



Pacific Advocates

January 21, 2011

Philip Isenberg, Chair
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA
95814

Re: Scoping Comments for the Delta Stewardship Plan and the Notice of Preparation for the Completion of an EIR on the Delta Stewardship Plan

Dear Mr Philip Isenberg:

As a fifth generation Californian with roots in the Sacramento Valley and now residing in the Sierra region, I appreciate the opportunity to comment on the proposed Delta Stewardship Plan scoping issues. As an advisor to the Sierra Business Council representing businesses throughout the Sierra and a small business working and living in Nevada and Placer counties, where much of the water originates that is exported, many who reside in these areas of origin will be impacted by proposals to continue Delta exports at the present unsustainable levels. You have the laudable goal of ensuring the Delta ecosystem and its public trust values are preserved and protected while providing a reliable supply of water to exporters from the Delta for the next 50 years.

For years, areas where California's water originates have been promised sufficient water to meet these regions' growing needs. The Delta Protection Act and the Watershed Protection Act also provide assurances that only water surplus to the needs of these areas will be exported. Critical to the livability of our communities is a functioning healthy bay estuary that provides important economic and ecological benefits well beyond any legislatively defined boundaries. The federal and state water projects have a long record of broken promises when it comes to mitigating impacts and providing promised water supplies to the areas from where the water is taken, the rivers are dammed and the watersheds, fisheries and wildlife impacts are left strewn for other generations to remedy.

This transfer of wealth or water from one region to another without compensation must stop. As part of any financing mechanisms, a charge per gallon of water exported should be returned to the surrounding counties and communities as part of the cost of the water exports in addition to meeting mitigation obligations. Further hand outs and taxpayer subsidies especially to Central Valley Project contractors, should be stopped and full cost pricing adopted as anticipated under the Central Valley Project Improvement Act of 1992 should not be further delayed. Much of the water pricing

reforms and mitigation have been avoided to date. In addition Westlands and other west side irrigators have argued, since their contracts were initiated in 1963, the renewals and changes to the contracts are not subject to CEQA. Thus they have also avoided mitigating the continued impacts of their diversions and irrigation of toxic soils. In addition these irrigators argue discharges of pollution to the San Joaquin River and associated wetland areas are outside of the scope of the Delta Plan, thus they are free to pollute these areas until some pollution treatment is discovered. The Delta-Bay estuary is fed by both the Sacramento and San Joaquin Rivers. Ignoring the polluting and diminished flows from the San Joaquin River watershed would place an unjust burden for mitigation on other watersheds. Despite their political power and public relations campaigns the west side irrigators should not be given a free ride. Existing funding commitments for recreational and watershed protection costs from these federal project diversions, such as those promised to the American River, Auburn State Recreation Area, Trinity River, San Joaquin River Restoration and other watersheds should be provided without delay.

To be a fifty year successful plan, the Delta Stewardship Council must define reliable water supply as sustainable water supply that fully protects Public Trust values. We understand the federal and state water contract exporters' desire to narrow the definition to include only engineering or some physical export apparatus. Such a narrow definition would lead to additional conflicts. The following principles should guide the plan development:

- 1. Guarantee Sufficient Fresh Water to Support & Restore the Delta Ecosystem:** The Bay and Delta Estuary is a national and statewide resource critical to California's economic health, to the plants, animals, birds and fish that live there, navigation and to the livability of our communities. The Public Trust benefits of this bay and estuary extend not only to the San Francisco Bay Area and Delta but into the Sierra and Northern California watersheds. This estuary and bay-delta mixing zone is essential not only to healthy water supplies, but critical fishery migration, essential wildlife corridors and as a place to work and recreate.
- 2. Enforce Existing Water Pollution Control Standards:** Water quality and pollution control standards must be enforced to protect and restore water quality of the Delta Estuary and Bay. Westside federal contractors along with others need to clean up their water pollution mess before passing it to the Delta communities to bear the brunt of clean up costs and damages. Discharges of selenium, boron, salt, mercury, pesticides and nutrients from the federal San Luis Drain and Westside farmers must be cleaned up at its source. Such discharge of pollutants does not comply with the federal Clean Water Act selenium control standards. The bioaccumulation of selenium pollution threatens salmon, steelhead, sturgeon and migratory birds throughout the Central Valley and San Joaquin River, but specifically is accumulating in the Suisun Marsh at dangerous levels. Increasing exports to the San Joaquin Valley is a "Double Whammy" to the Bay Delta ecosystem. It reduces important fresh water flows and increases the loads of selenium and other agricultural contaminants. [See Attachments 1 &2]

- 3. More Water Exports Should Not be Promised before Safe Limits are Established:**
Existing export of fresh water flows from the Delta Bay estuary should be contingent on ensuring sufficient water to support and restore the Delta ecosystem in perpetuity and reserve sufficient supplies for areas of origin.
- 4. Reduce Risks to people and property determine a safe yield for water exports:** A “water grab” that allows more water exports from the Delta, ignoring the restraints of nature, expanding exports by promising unrealistic inflated quantities of water does not promote reliability, it promotes conflict. Providing water to areas south of the Delta, must protect the habitat, local economies of the Sierra, Northern California, Delta and the San Joaquin River regions.
- 5. Enforce water rights:** Don’t allow politically connected and powerful interests to sell publicly owned water supplies at a profit while damaging surrounding communities, their groundwater supplies and natural resources. Before additional water transfer projects and sales of water take place, groundwater base lines must be measured and established. The State Water Resources Control Board and Fish and Game need sufficient resources to analyze water right violations, damage to surrounding water, fishery and wildlife resources, and impacts to water quality. As the author of the 1982 Assembly Office of Research publication, “A Marketing Approach to Water Allocation” there are benefits to water sales, leases and exchanges that promote water conservation, but a wholesale water market built at public expense without sufficient safeguards for public trust resources, leads to speculation and conflict.
- 6. Protect Taxpayers:** The taxpayer must not be soaked again either through bonds or direct payments for the costs of exporting this water from the Delta and surrounding rivers. Any plan adopted to export water out of the Delta from the Northern California and Sierra watersheds must be cost effective and ensure those exporting water from the Delta Bay Estuary can pay the mitigation costs, design, and capital costs. These costs need to be clearly described so ratepayers can weigh less expensive alternatives.
- 7. Require Water Conservation AS A Top Priority:** Water conservation is the most cost effective method of creating additional water supplies.
- 8. Full Public Disclosure and Ratepayer Approvals are needed before approving large risky engineering projects.** Any plan that contemplates spending billions of dollars of ratepayer or taxpayer revenues should require a vote of the people before their tax dollars or water rates are pledged to pay for large risky engineering projects such as contemplated by the Bay Delta Conservation Plan/Delta Habitat Conservation and Conveyance Program [BDCP/DHCCP]. Joint Power Authorities [JPAs] are sprouting like Delta asparagus. These “groups” of private and public agencies seek projects outside of their geographical boundaries, issue debt without voter approvals and avoid financial disclosure limits because the debt is “off balance sheets.” Many of these programs like the BDCP and DHCCP are not public processes. Further JPAs obstruct public access and often hinder public access to meetings, minutes, workshops etc. by adopting costly procedures, short notification, and public hearings at distant geographical locations. Full

electronic access to these records, agreements and financing should be available to the public on line and important debt approvals should be web cast. [See Attachments 3 and 4]

Thank you for opportunity to comment. The legislation creating this proposed 50 year Delta Plan protection process that also requires the adoption any peripheral canal included in the regulated communities' BDCP unless Fish and Game objects, was literally passed in the dead of night. This legislation along with the \$11.1 billion dollar bond measure that would saddle the general fund with debt payments of \$800 million dollars annually never had the benefit of public policy and fiscal committee reviews or public input. Much of the BDCP/DHCCP decision process is taking place outside of the public eye largely driven by Westlands, Westside irrigators and South of the Delta export interests. These decisions will determine the peripheral canal project design, location and mitigation. Hopefully the Delta Stewardship Council process can add some balance and public agency accountability to this stacked deck.

Sincerely,



Patricia Schifferle
Director
Pacifivadvocates.org

CC: Terry Macaulay | Delta Stewardship Council | 980 Ninth Street, Suite 1500 |
Sacramento, CA 95814

deltaplanscoping@deltacouncil.ca.gov

Bay-Delta Planning Needs to Address Selenium Contamination of the Estuary caused by the Central Valley Project

Patricia Schifferle

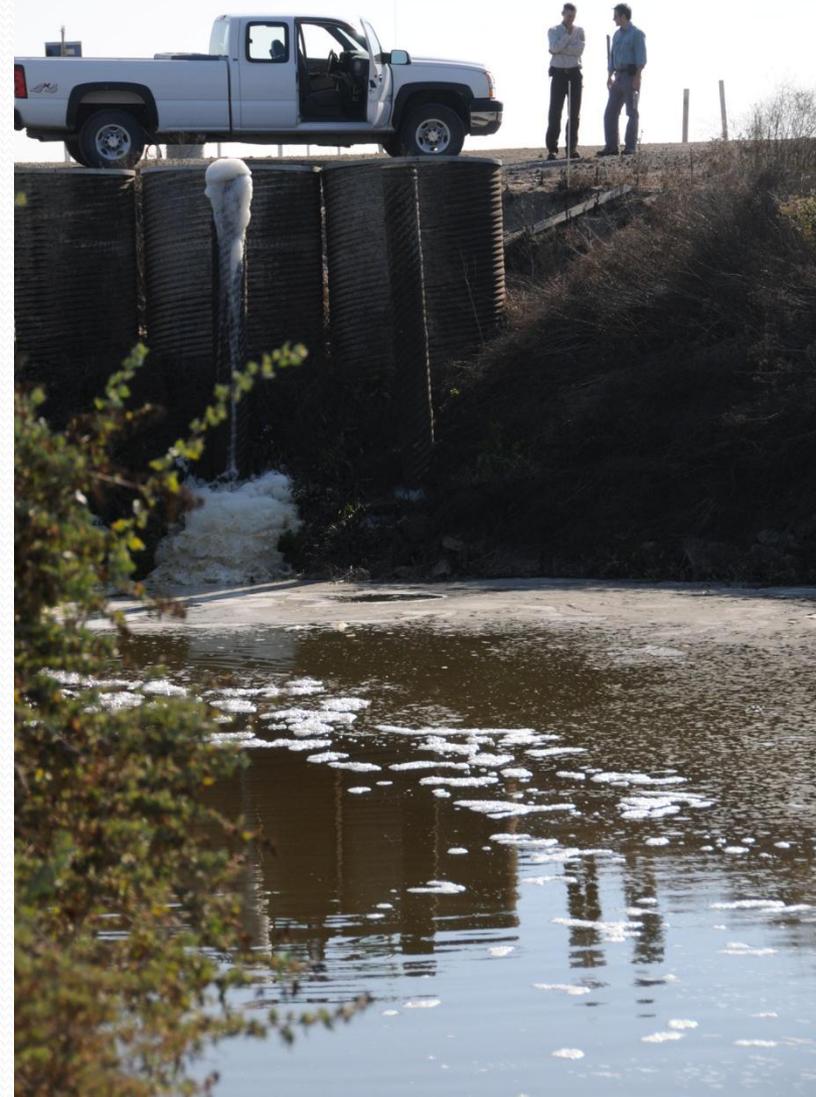
Author, “Toxic Ponds—Antiquated Methods and
Unacceptable Dangers”

Assembly Office of Research (1984)

December 8, 2010

California Recently Granted a New 10-yr Waiver Allowing Continued High Selenium in the San Joaquin River

- No proven and affordable treatment methods have been found, so selenium levels will stay high.



Public Health Threat

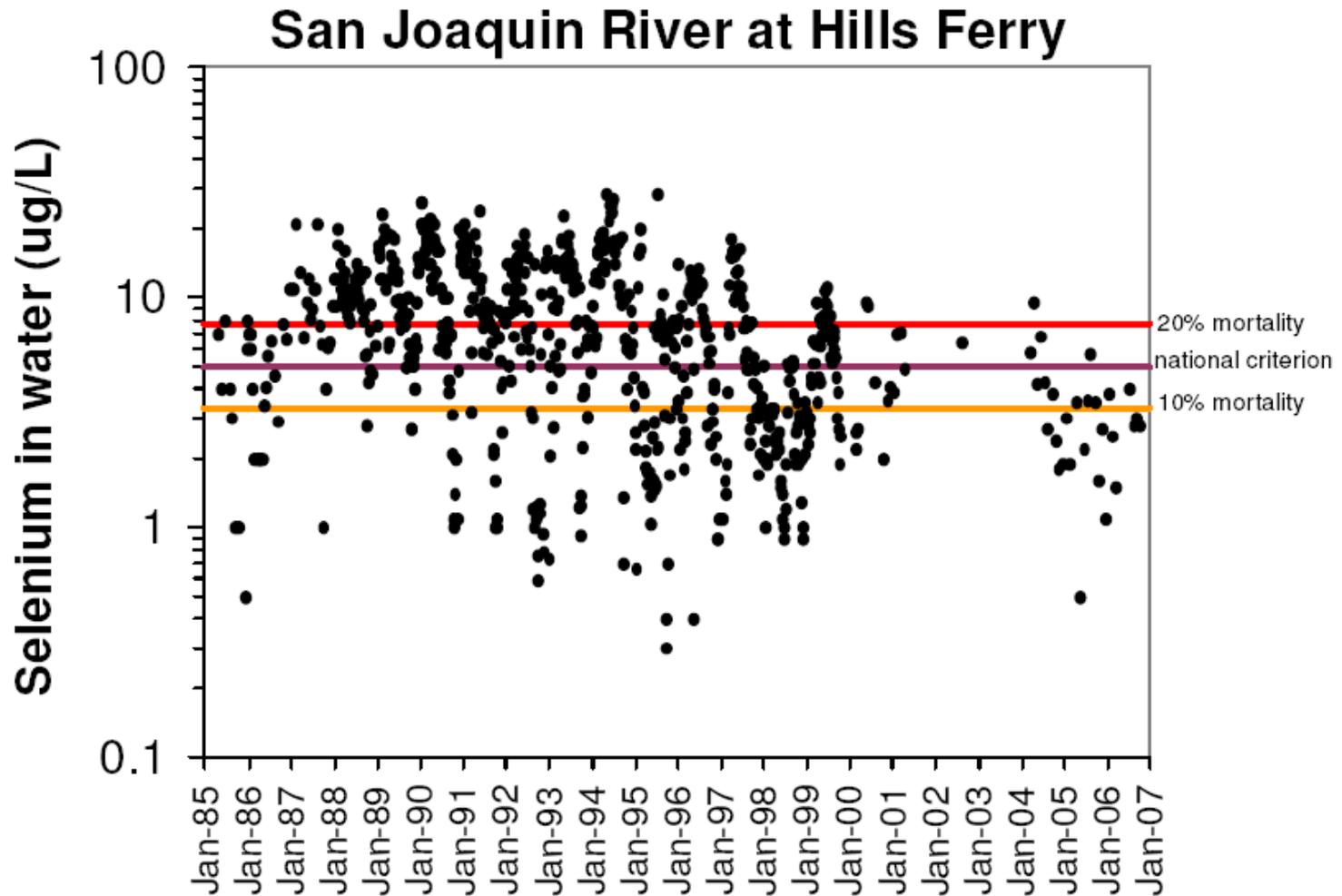
Figure 4-44



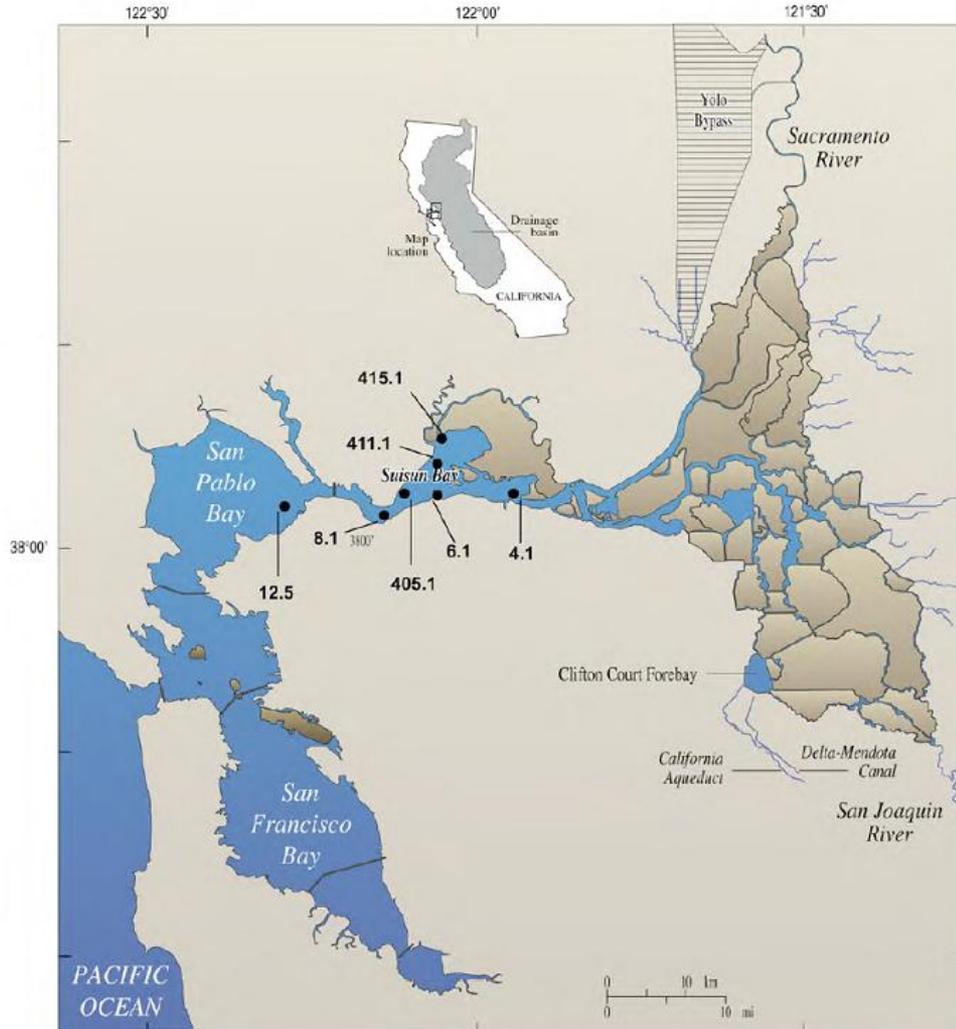
Grassland Area (Merced County) : CalEPA Health Advisory

Because of elevated selenium levels, no one should eat more than four ounces of fish from the Grassland area, in any two-week period. Women who are pregnant or may become pregnant, nursing mothers, and children age 15 and under should not any eat fish from this area.

Selenium in the San Joaquin River Often Exceeds Levels that are Dangerous for Salmon



Selenium Impacts Continue to Persist in Bay-Delta



USGS continues to find Selenium concentrations in the range of 2 to 22 micrograms per gram In Northern San Francisco Bay.

Ecological Threat

Don't repeat the problems found in the San Joaquin Valley in the Delta



Simple Solution

- Stop importing water to irrigate high-selenium lands.
- Operate the Central Valley Project to prevent the spread of this selenium pollution.
- Act now, so costs to the Public, Downstream Water Users, and the River and Delta Ecosystem are reduced.
- This would reliably protect Public Trust resources by stopping the problem at the source.

Congress of the United States
Washington, DC 20515

June 14, 2010

Don Glaser
Regional Director
Bureau of Reclamation
Agency Mid-Pacific Region
Department of the Interior
3310 El Camino Avenue
Sacramento, CA 95821

Jared Blumenfeld
Regional Administrator
Environmental Protection
Region IX
76 Hawthorne Street
San Francisco, CA 94105

Dear Director Glaser and Administrator Blumenfeld:

We are concerned that the May 27th meeting of the Central Valley Regional Water Quality Control Board may provide the ability for another ten years of non-enforcement of the selenium standards for the contaminated agricultural irrigation return flow waters flowing from the Grasslands Bypass Project, of the San Luis Unit, Central Valley Project. We strongly disagree with the requested ten year waiver by the Bureau of Reclamation and instead recommend that only a one-year waiver be granted with an agreement that over the next year an open, transparent and scientifically based assessment of potential management solutions be conducted.

We support the USEPA in their recommendation that effective selenium source controls be enacted and implemented. We concur with the U.S. Fish and Wildlife Service's warning that the adjacent wildlife refuges and fisheries in the San Joaquin River are at risk from selenium contaminated water. Finally we are concerned that as this selenium laced water moves through the San Luis Drain and the groundwater that moves both north and south, that millions of California's citizens may be at risk from poisoning.

Many Californians' remember the horrific photographs of the deformed ducks from Kesterson Reservoir, a scene that forced the Bureau of Reclamation to abandon their historic practice of dumping contaminated water and thinking it would just go away. Thirty years have passed since the first impacts of the agricultural drainage water first began to be seen. Thirty years when we should have been developing solutions rather than continuing to ask for waivers to continue to put Californian's and their environment at risk.

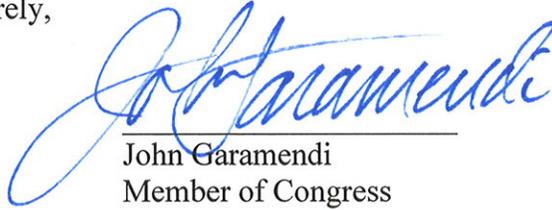
We recommend that a one-year waiver be given to remain legal with state laws. Over the next year we will work with the Administration, Congress, academia, and the public to identify real solutions to the selenium issues, which should include identifying not only treatment of the irrigation return flows and look at the potential for retiring selenium producing areas, a program similar to what occurred when Reclamation addressed salt producing areas in the Colorado River Basin.

We stand ready to help. We will not stand by and see our citizens and environment threatened by actions that should be controlled.

Sincerely,



Grace F. Napolitano
Chair, Subcommittee on Water and Power



John Garamendi
Member of Congress

cc: Secretary of the Interior
Governor of California
California Delegation



NORTH

COAST

RIVERS

ALLIANCE



November 4, 2010

Charles Hoppin, Chairman
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

E-mail <commentletters@waterboards.ca.gov>

Subject: Petition for Reconsideration—San Joaquin River Selenium Control Plan Basin Plan Amendment, Resolution 2010-0046

Dear Chairman Hoppin and Members of the Board:

Pursuant to California Water Code Sec 1120 et seq. and Title 23, California Code of Regulations, Sec. 768 et seq., Sierra Club California, Pacific Coast Federation of Fishermen's Associations, Institute for Fishery Resources, Planning and Conservation League, North Coast Rivers Alliance, and Southern California Water Alliance (Environmental Advocates) hereby jointly petition the State Water Resources Control Board (hereinafter "Board") to reconsider Resolution 2010-0046 approved on October 5, 2010 approving amendments to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (Basin Plan) to address selenium control in the San Joaquin river Basin (hereinafter "Basin Plan Amendment"). We adopt by reference comments and petitions filed by California Sportfishing Protection Alliance, California Water Impact Network, and AquAlliance.

STANDARD OF REVIEW

In accordance with California Water Code Section 1120 *et seq.*, and title 23 of the California Code of Regulations, Section 768 et seq., any interested party may petition the BOARD for reconsideration of a decision or order based on any of the following conditions:

- a. Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- b. The decision or order is not supported by substantial evidence;
- c. There is relevant evidence, which in exercise of reasonable diligence, could not have been produced; or
- d. Error in law.

Environmental Advocates contend that BOARD Resolution 2010-0046 constituted an error in law and is not supported by substantial evidence

STATEMENT OF FACTS

On October 5, 2010, the BOARD approved the Basin Plan Amendment to the Water Quality Control Plan for the Sacramento River and San Joaquin River to extend the compliance date for implementation of the 5 parts per billion (ppb) water quality objective for selenium in Mud Slough North and the San Joaquin River from Mud Slough to the Merced River until December 31, 2019. This approval followed the May 27, 2010 approval of Resolution R5-2010-0046 by the Central Valley Regional Water Quality Control Board (hereinafter "Regional Board").

Approval of the selenium Basin Plan Amendment provides for a cumulative 24-year and 9-month time extension (1996-2019) for the compliance date in meeting the 5 ppb selenium water quality objective (4 day average) in Mud Slough and the 8-mile portion of the San Joaquin River from Mud Slough to the Merced River. The BPA allows continued discharges of highly contaminated groundwater from the 100,000 acre Grasslands Drainage Area through a portion of the Bureau of Reclamation's San Luis Drain directly into Mud Slough which flows into the San Joaquin River. Average selenium concentrations in the San Luis Drain discharges into Mud Slough are up to 50 ppb on a daily average. Selenium readings at Hills Ferry downstream on the San Joaquin River have risen in recent years, with a reading of 52 ppb in January, 2010, exceeding the drinking water standard of 50 ppb.

Environmental Advocates, as well as, members of our organizations, other environmental and Delta representatives commented both orally and in writing for the hearing May 27, 2010 before the Regional Board and before the State the Board hearing October 5, 2010 regarding the Basin Plan Amendment. Environmental Advocates raised several significant technical and procedural issues to the Board. The Board completely dismissed all of concerns in their Basin Plan Amendment approval process. Thirty-five years after massive deaths and deformities found at the Kesterson National Wildlife Refuge, the Board extended the compliance schedule for selenium discharges into Mud Slough which runs through the Kesterson Unit of the San Luis National Wildlife Refuge and the San Joaquin River until December 31, 2019, totaling nearly a quarter of a century of non-compliance with selenium water quality standards.

ERROR IN LAW

As stated above, a petition for reconsideration may be made if there is an error in the law. Environmental Advocates hereby allege that the BOARD erred in its application and consideration of Basin Plan policies, the California Environmental Quality Act, the Porter-Cologne Act, the Federal Clean Water Act, the California Endangered Species Act, the Federal Endangered Species Act, the Fish and Wildlife Coordination Act, the Migratory Bird Treaty Act, the California Water Code, the Delta Protection Act, the Reclamation Act, the California Constitution's prohibition on Wasteful and Unreasonable Use of Water (Article X, Sec 2) and state and federal anti-degradation policies before approving Resolution 2010-0046 for the selenium Basin Plan Amendment.

THE RESOLUTION IS NOT SUPPORTED BY THE EVIDENCE

A petition for reconsideration may be made if the resolution is not supported by the evidence. Environmental Advocates believe that the BOARD's decision is not supported by substantial evidence, and therefore warrants reconsideration by the Board.

Resolution 2010-0046 does not address the fact that selenium concentrations in the San Joaquin River at Hills Ferry have been increasing since 2007. BOARD Resolution 2010-0046 approves REGIONAL BOARD Resolution R5 2010-0046. Resolution R5 2010-0046 justifies the selenium Basin Plan Amendment in paragraph 8 on page 2, stating that:

In a 13 December 2006, letter to the US Bureau of Reclamation, the GAF informed the Bureau and Central Valley Water Board staff that the GBP would be unable to eliminate all surface water discharges of agricultural subsurface drainage by 30 October 2010 without increased risks of loss of soil productivity; accelerated loss of beneficial use of groundwater due to salinization; a significant decrease in farm profitability stemming from a rising water table if irrigation continues; or low or no returns if fields are dryland farmed or fallowed. Rising groundwater would also increase groundwater seepage to surface water channels and open ditches, potentially increasing selenium in channels now protected by the monitoring and management of the regional drainage program. Continued farm productivity and profitability is necessary to fund ongoing regional drainage management in this area; and continued wildlife protection is consistent with state, federal, local and GBP priorities.

The Board by adopting Resolution 2010-0046 fails to control this selenium pollution at its source. Instead the pollution is exported to the Delta estuary. The Board refused to consider controlling this Delta export of water to irrigate toxic selenium soils and then sending the polluted selenium drainage back to the river and estuary. Such pollution control and unreasonable use *is* within the State Board's authority.¹ Additionally, the Board by adopting

¹ See Racanelli Decision (*United States v. State Water Resources Control Board*, 182 Cal.App.3d 82, 130 (1986)):

Resolution 2010-0046 refuses to effectively address partially regulated and the unregulated discharges of pollutants from adjacent and north Westside upslope areas into the Grasslands Watershed.

The Board's adoption of Resolution 2010-0046 fails to comply with federal and state laws to control pollution. As the Regional Board's Staff Report acknowledged, "[a]ny proposed changes to the Regional Water Board Basin Plans must be consistent with existing Federal and State laws and regulations..." (Regional Board Staff Report, p. 23.) Both the EPA and USFWS raised concerns regarding the adequacy of the Regional Board Staff Report's analysis and the proposed amendments themselves. The points raised by the federal agencies with responsibilities over the water quality and wildlife affected by the proposed amendments underscored those raised by the Environmental Advocates in their own comments to the Board. None of the Board or Regional Board's responses adequately addressed these concerns.

Too much selenium in streams kills or deforms fish and other aquatic life, and in high levels can damage human health. Selenium is one of a number of contaminants that are discharged from the federally owned San Luis Drain directly into the waters of the state. This failure to enforce protective selenium water quality standards transfers pollution from these Grassland drainers through this federal drain to the waters of the state, harming beneficial uses of these waters for our members' recreational use, domestic water supply, public health and public trust values.

The BOARD's justification for approving the selenium Basin Plan Amendment is based on maintaining one beneficial use at the expense of other beneficial uses and a faulty assumption that regional efforts to reduce selenium contaminated discharges to Mud Slough would end if discharge prohibitions were enforced. Despite significant concerns of the United States Environmental Protection Agency ("EPA") and United States Fish and Wildlife Service ("USFWS") regarding the harmful impacts of the Basin Plan Amendment to allow increased selenium discharges for such a prolonged period and the potential for violations of federal environmental standards, the Board rejected a feasible and less risky alternative put forth by a coalition of environmental groups to limit the amendment for a period of two years.

We perceive no legal obstacle to the State Board's determination that particular methods of use have become unreasonable by their deleterious effects upon water quality. Obviously, some accommodation must be reached concerning the major public interests at stake: the quality of valuable water resources and transport of adequate supplies for needs southward. The decision is essentially a policy judgment requiring a balancing of the competing public interests, one the Board is uniquely qualified to make in view of its special knowledge and expertise and its combined statewide responsibility to allocate the rights to, and to control the quality of, state water resources. ([Water Code] § 174.) . . . We conclude, finally, that the Board's power to prevent unreasonable methods of use should be broadly interpreted to enable the Board to strike the proper balance between the interests in water quality and project activities in order to objectively determine whether a reasonable method of use is manifested.

Admittedly there is no known effective treatment process for such huge volumes of polluted selenium contaminated groundwater and no known funding exists. For these and the following reasons the Environmental Advocates believes the Board's Resolution 2010-0046 is unsupportable due to its conflict with federal and state laws and policies.

REQUEST FOR RELIEF

The Environmental Advocates hereby respectfully request that the BOARD reconsider Resolution 2010-0046 and remand the selenium Basin Plan Amendment to the REGIONAL BOARD to adopt National Pollutant Discharge Elimination Service (NPDES) permit conditions to control selenium discharges from these pipes, ditches, sumps and canals, to fully regulate all selenium discharges into the Grasslands Watershed Basin, consider alternatives such as land retirement and a shorter compliance schedule for implementing the selenium objectives for Mud Slough North and the San Joaquin River upstream of the Merced River.

Respectfully submitted this 4th day of November 2010,



Jim Metropulos
Senior Advocate
Sierra Club California



Steven L. Evans
Conservation Director
Friends of the River



Zeke Grader
Executive Director
Pacific Coast Federation of Fisherman's
Federation Association Inc.



Jonas Minton
Senior Water Policy Advisor
Planning and Conservation League



Conner Everts
Executive Director
Southern California Watershed Alliance



Byron Leydecker
Chair
Friends of Trinity River

Frank Egger President
North Coast Rivers Alliance

Pietro Parravano, President
Institute for Fisheries Resources

Attachment:

Memorandum and Points and Authorities In Support of Sierra Club California, Pacific Coast Federation of Fishermen’s Associations, Institute for Fishery Resources, Planning and Conservation League, North Coast Rivers Alliance, and Southern California Water Alliance (Environmental Advocates) Joint petition for Reconsideration of Resolution 2010-0046

Points and Authorities

The Board’s adoption of the San Joaquin River Selenium Control Plan Basin Plan Amendment, Resolution 2010-0046 allows the continued violation of selenium pollution standards and other pollutants being discharged from the San Luis Drain into the San Joaquin River from the Grassland Bypass Project (GBP) by delaying the compliance time schedule in the current Basin Plan. The Basin Plan Amendment includes a revised compliance schedule for meeting selenium water quality objectives in Mud Slough (north) and the San Joaquin River (from Sack Dam to the Merced River). This revised compliance schedule includes a non-binding *Performance Goal* of 15 µg/L monthly mean by December 31, 2015, and a binding objective of 5 µg/L 4-day average for the reaches of Mud Slough (north) and the San Joaquin River by December 31, 2019.

The Environmental Advocates’ comments both before the Board and the Regional Board were not addressed. Specifically in adopting Resolution 2010-0046 the Board failed to enforce the Clean Water Act and Porter-Cologne (Water Code § 13000 *et seq.*) The Board approved the selenium BPA to allow nearly another decade in search of technology and funding that does not exist. Specifically the action fails to:

1. Regulate the point source discharge of selenium and other pollutants in accordance with the Clean Water Act through repeated waivers and basin plan amendments for over fifteen years, and extending this failure to enforce pollution control standards for almost another decade resulting in harm to the waters of the state and nation and the beneficial uses and public trust values.
2. Remedy the environmental impacts associated with deferring compliance of water quality objectives in Mud Slough (north) and the San Joaquin River; and
3. Regulate or remedy inputs of selenium contamination within the Grasslands Watershed and the Grassland Basin Project wetland supply channels that result in continued violations of water quality objectives in those channels and environmental harm to endangered species, migratory birds, fish, wildlife and human health.²

² “*Review of Selenium Concentrations in Wetland Water Supply Channels in the Grassland Watershed*” California Environmental Protection Agency Regional Water Quality Control Board Central Valley Region May 2000, Figure 4 page 11. See also Delta-Mendota Canal Water Quality Monitoring Program reports April-June 2010 documenting elevated levels of Mercury and Selenium.

A. The Board Failed to Enforce the Clean Water Act and Porter-Cologne (Water Code § 13000 et seq.) in Adopting Resolution 2010-0046--A State Cannot Issue Temporary Waiver from NPDES Permit.

The Grassland drainers entered into a joint powers agreement with the San Luis Delta Mendota Water Authority (“Authority”).³ Under the project’s agreement, groundwater is pumped to the surface and is discharged into the San Joaquin River via the federal San Luis Drain and Mud Slough. The discharged water contains a number of chemical constituents identified by the Environmental Protection Agency (“EPA”) as pollutants. One such pollutant discharged is selenium, occurring at levels that are toxic to fish, wildlife, and humans who rely on the San Joaquin River for a domestic water supply.

By adopting Resolution 2010-0046 and the Basin Plan Amendment, which delays enforcement of pollution control standards and fails to regulate the discharge of pollutants, the Board violates the Clean Water Act (CWA). Likewise, the Project’s operation without a National Pollutant Discharge Elimination System (NPDES) Permit constitutes an unlawful discharge of pollutants into navigable waters of the United States. State law cannot exempt the Authority from obtaining an NPDES and other necessary permits under the CWA.

In 1995 the Authority first entered into a use agreement with the Bureau of Reclamation to dump shallow untreated polluted groundwater from a four-mile long earthen ditch, through the San Luis Drain, and into Mud Slough. Though the agreement’s original terms allowed this arrangement for “two years,” and no more than “five years,” a series of use agreement extensions have made promised pollution treatment appear as a “treatment mirage.”

The technical and economic feasibility of drainage treatment is questioned in the water board’s staff report. More recently the US BOR, in contract negotiation sessions with Westlands, has indicated the cost is greater than \$12,000 to treat an acre of drainage impaired land. Such estimates also make the promised treatment unlikely.⁴ Treatment of this polluted ground water is further complicated by salt and the presence of constituents like selenium, arsenic, and boron.⁵ Yet the full range of source controls, including land retirement to

³ The Project is operated by the Bureau of Reclamation and the San Luis & Delta-Mendota Water Authority (Authority). Previous NPDES Permits to control pollution were rescinded when this “interim” project was announced. See United States Department of the Interior, Bureau of Reclamation, San Luis Drain, Merced and Fresno Counties, NPDES Permit No. CA0082368, Order No. 90-027. Also see NPDES permit to the Authority for discharge of sumps into the San Luis Drain On March 22, 1996, the Regional Board issued a NPDES Permit (Order No. 96-092, NPDES NO. CA0093917) to the Authority for the discharge of groundwater accumulated in the Drain to Mud Slough (North)

⁴ US BOR Reclamation cost estimates for drainage treatment and collection costs for the Northerly portion of Westlands Water District. 9-28-2010 Repayment Negotiations & 9 (d) Contract Negotiations.

⁵ *Technical Analysis of In-Valley Drainage Management Strategies for the Western San Joaquin Valley, California*, Open File Report 2008—1210 , By Theresa S. Presser and Steven E. Schwarzbach

regulate this discharge and the adoption of NPDES permit requirements by Environmental Advocates was ignored.

B. The Board Action Fails to Regulate Pollutants Entering Into Wetland Supply Channels at National and State Wildlife Refuges and to Enforce Federal and State Anti-degradation Policies Allowing Unreasonable Affects on the Beneficial Uses of Water in Adopting Resolution 2010-0046.⁶

The Regional Board Staff report (p. 25) acknowledges that the adoption of the Basin Plan Amendment will result in “temporary continuation of the potential impairment to warm freshwater habitat, spawning and wildlife habitat.” In fact, the Regional Board acknowledges that “with the amendments, water quality in Mud Slough (north) will remain vulnerable to degradation for up to an additional nine years, three months beyond 1 October 2010.” (*Ibid.*)

The Board Adopting Resolution 2010-0046 seemingly sides with the Regional Board Staff Report that argues this degradation will only occur in Mud Slough and therefore it is acceptable:

“The existing beneficial uses of Mud Slough (north) are irrigation (limited by naturally occurring salt and boron); stock watering; contact and non-contact recreation; warm freshwater habitat; spawning and wildlife habitat. Adopting the amendment will not change attainability of these uses relative to current conditions, but will result in temporary continuation of the potential impairment to warm freshwater habitat, spawning and wildlife habitat now occurring relative to no project.” [Regional Staff Report at p. 25]

This argument suggests that after over a decade of sanctioning the pollution of Mud Slough and the San Joaquin River, such degradation necessarily sanctions further degradation by these irrigation drains. Furthermore, this circular argument ignores the spread of selenium pollution throughout the lower San Joaquin and the Sacramento-San Joaquin Delta.

In addition, the Board Adoption of Resolution 2010-0046, does not control and violates the 2 µ/L standard for wetland supply channels and Salt Sough whenever there is sustained rainfall. The 1997 Storm Event Plan⁷ acknowledges uncontrolled storm water pollution from Panoche Creek and Silver Creek, with its terminus in and at the project boundary. During storm events, the wetland supply channels at Camp 13 Ditch and Agatha Canal gates are opened, allowing uncontrolled and polluted storm water, road runoff, and groundwater to flood into wetland channels, Mud Slough, and the San Joaquin River. Testimony and comments by the Environmental Advocates, the United States Fish and Wildlife Service and others document the

⁶ SWRCB Order No.WQ 2005-0010; SWRCB Order No. WQ 92-09, SWRCB Resolution No. 68-16 and 40 CFR § 131.12.

⁷ “*A Storm Event Plan For Operating the Grassland Bypass Project*”, Grassland Area Farmers and San Luis & Delta Mendota Water Authority, August 25, 1997.

pollution impacts to the beneficial uses of both public and private wetlands. The Board failed to consider regulation of this pollution in its action.

Specifically, Resolution 68-16 requires that high quality waters shall be maintained until it is demonstrated that degradation is in the best interest of the people of California; that beneficial uses will not unreasonably be affected and that water quality objectives and standards will be met. Further, waiving and failing to enforce water quality standards protective of fish and wildlife fails to comply with the Federal Anti-degradation Policy (40 Code of Federal Regulations 131.12).⁸

Beneficial uses, including domestic, agriculture, along with public health, aquatic life, migratory birds, rare fish and wildlife, and recreation, are threatened by the Board's action to waive protective selenium standards for almost another decade. USFWS documented the vast public trust resources that are threatened and we incorporate those comments by reference.⁹ These public trust resources and beneficial uses include the Grasslands Ecological Area with over 160,000 acres of Federal, State, and privately managed marsh, native pasture and riparian zones, including the largest contiguous block of wetlands remaining within the Central Valley (Sacramento and San Joaquin Valleys). Prior to the early 1900's, this area was part of a vast network of some 4,000,000 acres of wetlands spread throughout the Central Valley. Today that valley-wide network is down to 300,000 acres, of which the Grasslands area is a critical component. As much as thirty percent of the migratory birds that utilize the Central Valley frequent the watershed each winter. The area annually hosts hundreds of thousands of ducks, geese and waterbirds, and is recognized by the Western Hemisphere Shorebird Reserve Network as a place of international importance to wintering and migrant shorebirds.

The Grasslands Ecological Area has also been designated a Wetlands of International Importance under the Ramsar Convention, the only international agreement dedicated to the worldwide protection of wetlands. The Grasslands Ecological Area and vicinity also provides habitat to two known populations of the giant garter snake (*Thamnophis gigas*) (in Mendota and North and South Grasslands) as identified in the final rule listing this species as threatened (USFWS 1993) (56 FR 54053). The San Joaquin River provides habitat to the federally listed delta smelt (*Hypomesus transpacificus*), Central Valley steelhead (*Oncorhynchus mykiss*), Central Valley spring run Chinook salmon (*Oncorhynchus tshawytscha*) and green sturgeon (*Acipenser medirostris*).

These beneficial uses are threatened by pollutant levels of selenium exceeding the 2 µg/L monthly mean selenium objective in water in the Grassland wetland supply channels and 5

⁸ http://www.usbr.gov/mp/nepa/documentShow.cfm?Doc_ID=4826 The U.S. Fish and Wildlife Service's Biological Opinion indicates that the Poso/Rice/Almond drain areas adjacent to the Grasslands area are discharging uncontrolled drainage water into areas such as the Agatha Canal, which periodically has extremely high selenium levels that could cause reproductive failure, death and other impacts to waterfowl, fish and wildlife.

⁹ Susan K. Moore, Forest Supervisor, USFWS, May 8, 2010. Comment letter to CVRWQCB with attachments, see http://www.waterboards.ca.gov/centralvalley/water_issues/grassland_bypass/

µg/L in the San Joaquin River upstream of the Merced River and Mud Slough North. Sources of ongoing selenium contamination in Grassland wetland channels and the San Luis National Wildlife Refuge include:

- (1) Continued contamination of the water supply in the Delta Mendota Canal from 6 sumps and groundwater pumping exchange programs;
- (2) Unregulated and unmonitored discharges of subsurface groundwater from nearby farmland into local ditches and canals that feed into the Grassland wetland supply channels; (3) and large storm events that can overwhelm the GBP channel, requiring that uncontrollable storm runoff be diverted into wetland supply channels (Beckon et al. 2007; Pavaglio and Kilbride 2007; Eppinger and Chilcott 2002). The adoption of the BPA and failure to enforce Basin Plan objectives for selenium will continue to degrade aquatic life beneficial use.

In addition the Board and Regional Board failed to address damages to downstream beneficial uses presented in testimony provided on May 27, 2010, by Tom Stokely [California Water Impact Network], Bill Jennings [California Sportfishing Protection Alliance], Osha Meserve [representing Reclamation District 999, which is within the Clarksburg Agricultural District of the Delta], and Delta landowners, and incorporated here by reference.¹⁰

Further compliance with Basin Plan objectives and their implementation program is mandatory. (*See State Water Res. Control Bd. v. Office of Admin. Law* (1993) 12 Cal. App. 4th 697, 701-02.) The proposed nearly decade-long compliance extension comes in direct conflict with crucial Basin Plan Objectives, and the proposed amendment fundamentally alters the basin plan selenium pollution controls out of meaningful existence. Waiving enforcement or “implementation” for almost a decade has the effect of sanctioning pollution that will bioaccumulate in plant material, enter the food chain, and gather in groundwater and surface water supplies so as to significantly impact beneficial uses for decades.

Finally, the Board and the Regional Board failed to show that allowing degradation is in the best interest of the people of California.

C. The Board Failed to Enforce the Clean Water Act § 404 and the Rivers and Harbors Act of 1899 § 10 When it Adopted Resolution 2010-0046.

Under the CWA Section 404 and the Rivers and Harbors Act of 1899 Section 10, alteration of waterways, including wetlands, that affect navigable waters requires a permit from the Federal government and assurance that impacts will be avoided or mitigated. This

¹⁰ Comment letters, and May 27, 2010, testimony from Bill Jennings, Tom Stokely, Patricia Schifferle, Osha Meserve, and written comments; California Water Impact Network et. al. [Coalition] April 26, 2010; Janet Hashimoto, USEPA letter dated April 26, 2010; Susan K Moore, USFWS, May 8, 2010 plus attachments; Osha Meserve representing Reclamation District 999 letter dated May 26, 2010 plus attachments. For all written comments to the CVRWQCB, See http://www.waterboards.ca.gov/centralvalley/water_issues/grassland_bypass/

project has not been issued a 404 permit despite the acknowledged release of pollutants from groundwater sumps and canals directly into wetland channels. Further the project acknowledges unavoidable impacts on wetlands and fisheries. Yet the required compensatory mitigation in the form of replacing the lost aquatic functions is not included in this project.

Despite the Basin Plan's prohibition against the discharge of selenium without a permit, there are numerous discharges within the project and into the project that are not regulated.¹¹ The Delta Mendota Canal (DMC) sumps are located in a reach of the DMC between Milepost 100.86 and 109.5. These sumps have been identified as discharging selenium, salt, boron and other constituents to the DMC which in turn delivers water to the Grassland wetland areas¹². The Central Valley Regional Quality Control Board staff confirmed elevated levels in the DMC: "Monitoring of the DMC has shown elevated selenium levels (1-10 µ/L) in its lower reach; similarly monitoring of the Mendota Pool has shown elevated selenium levels (1-4 µ/L). In consideration of the uses of the water from the DMC and Mendota Pool, these levels of selenium are cause for concern."¹³

The USBR has identified average discharges from the BPA of 1,300 acre-feet, 732 pounds selenium and 8,268 tons of salt per year for the period July 2002 through June 2009.¹⁴ The Grassland Basin Drainers have suggested that USBR pay for the benefits of "participating in an established, ongoing drainage management project.... existing infrastructure, and permits in place" in order to address the issue of the DMC sump discharges of polluted groundwater (emphasis added).¹⁵

The Board Adopted Resolution 2010-0046, whereby the implementation schedule effectively delays enforcement of pollution control standards and an approved TMDL for almost

¹¹ Rudy Schnagl, Senior Scientist for the Central Valley Regional Board explained that subsurface polluted groundwater discharges from Westlands Water District (WWD) flow northeast toward Mud Slough, to other tributaries and to the San Joaquin River. Because of this flow pattern, some of the water that Grassland Basin Drainers manage originates from the unregulated discharge in WWD. Transcript of Proceeding, Central Valley Regional Water Quality Control Board, Agenda Item No. 10, (May 27th, 2010) pp. 89-91. This subsurface polluted groundwater flow has also been documented in United States Geological Reports. See "*Simulation of Water-Table Response to Management Alternatives*", *Central Part of the Western San Joaquin Valley, California*, US Geological Survey Water-resources Investigations Report 91-4193.

¹² Selenium in the Delta Mendota Canal 1987-2001 U.S. Bureau of Reclamation Staff Report April 2002.

¹³ "Investigation of Check Drains Discharging into the Delta-Mendota Canal, by F.W. Pierson, Thomasson and Chilcott et. al. Agricultural Unit, Central Valley Regional Water Quality Control Board. October 1987 pg 1.

¹⁴ USBR, June 2009 DMC Water Quality Monitoring Report, Tables 8a and 8b

¹⁵ San Luis Delta Mendota Water Authority, Joseph McGahan, Drainage Coordinator, Grassland Basin Drainers March 22,2010 Letter to Michael Jackson USBOR Area Manager, South Central Area Office.

another decade and the resulting state permit, sanctions the degradation of Mud Slough, the San Joaquin River and Delta Bay estuary, and violates the Clean Water Act [CWA].

This delay in enforcement and failure to issue the required National Pollution Discharge Elimination System Permit (NPDES) constitutes an unlawful discharge of pollutants into navigable waters of the United States. It is clear this ground water discharge is a "pollutant" within the meaning of the CWA, and we contend state law cannot exempt the Authority, from obtaining (NPDES) permits and other necessary permits under the CWA. The Board dismissed testimony regarding the benefits to fish and wildlife and wetland areas if such compliance is achieved. No consideration was given to the benefits of issuing the required NPDES permit controls, strict mitigation offsets or extending permit conditions to unregulated discharges.

D. NPDES Regulatory Jurisdiction Discussion and Points of Law: The Discharge of Polluted Groundwater from Sumps Constitutes a Point Source Subject to Regulation under the NPDES Permit Program.

The first question when determining whether the Clean Water Act has jurisdiction over sumps that pump polluted groundwater into canals should be whether those sump discharge pollutants from a point source.¹⁶ There are several features of the selenium-laden and polluted groundwater sumps that create de facto point sources. For example, the sumps, pumps and discharges from various groundwater locations surrounding the lands of the Grassland drainers are identifiable point sources, as are the pesticide and fertilizer application equipment. The next question is whether Congress and EPA excluded the Grassland Basin Drainers' sumps and canal collection systems from the NPDES permit program through the "irrigation return flow" exemption. It should be noted no federal court case has stated that subsurface drainage systems – which are end of the pipe discharges – are exempted from the Clean Water Act. If Grassland drainer's sump discharges, canal collection system discharges or seepage discharges either 1) do not fit within the broad "point source" definition, or 2) are excluded as irrigation return flow, they are not covered by the Act.¹⁷

1. Ditches, Sumps, Seepage and Canals as Point Sources

There can be little doubt that many features of the typical Grassland drainer, including the collector drains, sumps, pumps canals and earthen or lined ditches through which

¹⁶ 33 U.S.C. § 1362(6) (2000).

¹⁷ The Ninth Circuit in *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002), reaffirmed that although EPA has reasonable discretion to interpret the term "point source," it does not have the discretion to exempt classes of activities where those activities meet the parameters of the statutory definition. *Id.* at 1190; see also *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) (same). As a result, it is doubtful that EPA or states have the authority to specifically exclude polluted groundwater sump discharges and polluted seepage into canals for discharge into the San Luis Drain and the San Joaquin River, categorically, from the definition of point source.

pollutants are discharged seasonally throughout the year into the “four mile Grassland Bypass canal”¹⁸ which combines discharges from these sumps and pipes and then into the San Luis drain for discharge into Mud Slough and the San Joaquin River could at least theoretically fall within the definition of “point source.” In fact, the plain language definition of “point source” specifically includes “ditches,” and “discrete conveyances”¹⁹ that are common in the Grasslands Bypass Project. And, precedent has established that gullies, rills, check dams, sediment traps, and other natural or manmade conveyances or systems designed to catch runoff can also be point sources under the Clean Water Act.²⁰ After all, it is well established that Congress intended the “broadest possible definition” of the term point source.²¹

Some might argue this polluted groundwater discharged from sumps, pumps, seepage and canals is exempt citing it as agricultural return flows. We argue this is not the case.

2. The “Irrigation Return Flow” Exemption from the Definition of Point Source

The irrigation return flow exemption is a largely undefined area of law.²² However, a review of the legislative and regulatory history of, as well as case law on, the irrigation return flow exemption indicates that the Grassland Basin Drainers fall within the definition of point source, and are not exempt from the NPDES permit program.

¹⁸ Central Valley Regional Water Quality Control Board Order No. 98-171.

¹⁹ 33 U.S.C. § 1362(14) (2000).

²⁰ See, e.g., *N.C. Shellfish Growers’ Ass’n v. Holly Ridge Assocs.*, 278 F. Supp. 2d 654, 679–80 (E.D.N.C. 2003) (check dams, sediment traps, gullies and rills as part of a home development site on a wetland are point sources); *Froebel v. Meyer*, 217 F.3d 928, 938–39 (7th Cir. 2000) (recognizing that a partially destroyed dam can be a point source); *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 308 & n.1 (9th Cir. 1993) (dam that discharged mine tailings in pond-water to clean water downstream was a point source); *Catskill Mountains Chapter of Trout Unlimited v. City of N.Y.*, 273 F.3d 481, 493 (2d Cir. 2001) (tunnel was a point source that transferred water from one basin to another); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (manmade sediment basin was a point source); *United States v. Earth Scis, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (mining operation’s sump pit was a point source); *Northwest Environmental Defense Center v Marvin Brown, Oregon State Forester*, No. 07-35266 D.C. No. CV-06-01270-GMK Opinion (9th Cir. 2010) (logging road run-off that is channeled by a system of ditches and culverts into navigable waters is a point-source regulated under the NPDES, which requires a permit to limit the amount of pollution discharged to meet water quality standards.)

²¹ See, e.g., *Earth Sciences*, 599 F.2d at 373 (concluding that the broadest possible definition of point source must be adopted in order to further the congressional intent to regulate pollution emitting sources to the fullest extent possible); *United States v. W. Indies Transp. Inc.*, 127 F.3d 299, 309 (3d Cir. 1993); *Dague v. City of Burlington*, 935 F.2d 1343, 1354–55 (2d Cir. 1991).

²² 33 U.S.C. § 1342 (l)(1) (2000) (“The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.”).

a. Legislative History

On July 12, 1976, EPA amended the permit exemption for irrigation return flows and required a permit for “agricultural point sources.”²³ EPA defined an “agricultural point source” as “any discernible, confined and discrete conveyance from which any irrigation return flow is discharged into navigable waters.”²⁴ “Irrigation return flow” was defined as “surface water, other than navigable waters, containing pollutants which result from the controlled application of water by any person to land used primarily for crops, forage growth, or nursery operations.”²⁵

However, shortly after its promulgation, Congress obliterated EPA’s rule promulgation by creating the irrigation return flow exemption in sections 502(14) and 402(l) of the 1977 Clean Water Act Amendments.²⁶

Significantly, Congress never defined an “irrigation return flow.” Instead, a Senate Report on the 1977 Clean Water Act Amendments creating the irrigation return flow exemption reflects an affirmation of EPA’s definition of irrigation return flows as “conveyances carrying **surface** irrigation return as a result of the controlled application of water by any person to land used primarily for crops.”²⁷ This means that Congress likely only excluded tail water discharges from the NPDES requirements of the CWA, not subsurface groundwater drainage.

The legislative and regulatory history of the CWA suggests Congress did not exclude subsurface drainage when it excluded irrigation return flows from the NPDES program.

²³ 396 F. Supp. 1393 (D.D.C. 1975), *aff’d sub nom. Natural Res. Def. Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). See Agricultural Activities, National Pollutant Discharge Elimination System, 41 Fed. Reg. 7963, 7963 (Feb. 23, 1976) (“Although EPA is proceeding with the appeal of the decision; the Agency is still required to comply with the court order. Thus under the terms of the order . . . regulations applying the NPDES permit program to point source discharges in the agriculture and silviculture categories are required to be proposed by February 10, 1976 and promulgated by June 10, 1976.”).

²⁴ 40 C.F.R. § 125.4(i) (3) (2006); see 41 Fed. Reg. 28,493–28,496 (July 12, 1976). See also Radosevich and Skogerboe, *Achieving Irrigation Return Flow Quality Control through Improved Legal System* United State EPA document number EPA-600/2-78-184 (December, 1978) at 32. Though published by EPA in 1978, the report analyzes data only through September 30, 1977.

²⁵ *Id.* § 125.53(a) (2).

²⁶ Federal Water Pollution Control Act, Pub. L. No. 95-217, 91 Stat. 1566, 1577 (1977) (codified at 33 U.S.C. §§ 1362(14), 1342(l) (1) (2000)).

²⁷ S. REP. NO. 95-370, at 35 (1977), as reprinted in 1977 U.S.C.C.A.N. 4326, 4360 (emphasis added). The Senate Committee Report, adopted by the Joint House-Senate Conference Committee, explains the exclusion of irrigation return flows. It indicates that Congress intended to exclude surface irrigation return from the Act’s permit program: “*Permit requirements under section 402 of the act have been constructed to apply to discharges of return flows from irrigated agriculture. These flows have been defined by the Environmental Protection Agency as conveyances carrying surface irrigation return as a result of the controlled application of water by any person to land used primarily for crops.*”

Subsurface irrigation drainage that is confined in man-made conduits is no longer “un-channeled runoff” and is amenable to federal regulation as point source pollution. Further the definition of “discharge of a pollutant” includes “discharge into waters of the United States from: surface runoff which is collected and channelized by man.”²⁸

b. Failure of the State to Enforce Selenium Pollution Standards Through Implementation Delays and Rescission of NPDES Permits to Regulate the Discharge Is Arbitrary and Capricious.

First, NPDES permits employ enforceable numeric limits and best management practices as effluent limitations. Compliance with the numeric limits and best management practices means compliance with the NPDES permit, and in turn, the Clean Water Act. Assuming the permit limits and practices are established to protect water quality standards, compliance also means protection of water quality. Second, NPDES permit liability is strict.²⁹ The failure of the Board and Regional Board to regulate this discharge of pollutants by an NPDES permit is arbitrary. There is no scientific or regulatory basis for the rescission of previous NPDES permits to regulate portions of this discharge.³⁰

c. An NPDES Permit Can Prevent Pollution, Rather Than Relying on Untested Treatment Methods to Abate Pollution after it Happens

The relative ease of implementation and enforcement of the Clean Water Act’s NPDES permit scheme should operate to save the public money spent on cleaning up waterways after they are already degraded. Testimony provided by Environmental Advocates documenting the lack of treatment methods and high cost of this pollution was largely ignored by the Board. Further the Board ignored testimony that the cost of providing drainage is higher than the agricultural benefits of irrigating these lands and that no sources of funds for these expensive treatment methods have been identified or secured.

E. The Board Failed to Consider Article X, Section 2 of the California Constitution and Water Code Section 275 in the Adoption of Resolution 2010-0046

The Board is required by law to take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state. Water Code § 275.

²⁸ 40 CFR 112.3(k)

²⁹ 33 U.S.C. § 1311(a) (2000) (discharge of a pollutant to navigable waters prohibited except in compliance with a NPDES permit); *United States v. Pozsgai*, 999 F.2d 719, 725 (3d Cir. 1993); *United States v. Amoco Oil Co.*, 580 F. Supp. 1042, 1050 (W.D. Mo. 1984); *Stoddard v. W. Carolina Reg'l Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir. 1986).

³⁰ See footnote 2.

This statute has been clearly interpreted to mean that "[n]o one can have a protectable interest in the unreasonable use of water." *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1242. Section 275 also gives substantial authority to determine whether a particular use, method of use, or method of diversion of water is unreasonable. But what constitutes a reasonable use of water is a question of fact that must be decided in each case. *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132,140.

It is also true that "[w]hat is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time." *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, (1935) 3 Cal.2d 489, 567. In other words, what was once considered reasonable may be considered unreasonable at present, and what is reasonable in times of abundance may be unreasonable in times of shortage. Both the SWRCB and the courts have concurrent jurisdiction to limit a water rights holder who is wasting water, using water unreasonably, or using an unreasonable method of use or an unreasonable method of diversion. *Environmental Defense Fund v. East Bay Municipal District* (1980) 26 Cal.3d 183,200; *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743,753; *Imperial Irrigation District v. State Water Resources Control Board* (1990) 225 Cal.App.3d 548, 557-561.

The court in *Environmental Defense Fund*, 26 Cal.3d at 200, held that the courts have concurrent jurisdiction with the SWRCB over claims of unreasonable use under article X, section 2 of the California Constitution. Article X, section 2 provides "that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." In *Environmental Defense Fund*, Plaintiffs alleged that diversion of water for a single use in East Bay Municipal District's service area was unreasonable in light of a lower diversion point of diversion that would protect both in stream uses and the consumptive uses of the East Bay Municipal District service customers. The court noted that, in determining whether methods of use or diversion are unreasonable, "the board must consider the relative benefit to be derived from all beneficial uses of the water concerned, including domestic, irrigation, municipal, and industrial use, as well as use for preservation and enhancement of fish, wildlife, and recreational uses." *Environmental Defense Fund, supra*, 26 Cal.3d at 196 (Water Code § 1257.)

In adopting Adoption of Resolution 2010-0046, the Board failed to adequately consider both article X, Section 2 and Water Code § 275. The Board failed to consider whether the Grassland Drainers and other west side irrigators' use of water which causes groundwater pollution and discharges that pollute wetlands and the waters of the State and Nation in violation of the CWA standards is unreasonable in light of the substantial deterioration of Delta fisheries, waterfowl, and endangered species during the period in which the standards have been ignored. The Board largely dismisses the Environmental Advocates' testimony regarding the benefit to fish and wildlife if compliance is achieved for Mud Slough, the San Joaquin River, National Wildlife Refuges and the Delta. The connection between the enforcement of strict enforcement of the selenium standards and controlling other pollutants such as salt, mercury

and boron and the health of fish and wildlife cannot be so easily dismissed without real consideration by the Board.

Conclusion

Discharges from the Grassland drainers cause serious water pollution.³¹ Despite deficiencies in biological monitoring where biological effects of selenium are monitored either too early or too late to consistently measure impacts, data show a reproductive failure and death of migratory waterfowl with the selenium content of the egg with the deformed embryo greater than 70 parts per million--A clear violation of the Migratory Bird Treaty Act.³²

Unlike other agricultural sources, Grassland Basin Drainer discharges are not diffuse sources of runoff, nor do the discharges merely consist of "irrigation return flow" as Congress apparently meant when it used that phrase. Water is pumped from underground where polluted water is discharged to canals and the federal San Luis Drain and then to the San Joaquin River.

During the growing season, pesticides and fertilizers are applied. When water is applied to these fields it flows through soils mobilizes selenium, salts, mercury, boron and other nutrient contaminants these pollutants are discharged through discrete point sources back into the navigable waters, damaging aquatic life and water quality in the process.

Board Resolution 2010-0046 effectively sanctions pollution of Mud Slough, the San Joaquin River, and ultimately the Sacramento-San Joaquin Delta, by failing to enforce science-based protective water quality standards for selenium and allowing the continued contamination of these water bodies. Too much selenium in streams kills or deforms fish and other aquatic life, including waterfowl, and is a human-health concern in drinking-water supplies. Selenium is one of a number of contaminants that are discharged from the federally-owned San Luis Drain directly into the waters of the state. This failure to enforce protective selenium water quality objectives transfers pollution from these Grassland Basin Drainers through this federal drain to the waters of the state, harming beneficial uses of these waters for recreational use, domestic water supply, public health and public trust values.

³¹ USFWS criticized the Regional Board's Staff report for failing to consider new water quality information which showed that selenium levels exceeded 20 µg/L on the San Joaquin River during at least 4 months in 2009, failing to address selenium water quality impairments and provide remedies, and failing to address cumulative impacts. In particular, the USFWS requested that the Regional Board consider the protection of Chinook salmon and steelhead in the San Joaquin River, including the reach between Sack Dam and the Merced River, in this Basin Plan Amendment. The Service believes that as written, the revised compliance schedule and lack of an enforceable water quality objective for selenium in the San Joaquin River upstream of the Merced River until December 31, 2019, is not protective of salmonids and could result in the loss of or harm to out migrating young salmon in the San Joaquin River. (USFWS Comment Letter, p. 6.)

³² Panoche Drainage District, "San Joaquin River Water Quality Improvement Project, 2008 Wildlife Monitoring Report" 9-15-2009 Jeff Seay at HT Harvey, Page 22 and Table 4. Abnormal Black Necked Silt classic selenium caused deformities with selenium measured at 74.6.

Resolution 2010-0046 substantially weakens the Basin Plan's existing program by delaying the selenium objective in these water bodies by another nine years, three months. This open-ended extension would needlessly facilitate additional discharge of selenium-contaminated water, vitiating compliance with key provisions of the Basin Plan and the Clean Water Act.³³

Both USEPA (40 CFR §131.12) and the State of California (State Water Board Resolution 68-16) have adopted Antidegradation policies as part of their approach to regulating water quality. Basin Plan amendments must ensure that the federal or State Antidegradation policies are not violated. And yet the State and Regional Water Board readily admit waiving the selenium pollution control standards for another 9 years and 3 months will degrade the waters of the state.³⁴

The justification for this enforcement delay suggests that after over a decade of sanctioning the pollution Mud Slough and the San Joaquin River, such degradation necessarily sanctions further degradation by these drainers. Furthermore, this circular argument ignores the spread of selenium pollution throughout the lower San Joaquin and the Sacramento-San Joaquin Delta.

The Clean Water Act's NPDES permit program is appropriate for addressing the problems associated with these polluted discharges. The pollutant discharges are discrete, identifiable, well-documented, and arguably, not subject to the irrigation return flow exemption.

Further, applying the NPDES permit program reduces the need for expensive litigation that may have only isolated environmental benefits that fail to address a more common and widespread problem. As a result, the Board and if necessary EPA should broadly apply the NPDES permit program to eliminate the transfer of these pollutants to the San Joaquin River and the Bay-Delta estuary.

³³ See Comments From Environmental Coalition: Sierra Club et.al. Comment letter- San Joaquin River Selenium Control Plan Basin Plan Amendment. September 22, 2010. California Sportfishing Protection Alliance et. al. Comment letter- San Joaquin River Selenium Control Plan Basin Plan Amendment. September 22,2010

³⁴ See CVRWQCB Staff Report: "With the amendments, water quality in Mud Slough (north) will remain vulnerable to degradation for up to an additional nine years, three months beyond 1 October 2010." (Staff Report, at p. 25)
"Continued discharge constitutes an increase in waste volume over conditions without the amendments." (Staff Report, p. 26.)

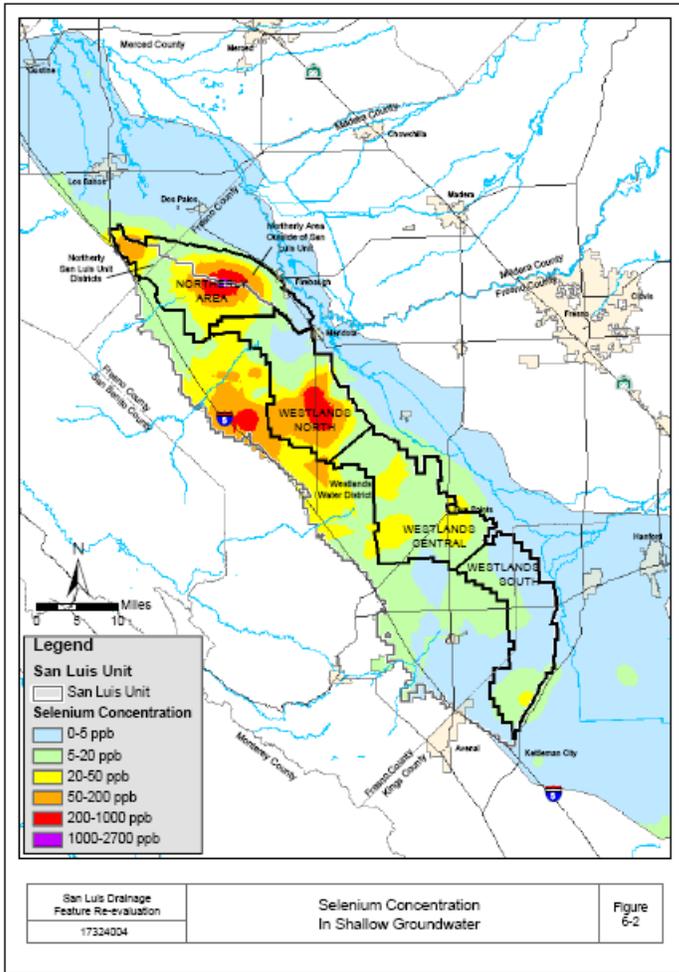


Groundwater Pumped into the DMC near Los Banos, California
U.S. Department of the Interior
Bureau of Reclamation
Mid-Pacific Region August 21, 2008

CVRWQCB Measured 1480 ppb Selenium in 2003 in Ponded Shallow Groundwater



http://www.camnl.wr.usgs.gov/Selenium/Library_articles/joepond.pdf Westlands Water District Groundwater Discharge near Five Points, Ca.



SLDR Final EIS

F_8_2

USBOR and USGS Documented levels of selenium polluted groundwater.



California Sportfishing
Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

AQUALLIANCE

DEFENDING NORTHERN CALIFORNIA WATERS

November 4, 2010

Charles Hoppin, Chairman
State Water Resources Control Board
1001 I Street,
Sacramento, CA 95814

E-mail <commentletters@waterboards.ca.gov>

Subject: Petition for Reconsideration—San Joaquin River Selenium Control Plan
Basin Plan Amendment, Resolution 2010-0046

Dear Chairman Hoppin and Members of the Board:

Pursuant to California Water Code Sec 1120 et seq. and Title 23, California Code of Regulations, Sec. 768 et seq., the California Water Impact Network (C-WIN), the California Sportfishing Protection Alliance (CSPA) and AquAlliance hereby jointly petition the State Water Resources Control Board (hereinafter "SWRCB") to reconsider Resolution 2010-0046 approved on October 5, 2010, approving amendments to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (Basin Plan) to address selenium control in the San Joaquin river Basin (hereinafter "selenium Basin Plan Amendment").

STANDARD OF REVIEW

In accordance with California Water Code Section 1120 *et seq.*, and title 23 of the California Code of Regulations, Section 768 et seq., any interested party may petition the SWRCB for reconsideration of a decision or order based on any of the following conditions:

- a. Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- b. The decision or order is not supported by substantial evidence;
- c. There is relevant evidence, which in exercise of reasonable diligence, could not have been produced; or
- d. Error in law.

C-WIN, CSPA and AquAlliance contend that SWRCB Resolution 2010-0046 constituted an error in law and is not supported by substantial evidence

STATEMENT OF FACTS

On October 5, 2010, the SWRCB approved the selenium Basin Plan Amendment to the Water Quality Control Plan for the Sacramento River and San Joaquin River to extend the compliance date for implementation of the 5 µg/l water quality objective for selenium in Mud Slough North and the San Joaquin River from Mud Slough to the Merced River until December 31, 2019. This approval followed the May 27, 2010 approval of Resolution R5-2010-0046 by the Central Valley Regional Water Quality Control Board (hereinafter "CVRWQCB").

Approval of the selenium Basin Plan Amendment provides for a cumulative 24-year and 9-month time extension (1996-2019) for the compliance date in meeting the 5 µg/l selenium water quality objective (4 day average) in Mud Slough and the 8-mile portion of the San Joaquin River from Mud Slough to the Merced River. The selenium Basin Plan Amendment allows continued discharges of highly contaminated groundwater from the 100,000 acre Grasslands Drainage Area through a portion of the Bureau of Reclamation's San Luis Drain directly into Mud Slough which flows into the San Joaquin River. Average selenium concentrations in the San Luis Drain discharges into Mud Slough are up to 50 µg/l on a daily average. Selenium readings at Hills Ferry downstream on the San Joaquin River have risen in recent years, with a reading of 52 µg/l in January, 2010, exceeding the drinking water standard of 50 µg/l.

The California Water Impact Network, California Sportfishing Protection Alliance, AquAlliance, as well as several other environmental and fishery organizations commented both orally and in writing for the May 27, 2010 CVRWQCB hearing and for the October 5, 2010 SWRCB hearing on the selenium Basin Plan Amendment. C-WIN, CSPA and AquAlliance raised several significant technical and procedural issues to the SWRCB. The SWRCB completely dismissed all of our concerns in their Basin Plan Amendment approval process. Twenty-five years after the wholesale poisoning of fish and wildlife at Kesterson National Wildlife Refuge, the SWRCB extended the compliance schedule for selenium discharges into Mud Slough and the San Joaquin River until December 31, 2019, totaling nearly a quarter of a century of non-compliance with selenium water quality standards.

ERROR IN LAW

As stated above, a petition for reconsideration may be made if there is an error in the law. C-WIN, CSPA and AquAlliance hereby allege that the SWRCB erred in its application and consideration of Basin Plan policies, the California Environmental Quality Act, the Porter-Cologne Act, the Federal Clean Water Act, the California Endangered Species Act, the Federal Endangered Species Act, the Fish and Wildlife

Coordination Act, the Migratory Bird Treaty Act, the California Water Code, the Delta Protection Act, the Reclamation Act, the California Constitution's prohibition on Wasteful and Unreasonable Use of Water (Article X, Sec 2) and state and federal anti-degradation policies before approving Resolution 2010-0046 for the selenium Basin Plan Amendment.

THE RESOLUTION IS NOT SUPPORTED BY THE EVIDENCE

A petition for reconsideration may be made if the resolution is not supported by the evidence. C-WIN, CSPA and AquAlliance believe that the SWRCB's decision is not supported by substantial evidence, and therefore warrants reconsideration by the Board.

Resolution 2010-0046 does not address the fact that selenium concentrations in the San Joaquin River at Hills Ferry have been increasing since 2007. SWRCB Resolution 2010-0046 approves CVRWQCB Resolution R5 2010-0046. Resolution R5 2010-0046 justifies the selenium Basin Plan Amendment in paragraph 8 on page 2, stating that:

In a 13 December 2006 letter to the US Bureau of Reclamation, the GAF informed the Bureau and Central Valley Water Board staff that the GBP would be unable to eliminate all surface water discharges of agricultural subsurface drainage by 30 October 2010 without increased risks of loss of soil productivity; accelerated loss of beneficial use of groundwater due to salinization; a significant decrease in farm profitability stemming from a rising water table if irrigation continues; or low or no returns if fields are dryland farmed or fallowed. Rising groundwater would also increase groundwater seepage to surface water channels and open ditches, potentially increasing selenium in channels now protected by the monitoring and management of the regional drainage program. Continued farm productivity and profitability is necessary to fund ongoing regional drainage management in this area; and continued wildlife protection is consistent with state, federal, local and GBP priorities.

The SWRCB approved the selenium Basin Plan Amendment despite evidence that selenium contamination of the San Joaquin River at Hills Ferry is getting worse and compliance was previously promised to occur on October 1, 2010. The SWRCB's justification for approving the selenium Basin Plan Amendment is based on maintaining farm profits and a faulty assumption that regional efforts to reduce selenium contaminated discharges to Mud Slough would end if discharge prohibitions were enforced. Despite the fact that there is admittedly no Best Practical Treatment and Control Option other than land retirement, the SWRCB approved the selenium Basin Plan Amendment to allow nearly another decade in search of technology and funding that does not exist. Any other discharger in the State of California would have been required to stop discharging long ago.

REQUEST FOR RELIEF

C-WIN, CSPA and AquAlliance hereby respectfully request that the SWRCB reconsider Resolution 2010-0046 and remand the selenium Basin Plan Amendment to the CVRWQCB to consider alternatives such as land retirement and a shorter compliance schedule for implementing the selenium objectives for Mud Slough North and the San Joaquin River upstream of the Merced River.

Our Memorandum of Points and Authorities in Support of our Joint Petition for Reconsideration of Resolution 2010-0046 is attached.

Respectfully submitted,



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Attachment:

Memorandum and Points and Authorities In Support of C-WIN, CSPA and AquAlliance's Joint petition for Reconsideration of Resolution 2010-0046



AQUALLIANCE

DEFENDING NORTHERN CALIFORNIA WATERS

November 4, 2010

Charles Hoppin, Chairman
State Water Resources Control Board
1001 I Street,
Sacramento, CA 95814

E-mail <commentletters@waterboards.ca.gov>

Subject: Memorandum of Points and Authorities in Support of C-WIN, CSPA
AquAlliance Joint Petition for Reconsideration of Resolution 2010-0046

Dear Chairman Hoppin and Members of the Board:

The California Water Impact Network (C-WIN), the California Sportfishing Protection Alliance (CSPA) and AquAlliance hereby present this Memorandum and Points and Authorities in support of their joint Petition for Reconsideration of State Water Resources Control Board (hereinafter "SWRCB) Resolution 2010-0046 approving amendments to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (Basin Plan) to address selenium control in the San Joaquin river Basin (hereinafter "selenium Basin Plan Amendment").

I. STATEMENT OF FACTS

On October 5, 2010, the SWRCB approved Resolution 2010-0046, the selenium Basin Plan Amendment to the Water Quality Control Plan for the Sacramento River and San Joaquin River to extend the compliance date for implementation of the 5 µg/l water quality objective for selenium in Mud Slough North and the San Joaquin River from Mud Slough to the Merced River until December 31, 2019. This approval followed the May 27, 2010, approval of Resolution R5-2010-0046 by the Central Valley Regional Water Quality Control Board (hereinafter "CVRWQCB"). C-WIN, CSPA and AquAlliance

thereby jointly filed the attached Petition for Reconsideration of SWRCB Resolution 2010-0046 claiming that the SWRCB made an error in the law, and that the decision was not based on substantial evidence.

II. ERROR OF LAW

A. The SWRCB failed to comply with the California Endangered Species Act in approving Resolution 2010-0046.

The EIS/EIR and Regional Board Staff Report mention, but do not demonstrate how the proposed project and basin plan amendment attain California Endangered Species Act (hereinafter "CESA") compliance (Fish and Game Code section 2080 *et seq*). The CRWQCB and SWRCB Responses to Comments reiterate that the Department of Fish and Game (hereinafter "DFG") had opportunities to comment and did not. Silence is not the same as compliance.

The SWRCB Response to Comments states that the "person" causing the take of listed species through selenium discharges is obligated to seek authority under Fish and Game Code Section 2081. The Response to Comments fails to note that by approving the Basin Plan Amendment, the SWRCB and CVRWQCB are considered "persons" under the Fish and Game Code and are allowing the harmful selenium discharges to occur which cause take, thereby requiring approval from DFG.

Because there are state-listed species affected and there is no federal take provision in the Biological Opinion, DFG will need to issue Fish and Game Code section 2081 clearance for Delta Smelt, San Joaquin Kit Fox, Giant Garter Snake, Swainson Hawk, spring run Chinook, and other potential state-listed species affected by the selenium Basin Plan Amendment.

The selenium Basin Plan Amendment is affects more than the federal Use Agreement that the U.S. Fish and Wildlife Service (hereinafter "USFWS") and the National Marine Fisheries Service (hereinafter "NMFS) signed off on under the federal Endangered Species Act because it affects all discharges upstream of the Merced River, not just the Grasslands Bypass Project. Therefore the selenium Basin Plan Amendment is a different project and the federal Endangered Species Act findings do not necessarily apply.

In regard to the need for a CESA consultation on the Delta Smelt, the USFWS Biological Opinion makes a statement that would lead a reasonable person to conclude that adverse impacts will occur as follows:

"...the Service believes that the smelt would more appropriately fall under the 'may affect' category, with the subsequent required analysis of whether or not the project is likely to adversely affect the species."¹

There is also substantial evidence submitted by C-WIN, CSPA and AquAlliance in the USFWS Biological Opinion indicating that harmful levels of selenium are bioaccumulating in San Joaquin Kit Foxes and Giant Garter Snakes due to their consumption of contaminated rodents and amphibians.

As an indication that the selenium Basin Plan Amendment is a different project, NMFS submitted comments to the SWRCB expressing concerns with the selenium Basin Plan Amendment impacts to green sturgeon and salmonids, despite the concurrence memo on the Use Agreement. NMFS cited information on high selenium levels in the San Joaquin River affecting salmonids, and a new study on the impacts of selenium on green sturgeon, and recommending only a two year extension.

The Regional Board, as a State Agency, is required to comply with CESA for approval of the Basin Plan Amendment. There is no indication that such a process with DFG has

¹ USFWS Biological Opinion on the Grasslands Bypass Project, December 2009, p 2-3
http://www.usbr.gov/mp/nepa/documentShow.cfm?Doc_ID=4826 . Accessed 4/20/2010.

been initiated, let alone completed. Approval of the Basin Plan Amendment is therefore unlawful pursuant to CESA.

B. The SWRCB failed to comply with the California Environmental Quality Act in approving Resolution 2010-0046.

The Regional Board cannot mandate land retirement or other alternatives, but it has a responsibility under the California Environmental Quality Act (hereinafter ‘CEQA’) to consider feasible alternatives and mitigation measures in the Substitute Equivalency Document (hereinafter “SED”). As stated numerous times by C-WIN, CSPA and AquAlliance in writing and at the May 27 CVRWQCB and October 5 SWRCB public hearings, land retirement from irrigation is the only solution that have been proven to reduce the amount of toxic drainage created and to reduce groundwater levels.² Neither the EIS/EIR nor the SED prepared by Regional Board staff considered land retirement as an alternative. The No Action Alternative in the SED predicted that additional land would be salinized and taken out of production compared to the Action Alternative, but it was not an inherent part of the alternative. Rather, it was an environmental consequence of the alternative.

C-WIN, CSPA and AquAlliance commented in writing and orally at the May 27 and October 5 hearings that the No Action Alternative is mischaracterized as a doomsday alternative that would result in disbanding of the regional drainage efforts, massive selenium contamination of the wetlands, the San Joaquin River and rising groundwater. Comments by USEPA and others agree that the No Action Alternative is inappropriately characterized.

The selenium Basin Plan Amendment was thus not a vote by the CVRWQCB or the SWRCB to continue with or without the drainage entity. Instead, it is highly likely that the

² USGS Professional Paper 1210: “*Land retirement is a key strategy to reduce drainage because it can effectively reduce drainage to zero if all drainage-impaired lands are retired.*” <http://pubs.usgs.gov/of/2008/1210/>, accessed 9/21/2010.

Grasslands Area Farmers would continue to work cooperatively to solve their drainage problems as part of the larger Westside Regional Drainage Management Plan and/or the Irrigated Lands Program. The inability to discharge selenium contaminated drainage water in excess of Basin Plan water quality objectives means that the Grasslands Area Farmers would find other ways to deal with their problem such as increased use and size of the San Joaquin River Improvement Project reuse area. In the absence of the selenium Basin Plan Amendment, the CVRWQCB would have to take individual enforcement actions against the drainers. For these reasons, our organizations see the proposed Basin Plan Amendment as providing a rationale for the Regional Board to avoid doing its job, to avoid using its authority appropriately.

C-WIN, CSPA, and AquAlliance commented in writing and orally at the May 27 and October 5 hearings that the CEQA documentation did not fully consider impacts to restore salmon in the San Joaquin River, nor did it consider the cumulative impacts of groundwater pumping in the region on water quality. C-WIN provided documentation from Dr. Dennis Lemly, research biologist and expert on selenium, that the continued selenium discharges into the San Joaquin River would kill up to 50% of the juvenile salmon and steelhead.³ Comments by the U.S. Fish and Wildlife Service on the EIS/EIR noted that Reclamation mischaracterized selenium impacts on salmonids in the San Joaquin River.⁴ USFWS stated in their comments to the Regional Board that *"...the revised compliance schedule...is not protective of salmonids and could result in the loss or harm to outmigrating young salmon on the San Joaquin River."*

Regardless of authority, the Regional Board has an obligation under CEQA to disclose probable environmental impacts to water quality, fish, wildlife and other resources, as well as cumulative impacts from other reasonably foreseeable actions. There was no disclosure in the SED regarding potential impacts to and conflicts with the San Joaquin

³ http://www.c-win.org/webfm_send/9, accessed 9/19/10.

⁴ http://www.waterboards.ca.gov/centralvalley/water_issues/grassland_bypass/usfws_att_e.pdf, accessed 9/19/10

River Restoration Program and the likely mortality of salmonids, nor was there disclosure that regional groundwater pumping efforts may be degrading water quality, further increasing biological exposure to selenium.

C-WIN, CSPA and AquAlliance provided testimony in writing and at the May 27 CVRWQCB hearing that the mitigation well water supply for loss of Mud Slough habitat was not completed and that there is no mitigation monitoring requirement that the well meet the 2 µg/l Basin Plan objective for wetland water supplies. This is clearly deferred mitigation and a violation of CEQA.

C. The SWRCB failed to comply with the Migratory Bird Treaty Act and Fish and Game Code Section 3513 in approving Resolution 2010-0046.

The SED checklist should have identified that part of the project is resulting in harm to bird species protected by the Migratory Bird Treaty Act (16 U.S.C. 703-712; Ch. 128; July 13, 1918; 40 Stat. 755, as amended), including Black-necked Stilts and American Avocets within the reuse area. A 2008 report identified a deformed, dead stilt embryo in the reuse area as a result of selenium contamination. Violation of the Migratory Bird Treaty Act is also a violation of Fish and Game Code Section 3513.

Other sources of selenium which harm species protected by the Migratory Bird Treaty Act should have also been identified in the SED. Six sumps along the Delta-Mendota Canal discharge highly contaminated groundwater into the Canal, which supplies water to refuges and wetlands in Grasslands. The U.S. Fish and Wildlife Service's Biological Opinion⁵ also indicated that the Poso/Rice/Almond drain areas adjacent to the Grasslands area are discharging uncontrolled and unregulated drainage water into areas such as the Agatha Canal, which periodically has extremely high selenium levels.

⁵ http://www.usbr.gov/mp/nepa/documentShow.cfm?Doc_ID=4826. Accessed 9/22/2010.

Additionally, a study by the U.S. Fish and Wildlife Service⁶ identified that several bird species protected under the Migratory Bird Treaty Act are considered “species most at risk” from selenium contamination in the San Francisco Bay. Greater scaup, lesser scaup, black scoter, white-winged scoter, surf scoter and bald eagle are listed as “species most at risk” from selenium contamination and all are covered by the Migratory Bird Treaty Act. By allowing continued discharges of selenium in excess of Basin Plan objectives, there is downstream contamination and selenium bioaccumulation in the Bay-Delta which should have been addressed in the SED and staff report.

The staff report does not even acknowledge that over 41,736 acres in the Delta, 5,657 acres in the Carquinez Straights, 70,992 acres in San Francisco Bay Central, 9,024 acres in San Francisco Bay south and 68,349 acres in San Pablo Bay and are listed as impaired by agricultural selenium, and that the San Joaquin River is a major source of that impairment.⁷ Health advisories are in effect for scaup, scoter and benthic feeding ducks in many of those areas. The SWRCB’s response to comments mistakenly notes on response 10.22 that there is no selenium listing in the Delta and fails to recognize numerous listings in the San Francisco Bay:

Any potential effects on downstream waters have already been significantly reduced, as evidenced by the removal of the San Joaquin River from the 303(d) list for selenium impairments **and the lack of a selenium listing in the Delta.** (emphasis added)

D. The SWRCB failed to comply with the Federal Clean Water Act and the Porter-Cologne Act (Water Code § 13000 et seq.) by not requiring a National Pollution Discharge Elimination System permit in approving Resolution 2010-0046.

⁶http://www.swrcb.ca.gov/rwqcb2/water_issues/programs/TMDLs/northsfbayselenium/Species_at_risk_FINAL.pdf, accessed 9/19/10.

⁷http://www.waterboards.ca.gov/water_issues/programs/tmdl/docs/303dlists2006/epa/state_usepa_combined.pdf

The SWRCB and CVRWQCB have asserted that this polluted groundwater discharged from sumps, pumps, seepage and canals is exempt from the federal Clean Water Act (33 U.S.C. § 1251 *et seq.*) citing it as exempt agricultural return flows. C-WIN, CSPA and AquAlliance argue this is not the case.

The irrigation return flow exemption is a largely undefined area of law.⁸ However, a review of the legislative and regulatory history of, as well as case law on, the irrigation return flow exemption indicates that the Grassland Basin Drainers fall within the definition of point source, and are not exempt from the National Pollution Discharge Elimination System (hereinafter “NPDES”) permit program.

On July 12, 1976, USEPA amended the permit exemption for irrigation return flows and required a permit for “agricultural point sources.”⁹ US EPA defined an “agricultural point source” as “any discernible, confined and discrete conveyance from which any irrigation return flow is discharged into navigable waters.”¹⁰ “Irrigation return flow” was defined as “surface water, other than navigable waters, containing pollutants which result from the controlled application of water by any person to land used primarily for crops, forage growth, or nursery operations.”¹¹

⁸ 33 U.S.C. § 1342 (l)(1) (2000) (“The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.”).

⁹ 396 F. Supp. 1393 (D.D.C. 1975), *aff’d sub nom. Natural Res. Def. Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). See *Agricultural Activities, National Pollutant Discharge Elimination System*, 41 Fed. Reg. 7963, 7963 (Feb. 23, 1976) (“Although EPA is proceeding with the appeal of the decision; the Agency is still required to comply with the court order. Thus under the terms of the order . . . regulations applying the NPDES permit program to point source discharges in the agriculture and silviculture categories are required to be proposed by February 10, 1976 and promulgated by June 10, 1976.”).

¹⁰ 40 C.F.R. § 125.4(i) (3) (2006); see 41 Fed. Reg. 28,493–28,496 (July 12, 1976). See also Radosevich and Skogerboe, *Achieving Irrigation Return Flow Quality Control through Improved Legal System* United State EPA document number EPA-600/2-78-184 (December, 1978) at 32. Though published by EPA in 1978, the report analyzes data only through September 30, 1977.

¹¹ *Id.* § 125.53(a) (2).

However, shortly after its promulgation, Congress obliterated EPA's rule promulgation by creating the irrigation return flow exemption in sections 502(14) and 402(l) of the 1977 Clean Water Act Amendments.¹²

Significantly, Congress never defined an "irrigation return flow." Instead, a Senate Report on the 1977 Clean Water Act Amendments creating the irrigation return flow exemption reflects an affirmation of EPA's definition of irrigation return flows as "conveyances carrying surface irrigation return as a result of the controlled application of water by any person to land used primarily for crops."¹³ This means that Congress likely only excluded tail water discharges from the NPDES requirements of the Clean Water Act, not subsurface groundwater drainage.

The legislative and regulatory history of the Clean Water Act suggests Congress did not exclude subsurface drainage when it excluded irrigation return flows from the NPDES program. Subsurface irrigation drainage that is confined in man-made conduits is no longer "un-channeled runoff" and is amenable to federal regulation as point source pollution. Further the definition of "discharge of a pollutant" includes "discharge into waters of the United States from: surface runoff which is collected and channelized by man."¹⁴

Important Point 4 on page III-2.00 of the Basin Plan states as follows:

¹² Federal Water Pollution Control Act, Pub. L. No. 95-217, 91 Stat. 1566, 1577 (1977) (codified at 33 U.S.C. §§ 1362(14), 1342(l) (1) (2000)).

¹³ S. REP. NO. 95-370, at 35 (1977), as reprinted in 1977 U.S.C.C.A.N. 4326, 4360 (emphasis added). The Senate Committee Report, adopted by the Joint House-Senate Conference Committee, explains the exclusion of irrigation return flows. It indicates that Congress intended to exclude surface irrigation return from the Act's permit program: "*Permit requirements under section 402 of the act have been constructed to apply to discharges of return flows from irrigated agriculture. These flows have been defined by the Environmental Protection Agency as conveyances carrying surface irrigation return as a result of the controlled application of water by any person to land used primarily for crops.*"

¹⁴ 40 CFR 112.3(k)

“Where the Regional Water Board determines it is infeasible for a discharger to comply immediately with such objectives or criteria, compliance shall be achieved in the shortest practicable period of time (determined by the Regional Water Board), not to exceed ten years after the adoption of applicable objectives or criteria.”

A cumulative 24-year, 9-month waiver does not meet the criteria in Basin Plan Important Point No 4, especially if the project is subject to an NPDES permit. By allowing the Grasslands Area Farmers to indefinitely evade compliance with Basin Plan selenium water quality objectives, the Board undermines its duties under the Clean Water Act and the Porter-Cologne (Water Code § 13000 *et seq.*).

E. The SWRCB failed to comply with the Public Trust Doctrine in approving Resolution 2010-0046.

The public trust doctrine embodies the principle that the state as sovereign owns all of its navigable waterways and the lands lying beneath them “as trustee of a public trust for the benefit of the people.” *Colberg, Inc. v. State of California ex rel Dept. Pub. Works* (1967) 67 Cal.2d 408, 416 (citing *People v. Gold Run Ditch & Min. Co.* (1884) 66 Cal. 138, 151). The California Supreme Court explained the public trust doctrine and its application to the California water rights system in *National Audubon Society v. Superior Court*, (1983) 33 Cal.3d 419. In *Audubon*, the court held that the state has authority as sovereign to “exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters.” *Id.* at 425. California law has expanded traditional public trust uses to include “nonconsumptive, in-stream uses, including navigation, fishing, recreation, ecology and aesthetics.” *United States v. State Water Resources Control Board (“Racanelli”)* (1986) 182 Cal.App.3d 82, 149 (footnote 41).

Once the SWRCB has granted a permit or license, the public trust imposes a “duty of continuing supervision” over the use of the water, and the SWRCB may reconsider past water rights allocations. *Audubon, supra*, 33 Cal.3d.at 447. The State has an

affirmative duty to take the trust into account when it allocates water and to protect public trust uses *whenever* feasible. *Id.* at 446. The public interest in the allocation of water resources is not confined by past allocations decisions which are incorrect “**in light of current knowledge or inconsistent with current needs.**” *Id.* at 447 (emphasis added). Accordingly, because the Board has the obligation to protect trust uses whenever feasible, when present uses of water are harmful to ecosystems protected by the public trust the SWRCB may reconsider the current allocations of water *Id.* at 446. The public trust doctrine empowers the SWRCB or the courts to modify or limit existing water rights in order to protect fish and wildlife and ecosystem elements in the Delta and its tributaries. In *Racanelli*, the court held that the SWRCB’s authority to impose new conditions on existing appropriative permits to protect fish and wildlife resided in the public trust doctrine, as held in *Audubon*:

In [*National Audubon*], the Supreme Court clarified the scope of the public trust doctrine and held that the state as trustee of the public trust retains supervisory control over the state’s waters such that no party has a vested right to appropriate water in a manner harmful to the interests protected by the public trust. ... This landmark decision... firmly establishes that the state... has continuing jurisdiction over appropriation permits and is free to reexamine a previous allocation decision.

Racanelli, supra, 182 Cal.App.3d at 149-50

The court concluded that “[i]n the new light of *National Audubon*, the SWRCB unquestionably posse[s] legal authority under the public trust doctrine to exercise supervision over appropriators in order to protect fish and wildlife. That important role was not conditioned on a recital of authority. It exists as a matter of law itself.” *Id.* at 150.

In approving Resolution 2010-0046, the Board rejected evidence and testimony regarding potential harm to fish and wildlife that would occur if the selenium Basin Plan Amendment were approved. In Water Quality Order 85-1 at 11, the SWRCB found that discharges of selenium contaminated drainage from Westlands “is reaching waters of the state and is creating and threatening to create conditions of pollution and nuisance.” While the location is different, the consequences of discharging pollution

from the Grasslands is still creating conditions of pollution and nuisance, yet the SWRCB continues to let these conditions continue by allowing clean water to be put upon the toxic soils of the Grasslands area and the larger San Luis Unit of the Central Valley Project.

The San Joaquin River Dissolved Oxygen TMDL states that excessive nutrients from Grasslands are the largest single cause of low dissolved oxygen at the Stockton Deepwater Ship Channel. Various municipalities are being required to spend millions to clean up their wastewater discharges, yet the Grasslands drainers will get another decade to delay compliance based on simple hopes for technological innovation and public subsidies for treatment of their continuing pollution. Other pollutants are discharged from the GBP as well, including mercury, nutrients, salt, boron and pesticides, and for which similar arguments could and should be made. Any other discharger of this magnitude in the State of California would have been required to pay for cleanup long ago.

Despite clear mandates from the courts and past findings of the SWRCB itself, Resolution 2010-0046 fails to consider what effects continued selenium discharges exceeding Basin Plan water quality objectives will have on public trust resources, and thereby fails to adequately consider the Public Trust.

F. The SWRCB failed to consider Article X, Section 2 of the California Constitution and Water Code Section 275 in approving Resolution 2010-0046.

The SWRCB is required by law to take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state (Water Code § 275). This statute has been clearly interpreted to mean that “[n]o one can have a protectable interest in the unreasonable use of water.” *City of Barstow v.*

Mojave Water Agency, (2000) 23 Cal4th 1224, 1242, Section 275 also gives substantial authority to determine whether a particular use, method of use, or method of diversion of water is unreasonable. But what constitutes a reasonable use of water is a question of fact that must be decided in each case. *Josline v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 140.

It is also true that “[w]hat is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.” *Tulare Irr. Dist. V. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 567. In other words, what was once considered reasonable may be considered unreasonable in times of shortage. Both the SWRCB and the courts have concurrent jurisdiction to limit a water rights holder who is wasting water, using water unreasonably, or using an unreasonable method of use or an unreasonable method diversion. *Environmental Defense Fund v. East Bay Municipal District* (1980) 26 Cal.3d 1893, 200; *People ex rel. State Water Resources Control Bd. V. Forni* (1976) 54 Cal.App.3d 743, 753; *Imperial Irrigation District v. State Water Resources Control Board* (1990) 225 Cal.App.3d 548, 557-561.

The court in *Environmental Defense Fund*, 26 Cal.3d at 200, held that the courts have concurrent jurisdiction with the SWRCB over claims of unreasonable use under Article X, Section 2 of the California Constitution. Article X, Section 2 provides “that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.” In *Environmental Defense Fund*, the court noted that, in determining whether methods of use or diversion are unreasonable, “the board must consider the relative benefit to be derived from all beneficial uses of the water concerned, including domestic, irrigation, municipal, and industrial use, as well as use

for preservation and enhancement of fish, wildlife, and recreational uses.”

Environmental Defense Fund, supra, 26 Cal.3d at 196 (citing Water Code § 1257).

In approving Resolution 2010-0046, the SWRCB failed to consider its findings in Water Quality Order 85-1 and both Article X, Section 2 of the California Constitution and Water Code § 275. C-WIN, CSPA and AquAlliance argued that the pollution coming from the Grasslands area is a function of a controllable factor—applying irrigation water to toxic lands, and that the SWRCB should issue a Cease and Desist Order halting water deliveries and their application to irrigation. Furthermore, C-WIN, CSPA and AquAlliance presented information that the cost of providing drainage is higher than the agricultural benefits of irrigating these lands. In light of the costs and the fact that no technology other than land retirement exists to reduce selenium pollution, the SWRCB’s approval of Resolution 2010-0046 approving the selenium Basin Plan Amendment constitutes an unreasonable method of use of water.

G. The SWRCB failed to comply with state and federal anti-degradation policies in approving Resolution 2010-0046.

The CVRWQCB Staff report (p. 25) acknowledges that the amendment will result in “temporary continuation of the potential impairment to warm freshwater habitat, spawning and wildlife habitat.” In fact, the Board acknowledges that “with the amendments, water quality in Mud Slough (north) will remain vulnerable to degradation for up to an additional nine years, three months beyond 1 October 2010.” (*Ibid.*)

The Regional Board argues that the amendment is consistent with federal anti-degradation law because the degradation of state waters is justified. Specifically, the Board argues that the degradation is justified because it will improve water quality in the future, even though funding and technology still do not exist for treatment. (Staff Report, *supra*, p. 25.) However, this circular argument fails to account for alternative actions

which could be taken to benefit wildlife without first degrading state water. The Regional Board fails to support any contention that the amendment is necessary. The Board also concludes that wildlife will degrade without the amendments because “the cooperative drainage management organization (GAF) could dissolve; and with it, the economic support for the regional drainage management system . . .” (Staff Report, *supra*, p. 25.) The report further conjectures as to what difficulties might ensue if the Grasslands Drainage Authority were to dissolve. *Ibid.* This argument is purely speculative. There is no firm basis for asserting that the Grasslands Drainage Authority would dissolve without the amendments or any basis for asserting what would happen if the Grasslands Drainage Authority were, in fact, to dissolve.

The Regional Board states that the “discharge of agricultural subsurface drainage on a controlled, limited basis . . . is allowable under the federal anti degradation policy because the permanent diversion . . . has long-term environmental benefits to the wildlife utilizing this portion of the Pacific Flyway and the Grasslands Ecological Area.” (Staff Report, *supra*, p. 25.) The San Francisco Bay, the Delta and Delta farmland, part of the Pacific Flyway, are extremely important habitats for a wide range of birds and wildlife. International conservation programs, as well as local and regional forms of habitat designations and programs all recognized that these lands are an important part of the landscape used by these migratory birds. Give the region’s ecological significance, any degradation of water quality is prohibited under the federal anti-degradation policy.

The Regional Board also argues that the amendment is a justified violation of state anti-degradation laws. Anti-degradation provisions of the State Water Resources Control Board Resolution No. 68-16 (“Statement of Policy with Respect to Maintaining High Quality Water in California”) states in part:

“(1) Whenever the existing quality of water is better than the quality established in policies as of the date on which such policies become

effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies.

“(2) Any activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the State will be maintained.”

The CVRWQCB and the SWRCB argue that the selenium Basin Plan amendment is consistent with the state anti-degradation policy because water degradation will continue to occur with or without the amendment. (CVRWQCB Staff Report, *supra*, p. 26.) Essentially this argument is based on the assumption that without the amendment no alternative actions including enforcement will be taken by the CRWQCB. The argument also fails to acknowledge that regardless of what may or may not happen in the future, the amendment will worsen the present quality of the water which is inconsistent with State anti-degradation policy.

The Regional Board argues that the “maximum benefit to the people of the State is best served by temporarily allowing water quality in Mud Slough (north) to be degraded in a controlled manner while full regional drainage management capability is developed.” Given the utter lack of economic or technical feasibility of drainage treatment, the Regional Board has failed to show that the amendment will result in the *best practicable treatment* or control of the discharge necessary to *circumvent pollution* and ensure that the *highest water quality consistent with maximum benefit to the people of the State* will be maintained as required under State anti-degradation policy. As a result, Resolution 2010-0046 approving the selenium Basin Plan Amendment violates federal and State anti-degradation policy.

H. The SWRCB failed to direct that upslope stormwater discharges be subject to an NPDES permit.

The written comments of C-WIN, CSPA and AquAlliance, as well as those of the USFWS stated that a significant amount of selenium is discharged during storm events and that a key to meeting water quality objectives is to control those discharges. The SWRCB response to comments dismissed concerns that storm induced discharges of selenium. The SWRCB and the CVRWQCB clearly have an obligation under CEQA to identify feasible alternatives and mitigation measures. Issuance of an NPDES permit for an upslope watershed program that reduces selenium inputs into the Grasslands area would greatly improve the possibility that Basin Plan water quality objectives for selenium will be met. Prohibitions on cultivation of floodplains, limitations on Off-Highway Vehicle use, grazing and other land-disturbing activities would be key components of a plan to reduce significant upslope seleniferous sediment discharges.

There still is no plan for those anticipated events. Stormwater contamination is foreseeable and predictable, the opposite of what the SWRCB and CVRWQCB and the Grasslands farmers have portrayed. Approval of Resolution 2010-0046 without directing that a stormwater permit be issued for upslope area is a violation of the California Environmental Quality Act the Federal Clean Water Act and Porter-Cologne (Water Code § 13000 *et seq.*).

CONCLUSION

The SWRCB failed to adequately consider the public trust, the doctrine of waste and unreasonable use in Article X, section 2 of the California Constitution, failed to properly apply Water Code section 275, the Clean Water Act, the Porter-Cologne Act (Water Code Sec 13000 *et seq.*), the California environmental Quality Act, the California Fish and Game Code section 2080 *et seq.*, the Migratory Bird Treaty Act, federal and State anti-degradation policies, and Fish and Game Code 3513 in the hearing and therefore

made an error in law. The Board should therefore reconsider its decision to approve Resolution 2010-0046.

Respectfully submitted this 4th day of November, 2010.



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November 23, 2010

Ms. Patricia Schifferle
Pacific Advocates
15652 Alder Creek Road
Truckee, CA 96161

RE: Brown Act Request

Dear Ms. Schifferle:

We have received your November 19, 2010 email to Dan Nelson, Executive Director of the San Luis & Delta-Mendota Water Authority (Water Authority) and accompanying memorandum concerning your requests made pursuant to the Brown Act. Your email contains several incorrect statements of the law with respect to your request, and the Water Authority will not be responding in those instances. However, given the procedures established for this agency, we wish to clarify that you will be receiving information you requested under that Act, as follows:

1. You will be receiving electronically posted meeting materials for Water Authority Board Meetings, Finance and Administration Committee, Water Resources Committee and Delta Habitat Conservation & Conveyance Program Steering Committee meetings when they are distributed to the Board of Directors or Committee Members, respectively.
2. The Water Authority posts all final agendas in accordance with the requirements of the Brown Act on its public notice board located at 842 Sixth Street, Los Banos, California, and provides all other notices required by law. The Water Authority will mail you the final agenda for each regular meeting at the time of posting.

Ms. Patricia Schifferle
Re: Brown Act Request
November 23, 2010

pg 2

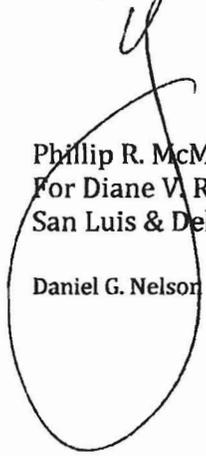
3. Final agendas for regular meetings and agenda packets for all meetings are distributed to the Board at the actual meeting. Your request entitles you to receive a copy of the final packet mailed following the meeting. The Water Authority charges a \$20 fee to cover the cost of this service, which must be received before documents will be mailed. Please note that there is an agenda and packet now available for the most recent FAC meeting. Please forward \$20 if you wish these documents to be mailed to you.

Finally, we are advising that in order to assure consistency of response, all Brown Act or Public Record Act written requests to the Water Authority will be answered by this office, so you may wish to direct any further inquiries to the undersigned at pmmcurray@linnemanlaw.com.

Very truly yours,

LINNEMAN, BURGESS, TELLES, VAN ATTA, VIERRA
RATHMANN, WHITEHURST & KEENE

By,


Phillip R. McMurray
For Diane V. Rathmann, General Counsel,
San Luis & Delta Mendota Water Authority

cc:

Daniel G. Nelson



Pacific Advocates

January 21, 2011

Daniel Nelson
Executive Director
San Luis Delta Mendota Water Authority
PO Box 2157
Los Banos, CA 93635

RE: Follow-up Delta Habitat Conservation and Conveyance (peripheral canal) \$50 Million Debt Offering, Agreements and Meeting Notes Public Records Act Request of October 15, 2010

VIA EMAIL and FAX

Dear Mr. Nelson:

On January 19, 2011, I received a letter from your General Counsel Phillip McMurray in response to my correspondence identifying records omitted from the Public Records Request of October 15, 2010. The letter failed to provide the documents requested. I am seeking your assistance to provide these documents.

I am in agreement with your general counsel, considerable time has been spent trying to obtain these public records regarding the \$50 million municipal debt offering by San Luis Delta Mendota Water Authority (Authority) a joint power authority for the study and design work to export more water from the Delta contemplated under the Delta Habitat Conservation and Conveyance Program collateralized 100% by Westlands Water District (Westlands).

As a municipal security investor and a member of the public, the response to the request has not met the standards for disclosure under state law, the Public Records Act Government Code Section 6250-6270 or the federal Security and Exchange Act disclosure rules.

After traveling 600 miles twice, once to review the files and again to unsuccessfully retrieve the files along with several letters requesting the documents, the following items are still missing:

1. Westlands Water District DHCCP Activity Agreement¹.

¹ <http://emma.msrb.org/MS279708-MS278527-MD564986.pdf>

“... Westlands Water District is obligated pursuant to its DHCCP Activity Agreement to pay 100% of the principal of and interest on the Notes when due... Each Financing Participant has agreed in its DHCCP Activity Agreement that it will, to the fullest extent permitted by law, fix, prescribe and collect rates, charges or assessments in connection with its water system or irrigation system which will be at least

2. Westlands Water District Resolution approving the debt obligation and collateral for the \$50 Million San Luis and Delta Mendota Water Authority Revenue Notes (DHCCP Development Project) series 2009A CUSIP # 798544AM4.
3. On October 1, 2010, the Authority provided notice to the California Debt Investment Advisory Commission of the Authority's intent to issue an additional \$35 million in debt to fund water supply, storage, distribution DHCCP Development Series A debt CDIA #0002010-1103. No resolution, notes or meeting references approving this debt were provided. Please provide these documents.

As mentioned in previous correspondence no reasons were provided for failing to provide:

1. Notes from the December 2008 meeting where Tom Birmingham, General Manager for Westlands explains the district does not have sufficient revenues to repay the principle for the \$50 Million debt service for the DHCCP notes.²
2. Under the debt obligation Westland has an obligation to provide financial disclosures.³ These documents were not provided. No explanation was given. As mentioned a copy was obtain under the public disclosure Electronic Municipal Market Access System.
3. In addition the annual financial disclosure information for Westlands required under the initial debt offering also was not provided. Again this was obtained through the EMMS access system because the documents were withheld under the Public Records Act without explanation.

sufficient to yield each fiscal year water system revenues or irrigation system revenues equal to 100% of principal of and interest on the Notes required to be made by such Financing Participant in such fiscal year (other than principal of any notes which the Authority and the Financing Participant project being refinanced by bonds, notes or other obligations).” Pg i

The Authority has reserved the right to issue additional indebtedness payable from Revenues on a parity with the Notes, so long as (i) no Event of Default (or any event which, once all notice or grace periods have passed, would constitute an Event of Default) under the Indenture has occurred and is continuing (unless such Event of Default shall be cured upon such issuance), (ii) the Westlands Water District DHCCP Activity Agreement is in full force and effect, and (iii) the Trustee receives an Opinion of Counsel to the effect that such additional indebtedness is permitted under law, the Joint Powers Agreement, the Westlands Water District DHCCP Activity Agreement and is secured by Revenues on a parity with the Notes.” Pg.11.

² “As further discussed in Appendix D hereto, Westlands Water District does not currently have, and does not currently project having on the maturity date of the Notes, sufficient unrestricted reserves to pay the principal of the Notes at maturity. See Appendix D—“INFORMATION CONCERNING WESTLANDS WATER DISTRICT—Investment of District Funds.” As a result, the Authority’s ability to pay principal on the Notes is dependent on the Authority’s ability to issue and sell refunding obligations prior to the maturity of the Notes.” Pg 11.

³ *Ibid.* “*Continuing Disclosure.* Westlands Water District has covenanted in a Continuing Disclosure Certificate for the Owners and Beneficial Owners of the Notes to provide certain financial information and operating data relating to Westlands Water District within nine months after the end of Westlands Water District’s fiscal year (currently ending on the last day of February of each calendar year) and to provide notices of the occurrence of certain enumerated events, if material.” Pg ii

Recent press reports suggest, Westlands and the Authority have sent letters indicating they are withdrawing from funding to complete the design and engineering for this delta conveyance project or 'peripheral canal' unless the amounts of water and type of conveyance project desired is guaranteed. Given the geographical distance of the peripheral canal project, outside of the boundaries of both the Authority and Westlands, it is uncertain even with this financing that either the Authority or Westlands will be able to control the outcome despite its concentrated political power and influence. Water supplies are constrained. This fact along with the federal budget constraints put at risk the millions of dollars in taxpayer funds paid to Westlands and Westside irrigators for water, power, and crop subsidies. The promise of repayment is based on inflated water delivery promises that are unlikely and principle repayment is based on refunding this debt in a risky market. As a municipal securities bondholder you can understand, disclosure of the Westlands Water District DHCCP Activity Agreement which controls repayment, is of significant interest. No reason has been provided for withholding this document.

Given the lengthy time period, well passed the ten day public record request time limit, prompt response to this request would be appreciated.

Sincerely,



15652 Alder Creek Road
Truckee CA 96161
[530] 550 0219
Fax 530 550 7171

Cc: Senator Diane Feinstein
Senator Barbara Boxer
Congressman Tom McClintock
Congressman John Garamendi
Chairwoman Mary L Shapiro, Security and Exchange Commission
California Attorney General Kamala Harris
Interested Parties



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NORTH
COAST
RIVERS
ALLIANCE



WINNEMEM
WINTU TRIBE



November 23, 2010

The Honorable John Garamendi
House of Representatives
2459 Rayburn HOB
Washington, D.C. 20515

Re: Request SEC Investigation of Westlands Water District for Misrepresentations and Omitted Statements in the Sale of Bonds to Finance the Preliminary Phase of the Peripheral Canal

Dear Congressman Garamendi:

We seek your help to request the Securities Exchange Commission to investigate whether Westlands Water District (Westlands) engaged in material misrepresentations and omissions in connection with the offer and sale of certain municipal securities, including those issued by the

Westlands and the San Luis & Delta Mendota Water Authority (Authority). The specific securities in question involved a \$50 million Revenue Notes, Series 2009A, CUSIP 798544AM4, issued in March 2009.¹

How could the largest irrigation district in the United States with declining revenues, highly leveraged debt, an uncertain water supply, and few actual water rights, borrow \$50 million in a bond market still reeling from the credit collapse of 2008?² Add to this Wall Street mystery, the fact that the borrowing was to quietly finance the early phase and highly uncertain phase of California's most controversial public works project--- the "Peripheral Canal" -- a massive project previously defeated by the state's voters in 1982.³

Except for a vague reference to a water "conveyance" facility, investors were never told about the history of controversy of the project to be financed. Nor were they informed that this offering was being sold more than one year and a half before even a draft of the new Peripheral Canal project proposal was finalized, any of the required federal, state, and local permits had been approved, or the lands/right of ways purchased upon which the proposed facilities could be built. Investors solicited to purchase these securities should have been informed of the uncertainties and controversy surrounding these notes and that the project's future was uncertain where Westlands proposed use of these funds for the early phase of the Peripheral Canal. Like the subprime mortgage crisis of 2008, the derivatives-driven bankruptcy of Orange County California in December 1994,⁴ and the California energy crisis of 2001, the complexity of circumstances surrounding this offering appears to have been used to mask its true risks for both private investors and taxpayers.

The bond offering relied heavily on Westlands misleading statements that the borrowing was secured by the districts revenues based on federal "water entitlements." The offering, as well as rating service information made available to investors used language that confused "water rights" with "water entitlements."

"Public entities that issue securities are primarily liable for the content of their disclosure documents and are subject to proscriptions under the federal securities laws against false and misleading information in their disclosure documents."⁵

Westlands and the Authority were aware that water entitlements are not "water rights," and that Westlands did not actually own the rights to 1.15 million acre feet of federal Central Valley Project (CVP) water contracts. Yet this claim in the offering served as the very foundation for the Westlands' assets and revenues and, thus constituted the security for the borrowing.

Based on these facts, an investigation is needed to answer fundamental questions and ascertain whether federal law has been violated:

1. Did Westlands Water District intentionally mislead investors by confusing “water entitlements” (contracts for CVP water) with CVP water rights in fact owned by the public?
2. Did Westlands intentionally mislead investors to believe that part of its borrowing was secured by illusory CVP “water rights” instead of inferior CVP water contracts? Specifically, did Westlands mislead investors into believing the borrowing was secured by 1.15 million-acre feet of water rights it did not own?
3. Did Westlands mislead investors by asserting that the federal CVP long term water contract renewal at full contract amounts was likely?⁶
4. Should Westlands have informed investors that its “potential” to sell federally subsidized agricultural water to Southern California and the San Francisco Bay area “at a higher price” was dependent on uncertain legislation still pending before Congress?⁷
5. Should Westlands have told investors that the transfer of 1.15 million acre feet of water rights currently owned by the public to Westlands would constitute the largest privatization of federally owned water rights in the history of the nation?

Background

Westlands Water District (Westlands) is the largest irrigation district in the United States. The district is a quasi-public agency with a highly concentrated private corporate ownership. Nine directors control Westlands, which is one of the strongest proponents of a Peripheral Canal-type isolated water conveyance system for moving Sacramento River water around the San Francisco Bay Delta to the San Joaquin Valley and beyond. The California Delta Habitat Conservation and Conveyance Program (DHCCP) is expected to announce a plan for a massive publicly financed Peripheral Canal-type plan as early as November 2010.

The \$50 million offering that is the subject of this request for investigation is being used to finance the initial studies and engineering development costs of this new Peripheral Canal proposal. In March of 2009, Westlands anchored the \$50 million dollar offering of Revenue Notes, Series 2009A, to finance the California Delta Habitat Conservation and Conveyance Program (DHCCP) under the auspices of the San Luis & Delta-Mendota Water Authority in California. To quote the FitchRatings report on the bond offering:

“Financial strength is derived from the obligor’s, the Westlands Water District (WWD, or the district), credit quality (revenue bonds rated ‘A’ by Fitch Ratings), based on satisfactory historical financial operations and high commodity value.”

“The DHCCP consists of joint efforts by agencies of the federal government, the state of California, and local agencies to fund and plan habitat conservation and water supply activities in the Sacramento San Joaquin River Delta/San Francisco Bay Estuary (the Bay Delta); including Bay Delta water conveyance options. The cost of the DHCCP project is currently uncertain but is expected to be substantial. The current issuance will finance the CVP portion of development costs pursuant to a memorandum of agreement. The ultimate source of funding for such a massive undertaking remains to be determined.”⁸

The DHCCP likely will announce the draft plan for the San Francisco Bay-San Joaquin Delta in late November 2010. This bond offering, however, took place one and a half years prior to the expected release date of the *draft* DHCCP for compliance with the endangered species act. It is widely expected that the proposed DHCCP will embrace the Westlands-backed Peripheral Canal-type option. Cost estimates for the canal or tunnel alone are over \$10 billion, with urban water users in Southern California, Santa Clara and Alameda counties slated to pay the majority of the bill for a project that will primarily benefit would-be agricultural water merchants (primarily Westlands).

The Facts

1. Westlands Water District’s General Manager has publicly conceded that Westlands does not have “water rights” to water delivered pursuant to CVP contracts: “The contractors who receive Central Valley Project Act water do not hold water rights. Those rights are held by the United States [for the benefit of the contractors.]”⁹
2. “Water entitlements” are not the same as “water rights.” Westlands holds interim CVP water contracts, where Westlands has junior contracts for supplemental water up to 1.15 million acre-feet of water a year. Even these contracts are not guaranteed, despite Westlands claims to the contrary. Now and at the time the bonds were issued, Westlands holds interim water contracts, which are subject to the discretion of the Secretary of Interior and balancing other Congressional directives. These water contracts are also subject to the state and federal laws, which have in the past limited water deliveries. Westlands water contract allocations are also subject to the Bureau of Reclamation’s CVP allocation formulas designed to account for various weather conditions.
3. The rating agency and Westlands may have misled potential investors in the \$50 million offering by confusing “water contracts” or “water entitlements” with “water rights.” The

documents misrepresented one of the six key bond rating rationales by claiming it can sell water “entitlements” (contracts), but such sale is not assured under existing federal law. Westlands allows the impression that the revenues of intermittent interim water contracts will be enough to securitize \$50 million dollars of debt:

“The value of the WWD’s entitlement to a substantial amount of water (1.15 million acre feet) offers financial flexibility, as it can be marketed for municipal and industrial uses at a higher price if the water is not sold for agricultural purposes.”¹⁰

This statement is speculative in that in that Westlands’ entitlements to water are not certain, as explained above. This is not a legal and certain right and it misrepresents Westlands’ capabilities by implying that the full amount of this supplemental contract water could be marketed under existing law.

The rating agency documents describing Westlands’ bond offering baits investors with a misleading claim about Westlands “potential” for becoming a major water wholesaler to Southern California and the San Francisco Bay area:

“...The WWD potentially has the ability to sell and transfer water rights outside the district should agriculture cease to be economic, as the demand for water in Southern California and the San Francisco Bay area by users with connectivity to the CVP is very high.”¹¹

However, Westlands failed to inform investors that such “a potential” to sell its contract water “at a higher price” would require regulatory approvals and could only be sold for a short time period until the term of the interim contract expires. At the time of the bond offering, and currently, these water rights are owned by the public and such long term sales are not guaranteed.

4. Westlands also potentially mislead investors into believing that its previous heavily leveraged borrowing would be secured by (1) CVP water rights it did not own and, (2) likely inflated real property values:

“The district’s high leverage position is somewhat offset by **the value of water rights** and real property held by the district, which is not included in fixed assets. The net long-term debt outstanding includes those obligations incurred for water rights acquisition as well as debt for land purchased. At the end of fiscal 2008, the district’s water rights net of accumulated depreciation totaled \$102.5 million, and real property held was valued at \$105.7 million.”¹² [Emphasis added.]

These figures in the offering do not appear justified based on actual values of the primarily water entitlements (not water rights) held by Westlands.

The Law

SEC Rule 10b-5 states that it shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange:

1. To employ any device, scheme, or artifice to defraud,
2. To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
3. To engage in any act, practice, or course of business this operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Investors and other third parties are entitled to objective information and data free from bias and inconsistency, regardless whether such bias and inconstancy is deliberate. Therefore, financial accounting relies on certain standards or guides that are called "Generally Accepted Accounting Principles" (GAAP).

Conclusion

Investors who purchased the \$50 million in revenue notes should have been fully informed that their funds were to be used in a risky scheme to privatize 1.15 million acre feet of federally owned water rights and the building of the massive and controversial Peripheral Canal water conveyance system around the San Francisco Bay Delta. Tax-exempt bonds are now being used to develop a conveyance system using phantom water rights as collateral. The appearance that the bonds would likely be rolled over or remarketed in 2014 also is unlikely,¹³ despite the fact that this was a key ratings driver for the debt.¹⁴ More broadly, a default on these bonds would not only harm bondholders, but could also have the potential to disrupt municipal bond debt.¹⁵ This risk was recently recognized in a study reported on in the New York Times.¹⁶ This planning project now has an anticipated shortfall of approximately \$100 million. Additional debt and obligation will be needed to complete the studies.¹⁷ Taking action to ensure adequate disclosure of the risks to bond investors is at the heart of our financial system. Last, but vitally important, the undue risks associated with leveraging the sale of inflated amounts of water likely will put increased bias and pressure on federal and state regulators to either bail out these bond holders or skew environmental and water policy. We urge you to seek this investigation and to enforce the disclosure laws before additional debt is issued.¹⁸

Thank you for your assistance,



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Senior Advocate
Sierra Club California



Steven L. Evans
Conservation Director
Friends of the River



Conner Everts
Executive Director
Southern California Watershed Alliance



Larry Collins
President
Crab Boat Owners Association Inc.

Carolee Krieger
Board President and Executive Director
California Water Impact Network

Bill Jennings
Chairman Executive Director
California Sportfishing Protection Alliance

Mark Franco
Headman
WINNEMEM WINTU TRIBE

Wenonah Hauter
Executive Director
Food and Water Watch

Barbara Vlamis
Executive Director
AquAlliance

Zeke Grader, Executive Director
Pacific Coast Federation of
Fishermen's Associations

Byron Leydecker
Chair Friends of Trinity River

Bruce Tokar Co-Founder
Salmon Water Now

Frank Egger, President
North Coast Rivers Alliance

ENDNOTES

¹ See <http://emma.msrb.org/SecurityView/SecurityDetails.aspx?cusip=798544AM4> (Official Statement).
<http://emma.msrb.org/MS279708-MS278527-MD564986.pdf>

² These are revenue notes that rely on the use of what is known as joint powers authorities—a coalition of public and/or private entities that pool resources for project where they can avoid voter approval of the bonds by obtaining a majority vote of the entity's board. [See California Government Code Division 7 Chapter 5 [6500-6599.3].

³ In 1982, California voters defeated the Peripheral Canal (a trench to carry water around the Sacramento-San Joaquin Delta for export south), voting by a 3-2 margin in favor of Proposition 9 (a veto referendum on the Legislature's SB 200 package of statewide facilities and related requirements).

⁴ See Municipal Bond Participants: Public Officials and Obligated Persons Public Officials Report under Section 21(a) of the Exchange Act *Report of Investigation in the Matter of County of Orange, California as it Relates to the Conduct of the Members of the Board of Supervisors.*, Exchange Act Release No. 36761 (January 24, 1996), available at:

<http://www.sec.gov/info/municipal/mbonds/publicof.htm#PO1> (SEC investigation report involving material misrepresentations and omissions in connection with the offer and sale of certain municipal securities issued by the County of Orange, California).

⁵ *Ibid.* See March 1994 Release; 1989 Release, *supra* note 5, at 18,199-10 and n.84; see also *In re CitiSource, Inc. Securities Litigation*, 694 F. Supp. 1069, 1072-75 (S.D.N.Y. 1988); *Draney v. Wilson, Morton, Assaf & McElligot*, 597 F. Supp. 528, 531 (D. Ariz. 1983).

⁶ See <http://emma.msrb.org/MS279708-MS278527-MC564986.pdf>. "The District now expects the long-term Water Contracts to be renewed during the term of the IRD, and in any event before February 10, 2010." D-7. The long-term water contracts were not renewed. Currently, Westlands is still operating under interim contracts with the Bureau of Reclamation.

⁷ See S. 1759 Senator Dianne Feinstein's Water Transfer Facilitation Act of 2009 pending before the Senate.

⁸ FitchRatings Report, San Luis and Delta Mendota Water Authority, California: Delta Habitat Conservation and Conveyance Program Development Project. March 12, 2009, p. 2.

⁹ Tom Birmingham, General Manager, Westlands Water District, Testimony Before the Assembly Water, Parks and Wildlife Committee, May 11, 2010. See <http://www.vimeo.com/11771367>

¹⁰ FitchRatings Report, San Luis and Delta Mendota Water Authority, California: Delta Habitat Conservation and Conveyance Program Development Project. March 12, 2009, p. 2
(*"There is concentration among the WWD's water purchasers. But offsetting this risk somewhat is the value of cash crops farmed in the district (about \$1.3 billion in fiscal 2008) and the absence of alternative/equivalent supplies or infrastructure to deliver water. In addition, the WWD potentially has the ability to sell and transfer water rights outside the district should agriculture cease to be economic, as the demand for water in Southern California and the San Francisco Bay area by users with connectivity to the CVP is very high."*).

"The inherent value in the district's extensive water entitlements through its role as the contractor with the federally owned Central Valley Project (CVP) is a credit strength. Offsetting credit considerations are the risk of the availability of CVP water, its increasing costs, high revenue concentration resulting from the small number of customers/land owners of the WWD, and future capital needs, potentially substantial, to secure future CVP water deliveries." [pp1-2 Credit Summary]

¹¹ FitchRatings Report, San Luis and Delta Mendota Water Authority, California: Delta Habitat Conservation and Conveyance Program Development Project. March 12, 2009, p. 2.

¹² Ibid., p. 6.

¹³ See Del Puerto Water District Benefit Assessment Evaluation California Proposition 218 Engineer's Report Summers Engineering January 2010. In order to pay back the principle instead of only the interest, a 340% water rate increase was sought by the District to avoid a projected deficit of \$4,382,280.

"In addition to the forecasted operational budget, the District also has a principle debt obligation due in March of 2014 to fund its share of the Delta Habitat Conservation and Conveyance Program. This \$150 million effort, which is being cost-shared equally between State and Federal Contractors, will select and design a preferred Delta conveyance alternative for South-of-the-Delta water supplies. Del Puerto's share of this program is \$3,692,405. The annual interest-only obligation currently associated with this debt is being paid as a component of the District's SLDMWA dues. While it is anticipated that the Contractors will be able to "roll" this principle obligation into a construction bond in 2014, no such opportunity currently exists. Due to this uncertainty, the District believes it is prudent to fiscally prepare to meet this debt obligation." P16.

¹⁴ Ibid. FitchRatings. "Key rating drivers are the ability to remarket the notes upon maturity in 2014, the WWD's ability to levy and collect increased land assessments, and ultimate costs attributable to the WWD and authority associated with the expected construction of the DHCCP". [pp1-2 Credit Summary]

¹⁵ *The Muni-Bond Debt Bomb* by [Steven Malanga](#) Wallstreet Journal JULY 31, 2010

New Risks Emerge in Munis Debtholders Are Left Steamed as Some Cities Forgo Repayment Promises, M. Corkery Wallstreet Journal 11-10-2010

¹⁶ See Leurig, Sharlene, Ceres Analysis, *The Ripple Effect: Water Risk in the Municipal Bond Market*, A Ceres Report, October 2010, available at: <http://www.ceres.org/Document.Doc?id=625>; see also

Water Scarcity a Bond Risk, Study Warns (New York Time, October 20, 2010), available at: <http://www.nytimes.com/2010/10/21/business/21water.html>.

¹⁷ San Luis & Delta-Mendota Water Authority Minutes – Delta Habitat Conservation and Conveyance Committee/Special Board Of Directors Meeting Workshop June 24, 2010.

"Executive Nelson reviewed additional funding needs to complete the development of the DHCCP. Nelson reviewed the most recent budget and indicated that the program continues to track around \$100 million over budget. Nelson indicated that our share of the original \$140 million commitment will likely provide sufficient cash flow through December 2010. We will need to have additional funding available by then to allow continuation of the project without delays. Nelson reported that we had initiated discussions with Dave Houston and Bond Counsel Doug Brown to secure funding and that we were looking at bonds that would mature 3/1/14 (date of maturity of original DHCCP bond financing). The expectation is the payments through maturation would be interest only and that the bond would be refinanced as part of

the financing for the construction of the project. Nelson reported that the Direct Funding Agreement 1st Amendment with DWR had been executed. Rathmann indicated that she was working on a draft Activity Agreement amendment to accommodate the increased funding.”

¹⁸ First Amendment to the Agreement for Funding Between the Department of Water Resources and the San Luis & Delta Mendota Water Authority for the Costs of Environmental Analysis, Planning and Design of Delta Conservation Measures, Including Delta Conveyance Options. 6-13-2010.

DHCCP Workshop Minutes (7-28-10) *“Nelson reported that we had initiated discussions with Dave Houston and Bond Counsel Doug Brown to secure funding and that we were looking at bonds that would mature 3-1-14 (date of maturity of original DHCCP bond financing). The expectation is the payments through maturation would be interest only and that the bond would be refinanced as part of the financing for the construction of the project.”* “Nelson reminded the Committee that although our original funding commitments would cash flow the project through the end of the year, we will need to commit to additional funding through the approval of Task Orders, probably by the beginning of October.”