3/18/08 Bd. Mtg. Item 11
Wetlands & Riparian Areas
Deadline: 3/5/08 by 12 p.m.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

MAR 4 2008

Dorothy Rice
Executive Director
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Subject: Comments on State Water Board Policy to Protect Wetlands and Riparian Areas

Dear Ms. Rice:

Thank you for the opportunity to review and comment on the proposed resolution to adopt a statewide policy to protect wetlands and riparian areas. The U.S. Environmental Protection Agency (EPA) strongly supports adoption of the new policy to ensure all California waters are afforded a high level of comprehensive protection. The policy direction contained in the draft State Board resolution will enable the State Board and Regional Boards to provide consistent, effective protection of highly valuable stream, wetland, and riparian resources. We urge the Board to proceed with development of the policy.

We are pleased the State Board is collaborating with the Regional Water Boards to develop policies to protect wetlands, stream courses, and riparian resources. Over the past three years, EPA Region 9 has supported the formulation of stream and wetland protection policies by the North Coast and San Francisco Bay Regions and provided more than $1 million in wetlands program development grant support for those efforts. We believe the State and Regional Board policy efforts are complementary and should each proceed as discussed in the proposed resolution.

Please consider the following comments as you proceed with policy development.

Wetland Definition

Since the 2001 U.S. Supreme Court ruling in *Solid Waste Agency of Northern Cook County vs. U.S. Army Corps of Engineers* (known as the *SWANCC* decision), there has been uncertainty concerning the scope of federal authority under the Clean Water Act (CWA). More recently, in 2006, the Supreme Court's ruling in *Rapanos vs. United States* created additional uncertainty concerning CWA jurisdiction. In the wake of the *SWANCC* and *Rapanos* rulings, wetlands and other waters that are "geographically isolated" from navigable waterways or that lack a

"significant nexus" to navigable waters may no longer be protected under the CWA. We commend the State Board for developing approaches to protect waters and wetlands that would no longer be subject to federal jurisdiction.

Isolated wetland systems support high levels of biodiversity, including a significant number of at-risk species and plant communities. According to a study completed by Comer, et al. (2005), there are more than 13 wetland ecological systems within California that occur in partial or total isolation from other water bodies. These include the Northern California Claypan and Volcanic Vernal Pools, the South Coastal California Vernal Pools, Central Valley Alkali Sinks and the California Mediterranean Alkali Marshes. Of all regions of the country, the Pacific Coast region contains the largest number of at-risk species (15) that depend upon isolated wetlands for all or part of their life cycles, including ten species that are listed under the Endangered Species Act (ESA). California has by far the largest number of at-risk plant species occurring within isolated wetlands (104) including 34 plant species listed under ESA.

Equally important, California's networks of headwater streams and, in drier parts of the State, ephemeral streams, are at risk of losing protection under the CWA. Although headwater streams are the smallest streams within a watershed, they critically influence the character and quality of downstream waters. Headwater streams recycle nutrients, mitigate flooding, maintain water quality and provide a crucial linkage between aquatic and terrestrial ecosystems (see JAWRA, 2007). Ephemeral and intermittent streams in the arid southwest are similarly important due to their vital ecological functions and contributions to downstream ecological heath and water quality (see Lewick, et al, 2007). Headwater and ephemeral streams make up at least 80% of the waters of the State and should be fully protected.

Many states, including California, have traditionally taken a broad approach to defining "waters of the state" to meet the goals of the CWA and associated State statutes. In addition to wetlands and waters subject to federal jurisdiction, state jurisdictional definitions often include isolated wetlands, seasonal wetlands, ephemeral streams, riparian areas, floodplains, and vegetated buffer areas. The new California policy should include definitions that provide for broad protection of these resources.

EPA and the Corps have long relied upon the Corps' 1977 wetland definition and 1987 *Wetlands Delineation Manual* to identify and delineate wetlands subject to the regulatory requirements of the CWA. The Corps wetland definition requires the presence of wetland hydrology, hydric soils and hydrophytic vegetation to establish federal jurisdiction. Since 1987, numerous technical documents, guidance, and training courses have been developed to support wetland delineation using the Corps manual. In December 2006, the Corps published an Interim Supplement to 1987 Delineation Manual for the Arid West Region that includes most of Central and Southern California. The Regional Supplement was developed to address regional wetland characteristics and improve the accuracy and efficiency of wetland-delineation procedures.

Because the extensive guidance and field experience already exist to support use of the Corps definition and 1987 Corps manual, we support adoption of a State wetland definition based upon

this approach. However, we recognize that some important types of wetlands that occur within California (such as mudflats, sandbars, and seasonal wetlands) do not exhibit all three wetland attributes. For this reason, the State should consider adopting a wetland definition and associated policy that protect wetland classes the three-attribute federal approach does not protect. This goal can be accomplished by adopting a wetland definition that asserts State jurisdiction based on the presence of two out of three attributes measured through Corps delineation practices. This approach would be scientifically defensible (see Cowardin, et al., 1979) and consistent with the approach used by other resource agencies (e.g. U.S. Fish and Wildlife Service) to classify protected wetlands. Through this approach, the State can define "waters of the state" using the same methods used to identify "waters of the U.S." but include important classes of wetlands warranting protection that would not meet the federal three-parameter test.

404 (b)(1) Guidelines

We support a policy that is based on the 404(b)(1) Guidelines (Guidelines) contained at 40 CFR 230.10(a) of the CWA. The Guidelines are a series of independent tests that the Army Corps of Engineers (Corps) and EPA use to evaluate Section 404 permit applications. The fundamental principle of the Guidelines is that discharges of dredged or fill material into waters or wetlands should not occur unless it can be demonstrated that such discharges, either individually or cumulatively, will not result in unacceptable adverse effects on the aquatic ecosystem. Since the burden for demonstrating compliance with the Guidelines relies solely on the permit applicant, adopting the Guidelines at the State and Regional level will promote consistency between state and federal requirements and streamline the regulatory process.

Watershed Approach

Since 1991, EPA has actively promoted the watershed approach to address priority water quality protection goals. In 2007, EPA and the Corps proposed regulations that promote a watershed-based approach to compensatory mitigation under CWA Section 404. Applying the watershed approach to regulatory decision-making will help to maintain and improve the quantity and quality of wetlands and other aquatic resources in watersheds through strategic selection of compensatory mitigation project sites. Incorporating the watershed approach into the State policy would be consistent with federal policy and would help promote consistency in mitigation requirements between State Section 401 certification and federal Section 404 permit provisions.

Monitoring Wetland Condition and Function

We are pleased Phase I of the policy will include guidance on tracking wetland condition and function. Monitoring wetland condition and function will allow water resource managers to more effectively manage watershed impacts, select and prioritize wetlands and watersheds for restoration and protect existing high-functioning wetland and aquatic resources from future degradation.

EPA Region 9 has strongly supported enhanced wetland monitoring and tracking in California. We have provided more than $ 1.5 million in grant and contract funds to support development and implementation of the California Rapid Assessment Methodology (CRAM) and the GIS-based Wetland Tracker database. By specifically endorsing use of CRAM, other established wetland monitoring methods, and the Wetland Tracker database, the State policy will greatly improve wetland monitoring and assessment efforts across the state.

We look forward to continuing our work with the State and Regional Boards to provide comprehensive protection of California's important wetland and riparian resources. If you have questions concerning these comments, please contact David Smith, Chief of the Wetlands Regulatory Review Office, at (415) 972-3464.

Sincerely,

4 March 2008

Alexis Strauss, Director
Water Division

cc: Jeanine Townsend, Clerk to the Board

References

Comer, et al. (2005). Biodiversity Values of Geographically Isolated Wetlands in the United States. NatureServe, 2005.

Cowardin, et al. (1979). Classification of Wetlands and Deepwater Habitats of the United States. U.S. Department of the Interior, Fish and Wildlife Service, FWS/OBS-79/31, December, 1979.

JAWRA (2007). Featured Collection on Headwater Connectivity. Vol. 43, No. 1. February, 2007.

Levick, et. al (2007), Hydrology and Ecology of Intermittent Stream and Dry Wash Ecosystems, U.S. Department of Agriculture, Agricultural Research Service (ARS/218464) and U.S. Environmental Protection Agency, Office of Research and Development (EPA/600/R-07/142), December 2007.