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Utility Water Act Group®

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May 19, 2011

VIA OVERNIGHT MAIL

Mr. Thomas Howard, Executive Director
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Mr. Charles R. Hoppin, Chair
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: UWAG's Comments on State Water Control Board Wetland Area Protection Policy and Dredge and Fill Regulations

Dear Mr. Howard and Hoppin:

I am writing, on behalf of the Utility Water Act Group ("UWAG"), to raise significant concerns in connection with the wetland definition proposed by the State Water Resources Control Board ("State Board") in the Notice of Preparation of Environmental Impact Report ("EIR") for the Wetland Protection Policy and Dredge and Fill Regulations (the "Wetland Proposal" or "Project"). The Wetland Proposal is centered on a new State definition for the delineation and regulation of wetland areas in California. If adopted, the proposed wetland definition, and its associated regulatory program, would introduce significant complexity, cost, and confusion to the regulated community in California. It would negatively impact future investment and economic development in the State.

These comments are filed on behalf of UWAG, which has a longstanding interest in regulatory issues arising under the Clean Water Act and related State programs. UWAG is a voluntary, *ad hoc*, non-profit, unincorporated group of 172 individual energy companies and three national trade associations of energy companies. The individual energy companies operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. The trade associations represent U.S. shareholder-owned energy companies, nonprofit energy cooperatives supplying central station service through generation, transmission, and distribution of electricity to rural areas of the United States, and publicly owned (municipal and state) energy utilities in 49 states. UWAG's purpose is to participate on behalf of its members in rulemakings and other proceedings under the Clean Water Act and related State programs.

The production and supply of electricity requires the construction and maintenance of power plants and substations, as well as thousands of miles of transmission and distribution lines. The need to

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supply electricity over long distances and to all areas of the State means that these activities must sometimes cross wetlands and other waters of the United States and thus must obtain and rely on Section 404 permits. The administration and reliability of the Section 404 regulatory program and related State programs, insofar as it affects the electric utility industry, is important not only to UWAG members but also to the public at large, whose health, safety and general welfare depend on a reliable source of electricity.

UWAG appreciates your consideration of the following comments on the State Board's Wetland Proposal:

Proposed Wetland Definition Would Introduce Significant Regulatory Uncertainty by Creating a Dueling Definition to That Used by the Federal Government

The most concerning aspect of the proposal is the rejection of the wetland definition used by the federal government for nearly twenty-five years for a new, alternative definition that would be used to define, delineate, and regulate "State" wetlands. In addition to extending State regulation to "isolated" wetlands, the proposed definition departs from the long-standing technical delineation criteria developed by the United States Army Corps of Engineers ("USACE") in several critical aspects. The State Board's proposed definition would:

1. Extend regulation of State wetlands to areas that are barren and lack any vegetation, whereas the federal definition is limited to areas dominated by wetland species;

2. Abandon the hydric soil requirement used in the federal definition and instead define a wetland as including any saturated "substrate," whether consisting of soil or not; and

3. Abandon the federal hydrology criterion of at least consecutive 14 days of saturation and substitute a period of only 7 consecutive days of saturation.

Adopting a wetland definition inconsistent with the accepted federal approach for delineating wetlands will result in additional complication in an already complex regulatory field, increase the burden and cost of regulatory compliance for private and public property owners, and reduce new investment in the State. For example, two separate regulatory definitions would result in dueling definitions between the State and federal government, and require that property owners in California delineate State and federal wetlands separately on project sites. Multiple regulatory requirements for wetland issues and the need to delineate federal and State wetlands separately on project sites will increase the cost of construction and real estate in California. It is likely that a number of projects would require separate permits from the State Board and federal government, oversight by both State and federal regulatory agencies during construction, and compliance with a different set of requirements for dredge and fill activities and any required mitigation. As a result, the proposal would significantly increase the cost and complexity of development.

The Wetland Proposal Does Not Adequately Explain Why Use of the Federal Wetland Definition is Not Feasible

The proposed definition also departs from the specific direction given to staff by the State Board in 2008. In tasking staff with preparing a policy to protect State wetlands from dredge and fill activities, including consideration of a State wetland definition, the State Board directed the Development Team to:

> [D]evelop and bring forward for State Water Board consideration: [] a wetland definition that would reliably define the diverse array of California wetlands *based on the United States Army Corps of Engineers' wetland delineation methods to the extent feasible* …

State Board Resolution 2008-0026 (emphasis added). Pursuant to Resolution 2008-0026, staff was directed not to depart from the existing federal definition of wetlands *unless it was determined that it was not feasible to use it.* The EIR, however, provides no meaningful discussion justifying the abandonment of the federal wetland definition for the proposed alternative definition. As such, the EIR fails to provide an explanation of why adoption of the federal wetland definition by the State Board is not be feasible to meet the goals identified in Resolution 2008-0026.

The Wetland Proposal Fails to Provide Adequate Analysis to Support the Necessity for Creation of a Broad, New State Wetland Program

Before implementing a broad, new regulatory program, we urge the State Board to conduct further investigation and provide additional analysis to determine whether there is, in fact, a need for the State to adopt a wetland definition inconsistent with the definition used by the federal government. Wetlands in California are already subject to strict protection under the federal Clean Water Act and existing State law, regulatory programs, and executive orders.

To justify the need for a new wetland definition, the Wetland Proposal states a goal of "uniformly" protecting all waters of the State. The EIR seeks to justify the adoption of additional regulation by citing the "diminishing jurisdiction of the federal government" in regulating wetlands under the Clean Water Act and the "documented historic losses of aquatic resources." The EIR, however, fails to provide relevant analysis or information to support the need for the Wetland Proposal – or any increased regulation of wetlands – or the conclusion that wetland resources are disappearing at a material rate today.

The EIR does not cite to studies, or otherwise provide data showing that the current regulation of wetlands in the State, as of 2011, is inadequate or allowing for a material loss of wetland resources. The conclusion that California is "losing" wetlands is supported by citations to only two studies: (1) a 1990 study performed by the U.S. Fish and Wildlife Service indicating that up to 91 percent of

historic wetland acreage in California had been lost by the late 1980s, and (2) a 1994 Coastal Commission Study finding that wetland loss has varied by region. These reports are irrelevant and inadequate to determine whether the existing regulation of wetlands in California is lacking or whether wetland acreage is currently decreasing. Both of the reports were generated more than fifteen years ago and do not take account more recent developments in delineating wetlands under the federal definition, such as the issuance of the Regional Supplement to the Corps of Engineers Wetland Delineation Manual for the Arid West Region. The time periods examined by the reports pre-date adoption of the 1993 California State Wetland Conservation Policy, and largely characterize wetland loss that occurred prior to implementation of the Clean Water Act Section 404 program. For example, the 1990 study evaluated wetland changes in California between the late 1700s and the late 1980s. Widespread protection of wetlands under the federal Clean Water Act did not begin until the mid-1980s and has been augmented by the Corps issuance of regional supplements covering California. In order to justify a burdensome new regulatory program related to wetlands, the State Board needs to document that the current system for protecting wetlands has failed and, without a specific change, identifiable losses of wetlands will occur and then to tailor any expansion of jurisdiction to the documented, identified losses. This type of analysis is not included in the EIR.

The Wetland Proposal Fails to Justify Why Duplicative Regulation of Wetlands Subject to Federal Regulation is Justified or Necessary

According to the EIR, the predominant purpose of the proposed wetland definition is to extend California's regulation of wetlands to "isolated" wetlands that the federal government may be unable to regulate under the Clean Water Act following the U.S. Supreme Court decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corp of Engineers (SWANCC)* and *Rapanos v. United States*. The EIR, however, provides no analysis of whether any change in the scope of federal jurisdiction attributable to the *Rapanos* or *SWANCC* decisions resulted in any identifiable and material impact on the protection and health of wetlands in California. Since it has now been a decade since the Supreme Court's *SWANCC* decision, any resulting deleterious impact to State wetlands should be observable, but such analysis is not included in the EIR.

Furthermore, the EPA and USACE proposed new guidance on the scope of federal Clean Water Act jurisdiction over wetlands in a May 2, 2011 Federal Register notice that may affect any arguable need for State regulation post-*Rapanos*. According to the Notice, the proposed guidance is intended to address the *SWANCC* and *Rapanos* decisions and, as a result of the new guidance, the "number of waters identified as protected by the Clean Water Act will increase compared to current practice ..." In addition, the Notice also indicates that the federal agencies intend to promptly initiate a rulemaking to amend the federal regulatory definition of "waters of the United States." Rather than spend scarce State resources to develop and implement an expansive new regulatory program, the State Board should withdraw the proposed wetland definition and allow the federal government to finalize its new Clean Water rule. Because the new rule will likely influence or resolve many of the issues driving the State Board's consideration of a State program to address wetlands following the

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Rapanos and *SWANCC* decisions, adoption of a costly, complex, and duplicative State regulatory program may be unnecessary.

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For these reasons, UWAG requests that the State Board reject any State definition of wetlands that departs from, or conflicts with the long-standing federal wetland delineation criteria. To the extent the State Board is determined to move forward with a State wetland definition, we ask that any action be delayed until after the EPA and USACE finalize a federal rule on this subject and until an evaluation of the basis and need for an additional, potentially duplicative State program is performed by the State Board. In such case, however, the State Board should withdraw the proposed State wetland definition pending finalization of the federal rule and further Board investigation. If you should need additional information, please do not hesitate to call our counsel, Mark Weisshaar, at (202) 955-1537.

Sincerely,

Brad Burke/JMW

J. Bradley Burke, Chairman
Section 404 Committee

cc: Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
PO Box 100, Sacramento, CA 95812-2000