

FEATURE ARTICLE

THE NEW WORLD OF STATE AND LOCAL  
WETLANDS REGULATION

By Wendy Lee Bogdan

Once upon a time, not-all-that long ago, common wisdom held that California wetlands were primarily regulated by the United States Army Corps of Engineers (Corps) as “waters of the United States” under the federal Clean Water Act. More recently, state and local jurisdictions have taken increasing interest in wetlands. This increased interest has occurred quietly in some cases and with great controversy in others. State and local interest in wetlands regulation sometimes expresses itself as increased enforcement of existing regulatory authority that had previously rested dormant. Alternatively, some such interest expresses itself as the reinterpretation, or explicit augmentation, of pre-existing authority to regulate wetlands. During the same time period the United States Supreme Court sent the Corps a clear message that it had adopted an overly broad interpretation of the Clean Water Act’s grant of authority to regulate wetlands. See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC). See 10 *Cal. Land Use L. & Pol’y Rptr.* 148 (Feb. 2001).

The end result of state and local efforts in combination with the SWANCC decision is that currently: (1) some wetlands may not be regulated by the Corps at all, but may nonetheless remain subject to state and local regulation; and (2) even where the Corps exercises jurisdiction over a wetland, state and local agencies are more willing to impose additional regulatory oversight. This article examines the vehicles by which state and local agencies regulate wetlands as well as the public policy advantages and disadvantages of increased state and local regulation.

A “Wetland” Defined

Before proceeding further to address different agencies’ regulation of “wetlands,” it is worth remembering that what constitutes a “wetland” is very much in the eye of the beholder. The definition of “wetland” is a mix of science, law, policy, and politics. Even the federal government cannot make up its mind as to what constitutes a “wetland.” The United States Fish and Wildlife Service (FWS) defines “wetland” as:

lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this classification, wetlands must have *one or more* of the following three attributes: (1) at least periodically, the land supports hydrophytes; (2) the substrate is predominantly undrained hydric soil; and (3) the substrate is non-soil and is saturated with water or covered by shallow water at some time during the growing season of each year.

Cowardin, 1979 (emphasis added).

By contrast, the Corps defines “wetland” to include only those areas containing hydrophytic vegetation, hydric soils, and wetland hydrology. The Corps’ definition states: those areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 33 C.F.R. § 328.3(b); 40 C.F.R. § 320.3(t).

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Section 2785 of the California Fish and Game Code defines wetlands as: lands which may be covered periodically or permanently with shallow water and which include saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, fens, and vernal pools.

In addition to differing definitions as to what constitutes a “wetland,” agencies have varying authority to regulate different subsets of “wetlands.” Most famously in *SWANCC*, the United States Supreme Court held that the Corps did not have the authority to regulate certain isolated wetlands.

Of course, these distinctions are frequently overlooked, thereby perpetuating the misconception that the definition of “wetland” is a fixed, socially and politically neutral target (or alternatively, has been set in stone by the Corps). As a result, interrupting a discussion about wetland regulation with the question, “what do you mean by ‘wetland’?” is interpreted as naiveté rather than as an acknowledgement of the increasing diversity of wetlands regulation.

### **The Role of SWANCC in State and Local Wetlands Regulation**

Although the State of California responded to *SWANCC* with a flurry of memoranda and reports, this article highlights the fact that most of the current vehicles for state and local jurisdiction pre-existed the *SWANCC* decision. *Cf.*, January 25, 2001, Memorandum from Craig M. Wilson, Office of Chief Counsel, State Water Resources Control Board, *Effect of SWANCC v. United States on the 401 Certification Program*; September 24, 2004, Memorandum from Arthur G. Baggett, Jr., Chair, State Water Resources Control Board, *Workplan: Filling the Gaps in Wetland Protection*; February 2002 California Research Bureau, California State Library, *The U.S. Supreme Court Limits Federal Regulation of Wetlands: Implications of the SWANCC Decision*; April 2003, State Water Resources Control Board, California Environmental Protection Agency *Regulatory Steps Needed to Protect and Conserve Wetlands Not Subject to the Clean Water Act, Report to the Legislature, Supplemental Report of the 2002 Budget Act Item 3940-001-0001*.

Whether the increased state interest in wetlands regulation resulted from the United State Supreme Court’s *SWANCC* decision or whether, perhaps more likely, the state and local interest was already on the upswing at the time *SWANCC* was decided,

project proponents may no longer look to the Corps as the sole, or even the primary, wetland regulator. Although certification under § 1341 of the federal Clean Water Act (§ 401 Certification) continues to provide state agencies with limited authority to regulate impacts to certain wetlands, the *SWANCC* decision accelerated state and local agencies’ awareness of the risks inherent in depending upon a regulatory vehicle (§ 401 Certification) that relied upon federal jurisdiction.

### **Sources of Authority for State and Local Regulation of Wetlands**

#### **Section 401**

Section 401 certification provides state jurisdiction over wetland impacts that fall within CWA jurisdiction. Traditionally, § 401 Certification provided the primary hook for the state’s regulation of impacts to wetlands. Two provisions of 33 U.S.C. § 1341 govern § 401 Certification. Section 1341(a)(1) requires that the state must issue a certification, “that any such discharge will comply with the applicable provisions of §§ 1311, 1312, 1313, 1316, and 1317 of this title....” 33 U.S.C. § 1341(a)(1). In contrast, § 1341(d) states that:

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under § 1311 or 1312 of this title, standard of performance under § 1316 of this title, or prohibition, effluent standard, or pretreatment standard under § 1317 of this title, and with any other appropriate requirement of state law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section. 33 U.S.C. § 1341(d) (emphasis added).

Overruling Ninth Circuit precedent, the United States Supreme Court held in 1994 that the conditions in a § 401 Certification need not be limited to those that are directly tied to the discharge. *See, PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology, et al.*, 511 U.S. 700, (1994)

(PUD No. 1). In addition, PUD No. 1 suggested that the states had broader authority than previously understood to impose conditions to assure that the activity would be “consistent” with the water quality standard’s designated uses. See *American Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2nd Cir. 1997) (finding that states’ conditions must nonetheless relate to water quality). Accordingly, § 401 Certification continues to provide the state jurisdiction over those wetland impacts that continue to be subject to §§ 404 and 401 of the Clean Water Act.

### Zoning

In California, numerous local jurisdictions have ordinances that specifically regulate impacts to wetlands. Sacramento County’s Wetlands Policy and Placer County’s General Plan are examples of local wetland policies and regulations that rely upon a finding of Corps jurisdiction. However, there is no legal mandate that a county’s jurisdiction be so limited. Unlike the Corps’ jurisdiction under the Clean Water Act, a county’s jurisdiction does not depend upon a nexus with interstate commerce. Rather, a county’s authority to regulate land uses arises from the county’s policy power to protect the public health, safety, and welfare of the residents. See Cal. Constitution, Article XI, § 7. The courts and the legislature have construed this authority broadly. See, e.g., *Birkenfield v. City of Berkeley*, 17 Cal.3d 129, 140 (1976); Gov’t. Code § 65800. San Diego County’s zoning ordinance demonstrates how counties may choose to exercise their authority to regulate wetlands more broadly. See San Diego County Zoning Ordinance Part 5, § 5300 *et seq.* For example, San Diego County’s zoning ordinance provides strict limits on the type of development that can occur in wetlands, and also provides for buffer areas around wetlands.

State and federal takings doctrines provide the absolute limit on counties’ authority to regulate wetlands. Despite nuances in the courts’ interpretations of the two doctrines, both state and federal takings doctrines require that local agencies demonstrate the following when imposing a land use condition in an individual case: (1) a substantial relationship between the proposed project’s impacts and the permit condition; and (2) a reasonable relationship between the exaction and the burden imposed by the proposed project. See *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S.

374 (1994). However, a more deferential standard applies to conditions that are legislatively imposed by ordinance or general rule. See *Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996).

### The California Environmental Quality Act

The California Environmental Quality Act (Pub. Res. Code § 21000 *et seq.*) (CEQA) arguably provides state and local agencies authority to regulate wetlands regardless of Corps jurisdiction under the federal Clean Water Act. CEQA applies to *discretionary approvals of a project by a public agency*. “Public agency” includes any state agency, board, or commission and any local or regional agency as defined in these guidelines. 14 C.C.R. § 15379. Where there is a local or state discretionary approval of a project that is not exempted from CEQA, such agencies would be considered lead, responsible, or trustee agencies over the project. 14 C.C.R. § 15367; 14 C.C.R. § 15381; 14 C.C.R. § 15386.

Although CEQA provides state and local agencies no independent authority to regulate (Pub. Res. code § 21004), CEQA does require that those agencies utilize their authority to impose feasible mitigation to reduce a project’s impacts to a less than significant level. See *Golden Gate Bridge District v. Muzzi*, 83 Cal. App.3d 707, 713 (1978) (upholding lead agency’s authority to condemn property to effectuate mitigation measures); *Citizens for Quality Growth v. City of Mount Shasta*, 198 Cal.App.3d 433 (1988) (holding that a lead agency may not refuse to exercise its policy power to try to mitigate significant environmental impacts to wetlands simply because another agency may also have the power to do so).

Notably, neither CEQA nor the CEQA Guidelines provide any definition of “wetland” or any specific guidance as to what would constitute a significant impact to a wetland. In fact, in *Community for a Better Environment v. California Resources Agency*, the Court of Appeal invalidated 14 C.C.R. § 15064(h) because it relieved the lead agency of the duty to look at evidence beyond any regulatory standard when deciding whether an environmental impact report must be prepared. See *Communities for a Better Environment v. California Resources Agency*, 103 Cal.App.4th 98, 113 (2002). Accordingly, the rationale that lead agencies rely upon to determine what constitutes a significant wetland related impact will vary. For instance, in *Mira Monte Homeowners Association v. Ventura County*, 165

Cal.App.3d 357, 364 (1985), the court concluded that the loss of a relatively small amount of wetland acreage constituted a restriction in “the range of a rare or endangered plant” under 14 C.C.R. § 15065 and, as a result, constituted a significant impact. In *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*, 27 Cal.App.4th 713, 724-729 (1994), the court found the EIR to be inadequate where it failed to include any investigation as to whether wetlands were located on-site, despite evidence in the initial study indicating that they were.

Despite the considerable discretion that CEQA provides lead agencies to identify impacts on wetlands and to impose mitigation measures, these determinations must be supported by substantial evidence. 14 C.C.R. § 15384. In addition, mitigation measures that go beyond the powers conferred by law on lead agencies are infeasible. *Kenneth Mebane Ranches v. Superior Court*, 10 Cal.App.4th 276, 291 (1992). State and federal takings doctrines, discussed above, provide two such limits on lead agencies’ authority. The fact that a condition of approval was recommended in an EIR does not insulate the measure from a claim that it exceeds the agency’s statutory or constitutional powers or is otherwise unlawful. See *Pinewood Investors, Inc. v. City of Oxnard*, 133 Cal. App.3d 1030, 1040 (1982).

### The California Endangered Species Act

Although the California Endangered Species Act (CESA) does not mention “wetlands,” CESA can provide the authority for state regulation of wetland impacts where such impacts would cause “take” as defined under Cal. Fish and Game Code 86 and California Fish and Game Code § 2080:

No person shall . . . take, possess, purchase, or sell within this state, any species, . . . that the commission determines to be an endangered species or a threatened species, or attempt any of those acts, except as otherwise provided in this chapter . . .

As defined under CESA, the term “take” means “hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill.” Cal. Fish and Game Code § 86. Although “take” can include otherwise lawful activity that is not intended to kill listed species, “take” does not include habitat modification

or other acts that might indirectly harm species listed under CESA. See *Dept. of Fish & Game v. Anderson-Cottonwood Irrigation Dist.*, 8 Cal.App.4th 1554, 1564 (1992). Therefore, indirect harm to listed species caused by habitat modification or wetland destruction is not necessarily prohibited by § 2080. *Id.* However, it is possible that the destruction of wetlands *while a listed species is occupying it* would constitute a take. Thus, impacts to wetlands occupied by species listed under CESA could provide state jurisdiction over those impacts.

### California Fish and Game Code § 1602

Similar to CESA, Cal. Fish and Game Code § 1602 does not mention wetlands, but may nonetheless provide the California Department of Fish & Game (DFG) jurisdiction over wetlands in limited circumstances. Cal. Fish and Game Code § 1602 provides in relevant part that:

An entity may not substantially divert or obstruct the natural flow of, or substantially change or use any material from the bed, channel, or bank of, any river, stream, or lake, or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake. . . . without providing written notification.

While § 1602 envisions that DFG would regulate only “designated” rivers, streams, or lakes, the DFG chose to designate by regulation *all* rivers, streams, lakes and streambeds in the state, including those “which may have intermittent flows of water.” 14 C.C.R. § 720; *Willadsen v. Justice Court*, 139 Cal. App.3d, 171, 176–177 (1983). Thus, all of California’s rivers, streams, and lakes are potentially subject to DFG jurisdiction under § 1602.

Although “wetlands” do not fall neatly within the category of rivers, streams, or lakes (see e.g., 14 C.C.R. § 1.72 (defining “stream”); 14 C.C.R. § 1.56 (defining “lake”)), DFG has exerted jurisdiction over upland areas where impacts to those areas would potentially affect jurisdictional waters. In analyzing a provision of a former version of § 1602, which language was substantially similar to the current version on this point, the California Attorney General concluded that the excavation of gravel pits in the

floodplain next to a river would require a notification because such pits might ultimately change the course of the adjoining river due to erosion during floods. See 56 Ops.Cal.Atty.Gen. 360, 362 (1973). Thus, this Attorney General opinion suggests that DFG has authority to regulate upland regulate wetland impacts that may effect a river, stream, lake, or streambed. The extent of this authority is unclear; it is unknown, for instance, whether DFG could assert jurisdiction over impacts to an otherwise isolated upland wetland that is only occasionally hydrologically connected to a river through groundwater. Nonetheless, § 1602 certainly provides DFG a potential source of authority to regulate wetland impacts.

### **State Regulation of Wetlands under the Porter-Cologne Water Quality Control Act**

Prior to the SWANCC decision, the State Water Resources Control Board's (SWRCB) primary tool for regulating impacts to wetlands was through the § 401 Certification process. In part as a response to SWANCC, the SWRCB approved Order No. 2004-0004-DWQ, Statewide General Waste Discharge Requirements for Dredged or Fill Discharges to Waters Deemed by the U.S. Army Corps of Engineers to be Outside of Federal Jurisdiction (General Dredge and Fill WDRs).

The issuance of the General Dredge and Fill WDRs, which apply to the discharge of small amounts of dredge or fill to wetlands (as well as other water bodies) that are not subject to §§ 401 and 404 of the Clean Water Act, is notable for three reasons. See General Dredge and Fill WDRs, Order No. 12.A. First, although there are substantial concerns as to whether the issuance of these General Dredge and Fill WDRs exceeds the SWRCB's authority, their issuance underscores the SWRCB's belief that it has jurisdiction to regulate wetlands. Second, while the General Dredge and Fill WDRs ostensibly fill the regulatory "gap" created by SWANCC, the General Dredge and Fill WDRs actually provide the SWRCB with more authority than it exercised prior to SWANCC. For instance, the General Dredge and Fill WDRs do not include the Corps' exception for incidental fall back. Third, the issuance of the General Dredge and Fill WDRs implies that the SWRCB is now requiring individual WDRs for discharge of fill to wetlands (and other waters) where the Corps does

not have jurisdiction. Thus, the SWRCB's issuance of the General Dredge & Fill WDRs represents a significant new state effort to regulate wetlands.

### **The Implications of Increased State and Local Regulation of Wetlands**

Increased state and local regulation of wetlands has several characteristics that present challenges—or opportunities—depending upon one is evaluating the matter from the perspective of a project proponent, environmentalist, or a state or local public agency. Increased local regulation has the potential to:

(1) Address local environmental conditions such as climate, terrain, hydrology, and biodiversity; (2) Reflect local prioritization of environmental and economic concerns; (3) Provide for enforcement practices that reflect local values; [and] (4) Create disparate wetland regulatory performs that increase cost and delay associated with the permitting process. See "Federal Wetlands Regulation: Restrictions on the Nationwide Permit Program and the Implications for Residential Property Owners," 37 *American Business Law Journal* 299, 340 (2000).

In California, the disadvantages of local regulation of wetlands may be particularly acute. Given the numerous authorities described above for state and local regulation of wetlands, a project proponent has little certainty moving through the entitlement process as to what definition of "wetland" will be used, much less which impacts will require mitigation. As discussed above, it is entirely reasonable to expect that the RWQCB, DFG, and the local land use jurisdiction will each have a different definition of "wetland," and in fact that: (1) DFG may regulate "wetlands" differently under Cal. Fish and Game Code § 1602 than under CESA; and (2) the local land use jurisdiction may impose mitigation pursuant to one standard under its zoning authority and pursuant to another standard under CEQA.

Although project opponents may benefit from this uncertainty, those project opponents who value environmental protection may also be frustrated by the shift from federal to local regulation. For instance, it is unclear whether local jurisdictions, whose boundaries frequently fragment watersheds, are well-positioned to address regional wetland issues. In addition, local jurisdictions prioritization of wetland protection

relative to other concerns may be more affected by short term stresses that would tend to work against wetland protection.

For these reasons, this writer does not support the continued shift towards local wetlands regulation unless the state puts in place clear parameters for that regulation. In short, we need to encourage the state to provide a consistent framework for local wetlands

regulation. Such an effort would be no small task, and would involve many different elements, including changes to CEQA to support more strongly lead agencies' reliance upon state standards. Nonetheless, it must be made a priority before each City and County within California arrives at a different answer to the question, "What do *you* mean by 'wetland'?"

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