

# PORT OF STOCKTON

Phone: (209) 946-0246



Fax: (209) 465-7244

September 18, 2017

VIA EMAIL – [COMMENTLETTERS@WATERBOARDS.CA.GOV](mailto:COMMENTLETTERS@WATERBOARDS.CA.GOV)



State Water Resources Control Board Members  
Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814

**Re: Statewide Dredged or Fill Procedures and Wetland Policy**

Dear State Water Resources Control Board Members:

The Port of Stockton operates dredging operations as well as a Municipal Separate Storm Sewer System (“MS4”) that includes several storm water ditches and retention basins. In order to keep the Port’s storm water infrastructure maintained and properly operating to avoid flooding, the Port must perform maintenance on these MS4 facilities, which can include sediment and vegetation removal. The Port is concerned about potential liability if these facilities were considered to be Waters of the State (“WOTS”) and must meet requirements in the new policy even where exempted from being considered Waters of the United States (“WOTUS”).

The United States Environmental Protection Agency and U.S. Army Corps of Engineers issued a final federal WOTUS rule in 2015, which states in the rule’s preamble that “the agencies’ longstanding practice [was] to view stormwater control measures that are not built in ‘waters of the United States’ as non-jurisdictional.” (*See* 80 Fed. Reg. 37054, 37100; *see also* at 37059 (“exclusions for some waters that were identified in public comments as possibly being found as jurisdictional under the proposed [WOTUS] rule where this was never the agencies’ intent, such as stormwater control features, constructed to convey, treat, or store stormwater.”). Even though this 2015 Rule is currently being litigated and has been stayed pending final resolution of that case, the rule arguably merely restated the common interpretation that storm water infrastructure would not be deemed WOTUS.

However, State Board staff at one of the public workshops said that these **exclusions would not be recognized** under State law, and all excluded waters, including puddles, swimming pools, artificial waters, such as treatment ponds, golf course ponds, and municipal storm water ponds and ditches would be considered WOTS. The new rule should at least contain exclusions from WOTS for MS4 ditches and detention/retention basins that are covered by an MS4 NPDES permit. In addition, the Policy should avoid duplicative regulation of waters regulated by the California Department of Fish and Wildlife’s Streambed Alteration Agreements.

The Port has proactively incorporated storm water capture and reuse into its plans for future droughts. The capture and storage of additional storm water requires more retention basins that will be wet and can grow wetland-like vegetation. However, these areas should not be treated the same as a natural as a “wetland” since any wetted areas in municipal detention basins must be actively managed to maintain adequate storage capacity. Thus, these facilities must have sediment and vegetation regularly removed. These operation and maintenance activities are regulated NPDES storm water permit, and these areas should be deemed non-jurisdictional areas under the under this proposed policy.

The main problem with the “artificial wetlands” definition is that it would arguably include storm water retention ponds and ditches since these features “[r]esulted from historic human activity and ha[ve] become a relatively permanent part of the natural landscape.” (See Policy at II.4.c.) This definition applies regardless of the size as only Section II.4.d. specifies more than one acre size criteria, and exempts waters that meet the criteria in II.4.a.-c.. At the workshop, staff was told of this Catch-22 situation and stated that the intent of Section II.4.c. was to apply this where such features were abandoned/unused and reverted to semi-natural states. If that is the intent, then this should be expressly included to avoid currently managed storm water facilities from falling into this definition.

***Request: The Procedures should define WOTS and exempt waters from this definition that fall within one of the recognized exceptions to federal jurisdiction, such as puddles, ornamental waters and swimming pools, artificial lakes and ponds (including golf course ponds), treatment ponds and other waste treatment systems, and ditches, storm water conveyance channels and retention/detention ponds regulated under an MS4 permit.***

The Port also worries about duplicative or additional State requirements on dredging operations. The Procedures call for additional application requirements, which provide additional burdens. In addition, the Procedures call for deference to the Corps’ alternatives analysis, but contain different language regarding mitigation. The Port is concerned that the Water Boards’ mitigation preferences may conflict with the Army Corps’ preferences. For example, the Water Boards might prefer in-watershed mitigation while the Corps prefers mitigation banks or other regional programs. The policy should be aimed at streamlining and facilitating important dredging projects that support navigation, commerce, and public safety instead of creating additional regulatory hurdles and time delays.

***Request: The Water Boards should not add additional requirements to Corps regulated dredging projects and should defer to Corps determinations as to the type, location, amount, and term of mitigation for all impacts where projects overlap WOTUS and WOTS, and not require additional or conflicting mitigation requirements.***

Respectfully submitted



Jason P. Cashman  
Port of Stockton

cc: Melissa Thorme, Downey Brand LLP