

Index for Response to Comments; Letter #20

Commenter	Comment Number	Representative Comment	Major Category Number	Major Category
Rural County Representatives of California	20.1	24.27	26	Legal, Procedural, Process Obligation
Rural County Representatives of California	20.2	20.2	38	Scope of Procedures
Rural County Representatives of California	20.3	5.1	31	Overall Opposition
Rural County Representatives of California	20.4	24.30	11	Complete Application (case-by-case basis)
Rural County Representatives of California	20.5	1.3	44	Waters of the State Definition/Delineation
Rural County Representatives of California	20.6	45.12	48	Wetland Definition (Jurisdictional)
Rural County Representatives of California	20.7	15.8	49	Wetland Definition (Technical)
Rural County Representatives of California	20.8	20.8	12	Complete Application (in all cases)
Rural County Representatives of California	20.13	20.13	12	Complete Application (in all cases)
Rural County Representatives of California	20.14	20.14	12	Complete Application (in all cases)
Rural County Representatives of California	20.15	24.30	11	Complete Application (case-by-case basis)
Rural County Representatives of California	20.16	21.5	42	Supplemental Data from Dry Season Delineation
Rural County Representatives of California	20.17	20.17	27	Monitoring and Assessment

Index for Response to Comments; Letter #20

Commenter	Comment Number	Representative Comment	Major Category Number	Major Category
Rural County Representatives of California	20.18	20.18	15	Draft Compensatory Mitigation Plan Requirement
Rural County Representatives of California	20.19	20.19	12	Complete Application (in all cases)
Rural County Representatives of California	20.20	20.20	3	Alternatives Analysis Exemption
Rural County Representatives of California	20.21	12.17	15	Draft Compensatory Mitigation Plan Requirement
Rural County Representatives of California	20.22	20.22	21	Final Compensatory Mitigation Plan
Rural County Representatives of California	20.23	20.22	15	Draft Compensatory Mitigation Plan Requirement
Rural County Representatives of California	20.24	20.24	15	Draft Compensatory Mitigation Plan Requirement
Rural County Representatives of California	20.25	20.25	46	Watershed Plan
Rural County Representatives of California	20.26	20.26	22	Financial Security/Terms of Mitigation Obligation
Rural County Representatives of California	20.27	20.27	23	General Orders
Rural County Representatives of California	20.28	20.28	18	Areas and Activities Excluded from the Application Procedures (section IV.D.)
Rural County Representatives of California	20.29	20.29	40	Storm Water Facilities Exclusion
Rural County Representatives of California	20.30	20.30	16	Ecological Restoration and Enhancement Definition

Index for Response to Comments; Letter #20

Commenter	Comment Number	Representative Comment	Major Category Number	Major Category
Rural County Representatives of California	20.31	20.31	14	Definitions



**California State Association of Counties**

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**Rural County Representatives**

**of California**  
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August 16, 2016

**VIA E-MAIL**

**Comment Letter # 20**

Ms. Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814

RE: State Water Resources Control Board Proposed Procedures for Discharges of Dredged or Fill Materials to Waters of the State

Dear Ms. Townsend:

On behalf of the California State Association of Counties (CSAC) and the Rural County Representatives of California (RCRC), we want to thank you for providing us with the opportunity to provide comments on the *Proposed Amendments to the California Ocean Plan and Inland Surface Waters, Enclosed Bays, and Estuaries of California Plan to Include Procedures for Discharges of Dredged or Fill Materials to Waters of the State* (the Proposed Procedures).

RCRC and CSAC also appreciate the two week extension of the comment deadline to August 18, 2016. However, it was not the 60 days requested that would have resulted in a more thorough and thoughtful analysis of this proposed new regulatory scheme surrounding wetlands and waters of the state. As such, we believe it is imperative that the State Water Resources Control Board's (State Board) subsequent comment period on this issue be allowed to address the entire proposal and not merely any potential changes to the second draft.

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While we have the utmost respect for the mission of the Water Board, the Proposed Procedures would affect a wide range of county flood protection and transportation related projects and activities that are needed to ensure public safety, economic vitality and quality of life. Generally we have an overarching concern that many of the new requirements would be unnecessarily duplicative of, or largely overlap existing permitting requirements, including the federal Clean Water Act § 404 program and the California Fish and Wildlife Lake and Streambed Alteration program. We are also concerned that the Proposed Procedures will result in substantial

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uncertainty for applicants, increase the potential for litigation over proposed projects, impose significant costs without attendant environmental benefit, and provide no assurance for timely project approval which is of particular importance to those counties that have a narrow window to complete projects.

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In addition, local government often has a statutory obligation to meet the needs of the public through normal operation and maintenance of local infrastructure. These activities are NOT discretionary but rather obligatory activities to meet state and/or federal statutes and regulations.

Our members also raised concerns about Regional Water Quality Control Board (Regional Board) staff continuing to have significant flexibility in making “case by case” determinations under the Proposed Procedures to impose increased mitigation ratios and requiring unnecessary alternatives analyses.

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We appreciate your consideration of the following comments, most of which are based upon the input we received from county public works officials across the state. As you’ll see we have not provided comments on all sections of the Proposed Procedures.

## **(II) Wetland Definition**

CSAC and RCRC support the state’s goals, including those stated in Governor Brown’s drought-related Executive Orders of maximizing stormwater capture and lessening demand for imported water as well as achieving groundwater sustainability under the Sustainable Groundwater Management Act (SGMA). We also support efforts that avoid adverse impacts to water quality and beneficial uses of waters of the state that can result from flood damages and reduced stormwater storage capacity. Additionally, we don’t want to negate the water quality benefits of NPDES Phase 2 implementation projects. To achieve these desired outcomes, we believe that the operation and maintenance of the following facilities need to be excluded from the Proposed Procedures’ wetlands definition:

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- Existing groundwater recharge facilities.
- Existing flood protection and water supply retention/detention basins and reservoirs.
- Existing debris entrapment facilities.
- NPDES Phase 2 implementation projects that involve water quality Best Management Practices.
- Sediment removal to prepare for sea level rise due to climate change. For example, sea level rise has necessitated in some areas the need to build levees along the edge of wetlands to protect people from direct coastal flooding.

In addition, while the Proposed Procedures include the definition of wetland they do not include a definition of “waters of the state”. CSAC and RCRC strongly recommend that the Proposed Procedures include a complete list or categorical descriptions of features that are not jurisdictional. We believe that a case by case determination by the Regional Boards undermines the goal of a uniform application of the Proposed Procedures.

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## **III. Wetland Delineation**

The presence of vegetation needs to be a requirement for the definition of a wetland. Otherwise managers of publicly owned infrastructure, especially flood protection and water supply facilities, will not be able to maintain their facilities’ public health, safety and water supply functions. A potential result from inadequately functioning facilities will be adverse environmental impacts to water supply facilities, local water quality and fish and wildlife habitat.

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#### IV. Procedures for Regulation of Discharges of Dredged or Fill Material to Water of the State

##### A. Project Application Submittal

###### 1. Items Required for a Complete Application (P. 3-4)

CSAC and RCRC appreciate the inclusion of what appears to be uniform criteria on what constitutes a “complete application” for discharges of dredged or fill material in waters of the state. Building upon the proposed criteria, we recommend that the Regional Boards be required to also do the following:

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- Post on their web sites the criteria of a complete application. In addition, the Proposed Procedures need to specify up-front the monitoring and reporting requirements.
- Adhere to the listed criteria in determining “completion” of an application.
- Provide to the applicant within 30 days of receipt of an application a complete list of all information needed to make the application complete. Questions and information requests should be limited solely to issues involving potential impacts to waters of the state.
- Avoid deeming an application incomplete or issue requests for information for the purposes of extending timelines set forth in the Permit Streamlining Act or the U.S. Army Corps of Engineers’ 404 Permit processing regulations, or because of potential public or political controversy in regards to the proposed project.
- Issue the 401 Water Quality Certification (WQC) to the applicant within 30 days of receipt of the applicant’s response to their request for information if the applicant provided all of the information specified in the request for information. Regional Boards should not make the issuance of a 401 WQC contingent upon the applicant obtaining other federal, state or local permits or authorizations.

Regarding the required description of the waters to receive a discharge of dredged or fill material, there is a specific requirement for rounding areas of impacts to the nearest tenth of an acre, but with a caveat of “where applicable.” CSAC and RCRC recommend that this requirement be deleted, as impacts of less than 0.1 acre are minimal.

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We also recommend that the Proposed Procedures be amended to clarify that driving on existing roads or concrete surfaces is not an activity that warrants inclusion as an “impact area.” This approach is consistent with the U.S. Army Corps of Engineers’ 404 Permit regulations (33 CFR Section 323.2(3)(i)), which state: “Section 404 authorization is not required for...any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the United States...”

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###### 2. Additional Information Required for a Complete Application (P. 4-6):

There are many places in the proposed list of required information that refers to information required on a “case-by-case basis.” The procedures need to provide more clarification up-front to applicants on the information needed by Regional Boards for the types of projects that the

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Regional Boards frequently encounter. A list of the types of projects infrastructure managers frequently undertake in waters of the State is attached. The proposed procedures need to specify what information the Regional Boards need to see in applications for these types of frequently undertaken activities. This would allow the Regional Boards and the applicants to focus their time and efforts on achieving a project's compliance with the Water Code rather than multiple rounds of questions and answers to ascertain the scope of the project's activities and impacts to waters of the state.

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The Proposed Procedures would allow the permitting authority on a case by case basis to require supplemental information from the wet season for delineations conducted during the dry season. We believe that this is an unnecessary provision and should be deleted. The Corp delineation manual already includes procedures to delineate waters and other waters during the dry season.

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Regarding the requirement for a draft monitoring plan for all Ecological Restoration and Enhancement Projects, the proposed procedures refer to assessment of conditions of resources "using an appropriate method." The Proposed Procedures need to include a provision requiring the Regional Boards to clarify and post on their web sites, the most current methods deemed "appropriate" for specified resources in waters of the state.

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The Proposed Procedures require consultation with the applicable airport land use commission or other appropriate responsible public agencies to determine whether the proposed compensatory mitigation within five miles of any airport may pose a danger to air traffic safety. CSAC and RCRC recommend that this requirement be deleted as projects are already subject to local airport land use agency rules and regulations.

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The Proposed Procedures also need to clarify that projects that are exempt from the California Environmental Quality Act (CEQA) are compliant with CEQA, and filed Notices of Exemption are not required to make an application "complete."

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## B. Permitting Authority Review and Approval of Applications for Individual Orders

### 3. Alternatives Analysis Submission and Review Requirements (P. 6):

#### d. Exemptions from Alternatives Analysis (P. 7)

CSAC and RCRC recommend that operation and maintenance of existing publicly owned infrastructure be included in the list of activities exempt from Alternatives Analysis. The reason is along the same lines as the justification to exempt "Ecological Restoration and Enhancement Projects." Water quality and beneficial uses in waters of the state will be adversely impacted if the infrastructure does not perform its function. For example, flooding of urban or agricultural areas due to inadequately functioning flood protection facilities will likely result in contaminated water and detritus making their way back to waters of the state. Similar impacts can result in blocked outfalls or failed water or sewer lines. Failed bridges or roadways will typically result in the deposition of vehicles and detritus depositing into waters of the state. In short, the state's water quality and beneficial use objectives are not served if infrastructure is not operated and maintained as designed, and therefore there is no "least environmentally damaging practicable alternative" to operation and maintenance.

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### 5. Compensatory Mitigation (P. 7-9):

Projects that require Lake/Streambed Alteration Agreements from the Department of Fish and Game should be exempt from Proposed Procedures' compensatory mitigation requirements. This would avoid conflicting mitigation requirements from the state and at the same time reduce the workload on the Regional Boards' already limited staffing resources.

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For the same reasons stated for exemptions from Alternatives Analysis, no compensatory mitigation should be required by the State for operation and maintenance of existing publicly owned infrastructure, or for actions undertaken to prevent or mitigate an emergency condition that threatens the public's health, safety or water supply. The state's water quality and beneficial use objectives are not served if operation and maintenance of existing publicly owned infrastructure or response to emergency conditions (e.g., disasters) are penalized. Along the same lines, we have expressed concern over the application of compensatory mitigation against "legacy" projects that were built prior to the advent of the Clean Water Act, the California Environmental Quality Act (CEQA), the California Endangered Species Act (CESA) and the similar protective statutes. The uncertainty of "if and how" mitigation might be required raises a host of issues among the counties.

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Additionally, compensatory mitigation requirements for new infrastructure, including that constructed by developers and transferred to public agencies for operation and maintenance, should address up-front not only the impacts to waters of the State associated with construction of the new infrastructure but also its long-term operation and maintenance. Doing so will address water quality and beneficial use impacts without further hindrance or penalty to the successor managers of the infrastructure.

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The proposed procedures state: "...compensatory mitigation shall be commensurate with the magnitude of impact associated with the project." The proposed procedures should state that no compensatory mitigation is required for impacts to areas that do not contain biological resources, nor for post disaster work on areas where biological resources were eliminated by the disaster.

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The Proposed Procedures also state that if an actual Watershed Plan exists where a project is proposed, then the amount of compensatory mitigation required will be less than the amount of compensatory mitigation required if a plan does not exist. This provision seems arbitrary and we question the rationale for its inclusion.

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Regarding the financial security requirements, the proposed procedures should clearly specify what types of financial securities are allowable. In addition, public agencies should be allowed to utilize "pledges of revenue" for their projects.

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### C. General Orders:

CSAC and RCRC appreciate the inclusion of a general orders as an option for classes of dredged or fill discharge activities and would encourage the Regional Boards to utilize this option.

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### D. Activities and Areas Excluded from the Application Procedures for Regulation of Discharges of Dredged or Fill Material to Waters of the State:

There is no direction for an emergency situation discharge. For example, there are situations where a levee is about to break or a road or freeway is being undermined and fill material (i.e. heavy rock) must be discharged into the waters of the state to avoid loss of life and property. In these situations there may not be an Army Corp Regional General Permit with a corresponding 401 WGC. To address this possible scenario, CSAC and RCRC recommend that the State

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Board and Regional Boards avoid potential liabilities in an emergency situation and allow a discharger to correct the emergency situation without an application but submit an “after the fact” report.

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(cont.)

In addition, the proposed procedures state that “routine maintenance activities of storm water facilities that are regulated under another Water Board Order” are excluded from application procedures under this proposed regulation. The procedures are not clear on what would happen after the existing Water Board Order expires. For example, will routine maintenance activities of storm water facilities be then regulated under the new procedures, or will the existing Water Board Order be renewed and extended? Will these activities be grandfathered in as not having to comply with new procedures? The proposed procedures need to provide clear direction regarding this issue.

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## V. Definitions

The definition of “Ecological Restoration and Enhancement Project” should include any project that “...assists or controls the recovery of an aquatic ecosystem that has been degraded, damaged or destroyed to restore some measure of its natural condition and to enhance the beneficial uses or potential beneficial uses of water.”

This definition should include any project undertaken to comply with Federal or State compensatory mitigation requirements, as such projects that provide the same ecosystem benefits as voluntary restoration projects, and the project will have already undergone vetting by Federal and State environmental agencies.

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This definition should include land conversions that eliminate conditions that U.S. Fish and Wildlife Service, Natural Resources Conservation Service, Farm Service Agency, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Forest Service, U.S. Bureau of Land Management, California Department of Fish and Wildlife, California Wildlife Conservation Board or other Federal or State resource agency has deemed harmful to native species or their habitat.

We also recommend that the Proposed Procedures include definitions General and Individual Orders.

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In concluding, CSAC and RCRC respectfully request your serious consideration of all of the comments and suggested changes outlined above, as well as those submitted by individual counties. We also want to note our appreciation for the time taken by your staff to participate in conference calls with us and our members for the purpose of providing an overview of the Proposed Procedures and to respond to questions and comments.

Thank you again for providing us with the opportunity to share with you the county perspective on this proposed regulatory program.

Sincerely,



Karen Keene, CSAC  
Senior Legislative Representative



Mary-Ann Warmerdam  
Legislative Advocate

**ATTACHMENT**  
**CSAC/RCRC Comment Letter**  
**August 15, 2016**

**Types of projects infrastructure managers frequently undertake in waters of the state:**

- Removal of accumulated sediment and vegetation from flood protection and water supply reservoirs, basins and channels for the purposes of maintaining and restoring the facilities' functional capacities.
- Enlargement of existing flood protection facilities, by means of deepening and/or increase in dam/levee/embankment height, to comply with Federal, State or local flood protection standards.
- Removal of vegetation from dams and flood protection levees to comply with orders issued by Federal or State regulatory agencies, including the U.S. Army Corps of Engineers and the California Department of Water Resources' Division of Safety of Dams.
- Repairs of channels, levees and dikes, including concrete patching; concrete replacement; backfill of eroded areas; replacement of displaced rip rap; grouting rip rap.
- Installation, maintenance and removal of temporary post fire debris barriers.
- Installation, repair and replacement of outfalls.
- Modification of dam spillways and dam crests to comply with the flow capacity requirements of the California Department of Water Resources' Division of Safety of Dams.
- Buttressing of dams to comply with the seismic safety requirements of the California Department of Water Resources' Division of Safety of Dams.
- Removal of vegetation at bridge abutments to allow for safety inspections and to prevent damage to the structural integrity of the bridge.
- Replacement or reinforcement of bridge piers and abutments to meet Federal and State seismic safety or loading standards.
- Replacement of bridges due to age, obsolescence in regards to safety standards, or severe damage.
- Repairs of road embankments, including concrete patching; concrete replacement; backfill of eroded areas; replacement of displaced rip rap; grouting rip rap.
- Removal of accumulated sediment and vegetation from road culverts for the purposes of maintaining and restoring the facilities' functional capacities.
- Replacement of road culverts due to age, obsolescence in regards to safety standards, or severe damage.
- Installation, repair and replacement of dip crossings.

- Removal of accumulated sediment and vegetation from water treatment wetlands for the purposes of restoring the facilities' treatment capacities.
- Installation, repair and replacement of stream gaging and water quality sampling stations in channels.
- Installation, repair and replacement of buried or overhanging waterlines and sewer lines.