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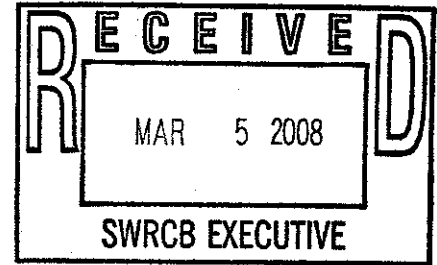
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March 5, 2008

Our File Number: 06CX-128812

VIA ELECTRONIC MAIL

Ms. Jeanine Townsend
Clerk to The Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
E-Mail: commentletters@waterboards.ca.gov



Re: Proposed Board Resolution to Develop a Policy to Protect Wetlands and Riparian Areas

Dear Ms. Townsend:

Attached please find the comments on the Proposed Board Resolution to Develop A Policy to Protect Wetlands and Riparian Areas submitted on behalf of the California Building Industry Association. Please contact me if you have any questions regarding these comments.

Very truly yours,

Ella Foley-Gannon

for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

W02-WEST:FEF400734673.1

Enclosures

cc: Timothy Coyle, CBIA
Nick Cammarota, CBIA

**CALIFORNIA BUILDING INDUSTRY ASSOCIATION'S COMMENTS ON
SWRCB S' RESOLUTION TO DEVELOP A POLICY TO PROTECT WETLANDS AND
RIPARIAN AREAS**

**PREPARED BY: ELLA FOLEY-GANNON & ROBERT J. URAM
SHEPPARD, MULLIN, RICHTER & HAMPTON**

MARCH 5, 2008

The California Building Industry Association (the "CBIA") appreciates the opportunity to comment on the State Water Resources Control Board's (the "State Board's") Proposed Resolution to Develop a Policy to Protect Wetlands and Riparian Areas (the "Proposed Resolution"). The CBIA is a statewide trade association representing more than 6,000 businesses, homebuilders, remodelers, subcontractors, designers and other industry professionals. As active members of our communities and significant contributors to California's economy, our members are committed to improving water quality and working with the State Board to implement programs that are legally, logistically and scientifically sound and practicable.

As was described in our comments on the State Board's Proposed Wetland and Riparian Area Protection Policy Scoping Document (the "Scoping Document"), submitted to the State Board on April 17, 2007, we fully support the State Board's stated goals of: (1) clarifying the extent of the State and Regional Boards' authority under the California Water Code for regulating wetlands and other aquatic areas; (2) providing statewide consistency in the definition of wetlands; and (3) providing statewide consistency in the definition of beneficial uses and the requirements for evaluating and regulating wetlands. However, we raised serious concerns regarding the State Board's proposed wetland and riparian policy (the "Policy"), both in terms of the process for considering the issues and the substance of the four alternatives described in the Scoping Document. A copy of our earlier comments is attached for your reference.

We were very disappointed to see that the Proposed Resolution suffers from the same flaws identified in our earlier comment letter and that the State Board has not responded to or addressed any of our comments. We ask that the State Board forego further action on the Proposed Resolution until State Board staff (the "Staff") have the opportunity to consider and respond to the many substantive comments received in response to the Scoping Document.

As is documented in our earlier comment letter and detailed below, we oppose the Proposed Resolution because each of the three phases identified therein seeks either to impose new regulatory requirements or to expand the scope of the State Board's jurisdiction. Given the current budgetary crisis in California, coupled with the economic downturn, we ask that the State Board exercise great caution before embarking on a regulatory program that will have tremendous fiscal impacts to both the state and the regulated communities.

After providing comments on the substantive provisions of the Proposed Resolution, this comment letter provides our recommendations to the State Board regarding how to proceed with the wetland and riparian Policy.

I. Comments on the Proposed Resolution

A. Phase 1 Includes Elements that May Fall Outside the State Board's Jurisdiction, and Additional Clarification Is Needed to Allow For Meaningful Public Input

The Proposed Resolution requires State Board Staff to develop a policy to protect wetlands from dredge and fill activities, as the first phase of developing a wetland and riparian Policy. The State Board should not proceed with this phase, as it involves activities which fall outside the scope of State Board jurisdiction, has not been defined clearly enough to allow for meaningful public comment, and would involve duplicative and unnecessary regulations.

1. Defining Wetlands

The Proposed Resolution instructs the Staff to develop a definition of "wetlands" that is broader than the federal definition to the extent that is necessary to reliably define the "diverse array of California wetlands." Because the Proposed Resolution instructs the Staff to consider alternatives outside "those outlined in the 2004 Workplan," it appears clear that the State Board anticipates the development of a broader definition than the one provided by the U.S. Army Corps of Engineers (the "Corps") and endorsed in the Workplan. However, the Proposed Resolution does not consider, or require the Staff to consider, the outer limit to which State Board jurisdiction may legally be extended. Under the California Water Code, the State Board's jurisdiction is limited to "waters of the state," which is defined as "any surface water or groundwater, including saline waters, within the boundaries of the state." Cal. Water Code § 13050(e). Therefore, in order to regulate "wetlands," the State Board must affirmatively describe how a terrestrial area can be classified as an area of "surface water or groundwater." We believe that a definition broader than that provided under federal law would exceed the scope of the State Board's jurisdiction, because it would include areas that do not have water present with sufficient frequency or duration to be reasonably classified as surface water or groundwater.

2. Developing a Regulatory Mechanism Based on the 404(b)(1) Program With a Watershed Focus

The Proposed Resolution instructs Staff to develop a regulatory "framework for protecting water quality and beneficial uses that relies on sequential avoidance, minimization, and mitigation of impacts." The Notice accompanying the Proposed Resolution states that this mechanism should be based on the Clean Water Act ("CWA") section 404(b)(1) program but should have a "watershed focus."

The State Board should consider that the sequencing approach, when utilized for individual project areas, can have many unintended consequences, such as the creation of small, disjointed avoidance areas which provide limited functions and values. By making avoidance of aquatic resources the ultimate consideration, it also can preclude adequate consideration of issues of significant concern in California, such as global warming impacts, promotion of large scale planning efforts such as the Sacramento Blue Print, or the use of low-impact development designs. Further, the information and processing requirements of the 404(b)(1) analysis can be very complex and time consuming, as is thoroughly described in a comment letter from David J. Castanon, Chief of the Regulatory Division for the Corps' Los Angeles District dated April 19,

2007. We urge the State Board to fully evaluate the risks and benefits of incorporating a similar approach into state permitting.

If the State Board intends to undertake a 404(b)(1) analysis on a watershed basis, it needs to recognize that this would require State Board or Regional Board staff to thoroughly evaluate the functions and values of resources, prioritize resources to be protected, and identify resources that may be impacted in each watershed. This would ultimately lead to Regional Board staff intruding into land use planning decisions, a task that they are not likely to have the resources, time or expertise to conduct adequately.

It is unclear how the State Board envisions implementing the described regulatory program. Without additional information, the public cannot comment meaningfully on this proposal.

3. Gathering Additional Data

We support the Proposed Resolution provisions requiring Staff to develop methods for tracking and evaluating wetlands. We believe that such information is in fact a necessary predicate to taking any additional regulatory action, because it is essential to evaluating the need for such regulations.

4. Duplicative Regulatory Processes

In instructing Staff to develop a policy to protect wetlands from dredge and fill activities, the State Board has failed to recognize that wetlands are already protected from dredge and fill activities under both federal and state law. Wetlands that meet the federal definition are regulated by both the Corps, through the CWA section 404 program, and the Regional Boards, through the CWA section 401 program. Further, the State Board has clarified that isolated wetlands should be regulated under either the General Waste Discharge Requirements (the "WDRs") or through issuance of individual WDRs. Any additional regulatory program created as a result of the Proposed Resolution probably would result in largely duplicative efforts that would require significant expenditures. Unless the State Board can demonstrate that such duplicative programs are needed to protect the quality of the waters of the state and are authorized under existing statutes, such action should not be taken. As the State Board has not provided any documentation in this regard, this action should not be taken at this time.

B. Phases 2 and 3 Contemplate Regulation of Activities that Do Not Fall Within The State Board's Jurisdiction and that Employ Means Not Authorized Under the California Water Code

The Proposed Resolution contemplates that the Policy will be expanded in Phases 2 and 3 to regulate non-fill activities, as well as activities that impact riparian areas. To accomplish this, the Proposed Resolution instructs the Staff to develop beneficial uses, water quality objectives, and implementation programs to obtain the identified water quality objectives and protect wetlands and riparian areas. However, development of such standards would involve considerations of uses of *land* rather than water. Additionally, implementation of such standards would involve regulation of activities that do not involve discharge of waste. Thus, any such policy would involve elements that fall outside the regulatory authority of the State Board.

1. **The California Water Code Does Not Authorize Adoption of the Previously Identified Beneficial Uses of Wetlands Nor Adoption of Beneficial Uses for Riparian Areas**

The Proposed Resolution instructs the Staff to develop new beneficial use definitions for wetland and riparian functions. Based on the discussion provided in the Scoping Document, we assume that beneficial uses would involve things such as pollutant removal, flood attenuation and habitat connectivity. While we agree that these "uses" are things that may, in certain instances, have an impact on water quality, we do not agree that they qualify as beneficial uses of the waters of the state.

The California Water Code states that beneficial uses include, but are not limited to, the following uses of water: "domestic, municipal, agricultural, and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife and other aquatic resources or preserves." Cal. Water Code § 13050(f). The CWA also requires that the state designate beneficial uses for surface waters, for protection and propagation of fish, shellfish and wildlife; recreation in and on water; use of water for public water supplies; and agricultural, industrial and navigational purposes. CWA §§ 101, 303, 33 USC §§ 1251, 1313. Common to all of the beneficial uses listed in the California Water Code and the CWA is that they are uses of water itself and not uses of land surrounding or containing the water. Further, the listed beneficial uses of water are those uses that are directly affected by the quality of water itself and are not uses that in and of themselves affect the quality of water.

A review of the legislative history of the California Water Code demonstrates that "beneficial uses" are limited to those *uses of water* that derive benefit from protections against water degradation.¹ In enacting the California Water Code, the Legislature noted that the revised definition of "beneficial uses" was meant to mirror the *water quality-based* definition previously adopted by the State Board in the "Statewide Policy for the Control of Water Quality," (the "Statewide Policy").² The Statewide Policy noted the following: "*Beneficial Use* of the water resources of the state is that use of water that is, in general, productive of public benefit, which

¹ The Porter-Cologne Act was intended to "implement the legislative recommendations of the final report of the State Water Resources Control Board submitted to the 1969 Regular Session of the Legislature entitled 'Recommended Changes in Water Quality Control' prepared by the Study Project—Water Quality Control Program." *Lake Madrone Water Dist. v. State Water Resources Control Board*, 209 Cal. App. 3d. 163, 169 (Ct. App. 1989) (internal citation omitted). See also 2 Assem. J. (1969 Reg. Session) p. 2677-78 (indicating that, with the exception of certain comments indicated at that session, "the notes in 'Appendix A of the Final Report of the Study Panel to the California State Water Resources Control Board, Study Project—Water Quality Control Program' (March 1969) reflect the intent of the Assembly Committee on Water in approving the various provisions of Assembly Bill No. 413"); 2 Sen. J. (1969 Reg. Session) p. 3933 (same).

² Appendix A of the Final Report of the Study Panel to the California State Water Resources Control Board, Study Project—Water Quality Control Program, 25 (March 1969) [hereinafter Appendix A].

promotes the peace, health, safety, and welfare of the people of the state."³ The Statewide Policy stated more specifically that beneficial uses are those uses of water that could be protected "against damage resulting from quality degradation," including domestic and municipal supply, agricultural supply, industrial supply (including power generation), propagation, sustenance and harvest of fish and aquatic life, recreation, aesthetic enjoyment, and navigation.⁴ As is clear from the statutory definitions and as emphasized by the Legislature, beneficial uses are those uses of water that may be benefited by protections against water quality degradation.

The earlier-referenced beneficial uses for wetland and riparian functions are not authorized, because they do not involve actual uses of *water itself* nor are they uses that will be directly affected by changes in water quality. For example, flood water attenuation is not a "beneficial use" of water under the Act because it is a *use of land* for retention of water for a period of time. Further, it is a use that does not benefit from protections against water quality degradation. The ability of land to provide flood control is not directly benefited or protected by the establishment of a certain quality of water. The other proposed beneficial uses suffer from similar problems. Accordingly, the State Board is not authorized to adopt such beneficial uses, and such an action therefore cannot be included as part of a viable wetland and riparian protection policy.

2. **The Wetland Water Quality Objectives Are Likely to Fall Outside the State Board's Regulatory Authority**

The Proposed Resolution instructs the Staff to develop water quality objectives to protect wetlands and riparian areas. It is unclear, however, what type of water quality objectives could be developed to fulfill this requirement.

Water quality objectives are criteria stated either in narrative or numeric form that, if met, will protect the designated beneficial uses. Narrative objectives describe general characteristics of water quality that must be obtained through pollutant control measures and watershed management. Examples of narrative objectives currently contained in some of the Regional Boards' Basin Plans are: "Waters shall not contain floating material, including solids, liquids, foams, and scum, in concentrations that cause nuisance or adversely affect beneficial uses;" and "Waters shall not contain oils, greases, waxes, or other materials in concentrations that result in a visible film or coating on the surface of the water or on objects in the water, that cause nuisance, or that otherwise adversely affect beneficial uses." San Francisco Bay Basin Plan, Ch. 3.3.6, 3.3.7.⁵ Numeric objectives generally establish the maximum levels or concentrations of pollutants that may be present in water. Whether expressed in narrative or numeric form, water quality objectives establish specific parameters for assessing the quality of the water itself.

The California Water Code requires that the following factors be considered in establishing water quality objectives:

³ Appendix A at 25 (quoting the Statewide Policy) (emphasis in original).

⁴ Appendix A at 26 (quoting the Statewide Policy).

⁵ The Basin Plan is available at http://www.waterboards.ca.gov/sanfranciscobay/basinplan/web/BP_CH3.html.

(a) past, present and probable future beneficial uses of water; (b) environmental characteristics of the hydrographic unit under consideration, including the quality of water available; (c) water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area; (d) economic considerations; (e) the need for developing housing within the region; and (f) the need to develop and use recycled water.

Cal. Water Code § 13241. Water quality objectives must be based on sound scientific rationales and contain sufficient parameters or constituents to protect the most sensitive beneficial use. 40 CFR § 131.11.

It is difficult to conceive of any water quality objective that could be identified to protect wetland and riparian beneficial uses, as it is not generally the quality of water that will affect such uses, but rather the proposed use that may itself have some influence on water quality.

3. **It Is Unclear How the State Board Could Implement New Water Quality Objectives to Protect Wetlands, As Such Implementation Would Involve Regulation of Activities that Fall Outside the State Board's Enforcement Authority.**

The state is required to identify programs of implementation for achieving identified water quality objectives. The implementation program details the regulatory programs and plans of action for meeting the identified objectives and for protecting the designated beneficial uses. It must include (a) a description of the nature of the actions which are necessary to achieve the objectives, including recommendations for appropriate action by any entity, public or private; (b) a time schedule for the actions to be taken; and (c) a description of the surveillance to be undertaken to determine compliance with objectives. Cal. Water Code § 13242.

Under the California Water Code, the State Board is only authorized to directly regulate activities that involve a *discharge of waste* that could affect the quality of waters of the state. Therefore, we believe that the proposal to regulate "all activities that impact water quality" in wetlands or riparian areas goes beyond the State Board's narrow regulatory authority.

The narrow enforcement authority of the State Board is confirmed by the legislative history of the California Water Code. The legislative history demonstrates that the Legislature intended for the State and Regional Boards to have direct enforcement jurisdiction over waters of the state only when a discharge of waste was taking place or was threatening to take place.⁶ In a comment to Water Code section 13263(a), the Assembly stated that, "[a]s with respect to Section 13260, it is intended that jurisdiction of a regional board [section 13263(a)] be limited to cases where there is a present or proposed discharge of waste, as defined in section 13050(d), which affect or may affect the quality of the waters of the state." 2 Assem. J. (1969

⁶ The Water Code itself provides for the Regional Boards to establish water quality objectives within the Basin Plans to "ensure . . . the prevention of nuisance," Cal. Water Code §§ 13241, which "[o]ccurs *during, or as a result of, the treatment or disposal of wastes*". Cal. Water Code § 13050(m) (emphasis added).

Reg. Session) 2681. Similarly, in one comment to section 13050(e), which contains the definition of waters of the state, the Assembly clearly noted that the Regional Boards would have no jurisdiction to impose waste discharge requirements unless an actual discharge were to take place. *Id.* at 2679. Specifically, in the case of waters used to irrigate farm lands, the Assembly stated that the Regional Board would not have jurisdiction over waters used to irrigate agricultural lands until and unless a discharge was made to a watercourse or other waters of the state after irrigation had taken place.

It is unclear how, apart from WDRs, the State Board would regulate under the Policy those activities that do not involve direct impacts to waters of the state. Although this issue has not been widely litigated, the California Court of Appeals has addressed the fact that the Water Code does not clearly authorize the Regional and State Boards to enforce implementation of water quality objectives. *United States v. State Water Resources Control Board*, 182 Cal. App. 3d 82, 124 (Ct. App. 1986) (noting that the "Legislature has not adequately authorized the Board to . . . compel compliance with water quality standards . . ."). The court noted that, although the State Board and Regional Boards have broad authority to adopt state policy for water quality control and to identify means to implement that policy, the Boards' "express authority to implement water quality standards seems limited to *recommending* actions by other entities." *Id.* at 124 (emphasis in original). The Court noted, for example, that the Regional Boards are empowered to "[e]ncourage regional planning . . . for water quality control" and to "[r]equest enforcement by appropriate [public] agencies of their respective water quality control." *Id.* at 124-25 (citing § 13225(d), (i)) (emphasis in original). The court found that the State and Regional Boards' *enforcement* authority, however, is limited to the unauthorized discharge of pollutants. *Id.*

The State Board's authority is further limited by the requirement that regulated activities must involve a discharge of *waste*. Under the Water Code, "waste includes sewage and any and all other 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 in containers of whatever nature prior to, and for purpose of, disposal." Cal. Water Code § 13050(d).

Many of the activities which occur in riparian areas or have been identified by the State Board as potentially impacting wetlands, such as vegetation clearing, do not involve a discharge at all. Others, such as the creation of homes or other structures in upland areas, do not involve the discharge of *waste* or the disposal of any material. Consequently, we do not believe that the State Board can regulate such activities under the WDRs to address potential impacts to water quality. Accordingly, Phases 2 and 3 contemplate significant regulations and enforcement activities that fall outside the scope of the State Board's jurisdiction and therefore are inappropriate.

II. Recommendations

CBIA is greatly concerned that, if the State Board proceeds with the Proposed Resolution, it will embark on a regulatory scheme that is not necessary to protect the quality of the waters of the state but which will have grave implications for the state budget and economy, will result in a myriad of unintended environmental and social impacts, and is without legislative

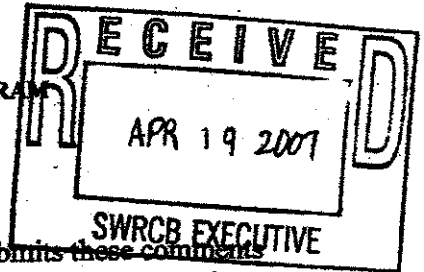
authority. We therefore urge the State Board not to adopt the Proposed Resolution. If the State Board intends to proceed with developing this Policy, we recommend the following actions:

1. The State Board should consider and respond to the extensive comments received on the Scoping Document before proceeding with consideration of further actions related to the Policy.
2. The State Board should direct Staff to clearly identify the legal basis for any actions proposed in furtherance of the Policy.
3. The State Board should clearly identify the need, with supporting data, for any expanded regulatory program proposed, taking into consideration the effectiveness of existing regulatory programs such as Corps regulation of wetlands, the State and Regional Boards' existing regulation of isolated wetlands, the California Department of Fish and Game's regulation of riparian areas through its 1600 program, the Coastal Commission's regulation of wetlands, and BCDC's regulation of wetlands. The State Board should direct staff to ensure that any proposed actions do not result in duplicative regulations.
4. The State Board should clarify how the policy will be adopted, whether through regulations or orders, and provide an explanation of why the chosen method is appropriate.
5. The State Board should instruct the Staff to fully satisfy the requirements of CEQA and to consider a reasonable range of alternatives to any proposed action, as well as considering all of the environmental impacts associated with any proposed policy.
6. The State Board should establish a forum for participation by interested stakeholders in development of the Policy.
7. If the State Board decides to adopt a resolution, we request that the Board limit the scope of the Policy to development of a wetland definition that is consistent with the Corps standards and other procedures necessary to fill any gap in federal regulation over such wetland features.
8. To ensure statewide consistency, the State Board should instruct the Regional Boards to cease development of independent wetland and riparian protection policies or orders during the pendency of the State Board's consideration of these issues.

**CALIFORNIA BUILDING INDUSTRY ASSOCIATION'S COMMENTS ON THE STATE
WATER RESOURCES CONTROL BOARDS' PROPOSED WETLAND AND RIPARIAN
AREA PROTECTION POLICY**

**PREPARED BY: ELLA FOLEY-GANNON & ROBERT URAM
SHEPPARD, MULLIN, RICHTER & HAMPTON**

APRIL 19, 2007



The California Building Industry Association ("CBIA") submits these comments on the State Water Resources Control Board's proposed Wetland and Riparian Area Protection Policy ("Policy"). The CBIA is a statewide trade association representing more than 6,000 businesses, homebuilders, remodelers, subcontractors, designers and other industry professionals. The homebuilding industry in California contributes approximately \$59 billion a year to the state's economy and generates over 500,000 jobs. CBIA's members are committed to improving water quality and working with the State Board to implement programs that are legally, logistically and scientifically sound and practicable. These comments augment those submitted by us with a coalition of interested stakeholders.¹ We appreciate the opportunity to comment on the proposed Policy.

We fully support the overarching announced goals of the proposed Policy to: (1) clarify the extent of State and Regional Board's regulatory authority under the California Water Code for regulating wetland and other aquatic areas; (2) provide statewide consistency in definition of wetlands; and (3) provide statewide consistency in definitions of beneficial uses and requirements for evaluating and regulating wetlands. However, we have serious concerns regarding the State Board's proposed Policy, both in terms of the process for considering these issues and the substance of the current proposals. Further, we do not believe that the identified alternatives meet the described goals.

As described in the *Informational Document: Public Scoping Meeting for Proposed Wetland and Riparian Area Protection Policy* (March 2007) ("Informational Document"), the proposed Policy has the potential to greatly expand the regulatory authority of the State and Regional Boards with regard to land use planning decisions, public works projects (both development and maintenance), flood control projects, and on-going farming activities. Specifically, it appears that the State Board is considering a policy which could extend the State and Regional Boards' jurisdiction over activities that do not involve direct impacts to water bodies and may have only a tenuous impact on water quality. We are very concerned that the some of the proposed alternatives are not based on adequate legal authority or sound policy and science. Our concerns are heightened by the fact that the Information Document does not accurately or adequately describe the current state of wetlands regulations nor does it provide a

¹ The coalition letter was submitted on behalf of the following organizations: Bay Planning Coalition, the California Building Industry Association, the California Business Properties Association, the California Chamber of Commerce, the California Construction and Industrial Materials Association, the California Farm Bureau Federation, the California State Association of Counties, Consulting Engineers and Land Surveyors of California, the Northern California Water Association, Regional Council of Rural Counties, the Resource Landowners Coalition, and the Wine Institute.

basis for meaningful assessment of the "problems" to be addressed by the proposed Policy. As detailed below, we urge the State Board to reconsider the alternatives for effectuating the proposed Policy goals and to issue a revised scoping document that allows for meaningful public participation in the scoping process.

If the State Board goes forward with consideration of the Policy as described, we have significant concerns regarding the Policy's potential environmental, economic and social impacts. If the Board were to expand its regulatory program as described in the Information Document, significant impacts would occur not just to land use determinations, but also to public works and flood control projects, on-going agricultural activities, recreational facilities and other areas. Should the State Board proceed with this consideration of the proposed Policy, we urge the Board to give serious consideration to these potential impacts.

1. By Failing to Adequately Describe the Current State of Regulations and the Proposed Alternatives, the Scoping Document Does Not Allow For Adequate Public Participation.

Pursuant to its regulations, the State Board is required to take appropriate actions to encourage public participation in the preparation and review of environmental documents. 23 CCR § 3763. In order for such participation to be meaningful and fulfill the intent of the regulations, the documents released must contain sufficient information for the public to evaluate the proposed action and potential alternatives.

Unfortunately, the Informational Document fails to meet this standard. First, the Informational Document does not accurately describe the current state of State Board's policy regarding regulation of wetlands nor does it include important information regarding the development of that policy. The State Board began efforts to establish an independent state program for regulating wetlands in 2001 following the U.S. Supreme Court's decision in *Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers* ("SWANCC") that removed federal Clean Water Act jurisdiction over certain isolated wetlands. In the wake of this decision, the State Board took significant steps to ensure continued regulation of these isolated waters including explicit assertion of jurisdiction over all discharges into isolated waters, adoption of a fee schedule for SWANCC Areas, adoption of General Waste Discharge Requirements for minor fills to isolated waters, issuance of direction to the Regional Boards to focus resources on regulating isolated wetlands and publication of a wetlands "Workplan: Filling the Gaps in Wetland Protection" that set forth a program for protecting wetlands no longer subject to federal jurisdiction.

In describing the State's role in regulating wetlands and riparian areas, the Information Document acknowledges that the State Board's Office of Chief Counsel clarified in 2001 that waters exempted from federal CWA by the SWANCC decision were still subject to regulation under the California Water Code. The document, however, does not discuss the significant steps that the State and Regional Boards have taken to regulate such areas, including issuance of the general WDRs and numerous individual WDRs for projects that impact isolated wetlands. By excluding such information, the Informational Document provides a distorted view of the current regulatory framework. In contrast to the discussion in the Information Document, we do not believe that there is any significant "gap" in regulation of isolated wetlands. Without

an adequate description of the current baseline, it is impossible for the public to meaningfully evaluate the need for the proposed policy or assess the proposed alternatives.

Second, the Informational Document does not accurately describe other agencies regulation of isolated wetlands and riparian areas and thereby again presents a distorted picture of the regulation of such areas. Most significantly, the document does not acknowledge or discuss the fact that the California Department of Fish and Game actively regulates riparian areas under its Lake and Streambed Alteration Program. To adequately assess the need for and relative merit of the various alternatives, it is essential the current state of regulations be adequately considered and described.

Third, the Information Document does not provide sufficient detail regarding the proposed alternatives to allow for meaningful assessment of or comments on potential impacts associated with each alternative. The Informational Document identifies four wide-ranging alternatives, from a purported no action alternative² to an alternative that involves development of broad "new state policy to regulate a variety of discharges and activities that impact wetlands and riparian areas." To varying degrees, the alternatives discuss "regulating" different areas through implementation of broad and undefined policies. For example, Alternative 3 and 4 propose the implementation of a program modeled after the Corps 404(b)(1) alternatives analysis for regulating riparian areas and areas that do not meet the federal definition of wetlands. Based on the information provided, it is difficult to determine the extent of areas which would need to be avoided where practicable, how impacts would need to be minimized and the type and extent of mitigation that would be required.³ Without such information, it is impossible to meaningfully comment on or assess the impacts associated with these regulations.

Finally, the Information Document also notes that none of the alternatives would "override any existing Regional Water Board Basin Plans nor limit the authorities of the State and Regional Water Boards under the California Water Code and federal CWA to protect wetlands, riparian areas, and other waters of the state." Not only does this statement seem to run directly counter to the identified goal of providing statewide consistency in regulating wetland and riparian areas, but it also makes it impossible to evaluate the potential impacts of the proposed Policy. If adopted Policy is inconsistent with a policy adopted by a Regional Board, what would be the state of wetlands regulation in such a Region? Without more clarity, it is impossible to provide meaningful comment the scope of the alternatives being considered or the impacts associated with such alternatives.

² We do not believe that the No Action alternative accurately describes the current state of regulation of wetland and riparian areas, as there is currently no basis for regulating activities that impact riparian areas unless there is a demonstrated discharge of waste that could affect the quality of waters of the state (*i.e.*, any surface or groundwater within the boundaries of the state). The No Action alternative appears to contemplate broader regulation of riparian areas.

³ We note that it is not surprising that the Information Document fails to provide any details on how such a program would be implemented because such a program is not designed to regulate broad and divergent areas of land. We do not believe that the 404(b)(1) Guidelines can provide a workable program for regulating such areas.

2. **The Scoping Document Does Not Include a Reasonable Range of Alternatives As It Include Alternatives that Fall Outside the Jurisdiction of the State Board.**

Pursuant to its regulations, the State Board is required to consider reasonable alternatives to any proposed activity in its environmental review document. 23 CCR § 3777. The Informational Document fails to identify a reasonable range of alternatives as at least two of the four proposed alternatives fall outside of the Board's jurisdiction.⁴

a. **Extent of Jurisdiction: Proposed Definitions for Wetlands and Riparian Areas**

Under Alternative 3 and 4, the State Board would adopt broad definitions for wetlands and riparian areas and would regulate activities affecting such areas. The State Board's jurisdiction under the California Water Code ("the Act") is limited to waters of the state which is defined as "any surface water or groundwater, including saline waters, within the boundaries of the state." Cal. Water Code § 13050(e). The Act does not specifically mention regulation of wetlands nor does it address how the boundaries between "land" and "water" should be defined.

As the State Board acknowledged in a Report to the Legislature in April 2003,⁵ the Act does not specifically authorize regulation of wetlands. The State Board noted that the Act established "programs to regulate discharges to water," and "were not designed to conserve wetlands." *Id.* at 6. The State Board recognized that use of the Act to protect wetlands is based on perceived need and a desire to protect wetlands, rather than being based on statutory authority. The State Board acknowledged that protection of wetlands under the Act is "an expedient driven largely by an increasing appreciation of wetlands values since these statutes were enacted." *Id.*

We believe that it is clear that the proposed expanded definitions of wetlands and riparian areas do not fall within the definition of waters of the state as they are not either areas of ground or surface water and therefore fall outside the Boards' jurisdiction. Moreover, the proposed definitions would represent a considerable deviation from those adopted in the 2004 Workplan and the State's No Net Loss Policy, both which contemplate adoption of the federal definition for wetlands. Accordingly, these definitions should not be included in a proposed Policy alternative.

b. **California Water Code Does Not Authorize Adoption of Proposed Beneficial Uses For Wetlands and Riparian Areas**

Under Alternative 3 and 4, the State Board would adopt consistent statewide beneficial use definitions for wetland and riparian area functions such as pollutant removal, flood

⁴ As previously noted, we also believe that the No Action alternative as described in the Informational Document contemplates potential regulation of upland areas that fall outside the purview of the State and Regional Board's jurisdiction. We believe that Alternative 2 may suffer from the same defect.

⁵ State Water Resources Control Board, "Regulatory Steps Needed to Protect and Conserve Wetlands Not Subject to the Clean Water Act" (April 2003), 19, at http://www.scrb.ca.gov/legislative/docs/2003/wetlands_02supprpt.pdf (hereinafter State Board 2003 Report).

attenuation and habitat connectivity. While we agree that these "uses" are things that may, in certain instances, have an impact on water quality, we do not agree that they qualify as "beneficial uses" of water of the state.

The Act states that beneficial uses include, but are not limited to, the following uses of water: domestic, municipal, agricultural, and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife and other aquatic resources or preserves." Cal. Water Code § 13050(f). The CWA also requires that the state designate beneficial uses for surface waters for protection and propagation of fish, shellfish and wildlife, recreation in and on water, use of water for public water supplies and agricultural, industrial and navigational purposes. CWA §§ 101 & 303. Common to all of the beneficial uses listed in the Act and the CWA is that they are uses of water itself and not uses of land surrounding or containing the water. Further, the listed beneficial uses of water are those uses that are directly affected by the quality of water itself and are not uses that in and of themselves affect the quality of water.

A review of the legislative history of the Act demonstrates that "beneficial uses" are limited to those uses of water that derive benefit from protections against water degradation.⁶ In enacting the Act, the Legislature noted that the revised definition of "beneficial uses" was meant to mirror the water quality based definition previously adopted by the State Board in the "Statewide Policy for the Control of Water Quality," ("Statewide Policy").⁷ The Statewide Policy noted the following: "Beneficial Use of the water resources of the state is that use of water that is, in general, productive of public benefit, which promotes the peace, health, safety, and welfare of the people of the state."⁸ The Statewide Policy stated more specifically that beneficial uses are those uses of water that could be protected "against damage resulting from quality degradation," including domestic and municipal supply, agricultural supply, industrial supply (including power generation), propagation, sustenance and harvest of fish and aquatic life, recreation, aesthetic enjoyment, and navigation.⁹ As is clear from the statutory definitions and as emphasized by the Legislature, beneficial uses are those uses of water that may be benefited from protections against water quality degradation.

⁶ The Porter-Cologne Act was intended to "implement the legislative recommendations of the final report of the State Water Resources Control Board submitted to the 1969 Regular Session of the Legislature entitled 'Recommended Changes in Water Quality Control' prepared by the Study Project-Water Quality Control Program." *Lake Madrone Water Dist. v. State Water Resources Control Board*, 209 Cal. App. 3d 163, 169 (Ct. App. 1989) (internal citation omitted). See also 2 Assem. J. (1969 Reg. Session) p. 2677-78 (indicating that with the exception of certain comments indicated at that session "the notes in 'Appendix A of the Final Report of the Study Panel to the California State Water Resources Control Board, Study Project—Water Quality Control Program' (March, 1969) reflect the intent of the Assembly Committee on Water in approving the various provisions of Assembly Bill No. 413"); 2 Sen. J. (1969 Reg. Session) p. 3933 (same).

⁷ Appendix A of the Final Report of the Study Panel to the California State Water Resources Control Board, Study Project—Water Quality Control Program, 25 (March 1969) (hereinafter "Appendix A").

⁸ Appendix A at 25 (quoting the Statewide Policy (emphasis in original)).

⁹ Appendix A at 26 (quoting the Statewide Policy).

The proposed beneficial uses for wetland and riparian area functions are not authorized as they do not involve actual uses of water itself nor are they uses that will be directly affected by changes in water quality. For example, flood water attenuation is not a "beneficial use" of water under the Act because it is a use of land for retention of water for a period of time. Further, it is a use that does not benefit from protections against water quality degradation. The ability of land to provide flood control is not directly benefited or protected by the establishment of certain quality of water. The other proposed beneficial uses suffer from similar problems. Accordingly, the State Board is not authorized to adopt such beneficial uses and therefore, such an action cannot be included in a reasonable Policy alternative.

c. **State Board Is Not Authorized To Directly Regulate Activities That Do Not Involve a Discharge of Waste**

The Informational Document states under that Alternative 4 the State Board would establish a "comprehensive framework for protecting wetlands and riparian areas from the impacts of a variety of discharges and activities, including; dredge or fill material, discharges of other pollutants (e.g., nutrients); hydromodification land and vegetation clearing activities; and invasive species." Because the State and Regional Boards are authorized to directly regulate only those activities that involve a discharge of waste that could affect the quality of waters of the state, we do not believe that the Board has the authority to enforce the regulations contemplated under Alternative 4.

The narrow enforcement authority of the Regional Boards is confirmed by the legislative history for the Act. The legislative history demonstrates that the Legislature intended for the State and Regional Boards to have direct enforcement jurisdiction over waters of the state only when a discharge of waste was taking place or was threatening to take place.¹⁰ In a comment to section 13263(a), the Assembly stated that "As with respect to Section 13260, it is intended that jurisdiction of a regional board [section 13263(a)] be limited to cases where there is a present or proposed discharge of waste, as defined in section 13050(d), which affect or may affect the quality of the waters of the state." 2 Assem. J. (1969 Reg. Session) 2681. Similarly, in one comment to section 13050(e), which contains the definition of waters of the state, the Assembly clearly noted that the Regional Boards would have no jurisdiction to impose waste discharge requirements unless an actual discharge were to take place. *Id.* at 2679. Specifically, in the case of waters used to irrigate farm lands, the Assembly stated that the Regional Board would not have jurisdiction over waters used to irrigate agricultural lands until and unless after irrigation had taken place, a discharge was made to a watercourse or other waters of the state.

It is unclear how, apart from WDRs, the State or Regional Board would regulate under the Policy those activities that do not involve direct impacts to waters of the state. Although this issue has not been widely litigated, the Court of Appeals, in the often cited opinion by then Presiding Justice Racanelli, addressed the fact that the authority of the Regional and State Boards to enforce implementation of water quality objectives is not specified in the Act. *United States v. State Water Resources Control Board*, 182 Cal. App. 3d 82, 124 (Ct. App. 1986)

¹⁰ See also Cal. Water Code §§ 13241, 13050(m) (providing for the regional boards to establish water quality objectives within its Basin Plan to "ensure . . . the prevention of nuisance," §§ 13241, which "[o]ccurs during, or as a result of, the treatment or disposal of wastes"). Cal. Water Code § 13050(m)).

(noting that while the "Legislature has not adequately authorized the Board to . . . compel compliance with water quality standards . . ."). The Court noted that although the State Board and Regional Boards have broad authority to adopt state policy for water quality control and to identify means to implement that policy, the Boards "express authority to implement water quality standards seems limited to recommending actions by other entities." *Id.* at 124 (emphasis in original). The Court noted, for example, that the Regional Boards are "empowered only to "[e]ncourage regional planning . . . for water quality control" and to "[r]equest enforcement by appropriate [public] agencies of their respective water quality control." *Id.* at 124-25 (citing § 13225(d), (i)) (emphasis in original). However, the Court found that the State and Regional Boards' enforcement authority is limited to the unauthorized discharge of pollutants.

As noted, under Alternative 4, the State and Regional Board's would purportedly regulate a number of activities that do not involve a discharge of any material, such as vegetation removal and invasive species. The Informational Document does not articulate the jurisdictional bases for implementing such regulation, nor do we believe one exists. Therefore, this is not an appropriate alternative to consider.

Additionally, it appears that under Alternative 4 the State Board would attempt to regulate activities that involve ground disturbance but do not involve discharge of waste. Under the Act, "waste includes sewage and any and all other 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 in containers of whatever nature prior to, and for purpose of, disposal." Cal. Water Code § 13050(d). Because the creation of impenetrable surfaces purposely placed in an upland area to support for example homes is not a waste substance nor does it involve the disposal of any material, we do not believe that the State Board can regulate such activities under the WDRs to address hydromodification issues. Accordingly, Alternative 4 contemplates significant regulations and enforcement activities that fall outside the scope of the State Board's jurisdiction and therefore is inappropriate.

3. The Board Should Revise the Alternatives to Address the Need to Provide Statewide Consistency in Regulation of Wetlands in a Manner Consistent with Its Regulatory Authority.

The Informational Document states that the proposed Policy is designed to address the lack of statewide consistency in regulating wetland areas. We applaud the State Board's efforts to establish consistent regulatory requirements and mitigation for the protection for wetlands. We are troubled, however, by the fact that the Regional 1 and 2 are currently developing independent wetland and riparian policies. The Informational Document states that "development of a State Water Board Wetland and Riparian Area Protection Policy would give a statewide regulatory context to the efforts of these and other Regional Boards to protect wetland and riparian areas." We do not understand how statewide consistency can be developed or implemented under such circumstances and urge the State Board to request that the Regional Board's cease such planning efforts. Consideration of a statewide wetlands policy should be consolidated in a single action before the State Board.

4. If the Board Proceeds with the Consideration of the Proposed Alternatives, It Needs to Fully Consider the Potentially Significant Impacts Associated with Each Alternative.

If the State Board decides to proceed with evaluation of the potential environmental effects of the alternatives described in the Informational Document, we believe that the various alternatives have the potential to result in significant environmental impacts that must be thorough evaluated before any action is taken. Given the fact that the Informational Document provides little detail regarding how the various alternative would be implemented, it is difficult to asses the potential environmental impacts. However, the following is a list of some of the potentially significant issues that need to be analyzed:

a. Potential Impacts on Agriculture

Under the CWA, regular farming activities are generally exempt from permitting requirements. Should the State Board not include such an exemption in an adopted state program, the implications for ongoing farming and ranching activities could be tremendous. For example, requiring ongoing farming and ranching activities to avoid, minimize and mitigate impacts to wetland features, could lead to abandonment of such activities and consequently conversion of prime agriculture land to other uses.

b. Potential Impacts on Flood Control

Maintenance of flood damage control features generally requires regular removal of vegetation from riparian areas and in channels. If additional regulation is placed on such activities, people and property could be exposed to flooding hazards. Additionally, if lack of maintenance results in flooding, significant environmental damage could occur.

c. Potential Impacts on Land Use and Planning

If the proposed Policy places significant new limitations on development activities, it would likely require alterations in planned land use in significant portions of California. The State Board needs to evaluate and consider the impacts associated with relocating such planned land uses.

d. Potential Impacts on Population and Housing

By limiting potential development opportunities in areas not currently regulated by the State or Regional Boards, the proposed Policy has the potential to significantly alter the location, distribution, density and growth rate in human population throughout the state. The Policy could also limit the amount new housing available throughout the state and thereby create additional unmet housing needs. This issues need to be evaluated and considered by the Board.

e. Potential Impacts on Recreation

As many recreational facilities and parks are located near aquatic areas, the ability to establish and maintain parks and trails in such areas may be compromised by the proposed Policy.

f. **Potential Impacts on Transportation**

Wetlands and drainages are frequently found along major roadways due to runoff from such areas. Under the new policy, road maintenance activities may be limited or prohibited. Further, the Policy could limit the areas where needed road construction can occur. Therefore, traffic impacts need to be thorough considered.

g. **Potential Impacts on Utilities and Sewer Services**

If the State Board's jurisdiction is expanded as proposed, it can be anticipated that many utilities will be located within or adjacent to regulated areas. Therefore, the ability to provide and maintain utilities may be effected by the Policy.

5. **Conclusion**

CBIA urges the State Board to thoroughly evaluate the legal basis for enacting and enforcing the proposed Policy, the need for the proposed Policy, and finally the wisdom of adopting any of the proposed Alternatives. As stated at the outset, we fully support the State Board's goal of providing statewide consistent regulation of the resources that fall under the Board's control. However, we do not believe that the proposed alternatives meet this goal. Specifically, we request that the State Board: (1) identify new alternatives that meet the identified goals and which the Board has the authority to implement; (2) release a new scoping document that describes the need for the proposed Policy and the proposed alternatives so that the public can meaningfully participate in the environmental review of the policy; and (3) request that the Regional Boards cease consideration of independent wetlands policies and consolidate review of these issues.