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16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
17 COUNTY OF SACRAMENTO
18

<p>19 Coordinated Proceeding Special Title</p> <p>20 DELTA STEWARDSHIP COUNCIL</p> <p>21 CASES</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>	<p>Coordinated Proceeding JCP No. 4758</p> <p>RESPONDENT AND DEFENDANT</p> <p>DELTA STEWARDSHIP COUNCIL'S</p> <p>OPPOSITION BRIEF, RESPONDING TO</p> <p>ALL OPENING BRIEFS</p> <p>(Pub. Resources Code, § 21167.6)</p> <p>Dept: 31</p> <p>Judge: Hon. Michael P. Kenny</p> <p>Hearing Date: Not Set</p>
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1 Many of the arguments directed against the Council by environmental and in-Delta
2 petitioners do not concern the Delta Plan at all. Rather, they concern tunnels and related
3 measures that the Department of Water Resources, an entity that is not a party to any of these
4 lawsuits, is considering in its draft Bay Delta Conservation Plan (BDCP). These petitioners
5 ignore the fact that the BDCP and the Delta Plan are two completely separate projects, and that
6 the BDCP is beyond the Council's direct control. Furthermore, if the BDCP is adopted by the
7 Department of Water Resources, the Legislature has mandated that the Council "shall incorporate
8 the BDCP into the Delta Plan" if it meets specified statutory criteria. (Wat. Code, § 85320, subd.
9 (e).) These petitioners ask this Court to ignore the will of the Legislature and order the Council to
10 draft its own BDCP.

11 Claims by water exporters and in-Delta petitioners also challenge the Council's authority to
12 adopt the Plan's regulations. Mostly, these petitioners object to regulations that potentially
13 restrict their activities in some manner, and instead press for a Plan devoid of regulations—or at
14 least any regulations that apply to them. But in seeking a regulation-free plan, they ignore the
15 Legislature's express intent to develop a "legally enforceable Delta Plan" and the Legislature's
16 creation of a specific process to obtain compliance with the Plan. (Wat. Code, §§ 85001, subd.
17 (c), 85225-85225.25.)

18 Petitioners' challenges under the California Environmental Quality Act (Pub. Res. Code §§
19 21000 et seq.) (CEQA) also primarily arise from petitioners' dissatisfaction with the content of
20 the Plan. Some of petitioners' arguments ignore the program-level nature of the Plan, and others
21 simply take issue with the policy choices inherent in the Plan.

22 Underlying these arguments is the petitioners' fundamental misunderstanding of the Plan's
23 nature. The Plan is not a development project; it is a state-level plan of broad scope and
24 geographic coverage for activities that may affect achievement of the coequal goals. The Plan
25 does not direct or authorize specific actions or projects. Rather, it establishes regulations and
26 guidance for other California agencies to follow in deciding whether to take actions that could
27 affect the achievement of the coequal goals. Accordingly, the Council prepared a programmatic
28 environmental impact report (EIR) to analyze the environmental effects of the Plan.

1 As the courts have long recognized, an EIR need not and cannot be more specific than the
2 project it analyzes because any such analysis would be speculative. Accordingly, the EIR for the
3 Plan analyzes the potential impacts of a wide variety of hypothetical future actions that may be
4 undertaken by agencies in many geographic areas throughout the state. The EIR does not
5 speculate about the specifics of these actions, nor does it quantify their impacts where no such
6 precision is possible. Instead, it appropriately describes the nature and the magnitude of the
7 potentially significant impacts of the types of actions that may be encouraged by the Plan,
8 describes the geographic areas and resources these potential future actions may affect, and
9 identifies mitigation measures to reduce or avoid them. Petitioners' complaints that this approach
10 is "vague" or "incomplete" are misplaced. As CEQA requires, the EIR provides analysis at a
11 level of detail commensurate with the specificity of the project under review, here, a state-level
12 plan of broad scope and geographic coverage.

13 Petitioners also misunderstand the role of the BDCP in the Plan's EIR. Some petitioners
14 wrongly insist, in the face of statutory direction to the contrary, that the BDCP is under review in
15 the Delta Plan EIR. As explained above, the BDCP is an entirely independent project from the
16 Delta Plan. Because environmental review for the BDCP is being conducted by the Department
17 of Water Resources, the BDCP is appropriately included in the EIR as a reasonably foreseeable
18 cumulative future project.

19 In sum, the petitioners' claims involve the very same type of stakeholder infighting that
20 doomed past Delta reforms and that the Legislature was attempting to overcome when it created
21 the Council. While petitioners may disagree with the policy choices the Council has made, the
22 Council acted well within the broad discretion granted by the Legislature in crafting its approach
23 and provided the level and scope of environmental review that CEQA mandates. As
24 demonstrated below, petitioners' disagreements are, therefore, with the Legislature, not with the
25 Council.

1 construction of the Central Valley Project, the nation’s largest water reclamation project and
2 California’s largest water supplier. (D6799; B473, 545; see also Wat. Code, § 85003, subd. (c).)
3 Approximately 25 years later, California voters approved the construction of the State Water
4 Project, the other major exporter of Delta water. (B548.) These systems are designed “to serve
5 as a buffer against the state’s natural susceptibility to floods and droughts.” (B6793.) In both
6 projects, reservoirs in the Sacramento River watershed upstream of the Delta store and release
7 water that flows to the Delta. (D6793.) Two pumping plants in the south of the Delta export
8 water into delivery systems for agricultural, municipal, industrial, and environmental uses. (*Ibid.*
9 and B549.) On average, 24 percent of the water that flows into the Delta is exported through
10 these water systems. (B545.)

11 Starting during the Gold Rush, when hydraulic miners flushed debris into the rivers, the
12 Delta has fallen into ever-greater decline. (B474-475.) Perhaps the most well-known impact to
13 the Delta ecosystem has been the critical decline in the population of native fish such as the
14 Chinook salmon and Delta smelt, which has prompted the National Marine Fisheries Service
15 (NMFS) and the United States Fish and Wildlife Service (USFWS) to issue biological opinions,¹
16 and courts to issue injunctions, limiting the operations of the Central Valley Project and State
17 Water Project. (L1509 [describing opinions and injunctions]; L26752 [2008 USFWS delta smelt
18 opinion]; L25301 [2009 NMFS salmonid opinion]; see also *San Luis & Delta-Mendota Water*
19 *Auth. v. Jewell* (9th Cir. 2014) 747 F.3d 581, 597-599 [describing USFWS’s 2008 delta smelt
20 opinion]; *San Luis & Delta-Mendota Water Auth. v. Locke, supra.* (2014) 776 F.3d 971, 988-989
21 [describing NMFS’s 2009 salmonid opinion].) Other ecological issues have included the
22 continual introduction of invasive species into the Delta and pollution from various sources.
23 (B590, 611.) Additional critical problems in the Delta include the risk of flooding (B713-717),
24 subsidence of the Delta’s islands (B650), and salinity intrusion that threatens habitat, farming,
25 and drinking water (B683-689).

26
27 ¹ These two agencies issue biological opinions pursuant to the federal Endangered
28 Species Act. (See *San Luis & Delta-Mendota Water Auth. v. Locke* (9th Cir. 2014) 776 F.3d 971,
987-988 [explaining the agencies’ responsibilities under that statute].)

1 **2. The State’s Past Failed Efforts to Resolve the Conflicting Interests**
2 **Driving the Delta’s Crisis**

3 The Delta’s continued state of crisis results in significant part from competing interests
4 making conflicting demands on the Delta. (B469.) Stakeholders who seek to promote their own
5 interests in the Delta include water exporters, water users within the Delta, upstream water users
6 in the Delta watershed, environmentalists, and supporters of Delta urbanization. (See L2244
7 [*Envisioning Futures for the Sacramento-San Joaquin Delta*, Public Policy Institute of California
8 (2007)].) For decades, the state attempted to resolve these competing interests without success.
9 (B470.) Until now, the most recent effort to resolve these competing interests was the extensive
10 “CALFED” planning process. (B478.)

11 CALFED involved a consortium of state and federal agencies formed to develop and
12 implement a long-term comprehensive plan to restore ecological health and improve water
13 management in the Delta. (D6798; J3813; see also *In re Bay-Delta Programmatic Env’tl. Impact*
14 *Report Coordinated Proceedings (In re Bay-Delta)* (2008) 43 Cal.4th 1143, 1164.) Following
15 eight years of litigation,² the California Supreme Court unanimously upheld CALFED’s
16 environmental impact report. (*In re Bay-Delta* at p. 1178.) But the entity that eventually oversaw
17 that program—the California Bay-Delta Authority—in spite of its name, lacked “any meaningful
18 authority.” (L21349 [Little Hoover Commission’s Review of the CALFED Bay-Delta Program].)
19 As a result, CALFED “degenerated into interagency conflict” when faced with “mounting
20 evidence of crisis.” (L21545 [legislative staff report presented to the Assembly Committee on
21 Water, Parks and Wildlife on September 11, 2009].)

22
23
24
25 ² Several parties filed suit challenging the CALFED program under the California
26 Environmental Quality Act (CEQA) and on other grounds. (*In re Bay-Delta, supra*, 43 Cal.4th at
27 p. 1161.) Petitioners Central Delta Water Agency and South Delta Water Agency filed one of
28 three CALFED lawsuits. (*In re Bay-Delta, supra*, 43 Cal.4th at p. 1161.) Other petitioners, such
as the State Water Contractors and Westlands Water District, later joined the litigation as
interested parties. (*Id.* at p. 1161, n.4.)

1 **3. The Legislature Enacted the Landmark Delta Reform Act of 2009**

2 In 2006, then-Governor Schwarzenegger created the Delta Vision Task Force with the
3 purpose of determining the path forward for CALFED. (B478.) The Governor directed the Task
4 Force to seek input from a broad array of public officials, stakeholders, scientists, and engineers
5 in drafting an independent public report setting forth its findings and recommendations regarding
6 the sustainable management of the Delta. (L3384.) The Delta Vision Task Force presented its
7 findings in its 2008 *Delta Vision Strategic Plan*. (*Ibid.*; L3196-3400.) The *Delta Vision Strategic*
8 *Plan* concluded that the Delta’s state of crisis was compounded by the fact that approximately
9 200 agencies play some role in managing the Delta’s resources, but no one was in charge.
10 (L3205.) It thus recommended that the Legislature create “a new governance structure with
11 needed legal authority and competencies to achieve the co-equal goals” of restoring the Delta
12 ecosystem and creating a more reliable water supply for California. (*Ibid.* [quotation]; L3199
13 [co-equal goals].)

14 In response, the Legislature adopted the landmark Sacramento-San Joaquin Delta Reform
15 Act of 2009 (Act) (Wat. Code, §§ 85000 et seq.), finding that “existing Delta policies are not
16 sustainable” and that “[r]esolving the crisis requires fundamental reorganization of the state’s
17 management of Delta watershed resources.” (D6798; see also Wat. Code § 85001, subd. (a).)
18 The Assembly Committee on Water, Parks and Wildlife’s staff report concluded that the agency
19 overseeing CALFED “lacked the authority to resolve conflicts among agencies and set a unified
20 direction.” (L21545.) Thus, in a distinct departure from CALFED, the Legislature created the
21 Council as an independent state agency³ (B479-480, 497; see also Wat. Code, § 85200, subd. (a)),
22 and directed it to adopt a Delta Plan that, by statute, is “legally enforceable.” (B512-513; Wat.
23 Code, §§ 85001(c), 85022.)

24
25
26 ³ The Council consists of seven voting members, four of whom are appointed by the
27 Governor and confirmed by the Senate, one member is appointed by the Senate Committee on
28 Rules, one is appointed by the Speaker of the Assembly, and one by the Chairperson of the Delta
Protection Commission. (Wat. Code, § 85200, subd. (b)(1).)

1 The Legislature called for a Plan that “furthers” the following two “coequal” goals:

- 2 • Providing “a more reliable water supply for California”; and
- 3 • “Protecting, restoring, and enhancing the Delta ecosystem.”

4 (B470, 479-480; Wat. Code, §§ 85300, subd. (a); 85054.) Moreover, the coequal goals must be
5 addressed “in a manner that protects and enhances the unique cultural, recreational, natural
6 resource, and agricultural values of the Delta as an evolving place.” (B480; Wat. Code, § 85054.)

7 The Act requires any state or local public agency that proposes to undertake certain defined
8 “covered actions” first to file a written certification of consistency with detailed findings as to
9 whether the proposed action is consistent with the Plan, and then submit the certification to the
10 Council. (B513-517; Wat. Code, §§ 85057.5 [covered action]; 85225 [certification]). Any
11 person, including the Council, may appeal the determination of consistency to the Council.
12 (B518; Wat. Code, § 85225.10, subd. (a).)

13 4. The Council Solicited, Received, and Incorporated Extensive Public 14 Input in Crafting the Plan

15 The Council engaged in a comprehensive and transparent public process that culminated in
16 its unanimous adoption of the Plan on May 16, 2013. (B2.) As explained in more detail below,
17 the public participated in 64 regular Council meetings, as well as numerous workshops and
18 special meetings. (E8-11.) The Council heard from over 160 speakers, and received 213
19 comment letters submitted by 149 different organizations and individuals that resulted in over
20 13,000 specific comments. (*Ibid.*) A number of petitioners agree that “the Plan has benefitted
21 greatly” from the Council’s comprehensive approach. (K7528 [June 27, 2012, letter from various
22 water districts, including some petitioners, to the Council].)

23 This process spanned two and one-half years. It formally started in January 2011, when the
24 Council sought public input by holding scoping meetings throughout California for both the Plan
25 and the environmental review, which consisted of preparing a program-level environmental
26 impact report (EIR) pursuant to CEQA. (See section 6 [scoping], *post*, and, Argument XVII.A
27 [program-level], *post*; G2014.) The Council decided at the outset of this process to prepare and
28

1 publish multiple revised updates of the draft Plan so that it could refine and improve the Plan
2 based upon input from experts, the public, and Council members. (G2133 [First Staff Delta Plan,
3 explaining proposed schedule for release of multiple drafts of the Plan].)

4 The Council released the first draft Plan in February 2011. (E8.) It then used public,
5 expert, and Council members' comments to revise the Plan, publishing and receiving comments
6 on six drafts before adopting the seventh as the final Plan. (*Ibid.*)

7 Concurrent with this process, during January 2012 the Council conducted hearings
8 throughout California to collect public input on the Draft EIR for the Plan. It held hearings in San
9 Diego, Pasadena, Ceres, Clarksburg, and Willows. (F285.) Many if not most commenters
10 provided input concerning the Plan, too, during this separate CEQA process. (*Ibid.*) All told, the
11 Council's outreach efforts included:

- 12 • 64 regular Council meetings
- 13 • 3 meetings about early actions
- 14 • 12 workshops about specific Plan topics
- 15 • 7 Draft EIR scoping meetings
- 16 • 7 Draft EIR hearings
- 17 • Dozens of informal meetings with Boards of Supervisors, Delta civic groups and
18 other stakeholders throughout the state

19 (E8-11; D67-68.)⁴

20 The Plan benefitted from the input provided by hundreds of organizations and individuals
21 representing diverse interests. (E8.) The Council considered and acted upon this input,
22 modifying, adding, and/or deleting a large number of provisions as it improved its drafts. For
23 example, the draft Delta Plan evolved over time from having a regulatory emphasis, in the early
24 drafts, to a plan that has a major coordinating and collaborating component. (E10.) Similarly, the
25 drafts became increasingly pragmatic by reducing the Plan's exercise of concurrent jurisdiction
26 with agencies such as the State Water Resources Control Board (SWRCB) and the Central Valley

27 ⁴ Section F of the administrative record contains summaries and videos of the numerous
28 public meetings the Council held on the Plan.

1 Flood Protection Board to the extent that the agencies were already addressing or were about to
2 address important Delta issues. (*Ibid.*)

3 **5. The Council Adopted the Delta Plan**

4 The Council unanimously adopted the Plan on May 16, 2013. The Plan is a comprehensive,
5 long-term management plan for the Delta. (B470.) While the Plan also includes extensive
6 descriptions and analyses of the problems facing the Delta, its “working parts” are 14 regulatory
7 “policies,” which are binding, and 73 “recommendations,” which are not.⁵ (B484.)

8 The Plan contains a table conveniently setting forth the 14 regulatory policies and 73
9 recommendations. (See B445-465.) Not counting appendices, the Plan is about 300 pages in
10 length. (B788.) It contains overviews of the California water system and the Delta Reform Act.
11 (B470-474, 478-480, 512-518, 529-567.) It devotes a chapter to each of the coequal goals.
12 (B529-628.) And it provides a detailed history and rationale for each of the 14 policies and 73
13 recommendations that implement the Delta Reform Act and further the coequal goals. (B497-
14 742.) The Plan groups these provisions into different chapters based on the following substantive
15 categories:

- 16 • Promote a more reliable water supply while reducing reliance on the Delta
- 17 • Protect and restore the Delta ecosystem
- 18 • Protect and enhance the unique values of the Delta as an evolving place
- 19 • Protect Delta water quality
- 20 • Reduce risks to people, property and state interests in the Delta

21 (B446-465, 568-742.)

22 The Plan’s 14 policies are regulations having the authority of law. As required under the
23 Administrative Procedure Act,⁶ the Council submitted the Plan policies to the Office of
24 Administrative Law as proposed regulations. On August 7, 2013, that office determined that the

25 _____
26 ⁵ The Plan uses abbreviated names for its policies and recommendations, such as WR P1
27 or WR R1. The first letter or letters represent the topic, in this case Water Reliability. The “P” or
28 “R” stands for policy or recommendation. The P or R is followed by the particular policy or
regulation’s number.

⁶ Gov. Code, § 11340 et seq.

1 regulations were necessary, clear, and authorized by the Act.⁷ (N1-100; see also Gov. Code, §
2 11349.1.) The regulations took effect on September 1, 2013. (N1.) They are located in
3 California Code of Regulations, title 23, sections 5001-5016.

4 The regulations do not propose or require the implementation of specific projects in specific
5 locations. Rather, they set enforceable standards, but they only apply if another agency “proposes
6 to undertake” certain actions. (Wat. Code, § 85225, see also B470.) As an example, the Plan
7 concludes that improving the management of local and regional sources of water is “central to the
8 state’s ability to better match its demands to the amount of water that is available.” (B568.) One
9 of the Plan’s central policies addresses that concern: Water Resources Policy 1 (WR P1), adopted
10 as California Code of Regulations, Title 23, Section 5003. (B568-569.) WR P1 prohibits an
11 agency from undertaking a covered action involving water exports from or through the Delta
12 where the water recipients have failed to take “locally cost effective and technically feasible”
13 measures to improve reliance on local and regional sources of water in lieu of Delta water, that
14 failure is causing the need for the covered action, and the action would significantly harm the
15 Delta. (*Ibid.*) Examples of such local measures could include water recycling, improvements in
16 water use efficiency, storm water capture, advanced water technologies, conjunctive use projects,⁸
17 local and regional storage projects, and improved regional coordination of local and regional
18 water supply efforts. (*Ibid.*)

19 The Plan recommendations, in contrast, are not enforceable. (B482). Rather, they
20 encourage agencies to take various steps that will further one or both of the coequal goals in a
21 manner that protects and enhances Delta values as an evolving place. (B498; Wat. Code, §
22 85054.) Examples of Plan recommendations are Delta-as-Place Recommendations 1 and 2 (DP
23 R1, DP R2). DP R1 recommends that the Delta Protection Commission⁹ designate the Delta and

24
25 ⁷ The Office of Administrative Law was dismissed from the present lawsuits without
26 prejudice. (See “Stipulation and Order for Dismissal of Respondent/Defendant Office of
27 Administrative Law Without Prejudice,” filed on November 18, 2013.)

28 ⁸ Conjunctive use is the periodic use of surface water by water supply agencies to
promote recharge of groundwater. (D6822.)

⁹ The Delta Protection Commission is a separate State agency with authority concerning
local land use plans in the Delta. (Wat. Code, § 29735 et seq.)

1 Suisun Marsh as a National Heritage Area. (B658-659.) DP R2 recommends that the California
2 Department of Transportation seek designation of State Route 160 as a National Scenic Byway.
3 (B659.)

4 **6. The Delta Plan Programmatic Environmental Impact Report's** 5 **Scoping Process**

6 The Council began its environmental review of the Plan on December 10, 2010, when it
7 filed a Notice of Preparation (NOP) with the Governor's Office of Planning and Research. (H1-
8 44, 53.) The Council distributed the NOP to over 400 agencies, organizations, and individuals.
9 (*Ibid.*) During the 48 days of public comment on the NOP, individuals, organizations, and public
10 agencies submitted more than 100 written responses to this scoping document. (H1; D6803.)
11 More than 370 people attended seven public scoping meetings in January 2011 in locations
12 throughout California (ranging from Chico to Diamond Bar). (*Id.*) Thus, the reach and content of
13 both the Plan and its environmental analysis were the focus of intense discussion and public
14 scrutiny before Council staff began drafting either document.

15 As described in section 4, above, Council staff, working with its experts, prepared several
16 drafts of the Plan, each of which was posted online and made available for public comment.
17 (D6803; K393-5925.) During this progressive drafting and planning process, Council staff
18 distilled the array of public comments into recurring themes regarding potential impacts of the
19 Plan on the environment and alternatives to one or more parts of the Plan. (D6870-6875.)
20 Participants in the scoping process emphasized different—often contradictory—aspects of the co-
21 equal goals. For example, the Environmental Water Caucus emphasized the importance of water
22 conservation and reducing exports of water from the Delta, while the State and Federal
23 Contractors Water Agency opposed any reduction in exports. (K136-139, K75-76.)

24 **7. The Project Description and Project Objectives**

25 As discussed in section 5, above, the Plan is a comprehensive, long-term management plan
26 that is intended to guide other agencies' decisions. (B470.) The EIR is a programmatic
27 document, consistent with the programmatic nature of the Plan. Section 1 of the Draft EIR
28 describes eight objectives that the Act identifies as "inherent" in the coequal goals, and identifies

1 the project objectives for purposes of environmental review based upon these statutory goals and
2 objectives. (D6788-91.) Hence, the overall project objective defined for the Plan is to

3 Further[] achievement of the coequal goals and the eight “inherent” objectives, in a
4 manner that 1) furthers the statewide policy to reduce reliance on the Delta in
5 meeting the state’s future water supply needs through regional self-reliance, 2) is
6 consistent with specific statutory content requirements for the Delta Plan, 3) is
7 implementable in a comprehensive, concurrent, and interrelated fashion, and 4) is
8 accomplished as rapidly as realistically possible without jeopardizing ultimate
9 success.

10 (D5902.)

11 Section 2A of the Draft EIR describes, in detail, the means by which the Plan policies and
12 recommendations implement the Act and are consistent with the Project Objectives. (D6807-62.)
13 It explains the substance and role of the policies and recommendations and the scope of “covered
14 actions” that they affect. (D6807-6810.) Section 2A refers the reader to the full text of the
15 policies and recommendations in Appendix C of the Draft EIR, and also provides a 52-page
16 overview of how the policies and recommendations may affect the environment. These effects on
17 the environment are then analyzed in more detail in the sections that follow.

18 **8. The Environmental Analysis’ Framework**

19 The Council will not construct or operate—or even approve—any physical projects.
20 (D6807.) However, as discussed above in section 5, the Delta Plan provides regulations
21 (“policies”) and guidance (“recommendations”) for future projects that may be approved by other
22 government entities. Projects that fall under the definition of “covered actions” must be
23 consistent with the Plan’s regulations. (B498, 513; Wat. Code, § 85225.10, subd. (a).) At this
24 point, however, it not known what particular projects other government entities may approve in
25 the future or where such projects may be located. Rather than speculate about hypothetical
26 scenarios, the EIR organizes its analysis around the following five categories or types of projects
27 that the Council seeks to influence and encourage in the Plan, which are:

- 28 • Reliable water supply projects (Plan Chapter 3, B529-580)
- Delta ecosystem restoration projects (Plan Chapter 4, B581-628)
- Water quality improvement projects (Plan Chapter 6, B671-707)

- 1 • Flood risk reduction projects (Plan Chapter 7, B709-748)
- 2 • Projects to protect and enhance the Delta as an evolving place (Plan Chapter 5,
- 3 B629-670; D5900, 6732-6733, 6914-6921; see also 23 CCR §§ 5001-5015.)

4 For each of these five categories, the EIR identifies the types of facilities or activities that a
5 public agency might approve in the future, subject to certifying that the facility is consistent with
6 the Plan. For example, the DEIR analyzes the environmental impacts associated with over a
7 dozen representative types of water supply reliability projects that a public agency may approve,
8 including surface water infrastructure such as water intakes, treatment and conveyance facilities,
9 reservoirs, and hydroelectric facilities; groundwater infrastructure such as wells, wellhead
10 treatment mechanisms, and conveyance facilities; ocean desalination infrastructure such as water
11 intakes, brine outfalls, and treatment and conveyance facilities; recycled wastewater and storm
12 water projects including treatment and conveyance facilities; water transfers; and water use
13 efficiency and conservation programs. (D6918.) Draft EIR Sections 3 through 21 analyze the
14 impacts of these types of representative projects in 19 resource areas, such as biological
15 resources, air quality, and water resources. (See, e.g., D7113-7120 [impacts of listed types of
16 water supply reliability projects on biological resources], D7523-7529 [same for air quality],
17 D7017-7022 [same for water resources].) Each analysis also identifies feasible mitigation for
18 potentially significant impacts. (D6915-6916; see also, e.g., D7279-7283.)

19 Where information is available, the EIR provides additional detail regarding the impacts of
20 specific “named” projects that were planned at the time the Council adopted the Plan and certified
21 the Final EIR. (E.g., D6811, 6831, 6846, 6852, 6858; see also B555, 571.) For each of these
22 named projects, the Draft EIR discusses likely impacts and proposes appropriate mitigation.
23 (E.g., D6816-8122, 6915-6916.)

24 Covered actions that are not exempt from CEQA must include all applicable, feasible
25 mitigation measures identified in the EIR that are within the agency’s jurisdiction. (GP 1 (b)(2).)
26 Alternatively, the certification may (1) demonstrate that the covered action “include[s] . . .
27 substitute mitigation measures that . . . are equally or more effective;” or (2) explain why the
28 mitigation is infeasible. (*Ibid.*; B517.) Thus, each agency that approves a covered action is

1 responsible for ensuring that it is not only consistent with the Plan, but that it has incorporated
2 mitigation measures at least as stringent as those analyzed in the EIR.

3 **9. The Assumptions Used in the EIR**

4 The EIR uses several conservative assumptions about the Plan in order to ensure that the
5 analysis and disclosure of potentially significant environmental effects is as complete as possible
6 in the absence of concrete data regarding specific future projects. For example, the EIR assumes
7 that the Plan will have its intended effect and that agencies will propose and approve facilities and
8 activities that will further the coequal goals. (See, e.g., D6732, fn. 2, 6811-6812, 6831-6832,
9 6846-6847, 6858-6859.) The EIR also analyzes the full range of likely indirect impacts of the
10 Plan on the environment, even though the Council will neither directly enforce the Plan's policies
11 and recommendations nor construct or operate any physical projects. (D6808, 6914-6915.)

12 **10. The Alternatives Analysis**

13 In addition to the CEQA-required No Project Alternative, staff developed four alternatives
14 to the Proposed Project for analysis in the Draft EIR. This range of alternatives is representative
15 of the range of themes expressed during the scoping process. The five alternatives analyzed in
16 the Draft EIR are summarized as follows:

- 17 • Alternative 1A emphasizes export of water from the Delta, deemphasizes reliance
18 on local and regional water supplies, and focuses levee improvements on those that
19 protect water supplies. This alternative was informed by comments from users of
20 exported water south of the Delta. (D6873-6874, D6899-6901.)
- 21 • Alternative 1B emphasizes export of water from the Delta, deemphasizes
22 conservation and water efficiency measures, makes all elements of the Plan advisory
23 rather than mandatory, and emphasizes additional studies prior to action. It was informed
24 by a proposal from the Agriculture/Urban Coalition, which represents business and
25 agricultural water interests statewide. (D6874-6875, 6901-6904; K3810.)
- 26 • Alternative 2 anticipates decreased export of water from the Delta and emphasizes
27 restoration of ecosystems throughout California. It was informed by proposals from
28

1 environmental organizations led by the Environmental Water Caucus, a coalition of 27
2 advocacy groups and tribes. (D6875, 6904-6907; K155; L10448.)

3 • Alternative 3 emphasizes protection and enhancement of communities, culture,
4 and agricultural land in the Delta and deemphasizes ecosystem restoration. It was
5 informed by members of those communities and other in-Delta water users. (D6875,
6 6908-6909.)

7 • The No Project Alternative describes the conditions that could continue to occur in
8 the future if no Plan had been adopted. This alternative is required by section 15126.6,
9 subdivision (e) of the CEQA Guidelines (California Code of Regulations, title 14, section
10 15000 et seq. "Guidelines"). (D6873, 6891-6898.)

11 While the alternatives were informed by the range of interests that participated in the
12 scoping process, none of the alternatives precisely corresponds in every aspect to what a
13 particular commenter proposed. Staff considered, but ultimately rejected, proposals for
14 alternatives that would not feasibly accomplish most of the basic project objectives, even if those
15 proposals had many proponents. (D6889.) For example, no alternative provides for removal of
16 dams in the Delta watershed to promote a more natural flow regime in the Sacramento and San
17 Joaquin rivers, because doing so would reduce the reliability of water supplies contrary to the
18 coequal goal and project objective of achieving a more reliable statewide water supply. (D6890.)
19 Despite numerous requests that it do so, the EIR also does not analyze through-Delta conveyance
20 facilities addressed in the BDCP as part of an alternative, because these facilities are not part of
21 the Plan or its objectives. Rather, the EIR addresses the BDCP in its analysis of cumulative
22 impacts. (D6891, 8188.)

23 **11. Public Review and Comment on the Draft EIR**

24 The Council selected the August 2, 2011, Fifth Staff Draft Delta Plan, which was the
25 culmination of the scoping process described above, to be the Proposed Project analyzed in the
26 Draft EIR.¹⁰ The Council published the Draft EIR for the Fifth Staff Draft Delta Plan for public

27 _____
28 ¹⁰ The November 4, 2011, Draft EIR, consists of Volumes 1 and 2. (D6803; H466-68.)

1 review and comment on November 4, 2011. (D5977; H466-468, H469-476, H577-581.) On
2 November 23, 2011, it extended the comment period from 60 to 90 days, ending on February 2,
3 2012. (H559-564; D28.) During this time, the Council conducted five field hearings on the Draft
4 EIR in locations throughout the state, in addition to taking comment on the Draft EIR at two
5 regularly scheduled Council hearings. (F282.001-282.005, 273-274, 282.) The Council received
6 approximately 3,500 comments from more than 200 agencies, organizations, and individuals
7 during this period. (D45-51, 68.) In response to this input, staff revised some Plan policies and
8 recommendations, prepared a sixth draft of the Delta Plan, and released this draft as the 2012
9 Final Draft Delta Plan. (D33-34.)

10 **12. The Recirculated Draft Programmatic Environmental Impact Report**

11 On November 30, 2012, the Council selected the Final Draft Delta Plan as sthe Revised
12 Project for purposes of analysis in the EIR. (D5973; F421.) Staff prepared the Recirculated Draft
13 Programmatic Environmental Impact Report (Recirculated Draft EIR), which analyzes the 2012
14 Final Draft Delta Plan as the “Revised Project.” The Fifth Staff Draft Delta Plan (which was the
15 Proposed Project analyzed in the Draft EIR) is redesignated in the Recirculated EIR as the
16 “Proposed Project Alternative.” (D5977-5979, 5903.) The Final Draft Delta Plan differs from
17 the Fifth Staff Draft Delta Plan in that it added and deleted policies and recommendations, revised
18 and reorganized many of the policies and recommendations, and changed some policies to
19 recommendations. (D5899.) It also added “performance measures” to measure progress toward
20 achieving the co-equal goals, expanded discussions of the need for proposed policies and
21 recommendations, and identified issues for future evaluation and coordination. (*Ibid.*)

22 The Council released the Recirculated EIR (Volume 3 of the Draft EIR) on November 30,
23 2012. (D5887-6710.) The Recirculated EIR applies the same organizational framework and
24 analytical approach used in the Draft EIR to identify both the impacts of the Final Draft Delta
25 Plan and any differences between those impacts and the impacts of the previously-analyzed
26 alternatives. (D5900-5901.) The Council took public comment on the Recirculated EIR for 45
27 days, through January 14, 2013, including at its January 11, 2013, meeting. (H582-84; F435.)
28

1 The Council received approximately 830 written comments on the Recirculated EIR during this
2 period, in addition to oral comments made at the January 11, 2013, hearing. (D68; G6283.)

3 **13. The Final EIR**

4 The Final Programmatic Environmental Impact Report (Final EIR) for the Plan responds to
5 comments made on both the Draft EIR and the Recirculated EIR. (D27.) It also describes minor
6 changes to the text of the Plan made by staff in response to comments. (*Ibid.*) The Final EIR
7 includes thousands of responses to comments. (See D97-5745.) It also provides five Master
8 Responses that address recurring comments and questions in a comprehensive essay format.
9 (D51-95.)

10 On April 30, 2013, the Council mailed notices to each public agency that commented on the
11 Draft EIR or Recirculated EIR announcing the availability of written responses to their
12 comments. (H1441-1447.) The Final EIR, including the responses described above, was posted
13 on the Council's website on May 3, 2013. (H1448-1460.) After receiving and reviewing
14 additional comments on the Final EIR submitted after the close of the comment period, the
15 Council certified the Final EIR and approved the Plan at a public meeting on May 16, 2013. (B1-
16 2; C1-3.) It filed a Notice of Determination the following day. (A1-4.) These seven lawsuits
17 followed.

18 **STANDARDS OF REVIEW FOR CHALLENGES TO DELTA PLAN AND COUNCIL'S** 19 **REGULATIONS¹¹**

20 Petitioners' descriptions of the standards of review for their challenges to the Delta Plan
21 and to the Council's regulations are either incomplete or erroneous. For example, Central Delta
22 and North Coast both assert that those challenges are always reviewed using independent
23 judgment or de novo standards. (Central Delta, pp. 12-15; North Coast, pp. 7-8.) In fact, the
24 appropriate standards for reviewing their challenges to the Plan and to regulate are far more
25 complex than, and generally very different from, any of petitioners' descriptions. As discussed
26

27 ¹¹ The Council addresses the standards of review for CEQA separately, below, in the
28 CEQA portion of this brief.

1 more fully starting on the next page, those challenges fall within four general categories, each
2 with a different standard of review.

3 First, petitioners challenge the Council's adoption of regulations implementing the Delta
4 Plan.¹² (E.g., Water Contractors, p. 12.) Under this first category, petitioners' claims fall into
5 two sub-categories: (1) when reviewing whether an agency has exceeded its statutory authority in
6 adopting a regulation, courts exercise independent review, giving great deference to the agency's
7 interpretation of its statutory authority where, as here, the regulations involve complex scientific,
8 technical, and policy issues; and (2) when reviewing whether the regulation is reasonably
9 necessary to effectuate the purpose of the authorizing statute, courts apply a substantial evidence
10 standard.

11 Second, petitioners challenge the Council's decisions not to regulate certain activities.
12 (E.g., North Coast, p. 32.) These are principally claims by North Coast, Save the Delta, and
13 Central Delta that the Plan does not do enough to address water exports and related issues. Out of
14 respect for the separation of powers, courts have afforded quasi-legislative decisions such as the
15 Council's adoption of the Delta Plan an even higher degree of deference than courts apply to an
16 agency's adoption of a regulation.

17 Third, petitioners raise procedural challenges to the Council's adoption of the regulations.
18 For example, Water Contractors and Central Delta assert that the Council's cost analysis of the
19 regulations was inadequate. (E.g., Central Delta, p. 77.) Courts apply a highly deferential
20 standard of review to these procedural challenges.

21 Fourth, Save the Delta and Water Contractors assert that the Council adopted "underground
22 regulations." (E.g., Water Contractors, p. 33.) Whether the Council adopted an "underground
23 regulation" is a question of law courts review de novo.

24
25
26 ¹² As discussed above, the Council enacted regulations that are taken verbatim from the
27 policies stated in the Delta Plan. Thus, where a petitioner's challenge is both to a Delta Plan
28 policy and its identical regulation, the standard of review applicable to the Council's adoption of
the regulation will apply.

1 **A. Courts Will Uphold the Council’s Adoption of the Delta Plan Regulations**
2 **So Long as the Regulations Are Within the Council’s Statutory Authority**
3 **and They Are Reasonably Necessary to Implement the Purpose of the**
4 **Statute**

5 The Council’s adoption of the Delta Plan and related regulations was a quasi-legislative act.
6 (*W. States Petroleum v. Bd. of Equalization (W. States)* (2013) 57 Cal.4th 401, 415; *Carrancho v.*
7 *California Air Resources Bd.* (2003) 111 Cal.App.4th 1255, 1265-1266.) Through that adoption,
8 the Council “exercised its quasi-legislative power pursuant to statute to issue generally applicable
9 regulations to achieve . . . the state’s . . . objectives.” (*American Coatings Assn. v. South Coast*
10 *Air Quality Management Dist.* (2012) 54 Cal.4th 446, 460.) As quasi-legislative regulations, the
11 Delta Plan “rules have the dignity of statutes.” (*W. States, supra*, 57 Cal. 4th at p. 415 [internal
12 citation omitted].)

13 A person challenging a Delta Plan regulation not only “bears the burden of proof”
14 (*American Coatings, supra*, 54 Cal.4th at p. 460), but that burden is very high. If the regulation is
15 (1) within the authority delegated by the Legislature; and (2) reasonably necessary to implement
16 the purpose of the statute, “judicial review is at an end.” (*W. States, supra*, 57 Cal.4th 401, 415.)
17 Courts do not substitute their judgment for that of the administrative body. (*Pitts v. Perluss*
18 (1962) 58 Cal.2d 824, 834-835, fn. 4.)

19 **1. Courts Give Great Weight to the Council’s Determination That It**
20 **Had the Authority to Adopt Its Regulations**

21 Petitioners argue that the Council’s adoption of the regulations went beyond its statutory
22 authority. (E.g., *Water Contractors*, p. 36.) When a regulation is challenged on the ground that
23 an agency did not have the authority to adopt the regulation in the first place, the issue of
24 statutory construction is a question of law on which courts exercise independent judgment. (*W.*
25 *States, supra*, 57 Cal.4th at p. 415.) But in exercising this judgment, courts generally give “great
26 weight” to an agency’s interpretation of the statute it is charged with implementing (*Nick v. City*
27 *of Lake Forest* (2014) 232 Cal.App.4th 871, 881), especially where, as here, “an agency has a
28 comparative interpretive advantage over the courts, as when the legal text to be interpreted is

1 technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion.”
2 (*W. States, supra*, 57 Cal.4th at pp. 415-416 [internal citation and quotation marks omitted].)

3 Here, even a cursory review of the Delta Reform Act and the Delta Plan shows that the
4 Council tackled highly technical issues that are entwined with complex factual, policy and
5 discretionary questions. The Delta Plan explains that “[s]ince the middle 1980s, California has
6 been looking for ways to secure the natural and human values of the Delta while maintaining its
7 place in the state’s water plumbing. These efforts have generally started in hope and ended in
8 impasse.” (B430; see also *In re Bay-Delta, supra*, 43 Cal.4th at pp. 1152-1160. [discussing the
9 efforts of 18 state and federal agencies to coordinate their actions in the Delta].) The Legislature
10 enacted the Delta Reform Act to facilitate a “fundamental reorganization of the state’s
11 management of Delta watershed resources” and “to establish a governance structure that will
12 direct efforts across the state agencies to develop a legally enforceable Delta Plan.” (Wat. Code §
13 85001, subs. (a) and (c).) The Act represents a comprehensive response to a set of complex
14 issues that have bedeviled regulators for a generation. Because the Council is the agency charged
15 with interpreting and implementing the Act, and the Legislature has delegated to the Council
16 significant responsibility for making technical and complex legal and policy judgments in doing
17 so, the Council’s views are entitled to “great weight.” (*Nick v. City of Lake Forest, supra*, 232
18 Cal.App.4th at p. 881.)

19 **2. Courts Apply the Deferential Substantial Evidence Standard of**
20 **Review In Determining Whether a Regulation Is “Reasonably**
21 **Necessary to Effectuate the Purpose of the Statute”**

22 Petitioners also argue that certain regulations adopted by the Council were not reasonably
23 necessary to implement the purpose of the statute. (E.g., *Water Contractors*, p. 24.) When a
24 regulation is challenged on the ground that it is not “reasonably necessary to effectuate the
25 purpose of the statute,” the judicial inquiry is confined to “whether the rule is arbitrary,
26 capricious, or without rational basis ... and whether substantial evidence supports the agency's
27 determination that the rule is reasonably necessary (Gov.Code, § 11350, subd. (b)(1)).” (*W.*
28 *States, supra*, 57 Cal.4th at p. 415.)

1 Under the substantial evidence standard, courts will review the entire record, resolving all
2 reasonable doubts in favor of an agency's decision. (*Committee to Save Hollywoodland Specific*
3 *Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1182.) "Substantial evidence" is
4 evidence of "ponderable legal significance ... reasonable in nature, credible, and of solid value"
5 and "evidence that a reasonable mind might accept as adequate to support a conclusion."
6 (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335.) It is for the
7 administrative agency to weigh the preponderance of conflicting evidence, and "the court may
8 reverse an administrative decision only if, based on the evidence before the administrative entity,
9 a reasonable person could not have reached the conclusion reached by that agency." (*Patterson*
10 *Flying Serv. v. California Dept. of Pesticide Regulation* (2008) 161 Cal.App.4th 411, 426.)
11 Courts presume that the findings and actions of the agency are supported by substantial evidence.
12 (*Desmond, supra*, 21 Cal.App.4th at p. 335.)

13 **B. Courts Will Uphold the Council's Decisions Not to Regulate Further**
14 **Unless Petitioners Prove Those Decisions Were Arbitrary, Capricious, or**
15 **Entirely Lacking in Evidentiary Support**

16 Many other claims challenge portions of the Delta Plan that do not attempt to regulate
17 activities. For example, certain petitioners assert that the Plan needs to do more to restrict exports
18 and to protect the Delta ecosystem. (E.g., North Coast, p. 32, lines 27-28.) For these sorts of
19 determinations, courts apply an even more deferential standard of review. Judicial authority is
20 limited to determining whether the decision of the agency was "arbitrary, capricious, entirely
21 lacking in evidentiary support, or whether the agency failed to follow the procedure and give the
22 notices the law requires." (*Sheldon v. Marin County Employees' Retirement Assn.* (2010) 189
23 Cal.App.4th 458, 463; accord *California Hosp. Assn. v. Maxwell-Jolly* (2010) 188 Cal.App.4th
24 559, 568; *Carrancho, supra*, 111 Cal.App.4th at p. 1265.)

25 Courts exercise limited review "out of deference to the separation of powers between the
26 Legislature and the judiciary, to the legislative delegation of administrative authority to the
27 agency, and to the presumed expertise of the agency within its scope of authority." (*Carrancho,*
28 *supra*, at p. 1265 [internal citations omitted].) Thus, mandamus will not lie to control the

1 government’s exercise of discretion, i.e., to compel an official to exercise discretion in a
2 particular manner. (*Cal.Hosp. Assn., supra*, 188 Cal.App.4th at p. 570.)

3 **C. Courts Will Uphold the Council’s Economic Impact Assessment if It Meets**
4 **a “Modest Requirement of Rationality and Transparency”**

5 The Administrative Procedure Act (APA) required the Council to conduct a cost analysis
6 for the Delta Plan’s regulations. Water Contractors and Central Delta assert that the Council’s
7 cost analysis fails to comply with the APA. (E.g., *Water Contractors*, pp. 41-44.) To prevail,
8 they must prove that the Council’s analysis was “unintelligible,” or that it lacked any evidentiary
9 basis (“an opaque calculation unsupported by any facts or other evidence explaining its validity”).
10 (*W. States, supra*, 57 Cal.4th at p. 431.) Unless petitioners establish that the Council’s analysis
11 does not meet this “modest requirement of rationality and transparency,” their assertions fail.
12 (*Ibid.*)

13 **D. Courts Review Underground Regulation Assertions De Novo**

14 Finally, Save the Delta and Water Contractors assert that the Council has adopted so-called
15 “underground regulations”—that is, regulations that allegedly should have but were not adopted
16 pursuant to the APA. (E.g., *Central Delta*, p. 8.) These are questions of law that courts review de
17 novo. (*County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501, 517.)

18 **E. Petitioners Forfeit Claims When Their Opening Briefs Fail to Cite the**
19 **Evidence in the Record Favorable to the Council**

20 In arguing that certain regulations were not based upon substantial evidence, petitioners
21 must carry the burden of demonstrating that the administrative record does not contain sufficient
22 evidence to support the agency’s decision. (*State Water Res. Control Bd. Cases* (2006) 136
23 Cal.App.4th 674, 749.) “A recitation of only the part of the evidence that supports the appellant's
24 position is not the demonstration contemplated under the above rule.” (*Ibid.*) Rather, petitioners
25 must “lay out the evidence favorable to the other side and show why it is lacking.” (*Pfeiffer v.*
26 *City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1572 [internal citation and
27 quotation marks omitted].) “Failure to do so is fatal.” (*Ibid.* [internal citation and quotation
28

1 marks omitted].) Moreover, a petitioner cannot first site this evidence in its reply brief, because
2 that would deprive the respondent of its right to respond. (*S. County Citizens for Smart Growth v.*
3 *County of Nevada* (2013) 221 Cal.App.4th 316, 331.) Each petitioner brief includes arguments
4 that suffer from this fatal flaw.¹³

5 **ARGUMENT: DELTA PLAN AND COUNCIL'S REGULATIONS**

6 Petitioners advance a range of often conflicting assertions that the Delta Plan and the
7 Council's regulations are allegedly invalid. Petitioners mainly assert that the Council failed to
8 comply with the Delta Reform Act, although they also include claims based upon the
9 Administrative Procedures Act. In this portion of its brief, the Council will show that none of
10 these assertions has merit.

11 **I. THE COUNCIL HAD THE AUTHORITY TO ENACT WR P1'S PROTECTIONS, AS** 12 **WELL AS THE DISCRETION NOT TO GO FURTHER**

13 Water Resources Policy 1 (WR P1¹⁴) takes a carefully balanced approach that furthers both
14 co-equal goals: protecting the Delta ecosystem while obtaining a more reliable water supply for
15 California. (Wat. Code, §§85054 [goals defined]; 85300, subd. (a). [Plan that "furthers the co-
16 equal goals"].) It furthers the Plan's water reliability goal by encouraging conservation and other
17 water sources that are more reliable than dependence on the Delta's fragile water system.
18 (*Ibid.*)¹⁵ At the same time, it helps protect the Delta by prohibiting, under limited circumstances,
19 in-Delta water projects that would "have a significant adverse environmental impact in the
20 Delta." (B446-447, 568-569.) Those projects are not allowed where they could have easily been
21 avoided, that is, where water users who will benefit have failed to take "locally cost effective and
22

23 ¹³ See discussions concerning the failures of Water Contractors (I.A.1, *post*), Central
Delta and Stockton (I.C.2.a, *post*), Central Delta (IV.B.3, *post*) North Coast (XII.A, B and C,
24 *post*) and Save the Delta (XII.B, *post*).

25 ¹⁴ The Council will generally follow the Delta Plan's approach of using the abbreviated
names for its policies and recommendations, such as WR P1 or WR R1. The First letter or letters
represent the topic, in this case Water Reliability. The "P" or "R" stands for policy or
26 recommendation. The P or R is followed by the particular policy or regulation's number.

27 ¹⁵ Moreover, as explained below, the Act requires the "Delta Plan," not each and every
one of the Plan's policies and recommendations, to further the co-equal goals. (Wat. Code, §
85300, subd. (a); see pp. 28-29, *post*, discussing many measures other than WR P1 that further
28 water supply reliability.)

1 technically feasible” measures that would have avoided the need to harm the Delta. (*Ibid.*) But
2 the in-Delta projects are allowed, even though they will harm the Delta, where users have pursued
3 those other measures. The projects are allowed to partially address the water supply reliability
4 goal. That goal is also significantly furthered by the WR P1’s encouragement of conservation
5 and other steps that are more reliable than dependence on the Delta’s fragile water system. (*Ibid.*)

6 WR P1 specifically provides that a covered action exporting water from, transferring water
7 through, or using water in the Delta would be inconsistent with the Delta Plan, and therefore
8 barred, if, and only if, the following three conditions exist:

- 9 (1) One or more water suppliers that would receive water as a result of the
10 export, transfer or use have failed to adequately contribute to reduced
11 reliance on the Delta and improved regional self reliance . . .
12 (2) That failure has significantly caused the need for the export, transfer or
13 use; and
14 (3) The export, transfer or use would have a significant adverse
15 environmental impact in the Delta.

16 (B446-447, 568-569.)

17 WR P1 goes on to expand on the first condition by outlining how water supplies can
18 contribute to reduced reliance on the Delta. WR P1 provides that water suppliers are compliant if
19 they have taken three actions:

- 20 (A) Completed a current urban or agricultural water management plan
21 ([Management] Plan) which has been reviewed by the California Department of
22 Water Resources for compliance with the applicable requirements of Water Code
23 Division 6, Parts 2.55, 2.6, and 2.8;
24 (B) Identified, evaluated, and commenced implementation, consistent with the
25 implementation schedule set forth in the [Management] Plan, of all programs and
26 projects included in the Plan that are locally cost effective and technically feasible
27 that reduce reliance on the Delta; and
28 (C) Included in the [Management] Plan, commencing in 2015, the expected
outcome for measurable reduction in Delta reliance and improvement in regional
self-reliance. The expected outcome for measurable reduction in Delta reliance
and improvement in regional self-reliance shall be reported in the [Management]
Plan as the reduction in the amount of water used, or in the percentage of water
used, from the Delta watershed. For the purposes of reporting, water efficiency is
considered a new source of water supply, consistent with Water Code Section
1011(a).

(B446-447, 568-569.)

1 Water Contractors mainly argue that the Act bars WR P1 for three reasons, none of which
2 is valid: (1) WR P1 allegedly undercuts the Act's water supply reliability goal, which they
3 mistakenly interpret as calling for increased exports; (2) the Act allegedly bars the Council from
4 prohibiting some harmful in-Delta water projects where they are needed because out-of-Delta
5 water users failed to take specified steps; and (3) the Act allegedly prohibits the Council from
6 adopting any regulation that can impact exports. But the Council will show that WR P1 advances
7 water supply reliability by, among other things, encouraging the use of water sources that are
8 more reliable than the fragile Delta's, and that Water Contractors' arguments ignore many
9 provisions in the Act that grant the Council the authority and discretion to adopt WR P1.

10 North Coast, in contrast, asserts that the Legislature required the Council to adopt a more
11 restrictive regulation. Its arguments ignore the Legislature's grant of discretion to the Council
12 and the Council's resultant authority to take a reasonable, balanced approach. Finally, in-Delta
13 water users want stronger regulations applied to agencies that export water out of the Delta, but
14 argue that *they* should not be regulated, pointing to various area of origin laws. Their arguments
15 ignore the fact that they can meet WR P1's requirements by conserving water where cost
16 effective and feasible, and that conservation is consistent with the area of origin laws.

17 **A. The Act Authorizes WR P1**

18 Water Contractors assert that WR P1 is inconsistent with the Act's water supply reliability
19 goal. They also assert that two provisions in the Act prohibit any Council regulation that can
20 impact exports of water from the Delta. One provision limits the Council's regulatory authority
21 to projects that occur "in whole or in part" within the Delta. (Wat. Code, § 85057.5, subd. (a)(1).)
22 The other prohibits the Council from regulating the "[r]outine maintenance and operation" of
23 Water Contractors' projects. (Wat. Code, § 85057.5, subd. (b)(2).) The Water Contractors also
24 argue that the Council based its "claim of authority" on a single provision in the Act. (See Water
25 Contractors, p. 14, referring to Wat. Code, § 85021.) These assertions are baseless. As explained
26 below, WR P1 promotes water supply reliability. In addition, it only applies to projects in the
27 Delta. Moreover, the Legislature's exclusion of routine actions does not undercut the Council's
28

1 ability to regulate non-routine actions. Finally, in arguing that the Council rests its authority to
2 adopt WR P1 on a single provision in the Act, Water Contractors ignore all of the other
3 provisions that authorize WR P1.

4 **1. Substantial Evidence Establishes That WR P1 Promotes Water**
5 **Supply Reliability**

6 Water Contractors argue that WR P1 “defeats” water supply reliability. (Water
7 Contractors, p. 14.) They are wrong. WR P1 furthers the water reliability goal. It does this by
8 encouraging water users to lessen their dependence on Delta water supplies, and increase their
9 focus on more reliable local and regional measures. Although the Water Contractors imply that
10 existing, if not increased levels of exports are needed to advance water supply reliability, in fact
11 enhanced local and regional measures would improve that goal because Delta water supplies are
12 unreliable. As the Plan explains, “many factors threaten . . . current export levels.” (B549.)
13 These include the need to allow Delta water to flow towards the ocean “to help repel salinity
14 intrusion,” as well as legal challenges seeking to protect the ecosystem. (*Ibid.*) Delta water
15 supplies are also volatile due to natural threats such as climate change and earthquakes. (B477.)
16 Local and regional measures, in contrast, can be more reliable than the current approach. (Wat.
17 Code, § 85004, subd. (b) [Legislative declaration to that effect]; see also Wat. Code, § 85020,
18 subd. (d) [Legislative declaration that “conservation, water use efficiency,” and related measures
19 are “inherent” in promoting the water supply reliability goal].) WR P1 therefore promotes
20 conservation, water recycling, stormwater capture and use, local and regional water storage
21 projects, and similar measures, but only if they are cost effective and feasible. (B446-447, 569.)

22 The Council’s approach thus advances a fundamental directive of the Blue Ribbon Task
23 Force’s *Delta Vision Strategic Plan (Strategic Plan)*. That *Strategic Plan* is the foundation of the
24 Delta Reform Act. (See Wat. Code, §§ 85001, subd. (b); 85079; 85300, subd. (a) [Delta Plan
25 “may include” any of the *Strategic Plan*’s strategies or actions].) The *Strategic Plan* explains that
26 a policy such as WR P1 is needed both to promote a more reliable water supply and to help the
27 Delta ecosystem. Specifically, it provides that “Californians need to become less dependent on
28 water supply from the Delta, both to reduce risk from a failed Delta conveyance system and to

1 reduce risks to the ecosystem.” (L3205.)¹⁶ Further, Water Contractors ignore the record in
2 advancing their argument that WR P1 undercuts the water supply reliability goal. They assert
3 that WR P1 “would frustrate one of the Act’s co-equal goals” and the “water supply” objective of
4 BDCP. (Water Contractors, p. 15, fn. 7.) But the latest draft of the BDCP EIR before the
5 Council when it adopted the Delta Plan contradicts their argument. It shows that the BDCP and
6 WR P1 are “consistent.”¹⁷ Specifically, the March 2013 BDCP Administrative Draft EIR/EIS
7 reviewed the relationship between the Final Draft Delta Plan and the BDCP. The BDCP
8 document discusses how “*the BDCP is consistent with the 14 policies of the Final Draft Delta*
9 *Plan.*” (J154510, italics added.) Moreover, rather than viewing WR P1 as undercutting a BDCP
10 objective, the BDCP EIR cites WR P1 as one of its “Examples of State Accomplishments.”
11 (J158672, J158673.)¹⁸ Water Contractors were obligated to, but did not, bring this to the Court’s
12 attention in presenting their substantial evidence argument. (See Standard of Review, Part E
13 [Forfeit Claims], *ante*.)

14 Finally, although WR P1 furthers the water supply coequal goal, it did not have to. Water
15 Contractors imply that every Delta Plan measure must promote the water supply reliability goal.
16 Not so. Rather, the Plan *as a whole* needs to advance the goal. The Legislature thus directed the
17 Council to adopt a “*Delta Plan that furthers the coequal goals.*” (Wat. Code, § 85300, subd. (a),
18 italics added.) The Legislature similarly provided that the Plan “shall include measures to
19 promote a more reliable water supply” (Wat. Code, § 85302, subd. (d).) Water Contractors
20 have failed to cite Delta Plan measures other than WR P1 that further the water reliability goal.
21 These include encouraging a closer match between available Delta water supplies and exports

22
23 ¹⁶ Moreover, the Legislature gave the Council the discretion to include any of the
24 *Strategic Plan’s* strategies in the Delta Plan (see Wat. Code, § 85300, subd. (a)), and one of those
25 strategies is to reduce water demand through statewide conservation and similar measures.
(L3263.)

26 ¹⁷ The BDCP documents commented on the Council’s draft version of WR P1. The
27 substance of the adopted version is virtually the same as that draft. (See G6449-6450 [staff’s
28 report showing minor changes]; see also B23-24 [redlined version of final Plan].)

¹⁸ Specifically, the draft BDCP document explains as follows: “With the passage of the
Delta Reform Act and the implementation of the Delta Plan, water suppliers *must demonstrate*
their reduced reliance on water from the Delta or the Delta watershed.” (J158673, italics added.)
It goes on to cite WR P1. (*Id.* at 158676.)

1 (B532) and a suite of recommendations such as those calling for more storage, improved
2 conveyance, and conjunctive use, all of which would make water supplies more reliable. (B525-
3 576; especially see B571-572; list is also in footnote 87 on pages 187-188, *ante*.)

4 The Council therefore had the discretion to adopt WR P1 even if it had not promoted the
5 water reliability goal. But the Council is on still firmer ground because WR P1 promotes both
6 coequal goals in a manner that is fully consistent with the *Delta Vision Strategic Plan* and with
7 the Act.

8 **2. WR P1 Only Applies to Actions That at Least Partially Occur in the**
9 **Delta**

10 Water Contractors also assert that WR P1 is invalid because it allegedly does not regulate
11 actions that “occur in whole or in part in the Delta or Suisun Marsh.” (Water Contractors, p. 19
12 [citing Wat. Code, § 85057.5, subd. (a)(1)].) It does. By its terms, the regulation only applies to
13 actions that occur at least in part in the Delta. WR P1 is limited to a proposal “to export water
14 from, transfer water through, or use water in *the Delta*.” (WR P1 (b); B569, italics added.) WR
15 P1’s Delta limitation is reinforced by a second Council regulation, expressly confining the Plan’s
16 regulatory application to a proposed action that “[w]ill occur, in whole or in part, within the
17 boundaries of the Delta or Suisun Marsh.” (23 CCR section 5001, subd. (j)(1)(B).)

18 Water Contractors object to the fact that under WR P1, the evaluation of these in-Delta
19 actions can involve looking outside the Delta. (Water Contractors, p. 19.) It can include a
20 determination of whether such Delta actions are needed because out-of-Delta recipients of the
21 water failed to reduce their dependence on the Delta. The actions required to reduce reliance may
22 take place outside the Delta. But the regulated actions themselves would occur in the Delta.

23 For example, an agency may propose a new in-Delta pump so that the agency can export
24 more water out of the Delta. The pump would be in the Delta. But the pump might have been
25 unnecessary if, for example, the intended out-of-Delta beneficiaries had adopted measures such as
26 feasible water conservation or recycling projects. WR P1, in part, looks at those out-of-Delta
27 actions in evaluating the validity of the pump proposal. But the regulated project—the pump in
28 this hypothetical—must be located in whole or in part in the Delta.

1 Despite Water Contractors’ implication that the Council is amending requirements of
2 existing laws governing water management plans, WR P1 does not alter those laws. Rather, it
3 imposes a condition on a benefit. If an entity seeks the benefit of engaging in a Delta project that
4 will *harm* the Delta ecosystem, it needs to show that it lacks a reasonable alternative. WR P1’s
5 provisions concerning water management plans describe how an entity may make that showing.
6 But the entity can *ignore* WR P1 by deciding not to engage in a harmful Delta project. WR P1
7 therefore does not amend any laws. To the contrary, WR P1 is fully authorized by the Delta
8 Reform Act. (See subsection 4, below.)

9 **3. The Act Only Prevents the Council from Regulating the “Routine**
10 **Maintenance and Operation” of Water Projects**

11 Water Contractors also try to greatly expand the Act’s limited restriction of Council
12 authority over their projects. They correctly state that the Legislature prohibited the Council from
13 regulating the “[r]outine maintenance and operation” of the State Water Project and the Central
14 Valley Project (SWP/CVP). (Water Contractors, p. 18; Wat. Code, § 85057.5, subd. (b)(2).) But
15 they draw the illogical conclusion that the Legislature’s exclusion of *some* SWP/CVP actions is a
16 “confirmation” of Legislative intent to prohibit the Council for regulating *all* actions that can
17 impact the SWP/CVP. (Water Contractors, pp. 17-18.) Their logic is counter to standard
18 statutory construction, under which a legislative body’s prohibition of some actions, but silence as
19 to others, indicates a legislative intent to allow those other actions. (*California Redevelopment*
20 *Assn. v. Matosantos* (2011) 53 Cal.4th 231, 261 [applying “[t]he principle of *inclusio unius est*
21 *exclusio alterius.*”].)

22 The Legislature granted broad authority to the Council over “covered actions” in Water
23 Code section 85057.5. It only carved out a limited exclusion concerning the SWP/CVP. The
24 Council lacks authority over their “[r]outine maintenance and operation.” (Wat. Code, § 85057.5,
25 subd. (b)(2).) But any actions concerning those projects that go beyond routine maintenance and
26 operation can be regulated if they meet the Act’s other requirements (such as occurring in part in
27 the Delta—see Wat. Code, § 85057.5). For example, capital projects are potentially subject to
28 regulation, because by their nature they are different from maintenance and operation. (See, e.g.,

1 Wat. Code § 12899.8, subds. (a) and (b), separately referring to the “*construction*, operation, and
2 maintenance of an encroachment” to a water project [*italics added*].) The same is true for “non-
3 routine” projects; by definition they are different from “routine” projects. Thus, the Legislature’s
4 very deliberate choice of words in Water Code section 85057.5, subdivision (b)(2) highlights its
5 grant of authority to the Council to regulate some projects that impact the SWP/CVP. As
6 discussed in the next section, many provisions in the Act reinforce this authority.

7 **4. Water Contractors Ignore the Act’s Numerous Provisions**
8 **Authorizing WR P1**

9 Water Contractors start from a false premise by arguing that the Council has no authority to
10 adopt a regulation that can impact exports from the Delta. They assert that “[t]he Council’s claim
11 of authority depends upon a flawed construction of a single statement of the statewide reduced
12 reliance policy of the Act, Water Code section 85021.”¹⁹ (Water Contractors, p. 14.) It does not.
13 The Council’s authority would exist absent that section. Section 85021 merely reinforces the
14 many other provisions that authorize WR P1.

15 The Legislature authorized the Council to adopt WR P1. It did so by adopting multiple
16 provisions, including the following:

- 17 • The Act calls upon the Council to adopt a Plan that “furthers the coequal goals.”
18 (Wat. Code, § 85300, subd. (a).) WR P1 takes a balanced approach in furthering these
19 potentially conflicting goals. As was previously explained (see pp. 24-25, *ante*), it
20 advances the protection of the Delta by prohibiting some in-Delta water projects that will
21 harm the Delta. It furthers the goal of “a more reliable water supply for California” by
22

23 _____
24 ¹⁹ Water Code section 85021 states in full:

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

1 promoting a shift to more reliable measures such as conservation and the development of
2 new, more stable out-of-Delta water supplies. (See Argument I.A.1, *ante*).

3 • At the outset of the Delta Reform Act, the Legislature declared its intent “to
4 establish a governance structure that will direct efforts across state agencies to develop a
5 *legally enforceable* Delta Plan.” (Wat. Code, § 85001, subd. (c) [*italics added*].) The new
6 governance structure refers to the Council. (See Part 3 of the Act [“DELTA
7 GOVERNANCE”], Wat. Code, § 85200 et seq.²⁰)

8 • The Legislature went on to declare state policy to “[e]stablish a new governance
9 structure with the authority” to, among other things, “promote statewide water
10 conservation, water use efficiency, and sustainable water use.” (Wat. Code, § 85020,
11 subd. (d), *italics added*.) “Promote” includes promoting by regulating. (See pp. 33-34,
12 *post*.)

13 • The Legislature therefore established an enforcement mechanism under which
14 “covered actions” (defined in Wat. Code, § 85057.5, subd. (a)) must be consistent with the
15 Delta Plan. (See Wat. Code, §§ 85225-85225.3 [*italics added*]; see also Wat. Code, §
16 85057.5 [definition of covered action].)

17 • The Legislature gave the Council the authority to “adopt regulations or guidelines
18 as needed to carry out the powers and duties” identified in the Act. (Wat. Code, § 85210,
19 subd. (i).) Moreover, that grant of authority goes beyond the Act’s express terms; the
20 grant also includes the Act’s “implied terms.” (Gov. Code, § 11342.2 [Legislative
21

22
23 ²⁰ The Act’s legislative history confirms that the Legislature was referring to the Council.
24 The Act’s last bill analysis explained that the Act gives the Council regulatory authority because
25 it “ensures consistency with the state’s Delta Plan,” and because “[t]he Council’s role in
26 developing and enforcing consistency with the Delta Plan will provide a critical component of
27 crafting a coherent and sustainable long-term state policy for the Delta.” The Act did this to
28 address the failure of the previous, non-regulatory CALFED approach to solving Delta issues,
where the agency overseeing that process “lacked the authority to resolve conflicts among
agencies and set a unified direction.” (Legislative staff report, presented to the Assembly
Committee on Water, Parks and Wildlife on November 3, 2009 [L21549 (date), L21568 (quoted
language)].)

1 determination in the Administrative Procedure Act that regulations authorized by a
2 statute's implied terms are valid.]

3 • The Legislature directed the Council to include Delta Plan measures that "promote
4 a more reliable water supply" generally, including addressing the broad issues of meeting
5 needs for reasonable and beneficial uses of water and sustaining the state's economic
6 vitality. (Wat. Code, § 85302, subd. (d).)

7 • The Legislature underscored its intent that the Council adopt a legally enforceable
8 plan that addresses water uses by directing the Council to develop a Delta Plan consistent
9 with "[t]he federal Coastal Zone Management Act [CZMA] . . . or an equivalent
10 compliance mechanism." (Wat. Code, § 85300, subd. (d)(A).) To be consistent with the
11 CZMA, and potentially obtain regulatory authority over federal agencies,²¹ the Delta Plan
12 needs enforceable policies concerning water uses.²²

13 • As explained in Part A.3 of this argument, *ante*, the Legislature's prohibition of
14 Council regulations governing the "[r]outine maintenance and operation" of the SWP/CVP
15 in Water Code section 85057.5, subdivision (b)(2), shows that the Council can regulate at
16 least some SWP/CVP actions that go beyond routine maintenance and operation.

17 Finally, a number of the Act's provisions call upon the Council to "promote" water
18 conservation and other measures. (See, e.g., Wat. Code, §§ 85020, subd. (d) and 85302, subd.

19 ²¹ The Legislature adopted this directive so that the Council could obtain regulatory
20 authority over federal agencies. (See L21567 [legislative staff report presented to the Assembly
21 Committee on Water, Parks and Wildlife on September 11, 2009]; see also B509 [explanation in
22 Delta Plan]. The Delta is potentially within the CZMA's coastal zone. (See 15 C.F.R. § 923.31,
subd. (a)(1) and (6) [coastal zone can extend inland to areas "vulnerable to sea level rise" and to
"intertidal areas"].)

23 ²² CZMA plans need to exert control over permissible "water uses" within the coastal
24 zone. (15 C.F.R. § 923.40, subd. (a); 16 U.S.C. § 1455, subd. (d)(2)(D) [plan must demonstrate
25 means of ensuring compliance with plan's enforceable policies]; 15 C.F.R. § 923.41, subd. (a)(1)
26 [state must identify how it will "exert control over the permissible . . . water uses within the
27 coastal zone"].) The state may directly regulate uses, or use the Act's approach of reviewing the
28 actions of other entities for consistency with the Delta Plan, but in either case it is required to
"regulate . . . water uses . . ." (15 C.F.R. § 923.40, subd. (a).) Although the Legislature granted
the Council the discretion to use an equivalent enforcement mechanism, as opposed to mandating
use of the CZMA, the Delta Reform Act's citation of the CZMA with its repeated references to
"water uses" reinforces the authority of the Council to adopt regulations that can impact water
uses.

1 (d.) Water Contractors assert that the term "promote" cannot include "require," but rather is
2 limited to recommendations and similar non-regulatory measures. (Water Contractors, pp. 16-
3 17.) They are correct that the term "promote" includes the notion of prodding. But it also
4 includes regulating. The California Supreme Court thus explains that an agency charged with
5 promoting a policy has the discretion to do so by adopting a regulation prohibiting an activity. In
6 *Ralphs Grocery Co. v. Reimel* (1968) 69 Cal.2d 172, for example, grocery stores asserted that a
7 state agency lacked the authority to adopt a state regulation that prohibited beer wholesalers from
8 granting discounts for quantity purchases. The Court rejected the claim, explaining that:

9 the Legislature gave the department a general mandate: to use its expertise and
10 power of continuous regulation as it sees fit to 'promote orderly marketing and
11 distribution.' One tool available to accomplish this goal was the prohibition of
12 quantity discounts. In not mentioning this method, the Legislature left the
13 question of its propriety for the department.

14 (*Id.* at 183, italics added). The Supreme Court similarly indicated that "promote" includes
15 "regulate" in numerous other cases, including *California Grocers Assn. v. City of Los Angeles*
16 (2011) 52 Cal.4th 177, 196 (local governments can "promote public health and safety through
17 regulation"), *Credit Ins. Gen. Agents Assn. v. Payne* (1976) 16 Cal. 3d 651, 656 (citing a statute
18 stating that the public welfare can be promoted by regulating credit insurance), and *Bank of Italy*
19 *v. Johnson* (1926) 200 Cal. 1, 22 (holding that a rule using the word "require" was "in harmony"
20 with a statute using the word "promoted").

21 Consistent with our Supreme Court's interpretation of the term "promote" as including
22 prescriptive regulations, the Oxford Dictionary defines the term as "support or actively encourage
23 (a cause, venture, etc.); further the progress of: [for example] *some regulation is still required to*
24 *promote competition.*" (See <http://oxforddictionaries.com/definition/english/promote>, original
25 italics.) In the Delta Reform Act, the Legislature did not limit the term "promote" to non-
26 regulatory actions. The Council therefore has the discretion to determine how best to promote
27 water conservation and related objectives.
28

1 Water Contractors' assertion that the Council solely based WR P1 on Water Code section
2 85021 is thus wrong. To the contrary, WR P1 is valid whether or not Water Code section 85021
3 existed. But as will be seen, that section still further buttresses WR P1's validity.

4 **5. Water Code Section 85021 Reinforces the Act's Many Other**
5 **Provisions Supporting WR P1**

6 Although Water Code section 85021 is not the primary basis for WR P1, it supplements the
7 numerous provisions outlined above that authorize WR P1. Section 85021 reads:

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

12 The first sentence's "reduce reliance on the Delta" policy reinforces the Legislature's prior
13 policy statement that it is establishing "a new governance structure [the Council] with the
14 authority . . . to achieve" the objective of "statewide water conservation, water use efficiency, and
15 sustainable water use." (Wat. Code, § 85020, subs. (f) and (h).)

16 Section 85021's second sentence provides that "[e]ach region that depends on water from
17 the Delta watershed shall improve its regional self-reliance." (*Ibid.*) Water Contractors assert
18 that, given the second sentence's reference to "each region," the Council is required to ignore
19 Section 85021. (Water Contractors, p. 22.) But that constrained reading chafes against the
20 Legislature's statement that it is creating a new governance structure to achieve statewide
21 conservation and similar measures that improve regional self-reliance. (Wat. Code, § 85020,
22 subs. (f) and (h).) There is no indication that the Legislature intended its policy declarations to
23 be read in isolation. To the contrary, in interpreting statutory language, courts presume that the
24 Legislature intended to "harmonize the various parts of the enactment." (*In re Alonzo J.* (2014)
25 58 Cal.4th 924, 933.)

26 Water Contractors also argue that the Legislature's reduced reliance policy should only
27 apply to increased uses over and above those that existed when the Legislature adopted the Delta
28

1 Reform Act. They base their argument on the use of the word “future” in the phrase “future water
2 supply needs.” (Water Contractors, p. 22, quoting Wat. Code, § 85021.) Water Contractors
3 ignore the dictionary meaning of future, and instead create their own definition. Future means
4 “[t]he time or a period of time following the moment of speaking or writing; time regarded as still
5 to come.” (See Oxford Dictionaries, English (US), at
6 http://www.oxforddictionaries.com/us/definition/american_english/future.) Instead, Water
7 Contractors ask this Court to interpret “future” as meaning over and above current levels. That
8 strained meaning—defining “future” in terms of volume rather than time—is not only contrary to
9 the plain meaning of the word “future,” but it runs counter to the Delta Reform Act’s intent to
10 further both coequal goals. As then-Assemblyman Jared Huffman (who insisted on including the
11 “reduced reliance” provision) pointed out to the Council, having declared in 2009 that the
12 “existing Delta policies are not sustainable,” (Wat. Code, § 85001, subd. (a)), it would it make no
13 sense to “enshrine” the existing level of reliance “as a means of fixing the Delta.” (K7534.)²³

14 Moreover, even under Water Contractors’ constrained reading of section 85021, WR P1
15 furthers its policies. WR P1 provides that reduced reliance can mean reducing the “amount [or]
16 *percentage* of water used from the Delta watershed.” (B446-447, 568-569.) Thus, if a region
17 experiences significant population growth, and it mainly increases local water sources, it could
18 also increase its use of Delta waters to some extent and still reduce its percentage of Delta waters.
19 Therefore, even if Water Contractors’ reading were correct, section 85021 would add to all of the
20 other provisions that establish WR P1’s validity.

21
22
23 ²³ Although Assemblyman Huffman’s letter to the Council is not legislative history, its
24 reasoning is persuasive. Moreover, he made similar statements when the Legislature discussed
25 the reduced reliance provisions. For example, he stated that the “[s]pirit of that policy is to
26 reduce dependence on Delta exports. . . . Delta Vision made very clear that the Delta is over-
27 subscribed and over-allocated and that over time ther’s a reality check that has to be part of the
28 solution. And that—concurrent with that is the fact that *the ecosystem, if we’re going to stabilize
it and restore it, is going to need some more water. . . . the coequal water supply goal is not co-
equal water exports from the Delta. Its co-equal statewide supply reliability Yes, we’re
going to continue to export water from the Delta, but over time it’s going to be less.*” (See
separately filed Transcript of Excerpts from Water Contractors’ Request for Judicial Notice, pp.
2-3; Exhibit 6 [DVD Video], Disc 1, 1:10:45 to 1;12.52 [italics added].)

1 **6. WR P1 Does Not Violate Water Contractors' Water Rights**

2 The Legislature created the Council because “existing Delta policies are not sustainable,”
3 and “[r]esolving the crisis requires fundamental reorganization of the state’s management of
4 Delta watershed resources.” (Wat. Code § 85001, subd. (a).) Water Contractors nonetheless ask
5 this Court to interpret the Act as barring the Council from effectively addressing that crisis.
6 Specifically, they assert that Water Code sections 85031 and 85032 prohibit WR P1. (Water
7 Contractors, p. 17.) Those sections disavow any intent in the Act to diminish, impair, or affect
8 any water rights protections.

9 But the Legislature simultaneously highlighted the limited scope of those water rights by
10 reaffirming the reasonable use and public trust doctrines and declaring that those doctrines “are
11 particularly important and applicable to the Delta.” (Wat. Code, § 85023.) Those legislatively
12 reaffirmed doctrines are background principles that limit an owner’s interest in using water. (See,
13 for example, *Allegretti v. County of Imperial* (2006), 138 Cal.App.4th 1261, 1279 [no property
14 right to unreasonable use of water]; *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132,
15 140 [paramount consideration in determining reasonable use is “the ever increasing need for the
16 conservation of water in this state”]; *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3
17 Cal.2d 489, 567 [“What is a (reasonable) beneficial use at one time may, because of changed
18 conditions, become a waste of water at a later time”]; *National Audubon Society v. Superior*
19 *Court* (1983) 33 Cal.3d 419, 437 [“no vested right to use (water) rights in a manner harmful to the
20 (public) trust”].) Thus, any water rights that diverters have do not include the right to use water
21 in a manner that is inconsistent with the public trust or reasonable use doctrines. Since WR P1
22 promotes the public trust interest in protecting the Delta’s ecosystem, and it promotes the
23 reasonable use of water, it cannot violate water rights.

24 Moreover, consistent with the reasonable use and public trust doctrines, the Legislature
25 underscored the importance of water conservation and local water supply development measures
26 by directing the Council to adopt a Delta Plan “that furthers the coequal goals” (Wat. Code, §
27 85300, subd. (a)), and declaring that “inherent” in those goals is the promotion of “statewide
28 water conservation, water use efficiency, and sustainable water use” (Wat. Code, § 85020, subd.

1 (d). Water Contractors disregard those directives, as well as numerous similar provisions
2 outlined in Part A.4 of this argument, *ante*, such as the Legislature’s call for “a legally
3 enforceable Delta Plan.” (Wat. Code, § 85001, subd. (c).) Instead, they assert that no entity other
4 than the State Water Resources Control Board (SWRCB) can adopt any regulation that can have
5 an effect on any use of water. (Water Contractors, p. 17.) But while the Legislature barred the
6 Council from overturning “[a] regulatory action of a state agency” (see Wat. Code, § 85057.5,
7 subd. (b)(1)), the Legislature did not bar the Council from exercising concurrent jurisdiction that
8 may overlap that of another agency.

9 Agency responsibilities often overlap. (See, e.g., *City of Morgan Hill v. Bay Area Air*
10 *Quality Management Dist.* (2004) 118 Cal.App.4th 861, 866 [“One who would construct and
11 operate a California power plant must first obtain an interconnected set of federal, state and
12 regional agency approvals”]. That overlap can involve water impacts and uses. For example, in
13 *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, the Supreme
14 Court held that both the SWRCB and the Department of Forestry could regulate the water quality
15 impacts of a proposed timber harvest. It explained that “a system of overlapping jurisdiction [is]
16 an uncontroversial concept under our law.” (*Id.* at p. 936; see also *Sonoma County Water Coal. v.*
17 *Sonoma County Water Agency* (2010) 189 Cal.App.4th 33, 37, fn. 4 [referring to “overlapping
18 regulatory environments”] and *id.* at p. 44 [describing the Department of Fish and Game’s
19 minimum flow requirements and the SWRCB’s water rights permits].)²⁴

20 WR P1 furthers numerous Legislative directives, and the fact that some of those directives
21 may also touch upon matters within the SWRCB’s jurisdiction does not negate the Legislative
22

23
24 ²⁴ Water Contractors have not alleged any actual conflict between agencies. That is
25 because they are challenging WR P1 on its face absent any actual application of the policy. Thus,
26 they must prove, at a minimum, that the regulation’s application would have been invalid “in the
27 generality or great majority of cases.” (*In re Guardianship of Ann S.* (2009) 45 Cal.4th 1110,
28 1126; see also *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 38-39
[applying requirement to challenge of regulations].) With no actual conflict before it, the Court
has “no occasion to speculate on how some hypothetical dispute [between agencies] that might be
presented for decision in the future should properly be resolved.” (*7 Found. v. Brown* (1981) 29
Cal.3d 168, 200.)

1 directives. In contrast, Water Contractors' approach would undermine the Legislature's call for a
2 legally enforceable Delta Plan that furthers the coequal goals.

3 7. Substantial Evidence Supports the Need for WR P1

4 Finally, Water Contractors assert that WR P1 is invalid because there is allegedly no
5 substantial evidence that "some water suppliers have not taken steps to adequately reduce their
6 reliance on the Delta." (Water Contractors, p. 24.) They ignore the Act itself. It declares that
7 "existing Delta policies are not sustainable." (Wat. Code, § 85001, subd. (a)). It goes on to
8 declare a new policy: "reduced reliance." (Wat. Code, § 85021.) These provisions alone
9 constitute all the evidence needed for the Council's reduced reliance policy. (See, e.g., *Am. Bank*
10 *& Trust Co. v. Cmty. Hosp.* (1984) 36 Cal.3d 359, 372 ["It is not the judiciary's function,
11 however, to reweigh the "legislative facts" underlying a legislative enactment."].) Moreover, the
12 Legislature established the Council in part to create an entity with the "authority" to "promote
13 statewide water conservation, water use efficiency, and sustainable water use." (Wat. Code, §
14 85020, subd. (d) and (h).) If the Legislature agreed with Water Contractors that more evidence of
15 over-reliance on the Delta was needed, it would not have enacted the Delta Reform Act.

16 Further, the record supports the Legislature's determinations. For example, in 2012, the
17 National Academy of Sciences found that, in spite of the Delta Reform Act's reduced reliance
18 policy, "the evidence suggests that demand for the delta's water has been increasing." (L3886.)
19 The Academy determined that, as a result, "regulatory improvements and principles are needed to
20 ensure more robust, comprehensive, and accountable planning. They include . . . more
21 comprehensive water conservation." (L3888.)

22 Additional evidence shows that while some regions are taking significant steps to reduce
23 their reliance on Delta waters (B561), others are not. For example, the most recent data indicate
24 that 15 percent of urban agencies are out of compliance with a state law requirement that they
25 submit a water management plan to the Department of Water Resources (DWR). (B561-562.)
26 Moreover, DWR did not review the submitted plans for completeness, and in prior years many
27 submitted plans failed to even include conservation measures. (B562.) Water Contractors assert
28

1 that the Council engaged in “pure speculation” because it assumed that some delinquent agencies
2 rely on Delta waters. (Water Contractors, p. 24.) But because “[m]ore than two-thirds of the
3 residents of the state” received Delta waters (Wat. Code, § 85004, subd. (a)), it is likely that a
4 significant number of noncompliant agencies receive Delta waters.

5 Finally, WR P1 does not only address agencies that have failed to submit their plans. It
6 goes further and calls upon agencies that did submit plans to have “commenced implementation”
7 of “locally cost effective and technically feasible” projects “which reduce reliance on the Delta.”
8 (B446, 569.)

9 The need for WR P1 is therefore fully supported by substantial evidence in the record. The
10 Legislature declared the need for this type of measure, the National Academy of Sciences
11 concurred, water suppliers have not submitted water management plans that would help to reduce
12 reliance, and this regulation will encourage water suppliers to comply with their plans.

13 **B. The Council Acted Within Its Discretion in Not Drafting WR P1 to Go**
14 **Further**

15 North Coast and Central Delta go to the opposite extreme. They argue that Water Code
16 section 85021 *mandates* that the Council “ensure that reliance on the Delta . . . is actually
17 reduced.” (Central Delta, pp. 16 [quote] and 18 [“mandate”]; North Coast, p. 32 [suggesting that
18 section 85021 mandates “legally enforceable measure for reducing reliance on the Delta”].) They
19 go on to assert that WR P1 fails to guarantee reduced reliance and therefore does not meet this
20 purported mandate.

21 There are four problems with their arguments. The first two are virtually the inverse of the
22 problems with Water Contractor arguments: North Coast and Central Delta overstate the
23 requirements of Water Code section 85021, and they ignore the Council’s lack of authority over
24 the routine operation of water projects. The third problem is Central Delta’s inclusion of an
25 assertion that the Council did not acknowledge the need for reduced reliance, when in fact the
26 Plan expressly acknowledges that need. The fourth flaw in these petitioners’ arguments is their
27 failure to acknowledge the Council’s broad discretion.

28

1 First, while Water Contractors incorrectly assert that section 85021 has no application to the
2 Council, North Coast and Central Delta claim that it imposes a “mandatory” duty on the Council.
3 (North Coast, p. 33 [“command . . . reducing reliance”]; Central Delta, p. 18 [“mandate”].) It
4 does not. Section 85021’s first sentence states California’s “reduce reliance” policy.²⁵ The
5 second sentence explains that it should be achieved through specified regional and local actions.
6 But neither sentence provides that the Council must take specified steps to further the policy.
7 That is left to the Council’s discretion.

8 Other provisions in the Act reinforce the fact that section 85021 left the furtherance of the
9 Legislature’s reduced reliance policy to the Council’s discretion. Most notably, the Legislature
10 used the word “promote” to describe the Council’s authority concerning water use efficiency and
11 reliability. (Wat. Code, §§ 85020, subd. (d) [water use efficiency], 85302, subd. (d) [more
12 reliable water supply].) That word gives the Council significant discretion. (See Part A.4 of this
13 argument, *ante*, explaining that “promote” ranges from regulating to non-regulatory prodding).

14 Second, while Water Contractors greatly overstate the Act’s regulatory prohibition
15 concerning routine maintenance and operations of the water projects, Central Delta and North
16 Coast entirely ignore the prohibition. The Council does not have authority over any action that
17 amounts to a “routine maintenance and operation.” (Wat. Code, § 85057.5, subd. (b)(2).) The
18 Council’s inability to regulate routine water project operations significantly limits its ability to
19 reduce exports. Petitioners never explain how, given this statutory constraint, the Council could
20 nevertheless “ensure that reliance on the Delta . . . is actually reduced.” (Central Delta, p. 16,
21 italics added.)

22
23
24 ²⁵ As previously noted, Water Code section 85021 states in full:

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

1 Third, Central Delta asserts that the best available science “clearly indicated that reduced
2 reliance . . . was necessary,” but that WR P1 is defective because the Council allegedly did not
3 use best available science, and as a result did not acknowledge the need for reduced reliance.
4 (Central Delta, pp. 17 – 18.) But the Plan expressly acknowledges that need. (See, e.g., B568
5 [stressing the importance of “achieving the policy of reduced reliance on the Delta”].)

6 Moreover, even if the Plan and WR P1 had not called for reduced reliance, Central Delta’s
7 best available science assertions would not help its position. For example, Central Delta asserts
8 that the Plan is not consistent with the Independent Science Board’s “nine-step Adaptive
9 Management Framework.” (Central Delta, p. 17.) But it ignores the Plan, which contains all of
10 those steps. (B503-512.) It also asserts that the Plan needs “conceptual models.” (Central Delta,
11 p. 17.) Conceptual models are descriptions of the “structure and function” of “a system or
12 process.” (B771.) The final Plan uses these models in each substantive chapter. Significantly,
13 the chapter that addresses the essence of Central Delta’s concern—Chapter 4 (Delta ecosystem)—
14 describes in detail the stressors on the Delta ecosystem and how they should be addressed (B590
15 [listing stressors], B592-593 [principles underlying restoration], B594-623 [details concerning
16 stressors and how to address them].)

17 Further, Central Delta criticizes the Plan’s references to studies by two researchers, Gilbert
18 and Dugdale, but never explains how the references allegedly undermine WR P1. The Plan cites
19 those studies, and others, to support its statement that “[r]ecent and current research is
20 reconsidering the role of nutrients for aquatic ecosystems of the Delta.” (B689.) Central Delta
21 fails to explain the connection between that statement and WR P1. And Central Delta does not
22 reveal that the only criticism previously received about the Plan’s citation to Gilbert and Dugdale
23 was that there were allegedly better citations for the same proposition, not that the proposition
24 was wrong. (See G5811 [“The cited work by Gilbert et al (2011) and Dugdale et al. (2007) is still
25 preliminary Use examples that are less controversial and better supported.”].) Central Delta
26 has not come close to establishing that best available science does not support WR P1.

1 Fourth, although Central Delta would have liked the Council to have gone further, the
2 Council had the discretion not to.²⁶ As our Supreme Court explains, “[r]eform may take place
3 one step at a time.” (*W. States, supra* 57 Cal.4th at p. 421 [internal quotations and citation
4 omitted.]) WR P1 furthers the Council’s goals without unnecessarily burdening the regulated
5 community. (See Gov. Code, § 11340.1 [Legislature’s intent that agencies “seek to reduce . . .
6 unnecessary regulatory burden”].) By statute, the Council will review the Delta Plan at least
7 every five years. (Wat. Code, § 85300, subd. (c).) At that time, the Council may revise the Plan
8 as it “deems appropriate.” (*Ibid.*) And at that time, petitioners will have the opportunity to
9 explain why, in their view, WR P1 had not been sufficiently effective. They can advocate an
10 alternative, more burdensome approach, which the Council could adopt if appropriate. But
11 petitioners have failed to point to any provision in the Act mandating the Council to do more than
12 it did with WR P1.

13 **C. The Council Had the Authority to Apply WR P1 to in-Delta Water Users**

14 In addition to arguing that the Council should have gone further in regulating exporters,
15 Central Delta, now joined by Stockton, assert that *they* should not be required to conserve water.
16 WR P1 applies to projects that will export water out of and through the Delta, as well as to
17 projects that will use water in the Delta. (Growers and residents in the Delta use approximately
18 four percent of the water that flows into the Delta. [See B543].) As a threshold matter, Central
19 Delta and Stockton argue that they cannot reduce their reliance on Delta waters because the Delta
20 is their main, if not only, water source. (Central Delta, p. 20; see also Stockton, p. 33.) But, by
21 its terms, WR P1’s reduced reliance provision can be met by measures that are available to in-
22 Delta users, namely conservation and related efficiency measures. (See WR P1 at B446-447, 568-
23 569 [“water efficiency is considered a new source of water supply, consistent with Water Code
24

25 ²⁶ In one case, the Council could not have gone further. Central Delta’s complains that
26 “WRP1 does not apply to water use upstream of the Delta.” (Central Delta, p. 16.) But Central
27 Delta ignores the Act’s requirement that a regulated action occur “in whole, or in part” in the
28 Delta. (Wat. Code, § 85057.5, subd. (a)(2).) As the Plan explains, given this provision the
Council cannot regulate “the diversion and use of water in the Delta watershed that is entirely
upstream” of the Delta. (B514.)

1 section 1011(a)”.²⁷) Also by its terms, WR P1 only requires these measures if they are “locally
2 cost effective and technically feasible.”

3 Central Delta and Stockton mainly assert that so-called area of origin laws prevent WR P1’s
4 application to in-Delta water uses. (Central Delta, pp.18-22; Stockton pp. 29-35.) They
5 specifically cite two measures: the Watershed Protection Act (Wat. Code, §§ 11460-11463) and
6 the Delta Protection Act of 1959 (Wat. Code, §§ 12200-12205).

7 The first measure, the Watershed Protection Act, applies to the Department of Water
8 Resources and to the United States Bureau of Reclamation. (See *Phelps v. State Water Resources*
9 *Control Board* (2007) 157 Cal.App.4th 89, 107.) It prohibits those entities from operating their
10 water projects in a manner that deprives the sending watershed of needed water. (*Ibid.*) The
11 second measure, the Delta Protection Act of 1959, is a “rather vague” set of laws that can limit
12 diversions of water from the Delta that are needed for Delta salinity control or Delta users. (*State*
13 *Water Res. Control Bd. Cases (SWRCB Cases), supra*, 136 Cal.App.4th 674, 768.)

14 Petitioners assert that WR P1 will divert Delta waters to exporters, but their briefs fail to
15 cite any evidence in support of this claim and they therefore forfeited their claim. Moreover,
16 even if they had not forfeited their claim, WR P1 cannot violate either of the area of origin acts
17 because it furthers an in-Delta water use: the protection of the Delta ecosystem. Finally,
18 Stockton presents a complex argument built on the premise that if it applied for a water right from
19 the State Water Resources Control Board, that application would be a covered action and
20 therefore subject to the Council’s regulations. But the Council does not regulate those water right
21 applications. By definition, covered actions do not include “[a] regulatory action of a state
22 agency.” (Wat. Code, § 85057.5, subd. (b)(1).)

23
24
25 ²⁷ As a second threshold matter, Central Delta states, in a footnote, that it is unsure
26 whether certain documents concerning the BDCP are in the record. (Central Delta, p. 21, fn. 10.)
27 They are. (See J143361 et seq. [March 2013 Admin. Draft EIR/S]; I1723 et seq. [March 2013
28 Admin. Draft BDCP]; K12416 and 12667 [so-called “red flag” comments on BDCP Effects
Analysis].) That said, Central Delta improperly cites those documents to argue that the Council
supported the BDCP as it existed at that time. It did not. As explained in Argument II,A, *post*,
the Council did not take any position on the BDCP’s content.

1 **1. In-Delta Water Users Can Reduce Their Use of Delta Waters**
2 **Through Measures Such as Conservation**

3 As a “threshold matter,” Central Delta asserts that applying WR P1’s encouragement of
4 improved regional self-reliance to in-Delta uses is “nonsensical.” (Central Delta, p. 20; see also
5 *id.* at p. 22 [“no other sources of water”]; Stockton, p. 33 [“may be impossible”].) They base their
6 conclusion on a false premise: that the only way to improve regional self-reliance is to obtain
7 more water.

8 WR P1 explains that conservation measures reduce reliance on the Delta. (WR P1, subd.
9 (c)(2) [B446-447, 568-569].) That provision is based upon the Act itself. The Legislature
10 expressly provided that improved self-reliance is achieved through conservation and other
11 measures that improve efficiency. It therefore explained that “[e]ach region that depends on
12 water from the Delta watershed shall improve its regional self-reliance for water through
13 investment in water use *efficiency, water recycling, advanced water technologies,*” and other
14 measures. (Wat. Code, § 85021, italics added.) Moreover, the Legislature provided that these
15 measures should be applied in “each region.” (*Ibid.*) Elsewhere, the Legislature declared that
16 these measures should be adopted “statewide.” (Wat. Code, § 85020, subd. (f).)²⁸ The
17 Legislature did not insert an exception in either provision for in-Delta water uses.

18 Further, WR P1 only calls for measures that are “locally cost effective” and that are
19 “technically feasible.” (B446-447, 568-569.) Rather than being “nonsensical,” WR P1’s
20 encouragement of reasonable conservation measures is not only quite sensible, but it closely
21 adheres to express provisions in the Act.

22
23
24 ²⁸ Further, the Legislature drew its statewide conservation provision from the Blue
25 Ribbon Task Force’s *Delta Vision Strategic Plan*. The Delta Reform Act is based upon that plan.
26 (See Wat. Code, §§ 85001, subd. (b); 85079.) Notably, the Legislature provided that the Council
27 “may include” any of the *Strategic Plan*’s strategies in the Council’s Delta Plan (Wat. Code, §
28 85300, subd. (a)), and one of those strategies is statewide conservation. (L3263.) Significantly,
the strategy not only seeks to reduce diversions of waters “exported from the Delta,” but also
diversions “within” the Delta. (*Ibid.*) The Legislature therefore gave the Council the discretion
to include a Delta Plan measure such as WR P1 calling for conservation within the Delta.

1 **2. Petitioners' Area of Origin Claim Fails Both Because They Forfeited**
2 **Their Claim by Not Citing any Evidence and Because Those Laws**
3 **Allow Using Delta Water for Delta Fish and Wildlife**

4 Central Delta and Stockton's main challenge to WR P1 is that it allegedly violates various
5 area of origin laws by "mandate[ing] water use reduction for in-Delta users for the benefit of
6 exporters." (Central Delta, p. 20; see also *id.*, p. 1 ["divert Delta water to serve others"];
7 Stockton, p. 33 [benefits "Southern California water development interests"].) But as explained
8 below, they forfeited their claim by failing to cite any evidence that WR P1 will divert Delta
9 water to serve non-Delta users.

10 Moreover, even if petitioners had not forfeited their claim, it is wrong. WR P1 promotes
11 in-Delta conservation and related measures so that water can be made available for another in-
12 Delta use: Delta habitat. Two elements in WR P1 protect and improve Delta habitat. As the
13 Council will show, by its terms WR P1 can only be applied to protect Delta habitat, and in
14 addition it promotes conservation, which frees up water for Delta habitat. Both help the Delta
15 ecosystem, and area of origin laws apply as much to using water for Delta habitat as they do to
16 other water uses. Finally, the cause of the Delta ecosystem's need is irrelevant. Even if exporters
17 caused the need, as long as water is used for an in-Delta use there is no area of origin issue.

18 **a. Petitioners Forfeited Their Claim by Failing to Cite Any**
19 **Evidence**

20 Petitioners assert the WR P1 will divert Delta water "for the benefit of exporters." (Central
21 Delta, p. 20; see also Stockton, p. 33.) But they have not cited any facts showing or even
22 suggesting that the policy will cause any water to be diverted from the Delta to export users. As a
23 result, their claim fails.

24 Petitioners were required to "set forth in their brief all the material evidence on the point
25 and not merely their own evidence." (*SWRCB Cases, supra*, 136 Cal. App. 4th at p. 749 [internal
26 citation and quotation marks omitted].) "Failure to do so is fatal." (*Tracy First v. City of Tracy*
27 (2009) 177 Cal.App.4th 912, 934 [internal citation and quotation marks omitted].) Central Delta
28 and Stockton did not even cite evidence *supporting* their position. But the court "is not required

1 to cull through the ... administrative record to see if there is support for [petitioners']
2 position[s].” (*S. County Citizens for Smart Growth v. County of Nevada* (2013) 221 Cal. App. 4th
3 316, 332.) Further, petitioners cannot “rectify [their] error in [their] reply brief[;] it is too late to
4 do so there because it deprives the respondent of the opportunity to respond.” (*S. County Citizens*
5 *for Smart Growth, supra*, 221 Cal.App.4th at p. 331; see also, discussion in Standard of Review,
6 Part B [Forfeit Claims], *ante*.) Central Delta and Stockton forfeited their claim.

7 **b. Even if Petitioners Had Not Forfeited Their Claim, It Would**
8 **Fail Because WR P1 Promotes the Delta Ecosystem**

9 Even if Petitioners had met their evidentiary burden, their claim would have failed as a
10 matter of law. By its terms, WR P1 can only prohibit an in-Delta water project if, among other
11 things, it “would have a significant adverse environmental impact in the Delta.” So WR P1 can
12 only impact in-Delta water uses in order to protect in-Delta habitat. Similarly, if users reduce
13 their use of Delta waters through conservation and other measures outlined in WR P1, more water
14 will be available for the Delta ecosystem. (See, for example, *Delta Vision Strategic Plan* at
15 L3205 and L3263.)²⁹ Petitioners have failed to cite any statute that bars a Council regulation that
16 could have the effect of redirecting waters to Delta ecological uses.³⁰ To the contrary, as the
17 Third District Court of Appeal explained in *SWRCB Cases, supra*, 136 Cal.App.4th 674, Delta
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19
20 ²⁹ Reduced diversions also mean that more fresh water is available to address the impacts
21 of salinity, which harms Delta agricultural, municipal and environmental uses. (See B697; see
22 also B685.) In addition, conservation makes the Delta’s fragile water supplies more reliable.
(See, e.g., Wat. Code, § 85020, subd. (d) [“statewide . . . conservation (and) water use efficiency”
are “inherent” means of promoting the state’s water supply reliability goal].)

23 ³⁰ Petitioners have even failed to explain how the area of origin laws apply to the Council,
24 other than citing Water Code section 85021, subdivision (a). That provision merely states that the
25 Delta Reform Act “does not diminish, impair or otherwise affect in any manner whatsoever any
26 area of origin [or similar] protections . . .” But those laws apply to other entities, not to the
27 Council. For example, as the Court explained in *SWRCB Cases, supra*, 136 Cal.App.4th at p.
28 754, Water Code section 11460 only applies to the Department of Water Resources, and section
11128 only extends its provisions to the Bureau of Reclamation. In that case, the court did hold
that the area of origin statute could apply to a third governmental entity (the State Water
Resources Control Board), but only if that third entity “required” the Department or Bureau to
violate statute. (*Id.* at p. 756.) Petitioners fail to assert that WR P1 requires the Department or
Bureau to violate an area of origin requirement.

1 fish and wildlife are as much part of the area of origin as are other water users. The court
2 therefore rejected an argument that is almost identical to Central Delta’s and Stockton’s.

3 In *SWRCB Cases*, the City of Stockton and other parties challenged a State Water
4 Resources Control Board requirement that might lead the Bureau of Reclamation to divert Delta
5 water from Delta users to uses that benefit Delta fish and wildlife. Stockton claimed that the
6 requirement violated the Water Protection Act because exporters caused the need for the
7 diversion. The court expressly rejected that argument.

8 *SWRCB Cases* held that diverting water from the in-Delta water users to Delta ecological
9 needs met the Watershed Protection Act’s area of origin requirements because the Delta fish and
10 wildlife were in the area of origin. (*Id.* at pp. 758-759.) The court explained that “all beneficial
11 uses within the area of origin stand on equal footing.” (*Id.* at p. 758.) These include uses to
12 “protect fish and wildlife in the Delta.” (*Id.* at p. 759.) Our case is the same. If in-Delta water
13 users conserve, that frees up water for Delta fish and wildlife. (See, for example, L3263
14 [*Strategic Plan’s* determination that “(d)iversions from the Delta watershed—upstream, *within*,
15 and exported from the Delta . . . directly impact restoration of the Delta . . .”. [Italics added].)
16 And as previously noted, by its terms WR P1 only applies to in-Delta uses that “would have a
17 significant adverse environmental impact in the Delta.” Thus, because WR P1 seeks to make
18 water available for Delta habit, it cannot violate the Watershed Protection Act.

19 Similarly, WR P1’s promotion of conservation in order to benefit the Delta ecosystem
20 cannot violate the other area of origin law that petitioners cite: the Delta Protection Act of 1959.
21 Although the Third District Court of Appeal has characterized that law as “rather vague”
22 (*SWRCB Cases, supra*, 136 Cal.App.4th at p. 768), the law does provide sufficient direction to
23 show that it includes the same goals as WR P1: (1) promoting conservation; and (2) preserving
24 Delta waters for the public good. The Legislature thus declared that the Delta Protection Act was
25 needed for “the *protection, conservation*, development, control and use of the waters in the Delta
26 *for the public good.*” (Wat. Code, § 12200; italics added.) Likewise, Central Delta itself has
27 explained that the purpose of the Delta Protection Act, in part, is to protect “fish and wildlife.”
28

1 (State Water Res. Control Bd. Cases, *supra*, 136 Cal.App.4th at p. 769, quoting Central Delta'
2 allegations.)

3 Moreover, as previously explained, the reasonable use and public trust doctrines limit the
4 scope of water rights. (See Part A.6 of this argument, *ante*.) Those doctrines encompass
5 conservation and the protection of the Delta's habitat. (*Ibid.*) For all of these reasons, the Delta
6 Reform Act's reference to area of origin laws does not limit the Council's ability to promote
7 conservation so that more water is available for the Delta's ecosystem.

8 **c. The Cause of the Delta Habitat's Need for Water Is Irrelevant**

9 Finally, petitioners seem to imply that exporters have caused the need to provide water for
10 Delta habitat. (Central Delta, p. 20; Stockton, p. 33.) But causation is not relevant. *SWRCB*
11 *Cases* held that it was irrelevant that exporters may have caused the need to divert Delta waters
12 for Delta habit. The area of origin law "is not concerned with why a particular beneficial need for
13 water exists within the area of origin." (*SWRCB Cases* at p. 759.) For the court, all that mattered
14 was that the water was being used for Delta purposes. (*Id.* at p. 760.) Petitioners' area of origin
15 argument therefore not only fails because they did not establish their facts, it fails as a matter of
16 law.

17 **3. Stockton's Additional Area of Origin Argument Fails Because It Is**
18 **Based on an Incorrect Premise: That Water Rights Applications Are**
19 **Subject to the Council's Regulations**

20 Stockton goes further than Central Delta. It presents an argument that, if accepted, would
21 preclude the Council from regulating any local Delta agency. Stockton's argument has four steps.
22 First, when an agency files "a water right application," that filing constitutes a "covered action."
23 (Stockton, p. 33.) Second, covered actions are subject to the Council's regulations. (*Ibid.*; also
24 see Wat. Code, § 85225.) Third, the regulations impose "a new burden." (Stockton, p. 33.)
25 Fourth, the new burden could cause an agency in an area of origin to lose its "statutory priority to
26 water." (*Ibid.*)

26 Stockton's argument fails at the first step. Water rights applications are not covered
27 actions. The Act provides that covered actions do not include "[a] regulatory action of a state
28

1 agency.” (Wat. Code, § 85057.5 (b)(1).) Parties seeking a water right are required to file an
2 application with a state regulatory agency, the State Water Resources Control Board. (Wat.
3 Code, §§ 1250, et seq.) A party’s water right application is therefore not a covered action. Thus,
4 it is not subject to the Council’s regulations. (See Wat. Code, § 85225.)

5 Although Stockton has asserted that area of origin laws apply to water right applications, it
6 has not argued that those laws insulate any project that might use Delta water from the Council’s
7 regulations. It cannot. For example, no court has even hinted that area of origin laws apply to
8 state regulations that limit or prohibit Delta development projects, even though many regulations
9 could have that effect. (E.g., regulations adopted pursuant to Fish and Game Code sections 2050,
10 et seq. [protecting endangered species] or Public Resources Code sections 29700, et. seq.
11 [regulating development in the Delta’s primary zone].) Moreover, the Act itself calls for the
12 Council to regulate “local land use actions.” (Wat. Code, § 85022, subd. (a).) That provision
13 would be nonsensical if area of origin laws insulated local land use actions from state regulations.

14 Finally, Stockton’s theory not only fails as a matter of law; it fails as a matter of fact. Its
15 area of origin theory is built upon the factual assertion that the Council’s regulations would divert
16 Delta water from in-Delta users to exporters. (Stockton, p. 33.) However, like Central Delta,
17 Stockton fails to point to any evidence in the record supporting that factual assertion. Like
18 Central Delta, Stockton has therefore forfeited this claim. (See Part C.2.a, *ante*.) Stockton
19 therefore has not met either its legal or its factual burden.

20 **II. THE COUNCIL’S APPROACH TO THE BDCP IS CONSISTENT WITH THE ACT, AND**
21 **NEITHER RUBBER STAMPS, NOR IMPEDES, THAT FUTURE PLAN**

22 Petitioners present three basic challenges to the Council’s approach towards the yet-to-be-
23 completed BDCP. First, Central Delta asserts that one of the Council’s non-regulatory
24 recommendations violates the Act by “rubber-stamping . . . the BDCP.” (Central Delta, p. 25.)
25 But the Council will show that its recommendation, WR R12, which calls for completion of a
26 BDCP by a date certain, cannot violate the Act because by its terms it calls for a BDCP that is
27 “consistent with the provisions of the Delta Reform Act.” (B572.)
28

1 Second, Central Delta, joined by Save the Delta, argues that the Act compelled the Council
2 to take a position concerning conveyance, i.e., how water is conveyed through the Delta for use
3 outside of the Delta. (Central Delta, pp. 23-26; Save the Delta, pp. 21-23.) But the Council will
4 show that Central Delta fails to address, and Save the Delta notes but tries to avoid, Water Code
5 section 85320's mandate requiring the Council to incorporate the BDCP into the Council's Plan if
6 the BDCP meets specified conditions.

7 Finally, both Save the Delta and Water Contractors challenge a statement in the Plan that
8 explains how the Council could address potential conflicts between the Plan and the BDCP, if the
9 BDCP is incorporated into the Council's Plan. (Save the Delta, pp. 8-17; Water Contractors, pp.
10 30-32.) In essence, an agency would need to certify that a project is in fact a BDCP project, but
11 would not need to comply with other policies in the Plan. Both sets of petitioners correctly point
12 out that the Plan's statement is not binding, as it has not been adopted as a regulation. But Water
13 Contractors go on to claim that the Act would prohibit the Council from ever adopting that
14 approach as a regulation. The Council strongly disagrees. The Council will now address the
15 three categories of challenges in turn.

16 **A. WR R12 Addresses the Timing of the BDCP's Completion, Not Its**
17 **Content**

18 Central Delta's main argument against the Council's approach towards the BDCP boils
19 down to a single assertion: that WR R12, which recommends that agencies complete the BDCP,
20 violates the Act. (Central Delta, p. 22). But WR R12 does not seek any particular BDCP content.
21 It only calls for its completion. Even more significant, the terms of WR R12 undercut Central
22 Delta's argument. WR R12 has a critical qualification. It calls for a BDCP that is "consistent
23 with the provisions of the Delta Reform Act." WR R12 states: "The relevant federal, State, and
24 local agencies should complete the Bay Delta Conservation Plan, *consistent with the provisions of*
25 *the Delta Reform Act*, and receive required incidental take permits by December 31, 2014."
26 (B572, italics added.) Central Delta ignores this qualifier, which undermines their argument.

27 Given this statutory qualifier, Central Delta's argument that WR R12 is inconsistent with
28 the coequal goals makes no sense. (Central Delta, pp. 22-23.) To the extent that the Act requires

1 consistency with the coequal goals, WR R12's calling for consistency with the Act also calls for
2 consistency with the coequal goals.

3 Central Delta's remaining arguments are equally groundless. In essence, it asserts that
4 "[t]he Delta Plan presented an opportunity to provide guidance to BDCP," but that the Council
5 failed to take advantage of that opportunity. (Central Delta, p. 24.) However, as will be
6 demonstrated, the Council's approach was most rational, and well within its discretion.

7 **B. The Council Acted Responsibly by Not Calling for a Particular**
8 **Conveyance Approach, Given the Act's BDCP Incorporation Requirement**

9 Both Central Delta and Save the Delta assert that the Delta Reform Act mandated that the
10 Council adopt measures telling the Department of Water Resources (DWR) how to address
11 conveyance in its yet-to-be adopted BDCP. (Central Delta, pp. 23-26; Save the Delta, pp. 21-23.)
12 The BDCP will contain a conveyance approach. (Wat. Code, § 85320, subd. (b)(1)(B).) These
13 petitioners do not want DWR's conveyance to be Delta tunnels,³¹ and they would like the Council
14 to adopt Delta Plan provisions that could somehow stop the tunnels. But Central Delta ignores,
15 and Save the Delta distorts, the Delta Reform Act's BDCP directive. Water Code section 85320,
16 subdivision (e), mandates that the Council "shall incorporate the BDCP into the Delta Plan" if the
17 Department of Fish and Wildlife determines that the BDCP meets the three conditions outlined in
18 the next paragraph of this brief. As a result, even if the Council adopted a Delta Plan regulation
19 prohibiting Delta tunnels, if DWR adopts a BDCP that includes tunnels, and the Department of
20 Fish and Wildlife determines that the BDCP meets specified statutory conditions, the tunnels
21 must become part of the Delta Plan by operation of law, and any attempt in the Delta Plan to
22 prohibit tunnels would be rendered meaningless.

23 Water Code section 85320, subdivision (e), provides that "the council shall incorporate the
24 BDCP into the Delta Plan" if the Department of Fish and Wildlife determines that the BDCP
25 meets the following three conditions:

26 ³¹ See, for example, Save the California Delta Alliance First Amended Verified Petition
27 for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, pp. 23-24 (¶¶ 56-58);
28 and Central Delta Water Agency's, et al.'s First Amended Verified Petition for Writ of Mandate
and Complaint for Declaratory and Injunctive Relief, pp. 14, 44 and 40-41 (¶¶ 50, 116 and 135).

- 1 • The BDCP must comply with the Natural Community Conservation Planning Act
2 (Fish & G. Code, §§ 2800 et seq.) and the Department of Fish and Wildlife must approve
3 the BDCP as a natural community conservation plan. (See Wat. Code, § 85320, subds.
4 (b)(1) and (e).)
- 5 • The federal government must approve the BDCP as a habitat conservation plan.
6 (See Wat. Code, § 85320, subd. (e).)
- 7 • The BDCP must comply with CEQA and include a review and analysis of
8 specified items (Pub. Resources Code, §§ 21000 et seq.). (See Wat. Code, § 85320,
9 subds. (b)(2), (e).)

10 The Council has no discretion concerning the BDCP's contents. It cannot, for example,
11 adopt a Delta Plan element that would add any condition, or modify one of the statutory
12 conditions. Its role is ministerial.

13 Central Delta ignores this mandate to incorporate the BDCP into the Delta Plan. Save the
14 Delta recognizes it, but tries to argue around it. Save the Delta asserts that, although the
15 Legislature directed that the Council "shall incorporate" the BDCP, it somehow also granted the
16 Council the authority to alter the BDCP's terms. (Save the Delta, pp. 22-23.) But Save the Delta
17 acknowledges that if the BDCP is incorporated into the Delta Plan, it will be part of the Plan. (*Id.*
18 at 22, citing various definitions to that effect.) Given that, it would be nonsensical for the
19 Legislature to mandate that the Council accept the BDCP, but to simultaneously grant the Council
20 the authority to change the BDCP's terms.

21 Save the Delta and Central Delta also assert that the Council took an allegedly inconsistent
22 position regarding habitat. They correctly point out that the BDCP will likely include habitat
23 projects (see, e.g., Wat. Code, §§ 85054 and 85320, subd. (e)), and that the Council adopted
24 enforceable habitat policies. (Save the Delta, p. 36; Central Delta, p. 25.) They go on to assert
25 that the Council acted improperly by failing to similarly adopt a conveyance policy. Not so; the
26 two situations are very different. A BDCP conveyance choice of a tunnel or other option would
27 occupy the field. (See B556, listing the three likely conveyance alternatives.) In contrast, BDCP
28

1 is only one of many likely Delta ecosystem restoration efforts. (See B594 [listing BDCP plus
2 seven other efforts].) Its potential ecosystem projects would not occupy the field.

3 The Council does have other roles concerning the BDCP, but they are outside of the Delta
4 Plan process. Notably, the Department of Fish and Wildlife’s determination that the BDCP meets
5 the three requirements discussed earlier “may be appealed to the council.” (See Wat. Code, §
6 85320, subd. (e).) Moreover, DWR is required to consult with the Council in developing the
7 BDCP, and the Council is a CEQA responsible agency for DWR’s BDCP environmental impact
8 report. (See Wat. Code, § 85320, subd. (c).) But Central Delta and Save the Delta’s petitions do
9 not raise any claims concerning those consulting and appellate roles.³²

10 The Council addressed conveyance in a responsible manner that recognized its statutory
11 duty to incorporate the BDCP into the Delta Plan if specified conditions are met. The Council
12 adopted WR P12, which recommends that the appropriate agencies complete the BDCP,
13 “consistent with the provisions of the Delta Reform Act,” by the end of 2014. (B572.) This
14 recommendation is well within the Council’s discretion to “promote options for new and
15 improved infrastructure relating to the water conveyance in the Delta.” (Wat. Code, § 85304.)
16 This approach also recognized that the BDCP agencies were studying conveyance options in
17 detail (B1156), and that any well grounded, specific Council recommendation on conveyance
18 would require an extremely costly, time-consuming, and duplicative evaluation. (B1156.) That
19 delay would have meant that the Delta Plan’s adoption would have been all the more tardy. The
20 Legislature emphasized the urgent need to implement the Delta Plan by specifying a very
21 ambitious statutory deadline for its adoption. (See Wat. Code, § 85300, subd. (a), calling upon
22 the Council to “adopt, and commence implementation of the Delta Plan” by January 2, 2012.)

23
24 ³² Given that fact, Central Delta’s claim on page 26 of its brief that a consulting-related
25 action of the Council allegedly ignored a “requirement to analyze a reasonable range of
26 alternatives” is irrelevant. (See *Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 898 [pleading
“delimits the legal theories a plaintiff may pursue”].) Its claim is also directly contradicted by the
evidence that it cites. Central Delta cites N329, which asks whether “the alternatives cover a
reasonable range.”

27 As to appeals, other petitioners (Water Contractors) challenge the Council’s procedures
28 for a BDCP appeal. The Council addresses that challenge later in this brief. (See Argument XV,
post.)