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Via California Overnight Delivery Service
May 29, 2008

Rudy Schnagl
Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive # 200
Rancho Cordova, California 95670-6114

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Re: **Draft MAA Between Regional Board and USBR**

Dear Mr. Schnagl:

These comments are submitted on behalf of the San Joaquin River Exchange Contractors Water Authority and its member agencies¹ (collectively "Exchange Contractors"). In sum, the Exchange Contractors request that the draft MAA be rejected by the Regional Board. In lieu of the MAA, the Regional Board must demand that the USBR comply with the express requirements of (1) the San Luis Act as interpreted by the United States Court of Appeals for the Ninth Circuit in *Firebaugh Canal Co. v. U.S.* (2000) 203 F.3d 568; (2) D-1641 and (3) the Basin Plan (excluding the challenged amendment establishing the salt and boron TMDL). All three obligations require the USBR to provide a drainage system for lands that drain into the San Joaquin River.

For over forty years, the USBR has obstinately refused to provide the legally required drainage. It is time for the State of California, acting through the Regional Board, to demand fulfillment of USBR's obligations. The first step in this process is rejecting the indefensible and illogical MAA.

I. The MAA is Preempted by the San Luis Act

As discussed in *Firebaugh, supra*, the San Luis Act gives the Secretary of the Interior discretion to construct the San Luis Unit. Prior to beginning construction, the San Luis Act required (1) satisfactory assurances regarding the right to use of water and (2) "satisfactory assurance from the State of California that it will make provision for a master drainage outlet and disposal channel for the San Joaquin Valley,...." (Pub. Law 86-488 § (1)(a)(1) & (2)).

¹ Central California Irrigation District, San Luis Canal Company, Firebaugh Canal Water District, and Columbia Canal Company

On June 21, 1961, the State of California notified the Secretary of the Interior that it would not provide a master drain. In response, on January 9, 1962, the Secretary of the Interior informed Congress that the Secretary would make provision for constructing the San Luis interceptor drain to the Contra Costa Delta. Regarding these facts, the Court in *Firebaugh* provides:

Within this context, section (1)(a)(2) expresses a clear indication that either the State of California or the Department of the Interior shall provide a drainage plan prior to construction of the San Luis Unit. After the State of California indicated that it would not provide a master drain, the Secretary of the Interior had a choice: provide for the interceptor drain or forego construction of the San Luis Unit. (*Firebaugh, supra*, 203 F.3d at 574).

Obviously, the Secretary decided to construct the San Luis Unit, but for over forty years now has refused to perform the USBR's obligation to provide a drain.

Fast forward to today and the draft MAA before the Regional Board. The MAA effectively requests the State of California to reconsider its 1961 decision to not provide a master drain. Inexplicitly, the Regional Board through the draft MAA appears ready to forgive the USBR of its obligations under the San Luis Act and, instead, permit the USBR to "study" the importation of salt and boron through the DMC and then apportion responsibility for salt and boron amongst the USBR and "other responsible parties."

The San Luis Act and the Court's decision in *Firebaugh* is clear: either the State of California or the USBR is responsible for providing the necessary drainage. The Regional Board's attempt to place some of that responsibility on "other responsible parties" is preempted by the provisions of the San Luis Act. The USBR's attempt to allocate that responsibility to "other responsible parties" is contrary to the unequivocal direction of Congress in the San Luis Act. In either event, the MAA cannot be squared with and is contrary to the explicit provisions of the San Luis Act.

II. Neither NEPA nor CEQA Has Been Complied With

When will the necessary environmental review be completed? Is the MAA intended to be an initial study followed by more complete environmental documentation? It may be that the Regional Board is relying on its functional equivalent environmental documentation supporting the salt and boron TMDL. If so, the deficiencies outlined in comments and legal briefs challenging the salt and boron TMDL remain uncured. The MAA, alternatives thereto, environmental impacts (if any) and mitigation measures must be clearly described within the parameters proscribed by CEQA.

Similarly, the USBR has not complied with NEPA. The "Action Plan" describes various operational modifications to New Melones Reservoir and other means of providing dilution flow to the San Joaquin River. The "Action Plan" describes the use of associated projects and drainage plans such as the Grasslands Bypass Project and Westside Regional Drainage Plan to reduce the salt load. The "Action Plan" describes mitigation measures such as establishing a real time monitoring network including the "install[ation] and upgrade [of] necessary stations." Previous NEPA documents prepared by the USBR do not discuss the use of the San Joaquin River as the "drain" required by the San Luis Act

The USBR adopted a Record of Decision in regard to drainage alternatives under NEPA for the northerly 100,000 acres of the San Luis Unit in March of 2007. It did not include, as an alternative to be considered and the environmental consequences of which needed to be examined and potential mitigation measures determined, the alternative of a management plan in which salt and boron were disposed of by utilizing the San Joaquin River as a drain limited only by the timing of the discharge. That Record of Decision under NEPA did not contend, as is suggested in the MAA, that the Regional Board and USBR could delegate responsibility for storing and then releasing salt and boron on local farmers and water districts when the origin of the salt and boron is the USBR's act of providing salt and boron laced water.

Page 5 of the Record of Decision provides:

Reclamation will integrate its implementation activities with the Westside Regional Drainage Plan, and prioritize implementation of the In-Valley/Water Needs Land Retirement Alternative in the Northerly Area so as to eliminate discharges to the San Joaquin River as soon as practicable. (Emphasis added.)

This management agreement does not obligate the USBR to remove salt and boron from the San Joaquin River, the alternative chosen in the ROD. Rather, it permits the use of the San Joaquin River by the USBR as a drain for salt and boron. If that was an alternative to be chosen by the USBR, it should have been studied and included in the NEPA process and the Regional Board must now comply with CEQA in regard to such a "project".

For the reasons stated above in regard to the San Luis Act and the determination that it is the USBR's duty to provide for a drainage system, vague references to other "stakeholders" or "responsible parties" is not in compliance with the San Luis Act nor is it a reasonable and performable mitigation measure under CEQA to be accepted by the Regional Board. As described in *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th *supra*, the Regional Board must have evidence that the USBR or the State will provide funding for the "treatment facilities" or "facilities for management of salt and boron" to treat these

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measures as adequate mitigation of environmental impacts arising from placing a whole new round of burdens on agricultural water users.

Undoubtedly, the MAA is a “major Federal action significantly affecting the quality of the human environment” requiring compliance with NEPA. (42 U.S.C. § 4332). As such, the Bureau must prepare a new detailed environmental statement regarding:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. (*Ibid.*).

The Regional Board and the USBR must explain the environmental documents each is relying on to support the entering into of the MAA. If either agency believes that compliance with CEQA and/or NEPA is not necessary or is premature, it must explain its reasons for so concluding.

III. The MAA Fails to Specify When or How the State Will Provide a Subvention of Funds To Construct Major Treatment Facilities

Under the guise of a “cooperative” agreement, the Regional Board asks that the USBR spearhead the implementation of the preferred alternative discussed in the salt and boron TMDL. The MAA requests that the USBR “lead the effort to develop stakeholder interest in real-time water quality management program[s].”

A real time management program for agriculture, as distinguished from wetlands, necessarily requires the construction of reservoirs and facilities to temporarily retain water until assimilative capacity is sufficient to allow discharge. These facilities are not currently in existence and would require major waste water treatment facility construction to implement the proposed programs.

Presumably, the reservoirs would become “point sources”, as that term is defined in the Clean Water Act, and would require discharge permits under California’s Clean Water Act

equivalent, Porter Cologne. The California Constitution includes a standard that local government entities, like the Exchange Contractors, shall not be made subject to new regulatory burdens by the State without receiving payment for the costs of implementing those regulatory programs. Article XIII B Section 6 of the California Constitution provides:

(a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service,

When the Constitutional subvention requirement was adopted, the Legislature simultaneously enacted Government Code Section 17516(c) to implement the Constitutional provision. Section 17516(c) provides, in relevant part:

‘Executive order’ does not include any order, plan, requirement, rule, or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code. It is the intent of the Legislature that the State Water Resources Control Board and regional water quality control boards will not adopt enforcement orders against publicly owned dischargers which mandate major waste water treatment facility construction costs unless federal financial assistance and state financial assistance pursuant to the Clean Water Bond Act of 1970 and 1974, is simultaneously made available. ‘Major’ means either a new treatment facility or an addition to an existing facility, the cost of which is in excess of 20 percent of the cost of replacing the facility. (Emphasis added)

Furthermore, a Regional Board or State Board order that requires a local agency to spend money is a state mandated cost requiring payment of the cost simultaneously with the adoption of the order. (*County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898).

The constitutional requirement to provide a subvention of funds is only applicable to state mandated costs and not federally mandated costs. The fact that the MAA purports to direct the USBR to “lead the effort” to establish real time management programs does not absolve the Regional Board from its constitutional obligation to provide a subvention of funds. Congress has provided in the San Luis Act that the United States will be responsible for building and operating a drainage system. Congress made no mention of “stakeholders” or “other responsible parties” being responsible for sharing in that expense. The Regional Board is obviously ignoring and not enforcing the San Luis Act (a federal law) and, rather, is enforcing Porter Cologne for which a subvention of funds is required. When will those funds be delivered to “stakeholders” such as the Exchange Contractors?

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IV. The Bureau is Solely Responsible for Providing a Drainage Solution Which the Regional Board can Facilitate by Refusing to Enter into this Foolish MAA

By act of Congress, the United States said that it is responsible for providing a drainage system for lands within the San Luis Unit. What is wrong with forcing the United States to live up to its promises? Under what authority does the Regional Board defy the intent of Congress and, instead, place part of the burden on "other responsible parties" such as the Exchange Contractors? Indeed, the Regional Board in the MAA permits the USBR to define its own level of responsibility for providing a drainage solution on the basis of future studies that will be conducted by the USBR. Is there any question what the result of those studies will be and who (entities such as the Exchange Contractors versus the USBR) will bear the primary responsibility and burden for constructing, operating and maintaining the drainage system?

The time has come to force the United States to solve the problems it is responsible for correcting. The Regional Board can facilitate this by classifying the disbursement of salt and boron laced waters by the USBR into the Central Valley as a point source and regulating it under the discharge permitting process. An analogous conclusion has already been made by the Regional Board by classifying and regulating the Grasslands Bypass project as a point source that must operate under a discharge permit.

Rather than enter into this ineffective and misleading management plan and reallocating the United States' drainage responsibility to entities such as the Exchange Contractors, the Regional Board should demand the USBR's compliance with the San Luis Act. Any Regional Board action short of that constitutes abuse of discretion in violation of the law.

Very truly yours,

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By: 

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