



California Water Boards

State Water Resources Control Board

Regional Water Quality Control Boards

Water Board Function: Wetlands protection, and dredge & fill regulation

Water Board Program(s) Relevant to Function:

Wetlands and Water Quality Certification Program (401 certification)

All applicants for federal and/or state permits for development projects that may result in placing any type of excavated (dredged) or fill material into surface waters, including wetlands, are required to obtain a water quality certification that the discharge will comply with California water quality standards.

Problem/Issue Description:

The Wetlands and Water Quality Certification Program regulates any activity that may result in placing excavated or fill material (such as soil, gravel, pilings, culverts, side cast material, etc.) into wetlands, lakes or streams. The program protects all waters, but has special responsibility for wetlands, riparian areas, and headwaters because these water bodies have high resource value, are vulnerable to filling, and are not systematically protected by other programs. This responsibility has been increased due to recent U.S. Supreme Court decisions that have reduced federal protection for these sensitive aquatic sites (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 2001, Rapanos v. United States, 2006, and Carabell v. United States, 2006*). In addition, this program is involved with the protection of special-status species associated with aquatic sites, and regulation of impacts that in any way modify the natural drainage of the landscape. Finally, this program is used to require additional site specific stormwater best management practices (BMPs) not addressed by the municipal separate storm sewer system (MS4) General permits.

Overview of Function:

The majority of water quality certifications are for Clean Water Act (CWA) Section 404 permits that are issued by the United States Army Corps of Engineers (Corps). Section 404 of the CWA prohibits the discharge of excavated or fill material into waters of the U.S (jurisdictional waters) without a permit from the Corps. Section 401 of the CWA requires applicants for a federal license or permit that may result in any discharge into jurisdictional waters to obtain from the state a water quality certification stating that the discharge will comply with the state's water quality plan. The Corps is required to enforce the conditions of the water quality certification in order to permit the project. However, the Corps may not elect to enforce any condition that involves activities outside the federal jurisdictional boundaries. If the project does not require a federal 404 permit, but does involve placing excavated or fill material into state waters, then the project may be regulated under state authority (in the case of California, the Porter-Cologne Act) in the form of Waste Discharge Requirements (WDRs) or Waiver of Waste Discharge Requirements. In either case, California may enforce the conditions of the water quality certification using its Porter-Cologne authority.

Role of Water Board Staff:

The Regional Board staff has primary permitting responsibility. Regional Board staff processes requests and the Executive Officer issues certification. State Water Board staff permits only those projects that span more than one region; the Executive Director issues certification. In addition, the State Water Board staff support the Regional Board Wetland and Water Quality Certification programs through training, guidance, program management, and program quality development. Currently, Regional and State Water Board staffs are participating jointly on the Wetland Policy Development Team to bring forward for Board consideration stream and wetland protection policies. The statewide policy will also consider language from the MS4 program to provide guidance for including stormwater measures in certification permitting.

Role of Regional Board Members:

The Executive Officer is authorized to approve a water quality certification required pursuant to CWA Section 401. However, the Regional Board approves WDRs or Waivers of WDRs for those projects that discharge material to State surface waters, but not waters of the U.S. Also, the Regional Boards would be involved in orders imposing administrative civil liability, and other enforcement actions. Board Members also direct and approve water quality plans related to this program.

Role of State Board Members:

State Board members review and consider all petitions from Regional Board issuance of certification, and are involved in enforcement proceedings for multi-regional projects permitted by the State Water Board staff. State Water Board will also direct and approve all policies and plans related to this program, such as the proposed Wetland and Riparian Area Protection Policy and the basin plan amendments currently being developed by Regions 1 and 2 for the Stream and Wetlands System Protection Policy.

Primary Issues of Concern:

Program staffing levels have been able to meet the basic permitting functions, but has been inadequate to meet essential compliance and enforcement functions. A recent study by the State Water Board conducted by Dr. Ambrose found that the health of wetlands established as mitigation to meet the requirements of water quality certification permits were generally very poor (An Evaluation of Compensatory Mitigation Projects Permitted under Clean Water Act Section 401 by the State Water Resources Control Board, 1991-2002). Although permit compliance was met in terms of wetland acreage, wetland losses were occurring due to poor health.

There is also strong evidence of non-filers for water quality certifications based on the fact that the Department of Fish and Game issues three times as many "Lake or Streambed Alteration Agreement" permits for work in streams and lakes. To remedy this, program augmentation is needed to provide for compliance monitoring and enforcement. This situation is exacerbated due to the recent U.S. Supreme Court decisions that have caused unstable federal jurisdiction. This requires additional State resources to regulate these non-jurisdictional areas. Expected climate change stress on watersheds adds urgency to act now to protect wetlands, headwater areas, and riparian areas that provide critical water quality improvement functions.

Definition of Key Terms:

Water Quality Certification: Permit issued by the California Water Boards under the authority of the CWA Section 401, or Porter-Cologne, for the discharge of dredge or fill material certifying that state water quality standards are met.

Compensatory Mitigation: Requirement that if a project cannot first, avoid, or second, minimize environmental impacts to waters including wetlands, then those unavoidable impacts must be compensated for by meeting certain conditions.

Waters of the U.S.: Broadly defined in Corps regulations (33 CFR 328.3(a), parts 1-8) as including both wetland and non-wetland aquatic habitats, such as streams, rivers, lakes, ponds, bays, and oceans. Generally includes navigable waters, tributaries to navigable waters and wetlands adjacent to, or with a “significant nexus” to, navigable waters.