



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901

SEP 06 2017

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



State Water Resources Control Board
Attn: Jeanine Townsend, Clerk to the Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Subject: Statewide Dredged or Fill Procedures

Dear Ms. Townsend:

Thank you for the opportunity to comment on the revised draft of the State Water Resources Control Board's (State Board) proposed *State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State* (Procedures). EPA recognizes the accomplishment that these Procedures represent in California's continued efforts to provide consistent standards for the State and Regional Boards' regulatory programs, and harmonize state and federal programs (Sections 401 and 404 of the Clean Water Act, and California's Porter-Cologne Act).

EPA appreciates the detailed responses to our comments of August 23, 2016, including the state's intent to: (a) revise Section IV.A(d) to clarify information requirements for proposed compensatory mitigation plans, (b) clarify that certain approved Habitat Conservation Plans and Natural Community Conservation Plans may qualify as "watershed approaches," and (c) add a brief section addressing geographic jurisdiction. Our remaining concerns focus on a potential misunderstanding of how decision factors and factual determinations are used under the 404(b)(1) Guidelines (Guidelines), and why we continue to recommend their use under the Procedures.

In the response to comments, the State Board expressed concern that the use of factual determinations to support Policy compliance decisions, and the use of enumerated decision factors, could artificially constrain sources of information important to evaluating compliance with the Procedures. EPA's experience with the Guidelines, which include such factors, has not borne out this concern. Subparts C-G of the Guidelines do not represent an exhaustive list of decision factors, but do provide an important general framework for the evaluation of compliance or noncompliance. Including such decision factors in the Procedures would not mandate staff review every project under the entirety of Subparts C-G; at 40 C.F.R. § 230.6, Subpart A of the Guidelines clarifies that the level of review and documentation should be commensurate with a project's impacts.

However, the lack of a factual determination on key compliance factors could make resolution of potential conflicts between state and federal permitting decisions more difficult, and could expose the state's decisions to otherwise avoidable challenges of being arbitrary and capricious. As described in 40 C.F.R. § 230.11, factual determinations are simply written findings of compliance with the Guidelines based on factual evidence. For the ease and consistency of implementation for state regulatory staff, and for clarity of expectations to the regulated public, EPA continues to recommend that the Procedures clearly articulate potential factors to be used in determining compliance, like those enumerated in

Subparts C-G of the Guidelines, and require that final regulatory actions include explicit determinations of compliance with reference to these factors. If the State Board intends to establish the Procedures without specifying decision factors, EPA recommends the State Board establish such factors in a subsequent rulemaking effort.

Thank you for considering EPA's comments on this important effort, and for your ongoing partnership implementing the programs of the Clean Water Act. Please contact me with any questions or concerns you may have on this matter or refer your staff to Jason Brush, Wetlands Section Supervisor, at (415) 972-3483.

Sincerely,



Nancy Woo
Assistant Director
Water Division