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Santa Clara Water District	3.2	3.2	26	Legal, Procedural, Process Obligation
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Santa Clara Water District	3.28	1.5	4	Alternatives Analysis Requirement
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Santa Clara Water District	3.31	1.5	4	Alternatives Analysis Requirement
Santa Clara Water District	3.32	3.32	1	State Supplemental Dredge or Fill Guidelines
Santa Clara Water District	3.33	3.33	4	Alternatives Analysis Requirement
Santa Clara Water District	3.35	3.35	1	State Supplemental Dredge or Fill Guidelines
Santa Clara Water District	3.36	3.36	1	State Supplemental Dredge or Fill Guidelines
Santa Clara Water District	3.37	3.37	4	Alternatives Analysis Requirement
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Santa Clara Valley Water District

August 18, 2016

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

Re: Proposed Statewide Program to Regulate Discharges of Dredged or Fill Material

Dear Members of the State Water Resources Control Board:

INTRODUCTION

The Santa Clara Valley Water District ("District") applauds the longstanding effort of the State Water Resources Control Board ("State Board") to improve its programs to protect waters of the state and to coordinate its programs with pertinent federal programs to achieve some measure of consistency in the implementation of such programs across the state by federal agencies and the several regional water quality control boards.

However, the District is concerned that the proposed Procedures for Discharges of Dredged or Fill Materials to Waters of the State ("proposed Program"), issued on June 17, 2016, are not well suited to advancing the State Board's stated goals and, indeed, would impede them in important respects. The proposed Program[1] would, as well, seriously complicate and burden the District's continuing efforts to develop and implement environmentally sound programs and projects to provide flood protection and clean water to the communities of Santa Clara County.

The District urges the State Board to not adopt the proposed Program and, instead, conduct a robust stakeholder discussion process with the aim of assessing whether there is a need for a regulatory program of this sort and/or developing alternatives to the proposed Program that would better serve the public interest.

The District offers the following comments, some of which concern the proposed Program as a whole and some of which pertain to particular aspects of the proposed Program that would benefit from revision in the event the State Board decides to adopt some version of the proposed Program.

[1] The District refers to the proposal as the "proposed Program" because that term more accurately conveys the proposal's nature and scope than does the term "Procedures." The State Board proposes much more than mere procedures. By this proposal, it would prescribe a host of substantive rules, standards, and requirements as well, and require the regional boards not only to follow various procedures, but also to assess projects' compliance with the prescribed substantive rules, standards, and requirements in deciding whether to approve them.

I. INADEQUATE PUBLIC REVIEW OF NEW REGULATORY PROGRAM

A. Defective Notice of Proposed Rule

The State Board's notice of its proposed regulatory program is defective in substantial respects. If the State Board decides to press ahead with its proposal, it should issue a new, accurate notice and provide sufficient time and opportunity for public review and comment. 3.1

The Administrative Procedure Act requires a state agency proposing to adopt a regulation to publish a notice of the proposed adoption and afford the public an opportunity to review and comment on the proposal. (Gov. Code §§ 11346-11348.) The notice must, in order to inform the public of the nature, scope, and effects of the proposal, provide specified items of information, among which is an informative digest that includes, "[i]f the proposed action differs substantially from an existing comparable federal regulation or statute, a brief description of the significant differences and the full citation of the federal regulations or statutes." (Gov. Code § 11346.5.)

The State Board included several documents in its notice, including one entitled "Comparison of 404(b)(1) Guidelines to State Supplemental Dredged or Fill Guidelines" ("Comparison"). In this Comparison, the State Board explained:

> The State Supplemental Dredged or Fill Guidelines indicate how the Water Boards will implement the 404(b)(1) Guidelines, 40 CFR part 230.1 – 230.98, (federal Guidelines) under the Procedures for Discharges of Dredged or Fill Materials to Waters of the State (proposed Procedures). It is the intent of the Water Boards to be consistent with the federal Guidelines where feasible. Due to jurisdictional and procedural differences some modifications to the federal Guidelines were necessary. Generally, these changes or deletions were made to remove redundancy (especially where sufficiently described elsewhere in the proposed Procedures) and to account for other state requirements. Language that is struck out (~~**example**~~) means that the State Water Resources Control Board and Regional Water Quality Control Boards (collectively, Water Boards) will not apply that portion of the federal Guidelines in their issuance of 401 Certifications and/or waste discharge requirements (WDRs). Language that is added or changed (**example**) shows how the Water Boards will implement that portion of the federal Guidelines in their issuance of 401 Certifications and/or WDRs for dredged or fill projects in waters of the state. Modifications are included as Appendix A in the proposed Procedures and are named State Supplemental Dredged or Fill Guidelines. Please note that the numbering scheme of the federal Guidelines has been retained in Appendix A for the benefit of practitioners who are familiar with the federal Guidelines. In cases of conflict, Parts 1 through V of the proposed Procedures take precedence over the State Supplemental Dredged or Fill Guidelines.

Review of the Comparison and the State Supplemental Dredged or Fill Guidelines attached as Appendix A of the proposed Program, however, reveals that the Comparison does not 3-2

accurately show the modifications—additions or deletions—of the federal Guidelines purportedly included in the State Supplemental Dredged or Fill Guidelines as Appendix A. For instance, the Comparison shows section 230.10 of the federal Guidelines deleted (i.e., struck out) in its entirety. (Comparison 8-9.) The State Guidelines, however, after noting that the numbering scheme of the federal Guidelines has been retained, includes a lengthy section 230.10 that largely corresponds to section 230.10 of the federal Guidelines but differs in important particulars. (Proposed Program 16-17.) One reading the Comparison would be misled to think that section 230.10 of the federal Guidelines had been deleted from the State Guidelines. Moreover, one would read the Comparison in vain to find a description of the actual differences between the respective sections 230.10 in the two Guidelines. In another particular, the Comparison shows that a phrase "and the costs of the compensatory mitigation project" in section 230.93 is deleted. (Comparison 26.) Yet that phrase appears intact in section 230.93 of the State Guidelines. (Proposed Program 25.) Faced with these two conflicting documents, the public cannot know whether the State Board means to delete or retain this phrase.[2]

3-2 (cont.)

With the above discrepancies in place, the notice does not accurately inform the public of the State Board's proposal and it undercuts the ability and opportunity of the District and the rest of the public to review and comment on the State Board's proposal.

The State Board should issue a new, accurate notice with a corrected Comparison, and afford the public sufficient time to review and comment on its proposal.

3-3

B. Insufficient Time for Considered Public Review

For the past decade or so, the State Board has circulated various proposals to "fill the *SWANCC* gap" by developing procedures and policies to regulate discharges of waste into so-called non-federal state waters and wetlands, i.e., waters and wetlands that the U.S. Army Corps of Engineers ("USACE") does not regulate under the Clean Water Act ("CWA") as interpreted by the U.S. Supreme Court in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*") and *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*"). The State Board staff has engaged in discussions of these proposals with stakeholders. All along, the staff has emphasized that the proposals would apply only to so-called non-federal state waters and wetlands. As a practical matter, the USACE regulates nearly all waters and wetlands, so the State Board's proposals applied to only a tiny fraction of waters and wetlands within the state.

On June 17, 2016, the State Board issued a public notice of a 45-day comment period for a proposed regulatory program vastly different than any it had previously posited. This new proposal covers not just the so-called *SWANCC* gap that has been the rationale of the State Board's previous proposals, but rather extends to all waters of the state. Apart from this vastly expanded geographic extent, the proposal differs substantially in both its substantive and procedural aspects from those the State Board had posited for discussion in the preceding

[2] The District favors retaining it. The cost of mitigation is an obvious, pragmatic, and important consideration in determining the mitigation required in a permit.

3-2 (cont.)

decade. The State Board has since announced a two-week extension of the public comment period.

Apart from the difficulties posed by the State Board's defective notice of its proposal (discussed above), sixty-two days does not provide an adequate amount of time to review and analyze a regulatory program of this breadth, complexity, and importance and provide fully considered, comprehensive comments to the State Board. The District has endeavored to do what it can in the little time allowed, and these comments are the result. The District emphasizes, though, that it has simply not had sufficient time to analyze the proposed Program as fully and carefully as it warrants.

The District urges the Board to issue a new, accurate notice of its proposal and to afford the public sufficient time—e.g., four months or so—to enable adequate, meaningful and appropriate review of the proposed Program. The District is unaware of any urgency that would necessitate or warrant rushing a new regulatory program of this magnitude and complexity into effect in the brief span of just a few months. Apart from the benefit of careful and considered review, the risk of needless mistakes and unintended consequences counsels against such pointless haste. 3-4

II. NO SHOWING OF NEED FOR THIS PROPOSED NEW REGULATORY PROGRAM

The first and most basic question to ask of a proposal for a new regulatory program is: Why? What is the need for it? What is the problem it is proposed to solve? 3-5

The State Board staff proffers three problems or needs as reasons for proposing this new regulatory program. Each should be carefully analyzed to determine (1) whether it withstands scrutiny and actually is a real problem or need and (2) whether any such problem or need is of sufficient magnitude to warrant the burden and expense of creating and implementing a new regulatory program.

A. Fill the So-Called *SWANCC* Gap

It was the asserted need to "fill the *SWANCC* gap" that prompted the State Board staff a decade ago to consider developing policies and procedures to regulate those waters and wetlands not regulated by the USACE under the CWA. A close look at this so-called gap, though, reveals that it is more theoretical than real.

First, any such gap at most is exceedingly small. Under the CWA, even as interpreted by the Supreme Court in *SWANCC* and *Rapanos*, the USACE regulates all but a few waters and wetlands on the landscape. The State Board staff observes that only as much as 1% of the permits issued by the State Board and regional boards pertain to such waters and wetlands. (Staff Report 47, 173, 182.)

Second, as a practical matter, the size of any such gap is rendered all the smaller owing to permit applicants' common resort to the USACE's "preliminary jurisdictional determination" ("PJD") process. A PJD basically maps all of the waters and wetlands on a site without regard to

whether they are subject to federal jurisdiction under the CWA. Only if an applicant requests an "approved jurisdictional determination" ("AJD") does the USACE consider legal aspects (e.g., *SWANCC* and *Rapanos*) to determine and delineate jurisdictional waters. The three USACE districts in California together typically issue a few thousand PJDs and only a few score AJDs per year. Whatever gap there may be, can only arise among that handful of AJDs.

Third, it should not be overlooked that the State Board and regional boards already exercise the authority to regulate discharges of waste to all waters of the state under the Water Code whether or not such waters are also regulated under the CWA. Indeed, the State Board staff issued guidance memoranda in 2001 and 2004 emphasizing as much, and the Staff Report confirms as much. Whatever small gap there may be in federal law has thus already and always been filled by state law. There has never been any real "gap" in regulation of waters of the state.

Fourth, if there were any real need predicated on some sort of gap, one would have expected it to have been revealed in the past 15 years (since *SWANCC* in 2001 and *Rapanos* in 2006). Yet no crisis or problem concerning the filling of so-called "gap" waters has emerged in all that time.

Finally, there is an obvious disconnect between any such gap and the proposed Program. The proposed Program, unlike earlier suggestions of the State Board staff, would regulate not just this handful of "gap" waters, but rather every water in the state. 3-6

B. Address Inconsistency Among Regional Boards

The Staff Report alludes to inconsistency across the regional boards in requirements for discharges of dredged or fill material and notes there is no single accepted definition of wetlands at the state level. (Staff Report 1.) What, if any, actual problems result from these observations, the Staff Report does not say. In the absence of any showing of such problems, assessing the need for a new regulatory program to address them is difficult. 3-7

To the extent the State Board is concerned about the regional boards using standard forms and templates for applications and orders and such, that concern may readily be addressed by providing them with standard forms and templates. To the extent the State Board is concerned about the regional boards applying different standards in evaluating and acting on applications, that concern may readily be addressed by providing guidance on appropriate standards. Neither concern calls for creation and implementation of a major new regulatory program. 3.8

The proposed Program, moreover, not only entails much entirely unrelated to addressing inconsistencies among the regional boards, it leaves ample opportunity for inconsistencies to remain. Indeed, in many important respects, the proposed Program invites regional boards to employ a discretionary "case-by-case" approach to what is required of applicants. For instance, they may—or may not—require an alternatives analysis. (Proposed Program 4-5.) 3.9

To the extent that a desire for consistency drives the State Board's thinking, the obvious and by far most effective approach would be to dovetail the regional boards' programs and practices with those of the USACE. Such an approach would promise consistency not only among the several regional boards, but also between the federal and state programs. It would as 3.10

well largely obviate any need or incentive to distinguish between "federal" and "state" waters, since the manner of regulation would be largely the same in any case.

3.10 (cont.)

C. Address Inadequacy of Current Regulations to Prevent Wetland Loss

The Staff Report asserts that "current regulations have not been adequate to prevent losses in the quantity and quality of wetlands in California" (*id.* at 1) and "compensatory mitigation throughout the state has not been adequate to prevent loss in the quantity and quality of wetlands . . . ." (*id.* at 48). There is little to support these assertions, and in any event the proposed Program appears ill-suited to address them.

Section 5.2 of the Staff Report, which is cited to explain that current regulations have not been adequate to prevent wetland losses, does not support that claim and indeed shows largely the opposite. It observes that California experienced "historical" wetland losses. (Staff Report 28.) Such historical losses naturally do not evidence any inadequacy of the current regulatory regime to protect wetlands. Nor do they justify the proposed Program, since it would be unlawful to call on current permittees to mitigate historical wetland losses lacking any nexus with their proposed projects. The Staff Report recognizes that wetland loss "has slowed in recent years." (*Id.*) Even that understates the trend to no net loss and indeed net gain of wetlands. The Staff Report's tables confirm that in recent years the acreage of compensatory mitigation was roughly double the acreage of filled waters and wetlands. Table 5-2 shows permanent impacts in FY 2014-15 of 196.76 acres. (*Id.* at 22-23.) (It also shows temporary impacts of 392.67 acres.) Table 5-3 shows compensatory mitigation. Although the total compensatory mitigation is not identified, the sum of all such compensatory mitigation amounts to 474.87 acres—more than double the permanently impacted acreage. (*Id.*at 24-25.) Table 5.4 confirms that compensatory mitigation in California in 2004-2009 consistently created substantially more wetland acreage than was filled and thus *added* net wetland acreage. (*Id.* at 31.)

3.11

The Staff Report does not discuss the relative quality of either the impacted or mitigation wetlands reflected in those tables. In a discussion of literature later in the report, the staff notes that one author (Ambrose) writing in 2007 found that compensatory mitigation wetlands from projects permitted in 1991-2002 "are largely meeting their permit requirements in terms of area and/or establishment of wetland vegetation." (*Id.* at 30.) Ambrose added, though, that "most sites do not achieve stated ecological performance goals." According to these criteria, he said, the average mitigation site was "suboptimal." (*Id.*) Review of Ambrose's report reveals that the goals and criteria by which he grades the mitigation as suboptimal are entirely of his own making independent of agency permit conditions. In that report, he states: "Despite relatively high permit compliance, most mitigation sites were not optimally functioning wetlands based on the criteria we established from reference wetlands across the state." (Ambrose, An Evaluation of Compensatory Mitigation Projects Permitted Under Clean Water Act Section 401 by the California State Water Resources Control Board, 1991-2002 at iii (Aug. 2007).) Those reference wetlands were chosen with an eye to their high quality. (*Id.* at 24-25.) While acknowledging that it would have been useful to sample reference sites paired with impact sites to allow for something akin to comparison of impact sites with mitigation sites, Ambrose did not do that because it was not possible. (*Id.*)

It cannot be concluded from Ambrose, thus, that mitigation wetlands did not prevent loss of wetland quality as asserted in the Staff Report. The most that can be concluded is that mitigation wetlands sometimes fell short of the "optimal" conditions of the reference sites.

The evidence provided by the State Board thus establishes largely the opposite of what the Staff Report suggests. Compensatory wetland mitigation generally has (1) more than offset the loss of wetland acreage from permitted projects and, indeed, has contributed to a net gain of wetland acreage, (2) compensatory wetland mitigation has largely met permit requirements with respect to wetland acreage and vegetation, and (3) compensatory wetland mitigation may well have offset other qualitative aspects wetland impacts; certainly, there is no evidence showing that it has failed to do so.

3.11 (cont.)

There is nothing in the Staff Report to support its conclusion of "insufficient compensatory mitigation" (Staff Report 31), nor is there anything in the report showing anything about compensatory mitigation that needs or warrants fixing at all, let alone by a new regulatory program.

The proposed Program is symptomatic of issues raised by others. Specifically, numerous cities, counties, and public infrastructure agencies have not been able to effectively and efficiently work with regulatory agencies to ensure permits are obtained in a predictable manner, and that the public resources entrusted to them are appropriately utilized. A hearing has been requested to help the legislature and public better understand what policy issues may be present. Issues that may be addressed include identifying what is preventing agencies from issuing permits in a predictable and timely fashion, and what can be done so regulatory agencies better coordinate mitigation requirements across all agencies.

III. THE PROPOSED PROGRAM WOULD CREATE CONFUSION AND CONFLICT WITH EXISTING REGULATORY PROGRAMS

A. Proposed Definition of "Wetlands"

There is no need for a new, different wetland definition. The USACE and EPA have long defined "wetlands" by regulation under the Clean Water Act and have long delineated wetlands using the USACE 1987 Wetland Delineation Manual. In recent years, the USACE has refined its delineation method by developing regional supplements tailored to the environmental conditions of various ecological regions, two of which pertain to California. The USACE's well understood, peer reviewed wetland definition and delineation method serves California well. There is no need to replace it with a new definition that would conflict with the existing USACE and EPA definition.

3.13

Moreover, a new, different wetland definition would only (1) add to the complexity and expense of the regulatory process, (2) cause confusion and uncertainty about how to map and label waters and wetlands, and (3) add unnecessary paperwork.[3]

3.14

[3] At the risk of further conflict, the proposed Program also defines the related term "normal circumstances" differently than does the USACE. (Compare Proposed Program 13 and USACE Regulatory Guidance Letter 86-9

The underlying rationale for redefining "wetlands" appears to be a desire to encompass some unvegetated waters not categorized as "wetlands" under the federal definition. The Staff Report says nonetheless that the proposed "definition is effectively equivalent to the Corps definition as implemented through the Arid West Manual." (Staff Report 50.) That being so, one wonders why a new definition is proposed at all—and why the State Board does not simply embrace the USACE definition and its delineation manuals. The Staff Report fails to explain.[4]

3.15

Why the State Board would want to categorize some unvegetated waters as wetlands rather than waters is not apparent or explained. To the extent that the State Board is motivated to redefine "wetlands" to assure that application of the section 404(b)(1) Guidelines extends to certain unvegetated waters, it bears noting that the Guidelines themselves already do that. First, they generally apply to all waters of the United States. Second, even particular provisions that apply to "special aquatic sites" govern not only "wetlands," but also certain unvegetated waters, i.e., "mudflats."

3.16

The uncertainty engendered by the proposed new definition is exacerbated by the State Board's elaboration of the relationship, or rather lack thereof, between the new wetland definition and the term "waters of the state" in the Water Code. The staff report states:

3.17

> This definition does not affect the meaning of "waters of the state" as it pertains to the Water Boards' jurisdiction pursuant to the Porter-Cologne Act, nor does it modify the current authorities of the Water Boards to protect water quality. Rather, a statewide wetland definition would provide consistent identification standards for certain types of aquatic features that are sometimes difficult to identify in the field, and for which current policy does not provide adequate guidance. It is important to note, however, that regardless of whether an aquatic feature meets the wetland definition criteria, it may not qualify as a water of the state under the jurisdiction of the Water Boards. Whether a wetland feature is also a water of the state under the jurisdiction of the Water Boards must be decided on a case-by-case basis by Water Board staff, as is presently the situation. In other words, the adoption of the wetland definition under this proposed Procedures do not automatically extend the Water Board's jurisdiction to every aquatic feature meeting the definition.

(Staff Report 3.)[5] Why the State Board would define "wetlands" unrelated to "waters of the state" (i.e., could or could not be part of such waters), the Staff Report does not say. Why and how the State Board might regulate "wetlands" that are not "waters of the state," it also does not

3.17 (cont.)

(Aug. 27, 1986).) The State Board does not explain what it proposes this different definition. It is not necessitated by any jurisdictional or procedural differences in the federal and state programs.

[4] In discussing alternatives, the Staff Report almost addresses this question. It considers a three-criteria definition, such as the USACE definition, but finds it wanting for not covering some unvegetated areas. (Id. at 177.) By this attempted explanation, though, the Staff Report simply contradicts what it earlier acknowledged, i.e., the USACE definition as implemented through the Arid West Manual actually does cover such areas. (Id. at 49.)

[5] The proposed Program, however, is equivocal on this point. Elsewhere it states that "[t]hese Procedures contain a wetland definition in section II and wetland delineation procedures in section III, both of which apply to all Water Board programs." (Proposed Program 1.)

say. How and by what criteria the State Board would determine which wetlands are waters of the state and which are not, it does not say. 3.17 (cont.)

Notwithstanding the absence of any explanation or guidance by the State Board in this regard, the proposed Program would require applicants somehow to determine whether particular wetlands are waters of the state in order to complete an application. It would require that "[i]f wetlands that are waters of the state are present, a delineation of those wetlands" must be provided as part of a complete application. (Proposed Program 3.) How an applicant is to make that determination is unknown. 3.18

B. Jurisdictional Determinations

The proposed Program appears to conflict with the USACE program in other respects concerning jurisdictional determinations. Under the USACE's regulation (the new one and the prior one) defining "waters of the United States," certain features are expressly excluded. The proposed Program, however, is silent with respect to such features. How, if at all, would the proposed Program address delineating such features? 3.19

Will more staff be added and will staff be trained to conduct and review delineations under the new definition using the USACE delineation manuals as proposed? If not, confusion, mistakes, and delay may well be expected. 3.20

The proposed Program invites regional boards "on a case-by-case basis" to require applicants "if the wetland area delineations were conducted in the dry season," to provide "supplemental field data from the wet season to substantiate dry season delineations." This would be a major departure from the USACE method, and could substantially delay the review and approval of projects, perhaps by as much as a year. 3.21

The proposed Program suggests that the boards will rely on USACE delineations, but falls far short of actually doing so. It states that the boards "shall rely on any Corps-approved wetland area delineation *within the boundaries of waters of the U.S.*" (Proposed Program 6, emphasis added.) When the USACE delineates waters and wetlands on a site, though, it effectively identifies the portions of the site that are waters or wetlands as well as those that are not waters or wetlands. Some jurisdictional determinations, indeed, do not delineate any waters or wetlands on a site, and thus identify it entirely as uplands. By the proposed provision, though, the boards would be required to rely on a USACE delineation of waters and wetlands *only within those waters and wetlands*, seemingly leaving the boards free to disregard the USACE's delineation with respect to the rest of the site and, if they so choose, delineate other, additional areas of the site as waters and wetlands. The boards should rely on USACE jurisdictional determinations with respect to the entirety of the sites covered by those determinations. 3.22

The proposed Program sows further confusion by requiring applicants to submit maps to "accurately show . . . all aquatic resources that *may* qualify as waters of the state." (Proposed Program 3-4.) It adds that a map submitted for a USACE preliminary jurisdictional determination may satisfy this requirement if it includes all "potential" waters of the state. As the State Board has not explained which wetlands are waters of the state and which are not or 3.23

how to distinguish between the two, how is an applicant to map not just waters of the state, but also all aquatic resources that "may qualify" as waters of the state? 3.23

The USACE provides an administrative process to appeal jurisdictional determinations under the CWA. The proposed Program is silent on this subject. Will there be an appeal process and, if so, how will it work? 3.24

C. Alternatives Analysis

For many reasons, the proposed Program's provision for use of a revised version of the section 404(b)(1) Guidelines is most troubling.

1. General and Nationwide Permits

The proposed Program would substantially expand the scope of activities subject to an Alternatives Analysis far beyond those subject to that process under the federal Guidelines. Among the casualties would be the USACE's nationwide permit ("NWP") program. The proposed Program would largely gut the NWP program in California. The federal Guidelines provide specific requirements and policies for general permits, which include NWPs. (40 C.F.R. § 230.7.) The federal Guidelines expressly exclude general permits from the alternatives analysis process: "[C]onsideration of alternatives in §230.10(a) are not directly applicable to General permits." (*Id.*) Rather, the USACE includes a general condition in the NWPs calling for on-site avoidance and minimization: "The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site)." (NWP General Condition 23(a); 77 Fed.Reg. 10184, 10285 (2012).) While the proposed Program includes an exception for the alternative analysis where the water boards have previously certified a USACE's general permit (Proposed Program 7), it is important to note that the State Board has only granted certification for 13 of the 50 current nationwide permits. The proposed Program would negate the federal approach and treat NWPs the same as individual permits. In one fell swoop, thus, this longstanding federal program and its useful streamlining features would be lost in California. 3.25

2. Increased Time and Expense for All Permit Applicants

The proposed Program would, as a result, also substantially increase the expense and time needed to complete all permit processes, since it would subject many permits (particularly the NWPs to an entirely new requirement and process) and would subject the remainder to duplicative, yet independent, and potentially conflicting analyses by two agencies using similar, but not identical criteria. 3.26

Will more staff be added and will staff be trained to review Alternative Analyses under the new state Guidelines? If not, confusion, mistakes, and delays can be expected. In this regard, the experience of the San Francisco Regional Water Quality Control Board is instructive. That Board's use of the federal Guidelines in various circumstances has long been fraught with confusion, controversy, and delay. 3.27

3. Conflicting Decisions of Water Boards and USACE

The regional boards should not second-guess the USACE's application of the federal Guidelines and determination as to whether there is a practicable alternative to the proposed project that would have less adverse impact on the aquatic ecosystem and not have other significant adverse environmental consequences. There is no good reason for the boards to duplicate this involved analysis. Apart from the lack of any need, this process would substantially burden both applicants and boards and, moreover, raise the prospect of conflicting decisions by the boards and the USACE. The Clean Water Act specifically tasks the USACE with applying the section 404(b)(1) Guidelines developed by the EPA, and in section 401 it calls on the state to ensure that discharges of dredged or fill material will comply with certain provisions of the Act and with state water quality standards. It does not require or invite the state simply to duplicate and second-guess the USACE's application of the Guidelines.

3.28

The proposed Program calls for boards generally to defer to the USACE's determination of the adequacy of an Alternatives Analysis, but provides broad exceptions that largely swallow the rule and render the call for deference illusory. In the end, it says little more than a board shall defer to the USACE unless it disagrees with the USACE. (Proposed Program 6; Staff Report 60.)

The proposed Program also says nothing to require the boards to consult with the USACE regarding the adequacy of Alternative Analyses. Is a board to understand and consider the USACE's analysis or simply to conduct its own independent, parallel review without regard to the USACE's thinking? How will the boards coordinate their review of alternative analyses with that of the USACE? What, if any, process would be available to resolve conflicting determinations of the boards and the USACE?[6]

3.29

The District's past experience with its flood protection projects has demonstrated the potential for conflicting state and federal determinations, and such conflicts have indeed resulted in delay of projects that were developed to provide much needed flood protection benefits to communities in Santa Clara County. The District has partnered with the USACE to implement projects that the United States Congress authorized the USACE to construct with the District as the local non-federal sponsor responsible for acquiring land rights and providing matching construction funds. Currently, the USACE's process provides that an USACE Chief of Engineer Report (Chief's Report) be approved by Congress prior to beginning the design and construction of a project. Because the Chief's Report contains the federally approved alternative to be constructed, any significant change to that alternative calls into question whether it is the project Congress authorized for funding. Hence, once a project is approved and authorized by Congress,

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[6] The state Guidelines also call for the boards to determine that a discharge will not cause or contribute to significant degradation of waters of the state. (Proposed Program 6.) The State Guidelines omit, however, the pertinent provisions of the federal Guidelines elaborating on the meaning and the finding of significant degradation, and the State Guidelines do not otherwise define or explain "significant degradation" in this context. Will the boards define that term in keeping with the federal Guidelines or devise some new, different meaning? Will the boards defer the USACE's findings regarding significant degradation? In the event of conflicting decisions by the boards and the USACE, how will that conflict be resolved?

3.0

the District has very limited ability to modify its design. Should the regional board engage in its own alternative analysis and reach a different conclusion regarding the project approved by Congress during its permit review process, that conclusion would at best likely delay the project significantly or at worst, threaten federal funding for the project. This could make it financially infeasible to construct and thus eliminate the public health and safety benefits that would have been realized if the project was constructed.

D. Needless Conflict Between Federal and State Guidelines

The proposed Program would create and apply new state Guidelines, derived by creating a revised version of the federal Guidelines, deleting some provisions and adding entirely new ones. The Staff Report suggests that the new state Guidelines adhere to the federal Guidelines except to the extent necessary to account for "jurisdictional and procedural differences." The Staff Report states:

> The State Guidelines include relevant portions of the federal Guidelines. Full integration of the federal Guidelines was not possible due to jurisdictional and procedural differences. Therefore, relevant sections of the federal Guidelines were retained and non-applicable sections were excluded. Global changes and/or deletions were made to translated federal terms to the state equivalent, and account for existing state regulations.

(Staff Report 4.) Just what those jurisdictional and procedural differences are, the staff does not elaborate. Elsewhere, the Staff Report states:

> The intent of the state Guidelines is to align Water Board dredged or fill requirements with federal requirements, to the extent practicable. The text in the state Guidelines is retained from the federal Guidelines to avoid conflicting regulations. Full integration of the federal Guidelines was not possible due to jurisdictional and procedural differences. The state Guidelines includes relevant sections of the federal Guidelines. Sections of the federal Guidelines were excluded that were redundant with, or were not relevant to, state regulation. Global edits were made to the federal Guidelines to make them applicable to state regulation, such as "District engineer" has been changed to "permitting authority." However, the integrity of the state Guidelines is maintained because it includes only text from the federal Guidelines; no additional language was added.

(*Id.* at 73.)

This description appears to be inaccurate and incomplete. It obfuscates that at least some of the proposed changes in the Guidelines are not required by any such jurisdictional or procedural differences. They are rather policy choices. The state Guidelines simply differ from, and in some respects conflict with, the federal Guidelines. The deletion of Guidelines section 230.7 pertaining to general permits and the expansion of the alternatives analysis to cover NWPs is the most obvious such change. As the Staff Report fails to acknowledge this change as a policy choice, it does not endeavor to explain or justify it as one. Without explaining or

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justifying this policy choice, the Staff Report nonetheless alludes to it as such in its discussion of alternatives. In rejecting the obvious alternative adopting the federal Guidelines and associated guidance without any changes or modifications, the Staff Report says:

> The disadvantage would be a missed opportunity to adjust the federal program for long-standing Water Board issues with the federal program.

(Staff Report 179.) What those issues are and why the State Board proposes this policy change, it does not say. A major, long established, and useful program such as the USACE's NWP program should not be summarily tossed aside without explanation. Certainly, the failure of the State Board to acknowledge it proposes a policy change and explain its reasons for that change deprives the public of a meaningful opportunity to review and comment on that policy issue. If the State Board, for instance, does not like the NWP program for some reason, it should forthrightly say so and enable the public to understand and review the issue.

3.32 (cont.)

The proposed Program states: "The purpose of the alternatives analysis is to identify the least environmentally damaging practicable alternative (LEDPA)." (Proposed Program 6.) It then adds this definition: "LEDPA means the least environmentally damaging practicable alternative. The determination of practicable alternatives shall be consistent with the State Supplemental Guidelines, section 230.10(a)." (*Id.* at 13.) It also defines "alternative analysis" as "the process of analyzing project alternatives, including the proposed project, to determine the alternative that is both practicable and the least environmentally damaging. (*Id.* at 12.)

3.33

These provisions may serve to describe Alternatives Analyses in a conversational sense, but they are not quite right in a legal sense. Under the federal Guidelines, the purpose of an Alternatives Analysis is to provide the USACE with information enabling it to determine under Guidelines section 230.10(a) "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem and not have other significant adver environmental consequences." LEDPA is but an acronym for "least environmentally damagi practicable alternative." That term or phrase, in turn, is merely a convenient, shorthand refere to the requirement spelled out in section 230.10(a) of the Guidelines. If the phrase "least environmentally damaging practicable alternative" or its acronym "LEDPA" is to be used in a regulation, these terms should be understood and defined ultimately to mean exactly what that section prescribes—no more, no less. Otherwise, the regulatory use of a casual shorthand phrase or its acronym could effectively work a change in the substantive requirements of the Guidelines.

3.34 (combined with 3.33)

Compounding the prospect of conflict and confusion, the proposed state Guidelines delete critical definitions and explanations of the term "special aquatic sites" that appear in the federal Guidelines. (Proposed Program 15; Comparison 3, 5, 8, 9.) That term is central to the meaning and application of the Guidelines. Whether, why, and how the boards may, as a result, deviate from the USACE's understanding and use of the term "special aquatic sites," the State Board does not say. Again, this change is not necessitated by any jurisdictional or procedural differences in the federal and state programs.

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Moreover, the proposed state Guidelines delete a critical section (230.5) of the federal Guidelines prescribing the procedures to be followed in applying the Guidelines. (Comparison

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6.) This change as well is not necessitated by any jurisdiction or procedural differences in the federal and state programs. Nor does the State Board explain why it deleted this section or how it will apply the state Guidelines in the absence of a provision for such procedures.

3.36 (cont.)

The Staff Report mistakenly states at one point that an Alternatives Analysis determines whether a discharge is the least environmentally damaging practicable alternative that will achieve the "basic project purpose." (Staff Report 59.) Apart from the issue noted above, this statement should refer to "overall project purpose" rather than "basic project purpose." The distinction is critical. Under the federal Guidelines, the USACE looks to the basic project purpose (e.g., providing housing or transportation) to determine whether a project is "water dependent" in the sense that it must be sited on or near waters, and looks to the overall project purpose (e.g., provide a medium-sized single-family residential development to meet local demand near a particular city) to review alternatives to the project.

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The proposed Program provides exemptions from the Alternatives Analysis requirement. While any exemption from this unnecessary, problematic requirement would be helpful as far as it goes, these exemptions are too few and limited. (Proposed Program 7; Staff Report 61.) One exemption, for a project that "would be conducted in accordance with a watershed plan that has been approved by the permitting authority and analyzed in an environmental document that includes a sufficient alternatives analysis, monitoring provisions, and guidance on compensatory mitigation opportunities" (Proposed Program 7), is rendered uncertain by the absence of an explanation of what must be included in a "watershed plan" for it to qualify as such in this context.

3.38

Moreover, the exemptions apparently do not even apply if a board "is required to analyze alternatives to a proposed project in order to comply with CEQA. (*Id.*) Whether this limitation would apply only when a board is the lead agency under CEQA for a project is not apparent. If the State Board intends it to apply when a board is a responsible agency under CEQA, the limitation will nearly always preclude application of any of the exemptions, since the vast majority of discharges subject to the proposed Program will undergo some review under CEQA and the boards commonly will be responsible agencies in such reviews. Apart from this practical consideration, this limitation makes little sense for the additional reason that an analysis of alternatives under CEQA is much different than an analysis of alternatives under the federal Guidelines. Why the State Board would predicate an exemption of one such analysis on the need for the other analysis is not apparent.

3.39

The District appreciates the State Board's attempt to align the state's mitigation approach with the federal program's approach. However, the proposed Program establishes a preference for types of compensatory mitigation quite different than the preference established by the USACE in its regulatory program. The proposed Program prefers mitigation developed in connection with a watershed plan or through a watershed approach. (Proposed Program 4, 7-8.) In their 2008 Mitigation Rule, the USACE and EPA established a preference for mitigation provided through mitigation bank or in lieu fee program credits. (73 Fed.Reg. 19594, 19613 (2008); see 40 C.F.R. § 230.93(b)(1).) Acceptable but less preferred is permittee-responsible mitigation developed under a watershed approach. (*Id.*)

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The proposed Program thus sets up a conflict of mitigation preferences that well could and logically would lead the boards and the USACE to prefer entirely different plans or approaches to mitigating a project's impacts. Applicants will be caught in the middle. The State Board says nothing of how these conflicts are to be resolved.

3.40 (cont.)

IV. CONTENTS OF COMPLETE APPLICATIONS

A. Conflict with Permit Streamlining Act

The Permit Streamlining Act requires each agency to publish a list specifying in detail what is required for a complete application (Gov. Code § 65940) and specifically prohibits any such list from including an extension or waiver of the time periods prescribed in the Act within which an agency must act on an application (Gov. Code § 65940.5). The Act requires agencies to determine in writing within 30 days of receiving an application whether that application is complete and transmit that determination to the applicant. (Gov. Code § 65943.) That indeed is a logical predicate of the whole statutory scheme of prescribing a time limit for agency action on an application, after which the application will be deemed approved. (Gov. Code § 65950.) After an agency accepts an application as complete, it may request an applicant to clarify, amplify, correct, or otherwise supplement the information required for the application, but cannot request new or additional information not specified in the list. (Gov. Code § 65944.)

The proposed Program conflicts with the requirements of the Permit Streamlining Act. It provides a list of items that are required for a complete application, but also provides a second list of "additional information" (including an Alternatives Analysis) that the boards may decide "case-by-case" are needed for a complete application. It prescribes two back-to-back 30-day review periods, one for completion of the items in the first list and one for completion of any items required in the second list. (Proposed Program 3.) Neither the dual lists nor the dual time periods comport with the Permit Streamlining Act.

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B. Cause Confusion and Conflict with USACE Permit Process

In addition, the proposed Program would foster undue uncertainty and inconsistency. The Staff Report asserts that "[s]etting clear expectations for applicants as well as Water Board staff for when an alternatives analysis *may* be required will provide for a clearer regulatory path and greater certainty that waters of the state will be identified and protected from dredged or fill activities." (Staff Report 59, emphasis added.) The proposed Program would do no such thing, and to the contrary would necessarily leave applicants uncertain of what would be required for an application unless and until they complete the process of dual 30-day reviews and are told what is required in each particular case. This "case-by-case" approach also undercuts the need-for-consistency rationale for the proposed Program. Under this approach, the boards may act quite differently. To that extent, if they tend to act differently now, they can continue to do so under the proposed Program. Indeed, the State Board staff appears to anticipate as much. (Staff Report 182-183.)

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There appears to have been little coordination with the USACE in the development of the detailed aspects of the application process, since the proposed Program differs from existing

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aspects of the USACE application process. For instance, the proposed Program calls for applicants to submit maps at scales different than required by the USACE. It requires maps with a scale of at least 1:24000 (1"=2000') (Proposed Program 3); Updated Map and Drawing Standards for the South Pacific Division Regulatory Program of the USACE (February 10, 2016) stipulate the scales should not exceed 1 inch = 400 feet. The South Pacific Division drawing standards also stipulate that only waters of the United States be displayed, and applicants should "[i]nclude information not directly related to delineation of water of the U.S. on a separate map(s)." In practice, the District has witnessed a preference by USACE staff to limit informational materials to the spatial area of the potential boundaries of USACE jurisdiction. Formatting of reports, electronic data submittals, drawings, and delineations could be affected.

3.43 (cont.)

The proposed Program provides that if an applicant proposes compensatory mitigation that involves restoration or establishment on a site(s) within five miles of any airport, the applicant shall consult the applicable airport land use commission or other appropriate responsible public agency to determine whether the proposed compensatory mitigation project may pose a danger to air traffic safety, and submit proof of consultation. (Proposed Program 5.) Why the State Board chose a five mile radius is not apparent; that does not correspond to the two-mile radius commonly used in other contexts, including environmental review of projects under CEQA.

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The proposed Program provides that "[i]f compensatory mitigation is required" by the boards on a case-by-case basis, then the applicant must provide a number of items, including "[p]reliminary information" about ecological performance standards, monitoring, and long-term protection and management. (Proposed Program 5.) This provision is problematic in at least two respects. First, when and how is an applicant to know whether a board will require compensatory mitigation? That typically is a determination made during project review based on evidence. Second, what does the State Board mean by "preliminary information" in this provision? What information is required?

3.45

V. COST, TIME, ETC.

Apart from the dual 30-day reviews of the completeness of applications, the proposed Program provides for a dual public notice process. It requires one public notice and then, if comments are received or there is substantial public interest, provides for a second public notice to be issued again inviting public comment. (Proposed Program 9.)

This unnecessary and cumbersome two-notice process should be removed. One notice, particularly one that actually accomplishes its purpose as evidenced by receipt of public comments, suffices to afford the public notice and opportunity to comment. There is no need for a routine second notice. Indeed, such a process invites abuse by those who would seek to delay the process by the expedience of submitting pro forma comments.

3.46

For many reasons, the proposed Program would substantially increase the expense and time needed to complete all permit processes with the boards as well as the USACE. Additional and different mapping under a new and uncertain wetland definition would entail additional expense and time to complete. Preparation and review of alternative analyses is no small

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undertaking; it entails considerable expense and time. For boards that have had little past experience with alternative analyses, adding that analysis to their process for individual permits and, moreover, for NWPs would be a major, burdensome undertaking. For the San Francisco Bay Regional Board, the expansion of the alternative analysis process to even a fraction of the many NWP authorizations the USACE issues each year would add considerably to the regional board staff's workload.

3.47

If, as appears to be the plan, the State Board does not add any staff to handle the substantial additional workload the proposed Program would impose on the staff of regional boards, any of various adverse consequences may be expected. Certainly, substantial delays may be expected to complete the process prescribed by the Program. Needless to say, for most applicants, such delay also entails substantial cost.

3.48

To the extent the staff of the boards, stretched thin and untrained in the new requirements of the proposed Program, endeavors nonetheless to speed applications along, one can expect less careful review, mistakes (and the additional delay and expense required to correct them), and less than optimal decisions.

To the extent the boards shift staff resources from other existing functions to handle the additional workload of the proposed Program, those other functions naturally would go wanting—and such functions would be delayed or perhaps forgone.

VI. WATERSHED PLANS

The proposed Program imposes various requirements and policies apparently with the aim of fostering watershed planning. Specifically, the proposed Program indicates that the amount of compensatory mitigation imposed on an applicant would be less if the applicant used a watershed approach based on a watershed profile developed from a watershed plan. (Proposed Program 8.) This is another feature of the Program not required by "jurisdictional and procedural differences" in state and federal law. It is rather a policy choice that is not explained or justified as such.

3.49

The District generally supports the concept of watershed planning and indeed has embraced a watershed approach in much of its planning and other activities. While watershed planning may well be regarded desirable for any number of reasons, the District is mindful as well that there currently are few programs or resources devoted to developing watershed plans in California. Simply imposing requirements on applicants as part of a new regulatory program will not change that. While the proposed Program calls for applicants to key their mitigation proposals to watershed plans and requires more mitigation if it is proposed apart from such a plan and otherwise prioritizes reliance on watershed plans, the practical problem looms that there currently are no such plans. The State Board does not explain whether or how it expects such plans to materialize. It does not say whether it plans to devote any resources (staff, money, time, etc.) to help develop such plans.

3.50

The proposed Program also leaves applicants uncertain in that the State Board does not explain what a watershed plan should include in order to qualify as such in the proposed Program. 3.50 (cont.)

VII. MITIGATION

The proposed Program presents various provisions, some new and some not, many drawn from the Guidelines, addressing mitigation. Apart from the more general comments on mitigation offered above, attention to the details in these provisions is warranted.

Particularly concerning is a provision calling for the boards, when determining the amount of compensatory mitigation to be required of an applicant, to "take into account recent anthropogenic degradation to the aquatic resource and the potential and existing functions and conditions of the aquatic resource." (Proposed Program 8.) While the boards naturally should assess the existing environmental baseline conditions when evaluating the effects of a project, they should not endeavor to evaluate putative effects on "potential" or hypothetical functions and conditions or "recent anthropogenic degradation" unrelated to the project. To do so would inject extraneous matters into evaluation of a project's environmental impacts and mitigation of those impacts, and run afoul of constitutional principles requiring that mitigation have an essential nexus and rough proportionality to a project's actual impacts. 3.51

Similarly, the proposed Program points to Executive Order W-59-93 and announces that in accordance with that Order the State Board's "regulation of dredged or fill activities will be conducted in a manner 'to ensure no overall net loss and long-term net gain in the quantity, quality, and permanence of wetlands acreage and values . . .'" (Proposed Program 1.) This announcement is problematic in several respects. First, the Executive Order and the related California Wetlands Conservation Policy state the foregoing as an overall objective of the State of California as a whole—and not an objective of any single state agency or program, let alone a regulatory program. It is inappropriate for a regulatory program to burden permittees with a goal of not just mitigating the impacts of their projects, but also ensuring a "long-term net gain" in wetlands. This overall state goal to achieve long-term net gain of wetlands is even less suitable as a standard for decision in an individual permit process. 3.52

Second, it bears emphasizing that the Executive Order also stated a primary objective "[t]o reduce procedural complexity in the administration of State and Federal wetlands conservation programs." The proposed Program, however, does not appear to achieve this stated objective; it substantially increases, rather than reduces, the procedural complexity in the administration of the federal and state regulatory programs. 3.53

The proposed Program includes a troubling provision that would conflict with existing practice, unduly complicate the process and paperwork, and cause unnecessary delay in reviewing and approving projects. 3.54 The provision allows boards to include as a condition of an order that the applicant receive approval of a final mitigation plan prior to proceeding with a project. (Proposed Program 9.) This much largely corresponds to existing practice in which the Executive Officer typically reviews and approves final mitigation plans required by an order. The provision continues, though, that in such cases, the board "will approve the final mitigation 3.55

plan by amending the Order." Why existing practice needs to be changed and why this problematic provision is proposed, the State Board does not say. 3.55 (cont.)

The proposed Program defines "project evaluation area" (for purposes of evaluating project and mitigation sites) with respect to an "ecologically meaningful unit" of a watershed. It does not define or otherwise explain what is an "ecologically meaningful unit," but says that the size and location of such a unit "shall be based on a reasonable rationale." (Proposed Program 13.) What would be a "reasonable rational" in this context or what criteria or considerations might be pertinent to any such rationale, the State Board does not say. Some explanation or guidance is needed. 3.56

The proposed Program calls for submission of a "restoration plan for restoring areas of temporary impact to pre-project conditions." (Proposed Program 5.) What the State Board has in mind when it speaks of "temporary impact," it does not say. The District notes that it makes little sense to arbitrarily designate a single period of time to distinguish permanent and temporary impacts in this context. The District suggests that the State Board instead clarify that a restoration plan may be submitted for any water or wetland that is not permanently filled or otherwise destroyed by a project and that is susceptible of being restored to pre-project conditions. Depending on the nature of the pre-project conditions, naturally the time needed to restore them (and thus the "temporariness" of the impact) will vary from site to site. Restoration of annual grasses and the like, for instance, generally can be accomplished more quickly than restoration of large woody vegetation. Ultimately though, as long as the pre-project conditions can be and are restored, the impacts on those conditions are temporary. 3.57

The proposed Program would revise section 230.93(a) of the federal Guidelines in ways that are not necessitated by any jurisdictional or procedural differences between federal and state programs and appear intended to blind the boards to important, pragmatic considerations in determining appropriate compensatory mitigation. Why the State Board proposes these critical policy changes, it does not say. The change is not merely unjustified, but unwise. It would, as well, lead to conflicts with the USACE's decisions under the federal Guidelines. The proposed Program requires boards to base compensatory mitigation on "what would be environmentally preferable" and deletes from consideration "what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity." (Proposed Program 25; Comparison 26.) Apart from the policy and practical reasons militating against this change, there is considerable uncertainty of what to make of it in any event, since considerations of practicability and cost remain in other aspects of the proposed Program. 3.58

CONCLUSION

The District appreciates the State Board's efforts to protect waters of the state and, in this proposal, to develop a program that complements the USACE's regulatory program. The District is concerned, though, that the proposed Program extends beyond the stated need, it is uncertain in many respects, and it unnecessarily conflicts with the USACE's program.

Accordingly, if the State Board decides to act on this proposal, the District encourages the Board to engage in stakeholder discussions to develop alternatives to or revisions of the

proposed Program and then make the resulting alternative or revision available for public review and comment. As this is a proposal for a major new regulatory program, it warrants careful and thorough review and consideration. No urgency appears to compel more hurried action.

The District appreciates the opportunity to provide its comments and request for sufficient time to review any revised draft. If you have any questions or would like to discuss any aspect of the proposed Program or the comments presented here, please contact Melanie Richardson at (408) 630-2035.

Sincerely,

Norma Camacho
Interim Chief Executive Officer

Cc: Board, Melanie Richardson, Jim Fiedler, Jesus Nava, Stanly Yamamoto