September 16, 2017

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

Re: State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State

Dear Chair Marcus and Members of the Board:

On behalf of Defenders of Wildlife, Center for Biological Diversity, Sierra Club California, San Francisco Baykeeper, The Bay Institute, Save the Bay, Audubon California, Citizens Committee to Complete the Refuge, AquAlliance, American Rivers, and California Coastkeeper Alliance, we submit these comments in response to the State Water Resources Control Board's ("SWRCB") July 21, 2017 State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State ("draft policy"). The SWRCB began working on this policy more than a decade ago because it realized that federal protections were inadequate to safeguard California's remaining wetlands. In the intervening years, federal protections have been further restricted and additional reductions to federal protections are on the horizon. Therefore, it is more important than ever that the SWRCB act quickly to adopt a meaningful statewide wetlands policy.

The draft policy is substantially improved from the version that the SWRCB released in June 2016, and we thank SWRCB Members and staff for their hard work. The new jurisdictional framework is both practical and protective, and the permitting procedures are a major step toward creating consistency across Regional Water Quality Control Boards ("Regional Boards") and ensuring wetland impacts are avoided and minimized whenever possible.

We are, however, suggesting several changes that we believe are necessary to ensure the policy complies with Executive Order W-59-93—California's no-net-loss and long-term-net-

gain policy—and is truly protective of California's remaining wetlands. First, as the SWRCB recognizes, a meaningful alternatives analysis is critical for avoiding and minimizing wetland losses. While the draft policy includes a framework to ensure that the amount of effort for an alternatives analysis is commensurate with the project's impacts, it then appears to give the Regional Boards unbounded discretion to permit a less rigorous analysis, thus undermining the carefully-crafted framework. We recommend that the SWRCB eliminate or limit the Regional Boards' discretion to permit a less rigorous analysis than that which is outlined in the framework.

Second, the compensatory mitigation requirements are critical to ensure that, where impacts are not avoidable, projects still comply with the no-net loss policy. It is well established that mitigation wetlands do not perform as well as natural wetlands, and that even a mitigation ratio of one-to-one is likely insufficient in most cases. We are concerned that the compensatory mitigation requirements could allow the Regional Boards to permit projects with mitigation ratios of *less than* one-to-one, which would be inconsistent with the state's no-net-loss policy. We recommend that the SWRCB require a *minimum* of one-to-one compensatory mitigation whenever mitigation is necessary.

Third, we urge the SWRCB to take another look at the prior converted croplands issue and close a loophole that could allow for unfettered development of wetlands on certain agricultural lands. Part III of this letter discusses these and other requested revisions in greater detail.

With a few simple changes, we believe the draft policy will dramatically improve protections for our remaining wetlands and safeguard some of California's most important resources from federal rollbacks. We respectfully request that you make the changes discussed in this letter, and adopt the policy without further delay.

I. A SWRCB Wetlands Policy is Essential for Protecting California's Wetlands and Waterways

Wetlands provide myriad environmental and economic benefits to the state of California. They protect against floods, facilitate groundwater recharge, improve water quality, and help to ameliorate climate change impacts. They also support fifty-five percent of endangered animal species and twenty-five percent of endangered plant species in California, and are essential to millions of birds that migrate along the Pacific Flyway each year. Draft Staff Report at 29-30. Among other economic benefits, wetlands are essential for the state's $110 billion fishing industry and have an estimated recreational value of $6.3 to $22.9 billion. Draft Staff Report at 29-30.

Despite their importance, over ninety percent of California's wetlands have been destroyed, and we continue to lose wetland acres every year. The draft staff report indicates that approximately 104 acres of wetlands were lost to fill or extraction activities in the 2014-2015 fiscal year alone. Draft Staff Report at 31. Though Governor Pete Wilson signed Executive

Order W-59-93 to halt the destruction of California's wetlands in 1993, the state has continuously failed to comply with the policy's mandate.

Now, in light of the Trump Administration's efforts to repeal and weaken the 2015 Clean Water Rule, even more California wetlands will be vulnerable to destruction. The SWRCB began working on this policy because it recognized that the federal Clean Water Act was inadequate to protect California's diverse wetlands. After the United States Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (2001) and *Rapanos v. United States* (2006), many California wetlands were left vulnerable to destruction, including vernal pools, playas, prairie potholes, alpine wet meadows, Northern California claypan, Central Valley Alkali Sinks, and California Mediterranean alkali marshes. Draft Staff Report at 52. President Obama's 2015 Clean Water Rule restored federal protections for some of these wetland types. However, in his February 28, 2017 Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule, President Trump directed the Administrator of the U.S. Environmental Protection Agency ("EPA") to review and possibly rescind or revise the 2015 Clean Water Rule, and indicated a clear preference for a particularly narrow reading of the scope of federal jurisdiction under the Clean Water Act.[1] EPA is currently working to comply with the Executive Order, and it is clear that any rule emerging from EPA's review will reduce federal protections for wetlands in California and throughout the United States.

Because federal protections for California wetlands will be reduced, state protections under the Porter-Cologne Act will be more important than ever, and the current approach isn't working. As the draft staff report acknowledges, "current regulations have not been adequate to prevent losses in the quantity and quality of wetlands in California, where there have been especially profound historical losses of wetlands." Draft Staff Report at 1-2. Among other problems, there is not a consistent approach to defining and asserting jurisdiction over wetlands across the Regional Boards, and the Regional Boards do not have consistent application submittal and approval procedures for permitting dredge or fill activities. Draft Staff Report at 52-53; *see id.* Table 5-5. The Colorado River Basin Plan, for example, "does not describe any specific wetland protection measures." Draft Staff Report at 43. The lack of consistency across and within the Regional Boards has led to under-protection of wetlands in some regions, and created substantial uncertainty for permit applicants.

Without a statewide wetland definition and clear procedures for ensuring that impacts to wetlands are avoided and minimized, California will continue to lose its remaining wetlands. To safeguard California's wetlands for future generations and to comply with the no-net-loss policy, the SWRCB must act quickly and adopt a statewide wetlands policy.

II. The Wetlands Definition and Jurisdictional Framework are Reasonably Protective

[1] The Executive Order is available at https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic.

We appreciate that the proposed modified-three-parameter definition is more protective of California wetlands than the federal definition, although we continue to recommend a more protective one-parameter definition.[2] The modification to the federal definition ensures protection of unvegetated wetlands like playas, tidal flats, some river bars, and shallow non-vegetated ponds. As the draft staff report recognizes, these "areas provide the hydrological and ecological functions and beneficial uses that distinguish wetlands from other places," but may not receive protection through application of the federal definition. Draft Staff Report at 54. The San Francisco Bay Regional Water Quality Control Board "recognizes mudflats, which would fail the three-of-three wetland parameter test since they are unvegetated, as one of the most important wetland types in the San Francisco Bay Region." Draft Staff Report at 39. The modifications to the federal definition included in the draft policy are essential for California's efforts to protect these and other unique wetland resources.

The draft policy also clearly identifies which features that meet the wetland definition are waters of the state. We believe the jurisdictional framework will capture the vast majority of ecologically important wetlands, and that it appropriately places the burden of demonstrating that a wetland is not a water of the state on the applicant. The framework will ensure consistency across Regional Boards, provide certainty to applicants, and substantially enhance protections for California wetlands. Although we continue to advocate for a one-parameter approach, we thank SWRCB Members and staff for the effort that went into crafting this framework and the modified-three-parameter definition.

III. Several Changes to the Permitting Procedures are Necessary to Ensure the Policy Complies with the No-Net-Loss Mandate and Effectively Protects California's Wetlands and Other Waters

The permitting procedures are substantially improved from the draft that the SWRCB released in 2016, and they include several elements that are critical for compliance with California's no-net-loss policy. For example, the draft includes a sequencing requirement to ensure that impacts are avoided and minimized before they are mitigated, and requires that the permitted project be the least environmentally damaging practicable alternative ("LEDPA"). The draft also appropriately acknowledges that projects proposing impacts to sensitive wetlands and waters that serve as habitat for rare, threatened, and endangered species deserve enhanced scrutiny. We thank the SWRCB for including these elements in the draft policy.

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[2] During the past decade, we have consistently advocated that a one-parameter wetland definition would be the most protective for California's wetlands. The draft policy's modified-three-parameter approach could still exclude important California wetlands, and is less protective than the wetland definitions used by the California Coastal Commission and California Department of Fish and Wildlife. Further, the fact that the Lahontan Regional Water Board uses a one-parameter approach for the Lake Tahoe Basin underscores that it is practically possible for the Regional Boards to implement a one-parameter definition. *See* Draft Staff Report at 42.

However, several changes are necessary to ensure that the policy complies with California's no-net-loss mandate and is meaningfully protective of our last wetlands.

A. The SWRCB Must Strengthen the Alternatives Analysis Requirements

1. The SWRCB should refine the exemptions to the alternatives analysis requirements

Section IV(A)(1)(g) of the draft policy exempts certain projects from the alternative analysis requirements. Because a meaningful alternatives analysis is critical for ensuring that the permitted project is the LEDPA, the exemptions to the alternatives analysis requirements must be narrow and clearly defined. Two of the four exemptions are appropriate, as written. We support the exemption for Ecological Restoration and Enhancement Projects (section IV(A)(1)(g)(iii)), and the exemption for projects with temporary impacts (section IV(A)(1)(g)(iv)) is reasonably narrow in light of the exclusion for any project with "impacts to any bog, fen, playa, seep wetland, vernal pool, headwater creek, eelgrass bed, anadromous fish habitat, or habitat for rare, threatened or endangered species."

However, the exemption regarding Water Board certified Corps' General Permits (section IV(A)(1)(g)(i)) is problematic. As written, the exemption is ambiguous and could be interpreted to apply to projects that have substantial impacts to waters of the state outside of federal jurisdiction. In particular, one could interpret the language to mean that a project can qualify for the exemption if the discharges to waters under federal jurisdiction comply with the terms of a Water Board certified Corps' General Permit, *even if the project's discharges to waters of the state outside of federal jurisdiction do not comply with the general permit's terms*. That outcome is unacceptable, as it would allow projects with significant impacts to avoid conducting an alternatives analysis. To eliminate this problematic ambiguity, we suggest the following revisions:

> The project includes discharges to waters of the state outside of federal jurisdiction, but the project<u>, including all discharges to waters of the state outside of federal jurisdiction,</u> would meet the terms and conditions of one or more Water Board certified Corps' General Permits, if all discharges were to waters of the U.S. The permitting authority will verify that the project would meet the terms and conditions of the Corps' General Permit(s) if all discharges<u>, including discharges to waters of the state outside of federal jurisdiction,</u> were to waters of the U.S. based on information supplied by the applicant.

The exemption for projects conducted in accordance with an approved watershed plan (section IV(A)(1)(g)(ii)) is also of some concern. In our comments on the 2016 draft of this policy (attached), we emphasized that we support watershed planning and believe it may be appropriate to reduce permitting requirements for projects conducted in accordance with an

approved watershed plan. However, such permitting streamlining is only appropriate if the requirements for watershed plans are clearly defined and meaningful. While we appreciate that the draft policy includes some additional details about watershed plans, it is missing information that is critical for ensuring Regional Boards only approve meaningful and protective watershed plans. For example, what scale (size) watershed must the plan include? How will cumulative impacts within the watershed be determined and addressed? How will the plan ensure that alternative approaches are analyzed? How will mitigation banks fit into watershed planning efforts? Without this and other information, it is impossible to know whether particular watershed plans will protect wetlands when project-specific alternatives analyses are not conducted. Further, while we support the creation of habitat conservation plans and natural community conservation plans, we are concerned about overreliance on these documents to satisfy the watershed plan requirements because they are focused on the needs of particular species, and may not account for other benefits associated with wetlands and waterways, including those related to water quality and flood protection.

In light of these problems, the SWRCB should provide additional details regarding the elements that must be included in a watershed plan and modify the language in section IV(A)(1)(g)(ii) to ensure the public has an opportunity to comment on any watershed plan before Regional Board approval:

> The project 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. <u>The permitting authority must provide the public with notice of a proposed watershed plan at least thirty days before approving the plan, and must consider any comments submitted by the public before approving the plan.</u>

2. The SWRCB must strengthen the alternatives analysis requirements for non-exempt projects

The draft policy creates a system of tiers so that the level of effort required for an alternatives analysis is commensurate with the severity of the project's impacts to waters of the state. We generally support this approach, and agree that a less detailed alternatives analysis is appropriate for some projects. However, there are three flaws in the alternatives analysis framework that undermine its efficacy and could allow projects with significant impacts to avoid conducting a meaningful alternatives analysis.

First, while the draft policy includes a clear framework for determining the level of analysis that is appropriate for each project, it then provides the Regional Boards with unbounded discretion to depart downward and permit a less detailed analysis than the framework prescribes. The draft policy states that "[a]lternatives analyses shall be completed in accordance with the following tiers, unless the permitting authority determines that a lesser level of analysis

is appropriate." Draft Policy at IV(A)(1)(h). The clause beginning with "unless" completely undermines the carefully crafted framework, and would allow Regional Boards to permit projects with significant impacts while requiring only minimal analysis. For example, according to the framework, a project proposing to impact two acres of vernal pools would fall into Tier 3 and would require "an analysis of off-site and on-site alternatives." Draft Policy at IV(A)(1)(h)(i). However, based on the clause beginning with "unless," a Regional Board could ignore the framework and the severity of the impact, and merely require the applicant to comply with Tier 1 and provide a "description of any steps that have been or will be taken to avoid and minimize loss of, or significant adverse impacts to, beneficial uses of waters of the state." *See* Draft Policy at IV(A)(1)(h)(iii). Such a cursory analysis is never appropriate for a project with significant impacts, and allowing the Regional Boards to depart downward in this manner undermines the SWRCB's efforts to avoid and minimize wetland impacts.

Accordingly, we strongly urge the SWRCB to delete the clause "unless the permitting authority determines that a lesser level of analysis is appropriate" from section IV(A)(1)(h) of the draft policy. If the SWRCB is unwilling to delete the problematic clause, at minimum, we request the addition of language to ensure that a full alternatives analysis is required for projects proposing impacts to particularly important and sensitive wetlands and waters. We suggest adding the following sentences to section IV(A)(1)(h):

> Alternatives analyses shall be completed in accordance with the following tiers, unless the permitting authority determines that a lesser level of analysis is appropriate. A lesser level of analysis is never appropriate for a project that directly or indirectly impacts a bog, fen, playa, seep wetland, vernal pool, headwater creek, eelgrass bed, anadromous fish habitat, or habitat for rare, threatened or endangered species. If the permitting authority determines that a lesser level of analysis is appropriate, it must provide a written explanation of the rationale for its decision. The level of effort required for an alternatives analysis within each tier shall be commensurate with the significance of the project's potential threats to water quality and beneficial uses.

Eliminating or limiting the Regional Boards' discretion to reduce the alternatives analysis requirements is essential for ensuring wetland impacts are avoided and minimized and complying with California's no-net-loss policy.

Second, the tiered framework fails to account for the significant degradation of wetlands and waters that can occur through indirect impacts. Indirect impacts include scour caused by culverts, the altering of the wetland's hydrologic regime due to either increased stormwater flow from impervious surfaces or from diversions of stormwater away from the wetland, the impeding of the movement or migration of wetland-related species such as California red-legged frogs or California tiger salamanders, and mortality from bird strikes on newly adjacent buildings. All of these impacts, and others, will significantly affect beneficial uses of waters of the state. Yet the tiered alternatives analysis framework ignores indirect impacts completely. This omission could

allow projects with substantial, permanent impacts to move through the permitting process without meaningful consideration of alternatives, and creates uncertainty regarding the level of analysis required for projects that only have indirect impacts. To fix these problems, we recommend adding the following language to section IV(A)(1)(h)(i)-(iii):

i. Tier 3 projects include any project that directly or indirectly impacts more than two-tenths (0.2) of an acre or 300 linear feet of waters of the state, or directly or indirectly impacts a bog, fen, playa, seep wetland, vernal pool, headwater creek, eelgrass bed, anadromous fish habitat, or habitat for rare, threatened or endangered species; and is not a project that inherently cannot be located at an alternate location. Tier 3 projects shall provide an analysis of off-site and on site alternatives.

ii. Tier 2 projects include any project that directly or indirectly impacts more than one tenth (0.1) and less than or equal to two tenths (0.2) of an acre or more than 100 and less than or equal to 300 linear feet of waters of the state, or any project that inherently cannot be located at an alternate location (unless it meets the size requirements set forth in Tier 1). Tier 2 projects shall provide an analysis of only on-site alternatives.

iii. Tier 1 projects include any project that directly or indirectly impacts less than or equal to one tenth (0.1) of an acre or less than or equal to 100 linear feet of waters of the state, unless it is a Tier 3 project because it impacts a specified habitat type. Tier 1 projects shall provide a description of any steps that have been or will be taken to avoid and minimize loss of, or significant adverse impacts to, beneficial uses of waters of the state.

We understand that the SWRCB is concerned that it may be difficult to ascertain the geographic extent of indirect impacts. However, Regional Boards could easily account for indirect impacts within the existing tiered framework. Some projects will fall into Tier 3 regardless of the number of acres or linear feet of state waters affected because they impact a bog, fen, playa, seep wetland, vernal pool, headwater creek, eelgrass bed, anadromous fish habitat, or habitat for rare, threatened or endangered species. Because these projects are categorized regardless of the geographic extent of the impact, there is no difficulty in considering both direct and indirect impacts. For other projects, we understand that Regional Boards regularly assess the geographic extent of indirect impacts, and we do not think this analysis would be particularly onerous. For example, a description of the geographic area affected by anticipated changes in hydrology from increased impervious surface should be a pro forma part of any application. The SWRCB could provide a specific list of potential indirect impacts to assist applicants and the Regional Boards with this analysis.

Third, because the level of analysis required in the tiered framework relates to the geographic extent of the impact, there is a risk that applicants will segment a single project into multiple applications to avoid conducting a detailed alternatives analysis. The draft policy does not clearly include language prohibiting this type of segmentation, leaving open the possibility

that applicants could piecemeal projects to avoid conducting the analysis required for Tier 3 or Tier 2 projects. We suggest adding the following language to the end of section IV(A)(1)(h) to prohibit segmentation:

> The applicant may not piecemeal a project to avoid being characterized as a Tier 3 or Tier 2 project. If a project lacks independent utility, the permitting authority shall treat the project as a Tier 3 project. A project has independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate projects with independent utility.

To ensure that applicants understand that piecemealing projects is unacceptable, we also recommend adding a clear prohibition on piecemealing in section IV of the draft policy that would apply to all aspects of the procedures.

Finally, at the September 6, 2017 SWRCB meeting, staff suggested limiting application of the presumption regarding the availability of off-site alternatives to wetlands that meet the U.S. Army Corps of Engineers' ("Corps") wetland or special aquatic site definitions, thereby excluding some unvegetated wetlands. We are firmly opposed to this suggestion. Why bother adopting a clear definition of wetlands with a transparent jurisdictional framework, only to deprive some of those jurisdictional wetlands of the protections afforded by state law? Unvegetated wetlands provide many of the same services and functions of other wetlands and no single wetland can provide all of the functions that the variety of wetlands as a whole can provide. Singling out this group of wetlands for lesser protection is inappropriate. Further, any requirement that Regional Boards defer to the Corps' determination regarding the applicability of the presumption is problematic because the Corps' approach may be a moving target, and requiring deference to unknown future federal standards could substantially and inappropriately reduce state law protections for California wetlands.

B. The SWRCB Must Strengthen the Compensatory Mitigation Requirements

The draft policy's compensatory mitigation requirements that could allow less than one-to-one mitigation in some circumstances are inconsistent with California's no-net-loss policy and must be strengthened. In particular, the provision in section IV(B)(5)(c) that permits Regional Boards to approve projects with mitigation ratios of less than one-to-one acreage or length of stream reach is inappropriate and will lead to continued wetland losses.

It is widely acknowledged that mitigation wetlands rarely function as well as natural wetlands. *See, e.g.*, Draft Staff Report at 33 (indicating that "many compensatory mitigation wetlands may not sufficiently replace the functions of lost natural wetlands" and citing research concluding that "[o]nly 19 percent of the mitigation wetlands were ecologically successful").

Because of the low ecological success rate for mitigation wetlands, it is unreasonable to assume that any applicant could fully replace lost wetland functions through the creation of less wetland acreage than was lost. Further, merely replacing lost wetland functions is inadequate. Executive Order 59-93 establishes that it is the policy of the state to "ensure no overall net loss and *long-term net gain* in the quantity, quality, and permanence of wetlands acreage and values in California," and permitting mitigation ratios of less than one-to-one certainly does not move the state toward a long-term net gain of wetlands.

The draft staff report provides "[e]xamples of factors that individually, or in combination with other factors, may lead to consideration of a less that one-to-one minimum mitigation ratio by the Water Boards," including "maintenance of substantial buffers to protect the mitigation as part of the mitigation plan" and "[w]here mitigation projects include multiple benefits, such as addressing climate change, sea level rise, or similar issues, as long as those issues are not related to impacts of the project." Draft Staff Report at 80. These examples actually enhance our concerns about mitigation ratios that drop below one-to-one. Creating buffers around mitigation wetlands should be a standard practice, and is not a proper basis for reducing mitigation requirements below one-to-one. And while we support multi-benefit projects, trading wetland mitigation for other project benefits is inappropriate and inconsistent with the state's no-net-loss obligations.

We are also concerned that allowing mitigation ratios of less than one-to-one will increase workload for Regional Board staff. Because the draft policy opens the door to the prospect of lowering mitigation requirements, applicants will regularly seek mitigation ratios that are less than one-to-one, and the Regional Boards will feel pressure to allow the reduced mitigation or explain why a higher mitigation ratio is necessary. The allowance of mitigation ratios of less than one-to-one is both under protective of wetlands and counterproductive for Regional Board staff workload.

To remedy these problems and comply with the no-net-loss policy, the SWRCB should make the following changes to section IV(B)(5)(c):

> A minimum of one-to-one acreage or length of stream reach replacement is necessary to compensate for wetland or stream losses ~~unless an appropriate function or condition assessment method clearly demonstrates, on an exceptional basis, that a lesser amount is sufficient~~.

Finally, while we support watershed planning, we are concerned about the language in the draft policy that would permit reduced mitigation requirements for projects that locate mitigation based on an approved watershed plan. *See* Draft Policy at IV(B)(5)(c). As discussed above, the draft policy does not include sufficient detail to ensure that Water Board approved watershed plans are meaningful and protective. Accordingly, reducing mitigation requirements for projects conducted in accordance with approved watershed plans may result in a net loss of wetland acres and functions and is unacceptable. The SWRCB should provide additional details

regarding the elements that must be included in a watershed plan, and modify the language in section IV(B)(5)(c) to ensure the public has an opportunity to comment on any watershed plan before Regional Board approval:

> Strategy 1: Applicant locates compensatory mitigation using a watershed approach based on a watershed profile developed from a watershed plan that has been approved by the permitting authority and analyzed in an environmental document, includes monitoring provisions, and includes guidance on compensatory mitigation opportunities~~;~~. The permitting authority must provide the public with notice of a proposed watershed plan at least thirty days before approving the plan, and must consider any comments submitted by the public before approving the plan.

C. The SWRCB Should Eliminate a Loophole Allowing Wetland Destruction on Prior Converted Croplands

In our letters dated August 7, 2012 and August 17, 2016 (attached), we explained that lands designated as prior converted croplands may still include important wetlands, and that the language in the draft policy would make it possible for these wetlands to be destroyed or filled for development without any oversight by the Regional Boards. The current draft continues to exclude prior converted croplands from the procedures, and we remain deeply concerned that the exclusion creates a loophole that could lead to unchecked destruction of ecologically important wetlands. *See* Draft Policy at IV(D)(2)(a). For example, because these lands are completely excluded from the dredge and fill procedures so long as the land remains in agriculture, a landowner could deep rip a vernal pool to plant an orchard without seeking a permit. Once the vernal pool is gone, the landowner can convert the orchard to a housing subdivision, and because the waters of the state have already been destroyed, there would be no oversight role for the Regional Board. The problem of conversion of ecologically important agricultural lands to development is particularly acute in urban edge areas, and we remain concerned about the role that the draft policy's loophole for prior converted croplands could play in facilitating this destructive trend.

Further, we are deeply concerned that the SWRCB is moving forward with this exemption without knowing how much land it is excluding from the dredge and fill procedures. After several inquiries for information, it is our understanding that the SWRCB does not have any information regarding the extent or geographic location of NRCS certified prior converted croplands in California, and we do not believe such information is publicly available. Without this information, it is impossible to understand the impact of the draft policy's complete exclusion of these ecologically important areas. Until the SWRCB better understands the extent of this serious and unquantified threat, it should proceed with caution and we urge the SWRCB to either eliminate or limit the exemption.

Accordingly, we respectfully request that the SWRCB either (1) eliminate the exemption for prior converted croplands, or (2) strengthen the recapture provision for prior converted croplands in the manner explained on pages 11 and 12 of our August 17, 2016 letter.

D. The SWRCB Must Support Ecological Restoration, Enhancement, and Management Efforts

Due to the highly-modified nature of California's waterways, many of the state's remaining wetlands have to be actively irrigated and managed to continue providing habitat values. Additionally, wetland enhancement and restoration efforts add important acres and functions to our portfolio of wetlands. The final policy must support rather than impede efforts to enhance, restore, and manage wetlands and other ecosystems. The Central Valley Joint Venture and Grassland Water District have particular knowledge and expertise regarding wetland restoration, enhancement, and management efforts, and we urge the SWRCB to pay careful attention to the comments submitted by those organizations.

E. The SWRCB Must Require that Climate Change Information Is Considered

State Board Resolution No. 2008-0030 "[d]irects Water Boards' staff to require sustainable water resources management such as [low impact development] and climate change considerations, in all future policies, guidelines, and regulatory actions." Further, State Board Resolution No. 2017-0012 states that, "[w]hen making recommendations on permits and other decisions to protect coastal infrastructure, wetlands, and other near-shore ecosystems, all [SWRCB] staff shall, and all Regional Water Boards are encouraged to, refer to projections of sea level rise . . . ." In recognition of these requirements, the draft staff report states that "[c]limate change should be taken into consideration during the project evaluation stage," and that "[c]onsideration should be given to the potential impacts on project viability and mitigation success." Draft Staff Report at 69.

However, the draft policy does not require all applicants to submit climate change related information. Instead it merely states that the permitting authority may, "on a case-by-case basis," require "an assessment of the potential impacts associated with climate change related to the proposed project and any proposed compensatory mitigation, and any measures to avoid or minimize those potential impacts." Draft Policy at IV(A)(2)(b). Merely granting the Regional Boards authority to request climate change information is likely to lead to inconsistent consideration and does not appear to conform with State Board Resolution Nos. 2008-0030 and 2017-0012. Information related to sea level rise and changing precipitation patterns, for example, may substantially affect the viability of proposed projects and the success of proposed mitigation, and this critical information should be considered with every application. We are concerned that, unless it is a clear requirement, some Regional Boards will never require submission of climate change information or otherwise ensure it is considered along with each application. Accordingly, we request that the SWRCB delete section IV(A)(2)(b) from the policy, and add the following language in a new section IV(A)(1)(i):

An assessment of the potential impacts associated with climate change related to the proposed project and to any proposed compensatory mitigation, and any measures to avoid or minimize those potential impacts.

We do not believe this requirement would be a substantial burden for applicants. Many applicants are already considering climate change in their CEQA analysis, and that analysis may be sufficient for the Regional Boards. If a project and its mitigation will not be affected by climate change, the applicant could merely provide a brief explanation of why the project will not be impacted. While the analysis does not have to be extensive in every case, requiring applicants to provide some climate assessment is critical for ensuring that all applicants and Regional Boards are considering climate change vulnerabilities in the early phases of project planning.

To provide additional guidance to applicants and Regional Board staff regarding the suggested contents and level of detail for a climate change assessment, we suggest that the SWRCB either add additional information to the draft staff report, or create a separate guidance document that includes sample climate change assessments that could be provided by the applicant or undertaken by the Regional Board.

IV. The SWRCB Should Immediately Begin Work on the Remaining Parts of the Policy Described in State Board Resolution No. 2008-0026

The long-awaited adoption of this policy will signify completion of Part 1 of the three-part policy described in State Board Resolution No. 2008-0026. Part 2 requires an expansion of the scope of this policy to protect wetlands from all other activities impacting water quality, and Part 3 involves extending the policy's protections to riparian areas. In light of ongoing threats to California's wetlands and riparian areas, it is imperative that the SWRCB begin working on both Part 2 and Part 3. Accordingly, we ask that, in the Resolution adopting this policy, the SWRCB direct staff to begin working on Parts 2 and 3 immediately.

Thank you for considering our comments. We respectfully request that you make the changes recommended in this letter, and adopt the policy without further delay. Please feel free to contact us with any questions or to further discuss the draft policy.

Sincerely,

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