KAWEAH DELTA
Water Conservation
DISTRICT

Submitted electronically to: commentletters@waterboards.ca.gov

January 17, 2011

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
Post Office Box 100
Sacramento, California 95812-2000

Subject: CEQA Comments on the Wetland Area Protection Policy & Regulations

Dear Ms. Townsend:

I am writing to express my comments on the Initial Study which has been prepared under the authority of the California Environmental Quality Act (CEQA) for Phase 1 of the State Water Resources Control Board's (Board) Wetland and Riparian Area Protection Policy. The three tasks outlined in Phase 1 are: develop a definition of wetlands for California; develop a policy with a watershed-focused regulatory mechanism to protect wetlands from dredge and fill activities; and design wetland assessment methodology to monitor program effectiveness.

The Board requested comments be limited to CEQA environmental concerns. Our only comment on the scope of review of environmental issues for the EIR is that the analysis of the policy's effect on Population and Housing, Public Services, Recreation, Transportation and Infrastructure, and Utilities and Service Systems should consider the fact that added regulation, both the increased scope of regulation and the increased environmental application processing requirements (resulting in added cost and authorization time), may inhibit development in California and may negatively effect the residents of California.

Regarding the proposed policy itself, the District has commented twice before. Our comments remain the same and we have attached our July 16, 2010 comment letter which contains comprehensive, specific concerns with the policy as proposed. In summary, the District has the following overarching concerns:

1. This policy was originally proposed for regulating aquatic resources no longer regulated by the Corps. Over the past two years, the policy has grown to encompass not just resources no longer regulated by the Corps, but all waters of the State including those which remain regulated as waters of the United States. This is a serious duplication of regulatory effort which will result in considerable added processing time and cost given the inconsistencies between the Corps' program and this proposed policy (see attached July 16, 2010 letter for details on inconsistencies). These differences will also undoubtedly lead to confusion for regulated agencies and the public.

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2. We understand that this request for comments on the preparation of the Initial Study Checklist and EIR is supposed to be limited to the environmental concerns evaluated under CEQA; however, the District is concerned that there has not been enough comment on the proposed policy itself. Specifically, there is little evidence that comments thus far have been considered. The language of the proposed policy has undergone minimal public review and vetting. There have been only two rounds of "by invitation only" stakeholder meetings to discuss the details of the policy as it has developed. At these meetings the Board typically presents an overview of progress made since the last meeting and then asks for comments. There is minimal discussion of dissenting opinion between the Board staff and the commenter. The Board is certainly noting the comments, but there has been very little discussion of why any given comment is incorporated into the policy or rejected. It is the opinion of the District that the preparation of an EIR at this time is premature.

Thank you for the opportunity to provide comment. The District looks forward to continued involvement in this process.

Respectfully,

Larry Dotson
Senior Engineer

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July 16, 2010

SENT VIA EMAIIL TO: WetlandPolicyPhase1Comments@waterboards.ca.gov

State Wetland Policy Working Group
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, California 95814

Subject: Comments on Proposed Policy to Protect Wetlands and Riparian Areas

Dear Wetland Policy Working Group:

I am writing to express my comments on Phase 1 of the State Water Resources Control Board's Wetland and Riparian Area Protection Policy, as presented at the Focused Stakeholder Meeting for Regulated State and Local Agencies on June 21, 2010, and in supporting materials posted on the Board's website.

The three tasks outlined in Phase 1 are: develop a definition of wetlands for California; develop a policy with a watershed-focused regulatory mechanism to protect wetlands from dredged and fill activities; and design wetland assessment methodology to monitor program effectiveness. Staff at the June Stakeholder meeting presented the proposed Wetland Protection Policy Overview, which included the definition of wetlands, regulatory summary, and wetland monitoring and assessment framework.

Wetland Definition
As discussed at the Stakeholder meeting, the Board has proposed a definition of wetlands that reads:

> *An area is a wetland if, under normal circumstances, it (1) is saturated by ground water or inundated by shallow surface water for a duration sufficient to cause anaerobic conditions within the upper substrate; (2) exhibits hydric substrate conditions indicative of such hydrology; and (3) either lacks vegetation or the vegetation is dominated by hydrophytes.*

In order to fully appreciate the meanings of the various terms used in the definition, we reviewed the Technical Advisory Team's *Technical Memorandum No. 2: Wetland Definition*. The memo states that there will be subsequent memos addressing wetland identification and delineation.

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These subsequent memos will provide a better framework to provide comment on the implementation of the wetland definition in the field; however, we have provided comment below on the definition itself and what it might mean for practitioners and those who are regulated by the State.

It is our understanding that the purpose of the proposed policy is to recapture wetlands that the Corps no longer regulates due to recent Supreme Court cases that narrowed the Corps' authority to regulate fill activities in wetlands. Changing the federal definition goes beyond this purpose as explained below.

The Board has included non-vegetated areas within their definition of wetlands including non-vegetated playas, tidal flats, and river bars. These areas are aquatic areas that are currently considered waters of the U.S. by the Corps of Engineers and waters of the State by the Board. Changing the nomenclature of these areas to wetlands would not offer any additional protection but would cause considerable confusion by having the State call certain types of aquatic features wetlands while the Corps did not consider them to be wetlands. The Corps and EPA have a well developed delineation manual that has been tried and tested for over 20 years, which can be utilized by the Board without losing jurisdiction of these types of waters removed from federal jurisdiction by the Supreme Court.

Modifying the definition of wetlands as proposed is very likely to increase the number and size of wetlands mapped regardless of the fact that the Corps manual would be used. This would result in the need for two separate delineation maps, one for the Corps and one for the Board.

The Board's position that non-vegetated aquatic features should be classified as wetlands would be easier to understand if proposed regulation of wetlands was to be stricter than regulation of other waters of the State. However, the proposed regulatory process provides the same amount of protection to all waters of the State (as required by Porter Cologne) unlike the Clean Water Act which affords more protection to "special aquatic sites," including wetlands, than to other waters of the U.S. If there is to be equal protection of all waters of the State, why is there such concern over the classification of non-vegetated areas as wetlands?

Originally, the proposed policy was described as being needed to address only wetlands no longer regulated by the Corps (i.e. federally isolated and regulated only by the State under the authority of Porter Cologne). However, with the release of the draft regulations, it is clear that the Board's wetland policy would apply not only to non-federally regulated waters, but also to dredge and fill activities within waters of the United States regulated by the Corps and requiring a water quality certification. How can there be different wetland definitions for the same aquatic feature regulated under two sections of the same Clean Water Act?

Utilization of the Corps' definition of a wetland is a straightforward first step in outlining an approach for the State to regulate dredge and fill activities in wetland features and other waters of the State no longer regulated by the Corps. At a minimum, the Corps definition should hold for federally regulated wetlands requiring Section 401 certification. It seems only logical to

utilize the Corps' definition in order to avoid incredible confusion and considerable added applicant cost.

Proposed Regulations
The Board has released a summary of the proposed regulations governing the discharge of dredged or fill material into waters of the State (for Waste Discharge Requirements) or into waters of the United States (for Water Quality Certification). Although this summary is not the full regulatory language, it provides a starting point for review and comment.

The District strongly urges the Board to consider adopting all of the Corps' 404 exemptions; not just those related to prior converted cropland. The Corps' exemptions can be found at CFR 323.4 and include normal farming activities, maintenance activities, construction/maintenance of farm or stock ponds and irrigation ditches, maintenance of drainage ditches, construction of temporary sediment basins on a construction site, and construction/maintenance of farm, forest, and temporary mining roads.

Types of Certification/WDR
Although the regulation summary states that Certifications and Waste Discharge Permits may be issued for individual activities or for specific types or groups of activities, there needs to be much more language in the regulations about types of activities that should be permitted under general WDR/Certification. The Board should consider utilizing the Corps' existing Nationwide Permit program to help classify activities that can make use of general authorization versus needing individual authorization. The Nationwides have been written to quickly authorize activities with minimal environmental impact. They are identified by types of activities and have defined thresholds, beyond which an individual permit must be obtained. At a minimum, the Board should issue general WDRs consistent with the Nationwide permits that have been granted general Water Quality Certification (including certification without conditions, certification with conditions, and certification with conditions and notification). However, the District encourages the Board to write General WDRs/Certifications (with condition and notification if necessary) for all activities currently meeting the criteria of any of the nationwide permits. Like the Nationwide permit program that is reauthorized every five years, the Board could reevaluate their general WDRs/Certifications periodically as needed.

Additionally, the Board needs to clearly define the regulatory process for individual Certification/WDR versus the process for general permits. Assuming these general authorizations are given to projects with minimal impact (again similar to the federal Nationwide Permits), the level of review should be commensurate with the level of impacts. The General Certification/WRD process should not include an analysis of alternatives.

As an example of appropriate streamlining, most of the District's on-going, standard maintenance activities are either exempt from needing a 404 permit or fall under the authority of an existing Nationwide Permit. Examples of the District's maintenance activities and the existing Corps permit streamlining are shown in the attached *Maintenance Activity Regulatory Matrix*. This document was created to be used with the last set of Nationwide permits (which expired in 2007) but it demonstrates the regular maintenance that can be accomplished without

the Corps' review. This type of streamlining is appropriate and necessary for on-going maintenance activities and other minimal impact projects.

Alternatives Analysis

The most significant change between the proposed State regulations and the current WCR/Certification application process is the proposed requirement that the project proponent demonstrate that the project is the least environmentally damaging practical alternative. The District appreciates that the Board has borrowed heavily from the Section 404(b)(1) alternatives analysis guidelines currently used by the Corps and EPA when evaluating permit applications for discharge of dredged or fill material into waters of the United States. However there is one key difference: the Board proposes to base the analysis of alternatives on the basic project purpose rather than the overall project purpose as used by the Corps and EPA. The Corps uses the basic project purpose to determine if a project is water-dependant. If it is not, it is held to a higher standard in terms of demonstrating that there is no less environmentally damaging practicable alternative that will accomplish the project purpose. However, the Corps then uses an overall project purpose to better reflect the project's purpose and need and to identify the appropriate range of alternatives that should be evaluated. Reducing a project to its basic purpose will greatly increase the geographic scope of the range of off-site alternatives and will create many more on-site design alternatives. Most of these expanded alternatives would not meet the need of the project if the overall purpose were not considered.

In order to illustrate this point, consider the following example. A new water diversion structure is proposed in Clear Creek. The basic purpose is diversion of water. The overall purpose might be diversion of a certain volume of water to be available for use by water user groups A and B for seasonal irrigation. If we reduce the project to its basic purpose of water diversion, we must look at alternative locations to the structure that may be too far upstream or downstream to serve both water users A and B. Some alternatives may serve one or the other, but not both while other alternatives may not serve either group. Once the off-site alternatives have been dismissed, on-site design alternatives with less impact may not provide the capacity needed for both water users. Without the overall purpose, which better reflects the detail of where the project needs to be and why the project is being proposed in the first place, we unnecessarily evaluate "nonsense" alternatives that do not serve the needs of the proposed action.

Also without the detail of an overall project purpose, the correct geographic scope of review is unclear. Would the off-site alternatives be limited to the project's watershed (and if so, which level of the watershed)? Would they be limited to the region associated with the Regional Board evaluating the project? Or would the scope be as broad as the state of California?

Because the Corps' regulations clearly state that the overall project purpose shall be used to evaluate alternatives, two alternatives analyses would be required for any project with waters of the United States. Without the bounds of the overall purpose, it is quite possible that each analysis would yield a different "least environmentally damaging practicable alternative". Projects mapped with solely waters of the State are the only types of projects that would be assured of processing just one alternatives analysis. As with the definition of a wetland, it seems

logical to utilize the EPA/Corps guidelines in their entirety. These guidelines have been tested by both agencies and in the courts for nearly thirty years.

Mitigation Sequencing

The Board has stated that there is an order of preference for compensatory mitigation and that the first preference will be for on-site restoration or establishment of habitat similar to that which was impacted. Mitigation banks or in-lieu fee programs are only to be used when on-site mitigation is unavailable or insufficient. This is in conflict with the federal mitigation regulations issued in April 2008. These regulations state that mitigation banks are the first preference, in-lieu fee programs are second, and that all permittee-responsible mitigation is after banking and in-lieu fees. This kind of inconsistency will set up situations where applicants are caught in the middle of two regulatory agencies, both of whom are seeking different outcomes. It is imperative that the Board allow for flexibility in the approach to compensatory mitigation so that project specifics and well as other agency considerations can be taken into account. It is not uncommon for applicants to mitigate impacts twice – once for the Corps' needs pursuant to the Clan Water Act, and once for U.S. Fish and Wildlife Service, pursuant to the Endangered Species Act. These proposed regulations open the opportunity for a project to mitigate yet a third time to meet the needs of the Regional Board pursuant to Porter Cologne and/or the Clean Water Act.

The recent federal guidelines will help strengthen the weakest point of federal mitigation – oversight. The District feels it is not necessary to develop different mitigation requirements above and beyond the joint Corps and EPA mitigation rule.

In conclusion, the District has serious concerns that if the Board does not align their proposed regulations with the federal regulations already in place, namely the wetlands definition, use of the overall project purpose to define a reasonable range of alternatives, and additional flexibility with assessment of appropriate mitigation, applicants will be faced with two delineation maps, two alternatives analyses (that my draw different conclusions), and two mitigation and monitoring plans for what could even be two different avoidance and/or compensatory mitigation areas. This would represent incredible confusion, regulatory delay, and an unnecessary duplicative regulatory burden, especially for public entities with limited budgets.

Thank you for the opportunity to provide comment. The District looks forward to continued involvement in this process.

Respectfully,

Larry Dotson
Senior Engineer

KAWEAH DELTA Water Conservation DISTRICT

Maintenance Activities within Waters of the United States and Required Regulation Pursuant to Section 404 of the Clean Water Act

Activity	Is Activity Exempt?	Can Activity be Authorized under Non-Reporting Nationwide Permit?[1]	Can Activity be Authorized under Reporting Nationwide Permit?	Does Activity Need Individual Permit Authorization?
Mechanical removal of living and dead vegetation from channel bottom and banks (below OHW) resulting in more than incidental fallback[2]	no	Nationwide 41, provided less than 500 linear feet.[3]	Nationwide 31 or NW 41 if greater than 500 l.f..	IP if not within constraints of listed nationwides.
Mechanical removal of trash and debris below OHW resulting in more than incidental fallback	no	Nationwide 41, provided less than 500 linear feet.	NW 3 if removal is near structures. Nationwide 31. NW 41 greater than 500 l.f.	IP if not within constraints of listed nationwides.
Removal of sedimentation below OHW by bulldozer	no	NW 41, provided less than 500 linear feet.	NW 3 if removal is near structures. Nationwide 31. NW 41 greater than 500 l.f.	IP if not within constraints of listed nationwides.
Repair or replace (in-kind) structure, flow, or erosion control feature	yes			
Construction of new flow control device	yes			
Placement of new erosion control rock, structure or device	no	NW 13, provided less 500 l.f. and 1 c.y. per running foot. NW 18 if less than 10 c.y. and not in wetland.	NW 13 if greater than 500 l.f. or 1 c.y. per running foot. NW 18 if greater than 10 c.y. but less than 25 c.y., or in wetland.	IP if not within constraints of listed nationwides.
Repair or replace existing measurement structures	no	Nationwide 3 if no removal of sediment and no placement of new rock. Work must occur within 2 years of damage.	NW 3 if placing new rock to protect structure or greater than 2 years since damage.	IP if not within constraints of listed nationwides.
Construction of new measurement structures	no	Nationwide 5	NW 5 if discharging more than 10 c.y. but less than 25 c.y.	IP if not within constraints of listed nationwides.
Maintenance of existing access roads	yes			
Establishment of new access roads	no	NW 18 if less than 10 c.y. and not in wetland.	NW 18 if more than 10 c.y. or if in wetland.	IP if over 25 c.y.

[1] This matrix ran with the Nationwide Permits which expired March 18, 2007.
[2] Incidental fallback is defined as the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal.
[3] The 500 linear feet of work must be a minimum of 1000 linear feet from any other regulated activity in a given year to be considered a separate (independent) project and comply with the conditions of the non-reporting Nationwide Permit.