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*via email*

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Central Valley Regional Water Quality Control Board  
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**Re: Grassland Bypass Project Drainage Management Plan**

Ms. Peters and Ms. Fregien:

Thank you for the opportunity to comment on the Grassland Bypass Project Drainage Management Plan, Including Components of the Westside Regional Drainage Plan and the Long-Term Stormwater Management Plan (“GBP DMP”). We submit these comments 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, the Winnemem Wintu Tribe and Felix Smith (collectively “Conservation Groups”). Please include these comments in the record for this matter.

**I. INTRODUCTION**

Since Felix Smith’s June 1983 Concern Alert to United States Fish and Wildlife Service Regional Director Joseph Blum reporting that high levels of selenium had caused widespread deformities in migratory bird chicks and embryos at Kesterson Reservoir due to the dangerous levels of selenium in the water draining into the Kesterson Reservoir, the Bureau of Reclamation (“Bureau”), the Regional Board, the State Board, and other relevant agencies have been on notice that water in the San Luis Drain is hazardous to wildlife and human health.<sup>1</sup> Despite Mr. Smith’s

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<sup>1</sup> See, e.g., Philip Garone, *The Tragedy at Kesterson Reservoir; a Case Study in Environmental History and a Lesson in Ecological Complexity*, 22 ENVIRONS: ENVTL. L & POL’Y J. 107 (1999),

warning nearly four decades ago, harmful levels of selenium, salts, pesticides, and other contaminants continue to be discharged from the Bureau's San Luis Drain into Mud Slough. The GBP DMP continues this tragic history of unlawful neglect.

The San Luis and Delta-Mendota Water Authority ("SLDMWA") prepared the GBP DMP ostensibly to "identify the actions and methods being or *to be implemented . . . by which the water quality objectives (WQO) in Mud Slough (North) and the San Joaquin River will be met.*" GBP DMP 1 (emphasis added). Yet the GBP DMP completely fails to comply with the Clean Water Act's clear mandate, reiterated and reinforced by the Ninth Circuit Court of Appeal's ruling rejecting the Bureau's and SLDMWA's claimed exemption and adopting Conservation Groups' position, 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 [National Pollutant Discharge Elimination System] permit for such discharges.*" *Pacific Coast Federation of Fishermen's Associations v. Glaser*, 945 F.3d 1076, 1085 (9th Cir. 2019). Because this Board must comply with the Clean Water Act's requirement for an NPDES permit for the San Luis Drain's commingled discharges, it may not approve the GBP DMP.

The GBP DMP's violations of the Clean Water Act do not end there. The GBP DMP fails to comply with several other mandates of the Clean Water Act and the Porter-Cologne Act that this Board must likewise enforce. As noted, the GBP DMP fails to provide any assurance that SLDMWA and the Bureau will prevent the unlawful discharge of pollutants from the San Luis Drain without the required NPDES permit. But as discussed in more detail below, the GBP DMP also fails to protect the beneficial uses of the receiving waters, including those far downstream, and needlessly creates dangerous hazards to both aquatic and terrestrial wildlife.

For these reasons, this Board must reject the GBP DMP, as it is counter to both the letter and the spirit of the Clean Water Act.

## **II. THE SAN LUIS DRAIN DISCHARGES POLLUTANTS**

The Bureau and SLDMWA jointly control and operate the San Luis Drain. For decades the San Luis Drain has unlawfully discharged commingled water laden with pollutants harmful to human health and to the fragile ecosystems of Mud Slough, the San Joaquin River, and the Bay-Delta, without having first obtained the NPDES permit required by the Clean Water Act. Along with other pollutants, the water discharged contains high levels of selenium. Elevated selenium levels harm benthic organisms and the fish and waterfowl that feed on them. Selenium contamination 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 GBP.

The Grassland Bypass Project was wrongly conceived as a means of using the San Luis Drain to export contaminated groundwater, including polluted wastewater commingled with return flows from irrigated agriculture, from lands within the Grassland Drainage Area to the San Joaquin River. But moving pollutants from one discharge point to another was never compliant with the Clean Water Act. Indeed, the operators of this unlawful contrivance have long recognized it to be contrary to the purposes of the Clean Water Act. In the late 1990s, SLDMWA conceded that the GBP as originally conceived, “*simply reroutes the drainage water around the wetland areas using several new earthen ditches and a portion of the San Luis Drain.*” *A Storm Event Plan for Operating the Grassland Bypass Project*, Grassland Area Farmers and San Luis & Delta-Mendota Water Authority, August 25, 1997, p. 2 (emphasis added).

Because the operators of the San Luis Drain persist in defying the law by continuing to discharge pollutants from the San Luis Drain’s commingled waste stream to waters of the United States without the required NPDES permit, members of Conservation Groups are prosecuting a Clean Water Act citizen enforcement action against SLDMWA and the Bureau to compel their compliance. See, *Pacific Coast Federation of Fishermen’s Associations v. Glaser*, Eastern District of California Cases No. No. 2:11-cv-02980–KJM. That lawsuit will soon succeed in court orders requiring the operators to apply for and obtain the NPDES permit that has long been required.

The operators of the GBP attempt to confuse the issue by arguing that none of the water discharged by the San Luis Drain is generated from “the discharge of agricultural subsurface drainage” because after 2019 this discharge “was prohibited.” GBP DMP 1. They claim that the only water discharged by the San Luis Drain is from storm events and groundwater seep through weep valves, joints, and cracks. GBP DMP 1, 2; GBP DMP Appendix A, Goal 1. But the discharge of any pollutants in this commingled waste stream, including pollutants entering the San Luis Drain through weep valves, joints and cracks, is prohibited by the Clean Water Act unless allowed by an NPDES permit. *Pacific Coast Federation of Fishermen’s Associations v. Glaser, supra*, 945 F.3d at 1086-1087 (reversing the district court’s erroneous striking of plaintiffs’ claims that commingled pollutants entering the San Luis Drain through seepage from adjacent unfarmed lands violated the Clean Water Act’s requirement for an NPDES permit). Contrary to the Clean Water Act, no NPDES permit has been issued. Therefore, these commingled discharges of pollutants still violate the Clean Water Act. And, these discharges contain many pollutants in addition to selenium, most notably boron and molybdenum whose levels continue to spike in this discharge stream each year. GBP DMP Appendix A, Background.

SLDMWA’s Grassland Bypass Project and the San Joaquin River Improvement Project have been promoted as the solution to the San Luis Drain’s harmful discharges but this campaign is flatly contrary to the Clean Water Act. They cannot eliminate the San Luis Drain’s discharge of harmful pollutants. The SJRIP, planted with salt tolerant crops and irrigated with

contaminated wastewater, long ago exceeded its capacity for treating highly saline water.<sup>2</sup> And the GBP continues to lack capacity to process contaminated groundwater, especially after storms.

SLDMWA approved an expansion of the Grassland Bypass Project in 2019. In conjunction with this expansion, SLDMWA prepared an Addendum to the Final Environmental Impact Statement/ Environmental Impact Report for the Grassland Bypass Project (“2019 Addendum.”). The 2019 Addendum purports to assess the impacts of SLDMWA’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.<sup>3</sup>

Because the 2019 Addendum failed to appropriately study and disclose the significant impacts of the Grassland Bypass Project, as expanded, on November 12, 2019 members of Conservation Groups filed a Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and Attorneys’ Fees challenging SLDMWA’s violations of CEQA, the Delta Reform Act, the Clean Water Act, and the Public Trust Doctrine in certifying the 2019 Addendum and making related approvals of the GBP.

On December 5, 2019, the Regional Board ignored the Ninth Circuit’s ruling earlier that year that commingled discharges from the San Luis Drain require an NPDES permit and, instead of complying with the law, wrongly approved Order R5-2019-0077, Waste Discharge Requirements for San Luis & Delta-Mendota Water Authority’s and United States Department of the Interior, Bureau of Reclamation’s Surface Water Discharges from the Grassland Bypass Project (the “WDRs”). In so doing, the Regional Board violated the Porter-Cologne Water Quality Control Act (Water Code § 13000 et seq.), the Clean Water Act (33 U.S.C. § 1251 et seq.), the California Environmental Quality Act, and the Public Trust Doctrine. For this reason, members of Conservation Groups filed a Petition for Review of Order R5-2019-0077 pursuant to Title 23 of the California Code of Regulations (“CCR”), section 2050, with the State Water Resources Control Board (“State Board”). And, when the Petition for Review was denied by

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<sup>2</sup> Further, the SJRIP’s management has lacked sufficient oversight to provide trustworthy data. For a significant portion of time, former Panoche Water District General Manager Dennis Falaschi “over[saw] management of the [SJRIP].” December 3, 2015 Declaration of Dennis Falaschi in Support of SLDMWA’s Reply Brief in Support of Motion for Summary Judgment, ¶ 2, filed in *Pacific Coast Federation of Fishermen’s Associations v. Glaser*, Eastern District of California Case No. 2:11-cv-02980–KJM. It is a matter of public record that Mr. Falaschi has been charged with embezzling funds from the Panoche Water District.

<sup>3</sup> As discussed at the Regional Board’s January 14, 2021 Grassland Bypass Stakeholder Meeting, these storage basins must be located in low lying areas in order to collect stormwater and other contaminated surface and groundwater and wastewater that would otherwise flow into the San Luis Drain, and thus will be located in areas near existing refuges and wildlife habitat.

operation of law, the Winnemem Wintu Tribe, 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 filed a Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and Attorneys' Fees challenging the Water Boards' violations of applicable law. Conservation Group's challenges to the 2019 Addendum and WDRs are pending in Merced County Superior Court.

### III. THE GBP DMP IS INSUFFICIENT

Like SLDMWA's 2019 Addendum and the Regional Board's WDRs, the GBP DMP fails to protect fish and wildlife, beneficial uses and downstream resources. Further, it lacks specificity as to the implementation of management activities designed to attain and comply with the Regional Board's WDRs and mitigate the impacts of the expanded Grassland Bypass Project as contemplated by the 2019 Addendum.

First, the GBP DMP falsely asserts that selenium discharges "in the region" are "non-point source" discharges, and claims that "accretion of selenium into drainage channels cannot be eliminated." GBP DMP 11. This overlooks the well-documented and thus irrefutable fact that the San Luis Drain itself is a point source that conveys selenium-laden, commingled waste water to Mud Slough, where this polluted water is discharged. By dismissing these selenium discharges as "non-point source" pollution despite the fact they are, in fact, discharged by a point source, SLDMWA attempts to evade responsibility for its plain violations of the Clean Water Act.

Second, the GBP DMP relies upon so-called "short term storage basins" to collect "up to 1,000 acre-feet of stormwater," in an area occupying approximately 290 acres – 200 acres of which will be new basins. GBP DMP 11. The GBP DMP does *not* specify a maximum length of time that these basins would retain water. At the January 14, 2021, Grassland Bypass Stakeholder Meeting, Joe McGahan of Summers Engineering speaking on behalf of SLDMWA, indicated that water could be retained in these basins for months at a time. The 2019 Addendum provides additional detail: these basins would fill with the first big winter storm and be emptied "in late May." 2019 Addendum 2-3 to 2-4. Yet at the January 14, 2021 Stakeholder Meeting, SLDMWA's representative claimed that these basins would not be attractive habitat due to wildlife harassment, and hostile design features such as steep slopes. But by retaining stormwater for months at a time, SLDMWA risks creating an attractive yet deadly "habitat" reminiscent of the La Brea Tar Pits for migratory birds and aquatic species. Further, Fish and Wildlife Service employees are already burdened with attempting to rescue and rehabilitate stuck and dead deer from the San Luis Drain due to its hostile design. *See* USFWS comments on 2019 Addendum. Yet, the GBP DMP has no discussion of terrestrial species impacts from the hostile design of the storage basins.

The GBP DMP does not reveal, let alone analyze, the factors that would contribute to a decision to use these storage basins as reservoirs for irrigation water for the SJRIP instead of pumping this selenium-laden storm water back into the San Luis Drain for discharge to Mud Slough. *Id.* Instead it merely states that the basins will hold the water until it can be discharged or used at the SJRIP. But that assumes without any facts and analysis that it will be possible to do so. Moreover, by retaining this selenium-laden water until after high storm flows recede, and then pumping this water into the San Luis Drain for discharge in Mud Slough, SLDMWA will continue to subject downstream water users, including fish and wildlife, to selenium exposure. And since selenium bioaccumulates, this continued extended exposure can have long-term unintended consequences up the food chain.

Third, the GBP DMP is impermissibly vague. It lacks details about implementation including detailed time-lines and site-specific information describing how its objectives will be achieved. It indicates, for example, that starting in September 2020, the pumps to the remaining tile-drains that drain to the Grassland Bypass Project would have remote control shut-offs installed. GBP DMP 9, 11, 17. It states only that this conversion is estimated to be completed in 2021, but provides no information about the percentage of converted pumps, the timeline for conversion, or any consequences or penalties for failure to convert the remaining pumps. GBP DMP 11. And, the GBP DMP does not address whether these dischargers have a contingency plan for times when the remote shutoff system fails. It does not detail whether there is monitoring to alert SLDMWA employees of the need to manually shut off these pumps in these instances. In short, it assumes treatment efficacy without essential facts and analysis.

Fourth, the GBP DMP simply assumes that ongoing selenium risks to fish and wildlife from stormwater storage basins will be mitigated through a bird hazing program (GBP DMP 13) even as harassment fails to fully reduce harms to wildlife in other parts of the Central Valley. Reliance upon bird hazing alone cannot prevent selenium exposure in other parts of the food chain. And the GBP DMP provides no facts and analysis demonstrating that storage basin use would be contingent upon successful harassment or hazing. GBP DMP 13. Thus, the storage basin component of the GBP DMP fails to demonstrate that it would protect fish and wildlife.

Fifth, it cannot protect the beneficial uses of Mud Slough (North) under the applicable basin plan. These uses 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 GBP DMP. As noted by Dr. Joseph P. Skorupa of the United States Fish and Wildlife Service during the January 14, 2021 stakeholder meeting hosted by the Regional Board, site-specific evaluations in other locales have revealed that selenium can be harmful even at levels within existing regulatory limits. The Regional Board should credit Dr. Skorupa’s experience researching selenium exposure, and carefully consider his opinion and conclusions regarding selenium impacts in and downstream of the Grassland Bypass Project.

Indeed, the United States Geological Survey's emerging research on the severe adverse impacts – including widespread spinal deformities – of selenium contamination on Sacramento splittail support the general consensus that existing selenium water quality objectives are insufficient to prevent harm. It is increasingly apparent that more stringent selenium standards are warranted to protect the beneficial uses in the Basin Plan. The WDRs allow SLDMWA and the Bureau's permit to be reopened "if it is determined that additional action is needed to address" scientific evidence regarding splittail deformities from selenium. WDRs ¶ 4. But this reopener clause is insufficient to protect the aquatic resources that will be harmed by the Basin Plan's and WDRs' relaxed 5 µg/L 4-day average selenium standard. For these reasons, the GBP DMP cannot protect the warm water aquatic habitat, warm water spawning and wildlife habitat uses recognized in the Basin Plan for Mud Slough (North), nor the downstream beneficial uses that are harmed by these toxic discharges.

Despite the foregoing unrefuted and irrefutable evidence of harm, the GBP DMP claims no additional selenium goals are needed. GBP DMP 16. It instead relies upon existing but deficient selenium water quality objectives. *Id.* It claims that those objectives are theoretically being met at sites D, N, and R. GBP DMP 16. Yet the GBP DMP also admits that there "have been a small number of selenium, boron, and molybdenum [water quality objective] exceedances at Mud Slough (Site D)" since 2014. GBP DMP 4. And, despite the water quality objective for selenium being expressed as a 4-day average, until 2019 sampling was performed weekly. Those samples consistently showed selenium levels that *exceeded* the 5.0 µg/L water quality objective at Site D at times when flows at Site A were elevated. GBP DMP 4. The data from July 2019 to June 2020 shows that selenium levels continue to spike whenever there is water flowing at Site A, even though those 4-day averages fell just under the 5.0 µg/L standard of the current water quality objective. GBP DMP 5. Had there been additional outflow at Site A over that time period, it is likely that the selenium levels would have again exceeded the water quality objectives.

#### IV. CONCLUSION

For the reasons discussed above, the Regional Board must require SLDMWA and the Bureau to obtain an NPDES Permit for their unpermitted and unlawful point-source discharge of commingled pollutants into Mud Slough from the San Luis Drain. The GBP DMP cannot substitute for the permit process required by the Clean Water Act.

As shown above, the GBP DMP is not based on adequate facts and analysis. It is, instead, a poorly conceived political compromise that is simply contrary to and unsanctioned by applicable law.

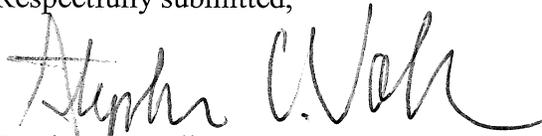
Moreover, the GBP DMP lacks both the specificity and the consequential penalties necessary for it to serve as an enforceable mitigation plan. The deficient GBP DMP must be reworked to include both deadlines and consequences. Further, the existing water quality

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objectives for selenium in Mud Slough (North) and the San Joaquin River must be updated and strengthened to protect aquatic life.

Finally, and most important of all, the discharges must be subjected to rigorous review under the NPDES permit program as required by the Clean Water Act and the Ninth Circuit's ruling on this very issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stephan C. Volker". The signature is fluid and cursive, with a long horizontal stroke at the end.

Stephan C. Volker

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