



THE CITY OF SAN DIEGO



September 18, 2017

VIA EMAIL TO: commentletters@waterboards.ca.gov

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

Subject: Statewide Dredged of Fill Procedures Final Draft dated July 21, 2017

Dear Ms. Townsend:

The City of San Diego (City) appreciates the opportunity to comment on the State Wetland Definition and Procedures for the Discharges of Dredged or Fill Materials to Waters of the State (hereafter referred to as Procedures).

The City acknowledges and supports the identified goals of the State Water Resources Control Board (State Water Board) in proposing the Procedures. The City's general comments are provided in this letter, and the attached table provides comments for each component. Text-specific suggested edits are also included where applicable.

The City believes it is beneficial to have standards that are applied statewide and follow the guidelines in place by the U.S. Army Corps of Engineers. This standardized approach would ensure that permit conditions are imposed using objective and consistent standards, and would prevent excessive or duplicative mitigation requirements. Streamlined processes allow for the timely protection of the public's health and safety, such as flood risk reduction-related channel maintenance efforts, while improving efficiency of government practices.

Additionally, the City encourages the State Water Board to include a fourth issue – streamlining the regulatory review and permit decision processes. This can be accomplished by incorporating consistency between local, state, and federal regulations, where possible. Several examples are provided in the attached table. A complicated and cumbersome regulatory process negatively affects California's economy and the government's ability to provide essential public services.

Transportation & Storm Water Department

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Please see the enclosed table that accompanies this letter for additional comments and further details. We appreciate this opportunity to share our comments. If you have any questions, please contact Ruth Kolb at (858) 541-4328 or at rkolb@san Diego.gov.

Sincerely,



Drew Kleis
Deputy Director

DK\sb

Enclosure: City of San Diego Comment Table - Dredge and Fill Comments

cc: Paz Gomez, Deputy Chief Operating Officer, Infrastructure/Public Works
Alejandra Gavaldon, Director of Infrastructure and Water Policy, Office of the Mayor
Kris McFadden, Director, Transportation & Storm Water Department
Davin Widgerow, Deputy City Attorney, City Attorney's Office
Gene Matter, Assistant Deputy Director, Transportation & Storm Water Department
Ruth Kolb, Program Manager, Transportation & Storm Water Department
Christine Rothman, Development Project Manager III, Transportation & Storm Water Department

#	Applicable Document Sections	Comment	Recommendation
Purpose of Procedures			
1.	Staff Report – Section 2, Executive Summary	Development of these Procedures is stated to be based on three issues, and the City strongly recommends that a fourth issue be added to address the regulatory review and permit decision processes.	The Procedures should address the following fourth issue: streamline the regulatory review and permit decision processes.
Wetland and Waters of the State Definition			
2.	Draft Procedures – Section II, Wetland Definition	<p><u>Waters of the State</u> The Procedures continue to define “waters of the state (WOTS)” broadly, and the Staff Report makes clear that the State will exercise broad, undefined discretion in determining the extent of WOTS. As stated in the public comments on the 2016 draft Procedures, this broad, undefined authority places a significant burden on the regulated community. By failing to include a clear-cut definition of WOTS, the draft Procedures still do not provide certainty to landowners and municipal agencies.</p> <p>As a frequent applicant to the San Diego Regional Water Quality Control Board (San Diego Water Board) for Section 401 water quality certifications, the City would still be subject to a case-by-case evaluation of whether a particular resource is considered WOTS. Such uncertainty and broad discretion given to Water Board staff to determine the extent of WOTS on a case-by-case basis, is untenable to the regulated community as it lacks predictability, transparency, or consistency.</p> <p><u>Wetland Waters of the State</u> The City appreciates the State Water Board’s revisions to the Procedures, which now include additional parameters/guidelines for when a wetland feature will also be considered a WOTS. However, the City remains concerned that the Procedures provide too much discretion and are too ambiguous for what wetlands qualify as WOTS. At the August 10 workshop, Water Board staff explained that a clear cut and</p>	<p>Section II, lines 36 and 37, of the Procedures should be revised as follows: “The Water Code Procedures defines “waters of the state” broadly to include “any surface water or groundwater, including saline waters, within the boundaries of the state.” <u>those areas that are considered waters of the US or that meet the state’s wetland definition.</u>”</p> <p>Additionally, the Water Board should replace the currently proposed wetland definition with the existing federal wetland definition and guidelines, which are utilized by the Army Corps of Engineers (ACOE) and the Environmental Protection Agency (EPA).</p>

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		<p>all-encompassing definition for WOTS has not and will not be put forth, and determinations will continue to be made on a case-by-case basis. This may cause permitting delays for routine and minor City projects as Section II.4.c of the Procedures identify that artificial wetlands that “[have] resulted from historic human activity and [have] become a relatively permanent part of the natural landscape” qualify as WOTS.</p> <p><u>Wetland Definition</u> The Water Board proposes a wetland definition that differs from and expands the federal definition of wetland. The federal definition requires all three criteria to be present under normal circumstances: hydrology, hydrophytic vegetation, and hydric soils. The proposed state definition would require only two parameters, hydrology and hydric soils, to be present in order to define an area as a wetland. The inclusion of unvegetated resources as wetlands of the State conflicts with the Federal definition, which will confuse applicants. Furthermore, the proposed definition also includes artificial wetlands, including storm water detention/treatment areas of one acre in size or more. Such artificial wetlands are often excluded under federal regulation.</p> <p>The primary stated goal of the draft Procedures is to ensure that isolated waters that may lack federal jurisdiction are still protected under state law. The proposed definition unnecessarily and inappropriately classifies areas as wetlands that do not meet the federal definition and are not necessarily isolated. While these areas may be considered WOTS, classifying them as wetlands confers additional sensitivity to resources that may provide only limited functions and services based on the presence of only two of the three wetlands criteria. At the August 10 workshop, Water Board staff explained that that the wetland definition in the Procedures was “effectively the same” as the federal wetland definition, when amendments and case law are considered. The City believes it would be clearer and</p>	<p>If the Water Board does not replace the definition as suggested, at minimum, a definition should be provided for the term “relatively permanent” as it relates to artificial wetlands described in Section II.4.c of the Procedures.</p>

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		<p>more effective to adopt the same wetland definition that is used by the federal government in order to avoid any future disagreements or complications.</p> <p>This issue could result in disagreements between federal and state agencies requiring wetland delineations that address both state and federal definitions. This could result in significant delays for City priority projects. The City supports adoption of a wetland definition that is consistent with the current federal definition.</p>	
3.	Draft Procedures – Section II, Wetland Definition	The Procedures state that “If an aquatic feature meets the wetland definition, the burden is on the applicant to demonstrate that the wetland is not a water of the state.” Additional guidance is needed to clarify the intent of this statement.	Section II of the Procedures should include additional guidance related to this statement and how an agency would go about demonstrating to the State Water Board that an aquatic feature is not a WOTS.
Project Application Requirements			
4.	Draft Procedures – Section IV.A, Item 1.f	<p>Item f requires quantification of impact to the nearest one-thousandth (0.001) of an acre. This is an unnecessary requirement and differs from standard practice within the industry. One-thousandth of an acre is approximately 40 square feet (or roughly a 6-foot by 6-foot area). Standard rounding to the nearest one-hundredth would adequately account for impacts since, in roughly half of the cases, impacts would be rounded down and in half of the cases impacts would be rounded up.</p> <p>Tracking and accounting for impacts and mitigation to the nearest one-thousandth of an acre places an undue regulatory burden on applicants and the Water Boards. The City supports quantification and tracking to the nearest one-hundredth (0.01) of an acre in accordance with standard industry practice.</p>	Section IV.A, Item 1.f, lines 136 of the Procedures should be revised as follows: “...each location rounded to the nearest one-thousandth (0.001) <u>one-hundredth (0.01)</u> of an acre, nearest linear foot, and...”

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5.	Draft Procedures – Section IV.A, Item 1.g	<p>Item g requires an alternatives analysis with only a very narrow list of exemptions and a tiered approach to determine the type of analysis required for different size/type projects. While this is an improvement to the case-by-case determination in the 2016 draft Procedures, as nearly all projects would be subject to an additional regulatory review process that is not currently in place and is not implemented by the California Department of Fish and Wildlife or US Army Corps of Engineers for similarly sized projects, this places an undue burden on the City. The City supports the current guidance for the federal process relative to alternatives and Least Environmentally Damaging Practicable Alternative (LEDPA) determination and requests that instead it includes avoidance, minimization and mitigation discussions to ensure consistency in the process.</p> <p>Under existing federal regulation, projects with impacts under one-half (0.5) acre generally qualify for a Nationwide Permit (NWP) and are not required to complete an alternatives analysis because those impacts are considered minimal. As proposed, for a typical project that qualifies for an NWP, the City expects that permitting costs under the draft Procedures would increase by 50-150% if an alternatives analysis is required by the Water Board. It is unclear that such an additional administrative burden is necessary to protect WOTS given that projects that qualify for NWPs are, by definition, limited in scope and scale and cumulatively result in minimal adverse impact to aquatic resources. The only justification for a state LEDPA analysis, when no federal LEDPA analysis is being conducted, is in cases where the application involves impacts to significant areas of non-federal waters.</p>	<p>Section IV.A, Item 1.g, line 141 of the Procedures should be revised as follows: “An alternatives analysis <u>for projects that impact one-half (0.5) acre or more of WOTS,</u>⁹ unless any of the following exemptions apply.”</p> <p>Section IV.A, Item 1.h, line 156 of the Procedures should be revised as follows: “If <u>the project impacts one-half (0.5) acre or more of WOTS and</u> none of the above exemptions apply, the applicant must submit an alternatives analysis...”</p>
6.	Draft Procedures – Section IV.A, Items	The use of 100 and 300 linear foot limits within tiered framework will result in the majority of projects being required to provide a Tier 3 analysis. Channel maintenance projects to manage storm water conveyance systems are particularly affected because impacts are often larger than 300 linear feet due to the pre-	Section IV.A, Items 1.g and 1.h of the Procedures should be revised to include additional language or a footnote that provides criteria that

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	1.g & 1.h	<p>existing shape of the facility. While the draft Procedures include recognition of projects “that inherently cannot be located at an alternate location,” the draft Procedures do not define how this will be determined. The analogous federal regulation is 40 CFR Section 230.10(a)(3), which states that offsite alternatives are required to be analyzed unless the activities “requires access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose.” In practice, determining that an activity is water-dependent under federal regulation is highly limited.</p> <p>As such, the City requests clarification regarding the criteria that Water Board staff would use to determine if a project inherently cannot be located at an alternate location. Storm water management and maintenance projects should be explicitly included in the criteria since off-site alternatives are cost-prohibitive in nearly every case.</p>	<p>Water Board staff would use to determine if a project inherently cannot be located at an alternate location. Storm water management and maintenance projects should be explicitly included in the criteria since off-site alternatives are cost-prohibitive in nearly every case.</p>
7.	Draft Procedures – Section IV.A, Item 2.b	<p>The case-by-case requirement for climate change assessment should include criteria that would be used by Water Board staff to determine or justify why an assessment is required. This would help the regulated community anticipate when an assessment may be required and assist in communication with Water Board staff regarding the basis and the potential nexus between the project and potential affects from climate change.</p>	<p>Section IV.A, Item 2.b, line 186 of the Procedures should be revised as follows: “If required by the permitting authority on a case-by-case basis a project is anticipated to exceed an established threshold of significance, the permitting authority may request an assessment of the potential...”</p>
8.	Draft Procedures – Section	<p>The Procedures identify that, if project activities include in-water work or water diversions, a water quality monitoring plan may be required on a case-by-case basis for a project application to be considered complete. Many of the City’s</p>	<p>Section IV.A, Item 2.d, line 226 of the Procedures should be revised as follows: “...should include type and</p>

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	IV.A, Item 2.d	<p>routine channel maintenance projects involve in-water work or water diversions, and as such, this requirement would be overly burdensome for routine channel maintenance projects intended to reduce potential flooding and improve safety. The City strongly urges the Water Board to consider adding an exemption from this application requirement for linear routine maintenance projects conducted to maintain the original purpose or hydraulic capacity of a linear facility. This is consistent with existing exemptions found in the Construction General Permit (General Permit) (Order No. 2009-0009-DWQ).</p>	<p>frequency of sampling for each applicable parameter. <u>Linear routine maintenance projects conducted to maintain the original purpose or hydraulic capacity of a linear facility are explicitly exempt from base-by-case requirement.</u>"</p>
9.	Draft Procedures – Section IV.B, Item 3.a	<p>The proposed requirement for analysis of direct, secondary (indirect), and cumulative impacts on the physical, chemical, and biological elements of the aquatic ecosystem is an extensive and excessively burdensome degree of analysis considering the requirement is placed on nearly all projects, with very few exemptions, including impacts to less than 0.1 acre or 100 linear feet. Such extensive analysis should be reserved for projects with large impacts (greater than 0.5 acre or more) that do not qualify for a Nationwide Permit. In these cases, such analysis will likely be required by the US Army Corps of Engineers and can occur concurrently and in collaboration with state review.</p> <p>As proposed, this detailed analysis would require extensive expenditures on the part of applicants to, for example, provide analysis of chemical constituents that may indirectly be affected by a proposed activity, as opposed to the current and common practice of using physical and biological mapping of jurisdictional resources as a sufficient surrogate to assess most potential impacts.</p>	<p>See recommendations under Comment 5 above.</p>
10.	Draft Procedures – Section IV.B, Item	<p>Watershed plans are referred to in several parts of the draft Procedures. The applicant’s use of compensatory mitigation that is consistent with an approved watershed plan is incentivized. The City appreciates the explicit acknowledgement in the definitions section that Habitat Conservation Plans (HCP) and Natural</p>	<p>Section IV.B, Item 4.c of the Procedures should explicitly state that HCPs and NCCPs will be accepted in lieu of a watershed plan.</p>

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	5.c	<p>Community Conservation Plans (NCCP) may be approved as watershed plans. The Staff Report indicates that such plans will not be reviewed or approved prior to adoption of the Procedures.</p> <p>The City views the City’s Multiple Species Conservation Program (MSCP) Subarea Plan as containing the required elements to be an approved watershed plan. As such, the City expects that any compensatory mitigation proposed consistent with the MSCP (i.e., located within the Multi Habitat Planning Area; MHPA) would be conferred the preferential status provided for by the draft Procedures. The City would have significant concerns if the San Diego Water Board takes the position that the MSCP Subarea Plan did not adequately focus on aquatic resources and a separate new watershed plan(s) is required for our region. The MSCP guides land use regulations with regards to wetlands and waters within San Diego. It was developed through a collaborative, scientific-based public process and it is unclear that a new, separate watershed plan(s) would result in different land use regulations.</p> <p>The City supports provisions that recognize existing plans may be approved as watershed plans. The City strongly objects that only Special Area Management Plans or new watershed plans are allowed to qualify as approved watershed plans. As stated in the Staff Report, it is not the intention of the Water Boards to create watershed plans, and if something other than the MSCP Subarea Plan is required within the City of San Diego, it would place a significant burden on government resources. Because the MSCP accounts for wetlands resources, any new plan(s) required by the Water Board to meet the standards in the Procedures would not necessarily result in improved land use regulations and would be an unnecessary expenditure of public resources.</p>	

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11.	Draft Procedures – Section IV.B, Item 5.e.	<p>Regarding mitigation plans, per the Procedures, the permitting authority may include as a condition of an order that final approval of the mitigation plan be received prior to the discharge of dredge or fill material. This section also requires that the permitting authority approve the final mitigation plan by amending the order.</p> <p>In the City’s experience, permit amendments are generally a lower priority for local RWQCB staff compared to other permit applications. Amendment requests may have no action for a year or more even for minor modifications. If the approval of the mitigation plan is by amendment, but permitting authority does not have the staff to issue the amendment, this could unnecessarily delay projects and add costs due to project delays.</p>	Section IV.B, Item 5.e, lines 348 and 349 of the Procedures should be revised as follows: “In this case, the permitting authority will approve the final mitigation plan by amending the Order <u>or by issuing a formal letter of approval.</u> ”
12.	Draft Procedures – Section IV.D, Item 2.b	This section discusses that discharges of dredge/fill when associated with routine maintenance of storm water facilities regulated under another Water Board Order would be excluded from these procedures. Please clarify if this includes all storm water facilities , including those identified in Municipal NPDES Storm Water permits which typically require maintenance of the entire municipal storm water system including drains, open channels, pipes, etc.	Section IV.D, Item 2.b, lines 419 through 421 of the Procedures should be revised as follows: “Discharges of dredged or fill material that are associated with routine maintenance of <u>all</u> storm water facilities regulated under another Water Board Order, such as sedimentation/storm water detention basins including those identified in Municipal NPDES Storm Water permits. ”
Initiatives to streamline the permit application, review, and approval process should be continued and expedited.			
13.	General	At the August 10 workshop, Water Board staff explained that several initiatives, outside the scope of and separate from the Procedures, are underway that are	The Water Board should continue to pursue, and expedite where

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		<p>intended to improve the permit application, review, and approval process so that it is uniformly administered throughout the State and is streamlined and expedited. One of the initiatives identified by Water Board staff is to approve additional Section 401 Water Quality certifications for General Permits established under Section 404. The City has a broad array of mandates and responsibilities, including a wide range of maintenance duties within jurisdictional resources, which typically require intensive staff time and coordination in order to obtain permits. The City strongly supports the effort and initiatives to streamline and expedite the permit process, including the additional certifications.</p>	<p>possible, the approval of additional Section 401 Water Quality certifications for Section 404 General Permits.</p>
14.	<p>Draft Procedures – Section V. Definitions – Project Evaluation Area</p>	<p>Clarify the definition of “ecologically meaningful unit” when determining the project evaluation area. In addition, basing the determination of the ecological meaningful unit on a “reasonable rationale” further complicates the process. The definition of this concept is unclear, vague and seemingly subjective. The lack of clarity is strongly related to the evaluation of the effects of the project and /or compensatory mitigation. In addition, it is unclear if Board staff determine the evaluation area or if the applicant proposes the extent of the evaluation area. If the applicant proposes the extent, the City recommends the Board include a discussion of the amount of effort needed to determine the project evaluation area and/or provided an example for review and comment.</p>	<p>The Project Evaluation Area definition in Section V. of the Procedures should be revised to clarify the meaning of “ecologically meaningful unit.”</p> <p>The Water Board should also provide an example of an applicant-proposed project evaluation area for review and comment.</p>
15.	<p>Draft Procedures – Section V. Definition – Watershed Profile</p>	<p>As proposed, the definition of a watershed profile related to the extent of the project evaluation area is unclear. The City appreciates the suggestion that the scope of the project profile should be commensurate with the magnitude of project impacts but also has concerns that, as proposed, the submittal of the profile should include a map and a report, which will potentially contribute to delays in processing.</p>	<p>The Watershed Profile definition in Section V. of the Procedures should be revised to clearly identify the required parameters and extent of a watershed profile.</p>

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Supplemental Dredge or Fill Guidelines			
16.	Draft Procedures – Appendix A, Subpart J	<p>The City has significant concerns with the portions of the federal Subpart J – Compensatory Mitigation for Losses of Aquatic Resources that are excluded under the proposed state Procedures. These exclusions include those sections that provide definitions and processes to establish advanced mitigation credits such as through the establishment of mitigation banks, in-lieu fee programs, or Advanced Permittee-Responsible Mitigation (APRM). The Water Board seems to be taking the position that Regional Boards will not participate in Interagency Review Team (IRT) and will not explicitly approve the establishment of advanced mitigation credits by excluding these sections. Instead, such credits may be used on a case-by-case basis, but in contradiction to federal regulation, under the proposed state Procedures there is no clear hierarchical preference for mitigation banks.</p> <p>Advanced mitigation credits are a critical method of providing compensatory mitigation. The City, in particular, has invested in establishing a Memorandum for the Record (MFR) with the US Army Corps of Engineers to provide APRM and intends to use this instrument for the majority of future City projects. This approach is based on federal regulations which provide a clear preference for advance credits, based on an ecological justification that such credits result in greater protection and improvement to aquatic resources. The State Board’s reticence to participate in the establishment of advanced credits and to instead defer to case-by-case evaluations by staff significantly reduces the state’s ability to protect and improve aquatic resources. Instead of being able to invest in large, advance mitigation projects with the certainty that resulting credits will be accepted by all regulatory agencies, applicants, including the City, are subject to future case-by-case evaluation which may determine that such advance credits are not preferred over project-by-project mitigation.</p>	Appendix A, Subpart J of the Procedures should be revised to incorporate the currently excluded portions of the federal regulation, so that the same preference for advance mitigation credits is established at the state level and that the Regional Boards have clear regulations that allow them to participate in IRTs and approve advance mitigation credits.

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17.	Draft Procedures – Appendix A, Subpart J, section 230.96 (b) Monitoring period	The City strongly supports the flexibility in monitoring periods to allow the permitting authority to reduce or waive remaining monitoring requirements upon a determination that the mitigation has achieved performance standards. Conversely, the City understands the need to extend monitoring periods when a site is not meeting standards, but would appreciate more explanation of cases when sites do not meet criteria, which may be natural ecological factors that change beyond the applicant’s control.	Appendix A, Subpart J, of the Procedures should be revised to include additional discussion on procedures available to applicants in cases when sites do not meet criteria.