

DESMOND, NOLAN, LIVAICH & CUNNINGHAM

ATTORNEYS AT LAW

November 9, 2022

SENT VIA U.S. MAIL & EMAIL

Executive Officer
California Water Commission
P.O. Box 942836
Sacramento, CA 94236-0001
cwc@water.ca.gov

**Re: Request to Appear at Resolution Hearing and Statement of
Written Objections to Adoption of Proposed Resolution of Necessity
to Take Property Owned By H Pond, LLC; APN 033-440-001, -004, -
005- DWR Parcel No. YBSH-147**

To Executive Officer and Commission Members:

Our office represents H Pond, LLC (“Owner”), owner of the above-referenced real property (“Property” or “Subject Property”). We are in receipt of the California Water Commission’s (“Commission”) Notice of Intent to Adopt Resolution of Necessity to Acquire Certain Real Property or Interest in Real Property by Eminent Domain for the Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project (“Big Notch Project”), dated October 25, 2022 (“Notice”).

This letter constitutes the Owner’s formal request, and reservation of right, for one or more of its representatives to appear and be heard at the Resolution of Necessity (“RON”) Hearing scheduled for November 16, 2022 at 9:30 a.m.

The Owner further submits this statement of written objections to be included in the official record of the proceeding.

Summary of Objections

A resolution of necessity adequately supported by facts is required before an eminent domain action can be filed. DWR has requested the Commission adopt a resolution of

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necessity that for a number of reasons would be fatally deficient and ineffective to support condemnation of the property interests contemplated to be taken by the proposed permanent flowage easement (“Proposed Easement”). There are insufficient facts in the record to support the findings that must be made in the RON, and the Proposed Easement and scope of authorization sought by the RON are overbroad in relationship to the Big Notch Project as approved and permitted. Most concerning to the Owner is the fact that DWR is now attempting to take a second easement within the Proposed Easement that has not been analyzed, adequately defined, or included in the approval and permitting process.

In light of these concerns, the Owner objects to adoption of the proposed RON on the following grounds:

1. The Owner Has Not Been Provided Adequate Notice.
2. Public Interest and Necessity Do Not Require the Project.
3. The Proposed Project Is Not Planned or Located in the Manner That Will Be Most Compatible with the Greatest Public Good and Least Private Injury.
4. The Subject Property is Not Necessary for the Project.
5. Proposed Acquisition Is for Future Use Beyond the Normal Statutorily Authorized Period, and Without a Specified Estimated Date of Use.
6. Authorization of a Taking for Indefinite Future Projects Is Improper and Would Expose the RON to an Independent Basis of Attack.
7. DWR Has Not Demonstrated Compatibility of Its Intended Use With Current Public Use Pursuant to Conservation Easements.
8. The Requirements of Government Code Section 7267.2 Have Not Been Complied With.
9. DWR Has Not Given Statutorily Compliant Notice to the Conservation Easement Holder.

10. DWR Is Irrevocably Committed to Take the Subject Property, Regardless of Any Evidence that Might Be Presented at the Hearing.

In order to avoid committing a gross abuse of discretion and inviting challenge to the RON on the basis that the hearing will be nothing more than a pretense where the Commission rubber stamps a predetermined result without sufficient evidence, and in derogation of the Eminent Domain Law, the Commission should decline to adopt the RON and require DWR to resolve outstanding issues with the Proposed Easement. (See *Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1127.)

Statement of Objections

In all dialogue with the Owner and other stakeholders, and in public meetings, DWR has consistently represented that the operations of the Big Notch Project and annual period of inundation would be confined to November 1 to March 15, at a maximum flow of 6,000 cubic feet per second (“cfs”). The Big Notch Project, as studied in the environmental review process and described in the Environmental Impact Statement/Environmental Impact Report (“EIS/EIR”) for the Big Notch Project referenced by the RON and permitted by the Central Valley Flood Protection Board is only planned and proposed to allow for such limited increased flow, through a gated notch on the east side of the Fremont Weir, from November 1 to March 15 each year, when it is supposed to have been determined that water surface elevations in the Sacramento River are amenable fish passage. The NMFS Biological Opinion for the Big Notch Project relies on such parameters, and such parameters were relied upon by the Department of the Interior in analyzing impacts upon federally threatened species and habitat and issuing a Biological Opinion.

However, the Owner has now come to learn that DWR is attempting to expand the scope of the Proposed Easement’s take of flowage rights beyond its prior representations and purported need for the presently planned and specified Big Notch Project. Rather, the Proposed Easement take includes no temporal limitations whatsoever. It allows for inundation 365 days a year, with no flow limitation.

At most, the Big Notch Project requires taking the right to increased flow on the

Property from November 1 to March 15, up to 6,000 cfs. Because the Proposed Easement and the RON's scope of authorization do not limit the flowage right commensurately, DWR is attempting to obtain authority to take an easement through condemnation that includes rights in excess of those necessary to meet the needs of the Big Notch Project.

The apparent reason DWR has drafted the Proposed Easement to take expanded rights is that DWR is attempting through subterfuge to take property rights for as-yet-undefined future projects, the impacts of which have not been analyzed or planned and for which no timeline to potential implementation has been estimated, and which has never been discussed with affected landowners. This was evidenced by DWR's recent filing of a Notice of Exemption for "Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project – Flowage Easement Acquisitions for Potential Future Adaptive Management," in which DWR describes having "initiated the process of acquiring flowage easement rights necessary to operate the Project," but indicates that it is also "acquiring adaptive management flowage easement rights for potential future Project operations" that would allow the Property to be "inundated post-March 15," and then states that its "flowage easement acquisition process includes acquisition of easement rights allowing for . . . potential future adaptive management." This "adaptive management flowage easement" appears to be an additional easement that has not been analyzed or disclosed to landowners, which "would allow for Project operations to increase flows up to 12,000 cfs from November 1 through March 15 annually and up to 1,000 cfs through May 1."

Staff reports submitted in relation to past RONs have said "DWR has adopted a Project Adaptive Management and Monitoring Plan (AMMP)," but where is it? What is it? They have said: "Adaptive management' means a framework and flexible decision-making process for ongoing knowledge acquisition, monitoring, and evaluation leading to continuous improvements in management planning and implementation of a project to achieve specified objectives. (Water Code § 85052.)" But that's not a project. It's a process. And one that encompasses potential future projects or project modifications that have yet to be designed, analyzed, or approved by anyone.

The Owner has never been presented with details of such a process, let alone any identifiable governing plan. The Owner has never been advised of what it might specifically encompass. The staff reports, and DWR's counsel at prior RON hearings

earlier this year and the Notice of Exemption have asserted that “[t]he adaptive management flowage easements would allow for Project operations to increase flows up to 12,000 cfs from November 1 through March 15 annually and up to 1,000 cfs through May 1.” However, the Owner has been unable to identify a source for that detail in any documents that refer to or provide some description of adaptive management. Even if such broader but defined parameters have been developed, it only further begs the question why DWR is seeking an easement to allow for *unlimited* flow.

It may well be prudent for DWR to engage in monitoring of its implementation of the Big Notch Project to determine whether it works as intended to meet its objectives, and, based on its monitoring, to either propose future alteration and expansion of the scope of the Big Notch Project or implement new projects, but the acquisition of property rights to implement future project changes or new projects that might be proposed to be implemented at some point more than a decade from now, in a way that would increase the depths, duration, and intensity of periods of inundation for as-yet unspecified reasons, based on as-yet unforeseeable events, should be deferred until such time as those changes in project or a new project are defined, vetted, and deemed necessary.

In short, the Proposed Easement is unduly broad in scope because it has been expanded beyond such rights as may be necessary to serve the Big Notch Project to cover potential future needs for as-yet unidentified future projects, let alone studied, analyzed, or approved in any fashion; and the RON is unsupported from an evidentiary and legal standpoint. Were the Commission to proceed with adoption of the RON in spite of these facts, the RON would be fatally deficient and ineffective to support a condemnation action for all of the following reasons.

1. The Owner Has Not Been Provided Adequate Notice.

“Identification of the project is an integral component of the property owner’s right to procedural due process.” (*City of Stockton v. Marina Towers LLC* (“*Marina Towers*”) (2009) 171 Cal. App. 4th 93, 108.) “A governing body of a public entity may not adopt a resolution of necessity until it has given the owner proper notice and an opportunity to be heard on all matters that are the subject of the resolution of necessity.” (*Id.* at 108-109.) “If the governing body does not have before it a definable project for which the property is sought to be taken, any discussion of the

pros and cons of the condemnation would be an empty gesture and the necessity findings rendered at the conclusion of the hearing would be devoid of real meaning.” (*Id.* at 109.)

The Owners have been denied meaningful, statutorily-compliant notice and a reasonable opportunity to appear and be heard on the matters referred to in California Code of Civil Procedure (“CCP”) section 1240.030. The notice of the RON hearing did not identify any project other than the Big Notch Project as necessitating the taking of the Proposed Easement. Acquisition of flowage easements for “potential future adaptive management” is not a project identified in the notice of RON as necessitating the taking of the Proposed Easement.

The Owner has not been advised of the parameters of any contemplated future modification of the Big Notch Project. The Proposed Easement takes rights for future projects for which no details appear to exist at present. Were the Commission to proceed in adopting a RON that authorizes a taking of rights for such future projects, the Owner would have been given absolutely no opportunity to meaningfully comment on the necessity of such future projects, whether such projects are planned or will be located in a manner compatible with the greatest public good and least private injury, or whether the rights that will have been required are necessary.

The proper thing for the Commission to do in this instance would be to limit the RON to an authorization for only those rights necessary to implement the Big Notch Project as it is presently proposed and has been studied. The Commission should refuse to authorize a taking of broader rights unless and until DWR develops the actual evidence to support such a taking for a properly defined new or modified project, that has been disclosed to the Owner, and the Owner has been afforded an opportunity to meaningfully analyze it and address any objections they may have.

2. Public Interest and Necessity Do Not Require the Project.

The evidence before the Commission is insufficient to support a finding that public interest and necessity require the Big Notch Project, or any future projects. (CCP § 1240.030(a).)

DWR’s “Project Adaptive Management Plan” and recitation in relation thereto in

the NE suggest DWR has little confidence the Project will do what it is supposed to do, as DWR indicates it has already “determined that there is a reasonable probability that adaptive management of the Project will be required within a reasonable period of time after Project operations commence.” So, it is already planning for what it will do when the Big Notch Project doesn’t work.

In fact, it appears that DWR has developed, planned, and proposed the Project in a manner that, while more palatable to certain stakeholders, is likely not to be effective in meeting its stated objectives, and that DWR’s real plan is to expand the scope of the Big Notch Project, or implement subsequent projects, that are decidedly less palatable, in hopes of ultimately meeting the objectives the Big Notch Project will fail to achieve, while evading environmental review requirements (including those imposed under the National Environmental Policy Act (“NEPA”)), general public scrutiny, *and informed right to take challenges by landowners.*

To be blunt, this is a bait-and-switch strategy. And the Commission cannot credibly make a finding that public interest and necessity require the Big Notch Project under these circumstances.

Moreover, even if there were solid evidence the Big Notch Project, as defined in the EIR/EIS, will serve the public interest and necessity, both the incomplete and misleading characterization of the Big Notch Project and its true scope and the complete absence of any identification of future projects preclude the Commission from making the finding required by CCP section 1240.030(a). “It is both a physical and legal impossibility for legislators to make a determination that public interest and necessity require ‘the project,’ . . . if the resolution contains no intelligible description of what the project is.” (*Marina Towers, supra*, 171 Cal. App. 4th at 108.)

The Commission cannot determine today that some future project that does not yet exist, with no defined scope or parameters, is necessary. Such a determination is a factually-intensive inquiry, for which the Commission has lacks critical facts to consider at this point in time.

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3. The Proposed Project Is Not Planned or Located in the Manner That Will Be Most Compatible with the Greatest Public Good and Least Private Injury.

Neither the Big Notch Project, nor any future projects, are planned in the manner that will be most compatible with the greatest public good and the least private injury. (CCP §1240.030(b).) The Big Notch Project's true scope and the potential scope of any project modifications or new projects are unknown. DWR has supplied the Commission with grossly insufficient evidence to allow the Commission to assess either the likelihood that the Big Notch Project will be effective as presently planned and proposed, or what the scope of ultimate private injury will be if DWR modifies the Big Notch Project or undertakes new projects that intensify the annual periods and/or intensity of inundation of the Property. *Of particular concern is the fact that if DWR were to lengthen periods of flow beyond March 15, it would threaten the utility of the Property for otherwise compatible agricultural and/or recreational uses.* The Notice of Exemption indicates DWR presently believes it may do this. But it has supplied the Commission with no information about when or under what circumstances this would occur, or what the effects of doing so would be. How can the Commission weigh the extent of potential public benefit against the extent of private harm when the extent of neither is known? DWR is asking the Commission to allow it to flood private property whenever it wants, for as long as it wants, to any depth that it wants. There is no evidence that this will promote the greatest public good, and it certainly does not lend itself to the least private injury.

As with the finding of public interest and necessity, it would be impossible for the Commission to determine that "the project" is located or planned in a manner consistent with the greatest public good and least private injury when the resolution contains no intelligible description of what "the project" actually is that necessitates DWR taking the Proposed Easement. (*Marina Towers, supra*, 171 Cal. App. 4th at 108.)

Finally, DWR has only looked at impacts to affected properties using its inundation model TUFLOW that analyzes water years 1997 to 2012 with the Big Notch opened between November 1 and March 15, with a maximum flow of 6,000 cfs and concluded a projected number of additional wetted days, based on averages. This method is inaccurate and does not adequately assess the private harm for at least two reasons. First, it does not follow the law of California when assessing damages

cause by a taking of easement rights. DWR is required to evaluate the *most injurious* use of the easement in assessing damages. The rights taken are controlling, not averages. (See *East Bay Municipal Utility Dist. v. City of Lodi* (1932) 120 Cal.App. 740, 762; *Ellena v. State of California* (1977) 69 Cal.App.3d 245, 254; and *People By & Through Dep't of Pub. Works v. Silveira* (1965) 236 Cal. App. 2d 604, 622.) Second, DWR's TUFLOW model did not include the effects of its' eleventh-hour attempt to take more rights than previously disclosed by the "adaptive management flowage easement." Therefore, private harm has not been assessed with respect to the adaptive management flowage easement.

4. The Subject Property is Not Necessary for the Project.

Neither DWR, nor the Commission, has advised that the RON is for a taking for any project other than the Big Notch Project. But DWR asks the Commission to authorize the taking of an easement that has *no duration or flow limitations*. The excess scope of rights is clearly not necessary for the Big Notch Project and would violate the landowners' constitutional rights. Therefore, the Commission cannot make the requisite statutory finding pursuant to CCP §1240.030(c).

If DWR's speculation that it may need the additional property rights in excess of those necessary for the Big Notch Project sometime in the future proves to be true, the Eminent Domain Law requires DWR return to the Commission with facts that show the necessity for modification or expansion of operations beyond those currently planned as part of the Big Notch Project. It would likewise be required to demonstrate the imposition of an increased burden on private property rights and an increase in private harm would be warranted. As it stands, DWR has not, and cannot, make such a showing to the Commission, and the Commission cannot make a determination that the property interests sought to be acquired are necessary for "the project," because it has no evidence before it of any details as to potential modifications to the Big Notch Project or future projects, which are undefined and unstudied. (*Marina Towers, supra*, 171 Cal. App. 4th at 108.)

Despite DWR's attempts to characterize it as such, adaptive management is not itself a project. It is a process that appears to more or less consist of DWR doing the job it is already tasked, or should be tasked, with doing: monitoring a project's implementation to assure it is working, and developing and proposing changes to the project or new projects as may be deemed necessary based on data developed

over time. And even if the Commission were to have presented to it a defined “AMMP” presented as the project necessitating the taking sought by DWR, it is beyond question that the proposed taking is wholly unnecessary for DWR to undertake the vast majority of that “project,” and that the taking will ultimately prove more broad than necessary to carry out any conceivable future increases in the duration or intensities of flow because the scope of the easement is unlimited in these respects.

5. Proposed Acquisition Is for Future Use Beyond the Normal Statutorily Authorized Period, and Without a Specified Estimated Date of Use.

“[P]roperty may be taken for future use only if there is a reasonable probability that its date of use will be within seven years from the date the complaint is filed or within such longer period as is reasonable.” (CCP §1240.220(a).) If a date of use is planned to occur at some point further in the future, a resolution of necessity “shall refer specifically to [CCP section 1240.220] and shall state the estimated date of use.” (CCP §1240.220(b).)

While there may be a reasonable probability that the Big Notch Project, as defined in the EIR/EIS will be implemented within the next seven years, the Proposed Easement also provides for “the right for the flowage of water over and upon the Property as may be required for the present *and future* permitted construction and operation of fish passage and floodplain restoration projects,” without specification as to what such future projects are or when they might occur. (Emphasis added.) The RON provides “for future use pursuant to Code of Civil Procedure Section 1240.220(b),” and states “there is a reasonable probability that use will be within 15 years, by May 18, 2037.”

Baldly stating there is a “reasonable probability” that some unspecified future use will occur at some point in time within a 15-year period of time is not compliant with the requirement of section 1240.220(b). It is not a statement of an estimated date of use, but an exceedingly broad range. Moreover, the 15-year range is entirely arbitrary. There is not an iota of evidence before the Commission to support a finding that DWR’s unspecified future uses will occur, if at all, within 15 years. The 15 years estimate has been pulled out of the air by DWR counsel. Every time a new RON is proposed for consideration, DWR changes its anticipated use date to a date

exactly 15 years from the anticipated RON adoption date for the property being considered, clearly demonstrating that the assertion of anticipated use is being dictated not by the actual date of anticipated use – which appears to be non-existent – but for the convenience of the attempt to appear statutorily compliant. It is a transparent charade.

It is the condemnor’s burden to show that use beyond 7 years is reasonable. (See Miller and Starr California Real Estate (4th ed. 2021), §24:12 and Matteoni and Veit, Condemnation Practice in California (3rd ed. 2019), §6.14.) That burden has clearly not been met. Therefore, adoption of the RON would purport to authorize a taking in violation of the Code of Civil Procedure section 1240.220, resulting in a fatally deficient RON that cannot support condemnation.

6. Authorization of a Taking for Indefinite Future Projects Is Improper and Would Expose the RON to an Independent Basis of Attack.

As already discussed, the indefiniteness of the potential future projects forming the basis for DWR’s attempt to secure the unduly broad flowage rights proposed via the Proposed Easement precludes the Commission from making the requisite findings pursuant to CCP section 1240.030(a)-(c). But it does more. Among other things, it invites the Commission to aid DWR in attempting to evade compliance with environmental review requirements of CEQA and NEPA, as well as judicial review of valid statutory defenses to DWR’s right to take, by furthering a project definition so vague “that no one could definitively determine what use the legislative body had in mind for the property.” (*Marina Towers, supra*, 171 Cal. App. 4th at 108.) Therefore, the indefiniteness exposes the RON to independent attack and judicial review on grounds not susceptible to any argument that a valid resolution conclusively establishes the matters addressed in CCP section 1240.030. (See Legislative Committee Comments—Senate, 1975 Addition, to CCP §1245.250.)

7. DWR Has Not Demonstrated Compatibility of Its Intended Use With Current Public Use Pursuant to Conservation Easements.

“Any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire for that use property appropriated to public use if the use for which the property is sought to be taken is a more necessary public use than the use to which the property is appropriated.”

(CCP §1240.610.) In such event, the RON must specifically refer to section 1245.610. Likewise, “Any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire for that use property appropriated to public use if the proposed use will not unreasonably interfere with or impair the continuance of the public use as it then exists or may reasonably be expected to exist in the future.” (CCP §1240.510.) And, in that event, the RON must specifically refer to section 1245.510.

Here, the Property is already appropriated to public use by a federal conservation easement, as well as a California Waterfowl Habitat Program Agreement (“State Habitat Agreement”). (CCP §1240.055(a)(3).) (A true and correct copy of the State Habitat Agreement is enclosed herewith as **Attachment A**.) DWR has made no assertion that its proposed use is a more necessary public use. It baldly asserts the Big Notch Project is a compatible use and will not unreasonably interfere with or impair continuance of the conservation easements’ public use as it exists or may reasonably be expected to exist in the future. However, DWR has not obtained a requisite compatibility determination from USFWS or the State Department of Fish and Wildlife (“CDFW”). Nor does it appear DWR has supplied any detail to the Commission as to the nature of the federal conservation easement or State Habitat Agreement, or the specific terms and objectives of either. (And this is particularly troubling given the prior written submissions and oral presentations of USFWS at part RON hearings, consistently, and over a series of many months at this point, with representatives of USFWS raising concerns about the lack of review and analysis of compatibility that has occurred to date.)

The Owners contend DWR’s Project as it is presently proposed will be incompatible with use under the conservation easement and State Habitat Agreement, particularly considering the undefined proposed future use that would be authorized under the terms of the Proposed Easement. The Commission lacks evidence to the contrary.

Further, the RON does not appear to make any specific reference to the conservation easement or State Habitat Agreement, or include any direct finding as to whether DWR’s use is either more necessary or compatible with conservation easement or State Habitat Agreement use, or include the applicable requisite statutory reference if it is ultimately determined that DWR’s use is not a compatible use.

Given that DWR has not confined the Proposed Easement to such rights as might be necessary to serve the Big Notch Project, but is instead seeking expanded rights that would allow longer periods of inundation of the Property, its assertions of compatibility and lack of interference or impairment are insufficient. It is unclear whether the compatibility determination is based on 6,000 cfs or 12,000, or on inundation through March 15 or through May. And DWR does not appear to have supplied any representation or assessment with respect to compatibility of future potential projects that could utilize the unlimited terms of the Proposed Easement further increase flow rates or periods of inundation. Certainly, USFWS and CDFW have interests in greater clarity being provided, and the Owner does as well.

Absent the Commission's receipt of sufficient evidence, its determination that DWR's use is more necessary than or is compatible with and will not interfere with or impair use of the Property pursuant to the federal conservation easement or State Habitat Agreement, and its inclusion of requisite findings and statutory reference in the RON, the RON will be fatally deficient and ineffective to support condemnation.

8. The Requirements of Government Code Section 7267.2 Have Not Been Complied With.

Although amount of compensation will not be considered at the hearing, the issue of compensation is distinct from the question of whether a condemnor has complied with Government Code section 7267.2. (*People ex rel. Dept. of Transportation v. Cole* (1992) 7 Cal.App.4th 1281, 1286.) A condemnor must consider the property owner's objections that the mandatory requirements of section 7267.2 have not been complied with, including objections concerning the adequacy of the appraisal upon which an offer is based. (*Id.* at 1285-86 (*City of San Jose v. Great Oaks Water Co.* (1987) 192 Cal.App.3d 1005, 1011-1013).)

Section 7267.2, subdivision (a)(1), requires: "Prior to adopting a resolution of necessity pursuant to Section 1245.230 of the Code of Civil Procedure and initiating negotiations for the acquisition of real property, the public entity shall establish an amount that it believes to be just compensation therefor, and shall make an offer to the owner or owners of record to acquire the property for the full amount so established." (*Id.*) "The amount shall not be less than the public entity's approved appraisal of the fair market value of the property." (Cal. Gov. Code § 7267.2.)

Further: “The public entity shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount it established as just compensation.” (Gov. Code § 7267.2(b).) The written statement must “contain detail sufficient to indicate clearly the basis for the offer” and must separately state “damages to real property,” with included “calculations and narrative explanation supporting the compensation.” (Gov. Code § 7267.2(b), (b)(3).)

In this case, the appraisal and offer to purchase based thereon clearly did not reflect the full measure of just compensation mandated by Article I, section 19 of the California Constitution and the Eminent Domain Law. And although an Appraisal Summary Statement (“Statement”) was supplied to the Owner, it did not contain anywhere close to statutorily adequate detail required by the section 7267.2. The skeletal Statement indicates that the Proposed Easement was valued at “20% rights,” suggesting, but with no explanation to confirm, that the interests to be acquired have been valued at twenty (20) percent of the fee value of the Property. How this figure was determined is a mystery. There is no narrative explanation to support its application. This deficiency has been prejudicial to the Owner’s ability to evaluate and raise with specificity and in full all concerns with respect to the sufficiency of the appraisal and compliance with section 7267.2, or to engage in informed negotiations as to the scope of the easement, as well as the amount of compensation.

Moreover, it appears based on information presented by DWR to the Commission that the appraisal was improperly influenced and based upon consideration of historical inundation data in the Project area to generate an anticipated scope of impact based on a limited number of “wetted” days, resulting in the failure of DWR to establish a valid appraisal of probable just compensation.

In order for the government to comply with the mandate of Article I, Section 19 of the California Constitution that a property owner be paid just compensation for the taking of their property, “all the damages that might be inflicted by the condemning party,” must be assessed “based upon the ***most injurious use to which the condemnor may lawfully put the property***” based on the scope of rights being acquired. (*East Bay Municipal Utility Dist. v. City of Lodi, supra*, 120 Cal.App. at 762 (emphasis added); accord *Ellena v. State of California, supra*, 69 Cal.App.3d at 254 and *People By & Through Dep’t of Pub. Works v. Silveira, supra*, 236 Cal. App. 2d at 622).) Upon final condemnation “it must be assumed that the owner has been

compensated for all reasonably foreseeable damage to his property resulting from the acquisition.” (*Id.*) A condemning agency cannot purport to take “less of an interest than is provided in the resolution.” (*People by Dept. of Public Works v. Schultz Co.* (1954) 123 Cal.App.2d 925, 931 disapproved of on other grounds by *People ex rel. Department of Public Works v. Chevalier* (1959) 52 Cal.2d 299.) “Mere promises by the condemner” that it does not intend to exercise all rights taken “are ineffective and cannot operate to reduce damages.” (*Id.*)

These are not “mere” matters of compensation that the Commission can defer resolving. The requirements of compliance with section 7267.2 are prerequisites to the Commission’s adoption of a RON.

DWR cannot be said to have complied with section 7267.2 when its appraisal does not value the Proposed Easement based on the most injurious way the State will be permitted to lawfully use the easement – i.e. to flow unlimited water for 365 days of the year. This does not represent a valuation concern outside the scope of the Commission’s charge with respect to consideration of the RON, but rather a question of a failure by DWR to meet the statutory requirements of section 7267.2 that are prerequisites to the adoption of a RON that ensure that if a condemnation action were instituted the amount deposited as probable just compensation to secure an early authorization of rights pending a final order of condemnation could credibly be deemed compliant with the constitutional mandate that just compensation be paid prior to taking. Therefore, in addition to the many other reasons the Commission should decline to adopt the RON, it should reject the sufficiency of DWR’s compliance with section 7267.2 and require a new appraisal be made of the full scope of rights DWR seeks authorization to take.

9. DWR Has Not Given Statutorily Compliant Notice to the USFWS or CDFW.

“Not later than 105 days prior to the hearing held pursuant to Section 1245.235, or at the time of the offer made to the owner or owners of record pursuant to Section 7267.2 of the Government Code, whichever occurs earlier, the person seeking to acquire property subject to a conservation easement shall give notice to the holder of the conservation easement as provided in this subdivision.” (Code Civ. Proc., § 1240.055(c).) To the Owner’s knowledge, DWR did not give timely notice to either USFWS or CDFW in accordance with section 1240.055(c). In fact, it does not appear

that CDFW has been in any way apprised of the RON hearing or DWR's intent to acquire use rights in the Subject Property that might conflict with those protected by the State Habitat Agreement.

10. DWR Is Irrevocably Committed to Take the Subject Property, Regardless of Any Evidence that Might Be Presented at the Hearing.

“[A]n agency that would take private property for an alleged public purpose, must, as a prelude to determining that there exists the necessary requisites for taking under Code of Civil Procedure section 1240.030, conduct a fair hearing and make its determination on the basis of evidence presented in a judicious and nonarbitrary fashion.” (*Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1129.) In this instance, a hearing meeting these criteria is impossible because DWR, on whose behalf the Commission is acting, has already “irrevocably committed itself to take the property in question, regardless of any evidence that might be presented at that hearing.” (*Id.* at 1127.) Contract No. C51627 for Salmonid Habitat Restoration and Fish Passage – Big Notch, Fremont Wier – Yolo Bypass has been awarded, executed, and at least one payment has been made pursuant thereto, on or about September 27, 2022 in the amount of \$94,050. This follows significant investments made in site preparation. The Project is already being constructed. DWR is not only heavily invested, but it contractually obligated to acquire right-of-way and deliver possession to its contractor on a specified schedule, including the Subject Property. Therefore, the hearing on the RON is certain to be “affected not by just a gross abuse of discretion but by the prior elimination of any discretion whatsoever.” (*Id.*) This will “nullify” and “deprive the resolution of any conclusive effect” as to the findings the Commission is statutorily required to make before adopting a resolution of necessity under the Eminent Domain Law. (*Id.*)

Conclusion

At minimum, the Commission should require DWR to modify the overly broad scope of rights proposed to be taken to conform its Proposed Easement to the rights actually required for the Big Notch Project, as presently planned. Should the RON be adopted without modification of the rights proposed to be authorized, and a condemnation suit initiated, the Owner will be compelled to judicially challenge the right to take, and will assert all of the objections stated herein, as well as any additional objections raised at the hearing, or which exceed the parameters set forth

November 9, 2022

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in the Notice or are based on facts later learned which are currently unknown to the Owner. The bases for objection stated herein are informed by the Notice's stated parameters, and the objections are limited to those the Owner is reasonably capable of making on the limited information available. The Owner reserves the right to raise additional arguments objecting to the right to take both at the hearing and in any future proceedings.

Sincerely,

DESMOND, NOLAN, LIVAICH & CUNNINGHAM

Kristen Renfro

Kristen Ditlevsen Renfro

KDR

cc: Client

w/attachment

Holly Stout, Esq.

California Water Commission

P.O. Box 942836

Sacramento, CA 94236-0001

Holly.stout@water.ca.gov

Joe Yun

Executive Director, California Water Commission

P.O. Box 942836

Sacramento, CA 94236-0001

joseph.yun@water.ca.gov

DESMOND, NOLAN, LIVAICH & CUNNINGHAM

Attorneys at Law

15th & S Building

1830 15th Street

Sacramento, California 95811

Telephone: 916/443-2051

Attachment A

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO

Wetland Habitat Coordinator
Department of Fish and Game
Wildlife Management Division
1416 Ninth Street, Room 1280
Sacramento, CA 95814

TONY BERNHARD
COUNTY RECORDER

94 APR 15 PM 12:14

STATE OF CALIFORNIA

NIC

012805

OFFICIAL RECORDS
YOLO CO.-CALIF.
RECORD REQUESTED BY:

STATE OF CALIFORNIA

STANDARD AGREEMENT

APPROVED BY THE
ATTORNEY GENERAL

STD. 2 (REV.5-91)

CONTRACT NUMBER FG 2297 WM	AM. NO.
TAXPAYER'S FEDERAL EMPLOYER IDENTIFICATION NUMBER 572-52-1291	

THIS AGREEMENT, made and entered into this 25 day of February, 19 93,
in the State of California, by and between State of California, through its duly elected or appointed, qualified and acting

TITLE OF OFFICER ACTING FOR STATE <u>Director</u>	AGENCY <u>Dept. of Fish and Game</u>	, hereafter called the State, and
CONTRACTOR'S NAME <u>H-Pond</u>		, hereafter called the Contractor.

WITNESSETH: That the Contractor for and in consideration of the covenants, conditions, agreements, and stipulations of the State hereinafter expressed does hereby agree to furnish to the State services and materials as follows: (Set forth service to be rendered by Contractor, amount to be paid Contractor time for performance or completion, and attach plans and specifications, if any.)

CALIFORNIA WATERFOWL HABITAT PROGRAM AGREEMENT

WHEREAS, the Contractor is the owner in fee simple of certain real property hereinafter described, situated in the County of Yolo, State of California;

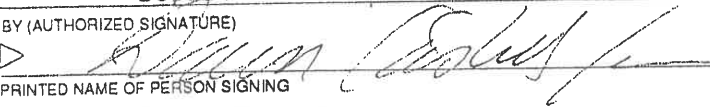
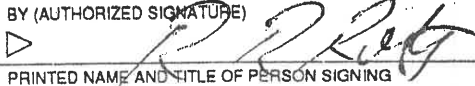
WHEREAS, said property supports or will support habitat of particular importance to waterfowl and other wetland associated species;

WHEREAS, the Contractor is willing to enter into this Agreement with the State over said property, thereby restricting and limiting the use of land and contiguous water areas of said property, on the terms and conditions and for the purposes hereinafter set forth;

WHEREAS, the Contractor and State recognize the value to waterfowl and other wildlife provided by the property in its present and/or planned state as managed wetland habitat, and have, by entering into this Agreement, the common purpose of restoring, enhancing and protecting the natural and managed wetland habitat and certain upland habitat values of said property, preserving the natural character of said property, and preventing the use or development of said property for any purpose or in any manner which would conflict with the maintenance of those habitat values referred to above.

CONTINUED ON 6 SHEETS, EACH BEARING NAME OF CONTRACTOR AND CONTRACT NUMBER.

The provisions on the reverse side hereof constitute a part of this agreement.
IN WITNESS WHEREOF, this agreement has been executed by the parties hereto, upon the date first above written.

STATE OF CALIFORNIA	CONTRACTOR
AGENCY <u>Department of Fish and Game</u>	CONTRACTOR (If other than an individual, state whether a corporation, partnership, etc.) <u>H-Pond (partnership)</u>
BY (AUTHORIZED SIGNATURE) 	BY (AUTHORIZED SIGNATURE) 
PRINTED NAME OF PERSON SIGNING <u>Karyn Meyreles</u>	PRINTED NAME AND TITLE OF PERSON SIGNING <u>Ron Rott - President</u>
TITLE <u>Deputy Director, Administration</u>	ADDRESS <u>2525 K St., Ste 202, Sacramento, CA 95816</u>
AMOUNT ENCUMBERED BY THIS	PROGRAM/CATEGORY (CODE AND TITLE)
	FUND TITLE <u>Department of General Services</u>

does hereby agree to furnish to the State services and materials as follows: (Set forth service to be rendered by Contractor, amount to be paid Contractor, time for performance or completion, and attach plans and specifications, if any.)

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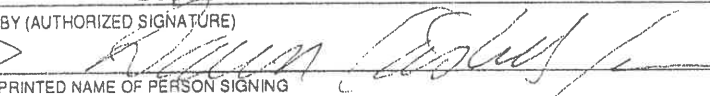
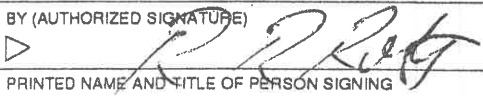
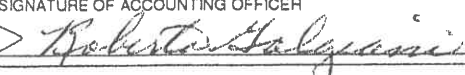
WHEREAS, the Contractor is willing to enter into this Agreement with the State over said property, thereby restricting and limiting the use of land and contiguous water areas of said property, on the terms and conditions and for the purposes hereinafter set forth;

WHEREAS, the Contractor and State recognize the value to waterfowl and other wildlife provided by the property in its present and/or planned state as managed wetland habitat, and have, by entering into this Agreement, the common purpose of restoring, enhancing and protecting the natural and managed wetland habitat and certain upland habitat values of said property, preserving the natural character of said property, and preventing the use or development of said property for any purpose or in any manner which would conflict with the maintenance of those habitat values referred to above.

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STATE OF CALIFORNIA		CONTRACTOR				
AGENCY Department of Fish and Game		CONTRACTOR (If other than an individual, state whether a corporation, partnership, etc.) H-Pond (partnership)				
BY (AUTHORIZED SIGNATURE) 		BY (AUTHORIZED SIGNATURE) 				
PRINTED NAME OF PERSON SIGNING Karyn Meyreles		PRINTED NAME AND TITLE OF PERSON SIGNING Ron Rott - President				
TITLE Deputy Director, Administration		ADDRESS 2525 K St., Ste 202, Sacramento, CA 95816				
AMOUNT ENCUMBERED BY THIS DOCUMENT \$ 6,720	PROGRAM/CATEGORY (CODE AND TITLE) Support Clearing Acct. 99	FUND TITLE Preservation		Department of General Services - Use Only This agreement is exempt from General Services approval pursuant to AB2849, Chapter 1425, Statute of 1990.		
PRIOR AMOUNT ENCUMBERED FOR THIS CONTRACT \$ 0	(OPTIONAL USE) Encumbrances - \$6,720 per yr for min 10 yrs					
TOTAL AMOUNT ENCUMBERED TO DATE \$ 6,720	ITEM 3600-001-200-99	CHAPTER 587	STATUTE 1992			FISCAL YEAR 1992-93
I hereby certify upon my own personal knowledge that budgeted funds are available for the period and purpose of the expenditure stated above.		T.B.A. NO.	B.R. NO.			
SIGNATURE OF ACCOUNTING OFFICER 		DATE 7-9-93				

CONTRACTOR STATE AGENCY DEPT. OF GEN. SER. CONTROLLER

NOW THEREFORE, for valuable, adequate and sufficient consideration and in further consideration of mutual covenants, terms, conditions, and restrictions hereinafter set forth, the Contractor hereby agrees to manage those lands described in Exhibit A, which is attached hereto and made a part hereof, for the benefit of waterfowl and wetland habitat. Such lands shall henceforth be referred to as the Agreement Lands.

The terms, conditions, and restrictions of the Agreement are hereinafter set forth:

1. The terms "Contractor" and "State", wherever used herein, and any pronouns used in place thereof, shall be held to mean and include the above-named Contractor, its agents, officers, employees, successors, assigns, and lessees, and the above-named State, its officers, employees, successors, and assigns. The covenants, terms, conditions, and restrictions of this Agreement shall be binding upon, and inure to the benefit of the Contractor and the State.
2. The initial term of this Agreement shall be for 10 (ten) consecutive years, beginning with the date of final signature.
3. This Agreement shall be automatically renewed, or noticed for nonrenewal, in the same manner as contracts are renewed and extended or noticed for nonrenewal, under the Williamson Act [Chapter 7 (commencing with Section 51200) of Division 1 of Title 5 of the Government Code]. Thus this Agreement shall be renewed automatically each year, with another year added to the initial term, on the anniversary date of the contract (or such other annual date as specified by the contract) unless notice of nonrenewal is given.

The procedure for nonrenewal shall be as follows: If either the Contractor or the State desires in any year not to renew the Agreement, that party shall serve written notice of nonrenewal of the Agreement upon the other party in advance of the annual renewal date of the Agreement. Unless such written notice is served to the State by the Contractor at least 90 days prior to the automatic renewal date, or served to the landowner by the State at least 60 days prior to the automatic renewal date, the Agreement shall be considered renewed automatically as provided above.

Upon receipt by the Contractor of a notice from the State of nonrenewal, the Contractor may make a written protest of the notice of nonrenewal. The State may, at any time prior to the renewal date, withdraw the notice of nonrenewal. Upon request by the Contractor, the State may authorize the Contractor to serve a notice of nonrenewal on a portion of the land under contract.

4. The Contractor and the State have cooperatively developed a long-term Waterfowl Habitat Management Plan, hereinafter referred to as the Management Plan, designed specifically for the Agreement Lands. This Management Plan constitutes Exhibit B, which is attached and hereby made

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part of this Agreement. The Management Plan contains recommended habitat management activities which are intended to result in the restoration, enhancement, and/or preservation of high quality waterfowl habitat occurring on the Agreement Lands. The Contractor agrees to implement each element of habitat maintenance and enhancement as defined in the Management Plan for so long as this Agreement remains in effect. The Management Plan may be amended by the mutual, written consent of the Contractor and State.

5. The Contractor, its agents, officers, employees, successors, assigns and lessees shall not engage in and shall not permit or condone any activities which result in or could result in a diminishment of waterfowl and wetland habitat values on the Agreement Lands, or prevent or inhibit the implementation of those habitat management practices specified in Exhibit B.
6. Reserved Rights. The Contractor reserves to itself, and to its personal representatives, heirs, successors, and assigns, all rights accruing from its ownership of the Agreement Lands, including the right to engage in or permit or invite others to engage in all uses of the Agreement Lands that are not prohibited herein and are not inconsistent with the purpose of this Agreement.
7. In each year of this Agreement, following a determination by the State that the Contractor has fulfilled its obligations under this Agreement regarding habitat management practices, as described in Exhibit B, for the preceding (12) twelve month period, the State shall remit payment to the Contractor of \$20 (twenty dollars) for each of the 336 acres of the Agreement Lands for a total annual payment not to exceed \$6,720. The State shall deduct the amount paid for recording and indexing fees from amounts due to the Contractor under this Agreement.

To receive payment, the Contractor shall annually submit a signed invoice within 10 (ten) days of the anniversary date of this Agreement to the Department of Fish and Game, 1416 Ninth Street, Room 1248, Sacramento, California 95814 (Attention: Wetland Habitat Coordinator). The obligation of the State to render said payment shall be limited by the availability of sufficient funds as may be annually generated from interest accruing to the California Waterfowl Habitat Protection Account pursuant to Section 3467 of the Fish and Game Code.

8. The State shall monitor compliance with the Management Plan, or contract with the U.S. Soil Conservation Service or other appropriate agency(s), entity(s), or person(s) to monitor compliance with the Management Plan.
9. The State, or its officers, employees, assigns or successors, reserves the right to enter the Agreement Lands, across the Contractor's fee if necessary, for the purpose of inspecting said Agreement Lands to determine if the Contractor, or its agents, officers, employees, successors, assigns and lessees are in compliance with the terms,

conditions, covenants, restrictions, and purposes of this Agreement. This Agreement does not convey a general right of access to the public.

10. Modification. The State and the Contractor may mutually agree, upon written agreement, to modify the terms and conditions of this Agreement as the State may determine to be desirable to carry out the purposes of, or to facilitate administration of, the California Waterfowl Habitat Program, or to achieve the production of high quality waterfowl habitat pursuant to Exhibit B.

11. Remedies. If the State determines that the Contractor is in breach of the terms of this Agreement, including the terms and provisions of the Management Plan, or that a breach is threatened, the State shall give written notice to the Contractor of such breach and demand corrective action sufficient to cure the breach. And, where the State determines that the breach involves injury to waterfowl habitat on the Agreement Lands from any use or activity inconsistent with the purpose of the Agreement, the Contractor, under the direction of the Department, shall restore the portion of the Agreement Lands so injured, to its original condition.

If the Contractor fails to cure the breach within thirty (30) days after the receipt of notice thereof from the State, or if the breach cannot reasonably be cured within a thirty (30) day period, or the Contractor fails to begin curing such breach within the thirty (30) day period or fails to continue diligently to cure such breach until finally cured, the Contractor shall do either of the following:

A. Refund to the State all payments received under the Agreement plus interest at the legal rate, as specified in Section 3289 of the Civil Code, if the Director of the Department of Fish and Game determines that the violation of this Agreement or any extension thereof warrants termination of the Agreement, and the Director terminates the Agreement; or

B. Make refunds or accept payment adjustments that the Director determines are appropriate, not to exceed the total amount paid by the State to the Contractor in the preceding calendar year plus interest at the legal rate, as specified in Section 3289 of the Civil Code, if the Director determines that the violation by the Contractor does not warrant termination of the Agreement.

12. Costs of Enforcement. Any costs incurred by the State in enforcing the terms of this Agreement against the Contractor including, but not limited to, costs of suit and attorneys' fees, and any costs of restoration necessitated by the Contractor's breach or negligence under the terms of this Agreement shall be borne by the Contractor.

13. State's Discretion. Enforcement of the terms of this Agreement shall be at the discretion of the State, and any forbearance by the State to exercise its rights under this Agreement in the event of any breach of

2003 MAR 5 587

any term of this Agreement by the Contractor shall not be deemed or construed to be a waiver by the State of such term or of any subsequent breach of the same or any other term of this Agreement or of any of the State's rights under this Agreement. No delay or omission by the State in the exercise of any right or remedy upon any breach by the Contractor shall impair such right or remedy or be construed as a waiver.

14. Acts Beyond Contractor's Control. Nothing contained in this Agreement shall be construed to entitle the State to bring any action against the Contractor for any injury to or change in the Agreement Lands resulting from causes beyond human control, including, without limitation, fire, flood, storm, and earth movement, or from any prudent action taken by the Contractor under emergency conditions to prevent, abate or mitigate significant injury to the Agreement Lands resulting from such causes.
15. In the event the state or federal government prohibits the hunting of waterfowl in California for a period of three consecutive years, the Contractor may apply to the State for termination of the Agreement. Such notification shall be made in writing to the State on or after February 15 following the third waterfowl season during which the Contractor was legally prohibited from hunting waterfowl on the subject property. If the State agrees to terminate the Agreement, the Contractor shall not be obligated to refund past management payments, nor shall the State be responsible for remitting any future management payments.
16. In the event the State acquires a perpetual conservation easement over the Agreement Lands, this Agreement shall be terminated on the day that escrow closes. The Contractor shall be paid a pro rata portion of the management payment earned by and due to the Contractor for work completed during the then current anniversary year prior to the closure of escrow. The Contractor shall not be obligated to refund past management payments, nor shall the State be responsible for remitting any future management payments.
17. The State shall reduce the amount of any payment to the Contractor made under this Agreement by an amount equal to the portion of any annual payment made to the Contractor under the Federal Water Bank Program (16 U.S.C. § 1301 et seq.), or any similar program, which the State determines to be in compensation for essentially the same obligations undertaken by the Contractor pursuant to this Agreement.
18. The Contractor agrees that this Agreement shall run with the land and further agrees to provide actual notice of the existence of this Agreement in any subsequent agreement or conveyance by which he divests himself of either the fee title to or of his possessory interest in the Agreement Lands.
19. If during the term of the Agreement the Contractor is divested of the use of the Agreement Lands, the Contractor shall notify the State concurrent with that divestment. Any unearned payment shall not be paid

2023 MAR 5 88

to the Contractor by the State. If the contractor divests himself of the use of the Agreement Lands by sale or otherwise, the person succeeding to that use is subject to all of the terms and conditions of this Agreement.

20. Not later than 20 (twenty) days after the State has entered into this Agreement, a copy of the Agreement particularly describing the subject lands described in Exhibit A shall be recorded by the State in the office of the county recorder in each county in which any portion of the Agreement Lands are located. The Agreement shall be indexed by the recorder in the grantor-grantee index to the name of the owner of record as grantor and to the State as grantee.

Notwithstanding Section 27383 of the Government Code, the State shall pay fees for recording and indexing the Agreement, and the State shall deduct the amount of fees paid by the State from the amount due to the Contractor under the Agreement.

21. If any provision of this Agreement or the application thereof to any persons or circumstances is found to be invalid, the remainder of the provisions of this Agreement and the application of such provisions to persons or circumstances other than those which were found to be invalid, shall not be affected thereby.
22. Nondiscrimination Clause. The attached Nondiscrimination Clause OCP-1 is hereby made a part of this Agreement.
23. Audits. Pursuant to requirements of the Government Code, for three years following final payment under this Agreement, the parties hereto shall be subject to the examination and audit of the State Auditor General concerning matters related to the performance of this Agreement and the costs of administering it.
24. Costs of Liabilities. The Contractor retains all responsibilities and shall bear all cost and liabilities of any kind related to the ownership, operation, upkeep, and maintenance of the Agreement Lands.
- A. Taxes. The Contractor shall pay before delinquency all taxes, assessments, fees, and charges of whatever description levied on or assessed against the Agreement Lands by competent authority (collectively "taxes"), including any taxes imposed upon, or incurred as a result of, this Agreement, and shall furnish the State with satisfactory evidence of payment upon request.
- B. Hold Harmless. The Contractor shall hold harmless, indemnify, and defend the State, and contractors and the heirs, personal representatives, successors, and assigns of each of them (collectively "Indemnified Parties") from and against all liabilities, penalties, costs, losses, damages, expense, causes of action, claims, demands, or judgments, including without limitation, reasonable attorney fees, arising from or in any way

H-Pond

Contract No. FG 2297 WM

Page Seven

connected with: (1) injury to or the death of any person, or physical damages to any property, resulting from any act, omission, condition, or other matter related to or occurring on or about the Agreement Lands, regardless of cause, unless due to the negligence of any of the Indemnified Parties; (2) the obligations specified in Articles 8, 9, 12, 24, 24A; and (3) the existence or administration of this Agreement.

- 25. The interpretation and performance of this Agreement shall be governed by the laws of the State of California.
- 26. The Contractor shall obtain any and all required local, State and Federal permits prior to the initiation of construction activities necessary for implementation of the Management Plan.
- 27. In signing this Agreement, the Contractor certifies under penalty of perjury that no more than one final unappealable finding of contempt of court by a federal court has been issued against the Contractor within the immediately preceding two-year period because of the Contractor's failure to comply with an order of the National Labor Relations Board.

STATE OF CALIFORNIA

COUNTY OF Sacramento

On June 11th, 1993 before me, the undersigned, a Notary Public in and for the State of California,

personally appeared ROD ROTT known to me to be the person whose name UJAA

subscribed to the within instrument and acknowledged that ehis executed the same.

WITNESS my hand and official seal.

Shirley K. Vullo
Notary Public in and for the State of California



2033 530

STATE OF CALIFORNIA)
COUNTY OF SACRAMENTO)

On 3/16/94 before me, the undersigned, a Notary Public in and for said State, personally appeared Dawn R. Casteel personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledgement to me that she executed the same in her authorized capacity(ies), and that by her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Conni R. Zakaria
NOTARY PUBLIC IN AND FOR THE STATE OF CALIFORNIA

.....
CONNI R. ZAKARIA
NOTARY PUBLIC
SACRAMENTO COUNTY, CALIFORNIA
My Commission Expires May 31, 1997
.....

2603 PM 591

NONDISCRIMINATION CLAUSE

(OCP - 1)

1. During the performance of this contract, contractor and its subcontractors shall not unlawfully discriminate against any employee or applicant for employment because of race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, age (over 40) or sex. Contractors and subcontractors shall insure that the evaluation and treatment of their employees and applicants for employment are free of such discrimination. Contractors and subcontractors shall comply with the provisions of the Fair Employment and Housing Act (Government Code, Section 12900 et seq.) and the applicable regulations promulgated thereunder (California Administrative Code, Title 2, Section 7285.0 et seq.). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code, Section 12990, set forth in Chapter 5 of Division 4 of Title 2 of the California Administrative Code are incorporated into this contract by reference and made a part hereof as if set forth in full, Contractor and its subcontractors shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement.
2. This contractor shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the contract.

SITE SPECIFIC MANAGEMENT PLAN

H - POND

The following is a site-specific habitat management plan for the H-Pond intended to optimize waterfowl food production and/or nesting and brood habitat. Habitat management practices are prescribed for each individual wetland unit. It is expected that proper implementation of these practices will enhance the wetland habitat value of the property. Amendments to this management plan may be made through consultation with and the agreement of the State.

The H-Pond consists of one large wetland unit (approximately 250 acres) and several tracts of adjoining uplands. Due to recent improvements in the water distribution system, approximately 25 acres in the northeast corner of the property can now be managed as summer wetland habitat. The H-Pond has excellent waterfowl habitat management potential due its soils and plentiful water supply. Intensified wetland management in 1992 resulted in a improvement in habitat quality.

The existing wetland vegetation on the property is as follows: 40% Japanese millet, 15% spikerush, 15% jointgrass, 10% salt grass, 10% hardstem bulrush, 10% sweet clover. With the exception of Japanese millet, the current vegetation provides minimal food resources for wintering waterfowl. Thus, the portions of the Big Pond not currently dominated by Japanese millet shall be disced prior to October 1994 in order to reverse wetland succession and encourage seed-producing waterfowl food plants. All water controls are in good condition, however the outlet structure for the Big Pond shall be lowered approximately one foot to facilitate effective drainage if determined by the State to be necessary.

Management practices described in the PRINCIPLES OF CENTRAL VALLEY MARSH MANAGEMENT section of Exhibit B shall generally be followed for the entire property. Specific management practices described in WETLAND HABITAT MANAGEMENT GUIDE #3 shall be followed for the Big Pond. Management practices described in WETLAND HABITAT MANAGEMENT GUIDE #5 shall be followed for the Brood Pond. These leaflets contain "how-to" information about drawdowns, discing, and irrigations.

The Big Pond shall receive at least one summer irrigation for the duration of the contract. These irrigations must affect at least 75% of the Big Pond and result in dominance by high quality waterfowl food plants such as watergrass, smartweed, sprangletop, and ammannia. The Brood Pond shall be maintained in a flooded condition until July 15 each year to provide habitat for local ducks and other wetland-dependent wildlife.

The upland habitat in the southeast corner of the property (approximately 80 acres) currently supports duck nesting habitat of adequate quality. However, if in the future the

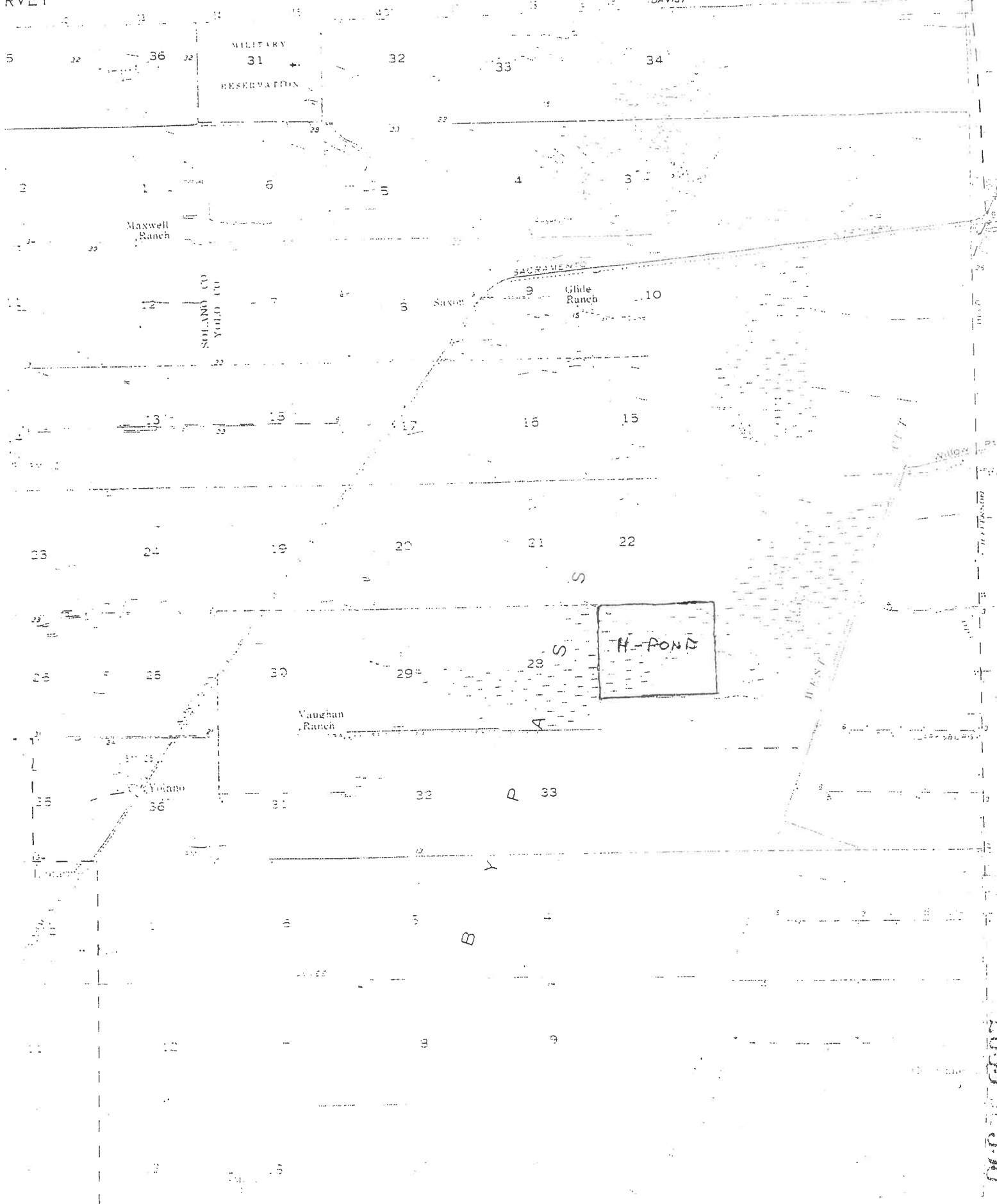
2003 JAN 5 04

State determines that the quality of the nesting habitat has declined to unacceptable levels, the State may then require the planting of a cover crop (e.g. vetch/barley mix).

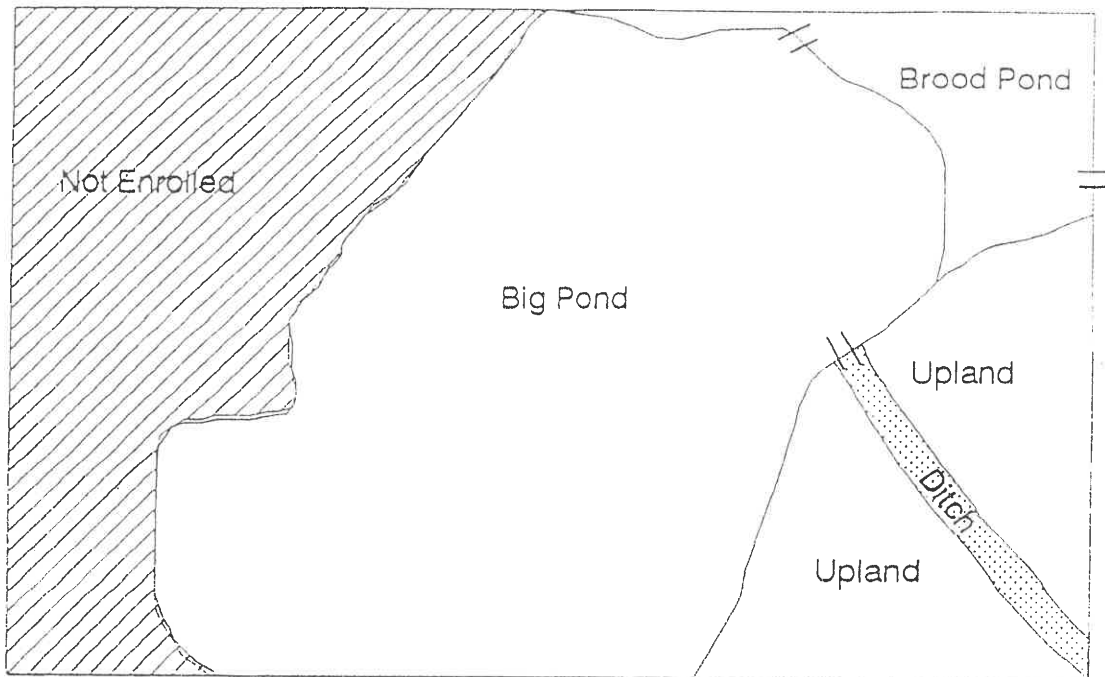
Habitat management must be dynamic in order to maintain productive wetland habitat. Managers need to adapt to changing wetland conditions by varying water management and soil disturbance schedules. The California Waterfowl Habitat Program provides landowners with the flexibility necessary to maintain optimum habitat. It is likely that the Department will periodically require the landowner to rotate habitat management practices among wetland units and/or disrupt wetland plant succession through discing to maintain the vigor of waterfowl food plants.

ES
E INTERIOR
RVEY

STATE OF CALIFORNIA
DEPARTMENT OF WATER RESOURCES
1861 #
DAVIS



H Pond



|| Water Control Structures

PRINCIPLES OF CENTRAL VALLEY MARSH MANAGEMENT

Exhibit B

Marsh management can best be described as the active manipulation of wetland habitat. Wetlands evolved as dynamic ecosystems, constantly changing due the physical and chemical processes associated with floods, drought, and fire. Today, the mighty rivers have been contained and natural seasonal flooding seldom occurs on the majority of California's wetlands. Marshes are now enclosed by levees and flooded with water from deep wells, rivers and sloughs, and/or irrigation district conveyance systems. It is the task of the modern marsh manager to interrupt the natural evolution of marsh habitat and to stabilize the marsh vegetation at a point which is the most productive of those elements required by waterfowl. To accomplish this, he must employ such tools as water management, discing, burning, mowing, seeding, earthwork, and perhaps most importantly, his powers of observation. Although marsh managers are knowledgeable about water manipulation, they are not always aware of the specific practices that maximize habitat conditions for waterfowl. The attached habitat management guides were designed to inform landowners of those management practices required to produce any of the five specific wetland habitat types. Coincidentally, many of these practices benefit entire wetland ecosystems and the wide variety of wildlife species dependent upon them.

Wetland habitat types are often defined by the duration of flooding. Seasonal wetlands are flooded in the fall, with standing water maintained continuously throughout the winter until drawdown occurs in the spring. Permanent marshes remain flooded all year although they should be drained every 5-7 years to restore marsh productivity. Semi-permanent marshes are flooded in the fall and remain inundated until they are either: 1) drained in mid-summer or 2) partially drained in spring with water maintained in low-lying areas throughout the year. These three wetland habitats each provide important resources to waterfowl at different times during the year. For example, permanent and semi-permanent marshes are essential to ducks during the breeding season due to the lack of summer water in the Central Valley, but typically provide very little food for wintering waterfowl. The primary seed-producing marsh plants that supply waterfowl with the majority of their natural winter food are found in seasonal wetlands.

A variety of annual plants germinate on the exposed mudflats of seasonal wetlands when surface water is drained during spring and summer. These plants are collectively known as "moist-soil plants". Some of these plants produce seeds, browse, and/or tubers that are important foods for waterfowl. A combination of moist-soil plants and robust emergent vegetation (typically cattails and/or tules) usually results from marsh management practices. The goal of "moist-soil management" (seasonal wetland

management) is to assure that the resultant vegetation is dominated by preferred waterfowl food plants. Although agricultural grains (e.g. rice, corn) supplement the diets of waterfowl in winter, these foods lack many of the vitamins, minerals, and proteins essential for survival and subsequent reproductive success. Marsh plants provide waterfowl with the essential nutritional balance lacking in grains.

Smartweed, swamp timothy, and watergrass are the most important natural waterfowl food plants in the Central Valley. These plants are easily propagated on most wetland sites through effective water management and soil disturbance. The timing of spring drawdown influences which moist-soil plants will dominate a seasonal wetland. The seeds of each plant species germinate best at a specific soil temperature. Therefore, as plants compete for dominance, marsh managers can favor specific plants by timing drawdowns to coincide with optimum germination conditions (primarily soil temperature). Although climatic conditions vary by year and location, the drawdown dates listed in the habitat management guides will generally induce germination of the target waterfowl food plant. The management strategies described in these leaflets have been successfully implemented by marsh managers throughout the Central Valley, but are by no means the only way to achieve these desired habitat types. Soil type and water quality also influence plant growth, so modification of these general recommendations may be necessary based on local knowledge and weather patterns for specific sites.

The rate of pond drawdown affects moist-soil plant composition, seed production, soil-salt levels, and the duration of food availability to waterfowl. Slow drawdowns (2-3 weeks) cause invertebrates to become concentrated in the shallow water and allow waterfowl optimum foraging conditions for a prolonged period. These invertebrates are a protein-rich food source important to pre-breeding and breeding ducks, ducklings, molting ducks, and shorebirds. Slow drawdowns also typically result in high vegetation diversity, and if executed during mid to late spring, may enhance seed production. However, they may concentrate salts near the soil surface in systems with brackish or saline water. Rapid drawdowns (3-5 days) are desirable if a soil-salt problem exists, as was quite often the case in the San Joaquin Valley in the past. The Grasslands Water District now provides water that appears to be of sufficient quality for managers to execute slow drawdowns without adversely affecting vegetation. However, further research is needed to determine the long-term relationship between slow drawdowns and alkaline soils. Rapid drawdowns generally produce extensive stands of waterfowl food plants if timed correctly, but "rob" wildlife of the extended shallow water habitat associated with slow drawdowns. Rapid drawdowns late in the growing season should be followed by a summer irrigation to insure a good seed crop. Although slow drawdowns are generally better for wildlife, there is no "right" or "wrong" way to drain a seasonal wetland. The rate of drawdown should be based on site-specific knowledge.

Summer irrigations are very important in Central Valley moist-soil management.

Most waterfowl food plants will not attain maximum seed production without at least one irrigation. The San Joaquin Valley receives less rainfall than the Sacramento Valley, and therefore the soils dry out faster and irrigations are more often a necessity. Swamp timothy is the only waterfowl food plant that may be grown successfully without an irrigation in the San Joaquin Valley. However, irrigations generally enhance seed production. Irrigation schedules for smartweed and watergrass vary with annual weather patterns. These plants can be observed for signs of wilting to determine proper irrigation dates.

The timing of fall flooding is typically based on water delivery dates. Most wetland units should be flooded prior to October 15. Irrigation districts typically cease water deliveries by mid-December, therefore marsh managers must devise feasible ways to maintain water in their ponds until spring drawdown. This ongoing problem is easily solved on those properties which can simply pump groundwater from deep wells to overcome the effects of evapo-transpiration and seepage (percolation). Wetland properties which do not enjoy access to wells can close all of their drainage structures and rely on rainfall to maintain pond levels and/or prior to the termination of water deliveries, raise the level of their ponds well above normal shooting depths and rely on the extra storage to carry them through to spring drawdown. If the latter technique is employed, water depth should not exceed 18 inches; any deeper would seriously impair the ability of waterfowl to feed effectively. In extreme cases, it may be possible to maintain pond levels by purchasing water from nearby properties that have wells and are willing to deal.

Water depth is also very important. Dabbling ducks (e.g. mallards, pintails, green-winged teal) cannot effectively feed on the seeds and invertebrates found on pond-bottoms if the water is deeper than 18 inches. Water depths of 6-12" are preferred for feeding. Therefore, in order to provide feeding habitat for dabbling ducks, shallow water must be maintained! Shallow water habitat management is valuable to many other wildlife species, as well. In Missouri, only 5 of 54 bird species that use seasonal marshes can effectively forage in water deeper than 10".

It is unlikely that marsh managers will be able to produce a monoculture of any one plant in an established marsh, particularly if pond bottoms are of uneven topography. Furthermore, a marsh with diverse habitats is valuable to a wider variety of waterfowl and other wildlife species and will better resist the devastating effects of plant diseases, insect pests, and bird depredation. Diversified habitats also provide a variety of waterfowl foods throughout the fall and winter. Even though some moist-soil plants are poor seed producers, when flooded they may support excellent assemblages of invertebrates. Waterfowl also utilize other plants (e.g. cattails and "tules") for cover. An ideal Central Valley seasonal wetland is dominated by waterfowl food plants, contains other moist-soil plants, and provides waterfowl with substantial cover.

Some plants reduce the value of a wetland to waterfowl if they become overly abundant. Tules and/or cattails can eventually "fill in" a pond and eliminate open water. While 40-60% tule/cattail coverage of the pond bottom may provide acceptable habitat for some species, efforts must be made to reduce these plants when they increase beyond this range. The primary tools for tule/cattail control are discing, mowing, and burning. Mowing and burning are only effective when followed by discing and 2-3 months of exposure to the sun, which is necessary in order to dry out and kill the tubers and rhizomes. Discing is beneficial for tule/cattail control because it also provides suitable conditions for invasion by waterfowl food plants. Habitat managers should be familiar with soil characteristics, however. Deep (24-36") "stubble" discing can adversely affect the water-holding capacity of a wetland if shallow clay layers exist near the soil surface. Shallow discing is preferred in this circumstance.

Marsh management is an art, not a science. Marsh management practices are continually being improved as a result of research and experimental management. The results of these learning efforts are disseminated to interested parties by the agencies and organizations involved in waterfowl management. However, it is to the advantage of all marsh managers to keep accurate records of habitat manipulations (e.g. dates of flooding, irrigation, drawdown, discing). Managers should eventually be able to predict how the vegetation on their property will respond to specific management practices, this in turn will allow them to consistently provide high-quality waterfowl habitat.

WETLAND HABITAT MANAGEMENT GUIDE #3

SEASONAL WETLAND

Target Waterfowl Food Plant: Watergrass

Timing of Spring Drawdown:

May 1 -31. Sacramento Valley.

April 15 - May 15. San Joaquin Valley

Moist-soil Plant Community: In addition to watergrass, other desirable wetland plants that may occur under the following water management and soil disturbance schedule include, but are not limited to tules, cattails, sprangletop, ammannia, fat-hen, beggarticks, and smartweed.

Potential Problem Plants: Some wetland plants are undesirable if they become overly abundant or create dense stands. These include but are not limited to tule, cattail, cocklebur, salt grass, bermuda grass, dock, jointgrass, and baltic rush.

Value to Waterfowl: A moist-soil plant community dominated by watergrass is an important component of a diversified marsh management program. Watergrass, also referred to as millet, is an important and very abundant waterfowl food plant in the Central Valley. It is highly attractive to pintails, mallards, and other dabbling ducks, presumably due to its combination of seed production, invertebrate habitat, and thermal cover. Watergrass is a weed that grows in dense stands and may produce in excess of 2,000 lb. of seed/acre. It has substantial stem mass, which provides ducks with thermal cover and protection from predators. Through flooding and waterfowl activity, the stems eventually become matted and serve as excellent substrate for invertebrate production.

Watergrass seeds provide greater balance in nutritive quality than the high-energy, low-protein cereal grains, (e.g. corn, rice). They are especially high in essential minerals. Marsh units dominated by watergrass typically receive heavy duck usage throughout the season. Sprangletop seeds provide waterfowl with a lesser, but still valuable, food source. Ammannia is a plant species that benefits waterfowl, but does not occur in great abundance.

Management Strategy: Watergrass requires more water than other waterfowl food plants, but is an easily propagated wetland plant species. Although an initial seeding may

be required, a stand can be sustained for several years with proper water management, which involves late-spring drawdowns and summer irrigations. Unlike other waterfowl food plants, watergrass is commonly propagated in a monoculture. These watergrass units resemble unharvested rice fields in appearance. This management practice maximizes food production at the expense of habitat diversity. However, units can be strategically located so that diverse wetland habitats are nearby. Watergrass is also produced in conjunction with other moist-soil plants in diverse wetland units.

Watergrass and rice have very similar growth requirements. Maximum growth occurs during hot days and warm nights. The establishment (i.e. aerial seeding) of rice can even be used as a local estimate for determining the proper drawdown date for watergrass. Watergrass seed maturation takes approximately 45-80 days, but less time may be required under ideal soil and temperature conditions. Although crops can be established as late as August, seed production is limited due to the cold nights at the end of the growing season. Sprangletop germination generally occurs with late June or July drawdowns. Watergrass grows best in heavy clay or loam soils and will tolerate mildly saline conditions.

Establishment: The introduction of watergrass to a seasonal wetland through seeding usually promotes rapid establishment. Optimal establishment occurs either by: 1) discing, broadcasting the seed, treating the soil with a cultipacker (ring-roller), then flooding for 3-5 days, or 2) through aerial application on saturated soils. The subsequent drawdown should be executed within the time frame in which watergrass locally germinates best (listed under "Timing of Spring Drawdown"). Seeds should begin to germinate within 2 weeks. If germination has not occurred 3 weeks after drawdown, an irrigation will be needed. Irrigation schedules are listed below. Discing prior to seeding reduces plant competition and need not occur if the ground is sparsely vegetated. It may be necessary to repeat the discing process several times to remove dense or robust vegetation. It is important to remember that watergrass is a weed and that drilling or covering the seed is unnecessary. The seed will not germinate if it is buried too deeply in the soil. "Rice cleanings" can be obtained from rice mills and should be applied at 50-100 lb./acre. Though only 10-40% watergrass seed, these have proven quite satisfactory. "Pure" watergrass can be purchased from seed distributors and only requires 15-40 lb./acre.

Spring Drawdown: Managers must do everything possible within the constraints imposed by water districts to maintain water until the late-spring drawdown that will typically encourage watergrass development. Coincidentally, the retention of pond water through April assures the availability of protein-rich invertebrates to breeding ducks. Appropriate drawdown dates are listed above. Watergrass seeds should begin to germinate within 2 weeks of drawdown. Rapid drawdowns (3-5 days) typically produce extensive stands of moist-soil vegetation, consisting of relatively few plant species. Slow drawdowns (2-3 weeks) maximize the foraging opportunity for waterfowl and other wetland birds and result in greater diversity of vegetation. Invertebrates, in particular, become concentrated and readily available to ducks.

Irrigation: Watergrass and other millets are water-dependent plants that require one or two summer irrigations for seed development to occur. Watergrass plants typically show signs of "redness" when soil moisture becomes limiting and the plants are "stressed". Plants will usually be 3-6" high when this condition occurs. At this point the marsh manager may

elect to employ either of two strategies. They are as follows:

a) **Irrigate Immediately:** This method is the most reliable way to produce a highly productive stand of watergrass. The first irrigation should occur when the majority of the plants are turning red, which is generally 4-6 weeks after drawdown. A subsequent irrigation is crucial if plants show redness again. This procedure generally produces a robust stand of watergrass with good seed development. Although ducks may initially have problems utilizing excessively tall watergrass, weather and feeding activity eventually create openings and facilitate access. Stems serve as an excellent substrate for invertebrates when they become "matted" in the water, therefore, tall watergrass provides good invertebrate habitat.

b) **Delay Irrigation Until August:** If irrigation water is unavailable until August or if a more open and shorter watergrass stand is desired, then irrigation can be delayed until August. However, under this scenario, high soil moisture must be maintained throughout the remainder of the growing season. This can be accomplished through repeated irrigations or continuous flooding. Early fall flooding (August) can serve as this irrigation. This form of watergrass management is not normally recommended because vegetation response is variable and, therefore, seed production is unreliable.

Fall Flooding: Flooding should coincide with the arrival of migratory waterfowl. Pintails begin arriving in the Central Valley in mid-August, and peak numbers of wintering waterfowl are usually present during December and January. Watergrass units should be flooded between August and October, but the delayed flooding (late November - early December) of an individual unit can make a "new" food source available to wintering waterfowl. The timing of water delivery plays a major role in the determination of flooding schedules, however. Many marsh managers simply execute their fall flooding when irrigation districts make water available. Marsh units should be gradually flooded to allow ducks maximum accessibility to seeds and invertebrates.

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WETLAND HABITAT MANAGEMENT GUIDE #5

BROOD POND

Flooding Schedule

Fall Flooding: October 1 preferred

Summer Drawdown: July 15 - August 1

A semi-permanent marsh is a wetland impoundment that incorporates a semi-permanent flooding regime with dense emergent vegetation, aquatic vegetation, moist-soil plants, open water, and possibly small islands. In the Central Valley, they are typically flooded from fall until mid-summer to meet the brood-rearing habitat requirements of local waterfowl. For this reason, semi-permanent marshes are often referred to as "**brood ponds**". They provide critical habitat for wetland wildlife, particularly during the summer when seasonal wetlands are dry. Hardstem bulrush (tules) and cattails are characteristic of brood ponds. Brood pond management limits the growth of "moist-soil" waterfowl food plants (e.g. smartweed, swamp timothy), but creates valuable escape cover for duck broods. Brood ponds also provide ducks with a diverse food source of invertebrates and aquatic plants.

Value to Waterfowl: Ducks utilize brood ponds throughout much of their annual cycle, but are most dependent upon them during the late spring and summer when aquatic invertebrates are their primary food source and relatively few wetland areas are flooded. Invertebrates, which are high in protein, are readily available to ducks in both seasonal and semi-permanent marshes during drawdowns. Seasonal wetlands in the Central Valley are typically dry and of little value to ducks during the summer. Although permanent marshes are flooded during the summer, invertebrates are not highly available to ducks in these deep-water marshes. Research has shown that while gadwall hens and their broods utilize permanent marshes extensively, hen mallards with broods prefer shallow seasonal or semi-permanent wetlands over permanent marshes when both habitat types are available. Thus, brood ponds (especially during drawdown) and other semi-permanent wetlands appear to be the preferred feeding habitat for Central Valley mallards during the summer.

Brood ponds typically support vigorous stands of cattails and/or tules. The maintenance of a productive brood pond generally requires periodic vegetation manipulation, however. Studies have shown that wetlands exhibiting the "hemi-marsh" 50:50 cover to open water ratio are ideal habitats for breeding ducks. Frequent discing will accomplish nutrient cycling and insure that the marsh remains in a productive state. Brood ponds also provide excellent loafing habitat for wintering waterfowl, particularly mallards and wood ducks.

Management Strategy: Brood ponds should be flooded continuously from the fall until at least July 15, but preferably August 1. The presence of summer water encourages cattail and/or tule growth in shallow areas, which provides ideal escape cover for duck broods. Discing, mowing, and burning are methods that can be used to maintain brood ponds in the 50:50 "hemi-marsh" state. Moderate production of moist-soil vegetation may occur (e.g. watergrass), although seed development is hindered by the short period between drawdown and fall flooding, as well as competition from dense emergent vegetation.

In the Central Valley, many wetlands that remain flooded during the spring and summer months are enrolled in the USDA Water Bank Program. Landowners receive annual payments for this provision of brood habitat and may only begin draining these units on established dates between June 15 and July 15. The flightless molting period and part of the brood-rearing period may occur after some Water Bank units have been drained, thus the maintenance of water beyond the contractual calendar date may provide increased benefits to brood-rearing and molting ducks. The timing of fall flooding is not crucial because seasonal wetlands provide the majority of the habitat for early migrant waterfowl. Flooding of brood ponds should occur after maintenance work (i.e. discing, mowing) has been completed.

Note: The presence of summer water benefits ducks and other wetland wildlife, but also may produce mosquitos. Landowners should check with their local mosquito abatement district for guidelines.

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