



THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

Office of the General Counsel

Via E-mail and U.S. Mail



September 18, 2017

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

Re: Comments on Proposed Amendments to the California Ocean Plan and Inland Surface Waters, Enclosed Bays, and Estuaries of California Plan to Include Statewide Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State

Dear Ms. Townsend:

The Metropolitan Water District of Southern California (Metropolitan) reviewed the Proposed Amendments to the California Ocean Plan and Inland Surface Waters, Enclosed Bays, and Estuaries of California Plan to Include Statewide Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State (Procedures) prepared by the State Water Resources Control Board (SWRCB).

The proposed Procedures consist of the following components: (1) a wetland definition; (2) a framework for determining if a feature that meets the wetland definition is a water of the state; (3) wetland delineation procedures; and (4) procedures for application submittal, and the review and approval of Water Quality Certifications, Waste Discharge Requirements, and waivers of Waste Discharge Requirements for dredged or fill activities (collectively referred to as Orders). The Procedures were initially developed to strengthen protections for waters of the state that are no longer protected under the Clean Water Act (CWA) due to past US Supreme Court decision, and are intended to establish consistency across the Water Boards in regulating discharges of dredged or fill material into waters of the state, including wetlands, and to prevent losses in the quality and quantity of wetlands in California.

Metropolitan is pleased to submit comments for consideration by the SWRCB during the public comment period. Metropolitan provides these comments to highlight issues which may have the potential for direct or indirect impacts to Metropolitan's facilities and operations throughout the state.

BACKGROUND

Metropolitan is a public agency and is the largest distributor of drinking water in the United

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States. It is a regional water wholesaler that provides supplemental water to the southern California coastal plain to augment local water supplies developed by surface catchment, groundwater production, and wastewater reclamation. Metropolitan receives water from the California State Water Project (SWP) and from the Colorado River via the Colorado River Aqueduct (CRA). This supplemental water is delivered to its 26 member agencies through a regional network of canals, pipelines, reservoirs, treatment plants, and appurtenant facilities. Metropolitan serves approximately 19 million people living within a 5,200-square mile service area and the economy which supports it. Metropolitan participates in various water resource planning endeavors in southern, central, and northern California that involve conservation efforts for sensitive habitats and species. The mission of the Metropolitan Water District of Southern California is to provide its service area with adequate and reliable supplies of high-quality water to meet present and future needs in an environmentally and economically responsible way. This mission requires Metropolitan to work in and around waters of the State. Consistent with this mission, Metropolitan provides the following comments on the proposed Procedures.

GENERAL COMMENT

The SWRCB included a number of supporting materials on the program website, including a Fact Sheet which states that the Procedures will “Establish a uniform regulatory approach consistent with the federal Clean Water Act section 404 program for the discharge of dredged or fill material into all waters of the state, including wetland areas that qualify as waters of the state.”

Metropolitan supports consistency and uniformity among regulatory agencies responsible for protecting water quality by regulating dredge and fill activities. However, there are distinct differences in these SWRCB procedures that may result in inconsistency with the Clean Water Act 404 program, especially compared to the 1987 Wetlands Manual and Supplements (hereinafter referred to as the 1987 Manual), including the associated Regional Supplement for the Arid West Region. Additionally, some of the criteria in the procedures are undefined, and would be subject to interpretation and regulation on a “case by case basis,” which may result in subjective and inconsistent regulation. Specific examples are provided further in this letter.

WETLAND DEFINITION

The SWRCB Procedures define a wetland as follows (pg. 1):

An area is wetland if, under normal circumstances, (1) the area has continuous or recurrent saturation of the upper substrate caused by groundwater, or shallow surface water, or both; (2) the duration of such saturation is sufficient to cause anaerobic conditions in the upper substrate; and (3) the area’s vegetation is dominated by hydrophytes or the area lacks vegetation.

In contrast, the 1987 Manual contains the following definition:

The CE (Federal Register 1982) and the EPA (Federal Register 1980) jointly define wetlands as: Those areas that are inundated or saturated by surface or ground water at a frequency and

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duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

The definition proposed by the SWRCB is not consistent with the Army Corps definition, as supplemented by the Regional Supplement for the Arid West Region and could lead to vastly different delineations of wetlands.

With regard to element (2) in the SWRCB definition, the clarifier of “sufficient to cause” can lead to various interpretations and does not provide the same quantifiable definition. The Army Corps definition states that hydric soils are in fact “present.” Under the SWRCB definition, it could be interpreted that hydric soils are not present, but saturation is sufficient such that they “could be.” This is undefined, immeasurable, and could be subject to argument.

With regard to element (3) in the SWRCB definition, the allowance for areas that lack vegetation will lead to a broad interpretation of wetlands beyond the Army Corps definition. Metropolitan is concerned that this definition could lead to regulatory overreach and disrupt a project where, for example, a rain storm results in a temporary puddle that causes the site to meet the broad and undefined state definition of wetland. The 1987 Manual states: “By definition, wetlands are vegetated.” Furthermore, that Manual states: “The presence of hydric soils and wetland hydrology indicators in addition to vegetation indicators will provide a logical, easily defensible, and technical basis (emphasis added) for the presence of wetlands.” The SWRCB definition will lead to substantial additional regulatory burden for project proponents and could result in unexpected project delay if a wetland becomes present after a rain event.

If the SWRCB desires to have consistency with the 404 program, Metropolitan recommends adopting the same definition of wetland provided in the 1987 Manual. If the SWRCB wishes to regulate wetlands that are “left out” of the Corps 404 program due to Supreme Court decisions, then it may be possible to clarify that certain types of intrastate wetlands are included in the state procedures without adding in new definitions, procedures and requirements.

In Section 4(d) (pg. 2), the definition of covered wetlands excludes categories of artificial wetlands that are maintained for defined purposes unless they also satisfy criteria listed in Section 4(c), including:

Resulted from historic human activity and has become a relatively permanent part of the natural landscape

This criteria is very ambiguous. The terms “historic” and “relatively permanent” are not clearly defined nor measurable. Without a clear definition or explanation as to how the various criteria interact, Metropolitan is concerned that any of the examples of artificial wetlands could be easily interpreted by the SWRCB to be (regulated) waters of the state.

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Metropolitan recommends deleting this criteria in section 4(c). Additionally, Metropolitan recommends adding to the list of specifically excluded artificial wetlands: All ponds, lagoons, and other basins, and any lined and/or covered reservoirs created for, and appurtenant to, the storage, treatment, and distribution of municipal water supplies.

WETLAND DELINEATION

The Procedures state: “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” (pg. 3). The Fact Sheet acknowledges this inconsistency that “the Water Boards definition does not require the occurrence of vegetation to call an aquatic resource a wetland.”

This conflicts with the long-established delineation procedures provided in the 1987 Manual and regional supplements. The difference in criteria can lead to vastly different delineations of wetlands. The presence of hydrophytic vegetation is an important indicator for determining whether a wetland is present according to the 1987 Manual, and this recognition is also included in the regional supplements. In the Manual’s flowchart of steps involved in making a routine wetland determination when an onsite visit is necessary (Figure 14, pg. 50), if hydrophytic vegetation is not present, then no further investigation of other indicators is necessary. The feature would not be considered a wetland.

Metropolitan recommends the procedures maintain consistency with delineation procedures provided in the Corps 1987 Manual and supplements. Metropolitan recommends utilizing the Army Corps definition of wetland for consistency in delineating both federal and state wetlands.

PROCEDURES FOR REGULATION OF DISCHARGES OF DREDGED OR FILL MATERIAL TO WATERS OF THE STATE

Project Application Submittal

The Procedures state that “applicant must submit the items listed in subsection 1 to the permitting authority. In addition, applicants shall consult with the permitting authority about the items listed in subsection 2. Within 30 days of receiving the items listed in subsection 1, the permitting authority may require the applicant to submit one or more of the items in subsection 2 for a complete application. Within 30 days of receiving all of the required items, the permitting authority shall determine whether the application is complete and notify the applicant accordingly” (pg. 4).

The inclusion of this additional documentation on a case-by-case basis creates a potentially lengthy application process that would last longer than the combined 60 days, by allowing the permitting authority to arbitrarily decide that an item from Subsection 2 is also necessary. There are no listed criteria to support when the permitting authority may require additional items from subsection 2 to determine an application is complete. The purpose of the State Permit Streamlining Act of 1977 (Govt Code § 65920 et seq), is to expedite the processing of permits

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for projects by imposing time limits. These procedures will interfere with this.

Metropolitan recommends the SWRCB determine which specific items constitute a complete application subject to review under CA Govt Code § 65920 et seq. In addition, the Board should reconsider allowing for a case-by-case requirement of the following items, which could lead to further uncertainty and delay.

Items for Complete Application:

Dates

The Procedures require the applicant provide the “dates upon which the overall project activity will begin and end; and, if known, the date(s) upon which the discharge(s) will take place” (pg. 4).

It is often difficult to know the exact day when a project will begin and end, due to pre-project permitting uncertainty, schedule conflicts, and other factors, and it would be helpful to have some flexibility in this requirement and a recognition that these dates will often be approximations. Metropolitan recommends modifying this requirement to state “estimated dates upon which the project activity will begin and end . . .”

Maps

The Procedures state that the “permitting authority may require that the map(s) be submitted in electronic format (e.g., GIS shapefiles)” (pg. 4).

Maps can be provided as (static) figures in a variety of electronic formats (e.g. in .jpeg or .pdf format). A shapefile is “an Esri vector data storage format for storing the location, shape, and attributes of geographic features” (ESRI 2017). It is unclear whether SWRCB wants to have static map figures for their records, or shapefiles to be used for additional (spatial) analysis within GIS applications. In order to promote consistency statewide Metropolitan recommends the Procedures state specific digital file type(s) to be submitted under this program.

Alternatives Analysis, unless exempt

The procedures state “To the extent that the permitting authority is acting as the lead agency under CEQA, it may be necessary for the permitting authority to conduct further analysis to comply with CEQA” (footnote pg. 5).

This highlights an inherent conflict between these procedures and the federal requirements and CEQA. Under CEQA, an alternatives analysis is only required when preparing an Environmental Impact Report (Guidelines CCR § 15126.6) It is unclear how the SWRCB proposes to reconcile these application requirements with CEQA. It is imperative that the SWRCB and permitting authority participate in the CEQA public review process, especially as required under CCR § 15096(b), in order to ensure adequate information is included in the CEQA document for the purposes of issuing a state permit.

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One of the exemptions from the alternatives analysis requirement would be if the project is “conducted in accordance with a watershed plan that has been approved by the permitting authority...” (pg. 5). It is unclear what type(s) of watershed plan would meet this requirement. The procedures need to include more information on the type of watershed plan and specific content requirements that would suffice.

Additional Information Required for a Complete Application

Wet season delineation requirements

The procedures state that: “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” (pg. 6).

This is inconsistent with the 1987 Manual, which contains procedures for delineating wetlands, including measurable indicators, that apply at any time of the year. The 1987 Manual does not contain any seasonal restrictions and notes that the combination of indicators (wetland hydrology, hydric soils, wetland vegetation) are adequate to classify a wetland at any time of the year. In addition to being inconsistent the Procedures could create significant delay if a project proponent has to schedule delineations for a specific time of year.

Per previous comments, Metropolitan recommends adopting a definition, with indicators, consistent with the Army Corps 1987 Manual that would allow for a consistent process to delineate wetlands at any time of year. A desire for supplemental wet season data should not unnecessarily delay the processing of an application. Additionally, Metropolitan recommends the procedures allow for the Army Corps jurisdictional delineation to be acceptable information for a complete application.

Assessment of Climate Change

The Procedures state “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” (pg. 6).

This requirement is not clearly defined, and there is a risk that this could create unnecessary duplication and inconsistencies with other regulatory processes. The SWRCB did not provide any guidance or methodology on how an applicant should assess “potential impacts associated with climate change related to the proposed project and ... compensatory mitigation.” The fact that this could be required on case-by-case basis leaves room for too much subjectivity and inconsistency among permitting staff, which was supposed to be avoided with implementation of consistent procedures. This is inconsistent with the desire to “Strengthen regulatory effectiveness and improve consistency across all Water Boards.”

Metropolitan requests that the SWRCB defer to other regulatory processes that ensure that

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impacts associated with climate change will be considered and mitigated.

Assessment method for likely stressors

The procedures state “If compensatory mitigation is required by the permitting authority on a case-by-case basis, an assessment of the overall condition of aquatic resources proposed to receive a discharge of dredged or fill material and their likely stressors, using an assessment method approved by the permitting authority . . .” (pg. 6).

This is another example of undefined and inconsistent requirements within the procedures. The procedures do not include examples of assessment methods that may be acceptable. This could lead to different methodologies being accepted among the various regional boards. This is inconsistent with the stated desire to “Strengthen regulatory effectiveness and improve consistency across all Water Boards.”

Metropolitan requests that the SWRCB reference a standard, consistent, and reliable method for assessing the conditions of aquatic resources and their likely stressors.

Permitting Authority Review and Approval

The Procedures state “The permitting authority has the discretion to approve a project only if the applicant has demonstrated the following: A sequence of actions has been taken to first avoid, then to minimize, and lastly compensate for adverse impacts to waters of the state; The potential impacts will not contribute to a net loss of the overall abundance, diversity, and condition of aquatic resources in a watershed...” (pg. 8).

The SWRCB originally stated that the one of the main purposes of the Procedures was to comply with executive order W-59-93 “to ensure no overall net loss and long-term net gain in the quantity, quality, and permanence of wetlands acreage and values...” Executive Order W-59-93 explicitly applies to wetlands, however it appears the SWRCB is now applying the “no net loss” policy to all waters of the state, not just wetlands. This creates the potential that a project proponent would not be allowed to impact any waters of the state without providing compensatory mitigation. More significantly, this in turn, could pre-determines that any activity with any impact to a waters of the state could not be exempt from CEQA if it required compensatory mitigation, even for .001 acre of impact.

Metropolitan recommends the SWRCB establish thresholds of significance for impacts to waters of the state, such that minor alterations to land, maintenance of existing facilities, and repair and replacement of existing facilities could still be exempt from CEQA if they impacted minor amounts of waters of the state. The thresholds could be similar to acreage criteria within the Army Corps Nationwide Permitting program.

Metropolitan further recommends the Procedures align with the Nationwide Permitting program, which could allow for minimal individual and cumulative adverse environmental effects to waters of the state for specified projects and activities. According to the Corps, the nationwide

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permits “provide incentives to avoid and minimize impacts to wetlands, streams, and other aquatic resources because of the limits and other conditions imposed on these authorizations.” This would fulfill the SWRCB intent to “Establish a uniform regulatory approach consistent with the federal Clean Water Act section 404 program for the discharge of dredged or fill material into all waters of the state” and provide a consistent mechanism for the regulated community to receive permits for activities in waters of the state

Alternatives Analysis Review Requirements

The procedures state “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, unless the project is exempt under Section IV.A.1.(g) above” (pg.8). Alternatives analyses under these procedures would be based on different categories, or “tiers,” of projects.

This is inconsistent with the Army Corps 404 program requirements for an alternatives analysis and would not be consistent with the federal Clean Water Act section 404 program. This creates an entirely new and potentially duplicative alternatives analysis requirement and could cause permittees to prepare an alternatives analysis for Army Corps jurisdictional waters in accordance with a (different) SWRCB procedure.

Metropolitan recommends that the procedures align with the alternative analysis requirements of the Army Corps 404 program for consistency and reliability.

We appreciate the opportunity to comment on the 2017 Draft Procedures. If you have any questions, please call Sean Carlson at (213) 217-6276.

Yours truly,



Deirdre West
Manager, Environmental Planning Section

References:

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