne Water Quality Control Act (“Porter-Cologne”), the State Board has authority to regulate and protect “waters of the state.” “Waters of the state” are defined by Porter-Cologne as “any surface water or groundwater, including saline waters, within the boundary of the state.” Water Code § 13050(e). Nothing in this definition supports the broad reach of regulatory authority proposed to be developed in Phase 3 of the Policy.

In fact, even the State Board’s authority to replicate the pre-SWANCC federal program under Phases 1 and 2 is far from clear. In contrast to the federal CWA, neither Porter-Cologne nor the relevant regulations define surface waters to include “wetlands.” The State Board itself has acknowledged that Porter-Cologne was “not designed to conserve wetlands and [does not] include any specific reference to wetlands.” State Board, Report to the Legislature, Supplemental Report of the 2002 Budget Act (p. 14). The State Board has previously taken the position that wetlands within California meeting the former federal definition of “waters of the United States” are also “waters of the state.” See January 25, 2001 letter from Craig M. Wilson, State Board Chief Counsel, to State Board members and Regional Board Executive Officers; *see also* State Board Order No. WQ-2003-0017 (requiring holders of CWA 404 permits for discharge of dredge or fill material to isolated wetlands removed from federal jurisdiction post-SWANCC to continue complying with conditions imposed by the State or Regional Boards as a matter of state law).

However, even assuming this broad interpretation of “waters of the state” is correct, it does not extend to fully terrestrial “riparian areas” that were never federally jurisdictional, as characterized in the proposed Phase 3. The plain meaning of “waters of the state” defined as “any surface water or groundwater” does not include the land

surface. Thus, while rivers themselves clearly are "waters of the state," terrestrial "riparian areas" just as clearly are not. There is no basis in the statute, regulations or case law to bring such areas within the State Board's jurisdiction. Moreover the Legislature has assigned responsibility for protecting and conserving biological resources in terrestrial habitats (including riparian areas) to other agencies, including in particular the California Department of Fish and Game and California Department Parks and Recreation. WSPA urges the State Board to give careful consideration to the scope of its authority under Water Code § 13050(e) before directing State Board staff to embark on an unprecedented and unjustified regulatory expansion.

WSPA appreciates the opportunity to submit these comments. We hope to work together with the State Board and other stakeholders toward developing a wetland protection policy of appropriate scope. Please contact me at your convenience if you have any questions or wish to discuss our comments. Thank you.

Sincerely,

*Kevin Buchan*