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12 **THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
13 **IN AND FOR THE COUNTY OF SACRAMENTO**

14 **FILE BY FAX**

15 **COORDINATION PROCEEDING SPECIAL**  
16 **TITLE**  
17 **(Cal. Rules of Court, rule 3.550)**

18 **DELTA STEWARDSHIP COUNCIL CASES**

19 **JUDICIAL COUNCIL COORDINATION**  
20 **PROCEEDING NO. 4758**

21 **PETITIONERS CDWA ET AL. AND C-WIN**  
22 **ET AL.'S JOINT OPENING BRIEF ON THE**  
23 **MERITS IN SUPPORT OF FIRST**  
24 **AMENDED VERIFIED PETITIONS FOR**  
25 **WRIT OF MANDATE AND COMPLAINTS**  
26 **FOR DECLARATORY AND INJUNCTIVE**  
27 **RELIEF**

28 **Hearing Date: TBA**

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**Judge: Honorable Michael P. Kenny**

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2 **Cases**

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9 *California Native Plant Society. v. City of Santa Cruz* (2009) 177 Cal.App.4th 957 ..... 13, 50

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11 *Californians for Native Salmon and Steelhead Association v. Department of Forestry* (1990) 221

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13 *Citizens to Preserve the Ojai v. County of Ventura* (1986) 176 Cal.App.3d 421 .....59, 64, 67, 68

14 *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515 .....39

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20 *Communities for a Better Environment v. South Coast Air Quality Management District*

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1 **Other Authorities**

2 Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 UC Davis L.Rev. 233 .....40

3 Robie, *Effective Implementation of the Public Trust Doctrine in California Water Resources Decision-*

4 *Making: A View From the Bench*, 45 U.C. Davis L.Rev. 1155 ..... 13

5 Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich.

6 L.Rev. 471 (1969-70).....40

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16 Cal. Code Regs., tit. 14, § 15126.6(a).....71

17 Cal. Code Regs., tit. 14, § 15130(a)(1) .....64, 67

18 Cal. Code Regs., tit. 14, § 15130(b).....64, 65, 66

19 Cal. Code Regs., tit. 14, § 15144 .....64

20 Cal. Code Regs., tit. 14, § 15151 .....64

21 Cal. Code Regs., tit. 14, § 15168(b).....72

22 Cal. Code Regs., tit. 14, § 15355 .....63

23 Cal. Code Regs., tit. 14, § 15355(b).....64, 67

24 Cal. Code Regs., tit. 14, § 15358 .....63

25 Cal. Code Regs., tit. 14, § 15378, subd. (a) .....55

26 Cal. Code Regs., tit. 14, § 21001(a).....68

27 Cal. Code Regs., tit. 14, §§15000 et seq. ....50

28 Cal. Code Regs., tit. 14, §§5001-5016.....73

1	Cal. Code Regs., tit. 14, §15004(b)(2).....	59
2	Cal. Code Regs., tit. 23, § 5001(f) .....	17
3	Cal. Code Regs., tit. 23, § 5002 .....	27, 33, 78
4	Cal. Code Regs., tit. 23, § 5003 .....	16, 78
5	Cal. Code Regs., tit. 23, § 5003(c).....	16
6	Cal. Code Regs., tit. 23, § 5003(c)(1)(A).....	16
7	Cal. Code Regs., tit. 23, § 5005 .....	27, 78
8	Cal. Code Regs., tit. 23, § 5007 .....	29, 78
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10	Cal. Code Regs., tit. 23, § 5010 .....	33
11	Cal. Code Regs., tit. 23, §§5001-5015 .....	15
12	Cal. Code Regs., tit. 23, §§5001-5016.....	11
13	Cal. Code Regs., tit. 23, §5001(dd)(3).....	33
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**Glossary of Terms Used in Brief**

<b>Term</b>	<b>Definition</b>
BAS	Best available science
BDCP	Bay Delta Conservation Plan
BDCP ADEIR/S	Administrative Draft Environmental Impact Report/Statement for BDCP (February 2012/March 2013)
APA	California Administrative Procedures Act (Gov. Code, §§ 11340 et seq.)
DFW	California Department of Fish and Wildlife (formerly Department of Fish and Game)
CEQA	California Environmental Quality Act (Pub. Resources Code, §§ 21000 et seq.)
cfs	Cubic feet per second
CCP	California Code of Civil Procedure
CNRA	California Natural Resources Agency
CVFPB	Central Valley Flood Protection Board
CVFPP	Central Valley Flood Protection Plan adopted pursuant to Senate Bill 5 in 2008
CVP	Central Valley Project
CVPIA	Central Valley Project Improvement Act (43 U.S.C. 390(cc) et seq.)
Delta	Sacramento-San Joaquin River Delta
DEIR	Draft Program Environmental Impact Report
DFG	California Department of Fish and Game
DISB	Delta Independent Science Board
DFW	California Department of Fish and Wildlife (formerly Department of Fish and Game)
DPA	Delta Protection Act (Wat. Code, §§12200 et seq.)
DPC	Delta Protection Commission
2009 DRA	Delta Reform Act (Wat. Code, §§85001 et seq.)
DSC	Delta Stewardship Council
DSP	Delta Science Program
DVF	Delta Vision Foundation
DWR	California Department of Water Resources
EIR	Delta Plan Environmental Impact Report. All of the environmental review documents prepared by the Delta Stewardship Council for the Project are referred to collectively as the EIR unless the distinction between drafts is important.
EIS	Environmental Impact Statement
ESA	Endangered Species Act (16 U.S.C., §1531 et seq.)
ESP	Economic Sustainability Plan
DISB	Delta Independent Science Board
FEMA	Federal Emergency Management Agency
FEIR	Final Environmental Impact Report

<b>Term</b>	<b>Definition</b>
Guidelines	CEQA Guidelines (Cal. Code Regs., tit. 14, §15000 et seq.)
HCP	Habitat Conservation Plan
NCCP	Natural Communities Conservation Plan
NEPA	National Environmental Policy Act (42.U.S.C. §§4321 et seq.)
NOAA Fisheries	National Oceanic and Atmospheric Administration Fisheries
PEIR	Program Environmental Impact Report
Plan	Delta Plan as Adopted by the Delta Stewardship Council
PRC	California Public Resources Code
Project	Delta Plan as reviewed in the EIR
RDEIR	Recirculated Draft Program EIR
Reclamation	Bureau of Reclamation
Regs.	Regulations adopted to implement Delta Plan (Cal. Code Regs., tit. 23, §§5001-5014)
SWRCB	California State Water Resources Control Board
SWP	State Water Project
USACE	U.S. Army Corps of Engineers
USEPA	U.S. Environmental Protection Agency
USFWS	U.S. Fish and Wildlife Service
USGS	U.S. Geological Survey
WMP	Water Management Plan
WC	California Water Code

**TABLE 1**  
**Delta Plan Regulation and Policy Correlations**

<b>Regulation Section</b>	<b>Short Form</b>	<b>Policy</b>	<b>AR Cite</b>
5001		<b>Definitions</b>	B763-767
5002	GP1	<b><u>Governance Policy 1</u></b> Detailed Findings to Establish Consistency With Delta Plan	B445
5003	WRP1	<b><u>Water Resources Policy 1</u></b> Reduce Reliance on the Delta through Improved Regional Self-Reliance	B446
5004	WRP2	<b><u>Water Resources Policy 2</u></b> Transparency in Water Contracting	B448
5005	ERP1	<b><u>Ecosystem Restoration Policy 1</u></b> Delta Flow Objectives	B451
5006	ERP2	<b><u>Ecosystem Restoration Policy 2</u></b> Restore Habitats at Appropriate Elevations Appendix 4 Map	B452 B1228
5007	ERP3	<b><u>Ecosystem Restoration Policy 3</u></b> Protect Opportunities to Restore Habitat Appendix 5 Map	B452 B1232
5008	ERP4	<b><u>Ecosystem Restoration Policy 4</u></b> Expand Floodplains and Riparian Habitats in Levee Projects Appendix 8 Map	B452 B1258
5009	ERP5	<b><u>Ecosystem Restoration Policy 5</u></b> Avoid Introductions of and Habitat Improvements for Invasive Non-native Species	B454
5010	DPP1	<b><u>Delta-as-Place Policy 1</u></b> Locate New Urban Development Wisely	B455
5011	DPP2	<b><u>Delta-as-Place Policy 2</u></b> Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats	B456
5012	RRP1	<b><u>Risk Reduction Policy 1</u></b> Prioritization of State investments in Delta Levees and Risk Reduction	B461
5013	RRP2	<b><u>Risk Reduction Policy 2</u></b> Require Flood Protection for Residential Development in Rural Areas	B463
5014	RRP3	<b><u>Risk Reduction Policy 3</u></b> Protect Floodways	B464
5015	RRP4	<b><u>Risk Reduction Policy 4</u></b> Floodplain Protection	B464

1 **I. INTRODUCTION**

2 In the Sacramento-San Joaquin Delta Reform Act of 2009 (Wat. Code (“WC”), §85000 et seq.  
3 (“DRA”), the Legislature tasked the Delta Stewardship Council (“DSC”) with developing the Delta  
4 Plan. In doing so, however, the DSC failed to comply with core provisions of California law, including  
5 mandates of the DRA itself. The Delta Plan’s egregious failure to comply with, or in some cases, even to  
6 acknowledge, California law protecting the Delta – a critically important natural resource – requires that  
7 the DSC’s approval of the Delta Plan be set aside.

8 The DRA requires a Delta Plan that provides for “reduced reliance” on the Delta and promotes  
9 “regional self-reliance.” However, the Delta Plan does nothing to reduce reliance on the Delta; to the  
10 contrary, it advances policies and recommendations that will have the opposite effect. Those policies  
11 and recommendations also fail to protect the special character of water rights held by water users within  
12 the Delta.

13 To comply with its statutory mandate to advance the “co-equal goals” (provide a more reliable  
14 water supply for California and protect, restore, and enhance the Delta ecosystem), the DSC was  
15 required to create a plan that would, among other things, foster healthy flows and improve water quality  
16 and salinity control in the Delta. Again, however, the Delta Plan, heavily influenced by water export  
17 interests, includes policies and recommendations that undermine efforts to improve Delta flow and water  
18 quality. The Delta Plan does not even consider available measures to improve flow and water quality by  
19 decreasing water exports from the Delta.

20 The DRA required the DSC to prepare a plan that preserves the statutory “area of origin” and  
21 watershed protections that are critical to the health of the Delta and to enhancement of Delta ecosystems.  
22 Such protections include the Delta Protection Act (WC, §§12200 et seq. (“DPA”), which requires the  
23 State and federal water projects to provide salinity control and an adequate water supply for the Delta.  
24 The DPA prohibits the export of water to which in-Delta users are entitled through water rights, as well  
25 as water necessary for salinity control and to assure an adequate supply of water “to maintain and  
26 expand agriculture, industry, urban, and recreational development in the Delta.” (WC, §12201.) Other  
27 provisions of the Water Code recognize prior rights to watershed and area of origin water that must be  
28 satisfied before the State Water Project is allowed to divert Delta water to serve others. Yet, as explained

1 below, the DSC crafted the Delta Plan so as to undermine, compromise, or bypass such protections  
2 altogether.

3         The DRA, the California Constitution, and case law required the DSC to create a Delta Plan  
4 consistent with the public trust doctrine. Our Supreme Court has observed that the public trust “is an  
5 affirmation of the duty of the state to protect the people’s common heritage of streams, lakes,  
6 marshlands and tidelands, surrendering that right of protection only in rare cases when abandonment of  
7 that right is consistent with the purposes of the trust.” (*National Audubon Society v. Superior Court*  
8 (1983) 33 Cal.3d 419, 441 (*Audubon*)). The DRA reaffirmed the over-arching significance of the public  
9 trust doctrine, declaring that the “longstanding constitutional principle of reasonable use and the public  
10 trust doctrine shall be the foundation of state water management policy and are particularly important  
11 and applicable to the Delta.” (WC, §85023.)

12         However, while the Delta Plan acknowledges the existence of the public trust, it fails to include  
13 an analysis or weighing of the public trust as affected by the Plan’s policies and recommendations.  
14 Simply put, the DSC failed to implement its duties under the public trust doctrine. As a matter of law,  
15 the DSC’s approval of the Delta Plan must be set aside for this reason as well.

16         In contrast to its failure to address the public trust, area of origin laws and the mandate to reduce  
17 reliance on the Delta, the DSC was quite clear in its unqualified endorsement of the Bay Delta  
18 Conservation Plan (“BDCP”), even before the “final” BDCP and its environmental review had been  
19 issued. The green light given the BDCP – a water export scheme to create a massive new water  
20 conveyance in the Delta to export water to points south of the Delta – forecloses proper consideration of  
21 alternatives that would not require new conveyance and/or would increase Delta flows and water quality  
22 by reducing exports. As explained below, the DSC’s unquestioning submission to BDCP proponents  
23 amounts to an unlawful abdication of its duties under the DRA.

24         In addition to its failure to comply with DRA requirements and its other violations of California  
25 law, the DSC also failed to comply with crucial requirements of the California Environmental Quality  
26 Act (Pub. Resources Code (“PRC”), 21000 et seq. (“CEQA”)) to analyze the impacts of carrying out the  
27 Plan. The Delta Plan Environmental Impact Report (“EIR”) fails to establish an adequate “baseline,”  
28 improperly defers and segments environmental analysis, lacks an accurate, stable, and finite description

1 of the project, fails to properly analyze impacts – at both the Plan and cumulative level – as required by  
2 CEQA, and fails to develop or consider the required range of reasonable alternatives. In addition, the  
3 DSC failed to follow minimum procedures under the Administrative Procedures Act (Gov. Code,  
4 §11340 et seq. (“APA”)) when it proposed Regulations to implement the Delta Plan. For these reasons,  
5 too, approval of the Delta Plan must be set aside.

## 6 **II. BACKGROUND**

### 7 The Sacramento-San Joaquin Delta

8 The Legislature has long recognized that the Sacramento-San Joaquin River Delta (“Delta”<sup>1</sup>), the  
9 largest and most productive estuarine system on the west coast of the Americas, “is a natural resource of  
10 statewide, national, and international significance, containing irreplaceable resources.” (PRC, §29701.)  
11 California’s express policy is “to recognize, preserve, and protect those resources of the delta for the use  
12 and enjoyment of current and future generations.” (PRC, §29701.) In adopting the Sacramento-San  
13 Joaquin Delta Reform Act of 2009, WC, §85000 et seq. (“DRA”), the Legislature found that:

14 (1) The Delta is a distinct and valuable natural resource of vital and enduring interest to  
15 all the people and exists as a delicately balanced estuary and wetland ecosystem of  
16 hemispheric importance.

17 (2) The permanent protection of the Delta’s natural and scenic resources is the paramount  
18 concern to present and future residents of the state and nation.

19 (3) To promote the public safety, health, and welfare, and to protect public and private  
20 property, wildlife, fisheries, and the natural environment, it is necessary to protect and  
21 enhance the ecosystem of the Delta and prevent its further deterioration and destruction.

22 (4) Existing developed uses, and future developments that are carefully planned and  
23 developed consistent with the policies of this division, are essential to the economic and  
24 social well-being of the people of this state and especially to persons living and working  
25 in the Delta.

26 (WC, §85022(c).) The Delta “serves Californians concurrently as both the hub of the California water  
27 system and the most valuable estuary and wetland ecosystem on the west coast of North and South  
28 America.” (WC, §85002.)

### 29 Deteriorating Conditions in the Delta/Causes of the Decline

30 In enacting the DRA, the Legislature declared that the “Delta watershed and California’s water  
31 infrastructure are in crisis and existing Delta policies are not sustainable.” (WC, §85001(a).) The  
32 Legislature resolved, “to provide for the sustainable management of the [Delta] ecosystem, to provide  
33

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34 <sup>1</sup> The “legal” Delta is defined in Water Code, (“WC”) §12220.

1 for a more reliable water supply for the state, to protect and enhance the quality of water supply from the  
2 Delta, and to establish a governance structure that will direct efforts across state agencies to develop a  
3 legally enforceable Delta Plan.” (WC, §85001(c).)

4 A principal cause of the crisis is well recognized: an unsustainable proportion of the Delta’s  
5 freshwater flows have been diverted for decades by the Central Valley Project (“CVP”) and the State  
6 Water Project (“SWP”). It was always known the Delta could not support the massive exports of water  
7 that have continued for decades. As early as 1960, the State’s planning contemplated that by 2000 an  
8 additional 5 million acre feet of water annually would be necessary from North Coast rivers to meet  
9 obligations within the Delta watershed and sustain diversions from the Delta. (J130926 – J130931;  
10 I000196-I000201; I000245-I000247) Such development of water never occurred, however. Increasing  
11 demand within the Watershed was also anticipated and the 5 million acre feet of water was intended to  
12 both meet approximately 4.25 million acre feet of State Water Project (SWP) contract entitlement, and  
13 provide about .75 million acre feet to meet the growing needs within the Watershed. Never was it  
14 intended that exports from the Delta would continue to be sustained with water from the Watershed  
15 beyond the year 2000. (*Ibid.*)

16 Diminished freshwater flows and increased temperature, and salinity are among the chief  
17 problems pushing the Delta to the brink of ecological collapse. (Administrative Record section B537,  
18 B591<sup>2</sup>) Populations of many ecologically and commercially important species (public trust resources)  
19 declined substantially over the past 15 years. (L11878) These declines are related to increased diversions  
20 of water since 1985 among other factors. (M934) Changes in Delta flows resulting from upstream  
21 diversions and operations of the CVP and SWP modified the hydrologic and physical habitat of the  
22 Delta system, in turn altering the Delta ecosystem. (M934; see generally, L26752-L27161; L25301-  
23 L26144; L3835-L4104) Excessive diversions of water for consumptive use, which in dry years can be  
24 36 percent of inflow in the Delta (B553), has resulted in the extinction of many species of fish endemic  
25 to the Delta. Just 12 indigenous species remain, and these are in grave danger. Since the SWP and CVP  
26 began operation, the Sacramento River winter and spring run Chinook salmon, Central Valley steelhead,  
27

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28 <sup>2</sup> Hereinafter, citations to the Administrative Record reference only the letter section of the Record  
and then the page number.

1 North American green sturgeon and Delta smelt have been driven perilously close to extinction. Each is  
2 now listed as endangered or threatened under the federal Endangered Species Act (16 U.S.C. §1531 et  
3 seq. (“ESA”)). (L2825)

4 Delta Protection Act and “Area of Origin” Protections

5 California courts and the Legislature have established and affirmed protections for areas in  
6 which water serving other parts of the states originates; these are known generally as “the Delta  
7 Protection Act” (“DPA”) (WC, §12200, et seq., and “Area of Origin” protections. (WC, §§1215.5,  
8 1216.) As stated in the DPA:

9 The Legislature finds that the **maintenance of an adequate water supply in the Delta**  
10 **sufficient to maintain and expand agriculture, industry, urban, and recreational**  
11 **development in the Delta area** . . . and to provide a common source of fresh water for  
12 export to areas of water deficiency is necessary to the peace, health, safety and welfare of  
the people of the State, except that delivery of such water shall be subject to the  
provisions of Section 10505 and Sections 11460 to 11463, inclusive, of this code.

13 (WC, § 12201, emphasis added.)

14 The DPA: (1) requires the SWP and CVP to provide salinity control and an adequate water  
15 supply for the Delta (WC, §§12201, 12202); (2) prohibits the export of water from the Delta to which  
16 in-Delta users are entitled through water rights and water which is necessary for salinity control and an  
17 adequate supply “to maintain and expand agriculture, industry, urban and recreational development in  
18 the Delta” (WC, §12204); and (3) requires maintenance of a common pool of water in the interior of the  
19 Delta and the operation and management of releases from storage for export to be integrated to the  
20 “maximum extent possible” in order to fulfill the objectives of the Act. The objectives of the DPA are  
21 to protect Delta water rights, provide salinity control and additionally provide an adequate supply to  
22 “maintain and expand agriculture, industry, urban, and recreational development in the Delta.” (WC,  
23 §12201.)

24 Water Code §11460 specifically recognizes the prior right to watershed water for those areas of  
25 origin from which the SWP may divert water to serve other areas. Other area of origin protections, such  
26 as Water Code §1216, also ensure that protected areas are not deprived of adequate supplies of water,  
27 “directly or indirectly,” “by a water supplier exporting or intending to export water for use outside a  
28

1 protected area.” (WC, §1216.) As water demands on the Delta have increased, these protections have  
2 become critical to ongoing agricultural and other beneficial uses of water within the Delta.

3 2009 Delta Reform Act and the Delta Plan

4 The DRA was intended to advance the “coequal goals” which means:

5 the two goals of providing a more reliable water supply for California and protecting,  
6 restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a  
7 manner that protects and enhances the unique cultural, recreational, natural resource, and  
8 agricultural values of the Delta as an evolving place.

9 (WC, §85054.) The Delta Plan must further the “coequal goals” (WC, §85300(a)), and the DSC’s central  
10 mission is to achieve the Act’s “coequal goals” (WC, §85302(a), (b); B527).

11 The DRA also requires the DSC to prepare the Delta Plan as the vehicle of the public trust  
12 doctrine for achieving these two coequal goals. (WC, §85023.) The “public trust is more than an  
13 affirmation of state power to use public property for public purposes. It is an affirmation of the duty of  
14 the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands,  
15 surrendering that right of protection only in rare cases when abandonment of that right is consistent with  
16 the purposes of the trust.” (*Audubon, supra*, 33 Cal 3d at 441.) The DRA confirmed the applicability of  
17 the public trust doctrine to actions taken under the DRA, stating that the “longstanding constitutional  
18 principle of reasonable use and the public trust doctrine shall be the foundation of state water  
19 management policy and are particularly important and applicable to the Delta.” (WC, §85023.)

20 The DRA also describes the DRA objectives inherent in the coequal goals, which are to:

21 (a) Manage the Delta’s water and environmental resources and the water resources of the  
22 state over the long term.

23 (b) Protect and enhance the unique cultural, recreational, and agricultural values of the  
24 California Delta as an evolving place.

25 (c) Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a  
26 healthy estuary and wetland ecosystem.

27 (d) Promote statewide water conservation, water use efficiency, and sustainable water  
28 use.

(e) Improve water quality to protect human health and the environment consistent with  
achieving water quality objectives in the Delta.

(f) Improve the water conveyance system and expand statewide water storage.

1 (g) Reduce risks to people, property, and state interests in the Delta by effective  
emergency preparedness, appropriate land uses, and investments in flood protection.

2 (h) Establish a new governance structure with the authority, responsibility, accountability,  
3 scientific support, and adequate and secure funding to achieve these objectives.

4 (WC, §85020; see also §§85054, 85086(c)(1) 85021, 85302(c)(2),(c)(5), 85302(d)(1), 85302(d)(3),  
5 85302(e)(4).)

6 In the DRA, the Legislature recognized the damage inflicted by excessive water diversions, and  
7 the critical need to reduce reliance on the Delta, declaring that:

8 The policy of the State of California is to reduce reliance on the Delta in meeting  
9 California’s future water supply needs through a statewide strategy of investing in  
10 improved regional supplies, conservation, and water use efficiency. Each region that  
11 depends on water from the Delta watershed shall improve its regional self-reliance for  
water through investment in water use efficiency, water recycling, advanced water  
12 technologies, local and regional water supply projects, and improved regional  
coordination of local and regional water supply efforts.

12 (WC, §85021.)

13 The DRA reaffirms and maintains the above-referenced area of origin and watershed protections,  
14 providing expressly that it “does not diminish, impair, or otherwise affect in any manner whatsoever any  
15 area of origin, watershed of origin, county of origin, or any other water rights protections.” (WC,  
16 §85031(a).) The DRA also reaffirms the prior appropriation doctrine and the state’s regulation of  
17 appropriative water rights, including the protections provided to municipal interests (WC, §85031(c-d)),  
18 and precludes the applicability of area of origin rights applying to recipients of water exported from the  
19 Delta through new diversions (WC, §85031(b)).

20 The Delta Stewardship Council Tasked to Create the Delta Plan

21 The DSC, created under the DRA, was tasked with preparing a “comprehensive, long-term  
22 management plan for the Delta.” (WC, §85059.) The DSC must “establish and oversee a committee of  
23 agencies responsible for implementing the Delta Plan” (WC, §85204), with the mission to “further[] the  
24 coequal goals” (WC, §85300(a)), including “inherent” objectives (WC, §85020), measures for healthy  
25 ecosystems and a more reliable water supply that the DSC must incorporate into the Delta Plan (WC,  
26 §85302(c-d), and “subgoals and strategies” for restoring a healthy ecosystem (WC, §85302(e-f)). The  
27 adopted Delta Plan includes 14 mandatory policies and 68 recommendations to implement its duties  
28 under the DRA. (B763-767, B445-464)

1 The DRA also sets forth a system for DSC’s review of “covered actions” that meet specified  
2 criteria. (WC, §8507.5; see D0415, 0498.) Covered actions must be consistent with the Delta Plan. (WC,

3 §§85057.7, 85225) A “covered action” means a plan, program, or project, that:

4 (1) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.

5 (2) Will be carried out, approved, or funded by the state or a local public agency.

6 (3) Is covered by one or more provisions of the Delta Plan.

7 (4) Will have a significant impact on achievement of one or both of the coequal goals or  
8 the implementation of government-sponsored flood control programs to reduce risks to  
9 people, property, and state interests in the Delta.

(WC, §85057.5(a).) Actions outside the Delta in areas exporting water from the Delta are, however, not  
subject to consistency review.

#### 10 Delta Independent Science Board

11 The 2009 DRA also established the Delta Independent Science Board (“DISB”). (WC, §85820.)

12 The mission of the DISB is to “provide the best possible unbiased scientific information to inform  
13 water and environmental decisionmaking in the Delta.” (WC, §85820(b)(4).) Pursuant to this directive,

14 the DISB has provided advice to the DSC and others with decisionmaking capacity regarding the

15 application of best available science (“BAS”), adaptive management and other related topics in the

16 Delta. (See, e.g., L23915; G4378-76; G5877-78)

#### 17 Bay Delta Conservation Plan

18 The Bay Delta Conservation Plan (“BDCP”) proposes to construct new water diversions for the  
19 SWP and CVP in the north Delta, along with habitat restoration, management of “stressors” on the Delta

20 ecosystem and scientific research. (B556, B595) The Department of Water Resources (“DWR”) is the

21 lead agency for the BDCP under CEQA, and DSC is one of a number of responsible agencies. The

22 federal Bureau of Reclamation and other agencies and districts are also participating in the development

23 of the BDCP. The BDCP will be incorporated into the Delta Plan if it meets certain criteria, including

24 approval by the California Department of Fish and Wildlife (“CDFW” (formerly DFG)), compliance

25 with CEQA, and qualification as a Habitat Conservation Plan and a Natural Community Conservation

26 Plan. (See WC, §85320.) The BDCP had not completed its public review process at the time of approval

27 of the Delta Plan. (B595)

1 The DRA included specific direction on public trust resource analysis and protection to guide  
2 future actions in the Delta, such as the BDCP. (WC, §85300(a), 85302(e) (listing 7 subgoals)<sup>3</sup> & (f)  
3 (implementing subgoals), 85320(g) (referring to BAS).) While the Delta Plan Recirculated Draft EIR  
4 acknowledges that “Conveyance facilities (pipelines and pumping plants)” (D6005, 6015) and “various  
5 actions which, if taken, could lead to construction and/or operation of projects that could provide a more  
6 reliable water supply” (D5981), the DSC determined that other “agencies are in the best position to  
7 complete the planning process, including defining acceptable ranges of exports and through-Delta Flows  
8 . . . .” (D59; B1157) The DSC’s position was that: “State and federal agencies are exploring options to  
9 reconfigure the manner in which the Delta is used to convey water . . . . At this time, the Delta Plan does  
10 not make recommendations regarding Delta conveyance.” (B469) With respect to other aspects of the  
11 BDCP besides conveyance (e.g., habitat restoration, ecosystem stressors), however, the DSC freely  
12 developed policies and recommendations providing guidance. (D6539-40 (listing  
13 Policies/Recommendations related to BDCP))

14 Accordingly, “[T]he PEIR [did] not evaluate the potential environmental consequences” of  
15 conveyance options, such as BDCP. (D59) DSC’s justification for not evaluating the environmental  
16 consequences of the project it promoted in Water Resources Recommendation 12 (WRR12, B449) rests  
17 on its assertions that the “BDCP is a separate and distinct program from the Delta Plan” (D6540), “is an  
18 independent state/federal project” (D59), and “could be approved and implemented whether or not the  
19 Delta Plan is approved.” (D59) DSC also excused the omission by claiming that “[i]t is unclear where  
20 these facilities would be located,” (D6941, 6943), the “precise magnitude and extent of project specific  
21 impacts on water resources would depend on the type of action or project being evaluated, its specific  
22 location, its total size, and a variety of project-and-site-specific factors that are undefined at the time of  
23

---

24 <sup>3</sup> Subdivision (e) states that the “following subgoals and strategies for restoring a healthy  
ecosystem shall be included in the Delta Plan:

- 25 (1) Restore large areas of interconnected habitats within the Delta and its watershed by 2100.  
26 (2) Establish migratory corridors for fish, birds, and other animals along selected Delta river channels.  
27 (3) Promote self-sustaining, diverse populations of native and valued species by reducing the risk of take  
and harm from invasive species.  
28 (4) Restore Delta flows and channels to support a healthy estuary and other ecosystems.  
(5) Improve water quality to meet drinking water, agriculture, and ecosystem long-term goals.  
(6) Restore habitat necessary to avoid a net loss of migratory bird habitat and, where feasible, increase  
migratory bird habitat to promote viable populations of migratory birds.

1 preparation of this program-level study” (D6005, 6005), and “[a]t this time, the specific details of BDCP  
2 have not been defined . . . .” (D6539, 6540) Similar excuses were made in the EIR for the failure to  
3 provide analysis of the most probable habitat projects explicitly promoted by the Plan. (D5887, D6541;  
4 D6711, D6002, D8216)

5 At the same time the DSC refused to disclose the impacts associated with carrying out the DRA  
6 recommendation to complete the BDCP, however, the DSC acknowledged that “the proposed BDCP is a  
7 reasonably foreseeable future project.” (D4583, 4861; D60; see also WC, §85320 (process for  
8 incorporation of BDCP into Delta Plan).) Further, in order to be eligible for public funding, the BDCP  
9 must first be incorporated into the Delta Plan. (WC, §85320(b).) The Record is replete with information  
10 available to DSC for purposes of analyzing the combined impacts of the Delta Plan and the BDCP.  
11 (G260, 273 (BDCP Overview); G4694, 4694 (Framework for Review of BDCP); G0283, 286-87 (A.G.  
12 Memo re Review of BDCP), I1723 (2013 Admin. Draft BDCP)<sup>4</sup> In addition to receiving frequent  
13 updates on the Progress of the BDCP (see, e.g., G242, G305, G1115, G1293, F137, F270, F179), DSC  
14 and the DISB also have submitted comment letters regarding BDCP that demonstrate the close  
15 connection between the DSC and the BDCP (G4694, 4694-95; G280-81, N314).

#### 16 Public Review and Approval of Delta Plan

17 After circulating four drafts of the Plan between 2010 to 2011, DSC released the Fifth Staff Draft  
18 Delta Plan in August 2011, and the Draft PEIR (“DEIR”) in November 2011. (C1-C3, C6) Petitioners<sup>5</sup>  
19 and other members of the public submitted extensive comments on the various draft Plans as the DEIR.  
20 DSC issued a Recirculated Draft PEIR (“RDEIR”) in November 2012 that purported to analyze a  
21 revised project. (D5587-D6707) Petitioners and others voiced significant concerns regarding the Delta  
22 Plan and RDEIR’s systemic legal deficiencies, including violations of the Delta Reform Act, CEQA  
23 (PRC, §21000 et. seq.), the public trust doctrine, and the California Government Code.

24  
25 <sup>4</sup> See also DSC’s Answer to CDWA et al.’s First Amended Verified Petition for Writ of Mandate  
26 and Complaint for Declaratory and Injunctive Relief, ¶¶ 76, 78 (admitting that the DSC had “received  
27 the 2012 and 2013 Administrative Draft EIR/EIS as a responsible agency under CEQA for BDCP and  
28 “was provided a copy of the [Red Flag] agency comments on the BDCP Effects Analysis”).

<sup>5</sup> Central Delta Water Agency, South Delta Water Agency, Lafayette Ranch, Inc., Cindy Charles,  
Local Agencies of the North Delta, California Water Impact Network, Friends of the River, California  
Sportfishing Protection Alliance, AquaAlliance, Restore the Delta, and Center for Biological Diversity  
(collectively, “Petitioners”).



1 CCP §1060 enables the Court to determine the DSC’s duties in relation to the project.  
2 (*Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 885.)  
3 Declaratory relief must be granted when the facts justifying that course are sufficiently alleged. (See,  
4 e.g., *Columbia Pictures Corp. v. De Toth* (1945) 26 Cal.2d 753, 762.) To determine the DSC’s duties  
5 with respect to the Project, the Court must review and declare the meaning of relevant evidence. (See  
6 *Steeve v. Yaeger* (1956) 145 Cal.App.2d 455, 462 (*Steeve*); *Californians for Native Salmon and*  
7 *Steelhead Association v. Department of Forestry* (1990) 221 Cal.App.3d 1419.)

8 **1. Standard of Review for Challenges to the Delta Plan**

9 Independent judgment is the standard of review applicable to Petitioners’ challenges the Delta  
10 Plan as inconsistent with its statutory authority. (*Yamaha Corporation of America v. State Board of*  
11 *Equalization* (1998) 19 Cal.4th 1, 10-11, and fn. 4 (“A court does not, in other words, defer to an  
12 agency’s view when deciding whether a regulation lies within the scope of the authority delegated by the  
13 Legislature”); *Aguiar v. Superior Court* (2009) 170 Cal.App.4th 313, 323 (*Aguiar*), (“[i]n deciding  
14 whether the regulation conflicts with its legislative mandate, the court does not defer to the agency’s  
15 interpretation of the law under which the regulation issued, but rather exercises its own independent  
16 judgment”).) For regulations to be valid in California, “they must be consistent with the terms or intent  
17 of the authorizing statute. (*Sabatasso v. Superior Court* (2008) 167 Cal.App.4th 791, 796 (*Sabatasso*);  
18 see also *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 269 [“A regulation that is inconsistent with the  
19 statute it seeks to implement is invalid”]). The court in *Communities for a Better Environment v.*  
20 *California Resources Agency* (2002) 103 Cal.App.4th 98 (*CBE v. CNRA*), held that “the judiciary  
21 independently reviews the administrative regulation for consistency with controlling law...the question  
22 is whether the regulation is within the scope of the authority conferred.” (103 Cal.App.4th 108-109).  
23 The court went on to state that this “is a question particularly suited for the judiciary...and does not  
24 invade the technical expertise of the agency.” (*Ibid.*) Petitioners allege that the Delta Plan is invalid  
25 because it is outside the scope of its statutory authorization. Thus, this Court exercises independent  
26 judgment on such claims, with no deference to the DSC’s interpretations.

1           **2.       Standard of Review for Public Trust Claims**

2           The applicable standard of review of the DSC’s failure to properly implement the public trust  
3 doctrine in developing the Delta Plan is independent judgment. The issue is whether or not the DSC’s  
4 Plan carried out its duty under the Act to make the “longstanding constitutional principle of reasonable  
5 use and the public trust doctrine the foundation of state water management policy” as required by Water  
6 Code §85023. (See *Aguiar, supra*, 170 Cal.App.4th. at 323 (“in deciding whether a regulation conflicts  
7 with its legislative mandate, the court does not defer to the agency’s interpretation of the law, but rather  
8 exercises its own independent judgment”).)

9           Here, effective implementation of the public trust doctrine must begin with the administrative  
10 agency, the DSC. (Accord, Ronald B. Robie, *Effective Implementation of the Public Trust Doctrine in*  
11 *California Water Resources Decision-Making: A View From the Bench*, 45 U.C. Davis L.Rev. 1155,  
12 1157 (2012) (“[T]he administrative arena...remains the front line in the eternal struggle to balance the  
13 public’s insatiable appetite for water in California with the equally important interest in protecting the  
14 non-consumptive uses embodied in the public trust.” “[A] challenge to an administrative decision based  
15 on the public trust must be raised at the earliest opportunity in proceedings before the administrative  
16 agency,” and “where enforcement of the public trust arises first in [administrative] proceedings..., and  
17 the court is the forum of last resort, the court will grant the [administrative agency] the deference  
18 commonly and traditionally accorded by a reviewing body where the applicable governing legal  
19 principles do not grant the power of independent review.” (*Id.* at 1175.) Petitioners have timely  
20 commented on several drafts of the Plan, the EIR, and the implementing Regulations, thereby bringing  
21 their claims at the earliest possible time.

22           **3.       Standard of Review for CEQA Claims**

23           The purpose of an EIR is to inform the public and its responsible officials of the environmental  
24 consequences of their decisions *before* they are made.” (*Stanislaus Natural Heritage Project v. County*  
25 *of Stanislaus* (1996) 48 Cal.App.4th 182, 190, internal citations omitted.) The “omission of required  
26 information constitutes a failure to proceed in the manner required by law where it precludes informed  
27 decision-making by the agency or informed participation by the public.” (*California Native Plant*  
28 *Society. v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 987 (*California Native Plant Society*).)

1           There are two main types of challenges brought under CEQA: an agency may abuse its  
2 discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual  
3 conclusions unsupported by substantial evidence.” (*Vineyard Area Citizens for Responsible Growth, Inc.*  
4 *v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (*Vineyard*)). “[W]e determine de novo whether  
5 the agency has employed the correct procedures, ‘scrupulously enfor[cing]’ all legislatively mandated  
6 CEQA requirements.” (*Ibid.*) “In evaluating an EIR for CEQA compliance, then, a reviewing court must  
7 adjust scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one  
8 of improper procedure or a dispute over the facts.” (*Id.*) “[I]f [an EIR] does not adequately apprise all  
9 interested parties of the true scope of the project for intelligent weighing of the environmental  
10 consequences of the project, informed decision-making cannot occur under CEQA and the final EIR is  
11 inadequate as a matter of law.” (*Communities for a Better Environment v. City of Richmond* (2010) 184  
12 Cal.App.4th 70, 82-83 (*CBE Richmond*)).

13           The claims set forth by Petitioners regarding the DSC’s compliance with CEQA are  
14 predominantly ones of improper procedure as opposed to disputes over the facts. Consequently, the  
15 deficiencies claimed here compel de novo review. (*Vineyard, supra*, 40 Cal.4th at 427, 435; *CBE*  
16 *Richmond, supra*, 184 Cal.App.4th at 82-83.)

#### 17           **4. Standard of Review for Claims under the California Administrative Procedures Act**

18           Petitioners’ action also challenges the Delta Plan Regulations under the California  
19 Administrative Procedures Act, Government Code §11340 et seq. (“APA”). The Court exercises  
20 independent judgment over an APA challenge that the Delta Plan Regulations violate applicable  
21 statutory and constitutional authority. (*Western States Petroleum Association v. Board of Equalization*  
22 (2013) 57 Cal.4th 401, 415-416 (*WSPA*)). “If a regulation does not properly implement the statute, the  
23 regulation must fail.” (*In Re Lucas* (2012) 53 Cal.4th 839, 849-850.) For regulations to be valid, “they  
24 must be consistent with the terms or intent of the authorizing statute.” (*Sabatasso, supra*, 167  
25 Cal.App.4th at 796.) Courts exercise independent judgment in determining whether the regulation is “in  
26 conflict with the statute (internal citation omitted) or does not lay ‘within the lawmaking authority  
27 delegated by the Legislature.’” (*WSPA, supra*, at 415; see also *Bearden v. U.S. Borax, Inc.* (2006) 138  
28 Cal.App.4th 429, 436 (administrative order inconsistent with the authorizing statute); *cf. CBE v. CNRA,*

1 *supra*, 103 Cal.App.4th at 108-109 (regulations invalid because they weakened environmental review  
2 standards, violated statute).)

3 In determining the procedural adequacy of DSC’s compliance with the APA (here with regard  
4 to responses compiled in the Final Statement of Reasons, and with the adequacy of the Economic  
5 Impact/Cost Analysis), the applicable standard of review is *de novo*. (*Sims v. Dept. of Corrections and*  
6 *Rehabilitation* (2013) 216 Cal.App.4th 1059 (*Sims*) (“courts reviewing regulations for compliance with  
7 the APA owe no deference to the promulgating agency’s opinion that it complied with the prescriptions  
8 of the APA”).)

#### 9 IV. ARGUMENT

##### 10 A. **DELTA PLAN FAILS TO COMPLY WITH REQUIREMENTS OF THE DELTA** 11 **REFORM ACT AND OTHER STATUTORY AUTHORITY**

12 The Legislature’s goal in enacting the DRA was to “Establish a new governance structure with  
13 the authority, responsibility, accountability, scientific support, and adequate and secure funding to  
14 achieve [the DRA’s] objectives.” (WC, §85020(h).) The DSC was directed to provide for “the  
15 sustainable management of the Sacramento-San Joaquin Delta ecosystem, to provide for a more reliable  
16 water supply for the state, to protect and enhance the quality of water supply from the Delta, and to  
17 establish a governance structure that will direct efforts across state agencies to develop a legally  
18 enforceable Delta Plan.” (WC, §85001(c).) Yet, as described below, the actions taken by the DSC in  
19 enacting the Delta Plan, including the 14 Policies and 68 Recommendations, fail to meet these goals.  
20 Further, the Delta Plan violates or fails to comply with key provision of the DRA and other applicable  
21 statutes. As a result, the DSC’s adoption of the Delta Plan and its issuance of Delta Plan Definitions and  
22 the 14 Policies as Regulations exceeded the Council’s statutory authority and must be set aside.<sup>6</sup>

##### 23 1. **Delta Plan Policies and Recommendations Regarding Water Supply Reliability for** 24 **California Conflict with the DRA**

25 Water reliability is a focal point of the Delta Plan. (WC, §§85001(c), 85004(b).) At least two  
26 provisions of the Delta Plan regarding water supply reliability conflict with the DRA and other

27 \_\_\_\_\_  
28 <sup>6</sup> This section of the brief also challenges the corresponding regulations for each of the 14 Policies adopted in the Delta Plan. (Regs., §§5001-5015 at B763-767 (Definitions), B445-64 (Policies).) Other arguments pertaining to the DSC’s violations of the APA are located *ante* in section IV.D.

1 applicable authority: (1) the policy to implement reduced reliance on the Delta (B446, Water Resources  
2 Policy 1 (“WRP1”; Regs., §5003”)); and (2) the recommendation to complete the BDCP (B449, Water  
3 Resources Recommendation 12 (“WRR12”)).

4 **a) The Delta Plan’s Formulation of “Reduced Reliance” Does Not Actually**  
5 **Reduce Reliance on the Delta**

6 WRP1 (Regs., §5003) prohibits water from being “exported from, transferred through, [and]  
7 used in the Delta” by a covered action unless certain actions have been taken to “reduce reliance on the  
8 Delta and improve regional self-reliance. . . .” (B446) Water may not be used in the Delta if the user: (1)  
9 has not contributed to reduced reliance on the Delta; (2) that failure to reduce reliance on the Delta  
10 results in a need to use water; and (3) the use has a significant environmental impact in the Delta. (B446)  
11 A proponent of a covered action may meet the policy by: (a) completing an Urban or Agricultural Water  
12 Management Plan (“WMP”); (b) implementing actions in the WMP that are locally cost effective; and  
13 (c) including in the WMP expected outcomes for reduction in Delta reliance and improved regional  
14 reliance. (B446-47, Regs., §5003(c); see also D85; M4216-M4217, M4395, M4413)

15 WRP1 does not ensure that reliance on the Delta (even for future water supply needs) is actually  
16 reduced. (*Cf.* WC, §85021.) All that is required under WRP1 is for the agency to have “contributed to  
17 reduced reliance” in one of the listed ways. (Regs., §5003.) For instance, completion of an urban or  
18 agricultural WMP (Regs., §5003(c)(1)(A)) does not ensure a contribution to reduced Delta reliance, nor  
19 do programs or projects that reduce water use in general necessarily reduce Delta reliance. DWR  
20 acknowledged to the DSC that reliance on such water management plans is an unenforceable method for  
21 reducing Delta reliance. (B1167-B1168; M4371-M4376; M4437-M4444; M4112.010; see also WC,  
22 §85001(c).) Moreover, as pointed out by the DISB, WRP1 does not apply to water use upstream of the  
23 Delta (G5883); these water uses also reduce availability of flows into the Delta. WRP1 will not directly  
24 reduce reliance on the Delta for water supply, relying instead on planning and encouragement, thus  
25 WRP1 is inconsistent with the directive of Water Code §85021.

26 **b) WRP1 Conflicts with the Delta Plan Mandate to Rely on Best Available**  
27 **Science**

28 Water Code §85302(g) states that DSC “shall make use of the best available science.” “Best  
available science’ means the best scientific information and data for informing management and policy

1 decisions. BAS “shall be consistent” with the guidelines and criteria found in Appendix 1A.” (B763,  
2 Regs., §5001(f).) The key elements of BAS are: “including clear statements of assumptions, the use of  
3 conceptual models, description of methods used, and presentation of summary conclusions [and]  
4 [s]ources of data used are cited and analytical tools used in analyses and syntheses are identified.”  
5 (B1178) The Plan explains that the scientific process includes: well-stated objectives; a clear conceptual  
6 or mathematical model; a good experimental design with standardized methods for data collection;  
7 statistical rigor and sound logic for analysis and interpretation; clear documentation of methods, results,  
8 and conclusions; and it must also meet the six broad criteria of relevance, inclusiveness, objectivity,  
9 transparency and openness, timeliness, and peer review. (B1178)

10         However, the Plan fails to follow this required BAS approach. (WC, §85308.) The DISB  
11 identified this error for the *entire* Plan in its review of the 5th Draft Delta Plan: “The absence of any  
12 reference to conceptual models guiding development of the Plan and of individual actions is a serious  
13 omission that needs to be corrected.” (G5880) Further, the DISB criticized the use of certain citations in  
14 the Plan that lacked the technical support and weight of valid scientific references. (G5881, referring to  
15 Glibert and Dugdale) Despite the DISB’s specific admonitions, these problems were never corrected.  
16 (B522, B689, B704)

17         Further, the Adaptive Management Approach described in the Delta Plan (B1153) does not  
18 include “a science-based, transparent, and formal Adaptive Management strategy for ongoing  
19 ecosystem restoration and water management decisions.” (WC, §85308(f).) The Appendices containing  
20 Administrative Performance Measures illustrate the DSC’s failure to follow BAS, and Adaptive  
21 Management in particular, by not establishing the scientific foundation by which these measures were  
22 established, how they are relevant, how their achievement would be scientifically meaningful, and  
23 under which conditions they could and should be adaptively modified. (B821, B1291) The required  
24 Output and Outcome Performance Measures appear to be absent from the body of the Plan because they  
25 would have required actual development of an Adaptive Management model/framework. (B1187,  
26 B1265) Despite repeated references to Adaptive Management in the Plan, the Plan includes no analysis  
27 of how the Plan itself complies with the nine-step Adaptive Management Framework developed by the  
28 DISB. (B1185, B1265)

1 This error with respect to BAS is carried forward into WRP1. The statutory mandate in the DRA  
2 (WC, §85021) and BAS clearly indicated that reduced reliance on the Delta for water supplies was  
3 necessary to restore the ecosystem. This could be achieved, in part by reduced demand for export of  
4 water out of the system. (See G2112.010; G2112.027) Yet, as explained above, the adopted policy  
5 (WRP1) will not actually lead to reduced reliance on the Delta that would, in turn, increase flows. As a  
6 result, WRP1 does not represent BAS. Moreover, WRP1 contains no Adaptive Management metrics in  
7 contravention to the DRA. (WC, §85308(f).)

8 **c) Delta Plan Policy WRP1 Conflicts with the Delta Reform Act Requirement**  
9 **Not to Impair Area of Origin, Watershed of Origin, County of Origin, and**  
10 **Other Water Right Protections**

11 The Delta Plan conflicts with venerable statutory law protecting the Delta and other areas of  
12 origin. Over the course of California’s water development history, the Legislature has enacted measures  
13 to protect areas in which water serving other parts of the state originates. These are known generally as  
14 “the Delta Protection Act of 1959” and “area of origin” protections. (See, esp., WC, §§12200 et seq.  
15 (Delta Protection Act of 1959) and WC, §11460 et seq. (Watershed Protection Act).)

16 The Watershed Protection Act at Water Code §11460, mandates the prior right to watershed  
17 water relative to SWP and CVP exports:

18 In the construction and operation by the department of any project under the provisions of  
19 this part a watershed or area wherein water originates, or an area immediately adjacent  
20 thereto which can conveniently be supplied with water therefrom, shall not be deprived  
21 by the department directly or indirectly of the prior right to all of the water reasonably  
22 required to adequately supply the beneficial needs of the watershed, area, or any of the  
23 inhabitants or property owners therein.

24 Further, the Delta Protection Act of 1959 (“DPA”) provides several related substantive  
25 protections, which include the following: (1) requiring the SWP and CVP to provide salinity control  
26 and an adequate water supply for the Delta (WC, §§12201, 12202); (2) prohibiting the export of water  
27 from the Delta to which in-Delta users are entitled through water rights and water which is necessary  
28 for salinity control and an adequate supply “to maintain and expand agriculture, industry, urban and  
recreational development in the Delta” (WC, §12204); and (3) requiring maintenance of a common pool  
of water in the interior of the Delta and the operation and management of releases from storage for

1 export to be integrated to the “maximum extent possible” in order to fulfill the objectives of the DPA.<sup>7</sup>  
2 The objectives of the DPA are to protect Delta water rights, provide salinity control and additionally  
3 provide an adequate supply to “maintain and expand agriculture, industry, urban, and recreational  
4 development in the Delta.”<sup>8</sup> (WC, §12201.)

5 In 2009, the California Legislature reaffirmed these area of origin and Delta protections in the  
6 DPA in 2009, which expressly reaffirms that area of origin and related water rights protections are to  
7 remain in place and unimpaired:

8 This division does not diminish, impair, or otherwise affect in any manner whatsoever  
9 any area of origin, watershed of origin, county of origin, or any other water rights  
10 protections, including, but not limited to, rights to water appropriated prior to December  
11 19, 1914, provided under the law. This division does not limit or otherwise affect the  
12 application of Article 1.7 (commencing with Section 1215) of Chapter 1 of Part 2 of  
13 Division 2, Sections 10505, 10505.5, 11128, 11460, 11461, 11462, and 11463, and  
14 Sections 12200 to 12220, inclusive.

15 (WC, §85031(a).)

16 The Delta Plan, however, violates these protections provided in the DPA, DRA and other laws  
17 because: (i) WRP1 fails to acknowledge and address the fact that water users within the Delta are to  
18 receive priority and do not have other potential water supplies besides the Delta; and (ii) the Delta Plan  
19 fails to include necessary measures to ensure adequate flows and water quality in the Delta as a pre-  
20 condition to exports. The latter failure is particularly egregious in light of the DRA’s express and  
21 unambiguous reaffirmation of flow and water quality protections for the Delta.

22 (i) **WRP1 Ignores the Special Protections Afforded by Statute to In-Delta  
23 Water Users**

24 WRP1 conflicts with the DRA, the DPA and other area of origin protections. WRP1 prohibits  
25 water from being “exported from, transferred through, or *used in the Delta*” by a covered action unless  
26 affirmative actions are taken that will result in a “measurable reduction in Delta reliance and  
27 improvement in regional self reliance.” (B23, italics added) Incredibly, this mandate applies to in-Delta  
28

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25 <sup>7</sup> Landowners within the boundaries of the North Delta Water Agency also receive water supply  
26 and quality protections in a 1981 Contract with DWR for the “Assurance of a Dependable Water Supply  
27 of Suitable Quality.” (I384)

28 <sup>8</sup> The Delta Protection Act was contemporaneously interpreted by the DWR in the Preliminary  
Bulletin 76, December 1960 Report to the Legislature as follows: “In 1959 the State Legislature  
directed that water shall not be diverted from the Delta for use elsewhere unless adequate supplies for  
the Delta are first provided.” (I220; see also I226 (complete Bulletin 76); I246)

1 users the same as to those who export water outside of the Delta. (B23) As an threshold matter, this  
2 policy is nonsensical by mandating that in-Delta users will somehow improve “regional self reliance”  
3 by reducing their “Delta reliance.” For in-Delta users, their “regional” watershed is the Delta. (WC,  
4 §85060.) Put another way, if in-Delta users reduce their “Delta reliance” then they are necessarily also  
5 reducing their “regional self reliance.” (N2882-2883 (MR8))

6 Setting aside the logical defect of WR P1 as it applies to in-Delta users, the effect of WR P1 is  
7 to mandate water use reduction for in-Delta users for the benefit of exporters, which is exactly contrary  
8 to DPA and area of origin protections:

- 9 • “The Legislature finds that the maintenance of an adequate water supply in the Delta sufficient  
10 to *maintain and expand* agriculture, industry, urban, and recreational development in the Delta  
11 area . . . and to provide a common source of fresh water for export to areas of water deficiency  
12 is necessary to the peace, health, safety and welfare of the people of the State, except that  
13 delivery of such water shall be subject to the provisions of §10505 and §11460 to 11463,  
14 inclusive, of this code.<sup>9</sup> (WC, §12201, italics added.)
- 15 • “Among the functions to be provided by the State Water Resources Development System, in  
16 coordination with the activities of the United States in providing salinity control for the Delta  
17 through operation of the Federal Central Valley Project, shall be the provision of salinity control  
18 and an adequate water supply for the users of water in the Sacramento-San Joaquin Delta.”  
19 (WC, §12202.)
- 20 • “It is hereby declared to be the policy of the State that no person, corporation or public or  
21 private agency or the State or the United States should divert water from the channels of the  
22 Sacramento-San Joaquin Delta to which the users within said Delta are entitled.” (WC, §12203.)
- 23 • “In determining the availability of water for export from the Sacramento-San Joaquin Delta no  
24 water shall be exported which is necessary to meet the requirements of §§12202 and 12203 of  
25 this chapter.” (WC, §12204.)

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26  
27 <sup>9</sup> WC §11460 provides that in the operation of the SWP and CVP no watershed or area of origin  
28 shall “be deprived by the department directly or indirectly of the prior right to all of the water reasonably  
required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or  
property owners therein.”

1 Nothing in the DPA suggests that in-Delta users should curtail their diversions to accommodate  
2 lower-priority exports or that higher-priority in-Delta users should be treated the same as lower-priority  
3 water exporters in terms of curtailing diversions. To the contrary, in-Delta users are entitled to satisfy  
4 all beneficial uses before a single drop of water of water is exported. These venerable protections  
5 afforded by the Delta Protection Act were expressly reaffirmed in the DRA, the statutory authority for  
6 the Delta Plan. (WC, §85031(a).)

7 Thus, the DPA’s mandate is unmistakable: in-Delta users have the statutory right to divert and  
8 use the water necessary to “maintain and expand agriculture, industry, urban, and recreational  
9 development in the Delta area” (WC, §12204), and are *not required* to reduce their existing lawful  
10 diversions for the benefit of exports. By mandating such reductions to in-Delta users, WRR1 directly  
11 conflicts with longstanding California statutory law and must be set aside. (*United States v. State Water*  
12 *Resources Control Board* (1986) 182 Cal.App.3d 82, 105, fn. 37 (*Racanelli Decision*).)

13 **(ii) Water Supply Reliability Means the Delta, Too**

14 In addition to protecting the Delta ecosystem, the local agency Petitioners are concerned about  
15 the continuing reliability and quality of water supplies within the Delta, as well as the continuing  
16 effectiveness of drainage and flood control services for landowners within these districts. (WC,  
17 §85300(b).) The definition of reliable water supply provided in the Delta Plan is inconsistent with the  
18 policy of the DRA that refers to the coequal goals including “a reliable water supply for California.”  
19 (See, e.g., WC, §85054.) A reliable water supply for the Delta is necessarily part of a reliable water  
20 supply for California, yet the Delta Plan includes no metrics for a reliable water supply in the Delta  
21 itself. In addition to domestic and commercial uses, a reliable water supply is critical to protecting and  
22 enhancing agriculture in the Delta as required by the DRA. Moreover, completion of the BDCP as  
23 recommended by the DSC (WRR12; B449), would cause significant adverse water quality, surface  
24 water and water supply impacts in the Delta and therefore interfere with achievement of a reliable water  
25 supply for the Delta. (See I4248-60; M2588; see generally March 2013 BDCP Admin. Draft DEIR/S<sup>10</sup>)  
26

27 <sup>10</sup> See fn. 4 *ante* re DSC admission that the DSC received the March 2013 BDCP Admin. Draft  
28 EIR/S and the “Red Flag” agency comments on the BDCP Effects Analysis. If Petitioners confirm that  
these documents are not in the Record and the DSC will not agree to stipulate to their inclusion,  
Petitioners intend to submit a motion to augment the Record.

1           Moreover, in-Delta landowners cannot “diversify local water supply portfolios” as they are area-  
2 of origin watershed water users and have no other sources of water. WRP1 as a whole conflicts with  
3 Water Code §85031(d) regarding the SWRCB’s authority, which states:

4           Unless otherwise expressly provided, nothing in this division supersedes, reduces, or  
5 otherwise affects existing legal protections, both procedural and substantive, relating to  
6 the state board’s regulation of diversion and use of water, including, but not limited to,  
7 water right priorities, the protection provided to municipal interests by Sections 106 and  
8 106.5, and changes in water rights. Nothing in this division expands or otherwise alters  
9 the board’s existing authority to regulate the diversion and use of water or the courts’  
10 existing concurrent jurisdiction over California water rights.

11 Thus, WRP1 conflicts watershed and area of origin protections and must be set aside.

12                           **d)       The DSC’s Unqualified Promotion of BDCP Violated the 2009 DRA**

13           The BDCP is the most destructive project to be proposed in the Delta since the completion of  
14 the state and federal water projects (CVP/SWP) in the mid-1900’s. (See B475) Yet the DSC chose to  
15 include an unqualified recommendation to complete BDCP. (WRR12; B449) This recommendation  
16 fails to implement “Delta as a Place” protections and other mandates of the DRA, and, specifically, the  
17 requirement to “promote options for new and improved infrastructure relating to the water conveyance  
18 in the Delta, storage systems, and for the operation of both to achieve the coequal goals.” (WC,  
19 §85304.)

20                           **(i)       BDCP Conflicts with the Coequal Goals**

21           WRR12 irresponsibly makes no reference to meeting the coequal goals and promotes the BDCP  
22 irrespective of whether it advances or is consistent with those goals. As made clear in the BDCP EIR/S  
23 provided to the DSC as a responsible agency under CEQA,<sup>11</sup> the proposed BDCP interferes  
24 substantially with meeting the coequal goals. For example, the BDCP would result in significant and  
25 unavoidable adverse impacts in virtually every resource area, including water quality, and agricultural  
26 resources, and biological resources. (See I4248-60; see also, March 2013 BDCP Admin. Draft EIR/S  
27 and fn. 10, *ante.*) Modeled increases in salinity from BDCP indicate that while water quality for  
28 exporters would improve dramatically, increases in salinity in the Delta would result in significant and  
unavoidable adverse impacts. (*Ibid.*) Implementation of the BDCP would also violate existing water

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<sup>11</sup> See, e.g., WC, §85320(c); see also Guidelines, §15096.

1 quality standards designed to protect beneficial uses of water by agriculture. (March 2013 BDCP  
2 Admin. Draft EIS/R. at Appendix 8H.)

3 In addition to conversion of 5,000 acres of prime farmland in the Delta for tunnel construction  
4 (I9625), the BDCP also includes 140,000 acres or more of other habitat types (primarily marsh and  
5 floodplain) over the course of 50 years. (B595) As eighty-five percent of the Delta is Prime Farmland  
6 (B636, 647), it is reasonable to assume that most of the new habitat will replace currently productive  
7 Delta farmland. (B595) Conversion of such a large percentage of farmland in the Delta, most of which  
8 is in private ownership, conflicts directly with the policy of protecting and enhancing the Delta's  
9 agricultural values. (WC, §85054.)

10 BDCP would also result in numerous adverse biological impacts in contravention of the DRA  
11 goal of "protecting, restoring, and enhancing the Delta ecosystem." (WC, §85054.) With respect to  
12 biological resources, the ADEIR/S indicated that out of 217 identified impacts on aquatic species  
13 resulting from implementing the preferred Alternative 4, only two of those impacts would be beneficial.  
14 (See March 2013, BDCP Admin. Draft EIR/S, Chapters 11-12 and *ante* fn. 10) Agency comments on  
15 the BDCP Effects Analysis, also provided to the Council, highlighted serious questions about the ability  
16 of the BDCP to meet minimum standards for habitat conservation planning. (See K12667 (NOAA Red  
17 Flag comments))<sup>12</sup> Such effects include, but are not limited to: adversely affecting designated critical  
18 habitat for listed endangered fish species, including winter-run and spring-run Chinook salmon, as well  
19 as reducing flows and degrading water quality in the lower Sacramento River, sloughs, and the Delta.  
20 (K12678-79; I4248-60; see also March 2013, BDCP Admin. Draft EIR/S, Chapter 4 and *ante* fn. 10)

21 **(ii) The DSC Had Ample Authority to Influence the BDCP**

22 In response to calls for the DSC to use its authority to require, or at least encourage, the BDCP  
23 to be formulated in a manner that meets the coequal goals, the DSC claimed that it has no ability to  
24 meaningfully influence the form of conveyance included in the BDCP. (B1155) This conflicts with the  
25 DSC's mandate regarding conveyance as set forth in Water Code §85304 and §85320(e). Without  
26 substantive support, the Delta Plan concluded that "the agencies pursuing the BDCP are best positioned  
27 to develop possible options, evaluate them, and decide on the best one." (B1157)

28 \_\_\_\_\_  
<sup>12</sup> See fn. 10, *ante*.

1 The Delta Plan concluded that “it would be wasteful now to include in the Delta Plan regulatory  
2 policies prescribing/limiting conveyance.” (B1155) While the DSC stated an intent to reassess the lack  
3 of treatment of conveyance in the Plan if the BDCP is not completed by 2015 (B1156), it is unclear  
4 how this commitment would be enforced. The DSC thereby impermissibly failed to carry out its  
5 mandate to attain the coequal goals. The arbitrary setting of this date also fails to meet any standard of  
6 Adaptive Management. There clearly is no scientific basis for the date, no scientific rationale for the  
7 measure, and no substance to its requirements. (*Cf.* B1184)

8 According to Water Code §85320(b), the BDCP must meet several criteria, including  
9 compliance with DFW take provisions and specific CEQA-related requirements prior to being  
10 incorporated into the Delta Plan. (WC, §85320(b)(2)(A)-(G)(BDCP EIR requirements), §85321  
11 (biological performance measures).) The Delta Plan presented an opportunity to provide guidance to  
12 BDCP regarding implementation of the coequal goals embodied in the DRA. (K9066) Yet, the DSC  
13 failed to include policies or recommendations to implement the specific considerations required by the  
14 DRA.

15 (iii) **“Improving Conveyance” Does Not Mean Rubber-stamping the**  
16 **BDCP**

17 The DSC’s failure to address conveyance also conflicts with the statutory directive to the DSC  
18 to “promote options for new and improved infrastructure relating to the water conveyance in the Delta .  
19 . . .” (WC, §85304) Instead of complying with its statutory mandate, the DSC simply “recommended”  
20 that the BDCP be completed – whatever it may be and irrespective of the BDCP’s consistency with the  
21 coequal goals. (WRR12; B449)

22 The Delta Plan refers to “improving conveyance” as a means to provide a more reliable water  
23 supply for California. (B763; Regs., §5001(h)(1)(C)) Water Code §85020(f), however, refers to  
24 “improv[ing] the water conveyance system,” not necessarily increasing conveyance or embarking on a  
25 massive construction of conveyance facilities to bypass the Delta. For example, improving levee  
26 integrity will improve the reliability of through-Delta conveyance, thereby providing a more reliable  
27 water supply. The Delta Plan fails to refer to a “conveyance system” and simply assumes that more  
28 conveyance capacity is the only means to provide a more reliable water supply. In fact, less conveyance

1 capacity for export, rather than more, will be required to assure a reliable water supply for the Delta and  
2 other areas of origin, as well as “flows necessary for recovering the Delta ecosystem and restoring  
3 fisheries.” (WC, §85320.) Levee and channel improvements, improved fish screening at the existing  
4 SWP and CVP intakes, and improvements to the existing Delta Cross Channel are all conveyance  
5 system improvements consistent with law that do not necessarily result in increased conveyance  
6 capacity. (See generally K850, K975 (agency comments suggesting conveyance alternatives; see also  
7 K2724 (suggesting “alternative vision” of conveyance in the Delta))

8 DSC’s premature rubber-stamping of the BDCP (WRR12) assumes the BDCP is the only option  
9 for “improving conveyance” and does not promote any other options, as required by Water Code  
10 §85304. The DSC’s avoidance of substantive analysis of BDCP conveyance and conveyance in general  
11 stands in stark contrast to its approach to habitat creation, which is also a major component of the  
12 BDCP. (See generally L22976; see also D6539-40) While the DSC adopted no binding policies for  
13 conveyance (whether associated with BDCP or not) and simply recommended that the BDCP be  
14 completed (WRR12), it adopted five policies (ERP2, ERP4, RRP3, RRP4 (guiding BDCP habitat),  
15 ERP3 (assisting BDCP habitat)), as well as nine recommendations that apply to habitat restoration  
16 components of the BDCP. (See D6539-40) This inconsistency highlights the DSC’s bias in promoting  
17 BDCP conveyance irrespective of what that will actually consist of and whether or not BDCP would  
18 meet the coequal goals. By uncritically promoting the BDCP in WRR12, the DSC acted contrary to its  
19 statutory mandates.

20 **(iv) WRR12 Fails to Follow Best Available Science and the Advice of the**  
21 **Delta Independent Science Board**

22 The DSC failed to follow the advice of its own DISB with respect to review of the BDCP. The  
23 DISB report on the Fifth Staff Draft Delta Plan suggested that the Council “may want to consider taking  
24 a more assertive approach” regarding parallel Delta planning efforts, including the BDCP, and noted  
25 that the Fifth Draft did not embrace the DSC’s statutory role as integrator of Delta planning. (G4385)  
26 These problems were never corrected, and the DSC instead took pains to avoid doing anything that  
27 could potentially interfere with the eventual completion of BDCP, irrespective of the details of the  
28 project. (B1155-57) According to the DSC’s Executive Director: “I do not know what we are doing but

1 we are not trying to take on any approval of BDCP. We have tried in every way to keep out of the  
2 details of BDCP and we do not need or want a backdoor way to review the plan.” (M1157)

3 Despite clear guidance on the required scope of scientific analysis for acceptance of the BDCP  
4 into the Plan (WC, §85320(b)(2)(A)-(G)(listing 7 criteria for incorporation of BDCP into the Plan); see  
5 also N316; N320-321 (Attorney General advice)), the DSC impermissibly narrowed its review authority  
6 over the BDCP EIR/S in two ways. First, the DSC removed two of the seven requirements (WC,  
7 §85230(b)(2)(E), (F)) for the BDCP review by the DISB (N327 (charge to the ISB for review of the  
8 BDCP)); and, second, the DSC deleted much of the substance of the required questions in the remaining  
9 criteria listed in Water Code §85230(A)-(C). In the final charge, the requirement to analyze a reasonable  
10 range of alternatives (WC, §85320(b)(2)(B) was altogether ignored. (N329) The ISB was apparently not  
11 free to define its own research questions. (N329)

## 12 **2. The Delta Plan Fails to Comply with the DSC’s Mandate to Promote Restoration of** 13 **Healthy Ecosystems**

14 The DRA focuses equally on ecosystem restoration and water supply reliability. (WC §§29702,  
15 85020(c).) The Record clearly establishes that flow is a primary driver of a healthy ecosystem in the  
16 Delta. (L46140; G2112.021; N3073-74; D4377; L1167-68) Yet again, under pressure from the water  
17 export community, the DSC backed away from providing any meaningful advancement of ecosystem  
18 restoration by way of flow. (See, e.g., K11804 (arguing reduced reliance should not be the central tenet  
19 and driving force); M1861 (complaining that “‘flow’ remains predominant”)) Instead of focusing on the  
20 critical issue of flow in a comprehensive manner, the DSC instead to further land use restrictions on the  
21 Delta, undermining area of origin water right protections and compromising the ability to continue to  
22 farm in the Delta, while at the same time allowing water intensive land uses to proceed unabated in  
23 water export service areas.

### 24 **a) Delta Plan’s Approach to Flow Conflicts with the DSC’s Mandate**

25 The DRA requires the SWRCB, “[f]or the purpose of informing decisions on the Delta Plan and  
26 the [BDCP]” to “develop flow criteria for the Delta ecosystem necessary to protect public trust  
27 resources. . . . The flow criteria for the Delta ecosystem shall include the volume, quality, and timing of  
28 water necessary for the Delta ecosystem under different conditions. . . .” (WC, §85086(c)(1).) The DRA

1 specifically directed the DSC to “[r]estore Delta flows and channels to support healthy estuary and  
2 other ecosystems. (WC, §85302(e)(4).) Yet the DSC merely directed the SWRCB to update Delta flow  
3 objectives, which “shall be used to determine consistency with the Delta Plan,” while moving forward  
4 with the Delta Plan and support of the BDCP. (ERP1, Regs., §5005; B451)

5         Neither ERP1 or the other Policies and Recommendations of the Plan implement the CVP  
6 obligation to double the natural production of anadromous fish, which was incorporated into the 2009  
7 DRA. (CVPIA, Pub. L. 102-575, 106 Stat. 4600, Title 34, 106 Stat. 4706-31 (1992), §3406(b)(2); see  
8 also WC, §85302(c)(5).) The CVPIA requires the Secretary of Interior to restore anadromous fish by  
9 developing a program to ensure by the year 2002 natural production of anadromous fish (salmon,  
10 steelhead, striped bass, sturgeon and American shad) on a long-term basis, at levels not less than twice  
11 the average levels attained during the period of 1967-1991. (*Ibid.*, §3406(b)(1); see also WC,  
12 §85302(c)(5).) Adequate flows and water quality for fish are essential to that obligation, which the DSC  
13 failed to include in ERP1, or elsewhere in the Ecosystem Restoration chapter of the Plan. The failure to  
14 require such flows also was a dereliction of the DSC’s duties with respect to BAS; the Record is replete  
15 with support for the need to ensure adequate flows for ecosystem restoration. (See generally N3063  
16 (comments from public regarding ERP1); see also N3073-74)

17                 **b)         ERP1 Fails to Ensure That Water Diverted from the Delta Is Truly Surplus**

18         According to DPA and other area of origin protections, water exported from the Delta *is limited*  
19 to water supplies legally available for export from the Delta. (See WC, §§11460 et seq. and 11128  
20 (Watershed of Origin Statutes – WC, §§1216, 11460 et seq.) and WC, §§10505 et seq. (County of  
21 Origin Statutes – WC, §§10505 et seq.), WC, §§12200 et seq. (DPA).) Exports by the SWP and CVP  
22 must therefore be limited to water that is truly surplus to the present and future needs of the Delta and  
23 other areas of origin. Defining achievement of a more reliable water supply without reference to these  
24 provisions is irrational and fails to comply with existing statutory authority. The Delta Plan violates  
25 these statutory protections by not premising any consistency determinations under GP1 (Regs., §5002)  
26 on a study that determines the amount of surplus water available for export that incorporates all  
27 beneficial uses within the Delta. (WC, §12201 (“maintenance of an adequate water supply in the Delta  
28

1 sufficient to maintain and expand agriculture, industry, urban, and recreational development in the  
2 Delta area”).) This defect in the Delta Plan is clearly demonstrated in the context of ER P1 (B451).

3 In determining the amount of surplus water available for export, the Legislature charged other  
4 state agencies with preparing critical technical studies to inform the DSC’s decision. The DRA provides  
5 in relevant part, “For the purpose of informing planning decision for the Delta Plan . . . , the [SWRCB]  
6 shall, pursuant to its public trust obligations, develop new flow criteria for the Delta ecosystem  
7 necessary to protect public trust resources.” (WC, §85086(c)(1).) Additionally, “The Department of  
8 Fish and Game . . . based on the best available science, shall develop and recommend to the board Delta  
9 flow criteria and quantifiable biological objectives for aquatic and terrestrial species of concern  
10 dependent on the Delta.” (WC, §85084.5) These technical studies sought to identify the flows necessary  
11 to protect biological and public trust resources in the Delta, which excluded additional in-Delta  
12 beneficial uses such as “maintain[ing] and expand[ing] agriculture, industry, urban and recreational  
13 development in the Delta.” (WC, §1220.4) In submitting its flow report to the DSC, the SWRCB was  
14 very clear that its report complied with its narrow statutory duty to describe flow criteria for its limited  
15 statutory charge of “public trust resources,” which is merely a subset of the much broader range of  
16 beneficial uses within the Delta. (L11827) The SWRCB explained:

17 This report, required by Water Code section 85086(c) (2009 Delta Reform Act) in 2010,  
18 suggests the flows that would be needed in the Delta ecosystem if fishery protection was  
19 the sole purpose for which its waters were put to beneficial use. In keeping with the  
20 narrow focus of the legislation, this report only presents a technical assessment of flow  
21 and operational requirements to provide fishery protection under existing conditions.

22 We know however, that there are many other important beneficial uses that these waters  
23 support such as municipal and agricultural water supply and recreational uses.

24 (L118727)

25 Both the SWRCB and DFW duly prepared and submitted their flow criteria reports to the DSC  
26 that described the minimum flows necessary to protect these narrower biological and public trust  
27 resources. (L11827, L46137) The flow standards that the DSC ultimately referenced to determine  
28 consistency with the Delta Plan in ERP1, however, did not even incorporate these minimum ecological  
and public trust flow criteria, much less also incorporate the need for the additional in-Delta beneficial  
uses acknowledged by the SWRCB as being outside the scope of these flow criteria and yet protected  
by the Delta Protection Act. (B451) Reliable flows for export in new covered actions must be premised

1 on a determination of the flows necessary to first satisfy all beneficial uses for water in the Delta. By  
2 failing to incorporate these flow standards necessary to calculate the total flows necessary to satisfy in-  
3 Delta beneficial uses, the Delta Plan failed to determine the amount of surplus water available for  
4 exports. The Delta Plan is therefore inconsistent with the DPA and area of origin protections, and must  
5 be set aside.

6 **c) ERP2 Lacks Sufficient Scientific Basis**

7 ERP2 (Regs., §5006) requires that restoration projects that are covered actions be consistent with  
8 the map provided in Appendix 3. (B452, B1211) The Draft DFG report, Conservation Strategy for  
9 Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone and the Sacramento and  
10 San Joaquin Valley Regions (2011) (“DFG 2011 Conservation Strategy”) (J9455) that is cited as the  
11 basis for the appropriate elevations for habitat restoration in ERP2 is incorrect and mis-cites its own  
12 source data. While the mapping in the DFG 2011 Conservation Strategy is based on an “[a]ssum[ption  
13 of] a rise in sea level of approximately 55 inches over the next 50-100 years (Cayan et al. 2009)” (J9492;  
14 B1211 (Plan citing Cayan et al. 2009)); the actual modeled mean sea level rise predicted in Cayan et al.  
15 2009, is 13.8 inches (35 cm) by 2050 and 35 inches (1,000 cm) by 2100. (J9492)<sup>13</sup> While the Cayan et  
16 al. 2009 report identifies a range of future modeled sea level change scenarios from a low of 23 inches to  
17 a high of 55 inches at 2100, the Cayan report does not itself suggest use of 55 inches of sea level rise for  
18 planning purposes and instead uses 55 inches as a theoretical extreme. Had the DSC applied BAS, it  
19 would not have blindly incorporated the results of the DFG 2011 Conservation Strategy conclusions  
20 without its own investigation. (See B1178 (BAS description in Plan)) This failure lead to adoption of a  
21 flawed Policy and Regulation (ERP2; Regs., §5006) that relies on a misstatement of expected sea level  
22 rise, thereby failing to plan habitat at appropriate elevations. (ERP2, B452, B602-03 (color map))

23 **d) ERP3 Unlawfully Requires Special Mitigation for Covered Actions in Areas**  
24 **That May Ultimately Be Unsuitable for Ecosystem Restoration**

25 ERP3 (Regs., §5007) specifies that “[w]ithin the priority habitat restoration areas depicted in [a  
26 DFW 2011 habitat priority map] significant adverse impacts to the opportunity to restore habitat must

27  
28 <sup>13</sup> Cayan et al., Climate Change Scenarios and Sea Level Rise Estimates for the California 2009  
Climate Change Scenarios Assessment (CEC 2009), available at:  
<http://www.energy.ca.gov/2009publications/CEC-500-2009-014/CEC-500-2009-014-F.PDF>, at 30,33.

1 be avoided or mitigated.” (B452, B481 (color version of map), Appendix 5 (B1232)) As explained  
2 above, this same habitat priority map referenced by both ERP2 and ERP3 is not based on BAS. The  
3 Plan contains no scientific assessment, developed habitat model, or any substantive technical analysis  
4 as to why the areas in the map (B481) are suitable for restoration, or what types of restoration projects  
5 are envisioned for which species, relying entirely on a “gray” literature summary of potential  
6 elevational rationale for habitat. (B602) Yet, the Plan recognizes that elevation is just one of many  
7 metrics. (B601-02)

8         The DSC also failed to provide a BAS analysis in support of reliance on elevation as the sole  
9 metric, or why another metrics for habitat should be weighted. Yet, the ability to analyze these issues  
10 are identified in the introduction, using tools from landscape ecology. The failure to follow BAS in the  
11 Plan’s sea level rise estimation (see *ante*, section IV.A.2.c) compounds the failure to understand that  
12 elevation is just one of several more important metrics (species mix, species risk, degree of endemism,  
13 flow, water quality, invasives, connectivity, existing habitat quality, existing state ownership) that can  
14 be used to determine habitat suitability for restoration. (B601-02)

15         ERP3 also creates a completely new and scientifically unsubstantiated mitigation requirement  
16 above and beyond existing legal requirements (e.g., ESA and CESA) for the thousands of acres  
17 depicted on the map – one that will unlawfully interfere with and cause additional costs and regulatory  
18 hurdles for otherwise permissible land uses in the Delta. ERP3 also fails to include any reference to  
19 when and under what circumstances an “opportunity” for habitat restoration on any individual parcel of  
20 land in the Delta becomes available or what the metric for mitigation will be. This again is a clear  
21 failure of the Plan to follow the BAS and Adaptive Management requirements. Specifically, the  
22 mapped area subject to this requirement will need to be modified in light of new (or any scientific) data,  
23 but no mechanism by for that update process is included in the policy. (*Cf.* B1260)

24         Moreover, the DSC exceeded its legal authority, in consultation with DFW or otherwise, to  
25 dictate mitigation requirements for landowners in connection with their uses of their properties simply  
26 because there “may be” an “opportunity” for future habitat restoration. Indeed, the Plan’s own decision  
27 to plan for 55 inches of sea level rise (ERP2) undermines the “Priority Habitat Restoration” areas in  
28 particular in the southern Delta. (Compare areas shown identified as priorities for restoration under

1 ERP3 (B481) to elevation map referenced in ERP2 (B1228)) Ultimately, the Plan’s faulty 55 inch sea  
2 level rise assumption (see discussion *ante* section IV.A.2.c) results in ecologically suitable lower  
3 elevation restoration areas being ignored, instead focusing on lands at elevations that may not be  
4 ecologically suitable for 80 (or likely more) years; at the same time, ERP3 foists new mitigation  
5 requirements on existing legal uses based on sheer speculation. This interpretation contradicts the  
6 mandates of the DRA and fails to meet the Plan’s own BAS standards (B1178).

7 **e) Delta Plan Focus on Setback Levees is Contrary to Achieving the Coequal**  
8 **Goals**

9 ERP4 (Regs., §5008) seeks to expand floodplains and riparian habitats in levee projects. (B452,  
10 B1258 (map for setback levee analysis)) “Levee projects must evaluate and where feasible incorporate  
11 alternatives, including the use of setback levees, to increase floodplains and riparian habitats.” (B452)  
12 Setting back levees in the Delta involves placement of the new levee at a different location, requiring  
13 significant additional volumes of fill soils, that must be imported from distant locations, to construct a  
14 new levee. (See generally, D6235, G6276) In developing ERP4, the DSC failed to weigh the  
15 environmental tradeoffs of these excavation and fill projects, which could outweigh any perceived  
16 biological benefits. While the DSC ultimately limited the application of this ERP4 somewhat by  
17 excluding certain sloughs within the Delta from the feasibility analysis requirement (B1258 (Appendix  
18 8 map), the costs of carrying out these assessments, let alone actually constructing setback levees, is  
19 enormous and inconsistent with the requirement to enhance agricultural resources in the Delta.<sup>14</sup> The  
20 mapped areas provided for setback levee assessment under ERP4 (B1258) were also not based on BAS.

21 **3. The Delta Plan Fails to Protect and Enhance the Delta**

22 The DRA states the policy of the State to “[p]rotect and enhance the unique cultural,  
23 recreational, and agricultural values of the California Delta as an evolving place.” (WC, §§85020(b),  
24 85054.) The Delta Plan fails to implement this core policy. Moreover, the DSC’s failure to use BAS for  
25 development and implementation of Policies/Regulations exacerbates this failure.

26  
27  
28 <sup>14</sup> See *ante*, section IV.D.2-3 for an analysis of the failure of the DSC to respond to comments on  
implementation costs of expanding levees in floodplains and disclose those costs as required by the  
APA.

1 Under the DRA, the Delta Protection Commission (“DPC”) was required to, and did, prepare an  
2 Economic Sustainability Plan (“ESP”), which included important and well-substantiated  
3 recommendations for carrying out the statutory policy to “protect and enhance the unique cultural,  
4 recreational, and agricultural values of the Delta as an evolving place.” (WC, §85020(b); L28317) The  
5 ESP’s findings and recommendations, however, were not incorporated into the Delta Plan as required,  
6 nor did the DSC explain why it chose to ignore or reject most of the content of the ESP. (WC, §85301.)

7 Maintaining Delta agriculture is a core policy of the Delta Plan. (B615) The Delta Plan,  
8 however, erroneously substituted the term “sustain” for the Delta economy (B630) when the DRA  
9 mandate is to “protect and enhance the unique cultural, recreational and agricultural values. . . .” (WC,  
10 §§85020(b), 85054.) “Sustaining” is not the same as “enhancing.” Including agriculture as only a  
11 factor, without recognition of its relative importance, conflicts with the ESP, which determined that  
12 agriculture was the primary driver of the present and future economy of the Delta. (L28527; ESP 2012,  
13 Ch. 10.1.1) Again, the Delta Plan conflicts with the DRA. (WC, §§85020(b), 85054.)

14 The Delta Plan includes only recommendations, and no policies, to promote agriculture, thereby  
15 failing to meet the “protecting and enhancing Delta agriculture” component of DRA. (B457; DP R8  
16 Promote Value-Added Crop Processing, DPR9 Encourage Agritourism, and DPR10 Encourage  
17 Wildlife-Friendly Farming) With respect to recreation, the Delta Plan incorrectly converted the  
18 statutory requirement -- to “protect and enhance the unique cultural, recreational, and agricultural  
19 values. . . .” (WC, §§85020(b), 85054) to “encourage recreation and tourism.” (B630) The DSC’s new  
20 language is inconsistent with the DRA.

21 The Delta Plan also impermissibly focuses on further restrictions on land use as a means to meet  
22 the coequal goal of “protecting, restoring, and enhancing the Delta ecosystem.” (WC, §85054.) Yet the  
23 Delta Plan recognizes that land use development in the Delta is already very constrained at both the  
24 local and state planning levels, most major conversions of habitat in the Delta occurred prior to the  
25 “Delta crisis” (WC, §85001(a)), and that habitat loss is just one of many stressors on the ecosystem.  
26 (B590) “Stressors include altered flows, habitat loss, entrainment in Delta diversions, degraded water  
27 quality, harmful nonnative species, migration barriers, and impacts from hatcheries.” (B590) While the  
28 Delta Plan focuses on land use within the Delta, it never directly addresses the land use drivers of areas

1 receiving water from the projects exporting water from the Delta, which are more closely connected  
2 with the decline of the Delta ecosystem. (WC, §85057.5; B590 (failing to list land uses in water export  
3 recipient areas as a stressor).)

4 The Legislature gave the DSC direct regulatory authority over “covered actions” with the Delta  
5 Plan. (WC, §§85225-85225.30.) The DRA included the definition of “covered action” (WC, §85057.5),  
6 as well as a description of the process by which the consistency of state and local public agency  
7 covered actions would be determined (WC, §§85225-85225.30). The process described in “Governance  
8 Policy 1: Detailed Findings to Establish Consistency with the Delta Plan” (GP1; Regs., §5002),  
9 however, fails to provide unambiguous and practical direction to other government entities regarding  
10 what constitutes “covered action” and conflicts with the mandated protection of the unique cultural,  
11 recreational, and agricultural values of the Delta. (WC, §85020(b); see K7082, K10968, K13343) The  
12 water exporters participating in the Delta Plan development were adamant that DSC should focus on  
13 “land use decisions there that could negatively affect capabilities to achieve the coequal goals.”  
14 (M1178.0004) However, the DRA plainly required the DSC to act on the full spectrum of impacts to  
15 the ecosystem, not just land use (WC, §85302).

16 While the DSC myopically focused on land use as a means to supposedly advance the coequal  
17 goals, it turned a blind eye to other more pressing stressors. For instance, the definition of “significant  
18 impact” adopted as part of the Delta Plan exclude temporary water transfers (one year or less under  
19 WC, §1725) from consistency review as a covered action. (B766-Definitions; Regs., §5001(dd)(3)) As  
20 explained by Petitioner CBD, however, these transfers, especially when undertaken serially, have a  
21 major impact to Delta water supply and quality. (See WC, §85057.5(a)(4).) These comments  
22 demonstrated that most water transfers are called “temporary” even though they often occur year after  
23 year. (K12475 (demonstrating most transfers are classified as “temporary”)) The DSC violated the  
24 mandate of the DRA with respect to what constitutes a covered action and altogether ignored evidence  
25 in the Record that temporary transfers have a significant impact on the coequal goals (particularly  
26 ecosystem restoration).

27 Delta-as-Place Policy 1 (B455; DPP1; Regs., §5010), which specifies that new residential,  
28 commercial, and industrial development is limited to certain areas, also conflicts with exercise of

1 existing local land use authority and planning. (See, e.g., Gov. Code, §§65100 et seq.) The restrictions  
2 in DPP1 conflict with several provisions of the DRA “Delta as a Place” protections, including: (1)  
3 Water Code §85022(c)(4) (stating that future developments that are carefully planned and consistent  
4 with the policies of that division are “essential” to the economic and social well-being, particularly to  
5 persons living and working in the Delta); (2) Water Code §85212 (stating what the Council’s input is  
6 required to include, but not conceding or transferring any powers to regulate land use development  
7 from the local government to the DSC), (3) Water Code §85300(a) (stating that the Delta Plan shall  
8 include subgoals and strategies “to assist in guiding state and local agency actions” related to the  
9 Delta); (4) Water Code §85305(a)(stating that the Plan shall reduce risks to people, property, and state  
10 interests in the delta by “promoting” “appropriate land uses,” but not granting any authority to the DSC  
11 or the Plan to “regulate” development or land uses (see WC, §§85057.5(c)), 85022(c)(4), 85212, 85300,  
12 85305(a) (referring to the CVFPP, and DWR’s May 2011 Urban Levee Design Criteria(B746)); and (5)  
13 Water Code §85054, which requires that the coequal goals shall be achieved in a manner that protects  
14 and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as  
15 an evolving place. DSC’s assertion of jurisdiction over this land use issue is an overreach and exceeds  
16 the authority of the DRA.

17 By further restricting land uses without a sound scientific basis, the DSC failed to protect and  
18 enhance the Delta’s unique cultural, recreational, and agricultural values as required by the DRA, and  
19 its approval of the Delta Plan must be set aside.

#### 20 **4. Delta Plan Fails Improve Water Quality to Protect Human Health and the** 21 **Environment**

22 The Delta Plan fails to implement the DRA requirements for water quality protections. (WC,  
23 §§85020, 85022(d), 85302(d), 85302(e).) The Delta Plan does not include any enforceable policies  
24 regarding water quality, despite strong recognition that water quality is a major stressor in the Delta.  
25 (G4389 (DISB commenting on ERP1)) The Delta Plan is thus inconsistent with Water Code  
26 §85032(d)(3) measures to “[i]mprov[e] water quality to protect human health and the environment.”  
27 While the SWRCB’s Bay Delta Water Quality Control Plan (“WQCP”) addresses the need to protect  
28 waters in the Delta from certain kinds of degradation, the WQCP does not address the need to improve

1 water quality in the Delta to protect human health and the environment, and cannot serve as a substitute  
2 for DSC action.

3 Particularly egregious is the Delta Plan’s failure to address ongoing selenium contamination  
4 from recipients of CVP water exported from the Delta, which contaminates the San Joaquin River and  
5 eventually the Delta. (See, e.g., B675) Indeed, the Delta Plan encourages continued selenium  
6 contamination by promoting the BDCP (ER R12), which allows San Joaquin Valley Farmers to avoid  
7 water originating in part from their own lands that contains high levels of selenium, and instead receive  
8 water from the Sacramento River, away from their toxic runoff. The Delta Plan recognizes that a major  
9 purpose of the BDCP is to improve exported water quality by avoiding water pollution from the San  
10 Joaquin River. (B694) Yet, the Plan continues to permit the degradation of San Joaquin River.

11 The Delta Plan also fails to address the relationship of increasing salinity to adequate flows. The  
12 plan recognizes that “[g]enerally, water quality is better in the northern Delta than in the central and  
13 southern Delta because higher quality Sacramento River inflows are greater than inflows from the San  
14 Joaquin River, and the proportion of agricultural water use and drainage in the San Joaquin Valley is  
15 greater than in the Sacramento Valley.” (B678) Yet the Delta Plan unlawfully fails to acknowledge that  
16 by constructing the BDCP Tunnels and diverting water more frequently from the Sacramento River,  
17 that “better” water quality will be impaired. (See, e.g., I4248-60 and March 2013 BDCP Admin. Draft  
18 EIR/EIS, Chapter 8 and Appendix 8H and *ante* fn. 10)

## 19 **5. The Delta Plan Fails to Reduce Risk to People, Property, and State Interests in the** 20 **Delta**

21 In yet another failure of the DSC to use BAS, the Delta Plan provides inadequate and inaccurate  
22 information regarding the state of the existing levee system of the Delta. The DPC’s ESP included  
23 detailed information regarding the status of the Delta’s levee system to assist the DSC in its  
24 development of the Plan. (L28365) The DSC, however, failed to adequately consider this report, as  
25 required under Water Code §85301(d), to inform the its approach to reducing risk in the Delta. This  
26 lack of adequate background data hindered the DSC in developing the necessary risk reduction policies  
27 and recommendations. Despite repeated attempts by the public to assist the Council in correcting these  
28 inaccuracies, the Delta Plan includes erroneous information, such as: (1) a map that shows nonexistent

1 levees (B722); and (2) large overstatements of the number of reclamation districts that fall below the  
2 FEMA Hazard Mitigation Plan guidance levels. (M3913) The inaccuracy of information regarding the  
3 current state of Delta levees is a failure to follow BAS.

4 Moreover, the 2012 ESP recommended that the Public Law 84-99 (“PL 84-99”) standard be the  
5 minimum flood protection standard for the Delta. (L28371) PL 84-99 is a minimum requirement  
6 established by the U.S. Army Corps of Engineers for levees that participate in its Rehabilitation and  
7 Inspection Program. (33 U.S.C., §701n) The Delta Plan also significantly overstated the number of  
8 miles levees below the PL 84-99 standard; based on that erroneous information, the DSC summarily  
9 concluded that funding was inadequate to obtain that objective. (B725) This conclusion is wholly  
10 unsupported.

11 The Delta Plan also overstated risks associated with earthquakes and levee failures in the Delta  
12 in order to justify its conclusions regarding the need for new isolated conveyance in the form proposed  
13 by BDCP. According to the Delta Plan, a study by DWR “concluded that a major earthquake of  
14 magnitude 6.7 or greater in the vicinity of the Delta Region has a 62 percent probability of occurring  
15 sometime between 2003 and 2032 (DWR 2009).” (B717) That information, however, was taken out of  
16 context in the cited report; the stated risk in the DWR study actually pertains to the San Francisco Bay  
17 Region, not the Delta. (J78930-31; M1516 (DISB critique)) Additionally, the levee failure map included  
18 in the Delta Plan prepared by the Metropolitan Water District of Southern California to garner support  
19 for the BDCP as a “fix” for earthquake hazards. (B718) Figure 7-2 presents an unrealistic and worst case  
20 picture of the risks associated with levee failures, cites the 300–year probability, and then implies that it  
21 is the 30-year probability. Moreover, even if Figure 7-2 were reliable, further study indicates that the  
22 Delta would flush and restore its freshwater character in a relatively short time period. (L28368) In the  
23 2009 Delta Risk Management Strategy (“DRMS”), prepared by the same author that predicted the  
24 scenario shown in Figure 7-2, the infusion of freshwater to flush salinity is shown to be a viable option  
25 that may be completed more or less quickly depending upon reservoir storage levels and the extent of  
26 levee damage. (L28368) In addition, the Plan fails to note the measures that may be taken to alleviate the  
27 duration of elevated salinity periods in the Delta. (J79340-41) Through these and other misleading and  
28

1 unscientifically supported statements, the Delta Plan is inconsistent with the DRA mandate to base the  
2 Delta Plan on BAS. (WC, §85308(a).)

3 While the Delta Plan highlighted and overstated risks from earthquakes and other catastrophic  
4 events in the Delta, the Delta Plan completely ignored documented risks to other parts of the SWP/CVP  
5 water system. For instance risks of San Luis Dam failure and aqueduct subsidence were not analyzed to  
6 determine the relationship of those risks to central and southern California’s Delta water supply  
7 reliability. In this manner, the Delta Plan fails to comprehensively reduce risk in a manner that sustains  
8 the economic vitality of the state. (See, e.g., WC, §85302(d)(2).)

9 Under Risk Reduction Policy 2: Require Flood Protection for Residential Development in Rural  
10 Areas (B739, RRP2; ), the DSC required that: “New residential development of five or more parcels  
11 shall be protected through floodproofing to a level 12 inches above the 100 year base flood elevation,  
12 plus sufficient additional elevation to protect against a 55-inch rise in sea level at the Golden Gate . . . ”  
13 unless the development is located within specified areas. (B739) RRP2 is not reflective of BAS, as it far  
14 exceeds the scientifically supported sea level rise predictions that are currently available. (See *ante*  
15 section section IV.A.2.c.) The postulated 55-inch sea level rise at the Golden Gate does not reflect a  
16 uniform elevation change within the Delta, the requirement is not based on any BAS analysis and fails to  
17 identify what the elevation would be within any particular locations within the Delta. It also places the  
18 burden for identifying the appropriate model, and modeling that speculative elevation on the landowner.

19 RRP2 and other Risk Reduction policies and recommendations are not based on BAS. The Plan  
20 relies on an interim and outdated recommendation of the Ocean Protection Council to justify its  
21 requirement of flood protection of 55 inches of sea level rise by 2100.<sup>15</sup> (B483, B579, B609, B624,  
22 B718, B744) The DISB, however, noted the Plan’s failure to scientifically assess the standards and the  
23 support for the Plan’s conclusions as they relate to both sea level rise and the levee standards,  
24 identifying the use of two different and potentially conflicting approaches. (G5893) A DISB member  
25 also noted the outdated citation of the Plan’s cited sea level rise and identified the need to update it,  
26  
27

28 <sup>15</sup> The 55 inch assumption appears to be copied from the statutory requirement for the BDCP to  
plan for a range of possible sea level rise up to 55 inches. (WC, §85320(b)(2)(C).)

1 which was ignored. (K3507) As a result of this inattention to BAS, RRP2 may result in massive levees  
2 being built at great expense to meet an unsupported standard.

3 The Delta Plan also fails to apply BAS in its levee standards and setback levee-related policies.  
4 (RRP1; Regs., §5012 (Priority Table); see also ERP4; Regs., §5008.) Under BAS, the DSC should have  
5 defined the problem scientifically, rather than politically. The Delta Plan needed to create a conceptual  
6 model for the technical protection requirements for the levees, examine and evaluate the available  
7 scientific literature, provide a scientific synthesis of those data, and then develop levee standards using  
8 that system. This must be done according to the BAS criteria of criteria: relevance, inclusiveness,  
9 objectivity, transparency and openness, timeliness, and peer review. (B1178) The Plan, however, fails to  
10 examine its levee standards and requirements under BAS, and also fails to provide for review and update  
11 the policy under an Adaptive Management Plan.

## 12 **6. Delta Plan Conclusion**

13 In summary, the DSC was directed to provide for “the sustainable management of the  
14 Sacramento-San Joaquin Delta ecosystem, to provide for a more reliable water supply for the state, to  
15 protect and enhance the quality of water supply from the Delta, and to establish a governance structure  
16 that will direct efforts across state agencies to develop a legally enforceable Delta Plan.” (WC,  
17 §85001(c).) In considering whether the DSC adequately carried out that duty, it is settled that  
18 “[a]dministrative regulations that alter or amend the statute or enlarge or impair its scope are void and  
19 courts not only may, but it is their obligation to strike down such regulations.” (*Morris v. Williams*  
20 (1967) 67 Cal.2d 733, 748.) As established above, the DSC unlawfully violated the DRA by ignoring  
21 its mandates to reduce reliance on the Delta, restore the Delta ecosystem, and determine what water is  
22 actually available for export. The Delta Plan affirmatively conflicts with the DRA and other applicable  
23 statutory authority, including area of origin and Delta protections, and favors conveyance facilities  
24 proposed in the BDCP over superior means to protect the Delta and water supplies from risk. The Plan  
25 also fails to incorporate BAS or to establish an effective Adaptive Management strategy. As a result of  
26 these deficiencies, the Delta Plan must be set aside.

1 **B. THE DELTA STEWARDSHIP COUNCIL FAILED TO IMPLEMENT ITS DUTIES**  
2 **UNDER THE PUBLIC TRUST DOCTRINE**

3 **1. The Public Trust Doctrine and the Delta Reform Act in California Law**

4 **a) The Public Trust Doctrine Applies in California**

5 “By the law of nature these things are common to mankind—the air, running water, the sea and  
6 consequently the shores of the sea.” (Institutes of Justinian 2.1.1.) From this origin in Roman law, the  
7 English common law evolved the concept of the public trust, under which the sovereign owns “all of its  
8 navigable waterways and the lands lying beneath them ‘as trustee of a public trust for the benefit of the  
9 people.’” (*Colberg, Inc. v. State of California Ex Rel. Dept. of Public Works* (1967) 67 Cal.2d 408, 416  
10 (*Colberg, Inc.*)). As noted in *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515 (*City of Berkeley*),  
11 *Illinois Central Railroad Company v. Illinois* (1892) 146 U.S. 387 (*Illinois Central*) “remains the  
12 primary authority even today, almost nine decades after it was decided.” (26 Cal.3d 515, 521.) There,  
13 the Court observed:

14 “A grant of all the lands under the navigable waters of a State has never been adjudged to  
15 be within the legislative power....The State can no more abdicate its trust over property in  
16 which the whole people are interested, like navigable waters and soils under them,...than  
17 it can abdicate its police powers in the administration of government and the preservation  
18 of the peace....So with trusts connected with public property, or property of a special  
19 character, like lands under navigable waterways, they cannot be placed entirely beyond  
20 the direction and control of the State.”

21 (146 U.S. at 453-454.)

22 The State of California acquired title as trustee to such lands and waterways upon its admission  
23 to the union (*City of Berkeley, supra*, 26 Cal.3d at 521, and cases there cited); from the earliest days (see  
24 *Eldridge v. Cowell* (1854) 4 Cal. 80, 87 (*Eldridge*)) its judicial decisions have recognized and enforced  
25 the trust obligation. The doctrine, which has existed in California since 1854, originally applied to  
26 protect the public’s right to use the state’s tidelands and navigable water ways for purposes of  
27 commerce, navigation and fishing. (*Eldridge*, 4 Cal.3d at 87; *Colberg, Inc., supra*, 67 Cal.2d at 417.)  
28 The California Supreme Court then endorsed the *Illinois Central* principles in *People v. California Fish*  
*Company* (1913) 166 Cal. 576, holding that the state may erect improvements to further navigation and  
take other actions to promote the public trust.

California courts subsequently expanded the doctrine to include, *inter alia*, the preservation of  
trust lands and waters in their natural state, “so that they may serve as ecological units for scientific

1 study, as open space, and as environments which provide food and habitat for birds and marine life.”  
2 (*Marks v. Whitney* (1971) 6 Cal.3d 251, 259-260 (*Marks*)). The public trust doctrine in American and  
3 California law covers all navigable streams; ecological preservation; wetland areas; underground water;  
4 artificially enlarged waters; and wild animals, including fish. (L7812-L7818; see also *Marks, supra*, 6  
5 Cal.3d at 259-260; and Cal. Const. Art. I, §25.)

6 In *Audubon, supra*, 33 Cal 3d at 441, the California Supreme Court held that:

7 [T]he public trust is more than an affirmation of state power to use public property for  
8 public purposes. It is an affirmation of the duty of the state to protect the people’s  
9 common heritage of streams, lakes, marshlands and tidelands, surrendering that right of  
protection only in rare cases when abandonment of that right is consistent with the  
purposes of the trust.

10 Governments therefore have a permanent fiduciary responsibility and obligation to protect the public  
11 trust. (“In the new light of *National Audubon*, the Board unquestionably possessed legal authority under  
12 the public trust doctrine to exercise supervision over appropriators in order to protect fish and wildlife.  
13 That important role was not conditioned on a recital of authority. It *exists* as a matter of law.” (*Racanelli*  
14 *Decision, supra*, Cal.App.3d at 150.)<sup>16</sup>

15 A separate, but related branch of the public trust doctrine protects wild fish as trust resources in  
16 and of themselves, independent of navigable waters. (See *California Trout v. State Water Resources*  
17 *Control Board* (1989) 207 Cal.App.3d 585, 630, “[w]ild fish have been recognized as a species of  
18 property the general right and ownership of which is in the people of the state”; *People v. Murrison*  
19 (2002) 101 Cal.App.4th 349, 360 (“State owns the fish in its streams in trust for the public”).) As early  
20 as 1932, a California court held that a water right holder has no authority to divert and use the waters of  
21 the state “regardless of its duty in so doing to protect the fish therein” and that “the grant of the right to  
22 erect a dam” must “be construed to be under the implied condition to keep open the fishways.” (*People*  
23 *v. Glenn-Colusa Irrig. Dist.* (1932) 127 Cal.App. 30, 36-37; see also *People v. Truckee Lumber Co.*  
24 (1897) 116 Cal. 397, 400 (also protecting fisheries for common good).)

25  
26  
27  
28 <sup>16</sup> See also Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L.Rev. 471 (1969-70); Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 UC Davis L.Rev. 233.

1                   **b)       The Allocation Role Is the Center of Applying the Public Trust Doctrine to**  
2                   **the Administrative Agency Planning**

3                   The 1986 *Racanelli Decision* illustrates the duties of public agencies with respect to the public  
4 trust. (182 Cal.App.3d 82.) There, the court found that the SWRCB defined its scope for action in its  
5 water quality control planning and water allocation decisions too narrowly “in terms of enforceable  
6 water rights....[T]he Board cannot ignore other actions which could be taken to achieve Delta water  
7 quality, such as remedial actions to curtail excess diversions and pollution by other water users.” (*Id.* at  
8 182.)

9                   **c)       The DSC’s Public Trust Duties under the 2009 Delta Reform Act**

10                  Under the DRA, the DSC’s duties were explicit. The DRA declares that “the Sacramento-San  
11 Joaquin Delta watershed and California’s water infrastructure are in crisis and existing Delta policies are  
12 not sustainable.” (WC, §85001(a).) The DSC is then endowed with powers and authorities typical for  
13 departments of the State of California and with the duty to protect public trust resources in the Delta.  
14 (WC, §§85210, 85023.) The DRA requires the DSC to prepare the Plan as the vehicle of the public trust  
15 doctrine for achieving the two coequal goals, stating: “The longstanding constitutional principle of  
16 reasonable use and the public trust doctrine shall be the foundation of state water management policy  
17 and are particularly important and applicable to the Delta.” (WC §85023; see also, WC §85020 (setting  
18 forth the eight “objectives” inherent in the coequal goals, four of which relate directly to public trust  
19 resources).)

20                  The DRA requires the DSC to consider hydrologic information, and to develop the Plan to  
21 contain performance measures and “measurable targets” based on the best available scientific  
22 information. (WC, §§85086(c)(1), 85302(a-h), 85308(a-f), 85086(c)(1); B494, B495.) To do so, the  
23 DRA tasked the SWRCB and DFW to gather BAS and develop flow criteria for the Delta ecosystem  
24 necessary to protect public trust resources. (WC, §§85086(c)(1), 85084.5.) The reports on flow criteria  
25 and quantified biological objectives to protect public trust resources were mandated as “early actions” in  
26 the DRA, preceding development and adoption of the Plan. (*Ibid.*)

27                  To implement objectives to restore Delta ecosystems and promote statewide water conservation,  
28 water use efficiency, and sustainable water use inhering in the coequal goals (WC, §85020 (c-d)), the  
2009 DRA calls for reduced reliance on the Delta for the state’s future water supply needs. (WC,

1 §85021.) In order to implement the policy of reducing reliance of importing regions on Delta, water  
2 exports must be addressed. The DRA finds and declares that the coequal goal of “water supply  
3 reliability” in the Act “involves implementation of water use efficiency and conservation projects,  
4 wastewater reclamation projects, desalination, and new and improved infrastructure....” (WC, §§85054,  
5 85004(b).) The inherent objective to “[i]mprove the water conveyance system” in Water Code §85020(f)  
6 therefore must conform to achieving the coequal goals, including all of the considerations that inhere in  
7 those goals as well as meet the policy declarations of the DRA. (WC, §§85054, 85004(b).)

8 Taken as a whole, the eight policy objectives (“inherent in the coequal goals”) and policy  
9 declarations for the state and the Delta intend active protection of the Delta’s water, cultural, and  
10 environmental resources, which, cumulatively, is about *stewardship*. The plain meaning of  
11 “stewardship” is provided by the DRA: “the sustainable management of the [] Delta ecosystem, to  
12 provide for a more reliable water supply for the state, to protect and enhance the quality of water supply  
13 from the Delta, and to establish a governance structure that will direct efforts across state agencies to  
14 develop a legally enforceable Delta Plan.” (WC, §85001(c).) The DSC positions DSC as a managing,  
15 supervising *responsible* agency, a steward guiding and coordinating actions of other state agencies, and  
16 these agencies “shall coordinate [their] actions pursuant to the Delta Plan.” (WC, §85204.)

17 By segregating only “relevant policies” in separate chapters in the Plan, the DSC deprives the  
18 public of a synoptic view in the Plan of how the DRA renounces the “existing Delta policies [that] are  
19 not sustainable” as it embraces Water Code §85020 as a whole (since this section’s policies are  
20 “inherent in the coequal goals for management of the Delta”), how the Plan implements that view, and  
21 how the DSC constructs its role as steward of the Delta with respect to all other state agencies. (WC,  
22 §§85001(a), 85023, 85204, 85302, 85308; see also, B493, B527, B583; see also, B506-B507, Table 2-  
23 2.)

24 As the appropriative water rights actions by and the water quality control responsibilities of the  
25 SWRCB must take account of protecting the public trust (*Racanelli Decision, supra*, 182 Cal.App.3d at  
26 182), so too must the DSC construct policies to guide and steward achievement of the coequal goals in  
27 the Plan. (WC, §§85204, 85054.) The DSC, however, *assumes* compliance with the DRA for its present  
28

1 formulation of the Plan when instead the DSC must *demonstrate* how its policies, programs, and actions  
2 comply with the public trust doctrine, reasonable use doctrine, and the Act.

3 **2. The DSC Failed to Consider and Analyze the Public Trust in Creating and**  
4 **Approving the Delta Plan and the EIR**

5 **a) The DSC Misinterprets the Public Trust Meaning of “Reduced Reliance on**  
6 **the Delta”**

7 Water Code §85021 directly addresses the crisis the DRA identifies: the status quo of water exportation  
8 by the SWP and CVP is unsustainable and no longer acceptable as a matter of law and policy. (WC,  
9 §85001(a).) The policy is neither optional nor conditional. “[A]ccording to 85021, the goal is to reduce  
10 reliance on the Delta; the strategy is to promote regional self-reliance[.]” (M4177) Yet, the DSC  
11 unlawfully softened this key policy – WRP1 - to “encourage water users to reduce their reliance on  
12 Delta water and to develop local and regional water projects to replace Delta water in their supply  
13 plans.” (D82) The DSC’s interpretation is volitional and erroneously construes adherence to the policy  
14 as subject to the willingness to voluntarily comply of those users taking water from the Delta.

15 The DSC has substituted its will for that of the Act by taking this approach in the Plan, which is a  
16 violation of the policy’s plain language and the DSC’s public trust duties. (WC, §85021; D85-D87;  
17 N198-N199; reaffirmed at N2865-N2866; see also discussion *ante* in section IV.A.2.a.)

18 **b) The DSC Failed to Determine for Its Approach to Reduced Delta Reliance**  
19 **Whether There Would Be Enough Water to Satisfy Demands among All**  
20 **Competing Reasonable and Beneficial Uses**

21 The DSC failed to perform three public trust-related analyses that fulfill its public trust and  
22 reasonable use obligations. (WC, §85023.) These analyses are required by statute and public trust  
23 doctrine case law. The DSC failed to: (1) take account of the SWRCB Delta flow criteria; (2) determine  
24 how much water is available among all competing reasonable and beneficial uses; and (3) determine,  
25 through economic analysis, the relative value of water in each competing use.

26 **(i) The DSC Failed to Use Best Available Science to Identify Delta Flow**  
27 **Criteria and Quantify Biological Objectives in the Plan to Protect**  
28 **Public Trust Resources**

As explained *ante* in section IV.A, the DRA required the Delta Plan to be based on Best  
Available Science (“BAS”) (WC, §85308(a)) and made requirements of other entities to inform the  
DSC’s development of the Plan. To this end, the SWRCB completed and approved its Delta Flow

1 Criteria Report in August 2010 and submitted it to the DSC. (WC, §85086(c)(1); L11827-L12017.) The  
2 SWRCB found that: “[r]ecent Delta flows are insufficient to support native Delta fishes for today’s  
3 habitats.” (D4377; L11867-L11868) The SWRCB determined flow criteria representing flow amounts,  
4 volumes and timing could be reasonably expected to help restore fish species. (L11844, L11937-  
5 L11962)

6 The DRA also required DFW to develop and recommend to the SWRCB Delta flow criteria and  
7 quantifiable biological objectives for aquatic and terrestrial species of concern in the Delta. (WC,  
8 §85084.5.) DFW scientists participated in SWRCB’s Delta flow criteria proceedings and DFW later  
9 submitted to SWRCB its draft report on Quantifiable Biological Objectives and Delta Flow Criteria in  
10 September 2010. (L46140, L11976 (recommendations based on how delta water flow affects species of  
11 concern in Bay-Delta ecosystem)) The DSC tacitly refused to accept the SWRCB’s 2010 Delta flow  
12 report as usable, and in doing so, abdicated its stewardship role to coordinate and guide other state  
13 agencies. According to DSC, the Plan “does not determine Delta flow criteria, [citation] the amounts of  
14 water available to various categories of water uses/users, or recommend a conveyance plan. The analysis  
15 of these issues is being undertaken by other agencies.” (D60) This position is contrary to mandates in the  
16 DRA for the DSC to use BAS and to assume a stewardship role, including guiding other state agencies  
17 on Delta public trust resource protection. (WC, §§85302(g), 85204; D62.) Instead the DSC preferred to  
18 wait until the SWRCB’s revises flow criteria for its next Bay Delta Water Quality Control Plan, as stated  
19 in ERP1 and ERR1. (D62; B614)

20 Neither of the Plan chapters on water reliability nor ecosystem restoration attempt to apply  
21 SWRCB’s flow criteria or analysis of public trust resource needs to its purpose as set forth in the Act.  
22 (B525, B628, B594, B597, B614; bibliographic citations at B580, B628) The Plan failed to take into  
23 account the needs of public trust resources throughout the Delta watershed, and failed to consider the  
24 water needs sufficient to sustain beneficial uses, including environmental needs in the watersheds that  
25 are protected as the “areas of origin.” (D4373, B528, B531, B539, B540.) Required information in  
26 timely reports produced by SWRCB and DFW represented BAS, but the DSC failed to consider them  
27 and perform important analyses for preparing the Plan in reliance on them, as mandated by the DRA.  
28

1 The DSC's stiff resolve to avoid use of relevant information when planning its allocation  
2 responsibilities extends also to its treatment of water demand available in the Record. (L6739-L6760;  
3 L1305-L001340; B566.) By downgrading BAS to "best available" information, the DSC substituted its  
4 view of information usage for that of the DRA's mandate in developing the Plan. (WC, §85302(g);  
5 L11827.) Similarly, the DSC's standard for its agency decision-making should be neither perfect  
6 information (an impossible standard), nor "clear understanding," nor "scientific certainty," but the BAS,  
7 as mandated by the Act. (WC, §85302(g); B566.)

8 **(ii) Policy ERP1 and Recommendation ERR1 are Intentionally Crafted**  
9 **Not to Effect Changes to Delta Flows**

10 Under the heading "Create More Natural Functional Flows," Policy ERP1 (Regs., 5005) states  
11 that the SWRCB's "Bay Delta Water Quality Control Plan flow objectives shall be used to determine  
12 consistency with the Delta Plan." (B614; D62.) The DSC states "it is essential that the SWRCB  
13 complete the work to develop, implement, and enforce new updated flow requirements" for the Delta.  
14 (K4332; D62) This is contrary to the DRA. (WC, §§85086(c)(1), 85302(g), 85054.) By so doing, the  
15 DSC avoids any component in the Plan that would require or recommend anything that would impact or  
16 define future Delta flow requirements before BDCP would be included in the Plan (WC, §85320, D59,  
17 D62, M1157.)

18 Policy ERP1 and Recommendation ERR1 are part of the "existing Delta policies [that] are not  
19 sustainable" according to the Legislature (WC, §85001(a)) and are contrary to the DRA's public trust  
20 mandate. The current SWRCB flow objectives are known to be inadequate to restore Delta flows, and do  
21 not adequately protect public trust resources. (L11843) As the SWRCB itself concluded, "[t]here is  
22 sufficient scientific information to support the need for increased flows to protect public trust resources"  
23 (L11827, 11843), because "[r]ecent Delta flows [as controlled by] "existing regulatory requirements  
24 included in the 2006 Bay-Delta Plan are insufficient to support native Delta fishes for today's habitats."  
25 (L11827, L11844 & n. 3.) These existing regulatory requirements include SWRCB's Water Rights  
26 Decision 1641. (L11858) Water Code §85023 provides that "the public trust doctrine shall be the  
27 foundation of state water management policy and [is] particularly important and applicable to the  
28 Delta." The DSC has adopted Policy ERP1, contrary to the DRA.

1                                   **(iii) The DSC Failed to Take Account of How Much Water Is Available in**  
2                                   **the Delta Watershed Given That There are More Claims to Divert**  
3                                   **and Use Water Than There Is Water to Meet the Claims**

4           The Plan and its environmental review fail to account for how much water is available from  
5 actual flows in rivers and streams of the Delta watershed to address the allocation tasks the DRA directs  
6 the DSC to perform. (D60) “An agency may not escape its duty by ignoring that duty and then present  
7 the result as a *fait accompli* incorporated into an environmental baseline.” (*League to Save Lake Tahoe*  
8 *v. Tahoe Regional Planning Agency* (E.D. Cal. 2010) 739 F.Supp.2d 1260.) To demonstrate a possible  
9 approach to determining water availability in the Delta watershed, an example report was submitted to  
10 the DSC. (D4388-D4693; see D4399-D4411; over-appropriation has long been known, see D4699-  
11 D4701, D4715, D4716, D4721, D4737-D4746, D4747, D4748.) The report was based on information  
12 readily available from SWRCB and DWR, as well as information on pre-1914 and riparian water rights  
13 obtained through California Public Record Act requests. (See, e.g., D4424-27)

14           The average annual water supplies of the Sacramento and San Joaquin river watersheds between  
15 1998 and 2005 totaled approximately 35 million acre-feet (MAF), including estimates of groundwater  
16 extraction and agricultural return flows. (D6960, Table 3-1; D6971, Table 3-4.) The average combined  
17 unimpaired flow of the two watersheds is approximately 29 MAF. However, there are 153.9 MAF of  
18 legal claims to that water. (D4398-4399) As California’s water rights system is seniority-based and  
19 restrained by Area of Origin and Watershed Protection statutes, the EIR’s analysis of impacts pertaining  
20 to the Plan’s water resources is inadequate because it fails to disclose and analyze over-subscription of  
21 water and legal constraints on out-of-basin transfers of water. (D63-64) Moreover, despite access to this  
22 important information, the DSC failed to incorporate water availability into its development of the Plan  
23 and its approach to allocating reduced Delta reliance in contravention of the DRA. (WC, §85021.)

24           The water availability analysis submitted to the DSC proceeds from basic water rights premises  
25 that: (1) instream flows have top priority to meet water quality and flow objectives; and (2) when  
26 applying water rights, riparian rights are paramount, followed by (a) pre-1914 and post-1914  
27 appropriative water rights claims based on seniority date, followed by (b) any water left over being  
28 provided to junior water rights holders, in order of priority date. (D4400) This method is consistent with  
the analysis described in the DRA for BDCP. (WC, §85320(b)(2)(A).)

1 The water availability analysis summarizes total regulated period unimpaired flow, the Delta  
2 inflow contribution, and calculates a “diversion cap” within which the report applies the water rights  
3 priority system as an analytic method. (D4400; D4444-D4461; see D4687-D4690, Appendices D.1, D.2,  
4 and E) The SWRCB previously employed a similar method in the environmental impact report on its  
5 1995 Bay-Delta water quality control plan. (N392-N409) The DSC needed to perform its own water  
6 availability analysis (or rely on the analysis it was provided) to determine how much water is available  
7 to meet public trust protection requirements and still provide a reliable level of water exports.  
8 Incredibly, the DSC judged the “setting [of] numerical targets for exports and water use reduction” as  
9 “overly prescriptive and not necessary to accomplish the DRA mandate of improved water supply  
10 reliability.” (N199.) This justification unlawfully substitutes DSC judgment for legislative command,  
11 and simultaneously places one supposedly “coequal” goal (that of statewide water supply reliability)  
12 ahead of another (that of Delta ecosystem restoration). (WC, §85054.)

13 (iv) **The DSC Failed to Undertake Analysis Essential to Incorporating the**  
14 **Value of Public Trust Resources into Its Planning and Allocation**  
15 **Decisions for Reducing Reliance on the Delta for Water Supply**

16 The DSC failed to define and undertake a balancing methodology that would provide a  
17 transparent economic analysis of the value to society of each competing beneficial use of water in the  
18 Delta watershed. This is necessary because, as the *Audubon* court stated, “In exercising its sovereign  
19 power to allocate water resources in the public interest, the state is not confined by past allocation  
20 decisions which may be incorrect in light of current knowledge or inconsistent with current needs.” (33  
21 Cal 3d 419, 447.) Moreover, “[t]he state accordingly has the power to reconsider allocation decisions  
22 even though those decisions were made after due consideration of their effect on the public trust. [] The  
23 case for reconsidering a particular decision, however, is even stronger when that decision failed to weigh  
24 and consider public trust uses.” (*Id.*) Moreover, “[n]o vested rights bar such reconsideration....Such  
25 concerns must enter into any allocation decision. We hold only that they do not preclude a  
26 reconsideration and reallocation which also takes into account the impact of water diversion on [public  
27 trust resources]. (*Id.*)

28 For allocation and reallocation decisions applied to the Delta’s water and fish, the state of  
California “can look to its own history for guidance on balancing its public-trust obligation to protect

1 Bay-Delta flows with the demands from other beneficial uses, and the role that economic information  
2 can play in the deliberations.” (D4776.) Under the 2009 DRA, analytical factors relevant to the DSC’s  
3 planning and allocation decisions include, but are not necessarily limited to, “[c]onduct[ing] economic  
4 analyses in the context of the biophysical requirements of the ecological uses of public-trust resources”;  
5 “[a]ccount[ing] for all relevant economic, legal, and other forces and trends”; “[c]onsider[ing] likely  
6 mitigating circumstances”; and “[a]ccount[ing] fully for both values reflected in market prices and  
7 values that are not.” (D4777-D4778.)

8 The Delta Protection Commission’s “economic sustainability plan” (PRC, §29759(a)), also was  
9 available to “inform the DSC’s policies regarding the socioeconomic sustainability of the Delta region.”  
10 The ESP contains much useful information that would help form a baseline of data for the public trust-  
11 related assessment of resources and human economic sectors in the Delta region. (See generally,  
12 L28298) The DSC, however, only cited and used the ESP in descriptive narration only in Chapter 5 of  
13 the Plan concerning the Delta as an evolving place. (B657, see Table 5-3, B668) Despite its clear  
14 relevance, it was not cited in Delta Plan chapters on water reliability, ecosystem restoration, or water  
15 quality, even though the sustainability of the Delta economy inheres in the coequal goals of the Act.  
16 (WC, §85020(a-g).)

### 17 **3. Public Trust Conclusion**

18 From the beginning, the DSC failed to define what it believes to be the “coequal goals” of the  
19 Plan, nor established quantifiable goals, or measurements for achieving the goals of the Plan. Instead,  
20 the Plan only recommends, and the EIR only evaluates, proposals that continue to violate existing  
21 environmental laws. The EIR utterly fails to adequately analyze, discuss, disclose or compare defensible  
22 and quantifiable goals, yardsticks and mileposts for achieving the coequal goals and their effects on  
23 various alternatives. The EIR merely proposes and analyzes a Plan that perpetuates an unsustainable  
24 status quo. Further, the DSC declined to conduct a water quality analysis to evaluate the impacts to  
25 pollutant concentration and residence time from diverting additional dilution flows around an already  
26 degraded estuary. Central Valley waterways are polluted despite more than forty years of laws  
27 prohibiting pollution, as the Legislature was well aware when it drafted the DRA. Yet the Plan and the  
28 EIR assumes that agencies that have failed to prevent pollution will, somehow, in the future prevent

1 pollution by implementing programs that failed to prevent pollution, even at the same time as the DSC  
2 acknowledged that the SWRCB was not going to get the job done. (M1518)

3 The Plan and EIR, however, cannot assume, given this historical record, that continuation of  
4 programs that have failed to prevent pollution will, in fact, improve water quality. The Plan and EIR are  
5 inadequate because they failed to acknowledge, and adequately analyze, discuss and disclose how a  
6 continuation of existing and largely failed programs will produce different outcomes in the future and  
7 how continued pollution will affect various analyzed alternatives. The over-appropriation of waters from  
8 the Delta watershed has been long known and amply documented, and there can be no justification for  
9 not providing decision makers with this crucial information. Under the DRA and the Public Trust  
10 Doctrine, such information was fundamental for the DSC to make reasoned choices regarding water  
11 supply reliability and Delta restoration.

### 12 **C. THE DELTA PLAN PEIR DOES NOT COMPLY WITH CEQA**

13 The Delta Plan encourages and plans for construction and operation of new water supply  
14 projects, including new water diversions beginning in the northern Delta and tunneling under the Delta  
15 to transport water to the south proposed by the BDCP. The Delta Plan forecloses alternatives that would  
16 not require new conveyance and/or would increase Delta flows by reducing exports. The FEIR,  
17 however, fails to properly analyze the impacts from implementing the Plan and Regulations.  
18 Specifically, it fails to establish an adequate “baseline”, improperly defers and segments environmental  
19 analysis, and fails to provide the accurate, stable, and finite description of the project, which includes the  
20 BDCP Water Tunnels. As a result of the failure to properly define the project, the EIR also cannot  
21 properly analyze the impacts of implementing the Delta Plan, including the project’s cumulative  
22 impacts, and fails to formulate adequate mitigation. The EIR also fails to develop or consider the  
23 required range of reasonable alternatives to avoid or minimize, the project’s impacts on the environment.

#### 24 **1. The EIR Established an Inadequate and Inaccurate Baseline**

25 The EIR’s formulation of baseline environmental conditions is fundamentally flawed and  
26 deceptive because it fails to provide accurate information regarding existing surface water and  
27 groundwater supply and demand. (See D4857 (concerns with the EIR’s flawed baseline)) Additionally,  
28 the EIR falsely cites ongoing unsustainable and illegal Delta water exports to establish a baseline for

1 future exports. (D6793) The vague and inaccurate environmental baseline established in the EIR violates  
2 CEQA and makes any analysis of the Plan’s impacts impossible. The EIR’s omission of the required  
3 information in its baseline analysis violates the foundational CEQA mandate for informed decision-  
4 making. (*California Native Plant Society, supra*, 177 Cal.App.4th at 987.)

5 Existing physical conditions in the vicinity of a project “normally” serve as the “baseline” for  
6 determining the significance of the project’s environmental impacts – that is, the set of conditions  
7 against which the scope and severity of the project’s effects are compared. (Cal. Code Regs., tit. 14,  
8 §§15000 et seq. (“Guidelines”), §15125(a); *Communities for a Better Environment v. South Coast Air*  
9 *Quality Management District* (2010) 48 Cal.4th 310, 315 (*CBE SCAQMD*).) If an “EIR does not  
10 adequately apprise all interested parties of the true scope of the project for intelligent weighing of the  
11 environmental consequences of the project, informed decision-making cannot occur under CEQA and  
12 the final EIR is inadequate as a matter of law.” (*CBE Richmond, supra*, 184 Cal.4th at 82-83, (citation  
13 omitted).) An adequate baseline thus serves the “fundamental goal” of an EIR: “to inform decision  
14 makers and the public of any significant adverse effects.” (*Neighbors for Smart Rail v. Exposition Metro*  
15 *Line Construction Authority* (2013) 57 Cal.4th 439, 447 (*Neighbors*); *County of Amador v. El Dorado*  
16 *County Water Agency* (1999) 76 Cal.App.4th 931, 953 (*County of Amador*) (without an “adequate  
17 baseline description ... analysis of impacts, mitigation measures and project alternatives becomes  
18 impossible”).) Similar to CEQA, the DRA mandates that “quantified baseline volume, quality, and  
19 timing of water necessary for the Delta ecosystem under different conditions” inform decision-making  
20 for the Delta Plan. (WC, §85086(c)(1).) The DRA also mandates “quantified or otherwise measurable  
21 targets associated with achieving the objectives of the Delta Plan.” (WC, §85308(a)-(b).)

22 An adequate baseline is one against which predicted effects can be described and quantified.  
23 (*Neighbors, supra*, 57 Cal.4th, at 447 (citing *CBE SCAQMD, supra*, 48 Cal.4th, at 315); *County of*  
24 *Amador, supra*, 76 Cal.App.4th at 955 (“An adequate EIR requires more than raw data; it requires also  
25 an analysis that will provide decision makers with sufficient information to make intelligent  
26 decisions.”)) The Delta Plan EIR, however, erred in failing to include a quantified analysis of the  
27 availability of water flowing into the Delta and the demand for that water. (D6949-6950) According to  
28 the EIR, annual Delta exports vary from 3 to 6.5 MAF. (D6955) However, without detailed information

1 on flows in and out of the Delta (after consumptive use is calculated), the EIR fails to provide sufficient  
2 information to allow agencies and the public to assess the impacts of implementing the Delta Plan on  
3 exports in a quantified manner. (*Neighbors, supra*, 57 Cal.4th at 447) (“an EIR must delineate  
4 environmental conditions prevailing absent the project, defining a “baseline” against which predicted  
5 effects can be described and quantified,” citing *CBE SCAQMD, supra*, 48 Cal.4th, at 315).)

6 The Water Resources chapter of the RDEIR provides at best a qualitative summary of various  
7 hydrological conditions, water resources and water uses for various watersheds within the Delta and  
8 those outside of the Delta that import Delta water. (D6941, D6943-6971; D6005) This qualitative  
9 assessment, however, fails to holistically recognize the critical importance of Delta water flow to the  
10 health of the ecosystem (G2112.024 (influence of flow on ecosystem); M242.002 (DISB Lead Scientist  
11 explaining that restoring more natural flow regime is critical goal for Delta ecosystem restoration)).  
12 Though it was possible to conduct an analysis of water availability and disclose that information as part  
13 of baseline conditions (see D4399-4693 (example water availability analysis)), the DSC deferred the  
14 development of water availability analysis to the SWRCB. (B451, ER P1, WR R18; B448, WR R5,  
15 B450, WR R15) Thus, the EIR fails to provide the public with a basic analysis of how much Delta water  
16 is available for various uses. (*County of Amador, supra*, 76 Cal.App.4th at 955 (baseline for water  
17 diversion project was actually existing stream flows, not minimum stream flows set by federal license).)

18 The EIR also fails to discuss over-allocated water entitlements that create unrealistic demands  
19 for Delta water, or “paper water.” In fact, the SWP only supplies approximately half of the entitlements  
20 of 4.23 MAF of water per year. (*PCL v. DWR* (2000) 83 Cal.App.4th 892, 908.) The California courts  
21 have criticized paper water, recognizing the “huge gap between what is promised and what can be  
22 delivered.” (*PCL v. DWR, supra*, 83 Cal.App.4th at 903 (“‘Entitlements’ is a misnomer, for contractors  
23 surely cannot be entitled to water nature refuses to provide or the body politic refuses to harvest, store  
24 and deliver”)).)

25 The Delta Plan acknowledges that “[e]xisting configurations of Delta water conveyance and  
26 associated conveyance facilities do not provide adequate long-term reliability to meet current and  
27 projected water demands for SWP and CVP water exports from the Delta watershed (DWR 2009).”  
28 (B555) However, the EIR avoids addressing the paper water issue in favor of more cursory treatment,

1 referring to the failure to construct a peripheral canal in 1982 and passage of federal and State laws to  
2 protect wild rivers has resulted in water supply shortages such that “full amount of water originally  
3 envisioned when the SWP was planned is no longer visible.” (D6797) Similarly, the EIR states that the  
4 CVP and SWP’s ability to convey water from the Delta is further reduced by the capacity of conveyance  
5 and storage facilities in areas outside of the Delta that use Delta water. (D6955) The EIR also notes that  
6 continued reliability of CVP and SWP water supplies in the Delta has been reduced over the past 20  
7 years through the implementation water quality objectives, water rights decisions, and biological  
8 opinions. (D6955)

9         The EIR fails to provide information that allows DSC and the public to quantify the difference  
10 between Delta water supply and demand, which is part of baseline conditions, and therefore necessary to  
11 assess the impacts of implementing the Delta Plan. The exact quantification of the gap between supply  
12 and demand is necessary in order for DSC to make informed decision-making that evaluate all actions  
13 that could be taken in order to meet the co-equal goals. Only through quantifying water supply,  
14 entitlements, and demand would DSC and the public be able to realistically assess the environmental  
15 impacts of the Delta Plan’s approach to water reliability, whereby it is expected that “[w]ater exported  
16 from the Delta will more closely match water supplies available to be exported . . .” (B531, B571),  
17 while providing the fullest possible protection for the Delta ecosystem.

18         The EIR’s failure to include realistic water supply data in its environmental baseline is  
19 prejudicial because it undermines the statutory goals of an EIR to inform decision makers and the public  
20 of potentially significant adverse effects on the physical environment. (See *Neighbors, supra*, 57 Cal.  
21 4th at 516 (citing *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712 (*Kings*  
22 *County*)).) The vague and cursory water supply and demand conditions as described by the EIR without  
23 support by quantitative data does not provide sufficient baseline information that would allow DSC or  
24 the public to evaluate significant adverse water resources and biological impacts (among others) the Plan  
25 will have on the environment. (Guidelines, §15125(a); *CBE SCAQMD, supra*, 48 Cal.App.4th, at 315.)

## 26         **2. The EIR Failed to Include an Accurate, Stable and Finite Project Description**

27         According to the EIR, the Delta Plan furthers achievement of the coequal goals through five  
28 types of projects that the Delta Plan encourages other agencies to undertake: (1) reliable water supply;

1 (2) Delta ecosystem restoration; (3) protection and enhancement of the Delta as an evolving place; (4)  
2 water quality improvement; and (5) flood risk reduction. (D5900, D5978) These broad concepts are  
3 implemented through the Policies, Recommendations, and Regulations discussed *ante* in section IV.A.  
4 (See also Table 1.) The EIR’s approach was to analyze a broad range of types of projects that could be  
5 encouraged by these aspects of the Plan. (D6002) While it may have been appropriate to take such a  
6 broad brush approach to expected environmental effects from implementation of certain Policies,  
7 Recommendations and Regulations, the EIR’s approach to analysis of impacts from implementation of  
8 BDCP was entirely inadequate.

9 By the time the Delta Plan Draft EIR (D6711) was issued on November 4, 2011, it was already  
10 anticipated that the BDCP would include actions to “modify SWP and CVP Delta water conveyance  
11 facilities and operations in the Delta . . . .” (D8189) At that time, it was anticipated that “a public draft of  
12 the BDCP and the related EIR/EIS is planned for release by mid-2012.” (D8190) The Draft EIR claimed  
13 that “At this time, the agencies pursuing BDCP are best positioned to develop and evaluate possible  
14 options and decide on the best Delta conveyance concept.” (D8192) The Draft EIR claimed that “the  
15 final features of the BDCP process are not defined, and the BDCP EIR/EIS is not complete. Therefore, it  
16 is not possible to fully predict the cumulative impacts of the BDCP in combination with implementation  
17 of the Delta Plan.” (D8216)

18 Adequate information regarding BDCP and its potential impacts on the environment, however,  
19 was available to the DSC throughout the environmental review of the Delta Plan. Specifically, DSC had  
20 access to reliable information that the BDCP planned divert up to 15,000 cfs of water from the Delta,  
21 and that the Resources Agency maintained that “a conveyance capacity ranging in size from 12,000 to  
22 15,000 cfs would best accommodate the dual objectives” of the Delta Reform Act. (J128784, J128822-  
23 23 (2010 BDCP Highlights), K12698) In July 2012, the Governor and the DWR Deputy Director  
24 described the BDCP project as consisting of two 33 foot diameter tunnels 35 miles long with the  
25 capacity to convey 15,000 cfs of water under the Delta to the pumping plants at the south end of the  
26 Delta. (D4899) The location of the upstream diversion would be near Clarksburg on the Sacramento  
27 River. (K12662, K12664)

1 The RDEIR released for public review four months later in November 2012, however, continued  
2 to define the project by a vague and misleading reference to plans to encourage “conveyance facilities  
3 (pipelines and pumping plants)” as if there was still some question as to what those projects entailed.  
4 (D5981) The RDEIR misrepresented that “the severity and extent of project-specific impacts on the  
5 physical environment would depend on the type of action or project being evaluated, it’s specific  
6 location, its size, and a variety of project-and site-specific factors that are undefined at the time of  
7 preparation of this program-level study.” (D6002) In fact, the location and size of the new conveyance  
8 project – the BDCP Water Tunnels – had been announced by the Governor four months earlier.  
9 Moreover, by March 2013, prior to the certification of the FEIR in May, Administrative Drafts of the  
10 BDCP Plan had been released showing more specific details about the project including placement of  
11 three intakes for the Water Tunnels “between River miles 37 and 41 (near Clarksburg).” (K12662,  
12 K12664, K12698) Contrary to the misrepresentations and deception in the RDEIR and FEIR, size and  
13 location of the new conveyance were known when the DSC approved the Delta Plan and certified the  
14 EIR.

15 CEQA requires that “an agency must use its best efforts to find out and disclose all that it  
16 reasonably can” about the project being considered and its environmental impacts.” (*Vineyard Area*  
17 *Citizens v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 428 (*Vineyard*)). “CEQA requires full  
18 environmental disclosure.” (*CBE Richmond, supra*, 184 Cal.4th at 88.) A primary goal of CEQA is  
19 “transparency in environmental decision-making.” (*Save Tara v. City of West Hollywood* (2008) 45  
20 Cal.4th 116, 136.) Specifically, “An accurate, stable and finite project description is the *sine qua non*  
21 [absolutely indispensable requirement] of an informative and legally sufficient EIR.” (*San Joaquin*  
22 *Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 655 (project description  
23 unstable and misleading statements that no increases in production were being sought).) “However, a  
24 curtailed, enigmatic or unstable project description draws a red herring across the path of public input.”  
25 (*Ibid.*). “Only through an accurate view of the project may the public and interested parties and public  
26 agencies balance the proposed project’s benefits against its environmental cost, consider appropriate  
27 mitigation measures, assess the advantages of terminating the proposal and properly weigh other  
28

1 alternatives.” (*Ibid.*, citations and internal quotation marks deleted; *accord, CBE Richmond, supra*, 184  
2 Cal.4th 83-86.)

3 Under CEQA a “project” is defined as “the whole of an action, which has a potential for  
4 resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect  
5 physical change in the environment. . . .’ Guidelines, §15378, subd. (a). . .” (*Tuolumne County Citizens*  
6 *for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1222.) Moreover, “The  
7 term project refers to the activity which is being approved and which may be subject to several  
8 discretionary approvals by governmental agencies. The term project does not mean each separate  
9 governmental approval.” (*Ibid.*, internal quotation marks deleted.)

10 Here, it would be difficult to construct a closer relationship than that of the BDCP Water Tunnels  
11 and the Delta Plan. The specific location, size, and a variety of the Delta Water Tunnels factors had  
12 already been described in the BDCP process by DWR and others.<sup>17</sup> (D4853, D4899; K12662, K12664;  
13 J128784, J128822-23) For instance, the chair of the DSC presented testimony to the Legislature  
14 regarding the BDCP and the Delta Plan. (F300 (March 20112) and commented extensively on  
15 administrative drafts of the BDCP as a responsible agency (see, e.g., N314, N317, N327). Pursuant to  
16 the 2009 DRA, the BDCP Plan must be considered for inclusion in the Delta Plan (WC, §85320(a)), and  
17 it was the DSC’s position that it had no discretion over the inclusion of the BDCP in the Plan if certain  
18 conditions precedent were met (B507, B1156 (DSC Role Regarding Conveyance)).

19 Thus, the DSC failed to provide an “accurate, stable, and finite” description of the project, by  
20 improperly excluding the BDCP Tunnels from the project under review. Despite the DSC’s claims to the  
21 contrary, the size and location of the improved, meaning new, conveyance was known and had been  
22 publicly announced by DWR and the Governor. The vague description of encouraging “implementation  
23 of actions or development of projects, including construction and operations of facilities or  
24 infrastructure” (D5887, D5981) misled the public into believing that there was some uncertainty about  
25 what conveyance projects were being pursued. Contrary to the excuses offered by the DSC, information  
26 was readily available from the BDCP process allowing the quantification of water to be diverted and  
27

28 <sup>17</sup> Similarly, the DSC promoted very specific habitat projects under BDCP. (D6539-6540 (listing  
Delta Plan policies and recommendations that “address concepts similar to BDCP”))

1 analysis of the resulting environmental consequences of the diversions as part of the Delta Plan project  
2 analyzed in the EIR. (D4853, 4899; K12662, 12664; J128784, 128822-23) Moreover, the DSC chose to  
3 actively recommend completion of the BDCP as a means to promote water supply reliability in WRR12.  
4 (B449) By failing to provide the required accurate, stable, and finite project description, the DSC failed  
5 to proceed in the manner required by law.

6 **3. The DSC Unlawfully Segmented and Deferred Environmental Analysis of the Most**  
7 **Likely Conveyance Project – the BDCP**

8 The RDEIR attempted to justify the absence of environmental analysis of the Revised Project by  
9 distancing the probable effects of implementing the Delta Plan:

10 . . . the Revised Project would not directly result in construction or operation of projects  
11 or facilities, and therefore would result in no direct impacts on many resources. The  
12 Revised Project could, however, result in or encourage implementation of actions or  
13 development of projects, including construction and operations of facilities or  
14 infrastructure. The severity and extent of project-specific impacts on the physical  
15 environment would depend on the type of action or project being evaluated, its specific  
16 location, its size, and a variety of project-and site-specific factors that are undefined at the  
17 time of preparation of this program-level study. Project-specific impacts would be  
18 addressed in project-specific environmental studies conducted by the lead agency at the  
19 time the projects are proposed for implementation.

20 (D6002)

21 The DSC, however, is a responsible agency for the BDCP EIR and has been consulting with  
22 DWR during the development of the BDCP. (D59)<sup>18</sup> According to the FEIR, “. . . the Council has  
23 determined that the BDCP agencies are in the best position to complete the planning process, including  
24 defining acceptable ranges of exports and through-Delta flows. Accordingly, the PEIR does not evaluate  
25 the potential environmental consequences of various BDCP options that DWR may be considering.”

26 (D59)

27 The FEIR thus denied that “both the Delta Plan and the PEIR must include quantitative measures  
28 of the Plan’s effect on the environment.” (D7, 71) According to the FEIR, “There is no basis on which to  
provide additional, project-specific analyses as suggested by commenters, including quantification of

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<sup>18</sup> See F19 (BDCP Progress Report); F27 (update from Chair regarding incoming information regarding conveyance sizing); F90 (re: DSC’s responsibilities in BDCP and acceptance into Delta Plan); F104 (BDCP update); F137 (presentation, intent to release end of year document providing key elements of the plan); F270 (update on BDCP and major impacts to Delta and EIR/EIS schedule); F179 (update re: development of alternatives for conveyance and BDCP progress report); see also *ante* fn. 10.

1 changes in the amount of water supply available from the Delta. . .” (D71) DSC claims that “Without  
2 specific details of future projects, it is not possible for the [DSC] to develop quantitative thresholds of  
3 significance, conduct site-specific quantitative analyses, and design site-specific mitigation measures.”  
4 (D2461)

5 Based on this approach, the FEIR stated that it did “not evaluate the potential environmental  
6 consequences of various BDCP options that DWR may be considering.” (D59). In responding to  
7 comments, the DSC denied that its EIR “must include quantitative measures of the Plan’s effect on the  
8 environment” and that it could provide “additional, project-specific analyses as suggested by  
9 commenters, including quantification of changes in the amount of water supply available from the  
10 Delta.” (D71).

11 The DSC’s approach is without merit. The DSC segmented and deferred environmental analysis  
12 of the new conveyance to the ongoing and future BDCP process. (D8192; D6002; D2461) An “EIR  
13 must include an analysis of the environmental effects of future expansion or other action if it: (1) is a  
14 reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be  
15 significant in that it will likely change the scope or nature of the initial project or its environmental  
16 effects.” (*Laurel Heights Improvement Association of San Francisco, Inc. v. Regents of University of*  
17 *California* (1988) 47 Cal.3d 376, 396 (*Laurel Heights*)). “When a specific project contemplates future  
18 expansion, the lead agency is required to review all phases of the project before it is undertaken.”  
19 (*Natural Resources Defense Council, Inc. v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 282.)

20 In *Laurel Heights*, the court, citing Guidelines §15004(b), noted that “EIRs should be prepared  
21 as early in the planning process as possible to enable environmental considerations to influence project,  
22 program or design.” (47 Cal.3d at 395, internal quotation marks omitted.) The court explained that “the  
23 later the environmental review process begins, the more bureaucratic and financial momentum there is  
24 behind a proposed project, thus providing a strong incentive to ignore environmental concerns that could  
25 be dealt with more easily at an early stage of the project.” (*Ibid.*) The court also explained that the  
26 standard requiring analysis of environmental effects of future expansion or other action “is consistent  
27 with the principle that ‘environmental considerations do not become submerged by chopping a large  
28

1 project into many little ones-each with a minimal potential impact on the environment-which  
2 cumulatively may have disastrous consequences.” (*Id.* at 396.)

3 The courts have explained with respect to chopping, piecemealing, and segmenting  
4 environmental review that:

5 Theoretical independence is not a good reason for segmenting environmental analysis of  
6 the two matters. Doing so runs the risk that some environmental impacts produced by the  
7 way the two matters combined or interact might not be analyzed in the separate  
8 environmental reviews. Furthermore, if the two matters are analyzed in sequence (which  
9 was a situation here) and the combined or interactive environmental effects are not fully  
10 recognized until review of the second matter, the opportunity to implement effective  
11 mitigation measures as part of the first matter may be lost.

12 (*Tuolumne County Citizens for Responsible Growth*, 155 Cal.App.4th 1214, 1230.)

13 “CEQA’s demand for meaningful information ‘is not satisfied by simply stating information will  
14 be provided in the future.’” (*Vineyard, supra*, 40 Cal.4th at 431.) In *Vineyard*, the court held that “the  
15 future water sources for a large land use project and the impacts of exploiting those sources are not the  
16 type of information that can be deferred for future analysis. An EIR evaluating a planned land use  
17 project must assume that all phases of the project will eventually be built and will need water, and must  
18 analyze, to the extent reasonably possible, the impacts of providing water to the entire proposed  
19 project.” (*Id.* at 431.) The court held that an EIR cannot attempt “in effect, to tier from a future  
20 environmental document.” (*Id.* at 440.) “An EIR that neglects to explain the likely sources of water and  
21 analyze their impacts, but leaves long-term water supply considerations to later stages of the project,  
22 does not serve the purpose of sounding an environmental alarm bell before the project has taken on  
23 overwhelming bureaucratic and financial momentum.” (*Id.* at 441, internal citations and quotation marks  
24 deleted.) The DSC had detailed water availability and quantification information available to it, but  
25 chose simply not to use it. (See *ante* section IV.B.2.b.iii.)

26 The fact that the BDCP is the subject of its own environmental review does not save the DSC  
27 from its responsibility to disclose all it reasonably can about the impacts of implementing the BDCP.  
28 Even if the BDCP was still being developed, the basic parameters of the project were known to DSC and  
should have been analyzed to the extent feasible in the EIR for the Delta Plan. Even if “a sophisticated  
technical analysis was not feasible, if some reasonable, albeit less exacting, analysis of [an impact] could

1 be performed, the [lead agency] was required to do so and report the results.” (*Citizens to Preserve the*  
2 *Ojai v. County of Ventura* (1986) 176 Cal.App.3d 421, 432 (*Ojai*.)

3 Here, the new conveyance planned for and encouraged by the Delta Plan has been described with  
4 specificity to the DSC during its preparation of the EIR. Quantification and analysis of the resulting  
5 environmental impacts should have been based on analysis of the BDCP Delta Water Tunnels. The DSC  
6 has created momentum for the Delta Water Tunnels by calling for and encouraging improved meaning  
7 new, conveyance. (B531; see also B449 (WRR12 recommending completion of the BDCP)) The  
8 parameters of the BDCP Delta Water Tunnels were known prior to issuance of the DEIR, RDEIR and  
9 the FEIR. (D4853, 4899; K12662, 12664) Consequently, the DSC failed to proceed in the manner  
10 required by law when it planned for and encouraged new conveyance in the absence of environmental  
11 analysis of the consequences of the new conveyance. (*Vineyard, supra*, 40 Cal.4th 412, 431, 440, 441.)

12 Guidelines §15004(b) states the fundamental CEQA rule that EIRs “should be prepared as early  
13 as feasible in the planning process to enable environmental considerations to influence project program  
14 and design and yet late enough to provide meaningful information for environmental assessment.”  
15 Consequently, “public agencies shall not undertake actions concerning the proposed public project that  
16 would have a significant adverse effect or limit the choice of alternatives or mitigation measures, before  
17 completion of CEQA compliance.” (Guidelines, §15004(b)(2).) As an example, “agencies shall not. . .  
18 Otherwise take any action which gives impetus to a planned or foreseeable project in a manner that  
19 forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that  
20 public project.” §15004(b)(2)(B).

21 Deferral of analysis in the context of EIR preparation is only permissible if (1) obtaining more  
22 detailed useful information is not meaningfully possible at the time of EIR preparation and (2) such  
23 information is not necessary at an earlier stage in determining whether or not to proceed with the project.  
24 (*County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern* (2005) 127 Cal.App.4th 1544,  
25 1599 (*County Sanitation*)). That other agencies have CEQA obligations pertaining to what they are or  
26 will be doing does not relieve the first agency from conducting environmental review including feasible  
27 alternatives. (127 Cal.App.4th at 1602-3.) (See also *Fullerton Joint Union High School Dist. v. State Bd.*  
28

1 *of Education* (1982) 32 Cal.3d 779, 794-797 (an essential step “culminating in action which may affect  
2 the environment” requires CEQA environmental review).)

3 In summary, the presence of a future CEQA/NEPA process for the BDCP does not absolve the  
4 DSC from its duties under CEQA to perform comprehensive and detailed environmental analysis for the  
5 Delta Plan and Regulations.

6 **4. Potential Impacts from New Conveyance and Restoration Projects Included in the**  
7 **BDCP Were Not Disclosed**

8 The RDEIR contains simple admissions of obvious and significant environmental impacts  
9 without accompanying exploration and analysis of those significant impacts. The RDEIR admits that  
10 “Operations of new water supply facilities whether . . . tunnels, . . . water intakes or diversions may create  
11 long-term changes in local mixtures of source waters within water bodies.” (D6007) “Operation of  
12 facilities within the rivers and streams upstream of the Delta or in the Delta could result in changes in  
13 salinity in the Delta by reducing Delta freshwater inflows during some periods of the year.” (D6017)  
14 The RDEIR admits that the “Revised Project” would have significant and unavoidable environmental  
15 impacts including violation of water quality standards or substantial degrading of water quality and  
16 substantial adverse effects on special status species and on fish or wildlife species and habitat and  
17 movement. (D6560; D6514 (also with respect to cumulative impacts)) Similarly, the cumulative impacts  
18 analysis for the BDCP states that the BDCP could lead to “changes in instream flow or water quality  
19 conditions” without providing further details. (D6542)

20 This cursory analysis does not, however, describe what the changes and their environmental  
21 impacts might be and/or the full consequences of those impacts. (D4853, 4906) Like the RDEIR, the  
22 CEQA Findings label certain environmental impacts as significant without exploring and analyzing the  
23 significant impacts. (C4) The Findings concede numerous substantial adverse effects likely to be caused  
24 by the construction and “operation of reliable water supply” projects that cannot be avoided and that  
25 cannot be mitigated to a “less-than-significant level” (C7) that “the Delta Plan could encourage” (C10).  
26 These admitted substantial adverse effects include: effects on “special status species” (C10), “sensitive  
27 natural communities, including wetlands and riparian habitat” (C8), “substantial degradation of visual  
28

1 qualities” (C23), “scenic vistas and scenic resources” (C24), and exposure of “sensitive receptors to  
2 substantial pollutant concentrations” (C29).

3 With respect to the effect of new conveyance in the north Delta altering flows, the DSC  
4 acknowledged that:

5 Water flow in the Delta is critically important because *flow affects the reliability of water*  
6 *supplies and the health of the Delta ecosystem.* The best available science demonstrates  
7 that *flow management is essential to restoration of the Delta ecosystem.*

8 Altered flows in the Sacramento and San Joaquin rivers and their tributaries change flows  
9 within and out of the Delta and affect salinity and sediment in the Delta. Fish and other  
10 aquatic species native to the Delta are adapted to natural flow, salinity, and sediment  
11 regimes. Current flow, salinity, and sediment regimes harm native aquatic species and  
12 encourage non-native species. *The best available science suggests that the currently*  
13 *required flow objectives within and out of the Delta are insufficient to protect the Delta*  
14 *ecosystem.*

15 (N199 (Nov. 12, 2012 Initial Statement of Reasons)) Nevertheless, information on what the significant  
16 adverse impacts are or how severe they are is absent from the RDEIR and the Findings.

17 To this end, comments on the RDEIR pointed out that:

18 Recent ‘Red Flag’ issues raised by the National Marine Fisheries Service (NMFS) and  
19 the U.S. Fish and Wildlife Service concerning the Delta Water Tunnels are many, and  
20 include as just one example ‘potential extirpation of mainstream Sacramento River  
21 populations of winter-run and spring-run Chinook salmon over the term of the permit. . .’  
22 (NMFS Progress Assessment and Remaining Issues Regarding the Administrative Draft  
23 BDCP Document, p. 12, April 4, 2013). Those species of salmon are listed endangered  
24 species under the Endangered Species Act, 16 U.S.C. §1531 et seq.

25 (K12663; K12666 (NOAA fisheries Red Flag comments on BDCP)) The Delta Plan itself conceded that  
26 “The perilous condition of salmon, Delta smelt, and other species remains a key limit on project  
27 operations.” (B586) The CEQA Findings also acknowledged cumulatively considerable impacts include:  
28 projects that “in combination with the cumulative projects, could violate water quality standards,” (C79),  
and “[t]hese cumulative biological resources impacts could be significant, and the Project could have a  
considerable contribution” (C80).

The EIR attempted to justify the absence of environmental analysis of the environmental impacts  
of new BDCP conveyance by arguing that “The severity and extent of project-specific impacts on the  
physical environment would depend on the type of action or project being evaluated, its specific  
location, its size, and a variety of project-and site-specific factors that are undefined at the time of  
preparation of this program-level study.” (D5887, D6002) However, the specific location, size, and a

1 variety of the details of the BDCP Water Tunnels had already been described in the BDCP process by  
2 DWR, as discussed above. (D4853, D4899; K12662, 12664; J128784, J128822-23)

3         Similar to conveyance, the BDCP also includes extensive plans to create specific different types  
4 of habitat in specific locations of the Delta. The Delta Plan specifically promotes the creation of those  
5 BDCP habitat projects in known locations. For instance, the map linked to Policy ERP3, which “protects  
6 opportunities to restore habitat” shows the same restoration areas as BDCP. (B452 (Policy), B481  
7 (map), J9455 (source referenced by Delta Plan map); see also J128826 (BDCP restoration priority  
8 areas)) The Ecosystem Restoration description in the Delta Plan EIR also clearly identifies that the Plan  
9 contemplates five specific restoration projects in five specific locations, yet claims that “the number and  
10 location of most potential projects that could be implemented is not known at this time.” (D6034) This  
11 argument is contradicted by very detailed specific project locations, projected acreages, and project  
12 timing identified for restoration as a part of the BDCP. (J128815-16, J128825-26, J128832) In addition,  
13 the source map for the Plan appears to come directly from this same BDCP reference document, which  
14 further includes specific target acreages for restoration. (J12883, J128835)

15         In addition to the five previously identified projects, the EIR identifies two additional restoration  
16 specific projects that it encourages, but the EIR claims that no additional environmental analysis is  
17 required by one and is silent on the other. (D6034) According to the EIR, “This recommendation does  
18 not change the number or size of encouraged restoration projects in the western Delta compared to the  
19 Proposed Project, but only the timing and priority of such projects within the western Delta.” This  
20 analysis fails to identify the specific environmental impacts associated with promoting the projects (and  
21 increasing their likelihood of completion), and by its own logic fails to identify the environmental  
22 impacts associated with accelerating the timing and priority of these projects; cumulative impacts and  
23 local environmental impacts *are* directly associated with the locations and timing of any given  
24 restoration project. This issue is acknowledged in the EIR: “The nature and severity of construction-  
25 related biological resource impacts for the projects encouraged by the Revised Project will depend on  
26 the specific location and characteristics of the projects at the time they are implemented.” (D6036)

27         Significant impacts would occur from the BDCP projects that are promoted by the Delta Plan,  
28 and yet are only generally alluded to in the EIR. (D6037) Just as the DSC had adequate information

1 regarding proposed BDCP conveyance to disclose potential impacts, the DSC also had adequate  
2 information about BDCP habitat proposals to provide the public with specific information about the  
3 environmental impacts of implementing the Delta Plan (which included the BDCP.) This evidence  
4 squarely refutes the EIR’s claim that inadequate information was available.

5 CEQA requires that each EIR shall include “[a]ll significant effects on the environment of the  
6 proposed project.” (PRC, §21000(b)(1).) “‘Significant effect on the environment’ means a substantial, or  
7 potentially substantial, adverse change in the environment.” (PRC, §21068.) Effects can be direct,  
8 indirect, or cumulative. (Guidelines, §§15358, 15355.) When “assessing the impact of a proposed  
9 project on the environment, the lead agency normally examines the ‘changes’ in existing environmental  
10 conditions in the affected area that would occur if the proposed activity is implemented.” (*San Joaquin*  
11 *Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 660; Guidelines, §15126.2(a).)

12 Before adopting the Delta Plan, the DSC was required to assess the environmental impacts  
13 resulting from the changes called for by the Plan, including those related to the BDCP, with which the  
14 Delta Plan is so inescapably intertwined. (D6539-6540 (RDEIR explaining that Delta Plan Revised  
15 Project “address[es] concepts similar to BDCP” and listing areas of overlap)). Instead of disclosing the  
16 likely impacts from these actions, the DSC elected to defer such analyses to others at a time *after* the  
17 Delta Plan was approved. Consequently, DSC and the public were not apprised of the possible  
18 environmental impacts of the Delta Plan, which included BDCP conveyance and claimed ecosystem  
19 restoration. The DSC therefore failed to proceed in the manner required by law when it promoted  
20 completion of the BDCP through a total of 16 Policies and Recommendations (D6539-6540), without at  
21 the same time including analysis in the EIR of adverse impacts associated with completion of the BDCP.  
22 (*California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 200 (*City of*  
23 *Woodland*) (“CEQA’s demand for meaningful information ‘is not satisfied by simply stating information  
24 will be provided in the future’”).)

25 This attempt to avoid disclosure of impacts runs counter to the DSC’s duty to discover, disclose,  
26 and analyze impacts in good faith, and not sweep stubborn problems “under the rug.” (*Kings County,*  
27 *supra*, 221 Cal.App.3d at 733.) A lead agency may not simply label certain impacts as significant and  
28 then find that overriding considerations warrant proceeding with the project; that approach is “backward

1 and allows the lead agency to travel the legally impermissible easy road to CEQA compliance.”  
2 (*Berkeley Keep Jets Over the Bay Com.v. Board of Port Comrs.*(2001) 91 Cal.App.4th 1344, 1371  
3 (*Berkeley*.) The EIR and the CEQA Findings conceded that implementation of the Delta Plan and the  
4 Regulations would have numerous significant adverse impacts ranging, from violation of water quality  
5 standards, conversion of agricultural land, and substantial adverse effects on special status species and  
6 their habitat. (See, e.g., C8-C60 (summarizing significant and unavoidable impacts from implementing  
7 the Delta Plan)) However, the EIR failed to analyze the degree and severity of those impacts, thereby  
8 violating CEQA.

9           **5. The EIR Fails to Properly Analyze Cumulative Impacts of Implementing the Delta**  
10           **Plan**

11           The EIR fails to properly analyze cumulative impacts of the project in that it does not sufficiently  
12 analyze the BDCP as a cumulative project and fails to properly analyze cumulative impacts regarding  
13 changing weather patterns, sea level rise, and other impacts of climate change. An EIR must discuss  
14 cumulative impacts, or the collectively significant changes in the environment resulting from the  
15 incremental impact of the project “when added to other closely related past, present, and reasonably  
16 foreseeable probable future projects.” (Guidelines, §§15355(b), 15130(a)(1).) An agency must use  
17 standards of practicality and reasonableness as well as its best efforts to fully disclose cumulative  
18 impacts of a project. (Guidelines, §§15130(b), 15144, 15151; see also *CBE Richmond, supra*, 184  
19 Cal.4th at 96; *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209,  
20 1228; *Vineyard, supra*, 40 Cal.4th at 428; *Ojai, supra*, 176 Cal.App.3d at 432 (citation omitted); *San*  
21 *Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61,  
22 81) (*San Franciscans*.) While the absence of information in an EIR is not a prejudicial abuse of  
23 discretion *per se*, it must not “minimize[] or ignore[] cumulative impacts.” (*Al Larson Boat Shop, Inc. v.*  
24 *Board of Harbor Comrs.* (1993) 18 Cal.App.4th 729, 749 (citations omitted); *Kings County, supra*, 221  
25 Cal.App.3d at 712.) Absent meaningful cumulative analysis, there would be no control of development  
26 and “piecemeal development would inevitably cause havoc in virtually every aspect of the []  
27 environment.” (*Kings County, supra*, 221 Cal.App.3d, at 720; *San Franciscans, supra*, 151 Cal.App.3d  
28 at 61.)

1                   **a)       The EIR fails to Adequately Analyze BDCP as a Cumulative Project**

2                   CEQA requires an EIR’s cumulative impact analysis to include either a list of past, present, and  
3 reasonably anticipated future projects that . . . are have produced or likely to produce” related or  
4 cumulative impacts or include a summary of projections contained in a general plan or related planning  
5 document. (Guidelines, §15130(b).) While the EIR includes the BDCP in its list of related actions,  
6 programs, and projects considered in the cumulative impact assessment (D8176), the EIR’s cumulative  
7 impact analysis regarding the BDCP fails to meet other minimum requirements.

8                   Guidelines §15130(b) requires an EIR to include “a summary of [a related project’s] expected  
9 environmental effects, with specific reference to additional information stating where such information  
10 is available.” The cumulative analysis in the EIR provides only a cursory paragraph summarizing the  
11 BDCP. (D8167) In section 23, the EIR chapter devoted to BDCP, DSC avoided discussing the BDCP’s  
12 expected cumulative environmental effects by stating that “specific details of BDCP have not been  
13 defined,” that the project does “not make recommendations for specific BDCP facilities or operations,”  
14 and that “the agencies pursuing BDCP are best positioned to develop and evaluate possible options and  
15 decide on the best Delta conveyance concept.” (D8188, D8192)

16                   Although an EIR is not required to speculate about cumulative impacts that might occur, it  
17 should include a detailed analysis of a cumulative impact when specific information or quantified data is  
18 reasonably available. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 277-78;  
19 *Kings County, supra*, Cal.App.3d at 729.) The cumulative impacts of the BDCP were far from  
20 speculative at the time the EIR was prepared. As discussed *ante* in section IV.C.2., records provided to  
21 DSC and the numerous briefings provided to DSC by the Resources Agency, DWR, and others fully  
22 demonstrate DSC was aware of specific diversion facilities, habitat restoration and other actions planned  
23 by the BDCP. (See, e.g., D4892; J128822-23; see also *ante* fn.4) This information permitted a  
24 discussion of a general range of impacts and cumulative impacts BDCP would likely produce in  
25 connection with the Delta Plan and other reasonably foreseeable projects.

26                   Yet the Delta Plan EIR systematically failed to disclose even the most basic information. For  
27 instance, the only information regarding BDCP’s impact on biological resources in the EIR’s cumulative  
28 impact analysis is that “changes in instream flow or water quality conditions” could result from

1 construction and operation of projects including the BDCP. (D8146-47; see also D6542 (similar  
2 statement in EIR section 23 on BDCP)) The EIR fails to discuss how biological resources would be  
3 impacted by these “changes” or, more accurately, flow reductions that likely will result from  
4 implementing the new BDCP diversions, for instance. (D6452; B571; D4904; J128822-23) With the  
5 Delta Plan explicitly promoting a project that would remove close to half of the flow of the entire  
6 Sacramento River (J128819 (BDCP operations criteria)), “changes in instream flow” ought to have been  
7 elaborated upon for purposes of full disclosure.

8 In addition, the EIR barely acknowledges that BDCP-related ecosystem restoration activities  
9 “could involve the conversion of farmland to accommodate ecosystem restoration or enhancement or  
10 Delta conveyance,” and claims these effects “could be temporary . . . which would not be a significant  
11 impact, or permanent.” (D6544) But BDCP will require 113,000 or more acres of land, most of which is  
12 currently in active farming, for purposes of creating new habitat, including replacement of various types  
13 of habitat that will be destroyed by construction of the Tunnels as well as flooding of upland habitat  
14 areas for purposes of creating water-based habitat types. (D8198, D8209; J128825) DSC indicates that  
15 such large-scale land conversion is insignificant without providing further analysis. (D8218) The EIR  
16 fails to provide a summary of the BDCP’s expected cumulative effects in a reasonable and good faith  
17 manner since specific details regarding the BDCP actions were available (I9495-9538 (showing land  
18 acquisition cost estimates for each of the BDCP conservation measures); see also *ante* fn. 4), yet the  
19 impacts of those actions were not disclosed in the EIR. (*San Joaquin Raptor/Wildlife Rescue Center v.*  
20 *County of Stanislaus* (1994) 27 Cal.App.4th 713, 733 (failure to note loss of prime farmland resulting  
21 from required sewer expansion led to an insufficient analysis of the combined environmental effects of  
22 the proposed development).)

23 Second, Guidelines §15130(b) requires that the discussion of cumulative impacts shall reflect the  
24 severity of the impact from the projects and their likelihood of occurrence. However, the scant level of  
25 detail the EIR’s cumulative impacts analysis disclosed regarding the BDCP does not correspond with the  
26 many significant impacts that will result from the BDCP, which the Delta Plan fully encourages in  
27 WRR12 and elsewhere in the Plan. (D8188, 8216-8223; D6539, 6541-6538) DSC even agrees that “the  
28 EIR does not evaluate the potential environmental consequences of various BDCP options that DWR

1 may be considering.” (D0045, 0059) Yet the analysis within the EIR scarcely mentions the cumulative  
2 effects of the project and BDCP in Section 22. (D8144, 8167) Instead, the EIR relegates details  
3 regarding BDCP to its own chapter (D6539, D8188; Section 23) that *still* contains no discussion of  
4 cumulative impacts of the Delta Plan when combined with effects of the BDCP. (*Cf.* Guidelines,  
5 §§15130(a)(1), 15355(b).) The EIR also carefully ignores the likely impacts of the BDCP in other  
6 portions of the EIR. (See, e.g., D6830) By obscuring details regarding the BDCP (found throughout the  
7 Record) and understating the cumulative impacts of the Delta Plan and the BDCP, the EIR skews the  
8 cumulative impact analysis in a manner that underestimates the full consequences of implementing the  
9 Delta Plan. (*Ojai, supra*, 176 Cal.App.3d at 431.)

10                   **b)       The EIR Fails to Properly Analyze Cumulative Impacts Related to Climate**  
11                   **Change, Water Resources, and Sea Level Rise**

12                   An EIR must assess direct and indirect environmental effects of a project to ensure the long-term  
13 protection of the environment. (CEQA Guidelines §§15065(a)(4), 15126.2; PRC, §21001(d).) As noted  
14 by the U.S. Supreme Court, “[t]he harms associated with climate change are serious and well  
15 recognized.” (*Massachusetts v. Environmental Protection Agency* (2007) 549 U.S. 497, 521.) The State  
16 of California, in passing AB 32, the Global Warming Solutions Act of 2006, declared that “[g]lobal  
17 warming poses a serious threat to the economic well-being, public health, natural resources, and the  
18 environment of California.” (Health & Saf. Code, §38501.) Climate change impacts fit squarely within a  
19 cumulative impacts analysis. (*Ctr. for Biological Diversity v. Nat. Highway Traffic Safety Admin.* (9th  
20 Cir. 2008) 538 F.3d 1172, 1217.) However, the EIR and the Findings do not adequately address the  
21 Delta Plan’s impacts on climate change. In particular, the EIR fails to analyze impacts of cumulative  
22 projects on water resources in the context of sea level rise and changes in weather patterns.

23                   The Delta Plan proposes potentially massive shifts in water resources that will be exacerbated by  
24 climate change impacts such including rising sea levels as well as changes in precipitation and patterns.  
25 (C0004, 0085-88; D8144, 8163; D6513, 6535) The Notice of Preparation (“NOP”) for the EIR states  
26 that the EIR will analyze how the project will result in potential changes in “flow patterns, volume, and  
27 erosion potential that could increase flood risks [and alter] surface water resources,” by assuming  
28 existing sea level and hydrological conditions *and* “a range of future conditions due to sea level rise and

1 changes in storm patterns . . . that would affect water supplies and flow patterns.” (D0982, D9113) The  
2 EIR also recognizes that “the most significant impacts of global warming have been changes to the  
3 water cycle and sea level rise.” (D8100, 8103)

4 However, the EIR fails to adequately address the project’s cumulative impacts could have on  
5 water resources against existing or future sea level and hydrological conditions. Nowhere in Section 21  
6 on climate change (D6483) or Section 22 on cumulative impacts (D6513) does the EIR address  
7 cumulative impacts based on quantified changes and a range of future conditions in sea level rise and  
8 storm patterns as promised in the NOP. The EIR also fails to adequately assess the impacts of sea level  
9 rise on the project as the specified in the NOP. The cursory sentence the EIR that discusses potential  
10 impacts on various projects due to changes in rainfall patterns does not adequately inform decision-  
11 makers or the public about these impacts. (D8144, 8163; D6513, 6535)

12 To the minimal extent the EIR does discuss sea level impacts on water resources, it relies on  
13 different assumptions than the Delta Plan. (D8100, 8107, 8116; D6513, 6535) The Delta Plan relies on  
14 planning for flood protection in anticipation of 55 inches of sea level rise by 2100. (B483) Yet the EIR  
15 assesses the impacts of sea level rise on water resource up to 2030, assuming sea level will increase 7  
16 inches on average. (D8107, 8116) The EIR fails to provide any explanation regarding why it analyzes a  
17 7-inch scenario for sea level rise, while the Delta Plan relies on a 55-inch scenario.

18 The failure of the EIR to adequately analyze potential climate change effects on Delta hydrology  
19 makes it impossible for the public and the decision-makers to evaluate the alternatives, the mitigations,  
20 and the true nature of the environmental impacts of the proposed Delta Plan, all of which are violations  
21 of CEQA’s fair disclosure requirements to afford the fullest possible protection of the environment.  
22 (CEQA Guidelines §21001(a); *Kings County, supra*, 211 Cal.App.3d, at 720; *Friends of the Eel River v.*  
23 *Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 868 (*Friends of the Eel River*); *Ojai, supra*,  
24 176 Cal.App.3d, p.432; *San Franciscans, supra*, 151 Cal.App.3d, at 81.) The EIR’s deficient cumulative  
25 impacts section has led to an incomplete EIR that skews DSC and the public’s decision-making process  
26 and must be returned to DSC for re-drafting. (*Madera Oversight Coalition, Inc. v. County of Madera*  
27 (2011) 199 Cal.App.4th 48.)  
28

1           **6.       The DSC Failed to Develop and Consider a Range of Reasonable Alternatives**

2           Brief DSC descriptions of the five project alternatives are found in the Findings (C4, 86-93 and  
3 RDEIR Executive Summary (D5887, 5902-5908) and RDEIR Section 25, comparison of alternatives  
4 (D6569-6586) According to the DSC, Alternatives 1A , called for by water exporters and 1B called for  
5 by an agriculture/urban coalition would both result in exporting more water out of the Delta. (Findings  
6 C4, C88-89) Alternative 2 discussed in more detail below, would reduce exports in order to increase  
7 flows to protect the Delta. (D5887, 5908; C4, 90-91) According to the DSC, Alternative 3, called for by  
8 Delta water users, would also reduce water exports but would do less than the Delta Plan to arrest or  
9 reverse the ongoing decline in Delta environmental conditions. (C 94-95) The Delta Plan Alternative  
10 includes policies and recommendations discussed in the DRA portions of this brief. The DSC claims the  
11 Delta Plan (C92-93) to be the environmentally superior alternative by being more clear and specific than  
12 the earlier Proposed Project Alternative (described C90-91) as well as being superior to the other  
13 alternatives. The DSC rejected the CEQA required No Project Alternative as being infeasible “as the  
14 Delta Reform Act requires adoption of a Delta Plan” as well as being claimed to be inferior. (C92)

15           First, other than Alternative 2 which would increase Delta flows by reducing exports, the  
16 alternatives appear vague to the point of being almost indescribable. Second, the DSC Finding that “The  
17 Proposed Project Alternative would result in export of roughly the same amount of water from the Delta  
18 and its watershed, as the Delta Plan” (C87) is baffling. As shown in earlier portions of this brief, the  
19 DSC has done no quantification so that it is not possible to understand from reading the Delta Plan,  
20 Regulations, and EIR how much water would be exported under either of those alternatives. The only  
21 thing we know is that by calling for improved, meaning new Delta conveyance, the Delta Plan is a step  
22 toward increasing the capacity to export even more water from the Delta and do so without letting the  
23 water first flow through the Delta as it does now. Thus the Delta Plan Alternative seems calculated to  
24 worsen rather than improve the current state of Delta water quality and quantity. Third, given the DSC  
25 conclusion that Alternative 2 would “sharply reduce exports from the Delta” and thus overall “is slightly  
26 environmentally inferior to the Revised Project [the Delta Plan] primarily because of its impacts on  
27 water supply reliability” (RDEIR D5908), the failure to develop and consider a range of reasonable  
28

1 alternatives reducing exports “less sharply” than called for by Alternative 2, discussed below, is  
2 incomprehensible.

3 The RDEIR (D5887) explains that EIR Alternative 2, “Decreased Export of Water from the  
4 Delta” was informed by proposals from environmental organizations led by the EWC. (D6572) It  
5 involves decreased water exports from the Delta as well as other features. (*Id.*) The RDEIR admits that  
6 “Overall, Alternative 2 would have less water quality impacts than the Revised Project, because it  
7 involves fewer facilities and less diversions of water from the Delta and Delta watershed.” (D6574) In  
8 addition, “Alternative 2 would contribute more to improving conditions for biological resources and  
9 arresting ecosystem decline than the Revised Project.” (D6575) Alternative 2 would be  
10 “environmentally superior to the Revised Project” with respect to impacts on Delta waters. (D6586)

11 The RDEIR concludes that “Alternative 2 is slightly environmentally inferior to the Revised  
12 Project primarily because of its impacts on water supply reliability.” (D5908; see also C4, 94  
13 (“Alternative 2 would do more than the Delta Plan toward the reversal of ecosystem decline within the  
14 Delta, but would do so at the cost of . . . [achieving] project objectives and coequal goals . . . .”) The  
15 DSC ignored this comment, explaining that continued irrigation of impaired lands in the San Luis Unit  
16 would have to cease eventually in any event. (D4919)

17 The DSC “has found that some of the impacts of the Delta Plan remain significant following  
18 adoption and implementation of mitigation measures described in the EIR and Incorporated into the  
19 Project.” (C98) Because of those findings, the DSC had to adopt a “Statement of Overriding  
20 Considerations” and claimed that having balanced the benefits of the Project against its significant and  
21 unavoidable environmental impacts; the benefits outweighed its unavoidable adverse environmental  
22 effects. (C98)

23 Comments on the EIR specifically proposed two new alternatives creating a range of reasonable  
24 alternatives in addition to Alternative 2. Alternative 2A would not make a decision on whether to call for  
25 new conveyance until after “determination of such fundamental issues as water supply availability and  
26 the environmental impacts of supplying the water under CEQA.” (K10780, 10782) Alternative 2B called  
27 for developing a range of export reductions less severe than called for by Alternative 2. (K10780,  
28 10783)

1           Despite the recognition by the DSC that the Delta and the fish require greater rather than  
2 reduced flows (N199), the DSC rejected Alternative 2 that would increase flows by reducing exports.  
3 The DSC summarily dismissed its responsibility to develop and consider a range of reasonable  
4 alternatives, including alternatives reducing exports, stating “The Delta Plan does not include a Delta  
5 conveyance facility of the type described in the comment, and thus the EIR neither analyzes the impacts  
6 of such a facility nor considers alternatives to one.” (D4971) In other words, the DSC summarily refused  
7 to consider Alternatives 2A and 2B and refused to develop and consider reasonable alternatives that  
8 would increase Delta flows by reducing exports.

9           This refusal to develop and consider a range of reasonable alternatives increasing flows by  
10 reducing exports violates Guidelines §15126.6(a) requires that: “An EIR shall describe a range of  
11 reasonable alternatives to the project or to the location of the project, which would feasibly attain most  
12 of the basic objectives of the project but would avoid or substantially lessen any of the significant effects  
13 of the project, and evaluate the comparative merits of the alternatives.” The “public agency bears the  
14 burden of affirmatively demonstrating that, notwithstanding a project’s impact on the environment, the  
15 agency’s approval of the proposed project followed meaningful consideration of alternatives and  
16 mitigation measures.” (*City of Woodland, supra*, 225 Cal.App.4th at 203.)

17           In *Watsonville Pilots Association v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1086-  
18 1090) (*Watsonville*) a city did not consider and evaluate a reduced development alternative claiming it  
19 would have been inconsistent with a general plan objective to accommodate projected growth. The court  
20 responded: “The City’s argument on this issue is premised on its claim that no discussion of an  
21 alternative is required if that alternative would not meet a project’s objective. This premise is mistaken.  
22 It is virtually a given that the alternatives to a project will not attain *all* of the project’s objectives.” (*Id.*  
23 at 1087.) The court affirmed the trial court’s issuance of writ of mandate and determination that the  
24 City’s certification of a Final EIR violated CEQA. (*Id.* at 1095; *accord, Friends of the Eel River, supra*,  
25 108 Cal.App.4th at 872-873 (EIR analysis flawed because it did not contain consideration of alternatives  
26 that would reduce dependence on water diverted from the Eel River).)

27           This case is dissimilar to the decision of *In Re Bay-Delta Programmatic Environmental Impact*  
28 *Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162- 1169 (*CalFed*). In *CalFed*, the court did

1 not fault the lead agency for failing to include reduced exports alternative in the former CalFed program  
2 EIR. CalFed had declined to carry the reduced export alternative over for study to the Final Program  
3 EIR because it concluded that alternative would not achieve the CalFed Program’s “fundamental  
4 purpose and thus was not feasible.” (*Id.* at 1166.) In this case, there has been no finding by the DSC that  
5 Alternative 2 reducing exports is not feasible. The DSC “considered” Alternative 2 in the EIR, and  
6 declared that the EIR “does not consider alternatives that. . . would not be feasible. . .” (C4, 90)

7 In addition, this case involves the very “program-generated environmental impacts,” that the  
8 court noted were absent and that “determine the required range of program alternatives.” (*CalFed*,  
9 *supra*, 43 Cal.4th at 1168.) Here, the Delta Plan expressly calls for new conveyance, and the Findings  
10 admit that water quality and fish species impacts result from new conveyance. (C4, C10, C79)  
11 Consequently, program-generated environmental impacts require a range of reasonable program  
12 alternatives. (See Guidelines, §15168(b) (explaining that a benefit of a program EIR is that it may  
13 include “more exhaustive consideration of effects and alternatives . . . .”); *Friends of Mammoth v. Town*  
14 *of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511, 533 (“Designating an EIR as a  
15 program EIR also does not by itself decrease the level of analysis otherwise required in the EIR. All  
16 EIRs must cover the same general content.”).) Also, the court in *CalFed* observed that the CalFed  
17 proceedings were at a “relatively early stage of program design” and that the CalFed theory that it is  
18 possible to restore the Bay-Delta’s ecological health while maintaining and perhaps increasing exports  
19 was “unproven.” (*Id.*) The court said, “if practical experience demonstrates that the theory is unsound,  
20 Bay-Delta water exports may need to be capped or reduced.” (*Id.*) The CalFed program work being  
21 reviewed in the cited case was performed in the 1990s. The theory that it is possible to restore Bay-Delta  
22 ecological health while maintaining or even increasing exports has now been demonstrated to be  
23 unsound. The importance of flow is reflected by the DSC’s own statements during the Delta Plan  
24 process that “The best available science suggests that the currently required flow objectives within and  
25 out of the Delta are insufficient to protect the Delta ecosystem.” (N199; see also C4, C98 (“the Delta is  
26 currently in crisis, as it cannot satisfy all of the competing demands placed on it, including those related  
27 to water supply, habitat, agriculture, recreation and flood protection), C99 (“water conveyance facilities  
28 that build strong urban and agricultural economies threaten ecosystem health”))

1 A fundamental threshold decision will be made to either establish new conveyance, resulting in  
2 the diversion of more freshwater flows away from the lower Sacramento River and Delta, or to instead  
3 to increase freshwater flows through the Delta by reducing exports. The EIR for the Delta Plan violates  
4 CEQA because the required range of reasonable alternatives is absent from consideration in the EIR.  
5 Moreover, the EIR impermissibly rejected consideration of variations on Alternative 2, which would  
6 have done more to increase flows into the Delta as the DSC itself has recognized will be necessary to  
7 restore the ecosystem.

## 8 7. CEQA Conclusion

9 In determining the adequacy of an EIR, the courts adopt a *de novo* standard of review to analyze  
10 potential abuse of discretion in procedural violations. (*City of Woodland, supra*, 225 Cal.App.4th at 187;  
11 see also *Vineyard, supra*, 40 Cal. 4th at 426-27.) As a result of the foregoing fatal defects in its  
12 approach, the DSC prejudicially abused its discretion by certifying an EIR that does not comply with  
13 CEQA and by approving the Delta Plan and Regulations in reliance thereon. The EIR was also so  
14 inadequate and conclusory that meaningful public review and comment were precluded. Consequently,  
15 DSC's certification of the EIR and approval of the Delta Plan and Regulations must be set aside.<sup>19</sup> In  
16 addition to setting aside the project approvals and EIR certification, DSC must prepare a new Draft EIR  
17 for recirculation and public comment. (Guidelines, §15088(a); *Vineyard, supra*, 40 Cal.4th at 448-450.)

### 18 **D. THE DSC FAILED TO MEET MINIMUM ADMINISTRATIVE PROCEDURE ACT** 19 **REQUIREMENTS IN ADOPTING THE DELTA PLAN REGULATIONS**

20 After adoption of the Final Delta Plan, the DSC submitted a rulemaking package to OAL which  
21 consisted of the enforceable Policies included in the Delta Plan. These regulations were subsequently  
22 approved by OAL. (Regs., §§5001-5016; see also Table 1 Correlation of Regulations to Delta Plan  
23 Policies.) The Regulations must be set aside because: (1) they are inconsistent with the statutory  
24 authority granted to the DSC through the Delta Reform Act; (2) the Final Statement of Reasons fails to  
25

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26 <sup>19</sup> Should the DSC claim and the court agree that the Delta Plan does not encourage or call for new  
27 conveyance, in effect the BDCP Water Tunnels, and that the DSC did not really reject the alternative of  
28 increasing Delta flows by reducing exports, Petitioners seek declaratory relief to that effect. Such relief  
is sought out of an abundance of caution to preclude inconsistent results and arguments such as agencies  
claiming during the BDCP process or judicial review of the BDCP process that alternatives increasing  
flows by reducing exports have already been foreclosed by the Delta Plan and Regulations.

1 adequately address public comments; and (3) the cost of implementing the Regulations was not fully  
2 disclosed, as required by law.

3 **1. The Final Regulations Lack Authority and Reference, and are Inconsistent with**  
4 **Existing Law**

5 As explained *ante* in section IV.A, several Delta Plan definitions and policies adopted as  
6 Regulations are not valid because they are not within the scope of authority conferred on the DSC by  
7 the Legislature and are inconsistent the 2009 DRA. (Gov. Code, §11342.1) The Regulations also  
8 conflict with existing common law, statutes, and other legal authority that limits the jurisdiction and  
9 rulemaking capacity of the DSC. Thus, all Regulations attacked *ante* in section IV.A of this brief must  
10 be set aside.

11 **2. The DSC’s Final Statement of Reasons Was Inadequate**

12 For each comment received during a public comment period and specifically directed at either  
13 the proposed action or the rulemaking procedures followed, the final statement of reasons shall contain a  
14 summary of the comment, and either “*an explanation of how the proposed action has been changed to*  
15 *accommodate the comment or an explanation of the reason for making no change.*” (Gov. Code,  
16 §11346.9(a)(3), italics added.) A violation of the APA through substantial failure to comply is found  
17 where “noncompliance...result[s] in a substantial violation of the act *and its underlying principles.*”<sup>20</sup>  
18 (*Sims v. Dept. of Corrections and Rehabilitation* (2013) 216 Cal.App.4th 1059, 1073 (*Sims*); see also  
19 *Stasher v. Harger-Haldeman* (1962) 58 Cal.2d 23 (substantial compliance means actual compliance with  
20 “respect to the substance essential to every reasonable objective of the statute”).) The DSC’s Final  
21 Statements of Reasons (“FSR”) is procedurally inadequate because it provides misleading and  
22 inadequate responses to public comments regarding, among others, the cost effects of the Delta Plan  
23 Regulations on local agencies and small businesses in the Delta.

24  
25  
26 <sup>20</sup> A failure to comply with the APA is harmless or insubstantial only if “it does not compromise  
27 any ‘reasonable objective’ of the APA.” (*Sims, supra*, 216 Cal.App.4th at 1073). A reasonable objective  
28 of the public comment process is “‘to provide a procedure whereby people to be affected may be heard  
on the merits of proposed rules’ . . . and to ensure ‘meaningful public participation in the adoption of  
administrative regulations by state agencies.’” (*Ibid.*) However, public participation is not “on the  
merits” or “meaningful” if the public has not “timely received all available information that is relevant  
to the proposed regulations” (*Ibid.*)

1 Petitioner LAND submitted detailed comments on the Rulemaking Package and Economic  
2 Analysis between January and May 2014. (K11895, K12471, K13395) These comments expressed  
3 concerns with inadequacies in the DSC’s submitted Form STD 399 and the accompanying cost analyses.  
4 Among these concerns was the failure of the DSC to consider the impact of Proposition 218 (Cal. Const.  
5 Art. XIII D, § 4, subd. (a).) (“Prop. 218”) on local districts to recover costs through assessments, the  
6 reduction of assessable land through the construction of setback levees, and failure to estimate or  
7 disclose the potential costs, which will be borne by business in the Delta.

8 First, the DSC fails completely to consider the impact of Prop. 218. Indeed, in its Cost Analysis,  
9 Table B-1 “Cost Recovery Authority for Special Districts in the Delta” fails to include Prop. 218 as  
10 restricting the authority of local agencies to recover costs. (E1371) When this was brought to the  
11 attention of the DSC (K12471), the DSC again referred to Table B-1 as having provided adequate cost  
12 recovery authority, and does not provide reasoning for excluding Prop. 218 Analysis. (N3199) With  
13 regard to this comment, DSC did not give reasons for making no change, merely citing as authority the  
14 same flawed document. DSC has therefore not provided meaningful participation on the merits of the  
15 regulations, by failing to provide “all available information that is relevant to the proposed regulations.”  
16 (*Sims, supra*, 216 Cal.App.4th at 1074.)

17 Second, DSC does not take into account the potential effect the Delta Plan’s emphasis on  
18 evaluating the feasibility of setback levees will have on local agencies’ ability to recover costs through  
19 special district assessments. Regs., §5008 (ERP4) requires analysis of the feasibility of setback levees on  
20 newly created levees or repair of damaged levees that qualify as covered actions within the mapped area.  
21 (B452) A comment expressed a concern that the inclusion of this requirement will necessarily lead to the  
22 construction of more setback levees, thereby reducing the amount of land available for local agencies to  
23 collect assessments to offset the costs of implementing the Delta Plan. (K12471) In its response, the  
24 DSC fails to consider this impact, referring only to the mitigating “economic factor” considerations in  
25 determining the feasibility of the initial requirement to *construct* setback levees. (N3199) This response  
26 is irrelevant, as the comment applied to situations where the setback levee has been built, thereby  
27 reducing quantity of land available for assessment within that district. This was unresponsive to the  
28 comment and thus failed to meet minimum APA standards. (*Sims, supra*, 216 Cal.4th at 1074)

1 Third, the DSC’s Final Statement of Reasons (“FSR”) does not adequately respond to concerns  
2 expressed by the public that the Delta Plan and its regulations will impose a significant cost burden to  
3 small businesses in the Delta. In its FSR, the DSC states that there is “no evidence that small businesses  
4 would be *disproportionately* affected or *overly burdened* by the proposed regulation.” (N2866, italics  
5 added) In its Cost Analysis, the DSC acknowledged the increase in attendant costs to local agencies in  
6 meeting the requirements of Regs. §5008, stating that the estimated additional planning costs between an  
7 existing levee and the re-design to a setback levee could be up to \$300,000 per mile of levee. (E1405)  
8 Furthermore, the DSC acknowledges in its Cost Analysis (E1371) that “costs potentially created by the  
9 proposed regulation could fall” on special districts like Reclamation Districts, and “that their financial  
10 ability to bear costs is very limited.” (E1383) The DSC also provides a list of the authority for local  
11 agencies to recover costs in its Cost Analysis, citing every relevant authorizing statute for each district in  
12 the Delta. (N873, Table B-1)

13 Thus, by its own analysis, the DSC acknowledges that implementation of the regulations may  
14 result in massively increased fees and assessments, and cites relevant authority for various agencies to  
15 recover costs. Yet in response to comments about how much implementation of the regulations will cost  
16 local businesses, DSC merely labeled these potentially enormous costs as “indirect” and therefore  
17 “unknown,” leaving out any meaningful discussion or estimations. (N3207) In its responses to these  
18 comments, DSC fails to either provide an estimate or provide evidence as to why estimates are  
19 impossible. This is despite the DSC’s own analysis concluding that planning and determinations of  
20 feasibility for alternatives will cost agencies, and therefore cost businesses. In so doing, the DSC failed  
21 to provide “all available information that is relevant to the proposed regulations” as required by the  
22 APA. (*Sims, supra*, 216 Cal.App.4th at 1074.)

23 By failing to properly respond to comments concerning the potential costs of the proposed  
24 regulations, the DSC substantially failed to provide meaningful discussion because the public did not  
25 “timely [receive] all available information that is relevant to the proposed regulations” (*Ibid.*) The DSC,  
26 therefore, did not substantially comply with the requirements of the APA, and the regulations must be  
27 declared invalid. (*NAC, supra*, 175 Cal. App. 4th 125.)  
28

1           **3.       DSC Failed to Disclose the Likely Costs of Implementing the Delta Plan Regulations**

2           The Cost Analysis prepared to assess the costs of implementing the Regulations pursuant to  
3 Government Code §11346.5 is inadequate, incomplete and misleading. Specifically, the DSC’s  
4 determination that its Regulations would not have a significant adverse economic impact upon small  
5 businesses is not supported by substantial evidence in the record. (Gov. Code, §11350(b)(2).) The  
6 increased local agency costs to comply with new and arbitrary flood standards, consistency  
7 determinations, reporting, and other new requirements established by the Delta Plan will make  
8 California less competitive.

9           A notice of proposed rulemaking, pursuant to Government Code §11346.5(a)(9) “shall” include  
10 “a description of all cost impacts known to the agency...that a representative person or business would  
11 necessarily incur in reasonable compliance with the proposed action.” If there is no known cost impact,  
12 an agency must state that “the agency is not aware of any cost impacts that a representative private  
13 person or business would necessarily incur in reasonable compliance with the proposed action.”  
14 Furthermore, the agency has an overarching obligation to “assess the potential economic impact on  
15 California business enterprises and individuals.” (Gov. Code, §11346.3(a).) However, in complying with  
16 this obligation, the agency “must provide in the record any ‘facts, evidence, documents, testimony, or  
17 other evidence’ upon which it relies for its initial determination.” (*WSPA, supra*, 57 Cal.4th at 428.)

18           In its Notice of Proposed Rulemaking (H156), its Form STD 399 and subsequent attachments  
19 and revisions, and its FSR (N2859), the DSC provides misleading and summary assessments of the  
20 potential costs to agencies and small businesses, while providing inadequate substantial evidence for its  
21 assumptions. For example, as previously noted, the DSC acknowledges in response to repeated  
22 comments by the public that the new requirement of Regs. §5008 that levee projects include evaluation  
23 of alternatives, such as setback levees, could cost \$300,000 per mile of levee in estimated additional  
24 planning costs alone (E1405), with total costs estimated from \$4 million to \$68 million per mile.<sup>21</sup>  
25 (E1405-1406; Cost Analysis, Appendix A, p. A-1 see also Table 3, page 28, superscript “e”) Thus, by  
26 the Plan’s own analysis, the cost per mile of levee would go from as low as \$4 million per mile to as  
27

28 <sup>21</sup>       The DSC bases this calculation on an “assumption” that planning costs are 20% of the “total cost of planning, engineering, and design.” (E1405) The analysis does not cite to any authority in determining this percentage.

1 much as \$68 million per mile, with additional habitat measures raising the cost to \$136 million per mile,  
2 a cost increase of 3,400 percent. Yet, the DSC’s cost analysis states that there will be no additional state  
3 or local agency costs in complying with Regs. §5008. (N2342, Table 3) The DSC contradictorily  
4 acknowledges that local agencies will incur costs simply in evaluating the feasibility of setback levees,  
5 but somehow concludes that the local agencies in the Delta will incur no additional costs in compliance  
6 with Regs. §5008. (E1391)

7 In *WSPA*, the court held that the defendant’s estimates of fixture depreciation and land  
8 appreciation, were “an opaque calculation unsupported by any facts or other evidence explaining its  
9 validity.” (57 Cal.4th at 431.) Similarly, DSC does not provide explanations for its valuations or  
10 calculations, nor does it cite to substantial evidence in the record supporting its assessment of cost. This  
11 misleading analysis violates the APA’s “modest requirement of rationality and transparency,” and fails  
12 to substantially comply with the APA. (*Ibid*).

13 With regard to effects on business, the DSC acknowledges that there may be *indirect* costs to  
14 small businesses, while claiming that those costs are unknown and speculative. Yet, in its Form STD  
15 399 (N821), the DSC states in Item 2 that “costs *will* occur” for businesses which participate *directly* in  
16 a covered action (italics added). However, the FSR states that businesses and individuals will not be  
17 directly impacted by the regulations, citing no evidence or authority for this proposition, and  
18 contradicting the DSC’s own Form STD 399. (N3207).

19 Lastly, the Cost Analysis incorrectly claims that “Delta Plan policies are expected to provide  
20 long-term benefits in protecting agriculture. . . .” (N826). To the contrary, many of the Regulations  
21 impair agriculture in the Delta by: (1) placing of additional restrictions and regulatory processes on land  
22 and water use in the Delta (Regs., §§5002, 5003); (2) promoting conversion of large areas of  
23 agricultural lands in the Delta to nonagricultural uses, such as habitat and conveyance uses, thereby  
24 reducing the economic viability of specialty crops grown in the Delta (Regs., §§5007, 5008); and (3)  
25 failing include any protections of the quantity and quality of water needed for agricultural uses in the  
26 Delta to continue (Regs., §5005 (lack of flow protections/complete deferral to the SWRCB).) The DSC  
27 therefore fails to cite any substantial evidence for the proposition that the Delta Plan regulations are  
28

1 expected to provide long-term benefits in protecting agriculture. As above, the dereliction of this  
2 responsibility requires that the Regulations be struck down as procedurally inadequate under the APA.

3 **V. CONCLUSION**

4 For the reasons described in detail herein, Petitioners respectfully request issuance of a writ of  
5 mandate and declaratory relief that results in setting aside the Delta Plan, the Delta Plan EIR, and the  
6 Delta Plan Regulations, as well as any such other relief as the Court deems just and proper.

7 Respectfully submitted,

8 Dated: October 15, 2014

FREEMAN FIRM,

9  
10 By: 

11 THOMAS H. KEELING  
12 Attorney for Petitioners Central Delta Water  
13 Agency, South Delta Water Agency, Lafayette Ranch,  
14 Inc., and Cindy Charles

14 Dated: October 15, 2014

SOLURI MESERVE,  
A LAW CORPORATION

15  
16 By: 

17 Osha R. Meserve  
18 Attorney for Petitioner  
19 Local Agencies of the North Delta

20 Dated: October 15, 2014

FRIENDS OF THE RIVER

21  
22 By: 

23 E. ROBERT WRIGHT  
24 Attorney for Petitioner  
25 Friends of the River  
26  
27  
28

1 Dated: October 15, 2014

MICHAEL B. JACKSON, ATTORNEY AT LAW

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By: Michael Jackson by Osha Meserve  
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Dated: October 15, 2014

CENTER FOR BIOLOGICAL DIVERSITY

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1 **PROOF OF SERVICE**

2 I hereby declare that I am employed in the City of Sacramento, County of Sacramento,  
3 California. I am 18 years of age or older and not a party to the action. My business address is  
4 1010 F Street, Suite 100, Sacramento, California 95814.

5 On October 15, 2014, I served the attached document: **PETITIONERS CDWA ET**  
6 **AL. AND C-WIN ET AL.’S JOINT OPENING BRIEF ON THE MERITS IN SUPPORT**  
7 **OF FIRST AMENDED VERIFIED PETITIONS FOR WRIT OF MANDATE AND**  
8 **COMPLAINTS FOR DECLARATORY AND INJUNCTIVE RELIEF**, on the following  
9 parties or attorneys for parties, as shown below in the attached SERVICE LISTS.

10 The document was served by the following means:

11 ✓ **BY OVERNIGHT DELIVERY:** I enclosed the documents in an envelope or  
12 package provided by an overnight delivery carrier and addressed to the persons at the addresses  
13 as listed below in the attached, “Service List via Overnight Delivery.” Copies have been  
14 provided to the designated recipient of service in each included action in the Delta Stewardship  
15 Council Cases, Judicial Council Coordination Proceedings No. 4758, which designated  
16 recipient has been established by prior written agreement to receive service and physical  
17 mailing of documents and correspondence related to this matter. I placed the envelope or  
18 package for collection and overnight delivery at an office or a regularly utilized drop box of the  
19 overnight delivery carrier; and by

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25 I declare under the penalty of perjury that the foregoing is true and correct and that this  
26 declaration was executed at Sacramento, California on October 15, 2014.

27  
28 \_\_\_\_\_  
Mae Ryan Empleo

1 **SERVICE LIST VIA OVERNIGHT DELIVERY**

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