Public Comment
Statewide Dredged or Fill Procedures
Deadline: 9/18/17 by 12 noon

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California Agricultural Irrigation Association

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11368 E. Stillwater Way • Redding, California 96003-8510
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Westlands Water District

South Valley Water Association

ACWA
Association of California Water Agencies

September 18, 2017

Sent Via E-Mail to: commentletters@waterboards.ca.gov

Ms. Felicia Marcus, Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812

Re: Procedures for Discharges of Dredged or Filled Materials to the Waters of the State

Dear Ms. Marcus and Members of the Board:

Our organizations represent the various segments of California's proud agriculture industry. California farmers and ranchers produce over 400 commodities and lead the nation in agricultural production and exports. In representing the various segments of California's agriculture industry, we appreciate the opportunity to comment on the State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State ("Procedures").

We submit these comments recognizing that wetlands provide economic and environmental benefits to the residents, farms, and businesses of the State. In protecting wetlands, growers and ranchers operate best, and the public is best served, under rules that can be fairly applied and are clear on their face, lacking ambiguity or subjectivity. Consequently, we continue to have concerns about the scope of the proposed Procedures.

In particular, the proposed Procedures are overbroad relative to the needs and legal authority identified by the State Board, contain duplicative and sometimes conflicting requirements due to the excessive scope, and are open to subjectivity that will likely lead to inconsistent applications. These problems will cause uncertainty and needless delay and expense for the agricultural community while failing to provide a meaningful improvement in environmental protection.

We suggest that the State Water Resources Control Board ("State Board") carefully consider how the Procedures potentially apply (perhaps unintentionally apply) to the agriculture industry. The Clean Water Act ("CWA") was written in a very thoughtful and deliberate manner in considering its effects on the agriculture industry. The CWA intentionally provides necessary agricultural protections that must also be included in these Procedures. Below is an explanation of the history of agriculture's exemptions from the CWA. This may be helpful in appreciating the need for a clear exemption for agriculture in the Procedures.

In 1972, Congress enacted the CWA. That Act, in Section 301(a) (33 U.S.C. § 1311(a)), generally prohibits "the discharge of any pollutant", except in accordance with other provisions of the Act. One of those provisions, Section 404(a) (33 U.S.C. § 1344(a)), authorizes the Army Corps of Engineers to issue permits for the "discharge of dredged or fill material into the navigable waters."

The Act defines "discharge" as "any addition of any pollutant to navigable waters from any point source". (33 U.S.C. § 1362(12).) Read together, these provisions mean that "any discharge of dredged or fill materials into 'navigable waters'—defined as the 'waters of the United States'—is forbidden unless authorized by a permit issued by the [Corps] pursuant to § 404."[1] Put another way, the elements of a claim for violation of Section 404 are: (i) a "discharge" (i.e., an "addition" from a "point source"), of (ii) "dredged" or "fill" material, to (iii) "navigable waters," (iv) without a permit.

After adoption, the question of whether farmers needed a Section 404 permit to plow their fields soon became a major national issue. In May 1975, the Corps issued proposed regulations to govern the Section 404 permit program. (40 Fed.Reg. 19766.) A Corps's press release explained that, under the proposed regulations, *"federal permits may be required by the ... farmer who wants to ... plow a field", and that "millions of people may be presently violating the law", subject to "fines up to $25,000 a day and one year imprisonment."*[2]

The reaction was swift and severe. More than 4,500 written comments were submitted (an "exceptional" number, in those pre-Internet days). (*Id.* at 70.) The Secretary of Agriculture campaigned against the proposal. (*Id.* at 68.) The Administrator of the Environmental Protection Agency (which shares responsibility for implementation of Section 404) wrote to the Chief of the Corps that "[b]y no stretch of the imagination" could plowing result in a regulated discharge: *"We are particularly concerned that the false impression that farmers must obtain permits whenever they plow a field be corrected. Since this was clearly not contemplated by either the Corps or EPA and is not required by the statute, we fail to understand how such a statement could appear in this press release. As you are well aware, the primary concern of section 404 is to address situations where dredged or fill material is discharged into wetland areas. By no stretch of the imagination can the simple act of plowing be considered to fall under that category."* (121 Cong. Rec. 17346 (1975).)

A concerned Congress held hearings, at which senior Corps staff apologized and committed to "dispel fallacies that the Corps is proposing to regulate a farmer plowing his field."[3]

Consequently, the resulting regulations broadly excluded "plowing" from regulation under Section 404. Interim regulations published in July 1975 did this by excluding "material resulting from … plowing" from the definitions of "dredged material" and "fill material." (40 Fed.Reg. 31320, 31325.) The final regulations published in 1977 likewise excluded "plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products" from the definitions of "dredged material" and "fill material," (42 Fed.Reg. 37122, 37145.) The preamble to those 1977 regulations explained that those activities simply "are not included in the Section 404 program." (*Id.* at 37130.)

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[1] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985).
[2] Jeffrey Stine, Regulating Wetlands In The 1970s, 27 J. Forest Hist. 60, 67 (1983), emphasis added.
[3] *Id.* at 68; Corps Issues Interim Rules For Discharges Of Dredged And Fill Materials, 5 Envt'l.L.Rep. 10143 (1975).

Subsequent regulations have carried this wholesale exclusion of plowing from the Section 404 program, with only one exception. EPA regulations adopted in 1980, and Army Corps regulations adopted in 1982, each provided that "[p]lowing … will never involve a discharge of dredged or fill material" unless it actually converts wetlands "to dry land."[4] EPA explained simply that "[p]lowing … is not a point source and, [under the regulation], will not require a section 404 permit." (45 Fed.Reg. 33290, 33398-33399.) This exclusion of plowing, so long as it does not convert wetlands to dry land, remains in the current Section 404 regulations. (33 C.F.R. § 323.4(a)(1)(iii)(D).)

Separate and apart from these regulations excluding plowing from the need to obtain a Section 404 permit, in December 1977, Congress—prompted in part by the Corps' proposal to regulate plowing—amended the CWA to expressly exempt certain discharges from "normal farming, silviculture, and ranching activities such as plowing" from regulation. (33 U.S.C. § 1344(f)(1)(A).) This was a belt-and-suspenders approach: the regulations by then excluded "plowing" from the definition of a regulated "discharge" in the first place, and the statutory amendment exempted certain discharges from normal plowing that might remain.

Collectively, these exemptions reemphasize that Congress never intended these activities to be considered discharges of dredged or fill material. [5]

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[4] 45 Fed.Reg. 33290, 33473 (EPA regulation); 47 Fed.Reg. 31794 (Corps regulation).

[5]The legislative history to the 1977 statutory amendments is replete with Congressional statements reflecting an intent to protect farmers from regulation under Section 404 withstatutory recognition that normal farming, ranching and silviculture activities do not belong in this [Section 404] permit program. (See Leg. Hist. 351 (Rep. Hammerschmidt); see also id. at 348 (Corps' pre-existing regulations made clear "that plowing, seeding, cultivating, and harvesting for the production of food, fiber, and forest products are not included in the Section 404 program") (Rep. Roberts); 420 (1977 amendments clarified that plowing did not involve point source discharges and "were not intended to require Section 404 permits") (Rep. Harsha); 485 (conferees' bill "includes the clarification that permits are not required for certain normal farming activities such as plowing and seeding which are not discharges of dredged or fill material") (Sen. Stafford); 524 ("Senate amendment to Section 404 … clarifies the exclusion of activities that do not involve point source discharges, such as plowing") (Sen. Baker); 529 (exemption "legislatively clarifies the exclusion of certain activities that do not involve point source discharge", and that "normal farming, ranching and silvicultural activities such as plowing … were not intended to require 404 permits") (Sen. Wallop); 911 ("plowing" is among the exempt "earth moving activities that do not involve discharges of dredged or fill materials into navigable waters") (Sen. Stafford); 924 (Congress "never intended under Section 404 that the Corps of Engineers be involved in the daily lives of our farmers, realtors, . . . We just did not intend that") (Sen. Domenici).)

CONCERNS:

We appreciate the State Board's efforts to create a program that is consistent with federal law as discussed above and the U.S. Army Corps of Engineers' current regulatory requirements. Additionally, we appreciate that the State Board intends that the Procedures bring "uniformity" among the regional water boards regarding the process and requirements for applying and receiving a CWA Section 401 water quality certification. We also understand that the goal of the Procedures is to "*ensure no overall net loss and long-term net gain in the quantity, quality and permanence of wetlands.*"

However, we are very concerned that Procedures include a California-only definition of a wetland which differs from the federal definition. The definitions of ephemeral and intermittent streams also differ from federal definitions. To qualify as a wetland under the State definition, a wetland only needs to meet a hydrology and hydric soils criteria. Hydrophytic vegetation does not need to be present.

By definition, the Procedures create a program which will regulate land features not currently recognized by the federal government as a wetland. Additionally, the State's Procedures create new regulatory requirements and provide broad authority and discretion to the water boards regarding specific permit components. For example, the Procedures require various subjective analyses such as effects to beneficial use, impacts associated with climate change, off-site alternative analysis on projects not owned or controlled by the applicant, suitability of mitigation despite approval at the federal level, and case-by-case determinations regarding buffer distances and site design after local agency approval.

The Procedures also require an on and off-site alternatives analysis for projects that exceed direct impacts to 0.2 or more acres of Waters of the State similar to the EPA's 404(b)(1) Guidelines. The national average cost of completing a 404(b)(1) alternative analysis is $271,596 and takes an average of 788 days.[6] The cost and timelines for adhering to the State's new Procedures could be equally as expensive and time consuming. The duplicative process proposed by the State will increase permitting timelines and cost.

Consequently, we ask that the State Board please consider the following broad-based concerns regarding the Procedures' scope, lack of clarity, consistency, and duplication and conflict:

- Scope: The Procedures must serve a public need that is not currently being addressed. Beyond filling the regulatory gap, it is very unclear exactly what problem, if any, the Procedures are attempting to solve.

- Lack of Clarity: The Procedures must be clear, well defined, and not allow for subjective case-by-case determinations. The public, and water board staff as well, will be best served with clear application requirements and Procedures.

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[6] *Rapanos v. United States,* 547 U.S. 715 (2006)

- Consistency: The Procedures must recognize that the vast majority of the permit applications are also subject to federal oversight. Therefore, mandating a state program that is inconsistent with federal law is problematic.

- Duplication and Conflict: The Procedures must protect against needless duplication of federal requirements. Such duplication can be costly and create needless delays. Additionally, the Procedures create inconsistencies with federal requirements and other state programs, such as the California Department of Fish and Wildlife's lake and streambed alteration program.

Scope:

There is no proven need for these expansive Procedures, especially when one considers its potentially broad scope relative to agriculture. The Procedures create a mandatory permitting program which will apply the wetland definition and dredged and fill Procedures to a regulated industry already committed to conservation and environmental protection.

The California agriculture industry provides the safest most reliable supply of food and fiber to the world through responsible stewardship of resources and is proud of its commitment to sustainability. Many California growers are multi-generational farms, vineyards, and ranches that have been passed on to children, grandchildren, great grandchildren, and beyond. This only happens when the land and the environment, including water resources, are continually respected and protected.

Growers and ranchers are heavily invested in the health of their water sources and certainly want to protect the quality of the water. To that end, growers and ranchers are already taking measures to manage sediment and erosion through irrigated lands regulatory programs and through other efforts. This proposal will only increase bureaucratic red tape and will not further protect water or water quality.

Lack of Clarity:

By including a wetland definition and delineation Procedures that are inconsistent with the Corps' wetland definition, the Procedures create uncertainty, confusion and conflict, for no apparent purpose. Growers and ranchers cannot meet the seasonable crop demands and manage their farms with regulatory uncertainly and associated delays and costs. Additional examples of confusing and unclear provisions include:

- The Procedures define wetlands to include "current and historic" definitions under Waters of the U.S. ("WOTUS"). This seems to indicate that any wetland that may have ever been covered under WOTUS is forever included under these Procedures. Keep in mind that there have been many revisions to federal law. And some changes, such as the 2015 WOTUS rule, have only been law for a few days. Consequently, this is very

unclear and growers and ranchers will have a difficult time understanding which water features are regulated under the Procedures.

- On page 6 of the Procedures beginning with line 183, the Procedures allow, in four places, for additional application information to be required on a case-by-case basis.

- Throughout the Procedures, the term "and/or" is used. Courts have repeatedly ruled that this is not a clear way for law to be written. [7] The regulation needs to be clear. Is it "and" or is it "or"? More specifically, in six places beginning on page 24, line 817, the Procedures refer to "physical, chemical, ***or*** biological" characteristics or attributes. In two places the Procedures refer to "physical, chemical, ***and*** biological" elements or processes. In one place the Procedures refers to "physical, chemical ***and/or*** biological" attributes. This is unclear, inconsistent and is very confusing. To be consistent with federal law, it should read "physical, chemical, ***and*** biological."

The proposed Procedure's lack of clarity creates confusion, impacting growers and ranchers as to how to apply regulatory requirements as these decisions are layered one upon-the-other, as well as create a regulatory quagmire for each Regional Water Board to follow and adhere to.

Consistency:

We appreciate that in several places the Procedures state that it is intended to be consistent with federal law and guidelines.[8] However, the scope of the Procedures goes well beyond the definitions of the CWA Section 401 certification requirements and Section 404 permitting program. These Procedures would give the Regional Water Boards too much subjective authority over discharges unrelated to the intended wetlands management, possibly crossing into upland areas already protected under the California Department Fish and Wildlife's lake and streambed alteration program.

This is troubling to growers and ranchers who must already comply with numerous layers of regulatory oversight for discharges. The Procedures would add yet another layer of broad oversight and regulatory over-reach instead of a targeted, well-confined set of regulatory objectives.

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[7] An American Bar Association Journal article in 2014 suggested that the word "and/or" should be stricken from use by legal drafters. It is confusing at best and subject to broad interpretation at worse. Courts have referred to and/or as a "freakish fad," an "accuracy-destroying symbol," a "meaningless symbol," and a "befuddling, nameless thing." Most recently, the Supreme Court of Kentucky called it a "much-condemned conjunctive-disjunctive crutch." http://www.slaw.ca/2011/07/27/grammar-legal-writing/

[8] For example, on Page 1, the Procedures states, "The Procedures **include elements** of the CWA Section 404(b)(1) Guidelines, **thereby bringing uniformity** to Water Boards' regulation of discharges of dredged or fill material to all waters of the state." Additionally, Appendix A states that, "**It is the intent** of the Water Boards **to be consistent** with the EPA's 404(b)(1) Guidelines **where feasible**."

Although the Procedures reference federal CWA section 404(f) exemptions for normal farming activities, the agricultural exemptions are inconsistent, causing uncertainty. Additionally, the Procedures narrowly describe the federal CWA exemption for prior converted cropland, adding regulatory confusion to everyday farming and ranching practices and placing the future of California agriculture in jeopardy. Lands designated as prior converted cropland is excluded from federal jurisdiction. The Procedures must therefore similarly exclude prior converted cropland from wetland and non-wetland WOTS subject to regulation under the Procedures. In the alternative, the exclusion in Section IV.D.2.a needs to be made consistent with the federal exemption. While this appears to have been the intent, the Procedures include conditions and definitions for this exclusion that would deny the exclusion to certain types of cropland that are eligible for the exclusion under federal law.

Duplication:

One of the largest frustrations for growers and ranchers is that there are multiple agencies, or even in some instances multiple branches of the same agency that are trying to accomplish the same thing, but cannot coordinate to streamline the requirements.

The Army Corps of Engineers and California Department of Fish and Wildlife already have regulatory programs in place that are overlapped by these Procedures, mainly due to the broad scope as noted above. This will present growers and ranchers with regulatory conflicts, uncertainty when conducting normal farming practices, and additional costs for permitting and engineering reports. It also appears that regulatory conflicts could become daily events as the Procedures allow override of decisions made by the Corps of Engineers, essentially wiping out the ability to utilize the streamlined permit process for minor discharges currently allowed under federal law.

Without a memorandum of understanding between the Water Board and the Corps that provides a framework for harmonizing the state and federal permitting processes and resolving conflicts, the Procedures are duplicative and unnecessarily add regulatory ambiguity to agricultural operations.

RECOMMENDATIONS:

In priority order, we recommend the following:

1) We are very concerned that many growers and ranchers will be enveloped in a new, duplicative regulatory process that will needlessly add even more expense and red tape to their operations. As such, we respectfully recommend that the Board reject these Procedures.

2) If the State Board determines it needs to move forward on this issue, we continue to suggest the adoption of a program that fills the regulatory gap by protecting non-federal waters of the state as if they were regulated by the Corps' current Procedures under the

1987 guidelines, including adopting a wetlands definition that is identical to the well-established definition used by the Corps. This would address the only need for any part of these Procedures.

3) Should the State Board decide it needs to go beyond filling the gap, thereby exceeding federal definitions of wetlands and creating a new state process, we recommend three fundamental changes to the Procedures, which, as written, will impact farming and ranching activities:
   a) Wetland Definition: The Procedures include a statewide wetland definition that would consider an area without any vegetation as a "wetland." Recommend that the Procedures adopt the federal definition of wetland.
   b) Wetland Delineation: The Procedures are a mandatory permitting program that applies to ALL waters of the state and imposes additional regulatory hurdles and permit requirements on a wide range of industries and activities that include private development; agricultural operations; infrastructure development, and operations and maintenance (including transportation and water conveyance infrastructure); and conservation/mitigation banking. Recommend a limited application of the Procedures.
   c) Dredge or Fill Activities: The Procedures also apply to ALL discharges of dredge and fill activities, including those that have already received authorization under CWA. The Procedures unnecessarily duplicate the federal CWA program, adding little, if any, value, while raising the risk that the State Board findings and determinations will vary from, or even conflict with findings and determinations made by the U.S. Army Corps of Engineers and/or CA Department of Fish and Wildlife. Recommend that the Procedures be revised to avoid any federal or state duplication.

In general, these Procedures make reference to federal law and federal guidelines, but then negate those references by allowing a state agency to subjectively interpret and apply federal law and guidelines. This ultimately creates the problems of inconsistency, lack of clarity, and the duplication discussed above.

4) We urge the State Board to phase implementation of the Procedures so that the provisions with greatest potential to conflict with the Corps' permitting program are applied only after the State has entered into a memorandum of understanding with the Corps that provides a framework for harmonizing the state and federal permitting processes and resolving conflicts.

5) We also urge the State Board to revise the draft Procedures in five key areas to minimize conflict with existing regulatory programs and requirements:

   - Make the wetland definition and delineation Procedures consistent with their federal counterparts under the Corps' Section 404 program;
   - Harmonize the exclusions from the Procedures with federal law;

- Identify non-wetland WOTS subject to the Procedures and include guidance for determining the limits of such features that is consistent with Corps practice;
- Eliminate the requirement of an alternatives analysis for all discharges subject to streamlined permitting Procedures under Corps-issued general permits; and
- Make the mitigation requirements and priorities of the Procedures consistent with the Corps' Mitigation Rule.

These revisions and the rationale for the above are described in detail in the coalition letter dated September 18, 2017 representing various industries' concerns with these Procedures. **We agree with all concerns raised in that letter and below are specific suggestions discussed in that letter that are of highest importance to the agriculture industry:**

1) There must be a Memorandum of Understanding with the Corps.
2) Eliminate the reliance on historic definitions of waters of the U.S.
3) The proposed wetland definition must be consistent with the Corps' definition.
4) Exclude from the Procedures features that are excluded by the Corps.
5) Harmonize the exclusions from the Procedures with federal and state law.
6) Prior converted cropland should be excluded.
7) Exclude discharges authorized by streambed alteration agreements.
8) Add exclusions for agricultural containment features and actions for maintenance of facilities covered by existing Orders.
9) Eliminate the recapture of artificial wetlands resulting from historic human activity and that have become relatively permanent parts of the natural landscape.
10) Clearly define the scope of upland waters subject to the Procedures and how to delineate them.
11) Identify upland features that are considered WOTS for purposes of the Procedures.
12) Adopt federal guidance for determining the limits of upland waters.
13) The Alternatives Analysis requirement should be revised to be consistent with federal requirements and avoid conflicting LEDPA determinations.
14) The Procedures should require deferral to Corps mitigation for impacts to federal waters.
15) Eliminate the discretion and uncertainty in determining when an application is complete.

CONCLUSION:

We greatly appreciate the opportunity to comment on the Procedures. While we support the goal of filling the regulatory gap, the Procedures go far beyond what is needed and, in the process, would create substantial burdens significantly jeopardizing California's agricultural industry while also straining Water Board resources.

As such, we respectfully recommend, in priority order that the Board either: 1) Reject these Procedures; 2) Adopt a program that fills the regulatory gap by protecting non-federal waters of the state; or 3) Make the revisions to the wetland definition and delineation procedures, exclusions from the alternatives analysis requirement and other application requirements, and compensatory mitigation requirements as set forth above to reduce those burdens.

Please feel free to contact any of the undersigned organizations if we can be of further assistance or if you have any questions.

Thank you for your consideration.

Sincerely,

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Kari Fisher, Counsel
California Farm Bureau Federation

Gail Delihant, Director, CA Government Affairs
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Tyler Blackney, Director, Legislative & Regulatory Affairs, Wine Institute

Trudi Hughes, Director, Government Affairs
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Joani Woelfel, President & CEO
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Dave Bolland, Director, Regulatory Relations
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Pete Downs, Acting President
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Mike Wade, Executive Director
California Farm Water Coalition

George Radanovich, President
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