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August 17, 2016

VIA U.S. MAIL AND EMAIL

Jeanine Townsend, Clerk of the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814  
E-mail: commentletters@waterboards.ca.gov

Dear Clerk and Members of the Board,

Please accept these comments on behalf of the Grassland Water District and the Grassland Resource Conservation District (collectively GWD) regarding the State Water Resources Control Board's (SWRCB) proposed amendments to the California Ocean Plan and Inland Surface Waters, Enclosed Bays, and Estuaries of California Plan to include procedures for discharges of dredged or fill materials to waters of the state (proposed Amendments). In accordance with the SWRCB's suggestion, these comments provide specific requested language changes to the proposed Amendments, in bold strike-out and underline format.

**I. INTRODUCTION**

The GWD is the largest component of the Grasslands Ecological Area (GEA). Comprising 240,000 acres of wetland and upland habitat, the GEA contains the largest contiguous freshwater wetland complex west of the Rocky Mountains, hosting millions of migratory birds and shorebirds each year as well as a diverse resident population of wildlife. The GEA is listed as one of the United States' most important wetland areas under the international Ramsar Convention on Wetlands. The GEA is located in

western Merced County and includes private, state, and federally owned wetland areas, all of which maintain long-term federal water service agreements with the U.S. Bureau of Reclamation.

The GEA wetlands (refuges), along with other national wildlife refuges and state wildlife management areas in the Central Valley, are listed under the federal Central Valley Project Improvement Act (CVPIA) as habitat mitigation areas.<sup>1</sup> Often called “managed wetlands” or “irrigated wetlands,” CVPIA refuges receive federal deliveries of imported water, in order to provide “ecologically equivalent habitat” for wetlands that were lost due to the construction, operation, and maintenance of the Central Valley Project (CVP).<sup>2</sup> A similarly managed area of privately owned wetlands exists in the Tulare Basin. In total, there are approximately 227,480 acres of managed wetlands in the Central Valley.<sup>3</sup>

The Central Valley Regional Water Quality Control Board (CVRWQCB) regulates discharges from managed wetlands under the Irrigated Lands Regulatory Program. The CVRWQCB has initiated a process to address the unique status of managed wetlands, in recognition of the limited water quality impacts from managed wetland discharges, the known water quality benefits that managed wetlands provide, the public trust values of managed wetlands, and the budgetary constraints of wetland owners and managing agencies.<sup>4</sup> The CVRWQCB’s goals in developing a proposed regulatory strategy for managed wetlands are to “increase managed wetlands and water quality benefits, and minimize regulatory costs.”<sup>5</sup>

GWD requests that the SWRCB give similar consideration in the proposed Amendments to the operational and budgetary concerns of wetland managers, and the significant benefits that managed wetlands provide. The Central Valley’s approximately 227,480 acres of managed wetlands have been successfully managed through artificial irrigation for at least 65 years. The regulatory burdens of extending the proposed Amendments to the ongoing management of irrigated wetlands are too great, particularly in light of the beneficial public trust purposes that managed wetlands serve. Increased regulatory burdens and costs on privately managed wetlands could also have the unintended consequence of actually reducing the acreage

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<sup>1</sup> CVPIA, Pub. Law. 102-575, Title 34, §§ 3406(a), (d).

<sup>2</sup> CVPIA § 3406(a)(3).

<sup>3</sup> CVRWQCB Proposed Order R5-2016-XXXX, “Developing a Strategy for Regulation of Managed Wetlands,” p. 1, *available at*:

[http://www.waterboards.ca.gov/centralvalley/board\\_decisions/tentative\\_orders/wetlands/wetlands\\_res.pdf](http://www.waterboards.ca.gov/centralvalley/board_decisions/tentative_orders/wetlands/wetlands_res.pdf)

<sup>4</sup> *Ibid.*, pp. 1-2.

<sup>5</sup> *Ibid.*, p. 3.

of managed wetlands in the Central Valley. If regulations, permitting, and fees prevent private landowners from continuing long established management practices and thwart implementation of projects designed to maintain and improve the wetland habitat, conversion to agriculture and / or lower quality wetlands will be the result.

## **II. Suggested Revisions to the Proposed Amendments**

### ***A. Request to Include an Exemption for Irrigated Wetlands Management***

GWD believes that managed wetlands in the Central Valley should be identified as areas that are exempt from the proposed Amendments, for several reasons. First, under guidance of the U.S. Army Corps of Engineers (USACE), artificially irrigated wetlands do not qualify as waters of the United States and are exempt from the requirements of Clean Water Act section 404.<sup>6</sup>

Second, ongoing management activities by wetland managers fall within the current exemption in the proposed Amendments for activities that are exempt under federal Clean Water Act section 404(f). Section 404(f) covers activities related to irrigation and drainage ditches, soil and water conservation practices, and normal farming activities. The 404(f) exemption is important for reducing the regulatory burdens that could otherwise be imposed on managed wetland water deliveries and management activities.

For example, the proposed Amendments list regulatory guidance letters and similar documents that interpret Clean Water Act section 404(f), such as the USACE Regulatory Guidance Letter No. 07-02, which describes the scope of the exemption for irrigation and drainage ditches.<sup>7</sup> As another example, although the scope of the exemption for soil and water conservation practices is currently uncertain, it should cover wildlife habitat management activities. In 2014, USACE executed a Memorandum of Understanding (MOU) with the Natural Resource Conservation Service (NRCS) and the U.S. Environmental Protection Agency, clarifying that the soil

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<sup>6</sup> U.S. Army Corps of Engineers Regulatory Guidance Letter No. 07-02, fn. 1, *available at*: <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl07-02.pdf> (“[W]e generally do not consider the following waters to be ‘Waters of the United States’ . . . Artificially irrigated areas which would revert to upland if the irrigation ceased. . . Thus, waters, including wetlands, created as a result of irrigation would not be considered waters of the US even when augmented on occasion by precipitation.”).

<sup>7</sup> Proposed Amendments, pp. 9-10.

and water conservation practices that are exempt under section 404(f) include 55 established NRCS conservation practice standards.<sup>8</sup>

That MOU was withdrawn in 2015 at the direction of Congress, but the NRCS's adopted conservation practice standards remain in place,<sup>9</sup> including shallow water development and management to maintain habitat for wildlife (Conservation Practice Standard 646),<sup>10</sup> and installation and management of water control structures that modify the flow of water to provide habitat for wildlife (Conservation Practice Standard 587).<sup>11</sup> In addition to the exemption for irrigated wetlands, these conservation practice exemptions allow for the continued management of irrigated wetlands to benefit public trust resources.

The proposed Amendments do not include an express exemption for artificially irrigated managed wetland areas, which could create confusion for managed wetland owners and managing agencies. It is not practical, nor is it good policy, for the SWRCB to deviate from long-established resource-beneficial federal exemptions for artificially managed wetlands, in order to impose new regulations on wetland habitat management practices through a permitting process. Accordingly, GWD requests that section D.2 of the proposed Amendments be revised as follows:

2. Areas excluded from application procedures in sections IV.A and IV.B:

[ . . . ]

**d. Discharges of dredged or filled materials into existing artificially irrigated (managed) wetlands in the Central Valley that serve the primary purpose of providing habitat for wetland-dependent species. The exclusion applies to the extent the discharges of dredged or filled materials are in furtherance of the provision of habitat for wetland-dependent species.**

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<sup>8</sup> MOU with attached list of 55 conservation practice standards available at: [http://www.spl.usace.army.mil/Portals/17/docs/regulatory/JD/404\(f\)/FinalMOU.pdf](http://www.spl.usace.army.mil/Portals/17/docs/regulatory/JD/404(f)/FinalMOU.pdf).

<sup>9</sup> Table of all NRCS conservation practice standards available at: [http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/technical/cp/ncps/?cid=nrcs143\\_026849](http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/technical/cp/ncps/?cid=nrcs143_026849)

<sup>10</sup> Available at: [http://www.nrcs.usda.gov/Internet/FSE\\_DOCUMENTS/nrcs143\\_026058.pdf](http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_026058.pdf)

<sup>11</sup> Available at: [http://www.nrcs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb1046933.pdf](http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1046933.pdf)

**B. *Request to Clarify the Definition of Ecological Restoration and Enhancement Projects to Include Those Made Under Agreements with Local Wetland Management Agencies***

The proposed Amendments contain relaxed regulatory requirements for Ecological Restoration and Enhancement Projects (“EREPs”). For example, EREPs are not subject to compensatory mitigation plan or alternatives analysis requirements, and have unique monitoring plan requirements.<sup>12</sup> GWD occasionally works with upland landowners to expand the wetland footprint of the GEA, and such projects may not require an agreement with a state or federal agency or a nonprofit organization. GWD is concerned that the EREP definition is too narrow and may arbitrarily exclude this type of restoration activity.

GWD requests that the SWRCB make a small revision to the definition of an EREP as follows, so that it includes wetland restoration projects made under an agreement with a local wetland management agency such as Grassland Water District or Grassland Resource Conservation District:

Ecological Restoration and Enhancement Project means projects undertaken for the sole purpose of assisting or controlling the recovery of an aquatic ecosystem that has been degraded, damaged or destroyed to restore some measure of its natural condition and to enhance the beneficial uses or potential beneficial uses of water. Such projects are undertaken voluntarily in accordance with the terms and conditions of a binding stream or wetland enhancement or restoration agreement, a wetland establishment agreement, **or projects designed to enhance or restore wetland habitat on managed wetlands subject to a conservation easement** between the landowner and the U.S. Fish and Wildlife Service, Natural Resources Conservation Service, Farm Service Agency, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Forest Service, U.S. Bureau of Land Management, California Department of Fish and Wildlife, California Wildlife Conservation Board or other federal, ~~or~~ state, **or local** resource agency or non-governmental conservation organization. ...<sup>13</sup>

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<sup>12</sup> Proposed Amendments, pp. 4, 5, 7.

<sup>13</sup> Proposed Amendments, p. 12.

### **III. Support for Comments Submitted by Partner Organizations**

GWD works closely with organizations such as Ducks Unlimited and Defenders of Wildlife to support the preservation and restoration of California's last remaining wetlands. GWD supports the comments and suggestions submitted by these organizations.

On behalf of the Grassland Water District, the Grassland Resource Conservation District, and Central Valley managed wetland owners and agencies, thank you for considering these comments to ensure that the proposed Amendments do not cause unintended collateral damage to California's protected managed wetlands.

Sincerely,



Ricardo Ortega  
General Manager,  
Director of Policy &  
Governmental Affairs