

DEPARTMENT OF WATER RESOURCES

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SEP 15 2017

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control
1001 I Street, 24th Floor
Sacramento, California 95814



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

Dear Ms. Townsend:

The Department of Water Resources (DWR) provides the following comments on the State Water Resources Control Board's (SWRCB's) proposed State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State (Procedures). DWR staff have recently had several productive conversations with SWRCB staff to discuss DWR's comments below and to discuss potential paths towards resolution. DWR staff look forward to continuing this discussion with SWRCB staff to resolve DWR's comments to the best extent possible.

Definition of Ecological Restoration and Enhancement Project

DWR is a leading agency implementing California EcoRestore, a California Natural Resources Agency initiative undertaken in coordination with other state and federal agencies to advance the restoration of at least 30,000 acres of Sacramento-San Joaquin Delta habitat by 2020. This program includes a broad range of restoration projects, including aquatic, subtidal, riparian, and floodplain habitats to benefit a multitude of species, including endangered Delta Smelt and Chinook salmon.

DWR is concerned that the current Procedures would exclude EcoRestore and other restoration projects from the alternatives analysis exemption, causing a delay in the development and implementation of these critical projects. The definition for "*Ecological Restoration and Enhancement Project*" (Section V, line 451) in the current preliminary draft of the Procedures potentially excludes numerous DWR restoration projects with inclusion of the phrase "project is voluntarily undertaken" and also, "These projects also do not include ..., actions to service required mitigation,..."

Many of DWR's restoration projects are being implemented for compliance with the 2008 United States Fish and Wildlife Service Biological Opinion, the 2009 National Marine Fisheries Service Biological Opinion (collectively, BiOps), and/or the 2009 California Department of Fish and Wildlife Incidental Take Permit (ITP). The restoration obligations set forth in these BiOps and the ITP, are 'reasonable and prudent alternatives' to offset aquatic food-web impacts resulting from the ongoing operations of the State Water Project. The inclusion of DWR restoration projects under the SWRCB's definition of "Ecological Restoration and Enhancement Projects" will assist DWR and EcoRestore restoration projects in moving forward without a burdensome permit fee schedule and without needing to undertake a detailed Least Environmentally Damaging Practicable Alternative analysis, as such alternative analyses are already undertaken as part of DWR's restoration planning processes. DWR requests that the SWRCB edit the language in the definition of "Ecological Restoration and Enhancement Project", specifically in Section V, line 468 to read "...actions to service required mitigation (except as those undertaken by a state or federal agency as listed in 2) above, ..." (underlines denote suggested text addition).

It is worth noting that restoration activities carried out to fulfill DWR's obligations under the BiOps are fully expected to comply with Executive Order W-59-93, specifically, the objective relating to ensuring the no overall net loss and long-term net gain in the quantity, quality, and permanence of wetlands.

Climate Change and Sea-Level Rise

Climate change and sea-level rise are key considerations in DWR's planning process. With respect to DWR restoration projects, certain design elements such as habitat levees, berms, and refuge habitats, are often considered to be incorporated into the project design. While such elements serve as highly functional habitat and help to create habitat diversity, the implementation of such elements can, at times, result in the fill of small amounts of existing wetlands. However, as sea levels rise over the next 50+ years, these areas of 'fill' would typically be expected to revert back to wetlands. To help better streamline the incorporation of these types of features on 'Ecological Restoration and Enhancement Projects', such as those DWR is actively undertaking, DWR proposes the addition of the following text:

- Section A.2.b, line 188: "*For Ecological Restoration and Enhancement Projects, compensatory mitigation impacts can be based upon future regional sea level elevations.*"
- Section B.5.c., line 308: following "*buffer areas*" insert "*, including uplands for wildlife refugia and habitat transition zones,*"
- Section Subpart J, Section 230.92 Definitions, line 798: following "*land uses*" insert "*, including uplands for wildlife refugia and habitat transition zones.*"

Deference to Army Corps of Engineers Analysis

The current draft of the Procedures states that the permitting authority shall defer to the Corps' determinations on the adequacy of the alternatives analysis, or rely on a draft alternatives analysis if no final determination has been made, unless the Executive Office or Executive Director determines that (1) the permitting authority was not provided an adequate opportunity to collaborate in the development of the alternative analysis, (2) the alternatives analysis does not adequately address issues identified in writing by the Executive Officer or Executive Director to the Corps during the development of the alternatives analysis, or (3) the proposed project and all the identified alternatives do would not comply with water quality standards (Section IV.B, lines 275-283).

While DWR respects the SWRCB's need to exercise its independent authority with regard to permit issuance, we are concerned that the proposed Procedures could result in a conflict between two regulatory agencies, the SWRCB and the Corps, regarding the adequacy of an alternatives analysis for a project. As drafted, the Procedures do not provide any qualitative or quantitative metric by which the permitting authority will determine whether it was given an adequate opportunity to collaborate in the development of the alternative analysis, or how a determination will be made as to whether the alternatives analysis adequately address the issues identified. This approach will result in uncertainty for applicants since the agencies may use a different alternatives analysis for a project, creating a potential situation where the required project design and mitigation measures will conflict. In such a situation, significant delays in the implementation of critical restoration and flood protection projects could occur while conflicts between the two agencies are resolved.

Because of the need to implement projects in a timely manner, DWR respectfully encourages SWRCB to modify this section to allow for the development of a joint, collaborative alternative analyses that would satisfy both the Corps' and the Board's regulatory needs.

Adaptive management and long term financial assurances

Adaptive management, monitoring, and long-term financial assurances will typically be included for most DWR's projects. For DWR restoration projects located in the Delta and Suisun Marsh, such plans and financial assurances will be necessary for compliance with other state and federal regulatory agencies (e.g., Delta Stewardship Council's Delta Plan, etc.). In order to best streamline the implementation of DWR restoration projects, DWR plans on developing and utilizing a single adaptive management and/or monitoring plan for each restoration project, as appropriate, that would service the needs of all regulatory agencies and stakeholders. Furthermore, due to bond restrictions and the way that State Water Project (SWP) operations are financed, DWR is usually unable to fund endowments, and instead relies on other stable funding streams to ensure long-term function of the restoration sites.

Pursuant to the Burns-Porter Act, DWR is authorized to use SWP revenue without annual approval by the Legislature to pay the operations and maintenance of the SWP (Water Code Section 12937(b)). Costs incurred to pay for the operation and maintenance of fish and wildlife mitigation areas for SWP activities are considered SWP maintenance and operations obligations, included within the first priority before payment of other SWP obligations. In addition, DWR has a strong AA bond rating and is in a good financial position to make any on-going payments for mitigation purposes. DWR's contractors, which include Metropolitan Water District, also have strong credit ratings, which is additional assurance of DWR's ability to make on-going payments for fish and wildlife mitigation purposes. Under the water supply contracts, the contractors are required to raise taxes on real property in their districts to pay SWP bills if they do not have sufficient funds from other financial resources.

Thus, for DWR projects where a permit will require the establishment of long-term funding arrangements, DWR asks SWRCB to recognize the limitations placed upon an agency such as DWR and ensure that the Procedures allow for flexibility in defining the mechanisms by which the long-term funding needs can be met. DWR appreciates the SWRCB's broad interpretation in the handling of such plans and financial assurances (i.e., Section 230.95 Ecological performance standards, Section 230.96 Monitoring, and Section 230.97 Management), and encourages this section to remain as broad and inclusive as possible.

DWR appreciates the opportunity to provide the foregoing comments on the Procedures.

If you have any questions or would like to discuss the comments further, please contact Laurence Kerckhoff in the Office of the Chief Counsel at (916) 653-6186 or laurence.kerckhoff@water.ca.gov.

Sincerely,



Cindy Messer
Chief Deputy Director