August 17, 2016

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

Re: Comments on 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

Dear Ms. Townsend:

On behalf of Defenders of Wildlife, Center for Biological Diversity, Citizens Committee to Complete the Refuge, San Francisco Baykeeper, Sierra Club California, California Coastkeeper Alliance, and Save the Bay, we submit these comments in response to the June 17, 2016 Preliminary Draft Procedures for Discharges of Dredged or Fill Materials to Waters of the State proposed for inclusion in the Water Quality Control Plans for Inland Surface Waters and Enclosed Bays and Estuaries and Ocean Waters of California ("draft policy"). Over the past thirteen years, our organizations have dedicated countless hours to the development of this policy. We continue to believe that having a strong State Water Resources Control Board ("SWRCB") wetlands policy is essential because federal jurisdiction under the Clean Water Act is limited and fails to safeguard many wetland types in California, and because the Regional Boards' current approach to regulating discharges of dredged or fill materials into waters of the state is failing to stop the destruction of wetlands.

We appreciate the fact that the SWRCB has repeatedly affirmed the need for a statewide wetlands policy and continued to direct staff to complete such a policy over the last several years. However, we are extremely disappointed with the approach proposed in the draft policy. The purpose of this policy is to protect California's declining wetlands and the values they provide as a critical part of our state waters. Yet under the draft policy, even if an aquatic site meets the definition of a wetland, it is not at all certain that it will be considered a water of the state and protected by the Porter-Cologne Act. As a result, the proposal undermines the purpose of this policy, and could make it even more difficult to protect California's wetlands. Additionally, while we are pleased to see a clear sequencing requirement in the draft policy, the weak provisions related to alternatives analysis and selection of the least environmentally

damaging practicable alternative ("LEDPA") would make it difficult for the Regional Boards to enforce the sequencing requirement. The draft policy has numerous other flaws, including failing to protect wetlands on prior converted croplands ("PCCs"), providing for inadequate mitigation ratios, and allowing projects to proceed without analyzing climate change impacts. Together, these flaws cause the draft policy to fall dramatically short of compliance with the state's no-net-loss policy, and implementation of the draft policy would be an abdication of the SWRCB's duty to protect the state's remaining wetlands and waters of the state pursuant to the Porter-Cologne Act.

The *primary* purpose of this policy must be the protection of state wetlands. We agree that creating a predictable, consistent, statewide permitting process compatible with the U.S. Army Corps of Engineers' ("Corps") permitting program is an important *secondary* goal. In particular, one of the stated purposes of this policy was to establish clear expectations regarding which landscape features are subject to the Regional Boards' jurisdiction, and to set forth a straightforward set of requirements that permit applicants must follow. Instead of providing a well-defined framework within which staff can work to protect waters of the state, the draft policy forces the Regional Boards to make a variety of decisions on a case-by-case basis without providing any criteria or guidance to instruct them on how to proceed. Such decisions include whether a wetland that meets the proposed criteria is a water of the state, whether an alternatives analysis is required, whether a mitigation ratio of less than one-to-one is acceptable, and whether a climate change analysis is required. This broad delegation of decision-making authority to the Regional Boards over fundamental aspects of the permitting process undermines the draft policy's ability to protect wetlands. It also creates a permitting program that fails to establish clear expectations for project proponents, will likely result in inconsistencies across the Regional Boards, will increase workload for already-overburdened Regional Board staff, sets the stage for "clarification" of this policy through excessive and burdensome litigation, and fails to do what it set out to do—protect California's remaining wetlands.

We offer the following comments to assist the SWRCB in its efforts to create a statewide wetlands policy protective of California's wetlands in compliance with the no-net-loss policy, and workable for permit applicants and Regional Board staff. Because modifying the draft policy to fulfill these basic purposes will require substantial revisions, we request that the SWRCB reissue the revised draft policy for public comment before it is adopted.

1. An effective statewide SWRCB wetlands policy is necessary to stop continued destruction of wetlands.

As the draft policy acknowledges, wetlands provide a diverse range of economic and environmental benefits to the State of California, including flood control, surface and ground water supply, erosion control, pollution treatment, nutrient cycling, and public enjoyment. Draft Policy at I. They also provide tremendous habitat value in California, "support[ing] 41 percent of the State's rare and endangered species, including 55 percent of [threatened and endangered] animal species and 25 percent of [threatened and endangered] plant species." Draft Staff

Report/Substitute Environmental Documentation ("Draft Staff Report/SED") at 140. California's wetlands are also exceedingly vulnerable. More than ninety percent of California's historic wetlands have been destroyed, and the state has suffered a higher rate of wetland loss than any other state. *Id.* at 28.

Because of wetlands' importance and vulnerability, California adopted Executive Order W-59-93—the no-net-loss policy—to halt the continued destruction of California's wetlands. Under this policy, all state agencies must conduct activities in accordance with the policy's objectives, including the objective of "ensur[ing] no overall net loss and long-term net gain in the quantity, quality, and permanence of wetlands acreage and values in California . . . ." The legislature also sought to protect wetlands through the Porter-Cologne Act, declaring that "activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable." Cal. Water Code § 13000. Because wetlands are waters of the state and are also critical to the health of other waterways, their protection is essential for attaining the water quality that the Porter-Cologne Act demands.

California's no-net-loss policy and the SWRCB's authority under the Porter-Cologne Act are particularly important because the federal regulatory regime under the Clean Water Act does not adequately protect the state's wetlands. Limitations on federal jurisdiction under the Clean Water Act leave several types of wetlands vulnerable, including vernal pools, playas, prairie potholes, alpine wet meadows, Northern California claypan, Central Valley Alkali Sinks, and California Mediterranean alkali marshes. Draft Staff Report/SED at 47. Without an effective SWRCB wetlands policy, we will continue to lose these wetlands that fall outside of federal jurisdiction in violation of the state's no-net-loss policy. Protecting these special California wetlands was the entire purpose for initiation of this policy process thirteen years ago but appears to have been abandoned in the draft policy.

It is also abundantly clear that the current approach to wetland protection at the Regional Boards, which relies on case-by-case jurisdictional determinations without the benefit of clear guidance from the SWRCB, is not working. The Corps reported that, between January 2007 and April 2009, 300 to 400 acres of wetlands and other jurisdictional aquatic habitat were destroyed each year. *Id.* at 28. We found nothing in the draft policy or associated materials to suggest this rate of loss has slowed in recent years. And the Draft Staff Report/SED flatly acknowledges that "current regulations have not been adequate to prevent losses in the quantity and quality of wetlands in California." *Id.* at 1.

In light of continued wetland losses, limitations on federal jurisdiction, and an admittedly ineffective state regulatory regime, an effective SWRCB wetlands policy is absolutely necessary to save our last remaining wetlands. Rather than creating a policy that will ensure robust protections, however, the draft policy principally formalizes the status quo, tacitly condoning the continued destruction of California's wetlands in violation of the no-net-loss policy and the Porter-Cologne Act. A more protective approach is required, and we offer the following

comments to provide a roadmap for the creation of an effective statewide SWRCB wetlands policy.

2. Wetlands meeting the criteria proposed by the SWRCB must be presumed to be waters of the state.

The sudden shift to a case-by-case analysis of whether a particular wetland is a water of the state is deeply troubling.[1] It undermines the purpose of the policy, and could reduce protections for California's wetlands. It is essential that a revised draft include a presumption that wetlands meeting the criteria proposed by the SWRCB are waters of the state.[2]

We appreciate that establishing a SWRCB wetlands definition that is inclusive of all of California's wetlands but is not so broad that it exceeds the Boards' jurisdiction over waters of the state is difficult. As explained below, however, it is an essential undertaking and necessary to comply with the state's no-net-loss policy. If the SWRCB concludes that a simple definition is unworkable, there are other feasible approaches. In particular, we suggest that the policy establish a rebuttable presumption of jurisdiction. Under this approach, the policy would create a strong presumption that, if a feature meets the modified three-parameter wetland definition proposed in the draft policy, then it is a jurisdictional wetland. To overcome the presumption, the permit applicant would have to provide clear and convincing evidence that the wetland is not a water of the state. The permit applicant would make this showing by relying on site-specific information and Regional Board precedents regarding the scope of their jurisdiction. To guide implementation at the Regional Boards, the policy could include a non-exhaustive list of features that meet the wetland definition and are *always* waters of the state (e.g., vernal pools and playa), and a non-exhaustive list of features that meet the wetland definition and are *never* waters of the state (e.g., ornamental ponds constructed in uplands). We believe this approach is protective of California's diverse wetlands, provides clarity to permit applicants regarding their obligations, promotes consistency across the Regional Boards, and ensures that the policy does not exceed the Boards' jurisdictional authority.

In contrast, the draft policy's approach is unacceptable. At best, a policy suggesting that not all wetlands are waters of the state will merely maintain the status quo, and thus, will fail to meet the fundamental purposes of the draft policy. At worst, it could place an increased burden

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[1] The last draft of the state wetlands policy that was circulated for public comment was explicit about the jurisdictional nature of the wetlands definition: "Pursuant to California Water Code §13050, this policy applies to all waters of the state. *Waters of the state include wetlands*." PRELIMINARY DRAFT Wetland Area Protection and Dredged or fill Permitting Policy, Version 6.5 (January 28, 2013) at 3 (emphasis added).

[2] As explained below, the modified three-parameter definition is not sufficiently inclusive, and a one-parameter definition is more appropriate to protect California's diverse wetlands. In comments on previous versions of this policy, some of our organizations explained that a modified three-parameter wetlands definition might be acceptable, but that was *only because it was understood that "wetlands" were presumed to be waters of the state*.

on staff if they have to defend their every decision and could also result in continued or even increased losses of wetlands. The Regional Boards currently determine whether particular features are regulated wetlands on a case-by-case basis, and this practice would continue under the draft policy. The Draft Staff Report/SED makes clear, however, that the status quo is unacceptable. *See* Draft Staff Report/SED at 1, 28 (acknowledging continued wetland losses and the inadequacy of current regulations). The proposed wetlands definition simply formalizes the status quo and fails to comport with California's no-net-loss mandate because it would permit the continued destruction of wetlands. Further, an important purpose of the SWRCB wetlands policy is to promote consistency across the Regional Boards; continuing to identify regulated wetlands on a case-by-case basis fails to achieve this purpose. *See* Draft Staff Report/SED at 1. Under this approach, an identical feature could be a regulated wetland in San Francisco but not in Sacramento. The lack of uniformity results in the under protection of wetlands and significant uncertainty for potential permittees.

Even more troubling, the proposed wetlands definition may not merely maintain the status quo—*it could result in increased destruction of California's wetlands*. Several Regional Boards currently have language in their basin plans indicating that all wetlands are waters of the state. For example, according to the Draft Staff Report/SED, the North Coast Regional Water Quality Control Board's Basin Plan "states that the 'definition of Waters of the state is broader than the definition of Waters of the United States' and that under state law 'wetlands are waters of the state and wetland water quality control is within the jurisdiction of the state . . . .'" Draft Staff Report/SED at 34 (citing Basin Plan 2011, p 2-16); *see also id.* at 35 (San Francisco Bay RWQCB "Basin Plan states that wetland water quality control is 'clearly within the jurisdiction of the State Water Board and Regional Water boards' because the Porter-Cologne Act defines waters of the state as 'any water, surface or underground, including saline waters, within the boundaries of the State (Cal. Wat. Code §13050(e)).'"), *id.* at 38 (Lahontan RWQCB "Basin Plan states that 'All wetlands shall be free from substances attributable to wastewater or other discharges . . . .'"). It is our understanding that this policy will amend the Basin Plans, replacing the Regional Boards' protective statements with language indicating that "not all features that qualify as wetlands are waters of the state." Draft Policy at I. This change would cast doubt on the Boards' practice of assuming all wetlands are waters of the state, increasing the likelihood that permit applicants will challenge jurisdictional determinations and creating an opening for litigants striving to limit the state's authority to regulate wetlands. Under this draft policy, there is a very real possibility that the Regional Boards would assert jurisdiction over fewer wetlands, and that the rate of wetland loss would increase.

Recent events in the San Francisco Bay Region illustrate the potential problems with the draft policy's definition and underscore the importance of a strong SWRCB wetlands definition. In 2009, Cargill Saltworks and Arizona-based developer DMB proposed filling and developing 1.5 square miles of former salt evaporation ponds that were once vibrant tidal marsh in San Francisco Bay. The San Francisco Bay Regional Water Quality Control Board reviewed the proposal and determined that the ponds were waters of the state and waters of the United States. *See* San Francisco Bay Regional Water Quality Control Board, Comments on Redwood

Saltworks Notice of Preparation dated October 2010 (Mar. 30, 2011). The Regional Board's assertion of jurisdiction and expression of concern over the project's impacts were essential to protecting the wetlands that would have been impacted if the project had gone forward as planned. Dissatisfied with the regulatory oversight, Cargill challenged the assertion of federal Clean Water Act jurisdiction over the ponds, and its challenge is still pending before the U.S. Environmental Protection Agency ("EPA"). If EPA determines that the Clean Water Act does not apply to the project site, the Regional Board's assertion of jurisdiction under the Porter-Cologne Act will be critical to protecting these and other wetlands that are adjacent to the San Francisco Bay. Inserting language into the Basin Plan for the San Francisco Bay Region emphasizing that some wetlands are not waters of the state undermines the Regional Board's ability to unambiguously assert its jurisdiction, and invites a litigious entity like Cargill to challenge the Regional Board's authority.

3. The Staff Report/SED must seriously analyze an alternative that includes a more protective wetlands definition and, if a modified-three parameter definition is selected, the policy must clarify that the SWRCB's wetlands definition is only applicable to proceedings under the SWRCB's authority.

The SWRCB is not the only State agency that regulates wetlands. Among other agencies, the California Coastal Commission ("CCC") regulates development in wetlands pursuant to its authority under the Coastal Act. The CCC uses a wetland definition that is less restrictive (i.e., more protective) than the definition included in the draft policy, requiring only that an area be wet enough to support wetland plants or promote the formation of hydric soils.[3] *See* Letter from Peter M. Douglas, CCC Executive Director to SWRCB re: Wetland Area Protection Policy and Dredge and Fill Regulations, Initial Study (May 19, 2011), attached. As we have emphasized in previous letters, adoption of a one-parameter definition would be substantially more protective of California's diverse wetlands than the SWRCB's currently proposed definition.[4] To fully understand the benefits of having a more protective SWRCB wetlands definition, the Staff

[3] The California Department of Fish and Wildlife ("CDFW") also employs a wetlands definition that is more inclusive and more protective than the SWRCB's proposed definition. *See* California Wetlands and Riparian Area Protection policy Technical Advisory Team Technical Memorandum No. 2: Wetland Definition, Appx. A at p. 14 (June 25, 2009).

[4] The overly-narrow, modified three-parameter wetlands definition is not widely supported, even by signatories to this letter. We believe the one-parameter (Cowardin) definition developed by the U.S. Fish and Wildlife Service, and used by CDFW, is the most comprehensive wetland definition and thus the most capable of defining the diverse array of California wetlands. Riparian areas pose a significant delineation problem. Whereas there is no question that riparian areas perform many of the same functions of wetlands (i.e., bank stabilization, sediment trapping, habitat, nutrients, etc.), they may not be underlain by hydric soils (more often non-hydric entisols) nor have the frequency and duration of inundation or saturation to meet the criterion for "wetlands" as they have been defined and delineated utilizing a three-parameter definition. The fact that the CCC has used a one-parameter definition in a regulatory framework for decades clearly indicates that the approach is both functional and legal.

Report/SED should at least seriously analyze an alternative that includes adoption of a one-parameter test.[5]

If the SWRCB adopts the modified three-parameter definition, the existence of multiple wetland definitions in California could create a significant possibility of confusion within the regulated community. Because the CCC's wetland definition is more protective, areas in the coastal zone may not qualify as wetlands under the SWRCB's proposed definition, but nonetheless be considered wetlands under the CCC's definition. Though beyond the reach of the Regional Boards, such wetlands would be subject to the CCC's regulatory authority. In light of the likelihood of confusion caused by inconsistent definitions, the CCC submitted comments on the Initial Study for this policy in 2011. The CCC recommended to the SWRCB "that you increase the clarity of your efforts by using the more precisely descriptive term 'State Water Board wetlands' rather than the generic and variously defined 'wetlands,'" and suggested that the SWRCB "should acknowledge the Coastal Commission's jurisdiction and regulatory approach to protecting wetlands." Letter from Peter M. Douglas, CCC Executive Director to SWRCB (May 19, 2011). In spite of these comments, the draft policy and Draft Staff Report/SED do not adequately address the limited nature of the SWRCB's proposed wetland definition.[6] The SWRCB should remedy this problem by clearly explaining that the proposed policy's wetland definition applies only to permitting processes overseen by the SWRCB and Regional Boards, and explicitly discussing the CCC's permitting authority and its more inclusive wetlands definition.

We also note that it is inappropriate to rely exclusively on the draft policy's wetland definition to monitor the status of California's wetlands and the state's compliance with the no-net-loss mandate. Executive Order W-59-93 focuses on wetlands generally and does not distinguish between CCC wetlands and SWRCB wetlands. Because many important wetlands will meet the one-parameter CCC wetland definition but not the more restrictive proposed SWRCB definition, monitoring wetlands based on the SWRCB definition alone would provide an incomplete and misleading picture of the health of California's wetlands. Therefore, for purposes of tracking the status of wetlands under the no-net-loss policy, if the SWRCB adopts the proposed more restrictive definition rather than the one-parameter test, the definition of wetlands for tracking must be broader and more inclusive than the SWRCB's definition.

4. The policy must consistently require a meaningful alternatives analysis and selection of the least environmentally damaging practicable alternative.

[5] The Draft Staff Report/SED's analysis of alternatives is cursory and fails to meaningfully assess the beneficial impacts of adopting a one-parameter wetlands definition. *See* Draft Staff Report/SED at 175-76.

[6] While Table 5-2 of the Draft Staff Report/SED mentions the CCC's permitting authority, the brief acknowledgement is insufficient to avoid confusion within the regulated community, and a more detailed discussion of the different state-level wetland definitions is required.

Under the draft policy, a permitting authority may approve a project only if the applicant has, among other things, demonstrated "[a] sequence of actions has been taken to first avoid, then to minimize, and lastly compensate for adverse impacts to waters of the state." Draft Policy at 4(B)(1)(a). This requirement, with its primary focus on avoidance, is essential to protecting California's wetlands. It is also consistent with the Corps' Section 404 permitting process. *See, e.g.*, 33 C.F.R. § 332.1 (requiring that permit applicants "take all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United States."). The sequencing requirement should remain a central component of the SWRCB's wetlands policy.

However, the draft policy's requirements related to alternatives analysis and selection of the LEDPA undermine the sequencing requirement and make it extremely likely that wetlands will continue to be destroyed under this policy. Of primary concern is the fact that the draft policy does not require a project to be the LEDPA to receive a permit. *See* Draft Policy at IV(B)(1). Rather, the Regional Boards are permitted to determine whether an alternatives analysis is required on a case-by-case basis, and only if an alternatives analysis is required must the selected project be the LEDPA. Draft Policy at IV(B)(3)(b) ("If the project also includes discharges to waters of the state outside of federal jurisdiction, the permitting authority *may* require the applicant to supplement the alternatives analysis to include waters of the state outside of federal jurisdiction.") (emphasis added); IV(B)(3)(c) ("The permitting authority *may* require an alternatives analysis in accordance with the State Supplemental Dredged or Fill Guidelines, unless the project is exempt under subsection (d) below.") (emphasis added); IV(B)(3)(e) ("The alternatives analysis must establish that the proposed project alternative is the LEDPA in light of all potential direct, secondary (indirect), and cumulative adverse impacts on the physical, chemical, and biological elements of the aquatic ecosystem."). If a Regional Board does not require an alternatives analysis, not only is there no LEDPA requirement, there is no way to know whether wetland impacts are being avoided to the greatest extent practicable because alternative project locations or designs were never fully explored. Allowing the Regional Boards to decide whether an alternatives analysis is required on a case-by-case basis and only requiring that a project be the LEDPA if an alternatives analysis is required is inconsistent with the state's no-net-loss policy and leaves California's wetlands vulnerable to destruction.

Further, leaving the Regional Boards with unbounded discretion to determine whether an alternatives analysis is required will cause uncertainty within the regulated community, a lack of uniformity across and within the Regional Boards, and increased workload for Regional Board staff. Under the draft policy, for example, a permit applicant who seeks to impact a wetland that is a water of the state outside of federal jurisdiction has no way to know whether an alternatives analysis will be required (assuming none of the exemptions occur). *See* Draft Policy at IV(B)(3)(c). And a permit applicant with similar projects in multiple regions may be required to do an alternatives analysis in one region but not in another. For Regional Board staff, the draft policy's lack of guidance regarding when an alternatives analysis is required could cause increased workload and additional delay in processing of permit applications.

Beyond a lack of clarity regarding when an alternatives analysis might be required, the Draft Staff Report/SED creates additional uncertainty by suggesting that the Regional Boards will have broad, unbounded discretion to determine the required contents of the analysis. According to the Draft Staff Report/SED, "[t]he amount of information necessary in the alternative analysis would be commensurate with the level of the projects impacts, i.e., more information would be required for projects with significant impacts; projects with minimal impacts may only need to describe avoidance and minimization measures." Draft Staff Report/SED at 59. The lack of clarity regarding the level of detail required in an alternatives analysis will lead to uncertainty and confusion within the regulated community, inconsistency across Regional Boards, and additional work and delay for Regional Board staff. Permitting a watered-down alternatives analysis is also inconsistent with ensuring wetland impacts are avoided.

Simple modifications to the draft policy would remedy these problems. These modifications would ensure that a meaningful alternatives analysis is required for every permit application, and require that the permitted project be the LEDPA.[7]

- Section IV(A)(2)(c): ~~If required by the permitting authority on a case-by-case basis, i~~If no exemptions apply, an alternatives analysis in accordance with section IV.B.3 and, any supporting documentation.

- Section IV(B)(3)(b): Discharges to waters of U.S.

  In reviewing and approving the alternatives analysis for discharges of dredged or fill material that impact waters of the U.S., the permitting authority shall defer to the Corps and EPA determinations on the adequacy of the alternatives analysis, unless the Executive Officer or Executive Director determines that (1) the permitting authority was not provided an adequate opportunity to consult during the development of the Corps' alternatives analysis, (2) the Corps' alternatives analysis does not adequately address issues identified by the permitting authority during consultation, (3) additional analysis is required to comply with CEQA, water quality standards, or other requirements or (4) the project and all of the identified alternatives would not comply with water quality standards.

[7] We note that, in certain places, the Draft Staff Report/SED already appears to assume that an alternatives analysis and selection of the LEDPA would be required in all cases: "Finally, the proposed Procedures would strengthen efforts to avoid and minimize impacts to wetlands and other waters of the state *by requiring* an evaluation of alternatives to identify and implement the LEDPA. This process will avoid or reduce conflicts with policies, regulations, and planning documents, including HCPs, NCCPs, or other similar plans." Draft Staff Report/SED at 142 (emphasis added).

If the project also includes discharges to waters of the state outside of federal jurisdiction, the permitting authority ~~may~~shall require the applicant to supplement the alternatives analysis to include waters of the state outside of federal jurisdiction. If an alternatives analysis is not required by the Corps for waters of the U.S. impacted by the discharge of dredged or fill material, the permitting authority ~~may~~shall require an alternatives analysis for the entire project in accordance with the State Supplemental Dredged or Fill Guidelines, unless the project is exempt under subsection (d) below.

- Section IV(B)(3)(c): Discharges solely to waters of the state outside of federal jurisdiction

  The permitting authority ~~may~~shall require an alternatives analysis in accordance with the State Supplemental Dredged or Fill Guidelines, unless the project is exempt under subsection (d) below.

- Section IV(B)(3)(e): ~~The permitting authority will be responsible for determining the sufficiency of an alternatives analysis that is required under their discretion (see 3b, 3.c and 3.d above).~~ The alternatives analysis must establish that the proposed project alternative is the LEDPA in light of all potential direct, secondary (indirect), and cumulative adverse impacts on the physical, chemical, and biological elements of the aquatic ecosystem.

5. The exemptions from alternatives analysis must be modified to ensure wetland impacts are avoided.

First, the exemption for projects that inherently cannot be located in an alternate location should be eliminated. *See* Draft Policy at IV(B)(3)(d)(iii). Under the draft policy, such projects fall within an exemption, but the permitting authority retains discretion to "require an analysis of on-site alternatives that would minimize impacts to waters of the state." *Id.* Analysis of on-site alternatives is important because it can identify alternative project designs that may avoid or minimize impacts to wetlands, and should be required in all cases. Additionally, leaving the Regional Boards with discretion to apply an exemption on a case-by-case basis will cause confusion and uncertainty within the regulated community, lead to inconsistent approaches across Regional Boards, and create additional burdens for Regional Board staff. Eliminating the exemption will better protect wetlands and reduce uncertainty and inconsistencies.

Second, the exemption for projects that would be conducted in accordance with an approved watershed plan needs further clarification. *See* Draft Policy at IV(B)(3)(d)(iv). 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, for the exemption in section IV(B)(3)(d)(iv) of the draft policy to be appropriate, there must be significantly more information regarding the contents of an approvable watershed plan. 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 approved watershed plans will protect wetlands when project-specific alternatives analysis are not conducted. Accordingly, the SWRCB should either provide details regarding the elements that must be included in a watershed plan, or remove the exemption found in section IV(B)(3)(d)(iv) of the draft policy and wait until a later time to include it in an amendment to the policy once further details have been resolved.

6. A loophole allowing for the destruction of wetlands on Prior Converted Croplands must be eliminated.

After decades of land conversion and wetland destruction, some of California's most important remaining wetland habitats are located on agricultural land. As explained more fully in the attached letter dated August 7, 2012, wetland areas that have been certified as PCCs may still meet the draft policy's proposed wetland definition and continue to provide important wetland functions. Without a strong policy protecting wetlands on PCCs, California will continue to lose wetland acres in violation of the no-net-loss policy.

In the current draft policy, wetlands on lands designated as PCCs are excluded from the application procedures unless the PCC (1) changes to a non-agricultural use, or (2) is abandoned. Draft Policy at IV(D)(2)(a). The exclusion and overly-limited recapture provision leave open the possibility that important wetlands on lands designated as PCCs could be destroyed without any oversight from the Regional Boards. In particular, the draft policy would not require a landowner to receive a permit to destroy wetlands on a PCC if the land is still being used for agriculture. This means a landowner could, without any permitting oversight, deep rip or even fill wetlands on a PCC to plant an orchard. Once the wetlands are gone, the landowner could replace the orchard with development. The loss of wetlands on PCCs to either incompatible agricultural uses or development is enormously problematic and inconsistent with California's no-net-loss policy.

The best way to remedy this problem is to eliminate the exclusion for PCCs. Under this approach, wetlands on PCCs would be subject to the same permitting requirements as any other wetlands. Eliminating the exclusion would help to create a policy that is clear, consistent, and protective of wetlands.

If the PCC exclusion is not eliminated, we alternatively request that the recapture provision be strengthened to ensure wetlands on PCCs are not converted to incompatible agricultural uses without oversight from the Regional Boards. In particular, the recapture provision found in section IV(D)(1)(a) of the draft policy, which applies to agricultural activities on lands not designated as PCCs, should be applied to PCCs as well. To make this change, the PCC exclusion in section IV(D)(2)(a) of the draft policy should be revised to state:

Discharges of dredged or fill material that occur within wetland areas that have been certified as prior converted cropland (PCC) by the Natural Resources Conservation Service. The PCC exclusion will no longer apply if: (1) the PCC changes to a non-agricultural use, or (2) the PCC is abandoned, meaning it is not planted to an agricultural commodity for more than five consecutive years and wetland characteristics return, and the land was not left idle in accordance with a USDA program. Additionally, any discharge of dredged or fill material to a water of the state is not exempt and shall be subject to the application procedures in sections IV.A and IV.B, if (1) the purpose of the activity is bringing a water of the state into a use to which it was not previously subject, where the flow or circulation of water of the state may be impaired or the reach of such waters be reduced, or (2) the discharge contains any toxic pollutant listed in CWA section 307.

i. For purposes of D.2.(a), agricultural commodity means any crop planted and produced by annual tilling of the soil, including tiling by one-trip planters, or sugarcane.

ii. For purposes of D.2.(a), agricultural use means open land planted to an agricultural crop, used for the production of (1) food or fiber, (2) used for haying or grazing, (3) left idle per a USDA program, or (4) diverted from crop production to an approved cultural practice by NRCS that prevents erosion or other degradation.

This approach is appealing, among other reasons, because the recapture provision is derived from Clean Water Act section 404(f)(2), and is already well-known within the regulated community.

In recent conversations, SWRCB staff have suggested that, under the draft policy, wetlands on PCCs would still be subject to the Regional Boards' permitting authority, but PCC landowners would not be required to comply with the draft policy's procedures. Subjecting wetlands on PCCs to some different, ill-defined permitting requirements would be enormously problematic. This approach would cause understandable confusion within the regulated community and lead to under protection of wetlands. Instead, the draft policy's permitting requirements should be consistently applied to all California wetlands, including wetlands on PCCs.

With respect to the draft policy's treatment of PCCs, we emphasize that merely mimicking the Corps' permitting process is inadequate. Because wetlands on PCCs are exempted from federal oversight, these important wetlands are not adequately protected. This policy must clarify and strengthen the Regional Boards' authority over wetlands on PCCs to ensure compliance with the statewide no-net-loss policy.

7. The policy's mitigation requirements must be strengthened.

Effective mitigation requirements are essential to ensuring the policy comports with the statewide no-net-loss mandate. As extensively detailed in the attached letter dated April 16, 2013, mitigation wetlands do not fully replicate natural wetlands, and mitigation requirements must be crafted carefully to avoid significant losses in wetland functions and values.

The draft policy's provisions related to the amount of compensatory mitigation are problematic. In particular, the draft policy's grant of authority to the Regional Boards to require mitigation ratios of less than one-to-one is inappropriate and inconsistent with achieving no net loss. *See* Draft Policy at IV(B)(5)(c). As discussed further below, we do not agree that a mitigation ratio of less than one-to-one *can ever* be appropriate because it undermines the no-net-loss policy. The draft policy's current approach, which leaves the Regional Boards with significant discretion to reduce the required mitigation ratio below one-to-one under an undefined set of circumstances would lead to losses of wetland acreage, inconsistent requirements across and within Regional Boards, uncertainty within the regulated community, and significant additional workload for Regional Board staff. To avoid these problems, we suggest the following changes to section IV(B)(5)(c) of the draft policy:

> Amount: The amount of compensatory mitigation will be determined on a project-by-project basis in accordance with State Supplemental Dredged or Fill Guidelines, section 230.93(f). The permitting authority ~~may~~shall take into account recent anthropogenic degradation to the aquatic resource and the potential and existing functions and conditions of the aquatic resource. 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. A reduction in the mitigation ratio for compensatory mitigation will be considered by the permitting authority if buffer areas adjacent to the compensatory mitigation are also required to be maintained as part of the compensatory mitigation management plan. The amount of compensatory mitigation required by the permitting authority will vary depending on which of the following strategies the applicant uses to locate the mitigation site within a watershed~~.
>
> ~~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;~~
>
> ~~Strategy 2: Applicant locates compensatory mitigation using a watershed approach based on a watershed profile developed for a project evaluation area,~~

~~and demonstrates that the mitigation project will contribute to the sustainability of watershed functions and the overall health of the 303 watershed area's aquatic resources.~~

~~Generally, the amount of compensatory mitigation required under Strategy 1 will be less than the amount of compensatory mitigation required under Strategy 2 since the level of certainty that a compensatory mitigation project will meet its performance standards increases if the compensatory mitigation project complies with a watershed plan as described above. Certainty increases when there is a corresponding increase in understanding of watershed conditions, which is increased when using a watershed plan as described above to determine compensatory mitigation requirements.~~

In theory, we support the draft policy's incorporation of watershed planning, but the draft policy includes insufficient detail regarding the required contents of an approvable watershed plan and does not explain the type of environmental review to which the plan would be subjected. Without adequate guidance, the draft policy's attempt to achieve meaningful planning at the watershed scale is destined to fail. Even with a strong watershed plan in place, there should be no allowance of less than a one-to-one mitigation ratio. A watershed plan should ensure that wetland mitigation is appropriate as to function (habitat, water recharge, flood protection, etc.) and location, but it cannot provide any rationale to support the mitigation of a destroyed wetland with the creation of a smaller wetland. Considering the scientific evidence indicating that restored and created wetlands are not functionally equivalent to natural wetlands, anything less than a one-to-one mitigation acreage ratio is inconsistent with the no-net-loss requirement.

The draft policy's mitigation requirements also need to be modified to require a financial security for every approved mitigation plan. *See* Draft Policy at IV(B)(5)(f). Requiring a letter of credit, performance bond, or other financial security is a standard practice, and is important for ensuring promised mitigation benefits materialize. We therefore recommend the following changes to section IV(B)(5)(f) of the draft policy:

Financial Security: ~~Where deemed necessary by the permitting authority,~~ ~~p~~Provision of a financial security (e.g., letter of credit or performance bond) shall be a condition of the Order. ~~In this case, t~~The permitting authority will approve the financial security to ensure compliance with compensatory mitigation plan requirements.

Additionally, we are concerned that the draft policy fails to emphasize the importance of in-kind mitigation. Losses to some wetland types, such as vernal pools, have been particularly profound, and we are concerned that the policy would allow impacts to these vulnerable wetland types to be mitigated by the creation of less ecologically valuable wetlands. The Draft Staff Report/SED explains that failure to require in-kind mitigation is a significant problem:

> [E]stimates of wetland losses may provide an overly optimistic picture if compensatory mitigation wetlands are not ecologically equivalent to the natural wetlands they are intended to replace. For example, the USFWS (2011) points out that, although there have been net wetland gains in recent years, there is a "non-parity between wetland types that have been lost and subsequent wetland mitigation…the net effect has been the loss of wetland diversity, hydrologic function, biological communities, and a 'homogenization of wetland landscapes.'"

Draft Staff Report/SED at 30. Thus, the Draft Staff Report/SED recognizes this significant problem in wetland compensation, but the draft policy fails to adequately address it. Inclusion of a provision in the policy that establishes a strong preference for in-kind mitigation would help to ameliorate this concern.

Finally, the following additional modifications are necessary to strengthen the draft policy's mitigation requirements:

- Section IV(B)(5)(a): Compensatory mitigation, in accordance with the State Supplemental Dredged or Fill Guidelines, Subpart J, should be presumed to be required, and will only be considered after the applicant has demonstrated that adverse impacts to waters of the state have been avoided and minimized to the maximum extent practicable ~~may be required to ensure that an activity complies with these Procedures~~.

- Section IV(B)(5)(e): Final Compensatory Mitigation Plan: The permitting authority will review and approve the final compensatory mitigation plan submitted by the applicant to ensure mitigation comports with the State Supplemental Dredged or Fill Guidelines, Water Code requirements, applicable water quality standards, and other appropriate requirements of state law. The level of detail in the final plan shall be sufficient to accurately evaluate whether compensatory mitigation offsets the adverse impacts attributed to a project considering the overall size and scope of impact. The compensatory mitigation plan shall be sufficient to provide the permitting authority with a reasonable assurance that replacement of the full range of lost aquatic resource(s) and/or functions will be provided in perpetuity.

  The permitting authority ~~may~~shall require ~~include as a condition of an Order~~ that the applicant receive approval of a final mitigation plan prior to discharging dredged or fill materials to waters of the state. ~~In this case, the permitting authority will approve the final mitigation plan by amending the Order.~~

- Section IV(B)(7): The permitting authority will review and approve the final monitoring and reporting requirements for all projects. Monitoring and reporting shall~~may be required to~~ demonstrate compliance with the terms of the Order.

8. The policy must support wetland enhancement, restoration, 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. The Central Valley Joint Venture, Grassland Water District and Grassland Resource Conservation 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.

9. The policy must consistently require assessment of climate change impacts.

The draft policy provides the Regional Boards with authority to require, on a case-by-case basis, an analysis of impacts associated with climate change and measures to avoid or minimize those impacts. Draft Policy at IV(A)(2)(b). The Draft Staff Report/SED highlights some of the ways in which climate change should be considered during project design:

> Consideration should be given to the potential impacts on project viability and mitigation success. Projects subject to sea level rise should consider the need for project design to accommodate for the long term viability of the project and compensation area. Projects involving channelization should show that anticipated changes in flows due to increased precipitation patterns, and potential flooding, due to climate change are analyzed.

Draft Staff Report/SED at 53. In light of wetlands' vulnerability to changes in temperature, hydrology, and sea level rise, these considerations and others are essential to ensuring that projects are resilient to climate change impacts, and that mitigation efforts can succeed. Accordingly, and in conformance with State Board Resolution No. 2008-0030, we suggest the following revisions to section IV(A)(2)(b) of the draft policy, which would make an assessment of climate change impacts a standard component of every permit application:

> ~~If required by the permitting authority on a case-by-case basis, a~~An assessment of the potential impacts associated with climate change related to the proposed project and any proposed compensation, and any measures to avoid or minimize those potential impacts.

10. The policy must consistently require that dry season wetland delineations be supplemented with data from the wet season.

The draft policy permits the Regional Boards to determine, on a case-by-case basis, whether to require that dry season wetland delineations be supplemented with field data from the wet season. Draft Policy at IV(A)(2)(a). This approach fails to set clear expectations for permit applicants, will lead to inconsistencies across the Regional Boards, will cause increased workload for Regional Board staff, and will likely under-protect wetlands. Supplementing dry season delineations with field data from the wet season is critical to avoiding wetland impacts, and should be required in all cases. We suggest the following changes to section IV(A)(2)(a) of the draft policy to make sure wetlands are consistently protected:

> ~~If required by the permitting authority on a case-by-case basis, i~~If the wetland area delineations were conducted in the dry season, supplemental field data from the wet season of a normal rainfall year to substantiate dry season delineations.

11. The policy should not exempt storm water facilities that were constructed in a water of the state.

Under section IV(D)(2)(c) of the draft policy, all discharges of dredged or fill material associated with routine maintenance of storm water facilities regulated under another Water Board Order are exempted from the draft policy's procedures. This exclusion is inappropriate for storm water facilities that were constructed in waters of the state because those areas may continue to provide significant ecological benefits. We suggest the following modifications to section IV(D)(2)(c) of the draft policy to more appropriately limit the exclusion:

> Discharges of dredged or fill material that are associated with routine maintenance of storm water facilities regulated under another Water Board Order, such as sedimentation/storm water detention basins, as long as the storm water facility is located in an area that did not historically support wetland areas or other aquatic resources.

12. The Draft Staff Report/SED fails to provide the identification and analysis of significant and potentially significant impacts required by CEQA.

The Draft Staff Report/SED states that it is intended to provide the needed CEQA review for the proposed regulatory changes.

> State Water Board staff prepared this Staff Report in compliance with the California Code of Regulations (CCR), title 23, §3775, et. seq. to identify, evaluate, and minimize potential adverse impacts to the environment of adopting the proposed Procedures. The Secretary for Natural Resources has certified the State Water Board's water quality planning process as an environmental regulatory program[5] [Cal. Code Regs. tit. 14, §15251(g)] meeting CEQA. The CCR[6] [23 CCR §3775 et seq.] requires the State Water Board to prepare a report that, at a minimum, contains:

> (1) A brief description of the proposed project (proposed Procedures);
> (2) An identification of any significant or potentially significant adverse environmental impacts of the proposed Procedures;
> (3) An analysis of reasonable alternatives to the proposed Procedures, and mitigation measures to avoid or reduce any significant or potentially significant adverse environmental impacts; and
> (4) An environmental analysis of the reasonably foreseeable methods of compliance.
>
> This Staff Report fulfills the State Water Board's requirements for preparation of an environmental document for public review, and is part of the substitute environmental documentation required to support the proposed Procedures.

Draft Staff Report/SED at 3. Unfortunately, the Draft Staff Report/SED fails to adequately or accurately identify significant and potentially significant impacts to the environment that will result from adoption of the proposal, fails to adequately analyze those impacts it does identify, and as a result fails to fully address needed alternatives and mitigation measures to avoid or minimize impacts from the proposed regulatory changes or to analyze the reasonably foreseeable methods of compliance with the proposed procedures that will ensure impacts are avoided, minimized and mitigated.

a. The SWRCB must comply with CEQA's substantive mandates in approving the new regulations under its certified regulatory program.

The "Water Quality Control (Basin)/208 Planning Program of the State Water Resources Control Board and the Regional Water Quality Control Boards" is a certified regulatory program for purposes of CEQA. *See* Cal. Pub. Res. Code § 21080.5; 14 C.C.R. ("CEQA Guidelines") § 15251(g). Although certification exempts the Board from CEQA's environmental impact report requirement, the Board still must comply with CEQA's substantive and procedural mandates. Cal. Pub. Res. Code §§ 21000, 21002, 21080.5; *Sierra Club v. Bd. of Forestry* (1994) 7 Cal. 4th 1215, 1236; *Joy Road Area Forest and Watershed Association v. Cal. Dept. of Forestry and Fire Protection* (2006) 142 Cal. App. 4th 656, 667-68.

> A certified regulatory program is exempt from the requirement of an environmental impact report (EIR) (Pub. Resources Code, § 21080.5, subd. (c)). *Nevertheless, there must be significant documentation. The document used as a substitute for an EIR must include a description of the proposed activity with alternatives to the activity and mitigation measures as well as written responses to significant environmental points raised during the evaluation process*. (*Id*., subds. (d)(2)(D) & (d)(3)(A); Cal. Code Regs., tit. 14, § 15252, subd. (a).)
>
> A certified regulatory program is subject to the broad policy goals and substantive standards of CEQA. (*City of Arcadia v. State Water Resources Control Bd.*, [(2006)], 135 Cal. App. 4th at p. 1422.) It is said that the substitute documents

> serve as the functional equivalent of an EIR. (*Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection* (2008) 43 Cal. 4th 936, 943.)

Conway v. State Water Resources Control Bd. (2015) 235 Cal. App. 4th 671, 680 (emphasis added).

The Board must ensure adequate environmental information is gathered and that the environmental impacts of the proposed regulatory changes are fully identified and analyzed before approval. "To conclude otherwise would place the burden of producing relevant environmental data on the public rather than the agency and would allow the agency to avoid an attack on the adequacy of the information contained in the report simply by excluding such information." *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 724.

The environmental review documents must "contain facts and analysis, not just the agency's bare conclusions or opinions." *Laurel Heights Improvement Assn. v. Regents* (1989) 47 Cal. 3d 376, 404 (and cases cited therein). The environmental review documents "must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." *Id*. Environmental review documents must also contain sufficient detail to help "insure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug." *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn*. (1986) 42 Cal.3d 929, 935 (citations omitted).

"An EIR which does not produce adequate information regarding alternatives cannot achieve the dual purpose served by the EIR, which is to enable the reviewing agency to make an informed decision and to make the decisionmaker's reasoning accessible to the public, thereby protecting informed self-government." *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 733 (citing *Laurel Heights Improvement Assn.*, 47 Cal. 3d at 392).

The same requirements apply to an environmental document prepared as part of a certified regulatory program. *See Sierra Club v. State Bd. of Forestry* (1994) 7 Cal. 4th 1215, 1228-29. Alternatives must be analyzed even if measures intended to mitigate the significant impacts also are proposed. *See Friends of the Old Trees v. Dept. of Forestry & Fire Protection (*1997) 52 Cal. App. 4th 1383, 1393-94. Overall, the Draft Staff Report/SED fails to address the most important criteria for a feasible alternative—that it avoids significant impacts on the environment of the proposed project. The question for the SWRCB in this matter is what are the impacts of adopting this new proposed regulation and whether the impacts could be avoided by a feasible alternatives. Unfortunately the environmental review in the Draft Staff Report/SED failed to address this critical question except in vague generalities. *See* Draft Staff Report/SED at 171-73.

When issuing regulations or policies, agencies will often conduct programmatic CEQA review (often referred to as first-tier analysis). While a programmatic CEQA document may

provide less detail than project-specific reviews, even programmatic environmental reviews must provide some detail as to the potential environmental impacts of the project and the mitigation measures and alternatives to reduce such impacts. Programmatic CEQA review must consider "cumulative impacts that might be slighted in a case-by-case analysis" and "broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts." CEQA Guidelines § 15168.

Determining what issues are appropriate for detailed review at each tier or stage of environmental review is critical.

> In addressing the appropriate amount of detail required at different stages in the tiering process, the CEQA Guidelines state that "[w]here a lead agency is using the tiering process in connection with an EIR for a large-scale planning approval, such as a general plan or component thereof … , the development of detailed, site-specific information may not be feasible but can be deferred, in many instances, until such time as the lead agency prepares a future environmental document in connection with a project of a more limited geographic scale, as long as deferral does not prevent adequate identification of significant effects of the planning approval at hand." (Cal. Code Regs., tit. 14, § 15152, subd. (c).) This court has explained that "[t]iering is properly used to defer analysis of environmental impacts and mitigation measures to later phases when the impacts or mitigation measures are not determined by the first-tier approval decision but are specific to the later phases." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova,* [(2007)], 40 Cal. 4th [412] at p. 431.

In re Bay-Delta etc. (2008) 43 Cal. 4th 1143, 1169. Certified regulatory program environmental documents can utilize CEQA's tiering principles so long as they provide the level of detail needed for the appropriate tier of analysis. *Conway v. State Water Resources Control Bd.* (2015) 235 Cal. App. 4th 671, 680.

Notably, this proposal from the SWRCB is in sharp contrast to that at issue in *Conway*, where the Court found that whether dredging would happen or not as a remediation measure associated with TMDLs was uncertain and a full analysis of those impacts was therefore premature in that first-tier analysis. 235 Cal. App. 4th at 680-81. Here, however, dredging and filling activities are at the core of the proposed regulatory changes and the proposed definition of wetlands and other procedures will directly affect where and how dredge and fill activities proceed across the state. Therefore, the impacts of those activities must be evaluated in some detail in order for the SWRCB to comply with CEQA.

b. The Draft Staff Report/SED recognizes significant annual loss of wetlands under the draft policy but refuses to identify or analyze the significant impacts of the proposal.

The Draft Staff Report/SED concludes at a programmatic level that there will be no significant impact or a less than significant impact to resources based on the assumption that the proposed procedures increase protections. As the Executive Summary states:

> The environmental impacts associated with the proposed Procedures are evaluated in this Staff Report on a programmatic level. As such, this Staff Report is not as detailed as an environmental document that would be used to analyze an individual discharge of dredged or fill material project that would be regulated under the proposed Procedures. The State Water Board expects future environmental reviews of projects that are subject to the proposed Procedures to identify project-specific environmental effects. At that time, the lead agency must identify any project-specific significant environmental effects, and adopt all feasible alternatives and mitigation for these effects. If no feasible mitigation or alternatives are available, the lead agency must adopt a statement of overriding considerations before approving the project, as required by CEQA.
>
> Staff cannot predict the exact nature of environmental effects associated with future individual projects because such forecasting would require knowledge of future projects (e.g., scope, scale, location, and design) throughout the state. However, the programmatic environmental impacts assessment may be representative of the types and magnitude of project-specific environmental effects. The State Water Board intends for the proposed Procedures to provide consistent identification of wetlands, and to strengthen efforts to avoid and minimize impacts to all waters of the state, through consistent application submittal and review requirements. This consistency may result in a greater avoidance, minimization, and compensation for impacts to waters of the state and reduction of discharges of dredged or fill materials, potentially resulting in the protection and retention of a greater proportion of aquatic resources relative to existing regulatory practice.
>
> Further, given the relatively small number of projects that might be regulated differently under the proposed Procedures, compared to the existing regulatory framework, the State Water Board has determined that the programmatic environmental effect on all environmental impact categories will be less than significant, or there will be no impact. As such, the proposed Procedures will not result in any cumulatively considerable impacts when combined with other past, present, or reasonably foreseeable related projects.

Draft Staff Report/SED at 4-5. Unfortunately, this is purely conclusory and, indeed, the Draft Staff Report/SED appears to be attempting a kind of slight-of-hand by ignoring the initial impetus for the regulatory changes and earlier iterations of the proposal including far more protective wetlands definitions (such as the one-parameter and two-parameter definitions). The past 13 years of stakeholder engagement, draft proposals and public comments appear to have

disappeared entirely. Only by ignoring the earlier process, can the staff find that the current proposal—essentially maintaining the status quo with continued significant annual losses of wetlands throughout the state—will cause no significant impacts.

Furthermore, even where the ultimate goal of an action or policy is intended to improve the environment and the impacts are on balance beneficial, detailed environmental review may be needed. *See* CEQA Guidelines § 15063 (b)(1) (where a project may cause significant effect on the environment "regardless of whether the overall effect of the project is adverse or beneficial" the agency shall prepare an EIR). Either the proposed change to the regulatory procedures makes a difference or it does not, it cannot both be a beneficial improvement and have no impact whatsoever. Even at the programmatic level some detailed identification and analysis of environmental impacts should be provided. *See* discussion *supra*. While this proposed change to the regulatory procedures on its own may not be the *sole* cause of impacts to environmental resources from the regulated activities, it would affect whether, when, where, and how impacts from dredge and fill activities will occur in the future.

There is no clear analysis of impacts to biological resources, even at a programmatic level, nor is it possible for decision makers or the public to hazard an educated guess. The fact that so many key junctures in the proposed permitting process are made on a case-by-case basis, beginning with whether a wetland is a water of the state, makes it impossible to determine the magnitude of impacts that might occur. The Draft Staff Report/SED refuses to enumerate or analyze the specific impacts to aquatic and riparian species and habitats from dredge and fill activities or explain how they would be lessened or avoided if the proposed procedures were adopted except in the most general terms, relying on later permitting utilizing the LEDPA (which, as described above, may not even be required) to look at all such impacts and the watershed approach to ensure mitigation is adequate. Even at the programmatic level of environmental review this is far too general and does not provide the needed identification and analysis of impacts to biological resources.

For example, the Draft Staff Report/SED admits that under the proposed policy, projects may be shifted to upland areas to avoid impacts to wetlands, creating the possibility of potentially significant impacts to species and habitats in those upland areas. Draft Staff Report/SED at 141. But those impacts have not been considered in the CEQA review because "[t]he State Water Board does not have information on the location of future projects or the effect of upland project locations relative to sensitive species or habitats." *Id.* And regardless, the Draft Staff Report/SED claims, the later process, the LEDPA analysis, will solve the problem because "selection of the LEDPA would avoid more damaging impacts to sensitive species or habitats since the LEDPA must consider all environmental impacts." *Id.* Yet, as discussed above, the draft policy does not even require selection of the LEDPA in every case. Further, while this might be a defensible argument for those projects that must obtain an individual 404 permit, it is certainly not the case for projects proceeding under nationwide or general permits. Similarly, the Draft Staff Report/SED admits impacts will occur to species movement and

migration but simply concludes the later analysis will avoid or mitigate any significant impacts. *Id.* at 141-42.

As another example, the Draft Staff Report/SED does not even provide basic information, such as the number of acres of PCCs in California might be functional wetlands, to support their position that exempting them would not be a significant impact. *Id*. at 72. The Draft Staff Report/SED again simply assumes there would not be any impacts because the regulations as a whole will protect waters of the state.

While we are deeply disappointed in the draft policy, we continue to believe that there is tremendous value for wetland conservation, Regional Board staff, and the regulated community in developing a standardized and consistent wetland definition and permit review process. We hope that our analysis and recommendations will result in SWRCB staff revising the draft policy so that it complies with California's no-net-loss policy and truly protects the state's diverse, ecologically essential wetlands.

Thank you for the opportunity to provide comments. Please contact us with any questions or to discuss the draft policy further.

Sincerely,

Rachel Zwillinger
Water Policy Advisor
Defenders of Wildlife

Lisa T. Belenky
Senior Attorney
Center for Biological Diversity

Carin High
Co-Chair
Citizens Committee to Complete the Refuge

Erica Maharg
Staff Attorney
San Francisco Baykeeper

Kyle Jones
Policy Advocate
Sierra Club California

Sara Aminzadeh
Executive Director
California Coastkeeper Alliance

David Lewis
Executive Director
Save the Bay