

State Wetland Definition and Procedures for the Discharges of Dredged or Fill Material to Waters of the State

Public Staff Workshop and Stakeholder Meeting

February 6, 2019

CalEPA Coastal Hearing Room

9:00 am to 4:00 pm

Today's Agenda

- 9:00 – 9:15 Welcome and Introductions
- 9:15 – 10:30 Clarifications
- 10:30 – 10:45 Break
- 10:45 – 11:45 Clarifications continued
- 11:45 – 12:00 Clarifications Wrap-up
- 12:00 – 1:00 Lunch Break
- 1:00 – 2:30 Identification of Policy Issues, Pros and Cons
- 2:30 – 2:45 Break
- 2:45 – 3:45 Identification of Policy Issues, Pros and Cons continued
- 3:45 – 4:00 Policy Issues Wrap-up

Organization of Today's Content

1. Clarifications
2. Staff proposals for text changes
3. Policy issues

Waters of the United States are Waters of the State

The Water Code defines “waters of the state” broadly to include “any surface water or groundwater, including saline waters, within the boundaries of the state.” “Waters of the state” includes all “waters of the U.S.”² The following wetlands are waters of the state:

~~3. Wetlands that meet current or historic definitions of “waters of the U.S.,” and~~

Footnote #2 edits: Therefore, wetlands that meet the current definition, or any historic definition, of waters of the U.S. are waters of the state. In 2000, the State Water Resources Control Board determined that all waters of the U.S. are also waters of the state by regulation, prior to any regulatory or judicial limitations on the federal definition of waters of the U.S. (California Code or Regulations title 23, section 3831(w).)

Lines 40 - 44, page 2

Modification of Waters of the State

2. Wetlands created by modification of a surface water of the state, and...

Line 43, page 2

Stormwater Facilities

iii. Stormwater Detention, infiltration, or treatment, **of stormwater runoff and other pollutants regulated under a municipal stormwater permitting program,**

Lines 57 – 58, page 2

Surface Water Treatment Facilities – Staff Proposal

Added a type of artificial wetland to the jurisdictional framework:

~~iii.~~ **iv. Treatment of surface waters,**

Line 59, page 2

Renewal, Amendment, or Reissuance of Orders

Unless excluded by section IV.D, applicants must file an application with the Water Boards for any activity that could result in the discharge of dredged or fill material to waters of the state in accordance with California Code of Regulations, title 23, section 3855. **This application requirement applies to new discharges, proposed material changes in the character, location, or volume of existing discharges, and upon renewal of existing Orders for existing discharges. The permitting authority may amend an existing Order solely for the purpose of extending the expiration date without requiring a new application.**

Lines 108 – 112, page 4

Clarification for Consistency – Staff Proposal

The applicant may consult with the Water Boards to determine whether a project could result in ~~impacts~~ **a discharge of dredged or fill material** to waters of the state and/or discuss submittals that would meet the application requirements listed below.

Lines 113 – 114, page 4

Alternatives Analysis – Staff Proposal

- Footnote # 13: “Alternatives analysis” as used in these Procedures refer to the analysis required by section IV.A.1.h **and is a means to comply with** the State Supplemental Dredge or Fill Guidelines, section 230.10(a). An alternatives analysis also may be required in order to comply with other statutory or regulatory requirements, such as CEQA or **a Regional Board water quality control plan discharge prohibition.**

Alternatives Analysis for Operation and Maintenance of Existing Facilities

Added to Tier 2: **For routine operation and maintenance of existing facilities, analysis of on-site alternatives is limited to operation and maintenance alternatives for the facility.**

Lines 210 – 212, page 7

Passive Restoration for Temporary Impacts

Added: **If temporary impacts are proposed to be restored through passive restoration, the draft restoration plan shall include an explanation of how passive restoration will restore the area to pre-project conditions, assessment components, and an estimated date for expected restoration.**

Lines 274 – 277, page 9

Mitigation Ratio

A minimum of one-to-one mitigation ratio, measured as area or length, is required to compensate for wetland or stream losses when compensatory mitigation is required. A higher overall mitigation ratio shall be used where necessary to ensure replacement of lost aquatic resource functions, as described in the State Supplemental Dredge or Fill Guidelines, section 230.93(f).

Lines 380 – 384, page 11

Watershed Plan Definition

The permitting authority may approve the use of **other plans, including for example,** Habitat Conservation Plans (HCPs), and Natural Community Conservation Plans (NCCPs), **or municipal stormwater permit watershed management programs** as watershed plans, **if they meet the specific requirements stated above.**

Lines 581 – 584, pages 16 and 17

Habitat

b) ~~habitat for~~ rare, threatened, or endangered species **habitat in waters of the state;**

Multiple edits for consistency:

Lines 174 – 175, 184 – 185, 200 – 201, pages 6 and 7

Rebuttable Presumption

~~For discharges of dredged or fill material to a water of the U.S. that meets the Water Boards' definition of a wetland (set forth in section II), but that the Corps does not classify as a special aquatic site (as defined in subpart E of U.S. EPA's section 404(b)(1) Guidelines),~~ tThe-permitting authority shall not apply the presumption set forth in the State Supplemental Dredge or Fill Guidelines, section 230.10(a)(3) to **any non-vegetated waters of the U.S. that the Corps does not classify as a special aquatic site (as defined in subpart E of U.S. EPA's section 404(b)(1) Guidelines)** ~~those discharges.~~

Lines 341 – 347, page 10

Ecological Restoration and Enhancement Projects (EREPs)

“Prior to 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. **For Ecological Restoration and Enhancement Projects, the restoration or enhancement plan provided as part of the binding stream or wetland enhancement or restoration agreement or wetland establishment may satisfy this requirement.**”

Lines 281-284, page 9

EREP Assessment Plan Requirements

Added language: **“An assessment plan approved by a federal or state resource agency, or a local agency with the primary function of managing land or water for wetland habitat purposes in accordance with a binding stream or wetland enhancement agreement, restoration agreement, or establishment agreement, will satisfy these requirements. An assessment plan approved by a non-governmental conservation organization or a state or federal agency that is statutorily tasked with natural resource management may satisfy some or all of these requirements.”**

Lines 292 -298, page 9

Alternative Analysis Exemption: Corps' Regional Terms and Conditions for Corps' General Permits

- i. The project includes discharges to waters of the state outside of federal jurisdiction, but the entire project would meet the terms and conditions of one or more Water Board Board-certified Corps' General Permits, **including any Corps District's regional terms and conditions**, if all discharges were to waters of the U.S. The permitting authority will verify that the entire project would meet the terms and conditions of the Corps' General Permit(s) if all discharges, including discharges to waters of the state outside of federal jurisdiction, were to waters of the U.S. based on information supplied by the applicant.
- ii. The project includes only discharges to waters of the U.S. and meets the terms and conditions for coverage under an uncertified Corps' General Permit, **including any Corps District's regional terms and conditions**.
- Lines 163 – 165, and Lines 170 – 171, page 6

Alternative Analysis Exemption: Uncertified Corps' General Permits, Limited to Waters of the U.S.

ii. The project **includes only discharges to waters of the U.S. and** meets the terms and conditions for coverage under an uncertified Corps' General Permit, including any Corps District's regional terms and conditions.

Line 169, page 6

Discharges of Dredged or Fill Materials

Added new footnote:

#12: Note that not all activities identified in this section necessarily result in discharges of dredged or fill material to waters of the state.

Footnote 15, page 12 (line 442)

Agriculture Activities – Staff Proposal

Staff proposal to add to board resolution adopting Procedures:

“The State Board recognizes that the Water Boards currently do not generally regulate discharges of dredged or fill material to waters of the state associated with agriculture activities excluded under section IV.D. of the proposed Procedures. Prior to regulating such discharges, the State Board expects that the regional water boards will notify the State Water Board’s Executive Director.”

See Lines 446 – 450, page 13

Clean Water Act section 404(f)

- a. Activities that are exempt under CWA section 404(f) (33 USC § 1344(f)). The permitting authority shall use 33 CFR 323.4 (1986) and 40 CFR 232.3 (1988) following federal regulations (Table 1), guidance letters (Table 2), and memoranda (Table 3), that have been adopted pursuant to CWA section 404(f) or that are used to interpret or implement section 404(f) shall be used when to determineing whether certain activities are excluded from these procedures exempt under CWA section 404(f). These documents regulations are hereby incorporated by reference and shall apply to all waters of the state.

Lines 452 – 472, page 13

Prior Converted Cropland

2. Areas excluded from application procedures in sections IV.A and IV.B:

Wetland areas that ~~are currently certified~~ qualify as prior converted cropland (PCC) within the meaning of 33 CFR section 328.3(a)(8). The applicant may establish that the area is PCC by providing relevant documentary evidence that the area qualifies as PCC or by providing a current PCC certification by the Natural Resources Conservation Service, the Corps, or the U.S. EPA to the permitting authority.

This exclusion will no longer apply if the wetland area changes to a non-agricultural use.