CALCIMA

California Construction and
Industrial Materials Association

September 18, 2017

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

Re: Statewide Dredged or Fill Procedures - Opposed
Sent Via E-Mail to: commentletters@waterboards.ca.gov

Dear Ms. Townsend:

CalCIMA is a statewide trade association representing construction and industrial material producers in California. Our members supply the minerals that build our State's infrastructure, including public roads, rail, and water projects; help build our homes, schools and hospitals; assist in growing crops and feeding livestock; and play a key role in manufacturing wallboard, roofing shingles, paint, low energy light bulbs, and battery technology for electric cars and windmills.

The sand and gravel industry provides products that are especially critical to many different types of State infrastructure projects. Several regions of the state already have shortages of sand, gravel, and other materials, shortages of which result in having to ship materials from other parts of the State. Increased shipping distances mean more environmental effects, including increased greenhouse gas emissions. For these reasons, and because the sand and gravel industry operates on alluvial deposits that often underlie areas where federal and state waters may be present, how those waters are regulated are of particular importance and concern to not only the industry but also the State.

As a trade association, we have worked with the State Water Resources Control Board ("Board") on regulatory and policy matters pertinent to our industry's activities for nearly fourteen years, including providing input during the Board's effort to establish a state dredge and fill policy and procedures ("Procedures") following the U.S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC). We appreciate the efforts the Board and its staff have made over the years to understand our industry and address our concerns, including adding specific language to the Procedures that excludes waters created by active surface mining operations from the definition of waters of the state or wetlands.

Nonetheless, we have reviewed the July 21, 2017 "Final Draft" of the Board's "State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State," and continue to have concerns about specific aspects of the policy, which we address below. We also share in the concerns and have joined the comments filed by a coalition of organizations ("Coalition"). Our comments in this letter focus on policy and implementation issues of specific interest to CalCIMA's members and to emphasize points made by the Coalition that are of particular importance for our membership.

"Active Surface Mining" Exclusion Clarity

We appreciate the Board's decision to include "active surface mining" as subsection (vii) of Section 4(d) of the definition of "wetlands" in the Procedures. With this language, artificial wetlands of any size (both smaller than one acre and greater than one acre) are excluded from the definition of "wetlands" as long as the "artificial wetland was constructed and is currently used and maintained primarily for an "active surface mining" operation, "even if the site is managed for interim wetlands functions and values."

However, the language of this section has led some to wonder whether artificial wetlands less than one acre are regulated despite the exclusion for Active Surface Mining. We would appreciate clarity that, consistent with our discussions with Board staff, all artificial wetlands "constructed" and "currently used and maintained primarily for" an "active surface mining" operation, regardless of size, are excluded from the definition of "wetlands." That is, what is really being regulated by the language in this section is artificial wetlands greater than one acre unless they meet one of the exclusions. By default, artificial wetlands less than one acre are not included unless they met one of the above definitions.

To provide additional clarity for both regulators and stakeholders, we also suggest that a definition of "active surface mining" be included to clarify what mining operations are and are not included. We particularly want to ensure that the definition include only lawfully operating mines. Accordingly, we suggest that an "active surface mining" operation be defined as any surface mining operation with a reclamation plan approved by a local lead agency or the State Mining and Geology Board, which operation has not yet been certified as having completed the reclamation process (an exact definition is proposed below).

Our thinking behind this definition is simple. Under the California Surface Mining and Reclamation Act of 1975 (SMARA), as amended, all surface mining operations in the State must have an approved reclamation plan. Reclamation plans are comprehensive documents with standards for revegetation, slopes and numerous other factors which are approved by local lead agencies (cities and counties) or, in some instances, by the State Mining and Geology Board (SMGB). Reclamation plans detail the how and when mined lands must be reclaimed, and must be accompanied by financial assurances to fully pay for that reclamation in the event that the operator fails to do so. Often as part of a reclamation plan and/or an Industrial Stormwater Permit from a Regional Water Quality Control Board, surface mining operations must maintain ponds or other water bodies meeting the definition of artificial wetlands. Accordingly, tying the definition of "active surface mining" in the Procedures to the reclamation obligations of mining operations makes sense. Synergizing these definitions creates clarity and ensures that the reclamation of the facilities in accordance with the law is treated the same as the extraction of resources on the lands. This approach also ensures that only lawfully operating surface mining operations (i.e., those with *approved* reclamation plans) fit within the definition of "active surface mining" operations under the Procedures.

Accordingly, we propose the following definition of "active surface mining":

> Active surface mining: Surface mining operations which, in accordance with Division 2, Chapter 9 of the Surface Mining and Reclamation Act of 1975, have an approved reclamation plan, and for which reclamation has not been certified as complete by the local lead agency with the concurrence of the Department of Conservation.

As a final point, we note that many active surface mining operations have been active within the State for many decades, and in some instances, for over a century. The Procedures' definition of wetlands as those that resulted from historic human activity in Section 4(c) is particularly concerning, as that provision appears capable of superseding the active surface mining exclusion for such facilities. We support the Coalition's proposed deletion of this historic human activity language to ensure that longstanding active mining operations qualify for the active surface mining exclusion.

Alternative Analysis Coordination

The Board's efforts to create collaboration and cooperation for the division of permitting authority between the U.S. Army Corps of Engineers ("Corps") and the Regional Water Quality Control Boards is admirable. Staff has presented that a primary goal of the current Board regulatory effort is to maintain alignment with federal procedures, wherever possible. However, as the Board is aware, the state has no direct authority over the federal government, and this results in undo procedural and economic burden on the regulated community by forcing them to seek approvals and concurrences from different state and federal entities, often for the same or similar activities or issues. Particularly problematic is the Procedures' grant of authority to permitting authorities to reject the federal Least Environmentally Damaging Practicable Alternative ("LEDPA"), utilizing language that is vague and subjective.

The Coalition has proposed language on page 12 of their strikeout comments concerning the alternatives analysis review requirements for cases where there are also discharges to Waters of the U.S. These additions on strikeouts on lines 389-401 would create a process that provides certainty to the regulated community and ensures that the permitting authority has the opportunity to participate in the alternatives analysis. The Coalition's clear language also gives project proponents a clear step they can take to ensure that their project's LEDPA can pass the first threshold of participation, while enabling the Board to not mandate any action by the permitting agency.

How alternatives analyses are conducted, and the Coalition's proposed changes, are of particular interest to CalCIMA's members, as sand and gravel often must be harvested from alluvial deposits where federal and non-federal state waters may be found. It is crucial that our members understand and have a clear process for effectively interfacing with federal and state permitting agencies.

Climate Change Analysis

The Procedures continue to require information (on a case-by-case basis) on potential impacts associated with climate change. Specifically, on page 7, "If required by the permitting authority on a case-by-case basis, an assessment of the potential impacts associated with climate change related to the proposed project and any proposed compensatory mitigation, and any measures to avoid or minimize those potential impacts." Staff has indicated in personal communication that the level of effort

intended on this analysis would be any impacts reasonably foreseeable. However, in staff's written response to comments to San Diego Water Authority (Comment No.1.8), the official scope of anticipated analysis is extensive. In its response, staff identifies analyzing future sea level rise, variable climate, storm intensity, dry periods, flood risks, drought, and increased vulnerability to invasive species.

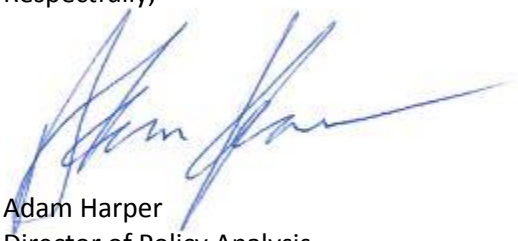
As the Coalition notes in its comments, there is no clear authority for the Board to impose this requirement, and it is unworkable. In addition, it would be difficult, at best, and speculative, at worst, for a project applicant to project forward the scope of impacts and their relevance to wetland mitigation projects as defined by the staff response to San Diego Water Authority letter. At a minimum, any information and related analysis should have a "reasonably foreseeable" requirement—i.e., information related to the *reasonably foreseeable* potential impacts of climate change associated with a proposed project. Without such a limitation, this requirement is an impermissibly vague, open-ended obligation to supply information and adopt mitigation measures. It is far preferable to delete the analysis altogether.

Conclusion

We appreciate your consideration of these important issues. The regulated community seeks to ensure that it has certainty as to its federal and state obligations; both the regulated community *and* the Board desire a reasonable, aligned process for achieving compliance with state and federal obligations. Additional clarity and definition in the Procedures will serve these goals.

We appreciate your consideration of our comments.

Respectfully,



Adam Harper
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