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FEDERATION OF FISHERMEN'S ASSOCIATIONS,  
7 SAN FRANCISCO CRAB BOAT OWNERS ASSOCIATION,  
and WINNEMEM WINTU TRIBE  
8

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 IN AND FOR THE COUNTY OF SACRAMENTO

11 COORDINATION PROCEEDING SPECIAL TITLE )  
(CRC 3.550): DELTA STEWARDSHIP COUNCIL )  
12 CASES )

JUDICIAL COUNCIL COORDINATION  
PROCEEDING NO. 4758

**CEQA CASE**

13 NORTH COAST RIVERS ALLIANCE, PACIFIC )  
COAST FEDERATION OF FISHERMEN'S )  
14 ASSOCIATIONS, SAN FRANCISCO CRAB BOAT )  
OWNERS ASSOCIATION, and the WINNEMEM )  
15 WINTU TRIBE, )

**PETITIONERS' OPENING TRIAL  
BRIEF**

Hearing: TBD  
Department: 31  
Judge: Michael P. Kenny

16 Petitioners/Plaintiffs,

17 v.

Action Filed: June 14, 2013

18 DELTA STEWARDSHIP COUNCIL, )  
CALIFORNIA OFFICE OF ADMINISTRATIVE )  
19 LAW, and DOES I-XX, inclusive, )

20 Respondents/Defendants,

21 DOES XXI-L, inclusive )

**FILED BY FACSIMILE**

22 Real Parties in Interest )  
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1 **INTRODUCTION**

2 This Court must issue a writ of mandate in order to enforce California’s environmental laws and  
3 protect the Delta from imminent ecologic collapse. The Delta Stewardship Council (“Council”) exceeded  
4 its authority and abused its discretion when it approved the Final Delta Plan (“Delta Plan” or “Project”),  
5 certified its Program Environmental Impact Report (“PEIR”) and promulgated implementing regulations,  
6 at Title 23, California Code of Regulations (“CCR”) sections 5001-5016 (the “Delta Plan Regulations”),  
7 without complying with the California Environmental Quality Act (“CEQA”), Public Resources Code  
8 section 21000 *et seq.*, the Sacramento-San Joaquin Delta Reform Act of 2009 (“Delta Reform Act”),  
9 Water Code section 85000 *et seq.*, the Public Trust Doctrine, and the Administrative Procedure Act  
10 (“APA”), Government Code (“Gov. Code”) sections 11340 *et seq.*

11 CEQA requires the Council to fully examine the impacts of increasing Delta exports, and to  
12 carefully consider alternatives that would avoid and reduce those impacts. Contrary to CEQA, the  
13 Council’s PEIR does neither. Although it purports to analyze the environmental impacts of the Delta  
14 Plan as required by CEQA, its excessive generality precludes meaningful public review, and it fails to  
15 adequately consider feasible alternatives and mitigation measures that would prevent further  
16 environmental harm. Because the PEIR falls far short of achieving CEQA’s twin mandates of identifying  
17 and avoiding significant environmental harm, it violates CEQA.

18 The Delta Reform Act requires the Council to complete a Delta Plan to achieve the “co-equal  
19 goals” of “providing a more reliable water supply for California and protecting, restoring, and enhancing  
20 the Delta ecosystem.” §§ 85054, 85300.<sup>1</sup> The Delta Plan does not achieve these goals. Instead, it  
21 accommodates unsustainable increases in Delta exports that will thwart protection and restoration of the  
22 Delta ecosystem. Because the Delta Plan will destroy rather than save the Delta’s imperiled fish and  
23 wildlife, it violates the Delta Reform Act.

24 The Public Trust Doctrine protects the Delta’s imperiled fish and wildlife from avoidable harm  
25 whenever it is feasible to do so. Contrary to this mandate, the Delta Plan accommodates unsustainable  
26 increases in Delta exports that will needlessly harm public trust resources, and dismisses from  
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<sup>1</sup> Undesignated sections refer to the Water Code.

1 consideration feasible alternatives and mitigation measures that would protect and restore the Delta’s  
2 ecological functions. Because the Delta Plan sacrifices rather than saves the Delta’s fish and wildlife, it  
3 violates the Public Trust Doctrine.

4 The Administrative Procedure Act establishes procedures and substantive standards governing  
5 adoption of regulations by state agencies including the Delta Stewardship Council, and forbids agencies  
6 from approving or implementing regulations that are not adopted in accordance with those procedures  
7 and standards. Gov. Code §§ 11340(a), 11342.2. The Council violated the APA because the Delta Plan  
8 Regulations it adopted conflict with the Delta Reform Act and are therefore invalid. *Id.*

### 9 FACTUAL BACKGROUND

10 In the 2009 Delta Reform Act, the Legislature declared that the Delta “is a critically important  
11 natural resource for California and the nation. It serves Californians concurrently as both the hub of the  
12 California water system and *the most valuable estuary and wetland ecosystem on the west coast of North*  
13 *and South America.*” § 85002 (emphasis added); PRC § 29701 (the Delta “is a natural resource of  
14 statewide, national, and international significance, containing irreplaceable resources”). But the  
15 Legislature also recognized that it is “in crisis and existing Delta policies are not sustainable.” §  
16 85001(a). “Resolving the crisis requires fundamental reorganization of the state’s management of Delta  
17 watershed resources.” *Id.* The Legislature accordingly commanded the Council to create a “legally  
18 enforceable Delta Plan” that achieved the coequal goals of “a more reliable water supply for California  
19 and protecting, restoring, and enhancing the Delta ecosystem.” §§ 85001(c), 85054.

20 The Delta’s imminent ecologic collapse is well-recognized and indisputable. It has two principal  
21 causes. First, an unsustainable proportion of the Delta’s freshwater flows has been diverted for decades  
22 by the Central Valley Project (“CVP”) and the State Water Project (“SWP”). *See, e.g.,* D107, D1773.<sup>2</sup>  
23 “Restoring environmental variability in the Delta is fundamentally inconsistent with continuing to move  
24 large volumes of water through the Delta for export.” L11845. “Recent delta flows are insufficient to  
25 support native Delta fishes for today’s habitats.” L11844; *see also* B615 (“The best available science  
26 suggests that currently required flow objectives within and out of the Delta are insufficient to protect the  
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28 <sup>2</sup> Administrative Record citations are in the form “[letter indicating section][page number].”

1 Delta ecosystem”). Second, for too long, agricultural diverters have discharged run-off contaminated  
2 with salt, selenium, and other toxic substances back into the rivers and groundwaters that are tributary to  
3 the Delta. B475, B683, B694, J74627. The one-two punch of diminished freshwater flows and increased  
4 temperature, salinity, herbicides, pesticides, and heavy metals has pushed the Delta to the brink of  
5 ecologic collapse.

6 Due to excessive diversions of water for consumptive use, many species of fish endemic to the  
7 Delta have already gone extinct, including the Sacramento perch, formerly one of the most abundant  
8 fishes of the Delta, and the thicktail chub. D7057. Just 12 indigenous species remain, and these are in  
9 grave danger. D2388. Since the SWP and CVP began operation, the Sacramento River winter and spring  
10 run Chinook salmon, Central Valley steelhead, North American green sturgeon and Delta smelt have been  
11 driven perilously close to extirpation; the delta smelt “is currently at its lowest level of abundance since  
12 monitoring began in 1967” and “it is the” U.S. Fish and Wildlife “Service’s biological opinion that the  
13 coordinated operations of the CVP and SWP, as proposed, are likely to jeopardize the continued  
14 existence of the delta smelt.” J74716; *see also* L25301 (National Marine Fisheries Service’s “final  
15 Opinion concludes that CVP/SWP operations are likely to jeopardize the continued existence” of the  
16 remaining species mentioned).

17 In addition to harming many fish species in the Delta, “[g]rowing agricultural production in the  
18 Central Valley has resulted in increased runoff of pesticides and fertilizer flowing to the Delta.” B475.  
19 “Agricultural drainage is” also a “significant source of salinity” and “selenium loading” in the Delta.  
20 B683, B694. “Levels of selenium in aquatic organisms and fish show that . . . current regulatory criteria  
21 may not be sufficient” to protect the environment. B694. Agricultural drainage also contains arsenic,  
22 boron, mercury, chromium, molybdenum and sodium sulfates. D6953, D6980, L10435-10436. The  
23 resulting pollution of the Delta and its San Joaquin Valley tributaries threatens the Delta’s water quality  
24 and the fish and wildlife dependent on them. L25442, J74627.

25 The Legislature enacted the Delta Reform Act to address these serious problems. The Delta  
26 Reform Act was meant to advance the “coequal goals” of “providing a more reliable water supply for  
27 California and protecting, restoring, and enhancing the Delta ecosystem.” § 85054. The Legislature  
28 found that eight “objectives” were inherent in those coequal goals, including to “[r]estore the Delta

1 ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem,”  
2 “[p]romote statewide water conservation, water use efficiency, and sustainable water use,” “[i]mprove  
3 water quality to protect human health and the environment consistent with achieving water quality  
4 objectives in the Delta,” and “[e]stablish a new governance structure with the authority, responsibility,  
5 accountability, scientific support, and adequate and secure funding to achieve these objectives.” § 85020  
6 (full list of objectives). The Legislature also declared that:

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

14 § 85021 (emphasis added). Further, the Legislature commanded that the reasonable use and public trust  
15 doctrines “shall be the foundation of state water management policy and are particularly important and  
16 applicable to the Delta.” § 85023.

17       The Legislature did not just set lofty policy goals. It directed the Council to create a “legally  
18 enforceable Delta Plan” that met a variety of specific requirements. For example, the Legislature  
19 commanded that the “Delta Plan shall” both “[b]e based on the best available scientific information” and  
20 “[i]nclude quantified or otherwise measurable targets associated with achieving the objectives of the  
21 Delta Plan.” § 85308. It also mandated that the “Delta Plan shall include measures that promote” five  
22 specified “characteristics of a healthy Delta ecosystem,” it “shall include measures to promote . . .  
23 improv[ed] water quality to protect human health and the environment,” and that six “subgoals and  
24 strategies for restoring a healthy ecosystem shall be included in the Delta Plan.” § 85302(c), (d)(3), (e).  
25 The Council concedes that its purpose was to create “a legally enforceable, comprehensive, long-term  
26 management plan . . . that achieves” the coequal goals of increased water supply reliability and a restored  
27 and enhanced Delta ecosystem. D6788. But notwithstanding this admission and these express legislative  
28 directives, the Council created a Delta Plan with very few enforceable requirements. The Delta Plan  
contains 14 policies and 73 recommendations, but the recommendations are “nonregulatory” and have no  
legal effect. B498, D56-D57. Moreover, as discussed more fully below, many of the 14 policies – which  
were codified as regulations by the Council (see 23 CCR sections 5002-5015) – are themselves vague and

1 unenforceable. For example, 23 CCR section 5003 requires that certain agencies report their progress in  
2 achieving reduced reliance on the Delta, but it does not require that agencies achieve any particular  
3 quantum of reduction in reliance or indeed any reduction at all. *See* B569. The Council’s claim that it  
4 “has chosen to apply its regulatory authority in a targeted manner” is a vast understatement. B498.

5         The Council’s environment review of the Delta Plan was convoluted. After repeated revisions to  
6 the Plan throughout 2011, the Council released the Fifth Staff Draft Delta Plan in August 2011, and the  
7 Draft PEIR (“DPEIR”) in November 2011. D6711-9082 (DPEIR); K4236 (Fifth Staff Draft Delta Plan).  
8 Petitioners submitted extensive comments on both. D2388-D2405, D2752-D2771. After the public  
9 comment period, the Council issued a Recirculated Draft PEIR (“RDPEIR”) in November 2012. D5887-  
10 D6710. The Council then certified the Final PEIR and approved a further revised Delta Plan at a public  
11 meeting on May 16, 2013. D7-5868 (Final PEIR); B415-1152 (final Delta Plan and appendices); B2  
12 (approval). The Council published its Notice of Determination on May 17, 2013. A1-A4. The  
13 regulations implementing the Council’s Delta Plan were subsequently approved by the Office of  
14 Administrative Law on or about August 7, 2013, and became effective on or about September 1, 2013.  
15 N1; 23 C.C.R. §§ 5001-5016.

16         The PEIR is a confusing mess. For instance, the RDPEIR made revisions to the DPEIR’s impact  
17 analysis but did not reproduce the unchanged portions of the analysis. *See* D5748 (Although the RDPEIR  
18 “did not change (or even repeat) the [DPEIR] discussion of the study area, significance thresholds,  
19 regulatory framework, or environmental setting for each resource topic,” the “impact and mitigation  
20 discussions in [the RDPEIR] for each resource topic supersede the corresponding impact and mitigation  
21 discussions in [the DPEIR] in most cases, unless otherwise noted. . . . Accordingly, where a text change is  
22 made below in this . . . . Final PEIR to an impact or mitigation discussion, it is made only to [the  
23 RDPEIR], except in cases where the [RDPEIR] impact discussion simply cross-referenced to the  
24 [DPEIR] impact discussion”). Requiring the public to cross-reference numerous locations in many-  
25 thousand-page documents simply to obtain a description of the Project is an obnoxious burden that  
26 hinders public review. The Council could have easily remedied this problem by issuing a single  
27 comprehensive Final PEIR that incorporated the various revisions across multiple documents, but it chose  
28 not to.

1 The Delta Reform Act requires the Council to provide detailed management direction to guide  
2 development of the subsequent Bay Delta Conservation Plan (“BDCP”). The BDCP will ostensibly  
3 provide for new Delta conservation and development programs including water management facilities,  
4 habitat restoration activities, and scientific research. B595. It is intended to both “restore a more  
5 naturally functioning Delta ecosystem” and ensure “a reliable freshwater source from the Delta.” D8188.  
6 The PEIR even claims that the BDCP will “help reverse the Delta’s ecological decline.” D60. Instead,  
7 however, the BDCP is likely to destroy the Delta. It proposes construction of two tunnels, the larger of  
8 which is 35 miles long and 40 feet in diameter. I4122. It would divert up to 9,000 cubic feet per second  
9 – about 6.5 million acre-feet per year – from the Sacramento River to Clifton Court Forebay for export  
10 south. I4119. Diverting this staggering quantity of water threatens to exacerbate rather than reverse the  
11 Delta’s ecologic decline. D1915-D1917.

12 The Council is a responsible agency for the BDCP under CEQA. § 85320(c). And the  
13 Legislature empowered the Council to make recommendations about creation and implementation of the  
14 BDCP and to hire consultants to do so. § 85213(a)(2); § 85320(c), (g). Moreover, the BDCP is to be  
15 incorporated into the Delta Plan if it meets certain criteria, including approval by the California  
16 Department of Fish and Wildlife (“DFW”) – formerly the Department of Fish and Game,<sup>3</sup> compliance  
17 with CEQA, and qualification as a Habitat Conservation Plan and a Natural Community Conservation  
18 Plan. § 85320(a). The two projects are clearly interconnected. Yet the Council refused to include the  
19 environmental impacts of the BDCP in its analysis of the Project.

20 **STANDARD OF REVIEW**

21 **I. CEQA**

22 This Court must determine whether the Council abused its discretion when it certified the PEIR,  
23 adopted CEQA findings, mitigation measures and a statement of overriding considerations, and approved  
24 the Project. PRC § 21168.5. An agency abuses its discretion by “failing to proceed in the manner CEQA  
25 provides or by reaching factual conclusions unsupported by substantial evidence.” *Vineyard Area*  
26 *Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435, citing PRC

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27  
28 <sup>3</sup> This name change was effective January 1, 2013. Fish & Game Code §§ 37, 700; Stats. 2012, ch. 559, §§ 5, 8, p. 90.

1 § 21168.5.

2 Whether the Council complied with CEQA’s procedural requirements is a question of law that  
3 this Court reviews independently. *Tuolumne County Citizens for Responsible Growth, Inc. v. City of*  
4 *Sonora* (2007) 155 Cal.App.4th 1214, 1224. “[W]hen an agency fails to proceed as required by CEQA,  
5 harmless error analysis is inapplicable.” *County of Amador v. El Dorado County Water Agency* (1999)  
6 76 Cal.App.4th 931, 946. Such a failure “subverts the purposes of CEQA if it omits material necessary to  
7 informed decisionmaking and informed public participation. Case law is clear that, in such cases, the  
8 error is prejudicial.” *Id.*

9 “Substantial evidence challenges” under CEQA “are resolved much as substantial evidence claims  
10 in any other setting.” *County of Amador*, 76 Cal.App.4th at 945-6. “‘Substantial evidence’ is not  
11 ‘synonymous with “any” evidence. It must be reasonable, credible, and of solid value.’” *Los Angeles*  
12 *County Office of the District Attorney v. Civil Service Commission* (1997) 55 Cal.App.4th 187, 198-99.  
13 “Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert  
14 opinion supported by facts.” Guidelines § 15384(b). “Argument, speculation, unsubstantiated opinion or  
15 narrative, [or] evidence which is clearly erroneous or inaccurate . . . does not constitute substantial  
16 evidence.” Guidelines § 15384(a).

## 17 **II. CONSISTENCY WITH DELTA REFORM ACT**

18 Administrative agencies promulgate two categories of rules: quasi-legislative rules and  
19 interpretive rules. *Yamaha v. Board of Equalization* (1998) 19 Cal.4th 1, 10-12. Quasi-legislative rules  
20 arise from a delegation of lawmaking power by the Legislature; interpretive rules “represent[] an agency’s  
21 view of [a] statute’s legal meaning and effect.” *Id.* Ordinarily, quasi-legislative rules are given more  
22 deference by the judiciary “[b]ecause agencies granted . . . substantive rulemaking power are truly  
23 ‘making law’” whereas interpretive rules “represent the agency’s view of the statute’s legal meaning and  
24 effect, questions lying within the constitutional domain of the courts.” *Id.* But where, as here, petitioners  
25 contend that the challenged agency conduct conflicts with the underlying substantive law and therefore  
26 does not “lie[] within the scope of authority delegated by the Legislature,” the court reviews the act  
27 “independently for consistency with controlling law” and “does not . . . defer to an agency’s view” –  
28 regardless of whether the challenged act is an interpretive rule or a quasi-legislative rule. *Id.*; *see also*

1 *EPIC v. Department of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1011, 1022 (appropriate  
2 standard for argument of inconsistency of regulation with controlling law is “respectful nondeference”),  
3 *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 108  
4 (“the judiciary independently reviews the administrative regulation for consistency with controlling  
5 law”); *cf. Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal.App.3d 90,  
6 95-96 (analogous question of whether a General Plan meets statutory requirements raises a question of  
7 law). As such, an independent *de novo* standard applies to petitioners’ claim that the Delta Plan fails to  
8 meet the explicit requirements of the Delta Reform Act – regardless of whether the legislatively mandated  
9 Delta Plan is viewed as a delegation of lawmaking authority or instead as the Council’s interpretation of  
10 that Act.

11 **ARGUMENT**

12 **I. THE COUNCIL VIOLATED CEQA IN CERTIFYING THE FINAL PEIR AND**  
13 **APPROVING THE PROJECT**

14 **A. CEQA Requires Informed Decision-Making.**

15 CEQA mandates that the Council consider the environmental consequences of the Delta Plan  
16 during its decisionmaking process. PRC § 21000(g); *Mountain Lion Foundation v. Fish & Game Com.*  
17 (1997) 16 Cal.4th 105, 112. CEQA is intended:

18 (1) to inform governmental decision makers and the public about the potential, significant  
19 environmental effects of proposed activities, (2) to identify ways that environmental  
20 damage can be avoided or significantly reduced, (3) to prevent significant, avoidable  
21 damage to the environment by requiring changes in projects through the use of alternatives  
or mitigation measures when the governmental agency finds the changes to be feasible,  
and (4) to disclose to the public the reasons why a governmental agency approved the  
project in the manner the agency chose if significant environmental impacts are involved.

22 *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1996) 42 Cal.App.4th 608, 614-15  
23 (citing CEQA Guidelines [14 C.C.R.; “Guidelines”] § 15002); see also PRC §§ 21000-21002.

24 CEQA must be interpreted so as “to afford the fullest possible protection to the environment  
25 within the reasonable scope of the statutory language.” *Friends of Mammoth v. Board of Supervisors*  
26 (1972) 8 Cal.3d 247, 259; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 563-  
27 64 (“*Goleta Valley II*”). The “environmental impact report is ‘the heart of CEQA’ and the  
28 ‘environmental alarm bell whose purpose it is to alert the public and its responsible officials to

1 environmental changes before they have reached ecological points of no return.” *Sierra Club v. State*  
2 *Board of Forestry* (1994) 7 Cal.4th 1215, 1229 (quoting *Laurel Heights Imp. Ass’n v. Regents of Univ. of*  
3 *Calif.* (1988) 47 Cal.3d 376, 392 (“*Laurel Heights I*”). The EIR functions as “a document of  
4 accountability” that “protects not only the environment but also informed self-government” (*id.*) by  
5 “demonstrat[ing] to an apprehensive citizenry that the agency has in fact analyzed and considered the  
6 ecological implications of its action.” *No Oil, Inc. v. County of Los Angeles* (1974) 13 Cal.3d 68, 86.

7 “The purpose of CEQA is not to generate paper, but to compel government at all levels to make  
8 decisions with environmental consequences in mind.” *Bozung v. Local Agency Form. Com.* (1975) 13  
9 Cal.3d 263, 283. This Court “can and must . . . scrupulously enforce all legislatively mandated CEQA  
10 requirements.” *Goleta Valley II*, 52 Cal.3d at 563. “Full compliance with the letter of CEQA is essential  
11 to the maintenance of its important public purpose.” *Resource Defense Fund v. Local Agency Formation*  
12 *Commission* (1987) 191 Cal.App.3d 886, 897-98. “When the informational requirements of CEQA are  
13 not complied with, an agency has therefore abused its discretion.” *Save Our Peninsula Committee v.*  
14 *Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 117-18. “[T]he ultimate decision . . .  
15 to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not  
16 provide the decision-makers, and the public, with the information about a project that is required by  
17 CEQA.” *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829; *Napa*  
18 *Citizens for Honest Gov’t v. Napa Cty. Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 361.

## 19 **B. The Council’s PEIR Is Inadequate**

### 20 **1. The EIR’s Organization Frustrates Informed Decisionmaking**

21 The Council likens the creation of the Delta Plan to the experience of an explorer lost in the reeds  
22 (B441) but the metaphor is more appropriately applied to those reading the PEIR. The reader must refer  
23 to various chapters and appendices scattered throughout multiple volumes to piece together any useful  
24 view of the Project, its alternatives, and its impacts.

25 For example, the 100-plus page project description in the DPEIR gives no concrete information  
26 about the key aspects of the Project. D6807-D6909. Further, the “Revised Project Description” in the  
27 RDPEIR refers repeatedly to un-referenced portions of the DPEIR for much of its substance, without  
28 providing any more clarity as to the Project’s components. D5977-D6002. For example, when

1 discussing changes regarding water supply, the RDPEIR states that “WR R4 . . . is similar to the portion  
2 of the Proposed Project WR P1 that became Revised Project WR R4, except that Revised Project WR R4  
3 applies to all water users in the Delta watershed under the Revised Project.” D5980. Yet the RDPEIR  
4 does not indicate where in the DPEIR the previous discussion occurs, making simple comparison  
5 impossible. *Id.* The PEIR further revises these sections but not with sufficient context to make the  
6 revisions stand alone. D5760-D5763. The PEIR’s Master Response to Comments creates an additional  
7 location the reader must review to discern the Project’s description. D51-D67. Thus, to understand what  
8 the Project comprises, the reader must wade through at least 150 pages, spread over at least four different  
9 documents, and even then may still not have a complete view of what the Council intends the Project to  
10 be.<sup>4</sup> This continues throughout the PEIR’s analysis of the potential impacts of the Project and its  
11 alternatives. *See e.g.* D5748 (“generally speaking, the [RDPEIR] did not change (or even repeat) the  
12 [DPEIR] discussion of the study area, significance thresholds, regulatory framework, or environmental  
13 setting for each resource topic”).

14 The PEIR’s fractured, cryptic and muddled organization frustrates CEQA’s goal of making the  
15 agency’s decisionmaking accessible to the public. *Laurel Heights I*, 47 Cal.3d at 392, 405 (“EIR must  
16 include detail sufficient to enable those who did not participate in its preparation to understand and to  
17 consider meaningfully the issues raised by the proposed project”). These organizational flaws are  
18 exacerbated by the incomplete and confusing text of the PEIR, as discussed below.

19 **2. The Project Description Is Inadequate**

20 CEQA defines “project” as “the whole of an action” potentially causing direct or indirect  
21 “physical change in the environment.” *Id.* at § 15378(a). CEQA requires that each EIR contain a  
22 comprehensive project description that includes (1) a map of the project’s location, (2) a statement of the  
23 project’s objectives and (3) a description of the project’s technical, economic, and environmental  
24 characteristics. Guidelines § 15124. “An accurate, stable, and finite project description is the *sine qua*  
25 *non* of an informative and legally sufficient EIR.” *County of Inyo v. City of Los Angeles* (1977) 71  
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27 <sup>4</sup> This confusion remains unrectified because the Council impermissibly buried its discussion of the  
28 policies and recommendations of the Delta Plan in various appendices throughout the PEIR process, as  
discussed below.

1 Cal.App.3d 185, 193 (“*County of Inyo*”). “Only through an accurate view of the project may affected  
2 outsiders and public decisionmakers balance the proposal’s benefit against its environmental costs,  
3 consider mitigation measures, assess the advantage of terminating the proposal (i.e., the ‘no project’  
4 alternative) and weigh other alternatives in the balance.” *Id.* at 192-193; *City of Santee v. County of San*  
5 *Diego* (1989) 214 Cal.App.3d 1438, 1454. A “curtailed, enigmatic or unstable project description draws  
6 a red herring across the path of public input.” *County of Inyo*, 71 Cal.App.3d. at 192-193. The Council’s  
7 PEIR contains precisely the type of enigmatic project description condemned in *County of Inyo*, as it fails  
8 to inform the public as to the Project’s objectives, purpose, and scope.

9 **a. The Project Description Fails to Disclose the Project’s Objectives and**  
10 **Underlying Purpose**

11 CEQA requires that the project description provide a “statement of the objectives sought by the  
12 proposed project,” including “the underlying purpose of the project.” Guidelines § 15124(b). Clear  
13 objectives “help the lead agency develop a reasonable range of alternatives to evaluate” and “help the  
14 agency prepare its findings or statement of overriding considerations.” *Id.*

15 The Council disregarded this mandate. The DPEIR’s “Delta Plan Purpose and Project  
16 Objectives” section explains neither the Project’s purpose nor its objectives. D6788-D6791. Instead, the  
17 Council recites provisions of the Delta Reform Act without further discussion of their meaning. For  
18 example, the objective to “[m]anage the Delta’s water and environmental resources and the water  
19 resources of the state over the long term” raises more questions than answers. D6788 (quoting §  
20 85020(a)). Does manage, as used here, require compliance with a specific level of water quality? Would  
21 continued degradation of these resources, if “managed” to support the massive water diversions  
22 elsewhere allowed, satisfy this vague policy objective?

23 The Council’s statement of the Project’s objectives does not answer this question. Indeed, the  
24 Council’s DPEIR makes no attempt to explain how its unadorned recital of the Delta Reform Act’s  
25 provisions somehow provides a clear statement of the Delta Plan’s objectives. D6788-6789. Instead of  
26 explication, it retreats behind the Act’s bare language, stating only that “[t]he fundamental purpose of the  
27 Delta Plan . . . is to achieve the coequal goals and all of the inherent subgoals and objectives listed . . . .”  
28 D6789. The PEIR does not further expand or explain these objectives. D57-D58. Absent more, the

1 Council's objectives are mere platitudes that provide no guidance for the Council's selection of  
2 alternatives, preparation of findings, and consideration of overriding considerations. By ignoring  
3 CEQA's procedural requirements, the Council has abused its discretion. Guidelines § 15124(b).

4 **b. The Project Description Is Incomplete**

5 The PEIR states that the "project" here encompasses adoption of the Delta Plan, future actions by  
6 the Council relating to its consistency determinations, "and implementing actions called for by the Delta  
7 Plan's policies, recommendations, and performance measures." D51. The whole of the "project"  
8 necessarily includes all components of the legislatively mandated "fundamental reorganization of the  
9 state's management of Delta watershed resources" that the Delta Plan is being proposed to achieve. §  
10 85001(a). Yet the PEIR's project description fails to present the whole Project.

11 **i. The Substance of the Project Is Hidden in an Appendix**

12 Contrary to CEQA's core mandate to *inform* the public of the Project's impacts on the  
13 environment, the actual policies and recommendations that comprise the Delta Plan Project are buried in  
14 an appendix. See D5842-D5867. This appendix, Appendix A to the PEIR,<sup>5</sup> presents the policies and  
15 recommendations of the Proposed Final Delta Plan in a table form, using abbreviations and acronyms  
16 defined elsewhere. *Id.*; see also D11-24. Hiding the basic elements of the proposed action in an appendix  
17 violates CEQA. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007)  
18 40 Cal.4th 412, 442 ("*Vineyard*") ("[I]nformation "scattered here and there in EIR appendices," or a  
19 report "buried in an appendix," is not a substitute for "a good faith reasoned analysis" . . ."); *San*  
20 *Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 659 ("decision makers  
21 and [the] general public should not be forced to sift through obscure minutiae or appendices in order to  
22 ferret out" fundamental aspects of the project's description); *California Oak Foundation v. City of Santa*  
23 *Clarita* (2005) 133 Cal.App.4th 1219, 1239 (important issues merit discussion in the "most readily  
24 accessible" EIR text, rather than receiving inadequate treatment in appendix).

25 **ii. The Project Description Improperly Excludes the BDCP from**  
26 **the Project**

27 CEQA requires agencies to prepare EIRs regarding the impacts of "projects" that may have

28 <sup>5</sup> The DPEIR, like the PEIR, relegated this information to an appendix. See D8323-D8433.

1 significant environmental impacts. Guidelines § 15064(a)(1). CEQA defines “project” to mean “the  
2 whole of an action.” Guidelines § 15378(a). “The term ‘project’ refers to the activity which is being  
3 approved and which may be subject to several discretionary approvals by governmental agencies. The  
4 term ‘project’ does not mean each separate governmental approval.” Guidelines § 15378(c).  
5 Accordingly, agencies “must consider the whole of an action, not simply its constituent parts, when  
6 determining whether [the action] will have a significant environmental effect (*Citizens Assoc. for Sensible*  
7 *Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151).” Guidelines § 15003(h).  
8 This ensures “that environmental considerations do not become submerged by chopping a large project  
9 into many little ones – each with a minimal potential impact on the environment – which cumulatively  
10 may have disastrous consequences.” *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263,  
11 283-284. Thus the “general description of the project’s technical, economic, and environmental  
12 characteristics” must describe the *whole project under review*. Guidelines § 15124(c).

13         The Council failed this mandate when it omitted the BDCP from the project description. The  
14 Council is authorized “to dictate in the Delta Plan the conveyance improvements it views as meeting the  
15 coequal goals” of the Delta Reform Act. D8190; B1156; §§ 85020, 85040, 85304. It is similarly  
16 authorized to recommend the “preferred Delta conveyance options that the BDCP process evaluates.”  
17 D8194; §§ 85320(c) (Council to consult during creation of BDCP), 85320(g) (“Council may make  
18 recommendations . . . regarding the implementation of the BDCP”). In this way the BDCP is no different  
19 from many other agency actions contemplated in the Delta Plan as recommended actions. *See* D56  
20 (recommendations are directed at other agencies). Yet the Council arbitrarily treated the BDCP as  
21 different from these other actions.

22         The Council declined to address and analyze any criteria to guide the most critical feature of its  
23 Delta planning process – the conveyance of Delta flows to consumptive users – despite its broad authority  
24 – indeed, duty – to do so under the Delta Reform Act. But the quantity, timing and location of  
25 conveyance of Delta water to meet consumptive demand are the key factors whose analysis is essential to  
26 achieving the Project’s stated objectives of balancing ecological restoration with assuring a sustainable  
27 supply of water for consumers. Yet the PEIR impermissibly deferred this pivotal task to the future BDCP  
28 process, thereby frustrating CEQA’s mandate that an EIR provide all of the information needed for

1 informed decisionmaking. D60, D4842, D8191. The PEIR completely omits analysis of the BDCP.

2         The prejudice to the CEQA process from this omission is undeniable. The Delta Plan  
3 emphasizes, as it must, that completing the BDCP “is essential; and should be done as soon as possible”  
4 and that the BDCP is “key” to resolving the conflicts between water conveyance and endangered species.  
5 B482. Indeed, for this reason the Council stated that it considered the BDCP in its assessment of the  
6 Project’s cumulative impacts, and that its “No-Project Alternative does *not* assume completion of the  
7 BDCP.” D61 (quotation, emphasis added). D60. The Council has the ultimate role of determining  
8 whether the BDCP complies with the Delta Reform Act’s requirements. B436; B1156; § 85320(e). Most  
9 importantly, upon its completion the BDCP will be incorporated into the Project if it satisfies these  
10 necessary statutory mandates. B436, B507-B508; D6541; § 85230. Future projects that are covered  
11 actions under the BDCP and the Delta Plan are presumed consistent with the Delta Plan if the Department  
12 of Fish and Wildlife (“DFW”) determines that they are consistent with the BDCP regardless of potential  
13 conflicts with the Delta Plan. D60-D61. Thus, *the BDCP is necessarily part of the Project*. B436, B42.

14         CEQA requires the Council to review the entire activity as a whole instead of segmenting the  
15 Project into smaller parts. *Association for a Cleaner Environment v. Yosemite Com. College Dist.*  
16 (2004) 116 Cal.App.4th 629, 638 (“ACE”); Guidelines § 15378(a), (c), (d); *Tuolumne County Citizens*  
17 *for Responsible Growth v. City of Sonora*, 155 Cal.App.4th 1214, 1230 (“if the two matters are analyzed  
18 in sequence . . . and the combined or interactive environmental effects are not fully recognized until the  
19 review of the second matter, the opportunity to implement effective mitigation measures as part of the  
20 first matter may be lost”).

21         The particular conveyance facilities selected during the BDCP process will substantially influence  
22 the impacts that arise from implementation of the Delta Plan. For example, if as proposed, the BDCP  
23 implements twin bypass tunnels that would remove a projected 6.5 million acre feet per year from the  
24 Sacramento River before it can flow into the Delta, far more water would have to be released from  
25 upstream reservoirs to maintain appropriate instream conditions below the BDCP conveyance structures.  
26 I3756, I4122 The PEIR ignores these plainly foreseeable future impacts. *E.g.*, D6007, D6027-D6028,  
27 D6541-D6543. And, it fails to explain what sorts of environmental restoration measures would be  
28 needed if bypass tunnels were to be selected. *E.g.*, D6010-D6013, D6034-D6041, D6541-D6543, D7022-

1 D7025. Likewise, the PEIR evades analysis of the extent to which global warming could affect water  
2 deliveries and the environment under various conveyance methods. D60, D6548.

3 Consistent with its dodging of these obvious and pivotal environmental issues, the PEIR fails  
4 completely to assess which conveyance methods best achieve the Delta Reform Act’s goals. D60. It  
5 omits altogether any analysis of how different conveyance methods might affect implementation of the  
6 Delta Plan. Instead, it shrinks from its CEQA duties, hinting only in the vaguest terms that, when taken  
7 cumulatively, the BDCP *could* have impacts, but making no effort to quantify those impacts as significant  
8 or less-than-significant. *See* D6540-D6548 (vague discussion of cumulative impact of BDCP and  
9 Project). By excluding the BDCP – the centerpiece of the inextricably interrelated Delta Plan – and the  
10 other key issues from its environmental review, the Council violated CEQA.

### 11 3. The EIR Uses the Wrong Baseline

12 “To decide whether a given project’s environmental effects are likely to be significant, the agency  
13 must use some measure of the environment’s state absent the project, a measure sometimes referred to as  
14 the ‘baseline’ for environmental analysis.” *Communities for a Better Environment v. South Coast Unified*  
15 *Air Quality Management District* (2010) 48 Cal.4th 310, 315 (“CBE”). “Normally” this baseline is the  
16 “physical environmental conditions in the vicinity of the project, as they exist at the time the notice of  
17 preparation is published,” Guidelines section 15125(a), because “normally” the “environmental  
18 condition[] in the vicinity of the project” is “the environment’s state absent the project.” *Id.*; *CBE*, 48  
19 Cal.4th at 315.

20 Here, by contrast, the Legislature intended the Delta Plan as a way to *restore* the declining Delta  
21 environment. *E.g.* § 85054. As the Council admits, “the failure to arrest such decline is itself a  
22 potentially significant environmental impact.” D79. To that end, the PEIR purports to consider each  
23 alternative’s “ability to arrest or reverse ongoing degradation of the Delta’s biological resources, flood  
24 protection, water resources, and agricultural resources” when selecting the “environmentally superior  
25 alternative.” D6584. But the PEIR sabotages this inquiry by selecting the Delta’s existing ecological  
26 collapse – including Delta exports so excessive they threaten extinction of species – as the baseline by  
27 which to measure the effects of the Project and its alternatives. *See* D6960-D6961; D2332.

28 CEQA requires agencies to compare the impacts of the proposed project with the “environment’s

1 state absent the project” so as to avoid “‘illusory’ comparisons that ‘can only mislead the public as to the  
2 reality of the impacts and subvert full consideration of the actual environmental impacts.’” *CBE*, 48  
3 Cal.4th at 315, 322 (quoting *Environmental Planning & Information Council v. County of El Dorado*  
4 (“*EPIC*”) 131 Cal.App.3d 350, 358). Such an “illusory comparison” flies in the face of CEQA’s goal of  
5 informed decisionmaking. *Id.* It cannot be squared with the Legislature’s intent that CEQA “be  
6 interpreted in such manner as to afford the fullest possible protection to the environment within the  
7 reasonable scope of the statutory language.” *Friends of Mammoth v. Board of Supervisors* (1972) 8  
8 Cal.3d 247, 259.

9       The Council’s threshold decision to select an illusory baseline that masked the Project’s adverse  
10 impacts stymied its opportunity to fairly address the Project’s actual impacts. The Council’s “[f]orfeiture  
11 of that opportunity is an action, rather than a perpetuation of the status quo. Put differently, an agency  
12 may not escape its duty by ignoring that duty and then presenting the result as a *fait accompli*  
13 incorporated into an environmental baseline.” *League to Save Lake Tahoe v. Tahoe Regional Planning*  
14 *Agency* (E.D.Cal. 2010) 739 F.Supp.2d 1260, 1276 (affirmed in part and reversed in part, 469 F.App’x  
15 621 (9th Cir. 2012)). Like the lead agency in *League to Save Lake Tahoe*, the Council’s authority under  
16 the Delta Reform Act is broad, and requires actions to improve – rather than perpetrate – the Delta’s  
17 declining environmental conditions. 739 F.Supp.2d at 1276; §§ 85020, 85054. Given this mandate, the  
18 Council should not have subsumed the catastrophic impacts of the existing, unsustainable Delta exports  
19 into the CEQA baseline. By using as a baseline the very conditions of environmental dystopia that  
20 prompted adoption of the Delta *Reform* Act in the first place, the Council made informative analysis of  
21 the Project’s impacts impossible.

#### 22           **4.       The PEIR’s Discussion of the Project’s Impacts Is Incomplete**

23       “The fundamental purpose of an EIR is ‘to provide public agencies and the public in general with  
24 detailed information about’” a proposed project’s environmental effects. *Vineyard*, 40 Cal.4th at 428.  
25 Therefore, CEQA requires that an EIR disclose and analyze all potential significant environmental  
26 impacts of a proposed project. PRC § 21100(b)(1); Guidelines § 15126.2. The agency must make a  
27 “good faith effort at full disclosure” of both short- and long-term direct, reasonably foreseeable indirect,  
28 and cumulative effects of the proposed project. Guidelines §§ 15064(d), 15126.2, 15151.

1 The PEIR’s discussion of the Project’s environmental impacts fails to do so. It is far too vague,  
2 generalized and abstract to permit informed public review. *See e.g.* D6034-D6041 & D7022-D7025  
3 (discussion of water resources impacts to Delta ecosystem restoration); D6010-D6013 & D7113-D7125  
4 (discussion of biological resources impacts on water supply and Delta ecosystem restoration). The PEIR  
5 fails to fully analyze the effects of the BDCP on each of the competing beneficial uses of water. D6539-  
6 D6548. It also fails to clearly present the Project’s potential impacts on all of its source watersheds –  
7 including the Trinity River watershed – and the threatened salmon and other species that depend on  
8 them.<sup>6</sup> *See, e.g.*, D6034-D6041, D7113-D7125. The Council impermissibly defers most essential  
9 analysis to later, project-specific environmental reviews, thereby evading CEQA’s command that hard  
10 questions be asked – and answered – “as early as feasible in the planning process to enable environmental  
11 considerations to influence project program and design . . . .” Guidelines § 15004(b).

12 And, where the PEIR does purport to address an issue, it speaks in such broad terms that it is  
13 impossible for the public to discern and analyze the Project’s environmental effects. For example, when  
14 comparing alternatives, the RDPEIR’s discussion of their greenhouse gas (“GHG”) emissions is so  
15 general that it forecloses an informed choice among them. As to “GHG impacts,” the RDPEIR states:

16 The Alternative, the Proposed Project Alternative, and Alternatives 1A, 1B, and 3 each  
17 would have fewer potential GHG impacts than the Revised Project, for differing reasons,  
18 while Alternative 2 would have a similar level of GHG impacts as the Revised Project.  
19 Alternatives 1A and 1B, which encourage no reductions in exports from the Delta, would  
20 involve fewer GHG emissions from construction than the Revised Project, but more GHG  
21 emissions from pumping and moving water, particularly over mountain ranges in southern  
22 California. The Proposed Project Alternative and Alternative 3 would involve overall less  
23 construction and operation of local water projects, similar amounts of water  
24 movement/pumping, and slightly more construction of levees than the Revised Project,  
25 therefore, generating a smaller amount of GHG emissions overall. Alternative 2 would  
26 involve similar GHG emissions from construction and operation of local water projects as  
27 the Revised Project, but fewer GHG emissions from pumping/moving water.

28 D6583; *see also* D5815 (PEIR revisions to GHG analysis).

The very generality of this purported GHG “analysis” precludes the informed consideration of  
alternatives that CEQA requires. “The failure to provide enough information to permit informed

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<sup>6</sup> While the Council revised the PEIR to include information regarding the CVP’s historical exports from the Trinity River Basin, it failed to include any discussion of the Project’s potential impacts on this Basin in its revisions. D5764.

1 decision-making is fatal. ‘When the informational requirements of CEQA are not complied with, an  
2 agency has failed to proceed in a manner required by law and has therefore abused its discretion.’ *Napa*  
3 *Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 361,  
4 (quoting *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87  
5 Cal.App.4th 99, 118) (additional citations omitted).

6 The Council acknowledges that the PEIR may be useless as a first-tier EIR. D74 (“not possible to  
7 determine . . . which future projects, if any, can properly tier from the [PEIR]”). Yet it relies upon its  
8 program-level designation to excuse the PEIR’s absent analysis. *E.g.*, D68. That the PEIR is a program-  
9 level document “does not excuse the [Council] from adequately analyzing reasonably foreseeable  
10 significant environmental effects of the project and does not justify deferring such analysis to a later tier  
11 EIR.” Guidelines § 15152(b). Indeed, the Council was required to analyze the Project’s significant  
12 environmental effects if feasible to do so. *EPIC v. California Dept. of Forestry and Fire Protection*  
13 (2008) 44 Cal.4th 459, 502-03; Guidelines § 15151 (“the sufficiency of an EIR is to be reviewed in the  
14 light of what is reasonably feasible”).

##### 15 5. The Council Failed to Consider Feasible Alternatives to the Plan

16 CEQA requires an EIR to “include sufficient information about each alternative to allow  
17 meaningful evaluation, analysis, and comparison with the proposed project.” Guidelines § 15126.6(d).  
18 Agencies must prevent “significant, avoidable damage to the environment” through the use of feasible  
19 alternatives, and must not approve a Project when feasible, less damaging alternatives exist. Guidelines  
20 §§ 15002(a)(3), 15021(a)(2); PRC §§ 21002, 21002.1, 21081.

21 Under the Delta Reform Act, the Council is tasked with developing a plan to *reverse* rather than  
22 perpetuate the Delta’s decline. §§ 85020, 85300. As part of this review, the Council must consider the  
23 continued viability of exporting large volumes of water from the Delta that are devastating the  
24 environment, and how to halt and repair this devastation. *Id.* Thus the Council had a duty to consider the  
25 alternative of reducing the existing high level of Delta water exports to mitigate their environmental  
26 impacts. The Council shirked this duty.

27 For example, the Council deliberately altered an alternative suggested by the Environmental  
28 Water Caucus (“EWC”) before considering its environmental impacts. D77; D2341-D2345. The

1 Council rewrote the EWC alternative into Alternative 2, adding the twin poison pills of a massive  
2 reservoir at Tulare Lake and energy-intensive ocean desalinization plants. *Id.*; D6904-D6905. Adding  
3 insult to injury, the Council additionally neglected to update Alternative 2 with ecosystem restoration data  
4 when it updated other portions of the RDPEIR. *See* D5985-D5988, D6906, 5762-5763 (no revisions to  
5 relevant sections). Having thus sabotaged the EWC proposal while insisting that it remained the  
6 environmentally protective option, the Council could easily find fault with its impacts. But the Council's  
7 legerdemain fooled no one. It plainly failed to study the EWC alternative as proposed. D77; *see also*  
8 L10399-L10448 (proposal). And the Council failed to adequately explain why the EWC alternative, as  
9 proposed, was infeasible. *See, e.g.*, D2341-D2345. By dismissing the less damaging EWC alternative  
10 without adequate discussion, the Council violated CEQA. *Kings County Farm Bureau v. City of Hanford*  
11 (1990) 221 Cal. App. 3d 692,731.

12 The Council's treatment of the No Project Alternative was equally lacking. As discussed above,  
13 the Council's description of existing conditions in the No Project Alternative downplays the potentially  
14 catastrophic impacts to fish populations if the status quo water exports continue. *See, e.g.*, D6891-6893.  
15 Indeed, the Council's presentation of this alternative is so skewed that the Council was able make the  
16 shocking statement that this alternative was – in the short-term – the environmentally “superior”  
17 alternative. D6584. This is in part because it limited its view of short-term impacts to construction  
18 activities and *ignored* the impacts of water diversions on fish populations. *Id.* The PEIR does not  
19 adequately describe the No Project Alternative's likely failure to meet existing water quality standards, or  
20 the consequences that arise from this failure. *See, e.g.*, D2760, D7033-D7034, D7139-D7140, D8163.  
21 The No Project Alternative “must be straightforward and intelligible, assisting the decision maker and the  
22 public in ascertaining the environmental consequences of doing nothing.” *Planning & Conservation*  
23 *League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 911. But instead of satisfying this  
24 role, the No Project Alternative leaves the public and decisionmakers lost, and the Project's actual  
25 environmental impacts ignored.

26 **6. The PEIR's Mitigations Measures Are Vague, Lack Quantifiable**  
27 **Criteria, and Are Unenforceable**

28 As with alternatives, the Council must prevent “significant, avoidable damage to the

1 environment” through the use of feasible mitigation measures. Guidelines § 15002(a)(3); PRC §§ 21002,  
2 21002.1, 21081. An EIR’s discussion of proposed mitigation measures must be sufficiently specific to  
3 enable the public to evaluate and comment upon their adequacy. *Endangered Habitats League, Inc. v.*  
4 *County of Orange* (2005) 131 Cal.App.4th 777, 794.

5 The vague mitigation measures in the PEIR do not satisfy CEQA’s informational mandate. They  
6 neither appropriately identify the Project’s significant impacts nor adequately indicate that these impacts  
7 can and will be mitigated. D5910-D5970. For example, the PEIR concludes that the Project will not  
8 substantially deplete groundwater supplies, even as the Project admits that reduced reliance upon Delta  
9 water could lead to such depletion. *See, e.g.,* D94, D259, D5912. In order to find that the impact would  
10 be less than significant, however, the Council has to assume that the Project’s non-binding  
11 recommendations regarding groundwater pumping are followed. D94, D259. CEQA requires much more  
12 than the vague and unenforceable recommendations that the PEIR proffers. Guidelines §§ 15144, 15151;  
13 *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727-728.

14 In addition, because the PEIR ignores impacts from the BDCP, its assessment and purported  
15 mitigations for these impacts are deficient. For example, the PEIR finds that the Project, after mitigation,  
16 will not have a significant impact on water quality that would cause a violation of water quality standards.  
17 D5910. Yet the PEIR’s mitigation measures do not address *any* changes to instream water quality caused  
18 by new conveyances, or otherwise mitigate the potentially significant impacts of diverting a significant  
19 portion of the Sacramento River from the Delta. D5910-5911; *see also* C112. This is true even as the  
20 PEIR states in text elsewhere that impacts from Project operations on water quality would be mitigated by  
21 the purchase of unidentified “additional transfer water that would be released . . . during drier periods to  
22 mitigate water quality impact.” D6007; D7019. The PEIR’s assumption that additional water would be  
23 available for release in dry periods is unfounded. *Id.*; *see also* D2760-D2761. Reliance on phantom  
24 water supplies to sidestep project impacts is no longer permitted. As the Supreme Court declared in  
25 *Vineyard, supra*, “the future water supplies identified and analyzed must bear a likelihood of actually  
26 proving available; speculative sources and unrealistic allocations (‘paper water’) are insufficient bases for  
27 decisionmaking under CEQA.” 40 Cal.4th at 432. Because the PEIR evades the hard questions by  
28 relying on soft water supplies, it failed to adequately assess or mitigate the significant impacts of the

1 Project. The PEIR’s failure to fully consider what mitigation measures might be feasible to reduce or  
2 avoid the BDCP’s foreseeable impacts violates CEQA. Guidelines § 15021(a)(2).

3 **7. The PEIR Lacks an Adequate Cumulative Impacts Assessment**

4 An EIR must discuss cumulative impacts when a “project’s incremental effect is cumulatively  
5 considerable.” Guidelines § 15130(a). A “cumulative impact” refers to “two or more individual effects  
6 which, when considered together, are considerable or which compound or increase other environmental  
7 impacts.” Guidelines § 15355. “Cumulative impacts can result from individually minor but collectively  
8 significant projects taking place over a period of time.” Guidelines § 15355(b). The cumulative impacts  
9 discussion must include either a “list of past, present, and probable future projects producing related or  
10 cumulative impacts,” or “a summary of projections contained in an adopted” broader plan “that describes  
11 or evaluates the conditions contributing to the cumulative effect.” Guidelines § 15130(b). “The Agency  
12 must interpret this requirement in such a way as to ‘afford the fullest possible protection of the  
13 environment.’” *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859,  
14 868-869, quoting *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172  
15 Cal.App.3d 151, 168.

16 Contrary to these requirements, the PEIR fails to adequately assess the Project’s cumulative  
17 impacts. Just as the PEIR’s analysis of impacts of the Project is too vague to be useful, so too is its  
18 analysis of cumulative impacts. The cumulative impacts assessment is plagued by meaningless  
19 generalities such as: “[i]mplementation of these types of projects and construction and operation of these  
20 types of facilities *could* result in significant environmental impacts.” D6513 (emphasis added). Such  
21 vague statements are entirely unhelpful. Second, the PEIR’s purported analysis of the Project’s  
22 cumulative impacts fails to examine the cumulative impact of all five types of actions covered by the  
23 Project together with the cumulative projects it examines. *See* D2766-2767; D6513-6536; D8144-D8163.  
24 Thus, the PEIR fails to address the *overall* cumulative impacts of the Project on any of the 19 impact  
25 categories discussed in the PEIR. D6513-6536; D8144-D8163.

26 Second, even in the PEIR’s discussion of cumulative impacts of the BDCP, the PEIR fails to  
27 address the BDCP’s conveyance and diversion of massive amounts of water away from the Sacramento  
28 River upstream of the Delta. D6513-D6515, D6540-D6548. The PEIR does not analyze how these

1 withdrawals will affect upstream reservoir operations, or conversely, how regulations related to the  
2 reservoirs and tunnels will affect downstream Project operations. D6513-D6536, D6540-D6548. This  
3 violates CEQA. In *Friends of the Eel River, supra*, the court held that the EIR’s cumulative impacts  
4 discussion was insufficient because it failed to acknowledge that curtailed diversions from the Eel River  
5 into the Russian River could cause the Sonoma County Water Agency to fail to “supply water to its  
6 customers in an environmentally sound way.” 108 Cal.App.4th at 871. Likewise, in *County of Amador v.*  
7 *El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 953, the court rejected an EIR because it  
8 failed to “demonstrate the timing, location and amount of water releases from the upper watershed lakes  
9 and analyze the resulting lake levels” occasioned by the downstream water project’s proposed diversions.  
10 So too here, the PEIR’s failure to discuss the likely effects on upstream reservoir operation of the  
11 BDCP’s downstream diversions – and vice versa – frustrates the public’s ability to understand the Project  
12 and its impacts, contrary to CEQA.

13 **8. The Council’s Responses to Comments Are Inadequate**

14 CEQA requires that the Council provide detailed responses to comments that raise significant  
15 environmental issues. Guidelines § 15088. The Council’s responses must show a “good faith, reasoned  
16 analysis,” and must be supported by factual information. *Id.*; *Laurel Heights Imp. Ass’n v. Regents of*  
17 *Univ. of Calif.* (1993) 6 Cal.4th 1112, 1124 (“*Laurel Heights II*”). If the Council chooses not to accept a  
18 comment that raises significant environmental issues, then it must explain why. Guidelines § 15088(c);  
19 *Flanders Foundation v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603, 615. Meaningful agency  
20 response to public comment is fundamental to CEQA’s informational purpose. For this reason, a failure  
21 to adequately respond to comments renders an EIR “fatally defective.” *People v. County of Kern* (1974)  
22 39 Cal.App.3d 830, 842.

23 Here, the Council failed to respond to hundreds of comments by improperly dismissing them as “a  
24 comment on the project, not on the EIR.” *See, e.g.,* D2753-D2759. For example, petitioners informed  
25 the Council that it should be considering a reduction in water exports from the Delta. D2392-D2395.  
26 The Council did not respond beyond its canned dismissal of the comment. D2393. It did the same when  
27 DFW informed it of additional information about essential habitat connectivity linkages, which would  
28 inform whether the Project would have significant impacts. D289. It violated CEQA a third time when

1 various commenting governments, agencies and individuals addressed the Project's failure to include  
2 specific flow criteria, and whether it should include more information regarding flow, and the Council  
3 dismissed their request. *E.g.*, D273, D295-D296, D2758, D5342. It repeated this error when comments  
4 suggested alternatives to the Project. *See, e.g.*, D553 (Project should include plans to remove barriers for  
5 fish-passage). When the EWC criticized the PEIR's failure to analyze the significant impacts that the  
6 Project contemplates, such as raising Shasta Dam, the Council stonewalled once again. D2340. When  
7 the EWC suggested that the Council implement a mandatory groundwater monitoring system to  
8 accurately ascertain the effects of the Delta Plan on groundwater withdrawals, the Council balked yet  
9 again. D2340. The Council did not explain that groundwater monitoring was unnecessary, outside of its  
10 authority to mandate, economically infeasible, or give any other permissible explanation. Instead the  
11 Council simply declared that all comments relating to the Delta Plan itself warranted no response, in  
12 violation of CEQA's informational purpose. Guidelines § 15088

13 The Council also failed to respond to comments regarding alternatives to the Project. As  
14 discussed above, the Council's changes to Alternative 2 were significant. When faced with comments  
15 requesting that it consider the original proposal, however, it failed to address how the proposed  
16 alternative was deficient or explain why it would not consider it. *E.g.*, D2341-2345; D2763. Instead, it  
17 responded by re-stating its summary of Alternative 2. *Id.* By failing to address the merits of the proposed  
18 alternative, the Council violated CEQA. Guidelines § 15088.

### 19 C. The Council's Findings and Statement of Overriding Considerations Violate CEQA

20 CEQA requires substantive protection of the environment from needless harm. It mandates that  
21 "agencies shall not approve projects as proposed if there are feasible alternatives and feasible mitigation  
22 measures available which would substantially lessen the significant environmental impacts of such  
23 projects." PRC § 21002. Accordingly, the agency's approval must affirmatively demonstrate that all  
24 alternatives and mitigation measures that would avoid or reduce the significant environmental effects of a  
25 project have either been implemented or are infeasible. PRC § 21002; *Citizens for Quality Growth v.*  
26 *City of Mount Shasta* (1988) 198 Cal.App.3d 433, 443-54.

27 If a project will have "significant environmental effects," CEQA requires the agency to make "one  
28 or more written findings for each of those significant effects, accompanied by a brief explanation of the

1 rationale for each finding.” Guidelines § 15091(a). There are three “possible findings”:

- 2 (1) Changes or alterations have been required in, or incorporated into, the project which avoid  
3 or substantially lessen the significant environmental effect . . . .
- 4 (2) Such changes or alterations are within the responsibility and jurisdiction of another public  
5 agency and . . . have been adopted . . . or can and should be adopted by such other agency.
- 6 (3) Specific economic, legal, social, technological, or other considerations . . . make infeasible  
7 the mitigation measures or project alternatives identified in the final EIR.

8 Guidelines §15091(a); PRC § 21081(a).

9 Here, as discussed above, the PEIR did not properly identify and fully analyze the Project’s  
10 myriad significant environmental impacts. The PEIR fails to appropriately consider alternatives that  
11 would reduce Delta exports without also requiring significant new construction, and that would feasibly  
12 attain most of the Project’s objectives of “sustainable management” to protect and enhance the Delta’s  
13 ecologic health while providing a “more reliable water supply for the state” to meet consumptive needs.  
14 *See* D2763. Yet the Council purported to find that it had incorporated mitigations to lessen the Project’s  
15 impacts, when feasible. C101. Where, as here, an agency has failed to determine whether there are  
16 feasible alternatives that would avoid a project’s significant environmental impacts (or reduce them to  
17 insignificance), its contrary findings are “necessarily invalid.” *Uphold Our Heritage v. Town of*  
18 *Woodside* (2007) 147 Cal.App.4th 587, 603; *City of Marina v. Board of Trustees of California State*  
*University* (2006) 39 Cal.4th 341, 368.

19 Where, as here, an agency approves a project that has significant environmental effects that “are  
20 not avoided or substantially lessened,” the agency must “state in writing the specific reasons to support its  
21 action.” Guidelines §§ 15093(b); 15096(h), 15064(a)(2). This “statement of overriding considerations  
22 shall be supported by substantial evidence,” and is to be made in addition to the findings required under  
23 section 15091. Guidelines §§ 15093(b) (quotation), 15091(f).

24 The Council’s statement of overriding considerations fails to explain how the various  
25 considerations override each of the Project’s significant and yet unmitigated impacts. C98-C101. For  
26 example, the Council claims that “each of the Project benefits . . . is a separate and independent basis” for  
27 finding that the Project’s benefits outweigh its harms. C98. Yet the claimed benefits include statements  
28 such as “[t]he Delta and Suisun Marsh support more than 55 fish species and more than 750 plant and

1 wildlife species. Of these approximately 100 wildlife species, 140 plant species, and 13 taxonomic units  
2 of fish are considered special status species.” *Id.* This is *neither* a Project benefit *nor* a clear reason to  
3 override the Project’s environmental harms. *Id.* The Council fails to address how the facts it cites excuse  
4 the environmental harm allowed. This is true of the first nine reasons the Council provides for approving  
5 the Project. C98-C99. Rather than attempt to make its decisionmaking process transparent and  
6 responsive to CEQA’s procedural mandates, the Council “randomly leap[t] from evidence to  
7 conclusions.” *Topanga Assn. for a Scenic Com. v. County of Los Angeles* (1974) 11 Cal.3d 506, 516-517.

8       The remaining twelve reasons do no more than reiterate the general conclusions of the PEIR, and  
9 rely upon outside agencies’ compliance with the Project’s nonbinding recommendations. C99-C101. For  
10 example, the Council claims that “the Delta Plan will reduce risks to people, property, and state  
11 interests . . . by encouraging effective emergency preparedness, appropriate land uses, and investments in  
12 flood protection.” C100. It also claims that the Project “will protect, restore, and enhance the Delta  
13 ecosystem by encouraging a more natural flow regime through the Delta; promoting the restoration of  
14 important, interconnected habitat for birds and terrestrial wildlife; and reducing impacts from stressors  
15 such as invasive species and poor water quality.” *Id.* Without requiring specific, enforceable mitigations  
16 and determining whether they will be effective to reduce the Project’s impacts to insignificance, the  
17 Council can provide no assurance that the Plan’s benefits will, in fact occur. The Council’s findings were  
18 not reached in accordance with the procedure required by law, lack evidentiary support, and violate  
19 CEQA. PRC § 21081.5; Guidelines §§ 15091(b), 15093(b).

## 20 **II. THE COUNCIL’S APPROVALS CONTRAVENE THE PUBLIC TRUST DOCTRINE**

21       Water Code section 85023 states, “the longstanding constitutional principle of reasonable use and  
22 the Public Trust Doctrine shall be the foundation of state water management policy and are particularly  
23 important and applicable to the Delta.” The PEIR recognizes that “compliance with the public trust  
24 doctrine is required by the Delta Reform Act.”

25       In *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 426, the court noted that the  
26 public trust doctrine mandates that “before state courts and agencies approve water diversions they . . .  
27 consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as  
28 feasible, to avoid or minimize any harm to those interests.” The *National Audubon Society* Court went on

1 to explain:

2 Just as the history of this state shows that appropriation may be necessary for efficient use  
3 of water despite unavoidable harm to public trust values, it demonstrates that an  
4 appropriative water rights system administered without consideration of the public trust  
5 may cause unnecessary and unjustified harm to trust interests. As a matter of practical  
6 necessity the state may have to approve appropriations despite foreseeable harm to public  
7 trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider  
8 the effect of the taking on the public trust, and to *preserve, so far as consistent with the*  
9 *public interest, the uses protected by the trust.*

10 *Id.*, citations omitted (emphasis added).

11 The public trust doctrine protects a broad array of the Delta's natural resources and their use and  
12 enjoyment by wildlife and man alike. "Public trust easements are traditionally defined in terms of  
13 navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim,  
14 to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom  
15 of the navigable waters for anchoring, standing, or other purposes." *Marks v. Whitney* (1971) 6 Cal.3d  
16 251, 259. For nearly 50 years it has been settled law in California that public trust values also  
17 "encompass[] . . . the preservation of those lands in their natural state, so that they may serve as  
18 ecological units for scientific study, as open space, and as environments which provide food and habitat  
19 for birds and marine life, and which favorably affect the scenery and climate of the area." *Id.* at 259-260.

20 Implementation of the Delta Plan will degrade public trust resources. As the PEIR and the  
21 Council's CEQA findings explain, the chosen alternative will harm wetlands, riparian vegetation, special-  
22 status species, and recreational activities, among other public trust resources. With regard to impacts on  
23 public trust resources, Alternative 2 is preferable to the chosen alternative in every respect. Alternative 2  
24 would reduce diversions and have beneficial effects on fish and wildlife. Alternative 2's only negative  
25 environmental impacts *vis-à-vis* the approved project involve impacts that do not harm public trust  
26 resources. For example, the PEIR states that Alternative 2 could lead to more farmland conversion than  
27 the selected alternative (D79-D80) but farming is not a public trust use. The PEIR concedes that  
28 Alternative 2 would allow "greater protection of Public Trust resources" than the Project. D7037. And,  
the record demonstrates that *Alternative 2 would feasibly attain most of the objectives of the Delta*  
*Reform Act. E.g., D79-D80; D2763-D2765.*

By rejecting Alternative 2 and approving the Delta Plan despite the fact that Alternative 2 would

1 preserve public trust resources to a greater extent than the approved Plan *and* feasibly attain most of the  
2 Delta Reform Act’s objectives, the Council abdicated its statutory and constitutional obligation to  
3 preserve public trust resources to the maximum extent feasible, based on a fair and fully informed  
4 balancing of the impacts of these alternatives on public trust resources.

5 **III. THE COUNCIL VIOLATED THE 2009 DELTA REFORM ACT**

6 Because the Legislature recognized the Delta is “in crisis” and that “[r]esolving the crisis requires  
7 fundamental reorganization of the state’s management of Delta watershed resources,” it commanded the  
8 Council to create a “legally enforceable Delta Plan” with specific content that would achieve the goal of  
9 protecting, restoring, and enhancing the Delta ecosystem while increasing the reliability of California’s  
10 water supply. §§ 85001, 85020-85021, 85302, 85308. The Council squandered its opportunity to take  
11 bold action by approving a Delta Plan that is filled with vague and unenforceable policies that lack the  
12 quantified targets required by the Legislature. Because the Delta Plan fails to comply with the law, it  
13 must be set aside. CCP § 1085; *cf. Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, 349-352  
14 (general plan violated Planning and Zoning Law by omitting required information).

15 The Delta Plan’s deficiencies fall into four overarching areas. First, the Delta Plan fails to include  
16 “quantified or otherwise measurable targets associated with achieving the objectives of the Delta Plan.” §  
17 85308(b). Second, the Delta Plan’s flow criteria are not “based on the best available scientific  
18 information.” § 85308(a). Third, the Delta Plan’s measures for reducing reliance on the Delta fail to  
19 meet statutory requirements. §§ 85021, 85302. Fourth, the Delta Plan’s measures for restoring the Delta  
20 ecosystem fail to satisfy the Delta Reform Act. §§ 85054, 85302.

21 **A. Fails to Include Quantified or Otherwise Measurable Targets**

22 The Legislature commanded that the Delta Plan “shall . . . include quantified or otherwise  
23 measurable targets associated with achieving the objectives of the Delta Plan.” § 85308(b). But the Delta  
24 Plan includes no measurable targets for many of the statutory objectives. First, a central aspect of the  
25 Delta Plan is to implement the legislative policy of reduced reliance on the Delta, but the Delta Plan does  
26 not require agencies to reduce their reliance on the Delta by any particular amount and it contains no  
27 “quantified . . . targets” to achieve this objective. *Id.*; § 85021 (statutory reduced reliance policy); B569-  
28 570, 576-577 (Delta Plan policies, objectives, and performance measures for reduced Delta reliance);

1 B1313 (importance of this goal). Second, the Delta Plan also fails to include measurable targets for  
2 achieving its goals of reduced environmental harm from invasive species and restoring more natural  
3 flows in the Delta. Third, the Delta Plan omits measurable targets by which to measure its success in  
4 achieving the coequal goal of increased water supply reliability. By omitting legally required elements of  
5 the Delta Plan, the Council violated the Delta Reform Act.

6 First, the Council admits that its objective is to create “a legally enforceable, comprehensive,  
7 long-term management plan . . . that achieves” the coequal goals of increased water supply reliability and  
8 a restored and enhanced Delta ecosystem. D6788. The Delta Plan emphasizes that “[a]chieving these  
9 coequal goals is expected to be done, in significant part, through compliance with the Delta Reform Act’s  
10 . . . new policy to reduce reliance on the Delta,” and the Delta Reform Act itself declares a state policy “to  
11 reduce reliance on the Delta in meeting California’s future water supply needs through a statewide  
12 strategy of investing in improved regional supplies, conservation, and water use efficiency.” B1313; §  
13 85021; *see also* B764 (23 CCR § 5001(h)(1)(B)) (achieving a more reliable water supply means reducing  
14 reliance on the Delta). But the Delta Plan includes *no* “quantified or otherwise measurable targets  
15 associated with achieving th[is] objective[.]” and accordingly violates the Delta Reform Act. § 85308(b).

16 In its appendix about achieving reduced Delta reliance, the Delta Plan states that the “Delta Plan  
17 includes performance measures for assessing the state’s progress in achieving the . . . objectives of the  
18 Delta Plan. At the statewide level, California’s success in achieving reduced reliance on the Delta and  
19 improving regional self-reliance will be demonstrated through a significant reduction in the amount of  
20 water used or in the percentage of water used from the Delta watershed.” B1313-B1314; *see also* B576  
21 (performance measure is merely to *document* expected decrease in reliance), E1208 (the “Delta Plan  
22 specifies a quantifiable target for achieving the policy . . . to reduce reliance on the Delta” of “a  
23 significant reduction in the amount . . . or the percentage of water used from the Delta”). No particular  
24 target for reduced reliance on the Delta is given other than the ambiguous goal of “a significant  
25 reduction” of Delta water use. B1314.

26 But the target of “a significant reduction” of Delta water use does not meet the statutory  
27 requirement that the Delta Plan include “*quantified or otherwise measurable targets.*” *Id.*; § 85308(b).  
28 The only quantified target is progress toward an existing *statewide* goal of an up to 20% reduction in per

1 capita water use by 2020, which says nothing at all about whether agencies are reducing reliance on the  
2 *Delta* rather than other water supplies. B577. Though the Delta Plan complains that “[d]evelopment of  
3 informative and meaningful performance measures is a challenging task,” it is a task mandated by the  
4 Legislature. B576; § 85308(b). The Council’s failure to include a quantified or measurable target for an  
5 *overall* reduction in reliance on the Delta violates the Delta Reform Act. *Id.*

6 Nor does the Delta Plan include “quantified or otherwise measurable targets” for *individual*  
7 suppliers to reduce their reliance on the Delta. The enforceable policy in this area is Policy WR P1,  
8 which requires water suppliers to meet three requirements in order to demonstrate their contribution to  
9 reduced reliance on the Delta. B568-B569. But although that policy requires suppliers to *report* their  
10 “expected outcome for measurable reduction in Delta reliance,” it does not require suppliers to report any  
11 particular *amount* of reduced reliance on the Delta. B569 (23 CCR § 5003(c)(1)(C)); *see also* E1226  
12 (Council rejects suggestion that agencies be required to “demonstrate[] an actual significant reduction” in  
13 Delta reliance). A report of a 0% reduction in reliance on the Delta would be entirely consistent with  
14 Policy WR P1. In sum, there is no “quantified or otherwise measurable targets” in the Delta Plan by  
15 which the Council can measure success in attaining the critical objective of reducing reliance on the  
16 Delta. § 85308(b); B1313 (achieving coequal goals depends on reduced Delta reliance).

17 Second, the Delta Plan also fails to contain “quantified or otherwise measurable targets” by which  
18 success in attaining numerous aspects of the coequal goal of “protecting, restoring, and enhancing the  
19 Delta ecosystem” will be determined. §§ 85308(b), 85054. For example, the Delta Reform Act states  
20 that “implementation of the Delta Plan shall further the restoration of the Delta” and states the Delta Plan  
21 “shall . . . include[]” reducing harm from invasive species as a subgoal. § 85302(a), (e)(3). But the Delta  
22 Plan merely states a goal of “[p]rogress toward decreasing annual trends in both the number of new and  
23 existing aquatic and terrestrial species, and the abundance and distribution of existing aquatic and  
24 terrestrial nonnative species in the Delta over the next decade.” B623. There is no “quantified or  
25 otherwise measurable target[]” of any particular *amount* of decrease, as required. § 85308(b). Similarly,  
26 the Delta Reform Act mandates that the Delta Plan include “restor[ing] Delta flows” as a “subgoal,” yet  
27 the Delta Plan sets a vague goal of “[p]rogress toward restoring in-Delta flows to more natural functional  
28 flow patterns” using a metric of “results from . . . monitoring and modeling.” § 85302(e)(4); B623. How

1 much more natural and by what criteria? Once again, there is no “quantified or otherwise measurable  
2 target[]”; the Delta Plan merely asks for progress toward an ambiguous goal whose satisfaction cannot be  
3 definitively ascertained. § 85308(b); B623. Finally, the Delta Plan contains no measurable water quality  
4 targets; instead it states that success in attaining improved water quality will be determined with reference  
5 to plans *that have not yet been completed*. B702 (performance measures); *see* B696-699 (calling for  
6 completion of the plans referenced in those measures).

7 Third, the Delta Plan fails to set “quantified or otherwise measurable targets” for attainment of the  
8 coequal goal of “a more reliable water supply for California.” §§ 85054, 85308(b). As set forth above,  
9 the Delta Plan declares reduced reliance of the Delta to be essential to achievement of this coequal goal  
10 (B764, 1313), yet it contains no measurable targets in that regard. And the Delta Plan’s other targets for a  
11 more reliable supply are as vague as its target of a “significant reduction in” use or export of Delta water  
12 (B1314): it states that achieving a more reliable water supply means “[b]etter matching the state’s  
13 demands for reasonable and beneficial uses of water to the available water supply” and also that “[w]ater  
14 exported from the Delta will more closely match water supplies available to be exported.” B763-764 (23  
15 CCR § 5001(h)(1)(A), (C)); *see also* B577 (circular statement that reliability performance measure is  
16 “[p]rogress toward improved reliability of Delta water exports”). But targets of “better matching” supply  
17 and demand and “more closely” matching exports with available supplies are not the quantified targets  
18 called for by the Delta Reform Act. *Id.*; § 85308(b).

19 The Delta Plan is inadequate because it fails to include “quantified or otherwise measurable  
20 targets” for these central objectives as required by the Delta Reform Act. § 85308(b).

## 21 **B. Fails to Use the Best Available Science**

22 Increasing Delta flows is a crucial element of attaining the coequal goal of protecting, restoring,  
23 and enhancing the Delta ecosystem. §§ 85054, 85302(e)(4). Restoring Delta flows is also an essential  
24 element of the Council’s public trust responsibilities, which the Legislature declared to be “particularly  
25 important and applicable to the Delta.” § 85023. “Flow is important to sustaining the ecological integrity  
26 of aquatic ecosystems” because it “affects water quality, food resources, physical habitat, and biotic  
27 interactions.” L11878. Moreover, “[f]low is a major determinant of habitat” and “[f]low modification is  
28 one of the few immediate actions available to improve conditions to benefit native species.” L11879.

1 “Recent flow regimes in the Delta have contributed to the decline of native species and encouraged non-  
2 native species.” *Id.* But the Delta Plan’s flow objectives are based on inadequate and outdated  
3 requirements rather than recently updated flow criteria from the SWRCB. Accordingly, the Delta Plan  
4 violates the statutory requirement that it “shall . . . [b]e based on the best available scientific  
5 information.” § 85308(a).

6         The Council failed to include “flow improvements that the State Water Board identifie[d] as being  
7 necessary to protect public trust resources” in the Delta Plan. B614; L11841, L11846. Current flow  
8 objectives for the Delta are “set forth in . . . both the 2006 Bay-Delta Plan and” the SWRCB’s “D-1641.”  
9 L11858. The Delta Plan states that compliance with these flow objectives “shall be used to determine  
10 consistency with the Delta Plan.” B614. But the “best available science suggests that currently required  
11 flow objectives . . . are insufficient to protect the Delta ecosystem.” B614, L11841 (same); *see* B597  
12 (“the current Delta flow regime is generally harmful to many native aquatic species while encouraging  
13 nonnative aquatic species”), L11844 (“[r]ecent Delta flows are insufficient to support native Delta fishes  
14 for today’s habitats”). The current flow regime “harms native species and encourages non-native species,  
15 possibly in synergy with other stressors such as nutrient loading, contaminants, and food limitation.”  
16 L11871. That is because “[r]estoring environmental variability in the Delta is fundamentally inconsistent  
17 with continuing to move large volumes of water through the Delta for export”; “drinking and agricultural  
18 water quality requirements . . . are at odds with the water quality and variability needs of desirable Delta  
19 species.” L11845. In sum, the Delta Plan requires compliance with flow objectives that the best  
20 available science indicates are inadequate to even *protect* the Delta ecosystem, much less “restor[e] and  
21 enhanc[e]” it as the Delta Reform Act mandates. The Delta Plan accordingly is not based on the best  
22 available scientific information, as required. §§ 85302(g), 85308(a).

23         The Delta Plan’s use of demonstrably inadequate flow criteria is particularly egregious because  
24 the SWRCB recently engaged in a lengthy process to determine “flow improvements . . . necessary to  
25 protect public trust resources” in the Delta. L11846; *see* L11970-11975 (criteria). The SWRCB created  
26 these criteria for the express purpose of “inform[ing] the Delta Plan.” L11848-11849 (same); *see* §  
27 85086 (c)(1) (SWRCB flow objectives are for “the purpose of informing planning decisions for the Delta  
28 Plan”). Though the Council points out that the SWRCB’s flow objectives did not consider other

1 beneficial uses of water when it determined the minimum flows necessary to protect public trust  
2 resources (D62; *see, e.g.*, L11842 (SWRCB has not considered balancing between potentially competing  
3 uses)), the fact remains that the SWRCB determined that *the best available science indicates that current*  
4 *flows are inadequate to protect public trust resources*. Yet the Council nonetheless failed to adopt any  
5 flow criteria based on this newly available scientific information. B614, L11841, L11844, L11871.

6         Instead of complying with the Delta Reform Act’s mandate, the Council abdicated its  
7 responsibility to adopt quantified flow targets supported by the best available science (§ 85308(a), (b))  
8 and left the current, demonstrably inadequate, standards in place pending further action of the SWRCB.  
9 D62 (“The Delta Plan only recommends that the SWRCB do, by a particular time, what the law already  
10 requires the SWRCB to do, at least regarding flow objectives”). The Council could have adopted the  
11 flows the SWRCB found to be the minimum necessary to protect public trust resources for the interim  
12 period until new flow criteria are created, or it could have created new interim flow criteria by balancing  
13 the SWRCB’s flow criteria against competing uses, utilizing the best available science, if it deemed those  
14 criteria insufficient. What it could *not* do is rely upon existing flow criteria that are universally  
15 acknowledged not to protect public trust resources. § 85308(a). Yet that is exactly what the Council did.  
16 By failing to include quantified flow targets supported by the best available science, the Council  
17 abdicated its public trust responsibilities and violated the Delta Reform Act. *Id.*

18         **C. Fails to Implement Policy of Reduced Reliance on the Delta.**

19         The Delta Plan is inadequate because it does not include any enforceable policies to reduce  
20 reliance on the Delta. The Delta Reform Act states that “implementation of the Delta Plan shall further  
21 the” coequal goals. § 85302(a). As discussed above, the Delta Reform Act, the Delta Plan, and the  
22 regulations it spawned all emphasize the central importance of reducing reliance on the Delta in achieving  
23 the coequal goals. § 85021; B1313-1314; B764 (23 CCR § 5001(h)(1)(B)). Finally, as the Council  
24 acknowledges, the Delta Reform Act requires that the Delta Plan be “a legally enforceable” means of  
25 attaining that objective. § 85001(c); *see* D6788 (the “Council’s primary responsibility is to develop,  
26 adopt, and implement the Delta Plan, a legally enforceable, comprehensive, long-term management plan  
27 . . . that achieves the coequal goals”). Yet the Delta Plan contains *no* legally enforceable measures for  
28 reducing reliance on the Delta.

1 As discussed above, the Delta Plan does not contain any quantified targets for reduced reliance on  
2 the Delta. Though Policy WR P1 requires agencies to quantify and report how much they expect to  
3 reduce reliance on the Delta, it does not require agencies to report that they have achieved any particular  
4 amount of reduction in Delta reliance or, indeed, any reduction at all. B569. An agency’s report that it  
5 did not plan to reduce reliance on the Delta at all would be wholly consistent with the Delta Plan’s  
6 requirement that the agency include “the expected outcome for measurable reduction in Delta reliance”  
7 under its urban water management plan. *Id.* (23 CCR § 5003(c)(1)(C)). And though it is true that Policy  
8 WR P1 requires agencies to implement any projects in their urban or agricultural water management  
9 plans that reduce reliance on the Delta (*id.* (23 CCR § 5003(c)(1)(B)), “there is no guarantee that a  
10 completed” plan “will in fact contain measures that reduce reliance on the Delta, because there is no  
11 necessary correlation between” increased self-reliance and reduced reliance on the Delta. E1209. A  
12 supplier could produce a plan that adequately conserved water but that also planned to correspondingly  
13 “reduce its supply from, say, groundwater supplies instead” of the Delta. *Id.*

14 Moreover, even the legally *unenforceable* “recommendation” about how agencies should reduce  
15 reliance on the Delta merely states that agencies should “provide[] . . . information about” their “planned  
16 investments in water conservation and water supply development” and explain how those investments are  
17 reducing reliance on the Delta. B570. The Delta Plan does not provide agencies with any guidance about  
18 how much they should reduce reliance on the Delta. Nor does the Delta Plan provide the Council with a  
19 metric for determining that a particular agency failed to adequately reduce its reliance on the Delta. An  
20 agency that documents its increased reliance on the Delta is fully in compliance with the Delta Plan. That  
21 makes a mockery of the Legislature’s command that the Delta Plan contain a legally enforceable means of  
22 reducing reliance on the Delta. For these reasons, the Delta Plan violates the Delta Reform Act. §§  
23 85001(c), 85021; B1313-1314; B764.

24 **D. Fails to Implement Policy of Restoring Delta**

25 One of the Delta Reform Act’s two coequal goals is to “protect[], restor[e], and enhanc[e] the  
26 Delta ecosystem.” § 85054. To achieve that objective, the Act states that “implementation of the Delta  
27 Plan shall further the restoration of the Delta ecosystem” and mandates that the Delta Plan contain  
28 numerous specific ecosystem restoration measures. § 85302(a), (c)-(e). Specifically, the Delta Reform

1 Act states that “the Delta Plan shall include measures that promote” four specified “characteristics of a  
2 healthy Delta ecosystem,” it mandates that six “subgoals and strategies for restoring a healthy ecosystem  
3 shall be included in the Delta Plan,” and it requires a particular emphasis on improved water quality. §  
4 85302(c)-(e). Moreover, three of the eight statewide policies announced by the Legislature in the Delta  
5 Reform Act specifically concern restoration of the Delta ecosystem. § 85020(a), (c), (e). Again, the  
6 Delta Plan was intended by both the Council and the Legislature to be “legally enforceable.” § 85001(c);  
7 D6788. Yet despite these many explicit requirements, the Delta Plan contains *no* legally enforceable  
8 measures to improve the Delta ecosystem. These fatal deficiencies fall into three main areas.

### 9 1. The Delta Plain Fails to Improve Water Quality

10 First, the Legislature mandated that the “Delta Plan *shall* include measures that . . . improv[e]  
11 water quality to protect both human health and the environment” and further specified that the “subgoal”  
12 of “[i]mprov[ing] water quality to meet drinking water, agriculture, and ecosystem long-term goals”  
13 “shall be included in the Delta Plan.” § 85302(d)(3), (e)(5) (emphasis added). Yet “[n]o policies with  
14 regulatory effect are included” in the sections of the Delta Plan concerning “Water Quality Protection,”  
15 “Improve[d] Drinking Water Quality” or “Improve[d] Environmental Water Quality.” B696-699.  
16 Instead, the Delta Plan only advances vague “recommendations” – which have *no* regulatory effect – such  
17 as proposing that “[w]ater quality in the Delta should be maintained at a level that supports, enhances,  
18 and protects beneficial uses” and calling for other agencies to continue their ongoing regulatory actions.  
19 *Id.* Even where other agencies have already adopted water quality criteria, the Council failed to  
20 incorporate those criteria into the Delta Plan. *See, e.g.*, B698 (Delta Plan acknowledges that new water  
21 quality standards for methylmercury are complete but merely recommends that “efforts to support their  
22 implementation should be encouraged”). Consequently, the Plan falls far short of its statutory duty to  
23 “include measures that . . . improv[e] water quality.” § 85302(d)(3).

24 The Council even failed to take the obvious step of mandating that covered actions not contribute  
25 to a *violation* of water quality standards. Though the Delta Plan plans to incorporate future *flow* criteria  
26 from the SWRCB, which “shall be used to determine consistency with the Delta Plan,” water quality  
27 criteria will not be so incorporated. B614. The Delta Plan contains *no* enforceable water quality targets  
28 and therefore violates the Delta Reform Act’s mandates that the Delta Plan shall include measures to

1 meet the objective of improved water quality, including measurable or quantified targets. §§ 85302(d)(3),  
2 (e)(5), 85308(b).

3       Indeed, the Delta Plan contains a provision that *the Council itself* acknowledged was *contrary* to  
4 the Delta Reform Act’s goal of protecting, restoring, and enhancing the Delta ecosystem. Though the  
5 Delta Reform Act contains its own set of exemptions (in section 85057.5(b)), the Council took it upon  
6 itself to create an additional exemption for “[t]emporary water transfers of up to one year in duration.”  
7 B766 (23 CCR § 5001(dd)(3)). The Council stated that it “understands that water transfers may have a  
8 significant impact on the Delta’s ecosystem, especially if these single-year transfers are repeated over  
9 consecutive years as a means to circumvent the CEQA review process for multi-year . . . transfers.”  
10 E1083. But the Council stated that “[a]t this time, the Council is not aware that single-year transfers are  
11 conducted in this manner” and “[a]ccordingly . . . determined that one-year water transfers do not have a  
12 significant impact on the coequal goals.” *Id.* Yet the Council’s premise is demonstrably false. The  
13 Center for Biological Diversity provided the Council with detailed evidence that many one-year transfers  
14 are in fact being repeatedly approved in a serial manner over consecutive years. K12475-12477. The  
15 Council’s response is that one-year transfers are statutorily exempt from CEQA and “[t]his suggests a  
16 legislative determination that single-year transfers are unlikely to significantly harm the environment.”  
17 E1287; *see also* E1298 (same). But this excuse fares no better than the first. Statutory exemptions do not  
18 reflect a legislative determination that an activity is unlikely to harm the environment; to the contrary, “it  
19 is incorrect to assume that harmony must exist between CEQA’s general purpose and the purposes of  
20 each of its statutory exemptions. The exemptions reflect a variety of policy goals.” *Del Cerro Mobile*  
21 *Estates v. City of Placentia* (2011) 197 Cal.App.4th 173, 184 (quotation omitted).

22       Water transfers harm the environment because they remove water from the Delta and because the  
23 transferred water is frequently applied to lands that are contaminated by selenium, like the land under  
24 Westlands Water District, which results in toxic return flows – a phenomenon the Delta Plan  
25 acknowledges. B694 (“[t]he major source of selenium loading . . . is the San Joaquin River, which  
26 receives selenium-laden agricultural drainage water from the western San Joaquin Valley”); K12476-  
27 12477 (serial “one-year” transfers are to Westlands). The Legislature knows how to create statutory  
28 exemptions for one-year water transfers and it knows how to exempt activities from the coverage of the

1 Delta Reform Act. §§ 1729, 85057.5(b). It *declined* to exempt one-year water transfers from *the Delta*  
2 *Reform Act* and the Council’s attempt to smuggle such an exemption in the back door is plainly contrary  
3 to that law’s coequal goal of protecting, restoring, and enhancing the Delta environment. By failing to  
4 include regulatory water quality standards and by exempting activities that will harm water quality from  
5 the coverage of the Delta Plan, the Council violated the Delta Reform Act. § 85302(d)(3), (e)(5).

6 **2. The Delta Plan Fails to Restore Delta Habitat**

7 Second, the Delta Plan fails to include any enforceable measures to restore Delta habitat. Yet the  
8 Delta Reform Act specifically states that the Delta Plan “shall include measures that promote . . . viable  
9 populations of native resident and migratory species[,] [f]unctional corridors for migratory species, . . .  
10 [and] [d]iverse and biologically appropriate habitats and ecosystem processes.” § 85302(c)(1)-(3). And,  
11 the Act directs that the Delta Plan must include the subgoals of “[r]estor[ing] large areas of  
12 interconnected habitats within the Delta and its watershed by 2100 . . . [e]stablish[ing] migratory  
13 corridors for fish, birds, and other animals along selected Delta river channels” and “[r]estor[ing] habitat  
14 necessary to avoid a net loss of migratory bird habitat and, where feasible, increase migratory bird  
15 habitat.” § 85302(e)(1), (2), (6).

16 Contrary to these statutory mandates, none of the Delta Plan’s legally enforceable Policies require  
17 habitat restoration to occur. Policy ER P2 merely prescribes standards for habitat restoration that does  
18 occur. B615 (23 CCR § 5006(a)). Policy ER P3 only states that adverse impacts to future opportunities  
19 to restore habitat “must be avoided or mitigated”; it does not require any restoration of habitat. *Id.* (23  
20 CCR § 5007(a)). Similarly, though the Delta Plan recognizes that poor land use decisions can “reduce  
21 opportunities for ecosystem restoration” (B659), its failure to contain enforceable criteria virtually  
22 ensures that destructive projects will be approved. Projects consistent with a sustainable communities  
23 strategy are exempt from the Delta Reform Act’s requirements (§ 85057.5(b)(4)), and although the Delta  
24 Reform Act provides that the Council “shall review and provide timely advice . . . regarding the  
25 consistency of” those strategies with the Delta Plan (§ 85212), the Council states that its review will  
26 consist of ascertaining “whether these plans set aside sufficient lands for natural resource protection to  
27 meet the Delta’s ecosystem needs.” B639. But because the Delta Plan contains no quantified or  
28 otherwise measurable targets for habitat or ecosystem restoration, as explained above, it is impossible to

1 use the Delta Plan to determine whether a particular sustainable communities strategy “set[s] aside  
2 sufficient lands for natural resource protection.” *Id.* The Delta Plan’s failure to include enforceable  
3 habitat restoration measures violates the Delta Reform Act. § 85302(c)(2), (3); 85302(e)(1), (2), (6).

### 4                   **3.       The Delta Plan Fails to Restore Delta Flows**

5           Third, the Delta Plan fails to include any measures to restore Delta flows, even though the Delta  
6 Reform Act explicitly requires the Delta Plan to “[r]estore Delta flows and channels to support a healthy  
7 estuary and other ecosystems.” § 85302(e)(4). As discussed above, rather than establish criteria that  
8 restore flows, the Delta Plan codifies existing flow criteria that even the Delta Plan itself recognizes are  
9 inadequate to protect public trust resources. B614, L11841, L11844, L11871. The Delta Plan states that  
10 other criteria may be incorporated at a future date, but the standards that the Council approved and will  
11 “use[] to determine consistency with the Delta Plan” do nothing at all to restore flows and moreover are  
12 inadequate to protect public trust resources. *Id.* This inadequacy violates the Delta Reform Act. §  
13 85302(e)(4).

14           Rather than include the specific, enforceable policies required by the Delta Reform Act, the  
15 Council elected to fill its Delta Plan with policies that do not actually require environmental restoration  
16 and vague recommendations that make no pretense of being enforceable. § 85302. Accordingly, the  
17 Delta Plan must be set aside.

### 18                   **IV.       THE COUNCIL’S REGULATIONS ARE INVALID**

19           The Legislature enacted the APA to assure that agencies adopt their regulations in an open, fair  
20 and orderly manner, and thereby “to advance ‘meaningful public participation in the adoption of  
21 administrative regulations by state agencies,’ and create ‘an administrative record assuring effective  
22 judicial review.’” *Voss v. Superior Court* (1996) 46 Cal.App.4th 900, 908-909 (quoting *California*  
23 *Optometric Assn. v. Lackner* (1976) 60 Cal.App.3d 500, 506). It “established ‘basic minimum procedural  
24 requirements for the adoption, amendment or repeal of administrative regulations’ . . . which give  
25 ‘interested parties an opportunity to present statements and arguments . . . and calls upon the agency to  
26 consider all relevant matter presented to it . . . .” *Id.* (citations and quotations omitted). To guard against  
27 unlawful regulations, the APA allows “[a]ny interested person” to “obtain a judicial declaration as to the  
28 validity of any regulation or order of repeal by bringing an action for declaratory relief in the superior

1 court.” Gov. Code § 11350(a). A court may declare a regulation “invalid for a substantial failure to  
2 comply with this chapter.” *Id.*

3 The APA thus establishes and governs the procedures by which state agencies, including the  
4 Council, may adopt regulations. In addition to prescribing procedural protections, the APA also  
5 establishes substantive standards. It directs that

6 no regulation adopted is valid or effective unless consistent and not in conflict with the  
7 statute and reasonably necessary to effectuate the purpose of the statute.

8 Gov. Code § 11342.2. The Council violated this simple but important limitation.

9 The Council violated the APA because the Regulations it adopted are in conflict with the Delta  
10 Reform Act. *Id.*; *Sabatasso v. Superior Court* (2008) 167 Cal.App.4th 791 (regulation was invalid  
11 because it was “not authorized by or consistent with the terms” of the statute); *Terhune v. Superior Court*  
12 (1998) 65 Cal.App.4th 864 (“an administrative agency has no discretion to promulgate a regulation that is  
13 inconsistent with the governing statutes”). They conflict with the objectives and criteria of the Delta  
14 Reform Act, just as the Delta Plan itself conflicts with those objectives and criteria in numerous respects.  
15 First, 23 CCR § 5003(c)(1)(C) is inconsistent with the Act’s requirement under § 85308(b) to use  
16 measurable targets and requirement under § 85021 to reduce reliance on the Delta. B1469. Second, 23  
17 CCR § 5005’s current flow objectives fail to use the best available science required by § 85308(a) of the  
18 Act. B1470. Third, the short-term water transfers allowed under 23 CCR § 5001(dd)(3) contravene the  
19 Act’s requirement under § 85054 requirement to protect, restore, and enhance the Delta’s environment.  
20 B1464. Fourth, 23 CCR §§ 5006(a) and 5007(a) fail to require the habitat restoration that is mandated by  
21 §§ 85302(c)(2), (3), and 85302(e)(1), (2), and (6). B1471. Each of these deficiencies echoes the Delta  
22 Plan’s conflicts with the Delta Reform Act discussed above.

23 The Regulations are also invalid because their interpretations of the Delta Reform Act  
24 impermissibly impair the scope of the Act. Gov. Code § 11342.2. They purport to interpret such  
25 statutorily defined terms as “coequal goals” (§ 85054) and “covered action” (§ 85057.5), and other terms  
26 vital to the Act such as “significant impact” and “best available science.” 23 C.C.R. § 5001. Although  
27 the Council has authority to adopt regulations that conform to and are consistent with the Delta Reform  
28 Act, the Council may not approve regulations that conflict with or impair the scope of the Act. “Unlike

1 quasi-legislative rules, an agency’s interpretation does not implicate the exercise of a delegated  
2 lawmaking power; instead, it represents the agency’s view of the statute’s legal meaning and effect,  
3 questions lying within the constitutional domain of the courts.” *Yamaha Corp. of Am. v. State Bd. of*  
4 *Equalization* (1998) 19 Cal. 4th 1, 11. Interpretive regulations that impair or enlarge a statute are  
5 therefore void. *Ontario Cmty. Foundations, Inc. v. State Bd. of Equalization* (1984) 35 Cal. 3d 811, 817  
6 (administrative regulation abridged statutory right to tax exemption and was therefore invalid) (citing  
7 *Woods v. Superior Court* (1981) 28 Cal.3d 668, 679).

8         The Council’s Regulations suffer from precisely this flaw. For example, 23 C.C.R. section  
9 5001(dd)(3), which purports to interpret the term “significant impact” in section 85057.5(a)(4), wrongly  
10 *exempts* water transfers despite the fact that – as discussed above – those water transfers may significantly  
11 impede achievement of the Act’s coequal goals. D6788. This water transfer exemption accordingly  
12 impairs the scope of the Delta Reform Act. Consequently, the Council’s adoption of the Regulations was  
13 contrary to Government Code section 11342.2. *Slocum v. State Bd. of Equalization* (2005) 134  
14 Cal.App.4th 969, 974 (“agencies do not have discretion to promulgate regulations that are inconsistent  
15 with the governing statute, or that alter or amend the statute or enlarge its scope”).

16         For a second example, 23 C.C.R. section 5002(b)(1) similarly impairs the scope of the Delta  
17 Reform Act. The Act mandates that agencies certify that their covered actions are consistent with the  
18 Delta Plan (section 85225), and specifies that “[a.]ny person” can appeal a consistency certification to the  
19 Council (section 85225.10). The Legislature mandated that an appeal must demonstrate “that a proposed  
20 covered action is inconsistent with the Delta Plan and, as a result of that inconsistency, the action will  
21 have a significant adverse impact on the achievement of *one or both* of the coequal goals.” § 85225.10(a)  
22 (emphasis added). 23 C.C.R. section 5002(b)(1) contains the Council’s interpretation of what it means  
23 “to be consistent with the Delta Plan.” Yet it explicitly contemplates allowing approval of projects that  
24 do *not* achieve “full consistency” with the Delta Plan if an agency finds that “on whole, that action is  
25 consistent with *the coequal goals*.” *Id.* (emphasis added). The Act’s section 85225.10(a), by contrast,  
26 does not contemplate balancing the coequal goals against each other. Instead, it states that an action is  
27 inconsistent with the Delta Plan if it “has a significant adverse impact on the achievement of *one or both*  
28 of the coequal goals.” The Council’s impairment of the legislatively decreed scope of actions

1 inconsistent with the Delta Plan must be set aside. Gov. Code § 11342.2; *Slocum, supra*, 134  
2 Cal.App.4th at 974.

3 The Delta Plan Regulations' flaws may not be dismissed as benign or outside the APA's  
4 protective reach. They implement the Council's Delta Plan and harm petitioners' environmental  
5 interests in the same way those interests are harmed by the Delta Plan itself, as explained above. Had the  
6 Legislature intended to allow the Council to bypass the APA's procedures, it would have so indicated in  
7 the legislation itself.<sup>7</sup> It chose not to do so. Therefore, because the Regulations conflict with the Delta  
8 Reform Act, under Government Code section 11350(a), this Court must declare the regulations invalid.  
9 *Western States Petroleum Association v. Board of Equalization* (2013) 57 Cal.4th 401, 415-416; *In re*  
10 *Lucas* (2012) 53 Cal.4th 839, 849-850 ("If a regulation does not properly implement the statute, the  
11 regulation must fail.").

12 **CONCLUSION**

13 The Council proceeded in excess of its jurisdiction and abused its discretion in purporting to  
14 approve the Delta Plan and the Delta Plan regulations, and to certify the PEIR thereon, because such  
15 approvals were not granted in accordance with the procedures required by law, based on the findings  
16 required by law; and were not based on, or were contrary to, the evidence in the record before the  
17 Council. Thus the Council failed to proceed in a manner required by law, and exceeded its jurisdiction in  
18 approving the Project and its regulations. For the foregoing reasons, these actions must be set aside.

19 Dated: October 15, 2014

Respectfully submitted,

20 

21 STEPHAN C. VOLKER

22 Attorney for NORTH COAST RIVERS ALLIANCE, PACIFIC  
23 COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS,  
24 SAN FRANCISCO CRAB BOAT OWNERS ASSOCIATION, and  
the WINNEMEM WINTU TRIBE

25  
26  
27  
28 <sup>7</sup> The Legislature *did* exempt from the APA the Council's administrative procedures governing appeals.  
Water Code § 85225.30.

**PROOF OF SERVICE VIA ELECTRONIC MAIL AND U.S. MAIL**

I, Teddy Ann Fuss, declare: I am and was at the times of the service hereunder mentioned, over the age of eighteen (18) years, and not a party to the within cause. My business address is: Law Offices of Stephan C. Volker, 436 - 14<sup>th</sup> Street, Suite 1300, Oakland, California 94612.

On October 15, 2014 I caused to be served **PETITIONERS' OPENING TRIAL BRIEF** by electronic mail to the email addresses listed below and by placing true copies of said document(s) in prepaid envelopes in the United States mail at Oakland, California, addressed as follows:

REPRESENTATIVE ATTORNEY	CASE
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*Central Delta Water Agency, et al. v. Delta  
Stewardship Council*  
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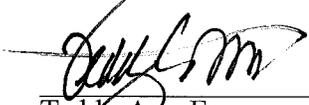
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<p>16 Chair, Judicial Council of California  17 Administrative Office of the Courts  18 Attn: Office of Appellate Court Services  19 (Civil Case Coordination)  20 455 Golden Gate Ave., 5<sup>th</sup> Floor  21 San Francisco, CA 94102-3688</p>	

22 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
23 true and correct and that this declaration was executed on October 15, 2014, at Oakland, California.

24   
25 \_\_\_\_\_  
26 Teddy Ann Fuss