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September 8, 2008

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

Dear Chairperson Doduc and Members of the State Water Resources Control Board,

This responds to the State Water Resources Control Board (Water Board's) request for public input regarding the development of Phase 1 of the “Wetland and Riparian Area Protection Policy” (Policy), pursuant to State Water Board Resolution No. 2008-0026.

We commend the Water Board's recognition of the crucial role wetlands and riparian areas play in maintaining water quality and beneficial uses of the waters of the state and for acting to close the regulatory gap that may now exist in Clean Water Act (33 U.S.C. § 1251 et seq.) (CWA) protection of wetlands and waters within the state. The Policy must be watershed based and must extend to all perennial, intermittent, ephemeral watercourses, isolated waters, wetlands, riparian areas, floodplains, and estuaries.

Definitions for “wetland” and “riparian”:

As part of the Phase 1 implementation, the Water Board will develop a statewide definition of “wetland” that will reliably define the diverse array of wetland habitats that exist within the state. The California Wetlands Information System website, “Defining Wetlands” (http://ceres.ca.gov/wetlands/introduction/defining_wetlands.html) states:

In conjunction with adopting a wetlands policy on March 9, 1987 the California Department of Fish and Game Commission assigned the Department of Fish and Game (DFG) the task of recommending a wetlands definition. The DFG found the U.S. Fish and Wildlife Service (USFWS) wetland definition and classification system to be the most biologically valid. The DFG staff use this definition as a guide in identifying wetlands while conducting on-site inspections for the implementation of its Commission's wetlands policy.

In the interest of capturing the diverse array of California's wetland habitats, while maintaining consistency with other state agencies, CCCR recommends the Water Board adopt the USFWS definition of wetlands (Cowardin 1979):

Wetlands are lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this classification, wetlands must have one or more of the following three attributes: (1) at least periodically, the land supports hydrophytes, (2) the substrate is predominantly undrained hydric soil, and (3) the substrate is non-soil and is saturated with water or covered by shallow water at some time during the growing season of each year.”

The U.S. Army Corps of Engineers (Corps) Arid West Region Supplement may provide useful guidance on the identification of “difficult wetland situations.” This portion of the supplement addresses “atypical” wetland situations that are not addressed within the 1987 Corps Wetlands Delineation Manual, where one might encounter problematic hydrophytic vegetation, problematic hydric soils, or the absence of wetland hydrology indicators.

The preface to the National Research Council’s (NRC) 2002 “Riparian Areas: Functions and Strategies for Management” states the report was an outgrowth of the NRC’s earlier report “Wetlands: Characteristics and Boundaries.” The earlier study recognized the need for a separate definition of “riparian” to ensure adequate regulatory protection of these important habitats. The definition provided states:

Riparian areas are transitional between terrestrial and aquatic ecosystems and are distinguished by gradients in biophysical conditions, ecological processes, and biota. They are areas through which surface and subsurface hydrology connect waterbodies with their adjacent uplands. They include those portions of terrestrial ecosystems that significantly influence exchanges of energy and matter with aquatic ecosystems (i.e., a zone of influence). Riparian areas are adjacent to perennial, intermittent, and ephemeral streams, lakes, and estuarine-marine shorelines.

Implicit within this definition are the notions that riparian areas encompass the floodplain of a waterbody, and that portions of adjacent upland should be included within any definition of “riparian”.

In any definition of wetlands and riparian, the Water Board must include provisions that will enable staff to recapture regulatory authority over areas where the wetland or riparian characteristics have been altered in an attempt to escape the assertion of regulatory authority.

Adoption of the 404 (b)(1) Guidelines (Guidelines) (40 C.F.R. parts 230-233) as a regulatory mechanism:

The 404 (b) (1) Guidelines (40 C.F.R. 230.10) require applicants who wish to dredge or fill wetlands must rebut the presumption that a practicable alternative exists that is less environmentally damaging. The preamble to the Guidelines states that it is the applicant’s responsibility to rebut this presumption. The Memorandum of Agreement between EPA and the Corps concerning mitigation under the CWA 404 (b)(1) Guidelines (Mitigation MOA) states:

1. Section 230.10(a) allows permit issuance for only the least environmentally damaging practicable alternative. The thrust of this section on alternatives is avoidance of impacts. Section 230.10(a)(1) requires that to be permissible, an alternative must be the least environmentally damaging practicable alternative (*LEDPA*). In addition, Section 230.10(a)(3) sets forth rebuttable presumptions that 1) alternatives for non-water dependent activities that do not involve special aquatic sites are available...
2. Minimization. Section 230.10(d) states that appropriate and practicable steps to minimize the adverse impacts will be required through project modifications and permit conditions.

Sequencing requires the applicant must first *avoid* impacts to wetlands, next *minimize* those impacts, and only after avoidance and minimization of impacts has occurred, compensate for any unavoidable impacts.

The concept of sequencing would appear to be an exemplary tool for the regulation and protection of wetland and riparian areas and given the language of the Guidelines it should be. However, more than 99% of the permit applications processed by the Corps are ultimately permitted. This has occurred gradually over time as a result of a certain laxity of practice by the Corps in the application of the Guidelines language. The following steps should be reinstated by the Water Board to ensure utilization of the Guidelines will be an effective regulatory tool for protecting wetlands and riparian areas:

- Potential applicants should be advised they must give serious consideration to avoidance and minimization of project impacts early in their design process and that an alternatives analysis will be required as part of a complete application; also that the burden of proof that a project design has minimized the adverse impacts to wetlands or riparian areas and is the least damaging, practicable alternative is the applicant's responsibility (if they have avoided impacts to wetlands there would be no need for a 401 certification or waiver). For the Guidelines to be effective in regulating and protecting wetlands and riparian areas, and in fairness to the regulated public, they must be made aware the important concepts of avoidance and minimization will be enforced during the permit review process.
- Yocum, Leidy, and Morris ("Wetlands Protection Through Impact Avoidance: A Discussion of the 404 (b)(1) Alternatives Analysis, 1989, copy attached) conducted a notable review of the 404 (b)(1) alternatives analysis process and concluded that, "...an alternatives analysis, performed properly and early in the project formulation stage can reduce project costs, increase certainty, and most importantly, result in avoidance [of impacts to wetlands] and protection of valuable wetland resources." The authors list many ways in which the application of the Guidelines have effectively protected special aquatic sites, we list the following are points as examples that should implemented to ensure the successful incorporation of the Guidelines into the state regulatory program:
 - The project purpose must be generically defined. Thus, residential housing has a basic project purpose of providing shelter, regardless of whether it is described as up-scale

- housing, waterfront housing, etc. it still has the basic project purpose of providing shelter and should be analyzed as such.
- Unacceptable ways of defining project purposes include, but are not limited to, “waterfront housing”, “developmet”, “redevelopment”, “making money”, “increasing tax base”, “generating revenues for redevelopment”, etc.
 - Overall project purposes should not include project amenities, a particular return on investment, “highest and best use of the land”, or certain desired size requirements.
 - For the most part, multi-purpose projects should be evaluated as separate projects with the assumption that the individual components can be relocated into uplands.
 - The geographic scope of the analysis of alternative sites must be broad enough to reasonably consider all environmentally preferable sites. (One of the examples given is that of a destination resort, the geographic scope of analysis in this instance may be as large as the state, or even as large as a multi-state state analysis.)
 - Determination of “practicability” – Often alternatives are rejected because the applicant insists they will not recover a large enough return on investment, however, Yocum, etal suggest “...a project alternative that achieves a smaller return on envestment than the applicant’s preferred alternative may be considered practicable for the purposes of 404 permitting...”

The authors also stress the need for strict adherence to the sequence of avoidance, then minimization, and only afterwards compensatory mitigation.

Recent studies of the efficacy of compensatory mitigation suggest this is paramount in wetlands protection. Ambrose, Calloway, and Lee (2007, “An Evaluation of Compensatory Mitigation Projects Permitted Under Clean Water Act Section 401 by the California State Water Resources Control Board, 1991-2002”) reveals while permittees for the most part comply with the compensatory mitigation requirements, and acreages of “wetlands” are produced, these areas do not fully recapture lost functions and values of wetlands.

Based upon our experience with compensatory mitigation sites within the San Francisco Bay area, we believe avoidance is pivotal to the protection of wetlands and riparian areas of the state.

We believe a watershed approach must be applied in the analysis of avoidance. Wetlands and riparian areas are inextricably linked to their surrounding uplands. Isolated wetlands, vernal pool complexes, riparian habitat, and the plant and animal communities which live in these habitats, also rely on surrounding upland habitat. For these types of habitats, avoidance analysis must take into consideration the hydrological and ecological linkages that exist and prevent situations where fill is not placed directly in the wetland, but the development of uplands immediately adjacent results in degradation of the wetland to the point where the ecological values are destroyed.

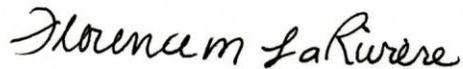
Any unavoidable impacts should and must be minimized and all non-essential projects or project components should be located in appropriate upland areas. Only after rigorous efforts have been made to avoid and minimize wetlands and riparian impacts should compensatory mitigation be considered. Studies which have analyzed the ability of compensatory mitigation projects to replace lost wetlands and riparian functions and values clearly indicate success rates are unacceptably low. Therefore, it should not be assumed compensatory mitigation will adequately replace lost functions and values and every effort must be made to ensure permit

conditions will address criteria necessary to successfully recreate wetlands and riparian functions, values, and services (e.g. hydrologic and biogeochemical conditions). Also, it is imperative that wetland and riparian acreage and functions, values, and services of the before and after conditions at the project and mitigation sites be required so that the efficacy of compensatory mitigation can be assessed.

Mitigation ratios should be high enough to offset the temporal losses of wetland or riparian functions and values and to ensure “no net loss of wetlands” as required by the State’s Wetlands Conservation Policy (Executive Order W-59-93). The National Research Council in 1992 recommended ratios of at least three, five, or ten acres of mitigation wetlands or streams for every acre of wetland or stream destroyed depending on its functional value (“Restoration of Aquatic Ecosystems”). Compensatory mitigation must be based on a watershed approach and take into account the linkage of wetland habitat with the surrounding uplands, existing hydrological conditions, etc. (e.g. created wetlands must be sustainable and not degrade adjacent existing wetlands or the upland habitat that supports them).

We thank you for the opportunity to provide comments.

Sincerely,

A handwritten signature in cursive script that reads "Florence M. LaRiviere".

Florence M. LaRiviere,
Chairperson