

1 KAMALA D. HARRIS  
Attorney General of California  
2 GAVIN G. MCCABE  
Supervising Deputy Attorney General  
3 MARK W. POOLE, SBN 194520  
CLIFFORD T. LEE, SBN 74687  
4 Deputy Attorneys General  
1515 Clay Street, 20th Floor  
5 P.O. Box 70550  
Oakland, CA 94612-0550  
6 Telephone: (510) 622-4451  
Fax: (510) 622-2270  
7 E-mail: Mark.Poole@doj.ca.gov  
*Attorneys for Amicus Curiae*  
8 *Department of Water Resources*

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 IN AND FOR THE COUNTY OF SACRAMENTO  
11

12 **COORDINATION PROCEEDING**  
13 **SPECIAL TITLE**  
14 **(CALIFORNIA RULES OF COURT, RULE 3.550)**  
15  
16 **DELTA STEWARDSHIP COUNCIL**  
17 **CASES**

Judicial Council Coordination Proceeding  
No. JCCP 4758  
  
**APPLICATION TO APPEAR AS  
AMICUS CURIAE BY CALIFORNIA  
DEPARTMENT OF WATER  
RESOURCES AND PROPOSED AMICUS  
CURIAE BRIEF**  
  
Dept: 31  
Judge: The Honorable Michael Kenny  
Trial Date: TBD  
Action Filed:

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1           **I.       DWR MEETS THE REQUIREMENTS FOR AMICUS CURIAE PARTICIPATION**  
2                                   **BASED ON ITS ROLE AS OPERATOR OF THE STATE WATER PROJECT**

3           California Rule of Court, rule 8.200(c)(2) requires that an amicus “application must state  
4           the applicant’s interest and explain how the proposed amicus brief will assist the court in deciding  
5           the matter.” As discussed below, DWR meets the standard for amicus participation in this matter.

6                                   **A. DWR Provides Water from the Delta to Millions of Californians from**  
7                                   **the SWP**

8           The State Water Project is the nation’s largest state-built water conveyance system. The  
9           chief function of the SWP is water delivery and conservation. (See generally *United States v.*  
10           *State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 99-100, 106.) SWP infrastructure  
11           captures, stores, and conveys water to 29 state water contractors. (See *State Water Resources*  
12           *Control Board Cases (SWRCB Cases)* (2006) 136 Cal.App.4th 674, 693.) The SWP is a complex  
13           system of dams and reservoirs, pumping and power generating plants, and hundreds of miles of  
14           pipelines and aqueducts. (*United States, supra*, 182 Cal.App.3d at pp. 100, 107.) The system has  
15           been described as follows:

16                   Water from the Feather River is stored behind Oroville Dam and is released into the  
17                   Feather River and its eventual confluence with the Sacramento River. The water flow  
18                   continues through the Delta to the Clifton Court Forebay where a portion of it enters  
19                   the South Bay Aqueduct for delivery to the Santa Clara Valley. A much greater  
20                   portion is lifted into the California Aqueduct for transport through the San Joaquin  
21                   Valley and eventually again lifted by a series of pumping stations over the Tehachapi  
22                   Mountains for delivery and use in the Southern California regions.

23           (*United States, supra*, 182 Cal.App.3d at pp. 99-100.) As mentioned, DWR’s role as operator of  
24           the SWP involves compliance with regulatory requirements, including those of the Council in  
25           evaluating projects for consistency with the Delta Plan. As a result, DWR has a substantial  
26           interest in participating as amicus to defend the Delta Plan.

27                                   **B. DWR Is the Proponent Agency for the Development of the BDCP**  
28                                   **Which, If Adopted and Approved, Will Be Incorporated into the Delta**  
                                  **Plan**

          DWR is the proponent for the development of the BDCP which is not yet final and  
          therefore, not properly at issue in this litigation. The Delta Reform Act provides that BDCP, if it  
          is adopted and meets the Act’s requirements, will be incorporated into the Delta Plan. (Wat.

1 Code, § 85320, subd. (e).) Petitioners have directed several challenges at the Council's treatment  
2 of the BDCP in the Delta Plan. As a result, DWR has a substantial interest in these proceedings.

3 DWR's role as operator of the SWP and proponent agency for BDCP positions the  
4 Department to offer a unique perspective to the Court. Project operations in the Delta are  
5 complex, and DWR is able to assist the Court in understanding this complicated system and its  
6 consistency with provisions of the Delta Plan. Moreover, DWR has a long history of interpreting  
7 and applying the area of origin laws—an issue raised by multiple petitioners—which could assist  
8 the Court in understanding this area of water law.

9 For all of these reasons, DWR meets the requirements of California Rules of Court, rule  
10 8.200, subsection (c)(2), and DWR respectfully requests that the Court grant its application to  
11 appear as amicus curiae and file this proposed brief.<sup>1</sup>

### 12 BACKGROUND ON THE DELTA REFORM ACT

13 The Sacramento-San Joaquin Delta (Delta) is located at the confluence of the Sacramento  
14 and the San Joaquin Rivers in California's Central Valley. The Delta is a 1,335 square mile  
15 estuary system of interconnected canals, streambeds, sloughs, marshes, levees, and fifty-seven  
16 peat islands. (B429, 469, 477.) The Delta is home to more than seven hundred plant and animal  
17 species, including many unique to the estuary. (B477.) These species include the winter- and  
18 spring-run Chinook salmon, the Central Valley steelhead, the Delta smelt, and the longfin smelt,  
19 species listed as threatened or endangered under state and federal statutes. Moreover, the Delta is  
20 one of the few estuaries in the world used as major source of water supply. Pumping operations  
21 in the Delta provide some or all of the drinking water for two-thirds of the state's population (23  
22 million people), primarily through the SWP and the federal Central Valley Project (CVP)  
23 facilities located in the southern Delta. (B433, 472.) In addition, up to 4.5 million acres of farm  
24 land are irrigated from water delivered by the SWP and the CVP. (B429.)

25 The Delta Reform Act was enacted to address longstanding issues related to the Delta  
26 ecosystem and water supply reliability. The Council was charged with developing the Delta Plan,

27 <sup>1</sup> This amicus curiae application and brief have been authored by the undersigned counsel.  
28 (Cal. Rules of Court, rule 8.200(c)(3)(A).)

1 a long-term management plan intended to attain the coequal goals of the Act: to improve and  
2 protect the Delta ecosystem and to improve water supply reliability. (Wat. Code, §§ 85054,  
3 85300, subd. (a).) The Council unanimously adopted the Delta Plan on May 16, 2013. The Delta  
4 Plan became effective with legally-enforceable regulations on September 1, 2013.

### 5 ARGUMENT

6 Petitioners have challenged the Delta Plan for failing to comply with the Delta Reform Act  
7 and the area of origin laws. For the reasons discussed below, the Delta Plan is consistent with the  
8 area of origin statutes, properly recommended completion of the separate, ongoing BDCP process  
9 for conveyance improvement, correctly adopted the SWRCB's flow criteria, and properly did not  
10 speculate as to the impacts BDCP conservation measures may have on Delta agriculture. The  
11 petitions should therefore be denied.

#### 12 I. THE DELTA PLAN DOES NOT CONTRAVENE CALIFORNIA'S AREA OF 13 ORIGIN STATUTES

14 Both the Central Delta Water Agency and the City of Stockton petitioners have relied upon  
15 the Watershed Protection Statute (Wat. Code, § 11460, et seq.) and the Delta Protection Act (*Id.*,  
16 § 12200, et seq.), commonly known as the area of origin statutes, in their challenges to the Delta  
17 Plan. Central Delta invokes these statutes to challenge Water Resource Policy 1 (WRP 1) and  
18 Ecosystem Restoration Policy 1 (ERP 1) on the grounds that "in-Delta users are entitled to satisfy  
19 all beneficial uses before a single drop of water is exported" and that "the SWP and the CVP must  
20 therefore be limited to water that is truly surplus to the present and future needs of the Delta."  
21 (Central Delta Opening Brf. at pp. 21, 27.)<sup>2</sup> City of Stockton cites to these statutes in its  
22 challenge to the Council's regulations that require "covered actions" subject to Council review to  
23 comply with specific measures to protect Delta interests. (City of Stockton Opening Brf. at pp.

24 \_\_\_\_\_  
25 <sup>2</sup> Central Delta also cites to section 1216 and sections 10505 et seq. of the Water Code.  
26 Section 1216 is limited to "applications to appropriate surface water filed, or groundwater  
27 appropriations initiated, after January 1, 1985," thus exempting its applicability to previously-  
28 established water rights of the SWP or CVP. (Wat. Code, § 1216.) Sections 10505 et seq. only  
apply to a release of water right priority or an assignment of a water right application filed by the  
Department of Water Resources or its predecessor under section 10500, a factual context not  
alleged in the petitioners' challenges to the Delta Plan. (*Id.*, § 10505.)

1 32-34; Cal. Code Reg., tit. 23, §§ 5002-5015.) These area of origin challenges must fail because  
2 settled case authority refutes the petitioners' reading of these statutes.

3 **A. The Central Delta and the City of Stockton Area of Origin Claims Are**  
4 **Not Ripe**

5 In 1933, the California legislature adopted the State Central Valley Project Act, thus  
6 establishing the basis for the public transfer of water from the northern part of the State to the San  
7 Joaquin Valley. (Wat. Code, § 11000 et seq.) The Act, an ambitious effort by the state to  
8 develop water supplies for the benefit of the Sacramento and San Joaquin valleys, foundered  
9 because the Great Depression prevented State financing of the project. (*United States, supra*, 182  
10 Cal.App.3d at pp. 98-99.) The State Central Valley Project Act included the Watershed  
11 Protection Statute,<sup>3</sup> of which section 11460 provides that:

12 In the construction and operation by the department of any project under the  
13 provisions of this part a watershed or area wherein water originates, or an  
14 area immediately adjacent thereto which can conveniently be supplied with  
15 water therefrom, shall not be deprived by the department directly or  
16 indirectly of the prior right to all of the water reasonably required to  
17 adequately supply the beneficial needs of the watershed, area, or any of the  
18 inhabitants or property owners therein.

16 (Wat. Code, § 11460.)<sup>4</sup>

17 It is settled that the Watershed Protection Statute “does not create an individual water  
18 right ...but rather a grant which is wholly inchoate.” (*United States, supra*, 182 Cal.App.3d at p.  
19 139.) As the Attorney General stated in a 1955 published opinion, “[n]o definable property right  
20 is created or presently vested in any particular individual. As to any particular individual the  
21 grant of the statute is wholly inchoate.” (25 Ops.Cal.Atty.Gen. 8, 21 (1955).) An individual can  
22 perfect this area of origin right in one of two ways. First, a potential area of origin diverter could  
23 secure an appropriative water right from the SWRCB, and the area of origin diverter's right

24 <sup>3</sup> DWR is aware that the watershed protection laws are commonly referred to as the  
25 Watershed Protection Act. However, DWR will refer to these laws as the Watershed Protection  
26 Statute because they were not enacted as a separate act, but were part of the much broader 1933  
27 State Central Valley Project Act. (Wat. Code, § 11000 et seq.)

26 <sup>4</sup> Section 11128 applies section 11460 to the federal government. (Wat. Code, § 11128.)  
27 Under section 8 of the Reclamation Act of 1902 (43 U.S.C. § 383), the federal government is  
28 required to comply with state law and to acquire water rights for diversion and storage of water  
by the CVP. (*United States, supra*, 182 Cal.App.3d at p. 134.)

1 would be senior to those of the projects, notwithstanding that the diversion would be junior in  
2 time to the projects' water rights. (*United States, supra*, 182 Cal.App.3d at p. 139 ["As the needs  
3 of a watershed inhabitant develop, he must make and perfect a regular application to appropriate  
4 water, the Board must issue the permit despite the needs of the projects, and the water projects  
5 must honor the vested water right thus created."].) Second, the projects could execute special  
6 area of origin contracts with individuals or entities for the delivery of water within the area of  
7 origin. (*SWRCB Cases, supra*, 136 Cal.App.4th at p. 758.)

8 Neither the Central Delta nor the City of Stockton petitioners aver that they hold either a  
9 perfected area of origin appropriative water right or an executed area of origin contract. The  
10 petitioners' area of origin claims are "wholly inchoate" and therefore not ripe for judicial review.  
11 (*Pacific Legal Foundation v. California Coastal Comm.* (1982) 33 Cal.3d 158, 170 ["The  
12 ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best  
13 conducted in the context of an actual set of facts so that the issues will be framed with sufficient  
14 definiteness to enable the court to make a decree finally disposing of the controversy."].)

15 **B. Central Delta's Claim that the Area of Origin Statutes Require the CVP**  
16 **and SWP to First Satisfy All of Central Delta's Beneficial Uses Is**  
17 **Unfounded**

18 Assuming arguendo that the issue is ripe, Central Delta's contention that the area of origin  
19 statutes entitle "in Delta users ...to satisfy all beneficial uses before a single drop of water is  
20 exported" must be rejected because it overlooks that water stored by the SWP and CVP projects  
21 is not subject to those statutes. Central Delta's reading of the area of origin statutes is contrary to  
22 settled authority. In *El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2005) 142  
23 Cal.App.4th 937, 976, the Third Appellate District addressed an area of origin claim under the  
24 Watershed Protection Statute and held that "although El Dorado may be entitled to assert a  
25 priority under section 11460 over the Bureau and the Department to the diversion of water  
26 originating in the watershed of the south Fork of the American River, that priority does not extend  
27 to water the projects have properly diverted to storage at an earlier date. If El Dorado wants  
28 water properly stored by the projects, it must pay for it." (*Id.*; see also *Phelps v. State Water*  
*Resources Control Bd.* (2007) 157 Cal.App.4th 89, 107 ["We affirm this reading of the

1 [Watershed Protection Statute] in *El Dorado...*"]; Wat. Code, § 11462 ["The provisions of this  
2 article shall not be so construed ... to require the department [DWR] to furnish to any person  
3 without adequate compensation therefor any water made available by the construction of any  
4 works by the department."].)<sup>5</sup>

5 Nothing in the Delta Protection Act (DPA) alters this reading of the Watershed Protection  
6 Statute. The DPA recognizes that the water problems of the Delta are unique, involving issues of  
7 salinity intrusion and the SWP's transfer of water from water-surplus areas to its areas of service,  
8 and therefore that a special law was necessary for the protection, conservation, development,  
9 control and use of the waters in the Delta for the public good. (Wat. Code, § 12200.) First, the  
10 DPA states that it is expressly subject to the statutory watershed protection provisions. (Wat.  
11 Code, §§ 12201, 12202.) Second, the DPA serves the dual purposes of protecting Delta interests  
12 and "providing fresh water for export to areas of water deficiency." (*SWRCB Cases, supra*, 136  
13 Cal.App.4th at p. 770.) Third, two Court of Appeal decisions have held that "[n]othing in the  
14 Delta Protection Act purports to grant any kind of water right to any particular party." (*Id.* at pp.  
15 771-772; *Phelps, supra*, 157 Cal.App.4th at pp. 109.) Instead, the DPA is intended to provide the  
16 SWRCB with direction in setting Delta water quality objectives, an agency determination that is  
17 subject to judicial deference. (*SWRCB Cases, supra*, 136 Cal.App.4th at pp. 771-772.) The Delta  
18 Plan's adoption of the SWRCB's Delta flow objectives in ERP 1 therefore does not contravene  
19 either the Watershed Protection Statute or the DPA, but furthers them. (B451.)<sup>6</sup>

20 **C. The Watershed Protection Statute Does Not Provide In-basin**  
21 **Users with Protection Against Other In-basin Uses**

22 The City of Stockton petitioner claims that, at some undefined future date, the City might  
23 apply for an area of origin appropriative water right. When such contingency occurs, the City  
24 argues that any obligation that it might have to obtain a Delta Plan certification of consistency as

25 <sup>5</sup> The rule that a downstream senior water right holder is not entitled to the release of  
26 upstream stored water or other water artificially introduced into the watershed is a settled  
27 principle of California water law. (*Stevens v Oakdale* (1939) 13 Cal.2d 343, 350-351; *Lindblom*  
28 *v. Round Valley Water Co.* (1918) 179 Cal. 450, 457.)

<sup>6</sup> The propriety of the Council's adoption of SWRCB flow criteria is discussed more  
generally in Section III, below:

1 a covered action would violate the area of origin statutes because it would “burden” the City by  
2 requiring it to meet new procedural requirements. (City of Stockton Opening Brf. at pp. 33-34.)  
3 As noted above, this claim is plainly unripe because the City has not claimed that it possesses an  
4 area of origin appropriative right from the SWRCB, or even that it has an application pending.

5 However, assuming again that the City’s claim is ripe, the Watershed Protection Statute  
6 does not provide the City any relief because that law does not protect in-basin users from  
7 measures intended to protect other in-basin uses of water. The statute only protects in-basin users  
8 when such users hold perfected rights and where such rights conflict with Project water deliveries  
9 outside of the area of origin. In the *SWRCB Cases*, the Court of Appeal rejected the assertion that  
10 the imposition of SWRCB water quality objectives on the New Melones Project for the protection  
11 of Delta beneficial uses violated the Watershed Protection Statute because the objectives reduced  
12 water deliveries to in-basin users. (*SWRCB Cases, supra*, 136 Cal.App.4th at p. 758 [“As  
13 between competing uses within the area of origin, however, section 11460 grants no priority.”];  
14 *Phelps, supra*, 157 Cal.App.4th at p. 108.) The Council’s regulations that the City contends  
15 contravene the Watershed Protection Statute do not purport to authorize project water deliveries  
16 outside of the area of origin and therefore do not contravene that law. To the contrary, the  
17 regulations advance Delta protection interests by requiring consistency with the policies set forth  
18 in the Delta Reform Act and described in the Delta Plan. (City of Stockton Opening Br. at pp.  
19 32-33; Cal. Code Reg., tit. 23, §§ 5002-5014.)

20 For the above reasons, the Central Delta and the City of Stockton area of origin challenges  
21 to the Delta Plan are without merit and should be denied.

22 **II. THE DELTA PLAN’S RECOMMENDATION TO COMPLETE THE BDCP**  
23 **COMPLIES WITH THE DELTA REFORM ACT BY PROMOTING AN OPTION TO**  
24 **IMPROVE CONVEYANCE**

25 The Central Delta and Save the California Delta Alliance petitioners challenge the  
26 Council’s decision to recommend completion of the BDCP as an abdication of the Council’s  
27 obligation under the Act to “promote options” for improving conveyance. (Central Delta Brf. at  
28 pp. 24-25; Save the California Delta Alliance Brf. at pp. 33-36; Wat. Code, § 85304.) Central  
Delta faults the Council for failing to promote options other than BDCP. (Central Delta Brf., at p.

1 25.) Save the California Delta Alliance claims that the Council did not promote any conveyance  
2 options at all. (Save the California Delta Alliance Brf. at pp. 33, 35-36.)

3 Both petitioners' arguments fail because the Delta Reform Act itself specifically establishes  
4 requirements for the BDCP that if met, mandate that the BDCP shall become part of the Delta  
5 Plan. (Wat. Code, § 85320, subd. (e).) Because the BDCP, if adopted and approved under  
6 section 85320, will be predicated on an extensive analysis of conveyance options (*id.* § 85320,  
7 subd. (b)(2)(A)-(G)), the Council's recommendation that the ongoing BDCP process for  
8 improving Delta conveyance continue outside of the Plan fully complies with the Act.

9 **A. The BDCP Is a Comprehensive Conservation Strategy that Supports the**  
10 **Coequal Goals**

11 The BDCP is a separate process led by DWR which, if adopted, would address the coequal  
12 goals of restoring and protecting the ecological health of the Delta and improving water supply  
13 reliability with an ecosystem-based approach. (B435-436.) The 2013 Draft BDCP "proposes  
14 major physical changes to the Delta, including new diversion and conveyance facilities and their  
15 operational criteria, extensive new aquatic habitat, and other measures to reverse the Delta's  
16 ecological decline and secure water supplies from the Delta for human use." (B556.)

17 Development of the BDCP by DWR had been underway for several years at the time of  
18 the adoption of the Delta Reform Act. (B1156, 436.) The Act recognized the advanced stage of  
19 planning by incorporating BDCP into the overall Delta reform strategy. Under the Act, BDCP is  
20 defined as "a multispecies conservation plan." (Wat. Code, § 85053.) One of the policies  
21 "inherent in the coequal goals for management of the Delta" declared by the Legislature in the  
22 Delta Reform Act is to "[i]mprove the water conveyance system." (Wat. Code, § 85020, subd.  
23 (f).) The BDCP proposes to improve conveyance by: (1) restoring a more natural flow pattern to  
24 the Delta ecosystem; and (2) providing increased flexibility for the SWP enabling it to utilize dual  
25 conveyance options (i.e., SWP diversions could be from either the existing south Delta Clifton  
26 Court Forebay or from new intakes in the north Delta). (B556.)

27 To facilitate this, the Legislature mandated specific requirements that the BDCP must meet  
28 in order for the Council to incorporate it into the Delta Plan. To that end, the BDCP must comply

1 with the natural community conservation plan requirements in the Fish and Game Code and with  
2 CEQA, and qualify as a habitat conservation plan under the federal Endangered Species Act.  
3 (Wat. Code, § 85320, subds. (b)(1), (2), (e); B595.) The Delta Reform Act further requires that  
4 analysis under CEQA specifically include: (1) “a reasonable range of flow criteria, rates of  
5 diversion, and operational criteria;” (2) “a reasonable range of Delta conveyance alternatives,  
6 including through-Delta, dual conveyance, and isolated conveyance alternatives, and including  
7 further capacity and design options of a lined canal, an unlined canal, and pipelines;” (3) the  
8 “potential effects of climate change;” (4) the “potential effects on migratory fish and aquatic  
9 resources;” (5) the “potential effects on ... flood management;” (6) the “resilience and recovery  
10 of Delta conveyance alternatives in the event of catastrophic loss caused by earthquake or flood;”  
11 and (7) the “potential effects of each Delta conveyance alternative on Delta water quality.” (*Id.*, §  
12 85320, subd. (b)(2)(A)-(G).) The Legislature’s comprehensive treatment of the BDCP indicates a  
13 clear choice that improving water conveyance should be explored in that process.

14 In light of these ongoing multiagency efforts and the proposed BDCP’s required  
15 consistency with the Act’s coequal goals, the Council appropriately adopted Recommendation  
16 WR R12 advising completion of the BDCP.

17 **B. Because the Delta Reform Act Expressly Provides for the Conditional**  
18 **Incorporation of the BDCP into the Delta Plan, the Council Was Not**  
19 **Required to Propose a Conveyance Option Different From BDCP**

20 Significantly, the Delta Reform Act contains an express requirement that if the BDCP  
21 meets the conditions of Water Code section 85320, “the council shall incorporate the BDCP into  
22 the Delta Plan.” (Wat. Code, § 85320, subd. (e).) If incorporated into the Delta Plan, the BDCP  
23 would therefore be but one component of a much broader plan for the Delta.

24 In the Delta Plan, the Council identified the need for conveyance improvements to  
25 “enhance the operational flexibility of the Delta system to divert and move water at times and  
26 from locations that are less harmful to fisheries” as well as to “provide adequate long-term  
27 reliability to meet current and projected water demands for SWP and CVP water exports from the  
28 Delta Watershed.” (B555.) The Council also recognized that “conveyance improvements and  
associated ecosystem restoration actions are being evaluated as part of the multiagency BDCP

1 effort.” (B556.) In Appendix A to the Delta Plan, the Council described its role related to  
2 conveyance at length. (B1155-1157.) After observing that the BDCP process had been ongoing  
3 since 2006 and that “significant time, resources, and expertise” had been invested in that process,  
4 the Council explained that “the best option at this point is to encourage the lead agencies of the  
5 BDCP to complete their work in short order. It would be a wasteful and duplicative exercise for  
6 the Council now to include a regulatory policy regarding conveyance. Doing so would require  
7 the same extensive policy, scientific, and environmental analysis the BDCP is already doing.”  
8 (B1156.) The Council determined that “the agencies pursuing BDCP are best positioned to  
9 develop possible options, evaluate them, and decide on the best one.” (B1157.) The Council  
10 concluded that once the new conveyance project is selected as the preferred option in the BDCP  
11 and meets the requirements of section 85320, “the project would be consistent with the Delta Plan  
12 regardless of whether the Delta Plan had previously endorsed a different conveyance option.”  
13 (B1156.) Accordingly, the Council adopted Recommendation WR R12. (B572, 449.)

14 **C. The Delta Reform Act Provides the Council Both a Consultative and**  
15 **Responsible Agency Role in Developing the BDCP**

16 The Council did not simply “rubberstamp” BDCP, as petitioners claim. (See Central Delta  
17 Brf. at p. 24-25.) The Council expressly recognized that it “may have a decisive say” in the  
18 BDCP if the California Department of Fish and Wildlife’s decision regarding the BDCP is  
19 appealed to it. (B436; see also Wat. Code, § 85320, subd. (e).) In that circumstance, the Council  
20 will be required to determine the BDCP’s compliance with section 85320, and if approved,  
21 incorporate the BDCP into the Delta Plan.

22 Moreover, petitioners overlook that, before that point, the Council has a multi-faceted role  
23 under the Delta Reform Act in relation to BDCP. First, the Act provides that DWR “shall consult  
24 with the council and the Delta Independent Science Board during the development of the BDCP”  
25 and the “council shall be a responsible agency in the development of the [EIR].” (Wat. Code, §  
26 85320, subd. (c).)<sup>7</sup> If the Department of Fish and Wildlife (DFW) approves BDCP as a natural

27 <sup>7</sup> The Delta Independent Science Board was created by the Delta Reform Act and its  
28 members are appointed by the Council. (Wat. Code, § 85280 subd. (a).)

1 community conservation plan, the Council is required to hold at least one public hearing  
2 concerning BDCP's adoption into the Delta Plan. (Wat. Code, § 85320, subd. (d).) As already  
3 indicated, once the BDCP is determined to meet the regulatory requirements of DFW and the  
4 federal endangered species act, "the council shall incorporate the BDCP into the Delta Plan,"  
5 unless DFW's decision is appealed to the Council. (Wat. Code, § 85320, subd. (e).) And the  
6 Council has a continuing role once the BDCP is incorporated into the Delta Plan because agencies  
7 charged with BDCP implementation are required to report to the Council and the Council may  
8 make recommendations regarding implementation. (Wat. Code, § 85320, subds. (f), (g).)

9 The Council's detailed role in relation to the BDCP reflects the Legislature's considered  
10 judgment and clear intent. Petitioners' arguments amount to simple disagreement with the  
11 decision by the Council to recommend completion of the BDCP process to attain the policy of  
12 improved conveyance.

13 **D. The Delta Reform Act's Division of Responsibility for**  
14 **Accomplishing the Coequal Goals Among Multiple State and**  
15 **Local Agencies Supports the Council's Decision to Recommend**  
16 **Completion of the BDCP Process**

17 The Council's conclusion to recommend continuance of the BDCP process for improving  
18 conveyance is reinforced by the Legislature's careful division of labor on Delta issues in the Delta  
19 Reform Act. No one agency is solely responsible for all of the actions necessary to achieve the  
20 coequal goals. The Delta Plan acknowledges this, describing the plan as "California's plan for  
21 the Delta ... to be carried out by all agencies in the field." (B431; see also, B497.)

22 As one potential element of the Delta Plan, the BDCP has an appropriately limited scope  
23 and purpose. Water Code section 85320 is the only statute in the Delta Reform Act specifically  
24 addressing requirements of the BDCP. The Delta Plan itself reflects the limited functions of the  
25 BDCP by explaining that the BDCP "is a different and more narrowly focused undertaking than  
26 the Delta Plan, into which, if certain conditions are met, it will be fused . . . ." (B431.)

27 The BDCP is only one of many activities occurring in the Delta, and while the proposal  
28 supports the Delta Reform Act's coequal goals, the BDCP is not directly responsible for  
accomplishing all of the policies set forth in the Delta Reform Act, including the protection and

1 enhancement of cultural, recreational, and agricultural values of the Delta and the promotion of  
2 regional self-reliance for California water users. Those policies are beyond the technical and  
3 legal reach of the BDCP. Rather, under the Delta Reform Act, they are the province of other  
4 agencies, including the Council, the Delta Protection Commission, the Sacramento-San Joaquin  
5 Delta Conservancy, and numerous state and local agencies. The complementary roles established  
6 by the Legislature in the Delta Reform Act is one of its central tenets.<sup>8</sup>

7 In the Delta Reform Act, the Legislature took care to lay out its vision and policies for the  
8 Delta, including assigning to different agencies particular responsibilities and duties for  
9 implementing those policies. In doing so, the Legislature limited its treatment of the BDCP to  
10 distinct and narrowly crafted sections of the Act. The overall structure of the Act, as well as the  
11 plain language and distinct breakdown of responsibilities make it clear that the Council's decision  
12 to recommend completion of the BDCP process for improving Delta conveyance is justified.

13 **III. THE DELTA PLAN'S USE OF THE SWRCB FLOW CRITERIA FULLY**  
14 **COMPLIES WITH THE DELTA REFORM ACT**

15 The Central Delta, the Save the California Delta Alliance, and the North Coast Rivers  
16 Alliance petitioners argue that the Delta Plan conflicts with the Delta Reform Act because, in  
17 meeting the Act's requirement "to restore Delta flows and channels to support a healthy estuary,"  
18 the plan and the regulations adopted the SWRCB's flow criteria as they may be amended.  
19 (Central Delta Opening Brf. at pp. 26-27; Save the California Delta Alliance Opening Brf. at p.  
20 26; North Coast Rivers Alliance Opening Brf. at p. 34; Wat. Code, § 85302, subd. (e)(4); Cal.  
21 Code Regs., tit. 23, § 5005; B451.)

22 <sup>8</sup> The Delta Reform Act is replete with complementary responsibilities assigned to  
23 multiple agencies. These include: (1) creating the Council and assigning it responsibility for  
24 preparing the Delta Plan to promote the coequal goals (Wat. Code, §§ 85200, subd. (a), 85300,  
25 subd. (a)); (2) establishing the Sacramento-San Joaquin Delta Conservancy in the Natural  
26 Resources Agency, which is required to act as the "primary state agency" to implement  
27 ecosystem restoration in the Delta, and to protect and preserve "Delta agriculture," and "the  
28 region's physical, agricultural, cultural, historical and living resources." (Legislative Counsel's  
Digest to SBX7 1, § 1; Pub. Resources Code, § 32322, subs. (a) and (b), § 32301, subd. (i)(2)-  
(4) and (9)); and (3) changing the membership of the Delta Protection Commission (Pub.  
Resources Code, § 29735), and re-defining that body as the "appropriate agency to identify and  
provide recommendations to the [Council] on methods of preserving the Delta as an evolving  
place as the [Council] develops and implements the Delta Plan" (*id.*, § 29703.5, subd. (a)).

1           However, these petitioners ignore the central role of the SWRCB in the setting of Delta  
2 flow criteria, and the Delta Reform Act's acknowledgment of that role. For example, section  
3 85086, subdivision (c)(2) directs the SWRCB to develop appropriate flow criteria to meet  
4 instream flow needs when considering an application from DWR for any change in point of  
5 diversion required by a cross-Delta conveyance facility. (Wat. Code, § 85086, subd. (c)(2).) The  
6 Act goes on to underscore the importance of the SWRCB's role by mandating that "[u]ntil the  
7 board issues an order approving a change in the point of diversion of the State Water Project and  
8 the federal Central Valley Project from the southern Delta to a point on the Sacramento  
9 River ... the department shall not commence construction of any diversion, conveyance, or other  
10 facility necessary to divert and convey water pursuant to the change in point of diversion." (Wat.  
11 Code, § 85088.) The Council's decision to acknowledge the SWRCB's central role in setting  
12 flow criteria was not an abuse of discretion. For these reasons, petitioners' claim that the Delta  
13 Plan is flawed for failure to include independent Delta flow criteria is groundless.

14           **IV.       PETITIONERS' ARGUMENT REGARDING EFFECTS ON AGRICULTURE FROM**  
15           **THE IMPLEMENTATION OF BDCP IS NOT RIPE AND SPECULATIVE**

16           Finally, the Central Delta Petitioners argue that the Delta Plan is inconsistent with the Delta  
17 Reform Act's coequal goals because WR R12 recommending the completion of the BDCP will  
18 lead to the loss of productive farmland from construction of the new BDCP conveyance project  
19 and its habitat measures. (Central Delta Brf. at pp. 22-23.) Central Delta argues that this  
20 conflicts with the policy of protecting and enhancing the Delta's agricultural values. (*Id.* at p. 23;  
21 see Wat. Code, § 85054.) But Central Delta's argument is again premature. As already pointed  
22 out, the BDCP is still under development by DWR in a separate public process subject to its own  
23 environmental review and unique statutory requirements. (See Wat. Code, § 85320.) This is not  
24 the appropriate time or place to challenge the BDCP, much less its hypothetical future impacts.  
25 (*See Pacific Legal Foundation, supra*, 33 Cal.3d at p. 170.)

26           Second, even if this were the appropriate time and forum to challenge components of the  
27 draft BDCP, and speculate as to their effects, the Delta Reform Act's balancing of the coequal  
28 goals and related policies does not contain the requirement suggested by Central Delta that every

1 acre of farmland be preserved in perpetuity. Rather, the Delta Reform Act states that the  
2 “coequal goals shall be achieved in a manner that protects and enhances the unique cultural,  
3 recreational, natural resource, and agricultural values of the Delta as an evolving place.” (Wat.  
4 Code, § 85054.)<sup>9</sup> A conservation measure in the BDCP to enhance habitat could enhance  
5 “natural resource,” “recreational,” and possibly even “cultural” values in the Delta, while setting  
6 aside some agricultural acreage as habitat. The effect of this same measure could be to increase  
7 productivity on the unaffected agricultural acreage by assisting in making the water supply more  
8 reliable. In its balancing of the coequal goals and policies, the Delta Plan achieves the protection  
9 and enhancement of all of the Delta values. Central Delta’s speculative and improper challenge  
10 to the Delta Plan’s recommendation regarding BDCP should be rejected.

### 11 CONCLUSION

12 For all of the reasons stated above, the petitions challenging the Delta Plan should be  
13 denied.

14 Dated: April 10, 2015

Respectfully Submitted,

15  
16 KAMALA D. HARRIS  
17 Attorney General of California  
18 GAVIN G. MCCABE  
19 Supervising Deputy Attorney General



20 MARK W. POOLE  
21 Deputy Attorney General  
22 *Attorney for Amicus Curiae*  
23 *Department of Water Resources*

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26 <sup>9</sup> In addition, section 85301 requires the Delta Protection Commission to develop a  
27 proposal for the Council’s consideration that protects and enhances these Delta values. This  
28 includes a proposal from the Department of Food and Agriculture to establish market incentives  
and infrastructure to protect and enhance the Delta agricultural economy. (Wat. Code, § 85301,  
subd. (c)(2).) The Council is required to consider the Commission’s proposal and “may include  
any portion of the proposal in the Delta Plan” at its discretion. (*Id.* § 85301, subd. (d).)

**DECLARATION OF SERVICE BY E-MAIL and U.S. Mail**

Case Name: Coordination Proceeding Special Title (California Rules Of Court, Rule 3.550)  
**Delta Stewardship Council Cases**  
No.: Judicial Council Coordination Proceeding No. JCCP 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. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 10, 2015, I served the attached

**APPLICATION TO APPEAR AS AMICUS CURIAE BY CALIFORNIA  
DEPARTMENT OF WATER RESOURCES AND PROPOSED AMICUS CURIAE  
BRIEF**

by placing a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

For Respondent Council  
Deborah M. Smith  
1300 I Street, Suite 125  
P.O. Box 944255  
Sacramento, CA 94244-2550

For Petitioner Save the California Delta Alliance:  
Michael A. Brodsky  
Law Offices of Michael A. Brodsky  
201 Esplanade, Upper Suite  
Capitola, CA 95010

For Petitioner City of Stockton:  
Steven A. Herum  
Herum Crabtree Suntag  
5757 Pacific Avenue, Suite 222  
Stockton, CA 95207

For Petitioners North Coast Rivers Alliance, et al.:

Stephan C. Volker  
Law Offices of Stephan C. Volker  
436 14<sup>th</sup> Street, Suite 1300  
Oakland, CA 94612

For Petitioners California Water Impact Network, et al.:

Adam Keats  
Center for Biological Diversity  
351 California Street, Suite 600  
San Francisco, CA 94104

For Petitioners State Water Contractors, et al.:

Charity Schiller  
Best Best & Krieger LLP  
3390 University Avenue, 5<sup>th</sup> Floor  
Riverside, CA 92501

For Petitioners San Luis & Delta-Mendota, et al.:

Daniel J. O'Hanlon  
Kronick Moskowitz Tiedemann & Girard  
400 Capitol Mall, 27<sup>th</sup> Floor  
Sacramento, CA 95814

For Petitioners Central Delta Water Agency, et al.:

Osha R. Meserve  
Soluri Meserve, a Law Corporation  
1010 F Street, Suite 100  
Sacramento. CA 95814

In addition, I transmitted a true copy via electronic mail to the following individuals:

For Respondent Council:

Daniel Siegel ([dan.siegel@doj.ca.gov](mailto:dan.siegel@doj.ca.gov))  
Deborah Smith ([deborah.smith@doj.ca.gov](mailto:deborah.smith@doj.ca.gov))  
Jeremy Brown ([jeremy.brown@doj.ca.gov](mailto:jeremy.brown@doj.ca.gov))

For Petitioner Save the California Delta Alliance:

Michael Brodsky ([michael@brodskylaw.net](mailto:michael@brodskylaw.net))

For Petitioner City of Stockton:

Steven Herum ([sherum@herumcrabtree.com](mailto:sherum@herumcrabtree.com))

For Petitioners North Coast Rivers Alliance, et al.:

Stephan Volker ([svolker@volkerlaw.com](mailto:svolker@volkerlaw.com))  
Daniel P. Garrett-Steinman ([dgarrett@volkerlaw.com](mailto:dgarrett@volkerlaw.com))  
Marcus Benjamin Eichenberg ([meichenberg@volkerlaw.com](mailto:meichenberg@volkerlaw.com))  
Lauren E. Pappone ([lpappone@volkerlaw.com](mailto:lpappone@volkerlaw.com))

For Petitioners California Water Impact Network, et al.:

Adam Keats ([akeats@biologicaldiversity.org](mailto:akeats@biologicaldiversity.org))  
Michael Jackson ([mjatty@sbcglobal.net](mailto:mjatty@sbcglobal.net))  
Bob Wright ([bwright@friendsoftheriver.org](mailto:bwright@friendsoftheriver.org))  
Chelsea Tu ([ctu@biologicaldiversity.org](mailto:ctu@biologicaldiversity.org))

For Petitioners State Water Contractors, et al.:

Charity Schiller ([charity.shiller@bbklaw.com](mailto:charity.shiller@bbklaw.com))  
Antony Fulcher ([afulcher@valleywater.org](mailto:afulcher@valleywater.org))  
Stanly Yamamoto ([syamamoto@valleywater.org](mailto:syamamoto@valleywater.org))  
Robert Horton ([rhorton@mwdh2o.com](mailto:rhorton@mwdh2o.com))  
Adam Kear ([akear@mwdh2o.com](mailto:akear@mwdh2o.com))  
Leland McElhaney ([lmcelhaney@bmblawoffice.com](mailto:lmcelhaney@bmblawoffice.com))  
William Brunick ([bbrunick@bmblawoffice.com](mailto:bbrunick@bmblawoffice.com))  
Stefanie Morris ([smorris@swc.org](mailto:smorris@swc.org))

For Petitioners San Luis & Delta-Mendota, et al.:

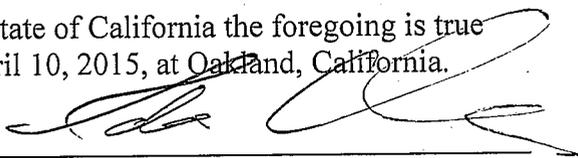
Daniel O'Hanlon ([dohanlon@kmtg.com](mailto:dohanlon@kmtg.com))  
Rebecca Akroyd ([rakroyd@kmtg.com](mailto:rakroyd@kmtg.com))  
Elizabeth Leeper ([eleeper@kmtg.com](mailto:eleeper@kmtg.com))  
Andrea Matarazzo ([andrea@pioneerlawgroup.net](mailto:andrea@pioneerlawgroup.net))

For Petitioners Central Delta Water Agency, et al.:

Osha Meserve ([osha@semlawyers.com](mailto:osha@semlawyers.com))  
Thomas Keeling ([tkeeling@freemanfirm.com](mailto:tkeeling@freemanfirm.com))  
Dante John Nomellini ([ngmplcs@pacbell.net](mailto:ngmplcs@pacbell.net))  
Dante John Nomellini, Jr. ([dantejr@pacbell.net](mailto:dantejr@pacbell.net))  
John H. Herrick ([jherrlaw@aol.com](mailto:jherrlaw@aol.com))  
S. Dean Ruiz ([dean@hpllp.com](mailto:dean@hpllp.com))  
Patrick M. Soluri ([Patrick@semlawyers.com](mailto:Patrick@semlawyers.com))  
Daniel A. McDaniel ([dampc@pacbell.net](mailto:dampc@pacbell.net))

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 10, 2015, at Oakland, California.

\_\_\_\_\_  
Ida Martinac  
Declarant

  
\_\_\_\_\_  
Signature