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SB-23 Water supply and flood risk reduction projects: expedited permitting. (2023-2024)

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CALIFORNIA LEGISLATURE— 2023–2024 REGULAR SESSION

SENATE BILL**NO. 23**

Introduced by Senator Caballero
(Coauthor: Senator Dodd)

December 05, 2022

An act to add Section 1618 to the Fish and Game Code, and to add the heading of Article 1 (commencing with Section 13370) to Chapter 5.5 of Division 7 of, and to add Article 2 (commencing with Section 13389.1) to Chapter 5.5 of Division 7 of, the Water Code, relating to water.

LEGISLATIVE COUNSEL'S DIGEST

SB 23, as amended, Caballero. Water supply and flood risk reduction projects: expedited permitting.

(1) Existing law prohibits an entity from substantially diverting or obstructing the natural flow of, or substantially changing or using any material from the bed, channel, or bank of, any river, stream, or lake, or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake, except under specified conditions, including requiring the entity to send written notification to the Department of Fish and Wildlife regarding the activity in the manner prescribed by the department.

This bill would require a project proponent, if already required to submit a notification to the department, to ~~complete and~~ submit *final* environmental documentation to the department for the activity in the notification. The bill would require the department, under prescribed circumstances, to take ~~specified certain~~ actions within ~~±80 days, specified timelines, or within~~ a mutually agreed-to extension of ~~time, of receiving notification from a project proponent.~~ *time*.

(2) Under the Porter-Cologne Water Quality Control Act, the State Water Resources Control Board (state board) and the California regional water quality control boards (regional boards) are the principal state agencies with primary authority over water quality matters. Existing law authorizes the state board to issue permits and promulgate procedures consistent with federal law.

This bill would require, if an applicant requests a preapplication consultation, the state board or regional boards to adhere to specified procedures *and timelines* in reviewing the application before issuing project certification. The bill would authorize a project proponent to petition the state board to reconsider ~~its~~ *its* determination of application completeness, or to appeal to the state board any regional board's determination of application completeness.

This bill would require the state board or regional boards to use specified approved conservation and habitat management plans as watershed plans for purposes of implementing the procedures in issuing a project certification, unless the state board or regional boards issuing a project certification determine in writing that an approved plan does not substantially meet the definition of a watershed plan, as defined. The bill would place requirements on the state board and regional boards regarding its determination on what is considered a watershed plan, including making a proposed written determination, and providing for public comment and a written response on that proposed determination. The bill would require, by January 1, 2025, the state board to review and adopt general water quality certifications for general nationwide permits issued by the United States Army Corps of Engineers under specified federal law within the state for discharge of dredge and fill material in connection with water supply projects and flood risk reduction projects. The bill would require, on January 1, 2025, and annually thereafter, the state board and regional boards to prepare, provide public notice of, make available for public review on their internet website, and submit to the relevant legislative committees, as specified, a report regarding specified information related to water supply projects and flood risk reduction projects.

This bill would authorize a state agency, defined to mean any agency, board, or commission, including the state board or the regional boards, with the power to issue a permit that would authorize a water supply project or authorize a flood risk reduction project, to take specified actions in order to complete permit review and approval in an expeditious manner. The bill would make findings and declarations related to the need to expedite water supply projects and flood risk reduction projects to better address climate change impacts while protecting the environment.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1618 is added to the Fish and Game Code, to read:

1618. (a) For ~~purpose~~ *purposes* of this section, the following definitions apply:

(1) "Flood risk reduction project" means a project or plan subject to department jurisdiction under this chapter that is proposed by a public agency or a public utility to construct, alter, retrofit, maintain, manage, or improve a facility, channel, levee, or flood control ~~modification~~ *modification, including nature-based solutions*, where flood risk reduction or sea level rise protection is ~~an~~ *a primary* objective of the project.

(2) "Notification" means the documents described in subparagraphs (A) to ~~(E)~~ *(F)*, inclusive, of paragraph (1) of subdivision (a) of Section 1602.

(3) "Project proponent" means a public agency or public utility that proposes a water supply project or flood risk reduction project.

(4) "Water supply project" means a project or plan subject to department jurisdiction under this chapter that is proposed by a public agency or a public utility to construct, alter, retrofit, maintain, manage, or improve a groundwater recharge, desalination, recycled water, water conveyance, surface water storage, stormwater capture, or water treatment facility.

(b) A project proponent shall do both of the following:

(1) Submit a complete notification for the project *activity* to the department when required under ~~this chapter~~ *Section 1602*.

(2) ~~Complete and submit~~ *Submit final* environmental documentation to the department for the activity in the notification, required under Division 13 (commencing with Section 21000) of the Public Resources Code.

(c) ~~Notwithstanding any other law,~~ *(1) In addition to the timelines applicable to the department's issuance of draft agreements specified in Section 1603 and notwithstanding Sections 65950 and 65952 of the Government Code, if the department determines that the activity in the notification for a water supply project or flood risk*

reduction project will substantially adversely affect an existing fish and wildlife resource and the project proponent completes the actions described in subdivision (b), the department ~~shall, within 180 days of receipt of a notification from the project proponent,~~ *shall* issue the final agreement that includes any reasonable measures mutually agreed to by the project proponent and the department pursuant to subdivision (a) of Section ~~1603~~ *unless 1603, by either of the following dates, whichever is later:*

(A) One hundred eighty days after receipt of a complete notification.

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

(2) Nothing in paragraph (1) shall effect the operation of subparagraph (D) of paragraph (4) of subdivision (a) of Section ~~1602~~ *1602, which* applies ~~because when~~ the department ~~did does~~ not issue a draft agreement to the project proponent within 60 days of the date the notification is complete. ~~if~~

(3) If the department and the project proponent are not able to reach a final agreement on all measures, the project proponent may proceed in accordance with a final agreement issued by an arbitration panel pursuant to subdivision (b) of Section 1603, including reasonable measures necessary to protect the existing fish and wildlife resources substantially adversely affected by the water supply project or flood risk reduction project.

(d) If the department and the project proponent mutually agree to an extension of the date for which the department shall provide a final agreement, the date mutually agreed upon shall apply instead of the ~~180-day time period:~~ *time period provided in subdivision (c).*

SEC. 2. The heading of Article 1 (commencing with Section 13370) is added to Chapter 5.5 of Division 7 of the Water Code, to read:

Article 1. Implementation of the Federal Water Pollution Control Act

SEC. 3. Article 2 (commencing with Section 13389.1) is added to Chapter 5.5 of Division 7 of the Water Code, to read:

Article 2. Water Supply and Flood Risk Reduction Permits

13389.1. For the purpose of this article, the following definitions apply:

(a) "Flood risk reduction project" means a project or plan that is proposed by a public agency or a public utility to construct, alter, retrofit, maintain, manage, or improve a facility, channel, levee, or flood control ~~modification~~ *modification, including nature-based solutions,* where flood risk reduction or sea level rise protection is ~~an a~~ *primary* objective of the project.

(b) "Habitat conservation plan" means any plan approved by the United States Fish and Wildlife Service pursuant to the federal Endangered Species Act (16 U.S.C. Sec. 1531 et seq.).

(c) "Habitat management plan" means any habitat conservation plan, natural communities conservation plan, habitat management plan, or other plan agreement or permit approved by or entered into by the Department of Fish and Wildlife in connection with the authorization of taking of an endangered, threatened, or candidate species pursuant to the California Endangered Species Act (Chapter 1.5 (commencing with Section 2050) of Division 3 of the Fish and Game Code).

(d) "Natural communities conservation plan" means any plan approved by the Department of Fish and Wildlife pursuant to Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code.

(e) "Procedures" means the "State Wetland Definition and Procedures for Discharge of Dredged or Fill Material to Waters of the State" (as adopted by the State Water Resources Control Board on April 2, 2019) as they may be amended from time to time.

(f) "Project certification" means water quality certification required by, and issued under, Sections 13160, 13260, and 13376.

(g) "Project proponent" means a public agency or public utility that proposes a water supply project or flood risk reduction project.

(h) "State agency" means any agency, board, or commission, including the state board or the regional boards, with the power to issue a permit that would authorize a water supply project or authorize a flood risk reduction project.

(i) "Water supply project" means a project or plan that is proposed by a public agency or a public utility to construct, alter, retrofit, maintain, manage, or improve a groundwater recharge, desalination, recycled water, water conveyance, surface water storage, stormwater capture, or water treatment facility.

(j) "Watershed plan" means a document or set of documents, developed in consultation with relevant stakeholders, that has a specific goal of aquatic resource restoration, establishment, enhancement or preservation within a watershed, that addresses aquatic resource conditions in the watershed, addresses multiple stakeholder interests and land uses, includes information about identification of priority sites for aquatic resource restoration and protection, includes implementation measures to attain aquatic resource protection goals for the watershed, and is used by the state board or regional boards in determining appropriate terms and conditions, including avoidance, minimization, and compensatory mitigation conditions, to be included in project certifications.

13389.2. (a) (1) This section shall apply if, before filing an application for project certification for a water supply project or flood risk reduction project, the project proponent requests a preapplication consultation with the state board or regional boards, as appropriate.

(2) The project proponent shall initiate the preapplication consultation at least 60 days before the filing of the application for project certification. Any meeting pursuant to the consultation shall occur no less frequently than once every 60 days thereafter until the project is fully certified.

(3) The 60-day preapplication period may run concurrently with any other preapplication or postapplication consultation period that a project proponent enters into as required by law with any other regulatory agency with jurisdiction.

(4) Nothing in this section shall require an applicant to request or engage in a preapplication consultation not otherwise required by law for any project certification.

(b) (1) Notwithstanding any other law, *and if the project proponent complies with paragraph (2)*, the state board or regional boards shall ~~issue take final action on a~~ project certification ~~within 180 days if a project proponent does all of the following:~~ *by either of the following dates, whichever is later:*

(A) One hundred eighty days after receipt of a complete application.

(B) Sixty days after receipt of final environmental documentation required under Division 13 (commencing with Section 21000) of the Public Resources Code for issuance of the project certification.

(2) Paragraph (1) shall apply if the project proponent does all of the following:

~~(1)~~

(A) Requests a preapplication consultation.

~~(2)~~

(B) Files a complete application for project certification.

~~(3)~~

(C) If required for the project, files a complete application or petition under Chapter 2 (commencing with Section 1250) of Part 2 of Division 2 for all water rights approvals or amendments necessary to implement the project.

~~(4) Completes and submits completed~~

(D) Submits final environmental documentation to the state board or regional boards for the project certification required under Division 13 (commencing with Section 21000) of the Public Resources Code.

(c) The state board or regional board shall notify the project proponent in writing whether the ~~submittal application~~ is complete no later than 30 days after the submittal of an application or petition. If the ~~submittal application~~ is determined to be incomplete, the state board or regional boards shall provide the project proponent with a 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, including a list and thorough description of the specific information needed to complete the application or petition. The list shall be limited to

those items actually required by the state board or regional board under applicable law. After the state board or regional board issues the list, it shall not request or require the project proponent to provide any new or additional information that was not identified in the initial list of items found to be incomplete. No list shall include an extension or waiver of any of the time periods prescribed by this section.

(d) If the state board or regional board does not provide the project proponent with a written notification that includes a list of specific items that are complete and incomplete within 30 days after receipt of the initial application or petition, the application or petition shall be deemed complete.

(e) (1) If the state board or regional board provides the written notification determining that the application or petition is incomplete, the project proponent shall act within 45 days after receipt of the notification to submit supplemental materials in order to complete the application or petition, or to appeal the determination, in whole or in part.

(2) Upon receipt of any supplemental materials from the project proponent, the state board or regional board shall, within 30 days after receipt of the ~~notification~~, *supplemental materials*, determine the completeness of the application or petition with the supplemental ~~material~~ *materials* and whether to issue the notification of a complete application. In making this determination, the state board or regional board shall be limited to whether the application or petition as supplemented includes the information specified in the prior notification of incompleteness.

(f) (1) If the supplemented application or petition is again determined to be incomplete, the state board or regional board shall 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, including a full list and thorough description of the information needed to complete the application or petition.

(2) The project proponent shall act within 30 days of receipt of that notification to submit additional supplemental materials in order to complete the application or petition, or to appeal the notification of incompleteness, in whole or in part.

(3) If the state board or regional board does not, within 30 days of receipt of application materials from *the* applicant, provide the project proponent with a written notification specifying those parts of the supplemented application or petition that are still incomplete and indicating the manner by which they can be made complete, the application or petition as supplemented shall be deemed complete for purposes of this section.

(4) If the project proponent elects to supplement a previously supplemented application or petition, the deadlines and obligations set forth in this subdivision shall also apply to any supplemented application or petition.

(g) The state board or regional board may, in the course of processing the application, request the project proponent to clarify, correct, or otherwise supplement the information required for the application under subdivision (c). This shall not affect any specified deadlines under this section.

(h) The project proponent may petition the state board to reconsider ~~a~~ *its* determination of application completeness, or may appeal to the state board any regional board's determination of application completeness. The project proponent may petition for reconsideration or appeal a determination of completeness, either in whole or in part, and the ~~appropriate state~~ board shall act on the petition for reconsideration or appeal no later than 60 days after receipt of the appeal in accordance with subdivision (c) of Section 65943 of the Government Code. Within 30 days of the timely issuance by the state board of its final written determination of completeness, the project proponent may challenge the determination of completeness in court.

(i) This section does not supersede or otherwise amend any deadlines set forth by or in the ~~federal~~ *Federal* Water Pollution Control Act (33 U.S.C. Sec. 1251 et seq.).

(j) Except as provided in subdivision (h), this section does not amend the procedures or any deadlines for administrative or judicial appeal of a project certification as set forth under state or federal law.

13389.3. (a) The Legislature finds and declares all of the following:

(1) On April 2, 2019, the state board adopted the "State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State" (procedures) that requires that any habitat conservation plan approved by the United States Fish and Wildlife Service pursuant to the federal Endangered Species Act (16

U.S.C. Sec. 1531 et seq.) before December 31, 2020, and any natural communities conservation plan approved by the Department of Fish and Wildlife pursuant to the Natural Communities Conservation Planning Act before December 31, 2020, shall be used by the state board and regional boards in issuing project certifications, ~~so long as if~~ the plan includes biological goals for aquatic resources.

(2) The procedures further require that the state 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.

(3) To expedite water supply projects and flood risk reduction projects to better address climate change impacts while protecting the environment, the Legislature finds that for purposes of issuing project certifications in compliance with the procedures, as they may be amended from time to time, the state board or regional boards shall expand their reliance on approved habitat conservation plans, natural community conservation plans, and other habitat management plans for provision of avoidance, minimization, and compensatory mitigation for project certifications, ~~so long as if~~ those plans are approved by other state and federal agencies with jurisdiction and address biological goals for aquatic resources.

(b) Unless the state board or regional boards issuing a project certification determine in writing that an approved plan does not substantially meet the definition of a watershed plan, the state board or regional boards shall use the following approved plans as watershed plans for purposes of implementing the procedures in issuing a project certification:

- (1) Habitat conservation plans that include biological goals for aquatic resources.
- (2) Natural communities conservation plans that include biological goals for aquatic resources.
- (3) Habitat management plans that include biological goals for aquatic resources.

(c) (1) Unless the state board or regional boards issuing a project certification determine in writing that an approved plan does not substantially meet the definition of a watershed plan, *for those impacts to waters of the state already addressed by the approved plan*, the state board or regional boards shall accept, as terms of the project certification, any avoidance, minimization, and compensatory mitigation ~~for impacts to waters of the state provided through compliance with any approved habitat conservation plan, natural community conservation plan, or habitat management plan, so long as required by the approved plan to address those impacts~~, *if the public entity administering the approved habitat conservation plan, natural community conservation plan, or habitat management plan identifies, tracks, and publicly reports the impacts to waters of the state and the manner that they are addressed by the avoidance, minimization, and compensatory mitigation.*

(2) The state board or regional boards shall not impose on any project certification 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 administered as set forth in paragraph ~~(1)~~: *(1) if all of the following conditions are met:*

(A) The watershed plan addresses the project impacts to waters of the state.

(B) The project proponent implements the avoidance, minimization, and compensatory mitigation as required by the watershed plan.

(C) The public entity administering the watershed plan identifies, tracks, and publicly reports the impacts to waters of the state and the manner that they are addressed by the implementation of watershed plan avoidance, minimization, and compensatory mitigation requirements.

(3) For the state board or regional boards to make a determination that an approved habitat conservation plan, natural communities conservation plan, or habitat management plan that includes biological goals for aquatic resources does not substantially meet the definition of a watershed plan for purposes of issuing a project certification, the state board or regional boards shall do both of the following:

(A) Make a proposed written determination, supported by specific written findings of insufficiency, available for public review and comment for at least 30 days prior to the adoption of the determination of insufficiency.

(B) Provide written responses to public comments received on the determination of insufficiency prior to making a decision on the determination.

(d) By January 1, 2025, the state board shall review and adopt general water quality certifications for general nationwide permits issued by the United States Army Corps of Engineers under Section 404 of the ~~federal~~ *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 the general water quality certifications, the state board shall rely upon an environmental review 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.

(e) Notwithstanding Section 10231.5 of the Government Code, beginning on January 1, 2025, and annually thereafter, the state board and regional boards 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, at a minimum, all of the following:

(1) The water supply projects and flood risk reduction projects for which project certifications have been issued.

(2) The water supply projects and flood risk reduction projects for which project certifications have been issued in reliance upon avoidance, minimization, and compensatory mitigation created and provided through an approved habitat conservation plan, natural communities conservation plan, or habitat mitigation plan.

(3) Any approved habitat conservation plan, natural communities conservation plan, or habitat mitigation plan found by the state board and regional boards to be insufficient as a watershed management plan and the reasons for the determination of insufficiency.

(4) The general water quality certifications adopted by the state board for general nationwide permits issued by the United States Army Corps of Engineers under Section 404 of the ~~federal~~ *Federal* Water Pollution Control Act (33 U.S.C. Sec. 1344) to authorize discharges of dredge and fill material in connection with water supply projects and flood risk reduction projects.

13389.4. (a) A state agency may do any of the following:

(1) Enter into an agreement with a project proponent to recover costs for actions authorized by this section to expedite the review of environmental documents prepared pursuant to Division 13 (commencing with Section 21000) of the Public Resources Code, and review the processing and issuance of project certifications, and other authorizations, permits, and approvals for water supply projects and flood risk reduction projects, with the goal of completing permit review and approval in an expeditious manner.

(2) Hire or compensate staff or contract for services needed to achieve the goal of completing permit review and approval in an expeditious manner.

(3) Work collaboratively with project proponents and other agencies with jurisdiction over the water supply project or flood risk reduction project to implement an integrated regulatory approach in authorizing the projects, similar to efforts implemented by the state permitting agencies for projects funded by the local parcel tax measure, San Francisco Bay Restoration Authority Measure AA, the San Francisco Bay Clean Water, Pollution Prevention and Habitat Restoration Measure.

(b) This section does not limit or expand the authority or discretion of a state agency with regard to conducting review of environmental documents under Division 13 (commencing with Section 21000) of the Public Resources Code, processing or issuing a project certification or other permit, approval, or authorization, or imposing conditions in conjunction with the issuance of a project certification or other permit, approval, or authorization.

(c) This section does not affect the project proponent's ability to phase the permitting or construction of a water supply project or flood risk reduction project.

(d) The Federal Energy Regulatory Commission, the United States Army Corps of Engineers, the United States Fish and Wildlife Service, the National Marine Fisheries Service, and the United States Environmental Protection Agency may, and are encouraged to, participate in implementing the integrated regulatory approach authorized by this section.