

AMENDED IN ASSEMBLY JUNE 15, 2004

AMENDED IN SENATE MAY 24, 2004

AMENDED IN SENATE APRIL 15, 2004

**SENATE BILL**

**No. 1477**

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**Introduced by Senator Sher**

February 19, 2004

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An act to add Section 13275 to, and to add Chapter 18 (commencing with Section 14150) to Division 7 of, the Water Code, relating to water, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

SB 1477, as amended, Sher. Water quality.

(1) Under existing law, the Porter-Cologne Water Quality Control Act, the State Water Resources Control Board and the California regional water quality control boards are the principal agencies that regulate water quality.

This bill would require the state board and the Department of Fish and Game to develop a memorandum of understanding to facilitate consultation, and coordinate permitting processes, among the state board, the regional boards, and the Department of Fish and Game with regard to the issuance of a waste discharge permit for a discharge that may require the issuance of an incidental take permit or the execution of a streambed alteration agreement under state law. The bill would require the state board to develop a process to facilitate consultation and reduce duplication among the state board, the regional boards, and the National Marine Fisheries Service or the United States Fish and Wildlife Service with regard to the issuance of a waste discharge permit

for a discharge that may require the issuance of an incidental take statement or an incidental take permit under federal law.

The bill would require the state board to formulate and adopt a program ~~to protect and restore isolated waters, nonnavigable waters, wetlands, riparian areas, and intermittent, ephemeral, and perennial streams,~~ in accordance with certain requirements, *to regulate the discharge of dredged or fill material to state waters not protected by the federal government under the federal Clean Water Act.*

(2) Existing law continuously appropriates money in the Fish and Game Preservation Fund to the department to pay all necessary expenses incurred in carrying out programs and policies contained in the Fish and Game Code and to pay the compensation and expenses of the department, and employees of the department.

By expanding the parameters of, and imposing new duties on, the department, this bill would make an appropriation.

Vote: majority. Appropriation: yes. Fiscal committee: yes. State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 13275 is added to the Water Code, to  
2 read:

3 13275. (a) In order to promote efficiency and enhance the  
4 protection of natural resources, the state board and the Department  
5 of Fish and Game shall develop a memorandum of understanding  
6 to facilitate consultation, and coordinate permitting processes to  
7 the extent possible, among the state board, the regional boards, and  
8 the Department of Fish and Game with regard to the issuance of  
9 a waste discharge permit pursuant to this division for a discharge  
10 that may require the issuance of an incidental take permit under  
11 Article 3 (commencing with Section 2080) of Chapter 1.5 of  
12 Division 3 of the Fish and Game Code or the execution of a  
13 streambed alteration agreement pursuant to Chapter 6  
14 (commencing with Section 1600) of Division 2 of the Fish and  
15 Game Code.

16 (b) The state board shall develop a process to facilitate  
17 consultation and reduce duplication, to the maximum extent  
18 feasible, among the state board, the regional boards, and the  
19 National Marine Fisheries Service or the United States Fish and  
20 Wildlife Service with regard to the issuance of a waste discharge



1 permit pursuant to this division for a discharge that may require the  
2 issuance of an incidental take statement under Section 1536 of  
3 Title 16 of the United States Code or an incidental take permit  
4 under Section 1539 of Title 16 of the United States Code.

5 SEC. 2. Chapter 18 (commencing with Section 14150) is  
6 added to Division 7 of the Water Code, to read:

7

8 CHAPTER 18. THE WATER QUALITY PROTECTION ACT OF 2005

9

10 Article 1. General Provisions

11

12 14150. The Legislature finds and declares all of the  
13 following:

14 (a) The health, safety, and welfare of the people of the State of  
15 California depend upon the protection of all the waters of the state,  
16 both navigable and nonnavigable.

17 (b) Isolated waters, nonnavigable waters, wetlands, riparian  
18 areas, and intermittent, ephemeral, and perennial streams provide  
19 a variety of important functions that benefit the state economically  
20 and biologically. These benefits include all of the following:

21 (1) Protecting subsurface water resources and providing  
22 valuable watersheds and recharging groundwater supplies.

23 (2) Flood and stormwater control by the hydrologic absorption  
24 and storage capacity of wetlands.

25 (3) Reducing pollutant loadings in waters of the state by  
26 serving as pollutant sinks and biological and chemical oxidation  
27 basins.

28 (4) Protecting wildlife habitat by providing breeding, nesting,  
29 feeding grounds, and cover for many forms of commercial and  
30 noncommercial fish and wildlife, including migratory waterfowl,  
31 and rare, threatened, or endangered wildlife species.

32 (5) Erosion control by serving as a sedimentation area and  
33 filtering basin, by absorbing silt and organic matter.

34 (6) Providing sources of nutrients in water food cycles and  
35 nursery grounds and sanctuaries for fish.

36 (7) Providing recreational areas for hunters, fisherman,  
37 bird-watchers, and others.

38 (c) The loss of isolated waters, nonnavigable waters, wetlands,  
39 riparian areas, and intermittent, ephemeral, and perennial streams  
40 has caused significant economic impairment to the state, including



1 losses due to flooding, costs associated with new flood control  
2 projects, increased water treatment costs, loss of water supplies,  
3 loss of commercial fisheries, and loss of public recreation revenue.

4 (d) Water is transported through interconnected hydrologic  
5 cycles, above and below ground, and pollution, impairment, or  
6 destruction of any part of an aquatic system may affect the  
7 chemical, biological, and physical integrity of other parts of the  
8 aquatic system.

9 (e) California's climate and hydrologic regimes range from  
10 coastal rain forest to inland desert with most locations receiving  
11 highly seasonal and variable precipitation. These environmental  
12 conditions result in a large inventory of swales, vernal lakes,  
13 vernal pools, desert seeps and springs, dry lake beds, ephemeral  
14 and intermittent headwater streams, and enclosed basins not  
15 draining to navigable waters.

16 (f) California has lost nearly 91 percent of its original wetlands.

17 (g) Since 1977, the United States Army Corps of Engineers has  
18 been charged with the regulation of discharges into waters of the  
19 United States pursuant to Section 404 of the Clean Water Act (33  
20 U.S.C. Sec. 1344).

21 (h) In 1993, Governor Pete Wilson issued an executive order  
22 that the state shall work to ensure there is no net loss of wetlands  
23 and a long-term net gain in the quantity, quality, and permanence  
24 of wetlands acreage and values in California.

25 (i) The United States Supreme Court has ruled that the United  
26 States Army Corps of Engineers does not have jurisdiction under  
27 the Clean Water Act to regulate isolated, nonnavigable waters  
28 where the sole basis is the use of the waters as habitat for migratory  
29 birds.

30 (j) On January 15, 2003, the United States Environmental  
31 Protection Agency and United States Army Corps of Engineers  
32 issued a joint memorandum that eliminates Clean Water Act  
33 jurisdiction over isolated, nonnavigable, *and seasonal* waters in a  
34 variety of settings, creating significant uncertainty as to how much  
35 of California's unique waterways are currently subject to the Clean  
36 Water Act.

37 (k) The Clean Water Act explicitly allows states to adopt more  
38 protective standards and permitting programs than those set forth  
39 in that act.



1 ~~(l) On January 25, 2001, the State Water Resources Control~~  
2 ~~Board issued a legal memorandum, explaining that the~~

3 ~~(l) The Porter-Cologne Water Quality Control Act grants to the~~  
4 ~~state board the authority to regulate the discharge of dredged or fill~~  
5 ~~materials all forms of waste, including dredged or fill material,~~  
6 ~~into all waters of the state, including isolated waters, wetlands,~~  
7 ~~riparian areas, and intermittent, ephemeral, and perennial~~  
8 ~~streams, whether or not the United States Army Corps of~~  
9 ~~Engineers determines that it has jurisdiction in the matter.~~

10 ~~(m) The state has a responsibility to protect the waters of the~~  
11 ~~state, including isolated waters, nonnavigable waters, wetlands,~~  
12 ~~riparian areas, and intermittent, ephemeral, and perennial streams,~~  
13 ~~from the discharge of all forms of waste, including dredged or fill~~  
14 ~~material, that could affect the quality of waters of the state.~~

15 ~~(n)~~

16 ~~(m) Consistent with its authority under this division, on May 4,~~  
17 ~~2004, the state board adopted statewide general waste discharge~~  
18 ~~requirements for small and low-impact discharges of dredged or~~  
19 ~~fill material to waters deemed by the United States Army Corps of~~  
20 ~~Engineers to be beyond the scope of federal jurisdiction.~~

21 ~~(n) While the state board has taken a good first step in asserting~~  
22 ~~its existing authority to regulate the discharge of waste, including~~  
23 ~~dredge or fill material, into waters of the state by issuing its May~~  
24 ~~2004 general permit, the state board has failed to undertake a more~~  
25 ~~comprehensive and coordinated effort to regulate, consistent with~~  
26 ~~its authority under this division, all discharges of dredged or fill~~  
27 ~~material affecting the quality of waters of the state not protected~~  
28 ~~by the federal government under the federal Clean Water Act.~~

29 ~~(o) The program established by this chapter shall be undertaken~~  
30 ~~by the state board and the regional boards.~~

31 ~~14151. It is the intent of the Legislature to do all of the~~  
32 ~~following:~~

33 ~~(a) Protect the public health and welfare by preventing~~  
34 ~~degradation to California's drinking water sources, including~~  
35 ~~those waters of the state not protected by the federal government~~  
36 ~~under the federal Clean Water Act, such as isolated waters,~~  
37 ~~nonnavigable waters, wetlands, riparian areas, and intermittent,~~  
38 ~~ephemeral, and perennial streams.~~

39 ~~(b) Maintain the pollution control benefits provided by~~  
40 ~~isolated, nonnavigable waters, including the removal of pollutants~~



1 and excess nutrients, reduction of erosion and sedimentation, and  
2 wastewater treatment.

3 (c) Prevent adverse impacts to California’s unique ecosystems,  
4 commercial and noncommercial fisheries and wildlife habitat, and  
5 state or federally protected species.

6 (d) Provide habitat connectivity for fish and wildlife species in  
7 order to prevent fish and wildlife populations from becoming  
8 isolated and to allow natural dispersal of fish and wildlife  
9 populations.

10 (e) Provide natural and enhanced flood control by protecting  
11 isolated waters, nonnavigable waters, wetlands, riparian areas, and  
12 intermittent, ephemeral, and perennial streams.

13 (f) Support the use of managed wetland habitat, which is  
14 administered primarily for the benefit of waterfowl and other  
15 wetlands-dependent species *and for water treatment*.

16 ~~(g) Create a state water quality control program for isolated  
17 waters, nonnavigable waters, wetlands, riparian areas, and  
18 intermittent, ephemeral, and perennial streams that provides the  
19 same protection as, or a greater level of protection than, that  
20 accorded to waters of the United States under Sections 401 and 404  
21 of the Clean Water Act (33 U.S.C. Sees. 1341 and 1344), and the  
22 act’s implementing regulations that were in effect on December  
23 31, 2000.~~

24 ~~(h) Enact a state water quality control program that provides for  
25 no net loss of state wetlands and riparian areas and achieves a  
26 long term net gain in the quantity, quality, and performance of  
27 wetlands and riparian acreage and values in California.~~

28 (g) *Direct the state board to exercise its existing authority  
29 under Article 4 (commencing with Section 13260) of Chapter 4 to  
30 issue waste discharge requirements for the discharge of dredge or  
31 fill material that could affect the quality of waters of the state not  
32 protected by the federal government under the federal Clean Water  
33 Act.*

34 ~~14152. As used in this chapter, the following words have the  
35 following meanings:~~

36 ~~(a) “Managed wetlands” means those areas intentionally  
37 converted from nonwetlands~~

38 *14152. As used in this chapter, “managed wetlands” means  
39 those wetlands that are managed primarily for the benefit of  
40 waterfowl, wildlife, or water treatment, or agricultural lands*



1 managed as wetlands primarily for the benefit of waterfowl or  
2 wildlife.

3 (b) ~~“Riparian area” means those areas transitional between~~  
4 ~~terrestrial and aquatic ecosystems that are distinguished by~~  
5 ~~gradients in biophysical conditions, ecological processes, and~~  
6 ~~biota. A riparian area is an area through which surface and~~  
7 ~~subsurface hydrology connect water bodies with their adjacent~~  
8 ~~uplands. A riparian area includes those portions of terrestrial~~  
9 ~~ecosystems that significantly influence exchanges of energy and~~  
10 ~~matter with aquatic ecosystems. A riparian area is adjacent to~~  
11 ~~intermittent, ephemeral, or perennial streams, lakes, or~~  
12 ~~estuarine-marine shorelines.~~

13 (c) ~~“Wetlands” means those areas that are inundated or~~  
14 ~~saturated by surface water or groundwater at a frequency and~~  
15 ~~duration sufficient to support, and that under normal~~  
16 ~~circumstances do support, a prevalence of vegetation typically~~  
17 ~~adapted for life in saturated soil conditions. For the purposes of~~  
18 ~~this chapter, wetlands include swamps, marshes, bogs, vernal~~  
19 ~~pools, and similar areas.~~

20

21 ~~Article 2. The Isolated, Nonnavigable Waters, Wetlands, and~~  
22 ~~Special Aquatic Sites Protection Program~~

23

24

25 *Article 2. The Isolated, Nonnavigable, and Seasonal Water*  
26 *Program*

27

28 14153. (a) The state board shall formulate and adopt a  
29 program to protect and restore isolated waters, nonnavigable  
30 waters, wetlands, riparian areas, and intermittent, ephemeral, and  
31 perennial streams. This program shall include, at a minimum,  
32 provisions pursuant to Article 4 (commencing with Section  
33 13260) of Chapter 4 that provide for all of the following:

34 (1) The adoption of requirements that afford the same or  
35 greater level of protection for these waters as that provided to  
36 waters of the United States under Sections 401 and 404 of the  
37 Clean Water Act (33 U.S.C. Secs. 1341 and 1344) and the act’s  
38 implementing regulations, as set forth in Part 328 of Title 33 of the  
39 Code of Federal Regulations and Part 230 of Title 40 of the Code  
40 of Federal Regulations, that were in effect on December 31, 2000.



1 ~~(2) The adoption of beneficial use categories to recognize the~~  
2 ~~basin-wide values of isolated waters, nonnavigable waters,~~  
3 ~~wetlands, riparian areas, and intermittent, ephemeral, and~~  
4 ~~perennial streams, including, but not limited to, floodwater~~  
5 ~~retention pollutant removal and habitat connectivity.~~

6 ~~(3) The adoption of requirements that provide for no net loss of,~~  
7 ~~and a long-term net gain in, the quantity, quality, permanence of~~  
8 ~~wetlands and riparian acreage and values in California, and the~~  
9 ~~achievement of, to the greatest extent practicable, protection for~~  
10 ~~intermittent, ephemeral, and perennial streams. program,~~  
11 ~~consistent with its authority under Article 4 (commencing with~~  
12 ~~Section 13260) of Chapter 4, to regulate the discharge of dredged~~  
13 ~~or fill material to state waters not protected by the federal~~  
14 ~~government under the federal Clean Water Act. This program shall~~  
15 ~~include, at a minimum, components that provide for both of the~~  
16 ~~following:~~

17 ~~(1) The adoption of waste discharge requirements to protect~~  
18 ~~waters of the state not protected by the federal government under~~  
19 ~~the federal Clean Water Act.~~

20 ~~(2) The adoption of beneficial use categories to reorganize the~~  
21 ~~basin-wide values of waters of the state not protected by the federal~~  
22 ~~government under the federal Clean Water Act, including, but not~~  
23 ~~limited to, floodwater retention pollutant removal and habitat~~  
24 ~~connectivity.~~

25 ~~(b) The state board and the regional boards shall be responsible~~  
26 ~~for implementing this program consistent with their~~  
27 ~~responsibilities under this division.~~

28 ~~(c) The program adopted by the state board pursuant to this~~  
29 ~~section does not apply to the discharge of dredge or fill from the~~  
30 ~~routine and ongoing management of managed wetlands. section~~  
31 ~~does not apply to managed wetlands or fallowed agricultural~~  
32 ~~lands. This subdivision does not affect the authority of the state~~  
33 ~~board to establish appropriate terms, conditions, or requirements~~  
34 ~~for compensatory mitigation.~~

35 ~~(d) The program adopted by the state board pursuant to this~~  
36 ~~section does not apply to a discharge of dredge or fill described in~~  
37 ~~Section 404 (f) of the Clean Water Act (33 U.S.C. Sec. 1344 (f))~~  
38 ~~or relevant implementing regulations that were in effect on~~  
39 ~~December 31, 2000, unless the discharge is a discharge that is~~  
40 ~~described in Section 404 (f) (2) of the Clean Water Act (33 U.S.C.~~



1 Sec. 1344 (f) (2)) or relevant implementing regulations that were  
2 in effect on December 31, 2000.

3 (e) The program adopted by the state board pursuant to this  
4 section does not apply to the discharge of dredge or fill from  
5 activities that are subject to a certification pursuant to Section 401  
6 of the Clean Water Act (33 U.S.C. Sec. 1341) if the requirements  
7 in the certification are consistent with this chapter.

8 (f) *The program adopted by the state board pursuant to this*  
9 *article does not apply to discharges voluntarily received by*  
10 *operators of managed wetlands.*

11 (g) *Nothing in this article affects the authority of the state board*  
12 *to regulate the waters of the state pursuant to existing laws and*  
13 *regulations.*

14 14154. The state board and the regional boards shall conduct  
15 public outreach to advise project proponents of their  
16 responsibilities under Article 4 (commencing with Section 13260)  
17 of Chapter 4 relating to project impacts on isolated waters,  
18 nonnavigable waters, wetlands, riparian areas, and intermittent,  
19 ephemeral, and perennial streams.

