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COAST

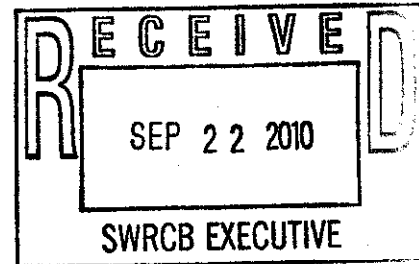
RIVERS

ALLIANCE



September 22, 2010

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
I Street,
Sacramento, CA 95814
E-mail <commentletters@waterboards.ca.gov>



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

Dear Ms. Townsend:

Thank you for the opportunity to provide input concerning the proposed San Joaquin River Selenium Basin Plan Amendment which, will allow continued selenium discharges to Mud Slough and the San Joaquin River in excess of Basin Plan Water Quality Objectives. As we understand it, the proposed action is to delay implementation of the protective selenium standard of 5 $\mu\text{g/l}$ (4 day average) Basin Plan Objective in Mud Slough (north) and the San Joaquin River from Mud Slough to the Merced River from October 1, 2010, until December 31, 2019. The amendment also proposes a **new relaxed pollution control objective of 15 $\mu\text{g/l}$ (30 day average)** interim "Performance Goal" for the same water bodies effective December 31, 2015.

Sierra Club California, Friends of the River, Friends of Trinity River, Pacific Coast Federation of Fisherman's Associations, Planning and Conservation League, North Coast Rivers Alliance, Southern California Watershed Alliance, other environmental groups and some of our members (Environmental Coalition) submitted extensive written and oral comments to the Central Valley Regional Water Quality Control Board for the

hearing on May 27, 2010. We incorporate those comments by reference. Most of the comments were either ignored completely, or insufficient responses were given by Regional Board staff.

We recommend that the proposed Basin Plan Amendment NOT be granted. The proposed Basin Plan Amendments effectively sanction pollution of Mud Slough, the San Joaquin River, and ultimately the Sacramento-San Joaquin Delta, by failing to enforce science-based protective water quality standards for selenium and allowing the continued contamination of these water bodies. Too much selenium in streams kills or deforms fish and other aquatic life, including waterfowl, and is a human-health concern in drinking-water supplies. Selenium is one of a number of contaminants that are discharged from the federally owned San Luis Drain directly into the waters of the state. This failure to enforce protective selenium water quality objectives transfers pollution from these Grassland drainers through this federal drain to the waters of the state, harming beneficial uses of these waters for our members' recreational use, domestic water supply, public health and public trust values.

The Central Valley Regional Water Quality Control Board believes that controlling this selenium pollution at its source—the export of Delta water to irrigate toxic selenium soils and then sending the drainage selenium pollution back—is not within its regulatory authority. Such control of pollution and unreasonable uses of water, however, certainly is within the State Board's authority.¹

BACKGROUND

Fourteen years ago, the Regional Board implemented the existing selenium control program, which requires compliance with a protective standard (5 µg/L) by October 1, 2010 for Mud Slough (north) and the San Joaquin River above the Merced River. The proposed amendment, if finalized, would substantially weaken the Basin Plan's existing program by delaying the selenium objective in these waterbodies by another nine years, three months. This open-ended extension would needlessly facilitate additional discharge of selenium-contaminated water, vitiating compliance with key provisions of

¹ See Racanelli Decision (*United States v. State Water Resources Control Board*, 182 Cal.App.3d 82, 130 (1986)):

We perceive no legal obstacle to the State Board's determination that particular methods of use have become unreasonable by their deleterious effects upon water quality. Obviously, some accommodation must be reached concerning the major public interests at stake: the quality of valuable water resources and transport of adequate supplies for needs southward. The decision is essentially a policy judgment requiring a balancing of the competing public interests, one the Board is uniquely qualified to make in view of its special knowledge and expertise and its combined statewide responsibility to allocate the rights to, and to control the quality of, state water resources. ([Water Code] § 174.) . . . We conclude, finally, that the Board's power to prevent unreasonable methods of use should be broadly interpreted to enable the Board to strike the proper balance between the interests in water quality and project activities in order to objectively determine whether a reasonable method of use is manifested.

the Basin Plan and the Clean Water Act, as well as state policy for water quality control.
(See Wat. Code section 13146.)

Despite significant concerns of the United States Environmental Protection Agency ("EPA") and United States Fish and Wildlife Service ("USFWS") regarding the harmful impacts of amending the waste discharge requirements to allow increased selenium discharges for such a prolonged period and the potential for violations of federal environmental standards, the Regional Board rejected a feasible and less risky alternative put forth by a coalition of environmental groups to limit the amendment for a period of two years. For the following reasons, this Environmental Coalition believes the Regional Board's decision is unsupportable due to its conflict with federal and state laws and policies. We request that the State Board instead issue a cease and desist order to stop this pollution and use its authority to regulate this contamination.

**APPROVAL OF THE OPEN-ENDED EXTENSION WOULD NEEDLESSLY
PRECIPITATE CONFLICT WITH FEDERAL AGENCIES AND FRUSTRATE CLEAN
WATER ACT COMPLIANCE.**

As the Regional Board's Staff Report acknowledged, "[a]ny proposed changes to the Regional Water Board Basin Plans must be consistent with existing Federal and State laws and regulations..." (Staff Report, p. 23.) Both the EPA and USFWS raised concerns regarding the adequacy of the Staff Report's analysis and the proposed amendments themselves. The points raised by the federal agencies with responsibilities over the water quality and wildlife affected by the proposed amendments underscored those raised by the Environmental Coalition in their own comments to the Regional Board. None of the Regional Board's responses adequately addressed these concerns.

1. Environmental Protection Agency (EPA)

The EPA's concerns, which went substantially unanswered, are of particular importance. EPA confirmed that extending the Basin Plan's compliance timetable is an "Amendment," reviewable by the EPA under section 303(c) of the Clean Water Act. Section 303(c)(2) requires the EPA Administrator to review the proposed revisions, which must among other things "protect the public health or welfare, enhance the quality of the water and serve the purposes of the Act." Where the revised standard does not meet the Clean Water Act's requirements, sections 303(c)(3) and 303(c)(4) empower the EPA Administrator to specify changes, and if needed, to adopt a new standard.

When enacted in 1972, the Federal Water Pollution Control Act Amendments intended to *eliminate* by the year 1985 the discharge of pollutants into the nation's navigable waters. (*City of Burbank v. State Water Resources Control Bd.*, 35 Cal. 4th 613, 628 (2005) [emphasis in original].) The Water Quality Control Plan for the Sacramento River and San Joaquin River Basins ("Basin Plan") was implemented in furtherance of that goal. The Staff Report asserts that it is in compliance with the Clean Water Act because "[t]he proposed amendments will not change the water quality objectives that

now protect [Salt Slough, wetland water supply channels, and the San Joaquin River]. The amendments simply allow additional time for the objective to be met in Mud Slough [north] and the San Joaquin River above the Merced in a manner the dischargers find feasible." (Staff Report, p. 27.) This contention is untenable. The proposed amendments, if approved, would remove the protective water quality standard of 5 µg/L set to be in effect on October 1, 2010, and would authorize proceeding without a protective selenium water quality standard in place until December 31, 2019. Further, the amendment will continue the practice of merely shifting the pollutants from Salt Slough to Mud Slough and continue discharge of these highly toxic pollutants into the San Joaquin River, Sacramento-San Joaquin Delta, estuaries and bay.

Indeed, the EPA even doubts that this December 31, 2019 deadline would be met. In its comment letter, the EPA questioned the attainability of the Regional Board's basis for the extension of the compliance timeline, namely, that it would give the dischargers' time to "seek additional funding, investigate and implement appropriate drainage treatment technologies." (Staff Report, p. 7.) The EPA expressed "concerns regarding the feasibility of the Grassland Bypass Project (GBP) operators being able to implement appropriate drainage treatment technologies by December 31, 2019" and instead, "believe[d] it would be prudent for the [Regional] Board to consider other approaches to drainage management that could provide alternative means of meeting the proposed performance goal by 2015 and the final water quality objective by 2019," such as a targeted removal of lands that contribute high selenium inputs and rotational land following. (EPA Comment Letter, April 26, 2010.) The Regional Board's responses to these comments—that the dischargers would have to submit a report to the Regional Board, and that the Board cannot mandate that land be retired to comply with the water quality objectives—were inadequate. (See Responses R1a-C, R1c-C, and R2-USEPA.)

Moreover, the Regional Board's statement that "[d]ischargers must comply with the Basin Plan and their Waste Discharge Requirements, but the Board does not dictate how compliance is achieved" (R2-USEPA) does little to allay concerns about actual compliance when, after having 14 years to meet the standard, the dischargers receive a nine year, three month extension.

The EPA also called into question the Regional Board's "No Project Alternative" scenario. Under the Staff Report's No Project alternative, "the multi-agency agreements and drainage management organizational structure could dissolve since there would no longer be any need for a Use Agreement." (Staff Report, p. 20.) Only by assuming that there would be a collapse in the cooperative work in the grasslands could the Regional Board conclude that "[o]verall, long-term and cumulative impacts of the proposed alternative are anticipated to be more environmentally favorable than the No Project Alternative due to the continuation of the current framework for multiple agency coordination." (Staff Report, p. 20.) The EPA comment letter notes that because "there are other programs and commitments that could step in if necessary [such as Westside Drainage Plan and/or Irrigated Lands Regulatory Program, or "ILRP"]," the No Project scenario and the serious environmental impacts that would result from such a "collapse" in cooperative work may be "overstated." (EPA Comment Letter, April 26, 2010.)

In response to similar concerns raised by the Environmental Coalition (several of whom are signatories to this letter) the Regional Board responded: "[The] draft GBP EIS/DEIR authors informed staff that continuation of coordinated regional efforts is uncertain if the Use Agreement is not extended. The possibility that regional cooperation may disappear without the Amendments does not change the Board's authority or responsibility to regulate, but it does raise logistical and policy issues that would take time to fully work out, and environmental impacts that are minimized or avoided now through regional monitoring and management could occur during the transition to issuance and enforcement of individual orders. There would be a very real possibility of increased impacts to drainage-area wildlife while the selenium control program is transitioned from regulating a single discharge to regulating multiple discharges; as well as the anticipated impacts to agriculture from lack of adequate drainage as described in the GBP EIS/EIR." (Response to Comments, R1d-C.)

In response to the EPA's concerns, the Regional Board stated: "The Westside Regional Drainage Plan is not a regulatory document. If the cooperative regional drainage management effort dissolves, staff will consider all regulatory options, including issuance of individual WDRs or inclusion of the Grassland drainers in the ILRP." (Response to Comments, R3-USEPA.)

These responses fail to adequately address the EPA's suggestion that the ILRP could be an adequate substitute for the current cooperative agreement. And they fail to show how even with the speculated collapse of the cooperative agreement that the No Project Alternative is more environmentally damaging than having no protective selenium standards for the nine year, three month extension when admittedly the Regional Board would have other regulatory options and duties to implement.

Further, the staff report's description of what could occur under the No Project alternative indicates that regulation of these toxic contaminants could be done, but staff considers it more convenient to delay enforcement of the regulation until some unknown treatment can be developed. Both federal and state water quality statutes demand the waters of the state not be degraded, even if regulation is difficult. Discharge of pollution is not a right of drainers' use of imported water.

The EPA also outlined the potential for the Basin Plan Amendment to conflict with upcoming federal regulations. EPA indicated that it will soon publish revised CWA 304(a) aquatic life criteria for selenium. These standards will be *more stringent than even the 5 µg/L standard that would be implemented on October 1, 2010 if the more polluting amendment is not adopted*. EPA is also developing statewide wildlife criteria for selenium, pursuant to Endangered Species Act consultation with US FWS and National Marine Fisheries Service, for the California Toxics Rule. These criteria will most likely be more stringent than the revised draft national CWA 304(a) criteria, since they will be designed to protect threatened and endangered species in California.

2. The United States Fish and Wildlife Service (USFWS)

The USFWS issued nine pages of comments on the proposed Basin Plan Amendment, emphasizing its "longstanding interest in ensuring water quality in the Grasslands Ecological Area and the San Joaquin River," and its preparation of the December 18, 2009, Grasslands Bypass Project Biological opinion. (USFWS Comment Letter, received May 8, 2010.) Among other things, USFWS criticized the Regional Board's Staff report for failing to consider new water quality information which showed that selenium levels exceeded 20 µg/L on the San Joaquin River during at least 4 months in 2009, failing to address selenium water quality impairments and provide remedies, and failing to address cumulative impacts. In particular, the USFWS requested that the Regional Board consider the protection of Chinook salmon and steelhead in the San Joaquin River, including the reach between Sack Dam and the Merced River, in this Basin Plan Amendment. The Service believes that as written, the revised compliance schedule and lack of an enforceable water quality objective for selenium in the San Joaquin River upstream of the Merced River until December 31, 2019, is not protective of salmonids and could result in the loss of or harm to out migrating young salmon in the San Joaquin River. (USFWS Comment Letter, p. 6.)

The Regional Board responded that the "[one of the reports cited by USFWS] was considered in drafting the staff report; however modifications to the national criterion for selenium on which the San Joaquin River objective is based are outside the scope of the proposed Amendments." (Response to Comments, R3-USFWS.)

This response fails to address the USFWS' concern regarding the impacts of the proposed amendment on the protected species in the area directly affected by the proposed Basin Plan Amendment. The USFWS' concerns are squarely within the Regional Board's purview. As the USFWS remarked, the proposed 9 year extension and the contamination it would allow compounds the reasonable and beneficial use problem that has eluded effective resolution. Namely: *"Exceedences of the State-adopted, federally approved chronic water quality objective for selenium in the Grassland wetland water supplies are a continuing problem and are resulting in failure to protect designated beneficial uses, including use by wildlife species."* (USFWS Comment Letter, p. 3 [emphasis in original].)

The EPA and USFWS letters corroborate key problems with the proposed open-ended extension identified, and further detailed, in the Environmental Coalition comments. The proposed alternative of a two-year extension would better protect water quality and further federal laws and policies. The failure to adopt that alternative cannot be avoided simply via speculation about the failure of continued cooperation of regional stakeholders. We urge the State Board to take over the control and regulation of the selenium discharge from the San Joaquin Valley using the federal San Luis Drain to transfer this pollution to the San Joaquin River and Sacramento-San Joaquin Delta.

THE REGIONAL WATER BOARD'S APPROVAL CONFLICTS WITH STATE AND FEDERAL ANTI-DEGRADATION POLICY

Both USEPA (40 CFR §131.12) and the State of California (State Water Board Resolution 68-16) have adopted antidegradation policies as part of their approach to regulating water quality. The Regional Water Board must ensure that its actions do not violate the federal or state antidegradation policies. And yet they readily admit waiving the selenium pollution control standards for another 9 years and 3 months will degrade the waters of the state:

"With the amendments, water quality in Mud Slough (north) will remain vulnerable to degradation for up to an additional nine years, three months beyond 1 October 2010." (Staff Report, at p. 25)

"Continued discharge constitutes an increase in waste volume over conditions without the amendments." (Staff Report, p. 26.)

The Staff Report seemingly argues this degradation will only occur in Mud Slough and therefore it is acceptable:

The existing beneficial uses of Mud Slough (north) are irrigation (limited by naturally occurring salt and boron); stock watering; contact and non-contact recreation; warm freshwater habitat; spawning and wildlife habitat. Adopting the amendment will not change attainability of these uses relative to current conditions, but will result in temporary continuation of the potential impairment to warm freshwater habitat, spawning and wildlife habitat now occurring relative to no project. [Staff Report at p. 25]

This argument suggests that after over a decade of sanctioning the pollution Mud Slough and the San Joaquin River, such degradation necessarily sanctions further degradation by these drainers. Furthermore, this circular argument ignores the spread of selenium pollution throughout the lower San Joaquin and the Sacramento-San Joaquin Delta.

APPROVAL OF THE OPEN-ENDED EXTENSION WOULD FRUSTRATE IMPLEMENTATION OF KEY BASIN PLAN OBJECTIVES

Compliance with Basin Plan objectives and their implementation program is mandatory. (See *State Water Res. Control Bd. v. Office of Admin. Law* (1993) 12 Cal. App. 4th 697, 701-02.) The proposed nearly decade-long compliance extension comes in direct conflict with crucial Basin Plan Objectives, and the proposed amendment fundamentally alters the basin plan selenium pollution controls out of meaningful existence. Waiving enforcement or "implementation" for almost a decade has the effect of sanctioning pollution that will bioaccumulate in plant material, enter the food chain, and gather in groundwater and surface water supplies so as to significantly impact beneficial uses for decades.

The Regional Board admits that the "proposed time extension will . . . potentially result [] in violation of the selenium water quality objective in Mud Slough (north) and the San Joaquin River above the Merced River." (Staff Report Environmental Checklist, Section 9 "HYDROLOGY and WATER QUALITY.") The Basin Plan *prohibits* "[a]ctivities that increase the discharge of poor quality agricultural subsurface drainage." (Basin Plan, Resolution No. 96-147, p. 16.) The record shows the Regional Board's action will allow discharge of selenium contaminated water into Mud Slough, a tributary of the San Joaquin River, in excess of Basin Plan water quality objectives. The Regional Board amendment fails to take action to stop selenium discharges to Mud Slough and the San Joaquin River in excess of Basin Plan Water Quality Objectives. The failure to stop this discharge of pollution will further deteriorate the waters of the state and the Sacramento-San Joaquin Delta and its tributaries.

Furthermore, the Basin Plan requires that "[w]here the Regional Water Board determines it is infeasible for a discharger to comply immediately with such objectives or criteria, compliance shall be achieved in the shortest practicable period of time (determined by the Regional Water Board), not to exceed ten years after the adoption of applicable objectives or criteria." (See Basin Plan, at III-2.00.) The ten years has not only already been exhausted, it has been exceeded, as the objectives were promulgated in 1996. (Resolution 96-147.) Allowing additional time for compliance is a violation of the Basin Plan. (See Basin Plan, at III-2.00.)

Under the Basin Plan disposal of drainage wastewater and dilution of salt is not a beneficial use and "cannot be satisfied to the detriment of beneficial uses." (Resolution No 96-146; Basin Plan, p. II-1.00, Para. 2.) As the USFWS outlined, the extension of the compliance timeline for almost ten years will harm the other beneficial uses recognized in the Basin Plan.

The regional board staff response is woefully inadequate, as it essentially asserts the best way to achieve "compliance" is to change the Basin Plan rules or not enforce them: "It should be noted that the proposed change in the compliance schedule conforms to the time frame in the Grassland Bypass Project Use Agreement. The proposed Amendments merely allow the Use Agreement to be implemented while remaining in compliance with our Basin Plan." (R2-USFWS at p.32.)

APPROVAL OF THE SELENIUM POLLUTION WAIVER IS NOT IN COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

The Regional Board invoked the regulatory exemption from the California Environmental Quality Act ("CEQA") for the Basin Planning process, arguing that its Staff Report and checklist were adequate to meet the further documentation required under Title 23, section 2377 of the California Code of Regulations. Instead of doing its own complete environmental analysis, the Regional Board relied almost exclusively on the EIS/EIR for the Grasslands Bypass Project (2010-2019), prepared by Bureau of Reclamation and San Luis & Delta-Mendota Water Authority, to satisfy CEQA. Delta-

Mendota certified the EIR on February 8, 2009, and filed its Notice of Determination with the State Clearinghouse on October 8, 2009. The Bureau's Record of Decision issued December 18, 2009.

However, the exemption for the certified state regulatory programs is not a blanket exemption from CEQA, as the agency must still comply with CEQA's policies, evaluation criteria and standards. The required environmental review must address all activities and impacts associated with a project. (*Laupheimer v. California* (1988) 200 Cal. App. 3d 440; *Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal. App. 3d 604.) The Regional Board must still provide responses to significant environmental objections, and must still properly analyze alternatives (including the No Project Alternative). (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal. 4th 105, 123.)

The Regional Board failed to satisfy even these basic requirements. The Regional Board improperly discounted crucial new evidence, postdating the 2009 EIS/EIR and directed specifically at the Regional Board's review and action on the Basin Plan amendment. For example, the Regional Board failed to consider the information contained in the 2010 EPA and USFWS letters, research biologist Dennis Lemly's findings in December 2009 regarding salmonid mortality rates caused by selenium discharges in the San Joaquin River, and Thomas Maurer's 2010 assessment of salmonids. These sources, as well as other comment letters, demonstrate that in its 2010 review, the Regional Board misidentified the No Project Alternative, evaded genuine assessment of the two-year extension alternative, and understated the project's significant environmental impacts. In addition to water quality and others, those impacts include impacts on the use of floodwaters, and on the protection of aquatic life and fisheries.

APPROVAL OF THE AMENDMENT -- BASICALLY AN ENFORCEMENT WAIVER FOR SELENIUM POLLUTION -- VIOLATES LAWS PROTECTING ENDANGERED SPECIES

The Regional Board failed to conduct adequate analysis under either federal or state endangered species laws. The Regional Board's citing of federal consultation letters with the Bureau of Reclamation -- the NOAA NMFS Concurrence letter dated November 19, 2009 or the USFWS Biological Opinion dated December 18, 2009 -- is insufficient for California Endangered Species Act ("CESA") compliance. Reliance on the NOAA NMFS Consultation dated November 19, 2009 is insufficient as the letter does not analyze a waiver of the 5 µ/L selenium standard that extends until January 1, 2020. Nor does the letter take into account new evidence of additional impacts from December 2009 and early 2010 provided by USFWS and Dennis Lemly. In addition, the Water Board failed to consider the cumulative impacts of the discharge allowed under the proposed Basin Plan Amendment on the San Joaquin River and Delta ecosystem, inhabited by several federally and state listed species. The Regional Board's entire statement regarding compliance with CESA in the Draft Staff Report is as follows:

"[California Department of Fish and Game ("CDFG")] has been working closely with the Bureau and Authority to craft the 2010-2019 Use Agreement's wildlife monitoring and protection and impact mitigation requirements." (Staff Report, p. 28.) This falls far short of CESA's requirement that either the CDFG issue concurrence statements for the NMFS and USFWS Biological Opinions, or issue separate CESA clearance for Delta Smelt, San Joaquin Kit Fox, Giant Garter Snake, Swainson Hawk Sacramento River winter-run Chinook, spring run Chinook, and other state-listed species affected by the Proposed Action.

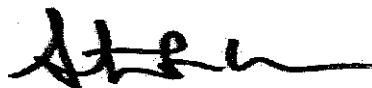
We further recommend the State Board consider taking over the regulation and control of selenium discharges so that this selenium drainage pollution is not merely exported from the San Joaquin Valley to the Sacramento-San Joaquin Delta. We urge the State Board to exercise both its water quality, water rights and public trust authority to ensure this pollution does not further degrade the waters of the state and nation. The Central Valley Regional Water Quality Control Board believes controlling this selenium pollution at its source—the export of Delta water to irrigate toxic selenium soils and then sending the drainage selenium pollution back—is not within its regulatory authority. Such pollution control and unreasonable use is within the State Board's authority.

Finally, the Regional Board refuses to effectively address and regulate Westside upslope selenium contamination. State Board action should be undertaken to complete a watershed sediment/selenium reduction program to reduce upslope selenium inputs from Westlands and surrounding irrigated areas or to control upslope selenium contaminants during storm events.² This program should include the unregulated Delta Mendota Canal sumps that are within the project area and lands to the north of the project area that still discharge into the wetland channels with impacts to endangered species and aquatic ecosystems. Further, extensions of any Selenium waiver should be contingent on compliance with protective water quality objectives for salmon in the San Joaquin River upstream of the Merced, and contingent on compliance with compliance with the 2 ppb SE objective in the Grasslands wetland channels. The interim 2 year extension recommended to the Regional Board was ignored. Such an approach would provide the opportunity to see if treatment methods actually exist that are effective. It would also provide time to investigate control measures to reduce Se pollution in the San Joaquin River at Hills Ferry that exceed drinking water standards. We include the September 22, 2010 comments of C-Win, CSPA and AquAlliance by reference.

Thank you for the opportunity to comment.



Jim Metropulos
Senior Advocate
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Steven L. Evans
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² See pages 89-91 of the May 27, 2010 transcript.

W. F. Zeke Grader, Jr.

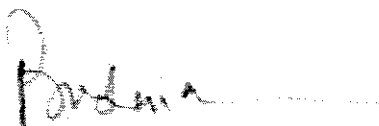
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