COMMENTS TO THE

ENVIRONMENTAL PROTECTION AGENCY

Submitted by:

San Joaquin River Exchange Contractors Water Authority

April 25, 2011

Regarding Advance Notice of Proposed Rulemaking
Water Quality Challenges in the San Francisco Bay
& Sacramento-San Joaquin Delta Estuary

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The San Joaquin River Exchange Contractors Water Authority submits the following comments to the Environmental Protection Agency's "Advance Notice of Proposed Rulemaking – Water Quality Challenges in the San Francisco Bay & Sacramento-San Joaquin Delta Estuary", as follows:

I. The EPA Has Not Made the Requisite "Finding" or "Determination" that California Has Not Adequately Enforced its NPDES System. EPA Cannot Increase its Enforcement Actions Absent Compliance with These Necessary Procedural Steps.

The EPA's goal of enhanced or increased Federal enforcement of California's NPDES permitting program is a common theme throughout the Advance Notice of Proposed Rulemaking (ANPR). EPA states that the specific purpose of the ANPR is: 1) to review the current status of the EPA and Water Boards' responses to adverse water quality conditions . . . ; and 2) to determine how best to implement the existing programs under the Clean Water Act. (ANPR at 9711.) In a footnote, EPA goes as far to say "[m]uch of EPA's statutory mandate is to perform oversight and review of state water quality agency activities" but does not highlight the fact that in doing so, EPA must follow specific procedures prescribed by statute. EPA further clarifies its intent to focus on enforcement by stating that it is not limiting its request to action that would require actual rulemaking, but that "there may be a range of changes in EPA's activities in the Bay Delta Estuary that would be constructive, including enforcement . . ." (ANPR 9712.)

The EPA seems to be treating this ANPR as the first step in EPA's assertion of enforcement jurisdiction over violations of California's NPDES permitting program. Such an attempt to assert NPDES enforcement authority through an ANPR is completely at odds with the Clean Water Act's statutory mandates, and violates the principles of cooperative Federalism which are the foundation of the State-Federal partnership under the Clean Water Act.

The attempt of the EPA to avoid the statutory requirements quoted hereafter is so egregious and transparent that an award of attorney fees and costs to a party that brings an action under the Equal Access to Justice Act at 5U.S.C 504 would seem probable. Does the EPA really plan to contend that the inclusion of the word "advanced" in front of the words "rulemaking" allows it to cause citizens and local public agencies to be deprived of the statutory and regulatory protections required by law? By persisting, the EPA is subjecting the Treasury to paying awards of attorneys fees, expert witness fees and costs amounting in the hundreds of thousands of dollars.

The Clean Water Act authorizes the EPA to issue NPDES permits, but States may apply for and receive EPA approval to administer their own permit programs, provided they comply with detailed statutory and regulatory requirements. 33 U.S.C. § 1342(b); 40 C.F.R. §§ 123.1-123.64. Nevertheless, the Clean Water Act reserves to EPA limited discretion to unilaterally enforce NPDES program. That discretion can be exercised only after the EPA demonstrates such enforcement is necessary through rigorous pre-enforcement proceedings. EPA has failed to follow the statutorily mandated procedures precedent to such an exercise of enforcement jurisdiction in California's Bay Delta. This comment objects to the ANPR process to the extent EPA seeks to circumvent the required statutory procedures precedent to an exercise of Federal enforcement of California's NPDES permitting program

The exclusive statutory reservations of Federal authority to enforce a state NPDES program are set forth below. 33 U.S.C. Section 1319(a)(2) states that the EPA Administrator shall assume enforcement of a State's permit program only after "the Administrator finds that violations of permit conditions or limitations ... are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively ...". 33 U.S.C § 1319(a)(2). Such a finding requires notice of the specific proposed action, an opportunity for parties to appear, and an administrative record. An "advanced" notice and "invitation to comment" violates this requirement.

Further, 33 U.S.C. Section 1342(c)(3) restricts the EPA Administrator's authority to withdraw approval of a State's NPDES program to situations when the EPA administrator has determined after a public hearing that a state is not administering its NPDES permit in accordance with requirements of the Clean Water Act, notified the State of the perceived deficiency in enforcement, and the State fails to take appropriate corrective action even after being notified by the Administrator that its program is noncompliant. See 33 U.S.C. § 1342(c)(3).

These cited sections "impose mandatory duties upon the Administrator of the EPA" which have not yet been complied with in this case. See *Save the Valley, Inc. v. U.S. Envtl. Protection Agency*, 99 F. Supp. 2d 981 (S. D. Ind. 2000). EPA cannot assert enforcement authority, or announce a planned Federal takeover of California's NPDES program in an ANPR. Rather, the EPA Administrator must first comply with the statutorily mandated procedures outlined below.

First, the Clean Water Act requires the Administrator "to make a 'finding' under § 1319(a)(2) or a 'determination' under § 1342(c)(3) ... when she becomes aware of such violations as articulated in § 1319(a)(2)." *Save the Valley*, 99 F. Supp. 2d at 985. EPA

has made no such "finding" under section 1319(a)(2) that "violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively."

Second, even after making a finding, the EPA Administrator must notify the State of her conclusion. If the Administrator finds such failure extends beyond the thirtieth day after such notice, she must give public notice of such finding. Section 1319(a)(2). Again, the EPA has not notified California, or the Public of a finding that any of the environmental conditions referenced in the ANPR result from California's failure to enforce its NPDES program. Therefore, EPA is not authorized to overtake California's enforcement authority.

The EPA administrator is not authorized to enforce permit conditions until after public notice is given, and even then, the EPA Administrator's enforcement authority only persist until the State remedies its problems. *Save the Valley*, 99 F. Supp. 2d at 984; 33 U.S.C. § 1319(a)(2). The EPA has not given public notice of any deficiency in California's NPDES enforcement program, and therefore, EPA's veiled threat through an "advance notice" and request for comments is a lawless attempt to overtake California's NPDES permit enforcement, is entirely premature, and is a blatant and obvious attempt to avoid Congress' specific directions.

Nor has EPA complied with the procedures outlined in § 1342(c)(3).That section requires EPA to first conduct public hearing, and then to make a "determination" that a state is not administering its NPDES permit in accordance with requirements of the Clean Water Act. The Administrator is authorized to withdraw approval of the State's program and make public the reasons for the withdrawal of approval of the state's NPDES program approval only after ninety days following the hearing, and only if the State has failed to take "appropriate corrective action," 33 U.S.C. § 1342(c)(3); *Save the Valley*, 99 F. Supp. 2d at 985. EPA has not held a single public hearing regarding California's enforcement of its NPDES program, nor made public any reasons which would support EPA's withdrawal of California NPDES program approval.

Thus, EPA's bald assertion that EPA's activities in the Bay Delta Estuary would include "enforcement" (ANPR at 9712) is utterly premature. EPA has not complied with the statutory requirements which are a prerequisite to the exercise of Federal NPDES enforcement authority under either 33 U.S.C. 1342(c)(3), or 33 U.S.C. 1319(a)(2). This comment objects to the use of the ANPR process to the extent EPA is attempting to circumvent the required statutory procedures precedent to the exercise of unilateral Federal enforcement of California's NPDES program. This comment also reminds EPA of U.S.C. § 1369(b)(1)(D), which allows private parties to seek direct review of the EPA's determinations regarding state permitting programs in the Federal courts of appeals.

II. EPA Actions Contemplated in the ANPR Constitute "Discretionary" Involvement of the Federal Government in the Bay Delta and Triggers Endangered Species Act Section 7 Review. EPA May Not Undertake Any of the Contemplated Actions Until the Necessary Review Occurs.

Section 7(a)(2) of the Endangered Species Act of 1973 provides that a Federal agency must consult with agencies designated by the Secretaries of Commerce and the Interior in order to "...insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 649-650 (U.S. 2007).

Section 7(a)(2)'s interpretive regulation, 50 CFR § 402.03, makes clear that the ESA Section 7 mandate applies "to all actions in which there is discretionary Federal involvement or control." The entire ANPR, along with each of the proposed actions contemplated by the ANPR constitute "discretionary Federal involvement" and thus trigger ESA review. A sampling of the EPA's language confirms that EPA's contemplated involvement in the Bay Delta estuary would be purely discretionary: " Specifically, the purposes of this ANPR are: [1] To review the current status of the EPA and Water Boards' responses to the adverse water quality conditions . . . [2] To determine how best to implement existing programs under the Clean Water Act, [5] To solicit input on whether EPA should be taking new or different actions under its programs to address aquatic resource problems." Essentially, EPA admits that it seeks discretionary opportunities to get involved in the Bay Delta estuary. None of the actions EPA may take as a result of the rulemaking procedure it has embarked upon are mandatory. Rather, any EPA involvement that results from the ANPR is purely discretionary, and would trigger mandatory ESA Section 7 review.

Section 7 of the ESA prescribes the steps that Federal agencies must take to ensure that their actions do not jeopardize endangered wildlife and flora. Section 7(a)(2) provides that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2).

Once the consultation process contemplated by § 7(a)(2) has been completed, the Secretary is required to give the agency a written biological opinion "setting forth the

Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." § 1536(b)(3)(A); see also 50 CFR § 402.14(h). If the Secretary concludes that the agency action would place the listed species in jeopardy or adversely modify its critical habitat, "the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate [§ 7(a)(2)] and can be taken by the Federal agency . . . in implementing the agency action." 16 U.S.C. § 1536(b)(3)(A); see also 50 CFR § 402.14(h)(3).

To date, EPA has not, to our knowledge, engaged in the necessary consultation process, nor has a biological opinion contemplating the full range of discretionary Federal activities by the EPA which may affect listed species been commenced. This comment asserts that any Federal activity which results from this ANPR would be entirely discretionary, and would require full ESA Section 7 compliance.

For each of the above reasons, because the EPA is in violation of the referred to statutory requirements, the EPA must withdraw its Advance Notice of Rulemaking. If the EPA wishes to proceed, it must give the State of California and the State Water Resources Control Board the necessary notices and engage in the required Endangered Species Act consultations before re-noticing its "Advance Notice."

III. The EPA's ANPR Did Not Comply With the Requirements of the Small Business Regulatory Enforcement and Fairness Act (5 U.S.C. 601.)

Congress amended the Small Business Regulatory Enforcement and Fairness Act in 1996 after finding that small businesses bear a disproportionate share of regulatory costs and burdens; and that fundamental changes were needed in the regulatory and enforcement culture of Federal agencies to make agencies more responsive to small business, and that such changes could be made without compromising the statutory missions of the agencies. Among the purposes of the act are: to encourage the effective participation of small businesses in the Federal regulatory process; to create a more cooperative regulatory environment among agencies and small businesses that is less punitive and more solution- oriented; and to make Federal regulators more accountable for their enforcement actions by providing small entities with a meaningful opportunity for redress of excessive enforcement actions. (P.L. 104-121, March 29, 1996.) EPA's ANPR violates the basic requirements of the Small Business Regulatory Enforcement Act by ignoring the burdens the contemplated changes in the Bay Delta would have on small business.

The Act specifically requires Federal agencies to advise small entities, including "small business", "small organization" and "small governmental jurisdiction" of the significant economic impact of a proposed rulemaking. The Act specifically compels Federal agencies to advise small entities in the Advance Notice of Proposed Rulemaking of any potential economic impacts:

> (a) When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through the reasonable use of techniques such as–
>
> (1) the inclusion in an advance notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;
> 5 USCS § 609

The ANPR issued by EPA discusses a myriad of proposed rules that would have a significant impact on a substantial number of small entities: 1) rules implementing new TMDL standards; 2) rules related to NPDES permits; and 3) rules regarding implementation of the Federal Insecticide, Fungicide, Rodenticide Act. However, the EPA administrator violated the Act by omitting an explanation of the significant economic impacts of the contemplated rules from the ANPR, and thereby deprived the small entities an opportunity to meaningfully participate in the rulemaking.

Further, to our knowledge, EPA has not complied with its additional obligation under the Act to notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected; nor has the agency convened the required review panel. (5 USCS § 609.) EPA must take these action prior to publishing the required initial regulatory flexibility analysis, which in turn must occur when the Agency publishes a general notice of proposed rulemaking for any proposed rule. Thus the demand for EPA compliance with its 5 USCS § 609 obligations is not premature.

This comment demands that EPA comply with its obligations under the Small Business Regulatory Enforcement and Fairness Act. These obligations at this stage of the proceeding require EPA to issue an explanation of the significant economic impacts the

proposed rules will have on small entities, and compels EPA to notify the Chief Counsel for Advocacy of the Small Business Administration with information on the potential impacts of the proposed rule on small entities.

IV. The United States Environmental Protection Agency's "Advance Notice of Rulemaking" regarding selenium discharges is government obfuscation at its highest level. It infers that additional rulemaking would be helpful in regard to the potential effects of selenium discharges to the San Joaquin River system from agricultural sources. In fact, the United States government's failure to provide drainage service to agricultural lands on the Westside of the San Joaquin Valley is a principal cause of the selenium problem, and rule-making establishing new discharge conditions upon non-point source discharges through TMDL's or new discharge standards through NPDES or State law Waste Discharge Requirements, would ignore that the United States is itself the cause of selenium discharges in this area.

Despite specific direction from Congress and the Federal courts, the United States Department of Interior has failed to implement a viable drainage program. For another arm of the Federal government (the EPA) to contemplate establishing additional rules that will result in placing this drainage responsibility on individual landowners and allow the Federal government to continue to shirk their responsibility to solve this problem is outrageous. EPA should not enable the Department of Interior's continued inaction. Instead, EPA should assist in the allocation of Federal funds to implement a comprehensive program to collect, treat, and dispose of selenium laden drainage water.

V. Congress has directed the Federal government to provide drainage service that will dispose of seleniferous waters generated by the San Luis Unit.

The United States at all times since 1958 has been directed by Congress to collect and dispose of drainage from seleniferous soils within the San Luis Unit of the CVP. Section 1(A)(2) of the San Luis Act (Public Law No. 86-488, 74 Stat.156 (1960)) adopted by Congress in 1958 and at all times since has required the United States to provide drainage for waters generated by irrigation of the San Luis Unit lands. The statute states:

> "Construction of the San Luis unit shall not be commenced until the Secretary has . . . (2) . . . made provision for constructing the San Luis interceptor drain to the Delta designed to meet the drainage requirements of the *San Luis*

unit as generally outlined in the report of the Department of the Interior, entitled "San Luis unit, Central Valley Project," dated December 17, 1956."

Thus, Congress intended for the Federal government to implement drainage service for the San Luis Unit. This requirement has been consistently upheld by the Federal courts.

VI. The Federal Courts have confirmed the Federal government's obligation to provide for the collection and disposal of seleniferous waters.

The United States Ninth Circuit Court of Appeal confirmed the United States' obligation to provide for drainage collection and disposal. In 2000, The Ninth Circuit Court of Appeal confirmed the United States' obligation to provide drainage for selenium-enriched waters:

> "As can be garnered from the plain meaning of these acts, (subsequent congressional acts Congress merely placed a condition on the determination of the final point of discharge; by no means did it excuse or repeal the Secretary's obligation to provide drainage." [emphasis added]
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> "It is thus apparent from the language of the acts that Congress's "clear and manifest" intention was not to repeal the drainage requirements of the San Luis Act, but merely to order the Secretary, in fulfilling those obligations, to develop a plan that addresses the environmental problems posed by the discharge of agricultural effluent." (*Firebaugh, supra,* 203 F.3d at 575.)
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> "Therefore, we hold that the subsequent Congressional action has not eliminated the Department's duty to provide drainage, but that it has given the Department the authority to pursue alternative options other than the interceptor drain to satisfy its duty under the San Luis Act." (*Firebaugh, supra,* 203 F.3d at 577.)

VII. Implementation and operation of a well managed regional drainage program will provide the greatest environmental protections against the potential detrimental effects of selenium.

Selenium is a naturally occurring element on the Westside of the San Joaquin Valley. It is present in the soils as well as the shallow groundwater. Regulations cannot magically change this fact. Some have advanced the idea that the termination of water deliveries to the San Luis Unit would eliminate the potential environmental problems associated with selenium. This concept ignores the reality of the situation. With or without irrigation, selenium will remain in the regions soil and groundwater. Implementation of a well developed regional drainage program will minimize the likelihood that wildlife will be exposed to elevated selenium levels. Agriculture is the only group willing and able to lead this effort.

The environmental risk of having no selenium management program far exceeds the environmental risk of local agricultural interests operating a well developed drainage control program. If water deliveries are eliminated agriculture will no longer be available to operate a drainage control program and selenium will be left unmanaged in the region. Existing hydraulic pressures along with gravity will move selenium laden water haphazardly throughout the region inevitably finding its way to sensitive environments. This unmanaged approach creates unnecessary risks to the environment. (USGS: "Simulation of Water-Table Response to Management Alternatives, Central Part of the Western San Joaquin Valley, California, USGS Water-Resources Investigations Report 91-4193.")

VIII. The United States Government has developed a comprehensive program to collect, treat and dispose of selenium laden drain water on the Westside of the San Joaquin Valley.

The Federal government has studied the selenium issue for decades. As a result of those studies the Federal government, in conjunction with local agricultural interests, has developed an environmentally sustainable program to address selenium impacts originating from the Westside. The United States Bureau of Reclamation (Reclamation) prepared a NEPA Report and Economic Feasibility Report, and adopted a Record of Decision in 2007 adopting this drainage plan. The adopted plan was consistent with the Westside Regional Drainage Plan developed by local agricultural interests. The basic elements of these plans include: (1) Source Control, (2) Regional Reuse Projects, (3) Selected Voluntary Land Retirement, (4) Shallow Groundwater Management, (5) Drain

Water Treatment, and (6) Salt Disposal. Implementation of these elements will provide the best environmental protection against the possible detrimental effects of selenium.

EPA was authorized to comment upon the Draft EIS, and its conclusion that the one feasible solution to selenium discharges and the solution common to all alternatives considered was reverse osmosis and selenium removal treatment of drainage water after reduction of the drainage quantities. A diagram of the reverse osmosis treatment plant process for the Northerly area and a schematic of the selenium biotreatment facility at each Reverse Osmosis Plant was shown at pages 2-28 of the FEIS, and a timeline for completion of "providing drainage" was given showing the final design completed by the Spring of 2008 and construction completed by the Fall of 2012. The schedule was described as "a preliminary implementation schedule" (pages 2-25), yet three years after construction of the treatment facilities was to commence, the Federal government has not progressed to even the final design . . . and now the EPA proposes "rules".

EPA should assist Reclamation in implementing the Federally adopted drainage control program. One of the purposes of a Final Environmental Statement and Record of Decision is to adopt and direct all arms of the Federal government in how a series of problems are to be solved. The Federal government should not work at cross purposes to itself. The NEPA process included Federal agency consultations, including EPA and should have resulted in a program acceptable to the United States. Now that the United States preferred drainage program has been selected, EPA should work with Reclamation to implement the Federal government's plan.

Unfortunately, implementation of the drainage program is significantly behind schedule. In order for the environment benefits to be realize the projects must be implemented as soon as possible. Local agricultural interests have invested hundreds of millions of dollars in implementing the program. The Federal government needs to step up and invest the resources necessary to finalize the treatment and disposal elements of the plan. Although Federal efforts have begun to develop treatment and disposal options the progress has been too slow. In order to ensure that a long-term viable drainage program is implemented in time to meet regulatory requirements both EPA and Reclamation must aggressively work to fund the program.

The proposed adoption of "rules" regarding selenium discharges into the San Joaquin River would require implementation of yet another NEPA process. How will the EPA explain its failure to rely upon and direct its efforts in accordance with the United States' plan as adopted in the FEIS and Record of Decision in 2007? How will the EPA now proffer a new alternative of "rules" curtailing discharges without the treatment system promised in the FEIS and without implementation by the Federal government

itself of the Record of Decision? This is in effect the "No Action" alternative rejected in 2007 because of its significant environmental impacts.

IX. The EPA should assist in funding projects to meet the Federal government's obligations to solve the drainage problem and not enable the government to shirk its responsibilities by placing the burdens on innocent landowners.

If EPA's goal is to improve water quality in the San Joaquin River it should not focus on issuing new rules that will place additional burdens on landowners that are already heavily burdened by the Federal government's failure to implement a viable drainage solution. EPA should work with the Department of Interior to help the Federal government fulfill its obligations to provide drainage service on the Westside of the San Joaquin Valley. The key factor needed to implement effective drainage service is additional Federal funding.

Rather than proposing additional "rules", the EPA should help fund solution to the drainage challenge by utilization of its separate programs for cleanup of environmental conditions. The EPA maintains on its website a list of more than a dozen programs it administers to improve water quality conditions. These funds should be utilized to implement projects that will result in tangible water quality benefits related to selenium. Hundreds of millions of dollars have been spent by the Federal government developing reports, drafting regulations and studying selenium in the San Joaquin Valley. Government should cease studying and begin building the infrastructure needed to collect, treat, and dispose of seleniferous water.

X. The EPA contention that "rules" are necessary because of possible effects of selenium discharges from agricultural lands into the San Joaquin River causing bioaccumulation in food sources for anadromous fish (salmon and steelhead) or other species is yet another example of government purporting to lead by adopting rules without any understanding of the science or effects.

On page 29 of the Unabridged Advance Notice of Proposed Rulemaking, the EPA states:

> "For example, concerns have been expressed about the possibility that juvenile salmon, which use the Delta and San Joaquin River, might be sensitive to selenium. Report 168."

When one examines Report 168, the only authority for this "concern" as to Chinook salmon is an experiment performed by providing juvenile salmon a diet highly enriched

with selenium in a laboratory for 90 days. However Report 168 does not explain how this could have any relevance to juvenile salmon in the San Joaquin River. San Joaquin River salmon emerge and mature to sizes that can move to the ocean in the East side tributaries of the River where selenium discharges are not present. Juvenile salmon migrate to the Sacrament/San Joaquin Delta through the main stem of the San Joaquin River in a matter of days, and Report 168 does not cite any food course during this period which might accumulate selenium. Juvenile salmon may reside for weeks before passing through the San Francisco bay to the ocean, but the authors of the Report cite no food source for these juveniles during this period which might bioaccumulate selenium. The authors do not measure dry weight selenium concentrations in any juvenile salmon or in any food that they might consume. This is not science, but instead, hysteria – and the EPA does itself no credit by this citation.

As to steelhead, Report 168 is similarly flawed and does not support any rulemaking to protect steelhead. No tissue samples or studies of juvenile steelhead are cited, and no food source which might have bioaccumulated selenium is ever mentioned. Similar to salmon, steelhead are reared in the East side tributaries where no selenium discharges occur, and steelhead then transit the San Joaquin River and Sacramento-San Joaquin Delta in an extremely short period.

The authors of Report 168 try to make up for the lack of facts by stating that:

> "Because steelhead are regarded as a life history variant or 'form' of the rainbow trout species, studies of the non-anadromous form of rainbow trout may provide a good indication of the risks of the exposure of steelhead to selenium."

Unless the San Joaquin River steelhead food sources are persistently affected by selenium and those food sources bioaccumulate selenium, how would the response of rainbow trout that live their entire lives in the same selenium-rich waters be relevant when studying a fish that might during its life spend less than 45 days in the San Joaquin River or Sacramento/San Joaquin Delta? This is like suggesting that because we call a person that works in a coal mine a "miner", and a person who visits a mine one day in their life "a miner", we should assume that there are similar risks to both types of "miners."

The EPA should suspend any suggestion of rulemaking regarding agricultural discharges of selenium until it has commissioned and paid for studies showing actual scientific evidence of bioaccumulation in food sources of salmon or steelhead and performed dry weight analysis of selenium concentrations in juvenile and adult salmonid fish within the San Joaquin River.

Finally, the suggestion in Report 168 that the fact that salmon may be introduced to the upper San Joaquin River does not justify "rules." Unless salmon will reside or consume a substantial amount of food within the areas of the San Joaquin River downstream of selenium discharges, how could the presence of salmon rearing and feeding areas 30 miles upstream of any selenium discharge into the San Joaquin River have any effect? The EPA violates the requirement that it must utilize the best scientific evidence to adopt a "rule" if this type of "evidence" is used.

XI. Conclusion

Additional EPA rules will be an expensive and a waste of time and resources. The EPA should break the Federal government's cycle of inaction by implementing physical solutions to the selenium problem on the Westside of the San Joaquin Valley. It has the funds and resources to remedy mine discharges, superfund sites, and other sites where hazardous conditions exist. The EPA can provide those funds to the Department of the Interior which has the legal responsibility for providing drainage service and a plan for the collection, treatment and disposal of saline and selenium-rich waters before they enter into the San Joaquin River. All environmental studies are in place to start treatment of the drainage water by the United States. The EPA should utilize its resources to help implement these projects that will improve water quality in the San Joaquin River. EPA should not enable the Federal government's continued inaction by adopting additional regulations thereby shifting the obligation from the Federal government to individual landowners that are already heavily burdened by the government's failure to provide legally mandated drainage service.

Dated: April 25, 2011

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