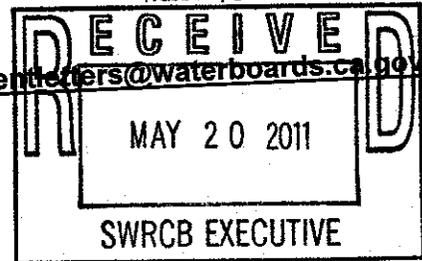


Public Cmt./Wrkshp (1/31 & 2/8)  
 CEQA Wetlands Policy & Reg  
 Deadline: 5/20/11 by 12 noon  
 manager  
 State Regulatory Affairs

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May 20, 2011

Jeanine Townsend, Clerk to the Board  
 State Water Resources Control Board  
 1001 I Street  
 Sacramento, CA 95814

RE: **Notice of Preparation of Environmental Impact Report / Initial Study Checklist for the Wetland Area Protection Policy and Dredge and Fill Regulations**

Dear Board Members:

Sempra Utilities (Southern California Gas Company and San Diego Gas and Electric Company) provides essential public services (electric and/ or gas transmission and distribution) to over 20 million consumers and utility rate payers in a total service area of over 25,000 square miles. In addition to providing essential public services to the communities that they serve, we also provide services to governmental agencies and other entities, which in turn, provide other essential public services such as fire protection, law enforcement, and emergency care (e.g., hospitals).

Thank you for the opportunity to comment on the Notice of Preparation of Environmental Impact Report / Initial Study Checklist for the Wetland Area Protection Policy and Dredge and Fill Regulations (the "Wetland Proposal" or "Project"). This letter raises significant concerns in connection with the wetland definition proposed by the State Water Resources Control Board ("State Board") in the Wetland Proposal. This proposal is centered on a new State definition for the delineation and regulation of wetland areas in California. If adopted, the proposed wetland definition, and its associated regulatory program would introduce significant complexity, cost, and confusion to the regulated community in California and negatively affect future investment and impact economic development in the State.

We provide the following comments on the State Board's Wetland Proposal:

**Project Goes Beyond Filling the Gap**

The Initial Study (IS) states (pg. 2) that the "The Project ... is intended to fill the gaps currently caused by the separate federal and State regulations and programs by consolidating existing Water Board requirements in a coordinated framework. However, it appears to do more than just fill the gaps and actually expands the requirements that have been applied to federal and state waters. Several examples of this expansion in the IS include:

- ◆ The IS identifies two different project purposes – one that protects "all waters", including wetlands (pg. 2) and the other that protects "beneficial uses", including wetlands (pg 22). Not only are these two purposes different from one another, they also go above and beyond "filling the gap" that was left by SWANCC related to isolated waters.
- ◆ The IS includes statements within the Biological Resources section in the response to:

- Questions a-c), which state: "This Project is intended to ensure the protection of special status species and sensitive habitat, including riparian and wetland areas"; and
- Question d), which states: "This Project is intended to protect resident and transient wildlife associated with the aquatic ecosystem..."

Because the State Board does not have jurisdiction over special status species or riparian areas, this would expand the requirements beyond those that have been applied to federal and state waters.

- ◆ The IS's inclusion of riparian areas and protection of wildlife suggest expansion of State Board's regulatory oversight as these resources have been historically regulated, on a state level, by the California Department of Fish & Game (DF&G). Including these components in the project description brings into question whether the DF&G should be the lead agency for the CEQA analysis instead of the State Board.

### **Proposed Wetland Definition Would Introduce Significant Regulatory Uncertainty by Creating a Dueling Definition to that Used by the Federal Government**

The most concerning aspect of the proposal is the rejection of the wetland definition used by the federal government for nearly twenty-five years for a new, alternative definition that would be used to define, delineate, and regulate "State" wetlands. In addition to extending State regulation to "isolated" wetlands, the proposed definition departs from the long-standing technical delineation criteria developed by the United States Army Corps of Engineers ("USACE") and the United States Environmental Protection Agency ("EPA") in several critical aspects. The State Board's proposed definition would:

1. Extend regulation of State wetlands to areas that are barren and lack any vegetation, whereas the federal definition is limited to areas dominated by wetland species;
2. Abandon the hydric soil requirement used for in the federal definition and instead define a wetland as including any saturated "substrate," whether consisting of soil or not; and
3. According to documents prepared by the Technical Advisory Team tasked by the State Board with developing the proposed wetland definition, the hydrology criteria would be satisfied under the proposed definition if an area is saturated for 7 days annually. The federal criteria, in contrast, generally require saturated conditions for at least 14 days annually.

The Project attempts to support the inclusion of riparian areas by identifying them in Table 2 as certain "isolated" waters that fell outside of the USACE jurisdiction as a result of the SWANCC decision. Typically, the USACE jurisdiction did not and does not extend to riparian (i.e., streamside) areas and this should be revised to reflect USACE practice.

The SWRCB has frequently referred to the "no net loss" objective in Governor Wilson's Executive Order W-59-93 ("Order") and the California Wetlands Conservation Policy ("Policy") as a fundamental basis for its development of the WRAPP. However, this "no net loss" objective is but one of three equally important objectives set forth in both this Order and Policy. Another express objective of the Order and Policy is to "reduce procedural complexity in the administration of State and Federal wetlands conservation programs." However, adopting a wetland definition inconsistent with the accepted federal approach for delineating wetlands will result in additional complication in an already complex regulatory-field, increase the burden and cost of regulatory compliance for private and public property owners, and reduce new investment in the State. As such, it would undermine the "reduce procedural complexity" objective in both the Order and Policy, which is not permitted by either directive. For example, two separate regulatory definitions would result in dueling definitions between the State and federal government, and require that property owners in California delineate State and federal wetlands separately on project sites. Multiple regulatory requirements for wetland issues and the need to delineate federal and State wetlands separately on project sites will increase the cost of

construction and real estate in California. It is likely that a number of projects would require separate permits from the State Board and federal government, oversight by both State and federal regulatory agencies during construction, and compliance with a different set of requirements for dredge and fill activities and any required mitigation on different portions of a project-site subject to the federal versus the State definition. As a result, the proposal would significantly increase the cost and complexity of development at the very point when the economy in California is recovering from a recession.

### **The Wetland Proposal Does Not Adequately Explain Why Use of the Federal Wetland Definition is Not Feasible**

The proposed definition also departs from the specific direction given to staff by the State Board in 2008. In tasking staff with preparing a policy to protect State wetlands from dredge and fill activities, including consideration of a State wetland definition, the State Board directed the Development Team to:

[D]evelop and bring forward for State Water Board consideration:  a wetland definition that would reliably define the diverse array of California wetlands based on the United States Army Corps of Engineers' wetland delineation methods to the extent feasible ...

State Board Resolution 2008-0026 (emphasis added). Pursuant to Resolution 2008-0026, staff was directed not to depart from the existing federal definition of wetlands *unless it was determined that it was not feasible to use it*. The EIR, however, provides no meaningful discussion justifying the abandonment of the federal wetland definition for the proposed alternative definition. As such, the EIR fails to provide an explanation of why adoption of the federal wetland definition by the State Board is not feasible to meet the goals identified in Resolution 2008-0026. **The Project's definition of wetlands needs to use the definition that has historically been used by the USACE.**

### **Creation of a State Regulatory Program for Wetlands – With a New, Independent Wetland Definition – Will Require Substantial Resources at a Time of Limited Government Funding**

In addition to the negative impact on economic development, adoption of a new wetland definition would require substantial cost to implement by the State Board (and Regional Boards) at a time of significant cuts in government programs and funding. In the past, the State has relied upon the Section 401 certification program in the Clean Water Act for many permitting decisions, with the USACE taking the lead on permitting decisions and shouldering the regulatory costs. If the new definition is adopted, the State would be required to review and process numerous permits relevant to projects, or portions of projects that do not meet the federal criteria, but meet only the State wetland criteria. The State and Regional Boards would also need to develop and provide regulatory guidance and compliance assistance in connection with the new wetland definition. There is also a near certainty of significant litigation over the scope of the new wetland definition, which could result in substantial cost to the State and distract limited regulatory resources from existing commitments such as the cleanup of contaminated groundwater sites.

### **The Wetland Proposal Fails to Provide Adequate Analysis to Support the Necessity for Creation of a Broad, New State Wetland Program**

Before implementing a broad, new regulatory program, we urge the State Board to conduct further investigation and provide additional analysis to determine whether there is, in fact, a need for the State to adopt a wetland definition inconsistent with the definition used by the federal government. Wetlands in California are already subject to strict protection under the federal Clean Water Act and existing State law, regulatory programs, and executive orders. To the extent the State Board identifies a need in the future for California to regulate wetlands beyond these existing regulatory programs, the State Board should limit the expansion of any new regulatory program to an extension of the existing federal definition of wetlands over "isolated" state waters.

To justify the need for a new wetland definition, the Wetland Proposal states a goal of "uniformly" protecting all waters of the State. The EIR seeks to justify the adoption of additional regulation by citing the "diminishing jurisdiction of the federal government" in regulating wetlands under the Clean Water Act and the "documented historic losses of aquatic resources." The EIR, however, fails to provide relevant analysis or information to support the need for the Wetland Proposal – or any increased regulation of wetlands – or the conclusion that wetland resources are disappearing at a material rate today.

The EIR does not cite to studies, or otherwise provide data showing that the current regulation of wetlands in the State, as of 2011, is inadequate or allowing for a material loss of wetland resources. The conclusion that California is "losing" wetlands is supported by citations to only two studies: (1) a 1990 study performed by the U.S. Fish and Wildlife Service indicating that up to 91 percent of historic wetland acreage in California had been lost by the late 1980s, and (2) a 1994 Coastal Commission Study finding that wetland loss has varied by region. These reports are irrelevant and inadequate to determine whether the existing regulation of wetlands in California is lacking or whether wetland acreage is currently decreasing. Both of the reports were generated more than fifteen years ago. The time-periods examined by the reports pre-date adoption of the 1993 California State Wetland Conservation Policy, and largely characterize wetland loss that occurred prior to implementation of the Clean Water Act Section 404 program by the United States. For example, the 1990 study evaluated wetland changes in California between the late 1700s and the late 1980s. Widespread protection of wetlands under the federal Clean Water Act did not begin until the mid-1980s. In order to justify a burdensome new regulatory program related to wetlands, the State Board needs to document that the current system for protecting wetlands has failed and, without a specific change, identifiable losses of wetlands will occur. This type of analysis is not included in the EIR.

### **The Wetland Proposal Fails to Justify Why Duplicative Regulation of Wetlands Subject to Federal Regulation is Justified or Necessary**

According to the EIR, the predominant purpose of the proposed wetland definition is to extend California's regulation of wetlands to "isolated" wetlands that the federal government may be unable to regulate under the Clean Water Act following the U.S. Supreme Court decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corp of Engineers (SWANCC)* and *Rapanos v. United States*. The EIR, however, provides no analysis of whether any change in the scope of federal jurisdiction attributable to the *Rapanos* or *SWANCC* decision resulted in any identifiable and material impact on the protection and health of wetlands in California. Since it has now been a decade since the Supreme Court's *SWANCC* decision, any resulting deleterious impact to State wetlands should be observable, but such analysis is not included in the EIR.

Furthermore, the EPA and USACE proposed new guidance on the scope of federal Clean Water Act jurisdiction over wetlands in a May 2, 2011 Federal Register notice that may obviate any arguable need for State regulation post-*Rapanos*. According to the Notice, the proposed guidance is intended to address the *SWANCC* and *Rapanos* decisions and, as a result of the new guidance, the "number of waters identified as protected by the Clean Water Act will increase compared to current practice ..." In addition, the Notice also indicates that the federal agencies intend to promptly initiate a rulemaking to amend the federal definition of "waters of the United States." Rather than spend scarce State resources to develop and implement an expansive new regulatory program, the State Board should withdraw the proposed wetland definition and allow the federal government to finalize its new Clean Water rule. Because the new rule will likely influence or resolve many of the issues driving the State Board's consideration of a State program to address wetlands following the *Rapanos* and *SWANCC* decisions, adoption of a costly, complex, and duplicative State regulatory program may be unnecessary.

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For these reasons, Sempra Utilities requests that the State Board reject any State definition of wetlands that departs from, or conflicts with the long-standing federal wetland delineation criteria. To the extent the State Board is determined to move forward with a State wetland definition, we ask that any action be delayed until

after the EPA and USACE finalize a federal rule on this subject and until an evaluation of the basis and need for an additional, potentially duplicative State program is performed by the State Board. In such case, however, the State Board should withdraw the proposed State wetland definition pending finalization of the federal rule and further investigation because the regulatory uncertainty associated with the potential definition is already causing confusion among stakeholders and the potential for increased costs and delay in projects.

Yours sincerely,

*Tamara Rasberry*