



Marin Audubon Society

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August 17, 2016

VIA commentletters@waterboards.ca.gov
Jeanne Townsend, Clerk of the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000



Re: Comments on Procedures for Discharges of Dredge or Fill Materials to Waters of the State

Dear Ms., Townsend,

Thank you for the opportunity to comment on the "Preliminary Draft Procedures for Discharges of Dredged and Fill Materials to Waters of the State; Proposed for Inclusion in the Water Quality Control Plans for Inland Surface Waters and Enclosed Bays and Estuaries and Ocean Waters of California Procedures for Discharges of Dredged or Fill Materials to Waters of the State." The Marin Audubon Society has a long history of involvement with the Corps of Engineers 404 program and the Water Board's 401 and NPDES programs, both as an advocate for wetlands in comments on Public Notices for filling wetlands and as an applicant. During the last 20 years, Marin Audubon has restored almost 1,000 acres of wetlands, and this, of course, has required that we go through the regulatory permitting processes. With this background, we express our support for the State's proposal to expand regulation of wetlands to close the gaps in the federal regulatory program left by court decisions. While many of the proposed procedural changes would be beneficial for wetland resources, we believe that certain aspects would not further the protection of wetlands and would be contrary to state wetland protection policy. We urge changes as described below.

Some provisions of the proposed Procedures do not support or further the 1993 California Wetlands Conservation Policy and would violate the goal of "ensuring no overall net loss of wetlands and achieving a long-term gain in the quantity, quality and permanence of wetlands acreage and values." In fact, as discussed below, many of the proposed provisions would contribute directly to a significant overall loss of wetland acreage, functions and values. The state's goal should be achieving a net gain in wetlands quality, quantity and permanence.

Wetland Definition and Waters of the State

We support changing the wetlands definition to allow for use of two parameters instead of three as required by the 404 (B)(1) Guidelines. Waters of the State should be clearly defined and should include all wetlands. This would fulfill one of the stated purposes of revising the Procedures i.e. to consider wetlands no longer regulated as a result of court decisions and would further the "no net loss" policy.

Defining Waters of the State should not be determined on a case-by-case basis. Doing so means that wetlands will be regulated inconsistently just because they are located in different parts of the state. Such a disparity cannot be justified and would most certainly lead to the loss of wetlands. For example,

not regulating ephemeral streams, which are important to maintaining water quality and habitat in our Mediterranean climate, is of particular concern. Restored and managed wetlands should also be regulated as Waters of the State. Managed wetlands, including treatment facilities, some of which are former tidal sloughs, have wetland characteristics and provide habitat functions and should also be regulated. Wetlands in all parts of the state should be regulated consistently to the same protective standard

Avoidance

Avoidance of impacts is the preferred mitigation under CEQA and should be the primary goal in the state's effort to achieve "no net loss." More attention should be focused on how to avoid filling wetlands. The primary means through which the ability to avoid wetlands is evaluated currently is through alternatives analyses. We recommend that the state not rely heavily on Corps review of alternative sites but conduct its own review of Alternative Analyses.

404 (B)(1) Guidelines provide: "No discharge ... shall be permitted which will cause or contribute to significant degradation of the waters of the state." Evaluation of alternatives analyses would be more effective tool to protect wetlands if it were a more open process with the Alternatives Analysis documents available to the public for review and comment. Commenters can highlight deficiencies, alert staff to potential problem areas and also provide information about alternative sites that developer/consultants do not put forward. An example of the value of public review was an Alternatives Analysis MAS is an Alternative Site Analysis Marin Audubon able to review recently that was replete with factual errors including ownerships, locations, zoning/land use designations, habitat and species conditions. It was clearly not an adequate analysis on which to base regulatory decisions and it is doubtful staff could have identified all of the deficiencies. Staff cannot be expected to be as knowledgeable about local conditions so as to catch inaccuracies, or have the time required to search records and check on-the-ground conditions as may be necessary to identify relevant deficiencies.

In addition, Alternatives Analyses should be required to examine on-site options and demonstrate why the proposed project cannot be modified to fit into the project site so that the wetlands can be saved. We agree that staff should be consulted early so that project designs can be reviewed while they are still being formulated and avoidance measures can be analyzed without pressures of already issued approvals.

Section B. 3. d. of the Introduction discusses allowing a CEQA alternatives analysis to suffice for a 404 Alternatives Analysis. A CEQA alternatives analysis would not meet the requirements of 404 (B)(1) Guidelines and should never suffice for Water Boards' analysis. CEQA alternatives analyses are significantly different in purpose and content than those required by 404 (B)(1) Guidelines for Alternatives Analyses. Also CEQA requires a range of alternatives, including no project, and to identify the environmentally preferred alternative on-site. There is no requirement to identify the LEVDA that is reasonable, or capable of being performed, or have any review at all of alternative off-site locations. CEQA analyses have no interest in avoiding wetlands.

Compensatory Mitigation

Compensatory mitigation should only be allowed for projects that are water dependent and are in the interest of all of the public, for example, bridge widening, water treatment facilities, ferries etc.

Procedures section 5. C. recommends that the amount of wetlands required for mitigation be decided on a case-by-case basis with a minimum ratio of 1:1. As discussed below, this approach would undoubtedly lead to a loss of wetlands. The ratio should be, at minimum, 2 acres of mitigation wetland

for each 1 acre filled to allow for temporal losses and possible failure.

The Procedures propose that anthropogenic degradation of the aquatic resources as well as existing and potential functions be taken into account in determining the wetland ratio so that the mitigation requirements would be lower if it is decided that the wetlands are degraded. This should not be allowed. This approach simply encourages owners/developers to degrade/destroy their wetlands.

Through the years, we have seen many situations where owners/applicants have allowed wetlands to be degraded, or have actively degraded or destroyed wetlands, only to later claim they will improve the wetlands by filling them and doing mitigation elsewhere. The existing quality of a wetland should have no bearing on the mitigation acreage and ratio requirements.

Protection as Mitigation – The most dependable way to ensure viable, functioning wetlands is to protect existing wetlands. Using a mitigation ratio of 1:1 and then allowing credit for protecting existing some wetlands, will ultimately lead to loss of wetland acreage, if not quality and function. In order to ensure that no net loss is achieved, mitigation credit should not be given for protecting existing wetlands unless the ratio is higher. We suggest a 2:1 ratio.

Buffer – Buffers are essential components of wetland habitats. Buffers are needed to protect the habitat quality and water quality. Buffers serve as transition zone habitat, provide essential refugia habitat for endangered Ridgway's Rail and Salt Marsh Harvest Mouse, foraging and nesting habitat for other special status species, and resting and foraging habitat for resident and migratory species. Buffers block impacts of adjacent human uses, be they noise, visual, or dogs, from adjacent development and help to clean water by filtering pollutants. Buffers also provide space to accommodate rising tides thereby contributing flood control benefits for adjacent human communities. For these reasons, buffers should be an integral part of all wetland mitigation requirements

No reduced compensation ratio should be allowed for buffers as suggested at B.5.c. Buffers should be required as part of all or most project designs to ensure a complete wetland habitat and all of the other services they provide. Allowing a reduced mitigation for providing buffers would ensure there would ultimately be a loss of wetland acreage. Restored or protected wetlands, in fact all wetlands, would be degraded in the short and long term unless buffers are provided.

Watershed Approach – Locating mitigation using a watershed approach may appear to be sound guidance but how this would protect wetlands, especially when combined with the proposed reduced mitigation acreage requirements, is uncertain at best. First of all, there are few watersheds that have watershed plans or the kind of plans that would ensure wetlands of the same type and location that would benefit the resources. Most watershed plans do not address wetland resources in the kind of detailed yet comprehensive way needed to choose mitigation sites. Sites or areas would have to be identified, and this usually generates opposition from property owners. Nor do watershed plans usually address the habitat needs of the species that depend on the watershed resources. They are often focused on development needs of communities, residents, and property and business owners.

Another problem with a watershed approach is how a watershed is defined. All of the San Francisco Estuary is a watershed. To ensure local wildlife and humans continue to benefit from the mitigation wetlands as they do from existing wetlands, a watershed must be defined as the local watershed.

Further, giving credit for locating mitigation in accord with a watershed plan would lead to losses of wetlands and functions. Reducing mitigation acreage benefits developers more than the watershed. There are other ways to encourage locating mitigation in the local watershed where the loss took place.

So, while locating mitigation in the same local watershed as the site of loss is a desirable approach, reducing requirements for the mitigation if it is located in the same watershed as the site of loss, especially if the mitigation ratio is only 1:1, would be detrimental to the resources. It does not fulfill "no net loss" goal and would lead to reduced wetland acreage and degrade the watershed.

Mitigation Banks –The State should not be supporting this type of mitigation. Marin Audubon opposes mitigation banks because they set the stage for losing wetlands in the future in an unidentified location and for unidentified projects. It is possible a project could be modified to reduce or eliminate wetland losses, but because a bank is available, applicants have a ready fix and further discussion of alternatives usually ends. Mitigation banks have a history of success that is mixed at best. Our experiences demonstrate many problems inherent in their use.

Local governments do not adequately address wetland losses but accept mitigation bank credits with little thought or evaluation. It's easier and they don't know much about mitigating for wetland losses. Further, some agencies support banks and appear to give their use little analysis. Credits are purchased and used without regard to wetland type or location. The service areas are too large so which leads to banks located far from the site of loss. This means that the habitat, wildlife and water quality benefits of the exiting wetlands are lost forever for local wildlife and people. Their use receives local approvals regardless of distant location, out-of-kind habitat type and species needs. One relatively recent example is in Corte Madera when a developer purchased credits in a bank 30 miles away even before the CEQA process had been initiated. This was not even questioned in the CEQA document or by the local government reviewing boards. It is easier for local governments to go along with mitigation that is available.

Banks are usually operated as a for-profit business, there is simply not enough land to make it a viable business in some local watersheds. Also the potential development picture is often unclear, so bank operators are uncertain they will be able to make a profit, if there is not enough development potential. Available land in urban or suburban areas, which is where most development occurs, is limited and more costly than in rural areas. So banks are located in undeveloped areas. These factors contribute to banks being located far away from most sites of wetland losses and the loss of wetlands to local watersheds, wildlife and communities

While there are certainly examples of postage stamp wetlands that become landlocked or have their water supply cut off, these are not the only experience. There are plenty of small wetland mitigation projects adjacent to or near other wetlands that expand the existing wetlands. And just because a wetland is small and isolated does not mean it has no ecological value. Such wetlands often serve as valuable alternative rest sites for birds on migration. We see them being used all the time. Having wetlands in different locations can be a safeguard - alternate habitats for wildlife should there be some calamity, such as oil spill making use of larger wetlands impossible or undesirable. There are resources for locating mitigation sites including Water Board staff, many of whom know their areas well enough to be able to identify suitable sites for mitigation, and local interested organizations.

Exclusions

We find some of the exclusions to be problematic as well. Some of the agricultural exemptions are troublesome. We see no reason to exempt farm roads. They should be located out of wetlands and are easier to construct on dry ground. There is even less reason to exempt forest roads which would undoubtedly require the destruction of trees, understory habitat and risk sedimentation of streams.


Conclusion

We emphasize the need to follow the policy guidance of "no net loss" in establishing Procedures for regulating wetlands. There is a way to go to ensure protection of the state's wetlands in the proposed Procedures and we urge you to renew your efforts to do so. We hope our comments above will be considered as changes are made in the Procedures so that further risks to our wetland resources can be avoided and there will be a long-term gain in the quantity, quality, and permanence of the state's wetlands, as called for in California's Wetlands Conservation Policy.

Finally, we would like to comment on a view that the wetlands restored in the multiple wetland projects constructed in recent years to restore historic tidal and other wetlands would offset wetland deficits that may be the result of inadequate regulatory program mitigation. We strongly object to operating under this approach. It would mean that the state and federal governments are subsidizing development projects and the filling of wetlands by private entities and others, to the detriment of the state's wetland, fish and wildlife resources. Without question, state and federal regulatory programs must ensure that each project they permit is required to ensure there is no net loss of wetland acreage, quality and function for the wetland losses it is responsible for causing, and that the mitigation is located in the watershed in which the losses occur.

Thank you for considering our input.

Sincerely,



Barbara Salzman, Co-chair
Conservation Committee



Phil Peterson, Co-chair
Conservation Committee