



September 18, 2017

Sent Via E-Mail to: commentletters@waterboards.ca.gov

Jeanine Townsend Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000



RE: State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State

Dear Ms. Townsend:

NextEra Energy Resources (NextEra) appreciates the opportunity to comment on the July 21, 2017 Final Draft State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State (Procedures). As the largest producer of wind and solar energy in the world, and one of the largest developers of wind and solar generation in the country, NextEra shares a common goal with the State of California to achieve the State's renewable energy goals. While NextEra is supportive of the State's efforts to protect wetlands, these efforts should be harmonized with the State's renewable energy goals. Accordingly, the Procedures should be crafted to avoid onerous and duplicative regulatory processes that increase burdens on the development of renewable energy projects.

There are several overlapping California initiatives that call for an increase in renewable energy projects. For example, SB32 codified the greenhouse gas (GHG) reduction goal of 40% below 1990 emissions levels by 2030 and the reauthorization of the AB32 through the passage of AB398 will provide increased pressures to develop new renewable energy projects in California. Over time, as the GHG emission cap declines and the cost of GHG allowances increases, it will be necessary for California to continue to develop new and existing renewable energy projects and technologies. The long term goal of an 80% reduction of GHG emissions from 1990 levels will only increase this need. In addition, as the state Renewable Energy Portfolio Standard increases, the demand for renewable electric generation will increase. Renewable energy projects obviously need to be developed in an environmentally responsible manner, however it is important to look for areas where the costs and administrative hurdles incurred during the development of these projects can be mitigated as much as possible.

The proposed revision of the procedures related to the waters of the State (WOTS) is an excellent opportunity to implement an environmentally protective program that also minimizes impacts to renewable energy project development and in essence rate payers. The urgency to be able to develop projects in a cost effective manner increases as the areas of optimal renewable energy generation are either developed or removed from consideration by other programs (i.e. Desert Renewable Energy Conservation Plan). We have seen not only in California but in many jurisdictions across North America increases in development costs that have the potential to greatly affect the viability of a project's development. This can cause a shift in corporate investment to jurisdictions where development is more economical. It is our hope that we can assist in the development of these proposed procedures so that we can capitalize on the potential efficiencies without compromising any protections sought by the State Water Resources Control Board (SWRCB). It is our aim to help the SWRCB accomplish their short and long term goals while providing opportunities for the growth in renewable generation sector. NextEra provides the following comments focused on avoiding duplicative permitting processes and promoting regulatory streamlining while still achieving the directive of Governor's Executive Order W-59-93 for a "no net loss" of wetlands.

Overlapping/Duplicative Permitting Processes

NextEra continues to have concerns with the jurisdictional scope of the draft Procedures, which have significant overlap with the federal Section 404 permitting program under the Clean Water Act and the California Department of Fish and Wildlife's (CDFW's) lake and streambed alteration (LSAA) program under Fish & Game Code section 1600 et seq. Notably, CDFW's LSAA program already regulates most (if not all) of the very same WOTS that the SWRCB's proposed Procedures are intended to regulate. CDFW's program not only applies to all lakes, rivers and streams in the state, but also has been extended to episodic rivers and streams, ephemeral stream, desert washes, watercourses with subsurface flow, and even floodplains. Many of the WOTS sought to be regulated under the draft Procedures fall under this broad scope of CDFW jurisdiction. The draft Procedures would create a regulatory program that in large part duplicates CDFW's LSAA program resulting in undue burdens on a wide array of industries and potentially duplicative mitigation. In addition, the introduction of another duplicative permitting process creates yet another opportunity for certain organizations to delay/derail an environmentally sound renewable energy project via administrative appeals and litigation. Furthermore, the draft Procedures and responses to comments do not explain or quantify which WOTS the SWRCB believes are not adequately protected under the LSAA program.

At a time when the State is setting increasingly aggressive renewable energy goals, the State should be seeking ways to simplify/streamline permitting processes for renewable energy projects, not adding a largely duplicative layer of regulation with arguably negligible environmental benefits. While NextEra fully appreciates the State's goals relating to its "no net loss" policy, the State's goals can be best served through a programmatic approach to protection of WOTS that promotes coordination between various federal and state regulatory agencies. Elimination of duplicative and overlapping regulatory processes and requirements is one key aspect of this. Accordingly, to avoid unnecessary regulatory program duplication and the associated cost/schedule impacts on renewable energy development in CA, Section IV.D of the Procedures should exclude any discharge to a WOTS that is also subject to regulation under CDFW's LSAA program.

Additionally, NextEra supports the exclusions identified in the current draft Procedures for artificial wetlands which would not qualify as WOTS, as well as the proposal for exemptions from the alternative analysis requirements for projects which meet the terms and conditions of one or more of the Water Board certified Corps' General Permits. Such specific exclusions and exemptions provide reasonable alternatives for avoidance and minimization measures which allow for certainty in constructing renewable energy projects.

Suggested Regulatory Streamlining Actions

If the Procedures do not exclude WOTS already governed by CDFW's LSAA program, NextEra has identified several ways in which the draft Procedures can be refined to minimize regulatory overlap and streamline the dredge and fill permitting process. Specifically, regulatory processes and measures could be consolidated or harmonized in a joint application process to reduce regulatory delays and costs for both project applicants and agencies. The coordinated agency process should include the following:

Joint Application Process: The Regional Water Quality Control Boards (RWQCBs), under the oversight of the State Board, should work with the CDFW and the Army Corps of Engineers' (Corps) California District Offices to create a joint application procedure for dredge and fill activities. The joint application process could be created through a memorandum of understanding between the three agencies or some similar agreement, which would establish a process for clear determinations of which agencies would process specific types of projects in specific types of jurisdictional waters. Such a uniform, joint application process for dredge and fill activities in the State would provide clarity for the agencies and applicants in determining the need for a permit, as well as which agency or agencies would have the lead regulatory oversight. Specifically, this joint application process should clearly allow for the description of type of water to be impacted (state and/or federal), level of jurisdictional impact, the specific permit (stream alteration, discharge waste, nationwide general permit, individual permit, exclusion/exemption, etc.) being applied for,

the design and performance standards of the proposed project, the avoidance and minimization measures, and the proposed mitigation. A joint application process would allow for a clear determination by the RWQCB and the CDFW to determine which State agency would be the appropriate regulatory entity to process the permit application when only WOTS will be impacted. Also, the joint application process would also allow for the State to defer to the Corps' to be the lead permitting agency when only federal waters would be subject to jurisdictional impacts or vice versa.

Uniform Mitigation Assessment Methodology: The RWQCBs should also work with the CDFW and the Corps' California District Offices to create a uniform mitigation assessment methodology which would provide for the equivocal assessment of ecological and hydrological function for impacts to waters. The establishment of a uniform mitigation assessment method would standardize the ability to determine the amount of mitigation needed to offset adverse impacts to wetlands and other surface waters, and to determine compensatory mitigation which would alleviate much of the subjective nature of the analysis process. A standardized process would also allow for a common agency understanding to measure impacts and mitigation requirements and could be objectively inserted into both a California Environmental Quality Act (CEQA) and/or National Environmental Policy Act (NEPA) analysis. Finally, a standardized procedure would allow for the uniform assessment of the ecological functions provided by wetlands and other surface waters, the amount that those functions are reduced by a proposed impact, and the amount of mitigation necessary to offset that loss. The minimal components of the methodology would evaluate functions through consideration of an ecological community's current condition, hydrologic connection, uniqueness, location, fish and wildlife utilization, time lag, and mitigation risk.

Water Board Certified Corps' General Permits: The SWRCB's proposal of allowing for exemptions from conducting an alternative analysis by a project meeting the terms and conditions of one or more of a SWRCB certified Corps' General Permit is a vital component of the draft Procedures in facilitating construction of renewable energy projects. The Nationwide General Permit (NWP) program administered through the Corps makes the determination that the classes of authorized activities comply with the CWA section 404(b)(1) Guidelines and have only minimal adverse effects individually and cumulatively. Either all NWPs or specific NWPs certified under the Section 401 program and Regional General Permits (RGP) specific to the California Corps' District Offices should be certified by the SWRCB in a parallel process with revisions of the Procedures. In the event the SWRCB chooses to not certify the NWP program in its entirety, but would rather review each individual General Permit for certification, we have identified the most crucial permits in the construction of renewable energy projects that we urge the SWRCB to certify (if not certified already) in conjunction with adopting revised Procedures: NWP 12 – Utility Line Activities; NWP 14 – Linear Transportation Projects; NWP 43 – Stormwater Management Facilities; and NWP 51 – Land Based Renewable Energy Facilities.

State Delegation of Section 404 Program: It is understood that it is the intent of the SWRCB to protect wetlands that are no longer subject to federal jurisdiction due to the multiple U.S. Supreme Court decisions and the uncertainty created by those decisions. However, the currently proposed draft definition claims all "Waters of the U.S." to also be WOTS. This definition, as currently set forth, exceeds the initial intent of the SWRCB, and would create an unnecessary jurisdictional overlap. If the SWRCB intends to regulate federal jurisdictional waters as WOTS, then the State should seek delegation of the Section 404 Program to reduce overlapping and potential contradictory jurisdictions and permitting processes.

Limit Applicability to Wetlands

If the SWRCB does not exclude discharges to WOTS that are already governed by CDFW's LSAA program, or does not adopt agency coordination/streamlining measures that effectively achieve the same result, then at the very least, the Procedures should apply to "wetlands" only and not to non-wetland WOTS. The SWRCB's proposed definition of "wetland" already covers the very wetlands that the SWRCB is concerned do not get adequate protection under the

federal Section 404 program – e.g., “isolated” wetlands. Furthermore, as discussed above, CDFW’s LSAA program already governs discharges to non-wetland WOTS.

In Resolution 2008-0026, the SWRCB directed staff to “establish a Policy to protect wetlands from dredge and fill activities” as the first phase of a three-phased policy; non-wetland waters were not included in that first stage. NextEra is concerned that the SWRCB staff have not thought through the potential consequences associated with expanding the reach of the Procedures beyond the SWRCB’s original focus on wetlands. In particular, we are concerned that if the Procedures are applied to non-wetland WOTS, it could have the unintended consequence of effectively taking thousands of acres of land off the table for renewable energy development that would otherwise be allowed under current law as long as impacts to those non-wetland WOTS are properly mitigated. This is because, under the draft Procedures, an alternatives analysis requiring the “least environmentally damaging practicable alternative” (LEDPA) would apply to almost every non-wetland dry wash/rivulet in the state regardless of size. Under CDFW’s LSAA program, impacts to those same non-wetland WOTS are required to be mitigated to less than significant levels. This ability to mitigate impacts to non-wetland WOTS (e.g., via the acquisition of offsite mitigation land) is critical to the viability of many renewable energy projects in CA. The application of LEDPA to such non-wetland WOTS (many of which have limited hydrologic/biological value) could derail otherwise viable renewable energy projects due to the inherent delays/legal challenges associated with applying LEDPA (e.g., forcing an applicant to an alternative site over which it has no existing control/ownership). NextEra is not as concerned with applying LEDPA to “wetlands” since renewable energy projects in CA are often able to avoid most, if not all, wetlands. However, extending the LEDPA requirement to non-wetland WOTS is a significant departure from the way non-wetland WOTS are currently regulated (e.g., by CDFW under CEQA) and could ultimately have a crippling effect on CA’s ability to meet its climate change goals.


Conclusion

NextEra believes that the suggestions set forth above will allow the State to achieve the “no net loss” policy goals, while at the same time avoiding duplicative and burdensome regulatory processes. We believe there are still additional clarifications that can be inserted into the exclusions of projects requiring alternatives analysis and considerable opportunity to institute streamlining synergies to reduce regulatory overlap and increase procedural consolidation which will result in both the efficiency and effectiveness of the program for both the agencies and applicants.

NextEra would like to be provided the opportunity to work with the SWRCB in the development of these procedures to protect WOTS. Our goal is to assist in further streamlining the process while achieving both “no net loss” of wetlands and increasing renewable energy generation for the State of California.

If you have any questions or require additional information please contact Kyle Boudreaux at (561) 691-7358 or kyle.boudreaux@nexteraenergy.com.

Sincerely,



Michael W. Sole
Vice President, Environmental Services
NextEra Energy Resources