March 11, 2019

TO: Senate Committee on Environmental Quality

SUBJECT: **SB 1 (ATKINS) CALIFORNIA ENVIRONMENTAL, PUBLIC HEALTH, AND WORKERS DEFENSE ACT OF 2019**
HEARING SCHEDULED – MARCH 20, 2019
OPPOSE– AS INTRODUCED DECEMBER 03, 2018

The California Chamber of Commerce and the organizations listed must respectfully **OPPOSE SB 1 (Atkins)**. Our coalition represents nearly every major business sector in California directly impacted by **SB 1.** While we appreciate this bill's goal of preserving the state's environmental legal regime from any federal changes, **SB 1** is too broadly written, contains ambiguous and undefined standards that will create significant costs, uncertainty and unintended consequences for the regulated community, raises substantial constitutional concerns regarding a lack of due process and violations to the single-subject rule, improperly delegates substantial legislative authority to state agencies with no oversight, threatens to undermine wetland regulation efforts currently being pursued by the State Water Resources Control Board, as well as operation of the Central Valley Water Project, and will instigate unnecessary litigation against state agencies and regulated entities.

If the intent of **SB 1** is to preserve the status quo in California by preempting our state agencies from mirroring any changes to federal environmental laws or regulations, the bill demands far more precise and targeted language that addresses only circumstances where there is a direct interrelationship between California and federal environmental laws. California agencies already retain *existing* authority to promulgate laws and regulations that exceed federal standards – and with limited exceptions, the majority of California's environmental and labor laws and regulations already go well beyond federal requirements and stand alone as some of the most protective environmental laws in the nation. Changes at the federal level in these circumstances have no practical effect on California's human health or the environment since state law is already more protective.

This letter outlines our concerns with the bill.

1. **SB 1 is unnecessary-- California agencies already have the authority and directive to adopt standards and requirements beyond the federal standards to the extent allowed under federal law; SB 1 strips away Legislative oversight, provides an ambiguous "Less Stringent" metric for agencies to follow, and diverts state resources to the SB 1's quarterly listing process**

The sponsors agree that California agencies already have the authority and power to do what this bill requires them to do - promulgate and enforce requirements at least as protective as federal environmental law within their respective jurisdictions to the extent permitted under federal law. As demonstrated by California's preeminence in environmental protection, our agencies frequently exercise their discretion to do so. There is no indication that California agencies would do any less if the federal government were to roll back major environmental laws or regulations that directly impact California public health and the environment. In the event such action is preempted, **SB 1** would not provide any assistance because a state statute cannot override federal preemption. Additionally, to the extent an agency needs additional authorization in a specific area of the law, the Legislature may step in and provide such authorization by directing the agency to act utilizing existing emergency regulation procedures under the California Administrative Procedures Act (APA). A targeted approach in that regard would allow the Legislature and the agencies to directly address the issue, provide due process to all stakeholders, including NGOs and regulated entities, and minimize unintended consequences that result from the overly broad approach of this bill.

2. **SB 1 allows state agencies to promulgate formal rulemaking without notice and comment by circumventing the California Administrative Procedure Act in violation of procedural due process protections.**

SB 1 expressly mandates that agencies shall adopt measures pursuant to **SB 1** by one of two pathways: emergency regulations not subject to review by the Office of Administrative Law (OAL), or in accordance with Section 100 of Title 1 of the California Code of Regulations. Any measures adopted shall remain in effect until 2021.

Emergency regulations adopted pursuant to the APA provide necessary due process safeguards. For example, an emergency regulation generally requires notice, remains in effect for only 180 days unless OAL approves a readoption of the emergency regulation during that time period, is subject to OAL review, and only allows for two readoptions before the agency must go through the formal notice and comment rulemaking process. **SB 1** circumvents all of these due process safeguards.

APA Section 100 "Changes Without Regulatory Effect" allows an agency to bypass notice and comment only in very limited circumstances. Regulations of the scope contemplated by **SB 1** are far more substantive, far reaching and consequential than Section 100 was meant to allow. Codifying federal law into California law, as **SB 1** provides, is not appropriately pursued under a Section 100 "Change without Regulatory Effect."

SB 1 therefore allows the state agencies when promulgating regulations to completely bypass the notice and comment procedures of the APA in its entirety in direct violation of procedural due process protections that are the bedrock of the California Constitution. Given the courts' deference to agency decisions on matters within the scope of their expertise and in the absence of an administrative record, the Legislature is providing the agencies *carte blanche* authority to conduct formal rulemaking without any Legislative, public or OAL notice, comment or oversight.

3. **"Less Stringent" is an ambiguous standard subjecting state and local agencies and regulated entities to unnecessary litigation over future, unknown laws and regulations that are not subject to legislative oversight or public notice and comment**

SB 1 attempts to lock in place federal standards "in existence" at a date certain if any changes to federal standards are "less stringent." As "less stringent" is undefined and open to numerous interpretations in the environmental context, **SB 1** will bring significant unintended consequences.

For example, California is currently working to revise its version of the Total Coliform Rule in response to the new Federal Revised Total Coliform Rule, which became effective under federal law on April 1, 2016. The U.S. EPA spent many years developing an *e. coli* standard to replace the fecal coliform standard. The change is a more appropriate standard, as it is measuring the constituent that actually threatens public health, rather than a surrogate that may or may not threaten health. If **SB 1** had been in place when the *e. coli* standard was adopted, California could have been prohibited from adopting the improved standard that was just as protective of the environment and public health, but that simply created a more accurate measurement of water quality impairments. Whether this standard is "less stringent" under **SB 1** would be a discretionary decision left entirely up to the agency with *no* notice and comment opportunity for the public nor OAL review. Rushing to place federal environmental laws into California law without any notice, without any opportunities for change, and without any stakeholder input, means California risks changing standards contrary to more developed science.

Other examples of unintended consequences include:

- **Delta Management**: If negotiations on improvements to manage the water delivery system and fisheries in the Delta leads to a potential increase in allowed incidental take of salmon at the water pumps in exchange for restrictions on ammonia discharges from publicly owned treatment works, **SB 1** would prohibit this from occurring because the increased incidental take allowance would be viewed as backsliding against current Endangered Species Act (ESA) take restrictions. This would

prevent an improvement in overall management because no changes would be allowed that expand take under the ESA even if overall the change was better for our environment.

- **Central Valley Project (CVP) and State Water Project (SWP)**: If certain provisions in **SB 1** are triggered, it would lock in the current Biological Opinions (BiOps) issued by NOAA's National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) on the long-term operations of the CVP and SWP, which include Reasonable and Prudent Alternatives (RPAs) designed to alleviate jeopardy of listed species and adverse modification of critical habitat. The U.S. Bureau of Reclamation (Bureau), NMFS and the Department of Water Resources annually review the BiOps to determine the efficacy of the prior years' water operations and regulatory actions prescribed by their respective RPAs, with the goal of developing lessons learned, incorporating new science, and making appropriate scientifically justified adjustments to the RPAs or their implementation to support real-time decision making for the next water year. If changes need to be made, the Bureau holds public hearings to gain input from stakeholders to ensure all parties are aware of the proposed changes and can offer input into how the system should be operated. As we have seen in these past years of drought, and considering climate change predictions, flexibility in management is essential. This flexibility has also fostered new and innovated collaborative efforts between farmers and researchers to help restore species populations, such as salmon and delta smelt, by creating improved habitat on winter flood plains normally farmed during the spring and summer months. These projects aim to improve water supplies, flood control and the estuary's struggling ecosystem by improving infrastructure, flood capacity and habitat throughout the Yolo Bypass and other sections of the Delta. Flexibility in the BiOps is needed to continue to allow and encourage this type of innovation and adaptation to changing conditions and improved science.

These practical implications and consequences should be given serious consideration, especially given the broad language used in the bill.

4. **SB 1 subjects state and local agencies to lawsuits, including when reasonable minds can differ as to whether a standard/requirement is "less stringent" than existing federal law, and encourages such lawsuits through a one-sided attorneys' fees provision and the vague/ambiguous language of the bill; Entities subject to promulgated regulations will be forced to intervene in lawsuits in order to have any input in the process**

SB 1 will likely instigate a wave of new litigation because anyone can now bring a writ of mandate to compel a state or local agency to perform an act required by, or to review a state or local agency's action for compliance with, any of the laws subject to **SB 1**. The anticipated prevalence of such prospective litigation is greatly amplified by:

- The vague, ambiguous, and broad language of the bill. For example:
    - The use of a specific date – i.e., January 19, 2017 – to set complex environmental standards is inconsistent with the nature of laws and science, which evolve and are modified, amended, and clarified over time.
    - The determination of which rule or standard is more or less "stringent" will likely lead to a difference of opinion - and thus litigation - because stakeholders frequently disagree on scientific applications and approaches depending on their specific interests. One merely needs to point to the disagreements regarding the science as applied to the California WaterFix project as an example. While some view flows as the environmentally superior guiding principle, others believe that there are reasonably prudent alternatives that, together, yield greater environmental protection (even if flows are reduced). The other example noted above regarding whether or not the e-coli standard is more stringent than the fecal coliform standard highlights why, had **SB 1** been in place before the federal standard went into effect, litigation would have been a virtual certainty.

- To guard against any potential changes to federal citizen suit provisions, **SB 1** would allow for recovery of attorneys' fees pursuant to Code of Civil Procedure section 1021.5 and expert fees pursuant to Code of Civil Procedure section 1033 to enforce any standards promulgated pursuant to this bill. Similarly, the ambiguity as to what constitutes "less stringent" under the bill will inevitably instigate lawsuits challenging agency determinations and inevitably force other stakeholders to intervene.

- There are no set timelines for compliance; yet the litigation provision goes into effect immediately.

- **SB 1** requires the state agencies to analyze and promulgate a list of federal changes, and then conduct emergency rulemaking, etc. in response. This process alone will expose state agencies to litigation *regardless* of whether there is a change at the federal level. This is especially true given no notice or comment is provided for any standards adopted pursuant to the bill.

- **SB 1** also fails to address how a regulated entity will comply with any newly adopted laws or regulations adopted by state or local agencies that once were federal-only requirements. Entities should not be subject to entirely new procedural reporting processes under state law.

5. SB 1 violates the California Constitution by addressing federal worker wage, hour, overtime and other labor standards into a bill also addressing complex federal environmental laws

Any one of the federal environmental laws (e.g. Clean Air Act, Clean Water Act, Endangered Species Act) **SB 1** addresses would be an expansive bill on its own. **SB 1** combines all three of these complex federal environmental laws and respective regulations into a single bill and then takes the extraordinarily step of including the Federal Labor Standards Act of 1938, the Federal Occupational Safety and Health Act of 1970, and the Federal Coal Mine Health and Safety Act of 1969, and *all* regulations established pursuant to those regulations.

Under the California Constitution, "[a] statute shall embrace but one subject, which shall be expressed in its title." (Cal. Const. art. IV, § 9.) This constitutional provision protects against several proposals being combined into a single bill so that legislators, by combining their votes, obtain a majority for a measure. which is contrary to the single-subject rule. (See, e.g. *Harbor v. Deukmejian* (1987) 43 Cal. 3d 1078, 1096) At a minimum, **SB 1** clearly deals with more than one subject by including the federal Fair Labor Standards Act of 1938, the federal Occupational Safety and Health Act of 1970, and the Federal Coal Mine Health and Safety Act of 1969 into a bill addressing a myriad of complex federal environmental laws and regulations, including the Clean Water Act, Clean Air Act, and the Endangered Species Act. Like in *Deukmejian,* where the Supreme Court found a single subject violation because the bill's provisions were only "minimally germane" through an excessively general topic like "public welfare," **SB 1** runs afoul by trying to address wage, overtime and a plethora of other labor law issues with unrelated environmental standards and regulations under the guise of "public welfare."

For all of these reasons, we must **OPPOSE SB 1 (Atkins).**

Sincerely,

Adam J. Regele, Policy Advocate
California Chamber of Commerce

Will Scott, Jr., African American Farmers of California
Richard Matoian, American Pistachio Growers
Tricia Geringer, Agricultural Council of California
Michael Boccadoro, Agricultural Energy Consumers Association
Aaron Lowe, Auto Care Association
Matthew Hargrove, Building Owners and Managers Association

Terry Gage, California Agricultural Aircraft Association
Jelisaveta Gavric, California Association of Realtors
Michael Miller, California Association of Winegrape Growers
Nick Cammarota, California Building Industry Association
Michael Hargrove, California Business Properties Association
Casey Creamer, California Citrus Mutual
Adam Harper, California Construction and Industrial Materials Association
Roger Isom, California Cotton Ginners and Growers Association, Inc.
Noelle Cremers, California Farm Bureau Federation
Kristin Kolpitcke, California Forestry Association
P. Anthony Thomas, California Independent Petroleum Association
Trudi Hughes, California League of Food Producers
James Simonelli, California Metals Coalition
Rodney Perini, CAWA – Representing the Automotive Parts Industry
Nicole Quinonez, Household & Commercial Products Association
Matthew Hargrove, International Council of Shopping Centers
Matthew Hargrove, NAIOP
Shawn Lewis, National Federation of Independent Business
Manuel Cunha, Jr., Nisei Farmers League
Ken Dunham, West Coast Lumber & Building Material Association
Roger Isom, Western Agricultural Processors Association
Gail Delihant, Western Growers Association
Chuck White, Western Independent Refiners Association
Renee Pinel, Western Plant Health Association
Kathy Lynch, Western Wood Preservers' Institute
Margo Parks, Western States Petroleum Association

cc: Kip Lipper, Office of Senate President pro Tempore Toni Atkins
Rachel Wagoner, Office of the Governor
David Garcia, Senate Committee on Environmental Quality
Morgan Branch, Senate Republican Caucus
Members, Senate Committee on Environmental Quality

AJR:mm