

# D R A F T

## STATE WATER RESOURCES CONTROL BOARD BOARD MEETING SESSION – DIVISION OF WATER QUALITY MARCH 18, 2008

### ITEM

#### SUBJECT

CONSIDERATION OF A RESOLUTION TO DEVELOP A POLICY TO PROTECT WETLANDS AND RIPARIAN AREAS IN ORDER TO RESTORE AND MAINTAIN THE WATER QUALITY AND BENEFICIAL USES OF THE WATERS OF THE STATE

#### DISCUSSION

The vital roles of wetlands and riparian areas in our natural environment are well documented. Although physically occupying only a small percentage of California watersheds, wetlands and riparian areas provide valuable water quality functions such as flood control, pollutant filtration, water supply and replenishment, recreation, and habitat for a wide variety of plants and animals. Wetlands and riparian areas promote the health and existence of other important natural resources and provide significant economic benefits to California.

However, in California, over 90 percent of historic wetlands and over 85 percent of riparian acreage has been lost to development, according to published research estimates. As a result, wetlands are now protected under the California Wetlands Conservation Policy that sets a goal to “ensure no overall net loss and achieve a long-term net gain in the quantity, quality, and permanence of wetlands acreage and values in California in a manner that fosters creativity, stewardship, and respect for private property” (Executive Order W-59-93). Recognition of the importance of wetlands and riparian areas has led to significant federal and State expenditures to restore the biological and hydrological functions of these aquatic ecosystems. However, much work needs to be done as the State grapples with an accelerating water crisis, sea level rise, and climate change effects.

The State has relied primarily on requirements of the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.) (Clean Water Act) to protect wetlands and riparian areas for water quality goals. Recent U.S. Supreme Court rulings (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 2001 and *Rapanos v. United States*, 2006) have reduced the jurisdiction of the Clean Water Act over wetland and riparian areas by limiting the definition of “waters of the United States.” These decisions necessitate the use of California’s independent authorities under the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.) to protect these vital resources.

In 2003, the State Water Resources Control Board (State Water Board) issued a report to the Legislature titled, *Regulatory Steps Needed to Protect and Conserve Wetlands Not Subject to the Clean Water Act (Supplemental Report of the 2002 Budget Act Item 3940-001-0001)*. This report reviewed the critical role that wetlands and riparian areas have in protecting the beneficial uses of waters throughout the State. Consistent with the State Water Board and Regional Water Quality Control Boards’ (Regional Water Boards) (collectively California Water Boards) 2001 Watershed Management Initiative, this report further recognized that a watershed-level perspective is needed to protect wetlands and riparian areas and their associated water quality functions.

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In 2004, State Water Board staff initiated a Workplan upon the California Environmental Protection Agency's request (*Workplan: Filling the Gaps in Wetland Protection*) (2004 Workplan) to address the waters of the State that are no longer subject to regulation under the Clean Water Act. This Workplan specified the need to adopt a State wetland definition to "provide a standard metric to help determine compensatory mitigation requirements and compliance with [the] 'no net loss' policy [Executive Order W-59-93]." In addition, the 2004 Workplan included developing a statewide policy for wetland protection "at least as protective as the federal requirements." To immediately address "the gap," the State Water Board adopted general waste discharge requirements for minor discharges to non-federal waters ([Water Quality Order 2004-0004](#), May 4, 2004).

In 2007, State Water Board completed a research study contracted with UCLA titled *An Evaluation of Compensatory Mitigation Projects Permitted Under Clean Water Act Section 401 by the California State Water Resources Control Board, 1991-2002*. This evaluation identified a number of concerns in the California Water Boards' compliance with the *California Wetlands Conservation Policy* and in the protection of water quality and beneficial uses; also, it identified strategies to address these concerns.

In 2007, State Water Board staff completed public scoping meetings on wetland and riparian area policy alternatives and considered comments received in accordance with the California Environmental Quality Act (CEQA).

This proposed resolution directs the following:

1. That the State Water Board recognizes the beneficial services of wetlands and riparian areas for people and wildlife in protecting and improving water quality, providing fish and wildlife habitat including unique plant communities (i.e., wetland and riparian vegetation), storing floodwaters, maintaining surface water flows in dry periods, and other valuable functions. California has a rich ecological diversity, therefore, the State Water Board further recognizes that watershed focused planning is the most effective strategy for maintaining and enhancing these functions.
2. That the State Water Board will take action to ensure the protection of the vital beneficial services provided by wetlands and riparian areas through the development of a policy to protect wetlands and riparian areas (Policy) that is watershed-based, and that extends to all perennial, intermittent, and ephemeral watercourses, including wetlands, from headwater regions to lowland river mouths.
3. That the State Water Board staff will examine the environmental issues, evaluate the relevant alternatives, and make recommendations regarding the Policy. To ensure a comprehensive scope, the staff is directed to consider additional alternatives and recommendations in addition to those outlined in the 2004 Workplan.
4. In recognition that successful Policy implementation will require a supporting level of internal program infrastructure, major policy areas should be addressed in a step-wise fashion and implemented in phases to allow for commensurate program development. The Policy shall support efforts to collect wetland data to monitor progress towards statewide wetland protection and to evaluate the level of program resources needed, including staffing, to undertake the next phases.

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5. That the State Water Board staff will develop the Policy in three phases:

Phase 1 – establish a Policy to protect wetlands from dredge and fill activities. Staff is directed to develop and bring forward for State Water Board consideration: (a) a wetland definition that would rely on the United States Army Corps of Engineers' wetland definition to the extent feasible, but would also reliably define the diverse array of California wetlands, (b) a wetland regulatory mechanism based on the 404 (b)(1) guidelines (40 C.F.R. parts 230-233) that includes a watershed focus, and (c) an assessment method for collecting wetland data to monitor progress toward wetland protection and to evaluate program development.

Phase 2 – expand the scope of the Policy to protect wetlands from all other activities impacting water quality. Staff is directed to develop and bring forward for State Water Board consideration: (a) new beneficial use definitions, (b) water quality objectives, and (c) a program of implementation to achieve the water quality objectives, as necessary, to protect wetland-related functions.

Phase 3 – extend the Policy's protection to riparian areas. Staff is directed to develop and bring forward for State Water Board consideration: (a) new beneficial use definitions, (b) water quality objectives, and (c) a program of implementation to achieve the water quality objectives, as necessary, to protect riparian area-related functions.

6. That State Water Board staff will begin Phase 1 immediately with a target completion date of mid-2009. Work on Phases 2 and 3 will follow in subsequent years. Phase 1 work products will include:
  - a. An overarching policy statement establishing the intent of the California Water Boards to protect all waters of the State using a watershed approach in coordination with the Regional Water Boards; other local, State, and federal agencies; and local watershed and stakeholder groups and forums.
  - b. A wetland definition that that would rely on the United States Army Corps of Engineers' wetland definition to the extent feasible, but would also reliably define the diverse array of California wetlands. Staff is directed to consider alternative definitions in addition to those outlined in the 2004 Workplan.
  - c. A framework for protecting water quality and beneficial uses that relies on sequential avoidance, minimization, and mitigation of impacts.
  - d. Guidance on tracking wetland condition and function to monitor wetland protection and other required data to evaluate necessary program development resources.
7. That State Water Board staff is directed to develop the Policy using a collaborative process that involves the Regional Water Boards. A California Water Board development team (Development Team) will be formed for the Policy. The Development Team will consider and utilize relevant plans, policies, and technical documents already adopted or being developed by the Regional Water Boards. The Development Team will coordinate with other State and federal agencies and interested stakeholders to ensure a high degree of public involvement and agency coordination throughout the Policy development process.

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8. At all phases, the Policy is intended to complement and support Region-specific plans and policies to protect wetlands and riparian areas and should recognize the Regional Water Boards' essential role in implementing and informing statewide policy.

## **POLICY ISSUE**

Should the State Water Board develop a policy to protect wetlands and riparian areas?

## **FISCAL IMPACT**

State Water Board and Regional Water Boards' staff work associated with or resulting from this action will be addressed with existing and future budgeted resources.

## **REGIONAL WATER BOARD IMPACT**

Yes, all Regional Water Boards will utilize this Policy for wetland and riparian area protection.

## **STAFF RECOMMENDATION**

That the State Water Board directs staff to develop a policy to protect wetlands and riparian areas as resolved in the State Water Board Resolution.

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## STATE WATER RESOURCES CONTROL BOARD RESOLUTION NO. 2008-

### DEVELOPMENT OF A POLICY TO PROTECT WETLANDS AND RIPARIAN AREAS IN ORDER TO RESTORE AND MAINTAIN THE WATER QUALITY AND BENEFICIAL USES OF THE WATERS OF THE STATE

#### WHEREAS:

1. Over 85 percent of historic wetland and riparian acreage in California has been lost according to published research estimates. Remaining resources continue to be vulnerable to future impacts from projected population growth, land development, sea level rise, and climate change in California.
2. Although physically occupying only a small percentage of California watersheds, wetlands and riparian areas provide valuable water quality functions such as flood control, pollutant filtration, water supply and replenishment, recreation, and habitat for a wide variety of plants and animals. Wetlands and riparian areas act to promote the health and existence of other vital natural resources, and provide significant economic benefits to California.
3. The value of wetlands and riparian areas has been recognized in California through the enactment of the California Wetlands Conservation Policy that sets a goal to “ensure no overall net loss and achieve a long-term net gain in the quantity, quality, and permanence of wetlands acreage and values in California in a manner that fosters creativity, stewardship, and respect for private property” (Executive Order W-59-93).
4. The State has relied primarily on requirements of the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.) (Clean Water Act) to protect wetlands and riparian areas for water quality goals.
5. Recent U.S. Supreme Court rulings (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 2001 and *Rapanos v. United States*, 2006) have reduced the jurisdiction of the Clean Water Act over wetland and riparian areas by limiting the definition of “waters of the United States.” These decisions necessitate the use of California’s independent authorities under the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.) to protect these vital resources.
6. In 2003, the State Water Resources Control Board (State Water Board) issued a report to the Legislature titled, *Regulatory Steps Needed to Protect and Conserve Wetlands Not Subject to the Clean Water Act (Supplemental Report of the 2002 Budget Act Item 3940-001-0001)*. This report reviewed the critical role that wetlands and riparian areas have in protecting the beneficial uses of waters throughout the State. Consistent with the State Water Board and Regional Water Quality Control Boards’ (Regional Water Boards) (collectively California Water Boards) 2001 Watershed Management Initiative, this report further recognizes that a watershed-level approach is needed to protect wetlands and riparian areas and their associated water quality functions.

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7. In 2004, State Water Board staff initiated a *Workplan* upon the California Environmental Protection Agency's request (*Workplan: Filling the Gaps in Wetland Protection*) to address the waters of the State that are no longer protected under the Clean Water Act. This *Workplan* specified the need to adopt a State wetland definition to "provide a standard metric to help determine compensatory mitigation requirements and compliance with [the] 'no net loss' policy [Executive Order W-59-93]." In addition, the *Workplan* included developing a statewide policy for wetland protection "at least as protective as the federal requirements." To immediately address part of "the gap," the State Water Board adopted general waste discharge requirements for minor discharges to non-federal waters ([Water Quality Order 2004-0004](#) May 4, 2004).
8. In 2007, the State Water Board completed a research study contracted with UCLA titled *An Evaluation of Compensatory Mitigation Projects Permitted Under Clean Water Act Section 401 by the California State Water Resources Control Board, 1991-2002*. This evaluation identified a number of concerns in the California Water Boards' compliance with the *California Wetlands Conservation Policy* and in the protection of water quality and beneficial uses; also it identified strategies to address these concerns.
9. In 2007, State Water Board staff completed public scoping meetings on wetland and riparian area policy alternatives and considered comments received in accordance with the California Environmental Quality Act.

## THEREFORE BE IT RESOLVED THAT:

1. The State Water Board recognizes the beneficial services of wetlands and riparian areas for people and wildlife in protecting and improving water quality, providing fish and wildlife habitat including unique plant communities (i.e., wetland and riparian vegetation), storing floodwaters, maintaining surface water flows in dry periods, and other valuable functions. California has a rich ecological diversity, therefore, the State Water Board further recognizes that watershed focused planning is the most effective strategy for maintaining and enhancing these functions.
2. The State Water Board will take action to ensure the protection of the vital beneficial services provided by wetlands and riparian areas through the development of a statewide policy to protect wetlands and riparian areas (Policy) that is watershed-based, and that extends to all perennial, intermittent, and ephemeral watercourses, including wetlands, from headwater regions to lowland river mouths.
3. The State Water Board staff will examine the environmental issues, evaluate the relevant alternatives, and make recommendations regarding the Policy. To ensure a comprehensive scope, the staff is directed to consider additional alternatives and recommendations other than those outlined in the 2004 *Workplan*.
4. In recognition that successful Policy implementation will require a supporting level of internal program infrastructure, major policy areas should be addressed in a step-wise fashion and implemented in phases to allow for commensurate program development. The Policy shall support efforts to collect wetland data to monitor progress towards statewide wetland protection and to evaluate the level of program resources needed, including staffing, to undertake the next phases.

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5. The State Water Board staff will develop the Policy in three phases:

Phase 1 – establish a Policy to protect wetlands from dredge and fill activities. Staff is directed to develop and bring forward for State Water Board consideration: (a) a wetland definition that would rely on the United States Army Corps of Engineers' wetland definition to the extent feasible, but would also reliably define the diverse array of California wetlands, (b) a wetland regulatory mechanism based on the 404 (b)(1) guidelines (40 C.F.R. parts 230-233) that includes a watershed focus, and (c) an assessment method for collecting wetland data to monitor progress toward wetland protection and to evaluate program development.

Phase 2 – expand the scope of the Policy to protect wetlands from all other activities impacting water quality. Staff is directed to develop and bring forward for State Water Board consideration: (a) new beneficial use definitions, (b) water quality objectives, and (c) a program of implementation to achieve the water quality objectives, as necessary, to protect wetland-related functions.

Phase 3 – extend the Policy's protection to riparian areas. Staff is directed to develop and bring forward for State Water Board consideration: (a) new beneficial use definitions, (b) water quality objectives, and (c) a program of implementation to achieve the water quality objectives, as necessary, to protect riparian area-related functions.

6. The State Water Board staff will begin Phase 1 immediately with a target completion date of mid-2009. Work on Phases 2 and 3 will follow in subsequent years. Phase 1 work products will include:

- a. An overarching policy statement establishing the intent of the California Water Boards to protect all waters of the State using a watershed approach in coordination with the Regional Water Boards; other local, State, and federal agencies; and local watershed and stakeholder groups and forums.
- b. A wetland definition that that would rely on the United States Army Corps of Engineers' wetland definition to the extent feasible, but would also reliably define the diverse array of California wetlands. Staff is directed to consider alternative definitions in addition to those outlined in the 2004 Workplan.
- c. A framework for protecting water quality and beneficial uses that relies on sequential avoidance, minimization, and mitigation of impacts.
- d. Guidance on tracking wetland condition and function to monitor wetland protection and other required data to evaluate necessary program development resources.

7. The State Water Board staff is directed to develop the Policy using a collaborative process that involves the Regional Water Boards. A California Water Board development team (Development Team) will be formed for the Policy. The Development Team will consider and utilize relevant plans, policies, and technical documents already adopted or being developed by the Regional Water Boards. The Development Team will coordinate with other State and federal agencies and interested stakeholders to ensure a high degree of public involvement and agency coordination throughout the Policy development process.

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8. At all phases, the Policy is intended to complement and support Region-specific plans and policies to protect wetlands and riparian areas and should recognize the Regional Water Boards' essential role in implementing and informing statewide policy.

## **CERTIFICATION**

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on March 18, 2008.

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Jeanine Townsend  
Clerk to the Board