O'Laughlin & Paris LLP

Attorneys at Law

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SWRCB Clerk

Via Email and U.S. Mail

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
Email: commentletters@waterboards.ca.gov

Re: SJTA COMMENTS ON THE STATE WETLAND DEFINITION AND PROCEDURES FOR DISCHARGES OF DREDGED OR FILL MATERIAL TO WATERS OF THE STATE

Dear Ms. Townsend:

The San Joaquin Tributaries Authority ("SJTA") reviewed the Draft Staff Report, including the Substitute Environmental Documentation for the State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State. The SJTA is concerned with the Board's legal authority to require new dredge and fill material procedures. The SJTA is also concerned with the redundant and conflicting requirements caused by the excessive scope of the proposed procedures.

While the SJTA does not believe the State Water Board has the legal authority to implement the proposed regulatory framework, if the State Water Board determines it needs to act, the SJTA encourages the Board to adopt a program that fills the regulatory gap and is consistent with the United States Army Corps of Engineers' ("Corps") current procedures and the Clean Water Act ("CWA") exemptions.

I. The State Water Board Lacks Authority to Proceed with the Proposed Procedures

The Porter-Cologne Water Quality Control Act (Water Code, § 13000 *et seq.*) provides the State Water Board with the legal authority to regulate the discharge of waste that may affect quality of waters of the State. However, the State Water Board has no authority to amend the requirements of section 404 of the Clean Water Act. Despite the lack of authority, the State Water Board is proposing to do just that – add requirements to the section 404 permit process.

2617 K Street, Suite 100
Sacramento, California 95816
(916) 993-3962
(916) 993-3688-fax

117 Meyers Street, Suite 110
Chico, California 95928
(530) 899-9755
(530) 899-1367-fax

Mailing Address:
2617 K Street, Suite 100
Sacramento, California 95816

A. *Lack of Statutory Authority to Implement Proposed Procedures*

The State Water Board has only such powers as conferred on them, expressly or by implication, by the California Constitution or Legislature. (*Friends of the Kings River v. County of Fresno (2014)* 232 Cal.App.4th 105, 117; see also *Security National Guaranty, Inc. v. California Coastal Com.* (2008) 159 Cal.App.4th 402, 419 ["because an agency has been granted some authority to act within a given area does not mean it enjoys plenary authority to act in that area."].) The Porter-Cologne Act does not authorize the State to regulate dredge and fill operations.

If the State wishes to regulate discharges of dredged or fill material, it must do so by adopting an approved permit program under the CWA. Sections 13370 – 13389 of the Water Code authorize the State and Regional Boards to issue permits for discharges of dredged or fill material, but only to the extent the State has an EPA-approved State permitting program under the CWA. Water Code section 13372, subsection [b] states:

> "The provision of section 13376 requiring the filing of a report for the discharge of dredged or fill material and the provisions of this chapter [chapter 5.5] relating to the issuance of dredged or fill materials permits by the state board or a regional board shall be applicable only to discharges for which the state has an approved permit program, in accordance with the provisions of the Federal Water Pollution Control Act, as amended, for the discharge of dredged or fill material."

The State Water Board does not have an approved permit program for dredge and fill material. For this reason, the provisions of section 13376 are not applicable and the State Water Board lacks the authority to regulate dredge and fill material, either through the section 404 process or the Water Code section 13260 process.

The State Water Board's use of Water Code section 13260 *et seq.* for the legal authority to implement the proposed procedures is not authorized nor envisioned by the California Legislature. The Legislature's intent is apparent: unless the State desires to administer its own USEPA approved State permit program for the discharge of dredged or fill material, CWA 404 and the regulations adopted by the Corps occupy the field and preempt the proposed procedures.

The procedures treat both water quality certifications issued by the Water Boards pursuant to CWA section 401 and WDRs issued under state law as permits for the discharge of dredged or fill material that are subject to the procedures. The use of the State Water Board's authority to adopt or approve discharge prohibitions, prohibiting the discharge of waste in certain areas or under certain conditions (Water Code § 13243), to include authority to prohibit discharges of dredged or fill material circumvents the procedures adopted by the Legislature and is regulatory overreach by the State Water Board.

B. *The Proposed Procedures Create Duplicity and Potential Conflict with Existing Federal Requirements*

The proposed procedures include the addition of an alternative analysis which requires an applicant to evaluate alternative locations, designs and/or configurations for a proposed project. (*See* Procedures § IV[B][3].) The existing federal process requires the development of an alternative analysis and the least environmentally damaging project alternative ("LEDPA"). As drafted, the proposed procedures allow Water Board Staff to require an alternatives analysis when one is not required by the Corps and allows Water Board Staff to second guess the Corps' LEDPA determination. Although the procedures include an exception where the Water Boards have already granted certification of a general permit, this exception is of limited value as it can be overridden if desired.

By requiring adoption of a new LEDPA, after a previous LEDPA was approved by the Corps, or by requiring additional alternatives analysis that may revise the project, the proposed procedures are likely to result in conflict with existing procedures. As such, by not providing deference to the Corps' determinations or exemptions for alternative analysis, the State Water Board is adding duplicity and increasing the likelihood of conflict.

II. Exemptions from the Procedures are Inconsistent with Federal Permitting Exemptions

The proposed procedures exempt certain areas and activities from the application procedures in order to better align the Water Board's dredged or fill material program with the CWA section 404. The language of the exemptions is uncertain. "These exclusions do not, however, affect the Water Board's authority to issue or waive waste discharge requirements (WDRs) or take other actions for the following activities or areas to the extent authorized by the Water Code." (*See* Procedures § IV[D].) This language erodes the exemptions and it is no longer clear whether the exemptions apply. Additionally, this language, appears to provide each Water Board the discretion to determine that an activity listed by the procedures as exempt shall, instead, be subject to permitting and regulation, effectively eliminating the exemptions on a case-by-case basis.

Moreover, as drafted, the exemptions create inconsistencies with the well-established federal exemptions. Specifically, the prior converted cropland exclusion and the definition of abandonment do not reflect current law. First, as currently used by the Corps, the prior converted cropland exclusion is applicable to land that changes to non-agricultural use. (See *New Hope Power Co. v. U.S. Army Corps of Engineers* (2010) 746 F.Supp.2d 1272.) Second, the proposed procedures state that the prior converted cropland exclusion is lost if the land has not been "planted" to an agricultural commodity for more than five consecutive years (i.e. abandoned). This is a significantly narrower definition than the Corps' guidance documents provide concerning abandonment. The Corps considers management and maintenance activities related to agricultural production to be proper uses that stave off abandonment, rather than just planting.

The State Water Board identified as one of its key goals for the procedures, "…ensuring consistent regulation across the regions." However, due to the inconsistencies noted above, the proposed procedures fail to provide dischargers with adequate notice of what conduct is prohibited and may trigger enforcement action. Thus, the proposed procedures are impermissibly vague. Due process protections proscribe the enforcement of vague regulations. (*Cranston v. City of Richmond* (1985) 40 Cal.3d 755.) Due process precludes enforcement of a regulation based upon impermissible vagueness when the regulated party

"could not reasonably understand that [their] contemplated conduct is proscribed." (*Id*. at p. 764.) The inconsistencies created by the draft language make the exemptions so vague the regulated community would not be able to understand whether their conduct is proscribed or authorized.

III. Persistent Regulatory Expansionism by the State Water Board

The SJTA is concerned by the State Water Board's increasingly zealous focus on regulatory expansionism. The State Water Board's recent actions test the limits of its legal authority (e.g. the Bay-Delta WQCP, the mercury provisions, and these proposed procedures), and are particularly troubling in light of the minimal outreach and stakeholder involvement that has preceded publication of draft procedures. Moreover, the cost of the State Water Board's regulatory expansionism increases the strain on the limited resources needed to process applications by the already understaffed Water Boards.

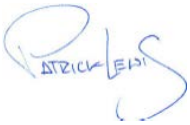
The SJTA is also concerned about the lack of benefit derived from the increased regulatory environment. Here, it makes little sense to create a new sweeping regulatory program for one percent of discharges – particularly when the Water Boards already regulate these discharges, when necessary through WDRs.

The State Water Board's regulatory expansion is proceeding at an unsustainable pace. First, the regulatory procedures recently adopted and currently under consideration will likely stretch the Regional Water Board's limited resources past their limits. The SJTA and it members are concerned the understaffed Regional Water Boards will be overwhelmed with increased permitting requests, which in turn will lead to delays in the approval process and ultimately affect the permittee and local communities. Moreover, this strain will reverberate throughout the Regional Water Boards affecting other regulatory programs. Second, stakeholder and regulated community participation suffer. During the administrative process for the recently adopted Mercury Water Quality Objectives, the regulated community lamented over the State Water Board's limited stakeholder outreach, commenting that had the regulated community been involved earlier, there would have been no scramble to revise the numerous unintended consequences created by the procedures.

Robust participation by stakeholders, environmental interests, and the State Water Board is necessary to achieve lasting regulatory programs that result in real and tangible benefits. The SJTA believes the State Water Board's current regulatory expansionism has ignored the regulated communities' concerns and limited their participation to a potentially deleterious level.

Very truly yours,

O'LAUGHLIN & PARIS, LLP



Patrick D. Lewis

PDL/llw