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Via email and U.S. Mail



August 17, 2016

Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
commentletters@waterboards.ca.gov

Comment Letter # 42

Re: Comments and request for Extension - Procedures for Discharges of Dredged or Fill Materials to Waters of the State

Dear Ms. Townsend,

I am writing on behalf of Wildlands to request that the State Water Resources Control Board ("State Board") extend the public comment period in connection with the *Proposed Amendments to the California Ocean Plan and Inland Surface Waters, Enclosed Bays, and Estuaries of California Plan to Include Procedures for Discharges of Dredged or Fill Materials to Waters of the State*.

42.1

Wildlands recently became aware of the public release of the policy document. As we understand it, the State Water Resources Control Board has developed a revised permitting process for placing any fill into state waters subject to regulation by the Regional Water Quality Control Boards ("Regional Boards") and would adopt a new definition for wetlands in California that departs from the long-standing definition used by the U.S. Army Corps of Engineers in implementing the federal Clean Water Act. In addition, as we understand it, the proposal would impose additional requirements to secure required section 401 certifications from Regional Boards for many Nationwide Permits and for individual permits issued under the federal Clean Water Act.

We are concerned that this proposal could substantially change the regulation of many projects throughout California and significantly complicate the permit application process for wetland and special-status species habitat restoration projects.

42.2

The comment period, however, has not provided us with an adequate opportunity to fully evaluate the scope of the proposed policy, how it may affect our projects, or to prepare comprehensive comments for consideration by the State Board.

42.1
cont.

Wildlands goal is to provide high quality wetland habitat restoration projects as mitigation either through the Mitigation Bank process or through permittee

responsible mitigation projects. As the largest developer of state and federally approved mitigation credits in California, it is important that we understand and provide well-informed input on the potential implications to existing and future mitigation and conservation banks and we would appreciate the extended time period to thoroughly evaluate the proposal.

In the event that a longer time period cannot be granted, Wildlands has the following preliminary comments:


1. **General Comment – Consistency with Federal standards:** We encourage the State Board to maintain consistency with all federal definitions and standards in the Clean Water Act and the Compensatory Mitigation Rule, but particularly with regard to
 - a. Definitions of waters, wetlands, and special aquatic sites; 42.3
 - b. Mitigation sequencing which pursuant to the Clean Water Act requires that **appropriate and practicable** steps be taken to avoid and minimize. While the sequence is the same under the Section IV.B.1. of the proposal there is no mention of appropriate or practicable; and 42.4
 - c. Mitigation preference (i.e. a preference for mitigation banks should be stated). 42.5
2. **General Comment – Existing Mitigation Banks:** Numerous existing mitigation banks have been established throughout the State of California under the oversight of the Interagency Review Teams (IRT) typically consisting of the U.S. Army Corps of Engineers (USACE) and the Environmental Protection Agency (EPA). In many cases the local region of the Regional Water Quality Control Board did not participate in these IRTs due to staffing, but utilize the bank credits as an appropriate form of wetland mitigation. We welcome the State’s participation in future banks, but urge that existing federally approved bank credits continue to be utilized without additional review/approval by the State or Regional Boards. 42.6
3. **Section II Wetland Definition–** *“in some cases, the Water Boards must determine whether a particular feature is a waters of the state on a case-by-case basis.”* A case by case basis determination for wetlands leaves too much uncertainty. Similar to federal regulations the State should have measurable standards that determine whether or not a feature is a wetland and subject to regulation by the State. This will result in more consistent enforcement statewide. 42.7
4. **Section V. Definitions –**It is not clear whether or not a mitigation or conservation bank would qualify as an Ecological Restoration or Enhancement Project as banks are “voluntary in accordance with the terms and conditions of a binding stream or wetland enhancement or restoration agreement” (i.e. Bank Enabling Instrument). However, the bank will ultimately mitigate for actions required under WDRs, waivers of WDRs, or water quality certifications and the proposal excludes mitigation for actions required under these authorities. Regardless, the exclusion of any form of mitigation from the definition of an Ecological Restoration and Enhancement Project is troubling. The policy appears to unfairly discriminate 42.8

against a wetland restoration project that is intended to provide compensatory mitigation, based solely on whether or not it would provide mitigation offsets instead of based on its ecological merits. Mitigation projects are typically constructed under a nationwide permit (NWP 27) specifically tailored for aquatic habitat restoration purposes. We request that the definition of an Ecological Restoration Project be based on the proposed action of restoring aquatic functions, and not discriminate against restoration actions that provide mitigation. If we have interpreted the current language accurately, wetland restoration projects that provide mitigation will be subject to higher fees, and will also not be exempt from Alternatives Analysis, resulting in longer permitting timeframes for mitigation projects.

42.8
cont.

Wildlands appreciates your consideration of this request.

Sincerely,



Cindy Tambini
Director of Planning