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**DEPARTMENT OF THE ARMY**  
SOUTH PACIFIC DIVISION, U.S. ARMY CORPS OF ENGINEERS  
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Ms. Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
Post Office Box 100  
Sacramento, California 95812-2000

Comment Letter # 41



Dear Ms. Townsend:

The U.S. Army Corps of Engineers (USACE), South Pacific Division is responding to your June 17, 2016, *Notice of Public Hearing, Public Workshops, Opportunity to Comment and Filing* for the *Proposed Amendments to the California Ocean Plan and Inland Surface Waters, Enclosed Bays, and Estuaries of California Plan to Include Procedures for Discharges of Dredged or Fill Material to Waters of the State* (Proposed Dredge/Fill Procedures).

USACE South Pacific Division has coordinated with the USACE Los Angeles, Sacramento, and San Francisco Districts on the Proposed Dredge/Fill Procedures. Due to the potential effects to the USACE Regulatory, Planning and Operations missions in California, USACE South Pacific Division has attached comments on the Proposed Dredge/Fill procedures for your consideration:

Thank you for the opportunity to comment. USACE South Pacific Division is available to discuss the above comments at your convenience. If you have any questions, please contact Wade Eakle at the letterhead address, by email at [Wade.L.Eakle@usace.army.mil](mailto:Wade.L.Eakle@usace.army.mil) or telephone at (415) 503-6577.

**BUILDING STRONG *and Taking Care of People!***

Sincerely,

A handwritten signature in black ink that reads "Edwin S. Townsley".

Edwin S. Townsley  
Chief, Operations and Regulatory  
Division

Enclosure

**USACE South Pacific Division Comments on the *Proposed Amendments to the California Ocean Plan and Inland Surface Waters, Enclosed Bays, and Estuaries of California Plan to Include Procedures for Discharges of Dredged or Fill Material to Waters of the State* (proposed Procedures)**

1. The State Water Resources Control Board (SWRCB) lacks authority to proceed with its proposed Procedures for the regulation of discharges of dredged or fill material to only those discharges that occur in waters of the State which are not also waters of the United States, as that term is defined by U.S. Army Corps of Engineers (USACE) and U.S. Environmental Protection Agency (EPA) regulations implementing the Clean Water Act (CWA). Section 404 of the CWA, 33 U.S.C. § 1344, (Section 404) preempts State law or regulation with respect to the regulation of dredge and fill operations in waters of the United States. In section 404(g), Congress creates a specific mechanism for a State desiring to administer its own individual and general permit program for the discharge of dredged or fill materials into waters of the United States that are within the State's jurisdiction. Section 404(g) requires the governor of the State to submit a request to the Administrator of the EPA with a full and complete description of the program it proposes to establish and administer under State law, and a statement from the Attorney General of the State that the laws of such State provide adequate authority to carry out the described program. The EPA Administrator is required to distribute the program and statement submitted by the State to the Secretary of the Army and the Secretary of the Interior, acting through the Director of the U.S. Fish and Wildlife Service, to obtain their comments. Under Section 404(h), the EPA Administrator, taking into consideration the comments of the other agencies, determines whether the State program meets the standards set forth in that section, and whether the State agency has the requisite legal authority to implement the program. If the EPA Administrator's determinations are affirmative, it approves the program and, upon notice from the State that it is administering such program, USACE must suspend the issuance of permits under Section 404(a) or 404(e) for activities with respect to which a permit may be issued under the State program. There is no provision in Section 404 that permits parallel or overlapping State and Federal regulation of discharges of dredged or fill material in waters of the United States. Because Congress created a specific process for States to obtain authority to regulate dredge and fill operations, it intended to prohibit States from otherwise asserting such authority. With respect to the current proposal, the SWRCB has not followed the section 404 procedures to obtain the EPA Administrator's approval of its program and therefore is prohibited by the CWA from implementing it insofar as it applies to waters of the United States.

41.1

2. Pursuant to sovereign immunity, USACE and other Federal agencies are not subject to SWRCB regulations, unless Congress explicitly authorizes such regulation. The CWA contains a waiver of sovereign immunity when the SWRCB is exercising CWA authority delegated to the State by the EPA or by the CWA itself. Section 404(t) contains a limited waiver of sovereign immunity requiring Federal agencies to comply with State or interstate requirements both substantive and procedural to *control the discharge of dredged or fill material* to the same extent that any person is subject to

41.2

such requirements. The control of discharges of dredged or fill material does not equate to the regulation of discharges of dredged or fill material. Therefore, section 404(t) does not explicitly and unambiguously waive sovereign immunity with regard to State regulation of the discharge of dredged or fill material. Consequently, State procedures for the regulation of discharges of dredged or fill material that are not contained in a program submitted to the EPA Administrator in accordance with Section 404(g) and approved pursuant to section 404(h) may not be enforced against any Federal agency.

41.2 cont

3. The introduction to the SWRCB's proposed Procedures for the regulation of discharges of dredged or fill material refers to the Water Boards' authority under the Porter-Cologne Water Quality Control Act (Water Code, § 13000 *et seq.*) to regulate the discharge of waste that may affect quality of waters of the State. Section 13050(d) of the Water Code defines "waste" to include "sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal." The definition of waste does not include discharges of dredge or fill material. Further, the Porter-Cologne Act does not contain provisions specifically authorizing the State to regulate dredge and fill operations. Chapter 5.5 of the Water Code is the only chapter that mentions dredge or fill material. Section 13372 of the Water Code specifically states,

41.3

the provisions of Section 13376 requiring the filing of a report for the discharge of dredged or fill material and the provisions of this chapter relating to the issuance of dredged or fill material 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.

California has not applied to administer the CWA section 404 program. EPA has approved only a California program to administer and enforce section 402 and 403 of the CWA, 33 U.S.C. §§ 1342-43.

4. Insofar as the SWRCB may have authority to issue individual or general permits for discharges of dredged or fill materials, applications for such permits should be separate and distinct from applications for permits or certifications which SWRCB issues under provisions of CWA. State regulations require a Water Board, upon receipt of an application, to determine if it is complete. "If the application is incomplete, the applicant shall be notified in writing no later than 30 days after receipt of the application of any additional information or action needed." 23 CCR § 3835(a). Further, "[a] request for certification shall be considered valid if and only if a complete application is received by the certifying agency." 23 CCR § 3835(d). A water quality certification under Section 401 of the CWA, 33 U.S.C. § 1341, is required before a Section 404 permit may be issued, but the requirement is deemed waived if the Water Board does not act within a reasonable time, and USACE regulations contains provisions for

41.4



deeming certification waived. See 33 C.F.R. §§ 325.2(b)(1)(ii) and 336.1(b)(8). Unless applications for water quality certifications are separate and distinct from an application to discharge dredged or fill material, USACE will be uncertain as to how to apply sections 325.2(b)(1)(ii) and 336.1(b)(8) when a Water Board finds an application to be incomplete. This subject is discussed further below in the comments on Section IV of the proposed procedures.

41.4 cont

5. On the State's website it states the proposed Procedures, formerly known as the *Wetland Riparian Area Protection Policy*, has been renamed in order to communicate that the proposed Procedures apply to all discharges of dredged or fill material to waters of the State, not just wetlands. Despite the name change, throughout the document the State continues to refer to the proposal as "Policy."

41.5

6. Please note Federal agencies that invoke CWA section 404(r), 33 U.S.C. § 1344(r), are not required to select the least environmentally damaging practicable alternative and are not required to seek a CWA section 401 water quality certification from the State.

41.6

7. To the extent the State possesses authority to regulate dredge and fill into waters of State, the USACE offers the following comments:

a. General Comments

(1) USACE is concerned about the proposed Procedures' consistency with the USACE Regulatory Program and how it may impact the quality and timeliness of decision-making. To avoid conflicts and impacts on the regulated public, the proposed Procedures should be aligned with the USACE Regulatory Program to the maximum extent possible. Where alignment cannot be achieved, deference should be given to the USACE Regulatory Program requirements for activities resulting in the discharge of dredged and/or fill material into waters of the United States subject to section 404 of the CWA, especially with regards to aquatic resource delineations; restrictions on discharges, including determinations on the least environmentally damaging practicable alternative (LEDPA) under the EPA's *Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material* (Section 404(b)(1) Guidelines); determinations of the appropriate amount and type of compensatory mitigation; and the approval of final mitigation and monitoring plans.

41.7

(2) The proposed Procedures, including any subsequent Memorandum of Understanding (MOU) entered into between the USACE and SWRCB, cannot add more time or extra steps to the USACE review process. USACE will not work on a MOU until after the proposed Procedures are in place and our concerns raised in comments 1 through 4 above have been addressed to our satisfaction.

41.8

(3) USACE recommends that there be consistency in terminology throughout the proposed Procedures related to the use of aquatic resources and waters.

41.9

(4) The proposed Procedures do not address applications for a Section 401 Water Quality Certification received from USACE for non-regulatory actions. This leaves unaddressed how the proposed Procedures apply to the USACE Civil Works Program, including USACE Operations and Maintenance (O&M) activities or projects (Civil Works Program). State staff, at the recent workshop held in Los Angeles, expressed the position that the proposed Procedures would apply equally to all applications. This status is untenable and not sustainable. Federal regulations (33 C.F.R. § 336.1(b)(8)) clearly provide for a separate Section 401 Water Quality Certification process that is procedurally very different for USACE. Federal regulations governing the application for Section 401 Water Quality Certification for the USACE Regulatory Program can be found at 33 C.F.R. § 325.2(b)(1). USACE believes the proposed Procedures should acknowledge and clearly spell out the procedural difference. Issuing procedures that do not recognize these procedural differences will set USACE and the State up for conflict, reducing the chances for a cooperative consultation. USACE believes the proposed Procedures should include procedures applicable to Federal applicants.

41.10

b. Section I: USACE recommends the State clarify the alignment with the USACE Regulatory Program and defer to the decisions made by USACE related to discharges of dredged and/or fill material into waters of the United States subject to section 404 of the CWA, as described in comment 7(a)(1) above.

41.11

c. Section II:

(1) For consistency and to avoid unnecessary delays in permit evaluation, USACE recommends the State adopt the definition of wetlands utilized by USACE, as follows: *those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions* (33 C.F.R. § 328.3(c)(4))

41.12

(2) This section states that Water Boards may consider a wetland to be a water of the State on a case-by-case basis. It is unclear what the State intends to consider as part of this case-by-case evaluation.

41.13

d. Section III:

(1) The USACE does not approve wetland delineations. The USACE issues either a preliminary or an approved jurisdictional determination (JD). An approved JD is an official USACE determination that jurisdictional “waters of the United States,” or “navigable waters of the United States,” or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the CWA/Rivers and Harbors Act. See 33 C.F.R. § 331.2. Preliminary JDs are non-binding “. . . written indications that there may be waters of the United States (), on a parcel or indications of the approximate location(s) of waters of the United States on a parcel.

Preliminary JDs are advisory in nature and may not be appealed.” See 33 C.F.R.

§ 331.2. It is unclear whether the permitting authority is to rely on either type of JD, or just an approved JD. We prefer the State relies on either type of JD issued by the USACE.

41.14

(2) The State intends to have applicants use the USACE’s 1987 wetland delineation manual and two regional supplements, but utilizing different methodology for the vegetation criterion, for identifying and delineating wetlands per the State’s proposed definition. The USACE recommends the State prepare a supplemental study or analysis to ensure that the USACE methodology, as modified by the State, can be used to make valid determinations about wetland boundaries under the State’s proposed wetland definition. However, as noted above, USACE recommends that the State adopt the Federal definition of wetland.

41.15

(3) This section of the proposed Procedures solely addresses the delineation of wetlands, and does not provide information for the delineation of other waters of the State. USACE recommends the State clarify how other waters of the State would be delineated/determined. USACE recommends the State adopt the methodology utilized by USACE for determinations of ordinary high water mark (OWHM) (33 C.F.R. § 328.3(c)(6)), mean high water (MHW) (33 C.F.R. § 329.12), and high tide line (HTL) (33 C.F.R. § 328.3(c)(7)). In addition, in August 2008, the USACE Engineer Research and Development Center/Cold Regions Research and Engineering Laboratory (ERDC/CRREL) published *A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States*, and in August 2014, ERDC/CRREL published *A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valleys, and Coast Region of the United States*, which USACE recommends be utilized for the determination of OHWM.

41.16

(4) USACE recommends the State refer to “aquatic resource” delineation to cover wetlands, other special aquatic sites, and other waters of the State.

41.17

e. Section IV:

(1) Lines 79 and 80 and 87-90: As noted in comment 3 above, it is unclear what State requirements exist for discharges of dredged or fill material into waters of the United States, which are regulated by USACE under section 404 of the CWA. Federal projects and federal permits do not require waste discharge requirements, only 401 water quality certifications pursuant to 23 CCR, Division 3, Chapter 28, Article IV. These proposed Procedures cannot expand or revise existing state regulations without following rulemaking procedures.

41.18

(2) Line 82: The proposed Procedures indicate that Appendix A contains relevant portions of the Section 404(b)(1) Guidelines, 40 C.F.R. Part 230, promulgated by EPA in 1980. Please note these regulations were modified in 2008 and 2015, however, the 2015 revisions are not currently being implemented.

41.19

(3) Lines 84-85: The section states it applies to all applications for discharges of dredged or fill material into waters of the State. It appears the SWRCB is attempting to require CWA section 401 water quality certifications for all waters of the State, even in non-Federal waters. Congress limited water quality certifications for discharges to waters of the United States. See 33 U.S.C. § 1341(a). Further, state regulations at 23 CCR § 3831(u) state, “water quality certification means a certification that any discharge or discharges to waters of the United States, resulting from an activity that requires a federal license or permit, will comply with water quality standards and other appropriate requirements.” Thus, any requirement to seek and obtain water quality certification for discharges to non-Federal waters is beyond the State’s authority.

41.20

(4) Section IV(A): USACE recommends including language regarding pre-application consultation and its importance. The permitting authorities should be strongly encouraged to attend pre-application meetings hosted by USACE.

41.21

(5) Section IV(A)(1): It appears as though an application for a CWA section 401 water quality certification will not be considered “complete” unless information related to waters of the State is submitted. Because a CWA section 401 water quality certification is required only for an activity that may result in a discharge of a pollutant into waters of the United States, the State lacks authority to require such information and to delay processing of an application for CWA section 401 water quality certification pending information related to the discharge of dredged and/or fill material into waters of the State, that are not waters of the United States.

41.22

(6) Section IV(A)(1)(b): USACE recommends a “final” aquatic resources delineation report, with a preliminary or approved JD issued by USACE.

41.23

(7) Section IV(A)(1)(d): Please note that aquatic resource delineations submitted to USACE likely do not include areas outside of the project boundaries. In addition, USACE recommends the SWRCB modify the second sentence (lines 116-118) to identify that an approved or preliminary JD issued by USACE satisfies this requirement for a determination of the location and extent of waters of the United States subject to section 404 of the CWA.

41.24

(8) Section IV (A)(1)(e): In the last sentence, it is unclear what is meant by “threatened or endangered aquatic species resource habitat,” as there is no clarification provided.

41.25

(9) Section IV (A)(2)(c): In addition to the CWA statutory exemptions under Section 404(f), 33 U.S.C. § 1344(f), USACE regulations at 33 C.F.R. §323.2(d)(3) describes activities that do not require a USACE 404 permit. This provision should recognize such exclusions along with the statutory exemptions.

41.26

(10) Section IV (A)(2)(d): This requirement appears to relate only to USACE Regulatory program-related permittee-responsible compensatory mitigation. Per

41.27

USACE and EPA regulations at 33 C.F.R. § 332.3(b) and 40 C.F.R. § 230.93(b), mitigation banks and in-lieu fee programs are generally preferred over permittee responsible compensatory mitigation. USACE recommends that the State adopt the same preference hierarchy.

41.27  
cont

In addition, the State should defer to the decisions by USACE on required compensatory mitigation for discharges of dredged and/or fill material into waters of the United States subject to section 404 of the CWA. To the extent the State intends a broader application than USACE permit actions, the State needs to recognize that for the Civil Works Program, the USACE determines and approves the final compensatory mitigation plan, not the State. However, the USACE welcomes the permitting authority's suggested edits and comments on the USACE's compensatory mitigation plan. The State must recognize that the USACE is unable to adhere to this section of the proposed Procedures because we must comply with the requirements of section 2036(a) of the Water Resources Development Act of 2007 and associated USACE Headquarters guidance in developing compensatory mitigation plans and determining the amount, nature, type and location of compensatory mitigation.

41.28

(11) Section IV (A)(2)(d)(iii): USACE recommends the State define "preliminary information," as it is unclear what is meant by this statement.

41.29

(12) Section IV (A)(2)(d)(vi): This requirement identifies only that the applicant consult with other agencies but does not require that any information be submitted. The State may want to modify this requirement to include submittal of documentation that this consultation occurred.

41.30

(13) Section IV (B)(1)(a) and IV(B)(3)(a) and (b):

(a) To mirror the Federal "no net loss" policy, rather than limiting the scope of the "no net loss" to a watershed, it is more appropriate to apply the State "no net loss" policy to the State of California.

41.31

(b) Please defer to USACE only; EPA does not make determinations on the LEDPA.

41.32

(c) Please note that in the USACE Regulatory Program, applicants do not prepare an alternatives analysis, but provide alternatives information to support the alternatives analysis prepared by USACE when making a permit decision under section 404 of the CWA. Please also be aware that the USACE's Regulatory Program Section 404(b)(1) Guidelines alternative analysis is included in the environmental document prepared for the standard permit and, if applicable, letter of permission. An alternatives analysis is conducted by the USACE Regulatory Program at the time the general permit is created in accordance with the Section 404(b)(1) Guidelines. Subsequent alternatives analyses are not conducted by the USACE to verify the applicability of a general permit. A similar approach is also proposed by the State in its Appendix A, subpart A, which appears to be inconsistent with the approach in this section. For the Civil Works Program which result in a discharge of dredged or fill material, the USACE's

41.33

Section 404(b)(1) Guidelines alternative analysis is included in the environmental document prepared for the project.

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(d) The timing of the issuance of permits under the proposed Procedures is unclear. If the intent is that these permits will be combined with required CWA section 401 water quality certifications, please note that USACE cannot issue a permit or proceed with an O&M activity or a construction project under the Civil Works Program in accordance with section 404 of the CWA until the section 401 water quality certification is issued or deemed waived, or is considered exempt or excepted from regulation under section 404 of the CWA. Generally, the permitting authority may not have access to the USACE's alternatives analysis at the time of their decision under the proposed Procedures, however alternatives information is included in environmental documents circulated by USACE for public review (e.g., environmental impact statements).

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(e) Lines 229-234: The State must eliminate the exceptions to deference to USACE Regulatory and Civil Works/O&M determinations on alternatives analyses for discharges of dredged and/or fill material into waters of the United States subject to section 404 of the CWA, and defer to USACE in all instances.

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(14) Section IV(B)(3)(d)(i): It is unclear under what authority the permitting authority would determine whether a proposed activity meets the terms and conditions of a USACE General Permit, as that determination is made by USACE.

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(15) Section IV(B)(3)(d)(ii): If a proposed activity would not result in the discharge of dredged and/or fill material into waters of the United States, then no permit would be required from USACE under section 404 of the CWA. Therefore, it is unclear under what authority the permitting authority would determine whether a proposed activity not subject to section 404 of the CWA would comply with the terms and conditions of a USACE General Permit. USACE recommends the State consider developing its own general permits or orders for waters of the State that are not waters of the United States.

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(16) Section IV (B)(3)(e): It is unclear what physical, chemical and biological elements of the aquatic ecosystem are to be considered, as these are not described in the proposed Procedures or Appendix A.

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(17) Section IV (B)(4): For the Civil Works Program, the USACE determines and approves the final restoration plan, not the State. However, the USACE welcomes the permitting authority's suggested edits and comments on the USACE's restoration plan. For USACE Regulatory permit actions, the permitting authority's review and approval should be limited to the State's authority under CWA section 401.

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(18) Section IV (B)(5): USACE recommends the State defer to compensatory mitigation requirements determined by USACE for all discharges of dredged or fill material into waters of the United States subject to section 404 of the CWA. For the

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Civil Works Program, the USACE determines and approves the final compensatory mitigation plan, not the State. However, the USACE welcomes the permitting authority's suggested edits and comments on the USACE's compensatory mitigation plan. The State must recognize that the USACE is unable to adhere to this section of the proposed Procedures because we must comply with the requirements of section 2036(a) of the Water Resources Development Act of 2007 and associated USACE Headquarters guidance in developing compensatory mitigation plans and determining the amount, nature, type and location of compensatory mitigation. In addition, for the Civil Works Program, the USACE is not able to provide any financial security to the State or commit to long-term management funding.

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(19) Section IV (D)(1)(a): The proposed guidelines do not identify who will determine whether a proposed activity is exempt from authorization under section 404(f) of the CWA (33 U.S.C. § 1344(f)). This is a determination that is made by USACE for discharges of dredged and/or fill material into waters of the United States under section 404 of the CWA and the State must defer to USACE. In addition, USACE recommends the State delete all references to the USACE Regulatory Guidance Letters. These documents are guidance to the field, are contextual in nature, may not be entirely relevant or applicable, and can change over time. USACE recommends that the State identify USACE will make the determination in accordance with section 404(f) of the CWA, USACE and EPA regulations, and any applicable USACE policies and guidance. Lastly, this subsection should include the exclusions from the need to get a section 404 permit provided by USACE regulations at 33 C.F.R. § 323.2(d)(3).

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f. Section V:

(1) Delineation: USACE recommends the State modify the definition to include all aquatic resources including wetlands, other special aquatic sites, and other waters, including, but not limited to, rivers, streams, and lakes.

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(2) Discharge of dredged material: USACE recommends the State utilize the definition for discharge of dredged material found in 33 C.F.R. § 323.2(d), in its entirety.

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(3) Discharge of fill material: USACE recommends the State utilize the definition for discharge of fill material found in 33 C.F.R. § 323.2(e), in its entirety.

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(4) Ecological Restoration and Enhancement Projects: The definition utilized indicates that only those activities undertaken in accordance with an agreement with federal or state resource agencies or non-governmental conservation organizations are considered to be ecological restoration and enhancement projects (Lines 400-446). Please note that this definition is not consistent with USACE experience with these activities, as aquatic habitat restoration, establishment, and enhancement activities frequently occur without such agreements. In addition, the definition should include ecosystem restoration projects proposed by the USACE.

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g. Appendix A: *State Supplemental Dredged or Fill Guidelines*:

(1) USACE recommends the State defer to USACE in all applications of the Section 404(b)(1) Guidelines for discharges of dredged and/or fill material into waters of the United States subject to section 404 of the CWA, and recommends the State identify that the proposed guidelines in Appendix A apply solely to discharges of dredged and/or fill material into non-Federal waters.

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(2) Please note that the Section 404(b)(1) Guidelines were issued by the EPA, not USACE, although USACE must ensure compliance with the Section 404(b)(1) Guidelines in the evaluation of proposed activities subject to section 404 of the CWA.

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(3) Appendix A differs substantially from the comparison document that was provided online.

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(4) Appendix A provides discussions of General Permits and Individual Permits issued by the permitting authority. However, the proposed Procedures identify general orders and individual orders issued by the permitting authority. General orders are defined differently (Lines 350-354) than General Permits issued by USACE in accordance with 33 U.S.C. § 1344(e) and the USACE's implementing regulations. Individual orders are undefined in the proposed Procedures. However, pursuant to USACE regulations, the term "individual permit" means a Department of the Army authorization that is issued following a case-by-case evaluation of a specific project involving the proposed discharge(s) in accordance with the procedures of Part 323 and Part 325 and a determination that the proposed discharge is in the public interest pursuant to 33 C.F.R. Part 320. Therefore, it is not clear why General Permits and Individual Permits are utilized throughout Appendix A.

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(5) Section 230.6: This section refers to the permitting authority making findings of compliance, however, it's unclear what specific findings the permitting authority is to make. In addition, this section indicates that extensive testing is generally not intended or expected for routine cases. However, the State has proposed elimination of Subpart G of the Section 404(b)(1) Guidelines for determining when testing is necessary. Therefore, it is not clear how a determination regarding testing would be made by the State, and any associated testing requirements to make such a determination.

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(6) Section 230.10(a)(1)(i) and (ii): These sections mention ocean waters separate from waters of the State. The proposed Procedures, however, do not define or distinguish ocean waters from waters of the State. Under the CWA, navigable waters means the waters of the United States, including the territorial seas. 33 U.S.C. § 1362(7). The term "ocean" means any portion of the high seas beyond the contiguous zone. 33 U.S.C. § 1362(10). It is the USACE's understanding and belief that waters under State jurisdiction does not extend beyond the limit of the territorial seas. That being the case, it is unclear why the State retained the reference to ocean waters in Appendix A.

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(7) Section 230.10(c): Appendix A retains the requirement of 40 C.F.R. § 230.10(c) of the EPA's Section 404(b)(1) Guidelines related to significant degradation. However, the determination of significant degradation made by USACE under section 404 of the CWA is based upon the factual determinations, evaluations, and tests identified in EPA's Section 404(b)(1) Guidelines. The State has proposed elimination of these methods for determining significant degradation. Therefore, it is not clear how a determination of significant degradation would be made by the State. See comment 7(g)(1) above related to deference to USACE in the application of the Section 404(b)(1) Guidelines for activities subject to section 404 of the CWA.

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(8) Section 230.92, Definitions; "In-lieu fee program instrument," and "Instrument": The State has proposed to eliminate all reference to the process for approving mitigation bank and in-lieu fee programs currently identified in the USACE Regulations at 33 C.F.R. Part 332, and the Section 404(b)(1) Guidelines at 40 C.F.R. Part 230, Subpart J, and has also proposed to eliminate the definition of "mitigation banking instrument." Therefore, it is not clear why the definition of "in-lieu fee program instrument" or "instrument" have been retained in Appendix A.

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(9) Section 230.92, Watershed approach: USACE recommends the State retain the existing definition of watershed approach as defined in USACE regulations at 33 C.F.R. § 332.2, and the Section 404(b)(1) Guidelines at 40 C.F.R. § 230.92

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(10) Section 230.93(k): This section is inconsistent with the proposed Procedures identified in Section IV(B)(5)(e), as well as the proposed Section 230.94(c), of Appendix A as follows:

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(a) Section IV(B)(5)(e) of the proposed Procedures identifies that the permitting authority may include as a condition of an Order, that the applicant receive approval of a final mitigation plan prior to discharging dredged or fill materials to waters of the state.

(b) Section 230.93(k)(ii) of Appendix A states that special conditions must incorporate, by reference, the final mitigation plan approved by the permitting authority.

(c) Section 230.94(c)(1)(i) of Appendix A states that for individual permits [see comment g(4)] the final mitigation plan must be approved by the permitting authority prior to commencing work in waters of the State (Lines 1274 and 1275). This section subsequently states that the approved final mitigation plan must be incorporated into the individual permit either as an attachment or by reference (Lines 1276 and 1277).

(d) Section 230.94(c)(ii) of Appendix A states that for general permits [see comment g(4)], a final mitigation plan must be approved by the permitting authority before the permittee commences work in waters of the State.

USACE recommends the State modify these sections of the proposed Procedures and Appendix A to be consistent, and require either that the final mitigation plan be submitted prior to the issuance of a permit, or prior to commencing work in waters of the State.

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(11) Section 230.93(l)(2): The State has proposed to eliminate all discussion of the process for approval of mitigation bank and in-lieu fee programs found in USACE regulations at 33 C.F.R. Part 332 and the Section 404(b)(1) Guidelines at 40 C.F.R. Part 230, Subpart J. Therefore, it is not clear why section 230.93(l)(2), related to the approval of mitigation banks and in-lieu fee program instruments, has been retained.

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(12) Section 230.93: The State needs to recognize for the Civil Works program and O&M activities performed by the USACE, the USACE approves the final compensatory mitigation plan, not the State. However, the USACE welcomes the permitting authority's suggested edits and comments on the USACE's compensatory mitigation plan. The State must recognize that the USACE is unable to adhere to this section of Appendix A of the proposed Procedures because we must comply with the requirements of section 2036(a) of the Water Resources Development Act of 2007 and associated USACE Headquarters guidance in developing compensatory mitigation plans and the amount, nature, type and location of compensatory mitigation. In addition, for the Civil Works program and O&M activities of the USACE, the USACE is not able to provide any financial security to the State or commit to long-term management funding.

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