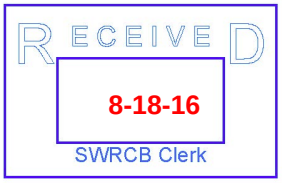
August 18, 2016 Sent Via E-Mail to: commentletters@waterboards.ca.gov

Public Comment
Statewide Dredged or Fill Procedures
Deadline:8/18/16 12:00 noon

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000



Re: Statewide Dredged or Fill Procedures

Dear Ms. Townsend:

Our organizations appreciate the opportunity to comment on the Procedures for Discharges of Dredged or Fill Materials to Waters of the State ("Procedures"), formerly known as the Wetland and Riparian Area Protection Policy.

We have been involved in the State Water Resources Control Board's ("State Board") efforts to protect wetlands for over 15 years following the U.S. Supreme Court's decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC). During this time, we have consistently advocated for measures to protect wetlands no longer subject to federal jurisdiction by filling the SWANCC gap without adding duplicative regulatory processes that increase burdens on landowners.

While we appreciate the State Board's efforts to create a program that is consistent with the Corps' current regulatory requirements, we continue to have concerns about the scope of the Procedures, which are overbroad relative to the needs and legal authority; redundant and sometimes conflicting requirements caused by the excessive scope; and vague and undefined terms that are likely to lead to inconsistent applications.

Accordingly, if the State Board determines it needs to act, we encourage the adoption of a program that fills the regulatory gap by protecting non-federal waters of the state as if they were regulated by the Corps' current procedures under the 1987 guidelines, including adopting a wetlands definition that is identical to the well-established definition used by the Corps. These and other comments are addressed in the attached comment package.

Based on remarks made by staff during the hearing on July 19th, we understand that a revised draft of the Procedures will be released for public review and comment prior to the State Board taking action. We request that the second comment period be a minimum of 45 days, be open to comments on all aspects of the Procedures, and include additional outreach by the State Board in the form of a workshop during that period of time. While we understand that the State Board typically limits comments on subsequent drafts to revisions that were made, we believe that practice is inappropriate in this particular situation. The scope of the program that would be set up by the Procedures is sweeping. It would apply to all impacts to waters of the state, not just wetlands (contrary to prior efforts that were subsequently abandoned). Many of the processes required by the Procedures are only vaguely defined. Even with the brief extension to the initial comment period, the sixty-day comment period in the middle of the summer when many affected parties were on vacation is not enough to fully assess the impact of the Procedures and their implications for permitting of discharges to both federal and state waters.

Given that the State Board has been considering efforts to regulate discharges to waters of the state for many years, the need to finalize the Procedures is not so urgent that affected parties should not be given a reasonable opportunity for review and comment.

We appreciate the opportunity to provide you with our comments as well as our request for adequate time to review any revised draft. Please contact us with any questions or comments regarding the attached comment package.

Sincerely,

Heather Stratman
Association of California Cities – Orange County

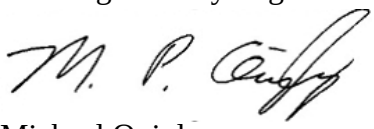
Rebecca Franklin
Association of California Water Agencies

Jim Wunderman
Bay Area Council

John Coleman
Bay Planning Coalition

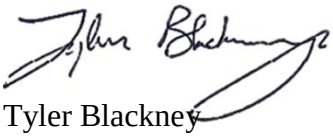
Mike Balsamo
Building Industry Association of Southern California

Shanda Beltran
Building Industry Legal Defense Foundation

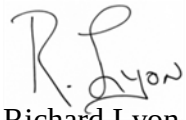


Michael Quigley
California Alliance for Jobs

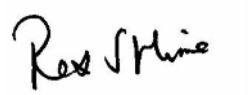
Jelisaveta Gavric
California Association of REALTORS®



Tyler Blackney
California Association of Winegrape Growers



Richard Lyon
California Building Industry Association

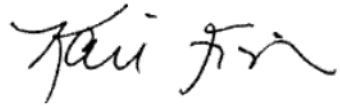


Rex S. Hime
California Business Properties Association

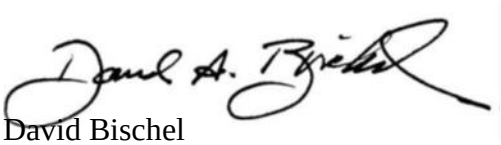
Kirk Wilbur
California Cattlemen's Association

Valerie Nera
California Chamber of Commerce

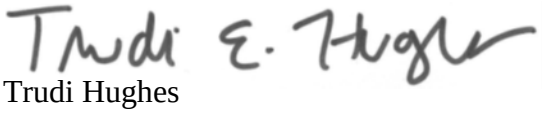
Gary Hambly
California Construction and Industrial Materials Association



Kari Fisher
California Farm Bureau Federation



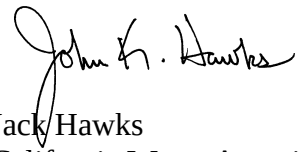
David Bischel
California Forestry Association



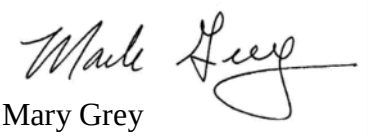
Trudi Hughes
California League of Food Processors

Danielle Blacet
California Municipal Utilities Association

Mike Rogge
California Manufacturers and Technology Association



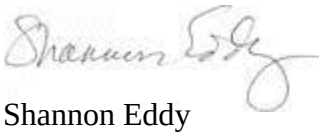
Jack Hawks
California Water Association



Mary Grey
Construction Industry Coalition on Water Quality

Michael Boccadoro
Dairy Cares

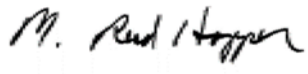
Larry Dotson
Kaweah Delta Water Conservation District



Shannon Eddy
Large-Scale Solar Association

Jason Rhine
League of California Cities

Bryan Starr
Orange County Business Council



Reed Hopper
Pacifica Legal Foundation

Bob Reeb
Valley Ag Water Coalition

Gail Delihant
Western Growers Association

Kevin Buchan
Western States Petroleum Association

Mike Falasco
Wine Institute

Comments on California State Water Resources Control Board
Draft Procedures for Discharges of Dredged
or Fill Materials to Waters of the State (issued June 17, 2016)

August 18, 2016

I. SUMMARY OF RECOMMENDATIONS

1. Limit the scope of the Procedures. The Procedures establish a new permitting program that imposes substantive and procedural requirements on discharges to waters of the state (WOTS) — most of which are already subject to regulation. The scope of this new program should be limited to wetland WOTS that are (*i*) not waters of the U.S. (WOUS) subject to federal regulation under the Clean Water Act, and (*ii*) not already subject to state regulation by the California Department of Fish and Wildlife (CDFW). This will fulfill the State Boards' long-stated goal of "filling the *SWANCC* gap" — *i.e.*, protecting waters that fall outside federal jurisdiction after the Supreme Court's decision in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). It will also avoid conflict and unnecessary duplication with the U.S. Army Corps of Engineers' (Corps) Clean Water Act section 404 permitting program and the CDFW's streambed alteration program, and focus the Water Boards' limited resources where they are needed most.

2. Make the Procedures consistent with federal law. Limiting the scope of the Procedures' new permitting program will greatly reduce the potential for conflict, but the State Board should also revise the Procedures to ensure that definitions (including the definition of "wetland"), exemptions, streamlined permitting procedures for discharges with minimal impacts, and other provisions are consistent with their federal counterparts under the Clean Water Act. This will promote the Board's stated goal of making regulation of WOTS uniform and ensure adequate notice to the regulated community of what discharges require a permit. It also will eliminate many of the unanswered questions about how the Procedures will be implemented, because dischargers will be able to rely on the Corps' comprehensive technical guidance, standard operating procedures, and well understood practices.

If the State Board does not limit the scope of the new permitting program as recommended in #1, it is even more important to revise the Procedures to avoid conflicts, including (*i*) removing the provisions that allow Water Board staff to require an alternatives analysis or second-guess the Corps' LEDPA determination; (*ii*) clarifying that Water Boards should not require individual waste discharge requirements (WDRs) for discharges that qualify under Clean Water Act general permits; and (*iii*) harmonizing the mitigation requirements with those of federal law.

3. Limit case-by-case determinations. The State Board should define key terms and procedures in a way that minimizes the need for case-by-case determinations by Water Board staff regarding (*i*) when a wetland will be considered a WOTS, (*ii*) how to define the limits of state jurisdiction for non-wetland aquatic features, (*iii*) which aquatic features and activities will be considered exempt from regulation under this new permitting program, (*iv*) when the Water Boards will conduct an alternatives analysis, and (*v*) what information is

required for a complete application, among other things. Providing clear rules and definitions for the new program — not just rebuttable presumptions as some commenters have suggested — will promote uniformity across regions, minimize workload for Water Board staff, streamline permitting and help the Water Boards comply with statutory time limits for permit decisions, and provide clarity and certainty for applicants.

II. SCOPE OF PROCEDURES AND LEGAL AUTHORITY

A. The Procedures create a permitting program that is much broader than necessary to achieve the Board's stated goals.

The Staff Report identifies three goals the Procedures are intended to address: (1) filling the *SWANCC* gap in federal regulation of wetland waters; (2) instituting consistent requirements across the regions for impacts to WOTS; and (3) providing additional regulatory support to prevent the loss of wetlands. None of these provides a valid basis to adopt the Procedures as drafted, which create a permitting program that is much broader than necessary to protect wetlands and will actually promote *in*consistency in regulation of discharges to WOTS.

1. The *SWANCC* gap in California is very narrow.

The Water Boards have long maintained they have authority under the Porter Cologne Water Quality Control Act (California Water Code Section 13000 *et seq.*) to regulate impacts to all waters of the state, including "isolated" wetlands that meet the Corps' definition of a wetland but may not be regulated by the Corps post-*SWANCC*. But experience shows this authority is seldom needed. Most applicants for Corps permits in California proceed under a Preliminary Jurisdictional Determination (PJD), which generally assumes that any aquatic feature meeting the Corps' three-parameter wetland definition or any linear feature presenting evidence of flow is a WOUS. As a result, very few waters are deemed isolated by the Corps and excluded from federal regulation.

The Water Boards' practice confirms the *SWANCC* gap is vanishingly small. The staff report for the Procedures indicates that only about one percent of the Water Board's current permitting actions related to filling WOTS are for non-federal waters. Draft Staff Report Including Substitute Environmental Documentation – Procedures for Discharges of Dredged or Fill Materials to Waters of the State (June 17, 2016), p. 4 (Staff Report). It makes little sense to create a sweeping new regulatory program for one percent of discharges — particularly when the Water Boards already regulate these discharges, when necessary, through WDRs. Staff Report p. 4. For the other 99 percent of discharges, the Procedures will impose duplicative and conflicting regulatory requirements on waters that are already adequately protected by federal regulation and will increase the resources needed to process applications by the already understaffed Water Boards. This broad new program regulating all WOTS — not just unregulated wetlands — is also inconsistent with the State Board's direction to staff in 2008, which launched the development of the Procedures, calling for "a *wetland* regulatory mechanism." State Board, Reso. No. 2008-0026, § 6.

The current need for a new program to fill the *SWANCC* gap is even more questionable given the given the Corps and EPA's recent promulgation of the Clean Water Rule revising the

regulatory definition of WOUS, which has been challenged in federal court. At this time it is not even clear which waters may fall outside federal jurisdiction when and if the new regulations are implemented.

If the State Board is dissatisfied with the Corps' implementation of the Clean Water Act section 404 program, the answer is not to duplicate the Corps' efforts. The Water Boards already can and do impose stringent conditions on section 401 water quality certifications for Corps permits. If the state believes that further authority is needed, the Water Boards with EPA approval can assume responsibility for administering the section 404 program — as the Legislature has authorized. *See* Water Code § 13370 *et seq*. The Staff Report considered and rejected this alternative because of "significant administrative costs" and because it would require addressing "additional complexities of meeting federal requirements." Staff Report, p.174. Instead, it recommends adoption of a new, duplicative program, without the benefit of federal funding that would be available if the state assumed section 404 permitting responsibility under the Clean Water Act and with significantly more case-by-case determinations than currently required of the Water Boards or the Corps under the federal program. This is not a rational response to concerns about cost and complexity.

2. The Procedures will not ensure consistent regulation of WOTS.

In the Staff Report and in testimony before the State Board, staff stated that the Procedures are needed because Water Boards have different application forms for discharges, apply different policies and practices to identify jurisdictional WOTS, and issue orders that differ in many respects. While we favor a uniform approach to Water Board permitting, we believe the Procedures go far beyond what is needed to address the inconsistencies noted by staff — yet they still do not ensure consistency in permitting because they rely on a "case-by-case" approach for many determinations and defer to the discretion of Water Board staff in far too many respects.[1] *See* Part IV, below. Moreover, the current proposed action does not even include those items identified by staff that might address some of the stated concerns, such as the standard application forms and template orders for water quality certifications and WDRs that staff mentioned during the workshops and the July 19th hearing as possibly being created in the future.

3. Historical losses of wetlands do not justify the Procedures.

Most of the losses of wetlands identified in the Staff Report are historical and not related to contemporaneous regulated activities. Staff Report, p. 28. These losses mostly predate the Clean Water Act, Porter-Cologne, and the Water Boards' current practices, and do not provide evidence that the current regulatory structure is inadequate or that the permitting program created by the Procedures is needed. Moreover, the historical losses lack an essential nexus with discharges proposed by current applicants, and thus it would be unlawful to require current applicants to mitigate for those losses.

[1] *E.g.*, "water boards must determine whether a particular feature is a water of the state on a case-by-case basis" (Procedures § II); "permitting authority may require an alternatives analysis" (Procedures § IV.B.3.c).

As for contemporaneous losses, Table 5-4 of the Staff Report acknowledges that more recent loss of wetland acreage has been offset by mitigation required for regulated activities, but the Staff Report asserts the mitigation wetlands have not adequately offset lost functions, citing a 2007 study.[2] Staff Report, p. 32 (citing to Ambrose et al. (2007)). The study predates the Corps' and EPA's adoption in 2008 of their Clean Water Act Mitigation Rule (73 Fed.Reg. 19,594 (Apr. 10, 2008), *codified at* 33 C.F.R. parts 325 & 332 and 40 C.F.R. part 230, subpart J), which the Procedures incorporate by reference. As a result of the Mitigation Rule and the Corps' implementation of its Standard Operating Procedures for determining appropriate mitigation, mitigation requirements have increased, with an emphasis on compensation for lost functions, services and values. The data cited in the report do not indicate that another program is needed to implement the same Mitigation Rule already in effect since 2008. If the efficacy of mitigation under the Mitigation Rule is questioned, a better approach would be to devote resources to training staff to better evaluate and monitor mitigation proposals as part of the section 401 certification process.

4. The State Board has not adequately considered the costs of the Procedures in relation to the potential benefits.

The excessive scope of the new permitting program established by the Procedures and its duplication of existing regulation will necessarily lead to redundant process and delays that impose economic costs on dischargers and further hamper the ability of developers, resource users, public agencies and many other dischargers to make beneficial use of their property and accomplish their missions. Direct conflicts with the requirements of other programs in areas such as mitigation will impose further costs (*see* Part III below). Yet the incremental benefits will be minimal precisely because the Procedures will primarily regulate resources that are already protected.

The Procedures and Staff Report do not show that the State Board has adequately considered the relationship between costs and benefits. Even if a formal cost-benefit analysis is not required by statute, the State Board should conduct such a study, quantifying and comparing both costs and benefits, before finalizing the Procedures, given the scope of its proposal and its potential impact on the state's economy. If the State Board does not conduct such an analysis, it is even more critical that the Board adopt the recommendations in these comments to limit the scope of the Procedures' new permitting program and address regulatory overlap and conflict, in order to minimize the potential for economic disruption.

B. The Board has not identified sufficient legal authority for the Procedures as drafted.

The Procedures impose significant new regulatory requirements on discharges of dredged or fill material but do not identify sufficient statutory authority for those requirements — particularly the measures authorizing the Water Board to require project modifications based on an alternatives analysis under the new State Supplemental Dredged or Fill Guidelines. If the Water Boards intend to exercise authority equivalent to the Corps' authority under Clean Water

[2] It is unclear whether the acreage given in Table 5-4 is limited to wetlands or includes all WOTS.

Act section 404, the state should apply to assume that authority under federal law as permitted by the Clean Water Act and Water Code section 13372(b).

1. Water Code section 13370 *et seq.* does not authorize the Procedures

Sections 13370 – 13389 of the Water Code authorize the Water Boards to issue permits for, among other things, discharges of dredged or fill material — but only to the extent the state has an EPA-approved state permit program under the federal Clean Water Act for those discharges. *See* Cal. Water Code §§ 13370, 13372(b), 13376; 33 U.S.C. § 1344(g)-(j) (authorizing state administration of dredged and fill material discharges). Water Code subsection 13372(b) states:

> The provisions of Section 13376 requiring the filing of a report for the discharge of dredged or fill material and the provisions of this chapter relating to the issuance of dredged or fill material permits by the state board or a regional board shall be applicable only to discharges for which the state has an approved permit program, in accordance with the provisions of the Federal Water Pollution Control Act, as amended, for the discharge of dredged or fill material.

California has not applied for authority to operate an approved permit program for dredged or fill material discharges under the Clean Water Act. Therefore, these provisions of the Water Code do not currently authorize any regulation of dredged or fill material discharges and cannot provide the legal authority for the Procedures. Even if they did apply, the Water Code provisions could not authorize any regulation of discharges to WOTS that are not WOUS, because their scope is limited to discharges to WOUS that are regulated under the Clean Water Act. *See* Water Code § 13376.

Moreover, the Legislature's explicit grant of authority to issue permits for dredged or fill discharges in section 13376 — combined with its decision to condition that authority on approval of a dredged and fill permit program under the Clean Water Act in subsection 13372(b) — strongly contradicts any inference that the state already had authority to issue permits for dredged or fill discharges under *other* provisions of state law. The Legislature's intent is clear: if the state is to regulate discharges of dredged or fill material, it must do so by adopting an approved permit program under the Clean Water Act.

2. Water Code section 13260 *et seq.* does not authorize the Procedures

Water Code sections 13260-13276 authorize the Water Boards to issue WDRs for discharges of "waste" to waters of the state. Water Code §§ 13260(a), 13263(a).

> "Waste" includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.

Water Code § 13050(d). On its face, the statutory definition of "waste" does not include clean fill material, which is not of human or animal origin and is not a by-product of human habitation or of any production, manufacturing or processing operation. Sections 13260 *et seq.* are clearly intended to protect the "*quality* of the waters of the state" from "pollution or nuisance" — not to regulate fill activities. Water Code §§ 13260(a)(1), 13264(a)(2). This chapter of the Water Code does not authorize the regulation of dredged or fill material discharges under the Procedures.

Even if "waste" arguably did include fill, sections 13372(b) and 13376 make clear that a report of waste discharge may be required for the discharge of dredged or fill material under section 13260 *only* if the state has an approved dredged and fill permit program under the Clean Water Act, which it does not (see above).

Further, even if the Water Boards had authority under state law to issue WDRs for dredged or fill material discharges, they would not be authorized to conduct an alternatives analysis under the State Supplemental Dredged or Fill Guidelines, Appendix A of the Procedures. The purpose of an alternatives analysis is to evaluate alternative locations, designs and/or configurations for a proposed project that could involve less impact to waters than the proposed activity, and to require such changes to the project if the Water Boards determine they are practicable. *See* Procedures § IV.B.3; Appendix A, § 230.10(a). Requiring such changes would violate Water Code section 13360, which prohibits WDRs or any "other order" of the Water Boards from "specify[ing] the design, location, type of construction, or particular manner" of compliance (with limited exceptions not relevant here). Water Code § 13360(a).

The State Board's decision to test the limits of its legal authority with the current draft Procedures is particularly troubling in light of the short time allowed for review and comment on the Procedures and the minimal outreach and stakeholder involvement that preceded publication of the draft Procedures. The State Board issued the draft Procedures on June 17, 2016, initially with a comment deadline of August 4, 2016. Even with the brief extension to August 18, 2016, only 60 days is too short a time for stakeholders to conduct meaningful analysis and provide thorough comments. Some stakeholders have not had an adequate chance to participate at all due to summer vacation schedules and other commitments.

C. Recommendations

Defer finalizing the Procedures until the challenges to the Clean Water Rule are resolved and the scope of federal jurisdiction is clear, and to allow time for an adequate cost-benefit analysis and opportunity for full stakeholder participation. Before finalizing the Procedures, clearly identify the legal authority for the State Board's action and demonstrate that the benefits outweigh the costs and that Water Boards can allocate the necessary staff and funding to implement the Procedures without compromising their existing mission.

If the Board decides to proceed, limit the scope of the Procedures' new permitting program to discharges of dredged or fill material to wetland WOTS (delineated in accordance with federal standards) that are not subject to federal regulation under the Clean Water Act and not already regulated by CDFW — *i.e.*, fill the SWANCC gap. While the legal authority is questionable for even this more limited scope of application, the approach would address the need identified by the Board while avoiding unnecessary duplication of regulation and

conflicting requirements for (*i*) WOTS that are also WOUS and thus subject to the Corps' jurisdiction, and (*ii*) WOTS that are already subject to regulation by the CDFW under its lake and streambed alteration program. Under this approach, the Water Boards would continue to fulfill their statutory mandate to protect water quality by issuing WDRs for discharges of waste or pollutants, and by issuing water quality certifications for discharges of fill material permitted under Clean Water Act section 404.

Remove the provisions authorizing the Water Boards to conduct an alternatives analysis and identify the least environmentally damaging practicable alternative (LEDPA), as these provisions are not authorized by state law. This recommendation applies even if the State Board limits the scope of the new permitting program created by the Procedures to filling the *SWANCC* gap but is particularly important if the Board does *not* limit the scope, because allowing the Water Boards to conduct alternatives analyses for discharges within the jurisdiction of the Corps and/or the CDFW would create serious conflicts as described in Part III of these comments.

To promote consistency in regulation and ensure that mitigation compensates adequately for authorized fill of wetlands, the State Board should provide guidance and standardized forms and templates to the Water Boards, and better training of staff to evaluate mitigation proposals and ensure their successful implementation.

III. DUPLICATION AND CONFLICT WITH EXISTING REGULATORY PROGRAMS

As written, the Procedures conflict with federal and state programs in many ways. Limiting the scope of the Procedures' new permitting program will fix many of these conflicts, but others still must be specifically addressed to ensure that regulation of WOTS under the Procedures, even if limited to the *SWANCC* gap, is consistent with regulation of other WOTS that are federally regulated and to prevent unintended problems.

A. Allowing the Water Boards to conduct alternatives analyses conflicts with the Corps' section 404 permitting program.

The Procedures treat both water quality certifications issued by the Water Boards pursuant to Clean Water Act section 401 and WDRs issued under state law as permits for the discharge of dredged or fill material that are subject to the Procedures. *See* Procedures § IV. For both types of permits, the Procedures authorize the Water Boards to conduct an alternatives analysis to identify the LEDPA. Procedures § IV.B.3.a, d. This authorization applies to discharges that are only to WOUS, discharges to both WOUS and WOTS outside federal jurisdiction, and discharges solely to WOTS outside federal jurisdiction. § IV.B.3.b-c.

For waters subject to federal jurisdiction, the Procedures direct the Water Boards to defer to the Corps' determination on the adequacy of the alternatives analysis *unless* one of several exceptions applies, including (1) the Water Boards do not feel they received an adequate opportunity to consult during development of the Corps' alternatives analysis; (2) the Water Boards believe the Corps' alternatives analysis did not adequately address issues raised by the Water Boards; (3) "additional analysis" is required to comply with CEQA, water quality

standards or "other requirements"; or (4) none of the alternatives considered by the Corps would comply with water quality standards. Procedures § IV.B.3.b.

These exceptions are so broad and vague that they swallow the rule. Exceptions 1 and 2 essentially authorize the Water Boards to conduct their own alternatives analysis any time they are not satisfied with the Corps' analysis. It is not clear what situations exception 3 is intended to cover — the Water Boards already have authority to conduct analysis under CEQA if they are the lead agency, but this does not call for application of the 404(b)(1) Guidelines, and water quality standards do not call for analysis of alternatives. Exception 4 appears to authorize the Water Boards to assess new alternatives *sua sponte* when the problem is not that the alternatives analysis was inadequate but rather that denial of certification was appropriate.

1. The Water Boards should not second-guess the Corps' alternatives analysis.

Authorizing the Water Boards to override the Corps' identification of the LEDPA under the 404(b)(1) Guidelines, as the Procedures appear to do, conflicts with the Clean Water Act. Clean Water Act section 401 requires the Water Boards to certify that the discharge proposed to be permitted by the Corps will comply with applicable state water quality standards. 33 U.S.C. § 1341(a)(1); *see* 23 Cal. Code Regs. § 3831(u). The Water Boards may specify effluent limits, monitoring requirements and the like to ensure the discharge will comply with water quality standards, and may deny certification if the discharge still will not comply. 33 U.S.C. § 1341(a)(1), (d); 23 Cal. Code Regs. § 3837(b)(1). But the Clean Water Act charges the Corps — not the state — with applying the 404(b)(1) Guidelines. 33 U.S.C. § 1344(b). If the Water Boards wish to assume responsibility for implementing the Guidelines, they must apply to the EPA for authority to administer Clean Water Act section 404. *See* 33 U.S.C. § 1344(g); Water Code § 13372(b).

The Procedures also will create logistical conflicts with the Corps' permitting process. The Procedures assume the Water Boards will review the Corps' LEDPA analysis and determine its adequacy before issuing water quality certification. But the Corps does not formally make a LEDPA determination until it issues its record of decision documenting its permit decision — and it cannot make a permit decision until the state issues certification. 33 U.S.C. § 1341(a)(1). Thus, the Procedures will create a scenario where neither the Corps nor the Water Boards can act because the Water Boards will not grant certification until the Corps has identified the LEDPA to their satisfaction, and the Corps will not identify the LEDPA until the Water Boards have granted certification.

Even if the Corps were to make a draft of its alternatives analysis available to the Water Boards for review before finalizing its LEDPA determination — which it is not required to do — nothing in the Procedures requires the Water Boards to consult with the Corps. The Water Boards already routinely decline to participate in pre-application consultations for water quality certifications due to understaffing and resource constraints, and the Procedures will only exacerbate those problems. As a result, Water Boards very likely will conduct their own alternatives analysis after the Corps has made its LEDPA determination, resulting in delay and a second "bite at the apple" that could trigger a cascade of further review and approvals including

revised local land use approvals (likely requiring additional CEQA analysis) and further review by the Corps (possibly including additional NEPA analysis).

2. Requiring an alternatives analysis for discharges under general permits is inappropriate.

Not only do the Procedures let the Water Boards override the Corps' identification of the LEDPA in cases where the Corps has conducted an alternatives analysis — *i.e.*, for individual permits — but they also allow an alternatives analysis for discharges that are (or could be) authorized under Clean Water Act general permits such as nationwide permits (NWPs), for which the Corps does not conduct a separate alternatives analysis for each activity that qualifies for authorization. Procedures § IV.B.3.(b), (d)(i)-(ii). Although the Procedures include an exception where the Water Boards have already granted certification for the general permit, that exception is of limited value since the State Board has only granted certification for 13 of the 50 current (2012) nationwide permits. Limiting the exception to previously certified general permits also makes little sense because, for discharges under general permits that are *not* already certified, the Water Boards must certify *each* discharge and will have an opportunity during that process to impose conditions as necessary to protect water quality.

Conducting an alternatives analysis for discharges that are or could be authorized by general permits is unnecessary and conflicts with the Clean Water Act's streamlined permitting procedures for these discharges. The Clean Water Act allows the Corps to issue general permits only for activities that will have "only minimal adverse environmental effects" considered separately *and* cumulatively. 33 U.S.C. § 1344(e)(1). The magnitude of these impacts is typically limited to ½-acre or less: *e.g.*, NWP 6 (1/10-acre), NWP 12 (1/2-acre), NWP 14 (1/2-acre), NWP 29 (1/2-acre), NWP 39 (1/2-acre), NWP 40 (1/2-acre). In addition, the Corps has imposed general conditions on these permits to ensure that impacts are minimal and reserves the right to require an individual permit application if appropriate.

NWPs are particularly important to Coalition members that need to conduct operation and maintenance activities that may involve some incidental discharges of dredged or fill material in order to provide critical public services, including the provision of water and power. Operation and maintenance activities conducted under NWPs by water and power providers typically do not contribute to significant loss of wetlands or adverse impacts to aquatic features because the permitted activities are limited to acquiring monitoring information and/or operating and maintaining already permitted existing infrastructure.

Activities authorized by these commonly used NWPs include: maintenance of existing infrastructure (NWP 3); survey activities (NWP 6); utility line activities (NWP 12); bank stabilization (NWP 13); minor discharges (NWP 18); minor dredging (NWP 20); maintenance of existing flood control facilities (NWP 31); work pursuant to completed enforcement actions (NWP 32); temporary construction, access, and dewatering (NWP 33); maintenance dredging of existing basins (NWP 35); emergency watershed protection and rehab (NWP 37); reshaping existing drainage ditches (NWP 41); stormwater management facilities (NWP 43); repair of uplands damaged by discrete events (NWP 45); and discharges in ditches (NWP 46). These NWP-permitted activities do not result in new permanent fills or losses of wetlands.

Accordingly, activities conducted under the NWPs should be exempt from all application procedures, including the preparation of any alternatives analysis.

The Corps authorizes approximately 700 discharges annually in California under the NWPs. If even a small percentage of these discharges are required to conduct alternatives analyses under the Procedures, the resulting increase in Water Board staff workload and permitting time will be substantial, while any resulting benefit will likely be negligible in light of the minimal impacts involved. The experience of Coalition members in regions that already require an alternatives analysis for discharges authorized by NWPs confirms that the expense to the applicant in time and money is significant, yet the process seldom yields any environmental benefit. These projects have already minimized their impacts in order to qualify for general permit authorization, and if it were practicable to completely eliminate the remaining impacts to avoid the need for a permit, they would very likely do so.

3. An alternatives analysis should not be required for projects consistent with a Corps-approved Special Area Management Plan.

Similar to discharges that qualify for coverage under general permits, discharges that are consistent with a Corps-permitted Special Area Management Plan (SAMP) have already been designed to minimize their impacts. A SAMP reflects years of multi-agency planning and permitting that identifies the highest value resources in a watershed area and prioritizes them for preservation and, where appropriate, restoration and enhancement, while guiding impacts toward areas with lower resource values and identifying ways to minimize those impacts. Examples of SAMPs include the SAMP for the San Diego Creek Watershed and the SAMP for the San Juan Creek Watershed/Western San Mateo Creek Watershed, both in Orange County.

Requiring an alternatives analysis under the Procedures for projects that are subject to, and consistent with, a SAMP would create potential conflicts between the Water Boards' determinations and the careful deliberations of the agencies that participated in the holistic SAMP planning process. It would waste limited resources and unsettle the expectations of landowners and dischargers that participated in the SAMP process. If the Water Boards wish to evaluate alternatives to discharges allowed within a SAMP area, they should participate in the SAMP process rather than imposing new requirements on dischargers after the SAMP process is complete.

Notably, the Water Board was invited to participate in both of the SAMPs described above but was unable to complete the process due to lack of resources. Allocating Water Board resources to participation in multi-agency planning efforts such as SAMPs would likely be a more efficient use of those resources than creating a duplicative program to second-guess the outcome of such efforts.

4. A combined federal-state alternatives analysis would create conflict.

For projects that include fill of WOUS and WOTS outside federal jurisdiction, the Procedures allow the Water Boards to require supplementation of the Corps' alternatives analysis to include the non-federal waters. This could create a situation where the Corps and the Water Boards have competing priorities for avoidance of waters, since the Corps has no authority to

require avoidance of WOTS outside federal jurisdiction, even if they have higher resource values than some WOUS. Where complete avoidance of all WOTS is impracticable, the applicant may be caught between the agencies' competing demands.

5. The *possibility* of a memorandum of agreement between the Water Boards and the Corps does not resolve these conflicts.

During hearings on the draft Procedures, State Board staff suggested many of the likely conflicts between the Procedures and the Corps' regulatory program could be resolved through a memorandum of agreement between the Water Boards and the Corps. Even assuming that prediction is accurate, the State Board should not rely on the promise of an undefined and uncertain future agreement with the Corps to resolve problems that are apparent now. Even if the agencies did adopt such an agreement, it would not adequately resolve the issues identified in these comments because the agreement would be unenforceable and either agency could terminate (or fail to comply with) the agreement at any time and for any reason, including lack of resources or changes in agency policy. The better course is to limit the scope of the Procedures and eliminate the provisions that cause the conflicts.

6. Recommendations

Limit the scope of the permitting program created by the Procedures to waters that fall within the *SWANCC* gap and are not protected by CDFW jurisdiction, as stated above in Part II. This will prevent application of the Procedures to water quality certifications for discharges to WOUS and avoid many of the conflicts described above. If the Board does not limit the scope of the Procedures, it should remove the provisions allowing the Water Boards to require an alternatives analysis or second-guess the Corps' 404(b)(1) alternatives analysis and LEDPA determination for discharges to WOUS, and to impose mitigation that is different in scope, location, purpose, and function than mitigation prescribed in accordance with federal regulations. These changes would include removing the State Supplemental Dredged or Fill Guidelines from the Procedures, and relying on the federal regulations that apply to compensatory mitigation requirements.

Instead of allowing the Water Boards to conduct their own alternatives analysis, the State Board could, instead, direct Water Boards to consult with the Corps during its evaluation of section 404 permit applications, including commenting on any alternatives analysis and compensatory mitigation plan submitted by the applicant in connection with the section 404 permit application— a process that could be addressed in a memorandum of agreement as currently contemplated by State Board staff, but focused on making the section 401 certification process more effective.

If the State Board insists on retaining the option of a state-conducted alternative analysis, it should exempt all discharges that qualify for general permit coverage, or would qualify if the discharge were to WOUS, regardless of whether the general permit has previously received water quality certification, and should exempt those same discharges from any requirement of individual WDRs. The State Board also should add an exemption to section IV.B.3.d stating that discharges that are subject to a Corps-approved SAMP will not be subject to an alternatives analysis under the Procedures, regardless of whether the Water Boards participated in the SAMP

process. The State Board should revise Section IV.B.3.b of the Procedures to clarify that review of the Corps' alternatives analysis and LEDPA determination will be limited to exceptional circumstances (*i.e.*, significant loss of functions and services), will occur only at the request of a Water Board's executive officer or executive director or the Board itself (not staff), and will not occur if the Corps has requested input from Water Board staff either pre- or post-application and staff did not respond in a timely manner.

B. The wetlands definition conflicts with the Corps' definition.

The Procedures contain a definition and method for delineating wetlands that differ from existing documentation and accepted methodologies developed by the Corps in support of its section 404 program. The 1987 Corps of Engineers Wetlands Delineation Manual and Regional Supplements, and other technical guidance and memoranda, have previously been used by the state but are not used in the Procedures for assessing wetland WOTS. This approach is inconsistent with the State Board's direction to staff in 2008 to "develop and bring forward for State Water Board consideration: (a) a wetland definition that would reliably define the diverse array of California wetlands based on the United States Army Corps of Engineers' wetland delineation methods to the extent feasible," among other mandates. State Board, Reso. No. 2008-0026, § 6. The Procedures and Staff Report do not explain the departure from this direction or why it is not feasible to use the federal wetland definition, and the use of the Procedures will not "reliably define" California wetlands subject to regulation, for the reasons explained below.

1. The federal wetland definition is widely used and well understood.

The Corps (33 CFR 328.3) and the U.S. Environmental Protection Agency (EPA) (40 CFR 230.3) use the following definition for wetlands:

> Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Based on this definition, the Corps uses three main wetland characteristics to delineate wetlands: presence of wetland vegetation, hydric soil, and wetland hydrology. The 1987 Corps of Engineers Wetlands Delineation Manual provides detailed methodologies for identifying the three wetland characteristics and is utilized across the U.S. as a guide for wetland delineation.

To consider regional differences across the U.S., the Corps has developed 10 regional supplements to the Wetlands Delineation Manual, which follow National Academy of Sciences recommendations to increase the regional sensitivity of wetland delineation methods. These regional supplements define procedures for future and continual updates to improve best practices as more scientific data are made available.

The Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0) was released in September 2008 and covers most of California. The northwest coastal region of California is under the Regional Supplement to the Corps of

Engineers Wetland Delineation Manual: Western Mountains, Valleys, and Coast Region (Version 2.0), released in May 2010. Both of these supplements have undergone peer review, and the Arid West Region Supplement has had two rounds of public comments. Version 2.0 of each regional supplement replaces sections of the Corps Manual for applications specific to unique environments within California. Specifically, regional variations in hydrophytic vegetation indicators (Chapter 2), hydric soil indicators (Chapter 3), wetland hydrology indicators (Chapter 4), growing season definition (Chapter 4), and hydrology standard for highly disturbed or problematic wetland situations (Chapter 5) are found in the regional supplements and are meant to address and provide methodologies for specific regional conditions including but not limited to rainfall, climate, drought, and low snowpack.

2. The proposed state wetland definition is unclear and will be problematic to implement.

In comparison, the wetland definition proposed in the Procedures includes the following:

> [T]he area must have continuous/recurrent saturation of the upper substrate caused by groundwater, shallow surface water, or both; duration of saturation is sufficient to cause anaerobic conditions in the upper substrate; the area is dominated by hydrophytic vegetation or lacks vegetation.

Procedures p. 2, lines 46-49. State Board staff have asserted that the state's proposed definition was developed to provide consistent identification standards. However, the inclusion of the words "anaerobic conditions" in reference to conditions found in the upper substrate may eliminate other classifications of hydric soil types that are associated with wetlands. For example, the 1987 Corps Manual indicates that repeated periods of saturation promote specific biogeochemical processes that are identifiable. Although saturated soils are often associated with anaerobic conditions, more importantly, saturated soils have visual, distinguishing characteristics. For example, reducing conditions affect iron in soil, and result in reddish-gray patches along root channels and pores that are visible to the eye. Additionally, the Arid West Supplement provides information on how to prepare dry/aerobic soils for the Munsell® colors, a soil color system that is used to determine if the soil is hydric. Aerobic soils may have indicators, such as color, that denote previous anaerobic conditions. Therefore, the use of the term "anaerobic conditions" does not encompass wetlands that may undergo periods of drying and an absence of anaerobic soil conditions. Soils can go anaerobic quickly when wetted to over-saturation, however, they may not otherwise exhibit characteristics of wetlands.

The Corps defines hydric soils as follows: "A hydric soil may be either drained or undrained, and a drained hydric soil may not continue to support hydrophytic vegetation. Therefore, not all areas having hydric soils will qualify as wetlands. Only when a hydric soil supports hydrophytic vegetation and the area has indicators of wetland hydrology may the soil be referred to as a wetland soil." This definition supports the use of the three characteristics (vegetation, soil, and hydrology) for classifying wetlands and accounts for both anaerobic and seasonal aerobic soils that are able to support wetland vegetation and demonstrate wetland hydrology.

Another inconsistency between the Corps' wetland definition and the State Board's proposed definition is the use of the words "soil" (Corps' definition) and "substrate" (state's proposed definition). According to the Soil Science Society of America, the definition for soil is:

> (i) The unconsolidated mineral or organic material on the immediate surface of the Earth that serves as a natural medium for the growth of land plants. (ii) The unconsolidated mineral or organic matter on the surface of the Earth that has been subjected to and shows effects of genetic and environmental factors of: climate (including water and temperature effects), and macro- and microorganisms, conditioned by relief, acting on parent material over a period of time. A product-soil differs from the material from which it is derived in many physical, chemical, biological, and morphological properties and characteristics.

The definition for substrate, also provided by the Soil Science Society of America, is:

> (i) That which is laid or spread under an underlying layer, such as the subsoil. (ii) The substance, base, or nutrient on which an organism grows. (iii) Compounds or substances that are acted upon by enzymes or catalysts and changed to other compounds in the chemical reaction.

The definition for substrate is vague and open to interpretation so that additional types of materials like mulch, vegetation cover, or leaf litter could be considered substrate. The broadly defined "substrate" in the state's definition could include materials that are not suitable for providing habitat for vegetation in saturated soil conditions and should not be considered as soil. Therefore, with the above word choices, the state's proposed wetland definition weakens and potentially broadens the definition of wetlands substantially. The use of hydric soils as a wetland indicator is a technical tool that can be employed in the field along with the other characteristics of a wetland, even though the Procedures state that "the proposed procedures wetland definition incorporates these three characteristics of hydrology, wetland soils, and wetland vegetation."

An apparent discrepancy between the State Board's proposed wetland definition and the Corps' wetland definition is that the state's proposed definition allows an area to be classified as a wetland if only two of the three wetland characteristics used by the Corps (vegetation, soils, hydrology) are met. For example, if a wetland lacks vegetation, per the proposed California definition, the area will still be classified as a wetland. However, with the use of the Arid West Supplement, areas lacking wetland vegetation may be equivalently classified as wetlands per the Corps definition. In this sense, the proposed wetland definition does not appreciably differ from the Corps general definition for a wetland as amended by the Arid West Supplement to reflect regional conditions.

3. Recommendations

To maintain consistency in defining and delineating wetlands, the state should use the existing Corps guidelines. We further recommend the state work closely with the Corps, in a process that involves public input and comment, to update the Regional Supplements applicable to California to update the existing wetland framework as necessary due to California's unique and varied environments.

C. Requiring wet season data for non-federal WOTS conflicts with Corps guidance for WOUS.

Another area of conflict with the Corps' procedures concerns jurisdictional determinations. The Procedures state that "[a] delineation of non-federal wetland areas potentially impacted by the project shall be performed using the methods described in … the 1987 Manual and Supplements…. The methods shall be modified only to allow for the fact that the lack of vegetation does not preclude the determination of such an area that meets the definition of wetland." Procedures § III. However, Section IV.A.2.(a) of the Procedures contains another modification of the Corps' methods.

In describing the additional information that may be required for a complete application, the Procedures state that supplemental field data from the wet season may be required on case-by-case basis for delineations conducted during the dry season. This requirement is unnecessary, as the Corps' Arid West Supplement, one of the three documents Water Boards are supposed to use in delineating non-federal wetland areas, includes procedures to delineate waters and other waters during the dry season. No explanation is provided why non-federal wetlands should be delineated differently from the wetlands subject to federal jurisdiction. Additionally, there is no guidance as to when such additional field data could be required. The different delineation practices could result in uncertainty and additional delays for applicants with non-federal wetland areas.

Additionally, Section IV.B.2 of the Procedures states that the permitting authority should rely on any "Corps-approved wetland area delineation." This language is confusing and does not match the Corps' current terminology.

Recommendation: Delete Section IV.A.2(a). The requirement for wet season data is unnecessary for delineations done in accordance with the Corps' 1987 Manual and Supplements. Replace the phrase "Corps-approved wetland area delineation" with the terminology used by the Corps in RGL 08-02: Approved Jurisdictional Determination (AJD) and Preliminary Jurisdictional Determination (PJD).

D. Exemptions from the Procedures do not line up with the federal permitting exemptions.

1. The exemption for prior converted croplands is inconsistent with federal law.

The Procedures include a "clawback" to the prior converted croplands (PCC) exemption that is inconsistent with federal practice. The Procedures state that "[t]he 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 the wetlands characteristics return, and the land was not left idle in accordance with a USDA program." Procedures§ IV.D.2.(a). The Staff Report provides additional commentary on the prior converted cropland exclusion, stating:

> A PCC is a farmed area that has been drained or filled by 1975, and converted to dry land no longer exhibiting wetland characteristics. PCCs are not regulated

> under Clean Water Act section 404. Likewise, the proposed Procedures would exempt PCCs that have been certified by the Natural Resources Conservation District. However, if a PCC changes to a non-agricultural use, or the PCC is abandoned and left idle for more than five years, the exemption would not apply. In this case, any areas exhibiting wetland characteristics would be subject to the proposed Procedures.

Staff Report, p. 72. The language both within the Procedures and in the Staff Report misstates the PCC exemption.

a. Conversion to non-agricultural use should not affect the exemption.

The statement that the PCC exclusion will no longer apply if the land is changed to a non-agricultural use does not reflect current law. In *New Hope Power Co. v. U.S. Army Corps of Engineers* (2010), 746 F.Supp.2d 1272, a sugarcane grower challenged the Corps' adoption of guidance related to PCC (Stockton Rules). The court found the Stockton Rules improperly expanded the Corps' jurisdiction by creating a new rule that wetland exemptions for PCC are lost upon conversion to a non-agricultural use. Accordingly, the court set aside the Stockton Rules in their entirety.

b. The Procedures' definition of "abandonment" is overbroad.

With regard to abandonment of PCC, the Procedures state the PCC exclusion is lost if the land has not been planted to an agricultural commodity for more than five consecutive years. The Corps' own guidance does not limit activities that preclude abandonment to "planting," but also considers management and maintained activities related to agricultural production to be proper uses of the land that do not forfeit the PCC exclusion. *See* RGL 90-07, p. 2 ¶ 5(e), *available at* http://www.usace.army.mil/ Portals/ 2/docs/civilworks/RGLS/rgl90-07.pdf; *see also* 7 C.F.R. § 12.33(c) ("Abandonment is the cessation for five consecutive years of management or maintenance operations related to the use of a farmed wetland or a farmed-wetland pasture.").

c. Recommendations

Delete Section IV.D.2.(a)(1), given the current state of the Stockton Rules.

Revise Section IV.D.2.(a) to expand "planted" to "cropping, management or maintenance activities related to agricultural production." Additionally, a new provision, IV.D.2.(a)(iii) should be added: "For the purposes of D.2(a), abandonment is the cessation for five consecutive years of management or maintenance operations related to the use of a farmed wetland or a farmed-wetland pasture and positive indicators of all mandatory wetlands criteria, including hydrophytic vegetation, must be observed."

2. Certain exemptions are undermined by a vague exception.

In addition to the exemptions discussed above, Section IV.D. of the Procedures exempts from the new permitting program other activities and areas including suction dredge mining regulated under Clean Water Act section 402, agriculture-related activities exempt under Clean

Water Act section 404(f) and discharges for purposes of creating or maintaining treatment wetlands. While this appears *potentially* consistent with federal rules, the actual scope of the exemptions in section IV.D is uncertain due to language stating that the "exclusions do not, however, affect the Water Board's authority to issue or waive [WDRs] or take other actions … to the extent authorized by the Water Code." Procedures§ IV.D. As a result of this language, each Water Board is free to determine in its own discretion that an activity listed by the Procedures as exempt shall, instead, be subject to permitting and regulation, effectively eliminating the exemptions on a case-by-case basis.

Recommendations: Delete the quoted language from this section. It is vague and confusing as drafted. If language about the scope of the exemptions is needed, the Procedures should clarify that WDRs will not be required for activities subject to an exemption under the Procedures unless they involve a discharge (*other than* a discharge of dredged or fill material) to waters of the state and that the Water Board will defer to determinations of exemptions made by the Corps for discharges to WOUS.

E. Eliminating the preference hierarchy and practicability requirements creates conflict with Corps mitigation requirements.

While the Procedures generally incorporate the Mitigation Rule promulgated by the Corps and EPA in 2008, the differences are significant. The Mitigation Rule created a hierarchy of mitigation options expressed in order of preference: mitigation bank credits, in-lieu fee program credits, permittee-responsible mitigation under a watershed approach, permittee-responsible mitigation through on-site and in-kind mitigation, and permittee-responsible mitigation through off-site and/or out-of-kind mitigation. This was a shift from prior practices, and the agencies explained their rationale in the preamble to the Mitigation Rule:

> To address that risk and uncertainty, and to reduce temporal losses of aquatic resource functions, we have established a preference hierarchy for mitigation options at § 332.3(b) [§ 230.93(b)]. This hierarchy, which is discussed in greater detail elsewhere in this preamble, generally provides a preference for mitigation bank credits, when the permitted activity is in the service area of an approved bank with the appropriate types of credits available. In the absence of an approved bank, in-lieu fee programs have certain advantages over permittee-responsible mitigation. They generally involve larger parcels, have access to appropriate scientific and technical expertise, may have a proven track record in establishing successful mitigation in the past, and will generally have a more fully developed watershed approach, developed through their required comprehensive planning framework. For these reasons, we do not believe it is appropriate to limit the use of in-lieu fee programs to any particular impact type or size. Rather, we believe the preference hierarchy described above will ensure that a mitigation option is selected with the highest probability of delivering successful, high-quality mitigation among the available choices in a given case.

73 Fed.Reg. 19,613. The preference hierarchy was codified in 40 C.F.R. section 230.93(b)(1), which states: "When considering options for successfully providing the required compensatory mitigation, the district engineer shall consider the type and location option in the order presented in paragraph (b)(2) through (b)(6) of this section," and the types were listed in the order presented above.

In the State Supplemental Dredged or Fill Guidelines, the first sentence of section 230.93(b)(1) from the Mitigation Rule, pertaining to the preference hierarchy, has been deleted. While Section IV.B.5(b) of the Procedures encourages consultation and coordination with other agencies on mitigation "[w]here feasible," the deletion of the preference hierarchy in Section 230.93(b)(1) sets up a clear conflict with the Corps' regulatory program. In place of the preference hierarchy, the Procedures impose a new deliverable that applicants must prepare prior to obtaining compensatory mitigation approvals: the watershed profile. The Procedures then rely exclusively on the watershed profile to ensure that a watershed approach underlies a determination of the type and location of mitigation, as described in Procedures § IV.B.5(d).

The problem with this approach is that the Procedures require applicants to prepare and submit a new deliverable, not required by CDFW, the Corps or any other agency, prior to obtaining Water Board approval of compensatory mitigation. Neither the Procedures nor the Staff Report reference resources that will be available either to applicants or Water Boards to prepare or approve these watershed profiles, but the Procedures mandate that the profiles must include significant amount of scientific information and assessment, including information and assessment of the "abundance, types, and condition of aquatic resources in a project evaluation area," that is "sufficient to provide information to evaluate direct, secondary and cumulative project impacts and compensatory mitigation alternatives, and to help define watershed goals," and that allows Water Boards "to track the cumulative effectiveness of permitting decisions." Procedures § V. This creates a new regulatory and practical burden on individual project applicants seeking approval of compensatory mitigation for impacts to aquatic resources.

Under the Procedures, the watershed profile must:

- Identify all WOTS within a project evaluation area, defined as an area that is bigger than, but "includes the project impacts sites and/or the compensatory mitigation site," and is an "ecologically meaningful unit of the watershed." However, the Procedures do not provide any definition of what any individual Water Board might determine, on a case-by-case basis, constitutes (or does not constitute) WOTS or the project evaluation area. Further, all the delineation issues discussed in Part III of these comments will apply equally at the landscape level, make delineation of WOTS within a larger, watershed-based project evaluation area extremely difficult and time consuming, if not infeasible to implement over such a broad area for individual project applicants.

- Characterize the condition of all WOTS within the project evaluation area. However, as acknowledged by staff, there is no generally accepted methodology that can be used to determine the condition of all WOTS at a landscape level within a watershed-based unit identified as a project evaluation area. Even if there were a methodology available to develop such a condition assessment, individual project applicants are unlikely to have

access to all properties within a project evaluation area as required to assess the condition of waters.

- Identify cumulative effects of permitting decisions on WOTS within the watershed encompassing the project evaluation area. However, requiring applicants to mitigate for cumulative impacts to aquatic resources caused by historical activities and permitting decisions is not constitutional or appropriate. Applicants are responsible for providing compensatory mitigation that is roughly proportion to their proposed impacts to aquatic resources and has a general nexus to the degree and type of impact proposed.

Rather than requiring applicants to submit a new, broad watershed profile as a condition precedent to compensatory mitigation approval, the Procedures should rely on the avoidance, minimization and compensatory mitigation hierarchy already mandated by federal regulations to ensure a watershed approach to mitigation. The new requirements related to preparation and approval of watershed profiles should be eliminated from the Procedures.

The Procedures also allow for reduction of mitigation if mitigation is located consistent with a Water Board-approved watershed plan under Section IV.B.5(c). In the workshops, staff indicated there were no approved watershed plans, and while the Procedures encourage the development of watershed plans, it is unclear how they are to be developed, who is supposed to develop them, and whether the Water Boards' approval of them will entail a public process to allow the regulated community to review and comment. Notably, two potential examples of a watershed plan, the SAMP for the San Diego Creek Watershed and the SAMP for the San Juan Creek Watershed/Western San Mateo Creek Watershed, were developed collaboratively with the Corps and California Department of Fish and Wildlife. The Water Board was invited to participate in both, but was unable to complete either process due to lack of resources.

Similarly, the Mitigation Rule acknowledged throughout that compensatory mitigation needed to be practicable. However, the State Supplemental Dredged or Fill Guidelines deletes every reference to practicable in Subpart J and, instead, requires mitigation based only on what would be "environmentally preferable." State Guidelines § 230.93(a)(1). The intent of this change is unclear, but it creates the potential for conflicting determinations for the suitability and adequacy of proposed compensatory mitigation between agencies. In addition, the replacement of "practicable" with "environmentally preferable" suggests an inflexible and unrealistic approach that could preclude approval of mitigation proposals that represent the best *practicable* mitigation available, and/or result in impracticable mitigation requirements that permittees cannot satisfy.

Section B.5.c requires a minimum 1:1 acreage or length of stream reach replacement to compensate for wetland or stream losses, absent exceptional circumstances. Replacement of streams is difficult, as the edits to Section 230.93(e)(3) of the State Supplemental Dredged or Fill Guidelines indicate. A strict interpretation of this provision would make many projects infeasible.

Recommendations: Reinsert the preference hierarchy in Section 230.93(b)(1) and all references to the consideration of practicability of mitigation throughout Subpart J, or simply revise Subpart

J to rely on and cross-reference the Mitigation Rule in its full and unedited state. Delete all requirements related to watershed profiles from the Procedures.

For mitigation to impacts to linear features, delete the requirement for replacing stream reaches at a 1:1 ratio based on length. A better approach, and consistent with the Corps' focus in the Mitigation Rule, is to focus on enhancement and restoration of existing but degraded resources and the increase in functions and values obtained through such mitigation — *i.e.*, the evaluation of impacted resources and mitigation opportunities should focus on overall functions and values of the respective resources; acreage or length is only one input in this assessment.

To the extent provisions incentivizing watershed plans are retained in the Procedures, the Procedures should include a process for Water Board review and approval of watershed plans that includes a public process, and the State Board should provide sufficient resources to Water Boards to develop those plans in coordination with the Corps and CDFW. Special area management plans undertaken and approved pursuant to federal regulations and policy, such as the San Diego Creek Watershed SAMP and San Juan Creek Watershed/Western San Mateo Creek Watershed SAMP in Orange County, should be recognized and accepted as watershed plans for purposes of the Procedures without further Water Board review or approval.

F. The Procedures would duplicate the CDFW lake and streambed alteration program.

The new permitting program established by the Procedures as drafted not only would duplicate the Corps' Clean Water Act permitting program but also would duplicate much of the CDFW's lake and streambed alteration program under sections 1600 *et seq.* of the Fish and Game Code. While the State Board's original vision for the Procedures was to fill the *SWANCC* gap by regulating *wetlands* that fall outside federal jurisdiction, the current draft Procedures go much further by regulating wetlands and *non*-wetland waters subject to regulation by CDFW (whether or not subject to federal jurisdiction).

The Procedures do not explain the need for this overlapping state regulation. It does not appear the State Board has consulted or coordinated with the CDFW in developing the Procedures, and nothing in the Procedures requires Water Boards to coordinate with, defer to, or otherwise ensure consistency in permitting and mitigation with CDFW's regulatory program.

At best, the current draft Procedures will create an unnecessary second regulatory program under state law that in large part duplicates CDFW's authority, resulting in wasted resources and undue burdens on the regulated community. At worst, the Procedures will impose conflicting requirements for avoidance, minimization and mitigation resulting in uncertainty, delay and confusion. In either case, the lack of coordination highlights a fundamental problem with the Procedures — they reach far outside the Water Boards' statutory mission of protecting water quality and into areas that the Legislature and Congress have delegated to other agencies.

Recommendation: Limit the scope of the Procedures to unregulated wetland WOTS (whether or not subject to federal jurisdiction) and defer to the CDFW's long-established lake and streambed alteration program and the Corps' section 404 program as to discharges already regulated by those programs.

IV. REDUCING UNCERTAINTY, INCONSISTENCY AND DELAY

The State Board has defined one of its key goals for the Procedures as ensuring consistent regulation of WOTS, including across regions, but the Procedures ensure the opposite by leaving far too many critical decisions to be made on a case-by-case basis at the discretion of Water Boards staff, rather than establishing clear rules and consistent requirements. Key issues left undefined include the requirements for a complete permit application, the timing of permit processing, the scope of WOTS to which the Procedures will apply, the methods for delineating WOTS, the requirements for a watershed profile and conditions under which permittees can be deemed to have satisfied their mitigation obligations.

A. The Procedures do not provide adequate notice of what WOTS will be subject to regulation.

The Procedures include a definition of "wetland" that is overbroad, as explained in Part III of these comments, and fail to define when features falling within that definition may or may not be considered WOTS subject to regulation under the Procedures. The Procedures also assert Water Boards jurisdiction over non-wetland features such as streams and rivers but fail to provide a process for delineating the extent of linear waters.

Because of these omissions, the Procedures fail to provide dischargers with adequate notice of what conduct is prohibited and may trigger enforcement action (*e.g.*, unpermitted fill of certain waters), rendering the Procedures unconstitutionally vague. The Procedures are also unconstitutionally inconsistent in defining potentially illegal conduct because the nature and scope of prohibited conduct may vary from region to region based solely on arbitrary differences in Water Boards' interpretation of what features are jurisdictional WOTS. The unconstitutional vagueness and inconsistency of the Procedures, combined with the State Board's concurrent action to identify and require enforcement against unpermitted discharges of fills to WOTS as Class I priority violations, violates substantive due process for dischargers. State Board, Draft Water Quality Enforcement Policy (July 2016) (WQEP).[3]

These deficiencies must be addressed.

1. The Procedures should include a list of exempt features.

a. Exemptions from jurisdiction

The Procedures define wetlands but state that the definition is not jurisdictional, suggesting that some unspecified type of waterbody may meet the definition of a wetlands but would not be a WOTS. Under Porter Cologne, the term "waters of the state" is defined in very broad terms to include "any surface water or groundwater, including saline waters, within the boundaries of the state. Water Code § 13050(e). However, the Procedures acknowledge that the

[3] The revisions to the WQEP, which were released near the end of the comment period for the Procedures, designate unpermitted fill of wetlands exceeding 0.5 acre in areal extent as a Class I priority violation subject to heightened enforcement, for the first time. Draft WQEP § II.A.

"Water Boards have not developed a complete list or categorical descriptions of all other features that qualify as waters of the state." Procedures § II. Instead, the Procedures provide that the Water Boards must determine whether a particular feature, including wetlands, is a WOTS "on a case-by-case" basis.

While it is true, as State Board staff asserted in the workshops and public hearing, that this case-by-case determination is not a change from existing practices, it represents a significant shortcoming of the Procedures and one that significantly undermines the stated objective of having a uniform regulatory program. We understand that attempts were made to develop a list of features that were not deemed waters of the state, but staff could not reach a consensus. Given that the Water Boards are administering the same law — Porter Cologne — it is troubling that they were unable to reach an agreement. It also suggests that the similar features might be regulated differently across the state. That should not happen.

Recommendation: The Procedures should include a list of aquatic features that are excluded from the new permitting program, in order to clearly preclude unreasonable regulation of isolated and small features that do not warrant regulation as WOTS — including but not limited to puddles, road potholes, tire track depressions, ornamental and decorative landscaping features, etc. For the federal Clean Water Rule, the following waters are not WOUS, and we strongly believe that they should not be classified as WOTS either.

i. Water treatment systems, ponds, and lagoons
ii. Prior converted cropland
iii. Ditches with ephemeral or intermittent flow, unless they contain a natural stream or were built in a natural stream bed, or if they drain a wetland (intermittent flow only). Also ditches that do not flow (directly or indirectly) into a jurisdictional water.
iv. Artificially irrigated land, if it would revert to dry land if irrigation stopped, and artificial lakes constructed on dry land such as stock watering ponds, irrigation ponds, cooling ponds
v. Artificial pools, ponds, and ornamental waters, and water-filled depressions incidental to mining or construction activity, including excavation pits
vi. Erosional features that are not tributaries
vii. Puddles and stormwater control features built on dry land, plus wastewater recycling features (e.g., retention basins, percolation ponds)
viii. Groundwater

In addition, in light of the broad definition of WOTS, the Procedures should include an exemption for industrial cooling ponds, industrial process ponds, and industrial and agricultural waste treatment ponds that are isolated and, if they discharge, only discharge pursuant to a NPDES/WDR permit. These types of features have not generally been subject to regulation in the past, but their status should be addressed in the Procedures to provide clarity to regulators and stakeholders. The Procedures should also exempt constructed stormwater bioswales and similar features from jurisdiction for the reasons explained in subsection (b) below.

b. Exemption for Treatment Wetlands

Certain water features, such as constructed wetlands and other features listed above, have been developed to function as structural treatment control Best Management Practices (BMPs). Under the Procedures as currently written, there is significant regulatory uncertainty regarding the degree to which discharges of dredged or fill material incidental to construction or maintenance of treatment wetlands will be exempt from the permitting program created by the Procedures.

As a practical matter, scores of treatment wetlands have been constructed pursuant to Corps, CDFW and Water Board policies to naturally improve surface water quality, improve the quality of storm water discharges to comply with MS4 permits, or further polish discharge water quality as required by other NPDES permits. However, certain individual and General NPDES permits (*e.g.*, the draft MS4 permit for Orange County) include findings and determinations declaring these BMPs "are or will be" considered waters of the State. Further, many MS4 permits (*e.g.*, the San Diego MS4 permit) state that authorizing the construction of a natural treatment systems within a WOTS, or using the water body itself as a treatment system or for conveyance to a treatment system, would be tantamount to accepting waste assimilation as an appropriate use for that water body.

Under this interpretation, water must be treated to meet water quality standards before it is discharged to a constructed wetland that was designed as a BMP to treat the water to meet applicable discharge limitations or water quality standards. The Procedures indicate that the permitting authority should decide whether treatment wetlands are exempt from the permitting program on a case-by-case basis. These examples demonstrate why it is essential for the Procedures to include clear standards as to which treatment wetlands and other BMPs are excluded from the permitting program, so as to not confuse the public and to provide clear direction to dischargers.

Section IV.D.2.(b) of the Procedures as currently written does not provide a meaningful exemption from application procedures (and thereby, alternatives analysis requirements) for construction, operation and maintenance of treatment wetlands. There are many examples of highly functioning treatment wetlands that already exist and require operations and maintenance work, which should be exempt from the proposed procedures but would not be exempt under current language. These natural treatment systems include a wide range of very valuable ecological amenities, including: offline wetlands that treat storm water runoff prior to entering surface waters; offline wetlands that further polish treated effluent prior to discharge to surface waters; and offline wetlands that treat diverted surface waters to assist in compliance with TMDLs. All of these systems have been constructed in areas that, at the time of construction, did not exhibit significant wetland or aquatic characteristics, functions or values, and that, but for construction and maintenance of the natural treatment wetland, would not otherwise have come to exhibit those characteristics.

Nevertheless, maintenance of these systems may not be exempt from the Procedures' permitting program, depending upon how far back into history any particular Water Board determines is appropriate to look in deciding whether a treatment wetland is "located in an area that did not historically support wetland areas or other aquatic functions," as the Procedures

require for a feature to be exempt. From a physical perspective, for natural treatment wetlands to hydrologically and hydraulically perform in a manner that further treats discharges, storm water and/or diverted surface waters, the systems must be located in close proximity to, and downstream of discharges or diversions, at a point that can be graded to facilitate collection, while remaining upstream of receiving waters. As a result, treatment wetlands only function physically if they are constructed in areas that may have, as a matter of deep history, been floodplains or areas that supported wetlands in decades or centuries past, but that are no longer within floodplains or areas that do or would naturally convert to wetlands. Consequently, the exception as written will be ineffective to exempt from the Procedures construction, operation and maintenance of treatment wetlands, and it should be amended.

Recommendation: Amend the exemption in Section IV.D.2.(b) as follows: "Discharges of dredged or fill material for the purpose of creating or maintaining constructed treatment wetlands, as long as the constructed treatment wetland is located in an area that ~~did not historically~~ does not support natural wetland areas or significant aquatic resources at the time of the construction of treatment wetlands, and the treatment wetlands were not constructed as mitigation for discharges of dredged or fill material to other wetlands."

c. Exemption for Corps Nationwide Permits for Operation and Maintenance Activities.

Operation and maintenance activities conducted under certain NWPs do not contribute to significant loss of wetlands or adverse impacts to aquatic features, since they are focused on acquiring monitoring information and/or conducting maintenance activities for already permitted existing infrastructure. The CEQA document required for a blanket 401 certification for these NWPs would not be burdensome, given that the activities authorized by these commonly used maintenance and monitoring NWPs do not result in new permanent fills or losses of wetlands.

Recommendation: Exempt from all application procedures, and thereby also exempt from preparing any alternatives analysis, at least the following NWPs: 3 (maintenance); 6 (survey activities); 12 (utility line activities); 13 (bank stabilization); 18 (minor discharges); 20 (minor dredging); 32 (maintenance of existing flood control facilities); 32 (completed enforcement actions); 33 (temporary construction, access, and dewatering); 35 (maintenance dredging of existing basins); 37 (emergency watershed protection and rehab); 41 (reshaping existing drainage ditches); 43 (stormwater management facilities); 45 (repair of uplands damaged by discrete events); and 46 (discharges in ditches).

2. The Procedures do not provide a complete delineation process for WOTS.

While the Procedures define wetlands and specify how to map the boundaries of wetlands by reference to the Corps' 1987 Manual and Supplements, the Procedures provide no guidance on how to map the boundaries of non-wetland WOTS, including linear and ponded features. For WOUS, the Corps defines its jurisdiction up to the ordinary high water mark (OHWM) for ponded and linear features. To the extent the State Board does not limit application of the Procedures to unregulated wetland waters as recommended, the Procedures should apply the

same jurisdictional limits as the Corps for linear and ponded features, in order to maintain consistency with the Corps' program and provide a marker that is readily identifiable in the field.

The failure to provide a process and standards for defining the limits of WOTS is particularly problematic because applicants must identify WOTS within their permit applications, as well as more broadly within the project evaluation area addressed by watershed profiles, yet the Procedures provide no appeal process for delineations, leaving landowners with the option of spending months trying to obtain a permit and approval of mitigation that may not be legally required before they can challenge the Water Board's assertion of jurisdiction, or proceeding without a permit and facing enforcement actions.

Recommendation: The Procedures should define the lateral limits for jurisdiction for linear features the same as the Corps (OHWM) and should include an appeal procedure for delineations that are conducted by Water Board staff. The appeal process could be modeled on the Corps' appeal procedures for jurisdictional determinations and should include mandatory time frames for action by Regional Board staff, such as 30 days, providing that an appeal will be upheld if staff do not act within the specified time frames.

B. The Procedures do not ensure compliance with the Permit Streamlining Act.

The state's Permit Streamlining Act requires agencies to provide permit applicants with a list of the information necessary for a complete application and to determine within 30 days after receiving an application whether it is complete. Cal. Gov. Code § 65940(a), 65943(a). If the agency fails to make a timely determination, the application is deemed complete. Cal. Gov. Code § 65943(a). Once an application is accepted as complete, the agency must make a decision on the permit application within a specified time period. Cal. Gov. Code §§ 65950, 65952.

The draft Procedures do not comply with the Permit Streamlining Act because they fail to clearly define the requirements for a complete application. While section IV.A.1. of the Procedures describes items that are always required for a complete application, section IV.A.2 lists multiple additional items, including an alternatives analysis, that are needed for a complete application "[i]f required by the permitting authority on a case-by-case basis." The Procedures provide little or no guidance on when the information will actually be required. This fails to satisfy the requirements of the Permit Streamlining Act to give applicants reasonable notice of what is required to provide a complete application and start the clock for the Water Boards to make a permit decision.

Compounding this problem, the Procedures create a new permitting program with new requirements and unnecessary procedures that will make it difficult for the Water Boards to comply with the PSA's time limits for acting on complete applications. For instance, the Procedures provide for an initial public notice on each application, as currently required, and another public notice if comments are received on the first or if there is substantial public interest in the project. The first trigger is such a low threshold that it provides an open invitation for project opponents to cause delay. The second trigger is so vague that it is meaningless. It is unclear what purpose the second notice serves, but the redundant notice and corresponding time for additional public comments and consideration of those comments will certainly delay the Water Boards' actions on permit applications.

Combined with the new requirements such as additional alternatives analyses to be conducted by the Water Boards, the result is predictable. In Region 9, where the Regional Board already routinely requires alternatives analyses, staff inform applicants it will take 18 months to issue water quality certifications (longer than allowed by either state or federal law), and even longer for WDRs. The effect of the Procedures will be to institutionalize these unlawful delays statewide.

Recommendation: Revise the Procedures to eliminate the additional, discretionary application requirements or, where appropriate, to specify under what circumstances they will be required. The second public notice should be eliminated. The Procedures also should state that the Water Boards will comply with the time limits of the PSA in acting on applications under the Procedures; that an application will be deemed approved if a Water Board does not approve or deny the application within the PSA time limits; and that the Water Boards shall not deny an application (with or without prejudice) based on the inability to comply with PSA time limits. The Procedures also should direct the Water Boards to issue a letter, upon request, to an applicant confirming that its application has been deemed approved under state law if a Board has failed to act on a complete application within the time allowed by the PSA. The requirement for a second public notice in Section IV.B.6 should be deleted.

V. OTHER ISSUES

In addition to the primary concerns discussed above, the Procedures contain various errors, inconsistencies and omissions that should be corrected or clarified in the next draft.

1. Climate change

Section IV.A.2.(b) of the Procedures states that a complete application *may* be required to include "an assessment of the potential impacts associated with climate change related to the proposed project and any proposed compensation, and any measures to avoid those potential impacts." It is unclear whether this refers to the proposed project's contribution to climate change or the effects of climate change on the proposed project, but in either case the topic has no relation to the Water Boards' authority. Any effects of the proposed project on climate change will be addressed under CEQA by the lead agency, whether that is a Water Board or some other agency, and do not require inclusion in the Procedures.

Recommendation: The Procedures should be revised to eliminate the reference to information regarding climate change.

2. ALUC consultation

Section IV.A.2.(d)(vii) requires consultation with the airport land use commission (ALUC) for any mitigation site within five miles of an airport, with "proof of consultation" to be included with the draft compensatory mitigation plan. While we agree with the goal of avoiding compensatory mitigation that may pose a danger to air traffic safety, the requirement is too broad. Many types of mitigation (*e.g.*, stream restoration, small seasonal wetlands creation) would have no effect on air traffic. Additionally, it is unclear whether ALUC are set up to consult with individual project applicants, and it's also unclear what constitutes "proof of

consultation." For instance, is it enough that the applicant has attempted to contact the ALUC, even if the ALUC does not respond?

Recommendation: Consultation should be required only if requested by the ALUC, not for every mitigation project within five miles of an airport. Further, consultation should not be required for a complete application, particularly if an affirmative response is required as "proof of consultation."

3. Mapping

a. Unnecessary duplication of application requirements

Section IV.A.1 describes the contents of a complete application. Two different subsections — Sections IV.A.1.(b) and (d) — address mapping requirements and appear to be overlapping, with subsection (b) apparently limited to delineation of wetlands.

Subsections (b) and (d) also contain a confusing reference to "preliminary and final [approved?] wetland delineation reports … submitted to the Corps."

Recommendation: Delete subsection (b). Add a note to subsection (d) stating that wetlands should be delineated in accordance with Section III and that the map required by that subsection should include features shown on a PJD or AJD.

b. Requirement that structures be shown on application materials.

Section IV.A.1(d) requires that application maps show "the location, dimensions, and type of any structures erected or to be erected on the plotted lands for use in connection with the activity." This could be interpreted to mean that plans submitted at the application stage must show where individual homes or other structures would be located. This level of detail is not always known at the application stage, particularly for projects that are not yet at the stage of producing tentative/parcel maps, including large-scale projects that are built out in phases over many years.

Recommendation: Delete the requirement for the map to show structures and instead have it depict the proposed grading limits and land uses. This will provide enough information to assess the impacts from discharges of fill materials into waters of the state and related indirect impacts from development.

4. Grandfathering

Section IV states the Procedures would apply to applications submitted after the effective date of the Plan Amendment incorporating the Procedures. We understand this to mean the Procedures would not apply to renewals or extensions of Water Board-issued WDRs, water quality certifications, or other approvals for which the original application was submitted before the effective date, even if the renewal or extension occurs after the effective date. Revisiting previously issued permits — particularly to conduct a new alternatives analysis as the Procedures might be construed to authorize — would be disastrous for permittees that have relied on those

permits to plan, fund and/or construct portions of a project and would create major conflicts with the decisions of local land use authorities.

The same rationale supports excluding discharges from application of the Procedures if they are subject to, and consistent with, a Corps-approved SAMP that was approved before the effective date of the Procedures, whether or not the Water Boards participated in the SAMP process. As explained in Part III.A.3 of these comments, a SAMP reflects a multi-year investment of time and resources by multiple agencies and participating landowners that leads to settled expectations about the location and type of impacts to covered resources that should be permitted.

Recommendation: In order to provide reasonable certainty for permittees, revise the Procedures to clarify that the Procedures will not apply to discharges for which a permit application was submitted before the effective date of the Procedures, even if a Water Board reopens, revises, renews or extends the permit after the effective date.

Revise the Procedures to clarify that the Procedures will not apply to discharges that are subject to and consistent with a Corps-approved SAMP approved before the effective date of the Procedures, even if an application for Water Board authorization or certification of the discharge is submitted after the effective date.

VI. CONCLUSION

The new permitting program established by the Procedures is far broader than necessary to achieve the State Board's stated goals of filling the *SWANCC* gap and preventing loss of wetlands, and rests on questionable statutory authority. The Procedures will duplicate and conflict with existing state and federal regulatory programs that protect aquatic resources, creating unnecessary burdens on dischargers while providing minimal environmental benefits. This new program also creates a significant burden on Water Boards staff and resources without any plan to increase staff or funding. The State Board has not adequately considered the costs of the Procedures in relation to their benefits and should not defer resolution of conflicts to some undefined process, such as an interagency agreement or guidance to the regional Water Boards, to be completed *after* adopting the Procedures.

The Procedures also will not achieve the State Board's goal of ensuring consistent regulation of WOTS because they are vague, internally inconsistent and leave far too many crucial determinations — including the scope of jurisdiction — to be made by staff on a case-by-case basis. The result will be uncertainty for dischargers and further delay for a program that already routinely fails to meet statutory deadlines.

Before adopting a new permitting program, the State Board should fully evaluate the expected costs and benefits and the need for the Procedures in light of existing regulatory protections. It also should identify the legal authority for the Procedures and demonstrate that the Water Boards can allocate the necessary staff and funding to implement the Procedures without compromising their existing mission. If the State Board still wishes to adopt the Procedures it should, at a minimum, reduce their scope to eliminate overlap with Corps and CDFW programs

and include clear definitions and processes as recommended in these comments to ensure consistent and efficient implementation of the new regulatory program.