



CALIFORNIA FARM BUREAU FEDERATION

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September 18, 2017



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**

Dear Chair Marcus and Members of the Board:

The California Farm Bureau Federation (“Farm Bureau”) is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing more than 48,000 agricultural, associate, and collegiate members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California’s resources.

Farm Bureau appreciates the opportunity to provide comments on the State Water Resource Control Board’s State Wetland Definition and Procedures for Discharges of Dredged and Fill Materials to Waters of the State (“Procedures”). Farm Bureau has been involved in the development of the Procedures since its inception as the Wetland and Riparian Area Protection Policy. Farm Bureau has numerous concerns with how the Procedures apply, perhaps unintentionally, to the agriculture industry and offer the following comments herein.¹

A. Scope

The scope of the Procedures is overbroad relative to the needs and legal authority identified by the State Board. The Procedures go far beyond regulating discharges to

¹ Farm Bureau is a signatory to two coalition comment letters, an industry-wide comment letter and an ag-specific comment letter, both submitted on September 18, 2017. Instead of re-raising the points made in each of those letters here, Farm Bureau incorporates by reference both comment letters.

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wetland waters of the state that fall outside the protection of the federal Clean Water Act — they regulate *all* waters of the state, including all waters of the U.S. already protected under the Clean Water Act’s section 404 permitting program and section 401 certification requirements, and non-wetland waters of the state already protected under the California Department of Fish and Wildlife’s (“CDFW”) lake and streambed alteration program.

The Procedures give the Water Boards broad power to regulate and revise activities involving dredged and fill discharges that exceeds the Water Boards’ authority under the Water Code, including the authority to conduct an “alternatives analysis” for such activities. The Procedures will also set new regulatory requirements that will affect farmers and ranchers’ agricultural activities across the state — from agricultural drainage projects to smaller projects on the field necessary for the operation and production of food and fiber — who will now have to comply with a bevy of new and costly water quality regulations in addition to current regulations such as those within irrigated lands regulatory programs.

B. Wetland Definition and Jurisdictional Framework

As currently drafted, the Procedures will create unnecessary conflict by proposing a new wetland definition that differs from the longstanding definition that has been used by the United States Army Corps of Engineers (“ACOE”). This definition, along with the jurisdictional framework and informational flowchart (Figure 3, Draft Staff Report, p. 66) will result in features being classified as a wetland by the Water Board but as non-wetland waters by the ACOE, leading to conflicting alternatives analysis determinations and mitigation requirements. Further, the definition’s expansive scope, especially regarding the definition of “artificial wetlands,” will classify numerous agricultural areas, such as spots in fields, irrigation channels, tailwater ponds, and agricultural drains and ditches, as wetlands that are waters of the state. Although the Procedures reference federal Clean Water Act exemptions and exclusions under Section 404(f) for certain agricultural activities, the hierarchy for determining exemptions and exclusions contained within the jurisdictional framework and Figure 3 Informational Flowchart lead to the conclusion that exclusions under state regulation are difficult, if not impossible, to obtain.

Recommendation:

The Procedures should revise the state wetland definition and delineation procedures consistent with their federal counterparts under the ACOE’s Section 404 program and harmonize exclusions from the Procedures with federal law.

C. Duplication and Conflict

Because of their excessive scope, the Procedures overlap the regulatory programs of the ACOE and the CDFW. The Procedures fail to ensure the Water Boards will defer

appropriately to those existing programs and implement their new authority in a way that minimizes duplicative regulation. The Procedures compound the negative effects of this overlap by including definitions and procedures that conflict with their federal counterparts, by adding unnecessary analysis for minor discharges that are subject to streamlined permitting under federal law, and by expressly allowing the Water Boards to override decisions by the ACOE. All of these individual components, whether they be duplicative or conflicting, compound to create a formula for regulatory delays and added costs.

Many of the activities and impacts that will be regulated under the Procedures are already regulated directly or indirectly in various ways by the Water Boards through the irrigated lands regulatory program general orders, TMDL implementation plans, NPDES permits, and waste discharge requirements or conditional waivers thereof, and by other state and federal agencies including, but not limited to, the California Department of Fish and Wildlife, the Department of Forestry and Fire Protection, various local governments, and the ACOE. There is significant regulatory overlap and duplication, as well as conflict and inconsistency for those dischargers required to now also comply with the mandatory permitting program created by the Procedures. The State Board should carefully consider the overlap, duplication, inconsistency, conflict, and burdens imposed by the Procedures, especially to the agricultural industry, as well as to Water Board staff with limited resources.

Recommendation:

Instead of adopting the Procedures which create a parallel regulatory process, the Water Boards should defer to the already existing and working 401 certification program and follow existing CWA requirements. Additionally, if the State Water Board feels that additional requirements are needed for a narrow subset of waters, particularly wetlands and special aquatic features, a program should be developed to regulate these waters rather than a mandatory permit program for all waters of the state, as proposed by the Procedures.

D. Exemptions and Exclusions

Farm Bureau appreciates the inclusion of exemptions and exclusions within the Procedures, especially since the Procedures contain duplicative and burdensome mandatory regulatory requirements, and add regulatory ambiguity to agricultural operations. Nevertheless, the Procedures need to be revised so that exclusions are harmonized with federal law, regulatory burdens are removed, and the process is streamlined; this is especially true regarding prior converted croplands and the normal farming activities.

1. CWA Section 404(f) exemptions

Although the Procedures' recognition of specific agricultural exemptions and exclusions under the federal Clean Water Act (section 404(f)) is appreciated, the application of such exemptions is unsettled and inconsistent statewide, causing uncertainty for farmers and ranchers. Further, the Procedures' language on how to determine the applicability of the federal Clean Water Act section 404(f) exemptions calls into question the true exclusion of certain agricultural activities from the Procedure's requirements. Specifically, the Procedures merely state that federal regulations, guidance letters, and memoranda will "be used when determining whether certain activities are excluded from these procedures." (Procedures, Section IV.D.1.a, p. 11.) This statement highlights the subjective nature of the Procedures — federal agricultural exemptions will "be used" when determining applicability, but the Water Boards are not required to defer to the federal exemptions. The applicability of the federal agricultural exemptions is further confounded by the jurisdictional framework and Figure 3 Informational Flowchart, which lead to the conclusion that true exclusions for agricultural activities under the Procedures are difficult, if not impossible, to obtain. To clarify that activities exempt under Clean Water Act Section 404(f) and the authorities in Table 1, Table 2, and Table 3 will be fully deferred to, Farm Bureau recommends revising the words "shall be used" in Section IV.D.1.a (Procedures, p. 11) with "shall be relied upon and deferred to"

Recommendation (revisions in red text):

Section IV.D.1. Activities excluded from application procedures in sections IV.A and IV.B:

- a. Activities that are exempt under CWA section 404(f) (33 USC § 1344(f)). The following federal regulations (Table 1), guidance letters (Table 2), and memoranda (Table 3), that have been adopted pursuant to CWA section 404(f) or that are used to interpret or implement section 388 404(f) shall be **used relied upon and deferred to** when determining whether certain activities are excluded from these procedures. These documents are hereby incorporated by reference and shall apply to all waters of the state. Consistent with CWA section 404(f)(2) and 40 CFR section 232.3, any discharge of dredged or fill material to a water of the state incidental to any of these activities is not exempt under CWA section 404(f) and shall be subject to the application procedures sections IV.A and IV.B, if (1) the purpose of the activity is bringing a water of the state into a use to which it was not previously subject, where the flow or circulation of water of the state may be impaired or the reach of such waters be reduced, or (2) the discharge contains any toxic pollutant listed in CWA section 307.

2. Prior Converted Cropland (“PCC”)

The Procedures state that “[t]he PCC exclusion will no longer apply if: (1) the PCC changes to a non-agricultural use, or (2) the PCC is abandoned, meaning it is not planted to an agricultural commodity for more than five consecutive years and the wetlands characteristics return, and the land was not left idle in accordance with a USDA program.” (Procedures, p. 12.) The Staff Report provides additional commentary on the prior converted cropland exclusion, stating: “A PCC is a farmed area that was drained or filled prior to 1975, and converted to dry land no longer exhibiting wetland characteristics. PCC’s are not regulated under CWA section 404. Likewise, the Procedures would exempt PCC’s that have been certified by the Natural Resources Conservation District. However, consistent with the Corps’ practices, if a PCC changes to a non-agricultural use, or the PCC is abandoned and left idle for more than five years, the exemption would not apply. In this case, any areas exhibiting wetland characteristics would be subject to the Procedures.” (Staff Report, p. 85.)

Unfortunately, the language both within the Procedures and the Staff Report misstates the PCC exclusion.²

With regard to the first component discussing that the PCC exclusion will no longer apply if the land is changed to a non-agricultural use, this component does not reflect current law. In *New Hope Power Co. v. U.S. Army Corps of Engineers* (2010) 746 F.Supp.2d 1272, a sugarcane grower challenged the ACOE’s new legislative rules (“Stockton Rules”) related to prior converted croplands without allowing the required public notice period. The court found that the Stockton Rules were not mere formalities or policy statements, but were legislative rules that substantially changed the ACOE’s treatment of PCC. Specifically, the Stockton Rules improperly expanded the ACOE’s jurisdiction by creating a new rule that wetland exemptions for prior converted croplands are lost upon conversion to a non-agricultural use. Accordingly, the court set aside the Stockton Rules in their entirety. Given the current state of the Stockton Rules, component D.2.(a)(1) should be deleted.

With regard to the second component discussing the abandonment of PCC, the Procedures state the PCC exclusion is lost if the land has not been planted to an agricultural commodity for more than five consecutive years. The ACOE’s own guidance does not limit abandonment to simply “planting,” but rather also considers management and maintained activities related to agricultural production to be proper uses of the land. (See RGL 90-07, p. 2 ¶ 5(e), available at <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl90-07.pdf> [The ACOE stated that its purpose in issuing RGL 90-07 was to clarify the concept of “normal circumstances” as it related to

² If the State Water Board does not utilize the revisions suggested by the industry-wide coalition in its September 18, 2017 comment letter and redline of the Procedures, Farm Bureau offers the following alternative suggestion to revise statements on Prior Converted Cropland.

cropped wetlands, while also addressing the abandonment of prior converted cropland. Specifically, the ACOE stated that such property “will be considered abandoned if for five consecutive years there has been no cropping, management or maintenance activities related to agricultural production. In this case, positive indicators of all mandatory wetlands criteria, including hydrophytic vegetation, must be observed.”³; see also 7 C.F.R. § 12.33(c) [“Abandonment is the cessation for five consecutive years of management or maintenance operations related to the use of a farmed wetland or a farmed-wetland pasture.”] Thus, Provision D.2.(a) should be revised to expand “planted” to “cropping, management or maintenance activities related to agricultural production.” Additionally, a new provision, D.2.(a)(iii) should be added to state: “For the purposes of D.2(a), abandonment is the cessation for five consecutive years of management or maintenance operations related to the use of a farmed wetland or a farmed-wetland pasture and positive indicators of all mandatory wetlands criteria, including hydrophytic vegetation, must be observed.

With regard to Section D.2(a)(i), which defines an “agricultural commodity” as used in D.2.(a), the definition severely restricts which crops can be classified as an agricultural commodity. Specifically, the definition requires “annual tiling of the soil. Not all crops require annual tiling; however, these crops are still agricultural commodities. The requirement to till soil annually should be deleted.

Recommendation:

The State Board should correct these inconsistencies by revising the Procedures to state that prior converted cropland will be deemed abandoned if it is not “planted to an agricultural crop for more than five consecutive years...”, add a sentence defining the term “planted” to include cropping, management or maintenance activities related to agricultural production, and by deleting the definition of agricultural commodity, which is not needed.

E. Resulting Impacts to Groundwater Recharge Projects

Farm Bureau is concerned that the Procedures may erect significant, unintended barriers to groundwater recharge activities that our organization anticipates may become a critical part of our industry’s long-term response to growing water supply constraints and the challenges of the Sustainability Groundwater Management Act. Specifically, in addition to dedicated recharge facilities, Farm Bureau anticipates that stormwater capture and winter flooding of agricultural fields may provide important, relatively inexpensive,

³ The Procedures should include Regulatory Guidance Letter 90-07 as an *advisory letter* in Table 2, starting on page 11 of the Procedures (the “Excavation Rule” promulgated jointly by the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) on August 25, 1993 (58 Fed. Reg. 45008) does not change the definition of “planted” as it pertains to the abandonment of prior converted cropland as described in RGL 90-07).

and environmental beneficial means to better manage and recharge our state's groundwater resources. To avoid conflicts with such critically important activities and the state's groundwater sustainability and broader water management goals, the State Water Board's Procedures should create an express exclusion for such activities.

F. Burdens and Benefits

The current draft Procedures would impose substantial burdens on the people of California, particularly farmers and ranchers, that are disproportionate to the expected benefits, especially since the Procedures create a mandatory permitting program applicable to all waters of the state. Specifically, the Procedures do not provide for "the *reasonable protection* of beneficial uses" upon mandated review of specific factors including economics. (*Id.*, § 13050(h), emphasis added; see also *id.*, § 13000 [activities that can affect the waters of the state "shall be regulated to attain the highest water quality which is *reasonable, considering all demands being made and to be made on those waters* and the total values involved, beneficial and detrimental, *economic* and social, tangible and intangible."]) Emphasis added.)

Farmers and ranchers are heavily invested in the health and quality of their water resources. Many agricultural areas of the state are regulated under irrigated lands regulatory program orders (waste discharge requirements or conditional waivers of waste discharge requirements). These programs include extensive measures to protect water quality, manage sediment and erosion, and implement best management practices. A separate new mandatory regulatory process is unnecessary and overly burdensome as it adds yet another layer of broad oversight and regulatory over-reach instead of a targeted, well-defined set of regulatory objectives.

Recommendation:

Farm Bureau recommends adding additional text to Section IV.C and to the exclusions in Section IV.D to specify that agricultural discharges already regulated under an existing irrigated lands regulatory program general order are not further regulated under the Procedures for normal agricultural activities

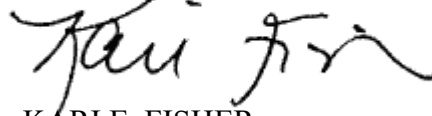
G. Conclusion

Farm Bureau appreciates the opportunity to comment on the State Water Board's State Wetland Definition and Procedures for Discharges of Dredged and Fill Materials to Waters of the State Procedures. As drafted, the Procedures go far beyond the goal of filling the regulatory gap to regulate "isolated" wetlands and, in the process, will create substantial burdens on farmers and ranchers and will strain Water Board resources. Farm Bureau respectfully urges the State Water Board to make revisions to the wetland definition and delineation procedures, exclusions from application requirements

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(especially those for agricultural activities) and alternatives analysis requirements, and compensatory mitigation requirements.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kari Fisher", written in a cursive style.

KARI E. FISHER
Associate Counsel

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