May 31, 2012

Mr. Tom Howard
Executive Director
State Water Resources Control Board
1001 "I" Street, 24th Floor
Sacramento, CA 95814

Re: State Water Resources Control Board: Wetland Area Protection and Dredge and Fill Permitting Preliminary Draft

Dear Mr. Howard:

Our organizations appreciate the opportunity to review the preliminary draft of the State Water Resources Control Board's Wetland Area Protection and Dredge and Fill Permitting policies (the "Preliminary Draft"). After a complete review of the proposal, we write to express our strong opposition to the unnecessary expansion of regulation proposed in the Preliminary Draft.

The Preliminary Draft, if adopted, would impose a costly, expansive new regulatory program in California and severely impede economic growth without resulting in improvement in environmental quality. Rather than contribute to consistency between the various Regional Water Quality Control Boards, this imposition of a complicated and extensive new regulatory program is certain to result in disparate treatment between the Regions in wetland permitting while imposing confusion and increased cost on the regulated community.

Wetlands in California are already heavily regulated under section 404 of the federal Clean Water Act, and pursuant to existing regulations, the California Porter-Cologne Act. The United States regulates wetlands through a permitting program administered by the Army Corps of Engineers and the Environmental Protection Agency. California is integrally involved in this existing program because, under section 401 of the Clean Water Act, every applicant for a federal permit must concurrently obtain State Water Quality Certification from a state Regional Water Quality Control Board. The required certification is only provided where the proposed activity is in compliance with existing state water quality standards. Without a certification from the state, the federal government will not issue a permit.

The Preliminary Draft fails to adequately characterize the problem it seeks to address through its expansive, complex proposed increase in regulation. The basis for a substantial new regulatory program would presumably be to stop a continuing decline of wetland acreage in the state. Although the Preliminary Draft discusses the importance of wetlands to the California ecosystem, it conspicuously fails to provide any data on whether remaining wetlands are currently in decline. Other California reports either conclude that state wetlands are now increasing in acreage or fail to characterize whether or not wetland acreage is increasing or decreasing. For example, the first *State of the State's Wetlands Report* concluded that "for the years 1996 and 1997 we can successfully report that California achieved a net gain in wetlands of 15,129 acres." California Resources Agency (1999) at 2. The second *State of the State's Wetlands Report*, published in 2010, fails to conclude whether wetland acreage has declined or increased since issuance of the first report in 1999.

Moreover, such an expansive state regulatory program is only justified if the protection afforded to wetlands under the federal Clean Water Act permitting scheme is deficient. The Preliminary Draft cites the Supreme Court of the United States decisions in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) and *Rapanos v.United States*, 547 U.S. 715 (2006), as potentially "diminishing" the scope of federal regulation and thereby requiring state action. The draft does not, however, characterize whether federal regulation of wetlands has actually declined in the years since these decisions or, if it has, characterize the relative impact to state wetlands. Without such an evaluation there is no metric to judge whether the Preliminary Draft is addressing a real or imaginary problem. Furthermore, the federal government is – right now – in the process of adopting new policies to govern wetland protection. The Preliminary Draft does not evaluate how these new policies will extend to wetland protection in California and whether the policies override any basis for a costly new state program.

The regulatory scheme proposed in the Preliminary Draft would significantly increase the permitting burden on the regulated community. As discussed in the attached memorandum, the proposed permitting requirements would apply to an incredibly wide range of projects due to the state's expansive proposed definition of wetlands and the regulatory presumption that any activity within 150 feet of a "wetland" causes an impact. Because of the divergence between the state and federal definitions and regulatory requirements, the proposal would require public and private property owners to draft two permit applications and wetland delineations – one for the federal government and one for the state – for nearly every regulated project.

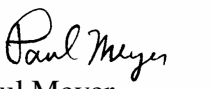
Adoption of the proposed permitting process in the Preliminary Draft would also drain limited state funds from other environmental protection programs. Based upon the trend of federal section 404 permit applications in California, the regional boards would likely need to respond to more than a thousand additional permit applications annually, a process that will include technical review, approval, permit issuance, and defending numerous appeals of permitting decisions. The Preliminary Draft does not provide an analysis of whether existing staff and budget resource are available to implement this proposed regulatory program, whether the new demands will sacrifice existing state water quality protection programs, or whether the regional boards will become so overwhelmed with permit applications that substantial delay will

result. If the resources for implementation of the proposed program are insufficient, the delay in the issuance of permits would cause economic harm for industry, municipalities, and property owners across the state.

Finally, if adopted, the regulatory program proposed in the Preliminary Draft will likely be subject to extensive litigation, just as the scope of federal regulation of wetlands under the Clean Water Act has been subject to substantial litigation over the past three decades. This will further drain limited staff and financial resources from the regional boards. Additionally, the confusion and complexity of wetland regulation will be further multiplied where state court decisions diverge from federal court decisions over applicable definitions and the extent of regulatory jurisdiction.

For all of these reasons, we oppose the adoption of a costly and unnecessary new state regulatory program.

Respectfully,



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American Council of Engineering Companies of California

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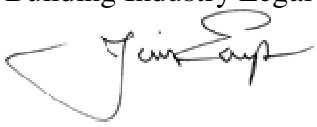

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California Alliance for Jobs

Jelisaveta Gavric
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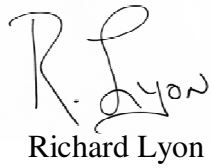
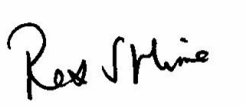


Richard Lyon
California Building Industry Association



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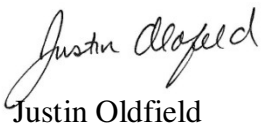

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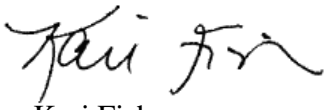

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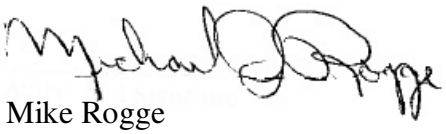

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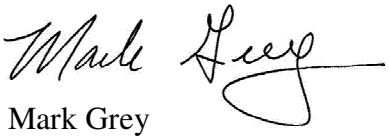

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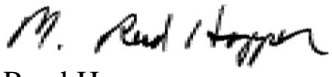

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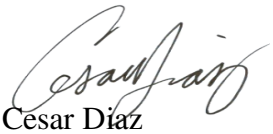

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CC: Ms. Nancy McFadden
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Enclosure

STATEMENT OF CONCERNS REGARDING THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD'S PROPOSED WETLAND AREA PROTECTION AND DREDGE AND FILL PERMITTING POLICY

May 2012

I. Overview

The State Water Resources Control Board ("State Board") has been pursuing establishment of a new regulatory regime for aquatic resources in California. Although it has been promoted as fostering consistency among the Regional Water Quality Control Boards throughout the state and bridging supposed "gaps" in existing regulatory programs, we fear that the outcome will actually cause confusion for the regulated community, inconsistency throughout the state and with federal regulators, and significant litigation.

Under the best of economic circumstances, these unintended outcomes would be concerning. These are, however, some of the most dire economic times in California's history. Record deficits, state employee furloughs, and the threat of deep and devastating cuts to education dominate the headlines. Other states publicly ridicule "excessive regulation" in California to try and entice away major California employers.

Mindful of these circumstances, we respectfully request that the State Board reconsider the timing, propriety of, and need for the proposed Preliminary Draft, Water Quality Control Policy for Wetland Area Protection and Dredge and Fill Permitting, Preliminary Draft Release Date: March 9, 2012 ("Preliminary Draft Policy"). Preliminarily, it remains unclear specifically what problem the proposal purports to solve. More specifically, given the multiple layers of overlapping regulation at the federal, state, and regional/local level, what are the resources that somehow are escaping regulation and protection? Further, how specifically does the proposal purport to resolve that alleged deficiency in the status quo? Given that this is not a function the state has historically led, how will the expertise for implementing the program be established? At a time of regular furloughs of existing state employees, how will we staff this entirely new regulatory regime? What will be the cost and how will it be funded? And how will the state address the inevitable flood of litigation over the project's implementation?

As provided in detail below, the proposed program departs significantly and materially from the existing federal regime. It co-opts certain core principles from federal law, but re-defines many in inconsistent ways, pulls them out of context from the federal program, and injects many vague concepts and terminology that ensures anything but uniformity and consistency throughout the diverse regions of the state.

For all of these reasons, we request that the State Board cease consideration of the proposed program and, instead, establish uniform implementation of the established federal program throughout the state and where there may be a demonstrated specific omission in regulatory reach, utilize existing state law to fill that gap.

II. The Preliminary Draft Policy Will Cause Confusion And Inconsistency Between The Regional Water Quality Control Boards

One of the proffered justifications for the Preliminary Draft Policy is concern regarding potentially inconsistent programs and implementation procedures by and between the respective Regional Water Quality Control Boards throughout the state – a good notion in concept. However, as we discuss below, the Preliminary Draft Policy is a significant departure from existing regulatory regimes for aquatic resources, both at the federal and state levels. How is this new program – pulling select provisions from the existing federal program, applying them out of context, and defining them in ways inconsistent with that existing federal program – going to provide greater regulatory protection, clarity, predictability, and overall benefit to the state? And in addition to the many departures from existing policy and practice, the Preliminary Draft Policy is vague and ambiguous as to critical substantive terms and direction for implementation. Accordingly, the Preliminary Draft Policy has the potential to cause, as opposed to resolve, inconsistency and arbitrariness in interpretation and implementation from one Regional Board to the next.

III. To The Degree Any "Gap" Exists In Federal Law, Existing State Law And Procedures Are Adequate, And There Is No Need For A New And Inconsistent Regulatory Regime

The Preamble of the Preliminary Draft Policy states:

> "Recent United States Supreme Court decisions have diminished what is recognized as a 'water of the United States.' As a result, there is a need to clarify the California Water Board's authority over wetlands in order to fully protect these aquatic resources." (Preliminary Draft Policy, pg. 3, ll. 15-18.)

The above statement, even to any degree it may be true, does not warrant or justify proposing the expansive new regulatory program embodied in the Preliminary Draft Policy. First, to the degree Supreme Court cases have narrowed or refined what is or is not jurisdictional at the federal level, that has no bearing whatsoever on the State Board's authority under state law. There is no indication or suggestion that judicial interpretation of federal law in any way compromises state laws or regulations. Second, there is no explanation as to why – regardless of the legal status of any given resource at the federal or state levels – a new regulatory program is warranted or necessary. What, *specifically*, are the aquatic resources within California that are escaping regulation under the current multi-layered regime? How are the broad and expansive provisions of the new Preliminary Draft Program *specifically* crafted to capture those purportedly unregulated resources? And what are the projected costs, staffing requirements, expertise, and litigation exposure of the state in carrying out this new Preliminary Draft Program?

IV. Critical Evaluation of the Objectives, Likelihood of Success, and Costs of the Preliminary Draft Policy Is Imperative

Development of the Preliminary Draft Policy is being undertaken pursuant to State Board Resolution No. 2008-0026. But it appears that an evaluation process required in that Resolution may have been overlooked.

Resolution No. 2008-0026 provides:

> "A charter will be developed by the Development Team defining the Development Team's purpose, responsibilities, goals and objectives, operating procedures, and timelines. The charter will identify the relationship of the Development Team to the water boards, other public agencies, and stakeholders. In July 2008, the Development Team will report back to the State Water Board on the proposed charter, before adoption by the Development Team." (SWRCB Resolution 2008-0026, Pg. 3, para. 5(c).)

A review of the State Board's website page devoted to Wetlands and the Preliminary Draft Policy makes no reference to the presentation, consideration, or adoption of the "charter" referenced in Resolution 2008-0026. And we don't believe this is a mere procedural technicality. In fact, the mandated content of the charter – i.e., "the purpose, responsibilities, goals and objectives . . . " related to preparation of the Preliminary Draft Policy – should have considered the core concerns we now raise. Namely, in adopting what we view as an expansive, inconsistent, and often vague new state policy with significant differences with and departures from long-standing federal policy, it is unclear what specific resources have avoided regulation, how the new Preliminary Draft Policy now catches them, and what the cost to the state will be.

V. The Differences Between the Preliminary Draft Policy and the Existing Federal and State Programs Are Multiple and Material

The following is a mere summary list designed to highlight *just* some of the material departures by the Preliminary Draft Policy from existing regulatory practice at the federal and state levels. The purpose is simply to underscore the magnitude of change from the perspective of the regulated community, many of which are elaborated upon in great detail further below. The justifications for these changes, issue by issue, may be debatable. What is beyond debate, however, is that the program proposed in the Preliminary Draft Policy is a significant and material departure from existing practice:

1. Definition of "wetlands": The proposed revised definition of "wetlands" (see discussion below), effectively eliminates two of the three criteria in the federal definition. (Draft Preliminary Policy, pg. 6, ll. 103-126.)

2. Delineation: Requires a separate delineation of areas subject to regulation, different than the federal program. (Draft Preliminary Policy, pg. 7, ll. 145-147; pg. 24, ll. 745 et seq.)

3. "Normal Circumstances" treatment of an area: Under this theory, an area that does not meet or satisfy the technical definition of a wetland is treated as if it does nonetheless, given circumstances surrounding the resource. See discussion below.

4. So-called "problem areas": The existing concept of federal "problem areas" is instead named "Difficult-to-resolve." (Preliminary Draft Policy, pg. 12, ll. 300-302.) Why depart from the established federal regime? Why was the existing program deficient in this area and how does changing it make for better results commensurate with the costs to the state?

5. Compensatory Mitigation options: The Preliminary Draft Policy sets out a hierarchy of mitigation approaches with proscriptive recognition parameters which are inconsistent with the Compensatory Mitigation for Losses of Aquatic Resources; Final Rule – U.S. Army Corps of Engineers, 40 CFR Part 230, April 10, 2008 ("Federal Mitigation Rule") and inhibit establishment of mitigation banks in contravention of established policy of the State Board. (See, e.g., Preliminary Draft Policy, pg. 12, ll. 305-308 [defining "Enhancement," but noting, "Enhancement does not result in a gain in aquatic resource area"]; Preliminary Draft Policy, pg. 14, ll. 400-402 [defining "Preservation," but noting, "Preservation does not result in a gain of aquatic resource area or functions"].)

6. Soils: The Preliminary Draft Policy abandons the federal "hydric soils" criteria in favor of a "hydric substrate conditions" criteria. (Preliminary Draft Policy, pp. 12-13, ll. 315-329.) The substrate definition includes ambiguous and undefined terms, the approach makes a major shift from a core prong of the federal wetlands definition – soil type – and reverts it to the already present "hydrology" prong. Further, the definition in the Preliminary Draft Policy requires saturation for only 14 days *or less in certain undefined circumstances*, ensuring a much more expansive reach and application of the regulatory program than the federal program without explaining the need, costs, or benefits of such expansion. (See also, Preliminary Draft Policy, pg. 15, ll. 427-431 [defining "Substrate" so expansively as to include man-made attributes equally with natural conditions, significantly departing from the federal focus on "hydric soils].)

7. "Project Purpose": In the federal regime, there is a "Basic Project Purpose," which is an extremely short, perfunctory description whose function is essentially to define whether the project is "water dependent" (e.g., a port or harbor) or not, and the "Overall Project Purpose," which is a somewhat more elaborative description which assists in the selection and consideration of practicable alternatives for the project under NEPA and the 404(b)(1) Guidelines. The Preliminary Draft Policy uses just the term "Overall Project Purpose" but applies

it to what is functionally the equivalent of the federal "Basic Project Purpose." (Preliminary Draft Policy, pg. 14, ll. 378-380.)

8. Watershed-level consideration of impacts and mitigation: The Preliminary Draft Policy recognizes the relatively recent federal emphasis on watershed-scale consideration of impacts and mitigation. (Preliminary Draft Policy, pg. 15, ll. 403-404.) But unlike the federal program which takes an expansive view in order to focus and pool conservation and restoration resources for expanded benefit, the Preliminary Draft Policy takes a narrow and proscriptive view, defining "watershed" far more narrowly than the federal regime. (See, e.g., Preliminary Draft Policy, pg. 35, ll. 1150-1155 [limiting the watershed reach for mitigation based on Hydrologic Unit Code more proscriptively than federal program].)

9. Exclusions: Under the Preliminary Draft Policy, exclusions are far more limited than the federal regime. (Preliminary Draft Policy, pg. 20, ll. 611-616.)

10. Collateral impacts: The Preliminary Draft Policy establishes a presumption that impacts within 150 feet of a water of the state – without explanation as to the justification for that singular measurement in all instances – will affect the water. (Preliminary Draft Policy, pg. 23, ll. 714-724.)

11. Appeals: The Preliminary Draft Policy makes no provision for review or appeal procedures related to the delineation process. (See Preliminary Draft Policy, pp. 23-24, ll. 745-796.)

12. Alternatives: The Preliminary Draft Policy includes a mandate for consideration of the "Least Environmentally Damaging Practicable Alternative" or "LEDPA" for any impacts to waters of the state. (Preliminary Draft Policy, pg. 29, ll. 951-958.) In the federal regime, this mechanism for highly specialized and heightened scrutiny is invoked in only rare circumstances. But here, again, the Preliminary Draft Policy grabs the core concept, redefines it, and applies it contrary to the federal program. The Preliminary Draft Policy triggers two separate presumptions from the LEDPA and invokes it for any impacts whatsoever to waters of the state.

13. Mitigation: The Preliminary Draft Policy has proscriptive and arbitrary mandates – established in a vacuum and without consideration of the facts at issue – regarding compensatory mitigation options relative to restoration v. establishment v. enhancement v. preservation. (Preliminary Draft Policy, pp. 32-33, ll. 1064-1083; pg. 15, ll. 405-411; pg. 12, 309-311; pg. 12, ll. 305-308; pg. 14, ll. 400-402.

14. Mitigation: The Preliminary Draft Policy Prioritizes "on-site" and "in-kind" mitigation. (Preliminary Draft Policy, pg. 33, ll. 1084-1088.) This is contrary to the Federal Mitigation Rule's focus on watershed-based consideration that channels and pools mitigation resources to where they will accomplish the greatest ecological benefit.

15. Mitigation: The Preliminary Draft Policy imposes mandatory ratios for compensatory mitigation as opposed to consideration of relative functions and services values utilized in the federal regime. (Preliminary Draft Policy, pg. 34, ll. 1112-1136.)

VI. The Preliminary Draft Policy's Proposed Definition of "Wetlands" Is Significantly Different than the Long-Established Federal Definition and Will Render Far More Areas in California Subject to Regulation Under the New Program

As recognized in the Preliminary Draft Policy, the long-settled standard for defining wetlands nationally has been a three-prong criteria involving: (1) hydrology; (2) soils; and (3) vegetation. 33 C.F.R. § 328.3(b). While still nominally recognizing this three-prong approach, the proposed new definition for state wetlands is far more expansive than and inconsistent with the federal definition. Specifically, the vegetation criteria may be satisfied by the "lack" of vegetation, thereby effectively eliminating it as a criteria ("Places lacking vegetation but otherwise meeting the hydrology and substrate criteria for wetlands are defined as wetlands"), and the "hydric soils" prong of the federal definition has been replaced by a "substrate" analysis that is actually a hydrology consideration more than a soils consideration, thereby effectively making the soils criteria merely redundant of the first factor, hydrology.

The consequence of this hydrology-dominated definition, paired with either a presence or absence of vegetation will result in inclusion of lands far beyond the federal wetlands definition. The new, expanded jurisdictional reach of the Draft Preliminary Policy will have far reaching and yet-to-be-defined implications for many industries critical to the California economy, including: agriculture, mining, water resource management, local government, education, residential and commercial development, utilities, and transportation providers.

VII. The Process of Identification and Delineation of Resources and Treatment of "Normal Circumstances" is Inconsistent with the Federal Program

A. *Delineation Requirements And Procedures*

The first step in any process of evaluating the existence, condition, and potential impacts relating to an aquatic resource is "delineation." Delineation is the process whereby experts in the field – both in the private and public sectors – evaluate a given area to determine whether resources subject to the respective regulatory policy are present or not. It is based upon the delineation that potential impacts and the need for a permit are evaluated. It is quite common in the federal arena for private landowners and regulatory agencies to disagree with regard to the delineation of jurisdictional resources at a given site.

In the federal realm, in fact, this issue just came to a head before the United States Supreme Court. It has been longstanding policy and practice that the federal agencies' exertion of jurisdiction

over a given property was NOT subject to judicial challenge at the delineation stage. Rather, an aggrieved landowner had to either pursue a permit or face the threat of an enforcement action before having access to the courts to challenge the exertion of regulatory authority. But in *Sackett v. Environmental Protection Agency,* 566 U.S. ___ (2012) (decided March 21, 2012), the U.S. Supreme Court ruled that a private property owner subject to a claim of jurisdiction through an enforcement order does have immediate redress to the courts.

Even under the existing, "settled" federal definition disputes and litigation over delineations are commonplace. And with the Preliminary Draft Policy's new definition of wetlands, new considerations for "normal circumstances," and related procedures (see discussion below), the state inheriting that flood of litigation is a veritable certainty.

While the Preliminary Draft Policy characterizes the differences between the proposed new state definition and the federal definition as "minor," the discussion throughout the Preliminary Draft Policy makes clear that the proposed substance and procedures established are a significant departure from the federal program. Historically, the state program has utilized the delineation documentation relied upon by the federal agencies. The Draft Preliminary Policy, however, makes explicit that the state reliance on federal delineation reports are acceptable only to the degree they follow "the delineation procedures as set forth in this Policy." (Draft Preliminary Policy, pg. 7, ll. 145-147; see also pg. 24, ll. 747-748.)

In consulting with practitioners in the field of delineation, they make clear that the criteria defining jurisdictional resources under the existing federal program as compared to the Preliminary Draft Policy are so different that there no longer will be the beneficial and efficient use of a single delineation.

B. *"Normal Circumstances;" "Altered Circumstances;" "New Normal Circumstances"*

Even in the arena of wetlands regulation, it is sometimes the case that what you see is *not necessarily* what you get. In this context, a given resource may not technically meet the precise definition of a "wetland," but nonetheless be treated as one, even in the federal area. One of the most straightforward examples occurs in Florida's Everglades. There, some areas will be pumped dry to allow for agricultural production. Due to the pumping, the area fails to satisfy the "hydrology" prong for the federal wetlands definition. But it is abundantly clear to all that once the pumps are turned off, the hydrology would return, and the area would revert to textbook wetlands. In such instances, the federal agencies treat and evaluate the resource according to its "normal circumstances," not the artificially imposed pumps.

As with many provisions of this new state proposal, the Preliminary Draft Policy grabs this core concept from the federal regime, but then makes material departures – often causing tremendous ambiguity on both substance and process – from that federal regime.

Instead of just defining and applying the established federal program of "Normal Circumstances," the Preliminary Draft Policy establishes new concepts of "Altered Circumstances" (Preliminary Draft Policy, pp. 10-11. ll. 245-254), "New Normal Circumstances" (pg. 13, ll. 357-358), and "Normal Circumstances" which the Preliminary Draft Policy explicitly recognizes is different than the federal concept of normal circumstances (pp. 13-14, ll. 359-371). And beyond rejecting the federal regime, the Preliminary Draft Policy invokes new, undefined, and vague concepts and terminology. This includes "recent human activities," "natural processes," "pre-alteration condition," and "normal hiatus," any and all of which are undefined but can have a direct impact on the "deeming" of an otherwise-non-wetland into a wetland for purposes of the Preliminary Draft Policy.

As is noted throughout this analysis, there is no explanation as to why the existing federal regime is insufficient as a standard, what resources are currently escaping regulation, how the new proposal is crafted to specifically reach those resources, how the program will be staffed and funded, and how a new, materially different approach will foster consistency by and between the Regional Boards.

VIII. The Alternatives Analysis and "LEDPA" Mandate Are Inconsistent with the Federal Program and Will Have Severe Consequences for California Projects

A. *Basic/Overall Project Purpose*

Another material example of the Preliminary Draft Policy grabbing a foundational aspect of the federal regime but then, for unexplained reasons, altering both its substantive meaning and procedural application is the "Project Purpose." Project Purpose serves a core function in the consideration of alternatives to the proposed project, and defining whether the alternatives are practicable and less environmentally impactful *relative to the attributes and intended aspects of the proposed project.*

The federal regime utilizes a two-part approach: a "Basic Project Purpose" and an "Overall Project Purpose." The Basic Project Purpose is a relative short and perfunctory statement, essentially aimed at identifying whether the proposed project is "water dependent" (e.g., a port or harbor) or not (e.g., residential development). The determination of water dependency is a foundational consideration in the federal regime. Then, the Overall Project Purpose more elaborately identifies the core attributes and purposes of the project in order establish a relative universe within which appropriate project alternatives may be considered.

The Preliminary Draft Policy utilizes one of the federal terms, "Overall Project Purpose," but the definition for that term actually more closely mirrors the federal definition for the Basic Project Purpose. (See Preliminary Draft Policy, pg. 14, ll. 378-380.) There is no reference to Basic Project Purpose in the Preliminary Draft Policy, nor is there any consideration of water dependency for the project at issue. This convoluting of one specific term from the federal regime, ignoring or eliminating other core attributes, and a lack of explanation for the changes assures confusion in the regulated community.

And, yet again, there is no explanation as to the need for an entirely new, inconsistent, and expansive program that will cost the state untold sums in staff time, monetary resources, and litigation risk.

B. *LEDPA Analysis*

Many regulatory regimes include an "alternatives" analysis – a comparison of the proposed project to other potentially viable alternative projects for purposes of comparison of impacts, avoidance potential, and mitigation opportunities, among other things. The California Environmental Quality Act, the National Environmental Policy Act, and many other regimes utilizes alternatives analyses as standard practice. And the approach is pretty straightforward: the applicant and lead agency agree on a universe of potential projects, comparable enough to the project at issue for meaningful analysis. It is a defined and limited universe of "other" proposals – ranging in number from 3 to a dozen, depending on the statue in play and relative circumstances.

In rare instances, however, a more heightened and exacting scrutiny takes place. And here, perhaps, is the most concerning grab of a federal principle out of context and contrary to the federal practice. In the federal regime's consideration of alternatives for a project impacting a narrowly defined universe of resources –a small subset of resource areas known as "aquatic resources of national importance" or "ARNIs" – the federal 404(b)(1) Guidelines (40 C.F.R. Sec. 230.10 et seq.) requires a determination by the federal agency that the chosen alternative is the "least environmentally damaging practicable alternative" or "LEDPA." Again, this extraordinary level of scrutiny is wielded only in the narrowest of circumstances, where impacts to that narrow universe of ARNIs cannot otherwise be avoided.

The Preliminary Draft Policy has taken that notion but not incorporated its limited context or practice of implementation from the federal regime. (Preliminary Draft Policy, pg. 29, ll. 951-958.) The Preliminary Draft Policy mandates a determination that a given proposed project is the LEDPA in all instances of impacts to any water of the state. There is no limitation or context as is the case with the federal program.

Further, the Preliminary Draft Policy invokes two separate presumptions with no limit on the discretion of the implementing agency to determine when and if the presumption is ever overcome. (Preliminary Draft Policy, pg. 29, ll. 955-958.) The presumptions effectively require the applicant to prove a negative – regardless of how many alternatives against which the project is evaluated, there is always presumed to be another, yet-to-be-considered, alternative that (1) would not involve a discharge to a water of the state, and (2) will have less adverse impacts on water quality.

So you are no longer dealing with a consensus-based, mutually defined universe of comparative project proposals as "alternatives" as is almost always the case. Now, no matter how many alternatives are presented and considered, this presumption assumes there is always one more alternative somewhere out there, and it leaves to the whim and fiat of the regulator to determine when and if enough is enough in terms of considering "just one more alternative."

The LEDPA in the federal regime is one of the most daunting and, sometimes, insurmountable regulatory hurdles for proposed projects. There is no way to determine in advance when the analysis will be enough to overcome the related presumptions. It requires a significant devotion of expertise, man power, and – frequently – litigation resources to resolve conflicts between the agency and the regulated individual. But, again, in the federal context, the LEDPA is invoked in only the most limited of circumstances. The Preliminary Draft Policy, on the other hand, would wield the LEDPA and its related presumptions *in each and every possible impact to waters of the state.*

IX. The Preliminary Draft Policy's Mandates and Proscriptions for Mitigation Approaches Is Contrary to Federal Practice and Establishes Barriers to Mitigation Banking

A. *Watershed Level Consideration*

While the Preliminary Draft Policy recognizes the federal focus on watershed-based consideration of both impacts and mitigation approaches (Preliminary Draft Policy, pg. 15, ll. 403-303), it actually takes an exact opposite approach than that of the Federal Mitigation Rule. The federal rule goes to great lengths to move away from on-site mitigation mandates to considerations that channel and pool restoration and conservation resources to areas in a watershed that have the greatest potential to do the most good. This also facilitates establishment of mitigation banks, a strategy and approach that the State Board is on record supporting.

But whereas the federal regime takes an innovative and expansive approach to watershed-based planning, the Preliminary Draft Policy is proscriptive. When considering watersheds in terms of Hydrologic Unit Codes or "HCU's", the Preliminary Draft Policy sets a mandate of "10-digit" (Preliminary Draft Policy, pg. 35, ll. 1151-1155) which is a far more narrowing criteria than the federal program and will, among other things, render mitigation banks infeasible by unduly curtailing the service area applicable to a given proposed bank. And that narrowing consequence generally limits the mitigation options and opportunities for any given project, not just in the context of mitigation banks.

B. *Absolute And Arbitrary Mandates For Mitigation Ratios that Are Contrary To The Federal Regime's Focus On Relative Functions And Service Values*

The Federal Mitigation Rule rightly recognizes that not all aquatic resources are created equal. There may be a relatively large (in terms of acreage) but highly degraded and low-functioning "wetland" being impacted by a given project. Or, conversely, an impact may be focused and very "small" in a technical sense, but have significant and far reaching impacts relative to a particular ecosystem. This more thoughtful and exacting analysis is the core of the Federal Mitigation Rule adopted in 2008. Compensatory mitigation is evaluated not in terms of sheer acreage, but relative to the actual functions and services of both the resource being impacted and the proposal for mitigation.

The Preliminary Draft Policy, however, opts for blind and arbitrary mandates of strict acreage ratios with no consideration for the relative functions and services of the area of impact or the value

being restored/created by the project. (Preliminary Draft Policy, pg. 34, ll. 1113-1115.) This arbitrary floor is inconsistent with the federal regime.

C. *The State Board Is On Record Supporting Establishment Of Mitigation Banks In California, But The Mandates Of The Preliminary Draft Policy Will Inhibit Them*

The Preliminary Draft Policy's limitation on both the reach of watershed-based mitigation by overly proscriptive HCU mandates (Preliminary Draft Policy, pg. 35, ll. 1151-1155) and prioritization of "on-site" and "in-kind" mitigation (Preliminary Draft Policy, pg. 33, ll. 1084-1088) are material inhibitors the fostering and viability of mitigation banks in the state, contrary to adopted State Board policy.

X. Consequences to the State and Regional Community

A. *The Preliminary Draft Policy Will Not Establish Certainty By And Between The Regional Boards*

As presented to the regulated community, one of the primary intents and objectives in establishing the Preliminary Draft Policy is to ensure consistency in both substance and practice by and between the Regional Boards. This is certainly a worthy and worthwhile objective on its face. But let us look at the means by which the Preliminary Draft Policy purports to do that.

Presumably, the developers of the Preliminary Draft Policy found the federal regime lacking, or they would have simply incorporated it wholesale. So, instead, they have co-opted some of the most provocative and volatile provisions of the federal regime, taken them out of context, often redefined the exact term contrary to its definition and implementation in the federal context, and cobbled together an entirely new program with no implementation history, guidance, or precedence on which to rely.

Arguably, the relative benefit or detriment of any given provision in terms of resource conservation may be subject to debate, but the one thing that is irrefutable is that this program will do anything but foster consistency among the very diverse regions of the state. As provided herein, the Preliminary Draft Policy is rife with undefined terminology, lacks direction on implementation, and is certain to foster administrative and litigation challenges by landowners impacted in both the public and private sectors.

B. *Uncertainty of Scope/Purpose*

The intended purpose and scope of the Preliminary Draft Policy – with specific reference to particular resources – remains unclear. There are generalized references to court precedent at the federal level scaling back the breadth of federal regulation. But what aquatic resources, specifically in the state of California, are escaping regulation? How is *existing* law (i.e., Porter-Cologne and its implementing regulations) inadequate to reach those resources? How is this new program – pulling select provisions from the existing federal program, applying them out of context, and defining them in

ways inconsistent with that existing federal program – going to provide greater regulatory protection, clarity, predictability, and overall benefit to the state? In trying to capture whatever narrow universe of resources we feel is unacceptably escaping regulatory oversight under the existing system, how much more are we inadvertently subjecting to regulatory mandates? And, perhaps most importantly, what will all of this cost the state and how will we pay for it?

C. *Expertise, Staff, Litigation*

Perhaps only second to the Endangered Species Act, implementation of the federal Clean Water Act is the most staff-intensive, expertise-mandated, and litigation-rich area of federal law. One need only navigate the U.S. Army Corps of Engineers or U.S. Environmental Protection Agency websites (not to mention the dockets of federal courts throughout the nation) to quickly appreciate the magnitude, expense, and complexity of the regulatory regime already in place.

Nowhere in the Preliminary Draft Policy does it provide for the staffing, expertise, or absorbing of the inevitable litigation risk and cost for the state. At a time of record deficits, furloughing of existing Regional Board staff, and crippling economic stagnation in the state, the Preliminary Draft Policy's silence on such foundational considerations is remarkable. And this glaring omission is only underscored when paired with the lack of identification of specific benefit to the state justifying the undetermined costs.

XI. Conclusion

We appreciate that the State Board and staff have devoted literally years to this undertaking. We fear, however, that a critical consideration of exactly what is being proposed *and why* has yet to take place. What is the need? What are the consequences of the "fix"? How will we establish the expertise? Who will staff it? How will we pay for it? What are the litigation risks? These are appropriate questions in any context, but especially so given the dire condition of the State. We respectfully request that the State Board reconsider moving forward with the Preliminary Draft Policy.