



Western Power Trading Forum



September 18, 2017

Jeanine Townsend
Clerk to the Boards
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

RE: State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State

Dear Ms. Townsend:

Western Power Trading Forum (WPTF) appreciates the opportunity to comment on the July 21, 2017 Final Draft State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State (Procedures). As a broad-based membership organization with nearly 70 member companies dedicated to establishing a vital energy market, WPTF shares a common goal with the State of California to achieve the State's renewable energy goals. While WPTF is supportive of the State's efforts to protect wetlands, these efforts should be harmonized with the State's renewable energy goals. Accordingly, the Procedures should be crafted to avoid onerous and duplicative regulatory processes that increase burdens on the development of renewable energy projects.

There are several overlapping California initiatives that call for an increase in renewable energy projects. For example, SB32 codified the greenhouse gas (GHG) reduction goal of 40% below 1990 emissions levels by 2030 and the reauthorization of the AB32 through the passage of AB398 will provide increased pressures to develop new renewable energy projects in California. Over time, as the GHG emission cap declines and the cost of GHG allowances increases, it will be necessary for California to continue to develop new and existing renewable energy projects and technologies. The long term goal of an 80% reduction of GHG emissions from 1990 levels will only increase this need. In addition, as the State Renewable Energy Portfolio Standard increases, the demand for renewable electric generation will increase. Renewable energy projects need to be developed in an environmentally responsible manner, however it is important to look for areas to minimize the costs and administrative hurdles incurred during the development of these projects.

The proposed revision to the draft Procedures related to the waters of the State is an excellent opportunity to implement a program that affords environmental protection while also minimizing impacts to renewable energy project development and in essence, rate payers. The urgency to be able to develop projects in a cost effective manner increases as the areas of optimal renewable energy generation are either developed or removed from consideration by other programs (e.g., Desert Renewable Energy Conservation Plan). We have seen not only in California but in many jurisdictions across North America increases in development costs that have the potential to greatly affect the viability of a project's development. This can cause a shift in corporate investment to jurisdictions where development is more economical. It is our hope that we can assist in the development of these proposed procedures so that we can capitalize on the potential efficiencies without compromising any protections sought by the State Water Resources Control Board (SWRCB). It is our aim to help the SWRCB accomplish their short and long term goals while providing opportunities for the growth in renewable generation sector. WPTF provides the following comments focused on avoiding

duplicative permitting processes and promoting regulatory streamlining while still achieving the directive of Governor's Executive Order W-59-93 for a "no net loss" of wetlands.

Overlapping/Duplicative Permitting Processes

WPTF continues to have concerns with the jurisdictional scope of the draft Procedures, which have significant overlap with the federal Clean Water Act (CWA) Section 404 permitting program and the California Department of Fish and Wildlife (CDFW) Lake and Streambed Alteration Agreement (LSAA) program under Fish & Game Code section 1600 et seq. As a general matter, WPTF continues to support the comments and recommendations filed on August 18, 2016 by a consortium of organizations (including, among others, the Large Scale Solar Association) on the prior draft of the Procedures, and we do not believe the SWRCB's responses to comments adequately address these extensive stakeholder comments, particularly those addressing duplicative and overlapping jurisdiction by multiple agencies, and the overly burdensome regulatory climate that is sure to ensue.¹

Indeed, WPTF is particularly concerned by the SWRCB's failure to address adequately comments related to the duplicative and overlapping jurisdiction with CDFW's LSAA program and the Army Corps of Engineers' under CWA Section 404, threatened by the draft Procedures.

Notably, CDFW's LSAA program already regulates most (if not all) of the very same State waters that the SWRCB's proposed Procedures are intended to regulate. CDFW's program not only applies to all lakes, rivers and streams in the State, but also has been extended to episodic rivers and streams, ephemeral stream, desert washes, watercourses with subsurface flow, and even floodplains. Many of the waters of the State sought to be regulated under the draft Procedures fall under this broad scope of CDFW jurisdiction.

The August 18, 2016 comments detailed how the draft Procedures would create a regulatory program that in large part duplicates CDFW's LSAA program, resulting in undue burdens on a wide array of industries, potentially duplicative mitigation, and ultimately, an unnecessary waste of time and resources by both regulators and the regulated community. In addition, the introduction of another duplicative permitting process creates yet another opportunity for certain organizations to delay/derail an environmentally sound renewable energy project via administrative appeals and litigation. Furthermore, the draft Procedures and responses to comments fail to explain or quantify which waters of the State that the SWRCB believes are not adequately protected under the LSAA program. Before adopting any Procedures, we ask that the SWRCB provide specific examples of waters of the State that CDFW's existing LSAA program has not adequately addressed in the past and would not adequately address in the future. Once that list has been populated we ask that the Procedures only pertain to the waters of the State that are not already covered under the LSAA program in order to avoid duplicative permitting and mitigation.

¹WPTF also has concerns regarding the procedures being utilized by the SWRCB for the promulgation of the Procedures. The SWRCB asserts that the Procedures "will have the same force and effect as a regulation" (see Response to Comment 46.4), but that because they have been crafted as a revision to a water quality control plan, they are exempted from the State's Administrative Procedures Act requirements regarding regulations pursuant to Gov. Code section 11353. However, the SWRCB is not, in fact, adopting or revising a water quality control plan in this case. Rather, the SWRCB is proposing to adopt extensive regulatory requirements similar to the requirements contained in analogous Corps' and CDFW regulatory programs that were adopted via formal rule-making processes. Such regulatory changes as those proposed by the SWRCB should follow the Administrative Procedure Act and be subject to full review by the Office of Administrative Law.

WPTF is also concerned that draft Procedures would create a regulatory program that has significant overlap with federal law under Section 404 of the CWA. The draft Procedures create mitigation requirements that are similar, yet not identical, to those regulated by the Corps under Section 404 of the CWA. Like the issue of draft Procedures requirements overlapping with CDFW regulations, the SWRCB draft Procedures would create inconsistency and duplicative effort between mitigation requirements for the SWRCB and the Corps, thereby further delaying review times for important state infrastructure projects.

WPTF supports the edits made to the draft Procedures that provide exemptions from alternative analysis requirements for projects which meet the terms and conditions of one or more of the SWRCB certified Corps' general permits. However, we recommend the draft Procedures should exempt all projects that fall under Corps' general permits, not just those general permits that have been certified by the SWRCB. Alternative analysis is already required for Corps review under Section 404 of the CWA for projects that do not fall under a Corps' general permit.

Regardless of what projects would be required to conduct alternative analysis, under the draft Procedures, as with Section 404 of the CWA, it is required that a permitted project that undergoes this analysis be the least environmentally damaging practicable alternative (LEDPA). The draft Procedures in their current form contain alternative analysis requirements that are similar but not exactly the same as federal requirements. Therefore, LEDPA determinations made by state and federal agencies may not be consistent, and state and federal agencies may disagree on the level of analysis required. WPTF understands that SWRCB attempted to resolve this issue in the current form of the draft Procedures with the provision that the SWRCB shall defer to the Corps' determinations on the adequacy of the alternatives analysis unless the SWRCB Executive Officer or Executive Director writes to the Corps. However, we believe that this provision does not go far enough to avoid and resolve disputes on LEDPA determinations as there is no formal agreement and associated process that has been established between the Corps and the SWRCB (i.e., no defined process after the letter has been received from the SWRCB or established statutory timelines). In the absence of consistent LEDPA requirements and determination procedures between the SWRCB and the Corps or a well-defined resolution process for disagreements between these agencies, the draft Procedures provide further opportunity for extended permit review time resulting in increases to overall project costs.

At a time when the State is setting increasingly aggressive renewable energy goals, the State should be seeking ways to simplify/streamline permitting processes for renewable energy projects, not adding largely duplicative layers of regulation with arguably negligible environmental benefits. While WPTF fully appreciates the State's goals relating to its "no net loss" policy, the State's goals can be best served through a programmatic approach to protection of State waters that promotes coordination between various federal and state regulatory agencies. Elimination of duplicative and overlapping regulatory processes and requirements is one key aspect of this.

Accordingly, if the SWRCB determines it needs to act, we encourage the adoption of a program that more surgically fills any regulatory gaps by protecting only those waters of the State that are not already protected by CDFW or the Corps under CWA Section 404.

Suggested Regulatory Streamlining Actions

In furtherance of the general comments above, WPTF has identified several ways in which the draft Procedures can be refined to minimize regulatory overlap and streamline the wetland and waters impact permitting process. Specifically, regulatory processes and measures should be consolidated or harmonized in a joint application process to reduce regulatory delays and costs for both project applicants and agencies. The coordinated agency process should include the following:

Joint Application Process: The Regional Water Quality Control Boards (RWQCBs) under the oversight of the State Board should work with CDFW and Corps' California District Offices to create a joint application procedure for impacts to wetland and water features to including dredge and fill impacts as well as other impacts regulated by the agencies (e.g., removal of riparian vegetation under the CDFW LSAA Program). The joint application process could be created through a memorandum of understanding between the three agencies or some similar agreement, which would establish a process for clear determinations of which agencies would process specific types of projects in specific types of jurisdictional waters. Such a uniform, joint application process for impacts to wetland and waters would provide clarity for the agencies and applicants in determining the need for a permit, as well as which agency or agencies would have the lead regulatory oversight. Joint Aquatic Resource Permit Application (JARPA) programs have been instituted both in Washington State and for the nine San Francisco Bay Area Counties in order to allow project proponents to apply for multiple aquatic resource permits at one time, thereby streamlining the environmental permitting process. WPTF proposes that a JARPA program be extended to the entire State of California in order to provide permitting efficiencies.

Specifically, a joint application process should clearly allow for the description of type of water to be impacted (state and/or federal), level of jurisdictional impact, the specific permit (e.g., streambed alteration, discharge waste, nationwide permit, individual permit, exclusion/exemption) being applied for, the design and performance standards of the proposed project, the avoidance and minimization measures, and the proposed mitigation. A joint application process would allow for a clear determination by the RWQCB, CDFW, or Corps to determine which agency or agencies would be the appropriate regulatory entity to process the permit application when waters of the State or waters of the US will be impacted.

Uniform Mitigation Assessment Methodology: The RWQCBs should also work with CDFW and the Corps' California District Offices to create a uniform mitigation assessment methodology which would provide for the equivocal assessment of ecological and hydrological function for impacts to waters and wetlands. In 2006, CDFW, the Corps, the SWRCB, and other state and federal agencies entered into a Memorandum of Understanding (MOU) (updated and renewed in 2011) that provided guidance on how agencies would work together to develop and use combined or coordinated approaches to mitigation and conservation banking (e.g., standardized banking documents and guidance). Although this MOU has led to some inter-agency agreement on issues such as what banks are approved by multiple agencies, there are still inconsistent standards among agencies regarding such things as what constitutes the appropriate level of mitigation for a project impact. Conflicting definitions of a wetland between the Corps and that asserted by the SWRCB under the draft Procedures further complicates consistency in determining appropriate mitigation. For example, an "other water" as defined by the Corps given lack of vegetation may be defined as a wetland under the draft Procedures, thus resulting in differing requirements between agencies regarding appropriate mitigation should that feature be impacted.

The establishment of a uniform mitigation assessment method would standardize the ability to determine the amount of mitigation needed to offset adverse impacts to wetlands and other surface waters, and to determine compensatory mitigation which would alleviate much of the subjective nature of the analysis process. A standardized process would also allow for a common agency understanding to measure impacts and mitigation requirements and could be objectively inserted into both a California Environmental Quality Act (CEQA) and/or National Environmental Policy Act (NEPA) analysis. It should be noted that standardization for measuring impacts would also require coordination among and within agencies in order to clearly define agency jurisdiction, a benchmark that sometimes even varies office to office at an intra-agency level. Finally, a standardized procedure would allow for the uniform assessment of the ecological functions provided by wetlands and other surface waters, the amount that those functions are reduced by a proposed impact, and the amount of mitigation necessary to offset that loss. The minimal components of the methodology would evaluate functions through consideration of an ecological community's current condition, hydrologic connection, uniqueness, location, fish and wildlife utilization, time lag, and mitigation risk.

Water Board Certified Corps' General Permits: The SWRCB's proposal of allowing for exemptions from conducting an alternative analysis by a project meeting the terms and conditions of one or more of a SWRCB certified Corps' general permit is a vital component of the draft Procedures in facilitating construction of renewable energy projects. The nationwide general permit (NWP) program administered through the Corps makes the determination that the classes of authorized activities comply with the CWA section 404(b)(1) Guidelines and have only minimal adverse effects individually and cumulatively. Either all NWPs or specific NWPs certified under the Section 401 program and regional general permits (RGP) specific to the California Corps' District Offices should be certified by the SWRCB in a parallel process with revisions of the Procedures. In the event the SWRCB chooses to not certify the NWP program in its entirety, but would rather review each individual General Permit for certification, we have identified the most crucial permits in the construction of renewable energy projects that we urge the SWRCB to certify in conjunction with adopting revised Procedures:

- NWP 12 – Utility Line Activities, NWP 14 – Linear Transportation Projects, NWP 43 – Stormwater Management Facilities, and NWP 51 – Land Based Renewable Energy Facilities

State Delegation of Section 404 Program: It is understood that it is the intent of the SWRCB to protect wetlands that are no longer subject to federal jurisdiction due to the multiple U.S. Supreme Court decisions and the uncertainty created by those decisions. However, the currently proposed draft definition claims all “Waters of the U.S.” to also be waters of the State. This definition, as currently set forth, exceeds the initial intent of the SWRCB, and would create an unnecessary jurisdictional overlap. If the SWRCB intends to regulate federal jurisdictional waters as waters of the State, then the State should seek delegation of the Section 404 Program to reduce overlapping and potential contradictory jurisdictions and permitting processes.

Conclusions

WPTF believes that the suggested refinements set forth above will allow the State to achieve the “no net loss” policy goals, while at the same time avoiding duplicative and burdensome regulatory processes. We believe there are still additional clarifications that can be inserted into the exclusions of projects requiring alternatives analysis and considerable opportunity to institute streamlining synergies to reduce regulatory overlap and increase procedural consolidation which will result in both the efficiency and effectiveness of the program for both the agencies and applicants.

WPTF would like to be provided the opportunity to work with the SWRCB in the development of these procedures to protect state waters. Our goal is to assist in further streamlining the process while achieving both “no net loss” of wetlands and increasing renewable energy generation for the State of California.

If you have any questions or require additional information please contact Clare Breidenich at (206) 697-4946 or clare@wptf.org.

Respectfully submitted,



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