

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

From: "Randal Friedman" <RandalFriedman1@comcast.net>
To: <commentletters@waterboards.ca.gov>
Date: Thu, Apr 19, 2007 2:42 PM
Subject: COMMENT LETTER ON CEQA SCOPING DOCUMENT WETLAND AND RIPARIAN AREA PROTECTION POLICY

Ms. Song Her

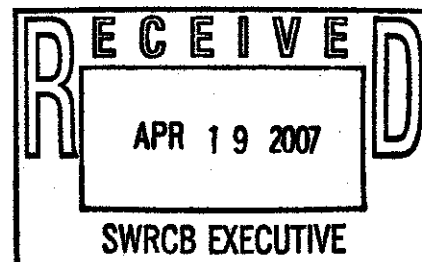
Clerk of the Board

Executive Office

State Water Resources Control Board

P.O. Box 100

Sacramento, CA 95812-0100



ELECTRONIC DELIVERY: commentletters@waterboards.ca.gov

Dear Ms. Her.

On behalf of the military services in California and RADM Len Hering, DoD Regional Environmental Coordinator, we have reviewed the Wetland and Riparian Area Protection Policy Scoping Document (Scoping Document) and thank you for this opportunity to comment.

Because the primary goals of this rulemaking process are the protection of water quality and the protection of natural riparian and wetland habitats, I will begin by noting that, in California, the Department of Defense (DOD) and its service branches are undisputed leaders in habitat protection. The United States military is proud of its track record in natural resources protection, a record illustrated by the breadth and depth of protected resources on DoD installations in California. These resources include numerous pristine natural areas containing a wealth of biodiversity and unique protected habitats. Military lands include and protect expanses of undeveloped coastline, native grasslands, old growth forests and southwestern deserts. This abundance of natural resources is due not only to the exclusive nature of DOD lands to commercial uses, but also to an intrinsic understanding of the importance of habitat preservation and a desire to work cooperatively with state and federal regulatory agencies in protecting natural resources.

As the Scoping Document recognizes, the protection of wetlands and riparian areas is a shared responsibility between federal and state agencies. The DOD applauds California's effort to reconcile the differences

in existing regulations, to identify gaps and overlaps and generally increase the efficiency and effectiveness of the regulatory framework. However, I must note that the DOD, as an agency of the federal government, is a unique entity among the regulated community. As such, there are special considerations the Board must make when determining how to approach the regulation of wetlands and riparian habitat on DOD installations.

For example, it is entirely unclear whether the state may extend its substantive clean water authority over waters on federal lands that do not meet the standard of jurisdictional waters under the federal CWA. While DOD installations in California currently make every effort to comply with such regulatory requirements, it is not clear how expanded state authority in this area will reconcile with the doctrines of federal sovereign immunity and federal preemption.

An example of an area where the issue of sovereign immunity may arise is in Alternatives 2, 3 and 4 in the Scoping Document. Each of the alternatives deal with the impacts of dredge and fill activities under Clean Water Act (CWA) section 404(b)(1), and the interplay between the protections offered through CWA sections 401 and 404. In 1998 the United States District Court for the Northern District of California held that the U.S. Army Corps of Engineers was immune from paying state dredging fees arising under various sections of the California Water Code. The court found that CWA 404(t) did not contain a sufficient waiver of sovereign immunity to state fees, as did section 313(a). *State of California v. United States of America*, C-98-0792 WHO, aff'd, 2001 US APP LEXIS 468, cert. denied, 2002 U.S. LEXIS 211. Any future regulations must consider the independence of DOD facilities from certain fee structures and certain state regulations.

Another potential conflict of laws arises in how the proposed wetlands and riparian area regulations will affect the interplay of existing DOD exemptions from critical habitat designation under the Endangered Species Act, 16 U.S.C. 1533(a)(3)(B)(i) and corresponding DOD responsibilities to develop and execute Integrated Natural Resource Management Plans (INRMP) under authority of the Sikes Act, 16 U.S.C. 670a. This balance requires DOD installations to develop INRMPs to integrate the implementation of the military mission of an installation with stewardship of the natural resources found thereon. Each INRMP includes an assessment of the ecological needs on the installation, including the need to provide for the conservation of species, habitat and water resources. It is unclear how the final wetlands and riparian area regulations will fit in to this existing framework.

Finally, development of proposed wetlands and riparian area regulations must consider the independence of the federal NEPA and CEQA processes. Neither the National Environmental Policy Act (NEPA) nor any other federal statute waives sovereign immunity with respect to CEQA. Because only Congress can waive sovereign immunity, no action by the state of California

can subject a federal agency to CEQA requirements. This fundamental distinction, if not properly addressed in rulemaking, has the potential to increase conflict and decrease efficiency in future regulatory processes.

It is my sincere hope that the wetlands and riparian regulations are developed in a way that maximizes the Board's goals of increasing the clarity, consistency and efficiency of the existing regulatory framework. The DOD shares the state's desire to develop enhanced protections for our wetland and riparian natural resources. The issues described in this document are a few areas that must be addressed to ensure a smooth transition to any new regulatory program. Other concerns may reveal themselves in the future, but by working closely together through the rule-making process and striving to understand both the Board's and the DOD's goals and legal limitations, we can ensure a successful, effective, efficient result.

I thank you for consideration of these and future matters. Please contact Randal Friedman at (619) 572-5037 if you have any questions.

Randal Friedman

California Government Affairs

Navy Region Southwest

(619) 572-5037

CC: <brian.gordon@navy.mil>, <peter.a.kennedy@navy.mil>, "Huber, Michael CIV"
<michael.huber@navy.mil>, "Faryan, Marykay CIV N05" <marykay.faryan@navy.mil>, "Konoval, George
J Maj AFLOA/JACE-WR" <George.Konoval@brooks.af.mil>