



August 13, 2021

Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000
Submitted electronically: commentletters@waterboards.ca.gov

RE: Ecological Restoration Practitioners Comment on NPDES Proposed Permit and Restoration Projects Statewide Order

Ms. Townsend:

The California Ecological Restoration Business Association (CalERBA) appreciates the opportunity to provide comments to the State Water Resources Control Board (SWRCB) on i) the draft statewide construction stormwater general permit reissuance (the Proposed Permit) and ii) the proposed General Order for large restoration projects (General Order) and draft Program Environmental Impact Report (PEIR).

CalERBA represents California's growing industry of companies in the business of land stewardship and delivering wetland, stream, water quality, and species restoration projects. Member businesses support job creation and bolster the state's natural infrastructure through accountable mitigation, restoration, coastal and flood resiliency, and biodiversity outcomes. Specific to the Proposed Permit, members have years of experience working with the SWRCB and Regional Water Quality Control Boards (RWQCB) under permitting programs applicable to restoration, including prior versions of the Proposed Permit. After navigating the current processes for many large-scale restoration projects, members understand first-hand the potential benefits of replicating the efficiencies available for small projects for large scale projects as well via the draft General Order and PEIR. Based on our restoration practitioner experiences, we respectfully submit the following comments and recommendations for your consideration.

I. General Strong Support for the General Order, PEIR, and Proposed Permit's Efficiencies and Consolidation of Requirements.

CalERBA strongly supports the state's leadership on the *Cutting the Green Tape* (CGT) campaign to expedite review of environmentally beneficial projects and accelerate our state's response to climate change and resiliency challenges. CalERBA was pleased to see multiple references to opportunities for SWRCB permitting efficiencies in the final November 2020 CGT Report, including the Proposed Permit in Appendix 1 and the General Order and PEIR in Recommendation 6.

CalERBA members are very encouraged by the potential efficiencies represented in the General Order and PEIR for large scale restoration projects. These drafts build on the demonstrated success of a similar order for smaller projects and this action is absolutely necessary for large scale restoration if the state is to meet its conservation and biodiversity targets. In addition to producing greater ecological benefits,

large landscape scale projects typically attract more interest from restoration firms because the firms can maximize their investment and expertise by delivering a project's ecological outcomes at scale. Appropriately streamlining the permitting process for large-scale projects will incentivize additional investment in these projects and accelerate the industry's ability to respond to public environmental needs. For these reasons, CalERBA is particularly committed to supporting Recommendations 6 through 10 of the final CGT report on large scale projects, and we offer our strong support for advancing Recommendation 6 forward through the draft General Order and PEIR.

We also applaud the SWRCB's efforts to improve navigation of the Proposed Permit and reorganization to consolidate repetitive requirements. As long-standing restoration practitioners, we have seen the unintended consequences of redundant and misinterpreted permitting requirements on project timelines and future investments. Restoration projects are often subject to more permitting triggers due to their location in or near state and/or federally regulated waters. Redundant, sometimes conflicting permit reviews hinder restoration work that has a purely environmental purpose and would produce net ecological benefits. Permit misinterpretations often result in permittees implementing unnecessary measures, which do not provide additional environmental protection, but lead to time delays and increased costs that disincentivize future investment in much-needed restoration projects.¹ From this perspective, we emphasize the importance of clarity in the Proposed Permit to ensure that the reissuance's intended consolidation and redundancy efficiencies are clearly worded for consistent interpretation and implementation.

II. Proposed Permit Recommendation on "I. Findings, Item 12."

CalERBA appreciates the revisions reflected in "I. Findings, Item 12" of the Proposed Permit, stating: "Stormwater discharges from dredge spoil placement that occur outside of waters of the state (upland sites) and that disturb one or more acres of land surface from construction activity are covered by this General Permit. This General Permit does not cover the discharge of dredged or fill material to waters of the state. Construction projects that include the discharge of dredged or fill material to waters of the state should contact the applicable Regional Water Board to obtain authorization for the discharge of dredged or fill material to waters of the state."

We understand that the intent of this language is to clarify the Proposed Permit's scope and distinguish between permitting requirements for discharges to uplands/non-waters of the state governed by Clean Water Act § 402 requirements, discharges to waters of the state that trigger § 401 and other SWRCB authorizations, and when both § 402 and § 401 or SWRCB procedures may all be triggered. These distinctions are important: some project sites have been subject to delays following unnecessary SWRCB consultations on requirements for discharges to waters of the state when the project only has dredge placement on upland sites and waters of the state are not impacted. Even more problematic from an environmental perspective, these consultations sometimes result in stormwater management requirements imposed on the project that are at odds with the environmental goals and purpose of the restoration project (see case study below).

The threshold disturbance analysis of "one or more acres of land surface" is critical to making these distinctions. The Proposed Permit's language limiting the land analysis to discharges that "occur outside

¹ For reference, one CalERBA member estimates up to \$10M and commonly 5% waste on projects, including grant funded projects with very limited budgets, due to unnecessarily implemented SWPPP measures during construction.

of waters of the state (upland sites),” is an improvement. However, we recommend that the SWRCB amend this Item 12 to provide further clarity and ensure smooth implementation. Specifically, we recommend adding in a sentence stating: “To be clear, waters of the state are not included in the “land surface” assessed for purposes of determining the one acre disturbance threshold under this General Permit.” Further, to avoid the interpretation that consultation with the SWRCB on discharges to waters of the state is always necessary, we recommend deleting the last sentence of Item 12 and adding the phrase “which requires a separate Regional Water Board authorization” to the end of the prior sentence. To summarize, our recommendations to Item 12 would read as:

“Stormwater discharges from dredge spoil placement that occur outside of waters of the state (upland sites) and that disturb one or more acres of land surface from construction activity are covered by this General Permit. To be clear, waters of the state are not included in the “land surface” assessed for purposes of determining the one acre disturbance threshold. This General Permit does not cover the discharge of dredged or fill material to waters of the state, which requires a separate Regional Water Board authorization. Construction projects that include the discharge of dredged or fill material to waters of the state should contact the applicable Regional Water Board to obtain authorization for the discharge of dredged or fill material to waters of the state.”

These additional changes will ensure the Proposed Permit is clear to RWQCBs, permittees, and restoration practitioners so that the intent behind the changes translates in implementation. By preventing redundant or unnecessary storm water measures, this permitting language clarification will save millions of dollars for restoration projects annually and allow more capital to be invested back into additional expedited restoration work.

III. General Order Recommendation for Consistency with Proposed Permit.

CalERBA appreciates reference in the General Order to the Proposed Permit to ensure the two permits are coordinated for SWRCB implementation. However, we are concerned that the currently proposed General Order reference to the Proposed Permit does not go far enough and the General Order should mirror the Proposed Permit’s language in Section I, Item 12 to prevent confusion. Specifically, we recommend that the SWRCB insert language similar to the Proposed Permit Section I, Item 12 language in the General Order and related sections WQHM-2: Storm Water Pollution Prevention Plan and WQHM-3: Erosion Control Plan in Appendix A, page A-30.

As currently written in these sections of the General Order, any disturbance greater than 1 acre of land triggers compliance with the Proposed Permit. Moreover, the text states that in any case where disturbance is over 1 acre, the applicant *shall* prepare and implement a Stormwater Pollution Protection Plan (SWPPP). Nowhere in this section or in WQHM-2 or WQHM-3 does the General Order clearly spell out that the Proposed Permit trigger is 1 acre of disturbance “outside of waters of the state or in uplands.” As practitioners, we have experienced this confusion and what appear to be inaccurate requirements for applicants to comply with Proposed Permit within the text of 401 certifications. Ensuring that language in this General Order is consistent with the language in the Proposed Permit is critical for consistency between SWRCB programs and consistency with the recommendation to reduce redundancy between § 401 and § 402 found in Appendix A of the final CGT report.

Again, for aquatic restoration projects this nuance can have both significant cost implications and more importantly, significant implications for project success. SWPPP requirements are developed and vetted

for application in uplands, not waters of the state, and § 401 conditions are specifically designed for application in waters of the state. As such, CalERBA recommends modifying the language in the General Order to reflect the distinction between triggers for § 401 and § 402.

IV. Case Study Illustrating § 402 and § 401 Permitting Challenges for Non-Point Source Discharges at Restoration Sites.

A CalERBA member's mitigation bank reconnected the hydrology of a river back to its historic floodplain and restored over 500 acres of alkali wetlands. The river had been channelized back in the 1930s and the bank project removed the berms, reconstructed a channel network within the floodplain, and created a mosaic of alkali floodplain and vernal pool depressions, which qualified as waters of the state for much of the project site. The bank was enrolled through the SWRCB SMARTS website for § 402 compliance for the grading work needed to complete the restoration. These activities also required approval through the RWQCB via a § 401 Water Quality Certification as well as through the Interagency Review Team process.

Following the project's construction, the RWQCB § 402 staff were unable to close out the WDID and issue a § 402 notice of termination through SMARTS because areas of grading within the wetland floodplain were not at least 70% vegetated per the State's General Permit requirements. The suggested solution for § 402 compliance was for the bank sponsor to hydroseed the site to stabilize it, despite this being incompatible with the ecological goals of the restoration and the sponsor's demonstration that the low erosivity and low velocities of the site during flooding or precipitation. Through the § 401 and IRT processes, it was determined that given the sensitive plant species onsite and local native seedbank, natural recolonization with limited seeding of native plants was the most ecologically appropriate action. Additionally, the bank's alkali habitats are by nature never vegetated over 70% cover, even when fully mature, so the suggested approach would have hindered the bank's ability to meet ecological performance standards.

The bank sponsor team had numerous meetings spanning over six months with the § 402 staff to try to resolve the conflicting needs for § 401 and § 402 RWQCB requirements. The § 402 process was ultimately concluded after the sponsor's project hydrologist, biologist, and QSP jointly completed additional site visits and generated a memo that conveys why 70% vegetative cover was ecologically unlikely for this wetland habitat and the potential for non-point source discharge was minimal given site conditions.

If the sponsor had been required to implement the suggested § 402 requirements, such an approach would have made the bank noncompliant with its instrument terms, delayed the successful performance of the wetland's recovery and maturation, and consequently delayed future credit releases. This case study illustrates that the goals and objectives of § 401 water quality certifications/waste discharge reports may be incompatible with § 402 requirements. Considering the unique nature of aquatic restoration projects and that they often trigger multiple competing permitting requirements, a more appropriate and efficient approach would be to have only the § 401 permit dictate the compliance terms for non-point source discharge associated with an aquatic restoration project.

V. Thank You and Summary.

Thank you for your consideration of the ecological restoration industry perspective and our recommendations. CalERBA generally supports the efficiency revisions reflected in the Proposed Permit

and General Order, but urges SWRCB to make further edits to provide clarifications and ensure smooth implementation of the intended efficiencies. These changes will be particularly beneficial for expediting large-scale ecological restoration project permitting, a primary priority of the CGT campaign. Lastly, CalERBA offers our support for recommendations submitted by peer organizations that also share first-hand experience as sponsors of restoration projects, especially those of the California Landscape Stewardship Network and their member agencies. We defer to their more detailed comments on the General Order and PEIR for ensuring the final versions of these documents meet the CGT mission.

Thank you for your efforts and dedication to improve permitting and supporting faster restoration project delivery. CalERBA is available as an industry resource and welcomes the opportunity for further discussion on these recommendations.

Sara Johnson, Executive Director
California Ecological Restoration Business Association
sjohnson@ecologicalrestoration.org