

Memorandum

Tab 21

To: CHAIR AND COMMISSIONERS

CTC Meeting: August 17-18, 2016

Reference No.: 4.20
Action

From: 
SUSAN BRANSEN
Executive Director

Subject: **PROPOSED PROCEDURES FOR DISCHARGES OF DREDGED OR FILL MATERIALS TO WATERS OF THE STATE**

ISSUE:

Should the California Transportation Commission (Commission) provide comments in response to the State Water Resources Control Board's (SWRCB) proposed Procedures for Discharges of Dredged or Fill Materials to Waters of the State (procedures)?

RECOMMENDATION:

Staff recommends that the Commission approve the attached letter for submission to the SWRCB since the proposed regulations may overlap with existing regulations and processes as well as potentially increase the cost and schedule of delivering transportation infrastructure projects.

BACKGROUND:

The SWRCB and the Regional Water Quality Control Boards (collectively Water Boards) are the agencies with primary responsibility for control of water quality in the State. 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.

Prior to this proposal, the SWRCB had for many years been working on a related state wetland policy for which the Commission provided comments in May/2011. At that time, the Commission noted its concern with the degree to which the California Department of Transportation and other transportation stakeholders can successfully balance compliance with the proposed policies requiring increased protection of California's environment and at the same time manage the competing demands for declining transportation revenues. The SWRCB staff report for the current proposed procedures references the prior work related to State wetland protection but acknowledges that the proposed procedures depart from that effort to create a broader program.

According to the SWRCB, it is considering the proposed procedures to address several important issues. First, there is a need to strengthen protections for waters of the State due to the diminishing

jurisdiction of the federal government related to water protection. 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 and the U.S. Army Corps of Engineers. However, as a result of 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.

Second, there is inconsistency across the Water Boards in requirements for discharges of dredged or fill material into waters of the State, including wetlands. There is no single accepted definition of wetlands at the State level, and the Water Boards may have different requirements and levels of analysis with regard to the issuance of dredge or fill orders. Finally, the SWRCB states that current regulations have not been adequate to prevent losses in the quantity and quality of wetlands in California, and therefore there have recently been especially profound historical losses of wetlands.

To uniformly protect all waters of the State, the SWRCB is proposing to add new procedures to the current State regulatory program for the discharge of dredged or fill material. Specifically, the proposed procedures consist of the following components: (1) a statewide wetland definition, (2) wetland delineation procedures, and (3) procedures for application submittal, including the review and approval of Water Quality Certifications, Waste Discharge Requirements, and waivers of Waste Discharge Requirements for dredged or fill activities.

SWRCB's release of its proposed procedures has garnered significant stakeholder feedback. This feedback raises two specific concerns that directly relate to the delivery of transportation projects across the state. First, the proposed procedures appear to overlap several existing permitting requirements, including Section 404 of the Clean Water Act and the California Fish and Wildlife Lake and Streambed Alteration Program. This redundancy could potentially increase costs and delay delivery of critical transportation infrastructure but provide no real quantifiable environmental benefits.

Second, the SWRCB has produced limited information related to the potential cost implications of these proposed procedures. The staff report published by SWRCB only provides a qualitative assessment of potential costs or consequences associated with the proposal because "the universe of future applicants and projects affected by these procedures is unknown." Given the magnitude of the new program created by these procedures, the broad consequences for both public and private sector entities could be significant in both costs and delay. It seems prudent that the SWRCB conduct a thorough cost-benefit analysis of the proposed procedures before implementation.

Commission staff has prepared the attached draft letter to the SWRCB outlining general concerns related to the proposed procedures and advising the SWRCB to estimate the potential costs and carefully weigh these against the expected benefits before taking any formal action. The SWRCB is accepting written comments until noon on August 18, 2016.

Attachment
Draft Comment Letter to the SWRCB
SWRCB Notice Related to Proposed Procedures

BOB ALVARADO, Chair
FRAN INMAN, Vice Chair
YVONNE B. BURKE
LUCETTA DUNN
JAMES EARP
JAMES C. GHIEMMETTI
CARL GUARDINO
CHRISTINE KEHOE
JAMES MADAFFER
JOSEPH TAVAGLIONE

STATE OF CALIFORNIA

EDMUND G. BROWN Jr., Governor

SENATOR JIM BEALL, Ex Officio
ASSEMBLY MEMBER JIM FRAZIER, Ex Officio

SUSAN BRANSEN, Executive Director



CALIFORNIA TRANSPORTATION COMMISSION

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SACRAMENTO, CA 94273-0001
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August 18, 2016

Jeanine Townsend, Clerk of the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000

Re: Comment Letter – Statewide Dredged or Fill Procedures

Dear Ms. Townsend:

The California Transportation Commission (Commission) is in receipt of and has reviewed and considered the State Water Resources Control Board's (SWRCB) proposed Procedures for Discharges of Dredged or Fill Materials to Waters of the State at its August 2016 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 California Department of Transportation (Department) and other transportation stakeholders can comply with the proposed procedures.

As you are aware, even with the current funding shortfalls, a significant amount of transportation funding is already directed towards those measures necessary to comply with existing laws and regulations including existing requirements to protect California's environment. For example, 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 Wildlife, the California Coastal Commission, and other agencies. To assure that the proposed procedures promote streamlined processes that reduce regulatory redundancy and costs, it is critical that the SWRCB consult with

Jeanine Townsend, Clerk of the Board
August 18, 2016
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these agencies to evaluate the necessity of expanding the wetland definition and permitting process beyond existing requirements.

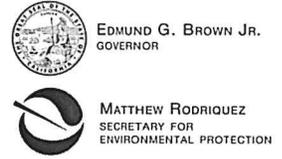
Given the potential magnitude of this new program, it is not enough to rely upon a qualitative assessment of potential costs or consequences associated with the proposal. Therefore, the Commission recommends the SWRCB quantitatively estimate the potential costs of these proposed procedures and carefully weigh the estimated costs against the expected benefits before taking any formal action. To facilitate in this effort, the Commission encourages the SWRCB to work closely with the Department and other stakeholders to develop a full analysis of the potential cost implications of these proposed procedures.

Finally, the Commission encourages the SWRCB to consider and address all comments received. Without careful consideration, a proposal of this magnitude could delay important transportation infrastructure, increase costs for an overburdened transportation financing system, and significantly impact the state's economy.

If you have any questions, please do not hesitate to contact Susan Bransen, Commission Executive Director, at (916) 654-4245.

Sincerely,

BOB ALVARADO
Chair



EDMUND G. BROWN JR.
GOVERNOR

MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

**REVISED
NOTICE OF OPPORTUNITY FOR PUBLIC COMMENT
AND
NOTICE OF PUBLIC COMMENT WORKSHOPS, PUBLIC HEARING, AND FILING¹**

**PROPOSED AMENDMENTS TO THE CALIFORNIA OCEAN PLAN AND INLAND SURFACE
WATERS, ENCLOSED BAYS, AND ESTUARIES OF CALIFORNIA PLAN TO INCLUDE PROCEDURES
FOR DISCHARGES OF DREDGED OR FILL MATERIALS TO WATERS OF THE STATE
(FORMERLY KNOWN AS THE WETLANDS POLICY)**

NOTICE IS HEREBY GIVEN that the State Water Resources Control Board (State Water Board) will receive public comments on the Proposed Amendments to both the Water Quality Control Plan for Ocean Waters of California (Ocean Plan), and the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California (ISWEBE Plan) to Include procedures for discharges of dredged or fill materials to waters of the state (proposed Amendments), and the Draft Staff Report, including the Draft Substitute Environmental Documentation (Draft SED).

On July 19, 2016, the State Water Board held a Public Hearing on the proposed Amendments and received requests for an extension of the public comment period. The State Water Board, in consideration of these requests, is extending the comment period an additional two weeks. The deadline for submission of written comments on the proposed Amendments and Draft Staff Report is now 12:00 Noon on Thursday, August 18, 2016. The purpose of this extension is to allow for detailed comments from reviewers of the proposed Amendments and the Draft SED. Specific requested language changes are preferred in bold strike-out and bold underline format. Detailed comments and specific requested language changes will facilitate followup discussions by State Water Board staff with the commenters.

The State Water Board has held ~~will hold~~ two public workshops to provide information and answer questions from the public on the proposed Amendments and Staff Report.

**June 28, 2016
1:00 p.m.**

Los Angeles Regional Water Quality Control Board, Carmel Room
320 West Fourth Street, Suite 200
Los Angeles, CA 90013

**July 7, 2016
10:00 a.m.**

Central Valley Water Quality Control Board
Sacramento Office, Auditorium
11020 Sun Center Drive, Suite 200,
Ranch Cordova, CA

¹ Notice of Filing submitted under California Code of Regulations, title 23, section 3779.

The State Water Board has held ~~will hold~~ a public hearing to receive public input and comments on the proposed Amendments and adequacy of the Draft SED.

Tuesday, July 19, 2016 9:00 a.m.
Joe Serna Jr. - Cal/EPA Headquarters Building
Coastal Hearing Room
1001 I Street, Second Floor
Sacramento, CA 95814

BACKGROUND

The State Water Board is considering amendment to the Ocean Plan and the ISWEBE Plan to adopt procedures for discharges of dredged or fill material to waters of the state (proposed Procedures). The proposed Procedures consist of the following components: 1) a wetland definition; 2) wetland delineation procedures; and 3) procedures for applications, and the review and approval of Water Quality Certifications, Waste Discharge Requirements, and waivers of Waste Discharge Requirements for dredged and fill activities.

The State Water Board developed the proposed Procedures to address several important issues. First, there is a need to strengthen protections for waters of the state that are no longer protected under the Clean Water Act (CWA) due to U.S. Supreme Court decisions. Second, there is inconsistency across the Water Boards in requirements for discharges of dredged or fill material into waters of the state, including wetlands. There is no single accepted definition of wetlands at the state level, and the Water Boards may have different requirements and levels of analysis with regard to the issuance of dredge or fill Orders. Third, current regulations have not been adequate to prevent losses in the quantity and quality of wetlands in California, where there have been especially profound historical losses of wetlands.

The proposed Procedures have been previously referred to by the State Water Board as the Water Quality Control Policy for Wetland Area Protection and Dredged or Fill Permitting. However, for administrative purposes, the decision was made to convert the policy into amendments to the Ocean Plan and the ISWEBE Plan. The title has been updated to better communicate to the public that the proposed dredge and fill procedures apply to all waters of the state, including both waters of the United States and waters of the state outside of federal jurisdiction, not just to wetlands. Please note that these procedures would not apply to suction dredge mining activities for mineral recovery.

DOCUMENT AVAILABILITY

The proposed Procedures and related documents and information are available on the State Water Board's web site at:

http://www.waterboards.ca.gov/water_issues/programs/cwa401/wrapp.shtml.

You may request a paper copy of the proposed Procedures by contacting Ana Maria Saenz at (916) 341-5480 or AnaMaria.Saenz@waterboards.ca.gov

Additional information on the hearing in Sacramento can be found at the State Water Board's web site at:

http://www.waterboards.ca.gov/board_info/calendar/.

SUBMISSION OF WRITTEN COMMENTS

The State Water Board will accept both written and oral comments on the proposed California Ocean Plan and Inland Surface Waters, Enclosed Bay, and Estuaries of California Plan amendments. Written comments must be received by ~~12:00 Noon on Thursday, August 4, 2016~~ 12:00 Noon on Thursday, August 18, 2016, and addressed to:

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Comment letters may be submitted electronically, in pdf text format (if less than 15 megabytes in total size), to the Clerk to the Board via e-mail at commentletters@waterboards.ca.gov. If the file is greater than 15 megabytes in total size, then the comment letter may be submitted by fax at (916) 341-5620. Please indicate the subject line: **“Statewide Dredged or Fill Procedures”**

Couriers delivering hard copies of comment letters must check in with lobby security personnel, who can contact Jeanine Townsend at (916) 341-5600.

CALIFORNIA ENVIRONMENTAL QUALITY ACT

This is to advise that the State Water Board is proposing to adopt or amend the Ocean Plan and the forthcoming ISWEBE Plan in accordance with a regulatory program exempt under Section 21080.5 of the Public Resources Code from the requirement to prepare an environmental impact report under the California Environmental Quality Act (Public Resources Code Section 21000 et seq.) and with other applicable laws and regulations.

FUTURE NOTICES

Any person desiring to receive future notices concerning the Proposed Amendments, including any changes to the notice of public hearing and consideration of adoption, must sign up for the Lyris e-mail list. To sign up for the Lyris list, access the E-mail List Subscription form, select the box for ‘Wetland and Riparian Area Protection Policy’ (located within the section entitled ‘Water Quality Topics’), and provide the required information. The subscription form is located at: http://www.waterboards.ca.gov/resources/email_subscriptions/swrcb_subscribe.shtml.

CONTACT INFORMATION

Questions regarding this notice may be directed to Ana Maria Saenz at (916) 341-5480 (AnaMaria.Saenz@waterboards.ca.gov) or Bill Orme at (916) 341-5464 (Bill.Orme@waterboards.ca.gov)

July 22, 2016

Date



Jeanine Townsend
Clerk to the Board

Memorandum

To: CHAIR AND COMMISSIONERS
CALIFORNIA TRANSPORTATION COMMISSION

CTC Meeting: August 17-18, 2016

Reference No.: 4.20
Action Item

From: NORMA ORTEGA
Chief Financial Officer

Prepared by: Katrina C. Pierce, Chief
Division of
Environmental Analysis

Subject: **COMMENTS ON THE PROCEDURES FOR DISCHARGES OF DREDGED OR FILL MATERIALS TO WATERS OF THE STATE**

ISSUE:

The California Department of Transportation (Department) is providing written comments to the State Water Resources Control Board (Waterboard) on their preliminary draft procedures for discharges of dredged or fill materials to waters of the state.

BACKGROUND:

On June 17, 2016, the Waterboard publically noticed that they are considering to adopt procedures for discharges of dredged or fill material to waters of the state (Proposed Procedures).

The Proposed Procedures consist of the following components: (1) a wetland definition, (2) wetland delineation procedures, and (3) procedures for applications, and the review and approval of Water Quality Certifications, Waste Discharge Requirements, and waivers of Waste Discharge Requirements for dredged and fill activities.

The Waterboard developed the Proposed Procedures not only due to the diminishing jurisdiction of the federal government, but to also address the inconsistency across the Regional Water Boards regarding requirements for discharges of dredged or fill material into waters of the state, including wetlands. There is no single accepted definition of wetlands at the state level, and the Regional Water Boards may have different requirements and levels of analysis with regard to the issuance of dredge or fill orders.

The Department has been an active stakeholder for these Proposed Procedures. In April 2007, the Department provided comments on the scope and content of the environmental analysis that will be used to support the policy development. In September 2008, the Department provided comments on the Policy to Protect Wetlands and Riparian Areas. In July 2010, the Department provided comments on the draft policy of Phase One of the Wetland and Riparian Protection Policy. In April 2011, the Department provided comment on the Initial Study for the Wetland Area Protection Policy and Dredge and Fill Regulations.

The Waterboard will accept written comments on the Proposed Procedures through 12:00 Noon on Thursday, August 18, 2016.

The Department has developed comments and will be submitting them for Waterboard consideration.

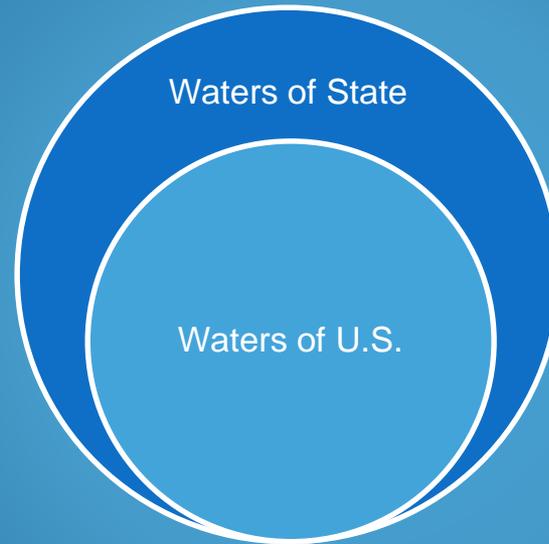
Procedures for Discharges of Dredged or Fill Material to Waters of the State

Proposed for inclusion in the Water Quality Control Plan for Inland Surface Waters and Enclosed Bays and Estuaries and Ocean Waters of California

Phil Crader
Assistant Deputy Director
Division of Water Quality
State Water Resources Control Board

Background

- 2001 and 2006 – U.S. Supreme Court decisions left a “gap” between State and federal jurisdiction of waters



- Some aquatic features once protected under federal Clean Water Act were no longer subject to federal jurisdiction
- State Porter-Cologne Water Quality Control Act provides broader jurisdiction over waters than federal CWA

Background

- Water Boards began regulating impacts to these waters under State authority
- Lacked consistency between the Water Boards
- 2008 – State Water Board directed development of Statewide Policy
- 2016 – Released Current Draft Procedures
 - Protect all waters of the state from dredged and fill discharges
 - Provide consistency between the State and Regional Boards
 - Align with the Corps of Engineers to the extent feasible

Procedures

- With some exceptions, apply to discharges of dredged or fill materials to all waters of the state, including discharges that impact non-federal waters
- Attempt to align state requirements with federal requirements and promote consistency between all Water Boards
- Largely adopt federal requirements for alternatives analysis and compensatory mitigation and apply those to all waters of the state on a case-by-case basis

Prevailing Stakeholder Concerns

- Do not duplicate other requirements
 - U.S. Army Corps of Engineers
 - State Department of Fish and Wildlife
- Define waters of the state
 - For wetlands
 - For non-wetland features
- Reduce or eliminate case-by-case determinations
 - Whether a feature is a water of the state
 - Whether an alternatives analysis is required
 - What mitigation is required

Status and Next Steps

Action	Date
Release draft Staff Report, and Procedures for public review and comment (Complete)	June 17 th
Public Workshops (during comment period)	June 28 th and July 7 th
State Water Board Hearing (during comment period)	July 19 th
Written Comments Due	August 18th
State Water Board Consideration of Adoption	Spring 2017

Caltrans' Comments
on the
**Proposed Procedures for Discharges of
Dredged or Fill Material in Waters of the
State**

Katrina C. Pierce
Chief, Division of Environmental Analysis
California Department of Transportation

CTC Meeting
August 17, 2016

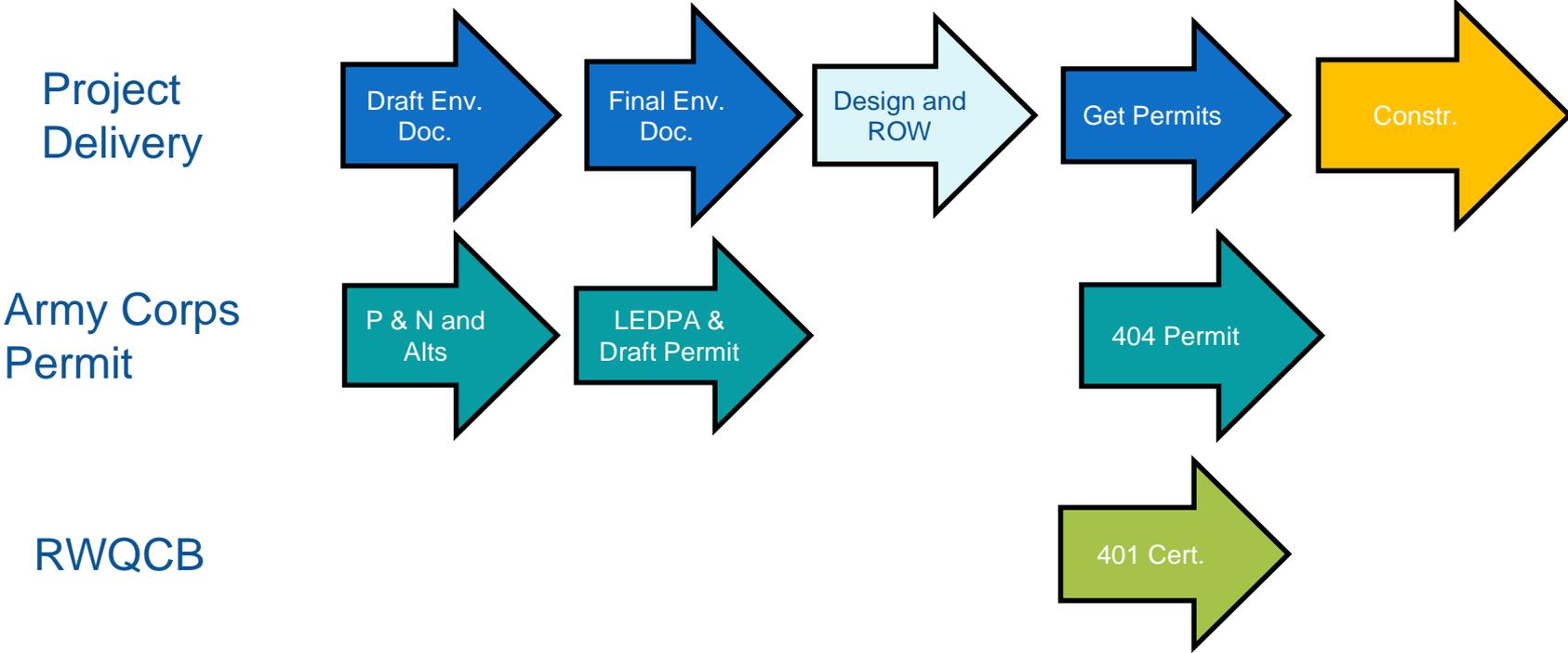
Current Wetland Permit Process

- ◆ The US Army Corps of Engineers has jurisdiction over “Waters of the US” (which includes Wetlands) under the Federal Clean Water Act
- ◆ Caltrans negotiates with the Corps on impacts to wetlands and obtains a “Section 404” Permit
 - We utilize a host of Nationwide Permits for minor impacts to waters or
 - Obtain an Individual Permit through a State/Federal MOU for projects with > 5 acres of impacts

Current Wetland Permit Process

- ◆ The Regional Water Quality Control Boards rely on the “Section 401” certification to meet their responsibility under the Clean Water Act and the Porter-Cologne Water Quality Control Act
- ◆ Some impacts to water of the State are also regulated by a “Streambed Alteration” permit from CDFW

Current Process*

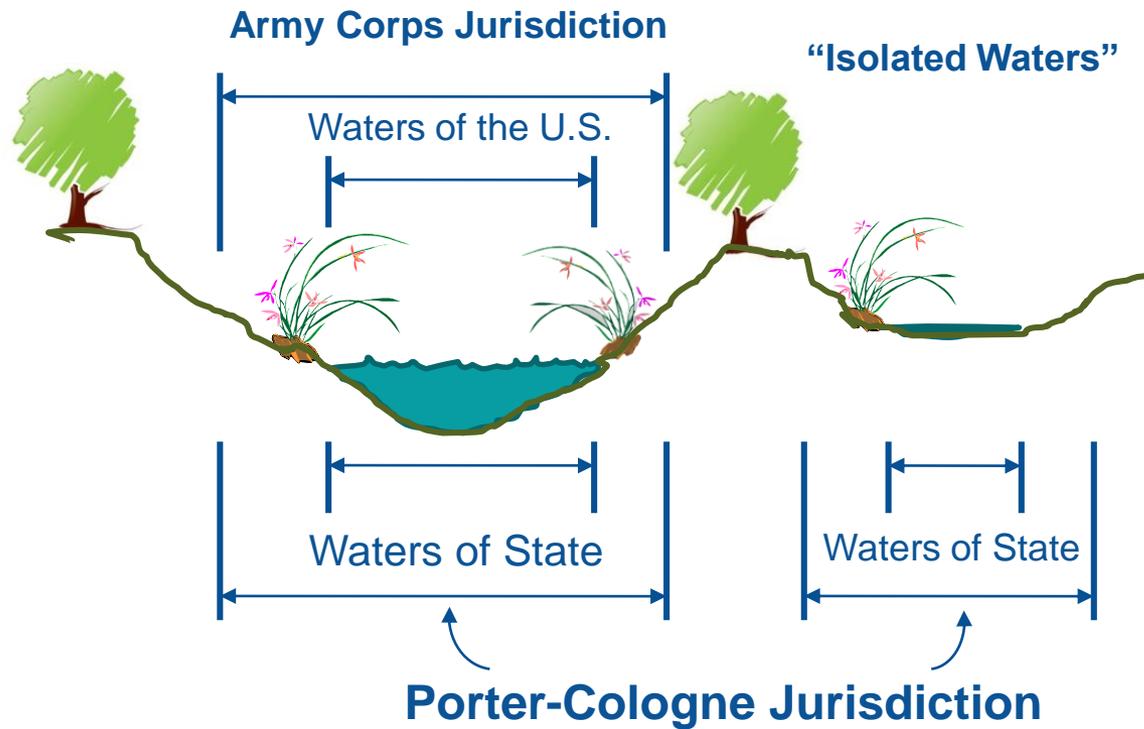


*RWQCBs also issue WDRs

U.S. Supreme Court Decisions

- ◆ Two U.S. Supreme Court decisions limit Clean Water Act application of “isolated” Waters of the U.S. – 2001 (SWANCC) and 2006 (Rapanos).
- ◆ As a result, the State Water Resources Control Board started developing a process to apply Porter-Cologne to wetlands no longer protected by the Corp’s Jurisdiction AND standardize the procedures for all “Waters of the State”.

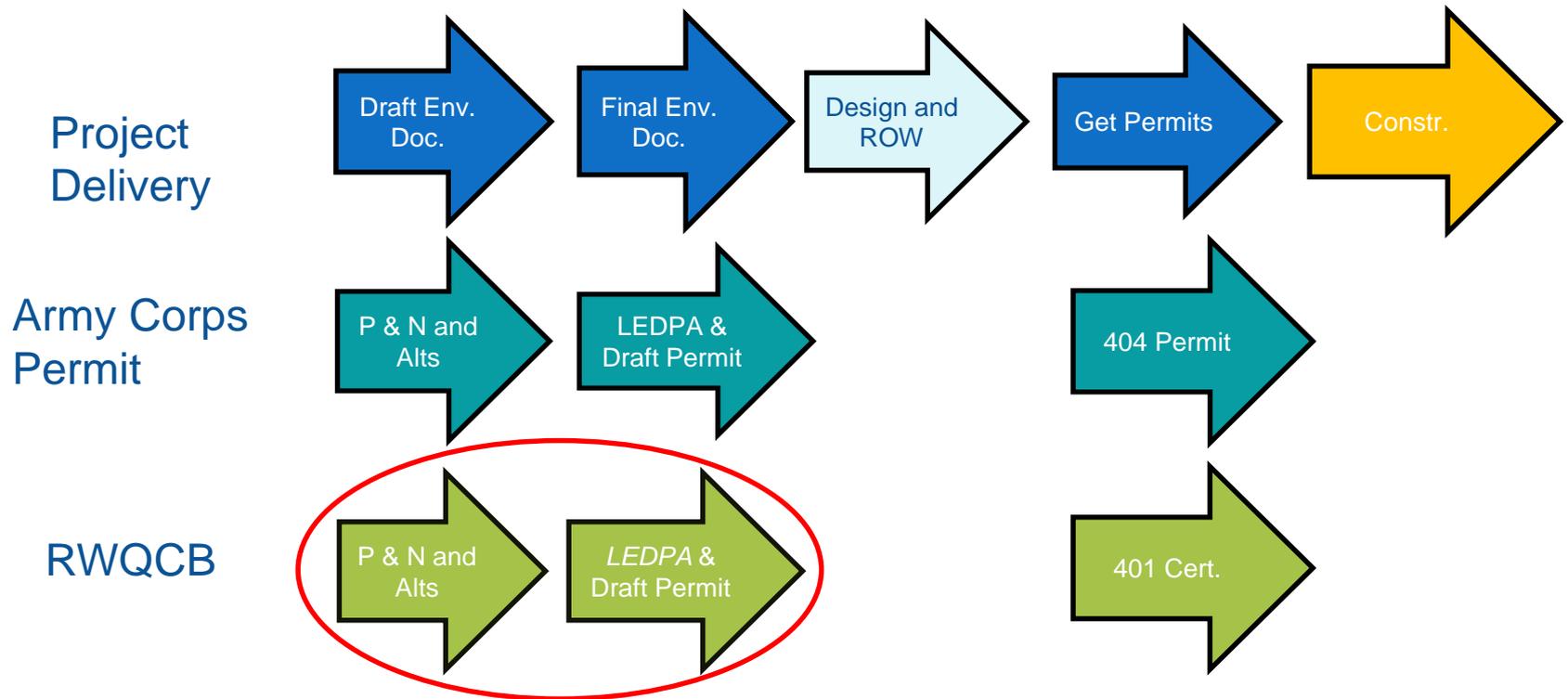
Jurisdiction



Work in Progress

- ◆ SWRCB started their efforts to develop these procedures in 2007.
- ◆ Proposing to address the “gap” and “standardize permitting processes”
- ◆ Caltrans has submitted comments at several past opportunities:
 - April 2007, September 2008, July 2010, April 2011 and October 2012

Proposed Process



Caltrans' Primary Concerns

- ◆ More Clarification Needed – Definitions – Guidelines
- ◆ Much is still left up to the Regional Water Boards
- ◆ Duplicative Requirements
- ◆ Potential Additional Efforts
 - LEDPA Analysis
 - Climate Change Analysis
 - Compensatory Mitigation Plans for already approved Mitigation Banks or In-Lieu Fee Programs

Caltrans' Recommendations

- ◆ Provide definitions and clarify ambiguity
- ◆ Develop a General Permit Program similar to the 404 Nationwide Permit Program OR waive the LEDPA requirement for these projects
- ◆ Eliminate requirements that are covered in other permits or approvals
 - Accept Alternatives Analysis from the Environmental Document
 - Water Boards involvement early and often (concurrently) for LEDPA determinations if we're obtaining an Individual Permit for the 404 Permit
- ◆ Have stronger language to ensure the Regional Boards are more consistent
- ◆ Accept/Address our comments and Continue working with us to eliminate over-burdensome and duplicative requirements

Questions?