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STATE WATER RESOURCES
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DIV OF WATER RIGHTS
SACRAMENTO
(209) 826-5188
Fax (209) 826-4984
Email: veronica@gwdwater.org

RICARDO ORTEGA
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February 17, 2014

VIA U.S. MAIL AND E-MAIL

Michael Buckman, Senior Environmental Scientist
Hearings Unit Chief, Division of Water Rights
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100
michael.buckman@waterboards.ca.gov

**RE: Comments on Temporary Urgency Change Order for the
Central Valley Project and State Water Project**

Dear Mr. Buckman and Members of the Board:

In advance of the State Water Resources Control Board's February 18, 2014 public workshop on drought-related topics, please accept these written comments from Grassland Water District and Grassland Resource Conservation District (collectively "GWD") regarding the January 31, 2014 Board Order ("Order"), modified on February 7, 2014, approving a Temporary Urgency Change Petition filed by the California Department of Water Resources and United States Bureau of Reclamation ("Reclamation").

GWD is the largest "refuge" water supply contractor located south of the Delta, and it receives water from Reclamation's Central Valley Project ("CVP"). The following comments address topics presented in the Board's notice of the public workshop: whether the Board's proposed changes are in the public interest or will have an unreasonable effect on wildlife.

GWD requests that the Board amend the Order to allow for moderate deliveries of CVP water supplies that are needed to manage important wetland habitat areas in the San Joaquin Valley. Limiting Reclamation's diversions from the Delta to only water needed for "health and safety purposes" will cause harmful effects on critical wildlife resources, including millions of migratory birds and numerous special-status species, such as the Giant garter snake, which depend on the managed habitat in the Grasslands Ecological Area.

Without the CVP water that is provided to the Grasslands Ecological Area as permanent mitigation for the loss of California's wetlands, there is a great risk of an environmental emergency. GWD recognizes the Board and Reclamation must act quickly and cautiously in this time of drought, but the Grasslands Ecological Area is a precious state, federal, and international resource that requires relatively small amounts of water to sustain the vast majority of California's waterfowl populations as well as other important wildlife species.

I. Overview of the Grasslands Ecological Area and Its Water Supply

The Grasslands Ecological Area (or "GEA") is the largest component of the remaining 5% remnant of the historic wetlands that once covered vast tracks of California's Central Valley. It has been designated as an Audubon Important Bird Area, a RAMSAR Convention Wetland of International Significance, and one of only twenty-two Western Hemisphere Shorebird Reserve Network Sites of International Importance.¹ The GEA is the largest wetland complex west of the Rocky Mountains, and is recognized as among the five most important wetland ecosystems on the North American continent.

The GEA is a "managed" habitat. Grassland Water District, the California Department of Fish and Wildlife, and the U.S. Fish and Wildlife Service provide controlled applications of water using a series of canals and control structures, mimicking historical flood patterns with pulses of high water flow during winter and spring. The GEA has been continuously managed for wildlife purposes since the construction of Friant Dam on the San Joaquin River, which created Millerton Lake and destroyed the natural flood hydrology of the lower San Joaquin River.

¹ Audubon Important Bird Area: <http://netapp.audubon.org/iba/Site/173>; International Ramsar Convention on Wetlands: http://www.ramsar.org/cda/en/ramsar-activities-wwds-two-new-us-ramsar-sites/main/ramsar/1-63-78%5E22428_4000_0; Western Hemisphere Shorebird Reserve Network: <http://www.whsrn.org/site-profile/grasslands>

The current water supply for the GEA can be traced back to actions that occurred during the last severe California drought in the late 1970's, when refuge water deliveries were greatly curtailed by Reclamation, resulting in "significant impacts to wetland habitat and waterbird populations, and in particular, wintering waterfowl."² Reclamation responded to the crisis by working with state wildlife and water agencies to develop a "comprehensive baseline of Central Valley fish and wildlife resources and to recommend specific solutions to water related issues."³ These efforts culminated in a 1989 Refuge Water Supply Investigation report, which recommended quantities of water necessary to sustain the remaining wetland habitat areas of the Central Valley.⁴

In 1986, the United States and Canada signed an international treaty, the North American Waterfowl Management Plan.⁵ Among the basic principles of the treaty were that the "maintenance of abundant waterfowl populations is dependent on the protection, restoration and management of habitat," that "persistent loss of important waterfowl habitat should be reversed," and "joint ventures" of private and governmental organizations should be convened to consider "projects of international concern that can only be addressed through a pooling of resources." The Central Valley Joint Venture was subsequently formed in furtherance of the obligations of the United States under the treaty.

In 1992, Congress responded to calls for action by the Central Valley Joint Venture and many others, and enacted the Central Valley Project Improvement Act ("CVPIA").⁶ Section 3406(d) of the CVPIA requires Reclamation to provide, either directly or through contractual agreements, "firm water supplies of suitable quality to maintain and improve" designated wetland habitat areas, including the GEA.⁷ Reclamation is required to provide from its CVP supplies "Level 2 of the 'Dependable Water Supply Needs' table for those habitat areas identified in

² See Central Valley Joint Venture 2006 Implementation Plan, p. 229, available at: http://www.centralvalleyjointventure.org/assets/pdf/wetland_water_supplies.pdf

³ *Ibid.*

⁴ *Ibid.*; see also *Undelivered Water: Fulfilling the CVPIA Promise to Central Valley Refuges*, Report of the Independent Review Panel, p. 13 (Nov. 3, 2009), available at: https://www.usbr.gov/mp/cvpia/docs_reports/indep_review/CVPIA_Final_Refuge_Report_2009-11-03.pdf

⁵ <http://www.fws.gov/birdhabitat/NAWMP/index.shtm> (Mexico became a signatory in 1994).

⁶ Public Law 102-575, Title 34, 106 Stat. 4706 ("CVPIA").

⁷ The GEA encompasses the majority of the Central Valley wetland habitat areas listed in CVPIA section 3406(d), including the GRCD, the Los Banos, Volta, North Grasslands, and Mendota state wildlife management areas, the San Luis National Wildlife Refuge complex, and the Merced National Wildlife Refuge.

[Reclamation's 1989 report] and two-thirds of the water supply needed for full habitat development.”⁸ Level 2 water is to be provided by contract, but Reclamation is “obligated to provide such water whether or not such long-term contractual agreements are in effect.”⁹ The CVPIA allows Reclamation to temporarily reduce deliveries of Level 2 water by “up to 25 percent,” if “reductions due to hydrologic circumstances are imposed upon agricultural deliveries” of CVP water.¹⁰

The CVPIA also requires Reclamation to acquire an additional increment of water and deliver a full “Level 4 of the ‘Dependable Water Supply Needs’ table for those habitat areas as set forth in the Refuge Water Supply Report and the full water supply needed for full habitat development for those habitat areas.”¹¹ The increment of water required to meet the full Level 4 water needs of the refuges, beyond Level 2 supplies, is referred to as “Incremental Level 4” water.

The CVPIA expressly declares that it is intended as “mitigation” for wildlife losses “incurred as a result of construction, operation, or maintenance of the Central Valley Project,” and that its mandates are “based on the replacement of ecologically equivalent habitat.”¹² Since the enactment of the CVPIA in 1992, CVP refuge contractors have not received full Incremental Level 4 supplies from Reclamation, and some refuges still do not receive full Level 2 supplies. In 2009, an independent review panel concluded that “Reclamation should immediately modify policies and practices” that are inconsistent with the intent of the CVPIA “and assure that all refuge water ... has highest priority at the pumps, equivalent with the exchange contractors.”¹³

Reclamation's CVP contract with GWD provides 125,000 acre-feet of Level 2 CVP water each year, and commits Reclamation to acquiring up to 55,000 acre-feet of Incremental Level 4 water.¹⁴ The contract allows for up to a 25% reduction in Level 2 water deliveries in a critically dry year such as this one, for a total of 93,000

⁸ CVPIA § 3406(d)(1).

⁹ *Id.*

¹⁰ *Id.* § 3406(d)(3).

¹¹ *Id.* § 3406(d)(2).

¹² *Id.* § 3406(a)(3).

¹³ *Undelivered Water: Fulfilling the CVPIA Promise to Central Valley Refuges*, Report of the Independent Review Panel, p. 8 (Nov. 3, 2009), available at:

https://www.usbr.gov/mp/cvpia/docs_reports/indep_review/CVPIA_Final_Refuge_Report_2009-11-03.pdf

¹⁴ GWD's CVP Contract with Reclamation, Exhibit B, available at:

http://www.usbr.gov/mp/cvpia/3406d/env_docs/final/1754_grassland_exh_b_map.pdf

acre-feet of Level 2 water.¹⁵ Since the enactment of the CVPIA in 1992, GWD has never received less than 75% of its Level 2 water supplies.¹⁶

Reclamation has not acquired full Incremental Level 4 supplies, and in critically dry years there is little to no chance of such deliveries. Because Level 2 water represents only two thirds of GWD's habitat needs, a cutback of 25%, coupled with insignificant Incremental Level 4 deliveries, would give GWD only half the water needed to sustain wildlife. This represents a potentially catastrophic ecological situation in itself, but further cutbacks would create even more crowded wildlife conditions and limited food resources, leading to distressed and malnourished wildlife, outbreaks of avian disease, and mortality.

2. State Water Resources Control Board Orders Recognize that Water Deliveries to the Grasslands Meets a Crucial Environment Obligation

In 1986, GWD lost a major source of its water supply: tile drainage from surrounding agricultural districts, which contained high levels of selenium and therefore posed a threat to wildlife. The Board granted GWD's application to divert flood flows from the San Joaquin River instead, noting that such diversions were in the public interest to avoid environmental harm:

In 1985, Grassland was informed that its usual water supply from upslope agricultural areas with tile drains contained elevated levels of selenium. ... Grassland stopped using this source of water in 1985. This unforeseen emergency left the Grassland with a critical water deficiency.

Grassland encompasses the largest tract of native grasslands remaining in the San Joaquin Valley. The State's wetlands have dwindled from 5,000,000 to 300,000 acres. Grassland comprises 17 percent of this remaining acreage. Preservation of Grassland is one of the U.S. Fish and Wildlife Service's highest priorities in its overall waterfowl habitat preservation program. The water supplies sought under this application are needed to protect this resource and the public welfare.

¹⁵ GWD's CVP Contract with Reclamation, Article 9, *available at*:
http://www.usbr.gov/mp/cvpia/3406d/env_docs/final/1754_grassland_cnt_11-14-00.pdf

¹⁶ Reclamation's historical CVP water allocations:
http://www.usbr.gov/mp/cvo/vungvari/water_allocations_historical.pdf

Water proposed to be diverted into Grassland under this permit would be used to maintain existing habitat, maintain salt balance in this flow through marsh land area and to circulate existing water supplies to help prevent waterfowl diseases such as avian cholera.¹⁷

In 2004 the Board determined that CVP refuge water deliveries are not subject to water right fees, acknowledging the special nature of Reclamation's obligations to refuges:

The DFG and Grasslands contracts are fundamentally different from those held by other contractors, who seek out water supplies from the USBR. Here, the USBR is using the contracts to satisfy its own statutory obligation to provide the water to these contractors at no charge. These deliveries basically carry out the same obligation that the USBR satisfies when it releases water from its reservoirs for fish and wildlife protection without having a contract.

Under California Code of Regulations ... a fee is not to be charged to a CVP contractor for a "base supply" that the USBR provides under the contract. The USBR does not charge water supply contractors for base supplies because this is water the contractors are entitled to receive outside of the contract. The USBR contracts to deliver this water because it agrees that it is legally obligated to provide it.

Under section 3406(d)(1) of the CVPIA, the Secretary of the Interior is required to provide Level 2 water supplies to lands that are the subject of the DFG and Grasslands contracts described above. ... Section 3406(d)(1) provides that the "Secretary [of the Interior] shall be obligated to provide such water whether or not such long-term contractual agreements are in effect." Because the contracts recognize a legal obligation of the USBR to provide the Level 2 and Level 4 water to these petitioners, this water constitutes a base supply.

...

¹⁷ State Water Resources Control Board Order No. WR 86-5 (March 20, 1986), "In the Matter of Temporary Permit 19806 (Application 28800) Grassland Water District, Permittee," *available at*: http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/1986/wro86-05.pdf

The deliveries of Level 2 and Level 4 water for wetland habitat are similar to water bypassed or released to meet water quality standards or prior rights. They are part of the costs of overall project operation.¹⁸

As the Board has acknowledged in the past, Reclamation's water deliveries to the GEA are unique, and are required to protect the state's ecological resources and the public welfare.

3. The Board's Order Would Have Unreasonable Effects on Wildlife and Would Harm Public Trust Resources

The Board's Order provides moderate protections for fish and wildlife north of and within the Delta, by providing for a Real-Time Drought Operations Team to help balance the beneficial uses of water, requiring a minimum Delta outflow and pulse flow for fish species, and conserving water in reservoirs to protect fish and wildlife. GWD is concerned by the Order's lack of discussion or similar protective measures for affected wetland habitats and wildlife south of the Delta. GWD will be directly affected by the Board's limit on Delta exports, and will not receive any of the benefit of water transfers that are allowed under Order. The effects of severely reduced Level 2 water deliveries on the Giant garter snake may well result in a "take" of this threatened population, and will have adverse effects on other sensitive species including the long-billed curlew, tri-colored blackbird, sandhill crane, and many other waterfowl, shorebirds, reptiles, amphibians, and mammals.

This year, Reclamation does not intend to honor its obligation to provide 75% of the Level 2 supplies required by refuge contractors in critically dry years. GWD fears that Reclamation will interpret the Board's Order as an unavoidable hurdle to meeting this statutory and contractual obligation. Accordingly, GWD requests that the Board modify Condition 1a of the Order so that the limit on CVP exports does not apply to deliveries of up to 75% of Level 2 refuge supplies. GWD requests that the Board modify Condition 4 of the Order to add refuge Level 2 requirements to the list of allowed uses for conserved water supplies. GWD also requests that the Board modify its Order to include direction for the Real-Time Drought Operations Management Team to consider options for meeting the Level 2 water needs of refuges.

¹⁸ State Water Resources Control Board Order WRO 2004-0007-EXEC (March 31, 2004), "In the Matter of the Petitions for Reconsideration of the California Department of Fish and Game and of Grasslands Water District Regarding Water Right Fee Determinations," 2004 WL 877117 (Cal.St.Wat.Res.Bd.).

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Thank you for considering these comments. GWD welcomes the opportunity to provide further input to the Board about this important issue. GWD will continue to pursue measures that will help lessen the impacts of the drought on the habitat and species within the Grasslands Ecological Area, in an attempt to avoid repeating the devastating effects of major water curtailments during the last severe drought in 1977.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ricardo Ortega".

Ricardo Ortega
General Manager

Cc: Tom Howard, toward@waterboards.ca.gov
Jean McCue, jean.mccue@waterboards.ca.gov
Janine Townsend, commentletters@waterboards.ca.gov
David Murillo, dmurillo@usbr.gov
Jason Phillips, jphillips@usbr.gov