



September 18, 2017

#06556

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
Email: commentletters@waterboards.ca.gov

RE: California High-Speed Rail Comments Regarding the State's July 21, 2017 Preliminary Draft "State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State"

Dear Ms. Townsend:

The California High-Speed Rail Authority ("Authority") provides the following comments in response to the State Water Resources Control Board's ("State Board") July 21, 2017 Preliminary Draft "State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State" ("Revised Procedures"). The Authority submitted comments on the earlier "Procedures for Discharges of Dredged or Fill Materials to Waters of the State" that the State Board released as a preliminary draft on August 18, 2016.¹ The Authority is pleased to see that the State Board made some positive changes to the Revised Procedures that address some of the Authority's, and other commenters', concerns. For example, the Revised Procedures allow for consolidating compensatory mitigation projects within multiple watersheds, a practical and ecologically preferable approach for linear projects such as the statewide high-speed rail system program ("Program"). In addition, the Revised Procedures have removed, in some important instances, references to each Regional Water Quality Control Board ("Regional Board") conducting "case-by-case" analyses; in those limited instances, the Revised Procedures will provide for greater clarity and consistency in the Procedure's application throughout the state.

Many of the Authority's concerns, however, are not adequately addressed in the Revised Procedures. If adopted as was proposed in 2016 and now, the Revised Procedures would likely have wide-ranging implications to the Authority's Program with the potential to delay the Program's implementation schedule. Importantly, the Revised Procedures could still force the Authority to repeat the alternatives development process in circumstances where the Authority has already reached agreement with USACE and USEPA. Additionally, for Authority projects where an alternatives analysis may not be required under the Clean Water Act, the Revised Procedures could require such an analysis, likely delaying approval, permitting and implementation, all with little environmental benefit.

The Authority submits the following specific comments and strongly urges the State Board to consider revisions to the Revised Procedures to fully address these issues:

¹ The "Background Regarding the High-Speed Rail" provided in the August 18, 2016 letter is incorporated herein.

BOARD MEMBERS

Dan Richard

CHAIR

Thomas Richards

VICE CHAIR

Ernest M. Camacho

Daniel Curtin

Bonnie Lowenthal

Nancy Miller

Lorraine Paskett

Michael Rossi

Lynn Schenk

EX-OFFICIO

BOARD MEMBERS

Honorable

r. Joaquin Arambula

Honorable Jim Beall

EDMUND G. BROWN JR.
GOVERNOR



- While the Revised Procedures do not include all of the prior references to “case-by-case” analyses, it now makes certain requirements mandatory, such as an alternatives analysis, except in very limited circumstances. As such, the Authority remains concerned with situations where the Revised Procedures would require an alternatives analysis for nationwide (“NW”) permitting where the Army Corps of Engineers (“ACOE”) does not require one. Additionally, the Revised Procedures continue to use the term “case-by-case” basis with respect to Sections IV.A.2.b and c (potential impacts due to climate change and the requirement of compensatory mitigation, respectively). This casts doubt on whether and to what extent these potentially lengthy assessments would be required at the time of application submittal. Moreover, the regulated community needs to know what the rules are so they can set budgets, schedules and expectations. Reliance on “case-by-case” rationale suggests the State Board will make up the rules *ad hoc*, which is contrary to the reasonable goal of regulatory certainty.²
- The Revised Procedures do not address the concern that the State Board would cover dredge or fill activities more broadly than the federal Clean Water Act. In broadly including activities that “could” result in discharge, the Revised Procedures introduce an inherent conflict in the scope of the alternatives analysis required by the Revised Procedures and federal law.
- Where the Revised Procedures describe the potential use of General Permits and explain that alternatives analyses will not be required for those permits, the Revised Procedures fail to include the types of General Permits that might be covered. If the State Board is not inclined to exempt certain “projects” from alternatives analysis in cases where they are entitled to NW authorization, the State Board should consider crafting General Permits that specifically integrate NW permit program criteria.
- The Revised Procedures do not address the Authority’s request that the term “project” be defined in a way that mimics the “single and complete” project as defined by the ACOE. The absence of a consistent definition that considers water “crossings” as a “single and complete” project renders the new tiered analysis strategy ineffective for much of the Authority’s Program.
- While the Revised Procedures still require deference to the ACOE’s determination on an alternatives analysis, this deference is only required where the State Board has “collaborated” with the ACOE, as opposed to the former term, “consulted.” It is unclear what “collaborate” means in this context, though it appears the State Board assumes it will have more of a hand in shaping alternatives analyses than previously proposed. In the absence of “collaboration,” this new requirement is still problematic because it creates additional uncertainty and the potential for conflicting and/or inconsistent requirements from the ACOE and the Regional and State Boards.
- The Revised Procedures do not address the Authority’s comments regarding the potential for conflicting mitigation. Instead, the Revised Procedures maintain that the Board will “consult and coordinate with” other public agencies with concurrent mitigation requirements, but only “where feasible.” As such, the Revised Procedures still leave open the possibility that mitigation accepted for purposes of the ACOE’s obligations under the federal Clean Water Act would not be acceptable under the Revised Procedures.
- The Revised Procedures should include a definition of the term “temporary” or “permanent” impacts, since those terms are used frequently and are important with respect to when an

² The Office of Administrative Law reviews regulations for clarity. (Gov. Code, § 11349.1, subd. (a)(3).) Clarity is defined as “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.” (Gov. Code, § 11349, subd. (c).) A regulation is not clear where “the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning....” (Cal. Code Regs., tit. 1, § 16.) Without greater specificity regarding these “case-by-case” analyses, there is no way to understand when and to what extent the Board will require an assessment.

- alternatives analysis may not be required (e.g., for projects with “temporary” impacts).
- Regional and State Board staff FTEs will no doubt be significantly increased by the Revised Procedures. In particular, and as the Authority has commented before, the Revised Procedures will likely result in the following: 1) additional analysis of proffered wetland delineations; 2) additional evaluation and analysis of alternatives analyses; 3) additional climate change analysis; and 4) additional mitigation planning analysis and requirements. The Authority is therefore concerned that this increased workload will slow Board review and approvals for Program permitting and thereby interfere with timely Program delivery. Potential delays and increased permitting costs associated with additional review would not only result at a permit-by-permit level, but from program-wide demands on staff time.

* * *

The Authority appreciates the State Board’s consideration of our earlier comments. We look forward to continuing our work with the Board to resolve our issues and concerns, and to establish a process that ensures the Authority’s Program moves forward expeditiously.

Sincerely,



Mark A. McLoughlin
Director of Environmental Services
California High Speed Rail Authority
mark.mcloughlin@hsr.ca.gov