

September 12, 2017

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

Re: Comments of Teichert Materials on Procedures for Discharges of Dredged or Fill Materials to Waters of the State

Dear Ms. Townsend,

Teichert Materials (Teichert) submits the following comments on the State Water Resources Control Board's (Board) proposed Procedures for Discharges of Dredged or Fill Materials to Waters of the State (Procedures). We appreciate the Board staff's thoughtful consideration of our prior comments, sent via letter dated August 18, 2016 and attached hereto, and the revision of certain portions of the Procedures to address these comments. We offer the following additional comments for the Board's consideration.

Framework for Successful Implementation of Procedures

The Procedures anticipate a significantly more vigorous permitting process when compared to the status quo. Presently, an application for a water quality certification under Section 401 of the Clean Water Act (CWA) and/or an application for Waste Discharge Requirements (WDRs) under Porter-Cologne Water Quality Act do not require submittal of many of the documents and analyses that would be required by the Procedures. For example, at least for projects located within the boundaries of the Central Valley Regional Water Quality Control Board (RWQCB), applicants have never before been required to prepare an alternatives analysis as part of these applications; rather, this exercise was performed at the direction of the U.S. Army Corps of Engineers (Corps) as part of an application filed pursuant to Section 404 of the CWA, and the Central Valley RWQCB deferred to this analysis. While Teichert appreciates the Procedures' emphasis on early coordination between the RWQCBs, applicants and any other relevant agencies, there is still a great deal of uncertainty about exactly how this coordination will occur and whether the RWQCBs will be able to effectively process applications filed under the Procedures without significant additional cost and delays. The comments below identify two key items that Teichert believes should be addressed to ensure that the Procedures can be implemented in a way that complements, rather than conflicts, with existing regulatory procedures.

1. **Assessment of Staffing Needs.** At present, the process of applying for a 401 certification or WDRs is relatively straightforward. In most cases, unless all of the waters to be impacted are isolated or "State only" waters, a 404 application is first filed with the Corps. The applicant works with the Corps to verify its wetland/waters delineation, identify and analyze alternatives, and conceptually approve a wetland mitigation proposal, among other things. It is only then, in most cases, that an project proponent will apply for a 401 certification. Moreover, applicants usually rely heavily on the materials prepared for their 404 applications to complete the 401 application. For example, the applicant will utilize the same, Corps-verified delineation and will present the same conceptual mitigation proposal to the RWQCB for its review.

The Procedures propose a more substantial application process than is currently required. Moreover, RWQCB staff are expected to coordinate with applicants and other agencies earlier and to provide more substantive feedback at all points of the process. By way of example, the following are some of the tasks that RWQCB would be expected to perform pursuant to the Procedures, and Teichert's rough estimate of the current and projected time associated with each task:

- Pre-application consultations (currently: 1 hour; projected: minimum of 4 hours);
- Verify wetland delineations (currently: 0 hours; projected: minimum of 2 – site visit and coordination with Corps);
- Alternatives Analysis (currently: 0 hours; projected: minimum of 4 hours – identification of alternatives, review of applicant's alternatives information; coordination with Corps);
- Development of mitigation proposals (currently: 2 hours to review conceptual materials prepared for Corps; projected: minimum of 4 hours to review designs of permittee-responsible construction, site visits, coordination with Corps).

The Procedures do not quantify the additional staff time that will be required to perform these tasks. Teichert believes that a review of current and projected staff workloads must occur prior to the implementation of the Procedures. If this assessment reveals that current staffing levels are not adequate to process applications filed under the new framework without additional delays and/or costs to applicants, the Board should delay implementation of the Procedures until additional staff can be hired.

1. Phased Implementation of Procedures. As expressed in our original comment letter, Teichert believes that an essential component of the success of the Procedures is a requirement that the RWQCBs enter into agreements with the Corps and any other relevant agencies to establish a framework for coordinating on applications that involve the fill of wetlands/waters. These agreements should address, at a minimum, the process for pre-application consultations (including the goals of these consultations and the responsibilities of all parties with respect to the consultations), provide guidance for coordinating on various common aspects of regulatory applications (e.g., alternatives/LEDPA determinations, mitigation proposals, long-term management requirements), and put in place a process for resolving conflicts, should they occur. Without such agreements in place, the agencies are likely to analyze their individual applications in isolation, resulting in potentially inconsistent determinations affecting the same property or project.

In its responses to comments, Board staff indicates that it cannot “mandate a pre-application process that must be followed by other agencies” and that “any effort to reach interagency agreements should be pursued after the Procedures are adopted.” (Response to Comment, 40.2) Likewise, the Corps has commented that it will not work on an agreement until the Procedures are in place. (Letter from South Pacific Division, U.S. Army Corps of Engineers, Comment 41.8.) Teichert requests, however, that the Board direct that, if/when the Procedures are adopted, the RWQCBs should immediately begin coordinating with the agencies to formulate these agreements. Furthermore, in recognition of the significant risk of delays and increased costs, Teichert believes that the Board should not begin implementing the Procedures until these agreements are in place.

Climate Change Assessment

The Procedures require, in certain cases, “an assessment of the potential impacts associated with client change related to the proposed project and any proposed compensatory mitigation, and any measures to avoid or minimize those potential impacts.” (Procedures, § IV.A.2.(b).) Several interested parties, including

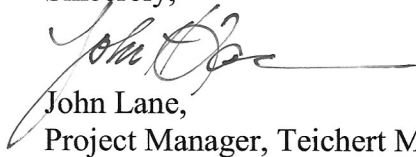
Teichert, requested clarification regarding the scope of these “climate change assessments” (CCA). The Board staff’s responses to comments indicate the difficulty in taking a “one size fits all” approach to CCAs, since the environmental setting of each project is unique. The Board staff further recognizes that the CCA requirement is not meant to be “onerous”; rather, its purpose is to give some consideration to the subject of climate change during the planning stage of the project itself (i.e., the activity for which impacts will occur) as well as any associated compensatory mitigation projects.

Teichert understands the Board’s desire to retain flexibility with respect to CCAs. However, in order to make the permitting process as streamlined and productive as possible, the Board should provide some guidance in the Procedures addressing the essential elements to be included in a CCA. The following are a few suggestions:

- Make clear that RWQCB staff should first consider a project’s CEQA climate change analysis, if one exists. If that analysis is sufficient, no further CCA should be required.
- Make clear that projects of a short duration or having minimal impact do not require a CCA. Moreover, if a CCA is required, the level of detail should be commensurate to project impacts. For example, a few paragraphs is probably sufficient for a project with fewer wetland impacts, while a larger project with increased impacts would require a more substantial CCA.
- A CCA should only require discussion of environmental stressors that are relevant to the location of the project and its proposed mitigation. For example, a project in Sacramento County should not require an assessment of sea level rise.

Thank you again for your time and consideration of these comments. Please feel free to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "John Lane", with a long horizontal flourish extending to the right.

John Lane,
Project Manager, Teichert Materials



August 18, 2016

Sent via email to: commentletters@waterboards.ca.gov

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100, Sacramento, CA 95812-2000

Re: Teichert Comments to State Dredge and Fill Procedures (June 17, 2016 Preliminary Draft)

Dear Mrs. Townsend,

Please find Teichert Materials (Teichert) comments to the June 17, 2016 Preliminary Draft Procedures for Discharges of Dredged or Fill Materials to Waters of the State (Procedures) below. Teichert Materials is a family owned construction and construction materials supply company that has been in continuous family control since 1887. In support of our mission to supply construction related materials, we have a number of active sand and gravel mines in California. Due to the long term and resource dependent nature of sand and gravel mining, we have and will continue to engage in a dredge and fill activities in California. This include extensive wetland permitting and restoration projects. As such, the Procedures being contemplated by the California State Water Resources Control Board (Board) have the potential to impact our operations and our industry. For that reason, we have been active in assisting and working with the Board on these procedures and policies since work began by the Board in 2008.

We would like to thank the Board for the extended period of time to prepare this comments and we would also like to sincerely thank Board staff for spending time answering our many questions. We have broken our comments into specific topics of concern. We have also attempted not only to comment on the Procedures but also to provide recommendations for resolving issues, where appropriate.

Scope and Timing of Application Processing

Comment: The current Procedures require Regional Board staff to evaluate projects, make recommendations and take actions that will potentially influence the scope and nature of a given project. However, in most cases, projects are considered and acted on by local land use agencies (e.g., cities, counties) (Lead Agencies) under the umbrella of CEQA and local zoning and regulation. In most cases, Lead Agencies begin making decisions on projects relying on Regional Board involvement related to dredge and fill permitting through direct comment in the Lead Agency preparation of CEQA documents. This ordinary sequencing is reflected in existing Regional Board policies which require the completion of CEQA review before a 401 application will be processed. The Procedures, as currently written, will result in Regional Board staff having to contend with a project that is likely already through CEQA and Lead Agency certification. Potential reopening of project elements after CEQA documents have been approved and certified will lead to an increase in the complexity and time involved for all parties involved and will potentially create conflicts between the Regional Boards and Lead Agencies if project decisions and actions are incongruent.

Recommendation: The Procedures should recognize that there are elements within the Procedures where local input is not only warranted but desired. Several of these elements are discussed in more detail in this letter. The Procedures and Future Guidance should identify these elements and work to ensure that the Regional Boards are engaged with Lead Agency and that Lead Agencies are given deference during the NOP process. The Procedures should strongly encourage the Regional Boards to provide adequate comment and guidance to Lead Agencies such that the ultimate CEQA document and analysis supports the inherent goals of the Procedures. In short, the Procedures are attempting to ensure that certain processes and resource protection actions are undertaken to ensure aquatic resource related environmental protection and benefits. Lead Agencies, in many cases, are in a better position to ensure these goals as long as the Regional Boards engage adequately and systematically.

Pre-consultation

Comment: The Procedures require that substantial materials be submitted before an application can be deemed “complete.” For example, on a “case by case” basis, the Regional Boards can require submission of an alternatives analysis and detailed information pertaining to an applicant’s proposal for compensatory mitigation. In many cases, these “application documents” will also need to be approved by other regulatory agencies. For example, the alternatives analysis and mitigation information mentioned previously would need to be approved by the U.S. Army Corps of Engineers (ACOE) and, potentially, other agencies. Significant conflicts can occur when different regulatory agencies consider the same materials, but in isolation. Due to the fact that each agency has its own unique set of rules and regulations, it is likely that two agencies could have vastly different perspectives on a single document (i.e., Corps typically will not consider impacts to Waters of State in their LEDPA analyses, whereas State will likely be looking at Waters of United States (WOUS) AND Waters of State (WOTS). These conflicts, in turn, translate into substantial and expensive delays in an already lengthy permitting process for applicants. Consequently, there is a need for a robust pre-application process to ensure that applicants, Regional Boards and agencies, including ACOE, coordinate as early in the process as possible and remain connected and coordinated throughout their respective application processing. This, by definition, means that all parties – the applicant, the Regional Boards and any other relevant agencies – must invest significant time and resources at the outset. The Procedures will need to ensure that all parties understand, and buy into, the process and timelines of this pre-consultation. Successful coordination will help create certainty for applicants (and other agencies) that decisions and commitments made during pre-application will “stick;” for example, if an applicant receives feedback from Agency A during pre-application consultation and the applicant incorporates Agency A feedback into their application, it will be imperative that they not later receive conflicting or incongruent feedback/decisions from Agency B for the same issue. Ideally, during pre-consultation, Agency A would have consulted with Agency B prior to issuing feedback and project application(s) processed on this issue in a coordinated manner.

Recommendation: The Procedures should identify and describe the pre-application process to be followed by applicants, the Regional Boards and other agencies. The Procedures and/or guidelines should clarify that Regional Boards will accept draft application materials, where appropriate, and to enter into pre-consultation with applicants and relevant agencies PRIOR to application completeness determination. The Procedures should also require that the Regional Boards enter into agreements with ACOE and any other relevant agencies, such as memoranda of understanding (MOU), which will identify the goals of pre-consultation, set forth the agencies respective responsibilities regarding pre-consultations and identify a process for resolving conflicts, should they arise, during the pre-consultation process. To this end, we recommend highly that the Procedures and or related guidance support the formation of an inter-agency working group (similar to the Interagency Review Team (IRT) used to review banking proposals) to meet on a defined schedule and calendar to conduct pre-application

consultation on projects with anticipated impacts to waters of US/waters of State. To support this, the Regional Boards will need to set aside adequate funding and staff time to meaningfully participate. This will result in more time up-front but much less time responding later in the project when the eventual conflicts evolve following the Regional Board completeness determination on a given application.

Alternatives Analysis (LEDPA):

Comment: As the Procedures are currently written, conflict(s) will inevitably arise between the Corps' federally defined scope of analysis (practicable avoidance of WOUS while still meeting the project's purpose) and the State's proposed scope of analysis (practicable avoidance of Waters of the State while still meeting the project's purpose). The Corps' regulations are not written to require/allow them to consider non-federally jurisdictional waters, so they are unlikely to do so. If the Procedures and/or future Guidance does not recognize or cede this fact, then each agency will be held to their respective scope and opposing and inefficient alternative conclusions may result, leading to delays, wasted staff time, and possible elimination of potential beneficial or viable projects due solely to incongruent agency decisions related to project alternatives.

Recommendation: The Procedures and/or future guidelines should incorporate the pre-consultation process outlined above. In addition, the Procedures and/or guidelines should uniformly defer to the federal analysis and determinations with respect to waters of the US, and where applicable, develop the ability for the ACOE alternatives analysis and LEDPA decision to cover WOTS through a process of commenting/collaboration between the Regional Board staff and ACOE staff. This commenting/collaboration process should be outlined in the MOU between the State and ACOE, described above.

Climate Change Assessments

Comment: The current Procedures require a Climate Change Assessment (CCA) be part of the overall application package and be considered by Regional Board staff in evaluation of Projects covered under the Procedures. Due to the timing of the application process covered by the Procedures, typically an application to the Regional Boards will come AFTER a Lead Agency evaluation of the project under CEQA. CEQA is required to evaluate all project impacts including those related to Climate Change. Without early and focused interaction between the Regional Boards and Lead Agencies, it is possible that the certified CEQA Lead Agency documents could be found to be inadequate and the Regional Boards would then be forced to conduct a separate CCA. The current Procedures, furthermore, do not give adequate guidance to Regional Board staff on how to evaluate and make determinations as to the adequacy of any prior Lead Agency analyses regarding climate change.

Recommendation: The Procedures or guidelines should clarify to the Regional Boards that the preference is the CEQA Lead Agency shall be responsible for making an assessment of a project's impacts to climate change, where applicable. The Procedures or guidelines should emphasize that the Regional Boards should work with Lead Agencies to ensure that the CEQA climate change analysis for a project adequately meets the needs of the Regional Boards. This may include requesting additional information during the NOP process when Lead Agencies are looking for early input and guidance and commenting on any draft CEQA documents.

Watershed Profiles

Comment: The Procedures currently require a Watershed Profile be conducted by Regional Board staff but does not give clear guidance as to what should be in a Watershed Profile or how the information contained therein would be evaluated. Without guidance, the content and scope of a Watershed Profile

would be left to the discretion of each Regional Board and staff thereby resulting in an inconsistent application of this element of the Procedures.

Recommendation: The Procedures should define watershed profile – what parameters need to be addressed, what the size/scale of the watershed analyzed should be, etc. and provide guidance as to how the information contained therein should be evaluated. The Procedures or guidelines should clarify that Regional Boards will accept a draft application during pre-consultation and allow the Watershed Profile to be included in overall Wetland Mitigation Plan as it works through all agencies, ACOE, in particular.

Compensation Evaluation

Comment: Mitigation proposals are supposed to be consistent with the ACOE mitigation guidelines, which expresses a preference for the use of mitigation banks. However, at present, most mitigation banks do not have credits available for impacts to “State only” waters.

Recommendation: The Procedures should make clear that, if no mitigation bank credits are available for impacts to waters of the State, the applicant can utilize available in-lieu fees and/or permittee-responsible mitigation.

Restoration Consultation – Other Agencies

Comment: The current draft Procedures and/or guidelines require that, where restoration or establishment of waters of the State is proposed as part of a project, applicants would be required to enter into a consultation with defined entities PRIOR to the Regional Boards determining that a project application is complete. As discussed above, most projects needing a permit from the Regional Boards will have been previously evaluated by a Lead Agency under CEQA. The agencies identified for consultation under the Procedures will have been invited to comment in that CEQA process. Requiring a separate consultation through and with Regional Board staff is not only potentially duplicative and time-consuming, but could lead to conflicting conclusions, actions, and requirements between Lead Agency and the Regional Boards.

Recommendation: Within the Procedures, change the “consultation” requirement to require instead that an applicant “notify” the identified agencies when its project includes restoration and/or establishment. The Procedures should also direct the Regional Boards to ensure notification occurs sufficiently early such that the agencies can participate in the Lead Agency’s CEQA process. This will meet the needs of the entities listed in the Policy to be aware of projects and be able to ensure that any comments or issues that they have are considered by Lead Agencies in the CEQA process versus dredge and fill application processing by Regional Boards.

Restoration Consultation - Airports

Comment: Identical to the restoration consultation issues outlined above, the requirement by the Procedures for Regional Boards to require applicants to consult with “ANY” airport within five miles of project restoration activities will create extreme burden on both applicants and Regional Board staff. This is due to the fact that there are many small to large public and private airports in California that would fall within this requirement. Moreover, in many cases the impacts of a mitigation project on bird airstrike hazards would be considered by the Lead Agency as part of its CEQA review process. As written, the applicant would be forced to enter directly into costly and time-consuming discussions with these airports outside the parameters and scope of CEQA. Regardless of actual decisions by Regional Boards on airport issues, any requirement of consultation will all airports within 5 miles would create a significant time delay and cost in any permit process covered under the Procedures as written.

To give an idea of the scale of this issue, a typical listing of airports within Sacramento and Yolo Counties can be found at:

Yolo: <http://www.tollfreeairline.com/california/yolo.htm>

Sac: <http://www.tollfreeairline.com/california/sacramento.htm>

The FAA has released a series of circulars to airport operators on this issue with recommendations related to wetland creation or restoration within 5 miles of airports. The most recent circular can be found at: http://www.faa.gov/documentLibrary/media/advisory_circular/150-5200-33B/150_5200_33b.pdf

Recommendation: Change “consultation” to “notification” and provide guidance to Regional Boards to ensure notification occurs early during the Lead Agency’s CEQA process. The Lead Agency and its decision makers would then be able to consider any comments from airports in rendering their decisions on a project.

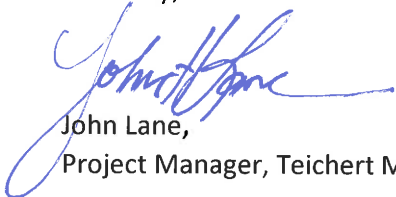
Nationwide Permits

Comment: In order to avoid the time and expense associated with acquiring an individual 404 permit from ACOE, applicants often make great efforts to design projects which qualify for the use of an ACOE Nationwide Permit (NWP). The current Procedures would require, in some cases, the preparation of an alternatives analysis for projects which qualify for NWPs. This limit the potential usefulness of NWPs by creating uncertainty as to ultimate project designs (through potential alternatives analysis requirements by Regional Boards), time and expense of application processing. Furthermore, doing so exceeds the State’s statutory/regulatory authority and significantly expands the financial and logistical burden on applicants. Requiring an alternatives analysis for NWPs could potentially be a disincentive to project applicants to design projects at the outset with minimized impacts. Moreover, although the current Procedures provide that that certain NWPs which are “pre-certified” by the Board under Section 401 of the Clean Water Act would not require an alternatives analysis, at this time none of the NWPs commonly used for urban development, road projects or restoration projects are pre-certified. This effectively makes pre-certification not useful unless the current list is expanded.

Recommendation: The Procedures should not require an alternatives analysis where a project qualifies for use of an ACOENWP. Alternatively, the Water Board or Regional Boards should pre-certify the most commonly used NWPs such that alternatives analysis are not required.

Thank you again for your time and consideration of these comments. Please feel free to contact me if you have any questions. We look forward to working with staff in the future on the improvement of the Procedures.

Sincerely,



John Lane,
Project Manager, Teichert Materials

Cc: File