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CENTRAL VALLEY JOINT VENTURE

Conserving Bird Habitat in California's Central Valley

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Comment Letter # 7

August 18, 2016

Audubon California

California Waterfowl
Association

Defenders of Wildlife

Ducks Unlimited, Inc.

Point Blue Conservation
Science

River Partners

The Nature Conservancy

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

SUBJECT: Central Valley Joint Venture Stakeholder Group's Comments on Preliminary Draft Procedures for Discharges of Dredged or Fill Materials to Waters of the State (June 17, 2016 Version)

Dear Chair Marcus:

The Central Valley Joint Venture (CVJV) Stakeholder Group appreciates the opportunity to comment on the Preliminary Draft Procedures for Discharges of Dredged or Fill Materials to Waters of the State (June 17, 2016 Version) (Discharge Procedures). Our group coordinated extensively with State Water Resources Control Board (SWRCB) staff and Board members during 2012-2013 regarding our concerns with previous versions of these Discharge Procedures. On July 15, 2013, the CVJV Stakeholder Group provided a very detailed letter outlining our requested revisions to the January 28, 2013 version of this document. We are pleased that many of our requested revisions to the January 28, 2013 document have been incorporated into the current Discharge Procedures. However, we are disappointed that the Discharge Procedures document does not reflect all of the revisions related to permitting procedures for voluntary habitat restoration and enhancement projects that the CVJV Stakeholder Group had previously raised with the SWRCB and that we thought were going to be incorporated. The CVJV Stakeholder Group does not expect these projects to be exempted or excluded from the Discharge Procedures, but we do expect that those procedures will recognize the monitoring and reporting requirements of the project 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. Consequently, streamlined

procedures should be adopted for these projects and additional revisions to the Discharge Procedures are needed. Some information that will provide context for our comments follows.

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 CVJV is comprised of 19 partners including representatives from seven non-governmental conservation organizations, 11 state and federal agencies, and one regulated utility provider. 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 CVJV partners restore, enhance, and conserve wetland habitat consists primarily of developing "managed wetlands" or "irrigated wetlands." Managed wetlands are developed and maintained through land contouring; planting of food resources for migratory waterfowl, shorebirds, and other wetland-dependent species; vegetation management; and irrigation and water management. In particular, land contouring involves moving soil to create swales and islands that mimic natural conditions in floodplains and other natural wetlands and to reduce topographic variation in order to maximize water use efficiency and water and vegetation management capabilities. The purpose of developing managed wetlands is to optimize the habitat value of the few remaining wetlands that exist in California for the species that are dependent on them.

Many of the CVJV'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. Beneficial habitat restoration and enhancement 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 10 and State Water Quality Certification CWA Section 401 permitting requirements and should not be subject to additional permitting requirements by the Discharge Procedures.

The CVJV Stakeholder Group is concerned that, if the Discharge Procedures document subjects wetland restoration and enhancement projects to additional permitting requirements, it will adversely impact the ability of the conservation partners of the CVJV and other joint ventures in California, including the San Francisco, Sonoran, Pacific Birds, and Intermountain West Joint Ventures, to deliver on-the-ground wetland restoration and enhancement. This outcome would be counter to the policy of the State of California, as set forth in Executive Order W-59-93, which states 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 privately-owned 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. Additional regulatory burdens and costs are disincentives.

Overview of CVJV Stakeholder Group’s Input on Previous Versions of Discharge Procedures

The CVJV Stakeholder Group met with members and staff of the SWRCB on April 16, 2013 to discuss the group’s concerns with 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 detailed letter dated July 15, 2013, in which it requested specific revisions to the Wetland Policy. A revised version of the Wetland Policy was not available for almost 3 years.

On April 27, 2016, SWRCB staff held a meeting for Environmental Advocacy and Restoration Stakeholders to discuss key elements of the new version of the Wetland Policy that was being developed. A representative of the CVJV Stakeholder Group attended that meeting. SWRCB staff stated that the intent of that meeting was to solicit feedback with regard to the key elements of the draft Wetland Policy prior to public release. However, there was not yet a revised Wetland Policy document for the Stakeholders to review at the time of that meeting so it was not possible to provide useful feedback on the revised document. On June 17, 2016, the SWRCB issued the Discharge Procedures with public comments due on August 4, 2016. After a public hearing on July 19, 2016, at which members of the CVJV Stakeholder Group 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 this letter, the CVJV Stakeholder Group wishes to express its concern that some of its requested revisions in the July 15, 2013 letter have not been incorporated into the Discharge Procedures. More detailed discussions of the CVJV Stakeholder Group’s concerns with the Discharge Procedures document follow.

Monitoring Requirement for Ecological Restoration and Enhancement Projects

The CVJV Stakeholder Group’s requested definition of “Ecological Restoration and Enhancement Projects” was largely incorporated in the Discharge Procedures. However, it 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 (Page 4, Subsection d, Lines 41-42), and Ecological Restoration and Enhancement Projects are exempted from providing alternatives analyses (Page 7, Subsection d, Line 267). Ecological Restoration and Enhancement Projects, however, are required to submit

draft monitoring plans with their applications for permits under the Discharge Procedures (Pages 5-6, Subsection g, Lines 195-203). This is unacceptable because these projects already have sufficient monitoring requirements.

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). SWRCB personnel indicated 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.

The CVJV attached samples of each of these types of agreements to its 2013 comment letter. If the attachments are no longer available to the SWRCB members and staff, the CVJV would be happy to provide the samples again.

The CVJV maintains that, because ecological restoration and enhancement projects are inherently beneficial to the environment and advance the state policy of “no net loss” of wetlands, the Discharge Procedures should recognize and accept the monitoring and reporting requirements included in the existing agreements with funding agencies and other wildlife regulatory agencies and programs. To require additional monitoring and reporting plans as part of the Discharge Procedures is not reasonable and will consume resources and serve as a disincentive to undertake important voluntary conservation efforts.

7-2

Project Application Submittal Process and Timeline

The materials that are required for an application to be considered complete need to be clearly defined and not left to the discretion of the permitting authority. This section, as currently written, will result in a process that is not clearly understood by applicants and that is not applied consistently by staff. The possible requirement by the permitting authority on a case-by-case basis to assess potential impacts associated with climate change related to the proposed project and any proposed compensation (see Subsection 2b) needs to be further explained and the methodology for conducting such an assessment needs to be defined.

7-3

7-4

The timeline for reviewing/approving project applications needs to be clearly defined. Our July 15, 2013 comment letter provided suggested language for specifying the timeline related to reviewing/approving applications for Ecological Restoration and Enhancement Projects. That language should be included in the Discharge Procedures document 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.”

7-5

Permit Fee Structure

As stated in our July 15, 2013 comment letter, a fee structure for permitting projects needs to be provided. 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

7-6

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 Discharge Procedures' 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."

7-6

Specific Requests for Revisions

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.

7-7

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."

7-8

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

7-9

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.”

7-9 cont.

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.”

7-10

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.

7-11

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.”

7-12

The CVJV Stakeholder Group thanks the SWRCB 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 SWRCB and working together to craft a Discharge Procedures 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 Mike Dunphy, CVJV Coordinator, at (916) 414-6459 or Virginia Getz, CVJV Lands Committee Chair, at (916) 852-2000 with questions or to further coordinate with the CVJV Stakeholder Group on the draft Discharge Procedures.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff McCreary". The signature is fluid and cursive, with the first name "Jeff" written in a larger, more prominent script than the last name "McCreary".

Jeff McCreary
Management Board Chair

cc: Gordon Burns, California Environmental Protection Agency
Tom Howard, SWRCB
CVJV Management Board