

Memorandum

To: CHAIR AND COMMISSIONERS

CTC Meeting: May 11-12, 2011

Reference No.: 2.2b (1)
Action

From: BIMLA G. RHINEHART
Executive Director

Subject: **NOTICE OF PREPARATION OF PROGRAM LEVEL ENVIRONMENTAL IMPACT REPORT/INITIAL STUDY CHECKLIST FOR THE STATE WATER RESOURCES CONTROL BOARD'S PROPOSED WETLAND AREA PROTECTION POLICY AND DREDGE & FILL REGULATIONS**

ISSUE:

Should the Commission, as a Responsible Agency, provide comments in response to the State Water Resources Control Board's (SWRCB) Notice of Preparation (NOP) of a Program Level Environmental Impact Report (EIR) /Initial Study (IS) for the proposed Wetland Area Protection Policy (policy) and Dredge & Fill Regulations (regulations)?

RECOMMENDATION:

Staff recommends that the Commission make no comments relative to the alternatives or environmental impacts to be addressed in the EIR/IS. However, since the proposed regulations may overlap with existing regulations and processes as well as increase the cost and schedule of delivering transportation infrastructure projects, Staff recommends that the comments included in the attached letter be provided to the SWRCB.

BACKGROUND:

The SWRCB is the CEQA Lead Agency for preparation of the EIR/IS. The SWRCB is proposing adoption of a wetland area protection policy and regulations governing the discharge of dredged or fill material into waters of the State. The SWRCB and the Regional Water Quality Control Boards (Water Boards) are the agencies with primary responsibility for control of water quality. For more than three decades, and under the authority of the Porter-Cologne Water Quality Control Act, State regulations and policy have directed the Water Boards to protect all waters of the State, including wetlands. The federal government shares in these responsibilities for those waters of the State that are also designated as waters of the United States under the federal Clean Water Act.

The SWRCB is considering the proposed regulations due to the diminishing jurisdiction of the federal government. The Initial Study, pages 8 - 11 (attached), identifies the existing federal and

state framework of regulations, policies, and guidance specific to the permitting of discharges of dredged and fill material to waters, including wetlands.

Traditionally, California has heavily relied on the federal regulatory program under Section 404 of the federal Clean Water Act to govern the discharge of dredged or fill material into waters of the State. This program is administered by the U.S. Environmental Protection Agency (USEPA) and the Army Corps of Engineers (Corps). However, due to recent U.S. Supreme Court decisions, federal law and its application over waters of the U.S. have proven insufficient to protect the diverse array of California's wetlands.

Therefore, in order to uniformly protect all waters of the State, the SWRCB is considering adding provisions to the current State regulatory program for the discharge of dredged or fill material to be consistent with and complementary to the federal program. Specifically, the IS identifies the intent of the proposed change to policy as "(1) a wetland area protection policy that includes a wetland definition based on the Corps' delineation methods and an assessment framework for collecting wetland data to monitor progress toward wetland protection and to evaluate program development; and, (2) necessary adjustments to the existing dredge and fill regulations to implement the wetland delineation methods and foster clarity and consistency in the permitting process."

As written, the IS does not include text for the proposed regulatory language, the draft permit process, or the estimated implementation cost and schedule impacts. The SWRCB states that it cannot predict the attributes of the specific projects that will be undertaken to comply with the proposed policy and regulations. Project level analysis will occur once projects are formulated and will be performed by the Lead Agency with primary responsibility for carrying out or approving a project. The Lead Agency for the future action would be required to evaluate potential environmental impacts of the individual project at that time, in compliance with CEQA. The Water Boards require documentation of CEQA compliance prior to approval of a permit.

The IS identifies impacts to aesthetics, biological resources, greenhouse gas emissions, land use/planning, population/housing, transportation/traffic, agriculture and forestry resources, cultural resources, hazards and hazardous materials, mineral resources, public services, utilities/service systems, air quality, geology/soils, hydrology/water quality, noise, recreation and public health vectors as requiring mitigation to be reduced to less than significant levels.

The SWRCB will accept written comments to the Notice of Preparation through noon, May 20, 2011.

Attachments

- Excerpt – SWRCB Initial Study, Pages 8-11
- Draft Comment Letter to SWRCB

Table 2: Federal Water Quality Framework for Dredge and Fill Discharges to Federal Waters, Including Wetlands

| Authority | Provisions and Requirements |
|--|--|
| Clean Water Act (1972) | <ul style="list-style-type: none"> • Prohibits the discharge of all pollutants without a valid permit. • Protects quality of waters of the United States, including wetlands. • Requires permits for discharge of dredge or fill material to waters of the United States (section 404). • Requires state water quality certification for all federal licenses and permits. |
| 404(b)(1) Guidelines (40 C.F.R. parts 230-233) | <ul style="list-style-type: none"> • Prohibits discharge of dredge or fill material if there is a practicable alternative that has less adverse impact on the aquatic environment and does not have other significant adverse environmental consequences. • Requires consideration of practicable alternatives, defined as activities that do not involve discharge of fill material into waters of the United States, or discharge at other locations. • Defines alternative as practicable if it is available and capable of being done considering cost, existing technology, and logistics in light of overall project purposes. • Prohibits discharges that will cause or contribute to significant degradation of the waters of the United States. • Requires consideration of cumulative and secondary effects on the aquatic ecosystem. |
| MOU between Dept. of Army and USEPA on the Determination of Mitigation under Clean Water Act Section 404(b)(1) Guidelines (1990) | <ul style="list-style-type: none"> • Provides guidance for USEPA and Corps in use of discretion in implementing Section 404(b)(1) guidelines in standard permits. • Sets policy of “avoid, minimize, compensate” sequence for impacts to wetlands. |
| Corps/USEPA Compensatory Mitigation Rule (April 10, 2008) | <ul style="list-style-type: none"> • Specifies requirements for mitigation when impacts are unavoidable; these requirements have been added to the 404(b)(1) Guidelines. |
| Corps Standard Operating Procedures (2009) | <ul style="list-style-type: none"> • Information for the Corps to consider in applying the 404(b)(1) Guidelines in issuing permits |
| Corps Wetlands Delineation Manual (Environmental Laboratory, 1987) | <ul style="list-style-type: none"> • General methods for delineating wetlands. |
| Corps Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (2008a) | <ul style="list-style-type: none"> • Identifies California-specific plants, hydric soils, and wetland hydrology indicators. |
| Corps Interim Regional Supplement to Corps of Engineers Wetland Delineation Manual: Western Mountains, Valleys, and Coast Region (2008b) | <ul style="list-style-type: none"> • Identifies California-specific plants, hydric soils, and wetland hydrology indicators. |

| Authority | Provisions and Requirements |
|--|--|
| <p><i>Solid Waste Agency of Northern Cook County v. U.S. Army</i> (2001) 531 U.S. 159</p> | <ul style="list-style-type: none"> • Certain “isolated” waters, including wetland and riparian areas, do not fall under Corps’ jurisdiction as waters of the United States |
| <p><i>Rapanos v. United States</i> (2006) 547 U.S. 715</p> | <ul style="list-style-type: none"> • Two tests to determine whether an adjacent wetland or waterbody is subject to federal Clean Water Act jurisdiction: (1) if there is a “relatively permanent, standing, or continuously flowing bodies of water” that are connected to traditional navigable waters, as well as wetlands with a continuous surface connection to such water bodies; and, (2) the Clean Water Act covers wetlands that “possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” |
| <p><i>Corps Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in Rapanos v. U.S. and Carabell v. U.S.</i> (December 2, 2008)</p> | <ul style="list-style-type: none"> • Provides guidance on Clean Water Act and River and Harbors Act of 1899 jurisdiction following the <i>Rapanos</i> and <i>Carabell</i> decisions. |

MOU = Memorandum of Understanding

Table 3: State Water Quality Framework for Discharge of Waste to Waters of the State, Including Wetlands

| Authority | Provisions and Requirements |
|---|--|
| Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.) | <ul style="list-style-type: none"> • Authorizes the Water Boards to regulate those activities and factors which may affect the quality of the waters of the state to attain the highest water quality which is reasonable. • Authorizes the Water Boards to adopt water quality control plans • Requires any person discharging waste, or proposing to discharge waste that could affect a water of the state to file a report of waste discharge (application for WDRs). • Authorizes the Water Boards to investigate the quality of the waters of the state by requiring persons who have discharged, are discharging, are suspected of discharging, or are proposing to discharge to furnish technical or monitoring reports. |
| California Wetlands Conservation Policy (1993) (Executive Order W-59-93) | <ul style="list-style-type: none"> • Establishes goal of ensuring no overall net loss of wetlands and achieving a long-term gain in the quantity, quality, and permanence of wetlands acreage and values. |
| State Water Board Water Quality Order No. 2004-0004 DWQ (2004) | <ul style="list-style-type: none"> • General WDRs for dredged or fill discharges of less than 0.2 acre or 400 linear feet or 50 cubic yards to waters of the state that are not waters of the United States. • Requires applicants to: avoid, minimize, and mitigate adverse impacts to wetlands. • Requires mitigation for unavoidable impacts; monitoring and reporting. |
| State Water Board General 401 Water Quality Certification Order of Corps NWP's (2007) | <ul style="list-style-type: none"> • Certifies Nationwide Permits 1, 4, 5, 6, 9, 10, 11, 20, 22, 24, 28, 32, 34, and 38 and finds that these activities are exempt from the requirements of CEQA. |
| Construction General Permit (NPDES Permit No. CAS000002) | <ul style="list-style-type: none"> • Requires applicants to implement best management practices for construction sites to control erosion and sedimentation such as limiting grading to the dry season, winterizing slopes, protecting storm drain inlets, and construction site good housekeeping. |
| Industrial Stormwater General Permit (NPDES Permit No. CAS000001) | <ul style="list-style-type: none"> • Requires applicants to implement best management practices for industrial sites to control erosion and sedimentation such as controlling runoff volumes, covering stockpiled materials, protecting storm drain inlets, and industrial site good housekeeping. |
| Storm Water NPDES Permit for Caltrans (NPDES Permit No. CAS000003) | <ul style="list-style-type: none"> • Requires Caltrans to implement best management practices to control pollutants in the stormwater runoff from its construction sites and maintenance facilities. |
| Municipal Stormwater NPDES Permit for Small Municipal Separate Storm Sewer Systems (NPDES Permit No. CAS000004) | <ul style="list-style-type: none"> • Requires applicants to reduce pollutants in stormwater runoff through public education and participation, illicit discharge detection and elimination, construction site stormwater runoff control, post construction stormwater management, and pollution prevention/good housekeeping for municipal operations. |

| Authority | Provisions and Requirements |
|--|--|
| Municipal Regional Stormwater NPDES Permit for Large Municipal Separate Storm Sewer Systems (NPDES Permit No. CAS612008) | <ul style="list-style-type: none"> Requires applicants to implement best management practices for stormwater runoff controls through public education and participation, illicit discharge detection and elimination, industrial site stormwater runoff control, construction site stormwater runoff control, post construction stormwater management, pollution prevention/good housekeeping for municipal operations, trash control, Total Maximum Daily Load (TMDL) implementation and monitoring. |
| California Department of Fish and Game Lake and Streambed Alteration Program (Fish & G. Code, § 1600 et seq.) | <ul style="list-style-type: none"> Requires notification for activities that substantially divert or obstruct the natural flow of any river, stream, or lake; change or use material from the bed, channel, or bank of, any river, stream, or lake; or deposit or disposal of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake. Requires a Lake and Streambed Alteration Agreement for activities that may affect fish and wildlife resources. |
| California Coastal Commission Local Coastal Program (LCP) Certification and Amendments (Pub. Resources Code, § 30500 et seq.) | <ul style="list-style-type: none"> Directs each of the 73 cities and counties lying wholly or partly within the coastal zone to prepare an LCP. Requires local jurisdictions containing wetlands to include regulatory policies in their LCP's to ensure consistency with the Coastal Act and the applicable Water Board's Basin Plan. |
| California Coastal Act (1987) (Pub. Resources Code, § 30000 et seq.) | <ul style="list-style-type: none"> Requires coastal development permit from California Coastal Commission for development within a wetland located in the coastal zone. |
| California Forest Practice Act (Pub. Resources Code, § 4511 et seq.); Forest Practice Rules (Cal. Code Regs., tit. 14, div. 1.5, chs. 4, 4.5, & 10.) | <ul style="list-style-type: none"> Requires a Timber Harvest Plan prepared by Registered Professional Foresters and identification of steps that will be taken to prevent damage to the environment for all commercial harvesting operations large and small; review by Water Board. Requires evaluation of potential for cumulative impacts from the effects of forest harvesting activity, including sediment transport. |
| California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) | <ul style="list-style-type: none"> Requires a project proponent to meet the goals and purposes of environmental review: information; participation; mitigation; and accountability. Requires evaluation of environmental impacts of projects proposed or approved by public agencies, mitigation of significant impacts where feasible, and evaluation of alternatives to mitigate significant impacts. |

Current Types of Activities Regulated

Table 4 shows the types of activities that account for known discharges of fill to federal waters in 2003 for California. In any given year, the project type accounting for the greatest discharge to federal waters will likely change. However, the general types of activities that result in discharges of fill which are subject to this Project are likely to be similar in the future.

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May 20, 2011

Charles R. Hoppin, Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000

Re: Comment Letter – CEQA – Wetland Area Protection Policy & Regulations

Dear Chair Hoppin:

The California Transportation Commission (Commission) considered the State Water Resources Control Board's (SWRCB) proposed Wetland Area Protection Policy and Regulations set forth in the Notice of Preparation of an Environmental Impact Report/Initial Study at its May Commission meeting. Recognizing the importance of addressing California's mobility needs while protecting California's environment, and at the same time, the competing demands for declining transportation revenue, the Commission is concerned with the degree to which the Department of Transportation (Department) and other transportation stakeholders can comply with the policy and regulations proposed.

As you are aware, a significant amount of transportation funding is directed towards those measures necessary to comply with existing laws and regulations including existing requirements to protect California's environment. As stated in the Initial Study, the federal Clean Water Act, the State Porter-Cologne Water Quality Control Act and other policies and guidance are regulated by the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, the California Department of Fish and Game, the California Coastal Commission, and other agencies. To assure that the proposed policy and regulations promote streamlined processes that reduce regulatory redundancy and costs, it is critical that the SWRCB consult with these agencies to evaluate the necessity of expanding the wetland definition and permitting process beyond existing requirements.

The Initial Study does not identify the draft regulatory language, the proposed permit process or the estimated cost of implementation including increased project delivery cost and schedule impacts. This information is necessary to provide affected stakeholders an opportunity to

Chair Hoppin
May 20, 2011
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understand and evaluate potential impacts due, in part, to additional permitting and mitigation requirements that should be considered and addressed by the SWRCB prior to adoption. It is also important that, if adopted, the wetlands policy and dredge and fill regulations align requirements and available resources towards those measures that address California's most critical water quality issues. Therefore, the Commission encourages that SWRCB to work closely with the Department and others affected to minimize cost and schedule impacts.

If you have any questions, please do not hesitate to contact Susan Bransen, Associate Deputy Director, at (916) 653-2082.

Sincerely,

BIMLA G. RHINEHART
Executive Director

c: Commissioners, California Transportation Commission
Tom Howard, Executive Director, SWRCB
Richard Land, Deputy Director, Project Delivery, Caltrans
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DRAFT

critical to properly assess the potential impacts of these regulations. Specifically, information regarding additional permitting and mitigation requirements are necessary to address the full impact of these regulations and how they will correspond to existing regulations. Additionally, though Phases 2 and 3 are not developed, we would appreciate the inclusion of conceptual information to give a sense of what the program as a whole will entail.

The lack of a State equivalent to the federal General Permit program could double the hours required to permit wetland impacts for projects with minimal impacts. This information should be assessed and disclosed to the public during the CEQA process. Projects with minimal impacts that fall under the federal general permit program comprise the majority of Caltrans projects and are integral to maintain the safety of the SHS. The IS states that Regulations “include... requirements applicable to discharges of dredged or fill material based on the United States Army Corps of Engineers (Corps) 404(b)(1) guidelines including the recent compensatory mitigation rule...”, but there is no mention of whether or not a general permit program, similar to what is identified in the 404(b)(1) guidelines, will be included in these regulations or whether the Regulations will match, or vary from, the permitting and mitigation requirements for the 404(b)(1) guidelines. While we support protecting wetlands and waters of the State, especially those no longer under federal jurisdiction, deviation from the federal permitting and mitigation requirements could impact Caltrans’ ability to deliver transportation projects. Given the current fiscal situation throughout the state, this could limit Caltrans’ ability to maintain the SHS and deliver transportation projects including safety and congestion relief projects.

Implementation of the new wetlands definition will likely require a substantial amount of time during the environmental review of transportation projects to write a supplemental report to the wetland delineation report currently required to verify wetland areas with the Corps. The additional costs associated with implementing a new wetland definition and the additional permitting requirements should be assessed as part of the CEQA process. The proposed definition for State wetlands is very similar to the federal definition which has gone through years of scientific and regulatory scrutiny. With the methodology provided in the Arid West (September 2008) and Western Mountains, Valleys, and Coast Region (April 2008) regional supplements (regional supplements), the federal definition of wetlands includes all but a very small area of what would be included under the proposed State definition.

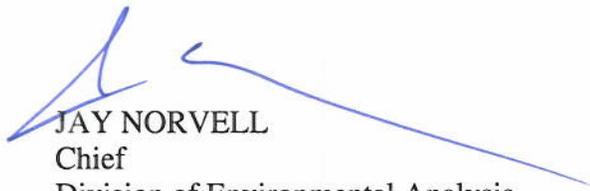
In order to fully assess the impacts of a new State wetlands definition, the project description needs to include a conceptual plan for a delineation methodology to address when the State definition differs from the federal definition. Additionally, definitions of the terms used in the proposed State policy should be clearly presented in the project description. While the proposed State definition is very similar to the current federal one, this information we are requesting could greatly affect the impact of the implementation of the new policy.

Jeanine Townsend, Clerk to the Board
April 27, 2011
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We urge the State Waterboard to consider the costs of the proposed regulation on Caltrans, other state agencies, and other stakeholders. As we noted in our April 9, 2007 letter and our September 8, 2008 letter, this effort should document the costs of the additional monitoring and mitigation required. These cumulative costs should then be compared with the benefits.

If you have questions regarding these comments, please contact Gregg Erickson at (916)654-6296, or Rebecca Loeffler at (916)651-6117. As Caltrans will be CEQA lead agency for many projects under the jurisdiction of the proposed policy and regulation, we would greatly appreciate being involved in future efforts to develop this policy and regulation.

Sincerely,



JAY NORVELL
Chief
Division of Environmental Analysis