Shifting Landscape

California wants to expand the territory defined as wetlands, further limiting and prohibiting development.

By **J. Tom Boer** and **Kathryn L. Oehlschlager**

Properties designated as wetlands have been subject to strict regulatory control for decades under the federal Clean Water Act. Now the state of California is trying to expand the scope of its oversight and regulation. The proposal revolves around a new definition of wetlands that is different from and broader than its federal counterpart.

Coupled with the state's protective policies specifying no net loss of wetland areas, the new approach could have widespread consequences for property owners. It would expand the amount of land classified as wetlands in California, subjecting owners to new permitting requirements and restrictions. The impact would likely be felt by public and private sectors throughout the state, ranging from ranches in eastern California to high-speed rail projects in central California, from municipal construction projects everywhere to developments near existing urban areas. From a practical standpoint, it means regulatory confusion, increased costs, permitting delays and litigation.

Already, certain development that impacts wetlands is prohibited outright, and countless other types of development require intensive site assessment, costly permitting and mitigation. Since the late 1970s, the federal government, through the Army Corps of Engineers and the Environmental Protection Agency, has taken the lead on regulating development and use of areas designated as wetlands under the Clean Water Act. The state has participated only through a concurrent process.

Federal agencies identify wetlands based on three criteria including hydrology and the types of vegetation and soil. Is the prevalent vegetation of a wetlands species? Is the area saturated permanently, or periodically inundated for at least 14 consecutive days a year? Two decisions by the U.S. Supreme Court in 2001 and 2006 limited the scope of the Clean Water Act and restricted the federal government's ability to regulate wetlands with no connection to interstate waters, so-called isolated wetlands. In early 2011, the EPA issued draft guidance apparently intended to expand the federal reach, but it remains unclear whether or how this guidance will apply.

Late in 2010, the California State Water Resources Control Board proposed its own broad expansion of the state's regulatory scheme for wetlands. The proposed program would allow the state to regulate isolated wetlands, but the initiative would not stop there. Rather, the board proposes to redefine and significantly expand what constitutes a wetland. The proposed definition conflicts with the federal definition regarding both wetland vegetation and soil, and requires only seven days—as opposed to 14—of consecutive saturation to meet the hydrology criteria.

The amount of acreage meeting the new definition could be significant. Numerous areas not previously regulated as wetlands would likely meet the new definition, including itinerant pools; areas surrounding isolated ponds, pools and other geographic depressions where there

are seven or more days of annual saturation; the pits and depressions caused by uprooted trees that remain devoid of vegetation and subject to saturation; certain agricultural land; and playas and mudflats devoid of vegetation but otherwise meeting the criteria. All would be subject to state regulation largely restricting development, regardless of the size of the feature or whether it is part of a bigger wetland system.

The proposal also would result in dueling federal and state definitions of wetlands, resulting in widespread confusion in the regulated community and ultimately, litigation. The proposed regulations also pose serious logistical challenges. They would likely increase the costs associated with development projects involving land that meets either the state or federal wetlands definitions. Landowners presumably would be required to conduct two assessments to identify what areas qualify under the state and federal standards.

The new definition proposed by the state board also has the potential to severely complicate the permitting process. The change in the definition of "saturated" from 14 to seven consecutive days a year would mean that many areas meeting the federal wetland definition would be surrounded by a circle of property that is subject to between seven and 13 days of annual saturation, therefore meeting the state definition. Presumably, property owners could be required to obtain multiple permits, resulting in delay and increased costs.

Finally, the new regulations would add to the demands on state agencies, particularly the regional water quality boards. That increased burden could have cascading consequences, delaying or killing projects that contribute to the state's economic development.

The California State Water Resources Control Board proposes to redefine and significantly expand what constitutes a wetland. The proposed definition conflicts with the federal standard.

There is no way to know for sure what happens next. The water board recently extended the deadline for a public comment period to later May. It could adopt the regulations as written, or revise and recirculate them for comment. Our best guess is that they will be adopted late this year or early next. In the meantime, watch for puddles, pools and ponds. ■

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