



**Terry Tamminen**  
Secretary for  
Environmental  
Protection

# State Water Resources Control Board

## Executive Office

1001 I Street • Sacramento, California 95814 • (916) 341-5615  
Mailing Address: P.O. Box 100 • Sacramento, California • 95812-0100  
Fax (916) 341-5621 • <http://www.swrcb.ca.gov>



**Arnold Schwarzenegger**  
Governor

**TO:** Terry Tamminen  
Agency Secretary  
California Environmental Protection Agency

**FROM:** Arthur G. Baggett, Jr.  
Chair

**DATE:** SEP 24 2004

**SUBJECT:** WORKPLAN: FILLING THE GAPS IN WETLAND PROTECTION

The attached workplan, "Filling the Gaps in Wetland Protection" (Attachment 1), responds to your August 27, 2004 request that the State Water Resources Control Board (SWRCB) 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 *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC). The SWRCB has submitted to the Legislature an April 2003 report titled *Regulatory Steps Needed to Protect and Conserve Wetlands Not Subject to the Clean Water Act* (Legislative Report). The attached workplan provides for implementation of the measures that the *Legislative Report* identifies as being necessary to replicate the pre-SWANCC federal program.

The attached workplan also outlines the steps the SWRCB has taken to-date to respond to SWANCC. We believe that our May 4, 2004 adoption of General Waste Discharge Requirements for "isolated" waters, our June 25, 2004 guidance to the Regional Water Quality Control Boards on regulating discharges to "isolated" waters (Attachment 2), and the additional measures identified in the workplan will restore pre-SWANCC protection to "isolated" waters and strengthen California's overall wetland protection program.

Please telephone me at 341-5611 if I can answer any questions on the workplan or any other aspect of our wetland protection efforts. This subject is currently under the direction of Stan Martinson, Chief of the Division of Water Quality, and he can be reached at 341-5458.

Attachments: 1: *Filling the Gaps in Wetland Protection*  
2: *Guidance for Regulation of Discharges to "Isolated" Waters*

cc: (See next page)

**California Environmental Protection Agency**

SEP 24 2004

Terry Tamminen

- 2 -

cc: (Continuation page)

Board members  
Regional Board Executive Officers

Ryan Broddrick, Director  
Department of Fish and Game

Alexis Strauss, Director  
Water Division  
U.S. Environmental Protection Agency, Region 9



State Water Resources Control Board  
Division of Water Quality

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WORKPLAN:

**FILLING THE GAPS IN WETLAND PROTECTION**

September 2004

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Governor Schwarznegger's *Action Plan for California's Environment* directs state agencies to fill any gaps in wetlands protection. This responsibility was highlighted in an August 27, 2004 letter from CalEPA Secretary Tamminen to the State Water Resource Control Board (SWRCB). This Workplan presents the SWRCB's response to this directive.

## **BACKGROUND**

### **The SWANCC Decision**

In 2001, the U.S. Supreme Court held in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* that certain "isolated" waters are not subject to Clean Water Act (CWA) jurisdiction solely because they are frequented by migratory birds that cross state lines. The Supreme Court emphasized that it is the responsibility of the states to protect such waters. The full implications of SWANCC are yet to be determined in federal courts, but as a result of current federal interpretation of the decision many discharges of dredged and fill material that previously would have required a federal CWA section 404 permit now no longer need one.

### **Current SWRCB Program**

In California, responsibility for regulating discharges to wetlands and other waters is delegated to the SWRCB and the nine Regional Water Quality Control Boards (RWQCBs). Although State law<sup>1</sup> provides independent regulatory authority, California has used CWA section 401 Water Quality Certification as its primary tool to protect wetlands. The Water Quality Certification (401) Program also regulates discharges to "isolated" waters.

### **SWRCB Actions to Date.**

In responding to SWANCC to date, the State Water Resources Control Board (SWRCB) has<sup>2</sup>:

1. on January 25, 2001, issued a legal memorandum asserting the authority and responsibility of the SWRCB and Regional Water Quality Control Boards (RWQCBs) to regulate discharges to "isolated" waters,
2. during 2001, coordinated with the US Army Corps Of Engineers (USACE) to ensure that all USACE jurisdictional disclaimer letters advise dischargers that they are subject to Regional

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<sup>1</sup> Porter Cologne Water Quality Control Act

<sup>2</sup> The documents cited below may be viewed at: <http://www.swrcb.ca.gov/cwa401/index.html>

Water Quality Control Board (RWQCB) regulatory jurisdiction, and that the USACE sends copies all such letters to the SWRCB and RWQCBs,

3. beginning in 2001, developed and populated a database documenting all USACE disclaimers and related RWQCB orders,
4. on March 13, 2003 submitted to the federal government detailed comments on a controversial proposal limiting federal jurisdiction under the CWA, titled *Comment On Advanced Notice Of Proposed Rulemaking On Definition Of "Waters Of The United States"*,
5. submitted to the legislature an April 2003 report titled *Regulatory Steps Needed to Protect and Conserve Wetlands Not Subject to the Clean Water Act (Legislative Report)*,
6. on May 4, 2004, adopted *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), regulating certain discharges to non-federal waters, and
7. on June 25, 2004 transmitted to the RWQCBs programmatic guidance titled *Guidance for Regulation of Discharges to "Isolated" Waters*, directing the RWQCBs to prioritize such discharges for regulatory attention, to request a report of waste discharge from all recipients of USACE jurisdictional disclaimer letters, to take appropriate regulatory action, and to copy the SWRCB on specified regulatory documents for tracking and reporting purposes (Attachment 1).

The above actions provide a good foundation for filling the SWANCC gap.

## WORKPLAN

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The SWRCB'S April 2004 *Legislative Report* identified and discussed measures needed to restore the protection that was provided to "isolated" wetlands before SWANCC. The SWRCB will build on the previous work listed above, and will implement the measures identified in the *Legislative Report*<sup>3</sup>. These measures are described and a schedule of products<sup>4</sup> is provided below.

### 1. Advise Dischargers of Need to Report Discharges

*Objective: reduce confusion and misinformation regarding state requirements for discharges to "isolated" waters.*

Conduct ongoing outreach in collaboration with relevant trade and professional associations, to include presentations at conferences and workshops and submittal of information to professional and trade journals and newsletters.

### 2. Interagency Coordination

*Objective: institute interagency coordination to ensure that discharges to "isolated" waters will not adversely affect listed specie; to enhance overall resource protection; and to reduce program overlaps.*

#### a. State Agency – Department of Fish and Game (DFG)

- i. Request DFG participation in developing systematic coordination.
- ii. Develop Memorandum of Understanding or other appropriate document regarding consultation protocol for State-listed species.
- iii. Develop Memorandum of Understanding or other appropriate document regarding ongoing coordination to enhance overall resource protection and to reduce program overlaps.

#### b. Federal Agencies – US Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS)

Develop programmatic guidance to facilitate consultation with USFWS and NMFS regarding federally-listed species.

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<sup>3</sup> Measures Nos. 1, 2, 3, and 5 below were also identified as necessary by the California Research Bureau in its February 2002 report, *The U.S. Supreme Court Limits Federal Regulation of Wetlands: Implications of the SWANCC Decision*. Measure No. 3 is identified in the *Legislative Report* as needed to establish a SWRCB wetland program; it is included in this Workplan because it is fundamental to State wetland protection and to forestall continuing proliferation of disparate wetland-related beneficial uses among different RWQCBs.

<sup>4</sup> For schedule planning purposes, this Workplan assumes the availability of four PYs in the SWRCB's Water Quality Certification Unit during FY 05-06 through FY 06-07.

### 3. **Develop Beneficial Use (BU) Definitions for Wetland-Related Functions**

*Objective: provide a Statewide regulatory standard to systematically protect wetland-related functions (e.g., pollutant removal, floodwater retention, and habitat connectivity) not explicitly included in the existing list of BUs.*

- a. Develop programmatic guidance providing Statewide definitions and directing adoption into RWQCB Water Quality Control Plans (Basin Plans)
- b. RWQCBs adopt wetland BUs into Basin Plans during scheduled triennial reviews or earlier.

### 4. **Adopt State Wetland Definition**

*Objective: provide a standard metric to help determine compensatory mitigation requirements and compliance with "no net loss" policy.*

Note: a State wetland definition will not affect the SWRCB/RWQCB's regulatory jurisdiction, which under State law extends to all waters of the state.

Adopt the federal regulatory wetland definition incorporated into the SWRCB's May 4, 2004 General WDRs<sup>5</sup>.

### 5. **Adopt State Analog of CWA 404(b)(1) Guidelines**

*Objective: provide a State policy framework at least as protective as the federal requirements applicable to fill and dredged discharges to waters of the U.S.*

Adopt State version of CWA section 404(b)(1) guidelines, making minimal revisions to reflect the State regulatory context and any changes to federal practice resulting from the federal December 2002 "Mitigation Action Plan"<sup>6</sup>.

### 6. **Monitor Permitting for "Isolated" Waters**

*Objective: document implementation of SWRCB's June 25, 2004 "Guidance for Regulation of Discharges to 'Isolated' Waters".*

- a. Develop and populate a database to document and correlate USACE disclaimer letters, RWQCB requests for Reports of Waste Discharge, and RWQCB regulatory requirements, i.e., WDRs, waivers of WDRs, or Notices of Applicability for General WDRs.
- b. Report at least annually on impact of SWANCC to waters of the state, and on degree to which waters subject to SWANCC are being protected by SWRCB/RWQCBs.

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<sup>5</sup> This action is categorically exempt from the California Environmental Protection Act pursuant to CEQA Guidelines section 15308 (Actions by Regulatory Agencies for Protection of the Environment).

<sup>6</sup> This action is categorically exempt from the California Environmental Protection Act pursuant to CEQA Guidelines section 15308, "Actions by Regulatory Agencies for Protection of the Environment".

## SCHEDULE OF PRODUCTS

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### By Task

<i>Task</i>	<i>Date</i> <sup>7</sup>
1. Presentations, newsletter articles, and other outreach	Ongoing
2.a.i Memorandum requesting DFG participation	11/05
2.a.ii MOU w. DFG re consultation protocol for State-listed species	06/05
2.a.iii MOU re ongoing coordination	06/06
2.b. Guidance for consultation with USFWS and NMFS	06/05
3. Adopt State Wetland Definition	09/06
4. Adopt State Analog of CWA 404(b)(1) Guidelines	09/06
5.a Develop Beneficial Use (BU) Definitions for Wetland-Related Functions	03/05
5.b RWQCBs adopt wetland BUs into Basin Plans.	09/09
6.a. Develop database	10/04
6.b Annual report	06 /an

### By Date

<i>Task</i>	<i>Date</i>
1. Presentations, newsletter articles, and other outreach	Ongoing
6.a. Develop database	10/04
2.a.i Memorandum requesting DFG participation	11/04
5.a Develop Beneficial Use (BU) Definitions for Wetland-Related Functions	03/05
2.a.ii MOU w. DFG re consultation protocol for State-listed species	06/05
2.b. Guidance for consultation with USFWS and NMFS	06/05
2.a.iii MOU w. DFG re ongoing coordination	06/06
3. Adopt State Wetland Definition	09/06
4. Adopt State Analog of CWA 404(b)(1) Guidelines	09/06
5.b RWQCBs adopt wetland BUs into Basin Plans.	09/09
6.b Annual report	06/an

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<sup>7</sup> All due dates are last day of indicated month.

# State Water Resources Control Board

ATTACHMENT 2



Terry Tamminen  
Secretary for Environmental  
Protection

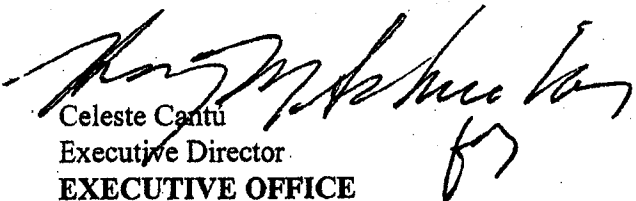
## Executive Office

1001 I Street • Sacramento, California 95814 • (916) 341-5615  
Mailing Address: P.O. Box 100 • Sacramento, California • 95812-0100  
Fax (916) 341-5621 • <http://www.swrcb.ca.gov>



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, 11<sup>th</sup> 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](mailto: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](mailto:balao@swrcb.ca.gov).

Attachment

Regional Board  
Executive Officers

- 4 -

JUN 25 2004

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, 12<sup>th</sup> 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*

Regional Board  
Executive Officers


- 5 -

JUN 25 2004

Electronic cc: Regional Board  
Assistant Executive Officers

RWQCB WQCP Liaisons and other staff

***California Environmental Protection Agency***

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