

Index for Response to Comments; Letter #44

Commenter	Comment Number	Representative Comment	Major Category Number	Major Category
US EPA	44.1	44.1	43	Water Board Regulatory Authority
US EPA	44.2	3.30	1	State Supplemental Dredge or Fill Guidelines
US EPA	44.3	41.27	10	Compensatory Mitigation (Hierarchy)
US EPA	44.4	44.4	10	Compensatory Mitigation (Hierarchy)
US EPA	44.5	44.5	43	Water Board Regulatory Authority
US EPA	44.6	44.6	24	Implementation

#44



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901

Comment Letter # 44

AUG 23 2016

Mr. Tom Howard, Executive Director
State Water Resources Control Board
Attn: Jeanine Townsend, Clerk to the Board
1001 I Street, 24th floor
Sacramento, California 95814

Subject: California's Preliminary Draft Procedures for Discharges of Dredged or Fill Materials into Waters of the State

Dear Mr. Howard:

Thank you for the opportunity to comment on the State Water Resources Control Board's (State Board) proposed *Procedures for Discharges of Dredged or Fill Material to Waters of the State* (Procedures). Since 2001, EPA has worked closely with the State and Regional Boards on a variety of challenging scientific and policy matters related to the regulation of dredged or fill materials at the state and federal levels. EPA recognizes the significant milestone these Procedures represent in California's efforts to improve protection of aquatic resources, and supports the goal of providing consistent standards for the State and Regional Boards' regulatory actions.

Harmonizing the federal and state programs surrounding dredged and fill material discharges is complex—especially across a state as varied in habitats and communities as California. However, despite differing legal authorities, streamlining regulatory services to the public for Sections 401 and 404 of the CWA and waste discharge requirements (WDRs) under the state's Porter-Cologne Act, is a laudable and achievable goal. Based on the current draft Procedures, EPA offers the following overarching comments, with a focus on clarifying definitions and processes for the public.

1. **State Assumption:** Although the Procedures directly incorporate many elements of EPA's 404(b)(1) Guidelines, the intent of these Procedures is not to initiate program assumption as per CWA Section 404(g). EPA recommends that the final Procedures clearly describe the difference between state assumption of the 404 permitting program under 404(g), versus the application of 404 concepts through analogous existing state authorities. To avoid confusion, the State Board would ideally reconsider using different terms than those of the 404 program (much like CEQA and NEPA use different terms for similar concepts). EPA is available to work with the State Board in pursuing formal 404 program assumption should there be interest in the future.

44.1

2. **Decision Criteria:** Although elements of the 404(b)(1) Guidelines (such as Alternatives Analyses, Significant Degradation, and Compensatory Mitigation) will be familiar to the regulated community, in many cases the Procedures do not carry over the decision criteria from the Guidelines that go with them. For example, definitions of what is "practicable," or the

44.2

factual determinations under the Guidelines for findings of significant degradation, are absent from the Procedures. Compensatory mitigation requirements discussed in the Procedures also may not be consistent with federal regulations (Section IV.A.2.d. and Appendix A), which could lead to confusion and impact timely decision-making for projects needing both state and federal approval. For example, it is unclear whether Sections A.2.d and B.5.c anticipate adopting the federal hierarchy of compensatory mitigation types (preferring, in descending order, mitigation banks, in-lieu fee programs, and finally permittee-responsible mitigation projects). The Procedures only refer to these decisions as being made on a “permit-by permit” basis.

44.2 cont

44.3

3. **Watershed Approach:** There are many ways to incorporate watershed-based strategies into site-specific permit approvals, and EPA has championed the watershed approach for over 25 years. The Procedures encourage the watershed approach in several respects; however, the policy would benefit from a broader definition and application of the concept. For example, Strategy 1 in Section B.5.c should explicitly include habitat conservation plans (HCPs) or natural community conservation plans (NCCPs) that incorporate CWA programs as satisfying the Strategy’s definition of a watershed approach. EPA recommends the State Board incorporate language on this subject, which was previously provided to your 401 staff. Incorporating HCP/NCCPs would exempt projects in their planning areas from additional alternatives analyses (Section B.3.d.iv), help advance regulatory streamlining for the state, and provide for better regional environmental outcomes including water quality protections.

44.4

4. **Waters of the State:** The Procedures are not meant, in present form, to define the state’s geographic jurisdiction over waterbodies; the wetland definition and delineation components of the Procedures neither expand nor contract state waters covered by California’s permit programs. However, this is an area that can create confusion for the regulated public as well for the Corps and EPA which may have overlapping jurisdiction. The Procedures can be improved by a creating a brief, separate section on jurisdiction (waters of the state), which then introduces the wetland definition separately as a purely technical matter.

44.5

5. **Online Information:** EPA continues to support a digital (“401 Online”) approach to application, and recommend the Procedures require project information and uniform monitoring (in most circumstances, California Rapid Assessment Method), made available to the public on the EcoAtlas platform.

44.6

I value the strong partnership between the State Board and EPA in protecting water quality and all beneficial uses, and look forward to continued engagement as the Procedures are further modified. Please do not hesitate to contact me at (415) 972-3337, or Jason Brush, Wetlands Section Manager, at (415) 972-3483 should you have any comments or concerns.

Sincerely,



Tomás Torres
Director, Water Division