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August 11, 2016

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
Sent by e-mail to <commentletters@waterboards.ca.gov>

Subject: Comments on Proposed Statewide Dredged or Fill Procedures

Dear Ms. Townsend:

The State Water Resources Control Board (State Board) published Draft Procedures for Discharges of Dredged or Fill Material to Waters of the State Proposed on June 17, 2017 for inclusion in the Water Quality Control Plan for Inland Surface Waters and Enclosed Bays and Estuaries and Ocean Waters of California. The proposed rules attempt to adopt federal procedures, expand the permit jurisdiction of the Regional Water Quality Control Boards (Water Boards), and impose additional regulations and permit requirements on a wide range of activities. The State Board states that the program will align state and federal requirements, address inconsistencies across the nine Water Boards, and simplify and streamline the application process.

The purpose of this letter is to comment on those proposed rules. My comments are from the perspective of a professional aquatic resource scientist and permitter whom has worked with these permits since the implementation of the Federal Clean Water Act in the early 1970's. I have represented the regulated community, including city, state and federal governments as well as private applicants, and have secured more than 100 sets of 404, 401 and 1602 permits from four of the Water Boards.

While the proposed wetland definitions and wetland delineation procedures are as troublesome and flawed as the proposed adoption of modified Procedures for Regulation of Discharges of Dredged or Fill Material to Waters of the State, my comments are focused on the latter.

The proposed adoption of Clean Water Act (CWA) Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredge or Fill Material (Guidelines), 1980, "*with minor modifications to make them applicable to the state dredged or fill program.*.", requiring an

Alternatives Analysis for General Permits (including Nationwide Permits), adding waters of the state to the federal analyses, and making the Water Boards the permitting authority that determines whether the proposed project complies with the Guidelines and identifies the LEDPA are not **minor**. They would have substantive effects on the permitting process through additional regulation, confusion over the rules and interpretation thereof, and add a tremendous amount of staff time to process 401 Water Quality Certifications.

While the idea of combining processes to simplify and expedite permits sounds like a good goal, the practicalities of that task make it almost impossible. Combining the two processes is complicated by jurisdictional and procedural difference in state and federal law and by the fact that Water Board staff is not trained in the federal processes.

It is absurd for the State Board to try to promulgate itself a role a separate federal process. While this is presented as a minor change, it would be a significant and substantive change in 401 Water Quality Certifications rules and processes. That would be analogous to the State of California to adopting Sharia Law without any experience with or understanding of those laws and their underpinnings in religion and culture.

The introduction of the Preliminary Draft Procedures for Discharges of Dredged or Fill Materials to Waters of the State (June 17, 2016 Final Draft, v1) states "*The dredged or fill procedures include elements of the Clean Water Act 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.*" That is not correct since the Water Boards have excluded fundamental elements of the federal regulation and procedures that they do not like.

Will Board staff attend training by the Corps?

The additional work required to complete a 404 (b)(1) Alternatives Analysis will increase staff time two to three fold. Adding additional Corps analyses and process will not result in a faster process. Many of the staff of the Boards do not currently meet statutory timelines and some even ignore the outcome of the CEQA process and the Permit Streamlining Act.

Will the Board also adopt the shorter timelines of the Corps?

Will the Board add more 401 staff to address the substantive increase in workload?

What happens when the Board applies the federal Guidelines and reaches different conclusions than the federal agencies (Corps and U.S. Environmental Protection Agency (EPA))?

Has the Board secured the Corps' concurrence on adoption of its processes?

The San Francisco Bay Regional Water Quality Control Board (SFBRWQCB) first amended its Basin Plan to use the federal Guidelines as underground regulations by not following the process prescribed in the Administrative Procedure Act. The application of those Guidelines by the SFBRWQCB has been a failure and has added substantive amounts of processing time. It has

also resulted in discord between the Board and Corps because of the states' lack of understanding of and intrusion into the 404(b)(1) process.

The Corps has strenuously objected to the SFBRWQCB intrusion into its process. On February 10, 2016, Tori K. White, Acting Chief, SPN Regulatory Division issued the attached Memorandum for the Record (MFR) directed to San Francisco Bay Regional Water Quality Control Board regarding its use of the term "LEDPA", to document his conversations with representatives from the EPA and SFBRWQCB, and to recommend solutions to address the problem. The Corps reiterated that the RWQCB has no authority under §404 of the CWA, determination of the LEDPA is specific to §404 of the CWA, the SFBRWQB is not part of the 404(b)(1) process, they do not determine the Least Damaging Practicable Alternative (LEDPA) and more specifically to cease and desist from even using the term LEDPA.

Chief White concluded the MFR by saying "*If the RWQCB continues to require a "LEDPA" determination for §401 certification, I recommend a formal letter to San Francisco Bay RWQCB reflecting agency counsel's positions on these points, ideally signed by both Corps and EPA*."

Under the proposed rules, where the Corps does not require an applicant to submit an Alternatives Analysis, the Water Boards may require the applicant to submit one on a case-by-case basis. Requiring a 404(b)(1) Alternatives Analysis for a Nationwide Permits is contrary to the whole concept and intent of General Permits. General Permits have already been determined to have no more than a minimal effect on the aquatic environment. Adding that additional analysis to the 401 process is unwarranted and un-needed, it would add an excessive amount additional processing and will lead to conflicts with the Corps.

In conclusion, the State Board should not adopt the 404(b)(1) process, neither as it is, nor as proposed with the substantive alterations to make the Corps' process more to its liking.

The Water Boards should read the Guidelines to mean what the Corps and EPA read them to mean. They should not, through interpretation, modification and cherry-picking, adopt or implement their own, different version of the Guidelines.

The 401 process should remain as intended by the federal Clean Water Act. For Individual Permits, the Corps conducts its 404 analyses of the proposed discharge, identifies the LEDPA and makes a determination that it intends to issue a permit. Then the Water Board determines whether or not that discharge is in compliance with applicable state *water quality* requirements.

The Water Boards should do their job and let the Corps do theirs.

Respectfully submitted,

Dr. Stephen Neudecker, CEO
Certified Senior Ecologist

Attachment

U.S. Department of the Army, San Francisco District, U.S. Army Corps of Engineers. 2016. Memorandum for the Record – Clarification of Lead Agency in Making the Least Environmentally Damaging Practicable Alternative (LEDPA) Determination, February 10.

DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, U.S. ARMY CORPS OF ENGINEERS
1455 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94103-1398

REPLY TO
ATTENTION OF

CESPN-RD 10 February 2016

MEMORANDUM FOR RECORD

Subject: Clarification of Lead Agency in Making the Least Environmentally Damaging Practicable Alternative (LEDPA) Determination

1. Purpose. The purpose of this memorandum is to document my concerns with the San Francisco Bay Regional Water Quality Control Board's (RWQCB) use of the term "LEDPA", to document my conversation representatives from the U.S. Environmental Protection Agency (EPA) and San Francisco Bay Regional Water Quality Control Board (RWQCB), and to recommend solutions to address.

2. References.

CECW-CO 1 July 2009 Updated Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program (Regulatory SOP)

3. Background. During line item reviews with SPN Regulatory Division project managers on pending permit actions, I discovered a number of actions that were held up due to the RWQCB wanting additional avoidance and minimization of wetlands impacts beyond what the Corps was requiring. In some instances the RWQCB was requiring a §404(b)(1) guidelines evaluation and alternatives analysis (AA) on projects qualifying for a Nationwide Permit (NWP). SPN regulatory staff showed reluctance in moving forward with a NWP verification where terms and conditions of the NWP had been met, yet the applicant was working with the RWQCB on additional avoidance and minimization. It also became apparent that for standard individual permits (SIP) in some cases SPN Regulatory staff will hold circulation of a Public Notice (PN) in abeyance in order to review and approve a §404(b)(1)Guidelines evaluation. Staff justified this action by stating the RWCQB would not approve the project as presented in the application so the PN should be held to reflect project revisions.

On 9 November 2015, I attended a special board meeting at the Santa Clara Valley Water District (SCVWD) with LTC. John Morrow, Arijis Rakstins, and Jay Kinberger. During the meeting SCVWD presented four regulatory policy issues for Board consideration. One of the policy issues included clarification of lead agency in making

the LEDPA Determination. I informed Ms. Melanie Richardson and Ms. Jennifer Castillo that the Corps is the lead agency in making a LEDPA determination and explained the term is specific to the §404 of the Clean Water Act (CWA) which the Corps administers, not the state/RWQCB, except in those cases where the state has assumed the §404 program (currently only New Jersey and Michigan). Ms. Richardson and Ms. Castillo informed me the issue needs clarification as the RWQCB often requires an independent review under §404 and LEDPA determination that can be different from what the Corps has determined to be the LEDPA. I told Ms. Richardson and Ms. Castillo I would raise the issue to EPA.

4. Discussion. Prior to raising the issue to EPA, I coordinated with Mr. Mike Jewell and Mr. David Castanon, Regulatory Division Chiefs at SPL and SPK, respectively, to see if this is also an issue in dealing with the RWCQBs in their area of responsibilities. Both assured me this was not the case; therefore, I am presuming the issue of making an independent LEDPA determination is specific to the San Francisco Bay RWCQB.

On 13 January 2016, I met with Mr. Jason Brush, Chief, Wetlands Section, EPA Region IX to discuss the issue. Mr. Brush concurred that the RWQCB has no authority under §404 of the CWA and should not be making independent LEDPA determinations. Mr. Brush agreed to meet with me and the RWCQB to discuss.

On 15 January 2016, Mr. Brush and I met with Mr. Keith Lichten, Division Chief, Watershed Management Division, San Francisco Bay RWQCB. Mr. Lichten provided the following information:

- The RWQCB believes it has the authority to do an independent LEDPA determination because the guidelines for wetland fill under the *Water Quality Control Plan for the San Francisco Bay Basin* considers the §404(b)(1) Guidelines. Mr. Lichten agreed the RWQCB has no direct 404 authority, but that this "consideration" of the Guidelines in the Bay Plan has the effect of applying 404 to their decisions under 401 and state law to protect beneficial uses.
- The RWQCB believes independent state LEDPA determination is therefore necessary as the RWQCB does not always agree with the Corps' conclusions on what is practicable or less damaging. Two examples were mentioned, Upper Berryessa and an unnamed regulatory action from many years ago where the Corps project reviewer incorporated the applicant's §404(b)(1) guidelines evaluation without doing an independent review.

In response, the following points were made by myself and Mr. Brush:

- All agreed that when AA requirements for a project are compatible, it is sound practice for the RWQCB to use the federal §404 AA to meet their needs as a matter of good government and regulatory simplicity for the public.
- However, we reiterated that the RWQCB has no authority under §404 of the CWA, and determination of the LEDPA is specific to §404 of the CWA. If the RWQCB chooses to require an AA for their own standards of review under §401

and state law, the result of that AA is not "the LEDPA" or otherwise a product of the Guidelines.

- When a §404 AA is required, the RWQCB could improve the chances that a single AA will be useful to both agencies, by providing input on to the Corps on a LEDPA determination early during review of the project.
- If the RWQCB ultimately wants to require additional avoidance and minimization of aquatic resources beyond what the Corps is requiring, that is their prerogative under §401 and state law, but the end product is not the "LEDPA" and should not be referred to as such.
- Similarly, general permits (Nationwide and Regional General Permits) do not require a §404(b)(1) guidelines evaluation for each project. State direction to an applicant to provide "a §404(b)(1) guidelines" product when the Corps has determined a project meets the terms and conditions of a general permit is inappropriate and causes confusion to the public. We therefore recommended to Mr. Lichten that in such circumstances, the state convey its alternatives requirements to the applicant without using the language of §404 ("LEDPA").

5. Recommendations.

- SPN Regulatory staff was provided direction on moving permit actions forward based on the Corps' regulations at 33 CFR Part 325 and the Regulatory SOP. This includes circulating a PN upon receipt of a federally complete application regardless of revisions or AA required by the RWQCB and verifying NWPs with a special condition that §401 certification must be received prior to commencement of construction (unless §401 certification for the NWP has been denied).
- Mr. Lichten agreed to discuss the issue with staff and caution them in use of terms and language that would imply the state has authority under §404 of the CWA. Mr. Brush and I left the meeting with the understanding that the RWQCB may continue its substantive alternatives requirements, but change its language to more clearly demarcate agency roles and authorities.
- If the RWQCB continues to require a "LEDPA" determination for §401 certification, I recommend a formal letter to San Francisco Bay RWQCB reflecting agency counsel's positions on these points, ideally signed by both Corps and EPA.

6. Point of contact for this memorandum and the conversations that took place on this subject through 8 February 2016 is Ms. Tori White at 904-232-1658 or Tori.White@usace.army.mil. Point of contact for additional discussion involving SPN Regulatory is Mr. Aaron Allen at 415-503-6768 or Aaron.O.Allen@usace.army.mil

Tori K White

Tori K. White
Acting Chief, SPN Regulatory Division
(17 Aug 2015 – 8 Feb 2016)