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



Subject: Statewide Dredged or Fill Procedures:

Written Comments on the Proposed... Procedures for Discharges of Dredged or Fill Materials to Waters of the State (June 17, 2016 Final Draft, v1)

Dear Ms. Townsend:

Sycamore Environmental Consultants, Inc., appreciates the opportunity to provide written comments on the *Proposed... Procedures for Discharges of Dredged or Fill Materials to Waters of the State* (June 17, 2016 Final Draft, v1). The written comments supplement our oral comments provided at the State Water Board's public hearing on July 19, 2016.

For 25 years, Sycamore Environmental Consultants, Inc., has provided our public and private sector clients support with wetlands delineation and permitting throughout California. On staff, we have a Ph.D. botanist, a Ph.D. ecologist and two wetland scientists with masters' degree who are recognized by the Society of Wetland Scientists as Professional Wetlands Scientists (PWS). Our Professional Wetland Scientists have completed most of the California Rapid Assessment Method (CRAM) modules for wetland assessment. Over the last 25 years we have obtained hundreds of Section 404 permits and 401 Water Quality Certifications. Our comments on the Proposed Procedures are based on 25 years of federal, state, and local wetlands permitting experience.

The Revised Notice of Opportunity for Public Comment identifies three key reasons why the proposed Procedures were developed. The three reasons are presented in ***bold, italic***. Our comments follow each key reason.

First, there is a need to strengthen protections for waters of the state that are no longer protected under the Clean Water Act (CWA) due to U.S. Supreme Court decisions.

1. In 2007 and 2008, following the U.S. Supreme Court's decision in *Rapanos and Carabell*, there were legitimate concerns that massive numbers of channels, rivers, and acres of wetlands would not be subject to Section 404 CWA. This concern prompted the Board to develop a wetlands policy to protect aquatic resources in California. The substantial loss of federal Section 404 CWA jurisdiction has not quite materialized because the Sacramento, San Francisco, and Los Angeles Districts of the Corps *do not disclaim Section 404 CWA jurisdiction very often*.

- a. For example, 98.6% of wetland verifications in the Sacramento District are Regulatory Guidance Letter (RGL) 08-02 Preliminary Jurisdictional Determinations (JD). The Corps assumes everything is Section 404 CWA jurisdictional when they verify a wetlands map with a Preliminary JD. *Is the Board creating a permitting program to capture the rest? The dredge/fill calculator worksheet already requires applicants to pay double the fees for non-Section 404 CWA jurisdictional wetlands and waters.*
 - b. An RGL 08-02 Approved JD adds many months to the already lengthy permit process. The Corps frequently still claims Section 404 CWA jurisdiction over the features that the wetlands consultant thinks are isolated or lack significant nexus. The permittee then has to go through an appeals process. Administrative appeals are infrequent, in part because they take a year or more to complete. There have been only 29 administrative appeals in the last 16 years in California that had merit (our four appeals had merit). Even then, the Corps generally retained jurisdiction. In only nine instances did the Corps reduce or disclaim jurisdiction.
 - c. Consequently, most aquatic resource permitting actions still go through the current Section 404 CWA process because nearly all wetlands and waters are deemed Section 404 CWA jurisdictional.
2. The State Board should take small, incremental steps in rolling out new regulations considering how infrequent the new permitting regulations will be used. Roll out the permitting process before rolling out new wetlands definitions.

Second, there is inconsistency across the Water Boards in requirements for discharges of dredged or fill material into waters of the state, including wetlands. There is no single accepted definition of wetlands at the state level, and the Water Boards may have different requirements and levels of analysis with regard to the issuance of dredge or fill Orders.

1. California does not need a new definition of wetlands.
 - a. The definition should not be used very much since the new definition comes into play only when the wetland is not subject to Section 404 CWA.
 - b. A new wetland definition is not needed to bring about consistency across the Regional Water Boards.
 - c. If “waters of the state” is defined in the CA Water Code, shouldn’t defining wetlands as “waters of the state” also be in the CA Water Code?
 - d. It is entirely unacceptable that the State Board would promulgate a wetland definition and then leave the determination of what constitutes a “waters of the state” up to case-by-case determinations (Staff Report, page 49). Case-by-case determinations do not promote consistency between the Regional Boards.
2. The Staff Report and Technical Memos provide no compelling reason why a new definition is needed. There is no quantification or even a guesstimate of the number of acres of unvegetated “wetlands” that do not already have protection under Section 404 CWA.

- a. Mudflats. Why do you need a new definition to call an area of the ocean or bay already below the elevation where low marsh grows, a “wetland”? Mudflats are mostly tidal waters subject to Section 404 CWA and Section 10 of the River and Harbors Act (RHA).
 - b. Most mudflats are within and below the high tide water surface elevation, making mudflats both CWA and Section 10 RHA waters of the U.S. The San Francisco Corps District exerts RHA jurisdiction over unfilled portions of the interior of diked areas below former mean higher high water (Public Notice No. 71-22(b), 6 July 1976).
 - c. The Staff Report makes it sound like the Corps and EPA aren’t protecting mudflats: “Examples of waters that would be considered wetlands by the proposed Procedures, but not by the federal definition...” (Staff Report, page 177). This is just not true that mudflats aren’t regulated. Mudflats are “special aquatic sites” per 40 CFR Sec. 230.42.
 - d. The TAT Memorandum 4, Wetland Identification and Delineation, provides two case study examples to justify why the Corps’ wetland definition is inadequate and why the new definition is superior. Figure 3 (page 23) “...focuses on tidal marshland between San Antonio Creek and the Petaluma River in Sonoma County (3A), which is part of the largest area of relatively unaltered ancient tidal marshland in California.” It shows that portions of a tidal marsh do not meet the Corps’ definition of wetlands. Will the State Board’s new definition of wetlands ever be used to call open water areas within this ancient tidal marsh “wetlands” meaning “waters of the state”? Of course not. The entire tidal marsh, both the vegetated and unvegetated mudflats and channels are subject to Section 404 CWA and Section 10 RHA.
 - e. Case study #1 poses its own interesting questions. Will the California Coastal Commission (CCC) be obligated to use the State Board’s new definition of wetlands? Does the new wetland definition include the “aquatic support” areas show in case study #1? Will wetland practitioners be required to delineate “aquatic support” areas?
 - i. Does the state’s definition now include “aquatic support” areas as wetlands? This will vastly increase the geographic area of wetlands.
 - ii. All that Figure 2 really shows is a USACE comprehensive delineation method is almost identical to the CCC one parameter wetland survey and that mapping wetlands only from aerial photographs without a field survey misses wetlands.
3. Use the Corps definition of wetlands.
 - a. It is the standard. It has a community of regulatory agencies and users behind it. The Corps maintains the Nationwide Wetland Plant List to ensure long-term consistency of wetland identification.
 - b. The Board should just say that where the Corps has disclaimed Section 404 CWA jurisdiction over wetlands and waters, that those features, whether there is water in them or they are bone dry, are still surface waters under Porter Cologne.
 - c. The Board is underestimating the time and expense of developing and maintaining a parallel wetland definition and the delineation methods and manuals to support a new permitting regime.
 4. Worse than having a new definition of wetlands different than the 404 CWA program, is that the Procedures still have Board staff exert Porter Cologne jurisdiction on a case-by-case basis.

- a. If consistency between the Regional Boards is a goal, “case-by-case” isn’t the way to achieve consistency.
 - b. I find no definition for why a non-federal wetland is Porter Cologne jurisdictional or not. All we are going to be doing is arguing. The staff will just say, “It’s a Porter Cologne jurisdictional waters of the state”.
 - c. The Corps’ permitting program does a better job of addressing non-natural wetlands resulting from artificial sources of water (and exempting them from 404 CWA permitting).
5. Highlighting the problems with rolling out a new permitting program designed to catch what the Corps has dropped (mostly due to Supreme Court decisions), the proposed Procedures have a major procedural flaw. The proposed Procedures rely on approved JDs. Most Corps verifications are not approved JDs.
- a. The Corps’ Regulatory Guidance Letter (RGL 08-02) distinguishes between Preliminary JDs and Approved JDs. A PJD is “not official.” An AJD is official.
 - b. Sacramento Corps District in 2015 completed 977 jurisdictional delineations. 14 were approved JDs, which is one percent of the total.
 - c. Unless the text is revised to say, Corps’ verifications of wetlands and waters of the U.S., either via a Preliminary JD or an Approved JD..., the Boards will be stuck permitting every aquatic resource under the new Procedures.
6. The Corps and EPA have promulgated a new definition of Waters of the U.S., which is currently stayed by a federal district court.
- a. If the stay is lifted, there are number of features (mostly roadside ditches, swales, and rice fields) that will not be 404 JD.
 - b. The Water Board should refrain from adopting the proposed Procedures until it has evaluated the permitting impact of new definition of Waters of the U.S.
 - c. The proposed Procedures should be better aligned with the terminology and approaches in the new definition of Waters of the U.S.
7. Watershed. Please use a HUC 10 digit code. Something that is clearly large and can accommodate a mitigation bank.

Third, current regulations have not been adequate to prevent losses in the quality and quantity of wetlands in California, where there have been especially profound historical losses of wetlands.

1. The current regulations weren’t in place, which is why profound historical losses of wetlands occurred.
2. The State Board stopped issuing waivers to most Section 404 Nationwide Permits by 2002. As a result, the Regional Boards receive hundreds of project specific requests for Section 401 Water Quality Certifications annually, allowing the State and Regional Boards the opportunity to regulate the majority of impacts to wetland and waters.
3. Figure 2 (Wetlands of the Central Valley) illustrates that most wetland loss occurred between 1820 and 1990 (Staff Report, page 29).

4. What do the current regulations accomplish? “As with the rest of the nation, wetland loss in California has slowed in recent years; between January 2007 and April 2009, the Corps recorded an annual rate of 300 to 400 acres of wetlands and other jurisdictional aquatic habitat losses in the state.” (Staff Report, page 28). Table 5-4 documents that the compensatory mitigation acres in 2007 and 2008 totaled 2,932 acres (Staff Report, page 31). To be fair, Ambrose et. al. (Staff Report, page 30) discounts the value or quality of the wetland mitigation projects that were approved by resource agencies. Nevertheless, for the two year period of 2007-08, California projects mitigated for 600 to 800 acres of impact at a ratio of somewhere between 3.7:1 and 4.9:1.

My recommendations:

1. Until you define which wetlands are Porter Cologne water of the state, do not create a permitting program for wetlands.
2. It is unacceptable to rely on case-by-case determinations for which wetlands are Porter Cologne water of the state.
3. Do not experiment with new wetlands definitions until you have a permitting program in place.
4. Develop a permitting program for the few wetlands for which the Corps disclaims Section 404 CWA jurisdiction.
5. Only after you have feedback on the successes and problems of the new permitting program for non-Section 404 CWA wetlands should you consider expanding the wetland definition.

I am available to discuss my comments and look forward to reviewing the next draft of the Proposed Procedures.

Cordially,



Jeffery Little

Vice President

NOTES ON THE PROPOSED PROCEDURES

Case-by-case.

Lines 41, 42, 129, 132, 135, 137, 180

The State Board should not implement a brand new regulatory program that excessively relies on case-by-case determinations. At seven critical junctures, the Draft Procedures hand authority to each Regional Board to make case-by-case determinations. This obviously conflicts with the claim that the Proposed Procedures are intended to “improve regulatory consistency across the Water Boards.” The State Board should not expect consistency, regulatory effectiveness, or permit streamlining when case-by-case determinations are needed to:

- Decide what constitutes a “waters of the state”,
- Decide when delineations are to be conducted,
- Decide what information is needed for a permit,
- Decide whether a modified 404(b)(1) alternatives analysis is needed, or
- Decide what is the level of compensatory mitigation.

Wetlands might not be waters of the state???

l.26, 27. “not all features that qualify as wetlands are waters of the state”

l.35. “the definition of wetlands includes some features that may not be protected as waters of the state”

l.39-43. “Water Boards have not developed a complete list or categorical descriptions of all other features that qualify as waters of the state. Therefore, in some cases, the Water Boards must determine whether a particular feature is a water of the state on a case-by-case basis. The Water Boards will continue to determine, on a case-by-case basis, whether a particular feature that meets the definition of wetlands also qualifies as a water of the state.”

l.50-53. “The Water Boards may consider a wetland, as defined above, to be a water of the state on a case-by-case basis. If uncertain whether a wetland as defined above is a water of the state, project proponents are strongly encouraged to contact the Water Boards for assistance prior to submitting an application for dredged or fill projects.”

I cannot find anything in the Prelim Draft Procedures that provide guidance or rules for determining what is or is not a State Water Code jurisdictional wetland.

145 The watershed profile is a major regulatory burden. Who is supposed to prepare? What size? Staff testimony at the July 19, 2016 hearing said that no basin plan currently has the information required for the new permitting regime. Doesn't this mean that permitting will come to a standstill for months or years?

General orders.

We need to see the draft general orders before you create the regulatory requirements. Otherwise numerous projects will require an Individual WDRs for projects that fit under simple NWP.

33 CFR 323.4 is not the only place that describes activities that do not need 404 permits, see piling.