

Client Alert

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California Proposes Far-Reaching Policy to Regulate Isolated Wetlands and Other Waters of the State

In the culmination of a process started in 2008, the California State Water Resources Control Board (“State Board”) is soliciting public comment on a proposed rulemaking that would regulate discharges of dredged or fill materials to waters of the state. This rulemaking, which includes a wetland definition differing from the longstanding US Army Corps of Engineers definition, has the potential to significantly impact businesses, agricultural interests and property owners across California by increasing permitting requirements and imposing limitations on the future use and development of property. Comments on the proposal are currently due to the State Board by August 4, 2016.

The State Board’s proposal consists of three components: (1) a state-only wetland definition; (2) state wetland delineation procedures; and (3) procedures for applications to allow for dredged and fill activities in state-only waters (including wetlands). The proposed wetland definition departs from the federal definition by extending to areas with no vegetation — including areas that may be permanently under water — as “wetlands.”

An area is a wetland if, under normal circumstances, (1) the area has continuous or recurrent saturation of the upper substrate caused by groundwater, or shallow surface water or both; (2) the duration of such saturation is sufficient to cause anaerobic conditions in the upper substrate; and (3) the area’s vegetation is dominated by hydrophytes or the area lacks vegetation.

The proposal has the potential to substantially increase the acreage of property regulated as “wetlands” in California because: (1) it would remove any requirement for a nexus to a water of the United States, therefore extending jurisdiction over small and completely isolated features; and (2) the new definition extends to features that would not otherwise meet the longstanding federal wetland definition, including many tidal flats, playas, beaches and river bars. The definition, as proposed, would also define many rivers, lakes, ponds, lagoons, impoundments and other inundated features — whether manmade or not — as wetlands.

Impacts of the proposal, if finalized, could be substantial, and include the following issues relevant to stakeholders:

- Overlapping and more complex permitting requirements for proposed projects due to separate state and federal wetland definitions (including a potential need for separate delineations using the separate wetland criteria). In some cases, projects would require separate federal and state permits, which could lead to permitting delays and complications.
- Features currently exempted under Corps guidance documents and interpretative statements in the Federal Register — such as construction-related depressions, artificial water features, ditches and erosion gullies — will not be excluded under the proposed state policy. Coupled with the extension of regulation over features without a nexus to a water of the United States, this will result in extensive regulation over a variety of features, including many that may be in upland areas or anthropogenic in origin.

- Imposition of additional requirement to provide the Regional Board with alternative analyses to determine whether projects are the “least environmentally damaging practicable alternative” that will achieve the project purpose. The Regional Boards may require an alternative analysis for Corps CWA § 404 permits as well, including for Nationwide Permits that would otherwise be exempt from this procedure.
- Because California does not recognize all of the Corps’ Nationwide Permits, a number of isolated or state-only features that fall within the new California wetland definition that would otherwise have qualified for a Corps Nationwide Permit will instead require applicants to go through a complete permitting process with the Regional Boards.
- Significant uncertainty caused by a new program with far-reaching impacts that may result in inconsistent application by the Regional Boards and increased litigation over the scope of the program.

The State Board will hold a workshop in Sacramento on July 7 on the proposed rulemaking followed by a public hearing in Sacramento on July 19 before the close of comments at noon on August 4, 2016. More detailed information on the rulemaking from the State Board is available here [http://www.waterboards.ca.gov/water_issues/programs/cwa401/wrapp.shtml].

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