



April 16, 2013

Via Electronic Mail

Mr. Bill Orme
State Water Resources Control Board
Division of Water Quality
P.O. Box 100
Sacramento, CA 95814

Dear Mr. Orme:

We are writing to express our serious concern and opposition to the dramatic changes in the Version 6.5, January 28, 2013, Preliminary Draft Wetland Area Protection and Dredged or Fill Permitting Policy (WRAPP). We have participated in the stakeholder process for the development of the language of this policy for more than seven years and feel we were stunned when we reviewed the sweeping changes in your latest draft.

When members of the environmental community met with State Water Resources Control Board (State Water Board) staff in October 2012, we believed the WRAPP was an effort worthy of our support, even though significant compromises had been made by the environmental community. Indeed, our acceptance of the narrow definition of wetlands was regarded as a significant compromise. Despite the fact that the draft we reviewed in October 2012 was weaker than what we would have liked to have seen, on the whole, our community believed that Version 4.3, October 5, 2012 provided enough incremental improvement in the protection of waters of the State and was consistent with the policy of "no net loss."

Unfortunately, we cannot support the latest version of the WRAPP, in its current form, as it is inconsistent with existing federal regulation and significantly weakens the State Water Board's ability to protect waters of the State. The language regarding avoidance and permit review is so vague that it no longer provides proper guidance for either Regional Water Quality Control Board (RWQCB) staff, or the regulated public. As a result Version 6.5 of the WRAPP will place substantial burdens on RWQCB staff and will result in unnecessary and time consuming litigation (from both the development and environmental community) regarding how the proposed policy should be interpreted for individual permit decisions.

We would like to believe that the SWRCB staff did not intend to weaken the WRAPP to the degree that it is weaker than federal law when they made the latest changes. Thus, as detailed below, we have provided our specific concerns with the various changes and suggested improvements so that a final WRAPP will provide improved protections for state waters, be consistent with the state's "no net loss" policy, and provide regional board staff with clear and consistent guidance in order to avoid unnecessary confusion, cost and litigation.

A. The Clean Water Act Clearly Requires Avoidance, Minimization, and the Least Environmentally Damaging Practicable Alternative

Under the Clean Water Act (CWA) the U.S. Army Corps of Engineers (Corps) has the responsibility of evaluating permit applications for the discharge of fill into waters of the U. S. The CWA gave the EPA the task of developing the 404 (b)(1) Guidelines (Guidelines) with the specific goal of providing the environmental criteria and framework by which the Corps evaluates dredge and fill applications.

40 CFR Part 230 - Section 404 (b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material, Subpart A - General, Section 230.1 Purpose and policy states:

(a) The purpose of these Guidelines is to *restore and maintain the chemical, physical, and biological integrity* of waters of the United States *through the control of discharges of dredged or fill material*. [emphasis added]

(c) Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern. [emphasis added]

(d) From a national perspective, *the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.* [emphasis added]

Nichols et. al.¹ succinctly describe the role of the Guidelines in framing the Corps' review of permit applications for discharges of fill in wetlands:

On December 24, 1980, EPA issued the § 404(b)(1) Guidelines, the regulations that established the environmental criteria by which the Corps evaluates dredge and fill permit applications. **Central to the Guidelines is the fundamental requirement for an alternatives analysis. "29 ...[N]o discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the environment,** so long as the alternative does not have other significant adverse environmental consequences."³⁰ "[T]he

¹ Nichols, Sandra S., Jared Thompson, Jessica Wilkinson. 2008. The Federal Wetland Permitting Program: Avoidance and Minimization Requirements. The Environmental Law Institute.

application is required in every case (irrespective of whether the discharge site is a special aquatic site or whether the activity associated with the discharge is water dependent) to evaluate opportunities for the use of non-aquatic areas and other aquatic sites that would result in less adverse impact on the aquatic ecosystem.”³¹ Thus, applicants must demonstrate that for any discharge or fill activity there is no practicable alternative site for the proposed activity that will have less adverse environmental impacts. [emphasis added]

For special aquatic sites such as wetlands, however, the Guidelines propose a more difficult test for avoidance with two presumptions. For proposed discharges to special aquatic sites there is a presumption that an alternative site that is not a special aquatic site exists and a presumption that such a site will result in less adverse environmental impacts on the aquatic ecosystem.³² These rebuttable presumptions clarify how to determine if discharges proposed for special aquatic sites meet the requirement that the practicable alternatives have less significant adverse impact on the environment and do not have other significant environmental impacts. [emphasis added]

Indeed, the Clean Water Act and EPA's Guidelines make mitigation a requirement of the Section 404 program through standards set at 40 CFR §§ 230.10 (a)-(d).² The Memorandum of Agreement between EPA and the Corps concerning mitigation under the CWA 404 (b)(1) Guidelines (Mitigation MOA) defines the three steps of mitigation - the first two being avoidance and minimization of impacts:

1. Section 230.10(a) allows permit issuance for only the least environmentally damaging practicable alternative. The thrust of this section on alternatives is *avoidance of impacts*. Section 230.10(a)(1) requires that to be permissible, an alternative must be the least environmentally damaging practicable alternative (LEDPA). In addition, Section 230.10(a)(3) sets forth rebuttable presumptions that 1) alternatives for non-water dependent activities that do not involve special aquatic sites are available...
2. Minimization. Section 230.10(d) states that appropriate and practicable steps to *minimize* the adverse impacts will be required through project modifications and permit conditions.

Sequencing requires the applicant must first demonstrate impacts to wetlands have been *avoided*. Next the applicant must demonstrate any remaining unavoidable impacts have been *minimized*. Lastly, and only after avoidance and minimization of impacts has occurred, the applicant must compensate for any remaining impacts [i.e. compensatory mitigation].

Nichols et. al.³ provide an excellent description of the avoidance requirement:

Avoidance is the first step in the sequencing process by which the Corps determines whether or not the proposed project is the least environmentally damaging practicable alternative (LEDPA).¹⁸ The LEDPA is identified by an evaluation of the direct, secondary, and cumulative impacts on the aquatic ecosystem¹⁹ and “other ecosystems”²⁰ of each alternative under consideration. [emphasis added]

The Guidelines state:

² Nichols et al. 6

³ Nichols et al. 7

...no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem so long as the alternative does not have other significant adverse environmental consequences.²¹

The universality of the requirement to evaluate opportunities for use of non-aquatic areas and other aquatic sites that would result in less adverse impact on the aquatic ecosystem was reiterated in a EPA and Army guidance memo in 1993.²² [Regulatory Guidance Letter 93-02]

The regulations further establish two analytical presumptions that increase the burden on an applicant for a *non-water dependent activity* to demonstrate that no practicable alternative exists.²³ The first presumption is that if the basic purpose of a project is not water dependent, “practicable alternatives that do not involve special aquatic sites are presumed to be available.”²⁴ The second presumption is, “where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem.”²⁵

The two presumptions hold unless the applicant proves otherwise.²⁶ The standards for overcoming these presumptions and the other components of the alternatives analysis have been clarified by numerous administrative and legal decisions.

The Corps formalized the requirement for sequencing in its regulations regarding Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR §332.1:

(1) (c) *Sequencing*. (1) Nothing in this section affects the requirement that all DA permits subject to section 404 of the Clean Water Act comply with applicable provisions of the Section 404(b)(1) Guidelines at 40 CFR part 230.

(2) Pursuant to these requirements, the district engineer will issue an individual section 404 permit *only upon a determination that the proposed discharge complies with applicable provisions of 40 CFR part 230, including those which require the permit applicant to take all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United States*. Practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. Compensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines. [emphasis added]

(3) Compensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines. During the 404(b)(1) Guidelines compliance analysis, *the district engineer may determine that a DA permit for the proposed activity cannot be issued because of the lack of appropriate and practicable compensatory mitigation options*. [emphasis added]

Therefore, based on the detailed description of the CWA's requirements, the 404 (b)(1) Guidelines, the mitigation sequencing requirement, and the least environmentally damaging practicable alternative are fundamental to the federal review of permit applications for the discharge of fill into wetlands.

B. De-emphasis of "sequencing" and "avoidance" in Version 6.5 of the WRAPP is unacceptable.

The most obvious and devastating change to the WRAPP is its abandoning of the concept of "Avoidance." As explained in more detail below, the WRAPP Version 4.3 followed existing federal law by clearly stating that no wetland should be filled if there is a practicable alternative upland site available for the general purpose of the project. The latest Version 6.5 **removes** the clear language included in Version 4.3 that would make it clear to Regional Board staff and Regional Board members that no wetland fill project should be approved if there is such an alternate site available. Version 6.5 even removes the language that instructs Regional Boards that they can, indeed, refuse to permit such projects.

These incomprehensible retractions from Version 4.3 (retractions that we believe violate State Water Board Resolution No. 2008-0026 – see below, page 5) remove from the State and Regional Boards the strongest tool available to them for the protection of the State's wetland resources. It is recognized nationally that created, or even restored, wetlands rarely, if ever, fully replicate the functions of natural wetlands. Your own study (Ambrose, et. al.⁴) demonstrated that mitigation wetlands do not fully replicate the functions of natural wetlands.

Below is a list of changes to the language of the WRAPP from Version 4.3 to Version 6.5:

1. Version 6.5 inappropriately deletes reference to the 404(b)(1) Guidelines in contradiction to State Board Resolution No. 2008-0026

Version 4.3 - Establish a uniform regulatory approach regarding the federal CWA section 404 program for dredge and fill discharges *by establishing procedures and criteria consistent with the CWA section 404 (b)(1) Guidelines (40 C.F.R. part 230) for the application, review and approval of permits to discharge dredged or fill material into waters of the state.* [emphasis added]

The most recently released version of the WRAPP completely removes any mention of the 404 (b)(1) Guidelines (Guidelines), a critical and essential component of the permit review process if the State truly intends to ensure "no net loss of wetlands". This deletion is completely unacceptable to our community and only creates confusion:

⁴ Ambrose, R.F., J.C. Callaway, and S.F. Lee. 2007. An evaluation of compensatory mitigation projects permitted under Clean Water Act section 401 by the California State Water Resources Control Board, 1991-2002. Technical Report prepared for the Los Angeles Regional Water Quality Control Board. Los Angeles, CA: University of California. San Francisco, CA: University of San Francisco.
http://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/mitigation_finalreport_wo_app081307.pdf

Version 6.5 - Establish a uniform regulatory approach consistent with the federal CWA section 404 program for the discharge of dredged or fill material into waters of the state, including wetland areas.

State Water Resources Control Board Resolution No. 2008-0026 specifically states that the Development Team will:

Phase 1 – establish a Policy to protect wetlands from dredge and fill activities. The Development Team is directed to develop and bring forward for State Water Board consideration: (a) a wetland definition that would reliably define the diverse array of California wetlands based on the United States Army Corps of Engineers' wetland delineation methods to the extent feasible, ***(b) a wetland regulatory mechanism based on the 404 (b)(1) guidelines (40 C.F.R. parts 230-233) that includes a watershed focus***, and (c) an assessment method for collecting wetland data to monitor progress toward wetland protection and to evaluate program development. [emphasis added]

Recommendation: The deleted segment of the sentence must be reinstated [beginning at line 61 of version 6.5] to ensure consistency with federal CWA regulation and to identify the framework within which permit applications will be evaluated.

2. Section C (6)(f) of Version 4.3 regarding the requirement that an applicant describe their compliance with mitigation sequencing has been deleted and must be reinstated.

Rather than requiring an alternatives analysis for all projects, the latest version of the WRAPP introduces a level of uncertainty as to when and if an alternatives analysis will be required. Federal Regulations do not provide such distinctions, even the Corps' nationwide permits (for minimal impact projects) require an alternatives analysis for projects involving wetland fill. Thus Version 6.5 results in a significantly weaker regulatory system that will allow for impacts to waters of the State in violation of the Porter-Cologne Act. Specifically, the earlier Version 4.3 states:

A description of all steps that have been or will be taken to avoid, minimize, or compensate for loss of or significant adverse impacts to beneficial uses of waters of the state. This description is also required for the Alternatives Analysis, when required, and for details on how the chosen mitigation steps will be evaluated, see the Restrictions on Discharge subsection in the Application Review section.

This section has been replaced by 2(B)(7) - Practicable Alternatives Analysis:

If required by the Water Boards, an analysis of the practicable alternatives to the proposed activity identifying the project as the least environmentally damaging practicable alternative [will be submitted by the applicant?]. [emphasis added]

33 CFR 325.1. d.7 regarding the content required for permit applications specifically states, "For activities involving discharges of dredged or fill material into waters of the United States, the

application must include a statement describing how impacts to waters of the United States are to be avoided and minimized." Corps Regulatory Guidance Letter (RGL) 93-02 specifically states, "The burden of proof to demonstrate compliance with the Guidelines *rests with the applicant; where insufficient information is provided to determine compliance, the Guidelines require that no permit be issued.* 40 CFR 230.12(a)(3)(iv)." [emphasis added]

The change in language will result in increased staff workload as there has been no framework provided within which staff can defend their decision that a least environmentally damaging practicable alternative (LEDPA) would or wouldn't be required. The WRAPP fails to even state that the applicant would be responsible for providing the LEDPA. Vague environmental regulation/policy results in uncertainty for RWQCB staff and the regulated public and increases the potential for inconsistency amongst the RWQCB regions. At what point is a project "complex" enough to be required to submit a LEDPA? What recourse does staff have under this scenario to require review of alternatives, if even a small wetland fill may have significant adverse impacts to water quality and beneficial uses? The uncertainty introduced in the latest version of the WRAPP will result in needless conflict between RWQCB staff and the regulated public. The resulting conflicts between RWQCB staff and the regulated public will require increased staff time, and will increase delay and unnecessary costs for the applicant if they elect to unsuccessfully argue that a LEDPA is unnecessary. Inconsistency in RWQCB determinations of when the LEDPA is or is not required will result in increased litigation.

Recommendation: The requirement that an applicant must demonstrate compliance with the sequencing steps of the Guidelines must be reinstated.

3. Version 6.5 incorrectly deletes the discussion of the Least Environmentally-Adverse Practicable Alternative that appeared in Section 4(H) of Version 4.3 [this should actually have been labeled the Least Environmental Damaging Practicable Alternative (LEDPA) to be consistent with the federal regulatory process].

Section 4H of the previous version of the WRAPP was crucial to the overall board policy guidance because it set a clear standard of permit application review for RWQCB staff and for the regulated public.

4(H)(1) provided strong guidance and language regarding the presumption that for non-water dependent projects a practicable alternative exists that would have less adverse impacts to water quality.

4(H)(2) defined the responsibilities of the permitting authority, explicitly stating the "permitting agency is *not obligated* to issue a permit for any project that will adversely impact a water of the state or its beneficial uses," and that the permitting authority could "consider the "no project" alternative for projects with significant adverse impacts that cannot be avoided or minimized." This section also made clear that it is the "*applicant's responsibility to offer sufficient evidence and proof to rebut the*

presumptions above [regarding the existence of a LEDPA], or to dispute the permitting authorities determination of what is the least environmentally damaging practicable alternative." [emphasis added]

This most recent Version 6.5 has replaced the language of the previous Version 4.3 with Section 3(A)(1) – Avoidance and Minimization. This section has been so heavily edited, it fails to discuss the important presumption that for non-water dependent projects, alternatives exist that do not involve discharges into waters of the state and that the Regional Boards are not obligated to issue permits for projects that do not pass this avoidance/practicable alternative test. Failing this specific language, Regional Board staff may believe they need to approve a project, even if there are practicable alternative sites available, as long as “adequate” compensatory mitigation is proposed by the applicant. Army Corps staff occasionally cite the fact that they are a permitting agency, and thus see their job as providing permits not denying permits. The State and Regional Water Boards are regulatory agencies and their roles are to protect the waters of the State not to provide permits to all applicants. As has been made clear above, the goal of the 404(b)(1) guidelines is to avoid impacts to wetlands, and only if unavoidable can permits be issued. The failure to make this clear in the WRAPP will undoubtedly result in unnecessary and avoidable impacts to the waters of the State.

40 CFR Section 230.10(a)(3) requires:

Where the activity associated with a discharge which is proposed for a *special aquatic site* (as defined in subpart E of the Guidelines) does not require access or proximity to or sighting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), *practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise*. In addition, *where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge, which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise*. [emphasis added]

As was stated earlier, the permit applicant must rebut the presumption that a practicable alternative exists that is less environmentally damaging. When reviewing the permit application, the Corps must determine whether the proposed project is the least environmentally damaging practicable alternative. Since this is one of the most crucial components of the 404(b)(1) guidelines, it must also be clearly stated in the WRAPP.

Sections 4(H)(1) and 4(H)(2) must be re-incorporated into the WRAPP to ensure that permit application review by RWQCB staff will be consistent with federal regulations, and to ensure the regulated public understands its responsibility to demonstrate compliance with the 404 (b)(1) Guidelines.

The draft policy declares the "proposed project shall avoid and minimize adverse impacts to the aquatic environment to the maximum extent practicable," but then goes on to say the procedures of the 404 (b)(1) Guidelines will be applied only to projects with "complex environmental impacts." What constitutes "complex environmental impacts?" What threshold would RWQCB staff utilize to determine when to incorporate the procedures of the Guidelines in their review of permit applications? What

percentage of permit applications submitted to the RWQCBs would escape review consistent with the Guidelines? Such language invites staff confusion and frequent litigation (and cost) over so obscure a criteria.

The entire tone, and the most disturbing retreat from previous versions of the WRAPP, is the emphasis on compensatory mitigation while de-emphasizing the first two (critical) steps of mitigation sequencing, avoidance and minimization. The language that remains in Version 6.5, reduces the mitigation sequencing steps of avoidance and minimization to mere paper exercises, items to be checked off before permits for filling of wetlands are authorized.

This is inconsistent with the requirements of the Guidelines and Clean Water Act (CWA). Nichols et. al.⁵ succinctly describe the mitigation sequencing requirement of the CWA:

The basic premise of the § 404 permitting program is that no discharge shall be permitted if (1) a practicable alternative exists that is less damaging to the aquatic environment, or (2) the discharge would cause the nation's waters to be significantly degraded. In order for a project to be permitted, it must be demonstrated that, to the extent practicable: steps have been taken to avoid impacts to wetlands and other aquatic resources, potential impacts have been minimized, and compensation will be provided for any remaining unavoidable impacts. This process is commonly referred to as the mitigation sequencing requirement of the Clean Water Act § 404 regulatory program.[emphasis added]

Nichols et. al.⁶ further elaborate on the LEDPA determination process by the permitting agency:

Once the practicable alternatives are identified, based on the factors and standards described above, the Corps may only issue a permit for the proposed activity if it is the alternative that which would cause the least damage to the aquatic environment—the LEDPA.⁹³ There are occasions, however, when the Corps may find that the LEDPA will still cause too much harm to special aquatic resources to be allowed.⁹⁴ The 1990 Mitigation MOA states: “It is important to recognize that there are circumstances where the impacts of the project are so significant that even if alternatives are not available, the discharge may not be permitted regardless of the compensatory mitigation proposed.”⁹⁵ [emphasis added]

In other words, the Corps may deny a permit if it finds that the proposed project is the least damaging alternative but that the damage would still be too significant, even after all practicable avoidance and minimization. Finally, the availability of compensation opportunities may not be taken into account during the alternatives analysis and identification of the LEDPA. Guidance issued in 1990 states that “compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of the least environmentally damaging practicable alternatives for the purposes of requirements under Section 230.10(a).”⁹⁶ Guidance issued by the Corps in 1993 further reinforced this position: “It is not appropriate to consider compensatory mitigation in determining whether a proposed discharge will cause only minor

⁵ Nichols et al. 1

⁶ Nichols et al 11

*impacts for purposes of the alternatives analysis required by Section 230.10(a)."*⁹⁷ [emphasis added]

Recommendation: The WRAPP must reinstate deleted passages referring to the 404 (b)(1) Guidelines, mitigation sequencing, the least environmentally damaging practicable alternative, and the burden of proof. These elements have already been established as integral components of the federal regulatory review process, and must be incorporated into the WRAPP to ensure consistency with federal regulation and to avoid unnecessary confusion between the regional boards and thus an increase in litigation and costs to the board and project applicants.

4. The WRAPP should be clear that the primary emphasis of the program is on avoidance and minimization and the achievement of "no net loss" of wetlands; compensatory mitigation is secondary. This language must be reinserted into the final version of the WRAPP.

Numerous studies, beginning with the National Research Council's 1992 "Restoration of Aquatic Ecosystems," 2001 "Compensating for Wetland Losses Under the Clean Water Act" and the SWRCB's study by Ambrose et. al., recognize the failure of compensatory mitigation wetlands in fully replicating the functions of natural wetlands.

Kihlslinger⁷, reviewed recent literature regarding wetlands compensatory mitigation compliance and success and concluded:

Although wetland mitigation accounts for a significant annual investment in habitat restoration and protection, *it has not, to date, proven to be a reliable conservation tool.* Despite the nationwide "no net loss" goal, *the federal compensatory mitigation program may currently lead to a net loss in wetlands acres and function.* On the high end, Turner and colleagues (2001) estimated that the §404 program may lead to an 80% loss in acres and functions. [emphasis added]

Her review of the existing literature revealed:

Studies of the ecological performance of compensatory mitigation have shown that compensatory wetland projects fail to replace lost wetland acres and functions even more often than they fail in their administrative performance. In fact, permit compliance has been shown to be a poor indicator of whether or not mitigation projects are adequately replacing the appropriate habitat types and ecological functions of wetlands.

...In addition to not meeting acreage requirements, mitigation wetlands often do not replace the functions and types of wetlands destroyed due to permitted impacts. *Turner and colleagues*

⁷ Kihlslinger, Rebecca. 2008. Success of Wetland Mitigation Projects. National Wetlands Newsletter Vol. 30, No. 2: 14-16

(2001) found that an average of only 21% of mitigation sites met various tests of ecological equivalency to lost wetlands. Two recent studies compared mitigation sites to *impact sites*. One found that only 17% of the sites evaluated successfully replaced lost functions (Mink and Ladd 2003). The other study determined that 29% of the sites were successful in this regard (Ambrose and Lee 2004). The former study also found that 50% of the mitigation sites evaluated were actually non-jurisdictional riparian and upland habitat. Four studies comparing mitigation sites to *reference wetlands* found that fewer than 50% of the sites evaluated were considered ecologically successful (Ambrose et al. 2006 - 19%; Johnson et al. 2002 - 46%; MDEQ 2001 - 22%; Sudol and Ambrose 2002 - 16%). Ambrose and colleagues' statewide study of 143 permit files in California found that 27% of the constructed mitigation did not even meet the jurisdictional definition of a wetland (Ambrose et al. 2006). [emphasis added]

As mentioned above, a critical concern with compensatory mitigation of all types (including the use of mitigation banks), is the loss of local wetland functions and values and a reduction in the biodiversity of wetland types. Clare et. al.⁸ observe:

The idea that a constructed wetland that visually resembles a natural wetland is adequate compensation ignores that wetlands grow and develop according to a myriad of highly variable inputs over time, including stochastic weather, random arrival events of species, competition, surface and groundwater interactions, and many others. The fluctuations and interactions of wetland ecosystems are more akin to human metabolism than they are to an automotive engine, with dynamic interacting components such as wetland soils, hydrologic regimes, riparian zones, and water chemistry that are linked to their surroundings. Constructed wetlands must grow, mature, and evolve, often requiring decades to centuries to stabilize and broadly resemble naturally occurring wetlands. Such time frames are rarely considered in the price of compensation.

Despite the complexity of wetland ecosystems, optimistic and naive land developers, economists, engineers, and policy makers often argue for compensation over avoidance, confident in the notion that constructed wetlands can adequately replace the values and functions of a natural wetland. *The lack of focus on wetland avoidance allows for engineered compensatory wetlands to receive more political and economic value than their natural counterparts, as they provide decision-makers the options, flexibility, and negotiation room beyond a hard and fast requirement to relocate the proposed development to a nonwetland site.* The premise of compensatory offset wetland policies is that habitat loss can be mitigated through the creation or restoration of habitat that is equivalent to that which was lost. The challenges associated with measuring, let alone reproducing, the full suite of ecological, social, and economic values and functions of a natural wetland makes the reliance on this policy approach untenable in all cases, *and highlights the need to give greater consideration to avoidance in the mitigation sequence.* [emphasis added]

⁸ Clare, Shari, Naomi Krogman, Lee Fotte, Nathan Lemphers. 2011. Where is the avoidance in the implementation of wetland law and policy? *Wetlands Ecological Manage* 19: 165-182

Recommendation: If the goal of the SWRCB's wetlands program is to protect the waters of the State, the emphasis of the policy must be on avoidance and minimization with compensatory mitigation as the last resort for avoiding the impacts to wetlands in the first place. The WRAPP must clearly articulate that the order of emphasis is first to avoid and minimize and, if that is not possible, then require compensatory mitigation.

5. Watershed Approach

Version 6.5 incorporates the concept of the "watershed approach." We support the incorporation of a watershed approach and recommend that a watershed approach must be applied in the analysis of avoidance. Wetlands and riparian areas are inextricably linked to their surrounding uplands. Isolated wetlands, vernal pool complexes, riparian habitat, and the plant and animal communities which live in these habitats, also rely on surrounding upland habitat. For these types of habitats, avoidance analysis must take into consideration the hydrological and ecological linkages that exist and prevent situations where fill is not placed directly in the wetland, but the development of uplands immediately adjacent results in degradation of the wetland to the point where the ecological values are destroyed.

Recommendation: The WRAPP must clearly articulate that the watershed approach is applied the analysis of avoidance.

6. Prior Converted Croplands

Section V. 1. B. Areas Not Subject to Procedures. Please refer to the previously submitted discussion of our concerns regarding the WRAPP language regarding prior converted croplands (attached).

Recommendation: The WRAPP must be revised as recommended in our attached letter in order to avoid significant losses of waters of the state.

7. Version 6.5's Proposed Permitting Procedures Put State's Wetlands at Risk

Section 2. Application Submittal. There are many substantive problems with this section of Version 6.5.

- Rather than begin Section 2 with a description of the elements of a complete permit application, the draft policy proposes circumstances under which the rigor of information required for permit application will be relaxed, including relaxing the requirement that the applicant provide an alternatives analysis (see previous sections 1-4 above). This approach is completely inconsistent with 33 CFR Part 325, the Corps' regulation for the processing of Department of the Army permits. The Corps' regulations regarding the processing of permits provide descriptions of the elements required for a "complete" application. The requirements include permit application review, the public notice process, conditioning of permits, etc. The Corps regulations do not discuss circumstances under which the requirements of application submittal would be relaxed, nor does 33 CFR 325 describe waiving the requirement that an alternatives analysis be provided. Requirements for different forms of permits are described separately under a description of those processes.

- The discussion of "Adaptability" regarding the level of information required for the alternatives analysis is found under the 404 (b)(1) Guidelines. The Adaptability section of the WRAPP, if included at all, must be substantively modified, and should occur elsewhere in the WRAPP.
- Sections 2.A.1, 2, and 3, should be deleted, or relocated and replaced as in Version 4.3 Section 4.D for the reasons discussed above.
- The WRAPP incorporates the concept of "minimal impacts" into a discussion of reduced requirements for permit application submittals and alternatives analysis. A "Minimal impact project" is defined as:

...a project of such size, scope or nature that it will cause only minor individual and cumulative environmental effects and dredged or fill discharges are limited to not more than 15000 square feet (0.34 ac), and 600 linear feet for fill and excavation discharges, and of not more than 75 cubic yards for dredging discharges.

The State Water Board must re-examine this definition. The definition appears to be an attempt to avoid the environmental review process that would be required for the development of a general permit. The definition muddies the issue of what constitutes a "minor individual and cumulative environmental effect" by incorporating a size limitation without providing any environmental context. In doing so, it shifts the burden of proof from the applicant to the RWQCB staff. For example, RWQCB staff would be faced with defending a position that a project meeting the size limitations described, located in a vernal pool swale/tidal marsh/wetlands in a floodplain/eelgrass bed/etc. has more than minimal impacts and must submit a full permit application (including an alternatives analysis). This new "minimal impacts" approach will only cause confusion and added burden and cost to Regional Board staff.

Further, the incorporation of this definition of "minimal impacts" is inconsistent with the federal regulatory process. The federal permit process determines the level of environmental review for a proposed activity by identifying whether a proposed project will be reviewed as an individual permit or as some other permit process. The federal regulations provide expedited permit review (less stringent permit application requirements and environmental analysis) through the issuance of general permits (nationwide permits, regional permits) or letters of permission. The most common form of expedited permit review is through the general permit program. The 404 (b)(1) Guidelines 40 CFR § 230.7 has specific conditions that must be met:

(a) *Conditions for the issuance of General permits.* A General permit for a category of activities involving the discharge of dredged or fill material *complies with the Guidelines if it meets the applicable restrictions on the discharge in § 230.10* and if the permitting authority determines that:

(1) *The activities in such category are similar in nature and similar in their impact upon water quality and the aquatic environment;*

- (2) The activities in such category will have only minimal adverse effects when performed separately; and
- (3) The activities in such category will have only minimal cumulative adverse effects on water quality and the aquatic environment. [emphasis added]

There is still a requirement that the permit applicant must demonstrate (though not through submittal of a full alternatives analysis) that they have avoided and minimized impacts to the aquatic environment. Also, there is an acknowledgement that activities vary in their impact on water quality and the environment depending upon the type of activity and type of aquatic resource that is being impacted.

We oppose the presumption that imposition of a size limitation on discharges or fill or dredging can ensure "minor individual and cumulative effect" without identifying the range of activities that might occur or the environmental context within which these impacts might occur, and without the benefit of public review and comment (even general permits provide opportunity for public comment when the general permit is first proposed).

If State Water Board feels it is necessary to provide a streamlined permit process for projects with "minor individual and cumulative effects," it must be in a manner consistent with the federal regulatory process. The State Water Board could certify portions of the Nationwide Permit process, establish a state process equivalent to Nationwide permits for waters of the state, or propose Water Board General Permits for specific suites of similar activities.

- If formal delineation maps are not required for "ecological restoration projects or projects with minimal impacts" (line 301-302) how will RWQCB staff determine the direct and indirect impacts to waters of the state? Why wouldn't this information be necessary? For example, if an ecological restoration project occurs in an area where wetlands currently exist, shouldn't the RWQCB need assurances a restoration project will not result in the degradation of existing wetlands? Shouldn't the RWQCB determine that if trade-offs in wetland type will result, there is still not a significant negative impact? Wouldn't RWQCB staff need to know the location and areal extent of existing wetlands to make a determination that a project with "minimal impacts" truly will have only "minimal impacts"? This section should be deleted as it is not protective of waters of the state and is inconsistent with a policy of "no net loss" of wetlands.
- Version 4.3 provided a detailed (and helpful) list of the required elements of a complete permit application submittal. Version 6.5 now provides a list consistent with existing federal requirements and refers the applicant to the California Code of Regulations, title 23, section 3856 "Contents of a Complete Application" for any remaining state requirements. For purposes of clarity, all items necessary to meet the requirements of a complete application should be listed.

Section 3. Factual Determinations (Application Review in Version 4.3)

Version 4.3 included language regarding "Adaptability" in this section of the draft policy. We concur that it would be more appropriate to locate the "Adaptability" section under the "Application Review" or possibly under a new section "Other Forms of Permit Review." This section could capture Ecological

Restoration Projects, and could include Section 2.A. 3. Section 2.A.2 should not be relocated but should be deleted as it is inconsistent with the existing federal process for the reasons discussed above.

Recommendation: The recommended changes to the policy are outlined above.

8. Compensatory Mitigation

Section 4.B.4. Amount of Compensation

- This section includes the following statement:

...However, the Water Boards shall *presume that a one-to-one acreage or length of stream reach replacement is the minimum necessary to compensate for wetland or stream losses*. The amount of compensatory mitigation shall be sufficient to provide the Water Boards with a reasonable assurance that replacement of the full range of lost aquatic resource(s) and/or functions will be provided in perpetuity.

Considering the abundant scientific evidence that mitigation wetlands do not fully replicate natural wetlands we believe that it is not appropriate to state a presumption that one to one mitigation is the minimum necessary for compensation. We believe it is more appropriate for the board policy to state that "the amount of compensatory mitigation required will be determined for each project on an individual basis, but that no project shall have less than a one to one compensatory mitigation ratio." We appreciate that one-to-one is stated as the "minimum necessary to compensate," but we are concerned about the focus on acreage or stream length as an appropriate determination of adequacy. We also request clarification of the situations intended to be covered by "Alternative 1. The compensatory mitigation site is in an area designated by a watershed plan or regional plan for aquatic resource preservation, enhancement, establishment or restoration." Is this alternative intended to cover mitigation banks?

Finally, we question the statement:

Generally, the amount of mitigation required for Alternative 1 will be less than for Alternative 2. The amount required for Alternative 2 will be less than for Alternative 3. The rationale for this relationship is based on the level of certainty that a compensatory mitigation project will meet its performance standards. Certainty increases when there is a corresponding increase in understanding of watershed conditions.

Minkin and Ladd⁹ conducted a study of the effectiveness of compensatory mitigation projects (creation and restoration) required for permitted impacts in New England and to determine what programmatic

⁹ Minkin, Paul and Ruth Ladd. 2003. Success of Crops-Required Wetland Mitigation in New England. U.S. Army Corps of Engineers. New England District
Comments re WRAPP Version 6.53

improvements might be necessary. Their study found "Forty of the mitigation projects (67%) were determined to meet permit conditions and would be considered successful by that standard. *However, only 10 (17%) were considered to be adequate functional replacements for the impacted wetlands.*" [emphasis added] They attribute the failure of mitigation projects to compensate for wetlands losses in part to "...*inadequate mitigation amounts* for permitted impacts and also for *inappropriate functional replacements*, e.g., replacing forested wetlands with open water, emergent, and/or scrub-shrub systems."

They also raised the issue of whether created or restored wetlands could replace those of natural systems and concluded that 1:1 mitigation ratios were inadequate:

The study also seems to indicate that insufficient compensatory mitigation has been required to offset project impacts. With impacts to 352.31 acres of wetlands and proposed compensatory mitigation of 324.12, of which no more than 317.65 became wetland, there would be an overall net loss in acreage of wetlands. Since there was considerable out-of-kind mitigation, there were increased losses in the more complex wetland types. The general replacement of forested wetlands with open water and emergent systems has resulted in considerable loss of function, particularly forested wildlife habitat and water quality functions such as denitrification, which occur best in seasonally saturated wetlands.

They also considered the results of other studies in reaching a conclusion that greater mitigation ratios are required:

He [Whigham] questioned whether there is any scientific justification for the underlying assumption of mitigation, that restored and created wetlands function similarly to natural wetlands with regard to biodiversity and nutrient cycling. He also noted that concentrating on replacing lost acreage amounts fails to account for the wetland degradation and functional loss resulting from creation and restoration of mitigation wetlands of lower functional value. In this regard, *greater compensatory mitigation acreage is required to replace the lost functions of impacted systems, i.e., mitigation to impact ratio must be greater than 1:1.* [emphasis added]

Minkin and Ladd concluded that there is a need for higher mitigation ratios if preservation and enhancement are proposed as compensatory mitigation:

An examination of enhancement and preservation, included in the overall mitigation proposals for several of the study projects was not reviewed in this study. Although preservation and enhancement can be important parts of a mitigation proposal, they do not prevent a net loss in wetland acreage and may not prevent a net loss in wetland function.

Mitigation banks might fair no better in providing compensation for lost wetland functions and values. Kihlslinger¹⁰ reported that:

¹⁰ Kihlslinger 15

A recent more comprehensive review of 12 mitigation bank sites in Ohio found that *25% of the bank areas studied did not meet the definition of wetlands* (Mack and Micacchion 2006). *Of the actual wetland acreage, 25% was considered in poor condition, 58% was fair, and 18% was good* quality in terms of vegetation as compared to natural reference wetlands. *The study also found that amphibian community composition and quality was significantly lower at banks than at natural forest, shrub, or emergent wetlands and that pond-breeding salamanders and forest-dependent frogs were virtually absent from the bank sites.* A recent study from Florida found that of the 29 banks evaluated, 70% fell within the moderate to optimal range of function. Although the baseline conditions of most sites were in the high functional range, most of the projects relied upon enhancement, rather than restoration, as the mitigation method (Reiss et al 2007).

It must be noted that while the findings of the Florida study are more encouraging, these banks employed enhancement, rather than restoration, and that raises the concern that wetlands functions and values continue to be lost.

Brown and Lant¹¹ conducted a survey of 68 mitigation banks within the United States as of January 1996 were achieving no-net-loss of wetland acreage nationally and regionally. Their review revealed that:

Although 74% of the individual banks achieve no-net-loss by acreage, overall, wetland mitigation banks are projected to result in a net loss of 21,328 acres of wetlands nationally, 52% of the acreage in banks, as already credited wetland acreages are converted to other uses. While most wetland mitigation banks are using appropriate compensation methods and ratios, several of the largest banks use preservation or enhancement, instead of restoration or creation. Most of these preservation/enhancement banks use minimum mitigation ratios of 1:1, which is much lower than ratios given in current guidelines. Assuming that mitigation occurs in these banks as preservation at the minimum allowable ratio, ten of these banks, concentrated in the western Gulf Coast region, will account for over 99% of projected net wetland acreage loss associated with banks.

Recommendation: Sufficient evidence exists to demonstrate the general failure of compensatory mitigation in replacing lost wetlands functions and values. For this reason, significantly higher mitigation ratios should be required, and as was stated earlier, an emphasis should be placed upon avoidance and minimization of impacts to waters of the state.

9. Definitions:

Recommendation: Ecological Restoration Projects - The definition of "Ecological Restoration Projects" should be reworded as follows:

¹¹ Brown, Philip H. and Christopher L. Lant. 1999. The Effect of Wetland Mitigation Banking on the Achievement of No-Net-Loss. Environmental Management Vol 23, No. 3 pp. 333-345

means projects undertaken for the primary purpose of assisting or intervening in 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. These projects do not include projects required under permit for compensatory mitigation, or projects designed to service required compensatory mitigation, projects that facilitate land development, or projects with the primary purpose of property protection.

Please refer to our earlier discussion regarding the definition of "minimal impacts projects."

C. Conclusion

Version 6.5 of the WRAPP represents a significant departure from the Version 4.3. The proposed language of the draft policy is not consistent with existing federal regulations and is not protective of waters of the state. The draft policy as written will result in the continued loss of the state's wetlands resources.

We are deeply disappointed in the manner in which the development of this policy was revised, as there is tremendous value for RWQBC staff and the regulated community, in developing a standardized and consistent wetland definition and permit review process.

For these reasons, we must strongly oppose Version 6.5 of the WRAPP. We hope that our analysis and recommendations in this letter will result in the SWRCB staff's revising the current draft WRAPP so that a final policy will result in protection of waters of the state, comply with federal regulations, and produce a "no net loss" of state wetlands.

We also note that the version we were provided in October 2012 was Version 4.3. This latest Version is 6.5 - we request copies of the intervening versions of the WRAPP.

Thank you for the opportunity to review this version of the policy and provide you with our comments. If you have any questions, please do not hesitate to contact any of us.

Sincerely,

Carin High
Citizens Committee to Complete the Refuge

Arthur Feinstein
San Francisco Bay Chapter Sierra Club

Kim Delfino
Defenders of Wildlife

Lisa Belenky
Center for Biological Diversity

Ian Wren
San Francisco Baykeeper



August 7, 2012

Mr. Bill Orme
State Water Resources Control Board
Division of Water Quality
P.O. Box 100
Sacramento, CA 95814

Dear Mr. Orme,

Thank you for meeting with us on July 5, 2012 to discuss the preliminary draft Wetlands Area Protection and Dredge and Fill Permitting Policy (WRAPP). During our conversation, we raised some issues with the way wetlands that are certified as Prior Converted Croplands (PCCs) are dealt with in the WRAPP. We are following up on this conversation with some more detailed information about what we think the problems are with the way PCCs are treated in the WRAPP and our suggestions for potential changes State Water Resources Control Board staff may want to consider in order to address these concerns.

Statement of Problem: The exclusion of certified Prior Converted Croplands (PCCs) from regulation under the Wetland Area Protection and Dredge and Fill Permitting Policy (WRAPP), puts at risk untold thousands of acres of wetlands in California that satisfy the wetland definition and criteria elaborated within the WRAPP.

The exclusion of PCCs in the WRAPP creates an internal contradiction and inconsistency over the proposed state definition of wetlands because the PCC definition used by NRCS relies on a narrower definition of wetlands than used in the WRAPP. PCCs are defined for the purposes of the NRCS certification as requiring actual "ponding" or surface inundation. The WRAPP definition, instead, recognizes that wetlands are also defined by having soils "saturated within the upper substrate" without requiring surface inundation or "ponding". This latter approach is consistent with the Army Corps delineation manual as the State Board required of the WRAPP definition. If two different definitions of wetlands are used, one for PCCs that are exempted and one for all other wetlands, it would create a definitional inconsistency that undermines the WRAPP's attempt to codify a clear definition of wetlands.

Potential Resolutions:

1) **Do not exempt PCC wetlands from the definition of wetlands** - The State Water Resources Control Board (SWRCB) could adopt a policy similar to that of Washington State. The State of Washington Department of Ecology (DOE) has never recognized Prior Converted Croplands as a regulatory definition:

The state Water Pollution Control Act (90.48 RCW) does not distinguish prior converted croplands from other wetlands. Rather, all "waters of the state" are covered by the law, and PCCs that are still wetlands are considered waters of the state.¹

The State does recognize that, "...many PCC wetlands have been significantly degraded and will regulate them according to the functions they provide."

2) Exempt PCC wetlands from regulation so long as the lands are kept in agricultural production: If the SWRCB includes PCC wetlands within the definition of wetlands the SWRCB might retain the exemption for PCCs so long as the lands are kept in agricultural production. [PLEASE NOTE - this approach has the potential of allowing degradation of wetlands functions and values.] If this course is taken, the following "recapture" language should be added to the policy language

Certified PCCs wetlands are not subject to Procedures as long as historic agricultural operations are continued and do not result in reductions or impairments in the reach, flow, and circulation of waters of the State.

Basis for concerns:

A common misconception is that lands identified/certified by the Natural Resources Conservation Service (NRCS) as Prior Converted Croplands have been sufficiently altered to permanently remove wetland characteristics and in particular, the hydrology required to maintain wetland functions and values. The designation Prior Converted Croplands is a regulatory construct for the purposes of implementing the "swampbuster" provisions of the Food Security Act (FSA) and does not reflect the ecological functions or values of these lands.

Votteler and Muir² observed:

Clinton's proposals relaxed some of the current restrictions on agricultural effects on wetlands and increased funding for incentives to preserve and restore wetlands on agricultural lands. The administrative policy *excluded 53 million acres of "prior converted croplands" from regulation as wetlands...* [emphasis added]

And Ruffolo³ also referred to changes implemented by the Clinton Administration:

¹ Washington State Department of Ecology. "Focus on Prior Converted Croplands/Wetlands - Clarifying State Authority and the Regulatory Process." Publication 03-06-032. December 2003.

² Votteler, Todd H. and Thomas A. Muir. "Wetland Management and Research - Wetland Protection Legislation." National Water Summary on Wetland Resources. United States Geological Survey Water Supply Paper 2425. <http://water.usgs.gov/nwsum/WSP2425/legislation.html>

³ Ruffolo, Jennifer. "The U.S. Supreme Court Limits Federal Regulations of Wetlands: Implications of the SWANNC Decision." California Research Bureau. CRB 02-003. 2002

...It also made the Soil Conservation Service, in the Department of Agriculture, responsible for wetland jurisdictional determinations on agricultural lands under both the Clean Water Act and the "Swampbuster" program (the Food Security Act). The administration also excluded "prior converted croplands" from regulation. *This exemption excluded from regulation vast tracts of wetlands* that had been drained and converted to agricultural use prior to 1985. [emphasis added]

National Food Security Act Manual (5th Edition) Definition of Prior Converted Croplands:

Prior Converted Croplands are defined in the 5th Edition of the National Food Security Act Manual (NFSAM) in the following manner:

A. Definition

(1) Prior converted cropland (PC) is a converted *wetland* where the conversion occurred before December 23, 1985; an agricultural commodity had been produced at least once before December 23, 1985; and as of December 23, 1985, the area was capable of producing an agricultural commodity (i.e., did not support woody vegetation and was sufficiently drained to support production of an agricultural commodity). The conversion could include draining, dredging, filling, leveling, or otherwise manipulating (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) the *wetland* area. In addition, PC meets the following hydrologic criteria:

- (i) If the area is not a pothole, playa, or pocosin, *inundation* is less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent change or more).
- (ii) If the area is a pothole, playa, or pocosin, inundation is less than 7 consecutive days and saturation is less than 14 consecutive days during the growing season in most years (50 percent change or more). [emphasis added]

The definition clearly labels PCCs "wetlands." The determining factor in whether a hydrologically modified (prior to December 23, 1985) wetland is regulated or not, is that of ponding. Is the (hydrologically modified) wetland inundated (ponded) for less than 15 consecutive days? If so (unless it is a pothole, playa, or pocosin), it is a PCC and not regulated, even if there is saturation of soils to the surface.

The proposed State definition of wetlands is:

An area is wetland if, under normal circumstances, it (1) is continuously or recurrently inundated with shallow water or saturated within the upper substrate; (2) has anaerobic conditions within the upper substrate caused by such hydrology; and (3) either lacks vegetation or the vegetation is dominated by hydrophytes.

According to this definition, PCCs could be considered wetlands.

Why is the exemption of PCC wetlands of concern?

In response to the question "Why regulate PCC wetlands?" the Washington State Department of Ecology asserts:

The original assumption behind exempting PCC wetlands from federal regulation was the belief that these wetlands had been so altered they no longer provided important wetland functions. However, *PCC wetlands in Washington perform many of the same important environmental functions as other wetlands, including recharging streams and aquifers, storing flood waters, filtering pollutants from water and providing wildlife habitat.* [emphasis added]

The National Research Council⁴ observes (p. 159):

One potential concern, however, is that agricultural wetlands will begin to diverge as separate from those regulated by USACE and EPA. This divergence could be fostered by maintenance of separate delineation manuals for agricultural and nonagricultural wetlands. Several *major differences based on policy rather than science* are already apparent. [emphasis added]

And, recommends for "Especially Controversial Wetlands" (p. 167):

Wetlands on agricultural lands *should not be regulated differently from other wetlands.* These wetlands may have many of the same attributes as do other wetlands, including maintenance of water quality, and *there is no scientific basis for delineating them under definitions or federal manuals different from those applicable to other wetlands.* [emphasis added]
...Wetlands in agricultural settings can enhance runoff water quality...

Sheldon, et al,⁵ asserts:

...However, *many wetlands meeting the criteria for PCC would still be expected to provide important functions,* given that the criteria for being designated "Prior Converted" require only that the wetland has been manipulated for production of commodity crops since 1985 and *does not pond* for more than 14 consecutive days during the growing season.
...In addition, the authors of Volume I *have documented significant water quality and quantity functions provided by PCCs* in projects reviewed and permitted by the Department of Ecology (This data has not been published). [emphasis added]

⁴ National Research Council. "Wetlands: Characteristics and Boundaries." National Academy Press. Washington D.C. 1995

⁵ Sheldon, Dyanne, Tom Hruby Ph.D., Patricia Johnson, Kim Harper, Andy McMillan, Teri Granger, Stephen Stanley, Erik Stockdale. "Wetlands in Washington State Volume 1: A Synthesis of the Science." Ecology Publication #05-06-006. Department of Ecology Publications Distribution Office. <http://www.ecy.wa.gov/biblio/0506006.html>

If, as the Preamble for the Wetland Area Protection and Dredge and Fill Policy (WRAPP) states, the "California Water Boards have the responsibility to preserve, enhance, and restore the quality of California's aquatic resources, including wetlands, for present and future generations;" and if, one of the purposes of the Policy is to "achieve no net loss and a long-term gain in the quantity, quality and diversity of waters of the state including wetlands," then this Policy must not exempt prior converted croplands from regulation.

Need for Protection and Recapture of Areas Certified as PCC:

PCC wetlands receive no protection under the FSA. Thousands of acres of wetlands could be at risk if the SWRCB fails to include language that explicitly prohibits actions that reduce or impair the reach, flow or circulation of waters of the State.

According to a "Wetland Fact Sheet - Prior Converted Cropland" published by the Vermont NRCS⁶:

Areas that qualify as Prior Converted Cropland (PC) are exempt from the Swampbuster provision of the Farm Bill. *These areas can be further drained, cropped or manipulated* without loss of eligibility for USDA program benefits. [emphasis added]

Once determined PCC, the wetland is forever considered PCC. Despite the fact that other categories of wetlands on agricultural lands are considered "abandoned" following the cessation for five consecutive years of management or maintenance, "PC lands will not be considered abandoned under the Food Security Act."⁷ The NFSAM does state:

This definition of abandonment is applicable only for compliance with the Food Security Act. Regulations governing the Clean Water Act may provide different or additional criteria for abandonment, particularly with regard to PC areas. Participants who are planning to abandon PC areas should be advised to discuss their plans with the COE before proceeding.

The February 25, 2005 Memorandum to the Field issued jointly by USDA-NRCS and the USACE provides the following guidance regarding PCCs:

Prior-Converted Cropland. Prior-converted cropland (PC) is identified for the purpose of implementing the FSA, and refers to wetlands that were converted from a non-agricultural use to cropland prior to December 23, 1985. While a PC area may meet the wetland hydrology criterion, production of an agricultural commodity or maintenance or improvement of drainage systems on the PC area, is exempt from the swampbuster provisions. A certified PC determination made by NRCS remains valid as long as the area is devoted to an agricultural use. *If the land changes to a nonagricultural use, the PC determination is no longer applicable and a new wetland determination is required for CWA purposes.* Specific guidance will be provided by the Corps in the near future addressing how the Corps will treat PC designations for land that changes from agricultural to non-agricultural use. [emphasis added]

⁶ Vermont NRCS. "Wetland Fact Sheet - Prior Converted Cropland."
http://www.vt.nrcs.usda.gov/programs/Wetland_Compliance/Wetland%20Fact%20Sheet%20-%20Prior%20Converted%20Cropland.htm

⁷ NRCS. National Food Security Act Manual. M_180_NSFAM_514_D, Fifth Edition, November 2010.

This language explicitly states that PCC determinations and exemptions remain valid only as long as the land is in agricultural use. However, the specific guidance promised has yet to be provided by the USACE.

Conversion of agricultural lands to development is an ever present threat in California. The potential loophole afforded by non-regulation of PCC wetlands must be avoided in the WRAPP. We are aware of situations where landowners/developers have attempted to utilize PCC determinations to preclude Clean Water Act regulation of wetlands.

It may be that the SWRCB attempted to preclude such a loophole through inclusion of the language of Section 1.C. of Appendix 1:

C. Inapplicability of Exclusions

Any discharge incidental to any of the excluded activities listed and subsections 3(A) - 3(F) which (1) brings an area or part of an area of water of the state into a use to which it was not previously subject; (2) where the flow or circulation may be impacted; or, (3) the reach of such water is reduced shall be required to obtain a permit pursuant to this Policy. Where the proposed discharge will result in significant discernible alternations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.

The language of this section refers to "excluded activities listed in subsections 3(A) - 3 (F)." However, those subsections appear to relate to the permit application process, so it is unclear whether the intent was to refer to agricultural exemptions (as are found in the Clean Water Act). Clearly this language speaks to *exempted* activities. The issue of PCCs, is that according to the current language of the WRAPP, these lands are not even considered jurisdictional, which is another matter entirely.

The WRAPP must not exempt conversion of PCC wetlands to non-agricultural uses and as stated above, must not exempt activities that would reduce or impair the reach, flow of circulation of waters of the State. The intent is not to regulate historic and ongoing farming operations, but to regulate any change in use that will result in the conversion of wetland areas to uplands. Changes in use could encompass proposals to remove the agricultural wetlands from farming for the purposes of development, but could also include changes in farming to crops that require drier soils. The latter is especially of concern, as we are aware of several instances in the San Francisco Bay Area where landowners brought in fill or deep ripped soils (e.g. Borden Ranch⁸) under the guise of "normal farming operations" on lands where we were aware of future development proposals. The WRAPP should not include loopholes that would allow the unregulated conversion of wetlands to uplands.

Other Issues to Consider Regarding PCCs:

⁸ Stricherz, Kelly. Borden Ranch Partnership V. U.S. Army Corps of Engineers: Getting ripped - Destroying Wetlands for Wine. 6 Great Plains Natural Resources Journal. 170 (2002)
http://nationalaglawcenter.org/assets/bibarticles/stricherz_getting.pdf

Every five to seven years agricultural policies are evaluated and reauthorized or modified by U.S. lawmakers through the Farm Bill authorization process. As can be observed through the current 2012 Farm Bill, the process is highly politicized and not without controversy. The SWRCB must not merely adopt NRCS's definition of PCC wetlands, as that definition is vulnerable to changes in definition or conditions with each Farm Bill reauthorization. As an example, PCC wetlands were originally considered abandoned if they were not cropped for five years. This policy was drastically altered with the 1996 Farm Bill, which stated PCC wetlands will not be considered abandoned under the FSA. Once a wetland is identified PCC, that designation (and exemption from regulation) lasts forever, as long as the lands are used for the production of food, forage or fiber, and so long as alterations of PCC wetlands do not alter the hydrology of nearby wetlands. We have already discussed the need for a incorporation of a recapture clause to prevent the unregulated drainage and conversion of these wetlands under the guise of normal farming operations. SWRCB must ensure its policies are well defined and protective of waters of the state. SWRCB must ensure its policies will not inadvertently be altered by changes adopted by an outside agency - especially one that does not have protection of waters of the state as its primary charge. To do anything less would be abrogating the SWRCB's responsibilities under the Porter Cologne Act.

No inventory of PCC determinations is available, thus it is impossible to determine how many thousands of acres of wetlands may be at risk.

Crumpton et al⁹ observed:

Lack of public information on cropped wetlands: Because USDA does not make the data public, very little information about cropped wetlands is available. USDA, the Corps, EPA and the Interior Department coordinated wetland protection under a 1994 interagency agreement. USDA confidentiality, however, was one reason that agreement terminated. It is essential that these data be made public in order to assess the policy implications of various alternatives for dealing with cropped wetlands.

Without such information, it is impossible for the SWRCB to determine the environmental impacts of exempting PCC wetlands from regulation.

On February 28, 2005, the NRCS provided rationale for withdrawing from the 1994 Memorandum of Agreement (Ag MOA)¹⁰. Of note are the following:

- The 2002 amendments *prohibit NRCS from sharing confidential producer information to agencies outside USDA. This makes it illegal for NRCS to provide wetlands delineations and determinations to the COE and EPA for CWA permitting and enforcement.*
- *1996 amendments eliminated the concept of "abandonment" for prior converted (PC) cropland. As a result, land may be considered non-wetland for Swampbuster purposes, and wetland for CWA purposes...*

⁹ Crumpton, William, Arnold van der Valk, Will Hoyer, David Osterberg. "Wetland Restoration in Iowa Challenges and Opportunities." The Iowa Policy Project. May 2012. www.iowaPolicyProject.org

¹⁰ NRCS. "Guidance on Conducting Wetland Determinations for the Food Security Act and Section 404 of the Clean Water Act." http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_007868.pdf

- The MOA states that NRCS wetland determinations shall not be revised without interagency coordination. However, *NRCS is required to comply with the decision of the USDA National Appeals Division, which may overturn a previous wetland determination without coordination among the agencies.*
- Per the MOA, NRCS agreed to conduct wetland determinations on agricultural land for the purpose of obtaining a CWA permit. *Regulations at 7 C.F.R. §12.30 state that NRCS's responsibilities regarding wetlands extend only to implementing the wetland conservation provisions of the FSA.* [emphasis added]

Clearly, NRCS cannot comply with the spirit and intent of the 1994 MOA. The FSA fails to provide any regulatory protection of wetlands identified as prior converted croplands. It has been seven years since the NRCS and USACE withdrew from the Ag MOA and the USACE has yet to provide any specific guidance regarding recapture of PCC wetlands. Failure to recognize prior converted croplands as wetlands would be an abrogation of the SWRCB's responsibilities to "preserve, enhance, and restore the quality of California's aquatic resources, including wetlands, for present and future generations."

We appreciate the opportunity to provide you with our thoughts on Prior Converted Croplands. If you have any questions, please contact Carin High at cccrrefuge@gmail.com.

Sincerely,

Carin High and Arthur Feinstein
Citizen's Committee to Complete the Refuge

Lisa Belenky
Center for Biological Diversity

Jim Metropulos
Sierra Club California

Kelly Catlett
Defenders of Wildlife

cc: Dominic Gregorio
Jonathan Bishop
PCC Issues

August 2012

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I am trying to understand the Board's position regarding prior converted croplands and in particular why the Board seems willing to remove these areas from regulatory authority.

Why are these lands not included in the recapture clause 1. C. 1? There seems to be some fudge factor added in for PCCs in 1.C.3 and 1.C.4, but why would areas that meet the State's proposed wetlands criteria not be eligible for recapture, when other wetlands located on agricultural areas clearly are? This introduces an internal inconsistency that does not exist in the federal regulations.

This also introduces an inconsistency between federal and state regulation of these lands, because lands that are determined to be regulated wetlands by the Corps might not be regulated by the Water Board. I am aware of a project in Newark, that has supported salt marsh harvest mouse habitat, the mouse has been trapped on the site, the lands had a prior converted croplands designation. The site is on diked baylands, has been cropped, but is proposed for development. The Corps required a delineation consistent with the 87 manual. The proposed draft policy would be inconsistent with federal regulation in this situation because according to the State's policy, this area would not be considered wetlands. [I understand the State might issue WDRs in this situation, but again, I thought the intent of the policy was to strive to achieve consistency - excepting areas no longer regulated by the Corps due to the Rapanos and SWANCC decisions.

Over the years I have had Corps staff complain about the problem of prior converted croplands. In their minds this issue is as important to deal with as Rapanos and SWANCC.

Does the resistance to protect these wetlands arise because PCCs were mentioned as excluded in the 1993 California wetlands policy? That particular portion of the policy predates important changes in the manner in which the Corps and NRCS deal with prior converted croplands - namely the dissolution of the memorandum by the USDA - copy attached.

Many lands that have been designated prior converted croplands meet all three wetlands criteria and in fact still maintain wetlands functions and values and are protective of beneficial uses. I have seen ag lands where crops are planted - clearly are not thriving because of the soil saturation, and the land owner has tried to obtain a PCC designation (within the 9 bay area counties) - this regulatory end run was avoided because the Corps would not agree to accept PCC designations on lands where development has been proposed (conversion of use)...

Prior converted croplands designations are often used by landowners to convert wetlands so that they can ultimately be developed and thus avoid any regulatory oversight or mitigation. This is inconsistent with a policy of "no net loss of wetlands."

Our experience and that of others is that there is little documentation available for the public to verify prior converted cropland designations are appropriate - in fact, we were denied access to the information at the state level - this was appealed to D.C. and the state was told information had to be released, but when it was, it was in a manner that made it extremely difficult to determine where these lands were located and the extent to which

wetlands were being impacted. In fact, later 2005 guidance from NRCS makes it explicit this information cannot be released:

NRCS may not disclose confidential information regarding a producer's personal information, such as objectives or decisions, conservation compliance determinations (HEL/WC), natural resource inventories, or environmental assessments to agencies outside of USDA. This includes wetland delineations and labels. [copy of document attached]

The 2002 amendments prohibit NRCS from sharing confidential producer information to agencies outside USDA. This makes it illegal for NRCS to provide wetland delineations and determinations to the COE and EPA for CWA permitting and enforcement.

From an environmental review perspective, how can the Board determine the impact of not regulating or recapturing prior converted croplands if it doesn't have access to this information? How many acres of land that meet all the proposed criteria for wetlands be impacted by this policy?

As mentioned earlier, the Corps has had a policy of recapturing prior converted croplands that would be converted to another use - NRCS' policy has changed over the years - per the 2005 document referred to above: 1996 amendments eliminated the concept of "abandonment" for prior converted (PC) cropland. As a result, land may be considered non-wetland for Swampbuster purposes, and wetland for CWA purposes.

The sole difference between an NRCS regulated "farmed wetland" and non-regulated "prior converted cropland" is whether the wetlands pond water - the soils could be saturated to the surface meeting the state's proposed criteria of hydrology (and the Corps') but not pond water on the surface. Is it really the State's intention to declare these lands are not wetlands and to provide no recapture for these areas?

Is there any possibility of having an off-line discussion about this? I know there will be many other issues to discuss on February 14th. I would like to understand why there is such resistance to protecting waters of the state that may clearly meet the criteria for the proposed wetland definition and provide important wetlands functions and values.

Regards,
Carin High