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



September 18, 2017

Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1101 I Street, 24<sup>th</sup> Floor  
Sacramento, CA 95814

*Submitted via email to: commentletters@waterboards.ca.gov*

**Re: Comments on Preliminary Draft: State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State**

Dear Ms. Townsend, Chair Marcus, and Board Members:

On behalf of Heal the Bay, we submit the following comments on the proposed State Water Resources Control Board *Preliminary Draft: State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State* (“Preliminary Draft Policy” or “Policy”). After reviewing the revised Preliminary Draft Policy released on July 21, 2017, we were pleased to see numerous changes that strengthen the policy, such as a clear and strong jurisdictional definition of wetlands as well as removal of many “case-by-case” approaches that were taken in the previous draft. However, we still have a number of concerns with the proposed Policy, all of which were addressed in our previous comment letter.<sup>1</sup> Our primary concern remains that the compensatory mitigation requirements could lead to a net-loss of wetlands in the State, a possibility which we cannot support. There are sections in the current policy that call into question the ability to meet the primary goal of the California Wetlands Conservation Policy, which is to ‘achieve a long-term net gain in the quantity, quality, and permanence of wetlands acreage’.<sup>2</sup> Further, we still have concerns over the ratio for compensatory mitigation, the possibility that off-site compensatory mitigation does not consider environmental justice, exemptions for prior converted cropland and irrigation ditches leading to a net-loss of wetlands, and the technical definition of wetlands.

<sup>1</sup> Heal the Bay to State Water Resources Control Board, Comment letter on Preliminary Draft: Procedures for Discharges of Dredged or Fill Materials to Waters of the State. August 18, 2016.

<sup>2</sup> Draft Staff Report for State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State, p. 45; Executive Order W-59-93 available at:

[http://www.waterboards.ca.gov/water\\_issues/programs/cwa401/docs/wrapp2008/executive\\_order\\_w59\\_93.pdf](http://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/wrapp2008/executive_order_w59_93.pdf).



California has lost more than 90% of its historic wetland habitat.<sup>3</sup> The specter of California losing all of its wetland habitat prompted elected officials to adopt the California Wetlands Conservation Policy in 1993 (Executive Order W-59-93)—the ‘no net loss policy’. There is an understanding of the importance of wetland habitats. Wetlands in both natural and urban environments provide important functions like regulating nutrients, pollution, and water, while providing a vital base of the food chain. Further, wetlands provide habitat, shoreline stability, and educational and recreational opportunities. As such, a strong policy is required that prioritizes and promotes wetland protection, restoration, and management.

**Compensatory mitigation should be required at a minimum ratio of 3:1 acres of mitigation wetland to natural wetland lost.**

Mitigation should *never* be under 1:1. It is important to note that mitigation should be considered a last resort for meeting the goals of the ‘no net loss’ policy. Nationwide, methods to replace wetlands have largely proven unsuccessful in fully re-creating the biodiversity and habitat lost in areas where the wetlands have been impacted or destroyed. Research shows that in general, mitigation requirements in 401 and 404 permits have been shown to be insufficient to ensure high performance in mitigated wetlands. According to Kihslinger<sup>4</sup>, studies of the ecological performance of compensatory mitigation have shown that compensatory wetland projects fail to replace lost wetland acres and functions more often than they fail in their ability to meet permitting requirements. As such, many compensatory mitigation projects would be seen to be successful in their permit requirements but would be failing to provide adequate functional replacement of the lost 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.<sup>4</sup>

The Amount of Compensation section of the Preliminary Policy states that the Water Boards shall presume that a one-to-one acreage or length of stream reach is the minimum necessary to compensate for wetland or stream losses.<sup>5</sup> This minimum is unjustifiably low. The Policy should contain a higher mitigation ratio to create a margin of safety to account for the disparity between the functions and acreage lost and the mitigated area. In situations where wetland destruction is

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<sup>3</sup> Draft Staff Report for State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State, p. 31.

<sup>4</sup> Kihslinger, Rebecca. 2008. Success of Wetland Mitigation Projects. National Wetlands Newsletter, vol. 30, no. 2. Environmental Law Institute.

<sup>5</sup> Preliminary Policy for State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State, p. 9.



unavoidable, a minimum mitigation ratio of 3:1 for new mitigation area to original wetland area should be established in this Policy to ensure that adequate area is set aside to mitigate wetland impacts. Setting the minimum mitigation ratio at a 3:1 ratio will also help ensure that avoidance of impacts is prioritized over minimizing and compensating for impacts. This ratio is a standard minimum that is frequently required for projects approved by the California Coastal Commission. Thus, use of this 3:1 ratio would ensure consistency with another State Agency and set a strong precedence of wetland protection throughout the State, setting a positive example for other Agencies to follow in strengthening their mitigation requirements. Again, we appreciate that a variety of factors are taken into account when determining the final mitigation ratio and that the ratio is oftentimes over 1:1; however, we urge taking a precautionary approach and setting the minimum at a higher ratio (3:1), with the burden of proof on applicants to demonstrate why a lower ratio may be warranted.

As proposed, the Policy suggests that compensatory mitigation could be under a 1:1 ratio without providing any evidence to support the rationale.<sup>6</sup> Given the scientific literature on limited success in wetland mitigation projects—Kihslinger<sup>7</sup> and Ambrose<sup>8</sup>—and the goal of no net-loss of wetlands, a policy that allows for a net loss of wetlands is concerning. We do appreciate that a mitigation ratio of less than 1:1 will only be granted on an “exceptional basis”<sup>9</sup>; however, given that this scenario is so rare, why even include it if there is the possibility that it could result in a net-loss of wetlands? We are glad to support a policy that might result in occasional net-gains of wetlands if this scenario results in mitigation projects that occasionally protect or restore highly functioning wetlands in greater amounts than were impacted.

### **Compensatory mitigation should consider social benefits as well as ecological benefits.**

We appreciate that a watershed approach, focused on ecological benefits, is prioritized for compensatory mitigation. However, we recommend that proposed mitigation projects be required to assess losses in environmental services to communities. For some mitigation projects, simply using the watershed approach may adequately capture the lost ecological area and habitat functions, but not properly replace the environmental services of open, green space in communities. A policy without such an assessment risks exacerbating environmental health

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<sup>6</sup> Preliminary Policy for State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State, p. 9.

<sup>7</sup> Kihslinger, Rebecca. 2008. Success of Wetland Mitigation Projects. National Wetlands Newsletter, vol. 30, no. 2. Environmental Law Institute.

<sup>8</sup> Ambrose. 2007. *An Evaluation of Compensatory Mitigation Projects Permitted Under Clean Water Act Section 401 by the California State Water Resources Control Board, 1991-2002*

<sup>9</sup> Preliminary Policy for State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State, p. 9.



inequalities by redistributing ecological amenities outside the sub-watersheds even if the mitigation remains within the larger watershed. For example, the Los Angeles River Watershed is over 800 square miles. Compensatory mitigation for a project in Compton Creek—a tributary in the extreme southern part of the watershed, may occur at a common mitigation bank in Tujunga Wash<sup>10</sup>— a tributary located in the northeast portion of the watershed. While both are in the Los Angeles River watershed, and the Tujunga Wash may be a superior ecological project, the loss of additional green, open space in South Los Angeles is disproportionately impacting one community over another. In this example, the socio-economic communities differ greatly and the unequal distribution of open space and recreational opportunities becomes an environmental justice issue. Mitigation banking or in-lieu fee programs should not exonerate the applicant from providing some environmentally friendly project within the locale of the impacted area. We recommend that mitigation projects be kept as local as possible to avoid these concerns of redistribution of wetlands and open space areas.

**The process for determining mitigation fees should be open to public review and account for ecosystem services.**

We recognize that mitigation fee determination will need to be made on a project-by-project basis to account for site-specific factors. We urge the State Water board to make the mitigation fee determination process public, so that stakeholders have the opportunity to review and provide comment on the proposed mitigation fee determination calculations. Presenting opportunity for public review of how mitigation fees are determined for projects provides a forum to incorporate important local knowledge into the process and give an independent assessment of whether the impacts are adequately compensated. We also recommend that the State Water Board include a robust process for incorporating ecosystem services valuation into the mitigation fee determination process. Wetlands provide a number of ecosystem services, from water filtration to providing a natural buffer to sea level rise and storm surges associated with climate change. Therefore, it is imperative that compensation for wetlands degradation accounts for the many vital services provided by these important habitats.

**Exemptions could result in wetlands losses; do not allow exemptions for prior converted cropland (PCC) or irrigation ditches.**

The exemptions in the Preliminary Draft Policy are concerning and may result in net losses of wetlands. The Draft Policy excludes wetlands that have been certified as Prior Converted Cropland (PCC) from the permitting requirements. This provides a loophole where a landowner

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<sup>10</sup> <http://dpw.lacounty.gov/wrd/Projects/BTWMA/index.cfm>



could convert a PCC into an agricultural use and then could convert that agricultural use into a development, resulting in complete loss of wetland habitat. PCCs can provide important wetland functions and excluding them from the permitting requirements allows for a loophole in which wetlands and the ecosystem services they provide may be lost.

In addition, irrigation ditches may provide important habitat and ecological functions. Completely excluding them from permitting requirements is a mistake. Further, the definition of irrigation ditches needs clarification. For instance, soft-bottom creeks with concrete side channels (such as portions of Compton Creek and the Los Angeles River) may be classified as “irrigation ditches” or “engineered maintenance channels” but they provide important habitat and services to the ecosystem. Any impacts to these habitats should be properly avoided, minimized, or mitigated. We recommend that a precautionary approach be applied and that PCC and irrigation ditches/engineered maintenance channels be included in the Policy and that the onus be on the applicant to prove otherwise that they are exempt from the Policy.

**The Preliminary Draft Policy should utilize a one-parameter wetland definition.**

Of note, we recognize that the wetland definition in the Preliminary Draft Policy is more inclusive than the Army Corps definition. However, we are still concerned that the wetland definition used is not inclusive of all of California’s remaining wetland resources. In particular, sites that may be degraded but which are still prime targets for restoration or are located in critical areas should be considered wetlands. We urge the Board to consider adopting a one-parameter definition instead, such as a modified version of the one-parameter definition used by the U.S. Fish and Wildlife Service. That definition requires that only one of the wetland parameters - hydrology, hydric soils, or hydrophytic plants – be present for an area to be considered a wetland.

**Conduct regular audits to assess policy effectiveness and success.**

The State Water Resources Control Board (SWRCB) needs to audit the Policy to assess the program and policy recommendations. This process could be done by requiring the individual Water Boards to conduct an assessment and produce a report every 3-years to the SWRCB. Without any historic assessment of the policy, it is impossible to determine issues like 1) mitigation preference, 2) service area requirements, 3) Water Board integration with other programs (NPDES, WDR, and MS4) that encompass a watershed approach, 4) restoration evaluation and success, 5) avoidance analysis, 6) annual accounting of wetland acres, 7) spatial distribution or concentration and, 8) monitoring effectiveness. Further, the Water Boards should establish basin plan criteria and objectives for the 401 program: number of acres gained, lost, impacted, restored, and preserved; reduction goals for frequency of impact to wetland areas; adoption of CRAM or IBI scoring (or other metric) for determining the effectiveness of



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protecting biological-based beneficial uses. Required consistent tracking and assessment of all Policy permits will ensure that the California Wetlands Conservation Policy of “no net loss” and goal to “achieve a long-term net gain in the quantity, quality, and permanence of wetlands acreage” are upheld and that critically important wetland habitats are preserved, protected, and restored.

As expressed above, we urge the Board to:

- Strengthen requirements for compensatory mitigation to include a minimum 3:1 mitigation ratio, requirements for mitigation locations to be as local as possible, and consider social impacts and redistribution of open space
- The process for fee determination for compensatory mitigation should be public and adequately value ecosystem services
- Remove exemptions of prior converted cropland and irrigation ditches from the Draft Policy
- Broaden the definition of wetlands, utilizing a one parameter approach
- Conduct regular audits to assess Policy implementation and success

We thank you for your consideration of these comments. Please feel free to contact us at (310) 451-1500 with any questions.

Sincerely,

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