

Memorandum

To: CHAIR AND COMMISSIONERS

CTC Meeting: March 25, 2020

From: MITCH WEISS, Executive Director

Reference Number: 4.14, Action

Prepared By: Brigitte Driller
Assistant Deputy Director

Published Date: March 13, 2020

Subject: Comments on the Draft Implementation Guidance: State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State.

Issue:

Should the California Transportation Commission (Commission) provide comments in response to the California State Water Resources Control Board's Draft Implementation Guidance for the State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State?

Recommendation:

Staff recommends the Commission approve the attached letter for submission to the State Water Resources Control Board.

Background:

The State Water Resources Control Board and nine Regional Water Quality Control Boards are the agencies with primary responsibility to ensure water quality in California. For more than three decades state regulations and policy have directed the Regional Water Quality Control Boards to protect all waters of the state, including wetlands. The federal government shares in these responsibilities for those waters of the state that are also designated as waters of the United States under the federal Clean Water Act.

The State Water Resources Control Board worked on the development of regulations regarding the State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State (Procedures) from 2007 to 2019. According to the State Water Resources Control Board, the Procedures are needed due to the diminishing jurisdiction of the federal government related to water protection and to address the inconsistency across the nine regional water boards regarding requirements for discharges of dredged or fill material into waters of the state,

including wetlands. The Commission was engaged in the development of the Procedures and provided comments to the State Water Resources Control Board in August 2016, and again in January 2019. These comments related to concerns that the proposed regulations might impact the cost and delivery of some transportation projects.

On April 2, 2019, the State Water Resources Control Board adopted the State Wetland Definition and Procedures for the Discharges of Dredged or Fill Material to Waters of the State. The final Procedures consist of four major elements: 1) a wetland definition; 2) wetland delineation procedures; 3) framework for determining if a feature that meets the wetland definition is a water of the state; and, 4) procedures for the submittal, review, and approval of applications for Water Quality Certifications and Waste Discharge Requirements for dredged and fill activities.

In adopting the Procedures, State Water Board Resolution No. 2019-0015 directed State Water Resources Control Board staff to develop implementation guidance for potential applicants, and to solicit informal input from stakeholders prior to finalizing the guidance. The State Water Resources Control Board held an informal public stakeholder meeting on December 2, 2019 in Sacramento to inform the development of the implementation guidance. On February 14, 2020, the State Water Resources Control Board issued the Draft Implementation Guidance and solicited stakeholder comments on the guidance through March 13, 2020. The State Water Resources Control Board held another informal public stakeholder workshop on February 28, 2020 in Sacramento to discuss and receive feedback on the guidance. Stakeholders responsible for delivering infrastructure projects subject to these new requirements, including environmental consultants, building industry representatives, government employees, and others, raised several concerns to State Water Resources Control Board staff at the workshop. Stakeholder feedback focused on the need for clarity within the guidance in the following areas: how permit applications submitted prior to the Procedures effective date but not processed by that date will be treated; how the State Water Resources Control Board defines reasonably foreseeable impacts under climate change; and how to ensure that regional water board staff will engage in pre-application consultation, among other topics.

In addition, Commission staff has held several meetings with the California Department of Transportation (Caltrans) as well as an informal call with Regional Transportation Planning Agencies on March 9, 2020 to understand their questions and concerns regarding the Draft Implementation Guidance specific to delivering transportation projects.

The implementation guidance must be in place prior to the May 28, 2020 effective date of the Procedures. It will be finalized at the staff level and will not go to the State Water Resources Control Board for approval. Caltrans has submitted technical comments to the State Water Resources Control Board regarding the guidance in their

letter dated March 11, 2020 (Attachment B). Commission staff has prepared a draft letter to the State Water Resources Control Board reflected in Attachment A, which supports Caltrans' comments and urges the State Water Resources Control Board and Caltrans to continue working together to finalize a Memorandum of Understanding, as permitted in the Procedures. The finalization of this agreement prior to May 28, 2020 will be critical to minimizing the impacts of the new Procedures on the cost and delivery of transportation projects.

Please see www.waterboards.ca.gov/water_issues/programs/cwa401/wrapp.html for the "State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State" link to the Procedures and Draft Implementation Guidance.

Attachments:

- Attachment A: Draft Comment Letter for the Draft Implementation Guidance for the State Wetlands Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State
- Attachment B: Caltrans letter to the State Water Resources Control Board dated March 11, 2020

DRAFT

Attachment A

SENATOR JIM BEALL, Ex Officio
ASSEMBLY MEMBER JIM FRAZIER, Ex Officio
MITCH WEISS, Executive Director



CALIFORNIA TRANSPORTATION COMMISSION

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March 25, 2020

Ms. Ana Maria Saenz, Environmental Scientist
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000

RE: Comment Letter – Draft Implementation Guidance for the State Wetland Definition and Procedures for the Discharges of Dredged or Fill Material to Waters of the State

Dear Ms. Saenz:

At its March 25-26, 2020 meeting, the California Transportation Commission (Commission) received an overview of the State Water Resources Control Board's Draft Implementation Guidance for the State Wetland Definition and Procedures for Discharge of Dredged or Fill Material to Waters of the State as noticed on February 14, 2020.

The Commission commends the State Water Resources Control Board's efforts to work with all stakeholders in the development and finalization of the Implementation Guidance. In particular, the public workshops hosted by the State Water Resources Control Board in Sacramento on December 2, 2019 and February 28, 2020 provided critical opportunities for stakeholders to provide feedback on the development of the Implementation Guidance. The Commission also commends the State Water Resources Control Board's ongoing coordination with the California Department of Transportation (Caltrans) through the Transportation Permitting Task Force established by Assembly Bill 1282 (Mullin, 2017), and encourages continued integration of Advance Mitigation Planning throughout these efforts.

Ms. Ana Maria Saenz

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The Implementation Guidance is expected to be finalized by State Water Resources Control Board staff by April 2020 and will improve consistency across the nine regional water boards for permit processing. However, more detailed guidance is needed to address how the State Wetland Definition and Procedures for the Discharges of Dredged or Fill Material to Waters of the State (Procedures) will be applied to permits for transportation projects administered by Caltrans as well as regional and local transportation agencies. The Commission supports the detailed technical comments submitted by Caltrans in their letter dated March 11, 2020 and urges the State Water Resources Control Board to continue working with Caltrans toward a Memorandum of Understanding, as permitted in the Procedures (identified in footnote 9 on page 4). This agreement is essential for providing timelines for compliance for projects in development as well as more specific guidance for transportation projects, including those that are limited by location. The Commission encourages the State Water Resources Control Board to consider transportation projects led by regional and local agencies under the same guidance to ensure that the Procedures are applied consistently for transportation projects.

The funding resulting from Senate Bill 1 (Beall, 2017) provides approximately \$5 billion annually for vital transportation improvements that have been promised to the taxpayers of California. The finalization of an agreement between the State Water Resources Control Board and Caltrans prior to the May 28, 2020 effective date of the Procedures is essential to providing certainty for transportation projects and ensuring the implementation of the Procedures does not delay, or otherwise impede the delivery of investments that are critical to improving safety, mobility, environmental sustainability, economic vitality, and quality of life in this state.

The Commission appreciates the opportunity to convey our comments. If you have any questions, please do not hesitate to contact Laura A. Pennebaker at (916) 653-7121.

Sincerely,

PAUL VAN KONYNENBURG
Chair

c: California Transportation Commissioners
The Honorable Jim Beall, Chair, Senate Transportation Committee
The Honorable Jim Frazier, Chair, Assembly Transportation Committee
Toks Omishakin, Director, California Department of Transportation
Phil Stolarski, Chief, Division of Environmental Analysis, California Department of Transportation

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Making Conservation
a California Way of Life.

March 11, 2020

Ana Maria Saenz
Surface Water - Regulatory Branch
California State Water Resources Control Board
1001 J Street
Sacramento, Ca 95814

Dear Ms. Saenz:

Caltrans wants to thank the Water Board for holding the informal stakeholders meetings on December 2, 2019 and February 28, 2020 regarding the new State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State (Procedures) and the Draft Guidance for State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State (Guidance). As Caltrans continues to work with the Water Board, we have appreciated our dialogue on particular concerns and look forward to successful implementation of the new Procedures.

Review of the Guidance, dated February 2020, has addressed several of our previous comments from our letters dated September 18, 2017 and December 6, 2019. We have remaining concerns related to Pre-Application consultation, Alternatives Analysis for Tier 2 Projects (defined by the Procedures as those that are limited by location or inherently cannot be located in an alternate location), a verification process for waters of the state, concepts of watershed plan, approach and profile, climate change analysis, and condition assessments.

Pre-Application Consultation: Caltrans views pre-application consultation as vital and agrees that including the Water Boards in any meetings with other agencies is a key to stream-lining the permitting processes. However, in the pre-application consultation and many other portions of the Procedures and Guidelines, the burden of initiating coordination is placed on the permittee without guarantee that the Water Boards will respond to early consultation requests or to participate in field review and interagency meetings. The Guidelines should provide assurance that the Water Boards will be available and also capable of handling what could be a substantive increase in work

load for regions where pre-application consultation and group participation has been minimal.

Alternatives Analysis for Tier 2: Tier 2 Projects are primarily limited by location or inherently cannot be located in an alternate location, such as culvert replacement, bridge repair, and shoulder widening projects. The Guidance does not address or provide examples of what constitutes an acceptable on-site alternatives analysis for Tier 2 projects.

Verification: Caltrans suggests that a defined process and form of agreement are needed to verify delineations. Our planning routinely includes efforts to avoid and minimize impacts, as well as compensate for unavoidable impacts. Much of this planning happens months or years before application submittal. In the meantime, regulatory staff or management may turn over. For many projects, proper planning of avoidance, minimization, and compensation requires a firm understanding of resources and their boundaries. And for many projects, it is critical that the understanding of boundaries does not change through regulatory staff turnover or change in management direction. Caltrans routinely request Jurisdictional Determinations from the Army Corps of Engineers, which provides the certainty that Caltrans needs. In cases with no federal waters, or where the Water Boards may disagree with the federal assessment of non-wetland waters, Caltrans may be left without the certainty needed for planning. The need may become even greater with implementation of the federal Navigable Waters Protection Rule. Caltrans believes that a defined process by which to request verification of our delineations, as well as a defined agreement by which to be certain that the verification will not change, will allow us to plan avoidance, minimization, and compensation of impacts. Caltrans request that the Water Board define a process and product to memorialize agreement on state waters.

Watershed Plan, Approach, Profile: These three separate issues related to watersheds have remained unclear within the Procedures and Guidance. As an applicant, it is unclear how Caltrans could make use of existing watershed plans, develop a watershed approach, or prepare a watershed profile that would consistently meet the needs of the Water Boards. Without guidance to the contrary, the effort to develop a watershed plan would be akin to the decades long work for developing a Habitat Conservation Plans or a Natural Community Conservation Plan.

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Climate Change Analysis: It is unclear when this analysis is required and remains case by case. The term "reasonably foreseeable" is undefined. It seems overly speculative related to climate matters.

Condition Assessment: Caltrans requests additional predictability in application of the condition assessment requirement for the situations under which Caltrans would use the California Rapid Assessment Method (CRAM), or use some other form of condition assessment. Caltrans has not seen CRAM required by most Regional Boards, and is unclear whether CRAM will be required from Regional Boards that have not so required in the past. When not performing CRAM, it is unclear what would constitute an acceptable condition assessment. When conducting condition assessments such as CRAM, Caltrans typically needs to conduct them months or years before permit application. Waiting until permit application to determine the form of condition assessment needed, or pinning the decision to pre-application consultation, if response from Water Board staff is not required, does not allow for effective project planning. Caltrans' need is for (1) a consistent, predictable set of conditions under which an application would need CRAM, and under which an application would need any alternate form of condition assessment; and (2) clear guidelines that illustrate what constitutes an acceptable form of non-CRAM condition assessment.

Caltrans looks forward to working collaboratively with the Water Board on addressing these remaining concerns and meet the mission to protect water quality and deliver transportation projects.

Sincerely,



PHILIP J. STOLARSKI
Chief, Division of Environmental Analysis

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Cc: Caltrans Division of Environmental Analysis:
Jeremy Ketchum, Assistant Division Chief,
Jennifer Gillies, Chief of Biological Studies
Julie Owen, Interagency Liaison for the Water Boards
Sean Marquis, Wetland Senior Specialist

California Transportation Commission – Transportation Planning:
Laura Pennebaker, Associate Deputy Director
Brigitte Driller, Assistant Deputy Director