

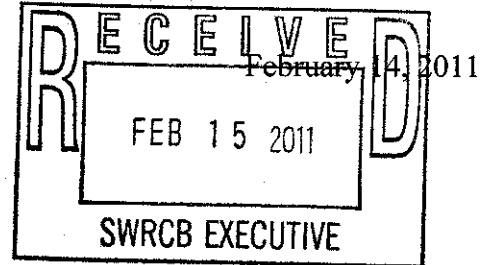


# United States Department of the Interior



FISH AND WILDLIFE SERVICE  
Ventura Fish and Wildlife Office  
2493 Portola Road, Suite B  
Ventura, California 93003

IN REPLY REFER TO:  
81440-2011-CPA-0051



Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, California 95812-2000

Subject: Comment letter – California Environmental Quality Act - Wetland Area  
Protection Policy and Dredge and Fill Regulations

Dear Ms. Townsend,

This letter provides the U.S. Fish and Wildlife Service's (Service) comments on the subject Notice of Preparation (NOP) of an Environmental Impact Report and Initial Study Checklist. The NOP was received in our office on January 6, 2011 via electronic mail. The adoption of a proposed Wetland Area Protection Policy and regulations governing the discharge of dredged and fill material into waters of the State (proposed project) would include a wetland definition. The State Water Resources Control Board (Water Board) is the Lead Agency and responsible for the preparation of the environmental document. We have downloaded and reviewed the Initial Study for the proposed project as described in the NOP and made available on your website.

The purpose of the proposed project is to protect all waters of the State as defined by Water Code section 13050, including wetland areas and waters of the United States' from dredge and fill discharges. It includes a wetland definition and associated delineation methods, and requirements applicable to discharges of dredged or fill material based on the United States Army Corps of Engineers' (Corps) 404(b)(1) guidelines. The proposed project attempts to complement the existing regulatory framework and is intended to fill the gaps currently caused by the separate Federal and State regulations and programs by consolidating existing Water Board requirements in a coordinated framework.

The Service's responsibilities include administering the Endangered Species Act of 1973, as amended (Act), including sections 7, 9, and 10. Section 9 of the Act and its implementing regulations prohibits the taking of any federally listed endangered or threatened species. Section 3(19) of the Act defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Harm is further defined by the Service to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Harass is defined by the Service as intentional or negligent actions that create the likelihood of injury to a listed species by annoying it to such an extent as to

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significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. The Act provides for civil and criminal penalties for the unlawful taking of listed species.

Exemptions to the prohibitions against take may be obtained through coordination with the Service in two ways. If a project is to be funded, authorized, or carried out by a Federal agency, and may affect a listed species, the Federal agency must consult with the Service pursuant to section 7(a)(2) of the Act. If a proposed project does not involve a Federal agency but may result in the take of a listed animal species, the project proponent should apply to the Service for an incidental take permit pursuant to section 10(a)(1)(B) of the Act.

As it is not our primary responsibility to comment on documents prepared pursuant to the California Environmental Quality Act (CEQA), our comments on the proposed project do not constitute a full review of project impacts. We are providing our comments based upon a review of sections addressing biological resources, project activities that have potential to affect federally listed species, and our concerns for listed species within our jurisdiction related to our mandates under the Act. Based upon our review, we have the following concerns regarding potential impacts to federally listed species and the habitats upon which they depend that may result from implementation of the proposed project.

It is our understanding that the proposed project was developed by the Water Board in response to the diminishing jurisdiction of the Federal government in relation to protection of wetlands. Recent court cases have limited the scope of Federal jurisdiction under the Clean Water Act, excluding many California wetlands from Federal jurisdiction regardless of whether they otherwise meet the technical requirements of the Federal wetland definition and the Corps' delineation manual. Due to the ongoing loss of wetlands in California, including those which provide essential habitat for migratory birds and federally listed species, we support the Water Board's attempt to clarify and strengthen the protection of these vital natural resources; however, we have concerns about the methods proposed to achieve these goals.

Wetlands are being lost at an unprecedented rate, and the Service is concerned that the Water Board's proposed wetland definition will not achieve any greater protection for wetland resources than is currently provided in existing regulations. According to the Water Board Resolution adopted on April 15, 2008, "the Development Team is directed to develop and bring forward for State Water Board consideration: (a) a wetland definition that would reliably define the diverse array of California wetlands based on the United State Army Corps of Engineers' wetlands delineation methods to the extent feasible..." It is the Service's opinion that, according to language presented in the Resolution, the primary goal of the proposed wetland definition is to "reliably define the diverse array of California wetlands." The second priority is to base the definition on the Corps' delineation methods to the extent feasible. The wetland definition, as currently proposed, focuses too heavily on the use of the Corps' definition, and fails to reliably define the diverse array of California wetlands. We are concerned that the definition will fail to include ecologically important habitats, in particular vernal pools.

Literature posted on your website states that the Corps' wetland delineation manual, including all of its supplements, would be used in the field to delineate State wetlands as defined by the proposed definition; however, the mandatory use of this document is not apparent in the wetland definition language itself. In addition, the California Department of Fish and Game, which also has State authority in the protection of wetland habitat, has its own definition of wetlands that is more inclusive of wetland habitat types. It is unclear why the State, when attempting to clarify wetland policies, would have inconsistent definitions of the natural resource. We recommend that the Water Board and its Technical Advisory Team reconsider adoption of the California Department of Fish and Game's definition of a wetland. We believe this existing definition reliably defines the diverse array of California wetlands, and would help clarify State regulations of the resource.

We have outstanding concerns that vernal pools and similar ephemeral wetlands would not meet the proposed definition of a wetland and, thus, would fail to be protected by the Water Board and Federal agencies. Vernal pools are a unique kind of wetland ecosystem. There are 20 federally listed species of plants and animals that occur exclusively or primarily within vernal pool ecosystems in California and southern Oregon. These species are largely confined to a limited area by topographic constraints, soil types, and climatic conditions. Habitat loss and fragmentation due to human activities are the primary causes of the endangerment of these species. The proposed wetland definition relies on the 3-parameter approach used by the Corps. The third parameter in the proposed wetland definition has been expanded and states "an area is a wetland if, under normal circumstances, it... (3) either lacks vegetation or the vegetation is dominated by hydrophytes." Drought conditions may be considered "normal" in California and during these climatic events vernal pools may exhibit neither hydrophytic vegetation nor absence of vegetation. Vernal pools can be dominated by annual grassland communities during drought conditions. We are concerned that the requirement of wetlands to meet all three parameters will result in a failure to identify vernal pools as wetlands, and subsequently, the State will not have the authority to protect the resource.

The Service has outstanding concerns over the use of the Corps' wetland delineation manual and its supplements to define wetlands in the field. While we understand that the manual and its supplements have been updated over time to reflect proven methods of wetland delineation, we are concerned that information gaps will exist when attempting to use these documents in conjunction with the proposed wetland definition. The Corps' wetland delineation manual and its supplements were developed to identify wetlands according to the Corps definition, not the proposed definition. The manual and its supplements may fail to identify State wetlands because it was not developed to identify wetlands using the State's proposed definition.

We appreciate the opportunity to provide comments on the Water Board's Wetland Area Protection Policy and Dredge and Fill Regulations. We are willing and available to work with you to develop a wetland definition and wetland protection policy that will result in increased

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protection of wetlands throughout California. If you have any questions, please contact Colleen Mehlberg of our staff at (805) 644-1766, extension 221.

Sincerely,

/s/ Jeff Phillips

Jeff Phillips  
Deputy Assistant Field Supervisor