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September 18, 2017

VIA ELECTRONIC MAIL

Jeanine Townsend
Clerk of the Board
California Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: Surface Mining Working Group – Comments on Proposed Procedures for Discharges of Dredged or Fill Materials to Waters of the State

Ms. Townsend:

INTRODUCTION

This office represents a group of mining and extractive industries that do business throughout the state. This working group, the Surface Mining Working Group will be significantly impacted by the Draft Procedures for Discharges of Dredged or Fill Materials to Waters of the State ("Regulations") and appreciates this opportunity to comment on them.

We reviewed the State Water Resources Control Board's ("State Board") current draft Regulations. While we appreciate the State Board's efforts to create a uniform statewide regulatory program, we have significant doubts regarding the State Board's authority to implement the Regulations under federal and state law and the Administrative Procedures Act ("APA").

1. The State Board Lacks Authority Under Federal Law to Implement the Procedures

The Regulations outline a new permitting procedure for discharges to "waters of the state", the vast majority of which are already subject to regulation under the Clean Water Act. Put simply, this new permitting procedure will result in an unlawful duplication and complication of the Corps' Clean Water Act Section 404 permitting program and frustrate the objectives of Congress.

Although congress left room in under the CWA for state regulations that are more stringent than federal requirements, state regulations are nonetheless pre-empted by federal law if those regulations "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525-526.) As the United States Supreme Court noted in *Int'l Paper Co. v. Oullette* (1986) 479 U.S. 481, in determining where whether a state water regulation "stands as an obstacle" to the execution of the CWA:

> [i]t is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law is also pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal.
>
> [*Id.* at 494.]

Subpart (g) of Section 404 outlines the sole procedure by which a state may establish a program to regulate the regulation of discharge of dredged or fill materials. By its own admission, the state has not completed the processes outlined in Section 404(g).

By implementing the Procedures without completion of the procedures required by Section 404 subpart (g), the State Board would frustrate federal law by overcomplicating, duplicating and confusing the Corps' 404 permitting process. The Procedures are therefore pre-empted by federal law.

2. The State Board Lacks Authority to Implement the Procedures Under the Porter Cologne Water Quality Control Act ("the Porter Cologne Act")

The Porter Cologne Act grants the State Board the authority to regulate the discharge of waste that may affect the quality of waters in the state. Section 13050(d) of the Water Code defines "waste" as including "sewage and any and all other waste of human or animal origin, or from any producing, manufacturing or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal." The definition of waste does not include discharges of dredge or fill material. The Porter Cologne Act does not provide the State Board with authority to regulate dredged or fill material as the State Board has suggested.

3. The Regulations Are Not Sufficiently Clear and Consistent as Required by the Government Code

Pursuant to California Government Code Section 11353, the Office of Administrative Law ("OAL") is required to review proposed regulations to ensure that, among other things, they are clear and consistent such that the regulated community understands how to comply with them. As drafted, the Regulations do not meet this standard.

For example, the Regulations identify a definition of "waters of the United States" which includes "any current or historic or historic final judicial interpretation of 'waters of the U.S.' or any current or historic federal regulation defining 'waters of the state'" (Footnote 2 of the Regulations.) This footnote suggests that prior regulatory interpretations that have been subsequently rejected by the courts of this land are nonetheless valid for this regulation. This is an impossible standard.

CONCLUSION

We appreciate the opportunity to comment regarding the Regulations. As drafted, we believe that the Regulations would amount to an unlawful interference with the laws and procedures adopted by Congress under the Clean Water Act. Moreover, the State Board lacks authority to implement the Regulations under the Porter Cologne Act. By implementing the Regulations, the State Water Board would cause unnecessary confusion and delay, as the regulated community attempts to comply with the requirements of the Clean Water Act.

Should you have any questions concerning the matters discussed herein, please do not hesitate to contact me by telephone at (916) 382-4377, or by e-mail at dtemblador@hthjlaw.com.

Very truly yours,
HARRISON, TEMBLADOR, HUNGERFORD & JOHNSON

By
David P. Temblador