

Date of Hearing: April 9, 2024

ASSEMBLY COMMITTEE ON WATER, PARKS, AND WILDLIFE

Diane Papan, Chair

AB 2875 (Friedman) – As Introduced February 15, 2024

**SUBJECT:** Wetlands: state policy

**SUMMARY:** Declares it is state policy to ensure no net loss, and long-term gain, in the quantity, quality, and permanence of wetlands acreage. Makes findings and declarations regarding the importance of wetlands and wetland policy.

**EXISTING LAW:**

- 1) Authorizes, under the Porter-Cologne Water Quality Control Act, the State Water Quality Control Board (State Water Board) and regional water quality control boards to regulate discharges of waste that may affect the quality of waters of the state (Water Code § 13000 *et seq.*).
- 2) Defines “waters of the state” as any surface water or groundwater, including saline waters, within the boundaries of the state. This definition includes natural wetlands, wetlands created by modification of a surface water of the state, and artificial wetlands that meet certain criteria [Water Code § 13050 (e)].
- 3) Requires, under the Keene-Nejedly California Wetlands Preservation Act, the Natural Resources Agency to inventory existing wetlands in California and develop a study to identify opportunities to protect and enhance the state’s wetlands (Public Resources Code §§ 5810 – 5818.2).
- 4) Declares it is state policy to ensure that no net loss of either wetland acreage or habitat value occurs as a result of fill permit activities pursuant to Section 404 of the federal Clean Water Act (33 U.S.C. § 1344) (Fish and Game Code § 1776).
- 5) Defines “wetlands” as lands which may be covered periodically or permanently with shallow water and which include saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, fens, and vernal pools (Fish and Game Code § 2785).

**FISCAL EFFECT:** Unknown. This bill is keyed non-fiscal.

**COMMENTS:**

- 1) **Purpose of this bill.** This bill codifies existing state policy relating to wetlands. According to the author, this is necessary in the wake of the U.S. Supreme Court’s decision in *Sackett v. EPA*, 143 S. Ct. 1322 (2023) (Sackett decision) which narrowed the definition of “waters of the United States” (WOTUS) and leaves many wetlands in California without protection under the federal Clean Water Act.

The author notes that “California has lost more than 90% of its historic wetlands from projects that filled in and converted wetlands to agricultural lands, housing, roads, and other development projects” and that this is problematic because wetlands “provide important

functions, including flood control, improving water quality and water supply, carbon sequestration, recreation, and habitat for imperiled species.”

The author maintains that “California acknowledged the importance of its wetlands when Governor Pete Wilson signed an executive order in 1993 declaring California’s policy of no-net-loss of wetlands. Unfortunately, since that time, state and federal laws and regulations have proved to be inadequate. Every year, California loses more wetland acres than it replaces with restoration or mitigation. As these wetlands disappear, more and more wetland-dependent fish and wildlife slide closer to extinction and migratory birds are crowded into shrinking habitat areas.”

The author argues that this bill “provides important leadership for other states and provides a model for using state law to shield wetland resources from efforts to erode federal protections. By clearly stating in statute that it is the state’s policy to ensure no net loss and long-term gain in the quantity, quality, and permanence of wetlands acreage and values in California, we will demonstrate our commitment to science-based wetland conservation that benefits our public health and biodiversity, and support our efforts to combat climate change and promote adaptation to the inevitable effects from climate change.”

- 2) **Background.** “Wetland” encompasses a wide variety of land types and include desert playas, washes, and oases, marshes, meadows, bogs, fens, sag ponds, vernal pools, tidal flats, tidal marshes, and even wastewater treatment ponds. Generally, wetlands are lower elevation lands that are covered, either seasonally or permanently, with shallow water. Wetlands occur in all regions of California and in both coastal (brackish or saline water) and inland areas (typically freshwater). Wetlands form where rainfall or water runoff accumulates and where groundwater saturates the topsoil. There are approximately 2.9 million acres of wetlands in California (Natural Resources Agency, 2010) representing nearly 3% of the state’s land cover. “It is estimated that California has lost more than 90% of its historic wetlands overall, and more than 95% of its coastal wetlands. The remaining wetlands are vulnerable to development, roads, farming practices, hydromodification, pollutants, invasive species, climate change, and a host of other potential stressors” (California Wetland Program Plan, 2023-2028).

While at the time of statehood, wetlands were perceived more negatively and terms such as “swamp” or “mire” might be used to describe wetland areas, wetlands have come to be increasingly valued for the many benefits they provide to society. These benefits include water storage, groundwater recharge, pollution control, nutrient cycling, shoreline protection, maintenance of biodiversity, recreation, education, and carbon sequestration (California Natural Resources Agency, 1990).

*Executive Order (EO) W-59-93.* Issued by Governor Wilson in 1993, this EO put in place the “California Wetlands Conservation Policy” that rests on three primary objectives: (a) to ensure no net loss and long-term gain of wetlands acreage and values; (b) to reduce complexity in the administration of state and federal wetlands conservation programs; and (c) to encourage partnerships, landowner incentives, and cooperative planning the basis of wetlands conservation. The EO calls for, among other things, an inventory and accounting system for wetlands, state assistance for local wetland planning efforts, development of a consistent definition of wetlands, development of consistent standards and guidelines concerning wetland mitigation and monitoring of mitigation and restoration efforts, and

increased efficiency of wetlands-related permitting processes. The language of this bill comes from the EO.

*California Wetlands Monitoring Workgroup (CWMW).* The CWMW is a workgroup of the California Water Quality Monitoring Council, to provide the mechanism for coordination and collaboration among federal, state, local and tribal agencies and non-governmental science support organizations involved in tool development and implementation. According to its website, CWMW's "mission is to improve the monitoring and assessment of wetland and riparian resources by developing a comprehensive stream, wetland, and riparian area monitoring plan for California and through increasing coordination and cooperation among local, state, and federal agencies, tribes, and non-governmental organizations. The workgroup reviews technical and policy aspects of wetland monitoring tool development, implementation and use of data to improve wetland management in California." CWMW's most recent plan is the "[California Wetland Program Plan 2023-2028.](#)"

*Sackett decision.* This decision stems from a case in which the Sackett couple purchased property in Idaho and began backfilling the lot with dirt in preparation for building a home. The U.S. Environmental Protection Agency (EPA) informed the Sackett's that the lot contained wetlands that were WOTUS and that, therefore, the backfilling was in violation of the federal Clean Water Act. The Sackett's sued alleging their property did not contain WOTUS as the property was near a ditch that fed into a lake and did not contain wetlands. The federal District Court and Ninth Circuit affirmed the U.S. EPA's jurisdiction, but the Supreme Court overturned the decision in May 2023 finding that WOTUS refers only to "geographic features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes'" and to adjacent wetlands that are "indistinguishable" from those bodies of water due to continuous surface connection. The *Sackett* decision narrows what was previously understood to be WOTUS and limits U.S. EPA jurisdiction over many wetlands. In response, the State Water Board has made a budget request of \$6.1 million in FY 2024-25 and \$7 million ongoing for 38 new positions in anticipation of increased workload related to water quality permitting and enforcement of "waters of the state" that had been considered WOTUS (and, therefore, subject to jurisdiction of U.S. EPA and U.S. Army Corps of Engineers) until the *Sackett* decision.

- 3) **Arguments in support.** This bill is sponsored by Audubon California and is supported by a number of environmental and conservation organizations. Audubon et al. argue that this bill codifies the state's long-standing "no net loss policy" and that it is as important as ever given that less than 10% of the state's historic wetlands remain. Audubon points out that wetlands provide many benefits: "Wetlands are among the most productive ecosystems in the world, comparable to rain forests and coral reefs, and can be thought of as "biological supermarkets." Wetlands function as natural sponges that trap and slowly release surface water, rain, snowmelt, groundwater, and flood waters. Trees, root mats and other wetland vegetation also slow the speed of flood waters and distribute them more slowly over the floodplain. This combination of water storage and braking action lowers flood heights and reduces erosion. Coastal wetlands also provide natural barriers to shoreline erosion. Finally, wetlands filter water, providing natural water quality improvement." Audubon maintains that this bill "will demonstrate our commitment to science-based wetland conservation that benefits our public health and biodiversity and supports our efforts to combat climate change and promote adaptation to the inevitable effects from climate change."

- 4) **Related legislation.** SB 1447 (Kuehl) of 2004 would have required the Fish and Game Commission to adopt regulations to protect state regulated wetlands to implement the no net loss of state wetlands policy. SB 1447 was never set for hearing.

AB 2286 (Davis), Chapter 964, Statutes of 2000, requires the Natural Resources Agency to update the wetlands management plan required by the Keene-Nejedly California Wetlands Preservation Act of 1978.

## **REGISTERED SUPPORT / OPPOSITION:**

### **Support**

California Audubon (sponsor)  
Bolsa Chica Land Trust  
California Association of Professional Scientists  
California Council of Land Trusts  
California Environmental Voters (formerly CLCV)  
California Native Plant Society, Alta Peak Chapter  
California Waterfowl Association  
Center for Biological Diversity  
Clean Water Action  
Cleaneearth4kids.org  
Climate Action California  
Defenders of Wildlife  
Environmental Protection Information Center  
Forests Forever  
Friends of The Inyo  
Friends of The River  
Los Angeles Neighborhood Land Trust  
Midpeninsula Regional Open Space District  
Nature Conservancy, The  
Pacific Forest Trust  
Planning and Conservation League  
Resource Renewal Institute  
San Francisco Baykeeper  
Santa Barbara Audubon Society  
Santa Clara Valley Audubon Society  
Sea and Sage Audubon Society  
Sierra Club California  
Sonoma Land Trust  
Tuolumne River Trust  
Wildlands Conservancy, The

### **Opposition**

None on file

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