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September 18, 2017

Ms. Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Floor  
Sacramento, CA 95814

Dear Ms. Townsend:

**Subject: Comments –Statewide Dredged or Fill Procedures**

The Los Angeles Department of Water and Power (LADWP) would like to thank the State Water Resources Control Board (SWRCB) for the opportunity to comment on the Draft Procedures for Discharges of Dredged or Fill Materials to Waters of the State (Draft Procedures).

LADWP is the largest municipally owned utility in the nation, which serves a 465 square mile area in Los Angeles with approximately 4 million residents and a portion of the Eastern Sierras in Owens Valley. Its mission is to provide essential public services (water and power) for grid reliability and public health and safety in an efficient, cost-effective, and environmentally responsible manner. LADWP owns and operates its 233-mile gravity fed Los Angeles Aqueduct which brings water to the City of Los Angeles (City). LADWP's Water System supplies approximately 177 billion gallons of water annually and an average of 446 million gallons per day to its residential and business customers.

In order to serve its customers reliably, LADWP must continuously maintain its systems and engage in large capital construction projects to integrate new technologies. Maintenance and/or construction projects that may affect the quality of Waters of the State will require permit approval and issuance through the Draft Procedures from the appropriate Regional Water Quality Control Board (RWQCB) or in some circumstances the SWRCB. As written, the Draft Procedures have the potential to delay the commencement of critical maintenance and construction projects, which could cause reliability issues for both LADWP's Water and Power systems. LADWP is mandated by

Putting Our Customers First 

its City Charter to provide reliable water and power and therefore, it is critical that LADWP be able to obtain any permits in a timely manner to deliver reliable water and power to the millions of people who depend upon it.

LADWP understands the Draft Procedures are intended to establish regulatory consistency across the RWQCBs. However, LADWP believes that portions of the Draft Procedures may lead to an expansion of the State's regulatory program, and may lead to delays and uncertainty in projects that are critical to the reliable and efficient delivery of water and power. LADWP provides the following comments:

### **1. Definition of Wetlands (Section II, Page 1)**

The Draft Procedures expand the definition of wetlands beyond the areas currently regulated by the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA). However, one of the main goals of the Draft Procedures is to provide consistency with the delineation process by relying on the Corps' delineation procedures for non-federal wetland areas. The proposed definition does not appear to be consistent with this goal and has the potential to cause more confusion. Since the Waters of the United States (WOTUS) rule is currently stayed by the U.S. Court of Appeals for the Sixth Circuit, it may be appropriate to wait until this rule has been finalized before redefining the current wetlands definition. The State Board's goal may be accomplished by the Court's ruling.

Moreover, the proposed state wetlands definition may include water features not intended by the SWRCB, such as puddles and ditches, placing an unnecessary additional workload on limited resources for both the regulated community and the regulator. Currently, the regulations allow the permitting authority to determine whether it has jurisdiction on a water feature on a case-by-case basis. Therefore, expanding the definition of wetlands at this time does not appear necessary.

Also, the State Water Board states in its staff report on page 56, that since the California Code of Regulations, title 23, Section 3831(w) was adopted prior to the Supreme Court decisions such as SWANNC and Rapanos, it is the intent of the State Water Board to include both historic and current definitions in order to broaden the WOTUS determination. In addition, the State Board's new definition would include artificial wetlands that "resulted from historic human activity and has become a relatively permanent part of the natural landscape" (Section II, Page 2, Lines 46-47). Using historic definitions is problematic given the long history of litigation and uncertainty.

Finally, the last sentence in Section II, Page 2, Lines 61-62 states: "If an aquatic feature meets the wetland definition, the burden is on the applicant to demonstrate that the wetland is not a water of the state". LADWP believes this shifts the burden of proof to the discharger, when in fact the SWRCB or RWQCB should continue to prove it has jurisdiction.

LADWP requests that the wetlands definition not be changed at this time; however, if the SWRCB does make a change, LADWP requests that any revision be consistent with the Corps delineation process to avoid confusion with the term "wetlands." To promote consistency among the RWQCBs in determining whether a particular water feature is a Water of the State, LADWP also requests that the specific criteria and process for this case-by-case determination be included in the Draft Procedures, and that the guidance be developed using a stakeholder process for input and comments from all stakeholders.

## **2. Concern about Staff resources – Discharge and Agency**

LADWP believes that the Draft Procedures as written will result in a significant increase in regulatory workload considering the following:

- The broad definition of wetlands
- The flow chart that leads to inclusion no matter the path
- Requirements for alternatives analysis

LADWP is concerned as obtaining a 401 or Waste Discharge Requirements (WDR) is an already lengthy process, and if the SWRCB or RWQCB staff experiences an increase in regulatory workload this might extend the process even more. LADWP is also concerned that the increase in regulatory workload will be more costly, resulting in a financial burden for both the applicant and the agency. This additional regulatory and financial burden could lead to project delays, including delays for critical maintenance and health and safety related projects, and delays for projects that are consistent with the State's ambitious goals to address climate change, such as renewable energy projects.

## **3. Timeline of Application Submittal and Response (Section IV. A, Page 4)**

The Draft Procedures require the permitting authority to either deem the initial application complete or request additional information within 30 days of receiving the initial application. Once the applicant submits the additional information, the permitting authority has 30 days to determine whether the application is complete. Once deemed complete, there is a 30 day public comment period, and if there are comments then the permitting authority must respond to comments, further delaying the issuance of the permit.

However, the Draft Procedures do not explain what happens if the permitting authority does not respond after the 30 day timeframes. LADWP has often experienced a request for information more than 30 days after submitting the initial application, and then further requests for information after each subsequent submittal of information. This often

results in resubmitting information that had previously been submitted, which causes significant delays. LADWP has experienced a 401 reissuance that has taken more than four years. Similarly, other project 401s have taken more than a year, which has delayed the construction schedule.

Additionally, the Draft Procedures add a climate change analysis and alternatives analysis, which will even further extend the permitting process and has the potential to cause undue burden and hardship with regards to grid reliability and lost opportunities with critical time-sensitive projects.

LADWP requests that the Draft Procedures include language that states the application is considered complete if there has been no response from the permitting authority after 30 days. LADWP also requests that the Draft Procedures include language that requires the permitting authority to be more specific with their requests, and to avoid making repetitive requests for information.

#### **4. Alternatives analysis (Section IV. A.1.h, Page 5)**

The Draft Procedures state that following the submission of the initial project application, the permitting authority may require the applicant to perform an alternatives analysis to deem the application complete. LADWP is particularly concerned that alternatives analyses may be required for routine maintenance and other projects that have the potential to impact health and safety. Conducting an alternatives analysis during the 401 certification process or WDR permitting process would be duplicative and significantly delay the certification process and project schedules. The Corps performs an alternatives analysis for federal waters, when required, and alternatives for state waters are considered through the CEQA process. LADWP thus proposes removing the alternatives analysis requirement.

#### **5. Final compensatory mitigation plan must be approved before commencing work in Waters of the State (Appendix A, Subpart H, Section 230.94, Page 37)**

The Draft Procedures require applicants to submit a draft mitigation plan for review prior to certification, and to obtain approval of a final mitigation plan before commencing work in Waters of the State. The latter requirement will extend the already lengthy certification process, and likely will cause unnecessary delays in project schedules.

Finalizing a mitigation plan before commencement of a project is difficult due to the extensive time involved for the administrative and permitting process in order to finalize an individual mitigation project. In addition, if a mitigation bank were to be used there is an extensive process for obtaining the necessary and critical documents needed to secure the land for credits and preparation of the agreement between the parties

involved. Further, a mitigation bank that is in the process of being certified (which can take years) may not be available by the end of the project. If the applicant undertakes its own mitigation project, it would require that all other regulatory approvals for the proposed mitigation be finalized before the plan is considered final and approved by the permitting authority. Therefore, approving a mitigation plan may not be feasible until after the construction project has begun. The requirement to have a final mitigation plan in place will cause undue hardship and problems with the construction schedule, procurement process, and any planned outages that are required for the work. In addition, due to schedule delays, this could cause grid reliability issues and missed opportunities to include critical infrastructure for new and greener technologies, such as renewables, on the grid. For example, if LADWP's Beacon Solar project had not been able to commence without the mitigation plan fully vetted and approved, it would not have been able to move forward and that would have forfeited the renewable project, resulting in not being able to meet the State mandates.

LADWP proposes the applicant be required to submit only a draft mitigation plan prior to the permitting authority's issuance of either the WDR or 401 certification in order to commence work; this mitigation plan would be finalized before project completion. This would avoid delays with necessary construction projects and/or maintenance.

#### **6. Assessment of the potential impacts associated with climate change (Section IV. A.2.b, Page 6)**

The Draft Procedures state that, following the submission of the initial project application, the permitting authority may require "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." LADWP believes that this assessment, if required, should be conducted earlier during the CEQA process.

Since the climate change evaluation is a new requirement, LADWP suggests that the SWRCB develop detailed guidance that is subjected to a public process in order to assist discharges in evaluating potential impacts associated with climate change.

#### **7. Supplemental field data from the wet season (Section IV. A.2.a, Page 6)**

The Draft Procedures state that following the submission of the initial project application, the permitting authority may require supplemental field data from the wet season if the wetland area delineations were conducted during the dry season. LADWP would like clarification on what kind of supplemental field data will be requested, and how the data will be obtained if wet season field data has not been conducted at the project site previously. If supplemental field data can only be obtained during the next wet season, there will be significant delays that could postpone the project for months or

years. Many LADWP maintenance projects are time-sensitive and cannot wait until the following wet season data is obtained. For example, outages must be scheduled months in advance and maintenance must be performed within the time frame of the outage in order to maintain water and power system reliability, and would not be able to wait for the wet season to collect data.

LADWP suggests that the Draft Procedures include an exemption from obtaining supplemental field data from the wet season if the project activity is time sensitive and cannot be delayed, such as operations and maintenance projects, which would compromise grid reliability.

**8. Final restoration plan for temporary impacts must be approved before issuance of the Order (Section IV. B.4, Page 9)**

The Draft Procedures require that an applicant obtain approval of a final restoration plan for temporary impacts before issuance of the Order. This requirement likely will cause delays in the certification process, which in turn would cause delays in projects schedules.

LADWP proposes that applicants only be required to submit a draft restoration plan prior to issuance of the Order, in order to minimize delays. Additionally, the temporary impacts of the project can be evaluated more accurately during the duration of the project or once the project has been completed. Therefore, the draft restoration plan can be finalized with permitting authority's approval.

**9. Proposal does not recognize current federal exemptions (e.g., maintenance, maintaining grade, maintaining capacity for protection of health and safety)**

LADWP is concerned that the SWRCB's proposal has the potential to expand SWRCB and RWQCB jurisdiction and involvement in activities that are currently recognized under federal exemptions and/or nationwide permits (NWP). Some of these exemptions provide reasonable and necessary avenues for routine activities, such as maintenance, maintaining grade, and maintaining the capacity of flood and sediment control basins, that have the potential to impact health and safety. As detailed throughout these comments, the SWRCB proposal expands the definition of wetlands, will require alternatives analysis for projects where an analysis had not previously been required, and has the potential to result in significant delays. Prior to adopting the proposed policy, the SWRCB should work with stakeholders to develop modifications that would ensure consistency with NWPs and allow timely implementation of projects involving health and safety and routine maintenance.

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In closing, LADWP appreciates the opportunity to provide comments on the Draft Procedures and looks forward to working with SWRCB staff in this process. Should you have any questions regarding this letter, please contact Ms. Chloé Grison of the Wastewater Quality and Compliance Group at (213) 367-1339, or me at (213) 367-0436.

Sincerely,

A handwritten signature in blue ink that reads "Katherine Rubin". The signature is written in a cursive, flowing style.

Katherine Rubin  
Manager of Wastewater Quality and Compliance

CG:

- c: Ms. Felicia Marcus, Chair, SWRCB
- Mr. Steven Moore, Vice Chair, SWRCB
- Ms. Tam M. Doduc, SWRCB
- Ms. Dorene D'Adamo, SWRCB
- Mr. E. Joaquin Esquivel, SWRCB