



August 17, 2016

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

Re: Comments on Proposed Amendments to the California Ocean Plan and Inland Surface Waters, Enclosed Bays, and Estuaries of California Plan to include procedures for discharges of dredged or fill materials to waters of the state

Dear Ms. Townsend:

On behalf of Defenders of Wildlife, Center for Biological Diversity, Citizens Committee to Complete the Refuge, San Francisco Baykeeper, Sierra Club California, California Coastkeeper Alliance, and Save the Bay, we submit these comments in response to the June 17, 2016 Preliminary Draft Procedures for Discharges of Dredged or Fill Materials to Waters of the State proposed for inclusion in the Water Quality Control Plans for Inland Surface Waters and Enclosed Bays and Estuaries and Ocean Waters of California ("draft policy"). Over the past thirteen years, our organizations have dedicated countless hours to the development of this policy. We continue to believe that having a strong State Water Resources Control Board ("SWRCB") wetlands policy is essential because federal jurisdiction under the Clean Water Act is limited and fails to safeguard many wetland types in California, and because the Regional Boards' current approach to regulating discharges of dredged or fill materials into waters of the state is failing to stop the destruction of wetlands.

We appreciate the fact that the SWRCB has repeatedly affirmed the need for a statewide wetlands policy and continued to direct staff to complete such a policy over the last several years. However, we are extremely disappointed with the approach proposed in the draft policy. The purpose of this policy is to protect California's declining wetlands and the values they provide as a critical part of our state waters. Yet under the draft policy, even if an aquatic site meets the definition of a wetland, it is not at all certain that it will be considered a water of the state and protected by the Porter-Cologne Act. As a result, the proposal undermines the purpose of this policy, and could make it even more difficult to protect California's wetlands. Additionally, while we are pleased to see a clear sequencing requirement in the draft policy, the weak provisions related to alternatives analysis and selection of the least environmentally

damaging practicable alternative (“LEDPA”) would make it difficult for the Regional Boards to enforce the sequencing requirement. The draft policy has numerous other flaws, including failing to protect wetlands on prior converted croplands (“PCCs”), providing for inadequate mitigation ratios, and allowing projects to proceed without analyzing climate change impacts. Together, these flaws cause the draft policy to fall dramatically short of compliance with the state’s no-net-loss policy, and implementation of the draft policy would be an abdication of the SWRCB’s duty to protect the state’s remaining wetlands and waters of the state pursuant to the Porter-Cologne Act.

The *primary* purpose of this policy must be the protection of state wetlands. We agree that creating a predictable, consistent, statewide permitting process compatible with the U.S. Army Corps of Engineers’ (“Corps”) permitting program is an important *secondary* goal. In particular, one of the stated purposes of this policy was to establish clear expectations regarding which landscape features are subject to the Regional Boards’ jurisdiction, and to set forth a straightforward set of requirements that permit applicants must follow. Instead of providing a well-defined framework within which staff can work to protect waters of the state, the draft policy forces the Regional Boards to make a variety of decisions on a case-by-case basis without providing any criteria or guidance to instruct them on how to proceed. Such decisions include whether a wetland that meets the proposed criteria is a water of the state, whether an alternatives analysis is required, whether a mitigation ratio of less than one-to-one is acceptable, and whether a climate change analysis is required. This broad delegation of decision-making authority to the Regional Boards over fundamental aspects of the permitting process undermines the draft policy’s ability to protect wetlands. It also creates a permitting program that fails to establish clear expectations for project proponents, will likely result in inconsistencies across the Regional Boards, will increase workload for already-overburdened Regional Board staff, sets the stage for “clarification” of this policy through excessive and burdensome litigation, and fails to do what it set out to do—protect California’s remaining wetlands.

We offer the following comments to assist the SWRCB in its efforts to create a statewide wetlands policy protective of California’s wetlands in compliance with the no-net-loss policy, and workable for permit applicants and Regional Board staff. Because modifying the draft policy to fulfill these basic purposes will require substantial revisions, we request that the SWRCB reissue the revised draft policy for public comment before it is adopted.

1. An effective statewide SWRCB wetlands policy is necessary to stop continued destruction of wetlands.

As the draft policy acknowledges, wetlands provide a diverse range of economic and environmental benefits to the State of California, including flood control, surface and ground water supply, erosion control, pollution treatment, nutrient cycling, and public enjoyment. Draft Policy at I. They also provide tremendous habitat value in California, “support[ing] 41 percent of the State’s rare and endangered species, including 55 percent of [threatened and endangered] animal species and 25 percent of [threatened and endangered] plant species.” Draft Staff

Report/Substitute Environmental Documentation (“Draft Staff Report/SED”) at 140.

California’s wetlands are also exceedingly vulnerable. More than ninety percent of California’s historic wetlands have been destroyed, and the state has suffered a higher rate of wetland loss than any other state. *Id.* at 28.

Because of wetlands’ importance and vulnerability, California adopted Executive Order W-59-93—the no-net-loss policy—to halt the continued destruction of California’s wetlands. Under this policy, all state agencies must conduct activities in accordance with the policy’s objectives, including the objective of “ensur[ing] no overall net loss and long-term net gain in the quantity, quality, and permanence of wetlands acreage and values in California” The legislature also sought to protect wetlands through the Porter-Cologne Act, declaring that “activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable.” Cal. Water Code § 13000. Because wetlands are waters of the state and are also critical to the health of other waterways, their protection is essential for attaining the water quality that the Porter-Cologne Act demands.

California’s no-net-loss policy and the SWRCB’s authority under the Porter-Cologne Act are particularly important because the federal regulatory regime under the Clean Water Act does not adequately protect the state’s wetlands. Limitations on federal jurisdiction under the Clean Water Act leave several types of wetlands vulnerable, including vernal pools, playas, prairie potholes, alpine wet meadows, Northern California claypan, Central Valley Alkali Sinks, and California Mediterranean alkali marshes. Draft Staff Report/SED at 47. Without an effective SWRCB wetlands policy, we will continue to lose these wetlands that fall outside of federal jurisdiction in violation of the state’s no-net-loss policy. Protecting these special California wetlands was the entire purpose for initiation of this policy process thirteen years ago but appears to have been abandoned in the draft policy.

It is also abundantly clear that the current approach to wetland protection at the Regional Boards, which relies on case-by-case jurisdictional determinations without the benefit of clear guidance from the SWRCB, is not working. The Corps reported that, between January 2007 and April 2009, 300 to 400 acres of wetlands and other jurisdictional aquatic habitat were destroyed each year. *Id.* at 28. We found nothing in the draft policy or associated materials to suggest this rate of loss has slowed in recent years. And the Draft Staff Report/SED flatly acknowledges that “current regulations have not been adequate to prevent losses in the quantity and quality of wetlands in California.” *Id.* at 1.

In light of continued wetland losses, limitations on federal jurisdiction, and an admittedly ineffective state regulatory regime, an effective SWRCB wetlands policy is absolutely necessary to save our last remaining wetlands. Rather than creating a policy that will ensure robust protections, however, the draft policy principally formalizes the status quo, tacitly condoning the continued destruction of California’s wetlands in violation of the no-net-loss policy and the Porter-Cologne Act. A more protective approach is required, and we offer the following

comments to provide a roadmap for the creation of an effective statewide SWRCB wetlands policy.

2. Wetlands meeting the criteria proposed by the SWRCB must be presumed to be waters of the state.

The sudden shift to a case-by-case analysis of whether a particular wetland is a water of the state is deeply troubling.¹ It undermines the purpose of the policy, and could reduce protections for California's wetlands. It is essential that a revised draft include a presumption that wetlands meeting the criteria proposed by the SWRCB are waters of the state.²

We appreciate that establishing a SWRCB wetlands definition that is inclusive of all of California's wetlands but is not so broad that it exceeds the Boards' jurisdiction over waters of the state is difficult. As explained below, however, it is an essential undertaking and necessary to comply with the state's no-net-loss policy. If the SWRCB concludes that a simple definition is unworkable, there are other feasible approaches. In particular, we suggest that the policy establish a rebuttable presumption of jurisdiction. Under this approach, the policy would create a strong presumption that, if a feature meets the modified three-parameter wetland definition proposed in the draft policy, then it is a jurisdictional wetland. To overcome the presumption, the permit applicant would have to provide clear and convincing evidence that the wetland is not a water of the state. The permit applicant would make this showing by relying on site-specific information and Regional Board precedents regarding the scope of their jurisdiction. To guide implementation at the Regional Boards, the policy could include a non-exhaustive list of features that meet the wetland definition and are *always* waters of the state (e.g., vernal pools and playa), and a non-exhaustive list of features that meet the wetland definition and are *never* waters of the state (e.g., ornamental ponds constructed in uplands). We believe this approach is protective of California's diverse wetlands, provides clarity to permit applicants regarding their obligations, promotes consistency across the Regional Boards, and ensures that the policy does not exceed the Boards' jurisdictional authority.

In contrast, the draft policy's approach is unacceptable. At best, a policy suggesting that not all wetlands are waters of the state will merely maintain the status quo, and thus, will fail to meet the fundamental purposes of the draft policy. At worst, it could place an increased burden

¹ The last draft of the state wetlands policy that was circulated for public comment was explicit about the jurisdictional nature of the wetlands definition: "Pursuant to California Water Code §13050, this policy applies to all waters of the state. *Waters of the state include wetlands.*" PRELIMINARY DRAFT Wetland Area Protection and Dredged or fill Permitting Policy, Version 6.5 (January 28, 2013) at 3 (emphasis added).

² As explained below, the modified three-parameter definition is not sufficiently inclusive, and a one-parameter definition is more appropriate to protect California's diverse wetlands. In comments on previous versions of this policy, some of our organizations explained that a modified three-parameter wetlands definition might be acceptable, but that was *only because it was understood that "wetlands" were presumed to be waters of the state.*

on staff if they have to defend their every decision and could also result in continued or even increased losses of wetlands. The Regional Boards currently determine whether particular features are regulated wetlands on a case-by-case basis, and this practice would continue under the draft policy. The Draft Staff Report/SED makes clear, however, that the status quo is unacceptable. *See* Draft Staff Report/SED at 1, 28 (acknowledging continued wetland losses and the inadequacy of current regulations). The proposed wetlands definition simply formalizes the status quo and fails to comport with California's no-net-loss mandate because it would permit the continued destruction of wetlands. Further, an important purpose of the SWRCB wetlands policy is to promote consistency across the Regional Boards; continuing to identify regulated wetlands on a case-by-case basis fails to achieve this purpose. *See* Draft Staff Report/SED at 1. Under this approach, an identical feature could be a regulated wetland in San Francisco but not in Sacramento. The lack of uniformity results in the under protection of wetlands and significant uncertainty for potential permittees.

Even more troubling, the proposed wetlands definition may not merely maintain the status quo—it *could result in increased destruction of California's wetlands*. Several Regional Boards currently have language in their basin plans indicating that all wetlands are waters of the state. For example, according to the Draft Staff Report/SED, the North Coast Regional Water Quality Control Board's Basin Plan "states that the 'definition of Waters of the state is broader than the definition of Waters of the United States' and that under state law 'wetlands are waters of the state and wetland water quality control is within the jurisdiction of the state . . .'" Draft Staff Report/SED at 34 (citing Basin Plan 2011, p 2-16); *see also id.* at 35 (San Francisco Bay RWQCB "Basin Plan states that wetland water quality control is 'clearly within the jurisdiction of the State Water Board and Regional Water boards' because the Porter-Cologne Act defines waters of the state as 'any water, surface or underground, including saline waters, within the boundaries of the State (Cal. Wat. Code §13050(e)).'", *id.* at 38 (Lahontan RWQCB "Basin Plan states that 'All wetlands shall be free from substances attributable to wastewater or other discharges . . .'"). It is our understanding that this policy will amend the Basin Plans, replacing the Regional Boards' protective statements with language indicating that "not all features that qualify as wetlands are waters of the state." Draft Policy at I. This change would cast doubt on the Boards' practice of assuming all wetlands are waters of the state, increasing the likelihood that permit applicants will challenge jurisdictional determinations and creating an opening for litigants striving to limit the state's authority to regulate wetlands. Under this draft policy, there is a very real possibility that the Regional Boards would assert jurisdiction over fewer wetlands, and that the rate of wetland loss would increase.

Recent events in the San Francisco Bay Region illustrate the potential problems with the draft policy's definition and underscore the importance of a strong SWRCB wetlands definition. In 2009, Cargill Saltworks and Arizona-based developer DMB proposed filling and developing 1.5 square miles of former salt evaporation ponds that were once vibrant tidal marsh in San Francisco Bay. The San Francisco Bay Regional Water Quality Control Board reviewed the proposal and determined that the ponds were waters of the state and waters of the United States. *See* San Francisco Bay Regional Water Quality Control Board, Comments on Redwood

Saltworks Notice of Preparation dated October 2010 (Mar. 30, 2011). The Regional Board's assertion of jurisdiction and expression of concern over the project's impacts were essential to protecting the wetlands that would have been impacted if the project had gone forward as planned. Dissatisfied with the regulatory oversight, Cargill challenged the assertion of federal Clean Water Act jurisdiction over the ponds, and its challenge is still pending before the U.S. Environmental Protection Agency ("EPA"). If EPA determines that the Clean Water Act does not apply to the project site, the Regional Board's assertion of jurisdiction under the Porter-Cologne Act will be critical to protecting these and other wetlands that are adjacent to the San Francisco Bay. Inserting language into the Basin Plan for the San Francisco Bay Region emphasizing that some wetlands are not waters of the state undermines the Regional Board's ability to unambiguously assert its jurisdiction, and invites a litigious entity like Cargill to challenge the Regional Board's authority.

3. **The Staff Report/SED must seriously analyze an alternative that includes a more protective wetlands definition and, if a modified-three parameter definition is selected, the policy must clarify that the SWRCB's wetlands definition is only applicable to proceedings under the SWRCB's authority.**

The SWRCB is not the only State agency that regulates wetlands. Among other agencies, the California Coastal Commission ("CCC") regulates development in wetlands pursuant to its authority under the Coastal Act. The CCC uses a wetland definition that is less restrictive (i.e., more protective) than the definition included in the draft policy, requiring only that an area be wet enough to support wetland plants or promote the formation of hydric soils.³ See Letter from Peter M. Douglas, CCC Executive Director to SWRCB re: Wetland Area Protection Policy and Dredge and Fill Regulations, Initial Study (May 19, 2011), attached. As we have emphasized in previous letters, adoption of a one-parameter definition would be substantially more protective of California's diverse wetlands than the SWRCB's currently proposed definition.⁴ To fully understand the benefits of having a more protective SWRCB wetlands definition, the Staff

³ The California Department of Fish and Wildlife ("CDFW") also employs a wetlands definition that is more inclusive and more protective than the SWRCB's proposed definition. See California Wetlands and Riparian Area Protection policy Technical Advisory Team Technical Memorandum No. 2: Wetland Definition, Appx. A at p. 14 (June 25, 2009).

⁴ The overly-narrow, modified three-parameter wetlands definition is not widely supported, even by signatories to this letter. We believe the one-parameter (Cowardin) definition developed by the U.S. Fish and Wildlife Service, and used by CDFW, is the most comprehensive wetland definition and thus the most capable of defining the diverse array of California wetlands. Riparian areas pose a significant delineation problem. Whereas there is no question that riparian areas perform many of the same functions of wetlands (i.e., bank stabilization, sediment trapping, habitat, nutrients, etc.), they may not be underlain by hydric soils (more often non-hydric entisols) nor have the frequency and duration of inundation or saturation to meet the criterion for "wetlands" as they have been defined and delineated utilizing a three-parameter definition. The fact that the CCC has used a one-parameter definition in a regulatory framework for decades clearly indicates that the approach is both functional and legal.

Report/SED should at least seriously analyze an alternative that includes adoption of a one-parameter test.⁵

If the SWRCB adopts the modified three-parameter definition, the existence of multiple wetland definitions in California could create a significant possibility of confusion within the regulated community. Because the CCC's wetland definition is more protective, areas in the coastal zone may not qualify as wetlands under the SWRCB's proposed definition, but nonetheless be considered wetlands under the CCC's definition. Though beyond the reach of the Regional Boards, such wetlands would be subject to the CCC's regulatory authority. In light of the likelihood of confusion caused by inconsistent definitions, the CCC submitted comments on the Initial Study for this policy in 2011. The CCC recommended to the SWRCB "that you increase the clarity of your efforts by using the more precisely descriptive term 'State Water Board wetlands' rather than the generic and variously defined 'wetlands,'" and suggested that the SWRCB "should acknowledge the Coastal Commission's jurisdiction and regulatory approach to protecting wetlands." Letter from Peter M. Douglas, CCC Executive Director to SWRCB (May 19, 2011). In spite of these comments, the draft policy and Draft Staff Report/SED do not adequately address the limited nature of the SWRCB's proposed wetland definition.⁶ The SWRCB should remedy this problem by clearly explaining that the proposed policy's wetland definition applies only to permitting processes overseen by the SWRCB and Regional Boards, and explicitly discussing the CCC's permitting authority and its more inclusive wetlands definition.

We also note that it is inappropriate to rely exclusively on the draft policy's wetland definition to monitor the status of California's wetlands and the state's compliance with the no-net-loss mandate. Executive Order W-59-93 focuses on wetlands generally and does not distinguish between CCC wetlands and SWRCB wetlands. Because many important wetlands will meet the one-parameter CCC wetland definition but not the more restrictive proposed SWRCB definition, monitoring wetlands based on the SWRCB definition alone would provide an incomplete and misleading picture of the health of California's wetlands. Therefore, for purposes of tracking the status of wetlands under the no-net-loss policy, if the SWRCB adopts the proposed more restrictive definition rather than the one-parameter test, the definition of wetlands for tracking must be broader and more inclusive than the SWRCB's definition.

4. The policy must consistently require a meaningful alternatives analysis and selection of the least environmentally damaging practicable alternative.

⁵ The Draft Staff Report/SED's analysis of alternatives is cursory and fails to meaningfully assess the beneficial impacts of adopting a one-parameter wetlands definition. See Draft Staff Report/SED at 175-76.

⁶ While Table 5-2 of the Draft Staff Report/SED mentions the CCC's permitting authority, the brief acknowledgement is insufficient to avoid confusion within the regulated community, and a more detailed discussion of the different state-level wetland definitions is required.

Under the draft policy, a permitting authority may approve a project only if the applicant has, among other things, demonstrated “[a] sequence of actions has been taken to first avoid, then to minimize, and lastly compensate for adverse impacts to waters of the state.” Draft Policy at 4(B)(1)(a). This requirement, with its primary focus on avoidance, is essential to protecting California’s wetlands. It is also consistent with the Corps’ Section 404 permitting process. *See, e.g.*, 33 C.F.R. § 332.1 (requiring that permit applicants “take all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United States.”). The sequencing requirement should remain a central component of the SWRCB’s wetlands policy.

However, the draft policy’s requirements related to alternatives analysis and selection of the LEDPA undermine the sequencing requirement and make it extremely likely that wetlands will continue to be destroyed under this policy. Of primary concern is the fact that the draft policy does not require a project to be the LEDPA to receive a permit. *See* Draft Policy at IV(B)(1). Rather, the Regional Boards are permitted to determine whether an alternatives analysis is required on a case-by-case basis, and only if an alternatives analysis is required must the selected project be the LEDPA. Draft Policy at IV(B)(3)(b) (“If the project also includes discharges to waters of the state outside of federal jurisdiction, the permitting authority *may* require the applicant to supplement the alternatives analysis to include waters of the state outside of federal jurisdiction.”) (emphasis added); IV(B)(3)(c) (“The permitting authority *may* require an alternatives analysis in accordance with the State Supplemental Dredged or Fill Guidelines, unless the project is exempt under subsection (d) below.”) (emphasis added); IV(B)(3)(e) (“The alternatives analysis must establish that the proposed project alternative is the LEDPA in light of all potential direct, secondary (indirect), and cumulative adverse impacts on the physical, chemical, and biological elements of the aquatic ecosystem.”). If a Regional Board does not require an alternatives analysis, not only is there no LEDPA requirement, there is no way to know whether wetland impacts are being avoided to the greatest extent practicable because alternative project locations or designs were never fully explored. Allowing the Regional Boards to decide whether an alternatives analysis is required on a case-by-case basis and only requiring that a project be the LEDPA if an alternatives analysis is required is inconsistent with the state’s no-net-loss policy and leaves California’s wetlands vulnerable to destruction.

Further, leaving the Regional Boards with unbounded discretion to determine whether an alternatives analysis is required will cause uncertainty within the regulated community, a lack of uniformity across and within the Regional Boards, and increased workload for Regional Board staff. Under the draft policy, for example, a permit applicant who seeks to impact a wetland that is a water of the state outside of federal jurisdiction has no way to know whether an alternatives analysis will be required (assuming none of the exemptions occur). *See* Draft Policy at IV(B)(3)(c). And a permit applicant with similar projects in multiple regions may be required to do an alternatives analysis in one region but not in another. For Regional Board staff, the draft policy’s lack of guidance regarding when an alternatives analysis is required could cause increased workload and additional delay in processing of permit applications.

Beyond a lack of clarity regarding when an alternatives analysis might be required, the Draft Staff Report/SED creates additional uncertainty by suggesting that the Regional Boards will have broad, unbounded discretion to determine the required contents of the analysis. According to the Draft Staff Report/SED, “[t]he amount of information necessary in the alternative analysis would be commensurate with the level of the projects impacts, i.e., more information would be required for projects with significant impacts; projects with minimal impacts may only need to describe avoidance and minimization measures.” Draft Staff Report/SED at 59. The lack of clarity regarding the level of detail required in an alternatives analysis will lead to uncertainty and confusion within the regulated community, inconsistency across Regional Boards, and additional work and delay for Regional Board staff. Permitting a watered-down alternatives analysis is also inconsistent with ensuring wetland impacts are avoided.

Simple modifications to the draft policy would remedy these problems. These modifications would ensure that a meaningful alternatives analysis is required for every permit application, and require that the permitted project be the LEDPA.⁷

- Section IV(A)(2)(c): ~~If required by the permitting authority on a case-by-case basis, if~~ no exemptions apply, an alternatives analysis in accordance with section IV.B.3 and, any supporting documentation.
- Section IV(B)(3)(b): Discharges to waters of U.S.

In reviewing and approving the alternatives analysis for discharges of dredged or fill material that impact waters of the U.S., the permitting authority shall defer to the Corps and EPA determinations on the adequacy of the alternatives analysis, unless the Executive Officer or Executive Director determines that (1) the permitting authority was not provided an adequate opportunity to consult during the development of the Corps’ alternatives analysis, (2) the Corps’ alternatives analysis does not adequately address issues identified by the permitting authority during consultation, (3) additional analysis is required to comply with CEQA, water quality standards, or other requirements or (4) the project and all of the identified alternatives would not comply with water quality standards.

⁷ We note that, in certain places, the Draft Staff Report/SED already appears to assume that an alternatives analysis and selection of the LEDPA would be required in all cases: “Finally, the proposed Procedures would strengthen efforts to avoid and minimize impacts to wetlands and other waters of the state *by requiring* an evaluation of alternatives to identify and implement the LEDPA. This process will avoid or reduce conflicts with policies, regulations, and planning documents, including HCPs, NCCPs, or other similar plans.” Draft Staff Report/SED at 142 (emphasis added).

If the project also includes discharges to waters of the state outside of federal jurisdiction, the permitting authority ~~may~~shall require the applicant to supplement the alternatives analysis to include waters of the state outside of federal jurisdiction. If an alternatives analysis is not required by the Corps for waters of the U.S. impacted by the discharge of dredged or fill material, the permitting authority ~~may~~shall require an alternatives analysis for the entire project in accordance with the State Supplemental Dredged or Fill Guidelines, unless the project is exempt under subsection (d) below.

- Section IV(B)(3)(c): Discharges solely to waters of the state outside of federal jurisdiction

The permitting authority ~~may~~shall require an alternatives analysis in accordance with the State Supplemental Dredged or Fill Guidelines, unless the project is exempt under subsection (d) below.

- Section IV(B)(3)(e): ~~The permitting authority will be responsible for determining the sufficiency of an alternatives analysis that is required under their discretion (see 3b, 3.e and 3.d above).~~ The alternatives analysis must establish that the proposed project alternative is the LEDPA in light of all potential direct, secondary (indirect), and cumulative adverse impacts on the physical, chemical, and biological elements of the aquatic ecosystem.

5. The exemptions from alternatives analysis must be modified to ensure wetland impacts are avoided.

First, the exemption for projects that inherently cannot be located in an alternate location should be eliminated. *See* Draft Policy at IV(B)(3)(d)(iii). Under the draft policy, such projects fall within an exemption, but the permitting authority retains discretion to “require an analysis of on-site alternatives that would minimize impacts to waters of the state.” *Id.* Analysis of on-site alternatives is important because it can identify alternative project designs that may avoid or minimize impacts to wetlands, and should be required in all cases. Additionally, leaving the Regional Boards with discretion to apply an exemption on a case-by-case basis will cause confusion and uncertainty within the regulated community, lead to inconsistent approaches across Regional Boards, and create additional burdens for Regional Board staff. Eliminating the exemption will better protect wetlands and reduce uncertainty and inconsistencies.

Second, the exemption for projects that would be conducted in accordance with an approved watershed plan needs further clarification. *See* Draft Policy at IV(B)(3)(d)(iv). We support watershed planning, and believe it may be appropriate to reduce permitting requirements for projects conducted in accordance with an approved watershed plan. However, for the exemption in section IV(B)(3)(d)(iv) of the draft policy to be appropriate, there must be significantly more information regarding the contents of an approvable watershed plan. For example, what scale (size) watershed must the plan include? How will cumulative impacts

within the watershed be determined and addressed? How will the plan ensure that alternative approaches are analyzed? How will mitigation banks fit into watershed planning efforts? Without this and other information, it is impossible to know whether approved watershed plans will protect wetlands when project-specific alternatives analysis are not conducted. Accordingly, the SWRCB should either provide details regarding the elements that must be included in a watershed plan, or remove the exemption found in section IV(B)(3)(d)(iv) of the draft policy and wait until a later time to include it in an amendment to the policy once further details have been resolved.

6. A loophole allowing for the destruction of wetlands on Prior Converted Croplands must be eliminated.

After decades of land conversion and wetland destruction, some of California's most important remaining wetland habitats are located on agricultural land. As explained more fully in the attached letter dated August 7, 2012, wetland areas that have been certified as PCCs may still meet the draft policy's proposed wetland definition and continue to provide important wetland functions. Without a strong policy protecting wetlands on PCCs, California will continue to lose wetland acres in violation of the no-net-loss policy.

In the current draft policy, wetlands on lands designated as PCCs are excluded from the application procedures unless the PCC (1) changes to a non-agricultural use, or (2) is abandoned. Draft Policy at IV(D)(2)(a). The exclusion and overly-limited recapture provision leave open the possibility that important wetlands on lands designated as PCCs could be destroyed without any oversight from the Regional Boards. In particular, the draft policy would not require a landowner to receive a permit to destroy wetlands on a PCC if the land is still being used for agriculture. This means a landowner could, without any permitting oversight, deep rip or even fill wetlands on a PCC to plant an orchard. Once the wetlands are gone, the landowner could replace the orchard with development. The loss of wetlands on PCCs to either incompatible agricultural uses or development is enormously problematic and inconsistent with California's no-net-loss policy.

The best way to remedy this problem is to eliminate the exclusion for PCCs. Under this approach, wetlands on PCCs would be subject to the same permitting requirements as any other wetlands. Eliminating the exclusion would help to create a policy that is clear, consistent, and protective of wetlands.

If the PCC exclusion is not eliminated, we alternatively request that the recapture provision be strengthened to ensure wetlands on PCCs are not converted to incompatible agricultural uses without oversight from the Regional Boards. In particular, the recapture provision found in section IV(D)(1)(a) of the draft policy, which applies to agricultural activities on lands not designated as PCCs, should be applied to PCCs as well. To make this change, the PCC exclusion in section IV(D)(2)(a) of the draft policy should be revised to state:

Discharges of dredged or fill material that occur within wetland areas that have been certified as prior converted cropland (PCC) by the Natural Resources Conservation Service. The PCC exclusion will no longer apply if: (1) the PCC changes to a non-agricultural use, or (2) the PCC is abandoned, meaning it is not planted to an agricultural commodity for more than five consecutive years and wetland characteristics return, and the land was not left idle in accordance with a USDA program. Additionally, any discharge of dredged or fill material to a water of the state is not exempt and shall be subject to the application procedures in sections IV.A and IV.B, if (1) the purpose of the activity is bringing a water of the state into a use to which it was not previously subject, where the flow or circulation of water of the state may be impaired or the reach of such waters be reduced, or (2) the discharge contains any toxic pollutant listed in CWA section 307.

- i. For purposes of D.2.(a), agricultural commodity means any crop planted and produced by annual tilling of the soil, including tiling by one-trip planters, or sugarcane.
- ii. For purposes of D.2.(a), agricultural use means open land planted to an agricultural crop, used for the production of (1) food or fiber, (2) used for haying or grazing, (3) left idle per a USDA program, or (4) diverted from crop production to an approved cultural practice by NRCS that prevents erosion or other degradation.

This approach is appealing, among other reasons, because the recapture provision is derived from Clean Water Act section 404(f)(2), and is already well-known within the regulated community.

In recent conversations, SWRCB staff have suggested that, under the draft policy, wetlands on PCCs would still be subject to the Regional Boards' permitting authority, but PCC landowners would not be required to comply with the draft policy's procedures. Subjecting wetlands on PCCs to some different, ill-defined permitting requirements would be enormously problematic. This approach would cause understandable confusion within the regulated community and lead to under protection of wetlands. Instead, the draft policy's permitting requirements should be consistently applied to all California wetlands, including wetlands on PCCs.

With respect to the draft policy's treatment of PCCs, we emphasize that merely mimicking the Corps' permitting process is inadequate. Because wetlands on PCCs are exempted from federal oversight, these important wetlands are not adequately protected. This policy must clarify and strengthen the Regional Boards' authority over wetlands on PCCs to ensure compliance with the statewide no-net-loss policy.

7. The policy's mitigation requirements must be strengthened.

Effective mitigation requirements are essential to ensuring the policy comports with the statewide no-net-loss mandate. As extensively detailed in the attached letter dated April 16, 2013, mitigation wetlands do not fully replicate natural wetlands, and mitigation requirements must be crafted carefully to avoid significant losses in wetland functions and values.

The draft policy's provisions related to the amount of compensatory mitigation are problematic. In particular, the draft policy's grant of authority to the Regional Boards to require mitigation ratios of less than one-to-one is inappropriate and inconsistent with achieving no net loss. *See* Draft Policy at IV(B)(5)(c). As discussed further below, we do not agree that a mitigation ratio of less than one-to-one *can ever* be appropriate because it undermines the no-net-loss policy. The draft policy's current approach, which leaves the Regional Boards with significant discretion to reduce the required mitigation ratio below one-to-one under an undefined set of circumstances would lead to losses of wetland acreage, inconsistent requirements across and within Regional Boards, uncertainty within the regulated community, and significant additional workload for Regional Board staff. To avoid these problems, we suggest the following changes to section IV(B)(5)(c) of the draft policy:

~~Amount: The amount of compensatory mitigation will be determined on a project-by-project basis in accordance with State Supplemental Dredged or Fill Guidelines, section 230.93(f). The permitting authority ~~may~~shall take into account recent anthropogenic degradation to the aquatic resource and the potential and existing functions and conditions of the aquatic resource. A minimum of one-to-one acreage or length of stream reach replacement is necessary to compensate for wetland or stream losses ~~unless an appropriate function or condition assessment method clearly demonstrates, on an exceptional basis, that a lesser amount is sufficient. A reduction in the mitigation ratio for compensatory mitigation will be considered by the permitting authority if buffer areas adjacent to the compensatory mitigation are also required to be maintained as part of the compensatory mitigation management plan. The amount of compensatory mitigation required by the permitting authority will vary depending on which of the following strategies the applicant uses to locate the mitigation site within a watershed.~~~~

~~Strategy 1: Applicant locates compensatory mitigation using a watershed approach based on a watershed profile developed from a watershed plan that has been approved by the permitting authority and analyzed in an environmental document, includes monitoring provisions, and includes guidance on compensatory mitigation opportunities;~~

~~Strategy 2: Applicant locates compensatory mitigation using a watershed approach based on a watershed profile developed for a project evaluation area,~~

~~and demonstrates that the mitigation project will contribute to the sustainability of watershed functions and the overall health of the 303 watershed area's aquatic resources.~~

~~Generally, the amount of compensatory mitigation required under Strategy 1 will be less than the amount of compensatory mitigation required under Strategy 2 since the level of certainty that a compensatory mitigation project will meet its performance standards increases if the compensatory mitigation project complies with a watershed plan as described above. Certainty increases when there is a corresponding increase in understanding of watershed conditions, which is increased when using a watershed plan as described above to determine compensatory mitigation requirements.~~

In theory, we support the draft policy's incorporation of watershed planning, but the draft policy includes insufficient detail regarding the required contents of an approvable watershed plan and does not explain the type of environmental review to which the plan would be subjected. Without adequate guidance, the draft policy's attempt to achieve meaningful planning at the watershed scale is destined to fail. Even with a strong watershed plan in place, there should be no allowance of less than a one-to-one mitigation ratio. A watershed plan should ensure that wetland mitigation is appropriate as to function (habitat, water recharge, flood protection, etc.) and location, but it cannot provide any rationale to support the mitigation of a destroyed wetland with the creation of a smaller wetland. Considering the scientific evidence indicating that restored and created wetlands are not functionally equivalent to natural wetlands, anything less than a one-to-one mitigation acreage ratio is inconsistent with the no-net-loss requirement.

The draft policy's mitigation requirements also need to be modified to require a financial security for every approved mitigation plan. *See* Draft Policy at IV(B)(5)(f). Requiring a letter of credit, performance bond, or other financial security is a standard practice, and is important for ensuring promised mitigation benefits materialize. We therefore recommend the following changes to section IV(B)(5)(f) of the draft policy:

~~Financial Security: Where deemed necessary by the permitting authority,~~
Provision of a financial security (e.g., letter of credit or performance bond) shall be a condition of the Order. In this case, t~~The permitting authority will approve the financial security to ensure compliance with compensatory mitigation plan requirements.~~

Additionally, we are concerned that the draft policy fails to emphasize the importance of in-kind mitigation. Losses to some wetland types, such as vernal pools, have been particularly profound, and we are concerned that the policy would allow impacts to these vulnerable wetland types to be mitigated by the creation of less ecologically valuable wetlands. The Draft Staff Report/SED explains that failure to require in-kind mitigation is a significant problem:

[E]stimates of wetland losses may provide an overly optimistic picture if compensatory mitigation wetlands are not ecologically equivalent to the natural wetlands they are intended to replace. For example, the USFWS (2011) points out that, although there have been net wetland gains in recent years, there is a “non-parity between wetland types that have been lost and subsequent wetland mitigation...the net effect has been the loss of wetland diversity, hydrologic function, biological communities, and a ‘homogenization of wetland landscapes.’”

Draft Staff Report/SED at 30. Thus, the Draft Staff Report/SED recognizes this significant problem in wetland compensation, but the draft policy fails to adequately address it. Inclusion of a provision in the policy that establishes a strong preference for in-kind mitigation would help to ameliorate this concern.

Finally, the following additional modifications are necessary to strengthen the draft policy’s mitigation requirements:

- Section IV(B)(5)(a): Compensatory mitigation, in accordance with the State Supplemental Dredged or Fill Guidelines, Subpart J, should be presumed to be required, and will only be considered after the applicant has demonstrated that adverse impacts to waters of the state have been avoided and minimized to the maximum extent practicable ~~may be required to ensure that an activity complies with these Procedures.~~
- Section IV(B)(5)(e): Final Compensatory Mitigation Plan: The permitting authority will review and approve the final compensatory mitigation plan submitted by the applicant to ensure mitigation comports with the State Supplemental Dredged or Fill Guidelines, Water Code requirements, applicable water quality standards, and other appropriate requirements of state law. The level of detail in the final plan shall be sufficient to accurately evaluate whether compensatory mitigation offsets the adverse impacts attributed to a project considering the overall size and scope of impact. The compensatory mitigation plan shall be sufficient to provide the permitting authority with a reasonable assurance that replacement of the full range of lost aquatic resource(s) and/or functions will be provided in perpetuity.

The permitting authority ~~may~~shall require ~~include as a condition of an Order~~ that the applicant receive approval of a final mitigation plan prior to discharging dredged or fill materials to waters of the state. ~~In this case, the permitting authority will approve the final mitigation plan by amending the Order.~~

- Section IV(B)(7): The permitting authority will review and approve the final monitoring and reporting requirements for all projects. Monitoring and reporting shall~~may be required~~ to demonstrate compliance with the terms of the Order.

8. The policy must support wetland enhancement, restoration, and management efforts.

Due to the highly modified nature of California's waterways, many of the state's remaining wetlands have to be actively irrigated and managed to continue providing habitat values. Additionally, wetland enhancement and restoration efforts add important acres and functions to our portfolio of wetlands. The final policy must support rather than impede efforts to enhance, restore, and manage wetlands. The Central Valley Joint Venture, Grassland Water District and Grassland Resource Conservation District have particular knowledge and expertise regarding wetland restoration, enhancement, and management efforts, and we urge the SWRCB to pay careful attention to the comments submitted by those organizations.

9. The policy must consistently require assessment of climate change impacts.

The draft policy provides the Regional Boards with authority to require, on a case-by-case basis, an analysis of impacts associated with climate change and measures to avoid or minimize those impacts. Draft Policy at IV(A)(2)(b). The Draft Staff Report/SED highlights some of the ways in which climate change should be considered during project design:

Consideration should be given to the potential impacts on project viability and mitigation success. Projects subject to sea level rise should consider the need for project design to accommodate for the long term viability of the project and compensation area. Projects involving channelization should show that anticipated changes in flows due to increased precipitation patterns, and potential flooding, due to climate change are analyzed.

Draft Staff Report/SED at 53. In light of wetlands' vulnerability to changes in temperature, hydrology, and sea level rise, these considerations and others are essential to ensuring that projects are resilient to climate change impacts, and that mitigation efforts can succeed. Accordingly, and in conformance with State Board Resolution No. 2008-0030, we suggest the following revisions to section IV(A)(2)(b) of the draft policy, which would make an assessment of climate change impacts a standard component of every permit application:

~~If required by the permitting authority on a case-by-case basis, a~~An assessment of the potential impacts associated with climate change related to the proposed project and any proposed compensation, and any measures to avoid or minimize those potential impacts.

10. The policy must consistently require that dry season wetland delineations be supplemented with data from the wet season.

The draft policy permits the Regional Boards to determine, on a case-by-case basis, whether to require that dry season wetland delineations be supplemented with field data from the wet season. Draft Policy at IV(A)(2)(a). This approach fails to set clear expectations for permit applicants, will lead to inconsistencies across the Regional Boards, will cause increased workload for Regional Board staff, and will likely under-protect wetlands. Supplementing dry season delineations with field data from the wet season is critical to avoiding wetland impacts, and should be required in all cases. We suggest the following changes to section IV(A)(2)(a) of the draft policy to make sure wetlands are consistently protected:

~~If required by the permitting authority on a case-by-case basis, i~~If the wetland area delineations were conducted in the dry season, supplemental field data from the wet season of a normal rainfall year to substantiate dry season delineations.

11. The policy should not exempt storm water facilities that were constructed in a water of the state.

Under section IV(D)(2)(c) of the draft policy, all discharges of dredged or fill material associated with routine maintenance of storm water facilities regulated under another Water Board Order are exempted from the draft policy's procedures. This exclusion is inappropriate for storm water facilities that were constructed in waters of the state because those areas may continue to provide significant ecological benefits. We suggest the following modifications to section IV(D)(2)(c) of the draft policy to more appropriately limit the exclusion:

Discharges of dredged or fill material that are associated with routine maintenance of storm water facilities regulated under another Water Board Order, such as sedimentation/storm water detention basins, as long as the storm water facility is located in an area that did not historically support wetland areas or other aquatic resources.

12. The Draft Staff Report/SED fails to provide the identification and analysis of significant and potentially significant impacts required by CEQA.

The Draft Staff Report/SED states that it is intended to provide the needed CEQA review for the proposed regulatory changes.

State Water Board staff prepared this Staff Report in compliance with the California Code of Regulations (CCR), title 23, §3775, et. seq. to identify, evaluate, and minimize potential adverse impacts to the environment of adopting the proposed Procedures. The Secretary for Natural Resources has certified the State Water Board's water quality planning process as an environmental regulatory program⁵ [Cal. Code Regs. tit. 14, §15251(g)] meeting CEQA. The CCR⁶ [23 CCR §3775 et seq.] requires the State Water Board to prepare a report that, at a minimum, contains:

- (1) A brief description of the proposed project (proposed Procedures);
- (2) An identification of any significant or potentially significant adverse environmental impacts of the proposed Procedures;
- (3) An analysis of reasonable alternatives to the proposed Procedures, and mitigation measures to avoid or reduce any significant or potentially significant adverse environmental impacts; and
- (4) An environmental analysis of the reasonably foreseeable methods of compliance.

This Staff Report fulfills the State Water Board's requirements for preparation of an environmental document for public review, and is part of the substitute environmental documentation required to support the proposed Procedures.

Draft Staff Report/SED at 3. Unfortunately, the Draft Staff Report/SED fails to adequately or accurately identify significant and potentially significant impacts to the environment that will result from adoption of the proposal, fails to adequately analyze those impacts it does identify, and as a result fails to fully address needed alternatives and mitigation measures to avoid or minimize impacts from the proposed regulatory changes or to analyze the reasonably foreseeable methods of compliance with the proposed procedures that will ensure impacts are avoided, minimized and mitigated.

a. The SWRCB must comply with CEQA's substantive mandates in approving the new regulations under its certified regulatory program.

The "Water Quality Control (Basin)/208 Planning Program of the State Water Resources Control Board and the Regional Water Quality Control Boards" is a certified regulatory program for purposes of CEQA. *See* Cal. Pub. Res. Code § 21080.5; 14 C.C.R. ("CEQA Guidelines") § 15251(g). Although certification exempts the Board from CEQA's environmental impact report requirement, the Board still must comply with CEQA's substantive and procedural mandates. Cal. Pub. Res. Code §§ 21000, 21002, 21080.5; *Sierra Club v. Bd. of Forestry* (1994) 7 Cal. 4th 1215, 1236; *Joy Road Area Forest and Watershed Association v. Cal. Dept. of Forestry and Fire Protection* (2006) 142 Cal. App. 4th 656, 667-68.

A certified regulatory program is exempt from the requirement of an environmental impact report (EIR) (Pub. Resources Code, § 21080.5, subd. (c)). *Nevertheless, there must be significant documentation. The document used as a substitute for an EIR must include a description of the proposed activity with alternatives to the activity and mitigation measures as well as written responses to significant environmental points raised during the evaluation process. (Id., subs. (d)(2)(D) & (d)(3)(A); Cal. Code Regs., tit. 14, § 15252, subd. (a).)*

A certified regulatory program is subject to the broad policy goals and substantive standards of CEQA. (*City of Arcadia v. State Water Resources Control Bd.*, [(2006)], 135 Cal. App. 4th at p. 1422.) It is said that the substitute documents

serve as the functional equivalent of an EIR. (*Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection* (2008) 43 Cal. 4th 936, 943.)

Conway v. State Water Resources Control Bd. (2015) 235 Cal. App. 4th 671, 680 (emphasis added).

The Board must ensure adequate environmental information is gathered and that the environmental impacts of the proposed regulatory changes are fully identified and analyzed before approval. “To conclude otherwise would place the burden of producing relevant environmental data on the public rather than the agency and would allow the agency to avoid an attack on the adequacy of the information contained in the report simply by excluding such information.” *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 724.

The environmental review documents must “contain facts and analysis, not just the agency’s bare conclusions or opinions.” *Laurel Heights Improvement Assn. v. Regents* (1989) 47 Cal. 3d 376, 404 (and cases cited therein). The environmental review documents “must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.” *Id.* Environmental review documents must also contain sufficient detail to help “insure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug.” *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935 (citations omitted).

“An EIR which does not produce adequate information regarding alternatives cannot achieve the dual purpose served by the EIR, which is to enable the reviewing agency to make an informed decision and to make the decisionmaker’s reasoning accessible to the public, thereby protecting informed self-government.” *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 733 (citing *Laurel Heights Improvement Assn.*, 47 Cal. 3d at 392).

The same requirements apply to an environmental document prepared as part of a certified regulatory program. See *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal. 4th 1215, 1228-29. Alternatives must be analyzed even if measures intended to mitigate the significant impacts also are proposed. See *Friends of the Old Trees v. Dept. of Forestry & Fire Protection* (1997) 52 Cal. App. 4th 1383, 1393-94. Overall, the Draft Staff Report/SED fails to address the most important criteria for a feasible alternative—that it avoids significant impacts on the environment of the proposed project. The question for the SWRCB in this matter is what are the impacts of adopting this new proposed regulation and whether the impacts could be avoided by a feasible alternatives. Unfortunately the environmental review in the Draft Staff Report/SED failed to address this critical question except in vague generalities. See Draft Staff Report/SED at 171-73.

When issuing regulations or policies, agencies will often conduct programmatic CEQA review (often referred to as first-tier analysis). While a programmatic CEQA document may

provide less detail than project-specific reviews, even programmatic environmental reviews must provide some detail as to the potential environmental impacts of the project and the mitigation measures and alternatives to reduce such impacts. Programmatic CEQA review must consider “cumulative impacts that might be slighted in a case-by-case analysis” and “broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts.” CEQA Guidelines § 15168.

Determining what issues are appropriate for detailed review at each tier or stage of environmental review is critical.

In addressing the appropriate amount of detail required at different stages in the tiering process, the CEQA Guidelines state that “[w]here a lead agency is using the tiering process in connection with an EIR for a large-scale planning approval, such as a general plan or component thereof ... , the development of detailed, site-specific information may not be feasible but can be deferred, in many instances, until such time as the lead agency prepares a future environmental document in connection with a project of a more limited geographic scale, as long as deferral does not prevent adequate identification of significant effects of the planning approval at hand.” (Cal. Code Regs., tit. 14, § 15152, subd. (c).) This court has explained that “[t]iering is properly used to defer analysis of environmental impacts and mitigation measures to later phases when the impacts or mitigation measures are not determined by the first-tier approval decision but are specific to the later phases.” *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, [(2007)], 40 Cal. 4th [412] at p. 431.

In re Bay-Delta etc. (2008) 43 Cal. 4th 1143, 1169. Certified regulatory program environmental documents can utilize CEQA’s tiering principles so long as they provide the level of detail needed for the appropriate tier of analysis. *Conway v. State Water Resources Control Bd.* (2015) 235 Cal. App. 4th 671, 680.

Notably, this proposal from the SWRCB is in sharp contrast to that at issue in *Conway*, where the Court found that whether dredging would happen or not as a remediation measure associated with TMDLs was uncertain and a full analysis of those impacts was therefore premature in that first-tier analysis. 235 Cal. App. 4th at 680-81. Here, however, dredging and filling activities are at the core of the proposed regulatory changes and the proposed definition of wetlands and other procedures will directly affect where and how dredge and fill activities proceed across the state. Therefore, the impacts of those activities must be evaluated in some detail in order for the SWRCB to comply with CEQA.

- b. The Draft Staff Report/SED recognizes significant annual loss of wetlands under the draft policy but refuses to identify or analyze the significant impacts of the proposal.**

The Draft Staff Report/SED concludes at a programmatic level that there will be no significant impact or a less than significant impact to resources based on the assumption that the proposed procedures increase protections. As the Executive Summary states:

The environmental impacts associated with the proposed Procedures are evaluated in this Staff Report on a programmatic level. As such, this Staff Report is not as detailed as an environmental document that would be used to analyze an individual discharge of dredged or fill material project that would be regulated under the proposed Procedures. The State Water Board expects future environmental reviews of projects that are subject to the proposed Procedures to identify project-specific environmental effects. At that time, the lead agency must identify any project-specific significant environmental effects, and adopt all feasible alternatives and mitigation for these effects. If no feasible mitigation or alternatives are available, the lead agency must adopt a statement of overriding considerations before approving the project, as required by CEQA.

Staff cannot predict the exact nature of environmental effects associated with future individual projects because such forecasting would require knowledge of future projects (e.g., scope, scale, location, and design) throughout the state. However, the programmatic environmental impacts assessment may be representative of the types and magnitude of project-specific environmental effects. The State Water Board intends for the proposed Procedures to provide consistent identification of wetlands, and to strengthen efforts to avoid and minimize impacts to all waters of the state, through consistent application and review requirements. This consistency may result in a greater avoidance, minimization, and compensation for impacts to waters of the state and reduction of discharges of dredged or fill materials, potentially resulting in the protection and retention of a greater proportion of aquatic resources relative to existing regulatory practice.

Further, given the relatively small number of projects that might be regulated differently under the proposed Procedures, compared to the existing regulatory framework, the State Water Board has determined that the programmatic environmental effect on all environmental impact categories will be less than significant, or there will be no impact. As such, the proposed Procedures will not result in any cumulatively considerable impacts when combined with other past, present, or reasonably foreseeable related projects.

Draft Staff Report/SED at 4-5. Unfortunately, this is purely conclusory and, indeed, the Draft Staff Report/SED appears to be attempting a kind of slight-of-hand by ignoring the initial impetus for the regulatory changes and earlier iterations of the proposal including far more protective wetlands definitions (such as the one-parameter and two-parameter definitions). The past 13 years of stakeholder engagement, draft proposals and public comments appear to have

disappeared entirely. Only by ignoring the earlier process, can the staff find that the current proposal—essentially maintaining the status quo with continued significant annual losses of wetlands throughout the state—will cause no significant impacts.

Furthermore, even where the ultimate goal of an action or policy is intended to improve the environment and the impacts are on balance beneficial, detailed environmental review may be needed. *See* CEQA Guidelines § 15063 (b)(1) (where a project may cause significant effect on the environment “regardless of whether the overall effect of the project is adverse or beneficial” the agency shall prepare an EIR). Either the proposed change to the regulatory procedures makes a difference or it does not, it cannot both be a beneficial improvement and have no impact whatsoever. Even at the programmatic level some detailed identification and analysis of environmental impacts should be provided. *See* discussion *supra*. While this proposed change to the regulatory procedures on its own may not be the *sole* cause of impacts to environmental resources from the regulated activities, it would affect whether, when, where, and how impacts from dredge and fill activities will occur in the future.

There is no clear analysis of impacts to biological resources, even at a programmatic level, nor is it possible for decision makers or the public to hazard an educated guess. The fact that so many key junctures in the proposed permitting process are made on a case-by-case basis, beginning with whether a wetland is a water of the state, makes it impossible to determine the magnitude of impacts that might occur. The Draft Staff Report/SED refuses to enumerate or analyze the specific impacts to aquatic and riparian species and habitats from dredge and fill activities or explain how they would be lessened or avoided if the proposed procedures were adopted except in the most general terms, relying on later permitting utilizing the LEDPA (which, as described above, may not even be required) to look at all such impacts and the watershed approach to ensure mitigation is adequate. Even at the programmatic level of environmental review this is far too general and does not provide the needed identification and analysis of impacts to biological resources.

For example, the Draft Staff Report/SED admits that under the proposed policy, projects may be shifted to upland areas to avoid impacts to wetlands, creating the possibility of potentially significant impacts to species and habitats in those upland areas. Draft Staff Report/SED at 141. But those impacts have not been considered in the CEQA review because “[t]he State Water Board does not have information on the location of future projects or the effect of upland project locations relative to sensitive species or habitats.” *Id.* And regardless, the Draft Staff Report/SED claims, the later process, the LEDPA analysis, will solve the problem because “selection of the LEDPA would avoid more damaging impacts to sensitive species or habitats since the LEDPA must consider all environmental impacts.” *Id.* Yet, as discussed above, the draft policy does not even require selection of the LEDPA in every case. Further, while this might be a defensible argument for those projects that must obtain an individual 404 permit, it is certainly not the case for projects proceeding under nationwide or general permits. Similarly, the Draft Staff Report/SED admits impacts will occur to species movement and

migration but simply concludes the later analysis will avoid or mitigate any significant impacts. *Id.* at 141-42.

As another example, the Draft Staff Report/SED does not even provide basic information, such as the number of acres of PCCs in California might be functional wetlands, to support their position that exempting them would not be a significant impact. *Id.* at 72. The Draft Staff Report/SED again simply assumes there would not be any impacts because the regulations as a whole will protect waters of the state.

While we are deeply disappointed in the draft policy, we continue to believe that there is tremendous value for wetland conservation, Regional Board staff, and the regulated community in developing a standardized and consistent wetland definition and permit review process. We hope that our analysis and recommendations will result in SWRCB staff revising the draft policy so that it complies with California's no-net-loss policy and truly protects the state's diverse, ecologically essential wetlands.

Thank you for the opportunity to provide comments. Please contact us with any questions or to discuss the draft policy further.

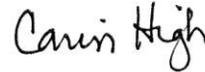
Sincerely,



Rachel Zwillinger
Water Policy Advisor
Defenders of Wildlife



Lisa T. Belenky
Senior Attorney
Center for Biological Diversity



Carin High
Co-Chair
Citizens Committee to
Complete the Refuge



Erica Maharg
Staff Attorney
San Francisco Baykeeper



Kyle Jones
Policy Advocate
Sierra Club California



Sara Aminzadeh
Executive Director
California Coastkeeper
Alliance



David Lewis
Executive Director
Save the Bay



April 16, 2013

Via Electronic Mail

Mr. Bill Orme
State Water Resources Control Board
Division of Water Quality
P.O. Box 100
Sacramento, CA 95814

Dear Mr. Orme:

We are writing to express our serious concern and opposition to the dramatic changes in the Version 6.5, January 28, 2013, Preliminary Draft Wetland Area Protection and Dredged or Fill Permitting Policy (WRAPP). We have participated in the stakeholder process for the development of the language of this policy for more than seven years and feel we were stunned when we reviewed these sweeping changes in your latest draft.

When members of the environmental community met with State Water Resources Control Board (State Water Board) staff in October 2012, we believed the WRAPP was an effort worthy of our support, even though significant compromises had been made by the environmental community. Indeed, our acceptance of the narrow definition of wetlands was regarded as a significant compromise. Despite the fact that the draft we reviewed in October 2012 was weaker than what we would have liked to have seen, on the whole, our community believed that Version 4.3, October 5, 2012 provided enough incremental improvement in the protection of waters of the State and was consistent with the policy of "no net loss."

Unfortunately, we cannot support the latest version of the WRAPP, in its current form, as it is inconsistent with existing federal regulation and significantly weakens the State Water Board's ability to protect waters of the State. The language regarding avoidance and permit review is so vague that it no longer provides proper guidance for either Regional Water Quality Control Board (RWQCB) staff, or the regulated public. As a result Version 6.5 of the WRAPP will place substantial burdens on RWQCB staff and will result in unnecessary and time consuming litigation (from both the development and environmental community) regarding how the proposed policy should be interpreted for individual permit decisions.

We would like to believe that the SWRCB staff did not intend to weaken the WRAPP to the degree that it is weaker than federal law when they made the latest changes. Thus, as detailed below, we have provided our specific concerns with the various changes and suggested improvements so that a final WRAPP will provide improved protections for state waters, be consistent with the state's "no net loss" policy, and provide regional board staff with clear and consistent guidance in order to avoid unnecessary confusion, cost and litigation.

A. The Clean Water Act Clearly Requires Avoidance, Minimization, and the Least Environmentally Damaging Practicable Alternative

Under the Clean Water Act (CWA) the U.S. Army Corps of Engineers (Corps) has the responsibility of evaluating permit applications for the discharge of fill into waters of the U. S. The CWA gave the EPA the task of developing the 404 (b)(1) Guidelines (Guidelines) with the specific goal of providing the environmental criteria and framework by which the Corps evaluates dredge and fill applications.

40 CFR Part 230 - Section 404 (b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material, Subpart A - General, Section 230.1 Purpose and policy states:

(a) The purpose of these Guidelines is to *restore and maintain the chemical, physical, and biological integrity* of waters of the United States through the control of discharges of dredged or fill material. [emphasis added]

(c) ***Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact*** either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern. [emphasis added]

(d) From a national perspective, *the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.* [emphasis added]

Nichols et. al.¹ succinctly describe the role of the Guidelines in framing the Corps' review of permit applications for discharges of fill in wetlands:

On December 24, 1980, EPA issued the § 404(b)(1) Guidelines, the regulations that established the environmental criteria by which the Corps evaluates dredge and fill permit applications. **Central to the Guidelines is the fundamental requirement for an alternatives analysis. "29...[N]o discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the environment, so long as the alternative does not have other significant adverse environmental consequences."**³⁰ "[T]he

¹ Nichols, Sandra S., Jared Thompson, Jessica Wilkinson. 2008. The Federal Wetland Permitting Program: Avoidance and Minimization Requirements. The Environmental Law Institute.

application is required in every case (irrespective of whether the discharge site is a special aquatic site or whether the activity associated with the discharge is water dependent) to evaluate opportunities for the use of non-aquatic areas and other aquatic sites that would result in less adverse impact on the aquatic ecosystem.”³¹ Thus, applicants must demonstrate that for any discharge or fill activity there is no practicable alternative site for the proposed activity that will have less adverse environmental impacts. [emphasis added]

For special aquatic sites such as *wetlands*, however, the Guidelines propose a more difficult test for avoidance with two presumptions. For proposed discharges to special aquatic sites there is a presumption that an alternative site that is not a special aquatic site exists and a presumption that such a site will result in less adverse environmental impacts on the aquatic ecosystem.³² These rebuttable presumptions clarify how to determine if discharges proposed for special aquatic sites meet the requirement that the practicable alternatives have less significant adverse impact on the environment and do not have other significant environmental impacts. [emphasis added]

Indeed, the Clean Water Act and EPA's Guidelines make mitigation a requirement of the Section 404 program through standards set at 40 CFR §§ 230.10 (a)-(d).² The Memorandum of Agreement between EPA and the Corps concerning mitigation under the CWA 404 (b)(1) Guidelines (Mitigation MOA) defines the three steps of mitigation - the first two being avoidance and minimization of impacts:

1. Section 230.10(a) allows permit issuance for only the least environmentally damaging practicable alternative. The thrust of this section on alternatives is *avoidance of impacts*. Section 230.10(a)(1) requires that to be permissible, an alternative must be the least environmentally damaging practicable alternative (LEDPA). In addition, Section 230.10(a)(3) sets forth rebuttable presumptions that 1) alternatives for non-water dependent activities that do not involve special aquatic sites are available...
2. Minimization. Section 230.10(d) states that appropriate and practicable steps to *minimize* the adverse impacts will be required through project modifications and permit conditions.

Sequencing requires the applicant must first demonstrate impacts to wetlands have been *avoided*. Next the applicant must demonstrate any remaining unavoidable impacts have been *minimized*. Lastly, and only after avoidance and minimization of impacts has occurred, the applicant must compensate for any remaining impacts [i.e. compensatory mitigation].

Nichols et. al.³ provide an excellent description of the avoidance requirement:

Avoidance is the *first step* in the sequencing process by which the Corps determines whether or not the proposed project is the least environmentally damaging practicable alternative (LEDPA).¹⁸ The LEDPA is identified by an evaluation of the direct, secondary, and cumulative impacts on the aquatic ecosystem¹⁹ and “other ecosystems”²⁰ of each alternative under consideration. [emphasis added]

The Guidelines state:

² Nichols et al. 6

³ Nichols et al. 7

...no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem so long as the alternative does not have other significant adverse environmental consequences.²¹

The universality of the requirement to evaluate opportunities for use of non-aquatic areas and other aquatic sites that would result in less adverse impact on the aquatic ecosystem was reiterated in a EPA and Army guidance memo in 1993.²² [Regulatory Guidance Letter 93-02]

The regulations further establish two analytical presumptions that increase the burden on an applicant for a *non-water dependent activity* to demonstrate that no practicable alternative exists.²³ The first presumption is that if the basic purpose of a project is not water dependent, "practicable alternatives that do not involve special aquatic sites are presumed to be available."²⁴ The second presumption is, "where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem."²⁵

The two presumptions hold unless the applicant proves otherwise.²⁶ The standards for overcoming these presumptions and the other components of the alternatives analysis have been clarified by numerous administrative and legal decisions.

The Corps formalized the requirement for sequencing in its regulations regarding Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR §332.1:

(1) (c) *Sequencing.* (1) Nothing in this section affects the requirement that all DA permits subject to section 404 of the Clean Water Act comply with applicable provisions of the Section 404(b)(1) Guidelines at 40 CFR part 230.

(2) Pursuant to these requirements, the district engineer will issue an individual section 404 permit *only upon a determination that the proposed discharge complies with applicable provisions of 40 CFR part 230, including those which require the permit applicant to take all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United States.* Practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. Compensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines. [emphasis added]

(3) Compensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines. During the 404(b)(1) Guidelines compliance analysis, *the district engineer may determine that a DA permit for the proposed activity cannot be issued because of the lack of appropriate and practicable compensatory mitigation options.* [emphasis added]

Therefore, based on the detailed description of the CWA's requirements, the 404 (b)(1) Guidelines, the mitigation sequencing requirement, and the least environmentally damaging practicable alternative are fundamental to the federal review of permit applications for the discharge of fill into wetlands.

B. De-emphasis of "sequencing" and "avoidance" in Version 6.5 of the WRAPP is unacceptable.

The most obvious and devastating change to the WRAPP is its abandoning of the concept of "Avoidance." As explained in more detail below, the WRAPP Version 4.3 followed existing federal law by clearly stating that no wetland should be filled if there is a practicable alternative upland site available for the general purpose of the project. The latest Version 6.5 **removes** the clear language included in Version 4.3 that would make it clear to Regional Board staff and Regional Board members that no wetland fill project should be approved if there is such an alternate site available. Version 6.5 even removes the language that instructs Regional Boards that they can, indeed, refuse to permit such projects.

These incomprehensible retractions from Version 4.3 (retractions that we believe violate State Water Board Resolution No. 2008-0026 – see below, page 5) remove from the State and Regional Boards the strongest tool available to them for the protection of the State's wetland resources. It is recognized nationally that created, or even restored, wetlands rarely, if ever, fully replicate the functions of natural wetlands. Your own study (Ambrose, et. al.⁴) demonstrated that mitigation wetlands do not fully replicate the functions of natural wetlands.

Below is a list of changes to the language of the WRAPP from Version 4.3 to Version 6.5:

1. Version 6.5 inappropriately deletes reference to the 404(b)(1) Guidelines in contradiction to State Board Resolution No. 2008-0026

Version 4.3 - Establish a uniform regulatory approach regarding the federal CWA section 404 program for dredge and fill discharges *by establishing procedures and criteria consistent with the CWA section 404 (b)(1) Guidelines (40 C.F.R. part 230) for the application, review and approval of permits to discharge dredged or fill material into waters of the state.* [emphasis added]

The most recently released version of the WRAPP completely removes any mention of the 404 (b)(1) Guidelines (Guidelines), a critical and essential component of the permit review process if the State truly intends to ensure "no net loss of wetlands". This deletion is completely unacceptable to our community and only creates confusion:

⁴ Ambrose, R.F., J.C. Callaway, and S.F. Lee. 2007. An evaluation of compensatory mitigation projects permitted under Clean Water Act section 401 by the California State Water Resources Control Board, 1991-2002. Technical Report prepared for the Los Angeles Regional Water Quality Control Board. Los Angeles, CA: University of California. San Francisco, CA: University of San Francisco.
http://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/mitigation_finalreport_wo_app081307.pdf

Version 6.5 - Establish a uniform regulatory approach consistent with the federal CWA section 404 program for the discharge of dredged or fill material into waters of the state, including wetland areas.

State Water Resources Control Board Resolution No. 2008-0026 specifically states that the Development Team will:

Phase 1 – establish a Policy to protect wetlands from dredge and fill activities. The Development Team is directed to develop and bring forward for State Water Board consideration: (a) a wetland definition that would reliably define the diverse array of California wetlands based on the United States Army Corps of Engineers' wetland delineation methods to the extent feasible, **(b) a wetland regulatory mechanism based on the 404 (b)(1) guidelines (40 C.F.R. parts 230-233) that includes a watershed focus**, and (c) an assessment method for collecting wetland data to monitor progress toward wetland protection and to evaluate program development. [emphasis added]

Recommendation: The deleted segment of the sentence must be reinstated [beginning at line 61 of version 6.5] to ensure consistency with federal CWA regulation and to identify the framework within which permit applications will be evaluated.

- 2. Section C (6)(f) of Version 4.3 regarding the requirement that an applicant describe their compliance with mitigation sequencing has been deleted and must be reinstated.**

Rather than requiring an alternatives analysis for all projects, the latest version of the WRAPP introduces a level of uncertainty as to when and if an alternatives analysis will be required. Federal Regulations do not provide such distinctions, even the Corps' nationwide permits (for minimal impact projects) require an alternatives analysis for projects involving wetland fill. Thus Version 6.5 results in a significantly weaker regulatory system that will allow for impacts to waters of the State in violation of the Porter-Cologne Act. Specifically, the earlier Version 4.3 states:

A description of all steps that have been or will be taken to avoid, minimize, or compensate for loss of or significant adverse impacts to beneficial uses of waters of the state. This description is also required for the Alternatives Analysis, when required, and for details on how the chosen mitigation steps will be evaluated, see the Restrictions on Discharge subsection in the Application Review section.

This section has been replaced by 2(B)(7) - Practicable Alternatives Analysis:

If required by the Water Boards, an analysis of the practicable alternatives to the proposed activity identifying the project as the least environmentally damaging practicable alternative [will be submitted by the applicant?]. [emphasis added]

33 CFR 325.1. d.7 regarding the content required for permit applications specifically states, "For activities involving discharges of dredged or fill material into waters of the United States, the

application must include a statement describing how impacts to waters of the United States are to be avoided and minimized." Corps Regulatory Guidance Letter (RGL) 93-02 specifically states, "The burden of proof to demonstrate compliance with the Guidelines rests with the applicant; where insufficient information is provided to determine compliance, the Guidelines require that no permit be issued. 40 CFR 230.12(a)(3)(iv)." [emphasis added]

The change in language will result in increased staff workload as there has been no framework provided within which staff can defend their decision that a least environmentally damaging practicable alternative (LEDPA) would or wouldn't be required. The WRAPP fails to even state that the applicant would be responsible for providing the LEDPA. Vague environmental regulation/policy results in uncertainty for RWQCB staff and the regulated public and increases the potential for inconsistency amongst the RWQCB regions. At what point is a project "complex" enough to be required to submit a LEDPA? What recourse does staff have under this scenario to require review of alternatives, if even a small wetland fill may have significant adverse impacts to water quality and beneficial uses? The uncertainty introduced in the latest version of the WRAPP will result in needless conflict between RWQCB staff and the regulated public. The resulting conflicts between RWQCB staff and the regulated public will require increased staff time, and will increase delay and unnecessary costs for the applicant if they elect to unsuccessfully argue that a LEDPA is unnecessary. Inconsistency in RWQCB determinations of when the LEDPA is or is not required will result in increased litigation.

Recommendation: The requirement that an applicant must demonstrate compliance with the sequencing steps of the Guidelines must be reinstated.

3. Version 6.5 incorrectly deletes the discussion of the Least Environmentally-Adverse Practicable Alternative that appeared in Section 4(H) of Version 4.3 [this should actually have been labeled the Least Environmental Damaging Practicable Alternative (LEDPA) to be consistent with the federal regulatory process].

Section 4H of the previous version of the WRAPP was crucial to the overall board policy guidance because it set a clear standard of permit application review for RWQCB staff and for the regulated public.

4(H)(1) provided strong guidance and language regarding the presumption that for non-water dependent projects a practicable alternative exists that would have less adverse impacts to water quality.

4(H)(2) defined the responsibilities of the permitting authority, explicitly stating the "permitting agency is *not obligated* to issue a permit for any project that will adversely impact a water of the state or its beneficial uses," and that the permitting authority could "consider the "no project" alternative for projects with significant adverse impacts that cannot be avoided or minimized." This section also made clear that it is the "applicant's responsibility to offer sufficient evidence and proof to rebut the

presumptions above [regarding the existence of a LEDPA], or to dispute the permitting authorities determination of what is the least environmentally damaging practicable alternative." [emphasis added]

This most recent Version 6.5 has replaced the language of the previous Version 4.3 with Section 3(A)(1) – Avoidance and Minimization. This section has been so heavily edited, it fails to discuss the important presumption that for non-water dependent projects, alternatives exist that do not involve discharges into waters of the state and that the Regional Boards are not obligated to issue permits for projects that do not pass this avoidance/practicable alternative test. Failing this specific language, Regional Board staff may believe they need to approve a project, even if there are practicable alternative sites available, as long as “adequate” compensatory mitigation is proposed by the applicant. Army Corps staff occasionally cite the fact that they are a permitting agency, and thus see their job as providing permits not denying permits. The State and Regional Water Boards are regulatory agencies and their roles are to protect the waters of the State not to provide permits to all applicants. As has been made clear above, the goal of the 404(b)(1) guidelines is to avoid impacts to wetlands, and only if unavoidable can permits be issued. The failure to make this clear in the WRAPP will undoubtedly result in unnecessary and avoidable impacts to the waters of the State.

40 CFR Section 230.10(a)(3) requires:

Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E of the Guidelines) does not require access or proximity to or sighting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge, which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise. [emphasis added]

As was stated earlier, the permit applicant must rebut the presumption that a practicable alternative exists that is less environmentally damaging. When reviewing the permit application, the Corps must determine whether the proposed project is the least environmentally damaging practicable alternative. Since this is one of the most crucial components of the 404(b)(1) guidelines, it must also be clearly stated in the WRAPP.

Sections 4(H)(1) and 4(H)(2) must be re-incorporated into the WRAPP to ensure that permit application review by RWQCB staff will be consistent with federal regulations, and to ensure the regulated public understands its responsibility to demonstrate compliance with the 404 (b)(1) Guidelines.

The draft policy declares the "proposed project shall avoid and minimize adverse impacts to the aquatic environment to the maximum extent practicable," but then goes on to say the procedures of the 404 (b)(1) Guidelines will be applied only to projects with "complex environmental impacts." What constitutes "complex environmental impacts?" What threshold would RWQCB staff utilize to determine when to incorporate the procedures of the Guidelines in their review of permit applications? What

percentage of permit applications submitted to the RWQCBs would escape review consistent with the Guidelines? Such language invites staff confusion and frequent litigation (and cost) over so obscure a criteria.

The entire tone, and the most disturbing retreat from previous versions of the WRAPP, is the emphasis on compensatory mitigation while de-emphasizing the first two (critical) steps of mitigation sequencing, avoidance and minimization. The language that remains in Version 6.5, reduces the mitigation sequencing steps of avoidance and minimization to mere paper exercises, items to be checked off before permits for filling of wetlands are authorized.

This is inconsistent with the requirements of the Guidelines and Clean Water Act (CWA). Nichols et. al.⁵ succinctly describe the mitigation sequencing requirement of the CWA:

The basic premise of the § 404 permitting program is that no discharge shall be permitted if (1) a practicable alternative exists that is less damaging to the aquatic environment, or (2) the discharge would cause the nation's waters to be significantly degraded. In order for a project to be permitted, it must be demonstrated that, to the extent practicable: steps have been taken to avoid impacts to wetlands and other aquatic resources, potential impacts have been minimized, and compensation will be provided for any remaining unavoidable impacts. This process is commonly referred to as the mitigation sequencing requirement of the Clean Water Act § 404 regulatory program.[emphasis added]

Nichols et. al.⁶ further elaborate on the LEDPA determination process by the permitting agency:

Once the practicable alternatives are identified, based on the factors and standards described above, the Corps may only issue a permit for the proposed activity if it is the alternative that which would cause the least damage to the aquatic environment—the LEDPA.⁹³ There are occasions, however, when the Corps may find that the LEDPA will still cause too much harm to special aquatic resources to be allowed.⁹⁴ The 1990 Mitigation MOA states: "It is important to recognize that there are circumstances where the impacts of the project are so significant that even if alternatives are not available, the discharge may not be permitted regardless of the compensatory mitigation proposed."⁹⁵ [emphasis added]

In other words, the Corps may deny a permit if it finds that the proposed project is the least damaging alternative but that the damage would still be too significant, even after all practicable avoidance and minimization. Finally, the availability of compensation opportunities may not be taken into account during the alternatives analysis and identification of the LEDPA. Guidance issued in 1990 states that "compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of the least environmentally damaging practicable alternatives for the purposes of requirements under Section 230.10(a)."⁹⁶ Guidance issued by the Corps in 1993 further reinforced this position: "It is not appropriate to consider compensatory mitigation in determining whether a proposed discharge will cause only minor

⁵ Nichols et al. 1

⁶ Nichols et al 11

*impacts for purposes of the alternatives analysis required by Section 230.10(a).*⁷ [emphasis added]

Recommendation: The WRAPP must reinstate deleted passages referring to the 404 (b)(1) Guidelines, mitigation sequencing, the least environmentally damaging practicable alternative, and the burden of proof. These elements have already been established as integral components of the federal regulatory review process, and must be incorporated into the WRAPP to ensure consistency with federal regulation and to avoid unnecessary confusion between the regional boards and thus an increase in litigation and costs to the board and project applicants.

4. The WRAPP should be clear that the primary emphasis of the program is on avoidance and minimization and the achievement of "no net loss" of wetlands; compensatory mitigation is secondary. This language must be reinserted into the final version of the WRAPP.

Numerous studies, beginning with the National Research Council's 1992 "Restoration of Aquatic Ecosystems," 2001 "Compensating for Wetland Losses Under the Clean Water Act" and the SWRCB's study by Ambrose et. al., recognize the failure of compensatory mitigation wetlands in fully replicating the functions of natural wetlands.

Kihlslinger⁷, reviewed recent literature regarding wetlands compensatory mitigation compliance and success and concluded:

Although wetland mitigation accounts for a significant annual investment in habitat restoration and protection, it has not, to date, proven to be a reliable conservation tool. Despite the nationwide "no net loss" goal, the federal compensatory mitigation program may currently lead to a net loss in wetlands acres and function. On the high end, Turner and colleagues (2001) estimated that the §404 program may lead to an 80% loss in acres and functions. [emphasis added]

Her review of the existing literature revealed:

Studies of the ecological performance of compensatory mitigation have shown that compensatory wetland projects fail to replace lost wetland acres and functions even more often than they fail in their administrative performance. In fact, permit compliance has been shown to be a poor indicator of whether or not mitigation projects are adequately replacing the appropriate habitat types and ecological functions of wetlands.

...In addition to not meeting acreage requirements, mitigation wetlands often do not replace the functions and types of wetlands destroyed due to permitted impacts. Turner and colleagues

⁷ Kihlslinger, Rebecca. 2008. Success of Wetland Mitigation Projects. National Wetlands Newsletter Vol. 30, No. 2: 14-16

(2001) found that an average of only 21% of mitigation sites met various tests of ecological equivalency to lost wetlands. Two recent studies compared mitigation sites to *impact sites*. One found that only 17% of the sites evaluated successfully replaced lost functions (Mink and Ladd 2003). The other study determined that 29% of the sites were successful in this regard (Ambrose and Lee 2004). The former study also found that 50% of the mitigation sites evaluated were actually non-jurisdictional riparian and upland habitat. Four studies comparing mitigation sites to *reference wetlands* found that fewer than 50% of the sites evaluated were considered ecologically successful (Ambrose et al. 2006 - 19%; Johnson et al. 2002 - 46%; MDEQ 2001 - 22%; Sudol and Ambrose 2002 - 16%). Ambrose and colleagues' statewide study of 143 permit files in California found that 27% of the constructed mitigation did not even meet the jurisdictional definition of a wetland (Ambrose et al. 2006). [emphasis added]

As mentioned above, a critical concern with compensatory mitigation of all types (including the use of mitigation banks), is the loss of local wetland functions and values and a reduction in the biodiversity of wetland types. Clare et. al.⁸ observe:

The idea that a constructed wetland that visually resembles a natural wetland is adequate compensation ignores that wetlands grow and develop according to a myriad of highly variable inputs over time, including stochastic weather, random arrival events of species, competition, surface and groundwater interactions, and many others. The fluctuations and interactions of wetland ecosystems are more akin to human metabolism than they are to an automotive engine, with dynamic interacting components such as wetland soils, hydrologic regimes, riparian zones, and water chemistry that are linked to their surroundings. Constructed wetlands must grow, mature, and evolve, often requiring decades to centuries to stabilize and broadly resemble naturally occurring wetlands. Such time frames are rarely considered in the price of compensation.

Despite the complexity of wetland ecosystems, optimistic and naive land developers, economists, engineers, and policy makers often argue for compensation over avoidance, confident in the notion that constructed wetlands can adequately replace the values and functions of a natural wetland. *The lack of focus on wetland avoidance allows for engineered compensatory wetlands to receive more political and economic value than their natural counterparts, as they provide decision-makers the options, flexibility, and negotiation room beyond a hard and fast requirement to relocate the proposed development to a nonwetland site.* The premise of compensatory offset wetland policies is that habitat loss can be mitigated through the creation or restoration of habitat that is equivalent to that which was lost. The challenges associated with measuring, let alone reproducing, the full suite of ecological, social, and economic values and functions of a natural wetland makes the reliance on this policy approach untenable in all cases, *and highlights the need to give greater consideration to avoidance in the mitigation sequence.* [emphasis added]

⁸ Clare, Shari, Naomi Krogman, Lee Fotte, Nathan Lemphers. 2011. Where is the avoidance in the implementation of wetland law and policy? *Wetlands Ecological Manage* 19: 165-182

Recommendation: If the goal of the SWRCB's wetlands program is to protect the waters of the State, the emphasis of the policy must be on avoidance and minimization with compensatory mitigation as the last resort for avoiding the impacts to wetlands in the first place. The WRAPP must clearly articulate that the order of emphasis is first to avoid and minimize and, if that is not possible, then require compensatory mitigation.

5. Watershed Approach

Version 6.5 incorporates the concept of the "watershed approach." We support the incorporation of a watershed approach and recommend that a watershed approach must be applied in the analysis of avoidance. Wetlands and riparian areas are inextricably linked to their surrounding uplands. Isolated wetlands, vernal pool complexes, riparian habitat, and the plant and animal communities which live in these habitats, also rely on surrounding upland habitat. For these types of habitats, avoidance analysis must take into consideration the hydrological and ecological linkages that exist and prevent situations where fill is not placed directly in the wetland, but the development of uplands immediately adjacent results in degradation of the wetland to the point where the ecological values are destroyed.

Recommendation: The WRAPP must clearly articulate that the watershed approach is applied the analysis of avoidance.

6. Prior Converted Croplands

Section V. 1. B. Areas Not Subject to Procedures. Please refer to the previously submitted discussion of our concerns regarding the WRAPP language regarding prior converted croplands (attached).

Recommendation: The WRAPP must be revised as recommended in our attached letter in order to avoid significant losses of waters of the state.

7. Version 6.5's Proposed Permitting Procedures Put State's Wetlands at Risk

Section 2. Application Submittal. There are many substantive problems with this section of Version 6.5.

- Rather than begin Section 2 with a description of the elements of a complete permit application, the draft policy proposes circumstances under which the rigor of information required for permit application will be relaxed, including relaxing the requirement that the applicant provide an alternatives analysis (see previous sections 1-4 above). This approach is completely inconsistent with 33 CFR Part 325, the Corps' regulation for the processing of Department of the Army permits. The Corps' regulations regarding the processing of permits provide descriptions of the elements required for a "complete" application. The requirements include permit application review, the public notice process, conditioning of permits, etc. The Corps regulations do not discuss circumstances under which the requirements of application submittal would be relaxed, nor does 33 CFR 325 describe waiving the requirement that an alternatives analysis be provided. Requirements for different forms of permits are described separately under a description of those processes.

- The discussion of "Adaptability" regarding the level of information required for the alternatives analysis is found under the 404 (b)(1) Guidelines. The Adaptability section of the WRAPP, if included at all, must be substantively modified, and should occur elsewhere in the WRAPP.
- Sections 2.A.1, 2, and 3, should be deleted, or relocated and replaced as in Version 4.3 Section 4.D for the reasons discussed above.
- The WRAPP incorporates the concept of "minimal impacts" into a discussion of reduced requirements for permit application submittals and alternatives analysis. A "Minimal impact project" is defined as:

...a project of such size, scope or nature that it will cause only minor individual and cumulative environmental effects and dredged or fill discharges are limited to not more than 15000 square feet (0.34 ac), and 600 linear feet for fill and excavation discharges, and of not more than 75 cubic yards for dredging discharges.

The State Water Board must re-examine this definition. The definition appears to be an attempt to avoid the environmental review process that would be required for the development of a general permit. The definition muddies the issue of what constitutes a "minor individual and cumulative environmental effect" by incorporating a size limitation without providing any environmental context. In doing so, it shifts the burden of proof from the applicant to the RWQCB staff. For example, RWQCB staff would be faced with defending a position that a project meeting the size limitations described, located in a vernal pool swale/tidal marsh/wetlands in a floodplain/eelgrass bed/etc. has more than minimal impacts and must submit a full permit application (including an alternatives analysis). This new "minimal impacts" approach will only cause confusion and added burden and cost to Regional Board staff.

Further, the incorporation of this definition of "minimal impacts" is inconsistent with the federal regulatory process. The federal permit process determines the level of environmental review for a proposed activity by identifying whether a proposed project will be reviewed as an individual permit or as some other permit process. The federal regulations provide expedited permit review (less stringent permit application requirements and environmental analysis) through the issuance of general permits (nationwide permits, regional permits) or letters of permission. The most common form of expedited permit review is through the general permit program. The 404 (b)(1) Guidelines 40 CFR § 230.7 has specific conditions that must be met:

(a) *Conditions for the issuance of General permits.* A General permit for a category of activities involving the discharge of dredged or fill material *complies with the Guidelines if it meets the applicable restrictions on the discharge in § 230.10 and if the permitting authority determines that:*

(1) *The activities in such category are similar in nature and similar in their impact upon water quality and the aquatic environment;*

- (2) The activities in such category will have only minimal adverse effects when performed separately; and
- (3) The activities in such category will have only minimal cumulative adverse effects on water quality and the aquatic environment. [emphasis added]

There is still a requirement that the permit applicant must demonstrate (though not through submittal of a full alternatives analysis) that they have avoided and minimized impacts to the aquatic environment. Also, there is an acknowledgement that activities vary in their impact on water quality and the environment depending upon the type of activity and type of aquatic resource that is being impacted.

We oppose the presumption that imposition of a size limitation on discharges or fill or dredging can ensure "minor individual and cumulative effect" without identifying the range of activities that might occur or the environmental context within which these impacts might occur, and without the benefit of public review and comment (even general permits provide opportunity for public comment when the general permit is first proposed).

If State Water Board feels it is necessary to provide a streamlined permit process for projects with "minor individual and cumulative effects," it must be in a manner consistent with the federal regulatory process. The State Water Board could certify portions of the Nationwide Permit process, establish a state process equivalent to Nationwide permits for waters of the state, or propose Water Board General Permits for specific suites of similar activities.

- If formal delineation maps are not required for "ecological restoration projects or projects with minimal impacts" (line 301-302) how will RWQCB staff determine the direct and indirect impacts to waters of the state? Why wouldn't this information be necessary? For example, if an ecological restoration project occurs in an area where wetlands currently exist, shouldn't the RWQCB need assurances a restoration project will not result in the degradation of existing wetlands? Shouldn't the RWQCB determine that if trade-offs in wetland type will result, there is still not a significant negative impact? Wouldn't RWQCB staff need to know the location and areal extent of existing wetlands to make a determination that a project with "minimal impacts" truly will have only "minimal impacts"? This section should be deleted as it is not protective of waters of the state and is inconsistent with a policy of "no net loss" of wetlands.
- Version 4.3 provided a detailed (and helpful) list of the required elements of a complete permit application submittal. Version 6.5 now provides a list consistent with existing federal requirements and refers the applicant to the California Code of Regulations, title 23, section 3856 "Contents of a Complete Application" for any remaining state requirements. For purposes of clarity, all items necessary to meet the requirements of a complete application should be listed.

Section 3. Factual Determinations (Application Review in Version 4.3)

Version 4.3 included language regarding "Adaptability" in this section of the draft policy. We concur that it would be more appropriate to locate the "Adaptability" section under the "Application Review" or possibly under a new section "Other Forms of Permit Review." This section could capture Ecological

Restoration Projects, and could include Section 2.A. 3. Section 2.A.2 should not be relocated but should be deleted as it is inconsistent with the existing federal process for the reasons discussed above.

Recommendation: The recommended changes to the policy are outlined above.

8. Compensatory Mitigation

Section 4.B.4. Amount of Compensation

- This section includes the following statement:

...However, the Water Boards shall presume that a one-to-one acreage or length of stream reach replacement is the minimum necessary to compensate for wetland or stream losses. The amount of compensatory mitigation shall be sufficient to provide the Water Boards with a reasonable assurance that replacement of the full range of lost aquatic resource(s) and/or functions will be provided in perpetuity.

Considering the abundant scientific evidence that mitigation wetlands do not fully replicate natural wetlands we believe that it is not appropriate to state a presumption that one to one mitigation is the minimum necessary for compensation. We believe it is more appropriate for the board policy to state that "the amount of compensatory mitigation required will be determined for each project on an individual basis, but that no project shall have less than a one to one compensatory mitigation ratio." We appreciate that one-to-one is stated as the "minimum necessary to compensate," but we are concerned about the focus on acreage or stream length as an appropriate determination of adequacy. We also request clarification of the situations intended to be covered by "Alternative 1. The compensatory mitigation site is in an area designated by a watershed plan or regional plan for aquatic resource preservation, enhancement, establishment or restoration." Is this alternative intended to cover mitigation banks?

Finally, we question the statement:

Generally, the amount of mitigation required for Alternative 1 will be less than for Alternative 2. The amount required for Alternative 2 will be less than for Alternative 3. The rationale for this relationship is based on the level of certainty that a compensatory mitigation project will meet its performance standards. Certainty increases when there is a corresponding increase in understanding of watershed conditions.

Minkin and Ladd⁹ conducted a study of the effectiveness of compensatory mitigation projects (creation and restoration) required for permitted impacts in New England and to determine what programmatic

⁹ Minkin, Paul and Ruth Ladd. 2003. Success of Crops-Required Wetland Mitigation in New England. U.S. Army Corps of Engineers. New England District

improvements might be necessary. Their study found "Forty of the mitigation projects (67%) were determined to meet permit conditions and would be considered successful by that standard. *However, only 10 (17%) were considered to be adequate functional replacements for the impacted wetlands.*" [emphasis added] They attribute the failure of mitigation projects to compensate for wetlands losses in part to "...*inadequate mitigation amounts* for permitted impacts and also for *inappropriate functional replacements*, e.g., replacing forested wetlands with open water, emergent, and/or scrub-shrub systems."

They also raised the issue of whether created or restored wetlands could replace those of natural systems and concluded that 1:1 mitigation ratios were inadequate:

The study also seems to indicate that insufficient compensatory mitigation has been required to offset project impacts. With impacts to 352.31 acres of wetlands and proposed compensatory mitigation of 324.12, of which no more than 317.65 became wetland, there would be an overall net loss in acreage of wetlands. Since there was considerable out-of-kind mitigation, there were increased losses in the more complex wetland types. The general replacement of forested wetlands with open water and emergent systems has resulted in considerable loss of function, particularly forested wildlife habitat and water quality functions such as denitrification, which occur best in seasonally saturated wetlands.

They also considered the results of other studies in reaching a conclusion that greater mitigation ratios are required:

He [Whigham] questioned whether there is any scientific justification for the underlying assumption of mitigation, that restored and created wetlands function similarly to natural wetlands with regard to biodiversity and nutrient cycling. He also noted that concentrating on replacing lost acreage amounts fails to account for the wetland degradation and functional loss resulting from creation and restoration of mitigation wetlands of lower functional value. In this regard, *greater compensatory mitigation acreage is required to replace the lost functions of impacted systems, i.e., mitigation to impact ratio must be greater than 1:1.* [emphasis added]

Minkin and Ladd concluded that there is a need for higher mitigation ratios if preservation and enhancement are proposed as compensatory mitigation:

An examination of enhancement and preservation, included in the overall mitigation proposals for several of the study projects was not reviewed in this study. Although preservation and enhancement can be important parts of a mitigation proposal, they do not prevent a net loss in wetland acreage and may not prevent a net loss in wetland function.

Mitigation banks might fair no better in providing compensation for lost wetland functions and values. Kihlslinger¹⁰ reported that:

¹⁰ Kihlslinger 15

A recent more comprehensive review of 12 mitigation bank sites in Ohio found that 25% of the bank areas studied did not meet the definition of wetlands (Mack and Micacchion 2006). Of the actual wetland acreage, 25% was considered in poor condition, 58% was fair, and 18% was good quality in terms of vegetation as compared to natural reference wetlands. The study also found that amphibian community composition and quality was significantly lower at banks than at natural forest, shrub, or emergent wetlands and that pond-breeding salamanders and forest-dependent frogs were virtually absent from the bank sites. A recent study from Florida found that of the 29 banks evaluated, 70% fell within the moderate to optimal range of function. Although the baseline conditions of most sites were in the high functional range, most of the projects relied upon enhancement, rather than restoration, as the mitigation method (Reiss et al 2007).

It must be noted that while the findings of the Florida study are more encouraging, these banks employed enhancement, rather than restoration, and that raises the concern that wetlands functions and values continue to be lost.

Brown and Lant¹¹ conducted a survey of 68 mitigation banks within the United States as of January 1996 were achieving no-net-loss of wetland acreage nationally and regionally. Their review revealed that:

Although 74% of the individual banks achieve no-net-loss by acreage, overall, wetland mitigation banks are projected to result in a net loss of 21,328 acres of wetlands nationally, 52% of the acreage in banks, as already credited wetland acreages are converted to other uses. While most wetland mitigation banks are using appropriate compensation methods and ratios, several of the largest banks use preservation or enhancement, instead of restoration or creation. Most of these preservation/enhancement banks use minimum mitigation ratios of 1:1, which is much lower than ratios given in current guidelines. Assuming that mitigation occurs in these banks as preservation at the minimum allowable ratio, ten of these banks, concentrated in the western Gulf Coast region, will account for over 99% of projected net wetland acreage loss associated with banks.

Recommendation: Sufficient evidence exists to demonstrate the general failure of compensatory mitigation in replacing lost wetlands functions and values. For this reason, significantly higher mitigation ratios should be required, and as was stated earlier, an emphasis should be placed upon avoidance and minimization of impacts to waters of the state.

9. Definitions:

Recommendation: Ecological Restoration Projects - The definition of "Ecological Restoration Projects" should be reworded as follows:

¹¹ Brown, Philip H. and Christopher L. Lant. 1999. The Effect of Wetland Mitigation Banking on the Achievement of No-Net-Loss. Environmental Management Vol 23, No. 3 pp. 333-345
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means projects undertaken for the primary purpose of assisting or intervening in the recovery of an aquatic ecosystem that has been degraded, damaged or destroyed to restore some measure of its natural condition and to enhance the beneficial uses or potential beneficial uses of water. These projects do not include projects required under permit for compensatory mitigation, or projects designed to service required compensatory mitigation, projects that facilitate land development, or projects with the primary purpose of property protection.

Please refer to our earlier discussion regarding the definition of "minimal impacts projects."

C. Conclusion

Version 6.5 of the WRAPP represents a significant departure from the Version 4.3. The proposed language of the draft policy is not consistent with existing federal regulations and is not protective of waters of the state. The draft policy as written will result in the continued loss of the state's wetlands resources.

We are deeply disappointed in the manner in which the development of this policy was revised, as there is tremendous value for RWQBC staff and the regulated community, in developing a standardized and consistent wetland definition and permit review process.

For these reasons, we must strongly oppose Version 6.5 of the WRAPP. We hope that our analysis and recommendations in this letter will result in the SWRCB staff's revising the current draft WRAPP so that a final policy will result in protection of waters of the state, comply with federal regulations, and produce a "no net loss" of state wetlands.

We also note that the version we were provided in October 2012 was Version 4.3. This latest Version is 6.5 - we request copies of the intervening versions of the WRAPP.

Thank you for the opportunity to review this version of the policy and provide you with our comments. If you have any questions, please do not hesitate to contact any of us.

Sincerely,

Carin High
Citizens Committee to Complete the Refuge

Arthur Feinstein
San Francisco Bay Chapter Sierra Club

Kim Delfino
Defenders of Wildlife

Lisa Belenky
Center for Biological Diversity

Ian Wren
San Francisco Baykeeper



August 7, 2012

Mr. Bill Orme
State Water Resources Control Board
Division of Water Quality
P.O. Box 100
Sacramento, CA 95814

Dear Mr. Orme,

Thank you for meeting with us on July 5, 2012 to discuss the preliminary draft Wetlands Area Protection and Dredge and Fill Permitting Policy (WRAPP). During our conversation, we raised some issues with the way wetlands that are certified as Prior Converted Croplands (PCCs) are dealt with in the WRAPP. We are following up on this conversation with some more detailed information about what we think the problems are with the way PCCs are treated in the WRAPP and our suggestions for potential changes State Water Resources Control Board staff may want to consider in order to address these concerns.

Statement of Problem: The exclusion of certified Prior Converted Croplands (PCCs) from regulation under the Wetland Area Protection and Dredge and Fill Permitting Policy (WRAPP), puts at risk untold thousands of acres of wetlands in California that satisfy the wetland definition and criteria elaborated within the WRAPP.

The exclusion of PCCs in the WRAPP creates an internal contradiction and inconsistency over the proposed state definition of wetlands because the PCC definition used by NRCS relies on a narrower definition of wetlands than used in the WRAPP. PCCs are defined for the purposes of the NRCS certification as requiring actual "ponding" or surface inundation. The WRAPP definition, instead, recognizes that wetlands are also defined by having soils "saturated within the upper substrate" without requiring surface inundation or "ponding". This latter approach is consistent with the Army Corps delineation manual as the State Board required of the WRAPP definition. If two different definitions of wetlands are used, one for PCCs that are exempted and one for all other wetlands, it would create a definitional inconsistency that undermines the WRAPP's attempt to codify a clear definition of wetlands.

Potential Resolutions:

1) **Do not exempt PCC wetlands from the definition of wetlands** - The State Water Resources Control Board (SWRCB) could adopt a policy similar to that of Washington State. The State of Washington Department of Ecology (DOE) has never recognized Prior Converted Croplands as a regulatory definition:

The state Water Pollution Control Act (90.48 RCW) does not distinguish prior converted croplands from other wetlands. Rather, all "waters of the state" are covered by the law, and PCCs that are still wetlands are considered waters of the state.¹

The State does recognize that, "...many PCC wetlands have been significantly degraded and will regulate them according to the functions they provide."

2) Exempt PCC wetlands from regulation so long as the lands are kept in agricultural production: If the SWRCB includes PCC wetlands within the definition of wetlands the SWRCB might retain the exemption for PCCs so long as the lands are kept in agricultural production. [PLEASE NOTE - this approach has the potential of allowing degradation of wetlands functions and values.] If this course is taken, the following "recapture" language should be added to the policy language

Certified PCCs wetlands are not subject to Procedures as long as historic agricultural operations are continued and do not result in reductions or impairments in the reach, flow, and circulation of waters of the State.

Basis for concerns:

A common misconception is that lands identified/certified by the Natural Resources Conservation Service (NRCS) as Prior Converted Croplands have been sufficiently altered to permanently remove wetland characteristics and in particular, the hydrology required to maintain wetland functions and values. The designation Prior Converted Croplands is a regulatory construct for the purposes of implementing the "swampbuster" provisions of the Food Security Act (FSA) and does not reflect the ecological functions or values of these lands.

Votteler and Muir² observed:

Clinton's proposals relaxed some of the current restrictions on agricultural effects on wetlands and increased funding for incentives to preserve and restore wetlands on agricultural lands. The administrative policy *excluded 53 million acres of "prior converted croplands" from regulation as wetlands...* [emphasis added]

And Ruffolo³ also referred to changes implemented by the Clinton Administration:

¹ Washington State Department of Ecology. "Focus on Prior Converted Croplands/Wetlands - Clarifying State Authority and the Regulatory Process." Publication 03-06-032. December 2003.

² Votteler, Todd H. and Thomas A. Muir. "Wetland Management and Research - Wetland Protection Legislation." National Water Summary on Wetland Resources. United States Geological Survey Water Supply Paper 2425. <http://water.usgs.gov/nwsun/WSP2425/legislation.html>

³ Ruffolo, Jennifer. "The U.S. Supreme Court Limits Federal Regulations of Wetlands: Implications of the SWANNC Decision." California Research Bureau. CRB 02-003. 2002

...It also made the Soil Conservation Service, in the Department of Agriculture, responsible for wetland jurisdictional determinations on agricultural lands under both the Clean Water Act and the "Swampbuster" program (the Food Security Act). The administration also excluded "prior converted croplands" from regulation. *This exemption excluded from regulation vast tracts of wetlands that had been drained and converted to agricultural use prior to 1985. [emphasis added]*

National Food Security Act Manual (5th Edition) Definition of Prior Converted Croplands:

Prior Converted Croplands are defined in the 5th Edition of the National Food Security Act Manual (NFSAM) in the following manner:

A. Definition

(1) Prior converted cropland (PC) is a converted *wetland* where the conversion occurred before December 23, 1985; an agricultural commodity had been produced at least once before December 23, 1985; and as of December 23, 1985, the area was capable of producing an agricultural commodity (i.e., did not support woody vegetation and was sufficiently drained to support production of an agricultural commodity). The conversion could include draining, dredging, filling, leveling, or otherwise manipulating (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) the *wetland* area. In addition, PC meets the following hydrologic criteria:

- (i) If the area is not a pothole, playa, or pocosin, *inundation* is less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent change or more).
- (ii) If the area is a pothole, playa, or pocosin, inundation is less than 7 consecutive days and saturation is less than 14 consecutive days during the growing season in most years (50 percent chance or more). [emphasis added]

The definition clearly labels PCCs "wetlands." The determining factor in whether a hydrologically modified (prior to December 23, 1985) wetland is regulated or not, is that of ponding. Is the (hydrologically modified) wetland inundated (ponded) for less than 15 consecutive days? If so (unless it is a pothole, playa, or pocosin), it is a PCC and not regulated, even if there is saturation of soils to the surface.

The proposed State definition of wetlands is:

An area is wetland if, under normal circumstances, it (1) is continuously or recurrently inundated with shallow water or saturated within the upper substrate; (2) has anaerobic conditions within the upper substrate caused by such hydrology; and (3) either lacks vegetation or the vegetation is dominated by hydrophytes.

According to this definition, PCCs could be considered wetlands.

Why is the exemption of PCC wetlands of concern?

In response to the question "Why regulate PCC wetlands?" the Washington State Department of Ecology asserts:

The original assumption behind exempting PCC wetlands from federal regulation was the belief that these wetlands had been so altered they no longer provided important wetland functions. However, *PCC wetlands in Washington perform many of the same important environmental functions as other wetlands, including recharging streams and aquifers, storing flood waters, filtering pollutants from water and providing wildlife habitat.* [emphasis added]

The National Research Council⁴ observes (p. 159):

One potential concern, however, is that agricultural wetlands will begin to diverge as separate from those regulated by USACE and EPA. This divergence could be fostered by maintenance of separate delineation manuals for agricultural and nonagricultural wetlands. Several *major differences based on policy rather than science* are already apparent. [emphasis added]

And, recommends for "Especially Controversial Wetlands" (p. 167):

Wetlands on agricultural lands *should not be regulated differently from other wetlands.* These wetlands may have many of the same attributes as do other wetlands, including maintenance of water quality, and *there is no scientific basis for delineating them under definitions or federal manuals different from those applicable to other wetlands.* [emphasis added]
...Wetlands in agricultural settings can enhance runoff water quality...

Sheldon, et al,⁵ asserts:

...However, *many wetlands meeting the criteria for PCC would still be expected to provide important functions,* given that the criteria for being designated "Prior Converted" require only that the wetland has been manipulated for production of commodity crops since 1985 and *does not pond* for more than 14 consecutive days during the growing season.
...In addition, the authors of Volume I *have documented significant water quality and quantity functions provided by PCCs* in projects reviewed and permitted by the Department of Ecology (This data has not been published). [emphasis added]

⁴ National Research Council. "Wetlands: Characteristics and Boundaries." National Academy Press. Washington D.C. 1995

⁵ Sheldon, Dyanne, Tom Hruby Ph.D., Patricia Johnson, Kim Harper, Andy McMillan, Teri Granger, Stephen Stanley, Erik Stockdale. "Wetlands in Washington State Volume 1: A Synthesis of the Science." Ecology Publication #05-06-006. Department of Ecology Publications Distribution Office. <http://www.ecy.wa.gov/biblio/0506006.html>

If, as the Preamble for the Wetland Area Protection and Dredge and Fill Policy (WRAPP) states, the "California Water Boards have the responsibility to preserve, enhance, and restore the quality of California's aquatic resources, including wetlands, for present and future generations;" and if, one of the purposes of the Policy is to "achieve no net loss and a long-term gain in the quantity, quality and diversity of waters of the state including wetlands," then this Policy must not exempt prior converted croplands from regulation.

Need for Protection and Recapture of Areas Certified as PCC:

PCC wetlands receive no protection under the FSA. Thousands of acres of wetlands could be at risk if the SWRCB fails to include language that explicitly prohibits actions that reduce or impair the reach, flow or circulation of waters of the State.

According to a "Wetland Fact Sheet - Prior Converted Cropland" published by the Vermont NRCS⁶:

Areas that qualify as Prior Converted Cropland (PC) are exempt from the Swampbuster provision of the Farm Bill. *These areas can be further drained, cropped or manipulated* without loss of eligibility for USDA program benefits. [emphasis added]

Once determined PCC, the wetland is forever considered PCC. Despite the fact that other categories of wetlands on agricultural lands are considered "abandoned" following the cessation for five consecutive years of management or maintenance, "PC lands will not be considered abandoned under the Food Security Act."⁷ The NFSAM does state:

This definition of abandonment is applicable only for compliance with the Food Security Act. Regulations governing the Clean Water Act may provide different or additional criteria for abandonment, particularly with regard to PC areas. Participants who are planning to abandon PC areas should be advised to discuss their plans with the COE before proceeding.

The February 25, 2005 Memorandum to the Field issued jointly by USDA-NRCS and the USACE provides the following guidance regarding PCCs:

Prior-Converted Cropland. Prior-converted cropland (PC) is identified for the purpose of implementing the FSA, and refers to wetlands that were converted from a non-agricultural use to cropland prior to December 23, 1985. While a PC area may meet the wetland hydrology criterion, production of an agricultural commodity or maintenance or improvement of drainage systems on the PC area, is exempt from the swampbuster provisions. A certified PC determination made by NRCS remains valid as long as the area is devoted to an agricultural use. *If the land changes to a nonagricultural use, the PC determination is no longer applicable and a new wetland determination is required for CWA purposes.* Specific guidance will be provided by the Corps in the near future addressing how the Corps will treat PC designations for land that changes from agricultural to non-agricultural use. [emphasis added]

⁶ Vermont NRCS. "Wetland Fact Sheet - Prior Converted Cropland."
http://www.vt.nrcs.usda.gov/programs/Wetland_Compliance/Wetland%20Fact%20Sheet%20-%20Prior%20Converted%20Cropland.htm

⁷ NRCS. National Food Security Act Manual. M_180_NSFAM_514_D, Fifth Edition, November 2010.

This language explicitly states that PCC determinations and exemptions remain valid only as long as the land is in agricultural use. However, the specific guidance promised has yet to be provided by the USACE.

Conversion of agricultural lands to development is an ever present threat in California. The potential loophole afforded by non-regulation of PCC wetlands must be avoided in the WRAPP. We are aware of situations where landowners/developers have attempted to utilize PCC determinations to preclude Clean Water Act regulation of wetlands.

It may be that the SWRCB attempted to preclude such a loophole through inclusion of the language of Section 1.C. of Appendix 1:

C. Inapplicability of Exclusions

Any discharge incidental to any of the excluded activities listed and subsections 3(A) - 3(F) which (1) brings an area or part of an area of water of the state into a use to which it was not previously subject; (2) where the flow or circulation may be impacted; or, (3) the reach of such water is reduced shall be required to obtain a permit pursuant to this Policy. Where the proposed discharge will result in significant discernible alternations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.

The language of this section refers to "excluded activities listed in subsections 3(A) - 3 (F)." However, those subsections appear to relate to the permit application process, so it is unclear whether the intent was to refer to agricultural exemptions (as are found in the Clean Water Act). Clearly this language speaks to *exempted* activities. The issue of PCCs, is that according to the current language of the WRAPP, these lands are not even considered jurisdictional, which is another matter entirely.

The WRAPP must not exempt conversion of PCC wetlands to non-agricultural uses and as stated above, must not exempt activities that would reduce or impair the reach, flow of circulation of waters of the State. The intent is not to regulate historic and ongoing farming operations, but to regulate any change in use that will result in the conversion of wetland areas to uplands. Changes in use could encompass proposals to remove the agricultural wetlands from farming for the purposes of development, but could also include changes in farming to crops that require drier soils. The latter is especially of concern, as we are aware of several instances in the San Francisco Bay Area where landowners brought in fill or deep ripped soils (e.g. Borden Ranch⁸) under the guise of "normal farming operations" on lands where we were aware of future development proposals. The WRAPP should not include loopholes that would allow the unregulated conversion of wetlands to uplands.

Other Issues to Consider Regarding PCCs:

⁸ Stricherz, Kelly. Borden Ranch Partnership V. U.S. Army Corps of Engineers: Getting ripped - Destroying Wetlands for Wine. 6 Great Plains Natural Resources Journal. 170 (2002)
http://nationalaglawcenter.org/assets/bibarticles/stricherz_getting.pdf

Every five to seven years agricultural policies are evaluated and reauthorized or modified by U.S. lawmakers through the Farm Bill authorization process. As can be observed through the current 2012 Farm Bill, the process is highly politicized and not without controversy. The SWRCB must not merely adopt NRCS's definition of PCC wetlands, as that definition is vulnerable to changes in definition or conditions with each Farm Bill reauthorization. As an example, PCC wetlands were originally considered abandoned if they were not cropped for five years. This policy was drastically altered with the 1996 Farm Bill, which stated PCC wetlands will not be considered abandoned under the FSA. Once a wetland is identified PCC, that designation (and exemption from regulation) lasts forever, as long as the lands are used for the production of food, forage or fiber, and so long as alterations of PCC wetlands do not alter the hydrology of nearby wetlands. We have already discussed the need for a incorporation of a recapture clause to prevent the unregulated drainage and conversion of these wetlands under the guise of normal farming operations. SWRCB must ensure its policies are well defined and protective of waters of the state. SRWCB must ensure its policies will not inadvertently be altered by changes adopted by an outside agency - especially one that does not have protection of waters of the state as its primary charge. To do anything less would be abrogating the SWRCB's responsibilities under the Porter Cologne Act.

No inventory of PCC determinations is available, thus it is impossible to determine how many thousands of acres of wetlands may be at risk.

Crumpton etal⁹observed:

Lack of public information on cropped wetlands: Because USDA does not make the data public, very little information about cropped wetlands is available. USDA, the Corps, EPA and the Interior Department coordinated wetland protection under a 1994 interagency agreement. USDA confidentiality, however, was one reason that agreement terminated. It is essential that these data be made public in order to assess the policy implications of various alternatives for dealing with cropped wetlands.

Without such information, it is impossible for the SWRCB to determine the environmental impacts of exempting PCC wetlands from regulation.

On February 28, 2005, the NRCS provided rationale for withdrawing from the 1994 Memorandum of Agreement (Ag MOA)¹⁰. Of note are the following:

- The 2002 amendments *prohibit NRCS from sharing confidential producer information to agencies outside USDA. This makes it illegal for NRCS to provide wetlands delineations and determinations to the COE and EPA for CWA permitting and enforcement.*
- *1996 amendments eliminated the concept of "abandonment" for prior converted (PC) cropland. As a result, land may be considered non-wetland for Swampbuster purposes, and wetland for CWA purposes...*

⁹ Crumpton, William, Arnold van der Valk, Will Hoyer, David Osterberg. "Wetland Restoration in Iowa Challenges and Opportunities." The Iowa Policy Project. May 2012. www.iowaPolicyProject.org

¹⁰ NRCS. "Guidance on Conducting Wetland Determinations for the Food Security Act and Section 404 of the Clean Water Act." http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_007868.pdf

- The MOA states that NRCS wetland determinations shall not be revised without interagency coordination. However, *NRCS is required to comply with the decision of the USDA National Appeals Division, which may overturn a previous wetland determination without coordination among the agencies.*
- Per the MOA, NRCS agreed to conduct wetland determinations on agricultural land for the purpose of obtaining a CWA permit. *Regulations at 7 C.F.R. §12.30 state that NRCS's responsibilities regarding wetlands extend only to implementing the wetland conservation provisions of the FSA.* [emphasis added]

Clearly, NRCS cannot comply with the spirit and intent of the 1994 MOA. The FSA fails to provide any regulatory protection of wetlands identified as prior converted croplands. It has been seven years since the NRCS and USACE withdrew from the Ag MOA and the USACE has yet to provide any specific guidance regarding recapture of PCC wetlands. Failure to recognize prior converted croplands as wetlands would be an abrogation of the SWRCB's responsibilities to "preserve, enhance, and restore the quality of California's aquatic resources, including wetlands, for present and future generations."

We appreciate the opportunity to provide you with our thoughts on Prior Converted Croplands. If you have any questions, please contact Carin High at cccerefuge@gmail.com.

Sincerely,

Carin High and Arthur Feinstein
Citizen's Committee to Complete the Refuge

Lisa Belenky
Center for Biological Diversity

Jim Metropulos
Sierra Club California

Kelly Catlett
Defenders of Wildlife

cc: Dominic Gregorio
Jonathan Bishop
PCC Issues

August 2012

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I am trying to understand the Board's position regarding prior converted croplands and in particular why the Board seems willing to remove these areas from regulatory authority.

Why are these lands not included in the recapture clause 1. C. 1? There seems to be some fudge factor added in for PCCs in 1.C.3 and 1.C.4, but why would areas that meet the State's proposed wetlands criteria not be eligible for recapture, when other wetlands located on agricultural areas clearly are? This introduces an internal inconsistency that does not exist in the federal regulations.

This also introduces an inconsistency between federal and state regulation of these lands, because lands that are determined to be regulated wetlands by the Corps might not be regulated by the Water Board. I am aware of a project in Newark, that has supported salt marsh harvest mouse habitat, the mouse has been trapped on the site, the lands had a prior converted croplands designation. The site is on diked baylands, has been cropped, but is proposed for development. The Corps required a delineation consistent with the 87 manual. The proposed draft policy would be inconsistent with federal regulation in this situation because according to the State's policy, this area would not be considered wetlands. [I understand the State might issue WDRs in this situation, but again, I thought the intent of the policy was to strive to achieve consistency - excepting areas no longer regulated by the Corps due to the Rapanos and SWANCC decisions.

Over the years I have had Corps staff complain about the problem of prior converted croplands. In their minds this issue is as important to deal with as Rapanos and SWANCC.

Does the resistance to protect these wetlands arise because PCCs were mentioned as excluded in the 1993 California wetlands policy? That particular portion of the policy predates important changes in the manner in which the Corps and NRCS deal with prior converted croplands - namely the dissolution of the memorandum by the USDA - copy attached.

Many lands that have been designated prior converted croplands meet all three wetlands criteria and in fact still maintain wetlands functions and values and are protective of beneficial uses. I have seen ag lands where crops are planted - clearly are not thriving because of the soil saturation, and the land owner has tried to obtain a PCC designation (within the 9 bay area counties) - this regulatory end run was avoided because the Corps would not agree to accept PCC designations on lands where development has been proposed (conversion of use)...

Prior converted croplands designations are often used by landowners to convert wetlands so that they can ultimately be developed and thus avoid any regulatory oversight or mitigation. This is inconsistent with a policy of "no net loss of wetlands."

Our experience and that of others is that there is little documentation available for the public to verify prior converted cropland designations are appropriate - in fact, we were denied access to the information at the state level - this was appealed to D.C. and the state was told information had to be released, but when it was, it was in a manner that made it extremely difficult to determine where these lands were located and the extent to which

wetlands were being impacted. In fact, later 2005 guidance from NRCS makes it explicit this information cannot be released:

NRCS may not disclose confidential information regarding a producer's personal information, such as objectives or decisions, conservation compliance determinations (HEL/WC), natural resource inventories, or environmental assessments to agencies outside of USDA. This includes wetland delineations and labels. [copy of document attached]

The 2002 amendments prohibit NRCS from sharing confidential producer information to agencies outside USDA. This makes it illegal for NRCS to provide wetland delineations and determinations to the COE and EPA for CWA permitting and enforcement.

From an environmental review perspective, how can the Board determine the impact of not regulating or recapturing prior converted croplands if it doesn't have access to this information? How many acres of land that meet all the proposed criteria for wetlands be impacted by this policy?

As mentioned earlier, the Corps has had a policy of recapturing prior converted croplands that would be converted to another use - NRCS' policy has changed over the years - per the 2005 document referred to above: 1996 amendments eliminated the concept of "abandonment" for prior converted (PC) cropland. As a result, land may be considered non-wetland for Swampbuster purposes, and wetland for CWA purposes.

The sole difference between an NRCS regulated "farmed wetland" and non-regulated "prior converted cropland" is whether the wetlands pond water - the soils could be saturated to the surface meeting the state's proposed criteria of hydrology (and the Corps') but not pond water on the surface. Is it really the State's intention to declare these lands are not wetlands and to provide no recapture for these areas?

Is there any possibility of having an off-line discussion about this? I know there will be many other issues to discuss on February 14th. I would like to understand why there is such resistance to protecting waters of the state that may clearly meet the criteria for the proposed wetland definition and provide important wetlands functions and values.

Regards,
Carin High

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May 19, 2011

State Water Resources Control Board
Attn: Jeanine Townsend, Clerk to the Board
P.O. Box 100
Sacramento, CA 95812-2000

Re: Wetland Area Protection Policy and Dredge and Fill Regulations, Initial Study

Dear State Water Resources Control Board:

The California Coastal Commission staff welcomes the opportunity to submit comments on the *Wetland Area Protection Policy and Dredge and Fill Regulations, Initial Study* (hereafter, "Initial Study"). The Coastal Commission is one of several state agencies with regulatory authority over development affecting wetlands, and the Commission has an MOA with the State Water Resources Control Board (hereafter 'State Water Board') to coordinate the protection and restoration of wetlands and other coastal waters through the California Nonpoint Source Control Program Plan. Commission staff has also been an active member of the California Wetland Monitoring Workgroup and provided guidance regarding Coastal Commission wetland regulatory and programmatic objectives to members of the Workgroup and the Technical Advisory Team (TAT). We have provided written comments to the State Water Board, San Francisco Regional Water Board, and the Natural Resources Agency regarding these efforts¹.

We are supportive of the State Water Board's effort to develop policies to address state wetlands outside the coastal zone that have lost protection under existing federal law following the 2001 *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC) and 2006 *Rapanos* U.S. Supreme Court decisions, such as vernal

¹ Letter to: Board Members, State Water Resources Control Board. April 16, 2007. Re: Proposed Wetland and Riparian Area Protection Policy. From: Al Wanger, Deputy Director, Energy, Ocean Resources and Water Quality, California Coastal Commission.

Letter to: Ben Livsey, Environmental Specialist, SF Regional Water Quality Control Board. October 19, 2007. Re: California Coastal Commission-Wetland Definition Process. From: Deputy Director, Energy, Ocean Resources and Water Quality, California Coastal Commission.

Letter to: Jeanine Townsend, Clerk to the Board, State Water Resources Control Board. March 5, 2008. Re: Resolution to Develop a Policy to Protect Wetlands and Riparian Areas. From: Al Wanger, Deputy Director, Information Technology and Water Quality, California Coastal Commission.

Letter to: Brian Baird, Assistant Secretary for Ocean and Coastal Policy, California Natural Resources Agency. July 13, 2009. Re: Draft State of the State's Wetlands. From: John D. Dixon, Ph.D., Environmental Program Manager, California Coastal Commission.

Letter to: Brian Baird, Assistant Secretary for Ocean and Coastal Policy, California Natural Resources Agency. November 20, 2009. Re: Public Comment Period; State of the State's Wetland Report. From: Jonna D. Engel, Ph.D., Staff Ecologist, California Coastal Commission.

pools and salt pans. The Initial Study's proposed wetland definition and policy responds to the loss of federal Clean Water Act authority over certain California wetlands resulting from the SWANCC decision by addressing wetland resources regardless of whether they constitute "navigable waters" under the aforementioned decisions. The proposed wetland definition further addresses the lack of federal jurisdiction protection over wetland systems that do not include vegetation (e.g. salt pans).

However, our main concerns regarding the State Water Board's efforts to develop a wetland definition and wetland protection policy, as laid out in our previous comment letters, have not been resolved or addressed in the Initial Study. We continue to be concerned that the wetland definition proposed by the State Water Board is put forth as a "state" wetland definition, suggesting that it applies to all state agencies, rather than a State Water Board wetland definition, which Bill Orme explained at a March 23, 2011 meeting with us, was the intention behind this effort. This is important because the wetland definition proposed by the Initial Study does not include some areas defined as wetlands by the Coastal Act and Coastal Commission Regulations. In addition, we think that the Initial Study should acknowledge the Coastal Commission's jurisdiction and regulatory approach to protecting wetlands.

The public is not aware that the term 'wetland' is construed differently by different agencies and that the statutory mandates of agencies with regulatory authority over wetlands are not the same. An introductory paragraph could simply explain that existing wetland definitions differ depending on the frequency and duration of inundation or saturation that they require. The definition proposed by the State Water Board is similar to that of the Army Corps of Engineers in this regard, whereas the Coastal Commission definition, like the U.S. Fish and Wildlife definition, simply requires an area to be wet enough to support wetland plants or promote the formation of hydric soils. This includes areas further toward the dry end of the moisture gradient than the proposed State Water Board definition. Neither definition is right or wrong. The Fish and Wildlife definition was originally developed to protect wetland dependent plants and wildlife, whereas the Army Corps definition had its genesis in the Clean Water Act. It is currently common practice among wetland delineators and their clients to distinguish "Coastal Commission wetlands" and "Army Corps wetlands." We recommend that you increase the clarity of your efforts by using the more precisely descriptive term "State Water Board wetlands" rather than the generic and variously defined "wetlands," as practitioners surely will.

We recognize the value of the proposed delineation guidelines and acknowledge and appreciate that the proposed definition is more protective than the U.S. Army Corps' federal definition. We commend the technical rigor that led to their development by the State Water Board and TAT. We believe there should be a clear distinction between producing an inclusive definition of the State Water Board's regulatory authority over wetlands and the publicizing of a definition for wetland resources that purports to be a "statewide" definition, which could create confusion given the more inclusive definition used under the Coastal Act and affirmed by the courts (see, e.g., *Kirkorowicz v. California Coastal Commission* (2000) 83 Cal.App.4th 980, 990). We recommend that the Initial

Study be amended to clarify that its purpose is to establish a State Water Board wetland definition and State Water Board jurisdictional authority over those wetlands. We also encourage you to include in the Initial Study acknowledgement of the Technical Advisory Team's recommendations that there be explicit recognition that additional wetland resources exist outside the areas defined by the modified three parameter delineation process, resources which they termed "Aquatic Support Areas." They defined an "Aquatic Support Area" as

... an area that either (1) meets the hydrology criterion for wetland, but not the substrate criterion (regardless of vegetation); or (2) meets the substrate criterion, but not the hydrology criterion (regardless of vegetation); or (3) meets neither the hydrology criterion nor the substrate criterion, but meets the vegetation criterion. Such areas often exist in close proximity to wetlands or in areas that are transitioning (temporally or spatially) to or from wetlands.

Besides any protection that the State Water Board may apply to such areas, there is a practical benefit for the regulated public. Areas meeting the proposed definition of State Water Board wetlands contained in the Initial Study combined with areas meeting the definition of "Aquatic Support Areas,"^{2,3} correspond exactly with Coastal Commission wetlands. Therefore, property owners who have completed the two-part delineation for the Water Board will also have met the Coastal Commission's delineation requirements.

In addition to our main concerns and comments presented above, we provide the following observations and suggestions:

- The Initial Study does not elucidate how the wetland definition proposed in the Initial Study is more protective of wetlands than the federal wetland definition.
- We suggest including another table following Table 1 that lists all existing agency wetland definitions (e.g. CCC, CDFG, USFWS, ACOE).
- "Current Statutory & Regulatory Framework" Section, page 6, covers CEQA and NEPA; however, the Coastal Act and the Coastal Commission's statutory and regulatory framework is not included and should be.
- Table 3 should include a reference to Section 30233 of the Coastal Act, which provides the Coastal Commission's regulatory framework for development within wetlands.

² Technical Advisory Team, California Wetland and Riparian Area Protection Policy. June 25, 2009. Technical Memorandum No. 2: Wetland Definition. Produced by San Francisco Estuary Institute.

³ Technical Advisory Team, California Wetland and Riparian Area Protection Policy. April 9, 2010. Technical Memorandum No. 3: Landscape Framework for Wetlands and Other Aquatic Areas. Produced by San Francisco Estuary Institute.

May 19, 2011

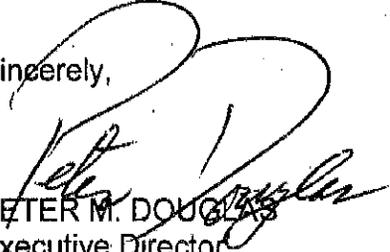
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- "State & Local Land Use Planning", page 12. There is no mention of the Coastal Act or Local Coastal Plans – a discussion of both should be added.

If the State Water Board adopts the wetland definition proposed in the Initial Study without our suggested changes we believe it will cause confusion in the regulated community and lead to the perception of conflicts among state regulatory agencies that do not exist.

We hope that you will consider our thoughts and comments for revising the Initial Study. Please do not hesitate to contact Jonna Engel at (805) 585-1800 if you have any questions.

Sincerely,



PETER M. DOUGLAS
Executive Director