

State Water Resources Control Board



Terry Tamminen
Secretary for Environmental
Protection

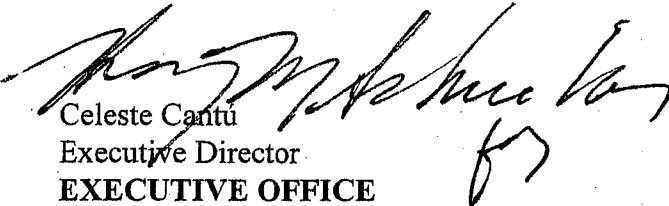
Executive Office

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Arnold Schwarzenegger
Governor

TO: Regional Board Executive Officers

FROM: 
Celeste Cantu
Executive Director
EXECUTIVE OFFICE

DATE: JUN 25 2004

SUBJECT: GUIDANCE FOR REGULATION OF DISCHARGES TO "ISOLATED" WATERS

Background

As you know, Governor Schwarzenegger's *Action Plan for California's Environment* directs State agencies to fill any gaps in wetlands protection. The Supreme Court's 2001 decision in *Solid Waste Agency of Northern Cook County v. U. S. Army Corps of Engineers (SWANCC)* found that certain "isolated" wetlands and other waters are out of federal jurisdiction under the Clean Water Act, and it is the responsibility of the states to protect them. As a result of the decision, many projects carried out in "isolated waters" that previously would have required a Clean Water Act section 404 permit now no longer need one. From January 1, 2001 to December 31, 2003, the U. S. Army Corps of Engineers (USACE) disclaimed jurisdiction over 160 water bodies comprising 449 acres of waters of the State, including 251 acres of wetlands, 121 acres of riparian area, and 77 acres of other waters (these figures are under-reported because 24 percent of the jurisdictional disclaimers did not specify the sizes of the disclaimed water bodies). USACE continues to disclaim waters, pursuant to relevant federal guidance.

In response to *SWANCC*, the State Water Resources Control Board (SWRCB) has:

- issued a January 25, 2001 legal memorandum asserting the authority and responsibility of the SWRCB and Regional Water Quality Control Boards (RWQCBs) to regulate discharges to "isolated" waters,
- coordinated with USACE to ensure that the SWRCB and RWQCBs receive copies of all USACE jurisdictional disclaimer letters and developed a database of such disclaimers and related RWQCB orders,
- submitted March 13, 2003 comments on a federal proposal that would have redefined "Waters of the United States,"
- submitted to the legislature an April 2003 report titled *Regulatory Steps Needed to Protect and Conserve Wetlands Not Subject to the Clean Water Act*, and

California Environmental Protection Agency

- on May 4, 2004, adopted general waste discharge requirements for certain discharges to non-federal waters.

However, we have not yet developed a systematic, statewide approach for protecting "isolated" waters. The effects of SWANCC have fallen on the State at a time of shrinking agency budgets, and discharges to disclaimed waters have gone almost entirely unregulated by the RWQCBs; they are also often not subject to Department of Fish and Game (DFG) or other State regulation.

At their January 6, 2004 meeting, RWQCB Assistant Executive Officers suggested that the SWRCB provide direction for protecting "isolated" waters; and at the April 21, 2004 meeting of the Water Quality Certification Program Coordinating Committee (Corcom), RWQCB 401 Liaisons recommended the adoption of the following guidance. This document provides internal guidance only and has no regulatory effect. It is being forwarded electronically to RWQCB 401 staffs and will be posted on the SWRCB 401 Program's Intranet site (<http://dwqweb/wqcert/>).

Guidance

Discharges subject to Clean Water Act section 404 receive a level of regulatory review and protection by the USACE and are often also subject to streambed alteration agreements issued by the DFG; whereas discharges to waters of the State subject to SWANCC receive no federal oversight and usually also fall out of DFG jurisdiction. Absent RWQCB attention, such discharges will generally go entirely unregulated. Therefore, to the extent that staffing constraints require the RWQCBs to regulate some dredge and fill discharges less closely than others and consistent with other RWQCB priorities, RWQCBs should consider setting a higher regulatory priority on discharges to "isolated" waters than to discharges of similar extent, severity, and permanence to federally-protected waters of similar value. Dredging, filling, or excavation of "isolated" waters constitutes a discharge of waste to waters of the State, and prospective dischargers are required to submit a report of waste discharge to the RWQCB and comply with other requirements of Porter-Cologne. Therefore, you should protect "isolated" waters in your Region by systematically instituting the following procedures:

1. Request a report of waste discharge from all recipients of USACE jurisdictional disclaimers, using the attached or a similar letter.
2. Pursuant to the requirements of the California Permit Streamlining Act, advise prospective dischargers within 30 days of receiving a report of waste discharge of whether their application is complete and, if not, what is needed to make it complete (assuming that you do not take regulatory action with 30 days).
3. Take appropriate regulatory action in response to receiving the report of waste discharge, using either the SWRCB's Water Quality Order No. 2004-0004-DWQ, *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* (General WDRs) or other individual or general WDRs or waivers. The General WDR can be downloaded from the SWRCB's website at "<http://www.swrcb.ca.gov/cwa401/index.html>". In issuing WDRs or waivers, you may refer to the same regulatory considerations which you generally apply to

issuance of Clean Water Act section 401 Water Quality Certifications (401 certification) and to those articulated in the General WDRs.

4. Copy SWRCB and USACE staffs on your requests for reports of waste discharge and on your regulatory orders. Addresses of appropriate parties are:

401 Program Manager
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

U.S. Army Corps of Engineers
(Appropriate District below):

Regulatory Branch
Sacramento District
1325 J Street
Sacramento, CA 95814-2922

Regulatory Branch
San Francisco District
333 Market Street
San Francisco, CA 94105

Regulatory Branch
Los Angeles District
911 Wilshire Boulevard, 11th Floor
Los Angeles, CA 90017-3401

Use the USACE's file number, whenever available, on all correspondence. SWRCB staff will use the USACE file number (or your file number in its absence) to correlate USACE jurisdictional disclaimers, RWQCB requests for reports of waste discharge, applicants' reports of waste discharge, and RWQCB regulatory orders. Using this information, the SWRCB will assist your tracking of SWANCC-related discharges and will report on our effectiveness in filling the regulatory gap created by the current federal interpretation of SWANCC.

Thank you for your effective management of our very limited program resources in regulating dredge, fill, and excavation discharges to wetlands, riparian areas, headwater streams, and other waters. If you have any questions, please contact Stan Martinson, Chief of the Division of Water Quality, at 916-341-5458 or at marts@swrcb.ca.gov. You may also contact Oscar Balaguer, Chief of the Wetlands and Certification Program, at 916-341-5485 or at balao@swrcb.ca.gov.

Attachment

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cc: Terry Tamminen
Agency Secretary
California Environmental Protection Agency

Chris Potter
Wetland Coordinator
Resources Agency
1416 Ninth Street
Sacramento, CA 95814

Larry Week, Chief
Watershed Restoration Branch
Department of Fish and Game
1416 Ninth Street, 12th Floor
Sacramento, CA 95814

Andrew Rosenau, Chief
Regulatory Branch
Sacramento District
U.S. Army Corps of Engineers
1325 J Street, Room 1444
Sacramento, CA 95814-2922

Calvin C. Fong, Chief
Regulatory Branch
San Francisco District
U.S. Army Corps of Engineers
333 Market Street
San Francisco, CA 94105-2197

Dave Castenon, Acting Chief
Regulatory Branch
Los Angeles District
U.S. Army Corps of Engineers
300 North Los Angeles Street, Room 6062
Los Angeles, CA 90012

Tim Vendlinski, Chief (WTR-8)
Wetlands Regulatory Office
U.S. Environmental Protection Agency,
Region 9
75 Hawthorne Street
San Francisco, CA 94105

California Environmental Protection Agency

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Electronic cc: Regional Board
Assistant Executive Officers

RWQCB WQCP Liaisons and other staff

Regional Board Letterhead

Dear _____

REQUEST FOR REPORT OF WASTE DISCHARGE

By copy of a U.S. Army Corps of Engineer (USACE) <date> jurisdictional disclaimer letter, we understand that you may be planning to dredge, fill, or excavate in waters which the USACE has determined to be outside of federal jurisdiction. Such activities may constitute a discharge of waste, which could affect the quality of waters of the State, as defined in California Water Code (CWC) section 13050. Pursuant to CWC section 13260, you are required to file with this Regional Water Quality Control Board (RWQCB) a Report of Waste Discharge (ROWD) describing the proposed discharge at least 140 days before it occurs (See CWC § 13264). This letter constitutes a formal request for such a ROWD. Pursuant to CWC section 13261, failure to respond to this request before discharging, or discharging without regulatory authorization, may result in substantial civil or criminal penalties.

If you do not plan to conduct any discharge to any "isolated" water as described above, please advise us so that we can close our file. If you are planning such a discharge, use one of the two forms listed below, as appropriate, to submit a ROWD. To expedite processing, please include a copy of this request letter with your response, and indicate the USACE's file number on all correspondence.

1. If the discharge will not be greater than 0.2 acre and 400 linear feet (for fill and excavation) or 50 cubic yards (for dredging), you may be eligible for the State Water Resource Control Board's *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* (GWDRs). You must submit a Notice of Intent (NOI) and a mitigation plan demonstrating that you have taken practicable steps to avoid and minimize impacts; that you will compensate for unavoidable permanent impacts to wetlands and headwater streams; and that you will comply with other specified conditions. Note that you will not be covered by the GWDRs unless the RWQCB sends you a written Notice of Enrollment; or unless the RWQCB does not issue you a Notice of Exclusion within 45 days of receiving your complete NOI. You can download a copy of the GWDRs and the NOI form at <http://www.swrcb.ca.gov/cwa401/index.html>. The form is also available in hardcopy from the RWQCB. Note that if your project is eligible under these GWDRs, your NOI need only be filed 45 days before the proposed discharge.
2. If your proposed discharge does not qualify for the GWDRs, you may need individual waste discharge requirements. To apply, please use the form normally used to apply for water quality certification. You can download that form at [www. <RWQCB website>](http://www.<RWQCB website>). Be sure to indicate that you are responding to this request for a ROWD. The form is also available in hardcopy from the RWQCB.

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As instructed in the NOI form, please include with your application any environmental documents, technical reports, plans, diagrams, maps, mitigation and monitoring proposals, and other documents which will help characterize the discharge. Please also submit the appropriate "To Non-Federal Waters" fee as determined from California Code of Regulations Title 23, section 2200 (a)(2). The fee schedule may be viewed and fees calculated at <http://www.swrcb.ca.gov/cwa401/docs/feecalculator.xls>.

Please send the application package to the address below. Please also send a duplicate copy of the application form/ROWD, but without any supplemental documents, to: SWANCC-ROWD, Wetlands and Certification Unit, Division of Water Quality, State Water Resources Control Board, 1001 I Street, 15th Floor, Sacramento, CA 95814.

If you have any questions, please contact <name> at <telephone> or <email> .

cc: SWANCC-ROWD, Water Quality Certification Unit
Division of Water Quality
State Water Resources Control Board
100 I Street, 15th Floor
Sacramento, CA 95814

<name>
Chief, Regulatory Branch
US Army Corps of Engineers
_____ District
<address>