Michael A. Brodsky
Law Offices of Michael A. Brodsky
201 Esplanade, Upper Suite
Capitola, CA 95010
Telephone: (831) 469-3514
Facsimile: (831) 471-9705
Email: michael@brodskylaw.net

Attorney for Petitioner Save the California Delta Alliance

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

Coordination Proceeding Special Title (Rule 3.550), **DELTA STEWARDSHIP COUNCIL CASES**	**JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4758** **PETITIONER SAVE THE CALIFORNIA DELTA ALLIANCE'S OPENING MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR A WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF** **[Pub. Res. Code §§ 21167.4(c) & 21167.6(e)(10); Code Civ. Proc. § 1085; Govt. Code §§ 11347.3 & 11350]** **Hearing: Not Set** **Time:** **Dept: 31** **Judge: Honorable Michael P. Kenny**

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I. STATEMENT OF FACTS

A. Overview: The Delta, The Delta Reform Act, The Delta Stewardship Council, The Delta Plan, And The Bay Delta Conservation Plan.

1. The Delta And Its Crisis.

The Sacramento, San Joaquin, Cosumnes, and Mokelumne Rivers, along with their tributaries, drain the vast Delta watershed, which covers 45,000 square miles (30,000,000 acres) stretching from Fresno to the Oregon border. The Delta is formed at the confluence of these rivers and covers an area of approximately 1300 square miles located in a triangular area roughly between Sacramento, Manteca, and Benicia. The Delta is the "largest estuarine system on the West Coast of the Americas." B415, 429. The Delta's myriad branching sloughs, marshes, and islands provide critical habitat for numerous species, a boating and recreational wonderland enjoyed by hundreds of thousands of Californian's each year, and a productive agricultural landscape rich in culture and history. B415, 469–477.

The Delta is also the hub of California's water infrastructure system; more than two thirds of the state's residents and over two million acres of farmland receive water exported from the Delta through state and federal pumping plants and canals. Water Code § 85004(a). The federally operated Central Valley Project ("CVP"), state operated State Water Project ("SWP"), and locally operated regional canals form one of the largest contiguous piece of water supply infrastructure in the world, reaching as far south as San Diego. B415, 429. "Approximately half of the water that historically flowed into and through the Delta is now diverted for human use, never reaching the sea." B415, 429.

The vast amount of water exported through this water conveyance system from the Delta's critical aquatic habitat causes an "ever spiraling tension over water exports and ecosystem decline." B417, 470. "After years of slow decline, the condition of the Delta's

watery ecosystem, as measured especially by the population of wild salmon and other native fishes, has gone critical. The list of causes begins, but does not end, with all those water withdrawals, a kind of tax that leaves the system in a condition of chronic drought." B415, 430.

2. The Legislative Response To The Delta Crisis: The Delta Reform Act Of 2009 Created The Delta Stewardship Council And Charged The Council With Promulgating The Delta Plan.

Respondent, the Delta Stewardship Council ("Council"), came to life because in 2009 the legislature found that the "Sacramento-San Joaquin Delta watershed and California's water infrastructure are in crisis and existing Delta policies are not sustainable." Water Code § 85001(a). The legislature responded to the crisis by enacting the Sacramento-San Joaquin Delta Reform Act of 2009, Water Code §§ 85000–85350 ("Delta Reform Act").

The Delta Reform Act is premised on the understanding that "[r]esolving the crisis requires fundamental reorganization of the state's management of Delta watershed resources." Water Code § 85001(a). To achieve the requisite reorganization the legislature determined that a "legally enforceable Delta Plan," Water Code § 85001(c), was needed. It therefore created the Council and charged it with developing the Delta Plan, which is the "comprehensive, long-term management plan for the Delta ... ." Water Code § 85059. Because of the urgency, vast scale, and complexity of the problem, the legislature appointed the Council to coordinate the activities of all other state agencies responsible for the Delta, directing the Council to "establish and oversee a committee of agencies responsible for implementing the Delta Plan." Water Code § 85204. The Delta Plan and the Council were intended by the legislature to be the "governance structure that will direct efforts across state agencies" to manage the Delta. Water Code § 85001(c). In the broadest terms, the purpose of the Delta Plan is to achieve the "coequal goals," which are

"providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem." Water Code section 85054.

3. Water Contractors' Delta Initiative: The Bay Delta Conservation Plan.

The Bay Delta Conservation Plan ("BDCP") was begun in 2006, D8188, 8194, at the initiative of water agencies who contract to receive water from the Delta through the CVP and SWP ("Water Contractors"). D8188. The Water Contractors have financed the BDCP planning process to date. D8188, 8192.

The BDCP has two basic components. The first is to build two water diversion tunnels, each 40 feet in diameter, with the capacity to divert 9,000 cubic feet per second ("CFS") from the Sacramento River at a point near the town of Hood, a few miles south of Sacramento. B415, 469; I3756, 3820. The Water Contractors will pay for the construction of the tunnels. Water Code § 85089. The cost of the tunnels has been estimated by the Water Contractors at close to $17,000,000,000. I9480, 9556. The tunnels themselves have a design capacity of 15,000 CFS, which is the maximum carrying capacity of the canal network of the CVP and SWP. D8188, 8207. The current BDCP design calls for 3 intakes with a total capacity of 9,000 CFS. I3756, 3820, which could be increased to 15,000 CFS by adding additional intakes at some time in the future. I3756, 3820; I9480, 9499. By way of comparison, the total flow of the Sacramento River at Hood during the summer months is approximately 16,000 CFS. Whether at 9,000 CFS or 15,000 CFS, addition of the tunnels will substantially increase the ability of the CVP and SWP to divert water from the Delta.

Water is currently diverted from the Delta and into the CVP and SWP systems by the Jones and Banks pumping stations that are located near Tracy, about 50 miles south of the BDCP's proposed new intakes at Hood. Water that currently flows through the myriad

of Delta channels and sloughs to reach those export pumps will be diverted at Hood and conveyed instead through the new tunnels directly to the pumps without flowing through the Delta. L5111, 5125.

The second component of the BDCP is to undertake habitat restoration or habitat creation projects in the Delta on an unprecedented scale as mitigation for the impact of water diversions on endangered species. The BDCP proposes to restore or create approximately 90,000 acres of habitat. D8188, 8197–8200. The Water Contractors have estimated the cost of habitat restoration and associated measures at close to $5,000,000,000. I9480, 9556. Proponents of the BDCP seek to have it approved as a Habitat Conservation Plan ("HCP") and a Natural Communities Conservation Plan ("NCCP") by the respectively responsible state and federal agencies under state and federal endangered species acts. D8188, 8192.

The BDCP is highly controversial. Its claims that the new tunnels are themselves "conservation measures," is hotly disputed by opponents of the project. Opponents point to the conclusions of the United States Environmental Protection Agency that operation of the tunnels will harm, rather than help Delta ecology as proponents claim. *See* Petitioner Save The California Delta Alliance's Request For Judicial Notice, Exhibit A at 2 ("Req. for Jud. Not.") (noting that operation of the tunnels will "contribute to increased and persistent violations of water quality standards in the Delta," and "would not protect beneficial uses for aquatic life, thereby violating the Clean Water Act," and that "we are concerned over the sole reliance on habitat restoration for ecosystem recovery, recognizing that existing freshwater diversions and significantly diminished seaward flows have played a significant role in precluding the recovery of Bay Delta ecosystem processes and declining fish populations.")[1].

[1] As explained in the Req. for Jud. Not., the EPA letter is introduced as general introductory background material only and not to contradict the evidence the agency

It is also controversial for the unprecedented role given to the Water Contractors in managing the Delta Ecosystem and making decisions about how much water may be diverted at any given time. L5111, 5173.

B. The Relationship Of The BDCP To The Delta Plan And The Council's Interpretation Of The Delta Reform Act Allowing It To Omit Substantial Components Of The Delta Plan In Deference To The BDCP.

In 2009, after the BDCP planning process had been underway for 3 years, the Delta Reform Act included provisions providing that the BDCP "shall be considered for inclusion in the Delta Plan," if certain specified criteria are met by the BDCP. Water Code § 85320(a). The Council determined that it would omit substantial portions of the Delta Plan, deferring responsibility for those aspects to the state and federal agencies pursuing the BDCP with the Water Contractors. B415, 470.

Presenting staff recommendations at a Council meeting on November 15, 2012, as the Delta Plan was nearing completion, senior Council staff person Dan Ray summarized the Delta Plan's approach to the BDCP:

> It will become part of the Delta Plan and it kinda docks in to the Delta Plan and we've left the Delta Plan in many ways deliberately sparse so that there is room for it to dock up, essentially.

F418 at timestamp 1:03 (video of Council meeting).

Examples of leaving the Delta Plan deliberately sparse in many ways include the following: Water Code section 85020(f) charges the Council to "[i]mprove the water conveyance system and expand statewide water storage." However, the Council determined that it had no authority at this time, and would take no position on conveyance, including making no recommendations as to conveyance options whatsoever,

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relied on in making its decisions or to raise a question regarding the wisdom of the agency's decision to embrace the BDCP.

due to the existence of the BDCP. B1153, 1156. The Delta Plan also has no legally enforceable provisions regarding expanding statewide storage. B415, 572 ("No policies with regulatory effect are included in this section"). The Delta Reform Act directs that the Delta Plan include measures to "[r]estore Delta flows and channels to support a healthy estuary and other ecosystems." Water Code § 85302(e)(4). The legislature directed that specially developed Delta Flow Criteria inform Delta Plan measures to restore Delta flows. Water Code § 85086(b). However, the "Council has determined that the BDCP agencies are in the best position to complete the planning process, including defining acceptable ranges of exports and *through-Delta flows*." D45, 59 (emphasis added). Therefore, the "Delta Plan does not suggest any particular [flow] objectives." D45, 62.

With regard to conveyance, Council Chair Isenberg initially believed that the Delta Reform Act required the Council to take action on conveyance. In a February 14, 2011, email to legislators Chair Isenberg wrote "we will ultimately make some recommendations or take action" on "a preferred Delta water export facility" in future Delta Plan drafts. M97, 98.

The subsequent decision to omit portions of the Delta Plan, including those dealing with conveyance, tracks statutory construction of the Delta Reform Act that reads it as not conferring "broad regulatory authorities and jurisdiction" upon the Council. M1178, 1178.004. This interpretation of the Delta Reform Act was conducted in secret, deliberately shielded from public view, through correspondence and meetings between the California Resources Agency, California Department of Water Resources, the Water Contractors, and the Council.

Four months after Chair Isenberg's "take action" on conveyance email, on May 23, 2011, Deputy California Resources Agency Secretary Jerry Meral, who was Governor Brown's chief facilitator for the BDCP, wrote to Council Executive Officer Joseph Grindstaff, Council Chair Isenberg, BDCP official Karla Nemeth, and California Department of Water Resources Director Mark Corwin. Meral attached to his email "an analysis prepared by [Water Contractor representative] Greg Zlotnick at my request of the impacts of the draft Delta Plan on BDCP." M1178. Mr. Zlotnick's statutory analysis concludes that "legislative history" shows that the Council's "regulatory purview was very narrowly focused on the Delta, and particularly land use decisions there that could negatively affect capabilities to achieve the coequal goals. The legislation was also specifically intended to insulate the BDCP from" Delta Plan requirements. M1178, 1178.004.

In keeping with Mr. Zlotnick's statutory analysis, the most salient omission from the Delta Plan is in the form or an express administrative rule, which exempts BDCP projects from complying with the Delta Plan. B415, 517 (BDCP projects need only be "consistent with the BDCP" and not the rest of the Delta Plan).

Secretary Meral asked that Mr. Zlotnick's memo be kept secret and that interpretation of the Delta Reform Act continue through private meetings: "I would ask that you not consider it 'input' to the process and not post it to the web since it isn't a formal submittal on our or Greg's part. Perhaps the most productive way to proceed is for us to meet in person" to "go through the issues raised in Greg's memo." M1178.

II. ARGUMENT.

A. The Council's Enactments Determining That BDCP Projects Are Exempt From The Delta Plan Are Unlawful Underground Regulations.

1. Standard of Review.

"Whether an agency action constitutes a regulation is a question of law that we review de novo." *County of San Diego v. Bowen*, 166 Cal. App. 4th 501, 517 (2008). Courts "determine the lawfulness of agencies' compliance with those rule-making procedures [of the APA] entirely de novo, simply substituting their judgment on that question for that of the agencies." *Cal. Advocates for Nursing Home Reform v. Bonta*, 106 Cal. App. 4th 498, 506 (2003).

2. All Generally Applicable Administrative Enactments That Interpret, Implement, Or Make Specific A Statute Not Adopted In Compliance With The APA Are Invalid Underground Regulations And Cannot Be Enforced.

The California Administrative Procedure Act, Gov. Code §§ 11340–11530 ("APA"), "applies to all generally applicable administrative interpretations of a statute." *Morning Star Co. v. State Bd. of Equalization*, 38 Cal. 4th 324, 335 (2006). In addition, every generally applicable agency enactment to "implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure" is a regulation subject to the APA. *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 571 (1997). The APA requires that such enactments be adopted as regulations, following procedures specified in the APA, including submission of the proposed regulation to the California Office of Administrative Law ("OAL"), *Morning Star Co.,* 38 Cal. 4th at 333, and filing with the Secretary of State for publication in the California Code of Regulations. Gov. Code § 11340.5(a).

The APA defines a regulation as follows:

> "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision to any rule, regulation, order, or standard adopted by any state agency to implement, *interpret*, or make specific the law enforced or administered by it, or to govern its procedure.

Government Code section 11342.600 (emphasis added). The APA further provides:

> No state agency shall issue, utilize, enforce, or attempt to enforce [anything] … which is a regulation as defined in Section 11342.600, unless the [regulation] … has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

Government Code section 11340.5(a). These provisions of the APA "prohibit[] state agencies from relying *in any way* on uncodified rules that modify or supplement duly adopted provisions of law." California Forms of Pleading and Practice § 472.20[1] (Mathew Bender 2012) (emphasis added). "If an agency adopts a regulation without complying with the APA requirements it is deemed an 'underground regulation' and is invalid" and "cannot be enforced." *Naturist Action Comm. v. Cal. State Dept. of Parks & Recreation*, 175 Cal. App. 4th 1244, 1250 (2009).

The Supreme Court has taken pains to stress that the APA "defines 'regulation' very broadly" under Gov. Code § 11342. *Tidewater*, 14 Cal. 4th at 571. *See also* California Forms of Pleading and Practice § 472.20[2] ("The definition of 'regulation' in the APA is very broad," and "has been broadly interpreted by the courts, notably by the California Supreme Court"). California's "definition of regulation, that is, those agency enactments that are invalid absent adoption through the formal rulemaking process, is much more inclusive than the definition contained in the federal Administrative Procedure Act," which, unlike California, provides exceptions for interpretive documents. *Id.* It is "clear that the rulemaking procedures of the APA apply to any regulation and the definition of regulation includes every rule adopted to interpret the law." *Capen v. Shewry,* 155 Cal. App. 4th 378, 896 (2007).

The sole exception relevant here, that the agency's interpretation is "the only legally tenable interpretation of a provision of law," Gov. Code § 11340.9(f), is very narrow. The "lone legally tenable reading of the law applies only in situations where the law can reasonably be read only one way." *Morning Star Co.,* 38 Cal. 4th at 336 (citation and quotation marks omitted). Only where "the agency's actions or decisions in applying the law are essentially rote, ministerial, or otherwise patently compelled by, or repetitive of, the statute's plain language," does the exception apply. *Morning Star Co.,* 38 Cal. 4th at 337.

3. Interpretive Appendix A And The BDCP Covered Activity Consistency Rule, Which Exempt BDCP Projects From The Delta Reform Act's Consistency Requirement, Are Unlawful Underground Regulations.

a. The Delta Reform Act's Consistency Certification Requirement Makes The Delta Plan Legally Enforceable.

The legislative intent that the Delta Plan be a "legally enforceable Delta Plan," Water Code § 85001(c), is carried out through the Delta Reform Act's consistency certification requirement. The Delta Reform Act defines the term "covered action" as a project undertaken in the Delta by a state or local agency that will implicate the achievement of the coequal goals. *See* Water Code §§ 85057.5(a)(1)–(4). Water Code section 85225 in turn provides that a state or local agency that proposes to undertake a covered action shall submit to the Council a "written certification of consistency" showing that the action is consistent with the Delta Plan. Any person who claims that the proposed action is actually inconsistent with the Delta Plan may challenge the filed consistency certification and the Council will then conduct a hearing to determine if the proposed action is consistent with the Delta Plan. Water Code §§ 85225.10–85225.25. If the Council determines that the action is not consistent with the Delta Plan, the project may

not proceed until and unless the project is revised or new information is presented so that upon rehearing the Council finally determines that the action is consistent. B1153, 1277, 1281.

b. Interpretive Appendix A and The BDCP Exemption Rule, Neither of Which Were Adopted As Regulations, Modify The Council's Duly Adopted Consistency Certification Regulations And Interpret And Implement The Delta Reform Act's Consistency Certification Provisions.

Interpretive Appendix A provides in pertinent part as follows:

> Upon successful completion of the BDCP process, and if the BDCP meets certain requirements explained in Water Code section 85320(e), the BDCP becomes part of the Delta Plan. Subsequently, if another government agency (California Department of Water Resources, most likely) proposes to implement the new conveyance project that is selected by BDCP as the preferred conveyance option and that project qualifies as a "covered action" (it would qualify, most likely), the project would be consistent with the Delta Plan regardless of whether the Delta Plan had previously endorsed a different conveyance option.

B1153, 1156.

The Council's conclusion that a "conveyance project that is selected by BDCP as the preferred conveyance option … would be consistent with the Delta Plan regardless of whether the Delta Plan had previously endorsed a different conveyance option" rests on its statement that "if the BDCP meets certain requirements explained in Water Code section 85320(e), the BDCP becomes part of the Delta Plan." Water Code section 85320(e) provides that if the BDCP meets certain criteria, the "council shall incorporate the BDCP into the Delta Plan." The Council's analysis takes it as axiomatic that if the BDCP is incorporated into the Delta Plan, any project proposed under the BDCP need only be consistent with the BDCP and not with other portions of the Delta Plan. As the Council sees it, if other portions of the Delta Plan required ("endorsed" in the Council's parlance)

conveyance features that conflict with BDCP conveyance features, nevertheless the BDCP conveyance project would be deemed consistent.

The Council implemented the legal conclusion of Appendix A by adopting the BDCP Covered Activity Consistency Certification rule ("BDCP Exemption Rule"), which applies to *all* BDCP projects, including habitat restoration projects, and requires "only that the covered action is consistent with the BDCP:"

> **Bay Delta Conservation Plan Covered Activity Consistency Certification**
>
> The Delta Reform Act describes a specific process for the potential incorporation of BDCP into the Delta Plan. If BDCP is incorporated, an agency proposing a qualifying "covered activity" under BDCP that also meets the statutory definition of a covered action must file a short form certification of consistency with findings indicating *only that the covered action is consistent with the BDCP*. Consistency for these purposes shall be presumed if the certification filed by the agency includes a statement to that effect from DFW.

B415, 517 (emphasis added).

The Council foresaw that conflicts between the Delta Plan and projects proposed under the BDCP's fifty year plan might come to light when those projects were subject to consistency certification with the Delta Plan over the course of coming years and decades. *See* L5111, 5174–75 (graphic from BDCP authored materials showing dozens of discrete BDCP projects implemented under the BDCP seriatim over fifty years; *see also* D8188, 8189 (describing multiple BDCP projects to occur throughout the Delta). To resolve these conflicts (in favor of the BDCP) the Council Adopted the BDCP Exemption Rule.

Thus in a two-step administrative process, the Council has interpreted and implemented Water Code § 85057.5 (defining "covered actions" that are subject to consistency certification) and Water Code § 85225 (requirements for certifying that a covered action "is consistent with the Delta Plan"). Under these two code sections the

Council has determined that BDCP projects are exempted from complying with Delta Plan requirements and must only comply with the BDCP.

The APA "prohibits state agencies from relying *in any way* on uncodified rules that modify or supplement duly adopted provisions of law." California Forms of Pleading and Practice § 472.20[1] (emphasis added). However, the BDCP Exemption Rule also modifies and supplements the Council's duly published regulations governing consistency certification, codified at 23 CCR § 5002(b)(1).

The regulations define "covered action" and track the statutory definition found at Water Code section 85057.5(a)(1)–(4). *See* 23 CCR § 5001(j)(1). The regulations further provide that a covered action "does not include any plan, program, or project that is exempted pursuant to Water Code section 85057.5(b)." *See* 23 CCR § 5001(j)(2). Water Code section 85057.5(b) contains the statutory exemptions list. The Council's published regulations do not add any additional exemptions or interpret the statutory exemption list in any way.

The Council's published regulations provide that "[c]overed actions, in order to be consistent with the Delta Plan, must be consistent with this regulatory policy and with each of the regulatory policies contained in Article 3 implicated by the covered action [all 14 Delta Plan regulatory policies]." *See* 23 CCR § 5002(b)(1). Finally, the regulations provide that "[c]ertifications of consistency must include detailed findings that address each of the following requirements," described in subparagraphs 1–4. *See* 23 CCR § 5002(b)(1–4).

There is no exemption for BDCP covered actions and nothing saying BDCP implementation projects must show consistency only with the BDCP and not the rest of the Delta Plan. There is no provision for a "short form" certification or presumption of

consistency for BDCP projects as allowed by the uncodified BDCP Exemption Rule. B415, 517.

The Council agrees that under the statutory criteria BDCP implementation projects that otherwise meet the statutory definition are covered actions and are not statutorily exempted by Water Code section 85057.5(b). If a "government agency (California Department of Water Resources, most likely) proposes to implement the new conveyance project that is selected by BDCP as the preferred conveyance option and that project qualifies as a "covered action" (it would qualify, most likely) … ." B1153, 1156. *See also* D8188, 8190 n.2 ("proposed conveyance improvements would almost certainly be a covered action"). As to BDCP habitat projects, in order to be incorporated into the Delta Plan, the BDCP must first be approved as an HCP and an NCCP. Water Code section 85320(e). "NCCP and HCCP *implementation* actions are not listed as exempt [from being a covered action] in the Delta Plan or the Delta Reform Act." D45, 55[2].

The BDCP Exemption Rule and Appendix A were not submitted to OAL for approval as regulations or filed with the Secretary of State for publication in the California Code of Regulations—these enactments did not comply with the APA requirements for a regulation.

c. Appendix A And The BDCP Exemption Rule Are Underground Regulations Under The Two-Part *Tidewater* Test.

The Supreme Court's two-part test to determine if a regulation is subject to APA rulemaking requirements was announced in *Tidewater*, 14 Cal. 4th at 571. The *Tidewater* test for a regulation is as follows:

[2] This is quoted from the Master Responses to Comments on the Draft PEIR, which on the next page says if the BDCP is incorporated into the Delta Plan a BDCP implementation project "that meets the statutory definition of a covered action must file a short form certification of consistency with findings indicating only that the covered action is consistent with the BDCP," D45, 56, thus reiterating the BDCP exemption rule.

> A regulation subject to the APA thus has two principal identifying characteristics First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedures.

Tidewater, 14 Cal. 4th at 571. As demonstrated above, Appendix A interprets the Delta Reform Act within the meaning of the APA, and the BDCP Exemption Rule implements and makes specific the Delta Reform Act.

These rules also apply generally because they declare how a certain class of cases will be decided. All those projects under the BDCP plan will be exempt from certification as complying with Delta Plan regulatory policies.

Appendix A and the BDCP Exemption Rule are not applied to a "specific case" within the meaning of the APA as elucidated in *Tidewater.* A "specific case" in the underground regulation context means a decision arrived at in the course of an adjudicatory proceeding. "Interpretations that arise in the course of case-specific adjudication are not regulations" subject to the APA. *Tidewater,* 14 Cal. 4th at 571. However, "[t]he APA applies to the exercise of *any quasi-legislative power* conferred by *any statute* heretofore or hereafter enacted" unless expressly exempted. *Tidewater* 14 Cal. 4th at 570 (emphasis original) (quotation marks and citation omitted).

The Council was exercising its quasi-legislative power when it created the BDCP exemption. An "administrative action is quasi-legislative when the administrative agency is creating a new rule for future application." *Cal. Ass'n. of Med. Prods. Suppliers v. Maxwell-Jolly,* 199 Cal. App. 4th 286, 301 (2011). Adoption of the Delta Plan and associated documents created new rules, policies, and recommendations for future application. The Delta Plan and its accoutrements are the "comprehensive, long-term

management plan for the Delta," Water Code § 85059, intended for application far into the future. The Council's only authorized adjudicative function is to sit as an appellate body hearing appeals of consistency certifications. Water Code §§ 85225.10–85225.30. It was not exercising that function when it adopted the challenged interpretation.

d. Appendix A And The BDCP Exemption Rule Are Similar To Other Underground Regulations Held Invalid By The Courts Of Appeal.

Capen v. Shewry, 155 Cal. App. 4th 378, provides a good example of a rule similar to the ones at issue here being struck down as an underground regulation. In *Capen*, the Department of Health Services was charged with administering Health and Safety Code section 1204(b)(1), "which defines the surgical clinics subject to licensing by the Department." *Capen v. Shewry*, 155 Cal. App. 4th at 382. Here, the Council is charged with administering the Delta Reform Act, which defines what projects are subject to certification of consistency with the Delta Plan. Water Code § 85057.5 (defining "covered actions" that are subject to consistency certification); Water Code § 85225 (contents of consistency certification and requirement for findings that project "is consistent with the Delta Plan").

The statute at issue in *Capen* provided for certain exceptions to the licensure requirement. *Capen*, 155 Cal. App. 4th at 382. The Delta Reform Act provides for exceptions to the consistency certification requirement by excluding certain projects from the definition of covered action. Water Code § 85057.5(b). In *Capen,* the agency interpreted the statute to mean that certain classes of clinics did not fall within the exception and were subject to the licensure requirement. *Capen*, 155 Cal. App. 4th at 382–383. Here, the Council interpreted the Delta Reform Act to mean that certain classes of projects are not subject to certification of consistency with the Delta Plan (projects proposed under the BDCP).

In *Capen,* the court held that the interpretation was an underground regulation and void because the Department's reading was not patently compelled:

> Accordingly, no one reading of section 1204, subdivision (b)(1), of consequence to this action, is "patently compelled." Because the Department's unwritten, contrary interpretation is a generally applicable policy, it "amounts" to a regulation subject to the rulemaking procedures of the APA. Since the Department did not comply with those procedures its interpretive regulation is void.

Capen, 155 Cal. App. 4th at 898.

In *Morning Star Co.*, the agency interpreted the law "by deciding what items and substances constitute hazardous materials and specifying what it means to use, generate, store, or conduct activities in this state related to these materials." *Morning Star Co.*, 38 Cal. 4th at 334. The Court held that the "Department's interpretation of use, generate, store, or conduct activities in this state related to hazardous materials is reasonable, but not plainly ineluctable," therefore the "Department cannot avail itself of the APA exception that applies if an agency's construction of a statute represents the only legally tenable interpretation of the law." *Morning Star Co.,* 38 Cal. 4th at 328.

As demonstrated in the preceding sections of this brief, the Council's interpretation is neither "patently compelled," nor "plainly ineluctable." The Delta Reform Act contains no exemption for BDCP projects that otherwise meet the definition of covered action. The Delta Reform Act's consistency certification provisions apply to all projects that meet the definition of covered action and provide no special treatment for BDCP projects. The Council's own published regulations provide no exception for or different treatment of BDCP projects. The Council relies on the fact that the BDCP "shall be incorporated" into the Delta Plan. However, this does not compel the conclusion that after incorporation BDCP projects will be subject only to the terms of the BDCP.

III. The Council Impaired The Scope Of The Delta Reform Act And Acted Arbitrarily And Capriciously When It Enacted The BDCP Exemption, And Chose To Omit Legally Enforceable Policies Covering Flow, Conveyance, And Storage.

A. Standard Of Review.

1. Interpretations Found In Underground Regulations Receive No Deference.

Underground interpretations receive no deference from courts. "To give weight to an improperly adopted regulation … would permit the agency to flout the APA … . We conclude we can give no weight to the DLSE's interpretation" at issue. *Tidewater*, 14 Cal. 4th at 576. An administrative interpretation, unless validly adopted, "merits no weight as an agency interpretation." *Armistead v. State Pers. Bd.*, 22 Cal. 3d 198, 205 (1978).

2. Review Of Agency Acts That Conflict With Or Impair The Scope Of The Agency's Statutory Mandate And Review Of Issues Of Statutory Construction Are Both De Novo.

"In deciding whether the regulation conflicts with its legislative mandate, the court does not defer to the agency's interpretation of the law under which the regulation issued, but rather exercises its own independent judgment." *Samantha C. v. State Dept. of Developmental Servs.*, 185 Cal. App. 4th 1462, 1482 (2010) (citation and quotation marks omitted).

"An administrative action is quasi-legislative when the administrative agency is creating a new rule for future application." *Cal. Ass'n. Of Med. Prods. Suppliers v. Maxwell-Jolly*, 199 Cal. App. 4th at 302. Where "an agency is exercising a quasi-legislative function, judicial review must proceed under ordinary or traditional mandamus." *W. States Petroleum Ass'n. v. Superior Court of Los Angeles County,* 9 Cal. 4th 559, 567 (1995). In "a traditional mandamus proceeding … legal issues, such as issues of statutory construction, are reviewed de novo." *Cal. Chamber of Commerce v. Brown*, 196 Cal. App. 4th 223, 248 n.1 (2011).

"A court independently determines" whether "the agency acted within the scope of its authority." *Plastic Pipe & Fittings Ass'n v. Cal. Bldg. Standards Comm'n*, 124 Cal. App. 4th 1390, 1406 (2004).

When "an implementing regulation is challenged on the ground that it is in conflict with the statute or does not lay within the lawmaking authority delegated by the Legislature, the issue of statutory construction is a question of law on which a court exercises independent judgment." *W. States Petroleum Ass'n. v. Bd. of Equalization*, 57 Cal. 4th 401, 415 (2013). Where the petition alleges that the agency's actions are inconsistent with legislative authority granted to the agency by the legislature review is de novo. *S.F. Fire Fighters Local 798 v. City and County of San Francisco*, 38 Cal. 4th 653, 668 (2006) (holding that "[a]dministrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations") *Samantha C. v. State Dept. of Developmental Servs.*, 185 Cal. App. 4th at 1482 (holding that "[i]n deciding whether the regulation conflicts with its legislative mandate, the court does not defer to the agency's interpretation of the law under which the regulation issued, but rather exercises its own independent judgment") (citation and quotation marks omitted); *Agric. Labor Relations Bd. v. Superior Court*, 48 Cal. App. 4th 1489, 1510 (1996) (holding that "[a]dministrative regulations that violate acts of the Legislature are void and no protestations that they are merely an exercise of administrative discretion can sanctify them. They must conform to the legislative will if we are to preserve an orderly system of government") (citation and quotation marks omitted).

3. Questions Of An Exercise Of Agency Discretion Are Reviewed Under The Arbitrary And Capricious Standard.

In "[a] traditional writ of mandate under Code of Civil Procedure section 1085 … the trial court reviews the challenged administrative action to determine if it was arbitrary, capricious, or entirely lacking in evidentiary support … ." *Sheldon v. Marin County Empls. Ret. Ass'n.*, 189 Cal. App. 4th 458, 463 (2010). *See also* California Civil Writ Practice § 2.38B (CEB 2014) ("[in] a traditional mandamus action, the reviewing court applies an abuse of discretion standard"). Out of respect for the separation of powers and the agency's presumed expertise within its scope of authority, review is limited and a court may not reweigh the evidence or substitute its judgment for that of the agency. *Cal. Hotel & Motel Ass'n v. Indus. Welfare Comm'n*, 25 Cal. 3d 200, 212 (1979). The California Supreme Court has articulated the standard of review as follows:

> A court will uphold the agency action unless the action is arbitrary, capricious, or lacking in evidentiary support. A court must ensure that an agency has adequately considered all the relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.

Id. See also W. States Petroleum Ass'n. v. Superior Court of Los Angeles County, 9 Cal. 4th 559, 574 ("In reviewing ... non-CEQA quasi-legislative decisions, the trial court [inquires] whether … the decision of the agency was arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair.").

The United States Supreme Court articulated the tests for arbitrary and capricious agency action in *Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). The *State Farm* tests are respected in state and federal courts alike. *See, e.g., S. Cal. Edison Co. v. Pub. Util. Com'n,* 85 Cal. App. 4th 1086, 1111 (2000) (applying *State Farm* and other federal administrative law cases). An administrative decision is arbitrary and capricious if it fails to make "a rational connection between the facts found and the choice made," *State Farm*, 463 U.S. at 43, which is an

essential component of making a rational connection between all the relevant factors and the choice made as articulated in *Cal. Hotel.*

B. The BDCP Exemption Rule Impairs The Scope Of The Delta Reform Act.

"We read the language of a statute in context and in light of the nature and purpose of the statutory scheme." *Modesto City Schools v. Education Audits Appeal Panel*, 123 Cal. App. 4th 1365, 1375 (2010). Keeping in mind the larger statutory scheme of which section 85320(e) is a part, the Council's reading is inconsistent with the overall structure and purpose of the Delta Reform Act. Section 85059 provides that "'Delta Plan' means the comprehensive, long-term management plan for the Delta as adopted by the council in accordance with this division." By "enacting this division, it is the intent of the Legislature to … establish a governance structure that will direct efforts across state agencies to develop a legally enforceable Delta Plan." Water Code § 85007(c). The legislature intended for the Delta Plan and the Council "to provide for the sustainable management" of the Delta. Water Code § 85001(c). There would be little point in promulgating a comprehensive management plan for the Delta and appointing it and the Council to direct efforts across state agencies when the BDCP would actually displace the Delta Plan and take precedence.

Nothing in the statutory definition of the BDCP suggests that it preempts the role of the Council or the Delta Plan. The definition of the BDCP reads in full, "'Bay Delta Conservation Plan' or 'BDCP' means a multispecies conservation plan." Water Code § 85053. "If the Legislature has provided an express definition of a term, that definition ordinarily is binding on the courts." *Curle v. Superior Court,* 24 Cal. 4th 1057, 1063 (2001).

The Council interprets the phrase "the council shall incorporate the BDCP into the Delta Plan," Water Code § 85320(e), to mean that the BDCP will displace Delta Plan terms where the two come into conflict. When and if the BDCP is found to comply with the statutory criteria for incorporation, the council apparently foresees itself figuratively stapling the BDCP onto the back of the Delta Plan and stamping it approved. Thereafter, when BDCP projects come up for consistency certification, the Council will turn only to the appended BDCP pages, and not the body of the Delta Plan to determine consistency.

However, the meaning of "incorporate" does not support the Council's position. "incorporate" is defined by Blacks Law Dictionary as "[t]o combine with something else." Blacks Law Dictionary 781 (8th ed. West 1999). Webster's defines "incorporate" as "to unite with or introduce into something already existent usu. so as to form an indistinguishable whole that cannot be restored to the previously separate elements without damage." Webster's Third New International Dictionary 1145 (unabridged ed.1993). The Oxford English Dictionary says "incorporate" means "to unite in one body; combined in one mass or uniform substance." OED Online, Oxford University Press, September 2014. Web. 14 October 2014. The Council's theory, that the BDCP exists in isolation after incorporation, is not born out by these dictionary definitions. Rather, the implication is that the BDCP, after incorporation, *cannot* be read or applied in isolation from the Delta Plan.

Courts facing the Council's apply-incorporated-document-in-isolation argument have rejected it. In *Erath v. Xidex Corp.*, 1991 WL 338322 (D. Ariz. 1991)[3], the defendant had incorporated by reference a portion of a corporate annual report into a 10-k statement

[3] "Although we may not rely on unpublished California cases, the California Rules of Court do not prohibit citation to unpublished federal cases, which may properly be cited as persuasive, although not binding, authority." *Airline Pilots Ass'n. Int'l. v. United Airlines, Inc.,* 223 Cal. App. 4th 706, 724 n. 7 (2014)

filed with the Securities and Exchange Commission. *Erath*, 1991 WL 338322 at *3. The plaintiff argued that the annual report was misleading to investors. However, when read in the context of the entire 10-k statement that it was incorporated into, it was not misleading. *Erath*, 1991 WL 338322 at *3–4. Plaintiff urged that the incorporated portion of the financial report be looked at "in isolation" as, plaintiff argued, it had an existence separate from the 10-K even though it had been incorporated.

The court rejected plaintiff's arguments in reasoning equally applicable here:

> Webster's Dictionary defines "incorporate" as "to unite or work into something already existent so as to form an indistinguishable whole." Webster's Ninth New Collegiate Dictionary 611 (1985). Once incorporated into the 10-k, the note from the financial report portion of the Annual Report became united or submerged into the rest of the 10-K and hence the 10-K "in toto" must be looked to for liability under § 18(a).

Erath, 1999 WL 338322 at *4. Likewise, once incorporated into the Delta Plan, the BDCP becomes united with and submerged into the rest of the Delta Plan and hence the Delta Plan "in toto" must be looked at to determine if a BDCP project is consistent with the Delta Plan. *See also Yosemite Park & Curry Co. v. Dept. of Motor Vehicles*, 177 Cal. App. 2 448, 453 (1960) (where one statute "incorporates some of the provisions" of another statute then the "two statutes are *in pari materia,* and, under accepted principles of law, should be read together.").

Appendix A and the BDCP Exemption Rule conflict with the legislative mandate of the Delta Reform Act and impair its scope. "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations" *S.F. Fire Fighters Local 798,* 38 Cal. 4th at 668.

C. The Council's Choices To Enact A Flow Policy That Does Not Advance The Goal Of Restoring Delta Flows And Not To Enact Any Conveyance Or Storage Polices Impair The Scope Of The Delta Reform Act And Were Arbitrary And Capricious.

1. The Delta Reform Act Requires That The Delta Plan Include Legally Enforceable Provisions That Advance The Statutorily Specified Two Coequal Goals, Eight Inherent Objectives, And Six Subgoals.

The statutorily specified purpose of the Delta Plan is to "further[] the coequal goals." Water Code § 85300(a). The legislature amplified the coequal goals by directing that "the following [eight] objectives … are inherent in the coequal goals for management of the Delta." Water Code § 85020. The legislature further amplified the coequal goals by mandating that six specified "subgoals and strategies for restoring a healthy ecosystem shall be included in the Delta Plan." Water Code § 85302(e). Finally, the legislature mandated that the co-equal goals, inherent objectives, and specified subgoals and strategies be implemented through a "legally enforceable Delta Plan," Water Code § 85001(c), that is "the comprehensive, long-term management plan for the Delta as adopted by the council in accordance with this division." Water Code § 85059.

The Delta Plan, therefore, is statutorily required to achieve, through a legally enforceable Plan, the two co-equal goals, the eight inherent objectives, and the subgoals specified for restoring a healthy ecosystem. The Council agrees with this fundamental description of the purpose of the Delta Plan: "The fundamental purpose of the Delta Plan, therefore, is to achieve the coequal goals and all of the inherent subgoals and objectives" that are specified by Water Code sections 85054 [co-equal goals], 85020(a)–(h) [eight inherent objectives], and section 85302(e)(1)–(6) [six subgoals and strategies] D6788. The Council also agrees that the Delta Plan must be legally enforceable and comprehensive: The "Delta Reform Act … requires the development of a legally enforceable,

comprehensive, long-term management plan for the Delta, referred to as the Delta Plan.[4]" D6788.

However, with rare exception, the Delta Plan is composed not of legally enforceable provisions but rather of pithy discussions about the problems facing the Delta followed by nonbinding "recommendations." The recommendations, for the most part, only inventory tasks that other agencies are already undertaking–and in most instances are statutorily required to undertake–in order to address those problems. According to the Council, the "73 Recommendations," B415, 432, within the Delta Plan are "nonregulatory," and merely "call attention to tasks being done or to be done by others." B415, 432. The Delta Plan also contains "14 Policies" that are "legal requirements." B415, 432. However, the 14 Policies do not come close to addressing all of the mandatory objectives and subgoals.

2. The Delta Plan's Flow Policy Does Not Advance The Goal Of Restoring Delta Flows And Impairs The Scope Of The Delta Reform Act.

Water Code section 85302(e)(4) provides that restoring Delta flows is a required subgoal of restoring a healthy ecosystem: The "following subgoals and strategies for restoring a healthy ecosystem *shall be included* in the Delta Plan: … (4) Restore Delta flows and channels to support a healthy estuary and other ecosystems." Water Code § 85302(e), § 85302(e)(4) (emphasis added).

The Council agrees the Delta Reform Act requires that the "following subgoals … shall be included in the Delta Plan: … Restore Delta flows and channels to support a

[4]Water Contractors have consistently argued that the legislature did not intend for the Delta Plan to achieve all of the legislatively enumerated goals or even broadly achieve the co-equal goals. *See, e.g.,* K162 (comments of State & Federal Contractors Water Agency ("SFCWA"), November 23, 2010); K705, 715 (comments of SFCWA, March 3, 2011) ("the 'fundamental purpose' cannot be to achieve the coequal goals").

healthy estuary and other ecosystems." D6788. However, the Council has expressly avoided taking any position on flows because that would interfere with the BDCP's choice of export levels, which determines how much water is left to flow through the Delta. The "Council has determined that the BDCP agencies are in the best position to complete the planning process including defining acceptable ranges of exports *and through-Delta flows.*" D45, 59 (emphasis added). The "Delta Plan [therefore] does not suggest any particular [flow] objectives[5]." D45, 62.

The Delta Plan contains one policy and one recommendation regarding flows. Policy ER P1 is titled "Delta Flow Objectives" and states in pertinent part that the "State Water Resources Control Board's Bay Delta Water Quality Control Plan flow objectives shall be used to determine consistency with the Delta Plan." B614 (hereafter "Flow Objectives"). The Council knows that the SWRCB Flow Objectives are already "implemented by the State Water Resources Control Board through modifications and limitations of future water rights to make sure these flows are met." B776. Requiring that a covered action be consistent with the Flow Objectives accomplishes nothing because any action that could affect Delta flows is already regulated by the SWRCB and required to meet the Flow Objectives.

The Council also knows that a policy requiring a covered action to meet current Flow Objectives in the SWRCB's 2006 Bay-Delta Plan *does not* advance the goal of restoring Delta flows and fails to carry out the Council's public trust obligations with regard to Delta flows. Water Code section 85023 provides that "the public trust doctrine

[5] Delta outflow "is a calculated flow expressed as Delta inflow, minus net Delta consumptive use, minus Delta exports." L11827, 11858. *See also San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 616 (9th Cir. 2014), *petition for a writ of certiorari filed September 30, 2014* ("delta outflow … is largely determined by the difference between the total inflow from the Sacramento and San Joaquin Rivers and the total amount of water exported through the Banks and Jones pumping stations").

shall be the foundation of state water management policy and [is] particularly important and applicable to the Delta." The SWRCB has concluded that "[t]here is sufficient scientific information to support the need for increased flows to protect public trust resources," L11827, 11843, because "[r]ecent Delta flows [as controlled by] existing regulatory requirements included in the 2006 Bay-Delta Plan are insufficient to support native Delta fishes for today's habitats." L11827, 11844 & n. 3. The Council also agrees that "the best available science suggests that currently required [2006 Bay-Delta Plan] flow objectives within and out of the Delta are insufficient to protect the Delta ecosystem." B415, 614.

Because it is widely recognized that existing SWRCB Flow Objectives are failing the Delta ecosystem, the Delta Reform Act provides that the SWRCB shall "develop new flow criteria for the Delta ecosystem necessary to protect public trust resources," Water Code § 85086(c)(1), "for the purposes of facilitating the planning decisions that are required to achieve the objectives of the Delta Plan." Water Code § 85086(b) (hereafter "Flow Criteria"). The new Flow Criteria are functionally very different from the Flow Objectives because the Flow Criteria establish "the flows that would be needed in the Delta ecosystem if fishery protection was the sole purpose of which its waters were put to beneficial use." L11827. In establishing the Flow Objectives, on the other hand, the SWRCB "consider[s] and balance[s] all competing uses of water" including water exports for municipal and agricultural use. L11827.

The legislature's directive to the SWRCB to promulgate the Flow Criteria and instruction to the Council to use them in developing the Delta Plan was a crucial and revolutionary feature of the Delta Reform Act:

> One key "early action" is the SWRCB developing "flow criteria," which is a new legal concept … . This bill's "flow criteria" reflect a landmark concept of the state exercising its public trust authority to ask–FIRST–what

> the Delta needs, before completing plans for fundamental change to the nature of the Delta, as envisioned by the Bay Delta Conservation Plan.

Req. for Jud. Not. Exh. B at 9 (Committee Report SB1).

Early on, the Council appeared to understand its duty to set legally enforceable flow criteria making use of specific metrics, including the volume, timing, and quality of flow:

> The [flow criteria] report includes the volume, timing, and quality of flow for the protection of public trust resources under different existing hydrologic conditions.
>
> ***
>
> The results of these flow criteria studies are to be used to inform ongoing programs, including development of the Delta Plan.

G1908, 1934.

Referring to the recently released SWRCB Flow Criteria, as well as a companion flow study released by DFG, Council Chair Isenberg reported to legislators that:

> **Our discussion of Setting Delta Flow Criteria continues.** Our enabling legislation directed the State Water Resources Control Board … to prepare reports on Delta water flows needed for environmental purposes … . Both [reports] were controversial. The DSC [is] … required to consider the flow reports.

M43, 44. At the Council's meeting of January 27, 2011, it heard a two hour presentation from its Lead Scientist, Cliff Dam, and the Council's scientific consulting firm, about "Setting Flow Criteria." G2019. Despite persistent skeptical questioning by Council members directing attention to other problems, the Council's experts were unwavering throughout that reduced flows due to exports are "a key stressor" on the Delta ecosystem. *See* F146 2:30–2:34; *see also* G2112.010 ("Principle 1: Flow is a major determinant of physical habitat, which in turn is a major determinant of biotic composition."); G2112.027 ("Numerous components of the Delta ecosystem respond positively to increased freshwater flow").

The Water Contractors and BDCP opposed any legally enforceable flow requirements in the Delta Plan. *See, e.g.,* K705, 722 (Water Contractor correspondence to Council dated March 3, 2011) ("It is inappropriate and sadly ironic that the DP cited to the SWRCB 2010 flow criteria report as the basis of asserting a need for more flow to meet the ecosystem restoration objectives"); K705, 718 (characterizing the "need to restore adequate water supplies to protect the state's environmental resources" as "throwing more water at the problem.").

On April 18, 2012, the Water Contractors' advocacy won out. Council Executive Officer Joseph Grindstaff outlined the Council's evolved position on flows in a letter to the SWRCB. The letter makes no mention of the Flow Criteria and no mention of increasing Delta flows. It emphasizes multiple stressors other than inadequate flows caused by excessive water exports as leading to the Delta's decline. K5936.001.

The Association of California Water Agencies ("ACWA") took note of the "DSC Letter," observing that the "language is seen as a significant shift in the way DSC staff has described flows and their role in addressing Delta ecosystem woes in past drafts of the Delta Plan." M3426, 3427. ACWA Executive Director Timothy Quinn "said the letter marks an important change in direction … . This approach is much more consistent with comments ACWA and the Ag-Urban Coalition have been making for the past 18 months." BDCP official Karla Nemeth celebrated the letter in a two-word email to Council staff person Jessica Pearson, "Congrats, honey." M3426.

The Council effectively removed itself, and Policy ER P1, from any role in establishing or influencing Delta flows.

Recommendation ER RI is titled "Update Delta Flow Objectives" and refers to the SWRCB updating its Bay-Delta Plan and the Flow Objectives contained therein. B614. As the Council frankly admits, ER R1's recommendation to the SWRCB to update the flow

objectives "only recommends that the SWRCB do, by a particular time, what the law already requires the SWRCB to do, at least regarding flow objectives." D62.

Policy ER P1 then goes on to state that if and when the SWRCB updates its Flow Objectives, the updated Flow Objectives will be used to determine consistency with the Delta Plan. B614. But the SWRCB Flow Objectives, current or updated, will be enforced by the SWRCB with or without the Delta Plan. As the Council acknowledges "it is essential that the SWRCB complete the work to develop, implement, *and enforce* new updated flow requirements" for the Delta. K4236, 4332 (emphasis added).

The net effect of Policy ER P1 and Recommendation ER R1 is to require that 1) covered actions that might come before the Council before any update to the SWRCB Flow Objectives comply with current Flow Objectives that *fail* to restore Delta flows, and, in any event, are already fully enforced by the SWRCB; and 2) covered actions that might come before the Council after any update to SWRCB Flow Objectives comply with Flow Objectives that will be independently enforced through water rights permits and other measures by the SWRCB.

The Council has failed to promulgate a legally enforceable plan that advances the goal of restoring Delta flows as required by the Delta Reform Act. Put another way, if it happens it won't be due to any policy or recommendation in the Delta Plan causing or influencing something to happen that wouldn't have happened in any event. This state of affairs is consistent with the Council's overall assessment of the weakness of the Delta Plan. "The Delta Plan's likelihood of nudging already considered projects forward, and the Delta Plan's degree of influence on future undefined projects, is unclear." D006914, 6915. "How much influence the Council will have is unclear." *Id*.

3. The Council's Choice Of A Flow Policy That Does Not Advance The Goal Of Restoring Delta Flows Was Arbitrary And Capricious.

The Council found that restoring Delta flows is indispensible to achieving the coequal goal of restoring the Delta ecosystem:

> The effort to improve the fortunes of the Delta ecosystem has two components that are vital: [one of which is] guaranteeing adequate flows from the rivers feeding into and through the Delta channels

B415, 436;

> To revitalize the Delta ecosystem, we *must* provide adequate seaward flows in Delta channels, on a schedule more closely mirroring historical rhythms: what the Plan calls natural, functional flows.

B415, 431 (emphasis added).

Under the arbitrary and capricious standard of review, "a court must ensure that an agency has adequately considered all the relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." *Cal. Hotel & Motel Ass'n v. Indus. Welfare Comm'n*, 25 Cal. 3d 200, 212 (1979).

Here the agency found an urgent need to increase flow. The Council also interpreted the Delta Reform Act to require that the Delta Plan advance the subgoal of "[r]estor[ing] Delta Flows … to support a healthy estuary and other ecosystems." D6788, 6789. As the Council's lead scientist informed the Council, restoring flows is also crucial because "[f]low can be modified to benefit native fishes and is one of the few immediate actions available." G2112,003, 2112.031. However, the Council failed to make a rational connection between these facts and its policy choice. It has failed to show how Policy ER P1 will advance the statutory mandate of restoring Delta flows, therefore it has not "demonstrated a rational connection between [relevant] factors, the choice made, and the purposes of the enabling statute." *Cal. Hotel*, 25 Cal. 3d at 212. Nor has it made "a

rational connection between the facts found and the choice made," *State Farm*, 463 U.S. at 43.

4. The Council's Choice To Omit Flow Performance Measures Was Arbitrary And Capricious.

The Delta Plan is required to "include performance measurements that will enable the council to track progress in meeting the objectives of the Delta Plan," Water Code § 85211, and shall "[i]nclude quantified or otherwise measureable targets associated with achieving the objectives of the Delta Plan." Cal. Water Code § 85308(b).

The Council adopted an outcome performance measure for restoring Delta flows as follows:

> Progress toward restoring in-Delta flows to more natural functional flow patterns to support a healthy estuary. Metrics: results from hydrological monitoring and hydrodynamic modeling. (ER R1).

B415, 623. The Council prefaced this performance measure by stating that:

> Development of informative and meaningful performance measures is a challenging task that will continue after the adoption of the Delta Plan. Performance measures need to be designed to capture important trends and to address whether specific actions are producing expected results. Efforts to develop and track performance measures in complex and large-scale systems like the Delta are commonly multiyear endeavors. The recommended output and outcome performance measures listed below are provided as examples and subject to refinement as time and resources allow.

B415, 622. The Council put in a placeholder with no quantified or otherwise measureable target, presumably to achieve superficial compliance with the statute.

At the January 27, 2011, Council meeting on "Setting Flow Criteria," G2019, the Council heard from its lead scientist that a performance measure for restoring Delta flows could be as simple and elegant as achieving the target of 75% of unimpaired flow. G2112.003, 2112.031. The Council's scientists explained that another available measure is the export to inflow ratio for each month, which allows for increased exports when flows are highest and exports do the least damage. "You can still maintain that pattern [of

a natural hydrograph] and withdraw significant amounts of water … as simple as that." F146: 2:38:00–2:39:06.

The SWRCB Flow Criteria report also contains numerous well established metrics for measuring the health of Delta flows. *See* L11827, 11844, 11937; *see also* L11827, 11938 (The suite of listed flow metrics "is intended as a means of distributing flows … in a manner that more closely resembles the natural hydrograph … preserving the general attributes of the flow regimes to which the native estuarine species are adapted.") L11827, 11938.

The Council retains discretion to choose among available scientifically valid performance measures. It also retains discretion to choose what the numerical targets should be—considering both the ecological needs of the Delta and export needs. However, the Council abused its discretion when it decided to do nothing at all, and implied that all of the performance metrics available to it don't yet exist and have to be developed from scratch. "Mandamus does not lie to compel a public agency to exercise discretionary powers in a particular manner, only to compel it to exercise its discretion in some manner." *Aids Healthcare Found. v. Los Angeles County Dept. of Pub. Health*, 197 Cal. App. 4th 693, 700–701 (2011).

5. Omitting Conveyance And Storage Policies Impairs The Scope Of The Delta Reform Act.

The Delta Plan contains no policies at all covering conveyance or storage: "No policies with regulatory effect are included in this section. See Appendix A, the Delta Stewardship Council's Role Regarding Conveyance." B415, 572. The now-familiar Appendix A concludes that the Council's authority to regulate conveyance is "contingent" on the BDCP:

> [Any BDCP conveyance] project would be consistent with the Delta Plan regardless of whether the Delta Plan had previously endorsed a different

> conveyance option. Accordingly, the Council's regulatory authority over conveyance is contingent upon conveyance being proposed prior to the BDCP's incorporation into the Delta Plan.

B1153, 1156. As demonstrated in the preceding sections of this brief, this interpretation of the Delta Reform Act justifying the omission of any legally enforceable conveyance policy is void as an underground regulation and is also incorrect.

It was the intent of the Delta Reform Act that the Delta Plan include legally enforceable policies regarding conveyance and storage. "The following objectives … are inherent in the coequal goals for management of the Delta: … (e) Improve the water conveyance system and expand statewide storage." Water Code § 85020 & 85020(e). Although the Council agrees that the "fundamental purpose" of the Delta Plan is to "achieve the coequal goals and all of the inherent subgoals and objectives," D6788, 6789, and the Plan must be "legally enforceable," D6788, the Council has decided to pick and choose which of the goals and objectives are to be legally enforceable and which are not.

The legislature took pains to declare the goals to be "coequal" and specified the objectives and subgoals that were "inherent" in the coequal goals. "Inherent" is defined as "existing in someone or something as a permanent and inseparable element, quality, or attribute." Random House Unabridged Dictionary 982 (2d ed.1993). The Council's decision to separate goals and objectives, making some legally enforceable and some not, is inconsistent with the language of the statute and impairs the scope of the Delta Reform Act.

"Although traditional mandamus will not lie to control the discretion of a public official or agency, … [it] will lie to force a particular action by the officer, when the law clearly establishes the petitioner's right to such action." *Cal. Hosp. Ass'n v. Maxwell-Jolly*, 188 Cal. App. 4th 559, 570 (2010). The Court is not called upon to intrude into the sphere

of the agency's expertise by dictating the content of storage and conveyance policies, but only to compel the Council to issue such policies in the first place.

6. Omitting Conveyance And Storage Policies Was Arbitrary And Capricious.

It may come as a surprise to the Court at this juncture that there is no shortage of water in California. Massive flood flows during winter storms discharge enough water through flood relief structures on the Sacramento Rive upstream of the Delta in a few days to supply the total annual export capacity of the CVP and SWP. *See* D2772, 2785 & 2792–2800. However, we have no way to capture, convey and store this water at times of abundance for use at times of scarcity. Currently more water is exported in dry years than in wet years, because in wet years local supplies are brimming, reservoirs are full, and there is nowhere to store excess water from the Delta watershed. D2772, 2784.

Abundant storage is available without building new dams. Depleted groundwater aquifers present the opportunity for storage at no environmental cost and the probability for net environmental gains through recharging badly overdrawn aquifers. D2772, 2785.

The Delta Plan agrees with all the above factual findings. *See* B429, 434–435 ("Storing Floods to Ride Out Droughts (and give the Delta a Break)").

Conveyance and storage operate together and improvements in both and the way they work together are essential to achieving the coequal goals. The legislature understood this essential linkage: "The Delta Plan shall promote options for new and improved infrastructure relating to the water conveyance in the Delta, storage systems, and for the operation of both to achieve the coequal goals." Water Code § 85304. However, the Council decided *not* to promote *any* options for conveyance. *See* B1153, 1156–1157 ("for the same reasons the Delta Plan at this time does not include any regulatory policies

regarding conveyance, the Delta Plan likewise does not include any Recommendations (i.e., opinion preferences) regarding conveyance.”).

The Delta Plan contains no legally enforceable policies to advance the coordinated improvements to conveyance, storage, and the interrelated operation of both that the Council agrees are necessary. The problem cannot be solved without storage, and as the Council knows, the BDCP does not include any storage. It is a run of the river project that cannot solve our problems. The Council does not explain why it adopted only nonbinding recommendations with regard to storage. *See* B415, 571572. The Council did not make “a rational connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43. It offers no valid reason for not implementing legally enforceable policies consistent with its own factual determinations.

The Council omitted legally enforceable conveyance policies on the BDCP contingent authority theory. The BDCP also contains extensive habitat projects and the Council *did* enact legally enforceable policies with regard to habitat. *See* B415, 615–616 (four legally enforceable habitat restoration policies). The Council does not explain why the contingent authority theory would not apply equally to habitat as well as conveyance.

“Requiring an administrative agency to articulate publicly its reasons for adopting a particular order, rule, regulation, or policy induces agency action that is reasonable rather than arbitrary … .” *McBail v. Solano County Local Agency Formation Com’n.*, 62 Cal. App. 4th 1223, 1229 (1998) (citation and quotation marks omitted).

In the absence of a reasoned explanation why BDCP preemption applies to conveyance and not habitat, and why storage merits only recommendations and not legally enforceable policies, the Council has failed to show that it “has adequately considered all the relevant factors, and has demonstrated a rational connection between those factors, the

choice made, and the purposes of the enabling statute." *Cal. Hotel,* 25 Cal. 3d at 212. The Council's choices were, therefore, arbitrary.

IV. The Council Must Determine That The BDCP Complies With Water Code Section 85321 In The First Instance Before The BDCP May Be Incorporated Into The Delta Plan.

The Council argues that its only role in incorporating the BDCP into the Delta Plan is to sit as an appellate body, pursuant to Water Code section 85320(e), if the determination of the Department of Fish and Wildlife ("DFW") that the BDCP meets the criteria of Water Code section 85320 is appealed to the Council. *See* N2888, 2995 (comment from Delta Alliance pointing out that Council determines compliance with section 85321 in the first instance, and Council disagreement in response).

Water Code section 85320(a) provides that "The Bay Delta Conservation Plan (BDCP) shall be *considered* for inclusion in the Delta Plan in accordance with this *chapter*." (emphasis added). DFW's role is only to consider whether the BDCP meets the standards of an NCCP and whether the BDCP "meets the requirements of this *section* [section 85320]." Water Code § 85320(e). However consideration for inclusion in the Delta Plan is *not limited* to the factors specified in section 85320. Consideration for inclusion must be in accordance "with this *chapter* [Chapter 2]*."* Water Code § 85320(a). Chapter 2 includes sections 85320 *and* 85321. Section 85321specifies perhaps the most important test that the BDCP must pass, that its real-time operational decisionmaking process is adequate to monitor the high-capacity tunnels' effects on the Delta and assure that extreme diversion rates are curtailed *immediately* if untoward signs appear in monitoring data.

Section 85320(d) specifies that, before DFW determines whether the BDCP complies with section 85320, the "council shall have at least one public hearing concerning incorporation of the BDCP into the Delta Plan." That hearing is for the

Council to consider in the first instance whether the BDCP complies with section 85321. If the Council's only function were to hear an appeal after DFW's determination, the public hearing would be an idle act because there would be no question before the Council and nothing it could determine. A "hearing" is "held for the purpose of deciding issues of fact or of law … in which an affected person presents arguments to an agency decision-maker." Blacks Law Dictionary 737. The legislative specification of a "hearing" (rather than a "meeting," which may be informational in character) indicates legislative intent that there is something to decide. Here, whether the BDCP meets section 85321.

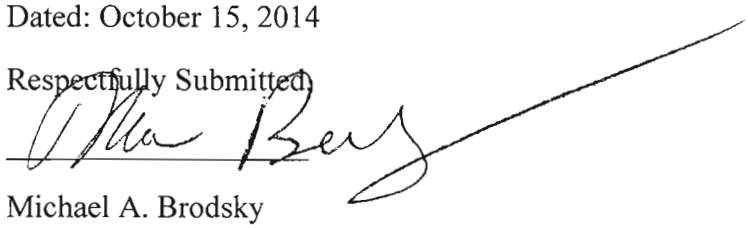
V. Conclusion.

Pursuant to the Court's July 31, 2014, Case Management Order, Delta Alliance incorporates by reference the briefs of North Coast Rivers Alliance, et al, Central Delta Water Agency, et al, C-Win et al, and City of Stockton in support of all allegations and claims for relief plead in Delta Alliances' Petition for a Writ of Mandate and Complaint for Declaratory Relief and not otherwise adequately supported herein.

For the foregoing reasons, Delta Alliance respectfully requests issuance of a writ of mandate and declaratory relief that results in setting aside the Delta Plan, the Delta Plan EIR, and the Delta Plan Regulations, as well as any other relief the Court deems just and proper.

Dated: October 15, 2014

Respectfully Submitted,



Michael A. Brodsky

Attorney for Petitioner Save the California Delta Alliance

PROOF OF SERVICE
Delta Stewardship Council Cases JCCP 4758

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 201 Esplanade, Upper Suite, Capitola, CA 95010. On the date shown below, I served the within documents:

PETITIONER SAVE THE CALIFORNIA DELTA ALLIANCE'S OPENING MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR A WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF

By Electronic Mail: I caused such documents to be sent by electronic mail to the addressees at the email addresses listed below in the attached Electronic Mail Service List.

I declare under penalty of perjury under the Laws of the State of California that the above is true and correct.

Executed: October 15, 2014 at Capitola, California.

Michael A. Brodsky

SERVICE LIST VIA ELECTRONIC MAIL

Attorneys for Respondent/Defendant Delta Stewardship Council for all the Delta Stewardship Cases:

Daniel L. Siegel, Supervising Deputy Attorney General (dan.siegel@doj.ca.gov)
Deborah M. Smith, Deputy Attorney General (deborah.smith@doj.ca.gov)
Jerry Brown (Jeremy.brown@doj.ca.gov)
Office of the Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

California Water Impact Network, Friends of the River, California Sportfishing Protection Alliance, AquAlliance, Restore the Delta, and Center for Biological Diversity v. Delta Stewardship Council

Attorneys for Petitioner Friends of the River:

E. Robert Wright (bwright@friendsoftheriver.org)
Friends of the River
141 20th Street, Suite 100
Sacramento, CA 95811

Attorneys for Petitioners California Water Impact Network, California Sportfishing Protection Alliance, AquAlliance, and Restore the Delta:

Michael B. Jackson (mjatty@sbcglobal.net)
Attorney at Law
429 West Main Street, Suite D
P.O. Box 207
Quincy, CA 95971

Attorneys for Petitioner Center for Biological Diversity:

Adam Keats (akeats@biologicaldiversity.org)
Chelsea Tu (ctu@biologicaldiversity.org)
Center for Biological Diversity
351 California Street, #600
San Francisco, CA 94104

Central Delta Water Agency, South Delta Water Agency, Lafayette Ranch, Inc., Local Agencies of the North Delta and Cindy Charles v. Delta Stewardship Council

Attorneys for Petitioner Local Agencies of the North Delta:

Osha Meserve (osha@semlawyers.com)
Patrick M. Soluri (patrick@semlawyers.com)
Soluri Meserve, a Law Corporation
1010 F Street, Suite 100
Sacramento, CA 95814

Attorneys for Petitioners Central Delta Water Agency, Lafayette Ranch, Inc., and Cindy Charles:

Dante John Nomellini (ngmplcs@pacbell.net)
Dante John Nomellini, Jr. (dantejr@pacbell.net)
Daniel. A. McDaniel (damplc@pacbell.net)
Nomellini, Grilli & McDaniel
Professional Law Corporation
235 East Weber Avenue
Stockton CA 95202

John H. Herrick (jherrlaw@aol.com)
Law Office of John H. Herrick
4255 Pacific Avenue, Suite 2
Stockton, CA 95219

S. Dean Ruiz (dean@hpllp.com)
Harris, Perisho & Ruiz
Brookside Corporate Center
3439 Brookside Road, Suite 210
Stockton, CA 95219

Thomas H. Keeling (tkeeling@freemanfirm.com)
Freeman Firm
1818 Grand Canal Boulevard, Suite 4
Stockton, CA 95207

City of Stockton v. Delta Stewardship Council

Attorneys for Petitioner City of Stockton:

Steven A. Herum (sherum@herumcrabtree.com)
Herum Crabtree Suntag
A California Professional Corporation
5757 Pacific Avenue, Suite 222
Stockton, CA 95207

North Coast Rivers Alliance, Pacific Coast Federation of Fishermen's Associations, San Francisco Crab Boat Owners Association, and the Winnemem Wintu Tribe v. Delta Stewardship Council

Attorneys for Petitioners North Coast Rivers Alliance, Pacific Coast Federation of Fishermen's Associations, San Francisco Crab Boat Owners Association, and the Winnemem Wintu Tribe:

Stephan C. Volker (svolker@volkerlaw.com)
Daniel P. Garrett-Steinman (dgarrett@volkerlaw.com)
Marcus Benjamin Eichenberg (mbeichenberg@volkerlaw.com)
Lauren E. Pappone (lpappone@volkerlaw.com)
Law Offices of Stephan C. Volker
436 14th Street, Suite 1300, Oakland, CA 94612

San Luis & Delta-Mendota Water Authority and Westlands Water District v. Delta Stewardship Council

Attorneys for Petitioners San Luis & Delta-Mendota Water Authority and Westlands Water District

Daniel J. O'Hanlon
(dohanlon@kmtg.com)
Rebecca R. Akroyd (rakroyd@kmtg.com)
Elizabeth L. Leeper (eleeper@kmtg.com)
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814

Jon D. Rubin, Senior Staff Counsel
(Jon.Rubin@sldmwa.org)
San Luis & Delta-Mendota Water Authority
c/o Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor, Sacramento, CA 95814

Attorneys for Petitioner Westlands Water District:

Andrea A. Matarazzo
(andrea@pioneerlawgroup.net)
Jeffrey K. Dorso
(jeffrey@pioneerlawgroup.net)
Pioneer Law Group, LLP
1122 J Street, Sacramento, CA 95811

Harold Craig Manson, General Counsel
(cmanson@westlandswater.org)
Westlands Water District
c/o Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814

State Water Contractors; Alameda County Flood Control and Water Conservation District, Zone 7; Santa Clara Valley Water District; The Metropolitan Water District of Southern California; Antelope Valley-East Kern Water Agency; Mojave Water Agency; and San Bernardino Valley Municipal Water District v. Delta Stewardship Council

Attorneys for Petitioners State Water Contractors, Antelope Valley-East Kern Water Agency, Alameda County Flood Control, Water Conservation District, Zone 7 and San Bernardino Valley Municipal Water District

Gregory K. Wilkinson (Gregory.Wilkinson@bbklaw.com)
Charity Schiller (Charity.Schiller@bbklaw.com)

Melissa R. Cushman (Melissa.cushman@bbklaw.com)
Best Best & Krieger LLP
3390 University Avenue, 5th Floor
P.O. Box 1028, Riverside, CA 92502

Stefanie Morris (smorris@swc.org)
State Water Contractors
1121 L Street, Suite 1050, Sacramento, CA 95814

Attorneys for Petitioner Santa Clara Valley Water District:

Stanly Yamamoto, District Counsel (syamamoto@valleywater.org)
Anthony T. Fulcher, Senior Assistant District Counsel (afulcher@valleywater.org)
Santa Clara Valley Water District
5750 Almaden Expressway, San Jose, CA 95118-3686

Attorneys for Petitioner Mojave Water Agency:

William J. Brunick (bbrunick@bmblawoffice.com)
Leland McElhaney (lmcelhaney@bmblawoffice.com)
Brunick, McElhaney & Kennedy
1839 Commercenter West, San Bernardino, CA 92408-3303

Attorneys for Petitioner The Metropolitan Water District of Southern California:

Marcia L. Scully (mscully@mwdh2o.com)
Adam C. Kear (akear@mwdh20.com)
Linus S. Masouredis (lmasouredis@mwdh20.com)
Robert C. Horton (rhorton@mwdh20.com)
The Metropolitan Water District of Southern California
P.O. Box 54153, Los Angeles, CA 90054-0153

Michael A. Brodsky
Law Offices of Michael A. Brodsky
201 Esplanade, Upper Suite
Capitola, CA 95010
Telephone: (831) 469-3514
Facsimile: (831) 471-9705
Email: michael@brodskylaw.net

Attorney for Petitioner Save the California Delta Alliance

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

Coordination Proceeding Special Title (Rule 3.550), **DELTA STEWARDSHIP COUNCIL CASES**	**JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4758** **PETITIONER SAVE THE CALIFORNIA DELTA ALLIANCE'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF OPENING MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR A WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF** **[Pub. Res. Code §§ 21167.4(c) & 21167.6(e)(10); Code Civ. Proc. § 1085; Govt. Code §§ 11347.3 & 11350]** **Hearing: Not Set** **Time:** **Dept: 31** **Judge: Honorable Michael P. Kenny**

Pursuant to Evidence Code section 452(c), Petitioner Save the California Delta Alliance ("Delta Alliance") respectfully requests that the Court take judicial notice of the following documents, which are attached as Exhibit A and B.

Exhibit A is a true and correct copy of the August 26, 2014, letter from the Office of the Regional Administrator, Region 9, of the United States Environmental Protection Agency regarding the Draft Environmental Impact Statement for the Bay Delta Conservation Plan ("EPA Letter"). The EPA Letter is available at http://www.epa.gov/region9/nepa/letters/ca/bay-delta-conservation-plan-deis.pdf.

Under Evidence Code section 452(c) it is appropriate for a court to take judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." Courts may properly take judicial notice of official letters sent by government agencies. *People v. Castillo*, 49 Cal. 4th 145, 157 n. 14 (2010); *Landstar Global Logistics, Inc. v. Robinson & Robinson, Inc.,* 216 Cal. App. 4th 378, 388 n.4 (2013) (letter from U.S. Department of State).

The EPA Letter is an official act of the Environmental Protection Agency, an agency of the executive branch of the United States government. It is therefore subject to judicial notice pursuant to section 452(c).

Extra-record evidence is generally not admissible in traditional mandamus proceedings conducted pursuant to Code of Civil Procedure section 1085. *W. States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 575 (1995). Extra-record evidence is not admissible in traditional mandamus proceedings merely to "contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a

question regarding the wisdom of the decision." *San Joaquin County Local Agency Formation Comm'n v. Superior Court,* 162 Cal. App. 4th 159, 169 (2008) (quoting *W. States*, 9 Cal. 4th at 578).

However, in a traditional mandamus proceeding, "[e]xtra record evidence is admissible to provide background information." *Porterville Citizens for Responsible Hillside Dev. v. City of Porterville*, 157 Cal. App. 4th 885, 896 (2007) (citing *W. States,* 9 Cal. 4th at 579). Extra-record evidence "may be admissible to provide background information regarding the quasi-legislative agency decision, to establish whether the agency fulfilled its duties in making the decision, or to assist the trial court in understanding the agency's decision." *Outfitter Props., LLC v. Wildlife Conservation Bd.*, 207 Cal. App. 4th 237, 251 (2012) (citing *W. States, 9 Cal. 4th* at 578–579).

Delta Alliance does not rely on the EPA Letter to establish any fact or contradict the evidence the Delta Stewardship Council ("Council") relied upon. It is submitted to aid the Court in understanding the controversy swirling around the Bay Delta Conservation Plan ("BDCP") and to provide general background context for the Council's actions. The EPA letter is quoted only in the introductory section of Delta Alliance's brief, which gives a contextual overview of the Delta Plan and the BDCP. Therefore admission of the EPA Letter is consistent with guiding authority.

Exhibit B is a true and correct copy of California Committee Report number RN0925373, Senate Bill No. 1, November 4, 2009, California 2009–2010 Seventh Extraordinary Session ("Committee Report"). The Committee Report is available on

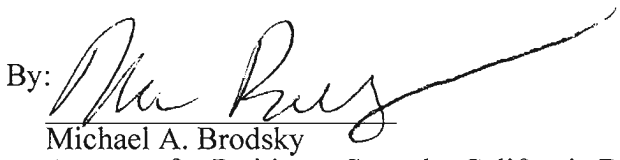
Westlaw by entering the California Legislative History database (CA-LH) and searching "RN0925373."

"[R]eports of legislative committees and commissions are part of a statute's legislative history, and may properly be subject to judicial notice as official acts of the Legislature." *Arce v. Kaiser Found. Health Plan, Inc.,* 181 Cal. App. 4th 471, 558 (2010) (citing Evid. Code § 452(c)) (citation and quotation marks omitted).

The Committee Report analyzes the Delta Reform Act and was authored on the day the Delta Reform Act was finally passed into law. The Committee Report is introduced as an aid to statutory construction and to provide context for the Court in understanding the background of the Delta Reform Act and the Council's actions.

Dated October 15, 2014

Respectfully Submitted,

By: 

Michael A. Brodsky
Attorney for Petitioner Save the California Delta Alliance

EXHIBIT A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

OFFICE OF THE
REGIONAL ADMINISTRATOR

Aug 26, 2014

Will Stelle, Regional Administrator
West Coast Region National Marine Fisheries Service
650 Capitol Mall, Suite 5-100
Sacramento, CA 95814

Subject: Draft Environmental Impact Statement for the Bay Delta Conservation Plan, San Francisco Bay Delta, California (CEQ# 20130365)

Dear Mr. Stelle:

The U.S. Environmental Protection Agency has reviewed the Bay Delta Conservation Plan (BDCP) Draft EIS pursuant to the National Environmental Policy Act (NEPA), Council on Environmental Quality regulations (40 CFR Parts 1500-1508), and our NEPA review authority under Section 309 of the Clean Air Act. The Draft EIS explores options for a comprehensive conservation strategy to restore and protect the Sacramento–San Joaquin Delta's ecosystem health, water supply, and water quality.

As you know, the San Francisco Bay/Sacramento-San Joaquin Delta Estuary is one of the largest and most important estuarine systems on the Pacific Coast of the United States, supporting over 750 species. It is the hub of California's water distribution system, supplying drinking water to 25 million people and irrigation water to 4 million acres of farmland. The decline of aquatic resources in the Estuary, along with the corresponding impacts on urban and agricultural water districts that rely on water exported from it, present significant challenges. Recent circumstances have only underscored the importance of working together on these issues, as California is experiencing severe drought and water shortages. We believe the NEPA process is well-suited to bring all of these considerations together, including the consideration of the environmental impacts of reasonable alternatives to the BDCP as it is currently proposed. We appreciate the effort to prepare the Draft EIS, and we support your recent decision to prepare a Supplemental Draft EIS to take a closer look at these issues.

EPA fully supports the stated purpose of the BDCP effort: to produce a broad, long-term planning strategy that would meet the dual goals of water reliability and species recovery in this valuable ecosystem, and we recognize the potential benefits of a new conveyance facility. However, we are concerned that the actions proposed in the Draft EIS may result in violations of Clean Water Act water quality standards and further degrade the ecosystem.

Our comments are consistent with those we have made in conversations that have taken place over the last few years among the agencies involved in managing the Delta. Many of our comments have also been made by others, both formally and informally, throughout the process, and we believe that they reflect a developing consensus within the scientific and regulatory communities. We are committed to continuing to work with you and other stakeholders toward a project proposal that meets the dual goals

of water reliability and species recovery in the Bay Delta, and toward a well documented EIS that adequately informs decision-makers and the public, as required by NEPA.

Clean Water Act Water Quality Standards

The Draft EIS shows that operating any of the proposed conveyance facilities, which constitute Conservation Measure 1 (CM1), would contribute to increased and persistent violations of water quality standards in the Delta, set under the Clean Water Act, measured by electrical conductivity (EC) and chloride concentrations. We recommend that the Supplemental Draft EIS include one or more alternatives that would, instead, facilitate attainment of all water quality standards in the Delta. Specifically, we recommend that an alternative be developed that would, at minimum, not contribute to an increase in the magnitude or frequency of exceedance of water quality objectives, and that would address the need for water availability and greater freshwater flow through the Delta. Such an alternative should result in a decrease in the state and federal water projects' contributions to the exceedance of any water quality objectives in the Delta.

We also note that, while CM1 would improve the water quality for agricultural and municipal water agencies that receive water exported from the Delta, water quality could worsen for farmers and municipalities who divert water directly from the Delta. In that regard, we recommend that the Supplemental Draft EIS consider measures to ensure that the project would not increase concentrations of bromide around the intake for the North Bay Aqueduct at Barker Slough. In addition, we recommend consideration of whether additional measures, such as operational modifications both upstream and downstream, are needed to avoid increasing mercury and selenium concentrations and bioavailability in the Delta.

The Draft EIS indicates that CM1 would not protect beneficial uses for aquatic life, thereby violating the Clean Water Act. Total freshwater flows will likely diminish in the years ahead as a result of drought and climate change. Continued exports at today's prevailing levels would, therefore, result in even lower flows through the Delta in a likely future with less available water. We recommend that the Supplemental Draft EIS consider modified operational scenarios for CM1 alternatives that would have beneficial effects on covered fish populations during all life stages and attain water quality standards in the Bay Delta.

Habitat Restoration

The Draft EIS describes a general proposal to restore approximately 150,000 acres of wetlands, uplands, grasslands, and riparian areas in and around the Delta to offset the adverse impacts of the continued operations of the water projects. However, the Draft EIS does not indicate whether suitable acreage is available or whether restoration alone would be sufficient to recover fish populations. We are concerned over the sole reliance on habitat restoration for ecosystem recovery, recognizing that existing freshwater diversions and significantly diminished seaward flows have played a significant role in precluding the recovery of Bay Delta ecosystem processes and declining fish populations. We recommend that the Supplemental Draft EIS consider measures to ensure freshwater flow that can meet the needs of those populations and the ecosystem as a whole, and is supported by the best available science. We recommend that this analysis recognize the demonstrated significant correlations between freshwater flow and fish species abundance. We also recommend that the Supplemental Draft EIS include gradients of partial success for each habitat type to be restored, as supported by available science. The impacts

could be re-evaluated relative to each alternative (CMs2-11) in light of these gradients and the likely success rates for each habitat restoration type.

Alternatives

The Draft EIS defines the alternatives in terms of the design and capacity of the proposed conveyance structure. Each alternative is paired with a particular operational scenario. EPA agreed with this organizational construct early in the BDCP process, expecting that the Draft EIS would present a range of fully evaluated alternatives that clarifies the environmental and water supply tradeoffs being considered. The Draft EIS, however, focuses primarily on Alternative 4. It appears that the environmental impacts of certain other alternatives would be reduced if those alternatives were matched with more optimal operational criteria (for example, Alternative 5 with Operational Scenario F). Other reasonable alternatives could be developed by incorporating a suite of measures, including Integrated Water Management, water conservation, levee maintenance, and decreased reliance on the Delta.[1] Such alternatives would be consistent with the purpose and need for the project, as well as with the California Bay Delta Memorandum of Understanding among federal agencies[2] and the Delta Reform Act of 2009.

Project-level Analysis

The Draft EIS states that it includes a *project-level* analysis of environmental effects associated with CM1 (the conveyance facilities, which define the alternatives), and a *programmatic-level* analysis of 21 other Conservation Measures, including a suite of habitat restoration and aquatic stressors management initiatives. Programmatic-level inputs were used in some of the "project-level" analyses. We recommend that the Supplemental Draft EIS include project-level information and analyses for the conveyance tunnels, including the information necessary for permit decisions, to support the federal decision.

Upstream/Downstream Impacts

The federal and State water management systems in the Delta are highly interconnected, both functionally and physically. The Draft EIS does not address how changes in the Delta can affect resources in downstream waters, such as San Francisco Bay, and require changes in upstream operations, which may result in indirect environmental impacts that must also be evaluated. We recommend that the Supplemental Draft EIS include an analysis of upstream and downstream impacts.

NEPA Effects Determination

The Draft EIS presents *NEPA Effects Determinations,* but does not describe the decision rules that were used to make those determinations from the analytical information presented for each impact category. We recommend that the *NEPA Effects Determinations* and thresholds -- quantitative when possible – be provided for each category so that it is clear why some estimated impacts result in one *NEPA Effects Determination* over another. We also recommend that the Supplemental Draft EIS explain whether all metrics are considered equal in the analysis or some are weighted. Please clarify whether negative impacts in one metric category translate into an adverse determination, regardless of the other metrics. Lastly, it would be helpful to include summary tables for each impact category so that the public and decision-makers can understand the metrics and their results and how they compare among alternatives.

[1] The "Portfolio Approach" developed by a diverse set of stakeholders is one attempt to place Delta water management into the larger context of facilities investments and integrated operations. http://www.sdcwa.org/sites/default/files/files/news-center/top-issues/portfolio-based-bay-delta-conceptual-alternative_1-16-13.pdf

[2] http://www2.epa.gov/sites/production/files/documents/baydeltamousigned.pdf

Adaptive Management

The Draft EIS explains that the adaptive management program is a work in progress. The specific approach for an adaptive management program and its effect on environmental consequences is fundamental to the success of the BDCP and should be addressed during the NEPA process. We recommend that a more detailed adaptive management program be provided in the Supplemental Draft EIS, since the goal of species recovery relies significantly on an effective adaptive management program. As you develop the plan, include detailed information on the plan's objectives, explicit thresholds, alternative hypotheses, responsive actions, and designated responsible parties.

Conclusion

EPA remains committed to working with the federal and state lead agencies to develop an environmentally sound, scientifically defensible, and effective plan for restoring the Bay Delta ecosystem and achieving greater water supply reliability. Please note that, because you are preparing a Supplemental Draft EIS, which we anticipate will address many of the issues raised about this Draft EIS, including the issues we have outlined here, EPA will defer our rating until the Supplemental Draft is circulated for public review and comment. We have also enclosed more detailed comments and recommendations for your consideration.

We are available to discuss our comments and recommendations. Please send one hard, and one electronic, copy of the Supplemental Draft EIS to this office at the same time it is officially filed with our Washington D.C. Office. If you have any questions, please contact me at 415-947-8702. Alternatively, your office may contact Kathleen Johnson, Enforcement Division Director. Ms. Johnson can be reached at 415-972-3873.

Sincerely,

/S/

Jared Blumenfeld

Enclosure

cc: Ren Lohoefener, Regional Director, Pacific Southwest Region, U.S. Fish and Wildlife Service
David Murillo, Regional Director, Mid Pacific Region, U.S. Bureau of Reclamation

U.S. EPA DETAILED COMMENTS ON THE DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR THE BAY DELTA CONSERVATION PLAN; AUGUST 25, 2014

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I. Water Quality Impacts

A. Adverse Impacts

Chapter 8 indicates that all project alternatives would result in adverse, significant, unmitigated effects to water quality and one or more beneficial uses within the affected water bodies. For example:

- The proposed changes in water management would measurably exacerbate impairment of agricultural and aquatic life beneficial uses in the South Delta and Suisun Marsh (p. 8-439);
- Bromide, chloride, dissolved organic carbon, and electrical conductivity (EC) are expected to increase due to changes in hydrodynamics as a result of the implementation of the CM1 Alternative 4 (pp.8-420, -428, -454, and -439). In addition, the feasibility of mitigation actions for EC is uncertain (p. 8-441); therefore, the net effect to overall salinity levels is unclear;
- Mercury, pesticide, and selenium exposure levels may increase and be cumulatively significant (p. 8-446, -767, -768); and
- Water quality degradation resulting from the increased pumping of freshwater from the North Delta could cause increases in water treatment costs (p. 8-420).

All Bay Delta Estuary waters are impaired due to numerous contaminants, including pesticides, manufacturing compounds, metals (including selenium), pathogens, nutrients/low dissolved oxygen, invasive species, salinity, and toxicity from unknown sources. Without adequate mitigation, these impairments would be exacerbated by any of the alternatives evaluated in the Draft EIS. Poor water quality in the Bay Delta Estuary and its tributaries adversely affects terrestrial and aquatic ecosystems, drinking water, recreation, industry, agriculture, and the local, state, and interstate economy.

Recommendation: *Discuss mitigation measures that would reduce the projected adverse impacts on water quality, and discuss whether the proposed actions would contribute to impairments of beneficial uses or further degrade water quality.*

B. Salinity (Electrical Conductivity, Chloride) and Bromide

1. Water Quality Standards Exceedances and Degradation

The Bay Delta Water Quality Control Plan (WQCP) contains EC objectives for the Delta to protect agricultural and fish and wildlife beneficial uses, and chloride objectives to protect municipal and industrial water supply beneficial uses. Bromide, a significant precursor to brominated disinfection byproducts, is subject to CALFED Drinking Water Program goals (p. 8-42). The Draft EIS estimates that EC, chloride and bromide concentrations would increase under CM1 Alternative 4, relative to the No Action Alternative and Existing Conditions for Delta locations. The document predicts increased exceedances of numeric water quality standards, which suggests that CM1 Alternative 4 would result in a loss of protection for municipal, agricultural, and aquatic life beneficial uses. Specifically, CM1 Alternative 4 would result in:

- A 17% increase in days out of compliance with the agricultural EC standard at Emmaton (p. 8-252 lines 6-7). The EC objective at Emmaton is intended to protect agricultural beneficial uses, but also has ancillary benefits to aquatic life. Increasing noncompliance days would further contribute to existing EC water quality impairments in the western Delta, and degrade beneficial use protection for agricultural and aquatic life beneficial uses.

- A 7% increase in days exceeding the municipal chloride standard (250 milligrams per liter (mg/L) mean daily maximum) at Contra Costa Canal Pumping Plant #1 (p. 8-243 line 26) and "substantial degradation during the months October through December when average concentrations would be near, or exceed, the objective" (p. 8-243 lines 33-34 and Appendix 8G, 27 Table Cl-9).

- A doubling of the frequency of exceeding the lower municipal chloride standard at Antioch and Contra Costa Canal Pumping Plant #1: "All of the Alternative H1-H4 Scenarios would result in substantially increased chloride concentrations in the Delta such that frequency of exceeding the 150 mg/L Bay-Delta WQCP objective would approximately double" compared to Existing Conditions (p. 8-429) and the No Action Alternative (Appendix 8G Table Cl-64).

- Increased EC levels in Suisun Marsh, exacerbation of the existing EC water quality impairment, and degradation of aquatic life beneficial use protection (p. 8-438 and Appendix 8H-27). "The most substantial EC increase would occur at Beldon Landing with long-term average EC levels increasing by 1.3-6.0 milliSiemens per centimeter (mS/cm), depending on the month and operations scenario, at least doubling during some months the long-term average EC relative to Existing Conditions" and the No Action Alternative (p. 8-438).

- Higher quality water to those receiving the exported water, but adverse impacts on those who rely on water directly from the Delta: "the operations and maintenance activities under Scenario H1-H4 of Alternative 4 would cause substantial degradation to water quality with respect to bromide at Barker Slough… and could necessitate changes in water treatment plant operations or require treatment plant upgrades" (p.8-420).

The EC and chloride analyses in the Draft EIS provide some confusing results. For example, the 16-year average EC concentration (mass balance) at Emmaton is 887 micromhos per centimeter (µmhos/cm) for CM7, and 935 µmhos/cm for CM8, even though outflow (an indicator of freshwater flow to the estuary) is twice as high for CM8. Similarly, chloride concentrations predicted for CM7 (mass balance and EC-chloride relationship) at Antioch on the San Joaquin River are slightly lower than those for CM8.

The water quality chapter of the Draft EIS does not evaluate the alternatives against the full suite of Water Quality Objectives for Fish and Wildlife Beneficial Uses, which are found in Table 3 of the Bay Delta WQCP. The Delta outflow objective is discussed in Chapter 5 Water Supply, and a brief discussion of Delta outflow objective is in the HCP for only the CEQA Preferred Alternative 4.

Recommendations: *Describe mitigation measures that would prevent the proposed project from resulting in increased exceedances of water quality objectives in the already-degraded Delta. These measures may include reducing exports to provide more outflow and mitigate salinity intrusion.*

Explain the differences in the predictions among CM1 alternatives, including why twice as much outflow would result in higher salinity concentrations for Alternative 8 relative to Alternative 7. Disclose the confidence intervals for the mass-balance and EC-chloride relationship approaches for predicting future concentrations of EC and chloride.

Evaluate all CM1 alternatives with respect to all water quality standards listed in Tables 1-3 of the Bay-Delta WQCP, and indicate whether each standard would be met under each alternative.

2. **Mitigation Effectiveness**
Appendix 8H "Electrical Conductivity" states that, although the modeling results show exceedences of water quality D-1641 standards, the project proponents "intend" to operate the State Water Project and Central Valley Project facilities by fine tuning reservoir storage and exports in real time to meet the standards (p. 8H-1). The water quality objectives that would be met in this manner are not specified, nor is an estimate provided of the impact of this measure on water supply. Furthermore, the Draft EIS includes the caveat that "if sufficient operational flexibility to offset chloride increases is not feasible under Alternative 4 operations, achieving chloride reduction pursuant to this mitigation measure would not be feasible under this Alternative" (p.8-430). A similar caveat is stated regarding bromide (p. 8-422). These statements suggest that the water supply exports that define the Alternative 4 operational scenario would be given higher priority than meeting water quality standards, thus rendering that scenario potentially inconsistent with the protection of beneficial uses.

Recommendations: *Clearly identify the water quality objectives that the proponents intend to meet by fine-tuning reservoir storage and exports in real time, and clearly state this intention as an enforceable commitment. Reconcile the conflicting caveats regarding operational flexibility with this commitment.*

Provide an estimate of the amount of water that would be needed to meet water quality standards during periods when the modeling predicts exceedances, and describe how the use of water for this purpose would impact water diversions for upstream and downstream users. Include a comparison against drought years.

Provide historical data to illustrate how D-1641 standards have been met in the past, including the number of times that DWR has submitted Temporary Urgency Change Petitions with the State Water Board requesting modification of requirements of D-1641 because of drought conditions.

3. **Mitigation Relationship to Water Quality Standards**
EPA understands that the modeling for the water quality analysis was based on an assumption that the Emmaton EC water quality standard compliance point would be moved four miles upstream to Three Mile Slough, as DWR is anticipated to request. We also understand that DWR will request that the State Water Resources Control Board include this compliance point change as part of the Phase II update to the Bay Delta WQCP. The State Board will review this request, as will the EPA. We are concerned that the intended mitigation for the water quality violations at Emmaton relies on a change in the compliance point. We consider the movement of the compliance point to Three Mile Slough a relaxation of the EC standard because it would potentially permit four miles of additional salinity intrusion into the upper estuary, which could have negative impacts on multiple beneficial uses.

Recommendations: *Explain the technical, scientific, and policy reasons for using Three Mile Slough in DSM2 modeling for assessing EC compliance at Emmaton. Describe how EC was estimated at Emmaton under the No Action Alternative and for Existing Conditions if it was not directly estimated using DSM2; and interpret the comparison of EC at Three Mile Slough in CM1 operational scenarios to EC at Emmaton.*

Identify all of the water quality standards, including EC at Emmaton, which the BDCP assumes will be modified. Disclose the process for obtaining a modification of a water quality standard.

4. Impacts of Changes to the Salinity Gradient (X2)

The salinity gradient, approximated by X2[1], has an inverse relationship with many diverse bay and estuarine fishes, including the threatened and endangered species that are the conservation targets of the BDCP. As X2 decreases (i.e., moves out to sea) habitat conditions for some species improve and relative abundance increases[2]. Because the location of X2 is closely tied to freshwater flow through the Delta, the proposed project would have a strong influence on this parameter, yet the Draft EIS does not analyze each alternative's impacts on aquatic life in the context of this relationship.

Examination of the predicted changes in monthly average X2 for each CM1 operational scenario, A through G, would help determine how the quantity and quality of estuarine habitats and relative fish abundance would change under those scenarios for multiple fish species. It would also be useful to estimate the range of monthly average X2 values (and/or monthly Delta outflow) for each alternative and compare it to the pattern of freshwater flows and salinity gradients that characterized a reference time period when resident and migratory fish populations were in comparatively better condition. The operational scenarios that more closely mimic the reference period freshwater flow and salinity gradient pattern could be expected to produce aquatic conditions and habitats that benefit native and migratory fishes and support important food web processes at all ecosystem levels.

Freshwater flow may be one of the best tools available in the short term to improve fish populations and protect aquatic life beneficial uses prior to the completion of planned restoration projects, given its widely cited importance to ecosystem recovery. Relative fish abundance responses to freshwater flow can be estimated using regression equations provided in peer reviewed literature and government reports.[3] The equations do not directly include the effects of tidal marsh and floodplain restoration on fish populations; therefore, in their current form, they would be most useful for evaluating the impacts of flow variations prior to the completion of restoration projects. We anticipate that the ability to measure the benefits of restoration projects will improve after the projects are started and measurements and monitoring data become available.

The Draft EIS does not evaluate potential downstream effects of CM1 alternatives on San Francisco Bay fish populations. The description of impacts to San Francisco Bay from Delta Outflow changes (p. 11-132) stops at Suisun Bay even though outflow affects relative abundance of San Francisco Bay fishes such as Bay shrimp, starry flounder, and Pacific Herring. Some of these populations may be negatively affected by reduced outflows associated with CM1 alternatives, and the effect of restoration CMs (2-12) on these fish populations may or may not be beneficial.

Recommendations*: Describe the estuarine salinity gradient and how it defines important aquatic habitats, including marine, low salinity zones, and migratory corridors for target fishes. Describe its relevance to important aquatic life communities, including phytoplankton and zooplankton.*

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[1] X2 refers to the distance from the Golden Gate up the axis of the estuary to the point where daily average salinity is 2 parts per thousand at 1 meter off the bottom (Jassby et. al. 1995).

[2] Jassby AD, Kimmerer WJ, Monismith SG, Armor C, Cloern JE, Powell TM, Schubel JR, Vendlinski TJ. 1995. Isohaline position as a habitat indicator for estuarine applications. Ecological Applications 5(1): 272-289;
Kimmerer, W. J. 2002. Effects of freshwater flow on abundance of estuarine organisms: Physical effects or trophic linkages? Marine Ecology Progress Series 243:39-55;
Kimmerer WJ, Gross ES, MacWilliams ML. 2009. Is the response of estuarine nekton to freshwater flow in the San Francisco Estuary explained by variation in habitat volume? Estuaries and Coasts 32: 375-389.

[3] United States Fish and Wildlife Service, September 27, 2005, Recommended Streamflow Schedules To Meet the AFRP Doubling Goal in the San Joaquin River Basin (FWS 2005), pp. 27 *available at:*
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/docs/sjrf_spprtinfo/afrp_2005.pdf;
Jassby AD, Kimmerer WJ, Monismith SG, Armor C, Cloern JE, Powell TM, Schubel JR, Vendlinski TJ. 1995. Isohaline position as a habitat indicator for estuarine applications. Ecological Applications 5(1): 272-289;
Kimmerer, W. J. 2002. Effects of freshwater flow on abundance of estuarine organisms: Physical effects or trophic linkages? Marine Ecology Progress Series 243:39-55;
Kimmerer WJ, Gross ES, MacWilliams ML. 2009. Is the response of estuarine nekton to freshwater flow in the San Francisco Estuary explained by variation in habitat volume? Estuaries and Coasts 32: 375-389.

Describe the Delta outflow objective in the Water Quality Chapter, including a description of the "X2" concept, recognizing that the "X2" concept provides the foundation for the Delta outflow objective and is the basis for protecting springtime estuarine habitat for resident and migratory fishes, which are the targets of the BDCP.

Include a year-round salinity gradient and/or Delta outflow analysis for each CM1 alternative. This can be accomplished using information already generated for the BDCP EIS.[4] Compare the results to a defined and supported reference period to determine how closely each scenario may mimic the salinity gradient and/or monthly outflow pattern. Alternatively, use three-dimensional modeling that maps the salinity gradient within the estuary on a monthly time step for all CM1 alternatives. This would make it possible to estimate the size and location of salinity zones, such as the low salinity zone, under different operational scenarios; however, it is not clear if this approach could be easily compared to a reference period using the same modeling tools.

Include at least one-dimensional salinity gradient and Delta outflow analyses for the fish species evaluated in Chapter 11. Define and support an agreed upon relative reference period for the analyses.

Use the referenced flow-abundance tools to predict a range of potential fish abundance changes under each operational scenario for CM1. The Kimmerer 2002 relationships should be used to evaluate potential downstream impacts to Bay fish populations. Provide the results of these analyses and explain that they do not include benefits of habitat restoration or entrainment reductions from minimizing use of south Delta pumping facilities when they cause the most harm for salmonids.[5]

C. Potential Increases in Methylmercury Formation and Transport

EPA agrees that restoring wetlands and floodplains in and near the Delta is an essential component of reviving the Estuary's health; however, nearly all the locations targeted for habitat restoration in the Delta have been, or are at risk of being, contaminated with mercury from historical mining sources and ongoing air deposition from industry. Sport fish in the Delta are already burdened with higher concentrations of mercury than anywhere else in the State,[6] and the presence of this powerful neurotoxin in the food web poses a threat to public health and the ecosystem as a whole. For this reason, health advisories have been issued for the Delta and several upstream rivers.

The BDCP relies heavily on proposed restoration in Yolo Bypass to mitigate for the adverse impacts of the CM1 alternatives on fish populations, noting that the Bypass is one of the places in the Delta that shows the most potential for providing floodplain benefits for fish, including salmon (BDCP p. 2-80). The Draft EIS, however, says that the Yolo Bypass may contribute up to 40% of the total methylmercury production in the entire Sacramento watershed (p. 25-63). The State Water Board has also observed that, when the Yolo Bypass is flooded, it becomes the dominant source of methylmercury to the Delta, and that restoration activities could exacerbate the existing mercury problem.[7] While EPA strongly supports restoration of aquatic habitat in the Delta, caution must be exercised to ensure that it

[4] Information needed to support salinity gradient and Delta outflow analyses appears to have been developed by completed modeling efforts for BDCP. The salinity gradient and low salinity zone are discussed in the HCP; X2 and Delta outflow are CALSIM outputs; a 3-dimensional model (UnTRIM) was used in Appendix 5A (Part D, Attachment 3 "Evaluation of Sea Level Rise Effects using UNTRIM San Francisco Bay-Delta Model") to predict salinity gradient changes in climate change scenarios; and a spring Delta outflow comparison was provided for the longfin smelt analysis in the Draft EIS. The longfin smelt analysis in Chapter 11 includes a comparison of average monthly spring Delta outflow between CEQA and NEPA baselines and the H1 – H4 operational scenarios.

[5] For more information, see EPA's comments to the State Water Resources Control Board regarding the State's effort to improve aquatic life beneficial use protection by modifying and/or adopting new water quality standards for flow in the Delta. See letter from US EPA to SWRCB, December 11, 2012, available at http://www2.epa.gov/sites/production/files/documents/sfdelta-decpost-workshopltr-dec2012.pdf; EPA presentation to SWRCB available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/wrkshp2/erinforesman.pdf

[6] SWAMP- Surface Water Ambient Monitoring Program http://www.waterboards.ca.gov/water_issues/programs/swamp/rivers_study.shtml

[7] P. 29 Periodic Review of the 2006 Water Quality Control Plan, State Water Resource Control Board http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/periodic_review/docs/periodicreview2009.pdf

does not result in unintended consequences that adversely affect water quality. Minimizing the formation and mobilization of methylmercury in wetlands is critical. Given the already high levels of mercury in the system, restoration in certain locations should be avoided if methylmercury production cannot otherwise be reduced or mitigated. For this reason, the BDCP's restoration acreage goals may not be attainable.

The DEIS underestimates the potential impacts of methylmercury on covered species and public health. Quantification of the methylmercury contributions from the proposed restoration were not provided in the document (this is acknowledged on p. 8-260), and the methylmercury NEPA Effects determinations rely on the success of unproven mitigation methods (CM12) that are currently under development to minimize formation and transport of methylmercury from Yolo Bypass, Cache Slough Complex, and the Cosumnes River Restoration Opportunity Areas (p.3-154). In the AQUA-8 "Effects of Contaminants Associated with Restoration Measures" evaluation of the impact of methylmercury, selenium, and other contaminants on delta smelt, the analysis of Alternative 1A concludes that methylmercury impacts to Delta smelt and winter-run Chinook salmon are "uncertain" (p. 11-277, 11-343). The analysis for Alternative 1A (and subsequent alternatives)[8] states that restoration actions (CM2, CM4–CM7, and CM10) may increase production, mobilization, and bioavailability of methylmercury in the aquatic system, but that many effects are unknown at this time.

Research studies in the Yolo Bypass that were conducted by the US Geological Survey found methylmercury production values in Yolo Bypass managed wetlands and agricultural lands to be "among the highest ever recorded in wetlands."[9] The Yolo Bypass mercury bioaccumulation study[10] reported that all caged and wild fishes sampled had methylmercury fish tissue concentrations greater than the small fish tissue objective in the Delta Methylmercury TMDL (0.03 micrograms per kilogram (µg/kg) wet weight).[11] In addition, 59% of wild fishes and 82% of caged fishes had methylmercury concentrations greater than 0.20 µg/g wet weight, which is a threshold above which fish health is impaired.[12] Finally, 52% of caged fish and 26% of wild fish had fish tissue concentrations greater than observed thresholds that reduce bird reproduction[13] and greater than the large fish tissue objective (intended to protect human health and wildlife consumers). These results suggest that increasing production, transport, and bioavailability of methylmercury through restoration actions could result in adverse effects to human health and the environment.

The Environmental Justice Chapter of the Draft EIS provides conflicting information and conclusions regarding whether or not the BDCP alternatives would create conditions conducive to increased bioaccumulation of mercury in Delta fish species, and whether such bioaccumulation would be cumulatively significant for increasing the body burden (pp. 28-22, 25, 103) in fish. The USGS Yolo

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[8] Analyses for subsequent alternatives refer back to the analysis for Alternative 1A.

[9] Alpers, C.N., Fleck, J.A., Marvin-DiPasquale, M., Stricker, C.A., Stephenson, M., and Taylor, H.E., Mercury cycling in agricultural and managed wetlands, Yolo Bypass, California: Spatial and seasonal variations in water quality: Science of The Total Environment, Volume 484, 15 June 2014, Pages 276–287 http://dx.doi.org/10.1016/j.scitotenv.2013.10.096.

[10] Ackerman, J. "Agricultural Wetlands as Potential Hotspots for mercury bioaccumulation: experimental evidence using caged fish" Environmental Science and Technology 2010, 44, 1451-1457.

[11] The Delta Mercury and Methylmercury TMDL contains two fish tissue objectives that target specific beneficial uses. The average methylmercury concentrations shall not exceed 0.08 and 0.24 mg methylmercury/kg, wet weight, in muscle tissue of trophic level 3 and 4 fish, respectively (150-500 mm total length). These objectives are protective of (a) people eating 32 g/day (eight ounces, uncooked fish per week) of commonly eaten, legal size fish, and (b) all wildlife species that eat large fish. Small fish (less than 50 mm in length) – 0.03 mg methylmercury/ kg, wet weight, in muscle. The average methylmercury concentrations shall not exceed 0.03 mg methylmercury/kg, wet weight, in whole fish less than 50 mm in length. Large fish (150 – 500 mm total length) – 0.08 and 0.24 mg methylmercury/ kg, wet weight, in muscle. These objectives target protection of sensitive wildlife that eat fish. http://www.swrcb.ca.gov/centralvalley/board_decisions/adopted_orders/resolutions/r5-2010-0043_res.pdf.

[12] Frayer, W. E.; Peters, D. D.; Pywell, H. R. Wetlands of the California Central Valley status and Trends: 1939 to mid-1980's; U.S. Department of the Interior, Fish and Wildlife Service: Washington, DC, 1989.

[13] Albers, P. H.; Koterba, M. T.; Rossmann, R.; Link, W. A.; French, J. B.; Bennett, R. S.; Bauer, W. C. Effects of methylmercury on reproduction in American kestrels. Environ. Toxicol.Chem.2007, 26, 1856–1866; Burgess, N. M.; Meyer, M. W. Methylmercury exposure associated with reduced productivity in common loons. Ecotoxicology 2008, 17, 83–91, as cited in Ackerman, J. "Agricultural Wetlands as Potential Hotspots for mercury bioaccumulation: experimental evidence using caged fish" Environmental Science and Technology 2010, 44, 1451-1457.

Bypass bioaccumulation study referenced above showed that the majority of wild and caged fishes had methylmercury tissue levels above the public health threshold for trophic level 3 fish and very close to the public health threshold for trophic level 4 (large) fish. Although the Delta is posted with fish advisories, people who rely on fishing for subsistence may consume more than the advisory recommends. Although the Draft EIS acknowledges that "restoration actions are likely to result in increased production, mobilization, and bioavailability of methylmercury in the aquatic system" (p. 25-64), it concludes that there would be no adverse effects on public health to any populations (p. 25-64, p. 28-22). This conclusion is inconsistent with the potential for increased methylmercury production, bioaccumulation, and effects to Environmental Justice communities, and the proposed mitigation actions described do not address the potential for significant negative effects to human health.

Recommendations: *Acknowledge that particular areas may not be suitable for restoration or that the acreages of proposed restoration may need to be reduced if such areas prove to be large contributors of methylmercury to the Delta ecosystem.*

Summarize recent research and current literature relevant to the potential for methylmercury impairment under existing conditions and future conditions; the potential impacts on covered fishes that use the Yolo Bypass; and the potential for bioaccumulation impacts to higher order species and human health.

Describe the existing methods that show potential for reducing formation and transport of methylmercury, and the CMs to which they could be applied. Further describe the range of potential reductions that could be expected from CM12 methods for minimizing methylmercury formation and transport.

Reconcile the Draft EIS's conflicting conclusions regarding the likely impact of the BDCP alternatives on the conditions conducive to bioaccumulation of methylmercury, and provide the basis for these conclusions.

Describe and commit to water column and fish and invertebrate tissue monitoring for mercury and methylmercury to support adaptive management actions. Include a commitment to ensure that adequate warning signs are posted in appropriate languages regarding the risks of consuming fish caught in the Delta, and provide further outreach to minority populations about these risks. Such outreach should include meaningful involvement by the affected populations.

D. Selenium

Soils on the west side of the San Joaquin Valley are high in selenium. As a result, it is present in agricultural drainage and enters the Delta in the San Joaquin River at Vernalis. When mobilized in the environment and transformed to organic, bioavailable forms, selenium is highly bioaccumulative and can be toxic to organisms at very low levels of chronic exposure. The BDCP proposes to bring additional reliable water to the west side of the San Joaquin Valley. This would result in a greater volume of water and greater loads of selenium being discharged to the San Joaquin River. Although available data show that the maximum selenium concentration at Vernalis is not exceeding the current water quality objective of 5 micrograms per liter (µg/L)[14] (p. 8-96), the operations of the proposed project would contribute significantly more selenium-laden San Joaquin River water to the Delta (p. 8-226). In addition, EPA is in the process of updating its national recommended chronic aquatic life criterion for selenium in freshwater to reflect the latest scientific information, which indicates that toxicity to aquatic life is driven by dietary exposures. As of this writing, a peer review draft of the

[14] 4-day average for above normal and wet year types and a monthly mean for dry and below normal water year types.

updated criterion is undergoing public review, with comments due to EPA in July 2014. Following consideration of comments received, the draft criterion will be revised, as appropriate, and released as a draft criterion for public review.

EPA is concerned that the potential effects of selenium on covered species, especially green sturgeon, are underestimated in the Draft EIS. The analysis discusses increased residence time of selenium in Suisun Bay and concludes that the impacts of the proposed restoration measures on green sturgeon are "not adverse"; but does not discuss the south Delta, which would receive increased loads of selenium under all CM1 alternatives (p. 11-526). The increased loads, combined with increased residence time, could lead to greater selenium absorption in clam tissue, which is a primary food item of sturgeon (p. 11-257). Adverse effects of elevated selenium on early life stages of green sturgeon have been documented[15].

Likewise, impacts of increased selenium loads to salmonids are not adequately addressed in the Draft EIS. Although salmonids do not eat clams, they are sensitive in all their life stages (figure 12 in Presser, Luoma 2010).[16] One objective of the San Joaquin River Restoration Project (SJRRP) is to manage the river to restore salmon migration. The increased drainage of selenium-enriched water from the West side of the San Joaquin Valley that would likely result from the BDCP could compromise this effort.

Recommendations: *To mitigate for the project's impacts to selenium levels in the estuary as a result of the BDCP operations, consider reviving and funding the Bureau of Reclamation's Land Retirement Program[17] to remove from cultivation and irrigation large areas of selenium laden lands on the West side of the San Joaquin Valley. This would save irrigation water, reduce discharges of selenium into the San Joaquin River basin, and advance attainment of selenium reduction targets[18] set by EPA and the Central Valley Regional Water Quality Control Board. Evaluate the extent to which restoration of these "retired" lands to the native plant community could also contribute to the recovery of threatened and endangered plants and animals listed by FWS. Consider analyzing the cost/benefit of implementing treatment technologies vs. land retirement. Although cost/benefit analyses are not required under NEPA, such an analysis may be useful to decision makers and the public in this case.*

Reanalyze the proposal to develop wetlands as part of the conservation plan, taking into account the increased amount of agricultural drainage water from selenium-enriched lands that would enter these areas in the Delta as a result of BDCP operations, and the potential for selenium build-up and availability.

Discuss hydrodynamics and increased residence time of selenium in the San Joaquin River in the southern Delta and its potential impact on clam uptake of selenium, bioaccumulation in sturgeon, and the potential for population effects.

Reference and summarize the available literature regarding the impacts of selenium on sturgeon, especially with respect to early life stages, and consider such impacts in the analysis of increased selenium loading.

The evaluation of the Alternatives should consider the objectives of ongoing or proposed projects and programs that are intended to improve Bay Delta water quality and fish and aquatic resources. Disclose

[15] Linares, J., Linville, R. Eenennaam, JV, Doroshov, S. 2004 Selenium effects on health and reproduction of white sturgeon in the Sacramento-San Joaquin estuary. Final Report for Project No. ERP-02-P35.
[16] Presser TS and Luoma SN 2010 Ecosystem-Scale Selenium Modeling in Support of Fish and Wildlife Criteria Development for the San Francisco Bay-Delta Estuary, California USGS Administrative Report.
[17] http://www.usbr.gov/mp/cvpia/3408h/index.html
[18] http://www.gpo.gov/fdsys/pkg/FR-2000-05-18/html/00-11106.htm

potential conflicts with such projects or programs, as well as ways in which such conflicts could be avoided or minimized. In particular, the potential for competing management objectives between the BDCP and the SJRRP should be comprehensively analyzed and described.

E. Additional Water Quality Impacts

The conclusion that there would be no impact to dissolved oxygen concentrations in reservoirs (p. 8-192, lines 6-15) is unsupported given that three major reservoirs are predicted to experience a 10% increase in dead pool under the No Action Alternative.

Recommendation: *Describe how predicted dead pool conditions in reservoirs may impact dissolved oxygen concentrations and other contaminant concentrations that may increase in these extreme conditions, and revise the impact conclusions, as appropriate.*

It is not clear whether residence time was considered in the impact assessment of water quality contaminants such as pesticides and metals. It appears that southern Delta residence times would increase due to increased use of the north Delta pumps (and decreased use of south Delta pumps), limiting freshwater inputs to, and movement of water in, the south Delta. These conditions could increase residence time of water moving through the southern Delta, which would increase aquatic life exposure to contaminants such as pesticides and selenium.

Recommendation: *Explicitly state whether or not residence time was included in assessments of contaminant impacts on aquatic life and other beneficial uses in the water quality analysis. If residence time was not considered, explain why it was not included and how increasing residence time could increase negative effects of contaminants as a result of CM1 operations.*

II. Fish and Aquatic Resources

A. Aquatic Resources Beneficial Uses

Data and other information provided in the Draft EIS indicate that that all CM1 alternatives may contribute to declining populations of Delta smelt, Longfin smelt, green sturgeon, and winter-run, spring-run, fall-run and late-fall run Chinook salmon. Impact analyses in Chapter 11 show that entrainment, rearing, and migration conditions for these species are estimated, for many of the action alternatives, to be similar to, or worse than, existing conditions and sometimes worse than the future no action condition. Some of the NEPA effects that are described as "not determined" for some alternatives are very similar to effects that are described as "adverse" for other alternatives. Data regarding the impacts on fish is provided in various tables, and the summary statements made in the text do not always accurately reflect the information in those tables.

1. Longfin Smelt Abundance

Long-term and recent sharp declines in fish abundance have been cited by the lead federal agencies, their partners, and EPA as evidence of collapse in the Bay Delta ecosystem. Longfin smelt relative abundance is estimated to decline for all but one of the CM1 alternatives in most water year types (and in the average of all water year types) when compared to *Existing Conditions*.[19] Alternative 8 is the only alternative that has a predicted relative abundance increase for Longfin smelt relative to *Existing Conditions*. In comparison to the *No Action* Alternative, four CM1 alternatives are predicted to result in declines in the Longfin smelt abundance index, while five CM1 alternatives are predicted to result in positive changes to that index. Despite these predictions, the Draft EIS concludes that the

[19] Table 11-1A-8 page 11-297 "Estimated differences between scenarios for longfin smelt relative abundance in FMWT or Bay Otter Trawl,", Table 11-2A-7 page 11-764, Table 11-3-7 page 11-1097, Table 11-4-8 page 11-1308; Table 11-5-7 page 11-1742; Table 11-6-8 page 11-1951; Table 11-7-7 page 11-2227, Table 11-8-8 page 11-2492; Table 11-9-8 page 11-2768.

impact on Longfin smelt abundance would be "not determined" for all CM1 alternatives for the NEPA effects determination. This conclusion disregards the predicted differences among the alternatives in comparison to the *No Action Alternative*, and the predominantly negative impacts in comparison to *Existing Conditions*.

2. **Entrainment of Juvenile Delta Smelt**
   The summary table on page 11-55 of the Draft EIS states that Alternative 4's flow-related effects on fish would lead to "beneficial impacts" with respect to entrainment of Delta smelt. While the prediction for Alternative 4 shows somewhat less entrainment in comparison to the No Action Alternative, the predicted difference is much smaller for juveniles than for adults, and Alternatives 1, 2, 7, and 8 are predicted to result in substantially less entrainment at all life stages. Compared to Existing Conditions, Alternative 4 is predicted to result in *increased* entrainment of Delta smelt, especially juveniles. It is unclear how increases in juvenile entrainment would result in overall beneficial impacts. Entrainment estimates provided in the Draft EIS show reductions in adult entrainment, but increases in juvenile entrainment for all Alternatives except Alternatives 7 and 8, compared to Existing Conditions, and for Alternatives 3 and 5, compared to the No Action Alternative. The discussion in the text provides the caveat that "entrainment is expected to remain at or below the levels currently experienced by fish… there are very few instances where there would be increases, but these are substantially offset by decreases during other periods" (p.11-53).The analysis does not describe the relative importance of reducing entrainment of each life stage (adult and juvenile) to the overall population. No comparison among alternatives is provided, nor does the Draft EIS explain why some alternatives, such as Alternatives 7 and 8, show much larger reductions than other alternatives in both juvenile and adult entrainment.

3. **Impacts on Delta Smelt Rearing Conditions**
   The Draft EIS forecasts changes to rearing conditions for Delta smelt by estimating the change in available fall abiotic habitat with and without estimated habitat restoration benefits relative to the two baselines: Existing Conditions and No Action Alternative. CM1 alternatives with "Fall X2" operational criteria are predicted to increase fall rearing habitat relative to the No Action Alternative. These include CM1 Alternatives 2, 4 H4, and 5-9. Alternatives 6 (isolated facility, eliminates south Delta exports) and 7 (enhanced flows) show the highest predicted increases in fall rearing habitat. The absolute values of fall rearing habitat or significance thresholds are not provided.

   Recommendations: *Modify operational scenarios for CM1 alternatives to develop at least one alternative that would have more certain and beneficial effects on covered fish populations during all life stages.*

   Present the predicted impacts to each of the covered fish species and impact categories (entrainment, spawning, rearing, migration), for all the alternatives and baselines in comparative form, sharply defining the issues and providing a clear basis for choice among options by the decision-makers and the public (40 CFR 1502.14).

   Provide absolute value estimates and proportional changes, in addition to relative changes from baselines, for predictions under each CM1Alternative.

   Describe the scientific basis of, and uncertainty associated with, any assumptions made in the analysis, including in the development of the No Action Alternative. This may include, for example, data regarding current entrainment levels of all covered fish species at all life stages in all water year types.

B. NEPA Effects Determinations

The NEPA Effects Determinations provided in the Draft EIS are not always consistent with the impacts described. We list a few examples below.

- **Alternative 1 AQUA-5: Effects of Water Operations on Rearing Habitat for Delta Smelt:** The description of impacts reports a 22% loss of rearing habitat (p. 11-265), which suggests that the impact should be considered adverse if proposed habitat restoration does not produce anticipated benefits. Instead, Table 11-1A-SUM2 (page 11-16) lists the NEPA Effects Determination as "Not Determined." The NEPA Effects discussion on page 11-265 does not explicitly state that the NEPA Conclusion is "not determined."
  Alternative 1 AQUA-21 Effects of Water Operations on Entrainment of Longfin Smelt: The description of impacts shows that entrainment is estimated to increase for juvenile Longfin smelt in dry (14%), below normal (46%), and above normal (33%) water year types (Table 11-1A-6), and the ***Summary*** text on page 11-295 states, "It is concluded that these changes in Longfin smelt entrainment would be adverse under Alternative 1A." The subsequent ***NEPA Effects*** statement comes to a different conclusion, "The overall effect of the Alternative 1A operations scenario would not be adverse to Longfin smelt." Table 11-1A-SUM2 also lists the NEPA conclusion for entrainment of Longfin smelt as "not adverse."
- **Impact AQUA-22: Effects of Water Operations on Spawning, Egg Incubation, and Rearing Habitat for Longfin Smelt.** The NEPA Effects discussion predicts reductions of 8 to 10 percent in relative abundance of Longfin smelt for Alternative 1A, suggesting an adverse impact on this species from Alternative 1A. No NEPA conclusion is explicitly stated in this section (p. 11-295); however, Table 11-1A- SUM2 (page 11-16) lists the NEPA conclusion as "not determined."

Furthermore, throughout the document, different NEPA Effects Determinations are provided for similar impact descriptions. For example, in the discussion of "Effects of Water Operations on Migration Conditions for Winter-Run Chinook Salmon", the Draft EIS concludes that Alternatives 1 and 8 would have "adverse" NEPA Effects and Alternatives 7 and 4 would have "not determined" NEPA Effects, even though the estimated NEPA effects are quantitatively similar for the multiple metrics evaluated. It is not apparent how the lead agencies decided that one impact was beneficial and another adverse.

Recommendations: *Describe the decision making process and decision rules used to make NEPA Effects Determinations from the analytical information presented for each impact category. Define the NEPA Effects Determinations and provide thresholds -- quantitative when possible -- for each category so that it is clear why some estimated impacts result in one NEPA Effects Determination over another. Explain whether all metrics are considered equal in the analysis or some are weighted. If negative impacts in one metric category translate into an adverse conclusion, regardless of the other metrics, this should be disclosed. Include summary tables for each impact category so that the reader can see the metrics and their results and how they compare among alternatives.*

Compare the NEPA Effects Determinations with the narrative text describing the metrics and NEPA Effects among all alternatives for each impact category (e.g., AQUA-42 above) to ensure that decision rules and methods are used consistently.

III. Analytical and Presentational Issues

A. Defining the Project Proposal

The proposed project evaluated in the Draft EIS is not fully defined. EPA is aware that interagency discussions with the project proponents regarding key aspects of the proposed project are ongoing. Many of the undefined aspects of the BDCP are fundamental to the potential environmental impacts of

the proposal. For example, it is EPA's understanding that potential agreement, in advance, to a certain range of exports is under consideration in the HCP discussions. While an Implementation Agreement has been released for public comment, it is incomplete and is still being discussed by the involved parties. The Implementation Agreement's financing and decision making elements are important for public disclosure because they affect the likely implementation and success of mitigation and environmentally beneficial activities, yet these effects are not described for public review in the DEIS.

In addition, given the large scale nature of the construction activities associated with the BDCP, "minor" changes in proposed project design or operation can make a significant difference in the potential environmental impacts.

Recommendation: *Fully describe the proposed project and reasonable alternatives, including information that is integral to decisions that are being made about the proposed project design and operations.*

The Draft EIS explains that the adaptive management program is a work in progress (p. 3D-9, BDCP p. 3.4-32). The specific approach for an adaptive management program and its effect on environmental consequences is a fundamental issue that should be addressed during the NEPA process. Given that species recovery depends largely on the success of the adaptive management program, it is essential that a more fully formulated adaptive management program be described in the EIS.

Recommendation: *Describe the adaptive management program in detail, including clear objectives, explicit thresholds, alternative hypotheses, and designated responsible parties. In addition, explain any limitations imposed on the adaptive management program by the Implementation Agreement, and explain how those limitations affect the integrity of the adaptive management program.*

B. Alternatives Analysis

The Draft EIS states that alternatives in the document are "evaluated at an equal level of detail, as required by NEPA" (p. 3-5); however, the lead federal agencies' Progress Assessments indicate that the operational components of the alternatives were subjected to different levels of analysis. For example, iterative modeling runs were conducted for Operational Scenario H (solely associated with the CEQA Preferred Alternative 4) that were not run for other Operational Scenarios.

The Draft EIS defines the Alternatives in terms of the design and capacity of the proposed conveyance structure. Each alternative is then paired with a particular operational scenario. EPA agreed with this organizational construct early in the BDCP process, expecting to see a range of alternatives that could present the environmental and water supply tradeoffs being considered. Instead, the DEIS focuses primarily on Alternative 4. It appears that the environmental impacts of certain other alternatives would be reduced if those alternatives were matched with more optimal operational criteria (for example, Alternative 5 with Operational Scenario F); however, the DEIS does not attempt to optimize the other alternatives for environmental and water supply benefits. Other reasonable alternatives could be developed by incorporating a suite of measures, including water conservation, levee maintenance, and decreased reliance on the Delta.[20] Such alternatives would be consistent with the purpose and need for the project, as well as with the California Bay-Delta Memorandum of Understanding among federal agencies[21] and the Delta Reform Act of 2009.

[20] The "Portfolio Approach" developed by a diverse set of stakeholders is one attempt to place Delta water management into the larger context of facilities investments and integrated operations.

[21] http://www2.epa.gov/sites/production/files/documents/baydeltamousigned.pdf

Recommendations: *Work with State and federal partners to modify and further analyze the proposed Operational Scenarios to improve the precision and utility of the aquatic life analyses for all the operational alternatives.*

If differences in the level of analysis remain among the Alternatives, disclose, and explain the reason for those differences.

Evaluate the environmental impacts of pairing each Alternative with more optimal operational criteria.

C. Comparison of Alternatives

The Draft EIS does not clearly present the alternatives and their respective environmental impacts in a clear and comparative manner. Because technical results are not synthesized and displayed in a comparative format, it is difficult for the reader to compare the predicted effects of CM1 alternatives.

Further compounding the difficulty is the fact that the Draft EIS uses two very different baselines (Existing Conditions and No Action), pursuant to CEQA and NEPA regulations, and neither baseline is clearly defined. The assumptions that inform the baseline descriptions are spread throughout the document (Chapter 4, Appendix 4D, Appendix 5A, and Appendix 3A). Although Chapter 4 attempts to summarize the baselines, the summary is confusing, and references appendices that are hundreds of pages long. The baseline assumptions form the basis for all impact assessments; therefore, their lack of clarity creates an underlying uncertainty in the document's analyses and conclusions.

The Draft EIS considers many other types of uncertainties, including those related to long-term climate change and human behavior, however, the treatment of uncertainty is confusing and exhibits a strong tendency to assume outcomes favorable to the proposed project. Uncertainties are expressed by "non-determined" NEPA conclusions, but they are not explicitly detailed in the body of the Draft EIS. EPA has repeatedly raised concerns about the treatment of uncertainty in the Draft EIS, and the Delta Independent Science Board and an independent panel commissioned by the Delta Science Program recently expressed similar critiques.[22] Notably, the Panel concluded that the Effects Analysis of the BDCP (as incorporated by reference into the EIS) is "fragmented in its presentation, inconsistent with its technical appendices, and… inadequately conveys the fully integrated assessment that is needed to draw conclusions on the Plan due to incomplete information."

Recommendations: *Include, in the body of the document, summary tables comparing the effects of all CM1 alternatives and the No Action Alternative to the applicable water quality standards and other relevant environmental impact indicators, and compare and contrast the alternatives with respect to one another in the text. This discussion should inform potential mitigation strategies by identifying which alternatives would need more or less mitigation to comply with environmental objectives.*
Clearly explain the underlying assumptions inherent in the baselines. We suggest that this be presented in Chapter 4.

Explicitly acknowledge uncertainties encountered in the analyses, explain what has been or could be done to eliminate or reduce those uncertainties, and disclose any assumptions made in the face of uncertainties that could not be eliminated.

[22] Delta Independent Science Board Review: http://deltacouncil.ca.gov/sites/default/files/documents/files/Cover-letter-v.4.pdf
Independent Science Panel Review: http://deltacouncil.ca.gov/sites/default/files/documents/files/Delta-Science-Independent-Review-Panel-Report-PHASE-3-FINAL-SUBMISSION-03132014_0.pdf

D. Scope of Impact Analysis

The scope of analysis in the Draft EIS does not fully consider upstream and downstream impacts of the proposed actions in the Delta. As evidenced by the intergovernmental response to California's ongoing drought, the state and federal water projects are functionally and physically interconnected. For example, actions that Central Valley Project (CVP) operators take from the Trinity River have implications for South of Delta CVP and SWP deliveries, and operational changes in the Delta require upstream adjustments in project operations. Based on EPA's ongoing discussions with the federal lead agencies, we understand that the U.S. Bureau of Reclamation is continuing to evaluate its broad operational response to the proposed changes in the Delta, for both near term and longer term operations. Upstream operational changes caused by BDCP implementation could have significant environmental and water supply impacts in the upstream areas, and these impacts must be disclosed in the DEIS. Similarly, the BDCP activities are expected to have impacts on downstream aquatic resources in San Pablo and San Francisco Bay, primarily by changing the magnitude and timing of outflow and by altering the mix of contaminant inputs from upstream (see discussion of selenium, above.)

Recommendation: *Explicitly recognize the integrated nature of the watershed and the water supply projects operating in the watershed, and analyze the upstream and downstream impacts, in particular to water supply and aquatic resources.*

E. Integrated Water Management

The BDCP effort has been ongoing since 2006. Initially, its broad goals were (a) the preparation of an HCP for continued operation of the state and federal water projects, and (b) a change in the mode of conveyance of export water through the Delta. As evidenced by the Alternatives Screening Criteria, as well as Water Supply Chapter 5 of the Draft EIS, there is now also a strong water supply *enhancement* component to the BDCP. That is, the project proponents appear to be anticipating that the CEQA Preferred Alternative 4 of the BDCP would result in the same or greater water exports (ranging from a decrease of 1% to an increase of 18%) than would be available in the absence of the BDCP (Table 5-9). Since the goals of a project drive the scope of the alternatives that must be evaluated in the NEPA process (as well as in the subsequent CWA Section 404 permitting process), EPA believes that a more robust discussion and evaluation of the water supply component of this project is warranted in the EIS.

California is moving quickly towards integrated water management, yet it is not clear how, as currently drafted, the BDCP conveyance component is consistent with this approach. Although the Draft EIS acknowledges California's progress in Demand Management in Appendix 1C, demand management is not incorporated into the project alternatives. Alternatives, such as the Portfolio Alternative, that proposed a more comprehensive and integrated approach to meeting the stated dual goals of the BDCP, were not evaluated.

Recommendations: *Explain how the proposed changes in conveyance and exports fit within the larger integrated water management plan for California. Include a more comprehensive consideration of, and response to, suggested alternatives such as the "Portfolio Alternative" and discuss the demand scenario driving the Delta export facilities. Include a consideration of the significant water conservation efforts Statewide and in the export areas.*

F. Habitat Restoration

We are concerned that the analysis assumes a 100 percent success rate for habitat restoration, which is not consistent with our experience, or supported by restoration ecology and conservation biology academic literature and scientific investigation. The potential adverse impacts of CM1 operations would be greater than projected in the DEIS in the likely event that restoration of the Bay Delta ecosystem is not 100 percent successful.

Recommendations: *Discuss restoration methods, performance metrics, and documented success rates for each habitat restoration type proposed.*

Work with the federal and state wildlife agencies to develop analytical methods to evaluate gradients of partial success for each habitat type. Re-evaluate the impacts of each Alternative (CMs2-11) in light of these gradients and the likely success rates for each habitat restoration type. Incorporate the results into final conclusions about the impacts of BDCP alternatives.

G. Aquatic Species Recovery

Although not explicitly stated in the Draft EIS, the primary premise of the BDCP appears to be the hypothesis that endangered and threatened fish populations in the San Francisco Estuary can be protected from further degradation by habitat restoration without increasing freshwater flow to the Estuary. As noted in the Executive Summary, restoration of more than 150,000 acres of habitat is proposed under most BDCP alternatives. Only moderate changes in freshwater flows (Delta outflow) to the Estuary are proposed under any of the alternatives. In particular, all sub-alternatives for CEQA Preferred Alternative 4) would result in less Delta outflow compared to the No Action Alternative (DEIS Table 5-9).

The habitat restoration-only premise is inconsistent with broad scientific agreement, reflected in EPA's Delta Action Plan[23], that existing freshwater flow conditions in the San Francisco Estuary are insufficient to protect the aquatic ecosystem and multiple fish species, and that *both increased freshwater flows and aquatic habitat restoration* are needed to restore ecosystem processes in the Bay Delta and protect native and migratory fish populations.[24]

The Draft EIS acknowledges the importance of freshwater flow to fish species abundance, but is inconsistent in describing its analyses of the benefits of habitat restoration versus increased freshwater flow. For example, page 11-202, lines 24 to 28 state that "although it is recognized that there are statistically significant correlations between freshwater flow and abundances of several fish species (e.g., Kimmerer 2002, FWS 2005), these correlations were not used in the EIR/EIS analysis to estimate fish population responses to alternatives because they do not directly include the effects of tidal marsh and floodplain restoration on fish populations." Elsewhere (e.g., p. 11-297), the document states that the Kimmerer 2002 model *was* used for the analysis. Correlations that do not include the effects of restoration were rejected for some analyses, but not for others.

Recommendation: *A consistent approach that recognizes the demonstrated significant correlations between freshwater flow and fish species abundance should be used to analyze all of the Alternatives. Describe the analytical approach and provide the rationale for, and implications of, any deviations from it.*

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[23] http://www2.epa.gov/sites/production/files/documents/actionplan.pdf

[24] This broad scientific agreement is illustrated in the following reports: (a) Public Policy Institute of California (2013) Scientist and Stakeholder Views on the Delta Ecosystem "a strong majority of scientists prioritizes habitat and flow management actions that would restore more natural processes within and upstream of the delta" (p. 2). http://www.ppic.org/content/pubs/report/R_413EHR.pdf
(b) State Water Resources Control Board (2010) Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem Flows Report, p.7. "Both flow improvements and habitat restoration are essential to protecting public trust resources [defined as "native and valued resident and migratory species habitats and ecosystem processes" p. 10].
(c) National Academy of Sciences Natural Resource Council Committee on Sustainable Water Management in California's Bay-Delta (2012) Report: Sustainable Water and Environmental Management in California's Bay-Delta "…sufficient reductions in outflow due to diversions would tend to reduce the abundance of these organisms ["these organisms" = 8 Bay Delta aquatic species at various trophic levels]." Page 60 and "Thus, it appears that if the goal is to sustain an ecosystem that resembles the one that appeared to be functional up to the 1986-93 drought, exports of all types will necessarily need to be limited in dry years, to some fraction of unimpaired flows that remains to be determined." Page 105
(d) California Department of Fish and Wildlife (2010) Quantifiable Biological Objectives and Flow Criteria "…current Delta water flows for environmental resources are not adequate to maintain, recover, or restore the functions and processes that support native Delta fish." Page 1 in Executive Summary

H. Project-level Decision-making

The Draft EIS indicates that it provides a *project level* analysis of the proposed changes in conveyance (CM1) and a *programmatic* analysis of other BDCP elements. The level of engineering detail provided for the tunnels is not commensurate with the level of site-specific information typically provided in an EIS for a project that would require federal permits. For example, actions that would result in impacts to aquatic resources (e.g., grading, dredging, trench and fill, boring, spoils piling, levee work, excavation, etc.) are not detailed or quantified at a project-level of detail (e.g., limited information is provided regarding acres and/or linear feet of estimated impacts to waters of the US, the volume of sediment proposed for disposal sites, or the size and length of intakes, p. 3-92; 3C-3). Where reusable tunnel material sites are estimated for the pipelines and the forebays, they are estimated only for the preferred alternative and "may" be on the order of thousands of acres (p. 3-96). We do not believe the information provided in the Draft EIS is adequate to support a full assessment of the project-level impacts and mitigation opportunities, or to determine whether the project, as proposed, would satisfy requirements for requisite authorizations and permits. Given the lack of project-level information, EPA agrees with the Corps that supplemental NEPA review will be needed before a section 404 permit or CWA section 408 "Letters of Permission" could be issued.[25]

The use of programmatic inputs to project-level analyses in the Draft EIS also substantially limited the predictive power of evaluations that were intended to provide project-level precision. For example, Section 8.4.1.7 "Constituent-Specific Considerations Used in the Assessment" states that the modeling to predict water quality effects (salinity) of CM1 operational scenarios relied on estimates of impacts from implementation of other conservation measures, specifically CM2 (Yolo Bypass Floodplain Restoration) and CM4 (tidal marsh restoration), which are evaluated in the Draft EIS at a programmatic level (p. 8-153). A representative estimate of the location and amount of tidal marsh restoration was used to predict water quality effects under each CM1 operational scenario. The programmatic nature of the CM4 input, which is based on an assumed 100 percent success rate, represents only one potential future configuration of tidal marsh restoration. The actual success rate and physical location(s) of tidal marsh restoration will have varying impacts on water quality elements such as salinity. The representative locations and amounts of CM4 and CM2 that were used for CM1 water supply modeling were not disclosed in the Draft EIS, nor has any feasibility analyses been cited that describes the availability of suitable sites in the restoration opportunity areas. The uncertainties introduced by the use of CM4 programmatic estimates raises concerns over the reliability of water quality modeling results, and whether the analysis presented in the Draft EIS is sufficient to support federal permit decisions.

Despite the substantial impact that the physical location of tidal marsh habitat restoration may have on water quality elements such as salinity, the Draft EIS does not describe how the locations for CM4 estimates were chosen or how likely it is that CM4 would result in the targeted amount of restoration (65,000 acres). A tidal marsh restoration success rate of less than 100 percent may yield very different results for predicted salinity values under each CM1 operational scenario. Typical success rates for wetland restoration have been reported to be substantially lower, e.g., on the order of 20-60 percent, and full restoration may require decades[26], yet this underlying uncertainty associated with the predicted salinity values is not characterized in the Draft EIS.

The envisioned CM-1 tunnels would require one of the largest construction projects in the nation, which would occur in the upper portion of a sensitive estuary. The proposed structure includes elements (e.g.,

[25] See Corps comments on the Draft EIS July 16, 2014 and July 29, 2014

[26] J.L. Lockwood and S.L. Pimm (1999), When Does Restoration Succeed? (Chapter 13 in Ecological Assembly Rule: Perspectives, Advances, and Retreats; and Angel Borja & Daniel M. Dauer & Michael Elliott & Charles A. Simenstad (2010) Medium- and Long-term Recovery of Estuarine and Coastal Ecosystems: Patterns, Rates and Restoration Effectiveness, Estuaries and Coasts (2010) 33:1249-1260.

intake facilities and fish screens) that have never been constructed in the Sacramento River at this scale, yet the Draft EIS provides only a qualitative analysis of construction-related water quality impacts. This is inconsistent with the intent of the Draft EIS to support project-level decision making, which necessitates project-level analysis. Assessment of construction-related impacts is a basic element of project-level analysis, yet the Draft EIS provides no quantitative estimates of the amounts of soil, sediment, and contaminants that would be discharged to water bodies during CM1 construction, nor a rationale for not including such estimates. The qualitative description of best management practices does not provide an adequate basis for a lead federal agency to write permit conditions that would be effective in minimizing the water quality impacts of constructing CM1.

Additionally, on page 8-293, in lines 35 to 38, the Draft EIS states that "Alternative 1A would result in similar potential contaminant discharges to water bodies and associated water quality effects to those discussed above for the no action alternative." It is not clear how the impacts on water quality from construction-related activities of building a 35-mile twin tunnel facility, with 5 screened on-bank intakes, would be the same as not building it.

Recommendations: *Provide quantitative information regarding project footprints and estimates of soil, sediment and contaminant discharges during construction, as well as the impacts of those discharges and measures that would mitigate those impacts.*

Provide the level of detailed information necessary to support project-level analyses and permit and authorization decision making, or specify and commit to the additional detailed work and appropriate supplemental NEPA analysis that will need to be done prior to project-level decision making.

Provide confidence intervals around predicted water quality effects of CM1 operational scenarios. Describe the methods used to identify tidal marsh habitat locations for estimating water supply effects of CM1 operational scenarios, and explain the reasons for choosing these locations. Disclose the tidal marsh habitat locations that were used to estimate water supply effects of CM1 operational scenarios. Evaluate water supply effects of CM1 scenarios using several configurations and success rates of CM4 and disclose methods and results.

Provide a summary of tidal marsh habitat success rates reported in academic literature and restoration industry reporting. Include a description of elements that drive restoration success, including location characteristics and restoration actions.

Describe the locations in Restoration Opportunity Areas that exhibit the location characteristics that optimize restoration success, would provide salinity gradient habitat benefits for pelagic native fishes and would protect municipal water supply intakes.

I. Energy Infrastructure

The Draft EIS indicates that DWR will conduct a five-to-seven year Systems Impact Study (SIS) to evaluate the electrical transmission and power needed for conveyance facilities (p. 21-22). This study is projected to be completed in time to procure the necessary power to support construction and operation of the facilities. Based on the Draft EIS, it is not clear whether the SIS could affect the conclusions summarized in the EIS, of the energy needed for the system (Table 21-11 p. 21-34) or to what extent it may influence the procurement and placement of future transmission and associated infrastructure.

Recommendations: *Provide additional details on the purpose of the SIS and how it may affect the assessment of the BDCP's energy needs as well as the procurement and placement of future transmission and associated infrastructure.*

In the absence of the SIS, disclose the assumptions made regarding electrical transmission placement and energy needs for the proposed conveyance facilities and whether the SIS could affect the analysis of environmental impacts.

Clarify, particularly with respect to impacts on terrestrial species, the level of uncertainty involved with future placement, and associated impacts, of the transmission line and related infrastructure pending the completion of the SIS.

Discuss whether the SIS would provide an opportunity to focus procurement of a guaranteed source of 100% renewable energy (e.g., contractually binding agreement) for the BDCP.

J. No Action Alternative

The No Action Alternative assumes that no BDCP actions would be undertaken, and that climate change and sea level rise would occur and water demands and diversions north and south of the Delta would increase, resulting in reduced freshwater flows into the Delta (p. 5-57). Under the No Action Alternative described in the Draft EIS, no action would be taken in response to the impacts of climate change and sea level rise on the Delta.

EPA supports the Draft EIS's recognition that climate change and sea level rise would likely result in decreased freshwater flows into and through the Delta and increased salinity intrusion; however, the assumption that, in the face of diminished overall water supply due to climate change, diversions north of the Delta would be allowed to increase seems unrealistic. Similarly, maintaining existing reservoir operations and meeting existing water supply demands is unlikely with the predicted effects of sea level rise and climate change. Comparing the CM1 alternatives to a "No Action" Alternative that assumes that no actions would be taken by *any* party to address climate change-induced reductions in overall water availability has the potential effect of exaggerating the benefits of the CM1 alternatives to the project proponents.

The Draft EIS appears to contradict itself by stating that some of the water supply delivery differences between CM1 alternatives and the No Action Alternative in the year 2060 are "*solely* attributable to sea level rise and climate change, and not to the operational scenarios themselves (emphasis added, p. 5-47, lines 20-23)." This overlooks the significant impact of the CM1 project operational scenarios, which propose exporting volumes of water approximately equal to, or greater than, those exported under existing conditions, regardless of overall water availability. In a future affected by climate change and sea level rise, with less fresh water to allocate among <u>all</u> water users, exports of such magnitude would further reduce water availability for other uses and users.

Recommendations: *Consider and incorporate into the No Action Alternative predictable actions by other parties to address the anticipated effects of increased north of Delta demands, climate change, and sea level rise on water availability. This should include consideration of any measures that would likely be taken to reduce demands both north and south of the Delta.*

Clarify that the comparisons of CM1 alternatives to the No Action Alternative isolate the effects that would be attributable to CM1, and that such effects would occur in the context of increased north of Delta demands, sea level rise, and climate change, not "in the absence of" the effects of those stressors.

K. Impacts to Wetlands

At this time, no Clean Water Act (CWA) Section 404 permit application has been submitted for discharges of dredged or fill material into waters of the United States, including wetlands, associated

with projects described in the BDCP. EPA and the Corps encourage lead agencies to proactively integrate CWA Section 404 regulatory requirements into the NEPA process to streamline environmental review by using NEPA documents for multiple permitting processes. With this in mind, EPA and the Corps met with the lead and federal state agencies multiple times over the past several years in the interest of using the BDCP EIS/EIR to inform Corps' CWA 404 regulatory decisions. Although constructive and informative, those meetings did not result in an agreement to coordinate the NEPA and CWA 404 permit reviews.

Information provided in the Draft EIS and through meetings with the lead agencies illustrate that there are substantial challenges to finding that discharges associated with Alternative CM1 are consistent with the CWA Section 404(b)(1) Guidelines. In addition, the Draft EIS acknowledges that additional analyses for NEPA may be required to support Corps CWA Section 404 permit decisions for CM1 and that additional NEPA work will be done for other conservation measures (p.1-13). The Corps also submitted comments on the Draft EIS verifying that the Draft EIS does not provide the site-specific information necessary to form the basis for a permit decision, and we agree with that comment.[27]

Recommendation: *Demonstrate that the proposed project would meet the requirements for a CWA section 404 permit.*

Wetland Extent and Jurisdiction (Section 12.3.4)
The accuracy of the CWA jurisdictional determination and estimates of impacts to jurisdictional waters need to be improved for project-level analysis. The Draft EIS is intended to provide project-level information for CM1. However, the BDCP applicants were not able conduct field delineations of wetlands and waters of the U.S. Instead the extent of wetlands and other waters in the study area was determined primarily using aerial photography interpretation in a GIS with limited (26 sites) field delineations (p. 12-146). However, the Draft EIS does not provide an estimate of GIS-based mapping accuracy as compared to the on-the-ground mapping. The Draft EIS also states that the extent of impacts to jurisdictional wetlands and other waters is likely an overestimate because actual construction footprints will be smaller than presented in the document and because some mapped wetlands and waters could be non-jurisdictional (p. 12-147). However, in some areas, when compared for other projects (e.g., Delta Wetlands project EIS) the extent of potential wetlands and waters mapped for BDCP is substantially lower. While the extent of ground disturbance may be overestimated in the document, it is likely that the extent of wetlands and waters have been substantially underestimated.

Recommendations**:** *In Section 12.3.2.4, clearly describe how the GIS-based mapping compared to the field delineations and provide an estimate of GIS mapping accuracy. Use available approved wetland delineations from other projects to supplement the GIS mapping.*

Identify a schedule for improving delineation methods completing wetland delineations on sites where DWR has access or can reasonably obtain access. Estimate direct fill impacts and secondary effects to waters using engineering drawings and cross sections.

L. Air Quality Impacts

General Conformity
The Draft EIS discloses that this project would generate emissions within multiple air basins that are federally designated as nonattainment for ozone, PM2.5 (particulate matter smaller than 2.5 microns), and/or PM10 (particulate matter smaller than 10 microns); as well as designated maintenance areas for

[27] See Corps comments on the Draft EIS July 16, 2014 and July 29, 2014

carbon monoxide (CO; p. 22-13, Table 22-4). The Draft EIS states that general conformity to the State Implementation Plan (SIP), with regard to all of these pollutants except CO, would be demonstrated through the use of a combination of mitigation measures and the purchase of offsets. For CO, conformity would need to be demonstrated through the use of local air quality modeling analyses (i.e., dispersion modeling).

The availability of sufficient offsets to demonstrate conformity for the BDCP may be limited. EPA is aware that other construction projects scheduled to take place in the BDCP project area during the BDCP's proposed construction time frame also include the purchase of offsets to demonstrate conformity. For example, two segments of the California High Speed Rail project scheduled to be constructed in the San Joaquin Valley Air District are currently pursuing a significant amount of offsets for several criteria pollutants.

The Draft EIS is not clear as to whether the federal lead agencies have made a general conformity determination. To the extent there is information regarding conformity, the Draft EIS also appears to rely on qualitative, not quantitative information. EPA interprets the general conformity rule as including all direct and indirect emissions from the federal action; therefore, the emissions from all conservation measures required as part of this federal action should be quantified and evaluated in the general conformity determination.

Recommendation: *Demonstrate that all direct and indirect emissions of the federal action, including all required conservation measures, would conform to the applicable SIPs and not cause or contribute to violations of the National Ambient Air Quality Standards (NAAQS).*

Continue to work closely with the local air districts to secure legally binding offset agreements and complete the general conformity determinations.

Include the Draft General Conformity Determination either as a detailed summary or as an appendix, and the previously referenced "Conformity Letters."

IV. Additional Issues

A. Alternatives

The reason for including maximum pumping capacity (10,600 cfs) for the State Water Project's Banks Pumping Plant in all CM1 alternatives that include north Delta intakes is not clear. The existing pumping restriction for Banks Pumping Plant for the gates of Clifton Court Forebay is intended to minimize erosive forces. Section 5.2.1.3 refers to the Corps of Engineers' Public Notice for the Bank Pumping Plant, which states that that additional permitting for the SWP's diversions would not be required so long as the SWP did not exceed a diversion of 13,250 acre feet (daily and 3-day running average). It is not clear that the Corps' goal of minimizing erosion would be met by full pumping capacity operation.

Recommendations: *Describe the Corps of Engineers' pumping restriction for the Banks Pumping Plant. Describe the circumstances under which the Banks pumping plant would be able to pump at maximum capacity, and why erosion would no longer be a significant effect from pumping.*

The description of CM2 (Yolo Bypass fisheries enhancement) in Section 3.6.2.1 (p. 3-122) does not contain information about the amount and location of planned restoration activities, disclosure of targeted flood frequency, or a description of how CM2 differs from what is already required of the Bureau of Reclamation by the 2009 NMFS Biological Opinion, Section I.6.1 (page 34 in the 2009

Biological Opinion with 2011 amendments). That Biological Opinion requires Reclamation to "provide significantly increased acreage of seasonal floodplain rearing habitat, with biologically appropriate durations and magnitudes, from December through April, in the lower Sacramento River basin, on a return rate of approximately one to three years, depending on water year type." The Biological Opinion indicates that the amount of floodplain restoration should range between 17,000-20,000 acres (excluding tidally-influenced areas), with appropriate frequency and duration.

It is EPA's understanding that CM2 is evaluated programmatically and subsequent NEPA document(s) will further define aspects of this alternative. Indeed, the Bureau has already collected scoping comments for the development of an EIS specific to CM2. It is not clear how programmatic information from this Conservation Measure was used to inform project-level impact determinations for Chapter 5 through Chapter 11 in the current Draft EIS.

Recommendations: *Provide additional available information about the planning of CM2, including floodplain acreages, frequency and duration of estimated inundation, and maps of potential locations of restoration sites.*

Summarize the potential overlap between CM2 and Section I.6.1 of the 2009 Biological Opinion so that the reader is informed about the existing requirements under Section 7 of ESA and how actions taken or proposed pursuant to the Biological Opinion may be modified by the BDCP.

Indicate whether additional water would be needed to flood the Yolo Bypass and, if so, where the water would come from.

Explain how programmatic information drawn from this Conservation Measure was used to inform project-level impact conclusions for water supply and water quality.

Recent floodplain habitat loss over the last few decades is listed as one of the reasons for proposing CM2, however, floodplain habitat loss has been occurring for more than a few decades.

Recommendations: *Provide a broader description of long-term floodplain habitat loss over a 100 year timeframe and describe how it has affected fisheries populations, with appropriate citations.*

It does not appear that a feasibility analysis was conducted to determine the availability of lands for restoration within the Restoration Opportunity Areas for CMs 2, 4-11. We understand that much of this information is confidential; however, there are multiple other draft HCP efforts moving forward that overlap with the project area, creating the potential for restoration planning conflicts on the same parcel of land.

Recommendation: *Conduct an analysis of areas that support each type of proposed habitat restoration in each of the Restoration Opportunity Areas and develop criteria for prioritizing acquisition based on potential restoration success and availability. Consider the other draft HCP efforts that overlap or are immediately adjacent to the project area to identify potential conflicts on restoration areas.*

The Draft EIS does not include a comprehensive description of the CVP and SWP with and without new north Delta intake facilities or through-Delta operations. Such information is needed to assist the reader in understanding how the water delivery system operates under Existing Conditions and how it would change under CM1 alternatives.

Recommendation: *Include a description of existing CVP and SWP operations in the Chapter 3 discussion of the No Action alternative, including how operations would change or remain static under each proposed alternative.*

The North Delta Bypass rules are difficult to understand and should be more clearly explained, particularly in the context of how flows occur currently (p. 3-181-3-209). Listing the rules does not enable the reader to understand how the new facilities would operate within the CVP and SWP system and, subsequently, how the new rules could modify the Sacramento River where new intakes would be placed and operated.

Section 3.6.4.2 provides only an annual average of how often the north Delta intakes would be used versus the south Delta intakes. For the reader to understand how the system would work, information about the potential timing, frequency, and duration of operation of each of the pumps throughout the year would be more useful.

Recommendations: *Provide information and references that describe current CVP and SWP operations. Describe modifications to reservoir operations to avoid dead pool conditions for all alternatives.*

Clearly state that BDCP's North Delta Bypass rules are intended to protect flows from only one storm pulse or, potentially, two storm pulses if the first storm arrives before December 1st. Explain that subsequent storm pulses (that are important fish cues for migration) can be exported after BDCP's new operational rules have been met.

Provide information about the potential timing, frequency, and duration of operation of each of the pumps throughout the year, including when and the conditions under which each pump would be used alone or simultaneously with the other.

Provide information about Sacramento River flows to put the North Delta Bypass rules in context. For example, describe how often flows are at the levels used as thresholds in the bypass rules to help the reader to generally understand how much flow would remain in the river versus be diverted into the new intakes. Also provide exceedance curves of Sacramento River flows and the Post Pulse Water Operations for each CM1 alternative, and consider including a chart that summarizes information in Table 3-16 (p. 3-183) describing Post Pulse Water Operations, and include Sacramento River flows for comparison.

The Export/Import ratio (also known as Export Limits in Table 3 of the Water Quality Control Plan) does not necessarily solely apply to the south Delta or explicitly exclude new points of diversion. The description of how the export/import ratio from the 1995 Bay-Delta WQCP is included in operational requirements and impacts from the CM1 alternatives (p. 3-32) may not be consistent with the description of the E/I ratio as interpreted by NMFS.[28]

Recommendation: *Describe how the E/I ratio was used in evaluations of each operational scenario for the alternatives. If the approach ultimately used in the analysis differs from the D-1641 approach, explain the reason(s) for, and implications of, using the different approach.*

[28] See NMFS Progress Assessment p. 10 http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/NMFS_Progress_Assessment_Regarding_the_BDCP_Administrative_Draft_4-11-13.sflb.ashx

State whether or not project proponents will request that the State Water Board modify the existing E/I water quality standard so it does not apply to the north Delta intakes and describe the process for having that modification approved.

Information that provides context for the Fremont Weir and Yolo Bypass Operational Criteria should be provided in the section that generally describes these operational criteria (p. 3-187). In the absence of context, it is unclear how the rules would change. For example, with no information about how often Sacramento River flows at Freeport are expected to be greater than 25,000 cfs, it is unclear how often the 17.5 and 11.5-foot elevation gates would be open and how often the Yolo Bypass floodplain restoration work would provide benefits to aquatic life using these resources.

Recommendations: *Provide cumulative distribution curves that show expected flows at Freeport under each CM1 alternative for each type of water year. Discuss the curves in the text and identify the median frequency at which Sacramento River flows at Freeport are expected to be greater than 25,000 cfs.*

Provide maps showing Yolo Bypass inundation of 3,000 to 6,000 cfs.

The Fremont Weir is described as a necessary component of CM1; however, the Draft EIS states that "CM2 is a programmatic element that will be further developed and analyzed in future technical and environmental reviews." The impacts associated with this element are not estimated and disclosed in the Draft EIS. For example, although Fremont Weir gate operational rules were developed for the purposes of modeling, the impacts of the proposed operation of the Fremont Weir do not appear to have been analyzed. Without such analysis, the impacts of CM1 cannot be fully evaluated.

Recommendation: *Describe the updates to Fremont Weir that would take place under all of the Alternatives.*

The Rio Vista Minimum Instream Flow Criteria shown on p. 3-188 are substantially different from the Rio Vista flow criteria in the 2006 Bay-Delta WQCP, which are implemented through water right permit D-1641. It is not clear how the BDCP process would result in a change to the Bay-Delta WQCP water quality standards and the water right permit.

Recommendations: *Describe the Rio Vista flow criteria in the 2006 Bay-Delta WQCP and the D-1641 permit requirements. Describe the difference in flows proposed by the BDCP and explain how they would be attained.*

If it is anticipated that water quality standards would be modified subject to a request connected to the implementation of BDCP, describe the process by which the modification would be requested and processed by the State Water Board.

The discussion in Section 5.2.2.2 "The Revised Water Quality Control Plan (2006)" does not reflect substantial work the State Water Board has completed or undertaken relevant to the 2006 Bay Delta WQCP, including the 2009 Triennial Review and its conclusions, the 2010 Flow Criteria Report, and the Phase I and Phase II Updates to the 2006 Bay-Delta WQCP. These updates include potential modifications to San Joaquin River tributary and lower San Joaquin River flows, Delta outflow objectives, export/inflow objectives, Delta Cross Channel Gate closure objectives, Suisun Marsh objectives, potential new reverse flow objectives for Old and Middle Rivers and potential new floodplain habitat flow objectives. Under recent state legislation, the State Water Board will also be evaluating changes to outflow requirements for major Delta tributaries. Although the outcome of these

State Water Board regulatory processes is unknown at this time, it is reasonable to expect that all will have significant impacts on BDCP planning and implementation.

Recommendation: *Summarize the current status of the State Water Board's update to flow objectives, including export limits and minimum Delta outflows. Updated objectives should be considered in the impacts analyses, and the document should describe how any proposed or pending updates to flow standards may affect the analyses and the implementation of the BDCP. Describe the mechanisms that would be in place in the BDCP, the Implementation Agreement or other BDCP agreements to assure implementation of future SWRCB water quality and water rights actions.*

B. Water Supply

We are concerned that the "Overview of California Water Demand" discussion in Section 5.1.1.3 provides an incomplete summary of water demand in California. For example, population growth is discussed as a reason for increasing urban water demand (p. 5-4); however, there is no reference to the statewide mandate to increase water efficiency 20% by the year 2020 for urban water uses, which is discussed in appendices to other chapters. Details are not provided regarding the rate of urban water demand growth or estimated urban water demand and use, and no basis other than population growth is provided for the conclusion that water demands will increase. Similarly, the importance of water to the agricultural economy is discussed (p. 5-4); however, there is no discussion about the importance of water to other economic sectors.

Municipal and industrial (M & I) demand north of the Delta was estimated by assuming full build out of facilities associated with water rights and contracts north of the Delta, primarily to meet projections of increasing urban water demand (p. 5-57). It is not clear whether the 81% estimated increase under the No Action Alternative, compared to Existing Conditions, takes into consideration the required water efficiency efforts for municipal and industrial water use (see table 5-8). This is important because "increased system demands by water rights holders, especially in El Dorado, Placer, and Sacramento counties" is identified as a reason for projected decreases in reservoir storage and CVP and SWP deliveries under the No Action Alternative (p. 5-61 through 5-64). An overestimation of M & I demand would result in exaggerated projected decreases in water availability for those other uses.

Recommendations: *Modify Table 5-1 to include sectors of consumptive water use, average water use in each category, and estimated rates of growth in each category.*

Summarize the information in Table 5-1 in the text of Section 5.1.1.3.

Provide an overview of water demand in California that summarizes water use by sector (e.g., urban, agricultural, industrial), discloses the economic value generated by each sector, and estimate the rates of water demand growth in each sector.

Clarify whether or not the 2010 urban water efficiency mandate of a 20% reduction in M & I water use by 2020 is included in estimates of future water demand. If it is not included in water demand estimates, explain why it is excluded in the context of the potential impact of overestimating demand on BDCP estimates of water supply effects.

Evaluate water supply effects of CM1 scenarios using several configurations and success rates of CM4, and disclose methods and results.

C. Groundwater

The Draft EIS describes beneficial impacts on groundwater resources for some alternatives as a result of CM1 (p. 7-54). It states that for all alternatives, increases in surface water supplies as a result of BDCP would result in diminished use of groundwater (p.7-84); however, no documentation is provided to support this assumption.

The Draft EIS states that groundwater use in the San Joaquin River area is estimated to be between 730,000 and 800,000 acre-feet per year, which exceeds the basin's estimated safe yield of 618,000 acre-feet per year and that each groundwater basin has experienced some overdraft (p.7-18). The Draft EIS also states that the estimated overdraft is between 1 and 2 million acre-feet annually, with many basins in Tulare Lake Basin in critical condition (p.5-4). The Draft EIS assumes that these overdrafts would stop after implementation of the BDCP. On the contrary, we believe it is reasonable to expect that provision of more water could result in more water being used, including as much groundwater as allowed, rather than in strict substitution of surface water for groundwater. Without management of groundwater resources, it is not clear that the pressure on groundwater resources would be diminished as a result of the BDCP.

Recommendations: *Explain the basis for the assumption that increases in surface water supplies would result in diminished use of groundwater. The likelihood and potential impacts of increased use of surface water supplies for aquifer storage and recovery should be discussed.*

Consider development of a mitigation measure to address management of groundwater resources in the southern San Joaquin Valley.

D. Water Quality

Reporting methods for the chloride and EC analyses may partially obscure conclusions about the predicted range of salinity intrusion, chloride, and EC concentrations for existing conditions, the No Action Alternative, and CM1 alternatives. The chloride modeling analysis (Appendix 8G) provides a 16-year average of estimated chloride concentrations, a 5-year drought average chloride concentration, and a percent exceedence of the minimum health objective of 250 mg/L chloride. Combining 16 years of water quality data and reporting the average omits the predicted range of maximum mean daily chloride concentrations predicted for each of the compliance points under various alternatives compared to their baselines. Averages can mask the severity of chloride and EC concentrations by allowing wet years with lower salinity (chloride and EC) levels to balance dry years with higher salinity concentrations. The 5-year drought average provides some indication for time periods when increased salinity concentrations are expected; however, elevated EC and chloride concentrations at certain compliance points may also occur in above normal and below normal years following dry years.

The reason for, and consequences of, constraining the water quality analysis by using a 16-year hydrology modeling period is not described in the Draft EIS nor its appendices. The 16-year hydrology period extends from 1975 to 1991 and includes a drought period and the highest water year recorded in recent decades (1982). If this hydrology period is different than other periods that could have been chosen or the entire 82-year period available for modeling, results of the water quality analysis may be inaccurate.

Recommendation: *Explain why the 16-year period was used and the 82-year period was not used, and describe the potential impacts on the precision of the water quality effects predicted by the modeling exercise reported in the Draft EIS Chapter 8 appendices and summarized in the text of the Draft EIS. Compare the 16-year hydrology period (1975-1991) to the entire hydrology period available, disclose*

that comparison to the public and decision-makers, and explain how the smaller time period may influence water quality predictions.

The assertion that water demand will go down in the Tulare basin, in the face of large increases in population, is not thoroughly supported (p. 30-31). This is stated to be the expected result of a decrease in agriculture (now using 82% of the water p. 30-32), but it is not a given that the acreage in agriculture would decrease when additional water resources become available as a result of BDCP. Rather, increases in both population and agriculture are plausible.

Recommendations: *Include a discussion of growth that considers the potential for increases in both urbanization and agricultural development in response to increased reliable water supplies, and that addresses the entire San Joaquin Valley. Include an explanation of why additional water resources are needed (p. 5-4) if projected urbanization would use less water (p. 30-11).*

Water Quality Impact Conclusion WQ-26 (effects on selenium concentrations resulting from restoration activities) lists impacts before mitigation, as "Less Than Significant." After mitigation, conclusions are "Less Than Significant" and "Not Adverse." Analysis of residence time for planned remediation efforts is not quantitative and, therefore, lacks sufficient resolution to substantiate impact conclusions.

Recommendation*: Re-analyze Impact WQ-26 based on quantitative measures of residence time and selenium bioaccumulation that: (1) include specificity of locations and species, and (2) reflects current science that assesses the Delta as one interconnected system physically and biologically.*

Consider making the environmental commitments for selenium in restored areas a high priority by addressing these impacts within the main water quality and aquatic resources part of the EIS. Clearly identify the potential impacts of using water supplies containing selenium for wetlands with high residence times and selenium risks to fish and wildlife.

Selenium bioaccumulation modeling for sturgeon is shown in Appendix 8M2, but an impact conclusion is not listed within the category of impacts to white and green sturgeon (e.g., AQUA-136). Other identified species considered of concern in terms of selenium effects, for which no conclusions are provided, are diving ducks (scoter and scaup), clapper rail, salmonids (Chinook salmon, steelhead) and splittail.

Recommendations*: Provide an impact analysis for these species, and add impact conclusions for these species to the category of Fish and Aquatic Resources impacts.*

Illustrate and conceptualize mixing of selenium sources. Document representativeness of sites to selenium modeling to enable coordination of site locations to modeling predictions.

Perform selenium bioaccumulation modeling to specifically address the potential for (1) less Sacramento River flow (i.e., less estuary dilution and increased residence times), and (2) more San Joaquin River flow (increased Se loads or concentrations) entering the Plan Area. Perform an analysis that is both species-specific and location-specific, and develop habitat-use and life-cycle diagrams to inform the selenium modeling. Identify the times and places of greatest ecosystem sensitivity to selenium as outcomes of the modeling and relate the outcome to the entire plan area. Add selenium bioaccumulation modeling of additional fish and bird species to identify the predators with the greatest selenium exposure within fish and bird communities. Development of a comprehensive set of enrichment factors to relate dissolved selenium concentrations to suspended particulate material selenium concentrations would address the uncertainty in this step of selenium modeling.

The data sets that were used to model selenium in sturgeon and derive impacts are not spatially and temporally matched. Locations in the western Delta are ecologically and hydrologically disconnected from the Bay, where effects to sturgeon are known to be greatest.[29]

***Recommendation**: Consider comprehensive sturgeon habitat and cumulative effects in selenium modeling and impact analysis.*

The multiple times that eutrophication is mentioned on page 8-70 (Section 8.2.3.1.0 Nitrate/Nitrite and Phosphorous) may suggest to some readers that the San Francisco Estuary is suffering from large-scale eutrophication. Currently, eutrophication is not one of the major stressors negatively affecting the open waters of the San Francisco Estuary.

***Recommendations:** Clarify that monitoring shows that the open waters of the San Francisco Estuary do not show signs of large-scale eutrophication and that anoxic waters and sediment are not commonly reported in the Estuary. Identify the sites with demonstrated low dissolved oxygen problems and describe the extent to which nutrients, subsequent algal blooms, and microbial respiration contribute to low DO problems in the Estuary.*

Discuss the lack of diatom algal blooms as a stressor in the Estuary and the relationship between nutrients and the composition of the algal community and subsequent frequency of desired algal blooms. This can be a short summary in a few sentences and can refer to other locations in the document where nutrients and algal community composition is discussed in more detail. See http://www.sfestuary.org/pea-soup/ for more information.

E. Fish and Aquatic Resources

The temperature analysis does not provide biologically meaningful temperature estimates for Chinook salmon and, potentially, other fishes. The majority of temperature estimates are calculated using models that predict monthly average temperatures which can obscure the occurrences of daily temperatures fluctuating above life stage impairment and lethal thresholds for Chinook salmon and other fishes. Daily temperatures are estimated for the mainstem of the upper Sacramento River in the segment downstream of Keswick dam because a model with a daily time unit of analysis is available for this exercise (Sacramento River Water Quality Model). Temperature models with a daily time unit are not yet available for the Feather, American, lower Sacramento, and Trinity Rivers, but we understand Bureau of Reclamation is developing daily temperature models as part of the OCAP Biological Opinion remand process. Completion of these models should be prioritized and used in any additional analyses to provide meaningful estimates of temperature impacts to fishes.

***Recommendations:** Estimate potential temperature impacts when updated models become available. Identify temperature thresholds for specific life stages based on NMFS recommendations and other available guidance; for example, EPA temperature criteria. Identify mitigation measures that would minimize adverse temperature conditions.*

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[29] (1) Linares, J., Linville, R. Eenennaam, JV, Doroshov, S. 2004 Selenium effects on health and reproduction of white sturgeon in the Sacramento-San Joaquin estuary. Final Report for Project No. ERP-02-P35.
(2) Linville RG 2006 Effect of excess selenium on the health and reproduction of white sturgeon (*Acipenser transmontanus*): Implications for San Francisco Bay-Delta. Ph.D. dissertation, University of California, Davis, CA 232 pp.
(3)Beckon, WN & Maurer, TC, 2008 Species at Risk from Selenium Exposure in the San Francisco Estuary. Final Report to the US EPA IAA No. DW14022048-01-0.
(4) Presser TS and Luoma SN 2010 Ecosystem-Scale Selenium Modeling in Support of Fish and Wildlife Criteria Development for the San Francisco Bay-Delta Estuary, California USGS Administrative Report.

EPA Region 10 developed EPA Guidance Criteria for Water Temperature[30] to assist States and Tribes in adopting water quality standards for the protection of coldwater salmonids. The guidance criteria provide an averaging period for temperature targets and would be an appropriate benchmark against which to evaluate estimated impacts from CM1 alternatives, in addition to the evaluated criteria summarized in Table 11-1A-11.

Recommendation: *Compare impacts from CM1 and other CMs with the potential to impact water temperatures to EPA Guidance Criteria for Water Temperature to provide an additional metric for estimated impacts to Chinook salmon.*

The Draft EIS assumes that state-of-the art fish screens would function in a way that results in minimal to zero entrainment, but provides no evidence that these screens would completely or almost completely prevent entrainment of larval, juvenile, or adult covered fishes. No details are provided regarding the design or operation of the proposed fish screens.

Recommendation: *Explain how the proposed fish screens would prevent entrainment of all life stages of covered fishes. Describe the entrainment thresholds that would trigger reduced pumping at the North Delta Diversion intakes, and mitigation strategies for minimizing entrainment if the fish screens do not function as anticipated.*

The construction analysis relies on Best Management Practices for concluding that potential impacts to aquatic species would not be adverse. The construction is estimated to span ten years, coffer dams are expected to be constructed simultaneously, and potentially increasingly severe weather conditions during the ten-year construction period are likely to challenge the most effective Best Management Practices. Additionally, some of the equipment that would need to be constructed (including the dual 40 foot wide tunnel boring machines) would be some of the largest in the world and the Best Management Practices that have been designed for more conventional construction projects may not be applicable or effective as anticipated.

Recommendation: *Describe options for minimizing construction impacts in the event that BMPs do not perform as anticipated or completely fail, given the size and scale of the construction.*

NEPA effects determinations used in Chapter 11 include: beneficial, not adverse, adverse, and no determination. These terms are not defined nor are thresholds for selecting among them identified. The reader is not provided with an indication or description of the magnitude of estimated positive or negative impacts or uncertainty associated with each conclusion.

Recommendation: *Define the NEPA conclusions and provide thresholds -- quantitative when possible -- for each category so that it is clear why some estimated impacts result in a NEPA conclusion.*

Multiple indicators are used to evaluate impact and derive NEPA Effects determinations; however, the Draft EIS does not describe how each indicator was used to support the NEPA effects determination. For example, AQUA-42 Effects of Water Operations on Conditions for Chinook salmon (Winter-Run ESU) uses nine indicators to determine the overall effect of CM1 alternatives on adult and juvenile migration for winter run Chinook salmon. We have summarized key information from this section in the following table:

[30] http://www.epa.gov/region10/pdf/water/final_temperature_guidance_2003.pdf

AQUA-42 Effects of Water Operations on Conditions for Chinook salmon (Winter-Run ESU)

Migration Indicators	**Alt 1**	**Alt 4**	**Alt 7**	**Alt 8**
Upstream of Red Bluff flow during juvenile emigration period (Nov – August)	Similar to No Action Alternative (NAA) July & October + 36% Aug, Sept, & Nov -44%	Similar to NAA November 5-18% lower	Similar to NAA November -14%	Flows 26% lower than NAA
Monthly mean temperature between Keswick and Bend Bridge (Nov – Aug)	Less than 5% difference in monthly mean T relative to NAA	Less than 5% difference in monthly mean T relative to NAA	Less than 5% difference in monthly mean T relative to NAA	Less than 5% difference in monthly mean T relative to NAA
Flow during adult migration (Dec – Aug)	Similar to NAA; August flows could be 19% lower.	Similar to NAA but May & June +12%	Similar to NAA or greater w/ few (unstated) exceptions.	Similar to NAA but up to 18% lower in July and August
Monthly mean T btw Keswick and Bend Bridge (Dec – Aug)	Less than 5% difference in monthly mean T relative to NAA	Less than 5% difference in monthly mean T relative to NAA	Less than 5% difference in monthly mean T relative to NAA	Less than 5% difference in monthly mean T relative to NAA
Through-Delta Monthly mean flows downstream of NDD	10-31% lower than NAA	11-23% lower than NAA	25% lower than NAA	15% lower than NAA in November
Predation at intakes % of annual juvenile production (2 methods)	9%-3% 18.5%	0.02 – 0.30% 12%	0.02 – 0.30% 12%	0.02 – 0.30% 11.6%
	19,000 linear feet 22 acres of habitat	6360 linear feet 12.3 acres	6360 linear feet 12.3 acres	6360 linear feet 12.3 acres
DPM analysis of % survival through the Delta to Chipps	Wet – 45.5% Dry – 26% All – 33.3%	Wet – 45-46% Dry – 25-27% All – 33-35%	Wet – 45% Dry – 26% All – 33%	Wet – 44% Dry – 27% All – 33.5%
Adult migration -- % of Sacramento River-origin water at Collinsville	December – 63% January – 71% February – 67%	December – 66% January – 73% February – 68%	December – 65% January – 73% February – 67%	Results not provided for Alt 8 but a range of 58–71%
NEPA Effects Determination	**Adverse**	**Not Determined**	**Not Determined**	**Adverse**

It is not clear whether all nine indicators are considered equal when identifying the NEPA effect determination for migration overall. The monthly mean temperatures do not substantially vary among alternatives, so that indicator appears to be less useful than the others in differentiating between the alternatives. Some indicators show improved conditions relative to the No Action Alternative, while others show relatively worse conditions. For some indicators, the level of detail that is provided in the text differs from one alternative to another. The narrative descriptions of the multiple indicators in the NEPA Effects paragraphs often highlights different indicators when discussing the NEPA Effects determination, suggesting that some indicators are more important than others, depending on the alternative being evaluated. The reader sees only the summarized results of multiple indicators but cannot ascertain how the information was used to determine NEPA effects.

Recommendation: *Explain how each metric was used, and how the metrics were used in combination, to derive the NEPA Effects determinations, including whether the metrics were weighted in any way. Thresholds that were used to determine the appropriate NEPA Effects conclusion should be disclosed.*

The description of Clean Water Act programs in the Water Quality Regulatory Setting Section 8.3.1.1 (p. 8-112-114) contains a number of errors. For example, it appears to indicate that EPA has delegated its CWA oversight responsibility to the State of California. A useful description of CWA programs and how they operate in the San Francisco Bay Estuary can be found in the US EPA Advance Notice of Proposed Rule-making for Water Quality Challenges in the San Francisco Bay/Sacramento San Joaquin Delta, available at http://www2.epa.gov/sites/production/files/documents/baydeltaanpr-fr_unabridged.pdf pages 11-18.

Recommendation: *Review the description of CWA programs in the San Francisco Bay Delta Estuary and California.*

It appears from the Draft EIS that there could be significant impacts to vernal pools from implementation of CM1 and CM4. Impacts and mitigation for vernal pools are only presented as "vernal pool complex" and it is not clear from the document what percentage of this habitat is vernal pool wetlands (wetted surface area).

The Draft EIS states that implementation of CM4 may result in the loss of 372 acres of vernal pool complex habitat and CM1 could result in up to an additional 37 acres of loss (depending on alternative). With the information in the Draft EIS we cannot assess what proportion of these impacts are to wetlands. The document also states that AMM12 limits removal of "vernal pool crustacean habitat" to 10 wetted acres. However, it is not clear if all vernal pool wetlands are being considered "crustacean habitat." According to the document, these 10 wetted acres of crustacean habitat equates to approximately 67 acres of "vernal pool complex" habitat. The 67 acres of impact allowed by AMM12 is significantly less than the 372 acres of potential loss identified for CM4.

Because the Draft EIS only presents theoretical footprints for tidal marsh restoration under CM4, it is unclear whether CM4 can be fully implemented while limiting vernal pool loss to 10 wetted acres as called for under AMM12. As the Draft EIS acknowledges, vernal pools are a highly sensitive community that has experienced significant loss in California. Yet, only 40 acres of restoration and 400 acres of protection are proposed in the near-term under the plan. Given the potential direct loss identified for CM1 and CM4, and the potential functional loss identified from implementation of CM2, the proposed vernal pool restoration may not be sufficient to meet mitigation needs under CWA Section 404. Mitigation needs cannot be fully assessed until project level information is available for all CMs.

Recommendations: *Clearly state what percentage of the vernal pools complex habitat may be vernal pool wetlands (by wetted surface area). Clarify whether AMM12 applies to all vernal pool wetlands or only vernal pool wetlands occupied by special status crustaceans.*

Clearly state how many acres of vernal pool wetlands may be lost from implementation of CM1 and CM4. Clarify whether it is feasible to fully implement CM4 while limiting vernal pool losses to 10 wetted acres and if there is a tradeoff, please disclose and discuss.

Quantify the potential functional loss to vernal pool habitat from changes in inundation and acknowledge that compensatory mitigation may be required for loss of function even if there is no net loss in area. Acknowledge and address that compensatory mitigation requirements under CWA Section 404 maybe greater than the vernal pool complex restoration and protection proposed under the plan.

Appendix 3B details dredged material (DM) and reusable tunnel material (RTM) disposal and reuse commitments, among other environmental commitments. Neither Appendix 3B nor Chapter 3 details how much DM and RTM will be generated by each alternative; however, Chapter 12 identifies potentially significant impacts to wetlands and waters from disposal of this material. Impacts to jurisdictional wetlands and waters must be avoided and minimized to the maximum extent practicable consistent with the 404 Guidelines. Furthermore, the Draft EIS does not address the Delta Long Term Management Strategy (LTMS)[31] goal to maximize beneficial reuse of DM by setting specific reuse targets for both DM and RTM. Appendix 3B states that material will be placed in multiple storage locations and reused in BDCP projects to the extent feasible, however, there are potentially many other construction and restoration projects in the Delta that could use the DM and RTM. If material will be placed in waters either temporarily or permanently, sediment testing will need to be coordinated with the Corps, EPA, and Regional Water Quality Control Boards.

Recommendations: *Include the volume of DM and RTM in Chapter 3 and Appendix 3B. In Appendix 3B clearly state that placement of DM and RTM must comply with the CWA 404(b)(1) Guidelines, in addition to meeting to BDCP goals.*

Discuss beneficial reuse goals for DM and RTM, including whether material will be made available for reuse in projects within and outside the BDCP.

Discuss whether placement of DM and RTM on peat soils, either temporarily or permanently, will further subsidence and undermine levee stability.

Clearly identify accessibility of placement sites and commit to promoting beneficial reuse of DM and RTM both within and outside BDCP projects.

For any material placed in waters, clarify that sediment testing must be coordinated with the USACE, EPA, and RWQCB.

F. Energy

The Draft EIS states that conveyance facility energy requirements are moderate and would not result in any substantial impacts (p. 21-25). The cumulative impacts analysis concludes that, while the cumulative energy demands of the BDCP, in combination with ongoing and reasonably foreseeable

[31] The San Francisco Bay Long Term Management Strategy (LTMS) is a cooperative effort of EPA, the US Army Corps of Engineers, the San Francisco Regional Water Quality Control Board, the San Francisco Bay Conservation and Development Commission, and stakeholders in the region to develop a new approach to dredging and dredged material disposal in the San Francisco Bay area. The LTMS serves as the "Regional Dredging Team" for the San Francisco area, implementing the National Dredging Policy in cooperation with the National Dredging Team.http://www.epa.gov/region9/water/dredging/ltms/index.html

future projects, may affect regional resources, the increase attributable to any alternative is not cumulatively considerable, compared to statewide use (300,000 gigawatt-hours) (p. 21-61). A comparison only to statewide use does not provide sufficient context for decision makers and the public to understand the new energy demands associated with the BDCP alternatives and evaluate their potential effects on local and regional energy supplies.

Recommendations: *Include a table showing the current overall energy usage by the CVP and SWP to supply water to the end users, compared to the projected overall energy demand by the CVP and SWP to do the same under the No Action and each of the BDCP build alternatives. Separately, for additional context, compare these projections to recent and reasonably foreseeable development projects, including the High Speed Rail project. Include an evaluation of the effects of each alternative on peak and base period demands, as well as effects on local and regional energy supplies, as recommended by the State CEQA Energy Conservation Guidelines (Appendix F).*

EPA supports the use of gravity-fed tunnels to transport water to minimize net energy use for conveyance to the greatest extent possible. Alternative 4 is designed to take greater advantage of gravity than the other alternatives. According to the Draft EIS, the Department of Energy has estimated that construction of two 40-foot tunnels (Alternative 4) would require about 78% more electrical energy than would be needed for alternatives requiring two 33-foot tunnels (p. 21-31 and Table 21-9); however, since Alternative 4 would eliminate the need for an intermediate low-head pumping plant for flows of more than 9,000 cfs (p. 21-31), Alternative 4 would be able to 'recover' the extra energy used during construction in 25 years. It is not clear why the 33-foot tunnel alternatives do not include gravity-fed designs.

Recommendations: *Discuss the practicability of increasing the energy head (difference in water elevation) between the intermediate Forebay at the north of the Delta and the Clifton Court and Byron Forebays to allow for greater gravity-fed flow through the 33-foot tunnel alternatives. Discuss whether 9,000 cfs could be achieved without the need for intermediate low-head pumping through 33-foot tunnels.*

Consider alternate locations for the intakes, including upstream of the Sacramento Regional Wastewater Treatment Plant, and evaluate whether an increase in the energy head between the alternative north end intake locations and the south end of the proposed conveyance system could decrease net energy use for each alternative.

Include a table that demonstrates, for each alternative, the time that would be needed to 'recover' the energy used during construction. Incorporate into the table any additional alternatives that would minimize net energy use, and the time to 'recover' energy used during their construction. As part of the same table, include the overall energy for construction and operation of the BDCP for the total expected life of the project.

EPA strongly supports the goal, stated in the Draft EIS, to power the BDCP's average 270 megawatt (MW) construction load and 57 MW permanent load with 100% renewable energy (p. 21-33). This would avoid emissions of greenhouse gases and other pollutants associated with the generation of energy from fossil fuels. We find, however, that the Draft EIS defers much of the necessary analysis of renewable energy benefits, challenges, and opportunities to the future development of other documents, and lacks clear commitments regarding procurement of renewable energy. For example, regarding construction, Mitigation Measure AQ-15 in Chapter 22 includes a suite of greenhouse gas emission reduction strategies that would be utilized to develop a future GHG Mitigation Program to reduce construction related GHG emissions to net zero (p. 22-75). At this time, it is unclear which strategies

would comprise the program and whether a commitment would be made to enter into a purchase agreement for 100% renewables (Strategy 1) or temporarily increase renewable energy purchases to offset BDCP construction emissions (Strategy 12).

Regarding operations, Chapter 21 of the Draft EIS explains that the energy needed for pumping water would be provided from a mix of hydro, power purchase contracts, power exchanges and power markets (p. 21-22). The Draft EIS notes that 60% of the State Water Project's (SWP) 2010 load was met by hydro resources, while the remainder of the load was met by a mix of coal power and real-time purchases from the California Independent System Operator's (CAISO) energy market (p. 21-7). According to Chapter 21, the potential for new or expanded electrical power generation facilities is not discussed in the Draft EIS because it will be addressed through SWP power purchase programs (p. 21-33). Similarly, new energy sources to support the potential increased load from the Central Valley Project (CVP) are not discussed in the Draft EIS. It is unknown what type of power source (e.g., renewable, natural gas) would be substituted for the CVP-generated electricity that would be consumed by the project, itself, or to what extent some of additional energy required would be made up with higher efficiency (p. 22-198).

The Draft EIS references DWR's Climate Action Plan, which established near-term (by 2020) and long-term (by 2050) goals of reducing emissions of greenhouse gases throughout DWR's operations -- including those of the SWP -- in part, by increasing the use of renewable energy sources. Similarly, the President's June 2013 Climate Action Plan established a goal for the federal government of consuming 20 percent of its electricity from renewable energy sources by 2020.

Recommendations:
Identify opportunities to power the BDCP conveyance system with renewable energy for the life of the project to demonstrate how the stated goal of powering the anticipated construction and operations energy loads with 100% renewable energy could be met. Consider committing to power construction and/or the conveyance system operations with 100% renewable energy, similar to the CA High Speed Rail (HSR) Authority's commitment to use 100% renewable energy for operation of the HSR. At minimum, commit to ensure that construction and operation of the BDCP facilities are powered by renewable energy sources to the greatest extent feasible.

Discuss whether DWR's Renewable Energy Procurement Plan (REPP) would provide a mechanism to secure 100% renewable sources for construction and operations of the BDCP prior to project approval. Consider adopting an approach similar to the California High Speed Rail Authority's partnership with the National Renewable Energy Laboratory to create and implement a strategic energy plan for the BDCP. Outline the steps that would need to occur, the barriers that would need to be overcome and the potential for partnerships with entities in the vicinity of the Delta that are aiming to achieve similar goals.

Quantify how securing new,100% renewable energy sources for construction and operations of the BDCP would assist DWR in achieving its Climate Action Plan (CAP) goals. Discuss the extent to which hydropower resources will be used to meet the 2020 and 2050 goals in the CAP, and whether larger hydropower generators would qualify.

Discuss the extent to which the CVP is currently being used to meet California's renewable energy goals. To reduce potential indirect effects from substitute electricity for any new CVP energy usage, consider a commitment to ensure that new, renewable sources are secured to compensate for any use of CVP electricity for the BDCP.

Under the "NEPA Effects" section for each alternative in Chapter 21.3.3, the Draft EIS indicates that the use of Best Management Practices will ensure that only high-efficiency equipment is utilized during construction and that all feasible control measures to improve equipment efficiency and energy use are included. Similarly, it is noted that operation of the water conveyance facilities would be managed to maximize efficient energy use, including off-peak pumping and the use of gravity and, therefore, would not result in a wasteful or inefficient energy use. These conclusions are identical for every tunnel conveyance alternative.

Recommendations: *Explain how all of the energy efficiency mitigation measures and Best Management Practices referenced in Chapter 21 would be made an enforceable part of the project's implementation schedule. We recommend implementation of applicable mitigation measures prior to or, at a minimum, concurrently with, commencement of construction of the project.*

With regard to solicitations for future contracts for project construction and operations, consider including the following as energy efficiency requirements:

- *The use of energy- and fuel-efficient fleets;*
- *For construction, the utilization of grid-based electricity and/or onsite renewable electricity generation, to the extent possible, rather than diesel and/or gasoline powered generators;*
- *Using lighting systems that are energy efficient, such as LED technology;*
- *Recycling construction debris to maximum extent feasible;*
- *Planting shade trees in or near construction projects where feasible;*
- *Giving preference to construction bids that use Best Available Control Technology, particularly those seeking to deploy zero emission technologies;*
- *Employing the use of alternative fueled vehicles;*
- *Using the minimum feasible amount of GHG-emitting construction materials that is feasible;*
- *Use of cement blended with the maximum feasible amount of flash or other materials that reduce GHG emissions from cement production; and,*
- *Use of lighter-colored pavement where feasible.*

G. HCP Monitoring and Assessment

The BDCP is a project of such significance, with a reliance on extensive monitoring and technical information, that its development and approval represents an opportunity to advance aquatic resource monitoring for the entire state of California. For several years, EPA and partner state and federal agencies have been advancing a comprehensive monitoring program that supports integration of federal and state aquatic resource permitting for Habitat Conservation Plans (HCPs) and Natural Community Conservation Plans (NCCPs). When implemented as a monitoring program, the framework that has been established will generate information to evaluate site specific and regional outcomes of habitat conservation and aquatic resource mitigation activity. This framework has been created in consideration of the Clean Water Act (CWA) Mitigation Rule (33 CFR Parts 325 and 332; 40 CFR Part 230), the "Five Point Policy" (Addendum to the HCP Handbook), Tenets of a State Wetland and Riparian Monitoring Plan (CA Water Quality Monitoring Council 2010)[32], and Designing Monitoring Programs in an Adaptive Management Context for Regional Multiple Species Conservation Plans[33].

[32] Tenets of a State Wetland and Riparian Monitoring Program. 2010. California Water Quality Monitoring Council (CA Wetland Monitoring Workgroup). (http://www.waterboards.ca.gov/mywaterquality/monitoring_council/wetland_workgroup/docs/2010/tenetsprogram.pdf).

[33] Atkinson, A. J., P. C. Trenham, R. N. Fisher, S. A. Hathaway, B. S. Johnson, S. G. Torres and Y. C. Moore. 2004. Designing Monitoring Programs in an Adaptive Management Context for Regional Multiple Species Conservation Plans. U.S. Geological Survey Technical Report. USGS Western Ecological Research Center, Sacramento, CA. 69 pages. (http://www.dfg.ca.gov/habcon/nccp/publications.html).

At the state level, the 2007 MOU signed by the Secretaries of the California Environmental Protection Agency (Cal/EPA) and the California Natural Resources Agency (Resources Agency) establishes the Water Quality Monitoring Council. The Council now requires the boards, departments and offices within Cal/EPA and the Resources Agency to integrate and coordinate their water quality and related ecosystem monitoring, assessment, and reporting. The Monitoring Council is further aligning state aquatic resource monitoring programs with their federal counterparts in order to develop an integrated monitoring program that addresses the needs of the HCP/NCCPs while providing CWA monitoring data and information that will satisfy the Corps of Engineers, EPA, and the Water Boards.

The primary goal of such a program is to develop a fully integrated monitoring framework (covering ESA, CESA, CWA, and the Porter-Cologne Act) that provides the best available information on the extent of impacts from permitted activities and progress toward achieving conservation targets using common databases to facilitate the sharing of this information across eco-regions and among local, regional, state and federal programs.

The monitoring design for this comprehensive federal/State monitoring program is based on the EPA tiered monitoring approach (http://water.epa.gov/type/wetlands/outreach/upload/techfram_pr.pdf), which has also been adopted by the State, is increasingly used by programs across the country, and is consistent with the tiered approach described by Atkinson et al. (2004)[34]. The Delta Science Plan (dated 12/30/2013 and found at http://deltacouncil.ca.gov/science-program/delta-science-plan) describes a process by which this monitoring approach could be developed and implemented, including sections on adaptive management, data management, modeling, and communication. EPA strongly supports the recommendations in the Delta Science Plan.

Recommendation: *Discuss how the BDCP mitigation monitoring and reporting program will be consistent with the federal and State efforts discussed above.*

[34] Ibid

8/27/2014 1:33pm

BDCP DEIS: Corrections and Additional Editorial Recommendations

To: 'will.stelle@noaa.gov'
Cc: 'ren_lohoefener@fws.gov'; 'dmurillo@usbr.gov'; 'Ryan Wulff - NOAA Federal' <ryan.wulff@noaa.gov>; Johnson, Kathleen <Johnson.Kathleen@epa.gov>; Hanf, Lisa <Hanf.Lisa@epa.gov>; Skophammer, Stephanie SKOPHAMMER.STEPHANIE@EPA.GOV

Will, Ryan –

Yesterday, I sent you EPA's major comments on the BDCP DEIS. During our review of the DEIS, we also identified a number of corrections that are needed, as well as some missing information that would improve the document's usefulness. These are listed below. In our role as a Cooperating Agency, we request that you also address the following in the Supplemental Draft EIS:

- Potential funding sources shown on page 8-105 of the BDCP are not valid. The table in the BDCP shows EPA's 2011 budget being spent on conservation measures under the BDCP. The text states that "Funding for this program [California Bay-Delta Restoration appropriations] is assumed to continue and to support natural community restoration under BDCP" (p.8-106 of the BDCP). EPA has not committed any funding towards the construction and implementation of the BDCP and any future funds that are available for projects in the San Francisco Bay Delta are subject to EPA's future budget, legislative mandates, and agency discretion. Please remove the section of the BDCP that indicates that EPA funding is assumed to continue and support restoration components of the BDCP for 50 years.

- There are errors in the Draft EIS describing multiple Clean Water Act programs including the CWA 404 Regulatory Program. In addition, the CWA Section 404 Program is described differently in different chapters. Please make the following corrections:

    - Correct language on page 8-114 that states that CWA Section 404 is implemented "via the issuance of National Pollutant Discharge Elimination System permits." The NPDES program comes from Section 402 of the CWA. The words "NPDES" permits should be replaced with "Section 404 permits." The following sentence in the Draft EIS accurately states that the "USACE is authorized to issue Section 404 permits."

    - Correct language on page 8-113 (lines 4-6) that states California "administers the CWA through the Porter-Cologne Act." Section 303 of the CWA gives the states the authority to establish water quality standards, subject to EPA approval, and the NPDES Program is delegated to the State of California under CWA Section. California administers these CWA programs **and** the Porter-Cologne Act.

    - The following sentence in the Draft EIS on page 8-114 is not correct and should be removed: "If a federal agency is a partner in the implementation of a project, the proposed action/project must be recognized as the LEDPA." A proposed action is not the LEDPA simply because a federal agency is a partner and chooses that proposed action as its preferred alternative. Federal agencies are required to comply with the 404(b)(1) Guidelines and their preferred alternative must meet the restrictions to discharge outlined at 40 CFR 230.10.

- Table 3-3 (p.3-19) "Summary of Proposed BDCP Conservation Measures of All Action Alternatives" is the only complete Conservation Measure (CM) summary table provided in the entire Draft EIS. While it is helpful to the extent that it lists all of the CMs in one place, it is lacks key information such as acreage

targets.

- CM2 is not included in the list of Conservation components for Alternative 1A on p. 3-49. The Draft EIS states that CM2 is included in all of the Alternatives considered.

- CM2 is not included in the description of CM3 Natural Communities Protection and Restoration (page 3-129).

- Table 8-1 Designated Beneficial Uses for Water Bodies in the Study Area identified Estuarine Habitat as an "Additional Beneficial Use of the Delta" suggesting the Delta is the only group of water bodies with the Estuarine Habitat beneficial use. The San Francisco Bay and its component water bodies, including Suisun Bay and Marsh also have the Estuarine Habitat beneficial use and they are part of the BDCP "Plan Area."

- The 2012 Pulse of the Delta was finalized in October 2012. Delete the word "draft" in reference to the *2012 Pulse of the Delta* on Page 8-48, line 39.

- Figure 8-7 shows the compliance locations commonly discussed in Chapter 8 with so many labeled locations that the reader cannot see their location precisely.

- It is very helpful to readers to provide citations when "available evidence" is referred to in the Draft EIS. For example, page 8-457, line 7, states "available evidence suggests that restorations activities establishing new tidal and non-tidal wetlands, new riparian and new seasonal floodplain habitat could potentially lead to new substantial sources of localize DOC loading within the Delta."

- Existing Conditions and No Action Alternative values are slightly different in Tables 11-1A-5 (p. 293) and 11-4-4 (page 1302). The tables rely on the same entrainment analysis at south Delta pumps, but one is for Alternative 1A and the other is for Alternative 4. The Existing Conditions and No Action Alternative numbers are very similar, but should be identical, and it is not clear why they are different. This occurs again for the North Bay Aqueduct Analysis (p. 11-295 Table 11-1A-7 v. page 11-4-6 page 11-1304).

- The list of local habitat conservation plans and natural community conservation plans in the Delta includes plans that are adjacent to the Delta is missing the south Sacramento HCP (page 11-176).

- Page 11-160: There is very little description of Section 10 and Section 7 of ESA. The Revised or Supplemental Draft EIS should include a description of basic regulatory requirements and targets that are applicable to the BDCP such as "contribute to recovery" for Section 10 and "avoid jeopardy" for Section 7.

- Page 11-166: CWA Section 303(c) Water Quality Standards and protection of beneficial uses should be discussed in this section.

- Page 11-175: The need for a change in point of diversion to D1641 should be discussed in this section.

- Page 11-183: Table 11-3, please discuss options for soft stabilization along river banks near the intake structures.

- Table ES-11 and its associated text describe changes in average Delta outflow, total exports, and south Delta pumping for the BDCP alternatives in the late long term (2060); however, the baseline for this comparison should be specified.

- The change in total exports from the No Action Alternative to Alternative 1 is listed in Table ES-11 as 1,025 thousand acre feet however, subtracting the value of No Action Alternative total exports (4441 TAF) from that of Alternative 1 total exports (5459 TAF) yields a difference of 1018 TAF. Similar small potential errors are present in the rest of the Total Exports Change column.

- The average Delta outflow and export values in Table ES-11 do not match average Delta outflow and export values in Table 5-4 Water Supply Summary Tables. Many of the values are very close to one another, but are not the same. The true values are important for determining compliance with Delta outflow water quality standards.

- Selenium effects and thresholds vary between the EIS and the appendices (see p. 8-167 (table 8-55) and page 8M-9 (table 8M-3)).

- Language used to describe Total Maximum Daily Loads in the Plan Area and Study area for Chapter 8 could be misinterpreted. Table 8-4 and the text in lines 13-15 on page 8-24 state that a number of TMDLs are "complete", which could be read as suggesting that TMDL water quality targets have been achieved, which is not accurate for most TMDLs. Many of these TMDLs are *adopted* and water quality is improving as a result, but is not yet meeting the TMDL quantitative targets. Replace the word "complete" with "adopted" in reference to TMDLs in this section.

- Table 22-5 should be updated to identify the annual PM2.5 NAAQS as 12 micrograms per meter cubed ($\mu g/m^3$).

- Table 22-3 provides ambient air quality monitoring data, in terms of standards exceedances, for the relevant air basins from 2008 to 2010. This table should be updated to provide monitoring data from 2010 to 2012.

- The data used to describe organophosphate pesticides on page 8-85, Tables 8-23 and 8-24 do not characterize existing conditions. More recent data show that diazinon is rarely detected in Delta waters in recent years and chlorpyrifos detections and exceedences have substantially declined. Update the pesticide discussion using more recent data. These data are available at http://www.ceden.org.

- In Table 30-2, it is unclear how much of the environmental water is also used by agriculture and urban users. Separate tables by water year type would be more informative.

Thank you for your consideration of these recommendations. If you have any questions, please contact me.

-Kathy

Kathleen Martyn Goforth, Manager
Environmental Review Section
EPA Region 9 (ENF-4-2)
75 Hawthorne Street
San Francisco, CA 94105
415-972-3521

EXHIBIT B

Westlaw Delivery Summary Report for BRODSKY,MICHAEL

Your Search:	RN0925376
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Citation Text:	2009 CA S.B. 1 (NS)
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2009 California Senate Bill No. 1, California 2009-2010 Seventh Extraordinary Session (FULL TEXT - NETSCAN)

CALIFORNIA COMMITTEE REPORT

VERSION: General
November 04, 2009
Simitian and Steinberg.

RELATED BILLS:

SUMMARY:An act to amend Sections 29702, 29725, 29727, 29733, 29735, 29735.1, 29738, 29741, 29751, 29752, 29754, 29756.5, 29763, 29771, and 29780 of, to add Sections 29703.5, 29722.5, 29722.7, 29728.5, 29759, 29773, 29773.5, and 29778.5 to, to add Division 22.3 (commencing with Section 32300) to, to repeal Section 29762 of, and to repeal and add Sections 29736, 29739, 29753, 29761, 29761.5, and 29764 of, the Public Resources Code, and to add Division 35 (commencing with Section 85000) to, and to repeal Division 26.4 (commencing with Section 79400) of, the Water Code, relating to public resources, and making an appropriation therefor.

TEXT:

BILL ANALYSIS

SB 1 X7

Revised - As Amended**RN0925376**

SENATE THIRD READING SB 1 X7 (Simitian and Steinberg) As Amended November 3, 2009 Majority vote

SENATE VOTE : 29-5

SUMMARY : Reforms state policies, programs and governance for the Sacramento-San Joaquin Delta (Delta), and establishes guidelines for developing a new Delta Plan.

1)Expands the ‘basic goals‘ for the Delta and the DPC, to include achieving the two coequal goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resources, and agricultural values of the Delta as an evolving place.

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2)Adds Knightsen and Collinsville as ‘unincorporated towns‘ in the Delta.

3)Reconstitutes the Delta Protection Commission (DPC):

a) Reduces membership of the DPC from 23 to 15, including:

i) Five members from the five Delta county Boards of Supervisors;

ii) Three elected city council members, from south, west and north Delta;

iii) Three members representing reclamation (i.e., levee) districts in specified regions;

iv) Secretary of Food and Agriculture, or sole designee;

v) Executive Officer of State Lands Commission, or sole designee;

vi) Secretary of Natural Resources Agency, or sole designee; and,

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vii) Secretary of Business, Transportation and Housing, or sole designee.

b) Allows member appointments at the pleasure of the appointing entity;

c) Designates DPC chair as a voting member of the Delta Stewardship Council (Council); and,

d) Changes nature of DPC advisory committees, to have one with broader representation.

4)Requires DPC to create a regional economic sustainability plan, including creation of a Delta Investment Fund in the State Treasury.

5)Authorizes DPC to make recommendations to Council, including specified issues, and requires Council to consider DPC recommendations and determine, in Council discretion, if recommendations are feasible and consistent with the objectives of the Delta Plan.

6)Requires the DPC, by July 2010, to prepare and submit to the Legislature recommendations regarding the potential expansion of or change to the Delta's primary zone.

7)Requires DPC to report annually to the Governor and the Legislature on specified issues.

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8)Creates a new Sacramento-San Joaquin Delta Conservancy (Conservancy):

a) Authorizes Conservancy, as a primary state agency for ecosystem restoration, to support efforts that advance environmental protection and the economic well-being of Delta residents, including specified activities;

b) Creates Conservancy board with 11 voting members of the board, including the Secretary of the Natural Resources Agency; Director of Finance; one member (or designee) of each of board of supervisors for Contra Costa, Sacramento, San Joaquin, Solano, and Yolo Counties; two public members, appointed by the Governor; one public member appointed by the Senate Committee on Rules; and, one public member appointed by the Speaker;

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c) Designates nonvoting members of the board and nonvoting liaison advisers who would serve in an advisory, nonvoting capacity;

d) Establishes terms of board members, from ‘at the pleasure‘ (for Governor and boards of supervisors) to four years (for legislative appointments) with 2-term limit;

e) Requires voting members of the board to elect a chairperson and vice chairperson, and other officers as necessary, from among the voting members, but chairperson must be from among county supervisor members; and,

f) Provides the Conservancy administrative powers, including authority to hire staff, adopt rules and procedures for conduct of the Conservancy's business, establish advisory committees, and enter into contracts.

9)Establishes and limits the Conservancy's powers and duties, including:

a) Authorizes Conservancy, as a primary state agency for ecosystem restoration, to support efforts that advance environmental protection and the economic well-being of Delta residents, including specified activities;

b) Limits the jurisdiction and activities of the Conservancy to the Delta and Suisun Marsh except if the board makes certain findings;

c) Establishes the Sacramento-San Joaquin Delta Conservancy Fund in the State Treasury, which may provide funding for ecosystem restoration projects consistent with the Conservancy's strategic plan or for ‘regional sustainability‘ consistent with the DPC's ‘Regional Sustainability and Land Use Plan;‘

d) Authorizes Conservancy, subject to specified conditions, to acquire, manage and transfer interests in property and water rights, with a preference for conservation easements;

e) Authorizes the Conservancy to accept funding from a broad range of sources, including creation and management of endowments;

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f) Requires the Conservancy to develop a strategic plan consistent with the Delta Plan, DPC's Regional Sustainability and Land Use Plan, the Central Valley Flood Protection Plan, the Suisun Marsh Preservation Act, and the Habitat Management, Preservation and Restoration Plan for the Suisun Marsh;

g) Authorizes the Conservancy to collaborate with other organizations and impose certain conditions on any grants it makes; and,

h) Prohibits the Conservancy from regulating land-use, exercising power over water rights held by others, or exercising the power of eminent domain.

10)Repeals the California Bay-Delta Authority Act.

11)Establishes new legal framework for Delta management, which:

a) Sets the coequal goals of ‘providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem‘ as the foundation for state decisions as to Delta management;

b) Sets certain objectives as inherent in the coequal goals;

c) Sets state policy of reducing reliance on the Delta to meet future water supply needs through a statewide strategy of investing in improved regional supplies and conservation;

d) Requires the Delta Stewardship Council (Council) land-use decisions to be guided by certain findings, policies, and goals;

e) States certain ‘fundamental goals for managing land use in the Delta;‘

f) Describes the longstanding constitutional principle of reasonable use and the public trust doctrine as the foundation of state water management policy;

g) Preserves procedural and legal protections under water

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rights law, as specified, and maintains scope of State Water Resources Control Board (SWRCB)/court jurisdiction;

h) Preserves specified statutes and legal doctrines as unaffected by this new division in the Water Code, including

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area-of-origin protections, water rights and public trust doctrine;

i) Establishes the Council as the successor to the California Bay-Delta Authority, and provides for the Council to assume its responsibilities;

j) Defines certain terms, including but not limited to the following key terms:

i) ‘Coequal goals‘ means ‘the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem,‘ but those goals are achieved in a manner to protect the Delta as an evolving place;

ii) ‘Council‘ means the Delta Stewardship Council, as established in Part 3;

iii) ‘Covered action‘ means Delta-related plan or program that meets certain conditions, including significant impact on achievement of the coequal goals.Specifies exemptions and clarifies that the definition will not abrogate vested rights; and,

iv) ‘Restoration‘ means achieving a close approximation of the Delta's ecosystem's natural potential, given past physical changes and future impact of climate change.

12)Requires the Council, the Department of Water Resource (DWR) or the Department of Fish & Game (DFG) to take certain ‘early actions,‘ including:

a) Appointment of Delta Independent Science Board;

b) Development of strategy to engage federal government in the Delta;

c) Development of DFG recommendations for in stream flow needs in the Delta; and,

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d) Certain Delta near-term ecosystem restoration projects, including the ‘Two-Gates Fish Protection Demonstration Project.‘

13)Requires the State Water Resources Control Board (SWRCB) to develop new ‘flow criteria,‘ to facilitate planning in Delta Plan and Bay Delta Conservation Plan, for the Delta ecosystem necessary to protect public trust resources;

a) Specifies process and substance for development of flow criteria;

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b) Requires SWRCB approval of change in State Water Project (SWP) and Central Valley Project (CVP) point of diversion, as specified, to include ‘appropriate‘ flow criteria;

c) Requires SWRCB to enter agreement with SWP/CVP contractors to pay costs;

d) Preserves SWRCB authority to review water rights and impose terms and conditions on water right permits; and,

e) Requires SWRCB to submit flow criteria to Council, for information purposes.

14)Requires SWRCB to submit prioritized schedule and costs for instream flow studies for the Delta and other high priority streams, with completion by certain dates.

15)Prohibits DWR from commencing construction of any new Delta diversion, conveyance or other facility related a change in the point of diversion, until:

a) SWRCB issues an order approving a change in the point of diversion; and,

b) SWP/CVP contractors execute a contract to pay the costs for environmental review, planning, design, construction, and mitigation for the construction, operation, and maintenance of any new Delta water conveyance facility, including mitigation of property tax or assessments levied by local agencies for land used in such construction.

16)Creates the Council as an independent state agency;

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a) Establishes a seven-member Council, with four appointments by the Governor, two by the Legislature, and the chair of the Delta Protection Commission;

b) Specifies both initial and subsequent staggered terms for Council members;

c) Provides for Council salaries, hiring of Council staff and headquarters;

d) Requires members to ‘possess diverse expertise and reflect a statewide perspective;‘ and,

e) Specifies Council administrative authorities (e.g., contracting) and hearing authority.

17)Authorizes Council to review ‘covered [in-Delta] actions‘ by state and local agencies for consistency with Delta Plan.

a) Requires state and local agencies that implement ‘covered [in-Delta] actions‘ to submit certification of project

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consistency with Delta Plan to Council;

b) Allows any person to appeal such certifications, within 30 days;

c) Requires Council to review certification and determine consistency;

d) Requires covered actions deemed inconsistent to be reviewed by proposing agency, which makes changes and resubmits a certification if it decides to proceed; and,

e) Specifies process for Council review of agency certifications.

18)Creates the 'Delta Watermaster' as enforcement officer for SWRCB in the Delta.

a) Requires SWRCB to delegate certain enforcement - not adjudicatory - authorities; and,

b) Limits Delta Watermaster authority to in-Delta diversions and SWRCB orders and terms/conditions on water

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right permits that apply to conditions in the Delta.

19)Creates the Delta Independent Science Board (Science Board) and Delta Science Program.

20)Requires Council to develop, adopt, and commence implementation of the 'Delta Plan' by January 1, 2012, with a report to the Legislature by March 31, 2012;

a) Requires Council to consider strategies and actions set forth in the Delta Vision Blue Ribbon Task Force Strategic Plan (Strategic Plan);

b) Allows Council to identify actions that state or local agencies may take to implement the sub-goals or strategies;

c) Requires Council to submit the Delta Plan to appropriate federal authorities for federal approval, if it complies with Coastal Zone Management Act;

d) Requires consultation and cooperation between the Council and federal, state and local agencies in developing the Delta Plan;

e) Requires Council to review the Delta Plan every five years, allowing the Council to request state agency recommendations for revisions;

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f) Requires Council to develop the Delta Plan consistent with federal statutes, including the Coastal Zone Management Act, Clean Water Act and the Reclamation Act; and,

g) Requires ‘performance measurements‘ to allow Council to track Delta Plan progress.

21)Requires the Delta Protection Commission (DPC) to develop proposal to protect, enhance, and sustain the unique cultural, historical, recreational, agricultural, and economic values of the Delta as an evolving place, for consideration by the Council as part of Delta Plan, including proposals for:

a) Federal/state designation of the Delta as a place of special significance;

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b) Regional economic plan to increase investment in agriculture, recreation, tourism and other resilient land uses in the Delta, including administration of Delta Investment Fund;

c) Expansion of state recreation areas in the Delta; and,

d) Market incentives and infrastructure to support Delta agriculture.

22)Requires the Delta Plan to further the coequal goals of Delta ecosystem restoration and a reliable water supply;

a) Limits geographic scope of ecosystem restoration projects to the Delta (defined separately as legal Delta and Suisun Marsh), except for ecosystem projects outside the Delta that contribute to achievement of coequal goals; and,

b) Requires Delta Plan to promote specified characteristics and include specified strategies for a healthy Delta ecosystem.

23)Requires the Delta Plan to promote a more reliable water supply to:

a) Assist in meeting the needs of reasonable and beneficial uses of water;

b) Sustain the economic vitality of the state; and,

c) Improve water quality to protect human health and the environment.

24) Requires the Delta Plan to promote statewide water conservation, water use efficiency, and sustainable use of water, as well as improvements to water conveyance/storage and operation of both to achieve the coequal goals.

25)Requires the Delta Plan to attempt to reduce risks to people, property, and state interests in the Delta by promot-

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ing effective emergency preparedness, appropriate land uses, and strategic levee investments;

a) Allows the Delta Plan to include actions outside the

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Delta that reduce flood risks, and local plans of flood protection;

b) Requires Council to recommend priorities for state investments in levee operation, maintenance, and improvements in the Delta;

c) Allows Council, in consultation with the California Department of Transportation, to address climate change effects on state highways in the Delta in the Delta Plan; and,

d) Allows Council, in consultation with the California Energy Commission, to address the needs of Delta energy development, storage and distribution in the Delta Plan.

26)Requires the Delta Plan to comply with the following requirements:

a) Be based on best available scientific information and advice from the Science Board;

b) Includes quantified targets for achieving the objectives of the Delta Plan;

c) Utilizes monitoring and analysis to determine progress toward targets;

d) Describes methods to measure progress; and,

e) Includes adaptive management strategy for ecosystem restoration and water management.

27)Requires DWR to prepare proposal to coordinate flood and water supply operations of the State Water Project and Central Valley Project, for Council consideration.

28)Requires Council to consider including the Bay Delta Conservation Plan (BDCP) under certain circumstances, including:

a) Conditions BDCP incorporation into Delta Plan and state funding for BDCP public benefits on compliance with the Natural Community Conservation Planning (NCCP) Act and California Environmental Quality Act (CEQA);

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b) Requires certain analyses as part of CEQA compliance:

i) Reasonable range of flow criteria, rates of diversion and other operational criteria required to satisfy NCCP Act;

ii) Reasonable range of Delta conveyance alternatives, and capacity/design options for a lined canal, an unlined canal, and pipelines;

iii) Potential effects of climate change on conveyance and habitat restoration activities;

iv) Potential effects on migratory fish and aquatic resources;

v) Potential effects on Sacramento River/San Joaquin River flood management;

vi) Resilience/recovery of conveyance alternatives in event of natural disaster; and,

vii) Potential effects of each conveyance alternative on Delta water quality;

c) Requires DWR to consult with Council and the Science Board during development of BDCP;

d) Requires Council to have at least one public hearing and incorporate BDCP into Delta Plan if DFG approves BDCP as NCCP;

e) Requires annual report to Council on BDCP implementation;

f) Allows Council to make recommendations to BDCP implementing agencies;

g) Requires BDCP to include a transparent, real-time operational decision-making process in which fishery agencies ensure applicable biological performance measures are achieve in a timely manner; and,

h) Specifies that BDCP chapter does not amend or create any

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additional legal obligation or cause of action under NCCP Act or CEQA.

29)Allows Council to incorporate other completed Delta-related plans into the Delta Plan.

30)Makes legislative findings regarding the Delta and California water.

31)Conforms certain laws to provide for creation of the Council.

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32)Appropriates $28 million for the ‘Two-Gates Fish Protection Demonstration Program.‘

33)Makes bill contingent on enactment of SB 6 X7 (Steinberg) and SB 7 X7 (Steinberg)

EXISTING LAW establishes the CALFED Bay-Delta Program and the California Bay-Delta Authority to implement programs and projects to improve conditions in the Delta.

FISCAL EFFECT : Unknown

COMMENTS : For several years, the Delta has suffered a crisis - ecosystem, water supply, levee stability, water quality, policy, program, and litigation.In June 2004, a privately owned levee failed and the state spent nearly $100 million to fix it and save an island whose property value was far less.In August 2005, the Department of Fish & Game (DFG) reported a trend showing severe decline in the Delta fishery.In 2006, the Legislature reorganized Delta programs and funding under the Resources Agency Secretary.In 2007, a federal judge, acting under the federal Endangered Species Act, declared illegal certain federal biological opinions about near-extinct fish and restricted water exports from the Delta, to the San Francisco Bay Area, the San Joaquin Valley and Southern California.The Governor shortly thereafter called the Legislature into an extraordinary session on water.

Delta Vision : Through this enduring Delta crisis, the Legislature and the Governor initiated, in 2006, a process to develop a new long-term vision for the Delta.SB 1574 (Kuehl) of 2006 requires a cabinet committee to present recommendations for a Delta vision.The Governor created a Delta Vision Blue-Ribbon Task Force to advise the Cabinet Committee.The

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Task Force produced an October 2008 Strategic Plan, which the Cabinet Committee largely adopted and submitted the recommendations to the Legislature on January 3, 2009.This year, the Legislature held numerous hearings on Delta Vision and a set of five bills.In August, policy committees in both houses held hearings on the topics in these bills, and considered ‘pre-print‘ versions.A Conference Committee on these bills heard several issues arising out of these bills and substantially amended the pre-prints.

Delta Protection Commission (DPC) : The DPC Delta Conservancy parts of this bill originated in a series of this year's bills by Senator Lois Wolk, who withdrew as an author of SB 458 this summer.Senator Wolk has authored several bills in recent years to reform DPC, giving DPC additional authority and balancing state and local representation on the Commission.The most significant recent change required, instead of allowed, local agencies to change a land-use decision to conform to a DPC appellate decision.DPC exercised this new authority in its 2007-08 review of the so-called ‘Sugar Mill‘ decision for a property in Clarksburg.

This bill reshapes DPC, to make it a stronger and clearer voice for the interests of those who live and work in the Delta.More than two-thirds of the membership comes from the Delta.The DPC chair, representing a county board of

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supervisors, sits on the Delta Stewardship Council, which adopts DPC recommendations under certain circumstances.It has responsibility for developing a Delta economic sustainability plan and the Delta Investment Fund.DPC also will study and recommend whether to change the boundaries of the Primary Zone.It retains its existing authority to consider appeals of Primary Zone land-use decisions.In the context of other new Delta governance, such as the Delta Stewardship Council, DPC will now contribute the local Delta voice to the broader State deliberations on Delta issues.

Delta Conservancy : In the last decade, several bills have been introduced to create a Delta conservancy.This conservancy proposal was developed in close cooperation with the in-Delta stakeholders, particularly the five Delta Counties.The board's makeup reflects the Delta Counties' request, that each board of supervisors have one representative, of the 11 members, just under a majority.This conservancy has the dual role of ecosystem restoration and economic development, which will

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require a delicate balance in expending its resources and reflects in-Delta interests in ensuring that the Delta economy will be sustainable as the Delta changes.

This bill creates the Delta Conservancy as a ‘state agency to work in collaboration and cooperation with local governments and interested parties.‘ The Legislature created most state conservancies with the primary purpose of conserving, restoring or enhancing natural resources.Delta Vision recommends creation of a conservancy ‘for implementing and coordinating Delta ecosystem enhancement and related revitalization projects.‘ This bill makes the conservancy ‘a primary state agency‘ for ecosystem restoration, but does not set ecosystem restoration as the conservancy's primary mission.

Legal Framework for the Delta : Since statehood, California has asked much of the Delta.Conflicting demands have led to crisis and conflict - between and among agencies, stakeholders and natural resources.The Delta Vision process spent more than 18 months, investigating the Delta, engaging agencies and stakeholders, and thinking carefully about the Delta's challenges and prospects for change.The Task Force's first recommendation was to change the fundamental legal framework for the state to make decisions as to its activities in the Delta - encapsulated in two ‘coequal goals‘ of ‘restoring the Delta ecosystem and creating a more reliable water supply for California.‘ This bill sets a new legal and governance framework for the Delta's future, explicitly stating for the first time how the state should approach resolving the inherent conflicts in managing Delta resources.This framework includes legislative findings, policies and definitions, which provides the foundation for new governance in the Delta.This framework, however, does not counteract long-standing legal principles, such as the public trust and reasonable use, because those and other legal protections are preserved in the framework's ‘savings clauses‘ (as discussed below).

Scope of ‘Delta‘ : This bill defines the ‘Delta‘ to include both the legally defined Delta as well as the Suisun Marsh.While both currently have separate legal protections in the Public Resources Code, they, in fact, operate as a single system, particularly for ecosystem purposes.The bill preserves Suisun Marsh's statutory protection, but brings public agency activities under the auspices of the Delta Council and the Delta Plan, in order to ensure that the two areas act as the natural

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estuary system they comprise.While conflicts between competing purposes may arise, this bill establishes a framework for resolving those conflicts in state policy.

Given this broader definition of the Delta, SB 1 X7 nevertheless limits the scope of most of its program and the Delta Plan to this Delta (including Suisun Marsh).The bill narrows the focus of the ecosystem restoration to the Delta, allowing ecosystem projects outside the Delta only if the Council finds the project contributes to the achievement of the coequal goals.The Delta Conservancy is similarly limited in its focus.Some criticized the CALFED Bay-Delta Program for the breadth of both its ‘problem area‘ (the Central Valley) and its even broader ‘solution area‘ (including Southern California and San Francisco Bay Area that rely on exports from the Delta Watershed).That criticism suggested that the breadth of the CALFED program led to CALFED losing its focus on fixing the Delta.This bill will restore the spotlight to the legal Delta and Suisun Marsh, as an estuary system.

Protection for Existing Law : When the August pre-print versions of the Delta bills came out, some questioned whether the Delta bills would change existing legal protections for water rights/quality and the environment.This bill includes several ‘savings‘ sections that protect certain statutes, water rights and other legal protections from any implied changes by this bill.These sections have been expanded to ensure the continued effectiveness of various water law principles that protect other water right holders, particularly upstream in the Delta watershed.Those principles preserve procedural and substantive legal protections that include, but are not limited to: ‘area of origin‘ protections, the ‘no injury‘ rule for all ‘legal users of water,‘ and the domestic-use preference.These sections also maintain SWRCB jurisdiction and preserve regulatory authority generally, in order to clarify that the new Delta Stewardship Council is NOT a super-regulatory agency that trumps other regulatory agencies, such as SWRCB and DFG.These sections were written, and should be interpreted, to broadly protect legal rights of all.

Early Actions : This bill identifies a series of actions that existing and new agencies need to take as soon as possible - before the Council completes its new Delta Plan.Some actions are administrative.Others are substantive projects for the Delta ecosystem and/or water supply reliability.The early

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actions part communicates the urgency of responding to the Delta crisis, without waiting for the completion of the new Delta plan.

Flow Criteria : One key ‘early action‘ is the SWRCB developing ‘flow criteria,‘ which is a new legal concept.The bill requires SWRCB to adopt such flow criteria within nine months, pursuant to a specified ‘informational proceeding‘ under existing SWRCB regulations.Those regulations provide an opportunity for all interested persons to submit comments and evidence, as part of the proceeding.SWRCB staff indicated that, in order to accomplish the 9-month deadline, they would use this established process.

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Such ‘flow criteria‘ are neither federal water quality ‘criteria,‘ nor state ‘flow objectives.‘ In 1994, the United States Supreme Court held that the federal Clean Water Act may not provide explicitly for setting flow standards, but states may do so consistent with certain provisions in that federal statute.PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700 (1994).This bill's ‘flow criteria‘ reflect a landmark concept of the state exercising its public trust authority to ask - FIRST - what the Delta needs, before completing plans for fundamental change to the nature of the Delta, as envisioned by the Bay Delta Conservation Plan.

Water Code Section 85086(c)(1) specifies that the flow criteria for the Delta ecosystem developed under that subdivision shall not be considered ‘predecisional‘ in a subsequent SWRCB proceeding.In this context, the word ‘predecisional‘ means that the flow criteria do not predetermine how any issue will be decided in any later proceeding before SWRCB.Nor will the flow criteria, at the conclusion of the nine-month process, establish any obligations on other parties outside the Bay Delta Conservation Plan process as described in paragraph (c)(2) and below.

Transforming these criteria into ‘flow objectives,‘ which is the term used in the state Porter-Cologne Water Quality Control Act, would require further proceedings, pursuant to existing law.In a landmark decision on Delta water quality issues, United States v. State Water Resources Control Board, 182 Cal.App.3d 82 (1986), the state court established a two-step process required to set water quality objectives and then - subsequently and separately - allocate responsibility for those objectives among

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water right holders.These flow criteria will not constitute even the first step in that process.While state and local agencies may use the flow criteria for other purposes in the Delta and the SWRCB may use the ‘flow criteria‘ as the foundation for developing new water quality ‘objectives‘ in a new Delta Water Quality Control Plan, SWRCB will need a complete record, as required by existing law, from a subsequent proceeding to adopt them as ‘flow objectives.‘

The flow criteria do not require a particular outcome in such further proceedings.Their development does not have the effect of a regulatory standard or precedential decision, and they do not affect the legal burden of proof in the later SWRCB proceeding.Also, because the development of the flow criteria does not amount to a determination as to how any issues will be decided in a later proceeding, a board or staff member is not be required to avoid participation in the development of the criteria in order to avoid the appearance of prejudging issues that may be presented in the later proceeding.

The flow criteria adopted under Water Code Section 85086(c)(2) may differ from the flow criteria developed under Water Code Section 85086(c)(1), and their legal effect is very different.Paragraph (c)(2) specifies that certain water right change orders, involving specified changes in the points of diversion for the Central Valley Project or the State Water Project, must include ‘appropriate‘ Delta flow criteria.While the analysis used in developing flow criteria under paragraph (c)(1) will be considered in setting flow criteria under paragraph (c)(2), neither the analysis nor the criteria themselves predetermine the outcome of the later proceeding to determine what criteria are ‘appropriate‘ for inclusion in the water right change order.In addition, while the flow criteria developed under paragraph (c)(1) do not have regulatory effect - they serve instead as recommendations for consideration in the Delta Plan and the Bay Delta

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Conservation Plan - the flow criteria set under paragraph (c)(2) are included in the water right change order, and have the effect of terms and conditions of that order.

This requirement for flow criteria should also be read in the context of the savings clauses in Water Code Sections 85031-32, which ensure protection for all water rights holders as the Bay Delta Conservation Plan and the Delta Plan develop.Several upstream parties have raised concerns about these flow criteria, suggesting that they will be held responsible for complying with

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these flow criteria.The combination of the focus on use of flow criteria early in Delta planning efforts, specified process for developing flow criteria, and the savings clauses ensure consistent legal protection for upstream water users without rewriting water law to focus protections on specific concerns.

Council Membership : The foundation of this bill's change in Delta governance is the new Delta Stewardship Council, which this bill creates with seven members.Council members would be required to possess diverse expertise and reflect a statewide perspective.However, this bill would also designate the chair of the Delta Protection Commission as a voting member of the Council ex officio.The bill now specifies that the Governor's appointments have either four or six-year terms, with subsequent four-year terms, to allow some staggering of terms over the long-term.The legislative appointments have four-year initial and subsequent terms.

Delta Vision suggested the Council should have no slots set aside for persons with specific characteristics, all appointed by the governor.Others suggest that there must be slots for persons with specific characteristics, such as representation or expertise.This bill appears to be a hybrid of the two approaches.It requires members ‘with diverse expertise and a statewide perspective,‘ appointed by several different entities and one regional representative from the Delta, but no other specified slots.This approach relies on the Senate confirmation process to ensure the Governor's appointments fairly balance different interests and reflect different expertise.This bill provides the Senate and Assembly an additional method to ensure balance, at least from the Senate and Assembly's perspectives, by allowing each to appoint a member.

Science Program : This bill establishes a ‘Delta Independent Science Board‘ and science program, using the CALFED Bay-Delta Program science program as its model.The CALFED science program has received broad acclaim for success as an effective independent science program, while CALFED now receives intense criticism for its alleged failure to address the Delta's crises.The science program in this bill therefore adopts and succeeds the CALFED science program.

Delta Watermaster : This bill includes a provision that requires SWRCB to appoint a Delta Watermaster.This version, however, is

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much narrower than the proposal in the August pre-print version, which had broader authority.The Watermaster in this bill acts by delegation of authority from the SWRCB.It is SWRCB's enforcement - not adjudicatory - officer, with specified delegated authorities.The Watermaster's jurisdiction is limited to diversions in the Delta and conditions on permits that relate to conditions in the Delta.

Federal Government Participation : In order to encourage federal government participation under the state's leadership, this bill requires the Delta Plan to be developed consistent with certain statutes that allow for certain state discretion over federal activities.These statutes include the Coastal Zone Management Act (CZMA), the Reclamation Act of 1902 (which governs the Bureau of Reclamation's Central Valley Project), and the Clean Water Act.If the Council decides to adopt the Delta Plan pursuant to the CZMA, then the bill requires submission to the Secretary of Commerce for approval, so the state may exercise certain authority over federal agency actions.It is widely anticipated that California may need Congress to enact laws to protect the Delta consistent with the state's plan - perhaps a ‘Delta Zone Management Act.‘ This bill allows for that eventuality, by providing for submission of the Delta Plan to whatever federal official a subsequent federal statute identifies.

Delta Plan/Balancing Coequal Goals : This bill includes substantial detail as to the nature of the Delta Plan, focusing on balancing the two coequal goals of ecosystem restoration and water supply reliability.It specifies certain elements, strategies for incorporation into the Delta Plan.It also includes several standards for completion of the plan, such as use of best available science.All these requirements still connect back to the fundamental ‘co-equal goals.‘

Levees/Flood Protection : The bill requires the Delta Plan to reduce risks to people, property and state interests in the Delta with emergency preparedness, appropriate land uses and strategic levee investments.The Delta Plan will include recommendations for priorities for state investments in levees.These recommendations, in combination with the Council's authority to ensure that state agencies act consistently with the Delta Plan, will ensure that levee spending by DWR and the Central Valley Flood Protection Board (CVFPB) reflects these priorities.The Legislature generally does not appropriate

funding to specific Delta levee projects, and has not succeeded in imposing priorities on state levee spending in the Delta.Instead, the State Budget leaves the discretion to DWR and the CVFPB to determine how to spend state money on both levees in the State Plan of Flood Control and non-project levees.These priorities will affect both the Delta levee subvention program (non-project levees) and the special projects program (levees with a State interest).

Consistency Review : One of the cornerstones of the fundamental change that this bill portends is the development and enforcement of a unified state plan for the Delta.The bill ensures consistency with the state's Delta Plan by requiring state and local agencies that propose to implement ‘covered actions‘ to submit consistency certifications and subjecting those certifications to appeal to the council.The Council reviews the certification and issues raised by an appellant and determines whether the project is consistent with the Delta Plan, with specific findings.If not, then the proponent must determine whether to proceed with the project, but must amend and submit a new certification if it decides to proceed with the project.

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The Council's role in developing and enforcing consistency with the Delta Plan will provide a critical component of crafting a coherent and sustainable long-term state policy for the Delta.As the Delta Vision Task Force noted, more than 200 federal, state and local agencies have authority in the Delta.State policy often has made competing demands on Delta resources, leading to the current crisis.State agencies often have reached gridlock, allowing the Delta to collapse as they dispute how to proceed.While the CALFED Bay-Delta Program had the noble goal of coordinating state and federal policy in the Delta, the Bay-Delta Authority lacked the authority to resolve conflicts among agencies and set a unified direction.When the Delta ecosystem crisis arose, CALFED agencies degenerated into interagency conflict and could not respond adequately to the mounting evidence of crisis, even to complete the Legislature's requirement to develop a short-term response to stabilize the Delta ecosystem.The Council can provide some coherence to how the State manages important water and environmental resources in the Delta.

Covered Actions : The threshold for certification of consistency and Council review requires the action to fall within the scope

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of ‘covered actions.‘ Determining whether a particular project is a ‘covered action‘ requires review of both the definition's four factors as well as the exemptions in that definition.The first, and possibly the most central, factor for that determination is that the project ‘will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.‘ Actions that outside the legal boundaries of the Delta (including Suisun Marsh), such as upstream diversions, will not be covered actions and, therefore, not subject to certification or the Council's consistency review.The existing diversions by the San Francisco Public Utilities Commission from the upper reaches of the Tuolumne River, for example, do not constitute ‘covered actions.‘

If the project ‘occurs‘ in the Delta, it still may not be a ‘covered action‘ because an exemption may apply.The first exemption applies to ‘regulatory actions,‘ in order to clarify that the Council does not have authority to countermand a regulatory determination, such as a water right or water quality order or a determination under the California Endangered Species Act.This exemption reaffirms, combined with the savings clauses, the overall intent of the bill that the Council does not become a super-regulator that can trump regulatory decisions of other agencies.Recent changes have added several new exemptions that:

1)Exempt regional transportation plans.

2)‘Grandfather‘ certain existing activities in the Delta, or activities that have completed the CEQA process by the time the Council adopts the Delta Plan.

3)Allow continued ‘routine maintenance and operation‘ of Delta facilities.

4)Support sustainable land-use planning under state law.

Bay Delta Conservation Plan : This bill requires Council consideration of the BDCP for incorporation into the larger

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Delta Plan, but conditions state funding and incorporation of BDCP on DFG's approval as a Natural Community Conservation Plan (NCCP) and completion of robust investigation and analysis pursuant to CEQA.While some agencies have asserted that BDCP would be an NCCP, the December 2006 planning agreement specifically provided that the signatories were not committed to

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achieving the higher ecosystem recovery standard for an NCCP.This bill sets the higher NCCP standard (‘the gold standard ‘) as the threshold for state funding of the public benefits of BDCP activities, while relying on existing law.The specified issues that will be analyzed under CEQA add credibility to the outcome of BDCP, but also rely on the context of existing CEQA law to ensure an impact on the ultimate BDCP decisions.

Delta Conveyance : This bill does NOT authorize ‘the Peripheral Canal.‘ There has been a debate about DWR's legal authority to construct a new Delta water conveyance system, and this bill does not address that issue.Instead, it specifies certain requirements for BDCP in considering options for changing Delta water conveyance for the State Water Project (SWP) and federal Central Valley Project (CVP).First, BDCP must analyze certain factors in the CEQA process.Second, BDCP must meet ‘the gold standard‘ of achieving approval as an NCCP, if it wants state funding and incorporation into the long-term Delta Plan.NCCP requirements include both public process and adaptive management of BDCP projects and programs, which may include new Delta water conveyance.Third, BDCP must include a ‘transparent, real-time operational decision-making process‘ that includes fishery agencies.Fourth, construction of any new conveyance facility may not start until SWRCB issues the necessary water rights change permits and the water project contractors have agreed to pay the costs of environmental review, planning, design, construction and mitigation of the conveyance facility.

These requirements ensure that any decision as to a new conveyance system for Delta water will consider all the necessary factors, and CEQA requirements will ensure that environmental impacts will be resolved.Construction does not start until cost and permitting issues are resolved.The requirements appear to balance the competing interests in ‘setting a clear path‘ to new Delta water conveyance, ensuring restoration of the Delta ecosystem, and providing comprehensive analysis of alternatives that address issues unique to the Delta.

Delta Finance : SB 1 X7 states legislative intent to rely on past water bond funding for the costs of developing the new Delta Plan required by this bill.Previous proposals to charge fees to fund Delta programs have been deleted.The bill does require, however, that water users pay the costs of building any new conveyance facility, as well as the costs of any necessary

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mitigation for such facilities.

Two-Gates Project : This bill promotes implementation of the Federal Government's proposed ‘Two-Gates Fish Protection Demonstration Program.‘ This project would experiment with certain flow gates in the Delta to see if it improves conditions for certain at-risk fish species.The bill identifies this project as an ‘early action‘ and appropriates

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$28 million, from bond funding, as the State's contribution to the experiment.

Recent Changes : Since the Assembly Water, Parks and Wildlife (WP&W) Committee considered the Delta governance and planning provisions, as part of SB 68 (the regular session version of this bill), on September 11, this portion of the 2009 Delta/Water legislative package has changed in limited ways, to address certain concerns.

Governor's Council Appointments: This bill restructures the original proposal for staggering the Governor's initial appointments to the Council.Instead of staggering the Governor's first appointments by one to four years, two initial gubernatorial appointees will have four-year terms and two will have six-year terms.After those initial appointments both gubernatorial and legislative appointees to the Council will have four-year terms.

Delta Water Quality: This bill amended SB 68's original findings and state policies to incorporate water quality concerns for human health and the environment.

Savings Clauses: This bill expanded the provisions that preserve legal protections in existing law, to assure that water rights are respected and water right holders receive the procedural and substantive protections of existing law.

‘Covered Actions‘ Exemptions/Grandfather Clause: The definition of ‘covered actions‘ sets the scope of what agency actions may be appealed to the Council as inconsistent with the Delta Plan.This bill includes exemptions to the definition for: 1) regulatory actions; 2) regional transportation plans; 3) local plans or projects that comply with Government Code provisions for sustainable communities; 4) routine maintenance and operation of federal, state and local government facilities in the Delta; 5) local agency projects that are either ‘fully permitted‘ or have completed

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the CEQA process by September 30, 2009; and 6) certain projects in the Delta's secondary zone finalized before adoption of the Delta Plan.

Flow Criteria: This bill - like SB 68 - requires SWRCB to exercise its public trust authority to develop new ‘flow criteria‘ to inform planning decisions for the Delta Plan.Recent changes have added some additional specificity as to the purpose of these flow criteria and the process for SWRCB to develop them.Specifically, the new language accomplishes two things: 1) focuses this effort on informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan; and, 2) specifies the procedure for SWRCB to develop the flow criteria, relying on an ‘informational proceeding,‘ not a regulatory proceeding.Savings clauses also were expanded to ensure protection for water rights.

Watermaster Authority: This bill specifies the scope of the Delta Watermaster's authority as applying to diversions in the Delta and board orders that apply to conditions in the Delta.This further specification is consistent with the original definition of the ‘Delta Watermaster.‘ It ensures that the Watermaster has authority over both in-Delta water diversions and water project operations outside the Delta where SWRCB has conditioned the water right permits

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based on conditions in the Delta.The CVP permits for New Melones Reservoir, for example, are conditioned on compliance with certain Delta water quality requirements, leading to reservoir releases to dilute salinity in the San Joaquin River.

Analysis Prepared by : Alf W. Brandt / W., P. & W. / (916) 319-2096

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PROOF OF SERVICE
Delta Stewardship Council Cases JCCP 4758

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 201 Esplanade, Upper Suite, Capitola, CA 95010. On the date shown below, I served the within documents:

PETITIONER SAVE THE CALIFORNIA DELTA ALLIANCE'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF OPENING MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR A WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF

By Electronic Mail: I caused such documents to be sent by electronic mail to the addressees at the email addresses listed below in the attached Electronic Mail Service List.

I declare under penalty of perjury under the Laws of the State of California that the above is true and correct.

Executed: October 15, 2014 at Capitola, California.

Michael A. Brodsky

SERVICE LIST VIA ELECTRONIC MAIL

Attorneys for Respondent/Defendant Delta Stewardship Council for all the Delta Stewardship Cases:

Daniel L. Siegel, Supervising Deputy Attorney General (dan.siegel@doj.ca.gov)
Deborah M. Smith, Deputy Attorney General (deborah.smith@doj.ca.gov)
Jerry Brown (Jeremy.brown@doj.ca.gov)
Office of the Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

California Water Impact Network, Friends of the River, California Sportfishing Protection Alliance, AquAlliance, Restore the Delta, and Center for Biological Diversity v. Delta Stewardship Council

Attorneys for Petitioner Friends of the River:

E. Robert Wright (bwright@friendsoftheriver.org)
Friends of the River
141 20th Street, Suite 100
Sacramento, CA 95811

Attorneys for Petitioners California Water Impact Network, California Sportfishing Protection Alliance, AquAlliance, and Restore the Delta:

Michael B. Jackson (mjatty@sbcglobal.net)
Attorney at Law
429 West Main Street, Suite D
P.O. Box 207
Quincy, CA 95971

Attorneys for Petitioner Center for Biological Diversity:

Adam Keats (akeats@biologicaldiversity.org)
Chelsea Tu (ctu@biologicaldiversity.org)
Center for Biological Diversity
351 California Street, #600
San Francisco, CA 94104

Central Delta Water Agency, South Delta Water Agency, Lafayette Ranch, Inc., Local Agencies of the North Delta and Cindy Charles v. Delta Stewardship Council

Attorneys for Petitioner Local Agencies of the North Delta:

Osha Meserve (osha@semlawyers.com)
Patrick M. Soluri (patrick@semlawyers.com)
Soluri Meserve, a Law Corporation
1010 F Street, Suite 100
Sacramento, CA 95814

Attorneys for Petitioners Central Delta Water Agency, Lafayette Ranch, Inc., and Cindy Charles:

Dante John Nomellini (ngmplcs@pacbell.net)
Dante John Nomellini, Jr. (dantejr@pacbell.net)
Daniel. A. McDaniel (damplc@pacbell.net)
Nomellini, Grilli & McDaniel
Professional Law Corporation
235 East Weber Avenue
Stockton CA 95202

John H. Herrick (jherrlaw@aol.com)
Law Office of John H. Herrick
4255 Pacific Avenue, Suite 2
Stockton, CA 95219

S. Dean Ruiz (dean@hpllp.com)
Harris, Perisho & Ruiz
Brookside Corporate Center
3439 Brookside Road, Suite 210
Stockton, CA 95219

Thomas H. Keeling (tkeeling@freemanfirm.com)
Freeman Firm
1818 Grand Canal Boulevard, Suite 4
Stockton, CA 95207

City of Stockton v. Delta Stewardship Council

Attorneys for Petitioner City of Stockton:

Steven A. Herum (sherum@herumcrabtree.com)
Herum Crabtree Suntag
A California Professional Corporation
5757 Pacific Avenue, Suite 222
Stockton, CA 95207

North Coast Rivers Alliance, Pacific Coast Federation of Fishermen's Associations, San Francisco Crab Boat Owners Association, and the Winnemem Wintu Tribe v. Delta Stewardship Council

Attorneys for Petitioners North Coast Rivers Alliance, Pacific Coast Federation of Fishermen's Associations, San Francisco Crab Boat Owners Association, and the Winnemem Wintu Tribe:

Stephan C. Volker (svolker@volkerlaw.com)
Daniel P. Garrett-Steinman (dgarrett@volkerlaw.com)
Marcus Benjamin Eichenberg (mbeichenberg@volkerlaw.com)
Lauren E. Pappone (lpappone@volkerlaw.com)
Law Offices of Stephan C. Volker
436 14th Street, Suite 1300, Oakland, CA 94612

San Luis & Delta-Mendota Water Authority and Westlands Water District v. Delta Stewardship Council

Attorneys for Petitioners San Luis & Delta-Mendota Water Authority and Westlands Water District

Daniel J. O'Hanlon
(dohanlon@kmtg.com)
Rebecca R. Akroyd (rakroyd@kmtg.com)
Elizabeth L. Leeper (eleeper@kmtg.com)
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814

Jon D. Rubin, Senior Staff Counsel
(Jon.Rubin@sldmwa.org)
San Luis & Delta-Mendota Water Authority
c/o Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor, Sacramento, CA 95814

Attorneys for Petitioner Westlands Water District:

Andrea A. Matarazzo
(andrea@pioneerlawgroup.net)
Jeffrey K. Dorso
(jeffrey@pioneerlawgroup.net)
Pioneer Law Group, LLP
1122 J Street, Sacramento, CA 95811

Harold Craig Manson, General Counsel
(cmanson@westlandswater.org)
Westlands Water District
c/o Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814

State Water Contractors; Alameda County Flood Control and Water Conservation District, Zone 7; Santa Clara Valley Water District; The Metropolitan Water District of Southern California; Antelope Valley-East Kern Water Agency; Mojave Water Agency; and San Bernardino Valley Municipal Water District v. Delta Stewardship Council

Attorneys for Petitioners State Water Contractors, Antelope Valley-East Kern Water Agency, Alameda County Flood Control, Water Conservation District, Zone 7 and San Bernardino Valley Municipal Water District

Gregory K. Wilkinson (Gregory.Wilkinson@bbklaw.com)
Charity Schiller (Charity.Schiller@bbklaw.com)

Melissa R. Cushman (Melissa.cushman@bbklaw.com)
Best Best & Krieger LLP
3390 University Avenue, 5th Floor
P.O. Box 1028, Riverside, CA 92502

Stefanie Morris (smorris@swc.org)
State Water Contractors
1121 L Street, Suite 1050, Sacramento, CA 95814

Attorneys for Petitioner Santa Clara Valley Water District:

Stanly Yamamoto, District Counsel (syamamoto@valleywater.org)
Anthony T. Fulcher, Senior Assistant District Counsel (afulcher@valleywater.org)
Santa Clara Valley Water District
5750 Almaden Expressway, San Jose, CA 95118-3686

Attorneys for Petitioner Mojave Water Agency:

William J. Brunick (bbrunick@bmblawoffice.com)
Leland McElhaney (lmcelhaney@bmblawoffice.com)
Brunick, McElhaney & Kennedy
1839 Commercenter West, San Bernardino, CA 92408-3303

Attorneys for Petitioner The Metropolitan Water District of Southern California:

Marcia L. Scully (mscully@mwdh2o.com)
Adam C. Kear (akear@mwdh20.com)
Linus S. Masouredis (lmasouredis@mwdh20.com)
Robert C. Horton (rhorton@mwdh20.com)
The Metropolitan Water District of Southern California
P.O. Box 54153, Los Angeles, CA 90054-0153