



Regulatory Changes On the Horizon for California State Water Resources Control Board

02.11.2021 | By [Mary Lynn K. Coffee](#)

On December 17, 2020, the Sacramento County Superior Court issued a ruling limiting the ability of the California State Water Resources Control Board (“State Board”) to implement its adopted statewide wetlands and Waters of the State (“WOTS”) regulations. The State Board enacted the WOTS regulations on a statewide basis as amendments to the State Board’s statewide water quality control plan. The court ruled that the State Board could not implement statewide regulations through a statewide water quality control plan for non-federal waters because the Porter Cologne Water Quality Act does not authorize the State Board to do so. This aspect of the decision potentially has broader implications for other regulations that the State Board has adopted as amendments to the statewide water quality control plan. Those broader implications are important to consider now because the State Board issued a Notice on February 3, 2021 stating that it will reconsider the WOTS regulations in response to the court’s ruling in a hearing scheduled for April 6, 2021.

The Notice also states that the State Board will confirm in the hearing that the State Board may apply the WOTS regulations to federal and non-federal waters as a *water quality policy* without violating the court’s ruling. The Notice further states that the State Board will consider whether the State Board may implement the WOTS regulations with respect to federal and non-federal waters as *water quality control requirements* without violating the court’s ruling. While the Notice does not state how the State Board might be able to implement the WOTS regulations as water quality control requirements, members of the homebuilding industry should be aware that the noticed action provides an opportunity to request State Board consideration of the increased costs for housing development resulting from implementation of the WOTS regulations. The Notice indicates the State Board is accepting written comments on its proposed action through noon on **March 8, 2021**.

Background

The State Board's WOTS regulations require that anyone proposing to discharge dredge or fill material to WOTS (which encompass Waters of the United States ("WOTUS"), as well as a variety of other aquatic features) must obtain a state water quality certification and/or a state discharge permit in accordance with the new, quite stringent regulations. The court's decision restricts the ability of the State Board to implement the WOTS regulations through a statewide water quality plan, allowing the State Board to apply the regulations only to discharges of dredged or fill material to WOTUS, a subset of WOTS. If the discharge is to WOTS, but not to WOTS features that are also WOTUS, then the State Board cannot require a permit for the discharge. As long as the ruling is not appealed or overturned, the State Board lacks authority to regulate discharges of dredge and fill to features such as unvegetated wetlands, wetlands not adjacent to otherwise jurisdictional WOTUS and ephemeral streams. Under the court's ruling, the authority to enact water quality control plan regulations for discharges of dredge and fill to aquatic features that are WOTS, but not WOTUS or ocean waters, rests with the Regional Water Quality Control Boards ("Regional Boards"). It is critical for the regulated community to know that even under the court's ruling, the Regional Boards retain full authority to regulate discharges of dredge and fill to WOTS and/or WOTUS under existing regional water quality control plan provisions. Regional Boards could also amend their regional water quality control plans to include the WOTS regulations in some form.

Based on the court's reasoning, the case may have broader effects beyond the WOTS regulations. The court reasoned that the Porter-Cologne Act restricts the State Board's ability to establish statewide water quality control plan policies, regulations and provisions to those areas specifically identified in the statute as being within the State Board's jurisdictional authority. The court found that the State Board lacks authority to implement the WOTS regulations as to WOTS that are not also WOTUS, and so eliminated the ability of the State Board to implement the regulations with respect to those features.

Broader Implications

Since approximately 2015, the State Board has increasingly implemented its regulatory objectives by amending the statewide water quality control plan. Like the WOTS regulations, some of those amendments involve regulations that the Porter-Cologne Act places within the purview of the Regional Boards, rather than the State Board. One example of a State Board statewide water quality control plan amendment potentially impacted by this ruling is the State Board's adoption of the mercury provisions. The provisions establish very low numeric water quality objectives for mercury for all WOTS throughout the state. Water Code section 13223(a) states that it is within the Regional Boards' authority to issue, modify or revoke water quality objectives for waters within their regions. Water Code section 13142(b) states that the State Board has limited authority to establish water quality objectives only at "key locations for planning and operation of water resource development projects and for water quality control activities." Thus, the State Board's adoption of numeric mercury water quality objectives for all inland surface waters, enclosed bays and estuaries statewide through amendment of the state water quality control plan arguably runs afoul of the court's ruling. Accordingly, if the court's ruling stands, the State Board's mercury provisions and other similar regulations enacted via amendment of the statewide water quality control plan, but addressing matters within the Regional Boards' purview, arguably exceed the limits of the State Board's policy-making authority under the statute.

Either the State Board or the plaintiff may appeal the court's decision. The court entered its judgment on January 5, 2021, and the deadline for a party to file a notice of appeal is March 1, 2021. If no party files a

notice of appeal by that date, then the ruling will stand, removing the authority for regulating discharges of dredge and fill material to WOTS that are not WOTUS or oceans from the State Board's purview and potentially limiting the State Board's authority to adopt and implement other statewide regulations through amendments to the statewide water quality control plan. Based on the State Board's issuance of the February 4, 2021 Notice, it appears that the State Board may be poised to determine that it need not appeal the court's decision.

April 6, 2021 State Board Hearing

The Notice indicates that the State Board intends to confirm that the WOTS regulations as adopted into the state water quality control plan constitute a statewide *policy* under Water Code section 13140, applicable to all federal and non-federal waters. The Notice also indicates that the State Board will consider whether it may also implement the WOTS regulations for all federal and non-federal waters as *water quality control requirements* under the Porter-Cologne Act. This second reference appears to signal, without overtly stating, that the State Board intends to re-adopt the WOTS regulations at its April 6th hearing as binding "principles and guidelines deemed essential by the state water board for *water quality control*" under Water Code section 13142.2, subdivision (c). The State Board may believe that re-adoption of the WOTS regulations under this section of the Porter-Cologne Act (in addition to their prior adoption of the regulations under sections 13140 and 13170) would allow the State Board to implement the regulations with respect to both federal and non-federal waters as "*water quality control requirements*."

The State Board action could remedy the problem created by the court's ruling for implementation of the WOTS regulations for non-federal waters. However, this action would not address questions regarding the ruling's application to other State Board regulations adopted via amendments to the statewide water quality control plan. In addition, the homebuilding industry should note that adoption of the WOTS regulation under Water Code section 13142, subdivision (c), specifically requires the State Board to consider whether the WOTS regulations are consistent with "providing a decent home. . .for every Californian." In its initial adoption of the WOTS regulations, the State Board did not consider any housing construction cost increases associated with the new, more stringent WOTS regulations, nor the impact of those cost increases on housing production. Comments regarding the additional costs of compliance imposed on housing development and construction would appear to be an important topic for comments submitted to the State Board, which are due on March 8, 2021.