



Submitted via email to PublicComments@bof.ca.gov.

April 22, 2022

Board of Forestry and Fire Protection
Attn: Jane Van Susteren
Regulations Coordinator
P.O. Box 944246
Sacramento, CA 94244-2460

RE: Comments on proposed Rules Language Changes for “Meadows and Wet Areas, and Cutover Land Amendments”

Dear member of the Board of Forestry,

On behalf of the Environmental Protection Information Center (EPIC) please accept the following comments regarding the Board of Forestry’s (BoF) proposed new definition of “Meadows and Wet Areas” in the Forest Practice Rules. EPIC is a non-profit organization founded in 1977 with the mission of defending Northwest California's forests and wild places. EPIC and its members strongly believe that it is the responsibility of the State to protect our State’s natural resources and that our environmental laws should be enforced to the hilt. Thank you for this opportunity to comment.

I. The Proposed Board of Forestry Definition Is Insufficient to Protect Sensitive Meadows and Wet Areas

The following is the proposed BoF definition:

“Meadows and Wet Areas” means those areas which are moist on the surface throughout most of the year and/or support aquatic vegetation, grasses and forbs as their principal vegetative cover.

This definition does not sufficiently protect these areas for three reasons. First, this definition does not account for the many recent drought years that have plagued California. Many areas that were once “moist on the surface throughout most of the year” have not been so for the past few years because of the drought. Because of this any definition of “Meadows and Wet Areas” must account for historic conditions and not merely measure current conditions. Otherwise, the definition will fail to protect areas that were historically moist and will helpful be again in the future.

Second, this definition does protect areas that are moist in the substrate soil. The definition specifically refers to areas that are “moist on the surface” but there are ecologically important

areas that are not moist in the substrate soil but not moist on the surface soil. These areas would not be adequately protected under this definition.

Third, this definition does not adequately protect wet areas that lack vegetative cover. For example, a temporarily dried pond may lack vegetative cover but still deserves protection under this rule. For these reasons, we recommend that the Board of Forestry reject the proposed definition.

II. A Sufficient Definition Already Exists and Is Used by the Rest of the State

The State and Regional Water Boards have already created a definition for “Wet Areas”. Here it is in full:

“Wet Areas” mean those areas where, under hydrologic conditions that are consistent with the long term precipitation record, (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.”

This definition addresses the three problems identified in the previous section with the Board of Forestry’s proposed definition. First, it refers to the long term precipitation record and therefore is not unfairly biased by our recent drought period. Second, it specifically refers to the upper substrate instead of the “surface” and therefore more effectively protects these areas. And third, it refers to areas that lack vegetation specifically as areas worthy of the definition if they meet the other two criteria.

As the State Agencies charged with defending our State’s water resources, the State and Regional Water Boards have considerable expertise in this area that should not be second guessed by the Board of Forestry in this instance.

Executive Order W-59-93 states that it is “the policy of the State of California that all State government programs and policies that affect the wetlands of California be coordinated.” By choosing to ignore the State and Regional Water Boards, the Board of Forestry is actively choosing to diverge from established State policy.

The State and Regional Water Board’s definition was also developed through considerable outreach, review, and rigor that lends it more credibility than the Board of Forestry’s proposed definition. It does not make any sense for the Board of Forestry to adopt a weaker, less rigorous definition when the rest of California employs a stronger more rigorous definition.

In addition, adopting a different definition that the State and Regional Water Board's definition will confuse State Policy. Having two different definitions with two distinctly different policy implications will make things more difficult for both regulators and landowners. Instead, the Board of Forestry should stick with State policy and choose a definition that is consistent with the current State and Regional Water Boards definition that is already in use throughout the State.

In order to avoid these problems, the Board of Forestry should simply adopt the definition suggested by the State and Regional Water Boards in Jonathan Warmerdam's letter sent January 12, 2022.

- III. BoF does not have authority to make rules that are not consistent with the authority of the State Water Board and State Policy for retention of wetlands - and - how wetlands are defined.

Current law vests the State and Regional Water Boards with sole authority to regulate and define California's wetlands. California Water Code § 13140 states "The state [water] board shall formulate and adopt state policy for water quality control." (California Water Code §13040) Federal administrative law (e.g., 40 CFR Part 122.2, revised December 22, 1993) defines wetlands as waters of the United States. National waters include waters of the State of California, defined by the Porter-Cologne Act as "any water, surface or underground, including saline waters, within the boundaries of the State" (California Water Code §13050[e]). Wetland water quality control is therefore clearly within the jurisdiction of the State Water Board and Regional Water Boards.

The Board of Forestry therefore cannot regulate wet areas in a way contrary to existing State Water Board policy as they propose to do here. Doing so would be in direct violation of the California Water Code.

IV. Conclusion

In conclusion, we urge the Board of Forestry and Fire Protection not to adopt their proposed definition. The definition is flawed, out of step with the rest of State policy, and violates State law. Instead, the Board of Forestry should adopt the definition suggested by Jonathan Warmerdam of the State Water Board in his letter to the board on January 12, 2022.

Sincerely,



Matt Simmons, Staff Attorney, Environmental Protection Information Center