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State Water Resources Control Board
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Via email: commentletters@waterboards.ca.gov

Re: Comments on the Proposed Order for Clean Water Act Section 401 Water Quality Certification and Waste Discharge Requirements for Restoration Projects Statewide (proposed General Order) and supporting California Environmental Quality Act (CEQA) Draft Program Environmental Impact Report (PEIR).

Dear Members of the Board,

On behalf of Citizens Committee to Complete the Refuge, Center for Biological Diversity, California Coastkeeper Alliance, and Sierra Club California, we submit these comments regarding the proposed Order for Clean Water Act Section 401 Water Quality Certification and Waste Discharge Requirements for Restoration Projects Statewide (proposed General Order) and supporting California Environmental Quality Act (CEQA) draft Program Environmental Impact Report (PEIR).

Our organizations support the concept of streamlined permitting for well-designed restoration projects. However, we are concerned that the proposed General Order is overly broad and over inclusive and, as a result, its adoption and application may result in unintended adverse consequences to water resources, species, and habitats. Restoration projects are complex and may have both beneficial and adverse impacts to various resources, it is important to have a transparent public process when the Regional Boards are balancing those factors. Particularly for large-scale restoration projects that will affect many resources and many public interest factors, a public process and review period may be needed to make sure the impacts to various environmental resources are fully considered and resources are adequately protected.

1. Definition of “restoration projects” in the General Order is Overbroad

We are concerned that the proposed definition of “restoration projects” for this General Order differs significantly from other definitions of restoration projects adopted by the State Water Resources Control Board (SRWCB). The SWRCB and the public spent a tremendous amount of time developing a definition of “restoration projects” in the *“Ocean Waters of California, and the Water Quality Control Plan for Inland Surface Waters and Enclosed Bays and Estuaries for Waters of the United States”* adopted April 2, 2019 and revised April 6, 2021 (Dredge and Fill Procedures). Restoration projects in that document are defined in the following manner:

“Ecological Restoration and Enhancement Project means the project is voluntarily undertaken for the purpose of assisting or controlling 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, including potential beneficial uses of water.

Such projects are undertaken:

1) in accordance with the terms and conditions of a binding stream or wetland enhancement or restoration agreement, or a wetland establishment agreement, between the real property interest owner or the entity conducting the habitat restoration or enhancement work and:

- a. a federal or state resource agency, including, but not limited to, the 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, California Coastal Conservancy or the Delta Conservancy;
- b. a local agency with the primary function of managing land or water for wetland habitat purposes; or
- c. a non-governmental conservation organization; or

2) by a state or federal agency that is statutorily tasked with natural resource management. These projects do not include the conversion of a stream or natural wetland to uplands or stream channelization. It is recognized that Ecological Restoration and Enhancement Projects may require ongoing maintenance or management to maximize fish, wildlife, habitat, or other ecological benefits, or filling gullied stream channels and similar rehabilitative activities to re-establish stream and meadow hydrology. Changes in wetland plant communities that occur when wetland hydrology is more fully restored during rehabilitation activities are not considered a conversion to another aquatic habitat type. These projects also do not include actions required under

a Water Board Order for mitigation, actions to service required mitigation, or actions undertaken for the primary purpose of land development. [emphasis added]

And under the “*Amended order for Clean Water Act Section 401 General Water Quality Certification for small habitat restoration projects File #SB12006GN*” only the following categories of projects would qualify:

“1. California Environmental Quality Act - The project shall be eligible for a categorical exemption under California Code of Regulations title 14, section 15333, "Small Habitat Restoration Projects." Examples of small habitat restoration projects may include, but are not limited to:

- a. Revegetation of disturbed areas with native plant species.
- b. Wetland restoration, the primary purpose of which is to improve conditions for waterfowl or other species that rely on wetland habitat.
- c. Stream or river bank re-vegetation, the primary purpose of which is to improve habitat for amphibians or native fish.
- d. Projects to restore or enhance habitat that are carried out principally with hand labor and not mechanized equipment.
- e. Stream or river bank stabilization with native vegetation or other bioengineering techniques, the primary purpose of which is to reduce or eliminate erosion and sedimentation.
- f. Culvert replacement conducted in accordance with published guidelines of the California Department of Fish and Game Wildlife (DFG) (CDFW) or National Oceanic & Atmospheric Administration Fisheries, the primary purpose of which is to improve habitat or reduce sedimentation.

2. The Project Size - The project size shall not exceed five acres or a cumulative total of 500 linear feet of stream bank or coastline.

The SWRCB’s General Certification for Small Habitat Restoration Projects (SHRP) also specifically disallows the use of this approval process for:

“4. Compensatory Mitigation Projects - The project shall not be a compensatory mitigation project. [emphasis added]

5. Primary Project Purpose - This Order authorizes activities whose primary purpose is habitat restoration. The project shall not be for restoration and enhancement conducted as part of a larger project whose primary purpose is not habitat restoration, e.g., land development or flood management. [emphasis added]

Both of these other approaches narrowly define the range of activities considered “restoration” activities. The definition of restoration projects in the Dredge and Fill Procedures makes clear that “restoration” activities do not include “actions required under a Water Board Order for mitigation, actions to service required mitigation, or actions undertaken for the

primary purpose of land development.” The General Certification for Small Habitat Restoration Projects reiterates that for projects where restoration and enhancement actions are “conducted as part of a larger project whose primary purpose is not habitat, e.g. land development or flood management” [emphasis added] the use of the General Certification is disallowed.

In contrast the proposed definition of restoration project for this General Order is silent regarding such prohibitions:

An eligible project type that would result in a net increase in aquatic or riparian resource functions and/or services through implementation of relevant protection measures listed in Section 2.6, *Categories of Restoration Projects in the Order*, and Section 2.8, *Programmatic Sideboards, General Protection Measures, and Other Requirements*. The project must also be included in the list of eligible project types (see Section 1.2, *Categories of Eligible Project Types*). A restoration project permitted by the Order may include multiple benefits, such as groundwater recharge, recreation, flood management, water quality improvement, and/or adaptation to climate change. Restoration projects permitted by the Order may also contribute to the protection of existing and potential beneficial uses identified in each of the nine Regional Boards water quality control plans (basin plans).

The draft documents fail to provide adequate supporting rationale for the SWRCB to adopt a substantially different and much broader definition of the list of activities that could be covered as “restoration activities” under this draft General Order than under the Dredge and Fill or SHRP.

As stated earlier, we heartily recognize the need to encourage implementation of restoration projects, however, we believe the list of activities that could be covered by the draft General Order is overly broad.

The General Order would allow too wide a range of activities to be permitted than is appropriate for a general certification. 23 C.C.R. § 3861 states for a “general certification action”:

- (b) A class of activities receiving general certification shall
 - (1) consist of the same or similar types of activities;
 - (2) involve the same or similar types of discharges and possible adverse impacts requiring the same or similar certification conditions or limitations in order to alleviate adverse impacts to water quality

The draft General Order provides no limitations that would ensure the order applies only to the same or similar types of activities, discharges or adverse impacts. There are no limits on the size of a large restoration project, the types of projects than can be permitted by the General Order range from restoration projects that include recreation activities, flood

management, ground water recharge, bridges, culverts, etc. Given the breadth of the activities that could be covered and the scant information provided in the documents, it is not possible to determine the magnitude of potential impacts to waters and wetlands under this General Order.

At minimum, the PEIR should be revised to provide some estimate of the number of the projects that are projected to be utilized under the different categories of activities per year and per the life of this General Order. The PEIR should provide some indication of the size and scale of restoration projects that are anticipated to be authorized under the proposed General Order. For example, what is the average length of bioengineered bank stabilization projects? How many of these types of projects would be anticipated per year? All we know currently is that the footprint of impacts can range for example from bioengineered bank stabilization projects that are over 500 linear feet in length to an unknown length.

2. Inclusion of Restoration Project that Provide Mitigation for Larger Projects in the General Order May Undermine Adequate Project Review

In addition, we are deeply troubled by the following draft General Order language that seems to remove the restrictions previously imposed on the use of an exemption or expedited permit review for “restoration” projects that are “actions required under a Water Board Order for mitigation, actions to service required mitigation, or actions undertaken for the primary purpose of land development”:

E. General Compliance Enrollment and authorization of restoration projects under this Order are for the discharges of waste associated with only the restoration action and shall not be construed as authorization or any compliance determination for any related underlying project or activity. Restoration projects serving as mitigation for a related project or activity may be enrolled under this Order; however, this Order does not include any findings regarding the underlying related activity’s impact to water quality, public trust resources, or other matters of public interest. When considering the impact of restoration projects under this Order, the approving Water Board considers only those adverse changes that may result from approval of the new restoration project, including multi-benefit projects that may include non-restoration action elements (e.g., recreation, flood protection). [emphasis added]

What is meant by an “underlying related project or activity?” Are there restrictions on the type of “underlying related project or activity”? Certainly, this cannot pertain to projects “whose primary purpose is not habitat restoration, such as land development or flood management”? The documents provided fail to explain the basis for this significant deviation from prior, firmly stated exclusions or provide any rationale why restoration projects that include “non-restoration action elements” would be eligible for consideration under this General Order.

We strenuously object to the inclusion of compensatory mitigation projects tied to land development projects because compensatory mitigation is proposed for projects, not as a

voluntary action, but because it is required to compensate for adverse impacts to waters of the U.S. and waters of the State that result will result in the loss of habitats, beneficial uses, and the functions and values of waters and wetlands.

We are also concerned about segmenting the review of restoration activities from those of related non-restoration action elements such as flood protection. The General Compliance language places no restrictions on what is considered a “multi-benefit project” or what is meant by “flood protection.” Could the phrase “flood protection” include traditional engineered levees and seawalls? Is this General Order intended to provide authorization for restoration/compensatory mitigation components of a flood protection project that employs traditional hard engineering (traditional riprap levees, seawalls, etc.) or is the use of this General Order limited to multi-benefit projects with “flood protection” actions such as those listed under the discussion of “floodplain restoration”?

And what is meant by the language in last sentence? Is this sentence saying for example, that for multi-benefit projects that may include non-restoration action elements (e.g., recreation, flood protection), the Water Board will only consider the adverse changes that may result from the restoration components and will not consider the adverse changes that may result from the “non-restoration components”? If so, how and why is it permissible to evaluate a “restoration project” separately from the “underlying related activity’s impacts to water quality, public trust or other matters of public interest”? The Dredge and Fill Procedures clearly state, “Project means the whole of an action that includes a discharge of dredged or fill material to waters of the state.” [emphasis added.] In contrast, the approach described above for the General Order suggests that the SWRCB would allow and encourage piece-meal review of a project’s impacts.

We have substantive concerns regarding the impact the General Compliance language of the General Order could have on CEQA review of multi-benefit projects. If, as an example, a multi-benefit project has an upland/flood plain component (e.g. in the arid regions of the state) would the applicant be able to include both aquatic restoration components and upland/flood plain restoration components and bypass any additional site specific CEQA compliance for the project as a whole including any upland components of the project that may affect water quality?

Similarly, with respect to water conservation projects the General Order does not explain what restrictions, if any, are proposed during periods of drought when low fall and winter rains are predicted or how would large infrastructure associated with “water conservation” would be analyzed. For example, if the General Order allows for inclusion of off-stream storage projects where water is collected during high flows and stored does the General Order cover any actual channel or diversion created? If the General Order covers activities such as construction of water storage tanks, pipelines and other infrastructure will the impacts of all of that construction fall within the General Order? If water conservation includes new reservoirs for water to be collected during periods of high flows (i.e. the rainy season), how will the General Order ensure consideration of potential impacts as a consequence of drying

reservoirs in periods of drought? Some examples of potential impacts might include loss of downstream sediment, or the addition of sediment in areas that might adversely impact the aquatic environment, air quality impacts from dry sediment being lofted into the air, which can also later be deposited in nearby streams, etc.

As explained further below and the SWRCB is well aware, CEQA prohibits “piecemeal” review of the significant environmental impacts of a project. Here, the SWRCB may not divide a single project into smaller individual projects in order to avoid its responsibility to consider the environmental impacts of the project as a whole – it cannot properly consider approval of a restoration project that is part of a larger project separately from the “underlying related activities” that may have also impacts to water quality and other related resources.

While we certainly support encouragement of restoration projects that restore or enhance beneficial uses and water quality, we cannot condone piece-meal review of projects.

3. Net Benefit Standard Needs to be Clearly Defined in the General Order

Net benefit should be clearly defined to require that the analysis of net benefit be within each watershed/stream affected and also consider net benefit to each of the resources. The General Order should ensure that the net benefit analysis can’t trade-off improvements in water quality in one watershed against water quality impairment in another watershed and the analysis cannot trade-off benefits to one species and its habitat against impacts to or degraded habitat condition for another species. While we understand that the proposal limits the use of General Order where “take” of listed species will occur “except as authorized by agencies (CDFW and USFWS),” that limitation alone does not ensure that the net benefit analysis is provided for each of the listed species and habitat type and wholly fails to address other rare, imperiled or special status species and habitat types and natural communities that may be affected by the projects covered under the General Order.

4. Other CEQA issues

a. PEIR project description and identification of likely impacts is inadequate

The EIR intended for use as a first-tier EIR for a program or policy should comply with CEQA’s standards for an adequate environmental analysis in an EIR for a planning-level action, which is to say that it should “focus on the secondary effects that can be expected to follow from the adoption [of the policy].”¹ In defining the scope of the analysis, the project should be defined to include “the whole of an action, which has a potential for resulting in a physical change in the environment, directly or ultimately,” and “may be subject to several discretionary

¹ Cal. Code Regs. tit. 14, § 15146. We agree with the CDFA that a program EIR is appropriate in this circumstance because the CalCannabis Licensing program will set the floor for environmental protection related to cannabis cultivation across the state.

approvals by governmental agencies.”² The entire project being proposed for approval, and not some smaller aspect of the project as a whole, must be described in the EIR.³ “‘Project’ is given a broad interpretation in order to maximize protection of the environment [citation].”⁴ This PEIR fails to do that.

A project description must include all relevant parts of a project, including reasonably foreseeable future expansion or other activities that are a part of the project.⁵ In *San Francisco Ecology Ctr. V. City & County of San Francisco*,⁶ the Court stated that agencies are encouraged under CEQA guidelines to make reasonable forecasts about future conditions. Those reasonable forecasts need to include predicted sea level rise and other climate change related changes to the environment when assessing the likely impacts of the broad range of projects that could be approved under the proposed General Order. The PEIR does not include such an analysis.

It is well settled that CEQA forbids “piecemeal” review of the significant environmental impacts of a project. A public agency may not divide a single project into smaller individual projects in order to avoid its responsibility to consider the environmental impacts of the project as a whole.⁷ This rule derives, in part, from section 21002.1, subdivision (d), which requires the lead agency--in this case, the Commission--to “consider[] the effects, both individual and collective, of *all activities* involved in [the] project.” (Emphasis added.) Courts have considered separate activities as one CEQA project and required them to be reviewed together where, for example, the second activity is a reasonably foreseeable consequence of the first activity;⁸ or both activities are integral parts of the same project.⁹

² *San Joaquin Raptor*, supra, 27 Cal. App. 4th at 730; Guidelines § 15378.

³ See, e.g., *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1297.

⁴ *San Joaquin Raptor*, 27 Cal. App. 4th at 730.

⁵ *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 396. In *Laurel Heights*, the University of California planned to transfer medical laboratories to an office building in a residential neighborhood. *Id.* at 389. Initially, the laboratories were to occupy 100,000 square feet of a 354,000-square-foot building. *Id.* at 398. The University claimed that it had not formally decided to occupy the entire building, but the court noted that statements by the chancellor in the final EIR, public releases in newsletters, public meeting minutes, and private correspondence all indicated the University’s intent to occupy the entire building when another agency’s lease expired in several years.⁵ *Id.* at 397. Accordingly, there was “credible and substantial evidence” that the University’s occupancy of the entire building was a reasonably foreseeable consequence of the decision to move into the building. *Id.* at 398.

⁶ (1975) 48 Cal.App.3d 584, 595.

⁷ *Orinda Assn. v. Board of Supervisors* (1986) 182 Cal. App. 3d 1145, 1171.

⁸ *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-84.

⁹ *Whitman v. Board of Supervisors* (1979) 88 Cal.App.3d 397, 414-415.

The PEIR also improperly fails to analyze all physical changes to the environment. The PEIR repeatedly fails to identify and analyze significant effects. The determination “whether a project may have a significant effect plays a critical role in the CEQA process.”¹⁰ “The determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data.”¹¹ “In evaluating the significance of the environmental effect of a project, the lead agency shall consider direct physical changes in the environment which may be caused by the project and reasonably foreseeable indirect physical changes in the environment which may be caused by the project.”¹²

As explained above, given the broad definition of restoration project and the lack of any specific information on the number and scope of projects that could fall within the General Order it is impossible for the public or decision makers to know what impacts are likely and whether they are being adequately addressed by the General Order requirements.

b. The Range of Alternatives is too Narrow.

The discussion of mitigation and alternatives is “the core of an EIR.”¹³ The lead agency must select a reasonable range of alternatives for evaluation in the EIR when determining its scope.¹⁴ The scope of alternatives reviewed must be considered in light of the nature of the project, the project’s impacts, relevant agency policies, and other material facts.¹⁵ Alternatives are not properly formulated and fleshed out in the PEIR. Action Alternatives in the PEIR only suggest what “could” be changed from the proposal but do not actually analyze any specific changes or suite of changes to the proposed project. The PEIR then uses overly narrow formulation of the project objectives to reject all action alternatives. This approach undermines clear-eyed assessment of potential impacts that could be avoided through alternatives.

When an EIR is considering a General Order that would apply to myriad projects across the state, the complex nature of the projects, scale of potential impacts, number of moving parts should present a broad, nuanced range of alternatives. Mere blanket alternatives which consider the non-implementation of all or part of the project, as presented in the PEIR are not sufficient.

¹⁰ Guidelines, § 15064(b)

¹¹ Id., § 15064(b)

¹² Id., § 15064(d)

¹³ *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.

¹⁴ Guidelines, §15126.6(a); *Citizens of Goleta Valley*, 52 Cal. 3d at 566.

¹⁵ *Mira mar Mobile Community v City of Oceanside* (2004) 117 Cal. App. 4th 477; *City of Rancho Palos Verdes v City Council* (1976) 59 CA3d 869.

At minimum, an alternative should be analyzed that uses the dredge and fill procedures definition of "restoration projects" and the categories of actions permitted under the GC for SHRP to assess whether by narrowing the definition in these ways, significant impacts to the environment can be avoided.

c. *Monitoring and Reporting*

The General Order should require that all monitoring and reporting for projects that rely on the General Order should be publicly available and posted by the boards on their websites in a timely manner. We are concerned that accurate and current information regarding projects is often difficult for the public to obtain. For example, much of the information currently available on the EcoAtlas website is very incomplete and out of date.

4. *Issues Raised in Scoping Were Not Adequately Addressed in the PEIR*

Many of the issues raised in these comments were presented to the board earlier, during the scoping process, but are not adequately addressed in the PEIR. The San Francisco Bay Conservation and Development Commission (BCDC) submitted scoping comments in a letter dated November 22, 2019, and in that letter several substantive concerns were raised that have not been adequately addressed in the PEIR or in the language of the draft General Order. One substantive comment is that restoration success is extremely dependent upon site specific design that requires adequate review and time for planning. It is still unclear whether the proposed expedited permit review process in the General Order will ensure and not hinder a rigorous review of proposed restoration plans.

Another concern raised by BCDC is that large scale restoration projects could result in habitat trade-offs where one type of habitat is replaced with another, which is why rigorous local, regional and cumulative review is required to ensure habitat conversions do not adversely impact suites of organisms. The example provided in the BCDC comment letter is where "wetland establishment activities in subtidal or some tidal areas could result in habitat type conversion that inadvertently eliminates or significantly reduces the numbers of certain populations of fish or wildlife (e.g. habitat conversion to another habitat type could disrupt foraging of certain bird guilds)." This issue has not been sufficiently addressed in the PEIR. The threshold of significance provided in the PEIR focuses on avoiding adverse impacts to listed species, but fails to adequately consider the potential individual and cumulative adverse impacts of the General Order related to habitat conversion as described above.

The BCDC letter also stated the PEIR should discuss whether the General Order would consider sea level rise and that the PEIR "...should consider how climate change may alter the way that allowable restoration projects will impact Bay and marsh natural resources (e.g. how might changing precipitation patterns and sea level rise impact the projects that would be allowed through the General Order)." The PEIR has not addressed this issue.

A related concern is that the long-term sustainability of tidal wetlands, restoration projects and proposed restoration projects may be adversely impacted by sea level rise and in

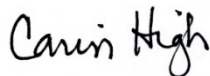
the San Francisco Bay Area. This is significant, especially in light of diminishing sediment supplies that are necessary to sustain these habitats. It is therefore all the more important that large scale restoration projects be carefully reviewed and that coordination occurs across regional jurisdictions to ensure beneficial reuse of sediment is directed towards projects that will be sustainable in the long-term to avoid squandering this precious resource on projects that will only provide short-term gains. Will this be possible under the expedited review proposed by the draft General Order?

Thank you for the opportunity to submit these comments. We request that we be informed of any future opportunities for public review or comment. Please do not hesitate to contact us if you have any questions.

Respectfully submitted,



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