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 Coder 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

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[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 Plan[7] 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

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[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; Paveglio 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 bioaccumlate 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 areas[12]. 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 202 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

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[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.

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[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.

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[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.

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[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 statue 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 lrr. Dist. v. Lindsay-Strathmore lrr. 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 lrrigation 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.

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[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.

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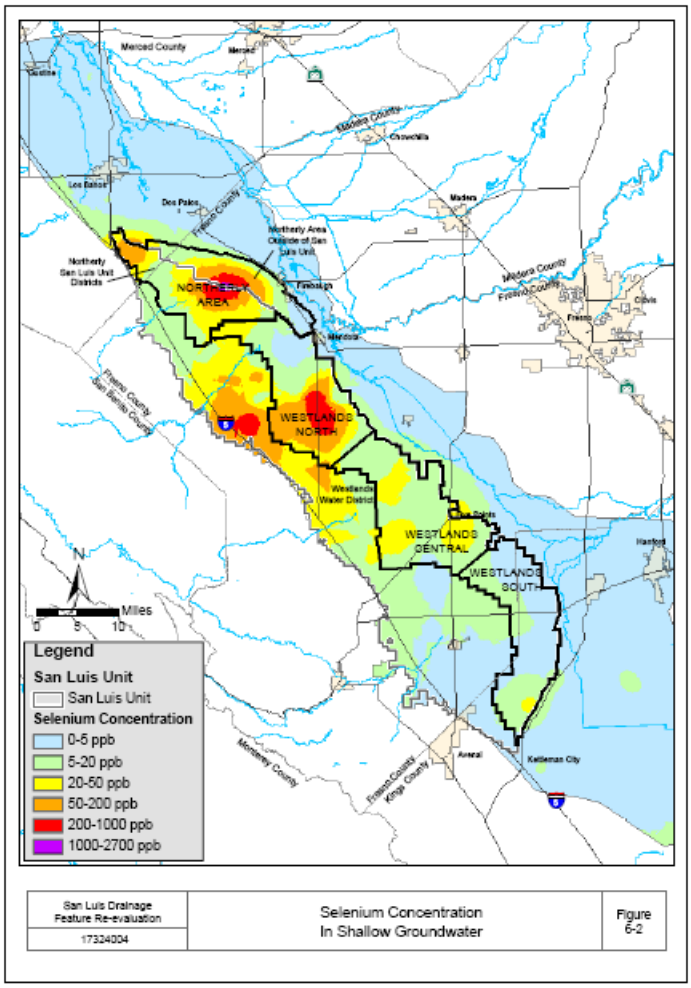
[33] See Comments From Environmental Coalition: Sierra Club et.al. Comment letter- San Joaquin River Selenium Control Plan Basin Plan Amendment. September 22, 2010. California Sportfishing Protection Alliance et. al. Comment letter- San Joaquin River Selenium Control Plan Basin Plan Amendment. September 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://wwwrcamnl.wr.usgs.gov/Selenium/Library_articles/joepond.pdf Westlands Water District Groundwater Discharge near Five Points, Ca.



San Luis Drainage Feature Re-evaluation	Selenium Concentration In Shallow Groundwater	Figure 6-2
17324004		

SLDFR Final EIS F_6_2

USBOR and USGS Documented levels of selenium polluted groundwater.