

Elizabeth Lucas
San Diego, CA 92117
maldaklib@earthlink.net

September 18, 2017

Chair Felicia Marcus and Board Members
State Water Resources Control Board
1001 I street, 24th Floor
Sacramento, CA 95814



Subject: Draft Procedures for Discharges of Dredged or Fill Materials to Waters of the State

Dear Chair Marcus and Board Members:

Thank you for the opportunity to review and comment on the draft Procedures for Discharges of Dredged or Fill Materials to Waters of the State (Procedures) and the associated draft Staff Report, both dated July 21, 2017. I am writing to request that you adopt the draft Procedures with the changes suggested below. The implementation of the Procedures would slow down further losses of wetlands and may result in the restoration of some of the acreage and functions of the over 90% of California's lost historic wetlands. It is particularly critical that California act now to protect its remaining wetlands given the uncertain fate of federal wetlands regulations in the aftermath of President Trump's decision to roll back federal protections for wetlands.

Please consider making the changes described below to the Procedures to improve their potential to better protect wetlands and better compensate for future losses of wetland acreage and function.

1. Among other things, Executive Order W-59-93 identifies the duplicative and inconsistent nature of wetlands programs and California's policy to streamline regulatory permitting processes. The Procedures address these concerns well starting at line 1167, Appendix A, Subpart J, §230.93 (General compensatory mitigation requirements.), Paragraph (j). Please clarify and strengthen the intent of Paragraph (j) as follows.
 - a. Create a new footnote #32 and move to it the examples provided in Paragraph (j)(1) of other programs as follows (including the added text): "Examples of such other programs include but are not limited to: (a) tribal, state, or local wetlands regulatory programs, (b) other federal programs such as the Surface Mining Control and Reclamation Act, Corps civil works projects, and Department of Defense military construction projects, and (c) compensatory mitigation under the state and federal Endangered Species Act or for Natural Community Conservation Plans and Habitat Conservation Plans.
 - b. Now, add to what is left of Paragraph (j)(1) the underlined text to Paragraph (j)(1) as follows:
Compensatory mitigation projects for Orders may also be used to satisfy the environmental requirements of other programs³² if the mitigation is consistent with the terms and requirements of those programs and subject to the following considerations.
 - c. Despite the added text to new footnote #32, retain the text at Paragraph (j)(3) to reinforce the importance of consistency with or at least not undermining the compensatory mitigation requirements of NCCPs and/or HCPs.
2. The draft Staff Report prepared in support of the draft procedures correctly concludes that "compensatory mitigation throughout the state has not been adequate to prevent loss in the quantity and

quality of wetlands that qualify as waters of the state, and other waters of the state, in California” (page 53). The Staff Report also states the Procedures include, “clarification of compensatory mitigation requirements with the intent of making compensatory mitigation more robust and successful in California” (page 53), but at least three aspects of the Procedures call this intent into question. The changes offered below would address these shortfalls.

- a. The procedures allow for a less than one-to-one compensatory mitigation ratio at Line 305 *et seq.* of Section IV.B.5.c. Given the overall loss of wetland acreage and functions in California to date despite the State’s “no net loss” policy, nothing less than a one-to-one ratio is acceptable, and that is usually insufficient. Please omit the allowance for anything less than one-to-one.
- b. The Staff Report and studies of wetland mitigation elucidate reasons why wetland mitigation often fails to adequately mitigate for the loss of wetland functions. One reason is the lack of adequate long-term management (including monitoring) of the mitigation areas whether inside or outside mitigation banks. Hence, the following comments, which apply only to mitigation outside of mitigation banks.
 - Starting at line 1469, Appendix A, Subpart J, §230.97 (Management) states, “A real estate instrument, management plan, or other long-term protection mechanism used for site protection of permittee-responsible mitigation must be approved by the permitting authority in advance of, **or concurrent with**, the activity causing the authorized impacts” (emphasis added). Please omit “or concurrent with” as it can take months, sometimes years, to negotiate and execute such instruments, plans, and/or mechanisms. The dredge/fill activity whose mitigation necessitates such instruments and/or mechanisms should not be authorized to commence prior to the execution of the instruments unless (a) a funding mechanism for long-term management of the mitigation area has already been fully funded, (b) the acquisition of all the credits has occurred if all the mitigation is to be through mitigation bank credits, the acquisition of all the credits, or (c) the full in-lieu fee has been paid if all the mitigation is to be through this mechanism. This requested stipulation is contemplated by Subparagraph 4 in §230.97 which states, “For permittee-responsible mitigation, any long-term financing mechanisms must be approved in advance of the activity causing the authorized impacts.” This requested stipulation, however, is that the funding mechanism be fully funded, not just approved, prior to onset of the authorized activity.
 - Starting at line 1514, Appendix A, Subpart J, §230.97 (Management) states, “(2) A long-term management plan should include a description of long-term management needs, annual cost estimates for these needs, and identify the funding mechanism that will be used to meet those needs.” Please add a requirement that the cost estimates be based on an agency-approved property analysis record (PAR) (<http://www.ecosystemmarketplace.com/resources/property-analysis-record/>) or similar software program.
 - Starting at line 1517, Appendix A, Subpart J, §230.97 (Management), the draft Procedures further elaborate on the long-term financing. Again, please add a requirement that the cost estimates be based on an agency-approved PAR; correctly prepared, PARs account for inflation and contingency funding needs.
- c. The scientific literature on wetlands is rife with evidence that one of the primary challenges in adequately compensating for the loss of wetland functions is the collective toll on the wetlands resulting from edge effects. One approach to minimizing those effects is to conserve and manage upland buffers to the adjacent wetland mitigation areas. The Staff Report discusses buffers in this context and the Procedures include some provisions about buffers.
 - Starting at line 307, the Procedures state, “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.” This equates to crediting buffers as wetland acreage.

- First, this seems inconsistent with the Staff Report’s assertion that “buffers are not included in the calculation of the ratio” (pages 80 and 82). By allowing a reduction in the mitigation ratio if a buffer is provided, this provision essentially accounts for the buffer in the determination of what the ratio will be.
 - Second, the Staff Report states, “If buffers are required by the permitting authority as part of the compensatory mitigation project, compensatory mitigation credit will be provided for those buffers” (page 33, emphasis added), which makes my former point.
 - Third, this contravenes California Fish and Game Commission’s policy which states, “In no case shall such buffers be credited as wetland acreage necessary to achieve compliance with the requirements of the Commission's policy regarding retention of wetland acreage.”¹
 - Fourth, this makes no biological sense and would further compromise the no-net loss policy. The mitigation ratio should be established to mitigate the loss of acreage and functions of wetlands. A buffer should be provided to better ensure that the lost wetland functions are realized and persist.
- The definition for “buffer” starting at line 796 is concerning. It states, “Buffer means an upland, wetland, and/or riparian area that protects and/or enhances aquatic resource functions associated with waters of the state from disturbances associated with adjacent land uses.” A buffer to wetland or habitat should be upland habitat or at least a combination of primarily upland with a transition to the wetland.
- The Procedures do not stipulate any minimum requirements for buffers such as (a) width from the outside edge of the wetland or (b) allowed human activities in buffers (there should be none in the biological buffers). With no such minimum requirements, there is no assurance about the efficacy of the buffers in provided the biological protection they should.

Based on the foregoing observations in 2(c), please (a) remove the option of reducing the mitigation ratio if a buffer is provided, (b) require a buffer for all wetland mitigation, (c) increase the mitigation ratio if a buffer is infeasible, (d) redefine buffer to exclude from it the very habitat it is intended to protect, and (e) establish minimum requirements for buffers or require that the permitting agency base the requirements for buffer widths *etc.* on scientific literature – there is much literature that informs on the issue of edge effects and buffers needed to minimize them.

3. To minimize adverse effects, the Procedures require, “Timing discharge to avoid spawning or migration seasons and other biologically critical time periods” [Subpart H – Actions to minimize Adverse Effects, §230.75 Actions affecting plant and animal populations, Subparagraph (e) (line 749)]. It is unclear whether this applies only to aquatic species (though it seems it does) or includes species that use uplands some part or all of the year, such as amphibians and birds. Given the potential for significant adverse effects of dredge and fill activities on sensitive species using upland habitat adjacent to those activities, please clarify that this provision is intended to apply to both aquatic and upland species or add provisions to address the need to avoid such effects on upland species, by either seasonal restrictions or otherwise.
4. Definitions. Please further clarify the meaning of “permittee-responsible mitigation” by modifying the definition (starting on line 857) for the term - distinguish it from mitigation at a mitigation bank or in-lieu fee mitigation.

1 The entirety of the Commission’s text on buffers within its DEPARTMENT OF FISH AND GAME RECOMMENDED WETLAND DEFINITION, MITIGATION STRATEGIES, AND HABITAT VALUE ASSESSMENT METHODOLOGY is found at <http://www.fgc.ca.gov/policy/p4misc.aspx#WETLANDS>.

Again, I urge you to adopt the proposed Procedures with the changes suggested herein.

Sincerely,



Elizabeth Lucas

ec: Regional Water Quality Control Board, San Diego Region
Wildlife and Habitat Conservation Coalition