



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 chance 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. SRWCB 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 etal⁹observed:

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 ccrrefuge@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

Page 8 of 8