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August 18, 2016

*Submitted Via Email*

Comment Letter # 14

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**California High-Speed Rail Authority Comments Regarding the State Water Resources Control Board's Preliminary Draft of "Procedures for Discharges of Dredged or Fill Materials to Waters of the State"**

The California High-Speed Rail Authority ("Authority") provides the following comments in response to the State Water Resources Control Board's ("State Board") proposed "Procedures for Discharges of Dredged or Fill Materials to Waters of the State" ("Draft Policy") that the State Board released as a preliminary draft in June of this year.

The Authority is committed to the highest levels of environmental protection and stewardship as it implements its program. The comments and concerns expressed below relate to how implementation of the Draft Policy could impact the Authority's ongoing and significantly-progressed program. The Authority supports the State Board's efforts to ensure protection of important environmental resources, if done in a way that does not force in-progress projects like the Authority's to go backwards and if done in a way that is very clear and certain for those subject to the Policy.[1]

14.1

## 1. Background Regarding High-Speed Rail; Summary of Comments

The Authority, an agency of the State of California, is responsible for a program that involves planning, designing, building and operating a statewide high-speed rail system Program (the "Program"). The Program will provide service from San Francisco to the Los Angeles basin in under three hours, and will eventually extend to Sacramento and San Diego. At full build-out, the Program will cover approximately 800 miles. The Program is comprised of ten separate project sections ("Section"), consisting of: (1) San Francisco to San Jose; (2) San Jose to Merced; (3) Merced to Fresno, including the Central Valley Wye that serves as the junction between the Central Valley and Bay Area; (4) Merced to Sacramento; (5) Fresno to Bakersfield; (6) Bakersfield to

[1] Whether the Authority's project would be subject to the Policy, or whether the Policy would be preempted by the federal Interstate Commerce Commission Termination Act, has not been finally determined.

14.1 cont.

Palmdale; (7) Palmdale to Burbank; (8) Burbank to Los Angeles; (9) Los Angeles to Anaheim; and (10) Los Angeles to San Diego. Eight of these ten (all but Merced to Sacramento and Los Angeles to San Diego) are in what the Authority denotes as "Phase I."

Between 2001 and 2012, the Federal Railroad Administration ("FRA"), the federal oversight agency for the Program, and the Authority scoped, prepared and approved a tier-one programmatic Environmental Impact Statement and Environmental Impact Report ("EIS/EIR") in accordance with the National Environmental Policy Act ("NEPA") and the California Environmental Quality Act ("CEQA") for the Program. The programmatic analysis considered the comprehensive nature and scope of the proposed Program at the conceptual stage of planning and decision-making, including consideration of alternative transportation improvements, and potential general route and station locations. FRA and the Authority's programmatic decisions approved the high-speed rail system and selected general corridors and station locations for more detailed tier-two project level analysis to be done Section by Section, as noted above. The U.S. Environmental Protection Agency ("USEPA") and the U. S. Army Corps of Engineers ("USACE") concurred with these programmatic decisions under the federal Clean Water Act ("CWA").

As a means at the project (tier-two) level to cooperatively align NEPA, CEQA, and CWA Section-specific alternatives development, the Authority, FRA, USEPA and USACE entered into a Memorandum of Understanding in 2010 ("MOU"). The MOU provides a cooperative and interactive process for the Authority, FRA, USEPA and the USACE to analyze and review potential alternative Section alignments and determine the Least Environmentally Damaging Practical Alternative ("LEDPA") under CWA Guidelines. (40 C.F.R. Sections 230 et seq. (the "Guidelines").) In all Phase I Sections, progress under the MOU has been significant. Two Sections have approvals and are under construction. In the remaining Sections, the Authority and FRA are preparing project-specific EIR/EIS documents, having already received for some Sections concurrence (and expecting concurrence for all Section before the Draft Policy would become effective) from the USACE and USEPA under the MOU on the range of alternatives to be evaluated in those documents. For these remaining Sections, the Program schedule is aggressive: all permits to allow construction to be issued within 60 to 90 days after the issuance of the Records of Decision/Notices of Determination, which are planned for late 2017.

14.2

The Draft Policy, if adopted as proposed, would have wide-ranging implications and could affect the Program on two levels. First, it could substantially delay the Program's implementation schedule by forcing the Authority effectively to repeat and potentially unwind the lengthy, comprehensive, and detailed alternatives development process the Authority almost certainly will have completed under the 2010 MOU by the time the Draft Policy takes effect. In the limited urban Sections of the Program (Los Angeles to Anaheim, for example) where alternatives analysis may not be required under the CWA, the Draft Policy could require such an analysis, thereby likely delaying approval, permitting and implementation.

14.3

Second, it could delay construction and increase mitigation costs by having requirements for compensatory mitigation that conflict with CWA mitigation requirements – a problem exacerbated by the Draft Policy's subjective, discretionary, vague and "case by case" mitigation standards.

## 2. "Waters of the US" and "Waters of the State" – Duplicate Regulation of the Same Resource

All aquatic features that are considered under federal law as "waters of the United States" are also "waters of the State" under applicable State law. However, the definition of "waters of the State" under State law is broader – *i.e.*, there are "waters of the State" that are not "waters of the United States" (but not vice versa). "Waters of the State" include State "wetlands." Early versions of the Draft Policy were initially proposed as a means to consistently regulate only those "waters of the State" that are not under federal jurisdiction because they were "isolated" or otherwise no longer regulated after United States Supreme Court cases narrowing federal jurisdiction ("Gap wetlands") (*see Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (2001) 531 U.S. 159; *Rapanos v. U.S.* (2006) 547 U.S. 715). However, the Draft Policy now proposes to cover *all* "waters of the State" even if also "waters of the United States" – thereby setting up a duplicative (and potentially conflicting) regulatory process over mostly the exact same resource. This definitional and policy change is significant and is foundational to many of the Authority's concerns.

14.4

## 3. Draft Policy Wetlands Definition

The Draft Policy provides a definition of State "wetlands" which mimics the definition contained in federal law but does not require the vegetation component of the federal definition.[2] The Draft Policy provides that the wetlands definition is "not intended to be jurisdictional – not all features that qualify as wetlands are waters of the state." (Draft Policy Section I, lines 26-7.) The establishment of a new State definition of wetlands that differs from the Corps' definition creates potential conflict and uncertainty. The existing federal and State regulatory programs already govern "waters" of which "wetlands" are a current subset. Further, while the Draft Policy recognizes that some "wetlands" defined in the proposal would not be "waters of the State," it leaves discretion to each Board to determine on a "case-by-case" basis whether a wetland feature would be regulated under State law. This is far too uncertain and thereby creates a real potential for permitting delays. Moreover, given that the Authority's Program Sections are located in multiple Regional Water Board jurisdictions, the potential for inconsistent jurisdictional determinations among Program Sections is of significant concern to the Authority. The Authority recommends that, if a wetland definition is adopted, it be clear, certain, and jurisdictional across the State. This would remove case-by-case determinations between Board Regions and provide more certainty in those determinations.

14.5

## 4. The Draft Policy Unnecessarily Adds to or Conflicts with the Federal Permit Process

The Draft Policy calls on the Regional Boards to apply federal Section 404(b)(1) Guideline procedures "where feasible," an ambiguous term that can lead to varying results and application of the procedures. To address comments on earlier drafts related to consistency

[2] In an apparent conflict with the proposed wetland definition, Appendix A, Subpart E section 230.41 of the Draft Policy ("State Supplemental Dredge and Fill Guidelines") defines wetlands to include a "prevalence" of vegetation. Footnote 3 of the Draft Policy states that "Appendix A will be applied in a manner consistent with sections I through V of these procedures."

14.20

with federal Guidelines, the Board has attached a modified version of the federal Guidelines to the Draft Policy as Appendix A.

14.6

The Draft Policy, at a minimum, duplicates the federal program with regard to preparation and review of the CWA 404(b)(1) alternatives analysis. This duplication introduces a real chance for varying or even conflicting findings, particularly where definitions under the Draft Policy are unclear. For instance, the Draft Policy provides procedures for review and permitting activities that result in discharge directly into "Waters of the State," but also for those activities that "could" result in discharge. (Draft Policy Section IV "Program Application Submittal for Individual Orders," line 87.)[3] Under the CWA, the term "discharge" is under most circumstances limited to addition of dredge or fill material directly into "waters." (33 C.F.R. Section 323.2 (d)(1).) As a result, Program activities covered and analyzed under the Draft Policy could be broader than those activities covered under the federal CWA process but in an uncertain and insufficiently-defined manner. From the outset, this ambiguity complicates the preparation of alternative analyses that would serve both the Draft Policy and federal law.

14.7

Although the Draft Policy provides that the Boards can rely on 404(b)(1) alternative analyses prepared for the federal agencies, the State Boards could ask for additional and different information in certain circumstances (*e.g.*, lack of "adequate opportunity to consult" with the Board during the development of the alternative analysis or when the Corps' analysis does not "adequately address issues identified by the permitting authority during consultation"). (Draft Policy Section V. A.(3)(b).) The terms "adequate opportunity to consult" and "consultation" are vague and not defined by the Draft Policy.[4]

An alternatives analysis requirement that is duplicative of the CWA and unclear is particularly troubling for the Authority because it presents a substantial risk of interference with the Authority's ability to meet the Program schedule. Given the Authority's ongoing coordination with both USEPA and USACE under the 2010 MOU, and the associated progress in reaching agreement with respect to Program Section alternatives, the possibility of Board review and reconsideration of agreed-to Section alignment alternatives could prove an impediment to timely Program delivery.

This possibility is real. While the Draft Policy procedures generally rely on and "defer" to other documentation prepared for the USACE (presumably, like the documentation the Authority has prepared under the MOU), there are exceptions that could prove significant by forcing re-opening of effectively closed alternatives analysis development. (*See*, *e.g.*, Draft Policy Section IV. A.(2)(a) and Draft Policy Section IV. A.(2)(b)).

14.8

The Draft Policy also requires additional "coordination" or "consultation" with "other interested" local entities, airport authorities, and vector control agencies "during the initial

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14.6 cont

[3] This statement conflicts with the definition provided by the Draft Policy for "discharge of dredged material" under Draft Policy Section V which limits the scope of the Draft Policy to "additions of dredged material . . . to the waters of the state."

14.9

[4] Other provisions of the Draft Policy are unnecessarily vague and ill-defined. For instance, Section IV. A of the Draft Policy provides for a two-step application process based on a "case-by-case" review. An application under the Draft Policy should either be complete or incomplete based on one set of known and certain application requirements.

compensatory mitigation project design stage." (Section V. A.(2)(d)(iv).)[5] These steps, which are required to be provided on a "case-by-case" basis and which must be completed prior to filing an application, may result in Board decisions that are inconsistent with federal review and permitting. Case-by-case requirements to engage in agency coordination regarding mitigation planning (with no specific standard of review or timetable and with agencies with little or no experience in compensatory mitigation planning) poses a significant risk to the Authority's timely Program delivery.

14.8 cont

In addition, the Draft Policy does not specifically incorporate certain important provisions associated with preparation of alternatives analyses under the CWA Section 404(b)(1) Guidelines. For instance, federal guidance provides a general rule that the level of analysis shall be commensurate with impacts to the aquatic environment, which is not referenced in the Draft Policy. Such provisions from the federal Guidelines have been omitted in Appendix A of the Draft Policy. (*See* Section 230.10 (the provision that compliance evaluation procedures will vary to reflect the potential for adverse impacts on the aquatic ecosystem posed by the discharge is omitted).) The potential impact on Authority permit schedule, Program delivery, and future operations is significant given the potential for differing levels of evaluation for the same Program alternatives analysis.

14.10

## 5. Nationwide Authorizations and "Single and Complete Project"

The Draft Policy provides only a limited exception to the alternatives analysis requirement when a project is being permitted under the USACE Nationwide Permit Program.[6] Under the USACE Nationwide Program, an alternative analysis is *not* required in part because impacts associated with activities covered under the Nationwide Program have less than minimal individual or cumulative net adverse effects on the environment. (*See, e.g.*, 33 C.F.R. section 330.1(d).) The Authority intends to rely on Nationwide 14 (Linear Transportation Projects) for Sections with discreet crossing impacts and within largely urbanized settings. The potential for an alternatives analysis as a requirement by the Regional Boards under these circumstances presents a potential delay for the Authority's Program schedule and could impact future operations.

14.11

Further, the Draft Policy does not contain a definition of a "single and complete" project as used under federal law.[7] This means that the Draft Policy would likely require an alternatives analysis for an entire Authority Program Section where no such requirement exists at all under the USACE Nationwide Program. This poses a substantial burden on Authority's permitting

14.12

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[5] Neither of the terms "coordination" nor "consultation" are defined in the Draft Policy; nor is any time limit provided for such "coordination" or "consultation."

14.10 cont

[6] Nationwide permits are a type of general permit that are designed to regulate with little, if any, delay certain activates having minimal impact. (33 C.F.R. section 330.1(b).)

[7] Single and complete project means the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers.... For linear projects, the 'single and complete project' (i.e., single and complete crossing) will apply to each crossing of a separate water of the United States (i.e., single waterbody) at that location; except that for linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly-shaped wetland or lake, etc., are not separate waterbodies. (33 C.F.R. section 330.2(i).)

efforts and could result in conflicting approvals between Board permits and USACE Nationwide Program authorization.

14.12 cont

Any permit streamlining offered by the Nationwide Program could be undone by any Draft Policy provision allowing the Boards to require alternatives analyses for activates qualifying for such authorization. Draft Policy Section IV. B.3(d)(i) and (ii) should exempt projects from preparing an alternatives analysis if the proposed activity complies with the Nationwide Program permit conditions. At a minimum, the Draft Policy should exempt projects from preparing an alternatives analysis if the proposed activity is a linear infrastructure project, and is utilizing Nationwide Program permits 3, 7, 12, 13, 14, 25, 33, 39, 41, 43, 45 or 46, or could otherwise use one of these Nationwide permits if the impacted waters were subject to federal jurisdiction.

## 6. Compensatory Mitigation Planning under the Draft Policy

14.13

The Draft Policy uses the terms "watershed profile," "project evaluation area," and "watershed approach" to assess direct, indirect, and cumulative impacts on the aquatic ecosystem and to assess mitigation suitability for those impacts. (Section IV. A.(2)(d).) While the Draft Policy provides a definition of these terms, the definitions are vague, unnecessarily complicated, and subject to wide-ranging interpretation. For instance, the geographic scope of a "project evaluation area" is based on an "ecologically meaningful unit," which in turn "shall be based on a reasonable rationale." Similarly, the geographic scope of a "watershed" as used in the Draft Policy is subject to interpretation and will likely complicate mitigation planning.

14.14

With respect to the Authority's Program, one of the problems created by the vagaries of the mitigation under the Draft Policy is that any given Program Section is likely to pass through multiple "watersheds." Developing incremental and small mitigation sites in separate watersheds through a single Section is impracticable and is not ecologically preferable. Aggregating compensatory mitigation is supported by federal law under the federal Compensatory Mitigation Rule of 2008. (33 C.F.R. parts 325 and 332; 40 C.F.R. part 230 (the "2008 Mitigation Rule").) The 2008 Mitigation Rule specifically provides for the use of consolidated mitigation projects for linear projects. Sections IV. A.(2)(d)(ii) and B.(5)(d) allow for mitigation to be located outside the watershed containing the impacts, but the Draft Policy requires an applicant to demonstrate how the proposed compensatory mitigation will not result in "net loss" based on the "watershed profile." It is therefore unclear how an applicant can demonstrate "no net loss" to one watershed when mitigating in another.

14.15

Furthermore, under the Draft Policy Section IV. B.(5)(c), the amount of compensatory mitigation required by the Boards will be dependent on one of two strategies: (1) a strategy based on a watershed approach based on a watershed profile developed from a watershed plan (approved by the Regional Boards); or (2) a strategy based on a watershed approach based on a watershed profile that will "contribute to the sustainability of watershed functions." According to the Draft Policy, planning under Strategy 1 will generally result in less compensatory mitigation than a plan under Strategy 2. This two-tier strategy is in important respects different from, and not necessarily consistent with, the USACE South Pacific Division's Final 2015 Regional Compensatory

Mitigation and Monitoring Guidelines.[8] Moreover, the Draft Policy's watershed approach to determine compensatory mitigation requirements does not follow the 2008 Mitigation Rule which identifies an order of preference for mitigation (mitigation bank credits, in-lieu fee program credits, permittee-responsible mitigation under a watershed approach, permittee responsible mitigation through on-site and in-kind mitigation, and permittee-responsible mitigation through off-site and/or out-of-kind mitigation). As such, the chance for inconsistent type, quality, and amount of compensatory mitigation for the same resources is concerning.

14.16

Additionally, the requirements of Section IV. A.(2)(d) (draft compensatory mitigation plan and watershed profile at the time of application submittal) are far more detailed than required for permit applications under federal law. For instance, Section IV. A.(2)(f) requires significant detail in a draft restoration plan at the time of the application. Such detail is not required under federal law. While the State Board may feel that more detail than is required under federal law is necessary and/or appropriate, the practical problem is that this level of detail at such an early point in planning, particularly for a large and complex project like the Authority's Program is generally not reasonably available.

14.17

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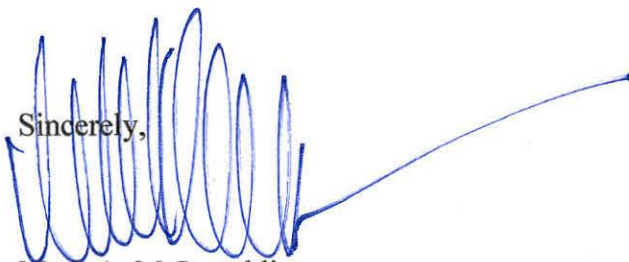
The Authority appreciates the Board's consideration of its input. We look forward to cooperatively working to resolve our issues with the Draft Policy and to establish a process that ensures the Authority's deeply-in-process Program is not set back.

Sincerely,



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[8] Many of the important terms used in the Draft Policy for determining adequate compensatory mitigation are not used or defined in the 2008 Mitigation Rule or in the South Pacific Division's 2015 Mitigation Guidelines. Additionally, the Draft Policy does not incorporate nor reference regional mitigation guidance documents (such as the South Pacific Division's 2015 Guidelines). Such integration and consistency is necessary if the goals and objectives of the Draft Policy are to be realized.

14.19

14.18