Wetland/Riparian Policy
Deadline: 4/19/07 12 noon

Western States Petroleum Association
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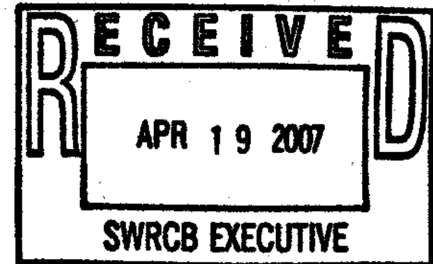

April 19, 2007

Chair Doduc, and Members of the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

RE: WSPA Comments on Proposed Wetland And Riparian Area Protection Policy

Chairperson Doduc, and Members of the Board:

The Western States Petroleum Association (WSPA) is a trade association that represents nearly thirty companies that explore, produce, transport, refine, and market petroleum and petroleum products in the western United States.

We are providing our comments on the State Water Board's CEQA Scoping document on the proposed Wetland and Riparian Area Protection Policy. We have summarized our concerns in this cover letter that accompanies our attached detailed comments.

The Scoping Document does not provide sufficient information as required by the California Environmental Quality Act ("CEQA") in order to allow adequate public comment on the alternatives and their potentially significant impacts. CEQA Scoping documents need to incorporate adequate detail to allow the public and regulated community to provide input for the process. There is no description of the probable environmental effects of the project as required by CEQA Guidelines other than benefits for wetland and riparian areas.

The State Board must consider potentially significant impacts including increased risk of flooding, impacts to non-wetland habitat and species, impacts to agricultural and recreational resources, and consistency with local land use planning. It is difficult for our members to know what to comment on. Under Alternatives 2-4, it is reasonably foreseeable that the policy could increase currently applicable mitigation requirements for projects that affect wetlands and/or riparian areas.

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Alternatives 3 and 4 go significantly beyond the policy direction described in Report to the Legislature and the Workplan. According to the Scoping Document, the proposed policy originated as the State's response to the Supreme Court's *SWANCC* decision, as outlined in the State Board's 2003 Report to the Legislature and 2004 Workplan. The Workplan states that it is intended to implement the measures identified in the State Water Board's Report to the Legislature which are needed to restore the protection that was provided to 'isolated' wetlands before *SWANCC*. We believe the Scoping Document has overreached this intent by a wide margin.

The State Board lacks legal authority to regulate areas beyond "waters of the state" in the manner proposed under Alternatives 3 and 4. The State Water Board has authority to regulate and protect waters of the state which are defined by Porter-Cologne as "any surface water or groundwater, including saline waters, within the boundary of the state." This definition does not support the broad reach of regulatory authority proposed in Alternatives 3 and 4. We request the State Water Board to give consideration to the definitional language in Water Code § 13050(e) before embarking on this level of regulatory expansion.

Since Congress is considering changes to the federal CWA to address the same issues, the State Board should await the outcome of federal legislative efforts before adopting state policy that is potentially unnecessary and conflicting. In the wake of *SWANCC* and subsequent decisions on wetland jurisdiction by the Supreme Court and other federal courts, Congress is currently considering action to amend the CWA. The recently proposed H.R. 1350 would eliminate the term "navigable" from the definition of "waters of the United States" in CWA section 502. Such congressional action would establish broader federal jurisdiction that could eliminate the "regulatory gap" the State Board seeks to address. Given the potential for substantial changes at the federal level, the State Board should defer developing competing and potentially conflicting policy until the outcome of federal legislative efforts is known.

We appreciate the opportunity to provide comments on this matter. It is our hope that WSPA can partner with the State Water Board as they move forward in addressing important policy issues.

Sincerely,

s/Kevin Buchan
(*sent via email)*

Enclosure: Western States Petroleum Association Scoping Comments on the Proposed Wetland and Riparian Area Protection Policy

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April 19, 2007

Western States Petroleum Association
Scoping Comments on the Proposed Wetland and Riparian Area Protection Policy

In March 2007, the State Water Resources Control Board ("State Board") issued an *Informational Document - Public Scoping Meeting for Proposed Wetland and Riparian Area Protection Policy* ("Scoping Document"). The Scoping Document states that the policy is being developed pursuant to the State Board's 2003 Report to the Legislature on *Regulatory Steps Needed to Protect and Conserve Wetlands Not Subject to the Clean Water Act* ("Report to the Legislature") and implementing tasks identified in the State Board's September 2004 *Workplan: Filling the Gaps in Wetland Protection* ("Workplan"). As their titles suggests, the original scope of the Report to the Legislature and Workplan was intended to address "regulatory gaps" in protection of wetlands that are no longer subject to federal Clean Water Act ("CWA") jurisdiction, following the U.S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 121 S. Ct. 675 (2001) ("*SWANCC*").

The Scoping Document proposes four policy alternatives: (1) no change in regulatory policy; (2) under authority of state law, regulate discharges of dredge and fill material to wetlands that are no longer subject to federal jurisdiction following *SWANCC*; (3) develop a new state policy for regulating discharges of dredge or fill material to wetlands and riparian areas, including those that were not federally jurisdictional prior to *SWANCC*; or (4) develop new state policy regulating discharges and activities beyond dredge or fill material discharges that impact wetlands and riparian areas. While the Scoping Document itself does not identify a preferred alternative, at the initial scoping meeting on April 9, 2007, State Board staff indicated their preference for Alternative 4.

The Scoping Document and its alternatives raise the following concerns:

- The Scoping Document does not provide sufficient information as required by the California Environmental Quality Act ("CEQA") in order to allow adequate public comment on the alternatives and their potentially significant impacts.

- The State Board must consider potentially significant impacts including increased risk of flooding, impacts to non-wetland habitat and species, impacts to agricultural and recreational resources, and consistency with local land use planning.

- Alternatives 3 and 4 go significantly beyond the policy direction described in Report to the Legislature and the Workplan.

- The State Board lacks legal authority to regulate areas beyond "waters of the state" in the manner proposed under Alternatives 3 and 4.

- Since Congress is considering changes to the federal CWA to address the same issues, the State Board should await the outcome of federal legislative efforts before adopting state policy that is potentially unnecessary and conflicting.

Comment 1 - The Scoping Document is Inadequate as a Basis for CEQA Scoping

The Revised Notice of Public California Environmental Quality Act Scoping Meeting, dated March 25, 2007, solicits CEQA scoping comments on "the range of actions, alternatives, mitigation measures, and potential significant environmental effects to be analyzed in the development of this project." Yet the Scoping Document itself nowhere mentions the term "CEQA" or effects on the environment other than wetlands and riparian areas.

While scoping under CEQA is not mandatory, having committed to conducting a scoping process, the State Board should conform to the applicable requirements. A CEQA scoping document must describe the "probable environmental effects of the project" and must provide "sufficient information" to enable a "meaningful response" by participants in the scoping process, including other agencies and members of the public. CEQA Guidelines (14 Cal. Code Regs.) §§ 15082(a)(1), 15083(c). The Scoping Document fulfills neither of these requirements.

The descriptions of the four alternatives in the Scoping Document provide a general overview of their policy reach, but offer no details for each particular program. There is no description of the "probable environmental effects of the project" as required by CEQA Guidelines § 15082(a)(1), other than benefits for wetland and riparian areas. However, the State Board cannot confine its consideration of probable environmental effects to the intended benefits for wetland and riparian areas. CEQA requires agency decision-makers to consider, and to inform the public regarding, the consequences of agency actions for the environment as a whole – not just for the particular medium that the agency is charged with regulating. For example, agencies responsible for protecting water quality must consider the potential adverse effects of their regulatory programs for air quality, and vice versa. *See City of Arcadia v. State Water Resources Control Board*, 135 Cal. App. 4th 1392 (2006).

In the absence of any specifics on reasonably foreseeable means of implementation (see next comment) and probable environmental effects, the Scoping Document does not provide sufficient information to enable a "meaningful response" by public commenters in the scoping process. The policy alternatives raise important issues on which the regulated community should have a full and fair opportunity to review and comment. The Scoping Document's cursory approach substantially limits the public's ability to respond adequately. Accordingly, we anticipate submitting more extensive comments when a draft CEQA document is issued.

Comment 2 - The State Board Must Consider Potentially Significant Impacts

Pursuant to CEQA, the State Board must consider potentially significant environmental impacts of expanding the protection of wetland and riparian areas as proposed in the Scoping Document. As noted above, CEQA requires an agency to consider the consequences of its actions for the environment as a whole. If a policy or regulation intended to benefit one aspect of the environment has other adverse environmental impacts as an unintended side-effect, those impacts must be fully evaluated under CEQA. *See City of Arcadia, supra.* An agency may not take action unless it adopts feasible alternatives or mitigation measures to substantially lessen or avoid such impacts, or finds that overriding considerations support the action despite its impacts. CEQA (Pub. Res. Code) §21002, CEQA Guidelines § 15021. Moreover, when new standards or requirements for pollution control are proposed, CEQA requires the State Board and other

agencies to perform an environmental analysis of the reasonably foreseeable methods by which compliance will be achieved, the reasonably foreseeable impacts of those compliance methods, and reasonably foreseeable mitigation measures and alternatives which would avoid or eliminate the impacts. CEQA Guidelines § 15187.

As noted above, based on the limited information in the Scoping Document, it is difficult for scoping commenters to know what to comment on. Nevertheless, under Alternatives 2-4, it is reasonably foreseeable that the policy would increase currently applicable mitigation requirements for projects that affect wetlands and/or riparian areas. Impacts that could arise from the policy and should be considered by the State Board include the following:

- Increased risk of flooding by hampering flood control projects by management agencies.
- Impacts to sensitive species and other biological resources from conversion of existing non-wetland and riparian habitats to wetland and/or riparian areas to meet increased mitigation burdens.
- Impacts to agricultural resources converted to wetland and/or riparian areas to meet increased mitigation burdens.
- Impacts to recreational resources converted to wetland and/or riparian areas to meet increased mitigation burdens.
- Inconsistency with local land use plans, policies and regulations which may specify other uses for areas converted to wetland and/or riparian areas to meet increased mitigation burdens.

Comment 3 – Alternatives 3 and 4 Go Significantly Beyond the Scope Described in the State Board's Workplan

According to the Scoping Document (p. 5), the proposed policy clearly originated as the state's response to the Supreme Court's *SWANCC* decision, as outlined in the State Board's 2003 Report to the Legislature and 2004 Workplan. The Workplan itself (p. 3) states that it is intended to implement the measures identified in the State Board's Report to the Legislature which are "needed to restore the protection that was provided to 'isolated' wetlands before *SWANCC*." The Workplan tasks addressed in the Scoping Document are adoption of (i) a state wetland definition, (ii) beneficial use definitions for wetland-related functions, and (iii) a state policy framework addressing impacts of dredge or fill material discharges to wetlands. In describing those tasks, the Workplan states that its objective for a state wetland definition is: "Adopt the *federal* regulatory wetland definition." Moreover, as a state policy framework, the Workplan states that its objective is: "Adopt [a] State version of the 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." Workplan (p. 4), emphases added.

The intended scope of the State Board's actions was further characterized in a September 24, 2004 letter regarding the "Workplan: Filling the Gaps in Wetland Protection" from Arthur G. Baggett, Jr., State Board Chair, to Terry Tamminen, California EPA Secretary. As that letter states, the original scope was intended to:

> 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 [*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. . . . 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" and the additional measures identified in the workplan will restore pre-*SWANCC* protection to "isolated" waters and strengthen California's overall wetland protection program.

Thus, the policy direction was to "replicate the pre-*SWANCC* federal program." As presented in the Scoping Document, Alternative 2 is consistent with this intent. However, at the initial scoping meeting on April 9, 2007, State Board staff indicated their preference for Alternative 4. Alternatives 3 and 4 go far beyond the stated intent to restore pre-*SWANCC* protection to isolated waters with "minimal revisions" from federal guidelines. Alternative 3 is designed to extend regulation to wetland and riparian areas that were never subject to federal jurisdiction. Alternative 4 is designed to extend regulation to such areas and also to activities beyond discharges of dredge and fill material, which were never part of the pre-*SWANCC* federal program. These alternatives as crafted in the Scoping Document greatly exceed the policy direction of the Workplan. Rather than promoting Alternative 4, the State Board should renew its focus on the purpose of this action and the specific issues raised by *SWANCC*.

Comment 4 – The State Board's Regulatory Authority Does Not Extend Beyond "Waters of the State"

It is a basic principle of administrative law that agencies cannot regulate beyond the reach of their statutory jurisdiction. Pursuant to the Porter-Cologne Water Quality Control Act ("Porter-Cologne"), the State Board has authority to regulate and protect "waters of the state." "Waters of the state" are defined by Porter-Cologne as "any surface water or groundwater, including saline waters, within the boundary of the state." Water Code § 13050(e). Nothing in this definition supports the broad reach of regulatory authority proposed in Alternatives 3 and 4.

In fact, even the State Board's authority to replicate the pre-*SWANCC* federal program under Alternative 2 is far from clear. In contrast to the federal CWA, neither Porter-Cologne nor the relevant regulations define surface waters to include "wetlands." The State Board itself has acknowledged that Porter-Cologne was "not designed to conserve wetlands and [does not] include any specific reference to wetlands." State Board, *Report to the Legislature, Supplemental Report of the 2002 Budget Act* (p. 14). The State Board has previously taken the position that wetlands within California meeting the former federal definition of "waters of the

United States" are also "waters of the state." *See* January 25, 2001 letter from Craig M. Wilson, State Board Chief Counsel, to State Board members and Regional Board Executive Officers; *see also* State Board Order No. WQ-2003-0017 (requiring holders of CWA 404 permits for discharge of dredge or fill material to isolated wetlands removed from federal jurisdiction post-*SWANCC* to continue complying with conditions imposed by the State or Regional Boards as a matter of state law). However, even when asserting this broad interpretation of "waters of the state," the State Board has never before claimed that Porter-Cologne was designed to conserve fully terrestrial "riparian areas" that were never federally jurisdictional, as characterized under Alternatives 3 and 4.

The plain meaning of "waters of the state" defined as "any surface water or groundwater" does not include terrestrial areas. There is no basis in the statute, regulations or caselaw to bring such areas within the State Board's jurisdiction. Moreover the Legislature has assigned responsibility for protecting and conserving biological resources in terrestrial habitats (including riparian areas) to other agencies, including in particular the California Department of Fish and Game and California Department Parks and Recreation. We urge the State Board to give careful consideration to the definitional language in Water Code § 13050(e) before embarking on an unprecedented and unjustified regulatory expansion.

Comment 5 – The State Board Should Await the Outcome of Federal Legislative Efforts

Finally, in the wake of *SWANCC* and subsequent decisions on wetland jurisdiction by the Supreme Court and other federal courts, Congress is currently considering action to amend the CWA. For example, the recently proposed H.R. 1350 would eliminate the term "navigable" from the definition of "waters of the United States" in CWA section 502. Such congressional action would establish broader federal jurisdiction that could eliminate the "regulatory gap" the State Board seeks to address. State certification pursuant to CWA section 401 would continue to provide a state role in regulation of wetlands restored to federal jurisdiction. Moreover, changes in U.S. Army Corps of Engineers and U.S. Environmental Protection Agency guidance and policy would necessarily follow congressional action on wetlands protection. Given the potential for substantial changes at the federal level, the State Board should defer developing competing and potentially conflicting policy until the outcome of federal legislative efforts is known.