

**STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2021-0012**

CONFIRMATION THAT THE “STATE WETLAND DEFINITION AND PROCEDURES FOR DISCHARGES OF DREDGED OR FILL MATERIAL TO WATERS OF THE STATE” (1) ARE IN EFFECT AS STATE POLICY FOR WATER QUALITY CONTROL FOR ALL WATERS OF THE STATE AND (2) SHALL BE APPLIED VIA THE INLAND SURFACE WATERS AND ENCLOSED BAYS AND ESTUARIES PLAN TO ONLY WATERS OF THE UNITED STATES

WHEREAS:

1. On April 2, 2019, the State Water Resources Control Board (State Water Board) adopted [Resolution No. 2019-0015](#) adopting the “State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State” (Procedures) and approving and adopting the accompanying Substitute Environmental Document, which was prepared in accordance with the regulatory provisions applicable to the State Water Board’s California Environmental Quality Act certified regulatory programs, California Code of Regulations, title 23, sections 3775 through 3781.
2. On May 1, 2019, the San Joaquin Tributaries Authority (SJTA) filed a petition for writ of mandate in Sacramento superior court. On May 20, 2019, SJTA filed an amended petition. One of SJTA’s claims was that “[t]o the extent the Procedures regulate waters of the state not covered by the Clean Water Act (i.e., waters of the state that are not waters of the United States) through a statewide water quality control plan, the Board has exceeded its authority under Water Code section 13170 because these waters are not waters for which water quality standards are required under the Clean Water Act.” (Amended Pet., ¶ 56.)
3. On January 26, 2021, the Superior Court in *San Joaquin Tributaries Authority v. California State Water Resources Control Board* issued a judgment and writ “enjoining the State Water Board from applying, via the Water Quality Control Plan for Inland Surface Waters and Enclosed Bays [and Estuaries], the ‘State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State’ adopted by the State Water Board on April 2, 2019, to waters other than those for which water quality standards are required by the Federal Clean Water Act (33 U.S.C. Section 1251 et seq.).” The Superior Court’s decision upheld the adoption of the Procedures as part of the (1) California Ocean Plan and (2) Inland Surface Waters and Enclosed Bays and Estuaries Water Quality Control Plan (ISWEBE Plan) for “waters of the United States” as defined by the Clean Water Act. The Superior Court rejected the other challenges to the Procedures that were raised by the petitioner. In response to the Superior Court’s decision, State Water Board staff has ceased efforts to prepare an item for public notice and comment and Board consideration to incorporate the Procedures into the ISWEBE Plan for non-federal waters.

4. The Superior Court decision addresses only the scope of the State Water Board's authority to adopt water quality control plans under Water Code section 13170. It does not restrict the State Water Board's authority to regulate the discharge of dredged or fill material to all waters of the state pursuant to the Board's other regulatory tools, including its authority to adopt state policy for water quality control under Water Code section 13140. Accordingly, the Superior Court's decision did not impair the Water Boards' authority to regulate discharges of dredged or fill material to all waters of the state, including waters of the state that are not also waters of the United States, except to the extent that such regulation is via the ISWEBE Plan. The court found inclusion in the California Ocean Plan separately authorized under Water Code section 13170.2.
5. In Resolution No. 2019-0015, which adopted the Procedures, the State Water Board referred to its authority to adopt state policies for water quality control pursuant to Water Code section 13140, in addition to its authority to adopt water quality control plans pursuant to Water Code section 13170. The purpose of this Resolution is for the State Water Board to provide clarification regarding Resolution No. 2019-0015 by confirming that its April 2, 2019 action relied, in part, on Water Code section 13140 and that the Procedures are therefore effective for all waters of the state as state policy for water quality control. In the alternative, this Resolution is for the State Water Board to adopt the Procedures as state policy for water quality control.

The State Water Board's Authority to Adopt State Policies for Water Quality Control under Water Code section 13140

6. The State Water Board is authorized to adopt state policy for water quality control. (Wat. Code, § 13140.) The components of state policy for water quality control include all or any of the following: (1) water quality principles and guidelines for long-range resource planning, including ground water and surface water management programs and control and use of recycled water, (2) water quality objectives at key locations for planning and operation of water resource development projects and for water quality control activities, and (3) other principles and guidelines deemed essential by the State Water Board for water quality control. (Wat. Code, § 13142.)
7. State policy for water quality control may supersede conflicting provisions in regional water quality control plans where the State Water Board determines it is appropriate. (*WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1460.)
8. The permissible contents of water quality control plans pursuant to Water Code section 13170 overlap with the permissible contents of policies for water quality control pursuant to Water Code section 13140. In some cases, the State Water Board acts under the authority of both Water Code sections 13170 and 13140.

9. Pursuant to Water Code, section 13146, “State offices, departments and boards, in carrying out activities which affect water quality, shall comply with state policy for water quality control unless otherwise directed or authorized by statute, in which case they shall indicate to the state board in writing their authority for not complying with such policy.” This section applies to the Regional Water Boards. (*Cf. State Water Resources Control Bd. Cases* (2006) 136 Cal. App. 4th 674, 730 [interpreting analogous language in Water Code section 13247 as applying to the State Water Board].)

The State Water Board’s April 2, 2019 Adoption of the Procedures

10. In 2008, the State Water Board resolved that, “The State Water Board will take action to ensure the protection of the vital beneficial services provided by wetlands and riparian areas through the development of a statewide policy to protect wetlands and riparian areas (Policy) that is watershed-based.” ([Resolution No. 2008-0026](#))
11. An informal, preliminary draft entitled “Water Quality Control Policy for Wetland Area Protection and Dredge and Fill Permitting” was released in March 2012.
12. The Procedures were first released for public comment and a Board hearing in 2016. The notice described “Proposed Amendments to the California Ocean Plan and Inland Surface Waters, Enclosed Bays, and Estuaries of California Plan to Include Procedures for Discharges of Dredged or Fill Materials to Waters of the State (Formerly Known as the Wetlands Policy).”
13. The staff report stated, “the decision was made to convert the policy into a plan amendment to both the existing Water Quality Control Plan for Ocean Waters and forthcoming Water Quality Control Plan for Inland Surface Waters and Enclosed Bays and Estuaries of California. . . . In addition, by adopting the Procedures as amendments to water quality control plans, they will automatically supersede any conflicting provisions in the Regional Water Quality Control Boards’ (Regional Water Boards) water quality control plans and will apply to the State and Regional Water Boards (collectively, Water Boards).” (Staff Report, p.1.) [citations omitted]
14. The State Water Board did not receive any comments specifically regarding the scope of the Water Board’s authority under Water Code section 13170 or 13140 or whether the Procedures would continue to be a freestanding policy.
15. The Procedures were released for a second public comment period and Board hearing in 2017. The 2017 draft of the Procedures also stated that the Procedures would be included in the Ocean Plan and the ISWEBE Plan. Again, the State Water Board did not receive any comments specifically regarding the scope of the Water Board’s authority under Water Code section 13170 or 13140 or whether the Procedures would continue to be a freestanding policy.

16. In developing, considering, and adopting the Procedures, the State Water Board complied with the procedural requirements applicable to actions taken under both Water Code sections 13140 and 13170 and provided additional public participation opportunities to afford the public with a reasonable opportunity to participate in the consideration of the Procedures. The State Water Board held hearings on July 19, 2016 and September 6, 2017 after appropriate notice. (Wat. Code, § 13147.)
17. During the formulation of the Procedures, the State Water Board consulted with concerned federal, state, and local agencies. (Wat. Code, § 13144.)
18. The State Water Board notified all the affected Regional Water Boards and afforded them an opportunity to submit recommendations. (Wat. Code, § 13147.)
19. The State Water Board intended for the Procedures to apply to all waters of the state, including waters of the state that are not also waters of the United States. For example, the introduction states an intent to bring uniformity to Water Boards' regulation of discharges of dredged or fill material to all waters of the state. (Procedures, page 1, lines 30-31.) The jurisdictional framework also refers to the broad scope of waters of the state as including all waters of the United States. (*Id.* at page 2, line 40.) The application procedures also apply to "all applications of discharges of dredged or fill material to waters of the state." (*Id.* at page 4, lines 105-107.) The desire to apply the same regulatory process to federal and non-federal waters is well-documented in the accompanying staff report.
20. The staff report analyzed the potential environmental impacts of applying the Procedures to all waters of the state.
21. In the response to comments submitted on the July 21, 2017 draft, the State Water Board stated "The Procedures will be included in a state policy for water quality control, the Water Quality Control Plans for Inland Surface Waters and Enclosed Bays and Estuaries and Ocean Waters of California." (Response to 2017 comments, pp. 24, 54, 361.)
22. On April 2, 2019, the State Water Board adopted Resolution No. 2019-0015 adopting the "State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State" and approving and adopting the accompanying Substitute Environmental Document, which was prepared in accordance with the Provisions applicable to the State Water Board's certified exempt regulatory programs, California Code of Regulations, title 23, sections 3777 through 3779. Resolution No. 2019-0015 stated that "The State Water Board is authorized to adopt a state policy for water quality control. (Water Code § 13140.)"

23. Although a specific citation was inadvertently omitted from Resolution No. 2019-0015, the State Water Board was authorized by Water Code section 13170.2 to incorporate the Procedures into the water quality control plan for Ocean Waters.
24. Footnote 1 of the Procedures states that “These Procedures will be incorporated into the Water Quality Control Plans for (1) Inland Surface Waters Enclosed Bays and Estuaries and (2) Ocean Waters of California. Because the Procedures will already have been adopted, future incorporation of the Procedures, as adopted, into the water quality control plans will be considered non-substantive amendments.”
25. The Office of Administrative Law (OAL) approved the Procedures on August 28, 2019. The Procedures went into effect nine months afterward, on May 28, 2020.
26. The State Water Resources Control Board issued a Notice of Decision on August 30, 2019.

Notice of and Comment on Adoption of this Resolution

27. The adoption of this resolution is not subject to CEQA because there is no effect on the environment. The regulations applicable to the State Water Board’s certified exempt regulatory programs set forth in California Code of Regulations, title 23, Chapter 27 are not applicable because Chapter 27 “does not apply if the board determines that the activity is not subject to CEQA.” (Cal. Code of Regs., tit. 23, § 3720(b).)
28. Even if this action is subject to CEQA, the State Water Board has already complied with the regulations applicable to its certified exempt regulatory programs. The State Water Board approved the Substitute Environmental Document in Resolution No. 2019-0015. In the Substitute Environmental Document, which was prepared in accordance with the Provisions applicable to the State Water Board’s CEQA certified regulatory programs, California Code of Regulations, title 23, sections 3775 through 3781, that accompanied the Procedures, the State Water Board considered the effects to the environment that would result from applying the Procedures to all waters of the state.
29. In developing, considering, and adopting this resolution, the State Water Board complied with the procedural requirements applicable to actions taken under Water Code sections 13140 and 13170.
30. The State Water Board held a written comment period regarding adoption of this resolution from February 5, 2021, through March 8, 2021. The State Water Board received seven comment letters. Responses to those comment letters were provided on March 23, 2021.

31. The State Water Board noticed an April 6, 2021 hearing regarding adoption of this resolution in accordance with Water Code, sections 13147 and 13244. The State Water Board received oral comments at the April 6, 2021 hearing.

THEREFORE BE IT RESOLVED THAT:

The State Water Board:

1. Confirms that because its April 2, 2019 action relied, in part, on Water Code section 13140, the Procedures were also effective as state policy for water quality control for all waters of the state. Accordingly, the Procedures should continue to be applied to non-federal waters as state policy for water quality control, but not via the ISWEBE.
2. Finds that, if a court determines that the State Water Board's April 2, 2019 action was not sufficient to adopt state policy for water quality control for all waters of the state, this resolution expressly adopts the Procedures as state policy for water quality control for all waters of the state, and accordingly the Procedures operate as state policy for water quality control for all waters of the state from at least the date of this resolution.
3. Determines that it is appropriate for the Procedures, as state policy for water quality control, to supersede any conflicting provisions in regional water quality control plans because one of the primary objectives of the Procedures was to establish procedures for regulation of discharges of dredged or fill material to all waters of the state, including those outside of federal jurisdiction. Superseding is also necessary to establish a uniform regulatory approach for all waters of the state and to strengthen regulatory effectiveness and improve consistency across all Water Boards. Because Water Code, section 13146 requires State offices, departments, and boards, which includes Regional Water Boards, to comply with state policy for water quality control, superseding any conflicting provisions in regional water quality control plans will improve clarity regarding the Procedures' applicability.
4. Determines that any statements regarding inclusion of the Procedures in a water quality control plan in the Procedures, staff report, and response to comments do not preclude the Procedures from also acting as state policy for water quality control.
5. Determines that in accordance with the Superior Court's January 26, 2021 judgment and writ, the Procedures shall not be applied via the ISWEBE Plan to non-federal waters, and directs staff to propose any appropriate incorporation of the Procedures to regulate waters of the United States into the ISWEBE Plan at a future meeting of the State Water Board.

6. Approves and adopts the revisions to the Procedures as set forth in Attachment 1 as state policy for water quality control and for future incorporation into the Ocean Plan and for future incorporation into the ISWEBE Plan for waters of the United States.
7. Approves and adopts the revisions to the Staff Report as set forth in Attachment 2 and directs the Executive Director to revise the formatting of the Staff Report as necessary to accommodate the revisions.
8. Authorizes the Executive Director or designee to submit this resolution, including the revisions to the Procedures and Staff Report, and the administrative record to OAL for review and approval and to include a concise summary of the Procedures in California Code of Regulations, tit. 23, Division 3, Chapter 22 and to U.S. EPA for informational purposes.
9. Authorizes the Executive Director or designee to make minor, non-substantive modifications to the language of the Procedures and the supporting documentation if State Water Board staff or OAL determines that such changes are needed for clarity or consistency, and inform the State Water Board and stakeholders of any such changes.

CERTIFICATION

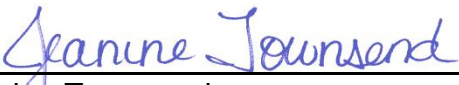
The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on April 6, 2021.

AYE: Chair E. Joaquin Esquivel
 Vice Chair Dorene D'Adamo
 Board Member Tam M. Doduc
 Board Member Sean Maguire
 Board Member Laurel Firestone

NAY: None

ABSENT: None

ABSTAIN: None



Jeanine Townsend
Clerk to the Board

Attachment 1



State Policy for Water Quality Control: State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State

[Also for Inclusion in the Water Quality Control Plan for Ocean Waters of California, and the Water Quality Control Plan for Inland Surface Waters and Enclosed Bays and Estuaries for Waters of the United States For Inclusion in the Water Quality Control Plans for Inland Surface Waters and Enclosed Bays and Estuaries and Ocean Waters of California]

STATE WATER RESOURCES CONTROL BOARD

**Adopted April 2, 2019
and Revised April 6, 2021**

1. Footnote 1 on page 1 is revised as follows:

[NOTE: These Procedures will be incorporated into the Water Quality Control Plans for (1) Inland Surface Waters Enclosed Bays and Estuaries **for waters for which water quality standards are required by the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto** and (2) Ocean Waters of California. ~~Because the Procedures will already have been adopted, f~~Future incorporation of the Procedures, as adopted, into the water quality control plans will be considered non-substantive amendments. At that time, formatting and other organizational edits necessary for incorporation into the water quality control plans will be addressed.]

2. Section I. Introduction, page 1, lines 31-32 is revised to state:

The effective date of these Procedures shall be **May 28, 2020**~~[insert date that is nine months after approval by the Office of Administrative Law]~~.

Attachment 2

Staff Report

Including the Substitute Environmental Documentation

State Policy for Water Quality Control: State Wetland Definition and Procedures for Discharges of Dredged or Fill Material 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]~~
Also for Inclusion in the Water Quality Control Plan for Ocean Waters of California, and the Water Quality Control Plan for Inland Surface Waters and Enclosed Bays and Estuaries for Waters of the United States]



Final: Adopted April 2, 2019, and Revised April 6, 2021

Staff Report

Including the Substitute Environmental Documentation

State Policy for Water Quality Control: State Wetland Definition and Procedures for Discharges of Dredged or Fill Material 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 Also for Inclusion in the Water Quality Control Plan for Ocean Waters of California, and the Water Quality Control Plan for Inland Surface Waters and Enclosed Bays and Estuaries for Waters of the United States]

SCH#: 2011012009

Final: Adopted April 2, 2019, and Revised April 6, 2021

Cover page photo credit: State Water Board Staff, Mather Field vernal pool, April 2009



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Revise Section 2. Executive Summary, page 1 and footnote 2 as follows:

The State Water Resources Control Board (State Water Board) prepared this Staff Report, including Substitute Environmental Documentation (SED) (Staff Report) to evaluate the potential environmental effects of adopting the *State Wetland Definition and Procedures for Dredged or Fill Material to Waters of the State* (Procedures) and comply with other requirements related to the development and adoption of water quality control plans and policies for water quality control. Previous drafts of the Procedures have been referred to by the State Water Board as the *Water Quality Control Policy for Wetland Area Protection and Dredged or Fill Permitting*. However, the decision was made to ~~convert the policy into~~ **also adopt the Procedures as** a plan amendment to both the existing Water Quality Control Plan for Ocean Waters **of California**, and **the** forthcoming Water Quality Control Plan for Inland Surface Waters and Enclosed Bays and Estuaries of California **for waters of the United States**. The title was shortened to better communicate the dredge or fill procedures apply to all waters of the state, including both waters of the United States (used interchangeably with “waters of the U.S.”) and waters of the state outside of federal jurisdiction, regardless of whether they meet the definition of a “wetland.” In addition, by adopting the Procedures as amendments to water quality control plans, they will automatically supersede any conflicting provisions in the Regional Water Quality Control Boards’ (Regional Water Boards) water quality control plans **for waters of the United States. Further, as state policy for water quality control, the Procedures** and will **also** apply to the State and Regional Water Boards (collectively, Water Boards) **for all waters of the state**.^{1,2}

¹ Water Code section 13170.

² The Procedures will be incorporated into the water quality control plans for (1) Inland Surface Waters Enclosed Bays and Estuaries **for waters for which water quality standards are required by the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto** and (2) Ocean Waters of California. **Because the Procedures will already have been adopted, f**uture incorporation of the Procedures, as adopted, into the water quality control plans will be considered non-substantive amendments. At that time, formatting and other organizational edits necessary for incorporation into the water quality control plans will be addressed.