The Council was unable to meet that deadline "due to the nature and complexity of the relevant issues." (N3210.) But if the Council accepted petitioners' recommendations and studied conveyance alternatives, it would have greatly increased that delay.

The Plan therefore seeks prompt completion of a BDCP that meets the requirements of the Delta Reform Act. The Council did not, and had no reason to, engage in the exhaustive, wasteful exercise that would be needed to properly recommend a particular conveyance option, however, since that work was already being undertaken by DWR as the Legislature intended. But the Plan does explain that if agencies have excessively delayed adoption of the BDCP, "the Council intends to revisit the issue of conveyance to determine how to facilitate improved conveyance facilities without the BDCP." (B1156.)

Central Delta and Save the Delta have failed to meet their burden to show that the Council's approach was arbitrary. (*California Hosp. Assn. v. Maxwell-Jolly, supra,* 188 Cal.App.4th at p. 568.) To the contrary, the Council took the most logical path forward.

C. Although the Plan's BDCP Consistency Statement Is Non-Binding, It Is Harmonious with the Act and Represents One Approach the Council May Take in the Future Following APA Review

Both Save the Delta and Water Contractors challenge a statement in the Delta Plan outlining a potential means of harmonizing any theoretical conflict between the Delta Plan and the yet to be adopted BDCP. The language challenged by petitioners provides that if the BDCP is incorporated into the Delta Plan, an agency would only need to show that its project is a BDCP project; it would not need to show that the project is consistent with specific Delta Plan requirements.[33] Save the Delta's and Water Contractors' challenges, however, are very different.

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[33] The full text follows:

> The Delta Reform Act describes a specific process for the potential incorporation of BDCP into the Delta Plan. If BDCP is incorporated, an agency proposing a qualifying "covered activity" under BDCP that also meets the statutory definition of a covered action must file a short form certification of consistency with findings indicating only that the covered action is consistent with the BDCP. Consistency for these purposes shall be presumed if the certification filed by the agency includes a statement to that effect from DFW. (B517.)

Save the Delta points out that the language has no regulatory effect. (Save the Delta, pp. 8-17.) The Council agrees. To be enforceable, the Council would need to adopt the language as a regulation. (Gov. Code, § 11340.5, subd. (a).) To date, it has not done so. The Council therefore will not enforce the language unless and until it adopts the language as a regulation. But Water Contractors go much further, and assert that the Council could never adopt the challenged approach as a regulation. (Water Contractors, pp. 30-32.) The Council strongly disagrees.

The challenged language provides an abbreviated process for certifying consistency of BDCP projects: if the BDCP is eventually incorporated into the Delta Plan, then an agency would only need to establish that its project is in fact a BDCP project. It would not need to address other elements of the Delta Plan to demonstrate consistency. The need to show that the project is in fact a BDCP project stems from the possibility that the BDCP will in many cases not describe specific projects (e.g., restore a specific parcel in a specific manner), but will instead only contain much more general guidelines. As a result, there could be disputes as to whether proposals are actually BDCP projects. The Delta Plan language articulates a potential path forward for how to address these projects in an efficient manner, and could be adopted as a regulation if needed in the future.

Alternatively, for example, the Council could address potential conflicts between the BDCP and the rest of the Delta Plan in at least one other way. It could adopt a regulation providing that an agency must establish that its project is consistent with the entire Delta Plan, but that to the extent any non-BDCP provision is inconsistent with a BDCP provision, the BDCP provision prevails.[34]

Water Contractors assert that the Act bars any of these approaches. They allege that the Act prevents the Council from requiring agencies proposing BDCP projects to submit anything to the Council. (Water Contractors, p. 32.) The opposite is true. The Act *requires* a submittal unless and until the Council adopts a regulation exempting these projects from its covered action

[34] The Council may not need to address this issue, because there may not be an eventual conflict. As explained earlier, the latest draft of the BDCP PEIR before the Council when it adopted the Delta Plan expressly states that no conflict existed at that time. (See pp. 28, *ante*.)

certification requirement. Specifically, the Act provides that agencies proposing to undertake any covered action "shall submit" a certification to the council that their proposal "is consistent with the Delta Plan." (Wat. Code, § 85225.) Moreover, as previously discussed, if the BDCP meets all of the conditions in Water Code section 85320, it will become part of the Delta Plan. (Wat. Code, § 85320, subd. (e).) Thus, by definition, at that point any proposed BDCP project will be "covered by one or more provisions of the Delta Plan," and therefore will be a potential "covered action." (Wat. Code, § 85057.5, subd. (a)(3).) Accordingly, any agency proposing that action will need to file a certification with the Council if the project also meets the other statutory covered action criteria set forth in Water Code section 85057.5. Thus, while the Council has not yet adopted a regulation requiring an agency proposing a BDCP project to file some form of certification, the Act does not prevent the Council from doing so in the future.

III. THE PLAN INCLUDES REASONABLE STRATEGIES FOR RESTORING DELTA FLOWS THAT ARE BASED UPON BEST AVAILABLE SCIENCE

Central Delta, North Coast, and Save the Delta assert that the Plan's flow provisions violate the Act. But petitioners ignore the Act's delegation of broad discretion concerning flows. The Council acted well within that discretion and took a balanced, one-step-at-a-time approach, recognizing other agencies' expertise and existing, ongoing efforts. Far from being arbitrary, its approach was very reasonable.

Petitioners gloss over the fact that the Act's requirements concerning flows are very limited. For example, Central Delta incorrectly asserts that the Act "specifically directed the DSC [Council] to '[r]estore Delta flows . . . .'" (Central Delta, p. 27.) In support, they cite Water Code, section 85302, subd. (e)(4). (Central Delta, p. 27.) But that section does not "specifically direct[]" the restoration of flows. Rather, it calls for "subgoals and strategies" that can "assist in guiding" other agencies. Specifically, Water Code section 85300, subdivision (a) states, in relevant part, that "[t]he Delta Plan shall include *subgoals and strategies* to *assist in guiding* state and local agency actions concerning the Delta." (Italics added.) The Act goes on to list those subgoals and strategies. They include "[r]estore Delta flows and channels to support a healthy

estuary and other ecosystems." (Wat. Code, § 85302, subd. (e)(4).) Thus, contrary to Central Delta's characterization, the Act gives the Council broad discretion.

The Act's only other flow provision likewise leaves the Council with extensive discretion. It is not even directed to the Council. Rather, it is directed to the State Water Resources Control Board (SWRCB). The Act requires the SWRCB "[f]or the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan" to "develop new flow criteria for the Delta." (Wat. Code, § 85086, subd. (c)(1).) Moreover, the Act stresses that the flow criteria are not regulatory. It states that the criteria "shall not be considered predecisional" concerning a subsequent SWRCB permit.(*Ibid.*)

With these limitations in mind, the Council will now show that its approach to flows was reasonable.

A. The Council Utilized Best Available Science

North Coast asserts that the Plan's flow provisions are not based upon the best available science. Specifically, North Coast asserts that the SWRCB's Delta flow criteria are the best available science, and that the Act required the Council to adopt those criteria. (North Coast, p. 31.) North Coast's assertion ignores the Act, as well as the SWRCB's report.

The Act does not require any entity to adopt the SWRCB's flow criteria. As previously noted, the Act expressly states that the SWRCB's criteria "shall not be considered predecisional" as to the SWRCB. Moreover, as to the Council, the Act provides that the criteria are only intended to "inform" the Council's Plan. (Wat. Code, § 85086, subd. (c)(1).)

Moreover, the SWRCB flow criteria report stresses the fact that it only focused on Delta ecosystem needs. It therefore starts with a "Note to Readers" that highlights its narrow scope. (L11827.) The note explains that the report ignores many other beneficial water uses that the SWRCB balances in its decision-making. (*Ibid.*) The report itself points out that these uses include upstream public trust needs that may conflict with Delta public trust needs. (L11842.)

Finally, the Council was informed by the SWRCB flow criteria report. The Council received the SWRCB's report (titled "Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem") at its August 26, 2010, Council meeting. (F95 [meeting minutes],

F88 [meeting video] at 4:59:45-5:00:45.) The Council, in turn, used information from the SWRCB's flow report (B594, 599, 625-626), as well as information from numerous other sources, to craft Delta Plan provisions that promote Delta flow restoration in numerous fundamental ways described immediately below.[35] North Coast has not come close to showing that the Council's approach somehow ignored best available science.[36] Rather, North Coast's argument ignores the Act's limitations concerning the SWRCB's flow criteria and the SWRCB's cautions about using those criteria.

B. The Plan Promotes More Natural Flows and Therefore Complies with the Act

As previously noted, the Act requires the Council to include certain "subgoals and strategies" in its Plan. (Wat. Code, §§ 85300, subd. (a), 85302, subd. (e).) One of those is to "[r]estore Delta flows and channels to support a healthy estuary and other ecosystem." (Wat. Code, § 85302, subd. (e)(4).) Some petitioners are dissatisfied with the Plan's flow provisions, but they ignore the extensive discretion that the Legislature gave to the Council. Pursuant to the Act, the Plan's flow provisions should "assist in guiding" the actions of other agencies. (Wat. Code, § 85300, subd. (a).) Petitioners have failed to establish that the Plan provides no guidance to agencies concerning flows. To the contrary, the Plan's flow provisions provide extensive guidance.

First, at the outset, the Plan calls for "more natural functional flows" in the Delta as one of its "core strategies." (B582.) The Plan includes a sidebar fully explaining what those flows would look like and how they could be achieved (e.g., by releasing cold water from reservoirs to improve salmon spawning, and using Delta outflow to create low-salinity areas in the Suisun Bay at key times). (B600.)

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[35] The Council also used the SWRCB'S flow report in preparing the Delta Plan Environmental Impact Report (EIR). (See, e.g., D45, 86-87 [portions of Draft Plan EIR's Master Response 5].)

[36] "An agency complies with the best available science standard so long as it does not ignore available studies, even if it disagrees with or discredits them." (*San Luis & Delta-Mendota Water Auth. v. Locke*, *supra*, (9th Cir. 2014) 776 F.3d 971, 995.)

Second, the Plan's strategies for obtaining more natural flows include a regulation mandating that covered actions use specified flow objectives: ER P1 (see B451, 614-615.) That regulation requires agencies proposing covered actions to comply with the SWRCB's Delta flow objectives. (*Ibid.*) By adopting that regulation, the Council recognized the SWRCB's pivotal role concerning Delta flows, including its current effort to update its Delta flow objectives. (B599.) But the regulation does more. It promotes compliance with the SWRCB's flow objectives by providing a new enforcement mechanism; agencies proposing covered actions must comply with ER P1. That helps address the concern that the SWRCB may not have been doing enough to enforce its flow objectives.[37]

Third, the Plan's strategies include a formal recommendation calling upon the SWRCB to adopt and implement updated flow objectives necessary to meet the coequal goals. The Plan recommends that the SWRCB initially adopt updated objectives for the Delta, followed by objectives for high-priority tributaries in the Delta watershed. (See B614-615 [ER R1].) Although petitioners would have preferred the Council to go further and order the SWRCB to adopt those updates, the Council could not do so because the Act does not allow the Council to regulate "[a] regulatory action of a state agency." (Wat. Code, § 85057.5, subd. (b)(1).)

Fourth, other Plan recommendations also guide agencies concerning the restoration of flows. For example, ER R2 calls for six specific projects that will enhance ecologically beneficial flooding, expand and restore flood plains, create wetlands, and otherwise help restore Delta flows and channels. (B452-453.)

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[37] See, e.g., Central Delta's First Amended Petition, pp. 4-5, paragraph 15, asserting that "notwithstanding . . . regularly occurring violations [of its water quality objectives], the SWRCB has taken no action to enforce the standards against the parties charged with compliance." Similarly, evidence in the record indicates that the SWRCB's enforcement authority is limited. (See separately filed Transcript of Excerpts from the Administrative Record ("A/R Transcript"), pp. 6-8; see also F402 [video] Agenda Item 9: Index 1, Segment 11 at 0:00-4:17 [9/27/12 testimony of Water Master Craig Wilson, explaining that water rights enforcement authority is weak and cumbersome (transcript filed with this brief)] and L21518 [Wilson handout stating that SWRCB's "water right . . . enforcement authority is weak."].) Water right enforcement is needed to protect flow objectives. (See *In re State Water Res. Control Bd. Cases, supra,* 161 Cal.App.4th 304, 308 [flow objectives are met through water rights requirements].)

Finally, contrary to Central's Delta's contention, the Act does not *mandate* that the Plan "double the natural production of anadromous fish." (Central Delta, p. 27.) Rather, the Act simply requires the Council to include "measures to *promote* . . . goals with respect to doubling salmon populations." (Wat. Code, § 85302, subds. (c) and (c)(5), italics added.) The measures discussed in the four preceding paragraphs promote those goals. Other measures do as well. For example, ER P3 (B452, 615-616) seeks to protect the ability of agencies to restore habitat needed for salmon and other fish. ER P5 (B454, 619) seeks to reduce invasive vegetation and species, which can decrease salmon and other native fish populations. (See B611, 619.) And the Plan includes a performance measure expressly calling for progress towards achieving the doubling of salmonids goal. (B623.[38])

Thus, the Council fully complied with the Act's flow provisions. Petitioners have not argued, and cannot argue, that the Plan's flow-related provisions are "arbitrary, capricious, or without a rational basis." (*W. States, supra,* 57 Cal.4th at p. 421.) The Council acted rationally, and well within its discretion.

IV. THE PLAN PROMOTES THE PROTECTION AND RESTORATION OF THE DELTA ECOSYSTEM

North Coast and Central Delta present conflicting attacks of the Plan's habitat protection measures. North Coast asserts that "the Delta Plan contains *no* legally enforceable measures to improve the Delta ecosystem." (North Coast, p. 34, original italics.) Central Delta, in contrast, asserts that the Council adopted many such measures, and goes on to challenge some of them. (See Central Delta, p. 25, arguing that the Council "adopted no binding policies for conveyance" but "adopted five policies . . . that apply to habitat restoration . . . "; see also Central Delta pp. 29-31 [challenging three of those policies].) North Coast is wrong; the Plan includes robust measures that promote Delta restoration. And contrary to Central Delta's assertion, the ecosystem policies it challenges are valid and well within the Council's discretion.

[38] The measure reads in full: "Progress toward achieving the State and federal 'doubling goal' for wild Central Valley salmonids relative to 1995 levels. Trends will be derived from longterm salmonid monitoring surveys conducted by the National Marine Fisheries Service, U.S. Fish and Wildlife Service, and others."

A. Numerous Plan Measures Further the Protection and Restoration of the Delta's Ecosystem

The Legislature directed the Council to adopt a "legally enforceable" Plan that "furthers" the coequal goal of "protecting, restoring and enhancing the Delta ecosystem." (Wat. Code, §§ 85001, subd. (c) ["legally enforceable"], 85300, subd. (a) ["furthers"], 85054 [coequal goal defined].) North Coast asserts that the Council did not go far enough in furthering this goal. It repeatedly states that the Plan "fails to include any enforceable measures to restore the Delta." (North Coast, p. 36 [see also p. 34 ["no legally enforceable measures"].) However, later it concedes that the Council adopted enforceable measures, and instead argues that the measures do not proactively "require" regulated agencies to implement restoration projects. (*Id.*) But North Coast's assertion that the Council can order agencies to engage in restoration projects ignores the Act.

The Act does not authorize the Council to order an agency to undertake a project; the agency must initiate the process. The Act's enforcement provisions, Water Code sections 85225 through 85225.25, are only triggered when "[a] state or local public agency [] proposes to undertake a covered action." (Wat. Code, § 85225.) Thus, the Council's regulations can only be activated by the regulated entity, not by the Council. The regulated entity must propose a project.

Moreover, North Coast does not address the Legislature's use of words that grant extensive discretion to the Council. The Act calls for a plan that "furthers" and "promote[s]" ecosystem measures. (Wat. Code, §§ 85300, subd. (a); 85302, subd. (c)). These words point the Council in a general direction, rather than dictate how it should act.[39] (Cf. *Engine Manufacturers Assn. v. California Air Res. Bd.* (2014) 180 Cal.Rptr. 3d 667, 669 -670 (agency has "broad authority" absent specific Legislative provisions].)

[39] The Council explained the expansive nature of the word "promote" at pp. 33-34, *ante*. The verb "further" is equally open ended. The Oxford Dictionary defines it as meaning "[h]elp the progress or development of (something); promote: 'he had depended on using them to further his own career'." (See Oxford Dictionaries, English (US), at http://www.oxforddictionaries.com/us/definition/american_english/further.)

Further, North Coast glosses over the fact that the Council adopted very significant measures to address threats to the Delta ecosystem. As the Council will show, these include measures expressly focused on protecting and restoring the Delta ecosystem, as well as others that have broader focuses but include that ecosystem goal.

The Plan contains five legally enforceable policies, and nine additional recommendations, that are directly aimed at protecting, restoring and enhancing the Delta ecosystem. (See list at B451-455; discussion and listing at B581-666.) One specifically mandates that certain projects increase riparian habitats where feasible, although, as previously discussed, the requirement is only triggered by an agency's decision to initiate a project. ER P4 requires that agencies proposing specified levee projects design them so that they will, where feasible, "increase . . . riparian habitats." (B452, 616.) That regulation targets levees in areas that "are most likely to provide significant habitat benefits." (N3206.) A second regulation, ER P3, will facilitate future habitat restoration projects by prohibiting development that would inhibit the restoration projects. (B454, 619.) A third, ER P5, protects the Delta ecosystem from invasive species by prohibiting actions that would introduce or improve habitat for those species. (B454, 619.) Other policies seek to increase the effectiveness of habitat restoration projects (ER P2, see B452, 615) and, as previously discussed, to promote flows needed for the Delta ecosystem. (See Argument III, B, *ante*.) Moreover, as noted earlier, the Plan includes numerous recommendations to further these ecosystem goals. (See list at B451-455.)

The Plan also seeks to further Delta ecosystem goals through other policies. Most notably, WR P1 and DP P1 are robust efforts to advance those goals. The Council previously explained in detail how WR P1 does this by promoting reduced reliance on Delta waters. (See Argument I.A.1, *ante*.) DP P1 likewise furthers these goals by protecting Delta lands from unwise development. DP P1 directs new urban development in the Delta to existing urbanized areas. (See B455, B660.) That will, among other things, protect "opportunities for ecosystem restoration." (B659.)

And RR P4 protects the Delta ecosystem by prohibiting encroachments in specified floodplains that could harm Delta fish, wildlife, or plant resources.[40]

Thus, while North Coast would have liked the Council to go further, the Council's approach to protecting the Delta ecosystem was not arbitrary, but was instead quite reasonable and well within its discretion. (*W. States, supra,* 57 Cal.4th at p. 421.) The Council will now show that Central Delta's challenges from the other side are equally unfounded.

B. The Plan's Ecosystem Protection Measures Are Valid

Central Delta asserts that three Council policies designed to protect Delta habitat are invalid: ER P2 (guiding the location of projects), ER P3 (prohibiting certain development that could block ecosystem projects), and ER P4 (setback levees where feasible). To the contrary, each is a valid means of advancing the coequal goal of protecting and enhancing the Delta ecosystem.

1. ER P2 Is Valid

ER P2 provides that agencies proposing Delta habitat restoration projects should be guided by a habitat restoration map developed by the California Department of Fish and Wildlife. (B452, 615.) Central Delta challenges the Council's use of that map, claiming that the map is based upon inaccurate sea level rise information. (Central Delta, p. 29.) Its only alleged support is extra-record evidence; it cites a web page that is not in the record. (*Id.,* p. 29, fn. 13.) But the law is clear. Evidence that is not in the record must be ignored by the court. (See *Protect Our Water v. County of Merced*, 110 Cal.App.4th 362, 364 (2003) ["if it is not in the record, it did not happen"]; *W. States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573 ["a court generally may consider only the administrative record in determining whether a quasi-legislative decision was supported by substantial evidence"]).[41]

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[40] RR P4 protects "floodplain values and functions." (B464, B740.) The Council's regulations incorporate the federal definition of that phrase. (See N6.) The federal definition includes "Living resource values (fish, wildlife, and plant resources)." (33 CFR § 320.4, subd. (l)(1)(ii).)

[41] Moreover, contrary to Central Delta's claims, which it subsequently presents in more detail, the record fully supports the Council's sea level rise figure. (See Central Delta, p. 37 [detailed challenge] and the Council's response, in Argument X.B.1, *post*, [citing extensive record support for the 55 inch figure].)

Further, Central Delta ignores ER P2's terms. That provision does not rigidly mandate planning at a particular elevation. Rather, it is quite flexible. It provides that the habitat restoration map should be used "as a guide." (B615.) Project proponents can deviate as long as they "provide [a] rationale for the deviation based on best available science." (*Ibid.*) Central Delta has not proven that the Council's approach is arbitrary. To the contrary, ER P2's flexible guidance is most rational.

Finally, when the Council developed ER P2, as well as ER P3 (discussed in the next section), it properly relied on a report prepared by a sister agency—the California Department of Fish and Wildlife. That Department has the expertise needed for habitat restoration. (Fish & G. Code, § 1000; see also § 703.3.) Moreover, governments have the right to rely on sister agency reports. (See *Personal Watercraft Coalition v. Marin County Board of Supervisors* (2002) 100 Cal.App.4th 129, 149, n. 5.) And tellingly, Central Delta never even questioned the Council's use of the Department of Fish and Wildlife map even though the Council circulated the map, as well as its proposal to use that map in its policies a full year before it finally adopted the Plan. (See May 14, 2012, draft Plan at K6141 [map] and K6142 [draft ER P2 and P3]; also see B2 [final Plan adopted on May 16, 2013.)

Central Delta has thus failed to meet its burden. It has not come close to showing that the Council lacked substantial evidence supporting ER P2. (*W. States, supra,* 57 Cal.4th at p. 415; see also *Desmond v. County of Contra Costa, supra*, 21 Cal.App.4th 330, 335 [courts presume substantial evidence exists].)

2. ER P3 Is Valid

ER P3 provides that developers who propose projects in a limited number of "priority habitat restoration areas" should avoid, or mitigate, significant impacts that would make the restoration described in ER P2 difficult. (B452. 615.) Central Delta mainly challenges ER P3 on the same grounds that it challenges ER P2. (See Central Delta, p. 30.) As a result, Central Delta's challenge of ER P3 fails for the same reasons that its challenge of ER P2 fails. The regulation's sea level rise assumption is supported by the record, the regulation is flexible, and the

regulation is based upon the report of a sister agency with expertise in this area.

Central Delta does add three assertions: (1) that ER P3 relies "on elevation as the sole metric" (Central Delta, p. 30); (2) that designated areas "will need to be modified . . . but [the policy has] no mechanism" for that update (*id.*); and (3) that the maps in ER P2 and ER P3 are inconsistent "in particular in the southern Delta." (*Id.*, pp. 30-31.) None of these assertions has merit.

First, ER P3 does not rely on elevation as the only metric. Rather, elevation is merely a starting point. Specifically, ER P3 protects the restoration described in the prior regulation, ER P2. ER P2, in turn, explains that restoration "must be carried out consistent with Appendix 3." Appendix 3 does not, as Central Delta argues, deem elevation "the sole metric." To the contrary, it explicitly provides that elevation is "a starting point." (N52.) On top of that, as previously explained, ER P2 is by its own terms very flexible. It expressly states that it is referencing the Department of Fish and Wildlife's habitat elevation map as a "guide," and that project proponents can deviate "based on best available science." (B615.)

Central Delta's second assertion, that there is no mechanism to update the priority restoration area map, is equally mistaken. The Council may revise the Plan at any time, and must review it "at least once every five years." (Wat. Code, § 85300, subd. (c).) Moreover, as discussed in the prior paragraph, ER P3 is built upon ER P2, which is quite flexible. Central Delta's assertion that there is no mechanism for adjustments is therefore wrong.

Central Delta's last assertion, that maps referenced in ER P2 and ER P3 are inconsistent as to the south Delta, is equally baseless. That alleged inconsistency is not apparent by visually comparing the maps. (Compare adopted ER P2 elevation map [N70] to adopted ER P3 priorities map [N74].) If Central Delta is claiming that the priorities map calls for restorations at different elevations in the south Delta, that is true. It is also intentional. The goal for that area is to restore various habitats at various elevations. The south Delta priority area is the "Lower San Joaquin River floodplain between Stockton and Manteca." (B604.) Projects would involve restoration at different levels ("[r]estoration to a mix of tidal marsh, riparian habitats, and wildlife-friendly agriculture."]. (*Ibid.*). Restoration at different elevations could benefit different species. It

"could create conditions to recover riparian brush rabbits and Swainson's hawks, benefit migrating salmon." (*Ibid.*) There is no conflict between the maps; the Council's decision to restore habitat at different elevations makes sense and is supported by substantial evidence.

3. ER P4 Is Valid

Finally, Central Delta challenges ER P4, which requires levee project proponents to, "where feasible," use setback levees. (B452, 616.) Central Delta asserts that the Council failed to weigh "environmental tradeoffs" to setback levees. (Central Delta, p. 31.) But Central Delta does not cite any evidence in the record supporting its claim, or its related conclusionary statement that the policy is "not based on BAS." (*Ibid.*) It therefore forfeited that claim. As the court explained in *S. County Citizens for Smart Growth, supra,* 221 Cal. App. 4th at p. 331, "the failure to present argument with references to the record and citation to legal authority results in a forfeiture of any assertion that could have been raised." Moreover, Central Delta cannot "rectify its error in its reply brief, it is too late to do so there because it deprives the respondent of the opportunity to respond." (*Ibid.*)

Central Delta compounds its error by failing to cite the evidence in the record that supports the Council's regulation. (See Standard of Review, Part E [Forfeit Claims], *ante*, discussing that mandatory requirement.) For example, the Delta Risk Management Strategy Phase 2 report (2011), prepared by the Department of Water Resources and overseen by numerous scientists and federal and state agencies, concluded that setback levees to restore shaded riverine habitat "provide benefits through enhanced and additional habitat and ecosystem restoration." (L34072 [conclusion], L34107 [Steering Committee], L34108 [Technical Advisory Committee for Ecosystem Impacts].) The Central Valley Flood Protection Board similarly concluded that setting back levees "provides significant opportunities to restore native habitat quantity, quality, and connectivity and to restore natural processes necessary to support healthy ecosystems." (L37010 [2012 Central Valley Flood Protection Plan, December 2011 Public Draft].) Central Delta's

claim would therefore fail even if it had met its burden of setting forth the relevant evidence concerning its challenge.[42]

V. THE PLAN IS CONSISTENT WITH THE ACT'S PUBLIC TRUST DOCTRINE PROVISIONS

North Coast and Central Delta argue that the Plan does not comply with the public trust doctrine. Both are wrong. North Coast ignores the fact that the Act and the public trust doctrine leave the Council with extensive discretion, and that the Plan fully complies with the Act and the doctrine because it promotes public trust values.

Central Delta builds its public trust argument upon a false premise. It asserts that the Council "must *demonstrate* how" its plan complies with the doctrine. (Central Delta, p. 43, original italics.) That is not the law. The Council does not have the burden of proof. Central Delta has that burden. (See, e.g., *Coachella Valley Unified School District v. State* (2009) 176 Cal.App.4th 93, 121 ("petitioner seeking review of quasi-legislative actions under Code of Civil Procedure section 1085 bears a heavy burden . . . "). Central Delta must both show that the public trust doctrine required a particular approach, and that the Council did not follow that approach.

Central Delta goes on to mainly repeat its arguments concerning flows, but this time under a public trust doctrine umbrella. (See Central Delta, pp. 27-29 [flows], pp. 43-47 [public trust flows]. But the Council will show that its prior explanation in this brief of why it properly addressed flows applies equally here. Central Delta further asserts that the Act and the public trust doctrine required the Council to engage in an economic analysis of water uses. However, Central Delta improperly assumes that the Council had a legal duty to allocate water resources. Finally, Central Delta reiterates its prior unfounded assertion that the Council violated the Act in adopting its key water reliability regulation (WR P1) because that measure does not go as far as Central Delta wishes in regulating exporters.

[42] Central Delta also cross-references its argument in a subsequent section of its brief concerning costs. (Central Delta, p. 31, fn. 14.) The Council responds to that and other cost assertions in Argument XIII [Cost Analysis]), *post.*)

A. The Act's Public Trust Statements, and the Doctrine Itself, Give the Council Broad Discretion

In adopting the Delta Plan and its regulations, the Council did not arbitrarily ignore any of the Delta Reform Act's public trust provisions. Rather, it acted well within the broad discretion that the Legislature gave it.

The Act's public trust provisions give the Council extensive discretion. The Act has three references to the public trust. The first simply states that the "longstanding . . . public trust doctrine shall be the foundation of state water management policy and [is] particularly important and applicable to the Delta." (Wat. Code, § 85023.) The second only states that the Act "does not affect" the doctrine. (Wat. Code, § 85032, subd. (h).) The last requires the State Water Resources Control Board (SWRCB) to "develop new flow criteria for the Delta ecosystem necessary to protect public trust resources." (Wat. Code, § 85086, subd. (c)(1).) The criteria are "[f]or the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan." (*Ibid.*) The Act provides that the SWRCB criteria have no regulatory effect; they "shall not be considered predecisional . . . ." (*Ibid.*)

Although the Act does not define the public trust doctrine, case law does. For example, in one of the main cases cited by petitioners, *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, the Supreme Court reviewed how the doctrine applies to the SWRCB's authorization of a water diversion. *National Audubon* shows that the doctrine gives the state extensive discretion in approving these diversions. The Court explained that "[b]efore state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust." (*Id.* at 426.) Those interests include "environmental and recreational values." (*Id.* at 425.) But the Court also explained that, to protect the "prosperity and habitability of much of" California, the state can nevertheless "grant nonvested usufructuary rights to appropriate water even if diversions harm public trust uses." (*Id.* at 426; see also *SWRCB Cases*, *supra*, 136 Cal.App.4th at p. 778 [SWRCB had the "discretion and judgment to balance all of these competing interests" in adopting a water rights decision governing Bay-Delta

water uses].)

This broad discretion is not limited to the water allocation context. It applies generally, and therefore applies to the Council to the extent that the Act's ecosystem provisions give it public trust authority. Under the public trust doctrine, "the State, as trustee for the People, has the power to act 'in any manner consistent with the improvement' of trust purposes." (*Personal Watercraft Coalition, supra,* 100 Cal.App.4th at p. 145, quoting *Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks.* (1967) 67 Cal.2d 408, 419, 420.) Moreover, the state can choose to advance one public trust interest over another. (See *Colberg, supra*, at pp. 418-420 [right to prefer commerce over navigation].)

North Coast and Central Delta ignore this broad discretion. The Council will now show that it acted well within its discretion.

B. The Council Acted Within Its Discretion Because the Plan Promotes Public Trust Values

While North Coast may have wanted the Council to go even further than it did, it cannot argue that the Plan fails to advance ecosystem values. The Council previously reviewed the numerous measures in its Plan that advance the Delta ecosystem's protection and restoration. (See Argument IV.A., *ante*.) Those measures promote public trust values. (*Nat'l Audubon Soc'y v. Superior Court, supra,* 33 Cal.3d at p. 425 [trust includes "environmental" values].) Those measures include five regulations directed toward improving the Delta ecosystem, and nine additional recommendations. (See Argument IV.A., *ante*.) They also include policies aimed at reducing reliance on the use of Delta water, protecting the Delta from urbanization, and protecting floodplains from encroachments that could harm habitat, fish, or wildlife. (*Ibid.*)

Like North Coast, Central Delta ignores the Plan's numerous public trust measures. Instead, as stated earlier, Central Delta mainly repackages its prior arguments about the Council's approach to flows. (Compare Central Delta, pp. 27-29 [flows], pp. 43-47 [public trust flows].) The Council's prior responses to those arguments (see Argument III, *ante*.) apply equally here. Central Delta mainly reasserts its attempt to rewrite the Act's limited provisions concerning the

flow report prepared by the State Water Resources Control Board. (Especially see Central Delta, pp. 43-45.) As previously stated, Central Delta ignores the Legislative directive that the SWRCB report "shall not be considered predecisional" as to the SWRCB and that the report is only intended to "inform" the Council. (Wat. Code, § 85086, subd. (c)(1).) Moreover, Central Delta ignores the report's own terms, which warn that it only considers one aspect of an ultimate flow determination. The SWRCB's report neither addresses non-ecosystem beneficial water uses, nor the public trust needs of upstream fish that may conflict with Delta public trust needs. (L11827 [other uses], L11842 [upstream fish].)

Central Delta further asserts that the Act's flow provisions somehow mandated the Council determine "how much water is available from actual flows in rivers and streams of the Delta watershed . . . ." (Central Delta, p. 46.) But, as the Council previously discussed in detail, the Act's provisions concerning flows are very limited, and give the Council extensive discretion. (See Argument III, *ante*.) Central Delta does not point to any section of the Act mandating that the Council quantify flows. It cannot; none exists. That said, the Council explained that this information is very important, and "one of the greatest challenges" is obtaining "accurate estimates of actual water use in the state . . . ." (B572.) While the Plan reviews available flow information (see, e.g., B594-B600, especially B598 [Figure 4-5, comparing modeled unimpaired and altered Delta inflows and outflows]), the Council explains that current figures concerning water "flows, usages, capacities and trends" are often "little more than guesses." (B433.) The Council therefore sought to improve information through its policy requiring water contract transparency, and its recommendations aimed at improving available information such as "a coordinated statewide system for water use reporting." (B572-573.) The Act does not mandate more.

Central Delta goes on to assert that the Act's public trust doctrine provisions required the Council to engage in an "economic analysis" of water uses. (Central Delta, p. 47.) Central Delta bases this on its unstated assumption that the Act requires the Council to allocate water resources. (*Ibid.*) It builds upon that assumption to argue, without citing any legal authority, that in allocating water resources, the Council needs to engage in an economic analysis. (Central Delta,

p. 48, only cites D4776-D4778, which is no more than a policy recommendation by an advocate.) But there is no need to address Central Delta's economic analysis argument because its underlying assumption is wrong. Just as the Act does not mandate that the Council determine flows (see preceding paragraph), it does not call for the Council to allocate water resources. The only legal support that Central Delta cites is *National Audubon Society, supra,* 33 Cal.3d 419. But *National Audubon* is not on point. It discusses an agency that is authorized to allocate water—the State Water Resources Control Board—and describes what the Board can consider when it allocates water resources. (Especially see *id.* at p. 499 [Legislature gave the SWRCB the authority to issue a "determination of the allocation of water"]; Wat. Code, § 174.) Central Delta has not cited any authority requiring the Council to allocate water resources. None exists.

Finally, Central Delta reiterates, under a public trust heading, its argument that the Act required the Council to go further in enacting its reduced reliance regulation (WR P1). (Central Delta, p. 43.) Central Delta asserts that the Council "unlawfully softened" WR P1. (*Ibid.*) But as the Council previously explained, the Legislature granted the Council extensive discretion concerning how to address reliance on Delta water supplies, and the Council acted well within that discretion in adopting WR P1. (See Argument I, *ante.*) The Council neither went too far, as Water Contractors allege, nor not far enough, as Central Delta alleges. (*Ibid.*)

VI. THE PLAN INCLUDES MEASURES TO IMPROVE WATER QUALITY

The Council adopted 12 specific recommendations aimed at improving water quality. (B458-459, 696-699.) North Coast and Central Delta assert that the Council nevertheless violated the Act because the Council allegedly did not also adopt formal regulations addressing water quality. But the Council did adopt a regulation that addresses multiple issues, including water quality. Its flow policy (ER P1 [comply with SWRCB's flow objectives]) promotes improved water quality. (B451, 614.) As the Plan explains, flow objectives address salinity and sediment in the Delta. (B614.) Salinity and sediment impact water quality because they can harm the ecosystem (*Ibid.*), and salinity can harm drinking water and agriculture (B697).

Moreover, even if the Council had not adopted ER P1, petitioners' claim would fail because the Act does not mandate a water quality *regulation*. Petitioners base their argument on their quotes of a portion of the Act that describes the required content for the Delta Plan. But their quotes, which suggest that the Plan needs to have water quality regulations, leave out key qualifying words—words that delegate the matter to the Council's discretion.

Specifically, these petitioners quote portions of Water Code section 85302, subdivision (d)(3), but leave out the qualifying words "promote" and "address." (See North Coast, p. 34; Central Delta, p. 34.) The statutory provision with those words included reads, in relevant part:

> (d) The Delta Plan shall include measures to *promote* a more reliable water supply that *address* all of the following:
>
> . . . . (3) Improving water quality to protect human health and the environment.

(Wat. Code, § 85302, subd. (d)(3), italics added.)

The Legislature's use of the word "promote" highlights its delegation of significant discretion to the Council. As the Council previously demonstrated, the term gives the Council wide latitude. (See pp. 24-25, *ante*.) "Promote" ranges from nonregulatory recommendations that encourage actions to regulatory mandates. (*Ibid.*) The Legislature's call for the Plan to "address" improving water quality is likewise very open-ended. The Oxford Dictionary defines "address" as follows: "Think about and begin to deal with (an issue or problem): 'a fundamental problem has still to be addressed'." (See Oxford Dictionaries, English (US), at http://www.oxforddictionaries.com/us/definition/american_english/address.)

Petitioners fail to assert that the Plan does not even "think about and begin to deal with" improving water quality. They cannot. The Plan addresses improving water quality in an entire chapter. (Chapter 6, see B761-707.) The Plan establishes "four core strategies" for improving the Delta's water quality: (1) require Delta-specific water protection; (2) protect beneficial uses by managing salinity; (3) improve drinking water quality; and (4) improve environmental water quality. (B672.) It describes the many threats to the Delta's water quality (B683-695), and includes twelve formal recommendations for improving water quality. (B696-699.) Many of these recommendations call upon other agencies to take specific steps to protect the Delta's

waters. For example, WQ R3 (B696) seeks to protect habitat restoration areas from pollution, and WQ R8 (B698) calls upon regulatory agencies to develop regulatory controls for specified contaminates. The Plan also recommends an effective monitoring program "so Delta conditions can be efficiently assessed and reported on a regular basis." (WQ R9 [B699].) In addition, as explained at the beginning of this section, the Plan's flow policy (ER P1) promotes improved water quality. That is furthered by the Council's companion recommendation, ER R1, which calls upon the SWRCB to update its flow objectives. (B451, 614.) The Plan thus includes many measures that address, and promote, improved water quality in the Delta.

Finally, Central Delta claims that the Plan fails to address selenium, and that it "encourages continued selenium contamination by promoting the BDCP." (Central Delta, p. 35.) Neither assertion is correct. First, the Plan does address selenium. It describes the sources of Delta selenium (B694-695), characterizes it as a "[p]ollutant[] of concern (B698), explains the need for more scientific information about its impacts in the Delta (B701), and calls upon regulatory agencies to "revise water quality objectives for selenium." (B702.) Further, as pointed out at the start of this section, the Council's flow policy addresses selenium.

Second, Central Delta's BDCP argument is based upon the same misinterpretation that it made in its broader attack of the Council's BDCP recommendation (WR R12). As the Council discussed in detail earlier, its recommendation only calls for a BDCP that is "consistent with the provisions of the Delta Reform Act." (B572; see Argument II., *ante*.) Other than that reference to the Act, WR R12 does not address the *content* of the BDCP. Because WR R12 does not recommend any particular BDCP approach, WR R12 cannot "encourage[] continued selenium contamination."

All of petitioners' assertions that the Plan does not comply with the Act's water quality provisions are therefore baseless.

VII. THE COUNCIL EXERCISED ITS AUTHORITY REASONABLY BY DEVELOPING AN INTERIM TEMPORARY TRANSFER POLICY

Three petitioners—Water Contractors, Central Delta and North Coast—raise arguments against the Council's temporary transfers policy. Water Contractors claim the policy exceeds the Council's authority. (Water Contractors, p. 36.) North Coast and Central Delta claim the opposite: that the policy falls short of mandates in the Delta Reform Act. (North Coast, p. 36; Central Delta, p. 33.) Petitioners ignore the fundamental truth that the proper method for regulating transfers depends upon the impacts of temporary transfers on the coequal goals, but much about those impacts remains unknown.

During the development of the Delta Plan, the engineering firm CH2M HILL reported that it had "not yet identified any single, comprehensive source of current and historical information on the number, duration, volume and origin/destination of water transfers through the Delta." (M5578.) At the same time, petitioners made competing claims over the information the Council did have, raising doubts about their reliability. (Compare, e.g., E1178 and E1287.) On account of this uncertainty, the Council developed a cautious interim transfer policy. The policy exempts temporary transfers from the Plan's regulations, but only until the end of 2016. (Cal. Code Regs., tit. 23, § 5001(dd)(3).) This approach enabled the Council the opportunity to gather the information needed to better understand the impact of transfers while ensuring that those impacts would not be ignored. Petitioners now challenge the policy from opposing directions.

Below, the Council demonstrates: (A) water transfers call for a balanced regulatory approach; (B) the Act empowers the Council to regulate temporary transfers; (C) the record does not conclusively demonstrate the magnitude or impact of temporary transfers; (D) temporary transfers are not routine operations; (E) the Council's transfer policy supplements the SWRCB's review process for temporary transfers; and (F) the policy complements existing water rights protections. For these reasons, petitioner's challenges to the temporary transfers policy must fail.

A. Water Transfers Call for a Balanced Regulatory Approach

California water law consistently recognizes the importance of balancing the benefits and harms of transfers. The Water Code declares that it is "the established policy of this state to facilitate the voluntary transfer of water and water rights *where consistent with the public welfare* of the place of export and the place of import." (§ 109, subd. (a), italics added).) Likewise, the Water Code provisions that mandate the review of proposed transfers require agencies to weigh the injuries those transfers could cause to other water users and the environment. (See §§ 1725, 1736, and 1810, subd. (d).) The 2009 California Water Plan recounts the standard policy arguments for and against transfers—which are similar to the arguments petitioners make in this litigation—and advises that the "key issue is how to balance these concerns to allow water transfers to continue as a viable water management strategy while having mechanisms to minimize effects on others." (J30070.)

The Act continued this balancing approach by orienting itself toward goals that are "coequal," and the Council respected it by developing an appropriately balanced transfer policy and counterpart recommendation. (Wat. Code, §§ 29702, subd. (a), 85020, and WR R15 [B450; 572].) Petitioners now challenge that approach on opposing grounds, and rest their challenges on different evidence. The diverging viewpoints among petitioners only highlight the thoughtfulness of the Council's approach to transfers.

B. The Act Empowers the Council to Regulate Temporary Transfers if They Have Significant Impacts

Under the Act, a "covered action" must be consistent with the Plan. (Wat. Code, § 85225.) The Act defines a "covered action" to mean a plan, program, or CEQA project that meets several criteria, including having a "significant impact" on the achievement of at least one of the coequal goals. (Wat. Code, § 85057.5, subd. (a)(4).) The Act does not define "significant impact" or specifically discuss water transfers. It does, however, give the Council "a general mandate: to use its expertise and power of continuous regulation as it sees fit" to achieve the coequal goals. (*Ralphs Grocery Co. v. Reimel, supra,* 69 Cal.2d at p. 183.) With this mandate comes the implied

authority necessary to implement it. (E.g., *Engine Manufacturers Assn. v. Cal. Air Resources Bd.* (2014) 180 Cal.Rptr.3d 667, 682-683.)

Acting under this implied authority, the Council defined "significant impact" to refer to "a substantial positive or negative impact on the achievement of one or both of the coequal goals." (Cal. Code Regs., tit. 23, § 5001, subd. (dd).) The Council created four exemptions from this definition. One is for temporary water transfers lasting less than a year, but this exemption will sunset on December 31, 2016. (*Ibid.* at tit. 23, § 5001, subd. (dd)(3).)

During the Council's rulemaking process, it did not have sufficient information to permanently exempt temporary water transfers from regulation. (E.g., A/R Transcript, pp. 3-4; see also F351, Agenda Item 6, Segment 3 at 7:10-7:40 and 20:24-21:06 [6/28/12].) As a compromise measure, it created an interim rule exempting transfers from May 2013, when it adopted the Plan, until December 2016. The Council believed the exemption period was short enough—at slightly more than 40 months—that it would limit the risk that unregulated transfers might have any cumulative impacts. (See, e.g., L7027.) In the meantime, seeking to obtain better information, the Council adopted WR R15:

> The California Department of Water Resources and the State Water Resources Control Board should work with stakeholders to identify and recommend measures to reduce procedural and administrative impediments to water transfers and protect water rights and environmental resources by December 31, 2016. These recommendations should include measures to address potential issues with recurring transfers of up to 1 year in duration and improved public notification for proposed water transfers.

(B450, 572.)

The Council understood that WR R15 was only a recommendation. (E.g., A/R Transcript, p. 2; see also F351, Agenda Item 6, Segment 3 at 1:29-1:34 [6/28/12] [then-chair Phil Isenberg stating "I also know that, without the sunset, it'll drag on for 76 years because all these things are complicated."].) To encourage sister agencies and the regulated community to follow the recommendation, Council members included the sunset provision. (A/R Transcript, p. 3; see also F351 at 5:45 to 6:32 [former Council Executive Officer Joe Grindstaff's explanation to that effect].) As the Delta Plan itself observes, the Council "contemplates that any extension [of the

transfers exemption] would be based upon DWR and the SWRCB's participation with stakeholders to identify and implement transfer measures, as recommended in WR R15." (B515.)

Petitioners disagree with this approach. Central Delta and North Coast argue that exempting temporary transfers—even on a temporary basis—adversely affects the coequal goal of ecosystem restoration. (North Coast, p. 36; Central Delta, p. 33.) In contrast, Water Contractors argue that regulating temporary transfers adversely affects the coequal goal of water supply reliability. (Water Contractors, p. 40.) Neither side has shown that the Council abused its discretion in choosing a middle ground.

C. The Record Does Not Compel the Council's Regulation of Temporary Transfers

In the temporary transfer regulation and counterpart recommendation, the Council stressed the need to develop a fuller understanding of "recurring" or "serial" transfers. (23 CCR § 5001, subd. (dd)(3); WR R15 [B450, 572].) The Council considered these transfers—which repeat over multiple consecutive years—to be of "particular concern" because of their potential cumulative impacts. (E1287.) "As a result," the Council explained, "further evaluation is needed." (*Ibid.*)

North Coast and Central Delta claim the Council erred by following this cautious approach. (North Coast, p. 36; Central Delta, p. 33.) They assert that the record already includes conclusive evidence that temporary transfers have significant impacts on the coequal goals. (North Coast, p. 36; Central Delta, p. 33.) They do not base their claims on citations to comprehensive reports or peer-reviewed studies. They base them on a single rulemaking comment letter submitted by petitioner Center for Biological Diversity, an environmental nonprofit that is a party to the Central Delta brief. (K12475; North Coast, p. 35; Central Delta, p. 33.)

While developing the Plan, the Council considered hundreds of pages of transfer-related documents, including white papers, agency reports, documentation for particular transfers, and stakeholder comments. (E.g., E1174, 1178, 1287, 1298, 1304, 1309, 1310; J30063; L22296, 22320, 22369, 22376.) The Center for Biological Diversity letter was among these. It asserts that one-year transfers are being repeated in a "serial" manner over consecutive years, but it does not

establish that the transfers are serial, or that they have significant impacts. (K12475.) The letter features a table summarizing ten transfers spread across as many years between the Department of Water Resources and Water Contractors (specifically, Westlands Water District). (K12476-12477.) But the transfers are not even for the same amount of water. (*Ibid.*) On the low end, one transfer is for 3,975 acre-feet. (*Ibid.*) On the high end, one is for 10,000 acre-feet. (*Ibid.*) Moreover, while the table may raise questions, it does not demonstrate that these temporary transfers had significant impacts.[43]

Moreover, while the Center for Biological Diversity letter also notes one non-serial transfer that was fairly large (100,000 acre-feet), the letter does not include evidence concerning the transfer's environmental or water quality impacts on the Delta. (K12476.) In theory, the timing and quantity of transfers might impact the Delta's ecology and water quality (see, e.g., B537, 571), but given the inconclusive nature of the information before it, the Council had the discretion to postpone the application of its policies until the end of 2016 to give it time to learn more.

Courts give substantial discretion to agencies in "technical matters requiring the assistance of experts and the use and interpretation of scientific data." (*O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 592.) North Coast and Central Delta, by relying exclusively on the Center for Biological Diversity letter, have failed to meet their burden of showing the Council acted arbitrarily or capriciously. To the contrary, as discussed above, the Council considered the numerous documents and comments in the record and concluded they did not show that, at least for the approximately 40-month duration of the section 5001, subdivision (dd)(3) exemption, temporary transfers would have significant impacts on the coequal goals. (See, e.g., K6625, 6778; L2152, 7020, 17459.)

[43] On multiple occasions, Central Delta parties have protested temporary transfer applications to the SWRCB, and on multiple occasions, the SWRCB has rejected the protests. (E.g., K12515.)

D. Temporary Transfers Are Not "Routine Maintenance and Operation" of the State Water Project and Central Valley Project

In contrast to North Coast and Central Delta, Water Contractors argue the Council does not have the authority to regulate temporary water transfers at all. (Water Contractors, p. 36.) They rest their argument on a statutory exemption to the definition of a "covered action" for the "[r]outine maintenance and operation" of the State Water Project and Central Valley Project. (Wat. Code, § 85057.5, subd. (b)(2).) The phrase "routine maintenance and operation," as Water Contractors admit, is not defined in the Act. (Water Contractors, pp. 36-37.) Nevertheless, Water Contractors claim that temporary transfers are routine operations. (Water Contractors, p. 37.) Their basis for this claim is that transfers "occur regularly." (*Ibid.*)

Words must be interpreted according to their contexts. (*Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 38.) Here, the word "routine" appears in the broader context of the Delta Reform Act. In passing the Act, the Legislature declared its intent to establish a legally enforceable Delta Plan. (Wat. Code, § 85001, subd. (c).) The "routine operation" exclusion creates an exemption from what the Council may regulate in the Plan, and it is a "familiar rule that [courts] must construe statutory exemptions narrowly." (*Sac. County Employees' Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440, 463.) Thus, "routine" calls for a narrow definition.

Temporary transfers would not fall under any reasonably narrow definition of "routine." During the rulemaking process, the Council explained: "By their very nature, one-year transfers cannot be routine because the participating water suppliers, the amount of the transfer, when the transfer will occur, or even the need for a transfer cannot be anticipated in advance with any certainty." (E1178.) Water Contractors themselves have echoed similar thinking, with Santa Clara Valley Water District commenting:

> [I]t is impossible for buyers to know from year to year what their water allocations might be and if the state and federal water projects will have any available capacity to move transfer water even if they need it for water supply supplementation. Likewise, sellers are generally unable to commit to annually providing a water supply for transfers because of variable customer demands and constraints on their supplies from variable hydrology and conditions on their

licenses, permits, or water right settlement agreements.

(K6629.)

In other words, transfers are complex puzzles, and the pieces—the buyers and sellers, the amount of water being transferred, the means by which the amount of water has been made available, the locations that the water will be transferred from, through and to, and the impacts that transferring it will have—will vary from one transfer to the next. (See, e.g., D6007, 6008, 6829, 6030; J30067; L7024, 22299, 22386, 22484.) Temporary transfers, then, are not rote assembly line transactions.

Recognizing temporary transfers as "routine" would stretch that term so broadly that it would encompass most if not all operations of the State Water Project and Central Valley Project. This construction would erode any distinction between "routine" and non-"routine" operations and would violate the rule that courts must give meaning to every word. (E.g., *Tuolumne Jobs & Small Bus. Alliance v. Superior Court of Tuolumne County* (2014) 59 Cal.4th 1029, 1037.) And as a practical matter, by shielding the two projects that together export 24 percent of total inflows into the Delta, "the rule's exemption[] would appear to swallow the rule itself." (B545; *Chambers v. Kay* (2002) 29 Cal.4th 142, 152.)

E. The Plan's Interim Exemption from the Act for Temporary Water Transfers Is Consistent with the SWRCB's Review Process

In California, water transfers are subject to a complex patchwork of regulation and review. (L21517.) The particular laws that apply to an individual transfer vary according to the legal interest in the water being transferred and the infrastructure used to convey it. (See, e.g., Wat. Code, §§ 1810 and 1735.) Certain transfers must receive approval from the SWRCB. Separate sets of statutes govern the SWRCB's review of temporary and long-term transfers. (Compare Wat. Code, §§ 1725 and 1735.) The temporary transfers statutes include a CEQA exemption—Water Code § 1729. Both Water Contractors and North Coast take issue with the manner in which the Council interpreted this CEQA exemption. Water Contractors argue the exemption establishes a legislative preference that implicitly reaches across the Water Code and prohibits the

"CEQA-like" review of temporary transfers even by agencies other than SWRCB. (Water Contractors, p. 38-39.) North Coast contends that the exemption cannot be taken as evidence of anything because CEQA exemptions may "reflect a variety of policy goals." (North Coast, p. 35.) The Council applied a reasonable approach that lies between these two positions.

As discussed above, the Act's definition of "covered action" expressly uses CEQA's definition of a "plan, program, or project." (Wat. Code § 85057.5, subd. (a).) But the Act does not incorporate any other CEQA provision. Notably, it does not incorporate CEQA's exemptions. Thus, the Council may look to CEQA exemptions for guidance, as it has done, but it is not bound by them. (E1298).

At the same time, the Act gives the Council the discretion to consider section 1729 as potential evidence that temporary transfers would not have significant impacts during the limited time frame that the Council's temporary transfer exemption would be in effect. During the rulemaking process, numerous stakeholders invoked the Water Code section 1729 exemption from CEQA. (See, e.g., N2981, 2994, 2998.) North Coast points out that CEQA exemptions may "reflect a variety of policy goals" (North Coast, p. 35), but it fails to acknowledge that one of those goals may be to exempt an action because it does not have a significant impact. (See, e.g., *Sunset Sky Ranch Pilots Assn. v. County of Sacramento* (2009) 47 Cal.4th 902, 907 [stating that exemptions are "not necessarily consistent with CEQA's general purposes," and thereby implying that some exemptions are consistent].) The Council therefore had the discretion to consider the Water Code section 1729 exemption as it weighed its options for addressing temporary transfers. Section 1729 thus serves as a single data point—telling but, on its own, inconclusive—that the Council considered as it developed its temporary transfers policy. Neither North Coast nor Water Contractors have shown that the court should not accord "great weight" to the Council's "interpretation of a statute governing its powers and responsibilities." (*People v. Harrison* (2013) 57 Cal.4th 1211, 1225.)

F. The Council's Temporary Water Transfer Regulation Does Not Conflict With the Act's SWRCB Savings Clause

The Act includes a savings clause, Water Code, § 85031, subdivision (d): "Unless otherwise expressly provided, nothing in this division supersedes, reduces, or otherwise affects existing legal protections, both procedural and substantive, relating to the state board's regulation of diversion and use of water, including, but not limited to … changes in water rights." As a rule, savings clauses such as this are strictly construed and courts should resolve doubts against their application. (*City of Dana Point v. Cal. Coastal Com.* (2013) 217 Cal.App.4th 170, 195; Wat. Code, § 85031, subd. (d).) A review of the savings clause's words shows that it does not call into question the eventual application of the Council's policies to temporary transfers.

The clause states that nothing in "the division" (specifically, Division 35, where the Act is codified) "supersedes," "reduces" or "otherwise affects" the legal protections that currently adhere to the SWRCB's regulation of water rights. (Wat. Code, § 85031, subd. (d).) The temporary transfers policy does none of these things. It leaves the SWRCB's regulation untouched and creates a potential new level of regulation in the form of a possible requirement of consistency with the Delta Plan. It is well recognized that agency responsibilities often overlap. (See discussion in Argument I.A.6, *ante*.) Water management in particular can be subject to such a "bewildering" "multiplicity of … overlapping regulatory environments" as to require its own "rosetta stone" of abbreviations and acronyms. (*Sonoma County Water Coalition v. Sonoma County Water Agency*, *supra*, 189 Cal.App.4th 33, 37, fn. 4.) The section 85031, subdivision (d), savings clause respects the existing regulatory environment but does not prohibit the Council from joining it.[44]

[44] Water Contractors also claim, without explanation, that the Council's consistency appeals process would conflict with the coequal goal of water supply reliability because it would cause "delays" of unspecified duration and make one-year transfers "ineffective." (Water Contractors, p. 40.) Water Contractors do not describe the length of the delays they believe the appeals process would cause, or the length at which they believe delays would be contrary to the coequal goals. In fact, Water Contractors cite to no evidence whatsoever in support of their interpretation of the timing of the appeals process. Water Contractors have therefore forfeited this claim. (See discussion in Standard of Review, Part B [Forfeit Claims], *ante*.)

VIII. THE COUNCIL HAD THE AUTHORITY TO REQUIRE WATER CONTRACT TRANSPARENCY

WP P2 seeks to ensure that the public has full access to water management information. It requires that parties entering into new and amended water contracts involving the State Water Project or the Central Valley Project comply with specified policies requiring public disclosures of information. (B450, 572.) Water Contractors object to WR P2 on two grounds: that the contracts are allegedly always excluded "routine operations" and therefore can never be regulated by the Council, and that the regulation is not needed. (Water Contractors, pp. 40-41.) But Water Contractors have not cited any evidence that all contracts are routine, and they ignore the substantial evidence in the record that the measure is needed.

Water Contractors fail to point to any evidence that water supply contracts are routine operations. To the contrary, by looking at a similar exclusion in CEQA, it becomes clear that at least some contracts are not routine. Although, as previously explained, the Delta Reform Act only incorporates CEQA's definition of a "project," as opposed to all of CEQA's provisions (see Wat. Code, § 85057.5, subd. (a)), both the Act and the CEQA Guidelines have similar operation and maintenance exclusions. (Compare Wat. Code, § 85057.5, subd. (b)(2) with Cal. Code Regs. tit. 14, § 15301.) Like the Act, the CEQA guidelines exclude projects that involve the "operation" or "maintenance" of facilities. And both only apply to operations that are essentially routine.[45] As a result of this similarity, if Water Contractors were correct that water contracts are always routine, they would never be subject to CEQA. Yet they are. Thus, in *Planning & Conservation League v. Dept. of Water Res.* (2000) 83 Cal.App.4th 892, 897-898, the court held that the Department of Water Resources (DWR) had to prepare a new EIR analyzing the "revision of long-term contracts . . . governing the supply of water under the State Water Project." Significantly, the parties did not even question whether those revisions came under the CEQA "operations" exclusion. Moreover, DWR itself explains that CEQA applies to water transfer

[45] Rather than using the word "routine, the CEQA Guidelines specify a similar requirement, i.e., an operation "involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." (Cal. Code Regs. tit. 14, § 15301.)

contracts. (See B1193 [DWR's explanation of CEQA requirements for "contract amendments" concerning proposed water transfers].)[46] Therefore, by analogy, at least some water contracts are not routine operations, and are subject to WR P2 if they meet the Act's other requirements.

Moreover, contrary to Water Contractors' claim, WR P2 is "reasonably necessary" as required by the Administrative Procedures Act. (See Gov. Code, § 11342.2.) The Plan explains that there is a "lack of consistent, comprehensive, and accurate estimates of actual water use in the state." (B566-567, 572.) As a result, "California does not have a clear understanding of its water demands, the amount of water available to meet those demands, how water is being managed, and how that management can be improved to meet the coequal goals." (B572.) The Council determined that improved information "on the management of California Water supplies" is needed to help achieve the coequal goal of "providing a more reliable water supply for California." (B572 [Council determination]; Wat. Code, § 85054 [coequal goal].) Water management information has not been available to the public and to decision makers, in part because state water contract amendments have "not always been developed and approved in a transparent manner." (B566; see also *Planning & Conservation League, supra,* 83 Cal.App.4th at p. 905 ["members of the public . . . were not invited to the table" during water contract negotiations].)

Finally, Water Contractors' assert that WR P2 is not needed because it is duplicative. (Water Contractors, p. 41.) WR P2 does incorporate DWR's "guidelines." (B1192.) But guidelines are not enforceable regulations. (See Gov. Code, § 11340.5.) In sharp contrast, WR P2 was adopted and approved as a regulation. (See N1 [Office of Administrative Law's approval of the Council's proposed regulations]; see also N3183 [WR P2 adds a consequence for noncompliance].) WR P2 therefore makes DWR's important public information guidelines enforceable. It is not duplicative. WR P2 is valid.

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[46] Federal law similarly recognizes that CEQA applies to water transfer contracts. (See 1992 Central Valley Improvement Act, § 3405, subd. (a)(1)(D) [Pub.L. No. 102–575, 106 Stat. 4700 (1992)]: "No transfer authorized by this subsection shall be approved unless the transfer is consistent with State law, including but not limited to provisions of the California Environmental Quality Act.")

IX. THE PLAN HELPS TO PROTECT AND ENHANCE THE DELTA AS AN EVOLVING PLACE

The Legislature called for a Plan that "furthers the coequal goals." (Wat. Code, § 85300, subd. (a). Further, it declared that, among the "objectives . . . inherent in the coequal goals" is to "protect and enhance the unique cultural, recreational, and agricultural values of the California Delta as an evolving place." (Wat. Code, § 85020, subd. (b).) The Council therefore devoted an entire chapter of its Plan to protecting and enhancing the Delta as an evolving place, and it adopted two policies and 19 recommendations aimed at furthering that objective. (See Chapter 5 at B629-670; see also B455-458, 569-663.)

Central Delta ignores most of Chapter 5, including the Delta-as-Place policies and recommendations. Instead, Central Delta asserts (1) that the Council was "required" to incorporate into the Plan certain proposals developed by the Delta Protection Commission (DPC); (2) that the Plan has no regulations promoting agriculture; and (3) that the Council was prohibited from protecting rural areas from urbanization. But the Council will show that (1) the Act expressly gives the Council the discretion whether or not to incorporate DPC proposals, and in exercising its discretion the Council did incorporate many DPC proposals; (2) the Plan includes regulations, as well as recommendations, promoting agriculture; and (3) Central Delta contradicts its first two points by opposing a key Council regulation that the Delta Protection Commission proposed and that protects agriculture from urbanization.

Finally, Central Delta reiterates some of its prior criticisms of the Council's approach to temporary water transfers. (Central Delta, p. 33.) The Council responded to those and other challenges to its temporary water transfers approach in the preceding section of this brief. Rather than repeating those responses here, the Council respectfully refers the Court to its prior responses. (See Argument VII, *ante*.)

A. Although Not Required by the Act, the Council Incorporated Many Delta Protection Commission Recommendations into the Plan

Central Delta asserts that Water Code section 85301 "required" the Council to incorporate the Economic Sustainability Plan developed by the Delta Protection Commission (DPC) into the Delta Plan. (Central Delta, p. 32.) Central Delta misreads the Act. It does not "require"

incorporation of the DPC plan. Rather, it expressly gives the Council total discretion to include, or not include, any portion of the DPC plan.

Specifically, the Legislature required the DPC to prepare a proposal to protect the Delta. (Wat. Code, § 85301, subd. (a)). The Act provides that the proposal should include an Economic Sustainability Plan. (Wat. Code, § 85301, subd. (b)(2); see also G4711 [Council staff explanation].) The Act goes on to require the Council to "consider" the DPC's proposal. (Wat. Code, § 85301, subd. (d).) The Act then expressly gives the Council the discretion to include, or not include, any part of the DPC plan into the Delta Plan. The Act states that the Council "*may* include any portion" of the proposal in the Delta Plan "in its *discretion.*" (*Ibid.*, italics added.) Central Delta's assertion that the Act "required" the Council to incorporate the DPC proposal into the Delta Plan is thus incorrect.

Further, the Council more than complied with its statutory obligation. The DPC submitted its proposal to the Council on January 26, 2012. (L3182 [proposal]; K7709 [acknowledging submittal].) The Council then did far more than just "consider" the proposal, as required by the Act. Council staff prepared and submitted an in-depth analysis of the proposal. (G4711.) The Council then held two days of public meetings to address the proposal. (F294.) At the meetings, the DPC and its consultants gave comprehensive presentations, which the Council followed with section by section discussions of the recommendations. (F294 [summary of February 9 and 10, 2012 hearings]; F290, archive segment numbers 12 – 59 of 60 [video of meetings].) As a result of this input, the Council based an entire chapter of the Delta Plan on the DPC's proposal, and on related Delta-as-a-place documents prepared by the DPC, the Delta Conservancy, and California State Parks. (See B628-670 [especially 647-666].)

Although the Council did not adopt all of the DPC's proposals, it accepted many into the Delta Plan. Of the DPC's 38 recommendations, the Council accepted 17, partially accepted 8, deferred action on 12, and ultimately only rejected one. (K7709-7710 [August 7, 2012, letter from Council Chief Deputy Executive Officer Dan Ray to DPC Executive Director Michael Machado].) Thus, although the Council was not required to accept any of the DPC's proposals, it ultimately incorporated many into the Delta Plan.

B. The Council's Regulations Support Delta Agriculture by Protecting Rural Areas and Existing Land Uses

Central Delta also asserts that "[t]he Delta Plan includes only recommendations, and no policies, to promote agriculture . . . ." (Central Delta, p. 32.) Again, it ignores the record. The Plan includes regulations, as well as recommendations, to promote Delta agriculture. One of the biggest threats Delta agriculture faces is urbanization. (B643, 649.) The Council adopted an important regulation, DP P1, to address that threat by generally limiting new urban development to areas planned for urban growth. (B660; see also B644 [needed to stem a "further loss of farms to urban development event"].) Absent that protection, Delta agriculture could lose the "critical mass" of farms needed to sustain the industry. (L539 [Delta Protection Commission 2010 study (final draft)].) Moreover, DP P1 further seeks to promote agriculture by allowing "facilities for processing of local crops or that provide essential services to local farms." (B660.)

A second regulation also benefits Delta agriculture. DP P2 seeks to protect Delta agriculture by regulating ecosystem restoration and related projects so that, where feasible, they do not impact agricultural lands. (B456.) The Plan also includes various recommendations aimed at *enhancing* Delta agriculture through approaches such as encouraging value-added processing of Delta crops and agritourism, as well as the provision of adequate infrastructure. (See DP R5, DP R8, DP R9, and DP R18; B661-663.) These were specifically recommended by the Delta Protection Commission in its Delta-as-an-evolving-place proposal. (See L3189 [value-added and agritourism], L3191 [infrastructure].) The Council's Plan thus furthers the Legislature's goal of protecting and enhancing the "agricultural values of the California Delta as an evolving place." (Wat. Code, § 85020, subd. (b).)

C. The Act Authorizes DP P1's Protection of Rural Areas from Urbanization

Central Delta's final assertion directly contradicts its prior two points (that the Council ignored the DPC report and failed to protect Delta agriculture). Central Delta alleges that the Council improperly regulates land uses. (Central Delta, pp. 32 and 34.) Yet the Council's main land use regulation, DP P1 (locate new urban development wisely—see B455, 660) was proposed

by the DPC and is the cornerstone of the Plan's effort to protect agriculture. As discussed in the prior subsection, one of the most critical threats to Delta agriculture is urbanization, and the Council's protection of agriculture from that urbanization is essential if Delta farming is going to remain viable. Thus, one of the key DPC proposals to protect agriculture is to adopt a regulation along the lines of DP P1. Specifically, the DPC recommended that "future residential development must be limited to the extent of city limits, city spheres of influence in the secondary zone, and unincorporated areas that are consistent with city and county general plans." (L3189.) DP P1 does that. (B455, 660.)

Moreover, Central Delta's underlying assertion, that the Legislature did not authorize the Council to regulate any land use, ignores the Act. The Act expressly provides that the Delta Plan is to regulate land uses and development. Water Code section 85022, subdivision (a), states as follows: "It is the intent of the Legislature that state and local land use actions identified as 'covered actions' pursuant to section 85057.5 be consistent with the Delta Plan." Section 85057.5, in turn, states that covered actions include a "project" as defined by the California Environmental Quality Act (CEQA) that will occur at least in part within the Delta. CEQA's definition of "project" encompasses among other things "development" ("an activity which may cause . . . a direct physical change in the environment . . ."). (Pub. Resources Code, § 21065.) Thus, contrary to Central Delta's assertion, the Legislature expressly called for land use regulations. Central Delta's assertion that the Act bars the Council from regulating land uses is therefore baseless.

Central Delta weaves two other arguments into its land use assertion. But nether argument actually addresses the Council's authority to regulate land uses in the Delta, and neither has merit. First, Central Delta correctly states that the Legislature defined the term "covered action," but it goes on to assert that the Council had a mandatory duty to refine the definition. (See Central Delta, p. 33 [Council "fails to provide unambiguous and practical direction to other governmental entities regarding what constitutes 'covered action' . . . "].) Although the Council has the authority to "make specific" the terms of the Act (see Gov. Code, § 11342.2), Central Delta does not point to any provision in the Act, or any other authority, *mandating* that the Council add to

the Legislature's definition. Moreover, the Council did, in fact, refine the Act's definition. (See 23 CCR § 5001, subds. (j)(3) [agency makes determination] and (dd) [exempting certain projects].) Second, Central Delta asserts that the Council's approach to temporary water transfers fails to protect the ecosystem. (Central Delta, p. 33.) The Council previously provided a detailed review of why its balanced approach is valid, and rather than repeating those points here respectfully refers the Court to that prior discussion. (See Argument VII, *ante.*)

In sum, Central Delta's assertions that the Plan fails to protect the Delta as an evolving place, and in particular Delta agriculture, are therefore unfounded. To the contrary, the Plan uses the Council's authority to regulate land uses to protect agriculture and other Delta values.

X. THE PLAN ATTEMPTS TO REDUCE RISKS IN THE DELTA

Central Delta asserts that the "Delta Plan Fails to Reduce Risk" in the Delta. (Central Delta, p. 35). Although the Act does not "require" the Plan to reduce risk, it does provide that the Plan "shall *attempt* to reduce risks . . . in the Delta . . . ." (Wat. Code, § 85305, subd. (a), italics added.) The Plan does. It has numerous policies and recommendations that seek to reduce Delta risks. Tellingly, Central Delta never expands upon its conclusionary statement to explain why it believes the Plan's policies and recommendations will not reduce risks. Instead, Central Delta in part argues that one policy does *too much* to reduce risks, but it mainly just questions some underlining information in the Plan. Its criticism essentially has three components: (1) it argues that the Council's use of a 55 inch sea level rise figure in the Council's regulation that requires floodproofing of new residences requires more protection than is needed; (2) it challenges the Plan's discussion of earthquake risks to Delta levees, but does not question the Plan's conclusion about those risks; and (3) it presents miscellaneous other arguments concerning levee information. None of these points has merit, and most are also inconsequential.

A. Central Delta Ignores the Numerous Policies and Recommendations Aimed at Reducing Risks

The Plan's reduced risk chapter includes four policies (regulations) and ten recommendations that attempt to reduce risks. (B462-465, 735-742.) These include a policy requiring new rural residential developments to have adequate floodproofing (RR P2 [B463,

739]), a policy protecting floodways from encroachments (RR P3 [B464, 740]), and a policy protecting major floodplains from encroachments (RR P4 [B464, 740]), along with numerous recommendations addressing matters such as emergency preparedness (B735-742). In addition to these, at least one Delta-as-an-evolving-place policy—DP P1—includes the goal of reducing risks. DP P1 directs new urban development away from rural parts of the Delta. (B660.) The Council adopted that policy, in part to "reduc[e] risks to people and property." (B659.)

Central Delta has not even tried to establish that those policies and recommendations fail to reduce risk in the Delta. (Central Delta, p. 35). If anything, Central Delta argues that the Council did too much, not too little. (See, e.g., Central Delta, p. 38, asserting [incorrectly] that the Council's floodproofing policy, discussed below, will require "massive levees" at "great expense.")

Rather than explaining why the Council's policies and recommendations will not reduce risk, Central Delta only addresses one policy—RR P2—and argues that it provides too much risk protection. It does not.

B. The Plan's Flood Protection Requirement for New Rural Residences (RR P2) Is Fully Supported by Substantial Evidence in the Record

Central Delta's assertion that the Council went too far in protecting new residences located in the Delta is unfounded. The Act provides that "[t]he Delta Plan shall attempt to reduce risks . . . in the Delta . . . by promoting . . . appropriate land uses." (Wat. Code, § 85305, subd. (a).) As part of that charge, the Council adopted RR P2, which requires that developers of five or more new residences in rural parts of the Delta provide adequate floodproofing of the residences. Central Delta asserts that the regulation is arbitrary because its standards are allegedly not supported by the evidence. (Central Delta, pp. 37-38.) It also argues that floodproofing would be costly. (Central Delta, p. 38.) In fact, the standards are supported by substantial evidence, they would not be costly, and reasonable regulations that protect property and lives would be valid even if they had been costly.

1. Substantial Evidence in the Record Supports the Council's Use of a 55 Inch Sea Level Rise Figure

Central Delta asserts that the amount of floodproofing required by RR P2 is excessive because it is allegedly based upon outdated sea level rise data. (Central Delta, p. 37.) RR P2 requires that floodproofing take into account global warming by addressing a potential sea level rise of 55 inches at the Golden Gate. (B463, 739.) Central Delta argues that the 55 inch figure is too high, claiming that it "relies on an interim and outdated recommendation of the Ocean Protection Council." (Central Delta, p. 37; see also Central Delta First Amended Petition, p. 36 [55 inch figure "far exceeds the scientifically supported sea level rise predictions that are currently available"].) Central Delta goes on to represent that "[a] DISB [Delta Independent Science Board] member also noted the citation of the Plan's cited sea level rise and identified the need to update it, which was ignored." (*Id.* at pp. 37-38.) This is simply not true. As will be seen, the Council obtained the updated information prior to adopting the Plan, and that data fully supports the Council's figure.

Central Delta argues that the Council based its 55 inch figure on an outdated Ocean Protection Commission (OPC) resolution adopted on March 11, 2011. (Central Delta, p. 37, citing B483, 579, 609, 624, 718, 744.) That OPC resolution refers to sea level rise projections along the California coast of up to 69 inches by the year 2100 (L38257), and suggests the use of a 55-inch figure. (L38255) The OPC resolution states that it is based upon a multi-agency report called the "Sea-Level Rise Interim Guidance Document" (Guidance Document). (L38255 [OPC resolution]; L33592 [Guidance Document].) That Guidance Document likewise projects a sea level rise along the California coast of up to 69 inches from 2000 to 2100. (L33595.) It also explains that the State Lands Commission and the State Coastal Conservancy have adopted the use of 55 inches for 2100. (L33597.) Significantly, it cautions that its projections "do not account for catastrophic ice melting, so they may *underestimate* actual SLR." (L33595.) It further cautions that the projections "do not include a safety factor to ensure against underestimating future SLR." (*Ibid.*)

Probably most important, the Guidance Document explains that model projections of sea level rise vary considerably, and decision makers need to choose a number based upon the risk they are addressing. The Guidance Document states that values are "continually changing" and "the choice of which solutions to use in guiding decision-making depends on application—how much risk is the decision maker or agency willing to take?" (L33606.)

The rest of the evidence in the record also supports the 55 inch figure. For example, the Legislature endorsed the 55 inch figure in the Delta Reform Act itself.[47] Central Delta tries to counter this evidence by claiming that it is "outdated" and that the Council "ignored" new information. (Central Delta, pp. 37-38.) Its only support for this argument is a statement, made on June 19, 2011, that the Council should be on the lookout for an upcoming National Research Council (NRC) report to see "[h]ow does 55 inches compare with the estimates in the [upcoming] NRC report." (K3505 [date], K3507 [NRC report statement]). Central Delta does not disclose that the Council obtained that new information to make sure it did not require that the Council lower its 55 inch figure. (M5597; J161029.) In fact, the new information confirmed the Council's use of its figure. The NRC report, issued in 2012, projects an almost identical sea level rise of up to 65.5 inches (M5597 [5.48 feet]; J161029 [65.5 inches].) That is very close to the "old" (69 inches) figure. And neither figure requires the Council to *lower* its 55 inch figure. Thus, substantial evidence (indeed all evidence) supports the Council's use of the legislatively endorsed and generally accepted 55 inch sea level rise figure.

[47] Specifically, the Act describes the conditions for incorporating the Bay Delta Conservation Plan (BDCP) into the Delta Plan. One is that BDCP's environmental impact report analyze "[t]he potential effects of climate change, *possible sea level rise up to 55 inches*, and possible changes in total precipitation and runoff patterns . . . ." (Wat. Code, § 85320, subd. (b)(C), italics added.)

The Delta Vision Task Force's 2008 *Delta Vision Strategic Plan* also supports the 55 inch figure. It warned of "[a] potential sea level rise of 55 inches by 2100." (L3249.) In support, the Task Force cited a memorandum to it from the CALFED Independent Science Board. (*Ibid.*)

2. Contrary to Central Delta's Assertion, RR P2 Is Tailored to the Projected Sea Level Rise on Each Delta Parcel

Central Delta also asserts that RR P2 improperly assumes "a uniform elevation change within the Delta." (Central Delta, p. 37; see also Central Delta First Amended Complaint, p. 36 [rise "in the northern Delta region will not be as high" as elsewhere].) But the Plan does not assume a uniform change. By its terms, RR P2's 55 inch sea level rise at the Golden Gate assumes that the rise on a particular Delta parcel may vary. It uses the Golden Gate rise as a starting point, and then calls upon the property owner (or engineer) to calculate what the rise would be on the particular Delta parcel if it is 55 inches at the Golden Gate. RR P2 thus reads as follows: "New residential development of five or more parcels shall be protected through floodproofing to a level 12 inches above the 100-year base flood elevation, *plus sufficient additional elevation to protect against a 55-inch rise in sea level at the Golden Gate*, unless the development is located within" excluded urban areas. (Italics added.) Central Delta asks this Court to read the regulation as requiring "floodproofing *to a level of 67 (55 plus 12) inches* above the 100-year base flood elevation." But that is not what the regulation states. By changing the regulation's terms, and then asserting that the changed terms are improper, Central Delta has raised an issue that does not exist.

3. Central Delta's Claim That RR P2 Requires Major, Unjustified Reclamation District Expenditures Is Wrong

Central Delta goes on to claim (in one sentence) that floodproofing new rural residential developments will require the construction of "massive levees . . . at great expense." (Central Delta Brief, p. 38.) There are two independent problems with this claim. First, the Delta Plan explains that floodproofing can be done in much cheaper ways than building levees. The Plan explains, for example, that a home can be protected by building it on compacted fill, or by raising it on posts. (B732 [figure 7-7 depicting those examples].) And second, Central Delta has not cited, and the Council is not aware of, any authority that prohibits it from requiring levees, even if they are expensive, in order to protect new residences and their inhabitants from dangerous floods.

C. The Plan's Narrative Does Not Overstate Earthquake Risks to Delta Levees

Central Delta's remaining arguments do not challenge any particular regulation or recommendation. Rather, Central Delta challenges various statements in the Plan. In particular, Central Delta asserts that the Council acted arbitrarily in describing the risk to Delta levees from earthquakes. (Central Delta, p. 36 [Plan narrative "overstated risks associated with earthquakes and levee failures in the Delta . . . ."].) At the outset, even if Central Delta had established that the Plan includes an overstatement, that would not be so arbitrary as to call for judicial intervention. (*California Hosp. Assn. v. Maxwell-Jolly* (2010) 188 Cal.App.4th 559, 581 [arbitrary and capricious standard][48].) In any event, a cursory review of the Delta Plan's evaluation of earthquake risks shows that it is reasonable.

The Plan summarizes its conclusion about earthquake risks to levees as follows: "Although the probabilistic nature of earthquake prediction makes it difficult to quantify the timing and magnitude of seismic threats, it is important to address the threats posed by earthquakes to the Delta levee system because of the potential adverse effects of such events." (B717.)

Central Delta does not challenge that conclusion. Rather, it only criticizes preliminary language, most notably the Plan's observation that a Department of Water Resources (DWR) "study concluded that a major earthquake of magnitude 6.7 or greater in the vicinity of the Delta Region has a 62 percent probability of occurring sometime between 2003 and 2032." (B717.) The DWR study cited the risk in the nearby "San Francisco Bay region," and concluded that "[s]uch an earthquake could cause major damage to Delta and Suisun Marsh Levees." (J78931.) The Council had the right to note that study by a sister agency. (See *Personal Watercraft Coalition, supra,* 100 Cal.App.4th at p. 149, fn. 5 [report and study].) Moreover, Central Delta does not cite any evidence undermining DWR's conclusion. Central Delta's *only* citation is to an

[48] Central Delta also questions whether statements in the Plan are supported by best available science. (See Central Delta p. 35, characterizing its reduced risk argument as a "BAS" argument.) Although the Council is not aware of state cases describing a special standard of review for best available science challenges, federal law addresses this and applies a highly deferential standard. (*San Luis & Delta-Mendota Water Auth. v. Locke* (9th Cir. 2014) 776 F.3d 971, 995.)

Independent Science Board member's suggestion that the Council add more detail to a companion table. (M1516 [member's suggestion that Council add "the expected consequences, in the Delta" to the table]; K3211 [that table, listing the probability of a "San Francisco Bay/East Bay Area earthquake affecting the Delta by 2032"].) Contrary to Central Delta's implication, the cited individual's suggestion does not undermine, or even question, DWR's conclusion.

Central Delta's assertion is especially off the mark given that the Delta Plan does not rely upon DWR's figures. Rather, as previously noted, it concluded that predictions are "difficult to quantify." (B717.)

Central Delta is even further off-target in claiming that a Plan figure illustrating a potential flood scenario "cites the 300-year probability, and then implies that it is the 30-year probability." (Central Delta, p. 36, referring to Figure 7-2.) Simply put, the figure does not cite any probability. (See B718 [Figure 7-2].) Moreover, as previously noted, the Plan unequivocally warns that earthquake predictions are "probabilistic." (B717.)

Given the consequence of levee failures due to earthquakes, the Plan determined that threats should be addressed. (B717.) Central Delta does not even try to meet its burden of proving that the Council's conclusion was arbitrary. (*California Hosp. Assn., supra,* 188 Cal.App.4th at p. 581.)

Central Delta next asserts that the Delta Plan's discussion of earthquake and other risks in the Delta "completely ignored documented risks to other parts of the SWP/CVP [State Water Project/Central Valley Project]." (Central Delta, p. 37.) But the Act only directs the Council to address risks "in the Delta." (Wat. Code, §§ 85305, subd. (a) and 85306.) The Act does have a provision stating that the Council "*may* identify actions to be taken outside of the Delta," but that provision is permissive. (Wat. Code, § 85307, subd. (a), italics added.) Even more important, it only applies to out-of-Delta actions that will "significantly reduce flood risks *in the Delta.*" (*Id.*, italics added.) It does not apply to risks to the State Water Project/Central Valley Project south of the Delta.

Because the Act's risk reduction provisions only focus on the Delta, Central Delta implies that a different provision—Water Code, section 85302, subdivision (d)(2)—mandates that the

Council address out-of-Delta risks. But that provision has no such mandate. Rather, it provides that the Plan "shall include measures to promote a more reliable water supply that address . . . [s]ustaining the economic viability of the state." The Plan contains many such measures. (See Plan's two water reliability regulations and 19 recommendations at B446-451 and B568-577.) The Act does not mandate, or even recommend, that the Council do more and evaluate specific out-of-Delta risks to downstream water systems.

D. Central Delta's Arguments Concerning Levee Information in the Plan Are Both Wrong, and Inconsequential

Finally, Central Delta presents brief arguments concerning levee-related information. For example, it asserts that the Delta Plan contains a map that allegedly includes nonexistent levees, and that the Plan allegedly overstates the number of reclamation districts that do not meet certain hazard mitigation guidelines. (Central Delta, pp. 35-36.) But both items are based upon substantial evidence in the record, namely a map created by the Department of Water Resources (DWR) in 2011 (see B722), and DWR's 2012 hazard calculations. (See L37130.) Moreover, even if Central Delta could establish that the DWR documents were imperfect, they support the Delta Plan's Delta levee conclusion, i.e.: "[r]ecent evaluations show that some of the flood control project facilities on the Sacramento and Jan Joaquin rivers are not adequate." (B720.) Any alleged imperfection in the underlying document was non-prejudicial.[49] Indeed, Central Delta does not even question the Delta Plan's conclusion that some flood control facilities are inadequate.

Central Delta also asserts that the Plan "fails to provide for review and update" of its levee policy. (Central Delta, p. 38.) It does. The Plan, and the Act, call for reviewing the Plan at least every five years. (B511 [part of Plan's adaptive management], Wat. Code, §85300, subd. (c).) Moreover, the Plan's prioritization for state funding of Delta levees, by its terms, creates "interim

[49] See *San Luis & Delta-Mendota Water Auth. v. Locke, supra*, (9th Cir. 20014) 776 F.3rd 971, 995 (where agency must base decision on best available science, "if the only available data is " 'weak,' and thus not dispositive," an agency's reliance on such data "does not render the agency's determination 'arbitrary and capricious.' " [internal citations omitted]); *Envtl. Prot. Info. Ctr. v. California Dept. of Forestry & Fire Prot.* (2008) 44 Cal.4th 459, 487, fn. 10 (citing "general rule" that "insubstantial" errors are "not prejudicial").

priorities." (B737.) These apply prior to the Council's "completion and adoption of updated priorities." (*Ibid.*) Central Delta's assertion that the Plan does not call for any review or update of its levee policies is therefore groundless.

Thus, all of Central Delta's reduced risk arguments fail. Central Delta never even tries to meet its burden of proving that the Plan's many reduced risk provisions are inadequate. Rather, Central Delta's only substantive argument asserts that the Council did too much; its unsupported claim is that RR P1 is based on outdated information and as a result requires excessive protection. Central Delta's other arguments, such as its earthquake points, mainly concern narrative statements in the Plan and do not even challenge the Plan's conclusions about earthquake or other risks. Central Delta's assertions are unsupported, and inconsequential.

XI. THE COUNCIL HAD THE DISCRETION TO ADOPT G P1'S SAFETY VALVE PROVISION, ALLOWING NARROW EXCEPTIONS UNDER VERY LIMITED CIRCUMSTANCES

North Coast asserts that the Act prohibited the Council from including a provision in its plan that may allow, under very limited conditions, a project to proceed even if it is not fully consistent with a policy in the Plan. (North Coast, p. 39.) General Policy 1, subdivision (b)(1) (GP 1), provides that due to "the nature of the covered action, full consistency with all regulatory policies may not be feasible." (B519[50].) G P1, subdivision (b)(1), allows an agency to explain

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[50] GP 1, subd. (b)(1) states, in full:

> (b) Certifications of consistency must include detailed findings that address each of the following requirements:
>
> (1) Covered actions, in order to be consistent with the Delta Plan, must be consistent with this regulatory policy and with each of the regulatory policies contained in Article 3 implicated by the covered action. The Delta Stewardship Council acknowledges that in some cases, based upon the nature of the covered action, full consistency with all relevant regulatory policies may not be feasible. In those cases, the agency that files the certification of consistency may nevertheless determine that the covered action is consistent with the Delta Plan because, on whole, that action is consistent with the coequal goals. That determination must include a clear identification of areas where consistency with relevant regulatory policies is not feasible, an explanation of the reasons why it is not feasible, and an explanation of how the covered action nevertheless, on whole, is consistent with the coequal goals. That determination is subject to review by the Delta

(continued...)

why consistency with a policy is not feasible, but why the action, on the whole, is nevertheless consistent with the coequal goals. (*Ibid.*) The agency's determination is subject to Council review on appeal. (*Ibid.*)

This provision seeks to avoid unintended consequences. A rigid requirement might inadvertently bar a plan or program that, overall, advances the coequal goals. (See N3005 [Department of Water Resource's expression of that concern].)

Moreover, contrary to North Coast's claim, the provision is not prohibited by the Act. North Coast correctly notes that the Act requires consistency with the Delta Plan. (North Coast, p. 39.) But North Coast fails to point out that G P1, subdivision (b)(1), is *part* of the Delta Plan. If an agency complies with G P1, subdivision (b)(1), it is complying with the Plan. North Coast tries to avoid that fact by creating the impression that G P1, subdivision (b)(1), allows an agency to evade "'full consistency' with the *Delta Plan*." (North Coast, p. 39, italics added.) It does not. Rather, G P1, subdivision (b)(1), refers to "full consistency with all relevant *regulatory policies*." (B519, italics added.) Given G P1, subdivision (b)(1), an action can be fully consistent with the Delta Plan (since G P1, subd. (b)(1) is part of the Plan), even though it is not fully consistent with every policy.

North Coast may be concerned that G P1, subdivision (b)(1), will be misapplied. If so, its concern is not ripe. North Coast is challenging the regulation on its face. Facial challenges to enactments assert that the text of a measure is invalid, without looking at its application to particular facts. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) In contrast, as applied challenges assert that a measure is being applied in an impermissible manner to specific facts. (*Ibid.*) In our case, North Coast is not challenging the Council's application of G P1, subdivision (b)(1); it only raises a facial challenge. As such, North Coast must prove, at a minimum, that the regulation's application will have to be invalid "in the generality or great majority of cases." (*In re Guardianship of Ann S., supra,* 45 Cal.4th 1110, 1126; see also *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 38-39 [applying requirement to challenge of

(...continued)
Stewardship Council on appeal[.]

regulations].) On its face, it is impossible for North Coast to meet that burden. The regulation requires an agency to show that, even absent full consistency with all policies, its project "is consistent with the coequal goals." (B519.) At a minimum, G P1, subdivision (b)(1), is therefore valid on its face.

XII. THE PLAN'S PERFORMANCE MEASURES ARE COMPREHENSIVE AND VALID, AND WILL BE REFINED

The Act calls upon the Council to adopt "quantified *or otherwise measurable* targets associated with achieving the objectives of the Delta Plan." (Wat. Code, § 85308, subd. (b), italics added.) North Coast raises three categories of challenges concerning these measures, and Save the Delta supplements a portion of one category. North Coast asserts that the Delta Plan fails to include such measures for (1) "reduced reliance on the Delta;" (2) "invasive species and restoring more natural flows in the Delta" (including "water quality"); and (3) "increased water supply reliability." (North Coast, pp. 27-30.) Save the Delta makes a similar assertion, but only concerning flows. (Save the Delta, pp. 32-33.) In fact, the Plan contains measurable targets for each of these areas.

The Plan has three categories of performance measures: administrative, output, and outcome. (B512.) Administrative measures track decisions made by policy makers, such as their commitment of funds to implement a program or their adoption of a plan. These are particularly useful for measuring near-term progress in meeting Plan objectives. (*Ibid.*) Output measures evaluate factors that may influence desired outcomes. These could include acres of habitat restored or acre-feet of water released. (*Ibid.*) Outcome measures, in turn, evaluate the desired end results from the other measures, such as increases in endangered fish populations due to the restored habitat. (*Ibid.*)

Most of the Plan's performance measures are administrative, focused on near-term actions. (*Ibid.*) The Council explained that its initial measures "will be expanded and refined after adoption of the Delta Plan." (*Ibid.*) It took this studied approach because it wanted its measures to be "informative and meaningful," and realized that crafting viable measures takes time "in complex and large-scale systems like the Delta." (*Ibid.*) Moreover, the Council explained that it

"will improve all performance measures, but will focus on outcome measures through a multiyear effort." (*Ibid.*) Finally, to track the Council's own progress in updating its performance measures, the Plan's first administrative performance measure calls upon its completion of a report on update revisions by December 31, 2014. (B1291.)

Petitioners' attacks on the Plan's performance measures start from a false premise. They assume that *every* performance measure addressing a Delta Plan objective must have a measurable target. The Act does not require "every" measure to be measurable; it only requires that the Council "include" measurable targets. (Wat. Code, § 85308, subd. (b).) Thus, some may not be measurable. Petitioners therefore must review all measures addressing a particular objective, and establish that none comply with the Act. Instead of meeting that burden, they only discuss particular measures that they claim are insufficient. As the Council explained under Standard of Review, Part E [Forfeit Claims], *ante*, that omission is fatal, and cannot be rectified in a reply brief.

Petitioners' claims also fail because the measures they ignored, and those they singled out, comply with the Act.

A. The Plan Has Measurable Reduced Reliability Targets

The Plan contains 24 administrative performance measures that track progress towards a more reliable water supply. (B1291-1293.) As a few examples, the performance measures do the following: (1) track the number of water suppliers that have, among other things, completed water management plans and commenced implementation of measures to reduce their reliance on the Delta (B1291); (2) determine whether the Department of Water Resources has included water efficiency and related requirements in its contracts and water transfer agreements (B1292); and (3) track the number of water suppliers who have developed groundwater management plans meeting specified criteria. (B1293.) North Coast ignores these measures. (North Coast, pp. 27-30.) Its assertion of error fails on that ground alone. (See Standard of Review, Part E [Forfeit Claims], *ante*.)

The Plan also has output targets. They include two that North Coast asserts are invalid:

- "Significant reduction in the amount of water used or in the percentage of water used from the Delta watershed." (B1313-1314; see also B575.)
- "Progress toward meeting California's conservation goal of achieving a 10 percent reduction in statewide urban per capita water usage by 2015 and a 20 percent reduction by 2020." (B577.)

North Coast challenges the first on the ground that "significant" is not "measurable." (North Coast, p. 28.) North Coast overlooks the Act itself, which uses "significant" as a means of measuring various actions. Most notably, the Council can only regulate an action that will, among other things, "have a significant impact on the achievement of one or both of the coequal goals . . . ." (Wat. Code , § 85057.5, subd. (a)(4).) "Significant impact" means an impact that is measurable. ("Measurable" means "[l]arge enough to be measured; noticeable; definite"[51] .) Although North Coast may have preferred, as a matter of policy, that the Council quantify its target with a numerical figure, the Act gives it the alternate of using an "otherwise measurable" target. (Wat. Code, § 85308, subd. (b).)

North Coast challenges the second measure (10 per cent reduction by 2015; 20 per cent by 2020), which includes quantified targets, on the ground that the targets address conservation statewide as opposed to within the Delta. It claims that statewide reductions "say[] nothing at all about whether agencies are reducing reliance on the Delta." (North Coast, p. 29.) North Coast ignores two facts. First, the coequal goal of "a more reliable water supply for *California*" (Wat. Code, § 85054, italics added) is a statewide goal, not a Delta-only goal. As the Legislature declares in the Act: "Providing a more reliable water supply *for the state* involves implementation of water use efficiency and conservation projects, wastewater reclamation projects, desalination, and new and improved infrastructure, including water storage and Delta

[51] See Oxford's American English definition at http://www.oxforddictionaries.com/us/definition/american_english/measurable

conveyance facilities." (Wat.Code, § 85004, subd. (b).) The Council acted well within its discretion in measuring progress towards meeting that statewide goal.

Second, statewide reductions are very likely to impact the Delta. As the Legislature also explains in the Act: "More than two-thirds of the residents of the state and more than two million acres of highly productive farmland receive water exported from the Delta watershed." (Wat. Code, § 85004, subd. (a).) Thus, statewide reductions will likely have a positive impact on the Delta.

B. The Plan Has Measurable Delta Ecosystem Targets

North Coast's second claim concerning the Plan's performance measures is that they allegedly do not include measureable targets for addressing three aspects of the Delta ecosystem: non-native species, flows, and water quality. (North Coast, pp. 29-30.) Save the Delta makes a similar claim concerning flows. (Save the Delta, pp. 32-33.) But the Plan has measureable performance measures addressing each of those items.

First, North Coast ignores significant evidence in the record concerning non-native species. That error is fatal. (See Standard of Review, Part E [Forfeit Claims], *ante*.) For example, it ignores the performance measure tracking whether "100 percent of all proposed actions that have the reasonable probability of introducing, or improving the habitat conditions for, nonnative invasive species have demonstrated that [the impacts] . . . have been fully considered and avoided." (B1296.) North Delta also ignores the measure determining whether specified agencies have prioritized "the list of 'Stage 2 Actions for Nonnative Invasive Species.'" (*Ibid.*) Both of those provisions are measurable. Rather than measuring with a numeric gauge, they measure with a simple checklist. For example, either all proposed actions met the invasive species requirement, or they did not.

Finally, as North Coast concedes, the Plan tracks

> [p]rogress toward decreasing annual trends in both the number of new and existing aquatic and terrestrial nonnative species, and the abundance and distribution of existing aquatic and terrestrial nonnative species in the Delta over the next decade. These trends will be derived from long-term animal and plant monitoring surveys conducted by the Interagency Ecological Program agencies, the California Department of Boating and Waterways, the U.S. Department of Agriculture, the San Francisco Estuary Institute, and others.

(B623.) North Coast asserts that the provision is invalid because it does not include a specific "amount of decrease." (North Coast, p. 29.) But North Coast ignores the Act by assuming that the Council must articulate a "quantified" target. It assumes that the Council had to pick a number. In fact, the Act gives the Council the alternative of using an "otherwise measurable" target, and trend lines are measurable. (Wat. Code, § 85308, subd. (b).) If the trends decrease, the measure is on target. If the trends do not decrease, they are not on target.

Second, North Coast, and Save the Delta repeat the fatal defect of ignoring evidence that does not help them concerning flows. (See Standard of Review, Part E [Forfeit Claims], *ante*.) They do not address the performance measure determining whether there is 100 percent compliance with current State Water Resources Control Board (SWRCB) flow requirements. (See B1295.) [They also ignore the measures determining whether the SWRCB adopts, by specified dates, updated flow objectives for the Delta and for Delta tributaries.] (*Ibid.*) They do however criticize the following performance measure: "Progress toward restoring in-Delta flows to more natural functional flow patterns to support a healthy estuary. Metrics: results from hydrological monitoring and hydrodynamic modeling." (B623.) But their only objection is that they would like more details. A generalized measurement, however, complies with the Act, even if petitioners would have liked more specifics. Moreover, as the Council previously explained, it intends to refine its performance measures.

North Coast likewise ignores significant evidence in claiming that all water quality measures refer to "plans." (North Coast, p. 30.) Besides failing to explain why tracking the adoption of a plan is insufficient, North Coast fails to even note the numerous measures that do not refer to plans. These include tracking whether the SWRCB has adopted regulatory measures concerning nutrients, pesticides, and other specified contaminants by certain dates. (B1300-1301.) North Coast also ignores the following performance measures:

- "Water quality in the Delta meets objectives established in the applicable water quality control plan." (B702.)
- "Trends in measureable toxicity from pesticides and other pollutants in Delta waters will be downward over the next decade." (B702.)

- "TMDLs for critical pesticides (for example, diazinon, chlorpyrifos, and pyrethroids) in the waters and sediments of the Delta are met by 2020." (B702.)

The Plan therefore has many performance measures that assess progress towards meeting the Plan's ecosystem objectives. North Coast forfeited its claim by failing to even cite these measures. (See Standard of Review, Part E [Forfeit Claims], *ante*.)

C. The Plan Has Measurable Water Supply Targets

North Coast similarly ignores the record in asserting that the Plan lacks meaningful water supply performance measures. (North Coast, p. 30.) For example, it ignores the tracking of "[p]rogress toward increasing local and regional water supplies, measured by the amount of additional supplies made available (reported in 5-year increments from 2000)." (B577.) It also ignores the Plan's 19 administrative performance measures. (B1291-1294.) Like its other omissions, these are fatal. (*SWRCB Cases*, *supra,* 136 Cal.App.4th at p. 749; see also Standard of Review, Part E [Forfeit Claims], *ante*.)

In sum, the Council fully complied with the Act's performance measure requirements. And by completely ignoring many of the Plan's performance measures, petitioners have forfeited their claims.

XIII. THE COUNCIL'S COST ANALYSIS OF THE PLAN'S REGULATORY PROVISIONS IS RATIONAL AND TRANSPARENT

The Council adopted the Plan's regulations pursuant to the Administrative Procedures Act (APA; Gov. Code, §§ 11340 et seq.) Water Contractors assert that the Council violated the APA by allegedly failing to properly analyze the cost impacts of WR P1 (reduced reliance on Delta waters). (Water Contractors, pp. 41-44.) Central Delta asserts that the Council's cost analysis, and responses to comments concerning that analysis, fail to adequately disclose the cost impacts of ER P4 (use setback levees where feasible), as well as the costs that the Council's regulations in general will allegedly impose on small Delta business and Delta agriculture. (Central Delta, pp. 73-79.) These parties are wrong.

The Council will first show that the standard of review applied to these claims is exceptionally deferential. It will then address the parties' four specific assertions and show that

the Council engaged in a careful, good faith effort to properly analyze and disclose the cost impacts of WR P1 and ER P4, and more generally the impacts of its regulations on small Delta businesses, and on Delta agriculture.

A. APA Cost Analysis Requirements Are Exceptionally Deferential

Under the APA, before a state agency adopts a regulation, the agency must assess the regulation's potential adverse economic impact on California businesses and individuals. (Gov. Code, § 11346.3.) Courts use a highly deferential standard in reviewing these assessments. The Supreme Court explained that an agency only needs to access "significant" economic impacts. (*W. States*, *supra*, 57 Cal.4th at p. 428.) Moreover, courts will uphold an agency's cost analysis if it meets a "modest requirement of rationality and transparency." (*Id.* at p. 431.) This can include "inferences and projections that are the product of logic and reason." (*Id.* at p. 429; internal citation and quotation marks omitted.) But an agency's analysis cannot be "opaque" and "unintelligible." (*Ibid.*) The Council's analysis easily meets the APA's requirements. It was very transparent, and well reasoned.

B. The Council Engaged in a Transparent, Comprehensive Cost Analysis

The Council set forth its analysis in three categories of documents:

(1) Its completed Department of Finance form titled "Economic and Fiscal Impact Statement" (N821-824), along with the Council's seven and one half page attachment to that form explaining its entries in far greater detail than the form required (N825-832), and its in depth November 2012 "Cost Analysis for Proposed Delta Plan Regulations" (N194.001);

(2) Its responses to comments on the regulations that concerned costs (N2861-2866, 2902, 2903, 2911-2912, 2916, 2926, 2941, 2946, 3059, 3078, 3085, 3098, 3108, 3112-3114, 3119-3127, 3199-3203, and 3205-3209); and

(3) Its April 2013 "Cost Analysis for Proposed Delta Plan Regulations," which updates the prior analysis mainly to respond to comments and to revisions of the draft regulations. (N833.)

The first and third categories of documents (initial and final "Cost Analysis for Proposed Delta Plan Regulations") go through each regulation and describe its economic impacts. (See, e.g., N194.016-194.025 [initial]; N849-858 [final].) Moreover, contrary to Water Contractors' and Central Delta's claims that the Council ignored impacts to jobs, small businesses, and other

items, both the initial and final analyses include specific discussions and estimates of the regulations' effects on:

- jobs (N194.025-194.026 [initial]; N858-860 [final])
- small businesses (N194.026-194.027; N860)
- housing (N194.027-194.028; N860-861)
- private businesses and individuals (N194.010; N843)
- the environment (N194.006-008; N837-840)

The Council will now address the petitioners' specific claims and show that it used sound reasoning in describing the cost impacts of WR P1 and ER P4, and the impacts of its regulations on Delta small business and on Delta agriculture.

C. The Council Properly Analyzed the Cost Impacts of WR P1

Water Contractors challenge the Council's reasoning concerning WR P1's cost impacts. At the core, they disagree with the Council's overall conclusion that WR P1 will not harm California's economy. The Council explains that the regulations will impose costs on businesses and others, such as "delayed or abandoned" projects, "more expensive" projects, or "the foregone economic benefit of real-estate development in the Delta." (N2888, 3125.) But the Council concluded that overall, the negative impacts of the regulations will be potentially outweighed by their positive impacts. (See, e.g., N821 [water reliability and ecosystem restoration benefits could outweigh impacts; same concerning jobs].)

Water Contractors disagree. They assert that any shift away from Delta water and towards regional water supplies will harm California's economy. (Water Contractors, p. 43 ["The economic costs of water reductions are severe"].) But rather than being irrational, the Council's reasoning was endorsed by the Legislature itself. Specifically, the Legislature determined that "[d]iverse regional water supply portfolios will increase water supply reliability and reduce dependence on the Delta." (Wat. Code, § 10608, subd. (c)). The Legislature went on to determine that requiring those diverse portfolios will "not limit the economic productivity of California's agricultural, commercial, or industrial sectors." (Wat. Code, § 10608.8, subd. (c).)

Moreover, petitioners ignore the fact that the challenged regulation is limited to measures that are "locally cost effective and technically feasible." (B446-447; see also Cal. Code Reg., tit. 23, § 5003, subd. (c)(1)(B).) Petitioners fail to point to substantial evidence (or indeed to any evidence) that cost effective measures would be economically harmful. By their nature, cost effective measures will not be economically harmful.

In addition, the regulations expressly provide that "water efficiency" is a means of reducing reliance on the Delta. (B446-447; see also Cal. Code Reg., tit. 23, § 5003, subd. (c)(1)(C).) Yet Water Contractors ignore the substantial evidence in the record that efficiency measures promote the economy. Notably, the Economic Roundtable, a nonprofit research organization based in Los Angeles, engaged in an extensive study of the economic impacts of water efficiency projects on the Los Angeles region. (L19897.) The study concluded that "[i]nvestments in water use efficiency . . . create large numbers of jobs that pay sustaining wages and generate broad expansion in local business activity." (*Ibid.*)

Finally, businesses and agriculture are harmed rather than benefited by excessive reliance on uncertain Delta exports. (See, for example, B476-477 [describing uncertainty due to regulatory restrictions, court orders, and natural threats].) Although Water Contractors may disagree, they have not come close to establishing that the Council's reasoning, which parallels the Legislature's, is "opaque" and "unintelligible." (*W. States, supra*, 57 Cal.4th at p. 431.) To the contrary, it is well supported.

D. The Council Properly Responded to Comments About the Cost Impacts of ER P4 (Setback Levees)

Central Delta asserts that the Council failed to respond to comments concerning (1) fiscal constraints local agencies may experience complying with the Plan's levee setback requirement; and (2) costs that local businesses may incur. Neither assertion has merit. The Council addressed the specific fiscal constraints that Central Delta describes (Proposition 218 and reduced taxable land), and it fully described potential costs for local businesses.

Before discussing those claims, the Council notes that Central Delta appears to argue that courts should apply more scrutiny to an agency's responses to critiques of its cost analysis than courts apply to the agency's cost analysis itself. The Council strongly disagrees. The same high level of deference applies to both. Central Delta bases its apparent assertion by citing a decision that neither addressed responses to comments nor a cost analysis, and by ignoring the Supreme Court's decision in *Western States Petroleum Association. v. Board of Equalization*, *supra*, 57 Cal.4th 401.[52] That said, the Council's responses are valid under any standard.

1. The Council Properly Responded to Comments About the Ability of Local Agencies to Recover Setback Levee Costs

ER P4 requires that, under limited circumstances, agencies proposing to build or substantially reconstruct a levee use setback levees. (B452, 615.) Central Delta asserts that the Council failed to properly respond to petitioner Local Agencies of the North Delta's (LAND's) comments concerning the potential inability of local agencies to fund ER P4's requirement. (Central Delta, p. 75.) Petitioner LAND commented that local agencies could not recover the costs of ER P4's setback levee provision due to limitations imposed by Proposition 218, and that setback levees could decrease an agency's tax revenues by reducing taxable land. (K12473.) The Council properly acknowledged, and responded to, those comments.

The Council acknowledged both the Proposition 218 and the tax limitations. The Council recognized the potential impact of Proposition 218 as follows: "[a] local agency's inability to pay . . . as described in the comment [LAND's discussion of "Prop. 218"], may make a levee setback project financially infeasible for it to carry out without outside funding." (N3112.) The Council

[52] Central Delta cites *Sims v. Department of Corrections & Rehabilitation* (2013) 216 Cal.App.4th 1059 as allegedly holding that where a response is "unresponsive to the comment [it has] failed to meet minimum APA standards." (Central Delta, p. 75.) But *Sims* did not involve responses to cost analysis comments. Indeed, it did not involve responses to comments at all. Although the trial court in that case found that a state agency "failed to summarize and respond to 'two dozen or so' public comments," the court of appeal did not address that finding. (See *Sims* at p. 1075, fn. 12 ["nothing in this opinion is meant to suggest that we take any position on the propriety of that finding"].)

similarly acknowledged the impact of losing assessable land, explaining that "setback levees . . . would require additional land or easement acquisition, impacting the tax base . . . ." (N853.)

Further, although Central Delta asserts that, given those limitations, the Council "does not provide reasoning" for its cost analysis (Central Delta, p. 75), the record reveals otherwise. The Council explained that the limitations are not particularly significant for four reasons (which we will discuss): (1) the state historically provides supplemental funding for local agencies' levee projects; (2) ER P4 only applies to a relatively small portion of the Delta; (3) it further only applies where setback levees are economically feasible; and (4) state mandate law provides a final financial safeguard.

First, the Council pointed out that the state often funds the habitat improvement portion of local levee projects. It explained that "[t]he state has a long history of providing financial assistance to local . . . agencies to maintain and improve levees. This assistance includes grants to improve habitat for fish and wildlife . . . . The Council expects that will continue." (N3112.) The Council's expectation is consistent with the law. For example, Water Code section 12986 provides for state reimbursement of up to "75 percent of any [levee] costs incurred in excess of . . . $1,000 per mile."

Second, the Council explained that ER P4 only applies to a limited number of levees. The Council restricted ER P4's geographic scope because the Central Valley Flood Protection Board (CVFPB) already had a similar setback policy in place for parts of the Delta. (N867 [explaining limitation], N12 [final regulation, listing covered areas].) As a result, ER P4 only applies to the limited fraction of Delta levees that were not already subject to the CVFPB's requirement. (N3081 and 3085 [explaining limited geographical application of ER P4]; also compare B722 [map of all levies] with E1061 [color map depicting levees potentially subject to ER P4] and N100 [identical black and white map submitted to the Office of Administrative Law].)

Third, the Council pointed out that ER P4 only requires setback levees in the specified areas where "feasible." The Council's regulations define that term as including a consideration of economic factors. The definition states: "'Feasible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic,

environmental, legal, social, and technological factors." (See N6 [codified at 23 CCR § 5001, subd. (p)].) Thus, the Council's responses to comments about ER P4's cost explain that if economic factors prevent the construction of a setback levee in a reasonable period of time, it is not "feasible." (See N3200; see also *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 187, fn. 15 [agency's "responses to comments . . . constitutes part of the official statement of regulatory intent."].) The Council's responses did recognize that an agency would incur costs in just making that feasibility determination. (See, e.g., N3200.) It also explained that, in at least some cases, that determination would be "very straightforward and inexpensive," such as where the setback would be "well outside the economic capacity of the local agency and no state or federal funding was available." (*Ibid.*)

Finally, the Council pointed out that there is an additional potential safeguard. If an agency incurs costs that it cannot recoup through fees or other means, the Act provides for recoupment through the "state mandate" process. (N3199; see also the Act at Stats. 2009-2010, 7th Ex.Sess., c. 5 (S.B.1), § 41 [provision for state's reimbursing mandates].)

The Council thus properly responded to the comments concerning the limitations on local agencies' abilities to recover setback levee costs. The Council will now show that it also adequately responded to comments that the setback levee requirement would impose significant costs on small Delta businesses.

2. The Council Properly Responded to Comments About the Impact of the Setback Levee Provision on Small Businesses

Central Delta's last argument about the Council's response to comments is that the Council allegedly did not "adequately" respond to concerns about cost burdens on small Delta businesses. (Central Delta, p. 76.) It did.

Central Delta in essence argues that (1) setback levees could be very costly; (2) to pay for them local agencies may need to impose "massively increased fees and assessments" on local businesses; but (3) the Council failed to estimate the cost of those impositions. (Central Delta, p. 76.) Central Delta's first two points ignore the Council's responses, discussed immediately

above, regarding agency costs. Local agencies that use setback levees will likely receive extensive state funding, ER P4 only requires agencies to consider setbacks for specified areas, ER P4 only requires them if they would be economically feasible, and there is a potential state mandate safeguard. Those factors will sharply reduce likely agency costs. They also make it difficult to estimate the final costs that a local agency might incur, and in turn costs that it might potentially pass on to local businesses.

Besides those questions about whether a setback levee will be constructed and how it will be financed, estimating the cost of a setback levee is itself difficult. The Council therefore explained that these costs are "unique to the details of a covered action." (N3207.) Variables that influence costs include those for evaluating "the feasibility of setback levees," as well as the costs of "land acquisition, design and construction, and establishment of habitat." (N867.) That said, the Council engaged in a good faith attempt to estimate ranges of potential costs that an agency could incur. It did that by listing and analyzing the costs actually incurred by agencies that completed past setback levee projects. (See N867-869.)

But the Council did not compound these uncertainties (whether setbacks are feasible, whether the state will subsidize them, what the actual cost would be) with a guess of the *quantitative* impact on local businesses. It reasoned that trying to quantify those costs would be speculative, because "[t]he portion of agency costs that is passed on to private businesses . . . and the way such costs are spread among agency constituents and ratepayers, will vary by agency and is unknown." (N3207.) The Council therefore explained that it discussed the impacts to businesses "qualitatively." (*Ibid.*) It pointed out that regulatory costs incurred by a local agency can be passed on to "[b]usinesses in general . . . through assessments, rates, fees, or other charges." (N860.) The Council further pointed out that those costs could "fall broadly on all customers," or could "be charged as fees or assessments to identified businesses that would benefit" from the project. (*Ibid.*) Moreover, the Council concluded that there was "no evidence that small businesses would be disproportionally affected" by those passed-on costs. (*Ibid.*) Finally, it concluded that there was no evidence indicating that small businesses would be "overly burdened by the proposed regulation." (*Ibid.*) In support, it explained that the regulations'

benefits for businesses could exceed their costs. (See N3206 [listing benefits that could outweigh costs]; N3081 [setback levees "will help to reduce the risk of flooding"].) The Council's response to comments about cost impacts on small businesses was therefore thorough and well reasoned.

E. Central Delta Has Failed to Support Its Claim That the Council Improperly Analyzed the Specific Cost Impacts of WR P1 (Setback Levees), and the Impacts of the Council's Regulations in General, on Small Delta Businesses and on Delta Agriculture

Central Delta supplements the cost analysis claims discussed above by arguing (1) that the Council allegedly concluded that local agencies would not incur costs to comply with WR P1; (2) that the Council failed to properly describe costs to businesses; and (3) that the Council improperly concluded that its regulations would not harm agriculture. (Central Delta, pp. 77-78.) These arguments are unfounded.

First, Central Delta claims that the Council "somehow concludes that the local agencies in the Delta will incur no additional costs in compliance with" the requirement that they evaluate "the feasibility of setback levees." Not so. The setback requirement is in WR P1 ("Expand Floodplains and Riparian Habitats in Levee Projects)." (See B461.) In the very document that Central Delta cites to support its no cost assertion, the Council estimated that agencies complying with the policy to "Expand Floodplains and Riparian Habitats in Levee Projects" could incur a "20 percent increase in planning costs." (N2342 [worksheet] see also N863-864 [final, including a footnote explaining the rationale for the Council's estimate].)

Second, Central Delta claims that the Council's description of small business costs is contradictory. It points to the Council's use of the word "direct" in a form (citing N821), and "indirect" elsewhere. (Central Delta, p. 78.) Central Delta never explains why this matters. In any event, there is no conflict. Central Delta fails to point out that the Council used the words in different contexts.

The Council explains its use of the words "direct" and "indirect" in the attachment to the form Central Delta cites. (See attachment at N825.) The Council points out that its regulations

only apply directly to agencies. That is consistent with the Act, under which the Council only regulates "a state or local public agency," not a business. (Wat. Code, § 85057.5, subd. (a)(2)) But the Council's direct regulation of an agency can lead to two types of indirect business costs. One is itself indirect—the regulated agency builds a project and passes on fees or other charges to businesses. (N825.) The second is where the business wants to build its own project, and seeks a permit from the regulated agency. The Council described that as the business being "directly involved in the proposed action." (N825.) In that situation, the business is *directly* involved in its own project, but it is only *indirectly* regulated; the agency issuing the permit is directly regulated. Central Delta has created a conflict that does not exist.

Finally, Central Delta asserts that the record does not support the Council's statement that "Delta Plan policies are expected to provide long-term benefits in protecting agriculture." (Central Delta, p. 78 [quoting N826] and 79.) It does. The record establishes that one of the biggest threats to Delta agriculture is urbanization. (See, e.g., B643, citing Delta Protection Commission's (DPC) determination that "rapid urbanization" is threatening Delta agriculture.) From 1984 to 2008, the percentage of agricultural lands in the Delta declined from 65 percent to 55 percent. (B649.) A key Delta Plan policy seeks to curb this trend. DP P1 generally limits new urban development to urban areas. (B660.) It is designed to stem a "further loss of farms to urban development." (B644.) This will benefit Delta agriculture by promoting the "critical mass" of farms needed for Delta agriculture to operate effectively. (L539 [DPC 2010 study (final draft)].) The Plan also benefits Delta agriculture with other measures, such as DP P2. That regulation requires proponents of ecosystem restoration and similar projects to design and locate them in a manner that avoids impacts to agricultural lands where feasible. (B456.)

The record therefore supports the Council's cost analysis. This is not a case in which an agency provided an "unintelligible" analysis that was "unsupported by any facts or other evidence" in the record. (*W. States Petroleum, supra*, 57 Cal.4th at p. 431.) To the contrary, the Council's analysis is well-reasoned and fully supported by the record.

XIV. THE COUNCIL'S COVERED ACTION APPEAL PROCEDURES ARE VALID

The Act requires the Council to adopt a "legally enforceable" plan. (Wat. Code, § 85001, subd. (c).) It goes on to provide an enforcement process under which parties asserting that an agency's proposed project violates the Plan can file an appeal with the Council. (Wat. Code, §§ 85225.10 - 85225.25.) Water Contractors challenge the Council's procedures for hearing those appeals. They allege that the Act allows an agency to proceed with its action even if the Council finds that the action would violate the Plan. (Water Contractors, p. 26.) It does not.

Specifically, Water Contractors agree that the Council can hold a hearing, find that an agency's proposed action is not consistent with the Delta Plan, and remand the matter back to the agency. But Water Contractors argue that the Council is then barred from hearing an appeal of the agency's revised proposed action. Rather, they argue that the agency can proceed even if its proposal violates the Delta Plan.

Water Contractors assert that the Act's "plain language" allows agencies to violate the Delta Plan. (Water Contractors, p.26.) To the contrary, we will show that the Act's plain language allows parties to enforce the Plan by challenging revised projects. Moreover, we will demonstrate that Water Contractors' argument ignores the "statutory framework as a whole." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) That framework expressly calls for a "legally enforceable Delta Plan." (Wat. Code, § 85001 (c).) Given the Act's plain language, and the statutory framework, Water Contractors' discussion of the Act's legislative history is irrelevant. (See *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992.) But even if it were relevant, it would not support Water Contractors.

A. The Act's Plain Language Allows Appeals of a "Certification of Consistency"; Not Just an "Initial" Certification of Consistency

When an agency wants to undertake an action regulated by the Delta Plan ("covered action"), the Act requires it to first submit a "certification of consistency" with the Council. (Wat. Code, § 85225.) The agency's certification must establish that the proposed action is consistent with the Plan. (*Ibid.*) Moreover, the Act provides that "any person" may file an appeal

with the Council challenging the agency's certification. (Wat. Code, § 85225.10, subd. (a).) The Act goes on to provide a general outline of appeal procedures. (Wat. Code, §§ 85225.10-85225.25.) Under these procedures, after the Council hears an appeal, it can remand a matter to the agency for reconsideration. (Wat. Code, § 85225.25.) If the agency decides to proceed, it must first file a "revised certification of consistency" with the Council. (*Ibid.*) Finally, the Legislature directed the Council to adopt administrative procedures governing, among other things, appeals of consistency certifications. (Wat. Code, § 85225.30.)

The Council complied with the Legislature's directive back in 2010 and adopted appeal procedures. (B1277-1281.) Water Contractors concede that their challenge of the procedures must overcome a deferential standard of review. (Water Contractors, p. 25, fn. 10; see also *Nick v. City of Lake Forest, supra*, 232 Cal.App.4th 871, 881 ["courts give great weight and respect to the administrative agency's interpretation of a statute governing its powers and responsibilities"; internal quotation marks and citation omitted].) But Water Contractors assert that the Council arbitrarily adopted a procedure allowing appeals of an agency's revised certification of consistency. Under the challenged Council provision, an agency filing a revised certification may not implement its project unless and until either (1) the 30 days to appeal runs without anyone filing an appeal; or (2) the Council rejects a timely appeal (meaning the Council upholds the certification of consistency).[53]

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[53] Specifically, Part I, section 15 of the Council's procedures states:

> No covered action which is the subject of an appeal shall be implemented unless one of the following conditions has been met:
> a) The council has denied the appeal;
> b) The public agency has pursuant to Water Code, section 85225.25 decided to proceed with the action as proposed or modified and has filed with the council a revised certification of consistency addressing each of the findings made by the council, 30 days has elapsed and no person has appealed the revised certification; or
> c) The council or its executive officer has dismissed the appeal for one or both of the following reasons:
> 1. The appellant has failed to provide information in her possession or under her control within the time requested or
> 2. The issue raised is not within the council's jurisdiction or fails to raise an appealable issue.

(B1281.)

Water Contractors assert that the Act allegedly has "plain language" that only allows the Council to hear a single appeal concerning a certification of consistency. (Water Contractors, p. 25.) It does not. Water Contractors insert a provision into the Act that does not exist: a bar on any party appealing a revised certification of consistency. To the contrary, the Act's plain language allows second appeals.

The Act provides that:

> (1) Agencies proposing to undertake a covered action must "prior to initiating the implementation" file a "certification of consistency" with the Council. (Wat. Code, § 85225.)
>
> (2) Any person "may file an appeal with regard to a certification of consistency submitted to the council." (Wat. Code, § 85225.10, subd. (a).)
>
> (3) The appeal must be filed within 30 days of the certification filing. "If no person appeals the certification of consistency, the state or local public agency may proceed to implement the covered action." (Wat. Code, § 85225.15.)
>
> (4) After hearing the appeal, the Council shall either deny the appeal or remand the matter back to the agency for reconsideration. (Wat. Code, § 85225.25.)
>
> (5) On remand, if the agency decides to proceed, it shall "prior to proceeding with the action, file a revised certification of consistency" with the Council. (Wat. Code, § 85225.25.)

Water Contractors would have the process stop there, and prohibit an appeal of that revised certification. The Act, however, expressly provides that any person "may file an appeal with regard to *a certification of consistency* submitted to the council." (Wat. Code, § 85225.10, subd. (a), italics added.) The revised "certification of consistency" is still a "certification of consistency." Water Contractors would like to change the statutory language to state that any person "may file an appeal with regard to *an initial* certification of consistency submitted to the council." The Legislature, however, did not limit appeals to "initial" certifications. Water Contractors ignore the Act's plain language. Moreover, as the Council will show, they disregard the Legislature's statutory framework, which calls for a plan that is enforceable.

B. Water Contractors Ignore the Act's Statutory Framework, Which Requires an Enforceable Plan

Our Supreme Court explains that courts do not only look at statutory "language in isolation," but rather they determine its meaning by reviewing "the statutory framework as a whole." (*Coalition of Concerned Communities, Inc. v. City of Los* Angeles (2004) 34 Cal.4th 733, 737.) Water Contractors ignore that directive. They must, because their interpretation would eviscerate the Legislature's repeated calls for an enforceable plan. These include the following:

- At the outset of the Delta Reform Act, the Legislature declared its intent "to establish a governance structure that will direct efforts across state agencies to develop *a legally enforceable Delta Plan*." (Wat. Code, § 85001, subd. (c) [italics added].)
- The Legislature went on to declare state policy to "[e]stablish a new governance structure with the *authority*" to advance broad objectives concerning the Delta's water resources and ecosystem. (Wat. Code, § 85020, subd. (h) [italics added].)
- The Legislature further required the Council to develop a Delta Plan consistent with the Coastal Zone Management Act (CZMA) "or an equivalent *compliance* mechanism." (Wat. Code, § 85300, subd. (d)(A) [italics added].) The CZMA mandates regulations that are "sufficiently comprehensive and specific to regulate land and water uses, *control* development, and *resolve* conflicts among competing uses." (15 C.F.R. § 923.40, subd. (a) [italics added].)
- The Legislature therefore established an enforcement mechanism under which "covered actions" must be consistent with the Delta Plan. (See Wat. Code, §§ 85225-85225.30 [enforcement mechanism] and 85057.5 [definition of covered action].)
- The Legislature then gave the Council the authority to "adopt regulations or guidelines as needed to carry out the powers and duties" identified in the Act. (Wat. Code, § 85210, subd. (i).)

- The Legislature's delegation concerning appeal procedures was particularly broad. The Act expressly exempts the Council's procedures from the Administrative Procedures Act's limitations. (Wat. Code, § 85225.30.)

Water Contractors ignore these provisions. Their position, that agencies can proceed with a project that fails to comply with the Delta Plan, would nullify the Act's numerous enforcement mandates and therefore must be rejected. (See *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 27 [courts will not construe a statute in a manner "that is contrary to the legislative intent apparent in the statute or that would lead to absurd results"].)

C. Even If the Act's Legislative History Were Relevant, It Supports the Validity of the Council's Procedures

Given the Act's express language, Water Contractors' legislative history argument is not relevant. Where legislative language is clear and unambiguous, courts do not resort to legislative history. (See *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992.)

Moreover, the legislative history that Water Contractors cite is incomplete, and even that incomplete reference does not support their argument. They point to a prior version of section 85225.25, as well as language governing the Delta Protection Commission. Under both, after remand, an agency would not have been allowed to proceed with a project unless the appellate body found that the project was consistent with its plan. Petitioners assert that the lack of that requirement in the final Delta Reform Act indicates a legislative intent that there cannot be further Council review. But, while the Legislature did weaken the review requirements where an agency decided to proceed with a covered action, the Legislature did not *eliminate* review. In the prior version, Council review was *mandatory*; it always occurred. In the enacted version, the only difference is that review is *contingent*; review does not occur unless a person files an appeal challenging the revised certification.

Equally significant, petitioners omit legislative history supporting the Council's procedure. Specifically, the final legislative analysis of SB 1X (the Delta Reform Act) shows that the Legislature did not intend to adopt an appeal process that would just encourage compliance, as petitioners assert, but rather it sought to "ensure" compliance: "The bill . . . *ensures* consistency

with the state's Delta Plan by requiring state and local agencies that propose to implement 'covered actions' to submit consistency certifications and subjecting those certifications to appeal to the council." (Legislative staff report, presented to the Assembly Committee on Water, Parks and Wildlife on November 3, 2009 [L21549 (date), 21568 (quoted language, italics added)].) The legislative report goes on to underscore the importance of enforcement, explaining that "enforcing consistency with the Delta Plan" is "a critical component" of the bill. (L21568.) That enforcement authority is critical because the Legislature's prior effort to resolve Delta issues, through the CALFED Bay-Delta Program, failed since that entity "lacked the authority to resolve conflicts among agencies." (*Ibid.*) Therefore, even if the legislature history were relevant, it confirms the Act's call for covered action procedures that make the Plan's policies enforceable, not procedures that make compliance voluntary as Water Contractors assert.

XV. THE COUNCIL'S BDCP APPEAL PROCEDURES ARE VALID

In addition to addressing covered actions, the Council's appeal procedures govern the appeal of a potential Department of Fish and Wildlife determination that the BDCP has met the requirements of Water Code section 85320. (The appeal procedures are at B1281-1285.) Water Contractors challenge those procedures on two grounds.

First, Water Contractors allege that the procedures are an underground regulation, i.e., not adopted in compliance with the Administrative Procedures Act (APA; see Gov.Code, § 11340.5, subd. (a); Water Contractors, pp. 33-34.) But, as explained below, the APA is not applicable because the APA does not apply to rules that are limited to a specific case, and the Council's BDCP procedures are limited to a particular BDCP determination. In addition, the Delta Reform Act exempts the Council's appeal procedures from the APA.

Second, Water Contractors assert that the procedures' standard of review is somehow inconsistent with a Legislative directive. (*Id.*, pp. 34-35.) In fact, the Legislature did not direct a particular standard of review, but rather left that to the Council's discretion.

A. The APA Does Not Apply to the Council's BDCP Appeal Procedures

1. Rules Must be "Generally Applicable" to be Underground Regulations, but the Council's BDCP Procedures Only Apply to a Single Matter

The Council's procedures concerning the BDCP apply to a single decision. Under the Act, "[t]he Department of Fish and [Wildlife's] determination that the BDCP has met the requirements of this section may be appealed to the council." (Wat. Code, § 85320 (e).) Thus, by the Act's terms, the Council's appellate role is limited to one particular case. But courts consistently hold that the first condition for a rule to be deemed an underground regulation is its intended application to a general class of situations. If it only applies to a single case, it is not an underground regulation.

In its seminal underground regulation decision, the California Supreme Court explained the requirement as follows: "[T]he agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided." (*Tidewater Marine W., Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.) Thus, where a rule applied to all California beaches, a court held that it met the "applied generally" requirement, but the court explained that the rule would not have been an underground regulation if it had only applied to a specific beach. (See *Naturist Action Comm. v. California State Dept. of Parks & Recreation* (2009) 175 Cal.App.4th 1244, 1249.) Likewise, *Pac. Gas & Elec. Co. v. State Dept. of Water Res.* (2003) 112 Cal.App.4th 477 analyzed how prior courts applied this condition. It explained that government resolutions setting bridge tolls are not regulations because even though they "affected the public generally," they only applied to "one particular bridge." (*Id.*, at p. 506.)

Here, the Council's BDCP appeal procedures only apply to one particular case: a specified Department of Fish and Wildlife determination. The procedures do not apply to any other case. Therefore, the procedures cannot be an underground regulation.

2. In Addition, the Legislature Exempted the Council's BDCP Appeal Procedures from the APA

Water Contractors' assertion also fails for a separate, independent reason, which is that the Legislature exempted all of the Council's appeal procedures from APA review. Water Code section 85225.30 provides that "[t]he council shall adopt administrative procedures governing appeals, which shall be exempt from [the APA]." Water Contractors argue that, because section 85225.30 follows the Act's provision for covered action related appeals, it only applies to those appeals. They assert that the exemption does not also apply to a BDCP appeal, because that appeal is addressed in a subsequent portion of the Act. But Water Contractors are reading a qualification into the Act that the Legislature did not insert. The Legislature did not limit the exception to "administrative procedures governing appeals *pursuant to this Chapter*." It expansively applies to "procedures governing appeals." The Legislature knows how to limit APA exemptions. For example, Health and Safety Code section 25205.4 exempts certain fee determinations made "pursuant to this section" from the APA. Similarly, Food and Agriculture Code section 42806, subdivision (b) exempts rate actions "pursuant to this section." But in this case, the Legislature did not limit the exemption.

Water Contractors' underground regulation challenge therefore fails for two independent reasons. The challenged BDCP appeal procedures are not generally applicable, but apply only to a single circumstance, and in any event they are statutorily exempt from the APA.

B. The Legislature Gave the Council Broad Discretion in Designing the BDCP Appeal Process

Water Contractors also assert that the Council's procedures include an illegal standard of review. See Water Contractors, pp. 33-36. The procedures use a modified "preponderance of the evidence" standard that gives "weight to the reasoning and factual findings" of the Department of Fish and Wildlife. (B1283, ¶ 23.) Water Contractors claim that the Act prohibits the Council's use of that standard, but rather mandates a different standard. It does not.

The fallacy of Water Contractors' argument is revealed by their inability to articulate the standard that the Act allegedly mandates. At one point, they assert that the Act requires a

"substantial evidence standard of review." (Water Contractors, p. 34.) At another point, they assert that the Legislature intended to dictate an "arbitrary and capricious standard." (Water Contractors, p. 35.[54])

Water Contractors are not able to articulate the standard of review that the Act allegedly requires for a BDCP appeal because the Act does not address that issue. Rather, it leaves the issue to the Council's discretion. The Legislature's sole directive is a single sentence. It states in full: "The Department of Fish and Game's determination that the BDCP has met the requirements of this section may be appealed to the council." (Wat. Code, § 85320, subd. (e).) That is it. The absence of more detail shows that the Legislature intended to leave issues such as the standard of review to the Council's discretion. (See *Credit Ins. Gen. Agents Assn. v. Payne* (1976) 16 Cal.3d 651, 656 ["absence of any specific provisions" indicates that the Legislature intended to "rely upon the expertise of (the administrative agency)"; *Engine Manufacturers As'n v. California Air Res. Bd.* (2014) 231 Cal.App.4th 1022, 1025-26 [same].) Thus, in adopting the standard for reviewing a BDCP appeal, the Council acted well within its discretion.

CONCLUSION: NON-CEQA CLAIMS

The disparate groups of petitioners before this Court were not able to obtain many of their policy goals when the Legislature adopted the Delta Reform Act, or when the Council adopted the Delta Plan. They are therefore seeking to advance their often conflicting goals in these lawsuits. But, as the Council has demonstrated, following a multi-year process involving extensive stakeholder participation, it adopted a carefully crafted Plan that fully complies with the Delta Reform Act and the Administrative Procedures Act. The Council will now show that it also fully complied with the California Environmental Quality Act.

[54] Specifically, they argue that the Act requires the standard "for traditional mandate under Code of Civil Procedure section 1085." (Water Contractors, p. 35.) That is the arbitrary and capricious standard. (See, *County of Los Angeles v. City of Los Angeles* (2013) 214 Cal.App.4th 643, 654 ("whether the public agency's action was arbitrary, capricious, or entirely lacking in evidentiary support").

INTRODUCTION: CEQA CLAIMS

Six of petitioners' suits involve CEQA challenges to the Programmatic EIR for the Delta Plan.[55] Like their arguments challenging the Plan itself, petitioners' CEQA claims essentially amount to a debate about the policy judgments that the Council made in approving the Plan and certifying the EIR. However, CEQA lawsuits are not the proper context for resolving such policy debates, and the wisdom of the Council's approach in approving the Delta Plan is not subject to review under CEQA. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 [court "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable"].)

CEQA petitioners argue that the EIR is inadequate for various and often conflicting reasons. They repeatedly fail to cite to material evidence in the record that supports the Council's findings and conclusion that the EIR was prepared in compliance with CEQA. Petitioners instead claim that the record is devoid of evidence that is, in fact, readily available. Because of this failure, they have forfeited their claims. (*Tracy First, supra,* 177 Cal.App.4th at pp. 934-935.)

A basic error underlying many of petitioners' arguments concerns the status of the Bay-Delta Conservation Plan (BDCP), which is being developed by the Department of Water Resources (DWR) as directed by the Legislature. Petitioners' often contradictory arguments all fail to acknowledge that the BDCP cannot become part of the Delta Plan until (1) its own environmental review is complete; (2) it is approved by two other state agencies; and (3) it meets the statutory criteria established by the Legislature. Thus, every argument based on the premise that the Delta Plan EIR should have included the BDCP as part of the Delta Plan "project description" must fail as a matter of law. In addition, the EIR did analyze the BDCP, properly treating it as a cumulative project undertaken by another lead agency.

Petitioners also argue that the EIR is vague, qualitative, and incomplete because it does not precisely pinpoint the locations at which the Delta Plan may have a significant environmental impact and it does not quantify site-specific impacts from potential future projects. These claims

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[55] Save the Delta raises no CEQA issues in its opening brief.

disregard the nature of the Delta Plan and CEQA's requirement that the level of detail in an EIR should correspond to the specificity of the project that it analyzes. As discussed in the Statement of Facts, above, the Delta Plan is a state-level plan for the natural resources in the Sacramento-San Joaquin River Delta and for increasing the reliability of the Delta water supply. It does not direct or authorize specific actions or projects, but rather establishes regulations and guidance for other agencies to follow in deciding whether to take actions that could affect the achievement of the coequal goals. The Delta Plan EIR is thus a first-tier, program EIR that properly analyzes the plan-level effects, policy alternatives, and mitigation measures associated with the Plan, without engaging in unsupported speculation about specific future outcomes. Petitioners also ignore the extensive, detailed analysis that the EIR does provide, including descriptions of the Plan, of the baseline environmental conditions against which impacts are measured, of the numerous and representative types of projects that other agencies are likely to approve consistent with the Plan, and of the ways in which those future projects would affect the environment.

Petitioners also challenge numerous other aspects of the EIR, such as its impacts analyses, mitigation measures, alternatives analysis, responses to comments, and findings. However, as explained below, the EIR is adequate in all respects and complies with CEQA. For all of these reasons, petitioners have failed to carry their burden to show that there is no substantial evidence in the record supporting the adequacy of the EIR. (*California Native Plant Society v. City of Rancho Cordova, supra,* 172 Cal.App.4th at p. 626 [the burden is on petitioners "to *affirmatively show* there was no substantial evidence in the record to support the [agency's] findings"].)

STANDARDS OF REVIEW FOR CEQA CLAIMS

A. The Legal Standards for Reviewing CEQA Claims

To prevail on their CEQA claims, petitioners must establish that the Council prejudicially abused its discretion, either by making a determination or decision that is not supported by substantial evidence or by failing to proceed in a manner required by law. (Pub. Resources Code, § 21168.5; *Laurel Heights Improvement Assn. v. Regents of Univ. of California* (*Laurel Heights I*) (1988) 47 Cal.3d 376, 392, fn. 5.) The Council's decisions to certify the EIR and approve the Delta Plan "are given substantial deference and are presumed correct," and petitioners bear the

burden of proving otherwise. (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497; *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1397.) "The reviewing court must resolve reasonable doubts in favor of the administrative finding and decision [citation]." (*Laurel Heights I, supra,* 47 Cal.3d at p. 393.)

The court must uphold an agency's determination under CEQA if there is any substantial evidence in the record to support such a determination. (*Laurel Heights I, supra*, 47 Cal.3d at pp. 392-393.) "Substantial evidence" means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Cal. Code Regs., tit. 14 (Guidelines) § 15384, subd. (a).) Substantial evidence includes facts, reasonable assumptions based on facts, or expert opinion supported by facts. (Pub. Resources Code, §§ 21080, subd. (e)(1), 21082.2, subd. (c).) Substantial evidence does not include "[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment." (Guidelines § 15384.)

The court may not overturn the Council's approval of the EIR on the ground that "an opposite conclusion would have been equally or more reasonable," nor may the court weigh conflicting evidence and determine whether adverse effects could be better mitigated. (*Laurel Heights I, supra*, 47 Cal.3d at p. 393.) Disagreement among experts also does not render an EIR inadequate. (*Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 371-372; *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173,1184-1185 [upholding city's finding of no urban decay despite petitioner's expert study to the contrary]; *Laurel Heights I, supra,* 47 Cal.3d at p. 409; Guidelines § 15151.) In determining whether an agency abused its discretion, a reviewing court is not to decide "whether the studies are irrefutable or whether they could have been better." (*Laurel Heights I, supra,* 47 Cal.3d at p. 409.) "[A] public agency may choose between differing expert opinions [citations]." (*Browning-Ferris Indus. v. City Council* (1986) 181 Cal.App.3d 852, 866.)

A court may not substitute its judgment for that of the local agency, but instead is limited to ensuring that the decision-makers considered the environmental consequences of their action. (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Comrs.* (*Berkeley Keep Jets*) (2001) 91 Cal.App.4th 1344, 1356.) In reviewing an agency's environmental analysis under CEQA, courts look for "adequacy, completeness, and a good faith effort at full disclosure." (Guidelines § 15151.) CEQA review need not be perfect or exhaustive; rather, the sufficiency of an EIR should be determined "in the light of what is reasonably feasible." (Guidelines § 15151; *Laurel Heights I, supra,* 47 Cal.3d at p. 407.)

Once the lead agency has disclosed the potentially significant environmental effects of a project, it has complete discretion to make the necessary findings and approve the project in spite of any significant environmental effects if there is no feasible way to lessen or avoid such effects. (Pub. Resources Code, § 21002.1, subd. (c).) A court may not interfere with the agency's discretion regarding the choice of whether to approve the project. (See Guidelines § 15121, subd. (b) ["[T]he information in the EIR does not control the agency's ultimate discretion on the project . . . ."]; *Citizens of Goleta Valley, supra,* 52 Cal.3d at p. 576 [the wisdom of approving a project, "a delicate task which requires a balancing of interests, is necessarily left to the sound discretion" of the agency].) The court may reverse the Council's decision only if petitioners show that, based on the evidence before the Council, no reasonable person could have reached the Council's conclusions. (*Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 401-402.)

An agency's decision to certify an EIR also may be overturned if the agency has failed to proceed "in a manner required by law." (Pub. Resources Code, § 21168.5.) An agency has failed to proceed in a manner required by law where an EIR's discussion and analysis of a required topic is either missing or so cursory that it does not comply with the legal requirement that the issue must be discussed and analyzed. (See *San Joaquin Raptor Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 729-735 [county's omission of sewer expansion from project description constituted failure to proceed in the manner required by law].) This is generally a question of law. (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 923.) "However, where the agency includes the relevant information, but the

adequacy of the information is disputed, the question is one of substantial evidence." (*San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 12.)

Under both the "substantial evidence" and "failure to proceed in a manner required by law" standard, an agency's decision to certify an EIR or approve a project may be set aside only when the failure to comply with CEQA's requirements is shown to be prejudicial. (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236.) "[C]ourts shall continue to follow the established principle that there is no presumption that error is prejudicial." (Pub. Resources Code, § 21005, subd. (b).) "A prejudicial abuse of discretion occurs 'if the failure to include relevant information precludes informed decision making and informed participation, thereby thwarting the statutory goals of the EIR process [citation].'" (*Berkeley Keep Jets, supra,* 91 Cal.App.4th at p. 1355; see also, e.g., *Environmental Protection Information Center. v. Cal. Dept. of Forestry & Fire Protection, supra,* 44 Cal.4th at pp. 484-488 [failure to respond to certain comments was not prejudicial error because the agency had addressed the same substantive issues in responses to other comments].) As the Supreme Court explained in *Laurel Heights I,* "[a] project opponent or reviewing court can always imagine some additional study or analysis that might provide some helpful information. It is not for them to design the EIR. That further study . . . might be helpful does not make it necessary." (*Laurel Heights I, supra,* 47 Cal.3d at p. 415.)

Finally, courts "shall not interpret [CEQA or its implementing guidelines] in a manner which imposes procedural or substantive requirements beyond those explicitly stated in [CEQA or the CEQA Guidelines]." (Pub. Resources Code, § 21083.1.)

Here, for the reasons explained below, petitioners have failed to meet their burden of proving that the Council's certification of the EIR and approval of the Plan constitute a prejudicial abuse of discretion. On the contrary, the EIR is amply supported by substantial evidence, and the Council otherwise proceeded in the manner required by law in all respects.

B. Petitioners Forfeit Their Claims by Failing to Cite the Evidence in the Record Favorable to the Council

Petitioners' obligations in trying to establish that a Council regulation was not based upon substantial evidence (see Standards of Review [Challenges to Plan and Regulations], Part E, *ante.*) also apply to their CEQA challenges. The burden is on petitioners "to *affirmatively show* there was no substantial evidence in the record to support the [agency's] findings," and a petitioner cannot "carry that burden by simply pointing to portions of the administrative record that favored its position." (*California Native Plant Society v. City of Rancho Cordova, supra,* 172 Cal.App.4th at p. 626.) Petitioners challenging an EIR also "must lay out the evidence favorable to the other side and show why it is lacking." (*San Diego Citizenry Group, supra,* 219 Cal.App.4th at p. 17; see also *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1266.) Here, petitioners have failed to carry their burden to cite substantial evidence in the record that supports the Council's actions. Therefore, as discussed below, petitioners have forfeited these claims as a matter of law.

Failure to present evidence favorable to the opposing party is "fatal." (See, e.g., *South County Citizens for Smart Growth v. County of Nevada, supra,* 221 Cal.App.4th at p. 331-332 [upholding County's decision not to prepare and recirculate revised draft EIR where petitioner did not meet its burden of setting forth all the evidence favorable to the County and showing why it was lacking]; see also *Defend the Bay, supra,* 119 Cal.App.4th at p. 1266.) That is because petitioners "*cannot* carry their burden of showing the evidence was insufficient to support the agency's decision because support for that decision may lie in the evidence [petitioners] ignore." (*Citizens For A Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 113 [quotation and citation omitted; italics in original]; *id.* at pp. 112-113 [petitioner failed to carry its burden to show that a subsequent EIR was required where it failed to cite evidence supporting city's decision].) "A reviewing court will not independently review the record to make up for appellant's failure to carry his burden." (*Defend the Bay, supra,* at p. 1266 [citing *Markley v. City Council* (1982) 131 Cal.App.3d 656, 673]; see *S. County Citizens, supra,* 221 Cal.App.4th at p. 332 [dismissing petitioner's claim for failure to cite all material evidence because the court is "not

required to cull through the more than 11,000-page administrative record to see if there is support for [petitioner's] position"].) Courts consider the failure to cite all the material evidence "a concession that the evidence supports the [agency's] findings." (*Citizens For A Megaplex-Free Alameda, supra,* 149 Cal.App.4th at p. 113.)

Furthermore, petitioners cannot "rectify [their] error in [their] reply brief[;] it is too late to do so there because it deprives the respondent of the opportunity to respond." (*S. County Citizens for Smart Growth, supra,* 221 Cal.App.4th at p. 331.)

As discussed in detail in each referenced section, below, petitioners' failure to cite all material evidence prevents this Court from finding in their favor on the following CEQA claims:

- Water Contractors' and North Coast's claims that the EIR as a whole, and many individual impacts, lack sufficient detail (Argument XVII [Level of Detail (introduction)], *post*).
- Water Contractors' claim that the EIR improperly excludes areas outside the Delta and its watershed that do not receive water from the Delta from its analyses (Argument XVII.E [Level of Detail], *post*).
- Central Delta's and Water Contractors' claim that the EIR provides insufficient information regarding baseline conditions (Argument XIX.B [Baseline], *post*).
- Stockton's claims that the Council failed to adequately address urban decay impacts and failed to respond to its comments regarding urban decay (Arguments XX.A.4 [Urban Decay] and XXIII.C [Responses to Comments]).
- Water Contractors' and Stockton's challenges to the substantial evidence supporting the EIR's analysis of water supply impacts, particularly its determination regarding the availability of alternative supplies (Argument XX.B.1 [Water Supply]).
- Water Contractors' claim that the Council's response of "noted" fails to respond adequately to comments (Argument XXIII.A [Responses to Comments]).

(See, e.g., *Tracy First, supra,* 177 Cal.App.4th at p. 935 [finding that because petitioner failed to "set forth fully the facts relating to the City's decision," it had "forfeited its contention that substantial evidence does not support the City's conclusion"].)

Failure to accurately and completely summarize the relevant facts constitutes a waiver of the claim. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 540-541 [petitioner waived review of its claims disputing the Supplemental EIR/EIR's conclusions].) Where a petitioner fails to carry its burden to cite all material evidence, a court is "justified in dismissing its challenge out of hand." (*Citizens For A Megaplex-Free Alameda, supra,* 149 Cal.App.4th at p. 113.) As such, these claims fail as a matter of law.

ARGUMENT: CEQA CLAIMS

XVI. THE BDCP IS NOT PART OF THE DELTA PLAN, AND THE EIR THUS PROPERLY ANALYZES IT AS A CUMULATIVE PROJECT

A major theme running through the opening briefs is the claim that the Bay Delta Conservation Plan (BDCP) is part of the Delta Plan. (North Coast, pp. 12-14, Stockton, pp. 24-27; see Central Delta, p. 49, 55-67); therefore, petitioners argue, the project description in the EIR impermissibly "segments" the project by not including the BDCP. (North Coast, pp. 12-14, Stockton, pp. 24-27; see Central Delta, pp. 49, 55-67.) These allegations ignore the plain language of the Delta Reform Act, in which the Legislature assigned the role of lead agency for the BDCP to other state entities, not the Council. The BDCP is not, moreover, a reasonably foreseeable consequence of the Plan. These arguments also fail to cite to substantial evidence in the record that the BDCP is being analyzed in a separate EIR/EIS prepared by the Department of Water Resources (DWR) and the federal Bureau of Reclamation (Reclamation), and that the Delta Plan EIR does fully consider the BDCP as a cumulative project. Therefore, as discussed in detail below, the BDCP is properly considered in the Delta Plan EIR. (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 101; *National Parks & Conservation Assn. v. County of Riverside* (1996) 42 Cal.App.4th 1505, 1519-1520.)

A. The Delta Reform Act Defines the BDCP as a Separate and Distinct Project from the Plan

The lead agency for a project must consider the whole of the action, and may not "segment" it for purposes of environmental review. As the California Supreme Court explained, this

mandate ensures that "environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences." (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-284.) Courts have declined to require agencies to include future actions in an EIR's project description, however, where the project under review does not commit that agency to undertaking the future action—especially where the future action is under the supervision of a different lead agency. (See *National Parks & Conserv. Assn. v. County of Riverside, supra,* 42 Cal.App.4th at p. 1519-1520 [EIR analyzing large regional landfill need not include transfer stations in project description, where locations of stations were not yet known and other lead agencies would issue the permits for them]; *Towards Responsibility in Planning v. City Council* (1988) 200 Cal.App.3d 671, 679-680 [City's EIR for zoning decision need not include proposed wastewater plant expansion where the size and nature of the plant expansion would be determined by agreement of several agencies].)

The Delta Reform Act is clear that the Plan and the BDCP are separate projects under the jurisdiction of different state agencies. Chapter 1 of Part 4 of the Act governs the Delta Plan, which is a plan to further the coequal goals. (Wat. Code, §§ 85300-85309, 85300, subd. (a).) Chapter 1 requires the Council to develop, adopt, and implement the Plan, which makes the Council the CEQA lead agency for the Plan. (Wat. Code, § 85300, subd. (a); Pub. Resources Code, § 21067 [a lead agency is "the public agency which has the principal responsibility for carrying out or approving a project"].) It also specifies the required contents of the Plan. (Wat. Code, §§ 85300-85309.) The Council approved the Plan on May 17, 2013. (A1.)

The BDCP is not mentioned at all in Chapter 1 of the Act. Rather, the Legislature addressed the BDCP process separately, in Chapter 2 of Part 4 of the Act. (Wat. Code, §§ 85320 et seq.) The BDCP is a multiple-stakeholder Habitat Conservation Plan (HCP) and Natural Community Conservation Plan (NCCP) prepared pursuant to federal and state endangered species laws to provide incidental take permits regarding specified "covered" species for the operation of the State Water Project and Central Valley Project, certain conservation actions, and discharge of water for power generation. (D8188; see also I1729 [2013 BDCP Revised Administrative Draft

§1.1].) During the time the Delta Plan EIR was being prepared, beginning with issuance of the Notice of Preparation (NOP) on December 10, 2010 (H1), the BDCP also was in the process of being prepared by DWR, U.S. Bureau of Reclamation, and local water districts (collectively, the BDCP Agencies) for use in permitting by the California Department of Fish and Wildlife, United State Fish and Wildlife Service (USFWS), and the National Marine Fisheries Service (NMFS) under federal and state endangered species laws.[56] (D8188, 8190.) By the time the Council certified the EIR and approved the Plan in May 2013, only a preliminary administrative draft of the BDCP had been made public.[57]

The BDCP is thus overseen by a different lead agency than the Plan and is undergoing separate and independent environmental review. DWR, not the Council, is the CEQA lead agency for the BDCP. (I1742-1743 [2013 BDCP Revised Administrative Draft § 1.3.6]; D8188.) However, the Act expressly states that the Council "shall be a *responsible agency* in the development of the [BDCP] environmental impact report." (Wat. Code, § 85320, subd. (c) [italics added].) In its capacity as responsible agency, the Council may provide comments and guidance to DWR during the environmental review of the BDCP. (*Ibid.*; Guidelines § 15096; D8192.) The Act further specifies that DWR "shall consult with the [C]ouncil . . . during the development of the BDCP." (Wat. Code, § 85320, subd. (c); D8192; *Communities for a Better Environment, supra,* 184 Cal.App.4th at pp. 97-98 [because refinery project would be implemented with or without the pipeline being analyzed in a county EIR, for which the city was a responsible agency, the pipeline was properly analyzed as a cumulative project in the city's refinery EIR].)

If the BDCP is completed, DWR will submit it to the California Department of Fish and Wildlife for approval as a state NCCP and to the federal fish and wildlife agencies for approval as

[56] The BDCP planning process began in 2006 on the initiative of these agencies, and had been underway for more than two years when the Act was passed. (D8191, 8194.)

[57] In March of 2013, DWR released a second version of the Administrative Draft BDCP. The 2013 Administrative Draft was not subject to formal review and comment and the document expressly indicated that it was not a "public draft." (I9448 [2013 BDCP Revised Administrative Draft, Chapter 7 at 7-1].) Thus, at the time of the preparation and certification of the Delta Plan EIR, the BDCP did not exist in a stable form. There is still not a final BDCP, as North Coast admits. (North Coast, p. 14.)

a federal HCP. (D8188.) If the California Department of Fish and Wildlife approves the BDCP as an NCCP, the Council must hold at least one public hearing concerning the incorporation of the BDCP into the Plan. (Wat. Code, § 85320, subd. (d); D58.) If the BDCP is approved as a state NCCP and a federal HCP, and the California Department of Fish and Wildlife determines that the BDCP also meets the requirements of Water Code section 85320, the Act mandates that the Council "*shall incorporate the BDCP into the Plan*," unless the California Department of Fish and Wildlife's approval of the BDCP is appealed to the Council.[58] (Wat. Code, § 85320, subd. (e) [italics added].) The Council, therefore, has no direct influence over the content of the BDCP.

The Council also has a limited statutory role with regard to Delta water conveyance. (D8191-8192.) As explained in the EIR, under the Act the Council will have a role in determining Delta conveyance facilities only if an agency proposes a conveyance project *before* the BDCP is incorporated into the Plan. (D8189-8190.) Because conveyance improvements proposed during this interim period would be covered actions under most circumstances, the certification of consistency for any such covered action could be appealed to the Council.[59] (*Ibid.*; Wat. Code, §§ 85225.10, subd. (a), 85225.20.) The only other specific requirement in the Act with regard to conveyance is the requirement for the Plan to "promote options for new and improved infrastructure relating to the water conveyance in the Delta." (Wat. Code, § 85304.) While this theoretically could involve the Council sharing its opinions about improving Delta water conveyance, the Council determined that the BDCP Agencies are in the best position to complete the BDCP planning process, including defining acceptable ranges of exports and through-Delta flows. (D8192.) Accordingly, the Plan does not make any recommendations

[58] As discussed in Argument II.B, *ante*, if an appeal of the California Department of Fish and Wildlife's determination is filed, the Council's role on appeal is limited to deciding whether the statutory requirements in Water Code section 85320 have been met. The Council cannot change BDCP's terms.

[59] While it is possible that a conveyance improvement might not be considered a covered action because it is exempt from CEQA and there are no unusual circumstances creating an exception to the exemption, that is highly unlikely. (Cal. Code Regs., tit. 23 § 5001, subd. (dd)(4).)