

1 regarding Delta conveyance, other than its recommendation to complete the BDCP process by  
2 December 31, 2014, with no reference to its contents.<sup>60</sup> (*Ibid.*; B449, 572.)

3 In sum, none of the Council's statutorily defined roles involves planning, designing,  
4 approving, or directly implementing the BDCP. The BDCP is an entirely separate project  
5 proceeding under separate statutory authority and subject to its own environmental review. As  
6 such, the Council was not required to include the BDCP as part of the project analyzed in the  
7 EIR. The project description in the EIR properly conforms to the Legislature's definition of the  
8 Plan, which does not include the BDCP.

9 **B. Because the BDCP Is Not a Part of the Delta Plan but Rather Another**  
10 **Lead Agency's Reasonably Foreseeable Future Project, the EIR Properly**  
11 **Analyzes It as a Cumulative Project**

12 In *Laurel Heights I*, *supra*, 47 Cal.3d at p. 396, the California Supreme Court established a  
13 two-part test for determining whether potential future actions, such as the BDCP, must be  
14 considered as part of a project under review. The court held that "an EIR must include an  
15 analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably  
16 foreseeable consequence of the initial project; and (2) the future expansion or action will be  
17 significant in that it will likely change the scope or nature of the initial project or its  
18 environmental effects." (*Ibid.*) "Absent both of these two circumstances," the court explained, "a  
19 future [action] need not be considered in the EIR for the proposed project." (*Ibid.*) The BDCP  
20 does not satisfy the first prong of this test because the Delta Plan does not commit the Council to  
21 any action with respect to the BDCP; rather, for the BDCP to move forward, other agencies must  
22 approve it.<sup>61</sup> (See Part A of this argument, *ante.*)

23 Courts have declined to require agencies to include potential future actions in an EIR's  
24 project description where, as here, the project under review does not commit that agency to

25 \_\_\_\_\_  
26 <sup>60</sup> But if the BDCP process is not successfully completed in a timely manner, the Council  
27 will consider whether to amend the Delta Plan to recommend or require a particular conveyance  
28 option. (B1155.)

<sup>61</sup> Because the BDCP does not meet the first prong of the Supreme Court's two-prong  
test, the Court need not review the second prong.

1 undertaking the future action and a different agency is developing that action. (See *Communities*  
2 *for a Better Environment, supra*, 184 Cal.App.4th at pp. 97-98 [environmental review of pipeline  
3 project was being conducted by another lead agency]; *National Parks & Conservation Assn.,*  
4 *supra*, 42 Cal.App.4th at pp. 1518-1519 [EIR analyzing large regional landfill need not include  
5 transfer stations in project description where locations of stations were not yet known and other  
6 lead agencies would issue the permits for them]; *Towards Responsibility in Planning v. City*  
7 *Council, supra*, 200 Cal.App.3d at p. 679-680 [City's EIR for zoning decision need not include  
8 proposed wastewater plant expansion where the size and nature of the plant expansion would be  
9 determined by agreement of several agencies].)<sup>62</sup>

10 As described above, the Plan and the BDCP have been developed independently of one  
11 another; neither is contingent upon the other. (See D60 [Master Response 1].) Moreover, the  
12 Plan makes no substantive recommendations with respect to the BDCP. The *single*  
13 recommendation in the Plan that addresses the BDCP simply encourages completion of the BDCP  
14 planning process by a date certain.<sup>63</sup> Encouraging the completion of an ongoing planning process  
15 by other agencies proceeding under separate legislative authority is not an approval or  
16 commitment to a definite course of action. Therefore, in approving the Delta Plan, the Council  
17 did not commit to any action with respect to the BDCP, now or in the future. The Plan does not  
18 make adoption of the BDCP by DWR reasonably foreseeable, nor does it increase the probability  
19 that the BDCP will include any particular characteristics or associated physical effects.

20 Accordingly, the BDCP is not a "reasonably foreseeable consequence" of the Plan (*Laurel*  
21 *Heights I, supra*, 47 Cal.3d at p. 396), it is not "necessary for the [Plan] to proceed"  
22 (*Communities for a Better Environment, supra*, 184 Cal.App.4th at p. 99 [discussing *San Joaquin*  
23 *Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713], nor is the

24  
25 <sup>62</sup> Furthermore, because the Act allows for adoption of the BDCP *before* the Council  
26 adopts the Delta Plan, it could not have been considered a reasonably foreseeable consequence of  
27 the Plan. (Wat. Code, § 85057.5, subd. (b)(6)(B); see also Argument XX,C [Cumulative  
28 Impacts], *post.*)

<sup>63</sup> This recommendation reads, in full: "[t]he relevant federal, State, and local agencies  
should complete the Bay Delta Conservation Plan, consistent with the provisions of the [Act], and  
receive required incidental take permits by December 31, 2014." (B449, 572 [WR R12].)

1 Delta Plan “conditioned upon completion” of the BDCP. (*Tuolumne County Citizens for*  
2 *Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1226.)

3 Rather than analyzing the BDCP as part of the project, the Delta Plan EIR properly  
4 considers the BDCP as a cumulative project. When the Notice of Preparation (NOP) for the Delta  
5 Plan EIR was published, DWR’s BDCP planning and environmental review processes were  
6 already underway. (D8194.) Hence, the BDCP is a reasonably foreseeable, probable future  
7 project under the authority of other agencies that are conducting their own comprehensive  
8 environmental review. The EIR thus properly analyzes the BDCP as a cumulative project. (See  
9 *Communities for a Better Environment, supra*, 184 Cal.App.4th at pp. 97-98, 101; *Berkeley Keep*  
10 *Jets, supra*, 91 Cal.App.4th at pp. 1362-1363 [airport development plan did not “depend on”  
11 future runway capacity expansion and would be built regardless; therefore, expanded runway  
12 capacity was properly analyzed in the cumulative impact analysis]; Pub. Resources Code, §  
13 21083, subd. (b)(2); Guidelines § 15130, subd. (b)(1).)

14 In contrast to the projects in the cases cited by petitioners (see, e.g. Central Delta, p. 58;  
15 North Coast, p. 14), the Plan will not somehow become inoperative if the BDCP is never  
16 completed or approved. (See, e.g., *Vineyard Area Citizens for Responsible Growth v. City of*  
17 *Rancho Cordova* (2007) 40 Cal.4th 412, 431-432 [full buildout of large development project  
18 could not occur without water supply]; *Tuolumne County Citizens for Responsible Growth, Inc.,*  
19 *supra*, 155 Cal.App.4th at 1230-1231 [home improvement center could not be completed and  
20 opened legally without the completion of road realignment].) The Delta Plan is more like the  
21 pipeline project in *Communities for a Better Environment, supra*, 184 Cal.App.4th at p. 101, in  
22 which the court held that because an oil refinery upgrade project under review by a city did not  
23 “depend on” construction of a hydrogen pipeline under review by a county, the pipeline project  
24 was properly considered in the city’s EIR as a separate, cumulative project. Here, because the  
25 Plan does not “depend on” the completion and implementation of the BDCP, treatment of the  
26 latter as a separate project does not constitute unlawful “piecemealing” or “segmentation.”

27 In addition, many of the cases petitioners cite are readily distinguishable. (Central Delta,  
28 pp. 57-58 and Stockton, pp. 25-26, citing to *Natural Resources Defense Council v. City of Los*

1 *Angeles* (2002) 103 Cal.App.4th 268 [concerning whether a phased container shipping project  
2 was covered in prior program EIR for the Port or whether it required a tiered or a stand-alone  
3 EIR]; *Laurel Heights I, supra*, 47 Cal.3d at p. 393 [EIR only analyzed the use of one-third of the  
4 space in building acquired by the University for its future use]; *Sundstrom v. County of*  
5 *Mendocino* (1988) 202 Cal.App.3d 296, 304 [concerning the adequacy of a negative declaration  
6 to approve a conditional use permit for private sewage plant].) None of these cases involve the  
7 issue presented here, which is whether a project proposed by another agency must be considered  
8 in an EIR.

9 Most importantly, the BDCP is not evading environmental review, as at least some of the  
10 petitioners themselves admit. (Central Delta, pp. 58-60.) Before the BDCP can be approved by  
11 DWR and Reclamation, and before it can be incorporated into the Delta Plan, it will have been  
12 analyzed in its own EIR/EIS, and its environmental impacts “will have their day of review.” (*El*  
13 *Dorado County Taxpayers for Quality Growth v. County of El Dorado* (2004) 122 Cal.App.4th  
14 1591, 1599-1600 [holding that proposed mining extension and related reclamation plan were  
15 properly analyzed as separate projects under CEQA since both were independently subject to  
16 environmental review].) Furthermore, as discussed in more detail below, the BDCP was properly  
17 reviewed in the Delta Plan EIR as a cumulative project.

18 **C. The Analysis of the BDCP as a Cumulative Project Is Adequate and Is**  
19 **Supported by Substantial Evidence**

20 The EIR more than adequately describes and discusses the BDCP as a cumulative project.<sup>64</sup>  
21 As the Guidelines make clear, the discussion of cumulative impacts need not be extensive.  
22 (Guidelines § 15130, subd. (b); see Argument XX.C.1 [Cumulative Impacts], *post.*) A general,  
23

24 <sup>64</sup> Petitioners argue that the EIR should have analyzed “different conveyance methods.”  
25 (North Coast, p. 15; see also Argument II.B [Council’s BDCP Approach], *ante*, explaining that  
26 the Council acted responsibly.) However, CEQA does not require an EIR to analyze alternatives  
27 to cumulative projects. Nevertheless, the conveyance options under consideration by DWR at the  
28 time the Draft EIR was published are described at length in the Delta Plan EIR. (D8192-8211,  
59; see also I3355-3709 [2013 BDCP Revised Administrative Draft, Chapter 3, Section 3.4  
 (“Conservation Measures”)], I4117-4143 [Chapter 4, Section 4.2 (“Covered Activities”)], I9778-  
9791 [Chapter 9, Section 9.2 (“Descriptions of Take Alternatives”).])

1 qualitative analysis is sufficient as long as the impacts are not minimized or ignored. (*Al Larson*  
2 *Boat Shop, Inc. v. Board of Harbor Comrs.* (1993) 18 Cal.App.4th 729, 748-750 [general  
3 discussion of significant increases in cumulative traffic and air quality impacts was sufficient; an  
4 EIR need not contain all information available on a subject].)

5 The EIR addresses the BDCP at a level of detail that exceeds what is required by CEQA  
6 and the Guidelines. Indeed, the EIR thoroughly describes the BDCP, to the degree information  
7 was available at the time, in its own 38-page section of the EIR. (D8188-8225 [DEIR Section  
8 23], D6539-6548 [RDEIR Section 23]; see also D8144-8187 [DEIR Section 22 (Cumulative  
9 Impact Assessment)], D6513-6536 [RDEIR Section 22 (Cumulative Impact Assessment)], D8167  
10 [Table 22-1 listing cumulative projects, including the BDCP].) This is more description in the  
11 EIR than for any other plan, program, or action except the Plan itself. Furthermore, and contrary  
12 to Central Delta's assertion (Central Delta, p. 66), the EIR found that the cumulative impacts  
13 related to the loss of farmland due to ecosystem restoration projects ("wetland and other habitat  
14 restoration sites") is significant. (D8149-8150.) The EIR specifically identifies the BDCP as a  
15 project "that could lead to these impacts." (*Ibid.*) In addition to the discussion and analysis of the  
16 BDCP in Sections 22 and 23 of the EIR, the EIR identifies mitigation measures in the relevant  
17 resource sections that are applicable to cumulative impacts as well. (D60 [Master Response 1];  
18 see, e.g., D8145-8146 [mitigation measures for cumulative water resources impacts], D8146-8147  
19 [mitigation measures for biological resources impacts].)

20 Section 23 of the EIR explains the relationship between the BDCP and the Plan. It explains  
21 the respective roles of the federal, state, and local agencies that are developing the BDCP and that  
22 are charged with approving it. The EIR further describes the nature and limits of the Council's  
23 role in the BDCP process. (D8189-8192.) The EIR provides the public with a clear  
24 understanding of which agencies are responsible for the BDCP. (D8188-8189, 8192-8195.)  
25 Therefore, the EIR provided the public with all information necessary to understand and evaluate  
26 the environmental impacts of the Plan in combination with the BDCP. The EIR thus more than  
27 fulfills its role as a "document of accountability." (*Laurel Heights I, supra*, 47 Cal.3d at p. 392.)  
28

1 **XVII. THE EIR PROVIDES THE APPROPRIATE LEVEL OF DETAIL FOR A PROGRAMMATIC**  
2 **ANALYSIS OF A BROAD STATE-LEVEL PLAN**

3 Water Contractors and North Coast challenge the scope and level of detail of the EIR.  
4 (Water Contractors, pp. 58-59; North Coast, pp. 17-18.) These petitioners ignore the substance of  
5 the EIR, along with both the nature of the Delta Plan and CEQA's direction that the level of detail  
6 in an EIR "will correspond to the degree of specificity involved in the underlying activity which  
7 is described in the EIR." (Guidelines § 15146.) Instead, they ask the Court to treat the Delta Plan  
8 as if it were a simple construction project rather than a comprehensive framework of regulations  
9 and guidance for other agencies to follow. Petitioners also ignore the extensive discussion of  
10 impacts provided in the EIR. That omission alone should end their challenge. (*Defend the Bay v.*  
11 *City of Irvine, supra*, 119 Cal.App.4th at p. 1266 [petitioners challenging an EIR "must lay out  
12 the evidence favorable to the other side and show why it is lacking"]; see also Standards of  
13 Review for CEQA Claims, Part B [Forfeit Claims], *ante*.)

14 Petitioners contend that this EIR does not meet the minimum standards for programmatic  
15 review because it allegedly defers required analyses, considers too small a study area, and  
16 provides insufficient detail for the areas it does consider. (Water Contractors, pp. 51-59, North  
17 Coast, pp. 16-18.) Petitioners are wrong on the facts and the law: the Delta Plan EIR provides  
18 decision makers and the public with sufficient information about the reasonably foreseeable  
19 impacts of the project at the earliest feasible opportunity. To provide analysis more detailed than  
20 what the EIR contains would require the Council to speculate, which CEQA prohibits.  
21 (Guidelines §§ 15384, subd. (a), 15144, 15145.)

22 **A. The EIR's Programmatic Approach to Environmental Analysis Is**  
23 **Appropriate Because the Delta Plan Is a State-Level Program Encouraging**  
24 **and Guiding Future Projects**

25 The Delta Plan is a state-level framework for coordinating future actions taken by other  
26 state and local agencies. The Council will not construct, propose, or even directly authorize  
27 individual projects. Instead, it will review other agencies' approvals for consistency with the  
28 Delta Plan. (See Statement of Facts, *ante*, at Section 8) The Council thus decided, consistent

1 with CEQA, to prepare a “program EIR” to evaluate this broad regulatory plan. (Guidelines §  
2 15168, subd. (a)(3) [program EIR appropriate “[i]n connection with issuance of rules, regulations,  
3 plans, or other general criteria to govern the conduct of a continuing program”].) A program EIR  
4 allows an agency to evaluate “general matters and environmental effects . . . [of] a policy, plan,  
5 program or ordinance,” with the opportunity to conduct “narrower or site-specific environmental  
6 impact reports” once more information becomes available at a later date. (Pub. Resources Code,  
7 § 21068.5; see also Guidelines §§ 15152, 15385.) This approach satisfies CEQA’s mandate that  
8 an agency analyze actions that have the potential to cause physical changes in the environment at  
9 the earliest possible time, without engaging in unsupported speculation about possible future  
10 outcomes. (Pub. Resources Code, §§ 21003.1; Guidelines §§ 15378, subd. (a), 15384, subd. (a),  
11 15145; see also *Ctr. for Biological Diversity v. Dept. of Fish and Wildlife* (2015) 234 Cal.App.4th  
12 at pp. 233-234 [“(Program EIRs) may also be used to consider broad programmatic issues for  
13 related actions at an early planning stage when the agency has greater flexibility to deal with  
14 basic problems or cumulative impacts”].)

15 The Delta Plan differs from physical construction projects in important ways that shape the  
16 analysis challenged in this litigation. Physical construction projects are analyzed in more  
17 traditional EIRs that discuss the physical effects of a known project on a selected project site and  
18 its vicinity. By contrast, the Plan does not require any particular physical project, but instead  
19 establishes policies that will one day guide physical projects that other agencies will propose and  
20 approve. These future projects, which have not yet been defined, described, or located on specific  
21 sites, may in turn cause the types of impacts in the general geographic areas that the Delta Plan  
22 EIR identifies and considers at a program level of analysis. The site-specific impacts of these  
23 future projects are still unknown, however. Thus, the Delta Plan EIR must forecast both the  
24 nature of these projects and their impacts on the environment, all based on substantial evidence  
25 rather than speculation.

26 To analyze these potential future impacts, the analysis in the EIR is organized into five  
27 categories of projects which the Plan seeks to encourage. These five categories of projects are:  
28 reliable water supply projects, Delta ecosystem restoration projects, water quality improvement

1 projects, flood risk reduction projects, and projects for the protection and enhancement of the  
2 Delta as an evolving place. (D5900, 6732-6733.) As described in the Statement of Facts, above,  
3 within each of these five categories, the EIR identifies the representative types of projects that  
4 public agencies may approve in the future. It then evaluates the impacts that these types of  
5 projects would have on each of 19 resource categories (e.g., water resources, biological resources,  
6 air quality) and identifies feasible mitigation for these impacts. (E.g., D7116-7118 [analyzing  
7 impacts of water supply reliability projects on special status species].) For example, the Water  
8 Resources section of the EIR analyzes the potential impacts from over a dozen representative  
9 types of water supply reliability projects<sup>65</sup> in locations from north of Redding to the Mexico  
10 border. (D6918, 6943.) For each of these impacts, the EIR examines the effects of both  
11 construction and operation of these potential project types, explaining how they might affect the  
12 relevant resource. (E.g., D7018-7019.) The EIR also identifies mitigation measures and assesses  
13 their feasibility. (E.g., D7031-7033.)

14 The EIR frequently refers to environmental impact reports that have been prepared for  
15 existing projects that fall within the types and categories described above. Thus, for example, in  
16 the Water Resources section, the EIR draws on the analyses previously performed in EIRs for  
17 reservoir, desalination, and flood control projects for substantial evidence to support its analysis  
18 of (1) the impacts that various types of projects are likely to cause; (2) feasible mitigation  
19 measures that can reduce or avoid those impacts; and (3) the likely significance of the identified  
20 impacts after mitigation. (See, e.g., D7018 [discussing Los Vaqueros Reservoir Expansion  
21 Project EIR to illustrate impacts of reservoir construction and operation on water quality], D7117  
22 [discussing Carlsbad Precise Development Plan and Desalination Plant Project EIR to “illustrate[]  
23 some [of] the likely impacts of ocean desalination plants” on special status species], D7029  
24 [discussing North Delta Flood Control and Ecosystem Restoration Project EIR, “which evaluated

25 <sup>65</sup> The EIR analyzes the following types of water supply reliability projects: surface water  
26 projects (water intakes, treatment and conveyance facilities, reservoirs), groundwater projects  
27 (wells, wellhead treatment, conveyance facilities), ocean desalination projects (water intakes and  
28 brine outfalls, treatment and conveyance facilities), recycled wastewater and stormwater projects  
(treatment and conveyance facilities), water transfers, water use efficiency and conservation  
program implementation. (D6918, 7017.)

1 water quality impacts associated with levee modification”].) This approach is expressly allowed  
2 under CEQA. (See Guidelines § 15150, subd. (a) [EIR “may incorporate by reference all or  
3 portions of another document which is a matter of public record or is generally available to the  
4 public”].)

5 As an illustration, within the “water supply reliability” category, the discussion of Impact 3-  
6 1a, concerning water quality impacts, explains that construction of surface and groundwater  
7 storage facilities or pumping plants could temporarily disturb or re-suspend sediment, as found in  
8 the EIRs prepared for the Los Vaqueros Reservoir Expansion Project, the Calaveras Dam  
9 Replacement Project, and the Davis-Woodland Water Supply Project. (D7018.) The EIR then  
10 concludes that long-term operation of these facilities could, among other things, change the local  
11 mixture of source waters within a channel, alter the balance of sedimentation and scour with  
12 resulting impacts on siltation and bioavailability of pollutants, require dredging, or change the  
13 temperature and chemical composition of water downstream. (D7019 [citing to EIRs for the Los  
14 Vaqueros Reservoir Expansion Project and the Lower Yuba River Accord].) This is just one  
15 illustration from the discussion of one impact; the discussion of Impact 3-1a identifies numerous  
16 other mechanisms by which water supply reliability projects could affect water quality. (D7018-  
17 7019.) For every resource (e.g., biological resources, air quality), the EIR repeats this approach  
18 for every impact potentially caused by each of the five categories of projects.

19 These are not superficial analyses, despite petitioners’ attempts to portray them as such.  
20 (See, e.g., North Coast, pp. 17-18; Water Contractors, pp. 58-59.) The approach described above  
21 is based on expert consideration of the types of projects that are likely to be proposed under the  
22 Plan, where they are likely to occur, what effects they may have on the environment, and in  
23 which locations. The EIR thoroughly examines the information that was available at the time it  
24 was prepared, circulated, and certified to support the analyses and conclusions. It does not,  
25 however, speculate about the details—including precise, quantified amounts—of impacts that  
26 may result from unspecified future projects.

27  
28

1           **B. The EIR's Programmatic Analysis Provides the Appropriate Level of**  
2           **Detail Without Undue Speculation**

3           Petitioners argue that the EIR does not provide sufficient detail, but in so doing they ignore  
4           the EIR's actual contents as well as the extensive case law addressing and distinguishing program  
5           EIRs from EIRs analyzing the impacts of a single, specific development project.

6           Water Contractors rely on *In re Bay-Delta, supra*, (2008) 43 Cal.4th at p. 1143 (*In re Bay-*  
7           *Delta*), concerning the previous state and federal agency effort to address water supply and  
8           environmental conditions in the Delta (CALFED Program), to support their claim that the EIR  
9           should have quantified various environmental impacts, rather than providing its extensive  
10          qualitative analysis. (Water Contractors, pp. 58-59.) But, in fact, that case strongly supports the  
11          Council's programmatic approach.

12          The CALFED Program was an agreement among the numerous state and federal agencies  
13          with resource management responsibilities in the Delta to coordinate anticipated future Delta  
14          projects and activities. (*Id.* at pp. 1151, 1156-57; see also J3815, 3817-3818, 3843 [CALFED  
15          Program Record of Decision].) This large-scale program included specific potential projects,  
16          such as "through-Delta" conveyance, surface storage projects, and a host of ecosystem restoration  
17          and levee improvement projects in various regions of the state. (*In re Bay-Delta, supra*, 43  
18          Cal.4th at pp. 1156-1157, 1159; see also J3860-3864 [describing CALFED Program through-  
19          Delta conveyance project], J3854-3857 [surface storage projects], J3847-3849 [ecosystem  
20          projects], J884-3885 [levee improvement projects].)

21          In upholding the program EIR for the CALFED Program, the California Supreme Court  
22          held that the level of detail required in an EIR "must be appropriately tailored to the current first-  
23          tier stage of the planning process, with the understanding that additional detail will be  
24          forthcoming when specific second-tier projects are under consideration." (*Id.* at p. 1172.) The  
25          court found that "the environmental effects . . . may be analyzed in general terms, without the  
26          level of detail appropriate for second-tier, site-specific review." (*Id.* at p. 1169.)

1           *In re Bay-Delta* thus stands for the proposition that the level of detail required in a program  
2 EIR varies with the nature of the project under review. (*Id.* at 1171-1172 [distinguishing prior  
3 CEQA cases concerning water supply analysis by noting difference between the projects at issue  
4 in those cases and the CALFED Program].) Water Contractors, however, erroneously read the  
5 case to mean that the Delta Plan EIR should take precisely the same approach as the CALFED  
6 EIR. Specifically, Water Contractors argue that the Council’s EIR should have provided specific  
7 “region-by-region” quantification of potential water supply impacts. (Water Contractors, p. 59.)  
8 In making this argument, Water Contractors ignore the important differences between the two  
9 programs.

10           *In re Bay-Delta* does not create a simple, one size fits all recipe for reviewing all state-level  
11 water plans. Instead, *In re Bay-Delta* stands for the principle that an EIR should contain a level  
12 of detail that is proportionate to the plan or project under review. The Delta Plan takes a  
13 significantly different approach to resource management in the Delta than the CALFED Program.  
14 The Delta Plan is not, as was the CALFED Program, a compendium or list of potential public  
15 agency projects or activities in the Delta. While the Delta Plan does include some  
16 recommendations for specific agency actions (which are appropriately studied in the EIR), its  
17 defining attribute, as directed by the Legislature, is its inclusion of legally-enforceable standards  
18 (“policies”) with which any significant future covered actions must be consistent. Thus, unlike  
19 the CALFED agencies, the Council has no authority to select or implement particular projects.  
20 Because the structure and contents of the Delta Plan contrast markedly from the CALFED  
21 Program, their EIRs are appropriately different.

22           Moreover, petitioners’ insistence that the Delta Plan EIR must include more specific,  
23 quantified impacts must fail, just like petitioners’ demands for greater detail in *In re Bay-Delta*.  
24 Although the CALFED Program had more project-level specificity than the Delta Plan, it was  
25 similar to the Delta Plan in that it did not include a mandate to take precise future actions, nor did  
26 it direct particular timeframes for these actions. (*In re Bay-Delta, supra*, 43 Cal.4th at pp. 1172-  
27 1173.) The EIR for the CALFED Program nevertheless had to analyze the environmental impacts  
28 of potential water supply actions without knowing precisely how an agency might develop

1 various water sources in the future. (*Ibid.*) In *In re Bay-Delta*, Water Contractors presented an  
2 argument very similar to their argument in the current case—that a programmatic review of a  
3 statewide water management plan should contain details even if those details are speculative or  
4 infeasible. The Supreme Court unanimously rejected this argument. (*Ibid.* [“It is . . . impractical  
5 to foresee with certainty specific sources of water and their impacts”].) An “EIR cannot be  
6 faulted for not providing detail that, due to the nature of the Project, simply does not now  
7 exist. . . . Nor have the courts required resolution of all hypothetical details prior to approval of an  
8 EIR.” (*Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014)  
9 227 Cal.App.4th 1036, 1054.)

10 Similarly, the Third District Court of Appeal recently upheld a program EIR for the  
11 Department of Fish and Wildlife’s statewide fish hatchery and stocking program, rejecting  
12 petitioners’ demand that it provide site-specific analysis. (*Ctr. for Biological Diversity, supra*,  
13 234 Cal.App.4th at p. 234 [EIR analyzed program “comprehensively, but within reason . . .  
14 [g]iven the nature and statewide scope of the project”]; see also *In re Bay-Delta, supra*, 43  
15 Cal.4th at p. 1173 [endorsing analysis of “general impacts of water acquisitions” under statewide  
16 plan on a regional, rather than site-specific level]; *Rio Vista Farm Bureau Ctr. v. County of*  
17 *Solano* (1992) 5 Cal.App.4th 351, 375 (*Rio Vista*) [not possible “to discuss the environmental  
18 impacts of locating a hazardous waste facility in [a particular] area” when no projects had been  
19 proposed at time program EIR was certified].)

20 Just like the EIRs in *In re Bay-Delta*, *Citizens for a Sustainable Treasure Island*, and *Rio*  
21 *Vista*, the Delta Plan EIR properly provides the level of detail commensurate with the level of  
22 detail of the Plan, without speculating as to the effects of future unknown projects. In each of  
23 these cases, the agency properly used a program EIR to analyze a broad plan or policy that had  
24 not committed to any specific projects implementing the plan at issue. And in each, the court  
25 rejected petitioners’ demand for additional detail, especially where, as here, details of the projects  
26 that will be proposed to implement the plan are speculative and uncertain. These cases show that  
27 CEQA does not contain any *per se* rule regarding how to approach an impact’s analysis. Rather,  
28 CEQA only requires a reasonable degree of forecasting and *prohibits* the agency from

1 speculating. (See Guidelines §§ 15144 [“forecasting the unforeseeable is not possible”]; 15145  
2 [“[i]f, after thorough investigation, a lead agency finds that a particular impact is too speculative  
3 for investigation, the agency should note its conclusion and terminate discussion of the impact”];  
4 15151 [EIR only needs to discuss impacts where reasonably feasible to do so].) Here, the Delta  
5 Plan EIR provides all the available and accurate information that it could, including extensive  
6 detail where it was possible and appropriate to do so, without veering into speculation. Under  
7 these circumstances, a qualitative analysis was absolutely appropriate.

8 **C. The EIR Includes Extensive Analysis of the Plan’s Environmental Impacts**

9 Despite the extensive authority for the EIR’s programmatic approach, Water Contractors  
10 and North Coast challenge it as insufficient. Water Contractors label the EIR as full of “bare  
11 conclusions” that lack explanation, analysis, or evidence. (Water Contractors, p. 59.) North  
12 Coast contends that it is “far too vague, generalized and abstract to permit informed public  
13 review.” (North Coast, p. 17.) Both ignore the actual content of the EIR and disregard the role of  
14 a program EIR.

15 Water Contractors provide a single string cite listing parts of the impact analyses that they  
16 allege “fail[] to analyze or describe th[e] impact[.]” (Water Contractors, pp. 59-60, fn. 26.)<sup>66</sup>  
17 North Coast similarly lists a series of analyses it alleges do not meet CEQA’s standards. (North  
18 Coast, p. 17.) Petitioners’ arguments are misplaced. Each of the referenced discussions  
19 thoroughly describes potential, representative projects that the Plan may encourage, where such  
20 facilities may be built, and how their construction and operation may affect a particular resource,  
21 as described below. This detail is both commensurate with the level of detail of the Plan and  
22 more than sufficient to inform the public and decision makers. (See Guidelines § 15146; *Rio*  
23 *Vista, supra*, 5 Cal.App.4th at pp. 371-373.)

24 For example, Water Contractors criticize the analysis of whether water supply reliability  
25 projects encouraged by the Plan will have substantial adverse effects on special-status species

26  
27 <sup>66</sup> Water Contractors additionally single out as inadequate the EIR’s analysis of water  
28 resources (Water Contractors, pp. 61-68) and human health impacts (Water Contractors, pp. 60-  
61). Arguments XX.B [Water Supply] and XX.E [Human Health], *post*, refute these claims.

1 (Impact 4-2a). (Water Contractors, p. 60, fn. 26 [citing D7116-7118, 6028-6030].) As Water  
2 Contractors concede, the cited subsections in the Draft and Recirculated Draft EIR explain that  
3 representative water supply projects may “result in changes to water flow and salinity, loss of  
4 habitat, and introduction of predators that would impact habitat for special-status species,  
5 including the delta smelt.” (*Ibid.*) The analysis describes specific types of water supply  
6 reliability projects, where these types of projects might occur, and how the identified types could  
7 cause the particular impact. As just one example, “water intakes, pumping plants, sedimentation  
8 basins, treatment, and associated conveyance facilities (e.g., pipelines and canals) . . . could be  
9 constructed in the Delta, Delta watershed, and in areas outside the Delta that receive Delta water.”  
10 (D7116.) Construction of these facilities could include “[n]oise and night-time lighting . . . [that]  
11 could disturb special-status birds and mammals, and construction dust could affect species such  
12 as valley elderberry longhorn beetle. Special-status amphibians, reptiles, small mammals, and  
13 plants could be killed by construction and earthmoving equipment.” (*Ibid.*) In addition,

14 Special-status fish species, including delta smelt, Chinook salmon,  
15 steelhead, green sturgeon, Sacramento splittail, longfin smelt, and  
16 others in the Delta and the Delta tributaries also might be adversely  
17 affected by construction of facilities in or near the water, such as  
18 water intakes and pumping plants, by the release of sediment into  
the water column, dewatering of construction areas, or through  
acoustic effects associated with pile-driving or placement of sheet  
pile barriers.

19 (*Ibid.*)

20 The EIR provides similar detail regarding the potential impacts of several other types of  
21 water supply reliability projects (e.g., “[s]mall storage reservoirs, regulating reservoirs, and  
22 groundwater percolation basins,” large reservoirs, and ocean desalination plants). (D7117-7118.)  
23 It also references four other prior EIRs that analyzed similar projects (e.g., the Davis-Woodland  
24 Water Supply Project EIR), and which provide additional substantial evidence to support the  
25 EIR’s conclusion that the water supply reliability projects encouraged by the Plan could have  
26 significant adverse effects on special-status species. (D7116-7118; see also Guidelines § 15150,  
27 subd. (a) [EIR “may incorporate by reference all or portions of another document which is a  
28

1 matter of public record or is generally available to the public”].) The Plan EIR concludes that  
2 construction activities are likely to affect special status species to a greater extent than long-term  
3 operations of these facilities, but that both construction and operations could have significant  
4 effects. (D7118.) Contrary to Water Contractors’ assertion, the EIR is not a “black box” that  
5 “fail[s] to analyze or describe th[e] impact[.]” (Water Contractors, pp. 59-60, fn. 26.)

6 North Coast’s attacks on the EIR’s analyses are similarly unavailing. (North Coast, p. 17.)  
7 For example, North Coast challenges the EIR’s analysis of the impacts of potential ecosystem  
8 restoration projects on water resources (Impacts 3-1b, 3-2b, and 3-3b). (*Ibid.*) The EIR describes  
9 the effects of six ecosystem restoration activities within the Delta ecosystem restoration category,  
10 as well as five specific, representative ecosystem restoration projects that were previously  
11 approved or are currently under consideration. (D7022-7025.) The EIR’s discussion of these  
12 impacts then explains, for example, how construction and operation of features such as new  
13 floodplains, channels, or restoration areas could alter the balance of sedimentation and scour  
14 within channels and hydraulic retention times. (D7023.) Likewise, the EIR explains that a more  
15 natural flow regime could benefit native species and most water users but harm nonnative fish  
16 and water users in the western Delta; additional tidal wetlands within the Suisun Marsh could  
17 increase salinity in the channels linking the wetlands to Suisun Bay; and biocides applied to  
18 control invasive species could also affect non-target species. (*Id.* at D7023-7034.) Based on  
19 these and other potential impacts, which are further documented in previous EIRs for analogous  
20 projects, the EIR concludes that Delta ecosystem restoration projects could have a significant  
21 impact on water quality. (D7024.)

22 The other analyses that Water Contractors and North Coast challenge are similarly  
23 comprehensive. (See D6085-6087, 7263-7264 [flood risk impacts from water quality projects],  
24 D6177-6179, 6182-6183, 6186-6187, 6189-6190, 6193-6195, 7523-7527, 7530-7532, 7535-7537,  
25 7539-7541, 7543-7544 [air quality impacts from water supply, ecosystem restoration, Delta  
26 enhancement, water quality, and flood risk reduction projects], D7022-7025, 6010-6013 [water  
27 resources impacts from ecosystem restoration projects], D7113-7120, 6034-6041 [biological  
28 impacts from water supply reliability projects], D8100-8143 [climate change impacts].)

1 This EIR is thus wholly distinguishable from those found inadequate in Water Contractors'  
2 cited cases. (See *Laurel Heights I, supra*, 47 Cal.3d at p. 404 [rejecting analysis that “contain[ed]  
3 no analysis of any alternative locations” for a project]; *Protect The Historic Amador Waterways*  
4 *v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1111 [invalidating EIR that provided no  
5 indication of why it concluded that a documented change in the environment—reduced stream  
6 flows—would not be significant].) Here, the EIR exhaustively documents how a vast array of  
7 representative projects encouraged by the Plan could affect not just specific types of resources,  
8 but particular species in different locations. (E.g., D7116 [“Special-status fish species, including  
9 delta smelt, Chinook salmon, steelhead, green sturgeon, Sacramento splittail, longfin smelt, and  
10 others in the Delta and the Delta tributaries also might be adversely affected by construction of  
11 facilities in or near the water . . . .”], D7130 [“[L]evee maintenance activities could disturb  
12 nesting Swainson’s hawks and other nesting raptors”], D7072 [describing range of Swainson’s  
13 hawk].) Petitioners’ unsupported assertion that the EIR’s analysis is “inadequate” fails to meet  
14 their burden in challenging the EIR. (See *California Native Plant Soc’y v. City of Rancho*  
15 *Cordova, supra*, 172 Cal.App.4th at p. 626 [petitioner must “affirmatively show there was no  
16 substantial evidence in the record to support the [agency’s] findings”]; see also Standards of  
17 Review for CEQA Claims, Part B [Forfeit Claims], *ante*.)

18 **D. The EIR Does Not Improperly Defer Analysis of Impacts**

19 In an attempt to obtain a more favorable standard of review, Water Contractors and North  
20 Coast also accuse the Council of impermissibly deferring analysis of the Plan. (Water  
21 Contractors, p. 56 [“failure to analyze impacts by impermissibly deferring analysis is reviewed  
22 under the failure to proceed [in accordance with law] standard”]; North Coast, p. 17.) Both Water  
23 Contractors and North Coast, however, only support this claim with references to impacts that the  
24 EIR actually *does* address and to impacts of the BDCP, which is not part of the project (see  
25 Argument XVI [BDCP], *ante*). Thus, neither petitioner identifies a single omission, much less  
26 one that “was prejudic[ial] in any way.” (*Al Larson Boat Shop, supra*, 18 Cal.App.4th at p. 749.)  
27  
28

1 Water Contractors' statement that the EIR "defers the analysis of . . . even program-level  
2 impacts" is incorrect. (Water Contractors, pp. 56-57.) For every single impact identified by  
3 Water Contractors, the EIR provides an appropriate degree of program-level analysis and states  
4 that "[p]roject-level impacts would be addressed in future site-specific environmental analysis  
5 conducted at the time such projects are proposed by lead agencies." (D6187, 6226, 7019, 7533,  
6 7538, 7605; see also D6013, 6197, 7544 [all cited in Water Contractors, pp. 56-57].) Water  
7 Contractors also claim that the EIR "deferred" analysis of impacts to cultural resources because  
8 the EIR determined that implementation and enforcement of some mitigation measures will be  
9 "within the responsibility and jurisdiction of public agencies other than the Council." (D7605.)  
10 This statement merely reflects the fundamental structure of the Plan, which, as described above,  
11 necessarily anticipates that all covered actions will be proposed and undertaken by other agencies  
12 subject to their own independent CEQA review. (See D81-82 [describing implementation of  
13 mitigation].) Moreover, this finding is explicitly authorized by CEQA. (Pub. Resources Code, §  
14 21081, subd. (a)(2) [allowing finding that mitigation measures "are within the responsibility and  
15 jurisdiction of another public agency and have been, or can and should be, adopted by that other  
16 agency"]; *City of Marina v. Bd. of Trustees of the California State Univ.* (2006) 39 Cal.4th 341,  
17 366.) Nevertheless, the EIR analyzes the efficacy of the mitigation measures, even though other  
18 agencies would ultimately implement them. (See, e.g., D7605-7609.)

19 Moreover, the courts have explicitly upheld EIRs that defer analysis of project-level, site-  
20 specific impacts until such time as individual projects are proposed, and have not required  
21 analysis of such impacts at the program stage. In addition to *In re Bay-Delta*, discussed above, in  
22 *Al Larson Boat Shop, supra*, 18 Cal.App.4th 729, the court upheld a first-tier EIR covering a large  
23 port's five-year policy plan, which deferred analysis of six specific, anticipated projects that  
24 would implement the plan's policies. The court explained that the purpose of the plan, similar to  
25 the Delta Plan, was to consider policy alternatives, not the specific projects that might follow:

26 [T]he agency and the public [should] first decide whether it is a good idea to  
27 increase Port capacity in a given five-year period at all, or by means of the six  
28 'anticipated projects.' If that decision is made in the affirmative then each  
individual project can be reviewed in-depth on its merits in a project EIR . . . . On

1 the other hand, if the agency rejects the overall goal then further consideration of  
2 the six 'anticipated' projects can be dropped.

3 (*Id.* at p. 744.)

4 Likewise, in *Rio Vista, supra*, 5 Cal.App.4th 351, the court upheld a program EIR  
5 evaluating a county's hazardous waste management plan. The court found that the EIR need not  
6 analyze impacts of future facilities where the plan made no commitment to such facilities and "no  
7 actual future sites have been recommended or proposed." (*Id.* at p. 371; cf. *Planning &*  
8 *Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 238, fn. 21  
9 ["Under CEQA, a program EIR does not inevitably encompass all activity flowing from the  
10 programmatic project evaluated in the EIR"].)

11 *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, on  
12 which Water Contractors rely (*Water Contractors*, p. 57), expressly follows this authority and  
13 supports the Council's approach. The court in *Town of Atherton* rejected demands that the first-  
14 tier, program EIR analyze "the specific vertical alignment" of tracks for "a certain portion of the  
15 [train]'s route." (*Id.* at p. 346.) Relying heavily on *In re Bay-Delta*, the court emphasized that the  
16 "primary decisions ripe for review in the first-tier program EIR were the general alignment and  
17 choice of routes." (*Ibid.*) As a result, "[p]olicy considerations also militate against requiring the  
18 level of detail petitioners seek in a program EIR." (*Ibid.*) Here, just as in *Town of Atherton*, the  
19 decisions before the Council and reviewed in the EIR are the Plan's policies and  
20 recommendations, not the specific projects other agencies may propose pursuant to those  
21 provisions.

22 North Coast claims that the EIR defers analysis of "the effects of the BDCP on each of the  
23 competing beneficial uses of water" and of the Plan's "impacts on all of [the Delta's] source  
24 watersheds—including the Trinity River watershed—and the threatened salmon and other species  
25 that depend on them." (*North Coast*, p. 17.) This claim is incorrect. As discussed in Argument  
26 XVI [BDCP], above, the BDCP is not part of the Delta Plan. Furthermore, the EIR does analyze  
27 Delta watershed impacts of both the Plan and the BDCP (as a cumulative impact—see Argument  
28

1 XVI.C [BDCP], *ante*). The study area for most impacts—including but not limited to water,  
2 biological, and agricultural resources—includes the Delta watershed.<sup>67</sup> (E.g., D6941, 7054,  
3 7376.)

4 As a general matter, and as discussed above, the EIR does not analyze impacts at the  
5 project- and site-specific level given the uncertain nature of future projects that will be proposed  
6 to implement the Plan’s policies and recommendations. This does not mean, however, that the  
7 EIR omits analyses of impacts in these areas. Instead, the EIR identifies the study area in which  
8 impacts may occur and identifies those impacts. In some instances, when more detailed  
9 information about a particular type of project or location is available, the EIR describes the scope  
10 and location of the potential impact in greater detail. (See, e.g., D7019 [“Water transfers to  
11 facilitate water supply reliability could influence water quality by producing temporary changes  
12 in flow that could affect the concentrations of regulated water quality constituents, including  
13 water temperature within the Delta watershed tributaries”], D7344 [“construction of a surface  
14 water storage reservoir in the Delta watershed could require closure of existing roadways through  
15 the inundated area” and related impacts], D7395 [“Surface water storage projects in mountainous  
16 areas in the Delta watershed are less likely to significantly convert agricultural lands, but could  
17 adversely affect forestlands.”].) As discussed in detail in Arguments XX.B [Water Supply] and C  
18 [Cumulative Impact], below, the EIR devotes hundreds of pages to its description and analysis of  
19 each of these, and many other, impacts on the environment and delineates the geographic area in  
20 which each such impact might occur.

21 Finally, future lead agencies will address impacts of specific proposed projects in project-  
22 level EIRs once they have received applications for such projects and gathered the relevant data.  
23 (See D74 [“likely that lead agencies will find new environmental review necessary once they  
24 identify specific projects located on specific sites”].) Petitioners do not identify such project-  
25 level information because it simply is not available. (Water Contractors, p. 56; North Coast, p.

26 <sup>67</sup> Contrary to North Coast’s allegations (North Coast, p. 17), the EIR includes the Trinity  
27 River system in its consideration of the Delta watershed, based on the connection provided by the  
28 Clear Creek Tunnel (D73, fn. 6). The EIR concludes that federal law prevents any action under  
the Delta Plan that could cause significant environmental impacts in the Trinity basin. (D91-92.)

1 17.) Until it is, it would be both fruitless and contrary to CEQA for this program EIR to speculate  
2 about impacts at a project- and site-specific level. (Guidelines §§ 15384, subd. (a), 15144,  
3 15145.)

4 **E. The EIR Analyzes the Reasonably Foreseeable Impacts of the Delta Plan in**  
5 **the Appropriate Geographical Regions at an Appropriate Level of Detail**

6 Water Contractors challenge the EIR's geographic scope. Specifically, they assert that the  
7 EIR provides less detailed analysis of impacts occurring outside the Delta (Water Contractors, pp.  
8 52-54), and they contend that the EIR is "artificially and impermissibly truncated" because it does  
9 not address areas outside the Delta and its watershed that do not receive water from the Delta (*id.*  
10 at pp. 52, 54-55). Not only do both of these claims lack merit, Water Contractors are barred from  
11 raising them. Neither Water Contractors nor any other commenter on the EIR previously raised  
12 questions regarding the EIR's failure to address impacts in areas that do not use Delta water.  
13 (See, e.g., D331-357, D1976-2015 [Water Contractors' comment letters].) Therefore, they have  
14 forfeited the claim for failure to exhaust administrative remedies. (*Bakersfield Citizens for Local*  
15 *Control v. City of Bakersfield (Bakersfield)* (2004) 124 Cal.App.4th 1184, 1199.)

16 Even if Water Contractors did not forfeit this claim, CEQA makes clear that the EIR  
17 appropriately tailored its approach to the geographic reach of the Plan and related impacts on the  
18 environment. CEQA requires analysis of "reasonably foreseeable" impacts on the environment.  
19 (Pub. Resources Code, § 21065; *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690,  
20 712.) Here, the Delta Plan will guide and encourage projects within the Delta, in the Delta  
21 watershed, and in areas of the state that use Delta water. (B480-485; D6801.) This encompasses  
22 a large part of California. The EIR properly analyzes the Plan's effects in the areas where there is  
23 some reason to believe that the Plan might cause impacts, including indirect impacts. (See  
24 D6800-6801, 6914-6915.) For each impact, the EIR specifies where impacts are most likely to  
25 occur. For example, the air quality analysis (Section 9) focuses primarily on the Delta and Suisun  
26 Marsh, "in which the majority of potential impacts are expected to occur," although it also  
27 "includes, to a lesser extent, . . . other areas in the Delta watershed or areas outside the Delta that  
28 use Delta water" where these impacts are less likely to occur. (D7510.) By contrast, the analysis

1 of impacts to water resources (Section 3) considers the Delta, its watershed, and areas that use  
2 Delta water. (D6941-6943.) For Delta flood risk (Section 5), the study area consists primarily of  
3 the Delta, because the Plan focuses on flood management activities within the Delta. (D7214.)

4 Courts have explicitly approved this approach of varying the level of scrutiny in different  
5 geographic areas: “That the effects will be felt outside of the project area . . . is one of the factors  
6 that determine the amount of detail required in any discussion. Less detail, for example, would be  
7 required where those effects are more indirect than effects felt within the project area, or where it  
8 [is] difficult to predict them with any accuracy.” (*Napa Citizens for Honest Gov. Napa County*  
9 *Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 369.)<sup>68</sup>

10 Neither Water Contractors nor any other commenter has identified any location outside of  
11 the study area where impacts are “reasonably foreseeable.” In fact, Water Contractors’ own  
12 examples fall within the study area and are included in the EIR’s analysis. They hypothesize that  
13 impacts will occur in the San Joaquin Valley and unspecified coastal areas using desalination to  
14 replace surface water, and accuse the EIR of omitting analysis of such impacts. (Water  
15 Contractors, p. 55.) But the EIR study area encompasses these very regions. (See D6802;  
16 D7112.) Various analyses in the EIR may not single out specific sites, but they do disclose,  
17 appropriately for a program-level document, the types of impacts that may occur and the  
18 geographic range in which they might occur. (See, e.g., D7020 [“Groundwater storage facilities  
19 would be encouraged to be constructed in areas such as the San Joaquin watershed, the Tulare  
20 Lake area, and certain areas in Southern California, where groundwater banking is needed to  
21 sustain long-term water supplies or provide emergency water supplies during drought conditions  
22 (WR PI)”], D7129 [describing potential impacts of flood risk reduction projects on special status  
23 species in the Delta].)

24 Water Contractors cite language from the description of the project’s environmental setting  
25 *for air quality* out of context, claiming that the EIR provides only a “general discussion” *of water*

26  
27 <sup>68</sup> Indeed, one of the cases that Water Contractors cite quotes this very language. (See  
28 *Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (2007) 41 Cal.4th 372, 388  
[Water Contractors, pp. 54-55].)

1 *resources* outside the Delta. (Water Contractors, pp. 52-53 [citing D7510].) In fact, the EIR  
2 applies the same level of detail to its analyses of impacts throughout the study area for water  
3 resources. (See, e.g., D7019 [desalination plants outside the Delta could release concentrated  
4 brine, although permitting requirements are likely to limit significance of resulting impacts];  
5 D7020-7021 [discussing potential for water supply projects to affect groundwater in the San  
6 Joaquin watershed, Tulare Lake area, and Southern California]; see also D7401-7402 [decreased  
7 deliveries of Delta water to users outside the Delta could lead to fallowing of agricultural land].)

8 Water Contractors do not point to any reasonably foreseeable impacts that the EIR missed  
9 because of its choice of study areas; the EIR analyzes every one of the impacts they list. Water  
10 Contractors contend that the EIR provides “almost no” analysis of “water-related issues outside  
11 the Delta,” never “identifie[s], let alone analyze[s]” impacts related to groundwater overdraft,  
12 “provides no analysis of visual or aesthetic impacts outside the Delta,” and does not discuss  
13 impacts of constructing projects to replace Delta water supplies on special status species. (Water  
14 Contractors, pp. 53-54.) They also demand “review in a revised PEIR” of “(a) agricultural  
15 impacts from fallowing due to lack of water; (b) air quality/health risk impacts from fallowing;  
16 (c) greenhouse gas emissions from fallowing; (d) biological and greenhouse gas impacts from  
17 construction and operation of replacement water projects; (e) impacts to water quality due to  
18 increased reliance on local water sources/salt water intrusion in coastal areas; and (f) impacts to  
19 utilities and energy demand due to increased reliance on local water sources.” (Water  
20 Contractors, p. 54 fn. 23.) However, the EIR already provides each of these analyses, as follows:

- 21 • Impacts of water supply projects on groundwater ( D7020-7022)
- 22 • Fallowing (D7401-7402)
- 23 • Groundwater overdraft (D6822)
- 24 • Visual resources study area includes areas outside the Delta (D7448-7449)
- 25 • Visual resources impacts outside the Delta (D7469)
- 26 • Impacts of water supply projects on special status species (D7116-7118)
- 27 • Fugitive dust from fallowing (D6178)
- 28 • Fallowing and greenhouse gas emissions (D6491-6492)

- 1 • Impacts of water supply projects on biological resources (D7113-7120)
- 2 • GHG emissions from water supply reliability projects (D8108-8112)
- 3 • Water quality impacts of water supply projects (D7019)
- 4 • Increased electricity demand from proposed project (D8090-8091)
- 5 • Altered storm water drainage in rural areas from proposed plan (D8087-8088)

6 The only impacts that Water Contractors point to that are outside the EIR's selected study  
7 area are purely hypothetical: they refer to water that "*may very well be sourced*" from areas  
8 outside the study area and "pipelines and/or conveyance facilities that will *presumably* be  
9 necessary to convey replacement groundwater or surface water to those areas currently relying on  
10 Delta water supply." (Water Contractors, p. 55 [emphases added].) Water Contractors' theories  
11 about how local agencies may provide water are not substantial evidence showing that these  
12 projects are reasonably foreseeable. Rather, they are the sort of speculation that CEQA prohibits.  
13 (See Guidelines §§ 15384, 15144, 15145.) To describe the impacts of such projects would  
14 require even further speculation. The EIR appropriately avoids such conjecture in determining  
15 the study area for each impact analysis.

16 By failing to provide any evidence of impacts that the EIR left out of its geographic scope,  
17 Water Contractors have failed to meet their burden to demonstrate the inadequacy of the EIR as  
18 an informative document. (*Pfeiffer v. City of Sunnyvale City Council, supra*, 200 Cal.App.4th at  
19 p. 1573 ["[Petitioner/appellants'] conclusory argument that the traffic baseline is hypothetical is  
20 not adequate to meet their burden as the parties challenging the EIR"]; see also *County Sanitation*  
21 *Dist. No. 2 of Los Angeles County v. County of Kern* (2005) 127 Cal.App.4th 1544, 1587 [under  
22 "fair argument" standard, requiring substantial evidence of impacts outside the study area as  
23 trigger for including such impacts in analysis]. This claim should be denied as a matter of law.  
24 (See Standards of Review for CEQA Claims, Part B [Forfeit Claims], *ante*.)

## 25 **XVIII. THE EIR ADEQUATELY DESCRIBES THE PROJECT**

26 An EIR must describe the "entirety of the project" under review. (*San Joaquin Raptor*  
27 *Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654; see also Guidelines §  
28

1 15124 [listing information contained in project descriptions]; Guidelines § 15378, subd. (a)  
2 [{"project"} is "the whole of an action, which has a potential for resulting in either a direct physical  
3 change in the environment, or a reasonably foreseeable indirect physical change in the  
4 environment"])). The project description must state the project objectives and express the  
5 "underlying purpose" of the project, but "should not supply extensive detail beyond that needed  
6 for evaluation and review of the environmental impact[s]." (Guidelines § 15124.) A "general"  
7 level of detail is adequate. (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70  
8 Cal.App.4th 20, 28; see also Guidelines § 15124 [project description must supply a "general  
9 description of the project's technical, economic, and environmental characteristics"]; *County of*  
10 *Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 198-199 [courts require an "accurate,  
11 stable, and finite" description that is not "curtailed, enigmatic, or unstable".])

12 Courts have invalidated EIRs based on the project description only when the descriptions  
13 are so "fundamentally inadequate and misleading" as to frustrate CEQA's core purpose of  
14 informing the public. (*San Joaquin Raptor Rescue Center, supra*, 149 Cal.App.4th at p. 655  
15 [{"D]espite assurances [in the project description] to the contrary, the Project includes a  
16 substantial increase in mine production"]; see also *Santiago County Water Dist. v. County of*  
17 *Orange* (1981) 118 Cal.App.3d 818, 829-830 [project description for mine entirely omitted the  
18 water delivery that would serve the project]; *County of Inyo, supra*, 71 Cal.App.3d at pp. 197, 200  
19 [{"incessant shifts among [three] different project descriptions. . . vitiate the city's EIR process as  
20 a vehicle for intelligent public participation".])

21 **A. The Project Description Incorporates the Project Objectives Defined in**  
22 **and Required by the Delta Reform Act**

23 North Coast argues that the project description does not adequately explain the project  
24 objectives because it only recites the language of the Delta Reform Act, while Water Contractors  
25 claim that the project objectives conflict with the Act. (North Coast, pp. 11-12; Water  
26 Contractors, p. 46.) Yet, the Legislature, not the Council, defined the Plan's objectives in the Act.  
27 The Plan's legislative objectives define the "underlying purpose" of the Plan; hence, the EIR  
28

1 identifies these statutory objectives as the project's objectives. (D5902, 6733; Guidelines §  
2 15124, subd. (b).)

3 The Plan's primary and fundamental purpose is to further achievement of the coequal goals  
4 of: (1) providing a more reliable water supply for California; and (2) protecting, restoring, and  
5 enhancing the Delta ecosystem. (Wat. Code, §§ 85300, subd. (a), 85054; see also D6788.) The  
6 Act provides additional guidance regarding the project objectives, specifically listing the  
7 following "objectives that the Legislature declares are inherent in the coequal goals":

- 8 (a) Manage the Delta's water and environmental resources and the water  
resources of the state over the long term.
- 9 (b) Protect and enhance the unique cultural, recreational, and agricultural  
values of the California Delta as an evolving place.
- 10 (c) Restore the Delta ecosystem, including its fisheries and wildlife, as the  
11 heart of a healthy estuary and wetland ecosystem.
- 12 (d) Promote statewide water conservation, water use efficiency, and  
sustainable water use.
- 13 (e) Improve water quality to protect human health and the environment  
consistent with achieving water quality objectives in the Delta.
- 14 (f) Improve the water conveyance system and expand statewide water  
storage.
- 15 (g) Reduce risks to people, property, and state interests in the Delta by  
16 effective emergency preparedness, appropriate land uses, and investments in  
flood protection.
- 17 (h) Establish a new governance structure with the authority, responsibility,  
18 accountability, scientific support, and adequate and secure funding to achieve  
these objectives.

19 (Wat. Code, § 85020; see also D6788-6789.)

20 Consistent with this statutory mandate, the EIR defines the project objectives for the Delta  
21 Plan as follows:

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

27 (D5902; see also D6733, 6791, 6001, 6569; see also Wat. Code, §§ 85020, 85054.)  
28

1 Both the coequal goals and inherent objectives were taken directly from the Act. (D6788-  
2 6790, D6001.) Thus, the EIR’s explanation of the project objectives faithfully reproduces the  
3 coequal goals, their definition, and the eight “inherent objectives.”<sup>69</sup> (D6788-6791, 5978-5979.)

4 North Coast challenges the project description because the EIR allegedly “recit[es]” the  
5 objectives established in the Act and does not further “explain” these objectives. (North Coast,  
6 pp. 11-12.) But North Coast does not articulate why further explanation of the project objectives  
7 is either necessary or required. As discussed above, the Delta Plan is based on project objectives  
8 set forth by the Legislature in the Act. (Compare D6788-6790 [Delta Plan Statement of  
9 Objectives], with Wat. Code, §§ 85020, 85021 [language from the Act].) The EIR makes this  
10 relationship clear. (D6788-6789; see also D5902 [“The project objectives examined in this EIR  
11 reflect [the Delta Reform Act’s] statutory mandates”].) Thus, the EIR: (1) explains that the  
12 Legislature defined the goals and inherent objectives of the Delta Plan; (2) states these same goals  
13 and objectives as the “project objectives” for purposes of CEQA; and (3) describes how the Delta  
14 Plan adopts those goals and objectives and implements them through the resulting 14 policies and  
15 73 recommendations. (D6788-6790, 6614-6643.) This is more than sufficient to comply with  
16 CEQA. (See Guidelines § 15124, subd. (b); see also *Cal. Oaks Foundation v. Regents of Univ. of*  
17 *Cal.* (2010) 188 Cal.App.4th 227, 273-274 [stating a project’s objectives “more broadly than  
18 necessary” does not render EIR invalid].)

19 In direct contrast to North Coast’s criticism that the project description follows the  
20 language of the Act too closely, Water Contractors assert that the project objectives do not follow  
21 the Legislature’s directives closely enough and instead have been “skewed” to reduce water  
22 supply reliability. (Water Contractors, p. 46.) The plain language of the EIR and the Plan  
23 contradicts this argument. With the project description’s near-verbatim use of the language in the  
24 Act, the Delta Plan and the EIR fully reflect the Legislature’s specific direction with regard to  
25 both of the coequal goals. (Wat. Code, §§ 85300, subd. (a), 85054, 85020, 85021; see also  
26

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27 <sup>69</sup> The Recirculated Draft EIR makes a one-word technical correction to the project  
28 objectives. (D6001.)

1 D6788-6790.) Water Contractors' complaint is really about the substance of the Plan, not the  
2 EIR's straightforward description of its mandated objectives.

3 **B. It Is Both Common and Appropriate to Provide the Full Text of the**  
4 **Policies and Recommendations that Constitute the Project in an Appendix**  
5 **Rather Than in the Body of the EIR**

6 North Coast and Water Contractors contend that the project description is "fundamentally  
7 defective" because the EIR allegedly buries the full text of the policies and recommendations that  
8 make up the project in an appendix to the EIR. (Water Contractors, p. 47, North Coast, p. 12.) It  
9 is perfectly permissible under CEQA, however, to supplement a project description section of an  
10 EIR in an appendix.

11 Section 2A of the Draft EIR, "Proposed Project and Alternatives," contains a 45-page  
12 description of the Plan's policies and recommendations for the five categories of projects  
13 discussed in the Statement of Facts, above, and also describes the future projects that these  
14 policies and recommendations may encourage. (D6807-6862.) Section 2A of the Recirculated  
15 Draft EIR contains an additional 23 pages that describe the Revised Project. (See D5977-6000  
16 [describing the Revised Project, including a table comparing it to the original Proposed Project].)  
17 The EIR does not reproduce, verbatim, the Plan's 87 policies and recommendations in section 2A  
18 because it would take up a disproportionate amount of space and detract from the EIR's analysis  
19 of the proposed project. Instead, both the Draft EIR and the Recirculated Draft EIR state clearly  
20 that "[p]olicies and recommendations for the Proposed Project and alternatives are presented in  
21 Appendix C." (D6807; see also D6810, 6812, 6832, 6847, 6853, 6859, 6860, 5978, 8323-8343,  
22 6614-6643.)<sup>70</sup> In sum, the EIR does not "bury" or "obscure" the Plan's policies and  
23 recommendations. Instead, it describes them at length in the body of the document and, in  
24 addition, reproduces them in full, conveniently, and in a format that will be most useful to  
25 decision makers and the public.

26 Both the Guidelines and cases interpreting them endorse precisely the approach used in the  
27 Delta Plan EIR. Guidelines section 1524, subdivision (c), directs that the project description

28 <sup>70</sup> The 2012 Final Draft Delta Plan also contains the full list of policies and  
recommendations. (See K7786-7804.)

1 should provide “[a] general description of the project’s technical, economic, and environmental  
2 characteristics” in the EIR. The project description should “not supply extensive detail beyond  
3 that needed for evaluation and review of the environmental impact.” (*Id.* § 15124.) Moreover,  
4 “[a]n EIR . . . may incorporate by reference all or portions of another document which is a matter  
5 of public record or is generally available to the public . . . [and] the incorporated language shall be  
6 considered to be set forth in full as part of the text of the EIR.” (*Id.* § 15150, subd. (a).) Thus,  
7 petitioners challenge precisely the approach that CEQA recommends. Contrary to the argument  
8 proffered by North Coast and Water Contractors (North Coast, p. 12; Water Contractors, p. 47),  
9 courts also have endorsed the use of cross-references, appendices, and tables to describe a project  
10 as “consistent with other CEQA mandates to make the EIR a user-friendly document.” (*Dry*  
11 *Creek Citizens Coalition, supra*, 70 Cal.App.4th at p. 28; see also *Citizens for a Sustainable*  
12 *Treasure Island, supra*, 227 Cal.App.4th at p. 1053.)

13       Accordingly, the court in *Citizens for a Sustainable Treasure Island, supra*, 227  
14 Cal.App.4th 1036, rejected claims that the project description in a program EIR was inadequate  
15 when the EIR included a “conceptual” description of the project in the main body of the  
16 document but allegedly left further detail about design elements to supporting documents that the  
17 EIR referenced. (*Id.* at p. 1053.) The court stated that, as here, “the EIR made an extensive effort  
18 to provide meaningful information about the project . . . . In fact, the design elements [plaintiff]  
19 claims are lacking in this EIR are found in several documents [referenced in the EIR].” (*Id.*; see  
20 also *Dry Creek Citizens Coalition, supra*, 70 Cal.App.4th at pp. 26-33 [rejecting challenge to  
21 project description that described intake structures in conceptual terms, with reference to  
22 technical studies].)

23       The cases cited in petitioners’ briefs are inapposite (North Coast, p. 12; Water Contractors,  
24 p. 47), and do not involve the use of appendices, tables, and cross-references to help describe a  
25 project. Rather, they concern EIRs that failed to adequately describe the baseline conditions on  
26 which the EIRs’ analyses relied, or failed to incorporate supporting documents by reference. (See  
27 *Vineyard Area Citizens, supra*, 40 Cal.4th at p. 442 [“To the extent the County, in certifying the  
28 FEIR as complete, relied on information not actually incorporated or described and referenced in

1 the FEIR, it failed to proceed in the manner provided in CEQA”]; *San Joaquin Raptor Rescue*  
2 *Center, supra*, 149 Cal.App.4th at p. 659 [“generalized statement” in project-level EIR “that  
3 ‘existing conditions’ include ‘the currently permitted extraction of aggregate materials’ and  
4 processing activities” inadequate when “nowhere is that [amount] plainly stated”]; *Cal. Oak*  
5 *Foundation, supra*, 133 Cal.App.4th at p. 1240 [EIR invalid when “neither the text of the EIR nor  
6 its appendices contain a proper analysis of” water supply for proposed industrial park].)

7 Here, the EIR provides both a comprehensive narrative description of the project and  
8 repeated citations to the attached appendix that contains the full text of the referenced policies and  
9 recommendations. This approach advances, rather than inhibits, the ability of the decision  
10 makers and the public to understand the project. It avoids redundancy and is consistent with the  
11 mandate in the Guidelines that the project description should “not supply extensive detail beyond  
12 that needed for evaluation and review of the environmental impact.” (Guidelines § 15124.) The  
13 EIR describes the project, including project objectives defined by the Legislature, and sets forth  
14 the full text of the proposed policies and recommendations in an appendix. The EIR’s structure  
15 thus fully enabled “the public and interested parties and public agencies [to] balance the proposed  
16 project’s benefits against its environmental cost, consider appropriate mitigation measures,” and  
17 weigh the advantages of the proposed project against other alternatives. (*City of Santee v. County*  
18 *of San Diego* (1989) 214 Cal.App.3d 1438, 1454.)

19 **XIX. THE EIR DESCRIBES THE CORRECT ENVIRONMENTAL SETTING AND BASELINE**  
20 **CONDITIONS FOR EACH OF THE RESOURCES ANALYZED**

21 Petitioners argue, often for contradictory reasons, that the EIR describes the wrong  
22 environmental setting, that the description it does provide is inadequate, and that the EIR thus  
23 does not provide a sufficient baseline against which to measure impacts of the Delta Plan on the  
24 environment. Some contend that the EIR must specify a particular water year type against which  
25 to measure all impacts of the project (Water Contractors, p. 49), while others contend that the EIR  
26 fails to account for rapidly changing conditions in the Delta *because* it uses a single baseline date  
27 (North Coast, pp. 15-16). Petitioners also argue that the EIR improperly includes (or fails to  
28 include) the effects of Delta exports. (North Coast, p. 16; Central Delta, pp. 49-50; Water

1 Contractors, p. 49.) Petitioners are wrong on the law and the facts. Moreover, they never identify  
2 a single conclusion regarding the significance of an impact that would change if the baseline were  
3 changed in the manner that they suggest. (Cf. *Al Larson's Boat Shop, supra*, 18 Cal.App.4th at p.  
4 749.)

5 The CEQA Guidelines require an EIR to describe “the physical environmental conditions in  
6 the vicinity of the project, as they exist at the time the notice of preparation is published . . . from  
7 both a local and regional perspective.” (Guidelines § 15125, subd. (a).) “The description of the  
8 environmental setting shall be no longer than is necessary to an understanding of the significant  
9 effects of the proposed project and its alternatives.” (*Ibid.*) “This environmental setting will  
10 normally constitute the baseline physical conditions by which the Lead Agency determines  
11 whether an impact is significant.” (*Ibid.*; *Communities for a Better Environment v. South Coast*  
12 *Unified Air Quality Management Dist.* (2010) 48 Cal.4th 310, 315 (*CBE*)). Accordingly, each  
13 impact section in the EIR begins with a description of the environmental setting relevant to the  
14 affected resource at the time the Council issued the Notice of Preparation (NOP) for the EIR.  
15 (See, e.g., D7377-7392, 7054.) To determine whether the project’s impacts are likely to be  
16 significant, the EIR compares post-project conditions to the pre-project, baseline conditions.  
17 (*CBE, supra*, 48 Cal.4th at p. 315.)

18 **A. The Proper Baseline for Analysis of the Delta Plan Is Existing Conditions**

19 North Coast and Central Delta criticize the EIR for using the Delta’s existing state of  
20 ecological decline as a baseline against which to measure impacts of the project. (North Coast, p.  
21 16; Central Delta, p. 49-50.) They contend that comparing impacts of the Delta Plan to current  
22 “unsustainable and illegal Delta water exports” “masked the Project’s adverse impacts.”<sup>71</sup>  
23 (Central Delta, pp. 49-50; North Coast, p. 16.) This argument lacks merit.

24 As explained above, CEQA establishes a presumption that the baseline physical conditions  
25 are those at the time the agency adopts an NOP for an EIR. (Guidelines § 15125, subd. (a); *CBE*,

26  
27 <sup>71</sup> While Central Delta describes existing water exports as “illegal,” it provides no  
28 authority for this characterization. (Central Delta, pp. 49-50; see also D6954-6955 [summarizing  
major diversions from the Delta and the effect of litigation on exports], D6797-6798.)

1 *supra*, 48 Cal.4th at p. 320 [EIR normally determines and describes baseline conditions “as they  
2 exist at the time the notice of preparation is published”].) There is no dispute that the EIR follows  
3 this approach.

4 There is also no dispute that the Delta was and is in a state of decline.<sup>72</sup> (See, e.g., Wat.  
5 Code, § 85001, subd. (a); B474-475; D6792-6796, 7056-7063.) The environmental setting  
6 sections describe both historic and current activities leading to the existing conditions, which  
7 include exporting water for use outside the Delta. (D6950, 7063.) Central Delta argues that the  
8 EIR somehow assumes or concludes that the existing level of water exports is sustainable or  
9 appropriate. (Central Delta, p. 49; see also North Coast, p. 16.) It does not. Rather, the EIR  
10 describes the environment as it is, by documenting current exports and describing the decline in  
11 Delta conditions to which the exports contribute. (D6792-6795.) The EIR also discloses that the  
12 Delta is subject to changing conditions, particularly continued degradation of both water supply  
13 reliability and ecosystem health. (D6960-6962, 7056-7063.) These declining conditions  
14 constitute the “environment’s state absent the project,” as required by CEQA. (*CBE, supra*, 48  
15 Cal.4th at p. 315; North Coast, p. 16; Central Delta, p. 49.)

16 Neither Central Delta nor North Coast contend that the EIR is inaccurate or describes  
17 anything other than actual conditions. In fact, both petitioners argue that the baseline should *not*  
18 reflect actual conditions. (North Coast, p. 15; Central Delta, pp. 49-50.) The California Supreme  
19 Court has already rejected this argument in a nearly identical factual context. In the *In re Bay-*  
20 *Delta* case, the court responded to similar challenges, clarifying that “the Bay–Delta’s existing  
21 environmental problems . . . would continue to exist even if there were no CALFED program, and  
22 thus under CEQA they are part of the baseline conditions.” (*In re Bay-Delta, supra*, 43 Cal.4th at  
23 p. 1168.) No case holds that an EIR must compare a project’s impacts to baseline conditions that  
24 are *better* than the actual environmental setting, as petitioners suggest. In fact, such an approach  
25 would be both misleading and uninformative. (See *Neighbors for Smart Rail v. Exposition Metro*  
26

27 <sup>72</sup> Notably, neither petitioner challenges the *accuracy* of the EIR’s description of current  
28 conditions.

1 *Line Const. Authority* (2013) 57 Cal.4th 439, 451-452 [to use a baseline other than existing  
2 conditions, the lead agency must show that the alternative baseline would not be “uninformative  
3 or . . . misleading to decision makers and the public”].)

4 None of the cases petitioners rely upon are on point. In fact, *CBE*, which North Coast and  
5 Central Delta both cite (North Coast, pp. 15-16; Central Delta, p. 50), actually supports the EIR’s  
6 approach. In *CBE*, the California Supreme Court held that an agency must use actual “existing  
7 physical conditions” as the baseline for analyzing operations of an oil refinery, “rather than the  
8 maximum level of emissions that would be authorized under the refinery’s existing permits.”  
9 (*CBE, supra*, 48 Cal.4th at p. 322.)

10 Even if Central Delta was correct that current hydrologic conditions in the Delta are “over-  
11 allocated” and “unsustainable and illegal” (Central Delta, pp. 49, 51), these conditions still  
12 provide the proper baseline against which to measure the effects of the project. California courts  
13 uniformly require that an EIR describe conditions as they exist—legal or not—for purposes of the  
14 environmental setting and baseline.<sup>73</sup> (See, e.g., *Ctr. for Biological Diversity, supra*, 234 Cal.  
15 App.4th at p. 251 [“[T]he baseline must include existing conditions, even when those conditions  
16 have never been reviewed and are unlawful”], *CBE, supra*, 48 Cal.4th at pp. 320-321 & fn. 7  
17 [“[T]he impacts of a proposed project are ordinarily to be compared to the actual environmental  
18 conditions existing at the time of CEQA analysis, . . . [even] where actual development or activity  
19 had, by the time CEQA analysis was begun, already exceeded that allowed under the existing  
20 regulations”]; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1281 [affirming baseline  
21 for airport expansion of existing conditions that included zoning violations]; *Riverwatch v.*

22 \_\_\_\_\_  
23 <sup>73</sup> North Coast relies on *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*,  
24 in which a federal district court applied federal law to find that the agency could not include  
25 existing unauthorized buoys in the baseline without additional analysis of the unpermitted actions.  
26 (North Coast, p. 16; *Save Lake Tahoe v. Tahoe Regional Planning Agency* (E.D. Cal. 2010) 739  
27 F.Supp.2d 1260, 1276, affd. in part, vacated in part, remanded (9th Cir. 2012) 469 Fed.Appx. 621  
28 [vacating ruling that use of unauthorized buoys is per se arbitrary and capricious].) The  
California Supreme Court has rejected this interpretation of CEQA. (*CBE, supra*, 48 Cal.4th at  
pp. 320-321 & fn. 7.) Moreover, the record shows that the water exports referred to by North  
Coast were authorized, and North Coast has failed to cite any evidence to the contrary. (See, e.g.,  
D6954-6955.)

1 *County of San Diego* (1999) 76 Cal.App.4th 1428, 1452–1453 [baseline for proposed quarry  
2 development was the actual condition of the land, including environmental degradation from prior  
3 illegal mining and clearing activities].)

4 **B. The Description of Existing Conditions Takes into Account Hydrologic**  
5 **Variability in the Study Area**

6 Water Contractors also contend that the EIR should have used a single, precise, quantified  
7 baseline value to represent hydrologic conditions, reservoir storage capacities, and limits affecting  
8 water transfers at a given moment in time. (Water Contractors, p. 49.) Where baseline conditions  
9 “fluctuate[] considerably,” however, as in the Delta and in the state’s water supply system  
10 generally, reliance on a specific snapshot in time may have “misleading and illusory” results.  
11 (*Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App.4th 238, 243; see also *Save our*  
12 *Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125  
13 [“Environmental conditions may vary from year to year and in some cases it might be necessary  
14 to consider conditions over a range of time periods”]; *CBE, supra*, 48 Cal.4th at p. 328 [“A  
15 temporary lull or spike . . . that happens to occur at the time environmental review for a new  
16 project begins should not depress or elevate the baseline”].)

17 Rather than arbitrarily selecting a single type of water year as the hypothetical baseline, the  
18 EIR describes the average and range of existing conditions affecting the complex system of Delta  
19 water resources. The manner in which the Delta Plan will affect this system is described in  
20 Impacts 3-1(a)-(e) (impacts on water quality), 3-2(a)-(e) (impacts on groundwater resources), and  
21 3-3(a)-(e) (impacts on water supply to users of Delta water). (See, e.g., D7018-7019 [Impact 3-  
22 1a], D7024 [Impact 3-2b], D7024-7025 [Impact 3-3b].)

23 As the EIR explains, there is dramatic variability in California’s hydrology: average annual  
24 flows into the Delta total approximately 21 million acre-feet but have ranged from 5.9 million  
25 acre-feet to 70 million acre-feet. (D6949-6950.) Conditions affecting protected species of fish—  
26 and thus, often, water system operations—are closely tied to these variations.<sup>74</sup> (See D7060-

27 <sup>74</sup> The EIR again provides much of the information demanded—but not cited—by  
28 petitioners. (Water Contractors, p. 49.) The EIR’s Biological Resources section identifies two  
(continued...)

1 7061; see also D6793, 6992.) The availability of storage and conveyance capacity also varies  
2 significantly with hydrologic and biological conditions. (See, e.g., D6997, 7009.) The Water  
3 Resources section therefore appropriately describes the total capacity of major reservoirs and  
4 conveyance facilities in the study area, as well as average annual releases and exports of water.  
5 (See, e.g., D6944-6946, 6954, 6960-6961.) Quantifying available storage or conveyance capacity  
6 at a single moment in time, as petitioners argue is necessary, would be illusory rather than  
7 representative.

8 The EIR is thus clear regarding baseline assumptions. The historic variability in hydrologic  
9 and biological conditions creates precisely the type of fluctuation that makes a broader  
10 description of baseline conditions more appropriate than a potentially “misleading” snapshot.  
11 (*Fairview Neighbors, supra*, 70 Cal.App.4th at p. 243; see also *Save our Peninsula Committee,*  
12 *supra*, 87 Cal.App.4th at p. 125 [rejecting baseline groundwater data as unrepresentative].) Any  
13 suggestion that the EIR should speculate regarding future conditions would be contrary to CEQA.  
14 (See *Ctr. for Biological Diversity, supra*, 2015 WL 543704, \*18, quoting *County of Amador,*  
15 *supra*, 76 Cal.App.4th at p. 955 [“CEQA requires an EIR to ‘focus on impacts to the existing  
16 environment, not hypothetical situations’”]; see also *CBE, supra*, 48 Cal.4th at p. 328 [“[A]n  
17 agency enjoys the discretion to decide, in the first instance, exactly how . . . the project can most  
18 realistically be measured, subject to review, . . . for support by substantial evidence”].)

19 **C. The Description of Existing Conditions in the EIR Is Sufficiently Detailed**

20 Central Delta and Water Contractors also contend that the EIR lacks sufficient detail  
21 regarding existing hydrologic conditions, water supply, infrastructure, and regulatory constraints.  
22 (Central Delta, pp. 50-52; Water Contractors, pp. 49-51.) Central Delta further complains that the

23 (...continued)  
24 regulatory documents that influence both water supplies and ecosystem conditions in the Delta.  
25 (D7055 [2008 Biological Opinion on the Long-Term Operational Criteria and Plan for  
26 coordination of the Central Valley Project and State Water Project, and the 2009 Biological  
27 Opinion and Conference Opinion on the Long-term Operations of the Central Valley Project and  
28 State Water Project].) It also explains that in December 2010, a federal court found portions of  
these documents and their supporting environmental analysis inadequate and remanded them to  
the U.S. Fish and Wildlife Service for further consideration. (*Ibid.* at fn. 1.) As a result, “[t]hose  
disputed portions of the Biological Opinion were not relied upon in the preparation of [the EIR].”  
(*Ibid.*)

1 Council “deferred the development of [a] water availability analysis” and thus failed to provide  
2 baseline data regarding “how much Delta water is available for various uses.” (Central Delta, p.  
3 51.) Petitioners are factually wrong; the EIR provides far greater detail regarding the  
4 environmental setting than they would have the Court believe. In addition, and as discussed in  
5 Argument XVII [Level of Detail], above, CEQA does not require such detail in this program EIR.

6 Courts are clear that the description of environmental conditions in an EIR, like the  
7 analyses of impacts, should be tailored to the scope, scale, and level of detail of the project under  
8 review. When the project is “broad, general, multi-objective, policy-setting, [and] geographically  
9 dispersed,” like the Delta Plan, the level of detail requested by petitioners is inappropriate. (*In re*  
10 *Bay-Delta, supra*, 43 Cal.4th at p. 1171 [rejecting call for excessive detail and quantification in  
11 program EIR]; see also *Al Larson Boat Shop, supra*, 18 Cal.App.4th at p. 749 [rejecting challenge  
12 to qualitative description of baseline conditions and impacts in program EIR]; *Rio Vista, supra*, 5  
13 Cal.App.4th at pp. 371-372 [rejecting claim that program EIR should have included details  
14 beyond what project actually entailed].) The CEQA Guidelines specify, moreover, that the level  
15 of detail required for the description of the environmental setting is even less than for the impact  
16 analyses. (Guidelines § 15125, subd. (a) [“The description of the environmental setting shall be  
17 no longer than is necessary to an understanding of the significant effects of the proposed project  
18 and its alternatives”].)

19 Nonetheless, and contrary to North Coast’s and Water Contractors’ assertions, the EIR  
20 provides a comprehensive description of the environmental setting for each of the 19 categories  
21 of impacts, with considerable information regarding existing water use, infrastructure, and  
22 supplies. (Central Delta, pp. 50-52; Water Contractors, pp. 50-51.) The description of the  
23 environmental setting for water resources alone extends for 73 pages. (D6943-7016.) The Water  
24 Resources section describes statewide sources of water, demands for water, and important storage  
25 and conveyance facilities. (D6943-6949.) It then provides additional detail regarding existing  
26 conditions and facilities in the Delta and Suisun Marsh, the Sacramento and San Joaquin River  
27 watersheds, the San Francisco Bay Area, the Tulare Basin, the Central Coast, and Southern  
28 California. (D6949-7016.)

1 The EIR also includes a separate “Water Use and Infrastructure” subsection for each of  
2 these seven regions, which quantifies both the availability and use of surface water and  
3 groundwater in each region and in major jurisdictions within the region as well. (D6953-6956,  
4 6960-6962, 6971-6975, 6981-6986, 6988-6994, 6996-6999, 7007-7016; see also D6944-6946.)  
5 These subsections also describe related actions such as water recycling and conservation, use of  
6 water for environmental purposes such as minimum flows, water transfers, and groundwater  
7 banking. (D6953-6956, 6960-6962, 6971-6975, 6981-6986, 6988-6994, 6996-6999, 7007-7016.)

8 Each subsection further details key infrastructure in the region, including major reservoirs,  
9 their capacities, and yields; desalination plants; and aqueducts and other conveyance facilities.  
10 (See, e.g., D6997 [describing capacity, average annual releases, and source and use of water in  
11 Twitchell Reservoir], D6999 [describing partially decommissioned desalination facility capable  
12 of providing 3,000 acre-feet per year and current planning for a new, 1.7 million gallon per day  
13 facility], D6990 [table listing seven key conveyance facilities serving the Bay Area, their  
14 operators and counties served, and the source and quantity of water delivered].) In short, the EIR  
15 provides precisely the information that petitioners claim is missing.<sup>75</sup>

16 Moreover, the cases cited by Central Delta are distinguishable. (Central Delta, p. 52.)  
17 First, *Neighbors for Smart Rail, supra*, 57 Cal.4th at p. 457, does not address the level of detail  
18 required by CEQA. Instead, it held that an agency may use a baseline consisting of

19  
20 <sup>75</sup> The descriptions of existing conditions in other sections of the EIR provide similar  
21 substance and detail, despite Water Contractors’ contention that the EIR “fails to account for  
22 changing conditions in California’s water supply, agriculture, and biological and other resources.”  
23 (Water Contractors, p. 50, fn. 20; see, e.g., D7380 [6% decline in agricultural land between 1994  
24 and 2008, corresponding to increase in urban lands], D7385 [shift toward high-value permanent  
25 crops in last 25 years], D7057-7060 [pervasiveness of invasive species], D7060 [altered flow  
26 regimes hurting native species], *ibid.* [sheltered waterways support invasive species and toxic  
27 algae blooms], *ibid.* [reduction in water sediment may hurt Delta smelt], *ibid.* [large numbers of  
28 fish entrained at water export facilities], D7062 [contaminants with potential to affect aquatic and  
terrestrial species], D7063 [impacts of climate change on ecosystem], D7066-7077 [listing special  
status species, many of which face habitat decline], D7081 [rates of sediment erosion and  
deposition may limit intertidal mudflat habitat in Suisun Marsh], D7082 [wildlife species  
composition shifting to those that favor submerged aquatic vegetation], D7093 [little Chinook  
salmon spawning activity in recent years near Keswick Dam], D7097 [declining numbers of  
native and nonnative fish in lower American River], D7102 [implementation of San Joaquin  
River Restoration Program in late 2006], D7105 [possible return of steelhead to San Joaquin  
River drainage], *ibid.* [return of steelhead populations to Stanislaus River].)

1 environmental conditions projected to exist in the future if the agency shows that relying on the  
2 normal baseline of existing conditions would be “misleading or without informational value.”  
3 (*Ibid.*) The court did not question the adequacy of the standard baseline, however, and the court  
4 neither discussed nor required a quantified baseline, as Central Delta suggests is necessary here.

5 Second, *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931,  
6 941, concerns a project-specific EIR for a hydro-electric project. In that case, the court found the  
7 EIR’s baseline description to be inadequate because it described operations of three existing  
8 reservoirs only in terms of end-of-month lake levels, without providing any data on the actual  
9 volume and timing of releases or the consideration given to fisheries, habitat, or recreation in  
10 making those releases. (*Id.* at 954-955.) The court also found error when the agency relied on  
11 prescribed minimum flow requirements rather than actual release data. (*Id.* at 955.) Here, in  
12 contrast, each of the impact analyses provides copious information about actual conditions at the  
13 time the Council issued the NOP. Central Delta has not identified a single specific deficiency in  
14 these descriptions. (Central Delta, pp. 50-52.) Simply making conclusory assertions that the  
15 baseline is inadequate, without supporting argument or evidence, cannot carry the petitioner’s  
16 burden in challenging an EIR. (*Pfeiffer v. City of Sunnyvale City Council, supra*, 200  
17 Cal.App.4th at p. 1573; see also Standards of Review for CEQA Claims, Part B [Forfeit Claims],  
18 *ante.*)

19 Central Delta makes the related argument that the Council improperly “deferred” analysis  
20 of water availability and thus failed to provide required information regarding “how much Delta  
21 water is available for various uses” in the EIR. (Central Delta, p. 51.) Central Delta again  
22 ignores the first-tier, programmatic nature of this EIR. As explained by the Supreme Court in *In*  
23 *re Bay-Delta*, “the description of potential water sources for the CALFED Program’s future  
24 projects . . . must be appropriately tailored to the current first-tier stage of the planning process,  
25 with the understanding that additional detail will be forthcoming when specific second-tier  
26 projects are under consideration.” (*In re Bay-Delta, supra*, 43 Cal.4th at p. 1172.) The court  
27 endorsed the “general” description of likely sources of water provided in the CALFED Program  
28

1 EIR and emphasized that “this stage of program development did not require a more detailed  
2 analysis of the Program’s future water sources, nor did it appear practicable.”<sup>76</sup> (*Id.* at p. 1173.)

3 Finally, Water Contractors’ conclusory statements that the EIR “must” explain that “[t]he  
4 historic Delta estuary cannot be fully restored in light of existing conditions within and outside of  
5 the Delta” and that “much of the water in the central and south Delta is foreign” again ignore the  
6 actual content of the EIR. (Water Contractors, pp. 48-49.) As a factual matter, the EIR does  
7 explain the historic and current, highly modified condition of the Delta ecosystem, including the  
8 fact that water released from upstream reservoirs has a significant effect on water quality,  
9 including salinity levels in the south Delta. (D6949-6952.)

10 Moreover, even if the EIR did not describe these facts, it would still be adequate under  
11 CEQA. “[A]n EIR need not include all information available on a subject. An EIR should be  
12 analytic rather than encyclopedic and should emphasize portions useful to decision-makers and  
13 the public.” (*Al Larson Boat Shop, supra*, 18 Cal.App.4th at 748 [quotation and citation omitted];  
14 see also Guidelines § 15125(a) [“The description of the environmental setting shall be no longer  
15 than is necessary to an understanding of the significant effects of the proposed project and its  
16 alternatives”]; Guidelines § 15151 [“[T]he sufficiency of an EIR is to be reviewed in the light of  
17 what is reasonably feasible. . . . The courts have looked not for perfection but for adequacy,  
18 completeness, and a good faith effort at full disclosure”].) In particular, courts reject challenges  
19 to the environmental setting unless a petitioner shows that an omission “misled the agency or the  
20 public, omitted or understated any problem, or was prejudicial in any way.” (*Al Larson Boat  
21 Shop, supra*, 18 Cal.App.4th at 749.)

22 Water Contractors fail to establish how not including their preferred language (that “[t]he  
23 historic Delta estuary cannot be fully restored in light of existing conditions within and outside of  
24 the Delta” and that “much of the water in the central and south Delta is foreign”) has affected the

25  
26 <sup>76</sup> Central Delta’s suggestion that the Council was obligated to rely on an analysis of  
27 water availability that Central Delta submitted is incorrect. (Central Delta, p. 51.) “[A]n agency  
28 realistically be measured, subject to review, as with all CEQA factual determinations, for support  
by substantial evidence.” (*CBE, supra*, 48 Cal.4th at p. 328.)

1 adequacy of the EIR’s analysis of the Delta Plan’s environmental impacts. (Water Contractors,  
2 pp. 48-51.) Conclusory statements that a particular description is “necessary,” without any  
3 explanation of the harm of the purported omission, do not demonstrate a prejudicial abuse of  
4 discretion as required to find that the Council violated CEQA. (*Al Larson Boat Shop, supra*, 18  
5 Cal.App.4th at 749 [rejecting challenge to baseline when the petitioners did “not identify, or even  
6 suggest, any manner in which the omission of more detailed information . . . [misled] the agency  
7 or the public, omitted or understated any problem, or was prejudicial in any way”].)

8 Water Contractors’ conclusory, unsupported, and frequently inaccurate allegations do not  
9 meet their burden to “lay out the evidence favorable to the other side and show why it is lacking.”

10 (*San Diego Citizenry Group, supra*, 219 Cal.App.4th at p. 17 [quotation and citation  
11 omitted]; see also Standards of Review for CEQA Claims, Part B [Forfeit Claims], *ante*.)

12 **XX. THE EIR’S ANALYSIS OF PROJECT IMPACTS IS SUPPORTED BY SUBSTANTIAL  
13 EVIDENCE**

14 **A. There Is No Substantial Evidence That the Delta Plan Will Have  
15 Significant Urban Decay Impacts**

16 Stockton argues that the Delta Plan EIR should have analyzed economic impacts of the Plan  
17 that will lead to urban decay. For purposes of CEQA, urban decay consists of general physical  
18 deterioration or blight affecting an entire area. (See, e.g., *Friends of Davis v. City of Davis* (2000)  
19 83 Cal.App.4th 1004, 1019, 1020-1022.) Stockton never identifies how the Plan could somehow  
20 lead to urban decay effects, however. The closest petitioner comes is its claim that “the Delta  
21 Plan would compel Stockton to alter existing growth patterns,” which in turn could have  
22 environmental impacts. (Stockton, pp. 22-23.) But Stockton does not explain how the Plan  
23 would alter existing growth patterns. Pointedly, Stockton ignores the fact that the Plan’s only  
24 growth-related regulation—DP P1—by its terms does *not* alter existing growth patterns. As  
25 explained below, by its terms DP P1 has no application to areas that are already designated for  
26 development.

26 Moreover, Stockton misstates the applicable standard of review and completely fails to  
27 acknowledge the evidence in the record that supports the Council’s position. Therefore, as  
28

1 discussed in detail below, Stockton’s claim that the EIR should have addressed urban decay fails  
2 legally, factually, and procedurally.

3 **1. The Substantial Evidence Standard, Not the “Fair Argument”**  
4 **Standard, Applies to the Council’s Conclusion About Whether**  
5 **Significant Urban Decay Impacts May Occur**

6 The Council determined that there was no potential for urban decay to occur and stated its  
7 reasons for that conclusion.<sup>77</sup> (See, e.g., D565, 606, 629 [Final EIR responses to comments].)  
8 The CEQA Guidelines expressly provide for this approach. (Guidelines §§ 15128, 15126.2, subd.  
9 (a) [“An EIR shall identify and focus on the significant environmental effects of the proposed  
10 project. . . .”].) Contrary to Stockton’s arguments (Stockton, pp. 14-15), the Council’s  
11 determination is subject to the substantial evidence standard, not the “fair argument” standard.  
12 (*Friends of Davis, supra*, 83 Cal.App.4th at p. 1017; *Anderson First Coalition v. City of Anderson*  
13 (2005) 130 Cal.App.4th 1173, 1183-1184 (*Anderson*); see also *North Coast Rivers Alliance v.*  
14 *Marin Municipal Water Dist.* (2013) 216 Cal.App.4th 614, 638 [conclusion that an impact will be  
15 less than significant can be based on substantial evidence anywhere in the record].)

16 In support of its argument, Stockton cites to three cases, all of which are inapposite.  
17 (Stockton, pp. 14-15.) *California Clean Energy Committee v. City of Woodland* (2014) 225  
18 Cal.App.4th 173, 188, does not, as Stockton argues, use the “fair argument” standard to judge  
19 whether a subsequent EIR was required. (Stockton, pp. 14-15.) The court in *California Clean*  
20 *Energy* simply recites, by way of background explanation, the standard for determining when an  
21 EIR is required in the first instance. (See *California Clean Energy, supra*, 225 Cal.App.4th at p.  
22 188.) Because the Council prepared an EIR for the Delta Plan, the standard of review for judging  
23 the adequacy of the analysis of impacts is the substantial evidence standard. (*Ibid.*) Nor does the

24  
25 <sup>77</sup> Stockton provides no citations to support its allegation that a “report submitted by [the  
26 Council]” concluded that the Plan would have urban decay impacts. (Stockton, p. 16.) Hence,  
27 Stockton has waived this claim. Regardless, if one assumes that Stockton meant to cite to the  
28 Economic and Fiscal Impact Statement prepared for the Delta Plan regulations as required by the  
Administrative Procedures Act (E1359-1370), that report did not identify or even involve  
physical effects on the environment, but rather the estimated economic private sector cost impacts  
and the fiscal effects of the Plan’s regulatory policies on government. (*Ibid.*)

1 court in *Bakersfield, supra*, 124 Cal.App.4th at pages 1197-1198, 1207-1208, use the fair  
2 argument standard.<sup>78</sup>

3 Moreover, Stockton's citation to *Protect the Historic Amador Waterways v. Amador Water*  
4 *Agency* (2004) 116 Cal.App.4th 1099 appears to concede that the Council used the correct  
5 approach to the analysis of whether the Delta Plan may have urban decay impacts. (Stockton, p.  
6 15.) As that case holds, "[o]nce the agency has determined that a particular effect will not be  
7 significant. . . the EIR need not address that effect in detail." (*Protect the Historic Amador*  
8 *Waterways, supra*, 116 Cal.App.4th at p. 1109; see also *North Coast Rivers Alliance, supra*, 214  
9 Cal.App.4th at p. 638 ["CEQA does not require detailed analysis of an impact that is less than  
10 significant"]; Guidelines § 15128 ["an EIR shall contain a statement briefly indicating the reasons  
11 that various possible significant effects of a project were determined not to be significant and  
12 therefore not discussed in detail in the EIR"].)

13 **2. Petitioners Have Not Shown That There Is Substantial Evidence of**  
14 **Social and Economic Effects that May Lead to Significant Urban**  
15 **Decay**

16 In order to establish that the Delta Plan EIR should have analyzed urban decay, Stockton  
17 must first show that substantial evidence in the record establishes that the Plan will have  
18 economic or social effects that will result in significant adverse physical urban decay effects. It  
19 has not done so.

20 CEQA expressly requires that "[e]conomic and social changes resulting from a project shall  
21 not be treated as significant effects on the environment." (Guidelines §§ 15064, subd. (e), 15131,  
22 subd. (a).) "Substantial evidence" specifically *excludes* "evidence of social or economic impacts  
23 that do not contribute to, or are not caused by, physical impacts on the environment." (Pub.  
24 Resources Code, § 21080, subd. (e)(2); Guidelines § 15384, subd. (a).) CEQA does, however,  
25 allow consideration of economic and social effects in order to (1) trace a chain of effects from the

26 <sup>78</sup> *Bakersfield, supra*, 124 Cal.App.4th at page 1208, is also distinguishable because,  
27 unlike the Delta Plan EIR, the EIRs in that case did not consider or contain *any* statement  
28 indicating the reasons for determining that urban decay was not a significant effect of the  
proposed project.

1 project through anticipated economic or social effects to physical change; or (2) determine the  
2 significance of physical changes caused by the project. (Guidelines § 15131, subds. (a), (b); see  
3 also *id.* §15064, subd. (e).) When there is substantial evidence that economic and social effects  
4 caused by a project “could result in a reasonably foreseeable indirect environmental impact, such  
5 as urban decay or deterioration, then the CEQA lead agency is obligated to assess this indirect  
6 environmental impact.” (*Anderson, supra*, 130 Cal.App.4th 1173, 1182.)

7 Thus, under CEQA, an EIR must only consider urban decay when there is substantial  
8 evidence that a project will cause physical deterioration or blight in the general area. (See  
9 *Friends of Davis, supra*, 83 Cal.App.4th at pp. 1019, 1021-1022 [appellants had not presented  
10 any evidence that a chain bookstore will cause other bookstores to close, “thus leading to a  
11 general deterioration of the downtown area”]; *City of Pasadena v. State of California* (1993) 14  
12 Cal.App.4th 810, 828, disapproved on other grounds by *Western States Pet. Assn. v. Superior*  
13 *Court, supra*, 9 Cal.4th at pp. 570-571 [categorical exemption was appropriate because appellant  
14 failed to prove that relocation of a parole office “would cause the physical deterioration of the  
15 area”]; Guidelines, § 15064, subd. (d)(3) [An impact “which is speculative or unlikely to occur is  
16 not reasonably foreseeable”].) There is no such evidence in this case.

17 Stockton’s main argument is that the Plan will have urban decay effects due to its effects on  
18 urban growth. (Stockton, pp. 22-24.) But Stockton fundamentally misunderstands the Plan. The  
19 relevant Plan policy, DP P1 [Locate New Urban Development Wisely], does not apply in areas  
20 that Stockton has identified for development in the city’s General Plan or its sphere of influence<sup>79</sup>  
21 as of May 16, 2013 [the date the Plan was adopted], nor does it apply to previously approved  
22 Master Infrastructure Plans. (Wat. Code, § 85225; B445-446.) Rather, DP P1 only applies to  
23 “[n]ew residential, commercial and industrial development” *outside* of “[a]reas that city or county  
24 general plans, as of May 16, 2013, designate for residential, commercial, and industrial  
25 development in cities or in their spheres of influence” and other areas in Contra Costa County,

26  
27 <sup>79</sup> “‘Sphere of influence’ means a plan for the probable physical boundaries and service  
28 area of a local agency, as determined by the [local agency formation] commission.” (See Govt.  
Code, §§ 56027 and 56076.)

1 San Joaquin County, and six unincorporated Delta towns. (B455 [Policy DP P1, subd. (a)(1)-  
2 (4)].) Moreover, “new residential, commercial, and industrial development is permitted outside  
3 the areas described in subsection (a) if it is consistent with the land uses designated in county  
4 general plans as of May 16, 2013, and is otherwise consistent with this Chapter.” (*Id.* subd. (b).)  
5 Hence, DP P1 does not apply to residential, commercial, or industrial development in areas  
6 already identified in Stockton’s general plan or sphere of influence for these uses.<sup>80</sup>

7 Stockton’s only other argument is its speculation that the Council “will reject infrastructure  
8 expansions...unless proposed facilities are substantially redesigned and relocated to be consistent  
9 with the Delta Plan.” (Stockton, pp. 3-4.) But Stockton cites to no Plan policy or evidence that  
10 leads to this pessimistic view. The only Delta Plan policy that might impact Stockton’s  
11 infrastructure is DP P2. (B456.) That policy, in relevant part, provides that, when feasible, water  
12 management facilities must be sited to avoid conflicts with existing uses or with uses depicted in  
13 a city or county’s (including Stockton’s) general plan.<sup>81</sup> Stockton does not even attempt to argue  
14 that it will be siting a water management facility in a location that conflicts with existing uses or  
15 uses depicted in its own general plan and that this, consequently, will lead to urban decay.

16 Moreover, as discussed in more detail below, Stockton’s two experts do not point to any  
17 evidence that the Plan will cause urban decay. Rather, they merely present conclusions based on  
18 speculation and contradictory arguments. Stockton’s mere speculation that such effects will  
19 occur does not require the Council to analyze urban decay.

20  
21 <sup>80</sup> Furthermore, the Plan expressly does not provide authority to abrogate any “vested  
22 right whether created by statute or by common law.” (DP P1, subd. (j)(4); Wat. Code, § 85057.5,  
subd. (d).)

23 <sup>81</sup> DP P2 states:

24 Water management facilities, ecosystem restoration, and flood  
25 management infrastructure must be sited to avoid or reduce conflicts with existing  
26 uses or those uses described or depicted in city and county general plans for their  
27 jurisdictions or spheres of influence when feasible, considering comments from  
28 local agencies and the Delta Protection Commission. Plans for ecosystem  
restoration must consider sites on existing public lands, when feasible and  
consistent with a project’s purpose, before privately owned sites are purchased.  
Measures to mitigate conflicts with adjacent uses may include, but are not limited  
to, buffers to prevent adverse effects on adjacent farmland.  
(B456.)

1                   **3. Stockton’s “Evidence” Consists of Unsupported, Speculative, and**  
2                   **Erroneous Conclusions**

3                   Even the “evidence” Stockton does cite fails to support its assertion that the Delta Plan will  
4                   lead to urban decay. Stockton submitted letters to the Council from Mr. Stephen Chase and Dr.  
5                   C. Mel Lytle. (Stockton, p. 22.) While these letters speculate that the Plan will result in urban  
6                   decay, the letters provide no factual basis for this conclusion in the form of economic effects  
7                   reasonably leading to urban decay. Rather, the letters present statements that are speculative, as  
8                   well as contradictory. Thus, they do not constitute substantial evidence of the potential for the  
9                   Plan to lead to urban decay. (Pub. Resources Code, § 21080, subd. (e)(2); Guidelines §§ 15384,  
10                  subd. (a), 15064, subd. (d)(3) [an impact “which is speculative or unlikely to occur is not  
11                  reasonably foreseeable”].)

12                  While the Chase letter states that Stockton faces severe unemployment, underemployment,  
13                  health, and education issues, those are existing conditions that will not be further adversely  
14                  affected by the Plan.<sup>82</sup> In fact, the Plan may actually improve these conditions. (See C96 [Delta  
15                  Plan has the greatest ability among the alternatives to arrest or reverse environmental decline,  
16                  including decline in flood protection and agricultural resources, and will improve water supply  
17                  reliability], C99-101 [Delta Plan will improve water conveyance, expand water storage, and  
18                  reduce risks to people and property through improving emergency preparedness, appropriate land  
19                  uses and flood protection], C100 [Delta Plan will improve the ecosystem which will benefit  
20                  commercial and recreational fisheries, recreation and tourism, and rural agriculture].)

21                  The Chase letter further alleges that the Plan “may partially or totally nullify or  
22                  substantially impede Stockton’s municipal infrastructure utility master plans,” and that  
23                  “development cannot proceed without sufficient infrastructure to support the proposed  
24                  development and the master plans represent the certainty and stability of sufficient

25  
26                  <sup>82</sup> See *Anderson, supra*, 130 Cal.App.4th at p. 1182 (the city concluded that there was no  
27                  evidence that the central business district would suffer from “*additional physical blight or a*  
28                  *significant deterioration of character’* as a result of the Project” [italics in original]; *id.* at p. 1183  
                  [“The EIR concluded that the Project would not result in additional physical deterioration of the  
                  City’s . . . downtown”].)

1 infrastructure.” (I530.) In Mr. Chase’s opinion, “uncertainty over implementing infrastructure  
2 and utility master plans has a substantial chilling effect over forming capital to fund new job  
3 creation and economic growth projects and would discourage retail, office and commercial  
4 developers from considering Stockton as a potential location for development.” (I530-532.) But  
5 the letter never explains how the two relevant Delta Plan policies (DP P1 and DP P2) either create  
6 uncertainty or undermine Stockton’s infrastructure plans.<sup>83</sup>

7 Furthermore, there is no substantial evidence supporting a multi-step chain of events  
8 leading from the Delta Plan to general physical deterioration in Stockton. As explained at length,  
9 above, the record contains ample substantial evidence that the Plan will not apply to most  
10 development in Stockton or even outside Stockton in its sphere of influence. Furthermore, to the  
11 extent the Plan would apply to an expansion of infrastructure, such as the City’s wastewater  
12 treatment plant, there is no substantial evidence that submitting a certification of consistency  
13 would have any such chilling effect, let alone lead to any significant environmental effects  
14 including urban decay. Stockton’s claim is entirely speculative and unsupported by substantial  
15 evidence.

16 Further undermining the credibility of Stockton’s argument, both the Chase and Lytle  
17 letters postulate, without citing any evidence or specific Plan policies, that the Plan will require  
18 duplicate or “parallel” infrastructure to be constructed, which will *remove obstacles to growth*  
19 and *induce growth* not presently contemplated in the General Plan. (I532-533; K12210.01-  
20 12210.05.) In addition to being completely unsupported by substantial evidence, the Chase and  
21 Lytle allegations—that the Plan will *induce* unplanned growth—are inconsistent with their  
22 allegations, summarized above, that the Plan *will have a chilling effect* on development and  
23 economic growth. The City’s unsupported and inaccurate opinions on this subject by definition  
24 do not constitute substantial evidence. (Pub. Resources Code, § 21080, subd. (e)(2).)

25  
26  
27 <sup>83</sup> Moreover, the Chase letter also admits that the City, itself, has not yet finalized these  
28 master plans, which “still require some degree of revision to match changing circumstances.”  
(I530.)

1 Stockton, relying on *Bakersfield*, *supra*, 124 Cal.App.4th 1184, seems to argue that *any*  
2 expert opinion, whether substantiated or not, may constitute substantial evidence. (Stockton, p.  
3 19, fn. 4 [referring to p. 15, fn. 2].) To qualify as substantial evidence, however, CEQA requires  
4 expert opinion to be “supported by fact.” (Pub. Resources Code, § 21080, subd. (e)(1).) In  
5 *Bakersfield*, the petitioner challenged the EIR for the development of two retail shopping centers  
6 located 3.6 miles apart and containing a Wal-Mart Supercenter. (*Id.* at pp. 209-210.) The record  
7 contained a study by an expert that identified specific stores within a 5-mile study area that were  
8 at risk of closure because the proposed shopping centers would oversaturate the market.

9 (*Bakersfield*, *supra*, 124 Cal.App.4th at p. 1209.) The record also contained numerous  
10 studies and articles, as well as testimony from numerous individuals, showing urban decay in  
11 other communities with similarly saturated markets. (*Id.* at pp. 1208-1211.) Based on this  
12 substantial evidence in the record, the court held the EIR was deficient because it did not analyze  
13 urban decay impacts. (*Id.* at p. 1213.) In stark contrast to the evidence of urban decay the  
14 petitioner provided in *Bakersfield*, here the “evidence” proffered by Stockton consists of  
15 unsupported and erroneous conclusions, not expert study of specific stores at risk of closure.  
16 Furthermore, unlike *Bakersfield*, the Plan does not authorize specific development in specific  
17 locations (e.g., a shopping center).

18 The instant case provides an even stronger ground for upholding the Council’s no urban  
19 decay determination than existed in *Anderson*, *supra*, 130 Cal.App.4th at pp. 1183-1185, 1186.  
20 In *Anderson*, the court considered whether the City of Anderson should have analyzed the urban  
21 decay effects of a shopping center anchored by a Wal-Mart Supercenter. (*Id.* at p. 1182-1183.)  
22 The city compared its own analysis to urban decay studies submitted by petitioner and determined  
23 that the potential for urban decay was speculative and, therefore, not reasonably foreseeable. The  
24 city conceded that while the proposed project could affect two downtown pharmacies, it  
25 determined that some businesses might benefit from the project and that the “studies did not  
26 persuade City that the *economic* effects of the project will foreseeably result in significant  
27 *environmental* effects.” (*Id.* at p. 1184 [emphases in original].) Reviewing the record in the light  
28 most favorable to the city’s conclusion of no foreseeable urban decay effects, the court held that

1 substantial evidence supported the city's conclusion that the impact of the development was  
2 speculative and that urban decay impacts would be less than significant. (*Id.* at pp. 1185-1186.)  
3 Notably, the *Anderson* court distinguished the decision in *Bakersfield*, in which, as discussed  
4 above, the EIR failed to consider the potential for urban decay notwithstanding a great deal of  
5 evidence of that potential. (*Id.* at p. 1185 [citing *Bakersfield, supra*, 124 Cal.App.4th at pp. 1193,  
6 1208-1212].)<sup>84</sup>

7 This case is also similar to *Melom v. City of Madera* (2010) 183 Cal.App.4th 41, 52, in  
8 which the court reviewed the evidence in the record and confirmed the city's decision that no  
9 subsequent EIR was required when the retail component of a project was increased because there  
10 was no evidence, expert or otherwise, that approval of the project might lead to urban decay. As  
11 in *Anderson*, the court in *Melom* distinguished *Bakersfield, supra*, 124 Cal.App.4th 1184, in  
12 which there was such evidence. (*Melom, supra*, 183 Cal.App.4th 41 at p. 49.)

13 Unlike *Bakersfield*, but similar to *Anderson* and *Melom*, here there is no evidence  
14 whatsoever that the Plan will cause economic or social effects that might lead to physical urban  
15 decay. (*Anderson, supra*, 130 Cal.App.4th at pp. 1184-1186; *Melom, supra*, 183 Cal.App.4th at  
16 pp. 49-51.) As discussed above, the Plan will not cause either direct or indirect economic effects  
17 because the Plan does not retroactively apply to previously approved city plans, including  
18 Stockton's Master Infrastructure Plans. (Wat. Code, §§ 85057.5, subds. (b)(6)-(7), (c).)

19 In addition, and as discussed in more detail below, the Council countered Stockton's  
20 concerns with expert opinion of its own and explained why the opposite of Stockton's claims is  
21 more likely to be true. For example, Council staff testified that the Plan will not affect growth

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22 <sup>84</sup> *California Clean Energy Committee*, relied on by Stockton, is inapposite. (Stockton, p.  
23 14.) That case does not concern the adequacy of the EIR's analysis of urban decay impacts, but  
24 rather whether mitigation measures identified in Woodland's EIR would reduce identified urban  
25 decay impacts to a less-than-significant level. (*Cal. Clean Energy, supra*, 225 Cal.App.4th at pp.  
26 196-200.) Therefore, *California Clean Energy* does not govern Stockton's challenge to the  
27 adequacy of the Delta Plan EIR on the subject of whether alleged urban decay impacts would, in  
28 fact, occur. *City of Redlands v. Cty. of San Bernardino* (2002) 96 Cal.App.4th 398, 404-405, 414,  
also cited by Stockton (Stockton, p. 23), is distinguishable because it applies the fair argument  
standard to determine that an EIR, rather than a negative declaration, should have been prepared  
for a county's general plan amendment. In the case at hand, the Council did prepare an EIR.

1 patterns, referring to both Policy DP P1 and the Plan's invasive species policy, Policy EP P5.  
2 (B456; see separately filed Transcript of Excerpts from the Administrative Record ("A/R  
3 Transcript"), pp. 8-15, 18-19; see also F561 [video] [Index 21, Segment 22 at 00:45-9:33, 15:24-  
4 17:39] [5/16/13 testimony of Dan Ray].) In properly applying the standard of review in the light  
5 most favorable to the Council, the courts afford discretion to the agency and its expertise.  
6 (*Anderson, supra*, 130 Cal.App.4th at p. 1183 [court reviews the record "in the light most  
7 favorable to the [agency's] conclusion to determine whether substantial evidence supports the  
8 conclusion that the impact of urban decay is less than significant"]; *Friends of Davis, supra*, 83  
9 Cal.App.4th at p. 1021 [same]; *Anderson, supra*, 130 Cal.App.4th at p. 1185 [while a good  
10 argument could be made for petitioners, a good argument also was made by the City and the court  
11 deferred to the City's conclusion].) "It is also well established that '[d]isagreement among  
12 experts does not make an EIR inadequate [citation].'" (*Laurel Heights I, supra*, 47 Cal.3d at p.  
13 409.)

14 Stockton claims that the Council "did not challenge the qualifications of the two experts  
15 presented by the City or the opinions offered," or "acknowledg[e] that Stockton expressed an  
16 urban decay concern" beyond the testimony of Deputy Attorney General Jim Andrew. (Stockton,  
17 pp. 6, 18-19.) This erroneous characterization of the record does not acknowledge Council Chief  
18 Deputy Director Dan Ray's<sup>85</sup> ten plus minutes of testimony at the same meeting made in direct  
19 response to Stockton's urban decay comments.<sup>86</sup> (A/R Transcript, pp. 8-15, 18-19; see also F561

20 <sup>85</sup> Mr. Ray is also a professional planner certified by the American Institute of Certified  
21 Planners. (A/R Transcript, pp. 8, 11, 13; see also F561 [video] Index 21, Segment 22 at 00:45-  
22 1:02 [5/16/13 testimony of Dan Ray].) "An agency may rely on the expertise of its planning staff  
23 in determining whether a project will not have a significant impact on the environment."  
24 (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196  
25 Cal.App.4th 515, 529-530 [citing *Porterville Citizens for Responsible Hillside Development v.*  
26 *City of Porterville* (2007) 157 Cal.App.4th 885, 907 and *Greenebaum v. City of Los Angeles*  
27 (1984) 153 Cal.App.3d 391, 413].)

28 <sup>86</sup> While Stockton's brief makes a fleeting mention of "Mr. Ray's statement," it provides  
no context or explanation that Mr. Ray's testimony was made in response to Stockton's May  
2013 urban decay comments. Further, even this mention of Mr. Ray's statement misstates the  
substance of his testimony. Stockton says that Mr. Ray testified that in the future the Council will  
not interpret "covered actions" in accordance with the plain statutory language, whereas what Mr.  
Ray actually said is that, in keeping with the regulation, development in areas designated for  
development within a city or its sphere of influence, as of the date the Delta Plan was adopted,  
would not be regulated as a covered action. (See Stockton, p. 20; A/R Transcript, pp. 8-15; 18-

(continued...)

1 [video] Agenda Item 6: Index 21, Segment 22 at 00:45-9:03, 15:24-17:39 [5/16/13 testimony of  
2 Dan Ray].) Mr. Ray explained that the Plan does not affect land use within cities or their spheres  
3 of influence, distinguished examples previously cited by Stockton's representatives, and testified  
4 that any urban decay impacts from the Plan are speculative. (*Ibid.*) Moreover, Stockton's  
5 selective representation of Mr. Andrew's testimony is inaccurate. Stockton fails to cite to or  
6 address the portion of Mr. Andrew's testimony in which he gives evidence and distinguishes  
7 Stockton's urban decay examples. (Stockton, pp. 12, 18-19; see A/R Transcript, pp. 15-18; see  
8 also F561 [video] Agenda Item 6: Index 21, Segment 22 at 9:27-11:20, 12:16-14:07 [5/16/13  
9 testimony of James Andrew].) This failure to cite material evidence constitutes a waiver of  
10 Stockton's claims.

11 **4. Substantial Evidence in the Record, Which Stockton Fails to Cite,**  
12 **Supports the Council's Determination That the Delta Plan Will Not**  
13 **Have Significant Urban Decay Impacts**

14 Not only does Stockton fail to provide substantial evidence of urban decay, it ignores the  
15 substantial evidence in the record supporting the Council's conclusion of no urban decay impacts.  
16 Contrary to Stockton's assertions, the Council responded to Stockton's comments and testimony  
17 throughout the EIR and Delta Plan review process, yet Stockton fails to cite this substantial  
18 evidence in its brief. For example, Stockton claims that the Council received the City's written  
19 and oral comments, including a January 14, 2013, comment letter and two additional letters from  
20 Stephen Chase and Dr. Mel Lytle on March 28, 2013, "without offering any comment."  
21 (Stockton, pp. 2-4, 16 ["the [Council] fully ignored the statements"].) This is untrue. The  
22 Council's responses to Stockton's January 14, 2013, comment letter, as well as its responses to  
23 Stockton's earlier comment letters, are in the record. (D3504-3521 [Council's response to  
24 1/14/13 Stockton Recirculated Draft EIR comments]; D605-639 [Council's response to 2/2/12

25 \_\_\_\_\_  
26 (...continued)

27 19; see also F561 [video] Agenda Item 6: Index 21, Segment 22 at 00:45-9:03, 15:24-17:39  
28 [5/16/13 testimony of Dan Ray].) Petitioner did not set forth all material evidence and did not  
fairly portray the evidence; therefore, it failed to carry its burden of proof. (*Citizens for  
Responsible Equitable Environmental Development, supra*, 196 Cal.App.4th at pp. 529-530.)

1 Stockton Draft EIR comments]; K12216-12221 [1/16/13 Council letter to Stockton Mayor Silva];  
2 K9752-9755 [11/8/12 Council letter to Stockton Mayor Johnston].)

3 The Council's responses to Stockton's comments on the Draft EIR, for example Comments  
4 LO195-4 and -51, address Stockton's main contentions about urban decay, explaining that (1) the  
5 Delta Plan does not retroactively affect previously approved plans, programs, or projects; (2) it  
6 does not affect the land uses in Stockton's adopted general plan for the incorporated city or its  
7 sphere of influence; and (3) social and economic impacts are not effects on the environment under  
8 CEQA. (D606, 615, 629; see also D565.) The Council also sent a letter to Stockton Mayor  
9 Anthony Silva on April 16, 2013, which specifically addresses the Chase and Lytle letters  
10 referred to in Stockton's brief and reiterates the Council's earlier response to Stockton in late  
11 2012, which is also in the record. (K12216-12221 [1/16/13 Council letter to Stockton Mayor  
12 Silva]; K9752-9755 [11/8/12 Council letter to Stockton Mayor Johnston].)

13 Stockton also fails to cite evidence favorable to the Council from the May 16, 2013,  
14 Council meeting at which Stockton presented testimony and submitted additional letters from Mr.  
15 Chase and Dr. Lytle. As stated above, at the May 16, 2013, Council hearing, Mr. Ray testified, in  
16 response to Stockton's testimony, that the Plan does not affect land use patterns within the areas  
17 covered by Stockton's general plan and its sphere of influence. That is because the only actions  
18 regulated by the Plan are actions covered by the Plan's policies, and policy DP P1 only applies  
19 outside of the City limits and its sphere of influence. Policy ER P5, which requires avoiding or  
20 mitigating for potential introduction of nonnative invasive species, could apply within the City or  
21 its sphere of influence; however, there is no substantial evidence, and no one has argued, that ER  
22 P5 will lead to urban decay in Stockton. Therefore, Mr. Ray concluded, there was nothing to  
23 analyze in the EIR with regard to the effects on land use in Stockton. (A/R Transcript, pp. 18-19;  
24 see also F561 [video] Index 21, Segment 22 at 15:24-17:39 [5/16/13 testimony of Dan Ray].)

25 Mr. Ray also testified that the Council's expert, CH2MHill, reviewed Stockton's Master  
26 Infrastructure Plans for the Council and found that the Plan would be limited to having a potential  
27 effect on a single speculative 2,500-acre development outside of Stockton's sphere of influence  
28 on land that is flood-prone cropland with no current services and no assurance of obtaining any.

1 (A/R Transcript, pp. 11-13; see also F6 [video] Index 21, Segment 22 at 00:45-9:03.) As Mr. Ray  
2 further testified, the Plan does not prohibit Stockton from providing municipal services to planned  
3 development. (*Ibid.*) To the contrary, Plan recommendation DP R5 recommends that Caltrans,  
4 local agencies and utilities meet infrastructure needs consistent with adopted State and local  
5 plans. (B456; A/R Transcript, p. 11; see also F561 [Index 21, Segment 22 at 00:45-9:33 [5/16/13  
6 testimony of Dan Ray].)

7 The Plan consistency certification requirement could apply to an expansion of the City's  
8 wastewater treatment plant because the Plan contains specific water management policies that  
9 may be implicated by the proposed expansion. (See DP P2 [siting water management facilities];  
10 see also K12217 [April 16, 2013, letter from Council to Stockton Mayor Silva responding to  
11 Chase and Lytle letters, at p. 2].) Pursuant to DP P2, "[w]ater management facilities . . . must be  
12 sited to avoid or reduce conflict with existing uses or those uses described or depicted in city and  
13 county general plans for their jurisdictions or spheres of influence when feasible . . . ." (DP P2,  
14 subd. (a)); see also *id.*, subd. (b), CCR § 5001, subd. (j)(1)(E); Wat. Code, § 85057.5, subd.  
15 (a)(3).) However, even if the Plan applies to the wastewater treatment plant expansion referred to  
16 in Stockton's letters, there is no evidence that such an expansion would need to be modified  
17 significantly enough to create economic impacts, let alone physical urban decay impacts resulting  
18 from economic impacts.

19 In addition, Deputy Attorney General James Andrew distinguished examples cited by Steve  
20 Herum, Stockton's counsel, and testified that any urban decay impacts from the Plan are  
21 speculative. (A/R Transcript, pp. 15-16; see also F 561 [video] Index 21, Segment 22 at 9:27-  
22 11:20 [5/16/13 testimony of James Andrew].) Mr. Andrew also testified that the Council sent a  
23 letter to Stockton on April 16, 2013, explaining that the certification of consistency process would  
24 not lead to inordinate delays. Stockton's claim that the Plan's consistency requirement will cause  
25 a "chilling effect" on development is thus unsupported. (A/R Transcript, pp. 16-18; see also F651  
26 [Index 21, Segment 22 at 12:16-14:09]; K12216-12217 [April 16, 2013 letter].)

27 Stockton's failure to cite to or disclose any evidence in the record favorable to the Council  
28 must be viewed as a concession that the Council's decisions were supported by substantial

1 evidence; therefore, Stockton’s challenges to the EIR based on alleged failure to consider urban  
2 decay issues must fail. (*Citizens, supra*, 149 Cal.App.4th at p. 113.)

3 Furthermore, the Council was entitled to decide which evidence to believe. In *Anderson*,  
4 the court explained that “we do not review the record, as the Coalition wishes us to do, to  
5 determine whether it demonstrates a possibility of environmental impact; we review it in the light  
6 most favorable to City’s conclusion to determine whether substantial evidence supports the  
7 conclusion that the impact of urban decay is less than significant.” (*Anderson, supra*, 130  
8 Cal.App.4th at p. 1183 [citing *Bakersfield, supra*, 124 Cal.App.4th at pp. 1207-1208; *Friends of*  
9 *Davis, supra*, 83 Cal.App.4th at p. 1021].) Similarly, here, the Delta Plan EIR’s conclusion of no  
10 significant impact is supported by substantial evidence, and Stockton’s claim must fail.

11 **5. The EIR Adequately Analyzes the Significant Adverse Physical**  
12 **Environmental Effects of the Plan**

13 Although the Council determined that there was no evidence the Plan would cause urban  
14 decay, the EIR did analyze the types of physical effects on the environment that Stockton alleges  
15 would result from social and economic impacts. Again, Stockton fails to inform the court that all  
16 of these impacts were analyzed in the EIR, and fails to cite to the portions of the record  
17 containing these analyses. (See Stockton, p. 18.)

18 Specifically, Stockton asserts that the EIR must address various “indirect” effects of the  
19 Plan on land use patterns, agricultural lands, infrastructure, traffic, greenhouse gas emissions,  
20 energy demand, and air pollution. (Stockton, pp. 3, 4, 24.) The EIR does in fact analyze all  
21 required physical effects on the environment that would result from implementation of the Delta  
22 Plan. This analysis is provided in numerous sections of the EIR, including, but not limited to, the  
23 following sections addressing the subjects mentioned in Stockton’s Brief (Stockton, p. 24):

- 24 • Land use and planning impacts are analyzed in EIR Section 6. (D6105-6118  
25 [Recirculated Draft EIR at 6-3 to 6-16]; D7343-7359 [Draft EIR at 6-46 to 6-62].)
- 26 • Agricultural resources impacts, including conversion of farmland, are analyzed in  
27 EIR Section 7 (Impacts 7-1, 7-5). (D6125-6126, 6128-6129, 6130-6131, 6133-6134,  
28

1 6134-6135, 6136-6137, 6138, 6140-6141, 6142, 6144, 7394-7396, 7401-7402, 7405-  
2 7406, 7409-7410, 7411-7412, 7415-7416, 7417-7418, 7421-7423, 7423-7424, 7426-  
3 7427.)

- 4 • Air quality impacts are analyzed in EIR Section 9. (D6177-6196 [Recirculated  
5 Draft EIR at 9-3 to 9-22]; D7523-7546 [Draft EIR at 9-14 to 9-37].)
- 6 • Traffic and transportation impacts are analyzed in EIR Section 19. (D6437-6464  
7 [Recirculated Draft EIR at 19-3 to 19-30]; D8031-8056 [Draft EIR at 19-20 to 19-45].)
- 8 • Impacts on utilities are analyzed in EIR Section 20 (Impact 20-6). (D6479  
9 [Recirculated Draft EIR at 20-9]; D8091 [Draft EIR at 20-14].)
- 10 • Climate change and greenhouse gas impacts are analyzed in EIR Section 21.  
11 (D6485-6504 [Recirculated Draft EIR at 21-3 to 21-22]; D8108-8127 [Draft EIR at 21-9  
12 to 21-28].)
- 13 • Energy use and conservation is analyzed in EIR Section 24.2. (D6555-6560  
14 [Recirculated Draft EIR at 24-5 to 24-10]; D8236-8241 [Draft EIR at 24-11 to 24-16];  
15 see also D73-74 [Master Response 2 § 2.5]; D88-92 [Master Response 5 §§ 5.3.1, 5.3.2].)

16 In summary, substantial evidence in the record demonstrates that the EIR analyzed all of  
17 the potentially significant environmental effects of the Delta Plan, and petitioners have not carried  
18 their burden to prove otherwise.

19 **B. The Analysis of Water Supply Impacts in the EIR Is Complete,  
20 Thoroughly Supported, and Appropriate to the Nature of the Delta Plan**

21 The Delta Plan includes two sets of provisions that could reduce the amount of water  
22 conveyed through and exported from the Delta. First are a series of policies and  
23 recommendations aimed at reducing the State's reliance on the Delta by encouraging the  
24 development of local and regional supplies.<sup>87</sup> The foremost of these provisions, Policy WR P1,

25 <sup>87</sup> These are WR P1 (Reduce Reliance on the Delta and Increase Regional Self Reliance);  
26 WR R1 (Implement Water Efficiency and Water Management Planning Laws); WR R2 (Require  
27 SWP Contractors to Implement Water Efficiency and Water Management Laws); WR R3  
28 (Compliance with Reasonable and Beneficial Use); WR R4 (Expanded Water Supply Reliability  
Element); WR R5 (Develop Water Supply Reliability Element Guidelines); WR R6 (Update  
Water Efficiency Goals); WR R7 (Revise State Grant and Loan Priorities); WR R8 (Demonstrate  
(continued...))

1 could, under certain circumstances, condition a water supplier's receipt of exports through and  
2 from the Delta on the development of such alternative supplies. (See D85-86 [explaining  
3 operation of WR P1].)

4 The other key provision is ER R1, urging the State Water Resources Control Board  
5 (SWRCB) to amend the 2006 Bay-Delta Plan to adopt updated flow objectives "that are  
6 necessary to advance the coequal goals" for the Delta. (D86.) Such flow objectives mandate the  
7 volume of water that flows out of the Delta's rivers and into San Francisco Bay. (*Id.*; J163711-  
8 163714.) The Plan and the sources it cites explain that the flow objectives that best advance the  
9 coequal goals will be those that bring about "more natural" flows within and out of the Delta.  
10 (See B602-608, 621.)

11 Petitioners Water Contractors and Stockton both make the unsupportable claim that the EIR  
12 fails to analyze the impacts of these policies. (Stockton, pp. 27-28; Water Contractors, pp. 61-  
13 62.) In fact, these petitioners have overlooked what the EIR actually contains. The EIR contains  
14 all of the analyses that Stockton and Water Contractors seek, and each of the analyses are  
15 supported by substantial evidence in the record.

16 **1. The EIR Adequately Analyzes All of the Delta Plan's Water Supply**  
17 **Impacts**

18 The EIR considers whether the Plan's policies and recommendations would cause an  
19 adverse impact related to any "[s]ubstantial[] change [in] water supply availability to water users  
20 located outside of the Delta that use Delta water." (E.g., D7017.) Water Contractors attempt to  
21 distract attention away from the EIR's threshold of significance by focusing on "Delta water  
22 supplies." (Water Contractors, p. 65.) Water Contractors fail to understand what the EIR  
23 considers to be a significant impact. Reducing the amount of water that is ultimately available to  
24 users of Delta water would be a significant impact in the EIR's analysis, but simply reducing the  
25

26 (...continued)  
27 State Leadership); WR R13 (Complete Surface Water Storage Studies); WR R14 (Identify Near-  
28 term Opportunities for Storage, Use, and Water Transfer Projects); WR R15 (Improve Water  
Transfer Procedures); WR R18 (California Water Plan). (B446-451.)

1 amount of water that such water users would otherwise receive from or through the Delta is not in  
2 itself a significant impact. The Delta is not the only water source for its users. Exporters such as  
3 Water Contractors have additional supplies (B544), in addition to alternative supplies encouraged  
4 by the Plan, as discussed below. Conservation is available to in-Delta users, as discussed in  
5 Argument I.C.1, above. The Plan actively seeks to reduce all users' reliance on the Delta. Thus,  
6 contrary to Water Contractors' assertion, the measure of impacts is not a reduction in "Delta  
7 water supplies," but is, rather, an overall reduction in the available supplies to current users of  
8 Delta water. As the EIR's analysis shows, these are very different standards.

9 As Water Contractors admit (Water Contractors, p. 64), there has been no attempt to hide  
10 the Plan's effect on Delta exports: the Plan, the EIR, and the Council's findings each are clear that  
11 the Plan as a whole would likely reduce the amount of water exported from and through the  
12 Delta. (See e.g., B541 [establishing "significant reduction in the amount of water used, or in the  
13 percentage of water used, from the Delta watershed" as a goal of the Delta Plan]; D85-86  
14 [describing limited circumstances in which WR P1 could "limit the overall availability of Delta  
15 water"], D6734 [noting that exports under status quo would be greater than under the Delta Plan],  
16 D7024-7025 [noting that following Plan implementation "Delta water would continue to be  
17 available for municipal, agricultural, and industrial water uses, but at a reduced amount"]; C80  
18 [finding in the context of cumulative impacts that Plan implementation could "substantially  
19 reduce water supply availability to water users that use Delta water"].)

20 Analyzing the Plan's Water Reliability provisions, the EIR finds that the Plan "would  
21 encourage a variety of actions to improve local and regional water reliability while reducing the  
22 use of Delta water" and therefore would not have a significant environmental impact under  
23 CEQA because any loss of Delta water would likely be replaced with other regional and local  
24 sources of water. (D6009, 7025.) And, as explained in detail in the Final EIR, WR P1 would in  
25 practice not deprive any user of Delta water unless it has sufficient replacement water from local  
26 and/or regional sources. (D85-87.) The bulk of potential export reductions would come from  
27 changes in the Delta's flow patterns pursuant to ER R1. (*Ibid.*) The Final EIR summarizes this  
28

1 analysis, with additional references to supporting evidence, including the key sections of the  
2 Delta Plan itself.<sup>88</sup> (*Ibid.*)

3       Regarding the Delta Plan’s recommendation for a more natural flow regime in ER R1, the  
4 EIR finds that the encouraged flow objectives would reduce the amount of water exported  
5 through and from the Delta. (D7025; see also D88 [finding that flow objectives “would likely  
6 reduce the amount of water available for municipal, agricultural, and industrial water uses within  
7 the Delta and outside the Delta”].) The EIR explains, however, that this reduction also would be  
8 limited because the SWRCB would consider and balance all beneficial uses in developing the  
9 objectives. (D7025.) Moreover, the local and regional water supply projects that the Plan  
10 encourages would compensate for any such reduction. (*Ibid.*) Thus, the EIR concludes that the  
11 flow regime encouraged under the Plan would not significantly, adversely impact overall water  
12 supplies. (D6013.)

13       The EIR follows this analysis with the straightforward finding that in times of “drier  
14 hydrologic conditions” reduced exports could lead to long-term fallowing of some agricultural  
15 lands. (D7402.) This could cause these lands’ conversion to other uses and thus have a  
16 significant environmental impact. (*Ibid.*; D6129.) The Final EIR again summarizes and explains  
17 the analysis of the water supply impacts of ER R1, and points readers to supporting documents in  
18 the administrative record. (D85-86.)

19       Stockton complains about the EIR’s alleged lack of analysis of a new flow regime’s impact  
20 on existing flood control structures. (Stockton, p. 28.) The EIR, however, does analyze this  
21 impact. (D94-95.) It explains that any future regulatory regime would provide for flood control.

22  
23       <sup>88</sup> Water Contractors also briefly argue that the EIR fails to analyze the impacts of the  
24 various local and regional water projects the Delta Plan will encourage. (Water Contractors, p. 62  
25 [“(T)he PEIR . . . includes no analysis of . . . what effects [reductions in water supply] will  
26 precipitate as public agencies attempt to make up for the loss”].) Water Contractors are again  
27 incorrect. Every impact analysis section of the EIR considers in its “Reliable Water Supply”  
28 subsection the physical impacts of the local and regional water projects that the Plan will  
encourage. (E.g., D7523-7529 [analyzing air quality impacts of potential water supply facilities,  
concluding they would be significant and unavoidable].) Given the perfunctory nature of the  
argument, its factual inaccuracy, and Water Contractors’ failure to identify the relevant facts in  
the record, this Court should reject this claim as a matter of law. (See CEQA Standards of  
Review, Part B [Forfeit Claims], *ante.*)

1 (*Ibid.* [citing federal authority and SWRCB acknowledgement that flood control would trump  
2 flow objectives].) Moreover, in its broad outlines, a “more natural” flow regime “would likely  
3 involve drawing down reservoirs during the fall, which is consistent with flood control needs.”

4 (*Ibid.*)

5 It is thus clear that, contrary to Water Contractors’ and Stockton’s assertions, the EIR  
6 thoroughly analyzed the Delta Plan’s water supply impacts. These analyses are, moreover,  
7 supported by substantial evidence, as described further below. Stockton has failed to set out these  
8 analyses and the underlying evidence. In addition, as also discussed below, Water Contractors  
9 have made no reference to the facts supporting the EIR’s analysis of water supply impacts, and no  
10 reference to the facts underlying the EIR’s determinations regarding the availability of alternative  
11 water supplies.<sup>89</sup>

12 These petitioners have, instead, simply made the conclusory assertion that the EIR’s  
13 determination is “[w]ithout any substantiated basis.” (Water Contractors, pp. 50-51, 62 [“[T]he  
14 PEIR provides no analytic route, indeed no analysis *at all*, regarding what impacts may result . . .  
15 from those reduced deliveries.”]; Stockton, p. 28 [“The EIR fails to evaluate the consequences of  
16 a more natural flow regime . . .”].) These petitioners thus have failed to carry their burden “to  
17 *affirmatively show* there was no substantial evidence in the record to support the [agency’s]  
18 findings.” (*California Native Plant Society v. City of Rancho Cordova, supra*, 172 Cal.App.4th at  
19 p. 626 [challenge to evidence in support of finding that impact was mitigated to less-than-  
20 significant failed].) As discussed in Standards of Review for CEQA Claims, Part B [Forfeit  
21 Claims], above, a petitioner’s failure to set out the evidence in support of the EIR’s conclusion is  
22 “fatal.” (See, e.g., *South County Citizens, supra*, 221 Cal.App.4th at pp. 331-332 [upholding  
23 County’s decision not to prepare and recirculate revised draft EIR where petitioner did not meet  
24 its burden of setting forth all the evidence favorable to the County and showing why it was

25  
26 <sup>89</sup> Unlike Stockton, Water Contractors admit that the EIR does contain water supply  
27 analyses, but assert that they are insufficiently quantitative or detailed. This argument essentially  
28 calls for the EIR to speculate, contrary to CEQA, about the projects the Delta Plan may  
encourage. As discussed in in Argument XVII.B [Level of Detail], above, the EIR’s analyses  
provide a level of detail appropriate to the nature of the Delta Plan.

1 lacking].) On this basis alone, the court should reject, as a matter of law, Stockton’s and Water  
2 Contractor’s challenges to the EIR’s analysis of water supply impacts.

3                   **2. Substantial, Consistent Evidence Supports the EIR’s Water Supply**  
4                   **Analyses**

5                   As explained above, several of the EIR’s conclusions regarding water supply impacts turn  
6 on the success of the myriad Delta Plan provisions aimed at encouraging the development of local  
7 and regional water supplies, which would shore up such supplies and improve reliability in the  
8 face of reduced Delta exports. Water Contractors attack the EIR for determining that the Delta  
9 Plan would work as intended, but again fail to set out the EIR’s substantial evidence supporting  
10 that conclusion.

11                   Instead of actually challenging the EIR’s analysis head-on, Water Contractors invent a  
12 series of alleged “contradictions” in the record regarding the Plan’s impacts on water supplies,  
13 and argue that the EIR’s conclusions are therefore unsupported. (Water Contractors, pp. 63-68.)  
14 These arguments fail both legally and factually.

15                   **a. Water Contractors Misstate the Substantial Evidence Test**

16                   Initially, Water Contractors ground their argument on the assertion that “contradictory  
17 statements do not meet CEQA’s evidentiary requirement.” (Water Contractors, p. 63.) But there  
18 is no such rule under CEQA. In fact, the law is precisely the opposite. A lead agency has  
19 discretion to “weigh conflicting evidence” and courts will not second-guess the agency’s  
20 conclusions in this regard. (See, e.g., *Laurel Heights I, supra*, 47 Cal.3d at p. 393; *Save Round*  
21 *Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1447.)

22                   Water Contractors cite two cases in support of their novel “contradictory evidence” rule,  
23 neither of which support their assertion. First, Water Contractors cite to the *dissenting opinion* in  
24 *Sacramento Old City Assn. v. City of Sacramento* (1991) 229 Cal.App.3d 1011, 1042, fn. 6,  
25 which is “not binding precedent.” (*People v. Lopez* (2012) 55 Cal.4th 569, 585; see also *Wall v.*  
26 *Sonora Union High School Dist.* (1966) 240 Cal.App.2d 870, 872 [“[A] dissenting opinion has no  
27 function except to express the private view of the dissenter”].)  
28

1 Water Contractors next cite to *Citizens Committee to Save our Village v. City of Claremont*,  
2 quoting a holding that a later court called “as slippery as a ball bearing sprayed with WD-40.”  
3 (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 935 [discussing *Citizens*  
4 *Committee to Save our Village v. City of Claremont* (1995) 37 Cal.App.4th 1157, 1168-1169].)  
5 In *Citizens Committee*, the court considered a challenge to a mitigated negative declaration, not  
6 an EIR. The petitioner argued that an EIR should have been prepared, on the ground that the  
7 record includes “substantial evidence supporting a fair argument that the project may have a  
8 significant adverse impact upon the environment.” (*Citizens Committee, supra*, 37 Cal.App.4th at  
9 p. 1168.) The court first stated that upon review of the record, “[c]onsideration is not to be given  
10 contrary evidence supporting the preparation of a negative declaration.” (*Ibid.* [citing *City of*  
11 *Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 244-245 and *Friends of*  
12 *“B” Street v. City of Hayward* (1980) 106 Cal.App.3d 988].) But it then stated that “[e]vidence  
13 that rebuts, contradicts or diminishes the reliability or credibility of appellants’ evidence is  
14 properly considered.” (*Citizen’s Committee, supra*, 37 Cal.App.4th at p. 1168.)

15 Water Contractors fail to inform this Court that the Third District Court of Appeal has  
16 warned that *Citizens Committee* “must be read with great care and caution.” (*Pocket Protectors,*  
17 *supra*, 124 Cal.App.4th at p. 935.) The consideration of evidence that “rebuts, contradicts or  
18 diminishes the reliability” of substantial evidence is in fact extremely limited: “if an expert  
19 purporting to hold a Ph.D. testifies as to the environmental effect of a project, a lead agency or a  
20 court may properly consider and ‘weigh’ evidence in the record showing the expert never  
21 attended college and his Ph.D. is phony.” (*Ibid.*) However, the court explained, “this limited  
22 weighing of evidence to determine admissibility in an environmental debate must not be confused  
23 with a weighing of *some substantial evidence against other substantial evidence.*” (*Ibid.* [italics  
24 added].) In other words, the lead agency, here the Council, has the authority to resolve conflicts  
25 in the evidence and the Court must uphold an agency’s determination under CEQA if there is any  
26 substantial evidence in the record to support such a determination. (*Laurel Heights I, supra*, 47  
27 Cal.3d at pp. 392-393; see Standards of Review for CEQA Claims, Part A, *ante.*)

28

1 Water Contractors' novel interpretation of the substantial evidence test is not supported by  
2 the law. Therefore, this Court should deny Water Contractors' claims of "contradictions" without  
3 looking to their factual merits.

4 **b. There Is No "Contradiction" in the EIR's Determination that**  
5 **Alternative Water Supplies Will Make up for Most of the**  
6 **Potential Reductions in Delta Exports**

7 Should the Court look past Water Contractors' alleged "contradictory evidence" rule, it will  
8 find that there is in fact no conflict in the evidence. Rather, Water Contractors take various  
9 findings and facts out of context to create illusory contradictions. A careful look at the actual  
10 evidence in the record demonstrates that Water Contractors do not undermine the EIR's  
11 conclusions.

12 Water Contractors first argue that a "contradiction" exists regarding the EIR's finding that  
13 the Delta Plan will not have significant impacts related to reductions in Delta exports. On the one  
14 hand, Water Contractors note that the EIR concludes that certain impacts related to reductions in  
15 Delta exports will be less than significant.<sup>90</sup> (See Water Contractors, pp. 63-64 and citations  
16 therein.) On the other hand, Water Contractors point out, various statements in the record  
17 acknowledge that the Delta Plan could reduce the amount of water exported through the Delta.  
18 (*Id.*, p. 64.) But these two facts are hardly contradictory, and they are reconciled in the EIR's  
19 analysis. The EIR considers whether the Plan's policies and recommendations would cause an  
20 adverse impact related to any "[s]ubstantial[] change [in] water supply availability to water users  
21 located outside of the Delta that use Delta water." (E.g., D7017.) The EIR concludes that some  
22 of the Delta Plan's policies and recommendations could ultimately reduce the amount of water  
23 exported through and from the Delta (see, e.g., C80; B541; D85-86, 6734, 7024), but that other  
24 Delta Plan policies will encourage the development of local and regional water supplies, thus

25  
26 <sup>90</sup> Water Contractors fail to acknowledge the EIR's conclusion that such reductions may  
27 lead to a significant and unavoidable impact through the long term fallowing of certain  
28 agricultural lands. (D7402.) Once again, Water Contractors' failure to clearly set out the facts  
underlying the conclusions they challenge is fatal to their claim. (*South County Citizens for  
Smart Growth, supra*, 221 Cal.App.4th at p. 331.)

1 limiting the impact of any such reduction (see e.g., D6009, 7025). These are logical results of the  
2 Plan's balanced approach to promoting the coequal goals, not a "contradiction."

3 **c. The Record and the Law Support the EIR's Determination**  
4 **That Local Agencies Will Implement the Delta Plan's Provision**  
5 **for Alternative Water Supplies**

6 As discussed above, the EIR's conclusions turn in part on the Plan's policies and  
7 recommendations encouraging alternative water supplies.<sup>91</sup> Water Contractors are effectively  
8 proposing that the EIR instead should have ignored the Delta Plan's alternative water supply  
9 provisions, and assumed that the provisions potentially reducing Delta exports were the only  
10 portions of the Delta Plan affecting water supplies. This approach is incorrect on its face. The  
11 EIR's approach, that all Delta Plan policies relevant to water supply would affect the future water  
12 supply portfolio in California, is supported by substantial evidence in the record and by  
13 longstanding CEQA precedent.

14 The record contains ample evidence establishing that the Plan will encourage alternative  
15 water supplies. The Delta Plan explains that DWR has determined that "California could reduce  
16 water demand and increase water supply in the range of 5 to 10 million acre-feet (MAF) by 2030  
17 just through the implementation of existing strategies and technology." (B530 [citing DWR,  
18 California Water Plan Update 2009].) The Plan discusses types of potential alternative water  
19 supply projects extensively and demonstrates their feasibility. (B557-562; see also J1551.0018,  
20 1551.0033-1551.0034, 1551.0037, 1551.0076-1551.0077, 1551.0185, 1551.0207, 1551.0209,  
21 1551.0225, 1551.0262, 1551.0278 [2009 California Water Plan Update, discussing various  
22 alternative sources].) In particular, the Plan describes several "Regional Success Stories" relating

23 <sup>91</sup> Water Contractors identify another alleged "contradiction" between the EIR's  
24 determinations of significance for water-supply impacts and other impacts. (Water Contractors,  
25 p. 66, fn. 30.) Water Contractors are again incorrect. The EIR finds that other impacts are  
26 significant and unavoidable because the Council cannot require future lead agencies to apply  
27 mitigation to actions that are not "covered actions" under the Delta Reform Act but are  
28 nonetheless encouraged by the Plan. (See, e.g., D7136; see also Argument XXII, [Mitigation],  
*post.*) By contrast, the EIR determines that the Delta Plan will have less than significant impacts  
related to changes in water availability. (D7025.) The difference between these determinations is  
mitigation: the water supply analysis depends on the development under then Delta Plan of local  
and regional supplies; these actions are not mitigation measures entrusted to another lead agency,  
but rather are a part of the project under review. As discussed above, the EIR appropriately  
assumed that such actions would be successful.

1 to reducing reliance on the Delta.<sup>92</sup> (B561.) The appropriate projects will vary by region, as the  
2 EIR and Plan acknowledge. (See, e.g., D6026). But every affected region has some alternative  
3 sources of water available. (B561.)

4 The EIR thus determines, on the basis of substantial evidence, that alternative local and  
5 regional water supplies will prevent the majority of water supply disruptions that the Delta Plan  
6 might otherwise cause. Encouraging the development of these new supplies is an essential  
7 element of the Plan. Based on this evidence, the EIR concludes that the Plan will be successful in  
8 achieving its goals. The EIR's projection of the Plan's success is entirely supportable and based  
9 on substantial evidence in the record. (See *Dry Creek Citizens Coalition v. County of Tulare*  
10 (1999) 70 Cal.App.4th 20, 34 [holding that EIR adequately supported "implied finding" that  
11 facilities would be "designed to function as intended"].)

12 Water Contractors imply that the EIR should ignore the Plan's alternative water supply  
13 provisions. (Water Contractors, p. 65, fn. 29.) But "it is common for an EIR's impacts analysis  
14 to *assume* . . . that the project exists and is in full operation at the time the environmental analysis  
15 is conducted." (*Neighbors for Smart Rail v. Exposition Metro Line Const. Auth., supra*, 57  
16 Cal.4th at p. 452 [italics added].) The idea that a project will be successful is inherent in  
17 environmental review—an EIR must begin from the position that a proposed project will in fact  
18 be implemented. (See *San Franciscans for Reasonable Growth v. City & County of San*  
19 *Francisco* (1984) 151 Cal.App.3d 61, 75 ["The fact that the EIR's subject project itself might be  
20 built, rather than the fact that it might not be built, creates the need for an EIR"].) CEQA thus  
21 provides for such assumptions, which are required to assess future outcomes. (Guidelines §  
22 15144 [preparing an EIR requires some degree of forecasting].) To follow Water Contractors'  
23 approach and assume the failure of the Delta Plan's water supply policies and recommendations  
24 is to assume a worst-case scenario in which the Council and local authorities subject to the Delta  
25 Plan's consistency requirement completely fail in their duties to develop new supplies. "An EIR .

26  
27 <sup>92</sup> Notably, Water Contractors make positive reference to these "Success Stories" earlier  
28 in their brief, arguing that such approaches are sufficient to provide water supply reliability for  
California. (Water Contractors, p. 24.)

1 . . . need not analyze a ‘worst case scenario.’” (*Vineyard Area Citizens, supra*, 40 Cal.4th at p.  
2 453.)

3 **d. There Is No “Contradiction” in the EIR’s Determination That**  
4 **Agencies Will in Fact Develop Alternative Water Supplies**  
5 **While Not Speculating About the Details of Such Projects**

6 Water Contractors next describe a further alleged “contradiction” that they claim somehow  
7 undermines the EIR’s approach. They claim that the EIR determines that the Delta Plan’s  
8 alternative water supply provisions will encourage the development of alternative water supplies,  
9 but that the EIR cannot determine the precise location or nature of such future projects. (Water  
10 Contractors, p. 65.) This is not a “contradiction”; rather, as discussed at length in Argument  
11 XVII [Level of Detail], above, by definition the Plan cannot specify specific projects at this stage.

12 As explained above, the Delta Plan does not direct or mandate any specific projects or  
13 agency actions. Instead, it guides and encourages other public agencies throughout California in  
14 their future actions. It is impossible at this time for the Council to know precisely how those  
15 agencies will respond to and choose to implement the Plan. However, based on substantial  
16 evidence, the Council reasonably determined that these agencies are likely to respond and  
17 develop alternative supplies. The EIR’s discussion of such development of alternative supplies,  
18 and their potential environmental impacts, is presented at a level of detail commensurate with the  
19 amount of information currently available. (See Argument XVII [Level of Detail], *ante*.) To do  
20 otherwise would be to engage in inappropriate speculation. (See Guidelines §§ 15384  
21 [“speculation [or] unsubstantiated opinion or narrative . . . does not constitute substantial  
22 evidence” that can support findings], 15145 [agency should terminate discussion of impact if  
23 “particular impact is too speculative for evaluation”]; see also *Marin Mun. Water Dist. v. KG*  
24 *Land Cal. Corp.* (1991) 235 Cal.App.3d 1652, 1662 “[W]hen the nature of future development is  
25 nonspecific and uncertain, an EIR need not engage in ‘sheer speculation’ as to future  
26 environmental consequences [citation].”.)

27 Water Contractors’ reliance on *Vineyard Area Citizens, supra*, 40 Cal.4th at p. 431, is thus  
28 inapposite. That case held that “[a]n EIR evaluating a planned land use project must assume that  
all phases of the project will eventually be built and will need water, and must analyze, to the

1 extent reasonably possible, the impacts of providing water to the entire proposed project.” If  
2 identified sources are unreliable, the EIR must identify and analyze alternative sources. (*Id.* at p.  
3 432.) But the *Vineyard Area Citizens* case dealt with a specific development project; the  
4 developers and lead agency officials in that case knew or could reasonably ascertain where the  
5 project was, how much water it would need, and what supplies were available. (*Id.* at pp. 421-  
6 24.)

7 Here, by contrast, the project is an overall program of improving the reliability of current  
8 water sources and developing alternative local and regional sources. The California Supreme  
9 Court has noted the distinction between a statewide water plan and the types of projects at issue in  
10 the line of cases leading up to *Vineyard Area Citizens*: “Unlike the [state-level] program at issue  
11 here, however, those projects involved proposed commercial land developments, with readily  
12 quantifiable water requirements, on identified sites.” (*In re Bay-Delta, supra*, 43 Cal.4th at p.  
13 1171, citing *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th  
14 182 [5000-unit residential/resort project]; *Santiago County Water Dist. v. County of Orange*  
15 (1981) 118 Cal.App.3d 818 [concerning a mining operation].) *Vineyard Area Citizens* itself  
16 acknowledges that “the burden of identifying likely water sources for a project varies with the  
17 stage of project approval involved; the necessary degree of confidence involved for approval of a  
18 conceptual plan is much lower than for issuance of building permits.” (*Vineyard Area Citizens,*  
19 *supra*, 40 Cal.4th at p. 434.) Here, the EIR identified potential types of likely water sources,  
20 which was as much as it could do without resorting to speculation.

21 The *In re Bay-Delta* case further illustrates the distinction between a state-level plan and  
22 specific projects. The CALFED Program considered in that case was similar to the Delta Plan,  
23 but more project-specific, as described above in Argument XVII.B [Level of Detail], above. The  
24 CALFED Program covered a vast geographic scope over the long term, and did not direct or  
25 immediately undertake new water supply actions. Rather, it set out a “range of actions” and a  
26 procedure by which the lead agency and its partner agencies would decide which to ultimately  
27 carry out. (*In re Bay-Delta, supra*, 43 Cal.4th at pp. 1156-1157.) The Supreme Court held that  
28 the level of detail required for such analysis “must be appropriately tailored to the current first-

1 tier stage of the planning process, with the understanding that additional detail will be  
2 forthcoming when specific second-tier projects are under consideration.” (*Id.* at p. 1172.)  
3 Complete, highly detailed analysis of each water source and its environmental effects would be  
4 unduly speculative:

5 the sources of water actually used depend on future decisions between willing  
6 buyers and sellers. It is therefore impracticable to foresee with certainty specific  
7 sources of water and their impacts. Furthermore, water supply plans must remain  
8 flexible as they are subject to changing conditions, such as changes in population  
9 projections, demographics, new or revised environmental restrictions, pollution of  
10 sources, or water supply effects from prolonged droughts. As a result, one cannot  
11 be certain that a particular future water source identified at the first-tier stage will  
12 ever materialize, or that the source will even be suitable 10 or 20 years later as  
13 changed conditions may make another source more advantageous.

14 (*Id.* at pp. 1172-1173.)

15 As discussed in great detail, above, the Delta Plan EIR provides an analysis commensurate  
16 with the known detail. (See Argument XVII [Level of Detail], *ante.*) This approach does not  
17 “contradict” the EIR’s determination that various local agencies are likely to develop alternative  
18 water supplies as the Delta Plan’s influence is felt throughout the state.

19 **e. There Is No “Contradiction” in the EIR’s Groundwater  
20 Analysis**

21 Water Contractors assert another alleged “contradiction” in the EIR’s analysis of the effects  
22 of developing groundwater sources. (Water Contractors, pp. 66-68.) As the EIR explains, some  
23 of the alternative water supplies encouraged by the Delta Plan will involve developing such  
24 groundwater sources. (See e.g., D7017 [listing groundwater projects among potential alternate  
25 water sources that local agencies may choose to develop].) Water Contractors point out that  
26 many of the areas that use large amounts of Delta water also use large amounts of groundwater, to  
27 the point that some of the groundwater basins are in “critical overdraft.” (*Id.*, p. 66 and record  
28 cites therein.) The structure of Water Contractors’ alleged “contradiction” seems to be: (1) the  
Delta Plan will encourage increased groundwater use in areas already in overdraft; (2) the EIR  
assumes that any overdraft-related impact will be resolved by recharging the affected

1 groundwater basins; but (3) the only water available for recharge is Delta water, which will be  
2 less available because of the Delta Plan. (See *id.*, p. 66.) Steps one and two of this chain are  
3 untrue, rendering step three irrelevant.

4 The Delta Plan encourages *feasible* alternative water supply projects. (e.g., D89-90 [WR  
5 P1, conditioning certain Delta export actions on the implementation of “feasible and locally cost-  
6 effective” local or regional sources of water]; see also D3683 [Response to Comment RLO033-  
7 37, clarifying that EIR’s analysis applies to projects encouraged by WR P1].) Water Contractors  
8 point out, as does the EIR, that many of the state’s groundwater basins are already overdrawn and  
9 thus are inappropriate sites for using groundwater to meet demand. (E.g., D6026.) In an  
10 overdrawn basin, groundwater development is not in fact feasible under the Council’s regulations  
11 because it is not “capable of being accomplished in a successful manner within a reasonable  
12 period of time [] taking into account economic, *environmental*, legal, social, and technological  
13 factors.” (23 CCR § 5001, subd. (p) [*italics added*].)

14 Moreover, the Plan includes several recommendations encouraging the sustainable use of  
15 groundwater.<sup>93</sup> Consistent with CEQA precedent, as discussed in Part B.2.c of this argument,  
16 above, the EIR determines that these recommendations would be implemented by the appropriate  
17 agencies and would thus help prevent local and regional water supply projects from significantly  
18 affecting groundwater supplies. (D94.) These recommendations will work alongside existing  
19 law, including local groundwater management requirements that may take the form of basin  
20 adjudications, county ordinances, or local groundwater management plans. (*Ibid*; see D8719  
21 [describing applicable regulations]; cf. *Oakland Heritage Alliance v. City of Oakland* (2011) 195  
22 Cal.App.4th 884, 906-907 [holding that lead agency may rely on compliance with existing law to  
23 reduce or avoid environmental impacts “where it is reasonable to expect compliance”].)

24 The Delta Plan thus does not encourage and in fact discourages increased groundwater use  
25 in already-overdrawn basins. (B449 [WR R11 (Recover and Manage Critically Overdrafted

26 <sup>93</sup> These are: WR R9 (Update Bulletin 118, California’s Groundwater Plan); WR R10  
27 (Implement Groundwater Management Plans in Areas that Receive Water from the Delta  
28 Watershed); WR R11 (Recover and Manage Critically Overdrafted Groundwater Basins).  
(B449.)

1 Groundwater Basins]).) The EIR therefore does not discuss recharge as mitigation for  
2 groundwater impacts. (D7033.) Water Contractors' citation for this claim (Water Contractors, p.  
3 66 [citing D7020]), appears to be a misreading of a discussion of groundwater storage  
4 ("banking") projects that may serve as alternative supplies for drought periods in parts of the  
5 state. "Banking" projects are a different endeavor altogether from over-pumping and then  
6 recharging to correct the problem. (See B771, D6975 [explaining banking and "conjunctive use"  
7 projects].)

8 Water Contractors find yet another alleged "contradiction" in the EIR's analysis of how  
9 groundwater supplies might be adversely affected by the construction of various projects pursuant  
10 to the Delta Plan. (Water Contractors, p. 68.) The EIR concludes that various construction  
11 activities for projects encouraged by the Delta Plan could cause temporary declines in  
12 groundwater levels. (D7024.) Among the mitigation measures proposed for this impact,  
13 Mitigation Measure 3-2 provides, in certain circumstances, for the deepening of the affected well.  
14 (D7033.) Water Contractors find a "contradiction" in the fact that deepening a well might  
15 exacerbate an existing groundwater problem. (Water Contractors, p. 68.)

16 Water Contractors' claim is legally irrelevant, however, because the EIR determines that  
17 construction-related groundwater impacts will be significant and unavoidable, and thus does not  
18 rely on or assume the efficacy of the measure. (D7033.) Moreover, as a practical matter, projects  
19 encouraged by the Delta Plan will undergo their own environmental review. If Mitigation  
20 Measure 3-2 will be ineffective under a future project's particular circumstances, that  
21 environmental review must identify a substitute mitigation measure. (See B445-446 [GP 1  
22 including: Delta Plan consistency standards, allowing substitute mitigation measures that are  
23 "equally or more effective" than those identified in EIR].) And if no mitigation measure can  
24 feasibly reduce or avoid the impact, the future review presumably will find the impact significant  
25 and unavoidable. (*Ibid.* [requiring only "feasible" measures for Delta Plan consistency review  
26 purposes]; Pub. Resources Code, § 21081; Guidelines § 15126.2, subd. (b).) The Delta Plan EIR  
27 committed no error in its analysis of groundwater impacts.

28

1 Finally, Water Contractors fault the EIR for failing to consider the impacts of implementing  
2 Mitigation Measure 3-2. (Water Contractors, p. 68.) But the actions listed in the mitigation  
3 measure (e.g. well deepening, sheet pile installation) are the same types of actions required to  
4 construct groundwater wells in the first place. Such construction is a type of project that the Plan  
5 encourages, and the EIR thus considers the impacts of these activities in every analysis. (D6822-  
6 23 [describing components of groundwater projects under the Plan]; see also, e.g., D7114 [EIR  
7 analysis of impacts to biological resources from water reliability projects, including groundwater  
8 wells].) Consequently, the EIR's impact analysis related to groundwater is legally adequate.

9 **C. The Cumulative Impact Analysis Includes All Reasonably Foreseeable  
10 Future Projects, Contains an Appropriate Level of Detail, Considers an  
11 Adequate Geographic Scope Based on Affected Resources, and Is  
12 Supported by Substantial Evidence**

12 Petitioners claim that the cumulative impact analysis in the EIR contains a cursory level of  
13 detail, an inappropriately narrow geographic scope, insufficient mitigation measures, and  
14 unsupported significance determinations (North Coast, pp. 21-22; Stockton, p. 28; Water  
15 Contractors, pp. 73-76), but these claims once again ignore the analysis in the EIR. The EIR's  
16 cumulative impact analysis fully complies with CEQA and is supported by substantial evidence.

17 An EIR is required to discuss the cumulative impacts of a project when the project's  
18 incremental effect is cumulatively considerable. (Guidelines § 15130, subd. (a)(1); D8144.)  
19 "Cumulatively considerable" means that the incremental effects of a project are significant when  
20 viewed in connection with the effects of past projects, other current projects, and probable future  
21 projects. (Guidelines § 15130, subd. (a)(3); Pub. Resources Code, § 21083, subd. (b)(2); D8144.)  
22 The EIR uses the "list of projects" approach specifically authorized in section 15130 of the  
23 Guidelines: it relies on "[a] list of past, present and probable future projects producing related or  
24 cumulative impacts . . . ." (See Guidelines § 15130, subd. (b)(1)(A); D8166-8187 [Table 22-1,  
25 list of projects].) In addition to the list of projects in Table 22-1,<sup>94</sup> Section 22 of the EIR provides

26 <sup>94</sup> The EIR includes the BDCP in the list of reasonably foreseeable future projects that are  
27 analyzed in the cumulative impacts assessment. (D8176 [Table 22-1, referencing Section 23:  
28 BDCP (D8188-8225)]; Guidelines § 15130, subd. (b)(1)(A).) Petitioners' arguments regarding  
the EIR's treatment of the BDCP as a cumulative project (North Coast, pp. 21-22; Central Delta,  
(continued...))

1 an analysis of the cumulative impacts of these projects in combination with the proposed project,  
2 as well as significance determinations for cumulative impacts for each of the 19 resource areas  
3 analyzed in the EIR. (See 6513-6536, 8144-8163, 8166-8187 [Table 22-1, list of future  
4 projects].)

5 **1. The Level of Detail of the Cumulative Impact Analysis Is**  
6 **Appropriate for a Program EIR**

7 As explained in the EIR, the analysis of the proposed project is inherently cumulative.  
8 (D8144-8145.) This is due to the number of projects that could be encouraged by the Plan, and  
9 their broad geographic scope. (D70 [“The Delta Plan covers a large portion of the state, and  
10 covers a broad area of project types within five project type categories”].)

11 The list of cumulative projects in Table 22-1 does not repeat the projects that are already  
12 included in the project description for the Plan and analyzed as part of the proposed project, as  
13 North Coast seems to request. (North Coast, p. 21.) This is because, under CEQA, cumulative  
14 projects are different from the projects that are directly under review. (See Guidelines § 15130,  
15 subd. (a)(1) [“a cumulative impact consists of an impact which is created as a result of the  
16 combination of the project evaluated in the EIR together with *other* projects causing related  
17 impacts” (italics added)]; see D8144-8145, 8166-8187 [Table 22-1].) Accordingly, the  
18 cumulative impact assessment in Section 22 cross-references and summarizes the analysis of the  
19 proposed project in each of the 19 resource areas and then analyzes the cumulative impacts of the  
20 proposed project in combination with past, present, and reasonably foreseeable future projects  
21 producing related or cumulative impacts, as CEQA requires. (See Guidelines § 15130, subd.  
22 (a)(1); see, e.g., D8145-8146 [cross-referencing and summarizing analysis of impacts on water  
23

24 (...continued)

25 pp. 65-67) are addressed in a separate section of this brief. (See Argument XVI [BDCP], *ante.*)  
26 To the extent that petitioners challenge the EIR’s cumulative impact analysis on the basis that it  
27 does not address BDCP flow criteria and water conveyance (North Coast, pp. 21-22; Central  
28 Delta, pp. 65-67), the Plan “does not determine Delta flow criteria, the amounts of water available  
to various categories of water uses/users, or recommend a conveyance plan” because those  
actions are “being undertaken by other agencies.” (D60; see also D8192 [BDCP agencies “best  
positioned” to develop conveyance concept].)

1 resources in Section 3], D8146-8147 [cross-referencing and summarizing analysis of impacts on  
2 biological resources in Section 4].)

3 Water Contractors try to characterize this cumulative analysis as focusing on “projects”  
4 rather than “impacts” (Water Contractors, p. 75), but it is unclear what this claim means in view  
5 of the extensive consideration of impacts in Section 22. The EIR fully discloses the impacts of  
6 the cumulative projects in combination with the impacts of the Plan. (See, e.g., D8145  
7 [cumulative water quality impacts due to potential release of hazardous materials into water  
8 supply during construction or dredging], D8145-8146 [cumulative water quality impacts due to  
9 changes in the balance of sedimentation and scour from operation of ecosystem restoration and  
10 flood control projects], D8146 [cumulative water quality and water supply impacts due to erosion  
11 and sedimentation from construction of projects encouraged by the Plan], D8146 [cumulative  
12 water supply impacts due to decreased groundwater from loss of recharge supplies and increased  
13 salinization from construction and implementation of projects encouraged by the Plan].)

14 Moreover, because the EIR’s analysis is inherently cumulative and considers the potential  
15 effects of multiple future actions in the context of various past and ongoing actions that constitute  
16 the baseline (D8144-8145), the related impacts of other projects are considered throughout the  
17 EIR. (See, e.g., D6943-7016 [discussing historical and existing water resources within the Delta  
18 and other areas].) For instance, possible projects that are known to some degree are named in the  
19 project description and considered in each of the five categories of projects that would be  
20 encouraged by the Delta Plan. (See D6811 [Reliable Water Supply], D6830-6831 [Ecosystem  
21 Restoration], D6845-6846 [Water Quality], D6852 [Flood Risk], D6858 [Delta As Evolving  
22 Place].) In the case of climate change, the resource analysis is also cumulative.<sup>95</sup> (See, e.g.,  
23 D8107 [“[t]he cumulative effect of human activities has been clearly linked to quantifiable  
24 changes in the composition of the atmosphere [and is] the main cause of global climate change”];  
25 see also D8105-8106 [EIR study period through 2030], D8106-8107 [climate change and sea

26  
27 <sup>95</sup> A further discussion of sea level and climate change impacts, in response to Central  
28 Delta’s cumulative climate change arguments, is presented in Argument XX.D [Climate Change  
Impacts], below. (See Central Delta, pp. 67-68.)

1 level rise], D8113 [climate change and sea level impact on proposed project], D8162 [cumulative  
2 climate change impacts].) In addition, to the extent that Water Contractors argue that the EIR  
3 does not consider past and current actions that are already causing environmental decline, that  
4 claim is disproved by the full disclosure in the EIR of declining existing conditions. (Water  
5 Contractors, p. 75; see Argument XIX [Baseline], *ante*.)

6 As discussed extensively in Argument XVII [Level of Detail], above, all aspects of a  
7 program EIR, including the cumulative impact analysis, should evaluate “general matters and  
8 environmental effects . . . [of the] policy, plan, program or ordinance.” (Pub. Resources Code, §  
9 21068.5; see Guidelines §§ 15152, 15385; see also Guidelines § 15130, subd. (b).) Contrary to  
10 several petitioners’ claims (see North Coast, p. 21; Stockton, p. 28; Water Contractors, pp. 73-74;  
11 Central Delta, p. 64), a general, qualitative analysis of cumulative impacts is adequate under  
12 CEQA. (See, e.g., *Al Larson Boat Shop, supra*, 18 Cal.App.4th at pp. 748-750 [general  
13 discussion of significant increases in cumulative traffic and air quality impacts was sufficient; an  
14 EIR need not contain all information available on a subject]; *Citizens for Open Gov. v. City of*  
15 *Lodi* (2012) 205 Cal.App.4th 296, 320 [technical perfection in a cumulative impact analysis is not  
16 required; courts have looked for “adequacy, completeness, and a good faith effort at full  
17 disclosure [citation]”].)

18 There is no requirement that cumulative impacts be quantified or presented in any particular  
19 format. (See *In re Bay-Delta, supra*, 43 Cal.4th at pp. 1172-1173 [quantification not required in  
20 program-level EIR].) Despite Water Contractors’ unsupported arguments to the contrary, CEQA  
21 makes clear that the discussion of cumulative impacts need not be detailed.<sup>96</sup> (See Guidelines §  
22 15130, subd. (b) [“The discussion of cumulative impacts . . . need not provide as great detail as is

23  
24 <sup>96</sup> *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, cited by  
25 Water Contractors, is inapposite. (Water Contractors, pp. 73-74.) *Kings County* held that an  
26 EIR’s cumulative impacts analysis was inadequate because the lead agency did not include a list  
27 of the projects considered or available data regarding the volume of ground water used by those  
28 projects. Here, in contrast, the EIR contains a list of reasonably foreseeable future projects and a  
non-speculative analysis based on available information regarding the cumulative impacts of  
these projects in conjunction with the proposed project. (See D6513-6536, 8145-8163, 8166-  
8187 [Table 22-1, list of projects].)

1 provided for the effects attributable to the project alone”].) Thus, in light of the programmatic  
2 and long-term nature of the Plan, the level of detail provided in the cumulative impact analysis  
3 offers the greatest amount of information on the potentially significant environmental effects of  
4 the Plan that is reasonable without engaging in unwarranted and unsupported speculation about  
5 which individual projects will go forward, where they will be located, and when they will be  
6 approved. (Guidelines §§ 15144, 15145, 15146, subd. (b); see also Argument XVII, [Level of  
7 Detail], *ante*.)

8                   **2. The Cumulative Impact Analysis Covers an Adequate Geographic**  
9                   **Scope**

10           The cumulative impact analysis also covers an adequate geographic scope based on affected  
11 resources. Under CEQA, the cumulative impact analysis “should define the geographic scope of  
12 the area affected by the cumulative effect and provide a reasonable explanation for the geographic  
13 limitation used.” (Guidelines § 15130, subd. (b)(3).) There is no fixed standard, however, and  
14 the lead agency has discretion to apply its expertise in selecting the appropriate study area for the  
15 analysis. (*City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889,  
16 906-908 [school district acted within its discretion in defining the geographic scope of its  
17 cumulative impact analyses for air quality and traffic].) Courts will defer to an agency’s  
18 definition of the appropriate area for assessing cumulative impacts. (*Ebbetts Pass Forest Watch*  
19 *v. Dept. of Forestry & Fire Protection* (2004) 123 Cal.App.4th 1331, 1352-1355 [department not  
20 required to define the appropriate area for assessing cumulative impacts of logging as the entire  
21 Sierra Nevada ecosystem]; *East Bay Mun. Util. Dist. v. Dept. of Forestry & Fire Protection*  
22 (1996) 43 Cal.App.4th 1113, 1130 (*East Bay*) [consideration of closely related past, present and  
23 reasonably foreseeable future projects in the watershed assessment area, rather than the entire  
24 river watershed, was sufficient].)

25           Contrary to Water Contractors’ claims (*Water Contractors*, p. 76), the EIR adequately  
26 defines the geographic scope of its cumulative impacts analysis and provides explanations for  
27 relevant geographic limits throughout the analysis. The cumulative impacts described in Section  
28

1 22 are also analyzed in the 19 resource sections, each of which contains “Study Area” and  
2 “Environmental Setting” subsections describing the resources that could potentially be adversely  
3 affected as a result of adopting the Plan or one of the alternatives. (See, e.g., D6941-7016 [Water  
4 Resources], D7054-7111 [Biological Resources].) The study area for each of the resource areas  
5 was selected based on physical environmental considerations pertinent to the potential impacts on  
6 that resource, i.e., the location of the potentially affected resource and the possible location of  
7 facilities influenced or encouraged by the Plan. Therefore, the precise geographic boundaries  
8 may differ for each resource analyzed, and the EIR provides a reasoned basis for these  
9 differences. (See, e.g., D7214-7248 [Section 5: Delta Flood Risk, focusing on the Delta], D7510-  
10 7521 [Section 9: Air Quality, focusing on air basins]; see also Argument XVII.A, [Level of  
11 Detail], *ante*.)

12 Because the boundaries of these study areas were appropriately based on the geographic  
13 reach of the Plan and its potential impacts, which includes cumulative impacts to which the Plan  
14 could potentially contribute, Water Contractors are incorrect in claiming that the EIR ignored or  
15 provided superficial analysis for areas outside the Delta. (See, e.g., *Napa Citizens for Honest*  
16 *Gov. v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 369 [“[l]ess detail, for  
17 example, would be required where those effects are more indirect than effects felt within the  
18 project area, or where it [would] be difficult to predict them with any accuracy”].)

### 19 3. The Cumulative Impact Analysis Includes Sufficient Mitigation 20 Measures for Identified Cumulative Impacts

21 The cumulative impacts analysis also identifies mitigation measures for significant  
22 cumulative impacts identified in the EIR. As required under CEQA, the EIR identifies mitigation  
23 measures to address potentially significant impacts in each of the resource sections. (See, e.g.,  
24 D7032-7033 [Water Resources Mitigation Measures 3-1, 3-2 and 3-3], D7135-7139 [Biological  
25 Resources Mitigation Measures 4-1 through 4-5].) These mitigation measures are cross-  
26 referenced in the cumulative impacts analysis as measures that would lessen or avoid significant  
27 cumulative impacts. [See, e.g., D8145 [“Mitigation measures similar to Mitigation Measure 3-1  
28 should be considered for these other [cumulative] actions as well as the Proposed Project”],

1 D8147 [“[m]itigation measures similar to Mitigation Measure 4-1 . . . should be considered for  
2 these other [cumulative] actions as well as the Proposed Project”].)

3 Water Contractors take issue with use of the word “should” in the EIR’s discussions of  
4 mitigation for cumulative impacts, and argue that this approach violates CEQA. (Water  
5 Contractors, p. 74.) This wording tracks the language of CEQA, however, with regard to the  
6 findings that are required when a mitigation measure must be implemented by an agency other  
7 than the lead agency in order to mitigate or avoid a significant environmental effect. (See Pub.  
8 Resources Code, § 21081, subd. (a)(2) [“Those changes or alterations are within the responsibility  
9 and jurisdiction of another public agency and have been, or can and *should* be, adopted by that  
10 other agency” (italics added)].) The Council adopted all of the mitigation measures identified in  
11 the EIR, and made the findings required by CEQA with regard to measures that are within the  
12 responsibility and jurisdiction of the lead agencies for the cumulative projects. (C8-78, C101.)

13 Moreover, neither of the cases cited by Water Contractors support the position that the  
14 mitigation for cumulative impacts is somehow defective. (See *City of Marina v. Bd. of Trustees*  
15 (2006) 39 Cal.4th 341, 367 [payment to third party to perform mitigation may be a feasible  
16 alternative form of mitigation, but may be subject to the discretion of another agency]; *East Bay*,  
17 *supra*, 43 Cal.App.4th at 1129 [upholding non-quantitative mitigation measure where  
18 quantification of sediment impacts was not feasible].)<sup>97</sup>

19 **4. The EIR Makes Appropriate Significance Determinations for**  
20 **Identified Cumulative Impacts**

21 Finally, the EIR makes appropriate significance determinations for each cumulative impact  
22 identified. Water Contractors argue that the EIR focuses solely on environmental benefits and  
23 fails to consider significant negative environmental impacts (Water Contractors, p. 74 [citing  
24 D6515, 6517]), but this is demonstrably incorrect. As an example, Water Contractors cite a Land  
25

26 <sup>97</sup> In fact, the holding in *East Bay* supports the cumulative impacts analysis in the EIR,  
27 because quantitative analysis of mitigation measures is not feasible in this program-level EIR  
28 inasmuch as other agencies will implement the future projects that the Plan encourages. (See  
Argument XVII.A and B [Level of Detail], *ante*.)

1 Use and Planning cumulative impact, which could cause “long-term and permanent disruption of  
2 local development patterns” and allege that the EIR concludes the impact is “beneficial” and  
3 “therefore less than significant.” (Water Contractors, p. 74 [citing to D6517].) But this  
4 characterization is incorrect. The EIR in fact concludes this impact discussion, which concerns  
5 construction of cumulative projects, with a finding of “cumulatively considerable contribution to  
6 [a] significant cumulative impact.” (D6517.)<sup>98</sup> The corresponding impact due to operation of  
7 cumulative Delta enhancement projects, once constructed, would be less than significant because  
8 public access to restored habitat areas and waterfronts of Delta communities would be increased.  
9 (D6518.)

10 Moreover, for cumulative impacts that are determined to be less than cumulatively  
11 considerable, the EIR need only “briefly indicate why the cumulative impact is not significant  
12 [and] identify facts and analysis supporting the Lead Agency’s conclusion that the cumulative  
13 impact is less than significant.” (Guidelines § 15130, subd. (a)(2); see also Guidelines §§ 15130,  
14 subd. (a) [lead agencies shall “briefly describe” the basis for “concluding that the incremental  
15 effect is not cumulatively considerable”], 15143 [“The EIR shall focus on the significant effects  
16 on the environment”].) The EIR provides appropriate explanations for each of its cumulative  
17 impact conclusions. (See, e.g., D6515 [“these impacts are likely to be less than significant  
18 because of the likelihood of overall beneficial effects of increased groundwater storage  
19 volume”].) Disclosing an impact’s potential benefits in the course of identifying significant and  
20 less-than-significant impacts is not a violation of CEQA, but, rather, contributes to full disclosure.

21 For all these reasons, the EIR’s cumulative impacts analysis is adequate under CEQA.

#### 22 **D. The EIR Adequately Analyzes Impacts Related to Climate Change**

23 Central Delta claims both that the EIR fails to analyze the impact of the Delta Plan and  
24 other cumulative projects “on climate change” and that the EIR failed to analyze the impact of sea  
25

26  
27 <sup>98</sup> Water Contractors also cite to *Cal. Farm Bur. Fed. v. Cal. Wildlife Conserv. Bd.* (2006)  
28 143 Cal.App.4th 173 in support of their argument. This case is entirely inapposite because it  
concerns a CEQA exemption and not an EIR.

1 level rise on the Project, particularly impacts on water resources. (Central Delta, pp. 67-68.)

2 These claims are incorrect.

3 Section 21 of the EIR analyzes Climate Change and Greenhouse Gas Emissions.

4 Subsection 21.4, Environmental Setting, discloses and describes at length global, regional, and  
5 local climate trends and associated impacts. (D8102-8105.) Subsection 21.5.1.1 describes sea  
6 level rise projections for the study areas. (D8106-8107.) Impact 21-1 concerns the impacts of the  
7 Plan on climate change due to increased greenhouse gas emissions. (See, e.g., D8108-8112  
8 [Reliable Water Supply], D8118-8120 [Water Quality].) Impact 21-3 addresses the impacts of  
9 sea level rise on the projects and facilities that would be encouraged by the Plan. (See, e.g.,  
10 D8113 [Reliable Water Supply], D8121 [Water Quality].) Impact 21-3a, in particular, discusses  
11 the impacts of sea level rise on water supply reliability projects. (D8113.) The analysis of  
12 cumulative impacts in Section 22 also addresses climate change, and concludes that the  
13 “[greenhouse gas] emissions impacts of the Proposed Project . . . could constitute a significant  
14 contribution to this significant cumulative impact” and that “[o]peration of other water supply . . .  
15 water quality . . . projects could be affected by climate change (e.g., more frequent extreme  
16 rainfall and snowmelt events) and sea level rise.” (D8162-8163.) This analysis identifies  
17 specific, representative cumulative projects that could be adversely affected by climate change  
18 and sea level rise. (D8163.)

19 In addition, the EIR considers the effects of climate change on various resources, including  
20 but not limited to water resources. (See, e.g. D6943-49 [water resources], D7063 [biological  
21 resources].) As explained in the Statement of Facts and in Argument XVII [Level of Detail], the  
22 Delta Plan is an overall program to guide future projects, and the EIR was properly prepared at a  
23 program level of detail commensurate with the level of detail of the project. CEQA does not  
24 require quantitative analyses of climate change or any other impact, despite Central Delta’s claim  
25 to the contrary. (Central Delta, p. 68; *ante*.) As discussed in Argument XVII.B [Level of Detail],  
26 above, any attempt to provide additional detail would improperly engage in speculation.

27 Central Delta also errs in arguing that the EIR is defective because the analysis of future  
28 climate conditions deviates from the precise language in the Notice of Preparation (NOP) and

1 from scenarios considered in the Plan itself. (Central Delta, p. 68.) The NOP states that the EIR  
2 would “assum[e] existing sea level and hydrological conditions and a range of future conditions  
3 due to sea level rise and changes in storm patterns.” (D9113; see also D8106-8107 [range of  
4 conditions considered in EIR].) The climate change analysis considers a range of potential future  
5 climate conditions before selecting the conditions most appropriate for the EIR’s 2030 study  
6 period, which is entirely consistent with the NOP.

7 Moreover, as it should, the NOP served as a starting point for CEQA review by eliciting  
8 public input on the scope of the EIR. (See Guidelines § 15375 [“The purpose of the notice is to  
9 solicit guidance . . . as to the scope and content of the environmental information to be included in  
10 the EIR”].) The entire purpose of the scoping process would be undermined if the EIR could not  
11 deviate in any respect from the general description in the NOP. (*County of Inyo v. City of Los*  
12 *Angeles* (1977) 71 Cal.App.3d 195, 199 [“The CEQA reporting process is not designed to freeze  
13 the ultimate proposal in the precise mold of the initial project; indeed, new and unforeseen  
14 insights may emerge during investigation, evoking revision of the original proposal”].)<sup>99</sup>

15 For the foregoing reasons, the discussion of climate change impacts, including sea level  
16 rise, in the EIR is legally adequate and is supported by substantial evidence.

17 **E. The EIR Adequately Analyzes Effects on Human Health And Sensitive**  
18 **Receptors**

19 Citing to the EIR, Water Contractors acknowledge that the EIR analyzes health impacts to  
20 sensitive receptors, but criticize the level of detail of the analysis. (Water Contractors, pp. 60-61.)  
21 As explained in Argument XVII.B [Level of Detail], above, however, a discussion of impacts in

22 <sup>99</sup> Central Delta also criticizes the EIR’s use of an average sea level rise projection for a  
23 study period ending in 2030, while the Plan’s regulation protecting rural residences from floods  
24 uses a high sea level rise projection for the year 2100. (Central Delta, p. 68.) Central Delta  
25 ignores the very different uses of the projections. The EIR uses a study period ending in 2030  
26 because extending the period far beyond that would be speculative. (See D6801.) But the Plan  
27 uses a significantly longer timeframe and higher projection in its regulation protecting new rural  
28 residences from flooding. (See, generally, Argument X.B.1, *ante*.) That was reasonable, because  
new residences will likely exist beyond 2100, and building unprotected structures in floodprone  
areas risks property and lives. (See, e.g., L33606 [recommendation that policy makers base sea  
level rise figure upon risk being addressed].)

1 general terms is “sufficient” for a program-level environmental analysis. (*In re Bay-Delta, supra*,  
2 43 Cal.4th at pp. 1171-1172.) Furthermore, the record contains ample substantial evidence  
3 supporting the Council’s findings and determinations and refuting Water Contractors’ claims.

4 As required by CEQA, the EIR adequately analyzes the human health impacts of projects  
5 that may be encouraged by the Plan at a program level, and identifies feasible mitigation  
6 measures that will ensure future site-specific, quantitative CEQA analysis of human health  
7 impacts at the project level. For example, Mitigation Measure 9-3 requires the lead agency for  
8 future projects to prepare an Air Quality Technical Report, which will evaluate human health  
9 risks from potential exposures of sensitive receptors to substantial pollutant concentrations using  
10 approved screening tools and the cooperation of the local Air Quality Management District or Air  
11 Pollution Control District. (D6200-6201, 7550-7551; see *Citizens for a Sustainable Treasure*  
12 *Island, supra*, 227 Cal.App.4th at pp. 1059-1060 [upholding mitigation measures postponing site-  
13 specific analysis based on regulatory requirements where project-level impacts are speculative].)

14 With regard to the claim that the EIR “merely declares that the Project may cause things to  
15 be built and operated, and that the emissions of those things may be significant” (Water  
16 Contractors, p. 61), the EIR fully describes the types of projects encouraged under the Plan,  
17 identifies examples of specific projects that illustrate those types, considers environmental  
18 documents for similar projects in making its analysis of impacts, and qualitatively describes the  
19 significance of air quality impacts that the various project types would generate. (See, e.g.,  
20 D7523-7525 [types of Reliable Water Supply projects with examples], D7528 [impact  
21 conclusions of Los Vaqueros Reservoir EIR discussed<sup>100</sup>], D7525-7526 [potential size and  
22 emissions level of reliable water supply projects].) Contrary to Water Contractors’ assertion, the  
23 EIR identifies baseline conditions for relevant toxic air contaminants (TACs) and potential  
24 pollutant emissions that could result from the proposed project, explaining that “[h]ealth effects  
25 of TACs may occur at extremely low levels and it is typically difficult to identify levels of  
26 exposure that do not produce adverse health effects.” (D7514-7519, 7528, 6177, 6179-6180.)

27  
28 <sup>100</sup> The Los Vaqueros Reservoir EIR is included in the record at pages J7919-8920.

1 The EIR draws clear distinctions between potential exposures to TACs and other pollutants from  
2 short-term project construction and long-term project operation, despite Water Contractors' claim  
3 otherwise. (See, e.g., D6180 [describing the difficulty in predicting health risk for short term  
4 construction-based exposures when most assessment models focus on longer-term exposure  
5 periods].) The EIR also identifies the types of sensitive receptors, including children, seniors,  
6 sick persons, residences, hospitals, day-care centers, and schools, that could be affected.  
7 (D8793.)

8 Water Contractors further contend that the EIR failed to identify the relative toxicities of  
9 the specific pollutants or health impacts they would cause (Water Contractors, p. 61), but a  
10 program-level EIR is not required to provide that level of specificity. (See *Citizens for a*  
11 *Sustainable Treasure Island*, *supra*, 227 Cal.App.4th at pp. 1054, 1060-1061 ["An EIR is not  
12 required to engage in speculative analysis," and "cannot be faulted for not providing detail that,  
13 due to the nature of the Project, simply does not now exist"]; Guidelines §§ 15145 [agencies  
14 should avoid speculation], 15146 [the degree of specificity in the EIR will correspond to the  
15 degree of specificity in the underlying activity described in the EIR]; D7522 ["Accurate  
16 quantification of potential human exposures to air pollutants resulting from future projects and  
17 related health risk characterization requires detailed site-specific information which is not  
18 available at this program level."].)

19 Water Contractors cite to cases concerning project-level review to argue that the Council  
20 failed to conduct an adequate analysis (Water Contractors, p. 59), but the California Supreme  
21 Court has already dismissed such a comparison. Because the Delta Plan EIR is a program-level  
22 EIR, these cases are inapposite.<sup>101</sup> (*In re Bay-Delta*, *supra*, 43 Cal.4th 1143, 1171 [rejecting  
23 appellate court's comparison of program-level CALFED Program EIS/EIR to cases considering  
24 project-level EIR].)

25  
26  
27 <sup>101</sup> See Water Contractors, p. 59, citing *City of Maywood v. Los Angeles Unified School*  
28 *Dist.* (2012) 208 Cal.App.4th 362, 393 (project-level EIR for construction of new high school),  
and *Bakersfield*, *supra*, 124 Cal.App.4th at p. 1220 (two project-level EIRs).

1 Here, the Council has considered all of the available, non-speculative information regarding  
2 the Plan's potential impacts on human health and sensitive receptors, as required under CEQA.  
3 (Guidelines § 15126.2.) The EIR informs the public of (1) the current air quality standards and  
4 nonattainment information for the air quality basins in and surrounding the study area (D7515-  
5 7519); (2) the persons considered "sensitive receptors" (D8793); (3) the types of projects that  
6 may be encouraged by the Delta Plan; (4) the potential for exposure to harmful air contaminants  
7 and other pollutants due to future construction and implementation of these projects; (5) the  
8 relative duration of these exposures (see, e.g., D6180); and (6) the mitigation measures, including  
9 additional review, that will be encouraged under the Delta Plan (see, e.g., D6200-6201). The EIR  
10 also discloses that additional, project-specific and more detailed CEQA review will be required  
11 prior to approval of any project that would have health impacts on sensitive receptors. (See, e.g.,  
12 D7527.) Thus, the EIR's analysis fully complies with CEQA and makes clear to the public the  
13 "analytic route the agency traveled from evidence to action." (*Laurel Heights I, supra*, 47 Cal.3d  
14 at p. 404.)

15 **XXI. THE EIR'S ANALYSIS OF ALTERNATIVES IS REASONABLE AND IS SUPPORTED BY**  
16 **SUBSTANTIAL EVIDENCE**

17 Petitioners challenge the adequacy of the EIR's alternatives analysis on a variety of  
18 grounds, asserting that the EIR: (1) did not analyze a reasonable range of alternatives and failed  
19 to consider other reasonable and feasible alternatives proposed by petitioners; (2) contained a  
20 vague and inadequate discussion of the comparative merits of the various alternatives; (3)  
21 improperly concluded that the Revised Project in the Recirculated Draft EIR was the  
22 environmentally superior alternative; and (4) contained an inadequate discussion of the No  
23 Project Alternative. For the reasons described below, none of these arguments has merit.

24 **A. Legal Standards for Adequacy of an EIR's Alternatives Analysis**

25 CEQA requires an EIR to "describe a range of reasonable alternatives to the project, or to  
26 the location of the project, which would feasibly attain most of the basic objectives of the project  
27 but would avoid or substantially lessen any of the significant effects of the project, and evaluate  
28 the comparative merits of the alternatives." (Guidelines § 15126.6, subd. (a).) "[A]bsolute

1 perfection is not the standard governing a lead agency's proposed range of project alternatives."  
2 (*Cal. Oak Foundation, supra*, 188 Cal.App.4th 227 at p. 275.) Rather, "[t]he range of alternatives  
3 required in an EIR is governed by a 'rule of reason' that requires the EIR to set forth only those  
4 alternatives necessary to permit a reasoned choice" regarding the proposed project. (Guidelines §  
5 15126.6, subd. (f).) Stated another way, an EIR only need consider a "reasonable range of  
6 potentially feasible alternatives that will foster informed decision making and public  
7 participation." (*Id.* § 15126.6, subds. (a), (f); *Laurel Heights I, supra*, 47 Cal.3d at pp. 404-405.)

8 The reasonableness of the range of alternatives selected for analysis in an EIR is determined  
9 by the scope and purpose of the project under review. (See *In re Bay-Delta, supra*, 43 Cal.4th at  
10 pp. 1163, 1165.) "CEQA establishes no categorical legal imperative as to the scope of  
11 alternatives to be analyzed in an EIR. Each case must be evaluated on its own facts, which in turn  
12 must be reviewed in light of the statutory purpose." (*Citizens of Goleta Valley v. Santa Barbara*  
13 *County Bd. of Supervisors, supra*, 52 Cal.3d at p. 566.)

14 An EIR "need not consider every conceivable alternative to a project." (Guidelines §  
15 15126.6, subd. (a).) "The alternatives shall be limited to ones that would avoid or substantially  
16 lessen *any* of the significant effects of the project. Of those alternatives, the EIR need examine in  
17 detail only the ones that the lead agency determines could feasibly attain *most* of the basic  
18 objectives of the project." (*Id.* § 15126.6, subd. (f) [italics added]; see also *id.* § 15126.6, subd.  
19 (c).) Thus, an EIR is not inadequate "because it fails to consider in detail each and every  
20 conceivable variation of the alternatives stated"; however, an EIR should contain "information  
21 sufficient to permit a reasonable choice of alternatives so far as environmental aspects are  
22 concerned." (*Village of Laguna of Laguna Beach, Inc. v. Orange County Bd. of Supervisors*  
23 (1982) 134 Cal.App.3d 1022, 1029 [quotation and citations omitted]; *Mira Mar Mobile*  
24 *Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 491.)

25 Petitioners bear the burden of demonstrating that the alternatives analysis is deficient. (*Cal.*  
26 *Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 987 (CNPS); *Sierra Club*  
27 *v. City of Orange, supra*, 163 Cal.App.4th at p. 530.) To do so, petitioners "must show that the  
28 alternatives are manifestly unreasonable and that they do not contribute to a reasonable range of

1 alternatives.” (*Federation of Hillside and Canyon Assns. v. City of Los Angeles* (2000) 83  
2 Cal.App.4th 1252, 1265.) The lead agency’s selection of the range of alternatives “will be upheld  
3 as long as there is a reasonable basis for the choices it has made.” (*City of Maywood v. Los*  
4 *Angeles Unified School Dist.* (2012) 208 Cal.App.4th 362, 414, 420-421 [quotation and citation  
5 omitted].)

6 **B. The EIR Analyzes a Reasonable Range of Alternatives**

7 **1. As Required by CEQA, the EIR’s Range of Alternatives Is Governed**  
8 **by the Fundamental Purposes of the Project**

9 “The process of selecting the alternatives to be included in the EIR begins with the  
10 establishment of project objectives by the lead agency.” (*In re Bay-Delta, supra*, 43 Cal.4th at p.  
11 1163; see also *Mt. Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210  
12 Cal.App.4th 184, 196-197.) These objectives “help the Lead Agency develop a reasonable range  
13 of alternatives to evaluate in the EIR.” (Guidelines § 15124, subd. (b).) An EIR must evaluate a  
14 range of alternatives that could feasibly achieve “most of the basic objectives of the project.” (*Id.*  
15 § 15126.6, subd. (f).) On the one hand, “an EIR should not exclude an alternative from detailed  
16 consideration merely because it ‘would impede to some degree the attainment of project  
17 objectives.’” (*In re Bay-Delta, supra*, 43 Cal.4th at p. 1165 [quoting Guidelines § 15126.6, subd.  
18 (b)].) On the other hand, an EIR need not analyze alternatives “that the lead agency has  
19 reasonably determined cannot achieve the project’s *underlying fundamental purpose*.” (*In re*  
20 *Bay-Delta, supra*, 43 Cal.4th at p. 1165 [italics added].) “CEQA clearly recognizes the agency  
21 will look to the proposed project’s particular objectives when developing its range of project  
22 alternatives.” (*Cal. Oak Foundation, supra*, 188 Cal.App.4th at p. 277.)

23 In this case, as discussed in XVIII.A [Project Description], above, the Delta Reform Act  
24 establishes the “underlying fundamental purpose” of the project for purposes of CEQA. These  
25 project objectives call for furthering achievement of the coequal goals of providing a more  
26 reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem  
27 (Wat. Code, §§ 85300, subd. (a), 85054; see also D6788) and the eight “inherent” objectives set  
28 forth in Water Code section 85020. (D5902.)

1 In total, the EIR analyzes seven alternatives, all at the same level of detail. The Draft EIR  
2 describes in detail six alternatives, including the Proposed Project. (D6733-6736, 6872-6909.)  
3 The Recirculated Draft EIR describes in detail a seventh alternative, referred to as the "Revised  
4 Project" alternative, and compares the impacts of this new alternative with the other six  
5 alternatives. (D5902-5908, 5973-5974, 6569- 6586.) The Council's selection of these  
6 alternatives was informed by both the fundamental project purpose of achieving the coequal  
7 goals, as required by the Act, and comments submitted to the Council by the general public,  
8 organizations and businesses, and public agencies. (D6862-6875.)

9 The Draft EIR thoroughly explains the process the Council used to develop and select  
10 alternatives for detailed consideration in the EIR. (D6862-6891.) The Council considered  
11 hundreds of comments made at the scoping sessions and submitted in letters and e-mails during  
12 the scoping period. (D6864-6872.) Every alternative proposed in these comments was  
13 considered in light of: (1) the extent to which the alternative would meet the project objectives;  
14 (2) feasibility, including whether the alternative was within the authority provided in the Delta  
15 Reform Act; and (3) the extent to which the alternative would avoid or substantially lessen any  
16 significant environmental effect of the Proposed Project. (D6873.)

17 While the alternatives analyzed in the EIR were informed by the range of interests that  
18 participated in the scoping process, none of the alternatives precisely corresponds in every aspect  
19 to what particular commenters proposed. As required by Guidelines section 15126.6, subdivision  
20 (c), the Draft EIR explains that it considered but rejected suggested alternatives that: (1) could  
21 jeopardize the attainment of one or more of the coequal goals; (2) focused on site-specific  
22 concerns rather than management of the entire Delta; or (3) addressed implementation of the  
23 BDCP rather than the Delta Plan. (D6889-6891.)

24 Because the coequal goals require tradeoffs between different environmental impacts, the  
25 alternatives are comprised of policies that emphasize different aspects of the coequal goals and  
26 the eight inherent objectives, while also reducing at least some of the project's significant  
27 environmental effects, as required by CEQA. (D8250; C90; D76-77.) The alternatives analyzed  
28 in the EIR are the following:

- 1 • Alternative 1A, informed by comments from water users in export areas south of  
2 the Delta, involves exporting more water from the Delta, and decreasing water use  
3 efficiency, conservation, and local supplies compared to the Proposed Project. (D6873-  
4 6874.)
- 5 • Alternative 1B, informed by a proposal from the Agriculture/Urban Coalition, is  
6 similar to Alternative 1A except that it changes all mandatory policies of the Proposed  
7 Project to recommendations and adds invasive species management to further the coequal  
8 goal of ecosystem enhancement. (D6874-6875.)
- 9 • Alternative 2, informed by proposals from environmental organizations led by the  
10 Environmental Water Caucus, emphasizes ecosystem restoration and flood risk reduction  
11 by severely decreasing water exports from the Delta and by encouraging more local  
12 water supply projects compared to the Proposed Project. (D6875.)
- 13 • Alternative 3, informed by letters and comments from farmers and other in-Delta  
14 water users, emphasizes the protection of Delta agriculture by reducing water exports,  
15 directing ecosystem restoration away from agricultural lands, and focusing on flood  
16 protection on such lands. (D6875.)
- 17 • The Proposed Project Alternative, which was the proposed Delta Plan as  
18 formulated in the Fifth Staff Draft. (D6803, 6810-6862.)
- 19 • The No Project Alternative, which consists of existing conditions and assumes the  
20 continuation of current plans and policies related to the Delta, as required by Guidelines  
21 section 15126.6, subdivision (e)(2). (D6873.)
- 22 • In response to comments on the Fifth Staff Draft Plan and the Draft EIR, the  
23 Council developed a seventh alternative, which is the Final Draft Delta Plan and is  
24 referred to as the “Revised Project” in the Recirculated Draft EIR. (D5973-5974.)

25 Each chapter of the Draft EIR includes multiple sections discussing the impacts of the  
26 various alternatives compared to the impacts of the Proposed Project, as required by Guidelines  
27 section 15126.6, subdivision (d). (See, e.g. D6737, 7033-7041, 7139-7151, 8249-8259 [Draft  
28 EIR at ES-7, 3-93 to 3-101, 4-86 to 4-98, 25-1 to 25-11].) Because the Draft EIR already

1 considered a wide range of alternatives, the Recirculated Draft EIR contains a detailed discussion  
2 and comparison of the Revised Project's environmental impacts with the impacts of the other six  
3 alternatives in each of the 19 resource categories. (*Id.*; D5902-5908, 6569- 6586 [Recirculated  
4 Draft EIR at ES-4 to ES-10, 25-1 to 25-18].)

5 **2. The EIR Was Not Required To Evaluate Further Variations of a**  
6 **Reduced Export/Increased Flow Alternative**

7 North Coast and Central Delta contend that the EIR failed to analyze a reasonable range of  
8 alternatives because it: (1) modified Alternative 2 from the version proposed by a coalition of  
9 environmental organizations, including some of the petitioners in this action, by adding a water  
10 storage reservoir; and (2) failed to analyze two variations on Alternative 2 proposed by these  
11 same petitioners that would have further reduced Delta exports and increased Delta flows. (North  
12 Coast, pp. 18-19; Central Delta, pp. 69-71.) In essence, North Coast and Central Delta argue that  
13 the EIR failed to include a sufficient number of alternatives that satisfied the coequal goal of  
14 restoring the Delta ecosystem in their preferred manner; i.e., by reducing Delta exports and  
15 increasing Delta flows. North Coast's and Central Delta's arguments are based on their policy  
16 disagreement with Alternative 2 rather than CEQA's legal requirements.

17 CEQA does not require analysis of "every conceivable alternative," just a reasonable range  
18 of alternatives that is sufficient to permit informed decision making and meaningful public  
19 participation. (Guidelines § 15126.6, subds. (a), (f).) In addition, "CEQA does not require that  
20 an agency consider specific alternatives that are proposed by members of the public or other  
21 outside agencies." (*City of Maywood, supra*, 208 Cal.App.4th at p. 420.) An EIR's "discussion  
22 of alternatives is adequate if it provides sufficient information to compare the project with a  
23 reasonable choice of alternatives." (*Federation of Hillside and Canyon Assns., supra*, 83  
24 Cal.App.4th at p. 1264.) Where, as here, "an EIR discusses a reasonable range of alternatives  
25 sufficient to foster informed decision making" on the major policy issues at stake, "it is not  
26 required to discuss additional alternatives substantially similar to those [already] discussed," such  
27 as, in this case, the two variations on Alternative 2 proposed by a group including some of the  
28

1 petitioners. (*Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190  
2 Cal.App.4th 316, 355.)

3 In *Cherry Valley*, the court rejected the petitioners' argument that an EIR's alternatives  
4 analysis for a 560-unit residential development was inadequate because the EIR did not consider  
5 a sufficient number of reduced development alternatives. The court reasoned that:

6 Though one or more . . . imaginable alternatives may have represented the  
7 optimum number of residences that could have profitably been built while  
8 minimizing the agricultural impacts of the project to the fullest extent possible, the  
9 range of alternatives discussed in the EIR was sufficient to foster informed  
10 decision making on this very question. . . . The hypothetical alternative plaintiffs  
11 imagine—the one that would maximize profit while reducing agricultural impacts  
to the fullest extent possible—could have been intelligently considered by  
studying the specifics and financial feasibility of the alternatives that were  
discussed.

12 (*Id.* at pp. 355-56; see also *Village of Laguna Beach, supra*, 134 Cal.App.3d at p. 1029 [“an  
13 alternative not discussed in the EIR could be intelligently considered by studying the adequate  
14 descriptions of the plans that are discussed”].)<sup>102</sup>

15 Likewise, here, the range of alternatives selected for analysis in the EIR was sufficient to  
16 “compare the project with a reasonable choice of alternatives,” and to foster informed and  
17 intelligent decision making on the policy tradeoffs involved in balancing the coequal goals of  
18 providing a more reliable water supply while protecting and restoring the Delta ecosystem.  
19 (*Federation of Hillside and Canyon Assns., supra*, 83 Cal.App.4th at p. 1264; *Cherry Valley,*  
20 *supra*, 190 Cal.App.4th at pp. 355-356.) As discussed above, the project's fundamental objective  
21 is to achieve the coequal goals and their eight inherent objectives in a manner that reduces  
22 reliance on Delta exports, satisfies both coequal goals, and is widely and quickly implementable.

23 <sup>102</sup> Central Delta cites *Watsonville Pilots Assn. v. City of Watsonville* (2010) 183  
24 Cal.App.4th 1059 in support of its contention that the EIR was required to consider two variations  
25 on Alternative 2. (Central Delta, p. 71.) That case is distinguishable because the EIR in that case  
26 only evaluated three alternatives in addition to the proposed project. Two of the alternatives  
27 provided for the same level of development and the third was the No Project Alternative. Under  
28 these circumstances, the court held that the EIR was required to evaluate a reduced development  
alternative. (*Watsonville Pilots Assn., supra*, 183 Cal.App.4th at pp. 1088-1090.) Here, in  
contrast, the Delta Plan EIR evaluates seven alternatives, two of which (Alternatives 2 and 3)  
focus more on the ecosystem protection coequal goal than on the water supply reliability coequal  
goal. (See detailed discussion of alternatives, below.)

1 (See, e.g., D6001, 6788-6789.) These objectives are complex and interdependent; furthering one  
2 may require tradeoffs in accomplishing another. (D8250, 6573, 76.) Each policy objective of the  
3 overall, multi-faceted project—water supply reliability, ecosystem protection, preservation of the  
4 Delta, development of local and regional water supplies, reduction of flood risk—will have  
5 different impacts on the environment. Accordingly, each of the seven alternatives in the EIR  
6 includes different combinations of Plan policies to emphasize different aspects of the coequal  
7 goals. (D76.)

8        Alternatives 1A and 1B emphasize exporting more water from the Delta and reducing new  
9 local water supply projects compared to the Proposed Project, Alternative 2 emphasizes  
10 ecosystem protection by reducing Delta exports and increasing Delta flows, and Alternative 3  
11 emphasizes protection of Delta agricultural lands and existing water supplies.<sup>103</sup> (D6873-6875.)  
12 Thus, Alternatives 1A, 1B, 2, and 3 each contain a different policy emphasis among the project’s  
13 overall objectives, while continuing to further all project objectives to at least some degree and  
14 reducing at least some of the project’s significant environmental effects, as required by CEQA.  
15 (D76.) Each of these four alternatives similarly emphasizes a major theme expressed during early  
16 rounds of public “scoping” comments on the Draft Delta Plan and Draft EIR. (*Ibid.*; D6873-  
17 6875.) These alternatives, together with the mandatory No Project Alternative, the initial  
18 Proposed Project Alternative, and the Revised Project Alternative that was crafted in response to  
19 public comments, explore the range of policy choices that would satisfy the fundamental project  
20 objectives and inform the decision maker and the public of the environmental tradeoffs involved  
21 in emphasizing different aspects of the coequal goals. Here, as in *Cherry Valley*, the EIR was not  
22 required to consider “every imaginable” potentially feasible additional alternative that would also  
23 reduce Delta exports and increase Delta flows, and the selected range was more than adequate to  
24 foster informed decision-making. (*Cherry Valley, supra*, 190 Cal.App.4th at p. 354.)

25  
26 <sup>103</sup> Thus, even though the *In re Bay-Delta* case holds that the lead agency was not  
27 required to consider a reduced exports alternative for the analogous CALFED Program (see *In re*  
28 *Bay-Delta, supra*, 43 Cal.4th at pp. 1162-69), in this case the Council did consider a reduced  
exports and increased Delta flow alternative in Alternative 2.

1                                   **3. The EIR Is Only Required to Evaluate Alternatives to the Entire**  
2                                   **Project That Would Reduce At Least Some of Its Significant Impacts**

3           Petitioners also object to specific features of individual alternatives (such as the water  
4 storage components of Alternative 2) in an attempt to eliminate them, and then argue that the EIR  
5 failed to consider a reasonable range. CEQA does not require a lead agency to develop  
6 alternatives to each separate component of an integrated project, however, or to consider  
7 alternatives that fail to meet the project’s fundamental underlying purposes. (*In re Bay-Delta*,  
8 *supra*, 43 Cal.4th at pp. 1165-1166; *Cal. Oak Foundation, supra*, 188 Cal.App.4th at pp. 276-  
9 277.) Rather, an EIR considers alternatives to the project as a whole, not to individual  
10 components of a project. (See Guidelines § 15126.6, subd. (a); *Big Rock Mesas Prop. Owners*  
11 *Assn. v. Los Angeles County Bd. of Supervisors* (1977) 73 Cal.App.3d 18, 227 [alternatives  
12 analysis applies “only to the project as a whole, not to the various facets thereof, such as grading  
13 and access roads”].)

14           There also “is no legal requirement that the alternatives selected must satisfy *every key*  
15 *objective* of the project.” (*CNPS, supra*, 177 Cal.App.4th at p. 991 [italics added].) Finally,  
16 particularly for large and complex projects such as the Plan, “it is practically impossible to  
17 imagine an alternative that would provide substantial environmental advantages in all respects.”  
18 (*Sierra Club v. City of Orange, supra*, 163 Cal.App.4th at p. 546.) Thus, alternatives need only  
19 “avoid or substantially lessen *any* of the significant effects of the project.” (*Id.* at pp. 546-547  
20 [quoting Guidelines § 15126.6, subd. (a)].) In sum, the adequacy of the EIR’s alternatives  
21 analysis ultimately turns on whether it comports with CEQA’s informational mandate, not on  
22 whether the alternatives meet a particular petitioner’s policy preferences. (See Guidelines §  
23 15126.6, subd. (f); *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176  
24 Cal.App.4th 889, 922, quoting *Laurel Heights I, supra*, 47 Cal.3d at p. 392 [“[C]ourts do not  
25 ‘pass upon the correctness of the EIR’s environmental conclusions, but only upon its sufficiency  
26 as an informative document.’”].)



1 Supplies for south-of-Delta users and the Metropolitan Water District could be  
2 sourced from the natural reservoir that is Tulare Lake . . . . The restoration of the  
3 Tulare Lake basin in the San Joaquin Valley is a unique opportunity to provide for  
4 the quality, quantity, and reliable regional sourcing and use of water for  
agricultural, economic development and environmental needs on a self-sufficient  
basis.

5 (K6320-6321.) Thus, Alternative 2 is appropriately included within the EIR's range of  
6 alternatives as an alternative that could feasibly meet most of the project objectives.

7 **C. The EIR Analyzes the Alternatives at a Sufficient Level of Detail**

8 Central Delta argues that the EIR's description of alternatives is too general or vague.  
9 (Central Delta, p. 69.) This argument likewise fails. While "an EIR's discussion of alternatives  
10 must be reasonably detailed," it need not be "exhaustive." (*Cal. Oak Foundation, supra*, 188  
11 Cal.App.4th at p. 276; see also *Sierra Club v. City of Orange, supra*, 163 Cal.App.4th at p. 548.)  
12 An EIR need only "include sufficient information about each alternative to allow meaningful  
13 evaluation, analysis and comparison with the proposed project." (Guidelines § 15126.6, subd.  
14 (d).) The EIR need not analyze each alternative at the same level of detail as the proposed  
15 project, but must simply identify the significant effects of the alternative that differ from the  
16 proposed project. (*Ibid.*) In addition, "[t]he degree of specificity required in an EIR will  
17 correspond to the degree of specificity involved in the underlying activity which is described in  
18 the EIR." (Guidelines § 15146.)

19 The alternatives analysis in the EIR more than satisfies these standards. Although not  
20 required by CEQA (see Guidelines § 15126.6, subd. (d)), all of the alternatives are analyzed at an  
21 equal level of detail. (D5974, 6731.) Because the Delta Plan is a state-level plan of broad scope  
22 and geographic coverage, the EIR takes a programmatic approach to the analysis of the impacts  
23 of both the project and alternatives to the project, and includes an appropriate level of detail for  
24 such a programmatic analysis. (See Guidelines § 15146, subd. (b); see also *In re Bay-Delta*,

25 \_\_\_\_\_  
26 (...continued)

26 Tribe are members of the Environmental Water Caucus (see K6732-33) and are parties to North  
27 Coast's complaint and brief. The Pacific Coast Federation of Fishermen's Associations was  
28 additionally a member of the coalition that submitted the prior Tulare Lake recommendations.  
(See I108 [listing members of coalition].)

1 *supra*, 43 Cal.4th at p. 1170; *Al Larson Boat Shop, supra*, 18 Cal.App.4th at pp. 745-746; D77-  
2 78; see also Arguments XVII.A [Level of Detail], *ante*.)

3 As discussed above, the EIR describes in detail seven program-level alternatives. (D6733-  
4 6736, 6872-6909, 5902-5908, 5973-5974, 5977-6002.) The EIR also includes a lengthy and  
5 detailed matrix, as authorized by Guidelines section 15126.6, subdivision (d), which compares the  
6 impacts of each alternative. (D6876-6888.) Each chapter of the EIR also includes sections  
7 describing the impacts of the alternatives for the resource covered in that chapter, and compares  
8 these impacts to those of the project. (See, e.g. D7033-7041, 7139-7151, 6005-6565.) The EIR  
9 in addition includes separate chapters summarizing this comparison. (D8249-8259, 6569- 6586.)

10 In the EIR, if an impact of an alternative is the same as was previously discussed for the  
11 proposed project, that fact is noted in the impact discussion. (See, e.g., D7033-7041, 7139-7151.)  
12 If an impact would be different, the EIR provides a detailed discussion. (E.g., D7437-7438  
13 [discussing the impacts of Alternative 2 on agricultural resources, which would be greater than  
14 those of the proposed Project].) This approach meets or exceeds the requirements of Guidelines  
15 section 15126.6, subdivision (d). The EIR also appropriately does not include quantitative impact  
16 analyses, because such quantitative details are not known at this time, as it is unknown what  
17 specific projects other agencies and entities will undertake in the future to implement the Plan.  
18 (See, e.g., D6002, 77-78; see also Argument XVII.B [Level of Detail], *ante*.) Thus, the EIR's  
19 alternatives analysis is sufficiently detailed.

20 **D. The Council Concluded, Based on Substantial Evidence, That the Revised**  
21 **Project Is the Environmentally Superior Alternative**

22 Water Contractors, North Coast, and Central Delta each expressly or impliedly challenge  
23 the EIR's determination that the Revised Project is environmentally superior to the other  
24 alternatives. (Water Contractors, pp. 76-77; North Coast, pp. 18-19; Central Delta, pp. 69-71.)  
25 CEQA requires that "[i]f the environmentally superior alternative is the 'no project' alternative,  
26 the EIR shall also identify an environmentally superior alternative among the other alternatives."  
27 (Guidelines § 15126.6, subd. (e)(2).) The designation of an environmentally superior alternative  
28 is strictly informational, and CEQA does not limit the factors that a lead agency may consider in

1 selecting an environmentally superior alternative. (See *ibid.*) As with other aspects of the  
2 alternatives analysis, courts must defer to the agency's selection of the environmentally superior  
3 alternative, as long as the EIR explains why each other alternative does "not offer substantial  
4 environmental advantages over" the environmentally superior alternative or "could not be  
5 feasibly accomplished in a successful manner considering the economic or environmental or  
6 technological factors involved." (*Marin Municipal Water Dist. v. KG Land Cal. Corp., supra*,  
7 235 Cal.App.3d at p. 1666.) The EIR in this case satisfies this standard.

8 The EIR reasonably concludes that the Revised Project (the Final Delta Plan) is the  
9 environmentally superior alternative. As the Council found, based on the EIR and the record as a  
10 whole, while the No Project Alternative is the environmentally superior alternative with regard to  
11 *short-term construction impacts* because it "involves less construction than the [Revised Project]  
12 or any other alternative" (C96), the Revised Project is environmentally superior in the long term,  
13 and is therefore the environmentally superior alternative. That is because it has the greatest  
14 ability to arrest the ongoing decline in environmental conditions in the Delta. (D6584-6586,  
15 8258-8259, 6738, 5906.) Absent the solutions encouraged by the Plan, these problems will only  
16 worsen over time. (*Ibid.*; see also B483-84, 537.) The No Project Alternative, in contrast,  
17 "would do nothing to address ongoing degradation of the Delta's water resources, biological  
18 resources, agricultural resources, and flood protection." (*Ibid.*)

19 The Council also found, based on substantial evidence in the record, that the Revised  
20 Project is environmentally superior to the other alternatives. (C96; see also D5906-5908, 6584-  
21 6586.) The Council's findings state that, "in the absence of the [Revised Project] or under the  
22 alternatives . . . , ongoing degradation of the Delta's biological resources, flood protection, water  
23 resources, and agricultural resources will continue, with results that are both contrary to the  
24 coequal goals and harmful to the environment." (C96; see also D78-79.)

25 Alternatives 1A and 1B would have fewer short-term impacts related to construction than  
26 the Revised Project, because these alternatives encourage fewer reliable water supply and  
27 ecosystem restoration projects than the Revised Project. However, these alternatives would delay  
28 investment in water quality improvement and ecosystem restoration, and would maintain current

1 Delta export practices, thereby failing to adequately improve water supply reliability. (D5908,  
2 6585.)

3 Alternative 2 would encourage greater ecosystem restoration, reduced reliance on Delta  
4 water supplies, and reductions in flood risk compared to the Revised Project, but would do so at  
5 the cost of greater overall environmental impacts on water supply reliability and the conversion of  
6 productive agricultural land. (D5908, 6585-6586; C96; D79-80.) While it is not possible to  
7 quantify the differences between these impacts because doing so would necessarily be  
8 speculative, the EIR reasonably determined that the impacts of Alternative 2 would be  
9 qualitatively greater in magnitude or severity than those of the Revised Project, and so concluded  
10 that Alternative 2 is slightly environmentally inferior to the Revised Project. (*Ibid.*)

11 Alternative 3 also is slightly environmentally inferior to the Revised Project. While  
12 Alternative 3 would have fewer impacts related to the conversion of Delta agricultural land than  
13 the Revised Project, it would do less than the Revised Project to arrest ecosystem decline,  
14 improve Delta water quality, and improve overall water supply reliability. (D5908, 6586; C96.)

15 Finally, the Revised Project is environmentally superior to the Proposed Project analyzed in  
16 the Draft EIR “because it does more to encourage and define measures that will improve water  
17 supply reliability, including in areas upstream of the Delta, and because it would cause less  
18 conversion of Delta farmland to non-agricultural uses.” (C96.) In addition, the Revised Project  
19 “would be more effective than the Proposed Project Alternative in reducing ongoing Delta  
20 environmental problems,” for the reasons explained in the Recirculated Draft EIR. (D5907,  
21 6584-6585.)

22 Based on these comparative analyses, which provide substantial evidence, the EIR  
23 appropriately concludes that the Revised Project is the environmentally superior alternative.  
24 (*Marin Municipal Water Dist., supra*, 235 Cal.App.3d at p. 1666.)

25 **E. The EIR Includes a Legally Adequate No Project Alternative**

26 Water Contractors and North Coast also challenge the adequacy of the EIR’s discussion of  
27 the No Project Alternative. (Water Contractors, p. 77, fn. 37; North Coast, p. 19.) The arguments  
28

1 of these petitioners are in tension with, if not direct contradiction to, one another: Water  
2 Contractors argue that the EIR's discussion of the No Project Alternative fails to describe future  
3 actions that will *improve* existing water quality and habitat conditions, while North Coast argues  
4 that the No Project Alternative improperly downplays the potential for a continued *decline* of  
5 existing conditions in the Delta in the future. (*Ibid.*)

6 The CEQA Guidelines require an EIR to describe and analyze the impact of a No Project  
7 Alternative, the purpose of which is "to allow decision makers to compare the impacts of  
8 approving the proposed project with the impacts of not approving the proposed project."  
9 (Guidelines § 15126.6, subd. (e)(1).) The Guidelines provide that the lead agency should  
10 "analyze the impacts of the no project alternative by projecting what would reasonably be  
11 expected to occur in the foreseeable future if the project were not approved, based on current  
12 plans and consistent with available infrastructure and community services." (*Id.*, subd. (e)(3)(C).)  
13 "[W]here failure to proceed with the project will not result in preservation of existing  
14 environmental conditions, the analysis should identify the practical result of the project's non-  
15 approval and not create and analyze a set of artificial assumptions that would be required to  
16 preserve the existing physical environment." (*Id.*, subd. (e)(3)(B).)

17 As the Third District Court of Appeal explained in *Planning and Conservation League v.*  
18 *Dept. of Water Resources*, *supra*, 83 Cal.App.4th at p. 892, the No Project Alternative must:

19 [A]ddress "existing conditions" as well as "what would be reasonably expected to  
20 occur in the foreseeable future if the project were not approved, based on current  
21 plans and consistent with available infrastructure and community services."  
22 (Guidelines, § 15126.6, subd. (e)(2).) (The existing conditions, supplemented by a  
23 reasonable forecast, are characterized as the no project alternative.) The  
24 description must be straightforward and intelligible, assisting the decision maker  
25 and the public in ascertaining the environmental consequences of doing nothing. . .  
26 . . . [¶]. . . A no project description . . . provides the decision makers and the public  
27 with specific information about the environment if the project is not approved. It  
28 is a factually based forecast of the environmental impacts of preserving the status  
quo.

(*Id.* at pp. 911, 917-918; accord *Berkeley Keep Jets*, *supra*, 91 Cal.App.4th at p. 1363.) The  
status quo constitutes the continuation of existing plans, programs, activities and projects that are

1 expected to occur even if the project is not approved. (See *Planning and Conservation League,*  
2 *supra*, 180 Cal.App.4th at pp. 247-248.)

3 Here, the EIR more than satisfies these requirements. The existing conditions in the Delta  
4 are well-documented in all impact analyses in the EIR. (See, e.g., D6943-7016, 7055-7111.) The  
5 EIR defines the No Project Alternative as “the environment if no Delta Plan is adopted.” (D6873;  
6 see also D6570-6571.) As required by Guidelines section 15126.6, subdivision (e), this  
7 alternative “assumes that existing relevant plans and policies would continue,” and includes  
8 “reasonably foreseeable modified or new plans or policies that are currently being analyzed for  
9 adoption or are required to be adopted.” (D6873; see also D6570-6571.) The No Project  
10 Alternative also includes “physical activities/projects that are permitted and funded at this time.”  
11 (*Id.*) The EIR adequately describes these existing plans, policies, activities, and projects, and  
12 analyzes their potential future impacts in comparison with the project, as measured against the  
13 baseline of existing conditions. (D6891-6898; see also D7033-7034, 7139-7140.)

14 Ultimately, petitioners’ objections to the EIR’s discussion of the No Project Alternative  
15 reflect policy disagreements with the conclusions reached in the EIR. But such policy  
16 disagreements are not cognizable under CEQA. (See *City of Long Beach, supra*, 176 Cal.App.4th  
17 at p. 922, quoting *Laurel Heights I, supra*, 47 Cal.3d at p. 392 [“[C]ourts do not ‘pass upon the  
18 correctness of the EIR’s environmental conclusions, but only upon its sufficiency as an  
19 informative document’”]; *Citizens of Goleta, supra*, 52 Cal.3d at p. 564 [a court “may not set  
20 aside an agency’s approval of an EIR on the ground that an opposite conclusion would have been  
21 equally or more reasonable”].) The EIR’s discussion of the No Project Alternative satisfies all  
22 requirements of Guidelines section 15126.6, subdivision (e).

23 **XXII. THE EIR IDENTIFIES EFFECTIVE MITIGATION MEASURES TO REDUCE OR AVOID**  
24 **MANY OF THE PROJECT’S POTENTIAL ENVIRONMENTAL IMPACTS**

25 Water Contractors argue that certain mitigation measures in the EIR are improperly  
26 “deferred” or are “uncertain and unenforceable.” (Water Contractors, pp. 69-72.)<sup>105</sup> This

27 <sup>105</sup> North Coast also purports to challenge the EIR’s mitigation measures, but the  
28 “mitigation” section of their Opening Brief does not name a single allegedly inadequate measure.  
(continued...)

1 argument ignores how the Plan actually works. When an EIR identifies potentially significant  
2 environmental impacts, CEQA requires it to identify feasible mitigation measures to reduce or  
3 avoid those impacts, and requires the lead agency to adopt such measures when approving the  
4 project. (Pub. Resources Code, §§ 21002, 21100, subd. (b)(3); Guidelines § 15126.4, subd.  
5 (a)(1)-(3).) The lead agency may adopt mitigation measures and either implement them itself or  
6 require the project proponent (for example, the developer of a residential project) to implement  
7 them. (See *City of Marina v. Bd. of Trustees of the California State Univ.* (2006) 39 Cal.4th 341,  
8 374 [discussing Pub. Resources Code, § 21081].)

9 Here, the lead agency for the Plan (the Council) will not be the agency approving or  
10 undertaking the projects that will cause impacts. Rather, the agencies undertaking or approving  
11 these projects will be lead agencies for the projects and will be responsible under CEQA for  
12 identifying, adopting, and enforcing project-specific mitigation measures. (See Pub. Resources  
13 Code, §§ 21067, 21081.6.) To ensure that these future agencies take the actions needed to reduce  
14 or avoid the potentially significant environmental impacts of projects encouraged by the Delta  
15 Plan, the Plan incorporates mitigation measures into its structure. A “covered action,” as defined  
16 in Water Code section 85057.5, must be consistent with the Plan’s policies. (Wat. Code,  
17 § 85225.) Pursuant to Policy GP 1, consistency requires that covered actions that are not exempt  
18 from CEQA include feasible mitigation measures identified in the EIR, or substitute mitigation  
19 measures of equal or greater effectiveness. (B445.)

20 Within this context, the EIR identifies mitigation measures that are simultaneously  
21 sufficiently specific to ensure that impacts can be mitigated and sufficiently flexible to allow  
22 other lead agencies to apply them in the most effective way. Water Contractors attempt to  
23 characterize this flexibility as vagueness or unenforceability (Water Contractors, pp. 72-74), but  
24 these claims must fail, as discussed below. Petitioners bear the burden of showing that measures

25 \_\_\_\_\_  
(...continued)

26 (North Coast, pp. 19-21.) Instead, it argues (1) that the Council inappropriately “assume[s]” that  
27 agencies would follow the Plan’s recommendation, an argument refuted in Argument XXB,  
28 above, [Water Supply], of this brief; and (2) that the EIR should have identified mitigation for the  
impacts of BDCP, which is refuted in Argument XVI [BDCP], above. (*Id.* at p. 20.)

1 are invalid or inadequate. (See *California Native Plant Society v. City of Rancho Cordova* (2009)  
2 172 Cal.App.4th 603, 626 [citations omitted].) “A court’s task is not to weigh conflicting  
3 evidence and determine who has the better argument when the dispute is whether adverse effects  
4 have been mitigated or could be better mitigated.” (*Laurel Heights I, supra*, 47 Cal.3d at p. 393.)  
5 Rather, the court’s limited function is to ensure that environmental consequences have been  
6 considered. (*Ibid.*) The mitigation measures in the EIR meet this standard.

7 **A. The Mitigation Measures Provide Adequate Performance Standards**

8 CEQA encourages lead agencies to define mitigation measures at the time of project  
9 approval. (Guidelines § 15126.4, subd. (a)(1)(B).) Recognizing that this is not always possible,  
10 CEQA also provides for flexibility: “[mitigation] measures may specify performance standards  
11 which would mitigate the significant effect of the project and which may be accomplished in  
12 more than one specified way.” (Guidelines § 15126.4, subd. (a)(1)(B); see also, e.g., *Sacramento*  
13 *Old City Assn. v. City Council* (1991) 229 Cal.3d 1011, 1019-1023, 1027-30 [finding list of seven  
14 potential mitigation measures adequate where lead agency “committed itself to mitigating the  
15 impacts of parking and traffic” and to incorporating selected measures into a transportation  
16 management program].) The performance standard approach is especially appropriate where, as  
17 here, it is impractical to identify specific measures at an early stage of the project. (See, e.g.,  
18 *Endangered Habitats League, Inc. v. City of Orange* (2005) 131 Cal.App.4th 777, 793-796.)

19 Such an approach affords the lead agency needed flexibility, allowing later tailoring of the  
20 measure to the specifics of the project. This type of flexibility is particularly critical when  
21 dealing with a large scale program like the Plan, where at the time of approval the lead agency  
22 does not, and cannot, know precisely how that program will be implemented under future site-  
23 specific conditions. The mitigation measures in the EIR will be applied by many different  
24 agencies for many different projects, the details of which are currently unknown. (See D82.)  
25 Such flexibility is part of the purpose of a program EIR: “An advantage of using a program EIR  
26 is that it can “[a]llow the lead agency to consider broad policy alternatives and program wide  
27 mitigation measures at an early time when the agency has greater flexibility to deal with basic  
28

1 problems or cumulative impacts.” (*In re Bay-Delta, supra*, 43 Cal.4th at p. 1169 [quoting  
2 Guidelines § 15168, subd. (b)(4)]; see also *Ctr. for Biological Diversity, supra*, 234 Cal.App.4th  
3 at p. 241 quoting *Sacramento Old City Assn., supra*, 229 Cal.App.3d at pp. 1028-29 [“[W]hen,  
4 for practical reasons, mitigation measures cannot be fully formulated at the time of project  
5 approval, the lead agency may commit itself to devising them at a later time, provided the  
6 measures are required to ‘satisfy specific performance criteria articulated at the time of project  
7 approval.’”].)

8 Water Contractors challenge this flexibility, claiming through incomplete quotations that  
9 the EIR defers the formulation of mitigation measures without providing sufficient performance  
10 standards. (Water Contractors, pp. 69-71.) A review of the EIR, however, demonstrates that the  
11 EIR contains exactly what Water Contractors claim that it lacks. They first attack Mitigation  
12 Measure 5-2, concerning storm water runoff associated with projects under the Plan. Water  
13 Contractors note that the measure calls for the preparation of a site-specific hydrology study and  
14 the design of facilities in accordance with the study. (Water Contractors, p. 70; D6097.) Water  
15 Contractors fail to mention, however, that both the study and the facilities themselves must  
16 additionally meet “the applicable standards” of the Federal Emergency Management Agency  
17 (FEMA), the United State Army Corps of Engineers (USACE), DWR, and the Central Valley  
18 Flood Protection Board (CVFPB). (D6097.) Other agencies’ standards, imported into a  
19 mitigation measure in this manner, are effective performance standards under CEQA. (See *Ctr.*  
20 *for Biological Diversity, supra*, 234 Cal.App.4th at p. 246, quoting *Oakland Heritage Alliance v.*  
21 *City of Oakland* (2011) 195 Cal.App.4th 884, 906 [“[A] condition requiring compliance with  
22 regulations is a common and reasonable mitigation measure and may be proper where it is  
23 reasonable to expect compliance”]; *Endangered Habitats League, supra*, 131 Cal.App.4th at pp.  
24 794-95 [approving measure mitigating fire risk by requiring a project’s fuel modification plans to  
25 comply with County Fire Authority guidelines].) Contrary to Water Contractors’ assertion, the  
26 mitigation measure meets CEQA standards.

27 Water Contractors make a similar attack on Mitigation Measure 9-2, intended to reduce  
28 odor impacts. Water Contractors note that this measure requires the development and

1 implementation of a “project-specific Odor Management Plan” (Water Contractors, p. 71;  
2 D6200), but fail to explain that the measure also specifies the contents of such a plan, and  
3 includes a performance standard requiring the plan to “minimize odor releases.” (*Ibid.*) This  
4 performance standard is adequate. (See *Ctr. for Biological*, *supra*, 234 Cal.App.4th at p. 243  
5 [approving measure “commit[ing] the Department to mitigating impacts to insignificance”].)

6 Water Contractors list further mitigation measures in a long citation on page 71 of their  
7 Opening Brief. However, the mitigation measures cited by Water Contractors all contain  
8 performance standards as appropriate, and many additionally list potential implementation  
9 measures or the contents of the mandated studies.<sup>106</sup>

- 10 • D6345 [Mitigation Measure 14-5, requiring preparation and implementation of “a  
11 fire management plan to *minimize potential for wildland fires*”]
- 12 • D5919 [Mitigation Measure 5-1, including 12 actions for mitigating drainage and  
13 runoff impacts, including preparing “drainage or hydrology and hydraulic study,”  
14 designing specific measures “in accordance with the final study and with the applicable  
15 standards of” FEMA, USACE, DWR, and CVFPB, and providing “onsite stormwater  
16 detention storage at construction and project facility sites that would *reduce project-*  
17 *caused short- or long-term increases in drainage runoff*. The storage space placement  
18 and capacity *would be designed based on the drainage or hydrologic and hydraulic*  
19 *study*”]
- 20 • D5943-5944 [Mitigation Measure 11-9, requiring geotechnical evaluation prior to  
21 construction to identify measures to *mitigate organic soils*”]
- 22 • D5960-5961 [Mitigation Measure 19-1, including 12 actions, such as requiring  
23 traffic control plan “*to reduce effects of roadway construction activities, including full*  
24 *and partial lane closures, bicycle and pedestrian facility closures, and reduced access to*  
25 *adjacent properties*” and “design and construct facility improvements to intersections or  
26 road segments *to maintain the acceptable level of service*”]

27 <sup>106</sup> Water Contractor’s list includes, without explanation, multiple instances of the same  
28 mitigation measures. The Council’s response discusses each cited measure only once.

- D5969-5970 [Mitigation Measures 21-2, 21-3, 21-4, to mitigate impacts of sea level rise, including eight actions in total, such as “Prepare a drainage or hydrology and hydraulics study that would assess the need and provide a basis for the design for projects that reduce risks of floods in the Delta,” and on the basis of that study “arrange the length of flood management facilities in the direction of the floodplain flow *to maximize surface flows under flood conditions*”  
(All italics added.)

Each of these measures contains a clear, objective performance standard, in full compliance with CEQA. Water Contractors’ extremely selective quotations from the mitigation measures obscure their real content, and should be disregarded.

Some of the standards and measures discussed above are relatively broad, but such flexibility is the only way to create workable mitigation measures for myriad projects spread across the state’s disparate regions with even more varied environmental conditions. More specific measures would be infeasible or ineffective in these circumstances, especially when they must respond to extremely localized and project-specific factors.

One such example of a necessarily broad mitigation measure relates to potentially dangerous organic soil conditions. Mitigation Measure 11-9 provides future lead agencies room to tailor their mitigation strategy to the environmental conditions of a particular location for a particular project. (D7702-7703.) Water Contractors question the flexibility built into this measure. (Water Contractors, p. 71.) The EIR recognizes that such mitigation may not be feasible in every instance and thus determines that the impact would be significant and unavoidable. (See, e.g., D7703.) The EIR thus answers Water Contractors’ concern: it provides a reasonable, pragmatic approach and it chooses not to rely on the mitigation measure’s ability to avoid the impact entirely. (*Ibid.*)

1           **B. The EIR’s Mitigation Measures Are Sufficiently Specific While Retaining**  
2           **Flexibility for Future Projects**

3           Water Contractors also argue that a series of mitigation measures are “uncertain,  
4           unenforceable, and speculative.” (Water Contractors, pp. 71-72.) All of the measures challenged  
5           are intentionally flexible because no other approach to mitigation would suffice to reduce or  
6           avoid the impacts of the Plan. Water Contractors’ assertion that the measures are “speculative” is  
7           also unpersuasive. Given the dearth of information about future projects under the Plan, the only  
8           way to develop the highly detailed, fine-tuned mitigation measures that Water Contractors seek  
9           would be to engage in improper and extensive speculation. (See Water Contractors, p. 72 [calling  
10          for analysis of whether trucked-in water will be available to mitigate certain groundwater  
11          impacts].) But CEQA prohibits such speculation. (See Guidelines § 15384, subd. (a) [excluding  
12          speculation from definition of “substantial evidence”].)

13          Water Contractors’ challenges to various mitigation measures demonstrate the  
14          unreasonableness of their preferred approach. Claiming that Mitigation Measure 8-1, concerning  
15          visual impacts, “essentially requires nothing” (Water Contractors, p. 72), Water Contractors  
16          selectively quote a single provision out of 11 mandatory measures for improving the aesthetics of  
17          projects under the Plan, while ignoring all others. (See D6170-6171 [Mitigation Measure 8-1].)  
18          Water Contractors are, moreover, wrong when they argue that the quoted language is  
19          unenforceable on the basis that the measure is subjective. The analysis of aesthetics is inherently  
20          subjective, as the courts have recognized (see, e.g., *Bowman v. City of Berkeley* (2004) 122  
21          Cal.App.4th 572, 592), so any mitigation measure concerning such impacts will be subjective as  
22          well. CEQA allows such subjectivity, entrusting decision making to the discretion and  
23          accountability of lead agencies. (See *National Parks and Conservation Assn. v. County of*  
24          *Riverside, supra*, 71 Cal.App.4th at pp. 1361-1362 [“The EIR acknowledges the potential  
25          subjective impacts of the project . . . . From the general information and hard data given, the  
26          County could reasonably draw conclusions about the significance of these impacts”].)

1 Water Contractors leave open the question of precisely how they would craft a sufficiently  
2 specific mitigation measure that would address the aesthetic impacts of every project that may be  
3 constructed under the Plan's guidance. This is because no such precise design specifications are  
4 possible at this first stage of environmental review. The Council has, instead, identified  
5 guidelines that future lead agencies must follow in mitigating visual and other impacts pursuant to  
6 their responsibilities under the Plan and under CEQA. (See D6170-6171 [Mitigation Measure 8-  
7 1].) This is a reasonable approach and is entitled to broad deference. (*Laurel Heights I, supra*, 47  
8 Cal.3d at p. 393.)

9 Water Contractors also object to qualifying language contained in several mitigation  
10 measures, such as "to the greatest extent feasible." (Water Contractors, p. 72; see, e.g., D6145.)  
11 This language simply acknowledges the reality of the Plan, which is that it is impossible to know  
12 now whether these measures will be feasible for every future project under the Plan. CEQA and  
13 the Plan account for this uncertainty. Under CEQA, only *feasible* mitigation measures are  
14 required. (Pub. Resources Code, § 21002 [barring project approval without adoption of "feasible  
15 mitigation measures"]; Guidelines § 15126.4 [requiring EIR to identify "feasible mitigation  
16 measures"].) Likewise, the Plan only requires the application of feasible mitigation, and it allows  
17 for the substitution of alternative, equally effective measures. (B445 [GP 1, subd. (b)(1)-(2)].)

18 Finally, it bears noting that CEQA imposes an independent mitigation obligation on every  
19 lead agency undertaking a project encouraged by the Delta Plan. (See Pub. Resources Code,  
20 §§ 21067, 21081.6.) These future lead agencies must apply the Plan's measures, or substitute  
21 measures, to reduce or avoid significant environmental impacts to the extent possible. (*Ibid.*;  
22 B445 [GP 1, subd. (b)(1)-(2)].)

### 23 **XXIII. THE COUNCIL PROVIDED GOOD FAITH, REASONED RESPONSES TO COMMENTS IN** 24 **THE EIR**

25 Water Contractors, North Coast, and Stockton contend that the EIR's responses to  
26 comments are inadequate. (Water Contractors, pp. 77-78; North Coast, p. 22-23; Stockton, pp. 9-  
27 10.) Petitioners are incorrect. CEQA requires an agency to prepare "good faith," "reasoned,"  
28 written responses that describe "the disposition of significant environmental issues raised."

1 (Guidelines § 15088, subds. (a), (c); see also Pub. Resources Code, § 21091, subd. (d).  
2 Responses are adequate where they “as a whole evince good faith and a reasoned analysis,” even  
3 if they are not “exhaustive or thorough in some respects.” (*Twain Harte Homeowners Assn. v.*  
4 *County of Tuolumne* (1982) 138 Cal.App.3d 664, 686 [applying substantial evidence standard].)  
5 The agency “need not respond to each comment made during the review process,” only “the most  
6 significant environmental questions presented.” (*Citizens for E. Shore Parks v. California State*  
7 *Lands Com.* (2011) 202 Cal.App.4th 549, 568 [quotation and citation omitted].)

8 **A. CEQA Does Not Restrict the Form of the Council’s Written Responses to**  
9 **Comments**

10 The Council responded to thousands of comments submitted by hundreds of agencies,  
11 organizations, and individuals. (D45-51, 97-5745 [comments and responses].) In responding to  
12 these comments, the Council provided five “master responses,” each of which comprehensively  
13 addresses an issue that was raised in numerous comments. (D51-95.) Petitioners complain that  
14 the master responses, and other recurring answers provided by the Council, are “dismissive and  
15 superficial,” but their briefs lack legal or factual support for this contention. (*Water Contractors*,  
16 pp. 78-80; see also *North Coast*, pp. 22-23.)

17 CEQA does not restrict the form of responses to comments, and courts have recognized that  
18 lead agencies have significant discretion in choosing how to organize their responses. (See, e.g.,  
19 Guidelines § 15088, subd. (d)(1)-(2); *Eureka Citizens for Responsible Gov. v. City of Eureka*  
20 (2007) 147 Cal.App.4th 357, 377-78.) Moreover, responses to comments need not be exhaustive;  
21 the level of detail of the response is based on the level of detail of the comment. (*Eureka*  
22 *Citizens, supra*, 147 Cal.App.4th at p. 378.) Accordingly, “where a general comment is made, a  
23 general response is sufficient.” (*Ibid.*)

24 Contrary to *Water Contractors*’ allegations, the Council appropriately responded to  
25 individual comments by referencing relevant master responses. (See, e.g., D105, 180, 236, 430,  
26 1676, 5054.) *Water Contractors* complain that the Council “excused” the programmatic nature of  
27 the EIR by responding to numerous comments with reference to Master Response 2. (*Water*  
28

1 Contractors, p. 78.) But each comment that Water Contractors cite criticizes the approach taken  
2 in the EIR, which is the precise subject of Master Response 2. (*Id.* [citing comments at D314,  
3 334-35, 338]; see also D67-74 [Master Response 2, explaining organization and methodology  
4 applied in EIR].) Accordingly, the Council’s cross-reference to Master Response 2 is apt and on  
5 point.

6 In other instances, Water Contractors mischaracterize the substance of a particular comment  
7 in arguing that a master response “does not address any of the issues raised [in that comment].”  
8 (Water Contractors, p. 78 [discussing comment LO232-43].) Comment LO232-43 contends that  
9 the cumulative impacts analysis is inadequate because the EIR “does not describe the overall  
10 impacts of the proposed project,” including the “appropriate geographical boundaries for each  
11 environmental category.” (D2002-2003.) The Council responded by referring the commenter to  
12 Master Response 2, which contains a detailed explanation of the methodology and approach used  
13 in the EIR, including the geographic scope of the study areas. (*Ibid.*; D72-73 [Master Response  
14 2, describing geographic scope].) This response was more than adequate. (See D67-74; see also  
15 *Twain Harte Homeowners Assn.*, *supra*, 138 Cal.App.3d at p. 686.)

16 Petitioners also take issue with responses that consist of a citation to relevant text in the  
17 EIR. (Water Contractors, p. 78; North Coast, p. 22.) The court in the *Eureka Citizens* case,  
18 however, expressly approved this approach. *Eureka Citizens* held that “[s]atisfactory responses to  
19 comments may . . . be provided by reference to the EIR itself.” (*Eureka Citizens*, *supra*, 147  
20 Cal.App.4th at pp. 377-378.)

21 Water Contractors and North Coast also assert that a response is inadequate when the  
22 response states that a comment was “noted.” (Water Contractors, p. 78; North Coast, p. 22.)  
23 CEQA does not require the Council to respond to comments that do not raise significant issues  
24 regarding the environmental analysis. (See *Citizens for E. Shore Parks*, *supra*, 202 Cal.App.4th  
25 at p. 568; see also *Environmental Protection Information Center v. Cal. Dept. of Forestry and*  
26 *Fire Protection* (2008) 44 Cal.4th 459, 487 [no prejudice in declining to respond to comments  
27 “demonstrably repetitive of material already considered,” “patently irrelevant,” or “support[ive]  
28 [of] the agency action”].) Petitioners have not identified a single instance in which a commenter

1 raised a significant environmental issue and received a response from the Council of “noted.”  
2 Indeed, Water Contractors only support their contention by providing an undifferentiated, general  
3 cite to *all* comments and responses rather than citing to specific comments. (Water Contractors,  
4 p. 78 [citing D97-5745].) This argument thus fails for lack of both merit and evidentiary support.  
5 (*Defend the Bay v. City of Irvine, supra*, 119 Cal.App.4th at p. 1266 [petitioners challenging an  
6 EIR “must lay out the evidence favorable to the other side and show why it is lacking”]; see also  
7 Standards of Review for CEQA Claims, Part B [Forfeit Claims], *ante*.)

8 Finally, Water Contractors’ assertion that the Council “glossed over” comments by using a  
9 “n/a” designation is misplaced. (Water Contractors, p. 78.) This convention simply indicates that  
10 there was no comment on the corresponding page to which to respond, or that the response to the  
11 corresponding text appears on a different page. (See, e.g., D1684-1686, 1687-1692, 1695-1696,  
12 1698-1699, 1704-1831.) In other words, the “n/a” designation is the equivalent of simply making  
13 note of a blank page, not a failure to respond.

14 **B. The Council’s Distinction Between Comments on the Plan and on the EIR**  
15 **Comports with CEQA**

16 Petitioners contend that the Council erred in its responses to comments that address the  
17 substance of the Plan rather than the EIR.<sup>107</sup> (Water Contractors, pp. 78-79; North Coast, pp. 22-  
18 23; Stockton, pp. 13-14.) As discussed above, CEQA only requires an agency to respond to  
19 comments that raise significant *environmental* questions. (See Guidelines §15088, subs. (a), (c);  
20 *Citizens for E. Shore Parks, supra*, 202 Cal.App.4th at p. 568.) Every comment petitioners  
21 challenge on this basis concerns policy disputes with the design and content of the Plan, however,  
22 not the environmental analysis in the EIR.<sup>108</sup> (See Water Contractors, pp. 78-79; North Coast, pp.

23 <sup>107</sup> In making this argument, North Coast and Stockton repeatedly refer to pages in the  
24 record that make no mention of the issue for which they are cited. (North Coast, p. 23, line 4  
25 [citing D553 (Regional Water Authority comment on groundwater levels)], Stockton, p. 14, lines  
26 1-2 [citing D5034 (League of Women Voters’ comment on relationship between Plan and  
27 BDCP), D5319 (email from individual explaining that comment letter is attached.) The Council  
28 cannot respond to petitioners’ contentions when they do not provide accurate citations.

<sup>108</sup> Additional comments cited by Water Contractors question the Council’s authority to  
impose regulatory requirements on local agencies. (Water Contractors, p. 79 [citing D312-313].)  
As a threshold matter, “CEQA does not grant an agency new powers independent of the powers  
granted to the agency by other laws.” (Guidelines § 15040, subd. (b); see also *Friends of Davis*,  
(continued...)

1 22-23; Stockton, pp. 13-14, [respectively citing, e.g., D312-313 (Plan gives Council too much  
2 regulatory authority over local agencies), D273 (Plan should be revised to discuss State Water  
3 Resources Control Board’s flow studies and public trust report), D4368 (Plan fails to include  
4 quantifiable performance measures)].) Accordingly, the Council’s responses indicating that these  
5 are “comment[s] on the project, not on the EIR” were appropriate under Guidelines section  
6 15088, subd. (c).

7 Moreover, many of the EIR’s responses that petitioners criticize provide additional,  
8 substantive explanations. For example, contrary to Water Contractors’ assertions (Water  
9 Contractors, p. 79), the Council did not simply respond “[t]his is a comment on the project, not on  
10 the EIR” to Comment LO175-9, which contends that the Plan does not reflect the best available  
11 science regarding stressors on the Delta ecosystem. (D338.) On the contrary, the response  
12 continues, “The EIR discusses multiple stressors in the Delta ecosystem. . . . For example,  
13 Subsection 4.3.2.1, . . . covers physical habitat loss, connectivity and interface loss, harmful  
14 invasive species, altered flow regimes, altered geometry, altered sediment supply, entrainment,  
15 contaminants, nitrogen loading, other water quality issues, and climate change . . . .” (*Ibid.*; see  
16 also D312-313, 2755, 2757-2758, 2758-2759, 3680.) This far surpasses CEQA’s requirement for  
17 a good faith and reasoned analysis. (Guidelines § 15088, subds. (a), (c).)

18 **C. The Petitioners’ Disagreement With the Content of the Council’s**  
19 **Responses to Comments Does Not Render Those Responses Inadequate**

20 North Coast argues that the Council rejected a particular project alternative proposed by the  
21 Environmental Water Caucus without adequate consideration or explanation. (North Coast, p. 23  
22 [citing D2341-2345, 2763].) Yet, as the Council repeatedly explained, including in responses to

23 \_\_\_\_\_  
24 (...continued)

25 *supra*, 83 Cal.App.4th at pp. 1014-1015 [CEQA does not enlarge an agency’s authority and the  
26 application of CEQA is within the scope of the authority granted to the agency by other  
27 ordinances, not vice versa].) Therefore, questions regarding the legal underpinnings of a  
28 proposed project relate to its legal feasibility and not to its potentially significant environmental  
effects. (See Guidelines § 15088, subd. (c) [“written response” limited to “the disposition of  
significant environmental issues raised”].) Accordingly, an EIR is not the proper forum for  
determining whether a proposed project should be altered or changed because it may conflict with  
other laws.

1 comments cited by North Coast, “Alternative 2 was informed by comments to the [Council] from  
2 several environmental groups and does not represent one specific proposal.” The Council’s  
3 response further explains the basic framework of Alternative 2, outlines its potential benefits and  
4 impacts, compares it to the Plan, and then references Master Response 3 for further discussion.  
5 (D2332; see also D75-80 [Master Response 3], D2341-2345, 2763.) This is a direct, good faith  
6 response in full compliance with CEQA. (Guidelines § 15088, subs. (a), (c); see also Pub.  
7 Resources Code, § 21091, subd. (d); *Twain Harte Homeowners Assn.*, *supra*, 138 Cal.App.3d at  
8 p. 686.) The merits of North Coast’s claim regarding the composition of Alternative 2 is a wholly  
9 separate issue, as discussed in Argument XXI.B.2, 3, and 4 [Alternatives], above. North Coast’s  
10 disagreement with the substance of Alternative 2 is irrelevant to its claim that the Council did not  
11 adequately respond to its comments. “The fact that [Petitioners] disagree[] with [the Council’s]  
12 responses does not render the responses inadequate.” (*N. Coast Rivers Alliance v. Marin Mun.*  
13 *Water Dist.* (2013) 216 Cal.App.4th 614, 634 [quotation and citation omitted].)

14 Similarly, Stockton asserts that a Council response misstated one of Stockton’s comments.  
15 First, Stockton fails to identify the comment at issue, citing instead to unrelated pages in the EIR.  
16 (Stockton, pp. 9-10 [citing D8, D73].)<sup>109</sup> Second, Stockton’s allegation is simply untrue. As  
17 discussed in Argument XX.A.4 [Urban Decay], above, the Council provided good faith, reasoned  
18 responses to all of Stockton’s comments on the EIR. (See, e.g., D605-639, D3504-3521.) The  
19 Council’s responses explain that (1) the Plan does not retroactively apply to previously approved  
20 plans, programs, or projects; and (2) social and economic impacts may not be treated as  
21 significant effects on the environment under CEQA. (D606-607, D615.) These responses also  
22 refer to Master Responses 1 and 2, which elaborate further on these points. (See D64-65 (Master  
23 Response 1 [Plan does not apply retroactively], D73-74 (Master Response 2 [social and economic  
24 impacts not significant effects on the environment for purposes of CEQA].) Again, the Council

25 <sup>109</sup> Stockton also asserts that the Council failed to respond to its written and oral  
26 comments, but later in its brief attacks the very same responses whose existence it previously  
27 denies. (Stockton, pp. 4, 9-10.) This failure to cite to evidence in support of its argument makes  
28 it impossible to determine which responses Stockton challenges, and is fatal to Stockton’s  
argument. (See *South County Citizens for Smart Growth*, *supra*, 221 Cal.App.4th at p. 331; see  
also CEQA Standards of Review, Part B [Forfeit Claims], *ante*.)

1 provided good faith, reasoned responses under CEQA. (Guidelines § 15088, subds. (a), (c); Pub.  
2 Resources Code § 21091, subd. (d).)

3 Stockton also claims that the Council unreasonably required it to submit substantial  
4 evidence supporting its comments. (Stockton, pp. 10-12.) However, a petitioner's arguments  
5 concerning the adequacy of environmental review cannot be "based solely upon speculation and  
6 unsubstantiated opinion." (*Friends of Davis, supra*, 83 Cal.App.4th at p. 1020; see also *Pala*  
7 *Band of Mission Indians v. County of San Diego* (1998) 68 Cal.App.4th 556, 578-580  
8 [petitioner's comment letter did not constitute substantial evidence supporting a fair argument  
9 that the landfill siting element of the county's general plan may have a significant effect on the  
10 environment].) "A determination that a project may have significant effects must be based on  
11 substantial evidence." (*Friends of Davis, supra*, 83 Cal.App.4th at p. 1020 [citing Guidelines, §  
12 15064, subd. (f).])

13 **XXIV. THE FINDINGS AND STATEMENT OF OVERRIDING CONSIDERATIONS ARE**  
14 **SUPPORTED BY SUBSTANTIAL EVIDENCE**

15 North Coast challenges the adequacy of the Findings and Statement of Overriding  
16 Considerations based on the same arguments it made regarding the Council's analysis of  
17 alternatives to the project and the adequacy of mitigation measures. (North Coast, pp. 23-25.) As  
18 explained in detail in Arguments XXI [Alternatives], and XXII [Mitigation], above, the EIR  
19 provides ample, substantial evidence to support its conclusions—and thus the Council's  
20 findings—that (1) the Revised Project is the environmentally superior alternative; and (2) the EIR  
21 incorporates all feasible mitigation measures. (See also, e.g., D8249-8259 [Draft EIR comparison  
22 of alternatives], D6569-6586 [Recirculated Draft EIR comparison of alternatives]; C8996  
23 [findings]; C96 [incorporating mitigation measures into findings].) North Coast's argument  
24 challenging the Council's findings identifies no new evidence or authority to challenge the EIR's  
25 conclusions regarding alternatives and mitigation measures. (North Coast, pp. 23-25.)

26 Courts routinely reject challenges to an agency's findings regarding the environmentally  
27 superior alternative and the feasibility of mitigation that are duplicative of challenges to the  
28 alternatives and impact analyses in an EIR; the cases on which North Coast relies are no

1 exception (North Coast, p. 24). If “the measures necessary to mitigate or avoid those [significant]  
2 effects have properly been found to be infeasible,” then this provides the required support for the  
3 statement of overriding considerations “approving a project despite the existence of unmitigated  
4 environmental effects.” (*City of Marina v. Bd. of Trustees of the California State Univ.*, *supra*, 39  
5 Cal.4th at p. 368; *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 603  
6 [quoting same]; see also *California Oak Found.*, *supra*, 188 Cal.App.4th at p. 285 [rejecting  
7 challenge to findings that “merely rehashes” a challenge to the alternatives analysis that was  
8 “already considered and rejected”].)

9 North Coast additionally argues that (1) the Council “fails to explain how the various  
10 considerations override *each* of the Project’s significant and yet unmitigated impacts”; and (2) the  
11 Council specifically fails to support the conclusion that the Plan’s “benefits outweigh its harms.”  
12 (North Coast, p. 24 [italics added].) These arguments are meritless. North Coast points to no  
13 requirement in the CEQA statute, the Guidelines, or the cases interpreting them that an agency  
14 must explain how the benefits of the project identified in the statement of overriding  
15 considerations apply to each individual significant impact. On the contrary, the Guidelines  
16 merely require that the statement of overriding considerations provide the agency’s “reasons to  
17 support its action based on the final EIR and/or other information in the record.” (Guidelines §  
18 15093, subd. (b); see also *San Franciscans Upholding the Downtown Plan v. City and County of*  
19 *San Francisco* (2002) 102 Cal.App.4th 656, 689-691 [substantial evidence supporting the  
20 findings may be found anywhere in the administrative record].)

21 Moreover, the California Supreme Court has held that this precise agency determination—  
22 “that the specific benefits a project offers outweigh any environmental effects that cannot feasibly  
23 be mitigated”—“lies at the core of the lead agency’s discretionary responsibility under CEQA and  
24 is, for that reason, not lightly to be overturned.” (*City of Marina*, *supra*, 39 Cal.4th at p. 368.)

25 Here, as North Coast acknowledges (North Coast, pp. 24-25), the statement of overriding  
26 considerations includes extensive context for its conclusions, including factual details about the  
27 economic, ecological, and historic importance of the Delta, as well as the tensions between these  
28 values and the history of efforts to balance them. (C98-101.) The statement of overriding

1 considerations then explains that the Plan encourages immediate changes that will shift water  
2 users' reliance away from the Delta to local supplies, promote restoration of the Delta ecosystem,  
3 protect cultural values in the Delta, and reduce the risk of flooding in the Delta. (C100-101.) The  
4 Council concluded that these "benefits outweigh [the Plan's] unavoidable adverse environmental  
5 effects." (C98.)

6 North Coast makes no attempt to show that the record lacks substantial evidence to support  
7 the Council's findings, nor could it. The EIR and the record describe numerous, specific benefits  
8 that the Plan will confer on water users, ecosystems, and communities. (See e.g., D7020-7021  
9 [groundwater], D7022 [water supply reliability], D7123-7124 [native species and water quality];  
10 see also D6584-6586 [Plan is environmentally superior alternative].) These sources describe not  
11 only desirable outcomes, but the mechanisms by which the Delta Plan will encourage those  
12 outcomes. (See e.g., D7020-7021, 7022, 7123-7124, 6791, 6807-6861.) Therefore, petitioners'  
13 arguments must fail.

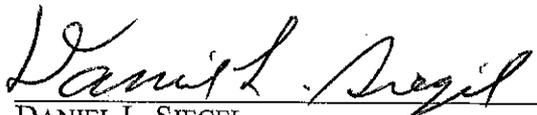
#### 14 CONCLUSION

15 For all of the foregoing reasons, the Delta Stewardship Council respectfully requests that  
16 the Court deny all the petitions for writ of mandate and complaints for declaratory and injunctive  
17 relief before this Court and uphold the Delta Plan on the grounds that it fully complies with the  
18 Delta Reform Act and the Administrative Procedures Act, and that the EIR and the Council's  
19 findings fully comply with CEQA.

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Dated: April 6, 2015

Respectfully Submitted,  
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**DECLARATION OF ELECTRONIC SERVICE**

Case Name: Delta Stewardship Council Cases  
Judicial Council Coordination Proceeding No. 4758

I declare:

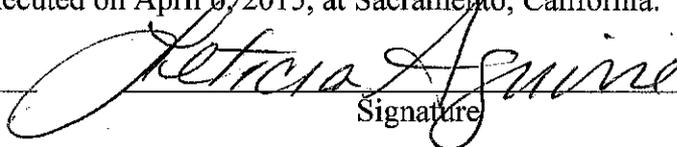
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

On April 6, 2015, I electronically served the attached **RESPONDENT AND DEFENDANT DELTA STEWARDSHIP COUNCIL'S OPPOSITION BRIEF, RESPONDING TO ALL OPENING BRIEFS**. I electronically served a copy of the above document from Office of the Attorney General's electronic service address Leticia.Aguirre@doj.ca.gov on April 6, 2015 by 5:00 p.m. on the close of business day at the following addresses:

SEE ATTACHED LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 6, 2015, at Sacramento, California.

Leticia Aguirre  
Declarant

  
Signature

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