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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).

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[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]" comingle 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

. . . to prevent evapo-concentration if there is not sufficient reuse capacity to drain the basins." 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.

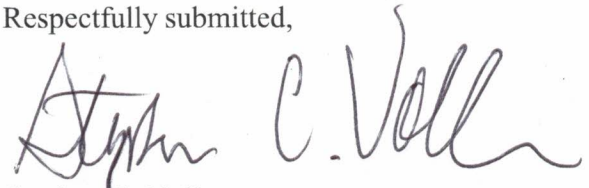
The Addendum and Initial Study again rely on ineffective mitigation measures from the 2009 FEIS/FEIR in an ill-advised attempt to reduce these new significant and substantially increased impacts. Supposedly, "[m]itigation contained in the Grassland Bypass Project Final EIS/EIR for the existing reuse 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,



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

Enclosures

LIST OF EXHIBITS

1. *Pacific Coast Federation of Fisherman's Associations, et al. v. Glaser, et al.*, Ninth Circuit Case No. 17-17130, September 6, 2019 (for publication)

EXHIBIT
1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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.*	No. 17-17130 D.C. No. 2:11-cv-02980-KJM-CKD OPINION

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

Before: MARY M. SCHROEDER and MILAN D. SMITH, JR., Circuit Judges, and DOUGLAS L. RAYES,* District Judge.

Opinion by Judge Milan D. Smith, Jr.

SUMMARY**

Clean Water Act

The panel reversed 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.

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 System permit before discharging pollutants from any point

* 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.

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 "entirely" was the but-for cause of the dismissal of plaintiffs' Vega claim (concerning groundwater discharges from lands underlying a solar product), 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.

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.

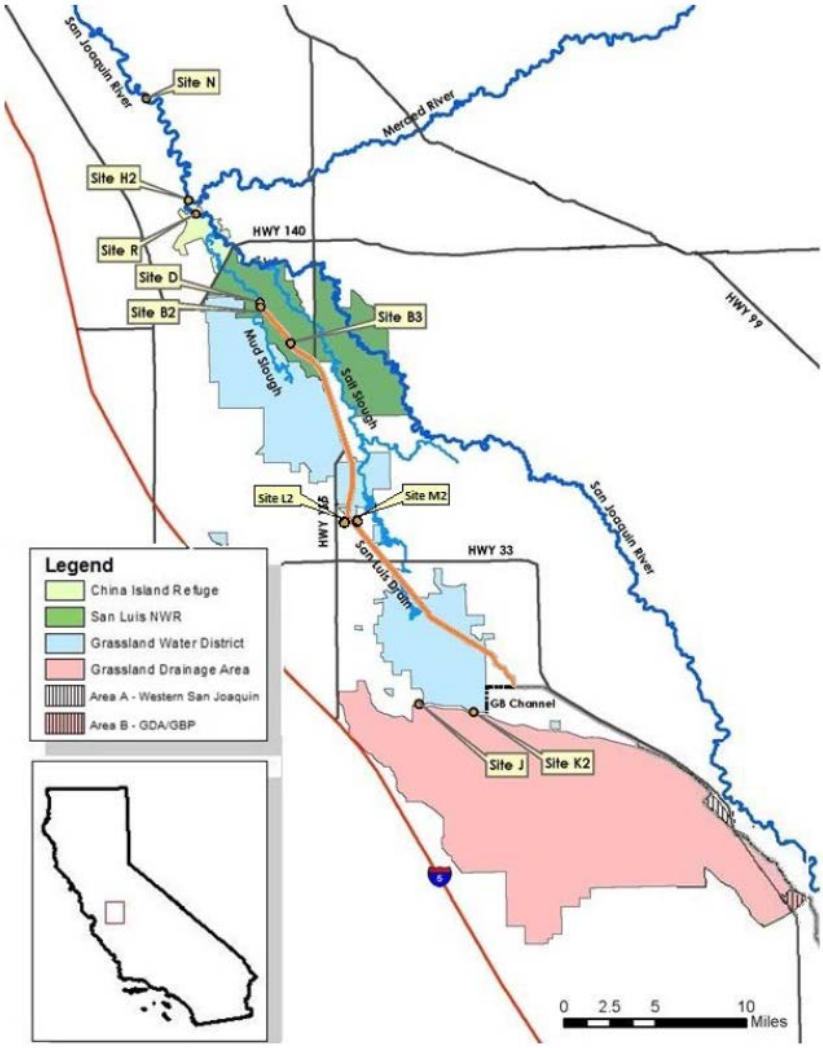
FACTUAL AND PROCEDURAL BACKGROUND

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 product 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]

[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,

33 U.S.C. § 1323(a). There is an exception to that permitting requirement, however, "for discharges composed entirely of 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

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concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

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.[2] 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.

[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.

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 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 (E.D. Cal. 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 both parties 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, the lack of evidence demonstrating that the discharges stemmed from activities unrelated to crop production 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 a "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]

[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.