



# Marin Audubon Society



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September 17, 2017

Jeannie Townsend, Clerk to the Board  
State Water Resources Control Board  
Division of Water Quality  
P.O. Box 100  
Sacramento, CA 95812

RE: Comments on *State Wetland Definition and Procedures for Discharges of Dredge or Fill Materials to Waters of the State*

Dear Ms. Townsend:

The Marin Audubon appreciates the opportunity to comment on the *Draft State Wetland Definition and Procedures for Discharge of Dredge and Fill Material to Waters of the State*. In particular, we support the revised definition of wetlands and we appreciate the clarification of procedures regional water boards must follow in deciding whether to allow discharges. A comprehensive definition and clear procedures for evaluation are critical to ensure protection of the state's wetlands and compliance with the state's "no net loss" policy. Based on our more than 40 years' experience reviewing proposed wetland fill projects under CEQA, 404 and SWRCB permitting processes, we have some problems with the Procedures as described below.

**Wetland Definition:**

Changing the definition of wetlands to include areas that are unvegetated and that do not have a hydrologic connection to a larger water body as wetlands is essential. This will fill a major gap in wetland regulation and significantly reduce the risk of losing more wetlands throughout the state. Isolated wetlands serve as important source of water for both birds and mammals, resting and foraging habitat for shorebirds, flood protection, to name a few benefits. This revised definition is long overdue.

**Problems with Procedures:**

Sections of the Procedures that are problematic are mitigation hierarchy, requirements, ratios, the use of banks, in lieu fees and permitting authority. We are concerned that these components would result in loss of wetlands which would be in violation of the state's "no net loss" of wetlands policy and would be detrimental to the state's wetland ecosystems.

Mitigation Ratio: The amount of mitigation required is proposed to be determined on a project-by-project basis with a minimum requirement of one acre of mitigation wetland for one acre of wetland or stream length filled. A minimum 1:1 ratio in itself is too low, and even that could be further reduced on a case-by-case basis by Regional Boards if the project provides buffer zones and/or is covered by a watershed plan.

All wetlands should have buffers, otherwise known as transition zones, for the reasons mentioned in the document and also because transition zones are essential for habitat for many species. Tidal marsh-

dependent endangered species, endangered Ridgway's Rails and Salt Marsh Harvest Mouse must leave wetlands when the water levels are high, and other special status species, such as San Pablo Song Sparrow and California Black Rail, nest, forage and seek cover in transition zones. Buffers are also needed to mitigate human use impacts, such as noise, lights and litter, from the use of adjacent trails, and to accommodate climate change and sea level rise.

Further, a ratio of 1:1 would not compensate for temporal losses and potential delay in restoring mitigation wetlands.

Mitigation Banks: The Procedures favor mitigation banks and indicate that they should be located within the watershed of the wetland loss. Banks are described as being environmentally preferable because they "usually involve consolidating compensatory mitigation projects where ecological appropriate, consolidating resources, providing financial planning and expertise...reducing temporal losses and uncertainty over project success." While this may be the case with some banks, it is certainly not true with all banks, e.g. those that have not successfully produced or sustained wetland resources such as the Burdell Bank in Marin County. Marin Audubon Society does not support the concept of mitigation banks because it is our experience that they facilitate the loss of wetlands by providing an avenue to avoid consideration of not filling wetlands.

The Procedures do not address several aspects of critical importance:

- 1) Whether a Regional Board has discretionary authority to not allow use of banks. The San Francisco Bay Board does not endorse the use of mitigation banks. We support this position and believe that requiring it to permit the use of mitigation banks would lead to reduced regulatory oversight and the loss of wetlands in this region.
- 2) The authority or requirement of Regional Boards to evaluate and approve mitigation banks. Currently the agencies that approve establishment of mitigation banks, at least in the Bay Area, does not include the RWQCB. If Regional Boards are required to permit the use of mitigation banks, they should certainly have a part in identifying standards for their approval and should have the authority to permitting individual banks and use thereof.

Location of Banks/Size of Service Areas: The Procedures provide that banks be located in the same watershed as the impact site. However, the size of the watershed and the size of the service area are poorly defined. Watersheds are defined as "a land area that drains to a common waterway, such as a stream, lake, ocean or ultimately to the ocean." This is a very broad range. The smallest unit, a headwater stream, is too small, whereas the San Francisco Estuary or San Francisco Bay, both of which could be described as watersheds, are too large. If the service area is defined as San Francisco Bay or even North San Francisco Bay, the mitigation could be 20, 50 even 100 miles from the site of loss.

The Procedures state: "watershed approach should not be larger than is appropriate to ensure that the aquatic resources provided through the compensation activities will effectively compensate for adverse environmental impacts resulting from activities authorized by the Orders." It is further stated that relevant environmental factors and local standards should be considered in when determining the appropriate watershed scale. These categories are broad and vague. What are the relevant environmental factors, how many local jurisdictions have standards and, if so, what are they? Local standards may be unfavorable to protecting wetlands. The loss of biological resources to the area of impact, habitat for its wildlife and flood control and other benefits for its people, should also be considered when evaluating whether to approve mitigation banks and the size of service areas.

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Although there is discussion of the consideration of biological resources in a watershed approach (page 29) the biological resources to be considered should also include the loss of habitat for local wildlife, and benefits for people, such as flood control, to the local area.

Wetland mitigation banks make it easier to fill wetlands as local governments, in our experience, often do not require developers to go through an avoidance analysis but they accept bank credits purchased or intended to purchase without question. Fortunately, the Procedures provide that Regional Boards can require an Alternative Site Analysis for non-water dependent projects if the Army Corps-required Analysis does not meet state standards. Alternative site analyses provide better assurance that avoidance is considered first, than the current situation.

In Lieu fees: We object to using in lieu fee programs unless the site for use of the fees is identified. Otherwise, there are risks that the funds may not be used for long periods of time, could no longer be sufficient to fund the needed mitigation, or could be used in an unacceptable location. A further concern is that with an in lieu fee programs there is no ability for the public to have input as decisions are made outside of a public process, after the wetland loss is approved. With mitigation that is identified at the time of the project approval there is public review. At minimum, there should be public noticing and review of the distribution of in lieu fee funds, if this component is ultimately approved.

Mitigation Preference: The highest ranked criterion for mitigation should be on-site and in-kind as the preferred mitigation. Criterion #5 should be moved to #1. This would best assure the ecological benefits, particularly the wildlife habitat, are not lost to the local wildlife and human communities. On-site and in-kind would certainly comply with a watershed approach. We would not think watershed interests would want to be moving natural wetlands around. The criterion should be reworded to recognize that it complies with a watershed approach and is not separate as is implied in the discussion on page 28.

Authority of Permitting Authority:

The permitting authority has latitude in requiring the quantity and location of wetlands and evaluating the watershed approach. We urge that wetland protections not be lower in some parts of the state. There should be a minimum standard that Regional Boards must follow, but each should have the authority to be stronger than the minimum to better ensure protection of the state's wetlands in their jurisdictional area.

In conclusion, Marin Audubon has more than 40 years' experience reviewing projects that would impact wetlands and commenting to and interacting with the San Francisco Bay Regional Water Control Board and other regulatory agencies. We also have the perspective of an applicant's having received multiple permits to restore wetlands over the last 30 years. We appreciate your consideration of our comments.

Sincerely,

  
Barbara Salzman, Co-chair  
Conservation Committee

  
Phil Peterson, Co-Chair  
Conservation Committee