



September 8, 2010

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Subject: "Comment letter- San Joaquin River Selenium Control Plan Basin Plan Amendment"

Proposed approval of Amendments to the Water Quality Plan for the Sacramento River and San Joaquin River Basins (Basin Plan) to address Selenium Control in the San Joaquin River Basin issued September 1, 2010, for comments.

Approval of the Basin Plan Amendment continues the Grasslands Bypass Project for another decade to December 31, 2019. The Project will continue to collect and move selenium contaminated drainage from parts of the Westside through the Federal San Luis Drain for discharge / disposal in Mud Slough flowing then to the San Joaquin River. At this location flows from the Merced River and flow releases from Friant Dam and Reservoir to restore the San Joaquin River's connection to the Delta and San Francisco Bay will reduce the selenium concentration in the lower San Joaquin River. Dilution appears to be the solution to this selenium bioaccumulation pollution.

In June of 1983 (over a quarter of century ago) I held the first live grossly deformed American coot hatchling (no eyes, deformed head, wings and no legs) found at the Kesterson NWR evaporation ponds. Drainage delivered to the Kesterson had contaminated the habitat and food chain of evaporation ponds. It was determined that selenium in the food chain caused the deformities of this American coot. Numerous other deformed embryos and dead birds were found. Selenium was accumulating to toxic levels via the food web in the Kesterson NWR evaporation ponds. At the time, pictures of grossly deformed birds were seen on dinnertime TV news or morning newspaper 27 years ago. Those images of gross deformities apparently have been forgotten and haven't been seen by at least two generations of TV viewers. May be it is time for the Sacramento Bee to run its Special Reports on Selenium of September 1985 and December 1988; for "60 Minutes" and for KQED San Francisco to do a follow-up of "Down the Drain" to expose what has and has not happened during the past 25 year.

In 1985 the State Board issued Order WQ 85-1. Order WQ 85-1 found the drainage entering Kesterson evaporation ponds contaminated habitat, threatened fish and wildlife, and was causing reproductive and biological problems to the people's fish and wildlife trust. This selenium was accumulating to levels toxic to fish and other aquatic life through the food web. The State Board concluded that agricultural drainage was creating and threatening to create conditions of pollution and nuisance, and the continued irrigation of affected lands could constitute an unreasonable use of water.

In 1986, Gerald Johns, a State Board representative, at UC Berkeley conference on drainage, stated that the State Board would use its water quality authority to address the drainage issue. If that did not work, it would then use its water right authority to protect beneficial uses and public trust resources.

It is now a quarter of a century after the State Board's WQ 85-1. In September 2010, the State Board accepted a Draft proposal to extend the Grassland Bypass Project for another decade from October 31, 2010, to December 31, 2019, which is over 3 decades since the State Board's WQ 85-1.

After the expenditure of millions of dollars including tax payer dollars and State Grant monies on treatment science, there is no clear best / practical treatment process to remove selenium from the agricultural drainage. Drainers have spent money lobbying the State Board, members of Federal and State legislature to come to their aid. The best practice is do not irrigate saline - seleniferous soils. If one doesn't cause the drainage mess in the first place, there is nothing to clean up.

There is little doubt that selenium, like DDT and toxaphene of the 1960's and 70's (SWRCB Water Quality Monitoring Report No. 82-1 TS, July 1982, and Water Quality in the San Joaquin -Tulare Basin, 1992-95, USGS Cir. 1159 - 1998), has also accumulated in the mud and food web of the Lower San Joaquin River and southern Delta biota. Bioaccumulation of DDT compounds and selenium is occurring. The 2000 California 305 (b) report refers to the condition as "unknown toxicity" with the source being "Agriculture" (SWRCB - 2000 California 305 (b) Report on Water Quality- 2000). Other State Board reports and other literature (USGS, etc) indicate that water borne selenium is the single and best predictor of pollution of the aquatic system. The continued irrigation of saline - seleniferous soils of the San Joaquin Valley with its selenium contaminated discharges to the San Joaquin River constitute a waste and unreasonable use of the State's water and is also a nuisance. When a use of water that so degrades the sustainability of a downstream ecosystem or a component of that ecosystem making it unsuitable for sustaining viable agriculture, populations of wildlife, fish and other aquatic life, or which results in fish unsuitable for human consumption, or which is a hazard to other fish and wildlife, or which degrades ecological, aesthetic, recreational uses, and scenic values; it is inconsistent with public trust protection and the reasonable use of water, it is a waste of water and is therefore a nuisance. When selenium enters the bodies of mothers of childbearing age or children, or enters the domestic or wildlife food supply to toxic levels without our consent, it is a trespass.

The meaning of an 1895 ruling by the California Court in *People ex rel Ricks Water Co. v Elk River Mill and Lumber Company* (40 Pac Rpt 486-1895) comes to mind. Elk River Lumber Company was a mill / farm / ranch enterprise having a water quality / beneficial use issue. The *Elk River* Court found filth from cows, hogs, stables, fetid matter and mill debris was entering and polluting Elk River (a domestic water supply). The *Court* found the situation to be a nuisance and an unreasonable use of State water. The *Court* reasoned that what the mill was doing was equivalent to actually putting the material directly into Elk River. The meaning of the *Elk River* decision is very clear; "if

**the conformation of the defendant's land is such that he cannot carry on a dairy without putting such filth directly into the water, then he must find some other use for the land.** This thinking should be applied to today's selenium and drainage issues associated with irrigating selenium-contaminated lands on the Westside of the San Joaquin Valley. If the Westside farmers cannot carry on their operations without polluting the local ground and surface water; if they cannot carry on their operations without polluting the San Joaquin River, wetlands and causing mortality (toxicity) to fish and wildlife resources, **they must find some other use for the land.**

The people, in 1884, did not pay off the corporations hydraulic mining gold to stop dumping / disposing their waste into the State's rivers. The people, in 1895, did not pay off the Elk River Mill and Lumber Company for its lost waste disposal area. Today, taxpayers do not owe Westside agribusiness a buyout or other payments for them to stop polluting the State's waters, contaminating aquatic fish and wildlife resources, and degrading beneficial uses of state waters and associated public trust values.

A key item in the 1902 Reclamation Act is Section 8—The Secretary of the Interior shall proceed in conformity with State laws; --- Provided, "the right to the use of water acquired under the provisions of this Act, shall be appurtenant to the land irrigated and beneficial use shall be the bases, the measure and the limit of that right"--.

It is the Bureau of Reclamation's responsibility to assure that beneficial use of its water right water attaches to the land being irrigated. The Bureau has not done this. It has looked the other way. Impacts to trust resources and beneficial uses are widespread and far-reaching. The impacts extend from areas where the water originates, including the Trinity River and American River, associated fishery resources including Steelhead, Chinook and Coho salmon, recreational, scenic and economic assets and biological values. In the San Joaquin Valley drainage has contaminated groundwater, the San Joaquin River and adjacent wetlands, fishery resources, associated public trust uses and values. Large corporations are the beneficiaries of this amendment. They are the ones allowing drainage and wastewater from their land to flow into public waters. The poor and low-income farm workers and their families, fisherpersons and others are paying costs through lost beneficial uses and values and with opportunities foregone. Public health advisories have been issued by the State cautioning people about eating fish from the lower San Joaquin River and selected adjacent waters.

Policy issue. Should the State Water Board approve the amendment to the Basin Plan to incorporate modifications to the existing time compliance schedule for the Grasslands Bypass Project?

The Draft Amendment allows the dischargers (supported by the Bureau of Reclamation and the Delta- Mendota Water Authority) to exceed the selenium objectives for an additional decade, to December 31, 2019. It appears this Water Board desires to continue the drainer's privilege to pollute surface and groundwater, aquatic habitats and degrade associated beneficial use for their past cooperation at reducing the amount of selenium contaminated drainage entering waters of the State.

If the State Water Board approves the requested amendment, it will be "an enabler", with the people and beneficial uses of State waters sentenced to another decade of selenium-contaminated discharges to the San Joaquin River. Instead, the State Water Board should issue a cease and desist order against the affected irrigators and drainers using its water right and water quality authorities and its responsibilities under the public trust doctrine. The affective date of such cease and desist order should be October 1, 2010, with full implementation and enforcement by January 1, 2011. Such a use of the public trust doctrine should derail any taking claim (Johnson - Water Pollution and the Public Trust Doctrine, Environmental Law, Northwestern School of Law, Vol. 19, NO. 3 - 1989). This is not about ending irrigated agriculture; it is about ending selenium drainage and its pollution / contamination of State waters.

The people want their government to work efficiently, effectively and in the public interest. The process of controlling selenium in drainage started in 1985 and has continued through today. This proposed Amendment allows the use of the Grasslands Bypass Project for another 10+ years. This supposedly will allow time for developing the best and practical corrective action to control selenium drainage from irrigating saline- seleniferous soils which has contaminated local ground water, State waters, associated fish and wildlife and degraded other public trust values. That makes a 35-year time frame (over a third of a century) that the State Water Board has been playing with the impacts from selenium contamination of surface and ground water and aquatic habitats of portions of the San Joaquin valley. This 35 year time frame does not seem to equal "timely and effective action" for controlling the production of selenium drainage to protect public trust resources, values and beneficial uses of State waters.

The State Water Board should remember that California courts have said, "The public is not to lose its rights through the negligence of its agents, nor because it has not chosen to resist an encroachment by one of its own number, whose duty it was, as much as that of every other citizen, to protect the state in its rights". The Court in *Cal Trout v State Water Resources Control Board* (207 Cal App 3d 585 - 1989) relied on *People v Kerber* (152 Cal 731,732-736, 93 Pac 878 1908) for the continuous protection of public trust interests. Therefore a member of the public can call for the State Board can revisit existing water rights aspects of irrigating saline- seleniferous lands at any time or can move ahead with independent action, a lawsuit.

Please include these comments into the record of subject --San Joaquin River Selenium Control Plan Basin Plan Amendment" dated September 1, 2010

Sincerely

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Cc: interested parties  
SWRCBSeleniumComSept2010