



San Diego County Water Authority

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September 18, 2017

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OTHER
REPRESENTATIVE

County of San Diego

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor -
Sacramento, CA 95814

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

Dear Clerk Townsend and Members of the Board:

The San Diego County Water Authority is the wholesale water agency in San Diego County with 24 member agencies serving a population of 3.3 million people. The Water Authority takes wetlands conservation planning seriously and is currently implementing a comprehensive Natural Community Conservation Plan/Habitat Conservation Plan (NCCP/HCP) through a 55-year agreement to protect natural resources in portions of San Diego and Riverside counties. As part of the NCCP/HCP which involved extensive scientific review and public participation, we have committed to a Wetland Protection and Mitigation Program emphasizing wetlands avoidance and minimization for unavoidable impacts, and includes a "no net loss of wetlands" mitigation standard which supports the State of California's Wetland and Riparian Area Protection Policy.

We appreciate modifications made by State Board staff to the Preliminary Draft of the State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State (Draft Procedures) to more closely align with U.S. Army Corps of Engineers (Corps) rules and guidelines. However, we continue to have concerns about the scope of the Draft Procedures, and have developed specific recommendations for changes to the language of the Draft Procedures to improve clarity and align with existing Corps rules and guidelines. These recommendations are included in the attachment to this letter. Some of our key issues are described below in more detail:

Wetland Definition (Section II)

The Wetlands definition should be revised to include the presence of vegetation to be consistent with the Corps' delineation manuals. The Regional Supplement to the Corps Wetland Delineation Manual for California clearly states that wetlands are areas containing greater than five percent (>5%) cover by vegetation whereas non-wetland waters of the U.S. are features containing less than five percent (<5%) cover by vegetation. As currently drafted, the Draft Procedures will create unnecessary conflict by proposing a new wetland definition that differs from the definition that has been used by

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the Corps since 1977. This discrepancy will result in features being classified as a wetland by the State Board but as non-wetland waters by the Corps, leading to conflicting alternatives analysis determinations and mitigation requirements.

The wetlands definition should exclude multi-benefit constructed facilities including artificial treatment wetlands as a Waters of the State and ensure that wetlands exclusions are consistent with the Corps' Clean Water Act (CWA) regulations. As proposed, the Draft Procedures may discourage development of artificial treatment wetlands. The Water Authority supports the construction of artificial treatment wetlands systems that intercept and remove nutrients and particulates, improving water quality. The Hodges Reservoir Natural Treatment System project under design and being funded through the San Diego Integrated Regional Water Management Program will implement a constructed biofiltration wetland to treat seasonally degraded water quality in the reservoir and storm water inflows from the surrounding urban communities. Hodges Reservoir suffers from a host of water quality issues and is currently listed as impaired under the CWA, Section 303(d). The water quality impairments are currently being addressed through the cooperation and coordination of many regional partners including the Water Authority. The Draft Procedures should not discourage the development of artificial treatment wetlands, such as the Hodges project, through onerous and duplicative provisions. The Water Authority endorses the joint letter submitted by Irvine Ranch Water District, City of San Buenaventura, San Bernardino Valley Water Conservation District and Santa Clara Valley Water District, which addresses similar issues, and we have incorporate the recommendations in that letter by reference.

Alternatives Analysis and Tiers (Section IV(A)(h))

Project acreage thresholds that trigger an alternatives analysis are unduly low and should be based on individual permanent direct impact to a wetland or water body, not cumulative project impact, similar to the Corps application of "single and complete linear project." As proposed, the Draft Procedures the project impact area threshold is so small that minor operations and maintenance activities will be burdened with elaborate alternatives analysis.

The Tier 3 category should not require projects that impact "rare, threatened or endangered species" to provide an alternatives analysis if that species is a Covered Species in a NCCP or HCP, and the project is being implemented subject to the NCCP and/or HCP. The Water Authority's comprehensive NCCP/HCP includes regional compliance with many environmental laws and regulations, including the Endangered Species Act, and provides for streamlined California Department of Fish and Wildlife Streambed Alteration permits [CFG Code §1602] for NCCP/HCP covered activities. In addition, the Water Authority's NCCP/HCP is a foundational document for the Water Authority's Programmatic Master Plan Permit, a 50-year term Corps CWA §404 permit, streamlining 404 permitting for NCCP/HCP covered activities. The Regional Board 401 certification was approved by operation of law. In its current form, the Draft Procedures

will significantly and unnecessarily stall the permitting process for activities that qualify for streamlined Corps' authorizations (permits). Lastly, we recommend changes to clarify that these Draft Procedures will not be applied to activities implemented under pre-existing permits associated with an NCCP or HCP, such as the Water Authority's Programmatic Master Plan 404 Permit.

Compensatory Mitigation (Section IV(B)(5)(c))

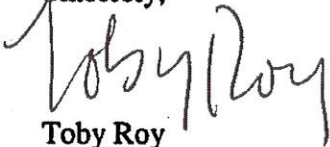
The Draft Procedures should include specific compensatory mitigation provisions for linear projects that would allow a project that impacts waters in multiple watersheds to consolidate wetlands mitigation at one location (one watershed), without incurring an "out-of-watershed mitigation penalty." Larger consolidated mitigation sites properly sited in the landscape have the potential for greater ecological benefits than multiple smaller sites making larger sites more environmentally preferable.¹

Definition of Watershed Plan (Section V)

The Watershed Plan definition should clearly identify pre-existing NCCP/HCPs as equivalent to Watershed Plans if they have adequately addressed wetlands resources. As detailed in the Draft Procedures, determination of compensatory mitigation using a watershed approach is required by the responsible permittee. The Water Authority's NCCP/HCP covers portions of San Diego and Riverside counties to provide region-wide wetland mitigation for future projects and operations. The NCCP/HCP's Preserve Area provides important, managed conservation sites for Covered Species and assists in building and connecting larger, biologically-diverse preserve lands. Project activities are prioritized emphasizing the expansion of habitat linkages and wildlife corridors. We highly encourage State Board staff to recognize that watershed approaches to planning have occurred outside of a Watershed Plan, as defined.

Thank you for consideration of our comments. Please contact Don Chadwick with any questions at (858) 522-6758.

Sincerely,



Toby Roy
Water Resources Manager

Sent via Electronic Mail to: commentletters@waterboards.ca.gov

¹ Compensatory Mitigation for Losses of Aquatic Resources; Final Rule, Federal Register Vol. 73, No. 70, April 10, 2008

Comments and Recommended Language Changes to Preliminary Draft
Procedures for Discharges of Dredged or Fill Materials into Waters of the State

No.	Section	Line Number	Comment	Recommended Language or Alternative(s)
1	Section I Introduction	7-9	The framework sweeps all artificial, Multi-benefit Constructed Facilities into the wetland Waters of the State designation which will deter development of new such facilities, as well as negatively impact the management and maintenance of existing facilities. (Refer to Comment No. 28 for a definition of Multi-benefit Constructed Facilities)	As described below, waters of the state include some, but not all, features that are defined as wetlands, as well as other features, including the ocean, lakes, and rivers, but, for purposes of these Procedures for the Discharges of Dredged or Fill Materials to Waters of the State, do not include features defined as Multi-benefit Constructed Facilities.
2	Section I Introduction	26-27	See Comment No. 1	These Procedures also include procedures for the review and approval of activities that could result in the discharge of dredged or fill material to any waters of the state in section IV. However, for purposes of these Procedures, features defined as Constructed Water Supply/Water Quality Treatment Facilities are not considered waters of the state under section II or section IV.
3	Section II Wetland Definition	34-35	The wetlands definition should be revised to include the presence of vegetation, consistent with the U.S. Army Corps of Engineers delineation manuals	(3) the area's vegetation is dominated by hydrophytes or the area lacks vegetation
4	Section II Wetland Definition	37-38	See Comment No. 1	The following wetlands are waters of the state unless they are Multi-benefit Constructed Facilities, in which case they are excluded as waters of the state for purposes of these Procedures:
5	Section II (3) Wetland Definition	41	The proposed procedures may discourage development of artificial treatment wetlands.	Wetlands that meet current or historic definitions of "waters of the United States," [1] and
6	Section II (4) (c) Wetland Definition	46-47	See Comment No. 5	Resulted from historic human activity and has become a relatively permanent part of the natural landscape;

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No.	Section	Line Number	Comment	Recommended Language or Alternative(s)
7	Section III Wetland Delineation	71-73	The wetlands definition should be revised to include the presence of vegetation, consistent with the U.S. Army Corps of Engineers delineation manuals. A dominance of hydrophytes is a key component in determining the presence of wetlands as a sub-set of the boarder category of Waters of the U.S. or state. Greater refinement to define areas that "lack vegetation" would be appropriate in Appendix A, Sub-part E where Special Aquatic Sites other than wetlands are defined.	Option A: The methods shall be modified only to allow for the fact that the lack of vegetation does not preclude the determination of such an area that meets the definition of wetland. Option B: "The methods shall be modified only to allow for the fact that the lack of vegetation does not preclude the determination of such an area that meets the definition of wetland if under normal circumstances the area would be dominated by hydrophytic vegetation."
8	Section IV. Procedures for Regulation of Discharges of Dredged or Fill Material to Waters of the State	88-90	See Comment No. 1	The purpose of this section is to establish application procedures for discharges of dredged or fill material to waters of the state, which includes both waters of the U.S. and non-federal waters of the state, <u>except for purposes of these Procedures, Multi-benefit Constructed Facilities are not considered waters of the state.</u>
9	Section IV (A)(1)(g) Project Application Submittal	155	We recommend the Draft Procedures exclude Multi-Benefit Constructed Facilities from the proposed permitting requirements by exempting them from the alternatives analysis.	<u>v. The project is a Multi-benefit Constructed Facility.</u>
10	Section IV (A)(1)(h) Project Application Submittal	162-163	We agree that there will be circumstances where less analysis is required to support authorizing some impacts, and staff should have this discretion. However, there are no procedures that the applicant can follow to determine if they qualify for a less stringent alternatives analysis. Please clarify how staff would apply this discretion.	An alternatives analyses shall be completed in accordance with the following tiers, <u>unless the permitting authority determines that a lesser level of analysis is appropriate.</u> [Add procedures on how a lesser level will be derived]

Comments and Recommended Language Changes to Preliminary Draft
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No.	Section	Line Number	Comment	Recommended Language or Alternative(s)
11	Section IV (A)(1)(h)(f-iii) Project Application Submittal	166-181	<p>The alternatives analysis is overly burdensome and should be revised to avoid significant disruption in the permitting process for activities that currently qualify for the U.S. Army Corps of Engineers' streamlined general permits. We recommend Section IV A(1)(h) be clarified so that:</p> <ul style="list-style-type: none"> • Impacts addressed under this section are identified as permanent impacts only • Acreage impacts that trigger an alternatives analysis should be calculated based on individual impact to a wetland or water body and not based on cumulative project impact (of all wetlands or water bodies for the entire project), similar to the U.S Army Corps of Engineers application of "single and complete linear project" as defined in the Federal Register, Vol. 82, No. 4, January 6, 2017 • Include an exemption from requiring offsite alternative analysis when it is being required solely because of the presence of habitat of the rare, endangered, threaten species, when that species is a Covered Species in a NCCP/HCP, and the project is being implemented subject to the NCCP/HCCP 	<p>i. Tier 3 projects include any <u>single and complete linear</u> project⁽¹⁾ that directly permanently impacts more than two-tenths (0.2) <u>of an one-half (0.5)</u> acre or 300 linear feet of waters of the state, or directly impacts a bog, fen, playa, seep wetland, vernal pool, headwater creek, eelgrass bed, anadromous fish habitat, or habitat for rare, threatened or endangered species not covered in a Department of Fish and Wildlife approved NCCP or U.S. Fish and Wildlife Service approved HCP ii. Tier 2 projects include any <u>single and complete linear</u> project that directly permanently impacts more than one tenth (0.1) and less than or equal to two-tenths (0.2) <u>one-half (0.5)</u> of an acre or more than 100 and less than or equal to 300 linear feet of waters of the state, or any project that inherently cannot be located at an alternate location (unless it meets the size requirements set forth in Tier 1). Tier 2 projects shall provide an analysis of only on-site alternatives.</p> <p>iii. Tier 1 projects include any <u>single and complete</u> linear project that directly permanently impacts less than or equal to one tenth (0.1) of an acre or less than or equal to 100 linear feet of waters of the state, unless it is a Tier 3 project because it impacts a specified habitat type. Tier 1 projects shall provide a description of any steps that have been or will be taken to avoid and minimize loss of, or significant adverse impacts to, beneficial uses of waters of the state.</p>

Comments and Recommended Language Changes to Preliminary Draft Procedures for Discharges of Dredged or Fill Materials into Waters of the State

No.	Section	Line Number	Comment	Recommended Language or Alternative(s)
12	Section IV (A)(2) Project Application Submittal	182	See Comment No. 10	Additional Information Required for a Complete Application, except for Multi-benefit Constructed Facilities.
13	Section IV (A)(2)(a) Project Application Submittal	183-185	The Draft Procedures identified State Board staff discretion to deviate from these procedures without identifying guidelines or otherwise examples of when and how staff should apply this discretion. We recommend adding language on a staff process for deviation.	If required by the permitting authority on a case-by-case basis, if the wetland area delineations were conducted in the dry season, supplemental field data from the wet season to substantiate dry season delineations. [Add procedures to clarify State Board staff discretion]
14	Section IV (A)(2)(b) Project Application Submittal	186-188	First, it is unclear how State Board staff would determine that a climate change assessment is needed. Second, language is vague regarding whether the applicant is analyzing the effect of their project on climate change or the climate change impact on their project. We recommend adding language that would outline staff process for deviation and the requirements of a climate change assessment.	If required by the permitting authority on a case-by-case basis, an assessment of the potential impacts associated with climate change related to the proposed project and any proposed compensatory mitigation, and any measures to avoid or minimize those potential impacts. [Add procedures to clarify State Board staff discretion to require a climate change assessment and the requirements of the assessment]
15	Section IV (A)(2)(c) Project Application Submittal	193-194	See Comment No. 1	Compensatory mitigation shall not be required for Ecological Restoration and Enhancement Projects or activities related to creating, restoring, enhancing, operating, managing, or maintaining function or value of Multi-benefit Constructed Facilities.
16	Section IV (A)(2)(c) Project Application Submittal	199-200	Recommend changes for greater clarity of procedures.	Draft compensatory mitigation plans required by this subsection shall comport with the State Supplemental Dredge or Fill Guidelines, Subpart J, and include the elements listed below.
17	Section IV (A)(2)(e) Project Application Submittal	240-241	Recommend changes for greater clarity of procedures.	Prior to commencement of permitted activities that would impact waters of the State, issuance of the Order , the applicant shall submit a final restoration plan that describes the restoration of all temporarily disturbed areas to pre-project conditions.
18	Section IV (B)(1) Permitting Authority Review and Approval of Applications for Individual Orders	251-254	Recommend changes for greater clarity of procedures.	The permitting authority will evaluate the potential impacts on the aquatic environment from the proposed project and determine whether the proposed project complies with the applicable provisions of the Procedures including sections IV.A.1.g and IV.A.2.

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No.	Section	Line Number	Comment	Recommended Language or Alternative(s)
19	Section IV (B)(3)(b) Permitting Authority Review and Approval of Applications for Individual Orders	284-290	Recommend changes for greater clarity of procedures.	If the project also includes discharges to waters of the state outside of federal jurisdiction, the permitting authority shall require the applicant to supplement the alternatives analysis to include waters of the state outside of federal jurisdiction <u>unless the project is exempt under Section IV.A.1.g.</u> If an alternatives analysis is not required by the Corps for waters of the U.S. impacted by the discharge of dredged or fill material, the permitting authority shall require an alternatives analysis for the entire project in accordance with the State Supplemental Dredge or Fill Guidelines, <u>unless the project is exempt under Section IV.A.1.(g) above.</u>
20	Section IV (B)(5) Permitting Authority Review and Approval of Applications for Individual Orders	293	Recommend changes for greater clarity of procedures.	Compensatory Mitigation Except as set forth in Section IV.A.2.c
21	Section IV (B)(5)(c) Permitting Authority Review and Approval of Applications for Individual Orders	300-311	The strategies identified under this section are excessive for an individual project, and are more appropriate in developing and guiding a watershed plan. The strategies should be deleted from this section, or redrafted to identify the minimum amount of information an applicant is to provide to support the approval of an individual project's proposed mitigation action.	Strategy 1: Applicant locates compensatory mitigation using a watershed approach based on a watershed profile developed from a watershed plan that has been approved by the permitting authority and analyzed in an environmental document, includes monitoring provisions, and includes guidance on compensatory mitigation opportunities; Strategy 2: Applicant locates compensatory mitigation using a watershed approach based on a watershed profile developed for a project evaluation area, and demonstrates that the mitigation project will contribute to the sustainability of watershed functions and the overall health of the watershed area's aquatic resources; applicant uses to locate the mitigation site within a watershed.
22	Section IV (D) Activities and Areas Excluded from the Application Procedures for Regulation of Discharges of Dredged or Fill Material to Waters of the State	382-384	Recommend State Board staff to strike this because the exception swallows the exclusion for Multi-benefit Constructed Facilities.	These exclusions do not, however, affect the Water Board's authority to issue or waive waste discharge requirements (WDRs) or take other actions for the following activities or areas to the extent authorized by the Water Code:

Comments and Recommended Language Changes to Preliminary Draft
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No.	Section	Line Number	Comment	Recommended Language or Alternative(s)
23	Section IV (D) Activities and Areas Excluded from the Application Procedures for Regulation of Discharges of Dredged or Fill Material to Waters of the State	384	We recommend changes to clarify that these Draft Procedures will not be applied to activities implemented under existing permits.	Add after last sentence: <u>Draft Procedures will not be applied to activities implemented under existing permits.</u>
24	Section IV (D)(2)(b) Activities and Areas Excluded from the Application Procedures for Regulation of Discharges of Dredged or Fill Material to Waters of the State	419-421	Exclude routine operation and maintenance activities from Draft Procedures.	Discharges of dredged or fill material that are associated with routine operation and maintenance of storm water facilities regulated under <u>implemented in compliance with another Water Board Order, such as, but not limited to, low impact development best management practices and</u> sedimentation/storm water detention basins.
25	Section IV (D)(2)(c) Activities and Areas Excluded from the Application Procedures for Regulation of Discharges of Dredged or Fill Material to Waters of the State	421	Add exclusion for Multi-benefit Constructed Facilities.	<u>Activities related to creating, restoring, enhancing, operating, managing, or maintaining Multi-benefit Constructed Facilities.</u>

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No.	Section	Line Number	Comment	Recommended Language or Alternative(s)
26	Section V, Definitions	438	Add Multi-benefit Constructed Facilities definition.	<p><u>Multi-benefit Constructed Facilities means artificial, man-made, or improved facilities that are operated to provide water supply/quantity, water storage, water conveyance, water quality treatment, and/or storm water, runoff or flood control functions, while also providing other environmental benefits, such as: groundwater recharge; natural beds, banks, soils, or substrates; wetland, riparian, or other habitat and vegetation, including, without limitation, naturalized surface water, runoff, or storm water quality treatment facilities or structural best management practices; naturalized surface water, runoff, storm water, or flood management swales, conveyance channels, or basins; naturalized percolation ponds and percolation channels; bio-filtration and bio-retention basins, ponds, and wetlands; and naturalized groundwater and surface water storage facilities.</u></p>
27	Section V, Definitions	510-511	The Watershed Plan definition should clearly identify pre-existing NCCP/HCPs as equivalent to Watershed Plans if they have adequately addressed wetlands resources.	<p><u>The permitting authority may approve the use of pre-existing HCPs and NCCP as watershed plans, when they are generally equivalent to other documents that meet the definition of watershed plans.</u></p>