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 8 OWNERS ASSOCIATION, CALIFORNIA SPORTFISHING
 PROTECTION ALLIANCE, AND FELIX SMITH
 9

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 COUNTY OF SAN FRANCISCO

12 WINNEMEM WINTU TRIBE,
 NORTH COAST RIVERS ALLIANCE,
 13 PACIFIC COAST FEDERATION OF
 FISHERMEN'S ASSOCIATIONS,
 14 INSTITUTE FOR FISHERIES RESOURCES,
 SAN FRANCISCO CRAB BOAT OWNERS
 15 ASSOCIATION,
 CALIFORNIA SPORTFISHING PROTECTION
 16 ALLIANCE, and
 FELIX SMITH,

17 Petitioners and Plaintiffs,

18 v.

19 STATE WATER RESOURCES CONTROL
 20 BOARD,
 CENTRAL VALLEY REGIONAL WATER
 21 QUALITY CONTROL BOARD, and
 DOES 1 through 100,

22 Respondents and Defendants,

23 and

24 SAN LUIS & DELTA-MENDOTA WATER
 25 AUTHORITY,
 UNITED STATES BUREAU OF
 26 RECLAMATION, and
 DOES 101 through 200,

27 Real Parties in Interest.
 28

) Civ. No.
)
) **VERIFIED PETITION FOR WRIT OF**
) **MANDATE AND COMPLAINT FOR**
) **DECLARATORY AND INJUNCTIVE**
) **RELIEF AND ATTORNEYS' FEES**
)
) **CEQA CASE**

1 Petitioners and plaintiffs Winnemem Wintu Tribe, North Coast Rivers Alliance, Pacific Coast
2 Federation of Fishermen’s Associations, Institute for Fisheries Resources, San Francisco Crab Boat
3 Owners Association, California Sportfishing Protection Alliance, and Felix Smith (“petitioners”) hereby
4 petition the Court for a writ of mandate and for preliminary and permanent injunctions and declaratory
5 relief against respondents State Water Resources Control Board (“State Board”) and the Central Valley
6 Regional Water Quality Control Board (“Regional Board”) (hereinafter collectively the “Boards”) and
7 DOES 1 through 20, and real parties in interest San Luis & Delta Mendota Water Authority (the
8 “Authority”) and the Bureau of Reclamation (the “Bureau”), and DOES 21 through 100, and by this
9 Verified Petition and Complaint allege as follows:

10 **INTRODUCTION**

11 1. This is a public interest citizen suit to enforce the Porter-Cologne Water Quality Control
12 Act, Water Code section 13000 et seq. (“Porter-Cologne Act”), the Federal Water Pollution Control Act,
13 33 U.S.C. section 1251 et seq. (“Clean Water Act”), the Sacramento-San Joaquin Delta Reform Act,
14 Water Code section 85000 et seq. (“Delta Reform Act”), the Public Trust Doctrine, and the California
15 Environmental Quality Act, Public Resources Code (“PRC”) section 21000 et seq. (“CEQA”).

16 2. Petitioners bring this action to challenge the approval of Order R5-2019-0077, Waste
17 Discharge Requirements (“WDRs”) for the Authority’s and the Bureau’s Surface Water Discharges from
18 the Grassland Bypass Project (“GBP” and, collectively with the WDRs. the “Project”). The Regional
19 Board approved the WDRs on December 5, 2019. The State Board failed to act on petitioners’ timely
20 Petition for Review of the Regional Board’s approval. By failing to require the Authority and the Bureau
21 to obtain a National Pollutant Discharge Elimination System (“NPDES”) Permit, and by failing to
22 mandate that the Authority make the consistency findings required by the Delta Reform Act, the Boards
23 have improperly sanctioned the Authority’s unlawful failure to comply with the same. The Boards’
24 actions are counter to the Public Trust Doctrine. And in making this unlawful and improper approval,
25 the Boards relied upon the Authority’s inadequate Addendum, and thus the Boards have also violated
26 CEQA in approving the WDRs and the GBP.

27 3. The Clean Water Act is the nation’s preeminent law regulating the discharge of pollutants
28 such as selenium to waters of the United States such as Mud Slough and the San Joaquin River. The

1 Clean Water Act requires the Authority to secure an NPDES permit before it may discharge pollutants
2 from the Project to Mud Slough and the San Joaquin River. 33 U.S.C. §§ 1311, 1342. The Porter-
3 Cologne Act mandates the Boards' compliance with and oversight of the Clean Water Act. Yet the
4 Boards' WDRs inappropriately sanction the Authority's pollutant-laden discharges into Mud Slough and
5 the San Joaquin River in violation of the same.

6 4. The Delta Reform Act requires agencies to determine whether their actions are consistent
7 with the Delta Plan and the Act's coequal goals. In approving this Project without requiring the
8 Authority to comply with the Delta Reform Act, the Boards have committed a prejudicial abuse of
9 discretion.

10 5. The Public Trust Doctrine mandates that the Boards consider public trust resources,
11 including fisheries, and act to protect those resources by all feasible means. Contrary to that mandate,
12 the Boards failed to consider and protect these resources in issuing the Project approvals.

13 6. CEQA requires all public agencies to examine the potential adverse impacts of their actions
14 before taking them. It is designed to protect California's extraordinary environmental resources from
15 uninformed and needlessly destructive agency actions. CEQA requires responsible agencies such as the
16 Regional Board to consider "the [environmental impact report ("EIR")] . . . prepared by the lead agency
17 and . . . reach[] its own conclusions on whether and how to approve the project involved." 14 CCR
18 (CEQA Guidelines ["Guidelines"]) § 15096(a). If the responsible agency concludes that the lead
19 agency's EIR is inadequate it should assume the lead agency role, or prepare a subsequent EIR.
20 Guidelines § 15096(e). Contrary to CEQA, the Boards instead relied upon the inadequate EIR
21 Addendum.

22 7. By issuing the Project approvals, the Boards failed to examine and feasibly mitigate the
23 Project's impacts, and failed to feasibly protect public trust resources and beneficial uses.

24 **JURISDICTION AND VENUE**

25 8. This Court has jurisdiction over this proceeding pursuant to Code of Civil Procedure
26 ("CCP") sections 526 (injunctive relief), 1060 (declaratory relief), 1085 (traditional mandamus), 1094.5
27 (administrative mandamus); PRC sections 21168 and 21168.5 (mandamus review); Water Code section
28 13330(b) ; and article VI, section 10 of the California Constitution.

1 9. Venue is proper in this Court pursuant to CCP sections 393 (actions against public officers),
2 395 (actions generally), and 401(1) (actions against state agency in any county where Attorney General
3 has office) because the Attorney General maintains an office in the City and County of San Francisco.
4 Petitioners were unable to file a verified petition and complaint in Sacramento, where the Boards' offices
5 are located, as the Sacramento County Superior Court has declared a holiday due to the ongoing public
6 health pandemic and is not currently accepting case-initiating documents in civil writ cases such as those
7 arising under CEQA or the Porter-Cologne Act.

8 10. Pursuant to CCP section 388, petitioners are serving the California Attorney General with a
9 copy of this verified petition and complaint. Consistent with PRC section 21167.5, petitioners timely
10 served the Boards with notice of this suit.

11 11. Petitioners are timely serving this verified petition and complaint on all named real parties.
12 PRC § 21167.6.5(a). Petitioners have named the Bureau as a real party in interest, as it is identified
13 within the Regional Board's Notice of Determination. PRC § 21167.6.5(a). The Bureau is neither a
14 necessary party under Code of Civil Procedure section 389(a) nor an indispensable party under Code of
15 Civil Procedure section 389(b).

16 **PARTIES**

17 12. Petitioner WINNEMEM WINTU TRIBE is a California-recognized Tribe whose aboriginal
18 territory encompasses the upper watersheds of the Sacramento River including the McCloud River, and
19 whose members have continuously maintained its spiritual, cultural and traditional connection to its
20 remaining unsubmerged native lands and waters, cultural spaces and subsistence uses. The Winnemem
21 Wintu Tribe has long advocated for the restoration of the McCloud River Chinook salmon, and the
22 necessary regulation of water quality to protect salmon habitat. The interests of the Tribe and its
23 members will be adversely affected and injured by the Boards' approval of the WDRs because they harm
24 the water quality and fishery habitat of the Delta through which the restored McCloud River Chinook
25 salmon will pass.

26 13. Petitioner NORTH COAST RIVERS ALLIANCE ("NCRA") is a non-profit unincorporated
27 association with members throughout Northern California. NCRA was formed for the purpose of
28 protecting California's rivers and their watersheds from the adverse effects of excessive water

1 diversions, ill-planned urban development, harmful resource extraction, pollution, and other forms of
2 environmental degradation. Its members use and enjoy California's rivers and their watersheds –
3 including the Delta – for recreational, aesthetic, scientific study, and related non-consumptive uses. The
4 interests of NCRA and its members will be adversely affected and injured by the Boards' approval of the
5 WDRs.

6 14. Petitioner PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS is a
7 nonprofit membership organization incorporated in 1976 with headquarters in San Francisco, California.
8 PCFFA comprises more than 14 separate commercial fishing and vessel owners' associations situated
9 along the West Coast of the United States. By virtue of its combined membership of approximately 750
10 fishermen and women, PCFFA is the single largest commercial fishing advocacy organization on the
11 West Coast. PCFFA represents the majority of California's organized commercial salmon fishermen and
12 has been an active advocate for the protection of Pacific salmon and their spawning, rearing and
13 migratory habitat for more than 30 years. PCFFA and its members would be harmed by the Boards'
14 approval of the WDRs.

15 15. Petitioner INSTITUTE FOR FISHERIES RESOURCES ("IFR") is a non-profit, tax-exempt
16 organization that works to protect and restore salmon and other fish populations and the human
17 economies that depend on them. IFR maintains its principal place of business in San Francisco,
18 California. IFR both funds and manages many fish habitat protection programs and initiatives. In that
19 capacity, IFR advocates for reforms to protect fish health and habitat throughout the West Coast of the
20 United States and has successfully advocated for dam removals, improved pesticide controls, better
21 forestry stream protection standards, reduced discharge of pollutants, and enhanced marine and
22 watershed conservation regulations throughout the West Coast. IFR has worked tirelessly for years to
23 restore and enhance the Delta and its beleaguered fish and wildlife. IFR and its members will be injured
24 by the Boards' approval of the WDRs.

25 16. Petitioner SAN FRANCISCO CRAB BOAT OWNERS ASSOCIATION, INC. ("San
26 Francisco Fishermen") is a century-old association of owners and operators of small, family-owned
27 fishing boats that catch Dungeness crab, wild California King salmon, Pacific herring, and other species
28 that live in and depend upon the cold waters of the Pacific Ocean, the San Francisco Bay-Delta and the

1 Sacramento and San Joaquin rivers and their tributaries. San Francisco Fishermen is also actively
2 involved in community education and advocacy concerning fisheries resources legislation to ensure that
3 the rich heritage of commercial fishing in the Bay Area will survive for future generations. San
4 Francisco Fishermen and its members will be harmed by the Boards' approval of the WDRs, because it
5 would threaten their continued historic use and enjoyment of the fisheries resources of the Delta and its
6 tributary and connected ecosystems.

7 17. Petitioner CALIFORNIA SPORTFISHING PROTECTION ALLIANCE ("CalSPA") is a
8 non-profit corporation organized under the laws of the State of California. CalSPA has thousands of
9 members who reside and recreate throughout California. CalSPA's members are Californians who, in
10 addition to being duly licensed sport fishing anglers, are interested in the preservation and enhancement
11 of California's public trust fishery resources and vigorous enforcement of California's environmental
12 laws. CalSPA members have been involved for decades in public education and advocacy efforts to
13 protect and restore the public trust resources of California's rivers and waterways. CalSPA members use
14 California's rivers and the Delta for recreation, scientific study and aesthetic enjoyment, and the Boards'
15 approval of the WDRs will harm the interests of CalSPA and its members.

16 18. Petitioner FELIX SMITH is a veteran fish and wildlife biologist with 37 years of managerial
17 and technical experience with the U.S. Fish and Wildlife Service prior to his retirement from that
18 agency. He discovered and reported the deformed migratory birds poisoned at Kesterson National
19 Wildlife Refuge including Mud Slough in June 1983. He has spent over 50 years working on water
20 management, wildlife, and fish related issues including 40 years on California ecosystem issues. He is
21 an outspoken advocate for using the Public Trust Doctrine to protect the people's fish and wildlife
22 resources, fish and wildlife habitats, and associated uses and values. Mr. Smith is an avid outdoorsman
23 and uses the Bay-Delta, the San Joaquin River and their tributaries for scientific study, recreation and
24 aesthetic enjoyment. Mr. Smith's interests are harmed by the Boards' approval of the WDRs.

25 19. Respondent and defendant CENTRAL VALLEY REGIONAL WATER QUALITY
26 CONTROL BOARD ("Regional Board") is a state agency charged with regulating water quality in "all
27 basins . . . draining into the Sacramento and San Joaquin Rivers to the easterly boundary of the San
28 Francisco Bay region near Collinsville." Water Code §§ 13200(g) (quote), 13225. On December 5,

1 2019, the Regional Board adopted Order R5-2019-0077, issuing the WRDs and approving the Project.
2 This approval was subject to and violated the requirements of the Clean Water Act and Porter-Cologne
3 Act, the Delta Reform Act, the Public Trust Doctrine, CEQA and the CCP.

4 20. Respondent and defendant STATE WATER RESOURCES CONTROL
5 BOARD (“State Board”) is a state agency charged with responsibility to determine water rights,
6 manage water quality, and assure safe and reliable drinking water. Water Code § 174 et seq. The State
7 Board is responsible for implementing the requirements of the Porter-Cologne Water Quality Control
8 Act, including the requirement that “waters of the state . . . be regulated to attain the highest water
9 quality which is reasonable.” Water Code § 13000. The State Board is responsible for carrying out the
10 requirements of the Clean Water Act, including section 402 thereof. 33 U.S.C. § 1342; Water Code §
11 13160. Its failure to vacate the Regional Board’s December 5, 2019, issuance of the WDRs and approval
12 of the Project through the Regional Board’s approval of Order R-5-2019-0077, was subject to and
13 violated the requirements of the Clean Water Act, the Porter-Cologne Act, the Delta Reform Act, the
14 Public Trust Doctrine, CEQA and the CCP.

15 21. The true names and capacities of respondents DOES 1-20, inclusive, are unknown to
16 petitioners who therefore sue such respondents by fictitious names pursuant to CCP section 474.
17 Petitioners are informed and believe, and based on such information and belief allege, that the
18 fictitiously named respondents are state or local officials or agencies who are responsible, in whole or in
19 part, for the approval and implementation of the Project. Petitioners will, with leave of Court if
20 necessary, amend this Verified Petition and Complaint if and when the true names and capacities of said
21 DOE respondents have been ascertained.

22 22. Real Party in Interest SAN LUIS & DELTA-MENDOTA WATER AUTHORITY (“the
23 Authority”) serves 29 member agencies reliant upon water exported from the Bay-Delta by the Bureau’s
24 Central Valley Project. The members of the Authority deliver water to approximately 1.1 million acres
25 of farmland and nearly 2 million California residents. The Authority, in association with the Bureau,
26 operates the Grassland Bypass Project.

27 23. Real party in interest UNITED STATES BUREAU OF RECLAMATION (the “Bureau”) is
28 being sued in its official capacity. Reclamation is the federal agency within the United States

1 Department of the Interior charged with managing the Central Valley Project. Reclamation, in
2 association with the Authority, operates the Grassland Bypass Project.

3 24. The true names and capacities of real parties in interest DOES 101-200, inclusive, are
4 unknown to petitioners who therefore sue such real parties in interest by fictitious names pursuant to
5 CCP section 474. Petitioners are informed and believe, and based on such information and belief allege,
6 that the fictitiously named real parties in interest are parties who have a direct or indirect economic or
7 similar interest in the approval and implementation of the Project. Petitioners will, with leave of Court if
8 necessary, amend this Verified Petition and Complaint if and when the true names and capacities of said
9 DOE real parties in interest have been ascertained.

10 **GENERAL ALLEGATIONS**

11 25. Petitioners have authorized their attorneys to file this lawsuit on their behalf to vindicate
12 their substantial beneficial interest in securing the Boards' compliance with the law.

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

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

23 28. Petitioners are entitled to declaratory relief under CCP section 1060 because an actual
24 controversy exists between petitioners and the Boards. Petitioners contend that the Boards have acted in
25 violation of applicable laws and must therefore vacate and set aside their unlawful Project approvals.
26 Petitioners are informed and believe that the Boards dispute this contention. A judicial resolution of this
27 controversy is therefore necessary and appropriate.

28 29. Petitioners are also entitled to injunctive relief under CCP section 526 because approval of

1 the Project threatens irreparable environmental harm. Unless enjoined, the Boards will implement the
2 Project despite its lack of compliance with applicable laws, causing undue and unnecessary
3 environmental and cultural resource degradation. Petitioners would thereby suffer irreparable harm due
4 to the Boards' failure to take the required steps to adequately protect the environment. Injunctive relief
5 is thus warranted under CCP section 525 *et seq.* and PRC section 21168.9 to prevent irreparable harm to
6 the environment.

7 LEGAL BACKGROUND

8 Porter-Cologne Water Quality Control and Clean Water Act

9 30. California's Porter-Cologne Act requires compliance with the federal Clean Water Act.
10 Water Code § 13377. Indeed, "California's permitting system . . . regulates discharges under both state
11 and federal law." *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661,
12 670.

13 31. Under the Porter-Cologne Act, "[t]he terms "navigable waters," "administrator,"
14 "pollutants," "biological monitoring," "discharge" and "point sources" "shall have the same meaning as
15 in the [Clean Water Act] and acts amendatory thereof or supplementary thereto. Water Code § 13373.

16 32. Congress adopted the Clean Water Act "to restore and maintain the chemical, physical and
17 biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Clean Water Act prohibits the
18 "discharge of any pollutant by any person" unless done in compliance with the Act. *Id.* at §
19 1311(a). Section 402 of the Clean Water Act requires a permit for the discharge of pollutants
20 from point sources such as pipes and ditches into navigable waters. *Id.* § 1342 (a)(1).

21 33. Under the Clean Water Act, the "discharge of a pollutant" means "any addition of
22 any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). An addition
23 occurs when a point source introduces a pollutant into a navigable water that would not exist in the same
24 form or concentration but for the addition from the point source. Under the Clean Water Act, "pollutant"
25 is broadly defined to include "dredged soil . . . biological materials . . . heat . . . rock, sand . . . and
26 agricultural waste discharged into water." 33 U.S.C. § 1362(6). The term "pollution" is defined as "the
27 man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of
28 water." *Id.* at § 1362 (19).

1 34. A “point source” is defined as “any discernible, confined and discrete conveyance
2 . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). “[A] point source
3 need not be the original source of the pollutant;” it “need only convey the pollutant to navigable
4 waters.” *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S.
5 95, 105 (2004).

6 35. Navigable waters under the Clean Water Act are “waters of the United States.” 33
7 U.S.C. § 1362(7). Mud Slough and the San Joaquin River are navigable waters under the Clean Water
8 Act because they are used by power boats, rowboats, rafts, canoes, kayaks, and other recreational
9 watercraft and are thus navigable in fact. *Rapanos v. United States*, 547 U.S. 715, 731 (2006).

10 36. Although irrigated agricultural return flows are exempt from the Clean Water Act’s NPDES
11 permit requirements (33 U.S.C. § 1362(14); 40 C.F.R. § 122.3(f)), the Clean Water Act only exempts
12 “discharges composed *entirely* of return flows *from* irrigated agriculture” 33 U.S.C. § 1342(l)(1)
13 (emphasis added); *South Florida Water Management Dist. v. Miccosukee Tribe of Indians, supra*, 541
14 U.S. 95 (agricultural return flows commingled with other water sources required NPDES permit).
15 Indeed, “Congress intended for discharges that include return flows from activities unrelated to crop
16 production to be excluded from the statutory exception, thus requiring an NPDES permit for such
17 discharges.” *Pacific Coast Federation of Fishermen’s Associations v. Glaser* (“PCFFA v. Glaser”), 945
18 F.3d 1076, 1085 (9th Cir. 2019).

19 The Delta Reform Act

20 37. The Delta Reform Act requires any “state or local public agency that proposed to undertake
21 a covered action” to “prepare a written certification of consistency with detailed findings as to whether
22 the covered action is consistent with the Delta Plan,” and submit the written findings to the Delta
23 Stewardship Council. Water Code § 85225. This must occur “prior to initiating the implementation of
24 that covered action.” *Id.* The Delta Reform Act defines “[c]overed action” as a “plan, program, or
25 project” as defined by PRC section 21065, that:

- 26 (1) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.
- 27 (2) Will be carried out, approved, or funded by the state or a local public agency.
- 28 (3) Is covered by one or more provisions of the Delta Plan.

1 (4) Will have a significant impact on achievement of one or both of the coequal goals

2

3 Water Code § 85057.5(a); *see also* 23 CCR § 5001(j)(1).

4 38. “‘Coequal goals’ means the two goals of providing a more reliable water supply for
5 California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be
6 achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and
7 agricultural values of the Delta as an evolving place.” Water Code § 85054.

8 39. The Delta Plan acknowledges that the 5 µg/L objective for chronic exposure to selenium
9 “may not be sufficient” for aquatic organisms and fish. Delta Plan, Chapter 6, p. 228. Recent scientific
10 studies confirm that it is not. The Delta Plan recommends that projects maintain water quality “at a level
11 that supports, enhances, and protects” the beneficial uses identified in the Basin Plan. WQ R1.

12 **Public Trust Doctrine**

13 40. The Public Trust Doctrine mandates that before a state agency approves an action that may
14 harm public trust resources, it consider the potential impact “upon interests protected by the public trust,
15 and attempt, so far as feasible, to avoid or minimize any harm to those interests.” *National Audubon*
16 *Society v. Superior Court* (1983) 33 Cal.3d 419, 426. “[T]he pivotal fact is not whether water is diverted
17 or extracted or the fact that it is water itself adversely impacting water within the public trust. Rather,
18 the determinative fact is the *impact of the activity on the public trust resource.*” *Environmental Law*
19 *Foundation v. State Water Resources Control Board* (2018) 26 Cal.App.5th 844, 859 (emphasis added).

20 41. Although compliance with CEQA “may assist an agency in complying with its duties under
21 the public trust doctrine [,] CEQA review of a project does not necessarily or automatically satisfy
22 the agency’s affirmative duties to take the trust into account and protect public trust uses whenever
23 feasible.” *San Francisco Baykeeper, Inc. v. State Lands Com.* (2018) 29 Cal.App.5th 562, 571. “[A]
24 public trust use is not any use that may confer a public benefit, but rather a use that facilitates public
25 access, public enjoyment, or public use of trust land.” *Id.* at 570. Agencies tasked with protecting public
26 trust resources have affirmative statutory and constitutional “duties to take the trust into account and
27 protect public trust uses whenever feasible,” based on a fair and fully informed balancing of the impacts
28 of these alternatives on public trust resources. *San Francisco Baykeeper*, 29 Cal.App.5th at 571.

1 CEQA

2 42. Water Code section 13389 exempts the State Board and Regional Board from complying
3 with Chapter 3 of the California Environmental Quality Act, which addresses Environmental Impact
4 Reports prepared by state agencies. Water Code section 13389 does not exempt the State Board or
5 Regional Board from other portions of CEQA, including its substantive mandates requiring adoption of
6 feasible alternatives and mitigation measures that would avoid this Project’s significant environmental
7 impacts. By relying upon the inadequate 2019 Addendum, the State Board and Regional Board failed to
8 appropriately study and mitigate the impacts of the GBP and the WDRs.

9 43. CEQA still demands that responsible agencies, such as the Regional Board, consider the
10 adequacy of the environmental documents, and reach their own conclusions. Guidelines § 15096(a), (e)-
11 (h); *Riverwatch v. Olivenhain Municipal Water District* (2009) 170 Cal.App.4th 1186, 1205-1215. The
12 Regional Board was prohibited from approving the GBP and its WDRs as proposed “if [it] finds any
13 feasible mitigation measures within its powers that would substantially lessen or avoid any significant
14 effect the project would have on the environment” and – as here – the GBP and WDRs do not include
15 those measures. Guidelines § 15096(g)(2).

16 FACTUAL AND PROCEDURAL BACKGROUND

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

23 45. For decades now, the Bureau and the Authority (collectively, the “Operators”) have been
24 discharging water laden with pollutants harmful to human health and to the fragile ecosystems of Mud
25 Slough, the San Joaquin River, and the Bay-Delta. The original GBP was permitted for just 5 years, as a
26 short-term, stop-gap project. However, with extensions, it has now operated for 24 years – long past the
27 time by which it was to be shuttered.

28 46. Under sections 301 and 402 of the Clean Water Act, an NPDES permit is required for

1 discharges of pollutants from the GBP. 33 U.S.C. §§ 1311, 1342. California’s Porter-Cologne Act
2 requires compliance with the Clean Water Act. Water Code § 13377. In 1996, the Operators obtained
3 an NPDES permit for the discharge of groundwater from the Project. But in September 1996, that
4 NPDES permit was rescinded, and the Operators never received a new NPDES permit.

5 47. After preparation of a Final Environmental Impact Statement / Final Environmental Impact
6 Report, the Operators signed a Use Agreement in 2001 allowing operation of the GBP from September
7 28, 2001 through December 31, 2009, when it was to be terminated.

8 48. However, the GBP was not closed in 2009. Instead, that year the Operators prepared a Final
9 Environmental Impact Statement / Final Environmental Impact Report (“2009 EIS/EIR”) and in 2010
10 approved another Use Agreement (2010 Use Agreement) allowing the continuation of the GBP from
11 2010 through December 31, 2019.

12 49. On September 6, 2019 the Ninth Circuit Court of Appeals confirmed that “Congress
13 intended for discharges that include return flows from activities unrelated to crop production to be
14 excluded from the statutory exception, thus requiring an NPDES permit for such discharges.” *PCFFA v.*
15 *Glaser*, 937 F.3d 1191, 1199 (9th Cir. 2019).¹ The wastewaters discharged by the GBP through the San
16 Luis Drain are commingled and include contaminated water from land that is neither irrigated nor
17 farmed. Therefore, under this ruling, an NPDES permit is required for operation of the GBP and its San
18 Luis Drain. *Id.*

19 50. On or about October 7, 2019, the Regional Board circulated public notice that it would be
20 holding a public hearing concerning proposed revisions to the waste discharge requirements for the GPB
21 at its December 5 and 6, 2019 meeting. The Regional Board invited the public to submit comments on
22 the draft WDRs for the Regional Board’s consideration at this meeting.

23 51. On October 10, 2019, the Authority approved the Final Addendum to the 2009 EIS/EIR, and
24 agreed to extend the operational life of the GBP for an additional 25 years, until 2045.

25 52. The Addendum purports to assess the impacts of the Authority’s proposed Long-Term
26

27
28 ¹ On December 20, 2019, the opinion was amended upon denial of rehearing. However, this key
holding remains unchanged. *See PCFFA v. Glaser*, 945 F.3d 1076, 1085 (9th Cir. 2019)

1 Storm Water Management Program (“Storm Water Program”). The Storm Water Program would add
2 approximately 200 acres of “storage basins,” expand the Grassland Bypass Project’s reuse area and
3 otherwise modify its operation. These changes will have significant impacts not previously analyzed,
4 and therefore require preparation of an SEIR.

5 53. There have been numerous changes in the circumstances surrounding the GBP, as the
6 Authority admits. Addendum Appendix A 19. These changes, along with the changes to the GBP itself,
7 have significant impacts not previously analyzed that should have been studied in an SEIR rather than an
8 addendum.

9 54. New information of substantial importance has come to light in the intervening years since
10 the GBP was last approved in 2009, showing changes in its effects not previously analyzed that require
11 analysis in an SEIR.

12 55. The Authority certified the Addendum and approved a 25-year extension of the GBP Use
13 Permit despite the fact that the GBP is continuing to violate the Clean Water Act by discharging polluted
14 flows from the Drain into waters of the United States without the required NPDES permit. CEQA
15 requires that this violation be addressed in an SEIR because it raises new information of substantial
16 importance and changes the circumstances surrounding the project such that significant environmental
17 effects not previously analyzed are shown. Guidelines § 15162(a).

18 56. The Addendum states that the Storm Water Program’s use of 200 acres of storage basins to
19 collect storm water for subsequent release will not significantly impact water quality. Addendum 3-4 to
20 3-5. The Addendum claims that, by impounding storm flows, and metering their release onto the reuse
21 area, contaminated discharges would be avoided or reduced to insignificance. *Id.* This assertion is based
22 on the false premise that storm water that would be collected in these storage basins from December to
23 May would not discharge pollutants such as selenium, boron, salt, and molybdenum to Mud Slough and
24 thence the San Joaquin River. Addendum 3-3. As the Authority admits, the storage basins are unlined
25 and will allow seepage of their contaminated water to the underlying and surrounding groundwater,
26 which seeps into the Drain and is thereby discharged into Mud Slough. Addendum Appendix A 10.
27 Furthermore, foreseeable weather conditions and constraints on the SJRIP’s efficacy and operational
28 capacity may result in the discharge of untreated water to the storage basins on the SJRIP, as further

1 discussed below. The potential impacts of those discharges were not analyzed in an SEIR.

2 57. In an attempt to reduce the volume of contaminated groundwater in its discharges, the
3 Storm Water Program calls for wastewater sump pumps to be turned off “prior to and during wet
4 weather flows.” Addendum 3-3. But as the impounded storm water collects in these storage basins, it
5 will add to the contaminants in the already impaired groundwater and soils underlying and surrounding
6 the basins, exacerbating their contamination. Addendum Appendix A 10. Consequently, the impounded
7 wastewater will simply create additional saturated soils, ponds of contaminated water, and polluted run-
8 off, all of which will continue to enter the Drain by gravity flow and seepage, and ultimately discharge
9 into Mud Slough.

10 58. The Authority claims it has removed from the Drain approximately 180,000 cubic yards –
11 so far – of contaminated sediment. But the question remains whether this contaminated sediment may
12 nonetheless find its way into the groundwater that drains into the San Luis Drain. Much of this
13 contaminated sediment was apparently relocated to old drains, or placed elsewhere in the reuse area. If
14 so, surface runoff and groundwater will continue to infiltrate this contaminated sediment, and remobilize
15 these contaminants – including high levels of selenium and other pollutants – into the water table, and
16 ultimately the San Luis Drain and thence Mud Slough. This potential pathway of re-contamination was
17 not properly disclosed, and its impacts and their mitigation have not been properly addressed.

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

27 60. The Authority did not perform any new modeling of the water quality impacts associated
28 with the Storm Water Program, including impacts resulting from the increase in the size of the reuse area

1 or the use of the proposed new storage basins. Addendum 3-11. By relying on out-of-date modeling that
2 does not accurately reflect the Storm Water Program’s impacts, or the changed conditions at the reuse
3 area, the Authority has precluded informed decisionmaking. Under Guidelines section 15162, these new
4 and substantially increased impacts must be thoroughly studied in an SEIR.

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

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

25 63. The Addendum and Initial Study argue that mitigation measures designed to limit the
26 impacts of irrigation ditches in the 2009 EIS/EIR will help “avoid impacts to wildlife” from these storage
27 basins, but the effectiveness of the mitigations is doubtful and moreover, they will have their own
28 impacts that must be considered in an SEIR. Addendum 2-3; Initial Study 2-14 to 2-16. The 2009

1 EIS/EIR proposed mitigations to make irrigation ditches less attractive and to haze birds to limit nesting
2 and foraging in those irrigation ditches. Addendum 3-6 to 3-7. The majority of the measures designed
3 to make irrigation ditches less attractive are inapplicable to the storage basins, both because the physical
4 structures are different and because the storage basins already exist, limiting the potential to incorporate
5 mitigations. Addendum Appendix A 9 (admitting that measures are more difficult to incorporate into
6 already existing features). And hazing has significant impacts because it displaces wildlife from its
7 foraging, breeding and nesting habitat.

8 64. The GBP includes a 1,450-acre expansion of the existing reuse facility – the SJRIP – from
9 6,100 acres to 7,550 acres. The 2009 EIS/EIR analyzed only a 6,100-acre reuse facility. Addendum 2-5;
10 2009 EIS/EIR 2-2. While the “additional acreage would be managed in the same manner as the existing
11 acreage with the same biological monitoring requirements established by the U.S. Fish and Wildlife
12 Service (USFWS) in their Biological Opinion,” that does not negate the significant new and increased
13 impacts that this substantial change will have on the surrounding environment. Addendum 2-5;
14 Guidelines § 15162(a). As the Addendum admits, “[t]he primary environmental concern is an increased
15 potential for ponding of seleniferous water within the fields of the SJRIP, which could be an attractive
16 nuisance to wildlife, particularly birds.” Addendum 2-5. Yet this additional acreage was not studied in
17 an SEIR.

18 65. The GBP’s increased ponding will likely poison birds. In “2003, a pasture at the existing
19 reuse area site attracted waterfowl when it was inadvertently flooded. This flooded area created ideal
20 ecological conditions for shorebird foraging and nesting and thus, a number of pairs responded
21 opportunistically and bred in the field.” Addendum 3-7. But as a consequence, “[r]ecurvirostrid [i.e.,
22 birds of the family *recurvirostridae*] eggs collected near the pasture *had highly elevated [selenium]*
23 *concentrations.*” *Id.* (emphasis added). This foreseeable poisoning of migratory birds violates the
24 Migratory Bird Treaty Act (“MBTA”), 16 U.S.C. section 703. But the Addendum dismissed this
25 concern, claiming that “other impacts would be created if the area is not enlarged to handle agricultural
26 drainage.” Addendum 2-5; Addendum Appendix A 9. But it is a violation of CEQA – and other laws
27 such as the MBTA – to ignore a significant impact on the grounds the effects of an alternative might be
28 greater. The deliberate exposure of waterfowl to these poisonous waters is a significant impact that

1 requires analysis in an SEIR. Creating this hazard is also a crime forbidden by the MBTA, 16 U.S.C.
2 section 703. An SEIR is needed both to assess the GBP’s impacts on wildlife, and to determine what
3 these “other” undisclosed impacts may be, and thereby allow the public and decisionmakers to weigh
4 them and make an informed decision.

5 66. The Addendum and Initial Study rely on ineffective mitigation measures from the 2009
6 EIS/EIR in an ill-advised attempt to reduce these new significant and substantially increased impacts.
7 Supposedly, “[m]itigation contained in the Grassland Bypass Project Final EIS/EIR for the existing reuse
8 facility would apply to this area also. This mitigation includes a contingency plan in the event of
9 inadvertent flooding in the reuse area due to breakage of a water supply canal or delivery facility.”
10 Addendum 2-5; Initial Study 1-11. But this one-page so-called contingency “plan” is vague and fails to
11 provide any enforceable guidelines. It recommends that “ponded water . . . be eliminated through the
12 discharge of the water into a tail-water return system *or* by pumping the water into one of the supply
13 channels in the project *or* a tail-water return system” within 24 hours. Initial Study, Appendix D, D-2
14 (emphasis added). But this page never explains why, when or how to utilize any of the options
15 presented. Nor does it enforce the 24-hour ponding elimination requirement. Instead, this page defers
16 mitigation for ponding that occurs for more than 24 hours, stating that “an event-specific monitoring
17 plan will be developed to monitor the impacts on bird species resulting from exposure to ponded water.”
18 Initial Study, Appendix D, D-2.

19 67. While acknowledging that the SJRIP field will be increased in size, that field flooding has
20 occurred previously, and that the flooded fields created “ideal ecological conditions for shorebird
21 foraging and nesting, and thus, a number of pairs responded opportunistically and bred in the
22 [contaminated] field,” the Addendum simultaneously dismisses the fact-based concern that birds will be
23 attracted to and use the polluted ponds – as they have in the past – and thereby become poisoned.
24 Addendum 3-7. Instead, the Authority claims that a vague and unenforceable mitigation measure that
25 was never analyzed with regard to a reuse area of this size is sufficient.

26 68. By approving an extension of the GBP Use Agreement allowing the continued discharge of
27 pollutants from the San Luis Drain into waters of the United States without the required NPDES permit,
28 the Authority – and the Boards by approving this polluted discharge – have violated the Clean Water

1 Act. The Boards may not excuse their – and Authority’s – attempted end-run around the Clean Water
2 Act by claiming the San Luis Drain is exempt from the NPDES permit requirement. That claim was
3 forcefully rejected by the Ninth Circuit in *PCFFA v. Glaser*. 945 F.3d at 1085-1087.

4 69. The Boards’ and the Authority’s violation of the Clean Water Act is causing significant
5 environmental harm. Discharges by the GBP contain high levels of selenium. Selenium kills juvenile
6 salmon and steelhead and causes birth defects in the birds that nest and feed along the shorelines and in
7 the wetlands affected by the GBP. Selenium pollution from the San Luis Drain is now contaminating the
8 public’s waterways via Mud Slough and the San Joaquin River into the Delta, a vital freshwater system
9 which, through the Central Valley Project and the State Water Project, serves as the water supply for 20
10 million Californians. Recent monitoring reports show that selenium levels in the San Joaquin River
11 exceed safe drinking water standards. According to a recent scientific study, elevated selenium exposure
12 has caused widespread spinal deformities in the Sacramento Splittail (*Pogonichthys macrolepidotus*), a
13 species listed by the State of California as a species of special concern.

14 70. On November 5, 2019, petitioners NCRA, PCFFA, IFR, San Francisco Fishermen, CalSPA,
15 and Felix Smith submitted comments to the Regional Board regarding the Tentative Waste Discharge
16 Requirements for Surface Water Discharges from the Grassland Bypass Project. These comments
17 attached petitioners’ related September 13, 2019 Comments to the Authority regarding the 2019
18 Addendum, and the September 6, 2019 slip opinion in *PCFFA v. Glaser*, 937 F.3d 1191 (9th Cir. 2019).

19 71. On November 5, 2019, petitioners Winnemem Wintu Tribe, NCRA, PCFFA, IFR, San
20 Francisco Fishermen, and CalSPA submitted additional comments to the Regional Board.

21 72. On November 12, 2019, petitioners NCRA, San Francisco Fishermen, CalSPA, PCFFA,
22 and IFR filed a Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive
23 Relief and Attorneys’ Fees against the Authority in Merced County Superior Court, case no. 19CV-
24 04989. That petition challenged the Authority’s October 10, 2019 approval of the Addendum to the
25 2009 EIS/EIR and entry into the use agreement, due to the Authority’s failure to comply with CEQA, the
26 Delta Reform Act, the Public Trust Doctrine, the Clean Water Act, and the CCP.

27 73. At the Regional Board’s December 5, 2019, hearing, several members of petitioners’ groups
28 provided additional comments regarding the inadequacies of the WDRs, the Grassland Bypass Project’s

1 harmful discharges, the inadequacy of the existing selenium standards, and the need for an NPDES
2 permit.

3 74. The Regional Board adopted Order R5-2019-0077 on December 5, 2019.

4 75. The Notice of Determination for the Regional Board’s adoption of Order R5-2019-0077 was
5 posted by the Governor’s Office of Planning and Research on December 12, 2019.

6 76. Petitioners timely filed a Petition for Review with the State Board on Monday, January 6,
7 2020, pursuant to Title 23 of the California Code of Regulations (“CCR”), section 2050 et seq.
8 Petitioners’ Petition for Review informed the State Board of the errors in the Regional Board’s
9 December 5, 2019, approval.

10 77. The State Board did not respond to petitioners’ January 6, 2020 Petition for Review within
11 90 days, by Sunday April 5. Thus, “effective the 91st day following receipt of the petition” – Monday
12 April 6, 2020 – the petition was deemed dismissed due to the State Board’s inaction. 23 CCR §
13 2050.5(e).

14 78. Title 23 CCR section 2050.5(e) provides that “[a] party aggrieved by a regional board final
15 decision or order for which the state board dismisses a petition pursuant to this subdivision must file any
16 judicial challenge within the 30-day period for judicial review allowed by Water Code section 13330,
17 subdivision (b).” Pursuant to Water Code section 13330(b), an aggrieved party “may obtain review of
18 the decision or order of the regional board in the superior court by filing in the court a petition for writ of
19 mandate not later than 30 days from the date on which the state board denies review.” Likewise, Water
20 Code section 13330(c) provides that “[t]he time for filing an action or proceeding subject to Section
21 21167 of the Public Resources Code for a person who seeks review of the regional board’s decision or
22 order under Section 13320 . . . shall commence upon the state board’s completion of that review or
23 reconsideration.” May 6, 2020 is 30 days after Monday, April 6, 2020, the day on which the State
24 Board’s inaction became a dismissal. By filing this Verified Petition and Complaint on May 5, 2020,
25 petitioners have timely challenged the Regional Board’s action, despite the Regional Board’s December
26 12, 2019 Notice of Determination. Water Code § 13330(b),(c); 23 CCR § 2050.5(e).

27 **FIRST CAUSE OF ACTION**

28 **(Violations of the Clean Water Act and Porter-Cologne Act)**

1 **(Alleged by All Petitioners Against All Respondents)**

2 79. The paragraphs set forth above and below are realleged and incorporated herein by
3 reference.

4 80. The WDRs state they are “not an NPDES permit.” WDRs ¶ 3.

5 81. The WDRs state they are not intended to address “any discharges from activities other than
6 those related to crop production.” WDRs ¶ 3. Yet the San Luis Drain is a single, commingled discharge
7 that does *not* segregate the pollutants it discharges based on their source. The WDRs are therefore
8 necessarily applicable to *all* of the San Luis Drain’s discharges to surface waters. WDRs ¶ 1.

9 82. It is indisputable that the discharges from the GBP and its San Luis Drain to Mud Slough
10 and other waters of the United States are *commingled* flows that include pollutants that are not *entirely*
11 from irrigated agriculture.

12 83. The Boards have a duty under the Clean Water Act and the Porter-Cologne Act to require an
13 NPDES permit for these discharges. By approving the WDRs for the GBP and failing to require an
14 NPDES permit, the Boards have violated both the Clean Water Act and the Porter-Cologne Act.

15 **SECOND CAUSE OF ACTION**

16 **(Violation of the Delta Reform Act)**

17 **(Alleged by All Petitioners Against All Respondents)**

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

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

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

1 Water Code § 85057.5(a).

2 86. While “[a] regulatory action of a state agency” – such as the Regional Board’s approval of
3 the WDRs themselves – is not a “covered action” requiring a finding of consistency with the Delta Plan,
4 the Authority’s and the Regional Board’s approval of a “project” enabled by the WDRs – the GBP – *is* a
5 “covered action.” Water Code §§ 85057.5(a), 85057.5(b)(1) (quote).

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

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

12 89. The Regional Board and the Authority failed to make the consistency determination
13 required by the Delta Reform Act before approving the GBP and its WDRs. They could not make this
14 required determination because the GBP is not consistent with the Delta Plan or the coequal goals of the
15 Delta Reform Act. The Delta Plan itself acknowledges that the existing 5 µg/L selenium objective for
16 chronic exposure “may not be sufficient” for aquatic organisms and fish. Delta Plan, Chapter 6, p. 228.
17 The Delta Plan recommends that projects maintain water quality “at a level that supports, enhances, and
18 protects” the beneficial uses identified in the Basin Plan. WQ R1. The GBP fails to meet this
19 requirement.

20 90. Thus, the Boards’ approval of the GBP and its WDRs green-light the Operators’ harmful
21 discharges, which degrade the quality of the Delta ecosystem, contrary to the Delta Reform Act and the
22 Delta Plan’s requirements that covered actions such as the GBP restore, protect, and enhance the Delta
23 ecosystem. Water Code §§ 85054, 85066; Delta Plan Chapters 4 (Protect, Restore and Enhance the
24 Delta Ecosystem) and 6 (Water Quality).

25 91. For the foregoing reasons, the GBP and its WDRs are neither consistent with the Delta Plan
26 nor compliant with the coequal goal of “protecting, restoring, and enhancing the Delta ecosystem.”
27 Water Code § 85054.

28 92. While the Delta Reform Act arguably excludes the Boards’ consideration of the WDRs –

1 standing alone – from the definition of covered action, the Delta Reform Act unequivocally applies to
2 the GBP. Yet the Boards issued the WDRs *for the GBP*, without *first* requiring that the Authority make
3 the Delta Plan consistency determinations required by the Delta Reform Act. By failing to require the
4 Authority to comply with these Delta Reform Act mandates, and by instead approving a project – the
5 GBP and its WDRs – that is inconsistent with the Delta Plan, the Boards violated the Delta Reform Act.

6 **THIRD CAUSE OF ACTION**

7 **(Violation of the Public Trust Doctrine)**

8 **(Alleged by All Petitioners Against All Respondents)**

9 93. The paragraphs set forth above and below are realleged and incorporated herein by
10 reference.

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

14 95. In *United States v. State Water Resources Control Board*, the court noted that the Public
15 Trust Doctrine mandates “that the state as trustee of the public trust retains supervisory control over the
16 state’s waters such that no party has a vested right to appropriate water in a manner harmful to the
17 interests protected by the public trust.” (1986) 182 Cal.App.3d 82, 149, citing *National Audubon Society*
18 *v. Superior Court*, 33 Cal.3d at 445. The court held that the public trust doctrine necessarily requires
19 agencies to “consider water quality for the protection of beneficial uses” when determining whether or
20 not to approve a project. *Id.* at 150-151.

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

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

11 98. But the Boards did exactly that here. The Regional Board approved the discharge of
12 polluted flows – a non-public trust use – over the protection of public trust resources. These flows
13 degrade the waters of Mud Slough, the San Joaquin River, and the Delta, harming the individuals and
14 species that rely on them, and impair the beneficial uses of the applicable basin plan. And, by failing to
15 act upon petitioners’ Petition for Review, the State Board has allowed non-public trust uses – including
16 the discharge of pollutants in violation of the Clean Water Act and the Porter-Cologne Act – to harm
17 public trust uses.

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

23 100. By approving the WDRs without adequately analyzing potential alternatives or additional
24 feasible mitigation measures as required by CEQA and the Public Trust Doctrine, the Boards abdicated
25 their affirmative statutory and constitutional “duties to take the trust into account and protect public trust
26 uses whenever feasible,” and impermissibly promoted a non-public trust use at the expense of public
27 trust resources. *Baykeeper II*, 29 Cal.App.5th at 571, 577.

28 101. For the foregoing reasons, the Boards’ approval of the WDRs violates the Public Trust

1 Doctrine.

2 **FOURTH CAUSE OF ACTION**

3 **(Violation of CEQA)**

4 **(Alleged by All Petitioners Against All Respondents)**

5 102. The paragraphs set forth above and below are realleged and incorporated herein by
6 reference.

7 103. Petitioners bring this fourth Cause of Action for violations of CEQA pursuant to PRC
8 sections 21168 and 21168.5, on the grounds that the Boards committed a prejudicial abuse of discretion
9 by failing to proceed in the manner required by law in approving the WRDs and the GBP based on the
10 Authority's legally inadequate Addendum.

11 104. Water Code section 13389 exempts the Regional Board from complying with Chapter 3 of
12 the California Environmental Quality Act, which addresses Environmental Impact Reports prepared by
13 state agencies. Water Code section 13389 does not exempt the Regional Board from other portions of
14 CEQA, including its substantive mandates requiring adoption of feasible alternatives and mitigation
15 measures that would avoid this Project's significant environmental impacts. By relying upon the
16 inadequate 2019 Addendum, and failing to require the NPDES permit required by both the Clean Water
17 Act and the Porter-Cologne Act, the Regional Board has failed to appropriately study and mitigate the
18 impacts of the GBP.

19 105. The Regional Board relied upon the Authority's 2019 Addendum to satisfy CEQA's
20 requirements. WDRs ¶¶ 31-34. The Regional Board cited PRC section 21167.3 in concluding it "must
21 presume that the [2019 Addendum] comports with the requirements of CEQA and is valid." WDRs ¶
22 34. However, CEQA still demands that responsible agencies, such as the Regional Board, consider the
23 adequacy of the environmental documents, and reach their own conclusions. Guidelines § 15096(a), (e)-
24 (h); *Riverwatch v. Olivenhain Municipal Water District* (2009) 170 Cal.App.4th 1186, 1205-1215.

25 106. The purpose of an addendum is to provide agencies and the public with information about
26 changes to a proposed project that will cause any "new significant environmental effects or a substantial
27 increase in the severity of previously identified significant effects," or result in changes to the feasibility
28 of any mitigation measures or alternatives, whether or not they were previously considered. Guidelines

1 §§ 15162(a), 15164(a). An addendum is not appropriate where, as here, “[s]ubstantial changes are
2 proposed in the project,” “[s]ubstantial changes occur with respect to the circumstances under which the
3 project is undertaken,” or “[n]ew information of substantial importance” shows a change in the project’s
4 effects, mitigation measures, or alternatives such that new significant environmental effects or a
5 substantial increase in the severity of previously identified significant effects are now shown. Guidelines
6 § 15162(a). All three factors exist here, and thus the Addendum was insufficient for the Boards to rely
7 upon it for the purposes of satisfying their responsible agency duties under CEQA.

8 107. The Boards were prohibited from approving the GBP and its WDRs as proposed “if [they]
9 find[] any feasible mitigation measures within [their] powers that would substantially lessen or avoid any
10 significant effect the project would have on the environment.” Guidelines § 15096(g)(2). Because such
11 measures – including the NPDES permit required by the Clean Water Act and the Porter-Cologne Act –
12 exist but were not even evaluated, let alone adopted, the Boards’ approval of the GBP and its WDRs
13 violates CEQA.

14 **FIFTH CAUSE OF ACTION**

15 **(Writ of Mandate, Declaratory and Injunctive Relief to Set Aside**

16 **Project Approvals as Contrary to CCP §§ 1085 and 1094.5)**

17 **(Alleged by All Petitioners Against All Respondents)**

18 108. The paragraphs set forth above and below are realleged and incorporated herein by
19 reference.

20 109. The Boards proceeded in excess of their jurisdiction and abused their discretion in
21 approving the GBP and its WDRs because such approvals violate CCP sections 1085 and 1094.5 in the
22 following respects, among others:

23 a. such approvals were not granted in accordance with the procedures required by law;
24 b. such approvals were not based on the findings required by law; and
25 c. such approvals were not based on, or were contrary to, the evidence in the record
26 before the Boards.

27 110. The Boards failed to proceed in the manner required by law in the following respects,
28 among others:

- a. The Boards violated the Clean Water Act and Porter-Cologne Act as alleged;
- b. The Boards violated the Delta Reform Act as alleged;
- c. The Boards violated the Public Trust Doctrine as alleged; and
- d. The Boards violated CEQA, all as alleged hereinabove.

111. The Boards' actions in approving the GBP and its WDRs without complying with the procedures required by CCP sections 1085 and 1094.5 exceeded the Boards' jurisdiction and constitute prejudicial abuses 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 Boards from taking any action to carry out the WDRs pending, and following, the hearing of this matter;
2. For a peremptory writ of mandate directing the Boards to set aside and vacate their approval of the WDRs;
3. For declaratory relief declaring the WDRs unlawful;
4. For a peremptory writ of mandate directing the Boards to suspend all activity implementing the WDRs that could result in any change or alteration in the physical environment until they have taken all actions necessary to bring their approval of the GBP, its WDRs, and the Addendum on which the Boards relied into compliance with the Clean Water Act, the Porter-Cologne Water Quality Act, the Delta Reform Act, the Public Trust Doctrine, CEQA, and the Code of Civil Procedure.
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: May 5, 2020

Respectfully submitted, LAW OFFICES OF STEPHAN C. VOLKER

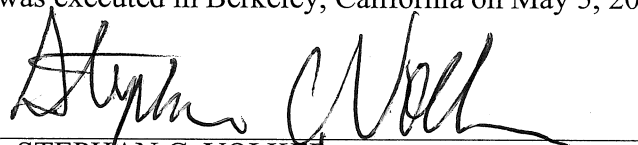

By: STEPHAN C. VOLKER

Attorney for Petitioners and Plaintiffs
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

1 **VERIFICATION**

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

8 I declare under penalty of perjury under the laws of the State of California that the foregoing is
9 true and correct, and that this Verification was executed in Berkeley, California on May 5, 2020.

10 
11 _____
12 STEPHAN C. VOLKER