



September 8, 2008

Via e-mail: commentletters@waterboards.ca.gov

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

Re: Comment Letter – “Policy to Protect Wetlands and Riparian Areas.”

Dear Ms. Townsend,

Orange County Coastkeeper (“Coastkeeper”) is a grass roots environmental organization with the mission to preserve, protect and restore the watersheds and coastal environment of Orange County. In the interest of the people of Orange County we welcome the opportunity to comment on the ongoing development by the State Water Resources Control Board (“Board”) of a Wetland and Riparian Area Protection Policy (“Policy”).

The loss of wetlands in the United States has been dramatic since settlement began, but no state has had a larger percentage of wetland loss than California. Since the 1780’s, approximately fifty-three percent of wetlands have been lost in the lower forty-eight states, with the highest percentages of loss in the agricultural states of Illinois, Indiana, Iowa, Kentucky, Missouri, and Ohio, each losing at least eighty percent of their wetlands.¹ However, California ranks highest in overall wetland loss with an approximate ninety-one percent reduction in wetland acreage.² This unenviable distinction as the state with the worst historical wetland record brings with it a responsibility to ensure the future health and protection of California’s remaining acres of natural wetlands from both anthropogenic and naturally occurring threats.

Fortunately, progressive policy decisions by state and federal agencies have direct impacts on vulnerable resources such as wetlands and can yield relatively immediate results considering the vast scale of the problem. The 1990’s saw an increased awareness of agricultural impacts on both decreasing wetland acreage and overall environmental quality. Following western states adoption of “no-net-loss” policies, such as California’s enactment of the California Wetlands Conservation Policy, the U.S. Department of Agriculture began reporting an increase of wetlands on agricultural land in the lower forty-eight states of 26,000

¹ Rodger Doyle, *By the Numbers: U.S. Wetlands*, 278 Scientific American, no. 6, at 24 (June 1998). Robert E. Beck, *Waters and Water Rights* § 61.01, 1116 (Michie 1996).

² Dahl, T.E., *Wetlands Losses in the United States 1780s – 1980s*, U.S. Fish & Wildlife Service. Robert E. Beck, *Waters and Water Rights* § 61.01, 1116 (Michie 1996).

acres annually.³ Between 1998 and 2004, the Fish and Wildlife Service estimated a net gain in wetlands of 220,000 acres in the lower forty-eight states, the first gain since the inception of the database in 1954.⁴ Policy decisions adopted in a minority of the lower forty-eight states have resulted in an overall increase of wetland acreage in a period of less than twenty years, this is a positive development in a field of natural habitat conservation that has been under constant assault for centuries and bodes well for further development in wetland conservation proposed here by the Board.

Coastkeeper seeks to further the progressive policy decisions adopted by the Board in furtherance of the “no-net-loss” policy by suggesting specific policy proposals intended to increase the total acreage and ecological quality of California’s precious wetlands.

I. In Order to Reliably Define the Diverse Array of California Wetlands the United States Army Corp of Engineers Wetland Delineation Method Must be Supplemented by Additional Factors.

The U.S. Army Corp of Engineers (USACE) wetland delineation method does not adequately address the diverse array of California’s wetlands and must be supplemented by additional factors. According to the USACE wetland delineation method, a wetland is an area “inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions....generally include[s] swamps, marshes, bogs and similar areas.”⁵ Those wetlands properly included in this definition fall within the jurisdiction of federal wetland protection and should receive adequate insurance against any further environmental degradation. However, this under-inclusive federal definition will not provide adequate protection for all intrastate wetlands and will leave some wetlands under the sole jurisdictional protection of inadequate local laws.

California’s adoption of a rigid and under-inclusive federal wetland delineation method would yield the same results the Board seeks to avoid in adopting a state-wide wetland protection law. Currently, those wetlands outside the USACE definition fall within the jurisdiction of state regulations. If California were to adopt, intact and without alteration, the USACE wetland delineation methodology those same wetlands would remain unregulated with jurisdiction falling within the jurisdiction of local regulations. The Board’s adoption of an unaltered USACE wetland delineation method would simply defer jurisdictional responsibility over wetlands from the state bureaucracy to overburdened county and municipal bureaucracies without providing state wetlands with additional regulatory protection. What is required is a comprehensive state-wide wetland delineation method that recognizes the inherent value in retaining and restoring valuable state wetland resources in a way which acknowledges the diverse ecology of the State of California and encourages local investment in the management of those resources.

³ Natural Resources Conservation Service, U.S. Dep’t of Agriculture, Natural Resources Inventory (2004). Robert E. Beck, *Waters and Water Rights* § 61.01, 1117 (Michie 1996).

⁴ U.S. Fish & Wildlife Service, U.S. Dep’t of the Interior, Report to Congress on the Status and Trends of Wetlands in the Conterminous United States 1998-2004 (2006). Robert E. Beck, *Waters and Water Rights* § 61.01, 1117 (Michie 1996).

⁵ 33 C.F.R. § 328.3(b); 40 C.F.R. § 230.3(t)

The Board should seek guidance on how best to achieve this goal by analyzing how similar states adapted the USACE wetland delineation methodology to the diverse array of their own wetlands and determine the most appropriate policies to imitate.

For example, Wisconsin recognized the limitations on the federal USACE definition and adopted a comprehensive wetland policy focused on the maintenance, enhancement, and restoration of wetland functions and values.⁶ In assessing a wetland's value, Wisconsin requires a "thoughtful analysis of all possible wetland values and functions,"⁷ including "biological functions, watershed functions, recreational, cultural, and economic value, scarcity of wetland type, aquatic study areas, sanctuaries and refuges, and the ecosystem concept in a regional context."⁸ This expansive list of supplemental factors is intended to bring wetlands under state protection even if they do not fall within the traditional federal definitions of a protected wetland. For instance, if an otherwise federally unprotected wetland was an "important part of the economic base and/or contribute[d] to the cultural heritage" of "some people or cultures" it would be protected by Wisconsin's definition.⁹ Furthermore, if a certain type of wetland which was not federally protected but it was either "statewide or regionally scarce," then the Wisconsin Natural Resource Board would determine its special resource significance by analyzing the frequency of the wetland's type, the area of the type prior to settlement, the historical conversion of the type and degree of destruction, and the "amount of similar habitat in the present landscape of the region."¹⁰ By incorporating a series of factors intended to provide a comprehensive review of wetland characteristics Wisconsin acknowledged the difficulty in determining a wetland's value and chose to err on the side of protection instead of development.

In reflecting the complex interactions occurring within and around wetlands, this broad definition also reminds the Wisconsin Natural Resource Board of the critical importance of functional and ecologically diverse wetlands as a component in a vibrant natural resource policy. Whether the function is groundwater recharge, retarding flow during periods of flood, dissipating storm surges, or storing heavy metals, sediments, and nutrients, this inclusive regulation properly incorporates each of the critical characteristics of a wetland which are sometimes ignored if the traditional USACE wetland delineation method were the sole measure of protection. Wisconsin's adoption of functional and value based supplemental factors in the USACE wetland delineation methodology should be adopted by the Board because its adoption would help to resolve the difficulty in creating a state-wide wetland definition that would reflect the geographical distinctions between California's vast array of wetland areas.

In conclusion, the Board must compensate for California's diverse array of wetlands by adopting supplemental factors, such as those adopted in Wisconsin, when assessing wetlands under the USACE wetland delineation method. Without such incorporation, the Board's final ruling would not adequately reflect the interests of the people of California in protecting those wetlands most threatened by preventable degradation.

⁶ Wis. Admin. Code § NR 1.95(1)

⁷ Wis. Admin. Code § NR 1.95(3)(b)

⁸ Wis. Admin. Code § NR 1.95(3)(b)(1-6)

⁹ Wis. Admin. Code § NR 1.95(3)(b)(3)

¹⁰ Wis. Admin. Code § NR 1.95(3)(b)(4)

II. Proper State Regulation of Activities In and Around Wetlands Require the Adoption of Co-Operative State and Local Wetland Management Policies and the Incorporation of Programs Designed to Strengthen Relationships with Wetland Stakeholders.

Any successful mechanism seeking to effectively regulate activities in and around wetlands requires the adoption of co-operative state and local wetland management policies as well as programs designed to strengthen relationships with wetland stakeholders. The strength in these more complex regulatory mechanisms comes from their innate ability to reflect the specific issues surrounding an individual wetland.

Oregon's wetland conservation plans prove to be an illustrative example of a successful regulatory scheme designed to control the activities in and around wetlands. Unlike California, Oregon established a state-wide land use planning program administered by the Department of Land Conservation and Development which regulates wetland activities through local zoning requirements instituted by its statewide land use planning program.¹¹ Local governments have the option of creating a local wetland conservation plan which focuses and coordinates intra-governmental wetland management efforts into a broader watershed context than what would be allowed in a site-by-site permitting process.

Wetland conservation plans contain a series of five elements which are reviewed by the Department of Land Conservation and Development prior to their approval. The elements include:

- (a) A description and maps of the area to be covered by the plan;
- (b) A detailed inventory of the wetlands in the plan area;
- (c) An assessment of wetland functions and values;
- (d) Designation of wetland areas for protection, conservation, or development;
- (e) A mitigation plan, including provisions that any planned wetland losses shall be fully offset by creation, restoration, or enhancement of wetland functions and values and identification of mitigations sites, and
- (f) Policies and implementing measures for the protection, conservation, and best use of the wetlands in the planning area.¹²

The standards for wetland conservation plans are similar to the standards used by the Department in deliberating individual permits in the existing state fill and removal law and proposed activities within the plan are given equal scrutiny to those proposed in private permits. Any proposed development within a designated wetland under the wetland conservation plan is limited to instances of public need, where no practical alternative is available, and requires full replacement of any planned wetland loss.¹³ Although adopted in a state with significant environmental organizational distinctions, Oregon's successful maintenance of localized control over wetland conservation provides a useful illustration of an effective regulatory mechanism which addresses each primary activity surrounding a wetland an agency would seek to regulate.

¹¹ William L. Want, *Law of Wetlands Regulation* § 13:28 (West 2008)

¹² William L. Want, *Law of Wetlands Regulation* § 13:28 (West 2008); Or. Rev. Stat. § 196.678(2)

¹³ William L. Want, *Law of Wetlands Regulation* § 13:28 (West 2008) ; Or. Rev. Stat. § 196.681(4)

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Nearly as important as the regulatory framework supporting a wetland delineation methodology is the decision by state regulators to strengthen the relationship with wetland stakeholders. Realizing that the state's wetland protection, maintenance, and restoration policies depended on the public's participation in the process Wisconsin began a public outreach campaign to educate its citizens to the problems surrounding wetlands and how they could be part of their solution. The Wisconsin Department of Natural Resources charged itself with the duty to strengthen their relationship with stakeholders through "outreach and technical assistance and stewardship incentive programs."¹⁴ The proposed programs encouraged private and public wetland owners alike to make sound decisions to use their land sustainably, encouraged groups to provide for education on wetland values and ecology, to work directly with private and public developers to incorporate the wetlands into their planning, and created incentives and conservation programs intended to encourage ecological restoration of degraded wetlands.¹⁵ The Board should adopt similar methodology to Wisconsin and incorporate frameworks which encourage citizen investment concerning wetland issues through education, advocacy, and incentive programs.

In conclusion, Coastkeeper applauds the efforts of the Board in its dedication to extend state protections to otherwise unprotected wetlands. A progressive approach must be taken towards an inclusive definition of "wetlands" that reflects the vast array of California's diverse natural environment. We believe the most appropriate means of protecting California's precious wetlands is through the adoption of the USACE's wetland delineation methodology in association with supplemental factors similar to those adopted by Wisconsin. Furthermore, we encourage the Board to recognize the unique regional characteristics of California's diverse wetland habitats by permitting local influence on wetland issues. Finally, Coastkeeper encourages the Board to adopt policies seeking to strengthen relationships with stakeholders through outreach and technical assistance and stewardship incentive programs similar to those adopted in Wisconsin. Coastkeeper will continue to work with the Board in this and other issues surrounding California's precious natural environment.

Thank the Board for the opportunity to comment on this important issue.

Sincerely,

A handwritten signature in black ink that reads "Garry Brown". The signature is written in a cursive, flowing style.

Garry Brown
Executive Director
Orange County Coastkeeper

¹⁴ Wis. Admin. Code § NR 1.95(4)(c)

¹⁵ Wis. Admin. Code § NR 1.95(4)(c)(1-3)