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Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
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SUBJECT: State Water Resources Control Board Preliminary Draft. State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State. [Proposed for Inclusion in the Water Quality Control Plans for Inland Surface Waters and Enclosed Bays and Estuaries and Ocean Waters of California] July 21, 2017

Dear Ms. Townsend,

The Alameda County Flood Control and Water Conservation District (District) appreciates the opportunity to comment on the *Preliminary Draft of State Water Resources Control Board's Proposed Procedures for Discharges of Dredged or Fill Material to Waters of the State (Procedures)*.

General Comments

Would this permit/order proposed procedures replace the existing 401 Water Quality Certification process? It will only lead to substantial project permit/order delays and project delivery costs increases. Local government agencies are leaders in preserving and protecting the environment, delivering infrastructure improvement needed to protect life and property. Local government agencies under continually stringent federal and state regulatory guidelines have incorporated into their work plans and project delivery approaches that have resulted in significant environmental quality improvements over the last several decades.

Maintenance activities generally results in more improved conditions of the local environment than the pre-project conditions. Flood Control Districts are not in the business of filling and dredging for financial benefits. Flood Control Districts maintain aging infrastructure many of these facilities are at the end of their design life. Local government agencies have adopted various policies and guidelines to address climate change sea level rise effects on the environment consistent with existing and evolving federal and state guidelines. Implementation of Change Climate/ sea level rise solutions is becoming a major responsibility of local government agencies.

District believes this proposed new permitting procedure and guidelines are far too excessive and burdensome on local government agencies such as flood control districts. Adoption of the procedures would result in significant project delivery delays and increasing project delivery costs without the incremental

environmental benefits that it seeks to address. The articulated goal is also inconsistent with the Executive Order (EO) W-59-93: *the goal is not meant to be achieved on permit-by-permit basis*” and “ *the development of internal policies with state agencies that encourage wetland conservation activities which are compatible with programmatic goals such as flood control, ground water recharge etc.*”

Specific Comments:

- **Wetland Definition.** The adoption of the existing federal definition of wetlands is commended. It certainly will provide some degree of certainty for the regulated community and eliminates arbitrariness of regulatory staff. However, inclusion in the definition areas that may have been waters of the US but are no longer considered jurisdictional (Historic) (line 40); and results of human activity- anthropogenic (Line 41) is problematic. The procedures further removes exemptions (Line 48) listed in a water board water quality control plan. In effect, the exemption will not be honored.

Additionally, it is not clear what constitutes “waters of the state” that is uniquely different from waters of the U.S. To leave the clarification to the permitting authority would result in arbitrary decision that would only lead to unnecessary delays and uncertainty.

- **Compensatory Mitigation determination Line 300.** “Recent Anthropogenic degradation of aquatic resources” should not be the basis of computing compensatory mitigation. Mitigation must be based solely on the project and associated construction impacts. Extending or attributing project impacts to “recent anthropogenic” activities that may have resulted several miles away in the watershed is rather inconsistent with E.O W-59-93 and contrary to the purpose and need of the project for which approval is sought. These anthropogenic degradations has no nexus to the project. Flood Control Districts should rather be credited for non-project related corrections or repairs of these identified anthropogenic degradations (or serve as a mitigation) instead of including this in the calculus of compensatory mitigation.

The water board should consider making funds available to address these anthropogenic degradations independently.

- **Preparation of additional documentation.** The proposed new regulation would require preparation of extensive documentation: Section 404(b)(1) analysis including Least Environmentally Damaging Practical Alternative (LDPA)(line 474); (Line 158-1670); Watershed Plan (Line 504); Watershed Profile (Line 512) in addition to the existing list of document that is submitted with Section 404/401 applications. This document review leading to permit (order) issuance would most likely result in delays given the current state of staffing at the water board. It is uncertain what the incremental environmental benefit would results beyond the existing permitting documentation.
- **Alternative Analysis Section 404(b) (1) analysis** (Line 158-167) (326-332). It is not clear how this will work. Copies of Corps Section 404 permit application packages are provided to the Water board. Section 404 may not require alternative analysis. Therefore,
 - At what point would the water board require a supplement to Section 401 certification without resulting in delay in issuing Section 401 certification?
 - Is this new procedures (order) a separate permit atop of the Section 401 certification?
 - Would application of this new procedures/order apply to waters of the State only or to both waters of the US which for the most part same as the waters of the state?
- **Case-by-case Determination:** (Line 186). It is not clear how a case-by case determination would work. The proposed procedures give the Regional Board staff excessive discretionary authority to determine features under state waters. The proposed procedures have not fully articulated what constitutes waters of the state differently from the waters of the US. This regulatory staff discretionary authority will lead to greater uncertainty in the regulated public on what features are covered that would trigger a violation of state waters.

- Interpretation thereof in the field becomes subjective and arbitrary. Waste Discharge Requirements will be uncertain and entirely arbitrary. This uncertainty will result in increased permitting costs and associated demand on Regional Board staff time during the application process.
- **Aesthetics (Line 850- 856):** This is beyond the water board's authority to require mitigation for aesthetics for maintenance projects that are generally exempt under CEQA.
- **Permitting agency prescribing type location of mitigation.** This prescriptive discretionary authority appears to overlap other federal and state agencies jurisdictions. It is best if water board continue the existing coordination with federal and state agencies rather than taking on the role of demanding mitigation for project associated impacts outside their authority i.e.; waters of the state.
- **Financial assurance requirements (Line 337):** This demand would lock up limited resources indefinitely that otherwise could be available to local agencies for advancing environmental improvements in the watershed including compliance with other state mandates such i.e. NPDES/MRP. This assurance demand erroneously assumes that Local Government agencies will cease to exist.
- **Climate Change.** The proposed procedures require consideration of existing climate change/sea level and future conditions in developing maintenance projects. The compensatory mitigation requirements do not account for the significant investment required to meet site success criteria.
- **Adaptive management definition (788)** is inconsistent with changing climate/ Sea level rise.
 - Project site conditions will change. Requiring mitigation to support the current site fauna and flora that may change is problematic. It will lead to increasing costs of continual intervention to meet permit/order mitigation conditions that is based on existing conditions.
 - The permitting authority as proposed in the procedures has discretionary authority to request the type and location of mitigation proposed by the applicant. Recommend working with applicants to develop an appropriate mitigation that is commensurate to the impacts.
- **Buffer (796)** as required to protect aquatic resources may not be feasible in many urban environment where the adjacent are full developed. Such requirement is also inconsistent with the EO W-59-93 no-net-loss goal ...stating that it shall not be based on permit by permit.

Thank you for the opportunity to comment.

Yours truly,

Kwablah Attiogbe
Environmental Services