

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

Public Training



State Water Resources Control Board: May 7, 2020

California Water Boards

Presentation Overview

- Wetland Definition
- Wetland Delineation
- Jurisdictional Framework
- Do You Need a Dredge or Fill Permit?
- Application Submittal and Review
 - Alternatives Analysis
 - Compensatory Mitigation
- Other Resources

Implementation Guidance

- Guidance for staff and applicants
- Non-regulatory
- Arranged by topic, reflecting most common requests during public process
- Climate change assessment framework
- Frequently asked questions
- Other resources

Procedures Overview

Wetlands Only

- Wetland definition (section II)
- Wetland jurisdictional framework (section II)
- Wetland delineation (section III)

Dredge or Fill Application Procedures (All Waters)

- Application submittal (section IV.A)
- Water Board review (section IV.B)
- Exclusions (section IV.D)
- Appendix A: State Supplemental Dredge or Fill Guidelines

Wetland Definition

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.

Similarities and Differences with Federal Definition

They are almost the same in most cases, except:

- The Procedures wetland definition recognizes wetlands that have no vegetation.
- The delineation methods are identical in that they emphasize reliance on the regional supplements, but delineation of unvegetated wetlands requires adaptation of Corps delineation methods to allow for wetland substrates that do not occur with vegetation.

Wetland Definition & Jurisdiction Framework

Does this aquatic feature meet the technical definition of a “wetland”?

If yes, is the “wetland” a water of the state, i.e., within the jurisdiction of the Water Boards?

Jurisdictional Wetlands

Wetlands that are waters of the state:

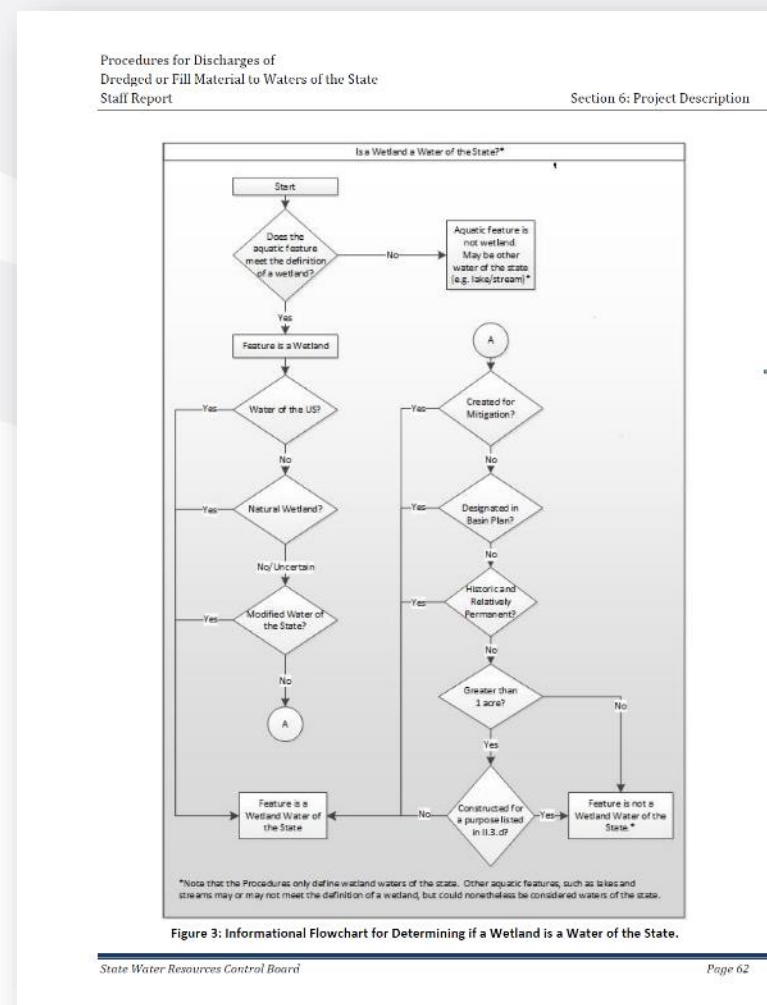
1. Natural wetlands
2. Wetlands created by a modification of a water of the state
3. Artificial wetlands that meet specific criteria
 - a. Compensatory mitigation
 - b. Identified in a water quality control plan
 - c. Resulted from historic human activity
 - d. Greater than one acre in size, unless it was created for a specific purpose

Examples of Excluded Artificial Wetlands

- Industrial or municipal wastewater treatment or disposal
- Certain types of stormwater treatment facilities
- Agricultural crop irrigation
- Industrial processing or cooling
- Fields flooded for rice growing

Jurisdictional Framework Flow Chart

- Found in the Implementation Guidance (Figure 1)
- Visualization aid to help understand the jurisdictional framework
- Does not take the place of the procedure language.



What about “waters of the U.S.”?

- Waters of the state is a broader term than waters of the United States
- Footnote 2 – “Therefore, wetlands that meet the current definition, or any historic definition, of waters of the U.S. are waters of the state.”
Waters of the state include the following features:
 - Approved jurisdictional determinations
 - Aquatic resource report verified by the Corps upon which a permitting decision was based
 - Consistent with current or historic federal definition of “waters of the U.S.”

Wetland Delineation

Procedures incorporate by reference three key documents:

- **U.S. Army Corps of Engineers Wetlands Delineation Manual. 1987. (1987 Manual)**
- **Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region. 2008. (Arid West Supplement)**
- **Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Western Mountains, Valleys, and Coast Region. 2010. (Western Mountains Supplement)**

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Do You Need a Dredge or Fill Permit?

- Does your project discharge dredged or fill material into waters of the state?
- “Discharge of dredged or fill material” defined in section V (p.15) of the Procedures
- Cross-references the Clean Water Act and federal regulations

What is a “section 401 certification”?

- Under Section 401 of the Clean Water Act, a federal agency may not issue a permit or license to conduct any activity that may result in any discharge into waters of the United States unless the state issues a certification verifying compliance with existing water quality requirements or waives certification requirement
- Certification shall set forth limitations and requirements necessary to assure that the applicant will comply with applicable effluent limitations and sections of the Clean Water Act, and with any other appropriate requirement of State law

What is a “waste discharge requirement”?

- Under the Porter-Cologne Water Quality Control Act, the Water Boards regulate waste discharges that could affect water quality, including the discharge of dredged or fill material, by issuing waste discharge requirements (also known as WDRs)
- Section 401 certifications are also WDRs

Do you need to comply with the Procedures?

- The Procedures do not apply to:
 - General Orders
 - Orders from Division of Water Rights
 - Suction Dredge Mining
 - Applications submitted prior to May 28, 2020
- More detail on other categories at the end of the presentation

Effective Date – May 28, 2020

- Section IV, page 4
- The Procedures do not apply to applications submitted prior to the effective date
- Applications submitted prior to the effective date will be processed according to the application procedures set forth in Cal. Code of Regs., title 23, sections 3830-3869

Effect on Existing Regulations and Practices

- The Procedures have the same force and effect as a regulation
- California Code of Regulations, title 23, §§ 3830-3869
 - These regulations remain in effect
 - Section 3855 (filing an application) and 3856 (contents of a complete application) will also apply to WDRs that regulate the discharge of dredged or fill material
- Supersedes a water quality control plan adopted by a Regional Water Board to the extent any conflict exists for the same waters (Water Code § 13170)

What About Federal Changes?



- What are the changes?
 - Navigable Waters Protection Rule
 - Forthcoming final section 401 regulations
- Status?
- Effect on the Procedures?

What will staff look for in my application?

- First avoid, then minimize, and lastly compensate
- No net loss of the overall abundance, diversity, and condition of aquatic resources in a watershed
- No violation of water quality standards; consistent with all applicable water quality control plans and policies for water quality control
- No significant degradation of the water of the state

What do I need to submit with my application?

Items required for ALL applications:

1. All items listed in the Cal. Code Regs., title 23, section 3856
2. Delineation report
3. Project start/end dates
4. Maps
5. Description of impacted waters
6. Alternatives analysis (unless exemption applies)

(section IV.A.1; lines 136 – 222; pp. 5 - 7)

What do I need to submit with my application?

Items that are required for SOME* applications:

1. Supplemental field data from wet season
2. Draft compensatory mitigation plan
3. Proposed water quality monitoring plan
4. Draft restoration plan for temporary impacts
5. For ecological restoration and enhancement projects: draft assessment plan

(section IV.A.2; lines 223 – 303; pp. 7 - 9)

*Consult with your applicable Water Board staff

Alternatives Analysis - Definition and Purpose

- An **alternatives analysis** is the process of analyzing project alternatives, including the proposed project, to determine the alternative that is the least environmentally damaging practicable alternative (LEDPA) (Procedures section V).
- An alternatives analysis must “establish that the proposed project alternative is the LEDPA in light of all potential direct, secondary (indirect), and cumulative impacts on the physical, chemical, and biological elements of the aquatic ecosystem.” (Procedures section IV.B.3.a)
- Section IV.A.1.h (page 7); section IV.B.3.a (page 10) and the State Supplemental Dredge or Fill Guidelines, section 230.10(a) (page 20)

Alternatives Analysis – Exemptions

- i. Certified Corps' General Permit with non-federal waters
- ii. Uncertified Corps' General Permits that do not trigger a section ii 'sideboard' (lines 175-183):
 - Impact size
 - Rare, threatened, or endangered species habitat
 - Wetland or eelgrass beds
 - ONRW or ASBS
- iii. Approved Watershed Plan
- iv. Ecological Enhancement and Restoration Project
- v. No permanent impacts

Alternatives Analysis - Deference to Corps' Alternatives Analysis Determinations

Deference, unless:

1. The Water Board was not provided adequate opportunity to collaborate
2. The alternatives analysis does not address identified aquatic resource issues, or
3. The project does not comply water with water quality standards

If the project includes discharges to waters of the state outside of Corps' jurisdiction, applicants should supplement the alternatives analysis to include all waters. (Section IV.A.1.g & h)

Alternatives Analysis – Level of Effort

Alternatives analyses should be commensurate with the significance of the impacts

- Three-tiered approach (section IV.A.1.h); line 194)
 - Tier 3 - Impacts more than 0.2 of an acre or 300 linear feet (on-site and off-site)
 - Tier 2 - Impacts more than 0.1 and less than or equal to 0.2 of an acre or more than 100 and less than or equal to 300 linear feet (on-site only)
 - Tier 1 - Impacts less than or equal to 0.1 of an acre or less than or equal to 100 linear feet (document avoid and minimize only)

Alternatives Analysis – Determining Practicability

- Practicable means available and capable of being done after taking into consideration cost, existing technology, and other logistics in light of the overall project purpose. (Procedures section 230.3 Definitions.)
- Water Board staff must consider the purpose and objectives of the project set forth by the applicant.
- An applicant should list, and briefly describe, alternatives that could meet the overall project purpose.

Compensatory Mitigation Requirements

- **Plan Requirements:** Section IV.A.2.b; pages 7 – 8; lines 227-264
- **Staff Review/Approval:** Section IV.B.5; pages 10 – 12; lines 358 – 437
- **Details:** State Supplemental Dredge or Fill Guidelines – Subpart J; pages 25 – 42; lines 906 - 1637

Compensatory Mitigation – Plan Requirements

- Watershed Profile
- Condition assessment
- No Net Loss Description
- Ecological performance standards
- Timeline
- Design criteria and management plan for buffers
- Notification of local entities (e.g., airports and vector control)
- Climate change assessment (if required)

Section IV.A.2.b; pages 7 – 8

Compensatory Mitigation – Watershed Approach

- Mitigation must be located using a “watershed approach”
- A watershed approach is an “analytical process for evaluating the environmental effects of a proposed project and making decisions that support the sustainability or improvement of aquatic resources in a watershed.” (section IV.D; page 17)
- Mitigation amounts, type, and location will be informed by the watershed approach based on a watershed profile. (section IV.B.5 (pages 10-12), Appendix A, § 230.93(b) (pages 28 – 37))

Compensatory Mitigation – Watershed Approach

- **Watershed Profile** is a compilation of data or information on the abundance, diversity, and condition of aquatic resources in a project evaluation area. (section IV.D: pages 17-18)
- **Project evaluation area** includes the project impact site, and/or compensatory mitigation site, and is sufficiently large to evaluate the effects of the project and/or the compensatory mitigation. (section IV.D; pages 16-17)

Compensatory Mitigation – Watershed Plan

- Applicants may develop a watershed profile using a watershed plan
- Use a watershed plan may result in a reduced compensatory mitigation amount
- Need to be approved by the Water Boards (project-by-project basis or on a regional basis)
- Some Habitat Conservation Plans (HCPs) and Natural Community Conservation Plans (NCCPs) are presumptively approved
- Applicants that plan projects using watershed plans may also qualify for an alternatives analysis exemption

Compensatory Mitigation – Other Considerations

- Minimum 1:1 ratio, when compensatory mitigation is required
 - Applies to wetland and stream loss only
 - Measured in area or length
 - Section IV.B.5.a(c) (page 11)
- Interagency coordination encouraged
- Preference hierarchy when considering compensatory mitigation types
 1. Mitigation Banks
 2. ILF Programs
 3. Permittee Responsible

Based on what is environmentally preferable

Compensatory Mitigation - Climate Change Assessment

- Required, on a case-by-case basis, for permittee responsible compensatory mitigation plans
- Attachment A: Climate Change Assessment Framework for Aquatic Resource Compensatory Mitigation Plans
- Framework can be used to inform the planning of compensatory mitigation projects to be more resilient to reasonably foreseeable climate change impacts
- Site-specific and landscape-scale factors to consider in a Climate Change Assessment
- Using a climate change assessment to inform mitigation plans
 - Avoidance and minimization measures

Procedural Exclusions (Section IV.D)

- Wetlands Used for Rice Cultivation
- Prior Converted Cropland (PCC)
- Clean Water Act Section 404(f)
 - Normal farming, ranching and silviculture activities
- Features Used for Agricultural Purposes
- Routine and Emergency Operation and Maintenance Activities conducted by public agencies, water utilities, or special districts
- Routine Operation and Maintenance Activities for other artificial features
- Suction Dredge Mining

References and Other Resources

Available on the Dredge or Fill Procedures Webpage:

- Procedures
- Staff Report
- Implementation Guidance

Thank You

For more information, check out our website at:

www.waterboards.ca.gov/water_issues/programs/cwa401/

or call us at: 916-341-5900