

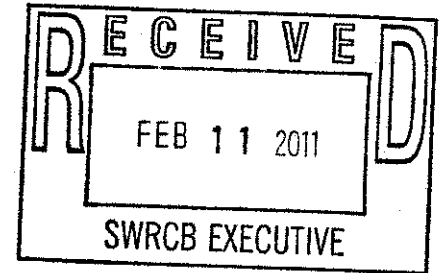


environmental
DEFENSE CENTER

Public Cmt /Wrkshp (1/31 & 2/8)
CEQA-Wetlands Policy & Reg
Deadline: 5/20/11 by 12 noon

February 11, 2011

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
PO Box 100
Sacramento, CA 95812-2000
commentletters@waterboards.ca.gov



VIA EMAIL

Re: Initial Study and Notice of Preparation of a Draft Environmental Impact Report for Wetland Area Protection Policy and Dredge and Fill Regulations

Dear Ms. Townsend:

Thank you for the opportunity to submit comments regarding the scope of the draft Program Environmental Impact Report (EIR) to be prepared by the State Water Resources Control Board (SWB) to evaluate significant environmental effects of the Wetland Area Protection Policy and Dredge and Fill Regulations (Project). This scoping comment letter is submitted by the Environmental Defense Center (EDC). EDC is a public interest law firm which protects and enhances the environment through education, advocacy and legal action.

The Initial Study's description of the Project demonstrates that the proposed state wetland definition conflicts with existing state and regional wetland definitions and will reduce the number and extent of areas currently considered wetlands. The Project's wetland definition should be consistent with other agencies' and regional boards' wetland definitions and include "all waters of the State" as intended.¹

The EIR must comply with the California Environmental Quality Act (CEQA) by disclosing the Project's significant impacts and identifying mitigation measures and alternatives which would avoid or substantially lessen significant impacts. CEQA's primary purposes are to identify the environmental impacts of proposed projects, to inform the public and decision makers about the impacts, and to provide opportunities for avoiding and lessening environmental damage whenever possible. A legally adequate

¹ State Water Resources Control Board Division of Water Quality. Initial Study for Wetland Area Protection Policy and Dredge and Fill Regulations. (Initial Study) Page 2.

EIR includes (1) an adequate project description, including project objectives; (2) a well-documented and up-to-date environmental baseline; (3) complete and accurate impact analyses; (4) effective, enforceable mitigation measures; (5) a thorough assessment of consistency with existing plans and policies; and (6) consideration of a range of alternatives which avoid or substantially lessen significant environmental impacts. All information and analyses in the EIR must be supported by substantial evidence.

Our specific questions and recommendations for the Project's EIR follow.

I. The EIR's Project Description Must Be Stable, Accurate, and Sufficiently Detailed to Enable the EIR to Analyze the Project's Impacts, and Must Include Sufficiently Broad Objectives.

The Project Description Must Be Stable, Accurate, and Sufficiently Detailed

The EIR must include a sufficient description of the proposed project. CEQA requires the project description to include enough detail to facilitate assessment of the environmental impacts caused by the Project.² Although the EIR is intended to provide a "program level analysis," the proposed definition, permitting requirements and exclusions can be detailed enough to provide a basis for thorough analysis.

The EIR must not Piecemeal Environmental Analysis

The Project is part of a larger Program and is being analyzed in a piecemeal fashion which may downplay its environmental effects. CEQA requires that a project description be accurate and complete.³ An EIR must not split a project into smaller pieces and conduct CEQA review separately on each piece; an EIR must include an analysis of the environmental effects of future expansion or other action if two criteria are met: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial action or its environmental effects.⁴ Using this standard, the facts of each case will determine whether an EIR must analyze future expansion or other action.⁵ Below, we address this two-step process with respect to the facts of the Project.

First, the Initial Study notes that the Project consists of "Phase 1 of the Wetland and Riparian Area Protection Policy."⁶ CEQA analysis of Phases 2 and 3 would occur later.⁷ The proposed phasing of the Project is planned to "allow for necessary infrastructure and program development."⁸ Phases 2 and 3 are thus reasonably

² CEQA Guidelines §15124.

³ *Id.*

⁴ *Laurel Heights Improvement Association of San Francisco, Inc. v. Regents of the University of California* (1988) 47 Cal.3d 376, 393-399.

⁵ *Id.* at 396.

⁶ Initial Study at page 14.

⁷ *Id.*

⁸ *Id.*

foreseeable related activities. While approval and implementation may be phased, pursuant to CEQA environmental review they cannot be piecemealed.

Second, the future actions of Phases 2 and 3 are significant and will expand the scope of the Project and its potential environmental impacts. Phase 1 will reduce protections for some wetlands, especially in Regions 2 and 4, and Phases 2 and 3 may similarly reduce protections for riparian areas, causing additive impacts to water quality. Therefore, rather than analyzing the environmental effects of only one component of the Wetland and Riparian Area Protection Policy (i.e. Phase 1 – The Wetland Area Protection Policy and Dredge and Fill Regulations), the SWB should prepare a single Program EIR for the Program's three phases.

Wetland Definition should be Consistent with Other Agencies' Definitions

One of the Project's objectives is to "develop consistent methods to define wetlands."⁹ However the proposed definition is inconsistent with definitions used by (1) the California Coastal Commission (CCC)¹⁰, (2) the California Department of Fish and Game (DFG)¹¹, and (3) the US Fish and Wildlife Service / National Wetlands Indicator (NWI).¹² The Project's proposed wetland definition is less inclusive of wetlands and therefore less protective of wetlands than these other agencies' wetlands definitions.

The proposed definition is also narrower than the California Water Code, which defines "waters of the state" as "*any* surface water or groundwater, including saline waters within the boundaries of the state."¹³ The SWB may not enact a policy or regulation that is inconsistent with statutory enactments.

Moreover, the proposed definition is narrower than the policy currently in place in Regional Water Quality Control Board Regions 2 and 4, which define wetlands consistent with the "one-parameter" test, using indicators such as hydrology, presence of hydrophytic plants, *and/or* hydric soils.¹⁴ Therefore, any attempt to invoke a three-parameter definition would actually decrease wetlands protections in these regions and significantly increase impacts to the environment. The EIR must analyze the effect of using a three-parameter definition in these regions.

⁹ Initial Study at page 2.

¹⁰ Public Resources Code section 30121. See also California Wetlands and Riparian Area Protection Policy Technical Advisory Team Technical Memorandum No. 2: Wetland Definition. Appendix A at page 14. June 25, 2009.

¹¹ California Wetlands Information Center.

http://ceres.ca.gov/wetlands/introduction/defining_wetlands.html Last viewed February 7, 2011. See also California Wetlands and Riparian Area Protection Policy Technical Advisory Team Technical Memorandum No. 2: Wetland Definition. Appendix A at page 14. June 25, 2009.

¹² *Id.* See also California Wetlands and Riparian Area Protection Policy Technical Advisory Team Technical Memorandum No. 2: Wetland Definition. Appendix A at page 13. June 25, 2009.

¹³ Water Code section 13050(e), emphasis added.

¹⁴ Initial Study at page 5, emphasis added.

The other agencies' definitions referenced above are all examples of the one-parameter wetland definition. This definition requires the presence of only one of the three wetland parameters (i.e. hydrology, vegetation or soils) for an area to qualify as a wetland. The Project's wetland definition, on the other hand, is a three-parameter definition essentially requiring the presence of wetland hydrology, vegetation and soils for an area to qualify as a wetland. The difference between the one-parameter and the three-parameter definitions is significant and often varies by a factor of three or more in terms of wetland protection¹⁵; i.e., where a project may affect one acre of three-parameter wetlands it may impact three or more acres of one-parameter wetlands. For instance, the Santa Barbara Ranch Project Final EIR delineates several times the acreage of wetlands utilizing the "State Wetland" definition than it does using the "Federal Wetlands" and "Waters of the US" definitions.¹⁶

Using the Corps' three-parameter wetland definition instead of the DFG's, CCC's and Regions 2 and 4's one-parameter definition creates dueling state definitions. The proposed definition is inconsistent with the stated purpose of providing "consistent methods to define wetlands."¹⁷ By eliminating one- and two-parameter wetlands, it reduces the acreage of wetlands that would be subject to state protection and directly contradicts the statutory definition of protected waters.

Project should restore Historic Wetland Acreage

The state's existing policy of "no net loss" of wetlands should continue and be augmented with a new policy to ensure historic wetland acreages are restored. California has lost 91% of its wetlands, more than any other state.¹⁸ Existing policies and objectives to protect the remaining 9% aim too low; the State should seek to restore and/or create 4.5 million acres of wetlands, equivalent to the acreage historically lost, to restore beneficial uses. This can be accomplished by amending the project description to include a goal of restoring or creating 4.5 million wetland acres.

Purpose and Need

The Initial Study clearly explains the purpose and need for the Project in the wake of relevant U.S. Supreme Court decisions.¹⁹ The Project is needed because some waters of the state have been excluded from federal protection, including isolated wetlands such as vernal pools.²⁰ The urgency is heightened because California has lost a greater percentage of its wetlands than other state in the nation.²¹ The EIR should similarly explain the purpose and need for the Project.

¹⁵ EDC estimates that 75% of wetlands in Santa Barbara County meet the one-parameter wetland definition but do not meet the three-parameter wetland definition.

¹⁶ Santa Barbara Ranch Final EIR. June 2008. Santa Barbara County. Figure 9.4-2 and Table 9.4-5.

¹⁷ Initial Study at page 2.

¹⁸ Initial Study at page 3.

¹⁹ Initial Study at pages 2 – 4.

²⁰ Initial Study at page 3.

²¹ *Id.*

The stated purpose of the Project is to “protect *all* waters of the State as defined by Water Code section 13050, including wetland areas and waters of the United States.”²² As noted above, Water Code section 13050 defines “waters of the state” as “any surface or groundwater.” The EIR should clearly state how a wetland definition that excludes all wetlands exhibiting one or two of the three wetland parameters protects “all waters of the State.” This proposal will actually reduce protections in Regions 2 and 4, which currently define wetlands using the one-parameter definition. If the State wetland definition is changed to a three-parameter definition as part of this Project, then the Project will not “protect all waters of the State” because many (e.g., one- and two-parameter wetlands in Regions 2 and 4) will no longer be considered wetlands and will be excluded from protection.

Project Objectives Must Not Unreasonably Restrict the EIR’s Range of Alternatives

The EIR’s project objectives will help define the range of alternatives. Under CEQA, an EIR’s project objectives must set forth the Project’s underlying purpose.²³ The EIR’s project objectives cannot be so narrow that they restrict the range of alternatives in violation of CEQA.²⁴ CEQA requires that an EIR include a range of alternatives that avoid or substantially lessen significant impacts while fulfilling most of the Project’s basic objectives.²⁵ Narrowing the objectives to eliminate feasible alternatives which may avoid or substantially lessen Project impacts may violate CEQA. Therefore the EIR must include objectives that are broad enough to foster consideration of an adequate range of less damaging alternatives.

For instance, if an objective was to develop a wetland definition which matches the Corps of Engineers definition, or if an objective specified the definition must be a three-parameter definition, then the EIR might exclude feasible alternatives which avoid or substantially lessen impacts merely because the alternatives do not fulfill these overly-narrow objectives. The objectives should not be so specific that they preclude consideration of one-parameter definition alternatives, such as the definitions adopted and used by DFG, US Fish and Wildlife Service, the CCC and SWB Regions 2 and 4.

The EIR’s objectives must include objectives to “*provide protection for all wetlands and waters of the state.*” In addition, the following objectives are appropriate for this Project:

- Protect all wetlands and waters of the state and their functions and values.
- Restore and create wetlands to replace California’s historic wetlands.

²² *Id.* at page 2, emphasis added.

²³ CEQA Guidelines Section 15124(b).

²⁴ *City of Santee v. County of San Diego* (1989) 214 Cal. App. 3d 1438, 1455. See also *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 735-737.

²⁵ CEQA Guidelines Section 15126.6(a).

- Protect and enhance beneficial uses.
- Provide consistency in state agency wetland definitions.
- Protect the hydrology and watersheds of all wetlands and waters of the state.
- Contribute to recovery of listed and rare species.

II. The EIR's Environmental Baseline Must Accurately and Sufficiently Set Forth the Existing Physical Conditions of the Areas and Resources Affected by the Proposed Project.

The EIR must describe the environmental setting with enough detail to ensure an understanding of the significant environmental impacts of the Project and alternatives.²⁶ As stated in the CEQA Guidelines, “[t]he environmental setting will normally constitute the baseline physical condition by which a lead agency determines whether an impact is significant.”²⁷ An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published.²⁸ The environmental setting constitutes the baseline physical conditions by which the state will determine whether an impact is significant.²⁹

When the environmental baseline is not properly understood, environmental impacts cannot be properly assessed. As a result, there is no basis to determine whether avoidance is feasible or what other mitigation measures are necessary to reduce significant impacts to the extent possible before a project can be approved, as required pursuant to CEQA.³⁰

The EIR's depiction of the environmental baseline must be supported by substantial evidence to ensure its accuracy as a starting point for impact assessment.

III. The EIR Must Accurately Disclose the Current Statutory and Regulatory Framework, including the Coastal Act Definition and Protections for Wetlands.

The Initial Study identifies the “Current Statutory and Regulatory Framework,” including federal and state authorities, provisions and requirements.³¹ Although the Initial Study references the California Coastal Act, it omits any information regarding the Coastal Act definition, provisions and requirements regarding wetlands. The EIR should point out that the Coastal Act defines wetlands broadly, as “lands within the coastal zone which may be covered periodically or permanently with shallow water and include

²⁶ CEQA Guidelines Section 15125(a).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Pub. Res. Code section 21081(a)(3); CEQA Guidelines Sections 15002(a)(3) and 15021(a)(2). (See also *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.App.4th 105, 134.)

³¹ Initial Study at pages 6-11.

saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and fens.”³² The Commission uses a “one-parameter” definition of wetlands.³³

The EIR should also disclose the Coastal Act provisions and requirements relating to wetlands. Specifically, the Coastal Act requires protection of the biological productivity and quality of “coastal waters, streams, *wetlands*, estuaries, and lakes.”³⁴ The Coastal Act limits the diking, filling or dredging of wetlands and other waters by only allowing such activities for certain delineated purposes, where there are no feasible less environmentally damaging alternatives, and where feasible mitigation measures have been provided to minimize adverse environmental effects.³⁵ The California courts have construed these protections literally.³⁶ The statement in the Initial Study that the Coastal Act merely requires a permit for development within a wetland located in the coastal zone is misleading and incorrect; in fact, the Coastal Act *prohibits* most types of development within wetlands.³⁷

IV. The EIR Must Assess, Classify and Disclose Environmental Impacts and Must Identify Mitigation Measures which Avoid or Mitigate Significant Impacts to the Maximum Extent Feasible.

Consideration and Discussion of Environmental Impacts

The EIR must identify, analyze, and mitigate each and every significant environmental impact of the Project. Specifically, CEQA requires that an EIR “shall include a detailed statement setting forth...*all* significant effects on the environment of the proposed Project.”³⁸ The EIR must evaluate and classify impacts as to their severity.³⁹

The EIR must also analyze and mitigate not only direct impacts, but also indirect impacts⁴⁰ and cumulative impacts.⁴¹

The Initial Study is based upon a flawed premise that the Project will not cause significant impacts because it is intended to enhance wetland protections. However, by narrowing the definition of wetlands, and changing from the existing one-parameter to a three-parameter definition in some regions, the Project actually reduces wetland protections. As a result, the Project may cause significant impacts relating to aesthetics,

³² Pub. Res. Code Section 30121.

³³ Memorandum from Dr. John Dixon, CCC ecologist/wetland coordinator to Melissa Hetrick, CCC re UCSB North Parcel Wetland Delineation noting that the CCC uses a “one-parameter” wetland definition. Page 1. March 16, 2006.

³⁴ Pub. Res. Code Section 30231, emphasis added.

³⁵ Pub. Res. Code Section 30233.

³⁶ See *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493.

³⁷ *Id.*

³⁸ Pub. Res. Code Section 21100(b)(1), emphasis added.

³⁹ CEQA Guidelines Sections 15126 and 15126.2.

⁴⁰ CEQA Guideline Section 15126.

⁴¹ CEQA Guidelines Section 15130.

air quality, greenhouse gas (GHG) emissions, biology, hydrology and water quality, fire hazard, recreation and land use.

Consideration and Discussion of Measures Proposed to Mitigate Significant Effects

The EIR must describe feasible mitigation measures which will avoid or substantially lessen each significant environmental effect to the maximum extent feasible.⁴² A lead agency cannot approve a project if there are feasible alternatives or mitigation measures that would avoid or substantially lessen significant impacts.⁴³ The lead agency's decision with regard to the feasibility of mitigation measures must be based on substantial evidence in the record.⁴⁴ Decisions regarding whether or not alternatives and mitigation measures substantially lessen or avoid significant impacts must also be based on substantial evidence in the record.

Moreover, mitigation may not be deferred. As a matter of law, an agency cannot defer consideration or adoption of mitigation measures to a later date.⁴⁵ Deferral may be allowed in limited instances, provided there is a reasonable expectation of effectiveness and compliance based on a requirement that the measure meet specific performance standards that are identified in the EIR.⁴⁶

Throughout the Initial Study, the document relies upon future environmental, planning and permitting review. The Initial Study relies on the fact that mitigation measures could be incorporated by public agencies when they approve future actions. Such conclusory statements are unsupported by any evidence. The EIR must not improperly defer to and rely on other agencies' future mitigation measures when feasible programmatic mitigation measures and alternatives, such as that discussed below, can avoid and substantially reduce the Project's impacts.

The impacts of mitigation measures must also be discussed in the EIR.⁴⁷

Biological Resources

Wetlands, for instance those in Regions 2 and 4 that do not meet the Project's three-parameter definition (i.e., one- and two-parameter wetlands), will no longer be considered wetlands or receive state protection from dredge and fill operations. The EIR must analyze how redefining wetlands to remove certain areas from consideration as wetlands will lead to reduced protection and new significant impacts, especially in Regions 2 and 4.

⁴² CEQA Guidelines Section 15126.4(a)(1); *Save Our Peninsula Committee*, supra, 87 Cal.App.4th at 139

⁴³ Pub. Res. Code Sections 21002 and 21081(a)(3); CEQA Guidelines Sections 15002(a)(3) and 15021(a)(2); *Mountain Lion Foundation*, supra, 16 Cal.App.4th at 134.

⁴⁴ *Citizens for Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167 ("Goleta I").

⁴⁵ CEQA Guidelines Section 15126.4(a)(1)(B); *Kings County Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296.

⁴⁶ *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal. App.4th 777.

⁴⁷ CEQA Guidelines Section 15126.4(a)(1).

The Initial Study states that impacts to biological resources will be less than significant because the “Project would establish procedures to ensure that impacts would be avoided, minimized, and mitigated.”⁴⁸ This circular logic is not based on any evidence and lacks an objective analysis. It is also inconsistent with the proposal to redefine, and thus reduce protection for, wetlands in some regions.

The Initial Study also relies on the fact that “future actions taken in accordance with this Project will be required not to conflict with any local policies or ordinances protecting biological resources.”⁴⁹ Similarly, the Initial Study relies on compliance with habitat conservation plans and natural community conservation plans.⁵⁰ Without an analysis of such plans, policies and ordinances, and their effectiveness in protecting wetlands, there is no evidence to support this statement.

The EIR must include specific, feasible programmatic mitigation measures and alternatives which avoid or substantially lessen this impact. One such alternative discussed below is to define wetlands consistent with other state agencies and require protection for one-, two- *and* three-parameter wetlands.

Fire Hazards

Wetlands are natural impediments to wildfire. The Project’s reduced wetland protections may lead to loss or desiccation of wetland vegetation and an increased fire hazard. The EIR must evaluate the increased fire hazard caused by the Project.

Greenhouse Gas Emissions

The EIR must identify, analyze, and avoid or mitigate significant GHG effects.⁵¹ The Project will define wetlands more narrowly than proscribed by statute and by other agencies, and therefore fewer wetlands will receive protection leading to (a) reduced carbon sequestration and (b) direct release of methane from decomposition of biomass from unprotected wetlands. GHG emissions can also result from vegetation removal and decomposition.⁵² The EIR must disclose these indirect GHG emissions.

New development that would result from defining wetlands narrowly will also generate indirect GHG emissions that must be evaluated programmatically in the EIR.

The EIR must assess the significance of the impact on climate change. Not only will a narrow definition of protected wetlands reduce carbon sinks in the state, but it will also generate increased direct and indirect GHG emissions. Recent science supports a

⁴⁸ Initial Study at page 28.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ CEQA Guidelines Sections 15064.4 and 15064. See also, Appendix G.

⁵² Science Daily. July 21, 2008. <http://www.sciencedaily.com/releases/2008/07/080720150209.htm> Last viewed February 2, 2011.

determination that *any* net increase in emissions will have a significant effect on global climate change and therefore that a zero emission threshold should be used to evaluate impacts. Current evidence demonstrates the target atmospheric level of CO₂ should be 350 parts per million (ppm) to achieve climate stabilization and avoid disastrous global consequences.⁵³ Given current atmosphere levels of 385 ppm, we are already on a trajectory that is not sustainable, and we must decrease GHG emissions more rapidly and to a greater extent than previously thought. Thus, *any* additional contribution of CO₂ would be a step further from state and regional target levels.

The potential consequences of global warming further underscore the need for a zero threshold standard. The IPCC, Union of Concerned Scientists, and the California Climate Change Center have published several studies that identify how climate change will affect the environment.⁵⁴ These impacts include an increase in water temperatures, rise in sea level, coastal erosion, reduction of the Sierra snowpack, increase in severity and frequency of storms, increased droughts, famine, changes in ecosystems, increase in heat waves, increases in pests and diseases, flooding, retreating glaciers, ozone formation, and the potential for wildfires.⁵⁵ Given these impacts and the associated need to reduce GHG emissions a zero emission threshold is warranted and supported by substantial evidence.

The use of a zero emission threshold is discussed in CAPCOA's white paper.⁵⁶ A zero emission threshold was used recently in the California State Lands Commission's Final EIR for the Venoco Ellwood Marine Terminal and Draft EIR for the Venoco Ellwood Full Field Project.⁵⁷ We strongly encourage the SWB to utilize a zero emission

⁵³ Matthews H.D., and K. Caldeira (2008), *Stabilizing climate requires near-zero emissions*, *Geophys. Res. Lett.*, 35, L04705, doi:10.1029/2007GL032388; James Hansen, et al., *Target Atmospheric CO₂: Where Should Humanity Aim?* *The Open Atmospheric Science Journal*, 2008, 2, 217-231; Statements of Dr. Chris Field, Carnegie Institution for Science, *Decisive Action Needed as Warming Predictions Worsen*, Says Carnegie Scientist, available at http://www.ciw.edu/news/decisive_action_needed_warming_predictions_worsen_says_carnegie_scientist

⁵⁴ Union of Concerned Scientists. 2006. *California Global Warming Impacts and Solutions*, available at http://www.ucsusa.org/clean_california/ca-global-warming-impacts.html. California Climate Change

⁵⁵ Karl, T.R., *supra*; Levin, K., *supra*, citing Emanuel, K., *Increasing Destructiveness of Tropical Cyclones Over the Past 30 Years* (*Nature*, vol. 436, August 4, 2005), P.J. Webster, et al., *Changes in Tropical Cyclone Number, Duration, and Intensity in a Warming Environment* (*Science*, vol. 309, September 16, 2005), NASA Earth Observatory, *Record Low for June Arctic Sea Ice* (June 2005 at earthobservatory.nasa.gov/Newsroom/NewImages/images.php3?img_id=16978), A.J. Cook et al., *Retreating Glacier Fronts on the Antarctic Peninsula Over the Past Half-Century* (*Science*, vol. 308, April 22, 2005), R.B. Alley et al., *Ice-Sheet and Sea-Level Changes* (*Science*, vol. 310, October 21, 2005), E.D. Domack, et al., *Stability of the Larsen B Ice Shelf on the Antarctic Peninsula During the Holocene Epoch* (*Nature*, vol. 436, August 4, 2005), F.S. Chapin III, et al., *Role of Land Surface Changes in Arctic Summer Warming* (*Science*, vol. 310, October 28, 2005), M. Hopkin, *Amazon Hit by Worst Drought for 40 Years: Warming Atlantic Linked to Both US Hurricanes and Rainforest Drought* (*Nature*, October 11, 2005), I.T. Stewart, et al., *Changes Toward Earlier Streamflow Timing Across Western North America* (*Journal of Climate*, vol. 18, April 2005).

⁵⁶ CAPCOA. 2008. *CEQA & Climate Change: Evaluating and Addressing Greenhouse Gas Emissions from Projects Subject to the California Environmental Quality Act*. Jan.

⁵⁷ Venoco Ellwood Marine Terminal Lease Renewal Project Final Environmental Impact Report, California State Clearinghouse (SCH) No. 2004071075, CSLC EIR No. 743, April 30, 2009; Draft Environmental

threshold in its evaluation of direct and indirect GHG emissions. The CAPCOA white paper discusses other approaches as well.

Finally, if the GHG emission impact is found to be significant, the EIR must identify alternatives and/or mitigation measures that will reduce the impact below significance. Courts have found EIRs inadequate when they improperly defer formulation of mitigation measures to address the global warming impacts.⁵⁸ The California Attorney General has also provided guidance on the subject, pointing out the need to develop specific mitigation measures even in the context of programmatic planning efforts. As the AG pointed out, even general plan EIRs must provide enforceable mitigation measures:

Can a lead agency rely on policies and measures that simply “encourage” GHG efficiency and emissions reductions?

No. Mitigation measures must be “fully enforceable.”⁵⁹ Adequate mitigation does not, for example, merely “encourage” or “support” carpools and transit options, green building practices, and development in urban centers. While a menu of hortatory GHG policies is positive, it does not count as adequate mitigation because there is no certainty that the policies will be implemented.⁶⁰

There are many concrete, enforceable mitigation measures appropriate for inclusion in an EIR. Examples are described in a variety of sources, including the CAPCOA’s white paper,⁶¹ Office of Planning and Research’s (OPR) Technical Advisory,⁶² and a mitigation list on the Attorney General’s website.⁶³

Impact Report for the Venoco Ellwood Oil Development and Pipeline (Full Field) Project, State Clearinghouse No. 2006061146, CSLC EIR No. 738, June 2008.

⁵⁸ *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal. App. 4th 70, 89-96 (city improperly deferred identification of specific mitigation measures until after completion of the CEQA process); see also *Sierra Club v. City of Tulare*, Tulare County Superior Court, #08-228122 (March 16, 2009) (mitigation measure requiring development of a plan to identify and reduce greenhouse gas emissions was inadequate “because it impermissibly defers the formulation of mitigation measure and does not include any specific performance criteria,” emphasis in original, citing *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670).

⁵⁹ Pub. Res. Code, Section 21081.6, subd. (b); CEQA Guidelines, Section 15091, subd. (d); see also *Federation of Hillside and Canyon Assocs.* (2000) 83 Cal.App.4th 1252, 1261 (general plan EIR defective where there was no substantial evidence that mitigation measures would “actually be implemented”).

⁶⁰ California Attorney General’s Office. 2009. Climate Change, the California Environmental Quality Act, and General Plan Updates: Straightforward Answers to Some Frequently Asked Questions. Page 5.

⁶¹ CAPCOA white paper at pp. 79-87.

⁶² Office of Planning and Research. 2008. CEQA AND CLIMATE CHANGE: Addressing Climate Change Through California Environmental Quality Act (CEQA) Review. Jun.

⁶³ See <http://ag.ca.gov/globalwarming/ceqa/GHGmitigation.php> (Last viewed on January 25, 2011)

Air Quality

Particulate Matter

The SWB must analyze the Project's effect on particulate matter as an air pollutant. When fewer areas are considered and protected as state wetlands pursuant to the Project, they may be filled more readily without SWB approvals under the California Porter-Cologne Act. When this occurs, winds may pick up silt, organics and other particulate matter from former wetland sites. These particulates can cause respiratory problems. Various counties within California, including Santa Barbara County⁶⁴, do not meet California state standards for particulate matter (PM10). Any increase in PM10 should be considered a significant impact as it would increase counties' non-compliance with state standards for health and air quality.

Ozone

The EIR should analyze impacts associated with ozone. The Project's proposal to redefine wetlands may facilitate urban development by removing an obstacle to growth. Urban development results in smog precursors such as NOx, leading to generation of ozone. Some California counties, including Santa Barbara County⁶⁵ do not currently meet state standards for ozone. Any increase of this problem caused by facilitating urban development should be considered significant for exacerbating non-compliance with state ozone standards.

Flooding

The EIR must analyze at a programmatic level the potential flooding threat caused by filling wetlands which would no longer be protected pursuant to the Project's new definition. Wetlands act as natural reservoirs for flood waters and help attenuate flooding; loss of wetlands therefore increases flooding. Given climate change, storm severity and flooding are expected to increase.⁶⁶ Therefore, the EIR should consider the Project's flooding impacts in light of climate change.

Hydrology and Water Quality

The EIR should programmatically analyze whether the Project will reduce water quality by reducing areas subject to protection as state wetlands. Wetlands act as natural filters which remove pollution from urban and agricultural runoff; when wetlands are removed these filters are removed and pollution increases. The EIR must therefore evaluate the Project's impacts on water quality in waterways and water bodies located downstream from wetlands.

⁶⁴ IS/EC at page 53.

⁶⁵ *Id.*

⁶⁶ DW.World.DE. August 25, 2009. <http://www.dw-world.de/dw/article/0,4598235,00.html>. Last viewed February 2, 2011.

Recreation

The EIR must programmatically assess how the Project may affect recreation in wetlands by withholding protections from one-parameter and two-parameter wetlands. Wetlands are used by the public for a variety of water-related recreational activities including bird-watching, swimming, fishing and hiking.

Land Use Planning

The EIR must analyze consistency between the Project and applicable regional plans.⁶⁷ In particular, the EIR should carefully evaluate how the Project complies with existing wetlands definitions and protections in California, and should identify inconsistencies as Land Use Planning Impacts.

As noted above, the California Coastal Act defines wetlands using a one-parameter definition.⁶⁸ The Act only allows fill and dredging of wetlands the California Coastal Zone for a very limited number of activities.⁶⁹ The Project includes the Coastal Zone, but the Project's three-parameter wetland definition is grossly inconsistent with the Coastal Act's definition. The Project's dredge and fill regulations do not include a limited set of activities in wetlands, and are inconsistent with the Coastal Act. The EIR must analyze Project consistency with the Coastal Act and must disclose any inconsistencies as Land Use Planning Impacts.

The Coastal Act requires every coastal city and county in the state to submit a Local Coastal Plan (LCP) to the CCC⁷⁰, which must be certified by the CCC as consistent with the Act before becoming effective. Santa Barbara County's 1982 Local Coastal Plan reflects the Coastal Act definition of wetlands.⁷¹ The LCP limits development according to the Act.⁷² The EIR should consider how the new State wetland definition and protection policies would comply with certified LCPs throughout the State.

Growth-Inducement

By more narrowly defining wetlands, the Project may result in a significant increase in urban growth. CEQA requires that EIRs assess growth-inducement as an

⁶⁷ CEQA Guideline Section 15125(d).

⁶⁸ Public Resources Code Section 30121.

⁶⁹ Public Resources Code Section 30233 limiting uses in coastal wetlands to (1) new or expanded port, energy and coastal dependent industrial facilities, including commercial fishing facilities; (2) maintaining existing or restoring previous depths in navigational channels; (3) boating facilities and recreational piers in open waters; (4) incidental public services such as burying cables and pipes; (5) mineral extraction (except in environmentally sensitive areas); (6) habitat restoration; and (7) nature study, and aquaculture and similar resource-dependent activities.

⁷⁰ Public Resources Code Section 30512(a).

⁷¹ Santa Barbara County LCP. 1982. Appendix A at page A-4.

⁷² Santa Barbara County LCP. 1982. Policy 9-6. Page 124.

environmental impact, including ways in which projects could foster population growth, construction of new housing, remove obstacles to development, and provide new public services which can foster additional growth and cause additional environmental impacts that must be analyzed in the EIR.⁷³ The EIR must analyze the effects of removing obstacles to growth by adopting a narrow definition of wetlands.

V. The EIR Must Evaluate Feasible Alternatives which Avoid or Substantially Lessen Significant Impacts.

The EIR must analyze the impacts of an adequate range of feasible alternatives that avoid or lessen significant impacts, such as those caused by reducing the number and extent of areas considered wetlands, and which meet most of the Project's basic objectives.⁷⁴ The Initial Study does not describe alternatives. The "Comparison of Alternatives" available on the SWB's website compares four alternatives but none include alternative wetland definitions.⁷⁵ However the Project's Technical Advisory Team evaluated nineteen candidate wetland definitions from different state and federal agencies, several of which included the one-parameter definition.⁷⁶ The one-parameter wetland definition alternative is feasible, meets the overall objective of the Project, and has the potential to avoid or substantially lessen Project impacts on a program-wide basis.

One-Parameter Wetland Definition Alternative

Defining wetlands based on the presence of one of three wetland parameters would ensure that all state wetlands and state waters will be protected, consistent with the Project purpose and underlying intent. This alternative would comply with the statutory definition of protected waters.

The One-Parameter Wetland Definition Alternative is feasible as evidenced by the fact many state, local and federal agencies, including the CCC, DFG, US Fish and Wildlife Service and SWB Regions 2 and 4, already utilize the one-parameter definition. As implied in its title, the One-Parameter Wetland Definition Alternative will include substantially more wetlands than the Project (i.e. will include one-, two- and three-parameter wetlands) and will thus protect substantially more wetlands than the Project (which protects only three-parameter wetlands). As such, the One-Parameter Wetland Definition Alternative is more consistent with the Project's underlying purpose and objective: "protect all waters of the State." This alternative also fulfills the objective of providing consistent methods to define wetland. Moreover, by retaining the one-parameter definition already used by the SWB in Regions 2 and 4, it avoids the significant impact caused by redefining wetlands in these regions to exclude, and remove protection for, one-parameter and two-parameter wetlands.

⁷³ CEQA Guidelines Section 15126.2(d)

⁷⁴ CEQA Guidelines Section 15126.6(a).

⁷⁵ http://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/wrapp/scoping_presentation.pdf at slide 25. Last viewed February 7, 2011.

⁷⁶ California Wetlands and Riparian Area Protection Policy Technical Advisory Team Technical Memorandum No. 2: Wetland Definition. Appendix A. June 25, 2009.

IV. Conclusion

In closing, the SWB must develop and analyze a policy that truly protects all “waters of the state.” The EIR must establish an accurate description of baseline conditions including existing regulatory wetland definitions, and an accurate and stable project description, and must evaluate potential environmental impacts based on substantial evidence. The EIR should always seek to first identify methods to feasibly avoid significant impacts, and should include a sufficient range of feasible, less-damaging alternatives to give the SWB options for protecting all of the public’s important wetland resources.

Thank you for the opportunity to provide you with this information. Please feel free to contact Brian Trautwein at (805) 963-1622 if you have any questions.

Sincerely,



Brian Trautwein
Environmental Analyst



Linda Krop
Chief Counsel