

STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 91-29

AUTHORIZING THE EXECUTIVE DIRECTOR, OR HIS DESIGNEE, TO ACCEPT/AMEND A
CLEAN WATER ACT (CWA) SECTION 104(b)(3) GRANT FOR DEVELOPMENT OF A WETLANDS
PROTECTION PROGRAM

WHEREAS:

1. The U.S. Environmental Protection Agency (EPA) has adopted the goal of achieving no overall net loss of the Nation's remaining wetlands and, where feasible, of increasing the quantity and quality of the Nation's wetlands.
2. The State Water Resources Control Board (State Board) recognizes the need to more aggressively protect California's remaining wetlands.
3. Congress has appropriated \$5 million in FFY 1991 to help states develop or enhance wetland protection programs. Funds will be disbursed by EPA under CWA Section 104(b)(3).
4. State Board staff has submitted a proposal to EPA for development of a wetlands protection program to be funded by a Section 104(b)(3) grant.
5. A notice of intent has been submitted to the State Clearinghouse advising it of the State Board's application for the CWA Section 104(b)(3) funds.

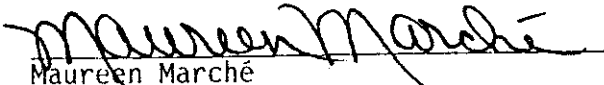
THEREFORE, BE IT RESOLVED THAT:

The State Board authorizes the Executive Director, or his designee, to:

1. Accept a Section 104(b)(3) grant from EPA for wetlands protection program development, if offered;
2. Negotiate subsequent amendments to the workplan not affecting the total grant amount; and
3. Negotiate and execute contracts and amendments in accordance with the program workplans.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on April 18, 1991.


Maureen Marché
Administrative Assistant to the Board

ATTACHMENT 1

DEVELOPING WETLAND WATER QUALITY STANDARDS
FOR CALIFORNIA

OBJECTIVE

The objectives of this proposal are to:

1. Ensure that all wetlands are legally recognized as waters of the State.
2. Develop a categorization scheme to protect wetlands.
3. Designate beneficial uses for wetlands within each region of the State.
4. Develop narrative water quality objectives to protect the designated wetland beneficial uses.

SUMMARY

The State has an existing structure through which it could provide water quality protection and address the national goal to achieve the no net loss of wetlands. The designation of beneficial uses and the establishment of water quality objectives (water quality standards) can provide protection and achieve the necessary consistency with the other federal and State programs that regulate wetlands. Establishment of water quality standards would also promote a consistent approach for the development of policies and procedures to manage activities that impact wetlands. Implementation of this proposal will result in recommendations to define, identify, and designate water quality standards for wetlands for incorporation into the California Water Quality Control Plans (Basin Plans).

BACKGROUND

Wetlands have emerged in recent years as areas of important environmental and commercial interest. Wetlands are important producers of commercially valuable fish and shellfish and provide essential habitat for many species of migrating birds as well as many listed threatened and endangered species of plants and animals. In addition wetlands serve to provide recreation, erosion control, floodwater retention, ground water recharge, and can be valuable in reducing pollutant in aquatic systems.

High priority national goals are to achieve "no-net loss" of wetlands in acreage and function and to restore and create wetlands, where feasible, in order to increase the quality and quantity of this valuable natural resource. The State Board has the basin planning structure through which it can help achieve the "no-net loss goal" of wetlands. This tool is made available through the Porter-Cologne Water Quality Control Act (Porter-Cologne) and the federal Clean Water Act (CWA) which mandate the adoption of Basin Plans and the establishment of water quality objectives to ensure the reasonable protection of the beneficial uses of State and national waters. This protection mechanism is

implemented through the waste discharge permit authority which allows the State Board and Regional Water Quality Control Boards (Regional Boards) to control discharges impacting or potentially impacting wetlands and the water quality certification process authorized under Section 401 of the CWA.

The San Francisco Bay Regional Water Quality Control Board recently incorporated in its Basin Plan the wetland definition used by the EPA and the CoE, identified prominent wetlands, assigned beneficial uses to them, and adopted a wetland fill policy which includes mitigation strategy for wetland fill projects. This Regional Board presently leads the State in wetland water quality protection strategies. In the remainder of the State, wetland identification and beneficial use designation has just begun under the Basin Planning Update Program (BPU). In conjunction with the wetland inventory task identified under the BPU, there is a need to develop a framework to categorize wetlands and establish wetland water quality standards.

WORK DESCRIPTION

Under the BPU program, Regional Boards at their discretion, should identify all waterbodies within each hydrologic basin throughout the State. This compilation will include general wetland information gathered from a variety of Federal, State, and local wetland information sources including, but not limited to, the National Wetland Inventory maps, U.S. Fish and Wildlife Service, the CoE, EPA, the California Department of Fish and Game. The information compiled will also include the designated beneficial uses for specific waterbodies and the general categories of water uses applicable to all waters of a Region.

TASK 1. BENEFICIAL USE DESIGNATION

This task involves the review of current Basin Plan beneficial use designations in Basin Plans and the information generated under the BPU program and development of recommendations regarding new beneficial use designations and definitions applicable to wetlands. This effort will consider the guidance provided by EPA in the document entitled Water Quality Standards for Wetlands and will deal with all wetland types inventoried by the BPU program.

Product: A report recommending wetland beneficial use designations and definitions that can be applied consistently throughout the State.

TASK 2. NARRATIVE WATER QUALITY OBJECTIVES FOR WETLANDS

This task involves the development of recommendations regarding narrative water quality objectives for wetlands designed to protect specific designated uses or set of uses developed in Task No.1.

This effort will be completed in a manner consistent with the National Guidance on Water Quality Standards for Wetlands issued by EPA on July 1990.

Product: A report recommending narrative water quality objectives to protect designated beneficial uses for wetlands.

TASK 3. WETLANDS SELECTION AND CATEGORIZATION PROTOCOL

This task involves the development of a selection process by which wetlands can be categorized according to specific characteristics, such as, size, type, wetland value, sensitivity, and rarity. Corresponding recommendations will also be developed on the appropriate level of protection that should be provided to each category for inclusion into the Basin Plan. This effort will build upon the existing protocol implemented under the California Clean Water Strategy and Water Quality Assessments.

Product: A report recommending a categorization and priority scheme and appropriate levels of protection to be provided to each wetland category.

SCHEDULE:

<u>Task</u>	<u>Milestones</u>	<u>Date</u>
1.	Wetland beneficial use recommendations	June, 1992
2.	Wetland narrative water quality obj. rec..	Sept., 1992
3.	Wetland selection and categorization protocol	Dec., 1992

BUDGET

Staff (Environmental Specialist III) (1.3 PY)	\$127,182
Equipment	0
Contracts	0
-----	-----
Total	\$127,182

STRENGTHENING CALIFORNIA'S
401 WATER QUALITY CERTIFICATION PROGRAM

OBJECTIVE

To more effectively protect California wetlands by increasing the quantity and quality of 401 certifications issued by the State Water Resources Control Board.

SUMMARY

The 401 program could be a powerful tool to protect wetlands in California, but program implementation has been hampered by legal and policy uncertainties, multi-jurisdictional complexities, inadequate statewide guidance, and poor understanding of the program. This workplan presents four tasks to (1) resolve legal and policy issues; (2) coordinate with related programs; (3) develop program procedures and guidance; and (4) provide staff training:

BACKGROUND

Clean Water Act (CWA) Section 404 authorizes the U.S. Army Corps of Engineers (COE) to issue permits for the discharge of dredged or fill material into national waters, including wetlands. At the same time, Section 401 of the CWA provides the states an opportunity to certify, to certify with conditions, or to deny certification to any federally proposed or permitted activity, including the issuance of 404 permits by COE. COE must include any state certification conditions in its 404 permit, and cannot issue a permit if state certification is denied.

Historically, the nine Regional Water Quality Control Boards (Regional Boards) were delegated the authority to make 401 determinations. Each Regional Board developed its own approach to the program. In May 1990 this delegation was withdrawn; the State Board Executive Officer now issues 401 decisions, generally following recommendations received from the Regional Boards. Due to factors discussed below, the 401 program has generally been a low priority for the Regional Boards. Only six certification requests were processed by the State Water Resource Control Board (State Board) in the last quarter of 1990 (Attachment 1).

Increased interest in wetlands protection has focused attention on both the potential utility of the 401 certification program in California and on problems in its implementation. These are discussed below:

Potential Utility of the 401 Program

1. Problem Prevention

The 401 program allows the state to identify and prevent problems before they occur. This is especially true to the extent certification conditions can require management practices to control secondary nonpoint source impacts.

2. Cost-Effectiveness

The 401 program allows the state to make enforceable permitting decisions, while shifting the lead enforcement responsibility to COE and the U.S. Environmental Protection Agency (USEPA). The federal agencies also take the lead in determining whether discharge sites are wetlands, which are subject to regulation.

3. Complement to Waste Discharge Requirements (WDRs)

Certification decisions can address nonpoint sources which are not generally subjected to WDRs.

Problems in 401 Program Implementation

1. Legal and Policy Uncertainties

There are a number of unresolved legal and policy questions relating to 401 certification in California.

2. Multi-Jurisdictional Complexities

The nine Regional Water Quality Control Boards (Regional Boards) have developed diverse approaches to the 401 program. Similarly, the three COE Districts in California follow inconsistent procedures in implementing their 401/404 responsibilities. Regional Board and COE District boundaries do not necessarily coincide, and there has usually been little coordination between the Regional Boards and COE on the 401 program. For these reasons, implementation procedures are inconsistent across the state and sometimes irregular in terms of regulatory requirements. Problems exist in assuring that 404 permit applicants request certification and that sensitive projects come to the Regional Board's attention; that requests for certification include required information and fees; and that the Regional and State Boards have enough time to issue a certification decision before COE takes action on the permit. These problems will yield only to coordinated procedures developed jointly by the State Board and COE.

CWA Section 404 also gives USEPA and the U.S. Fish and Wildlife Service (USFWS) important roles in program implementation. Additionally, the California Department of Fish and Game (CDFG) has expertise in wetland habitat issues. Better coordination with these other federal and state agencies would further help strengthen California's 401 program.

3. Inadequate Statewide Guidance

As noted above, until recently the Regional Boards issued 401 certifications with little statewide direction; currently the Regional Boards recommend certification actions to the State Board. This greater centralization of the 401 program has highlighted the inconsistent implementation procedures discussed above. Existing guidance on the 401 program is presented in the California Code of Regulations and in the State Board Administrative Procedures Manual, however, the administrative guidance is both inaccurate and incomplete, and state regulations constrain application of 401 certification beyond what is required by state or federal law. In addition, state fee schedules do not clearly identify 401 fees, and Regional Boards are not consistently or systematically collecting fees for this work. Given current funding shortfalls, unreimbursed work may be given less emphasis than activities for which cost-recovery is routine. Clear procedures for 401 implementation need to be developed for State Board, Regional Board, and COE staffs, other concerned agencies, and the regulated community.

4. Need for Training

As a result of the factors reviewed above, Regional Board staffs are not comfortable in their knowledge about the legal and regulatory requirements of the 401 program, or about its potential for managing nonpoint pollution and protecting wetlands. A related problem is that Regional and State Board staffs have had little experience in protecting wetlands from the development-related impacts typically encountered in connection with 404 permits. Staffs are not generally familiar with regional wetlands types, wetland beneficial uses, pollutant effects on wetlands, or how to determine appropriate mitigation conditions.

WORK STATEMENT

Four work tasks are presented to address the four problems discussed above:

1. RESOLVE LEGAL AND POLICY ISSUES

1.1. Legal Questions

Obtain guidance from the State Board's Office of Chief Counsel (OCC) on legal issues involved with 401 implementation, including:

1. To what extent can 401 certifications be conditioned to control the secondary effects of 404-permitted activities (e.g. runoff from the urban development to be located on a fill site)?
2. Does Section 13360 of the Porter-Cologne Water Quality Control Act, dealing with specification of manner of compliance, apply to 401 certification?
3. How does the state anti-degradation policy apply to 401 certifications?

1.2. Policy Issues

Obtain guidance from the State Board on policy issues involved with 401 implementation, including:

1. Should 401 certification and issuance of WDRs be mutually exclusive?
2. What level of public comment should be sought to support 401 certification decisions?
3. When should Regional and State Board members participate in certification decisions?

Product: Determination of legal and policy issues

2. COORDINATE WITH RELATED PROGRAMS

2.1. U.S. Army Corps of Engineers

Negotiate 401 administrative procedures which will apply statewide to the three COE Districts and the nine Regional Boards in California.

2.2. Other Agencies

In consultation with USEPA, USFWS, and CDFG, recommend appropriate coordination procedures.

Product: Develop administrative process with COE and recommend coordination mechanisms with other agencies

3. DEVELOP PROGRAM PROCEDURES AND GUIDANCE

3.1. Revise State Regulations if Necessary

Review Title 23, California Code of Regulations, Section 3830 et.seq. and recommend changes as necessary.

3.2. Develop Cost-Recovery Procedures

Develop procedures to facilitate routine collection of fees for certification determinations. If necessary, revise Title 23, California Code of Regulations, Section 2200 to identify appropriate fees for 401-related work.

3.3. Revise State Board Administrative Procedures Manual (APM)

Revise APM Chapter 10 to eliminate inaccuracies and unnecessary requirements; to include the policy and procedural determinations addressed in Tasks 1 and 2 above; and to include sample transmittals, notification forms, and public information documents to support the published procedures.

3.4. Develop Technical Guidance

Develop technical guidance to help the Regional Boards issue appropriate certification conditions for various project types, including:

1. Control of secondary effects to the extent compatible with legal and policy considerations as determined from preceding tasks.
2. Mitigation conditions, including onsite versus offsite mitigation, acceptable areal ratios, assurance of quality (same type, value), required monitoring and reporting, and contingency

guarantees of remedial action if mitigation is unsuccessful.

Products: Revision of Title 23 (if needed); Cost-Recovery Procedures, Revised APM, Technical Guidance

4. PROVIDE STAFF TRAINING

Convene a workshop for Regional Board staff to help ensure incorporation of the above work into Regional Board practice. The workshop will include basic information on wetlands (regional types, ecosystem functions, beneficial uses, pollutant effects), and "nuts and bolts" information on program implementation and administration. State Board legal staff and representatives of COE, USEPA, USFWS, and CDFG will be asked to participate.

Product: Regional Board Workshop

SCHEDULE

<u>Task</u>	<u>Milestone</u>	<u>Month</u>
1.	Determination of legal and policy issues	12
2.	Develop administrative process with COE and recommend coordination mechanisms with other agencies	18
3.1	Revision of Title 23 (if needed)	30
3.2	Cost-Recovery Procedures	12
3.3	Revised APM	30
3.4.	Technical Guidance	24
4.	Regional Board Workshop	30

BUDGET

Staff		
DWQWR (Environ. Spec. III)	\$ 97,832	(1.0 PY)
OCC (Staff Counsel)	27,879	(0.2 PY)
Equipment	0	
Contracts	0	

Total	\$ 125,711	(1.2 PY)