

State and federal regulatory authority over water quality. The Porter-Cologne Water Quality Control Act (Porter-Cologne), enacted in 1969, vests the State Water Resources Control Board (SWRCB) with ultimate authority over state water quality policy. The regional water quality control boards (regional boards) oversee water quality at the local level. Collectively, these are known as the “Water Boards.” Porter-Cologne sets the goal of regulating activities in California to achieve the highest reasonable water quality. Three years after the enactment of Porter-Cologne, Congress enacted the Federal Water Pollution Act Amendments of 1972, commonly referred to as the Clean Water Act (CWA).

Federal Clean Water Act certification. Under Section 401 of the CWA (Section 401), 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 a Section 401 water quality certification (401 certification) is issued, or certification is waived. States where the discharge would originate are generally responsible for issuing water quality certifications. Section 401 is an important tool for states to help protect the water quality of federally regulated waters within their state borders, in collaboration with federal agencies. It gives states the authority to grant, deny, or waive certification of proposed federal licenses or permits that may discharge into waters of the United States. In essence, it authorizes the state to ensure that all federal permits issued under the CWA comply with state law. Some major federal licenses and permits subject to Section 401 include Federal Energy Regulatory Commission licenses for hydropower facilities and natural gas pipelines.

401 Water Quality Certification and Wetlands Program. This program is responsible for regulating discharges of dredged or fill material into waters of the state. Pursuant to Section 401, the Water Boards have authority to issue 401 certifications to applicants for a federal license or permit for activities that may result in a discharge into the waters of the United States, including, but not limited to, the discharge of dredged or fill material. For discharges into waters of the state, authority is provided under Porter-Cologne.

On April 2, 2019, SWRCB adopted the State Wetland Definition and Procedures for the Discharge of Dredged or Fill Material to Waters of the State (Procedures). The Procedures consist of four major elements: (1) a wetland definition; (2) a framework for determining if a wetland feature is a water of the state; (3) wetland delineation procedures; and (4) procedures for submittal, review, and approval of applications for Water Quality Certifications and Waste Discharge Requirements for dredge or fill activities. The Procedures were adopted to address several important issues: (1) a need to strengthen protection of waters of the state that were no longer protected under the CWA due to US Supreme Court decisions; (2) there was inconsistency across the Water Boards in requirements for discharges of dredged or fill materials into waters of the state, including wetlands; (3) there was no single accepted definition of wetlands at the state level and the Water Boards historically had different requirements and levels of analysis regarding issuance of water quality certification; and (4) regulations have historically not been adequate to prevent losses in the quantity and quality of wetlands in California, where there have been especially profound historical losses of wetlands.

Applicants proposing to discharge dredged or fill material are required to comply with the Procedures unless an exclusion applies.

Executive Order N-5-23. Since July 2021, Governor Newsom has issued four executive orders in response to the drought: Executive Orders N-10-21, N-7-22, N-3-23, and N-4-23. On March 24, 2023, the Governor issued Executive Order N-5-23 to “terminate several operative provisions” “that are no longer needed in light of improving drought conditions.” Of the 81 operative provisions, 49 were terminated and 32 remain in effect. The remaining operative provisions include, among others:

- Directing the Water Boards to prioritize processing of applications for groundwater recharge projects, and suspending CEQA for such projects. (Executive Order N-7-22, Paragraph 12)
- Suspending CEQA for specified flood-related and state-supported recharge projects. (Executive Order N-7-22, paragraph 13)
- Facilitating the diversion of flood flows to accelerate groundwater recharge, under specified conditions that limit permissible diversions to those that do not harm water quality, habitat, or infrastructure. (Executive Order N-4-23, paragraphs 2-5,7)

Existing Law:

- 1) Requires an entity to notify CDFW before commencing any activity that may substantially alter a streambed. (FGC §1602)
 - a) CDFW may enter into Lake and Streambed Alteration Agreements, which permit activities that alter a streambed *IF* reasonable measures to protect fish and wildlife resources are included.
- 2) The federal Clean Water Act makes it unlawful to discharge any pollutant from a point source into navigable waters without a permit; and establishes a structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters.
 - a) Designates SWRCB as the state water pollution control agency for purposes of the Federal Clean Water Act and authorizes SWRCB to issue a certificate or statement under the federal act that there is reasonable assurance that an activity of a person subject to the jurisdiction of the state board will not reduce water quality below applicable standards. (Water Code (Wat. C.) §13160)
- 3) Porter-Cologne establishes the SWRCB and regional water quality control boards to **preserve, enhance, and restore the quality of California’s water resources and drinking water for the protection of the environment, public health, and all beneficial uses, and to ensure proper water resource allocation and efficient use for the benefit of present and future generations.**
 - a) Requires a person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state, to file with the appropriate regional board a report of the discharge. (Wat. C. §13260(a))

PROPOSED LAW

This bill requires CDFW and the Water Boards, for water supply projects and flood risk reduction projects, to issue a final LSAA or take final action on water quality certifications issued pursuant to either Porter-Cologne or under the federal CWA, as applicable, within specific timeframes. Specifically:

For purposes of LSAA's,

- 1) Requires CDFW, for water supply projects and flood risk reduction projects subject to LSAA's whose project proponent submits a "complete notification" for the project activity and submits final environmental documentation for the activity, to issue a final agreement within 180 days of receiving a complete notification or within 60 days of receiving final environmental documentation, whichever is later. Authorizes CDFW and the project proponent to agree to extend this period.
- 2) Authorizes, if CDFW and the project proponent are not able to reach a final agreement on all measures within that timeframe, the project proponent to proceed in accordance with a final agreement issued by an arbitration panel.

For purposes of water quality certifications,

- 1) Requires the Water Boards to take final action on a water quality certification required pursuant to either Porter-Cologne or federal CWA within 180 days after receiving a complete application or 60 days after receiving final environmental documentation, whichever is later, if the project proponent does all of the following:
 - a. Requests a preapplication consultation. The project applicant is required to initiate the preapplication consultation at least 60 days before the filing of the application of certification.
 - b. Files a complete application for project certification.
 - c. Files a complete application or petition for all water rights approvals, or amendments necessary, to implement the flood risk reduction project or water supply project.
 - d. Submits final environmental documentation to the Water Boards required by CEQA.
- 2) Requires the Water Boards, within 30 days after the submittal of an application or petition, to notify the project proponent whether the application is complete. If the application is incomplete, the Water Boards are required to provide the project proponent with written notification that includes a full list of specific items that were complete and incomplete, and indicate the manner by which incomplete items can be made complete.
 - a. Prohibits the Water Boards from requesting or requiring the project proponent to provide new or additional information that was not identified in the initial list of incomplete items.
 - b. Deems the application or petition complete if the Water Board does not provide the project proponent with written notification that includes complete and incomplete items within 30 days.

- 3) Requires the project proponent, within 45 days of receiving a notification of incomplete materials, to submit the supplemental materials or appeal the determination.
- 4) Requires SWRCB or the regional board, within 30 days of receiving the supplemental materials, to determine the completeness of the application or petition with the supplemental materials, and whether to issue the notification of a complete application. Limits the Water Boards determination to whether the application or petition includes the information specified in the prior notification of incompleteness when determining whether to issue this notice.
 - a. If the supplemented application or petition is again determined to be incomplete, requires the Water Boards to provide the project proponent with a written notification specifying the parts of the supplemented application or petition that are still incomplete and indicate the manner by which they can be made complete. If the Water Boards does not provide such written notification within 30 days of receiving the supplemented application or petition, the application or petition, as supplemented, is deemed complete.
 - b. Requires the project proponent to act within 30 days by submitting additional supplemental materials or by appealing the notification of incompleteness.
- 5) Authorizes the project proponent to petition SWRCB to reconsider a SWRCB-determination of application completeness, or to appeal to SWRCB any regional board's determination of application completeness; and requires SWRCB to act on the petition or appeal within 60 days.
- 6) Requires the Water Boards, when issuing water quality certifications, to use an approved habitat conservation plan, natural communities conservation plan, or habitat management plan (collectively, approved plan), as specified, as a watershed plan unless the Water Board determines that the approved plan does not substantially meet the definition of a watershed plan.
 - a. Requires the Water Boards to accept, as terms of the water quality certification, any avoidance, minimization, and compensatory mitigation required by the approved plan, for those impacts to waters of the state already addressed by the approved plan, if certain conditions are met.
 - b. Prohibits the Water Boards from imposing terms and conditions mandating avoidance, minimization, or compensatory mitigation for impacts to waters of the state in addition to those already provided pursuant to approved plans if certain conditions are met, including the watershed plan addresses the project impacts to waters of the state, among others.
 - c. Requires the Water Boards, in order to make a determination that an approved plan does not substantially meet the definition of a watershed plan, to make a proposed written determination, supported by specific written findings of insufficiency, for public review and comment and provide written responses to the public comments received.

- 7) Requires SWRCB, by January 1, 2025, to adopt general water quality certifications for general nationwide permits issued by the United States Army Corps of Engineers (Army Corps) under the federal CWA within the state for discharge of dredge and fill material in connection with water supply projects and flood risk reduction projects. Requires SWRCB to rely on an environmental review completed by the Army Corps under the National Environmental Policy Act (NEPA) for compliance with CEQA.
- 8) Requires the Water Boards, commencing January 1, 2025, to annually prepare, provide public notice of, and make available for public review on their internet website, and provide to legislative policy and budget committees, a report with specified information, including water supply projects and flood risk reduction projects that have been issued water quality certifications.

ARGUMENTS IN SUPPORT

According to the author, “The climate extremes California has been experiencing in recent years are unfolding a new pattern of drought and precipitation timeframes that we are ill adapt to respond to. With drought lasting years at a time, only to be interrupted by prolonged and potentially destructive rainfall, the need for water supply and flood protection infrastructure is evident. However, getting these critical, timely projects approved and built can be a significant challenge. The permitting process for these projects can be mired in delays caused by overlapping jurisdictions of state and federal agencies, confusion over what’s required for a completed application, and state agency and project applicant staffing issues. As described in Governor Newsom’s “Water Supply Strategy: Adapting to a Hotter, Drier Future”, streamlining permitting processes is a crucial next step for our state, so projects can be planned, permitted, and built more quickly, while still protecting the environment. SB 23 would provide comprehensive solutions to streamline a multitude of projects meant for various hydrological events. This bill will help accelerate recycled water, desalination, and stormwater capture projects so that these regions have access to a drought-proof sustainable supply of high-quality water, while also accelerating projects meant to provide flood control and respond to sea level rise. SB 23 identifies opportunities to improve and streamline the regulatory permitting process, while preserving established environmental protections, so critical infrastructure projects are built at the pace and scale needed to prepare for climate change, and protect families and businesses that are affected by the delays inherit in our current permit process.”

The Association of California Water Agencies, sponsor of the bill, writes that “the current permitting process can be slow and cumbersome, delaying important projects that are crucial to protecting our communities and natural resources,” and that “SB 23 would create a clear and predictable timeline for obtaining Lake and Streambed Alteration Agreements and section 401 water quality certifications.”

ARGUMENTS IN OPPOSITION

A coalition letter submitted by groups including Community Water Center, Sierra Club California, Leadership Counsel of Justice & Accountability, among others, writes that SB 23 “limits the ability of the State and Regional Water Quality Control Boards to be able to fulfill their mission to protect water quality for public health and other beneficial uses of water. Many of these applications could be long, complicated, or misleading;

necessitating additional analysis that could easily take longer than the 180-day window ... [and] it is insufficient to suggest that completed environmental review is sufficient protection for a community. Many of these projects could be exempted from [CEQA], ministerially permitted by land use agencies, or simply go unnoticed by state permitting agencies. As such, we need both environmental review and water quality permitting by the State and Regional Boards to fully protect water quality.” The letter also expresses concern about allowing entities to “pay more to receive more attention from permitting agencies” and how it will “affect the workload of the State and Regional Water Boards. Our organizations have made significant progress to have the State Water Board prioritize disadvantaged communities” and “if the State and Regional Boards were forced to prioritize projects for wealthier communities that could just offer more money, projects for disadvantaged communities would have to go to the back of the line, furthering environmental injustice.”

Another coalition letter, including the Natural Resources Defense Council, Defenders of Wildlife, Clean Water Action, and Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries Resources, among others, writes, “as currently drafted, SB 23 would undermine effective permitting of water infrastructure, weakening substantive provisions of State law and establishing unworkable deadlines and limitations on the permitting process. In short, this bill sets up a permitting system that could result in shoddy projects that threaten public health and safety and the environment at a time when it is essential that projects are designed to further climate resilience and not undermine it. Further, instead of speeding up projects, this bill will only further delay projects with conflict, controversy and litigation.” The letter goes on to state that, “SB 23 undermines the State’s wetlands policy. For instance, the bill mandates that that State approve general orders issued by the Army Corps of Engineers, regardless of whether those general orders are consistent with California law and policy, and it requires the State to rely on analyses prepared by the Army Corps under NEPA. The State Water Board already has the authority to approve nationwide permits issued by the Army Corps, but in 2020 the State Water Board rejected approval of 39 of the Army Corps’ nationwide permits because they did not assure compliance with state law, and imposed additional conditions on others to ensure compliance with State law. Moreover, while the State’s wetlands policies and procedures establish minimum requirements for dredge and fill permits, SB 23 seeks to codify these minimum requirements as the maximum allowed by law.

COMMENTS

Double referral. This bill is double referred with the Senate Environmental Quality Committee, with this committee being the committee of first referral. Elements of this bill under the jurisdiction of the Senate Environmental Quality Committee are included here for context and completeness only and will be discussed before that committee. Specifically, the Water Boards’ processes for issuing water quality certifications will likely be covered.

One size fits all. SB 23 imposes specific timeframes in which CDFW must issue final LSAAs for flood risk reduction projects and water supply projects and requires Water Boards to take final action on water quality certifications within specific timeframes for those same type of projects when the project proponent has requested a preapplication consultation. The timeframes apply regardless of size or complexity. “Flood risk reduction projects” could include major flood management projects such as those that

are underway in the Mossdale Tract. “Water supply projects” could include desalination plants, the SITES Reservoir, dam spillway projects, enlarging existing reservoirs, groundwater recharge projects, and the Delta Conveyance project. The purpose of having such a broad application, according to the sponsors, is to promote diversity in how the state gets water.

The broader the application, the greater the impact this bill could have on CDFW and the Water Boards and their ability to adequately process LSAAs and water quality certifications in accordance with the bill’s mandated timeframes. SB 23 could impact the management of fish and wildlife resources and water quality throughout the state. The amount of time it may take for CDFW to issue a final LSAA or Water Boards to take final action on a water quality certification can vary from project to project; the more complex the project, the more likely a longer process is involved. Each project is unique and the CDFW and Water Boards are required to consider the individual circumstances of each project – whether it be size, project type, location of the state, or hydrological conditions. It could apply to projects that impact the fish and wildlife and water quality of the Delta, Klamath River, Salinas River, Lake Tahoe, and Lake Elsinore, among others. Because it is hard to identify the universe of projects that could be subject to the bill, and it is unknown how many projects could be before either CDFW or the Water Boards at any given moment, it is also difficult to evaluate the impact these new processes will have on CDFW and the Water Boards. What kind of domino effect could these expedited timeframes have on other responsibilities and duties of CDFW and the Water Boards? Could other projects be pushed to the back of the line and delayed?

The author may wish to consider narrowing the scope of flood risk reduction projects and water supply reduction projects.

Blank check. While the bill requires the Water Boards to report to the Legislature certain information relating to water quality certifications issued for flood risk reduction projects and water supply projects, similar reporting is not required for LSAAs. To provide the Legislature with a better idea of the types of projects utilizing the bill’s expedited processes for LSAAs, *the committee may wish to amend the bill* to require CDFW, commencing January 1, 2025, and annually thereafter, to submit a similar report for LSAAs. (See Amendment 1)

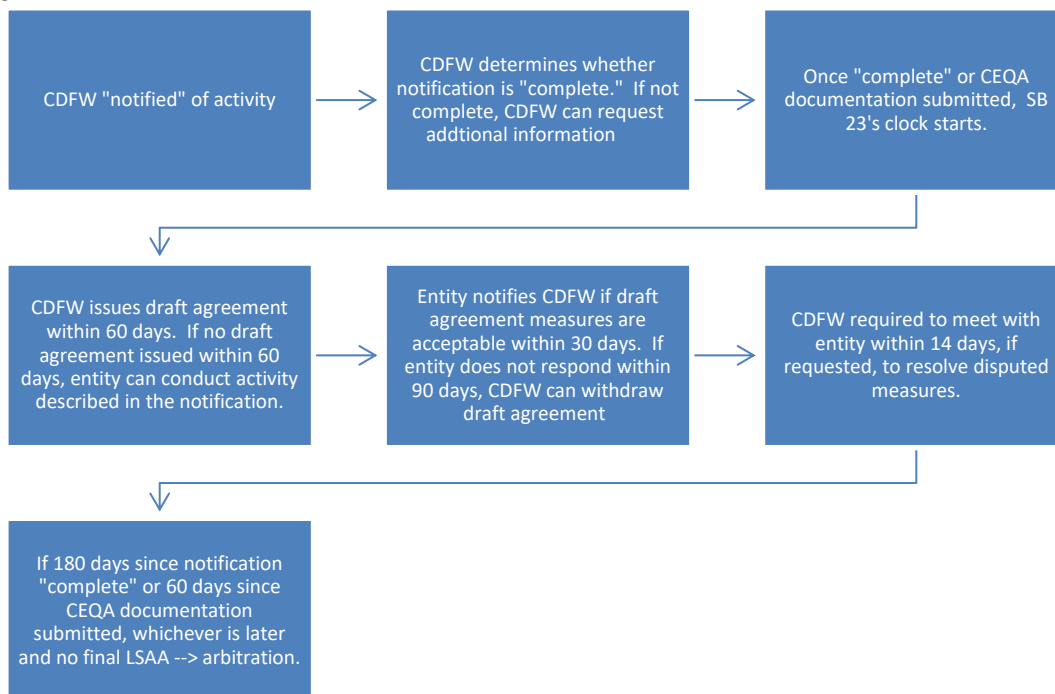
Existing LSAA processes. Existing law already imposes specific timeframes for the issuance of LSAAs. Within 60 days after notification is complete, CDFW is required to provide a draft agreement to the entity, which describes the fish and wildlife resources that may be substantially and adversely affected and includes measures to protect those resources. If CDFW does not issue a draft agreement to the entity within 60 days from the date notification is deemed complete, the entity may conduct the activity described in the notification, including any measures in the notification intended to protect fish and wildlife.

If a draft agreement is issued, the entity, within 30 days of receiving the draft agreement, is required to notify CDFW whether the mitigating measures are acceptable. If the measures are not acceptable, the entity is required to notify the department and specify which measures are not acceptable. If requested, CDFW is required to meet with the entity within 14 days of the request to resolve any disagreements regarding those measures. If the entity fails to respond within 90 days of receiving the draft

agreement, CDFW may withdraw the agreement and may require the entity to resubmit a notification.

If mutual agreement is not reached, the entity may request that a panel of arbitrators resolve the disagreement. The panel is required to issue a decision within 14 days and is binding on CDFW and the entity.

SB 23, in addition to the already established timeframes, would require CDFW to issue a final LSAA either within 180 days of receiving a complete notification from the project proponent or within 60 days of receiving final environmental documentation, whichever is later.



Essentially, SB 23 puts a time limit between when an LSAA “complete” notification or CEQA documentation is submitted and when CDFW is required to issue a final LSAA. If the final LSAA is not issued, the project proponent can proceed to arbitration.

Under current LSAA processes, the entity may request arbitration at any point if mutual agreement is not reached pursuant to a requested meeting (FGC §1603(b)).

The main objective of this bill is to decrease delay that some of the larger water supply projects and flood risk reduction projects encounter. According to CDFW’s website, some causes of delay in issuing LSAA’s include the following:

- Project description in the notification is incomplete or applicant requests changes.
- Insufficient project planning.
- Notification fees are calculated incorrectly.
- Notification did not identify all projects or activities.
- CEQA review has not been completed or does not address all activities or impacts for issuance of an agreement.

- Notification does not adequately address project impacts.
- Notification does not propose measures to protect fish, wildlife, and plant resources, or compensatory mitigation when applicable.
- Draft agreement is not signed and returned promptly by the applicant.
- Person other than the Applicant or Authorized Designed Representative signs the notification or agreement.
- Notification is sent to the wrong CDFW regional office.

Given that current processes require CDFW to issue draft LSAAs within a certain timeframe, an entity has the ability to request arbitration if an agreement cannot be reached pursuant to any requested meeting, and the common causes for delay, it is unclear if this bill would help solve the LSAA issue the author seeks to address.

The importance of being complete. Under the current LSAA program, CDFW determines whether the notification is complete. However, SB 23's requirement that a project proponent "submit a complete notification" has caused some confusion on when the notification is deemed complete and who makes that determination. Is the notification deemed complete when determined by CDFW, as under existing law? Or is the notification complete when the project proponent submits the notification with all the specified, required documents? It is also unclear if CDFW can ask for additional information once they receive the initial notification.

According to the sponsors, SB 23 is not intended to change these existing processes. Because FGC §1602(a)(1)(F) requires the notification to include "any other information required by the department," CDFW may ask for additional information even after receiving the notification. To provide clarity and better effectuate the author's intent, the committee may wish to amend the bill to specify that CDFW determines whether a notification is complete. (See Amendments 2).

Further, "final" environmental review documents under CEQA are either certified or adopted. To clarify what is meant by "final environmental documentation," the committee may wish to amend the bill to refer to environmental documents that have been certified or adopted. (See Amendments 3 & 4)

The author may consider making similar changes to the Water Board provisions.

Not shortcutting, substituting. SB 23 provides for the substitution of different types of environmental documents in attempts to "streamline" and cut down on "redundant" environmental review in two situations. First, when the Water Boards are issuing water quality certifications, the Water Boards are required to use approved habitat conservation plans (HCPs), natural communities conservation plans (NCCPs), and habitat management plans (HMPs) that include biological goals for aquatic resources (collectively, approved plans) in the place of watershed plans unless the Water Board makes a certain finding. HCPs and NCCPs are landscape level multi-species plans that are authorized and permitted pursuant to the federal Endangered Species Act, the California Endangered Species Act, and the state's Natural Community Conservation Planning Act. NCCPs and HCPs take a broad-based ecosystem approach to planning for the protection and perpetuation of biological diversity while allowing for the incidental take of endangered species in the course of otherwise legal activities, such as land

development projects.

Second, when adopting general water quality certifications that are issued by the Army Corps, SWRCB is required to rely on the environmental review completed by the Army Corps under NEPA for its compliance with CEQA. Both of these substitutions apply for any water quality certifications, both pursuant to Porter-Cologne or federal CWA, and not just certifications for flood risk reduction projects and water supply projects.

That's what the Procedures said. SB 23 requires the Water Boards to use the "approved plans" instead of a watershed plan when issuing a water quality certification unless the Water Board makes a determination, in writing, that the approved plan does not substantially meet the definition of a watershed plan. Accordingly, the Water Boards are also required to accept, as terms of water quality certification, any avoidance, minimization, and compensatory mitigation required by the approved plan for those water impacts.

According to the sponsors, and the bill's findings and declarations, these provisions are based on the Procedures that SWRCB adopted in April 2019. The intent was to codify the processes in the Procedures. Proposed Wat. C. §13389.3(a)(2) asserts that "The procedures further require that the state water board or regional boards shall use the approved plans as watershed management plans under the procedures unless the state board or regional boards determine that the approved habitat conservation plan or the natural communities conservation plan does not substantially meet the definition of a watershed plan, as set forth in the procedures, for aquatic resources."

This compares to Page 19, lines 629-637 of the Procedures, which reads:

"The permitting authority *may approve* the use of other plans, including for example, Habitat Conservation Plans (HCPs), Natural Community Conservation Plans (NCCPs), or municipal stormwater permit watershed management programs as watershed plans, if they substantially meet the stated above. Any NCCP approved by the California Department of Fish and Wildlife before December 31, 2020, and any regional HCP approved by the United States Fish and Wildlife Service before December 31, 2020, which includes biological goals for aquatic resources, shall be used by the permitting authority as a watershed plan for such aquatic resources, unless the permitting authority determines in writing that the HCP or NCCP does not substantially meet the definition of a watershed plan for such aquatic resources." (Emphasis added)

While the Procedures *authorize* the Water Boards to use the approved plans as watershed plans, it is not required. The Procedures only require the use certain NCCPs approved by CDFW before December 31, 2020, and certain HCPs approved by USFW before December 31, 2020, unless it is determined, in writing, that the HCP or NCCP does not substantially meet the definition of a watershed plan. Additionally, the Procedures do not limit the permitting entity to what is contained in the approved plan. The Procedures say that the approved plans can be used, or in limited circumstances, mandate its use, but do not restrict the Water Boards from imposing additional conditions, or supplementing it.

Putting the differences between what the Procedures say versus what SB 23 requires aside, the requirement to use the approved plans gives rise to a number of questions:

- *What does it mean to “substantially meet”?* If the Water Boards finds that an approved plan does not substantially meet the definition of a watershed plan, it is not limited to using the plan and any of its avoidance, minimization, and compensatory mitigation. Determining whether something “substantially meets” something can be vague and is often characterized as an “I know it when I see it” situation. In this case, however, could such a vague term open the door to litigation? Could this potentially delay the issuance of water quality certifications, the very purpose for which this bill is being sought?
- *What does that mean?* SB 23 prohibits the Water Boards from imposing additional conditions that would avoid, minimize, or provide compensatory mitigation for impacts to waters other than those conditions that are in the approved plan if the watershed plan meets certain conditions.

If watershed plans, in this case, are being substituted with approved plans, the question is – *what watershed plan?*

- *When can the Water Boards impose additional conditions not in an approved plan?* SB 23 allows for the Water Boards to impose additional conditions not in an approved plan only if the impacts that the conditions would address are not already addressed in the approved plan. However, if the approved plan does contain any avoidance, minimization, or compensatory mitigation for those impacts, the Water Board is restricted to using those measures. This restriction applies even if the measures are inadequate. If the Water Board finds the mitigation measures inadequate, its only recourse would be to make a finding that the approved plan does not substantially meet the definition of a watershed plan.

As noted above, nothing in the Procedures restricts the Water Boards from imposing additional conditions that are not in an approved plan. The Procedures provide that the Water Board may use the approved plans, but does not prohibit the Water Boards from supplementing it. Thus, if an approved plan addresses a particular water impact, but the mitigation in the plan is inadequate, under the Procedures, the Water Boards may impose additional conditions.

- *Is finding an approved plan to be insufficient really an option?* While the Water Boards may have the option of making a finding that the approved plan is inadequate, in the context of water quality certifications for water supply projects and flood risk reduction projects, this could make their timeframes even tighter.

Given all of the above concerns and considerations, that proposed Section 13389.3 is intended to codify what is in the Procedures but does not impose the same requirements as the Procedures, and that the Procedures are already required to be followed, the addition of proposed Section 13389.3 seems to add little benefit and may only cause additional confusion. The committee may wish to require the author to continue to work with committee staff to either amend the language so that it is

consistent with what is required by Procedures, or to remove these provisions from the bill to avoid confusion.

Trading CEQA for NEPA. SB 23 also requires SWRCB, by January 1, 2025, to review and adopt general water quality certifications for general nationwide permits issued by the Army Corps under Section 404 of the Clean Water Act within the state for discharge of dredge and fill material in connection with water supply projects and flood risk reduction projects. In reviewing and adopting these certifications, SB 23 requires SWRCB to rely on the environmental review completed by the Army Corps under NEPA for compliance with its duties under CEQA.

California's Porter-Cologne is more stringent in its requirements than the federal Clean Water Act, and has a broader reach, applying to more activities and more categories of water. For example, Porter-Cologne governs groundwater and isolated wetlands, which are generally outside the scope of the federal Clean Water Act, and Porter-Cologne's discharge requirements, apply to both point and non-point sources of pollution.

CEQA requires, in the event that a project requires both an EIR pursuant to CEQA and an EIS pursuant to NEPA, the lead agency, whenever possible, to use the EIS as the EIR *if* that EIS complies with the requirements of CEQA. (Public Resources Code (PRC) §§21083.5, 21083.7).

However, SB 23 would require SWRCB to rely on the Army Corps' environmental review performed under NEPA, with no consideration if that environmental review complies with CEQA. Requiring SWRCB to use NEPA documents prevents SWRCB from being able to do its own CEQA analysis and determine whether each general nationwide permit is consistent with California law. SWRCB would not be able to consider the potential significant environmental impacts of the general nationwide permit, would not be able to use California's wetlands policy to address these impacts and would undermine the state's ability to protect its water quality. As pointed out in one of the coalition letters, SWRCB already has the authority to approve nationwide permits issued by the Army Corps, but in 2020, SWRCB rejected approval of 39 Army Corps permits because they did not assure compliance with State law.

To ensure that SWRCB has the ability to adequately regulate the discharge of dredge and fill material in accordance with the state's environmental protection standards and uphold the State's wetlands policy, the committee may wish to amend the bill to require SWRCB to review and act on the Army Corps permits, which would maintain SWRCB's discretion to reject permits that do not comply with State law, and to amend the bill to only require use of NEPA documents if the environmental review complies with CEQA. (See Amendment 5)

Choose wisely. Water supply projects can be especially controversial and complex. Is it appropriate to require CDFW or the Water Boards to act within expedited timeframes for these types of projects? The main purposes of the LSAA and water quality certifications is the protection and conservation of fish and wildlife resources and to protect the water quality of the state's water resources, respectively. Could expedited timeframes, particularly for controversial and complex water supply projects, force agencies to choose between expediency and completeness? While the Water Boards, as a final action, may choose to not issue a water certification, this in practice, would

likely cause both the Water Boards and the project applicant to go back to the beginning, further delaying the process.

Here comes the sun(set). A big question continues to be – what is the impact on CDFW and the Water Boards and their ability to issue LSAs and water quality certifications? How many projects could this entail? What does this mean for CDFW and Water Board staff resources? What does this mean for the agencies' ability to ensure fish and wildlife resources and the state's water resources are adequately protected? SB 23 could drastically change how CDFW and the Water Boards issue LSAs and water quality certifications. It may be helpful for the Legislature to have a mechanism that would give them the ability to "check-in" on these new processes and reevaluate, as appropriate. The committee may wish to amend the bill to sunset its provisions on January 1, 2029. (See Amendments 6 & 7)

To be continued. This analysis identifies a number of concerns, some of which can be addressed with committee amendments, others that are still pending. Working out these issues will require continued discussions with various stakeholder groups. Should the committee decide to approve the bill out of committee, the committee may wish to require the author to continue to work with committee staff on these issues and reserves the right to bring the bill back before the committee if it finds that the issues and concerns in this analysis have not been adequately addressed.

Related legislation

SB 586 (Eggman) allows Mossdale Tract and West Sacramento to not achieve the urban level of flood protection by a date certain if an active federal project is in place. SB 586 was heard in this committee on March 28, 2023, and passed out with a vote of 9 – 0. SB 586 is now pending in the Senate Governance and Finance Committee.

SB 651 (Grove) exempts from CEQA actions taken by state and local agencies, and permits necessary to carry out those actions, to accelerate approvals for projects that enhance the ability of the state or local agency to capture high precipitation events for local storage or recharge. These projects would not be required to have a written certification of consistency with the Delta Plan. SB 651 also exempts from CEQA recharge projects under the Department of Water Resources' Sustainable Groundwater Management Grant Program and flood-managed aquifer recharge projects, as specified. SB 651 is set to be heard in this committee on April 11, 2023.

AB 830 (Soria) exempts from lake or streambed alteration agreement provisions temporary operation of existing infrastructure or temporary pumps being used to divert flood stage and monitor stage flows to beneficial groundwater recharge necessary to protect downstream life and property. AB 830 is pending in the Assembly Water, Parks, and Wildlife Committee.

AB 1581 (Kalra) exempts certain individuals, public agencies, universities, zoological gardens, and scientific or education institutions authorized to import, export, take, or possess any endangered species, threatened species, or candidate species for scientific, educational, or management purposes from the requirement to obtain a lake or streambed alteration agreement and instead requires these entities to submit to CDFW a written notification and copy of proposed environmental protection measures

authorized by other agencies' programmatic habitat restoration permits and guidance. AB 1581 is pending in the Assembly Water, Parks, and Wildlife Committee.

Previous legislation

AB 2545 (Gallagher, 2018) would have required CDFW, until January 1, 2023, to establish procedures for the issuance of a general lake or streambed alteration agreement in lieu of an individual agreement and would have required CDFW to adopt general agreements for lake or streambed alteration agreements. AB 2545 was held in this committee.

AB 3102 (Gray, 2018) would, in the case of an activity for which an environmental impact report, negative declaration, or mitigated negative declaration has been certified or adopted, have limited the measures to protect fish or wildlife resource proposed or included in an LSAA to the mitigation measures, if any, contained in the certified or adopted environmental document if CDFW had been provided the opportunity for consultation and comment pursuant to CEQA. AB 3102 was held in the Assembly Water, Parks, and Wildlife Committee.

AB 1704 (Dodd, 2016) would have required CDFW, if an activity includes the diversion of water and the LSAA notification is accompanied with a proposed registration of water use, a renewal of registration, or an amended registration, to determine whether the notification is complete in the same manner it determines whether other notices are complete and to propose any conditions on the registration in a draft agreement. AB 1704 would have provided that the conditions on a registration that are included in a final LSAA agreement are deemed conditions upon the appropriations of water under the registration. AB 1704 was held in the Senate Appropriations Committee on suspense.

SB 665 (La Malfa, 2011) would have amended the LSAA program to, instead of prohibiting substantial diversion or obstruction, prohibit the installation of new diversion or means of diversion, or substantially alter an existing means of diversion. SB 665 also would have deleted the LSAA exemption for pre-1977 agreements, and would have exempted from lake or streambed alteration requirements activities that involve the routine maintenance and operation of water supply, drainage, flood control, or waste treatment and disposal facilities constructed and in existence before 2000, unless the work has substantially changed or conditions affecting fish and wildlife have substantially changed. This bill was held in this committee.

SUGGESTED AMENDMENTS

AMENDMENT 1

Amend FGC §1618 to add subdivision (e) as follows:

(e) On or before January 1, 2025, and annually thereafter, the department shall prepare, provide public notice of, and make available for public review on their internet website, and submit to the relevant legislative policy committees and relevant legislative budget committees, a report regarding the water supply projects and flood risk reduction projects for which final agreements have been issued pursuant to this section.

AMENDMENT 2

Amend FGC 1618(c)(1)(A) as follows:

(A) 180 days after receipt of a complete notification, as determined by the department.

AMENDMENT 3

Amend Fish and Game Code §1618(b)(2) as follows:

(2) Submit ~~final environmental documentation~~ to the department the certified or adopted environmental review document, as applicable, for the activity in the notification, required under Division 13 (commencing with Section 21000) of the Public Resources Code

AMENDMENT 4

Amend FGC §1618(c)(1)(B) as follows:

(B) Sixty days after receipt of ~~final~~ the certified or adopted environmental ~~documentation~~ document required under Division 13 (commencing with Section 21000) of the Public Resources Code for issuance of the agreement.

AMENDMENT 5

Amend Water Code §13389.3(d) as follows:

(d) By January 1, 2025, the state board shall review and ~~adopt~~ take action on general water quality certification for general nationwide permits issued by the United States Army Corps of Engineers under Section 404 of the Federal Water Pollution Control Act (33 U.S.C. Sec. 1344) within the state for discharge of dredge and fill material in connection with water supply projects and flood risk reduction projects. In ~~adopting~~ its consideration of the general water quality certifications, the state board shall ~~rely upon an,~~ whenever possible, use the environmental review document completed by the United States Army Corps of Engineers under the federal National Environmental Policy Act (42 U.S.C. Sec. 4321, et seq.) for compliance with its duties under the requirements of Division 13 (commencing with Section 21000) of the Public Resources Code, pursuant to Section 21083.7 of the Public Resources Code and its implementing regulations.

AMENDMENT 6

Amend Fish and Game Code §1618 to add:

“(f) This section shall become inoperative on January 1, 2029.”

AMENDMENT 7

Add Section 13389.5 to the Water Code to add:

“13389.5. This article shall become inoperative on January 1, 2029.”

SUPPORT

Association of California Water Agencies (sponsor)
Amador Water Agency
American Pistachio Growers
Bay Area Council
Bella Vista Water District
CalChamber
CalDesal
California Alliance for Jobs
California Building Industry Association
California Citrus Mutual
California Council for Environmental & Economic Balance
California Date Commission
California Farm Bureau Federation
California Fresh Fruit Association
California Municipal Utilities Association
California Special Districts Association
California Strawberry Commission
Calleguas Municipal Water District
Carmichael Water District
Citrus Heights Water District
City of Santa Rosa
Coachella Valley Water District
Coastside County Water District
County of Humboldt
County of Monterey
County of Tuolumne
Cucamonga Valley Water District
Desert Water Agency
Eastern Municipal Water District
El Dorado Irrigation District
Elk Grove Water District
Elsinore Valley Municipal Water District
Foothill Municipal Water District
Fresno Metropolitan Flood Control District
Habitat for Humanity, Merced/Stanislaus County
Hidden Valley Lake Community Services District
Humboldt Bay Municipal Water District
Indian Wells Valley Water District
Irvine Ranch Water District
Kings River Conservation District
McKinleyville Community Services District
Mesa Water District
Monterey Peninsula Water Management District
Nisei Farmers League INC.

North Marin Water District
Olivenhain Municipal Water District
Orange County Water District
Orchard Dale Water District
Padre Dam Municipal Water District
Pajaro Valley Water Management Agency
Rancho Water
Regional Water Authority
Rowland Water District
San Bernardino Valley Municipal Water District
San Diego County Water Authority
San Joaquin Council of Governments
San Juan Water District
San Luis Delta-Mendota Water Authority
Santa Clara Valley Habitat Agency
Santa Clara Valley Water District
Santa Fe Irrigation District
Solano County Water Agency
Solano Water
Stockton East Water District
Tahoe City Public Utility District
Three Valleys Municipal Water District
Tuolumne County Water Agency
Tuolumne Utilities District
Turlock Irrigation District
United Water Conservation District
United Way of Merced County
Upper San Gabriel Valley Municipal Water District
Utica Water and Power Authority
Valley Center Municipal Water District
Valley Onward
Vista Irrigation District
Walnut Valley Water District
Western Growers Association
Western Municipal Water District
Western Plant Health Association

OPPOSITION

California Environmental Voters (formerly CLCV)
California Trout
Clean Water Action
Community Water Center
Defenders of Wildlife
Environmental Law Foundation
Friends of the River
Golden State Salmon Association
Institute for Fisheries Resources

Leadership Counsel for Justice &
Accountability
Los Angeles Waterkeeper
Mono Lake Committee
National Resources Defense Council
Pacific Coast Federation of Fishermen's
Associations

Restore the Delta
San Francisco Baykeeper
Sierra Club California
Trout Unlimited
Union of Concerned Scientists

-- END --