December 23, 2019

via email
remerson@usbr.gov
Rain Emerson
U.S. Bureau of Reclamation
South-Central California Area Office
1243 N Street
Fresno, CA 93721


Dear Ms. Emerson:

We submit the following comments on the Draft Environmental Assessment (“Draft EA”) and 10-Year Use Agreement for the San Luis & Delta-Mendota Water Authority’s (“SLDMWA’s”) Long-term Storm Water Management Plan for the Grasslands Drainage Area (“Project”) on behalf of the Winnemem Wintu Tribe, North Coast Rivers Alliance, Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries Resources, California Sportfishing Protection Alliance, and San Francisco Crab Boat Owners Association, Inc.

Since 1995, the Grassland Bypass Project (“GBP”) has conveyed water contaminated with pollutants, including selenium, through the San Luis Drain (“Drain”) to Mud Slough, a water of the United States. After the original five-year term, use of the GBP was extended through 2009, and again through 2019. And now, despite being made fully aware of the detrimental consequences of the GBP’s discharge of pollutants, the Bureau of Reclamation (“Bureau”) proposes to extend the term of the Drain Use Agreement once again. But any extension must be denied because the negative impacts to the environment from the GBP’s unlawful discharge of pollutants to Mud Slough and the San Joaquin River are unacceptable.

It is clear that the Project poses significant environmental impacts that must be addressed in a Supplemental Environmental Impact Statement (“SEIS”). An SEIS is required wherever “[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c). And where, as is the case here, an Environmental Impact Statement (“EIS”) is “more than 5 years old,” it
should be “carefully re-examined” to determine if a supplement is required. 46 Fed.Reg. 18026 (Mar. 23, 1981), as amended 51 Fed.Reg. 15618 (Apr. 25, 1986), Question 32. “[I]f there remains ‘major Federal actio[n]’ to occur, and if the new information is sufficient to show that the remaining action will ‘affect the quality of the human environment’ in a significant manner or to a significant extent not already considered, a Supplemental EIS must be prepared.” *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989), quoting from 42 U.S.C. § 4332(2)(C) (emphasis added).

Such is the case here. The GBP has significant adverse impacts due to its discharge of substantial quantities of selenium and other pollutants whose cumulative effects are severe and growing – and unstudied. SLDMWA’s October 2019 approvals made substantial changes to the GBP that were *not* previously considered in the 2009 Environmental Impact Statement/Environmental Impact Report (“2009 FEIS/FEIR”) and that substantially *increase* the impacts evaluated in the 2009 FEIS/FEIR. Neither SLDMWA’s Addendum to the 2009 FEIS/FEIR nor the Draft EA adequately addresses the impacts of these changes.

The Project will increase the likelihood of contaminated discharges from the Drain into Mud Slough and the San Joaquin River. The Bureau must comply with the Clean Water Act, 33 U.S.C. section 1251, et seq. (“CWA”), and obtain a National Pollutant Discharge Elimination System (“NPDES”) permit for the Drain’s discharge of pollutants to waters of the United States. *See Pacific Coast Federation of Fishermen’s Associations v. Glaser*, 937 F.3d 1191 (9th Cir. 2019) (as modified on denial of rehearing Dec. 20, 2019). The Project will also increase the risk for potential ponding of seleniferous water, which is hazardous to wildlife. In addition, by relying upon stale data in the 2009 FEIR/FEIS, the Bureau and SLDMWA have failed to take a hard look at the capacity of the GBP to process contaminated water in the Project’s reuse area.

The Project’s severe adverse effects on water quality and fish and wildlife are addressed in detail in the attached documents:

(1) September 13, 2019 Comments of Pacific Coast Federation of Fishermen’s Associations, California Sportfishing Protection Alliance, Friends of the River, San Francisco Crab Boat Owners Association, Inc., Institute for Fisheries Resources, and Felix Smith on the Addendum to the Final Environmental Impact Statement / Environmental Impact Report for the Grassland Bypass Project, 2010-2019, SCH No. 2007121110

(2) November 5, 2019 Comments of North Coast Rivers Alliance, Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries Resources, San Francisco Crab Boat Owners Association, California Sportfishing Protection Alliance, and Felix Smith, on Tentative Waste Discharge Requirements for Surface Water Discharges from the Grassland Bypass Project Operated by the San Luis and Delta-Mendota Water Authority and United States Bureau of Reclamation

(3) November 12, 2019 Verified Petition for Writ of Mandate and Complaint for Declaratory
and Injunctive Relief and Attorneys’ Fees filed in *North Coast Rivers Alliance, et al., v. San Luis and Delta-Mendota Water Authority*, Merced County Superior Court Case No. 19CV-04989


As is clear from the attached, the impacts of the Project must be studied in an SEIS. In addition, the Bureau and SLDMWA must both apply for an NPDES permit before either can use the Drain.

Please include these comments in the public record for this matter.

Respectfully submitted,

[Signature]

Stephan C. Volker
Attorney for Winnemem Wintu Tribe, North Coast Rivers Alliance, Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries Resources, California Sportfishing Protection Alliance, and San Francisco Crab Boat Owners Association, Inc.
Exhibits

Exhibit 1: September 13, 2019 Comments of Pacific Coast Federation of Fishermen’s Associations, California Sportfishing Protection Alliance, Friends of the River, San Francisco Crab Boat Owners Association, Inc., Institute for Fisheries Resources, and Felix Smith on the Addendum to the Final Environmental Impact Statement / Environmental Impact Report for the Grassland Bypass Project, 2010-2019, SCH No. 2007121110 (Exhibit 1 omitted).

Exhibit 2: November 5, 2019 Comments of North Coast Rivers Alliance, Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries Resources, San Francisco Crab Boat Owners Association, California Sportfishing Protection Alliance, and Felix Smith, on Tentative Waste Discharge Requirements for Surface Water Discharges from the Grassland Bypass Project Operated by the San Luis and Delta-Mendota Water Authority and United States Bureau of Reclamation (Exhibit 1 omitted).

Exhibit 3: November 12, 2019 Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and Attorneys’ Fees filed in North Coast Rivers Alliance, et al., v. San Luis and Delta-Mendota Water Authority, Merced County Superior Court Case No. 19CV-04989.

EXHIBIT

1
September 13, 2019

via U.S. Mail and email

Joseph C. McGahan, Drainage Coordinator  
San Luis & Delta-Mendota Water Authority  
P.O. Box 2157  
Los Banos, CA 93635  
jmcgahan@summerseng.com

Re: Comments of Pacific Coast Federation of Fishermen’s Associations,  
California Sportfishing Protection Alliance, Friends of the River, San  
Francisco Crab Boat Owners Association, Inc., Institute for Fisheries  
Resources, and Felix Smith on the Addendum to the Final Environmental  
Impact Statement / Environmental Impact Report for the Grassland Bypass  
Project, 2010-2019, SCH No. 2007121110

Dear Mr. McGahan:

We submit the following comments on the San Luis & Delta Mendota Water Authority’s (“SLDMWA’s”) Addendum to the Final Environmental Impact Statement / Environmental Impact Report for the Grassland Bypass Project (“Addendum”) on behalf of Pacific Coast Federation of Fishermen’s Associations, California Sportfishing Protection Alliance, Friends of the River, San Francisco Crab Boat Owners Association, Inc., Institute for Fisheries Resources, and Felix Smith (collectively, “PCFFA”).

Since 1995, the Grassland Bypass Project (“GBP”) has conveyed water contaminated with pollutants, including selenium, through the San Luis Drain (“Drain”) to Mud Slough, a water of the United States. After the original five-year term, use of the GBP was extended through 2009, and again through 2019. And now, despite being made fully aware of the detrimental consequences of the GBP’s discharge of pollutants, SLDMWA proposes to extend the term of the Drain Use Agreement once again. But any extension must be denied because the negative impacts to the environment from the GBP’s unlawful discharge of pollutants to Mud Slough and the San Joaquin River are unacceptable.

As you are aware, the Drain’s discharge of pollutants into Mud Slough, a water of the United States, without a National Pollutant Discharge Elimination System (“NPDES”) permit...
violates the Clean Water Act, 33 U.S.C. section 1251, et seq. ("CWA"). Any extension of the GBP Use Agreement would be in furtherance of that CWA violation. Therefore SLDMWA is barred by law from seeking an extension of the Use Agreement. Instead, it must apply for the NPDES permit that is required for the Drain’s discharge of pollutants.

Additionally, SLDMWA and its co-operator the U.S. Bureau of Reclamation must complete a Subsequent Environmental Impact Report ("SEIR") and Supplemental Environmental Impact Statement ("SEIS") to comply with the California Environmental Quality Act, Public Resources Code section 21000 et seq. ("CEQA") and the National Environmental Policy Act, 42 U.S.C. section 4321 et seq. ("NEPA").¹ Under CEQA Guidelines section 15162, a subsequent EIR must be prepared when:

“(1) Substantial changes are proposed in the project which will require major revisions of the previous EIR . . . due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;

(2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR . . . due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or

(3) New information of substantial importance, . . . shows any of the following:
   - The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
   - Significant effects previously examined will be substantially more severe than shown in the previous EIR;
   - Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
   - Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.”

14 C.C.R. ("CEQA Guidelines") § 15162(a).

¹ United States Fish and Wildlife Service must also comply with NEPA in evaluating whether to approve the modifications contemplated by the Addendum. Initial Study 1-1.
Similarly under NEPA, an SEIS is required wherever “[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c). And where, as is the case here, an EIS is “more than 5 years old,” it should be “carefully re-examined” to determine if a supplement is required. 46 Fed.Reg. 18026 (Mar. 23, 1981), as amended 51 Fed.Reg. 15618 (Apr. 25, 1986), Question 32. “[I]f there remains ‘major Federal actio[n]’ to occur, and if the new information is sufficient to show that the remaining action will ‘affect the quality of the human environment’ in a significant manner or to a significant extent not already considered, a Supplemental EIS must be prepared.” Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989), quoting from 42 U.S.C. § 4332(2)(C) (emphasis added).

Both the test under CEQA for an SEIR, and the test under NEPA for an SEIS, are easily met here. The GBP has significant adverse impacts due to its discharge of substantial quantities of selenium and other pollutants whose cumulative effects are severe and growing – and unstudied. Contrary to the Addendum’s claim that “the prior CEQA analyses retain their relevance,” the evidence in the Addendum shows otherwise. The project proposed in the Addendum makes substantial changes to the GBP that were not previously considered and that substantially increase the impacts evaluated in the 2009 FEIS/FEIR. Therefore, SLDMWA’s reliance on an addendum – rather than a Subsequent EIR and a Supplemental EIS – fails to provide decisionmakers and the public with the information needed to make an accurate and informed decision, in violation of CEQA and NEPA.

I. SLDMWA MUST NOT GRANT A USE AGREEMENT EXTENSION WITHOUT FIRST OBTAINING AN NPDES PERMIT

By allowing an extension of the GBP Use Agreement, SLDMWA is authorizing the continued discharge of pollutants, including selenium, from the Drain into Mud Slough, a water of the United States. SLDMWA has admitted that the Drain, a point source under the CWA, discharges pollutants into waters of the United States. That discharge requires an NPDES permit under the CWA. SLDMWA cannot lawfully authorize the continuance of this ongoing violation of the CWA. Therefore the extension should be denied in its entirety. SLDMWA’s attempted end-run around this legal mandate – by claiming that the Drain is exempt form the CWA NPDES permit requirement – was forcefully rejected by the Ninth Circuit in its recent ruling, PCFFA v. Glaser, ___ F.3d ___, 2019 WL 4230097 (Sept. 6, 2019), Slip Op. at 8-19.2

On September 6, 2019, the Ninth Circuit ruled that PCFFA’s lawsuit challenging SLDMWA’s and the Bureau of Reclamation’s failure to secure an NPDES permit for the GBP as required by the CWA was wrongfully dismissed by the district court. The Ninth Circuit held that

2 The Ninth Circuit’s Slip Opinion in PCFFA v. Glaser is attached as Exhibit 1.
“Congress intended for discharges that include return flows from activities unrelated to crop production to be excluded from the statutory exception, thus requiring an NPDES permit for such discharges.” *PCFFA v. Glaser*, Slip Op. at 15. The wastewaters discharged through the GBP, and specifically through the Drain, are comingled and include both agricultural return flows and non-agriculture wastewater. Therefore, an NPDES permit is required for operation of the Drain.

The Court correctly ruled that “the defendant carries the burden to demonstrate the applicability of a statutory exception to the CWA” and that neither SLDMWA nor Reclamation had presented such evidence. *Id.*, at 10. Indeed, they could not carry that burden because there is overwhelming evidence to the contrary that the flows through the Drain are not composed “entirely” of irrigated agricultural return flows. As PCFFA properly alleged, “discharges from highways, residences, seepage into the [Drain] from adjacent [unfarmed] lands, and sediments from within the [Drain]” come with the irrigated agriculture return flows. *Id.*, at 17. Because the polluted waters that discharge from the Drain are comingled flows, the Drain cannot lawfully operate without an NPDES permit. Therefore, SLDMWA cannot authorize an extension of the GBP Use Agreement unless and until such a permit has been lawfully obtained.

II. Extension of the Use Agreement Will Cause New Significant Environmental Effects and Will Substantially Increase the Severity of Previously Identified Effects Necessitating Preparation of an SEIR/SEIS.

The Addendum studies the impacts of the Long-Term Storm Water Management Program (“LTSWMP”). If approved, the LTSWMP will add approximately 200 acres of “storage basins,” expand the Project’s reuse area and otherwise modify the operation of the Project. These changes will have significant impacts that require preparation of an SEIR and SEIS. SLDMWA’s contrary claims are meritless.

A. Surface Water, Groundwater, and Soils

The Addendum states that the LTSWMP’s use of 200 acres of storage basins to collect storm water for subsequent release will not significantly impact water quality. Addendum 3-4. The Addendum claims that, by impounding storm flows, and metering their release onto the reuse area, contaminated discharges would be reduced or avoided. *Id.* This assertion is based on the assumption that storm water that would be collected in these storage basins from December to May would not discharge pollutants such as selenium, boron, salt, and molybdenum to Mud Slough and thence the San Joaquin River. Addendum 3-3. That premise is false. An NPDES permit is therefore required for any such discharge. Unless and until an NPDES permit is secured, this project may not proceed further.

In an attempt to reduce the contaminated groundwater in these discharges, the LTSWMP calls for wastewater sumps to be turned off “prior to and during wet weather flows.” *Id.* But as the impounded storm water collects in these storage basins, it will interact with the already
impaired groundwater and soils underlying and surrounding the basins, and collect and mobilize these contaminants. Hence, the impounded wastewater will simply create additional saturated soils, ponds of contaminated water, and polluted run-off, all of which will continue to enter the Drain through seepage, and ultimately discharge into Mud Slough.

Further, the approximately 180,000 cubic yards – so far – of contaminated sediment SLDMWA claims it has removed from the Drain will leach additional contaminants back into the system. Much of this sediment was apparently relocated – but never treated – to old drains, and placed in other parts of the reuse area. Water will continue to infiltrate this contaminated sediment, and remobilize these contaminants – including high levels of selenium and other pollutants – into the water table, and the San Luis Drain.

The LTSWMP would also expand the size of the reuse area. The Addendum states that the expansion is necessary because the existing reuse area cannot successfully manage the seleniferous water without dangerous ponding. Addendum 1-11. In other words, the reuse area was unable to serve the purpose for which it was designed. Instead of reevaluating the wisdom of the system, SLDMWA is doubling-down on the Project by expanding its size. But the SLDMWA did not perform any new modeling of the water quality impacts associated with the LTSWMP, including impacts resulting from the increase in the size of the reuse area or the use of these storage basins. Addendum 3-11. By relying on out-of-date modeling that does not accurately reflect the LTSWMP’s impacts or the conditions at the reuse area, SLDMWA has precluded informed decisionmaking and therefore failed to comply with CEQA and NEPA. Under CEQA Guidelines section 15162 and 40 C.F.R. section 1502.9(c), these new and substantially increased impacts must be thoroughly studied in an SEIR/SEIS.

**B. Biology**

The changes contemplated in the Addendum will substantially increase the severity of previously identified biological impacts and cause significant new biological impacts that were not considered in the 2009 FEIS/FEIR. For example, the Addendum proposes “to accumulate storm water in the [storage basins in the GDA] as needed to reduce peak flows during high rainfall events . . . for subsequent release of the storm water through the Drain or to the reuse area.” Addendum 2-3. As the Addendum acknowledges, use of storage basins in the GDA has the potential to expose waterfowl to water with elevated selenium levels if the basins cannot promptly be drained. Addendum 2-3. But nothing in the Addendum, 2009 FEIS/FEIR, or the Initial Study indicates that the basins will be promptly drained, or that these impacts will be otherwise mitigated to insignificance.

The Addendum claims that “[w]ater in the basins would be distributed to the SJRIP to meet irrigation demand as soon as practical,” but “as soon as practical” does not ensure that the basins will be “promptly drained” to protect wildlife. Addendum 2-3. In fact, SLDMWA will only deviate from its primary goal of distributing the water “as soon as practical” “[i]n rare cases
Addendum 2-3 to 2-4. The only guarantee the Addendum provides is that the basins would be emptied by late May. Addendum 2-4. Aside from a late May deadline, the Addendum fails to provide any guidelines or criteria for when the basins will be drained, nor does it even consider what actions and facilities would be needed to promptly drain the basins to protect wildlife.

The Addendum and Initial Study argue that mitigation measures designed to limit impacts of irrigation ditches in the 2009 FEIS/FEIR will help “avoid impacts to wildlife” from these storage basins, but the mitigations proposed are probably – if not demonstrably – ineffective and have their own impacts that must be considered in an SEIR/SEIS. Addendum 2-3; Initial Study 2-14 to 2-16. The 2009 FEIS/FEIR proposed mitigations to make irrigation ditches less attractive and to haze birds to limit nesting and foraging in those irrigation ditches. Addendum 3-6. The majority of the measures designed to make irrigation ditches less attractive are inapplicable to the storage basins, both because the physical structures are different and because the storage basins already exist, limiting the potential to incorporate mitigations. And hazing has significant impacts because it displaces wildlife from its foraging, breeding and nesting habitat. Those impacts must be examined in an SEIR/SEIS. CEQA Guidelines § 15162(a); 40 C.F.R. § 1502.9(c). In any event, hazing would be ineffective because it relies on observation to determine when it is necessary – a self-defeating requirement since these storage basins will not be monitored 24 hours a day, 7 days a week.

Furthermore, the project includes a 1,450-acre expansion of the existing reuse facility – the SJRIP – to 7,550 acres. The 2009 FEIS/FEIR analyzed a 6,100 acre reuse facility, and the proposed expansion “is an additional 650 acres over the maximum size anticipated in the 2009 Final EIS/EIR.” Addendum 2-5; 2009 FEIS/FEIR 2-2. While the “additional acreage would be managed in the same manner as the existing acreage with the same biological monitoring requirements established by the U.S. Fish and Wildlife Service (USFWS) in their Biological Opinion,” that does not negate the significant new and increased impacts that this substantial change will have on the surrounding environment. Addendum 2-5; CEQA Guidelines § 15162(a); 40 C.F.R. § 1502.9(c). As the Addendum admits, “[t]he primary environmental concern is an increased potential for ponding of seleniferous water within the fields of the SJRIP, which could be an attractive nuisance to wildlife, particularly birds.” Addendum 2-5.

Indeed, in “2003, a pasture at the existing reuse area site attracted waterfowl when it was inadvertently flooded. This flooded area created ideal ecological conditions for shorebird foraging and nesting and thus, a number of pairs responded opportunistically and bred in the field. Recurvirostrid eggs collected near the pasture had highly elevated [selenium] concentrations.” Addendum 3-6 to 3-7 (emphasis added). But the Addendum dismisses this concern, claiming that “other impacts would be created if the area is not enlarged to handle agricultural drainage.” Addendum 2-5. But deliberating exposing waterfowl to these poisonous waters is a crime under the takings prohibition of the Migratory Bird Treaty Act, 16 U.S.C. section 703. An SEIR/SEIS is needed both to assess the Project’s impacts on wildlife, and also
to determine what these “other” undisclosed impacts may be and to allow the public and decisionmakers to weigh them and make an informed decision.

The Addendum and Initial Study again rely on ineffective mitigation measures from the 2009 FEIS/FEIR in an ill-advised attempt to reduce these new significant and substantially increased impacts. Supposedly, “[m]itigation contained in the Grassland Bypass Project Final EIS/EIR for the existing reuse facility would apply to this area also. This mitigation includes a contingency plan in the event of inadvertent flooding in the reuse area due to breakage of a water supply canal or delivery facility.” Addendum 2-5; Initial Study 1-11. But this one-page contingency plan is vague and fails to provide any enforceable guidelines. The plan, if it can even be called that, recommends that “ponded water . . . be eliminated through the discharge of the water into a tail-water return system or by pumping the water into one of the supply channels in the project or a tail-water return system” within 24 hours. Initial Study, Appendix D, D-2 (emphasis added). But nothing in this contingency plan explains when or how to utilize any of the options presented. Nor does the plan enforce the 24-hour ponding elimination requirement. Instead, the contingency plan defers mitigation for ponding that occurs for more than 24 hours, stating that “an event-specific monitoring plan will be developed to monitor the impacts on bird species resulting from exposure to ponded water.” Initial Study, Appendix D, D-2. In other words, make it up as you go. That approach is the exact opposite of the searching examination and public review of a project’s impacts before project approval that CEQA and NEPA demand.

While acknowledging that the SJRIP field will be increased in size, that field flooding has occurred, and that the flooded field created “ideal ecological conditions for shorebird foraging and nesting, and thus, a number of pairs responded opportunistically and bred in the [contaminated] field,” the Addendum simultaneously dismisses this concern. Instead, SLDMWA claims that a vague and unenforceable mitigation measure that was never analyzed with regard to a reuse area of this size is sufficient. But it is not. An SEIR/SEIS is required to analyze the impacts of the proposed project. CEQA Guidelines § 15162; 40 C.F.R. § 1502.9(c).

For the foregoing reasons, particularly the Ninth Circuit’s recent ruling requiring an NPDES permit for commingled discharges of pollutants into a water of the United States, any extension of the GBP Use Agreement should be denied. SLDMWA must prepare an SEIR/SEIS to consider the impacts of the proposed Project, including the impacts to surface water, groundwater, soil, and biology. SLDMWA’s reliance on an Addendum to support this highly impactful extension violates the CWA, CEQA and NEPA.

Please make these comments part of the public record in this proceeding.
Respectfully submitted,

[Signature]

Stephan C. Volker
Attorney for Pacific Coast Federation of Fishermen's Associations, California Sportfishing Protection Alliance, Friends of the River, San Francisco Crab Boat Owners Association, Inc., Institute for Fisheries Resources, and Felix Smith
LIST OF EXHIBITS


(Omitted from 12-23-2019 Letter)
EXHIBIT

2
November 5, 2019

via email
Ashley.Peters@waterboards.ca.gov

Joseph C. McGahan, Drainage Coordinator
San Luis & Delta-Mendota Water Authority
P.O. Box 2157
Los Banos, CA 93635

Re: Comments of North Coast Rivers Alliance, Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries Resources, San Francisco Crab Boat Owners Association, California Sportfishing Protection Alliance, and Felix Smith, on Tentative Waste Discharge Requirements for Surface Water Discharges from the Grassland Bypass Project Operated by the San Luis and Delta-Mendota Water Authority and United States Bureau of Reclamation

Ms. Peters:

On behalf of North Coast Rivers Alliance, Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries Resources, San Francisco Crab Boat Owners Association, California Sportfishing Protection Alliance, and Felix Smith, we submit the following comments on the October 7, 2019, Tentative Waste Discharge Requirements for the San Luis and Delta-Mendota Water Authority and United States Bureau of Reclamation for Surface Water Discharges from the Grassland Bypass Project (“Project”), scheduled to be discussed at the Central Valley Regional Water Quality Control Board (“Regional Board”) Meeting on December 5, 2019 and December 6, 2019. Please include these comments in the public record.

In operating the Grassland Bypass Project (“GBP”), the San Luis and Delta-Mendota Water Authority (“SLDMWA”) and United States Bureau of Reclamation (“Reclamation”) discharge pollutants into waters of the United States through the San Luis Drain (“SLD”), a point source. The SLD collects and commingles polluted water from a variety of sources, both ground and surface, and conveys this pollution into Mud Slough and thence the San Joaquin River and the Delta. The tentative Waste Discharge Requirements (“WDRs”) for the GBP address only agricultural subsurface drainage flows and stormwater discharges. WDRs ¶ 2. They are not
sufficient because they allow the SLD’s harmful discharges to Mud Slough to continue at unacceptable levels, and without the National Pollutant Discharge Elimination System (“NPDES”) Permit required by law, violating the letter and the spirit of the Porter-Cologne Water Quality Control Act (Water Code § 13000 et seq.), and the Clean Water Act (33 U.S.C. § 1251 et seq.). Approval of the WDRs as written would likewise violate the Public Trust Doctrine and the Delta Reform Act, as these discharges will harm the public trust resources that depend on the receiving waters, and lead to further degradation and destruction of the Delta ecosystem.

I. THE WDRS SANCTION UNLAWFUL DISCHARGES

A. The GBP Discharges Pollutants to Mud Slough from Activities Unrelated to Crop Production

The WDRs state they are not intended to address “any discharges from activities other than those related to crop production.” WDRs ¶ 3. But in fact they do exactly that. It is indisputable that the discharges from the SLD to Mud Slough are commingled flows that discharge pollutants to Mud Slough, and downstream waters from sources that are not related to crop production. The Ninth Circuit has ruled that these commingled discharges from the SLD require an NPDES permit. Pacific Coast Federation of Fishermen’s Associations v. Donald R. Glaser, 937 F.3d 1191, 1199 (9th Cir. 2019) (“PCFFA”). The WDRs ignore and unlawfully allow the discharge of pollutants to waters of the United States without the required NPDES permit, in violation of the Clean Water Act.1

The WDRs would apply to the expanded Project described in SLDMWA’s 2019 Addendum to the Final Environmental Impact Statement / Environmental Impact Report for the Grassland Bypass Project (“2019 Addendum”). The Project includes the use of 200 acres of storage basins to collect storm water for subsequent reuse. It may be that some of this water will be applied to salt-tolerant crops, to the extent that the GBP reuse area has capacity to accept such contaminated water. But during storm events, saturated soils underlying and surrounding these storage basins, and the SLD itself, will continue to cause seepage into the SLD. It is likely that, during the ponding and reuse process, the contaminated water will have higher concentrations of selenium, boron, salt, molybdenum, pesticides, and other pollutants. Regardless of its path, the contaminated water will eventually enter the SLD – a point source – and be discharged into Mud Slough. Under PCFFA, an NPDES permit is required for this discharge.

1 While the WDRs state they address only discharges related to crop production (¶ 3), they acknowledge that “discharge limits apply to selenium from the sediment [deposited in the San Luis Drain] as well as selenium in drainage water.” WDRs ¶ 18.
B. The WDRs Allow Discharges That Will Have Significant Negative Impacts on the Receiving Waters

The SLD conveys and discharges contaminated water that contains high levels of selenium, boron, molybdenum, and other pollutants. The Regional Board acknowledges that the SLD’s discharge into Mud Slough harms “the last six miles of Mud Slough (north)” by adversely impacting its water quality and biota. WDRs ¶ 32. These six miles are those between the SLD’s terminus and Mud Slough’s confluence with the San Joaquin River. Despite these adverse impacts, the WDRs allow this unacceptable discharge because it will be diluted by other flows.

But dilution is not the solution to pollution. SLDMWA’s 2019 Addendum acknowledges that the Project will discharge selenium at levels in excess of the 5 parts per billion (“ppb”) 4-day average set by the Water Quality Control Plan, Fifth Edition, for the Sacramento River and San Joaquin River Basins (“Basin Plan”) when “dilution flows in Mud Slough upstream of the [SLD] are reduced.” 2019 Addendum 3-3. Yet SLDMWA’s 2019 Addendum, as approved, commits only to vague efforts to develop undefined and unproven “adaptive management approach[es] to implement additional corrective actions” when the 4-day limit is exceeded.

In addition, the 2019 Addendum relies upon attainment of selenium load targets set by the Long-Term Storm Water Management Plan, as measured at Site B (the terminus of the SLD into Mud Slough), to downplay the impacts of the SLD’s excessive selenium discharges. 2019 Addendum 3-4. But the load level can be measured after it is diluted downstream at Crows Landing, rather than in Mud Slough where it is most likely to be exceeded. Thus, the Regional Board proposes to allow selenium discharges at levels that are unacceptably high, so long as the 5 micrograms per liter (“µg/L”) selenium objective is met by the time the discharges have been diluted at Crows Landing. WDRs ¶ 15. Moreover, as discussed in more detail below, the 5 µg/L selenium objective is not sufficiently protective of fish or other aquatic life, as it uses the Environmental Protection Agency’s (“EPA’s”) now-superseded 1999 selenium criteria.

The WDRs allow these damaging discharges to continue, in part, because “a plan will be submitted” to address efforts to reduce use of the SLD, on an annual basis. WDRs ¶ 32(c). This requirement was also contained in the 2015 WDRs, but did not achieve its objective then. The creation of annual drainage reduction plans has failed to eliminate the continued harmful drainage.

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2 This standard can also be expressed as 5 micrograms per liter (“µg/L”).

The Regional Board has the authority and ability to curtail these harmful discharges by enforcing the water quality standards established in the Basin Plan, and protecting the resources and beneficial uses under its jurisdiction. It must act now to prevent the Project’s harmful discharges from continuing to degrade water quality in Mud Slough, the San Joaquin River, and Delta.

C. SLDMWA and Reclamation Must Obtain an NPDES Permit for the Grassland Bypass Project

The WDRs state that the Regional Board “will begin the appropriate permitting process” for the Grassland Bypass Project after the final resolution of the litigation that the Ninth Circuit decided in PCFFA, “if . . . it is determined that additional permitting is needed for discharges from the Grassland Drainage Area.” WDRs ¶ 3. But the time for this permitting is now, not later. The Ninth Circuit’s ruling in PCFFA makes clear that commingled discharges – like those of the SLD – are not subject to the agricultural return flow exemption, and require an NPDES permit. PCFFA, 937 F.3d at 1199. Under this ruling the Regional Board may not allow discharges from the SLD to Mud Slough unless an NPDES permit is obtained.

II. WDRS FAIL TO PROTECT BENEFICIAL USES AND PUBLIC TRUST RESOURCES

Allowing the Project’s discharges of selenium, boron, molybdenum, salt, pesticides, and other pollutants unlawfully impairs protected beneficial uses and harms public trust resources.

Selenium is toxic to biological resources, both avian and aquatic. The EPA’s 2016 Aquatic Life Ambient Water Quality Criterion for Selenium (“Selenium Criterion”) sets a four-part criterion, which includes fish tissue and water column components. The water column components include a 30-day lentic concentration of 1.5 µg/L (which applies in lakes and impoundments) and a 30-day lotic concentration of 3.1 µg/L (which applies in rivers and streams) as the recommended selenium concentration limit. For intermittent exposure, the Selenium Criterion recommends the implementation of an intermittent exposure equation.\(^4\) EPA recommends that the 30-day and intermittent water column concentration levels not be exceeded more than once every three years on average. The fish tissue concentration limits are continuous and may never be exceeded. For eggs and ovaries, the concentration limit is 15.1 milligrams per kilogram dry weight. The whole body or muscle concentration is either 8.5 milligrams per kilogram dry weight.

\[ WQC_{\text{int}} = (WQC_{30\text{-day}} - C_{\text{bkgrnd}} (1-f_{\text{int}}))/f_{\text{int}}, \]

where \( WQC_{30\text{-day}} \) is [either the lentic or lotic] monthly element . . . \( C_{\text{bkgrnd}} \) is the average background selenium concentration, and \( f_{\text{int}} \) is the fraction of any 30-day period during which elevated selenium concentrations occur, with \( f_{\text{int}} \) assigned a value \( \geq 0.033 \) (corresponding to 1 day).” 2016 Aquatic Life Ambient Water Quality Criterion for Selenium – Freshwater, Table 4.1.
kilogram dry weight, for whole body measurements, or 11.3 milligrams per kilogram dry weight muscle measurements, which are taken from skinless, boneless filets. The Selenium Criterion addresses the bioaccumulative risks of selenium exposure on fish, including those that occur from short-term, high exposure events. The EPA’s recommended levels are more protective, overall, than the 5 µg/L 4-day average included in the Basin Plan and WRDs.

Under the Basin Plan, the beneficial uses of Mud Slough (North) include “limited irrigation supply, stock watering, water contact recreation and noncontact water recreation, sportfishing, shellfish harvesting, warm water aquatic habitat, warm water spawning and wildlife habitat.” WDRs ¶ 12; Basin Plan Table 2-1, pp. 2-14 to 2-15. Discharges must not impair these beneficial uses. Yet the GBP’s discharges of contaminated water to Mud Slough will continue under the WDRs – and may increase as the GBP expands – at levels that are higher than those protective of aquatic life.

The Public Trust Doctrine requires agencies that manage public trust resources, including the Regional Board, to avoid or mitigate impacts to public trust resources whenever feasible. National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, 426; Marks v. Whitney (1971) 6 Cal.3d 251, 259; San Francisco Baykeeper Inc. v. State Lands Com. (2018) 29 Cal.App.5th 562, 570-571. By allowing discharges at levels that will harm aquatic life and birds, the Regional Board’s WDRs are insufficient to protect public trust resources. Therefore they violate the Public Trust Doctrine.

III. THE REGIONAL BOARD’S WDRS ARE INSUFFICIENT TO COMPLY WITH APPLICABLE REQUIREMENTS OF CEQA

The Regional Board relies on the environmental analysis performed by SLDMWA in its 2019 Addendum to satisfy the requirements of the California Environmental Quality Act, Public Resources Code section 21000 et seq. (“CEQA”). WDRs ¶¶ 29-32. But the 2019 Addendum is not sufficient. As discussed in the September 13, 2019, comment letter from the Pacific Coast Federation of Fishermen’s Associations and the Institute for Fisheries Resources to SLDMWA (attached as Exhibit 1 and incorporated herein by reference), the Addendum fails to appropriately study and disclose the significant impacts of the Grassland Bypass Project. Further, the WDRs themselves are insufficient to evaluate and avoid or mitigate the impacts of the Project.

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5 Water Code section 13389 exempts the Regional Board from complying with Chapter 3 of the California Environmental Quality Act, which addresses Environmental Impact Reports prepared by State Agencies. Water Code section 13389 does not exempt the Regional Board from other portions of CEQA. By relying upon the inadequate 2019 Addendum, the Regional Board has failed to appropriately study and mitigate the impacts of the Grassland Bypass Project.
IV. THE TENTATIVE WDRS ALLOW DISCHARGES THAT DAMAGE THE DELTA ECOSYSTEM, IN VIOLATION OF THE DELTA REFORM ACT

The Delta Reform Act requires any state agency “that proposed to undertake a covered action” to “prepare a written certification of consistency with detailed findings as to whether the covered action is consistent with the Delta Plan,” and submit the written findings to the Delta Stewardship Council. Water Code § 85225. It defines “[c]overed action” as a “plan, program, or project” as defined by Public Resources code section 21065, that:

1. Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.
2. Will be carried out, approved, or funded by the state or a local public agency.
3. Is covered by one or more provisions of the Delta Plan.
4. Will have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta.

Water Code § 85057.5(a). The Project discharges pollutants to the Delta that harm its fish and wildlife and therefore will have a significant impact on achievement of the Delta Reform Act’s coequal goals. “‘Coequal goals’ means the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.” Water Code §85054.

Neither SLDMWA nor the Regional Board has addressed whether the Project is consistent with the Delta Plan or the coequal goals of the Delta Reform Act. The Delta Plan, however, acknowledges that the 5 µg/L objective for chronic exposure “may not be sufficient” for aquatic organisms and fish. Delta Plan, Chapter 6, p. 228. The Delta Plan recommends that projects maintain water quality “at a level that supports, enhances, and protects” the beneficial uses identified in the Basin Plan. WQ R1. As formulated, the WDRs permit harmful discharges that degrade the quality of the Delta ecosystem, contrary to the Delta Reform Act and the Delta Plan’s requirements that projects restore, protect, and enhance the Delta ecosystem. Water Code §§ 85054, 85066; Delta Plan Chapters 4 (Protect, Restore and Enhance the Delta Ecosystem) and 6 (Water Quality). The Project is neither consistent with the Delta Plan nor the coequal goal of “protecting, restoring, and enhancing the Delta ecosystem.” Water Code § 85054.

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CONCLUSION

For the foregoing reasons, the WRDs as proposed violate several environmental laws. These discharges require an NPDES permit, and may not be allowed unless and until an NPDES permit regulating them is issued. They also require additional environmental review under CEQA. Further, they must be revised, as they allow SLDMWA to discharge pollutants into Mud Slough at levels that harm beneficial uses and public trust resources in violation of the Porter Cologne Act, the Clean Water Act, the Public Trust Doctrine and the Delta Reform Act.

Respectfully submitted,

Stephan C. Volker
Attorney for North Coast Rivers Alliance, Pacific Coast Federation of Fishermen’s Associations, California Sportfishing Protection Alliance, Friends of the River, San Francisco Crab Boat Owners Association, Inc., Institute for Fisheries Resources, and Felix Smith
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF MERCED

Civ. No. 19CV-04989

VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND ATTORNEYS’ FEES

PETITIONERS AND PLAINTIFFS,

NORTH COAST RIVERS ALLIANCE, SAN FRANCISCO CRAB BOAT OWNERS ASSOCIATION, CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, PACIFIC COAST FEDERATION OF FISHERMEN’S ASSOCIATIONS, and INSTITUTE FOR FISHERIES RESOURCES,

v.

SAN LUIS AND DELTA-MENDOTA WATER AUTHORITY, and DOES 1 through 100,

Respondents and Defendants,

UNITED STATES BUREAU OF RECLAMATION, and DOES 101 through 200,

Real Parties in Interest.

PETITIONERS AND PLAINTIFFS, NORTH COAST RIVERS ALLIANCE, SAN FRANCISCO CRAB BOAT OWNERS ASSOCIATION, CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, PACIFIC COAST FEDERATION OF FISHERMEN’S ASSOCIATIONS, and INSTITUTE FOR FISHERIES RESOURCES,

VERIFIED PETITION AND COMPLAINT
FISHERIES RESOURCES (collectively “petitioners” or “NCRA”) hereby petition the Court for a writ of mandate against defendant and respondent SAN LUIS AND DELTA-MENDOTA WATER AUTHORITY (“the Authority”) and by this Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and for Attorney’s Fees (“Verified Petition”) hereby allege as follows:

INTRODUCTION

1. This is a public interest citizen suit to enforce the California Environmental Quality Act, Public Resources Code (“PRC’) section 21000 et seq. (“CEQA”), the Sacramento-San Joaquin Delta Reform Act, Water Code section 85000 et seq. (“Delta Reform Act”), the Public Trust Doctrine and the Clean Water Act, 33 U.S.C. section 1251 et seq. (“CWA”). Petitioners bring this action to challenge the Authority’s October 10, 2019 certification of the Addendum to the Final 2009 EIS/EIR (“Addendum”) for the Grassland Bypass Project (“GBP”), and all related approvals including the continuation and modification of the Grassland Bypass Project, adoption of the Long-Term Storm Water Management Plan 2020-2045, approval of a Mitigation Monitoring and Reporting Program, adoption of CEQA Findings, and approval of a Statement of Overriding Considerations (collectively, “the Project”) which will extend the term of the GPD Use Agreement. In approving the Project, the Authority violated CEQA, the Delta Reform Act, the Public Trust Doctrine and the Clean Water Act.

2. CEQA is California’s preeminent environmental law. It requires all public agencies to examine the potential adverse impacts of their actions before taking them. It is designed to protect California’s extraordinary environmental resources from uninformed and needlessly destructive agency actions.

3. CEQA requires the Authority to fully examine the impacts of its actions and to carefully consider alternatives and mitigation measures that would reduce those impacts. “[I]f there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects” of a project, then CEQA forbids the Authority from approving the project. PRC § 21002.

4. The Public Trust Doctrine requires the Authority to identify beneficial uses of navigable waters, including those dependent on public trust resources, and to establish and achieve the water quality standards necessary to protect them.
5. The Clean Water Act is the nation’s preeminent law regulating the discharge of pollutants such as selenium to waters of the United States such as Mud Slough and the San Joaquin River. The CWA requires the Authority to secure a National Pollutant Discharge Elimination System (“NPDES”) permit before it may discharge pollutants from the Project to Mud Slough and the San Joaquin River. 33 U.S.C. §§ 1311, 1342.

6. The Authority improperly approved the Project, thus allowing the extension of the GBP Use Agreement, without adequately examining the environmental impacts of doing so, without adequately protecting public trust resources and uses, and without compliance with state and federal laws protecting the Bay-Delta and its southern tributaries including the San Joaquin River and Mud Slough, and their public trust resources and uses, from pollutants.

VENUE AND JURISDICTION

7. This Court has jurisdiction over this proceeding pursuant to Code of Civil Procedure (“CCP”) sections 526 (injunctive relief), 1060 (declaratory relief), 1085 (traditional mandamus) and 1094.5 (administrative mandamus); PRC sections 21168 (CEQA administrative mandamus) and 21168.5 (CEQA traditional mandamus); and article VI, section 10 of the California Constitution.

8. Venue is proper in this Court pursuant to CCP sections 393 (actions against public officers) and 395 (actions generally) because the Authority’s offices are located in Los Baños, California in Merced County, and a substantial part of the Project is located within Merced County.

9. Pursuant to CCP section 388, petitioners are serving the California Attorney General with a copy of this Verified Petition. Consistent with PRC section 21167.5, petitioners timely transmitted notice of this suit to the Authority and the California Attorney General.

PARTIES

10. Petitioner NORTH COAST RIVERS ALLIANCE (“NCRA”) is a non-profit unincorporated association with members throughout Northern California. NCRA was formed for the purpose of protecting California’s rivers and their watersheds from the adverse effects of excessive water diversions, ill-planned urban development, harmful resource extraction, pollution, and other forms of environmental degradation. Its members use and enjoy California’s rivers and watersheds for recreational, aesthetic, scientific study, and related non-consumptive uses. The interests of NCRA and
its members will be adversely affected and injured by the Project unless the relief requested herein is granted.

11. Petitioner SAN FRANCISCO CRAB BOAT OWNERS ASSOCIATION, INC. ("San Francisco Fishermen") is a century-old association of owners and operators of small, family-owned fishing boats that catch Dungeness crab, wild California King salmon, Pacific herring, and other species that live in and depend upon the cold waters of the Pacific Ocean, and San Francisco Bay-Delta and the Sacramento and San Joaquin Rivers and their tributaries. San Francisco Fishermen is also actively involved in community education and advocacy concerning fisheries resources legislation to ensure that the rich heritage of commercial fishing in the Bay Area will survive for future generations. San Francisco Fishermen and its members will be harmed by the Project because it would threaten their continued historic use and enjoyment of the fisheries resources of the Delta and its tributary and connected ecosystems.

12. Plaintiff CALIFORNIA SPORTFISHING PROTECTION ALLIANCE ("CalSPA") is a non-profit corporation organized under the laws of the State of California. CalSPA has thousands of members who reside and recreate throughout California. CalSPA’s members are citizens who, in addition to being duly licensed sport fishing anglers, are interested in the preservation and enhancement of California’s public trust fishery resources and vigorous enforcement of California’s environmental laws. CalSPA members have been involved for decades in public education and advocacy efforts to protect and restore the public trust resources of California’s rivers. CalSPA members use California’s rivers and the Delta for recreation, scientific study and aesthetic enjoyment. The interests of CalSPA and its members will be adversely affected and injured by the Project unless the relief requested herein is granted.

13. Petitioner PACIFIC COAST FEDERATION OF FISHERMEN’S ASSOCIATIONS ("PCFFA") is a nonprofit membership organization incorporated in 1976 with headquarters located in San Francisco, California. PCFFA comprises more than 14 separate commercial fishing and vessel owners’ associations situated along the West Coast of the United States. By virtue of its combined membership of approximately 750 fishermen and women, PCFFA is the single largest commercial fishing advocacy organization on the West Coast. PCFFA represents the majority of California’s
organized commercial salmon fishermen and has been an active advocate for the protection of Pacific
salmon and their spawning, rearing and migratory habitat for more than 30 years. PCFFA and its
members would be harmed by the proposed Project unless the relief requested herein is granted.

14. Petitioner INSTITUTE FOR FISHERIES RESOURCES (“IFR”) is a non-profit, tax-exempt
organization that works to protect and restore salmon and other fish populations and the human
economies that depend on them. IFR maintains its principal place of business in San Francisco,
California. IFR both funds and manages many fish habitat protection programs and initiatives. In that
capacity, IFR advocates for reforms to protect fish health and habitat throughout the West Coast of the
United States and has successfully advocated for dam removals, improved pesticide controls, better
forestry stream protection standards, reduced discharge of pollutants, and enhanced marine and
watershed conservation regulations throughout the West Coast. IFR has worked tirelessly for years to
restore and enhance the Delta and its beleaguered fish and wildlife. IFR and its members will be directly
and indirectly injured by the Project unless the relief requested herein is granted.

15. Defendant SAN LUIS & DELTA-MENDOTA WATER AUTHORITY (“the Authority”)
serves 29 member agencies reliant upon water exported from the Bay-Delta by the Bureau of
Reclamation’s (“Reclamation’s”) Central Valley Project. The members of the Authority deliver water to
approximately 1.1 million acres of farmland and nearly 2 million California residents. The Authority, in
association with Reclamation, operates the Grassland Bypass Project. The Authority is also the lead
agency under CEQA for the Project and its Addendum to the 2009 EIS/EIR for the GBP Use Agreement.

16. The true names and capacities of respondents DOES 1-100, inclusive, are unknown to
petitioners who therefore sue such respondents by fictitious names pursuant to CCP section 474.
Petitioners are informed and believe, and based on such information and belief allege, that the
fictitiously named respondents are state or local officials or agencies who are responsible, in whole or in
part, for the approval and implementation of the Project. Petitioners will, with leave of Court if
necessary, amend this Verified Petition if and when the true names and capacities of said DOE
respondents have been ascertained.

17. Real party in interest the UNITED STATES BUREAU OF RECLAMATION
(“Reclamation”) is being sued in his official capacity. Reclamation is the federal agency within the
United States Department of the Interior charged with managing the Central Valley Project. Reclamation, in association with the Authority, operates the Grassland Bypass Project.

18. The true names and capacities of real parties in interest DOES 101-200, inclusive, are unknown to petitioners who therefore sue such respondents by fictitious names pursuant to CCP section 474. Petitioners are informed and believe, and based on such information and belief allege, that the fictitiously named real parties in interest are state or local officials or agencies who are responsible, in whole or in part, for the approval and implementation of the Project. Petitioners will, with leave of Court if necessary, amend this Verified Petition if and when the true names and capacities of said Doe respondents have been ascertained.

GENERAL ALLEGATIONS

19. Petitioners have authorized their attorneys to file this lawsuit on their behalf to vindicate their substantial beneficial interest in securing the Authority’s compliance with the law.

20. Petitioners have performed any and all conditions precedent to the filing of this Verified Petition and Complaint and have exhausted any and all available administrative remedies to the extent required by law.

21. Petitioners have no plain, speedy, and adequate remedy in the ordinary course of law within the meaning of CCP section 1086 in that, unless this Court issues its writ of mandate setting aside the Authority’s approval of the Project, and ordering it to comply with the laws whose violation is alleged herein, the environmental interests of petitioners and the public that are protected by those laws will be substantially and irreparably harmed. No monetary damages or other legal remedy could adequately compensate petitioners for the harm to their beneficial interests, and to the environment, occasioned by the Authority’s unlawful conduct.

22. Petitioners are entitled to declaratory relief under CCP section 1060 because an actual controversy exists between petitioners and the Authority. Petitioners contend that the Authority has acted in violation of applicable laws and must therefore vacate and set aside its approval of the Project. Petitioners are informed and believe that the Authority disputes this contention. A judicial resolution of this controversy is therefore necessary and appropriate.

23. Petitioners are also entitled to injunctive relief under CCP section 526 because the
Authority’s approval of the Project threatens irreparable environmental harm. Unless enjoined, the
Authority will implement the Project despite its lack of compliance with applicable laws, causing undue
and unnecessary environmental degradation. Petitioners would thereby suffer irreparable harm due to the Authority’s failure to take the required steps to adequately protect the environment. Injunctive relief is thus warranted under CCP section 525 et seq. and PRC section 21168.9 to prevent irreparable harm to the environment.

LEGAL BACKGROUND

CEQA

24. CEQA is California’s primary statutory mandate for environmental protection. It applies to all state and local agencies, and requires them to “first identify the [significant] environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives.” Sierra Club v. State Board of Forestry (1994) 7 Cal.4th 1215, 1233. Its most important substantive imperative requires “public agencies to deny approval of a project with significant adverse effects when feasible alternatives or feasible mitigation measures can substantially lessen such effects.” Sierra Club v. Gilroy City Council (1990) 222 Cal.App.3d 30, 41.

25. CEQA’s mandate for detailed environmental review “ensures that members of the [governmental decision-making body] will fully consider the information necessary to render decisions that intelligently take into account the environmental consequences” of their proposed action. Mountain Lion Foundation v. Fish and Game Commission (1997) 16 Cal.4th 105, 133; PRC §§ 21080.5(d)(2)(D), 21091(d)(2); 14 C.C.R. [CEQA Guidelines] (“Guidelines”) § 15088. The CEQA process thus “protects not only the environment but also informed self-government.” Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553, 564.

26. California “public agencies” must comply with CEQA when they approve discretionary projects. PRC § 21080(a).

27. The Authority is a “public agency” and a “state agency” as defined in CEQA. PRC § 21063.

28. When an EIR has been prepared for a project, CEQA Guidelines section 15162 directs that a
Subsequent Environmental Impact Report ("SEIR") be prepared where "[s]ubstantial changes are
proposed in the project," "[s]ubstantial changes occur with respect to the circumstances under which the
project is undertaken," or "[n]ew information of substantial importance" shows a change in the project’s
effects, mitigation measures, or alternatives, such that new significant environmental effects or a
substantial increase in the severity of previously identified significant effects, are now shown.

29. An addendum to an EIR is only allowed where changes are necessary but none of the
conditions requiring preparation of an SEIR are met. Guidelines § 15164(a). If there are any “new
significant environmental effects or a substantial increase in the severity of previously identified
significant effects,” an SEIR—rather than an addendum—must be prepared. Guidelines §§ 15162(a),
15164(a). Similarly, if there are mitigation measures or alternatives “previously found not to be feasible
[that] would in fact be feasible” or that are “considerably different . . . [and] would substantially reduce
one or more significant effects,” an SEIR must be prepared. Id.

The Sacramento-San Joaquin Delta Reform Act

30. To address the indisputably perilous state of the Delta, in 2009 the California Legislature
enacted the Sacramento-San Joaquin Delta Reform Act, Water Code section 85000 et seq. ("Delta
Reform Act"), declaring that “[t]he Sacramento-San Joaquin Delta watershed and California’s water
infrastructure are in crisis and existing Delta policies are not sustainable.” Water Code § 85001(a),
emphasis added. The Legislature found that “‘the Delta . . . is a critically important natural resource for
California and the nation. It serves Californians concurrently as both the hub of the California water
system and the most valuable estuary and wetland ecosystem on the west coast of North and South
America.” Water Code § 85002. “Resolving the crisis requires fundamental reorganization of the
state’s management of Delta watershed resources.” Water Code § 85001(a), emphasis added.

31. The Delta Reform Act was enacted to advance the “coequal goals” of restoring the Delta
ecosystem and ensuring water supply reliability.” Water Code § 85054. To this end, the Act requires
adoption of a legally enforceable Delta Plan by the Delta Stewardship Council to achieve these coequal
goals. It also requires any state agency “that proposes to undertake a covered action” to “prepare a
written certification of consistency with detailed findings as to whether the covered action is consistent
with the Delta Plan,” and submit the written findings to the Delta Stewardship Council. Water Code §
85225. It defines “[c]overed action” as a “plan, program, or project” as defined by Public Resources Code section 21065, that:

(1) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.
(2) Will be carried out, approved, or funded by the state or a local public agency.
(3) Is covered by one or more provisions of the Delta Plan.
(4) Will have a significant impact on achievement of one or both of the coequal goals . . . . Water Code § 85057.5(a).

The Public Trust Doctrine

32. Water Code section 85023 states, “the longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta.”

33. In United States v. State Water Resources Control Board (1986) 182 Cal.App.3d 82, the court noted that the Public Trust Doctrine mandates “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.” Id. at 149, citing National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, 445. The court held that the Public Trust Doctrine necessarily requires agencies to “consider water quality for the protection of beneficial uses” when determining whether or not to approve a project. Id. at 150-151.

34. “Public trust easements are traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes.” Marks v. Whitney (1971) 6 Cal.3d 251, 259. For nearly 50 years it has been settled law in California that public trust values also “encompass[ . . .] the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.”

35. Although compliance with CEQA “may assist an agency in complying with its duties under the public trust doctrine . . . .[,] CEQA review of a project does not necessarily or automatically satisfy

FACTUAL BACKGROUND

36. The Grassland Bypass Project (“GBP”), which began in 1996, is a misguided attempt to reduce the load of selenium and other pollutants discharged from the Grassland Drainage Area (“GDA”) into wetlands and refuges by diverting those discharges through the San Joaquin River Water Quality Improvement Project (“SJRIP”) to the Grassland Bypass Channel and the San Luis Drain (“Drain”), and subsequently discharging the polluted waste stream into Mud Slough, a water of the United States.

37. For decades now, Reclamation and the Authority (collectively, the “Operators”) have been discharging water laden with pollutants harmful to human health and to the fragile ecosystems of Mud Slough, the San Joaquin River, and the Bay-Delta. The original GBP was permitted for just 5 years, as a short-term, stop-gap project. However, with extensions, it has now operated for 23 years – long past the time by which it was to be shuttered.

38. After preparation of a Final Environmental Impact Statement / Final Environmental Impact Report, the Operators signed a Use Agreement in 2001 allowing GBP operation from September 28, 2001 through December 31, 2009, when it was to be terminated.

39. However, the GBP was not closed in 2009. Instead, that year the Operators prepared a Final Environmental Impact Statement / Final Environmental Impact Report (“2009 EIS/EIR”) and in 2010
approved the current Use Agreement (2010 Use Agreement) allowing the continuation of the GBP from 2010 through December 31, 2019.

40. The ongoing discharges of pollutants from the GBP violate the Clean Water Act. Under sections 301 and 402 of the CWA, an NPDES permit is required for those discharges. 33 U.S.C. §§ 1311, 1342. California’s Porter-Cologne Water Quality Control Act requires compliance with the CWA. Water Code § 13377. In 1996, the Operators obtained an NPDES permit for the discharge of groundwater from the Project. But in September 1996, that NPDES permit was rescinded. Consequently, the current discharges are not authorized by any NPDES permit. Nonetheless, the Authority approved the Project knowing that it collects polluted groundwater and discharges it into the San Luis Drain, Mud Slough, and eventually into the San Joaquin River and the Bay-Delta without an NPDES permit. The Authority’s approval of the Project therefore violates the Clean Water Act.

41. On September 6, 2019 the Ninth Circuit Court of Appeals confirmed that “Congress intended for discharges that include return flows from activities unrelated to crop production to be excluded from the statutory exception, thus requiring an NPDES permit for such discharges.” PCFFA v. Glaser, 937 F.3d 1191, 1199 (9th Cir. 2019). The wastewaters discharged by the GBP through the San Luis Drain are commingled and include contaminated water from land that is neither irrigated nor farmed. Therefore, under this ruling, an NPDES permit is required for operation of the Drain. Id.

42. By approving an extension of the GBP Use Agreement allowing the continued discharge of pollutants from the Drain into waters of the United States without the required NPDES permit, the Authority is violating the CWA. The Authority’s attempted end-run around the CWA – by claiming the Drain is exempt from the NPDES permit requirement – was forcefully rejected by the Ninth Circuit in PCFFA v. Glaser. 937 F.3d at 1199-1201.

43. The Authority’s violation of the CWA is causing significant environmental harm. Discharges by the GBP contain high levels of selenium. Selenium kills juvenile salmon and steelhead and causes birth defects in the birds that nest and feed along the shorelines and in the wetlands affected by the Project. According to recent monitoring reports, selenium levels in the San Joaquin River exceed safe drinking water standards. Selenium pollution from the Drain is present throughout the Bay-Delta, a vital estuarine system which, through the Central Valley Project and the State Water Project, serves as
the water supply for 20 million Californians.

44. Despite this serious pollution impact, the Operators have extended the operational life of the GBP for an additional 25 years, until 2045, without first securing the NPDES permit that is required, and remedying the pollution that the CWA prohibits.

45. Petitioners exhausted their administrative remedies by timely submitting detailed comments objecting to the Project and its Addendum on September 13, 2019. Petitioners pointed out in their comments that the Authority must comply with the CWA’s requirement for an NPDES permit, prepare an SEIR for the Project, comply with the Delta Reform Act, and protect public trust resources, among other objections.

46. Despite these objections by Petitioners and others, on October 10, 2019 the Authority issued a Notice of Determination (“NOD”) certifying its Final Addendum and Initial Study and approving the Project. The NOD was posted by the Governor’s Office of Planning and Research on October 11, 2019.

FIRST CAUSE OF ACTION
(Violation of CEQA)
(Alleged by All Petitioners Against All Respondents)

47. The paragraphs set forth above and below are realleged and incorporated herein by reference.

48. Petitioners bring this First Cause of Action for violations of CEQA pursuant to PRC sections 21168 and 21168.5, on the grounds that the Authority committed a prejudicial abuse of discretion by failing to proceed in the manner required by law in approving a deeply flawed Project based on a legally inadequate Addendum.

49. The purpose of an addendum is to provide agencies and the public with information about changes to a proposed project that will cause any “new significant environmental effects or a substantial increase in the severity of previously identified significant effects,” or result in changes to the feasibility of any mitigation measures or alternatives, whether or not they were previously considered. Guidelines §§ 15162(a), 15164(a). An addendum is not appropriate where, as here, “[s]ubstantial changes are proposed in the project,” “[s]ubstantial changes occur with respect to the circumstances under which the project is undertaken,” or “[n]ew information of substantial importance” shows a change in the project’s
effects, mitigation measures, or alternatives such that new significant environmental effects or a substantial increase in the severity of previously identified significant effects are now shown. Guidelines § 15162(a).

50. The Addendum purports to assess the impacts of the Authority’s proposed Long-Term Storm Water Management Program (“Storm Water Program”). The Storm Water Program would add approximately 200 acres of “storage basins,” expand the Project’s reuse area and otherwise modify the operation of the Project. These changes will have significant impacts not previously analyzed, and therefore require preparation of an SEIR.

51. There is a second reason an SEIR is required. There have been numerous changes in the circumstances surrounding the Project, as the Authority admits. Addendum Appendix A 19. These changes, along with the changes to the Project itself, have significant impacts not previously analyzed that must be studied in an SEIR rather than an addendum.

52. There is a third reason an SEIR is required. New information of substantial importance has come to light in the intervening years since the GBP was last approved in 2009, showing changes in the Project’s effects not previously analyzed that require analysis in an SEIR.

53. The Authority’s certification of the Addendum instead of an SEIR, and approval of a 25-year extension for the GBP Use Agreement based on the Addendum, violate CEQA. The Addendum is inadequate, and an SEIR was required, for the reasons detailed below.

Surface Water, Groundwater, and Soils

a. The Project Requires an NPDES Permit

54. The Authority certified the Addendum and approved a 25-year extension of the GBP Use Permit despite the fact that it is thereby violating the Clean Water Act by discharging polluted flows from the GBP into waters of the United States without the required NPDES permit. This violation of the CWA contravenes CEQA’s requirement that the Authority must disclose whether the Project would “[v]iolate any . . . waste discharge requirements.” Guidelines Appendix G, Environmental Checklist Form, Subdivision X (“HYDROLOGY AND WATER QUALITY”) Question “a.” CEQA requires that this violation be addressed in an SEIR because it raises new information of substantial importance and changes the circumstances surrounding the Project such that significant environmental effects not
previously analyzed are shown. Guidelines § 15162(a).

**b. Adding 200 Acres of Storage Basins Poses Significant New Impacts**

55. The Addendum states that the Storm Water Program’s use of 200 acres of storage basins to collect storm water for subsequent release will not significantly impact water quality. Addendum 3-4 to 3-5. The Addendum claims that, by impounding storm flows, and metering their release onto the reuse area, contaminated discharges would be avoided or reduced to insignificance. *Id.* This assertion is based on the assumption that storm water that would be collected in these storage basins from December to May would not discharge pollutants such as selenium, boron, salt, and molybdenum to Mud Slough and thence the San Joaquin River. Addendum 3-3. That premise is false. As the Authority admits, the storage basins are unlined and will allow seepage of their contaminated water to the underlying and surrounding groundwater. Addendum Appendix A 10. Furthermore, foreseeable weather conditions and constraints on the SJRIP’s efficacy and operational capacity may result in the discharge of untreated water to the storage basins on the SJRIP, as further discussed below. The potential impacts of those discharges must be analyzed in an SEIR.

**c. Shutting Down Sump Pumps During Wet Weather Creates Significant New Impacts**

56. In an attempt to reduce the volume of contaminated groundwater in its discharges, the Storm Water Program calls for wastewater sump pumps to be turned off “prior to and during wet weather flows.” *Id.* But as the impounded storm water collects in these storage basins, it will add to the contaminants in the already impaired groundwater and soils underlying and surrounding the basins, exacerbating their contamination. Addendum Appendix A 10. Consequently, the impounded wastewater will simply create additional saturated soils, ponds of contaminated water, and polluted runoff, all of which will continue to enter the Drain by gravity flow and seepage, and ultimately discharge into Mud Slough.

**d. Relocating Contaminated Sediment Did Not Eliminate the Problem**

57. The Authority claims it has removed from the Drain approximately 180,000 cubic yards – so far – of contaminated sediment. But the question remains whether this contaminated sediment may nonetheless find its way into the groundwater that drains into the San Luis Drain. Much of this contaminated sediment was apparently relocated to old drains, or placed elsewhere in the reuse area. If
so, surface runoff and groundwater will continue to infiltrate this contaminated sediment, and remobilize these contaminants – including high levels of selenium and other pollutants – into the water table, and ultimately the San Luis Drain. This potential pathway of recontamination must be disclosed and its impacts and their mitigation must be addressed.

**e. Expanding the Reuse Area Does Not Solve the Contamination Problem**

58. The Storm Water Program would also expand the size of the reuse area. The Addendum states that the expansion is necessary because the existing reuse area cannot be used to store and treat the seleniferous water without dangerous ponding. Addendum 2-5. In other words, the reuse area is unable to serve the purpose for which it was ostensibly designed. Instead of reevaluating the wisdom of the system in light of its failure, the Authority is doubled-down on the Project by expanding its size. The Authority claims that because the expansion area “represent[s] a 9% increase” over the reuse area permitted in 2009, and that “crops grown and water management will be identical to the existing project,” no further analysis is needed. Addendum Appendix A 11. But this logic is fatally flawed. The SJRIP is broken. It cannot serve the purpose for which it is designed. This broken Project must be replaced with effective treatment, not expanded.

**f. The Addendum Relies on Obsolete and Inaccurate Modeling**

59. The Authority did not perform any new modeling of the water quality impacts associated with the Storm Water Program, including impacts resulting from the increase in the size of the reuse area or the use of the proposed new storage basins. Addendum 3-11. By relying on out-of-date modeling that does not accurately reflect the Storm Water Program’s impacts, or the changed conditions at the reuse area, the Authority has precluded informed decisionmaking and therefore failed to comply with CEQA. Under CEQA Guidelines section 15162, these new and substantially increased impacts must be thoroughly studied in an SEIR.

**Biology**

**a. Use of Storage Basins Exposes Waterfowl to Elevated Selenium**

60. The changes contemplated in the Addendum will substantially increase the severity of previously identified biological impacts and cause significant new biological impacts that were not considered in the 2009 FEIS/FEIR. For example, the Addendum proposes “to accumulate storm water in
the [storage basins in the GDA] as needed to reduce peak flows during high rainfall events ... for subsequent release of the storm water through the Drain or to the reuse area.” Addendum 2-3. As the Addendum acknowledges, use of storage basins in the GDA has the potential to expose waterfowl to water with elevated selenium levels if the basins cannot promptly be drained. Addendum 2-3. But nothing in the Addendum, 2009 FEIS/FEIR, or the Initial Study indicates that the basins will be promptly drained, or that these impacts will be otherwise mitigated to insignificance. Rather, the Authority ignores the Project’s impacts on the “several avian species ... observed on the existing reuse area” because the “observed densities of birds” are low.

b. Reliance on the Ineffectual SJRIP Is Unavailing

61. The Addendum claims that “[w]ater in the basins would be distributed to the SJRIP to meet irrigation demand as soon as practical,” but “as soon as practical” does not ensure that the basins will be “promptly drained” to protect wildlife. Addendum 2-3. In fact, the Authority will only deviate from its primary goal of distributing the water “as soon as practical” “[i]n rare cases ... to prevent evapo-concentration if there is not sufficient reuse capacity to drain the basins.” Addendum 2-3 to 2-4. The only assurance the Addendum provides is that the basins would be emptied by late May. Addendum 2-4. Aside from a late May deadline, the Addendum fails to provide any guidelines or criteria for when the basins will be drained, nor does it even consider what actions and facilities would be needed to promptly drain the basins to protect wildlife.

c. Proposed Mitigations for Irrigation Ditches Are Ineffectual

62. The Addendum and Initial Study argue that mitigation measures designed to limit the impacts of irrigation ditches in the 2009 EIS/EIR will help “avoid impacts to wildlife” from these storage basins, but the effectiveness of the mitigations is doubtful and moreover, they will have their own impacts that must be considered in an SEIR. Addendum 2-3; Initial Study 2-14 to 2-16. The 2009 EIS/EIR proposed mitigations to make irrigation ditches less attractive and to haze birds to limit nesting and foraging in those irrigation ditches. Addendum 3-6 to 3-7. The majority of the measures designed to make irrigation ditches less attractive are inapplicable to the storage basins, both because the physical structures are different and because the storage basins already exist, limiting the potential to incorporate mitigations. Addendum Appendix A 9 (admitting that measures are more difficult to incorporate into
already existing features). And hazing has significant impacts because it displaces wildlife from its foraging, breeding and nesting habitat. Those impacts must be examined in an SEIR. CEQA Guidelines § 15162(a).

//

d. Expansion of the SJRIP Would Increase Ponding of Seleniferous Water

63. The Project includes a 1,450-acre expansion of the existing reuse facility – the SJRIP – to 7,550 acres. The 2009 EIS/EIR analyzed a 6,100 acre reuse facility, and the proposed expansion “is an additional 650 acres over the maximum size anticipated in the 2009 Final EIS/EIR.” Addendum 2-5; 2009 EIS/EIR 2-2. While the “additional acreage would be managed in the same manner as the existing acreage with the same biological monitoring requirements established by the U.S. Fish and Wildlife Service (USFWS) in their Biological Opinion,” that does not negate the significant new and increased impacts that this substantial change will have on the surrounding environment. Addendum 2-5; CEQA Guidelines § 15162(a). As the Addendum admits, “[t]he primary environmental concern is an increased potential for ponding of seleniferous water within the fields of the SJRIP, which could be an attractive nuisance to wildlife, particularly birds.” Addendum 2-5. This impact requires examination in an SEIR.

e. Ponding in the Past Has Poisoned Birds

64. The Project’s increased ponding will likely poison birds. In “2003, a pasture at the existing reuse area site attracted waterfowl when it was inadvertently flooded. This flooded area created ideal ecological conditions for shorebird foraging and nesting and thus, a number of pairs responded opportunistically and bred in the field.” Addendum 3-7. But as a consequence, “[r]ecurvirostrid [i.e., birds of the family recurvirostridae] eggs collected near the pasture had highly elevated [selenium] concentrations.” Id. (emphasis added). But the Addendum dismisses this concern, claiming that “other impacts would be created if the area is not enlarged to handle agricultural drainage.” Addendum 2-5; Addendum Appendix A 9. But it is a violation of CEQA to ignore a significant impact on the grounds the effects of an alternative might be greater. The deliberate exposure of waterfowl to these poisonous waters is a significant impact that requires analysis in an SEIR. Creating this hazard is also a crime forbidden by the Migratory Bird Treaty Act, 16 U.S.C. section 703. An SEIR is needed both to assess the Project’s impacts on wildlife, and to determine what these “other” undisclosed impacts may be, and
thereby allow the public and decisionmakers to weigh them and make an informed decision.

**f. Reliance on Ineffective Mitigation Measures from 2009 EIS/EIR**

65. The Addendum and Initial Study rely on ineffective mitigation measures from the 2009 EIS/EIR in an ill-advised attempt to reduce these new significant and substantially increased impacts. Supposedly, “[m]itigation contained in the Grassland Bypass Project Final EIS/EIR for the existing reuse facility would apply to this area also. This mitigation includes a contingency plan in the event of inadvertent flooding in the reuse area due to breakage of a water supply canal or delivery facility.” Addendum 2-5; Initial Study 1-11. But this one-page so-called contingency “plan” is vague and fails to provide any enforceable guidelines. It recommends that “ponded water . . . be eliminated through the discharge of the water into a tail-water return system or by pumping the water into one of the supply channels in the project or a tail-water return system” within 24 hours. Initial Study, Appendix D, D-2 (emphasis added). But this page never explains why, when or how to utilize any of the options presented. Nor does it enforce the 24-hour ponding elimination requirement. Instead, this page defers mitigation for ponding that occurs for more than 24 hours, stating that “an event-specific monitoring plan will be developed to monitor the impacts on bird species resulting from exposure to ponded water.” Initial Study, Appendix D, D-2. In other words, the “plan” is to make it up as you go. That approach is the exact opposite of the searching examination and public review of a project’s impacts before project approval that CEQA demands.

**g. Reliance on Vague and Unenforceable Mitigation Measures**

66. While acknowledging that the SJRIP field will be increased in size, that field flooding has occurred previously, and that the flooded field created “ideal ecological conditions for shorebird foraging and nesting, and thus, a number of pairs responded opportunistically and bred in the [contaminated] field,” the Addendum simultaneously dismisses this concern. Addendum 3-7. Instead, the Authority claims that a vague and unenforceable mitigation measure that was never analyzed with regard to a reuse area of this size is sufficient. But it is not. An SEIR is required to analyze the impacts of the proposed Project. CEQA Guidelines § 15162.

67. For the foregoing reasons, the Authority’s Addendum violates CEQA. The Authority must prepare an SEIR to consider the impacts of the proposed Project, including the impacts to surface water,
groundwater, soil, and biology.

SECOND CAUSE OF ACTION
(Violation of the Delta Reform Act)
(Alleged by All Petitioners Against All Respondents)

68. The paragraphs set forth above and below are realleged and incorporated herein by reference.

69. The Delta Reform Act requires any state agency “that proposes to undertake a covered action” to “prepare a written certification of consistency with detailed findings as to whether the covered action is consistent with the Delta Plan,” and submit the written findings to the Delta Stewardship Council. Water Code § 85225. It defines “[c]overed action” as a “plan, program, or project” as defined by Public Resources Code section 21065, that:

   (1) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.
   (2) Will be carried out, approved, or funded by the state or a local public agency.
   (3) Is covered by one or more provisions of the Delta Plan.
   (4) Will have a significant impact on achievement of one or both of the coequal goals

   . . . . Water Code § 85057.5(a).

70. The Delta Reform Act’s coequal goals are “providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.” Water Code § 85054.

71. The Project discharges pollutants to the Delta that harm its fish and wildlife and therefore will have a significant impact on achievement of the Delta Reform Act’s coequal goals.

72. The Authority failed to make the consistency determination required by the Delta Reform Act before approving the Project. It could not make this required determination because the Project is not consistent with the Delta Plan or the coequal goals of the Delta Reform Act. The Delta Plan itself acknowledges that the existing 5 µg/L selenium objective for chronic exposure “may not be sufficient” for aquatic organisms and fish. Delta Plan, Chapter 6, p. 228. The Delta Plan recommends that projects
maintain water quality “at a level that supports, enhances, and protects” the beneficial uses identified in
the Basin Plan. WQ R1. The Project fails to do so.

73. As formulated, the Project’s WDRs permit harmful discharges that degrade the quality of
the Delta ecosystem, contrary to the Delta Reform Act and the Delta Plan’s requirements that projects
restore, protect, and enhance the Delta ecosystem. Water Code §§ 85054, 85066; Delta Plan Chapters 4
(Protect, Restore and Enhance the Delta Ecosystem) and 6 (Water Quality).

74. For the foregoing reasons, the Project is neither consistent with the Delta Plan nor compliant
with the coequal goal of “protecting, restoring, and enhancing the Delta ecosystem.” Water Code §
85054. Therefore it violates the Delta Reform Act.

THIRD CAUSE OF ACTION
(Violation of the Public Trust Doctrine)
(Alleged by All Petitioners Against All Respondents)

75. The paragraphs set forth above and below are realleged and incorporated herein by
reference.

76. Water Code section 85023 states, “the longstanding constitutional principle of reasonable
use and the Public Trust Doctrine shall be the foundation of state water management policy and are
particularly important and applicable to the Delta.”

77. In United States v. State Water Resources Control Board, the court noted that the Public
Trust Doctrine mandates “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.” Id. at 149, citing National Audubon Society v. Superior Court,
33 Cal.3d at 445. The court held that the public trust doctrine necessarily requires agencies to “consider
water quality for the protection of beneficial uses” when determining whether or not to approve a project.
Id. at 150-151.

78. “Public trust easements are traditionally defined in terms of navigation, commerce and
fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and
general recreation purposes the navigable waters of the state, and to use the bottom of the navigable
waters for anchoring, standing, or other purposes.” Marks v. Whitney, 6 Cal.3d at 259. For nearly 50
years it has been settled law in California that public trust values also “encompass[.] . . the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.” *Id.* at 259-260.

79. The Public Trust Doctrine “imposes an obligation on the state trustee [here, the Authority] to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.” *Baykeeper II*, 29 Cal.App.5th at 569; *Baykeeper I*, 242 Cal.App.4th at 234; *National Audubon*, 33 Cal.3d at 441. The Delta and its tributaries are public trust resources that must be protected. The Public Trust Doctrine “impose[s] an affirmative duty” on the Authority “to take the public trust into account” before authorizing the continued degradation of already imperiled waterways. *Baykeeper II*, 29 Cal.App.5th at 570-571. Although “the state trustee has broad discretion . . . to promote [one public trust use] over other legitimate trust uses,” it does not have discretion to promote non-public trust uses over “legitimate trust uses.” *Id.* at 577.

80. But the Authority did exactly that here. It approved the discharge of polluted flows – a non-public trust use – over the protection of public trust resources. These flows degrade the waters of Mud Slough, the San Joaquin River, and the Delta, harming the individuals and species that rely on them.

81. The Project will harm public trust resources, including habitat necessary for fish and wildlife, and clean water essential for recreation, because the Project directly contributes to the pollution and degradation of Mud Slough, the San Joaquin River, and the Delta. The Project impermissibly promotes a non-public trust use at the expense (indeed, potential extirpation) of the Delta’s imperiled fish and wildlife and other public trust resources.

82. By approving the Project without adequately analyzing potential alternatives as required by CEQA and the Public Trust Doctrine, the Authority abdicated its affirmative statutory and constitutional “duties to take the trust into account and protect public trust uses whenever feasible,” and impermissibly promoted a non-public trust use at the expense of public trust resources. *Baykeeper II*, 29 Cal.App.5th at 571, 577.

83. For the foregoing reasons, the Authority’s approval of the Project violates the Public Trust
FOURTH CAUSE OF ACTION

(Writ of Mandate, Declaratory and Injunctive Relief to Set Aside
Project Approvals as Contrary to CCP §§ 1085 and 1094.5)

(Alleged by All Petitioners Against All Respondents)

84. The paragraphs set forth above and below are realleged and incorporated herein by
reference.

85. The Authority proceeded in excess of its jurisdiction and abused its discretion in purporting
to approve the Project and certify the Addendum thereon, because such approvals violate CCP sections
1085 and 1094.5 in the following respects, among others:

a. such approvals were not granted in accordance with the procedures required by law;
b. such approvals were not based on the findings required by law; and

c. such approvals were not based on, or were contrary to, the evidence in the record
before the Authority.

86. The Authority failed to proceed in the manner required by law in the following respects,
among others:

a. The Authority violated CEQA as alleged hereinabove;
b. The Authority violated the Delta Reform Act as alleged hereinabove; and

c. The Authority violated the Public Trust Doctrine as alleged hereinabove.
d. The Authority violated the Clean Water Act and the Porter-Cologne Water Quality
Control Act by not securing the NPDES permit they require as alleged hereinabove.

87. The Authority’s actions in approving the Project without complying with the procedures
required by CCP sections 1085 and 1094.5 exceeded the Authority’s jurisdiction and constitute a
prejudicial abuse of discretion, and therefore are invalid and must be set aside.

PRAYER FOR RELIEF

WHEREFORE, petitioners pray for relief as follows:

1. For interlocutory and permanent injunctive relief restraining the Authority from taking any
action to carry out the Project pending, and following, the hearing of this matter;
2. For a peremptory writ of mandate directing the Authority to set aside and vacate its approval of the Project, and certification of its Addendum;

3. For declaratory relief declaring the Project and its Addendum to be unlawful;

4. For a peremptory writ of mandate directing the Authority to suspend all activity implementing the Project that could result in any change or alteration in the physical environment until it has taken all actions necessary to bring its approval of the Project and its Addendum into compliance with CEQA, the Delta Reform Act, the Public Trust Doctrine, the Code of Civil Procedure, the Clean Water Act and the Porter-Cologne Water Quality Act.

5. For attorneys’ fees under Code of Civil Procedure section 1021.5;

6. For costs incurred in this action; and

7. For such other equitable or legal relief as the Court may deem just and proper.

Dated: November 12, 2019

Respectfully submitted,

LAW OFFICES OF STEPHAN C. VOLKER

By: STEPHAN C. VOLKER
Attorney for Petitioners and Plaintiffs
NORTH COAST RIVERS ALLIANCE, SAN FRANCISCO CRAB BOAT OWNERS ASSOCIATION, CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, PACIFIC COAST FEDERATION OF FISHERMEN’S ASSOCIATIONS, and INSTITUTE FOR FISHERIES RESOURCES
VERIFICATION

I, Stephan C. Volker, am the attorney for petitioners/plaintiffs in this action. I make this verification on behalf of the petitioners/plaintiffs because such parties and their representatives are absent from the county in which my office is located. I have read the foregoing Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and Attorneys’ Fees and know its contents. The facts therein alleged are true and correct to the best of my knowledge and belief, and are based on documents within the public records underlying the approvals herein challenged.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Verification was executed in Berkeley, California on November 12, 2019.

[Signature]

STEPHAN C. VOLKER
EXHIBIT

4
December 20, 2019

via email
reverest@usbr.gov
Ryan Everest,
Bureau of Reclamation,
2800 Cottage Way, MP-440,
Sacramento, CA 95825-1898


Mr. Everest:

On behalf of the Winnemem Wintu Tribe, North Coast Rivers Alliance, Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries Resources, California Sportfishing Protection Alliance, and San Francisco Crab Boat Owners Association, Inc., we submit the following comments regarding the Bureau of Reclamation’s (“Bureau’s”) draft agreement with the San Luis & Delta-Mendota Water Authority (“SLDMWA”) to renew SLDMWA’s contract to operate and maintain certain Central Valley Project facilities (“Project Works”) and transfer the administrative and financial responsibility to fund SLDMWA’s operation, maintenance and replacement (“OM&R”) of those Project works for the proposed 35-year term (“Draft Agreement”).

I. SLDMWA Has Not Demonstrated the Ability to Operate and Maintain the Project Works in Compliance with Applicable Law Including the Clean Water Act

The Draft Agreement tasks SLDMWA with the “complete operation and maintenance” of the “Delta-Mendota Canal and related in-line control facilities; wasteways, laterals, holding reservoirs, turnouts and measuring devices, associated water level control devices and water level recording instruments; appurtenant equipment, structures and maintenance buildings; the Jones Pumping Plant; the O’Neill Pumping/Generating Plant; the Delta-Mendota Canal/California...
Aqueduct Intertie Pumping Plant; the San Luis Drain; the Kesterson Reservoir; and such other facilities as the Parties may agree by modification of Exhibit A, without amending this Agreement.” Draft Agreement Article 1.(d) (p.4:84-85) (first quote, defining OM&R), Article 1.(i) (p. 6:122-128) (second quote, defining “Project Works”). SLDMWA will be required to “perform[], fund[] and financ[e] such repairs and replacements as are normally considered part of annual operation and maintenance functions . . . in accordance with Federal law and other regulations, policies, guidelines or instructions adopted thereunder,” Draft Agreement Article 1.(d) (pp.4:85-5:90). It also allows SLDMWA to “include Capital Improvements . . . which [SLDMWA] chooses to accomplish and finance.” Draft Agreement Article 1.(d) (p. 5:96-98).

While the title to Project Works remains with the Bureau, the Draft Agreement shifts all responsibility to SLDMWA to maintain, operate, and repair the Project Works. SLDMWA is, by the terms of the Contract, required to maintain them “in such a manner that [they] shall remain in good and efficient condition for the storage, diversion and carriage of water.” Draft Agreement Article 3.(a) (p. 9:203-204) 6.(a) (p. 12:284-286).

The Draft Agreement states that SLDMWA “has demonstrated its ability to operate and maintain such facilities to the satisfaction of the [authorized representative of the Department of Interior] and in a manner which best and most economically serves the water users relying on those facilities . . . .” Draft Agreement Recital h. (p. 3:49-51). All the same, SLDMWA’s past actions and inactions demonstrate that its performance has been deficient.

SLDMWA and the Bureau currently discharge pollutants into waters of the United States through the San Luis Drain, a point source. The San Luis Drain collects and commingles polluted water from a variety of sources, both ground and surface, and conveys this pollution into Mud Slough and thence the San Joaquin River and the Delta. Its discharge of pollutants into Mud Slough, a water of the United States, without a National Pollutant Discharge Elimination System (“NPDES”) permit violates the Clean Water Act, 33 U.S.C. section 1251, et seq. (“CWA”). See Pacific Coast Federation of Fishermen’s Associations v. Glaser, 937 F.3d 1191 (9th Cir. 2019) (as modified on denial of rehearing Dec. 20, 2019) (modified slip opinion attached as Exhibit 1.)

The Ninth Circuit held that “Congress intended for discharges that include return flows from activities unrelated to crop production to be excluded from the statutory exception, thus requiring an NPDES permit for such discharges.” PCFFA v. Glaser, Slip Op. at 16. The wastewaters discharged through the San Luis Drain, are commingled and include both agricultural return flows and non-agriculture wastewater. Therefore, an NPDES permit is required for operation of the San Luis Drain.

The Court correctly ruled that “the defendant carries the burden to demonstrate the applicability of a statutory exception to the CWA” and that neither SLDMWA nor the Bureau had presented such evidence. Id., at 11. Indeed, they could not carry that burden because there is overwhelming evidence to the contrary that the flows through the San Luis Drain are not
composed “entirely” of irrigated agricultural return flows. As the plaintiffs properly alleged, “discharges from highways, residences, seepage into the [San Luis Drain] from adjacent [unfarmed] lands, and sediments from within the [San Luis Drain]” commingle with the irrigated agriculture return flows. Id., at 18. Because the polluted waters that discharge from the San Luis Drain are commingled flows, the San Luis Drain cannot lawfully operate without an NPDES permit.

Thus, SLDMWA has not demonstrated that it has the ability to operate and maintain the Project Works in a manner that complies with applicable law. While the Draft Agreement includes terms requiring compliance with the Clean Water Act, and preventing contamination of “Project waters,” the terms do not supersede applicable law. Draft Agreement Article 19.(a)-(h) (pp. 32:796-33:837), Article 23.(a)-b) (pp. 34:852-35:898). SLDMWA’s past and ongoing operation of the San Luis Drain discharges pollutants without the required NPDES permit. Therefore it should not be entrusted with responsibility to operate, maintain, and replace the Project Works for the next 35 years.

II. Terms of the Draft Agreement Run Counter to the CVPIA

In 1992 Congress enacted the Central Valley Project Improvement Act, Public Law No. 102-575, 108 Stat. 4600 (“CVPIA”), to reduce the adverse environmental impacts of Central Valley Project operations. CVPIA §§ 3402(a)-(b), 3406(b). The Draft Agreement runs counter to the CVPIA’s goals for the protection of fish and wildlife.

CVPIA section 3406 codified a fish-doubling standard. CVPIA Section 3406(b)(1) (“natural production of anadromous fish in the Central Valley rivers and streams will be sustainable, on a long-term basis, at levels not less than twice the average levels attained during the period of 1967-1991” by 2002). This goal has not been, and cannot now be, achieved by the 2002 deadline. The 2001 Final Restoration Plan for the Anadromous Fish Restoration Program (“AFRP Plan”) adopted by the National Marine Fisheries Service established objectives that were supposed to meet the fish doubling goal, including “improve habitat for all life stages of anadromous fish through provision of [suitable] flows . . . and improved physical habitat,” “improve survival rates by reducing or eliminating entrainment of juveniles at diversions,” and “improve the opportunity for adult fish to reach their spawning habitats in a timely fashion” among others. AFRP Plan, p. 5 (capitalization altered).¹

¹ Available at: www.fws.gov/cno/fisheries/CAMP/Documents/Final_Restoration_Plan_for_the_AFRP.pdf (last visited December 20, 2019).
flows, dams, reversed flow on the San Joaquin River, the loss of riparian vegetation through the levee system, and other habitat degradation. However, neither the AFRP Plan nor the CVPIA PEIS lead to compliance with the fish-doubling goal, and the Bureau has continued to operate the Central Valley Project in a manner that prioritizes water deliveries over – and to the detriment of – environmental needs.

Indeed, in the over-quarter century since Congress passed the CVPIA, populations of fish species in the Bay Delta have steeply declined toward extinction. Indeed, endangered winter-run Chinook salmon, threatened spring-run Chinook salmon, threatened Central Valley steelhead, threatened green sturgeon, and threatened delta smelt have all faced an uphill battle for survival in the face of increased salinity, sedimentation, rising temperature, and other harmful reductions in water quality and flow. These trends are not limited to fish species listed as threatened or endangered under the Endangered Species Act. Fall-run and late fall-run Chinook salmon – the remaining commercially fished Chinook – have also faced population declines. When there are insufficient returning fall-run and late-fall run Chinook, the commercial and recreational Chinook salmon fisheries have been shut down as emergency measures to protect the species. The adverse conditions causing these population declines can be attributed to Central Valley Project operations, including the Project Works that are the subject on the Draft Agreement.

The CVPIA prevented the Bureau from entering into “any new short-term, temporary, or long-term contracts or agreements for water supply from the Central Valley Project for any purpose other than fish and wildlife” until “[t]he provisions of [CVPIA] subsections 3406(b)-(d) are met.” CVPIA § 3404(a). The Draft Agreement would transfer significant water delivery authority to SLDMWA, allowing it to deliver water to existing contractors and other parties. Draft Agreement Article 9 (pp. 15:355-16:383). Yet the Draft Agreement contains no explicit requirements that SLDMWA administer contracts or deliver water in compliance with the terms of the CVPIA, as the Bureau would be required to do under CVPIA section 3404(b)(2.) Draft Agreement 9 (pp. 15:355-16:383). It likewise contains no explicit provisions preventing “new obligations” to convey and distribute water until the CVPIA’s fish and wildlife provisions are satisfied, as would be required before the Bureau enters into a new contract for Central Valley Project water. CVPIA § 3404(a).

The Draft Agreement also fails to appropriately protect water deliveries to wildlife refuges, as it authorizes SLDMWA to “discontinue delivery and conveyance of water” when an account is delinquent. Draft Agreement Article 12.(d) (pp. 22:530-535). The Draft Agreement acknowledges that the Bureau is the party “required to pay [SLDMWA] the amounts described in Article 12 in connection with delivery” of water to “wildlife refuges and wildlife management areas.” Draft Agreement Article 1.(f) (pp. 5:111-6:115). Yet the Draft Agreement does not contain appropriate protective language to prevent SLDMWA from terminating water deliveries in the event that the Bureau fails to meet its obligations. Draft Agreement Article 12 (pp. 18:117-25:614). The Bureau is required to deliver water to these refuges and cannot avoid doing so by failing to pay for deliveries through this contract. CVPIA § 3406(d).
The CVPIA also requires the Bureau to “operate the Central Valley Project to meet all obligations under State and Federal law, including but not limited to ... all decisions of the California State Water Resources Control Board establishing conditions on applicable licenses and permits for the project.” CVPIA § 3406(b). Yet the Draft Agreement fails to provide that SLDMWA operate the Project Works to meet the requirements of CVPIA section 3406(b). Past practice shows that the Bureau and SLDMWA will not do so, as the Project Works have been operated without compliance with the applicable Water Quality Control Plans.

For the reasons stated, the Draft Agreement improperly delegates the Bureau’s authority and responsibility to SLDMWA. SLDMWA, in turn, has demonstrated that its operation of the Project Works will be done to benefit its agricultural water users at the expense of the environment. The Bureau must ensure that the Project Works are operated in compliance with the Clean Water Act, the CVPIA, and other applicable environmental laws, through a revised Draft Agreement or through better oversight and direct action.

Respectfully submitted,

Stephan C. Volker
Attorney for Winnemem Wintu Tribe, North Coast Rivers Alliance, Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries Resources, California Sportfishing Protection Alliance, and San Francisco Crab Boat Owners Association, Inc.,
LIST OF EXHIBITS

1. Pacific Coast Federation of Fishermen’s Associations v. Glaser, 937 F.3d 1191 (9th Cir. 2019) (as modified on denial of rehearing Dec. 20, 2019)
EXHIBIT

1

(to December 20, 2019 Comment Letter)
PACIFIC COAST FEDERATION OF FISHERMEN’S ASSOCIATIONS;
CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; FRIENDS OF THE RIVER; SAN FRANCISCO CRAB BOAT OWNERS ASSOCIATION, INC.;
THE INSTITUTE FOR FISHERIES RESOURCES; FELIX SMITH,
Plaintiffs-Appellants,

v.

DONALD R. GLASER, Regional Director of the U.S. Bureau of Reclamation; UNITED STATES BUREAU OF RECLAMATION; SAN LUIS & DELTA MENDOTA WATER AUTHORITY,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of California
Kimberly J. Mueller, District Judge, Presiding

Argued and Submitted June 10, 2019
San Francisco, California

Filed September 6, 2019
Amended December 20, 2019

Opinion by Judge Milan D. Smith, Jr.

SUMMARY**

Clean Water Act

The panel filed an amended opinion reversing the district court’s judgment in an action alleging that the drainage system managed by the U.S. Bureau of Reclamation and the San Luis & Delta Mendota Water Authority discharged pollutants into surrounding waters in violation of the Clean Water Act, 33 U.S.C. §§ 1251-1387; and denied petitions for panel rehearing.

The Central Valley Project is a federal water management project. The Grasslands Bypass Project, jointly administered by the defendants, is a tile drainage system that consists of a network of perforated drain laterals underlying farmlands in California’s Central Valley that catch irrigated water and direct it to surrounding waters.

The Clean Water Act generally requires that government agencies obtain a National Pollutant Discharge Elimination

* The Honorable Douglas L. Rayes, United States District Judge for the District of Arizona, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.
System permit before discharging pollutants from any point source into navigable waters of the United States. There is an exception to that permitting requirement “for discharges composed entirely of return flows from irrigated agriculture.” 33 U.S.C. § 1342(l)(1).

The panel held that the district court properly interpreted “discharges . . . from irrigated agriculture,” as used in § 1342(l)(1), to mean discharges from activities related to crop production. The panel held that the district court ought to have begun its analysis with the statutory text, but its reliance on legislative history to construe this portion of the statute was not erroneous. The panel further held, however, that the district court erred by interpreting “entirely” to mean “majority,” and by placing the burden on plaintiffs to demonstrate that the discharges were not covered under § 1342(l)(1), rather than placing the burden on defendants to demonstrate that the discharges were covered under § 1342(l)(1). The panel concluded that the district court’s erroneous interpretation of the word “entirety” was the but-for-cause dismissal of plaintiffs’ Vega claim (concerning groundwater discharges from lands underlying a solar project), and the panel, therefore reversed the district court’s dismissal of that claim. The panel further concluded that the district court’s dismissal of plaintiffs’ other claims was also erroneous, reversed the dismissal of those claims, and remanded for the district court to reconsider them under the correct interpretation of § 1342(l)(1).

The panel held that the district court erred by striking plaintiffs’ seepage and sediment theories of liability from plaintiffs’ motion for summary judgment because the first amended complaint encompassed those claims.
COUNSEL

Stephan C. Volker (argued), Alexis E. Krieg, Stephanie L. Clarke, and Jamey M.B. Volker, Law Offices of Stephan C. Volker, Berkeley, California, for Plaintiffs-Appellants.

Brian C. Toth (argued) and Martin F. McDermott, Attorneys; Eric Grant, Deputy Assistant Attorney General; Jeffrey H. Wood, Acting Assistant Attorney General; United States Department of Justice, Environment & Natural Resources Division, Washington, D.C.; Amy L. Aufdemberge, Office of the Solicitor, Department of the Interior, Washington, D.C., for Defendants-Appellees Donald R. Glaser and United States Bureau of Reclamation. Eric J. Buescher (argued), and Joseph W. Cotchett, Cotchett Pitre & McCarthy LLP, Burlingame, California; Diane V. Rathmann, Linneman Law LLP, Dos Palos, California; for Defendant-Appellee San Luis & Delta Mendota Water Authority.

Ellen L. Wehr, Grassland Water District, Los Banos, California, for Amicus Curiae Grassland Water District.

ORDER

The opinion filed on September 6, 2019, and reported at 937 F.3d 1191 is hereby amended as follows:

At 937 F.3d at 1196, <underlying a solar product> is replaced with <underlying a solar project>.

At 937 F.3d at 1200, <which both parties now concede was erroneous> is replaced with <which Defendants now concede was erroneous>. <Accordingly, the lack of
A clean copy of the amended opinion is attached to this order.

With the foregoing amendments, the pending petitions for panel rehearing are DENIED. Dkt. Nos. 57, 62. The Grassland Water District’s motion to file an amicus curiae brief is GRANTED. Dkt. 59. No further petitions for panel rehearing or rehearing en banc will be entertained.

OPINION

M. SMITH, Circuit Judge:

California’s Central Valley features some of the most fertile agricultural land in the United States, but it typically receives less rainfall than necessary to cultivate the crops grown in the Valley. To help address this problem, the federal government has constructed and managed several irrigation and drainage projects.

Plaintiffs, a group of commercial fishermen, recreationists, biologists, and conservation organizations, sued Defendants Donald Glaser, the United States Bureau of Reclamation, and the San Luis & Delta Mendota Water Authority, alleging that the drainage system managed by Defendants discharges pollutants into surrounding waters, in
violation of the Clean Water Act (CWA), 33 U.S.C. §§ 1251–1387. Plaintiffs appeal several rulings by the district court in favor of Defendants that ultimately led to the stipulated dismissal of Plaintiffs’ single claim remaining for trial. We reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

As “the largest federal water management project in the United States,” the Central Valley Project (CVP) “provides the water that is essential to [the California Central Valley’s] unparalleled productivity.” Cent. Delta Water Agency v. United States, 306 F.3d 938, 943 (9th Cir. 2002). Among other functions, the CVP “transfer[s] water from the Sacramento River to water-deficient areas in the San Joaquin Valley and from the San Joaquin River to the southern regions of the Central Valley.” San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 594 (9th Cir. 2014).

“Any water project that brings fresh water to an agricultural area must take the salty water remaining after the crops have been irrigated away from the service area.” Firebaugh Canal Co. v. United States, 203 F.3d 568, 571 (9th Cir. 2000). Otherwise, irrigating the selenium and salt-rich soils causes pollutants to leach into groundwater. The Grasslands Bypass Project (the Project), jointly administered by Defendants, was created for this purpose. The Project is “a tile drainage system that consists of a network of perforated drain laterals underlying farmlands in California’s Central Valley that catch irrigated water and direct it to” surrounding waters. The map below depicts the Project’s location:
The Project includes the San Luis Drain (the Drain), labeled on the map above, which is designed to collect and convey contaminated groundwater from lands adjacent to and upstream of the Drain to Mud Slough. As both parties
acknowledge, the Drain discharges substantial quantities of selenium and other pollutants into the Mud Slough, the San Joaquin River, and the Bay-Delta Estuary.

B. Procedural Background

Plaintiffs filed their initial complaint in November 2011, alleging that Defendants violated the CWA by discharging pollutants into the waters of the United States without a National Pollutant Discharge Elimination System (NPDES) permit, in violation of 33 U.S.C. § 1311(a). After the district court granted Defendants’ motion to dismiss with leave to amend, Plaintiffs filed their First Amended Complaint (FAC).

Defendants then moved to dismiss the FAC. The court granted the motion as to all but one of Plaintiffs’ claims. It determined that Plaintiffs had plausibly alleged facts “that, when accepted as true, suggest [that] at least some amount of the Project’s discharges may be unrelated to crop production.”

The parties then filed cross-motions for summary judgment. The court denied Plaintiffs’ motion for summary judgment and granted in part Defendants’ motion for summary judgment. The court held that three of Plaintiffs’ theories of liability in their motion for summary judgment—arguments about discharges from “seepage into the [Drain] from adjacent lands, and sediments from within the [Drain]”—did not arise from the allegations in their FAC. Accordingly, the court struck those three theories of liability. The court also determined, however, that there was a genuine dispute of material fact as to whether groundwater discharges from lands underlying a solar project violated the CWA (the Vega Claim). It therefore denied Defendants’ motion for summary judgment as to that claim.
Plaintiffs moved to file a second amended complaint. The court denied that motion. The court also denied Plaintiffs’ motion to reconsider its order ruling on the cross-motions for summary judgment. The parties then stipulated to the dismissal of Plaintiffs’ lone remaining claim “because the discharges from the Vega Solar Project property do not make up a majority of discharges from the [Project].” The district court entered judgment for Defendants.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court’s grant of summary judgment. Nat. Res. Def. Council, Inc. v. County of Los Angeles, 725 F.3d 1194, 1203 (9th Cir. 2013). We also review de novo “the district court’s interpretation of the CWA and its implementing regulations.” Olympic Forrest Coal. v. Coast Seafoods Co., 884 F.3d 901, 905 (9th Cir. 2018).

ANALYSIS

I. The District Court’s Interpretation of § 1342(l)(1)

The CWA generally requires that government agencies obtain an NPDES permit before discharging pollutants from any point source into navigable waters of the United States.1 33 U.S.C. § 1323(a). There is an exception to that permitting requirement, however, “for discharges composed entirely of

1 The CWA defines “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).
return flows from irrigated agriculture . . .” *Id.* § 1342(l)(1).

The parties do not disagree that the Mud Slough, the San Joaquin River, and the Bay-Delta Estuary constitute navigable waters of the United States. They also do not dispute that the Drain “discharges substantial quantities of selenium and other pollutants.” At issue then is whether the Drain’s discharges required Defendants to obtain an NPDES permit, or whether the discharges were exempt from the permitting requirement pursuant to § 1342(l)(1).

Plaintiffs argue that the district court committed three errors in its interpretation of § 1342(l)(1). First, they contend that the district court erred by placing the burden of proving that the Drain’s discharges were not exempt on Plaintiffs instead of requiring that Defendants prove that the Drain’s discharges were exempt. Second, they argue that the court erred in interpreting what constitutes “discharges . . . from irrigated agriculture” when it held that all discharges from the Drain are exempted so long as they are not generated by activities unrelated to crop production. Third, they assert that the district court erred by interpreting the word “entirely” as meaning most. We address each argument in turn.

**A. Burden of Proving the Statutory Exception**

In its pretrial order, the district court stated that Plaintiffs bore the burden of demonstrating that the discharges at issue were not exempt from the CWA’s permitting requirement pursuant to § 1342(l)(1). Plaintiffs argue that such an interpretation of the statute was erroneous because the burden was on Defendants to prove that the discharges at issue were covered by § 1342(l)(1).
We agree. To establish a violation of the CWA, “a plaintiff must prove that defendants (1) discharged, i.e., added (2) a pollutant (3) to navigable waters (4) from (5) a point source.” *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993). After a plaintiff establishes those elements, however, the defendant carries the burden to demonstrate the applicability of a statutory exception to the CWA. *See N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir. 2007). Because § 1342(l)(1) contains an exception to the CWA’s permitting requirement, Defendants had the burden of establishing that the Project’s discharges were “composed entirely of return flows from irrigated agriculture.”

B. Interpretation of “Irrigated Agriculture”

The district court construed § 1342(l)(1) as exempting discharges that are related to crop production from the CWA’s permitting requirement. The parties agree that, by focusing on the statute’s legislative history *ab initio*, rather than commencing its analysis with the text, the district court’s interpretive method was flawed.

“It is well settled that ‘the starting point for interpreting a statute is the language of the statute itself.’” *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, Inc., 484 U.S. 49, 56 (1987) (quoting *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Section 1342(l)(1) states that “[t]he Administrator shall not require a permit under this section for discharges . . . from irrigated agriculture.” 33 U.S.C. § 1342(l)(1). Here, rather than starting its analysis with the text, the district court focused first on the Senate Committee Report
accompanying the CWA to hold that the relevant statutory text—“discharges . . . from irrigated agriculture”—meant discharges that “do not contain additional discharges from activities unrelated to crop production.”

Although we agree that the district court ought to have begun its analysis with the statutory text, its reliance on legislative history to construe this portion of the statute was not erroneous. “It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989). “The purpose of statutory construction is to discern the intent of Congress in enacting a particular statute.” *Robinson v. United States*, 586 F.3d 683, 686 (9th Cir. 2009) (quoting *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999)).

Section 1342(l)(1) does not define “irrigated agriculture.” In determining the plain meaning of a word, we may consult dictionary definitions in an attempt to capture the common contemporary understandings of a word. *See Transwestern Pipeline Co., LLC v. 17.19 Acres of Prop. Located in Maricopa Cnty.*, 627 F.3d 1268, 1270 (9th Cir. 2010). The definition of agriculture—“the science or art of cultivating the soil, harvesting crops, and raising livestock,” *Webster’s Third New International Dictionary*, 44 (2002)—shows that the term has a broad meaning that encompasses crop production. The “ordinary, contemporary, and common meaning” of agriculture likewise supports a broad interpretation of the term. *United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998).
Although the plain meaning of the statutory text demonstrates that agriculture has a broad meaning, it does not resolve whether the discharges at issue here are exempt from the CWA’s permitting requirement. As a result, “we may [also] use canons of construction, legislative history, and the statute’s overall purpose to illuminate Congress’s intent” in enacting § 1342(l)(1). *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1133 (9th Cir. 2009) (quoting *Jonah R. v. Carmona*, 446 F.3d 1000, 1005 (9th Cir. 2006)).

In this instance, we begin by considering the legislative history of § 1342(l)(1). In its original form, the CWA did not contain any exceptions to its permitting requirement. *See Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1072 (9th Cir. 2011), *rev’d and remanded sub nom. Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013). Five years after its enactment, however, Congress amended the CWA to include an exception for discharges composed entirely of return flows from irrigated agriculture. *Id.* at 1073. “Congress did so to alleviate EPA’s burden in having to issue permits for every agricultural point source.” *Id.* By passing § 1342(l)(1), Congress sought “to limit the exception to only those flows which do not contain additional discharges from activities unrelated to crop production.” S. Rep. No. 95-370, 35 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4326, 4360. This history supports the district court’s interpretation of “irrigated agriculture” as used in § 1342(l)(1).

The statute’s legislative history also reveals that Congress passed § 1342(l)(1) to treat equally under the

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2 One issue disputed by the parties, for example, is whether discharges from fallow and retired lands fall under § 1342(l)(1). The plain meaning of the statutory text does not definitively answer that question.
CWA’s permitting requirement farmers relying on irrigation and those relying on rainfall. See 123 Cong. Rec. 39,210 (Dec. 15, 1977) (statement of Sen. Wallop: “This amendment corrects what has been a discrimination against irrigated agriculture. . . . Farmers in areas of the country which were blessed with adequate rainfall were not subject to permit requirements on their rainwater run-off, which in effect . . . contained the same pollutants.”)); 123 Cong. Rec. 26,702 (Aug. 4, 1977) (statement of Sen. Stafford: “This amendment promotes equity of treatment among farmers who depend on rainfall to irrigate their crops and those who depend on surface irrigation which is returned to a stream in discreet conveyances.”). Indeed, one legislator said that an NPDES permit would not be required for “a vast irrigation basin that collects all of the waste resident of irrigation water in the Central Valley and places it in [the San Luis Drain] and transport[s] it . . . [to] the San Joaquin River.” Brown, 640 F.3d at 1072. This history supports the view that Congress intended for “irrigated agriculture,” as used in § 1342(l)(1), to be defined broadly and include discharges from all activities related to crop production.

Plaintiffs argue that such an interpretation of the statutory exception is erroneous because it would exempt fallow and retired lands from the CWA’s permitting requirement. That result, however, complies with our prior case law addressing the Project. We have ordered Defendants, in separate litigation, to provide drainage “to lands receiving water through the San Luis Unit.” Firebaugh Canal Co., 203 F.3d at 572. The retirement of farmlands was a component of that drainage plan. Firebaugh Canal Water Dist. v. United States, 712 F.3d 1296, 1300 (9th Cir. 2013). To hold that drainage from retired lands does not fall under the CWA’s statutory exception for discharges from irrigated agriculture would
lead to contradictory and illogical results. *Cf. United States v. Fiorillo*, 186 F.3d 1136, 1153 (9th Cir. 1999). We decline to require Defendants to provide a drainage plan that includes the retirement of farmland, on the one hand, and hold that those activities violate the CWA absent a permit, on the other.

For these reasons, § 1342(l)(1)’s statutory text, as well as its context, its legislative history, and our prior case law on the Project, demonstrate that Congress intended to define the term “irrigated agriculture” broadly. Accordingly, we hold that the district court’s interpretation of the phrase was accurate.

**C. Interpretation of “Entirely”**

We next address Plaintiffs’ contention—which Defendants do not dispute—that the district court erred by holding that § 1342(l)(1) exempts discharges from the CWA’s permitting requirement unless a “majority of the total commingled discharge” is unrelated to crop production. They argue that such an interpretation of the statutory text was mistaken because the text states that the exception applies to “discharges composed *entirely* of return flows from irrigated agriculture.” 33 U.S.C. § 1342(l)(1).

We agree that the district court’s majority rule interpretation misconstrued the meaning of “entirely,” as used in § 1342(l)(1). Although “entirely” is not defined by the statute, we begin by considering its “ordinary, contemporary, common meaning.” *Iverson*, 162 F.3d at 1022. “Entirely” is defined as “wholly, completely, fully.” *Webster’s Third New International Dictionary* 758 (2002). That definition differs significantly from “majority,” the meaning that the district court gave the term.
The district court rejected a literal interpretation of “entirely” because it reasoned that it “would lead to an absurd result.” We disagree. “Claims of exemption, from the jurisdiction or permitting requirements, of the CWA’s broad pollution prevention mandate must be narrowly construed to achieve the purposes of the CWA.” N. Cal. River Watch, 496 F.3d at 1001. Given the many activities related to crop production that fall under the definition of “irrigated agriculture,” Congress’s use of “entirely” to limit the scope of the statutory exception thus makes perfect sense. The text demonstrates that Congress intended for discharges that include return flows from activities unrelated to crop production to be excluded from the statutory exception, thus requiring an NPDES permit for such discharges.

D. Effect of Errors on Plaintiffs’ Claims

Having determined that the district court erred by placing the burden of demonstrating eligibility for the exception on Plaintiffs, rather than on Defendants, and by misinterpreting “entirely,” as used in § 1342(l)(1), we next consider the effect of those errors on Plaintiffs’ claims. Defendants argue that the district court’s errors were harmless because “the record contains no evidence of any discharge of pollutants unrelated to agricultural flows.”

We begin with Plaintiffs’ Vega Claim. The district court denied Defendants’ motion for summary judgment as to that claim because it determined that “Plaintiffs [] have provided sufficient evidence to raise an inference that discharges underneath the Vega Project originate from the solar project itself, as opposed to [from] other nearby agricultural lands.” Plaintiffs stipulated to the dismissal of that claim because they were “unlikely to succeed [in demonstrating that] the discharges from the [Vega Claim] do not make up a majority
of discharges from the [Project].” The district court’s interpretation of the word “entirely” to mean “majority”—which Defendants now concede was erroneous—was thus the but-for cause of the dismissal of Plaintiffs’ Vega Claim. It is reasonable to believe that Plaintiffs would have proceeded to trial under the correct interpretation of § 1342(l)(1), which requires Defendants to prove that the discharges were composed entirely of return flows from irrigated agriculture. We therefore reverse the district court’s dismissal of that claim.

The district court’s dismissal of Plaintiffs’ other claims was also erroneous. In its order ruling on the parties’ cross-motions for summary judgment, the district court determined that, apart from the Vega Claim, Plaintiffs had failed to “provide any evidence” to show that discharges stemmed from activities unrelated to crop production. Because the burden of demonstrating the applicability of § 1342(l)(1) should have been on Defendants, rather than on Plaintiffs, however, Plaintiffs were not required to present any evidence. Instead, Defendants ought to have been required to demonstrate that the discharges at issue were composed entirely of return flows from irrigated agriculture. Accordingly, even if there were a lack of evidence demonstrating that the discharges stemmed from activities unrelated to crop production, it should not have been fatal to Plaintiffs. Cf. Gilbrook v. City of Westminster, 177 F.3d 839, 871 (9th Cir. 1999) (“Such an inference from lack of evidence would amount to no more than speculation.”). We therefore reverse the district court’s dismissal of Plaintiffs’ other claims and remand for the district court to reconsider them under the correct interpretation of § 1342(l)(1).
II. The District Court’s Striking of Plaintiffs’ Claims

Plaintiffs argue that the district court also erred by striking their theories of liability “based on discharges from highways, residences, seepage into the [Drain] from adjacent lands, and sediments from within the [Drain]” from Plaintiffs’ motion for summary judgment. The court held that those claims were not encompassed by Plaintiffs’ FAC.

“Rule 8’s liberal notice pleading standard . . . requires that the allegations in the complaint ‘give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’” Pickern v. Pier 1 Imports (U.S.), Inc., 457 F.3d 963, 968 (9th Cir. 2006) (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002)). “A party need not plead specific legal theories in the complaint, so long as the other side receives notice as to what is at issue in the case.” Am. Timber & Trading Co. v. First Nat’l Bank of Oregon, 690 F.2d 781, 786 (9th Cir. 1982). But if “the complaint does not include the necessary factual allegations to state a claim, raising such claim in a summary judgment motion is insufficient to present the claim to the district court.” Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1080 (9th Cir. 2008).

Here, Plaintiffs’ FAC alleged that the Drain discharged “polluted groundwater . . . originating from parcels where no farming occurs because, for instance, these parcels have been fallowed or retired from agricultural use.” The theories of liability struck by the district court argued that Defendants violated the CWA because the Drain picked up seepage from non-irrigated land on its way to the Mud Slough, and because the Drain discharged pollutants from seepage and sediment within the Drain.
Although we agree with Defendants that Plaintiffs’ complaint did not specifically allege their seepage and sediment theories of liability, we reject the contention that Defendants had not been given fair notice of those theories. Plaintiffs’ essential allegation was that the Drain’s discharges violated the CWA because of where the contaminants in the discharges originated from—“for instance, [] parcels [that] have been fallowed or retired from agricultural use.” Plaintiffs’ seepage and sediment claims, which alleged that contaminants from “highways, residences, seepage . . . and sediment” commingled with other discharges and thereby violated the CWA, alleged that contaminants originated from other locations, too. Those allegations were thus encompassed by the allegations in the FAC. Indeed, at oral argument, Defendants conceded that they “received [Plaintiffs’] expert witness reports,” “were on notice as to what their expert was talking about,” and “had enough information to respond” to the seepage and sediment theories of liability discussed in Plaintiffs’ expert witness reports. These facts, when taken together, compel the conclusion that Plaintiffs’ FAC provided Defendants with fair notice of their seepage and sediment theories of liability. Accordingly, we reverse the district court’s striking of Plaintiffs’ seepage and sediment claims from their motion for summary judgment.  

3 The district court held, in the alternative, that Plaintiffs’ seepage and sediment claims were “unsupported by evidence.” Because we hold that the district court erred in its interpretation of § 1342(l)(1), however, we remand Plaintiffs’ seepage and sediment claims for the district court to determine whether they survive summary judgment under the correct interpretation of the statutory exemption.
CONCLUSION

The district court properly interpreted “discharges . . . from irrigated agriculture,” as used in § 1342(l)(1), to mean discharges from activities related to crop production. It erred, however, by interpreting “entirely” to mean “majority,” and by placing the burden on Plaintiffs to demonstrate that the discharges were not covered under § 1342(l)(1), rather than placing the burden on Defendants to demonstrate that the discharges were covered under § 1342(l)(1). The district court also erred by striking Plaintiffs’ seepage and sediment theories of liability from Plaintiffs’ motion for summary judgment because the FAC encompassed those claims.

REVERSED and REMANDED.