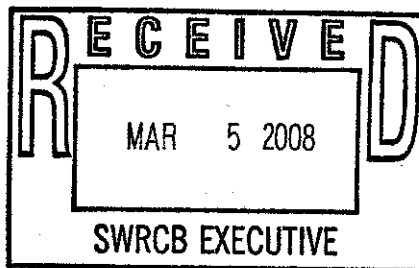




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3/18/08 Bd. Mtg. Item 11
Wetlands & Riparian Areas
Deadline: 3/5/08 by 12 p.m.



March 5th, 2008

Ms. Tam Doduc, Chair
Board Members
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Re: Comment Letter – Policy to Protect Wetlands and Riparian Areas

Dear Ms. Doduc and Board Members:

Thank you for allowing Defenders of Wildlife the opportunity to comment on the Policy to Protect Wetlands and Riparian Areas (“Policy”). We commend the State Water Resources Control Board (“Board”) for its effort to expand the scope and strength of California’s wetland protections.

As the Board is aware, federal jurisdiction over wetlands has been severely limited in recent years resulting from the U.S. Supreme Court decisions in *SWANCC v. U.S. Army Corps of Engineers* and *Rapanos v. United States*. *SWANCC* revoked federal jurisdiction over so-called “isolated waters”, explicitly invalidating the migratory bird rule, which had allowed the U.S. Army Corps of Engineers (“USACE”) to assert jurisdiction over wetlands used as habitat by migratory birds. The *Rapanos* decision further limited federal jurisdiction to only those wetlands which are adjacent to or have a significant nexus to traditionally navigable waters. These Supreme Court decisions have removed from federal jurisdiction several important wetland types, including riparian habitat and vernal pools. The USACE is still grappling with these decisions and attempting to draft a guidance document which is compliant with their mandates (see attached comments on the USACE’s *Rapanos* Guidance).

Vernal pools, swales, marshes and some riparian habitat are among the wetland types now vulnerable to alteration or development due to limited federal jurisdiction. Over 225 species of birds, mammals, reptiles, and amphibians depend upon California’s riparian habitats alone.¹ Vernal pool habitat, of which over 90 percent has been lost in California, is home to 20 federally listed species, including 10 endangered plants, 5 threatened plants, 3 endangered animals, and 2 threatened animals.²

With federal jurisdiction severely curtailed, the Board now effectively serves as the backstop to further development and appropriation of wetland habitat. We applaud the Board’s

¹ Knopf, F. R., R. R. Johnson, T. Rich, F. B. Samson, and R.C. Szaro. 1988. Conservation of riparian ecosystems in the United States. *Wilson Bull.*, 100(2), 1988, pp. 272-284.

² Leong, J.M., and Thorp, R.W., 2005. Bee Diversity Associated with *Limnanthes* Floral Patches in California Vernal Pool Habitats. USDA Forest Service Gen. Tech. Rep. PSW-GTR-195. 2005, p. 267.

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determination and effort to create a comprehensive policy to protect wetlands. We hope the Board will call upon our organization as a resource and as a stakeholder throughout the development of this phased approach.

In summary, we make the following recommendations:

1. The Board's Phase I wetland definition should include the entire suite of California wetlands and reflect the U.S. Fish and Wildlife Service's "one parameter" approach.
2. The Board should focus its Phase II framework for protecting water quality and beneficial uses on avoidance rather than minimization and mitigation.
3. The Board should use a watershed approach and consider cumulative impacts.
4. The Board should complete all three phases of the policy in an expeditious manner and determine interim procedures to protect wetlands while the policy is in development.

A Broad Wetland Definition Based on the "One Parameter" Approach

The Board is fully authorized under California law to create a broad definition of wetlands. The Water Code defines waters of the state, over which the Board has regulatory jurisdiction, as "any surface water or groundwater, including saline waters, within the boundaries of the state." Cal. Water Code § 13050(e). Although the Board has this broad mandate under statute, the draft resolution states that the Board would rely on the USACE wetland definition "to the extent feasible". We urge the Board to remove this language. As stated above, federal jurisdiction over wetlands has been severely limited, and therefore relying on the federal wetland definition to any extent contradicts the goal of creating comprehensive protections.

In order to protect and restore the physical characteristics of stream and wetland systems, including their connectivity and natural hydrologic regimes, the SWRCB must adopt expansive definitions for wetlands and streams. The SWRCB should not adopt the U.S. Army Corps of Engineers' (ACOE) wetland definition, which requires *three* parameters (wetland vegetation, hydric soils, and wetland hydrology). Unfortunately, the ACOE definition fails to capture key wetlands in infrequently flooded or saturated wetlands such as flats, playas, riparian zones, and some depressional wetlands, which lack wetland vegetation. Characteristic soils may also be lacking. This is true for wetlands subject to significant long-term surface water or ground water fluctuations. Thus, the ACOE definition is too narrow and would not adequately protect all "waters of the state."

Instead, the SWRCB should pursue a broader definition that protects the full range of California's wetlands, explicitly including seasonal and intermittent wetlands no longer protected by the USACE. Thus, we urge the SWRCB to adopt the U.S. Fish and Wildlife Service (USFWS) definition of wetlands, which requires only *one* parameter. This definition states:

Wetlands are lands transitional between terrestrial and aquatic

systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this classification, wetlands must have one or more of the following three attributes: (1) at least periodically, the land supports hydrophytes, (2) the substrate is predominantly undrained hydric soil; and (3) the substrate is non-soil and is saturated with water or covered by shallow water at some time during the growing season of each year.

The USFWS definition includes swamps, freshwater, brackish water, and saltwater marshes, Bogs, vernal pools, periodically inundated saltflats, intertidal mudflats, wet meadows, wet Pastures, springs and seeps, portions of lakes, ponds, rivers and streams, and all other areas which are periodically or permanently covered by shallow water, or dominated by hydrophytic vegetation, or in which the soils are predominantly hydric in nature.

Avoidance Over Minimization and Mitigation

The Board should focus the thrust of the Policy on avoidance of wetland impacts rather than minimization or mitigation of impacts. With an estimated 10% or less of the state's original wetlands left intact, it is essential that avoidance of impacts be the Board's first priority. Mitigation and minimization often result in highly fragmented "postage stamp" wetland preserves that are difficult to manage. Wetlands created pursuant to mitigation plans do not retain even a semblance of the hydrological features, vegetation types, and habitat values of original wetlands. Mitigation often also fails to consider watershed function, particularly the hydrological complexities and movement of pollutants through watersheds. Mitigation wetlands are often designed "too wet" and translocation of species to populate these wetlands often is ineffective.

The Board should permit mitigation only when appropriate development is approved and to comply with the no-net-loss mandate. In the rare case that the Board must allow mitigation, it should require in-kind mitigation, meaning that the project proponent must restore the same type of wetland that was appropriated. Out-of-kind mitigation may include the creation of a "generic" wetland that does not provide the same hydrological function, vegetation types, or habitat as the original wetland. The Board should not allow out-of-kind mitigation.

Consideration of Cumulative Impacts and Use of a Watershed Approach

Cumulative impacts are the combined, incremental effects of various development projects. These impacts accumulate over time, from one or more sources, and can result in the degradation of wetland resources due to multiple development projects in an area. Cumulative impacts, if left unaddressed, could lead to wholesale appropriation of entire wetland systems in the state.

For that reason, it is imperative that the Board use a watershed approach. Under such an approach the Board would assess wetland values across an entire spectrum of characteristics, including hydrophytic vegetation types, soil types, degree of saturation, pollutant transport, hydrological connections to groundwater, and streamflow from adjacent tributaries. It is crucial

that the Board streamline its regulatory functions relating to both water rights and water quality to accomplish this assessment.

We commend the Board for including a monitoring component under Phase I. A robust monitoring system, using all the variables included above, will greatly assist the Board in protecting all of the beneficial uses associated with wetlands.

Timely Completion of All Three Phases and

The Board should tighten up its timeline for completion of the three-phased policy. The Policy includes an estimated completion date for Phase I (mid-2009), but not for Phases II and III. It is crucial that the Board complete and implement this wetland protection policy as quickly as possible. Due to the new federal jurisdiction rules, the USACE is declining to assert jurisdiction on many development projects and allowing applicants to move forward without a Clean Water Act section 404(b) permit. If the Board is to serve as an effective backstop to the federal government, it must act quickly to regulate these applicants through the section 401 water quality certification process and the WDR permitting process. The Board should set up interim procedures for protecting wetlands using these processes *before* the final three-phased Policy is complete.

The North Coast and San Francisco Bay Regional Water Quality Control Boards ("Regional Boards 1 and 2") are currently developing their own wetlands policy, which will be implemented through the inclusion of new beneficial uses in their Basin Plans. The Board should allow Regional Boards 1 and 2 to move forward with these efforts, but should also ensure consistency among all of the Regional Boards. Regional Boards 1 and 2 may begin adopting the new rules into their Basin Plans in the fall of 2008. However, under the current timeline the Board would not even have a wetland definition completed until mid-2009. The Board should set timelines for all three Phases of the Policy and ensure consistency among the Regional Boards.

Defenders of Wildlife appreciates the opportunity to submit these comments. We strongly support the Board's mission to preserve, enhance and restore the quality of California's water resources. We look forward to assisting in the development of this Policy and to seeing it successfully protect California's remaining wetlands.

Sincerely,

Joshua Basofin
California Representative
Defenders of Wildlife



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January 21st, 2008

Mr. Benjamin H. Grumbles
Assistant Administrator for Water
U.S. Environmental Protection Agency

Mr. John Paul Woodley, Jr.
Assistant Secretary of the Army
(Civil Works)
Department of the Army

Water Docket
Environmental Protection Agency
Mailcode: 2822T
1200 Pennsylvania Ave., NW.
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OW-2007-0282

Dear Mr. Grumbles and Mr. Woodley:

This letter is submitted as the comments of Defenders of Wildlife regarding the U.S. Army Corps of Engineers (“USACE”) and U.S. Environmental Protection Agency (“USEPA”) guidance regarding “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* and *Carabell v. United States*” (“*Rapanos* Guidance”). EPA and USACE guidance and practice should offer the broadest possible protections for the nation’s waters. We urge the agencies to withdraw the *Rapanos* Guidance document and amend it to meet the purposes and policy of the Clean Water Act.

In summary, we make the following recommendations:

1. USACE and USEPA (“the agencies”) should continue to follow the two binding legal principles articulated in *Rapanos*. In this instance, five Justices have subscribed to the following principles:
 - a. The agencies should assert jurisdiction over wetlands that directly abut non-navigable tributaries of traditionally navigable waters (“TNWs”) that are relatively permanent. The guidance should clarify that this standard is satisfied by adjacency to a TNW rather than a “navigable-in-fact” water. “Navigable-in-fact” is a narrower definition of jurisdictional waters than “traditionally navigable.”

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- b. The agencies should conduct a case-by-case determination (using the “significant nexus” analysis) for non-relatively permanent tributaries and adjacent wetlands which have characteristics that may significantly affect TNWs and may create categories which are presumed to be jurisdictional.
2. USACE should amend its Approved Jurisdictional Determination Form (“Approved JD Form”) to broaden the scope of the “significant nexus” analysis to entire watersheds, rather than each individual RPW. The “significant nexus” standard articulated by Justice Kennedy in *Rapanos* simply requires that “the wetlands, *either alone or in combination with similarly situated lands in the region*, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable’ (emphasis added)” for a significant nexus to be found. *Rapanos v. United States*, 126 S.Ct. 2208, 2248 (2006). This finding can and should be made at the watershed level.
3. USACE should amend its Approved JD Form to include a cumulative impacts analysis. Such an analysis, in addition to the watershed approach referenced above, is entirely compliant with the significant nexus standard articulated by Justice Kennedy in *Rapanos*. USACE’s current analysis directly contradicts the “No Net Loss of Wetlands” policy espoused by every federal administration since 1988. By using a stream-by-stream approach, rather than a watershed approach, the current analysis disconnects wetlands and speeds their transformation into developed areas.
4. USACE should rewrite its Approved JD Form to eliminate confusing instructions and questions which field staff are unable to answer due to insufficient training and knowledge. USACE should also include methodology and threshold standards for questions involving water quality impairments, water flows and habitat values.
5. USACE should implement a scientific review of the Approved JD Form by the National Academies of Science. Additionally, USACE should seek a scientific review of data collected for use in jurisdictional determinations. Such a review will ensure that scientific data is collected and analyzed correctly to determine the existence or absence of a significant nexus.

Adhering to the Binding Legal Principles in Rapanos

33 C.F.R. 329(4) provides the appropriate definition for TNWs. That section defines “navigable waters” as those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity.” The *Rapanos* Guidance explicitly states that the agencies shall continue using the section 329(4) definition for TNWs.

The “navigable-in-fact” standard, however, is a narrower one and should not be used in delineations. A water body which is navigable-in-fact must be susceptible to transportation

presently, and therefore does not benefit from section 329(4)'s application to previously navigable water bodies which are currently impeded. This distinction is crucial, particularly in Western states where obstructions such as dams and onstream reservoirs are commonplace.

As noted above, the appropriate threshold for jurisdiction under the Scalia standard is a wetland's adjacency to a TNW, not a "navigable-in-fact" water. Jurisdiction over a TNW, and by extension an RPW, is not extinguished by later actions or events on the water body which impede or destroy navigable capacity. 33 C.F.R. Part 329(4). Therefore, the following types of obstructions and impediments commonly found on Western streams and tributaries should not affect individual jurisdictional determinations: dams, onstream reservoirs, levees, bridges, culverts, roads, pipeline crossings, and weirs.

Broadening the scope of the Approved JD Form to Incorporate a Watershed Approach

The agencies should rewrite the *Rapanos* Guidance to ensure that protection of our nation's waters remains a high priority. The current version uses a significant nexus analysis that unnecessarily and injuriously disconnects entire watersheds. Questions and directions on the Approved JD Form such as the ones below involve far more detail than is necessary to determine a significant nexus.

TNWs and Adjacent Wetlands. Check all that apply and provide size estimates in review area:
TNWs: _____ linear feet _____ width (ft), Or, _____ acres.
Wetlands adjacent to TNWs: _____ acres.

RPWs that flow directly or indirectly into TNWs.

Tributaries of TNWs where tributaries typically flow year-round are jurisdictional. Provide data and rationale indicating that tributary is perennial:

Tributaries of TNW where tributaries have continuous flow "seasonally" (e.g., typically three months each year) are jurisdictional. Data supporting this conclusion is provided at Section III.B. Provide rationale indicating that tributary flows seasonally:

When an agency staff person conducts a field investigation, questions such as these require following a 1st order stream down a slope until it meets 2nd, 3rd and 4th order streams. The staff person must sometimes fixate on streams of only a few hundred feet in length, following them down the watershed until reaching an RPW that displays the characteristics necessary to establish a significant nexus. Such an approach is disjointed and will eventually wreak havoc on our remaining wetland systems. As these streams, tributaries and wetlands become disconnected from one another, the watershed's overall value and the ability of wetlands to function will be severely compromised. This disconnection will impair the wetland's ability to provide ecosystem services such as trapping and assimilating pollutants, protecting against floods, and creating habitat for migratory birds and aquatic species.

Indeed, USACE's use of this confusing matrix for significant nexus determinations is perplexing. Nothing in Justice Kennedy's concurring opinion requires that the agencies limit their inquiry to individual waters. Justice Kennedy's standard simply requires that "the wetlands, *either alone or in combination with similarly situated lands in the region*, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable' (emphasis added)" for a significant nexus to be found. Thus, the standard expressly allows for a watershed approach by incorporating similarly situated lands into

the analysis. USACE staff need not analyze each water in isolation, but rather should assess the entire watershed.

Including a Cumulative Impacts Analysis in the Approved JD Form

Similarly, the current stream-by-stream piecemeal approach stipulated in the *Rapanos* Guidance and Approved JD Form for determining significant nexus will almost certainly lead to *significant* cumulative impacts. Cumulative impacts are the combined, incremental effects of various development projects. These impacts accumulate over time, from one or more sources, and can result in the degradation of wetland resources due to multiple development projects in an area. The *Rapanos* Guidance omits any mention of cumulative impacts. This is unacceptable.

The field investigation required by the current Approved JD Form will lead to multiple cumulative impacts. First, USACE field staff must traverse a watershed in search of RPWs, discounting 1st order streams with more ephemeral flows (though such streams might well affect the integrity of the downstream TNW, as Justice Kennedy foresaw). Second, these discounted streams would be severed from the jurisdictional watershed. Third, the absence of those 1st order streams, together with permitted fill on jurisdictional wetlands, would impact the biological functions of the watershed. And fourth, this significant nexus analysis would likely be used for future jurisdictional determinations, creating a domino effect in which stream after stream is severed, breaking the watershed into disconnected pieces that could not meet even the significant nexus standard, much less the narrow standard articulated by Justice Scalia.

Justice Kennedy's significant nexus analysis is closely aligned with a cumulative impacts analysis. Both analyses use a holistic approach in assessing the scope and health of a watershed. USACE should adhere to this approach by analyzing the chemical, physical and biological impacts of the entire watershed (i.e. "similarly situated lands") on downstream RPWs and wetlands. This will go a long way in preventing cumulative impacts of aggregated development projects. These cumulative impacts, if left unaddressed, could lead to wholesale appropriation of entire wetland systems. Allowing development at this rapid pace violates the "No Net Loss" policy espoused by every federal administration since 1988. Lastly, the *Rapanos* Guidance does not appropriately categorize jurisdictional waters for further use in delineations.

Eliminating Subjectivity and Including Threshold Standards in the Approved JD Form

The Approved JD Form has proved troublesome for many USACE field staff. To be completed properly and comprehensively, the significant nexus portion of the form requires extensive training in water quality sampling, biology, hydrology, chemical engineering and even law. Many USACE staff are not trained in these disciplines. This has led to much frustration. Perhaps most importantly, these determinations are entirely subjective. For example, the following provisions on the form require subjective determinations that field staff are probably not capable of making:

Section III(C)(3): **Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D.

III(D)(3): Non-RPWs that flow directly or indirectly into TNWs.

Water body that is not a TNW or an RPW, but flows directly or indirectly into a TNW, and it has a significant nexus with a TNW is jurisdictional. Data supporting this conclusion is provided at Section III.C.

As these two provisions demonstrate, field staff must make subjective determinations without the benefit of definitions that illuminate where a significant nexus exists, or when an RPW flows “directly or indirectly” into a TNW. These types of provisions contain greater amounts of legal jargon than directions for interpreting geographical and hydrological features.

Additionally, the Approved JD Form does not contain threshold standards for making a significant nexus determination. Field staff require instructions for determining when characteristics such as water quality impairments, water flows and habitat values exist in such abundance as to be analytically important. Even after the required data is extensively collected and tabulated, field staff are left without guidance on how to aggregate the data or apply it to a significant nexus definition. USACE should amend the form to provide threshold standards, cultivated from the totality of data collected during a field investigation, to help staff determine when a significant nexus exists, either by itself or *in combination with similarly situated lands*. These standards should adhere to the spirit of Justice Kennedy’s concurrence, which directs USACE to make a jurisdictional finding based on the entire watershed, not on isolated RPWs and TNWs.

Implementing a Scientific Review of Jurisdictional Determinations

In 1995, the National Academy of Sciences (“NAS”) issued a study entitled “Wetlands: Characteristics and Boundaries (“1995 report”).” NAS initiated the study in response to USACE’s request for guidance on its delineation manual, which was created in 1987 and amended in 1991. The report provided technical advice on delineating wetlands and assessing their important functional values. This study helped solidify USACE’s delineation technique for many years. The agency referenced the study heavily in later guidelines and policies.

A scientific review of the *Rapanos* Guidance and Approved JD Form is desperately needed. The 1995 report foresaw that “...definitional or procedural flaws [leading] to the exclusion of true wetlands will not reflect the intent of legislation and judicial decisions that have established federal regulatory authority over wetlands.” To avoid this fate, USACE should solicit another report from NAS. This will provide much needed scientific guidance to the USACE so that its staff may conduct delineations in a manner that preserves our remaining wetlands while adhering to the Supreme Court’s decision in *Rapanos*.

USACE should also invoke a scientific review of individual wetland delineations. The agency should not rely predominantly on information submitted by private consultants in delineating wetlands. Such reliance compromises the agency’s independence. It is estimated that up to 75% of delineations are conducted by USACE staff in an office rather than in the field. Regardless of who collects the data needed for delineations or the manner in which it is collected, an independent body with the requisite resources and skill should review it. The reviewer’s skill set should include knowledge of water quality sampling, biology, hydrology, and chemical engineering. The reviewer should pay special attention to data related to water quality

impairments, water flows and habitat values, as this data is important for a significant nexus finding.

Defenders of Wildlife appreciates the opportunity to submit these comments. We strongly support USACE's mission to preserve and protect the nation's wetlands. We look forward to seeing the *Rapanos* Guidance amended in a way that balances the need to comply with the Supreme Court decision and the need to protect our remaining wetlands.

Sincerely,

Joshua Basofin
California Representative