**Discussion of August 30, 2019 Amendments to SB 1 (Atkins)**

*Relative to* [*Procedures for Discharges of Dredged or Fill Material to Waters of the State*](https://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/rs2019_0015.pdf)

***Definition of “Waters of the State”:***

Background:

New language in SB 1 amends Section 13050 of the Water Code as follows:

(e) (1) “**Waters of the state” includes, but is not limited to, all waters that meet any current or historic definition of “water of the United States” promulgated by the United States Environmental Protection Agency or the United States Army Corps of Engineers to implement the Federal Water Pollution Control Act of 1972 (33 U.S.C. Sec. 1251 et seq.), as amended.**

**(2) The amendments made to paragraph (1) by Senate Bill 1 of the 2019–20 Regular Session do not constitute a change in, but are declaratory of, existing law.**

The March 22, 2019 [Amendments to Procedures for Discharges of Dredged or Fill](https://www.waterboards.ca.gov/board_info/agendas/2019/apr/040219_10_procedures_comparison_to_july_2017_032219_version.pdf)

[Material to Waters of the State](https://www.waterboards.ca.gov/board_info/agendas/2019/apr/040219_10_procedures_comparison_to_july_2017_032219_version.pdf) were approved by the Water Board on April 2. Those amendments struck out the regulatory reference to “historic definitions” of waters of the United States.

The Water Code defines “waters of the state” broadly to include “any surface water or groundwater, including saline waters, within the boundaries of the state.” “**Waters of the state” includes all “waters of the U.S.” 2**

The following wetlands are waters of the state:

1. Natural wetlands,

2. Wetlands created by modification of a surface water of the state, 13

3. **~~Wetlands that meet current or historic definitions of “waters of the United States,” 2~~**

Footnote 2 refers to historic definitions of waters of the United States. However, it also states “In 2000, the State Water Resources Control Board determined that all waters of the U.S. are also waters of the state by regulation, prior to any regulatory or judicial limitations on the federal definition of waters of the U.S. ([California Code or Regulations title 23, section 3831(w).](https://govt.westlaw.com/calregs/Document/I8F23E3E0D45B11DEA95CA4428EC25FA0?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)))”

§ 3831. Definitions.

The following words (in alphabetical order), ***as used in this Chapter***, shall have the meaning hereafter ascribed to them unless the context of their use clearly requires a different meaning:

(w) “Waters of the United States” means surface water and water bodies as defined by EPA regulations (e.g., 40 CFR Section 122.2). All waters of the United States in California are also “waters of the state” (defined by the Porter-Cologne Water Quality Control Act as “any surface water or ground water, including saline waters, within the boundaries of the state.” [Water Code Section 13050(e)]). Not all waters of the state (e.g., ground water) are waters of the United States.

***Emphasis added***

Conclusion: The new language in SB 1 relative to waters of the US reverses the decisions made in adopting [Procedures for Discharges of Dredged or Fill Material to Waters of the State](https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2019/040219_10_procedures_clean_v032219_conformed_final.pdf). This new language is not declaratory of existing law. This conclusion is based on the following:

* Definitions of Waters of the State by reference to Waters of the US (regardless of current or historic) are in regulations, not the Water Code.
* The most recent regulation on this issue is the Procedures for Discharges of Dredged or Fill Material to Waters of the State approved by the State Water Resources Control Board on April 2, 2019.
* State Water Board Members contemplated and rejected language including, “historic definition of ‘water of the United States’.”
* Instead, those procedures by footnote referenced California Code of Regulations Title 23, Section 3831(w). This footnote has no force or effect in law.
* Additionally, Section 3831 (w) does not include a reference to historic waters of the US. Instead, it simply references EPA regulations (e.g., [40 CFR Section 122.2](https://www.law.cornell.edu/cfr/text/40/122.2)) and California Water Code [Section 13050 (e).](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=WAT&sectionNum=13050.)
* Even if Section 3831 (w) did include historic waters of the US, that definition is solely for purposes of Chapter 28 (Certifications) of Division 3 of Title 23. The definition proposed in SB 1 would apply to the entirety of the Porter-Cologne Water Quality Control Act.

***Dredged or Fill Materials:***

Background:

New language in SB 1 amends Section 13050 of the Water Code as follows:

(d) (1) “Waste” includes sewage and any and all other **pollutants, dredged or fill materials, or** waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.

**(2) The amendments made to paragraph (1) by Senate Bill 1 of the 2019–20 Regular Session do not constitute a change in, but are declaratory of, existing law.**

March 22, 2019 [Amendments to Procedures for Discharges of Dredged or Fill](https://www.waterboards.ca.gov/board_info/agendas/2019/apr/040219_10_procedures_comparison_to_july_2017_032219_version.pdf)

[Material to Waters of the State](https://www.waterboards.ca.gov/board_info/agendas/2019/apr/040219_10_procedures_comparison_to_july_2017_032219_version.pdf) were approved by the Water Board on April 2. Those

those amendments to the procedures include amendments to Section D Activities and Areas Excluded from the Application Procedures for Regulation of Discharges of Dredged or Fill Material to Waters of the State. These exclusions include but are not limited to the following:

* Prior converted cropland.
* Rice cultivation.
* Farm and stock watering ponds, irrigation ponds, settling basins, and ditched used for agricultural purposes.
* Activities that are exempt under CWA section 404(f) (33 USC § 1344(f)
* Suction dredge mining activities for mineral recovery regulated under CWA section 402.
* Routine and emergency operation and maintenance activities conducted by public agencies . . .

Conclusion: The new language in SB 1 relative to dredged or fill materials reverses the decisions made in adopting Procedures for Discharges of Dredged or Fill Material to Waters of the State. This new language is not declaratory of existing law. This conclusion is based on the following:

* In the Sweeney case, the SF Regional Board was chastised by the Superior Court in 2017 because the board viewed use of dredged materials for levy maintenance on a Suisun island as “waste.” That decision is under appeal. Without regard to the potential outcome of that decision, SB 1 would find the use of fill material for levy maintenance to be “waste.”
* The State Water Resources Control Board considered the Sweeny case and excluded this kind of activity from the Procedures for Discharges of Dredged or Fill Material to Waters of the State.
* The State Water Resources Control Board also excluded various routine agricultural operations from the Procedures for Discharges of Dredged or Fill Material to Waters of the State. SB 1 contains no such exclusions and could therefore be used to expand the existing Procedures.

***Summary:***

The amendments to SB 1 represent a substantial change in law and are in no way declaratory of existing law. The amendments make SB 1 even worse for the following reasons:

* By codifying that the amendments are declaratory of existing law, those amendments can be applied to current and ongoing enforcement actions and litigation as well as to existing regulations.
* The amendments may be used to broaden the scope of the Procedures for Discharges of Dredged or Fill Material to Waters of the State to include ag and other activities that are currently exempt from the Procedures.
* By including “historic definitions of waters of the US”, the amendments create confusion and inconsistencies as to what qualifies as a water of the state for purposes of the Procedures for Discharges of Dredged or Fill Material to Waters of the State.
* Relative to ag, the above three concerns, when combined, may subject routine farming activities on ag land to new lengthy, uncertain, and costly permitting requirements.