Index for Response to Comments; Letter #12				
Commenter	Comment Number	Representative Comment	Major Category Number	Major Category
Department of Water Resources	12.1	12.1	32	Overall Support
Department of Water Resources	12.2	12.3	44	Waters of the State Definition/Delineation
Department of Water Resources	12.3	12.3	44	Waters of the State Definition/Delineation
Department of Water Resources	12.4	12.4	44	Waters of the State Definition/Delineation
Department of Water Resources	12.5	12.19	46	Watershed Plan
Department of Water Resources	12.6	24.30	11	Complete Application (case-by-case basis)
Department of Water Resources	12.7	12.7	8	Compensatory Mitigation (General)
Department of Water Resources	12.8	12.17	15	Draft Compensatory Mitigation Plan Requirement
Department of Water Resources	12.9	24.64	37	Restoration Plan for Temporary Impacts
Department of Water Resources	12.10	12.10	2	404(f) Exclusion (Farming, Silviculture & Ranching)
Department of Water Resources	12.11	12.11	12	Complete Application (in all cases)
Department of Water Resources	12. 12	12.12	12	Complete Application (in all cases)
Department of Water Resources	12.13	3.21	42	Supplemental Data from Dry Season Delineation
Department of Water Resources	12.14	24.49	7	Climate Change Analysis
Department of Water Resources	12.15	12.15	27	Monitoring and Assessment
Department of Water Resources	12. 16	12.16	4	Alternatives Analysis Requirement
Department of Water Resources	12. 17	12.17	15	Draft Compensatory Mitigation Plan Requirement
Department of Water Resources	12. 18	12.18	9	Compensatory Mitigation (Ratio)
Department of Water Resources	12. 19	12.19	46	Watershed Plan
Department of Water Resources	12. 20	12.20	5	Application Timing & Process
California Natural Resources Agency	12.21	12.21	10	Compensatory Mitigation (Hierarchy)

Index for Response to Comments; Letter #12				
Commenter	Comment Number	Representative Comment	Major Category Number	Major Category
Department of Water Resources	12.22	12.22	9	Compensatory Mitigation (Ratio)
California Natural Resources Agency	12.23	12.23	30	Other

State of California California Natural Resources Agency

Memorandum

Date: August 18, 2016

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

Comment Letter # 12

From: **Department of Water Resources**

Subject: Comments on the SWRCB Procedures for Discharges of Dredged or Fill Materials to Waters of the State

The Department of Water Resources (DWR) provides the following general comments on the State Water Resources Control Board's (SWRCB's) proposed Procedures for Discharges of Dredged or Fill Materials to Waters of the State (Procedures). Additional comments requesting clarification on specific sections of the Procedures are included in this letter as Attachment A.

Alignment with Army Corps of Engineers (Corps) delineation and analysis processes

DWR appreciates the SWRCB's efforts toward alignment with federal application, alternatives analysis, definitions, etc. 12.1 However, the Procedures are unclear whether a "wetland area delineation approved by the Corps" refers only to Approved Delineations in the strict sense. 12.2 For ease of permitting, DWR usually prepares and submits a Preliminary Jurisdictional Determination (PJD) for verification with the Corps. 12.3 The PJD identifies all aquatic resources within a review area and all delineated aquatic resources are assumed to be jurisdictional. The PJD process saves a considerable amount of review time with the Corps and usually results in much faster processing of a CWA 404 permit because the process does not require the Corps and EPA to make determinations of significant nexus for each feature, which would be required in an Approved Delineation. As the PJD is the more widely used process by the Corps (rather than an Approved Delineation), and is usually preferred by applicants, **DWR suggests that the Board also accept PJD's which have been verified by the Corps.**

Additionally, it appears that the SWRCB project evaluation area may differ from the Corps' review/study area boundary in that the SWRCB requires mapping of "all aquatic resources that could be affected by the project," whereas the Corps direction has generally been to only include the area where project activities will take place. 12.4 This disparity in the area of evaluation may result in separate reports being prepared for each agency, even when the Corps' delineation includes all waters of the State within the project area. In this situation, will the SWRCB review the delineation area in its entirety or only the areas that fall outside of the Corps study area? Further, will this review happen concurrently with the Corps' review?

Watershed approach

The Procedures call for a watershed approach to compensatory mitigation. While such an approach would be beneficial from a biological and ecological standpoint, complications can arise in its implementation. For example, lack of access to private lands will make it difficult to carry out a proper watershed analysis and develop appropriate mitigation. DWR requests that SWRCB provide additional guidance as to the identification of watershed boundaries. Will USGS Hydrologic Units be used, and if so, at which of the classification levels (HUC 8, 10, or 12)? How should applicants analyze and delineate projects that are located in highly modified watersheds such as the Sacramento-San Joaquin Delta, where levees may isolate waters from the rest of the watershed? 12.5

Consistency in application of the Policy

For an entity such as DWR, which has projects located throughout the State, consistency in the application of a policy such as set forth in the Procedures is of paramount importance. In the "Additional Information Required for a Complete Application" section of the Procedures, there are numerous instances of the phrase "if required by the permitting authority on a case-by-case basis." DWR is concerned that having the information required for a complete application be determined on a case-by-case basis will lead to regional and potentially individual differences in the application of these requirements. We are concerned that determinations made on a "case-by-case" basis will lead to greater inconsistency in permitting, increase the time needed to obtain permits, and hinder DWR's ability to anticipate project costs and resource allocations. Rather than require the additional information described in IV.A.2 on a case-by-case basis, **the Department requests that the Procedures be drafted to indicate project actions or impacts that will trigger the additional analyses**. This guidance would allow project proponents to better anticipate time and resources necessary to provide a complete application. 12.6

Mitigation/restoration plan requirements

The procedures state that a compensatory mitigation plan may be needed as part of a complete application as determined on a case-by-case basis. It has been the experience of DWR that mitigation required by other agencies such as the California Department of Fish and Wildlife (CDFW) or the United States Fish and Wildlife Service (FWS) has often been accepted as adequate mitigation by a Regional Water Quality Control Board (RWQCB). In other cases, RWQCB has required additional mitigation. **DWR requests that the Procedures be amended to take into account cases where mitigation is or may be required by other agencies as part of the same project, and to provide clear guidance as to when additional information or mitigation may be required by the RWQCB.** 12.7

DWR also requests that the Procedures be modified to have the SWRCB or applicable RWQCB consult with other permitting agencies to develop a single, comprehensive mitigation plan for a project in order to prevent unnecessary delays and costs for a proposed project and mitigation plan. 12.8

In addition, the procedures require that a final restoration plan must be submitted prior to the issuance of an Order. DWR believes that the level of detail called for in a restoration plan for temporary impacts (planting palette, seed sources, etc.) is too high at this point in the application process. DWR's policy requires us to obtain an Order before soliciting construction contracts. An agreed upon restoration plan which specifies items in such high detail would be restrictive for the contracting process usually used by DWR, as we generally do not specify material sources to be used by the contractor that is subsequently selected. To do so would require DWR to significantly change the wording in our contracts, unnecessarily restrict contractor options, and could delay construction if product availability changes. **DWR therefore requests that the Procedures be modified to allow for the issuance of an Order which will require the final, specific details of a restoration plan, such as the specific native plant palette and seed sources, be determined after the issuance of the Order, subject to the assurance that the requirements of the Order will be met.**

12.9

DWR appreciates the opportunity to provide the foregoing comments on the Procedures. If you have any questions or would like to discuss the comments further, please contact Laurence Kerckhoff in the Office of the Chief Counsel at (916) 653-6186 or laurence.kerckhoff@water.ca.gov.

Carl A. Torgersen
Chief Deputy Director
(916) 653-6057

Attachment A

Specific comments requesting clarification to the Procedures

page	line	comment	
2	46	Do normal circumstances include pumping, such as in irrigation ditches? In cases where irrigation ditches are the only impacted aquatic feature, and Corps jurisdiction does not apply, we would need clarification from SWRCB and RWQCB to determine if they are jurisdictional waters of the state.	12.10
4	115	Access limitations to lands outside of the project area often restrict our ability to conduct on the ground assessments. Will it be acceptable for this map to be based on aerial photo interpretation only? Also, a clearer definition of waters that "could be affected" is needed. Current wording leaves the statement open to interpretation, and could range from a significant impact within the immediate area to an insignificant impact miles downstream.	12.11
4	126	Are there specific resources (such as basin plans) which should be used to obtain information on existing water quality impairments; source of impairments?	12.12
4	130	Please give examples of "supplemental field data" that may be required from the wet season? Is this requirement simply to question whether additional aquatic features were missed?	12.13
4	133	Is there additional guidance for assessment of the potential impacts associated with climate change and under what circumstances this will be required? For instance, the SED mentions (pg. 74 of 230) that projects subject to sea level rise or involving channelization should analyze potential effects of climate change such as flooding and increased precipitation patterns.	12.14
5	180	A water quality monitoring plan to be developed by the project proponent is a new requirement. Currently, the RWQCB stipulates monitoring requirements in their permits based on their specific water quality concerns for the area and project activities. It seems more appropriate to follow the current process rather than attempting to anticipate the RWQCB's requirements in developing a monitoring plan.	12.15
6	229	How and when will the SWRCB consult on development of the Alternatives Analysis? Will they consult with the project proponent during document development or with the Corps prior to document finalization?	12.16
7	281	Coordination with the other public agencies requiring mitigation is critical, as restoration plan conditions by CDFW (LSAA and ITP) and USFWS/NMFS (BO's) may lead to conflicting requirements.	12.17
8	292	A potential reduction in the ratio for compensatory mitigation which includes buffer areas is appreciated, as this measure is ecologically beneficial and cost effective for project proponents.	12.18
8	297	More information is needed regarding existing approved watershed plans. Will these be provided by the permitting agency? What is the appropriate area/size for the watershed analyzed in the watershed profile? This ties back to the uncertainty regarding the extent of the project evaluation area and waters that "could be affected" by the project.	12.19
11	408	Is it necessary to send application to division of water rights as well as 401 group? Does this mean that the Division of Water Rights is the permitting authority for activities that are associated with a diversion of water (rather than the Regional Boards)?	12.20
26	911	What is the definition of "within the same watershed" with respect to mitigation? HUC 8, 10, 12? How will the watershed approach be applied in areas like the Sacramento -San Joaquin Delta which consists of many leveed islands?	12.21
28	1002	If the watershed approach for the compensatory mitigation plan places value on the protection of terrestrial resources, will compensatory credit be allocated for those non-wetland acres?	12.22
32	1150	What does IVB7(a) refer to? There is no part (a).	12.23