

RESOURCE LANDOWNERS COALITION

BILL GEYER, Executive Director

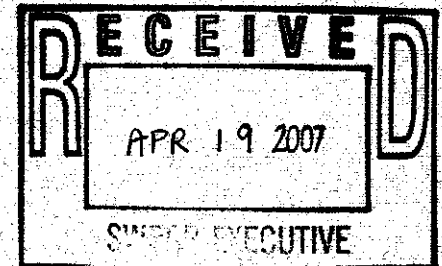
MEMORANDUM

TO: Members, State Water Resources Control Board

FROM: Jennifer West
Resource Landowners Coalition

DATE: April 19, 2007

RE: Comments, "Proposed Wetland and Riparian Area Protection Policy"



On behalf of the Resource Landowners Coalition (RLC), we thank you for the opportunity to comment on the Proposed Wetlands and Riparian Area Protection Policy.

The Resource Landowners Coalition (RLC) believes that the State Water Resources Control Board (SWRCB) should set statewide policy to provide consistent regulation of those wetlands and riparian areas that the SWRCB determines require state protection as a result of those areas falling out of federal jurisdiction as a result of U.S. Supreme Court cases, including *Solid Water Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC, 2001). We believe this regulation should be no more burdensome to the regulated community than the former requirements of the U.S. Army Corps of Engineers (Corps).

Reconsider Basis for Wetlands and Riparian Area Protection Policy

The scoping document discusses a number of reasons the SWRCB had embarked on the development of this policy. One reason identified is to provide consistent regulatory protection for those areas that were once regulated by the Corps, but are no longer due to SWANCC. To the extent that state regulation of such areas is necessary, RLC supports this objective. In fact, providing consistent regulations for the areas that have fallen out of federal jurisdiction, we believe, should be the primary objective of the entire policy. We believe each alternative presented should be analyzed based upon how the alternative would achieve this policy objective.

Regulating these federally disclaimed areas was the primary reason for, "Workplan: Filling the Gaps in Wetlands Protection" (workplan), which was issued by the SWRCB in 2004. The cover memo from then-Chairman Art Baggett to then-CAL-EPA Secretary Terry Tamminen states:

"The attached workplan, "Filling in the Gaps in Wetlands Protection", responds to your August 27, 2004 request that the State Water Resources Control Board (SWRCB) adopt a detailed program to protect waters of the State no longer subject to federal regulation."

The memo goes on to explain that the workplan's implementation would "replicate the pre-SWANCC federal program."

Despite what we thought was clear direction from the SWRCB's own workplan, the scoping document attempts to broaden the underlying reasons for preparation of a SWRCB wetlands policy and thereby to broaden the scope of the policy's coverage. We do not understand how significantly broadening the SWRCB scope of jurisdiction, as contemplated in a number of the alternatives, would result in better or consistent regulation of these areas. In fact, we are concerned that rather than focusing on the needed actions, these broad alternatives, if adopted, would serve as a regulatory distraction to the RWQCBs.

We ask that you reconsider the underlying reasons for issuing the proposed policy and refocus the policy discussion on replicating a pre-SWANCC wetlands program, as proposed by your workplan. We believe this can be thoroughly implemented and will result in an understandable outcome to the public, the Legislature and the regulated community.

Need for Statewide Consistency

We are pleased that the SWRCB is moving forward in crafting a statewide wetlands protection policy. We do not think there should be nine different sets of rules in nine different regions for the protection and mitigation of impacts to wetlands. We appreciate that the public scoping document specifically recognizes that statewide consistency is needed.

However, we are concerned that other regions are moving forward with their own policies for wetlands protection. Alternatives 2, 3 and 4 include the following statement, that each alternative would "neither override any existing Regional Water Board Basin Plans, nor would it limit the authorities of the State and Regional Water Boards under the California Water Code and federal CWA to protect wetlands, riparian areas and other waters of the state." So is it contemplated that these other regional policies will be subsumed by this proposed policy, or will this proposed policy be used as a "baseline"? It is difficult to comment on these alternatives without knowing the answer to this fundamental question.

Alternative 1 "No Action"

The SWRCB has taken a number of steps to regulate areas that have fallen out of federal jurisdiction, including issuing General WDR on May 4, 2004, issuing a wetlands workplan, and sending a guidance memo to the RWQCB asking them to regulate disclaimed areas. In 2005 the SWRCB received 7 PYs, adding to its existing 18 PYs statewide to regulate disclaimed areas and to implement the workplan. None of this is mentioned in the No Action alternative and therefore leaves the impression that the SWRCB had done nothing to protect these areas. Since each alternative increases in regulatory intensity, these significant omissions from the SWRCB's baseline activities to protect wetlands truly distort the entire document.

We have attached a copy of the General WDR, a copy of the SWRCB guidance to the RWQCB on this issue and a copy of the workplan. You will note that the General WDR,

while only for smaller wetlands areas, was intended to create a regulatory framework for addressing the areas disclaimed by the Corps. It contains very strict mitigation requirements and was very controversial when adopted.

We are also concerned that, while the staff states that areas that have fallen out of federal jurisdiction are still going unregulated, they fail to quantify the extent of the problem and identify where this is happening. This seems fundamental to understanding what additional steps might be needed to provide adequate protection of these areas.

Alternative 3 and 4

Wetlands Definition

The definition of wetlands is central to this whole policy. Alternatives 3 and 4 call for using a broader definition than the federal wetlands definition. We want to point out that the SWRCB's own 2004 workplan on Page 4 specifically states that the Board should adopt the federal definition. It states:

“Adopt the federal regulatory wetlands definition incorporated into the SWRCB May 4, 2004 General WDR.”

As the workplan mentioned, the SWRCB has already taken action in 2004 on the definition of wetlands and adopted the federal definition. If nothing else, the SWRCB will have to rescind this action if alternatives 3 or 4 go forward. Also, the No Net Loss Policy states that California should adopt the federal definition of wetlands. While other sections of the No Net Loss Policy were cited in the scoping document, this was omitted. We are troubled by these omissions. RLC believes the federal wetlands definition should be adopted.

Riparian Areas

Alternatives 3 and 4 call for the Board to begin regulating upland riparian areas never regulated by the Corps. We have a number of concerns with this. Alternative 3 states that the Board should adopt the National Research Council definition of riparian areas. This definition would mean that the RWQCBs and the SWRCBs would begin regulating areas approximately 100 meters away from the water courses. When the Board adopted the General WDR in 2004 it rejected a *similar* broad definition of riparian areas. This was not mentioned in the scoping document. Overall, the proposal for regulating upland riparian areas moves dangerously close to regulating land use; it fails to recognize that the authority of the State and Regional Boards in this context is limited to regulating "discharges" of pollutants into waters of the state.

We have attached pictures of the broad definition of "riparian areas", as defined by the National Academy of Sciences, that was rejected by the Board in 2004. These pictures were also presented to the Board in 2004 by RLC when it considered the WRD.

Perhaps the most glaring omission from the scoping document is the fact that riparian areas are already regulated by the Department of Fish and Game

through its 1600 program. This program has been operating for decades. We understand that some may feel that this program is operated for the protection of wildlife and not water quality. But 1600 agreements are triggered largely by water quality impacts. Section 1602 of the Fish and Game Code states:

(a) An entity may not substantially divert or obstruct the natural flow of, or substantially change or use any material from the bed, channel, or bank of, any river, stream, or lake, or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake, unless all of the following occur:

Clearly, 1600 agreements and their accompanying mitigation measures would overlap and possibly be duplicative with the riparian area regulation proposed in alternatives 3 and 4.

Alternative 4 Fails to Specify What Land Forms it Would Cover

It is not clear from the scoping document what land forms Alternative 4 is proposing to regulate and therefore it is extremely difficult to evaluate this option. In addition to regulating wetlands an riparian areas broadly defined, it also calls for regulating actions associated with "vegetation clearing", "hydromodification" and "invasive species." This alternative bears little relationship to the actions proposed in your workplan. We ask that this option be dismissed because it appears to be unworkable and beyond your regulatory authority.

Exempt Normal Farming Practices

The federal wetlands program has always exempted "normal farming practices" as defined in the 404 (b)(1) guidelines from the application of their program. We think whatever the Board does in this area should contain a similar exemption for normal farming practices. I have attached the federal definition of "normal farming practices."

Creating incentives for Wetlands Creation

RLC also believe that California should be encouraging and creating incentives for public and private landowners to construct wetlands for water quality or habitat purposes. This is happening in Southern California in many places.

Recognizing the role that landowners play in wetlands creation is also consistent with the 1993 "No Net Loss Policy", which includes as one of three overarching goals:

"Encourage partnerships to make landowner incentive programs and cooperative planning efforts the *Primary* focus of wetlands conservation and restoration."

While the scoping document frequently cites the No Net Loss Policy, it omits this critical goal. We think public and private landowners that create and maintain wetlands on their property for any purpose should not be subject to a new burdensome regulatory process. I have attached the full No Net Loss Policy for your consideration.

Conclusion

Before the scoping document was issued, RLC met a number of times with the SWRCB staff regarding the 2004 workplan. We have tried to make it clear that we stood ready to work with the Board and staff on implementing the workplan. It was never clear to us why there was so much delay in implementing the workplan. Unfortunately, during the past three years other regions have begun developing their own wetlands protection policies that vastly differ from the workplan and from the action the SWRCB took on this issue in 2004. Now one of those policies, alternative 4, is being presented to the regulated community as an option for statewide regulation.

We strongly suggest that you reject alternatives 3 and 4. Instead, we believe the scope of the policy should be limited to alternatives, potentially new alternatives, which reflect the post-SWANCC federal regulatory scheme. Thank you for considering our views.

Attachments:

California Wetlands Conservation Policy, 1993
Letter from Secretary Terry Tamminen to Chariman Art Baggett, 2004
Workplan: Filling the Gaps in Wetlands Protection, 2004
SWRCB Water Quality Order No. 2004-0004 DWQ
Illustrations from the National Research Council: Riparian Areas, 2002



California Environmental Protection Agency

Air Resources Board • Department of Pesticide Regulation • Department of Toxic Substances Control
Integrated Waste Management Board • Office of Environmental Health Hazard Assessment
State Water Resources Control Board • Regional Water Quality Control Boards



Terry Tamminen
Agency Secretary

Arnold Schwarzenegger
Governor

August 27, 2004

Mr. Arthur Baggett, Jr., Chair
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Dear Chairman Baggett:

I am writing to request that the State Water Resources Control Board (Board) take action by the earliest feasible date to ensure that each of the nine regional water quality control boards adopt and enforce waste discharge requirements for the protection of waters of the State that are no longer protected by the federal Government under Sections 401 and 404 of the federal Clean Water Act (33 U.S.C.A. Sec. 1341 and 1344), and that are not subject to the General Waste Discharge Requirements that were adopted by the Board earlier this year.

This past spring, the Board took an important first step to protect some of these waters when it issued its General Waste Discharge Requirements (WDR) for dredge or fill to waters outside of federal jurisdiction.¹ As the order itself recognized, however, it only addressed smaller discharges, which make up approximately half of the likely number of dredge and fill projects that would have been subject to federal jurisdiction prior to 2001.² The Board should adopt a detailed program to be used by the regional boards to provide consistent protection for the remaining state waters no longer subject to federal jurisdiction.

The Board has the authority under the Porter-Cologne Act to issue WDRs for dredge and fill into waters of the State that are no longer federally protected.³ Indeed, Water Code section 13260 requires any person discharging waste, or proposing to discharge waste, *that could affect the waters of the state* to file a report of discharge (an application for waste discharge requirements). The obligation to file a report is mandatory, as is the regional boards' responsibility to issue or waive a WDR.

¹ State Water Resources Control Board, Water Quality Order No. 2004-0004-DWQ, dated May 4, 2004.

² The General WDR is restricted to discharges of no more than two-tenths of an acre and 400 linear feet of fill or excavation discharges, and no more than 50 cubic yards of dredging discharge. Order No. 2004-0004-DWQ page 3.

³ See the August 18, 2004 memo from the Resources Landowner Coalition to Senator Byron Sher on behalf of 43 stakeholders, stating that "it is broadly acknowledged by all parties that the State Water Resources Control Board has existing authority to regulate SWANCC areas . . ."

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Mr. Arthur Baggett
August 27, 2004
Page 2

While the Board has stated that it expects discharges that are not eligible for the General WDR to apply to regional boards for individual WDRs, I am concerned that this is not occurring in all instances. In addition, the regional boards have varied in their approaches to the General WDR, creating inconsistent processes and requirements for individual WDRs in non-federally protected waters. The inconsistencies among the regional boards' approaches to discharges outside the scope of the General WDR may leave many waters of the State without protection.

The Porter-Cologne Act requires the State and regional boards "at all times, [to] coordinate their respective activities so as to achieve a unified and effective water quality control program in this state."⁴ In order to achieve that coordinated, consistent approach to dredge and fill discharges not covered by the General WDR, the State Board should adopt a program to be used by the regional boards in issuing individual WDRs. In order to improve agency efficiency and to better protect water quality, the Board should enter into a Memorandum of Understanding with the Department of Fish and Game to implement a consistent program and the Board's guidance to the regional boards should include guidelines for better coordinating permitting activities with the Department of Fish and Game.

I urge the State Board to address and complete this program as soon as possible to provide maximum protection for our state waters.

Thank you for your attention to this important issue.

Sincerely,



Terry Tamminen
Agency Secretary

cc: SWRCB Board members
Senator Byron Sher

⁴ California Water Code, Division 7, Water Quality, Section 13001.



Terry Tamminen
Secretary for
Environmental
Protection

STATE WATER RESOURCES CONTROL BOARD

Executive Office

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Arnold Schwarzenegger
Governor

TO: Terry Tamminen
Agency Secretary
California Environmental Protection Agency

FROM: Arthur G. Baggett, Jr.
Chair

DATE: SEP 24 2004

SUBJECT: WORKPLAN: FILLING THE GAPS IN WETLAND PROTECTION

The attached workplan, "Filling the Gaps in Wetland Protection" (Attachment 1), responds to your August 27, 2004 request that the State Water Resources Control Board (SWRCB) adopt a detailed program to protect waters of the State no longer subject to federal regulation. Such "isolated" waters have fallen out of federal jurisdiction as a result of the 2001 U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*. The SWRCB has submitted to the Legislature an April 2003 report titled *Regulatory Steps Needed to Protect and Conserve Wetlands Not Subject to the Clean Water Act (Legislative Report)*. The attached workplan provides for implementation of the measures that the *Legislative Report* identifies as being necessary to replicate the pre-SWANCC federal program.

The attached workplan also outlines the steps the SWRCB has taken to-date to respond to SWANCC. We believe that our May 4, 2004 adoption of General Waste Discharge Requirements for "isolated" waters, our June 25, 2004 guidance to the Regional Water Quality Control Boards on regulating discharges to "isolated" waters (Attachment 2), and the additional measures identified in the workplan will restore pre-SWANCC protection to "isolated" waters and strengthen California's overall wetland protection program.

Please telephone me at 341-5611 if I can answer any questions on the workplan or any other aspect of our wetland protection efforts. This subject is currently under the direction of Stan Martinson, Chief of the Division of Water Quality, and he can be reached at 341-5458.

Attachments: 1: *Filling the Gaps in Wetland Protection*
2: *Guidance for Regulation of Discharges to "Isolated" Waters*

cc: (See next page)

California Environmental Protection Agency

Terry Tamminen

- 2 -

cc: (Continuation page)

Board members
Regional Board Executive Officers

Ryan Broddrick, Director
Department of Fish and Game

Alexis Strauss, Director
Water Division
U.S. Environmental Protection Agency, Region 9

State Water Resources Control Board
Division of Water Quality

WORKPLAN:

FILLING THE GAPS IN WETLAND PROTECTION

September 2004

Governor Schwarzenegger's *Action Plan for California's Environment* directs state agencies to fill any gaps in wetlands protection. This responsibility was highlighted in an August 27, 2004 letter from CalEPA Secretary Tamminen to the State Water Resource Control Board (SWRCB). This Workplan presents the SWRCB's response to this directive.

BACKGROUND

The SWANCC Decision

In 2001, the U.S. Supreme Court held in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* that certain "isolated" waters are not subject to Clean Water Act (CWA) jurisdiction solely because they are frequented by migratory birds that cross state lines. The Supreme Court emphasized that it is the responsibility of the states to protect such waters. The full implications of SWANCC are yet to be determined in federal courts, but as a result of current federal interpretation of the decision many discharges of dredged and fill material that previously would have required a federal CWA section 404 permit now no longer need one.

Current SWRCB Program

In California, responsibility for regulating discharges to wetlands and other waters is delegated to the SWRCB and the nine Regional Water Quality Control Boards (RWQCBs). Although State law¹ provides independent regulatory authority, California has used CWA section 401 Water Quality Certification as its primary tool to protect wetlands. The Water Quality Certification (401) Program also regulates discharges to "isolated" waters.

SWRCB Actions to Date.

In responding to SWANCC to date, the State Water Resources Control Board (SWRCB) has²:

1. on January 25, 2001, issued a legal memorandum asserting the authority and responsibility of the SWRCB and Regional Water Quality Control Boards (RWQCBs) to regulate discharges to "isolated" waters,
2. during 2001, coordinated with the US Army Corps Of Engineers (USACE) to ensure that all USACE jurisdictional disclaimer letters advise dischargers that they are subject to Regional

¹ Porter Cologne Water Quality Control Act

² The documents cited below may be viewed at: <http://www.swrcb.ca.gov/cwa401/index.html>

Water Quality Control Board (RWQCB) regulatory jurisdiction, and that the USACE sends copies all such letters to the SWRCB and RWQCBs,

3. beginning in 2001, developed and populated a database documenting all USACE disclaimers and related RWQCB orders,
4. on March 13, 2003 submitted to the federal government detailed comments on a controversial proposal limiting federal jurisdiction under the CWA, titled *Comment On Advanced Notice Of Proposed Rulemaking On Definition Of "Waters Of The United States"*,
5. submitted to the legislature an April 2003 report titled *Regulatory Steps Needed to Protect and Conserve Wetlands Not Subject to the Clean Water Act (Legislative Report)*,
6. on May 4, 2004, adopted *Statewide General Waste Discharge Requirements For Dredged or Fill Discharges to Waters Deemed by the U.S. Army Corps Of Engineers to be Outside of Federal Jurisdiction (General WDRs)*, regulating certain discharges to non-federal waters, and
7. on June 25, 2004 transmitted to the RWQCBs programmatic guidance titled *Guidance for Regulation of Discharges to "Isolated" Waters*, directing the RWQCBs to prioritize such discharges for regulatory attention, to request a report of waste discharge from all recipients of USACE jurisdictional disclaimer letters, to take appropriate regulatory action, and to copy the SWRCB on specified regulatory documents for tracking and reporting purposes (Attachment 1).

The above actions provide a good foundation for filling the SWANCC gap.

WORKPLAN

The SWRCB'S April 2004 *Legislative Report* identified and discussed measures needed to restore the protection that was provided to "isolated" wetlands before SWANCC. The SWRCB will build on the previous work listed above, and will implement the measures identified in the *Legislative Report*³. These measures are described and a schedule of products⁴ is provided below.

1. Advise Dischargers of Need to Report Discharges

Objective: reduce confusion and misinformation regarding state requirements for discharges to "isolated" waters.

Conduct ongoing outreach in collaboration with relevant trade and professional associations, to include presentations at conferences and workshops and submittal of information to professional and trade journals and newsletters.

2. Interagency Coordination

Objective: institute interagency coordination to ensure that discharges to "isolated" waters will not adversely affect listed specie; to enhance overall resource protection; and to reduce program overlaps.

a. State Agency – Department of Fish and Game (DFG)

- i. Request DFG participation in developing systematic coordination.
- ii. Develop Memorandum of Understanding or other appropriate document regarding consultation protocol for State-listed species.
- iii. Develop Memorandum of Understanding or other appropriate document regarding ongoing coordination to enhance overall resource protection and to reduce program overlaps.

b. Federal Agencies – US Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS)

Develop programmatic guidance to facilitate consultation with USFWS and NMFS regarding federally-listed species.

³ Measures Nos. 1, 2, 3, and 5 below were also identified as necessary by the California Research Bureau in its February 2002 report, *The U.S. Supreme Court Limits Federal Regulation of Wetlands: Implications of the SWANCC Decision*. Measure No. 3 is identified in the *Legislative Report* as needed to establish a SWRCB wetland program; it is included in this Workplan because it is fundamental to State wetland protection and to forestall continuing proliferation of disparate wetland-related beneficial uses among different RWQCBs.

⁴ For schedule planning purposes, this Workplan assumes the availability of four PYs in the SWRCB's Water Quality Certification Unit during FY 05-06 through FY 06-07.

3. Develop Beneficial Use (BU) Definitions for Wetland-Related Functions

Objective: provide a Statewide regulatory standard to systematically protect wetland-related functions (e.g., pollutant removal, floodwater retention, and habitat connectivity) not explicitly included in the existing list of BUs.

- a. Develop programmatic guidance providing Statewide definitions and directing adoption into RWQCB Water Quality Control Plans (Basin Plans)
- b. RWQCBs adopt wetland BUs into Basin Plans during scheduled triennial reviews or earlier.

4. Adopt State Wetland Definition

Objective: provide a standard metric to help determine compensatory mitigation requirements and compliance with "no net loss" policy.

Note: a State wetland definition will not affect the SWRCB/RWQCB's regulatory jurisdiction, which under State law extends to all waters of the state.

Adopt the federal regulatory wetland definition incorporated into the SWRCB's May 4, 2004 General WDRs⁵.

5. Adopt State Analog of CWA 404(b)(1) Guidelines

Objective: provide a State policy framework at least as protective as the federal requirements applicable to fill and dredged discharges to waters of the U.S.

Adopt State version of CWA section 404(b)(1) guidelines, making minimal revisions to reflect the State regulatory context and any changes to federal practice resulting from the federal December 2002 "Mitigation Action Plan"⁶.

6. Monitor Permitting for "Isolated" Waters

Objective: document implementation of SWRCB's June 25, 2004 "Guidance for Regulation of Discharges to 'Isolated' Waters".

- a. Develop and populate a database to document and correlate USACE disclaimer letters, RWQCB requests for Reports of Waste Discharge, and RWQCB regulatory requirements, i.e., WDRs, waivers of WDRs, or Notices of Applicability for General WDRs.
- b. Report at least annually on impact of SWANCC to waters of the state, and on degree to which waters subject to SWANCC are being protected by SWRCB/RWQCBs.

⁵ This action is categorically exempt from the California Environmental Protection Act pursuant to CEQA Guidelines section 15308 (Actions by Regulatory Agencies for Protection of the Environment).

⁶ This action is categorically exempt from the California Environmental Protection Act pursuant to CEQA Guidelines section 15308, "Actions by Regulatory Agencies for Protection of the Environment".

SCHEDULE OF PRODUCTS

By Task

Task	Date ⁷
1. Presentations, newsletter articles, and other outreach	Ongoing
2.a.i Memorandum requesting DFG participation	11/05
2.a.ii MOU w. DFG re consultation protocol for State-listed species	06/05
2.a.iii MOU re ongoing coordination	06/06
2.b. Guidance for consultation with USFWS and NMFS	06/05
3. Adopt State Wetland Definition	09/06
4. Adopt State Analog of CWA 404(b)(1) Guidelines	09/06
5.a Develop Beneficial Use (BU) Definitions for Wetland-Related Functions	<u>03/05</u>
5.b RWQCBs adopt wetland BUs into Basin Plans.	09/09
6.a. Develop database	10/04
6.b Annual report	06 /an

By Date

Task	Date
1. Presentations, newsletter articles, and other outreach	Ongoing
6.a. Develop database	10/04
2.a.i Memorandum requesting DFG participation	11/04
5.a Develop Beneficial Use (BU) Definitions for Wetland-Related Functions	03/05
2.a.ii MOU w. DFG re consultation protocol for State-listed species	06/05
2.b. Guidance for consultation with USFWS and NMFS	06/05
2.a.iii MOU w. DFG re ongoing coordination	06/06
3. Adopt State Wetland Definition	09/06
4. Adopt State Analog of CWA 404(b)(1) Guidelines	09/06
5.b RWQCBs adopt wetland BUs into Basin Plans.	<u>09/09</u>
6.b Annual report	06/an

⁷ All due dates are last day of indicated month.

State Water Resources Control Board

AMICPL/RTT J



Terry Tamminen
Secretary for Environmental
Protection

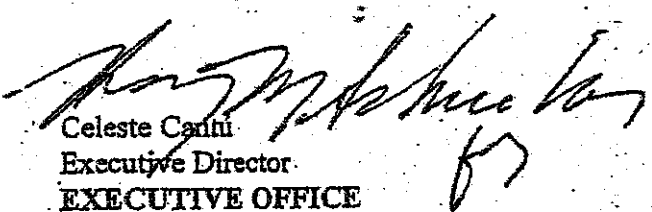
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Arnold Schwarzenegger
Governor

TO: Regional Board Executive Officers

FROM: 
Celeste Canni
Executive Director
EXECUTIVE OFFICE

DATE: JUN 25 2004

SUBJECT: GUIDANCE FOR REGULATION OF DISCHARGES TO "ISOLATED" WATERS

Background

As you know, Governor Schwarzenegger's *Action Plan for California's Environment* directs State agencies to fill any gaps in wetlands protection. The Supreme Court's 2001 decision in *Solid Waste Agency of Northern Cook County v. U. S. Army Corps of Engineers (SWANCC)* found that certain "isolated" wetlands and other waters are out of federal jurisdiction under the Clean Water Act, and it is the responsibility of the states to protect them. As a result of the decision, many projects carried out in "isolated waters" that previously would have required a Clean Water Act section 404 permit now no longer need one. From January 1, 2001 to December 31, 2003, the U. S. Army Corps of Engineers (USACE) disclaimed jurisdiction over 160 water bodies comprising 449 acres of waters of the State, including 251 acres of wetlands, 121 acres of riparian area, and 77 acres of other waters (these figures are under-reported because 24 percent of the jurisdictional disclaimers did not specify the sizes of the disclaimed water bodies). USACE continues to disclaim waters, pursuant to relevant federal guidance.

In response to *SWANCC*, the State Water Resources Control Board (SWRCB) has:

- issued a January 25, 2001 legal memorandum asserting the authority and responsibility of the SWRCB and Regional Water Quality Control Boards (RWQCBs) to regulate discharges to "isolated" waters,
- coordinated with USACE to ensure that the SWRCB and RWQCBs receive copies of all USACE jurisdictional disclaimer letters and developed a database of such disclaimers and related RWQCB orders,
- submitted March 13, 2003 comments on a federal proposal that would have redefined "Waters of the United States,"
- submitted to the legislature an April 2003 report titled *Regulatory Steps Needed to Protect and Conserve Wetlands Not Subject to the Clean Water Act*, and

California Environmental Protection Agency

- on May 4, 2004, adopted general waste discharge requirements for certain discharges to non-federal waters.

However, we have not yet developed a systematic, statewide approach for protecting "isolated" waters. The effects of SWANCC have fallen on the State at a time of shrinking agency budgets, and discharges to disclaimed waters have gone almost entirely unregulated by the RWQCBs; they are also often not subject to Department of Fish and Game (DFG) or other State regulation.

At their January 6, 2004 meeting, RWQCB Assistant Executive Officers suggested that the SWRCB provide direction for protecting "isolated" waters; and at the April 21, 2004 meeting of the Water Quality Certification Program Coordinating Committee (Corcom), RWQCB 401 Liaisons recommended the adoption of the following guidance. This document provides internal guidance only and has no regulatory effect. It is being forwarded electronically to RWQCB 401 staffs and will be posted on the SWRCB 401 Program's Intranet site (<http://dwqweb/wqcert/>).

Guidance

Discharges subject to Clean Water Act section 404 receive a level of regulatory review and protection by the USACE and are often also subject to streambed alteration agreements issued by the DFG; whereas discharges to waters of the State subject to SWANCC receive no federal oversight and usually also fall out of DFG jurisdiction. Absent RWQCB attention, such discharges will generally go entirely unregulated. Therefore, to the extent that staffing constraints require the RWQCBs to regulate some dredge and fill discharges less closely than others and consistent with other RWQCB priorities, RWQCBs should consider setting a higher regulatory priority on discharges to "isolated" waters than to discharges of similar extent, severity, and permanence to federally-protected waters of similar value. Dredging, filling, or excavation of "isolated" waters constitutes a discharge of waste to waters of the State, and prospective dischargers are required to submit a report of waste discharge to the RWQCB and comply with other requirements of Porter-Cologne. Therefore, you should protect "isolated" waters in your Region by systematically instituting the following procedures:

1. Request a report of waste discharge from all recipients of USACE jurisdictional disclaimers, using the attached or a similar letter.
2. Pursuant to the requirements of the California Permit Streamlining Act, advise prospective dischargers within 30 days of receiving a report of waste discharge of whether their application is complete and, if not, what is needed to make it complete (assuming that you do not take regulatory action with 30 days).
3. Take appropriate regulatory action in response to receiving the report of waste discharge, using either the SWRCB's Water Quality Order No. 2004-0004-DWQ, *Statewide General Waste Discharge Requirements for Dredged or Fill Discharges to Waters Deemed by the U.S. Army Corps of Engineers to be Outside of Federal Jurisdiction* (General WDRs) or other individual or general WDRs or waivers. The General WDR can be downloaded from the SWRCB's website at "<http://www.swrcb.ca.gov/cwa401/index.html>". In issuing WDRs or waivers, you may refer to the same regulatory considerations which you generally apply to

issuance of Clean Water Act section 401 Water Quality Certifications (401 certification) and to those articulated in the General WDRs.

4. Copy SWRCB and USACE staffs on your requests for reports of waste discharge and on your regulatory orders. Addresses of appropriate parties are:

401 Program Manager
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

U.S. Army Corps of Engineers
(Appropriate District below):

Regulatory Branch
Sacramento District
1325 J Street
Sacramento, CA 95814-2922

Regulatory Branch
San Francisco District
333 Market Street
San Francisco, CA 94105

Regulatory Branch
Los Angeles District
911 Wilshire Boulevard, 11th Floor
Los Angeles, CA 90017-3401

Use the USACE's file number, whenever available, on all correspondence. SWRCB staff will use the USACE file number (or your file number in its absence) to correlate USACE jurisdictional disclaimers, RWQCB requests for reports of waste discharge, applicants' reports of waste discharge, and RWQCB regulatory orders. Using this information, the SWRCB will assist your tracking of SWANCC-related discharges and will report on our effectiveness in filling the regulatory gap created by the current federal interpretation of SWANCC.

Thank you for your effective management of our very limited program resources in regulating dredge, fill, and excavation discharges to wetlands, riparian areas, headwater streams, and other waters. If you have any questions, please contact Stan Martinson, Chief of the Division of Water Quality, at 916-341-5458 or at marts@swrcb.ca.gov. You may also contact Oscar Balaguer, Chief of the Wetlands and Certification Program, at 916-341-5485 or at balao@swrcb.ca.gov.

Attachment

Regional Board
Executive Officers

- 4 -

JUN 25 2004

cc: Terry Tamminen
Agency Secretary
California Environmental Protection Agency

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Wetland Coordinator
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Los Angeles, CA 90012

Tim Vendlinski, Chief (WTR-8)
Wetlands Regulatory Office
U.S. Environmental Protection Agency,
Region 9
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California Environmental Protection Agency

Recycled Paper

Regional Board
Executive Officers

- 5 -

JUN 25 2004

Electronic cc: Regional Board
Assistant Executive Officers

RWQCB WQCP Liaisons and other staff

California Environmental Protection Agency

 Recycled Paper

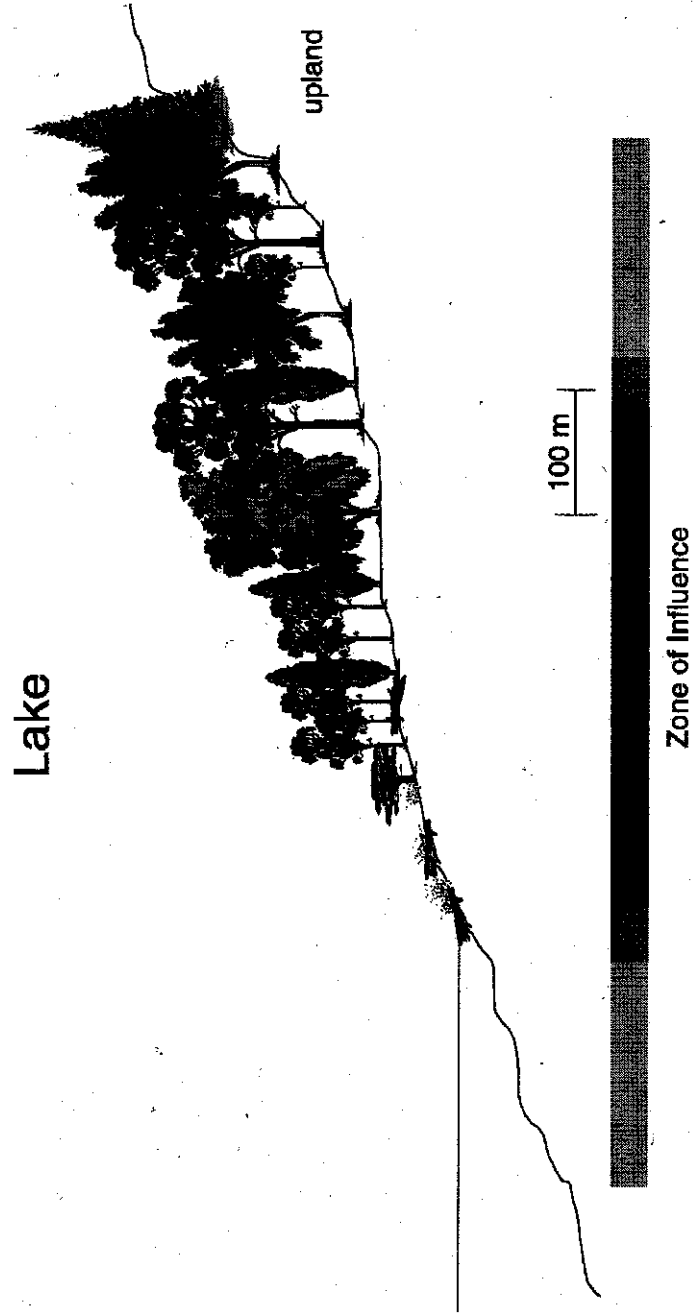


FIGURE 1-5(D)

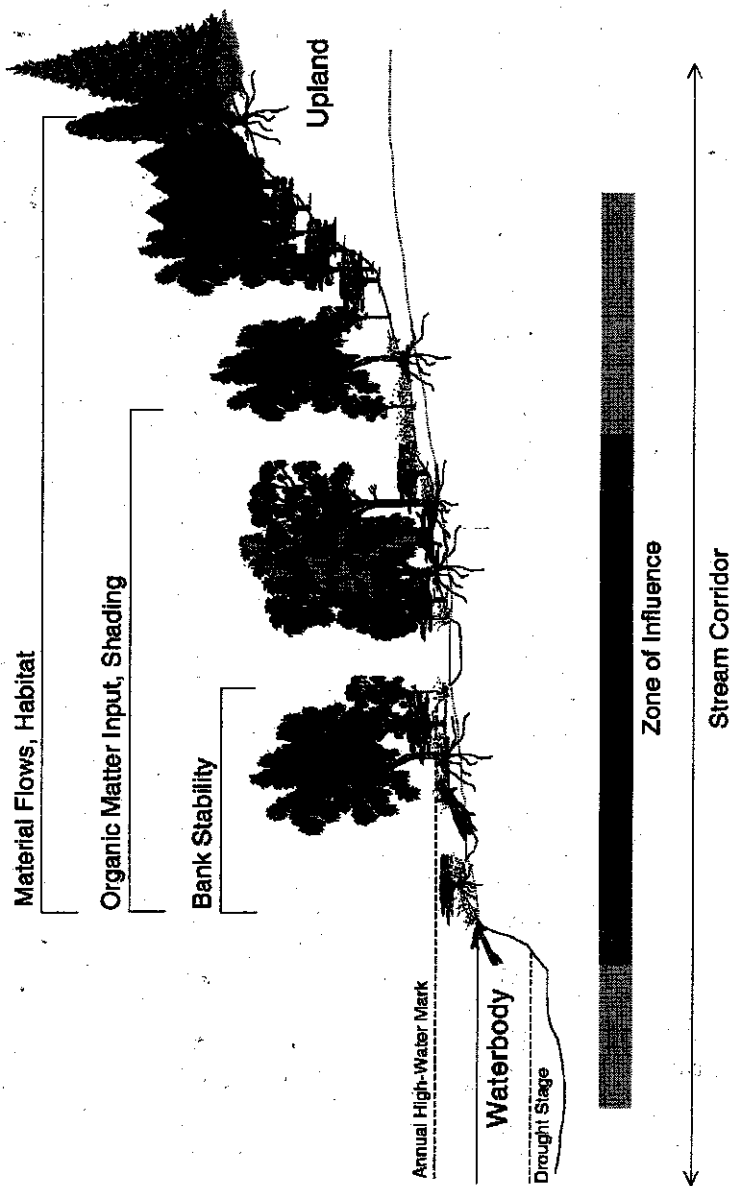
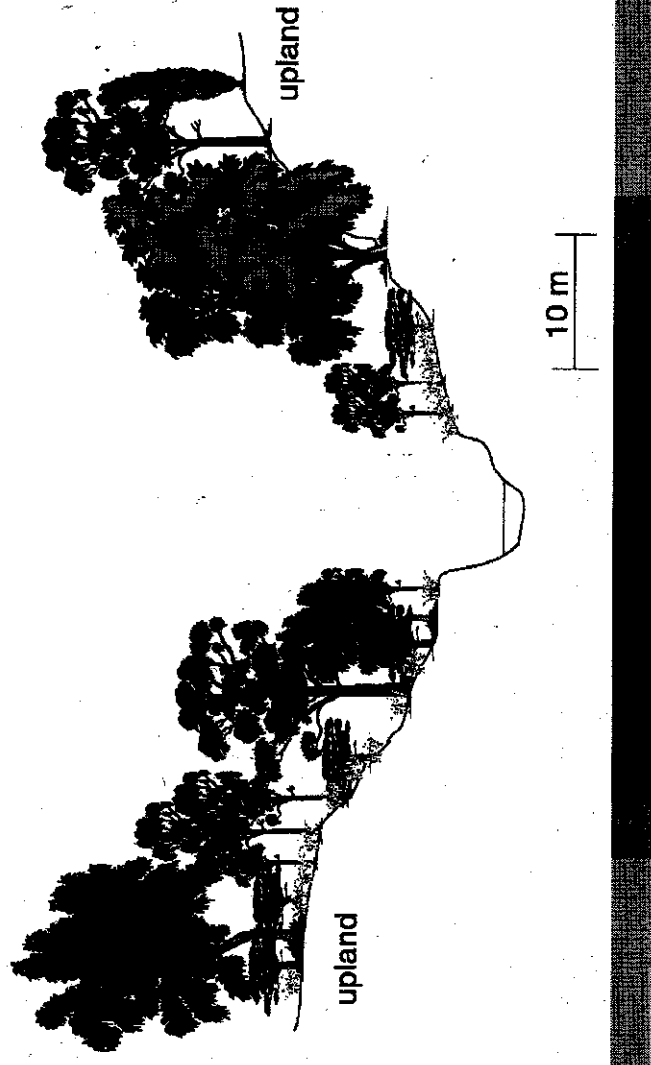


FIGURE ES-1 Schematic of a generic riparian area showing a zone of influence relative to aquatic and upland areas. The intensity of riparian influence is depicted with shading. "Material flows" refers to energy, organic matter, water, sediment, and nutrient flow.

Small Stream



Zone of Influence

FIGURE 1-5(B)

**STATE WATER RESOURCES CONTROL BOARD
WATER QUALITY ORDER NO. 2004-0004-DWQ**

**STATEWIDE GENERAL WASTE DISCHARGE REQUIREMENTS
FOR DREDGED OR FILL DISCHARGES TO WATERS DEEMED BY THE
U.S. ARMY CORPS OF ENGINEERS TO BE OUTSIDE OF
FEDERAL JURISDICTION (GENERAL WDRs)**

I. FINDINGS

The State Water Resources Control Board (SWRCB) finds that:

Reasons for issuing these General WDRs

1. Section 13260(a) of the California Water Code (Water Code) requires that any person discharging waste or proposing to discharge waste within any region, other than to a community sewer system, which could affect the quality of the waters of the State¹, file a report of waste discharge (ROWD). The discharge of dredged or fill material may constitute a discharge of waste that could affect the quality of waters of the State.
2. California has largely relied upon its authority under section 401 of the federal Clean Water Act (CWA) (33 U.S.C. § 1341) to regulate discharges of dredged or fill material to California waters. That section requires an applicant to obtain "water quality certification" from California that the project will comply with State water quality standards before certain federal licenses or permits may be issued. The permits subject to section 401 include permits for the discharge of dredged or fill materials (CWA section 404 permits) issued by the U.S. Army Corps of Engineers (ACOE).
3. Given the regulatory process employed under section 401, waste discharge requirements under the Porter-Cologne Water Quality Control Act were typically waived for projects that required certification. Regional Water Quality Control Board (RWQCB) waivers also applied to discharges outside of ACOE jurisdiction. However, these waivers expired as of January 1, 2003 pursuant to the requirements of SB 390. These General WDRs regulate some of the activities for which WDRs were previously waived.
4. The certification process under section 401 only applies to those waters that are subject to the reach of the CWA. The CWA applies to "navigable waters," which are defined in the CWA as "waters of the United States." The term "waters of the United States" is defined expansively in 33 Code of Federal Regulations (CFR), part 328. In 2001, the U.S. Supreme Court issued a decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), which held that certain "isolated" waters are not subject to CWA jurisdiction merely because they are frequented by migratory birds that cross state lines. The full implications of *SWANCC* are yet to be determined in the federal courts, but as a result

¹ "Waters of the State" as defined in Water Code section 13050(e).

of the decision, many projects that previously would have required a section 404 permit now no longer need one. From January 1, 2001 to December 31, 2003, the ACOE disclaimed jurisdiction over 160 water bodies comprising 449 acres of waters of the state, including 251 acres of wetlands, 121 acres of riparian area, and 77 acres of other waters (these figures are under-reported because 24 percent of the jurisdictional disclaimers did not specify the sizes of the disclaimed waterbodies). The prospect of issuing waste discharge requirements for each of the now non-federal waters, especially in a time of budgetary contraction, is daunting. Many of the projects that were traditionally subject to certification requirements involved small discharges with few or no permanent impacts. It is the intent of these General WDRs to regulate a subset of the discharges that have been determined not to fall within federal jurisdiction, particularly those projects involving impacts to small acreage or linear feet and those involving a small volume of dredged material.

5. Wetlands, riparian areas, and headwaters are shallow waters of the state, which are by their nature affected most often and severely by filling and excavation. Regulatory attention to these water bodies is necessitated by the State "No Net Loss" Policy for wetlands (Executive Order W-59-93); the high habitat value of these waters; the basin-wide value of these waters for pollutant removal, floodwater retention, channel stability, and habitat connectivity; the high number of special-status species associated with these waters and their associated habitats; the high percentage of historic losses of these waters in California; the vulnerability of these waters to future impacts from projected population growth and land development; and the high level of public interest in these waters.
6. Water Code section 13263(a) requires that waste discharge requirements (WDRs) be prescribed as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge. Such WDRs must implement any relevant water quality control plans, taking into consideration beneficial uses to be protected, the water quality objectives reasonably required for those purposes, other waste discharges, the need to prevent nuisance, and the provisions of section 13241 of the Water Code.
7. Water Code section 13263(i) authorizes the SWRCB to prescribe general WDRs for a category of discharges if the discharges are produced by the same or similar operations; the discharges involve the same or similar types of waste; the discharges require the same or similar treatment standards; and the discharges are more appropriately regulated under general discharge requirements than individual discharge requirements.
8. The discharges authorized by these General WDRs meet the criteria for general WDRs set forth in Water Code section 13263(i) because they are all produced by dredging or filling operations; they all involve the discharge of earth, rock, or similar solid materials; they are all limited in size per the terms of the WDRs; they all require similar mitigation techniques to avoid, minimize, and/or compensate for their adverse impacts; and they are all relatively small surface water bodies or water body segments that have been deemed by ACOE to be "isolated," do not meet the federal wetland criteria, or are above the "line of ordinary high water" limit of federal jurisdiction. They are appropriately regulated under General WDRs because of their similar nature, large numbers, and amenability to being regulated through the use of similar discharge restrictions, as specified in these General WDRs. Regulation of

such discharges by these General WDRs will allow the SWRCB and RWQCBs to direct limited staff time to larger, more complex, and potentially more damaging discharges to waters deemed to be outside of federal jurisdiction.

Eligibility Criteria

9. These General WDRs are restricted to dredged or fill discharges of not more than two-tenths (0.2) of an acre and 400 linear feet for fill and excavation discharges, and of not more than 50 cubic yards for dredging discharges. Projects that may be covered under these General WDRs include land development, detention basins, disposal of dredged material, bank stabilization, revetment, channelization, and other similar projects. These size maximums help limit the potential environmental impact of the discharges and make them amenable to similar discharge restrictions, while permitting about half of the projects discharging to non-federal waters, as projected from historical data on discharge sizes. The size and volume restrictions are appropriate because larger projects involve a significantly greater risk to the environment and are more appropriately regulated by individual WDRs.

Absent a potential effect on the quality of waters of the state, no notification is required under these General WDRs.² The "quality of waters" refers to chemical, physical, biological, bacteriological, radiological, and other properties and characteristics of water which affects its use.³ Because of the variability, complexity, and interactions of the factors affecting the quality of waters, it is not possible to provide advice on the kind, size, location, or duration of discharges that can affect water quality under all circumstances. Generally, discharges of dredged, fill, or excavated material to a wetland, or to the active channel or bed of a waterbody will require regulation. Discharges to a riparian area or to an area in proximity to a waterbody can affect the quality of the water if they directly or indirectly result in a discharge to the water (e.g., via stormwater flows, during flood events, or by generating pollutants or increased runoff); are associated with a change in the nature of vegetation that could affect water quality (e.g., by affecting pollutant removal, stream shading, or bank stability); or change the hydrologic or geomorphologic characteristics of the waterbody during some flow condition.

These General WDRs do not set a lower size limit below which a Notice of Intent is not required. Neither the Porter-Cologne Water Quality Control Act nor the federal CWA establish a lower size threshold for permitting. If a lower threshold were established in these General WDRs, discharges below that threshold would be subject to regulation under individual WDRs or an individual waiver of WDRs, thus defeating the purpose of these General WDRs. Moreover, size is not the sole factor dictating the value of a wetland or other water. Small, strategically placed waters, or segments of waters, can play important roles in supporting local habitat, habitat connectivity, pollutant removal, floodwater attenuation, and other beneficial uses. In addition, without a reporting requirement, there would be no way for the State to ensure that multiple small discharges will not have significant cumulative effects.

10. Discharges of fill can directly or indirectly destabilize the channel or bed of a receiving water by changing geomorphic parameters, including hydrologic characteristics, sediment characteristics, or stream grade. Such destabilization diminishes the ability of the water body

² Water Code section 13260

³ Water Code section 13050(g)

to support designated beneficial uses. Quantification and mitigation of such impacts may require detailed project-specific analyses. Therefore, these General WDRs do not authorize discharges that could destabilize the channel or bed of a receiving water.

11. In urbanizing basins or other situations, a large number of relatively small projects potentially eligible for these General WDRs, in their aggregate, may adversely impair the ability of the water body to support beneficial uses. Quantification and mitigation of such impacts may require basin-wide analyses. Therefore, these General WDRs do not authorize discharges that, when considered in conjunction with other potential discharges, could cause a significant cumulative effect on water quality or beneficial uses.
12. To the extent they are determined to fall within federal jurisdiction, it is likely that the SWRCB and RWQCBs will continue to regulate dredged or fill discharges primarily through their authority under section 401 of the CWA. Therefore, these General WDRs do not apply to discharges to federal waters that are subject to sections 401 and 404 of the CWA. These General WDRs likewise do not apply to discharges regulated under a section 402 storm water permit.
13. Discharges which could have a significant impact on rare, candidate, threatened, or endangered species require detailed project-specific analysis and individual regulation. Such discharges are therefore not authorized by these General WDRs.
14. Although a discharge may be eligible for coverage under these General WDRs, the RWQCB may elect to regulate the discharge under other WDRs or waivers thereof.
15. Discharges that would be exempt pursuant to section 404(f) of the CWA are waived from these WDRs. This waiver shall not affect a RWQCB's authority to issue individual WDRs or waivers for such discharges if it deems it appropriate.

Mitigation Plan

16. SWRCB Resolution No. 68-16, "Statement Of Policy With Respect To Maintaining High Quality Of Waters In California" ("Antidegradation Policy"), states that discharges to existing high quality waters will be required to meet WDRs which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur, and (b) the highest water quality consistent with maximum benefit to the people of the State will be maintained.
17. Executive Order W-59-93, dated August 23, 1993, establishes a California Wetlands Conservation Policy including an objective to ensure no overall net loss of and a long term net gain in the quantity, quality, and permanence of wetland acreage and value in California ("No Net Loss Policy").
18. Filling wetlands, riparian areas, headwaters, and other waters causes partial or complete loss of the beneficial uses provided by those waters. To reconcile such losses with the "No Net

Loss" requirements of Executive Order W-59-93 and the "Antidegradation" requirements of SWRCB Resolution No. 68-16, these General WDRs require mitigation plans to ensure that impacts are mitigated through avoidance and minimization and that unavoidable loss of beneficial uses is offset with appropriate compensatory mitigation, including creation, restoration, or (in exceptional cases) preservation of other waters of the state. These mitigation requirements are consistent with those adopted by the U.S. Environmental Protection Agency and the ACOE for regulation of dredged or fill discharges to federal waters under CWA section 404.

19. To comply with the objective of the State "No Net Loss Policy" to ensure the quantity, quality, and permanence of wetland acreage and values in California, and with the "Antidegradation" requirements of SWRCB Resolution No. 68-16, these General WDRs require that compensatory mitigation areas for permanent impacts be subject to a deed restriction or other legal instrument that ensures preservation of the mitigation in perpetuity. These General WDRs do not generally require compensatory mitigation for temporary impacts, because the SWRCB does not anticipate that projects eligible under this order would ordinarily create temporary impacts of a size, severity, and/or duration that would have a significant adverse impact on beneficial uses. The decision in this order to generally require compensatory mitigation only for permanent impacts is not meant to be a precedent for any other SWRCB or RWQCB order.
20. Consistent and equitable application of these General WDRs is in the interest of environmental protection and the applicants. These General WDRs therefore provide guidance to SWRCB and RWQCB staffs regarding factors to evaluate in considering the eligibility of these General WDRs and in evaluating mitigation plans.

Basin Plans

21. All WDRs must implement the RWQCB Water Quality Control Plan (Basin Plan) for the region affected by the discharge. These General WDRs require dischargers to comply with all applicable Basin Plan provisions, including maintaining the protection of beneficial uses and complying with any prohibitions and water quality objectives governing the discharge.

Beneficial Uses

22. Beneficial uses are the most fundamental of the State's water quality standards. RWQCBs designate appropriate beneficial uses for waters in their regions' Basin Plans. The beneficial uses for the waters of the State include, but are not limited to, domestic supply, municipal supply, agricultural and industrial supply, power generation, recreation, aesthetic enjoyment, navigation, and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.

Fees

23. Water Code section 13260(d)(1) requires that each person for whom WDRs have been prescribed pursuant to section 13263 shall submit an annual fee according to a reasonable fee

schedule established by the SWRCB. The schedule of fees for discharges of dredged or fill material is published at California Code of Regulations (CCR) 23 section 2200(a)(2). For activities covered by these General WDRs, the SWRCB anticipates that most of the discharges will be one-time and of short duration. Therefore, only a one-time fee usually will be charged.

California Environmental Quality Act (CEQA)

24. CEQA requires a government agency to comply with certain procedures when it approves or proposes to carry out an activity. (Cal. Code Regs., tit. 14, § 15002(e))
25. Private actions are subject to CEQA if they involve governmental participation, financing, or approval. (Cal. Code Regs., tit. 14, § 15002(c))
26. A Mitigated Negative Declaration in compliance with CEQA has been adopted for these General WDRs.
27. Potential dischargers and all other known interested parties have been notified of the intent to adopt these General WDRs.
28. All comments pertaining to the proposed discharges have been heard and considered in a public meeting.

II. ORDER

A. ELIGIBILITY

IT IS HEREBY ORDERED that only discharges that meet the following criteria shall be enrolled under these General WDRs:

1. The discharge shall not be subject to section 404 of the CWA or section 10 of the federal Rivers and Harbors Act. These General WDRs likewise do not apply to discharges regulated under a section 402 storm water permit.
2. The discharge shall be dredged or fill materials.
3. The discharge shall meet the following size criteria:
 - a. Excavation⁴ and fill activities must not excavate or fill an area greater than two-tenths (0.2) of an acre of waters of the state, and

⁴ "Excavation refers to moving sediment or soil in shallow waters or under no-flow conditions where impacts to beneficial uses are best described by the area of discharge. It typically is done for purposes other than navigation. Examples include trenching for utility lines, other earthwork preliminary to construction, removing sediment to increase channel capacity, and aggregate mining in fresh water." (Cal. Code Regs., tit. 23, § 2200(a)(2).)

- b. Linear excavation and fill activities affecting drainage features and shorelines (e.g., bank stabilization, revetment, and channelization projects), must not excavate or fill more than 400 linear feet of waters of the state, measured parallel to the streambank or shoreline, and
 - c. Dredging⁵ activities must dredge not more than 50 cubic yards within waters of the state.
 - d. These size criteria apply to discharges, which could either permanently or temporarily affect the quality of waters of the state⁶.
 - e. These size criteria apply to complete projects and shall not be used to authorize "piecemealing" of larger discharges. In regulating recurring discharges, e.g., routine maintenance of sedimentation basins, forebays, or similar waters, these criteria shall be applied for each discharge episode.
4. For purposes of defining the size criteria specified in this section, determining fees as required by section II.B.3, and evaluating mitigation proposals as required by section II.B.4 of these General WDRs, the lateral extent of waters of the state shall be determined by the most expansive of the following:
- a. The federal criteria current on the date of adoption of these General WDRs⁷,
 - b. Headwaters, defined as intermittent and ephemeral drainages.
5. The discharge shall not directly or indirectly destabilize a channel or bed of a receiving water. In determining whether a discharge meets this criterion, the RWQCB Executive Officer⁸ will consider potential project-induced changes to:

⁵ "Dredging" refers to removing sediment in deeper water to increase the depth. Impacts to beneficial uses are best described by the volume of the discharge. It typically occurs to facilitate navigation and for aggregate extraction in marine waters.

⁶ Fill or dredged discharges can *permanently* affect the quality of waters of the state when the discharged material will be in place indefinitely and/or by its nature precludes a reasonable assurance that beneficial uses will be fully reestablished. Examples include filling of wetlands or other waters, streambank hardening, channelization, construction of bridge piers and abutments, and ongoing vegetation removal and channel maintenance. Fill or dredged discharges can *temporarily* affect the quality of waters of the state when the discharged material will be in place for a limited time and/or there is a reasonable assurance that beneficial uses will be fully reestablished once the discharge ceases. Examples include temporary fills, excavation for temporary access roads, and one-time vegetation removal or excavation of sediment. Mitigation measures or management practices may be needed to assure that impacts are "temporary" (e.g., reestablishment of natural grade, revegetation, reestablishment of soil permeability to allow vegetative growth, compaction of backfill to assure that utility trenches do not dewater wetlands).

⁷ 33 CFR 328.3(b)-(e), 33 CFR 328.4, 40 CFR 230.41.

⁸ For multi-region projects, the SWRCB Executive Director. The terms Executive Officer or Executive Director as used herein include any designees.

- a. Quantity, velocity, timing, and direction of flow;
 - b. Sediment characteristics;
 - c. Stream grade; and
 - d. Other relevant project-induced changes.
6. The discharge shall not cause in combination with other discharges a significant cumulative effect on water quality or beneficial uses of the waters of the State including, but not limited to, wetlands and headwaters.
 7. The discharge shall not adversely impact, either directly or through habitat modification, any plants or animals identified as candidate, sensitive, or special status species in local or regional plans, policies or regulations; or by the California Department of Fish and Game (DFG), the U.S. Fish and Wildlife Service (USFWS), or the National Marine Fisheries Service (NMFS). The project shall not, substantially reduce the habitat of fish or wildlife species, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, or reduce the number of or restrict the range of an endangered, rare or threatened species.
 8. The discharge shall not significantly conflict with any adopted and approved USFWS Habitat Conservation Plan (HCP) or DFG Natural Community Conservation Plan (NCCP).
 9. The discharge shall not adversely impact a significant historical or archeological resource, shall not directly or indirectly destroy a unique paleontological resource or site or unique geologic feature, shall not disturb any human remains, and shall not eliminate important examples of the major periods of California history or prehistory.
 10. The discharge shall not cause conflict with existing zoning for agricultural use or a Williamson Act contract.
 11. The discharge, as mitigated, shall not cause significant adverse environmental impacts.
 12. Discharges that would be exempt pursuant to section 404(f) of the CWA are waived from these WDRs. This waiver shall not affect a RWQCB's authority to issue individual WDRs or waivers for such discharges if it deems it appropriate.

B. APPLICATION REQUIREMENTS

IT IS FURTHER ORDERED that dischargers seeking enrollment under these General WDRs shall submit the following to the appropriate RWQCB Executive Officer or, in the case of multi-Region projects, to the SWRCB Water Quality Certification Program Manager at least 45 days prior to any discharge:

1. A Notice of Intent (NOI) to be enrolled under and to comply with these General WDRs.
2. Any CEQA documents that have been prepared for the project.

3. A fee pursuant to Title 23, section 2200 of the CCR.

4. A Mitigation Plan:

The Mitigation Plan shall demonstrate that the discharger will sequentially avoid, minimize, and compensate for the adverse impacts to the affected water bodies' beneficial uses (as defined in the applicable Basin Plan). The Mitigation Plan shall address the following:

- a. Avoidance: No discharge shall be permitted if there is a practicable alternative⁹ to the proposed discharge, which would have less adverse impact to the aquatic ecosystem, as long as the alternative does not have other significant adverse environmental consequences.
- b. Minimization: Unavoidable temporary impacts shall be mitigated by restoring water bodies and vegetation to pre-discharge conditions as quickly as practicable and by taking other practicable measures to reduce the severity and duration of such impacts.
- c. Compensatory mitigation: Discharges resulting in unavoidable permanent impacts to wetlands or headwaters shall ensure "no net loss" of area (acreage), functions, and beneficial use values by providing appropriate compensatory mitigation including creation, restoration, or (in exceptional cases) preservation. The RWQCB Executive Officer/SWRCB Executive Director will consider, at a minimum, the following when reviewing the adequacy of compensatory mitigation:
 - (1) Onsite habitat value
 - (2) Habitat connectivity value
 - (3) Floodwater retention value
 - (4) Pollutant removal value
 - (5) Ratio of area of proposed compensation to proposed loss
 - (6) Proposed revegetation and irrigation plans and success criteria
 - (7) Availability of suitable soils, hydrology, and natural vegetation at the compensation site
 - (8) Monitoring and reporting provisions
 - (9) Contingency plan for failure to achieve success criteria
 - (10) Any other information requested by the RWQCB or SWRCB.

The Mitigation Plan shall demonstrate that all potentially adverse environmental impacts have been mitigated to a less than significant level. The thoroughness of the alternatives analysis and the extent of the proposed mitigation shall be commensurate with the purpose of the discharge, the value and sensitivity of the receiving water(s), and the extent, severity, and duration of the effect on the quality of waters.

⁹ An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded, or managed in order to fulfil the basic purpose of the proposed activity may be considered (this definition is the same as presented in federal regulations at section 230.10(a)(2) of Title 33 of the CFR).

5. Any other additional information requested by the SWRCB or RWQCB to evaluate the proposed dredged or fill discharge.

A discharge shall not be enrolled under these General WDRs unless the RWQCB Executive Officer or SWRCB Executive Director finds that the Mitigation Plan meets the requirements of this section and the discharge meets all other eligibility criteria. The RWQCB Executive Officer or SWRCB Executive Director shall independently determine eligibility, including the adequacy of the Mitigation Plan, but may consider findings and requirements included in other agencies' permits.

C. DISCHARGE REQUIREMENTS

IT IS FURTHER ORDERED that the discharger shall comply with the following:

Prohibitions:

1. The discharge of material is prohibited until the discharger has received a Notice of Applicability (NOA) from the RWQCB Executive Officer or the SWRCB Executive Director or until 45 days after submission of a complete and accurate NOI.¹⁰ If the RWQCB Executive Officer or the SWRCB Executive Director has not issued a Notice of Exclusion (NOE) within 45 days of receiving a complete and accurate NOI, the discharge may proceed.
2. No discharges are authorized under these General WDRs if the discharger has received a NOE from the RWQCB Executive Officer or the SWRCB Executive Director.
3. The discharge shall not cause pollution, contamination, or nuisance as defined in Water Code section 13050.
4. The discharge of material in a manner other than as described in the NOI, the Findings or conditions of these General WDRs, or in the RWQCB Executive Officer or SWRCB Executive Director-approved Mitigation Plan is prohibited.
5. The discharge of substances in concentrations toxic to human, plant, animal, or aquatic life or that produce detrimental physiological responses therein, is prohibited.
6. The discharge of waste classified as "hazardous" or "designated" as defined in Title 22, section 66261 of the CCR, or Water Code section 13173 is prohibited.

Special Provisions:

7. The discharger shall discharge in a manner that is consistent with the information provided in the NOI.

¹⁰ The RWQCB Executive Officer or the SWRCB Executive Director, within 30 days from submittal of the NOI, may find a submittal to be incomplete or inaccurate.

8. The discharger shall comply with the eligibility criteria for these General WDRs.
9. The discharger shall implement the approved Mitigation Plan.
10. Requested amendments to the approved Mitigation Plan must be submitted in writing to the RWQCB Executive Officer and, for multi-region projects, to the SWRCB Water Quality Certification Program Manager. The discharger may not modify operations until the discharger has received written notification that the RWQCB Executive Officer or SWRCB Executive Director has approved the amendment. If the RWQCB Executive Officer or the SWRCB Executive Director does not disapprove the requested amendment within 45 days of receiving the written notification, the changes to the approved Mitigation Plan may be implemented as described in the requested amendment.
11. If mitigation measures do not meet their interim or ultimate success criteria, the discharger shall implement remedial measures that are acceptable to the RWQCB Executive Officer or SWRCB Executive Director.
12. All compensatory mitigation areas shall be subject to a conservation easement, deed restriction, or other legal instrument, which shall ensure preservation of the mitigation in perpetuity. Documentation of the easement, restriction, or other legal instrument shall be submitted to the RWQCB, or to the SWRCB for multi-region projects, before any discharge authorized by these General WDRs occurs.
13. The discharger, if requested by the RWQCB or SWRCB, shall provide certification that supervisory and other responsible operations personnel have received training regarding these General WDRs.
14. Fueling, lubrication, maintenance, operation, and storage of vehicles and equipment shall not result in a discharge or a threatened discharge to water bodies. At no time shall the discharger use vehicles or equipment that leak any substance that might impact water quality. Staging and storage areas for vehicles and equipment shall be located outside of water bodies.
15. Except in compliance with the terms of an NOA for this order, no construction material, spoils, debris, or other substances associated with this project, that may adversely impact water quality, shall be located in a manner which may result in a discharge or threatened discharge to water bodies.
16. Upon completion of the project, the discharger shall complete a Notice of Termination (NOT) requesting to be un-enrolled from these General WDRs.

Standard Provisions:

17. A copy of these General WDRs shall be kept at the project site for reference by project personnel. Personnel shall be familiar with its contents.

18. The discharger shall take all reasonable steps to prevent any discharge in violation of these General WDRs.
19. The discharger shall report promptly to the RWQCB or SWRCB any proposed material change in the character, location, area, and/or volume of the discharge. The discharger shall obtain confirmation from the RWQCB or SWRCB that such proposed modifications do not disqualify the discharger from coverage under these General WDRs. Confirmation or new WDRs shall be obtained before any modifications are implemented. If the RWQCB Executive Officer or the SWRCB Executive Director does not disapprove the proposed change within 45 days of receiving a written report describing the proposed change, the discharge may proceed in accordance with the proposed modifications.
20. These General WDRs do not convey any property rights or exclusive privileges. The requirements prescribed herein do not authorize the commission of any act causing injury to persons or property, do not protect the discharger from liability under federal, State, or local laws, and do not create a vested right to continue to discharge waste.
21. These General WDRs do not relieve the discharger from the responsibility to obtain other necessary local, State, and federal permits, nor do these General WDRs prevent imposition of additional standards, requirements, or conditions by any other regulatory agency.
22. The discharger shall allow the RWQCB or SWRCB, or an authorized representative, upon the presentation of credentials and other documents, as may be required by law, to do the following:
 - a. Enter upon the premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of these General WDRs,
 - b. Have access to and copy, at reasonable times, any records that must be kept under the conditions of these General WDRs,
 - c. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under these General WDRs, and
 - d. Sample, photograph, and monitor at reasonable times, for the purpose of assuring compliance with these General WDRs.
23. After notice and opportunity for a hearing, coverage of an individual discharge under these General WDRs may be terminated or modified for cause, including, but not limited to, the following:
 - a. Violation of any term or condition of these General WDRs.
 - b. Obtaining these General WDRs by misrepresentation or failure to disclose all relevant facts.

- c. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge.
24. The filing of a request by the discharger for an order modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any condition of these General WDRs.
25. Where the discharger becomes aware that it failed to submit any relevant facts in an NOI or submitted incorrect information in an NOI to the RWQCB or SWRCB, it shall promptly submit such facts or information.
26. The discharger shall furnish, within a reasonable time, any information the RWQCB or SWRCB may request to determine whether cause exists for modifying, revoking and reissuing, or terminating the discharger coverage under these General WDRs. The discharger shall also furnish to the RWQCB or SWRCB, upon request, copies of records required to be kept by these General WDRs.
27. The Water Code provides that any person failing or refusing to furnish technical or monitoring program reports, as required under these General WDRs, or falsifying any information provided in the monitoring reports, is subject to civil liability for each day in which the violation occurs.
28. The discharger shall take all reasonable steps to minimize or correct any adverse impact on the environment resulting from noncompliance with these General WDRs, including such accelerated or additional monitoring as may be necessary to determine the nature and impact of the noncompliance.
29. All reports, notices, or other documents required by these General WDRs or requested by the RWQCB or SWRCB shall be signed by a person described below or by a duly authorized representative of that person.
 - a. For a corporation: by a responsible corporate officer such as (1) a president, secretary, treasurer, or vice president of the corporation in charge of a principal business function; (2) any other person who performs similar policy or decision-making functions for the corporation; or (3) the manager of one or more manufacturing, production, or operating facilities if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.
 - b. For a partnership or sole proprietorship: by a general partner or the proprietor.
 - c. For a municipality, State, federal, or other public agency: by either a principal executive officer or ranking elected official.
30. Any person signing a document under Provision II.C.29 shall make the following certification, whether written or implied:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

31. The discharger shall report any discharge of waste that may endanger public health or the environment. Any information shall be provided orally to the RWQCB within 24 hours from the time the discharger becomes aware of the occurrence. A written report shall also be submitted to the RWQCB Executive Officer within five (5) consecutive days of the time the discharger becomes aware of the occurrence. The written report shall contain (a) a description of the noncompliance and its cause; (b) the period of the noncompliance event, including dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and (c) steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.
32. The discharger shall report all instances of noncompliance not reported under Provision II.C.31 within seven (7) consecutive days of the time the discharger becomes aware of the occurrence. The report shall contain any applicable information listed in Provision II.C.31.
33. The discharger shall comply with all of the conditions of these General WDRs. Any noncompliance with these General WDRs constitutes a violation of the Water Code and is grounds for an enforcement action.
34. The discharger must comply with all applicable Basin Plan provisions, including maintaining the protection of beneficial uses and complying with any prohibitions and water quality objectives governing the discharge. In the event of a conflict between the provisions of these General WDRs and the applicable Basin Plan, the more stringent provisions prevails.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the SWRCB held on May 4, 2004.

AYE:

NO:

ABSENT:

ABSTAIN:

Debbie Irvin
Clerk to the Board

ATTACHMENT 1
TO WQ ORDER NO. 2004-004-DWQ

STATE WATER RESOURCES CONTROL BOARD

NOTICE OF INTENT (NOI)

TO ENROLL UNDER AND COMPLY WITH THE TERMS OF WATER QUALITY ORDER NO. 2004-004 DWQ (GENERAL WDRs), STATEWIDE GENERAL WASTE DISCHARGE REQUIREMENTS FOR DREDGED OR FILL DISCHARGES TO WATERS DEEMED BY THE U.S. ARMY CORPS OF ENGINEERS TO BE OUTSIDE OF FEDERAL JURISDICTION

Mark Only One Item	1. <input type="checkbox"/> New Discharge 2. <input type="checkbox"/> Change of Information-WDID # _____
--------------------	---

I. Owner of the Land

Name				
Mailing Address				
City	County	State	Zip	Phone
Contact Person				

II. Billing Address

Name				
Mailing Address				
City	County	State	Zip	Phone
Contact Person				

III. Discharger (if different from owner of the land)

Name				
Mailing Address				
City	County	State	Zip	Phone
Contact Person				

STATE USE ONLY

WDID: □□□□□□□□□□	Regional Board Office: □□	Date NOI Received: _____	
		Check #: _____	

IV. Site Location

Street (including address, if any)	
Nearest Cross Street(s)	
County:	Total Size of Site (acres):
<p>Latitude/Longitude (Center of Discharge Area) in degrees/minutes/seconds (DMS) to the nearest ½ second or decimal degrees (DD) to four decimals (0.0001 degree)</p> <p>DMS: N. Latitude Deg. _____ Min. _____ Sec. _____ W. Longitude Deg. _____ Min. _____ Sec. _____</p> <p>DD: N. Latitude _____ W. Longitude _____</p> <p>Attach a map of at least 1:24000 (1" = 2000') detail of the proposed discharge site (e.g., USGS 7.5 minute topographic map).</p>	

V. Discharge Information

Subject	Notes
Name(s) and type(s) of receiving waters:	Receiving water types are: river/streambed, lake/reservoir, ocean/estuary/bay, riparian area, wetland
Eligibility of receiving water. Provide evidence that the water affected by this discharge is deemed to be out side of federal jurisdiction:	U.S. Army Corps of Engineers jurisdictional disclaimer letter, or explanation why such a disclaimer is not needed
Identify all regulatory agencies having jurisdiction over this project. Attach copies of all federal and State license/permit applications or issued copies of licenses/permits from government agencies:	For example: Dept. of Fish and Game Streambed Alteration Agreement, Coastal Commission permit
Proposed project start date:	Expected date of completion:

Project description:		For example: Discharge of riprap; discharge of fill; excavation for a utility line		
Purpose of the entire activity:		For example: Stream-bank erosion control; flood management; residential development		
Characterization of discharges:		What types of constituents will be discharged? Is the sediment contaminated?		
<p>Fill and Excavation Discharges: For each water body type listed below indicate in ACRES the area of the proposed discharge to waters of the state, and identify the impacts(s) as permanent and/or temporary. For linear discharges to drainage features and shorelines, e.g., bank stabilization, revetment, and channelization projects, ALSO specify the length of the proposed discharge to waters of the state IN FEET.¹</p>				
Water Body Type	Permanent Impact		Temporary Impact	
	Acres	Linear Feet	Acres	Linear Feet
Wetland				
Streambed				
Lake/Reservoir				
Ocean/Estuary/Bay				
Riparian				
<p>Dredging Discharges: Volume (cubic yards) of <u>dredged</u> material to be discharged into waters of the United States.</p>				

¹ For guidance in determining the extent of impacted waters, see General WDRs, section II.A.4

VI. California Environmental Quality Act

Will an environmental impact report or a negative declaration be adopted for this project or has one been adopted?

YES NO

If yes, what is the current status of the environmental impact report or negative declaration?

- Not yet issued for public review.
- In public review.
- Adopted.

Name of lead agency _____

If an environmental impact report or a negative declaration is in public review or has been adopted, enclose the document with this NOI.

Will the discharge occur in, or in immediate proximity to, an area covered by a U.S. Fish and Wildlife Service (USFWS) Habitat Conservation Plan (HCP) or a Department of Fish and Game Natural Community Conservation Plan (NCCP)?

YES NO

Will the discharge occur in, or in immediate proximity to, any habitat of a plant or animal species that has been classified by the Department of Fish and Game, the U.S. Fish and Wildlife Service, or the National Marine Fisheries Service as candidate, sensitive, endangered, rare, or threatened?

YES NO

Will the discharge occur in, or in immediate proximity to, a significant historical or archeological resource, a unique paleontological resource or site, a unique geologic feature, or any human remains?

YES NO

Will the discharge occur in, or in immediate proximity to, land under existing zoning for agricultural use or under a Williamson Act contract?

YES NO

Will the discharge, as mitigated, cause any other significant adverse environmental impact?

YES NO

If you answered "yes" to any of the previous five questions, provide a detailed explanation demonstrating why the discharge is eligible to be enrolled under the General WDRs.

VII. **Additional Submittals.** In accordance with provisions of State Water Resources Control Board (SWRCB) Water Quality Order No. 2004-0004 DWQ, please submit the following with this NOI to the appropriate Regional Water Quality Control Board or, for multi-Region projects, to the SWRCB.

- a. A fee pursuant to California Code of Regulations, Title 23 Section 2200.
- b. A Mitigation Plan, as described in the General WDRs.

VIII. CERTIFICATION

"I certify under penalty of law that this document and all attachments were prepared under my direction and supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment. In addition, I certify that the provisions of these General WDRs will be complied with."

Signature of Discharger

Title

Printed or Typed Name

Date

STATE WATER RESOURCES CONTROL BOARD

NOTICE OF TERMINATION

**OF DREDGED OR FILL DISCHARGES
TO WATERS DEEMED BY THE U.S. ARMY CORPS OF ENGINEERS
TO BE OUTSIDE OF FEDERAL JURISDICTION
(WATER QUALITY ORDER NO. 2004-0004 DWQ)**

WDID # _____

III. Owner of the Land

Name				
Mailing Address				
City	County	State	Zip	Phone
Contact Person				

III. Discharger (if different from owner of the land)

Name				
Mailing Address				
City	County	State	Zip	Phone
Contact Person				

III. Site Location

Street (including address, if any)
Nearest Cross Street(s)
County:

IV. Reason For Notice of Termination

Indicate why the discharge should no longer be regulated under WQ Order No. 2004-0004-DWQ.

STATE USE ONLY

WDID: □□□□□□□□□□	Regional Board Office: □□	Date NOT Received: _____ —	Date NOT Processed: _____ —
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V. CERTIFICATION

"I certify under penalty of law that this document and all attachments were prepared under my direction and supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."

Signature of Discharger	Title
Printed or Typed Name	Date

404 (b)(1) Guidelines: Farming practices

323.2(c)(3) The term *discharge of dredged material* does not include the following: (ii) Activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.

(c)(4) Section 404 authorization is not required for the following: (iii) Certain discharges, such as those associated with normal farming, silviculture, and ranching activities, are not prohibited by or otherwise subject to regulation under section 404. See 33 CFR 323.4 for discharges that do not require permits.

(f) The term *discharge of fill material* does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See Sec. 323.4 for the definition of these terms).

323.4(a)(1)(i). Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404: Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(a)(iii)(A) Cultivating means physical methods of soil treatment employed within established farming, ranching and silviculture lands on farm, ranch, or forest crops to aid and improve their growth, quality or yield.

(B) Harvesting means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or ranch land, but does not include the construction of farm, forest, or ranch roads.

CALIFORNIA WETLANDS CONSERVATION POLICY

August 23, 1993

The goal of the California Wetlands Conservation Policy is to establish a policy framework and strategy that will:

- *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.*
- *Reduce procedural complexity in the administration of State and Federal wetlands conservation programs..*
- *Encourage partnerships to make landowner incentive programs and cooperative planning efforts the Primary focus of wetlands conservation and restoration..*

Elements

The policy means that are employed to achieve these objectives are largely three in nature. They (and the pages in which they and their components parts are fully outlined in this document) are:

I. Statewide policy initiatives (pages 2-7), including:

- a Statewide wetlands inventory
- support for wetland planning
- improved administration of existing regulatory programs
- strengthened landowner incentives to protect wetlands
- support for mitigation banking
- development and expansion of other wetlands programs
- integration of wetlands policy and planning with other environmental and land use processes

II. Three geographically based regional strategies in which wetlands programs can be implemented, refined, and combined in unique ways to achieve the goals and objectives of the policy (pages 8-12). These strategies will be implemented in:

- the Central Valley
- San Francisco Bay Area, and
- Southern California

III. Creation of an interagency wetlands task force on wetlands to direct and coordinate administration and implementation of the policy (Page 13)

STATEWIDE INITIATIVES

I. Wetlands Inventory and Goals

Statewide wetlands data collection efforts have occurred only at a very a broad level. As a consequence, wetland decision-making - whether related to regulation., acquisition, restoration or other activities - has often proceeded in a piecemeal fashion. It has also been difficult to establish specific statewide goals for restoration and enhancement of wetlands absent such an inventory.

A. Conduct statewide wetlands inventory and establish a wetlands accounting system.

The inventory will compile U.S. Fish and Wildlife Service National Wetland inventory and other available data into an understandable and accessible format. it will serve as a baseline from which to determine losses and gains (both functional and acreage) to the State's wetlands base. Biennial reports on the status of the State's wetlands will be made. This inventory will not be used for regulatory purposes.

B. Identify regional and Statewide restoration and enhancement goals.

Using information derived from the inventory, the State will identify regional and Statewide goals for conserving restoring and enhancing wetlands. Achievement of these goals will emphasize maintaining economic uses (e.g., agriculture) of restored ' and enhanced lands and be achieved through the voluntary participation of landowners. These goals are not meant to be achieved on a permit-by-permit basis.

- o **Participating entities: Department of Fish and Game, the Resources Agency, Department of Food and Agriculture, Cal/EPA, SWRCB.**

II. Support Wetlands Plan

To date, there have been very few integrated planning efforts which included the use and conservation of wetlands in California. The planning that has occurred has been in association with broader land use planning efforts or has been driven by non-wetlands related needs.

A. Encourage local and regional wetlands planning-in coordination with State growth management policies.

The State will encourage efforts by local and regional governments to incorporate wetlands into planning processes. These efforts are likely to include watershed plans, advanced identification of wetlands, and floodplain management. All new and existing wetlands policies with need to incorporate and coordinate with growth management efforts.

- o **Participating entities: The Governor's Office of Planning and Research, the Resources**

Agency, Department of Fish and Game, local government representatives.

III. Improve the Administration of Wetlands Regulatory Programs

Federal and State regulations seek to protect wetlands from being filled unnecessarily and assure mitigation of unavoidable wetland impacts. However, the current Federal-State system of wetlands regulation in California is unnecessarily fragmented and cumbersome for landowners, and, in some parts of the State, fails to protect unique types of California wetlands.

A. Assume the Federal Clean Water-Act Section 404 permitting authorities on an incremental basis.

1) In the near-term, the State will negotiate with the Army Corps of Engineers the delegation of Section 404 permitting authority in the San Francisco Bay Area, with possible funding, to the San Francisco Regional Water Quality Control Board and, for a limited set of activities, the San Francisco Bay Conservation and Development Commission through a "State Program General Permit" (SPGP), or similar mechanism. Once secured, the SPGP will effectively remove one layer of review from the wetlands regulatory process, while maintaining the effectiveness of the program. (See San Francisco Regional Strategy)

2) In the long-term, after evaluation and a determination that the San Francisco Bay Area demonstration program has been a success, the State will either take over full control of the Section 404 permitting authority or seek additional State Program General Permits, or similar mechanism, tailored to meet the needs of other regions. Adequate Federal funding will need to be obtained to support either approach.

3) Work with Congress to amend Section 404 of the Clean Water Act to enhance the program's administration and the transfer of the program to the states, including provision of funding.

B. Develop and adopt a consistent wetlands definition for state regulatory purposes.

Because of the lack of consistency in the existing definitions of wetlands definitions used by State agencies, the State will work toward the adoption of a single definition for regulatory purposes. The definition will, to the greatest extent possible, be consistent with the definition and wetlands delineation manual used by the Federal government. The definition will also recognize California unique wetland types, and not apply to prior converted croplands currently exempt from federal regulation.

C. Develop and Adopt a State policy regarding Army Corps of Engineers Nationwide Permits.

The policy requests the SWRCB, upon adequate environmental review, to develop a balanced policy on such permits, which emphasizes the conservation of large, non-fragmented, functioning wetlands. In addition, the policy encourages the SWRCB to adopt as many of these permits as quickly as possible, consistent with this direction.

D. Develop and adopt consistent wetlands standards and guidelines.

The application of standards and guidelines varies in content and application between State agencies and therefore can cause confusion about and inconsistent application of the State's policies. The State will convene the relevant agencies to develop consistent policies, standards and guidelines--on a statewide or regional basis--relative to mitigation and restoration monitoring and evaluation.

E. Enhance efficiency of and coordination in the wetland permitting process.

The State will initiate and support a number of activities to improve the administration of wetlands programs. These include pre and post application coordination meetings, firm time deadlines, and concurrent permit review periods.

F. Encourage regulatory flexibility in situations in which wetlands are created unintentionally or incidental to other activities.

Many private landowners and public agencies create wetlands unintentionally or incidentally, e.g., drainage ditches, land held under agricultural best management practices, and wet areas from parking lot run-off. The State will encourage regulatory agencies to take a flexible approach in regulating these types of wetlands.

G. Encourage regulatory flexibility to allow public agencies and water districts to create wetlands but later remove them if the wetlands are found to conflict with the primary purpose to which the property is devoted. (See also Central Valley Regional Strategy)

Many Large public and private land owners, such as flood control agencies and water districts, can often integrate substantial wetland habitat into the operation of their lands. This habitat, however, may need to be removed or modified periodically for the agency to achieve the primary purpose to which the land is devoted, e.g., water storage or -flood management. Many agencies with the potential of creating temporary wetland habitat would do so if they had assurances of regulatory flexibility.

- o **Participating entities: Cal/EPA, SWRCB, RWQCB, Fish and Game, Office of Permit Assistance, BT&H, T&C, CDFG, Resources Agency, CCC, BCDC, SLC.**

IV. Achieve Wetlands Conservation Through Landowner Incentives

By helping to make wetlands ownership an asset for California landowners, incentive programs can be used to achieve significant net gains of wetlands especially for example, in agricultural and recreational areas.

A. Support USDA's Wetlands Reserve Program (WRP) and other public financial incentive programs.

The State will support funding for WRP and modification of it to meet California unique needs. The State will also support additional Federal funds from the Land and Water Conservation Fund and State funding of wetlands incentive programs. These programs could include provision of income streams for privately-owned wetlands.

B. Support other existing programs to voluntarily acquire, restore, enhance, and manage wetlands.

The State will continue to support the voluntary acquisition, restoration, enhancement and management of wetlands through sufficiently funded State, Federal, local and private programs. The use of State funds will emphasize the restoration, enhancement, and management of existing State-owned wetlands.

C. Enhance coordination of State, Federal, and private, voluntary acquisition, restoration, enhancement, and management programs.

The State will convene regular meetings of all the agencies involved in wetlands acquisition, restoration, enhancement and management activities. The intent will be to improve the coordination of the existing programs and leverage limited funds for the implementation of these programs.

D. Support natural resources bond act.

The State will continue to support the need for a natural resources bond act which includes over \$70 million for wetlands acquisition, restoration, and enhancement.

E. Publish landowners assistance guide.

The State will publish and widely distribute a landowner's assistance guide detailing the range of State, Federal, and private incentive programs.

- o **Participating entities: Resources Agency, OPR, Department of Fish and Game, CDFA, WCB, Conservancies.**

V. Support Wetlands Mitigation Banking

Wetland mitigation banking allows proponents of unavoidable wetland fills to buy credits in pre-established mitigation sites or banks. The goal is to develop high quality mitigation while freeing economic interests developers from the responsibility of developing new mitigation for every project. Project-by-project mitigation often results in low quality, fragmented wetlands. Banking strategies thus can provide flexibility and regulatory relief for landowners while financing the creation of large wetlands with high functional values. Development of mitigation banks, however, has been stymied in part because of uncertainties related to necessary but as yet undefined governmental requirements for bank operations.

A. Develop and adopt state mitigation banking guidelines.

The State will develop and adopt guidelines for wetland mitigation banks which recognize regional concerns, contain flexible mitigation ratios, are consistent with Federal agency guidelines, and encourage decisions to locate banks in the context of local or regional plans. (See also Central Valley Regional Strategy)

- o **Participating entities: Resources Agency, Fish and Game commission, Fish and Game, Cal/EPA, SWRCB, RWQCB, CCC, BCDC, SLC, CDFA**

VI. Develop and Expand Other Wetlands Programs

Several other programs will need to be improved or undertaken to meet the overall objectives of this

California Wetlands Policy. These include wetlands management and education programs and public lands management.

A. Address management and operations of wetlands.

Recognizing that the responsibility for wetlands only beg-ins with acquisition or restoration, the State will work to provide adequate financial resources for wetlands management and operations, including water source and delivery, mosquito abatement and vector control. The emphasis for these programs will be on State-owned wetlands. The State also recognizes the responsibility public and private wetlands landowners have to their neighbors and will establish a model "good neighbor" policy to guide management of newly created, restored or enhanced wetlands.

B. Establish State level wetlands information clearinghouse, education, and research programs.

Because there is no single repository for information on wetlands in the state, the Resources Agency will establish such a repository for information related to the full range of wetlands policies, programs and projects. The State will also undertake programs to increase public awareness of wetlands and better coordinate and direct the wetlands research agenda.

C. Direct State agencies to develop internal policies and programs to encourage wetland conservation activities.

The policy directs State agencies to develop internal wetlands conservation policies and programs which are compatible with programmatic goals such as flood control, groundwater recharge, water management, water pollution control, transportation, recreation, and other purposes.

D. Work with Federal agencies to maximize and coordinate wetlands conservation activities on Federal land.

Because over half of the land in California is owned and managed by the federal government, the State will work closely with the land management agencies to maximize wetlands conservation, while maintaining appropriate economic uses.

- o **Participating entities: Resources Agency, Fish and Game, WCB, Conservancies, DWR, CDFA, BT&H, CalTrans, DPR, CDF, Executive Council on Biodiversity, University of California, CSU, and various Federal agencies**

REGIONAL IMPLEMENTATION STRATEGIES

In order to successfully implement the many policies and programs described above, regional projects have been identified in the Central Valley, San Francisco Bay Area, and Southern California to serve as pilots for implementing the policy. These projects will permit State government to tailor statewide policies and programs to local conditions, help the State learn what works and what does not, and can be implemented in those parts of the State where a high likelihood of success will help sustain public support for the program over time.

I. Regional strategy for the Central Valley

A. Support the program of the Central Valley Habitat Joint Venture (CVHJV)

The State formally supports the program of the CVHJV to protect, restore and enhance wetlands in the Central Valley. The State specifically supports the Joint Venture's efforts to achieve its goals through maintaining agricultural lands in production, and its broad-based partnerships.

B. Support substantial funding of financial incentive programs.

Landowner-incentive programs, including State and Federal easement acquisition programs, are an integral part of the Central Valley Habitat Joint Venture's efforts to conserve and protect existing and restorable wetlands in the Central Valley-

C. Maximize the potential of the Sacramento Valley Ricelands Habitat Partnership.

This unique project involves enhancement of wetlands values while allowing continued economic use of the land. The project also reduces the need to burn rice straw. The State will continue to support this demonstration project and apply similar principles to other geographic areas and crop types, e.g., corn in the Delta.

D. Initiate an endangered species planning process comparable to the State's Natural Communities Conservation Planning program for a central Valley wetland type.

As development pressures increase in the Valley, the conflict between habitat and-species conservation and economic development will intensify. The State will initiate a cooperative, long term planning process to identify and protect a critical mass of wetlands habitat, while allowing economic activities to continue.

E. Develop pilot wetlands mitigation banks in the central Valley.

With the adoption of Statewide guidelines (see above), the State will direct its efforts toward the development of wetlands mitigation banks in the central Valley, a region where high demand for these banks exists.

F. Initiate a flood management/wetlands habitat program in the Yolo Bypass.

The Yolo By-Pass, which is managed as a floodway, could also accommodate some wetlands projects in conjunction with existing agricultural activities. The State will initiate a demonstration project to facilitate cooperation between the flood control agencies, the fish and wildlife agencies, and local agricultural interests to allow agricultural and flood control activities to coexist with wetlands habitat.

- o **Participating entities: Resources Agency, Fish and Game, WCB, DWR, OPR, OPA, CDEA, BT&H, CVRWQCB, Cal/EPA, Reclamation Board, federal agencies**

II. Regional strategy for wetlands planning and regulatory streamlining in the San Francisco Bay Area

A. Inventory wetlands in the San Francisco Bay Area.

As a component of the Statewide wetlands inventory, the State will identify: 1) the extent and types of wetlands in the Bay Area; 2) the relative values and functions within different wetlands types and sub-regions; and 3) areas with potential for restoration and enhancement. This Bay Area inventory will use, to the greatest extent feasible, existing data.

B. Incorporate wetlands and restoration inventory information into broader, participatory wetlands planning effort.

The State will work with local governments to develop a comprehensive wetlands plan for the Bay Area. This effort will include identification of areas for the voluntary acquisition, restoration, and enhancement of wetlands including the establishment of a preservation-restoration-enhancement goal. The plan and final goal will be prepared with broad public participation. The goal is not meant to be achieved on a permit-by permit-basis.

C. Promote the acquisition (fee and less than fee), trades, restoration, and enhancement of Day Area wetlands.

These activities will be undertaken by a variety of State, Federal, local, and private entities with willing landowners. The state will rely in part on a natural resources bond act to maximize its role. The State will emphasize continued economic use (agriculture and salt production) of enhanced lands as it pursues these activities to accomplish the preservation, restoration and enhancement goal. The State will also encourage application of the concepts of the Sacramento Valley Ricelands Partnership to the Bay Area.

D. Encourage the use of landowner incentives.

Significant potential exists to use landowner incentives to achieve Bay Area restoration targets. Two particularly promising incentive programs include transfer and purchase of development rights programs, and management agreements to maximize compatible agricultural wetlands values on diked historic baylands.

E. Improve the-wetlands permitting process in the Bay Area

Consistent with the Statewide goal to assume permitting authority under Section 404 of the Clean Water

Act, the State will negotiate terms and conditions of a State program general permit (SPGP), or -similar mechanism, from the U.S. Army Corps of Engineers to the SFRWQCB and, for a limited set of activities, SFBCDC. This permit would streamline the regulatory process by eliminating the Corps, role.

- o **Participating entities: SFRWQCB, SWRCB, SFBCDC, Resources Agency, Cal/EPA, Fish and Game, CDFA, OPR, and OPA**

III. Regional strategy to initiate better coordination and communication among diverse interests in Southern California by establishing a "Southern California Joint Venture."

There is no mechanism for coordinating regional wetland conservation activities in Southern California. As a result, no regional priorities have been set for protecting, restoring, enhancing or creating wetlands in the region. Consequently, conservation and mitigation--sometimes large scale--are often done on an ad hoc basis without regard to what is good for any relationship to the region as a whole. The Southern California project intends to adopt some of the principles of the successful Central Valley Habitat Joint Venture, while recognizing that the region's resources are much different, in shorter supply, and under much greater threat.

The Administration envisions bringing together the principle stakeholders in the wetlands arena in the region. This would include environmental organizations, agriculture, public agencies, water agencies, and economic interests in need of substantial mitigation (ports, utilities, and large land owners.) This group would set long-term goals and priorities for the conservation of wetlands and develop a-policy to achieve those goals, and would encourage a variety of demonstration projects designed to enhance the State's ability to constructively address regional wetlands issue.

- o **Participating Entities: Resources Agency, DFG, CDFA, SWRCB, local governments, Federal agencies, and local conservation, Agricultural, and business organizations.**

ADMINISTRATION AND COORDINATION OF PLAN IMPLEMENTATION AND OF STATE WETLANDS PROGRAMS THROUGH NEW INTER-AGENCY TASK FORCE

Establish an interagency wetlands task force.

In order to ensure continued coordinated development and implementation of the. Wetlands Policy, task force will be established. It will be comprised of senior administration officials representing the broad range of interests on wetlands issues. It will be advisory to the Governor. The task force will also help resolve inter-agency conflicts on wetlands. The task force will appoint an advisory committee of stakeholders and may seek additional technical advice as necessary.

- **Participating Entities: The Resources Agency and Cal/EPA will lead in cooperation with Cal-EPA, Business, Transportation and Housing Agency, Department of Food and Agriculture, Trade and Commerce Agency, Governor's Office of Planning and Research, Department of Fish and Game, Department of Water Resources, and the State Water Resources Control Board. Other State**

agencies, Federal agencies and private organizations will participate on the task force on specific components of the Policy.

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