

ULOP CRITERIA REFINEMENT SUBGROUP #2 MEETING
California Department of Water Resources, JOC Annex, North
Conference Room

June 26, 2013; 1:00pm to 4:00 pm

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Summary of subgroups suggestions are provided in a separate document titled: ULOP Criteria Refinement Subgroup Suggestions.

DWR Welcome and Framing

Adam Sutkus, facilitator, Center for Collaborative Policy, welcomed participants and led introductions around the room. The meeting was convened to discuss issues that were identified in the Urban Level of Flood Protection (ULOP) Criteria Refinement Work Group meeting. This is the third meeting of subgroups and the meeting will build on some of the discussion and suggestions of the previous subgroups. The subgroup process is iterative and DWR will be summarizing the progression of ideas and suggestions for the three meetings.

Mr. Sutkus reviewed the ground rules and gradients of agreement as a reminder that there are degrees of agreements that need to be considered. Mr. Sutkus reviewed the agenda for the meeting.

High Level Perspectives

Paul Marshall, Assistant Division Chief, California Department of Water Resources (DWR), provided framing for the process and thanked all participants for their commitment and dedication to this process. Mr. Marshall asked participants to be patient through this process as clarifications are made for subgroup suggestions that were made in previous subgroup discussions. This process is an open and a transparent discussion in effort to move forward. Mr. Marshall reiterated that DWR would like the criteria to work and be implementable to the local agencies.

Review of Subgroups 1 and 3 Discussions

A participant suggested that it might be helpful to have sample projects in mind when discussing and evaluating the criteria text. Having a hypothetical situation can help gauge the implementability of the criteria or help identify potential challenges. Specific examples were used in previous discussions.

Participants are encouraged to provide suggestions or edits to the criteria text. Some participants have already done so. For today's discussion, a participant provided the DWR team wording for shallow flooding, local drainage definitions, and adequate progress as well as a Federal Emergency Management Agency (FEMA) technical document on wet floodproofing.

Participants discussed the progress in addressing the map and geographic scope issue from the previous subgroups meetings. The definition and options are getting fine-tuned and will be brought to the larger ULOP Criteria Refinement Work Group meeting in July.

The text on urban area/develop area definition was accepted in previous subgroups discussions.

The issue of infill conditions was addressed with some suggested changes to criteria language that would align with city and county planners' terminology and consider the definition of urban core area, although it was recognized that not all cities and counties have clear definition for their urban core area. The term infill *exception* was suggested to be replaced with infill *condition*. A participant suggested that the infill language is not necessary since it is part of Senate Bill 5 (2007) and the law already allows local agencies to impose conditions on

development. The issue of infill may require additional legislation. A participant restated that the law requires structures to withstand flooding rather than prevent flooding and that the focus of Senate Bill 5 (2007) is residential (comply with FEMA or provide floodproofing). A discussion regarding freeboard elevation followed to clarify freeboard requirements.

Suggested text for the tentative map issue was provided during the Subgroup 3 meeting and is included in the [ULOP Criteria Refinement Subgroup Suggestions](#).

Permit Scope

Michele Ng, project manager, DWR, summarized the background information that was included in the workbook. Ms. Ng pointed out that proposed legislative changes may not provide the intended results and that there is more control and potential for success in developing the criteria.

The issue of the 'comma' in the legislation was discussed. There was disagreement regarding the effect of the comma on the meaning of the text. A participant inquired if DWR's position is that all discretionary permits are subject to the criteria. It was reiterated that the purpose of the discussion is to move forward toward an implementable, reasonable, based on state statute, and user-friendly approach.

Mr. Marshall asked if DWR has defined the problem correctly and if there are discretionary permits that do not have impact on flood risk. DWR would like to hear from the local agencies on the discretionary permits issue. DWR is concerned about flood risk for residential development but also for industrial and commercial as well. DWR would like to avoid industrial/commercial development in a floodplain because it can result in economic loss to the State of California (State) and community.

A participant explained that planners on first read of the law may interpret the text with the modifier for new residence.

Mr. Marshall brought up an example of a commercial subdivision in Natomas where infrastructure is already in place, it is mapped, and subdivided. Mr. Marshall inquired whether such development will fall subject to ULOP requirements. Another participant stated that this area could be considered infill because the infrastructure is already in place. The development agreement and map requirements apply to both commercial and residential while the discretionary permit scope is not clear. This development would not require a discretionary permit and therefore the comma issue does not change the development situation in Natomas. Other examples were provided for commercial properties that are awaiting building permits and the comma issue does not apply.

The way to ensure that there is a 200-year level of flood protection is to go through a General Plan amendment to make it consistent with the 2012 Central Valley Flood Protection Plan (CVFPP). Permits will have to meet the level of flood protection requirements as stated in the General Plans.

A participant explained that from a developer's perspective, it is important to know that the tentative map is what is subject to ULOP requirements and that last minute requirements will not be imposed when the final map is recorded. The findings should be part of the tentative

map process (including California Environmental Quality Act (CEQA), General Plan and Zoning Ordinance, Senate Bill 5 (2007), and other local conditions). For all subdivisions the law states that the tentative map requires a ULOP finding.

A participant suggested that DWR is not in the position to enforce the requirements but rather to set the criteria. Another participant followed that there is no comma issue as planners may read the law to exclude other types of developments from the discretionary permit scope. If there is doubt about the intent, it may need to go through legislation. A clarification is needed regarding what can be established with the criteria and what should go through legislation. The question regarding the role of the criteria as regulation or guidance was brought back for discussion. Mr. Marshall reiterated that he will discuss this issue with DWR executive and report back at the ULOP Criteria Refinement Work Group meeting on July 16th.

There was disagreement on the question of whether or not DWR has the authority to promulgate regulations resulting from the criteria. It was stated that DWR should set the criteria and delineate how the criteria is carried out.

Mr. Maguire addressed the makeup of the subgroups and whether interested parties should participate in the conversations, citing the charter. Mr. Sutkus mentioned that the charter allows for various methods of participation by interested parties, subject matter experts and members to join the ULOP discussions; however, final recommendations will be made by members of the work group at the plenary meeting level.

Mr. Marshall asked for clarification on the permitting process. A participant discussed that there are three land use decisions affected by the law: permitting, mapping, and development agreements.

Based on the permits discussion, edits were suggested for the criteria text. The discussion on editing the text continued with a subgroup suggestion to remove the whole paragraph (draft ULOP Criteria, page 3-5). Others will provide additional definitions to be included in the ULOP Criteria Refinement Subgroup Suggestions document.

Adequate progress

Ms. Ng reviewed the adequate progress issue which could require a legislative change. Mr. Marshall clarified that the main issue is likely not the definition but rather the timeframe. As projects for development are coming up, local agencies want assessment of projects. At the State level, regional and basin-wide plans are being pulled together but ultimately it is up to Congress to move forward with legislation. Mr. Marshall suggested that Congress may not move forward until there is an extreme event somewhere that will gain attention and elicit intervention and then funds for projects may be available. Much urban work is needed in the Central Valley and it is likely that not all permits and plans for construction will be completed by 2025. Changing the date for adequate progress now may be premature and will likely not be backed up by the legislature at this point without other planning activities completed. Generally, participants agreed with this statement and a subgroup suggestion was made to add “planning or” to item (a)(3) in the adequate progress legislative text (suggestion is reflected in ULOP Criteria Refinement Subgroup Suggestions).

Mr. Marshall stated that it may be difficult for Feasibility Studies to be completed by 2025 and that funding may not be available to complete the work. It is hoped that the flood control community will provide support.

There may not be sufficient funding to bring all levees to meet U.S. Army Corps of Engineers (USACE) standards by 2025. It was further stated that urban levees projects use mostly State rather than federal funding and that this pattern is expected continue.

A suggestion was made for the State to add a permissive 'release valve' for locals where the Central Valley Flood Protection Board can make findings that allow adequate progress to continue.

The concern is not the ability to make adequate progress findings by 2017, which require permits from the USACE, but rather the ability to meet the 2025 deadline. The USACE permitting process is very slow. Ultimately, the deadline will be addressed in court.

Mr. Marshall offered to share this conversation regarding the minor text changes to the adequate progress definition with DWR and suggested that the way to address it would be for locals to go through Assembly Woman Olsen and legislative changes.

Participants discussed specific bullet items in the text and provided edits that are reflected in ULOP Criteria Refinement Subgroup Suggestions.

The City of Sacramento was provided as an example. In 2017, the city will make a finding that it is demonstrating reasonable progress towards ULOP. If the city has a plan with a timeline which states that the funding will be spent later in the process, the city can demonstrate adequate progress without having the funding available in 2017. It was noted that this statement of adequate progress can still be challenged in court.

The discussion turned to the ULOP Criteria text. The participants considered the language and compared the ULOP Criteria text to the legislative language. It was suggested that the ULOP Criteria use "should," a more permissive tone, rather than require an annual progress report. Mr. Marshall clarified that the requirement for the annual progress report is required in Government Code Section 65007(a)(5). If local agencies do not report in the manner that is laid out in the text, they will have to find other ways to meet funding requirements. Further suggestions were made to the text to reflect the discussion. It was suggested that the public comment requirement be either taken out or modified to allow city's discretion. Subgroup suggestions are summarized in ULOP Criteria Refinement Subgroup Suggestions.

Adequate Incremental vs. Comprehensive Determination

Ms. Ng reviewed the issue and draft criteria text for the adequate incremental vs. comprehensive determination. A participant commented that the issue was not framed in a manner that reflects the past plenary discussions.

Procedure to Develop Substantial Evidence

The discussion switched to the substantial evidence text from the ULOP Criteria and focused on the expert panel requirement. The local agencies feel that this is a great burden. Mr. Marshall clarified that the intent is to provide the review for a large area rather than project by project, which could be a burden. DWR uses expert panels for basin reviews

It was clarified that the reporting requirements in the draft ULOP Criteria (including expert panel requirements) only applies to levees/floodwalls which protect more than 5 acres to a 200-year level of flood protection.

The City of West Sacramento was used as an example. West Sacramento is surrounded by levees and could have a comprehensive (city-wide) determination. For other areas it may be a different situation and some will be left to make their own findings project by project. Some areas may be exempt if they are subject to shallow flooding but there may be pocket areas with isolated segments that are subject to more than shallow flooding. It is unclear who will pay for determinations in these areas. It was suggested that FEMA's 500-year maps can be used to make a finding of meeting ULOP as the 500-year water surface elevation will be greater than the 200-year water surface elevation. Some areas already have FEMA profiles which show the 500-year water surface elevation and it is often less than 0.5 feet above the 100-year water surface elevation. This could be easy to accommodate.

The expert panel review process follows the USACE review process for the 408 permits. At the local level, the project manager hires their own team. There was a discussion and disagreement on how other government agencies utilize review panels for construction projects (Caltrans, FEMA were discussed). The recommendation for expert review panel is needed when safety is at stake.

Mr. Marshall responded to the comment that the city will not go back and certify its levees in already developed areas and this will leave single home owners to make their own finding. It was clarified by others that the cities do not own the levees, they are owned by others and the cities will be looking for maintaining agencies for certification.

The discussion focused on the need to include a combination of professional expertise in the expert review panel (Geotechnical/Hydrology/Engineering design). This is an important requirement for large basins where development will bring many people in and safety is an issue.

The question of whether the criteria is regulation or guidance was brought back. If the criteria is guidance, the language is fine but if it will become a regulation, the local agencies will have concerns over the requirement for an expert review panel. It was further suggested that the paragraph on expert panel review be stricken from the text. DWR can add this as a condition for projects receiving State funding but should not include it in the criteria.

Mr. Marshall said that the infill exemption issue will need to go back to legislation. The criteria focus is on raising residential development above the 200-year floodplain and floodproofing commercial activity. Additional editing suggestions were made, by the subgroup, to the criteria text and are provided in the [ULOP Criteria Refinement Subgroup Suggestions](#).

A participant raised concerns that public review requirements can be used by organizations that are protesting and trying to stop development projects. It was suggested that a public comment period may not be necessary as it would have already undergone expert panel review. Although there is room to streamline the review process, it is important to have expert panel review and make it public. Ultimately, at the end of the day, the engineer should make the final decision. A subgroup suggestion was made that the review requirement be moved back to the *Urban Levee Design Criteria* but this was not addressed further since the *Urban Levee Design Criteria* was already released last year.

Participants offered to further review the text, with the subgroup discussion in mind, and provide additional suggestions for potential editing of this section to make it acceptable prior to the ULOP Criteria Refinement Work Group meeting on July 16th (e.g., is there a way to address expert panel review for large projects but remove the need for smaller projects?).

Concluding Remarks

Mr. Sutkus thanked the participants for their time and participation. Notes and the [ULOP Criteria Refinement Subgroup Suggestions](#) will be distributed to the ULOP Criteria Refinement Work Group prior to the next ULOP criteria refinement workgroup plenary meeting on July 16th.

Participants

| Name | Affiliation |
|----------------------|--|
| Nick Cammarota | California Building Industry Association |
| Les Harder | Sacramento Area Flood Control Agency (HDR) |
| Karen Keene (phone) | California State Association of Counties |
| John Maguire (phone) | San Joaquin County |
| Michael McDowell | City of Stockton |
| Jim Nelson | Stormwater Consulting |
| Barry O'Regan | Sutter Butte Flood Control Agency (Peterson Brustad) |
| John Powderly | City of West Sacramento |
| David Storer | American Planning Association |
| Carl Walker | City of Roseville |
| DWR ULOP Team | |
| Paul Marshall | DWR |
| Michele Ng | DWR |
| Allan Oto | DWR |
| Michael Musto | DWR |
| Alan Waltner (phone) | Legal Counsel |

| | |
|---------------|-----|
| Yung-Hsin Sun | MWH |
| Rebecca Guo | MWH |
| Adam Sutkus | CCP |
| Orit Kalman | CCP |

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