



**California Council for Environmental and Economic Balance**

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August 18, 2016



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

Via Electronic Submission: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

**Re: Comments Regarding the Draft Statewide Dredged or Fill Procedures**

Dear Ms. Townsend,

On behalf of the members of the California Council for Environmental and Economic Balance (CCEEB), we appreciate the opportunity to offer the following comments regarding the State Water Resources Control Board's (SWRCB) draft Statewide Dredged or Fill Procedures for incorporation as amendments to the California Ocean Plan and Inland Surface Waters, Enclosed Bays, and Estuaries of California Plan ("Draft Procedures"). Additionally, we appreciate your consideration of our request to extend the comment period and provide an additional two weeks for stakeholders to review and develop comments on the Draft Procedures.

CCEEB is a coalition of business, labor, and public leaders that works together to advance strategies to achieve a sound economy and a healthy environment. Founded in 1973, CCEEB is a non-profit and non-partisan organization.

While we applaud the SWRCB and staff in its efforts to more closely align the proposed amendments for regulating discharges of dredged or fill materials to the federal requirements and to provide statewide consistency as they apply to waters of the state, after thorough review CCEEB has identified a number of concerns with the Draft Procedures that may create significant and unreasonable burden on a host of regulated entities seeking to maintain regulatory compliance. Further, the approach contemplated in the new document is a vast departure from the prior work the SWRCB had undertaken related to a state wetlands policy and in this regard the considerations and feedback associated with the prior work does not apply in-full to the current draft. As a matter of fact, the approach contemplated in the proposed amendments creates a broader program that has not been sufficiently vetted nor the implications fully understood.

As you and the Board know, CCEEB and its members always endeavor to provide substantive feedback to help balance economic and environmental considerations, avoiding detrimental effects on the economy and positively inform potential revisions to various efforts undertaken by the SWRCB. In this regard, we have divided our comments into general comments accompanied by more specific comments and some proposed language revisions for your consideration.

## **GENERAL COMMENTS**

CCEEB appreciates the SWRCB's interest in providing consistency across the state and improving protections for waters of the state not covered by the Clean Water Act (CWA). However, we are concerned about the broad nature of the Draft Procedures that would encompass all impacts to waters of the state – not merely wetlands as prior SWRCB direction would have addressed. Further, the Draft Procedures are duplicative and in some cases we believe are in conflict with the CWA. These concerns, we believe, will result in significant burden on the regulated entities subject to these procedures that outweigh any minor benefit that may be realized, if at all. Additionally, a number of the provisions are vague, inconsistent and even present conflicts that will impact the Draft Procedures' implementation, the National Pollution Discharge Elimination System (NPDES) permitting requirements and result in inconsistent application by regional boards.

### ***Project Objectives Are Not Achieved***

As described in the Staff Report in Section 6.1, the Draft Procedures include seven specific objectives. Unfortunately, four of the seven objectives clearly would not be fulfilled through implementation of the Draft Procedures:

- Objective 3 strives for consistency with the federal CWA Section 404 program. The approach described in the Draft Procedures does not fulfill this objective.
- Objective 5 strives to improve consistency across all Water Boards; however, the use of the terms “may” and “case-by-case” eliminates the consistency the SWRCB is focused on institutionalizing across and possibly within regional boards. Further, future efforts to develop application forms, template order for 401s and WDRs, and guidance were alluded to in the Staff Report and during the workshop, but it is difficult to assess how effective these documents will be when they have not been developed or shared in conjunction with the review of the Draft Procedures.
- Objective 6 strives to streamline the 401 Certification process; however, the Draft Procedures specify additional requirements that burden projects and instead obfuscate the permitting process.
- Objective 7 strives to establish procedures for regulation of dredged or fill discharges to all waters of the state, but these Draft Procedures are incredibly confusing and vague to the point where this objective is not fulfilled.

The Draft Procedures are taking the approach of “one size fits all,” which is not an appropriate way to permit various activities that occur throughout California. Additional thought is required to tease apart requirements associated with activities that result in minimal impacts. Given the intense Water Board staff workload, this approach ensures that staff time is focused on those projects that truly require additional analyses and more comprehensive permitting.

### ***Level of Staff Discretion May Cause Significant Uncertainty and Inconsistency***

Throughout the Draft Procedures, the terms “may” and “case-by-case” basis are used to describe Draft Procedures implementation. Although we applaud the SWRCB’s efforts to streamline the permitting process, these terms will not drive consistency among the Water Boards and instead are likely to create substantial variation in permit processing decisions between regional boards, as well as among staff within a regional board. While it may be understandable that the individual Boards be given some discretion on when to apply specific conditions, the language includes no guidance on when or how to apply these. This vague language is likely to result in inconsistencies on how these are applied and could create substantial uncertainty for the regulated community. It is recommended that additional, condition-specific language be added in the next revision of the Draft Procedures to better define when and how these requirements may be enforced. Further, this will provide interested stakeholders the opportunity to review and comment on these important components of the Draft Procedures.

### ***NWP Pre-Certification Process***

As the U.S Army Corps of Engineers (USACE) works to reissue its Nationwide Permits (NWP) in March of 2017, the utilities (and other CCEEB-represented industries) would like to work with the SWRCB to expand the scope of the precertification of NWP 12 (and other NWPs). Pre-certifying a greater range of NWP activities would serve to provide significant streamlining to the process. In fact, in addition to pre-certifying these activities, Water Board staff should consider finding them exempt from the Draft Procedure’s application process. This would create significant efficiencies for many activities, particularly repair and maintenance activities that are already identified as having minimal impacts to water quality.

### ***Draft Procedures Do Not Specify How they Amend Existing SWRCB Documents***

The Draft Procedures lack any specific proposed revisions to the Water Quality Control Plan-Ocean Waters of California (Ocean Plan) and Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays & Estuaries of California (Implementation Policy) that are needed to reference to the Draft Procedures or to explain how the Draft Procedures interact with the balance of the Ocean Plan and Implementation Policy. For example, the Ocean Plan states (at Introduction Section C.2.) that:

“This plan is not applicable to discharges to enclosed” bays and estuaries” or inland waters of control of dredged material.”

Will this statement be revised and, if so, to what extent will the Ocean Plan be applicable to the control of dredged material or to wetlands? What other revisions are contemplated? Proposed revisions to the Ocean Plan and Implementation Policy need to be incorporated into the proposed amendments so that interested stakeholders are provided the opportunity to review and comment on these important components of the amendments.

## **SPECIFIC COMMENTS**

### ***II. Wetland Definition***

Although the Draft Procedures attempts to make clear that they are not intended to expand or modify the SWRCB's jurisdiction over waters of the state, we believe it may in fact expand the definition of wetlands as used by the US Army Corps of Engineers (USACE) and the US Environmental Protection Agency (EPA). While one of the goals was to make the Draft Procedures consistent with the USACE delineation, the proposed definition is not consistent with this goal. As a matter of fact, the expanded definition may subject water features such as puddles and ditches to regulation.

The Draft Procedures do not provide clear criteria on how waters will be determined to be "waters of the state" and rather, states that Water Boards "may" consider a defined wetland to be a water of the state on a "case by case" basis. In the absence of any SWRCB-issued guidance or framework addressing jurisdiction, this approach seems to create a great deal of unnecessary confusion and uncertainty for Water Board staff and the public. The Draft Procedures mention that a complete list of categorical "water of the state" descriptions has not been developed, and give no assurances that a list will be issued in the future. Such a list is a critical component of the Draft Procedures and should be incorporated into the Draft Procedures so that interested stakeholders are provided the opportunity to review and comment on the list.

Ultimately, the wetland definition within the Draft Procedures does not provide regulatory certainty; does not streamline the application process; does not promote regulatory consistency across or within regional boards; and will result in confusion in the use of the term "wetlands" outside of the Boards' program. In order to address these concerns, CCEEB recommends the following:

- Incorporation of the USACE definition of "wetland;" and
- Inclusion of a complete list of "waters of the state" in the revised Draft Procedure to provide clarity to the public and a consistent approach for Water Board staff.

### ***IV.A. Project Application Submittal***

The Draft Procedures require the permitting authority to either determine an initial application complete or request additional information within 30 days of receipt of the application. The permitting entity then has an additional 30 days to determine whether the application is complete upon receiving the additional information requested. They do not clarify, however, the permitting entities' obligation to

respond and ability to continue to request additional information beyond that which has already been provided. The Draft Procedures in this regard should include language that requires the permitting entity to be specific with their requests for more information to prevent repetition of requests and provides that the application is complete if there has been no formal written response from the permitting entity within 30 days.

The Draft Procedures add an additional 30-day timeframe for deeming an application complete. In total, the proposed regulations could result in a 60-day timeframe for deeming an application complete, with little incentive for Water Board staff to deem an application complete at the first 30-day window. Guidelines and training should be developed and provided to agency staff to explain which projects would be more likely to require the longer permit timeframe.

The Draft Procedures include a two-part application—Part 1 Items Required for a Complete Application and Part 2 Additional Information Required for a Complete Application. The Staff Report states that the lists of items were generated by querying what various agency staff currently require and compiling these items into a master list. We believe further consideration needs to be given to the Part 2 items to evaluate the merit and value they bring to the application assessment process. The Part 2 items include topics that may be difficult and costly to address, including impacts associated with climate change related to the project and a description of the overall abundance, diversity and condition of aquatic resources in the proposed compensatory mitigation project. Most importantly, there is no threshold or criteria as to when the Part 2 items would be required and this will very likely lead to significant inconsistencies. It is unfortunate that the Draft Procedures propose what appears to be a menu for staff to choose from, as opposed to developing guidance for specific impacts or water features that may require additional information for analysis. Triggers or thresholds based on the level of project impacts or the type of water impacted need to be included in the revised Draft Procedures to address this omission. It will also provide interested stakeholders the opportunity to review and comment on these important components of the Draft Procedures.

#### ***IV.A.3. Project Application – Emergencies***

Many of CCEEB's members provide essential public services, such as transmission and delivery of electricity, natural gas, telecommunications and water to residential, commercial, industrial, institutional and governmental customers throughout California. It is imperative that the amendments contain language that would provide for facilitated, if not "after-the-fact," permitting for emergencies so that these essential services can be promptly restored. We recommend the addition of the following language:

"3. In the case of an emergency that requires immediate action to prevent or mitigate the loss of essential public services, the discharger shall submit a brief description of the emergency action within five days of commencement, and then shall submit, as feasible, the information identified in Section IV.A.1. and establish a schedule within thirty days for submitting any additional information with the Regional Board."

### ***IV.B.3 Alternative Analysis***

The Draft Procedure states that an alternatives analysis “may” be required for both discharges to water of the United States when not required by the USACE and discharges to waters of the state. However, it provides no criteria or guidance as to when an alternatives analysis would be required. Again, without providing any decision-making framework, the likelihood of inconsistent approaches is very high.

The USACE exempts projects utilizing NWP from the requirement to conduct an alternatives analysis. However, the SWRCB puts an additional condition that an NWP needs to be pre-certified. We request that this requirement be removed. The intent of the NWP Program is to provide “timely authorizations for the regulated public while protecting the Nation’s aquatic resources” for activities which will result in “no more than minimal individual and cumulative adverse environmental effects.” Each NWP permit goes through an alternatives analysis under the National Environmental Policy Act (NEPA) and consistent with the 404(b)(1) Guidelines as part of the issuance process. As such, there is no need to conduct an extensive alternatives analysis on projects that qualify under this program, regardless of the pre-certification status. This is a clear example of a requirement within the Draft Procedures which would subject minor activities to additional unnecessary review.

The SWRCB should consider an additional exemption in regards to the California Environmental Quality Act (CEQA) — that is, if a project is exempt from CEQA – since it would not have a significant effect on the environment, either individually or cumulatively, it would also be exempt from the alternatives analysis requirement.

We recognize that the SWRCB's intent for the Draft Procedures is to align with the USACE's 404(b)(1) Guidelines, but there are two important concerns with this approach. First, the Comparison of the 404(b)(1) Guidelines to the State Supplemental Dredged or Fill Guidelines strikes out all the language pertaining to the USACE's approach to alternatives analysis and thus, the procedures do not provide any documentation confirming how the alternatives analysis will be conducted. Second, requiring an alternative analysis for projects that qualify for a NWP is not in alignment with the USACE's process and creates significant additional burdens for projects with minimal impacts. In essence, the SWRCB is creating a new process for a 401 Certification alternative analysis that is not congruent with that of the USACE and instead may result in excessive cost and time delays in its development with little gain to waters of the state. In this regard, CCEEB firmly believes the Draft Procedures should not make an alternatives analysis a requirement of a 401 certification. If the SWRCB opts to maintain the alternatives analysis as part of its process, as with the USACE's process it should be required only for projects with significant permanent losses of state waters. Given Water Board staff workload, this approach increases the likelihood that staff time is focused on those projects that truly require additional analyses and more comprehensive permitting.

### ***IV.B.5 Compensatory Mitigation***

As detailed in the staff report, a watershed approach is contemplated in the Draft Procedures in terms of compensatory mitigation. Both strategies involve locating

compensatory mitigation "using a watershed approach based on a watershed profile from a watershed plan." We have conducted informal research with professional mitigation acquisition entities, and this approach has not been seen in California. We would like this language to be removed or revised to ensure that it does not limit potential benefits in securing and protecting waters of the state.

We do support the efforts to promote regional conservation and applaud the SWRCB for not requiring mitigation to occur within the vicinity of the project if greater benefits can be achieved elsewhere. Further, we request that the revised Draft Procedures clarify that in-lieu-fee programs and mitigation banks are acceptable mitigation options, including when a wetland impact is located within another watershed but within the in-lieu-fee program's or mitigation bank's service area.

Although the intentions to implement standardized procedures to determine compensatory mitigation requirements is stated in the Staff Report, the existing Draft Procedures provide no security or transparency to the applicant.

### ***C. General Orders***

Section C of the Draft Procedures state that the State or Regional Boards may adopt General Orders for specific types or classes of activities that require similar conditions or limitations to minimize adverse impacts and are more appropriately regulated by a general order. While this is arguably a helpful approach, another possibility would be to more clearly recognize the USACE's NWP's and provide streamlined processing for activities that qualify for these permits. They are categories of discreet activities with minimal impacts. A further concern with this approach is that it will create inconsistencies among the regional boards in terms of how certain types of activities are regulated.

### ***Additional Detailed Concerns & Specific Language Suggestions***

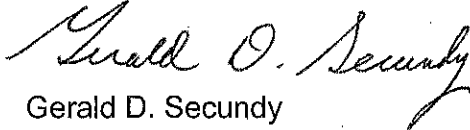
In addition to these comments, CCEEB respectfully submits the attached table that outlines additional detailed concerns and provides specific language recommendations to address these concerns as you consider revisions to the Draft Procedures. The comments and proposed changes provided in this table are based on the language contained in the Draft Procedures and revised 404.b.1 guidelines. We request that changes staff makes to the Draft Procedures and revised 404.b.1 guidelines also be reflected in the Staff Report.

With regard to revisions, we understand from the July 19<sup>th</sup> workshop that a revised Draft Procedures will be released for public review and comment ahead of final Board action. We respectfully request that at such time that a revised document is released stakeholders are provided no less than a 30-day comment period and provided leeway to submit comments on the totality of the revised Draft Procedures, rather than merely the changes. CCEEB asserts that given the scope of the program is significant and could have substantial impact, the opportunity to review the revision in its totality when released is warranted.

Thank you for the opportunity to comment and for your consideration of our concerns and recommended revisions. CCEEB looks forward to working with the

SWRCB and staff to develop a procedure that is workable, consistently applied across jurisdictions, and protective of the environment. Should you have questions, please contact CCEEB's Water, Chemistry and Waste Project Manager Dawn Koepke with McHugh, Koepke & Associates at (916) 930-1993. Thank you.

Sincerely,



Gerald D. Secundy  
CCEEB President

cc: The Honorable Felicia Marcus, Chair, SWRCB  
The Honorable Fran Spivy-Weber, Vice Chair, SWRCB  
The Honorable Tam Doduc, SWRCB  
The Honorable Steven Moore, SWRCB  
The Honorable Dorene D'Adamo, SWRCB  
Karen Larsen, Deputy Director, SWRCB  
Phillip Crader, Assistant Deputy Director, SWRCB  
CCEEB WCW Project Members  
Dawn Koepke, McHugh, Koepke & Associates  
The Gualco Group, Inc.

*Attachment*



CCEEB SWRCB Dredge & Fill Procedures, Water of the State Comments

| Ref # | Document Name | Page # | Citation/Line # | Issue  | Comment <sup>1</sup>   |
|-------|---------------|--------|-----------------|--|--|
| G1    |               |        |                 | <p><b>General Comments</b></p> <p>Requirements are one size fits all</p>             | <p>Many of the conditions in the Amendments are written for projects that have medium to large impacts to waters of the state. Many projects, including utility operations and maintenance (O&amp;M) projects and some construction projects, have very small impacts. Further, linear projects with multiple impacts such as those from utility projects may be separated by long distances (e.g., &gt; 0.25 miles). Also, utility O&amp;M projects are conducted on existing facilities that cannot be relocated. These Amendments should identify in appropriate sections (e.g., Alternatives Analysis) that they are not applicable to projects that have impacts that are below a specified threshold and/or cannot feasibly be relocated. Subsequent comments will provide locations in the document where this language can be incorporated.</p>  |
| G2    |               |        |                 | <p>Amendments should not be adopted at this time as State Plan/Policy Amendments</p> | <p>Although the Policy (and now Amendments) have been years in the making, the draft Amendments represent a significant change in direction from previous proposals. There is a concern that there is a rush to adopt these Amendments even though they have just been released for public review after almost three years since the last document. At this point, they do not seem to be suited for use in the Water Quality Control Plan-Ocean Waters of California and Policy for Enclosed Bays, and Estuaries of California, due to the many cases in which the language is ambiguous as to what the applicable requirements will be (e.g., application information). Further, the Procedures are incomplete in that they do not provide all of the criteria that would be used to determine whether a specific feature identified as a wetland is within the jurisdiction of the SWRCB pursuant to the California Water Code (Water Code). To not provide</p> |

<sup>1</sup> The comments and proposed changes provided in this table are based on the language contained in the Draft Procedures and revised 404.b.1 guidelines. We request that changes staff makes to the Draft Procedures and revised 404.b.1 guidelines also be reflected in the Staff Report.

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| G3    |               |        |   | Use of "case by case basis" in multiple conditions throughout the document. | these criteria eliminates the opportunity for all stakeholders to provide comments on this critical component of this rulemaking.<br><br>Throughout the document multiple conditions stipulate the permitting authority apply requirements on a "case by case basis". It is understandable that the individual Boards be given some discretion on when to apply specific conditions, however the language includes no guidance on when or how to apply these. This vague language may result in inconsistencies on how these are applied and could create uncertainty to the regulated public. It is recommended that additional, condition-specific language be added to better define when and how these requirements may be enforced. |
|       |               |        |   | <b>Specific Comments</b>  |  |
| 1     | Procedures    |        | Title/ 0  | Scope of the Procedures   | The title of the Procedures indicates that the Procedures apply to "waters of the state". Since the Procedures are intended to apply to surface waters, and waters of the state also include groundwaters, the title should be revised to clarify that the draft Procedures apply only to surface waters of the state, as follows:<br><br>"Procedures for Discharges of Dredged or Fill Materials to <b>Surface Waters of the State</b> "  |
| 2     | Procedures    | 1      | Section 1./9  |   | Language should be revised in Line 9 as follows:<br><br>"These <b>wetlands waters</b> provide environmental and economic benefits to the people of this state, including flood..."   |
| 3     | Procedures    | 1      | <ul style="list-style-type: none"> <li>• Section I./ 26-27</li> <li>• Section II./ 34-36</li> </ul> | Not all wetlands are WOS  | The proposed Procedures (Lines 26-27) state:<br>"The wetland definition is not intended to be jurisdictional – not all features that qualify as wetlands are waters of the state."   |

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|       |               |        |                 |       | <p>There are inherent problems with including a definition of “wetlands” within the Procedures that is not limited to features that are also waters of the state (WOS) and therefore jurisdictional. These problems include:</p> <p>1) <b>The Procedures will not provide regulatory certainty.</b> The presentation materials for the stakeholder outreach conducted in spring 2016 included a slide that listed four desired outcomes for the proposed wetland “policy”. One of these outcomes was “increased regulatory certainty”. Notably, this desired outcome was deleted from the July 2016 workshop presentation materials used for the proposed Amendments. A key purpose of state water quality implementation plans is to provide clarity and certainty for how water quality policies are implemented. For example, the SWRCB’s Ocean Plan lists the water quality criteria that are applicable to ocean waters and specifies a detailed procedure that is to be used to convert the water quality criteria into numeric effluent limits in for NPDES permits under different circumstances. This provides regulatory certainty for dischargers to the ocean. However, the proposed Procedures have many instances of uncertainty, foremost of which is whether a feature that has been delineated as a wetland under the new wetland definition is actually jurisdictional under the Water Code. This lack of certainty needs to be addressed to provide clarity and certainty.</p> <p>2) <b>The Procedures will not streamline the application process.</b> One of the Procedure’s identified desired outcomes is that it will facilitate the permitting process. Having a specific definition for wetlands would presumably achieve this outcome, except for the fact that the proposed definition does not allow a party, after conducting a wetland delineation, in at least some cases to determine whether their proposed activities will be in a</p> |

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|       |               |        |                 |       | <p>jurisdictional area and therefore regulated by the Water Boards. This uncertainty will likely require dischargers to frequently request clarification from the RWQCBs. Such interactions between permittees and staff not only take time but also impact RWQCB staff workload and schedules. Currently, many permit requests (e.g., water quality certifications) are not concluded in a timely manner. This additional workload will likely result in further permitting delays and does not appear to support the desired outcome of streamlining the permitting process and improving response times. Therefore, inclusion of a definition that does not provide certainty on whether a wetland feature is jurisdictional is counterproductive to the outcomes the Procedures are intended to achieve.</p> <p>3) <b>The Procedures will not promote regulatory consistency across RWQCBs.</b> As the Procedures are currently drafted, staff at the RWQCBs would make the determination of whether a specific feature that meets the proposed wetland definition is also a WOS. Since the Procedures are silent on what criteria would be used by Water Board staff to make these determinations, each decision will presumably be made on a case-by-case basis using criteria unique to each Water Board and/or each person at a Water Board. This approach will not lead to consistency between Water Boards or even within Water Boards. Further, since the criteria may be fluid, it may also result in prolonging the process of deciding whether or not a wetland feature is jurisdictional. The Procedure needs to specify the criteria and process that will be used to determine whether a wetland feature is also jurisdictional and therefore regulated under the Water Code. This will also afford all stakeholders the opportunity to review and comment on the proposed criteria and process.</p> <p>4) <b>The Procedures will result in confusion in the use of the term</b></p> |

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| 4     | Procedures    | 1      | Section II./ 37-44 | Water Boards will have to determine whether some features are WOS on a case-by-case basis | <p><b>“wetlands” outside of the Water Board programs.</b> Other regulatory programs also use the term “wetlands”. In some cases, a reference to wetlands in other programs may extend to features identified by the SWRCB’s definition of wetland even those features are not jurisdictional. This will cause confusion over whether the wetland feature, as defined by the Procedures, would have a regulatory affect under other regulatory programs even though the subject wetlands may not be jurisdictional under the Water Code. It would be an unfortunate result to have a “wetland” feature regulated by another agency based on the feature being identified as a wetland by these Procedures, even though the subject wetland is not even regulated under the Water Code.</p>  |
| 5     | Procedures    | 2      | Section II./ 46-49 | Definition of “Wetland”   | <p>This seems to be a fairly inefficient approach to the WDR process and will also likely interject staff discretion into the determination of whether a particular wetland is regulated as a WOS. This is counter to the Procedure’s goal to achieve consistency in the program. It would be better to provide clarification within the Procedures as to what features that are considered wetlands are not also WOS. Alternatively, the factors or criteria and the process that staff will use to determine whether a wetland feature is also a WOS need to be identified in the Procedures.</p> <p>The proposed definition of a wetland is not consistent with the definition used by the Corps in that the proposed definition also includes features that lack vegetation. The draft Procedures should be clear as to what additional features the proposed definition is trying to capture. Further, since SWRCB’s Resolution No. 2008-0026 (“Development of a Policy to Protect Wetlands and Riparian Areas in Order to Restore and Maintain the Water Quality and Beneficial Uses of the Waters of the State”) was adopted to address the “gap”</p> |

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|       |               |        |                     |                                 | <p>of protection between federal and state programs that was created by the SWANCC and Rapanos Supreme Court decisions, the Procedures should clarify whether the proposed definition goes beyond protecting just those features no longer protected by the CWA due to the SWANCC and Rapanos decisions.</p> <p>The second objective of Executive Order W-59-53 (and second goal of the California Wetlands Conservation Policy) is:</p> <p>“To reduce the procedural complexity in the administration of State and Federal wetlands conservation programs.”</p> <p>Adopting a state definition of wetlands that is inconsistent with the federal definition would increase, not decrease, the procedural complexity of the State Board’s wetlands program. This would increase both the field work to complete jurisdictional delineations and the reports that are prepared from such delineations. It could also increase the complexity of any mitigation that is required as a result of the project.</p> <p>For these reasons, at a minimum, we recommend that the draft Procedures be revised to change the wetlands definition to be consistent with the federal definition of wetlands.</p> |
| 6     | Procedures    | 2      | Section III./ 63-64 | Terms defined in the Procedures | <p>The Procedures state that the terms defined in the Procedures shall be used in the event there is a conflict with the terms in the 1987 Corps Manual and Supplements. It would be helpful for staff to identify which terms for which this is an issue and list them in the draft Procedures to ensure there is no confusion as to which terms the draft Procedures are referring. We recommend the following revisions:</p> <p>“The methods shall be modified only to allow for the fact that</p>  |

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| 7     | Procedures    | 2      | Section IV./ 77-78   | The purpose of this section is to establish application procedures for discharges of dredged or fill material to <u>waters of the state</u> , which includes both waters of the U.S. and non-federal waters of the state. | <p>the lack of vegetation does not preclude the determination of such an area that meets the definition of wetland. <u>The F terms (list terms...)</u> as defined in these Procedures shall be used <del>#</del> <u>there is conflict with in lieu of the</u> terms in the 1987 Manual and Supplements.”</p> <p>Since many discharges to land are regulated as potential discharges to groundwater, this document needs to clarify that these Procedures apply only to discharges to <u>surface</u> waters of the state not groundwaters; or if they also apply to groundwaters under some circumstances, those circumstances should be identified. The following sentence should be revised to state:</p> <p>“The purpose of this section is to establish application procedures for discharges of dredged or fill material to <u>surface</u> waters of the state, which includes both waters of the U.S. in <u>California</u> and non-federal waters of the state.</p> <p><b>This comment also applies to the balance of the draft Procedures and accompanying documents.</b></p> |
| 8     |               | 3      | Section IV./89-90    |   | <p>Pre-application consultation to determine the need to obtain a certification or for regulatory guidance would be very helpful and could improve overall permitting timeframes and avoidance strategies. Clearer guidance should be provided to the Regional Boards.</p> <p><b>Suggested revision:</b></p> <p>“The applicant may consult with the Water Boards, prior to submitting a permit application, to determine whether a project could result in impacts to waters of the state.”</p>   |
| 9     | Procedures    | 3      | Section IV.A./ 93-97 | Within 30 days of receiving the items listed in subsection 1, the   | <p>It is helpful to have language that specifies the process and associated timeframes. It appears that once the applicant submits</p>  |

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|       |               |        |                 | <p>permitting authority may require the applicant to submit one or more of the items in subsection 2 for a complete application. Within 30 days of receiving all of the required items the permitting authority shall determine whether the application is complete and notify the applicant accordingly.</p> | <p>their application with the items required in Section A.1. that the permitting authority has 30 days to request the applicant to submit one or more of the items listed in Section A.2. Then, within 30 days from receiving the information from Section A.2., the permitting authority will determine whether the permit is complete. Section A does not specify the process or timelines that are applicable if the permitting authority finds:</p> <ul style="list-style-type: none"> <li>• No additional information contained in Section A.2. is required; or</li> <li>• The application is not complete after receiving the requested information from in Section A.2.</li> </ul> <p>These actions are subject to the Permit Streamlining Act, so staff is required to confirm whether the application is complete within 30 days of receiving the application. However, the proposed process of achieving a complete application is not fully described. It leaves the following questions:</p> <ul style="list-style-type: none"> <li>• If no additional information contained in Section A.2. is required, is the permitting authority required to notify the applicant within that first 30 days that the application is complete? Or, if there was information from Section A.1. is found to be inadequate in some way, what are the timelines for applicant notification of such and subsequent permitting authority action?</li> <li>• If the application is not deemed complete after receiving the requested information from in Section A.2., what are the timelines for applicant notification of such and subsequent permitting authority action?</li> </ul> <p>We recommend the following revisions:<br/>                     “Applicants must submit the items listed in subsection 1 to the permitting authority. In addition, applicants shall consult with</p> |



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| 10    | Procedures    | 3      | Section IV. and Section IV.A.1.a./Footnotes 4 and 5 | These footnotes incorporate by reference sections of the California Code of Regulations that are not specifically applicable to WDRs | <p>the permitting authority about the items listed in subsection 2. Within 30 days of receiving the items listed in subsection 1 and <u>any items in subsection 2 identified in the consultation with the permitting authority, the permitting authority may require the applicant to submit one or more of the items in subsection 2 for a complete application. Within 30 days of receiving all of the required items</u> the permitting authority shall determine whether the application is complete and notify the applicant accordingly. <u>If additional information is required to make the application complete, once the requested information is submitted, the permitting authority shall notify the applicant within 30 days that the application is complete. If the applicant's federal license or permit...</u></p> <p>Section IV.A.1.a. states:<br/>                     "All items listed in California Code of Regulations, title 23, section 3856 "Contents of a Complete Application."<sup>5</sup></p> <p>and</p> <p>Footnote 4 states:<br/>                     "Note that California Code of Regulations, title 23, section 3855 applies only to individual water quality certifications, but these Procedures extend the application of section 3856 to individual waste discharge requirements for discharges of dredged and fill material to waters of the state."</p> <p>And</p> <p>Footnote 5 states:<br/>                     "Note that California Code of Regulations, title 23, section 3856 applies only to individual water quality certifications, but these Procedures extend the application of section 3856 to individual</p> |

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| 11    | Procedures    | 3-4    | Section IV.A.1.d./110-119 | <p>This subsection describes the information regarding the boundaries of the project, the structures to be erected, and all waters of the state located within the project boundaries and aquatic resources found outside the project boundaries that may be affected by the project. Further, the Permitting Authority may request the maps to be submitted in shape files.</p> <p>Maps to accurately show...<br/>                     “...(2) all aquatic resources that may qualify as waters of the state, within the boundaries of</p> | <p>waste discharge requirements for discharges of dredged and fill material to waters of the state.”</p> <p>It appears that these Amendments would presume to change the applicability of a codified regulation. This raises the following questions that staff need to address:</p> <ul style="list-style-type: none"> <li>• Does a state water plan have the power to amend the applicability of a state regulation?</li> <li>• Does the SWRCB propose to revise this CCR section concurrently with the adoption of these Amendments in order to provide clarity to the regulations?</li> </ul> <ul style="list-style-type: none"> <li>• The Homeland Security Act and other federal and state laws and regulations limit the information about critical infrastructure (e.g. gas &amp; electric facilities) that can be made publically available in order to protect this critical infrastructure. The Draft Procedures need to acknowledge this restriction and we recommend inclusion of the following condition:<br/> <u>if the reporting requirements in this Order conflict with the requirements of the Homeland Security Act and/or any other federal or state law or requirement that pertains to security in the United States, the Homeland Security Act and/or any other federal or state law or requirement that pertains to security in the United States shall take precedence.”</u> </li> </ul> <p>Further, for the above reasons, information may not be able to be provided in “shape-files.”</p> <ul style="list-style-type: none"> <li>• For linear projects that may have only one or several</li> </ul> |

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| 12    |               | 3      | Section IV.A.1.b./105-107 | the project, and all aquatic resources that may qualify as waters of the state outside of the boundary of the project that could be affected by the project.” | <p>locations that may be co-located within a water of the state, this requirement to provide aquatic resource information for the entire project area is unnecessary and overly burdensome. We recommend that the requirements for linear projects be limited to those waters of the state that are directly impacted by the project and the insertion of the sentence below on line 116, as follows:</p> <p><u>“...project that could be affected by the project. Linear projects only need to show those water features in which it will have dredge and/or fill impacts. A map submitted...”</u></p>   |
| 13    | Procedures    | 4      | Section IV.A.1.e./122-123 | Requires the impact to be rounded to the nearest 0.1 acre.  | <p>Smaller projects often qualify as “Non-notifying under the USACE Nationwide Permit program and no report is submitted to the Corps.</p> <p><b>Suggested revision:</b></p> <p>“If wetlands that are waters of the state are present, a delineation of those wetlands as described in section III. In addition, if waters of the U.S. are present, any preliminary or final wetland delineation report.”</p> <p>The amount of impacts that result from a project are used for a number of purposes, including calculation of fees and identifying the quantity of the required mitigation. Rounding the area of impact to the nearest 0.1 acre (i.e., 4,356 sq-ft) is not a significant issue on impact locations with larger areas of impact. However, for projects that result in only small impacts (e.g., 100 sq-ft.), it would be unreasonable to round this to the next 0.1 acre and as a result be required to mitigate for 4,356 sq-ft. of impacts (i.e., assuming at a minimum a 1x1 mitigation ratio is required). An approach that would be more reasonable and that would address this issue would</p> |

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|       |               |        |                         |   | <p>be to round to the nearest one-thousandth (0.001) of an acre for an impact location that is less than or equal to one acre and to the nearest one-hundredth (0.01) of an acre at an impact location that is over one acre.</p> <p>We recommend the following revisions:<br/>                     “A description of the waters proposed to receive a discharge of dredged or fill material, including the beneficial uses as listed in the applicable water quality control plan. The description should also include: a description of discharge at each individual impact location, quantity of impact at each impact location <del>is</del> rounded to the nearest <u>one-hundredth (0.01) tenth</u> of an acre <u>at an impact location with more than one acre of impacts and to the nearest one-thousandth (0.001) of an acre at an impact location with less than or equal to one acre of impacts</u>, linear foot, and cubic yard (as applicable), assessment of potential direct and indirect impacts to listed beneficial uses and potential mitigation measures for those potential impacts to beneficial uses, identification of existing water quality impairment(s); the source of water quality impairment(s), if known; and the presence of threatened or endangered aquatic species resource habitat.”</p> |
| 14    | Procedures    | 4      | Section IV.A.2./<br>128 | Additional Information Required for a Complete Application<br><br>Section title | <p>This section would be more appropriately titled “Additional Information <u>Potentially</u> Required for a Complete Application” since it includes information that may be required <del>by staff</del> for some, but not all, projects.</p> <p>This section contains a list of seven additional categories of information that may be required by the permitting authority. In many cases, the criteria for when one or more of these categories of information are required is not identified. In fact, many of them begin with the prepositional phrase “if required by the permitting</p>   |
|       |               |        | Section IV.A.2./        | Additional Information that   |   |

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|       |               |        | 129 - 203                     | may be Required       | <p>authority on a case-by-case basis", indicating that staff will make a determination, but it is not clear what factors or criteria will be used for making the determinations.</p> <p>It would be more helpful and would facilitate the application and approval process and ensure more consistency in these decisions within and between RWQCBs if the factors, criteria and process (e.g., proposed size of impacts/site, type of WOS impacted, temporary vs. permanent impacts, location of impact within the watershed) to be used for determining the need for the information were identified up front in the Amendments. This would allow an applicant to plan ahead for the information that would be needed on future projects.</p> <p>Also, not including the factors, criteria and process for requiring additional information deprives the stakeholders from being able to comment on an important part of the Amendments that have both cost and timing significance to applicants.</p> <p>We request that the Procedures be revised to include the factors, criteria and process that staff will use for determining if additional information is required and then provide an opportunity for stakeholders to review and comment on these revisions.</p> |
| 15    | Procedures    | 4      | Section IV.A.2.a./<br>129-131 | Wet season field data | <p>This section would allow staff to request supplemental wet season delineation data if only dry season data had been collected and submitted in the application. This could result in long delays to projects, potentially years under the current drought conditions.</p> <p>For utility projects that need to be conducted promptly to ensure the on-going integrity of gas and electric systems, this requirement could delay projects six months or more. This could especially impact maintenance and repair projects that are best conducted</p>  |

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| 16    | Procedures    | 4      | Section IV.A.2.b./<br>132-134 | Additional Information Required – Climate Change Assessment | <p>during the dry season and consequently result in delaying the performance of the work until the wet season which could be more impactful to the environment. In accordance with the previous comment on Section IV.A.2., we recommend that one of the criteria that is included in the factors, criteria and process for this information requirement be the following sentences:</p> <p>“If the wetland area delineations were conducted in the dry season, <u>and results of the delineation are inconclusive</u>, supplemental field data from the wet season to substantiate dry season delineations.”</p> <p><u>“This requirement is not applicable to work that needs to be conducted to maintain the integrity of facilities that provide essential public services.”</u></p> |
| 17    | Procedures    | 4      | Section IV.A.2.c./<br>135-136 | Alternatives analysis                                       | <p>The draft states:</p> <p>“If required by the permitting authority on a case-by-case basis, an assessment of the potential impacts associated with climate change related to the proposed projects and any proposed compensation, and any measures to avoid or minimize those potential impacts.”</p> <p>In accordance with our previous comment on Section IV.A.2., we recommend that the criteria, factors and process for deciding when this information will be required should be provided in the Amendments.</p> <p>This section would allow staff to request, on a case-by-case basis, an alternatives analysis.</p> <p>In accordance with our previous comment on Section IV.A.2., we recommend that the criteria, factors and process for deciding when</p>                  |

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| 18    | Procedures    | 4      | Section IV.A.2.d./137-144 | Compensatory mitigation | <p>this information will be required should be provided in the Amendments.</p> <p>For instance, one criteria should be that it is only applies to projects that are required to get an individual Corps permit, not on projects that use a Nationwide Permit (or projects that only involve WOS that would have qualified for coverage under a Nationwide permit).</p> <p>Also, it would be helpful to clarify that the scope of the alternatives analysis should be commensurate with the potential level of impacts. For example, some utility projects (e.g., pole replacement) have very limited impacts and, when directed by staff to conduct an alternatives analysis, this should help determine the scope of what is required in the analysis.</p> <p>Staff may direct the applicant to conduct an assessment using a method approved by the permitting authority. In accordance with our previous comment on Section IV.A.2., we recommend that the criteria, factors and process for deciding when this information will be required should be provided in the Amendments. One of the criteria should be that the project is not required to conduct an assessment when the project is using an in-lieu fee program or a mitigation bank. Additionally, the Amendments need to acknowledge that the authorized service area of a mitigation bank or in-lieu fee program may cover multiple watersheds and, in such a case, mitigation from a mitigation bank or in-lieu fee program located outside of the impacted watershed may be used when the service area includes the impacted area. To address projects that use in-lieu fee programs or mitigation banks we recommend the following revision:</p> <p>“If compensatory mitigation is required by the permitting authority on a case-by-case basis, an assessment of the overall</p> |

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| 19    | Procedures    | 4      | Section IV.A.2.d.i. 145-155   | Additional Information Required – Watershed Profile | <p>condition of aquatic resources proposed to receive a discharge of dredged or fill material and their likely stressors, using an assessment method approved by the permitting authority and a draft compensatory mitigation plan developed using a watershed approach containing the items below.</p> <p>Compensatory mitigation plans are not required for Ecological Restoration and Enhancement Projects <u>or when an in-lieu fee program or mitigation bank is used</u>. <u>Further, mitigation banks and in-lieu fee programs located outside of the impacted watershed may be used when the impact is located within the mitigation bank's or in-lieu fee program's service area</u>. Draft compensatory mitigation plans shall comport with the State Supplemental Dredged or Fill Guidelines, Subpart J, and include the elements listed below.”</p> <p>The draft states:</p> <p>“The scope and detail of the watershed profile shall be commensurate with the magnitude of impact associated with the proposed project...”</p> <p>In accordance with our previous comment on Section IV.A.2., we recommend that the criteria, factors and process for deciding when this information will be required should be provided in the Amendments. For example, this should not be required for small projects with impacts below a specific impact area threshold, such as utility pole replacements, repair of existing facilities (e.g., pipelines, access roads, culvert replacements, etc.).</p> |
| 20    | Procedures    | 5      | Section IV.A.2.d.vi./ 168-170 | Compensatory mitigation-consultation requirements   | <p>This section mandates (i.e., shall consult) consultation with an open-ended list of parties. Any mandated consultation should only be with specific governmental agencies and be a requirement to request consultation. If an agency is non-responsive after a certain period of time for any reason, this should satisfy the consultation</p>  |



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| 21    | Procedures    | 5      | Section IV.A.2.f./184-194 | Restoration Plan for Temporary Impacts | <p>requirement. Further, consultation with other interested “local entities” could be encouraged but should not be mandated. We recommend the following revisions:</p> <p>‘If the compensatory mitigation involves restoration or establishment as the form of mitigation, applicants shall consult with <u>applicable</u> state and federal land management agencies, fire control districts, flood control districts, <u>and</u> local mosquito-vector control district(s).<del>and</del><u>The applicant is encouraged to consult with</u> any other interested local entities prior to initial site selection. Appropriate mosquito and vector control measures, including maintenance specifications, shall be developed in coordination with local mosquito-vector control district(s) or other responsible public agency(ies) during the initial compensatory mitigation project design stage. <u>If an attempt is made to consult, but the agency or party is non-responsive, this shall satisfy the consultation requirement.</u>”</p> <p>This section calls for a detailed restoration plan for all cases where temporary impacts are proposed “...including, at a minimum, the following: the objectives of the restoration plan; a work schedule; plans for grading of disturbed areas to pre-project contours; a planting palette with plant species native to the area; seed collection locations; an invasive species management plan; a description of performance standards used to evaluate the attainment of objectives; the timeframe for determining attainment of performance standards; and maintenance requirements...”</p> <p>For small O&amp;M projects with very small temporary impacts this is more information than is needed. Utilities often have projects, such as pole replacements and access road repairs, with temporary impacts (e.g., &lt;100 square feet) within previously disturbed habitat. It would be overly-burdensome to require this type of detailed</p> |

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|       |               |        |                 |       | <p>restoration plan for each of these projects. This section, like others, should include a set of criteria (e.g., a disturbance threshold) which if the criteria are met would not trigger the preparation of a detailed restoration plan.</p> <p>Finally, submittal of a final restoration plan prior to initiating work should not be required. It would be better to require finalization of the plan prior to completion of the work activity so that any changes in conditions in the field during the work activity can be incorporated into the plan and this would also help to facilitate initiation of the work.</p> <p>We recommend this language be revised as follows:<br/> <u>"In all cases where temporary impacts are proposed at a site that will exceed 100 square feet of impact to areas predominantly supporting hydrophytic vegetation, submittal of a draft restoration plan is required for restoring areas of temporary impact to pre-project conditions including, at a minimum, the following: the objectives of the restoration plan; a work schedule; plans for grading of disturbed areas to pre-project contours; a planting palette with plant species native to the area; seed collection locations; an invasive species management plan; a description of performance standards used to evaluate attainment of objectives ; the timeframe for determining attainment of performance standards; and maintenance requirements (e.g. watering, weeding, and replanting). The level of detail in the restoration plan shall be sufficient to accurately evaluate whether the restoration offsets the adverse impacts attributed to a project.</u></p> <p><u>When a restoration plan is required by this section, prior to completion of work under issuance of the Order, the applicant</u></p> |

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| 22    | Procedures    | 6      | New: Section IV.A.3.       | Emergency Restoration of Essential Public Services | <p>shall submit a final restoration plan that describes the restoration of all temporarily disturbed areas to pre-project conditions.”</p> <p>Many of CCEEB’s members provide essential public services, such as transmission and delivery of electricity, natural gas, telecommunications and water to residential, commercial, industrial, institutional and governmental customers throughout California. It is imperative that the amendments contain language that would provide for facilitated, if not “after-the-fact,” permitting for emergencies so that these essential services can be promptly restored. We recommend the addition of the following language:</p> <p><u>“3. In the case of an emergency that requires immediate action to prevent or mitigate loss of essential public services, the discharger shall submit a brief description of the emergency action within five days of commencement, and then shall submit, as feasible, the information identified in Section IV.A.1. and establish a schedule within thirty days for submitting any additional information to the Regional Board.”</u></p> |
| 23    | Procedures    | 6      | Section IV.B.1.b./ 211-212 | Project evaluation                                 | <p>This section identifies findings that staff must make in order to approve (i.e., “The permitting authority has the discretion to approve a project <u>only</u> if the applicant has demonstrated the following:”) an individual order. Subsection B.1.b. requires:</p> <p>“The potential impacts will not contribute to a net loss of the overall abundance, diversity, and condition of aquatic resources in a watershed;”</p> <p>First, this specific requirement should only potentially apply to new construction projects rather than to work associated with existing facilities, since impacts adjacent to existing facilities may be unavoidable. New projects may have the ability to be moved to avoid impacts.</p>  |

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| 24    | Procedures    | 6      | Section IV.B.1.c./<br>213-214 | Project evaluation-water quality standards | <p>Second, the Procedures need to clarify that mitigation banks and in-lieu fee programs located outside the impact watershed can be utilized in this demonstration when they are authorized by the Corps for use in the impacted watershed. We recommend the following revision to this section:</p> <p><u>“For new construction projects (i.e., not projects associated with existing facilities), the potential impacts will not contribute to a net loss of the overall abundance, diversity, and condition of aquatic resources in a watershed. When a mitigation bank or in-lieu fee program is used for mitigation (including mitigation banks and in-lieu fee programs that are located outside of the impact watershed but whose authorized service area covers the impacted site), this requirement is satisfied.”</u></p> <p>This section states:<br/>           “The discharge of dredged or fill material will not violate water quality standards and will be consistent with all applicable water quality control plans and policies for water quality control; and”</p> <p>This requirement appears to make two stand-alone requirements:<br/>           1) no violation of water quality standards; and 2) consistency with all water quality control plan and policies... It is unclear whether a mixing zone may be allowed for a discharge, in which the compliance with the water quality standards would be determined at the edge of a mixing zone instead of at the point of discharge. To eliminate any potential confusion, we recommend linking these two requirements together with the following revisions:</p> <p>“The discharge of dredged or fill material will not violate water quality standards <u>in accordance and will be consistent</u> with all</p> |

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| 25    | Procedures    | 6-7    | Section IV.B.3./<br>222-274   | Alternatives Analysis                        | <p>applicable water quality control plans and policies for water quality control; and"</p> <p>There should be an impacts threshold below which an alternatives analysis is not required (for small impacts, especially those associated with O&amp;M of existing infrastructure).</p> <p>We recommend that the language be revised to clearly state that small O&amp;M type projects, such as pole replacements, access road repairs, etc. do not require an alternatives analysis.</p> <p>Further, as discussed in our subsequent comments on Lines 254-259, These procedures need to be made consistent with the Corps procedures in regards to projects that do not require an alternatives analysis. We recommend the proposed Amendments be revised to provide this consistency with the Corps on this issue.</p> |
| 26    | Procedures    | 6      | Section IV.B.3.b./<br>229-230 | Alternatives analysis-"adequate opportunity" | <p>This section states that the permitting authority shall defer to the Corps and EPA determinations of adequacy of the alternatives analysis unless several conditions occur. Condition 1 is that:</p> <p>"...the permitting authority was not provided an adequate opportunity to consult during the development of the Corps' alternatives analysis,..."</p> <p>It is unclear what constitutes an "adequate opportunity". We recommend that the Amendments be revised to include the parameters that constitute an "adequate opportunity". The parameters should help ensure that the occurrence of the permitting authority not relying on the Corps and EPA determination of adequacy of the alternatives analysis is infrequent, and that will support timely CWA 401 application reviews.</p>                   |
| 27    | Procedures    | 6      | Section IV.B.3.b./<br>237-241 | Alternatives analysis-"entire project"       | <p>This section states that:</p> <p>"if an alternatives analysis is not required by the Corps for waters of the U.S. impacted by the discharge of dredged or fill</p>  |

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|       |               |        |                               |                                       | <p>material, the permitting authority may require an alternatives analysis for the <i>entire project</i> in accordance with the State Supplemental Dredged or Fill Guidelines, unless the project is exempt under subsection (d) below.” (<i>emphasis added</i>)</p> <p>It is unclear why the Amendments require an alternatives analysis for all projects for which the Corps does not conduct an alternatives analysis. Since this includes all nationwide permits other than those few nationwide permit that have already been certified by the permitting agency (see lines 250-253), it means that an alternatives analysis will be required by the state, but not by the Corps, on most projects that use a nationwide permit. The second objective in Executive Order W-59-93 (and the second goal in the California Wetlands Conservation Policy) is to reduce procedural complexity in the administration of State and Federal wetlands conservation programs. This provision appears to be inconsistent with the above objective and goal.</p> <p>See Section IV.B.3.d (exemptions) for recommended revisions to address this inconsistency.</p> |
| 28    | Procedures    | 7      | Section IV.B.3.d./<br>247-259 | Exemptions from alternatives analysis | <p>This section provides five exemptions for requiring the applicant to conduct an alternatives analysis.</p> <p>It is unclear why the Amendments require an alternatives analysis for all projects for which the Corps does not conduct an alternatives analysis, since this includes all nationwide permits. Sections d.i. and d.ii. limit exemptions from the alternatives analysis requirement to those projects that are pre-certified under a Corps permit (for a water of the US) or those project within a water of the state that would have qualified for a pre-certified nationwide permit. As a result, most projects using a nationwide permit, other than those few nationwide permits that have already been certified by the</p>  |

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|       |               |        |                 |       | <p>permitting agency (see lines 250-253), will be required to prepare an alternatives analysis by the state, but not the Corps. The second objective in Executive Order W-59-93 (and the second goal in the California Wetlands Conservation Policy) is to reduce procedural complexity in the administration of State and Federal wetlands conservation programs. This provision appears to be inconsistent with the above objective and goal.</p> <p>We recommend the following revision to these exemptions:</p> <p>‘i. The project includes discharges to waters of U.S. only, and the project meets the terms and conditions of one or more Corps’ General Permits that has been previously certified by the Water Boards <u>or a nationwide permit</u>. The permitting authority will verify that the project meets the terms and conditions of the Corps’ General Permit <u>or nationwide permit</u> based on information supplied by the applicant.</p> <p>ii. The project includes discharges to waters of the state outside of federal jurisdiction, and the project would meet the terms and conditions of one or more Corps’ General Permits that has been previously certified by the Water Boards <u>or a nationwide permit</u>, if all the discharges were to waters of the U.S. The permitting authority will verify that the project would meet the terms and conditions of the Corps’ General Permit(s) <u>or a nationwide permit</u> if all discharges were to waters of the U.S. based on information supplied by the applicant.”</p> <p>Further, a number of small impact projects that require permitting under Corps and SWRCB permitting programs are exempt from CEQA. We recommend that this be added as a sixth exemption, as follows:</p> |

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| 29    | Procedures    | 7      | Section IV.B.3.e./<br>268-269 | Sufficiency of an Alternatives Analysis | <p><u>"vi. The project is exempt from CEQA."</u></p> <p>This section states that the permitting authority will be responsible for determining the sufficiency of an alternatives analysis that is required under their discretion (see 3b, 3.c and 3.d above). The section lacks a description of the criteria that will be used to make this determination.</p> <p>We recommend that:</p> <ul style="list-style-type: none"> <li>• The Procedures identify the criteria that will be considered for this determination; and</li> <li>• This section reference to the five categories used in assessing alternatives (i.e., environmental consequences to waters of the US and waters of the state; project purpose; logistics; costs; and technology).</li> </ul>   |
| 30    | Procedures    | 7      | Section IV.B.4./<br>275-276   | Restoration Plan Approval Timing        | <p>This section states:</p> <p>"Prior to issuance of the Order, the permitting authority will review and approve the final restoration plan for temporary impacts."</p> <p>As written, this section appears to prevent the permitting authority from issuing an Order prior to approving the final restoration plan for temporary impacts. To prevent potentially significant delays in a project, we recommend that the applicant be required to provide a draft restoration plan prior to approval with a condition that the final restoration plan must be implemented once approved.</p> <p>We recommend the following revision:</p> <p><u>"At a minimum, p</u>Prior to issuance of the Order, <u>the permitting authority will review and approve the final restoration plan for temporary impacts. applicant shall submit a draft restoration plan for temporary impacts upon which the Order can be</u></p> |



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| 31    | Procedures    | 7-8    | Section IV.B.5.b./<br>281-284 | Agency Coordination of Mitigation Requirements | <p><u>issued. Upon finalization by the applicant and approval by the permitting agency, the applicant shall implement the approved restoration plan for temporary impacts.</u></p> <p>This section states:<br/>                     “Where feasible, the permitting authority will consult and coordinate with any other public agencies that have concurrent mitigation requirements in order to achieve multiple environmental benefits with a single mitigation project, thereby reducing the cost of compliance to the applicant.”</p> <p>We are generally in support of this proposal, but only to the extent that it does not result in increased costs or project delays.</p> <p>We recommend the following revision to this section:<br/>                     “Where feasible <u>and with the applicant’s concurrence</u>, the permitting authority will consult and coordinate with any other public agencies that have concurrent mitigation requirements in order to achieve multiple environmental benefits with a single mitigation project, thereby reducing the cost of compliance to the applicant.”</p> |
| 32    | Procedures    | 8      | Section IV.B.5.c.<br>285-287  | Losses   | <p>It is important for the Procedures to clarify that the requirement for mitigation is triggered when permanent “losses” occur.</p> <p>This section states:<br/>                     “Amount: The amount of compensatory mitigation will be determined on a project-by-project basis in accordance with State Supplemental Dredged or Fill Guidelines, section 230.93(f). The permitting authority may take into account recent anthropogenic degradation to the aquatic resource and the potential and existing functions and conditions of the aquatic resource. A minimum of one-to-one acreage or length</p>  |

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| 33    | Procedures    | 8-9    | Section IV.B.5.c.-<br>IV.B.7./ 312-318 | Mitigation Requirements- Amount, type and location, final compensatory mitigation plan, financial security, term of mitigation obligation, public noticing, final monitoring, and reporting requirements | <p>of stream reach replacement is necessary to compensate for wetland or stream losses unless an appropriate function or condition assessment method clearly demonstrates, on an exceptional basis, that a lesser amount is sufficient.”</p> <p>To help provide clarity, we recommend that the following sentence be inserted into this paragraph following the last sentence in the above quote:<br/> <u>“Losses” are for those waters that are permanently adversely affected.”</u></p> <p>These sections do not directly address the use of a mitigation bank or in-lieu fee programs, nor do they address the use of a mitigation bank or in-lieu fee program located outside of the impact watershed that is authorized to provide mitigation credits to the impact watershed. These sections need to be revised to address mitigation banks and in-lieu fee programs.</p> <p>Section IV.B.5.d. states that under certain conditions a project that impacts to watersheds may locate all of their mitigation in one of the watersheds, rather than all watersheds. It should be clarified that one of the factors should be the availability of mitigation opportunities in the watersheds (e.g., mitigation banks, in-lieu fee programs). We recommend revising the language in lines 317-318, as follows:<br/> <u>“...location and spacing, aquatic resource values, relevant watershed plans and other considerations (e.g., availability of mitigation opportunities, such as mitigation banks and in-lieu fee programs). Additionally, mitigation banks and in-lieu fee programs with approved service areas that cover multiple watersheds can be used to compensate for out-of-watershed impacts, as long as the impacts occur within the mitigation bank’s or in-lieu fee program’s service area.”</u></p> |

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| 34    | Procedures    | 9      | Section IV.B.5.e./<br>328-331 | Mitigation Plan approval | <p>This section states:<br/>                     “The permitting authority may include as a condition of an Order that the applicant receive approval of a final mitigation plan prior to discharging dredged or fill materials to waters of the state. In this case, the permitting authority will approve the final mitigation plan by amending the Order.”</p> <p>Based on this section it appears that an Order can be adopted prior to the finalization of the mitigation plan, however discharge of dredge or fill materials to waters of the state cannot start before the mitigation plan is approved through amending the Order. This process could significantly impact the schedule of a project.</p> <p>It would be preferable to not have the start of a dredge or fill activity dependent on the approval of the mitigation plan, but rather just the adoption of the Order. In this approach, the applicant would be required to submit a proposed mitigation plan prior to adoption of the Order but would be authorized to proceed with their activities once the Order is adopted.</p> <p>The Order could also provide authority to the Executive Officer to approve the final mitigation plan so that a project is not required to wait for a Board meeting to be scheduled, noticed and held in order to obtain approval of the mitigation plan (with the understanding that to the extent the applicant wants to have the board consider the mitigation plan, the applicant can request a hearing for this purpose). Once approved, the mitigation plan becomes effective and shall be implemented in accordance with its schedule.</p> <p>We recommend this language be revised as follows:<br/>                     “A proposed mitigation plan is required to be submitted prior to the adoption of the Order. Once the Order is adopted, the</p> |

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| 35    | Appendix A    | 15     | 509-511                            | Cases of Conflict | <p>applicant's activities may proceed. The Order may delegate the authority to approve the mitigation plan to the Executive Officer. Once the mitigation plan is approved, it shall be implemented in accordance with its schedule. <del>The permitting authority may include as a condition of an Order that the applicant receive approval of a final mitigation plan prior to discharging dredged or fill materials to waters of the state. In this case, the permitting authority will approve the final mitigation plan by amending the Order.</del>"</p> <p>This section states:<br/>                     "The State Supplemental Dredged or Fill Guidelines describe how the Water Boards will implement the 404(b)(1) Guidelines, 40 CFR under these Procedures. In cases of conflict, Parts I through V take precedence over these State Supplemental Dredged or Fill Guidelines.</p> <p>To make this document more useful, it would be helpful to have the two parts of the Amendments (Parts I – V and the State Supplemental Dredged or Fill Guidelines) revised so that they are consistent or, at the very least, include a table that identifies where the inconsistencies exist. This would eliminate the need to compare Parts whenever reviewing the document.</p> <p>The 404.b.1. guidelines contain the definition of "mixing zones".</p> <p>Further, the document provided by the SWRCB that compares the Corps 404.b.1. guidelines to the SWRCB's revised guidelines shows the definition of "mixing zones" is retained. However, the definition of mixing zones is not included in Appendix A. Mixing zones are an important part of water quality regulation and this definition should be inserted into Appendix A between Lines 525 and 526, as follows:</p> <p><del>"(m) The term mixing zone means a limited volume of water serving as a zone of initial dilution in the immediate vicinity of a discharge</del></p> |
| 36    | Appendix A    | 15     | Subpart A.<br>§230.3.m.<br>525-526 | Mixing Zones      |   |

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| 37    | Appendix A    | 16     | Subpart A.<br>§230.6.a.<br>543-546 | Minor and routine activities | <p><u>point where receiving water quality may not meet quality standards or other requirements otherwise applicable to the receiving water. The mixing zone should be considered as a place where wastes and water mix and not as a place where effluents are treated.</u></p> <p>This section states:<br/>                     “...These Guidelines allow evaluation and documentation for a variety of activities, ranging from those with large, complex impacts on the aquatic environment to those for which the impact is likely to be innocuous. It is unlikely that the Guidelines will apply in their entirety to any one activity, no matter how complex. It is anticipated that substantial numbers of permit applications will be for minor, routine activities that have little, if any, potential for significant degradation of the aquatic environment. It generally is not intended or expected that extensive testing, evaluation or analysis will be needed to make findings of compliance in such routine cases...”</p> <p>We concur with these statements about minor routine activities. However, these statements first occur in this Appendix and it would be helpful and provide better guidance to permittees and applicants if these concepts were better reflected in the main body (i.e., the “Procedures”) of the Amendments.</p> <p>We request that these concepts be incorporated into the appropriate sections of the Procedures.</p> |
| 38    | Appendix A    | 18     | Subpart E.<br>§230.41.<br>620-622  | Wetlands Definition          | <p>This section contains a definition of “Wetlands” that is not the same as the one on page 2 of the Procedures (Lines 46-49). Having two separate definitions could lead to confusion.</p> <p>We recommend that the Appendix clarify how and when this definition of wetlands is to be used.</p>  |

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| 39    | Appendix A    | 22     | Subpart J.<br>§230.91.a.1.<br>763-766 | Wetlands Definition     | <p>This section states:</p> <p>“§ 230.91 Purpose and general considerations.<br/>(a) Purpose.<br/>(1) The purpose of this subpart is to establish standards and criteria for the use of all types of compensatory mitigation, including on-site and off-site permittee-responsible mitigation, mitigation banks, and in-lieu fee mitigation to offset unavoidable impacts to waters of the state authorized through the issuance of permits.”</p> <p>We appreciate that “mitigation banks” and “in-lieu fee programs” are identified here, as these are very important options for satisfying mitigation requirements. Because of their importance it would be helpful to acknowledge these options in the updated Procedures. Pipeline and electric utility companies generally do not own the land their pipelines traverse and, as such, rely heavily on such mitigation banks and in-lieu fee programs to mitigate unavoidable wetland and streambed losses.</p> <p>We believe that it is vital that any updated Procedures include the maximum flexibility possible to utilize these options.</p> <p>We recommend that “mitigation banks” and “in-lieu fee programs” be incorporated into the appropriate sections of the Procedures.</p> |
| 40    | Appendix A    | 23     | Subpart J. §230.92.<br>809-810        | In-Kind Definition      | <p>The definition of in-kind was omitted from Appendix A although it was not deleted in the “Compare” document.</p>  |
| 41    | Appendix A    | 26     | Subpart J.<br>§230.93.b.2. &          | Compensatory Mitigation | <p>We recommend that this definition be retained in Appendix A.<br/>Some regions have Corps-approved mitigation banks and/or in-lieu fee programs with a service area that covers multiple watersheds.</p>   |

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|       |               |        | b.3./<br>922-959                      |   | <p>These two sections (b.2. and b.3.) should include language that confirms their use is approved for compensating for out-of-watershed impacts, as long as the impacts occur within the bank's or in-lieu fee program's service area.</p> <p>We recommend adding the following language to these two sections:</p> <p><u>"Mitigation banks and in-lieu fee programs, with approved service areas that cover multiple watersheds, can be used to compensate for out-of-watershed impacts, as long as the impacts occur within the mitigation bank's or in-lieu fee program's service area."</u></p>                              |
| 42    | Appendix A    | 26     | Subpart J.<br>§230.93.b.1.<br>910     | Order of preference for compensatory mitigation | <p>Section 230.93.b.1. in the Corps guidelines includes an opening sentence that establishes the order of preference for use of mitigation methods, as follows:</p> <p>"When considering options for successfully providing the required compensatory mitigation, the district engineer shall consider the type and location options in the order presented in paragraphs b.2. through b.6. of this section."</p> <p>This section removes the preference provided in the Corps guidelines for mitigation banks as the first preferred option.</p> <p>We recommend that this sentence (and the Corps preference) be retained.</p> |
| 43    | Appendix A    | 31     | Subpart J.<br>§230.93.g.<br>1121-1125 | After-the fact permits - mitigation             | <p>The Corps guidelines specify that mitigation banks and in-lieu fee programs may be used to mitigate for individual permits, general permits and after-the-fact permits. However, the proposed language in Appendix A omits "after-the-fact" permits.</p>  |

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| 44    | Appendix A    | 36     | Subpart J.<br>§230.94.c.1.<br>1274-1275 | Final Mitigation Plan Approval | <p>It is not clear why this option is not available for after-the-fact permits and we recommend that it be added back in to this section.</p> <p>This section would require preparation and approval of the final mitigation plan prior to commencing work in waters of the state.</p> <p>This section provides a different description of how the final mitigation plan is approved than provided in Section IV.B.5.e. (Lines 328-331). Please see our comments on Section IV.B.5.e.</p> |