

Westlands Water District



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September 18, 2017

**Via Email and U.S. Mail**

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

Email: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

***Re: Westlands Water District's Comments on the Proposed Amendment to the California Ocean Plan and Inland Surface Waters, Enclosed Bays, and Estuaries of California Plan to Include Statewide Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State ("Wetlands Definition and Procedures")***

Dear Ms. Marcus and Members of the State Water Resources Control Board:

Thank you for the opportunity to provide comments on the State Water Resource Control Board's ("State Water Board") proposed Wetlands Definition and Procedures. As the largest agricultural water district in the nation, Westlands Water District's farmers provide food to the world, and activities in Westlands directly account for about \$3.6 billion of economic output, much of which directly benefits our State and its residents. Westlands and the families and farmers it serves have an acute interest in the responsible administration and stewardship of our natural resources, including water. There are no greater stewards of the land than those who must coax life out of it for sustenance for the rest of us – no one knows better the true value of each drop of water than a farmer carefully applying that drop to turn tiny seeds into onions on our kitchen tables or into the cotton in the shirts we are wearing. Irrigated agriculture formed the foundation of civil society.<sup>1</sup> The story of irrigated agriculture is the story of who we are as a people.<sup>2</sup>

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<sup>1</sup> See Francis Fukuyama, *The Origins of Political Order* (2011) at 55. ("The transition from band-level societies to tribal societies was made possible by the development of agriculture. Agriculture was invented in widely separated parts of the world, including Mesopotamia, China, Oceania, and Mesoamerica nine to ten thousand years ago, often in fertile alluvial river basins. The domestication of wild grasses and seeds took place gradually and was accompanied by large increases in population.... Human beings were now in contact with one another on a much broader scale, and this required a very different form of social organization.")

<sup>2</sup> See, e.g., Alexis d'Tocqueville, *Democracy in America* (1966 ed.) (de Tocqueville's observations on the differences in agricultural practices between the North and South just prior to the Civil War and the implications on their relative social and political institutions); see also Wallace Stegner, *Angle of Repose* (2000), *Where the Bluebird*

Despite its name, the Wetlands Definition and Procedures is not about water – it is about power: namely, an assertion of power largely in response to recent court decisions and administrative changes regarding the federal Clean Water Act and concerns about protecting our natural resources in California. Professor Douglas Kinney wrote that:

[O]ur interest in water often runs wider and deeper than the streams themselves – going beyond what even a rigorous classification of economic, environmental, and spiritual values in water can capture to include more basic concerns such as our safety, security, and regional identity, *and what, in the final analysis, we are willing to accept as fair and appropriate in our laws, policies, and management regimes....* Ultimately, most water issues are not merely about water ... [r]ather, most water issues are about values, aspirations, expectations, and, perhaps more importantly, about fears and uncertainties.<sup>3</sup>

Unfortunately, the Wetlands Definition and Procedures is laced with fear, a result of an apprehension of a sudden abrogation of the environmental protections provided in the Clean Water Act. The apparent response to that fear – the Wetlands Definition and Procedures – results in what all such responses amount to: over-reaction. But the exercise of power in our democratic institutions demands an acute sensitivity to the limits of that power and the accompanying exercise of due restraint. Our decisions must not be animated by fear – rather, our task is to provide a vision that springs from courage and insists on the democratic and institutional integrity of the offices we hold.

Far from providing a clear vision, the Wetlands Definition and Procedures add additional uncertainty – for all concerned: leaders, regulators, environmental stewards, and the regulated community. You have received comment after comment that calls out this uncertainty – from the differences between the federal definition and the state's proposed definition of wetland;<sup>4</sup> ambiguities in the state's proposed wetland definition itself;<sup>5</sup> which areas fall under the proposed jurisdiction;<sup>6</sup> the application of proposed exemptions and the relationship to and conflict with

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*Sings to the Lemonade Springs* (2002), and *The Big Rock Candy Mountain* (2010); see additionally John Steinbeck, *The Grapes of Wrath* (1992).

<sup>3</sup> Douglas S. Kinney, *In Search of Sustainable Water Management* (2005) at xiii.

<sup>4</sup> See Letter from Association of California Cities, Association of California Water Agencies, et. al. to Jeanine Townshend State Water Resources Control Board (August 18, 2016) at 12; see also Letter From California High Speed Rail Authority to Jeanine Townshend State Water Resources Control Board (August 18, 2016) at 3.

<sup>5</sup> See Letter from Association of California Cities, Association of California Water Agencies, et. al. to Jeanine Townshend State Water Resources Control Board (August 18, 2016) at 13; see also Letter From California High Speed Rail Authority to Jeanine Townshend State Water Resources Control Board (August 18, 2016) at 3.

<sup>6</sup> See Letter from Association of California Cities, Association of California Water Agencies, et. al. to Jeanine Townshend State Water Resources Control Board (August 18, 2016) (on file with the State Water Resources Control Board) at 13.

those provided in the federal Clean Water Act;<sup>7</sup> to the very legal framework under which this proposal operates.<sup>8</sup>

Westlands' comments are not restricted to the threshold issue of the State Water Board's authority to promulgate the Wetlands Definition and Procedures, as it joins in the comments submitted by the California Association of Winegrape Growers, et al., and, as a member of ACWA, joins in the coalition letter which ACWA has signed on behalf of its membership. Westlands also supports comments made by other entities, including the San Joaquin Tributary Authority.

Prior to addressing the authority question, the treatment of existing exclusions found in the Clean Water Act for farming activities and those exclusions' incorporation into the State Water Board's proposal deserves separate comment and emphasis. There is a long and robust history of the recognition that farming practices necessarily require constant interaction with soil and water, and that those who labor in that medium should not be subjected to ill-informed regulatory constraints. Specifically, the Wetlands Definition and Procedures depart from the definition of abandonment established by the Army Corps for prior converted cropland, thereby unnecessarily narrowing the exemption's applicability. Some commenters during the Public Hearing on September 6, 2017, posited a series of hypothetical scenarios around prior converted cropland. Such comments shamelessly seek to exploit a nameless, unreasoning, and unjustified terror that, if yielded to, will only result in increased uncertainty and confusion between the federal Clean Water Act and the Wetlands Definition and Procedures, if adopted. Any exemptions or exclusions provided for agriculture and farming in the federal Clean Water Act ought to be included in the Wetlands Definition and Procedures without additional constructs to protect against imagined hobgoblins. To do otherwise will not only cause significant confusion between the overlapping regulatory regimes, but will be met with unqualified and unhesitating resistance from a united agricultural community in California.

As it is *the* threshold issue, Westlands' comments below echo and compliment comments made previously by a wide variety of commenters – from municipal interests to those managing wetlands to the United States Army Corps of Engineers – regarding the authority of the State Water Board to promulgate the Wetlands Definition and Procedures. With an apparent focus this comment period on specific aspects of the procedures, it is imperative, especially given the responses to the last round of comments on the authority question, that the fundamental question of authority not be lost, or that the State Water Board interpret the shift in focus as an abdication of this threshold issue. It is imperative that government only execute those powers which the people have delegated to their public servants and the agencies those servants steward.

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<sup>7</sup> See Letter from Association of California Cities, Association of California Water Agencies, et. al. to Jeanine Townshend State Water Resources Control Board (August 18, 2016) at 12.

<sup>8</sup> See Letter from Association of California Cities, Association of California Water Agencies, et. al. to the Jeanine Townshend State Water Resources Control Board (August 18, 2016) at 4-6.; *see also* Letter from the U.S. Army Corps of Engineers, South Pacific Division, to Jeanine Townshend State Water Resources Control Board (August 15, 2016) at 1.

1. The State Water Board Does Not Have the Authority to Regulate “Waters of the United States”

As the United States Army Corps of Engineers made clear in its letter to the State Water Board on August 15, 2016, the State Water Board lacks authority to regulate the discharge of dredged or fill material into Waters of the United States. Section 404 of the federal Clean Water Act<sup>9</sup> clearly preempts State law or regulation with respect to the regulation of dredge and fill operations in Waters of the United States. This is further supported by the fact that the United States Congress created a mechanism in section 404(g) and a process in section 404(h)<sup>10</sup> through which a State may administer a permitting program for discharges of dredged or fill material into Waters of the United States which are within the particular State’s jurisdiction. Absent this mechanism and process, Congress clearly created a regime in which the States lacked the authority to regulate the discharge of dredged and fill material. The Wetlands Definition and Procedures purport to “apply to *all* waters of the [S]tate,”<sup>11</sup> which, absent an explicit exemption, includes those waters that are also Waters of the United States – an activity that is preempted by federal law.

The State Water Board’s response to the Army Corps’ comment is unconvincing. In its response, the State Water Board alleges that it is not “seeking to initiate program assumption for Section 404 permitting at this time,” and is presumably advancing the regulations under section 401. This despite the fact that the “final element of the [Wetlands Definition and Procedures] is regulatory procedures for the *discharge of dredged or fill material* into waters of the state.”<sup>12</sup> The explanation for the fact that the State Water Board is using the exact same terminology found in Section 404 of the Clean Water Act for a program purportedly being administered under Section 401 is that “the introduction of new state-specific terms could cause confusion regarding the meaning of new terms.”<sup>13</sup> The use of the same terms only creates more confusion and conceals a point of greater importance: the legal authority of the State Water Board to promulgate the Wetlands Definition and Procedures in the first place. It certainly appears the State Water Board is in fact regulating the discharges of dredged and fill material despite the name or language used in the proposed regulations.

A similar argument may be anticipated for the distinction between Section 404’s use of individual or general “permits,” and the “Orders” that would be issued under the purported Wetlands Definition and Procedures. The nomenclatural differences between “permit” and “order” are likely without significance, as Orders issued by the State Water Board and the

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<sup>9</sup> 33 U.S.C. § 1344.

<sup>10</sup> See 33 U.S.C. §1344(g) and 33 U.S.C. §1344(h).

<sup>11</sup> State Water Resources Control Board, Draft Staff Report State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State (July 21, 2017) at 64.

<sup>12</sup> *Id.* at 62. (emphasis added).

<sup>13</sup> State Water Resources Control Board, Response to Comments on State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State, Version 1, (July 21, 2017) at 182.

various Regional Water Quality Control Boards (“Regional Boards”) carry the same effect on the person to whom the Order runs: that of granting permission to conduct a certain activity within prescribed parameters. Like the point above, an attempt by the State Water Board to exploit certain terms or their definitions to avoid federal law is unconvincing; mankind may indeed be governed by names, but in the present case the nomenclatural manipulation rings hollow.<sup>14</sup>

2. Water Code Section 13392(b) Requires the State to Have an Approved Permit Program in accordance with the Clean Water Act in order to Regulate Discharges of Dredged or Fill Material

Contemplation of the entire state and federal statutory scheme further illustrates the separation between regulation of “waste” and the regulation of dredged and fill activity. Chapter 5.5 of the Water Code, which provides for “Compliance With the Provisions of the Federal Water Pollution Control Act as Amended in 1972,” explicitly references dredged and fill material. Water Code Section 13372(b) provides:

*The provisions of Section 13376 requiring the filing of a report for the discharge of dredged or fill material and the provisions of this chapter relating to the issuance of dredged or fill material permits by the state board or a regional board shall be applicable only to discharges for which the state has an approved permit program, in accordance with the provisions of the Federal Water Pollution Control Act, as amended, for the discharge of dredged or fill material.*

Water Code Section 13372(b) is clearly consistent with the Army Corp’s comment letter and interpretation of federal authority. The Legislature has provided a clear directive: a state can regulate the discharge of dredged and fill material if it coordinates with the federal authorities and operates under an approved permit program.

3. The State Water Board Does Not Have the Authority to Regulate the Discharge of Dredged or Fill Material that Does Not Constitute “Waste”

The State Water Board does not have carte blanche authority under the Porter-Cologne Act to regulate the discharge of dredged and fill material. The State Water Board must act within the appropriate framework provided by the Legislature through the Water Code. The primary step of statutory construction, the purpose of which is to gauge the appropriate boundaries of lawful authority, is to determine legislative intent. The Porter-Cologne Act grants the State Water Board authority to regulate “waste” to attain high water quality “within a framework of statewide coordination and policy.”<sup>15</sup> This statewide framework, itself embedded within a system of cooperative federalism, was contemplated and intended by the Legislature.

<sup>14</sup> See Edward Gibbon, *The History of the Decline and Fall of the Roman Empire, Vol. 1* (1993) at 83 (“Augustus was sensible that mankind is governed by names; nor was he deceived in his expectation, that the senate and the people would submit to slavery, provided they were respectfully assured that they still enjoyed their ancient freedom.”)

<sup>15</sup> Water Code § 13000.

Porter-Cologne grants the State Water Board authority to regulate the discharge of waste into waters of the state.<sup>16</sup> The term of art, "waste," must be given the meaning the Legislature intended. To determine this intent, one must "first look to the words of the statute, giving the language its usual, ordinary meaning."<sup>17</sup>

Water Code Section 13050(d) provides waste:

Includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or 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 implies a material being disposed of or gotten rid of. There is little doubt that dredged and fill material can, in appropriate circumstances, constitute "waste" and be appropriately subject to regulation by the Board under its authority through Porter-Cologne. However, dredged and fill material will not always be "waste" subject to board regulation. Dredged and fill material is often not "disposed of" but is applied to a beneficial use. The EPA's "Beneficial Use Planning Manual" provides dredged material is a "manageable, beneficial resource."<sup>18</sup> Dredged and fill material can be used for habitat restoration and development, beach nourishment, parks and recreation, agriculture, forestry, horticulture, and aquaculture, strip-mine reclamation and solid waste management, construction and industrial development, and multiple-purpose activities.<sup>19</sup> Such uses of dredged and fill material do not fall under the definition of "waste" under Water Code Section 13050(d), or under any reasonable interpretation of the term.

The State Water Board's apparent reliance on forty-year old Attorney General opinions, a thirty-year old memo by a Mr. Attwater, and two Orders likely falls far short of entitling it the deference it appears to claim in interpreting the meaning of "waste" given that term's explicit definition and the statutory framework in which that term operates.<sup>20</sup>

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<sup>16</sup> Water Code § 13260.

<sup>17</sup> *Hunt v. Superior Court*, 21 Cal. 4th 984, 1000 (1999).

<sup>18</sup> U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, *Identifying, Planning, and Financing Beneficial Use Projects Using Dredged Material Beneficial Use Planning Manual*, at v (October 2007).

<sup>19</sup> *Id.* at 9.

<sup>20</sup> See State Water Resources Control Board, Response to Comments on State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State, Version 1 (July 21, 2017) at 173. (On this fine point, Westlands agrees with the State Water Board's response: "language of the statute *should* be construed so as to accomplish the purpose of the statute...Essential is whether [the court's] interpretation, as well as the consequences flowing therefrom, *advances the Legislature's intended purpose*...statutes are to be construed so as to *effectuate the purpose of the law*." (emphasis added and citations omitted.) While "legislative history of the Porter-Cologne Act [may have] indicated an intention [by the Legislature] to include in the definition of waste all materials that the Attorney General had previously interpreted as waste under the Dickey Water Pollution Act," the reality is that the Legislature did not in fact do so, and instead provided the definition found in Water Code section 13050(d)).



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It is a hard thing to accept that to do the very thing we believe is right is not appropriate given the environment in which we are called to operate. But this is where the true challenge of leadership in democratic institutions lies: to understand the tools we have available and the authorities we have been granted as public servants, and to restrain an impulse to employ levers of power that are beyond those which the people we serve have delegated to us. To do otherwise is to exacerbate the decay of our democratic institutions and thereby undermine the very foundation which that which we seek to protect and advance is built upon. To do otherwise puts us at risk of becoming the very thing we profess to disdain and seek to defeat.<sup>21</sup>

Engaging with the State Water Board and its dedicated public servants is always a privilege. Thank you for your consideration and for your service.

Sincerely,



Philip A. Williams  
General Counsel  
Westlands Water District

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<sup>21</sup> See Friedrich W. Nietzsche, *The Birth of Tragedy* (1872) (“Beware that, when fighting monsters, you yourself do not become a monster.”)

