

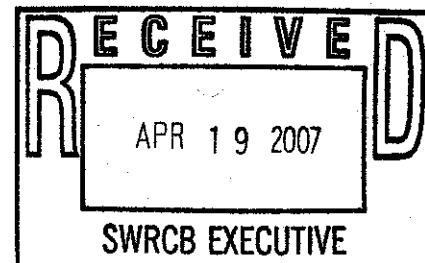
California Council for Environmental and Economic Balance

1001 Spear Street, Suite 805, San Francisco, CA 94105 (415) 512-7890 FAX (415) 512-7897

Wetland/Riparian Policy
Deadline: 4/19/07 12 noon

April 18, 2007

Song Her, Clerk of the Board
Executive Office
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95814



RE: Comment Letter – Wetland and Riparian Area Protection Policy

Dear Members of the Board:

The California Council for Environmental and Economic Balance (CCEEB) is a non-partisan, non-profit organization of business, labor and community leaders that sees to achieve the State's environmental goals in a manner consistent with a sound economy. We are writing this letter to provide the State Water Resources Control Board (SWRCB) with comments on their scoping document for the Proposed Wetland and Riparian Area Protection Policy ("Policy").

CCEEB concurs that a SWRCB policy could bring much needed clarity and consistency into the definition and regulation of state-only waters (including wetlands and riparian areas) and supports the development of the Policy for that purpose. However, CCEEB is concerned that the scope of the Policy may broaden the resulting regulatory program far beyond the original purpose of "filling the gap" that was created by the SWANNC court decision and other subsequent court decisions. Broadening the scope of the regulatory program has the potential to negatively impact CCEEB member companies and the essential public services they provide. CCEEB believes the Policy should focus on filling the gap while staying within the SWRCB's existing legal authorities.

CCEEB has been an active participant in proceedings on proposed policies and permits before SWRCB, including proceedings on construction stormwater and non-jurisdictional waters, to ensure that SWRCB's plans, policies and permits address linear projects in a manner that is environmentally protective and that also provides for and supports the need for the reliable delivery (i.e., transmission and distribution) of essential public services, such as natural gas and electricity. Delivery of these services requires routine and emergency construction, operation, inspection, maintenance, repair and replacement of utility and other linear construction infrastructure.

A primary mandate to utilities and other entities with linear facilities by the California Public Utilities Commission and/or other state and federal regulatory agencies is to provide safe and reliable service. Since CCEEB's member companies have thousands of miles of linear facilities, they need an efficient and timely process to obtain any required permits and authorizations for work in state waters, while minimizing overlap and inconsistencies between multiple state and federal agency requirements. In previous discussions with staff, CCEEB has focused on options for streamlining and minimizing the implementation permitting process (e.g., Linear Construction Stormwater General Permit) for linear facilities.

Implementation of the Policy needs to accomplish both the need of these companies to provide safe and reliable essential public services and to protect water quality.

Additional comments that need to be addressed during the CEQA scoping process include the following:

- **Scope of the Policy** - One of the three stated¹ primary needs for the proposed policy would be to address the "lack of clarity in the existing regulatory framework for protecting wetlands and riparian areas that are no longer regulated under the federal Clean Water Act due to recent federal court cases that have limited the extent of federal jurisdiction..." (emphasis added). However, the proposed alternatives appear to go beyond the goal of filling the gap and expands current SWRCB jurisdiction.

Where the scope of the policy and the implementing regulatory program go beyond filling the gap, it will increase the types and numbers of projects for which permitting will likely be required. This increase in permitting activity will impact not only the State and Regional Boards, but also the companies with linear facilities. Therefore, the scoping document needs to identify the implementation mechanisms that will be used under the alternatives that are studied so that impacts to permitting linear facility projects can be assessed and quantified. For example, a linear project with limited impacts could be permitted using a conditional general-waiver of waste discharge requirements when the project either obtains coverage under a construction stormwater permit, when required, or implements appropriate best management practices. The costs and the delays to obtain any applicable permits need to be assessed in the scoping document, based on the planned implementation program.

- **Definitions -**

- In order to conduct the CEQA scoping process, the definitions of key terms need to be identified. These terms need to include, at a minimum, wetlands, riparian areas, and isolated waters. These terms should be defined for each alternative, since there may be some differences in the definitions between alternatives.
- It is important to define the term "wetland" for use in California regulatory proceedings. As described in the 1993 Wetlands Conservation Policy² (1993 Policy), "wetlands" should be a single definition utilized by all of the state agencies and, **to the greatest extent possible, be consistent with the definition and wetlands delineation manual used by the Federal government** (emphasis added). However, rather than adopt the federal wetland definition, the Policy proposes to seek alternatives to it: ref. "the State Water Board is currently evaluating definitions of wetland as alternatives to the federal regulatory definition, including those used by the California Department of Fish and Game and the California Coastal Commission."³ Not only is the proposed Policy inconsistent with the 1993 Policy, it appears to expand the State and Regional Board's jurisdiction to include wetlands that may have never been regulated under the federal Clean Water Act. For example, the Coastal Commission's definition for a wetland does not require that hydrologic conditions be present, only that the lands "may be covered periodically or permanently with shallow water."
- We agree that there is a lack of statewide consistency in the definition for riparian areas and that "most riparian areas do not meet the federal wetland criteria and are not located

¹ Page 2 of "Wetland and Riparian Area Protection Policy Scoping Document, Informational Document, Public Scoping Meeting for Proposed Wetland and Riparian Area Protection Policy", Division of Water Quality, State Water Resources Control Board, California Environmental Protection Agency, March 2007.

² Page 3 of "Executive Order W-59-93 (California Wetlands Conservation Policy)" 1993

³ Page 12 of "Wetland and Riparian Area Protection Policy Scoping Document, Informational Document, Public Scoping Meeting for Proposed Wetland and Riparian Area Protection Policy", Division of Water Quality, State Water Resources Control Board, California Environmental Protection Agency, March 2007

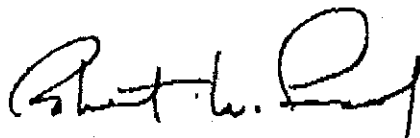
- below the ordinary high water mark." However, since most of these riparian areas may have never been regulated under the federal Clean Water Act, this appears to go beyond what is needed to "fill the gap". Any definition should, as with the definition of "wetlands", be consistent with the definition in the wetlands delineation manual used by the Federal government.
- o We recommend that the State Board adopt a definition for "isolated waters" and that they clarify the extent of their existing jurisdiction under Porter-Cologne. The definition of "waters of the State" has long been interpreted inconsistently by State and Regional Board staff.
 - o It is important for SWRCB to solicit public input for the definitions of key terms to be included in the Policy during the CEQA process and CCEEB looks forward to contributing their input.
- **Waters of the State/Beneficial Uses** - The introduction to the Policy states that the "... State and Regional Boards' duties include the regulation of wetlands and riparian areas...." Since the Porter-Cologne Act defines "Waters of the state" as "...any surface water or groundwater, including saline waters, within the boundaries of the state.", the SWRCB's legal authority to regulate all wetlands and riparian areas as waters of the state needs to be supported.

Further, the SWRCB has authority to set beneficial uses only for "waters of the state", so if all wetlands and riparian areas are not "waters of the state", the Policy needs to provide the legal basis for SWRCB to consider all wetlands and riparian areas as waters of the state for which they can set beneficial uses.
 - **Linear Operations** - Linear operations require policies and permits that facilitate gaining the access and approvals to conduct their operations in an efficient and timely manner. The Policy needs to be protective of the environment, recognize the companies with linear facilities need to maintain the safety and reliability of their services, and not add additional layers of regulation. The scoping document needs to assess the impact of any potential cost and delays to these companies in providing services and any potential for reduced safety and/or reliability.
 - **Economic and Social Values** - Section 13140 of the Porter-Cologne Act requires that SWRCB formulate and adopt state policy in conformity with the policies set forth in Chapter 1 (starting with Section 13000). Therefore the Policy needs to be reasonable and consider the total values involved, including its impact on economic and social values and the CEQA analysis needs to address the linear facility activities identified above that are required to maintain the safety and reliability of these essential public services.
 - **Regulation of Other Activities** - We agree that there is a lack of consistent statewide requirements for evaluating the condition of wetland and riparian area resources and encourage the State Board to adopt such requirements. However, we are concerned with the State Board's proposal to regulate "potential impacts from discharges and other activities." Again, we request that the State Board acknowledge that unless a person is discharging waste, or proposing to discharge waste, an application for waste discharge requirements would not be required. The State Board's reference to "other activities" appears to be another attempt to expand the jurisdictional authority of the State and Regional Boards.
 - **Permitting Consistency** - The Policy should provide for consistency between all of the regulating agencies and eliminate, if possible, or at least minimize overlap in regulation. For instance, Department of Fish & Game (DF&G) regulates riparian areas. Having the SWRCB/RWQCBs also regulate riparian areas seems to be unnecessary. Also, DF&G requires mitigation for impacts. The RWQCB may also require mitigation for the same impacts, in addition to the mitigation required by DF&G. The Policy should assess these overlaps and find ways to resolve these types of regulatory overlap.

Finally, CCEEB recommends that Alternate No. 2 be implemented in such a manner that it would fill the existing gap. If and where SWRCB decides to broaden the scope of the Policy, it needs to incorporate and assess actual implementation procedures that will facilitate the timely permitting of linear facility activities. CCEEB is currently working with SWRCB to identify environmentally protective but practical methods of regulating linear projects and looks forward to contributing further to these efforts and the CEQA analysis of alternatives for the Wetland and Riparian Area Protection Policy.

CCEEB appreciates this opportunity to comment. If you have any questions or would like to discuss these comments further, please contact me at 916-444-7337.

Sincerely,



Robert W. Lucas

Cc: Gerald Secundy, CCEEB
Jackson Gualco, The Gualco Group, Inc.