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10
11 THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 IN AND FOR THE COUNTY OF SACRAMENTO

13 Coordination Proceeding
Special Title (Rule 3.550),

JUDICIAL COUNCIL COORDINATION
PROCEEDING NO. 4758

14 DELTA STEWARDSHIP COUNCIL CASES

**PETITIONER CITY OF STOCKTON'S
OPENING BRIEF IN SUPPORT OF
PETITION FOR WRIT OF MANDAMUS**

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17 Judge: Honorable Michael Kenny
18 Dept.: 31
Date:
19 Time:

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1 I. INTRODUCTION.

2 Lutheran theologian and martyr Dietrich Bonhoeffer explained, “If you board the wrong
3 train it is no use running along the corridor in the opposite direction.” Quoted in Eric Metaxas,
4 Bonhoeffer: Pastor, Martyr, Prophet, Spy at 176. The Delta Stewardship Council would have
5 been well advised to heed this sage advice. In this instance the DSC first ignored the City of
6 Stockton’s sound evidence supported criticisms of the EIR and Delta Plan. Recognizing that this
7 initial and ill-conceived approach produced a self-created administrative trap thereafter the DSC
8 chose to “run along the corridor in the opposite direction” instead of taking a step back,
9 following CEQA law and dealing with Stockton’s concerns as designed and required by state
10 law. Indeed DSC’s subsequent actions merely confused and muddled any cognizable effort to
11 achieve CEQA compliance. This abject failure requires these challenged actions be returned to
12 the agency for further hearings conducted according to state law requirements.

13 II. STATEMENT OF FACTS.

14 Since at least May 2011 Stockton actively participated in the DSC administrative process
15 by commenting in writing about multiple draft Delta Plans and EIRs, attending DSC public
16 meetings and workshops, and commenting on testimony delivered by the DSC chairman to
17 various state legislative committees. Petition at ¶11. Stockton commented on the draft EIR
18 during the formal public comment period and thereafter continued providing comments critical
19 of the EIR and the draft DSC Delta Plan.

20 The City’s January 14, 2013 comment letter regarding the EIR in part explained direct
21 economic impacts from the Plan would produce a chain of events leading to indirect significant
22 adverse environmental impacts, particularly in the form of urban decay. [K010923-30] The
23 Council responded by 1) hugely misunderstanding the argument presented, wrongly claiming
24 that the loss of agricultural land was involved in this chain, a belief which does not cohere to the
25 City’s comment [F000562, 568-569]; 2) claimed the City’s argument lacked sufficient
26 substantial evidence to require a response [F000562, 568-569]; and, 3) asserted the City rather
27 than the Council had a duty to assemble environmental information that the impact was or wasn’t
28 significant. [F000562, 574] Critical to this dispute neither the draft EIR nor the agency’s formal

1 response to the comments asserted that Stockton’s future discretionary land use decisions were
2 not Covered Actions subject to the Delta Plan and DSC’s jurisdiction.

3 The response affirmatively misstates the City’s environmental concern. Factually the
4 City explained the proposed Plan represents a first chain in events leading to urban decay,
5 unrelated to the loss of agricultural land, and supported this assertion by qualified testimony
6 supplied by two experts. [I000528-36 and K012210.001-.005] At a regularly scheduled DSC
7 meeting of March 28, 2013 Stockton appeared and criticized both the EIR and the Delta Plan.

8 Stockton introduced into the record of proceedings two letters from qualified experts
9 raising concerns about the proposed plan’s environmental consequences. Stephen Chase, who
10 has a 37 year career as a Community Development Director or as an assistant city manager,
11 explained to the Council that the “Council’s EIR fatally omits relevant data, information and
12 analysis regarding the secondary physical effects derived from the direct economic consequences
13 of the proposed regulation to Central Valley communities affected by the Delta Stewardship
14 Council jurisdiction.” [I00528] Mr. Chase explained the Stockton area suffers from chronic and
15 persistently high levels of unemployment and underemployment as well as a variety of very
16 serious socio-economic conditions. *Id.* Mr. Chase concluded, in his opinion, the DSC Delta Plan
17 would cause three separate chains of events producing a secondary or indirect adverse
18 environmental effect. Mr. Chase’s letter was designed to address the DSC formal response that
19 the urban decay comments in the City’s January 14, 2013 letter, especially Major Concerns and
20 Comments 3 and Detailed Comments 15, lacked supporting evidence by supplying DSC with
21 “additional data, information and inference from this information”. [I00528]

22 First, the Delta Plan “may partially or totally nullify or substantially impede Stockton’s
23 municipal infrastructure utility master plans.... [¶] In my opinion uncertainty over implementing
24 infrastructure and utility master plans has a substantial chilling effect over forming capital to
25 fund new job creation and economic growth project and would discourage retail, office and
26 commercial developers from considering Stockton as a potential location for development.
27 Suppressing employment and economic opportunities would lead to various factors responsible
28

1 for urban decay: crime, foreclosures, vacancies and a suppression of economic growth and
2 vitality.” *Id.*

3 Second, the City’s general and specific plans, development code and infrastructure
4 master plans are designed to “attain orderly and logical growth through the efficient and
5 economic extension of public services.” *Id.* Aspects of the approved plans will be impeded or
6 interrupted by the Delta Plan and this “disruption would affect the intended orderly, logical and
7 efficient development pattern of the City and its environs, thereby creating impacts that are
8 different or more intense than planned.” *Id.* In particular the Plan would “result in an indirect
9 significant effect to the physical environment in the form of less efficient development patterns,
10 increased GHG emissions, more vehicular miles traveled and increased air pollution. None of
11 these foreseeable effects are evaluated in the EIR.” According to Mr. Chase, the “EIR does not
12 disclose or discuss a different pattern of urban development that causes new or substantially
13 more severe environmental impacts from development patterns that are less logical.” *Id.*

14 Third, the Delta Plan “would have a chilling effect on business expansion or location
15 decisions.” This in turn suppresses or chills employment opportunity and capital formation
16 leading to, in Mr. Chase’s professional opinion, “the interconnected factors of increased crime,
17 an erosion of property values and urban decay.” *Id.* Mr. Chase concluded, in his professional
18 and expert opinion and from personal observations acquired during a 37 year career as an urban
19 planner and deputy city manager, the Delta Plan EIR omitted consideration and evaluation of
20 reasonably foreseeable secondary environmental impacts caused by the Delta Plan.

21 The City also introduced a letter from Dr. Mel Lytle. [K012210.001 – K012210.005]
22 Dr. Lytle points out that the master infrastructure plans were approved and the first phase of
23 implementing these infrastructure plans were completed before the Delta Stewardship Council’s
24 creation. As a result, the approved infrastructure plans and first phase of construction predate the
25 Council and did not take into account the statutory co-equal goals. *Id.* Subsequent construction
26 activities to carry out master infrastructure plans are Covered Actions under the Delta Plan that
27 must cohere to the co-equal goals but implement a plan previously designed and approved
28 without considering these co-equal goals. *Id.* This, according to Dr. Lytle, means DSC will

1 reject infrastructure expansions whenever an expansion is consistent with the preexisting master
2 plan or existing facilities unless proposed facilities are substantially redesigned and relocated to
3 be consistent with the Delta Plan. *Id.* This thwarts the general plan’s adopted growth pattern and
4 disrupts implementing the master infrastructure plans.

5 According to Dr. Lytle, this consequence yields two significant but omitted secondary
6 adverse environmental impacts. First, major infrastructure presently designed or located to
7 lessen energy demand, lessen vehicular miles traveled and reduce air pollution, will be
8 redesigned or relocated and therefore increases energy demands, vehicular miles traveled and
9 harmful air pollution emissions. Second, relocated infrastructure will in turn alter development
10 and growth patterns, and the new growth patterns will increase “air pollution and green house
11 gases[,]...vehicular miles traveled” and the amount of agricultural land converted to urban uses.
12 *Id.* Dr. Lytle concluded the Plan’s EIR must address these ignored secondary adverse
13 environmental effects or otherwise a revised Plan must recognize a vested right to build out
14 infrastructure according to a master plan adopted before the Plan. *Id.*

15 The Council received the written and oral comments presented by the City without
16 offering any comment. (F000562, 563, 568-569) In particular the Council did not raise any
17 doubt about the qualifications of either expert presented by the City or otherwise notify the City
18 that it needed to be more expansive in describing their qualifications.

19 The City next appeared at the Council’s May 7, 2013 public hearing scheduled to
20 consider certifying the EIR and approving the Delta Plan. City representatives spoke at the
21 public hearing and also introduced two more letters into the record of proceedings: a second
22 letter from Mr. Chase and a second letter from Dr. Lytle. Mr. Chase addressed the recently
23 released Modified Economic and Fiscal Impact Statement. This Statement concluded it could
24 not quantify the potential adverse economic impact of the new regulation but did not disclose it
25 seriously attempted to perform such an evaluation. Instead the Statement contains naked
26 conclusions of profound uncertainty over the proposed regulation’s impacts. According to
27 Mr. Chase, this Statement “confirms the City’s major conclusion that the draft EIR omits a
28 meaningful discussion of environmental impacts produced by direct economic impacts of the

1 DSC plan...The report offers multiple statements about the lack of relevant information and data
2 to study whether economic impacts of the proposed DSC plan will start a chain of events leading
3 to environmental effects or statements that the DSC plan will cause direct economic impacts but
4 it is unable to quantify the significance of these impacts.” [K013388, 133890] Mr. Chase
5 concluded the Delta Plan’s cost would substantially bar or impede efforts to create new or
6 expand existing businesses in Stockton and the Statement fortifies rather than contradicts his
7 professional opinion. Mr. Chase quoted from the Statement to support his contention:

8
9 **“The cost of actions taken to comply with Delta Plan**
10 **policies...cannot be known...the total cost of the Delta Plan policies to**
11 **private business or individuals is unknown, and the total number and**
12 **type of businesses impacted, including small business, is also**
13 **unknown”**

14 **“The number of businesses and jobs created or eliminated is**
15 **uncertain.”**

16 **“The number of businesses impacted cannot be estimated.”**

17 **“Even expressed as a range, the cost estimate is highly**
18 **uncertain.”**

19 **“the number of businesses impacted cannot be estimated.”**

20 *Id.* Mr. Chase concludes, in his professional opinion, “the EIR does not disclose relevant
21 information and data about potential environmental effects. Indeed, the Statement concedes the
22 DSC lacks sufficient data to analyze and evaluate the potential that economic impacts may
23 trigger a chain of events producing a direct environmental effect.” *Id.*

24 Dr. Lytle also presented additional written comments. He explained, “In the course of
25 earning a doctorate degree, I became very familiar with research, experimental design and
26 scientific methods. The problem identified in the Statement constitutes a basic and elementary
27 design flaw that operates to contaminate the study and render the results relatively useless. The
28 problem is relatively straightforward: The agency and the draft EIR lacked necessary baseline
information about the Delta Plan regulation’s direct economic impact to local government and
private industry to evaluate whether this impact would produce indirect environmental impacts.”
(K013394, K013395). He added:

1 “...based on our professional judgments, the Delta Plan’s regulations
2 cause significant economic impacts that will produce significant indirect
3 environmental impacts. Critical to this analysis, the Statements reveal the
DSC has not assembled sufficient and necessary baseline information to
study this problem and thereafter agree or disagree with our conclusions.”

4 *Id.* Additionally a City Council member and the City’s attorney testified. [F000562, 568-569t]
5 After the City’s presentation concluded the Council did not challenge the qualifications of the
6 two experts presented by the City or the opinions offered. Instead an assistant Attorney General
7 scoffed at the testimony and offered a rambling and disjointed personal opinion:

8 “Just um quickly uh in in reinterpreting uh Mr. Ray’s uh comments
9 through the lens of C.E.Q.A., in respond to some of the comments that
10 were made by um the city and it’s uh attorney. Uh. I think that what what
11 Mr. Ray said is accurate that is is um 1) uh the chance of projects ever
12 being Covered Actions so thereby even being subject to sort of this
13 chilling capital formation problem uh is, has Mr. Ray just said, is uh
14 highly unlikely therefore grossly speculative and CEQA says speculative
15 impacts need to just be noted and that’s it and you don’t need to discuss
speculative issues that the EIR is not supposed to engage in speculation
and I think um uh the record’s clear that the chances of of there being
Covered Actions that would have this sort of chilling effect um uh uh this
um um assuming chilling effect are slim. Um...then the speculation of any
sort of chilling effect is is uh also highly speculative so you have sort of
two layers of 1) factual incorrect, of something that is factually incorrect,
in terms of the scope of Covered Actions, um.”

16 F000561 (Delta Stewardship Council Meeting Video. 05 16-17 2013. Delta Stewardship Council
17 May 16 and 17, 2013. Agenda Item 6 Index 21. Archive Segment Number 22 of 51. Minutes
18 9:27 – 11:21. He concluded that “speculative impacts only need be noted in the EIR.” [F000562,
19 568-569] (Unfortunately for the deputy attorney general, the EIR did not conclude the City’s
20 comments are “highly speculative”.) No DSC member agreed with the assistant Attorney
21 General or, for that matter, acknowledged that Stockton expressed an urban decay concern.

22 III. STANDARD OF REVIEW.

23 Environmental quality is a matter of statewide concern and CEQA requires public
24 agencies to exercise regulatory authority “so that major consideration is given to preventing
25 environmental damage.” Pub. Res. C. §21000(g); Cal. Code Regs., Tit.14, §15002(a)(2)-(3).¹
26 Ignoring individual and cumulative impacts defeats the overriding policy as the Supreme Court

27 _____
28 ¹ All subsequent unidentified code sections refer to the CEQA Guidelines (Cal. Code Regs.,
tit.14, §§15000 *et seq.*).

1 articulated in the venerated and oft-cited statement that CEQA is “to be interpreted...to afford
2 the fullest possible protection to the environment within the reasonable scope of the statute
3 language.” *Friends of Mammoth v. Bd. of Supervisors* (1972) 8 Cal. 3d 247, 259. “The EIR
4 requirement is the heart of CEQA.” §15003(a). An EIR demonstrates “to an apprehensive
5 citizenry that the agency has, in fact, analyzed and considered the ecological implications of its
6 actions.” §15003(d). The Supreme Court observes, “The EIR process protects not only the
7 environment but also informed self government.” *Laurel Heights Improvement Ass’n of San
8 Francisco v. Regents of the Univ. of California* (1988) 47 Cal. 3d 376, 392.

9 “In reviewing an agency’s determination under CEQA, a court must determine whether
10 the agency prejudicially abused its discretion.” *Bakersfield Citizens for Local Control v. City of
11 Bakersfield* (2004) 124 Cal.App.4th 1184, 1197 (hereafter “*Bakersfield*”). In CEQA litigation,
12 this creates a test involving two fully independent prongs: for a prejudicial abuse of discretion is
13 established if either “the agency has not proceeded in a manner required by law or if the
14 determination is not supported by substantial evidence.” Pub. Res. C. §21168.5 (all subsequent
15 bolding and underline added). As the Supreme Court explains, “Judicial review of these two
16 types of error differs significantly”. *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116,
17 131. “In evaluating an EIR for CEQA compliance, then, a reviewing court must adjust its
18 scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one
19 of improper procedure or a dispute over the facts.” *Vineyard Area Citizens for Responsible
20 Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

21 Under the first independent prong, courts determine “de novo whether the agency has
22 employed the correct procedures, ‘scrupulously enforc[ing] all legislatively mandated CEQA
23 requirements’” (*Save Tara* at 131) and “ensur(ing) strict compliance with the procedures and
24 mandates of the statute.” *Save Our Peninsula Committee v. Monterey County Board of
25 Supervisors* (2001) 87 Cal.App.4th 99, 118. If an EIR is adopted without sufficiently discussing
26 the environmental effects of a project, the agency has not proceeded as required by law. *TRIP v.
27 City Council* (1988) 200 Cal. App. 3d 671, 679. The “[f]ailure to provide enough information to
28 permit informed decisionmaking is fatal.” *Napa Citizens for Honest Gov’t v. Napa County*

1 (2001) 91 Cal. App. 4th 342, 361. Thus, “[c]ertification of an EIR which is legally deficient
2 because it fails to adequately address an issue constitutes a prejudicial abuse of discretion
3 regardless of whether compliance would have resulted in a different outcome.” *Citizens to*
4 *Preserve the Ojai v. County of Ventura* (1985) 176 Cal. App. 3d 421, 428. Courts are precluded
5 from collapsing or subsuming the “failure to proceed” prong into the “substantial evidence”
6 prong. *Bakersfield* at 1197.

7 The substantial evidence prong, which applies to conclusions, findings, and
8 determinations, compels a trial court to take a hard and demanding evaluation of the evidence
9 and the agency’s treatment of this evidence:

10 It should be made emphatically clear that the test of substantial evidence
11 on the whole record is not a toothless standard which calls for a court
12 merely to rubber stamp an agency’s findings if there is ‘any evidence’ to
13 support them. The reviewing court is empowered and obligated by the
14 substantial evidence test to reverse an agency decision that seems
15 unresponsive to the evidence or unfair.

16 Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*
17 (1995) 42 UCLA L. Rev. 1157, 1178 (underlining added). Courts must “examine all relevant
18 evidence in the entire record, considering both the evidence that supports the administrative
19 decision and the evidence against it, in order to determine whether the findings of the agency are
20 supported by substantial evidence.” *American Canyon Community United for Responsible*
21 *Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1070.

22 In sum, a reviewing court ascertains whether an EIR “include[s] detail sufficient to
23 enable those who did not participate in its preparation to understand and to consider
24 meaningfully the issues raised by the proposed project.” *Bakersfield* at 1197. If not, the error is
25 prejudicial. *Id.* at 1220-21. Under this standard Council prejudicially abused its discretion by
26 certifying the EIR and approving the Project.

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1 IV. THE COUNCIL FAILED TO PREPARE AND CERTIFY A
2 LEGALLY SUFFICIENT EIR.

3 A. THE COUNCIL FAILED TO ADEQUATELY RESPOND TO THE CITY'S
4 COMMENTS ABOUT THE LEGAL INADEQUACY OF THE EIR.

5 1. General Rule concerning the Legal Sufficiency of Responses of Comments.

6 During the required public comment period the City pointed out that the draft EIR
7 wrongly omitted urban decay as a potentially significant environmental effect. (I000528-
8 I000533) Whenever an environmental issue raised in the public comments process objects to a
9 draft EIR's analysis or complains about omitting an environmental impact from the EIR's
10 analysis, a public agency's response must be detailed and provide a reasoned, good faith
11 analysis. §15088(c). "Conclusory statements unsupported by factual information' are not an
12 adequate response; questions raised about significant environmental issues must be addressed in
13 detail. 14 Cal Code Regs §15088(c)." Kostka and Zischke 2 Prac. Under the Calif.
14 Environmental Quality Act (CEB 2014) §16.7 at 16-6. "In particular, **the major environmental**
15 **issues raised when the lead agency's position is at variance with recommendations and**
16 **objections raised in the comments must be addressed in detail giving reasons why specific**
17 **comments and suggestions were not accepted."** §15088(c) (bolding added). The need for a
18 reasoned, factual response is particularly acute when critical comments have been supplied by
19 other agencies or experts. *Berkeley Keep Jets Over the Bay Committee v. Board of Port*
20 *Commissioners* (2001) 91 Cal.App.4th 1344, 1367, 1371 ["The EIR failed to acknowledge the
21 opinions of responsible agencies and experts who cast substantial doubt on the adequacy of the
22 EIR's analysis of this subject. The conclusory and evasive nature of the response to comments is
23 pervasive, with the EIR failing to support its many conclusory statements by scientific or
24 objective data. These violations of CEQA constitute an abuse of discretion."].

25 2. DSC did not prepare a reasoned good faith response to Stockton's comment.

26 DSC's response (D000008, 73) to the City's urban decay comment is legally inadequate;
27 indeed it wildly missed the mark. First, it wrongly misstated the comment as implicating the
28 conversion of agricultural land as a link of chain leading to urban decay. Yet the City's
comment neither expressly nor impliedly involved converting agricultural land as a feature or

1 event located within the chain of events leading to urban decay. Hence the DSC agricultural
2 land response is totally misplaced, unresponsive and irrelevant to the comment as presented.

3 Additionally, DSC improperly dispensed with supplying a response to the City's urban
4 decay comment by claiming "there is not substantial evidence that these effects would occur, or
5 that if they would occur they would be substantial, adverse physical effects that could be
6 mitigated." (D000008, 73)

7 Three separate and distinct legal infirmities flow from this unresponsive and generalized
8 response. First, the response does not attain the minimum legal requirement for a response as
9 defined by the CEQA Guidelines. CEQA Guideline section 15088(c) rejects "[c]onclusory
10 statements unsupported by factual information" as sufficiently responding to a comment. For
11 instance, a response to a comment about insufficient groundwater, asserting "all available data"
12 disclosed sufficient groundwater existed, without identifying the data, amounted to a legally
13 deficient "[c]onclusory statement unsupported by factual information". *People v. County of*
14 *Kern* (1976) 62 Cal.App.3d 761, 772. Here the DSC response offers no information and data but
15 rather presented a truncated response about the comment lacking "substantial evidence" to
16 warrant a detailed response. Simply stated, this generalized data starved response fails the test
17 presented by section 15088(c).

18 Second, no controlling legal authority authorizes a public agency to abruptly dismiss a
19 comment raised during a public comment period because substantial evidence did not
20 accompany the comment; the curtailed dismissal of the City's urban decay comment is legally
21 deficient. We find no controlling legal precedent offering an excuse from satisfying Section
22 15088(c)'s requirements because the comment did not include substantial evidence. Indeed, the
23 groundwater comment in *People v County of Kern* at 771 or the air resource comment in *Cleary*
24 *v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 357, each lacked "substantial evidence"; yet
25 each appellate court demonstrated no hesitancy in concluding the responses were "peremptory at
26 best" (*Id.* at 358) and therefore legally deficient. This result applies to our situation.

27 Third, this truncated response turns CEQA on its head. "An EIR should be prepared with
28 a sufficient degree of analysis to provide decision makers with information which enables them

1 to make a decision which intelligently takes into account of environmental consequences.”
2 §15151. Yet the DSC response impliedly suggests it is relieved of the obligation to prepare a
3 good faith detailed response whenever, according to a public agency, a comment is not
4 accompanied with sufficient substantial evidence. But this myopic and narrow interpretation of a
5 public agency’s obligation to prepare detailed responses to comments does not cohere to
6 CEQA’s overarching objective to compel public agencies to produce information and data about
7 environmental effects as part of the CEQA process. §15121(a).

8 A public agency and not a commentator has a statutory burden to supply information and
9 data sufficient to evaluate environmental effects. Simply stated: “The agency should not be
10 allowed to hide behind its own failure to gather relevant data...CEQA places the burden of
11 environmental investigation on government rather than the public.” *Sundstrom v. County of*
12 *Mendocino* (1988) 202 Cal.App.3d 296, 311. *Sundstrom* adds, “deficiencies in the record
13 actually enlarge the scope...by lending a logical plausibility to a wider range of inferences...[I]n
14 the absence of any further information the record permits the reasonable inference that sludge
15 disposal presents a material environmental impact. (¶) The sparseness of the record concerning
16 potential vegetative change also suggests significant issues.” *Id.* The DSC’s truncated dismissal
17 of Stockton’s comment and refusal to provide information and data about the Delta Plan’s
18 potential to start a chain of events leading to urban decay offers the same “enlarged scope” of
19 inferences and suggestions that the urban decay impact is significant and requires detailed
20 evaluation in the EIR.

21 Finally a strategic decision to dispense with responding to the urban decay comment and
22 instead offering an abbreviated response predicted on the comment’s lack of substantial evidence
23 imposes a self created dilemma for DSC. On one side of this dilemma, if the court concludes the
24 bland DSC response—narrowly limited to complaining that not enough evidence accompanied
25 the comment to warrant a detailed response—amounts to a “[c]onclusory statement unsupported
26 by factual information” or fails to constitute a “reasoned factual response” or is “conclusory and
27 evasive” then DSC failed to proceed in a manner required by law and a writ setting aside EIR
28 certification and Plan approval should issue.

1 On the other side of the dilemma, DSC, for unexplained reasons, dispensed with a
2 detailed response on the exclusive and easily curable basis that Stockton failed to submit
3 substantial evidence about the chain of events leading to urban decay. Except for Stockton not
4 including evidence within the comment, a requirement we suggest does not exist in CEQA
5 when submitting comments during a public comment period, DSC waives any additional reason
6 for omitting the urban decay impact from the draft EIR's investigation. This may, if CEQA is
7 interpreted in a most perfunctory fashion, excuse DSC from offering a fact based response to
8 the comment but this excuse does not forgive DSC from omitting the urban decay impact from
9 the draft EIR. In short, DSC's only expressed criticism of Stockton's urban decay comment and
10 only basis to omit a detailed fact based response or to disagree that the urban decay impact
11 should have been evaluated in the draft EIR exclusive pivots on the presence of evidence to
12 support an alleged chain of events.

13 Stockton evaluated and answered DSC's criticism by submitting four comments from
14 two experts concerning the potential urban decay impact, presenting their qualifications
15 (I000528-536, K012210.001-.005, K013388-93, and K013394-95), and offering oral testimony
16 emphasizing the four statements and the legal requirement to study urban decay within an EIR
17 context. (F000562, F000567-568) Excluding the deputy attorney general's jumbled and
18 unsubstantiated comment no DSC Councilmember or staff member provided any negative
19 evaluation or critique of the declarant statements or their qualifications to offer such opinions.
20 Thus the sequence of events under the dilemma's second side richly illustrates why the writ
21 requested by Stockton should issue. First Stockton provided a comment during the public
22 comment period that the EIR was legally deficient for omitting an investigation of the urban
23 decay effect. Second, rather than offer a good faith response DSC dispensed with providing a
24 detailed response and instead dismissed the comment because Stockton's comment did not
25 include substantial evidence. Third, Stockton followed up by providing four statements from
26 two experts about the Delta Plan starting a chain of events leading to urban decay. The
27 statements fully satisfy the Fair Argument Test that *California Clean Energy Committee v. City*
28 *of Woodland* (2014) 225 Cal.App.4th 173, 188 teaches us applies to this situation. DSC ignored

1 the evidence. Hence DSC did not proceed in a manner required by law and was “deceived by
2 their own conjectures” St. Augustine City of God Book 19, Chapter 17.

3 Also, and in a more generalized manner, DSC failed to proceed in a manner required by
4 law when responding to other environmental comments presented during the public comment
5 period. (*Flanders Foundation v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603, 615.
6 Here, the DSC failed to respond to many public comments raising potentially significant
7 environmental impacts from implementing the Delta Plan, repeatedly asserting that: “This is a
8 comment on the project, not on the EIR.” (See, e.g., D4154, 4368, 4835, 5034, 5319) This
9 conclusory refusal to respond to comments violates CEQA.

10 CEQA requires a lead agency fact based written response to public comments to also
11 “describe the disposition of each significant environmental issue that is raised by commenters.”
12 (Pub. Resources Code, § 21091(d)(2)(B).) To arbitrarily distinguish between comments “on the
13 EIR” from those about the underlying “project” is nonsensical since an EIR is specifically
14 defined as “a detailed statement prepared under CEQA describing and analyzing the significant
15 environmental effects of a project and discussing ways to mitigate or avoid the effects.”
16 (§15362.) Accordingly, a “written response shall describe the disposition of significant
17 environmental issues raised (e.g., revision to the proposed project to mitigate anticipated impacts
18 or objections).” (§15088(c).) Thus, the test to determine whether a response is required focuses
19 on whether the comment raises a “significant environmental issue” about a project, not a
20 meaningless distinction between the EIR and the underlying project that it analyzes.

21 It is optional to respond to public comments failing to raise environmental issues. (§§
22 15088(c), 15132(d), 15204(a). However, this was *not* the lead agency’s excuse for repeatedly
23 refusing to respond to multiple comments. Instead the DSC refused to respond to many
24 comments raising significant environmental issues based on this strained “EIR versus Project”
25 distinction, an excuse not expressed in the Guidelines. (See, e.g., D4154 (no analysis of export
26 pumping and its effects on ecosystem collapse); D4368 (complaint that DSC failed to conduct
27 water quality analysis to evaluate impacts of increased pollutant concentration as a result of
28 diverting additional flows); D4835 (no analysis conducted of the environmental impacts of WQ

1 R3; water quality protections are ambiguous); D5034 (EIR had no analysis of options to protect
2 environment in areas of origin, or analysis of flow criteria); D5319 (no analysis of the effects of
3 implementing SWRCB flow criteria).) The DSC’s refusal to respond to these and other
4 comments raising significant environmental issues constitutes a failure to proceed in a manner
5 required by law. (§ 15088(c); *Save Our Peninsula Committee v. Monterey County Board of*
6 *Supervisors* (2001) 87 Cal.App.4th 99, 118 (referring to the necessity for “strict compliance with
7 the procedures and mandates of the statute”).)

8 B. THE COUNCIL COMMITTED AN ABUSE OF DISCRETION AS A MATTER OF
9 LAW BY FAILING TO ADDRESS THE URBAN DECAY ENVIRONMENTAL
IMPACT.

10 1. Method for Evaluating the Urban Decay Claim.

11 An EIR’s failure to study the urban decay effect is governed by the “failure to proceed”
12 prong of the abuse of discretion standard as evaluated under the Fair Argument Standard. As
13 *Bakersfield* explained, “If [developer] is contending that claims concerning omission of
14 information from an EIR essentially should be treated as inquiries whether there is substantial
15 evidence supporting the decision approving the projects, we reiterate our rejection of this
16 position for the reasons previously expressed in *Irritated Residents...*” *Id.* at 1208 (holding city
17 failed to proceed in the manner required by law and committed a prejudicial abuse of discretion
18 in refusing to evaluate urban decay in EIRs despite evidence received during city council
19 proceedings that the projects may trigger this significant indirect environmental effect). Thus,
20 consistent with the Fair Argument Standard, whether or not substantial evidence supports a
21 decision to approve the Delta Plan is irrelevant to determining whether DSC proceeded in the
22 manner required by law in refusing to evaluate urban decay impacts in the EIR.

23 What is required by law? The Third Appellate District recently answered this question in
24 the context of a challenge to the sufficiency of an EIR: “a lead agency must address the issue
25 of urban decay in an EIR when a **fair argument** can be made that the proposed project will
26 adversely affect the physical environment.” *California Clean Energy Committee v. City of*
27 *Woodland* (2014) 225 Cal.App.4th 173, 188 (bolding and underlining added). Earlier the Third
28 District instructed us that: “In preparing an EIR, the agency must consider and resolve

1 every fair argument that can be made about the possible significant environmental effects of a
2 project...Once the agency has determined that a particular effect will not be significant, however,
3 the EIR need not address that effect in detail. Instead, the EIR need only ‘contain a statement
4 briefly indicating the reasons for determining that various effects on the environment of a project
5 are not significant and consequently have not been discussed in detail in the environmental
6 impact report.’” *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116
7 Cal.App.4th 1099, 1109 (bolding and underlining added).

8 Thus, in our situation, the Fair Argument Standard applies whenever an EIR is
9 challenged for failing to address an impact claimed to be significant but not addressed in an EIR.
10 The Fair Argument Standard provides for environmental effects to be evaluated within the
11 context of an EIR “whenever it can be fairly argued on the basis of substantial evidence that the
12 project may have a significant environmental effect.” *No Oil, Inc. v. City of Los Angeles* (1974)
13 13 Cal.3d 68, 75. The Fair Argument Standard “creates a low threshold requirement for initial
14 preparation of an EIR and reflects a preference for resolving doubts in favor of environmental
15 review when the question is whether such review is warranted. ‘If there is substantial evidence of
16 a significant environmental impact, evidence to the contrary does not dispense with the need for
17 an EIR when it still can be ‘fairly argued’ that the project may have a significant effect.’ ... [¶]
18 Application of this standard is a question of law and deference to the agency’s determination is
19 not appropriate.” *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th
20 144, 151 (internal citations omitted).

21 Here the record reveals the City produced substantial evidence, in the form of expert or
22 qualified lay opinion, that the Delta Plan would be the first event in a chain of events leading to
23 urban decay.² But, using Professor Asimov’s language, the DSC “seem(ed) unresponsive to the
24 evidence or unfair”. It never acknowledged or disagreed Mr. Chase and Dr. Lytle were qualified
25 to provide expert opinions, nor did it produce information or data that the impact would not

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28 ² *Bakersfield* at 1209-1213 illustrates the types of evidence that may be sufficient to require
including the urban decay impact within an EIR. This evidence includes expert testimony,
reference to previous studies and lay opinion based on “relevant personal observations”.

1 occur. To the contrary, after receiving the comments the only report submitted by DSC
2 concluded it lacked enough information or data to form an opinion whether the Plan would be
3 the first event in a chain of events leading to urban decay, a remarkably insufficient and
4 unresponsive answer in a CEQA process where the overarching statutory goal demands a public
5 agency produce meaningful information and data about potential environmental effects.³ The
6 only other statement is a decidedly flimsy crutch to lean on: the deputy attorney general's
7 confusing yet autocratic dismissal of the urban decay claim (F000562, 568-569), presented
8 without supplying any evidence or analysis. Thus there is "a hole in the administrative record"
9 where the agency evaluation and analysis of urban decay should be located and if an EIR is
10 adopted without sufficiently discussing project's environmental effects, then the agency has not
11 proceeded as required by law (*TRIP v. City Council* (1988) 200 Cal. App. 3d 671, 679) because
12 the "[f]ailure to provide enough information to permit informed decision making is fatal." *Napa*
13 *Citizens for Honest Gov't v. Napa County* (2001) 91 Cal. App. 4th 342, 361.

14
15 2. Urban Decay is an Identified Environmental Effect that must be
Evaluated in an EIR.

16 Defendant failed to adequately evaluate and mitigate the Project's potential to trigger a
17 chain reaction ultimately leading to urban decay. DSC fully ignored the environmental effect
18 when it was first raised during the comment period, suggesting instead the comment lacked
19 substantial evidence and therefore a detailed response was unnecessary. (F000562, 568-569). On
20 two separate and subsequent occasions the City presented additional professional and expert
21 statements. On one occasion the DSC fully ignored the statements. (F000535, 538). On another
22 occasion a deputy attorney general, without describing his qualifications to offer an opinion on
23 this topic and without referencing any information or data, blandly dismissed the expert
24 statements as irrelevant. (F000562, 568-569).

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28 ³ "The EIR is an information document." Pub. Res. C. §21061; §15121(a). "An EIR should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes into account of environmental consequences." §15151.

1 3. Urban Decay is Treated as an Indirect Environmental Effect.

2 Courts have long held that urban decay or physical deterioration stemming from business
3 closures is an environmental issue to be evaluated in an EIR context. *See Citizens for Quality*
4 *Growth v. City of Mt. Shasta*, 198 Cal. App. 3d 433, 445-446 (1988) (holding that proposed
5 project’s potential to cause economic problems for existing businesses should be considered to
6 the extent that potential is demonstrated to be an indirect environmental effect of the project);
7 *Citizens Ass’n for Sensible Dev. of the Bishop Area v. County of Inyo*, 172 Cal. App. 3d 151, 167
8 (1985) (“lead agency must consider whether the proposed shopping center will take business
9 away from the downtown shopping area and thereby cause business closures and eventual
10 physical deterioration of downtown Bishop”). Deterioration of local communities is a “very real
11 problem that directly impacts the quality of our daily life.” *Bakersfield* at 1220.

12 In fact, “experts are now warning about land use decisions that cause a chain reaction of
13 store closures and long-term vacancies, ultimately destroying shells in their wake.” *Id.* at 1204.
14 If “forecasted economic or social effects of a proposed project directly or indirectly will lead to
15 adverse physical changes in the environment, then CEQA requires disclosure and analysis of
16 these resulting physical impacts.” *Id.* at 1205. “[W]hen there is evidence...that economic and
17 social effects caused by a project, such as a shopping center, could result in a reasonably
18 foreseeable indirect environmental impact, such as urban decay or deterioration, then the CEQA
19 lead agency is obligated to assess this indirect environmental impact.” *Anderson First Coalition*
20 *v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1182.

21 As explained subsequently, the administrative record is replete with evidence
22 demonstrating the Delta Plan is likely to trigger a chain of events leading to urban decay. DSC
23 thus abused its discretion by failing to analyze the Project’s potentially significant urban decay
24 effects in accordance with CEQA. In short, the only evidence in the record regarding economic
25 effects indicates the Project will result in urban decay and DSC failed to proceed in a manner
26 required by law by ignoring Stockton’s arguments and evidence.

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2 4. Substantial Evidence supported the City's claim that the Plan
3 is likely to cause Urban Decay.

4 Besides DSC's failure to proceed in a manner required by law, substantial evidence
5 supports Stockton's claim that the Delta Plan may be indirectly responsible for environmental
6 effects omitted from the EIR. To a great extent this claim pivots on the evidence submitted by
7 Stockton and a wholesale lack of evidence supporting DSC's decision to dispense with
8 evaluating urban decay in the EIR. Two slender pieces of unsubstantial evidence and a highly
9 inconclusive study in the record (indeed this report's inability to reach a meaningful conclusion
10 about the first chain of urban decay—the Delta Plan's potential to cause economic disruption—
11 actually underscores a conclusion that the EIR is insufficient as an informational document for
12 purposes of understanding the Plan's potential to be responsible for urban decay) supports
13 Stockton's claim.

14 First, the DSC dismissed a comment submitted by Stockton during the EIR's public
15 comment period by claiming a lack of supporting evidence excused the statutory duty to provide
16 a detailed response or evaluate urban decay. The DSC wrongly dispensed with evaluating urban
17 decay on a strained theory that the public failed to supply enough facts, data and studies about
18 urban decay, thereby improperly shifting a statutory duty to study environmental effects from the
19 public agency to the general public. In short, DSC improperly dealt with the issue by hiding
20 behind the agency's failure to investigate potential environmental effects. Yet it is a public
21 agency's duty and not a judicial [*Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995)
22 33 Cal.App.4th 144; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311] duty to
23 follow the CEQA process and gather information and data about environmental effects. In this
24 instance the DSC wrongly dispensed with evaluating a potentially significant environmental
25 effect because the public failed to assume a public agency's duty: evaluate environmental effects
26 in detail. This wrong-headed approach turns CEQA upside down.

27 The second scintilla of unsubstantiated and unqualified opinion was uttered after one of
28 the City's presentation at a noticed public hearing. The City's representative presented and
summarized the professional and expert opinions of Mr. Chase and Dr. Lytle. The only response

1 was provided by a deputy attorney general who nakedly asserted, without logic or evidence, the
2 statements were too remote and speculative:

3 “Just um quickly uh in in reinterpreting uh Mr. Ray’s uh comments
4 through the lens of C.E.Q.A., in respond to some of the comments that
5 were made by um the city and it’s uh attorney. Uh. I think that what what
6 Mr. Ray said is accurate that is is um 1) uh the chance of projects ever
7 being Covered Actions so thereby even being subject to sort of this
8 chilling capital formation problem uh is, has Mr. Ray just said, is uh
9 highly unlikely therefore grossly speculative and CEQA says speculative
10 impacts need to just be noted and that’s it and you don’t need to discuss
11 speculative issues that the EIR is not supposed to engage in speculation
12 and I think um uh the record’s clear that the chances of of there being
13 Covered Actions that would have this sort of chilling effect um uh uh this
14 um um assuming chilling effect are slim. Um...then the speculation of any
15 sort of chilling effect is is uh also highly speculative so you have sort of
16 two layers of 1) factual incorrect, of something that is factually incorrect,
17 in terms of the scope of Covered Actions, um.”

11 F000561 (Delta Stewardship Council Meeting Video. 05 16-17 2013. Delta Stewardship Council
12 May 16 and 17, 2013. Agenda Item 6 Index 21. Archive Segment Number 22 of 51. Minutes
13 9:27 – 11:21.⁴

14 But the EIR did not dismiss the comment for being “speculative” or “remote”; it believed
15 the comment was merely undeveloped due to a lack of supporting evidence. Thus the EIR never
16 raised the excuse offered by the deputy attorney general. (“The City adopted a rationale
17 unsupported by its EIR.” *California Clean Energy Committee v. City of Woodland*, 225 Cal.
18 App. 4th (2014) 173, 205. Omitting *any* analysis of urban decay impacts from the EIR is equally
19 fatal.) Moreover, he did not provide his qualifications for commenting on the chain of events
20 leading to urban decay or otherwise establish his qualifications to evaluate the City’s claim.
21 Anyway, in a CEQA context, controlling legal authority dismisses this type of attorney statement
22 as being relevant or substantial evidence:

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27 ⁴ Mr. Andrews then repeated the theory advanced by the EIR’s response to comments that the
28 City’s claim lacked substantial evidence by wrongly argued *Bakersfield* was inapt because the
Bakersfield urban decay claim pivoted on the testimony of a college professor. As explained at
page 15 footnote 2 the evidence in *Bakersfield* consisted of expert opinion, reports and lay
opinion based on personal observation.

1 “Pala’s four-page letter of comment, which was submitted by Pala’s
2 general counsel, consisted almost exclusively of various arguments
3 supporting counsel’s opinion that CEQA required the preparation of an
4 EIR in connection with approval of the plan....We conclude that Pala’s
5 comment letter does not constitute substantial evidence under the
6 applicable ‘fair argument’ standard because it consists almost exclusively
7 of mere argument and unsubstantiated opinion, which are excluded from
8 the definition of substantial evidence under CEQA.”

6 *Pala Band of Mission Indians v. County of San Diego* (1998) 68 Cal.App.4th 556, 568, 580. The
7 deputy attorney general’s unsupported comment is equally flawed. Plus his reliance on
8 Mr. Ray’s statement is faulty. Mr. Ray basically asserted that although the Delta Plan defined
9 local land use actions as Covered Actions in the future the DSC would not interpret the defined
10 term in accord with the plain statutory language. Indeed, the plain language of the statute
11 directly contradicts Mr. Ray’s prediction about how the agency may interpret the term “Covered
12 Action” in the future. However agency interpretations can and do change and, more importantly,
13 a landowner cannot reasonably rely upon a statement from a staff member about the proper
14 interpretation of an agency regulation; it has no legal weight and does not legally restrain
15 subsequent decision making bodies from adopting a conflicting and materially adverse
16 interpretation in the future. *Pettit v. City of Fresno* (1973) 34 Cal.App.3d 813. Furthermore, the
17 response to comment assumed and did not assert to the contrary that Stockton’s discretionary
18 land use decisions were not Covered Actions subject to DSC review and denial. The response’s
19 scope was expressly limited to the amount of evidence to support the Fair Argument contained in
20 the City’s written comment.

21 By silence the DSC Council members and staff impliedly conceded the professional
22 expert qualifications of Mr. Chase and Dr. Lytle or alternatively, by neglecting to raise any
23 questions impeaching their respective qualifications to present these opinions and conclusions,
24 did not perfect the administrative record on this issue for purposes of judicial review.

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1 Third, after receiving the City's first set of expert comments about the Delta Plan, the
2 DSC prepared a "Modified Economic and Fiscal Impact Statement".⁵ A purpose of the
3 Statement was to evaluate potential direct economic effects of the Plan, the exact and direct
4 economic effects that starts a chain of event culminating in an indirect physical effect, urban
5 decay. (E001359,1363). Unfortunately for DSC, instead of contradicting the expert opinions
6 supplied by Mr. Chase and Dr. Lytle, it conceded lacking sufficient information and data to form
7 any opinion about the Plan's adverse economic consequences, the first chain in the chain of
8 events leading to urban decay, thereby impliedly endorsing Stockton's demand for the EIR to
9 address the urban decay impact.⁶

10 The Statement's "Sergeant Schultz-like 'I know nothing'" disclosure is staggering. With
11 respect to the Plan's economic consequences to communities such as Stockton the Statement did
12 not offer even a feeble disagreement. Instead it impliedly agreed that the EIR had not produced
13 sufficient information and data to quantify the environmental effect's significance. Specifically
14 the Statement concluded:

15 "The cost of actions taken to comply with Delta Plan
16 policies...cannot be known...the total cost of the Delta Plan policies to
17 private business or individuals is unknown, and the total number and type

18 ⁵ This Statement is part of the record of proceedings but not part of the EIR. It was released
19 after the draft EIR's public comment period and therefore is not located within the EIR's four
20 corners. If it is not part of the EIR it cannot be relied upon to defend the EIR's failure to
21 investigate and evaluate the urban decay environmental effect. Defects in the four corners of an
22 EIR cannot be cured with extra-EIR information: "Whatever is required to be considered in an
23 EIR must be in that formal report; what any official might have known from other writings or
24 oral presentations *cannot supply what is lacking in the report.*" *Laurel Heights Improvement
25 Association v. Regents of University of California* (1986) 47 Cal.3d 376, 405. There, the
26 Supreme Court held an EIR's failure to discuss alternatives was fatal, despite post-EIR testimony
27 asserting such alternatives were rejected as infeasible. Thus, DSC failed to proceed in the
28 manner required by law by omitting any analysis of urban decay effects from the EIR. Recently
the Third District set aside an EIR when the reasoning for rejecting an alternative was found
outside the four corners of the EIR: "The City adopted a rationale unsupported by its EIR."
California Clean Energy Committee v. City of Woodland. 225 Cal. App. 4th (2014) 173, 205.
Omitting any analysis of urban decay impacts from the EIR and offering excuses for this
omission not contained within the EIR is equally fatal.

18 ⁶ "When there is evidence...that economic and social effects caused by a project, such as a
19 shopping center, could result in a reasonably foreseeable indirect environmental impact, such as
20 urban decay or deterioration, then the CEQA lead agency is obligated to assess this indirect
21 environmental impact." *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th
22 1173, 1182.

1 of businesses impacted, including small business, is also unknown”
2 (E001359, 1363)

3 “The number of businesses and jobs created or eliminated is
4 uncertain.” (E001359, 1364)

5 “The number of businesses impacted cannot be estimated.”
6 (E001359, 1364)

7 “Even expressed as a range, the cost estimate is highly uncertain.”
8 (E001359, 1364)

9 “the number of businesses impacted cannot be estimated.”
10 (E001359, 1364)

11 Chase and Dr. Lytle each emphasized that the Statement lacked meaningful information or data
12 to address the urban decay impact and instead impliedly endorsed Stockton’s claim that the EIR
13 was inadequate as an informational document.

14 C. THE COUNCIL COMMITTED AN ABUSE OF DISCRETION AS A MATTER OF
15 LAW BY FAILING TO ADDRESS THE ADVERSE ENVIRONMENTAL
16 CONSEQUENCES FROM MEANINGFULLY DIFFERENT PATTERNS OF URBAN
17 GROWTH CAUSED BY THE DELTA PLAN.

18 Mr. Chase and Dr. Lytle each offered professional opinions that Stockton’s General Plan
19 and Infrastructure Master Plans, consistent with Government Code sections 665300, 65302.2 and
20 65401, are correlated in order to attain orderly and logical growth through efficient and
21 economic extensions of public services in a manner intended to lessen potential environmental
22 effects. (I000528-536; K012210.001-.005; K013388-93; and K013394-95.) Mr. Chase and Dr.
23 Lytle each explained that the Delta Plan *would* compel Stockton to alter existing growth patterns
24 depicted in the correlated General and Master Infrastructure Plans to accommodate new
25 regulations imposed by the Delta Plan; subsequently enacted Delta Plan regulations could
26 conflict with and therefore bar implementing these previously adopted plans. Each City plan was
27 adopted prior to the Delta Plan requiring such plans to comply with the co-equal goals; therefore,
28 Stockton did not take into account the co-equal goals when developing, designing and approving
these plans. Implementing the General and Master Infrastructure Plans have been partially
implemented and future implementation actions could be impeded or barred for failing to satisfy
the newly required co-equal goals. This in turn would force Stockton to significantly change

1 growth and infrastructure patterns and plans and these changes would produce reasonably
2 foreseeable new or more intensive environmental effects from less efficient development
3 patterns, more GHG emissions, more vehicular miles traveled, more air pollution, and more
4 energy consumption. (I000528, I000532; K012210.001, K012210.002).

5 Changed policies or regulations that in turn affect the type or pattern of anticipated
6 population growth and concomitant necessary municipal infrastructure must address potentially
7 different or more intense environmental effects stemming from the new policies or regulations.
8 “Included in this [growth inducing impact of a proposed project] are projects which would
9 remove obstacles to population growth (a major expansion of a waste water treatment plant
10 might, for example, allow for more construction in service areas). Increases in the population
11 may tax existing community service facilities, requiring construction of new facilities that could
12 cause significant environmental effects.” §15126.2(d) (bracketed language added; language in
13 parenthesis original).

14 *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398 vividly
15 illustrates the flaw inherent in dispensing with any evaluations of these impacts. There a county
16 “substantially changed the County’s land use policies pertaining to unincorporated territories
17 within various spheres of influence.” *Id.* at 404. It “often replaced mandatory language with
18 more permissive or discretionary language...eliminated certain provisions containing various
19 requirements and limitations...granted the County greater discretion in land use matters relating
20 to unincorporated territory... (and) where a conflict between city and county standards exist, the
21 County has granted itself discretion to override city standards.” *Id.* at 406-408. The Court
22 concluded that letters presented by various cities, while not expert opinion, constituted
23 substantial evidence indicating the new county regulations could affect the density, intensity,
24 location and type of growth patterns. *Id.* at 409 and 411. Since CEQA “advances a policy of
25 requiring an agency to evaluate the environmental effects of a project at the earliest possible
26 stage in the planning process (*Id.* at 410) and the cities’ letters “drew reasonable inferences from
27 this evidence” (*Id.* at 411) demonstrating “reasonably anticipated future development” (*Id.* at

28

1 409) the county erred by not addressing the environmental effects produced by potentially
2 changed growth patterns in an EIR before approving the new regulations.

3 We reach the same result here. The City asserted Mr. Chase and Dr. Lytle were experts
4 and qualified to render their opinions. DSC never contested this statement (and in any event,
5 Chase and Lytle’s conclusions, predicated upon “reasonable inferences from this evidence”,
6 constitutes Substantial Evidence whether or not they are found to be “experts”). Thus,
7 Stockton’s Community Development Director and Municipal Utility District Manager, one
8 responsible for implementing the City’s General Plan and the other responsible for implementing
9 Master Infrastructure Plans, each explained it was reasonably foreseeable for Delta Plan
10 regulations to alter planned growth patterns and municipal service expansions anticipated by the
11 enacted plans and these alterations would produce new or more intense environmental effects
12 concerning air pollution, global warming, traffic, agricultural land conversion and energy
13 consumption. The record discloses DSC did not take a hard look at this evidence or
14 meaningfully address this CEQA concern or, for that matter, even acknowledged this potential
15 environmental effect. The omission constitutes a failure to proceed in a manner required by law.

16 D. THE EIR FAILED TO INCLUDE AND EVALUATE REASONABLY FORSEEABLE
17 FEATURES OF THE DELTA PLAN IN THE PROJECT DESCRIPTION AND
18 THEREFORE PRODUCED AN UNSTABLE AND INACCURATE PROJECT
DESCRIPTION AND CONSEQUENTLY OMITTED ADDRESSING A MAJOR
FUTURE BUT KNOWN SIGNIFICANT FEATURE OF THE DELTA PLAN.

19 1. CEQA Requires an EIR to contain an Accurate and Stable Project Description.

20 A “finite project description is indispensable to an informative, legally adequate EIR.”
21 *County of Inyo v. City of Los Angeles* (1977) 71 Cal.3d 185, 199. A project description omitting
22 integral components of the project may result in an EIR failing to disclose all of the project’s
23 impacts. *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3d 818, 829.
24 “[A]n accurate project description is necessary for an intelligent evaluation of the potential
25 environmental effects of a proposed activity.” *San Joaquin Raptor/Wildlife Rescue Center v.*
26 *County of Stanislaus* (1994) 27 Cal.App.4th 713, 730.

27 The EIR’s entire project description must reflect the Guideline’s definition of a project as
28 “the whole of an action” that may result in a direct or indirect environmental effect. §15378.

1 Under CEQA, “‘Project’ is given a broad interpretation ... to maximize protection of the
2 environment.” *Center for Sierra Nevada Conservation v. County of El Dorado* (2012) 202
3 Cal.App.4th 1156, 1169-70.

4 The underlying statutory purpose is self evident: project features incorporated in a
5 project description give assurance that a public agency will evaluate potential significant
6 environmental effects produced by the whole of a project or by all project features. The legal
7 defect presented here pivots on the fact that the EIR acknowledged that the BDCP project would
8 be subsequently incorporated as a part of the Delta Plan without first submitting this enormous
9 modification to CEQA review. The DSC concedes it followed this restrictive approach: “I do
10 not know what we are doing but we are not trying to take on any approval of BDCP. We have
11 tried in every way to keep out of the details of BDCP and we do not need or want a backdoor
12 way to review the plan.” M1157. To put a finer point on it, a public agency cannot disclose that
13 environmentally significant aspects of a project will be incorporated into a project after project
14 approval without complying with CEQA. This approach does violence to the public’s right, the
15 central purpose for CEQA review and amounts to an impermissible post-hoc rationale favoring
16 new project features. CEQA doesn’t tolerate project add-ons after project approval.

17 2. Controlling Decisional Law teaches us that a public agency may not by-pass
18 CEQA when adding aspects of a project after the project is approval.

19 *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296 illustrates the legal
20 deficiency present here. In *Sundstrom* a landowner sought a use permit to construct a private
21 septic sewage treatment system to serve both a new and an existing motel complex. *Id.* at 301.
22 However, no disposal site for the sludge was identified and legitimate uncertainty attached to
23 whether surface and ground water hydrology supported the sewage disposal method. *Id.* at 306.
24 To resolve this uncertainty the county added a condition of approval requiring the landowner to
25 prepare a study about potential effects of the sewage disposal to “soil stability, erosion, sediment
26 transport and the flooding or downslope properties.” *Id.* The report was to propose mitigation
27 measures that would be incorporated “as requirements of this use permit.” *Id.* Finding that
28 “project plans” may not be “revised to incorporate needed mitigation measures after the final

1 adoption of the negative declaration” the appellate court set aside the use permit’s approval. *Id.*
2 In short, an approval cannot contain a provision allowing for automatically revising a project
3 after it has been approved. This approach has been characterized as “analogous to the sort of post
4 hoc rationalization of agency action that has been repeatedly condemned in decisions construing
5 CEQA.” *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70,
6 108. This is because it is important “that environmental decision be made in an accountability
7 arena.” *Citizens for Responsible & Open Government v. City of Grand Terrace* (2008) 160
8 Cal.App.4th 1323, 1341.

9 The Delta Reform Act of 2009 requires the Bay Delta Conservation Plan (BDCP) to be
10 automatically incorporated into the DSC Delta Plan, without DSC taking into account CEQA
11 requirements or examining whether the BDCP conflicts with the Delta Plan. According to the
12 EIR, “specific details of the BDCP have not been identified...However, if the BDCP is
13 approved...the [Delta Stewardship] Council is required to incorporate the BDCP into the Delta
14 Plan.” (D008188, D008215) No controlling legal authority authorizes a post-hoc wholesale
15 revision of an approved project without first complying with CEQA requirements. At a
16 minimum the DSC must evaluate whether this announced future change to the Delta Plan
17 introduces new significant environmental effects or intensifies existing significant effect as well
18 as consider whether the new Delta Plan feature conflicts with or lessens the effectiveness of
19 existing mitigation measures. Indeed, the potential environmental and policy conflicts between
20 the BDCP and Delta Plan are vividly illustrated in the Central Delta *et al.* opening brief and
21 incorporate that analysis by this reference.

22
23 3. No recognized Exemption justifies the DSC’s automatic incorporation of the
BDCP into the Delta Plan.

24 Omitting CEQA compliance is only appropriate if warranted by an approved CEQA
25 exemption. Yet no statutory or Guideline enacted exemption excuses DSC from complying with
26 CEQA before adding the BDCP to the Delta Plan (and this statement assumes that DSC
27 overcomes the distinct problem of rendering a decision by a legally impermissible *post-hoc*
28 rationale process). The Legislature know how to and is fully capable of exempting projects from

1 CEQA requirements. Indeed it has done so approximately 73 times. Pub.Res.C. §§ 21080.8-
2 21080.24, 21080.26, 21080.29, 21080.32-21080.42 and 21151.1 §§15261-15285, 15300.1,
3 15300.3, 15301-15333. The exemptions include categories of projects or activities and in certain
4 instances specifically names projects that are excused from CEQA compliance. No approved
5 exemption applies to the reasonably foreseeable future amendment to the Delta Plan.

6 Furthermore neither administrative agencies nor courts are authorized to create and apply
7 new exemptions not found in CEQA or the Guidelines. An implied or common law exemption
8 in this instance exceeds the Act and Guidelines, and exempting the Plan's revision may not be
9 accomplished by judicial fiat. **"It is the intent of the Legislature that courts, consistent with**
10 **generally accepted rules of statutory interpretation, shall not interpret this division or the state**
11 **guidelines...in a manner which imposes procedural or substantive requirements beyond**
12 **those explicitly stated in this division or in the state guidelines."** Pub.Res.C. §21083.1
13 (emphasis and underlining added). The Legislature could have expressly exempted the
14 incorporation of BDCP into the Delta Plan but did not choose to add an exemption to the
15 operative statute; therefore, an administrative or judicial CEQA interpretation cannot recognize
16 or create by implication an exemption of this nature.

17 Thus the EIR provides an incomplete project description by not including the obviously
18 foreseeable addition of the BDCP into the Delta Plan and compounds the error by revealing that
19 in the future the BDCP will be automatically incorporated into the Delta Plan without the benefit
20 of a recognized exemption for taking this action in lieu of first complying with CEQA.

21 E. THE EIR FAILED TO EVALUATE INFORMATION ABOUT FUTURE NATURAL
22 FLOW REGIMES.

23 *(Prejudicial Abuse of Discretion: Failure to Evaluate Information about Future*
24 *Natural Flow Regimes)*

25 According to the EIR, development of future flow and water quality objectives under the
26 Delta Plan "would likely result in a more natural flow regime in the Delta and Delta tributaries."
27 (D006005, D006011) Petitioner expressly commented that the EIR omitted relevant data and
28 information by failing "to identify the potential environment risks associated with requiring the

1 various water and flood control projects to operate in such a way as to provide a more natural
2 flow regime.”

3 A more natural flow regime would result in higher peak flows or prolonged flows and the
4 EIR fails to evaluate whether Delta area levees designed and constructed to be self-sustaining
5 and protect valuable agricultural and habitat lands from flow regimes operated artificially to
6 release peak flows gradually following storm events are also capable of protecting valuable
7 agricultural and habitat land from a significantly different natural flow regime. The EIR fails to
8 evaluate the consequences of a more natural flow regime and higher flows during different times
9 of the year and the relationship between these different high flow times and the adequacy of
10 flood control protections that were not planned, designed or constructed to accommodate these
11 anticipated new natural flow regimes.

12 City incorporates by reference the analysis and arguments presented by other Petitioners
13 on this issue and to avoid presenting repetitive arguments and authorities will file a joinder
14 concerning this argument.

15 F. THE EIR FAILED TO ADEQUATELY ADDRESS CUMULATIVE IMPACTS.

16 The EIR failed to analyze in a legally adequate manner significant cumulative impacts
17 from implementing the policies contained in the DSC’s Delta Plan. The EIR dispensed with the
18 procedure contained in the state CEQA Guidelines for investigating cumulative environmental
19 impacts. Among other deficiencies, the EIR provided a truncated list and a truncated analysis of
20 closely related actions.

21 City incorporates by reference the analysis and arguments presented by other Petitioners
22 on this issue and to avoid presenting repetitive arguments and authorities will file a joinder
23 concerning this argument.

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1 V. THE DELTA PLAN CONFLICTS WITH OR IMPERMISSABLY INTRUDES
2 WITH STATE LAW AND VESTED RIGHTS CREATED BY
3 STATUTORY AND COMMON LAW.

3 A. THE DELTA REFORM ACT MUST OBSERVE AND NOT DIRECTLY OR
4 INDIRECTLY FRUSTRATE AREA OF ORIGIN RIGHTS HELD BY NORTHERN
5 CALIFORNIA WATER INTERESTS.

5 The Sacramento-San Joaquin Delta Reform Act of 2009 (“Act”) prohibits the DSC from
6 adopting a plan or regulations directly or indirectly impairing or frustrating certain water
7 interests exercising or seeking to exercise rights under area of origin, watershed of origin, county
8 of origin and other associated water right protections. Stockton is one of those water interests.
9 Specifically, Water Code subsection 85031(a) provides in relevant part:

10 This division does not diminish, impair, or otherwise affect in any manner
11 whatsoever any area of origin, watershed of origin, county of origin, or
12 any other water rights protections, including, but not limited to, rights to
13 water appropriated prior to December 19, 1914, provided under the law.
14 This division does not limit or otherwise affect the application of Article
15 1.7 (commencing with Section 1215) of Chapter 1 of Part 2 of Division 2,
16 Sections 10505, 10505.5, 11128, 11460, 11461, 11462, and 11463, and
17 Sections 12200 to 12220, inclusive.

15 This exceedingly expansive and broad statement prohibits not just a direct and precise
16 impairment of these protections but prohibits any negative “affect in any manner whatsoever”.
17 The Legislature deliberately enacted this expansive and broad language in order to observe and
18 respect the delicate compromise reached decades ago between bitterly competing Northern and
19 Southern California water interests in order to enact historic legislation facilitating water projects
20 of state-wide concern, such as the State Water Project and Central Valley Project. However,
21 despite incorporating this compromise into the Act, numerous provisions of the Delta Plan, and
22 its implementing regulations, on their face, directly affect and indirectly diminish and impair the
23 statutory rights and protections afforded by the watershed of origin, county and other water right
24 protections.

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1 B. BACKGROUND CONCERNING THE COMPROMISE.⁷

2 Water Code section 11460 embodies various “watershed of origin” protections agreed to
3 by geographically diverse and competing water interests in order address Northern California
4 concerns about transferring water from the water rich northern part of the state to the population
5 dense southern part of the state through state financed water delivery facilities:

6 In the construction and operation by the department of any project under
7 the provisions of this part a watershed or area wherein water originates, or
8 an area immediately adjacent thereto which can conveniently be supplied
9 with water therefrom, shall not 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.

10 Water Code section 12203 embodies the “delta protection act” by making an overarching
11 declaration of public policy intending to protect apprehensive Northern California Water
12 interests:

13 ///

14 _____
15 ⁷ The following analysis concerning water development and legislative history of various area of
16 origin statutes draws heavily from the following sources: “Area of Origin Statutes – The
17 California Experience”, Ronald B. Robie, Russell R. Kletzing, Idaho Law Review, Volume 15
18 (1979), page 419, 422-425 and 1 Rogers & Nichols, Water for California (1967) pp. 20, 26-33,
19 43-46, 115-117. United States v. State Water Resources Control Board, (1986) 182 Cal. App. 3d
20 82, 98, explains: “The history of California water development and distribution is a story of
21 supply and demand. California's critical water problem is not a lack of water but uneven
22 distribution of water resources. The state is endowed with flowing rivers, countless lakes and
23 streams and abundant winter rains and snowfall. But while over 70 percent of the stream flow
lies north of Sacramento, nearly 80 percent of the demand for water supplies originates in the
southern regions of the state. And because of the semiarid climate, rainfall is at a seasonal low
during the summer and fall when the demand for water is greatest; conversely, rainfall and runoff
from the northern snowpacks occur in late winter and early spring when user demand is lower.
(See 1 Rogers & Nichols, Water for Cal. (1967) pp. 20, 26-33, 43-46 [hereafter Rogers &
Nichols].) Largely to remedy such seasonal and geographic maldistribution, while
simultaneously providing relief from devastating floods and droughts, the California water
projects were ultimately conceived and formed”.

24 Further: “Watershed or area-of-origin protective legislation was enacted during the
25 formative years of the projects in order to alleviate the fear of Northern California interests that
26 local water supplies would become depleted. (See generally Rogers & Nichols, *op. cit. supra*, pp.
27 115-117; Hutchins, *op. cit. supra*, pp. 143-145.) In 1931 the Legislature enacted section 10505
28 which prohibits the DWR from assigning appropriative rights which would deprive the county of
origin of water necessary for its development. In 1933, contemporaneous with legislation
authorizing construction of the CVP, the Legislature also enacted the Watershed Protection Act.
(§§ 11460-11463.) Under the provisions of section 11460, DWR project operations cannot
deprive ‘a watershed or area wherein water originates, or an area immediately adjacent thereto
which can conveniently be supplied with water therefrom, . . . of the prior right to all of the water
reasonably required to adequately supply the beneficial needs of the watershed, area,’ A
similar limitation upon federal agencies was later imposed. (§ 11128.)” *Id.* at 138-139.

1 It is hereby declared to be the policy of the State that no person,
2 corporation or public or private agency or the State or the United States
3 should divert water from the channels of the Sacramento-San Joaquin
Delta to which the users within said Delta are entitled.

4 These laws evidence important compromises reached between competing and contentious
5 water users before major water development began in the state. In the early 1900's the State was
6 planning water projects designed to utilize the plentiful water located in the northern portion of
7 the state and convey it to the parched southern portion of the state. Northern California water
8 interests expressed huge concerns that their water was being taken for use in the south and would
9 be permanently lost. The disagreement was intense, and the controversy threatened to prevent
10 state funding and construction of major California water delivery projects. In the end,
11 protections were devised and included in the final version of the Central Valley Project Act of
12 1933 and it can fairly be argued these compromises were a pivotal aspect of securing necessary
13 legislative support for the project and the enormous financial commitment. The Central Valley
14 Project Act authorized the funding and construction of the Central Valley Project ("CVP"),
15 which includes both the State Water Project and the Federal Central Valley Project as currently
16 constructed and operating. During the CVP Act's legislative process, area of origin residents
17 insisted it contain restated provisions guaranteeing they have first access to water originating in
18 their area. Several key provisions of the Act addressed these concerns, now codified
19 as California Water Code sections 11460-11463. These provisions, commonly known as the
20 "Watershed Protection Act", were the grease of a historic legislative compromise, and provided
21 inhabitants of watersheds of origin a protected future priority over out of area users and
22 facilitated a delicate compromise between competing Northern and Southern California water
23 interests.

24 These promises and guarantees were offered to meaningfully address the concerns of
25 Northern Californians that the resources and economic future of one area of California would not
26 be destroyed or otherwise exploited by state government fostering the economic well being of
27 Southern California. Without including these guarantees the legislation to fund and construct
28 state water deliver facilities would not have been approved, and the economic benefits derived

1 from exporting surplus water would not have been realized. The tremendous economic benefit
2 of converting low value arid lands into farms and cities has been realized, and the state has
3 carefully honored the promises and priorities extended to “area of origin” water interests. Due to
4 these protections, a watershed of origin entity has a claim of priority, so when an applicant seeks
5 an appropriative water right from the state, the application cannot be denied, conditioned, or
6 subordinated by reason of any CVP activities. As acknowledged by the Attorney General,
7 various area of origin protection statutes:

8 . . . have a common purpose, i.e., to reserve for the areas where water
9 originates some sort of right to such water for future needs which is
10 preferential or paramount to the right of outside areas. . . . 25 Ops.
Cal.Atty.Gen. (1955) 8, 10.

11 C. THE DELTA PLAN IMPACTS AREA OF ORIGIN PROTECTIONS.

12 The Act directs the DSC to adopt a Delta Plan and regulations (Water Code sections
13 85300 and 85210), consistent with the enabling Act, including the prohibitions articulated in
14 section 85031(a).

15 The Delta Plan enacts regulatory policies, and compliance with these regulations is
16 required for local agencies proposing a “Covered Action,” as defined in section 85057.5 of the
17 Act. Many mandatory policies restrict water right applications filed by water users within the
18 Delta to exercise their rights under the watershed protection statutes; such a water right
19 application constitutes a “Covered Action” subject to DSC jurisdiction. The regulations require
20 proponents proposing Covered Actions to adopt “certifications of consistency [that] must include
21 detailed findings” addressing the following (23 CCR §5002):

- 22 • The Covered Action must be consistent with each of the regulatory
23 policies contained in Article 3 implicated by the covered action. (*Id.*
24 §5002(b)(1)), including:
 - 25 ○ Reducing Reliance on the Delta Through Improved Regional
26 Water Self-Reliance. (*Id.* at §5003.)
 - 27 ○ Consistency with the Delta Flow Objectives. (*Id.* at §5005.)
 - 28 ○ Avoid adverse impacts to the opportunity to restore habitat. (*Id.*
at §5007.)
 - Locate New Urban Development Wisely. (*Id.* at §5010.)
 - Respect Local Land Use when Siting Water Facilities. (*Id.* at
§5011.)
 - Require Flood Protection for Residential Development in Rural
Areas. (*Id.* at §5013.)
 - Protect Floodways. (*Id.* at §5014.)

- The Covered Action must include applicable feasible mitigation measures identified in the Delta Plans’ Program EIR. (*Id.* at §5002(b)(2).)
- All Covered Actions must document use of best available science. (*Id.* at §5002(b)(3).)
- The Covered Action must include adequate provisions to assure continued implementation of adaptive management. (*Id.* at §5002(b)(4).)

A protected user exercises rights assured by the watershed protection statute when filing a water right application for diverting Delta water for use within the area of origin. This discretionary action constitutes a Covered Action. It requires agencies such as Stockton, before enjoying the important statutory priority to water arrived at as a delicate compromise between competing water users, to additionally demonstrate as a new burden that exercising this statutorily granted priority right is “consistent with the Delta Plan”. These findings constitute new requirements burdening the enjoyment of the statutory priority, and some, such as a requirement to “reduce reliance on the Delta through improved regional water self-reliance” (*Id.* at §5003), may be impossible for a Delta water user to make. Surely Southern California water development interests, some of whom are co-petitioners in this Action, would vigorously argue the statutory priority must fail because of a conflict with the later enacted co-equal goals espoused by the Delta Plan. While imposing such requirements may make sense for remotely locate water exporters without a statutory priority, applying this requirement to a entity protected by the statutory priority, such as the City of Stockton, unwinds a delicately designed compromise between competing water interests.⁸

Even assuming a protected water user makes detailed consistency findings, its actions can be judicially challenged, and then second guessed by the DSC or a competing Southern

⁸ Ironically the Delta Plan insists that entities enjoying a statutory priority to Delta water be required to reduce their reliance on the very water to which they were granted a priority through a hard fought legislative negotiation. The Delta Plan impairs the statutory priority granted to them. Adding absurdity to irony, the Delta Plan compels local Delta water users to “diversify local water supply portfolios” (*Id.* at §5003) yet these users lack alternative sources of water for diversification purposes. Similarly, requiring Covered Actions to be consistent with the Delta flow objectives to be adopted by the State Water Resources Control Board may prove impossible for a protected Delta user attempting to exercise its rights under the Watershed Protection statute.

1 California water developer on appeal to the DSC or as an intervener in a State Water Board
2 proceeding. The Act enables any person to file an appeal to the DSC asserting that a Covered
3 Action is inconsistent with the Delta Plan, and should not be approved. Water Code §85225 *et*
4 *seq.* This positions the DSC to deny or conditionally approve the validly exercised statutorily
5 protected prior right to water originally granted by the California Legislature more than eighty
6 years ago and reaffirmed as recently as 2009. Simply stated the Delta Plan as drafted adds
7 significant burdens to area of origin beneficiaries attempting to exercise statutory rights.

8 D. REGULATIONS VIOLATE LAW

9 The Delta Plan and its regulations diminish, impair and affect statutory rights and
10 protections afforded by watershed of origin, county and other water right protections.
11 Consequently, the regulations add burdens and impediments to exercising the statutory priority
12 and therefore must be invalidated. Government Code section 11342.2 provides:

13 Whenever by the express or implied terms of any statute a state agency
14 has authority to adopt regulations to implement, interpret, make specific or
15 otherwise carry out the provisions of the statute, no regulation adopted is
valid or effective unless consistent and not in conflict with the statute
and reasonably necessary to effectuate the purpose of the statute.

16 A regulation failing to precisely cohere to this standard is invalid. *Desert Environment*
17 *Conservation Asso. v. Public Utilities Com.* (1973) 8 Cal 3d 739. Courts are required to
18 determine whether the DSC exercised its authority within the bounds of the Delta Reform Act.
19 Administrative regulations that alter or amend the statute or enlarge or impair its scope are void
20 and courts are obligated to strike down such regulations. *Id.*; *Hodge v. McCall* (1921) 185 Cal.
21 330, 334; *Boone v. Kingsbury* (1928) 206 Cal. 148, 161-162; *First Industrial Loan Co. v.*
22 *Daugherty* (1945) 26 Cal.2d 545, 550. Administrative regulations doing violence to Legislative
23 acts are void, and an argument that they are merely an exercise of administrative discretion can
24 save them. *Morris v. Williams* (1967) Cal.2d 733; *California Welfare Rights Organization v.*
25 *Carleson* (1971) 4 Cal.3d 445.

26 The Legislature was unambiguous when it drafting Water Code Section 85031(a):
27 nothing in the Act was intended to affect in any way the protections provided by the area of
28 origin statute, including the watershed protection laws. The Legislature clearly intended through

1 Water Code Section 85031(a) to honor the delicate compromise reached early last century. Yet,
2 complete disregarding this legislative prohibition, the Delta Plan and its implementing
3 regulations expressly condition, restrict and burden these protected rights. Under the guise of
4 exercising delegated power, the DSC imposes upon Delta users such as the City of Stockton new
5 and undue obstacles and burdens that must be overcome and complied with before enjoying their
6 statutorily granted protection. This was not intended when the compromise was reached many
7 years ago and was not authorized by the Delta Reform Act of 2009. The Legislature in the early
8 1900's guaranteed the City of Stockton that the water needed for its development would be
9 available in the future; the Legislature in 2009 deliberately honored that commitment when it
10 adopted the Act. The DSC cannot now abusively use the coequal goals to impair the prior rights
11 granted to areas of origin by statute. It is the Legislature, not the DSC, which directs what is to
12 be done; the DSC cannot substitute its own ideas of what is good public policy for those of the
13 Legislature, particularly when those ideas expressly frustrate the expressed intention of the law.

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DATED: Oct. 15, 2014

HERUM\ CRABTREE\SUNTAG
A California Professional Corporation

By: 
STEVEN A. HERUM
Attorneys for Petitioner
CITY OF STOCKTON

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PROOF OF SERVICE

I, LAURA CUMMINGS, certify and declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 5757 Pacific Avenue, Suite 222, Stockton, California 95207, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing. On October 15, 2014 at my place of business a copy of **PETITIONER CITY OF STOCKTON'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS** was placed for deposit following ordinary course of business as follows:

BY U.S. MAIL with the United States Postal Service in a sealed envelope, with postage thereon fully prepaid.

The envelope(s) were addressed as follows:

SEE SERVICE LIST ATTACHED.

BY ELECTRONIC MAIL (EMAIL). By sending the document(s) to the person(s) at the email address(es) listed below.

SEE SERVICE LIST ATTACHED.

BY FEDERAL EXPRESS/OVERNIGHT MAIL in a sealed envelope, with postage thereon fully prepaid. [Code Civ. Proc., §§ 1013(c), 2015.5.]

BY PERSONAL SERVICE/HAND DELIVERY.

BY FACSIMILE at approximately _____.m. by use of facsimile machine telephone number (209) 472-7986. I caused the facsimile machine to print a transmission record of the transmission, a copy of which is attached to this declaration. The transmission was reported as complete and without error. [Cal. Rule of Court 2008 and 2003(3).]

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: October 15, 2014


LAURA CUMMINGS

SERVICE LIST BY U.S. MAIL

REPRESENTATIVE ATTORNEY	CASE
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