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Comment Letter #4

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1101 I Street, 24th Floor
Sacramento, CA 95814
Submitted via email to: commentletters@waterboards.ca.gov

Re: Comments on Preliminary Draft: Procedures for Discharges of Dredged or Fill Materials to Waters of the State.

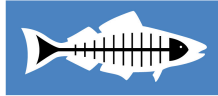
Dear Ms. Townsend, Chair Marcus, and Board Members:

On behalf of Heal the Bay, we submit the following comments on the proposed State Water Resources Control Board *Preliminary Draft: Procedures for Discharges of Dredged or Fill Materials to Waters of the State* (“Preliminary Draft Policy” or “Policy”). After reviewing the Preliminary Draft Policy released on June 17, 2016, we have a number of concerns with the proposed Policy. California has lost more than 90% of its historic wetland habitat.¹ 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’. Today, as back then, there is an understanding of the importance of wetland habitats. Wetlands in both natural and urban environments provide important functions like regulating nutrients, pollution, water, while providing a vital base of the food chain; providing habitat and shoreline stability; and educational and recreational opportunities. As such, wetland protection, restoration, preservation, and management must be part and parcel of a watershed approach.

While the 2016 Preliminary Draft Policy is a marked improvement compared to the State Water Resources Control Board 2013 *Preliminary Draft: Water Quality Control Policy for Wetland Area Protection and Dredged or Fill Permitting*, particularly in the areas of monitoring and assessment, and performance standards, there are areas in the current policy that call into question the ability to meet the ‘**achieve a long-term net gain in the quantity, quality, and permanence of wetlands acreage**’ component of the California Wetlands Conservation Policy.² We are particularly concerned about the wetland

¹ Draft Staff Report for Procedures for Discharges of Dredged or Fill Materials to Waters of the State, p. 28.

² Draft Staff Report for Procedures for Discharges of Dredged or Fill Materials to Waters of the State, p. 19; Executive Order W-59-93 available at:



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definition, compensatory mitigation requirements, the lack of 'buffer' requirements, the hierarchical preference for mitigation, and a lack of cumulative analysis from a 'case-by-case' approach. These concerns and others are explained in more detail below.

The Preliminary Draft Policy should broaden the 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 precious wetland resources, in particular sites that may be degraded, but which are still prime targets for restoration or are located in critical areas. 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.

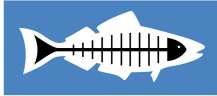
4-1

All Wetlands Should Qualify as Waters of the State

We recommend taking the precautionary approach, in which the default is that all wetlands are considered Waters of the State. Project applicants could then argue on a case-by-case basis to have a particular wetland not be considered a Water of the State but the onus would be on them and not the Water Boards. For those wetlands that may include features not protected as Waters of the State, the SWRCB should develop criteria for the Water Boards to use in making such determinations. The criteria would provide a sense of uniformity across the state in its application, reduce uncertainty and subjectivity in interpretations, and smooth-out any unevenness in implementation. This would ensure consistency of wetland protection throughout the state.

4-2

Further, the current Draft Policy does not establish criteria for defining Waters of the State that could be used to evaluate wetland features, instead placing the burden of making these determinations on individual Water Boards. As the Policy notes, "...the Water Boards have not developed a complete list or categorical descriptions of all other features that qualify as Waters of the State. Therefore...the Water Boards must determine whether a particular feature is a Water of the State on a case-by case basis." This approach will likely result in problems with statewide consistency, as criteria will vary on a regional, if not case-by-case basis, resulting in an excessive demand of Water Board staff resources, and confusion among applicants. In the absence of a 'complete list or categorical description of all other



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features that qualify as waters of the state', making such determinations on a case-by-case basis by the Water Boards is onerous and is likely to lead to inconsistencies, which could result in net losses of wetland—types, functions, and distribution. We recommend therefore that all wetlands be classified as Waters of the State; alternately, we recommend that the SWRCB develop a complete list of all features that qualify as Waters of the State within one year and that Regional Boards use this list to decide which wetlands qualify as Waters of the State.

4-2 cont.

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.

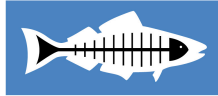
4-7

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 recreating 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 Kihslinger¹, 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. In addition to not meeting acreage requirements, mitigation wetlands often do not replace the functions and types of wetlands destroyed due to permitted impacts.³ The Policy should clearly outline requirements for effective mitigation of impacts to wetlands.

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.⁴ 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 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

³ Kihslinger, Rebecca. Success of Wetland Mitigation Projects. National Wetlands Newsletter, vol. 30, no. 2. 2008 Environmental Law Institute.

⁴ Preliminary Policy Page 8 Section IV.B.5c. Compensatory Mitigation: Amount



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of this 3:1 ratio would ensure consistency with another State Agency. The Policy suggests that compensatory mitigation could be under a 1:1 ratio without providing any evidence to support the rationale.⁵ Given the scientific literature on wetland mitigation projects—Kihlslinger⁶ and Ambrose⁷—and the goal of no net loss of wetlands, a policy that allows for a net loss of wetlands is one we cannot support.

4-7
cont.

Compensatory Mitigation Must be In-kind (of the same type) and On-site

If compensatory mitigation is required, the Policy should require in-kind and on-site wetland mitigation projects, to ensure that the mitigated wetlands are similar in structure and habitat to the impacted wetlands. This will help to ensure that similar habitat for indigenous species and wetland function (i.e. freshwater to freshwater wetlands) is protected, restored, or recreated.

4-3

We appreciate that a watershed approach is prioritized for compensatory mitigation but we recommend that mitigation projects be further required to be on-site and as local as possible. For many areas, a watershed approach may be too large and a compensatory mitigation project, even within the watershed, may be completely redistributing ecological and social benefits of open space to very different areas and communities. For instance, the Los Angeles River Watershed is very large at over 800 square miles. Compensatory mitigation for a project in Compton Creek, a tributary in the southern part of the watershed, may occur at a common mitigation bank in Tujunga Wash⁸, which is located in the northern part of the watershed. 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 in-kind and on-site to avoid these concerns of redistribution of wetlands and open space areas.

The Preliminary Draft Policy should require buffers and specify minimum buffer size requirements.

The Policy suggests that buffer areas be included as a component of compensatory mitigation. For example, the Policy states that “...the permitting authority *may*

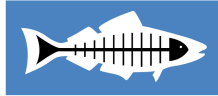
4-5

⁵ Preliminary Policy Page 8 Section IV.B.5c. Compensatory Mitigation: Amount

⁶ Kihlslinger, Rebecca. Success of Wetland Mitigation Projects. National Wetlands Newsletter, vol. 30, no. 2. 2008 Environmental Law Institute.

⁷ 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*

⁸ <http://dpw.lacounty.gov/wrd/Projects/BTWMA/index.cfm>



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require...buffers around aquatic resources..." (pg32) As has been noted by Ambrose, "Buffers can protect wetlands by filtering pollutants, providing refuge for wetland wildlife during times of high water levels, acting as barriers to the disruptive incursions by people and pets into wetlands, and moderating predation by ground-dwelling terrestrial predators. Buffers can also reduce the risk of invasion by non-native plants and animals, by either obstructing terrestrial corridors of invasion or by helping to maintain the integrity and therefore the resistance of wetland communities to invasions."⁹ Buffers increase the success of mitigated wetlands. In which situations would it be unnecessary to include buffers? The SWRCB should strengthen this language by requiring that buffers be included in all permittee-responsible compensatory mitigation projects by default, unless the project proponent can prove that they are not needed to ensure the ecological sustainability of a mitigation site.

4-5 Cont

In addition, the Preliminary Draft Policy should place requirements and minimum criteria for what constitutes a buffer, rather than merely suggesting they be included as part of a compensatory mitigation plan. While we understand buffer sizes may vary based on the scale of the project, we believe the State Board should specify guidelines for these buffers by setting minimum criteria. For example, the California Coastal Commission requires the establishment of 100-foot buffers around wetlands to allow adequate distance between the wetland and construction activities.¹⁰ These buffers provide critical habitat for species residing in the transitional zone between wetlands and uplands and should provide protection by minimizing the effects of erosion, sedimentation, and pollution arising from urban, industrial, and agricultural activities in nearby developments.

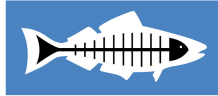
Exemptions Could Result in Wetlands Losses; Do Not Allow Exemptions for Prior Converted Cropland (PCC), Constructed Treatment Wetlands, or Irrigation Ditches

4-6

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 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

⁹ 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*

¹⁰ In Southern California, the CCC has typically required 100 foot buffers for fresh- and salt-water wetlands and 50 foot buffers for riparian areas. Riparian areas are considered environmentally sensitive areas, but for a variety of reasons have not always received the same treatment as other types of wetlands.



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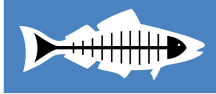
requirements allows for a loophole in which wetlands may be lost. Constructed treatment wetlands and irrigation ditches may provide important habitat and ecological functions. Completely excluding them from permitting requirements is a mistake. For instance, a constructed treatment wetland could serve as an important stop on a bird migratory fly-over path, offering food, water, and safety to important species. Potential impacts to and loss of this habitat should be mitigated for. The definition of irrigation ditches needs further 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, constructed treatment wetlands, 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.

4-6
Cont

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 and 7) spatial distribution or concentration. 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 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.

4-8



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As expressed above, we urge the Board to:

- Broaden the definition of wetlands, utilizing a one parameter approach
- Define all wetlands as Waters of the State
- Strengthen requirements for compensatory mitigation to include a minimum 3:1 mitigation ratio, requirements for mitigation locations to be as local as possible, and minimum buffer parameters
- Remove subjective language from the Policy to promote consistency among Regional Boards and reduce burden on Regional Boards
- Remove exemptions of prior converted cropland, constructed treatment wetlands, and irrigation ditches from the Draft Policy
- 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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