



August 18, 2016

Ms. Felicia Marcus  
Chair  
State Water Resources Control Board  
PO Box 100  
Sacramento CA 95812-0100



SUBJECT: Preliminary draft Procedures for Discharges of Dredged or Fill Materials to Waters of the State

Dear Chair Marcus:

California Waterfowl Association appreciates the opportunity to comment on the preliminary draft Procedures for Discharges of Dredged or Fill Materials to Waters of the State (Discharge Procedures).

California Waterfowl Association is a member of the Central Valley Joint Venture. In 2013, California Waterfowl participated with CVJV as a stakeholder group in meeting with the Board in April 2013 and following up with a letter in July 2013.

The Discharge Procedures picked up some of the changes to the Wetland Policy that were requested by the CVJV Stakeholder Group, for which we are appreciative. The specific changes included the definition of "Ecological Restoration and Enhancement Projects", removal of the requirement of compensatory mitigation for Ecological Restoration and Enhancement Projects, and exemption of Ecological Restoration and Enhancement Projects from alternatives analysis.

However, we are disappointed that the latest draft does not reflect everything we thought had been agreed upon. While California Waterfowl does not expect Ecological Restoration and Enhancement Projects to be exempted or excluded from the Discharge Procedures, we do expect that those procedures will recognize the monitoring and reporting requirements of the agreements we have with other funding and regulatory agencies, as well as the environmentally beneficial nature of Ecological Restoration and Enhancement Projects and their role in advancing the state's policy of "no net loss" of wetlands.

**First, some history:**

The CVJV, as a Stakeholder Group, met with members and staff of the State Water Resources Control Board on April 16, 2013, to discuss the group's concerns about the preliminary draft Water Quality Control Policy for Wetland Area Protection and Dredged or Fill Permitting (January 28, 2013) (Wetland Policy), a predecessor to the current document. The CVJV followed up with a letter dated July 15, 2013, in which the CVJV requested specific revisions to the Wetland Policy.

On June 17, 2016, the Board issued the Discharge Procedures. After a hearing on July 19, 2016, at which California Waterfowl testified, the Board extended the comment period to August 18, 2016.

The Discharge Procedures document is the follow-up and successor draft to the Wetland Policy. A previous draft of the Wetland Policy was issued on March 9, 2012. Through these comments, California Waterfowl wishes to express its concern that the revisions requested in the CVJV July 15, 2013 letter have generally not been incorporated into the Discharge Procedures.

One requested revision that was incorporated was the definition of “Ecological Restoration and Enhancement Projects.” However, the adoption of the definition does not appear to have a substantive effect on the treatment of Ecological Restoration and Enhancement Projects within the Discharge Procedures document except in two cases: Ecological Restoration and Enhancement Projects are not required to provide compensatory mitigation plans (DP; Page 4, ll. 41-42), and Ecological Restoration and Enhancement Projects are exempted from providing alternatives analyses (DP; Page 7, l. 267). On the other hand, Ecological Restoration and Enhancement Projects are required to submit draft monitoring plans with their applications for permits under the Discharge Procedures (DP; Page 5-6, ll. 195-203).

California Waterfowl maintains that, because the projects its constituent members engage in are inherently beneficial to the environment and advance the state policy of “no net loss” of wetlands, the Discharge Procedures should recognize the monitoring and reporting requirements included in agreements with funding agencies and other wildlife regulatory agencies and programs. A representative list of these monitoring and reporting requirements is provided below.

To require additional and redundant monitoring and reporting plans as part of the Discharge Procedures will consume resources and serve as a disincentive to undertake important conservation efforts.

### **Joint Venture Background**

Joint ventures are self-directed public-private partnerships responsible for implementing national or international bird conservation plans within a specific geographic area or for a specific taxonomic group and are formally recognized for that responsibility. The Central Valley Joint Venture is comprised of 21 partners including representatives from eight non-governmental conservation organizations, 12 state and federal agencies, and one corporation. The CVJV’s mission is to work collaboratively through diverse partnerships to protect, restore, and enhance wetlands and associated habitats for waterfowl, shorebirds, waterbirds, and riparian songbirds in California’s Central Valley in accordance with the CVJV’s Implementation Plan.

The Central Valley is one of the most important and most threatened areas for waterfowl and other wetland-dependent wildlife on the continent. Habitat loss has been extensive. More than 95% of the wetlands that were present historically have been lost. The CVJV is working rigorously to conserve wetland habitat in this critical area before it is too late.

The process by which California Waterfowl and other CVJV partners restore and conserve wetlands habitat consists of developing “managed wetlands” or “irrigated wetlands.” Managed wetlands are developed and maintained through land contouring, planting of food resources for migratory waterfowl, shorebirds, songbirds, and other wetlands-dependent species, and irrigation. In particular, land

contouring involves moving soil to create swales and islands that mimic natural conditions in floodplains and other natural wetlands. The purpose of developing managed wetlands is to optimize the habitat value of the wetlands for the species that are dependent on the few remaining wetlands that exist in California.

### **Monitoring for Ecological Restoration and Enhancement Projects**

As discussed at the April 16, 2013 meeting between the CVJV Stakeholder Group and SWRCB personnel, Ecological Restoration and Enhancement Projects are already subject to monitoring and reporting as required by the binding stream or wetland enhancement or restoration agreement or wetland establishment agreement through which the project was undertaken (private lands) or through routine assessments conducted by the managing resource agency to determine progress in accomplishing habitat management objectives (public lands). Therefore, SWRCB personnel agreed that the Policy will not require any additional monitoring or reporting for these projects but requested examples of representative agreements documenting those monitoring and reporting requirements.

Most of the wetland restoration and enhancement work that is conducted on private lands in the Central Valley is funded by the Natural Resources Conservation Service (NRCS), California Wildlife Conservation Board (WCB), North American Wetlands Conservation Act (NAWCA), U.S. Fish and Wildlife Service (USFWS), or California Department of Fish and Wildlife (CDFW). Monitoring results are kept in the grantor and/or grantee's project files. NRCS conducts annual monitoring of its projects, regardless of the program under which the project was accomplished. NRCS' programs require landowners to manage and maintain projects for a minimum of 10 years and up to perpetuity, depending on the program.

WCB grant agreements require that wetland restoration and enhancement projects be managed and maintained for the purpose for which they were intended in the grant for a minimum of 25 years. The grant agreements include a Management Plan that describes the site monitoring that will be conducted over that time period.

NAWCA also requires that wetland restoration and enhancement projects be managed and maintained for the purpose for which they were intended in the grant for a minimum of 25 years from the date the Grant Officer receives final performance and financial reports.

The management and maintenance requirements in these documents are transferred from the grantee to the landowner (public or private) in a separate site-specific agreement between the grantee and the landowner.

Most of the private wetlands in the Central Valley are permanently protected in conservation easements held by NRCS, USFWS, or CDFW. These agencies all conduct annual monitoring of their easement properties. USFWS conducts aerial monitoring of its Sacramento and San Joaquin Valley wetland easements and restoration and enhancement projects annually.

USFWS has an extensive annual habitat review program for each of the five refuges included in the Sacramento National Wildlife Refuge (NWR) Complex including Sacramento, Delevan, Colusa, Sutter,

and Sacramento River NWR's. This program has been in place for many years. Habitat conditions in individual tracts on each refuge are compared to the habitat objectives that were established for those tracts during the previous year's review and specific work that is needed on each tract is identified and prioritized. USFWS staff also routinely conducts surveys and monitoring for a variety of plants and wildlife on their properties to assess progress in accomplishing habitat and species management objectives.

CVJV attached samples of each of these types of agreements to the 2013 comments letter. If the attachments are no longer available to the Board, California Waterfowl will obtain and provide the samples on request.

### **California Waterfowl concerns with the preliminary draft of the Discharge Procedures**

Many of California Waterfowl's opportunities for wetland restoration and enhancement occur within areas recognized as "Waters of the State". Most of these areas are also recognized as "Waters of the U.S.". Habitat restoration and enhancement work may cause the discharge of dredge or fill into these wetland areas even though the work results in an increase in the quality, and usually also the quantity, of wetland habitat. Such work that occurs in Waters of the State that are also Waters of the U.S. is already subject to the U.S Army Corps of Engineers' (Corps') Clean Water Act (CWA) Sections 404 and State Water Quality Certification CWA Section 401 permitting requirements.

California Waterfowl is concerned that, if the Discharge Procedures document is adopted as written, such work that occurs in Waters of the State, regardless of whether those areas are also Waters of the U.S., would be subject to the more rigorous permitting requirements of the Discharge Procedures. The Discharge Procedures could adversely impact the ability of California Waterfowl and the other conservation partners of the CVJV and other joint ventures in California, including the San Francisco, Sonoran, and Intermountain West Joint Ventures, to deliver on-the-ground wetland restoration and enhancement.

The policy of the State of California, as set forth in Executive Order W-59-93, is that the Water Boards' regulation of dredged or fill activities will be conducted in a manner "to ensure no overall net loss and long-term net gain in the quantity, quality, and permanence of wetlands acreage and values . . .". Those who develop and maintain managed wetlands do so with no commercial purpose. Two-thirds are private landowners and one-third are government agencies. Most of the private managed wetlands are under conservation easements that restrict the use of the land for purposes other than wetland habitat. To encourage these landowners to continue to make efforts to advance the state's wetland policies requires the provision of incentives and the removal of disincentives. Overlapping and redundant regulatory burdens and costs are disincentives.

The Discharge Procedure does provide (DP; Page 9, l. 359 through Page 12, l.412) that activities that would be exempt under the CWA Section 404(f) are also excluded from the Discharge Procedures. Those activities are primarily agricultural in nature, and include the construction and maintenance of irrigation ditches, farm ponds, and stock ponds, as well as the maintenance (but not construction) of drainage ditches. While these exemptions apply to managed wetlands, they do not explicitly apply to them. They

do not apply to the contouring of land that is often involved in creating managed wetlands. Despite their inclusion in the Irrigated Lands Regulatory Program, managed wetlands are not the same as commercial agriculture and should be distinguished from agriculture in any regulatory setting.

### **General Comments and Revisions Requested**

The January 28, 2013 Wetland Policy contained definitions of Ecological Restoration Projects (WP; Page 22, ll. 606-612) and Enhancement (WP; Page 22, ll. 614-617). In the July 15, 2013 comment letter, CVJV requested that the definitions be merged into a definition of “Ecological Restoration and Enhancement Projects.” The current preliminary draft adopts this definition (DP; Page 12-13, ll. 437-457), but, as stated above, the adoption of the definition has little practical effect.

The letter also requested that the Wetland Policy also include a timeline for approval of the application (if required) for Ecological Restoration and Enhancement Projects, as follows:

“The Regional Water Quality Control Board (RWQCB) must determine if an application is complete and notify the prospective permittee accordingly in writing within 30 calendar days of the date of receipt. If the application is determined to be incomplete, the RWQCB must request the specific additional information needed to make the application complete from the prospective permittee within that 30-day period. The RWQCB may make only one request for additional information in response to an application. If the prospective permittee does not provide all of the requested information, then the RWQCB will notify the prospective permittee in writing within 30 calendar days of the date of receipt of the supplemental information that the application is still incomplete. The application review process will not commence until all of the requested information has been received by the RWQCB. The prospective permittee shall not begin the proposed activity until either: a) Prospective permittee is notified in writing by the RWQCB that the proposed activity may proceed under the issued permit; or b) 45 calendar days have passed since the notification of receipt of a complete application and the prospective permittee has not received written notice from the RWQCB that the proposed activity may proceed under an issued permit.”

Finally, the letter requested that the Wetland Policy include a fee structure for permitting projects. Knowing required fees up-front will aid in project planning and budgeting. It will take less time for RWQCB staff to review applications for Ecological Restoration and Enhancement Projects than many other types of projects. Therefore, the permit fees for Ecological Restoration and Enhancement Projects should be lower than for other types of projects. In addition, many of these projects are funded with grant dollars and the funding entities desire that most of those dollars be applied directly to on-the-ground restoration and enhancement activities. Also, lower permit fees for these projects will encourage voluntary wetland conservation efforts, which in turn, will help achieve the Policy’s objective of achieving, “...no overall net loss and a long-term net gain in the quantity, quality, and diversity of waters of the state, including wetlands”.

## Specific Requests for Revisions to the Discharge Provisions

The January 28, 2013 Wetland Policy contained material that is not included in the June 17, 2016 Discharge Procedures. In addition, the two documents are organized differently. Therefore, it is not possible to simply incorporate the line-specific comments and revisions in the 2013 comment letter into this letter. However, the following comments and requests for revisions refer to the Discharge Procedures document.

The January 28, 2013 Wetland Policy contained material that is not included in the June 17, 2016 Discharge Procedures. In addition, these two documents are organized differently. Therefore, it is not easy to determine if all the line-specific comments and requested revisions provided in our July 15, 2013 letter have been addressed in the current Discharge Procedures document. Comments on and specific requests for revisions to the Discharge Procedures document are provided below. This is not an all-inclusive list of our concerns and it is possible that the CVJV Stakeholder Group will identify additional issues after further review of the Discharge Procedures and additional coordination with SWRCB staff and Board members.

1. Wetland Definition (Pages 1 and 2, Section II, Lines 40-43 and 50-51). The definition of “Waters of the State” should be jurisdictional and not be subject to determination by Water Boards on a case-by-case basis.
2. Project Application Submittal (Pages 3-6, Section A, Lines 91-203). Add a new subsection header titled: “1) Ecological Restoration and Enhancement Projects that will occur within areas recognized as Waters of the State that are also recognized as Waters of the U.S. shall not be subject to additional permitting requirements by the Discharge Procedures. Those projects will continue to follow the application procedures already in place to satisfy the Corps’ CWA Sections 404 and 10 and State Water Quality Certification CWA Section 401 permitting requirements.”
3. Project Application Submittal (Pages 3-6, Section A, Lines 91-203). Add a new subsection header titled: “2) Ecological Restoration and Enhancement Projects that Will Occur within Areas Recognized as Waters of the State that are Not Also Recognized as Waters of the U.S.” Insert the following text under this subsection header: “A complete application package for Ecological Restoration and Enhancement Projects that will occur within areas recognized as Waters of the State that are not also recognized as Waters of the U.S. will include the following items: i) Contact information (name, address, and telephone number) for permittee; ii) Location of proposed project; iii) Description of proposed project including project’s purpose, size, and schedule; iv) Description of impacted water bodies including name of receiving water body, anticipated potential stream flow during project activities, potential impacts to water quality, anticipated permanent and temporary impacts to Waters of the State from any discharge other than dredging (in acres/linear feet), and volume and type of dredged material to be discharged to Waters of the State; v) Wetland determination (identification of wetland types and map of wetland locations using GIS digitizing or GPS coordinates; vi) Description and photographs of baseline habitat conditions at the project site and discussion of best management practices that will be implemented to avoid or minimize project impacts on the environment; vii) Wetland restoration or enhancement plan or contract; viii) Binding stream or wetland restoration or enhancement agreement or wetland establishment agreement between the landowner and federal or state resource agency or non-governmental conservation organization (if different

- than item “vii” above); ix) Description of monitoring or reporting requirements for project and identification of where such information will be filed; x) Identification of any federally or state-listed special-status species or designated critical habitat for those species that might be affected by the proposed work (for non-federal applicants) or documentation demonstrating compliance with the Federal Endangered Species Act (for federal applicants); xi) CEQA documentation (for those projects with a federal nexus but no state nexus other than Section 401 compliance, National Environmental Policy Act [NEPA] documentation sufficient for the RWQCB to prepare the CEQA documentation will be provided); and xii) Permit fee.”
4. Project Application Submittal (Pages 5-6, Subsection g, Lines 195-203). Replace Subsection g. with “Monitoring and reporting to ensure that Ecological Restoration and Enhancement Projects are being managed and maintained consistent with their intended purpose shall be limited to that which is required by the binding stream or wetland enhancement or restoration agreement or wetland establishment agreement through which the project was undertaken (private lands) or which is routinely conducted by the managing resource agency to assess progress in accomplishing habitat management objectives (public lands) (see definition of Ecological Restoration and Enhancement Projects). These Discharge Procedures do not require any additional monitoring or reporting for these projects.”
  5. Activities and Areas Excluded from the Application Procedures for Regulation of Discharges of Dredged or Fill Material to Waters of the State (Pages 9-11, Subsection 1, Lines 361-387). The Discharge Procedures recognizes that Corps Regulatory Guidance Letters 82-03, 87-07, and 07-02 create exemptions from CWA Section 404 permits for construction or maintenance of irrigation and maintenance of drainage ditches. Although these exemptions may have originally been developed to address ditches used for agriculture, they also apply to ditches used to convey water to or from managed wetlands. Most of the wetlands that remain in the Central Valley are managed wetlands that depend on ditches and irrigation infrastructure for water supply and drainage. Most of these wetlands could not be supported without these water conveyance systems because the natural hydrology of the Central Valley has been so drastically altered. Therefore, this section needs to state that construction and maintenance of irrigation ditches and maintenance of drainage ditches for purposes of Ecological Restoration and Enhancement Projects are not subject to the procedures for dredged or fill discharges included in the Discharge Procedures.
  6. Ecological Restoration and Enhancement Project (Pages 12-13, Lines 437-457). The language in the definition of an Ecological Restoration and Enhancement Project that we provided in our July 15, 2013 comment letter related to such projects being undertaken on public lands, needs to be included in the definition provided in the Discharge Procedures. Insert the following sentence on Line 446 after “...or non-governmental conservation organization...”: “Such projects may also be undertaken voluntarily on public lands that are managed primarily to provide wildlife habitat, such as state wildlife areas, preserves, and national wildlife refuges, to help accomplish habitat management objectives.”

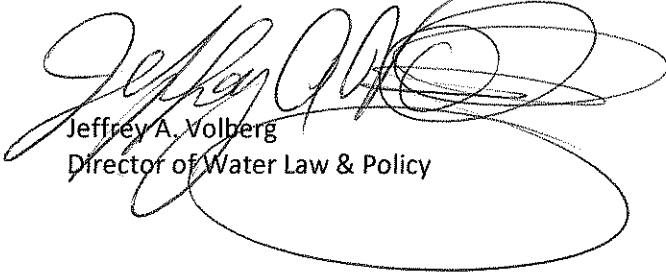
California Waterfowl works closely with organizations such as Central Valley Joint Venture, Grasslands Water District, Ducks Unlimited, and Defenders of Wildlife to support the preservation and restoration of California’s last remaining wetlands. California Waterfowl supports the comments and suggestions submitted by these organizations.

California Waterfowl thanks the Board for the opportunity to express our concerns with the draft Discharge Procedures as currently written and to provide our requested revisions to the document. We look forward to continuing dialogue with the Board and working together to craft a Discharge

Procedure that will facilitate voluntary wetland restoration and enhancement work and truly achieve no overall net loss and a long-term net gain in the quantity, quality, and diversity of Waters of the State, including wetlands.

Please contact Jeffrey A Volberg, at (916) 217-5117 or at [jvolberg@calwaterfowl.org](mailto:jvolberg@calwaterfowl.org) if you have any questions regarding these comments.

Respectfully submitted,



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