CITIZENS COMMITTEE TO COMPLETE THE REFUGE

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Re: Comment Letter – "Draft Wetland and Riparian Protection Policy"

Dear Chairperson Hoppin and Members of the State Water Resources Control Board,

This responds to the State Water Resources Control Board (Water Board's) request for stakeholder input regarding the development of Phase 1 of the "Wetland and Riparian Area Protection Policy" (Policy), pursuant to State Water Board Resolution No. 2008-0026.

We commend the Water Board's recognition of the crucial role wetlands and riparian areas play in maintaining water quality and beneficial uses of the waters of the state and for acting to close the regulatory gap that may now exist in Clean Water Act (CWA) (33 U.S.C. § 1251 et seq.) protection of wetlands and waters within the state. The Policy must be watershed based and must extend to all perennial, intermittent, ephemeral watercourses, isolated waters, wetlands, riparian areas, floodplains, and estuaries.

Wetland Definition:

While we concur the proposed definition is an improvement over the definition utilized by the U.S. Army Corps of Engineers (Corps), in the interest of capturing the diverse array of California's wetland habitats, while maintaining consistency with other state agencies, CCCR still recommends the Water Board adopt the U.S. Fish and Wildlife Service (USFWS) definition of wetlands (Cowardin 1979):

> Wetlands are lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this classification, wetlands must have one or more of the following three attributes: (1) at least periodically, the land supports hydrophytes, (2) the substrate is predominantly undrained hydric soil, and (3) the substrate is non-soil and is saturated with water or covered by shallow water at some time during the growing season of each year."

Failing adoption of the USFWS definition utilized by the California Department of Fish and Game (DFG) we suggest it would be valuable to define "normal circumstances".

Wetland Area Delineation:

We agree the U.S. Army Corps of Engineers (Corps) Arid West Region Supplement may provide useful guidance on the identification of "difficult wetland situations." This portion of the supplement addresses "atypical" wetland situations that are not addressed within the 1987 Corps Wetlands Delineation Manual, where one might encounter problematic hydrophytic vegetation, problematic hydric soils, or the absence of wetland hydrology indicators.

In any definition of wetlands the Water Board must include provisions that will enable staff to recapture regulatory authority over areas where the wetland or riparian characteristics have been altered in an attempt to escape the assertion of regulatory authority.

Proposed Prior Converted Croplands (PCC) Exemption:

We are shocked and appalled by the proposal to exclude prior converted croplands from State dredge and fill regulations. The proposal is highly inconsistent with the stated purpose of reversing "historic trends in wetland loss, mitigate future risks to aquatic resources, and produce measurable improvement in the abundance, diversity and health of the state's wetland and riparian resources."

Contrary to the mantra that prior converted croplands have been so altered as to no longer retain wetlands functions and values is the following statement from the State of Washington Department of Ecology (http://www.ecy.wa.gov/programs/sea/wetlands/pcc.html):

> In the past, PCC wetlands were often exempt from federal regulation under the Clean Water Act, based on 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*. In some cases, PCC wetlands have been significantly altered so they provide only minimal functions. *However, in many cases, PCC wetlands provide important hydrologic functions and may provide significant wildlife habitat*. [emphasis added]

There is no basis to conclude PCC wetlands in California are any different or that PCC wetlands in California don't also continue to provide important wetland functions and beneficial uses. In fact, we are aware of several sites in the Bay Area in which PCC determinations were made that do in fact maintain important wetlands functions and values. And others in which those functions and values would be easily restored if farming practices were halted or if pumping waters off the lands ceased.

In 1995 the National Research Council (*Wetlands Characteristics and* Boundaries) recommended:

> 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 the 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.

In 1996, Dr. Terry Huffman conducted an evaluation of the Natural Resources Conservation Service (NRCS) wetland determination and delineation methodology for agricultural lands [*An Evaluation of the Natural Resources Conservation Service Wetland Determination and Delineation Methodology For Agricultural Lands as Currently Used in the San Francisco Bay, Delta and Central Valley Areas of California.* December 1996. Prepared by Terry Huffman, PhD, Huffman & Associates, Inc. copy attached]. Based upon his review Dr. Huffman concluded:

> …many of the wetlands receiving a prior converted classification due to the use of inappropriate wetland determination or delineation methodology and/ or application thereof, are currently seasonal wetlands, have portions of seasonal wetlands on them, or will revert to wetlands if farming practices cease…

And:

> The "Swampbuster" provisions, through the various mitigation programs, also provides the means to avoid Clean Water Act (CWA) regulations under Section 404(f)(2). Under this section of the CWA, the conversion of wetlands from agriculture to another type of land use (e.g. housing development) is a regulated activity requiring a permit from the Corps.

Dr. Huffman's report revealed serious deficiencies in the process of identifying prior converted croplands that could lead to "significant wetland losses within agricultural lands of California San Francisco Bay, and Delta and Central Valley of California." If the purpose of the WRAPP is to stem the loss of wetlands in California, the State Board must not exempt prior converted croplands from drege and fill regulation.

Finally, what is puzzling about this proposal is the existence of a January 18, 2005 letter from the United States Department of Agriculture (USDA) to the Assistant Secretary of the Army for Civil Works [copy attached], stating:

> …In addition, differences now exist between the FSA and CWA on the jurisdictional status of certain wetlands (e.g. prior converted croplands or isolated wetlands may be regulated by one agency, but not the other).
>
> Therefore, effective immediately, USDA intends to withdraw from participation in the MOA and no longer make wetland determinations for purposes other than implementation of the Swampbuster Provisions of the FSA.

Who will be making prior converted croplands determinations?

We urge the Water Board to drop any reference to exemptions for prior converted croplands in the WRAPP. Failing removal and prior to enacting any exemptions, the State Board must at minimum ensure:

- the practice of assigning prior converted croplands determinations is well documented and can be verified,
- PCC determinations are based upon field delineations,
- cropping histories are maintained and well documented going back to 1985,
- very clear guidelines are developed for what constitutes "abandonment,"

- any loopholes that would provide escape from regulation for activities that are not related to farming are closed (e.g. if lands in question are identified for uses other than agriculture in any planning documents they should lose their PCC status, etc.)
- some form of monitoring program is developed to evaluate whether there are significant wetland losses due to undocumented and unauthorized land use changes of prior converted croplands.

Adoption of the 404 (b)(1) Guidelines (Guidelines) (40 C.F.R. parts 230-233) as a regulatory mechanism:

We commend the Water Board for incorporating the 404 (b)(1) Guidelines into the application review process. We do urge the concept of sequencing be emphasized more strongly in policy language rather than lumping avoidance and minimization together.

We commend the Water Board for incorporating the highlighted "Practicable alternatives that do not involve a discharge to a water of the state are presumed to be available and to have less impact on water quality." It is critical this statement is maintained in the policy if the emphasis is to remain on protecting waters of the state.

The 404 (b) (1) Guidelines (40 C.F.R. 230.10) require applicants who wish to dredge or fill wetlands must first rebut the presumption that a practicable alternative exists that is less environmentally damaging. The preamble to the Guidelines states that it is the applicant's responsibility to rebut this presumption. The Memorandum of Agreement between EPA and the Corps concerning mitigation under the CWA 404 (b)(1) Guidelines (Mitigation MOA) states:

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 permittable, 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 *avoid* impacts to wetlands, next *minimize* those impacts, and only after avoidance and minimization of impacts has occurred, compensate for any unavoidable impacts.

For the Guidelines to be effective in regulating and protecting wetlands and riparian areas, and in fairness to the regulated public, they must be made aware the important concepts of avoidance and minimization will be enforced during the permit review process.

We believe the definition of "basic project purpose" should be revised to simply:

> "Basic project purpose" means the fundamental, essential, irreducible purpose of the project."

Yocom, Leidy, and Morris ("Wetlands Protection Through Impact Avoidance: A Discussion of the 404 (b)(1) Alternatives Analysis, 1989, copy previously forwarded) differentiated "basic project purpose" from the phrase "capable of being done." In defining "capable of being done" the authors brought in the concepts of "considering costs, existing technology, and logistics." We think it is more appropriate to separate the two definitions. It is first important to determine what the project purpose is…to provide shelter, to provide retail, to provide a recreational facility, and then ask whether an alternative is "capable of being done."

As we indicated in a previous comment letter the authors list many ways in which the application of the Guidelines have effectively protected special aquatic sites, we list the following are points as examples that should implemented to ensure the successful incorporation of the Guidelines into the state regulatory program:

- The project purpose must be generically defined. Thus, residential housing has a basic project purpose of providing shelter, regardless of whether it is described as up-scale housing, waterfront housing, etc. it still has the basic project purpose of providing shelter and should be analyzed as such.
- Unacceptable ways of defining project purposes include, but are not limited to, "waterfront housing", "development", "redevelopment", "making money", "increasing tax base", "generating revenues for redevelopment", etc.
- Overall project purposes should not include project amenities, a particular return on investment, "highest and best use of the land", or certain desired size requirements.
- For the most part, multi-purpose projects should be evaluated as separate projects with the assumption that the individual components can be relocated into uplands.
- The geographic scope of the analysis of alternative sites must be broad enough to reasonably consider all environmentally preferable sites. (One of the examples given is that of a destination resort, the geographic scope of analysis in this instance may be as large as the state, or even as large as a multi-state state analysis.)
- Determination of "practicability" – Often alternatives are rejected because the applicant insists they will not recover a large enough return on investment, however, Yocom, etal suggest "…a project alternative that achieves a smaller return on investment than the applicant's preferred alternative may be considered practicable for the purposes of 404 permitting…"

The authors also stress the need for strict adherence to the sequence of avoidance, then minimization, and only afterwards compensatory mitigation.

Recent studies of the efficacy of compensatory mitigation suggest this is paramount in wetlands protection. Ambrose, Calloway, and 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") reveals while permittees for the most part comply with the compensatory

mitigation requirements, and acreages of "wetlands" are produced, these areas do not fully recapture lost functions and values of wetlands.

Based upon our experience with compensatory mitigation sites within the San Francisco Bay area, we believe avoidance is pivotal to the protection of wetlands and riparian areas of the state.

We believe 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.

Any unavoidable impacts should and must be minimized and all non-essential projects or project components should be located in appropriate upland areas. Only after rigorous efforts have been made to avoid and minimize wetlands and riparian impacts should compensatory mitigation be considered. Studies which have analyzed the ability of compensatory mitigation projects to replace lost wetlands and riparian functions and values clearly indicate success rates are unacceptably low. Therefore, it should not be assumed compensatory mitigation will adequately replace lost functions and values and every effort must be made to ensure permit conditions will address criteria necessary to successfully recreate wetlands and riparian functions, values, and services (e.g. hydrologic and biogeochemical conditions). Also, it is imperative that wetland and riparian acreage and functions, values, and services of the before and after conditions at the project and mitigation sites be required so that the efficacy of compensatory mitigation can be assessed.

Mitigation ratios should be high enough to offset the temporal losses of wetland or riparian functions and values and to ensure "no net loss of wetlands" as required by the State's Wetlands Conservation Policy (Executive Order W-59-93). A one-to-one ratio is setting the bar too low. The National Research Council in 1992 recommended ratios of at least three, five, or ten acres of mitigation wetlands or streams for every acre of wetland or stream destroyed depending on its functional value ("Restoration of Aquatic Ecosystems"). We urge the Water Board to amend the guidance on mitigation ratios – certainly in the situation where a mitigation bank or in-lieu fee program is used a much higher mitigation ratio should be required.

We urge caution in the issuance of mitigation credit for buffers. This should only occur when there is thorough documentation the buffer areas provide vital support of the adjacent wetland ecosystem and are not merely aesthetic features of a development.

Compensatory mitigation must be based on a watershed approach and take into account the linkage of wetland habitat with the surrounding uplands, existing hydrological

conditions, etc. (e.g. created wetlands must be sustainable and not degrade adjacent existing wetlands or the upland habitat that supports them).

We thank you for this opportunity to provide comments.

Sincerely,

Florence M LaRivere

Florence M. LaRiviere,
Chairperson