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12 **THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **IN AND FOR THE COUNTY OF SACRAMENTO**

14 **FILE BY FAX**

15 **COORDINATION PROCEEDING SPECIAL**
16 **TITLE**
17 **(Cal. Rules of Court, rule 3.550)**

18 **DELTA STEWARDSHIP COUNCIL CASES**

19 **JUDICIAL COUNCIL COORDINATION**
20 **PROCEEDING NO. 4758**

21 **PETITIONERS CDWA ET AL. AND C-WIN**
22 **ET AL.'S JOINT REPLY BRIEF ON THE**
23 **MERITS IN SUPPORT OF FIRST**
24 **AMENDED VERIFIED PETITIONS FOR**
25 **WRIT OF MANDATE AND COMPLAINTS**
26 **FOR DECLARATORY AND INJUNCTIVE**
27 **RELIEF**

28 **Hearing Date: TBA**

Time: TBA

Dept.: 31

Judge: Honorable Michael P. Kenny

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Glossary of Terms Used in Brief

Term	Definition
BAS	Best available science
BDCP	Bay Delta Conservation Plan
BDCP ADEIR/S	Administrative Draft Environmental Impact Report/Statement for BDCP
APA	California Administrative Procedures Act (Gov. Code, §§ 11340 et seq.)
DFW	California Department of Fish and Wildlife (formerly Department of Fish and Game)
CEQA	California Environmental Quality Act (Pub. Resources Code, §§ 21000 et seq.)
cfs	Cubic feet per second
CCP	California Code of Civil Procedure
CNRA	California Natural Resources Agency
CVFPB	Central Valley Flood Protection Board
CVFPP	Central Valley Flood Protection Plan adopted pursuant to Senate Bill 5 in 2008
CVP	Central Valley Project
CVPIA	Central Valley Project Improvement Act (43 U.S.C. 390(cc) et seq.)
Delta	Sacramento-San Joaquin River Delta
DEIR	Draft Program Environmental Impact Report
DFG	California Department of Fish and Game
DISB	Delta Independent Science Board
DFW	California Department of Fish and Wildlife (formerly Department of Fish and Game (DFG))
DPA	Delta Protection Act (Wat. Code, §§12200 et seq.)
DPC	Delta Protection Commission
2009 DRA	Delta Reform Act (Wat. Code, §§85001 et seq.)
DSC	Delta Stewardship Council
DSP	Delta Science Program
DVF	Delta Vision Foundation
DWR	California Department of Water Resources
EIR	Delta Plan Environmental Impact Report. All of the environmental review documents prepared by the Delta Stewardship Council for the Project are referred to collectively as the EIR unless the distinction between drafts is important.
EIS	Environmental Impact Statement
ESA	Endangered Species Act (16 U.S.C., §1531 et seq.)
ESP	Economic Sustainability Plan
DISB	Delta Independent Science Board
FEMA	Federal Emergency Management Agency
FEIR	Final Environmental Impact Report

Term	Definition
Guidelines	CEQA Guidelines (Cal. Code Regs., tit. 14, §15000 et seq.)
HCP	Habitat Conservation Plan
NCCP	Natural Communities Conservation Plan
NEPA	National Environmental Policy Act (42.U.S.C. §§4321 et seq.)
NOAA Fisheries	National Oceanic and Atmospheric Administration Fisheries
PEIR	Program Environmental Impact Report
Plan	Delta Plan as Adopted by the Delta Stewardship Council
PRC	California Public Resources Code
Project	Delta Plan as reviewed in the EIR
RDEIR	Recirculated Draft Program EIR
Reclamation	Bureau of Reclamation
Regs.	Regulations adopted to implement Delta Plan (Cal. Code Regs., tit. 23, §§5001-5014)
SWRCB	California State Water Resources Control Board
SWP	State Water Project
USACE	U.S. Army Corps of Engineers
USEPA	U.S. Environmental Protection Agency
USFWS	U.S. Fish and Wildlife Service
USGS	U.S. Geological Survey
WMP	Water Management Plan
WC	California Water Code

TABLE 1
Delta Plan Regulation and Policy Correlations

Regulation Section	Short Form	Policy	AR Cite
5001		Definitions	B763-767
5002	GP1	<u>Governance Policy 1</u> Detailed Findings to Establish Consistency With Delta Plan	B445
5003	WRP1	<u>Water Resources Policy 1</u> Reduce Reliance on the Delta through Improved Regional Self-Reliance	B446
5004	WRP2	<u>Water Resources Policy 2</u> Transparency in Water Contracting	B450
5005	ERP1	<u>Ecosystem Restoration Policy 1</u> Delta Flow Objectives	B451
5006	ERP2	<u>Ecosystem Restoration Policy 2</u> Restore Habitats at Appropriate Elevations Appendix 4 Map	B452 B1228
5007	ERP3	<u>Ecosystem Restoration Policy 3</u> Protect Opportunities to Restore Habitat Appendix 5 Map	B452 B1232
5008	ERP4	<u>Ecosystem Restoration Policy 4</u> Expand Floodplains and Riparian Habitats in Levee Projects Appendix 8 Map	B452 B1258
5009	ERP5	<u>Ecosystem Restoration Policy 5</u> Avoid Introductions of and Habitat Improvements for Invasive Non-native Species	B454
5010	DPP1	<u>Delta-as-Place Policy 1</u> Locate New Urban Development Wisely	B455
5011	DPP2	<u>Delta-as-Place Policy 2</u> Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats	B456
5012	RRP1	<u>Risk Reduction Policy 1</u> Prioritization of State investments in Delta Levees and Risk Reduction	B461
5013	RRP2	<u>Risk Reduction Policy 2</u> Require Flood Protection for Residential Development in Rural Areas	B463
5014	RRP3	<u>Risk Reduction Policy 3</u> Protect Floodways	B464
5015	RRP4	<u>Risk Reduction Policy 4</u> Floodplain Protection	B464

1 **I. INTRODUCTION**

2 The Delta Stewardship Council’s (“DSC”) Opposition Brief Responding to All Opening Briefs
3 (“Opp.”) rests on a facile underlying theme: complaints about the Delta Plan (or “Plan”) from diverse
4 stakeholders – including environmentalists, farmers and water exporters – prove the adequacy of the
5 Delta Plan and the Environmental Impact Report (“EIR”). This canard (“if both sides say it’s
6 inadequate, it must be adequate”) is hardly a satisfactory substitute for reasoned argument supported by
7 legal authority and relevant evidence.

8 As explained in this Reply Brief filed jointly by environmental groups, local Delta agencies and
9 others (collectively, “Petitioners”),¹ the Delta Plan fails to comply with key requirements of the
10 Sacramento-San Joaquin Delta Reform Act of 2009 (Wat. Code (“WC”), §85000 et seq. (“DRA”)), the
11 Public Trust Doctrine and interpreting case law, the California Environmental Quality Act (Pub.
12 Resources Code (“PRC”), §21000 et seq. (“CEQA”)), as well as the California Administrative
13 Procedures Act (Gov. Code, §11340 et seq. (“APA”)). As a result, the Delta Plan, the Regulations
14 implementing the Delta Plan, and the Delta Plan EIR must be set aside.²

15 Among its failures, the DSC struggles to insulate its Delta Plan from the mandates of the DRA.
16 Critical DRA provisions that the DSC should have treated as its roadmap in creating the Delta Plan are
17 now dismissed as mere recommendations that may be ignored or neutralized by agency re-interpretation.
18 No invocation of agency “deference” can justify such non-compliance with the DRA.

19 For example, the DRA plainly directs the DSC to defer to the Delta Independent Science Board
20 (“DISB”) to develop and implement “best available science” (“BAS”) to provide the best possible
21 unbiased scientific information to inform water and environmental decision-making in the Delta. The
22 BAS standard adopted by the DSC, based on studies by the National Research Council (“NRC”), is
23 intended to impose a rigorous science-based standard for water and environmental governance in the
24

25 ¹ California Water Impact Network, Friends of the River, California Sportfishing Protection Alliance,
26 AquaAlliance, Restore the Delta, and Center for Biological Diversity, Central Delta Water Agency,
South Delta Water Agency, Lafayette Ranch, Inc., Cindy Charles, Local Agencies of the North Delta.

27 ² This brief responds to the DSC’s 244-page brief. Due to space constraints only, on certain issues,
28 Petitioners continue to rely solely on the arguments presented in their Opening Brief (“OB”). Petitioners
also incorporate by reference the Reply Briefs, Amicus Answers and accompanying pleadings filed by
Save the California Delta Alliance, the North Coast Rivers Alliance et al., and the City of Stockton,
unless otherwise in conflict with this brief.

1 Delta. Although the DSC’s adopted BAS standard is a regulation carrying the force of law, the Delta
2 Plan fails to follow it. Instead, the DSC now brushes that standard aside, urging the Court to substitute in
3 its place a relaxed federal standard specifically rejected by the NRC, the DSC and the DISB.

4 The DSC and Delta Plan are subject to existing “Area of Origin” and watershed protections.
5 However, the DSC seeks to avoid compliance with these critically important protections by labeling
6 them as “vague” or by asserting that they do not apply to the DSC at all. Such assertions are without
7 merit, as explained below.

8 Further, the DSC abrogated its statutory obligation to assure that water diverted from the Delta is
9 truly “surplus.” The Plan’s only policy addressing flow simply refers to another agency’s flow
10 objectives and fails to address the amount of surplus water available for export after all beneficial in-
11 Delta uses are satisfied. This contravenes the requirements of the Area of Origin and Watershed of
12 Origin statutes,³ including the requirement of WC, §12201 that there must be “adequate water supply in
13 the Delta sufficient to maintain and expand agriculture, industry, urban, and recreational development in
14 the Delta area.” Although additional Delta flows are required to protect in-Delta beneficial uses, the
15 DSC scrupulously avoided defining those flows. Moreover, the DSC unquestioningly promotes the Bay
16 Delta Conservation Plan (“BDCP”) and related water diversions that would increase the very water
17 exports that have precipitated the ecological crisis now facing the Delta.

18 Nowhere is the DSC’s attempt to circumvent California law and policy more apparent than in its
19 dismissive approach to the public trust. The public trust, as explained in *National Audubon Society v.*
20 *Superior Court* (1983) 33 Cal.3d 419 (*Audubon*), is far more than “an affirmation of state power to use
21 public property for public purposes”; it is “an affirmation of the duty of the state to protect the people’s
22 common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only
23 in rare cases when the abandonment of that right is consistent with the purposes of the trust.” (*Id.* at
24 441.) In the Opening Brief (“OB”), Petitioners explained that the DSC had failed to consider, analyze
25 and implement the public trust in approving the Delta Plan, especially with respect to the crisis facing
26 the Delta as a result of over-appropriation of waters from the Delta watershed. (OB 39-49)

27 _____
28 ³ Chief among these are the enactments generally known as “the Delta Protection Act of 1959” and
“Area of Origin” protections. (See WC, §§12200 et seq. (Delta Protection Act of 1959) and WC, §11460
et seq. (Watershed Protection Act).)

1 In response, the DSC minimizes its public trust role, reducing the public trust to a mere policy
2 statement subject to unrestrained agency discretion. According to the DSC, merely promoting “public
3 trust values” satisfies its public trust duties. In fact, however, the DSC’s public trust role is pivotal: the
4 DRA and public trust case law compel the DSC to perform an actual analysis in its stewardship role as
5 author of the Delta Plan, especially with respect to instream flows for the Delta and compliance with the
6 mandate to reduce reliance on the Delta for plainly unsustainable water exports.

7 The DSC’s insistence that the Delta Plan EIR complies with CEQA is also without merit. The
8 core of any EIR consists of the mitigation and alternatives sections. Yet, the EIR failed to develop and
9 consider such obvious alternatives as increasing Delta flows by reducing water exports. Given the
10 undisputed fact that excessive exports and decreased flows are largely responsible for the crisis facing
11 the Delta, such a glaring failure renders the EIR inadequate as a basis for informed decision-making and
12 informed public participation. The DSC’s response is anemic at best, as explained below.

13 Nor does the DSC succeed in justifying the EIR’s failure to include an accurate, stable and finite
14 project description, its failure to provide proper environmental baseline or its failure adequately to
15 disclose the impacts of the BDCP Water Tunnels as a cumulative project. The DSC also violated CEQA
16 by segmenting and deferring environmental analysis of the true conveyance project, the Water Tunnels.
17 On this issue, too, the DSC’s explanations ring hollow.

18 In sum, the DSC’s response to Petitioners’ arguments turns largely on overstatements of agency
19 discretion where convenient, understatement of agency authority where convenient, avoidance of
20 focused legal analysis where such analysis would yield inconvenient conclusions, studied avoidance of
21 public trust and statutory directives, obfuscation, and, in some cases, outright mischaracterization of the
22 Record and governing law. In place of sustained and reasoned argument, the DSC offers its faulty “if
23 both sides say it’s inadequate, it must be adequate” rationale. This rhetorical gambit does not merit
24 serious consideration. The most important estuary on the West Coast of the Americas, now in a crisis of
25 historical dimensions caused by decades of excessive water exports, deserves better.

26 ///

27 ///

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1 **II. ARGUMENT**

2 **A. THE DSC IGNORED THE 2009 DRA PRIORITIES, INCLUDING FLOW AND**
3 **REAL ECOSYSTEM RESTORATION**

4 The DSC argues that it had virtually unfettered discretion to interpret the directives of the DRA
5 when preparing the Delta Plan and adopting the accompanying Regulations. (See, e.g., Opp. 65-66) To
6 the contrary, the DRA contains specific and important directives that the DSC failed to heed. (See, e.g.,
7 WC, §85001(c).) As a result, the Delta Plan, Policies, Regulations and Recommendations must be set
8 aside.⁴ Contrary to the DSC’s assertions, the court must apply “independent review” to determine
9 whether the Delta Plan’s policies and regulations implement the DRA. A court must engage in
10 “independent judgment” review on matters of law, and “substantial evidence” review for issues of fact.
11 (*North Gualala Wat. Co. v. SWRCB* (2006) 139 Cal.App.4th 1577, 1587-1589 (*Gualala*).

12 The DSC argues that the appropriate standard of review is “substantial evidence” where the law
13 is “technical, obscure, complex, open ended, and entwined with issues of fact, policy and discretion.”
14 (Opp. 20, citing *WSPA v. Bd. of Equalization* (2013) 57 Cal.4th 401, 415-416 (*BOE*)). The DSC
15 misconstrues the applicable standard. “Where . . . a party challenges a regulation . . . on the ground that
16 it is in conflict with the governing statute or exceeds the lawmaking authority delegated by the
17 Legislature, ‘the issue of statutory construction is a question of law on which a court exercises
18 independent judgment.’” (*PaintCare v. Mortensen* (2015) 233 Cal.App.4th 1292, 1303, quoting *BOE*
19 (2013) 57 Cal.4th 401, 415-416 (applying the independent judgment standard to resolve challenges to
20 regulations pertaining to appraisal units for valuation where challenges are based on asserted
21 inconsistencies with statutes); accord *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19
22 Cal.4th 1, 11, fn. 4 (*Yamaha*) (“[a] court does not . . . defer to an agency’s view when deciding whether
23 a regulation lies within the scope of the authority delegated by the Legislature”]; see also *American*
24 *Coast Air Quality Dist.* (2012) 54 Cal.4th 446, 461-462.)

25 The *degree* of deference to which the DSC’s interpretation of the DRA is entitled depends on the
26 amount of guidance provided in the DRA. The court in *Gualala* distinguishes between the two types of
27 administrative rules presented in *Yamaha* characterizing the rules as either quasi-legislative or the
28

⁴ See also Regs., §§5001-5015 at B763-767 (Definitions), B445-64 (Policies)).

1 “agency’s view of the statute’s legal meaning.” (*Gualala, supra*, 139 Cal.App.4th at 1587, citing
2 *Yamaha, supra*, 19 Cal.4th at 11.) This distinction determines the level of review when an agency’s
3 implementing statute contains little to no guidance, as compared to an implementing statute such as the
4 DRA that contains detailed instructions regarding jurisdictional authority and directives. (*Ibid.*)

5 As in *Gualala, supra*, 139 Cal.App.4th at 1587, the DSC interpreted its own jurisdictional
6 authority granted by the DRA. For instance, the DSC interpreted the meaning of “covered action” to
7 determine the applicability of its policies. (WC, §§85057.7, 85225.) Because the legal definition of
8 “covered action” drives the DSC’s jurisdiction (WC, §85057.5), the authority granted by the DRA is not
9 quasi-legislative under the *Yamaha* framework. Instead, DSC’s legal opinions with respect to what
10 actions constitute covered actions for consistency determinations are subject to a “commensurably lesser
11 degree of judicial deference.” (*Gualala, supra*, 139 Cal.App.4th at 1588 (“An important corollary of
12 agency interpretations . . . is their diminished power to bind. Because an interpretation is an agency’s
13 legal opinion, however ‘expert,’ rather than the exercise of delegated legislative power to make law, it
14 commands a commensurately lesser degree of judicial deference.”) (citation omitted).)

15 The DRA is not technical, obscure, or complex, and there is no good reason to defer to agency
16 interpretation of the statute. Proper interpretation of statutes is the domain of the courts and this Court
17 should independently review the question of whether the DSC’s Policies and Regulations exceed the
18 authority delegated to the DSC by the Legislature. (*Ibid.*; see also *Yamaha, supra*, 19 Cal.4th at 10-11;
19 see also *BOE, supra*, 57 Cal.4th at 415-416; see also *Sonoma County Wat. Coalition v. Sonoma County*
20 *Wat. Agency* (2010) 89 Cal.App.4th 33, 40 (the court must review the Agency’s decision under
21 independent review, “scrupulously enforce[ing] all legislatively mandated . . . requirements” to assess
22 “whether the Agency employed the correct procedures”).)

23
24 **1. The DSC Fails to Mention or Follow Its Own Authority and Regulation
Prescribing the Applicable BAS Standard**

25 Despite all the work the DSC and DISB undertook to develop and adopt via regulation a specific
26 BAS standard, the DSC now contends “it is not aware” of an applicable BAS standard, suggesting that
27 the Court should apply the same federal standard the DSC itself determined previously was inadequate.
28 (Opp. 95, fn. 48, 58, 97) According to the DSC, “[a]n agency complies with the [BAS] standard so long

1 as it does not ignore available studies, even if it disagrees with or discredits them.” (Opp. 58, 95, 97)
2 The new ad hoc “available” standard now advanced by the DSC, however, conflicts with the DSC’s own
3 adopted BAS. (Regs., §5001(f); B1261,⁵ 1178-79)

4 The Delta Plan is required to implement BAS under the DRA (WC, §§85308(a), 85302(g)) as
5 defined by the DSC’s own adopted BAS standard, Regs., §5001(f). (B763) The DRA directs the DISB
6 to develop and implement BAS to “provide the best possible unbiased scientific information to inform
7 water and environmental decisionmaking in the Delta” (WC, §85280(b)(4)), which directly applies to
8 the Delta Plan (WC, §85308 (Plan must be based on BAS and DISB advice).) Based on National
9 Research Council (“NRC”) analyses (WC, §§85302(g), 85204; D62; OB 44; B1178), the DSC and the
10 DISB adopted a series of BAS standards to ensure a strong scientific foundation for the Delta Plan
11 Policies and Regulations (B1176-1180).⁶ Thus, the BAS standard included in the Plan defined BAS,
12 adaptive management for the Delta. (G4379 (demonstrating BAS in Delta Plan “critical”))

13 The NRC reports directly address the definition of BAS in an environmental management
14 context. The NRC examined the “application and the development of procedures to ensure that the ‘best
15 scientific information available’ is used consistently to support management decision making” within
16 the context of the Endangered Species Act (16 U.S.C., 1531 et seq. (“ESA”) and other environmental
17 management laws. (L3716; see also L3723) Another NRC report specifically addresses how this BAS
18 definition should apply to the Delta Plan. (G4379 (“it is clear that the use of [BAS] and adaptive
19 management, as stipulated in the founding legislation, will play a central role in the success of the
20 [P]lan”).) The DSC then adopted the standard developed by the NRC as Regs., §5001(f) and cited to the
21 NRC studies to apply the BAS standard to the full extent of its jurisdictional authority pursuant the
22 DRA. (WC, §85210(i); L3716)

23 The DSC’s BAS standard (Regs., §5001(f)) highlights the DSC’s authority to adopt and apply
24 the BAS standard to implement the DRA. (B767; OB 17) Further, Regs., §5001(f) incorporates

25
26 ⁵ Citations to the Administrative Record reference the letter section and then the page number.

27 ⁶ Under the BAS standard adopted by the DSC, “proposed covered actions and for use in the Delta Plan
28 should be consistent with the [adopted BAS] guidelines and criteria in Table 1A-1.” (B1178) For
example, the Plan specifies that Regs., §5001(f) applies to: WC, §§85020 (policy and objectives to meet
the coequal goals), 85052 (adaptive management), 85054 (coequal goals), 85057.5 (covered action),
85058 (the Delta generally), 85059 (the Delta Plan), 85066 (restoration), 85302(g) (use of BAS to
implement the Delta Plan), 85308 (Delta Plan requirements).

1 Appendix 1A, which methodically defines BAS “for proposed covered actions and for use in the Delta
2 Plan.” (B1179; see also B1178, 763; OB 17) Thus, the DSC’s BAS standard applies to everything in the
3 Plan, and the Plan itself cites the need to follow BAS (B432, 446, 482, 1178); there is no reason to look
4 beyond Regs., §5001(f) for the proper BAS standard. (OB 17) The Plan, however, did not follow the
5 required BAS approach. (B1178, OB 17)

6 The DSC’s argument to use the federal court BAS standard ignores the fact that the DSC, DISB
7 and NRC studies adopted by the DSC specifically rejected that same federal standard. (L3716)
8 Beginning in 2004 or earlier, the NRC issued its reports (G4379; L3716) in response to federal court
9 decisions in order to address the “use of scientific information in the preparation of fishery management
10 plans and supporting documents” by the federal fish agencies. (L3732) The report clarifies the
11 committee considered related environmental legislation “because they contain similar directives on the
12 use of scientific information in formulating policies.” (L3741-42) The NRC noted, “In these cases, the
13 federal courts have not defined ‘best scientific information available’ but have ruled that the standard
14 does not require conclusive evidence.” (L3741) Thus, the NRC publications guided the definition of a
15 BAS standard for use in the Delta. The NRC’s BAS analysis also specifically criticized the inadequacies
16 of the federal court standard as scientifically unsupported in the context of developing a BAS standard
17 for implementation of the DRA and the Delta Plan. (B1179; B523)

18 Though its adopted BAS standard is required under the DRA and was foundational to the
19 development and implementation of the Delta Plan (G4379), the DSC conspicuously omits any
20 reference to Regs., §5001(f), Appendix 1A or the relevant statutory authority (WC, §85302(g)). The
21 DSC uses the term “best available science” close to a hundred times throughout the Plan and its
22 Appendices, and even adopts reports developed by the NRC for use within the Plan. (B415-788; B1153-
23 1456; G4379; L3716) Yet the DSC’s Opposition Brief never acknowledges the Plan’s lengthy
24 discussion of BAS. (B501)

25 The DSC ignores its own BAS standard, never once mentioning or citing it in the entire
26 Opposition Brief. (WC, §85308; OB 17) Furthermore, the DSC’s argument that the lesser federal
27 standard applies – a contention that the DSC and DISB themselves specifically rejected – is specious.
28

1 The specific statutory standards in the DRA (WC, §§ 85308, 85280) and the DSC’s adopted BAS
2 standard (Regs., §5001(f)) applied to the Plan, and the DSC’s failure to apply BAS is fatal.⁷

3 **2. Delta Plan Policies Regarding Water Resources Do Not Promote the Coequal**
4 **Goals**

5 Water reliability is a focal point of the Delta Plan. (WC, §§85001(c), 85004(b).) The Legislature
6 recognizes (WC, §85021), and the DSC agrees (OB 36), that there is a critical need to reduce reliance
7 on the Delta for water supplies. As written, however, the Delta Plan policies addressing water resources
8 are too vague, ambiguous and inconsistent to be legally enforceable (WC, §§85001(c)). They therefore
9 cannot further the “coequal goals” of providing a more reliable water supply for California and
10 protecting, restoring, and enhancing the Delta. (WC, §85302(a), (b); B527) Additionally, the DSC
11 promoted major water diversion projects such as the BDCP Tunnels, and at the same time failed to
12 adopt any enforceable Policies pertaining to the diversion of additional water out of the already
13 freshwater-starved Delta. As a result, the coequal goals were not met and Delta water resources are less
14 protected than prior to the 2009 DRA. The Water Resources policies also are inconsistent with “Area of
15 Origin” and related protections and fail to address the recognized problems with “temporary” water
16 transfers.

17 **a. The DSC’s Confused Interpretation of “Covered Action” Is**
18 **Inconsistent with the Purpose of the DRA**

19 The Legislature defined the term “covered action,” and the DSC had a mandatory duty to
20 interpret, not to “refine,” that definition as the DSC now contends (Opp. 89). The DSC’s authority is
21 limited to those plans, programs or projects that are statutorily defined as “covered actions.” (WC,
22 §85057.5.) Implementing agencies must interpret terms provided to them by the Legislature, especially
23 those terms that are ambiguous or subject to multiple interpretations. (*Lungren v. Deukmejian* (1988) 45
24 Cal.3d 727, 735 (*Lungren*)). The DSC’s failure to consistently interpret and apply the term “covered
25 action” renders many policies in the Delta Plan unenforceable and therefore useless as a means of
26 advancing the DRA’s goals.⁸ (G5882)

27
28 ⁷ Specific instances in which the DSC failed to use the applicable BAS standards are discussed below.
⁸ The DSC also ignored the DISB’s request to provide guidance regarding the term “covered action.”
(G5893, 5894, 5882)

1 Delta Plan Policies/Regulations apply only to covered actions. (WC, §85057.5.) The DRA
2 defines a “covered action,” and by extension the DSC’s jurisdictional authority, to cover a plan,
3 program, or CEQA project that meets four criteria, including having a “significant impact” on the
4 achievement of at least one of the coequal goals. (WC, §85057.5(a)(4).) “A *regulatory action* of a state
5 agency” (WC, §85057.5(b)(1), italics added), however, is not a covered action.

6 The applicability of the DSC’s Regulations hinges on the definition of “regulatory action.” The
7 term “regulatory action” within the context of the DRA refers to an agency’s legislative capacity to
8 develop broadly applied regulations. Thus, a “regulatory action” is an action that is “legislative in
9 character,” rather than “adjudicatory in character.”⁹ Yet, the DSC broadly interprets a “regulatory
10 action” to include both legislative and adjudicative actions, claiming it has no jurisdiction when
11 applications are filed “with a state regulatory agency.” (Opp. 44, 49-50, 60) For instance, according to
12 the DSC, when “water rights applications” are filed with the State Water Resources Control Board
13 (“SWRCB”) (see e.g., WC, §174, 1250 et seq.) they are therefore not subject to DSC jurisdiction.¹⁰
14 (Opp. 49-50) The DSC’s interpretation that a “regulatory action” under WC, §85057.5(b)(1) includes
15 both legislative and adjudicative facts is fatal to the DSC’s Water Resources Policy 1 (“WRP1”/Regs.,
16 §5003; B446), as well as other DSC policies. The DSC thus interprets its authority so as to render the
17 DRA directive to promote water supply reliability ineffective.

18 Where a statute is ambiguous, it must be interpreted using the “plain meaning” rule. (*Lungren*,
19 *supra*, 45 Cal.3d at 735.) As the implementing agency, the DSC must interpret its jurisdiction in such a
20 way that furthers the intent of Legislature. (*Ibid.*) Further, where “a statute is amenable to two
21 alternative interpretations, the one that leads to the more reasonable result will be followed.” (*Ibid.*) The
22 DSC interprets the statutory definition of a “covered action” and “regulatory action” in an inconsistent
23

24 ⁹ Levitan, *The Legislative-Adjudicative Distinction in California Land Use Regulation: A Suggested*
25 *Response to Arnel Development Co. v. City of Costa Mesa* (1982) 34 Hastings L.J. 425, 426, citing
26 *Arnel Development Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511.

27 ¹⁰ At the same time, the Plan provides long term water transfers as an example of covered action that
28 would be subject to WRP1. (B1315) As water transfers also generally require approval of SWRCB, it is
not clear how a water rights application appreciably differs from a water transfer in terms of what
constitutes a “regulatory action” under WC, §85057.5(b)(1). The Plan also supposedly clarifies that
“Infrastructure and transportation projects that are consistent with adopted general plans and specific
plans may not be covered actions if they are exempt” (D56) but provides no basis for the fabricated
distinction between such projects.

1 manner that fails to promote water supply reliability, reduced reliance on the Delta, and other statutory
2 responsibilities, and therefore the definition is unreasonable and inconsistent with the DRA.

3 Ignoring the common definition of regulatory action, the DSC provides an extremely broad
4 definition, consequently narrowing the scope of “covered actions” to the point the Delta Plan may have
5 no effect on actions involving water resources. According to the DSC’s interpretation of covered
6 actions, policies such as WRP1 (Regs., §5003; B446) would never apply.

7 Under WRP1, the export, transfer and use of water in the Delta are all subject to ongoing
8 regulatory actions by the SWRCB, Department of Water Resources (“DWR”) and Department of Fish
9 and Wildlife (“DFW”) that, according to the DSC, are excepted from the “covered action” provisions
10 under WC, §85057.5(b)(1). (D63-64) The DSC asserts that WRP1 “advances the protection of the Delta
11 by prohibiting some in-Delta water projects that will harm the Delta.” (Opp. 31) However, WRP1, as
12 defined by DSC, does not limit in-Delta water projects because the DSC excludes from the definition of
13 a “covered action” an action subject to apparently *any* regulatory action. (D63-64) The actions of water
14 suppliers that would otherwise meet the definition of a covered action under WC, §85075.5 will nearly
15 always be subject to some regulatory action by the SWRCB, DFW or another public agency. Such
16 actions, clearly critical in any discussion of water reliability and coequal goals, would be treated as
17 “regulatory actions” not subject to the scrutiny and requirements to which “covered actions” are
18 subjected under the Plan. DSC’s explanations of the applicability of WRP1 and other policies conflict
19 with the Legislative intent for the covered action and consistency process to promote water supply
20 reliability.

21 **b. Promotion of the BDCP under RRR12 and Failure to Account for**
22 **Other Possible Water Diversion Projects Was Erroneous**

23 The DSC’s recommendation to complete the BDCP (Water Resources Recommendation 12
24 (“WRR12”) B449) states: “The relevant federal, State, and local agencies should complete the [BDCP],
25 consistent with the provisions of the [DRA], and receive required incidental take permits by December
26 31, 2014.” (B572) The DSC complains that many of the arguments advanced by Petitioners in this case
27 relate to the BDCP. (Opp. 1) That is because the Legislature provided an oversight role to the DSC and
28

1 DISB to help ensure that the BDCP/Water Tunnels would meet the coequal goals that were so important
2 in 2009 (WC, §85320(c), (f), (g)); this role was left completely unfulfilled (OB 22-26).

3 The DSC’s position is that otherwise covered actions that involve applications for water rights to
4 the SWRCB are exempted from application of WRP1 since they would also be subject to regulatory
5 action of a state agency (WC, §85057.5(b)(1).) As a result, even a project with as much potential as the
6 BDCP Water Tunnels¹¹ to have significant impacts on the coequal goals (WC, §85054) would be
7 exempt from the consistency determination requirement because it requires “regulatory action” by the
8 SWRCB, among other entities. The Water Tunnels would obviously include SWRCB petitions to add
9 new points of diversion on the Sacramento River for the State Water Project (“SWP”) and Central
10 Valley Project (“CVP”). (See, WC, §1701; J143805, 43619 (BDCP ADEIR discussing approvals needed
11 from SWRCB).)

12 In response to the point that there are Policies relating to habitat restoration (e.g., ERP1-ERP4),
13 but not conveyance, DSC argues that the BDCP Tunnels would somehow “occupy the field.” (Opp. 53-
14 54) DSC provides no support for the applicability of the preemption term, “occupy the field,” to the
15 question of whether the DRA mandated development of policies to manage water resources in the Delta
16 consistent with state policy.¹² The tunnels, in any event, certainly do not occupy the field. With the
17 current changes to the BDCP process, the Delta Plan is clearly the governing regime for water policies
18 in the Delta, not the BDCP. (See fn. 11.)

19 The DSC’s failure to address massive water diversion projects at all creates a space that a project
20 much different from the BDCP defined in the DRA (WC, §85053) may later fill. In particular, the lack
21 of any policies regarding conveyance means that there is no guidance to the putative successor to BDCP,
22 the California Water Fix. (OB 24-25) While the DSC portrays Petitioners as urging that the DSC write
23
24

25 ¹¹ See Petitioners’ Request for Judicial Notice re BDCP (“BDCP RJN”). The BDCP RJN establishes
26 that by April 30, 2015, the state modified the BDCP with two new processes called California Water Fix
27 and California Eco-Restore. The preferred alternative in the BDCP process is no longer a NCCP/HCP
28 and would not be subject to mandatory incorporation into the Delta Plan pursuant to WC, §85320(e). To
the contrary, the Water Fix would be subject to a consistency determination with the Delta Plan if
considered a covered action, among other criteria it would likely meet. (WC, §85057.5.)

¹² See *People v. Nguyen* (2014) 222 Cal.App.4th 1168, 1178 (discussing legislative intent to occupy the
field in a preemption setting.)

1 the Water Tunnels out of the Delta Plan (Opp. 51-52), an enforceable plan would ensure review of major
2 new water diversion projects for consistency with state policy regarding the Delta.

3 Instead, the Plan crows: “Improved Delta conveyance, including successful completion of the
4 BDCP is essential, and it should be done as soon as possible.” (B482) Moreover, a “successfully
5 permitted BDCP is key” to resolving “the conflict between the way we move water and the health of
6 native species[.]” (B482) These statements ignore the necessity to apply the DSC’s statutory
7 requirements, including consistency with the coequal goals, for any new diversions of water from the
8 Delta. (See WC, §85020, 85021.)

9 **c. WRP1 Conflicts With Area of Origin Protections**

10 In contravention of the DRA, the DSC sidesteps the Delta Plan’s inconsistency with existing
11 Area of Origin and watershed protections.¹³ (WC, §85031(a).) Contrary to the assertions of the DSC,
12 area of origin and related protections apply to the DSC and the Delta Plan.¹⁴ While Petitioners support
13 the DSC’s goal of water conservation, the common treatment of all water rights byWRP1, without
14 priority-based distinctions, is the cause of concern.

15 WC, §12201 requires an “adequate water supply in the Delta sufficient to maintain and expand
16 agriculture, industry, urban, and recreational development in the Delta area.” To meet these
17 requirements, the DSC’s detailed findings to establish consistency (“GP1”) (B445) needed to include a
18 consideration of compliance with WC, §§12200 et seq., 11460 et seq., and 10505 et seq. The DSC must
19 obtain the information necessary to ensure that water exported from the Delta is limited to water
20 supplies legally available for export. Reducing reliance on the Delta must begin with a BAS-based
21 factual analysis critical to inform decision-making with respect to the co-equal goals of water supply
22 reliability and ecosystem restoration. (WC, §§85086(c)(1), 85084.5, 1220.4) Thus, the DFW and
23 SWRCB flow criteria do not address all available water supplies, but only some of the many in-stream
24 flow requirements in the Delta. The DSC was required to use this information to develop an informed
25 Delta Plan. (OB 28)

26
27 ¹³ The DSC’s assertion that Petitioners forfeited any arguments (Opp. 23) is incorrect. Petitioners have
28 cited to the relevant authority and have forfeited nothing. (*Pfeiffer v. City of Sunnyvale City Council*
(2011) 200 Cal.App.4th 1552, 1572; *People v. Simon* (2001) 25 Cal.4th 1082, 1107 (“‘forfeiture’ is the
failure to make the timely assertion of a right”).)

¹⁴ See also Petitioners’ Response to DWR Amicus Brief, section II.A.

1 The DSC complains that Petitioners did not specify evidence in the Record showing that water
2 conserved in the Delta by in-Delta users under WRP1 would be diverted by water exporters. (Opp. 44)
3 DSC misconstrues Petitioners’ argument. The problem with WRP1 is that it makes no distinction
4 between different kinds of water rights, in contravention of the requirements of the 1959 DPA and the
5 Watershed Protection Act. (B446) As explained in *State Water Resources Control Board Cases* (2006)
6 136 Cal.App.4th 674, 768 (*SWRCB Cases*), these laws conferred important protections for the Delta, and
7 are overlooked by WRP1.

8 The DSC also attempts to argue that if the Petitioners conserve water within the Delta, then the
9 water will be somehow redirected to the Delta ecosystem, which is also a protected Area of Origin use.
10 (Opp. 45, 45) Struggling for any support, the DSC cites to the Delta Vision Strategic Plan (“Delta
11 Vision”). (Opp. 47, citing L3205, 3263) The cited pages, however, provide no evidence that such water
12 would stay within the Area of Origin (the Delta) instead of being exported out of the Delta. Thus,
13 restricting exercise of water rights within the Area of Origin in favor of exporting what should be
14 environmental water to users outside the watershed (without regard for priority) violates Area of Origin
15 protections. (*SWRCB Cases, supra*, 136 Cal.App.4th at 758; see also WC, §§ 11460; 85031(a).) Also, if
16 other water users take advantage of in-Delta water conservation by increasing their current diversions or
17 applying for new diversions (such as the BDCP Tunnels proposal), no additional water will be made
18 available to the environment. In-Delta water users practice water conservation, and support
19 environmental flows, in contrast with the DSC’s approach of claiming support but ultimately doing
20 nothing to increase water for the ecosystem.

21 **d. The Exclusion of Temporary Transfers from Covered Action Status**
22 **Conflicts With the DRA**

23 The DSC contends that the exclusion of temporary transfers from covered action status was
24 temporary and it needed to “learn more” in order to eventually improve water transfer procedures under
25 WRR15. (Opp. 78; B450) WRP1 applies to water transfers that “would have a significant adverse
26 environmental impact in the Delta” (Regs., §5003; B446), but under Regs., §5001(d)(3) (B450, 572),
27 temporary transfers are excluded from consistency review. Yet the Record shows temporary water
28 transfers (one year or less under WC, §1725) will have a significant impact on the coequal goals and

1 therefore should not be excluded from consistency review. (See WC, §85057.5(a)(4); OB 34; K12475-
2 12654 (Petitioner Center for Biological Diversity (“CBD”) comments explaining how so-called
3 “temporary” water transfers constitute a major impact to Delta water supply and quality).) As carefully
4 documented by CBD, most water transfers are characterized as “temporary” even though they occur
5 serially from year to year. (K12475 (in 2010, 100 percent of proposed water transfers were
6 “temporary”, totaling over 250,000 acre-feet of water))

7 Without explanation, DSC disregards the evidence submitted by CBD regarding the significant
8 impacts of “temporary” and serial transfers. (Opp. 78) Moreover, DSC’s contorted approach to the
9 “regulatory action” exclusion from consistency review (see *ante*, section II.A.2.a; Opp. 50) indicates
10 that even a long term transfer involving an application to the SWRCB may not be considered a covered
11 action, thus creating a gap in which any kind of transfer could occur without consistency review. While
12 some deference in technical matters may be appropriate, DSC has not demonstrated that any such
13 technical analysis is actually occurring. Instead, the Plan merely turns a blind eye to the significant
14 impacts of transfers. The requested deference should be denied.

15 **3. Delta Plan’s Approach to Flow and Restoration Fails under the DRA**

16 The DSC fails to use BAS to implement the Plan to further the restoration of the Delta ecosystem
17 and a reliable water supply. The DRA specifies the measures the DSC must take to implement the Plan
18 to further the restoration of the Delta ecosystem and restore flows. (WC, §85302(e)(4), (f), (g).) As
19 discussed above, the DSC’s BAS standard applies directly to WC, §85302 to accomplish this directive.
20 (Regs., §5001(f); B763; B1178; OB 17)

21 The DSC failed to use BAS or incorporate the DISB’s recommendations to implement the Plan
22 to further the restoration of the Delta ecosystem. (G5884) The DSC’s policies on ecosystem restoration
23 fail to fully and accurately describe and then address fundamental ecosystem needs and the DRA
24 requirements, including BAS. The policies illegally delegate the DRA’s directive to restore flows, or
25 double fish populations, and do not use the appropriate variability to account for SLR. Instead of
26 developing a coherent scientific approach required by the DRA, the DSC ignored BAS, and instead
27 placed the burden of BAS onto rural Delta communities.

1 (M1861)) as “core” strategies in the Plan is plainly insufficient. (Opp. 59) The DSC must fully define
2 what it means and how to accomplish “more natural functional flows” in the Delta. (Regs., §5001(f);
3 B1261, 1176) The DISB provided specific recommendations to accomplish flow goals. (K832.20) The
4 DISB explained that the goal, rather than “minimum flows,” is to identify the volume and timing of
5 flows and paths necessary for meeting ecosystem functions. (G5878) The DISB criticizes the DSC’s
6 analysis: “It certainly is not obvious how to measure or evaluate the “natural” potential of a population,
7 much less of an ecosystem.” (G5885) The DISB explains further, “The recommendation should be to
8 achieve a more natural functional flow regime for the Delta and its major tributaries, not minimum
9 flows. That is the recommendation supported by science and what is in the text of the Plan.” (G5879)
10 The DISB then criticized the DSC’s approach: “Restoring habitat won’t do any good unless species have
11 access to it. Access to habitat or connectivity should be included as part of this bullet. If it is implied in
12 the concept of habitat used here, that needs to be clarified.” (G5884) The DSC chose to ignore these
13 recommendations, directly contrary to the DRA (WC, §§85308, 85280.)

14 The amount of surplus water available for export cannot be determined without first determining
15 the amount of water exported in relation to the amount of flows required for other beneficial uses within
16 the Delta. The DSC argues that ERP1 is meant to further Delta ecosystem goals (Opp. 63), without an
17 understanding of the water resources available to accomplish those goals. (Regs., §5002; G5878, 5880,
18 5883) Therefore, ERP1 cannot further Delta ecosystem goals and fails to meet the statutory
19 requirements.

20 The DSC failed to obtain additional studies and to respond to the DISB’s request to explain the
21 link between water efficiency and improved inflows to the Delta. These studies, and the flow standards
22 referenced for consistency with ERP1, did not address additional required in-Delta beneficial uses, and
23 the DSC didn’t define those flows. (B451; WC, §§1220.4, 85082, 85084.5; L11827, 11844, fn.3) The
24 DISB insisted that the DSC should “Make clear how agricultural water efficiency translates into
25 improved inflows to the Delta.” (G5884) The failure to obtain sufficient information and address the
26 DISB’s concerns directly required by WC, §§85082 and 85084.5 is a failure to ensure that water
27 diverted from the Delta is truly surplus, and to reduce reliance on the Delta. (WC, §85021.)
28

1 The DSC further fails to address the CVP obligation to double the natural production of
2 anadromous fish. (CVPIA, Pub.L. 102-575, 106 Stat.4600, Title 34, 106 Stat. 4706-31 (1992),
3 §3406(b)(2); see also WC, §85302(c)(5); OB 27) The Record supports the need for flows to support this
4 obligation. (See N3063 (comments regarding ERP1); N3073-74; OB 27) The DRA directs the DSC to
5 include measures that implement “Conditions conducive to meeting or exceeding the goals in existing
6 species recovery plans and state and federal goals with respect to doubling salmon populations.” (WC,
7 §85302(c)(5).)

8 The DSC argues that the DRA requires that the Plan only *promote*, not *mandate* that the Plan
9 “double the natural production of anadromous fish,” (WC, §85302(c)(5)) and that the four preceding
10 paragraphs (WC, §85302(c)(1)-(4)) are sufficient to satisfy the obligation. (Opp. 61) Although other
11 directives may also promote the same goal (WC, §85302(c)(1)-(4)), the DRA specifically speaks to
12 doubling salmon populations. (WC, §85302(c)(5).) If the Legislature felt the preceding four paragraphs
13 (WC, §85302(c)(1)-(4)) were sufficient to satisfy the obligation, then the fifth paragraph about doubling
14 salmon populations would not have been included.¹⁵ The DSC ignored the requirement that the CVPIA
15 requires flows to be met and ignored this statutory obligation. (OB 27)

16 **b. ERP2 Fails to Address Appropriate SLR Variability and Lacks**
17 **Sufficient Scientific Basis**

18 Ecosystem Restoration Policy 2 (“ERP2”/Regs., §5006; B452) illegally shifts the burden of BAS
19 onto the project proponent as it only maps habitat restoration areas according to sea level rise (“SLR”)
20 using elevation, rather than incorporating other habitat variables as required by BAS and the DISB.
21 (B1228) The DISB emphasized the need to cite several studies to account for variability in SLR
22 projections, and provided two recent references on 21st Century SLR. (K832.021) The DSC states:
23 “Other habitat variables (e.g., turbidity, salinity) show similar spatial variation in the Delta. This spatial
24 variation in physical characteristics of the Delta determines the structure and function of biological
25 communities. Changing conditions (climate change, population growth, changing water and land use
26

27 ¹⁵ “[C]ourts should interpret statutes . . . so as to give force and effect to every provision and not in a
28 way which would render words or clauses nugatory, inoperative or meaningless.” (*Taxpayers for
Accountable School Bond Spending v. San Diego Unified School District* (2013) 215 Cal.App.4th 1013,
1026, citation omitted.)

1 and management) will affect patterns of spatial variation in the Delta with uncertain consequences for
2 Delta organisms.” (K832.004) The habitat areas of the map referenced in ERP2 do not identify or
3 support any of these or other variables identified by science to appropriately determine SLR-resilient
4 habitats, or scientifically defensible locations for restoration. (ERP2, B452, B602-03 (color map))

5 The flexibility claimed by the DSC (Opp. 65), including that the map (B1228) should only be
6 used as a “guide,” conflicts with the plain language of ERP2. ERP2 states “If a proposed habitat
7 restoration is not consistent with Appendix 4, the proposal shall provide rationale for the deviation based
8 on [BAS].” (B452) This error shifts the scientific burden onto the project proponent, without
9 justification. (Regs., §5001(f); B763; B1178; OB 17) If ERP2 is truly flexible, the policy should so
10 state. To the extent the DSC has conceded that ERP2 provides flexibility, Petitioners’ request
11 declaratory relief that codifies that flexibility within the implementing policy.

12 Even if elevation were enough to support ERP2, the habitat restoration map (B1228) does not
13 constitute BAS and will not accomplish the stated goal of identifying future habitat given SLR because
14 it is based on an oversimplified and erroneous prediction of 55 inches. (Regs., §5001(f); B763; B1178;
15 OB 17; B452, B602-03 (color map)) The DSC conflated the *BDCP’s mandatory* 55 inch SLR analysis
16 requirements under WC, §85320, and DFW’s requirements under §85066, with a mischaracterization of
17 the Cayan Report¹⁶ to set its own non-scientifically based policy. (OB 29) Yet, to create the map that
18 accompanies ERP2, the DSC explicitly relied on the “DFG 2011 Conservation Strategy.” (J9455) The
19 2011 DFG report points to planning for 55 inches of SLR, citing to Cayan Report. However, the Cayan
20 Report *does not support* 55 inches and instead states 35 inches as the modeled mean for 2100. (J9492,
21 9662; OB 29; Cayan Report, at 30 and 33 (Figure 17))

22 The DSC’s reliance on the Ocean Protection Commission (“OPC”) (L38257) also is misplaced.
23 (Opp. 92) In fact, the OPC cites to the 55 inch estimated SLR as the model average only under the *most*
24 *extreme greenhouse gas* (“GHG”) scenario for 2100. The DSC mischaracterizes the 69 inch SLR
25 projection and fails to identify that number as reflecting only the very highest number of the very
26 highest range under the highest SLR scenario developed. (Opp. 92; L33595) The average of the models

27 _____
28 ¹⁶ See Cayan, et al., *Climate Change Scenarios and Sea Level Rise Estimates for the California 2009
Climate Change Scenarios Assessment*. California Energy Commission. CEC 500-2009-014-F: see
Motion to Augment Record/Request for Judicial Notice, Meserve Decl., Ex. 1, filed herewith.

1 for the medium GHG scenario is actually 47 inches. In any case, the scenarios should be stated as ranges
2 (e.g., 37-60 inches) under the Governor’s Order cited by the DSC. (L33592) The “updated” information
3 the DSC cites also mischaracterizes the source material; a range is provided by OPC in an email of 1.38
4 to 5.48 feet, whose average is 49 inches (M5597), which the DSC then identifies only by the maximum
5 upper bound of 65.5 inches. (Opp. 93)

6 The DSC again directly mischaracterizes its citations by claiming that a 55 inch SLR is somehow
7 “suggested” by the OPC. (Opp. 92) The reference to 55 inches on the cited page is:

8 WHEREAS, research funded in part by the Ocean Protection Council (OPC) has shown
9 that a 55-inch sea-level rise, with a 100-year storm event along the California coast
10 places approximately 480,000 people (given today's population) and nearly \$100 billion
(in year 2000 dollars) of property at risk

11 (L38255) However, nowhere is 55 inches suggested as a standard, and, regardless, it is not germane to
12 the Delta. The DSC also misinterprets the Governor’s order stating that: “all state agencies within my
13 administration that are planning construction projects in areas vulnerable to future SLR shall, for the
14 purposes of planning, consider a range of SLR scenarios for the years 2050 and 2100 in order to assess
15 project vulnerability. . . .” (L33592) The DSC fails to use a range of scenarios and BAS to determine
16 what types of construction projects are in an area actually vulnerable to SLR. None of this context
17 specific analysis was carried out by the DSC. (L33594) Petitioners are not denying SLR, but rather, the
18 misleading and unscientific approach used by the DSC.

19 DSC also claims that the “flexibility” of ERP2 saves it (Opp. 65). Even if ERP2 is flexible,
20 however, that flexibility cannot cure the inconsistency of ERP2 with BAS. (B763; B1178) The fact that
21 DFW is a sister agency is also irrelevant to the BAS standard. (Regs., §5001(f)); B763; B1178; OB 17)
22 In fact, the standard was crafted to ensure that each study meets the appropriate BAS criterion regardless
23 of who created the study. Petitioners raised these issues in comments (K98.002), yet the 55 inches cited
24 by the DSC has not been changed within the Plan since 2010. (K98.002) Had DSC applied BAS, it
25 would not have accepted DFW’s erroneous interpretation of the Cayan study prior to its own
26 investigation.

1 **c. ERP3 Unlawfully Requires Special Mitigation for Covered Actions in**
2 **Areas That May Ultimately Be Unsuitable for Ecosystem Restoration**

3 The map used within Ecosystem Restoration Policy 3 (“ERP3”/Regs. §5007) to denote areas
4 where mitigation is required is not based on BAS and therefore imposes special mitigation in areas that
5 are not actually suitable for ecosystem restoration, thereby placing an unnecessary burden on
6 landowners. ERP3 requires mitigation within priority habitat restoration areas depicted in Appendix 5.
7 (Regs., §5007) Again, DSC claims there is flexibility to correct this problem in implementation (Opp.
8 64, 65); that flexibility does not appear in ERP3, however, and the plain language of ERP3 states that
9 mitigation is necessary in areas where habitat restoration may not ever be suitable. (Regs., §5007) The
10 Plan specifies that “[w]ithin the priority habitat restoration areas depicted in [a DFW 2011 habitat
11 priority map] significant adverse impacts to the opportunity to restore habitat *must* be avoided or
12 mitigated.” (B452, italics added; B481 (color Appendix 5 map); B1232)

13 The same defect applies to ERP3 as it does to ERP2, since 55 inches is not a BAS estimate of
14 SLR. While ERP2 applies to proposed actions in the priority habitat restorations depicted in Appendix 5
15 (B1232), ERP2 applies to proposed actions within Appendix 4 (B452; B481). Petitioners thus request
16 declaratory relief regarding the flexibility within the implementing policy now claimed by the DSC.
17 (Opp. 64)

18 **d. Blind Promotion of Setback Levees under ERP4 Does Not Meed BAS**
19 **or Achieve the Coequal Goals**

20 Setback levees are often not appropriate in a tidal system such as the Delta, yet Ecosystem
21 Restoration Policy 4 (“ERP4”/Regs., §5008) blindly promotes their use contrary to BAS. (B452, B1258
22 (map for setback levee analysis)) ERP4 requires levee projects to evaluate the potential for setback
23 levees in the 200-mile linear area shown in Appendix 8. (B452) This new requirement places the burden
24 of BAS onto levee project proponents, increasing regulatory and other cost burdens. Yet the Delta Plan
25 does not contain an analysis using BAS or provide the relevant scientific data in support of its
26 conclusion for the need to promote setback levees in tidal-settings (B452, 616, 716, 725, 726, 741,
27 N3085), as opposed to other appropriate flood control or habitat improvement options. (B719-726)
28

1 The new requirement to evaluate the feasibility of setback levees will create significant new local
2 costs of up to \$300,000 per mile of levee (E1405), which may be unrecoverable.¹⁷ (OB 75) Although the
3 Delta Plan states that setback levees will benefit plants, birds, and fish (B441), it does not weigh the
4 environmental tradeoffs of these massive riparian clearing, excavation and fill projects (D36, 84), might
5 outweigh biological benefits, certainly for terrestrial and riparian species. (OB 31) This policy shifts the
6 burden to landowners in the areas shown in Appendix B who must prove that setback levees are not
7 feasible merely in order to carry out maintenance of existing levees. (B452, 1258; Regs., §5008)

8 **4. The Delta Plan Fails to Protect and Enhance the Delta**

9 The DRA mandate is to “protect and *enhance* . . . cultural, recreational, and agricultural values . . .
10 .” (WC, §§85020(b), italics added, 85054), and agriculture, recreation and culture are the primary
11 drivers of the Delta economy (B615; WC, §§85020(b), 85054). Yet the Plan substitutes the term
12 “*sustain*” for “*enhance*” (B630) in reference to agriculture and “*encourage*” for “*enhance*” for
13 recreation. (B630) The term “sustain” suggests that the status quo is sufficient, whereas the term
14 “enhance” requires improvement. Similarly, the term “encourage” is more passive than “enhance.” A
15 policy written using the term “sustain” or “encourage” rather than “enhance” therefore seeks to maintain
16 the status quo or to reduce responsibility rather than to improve circumstances. (OB 32) The DSC
17 impermissibly changed the language of the DRA. (*Lungren, supra*, 45 Cal.3d at 735.) The DSC does not
18 respond to these omissions and therefore waives any defense on the issue. (*People v. Simon* (2001) 25
19 Cal.4th 1082, 1107 (“waiver’ is the abandonment of a known right,” or argument).)

20 The DSC failed to consider and incorporate recommendations in the DPC’s Economic
21 Sustainability Plan (“ESP”) consistent with the coequal goals, as required by the DRA. (WC, §85301)
22 The DSC argues that the DRA “expressly gives the Council the discretion whether or not to incorporate
23 DPC proposals.” (Opp. 86) Nevertheless, WC, §85301 directs the DPC to “develop, for consideration
24 *and incorporation* into the Delta Plan by the council, a proposal to protect, enhance, and sustain the
25 unique cultural, historical, recreational, agricultural, and economic values of the Delta as an evolving
26 place, in a manner consistent with the coequal goals.” (Italics added.)

27
28

¹⁷ See also section II.D, *post* regarding DSC’s failures under the APA.

1 Contrary to DSC’s recasting of Petitioners’ argument, Petitioners do not argue that the DSC is
2 required to adopt the ESP. (Opp. 87) Rather, the DSC must consider and incorporate the ESP in a
3 manner consistent with the coequal goals. (WC, §85301.) The DSC was required to consider whether the
4 provisions of the ESP (L28298; K7709) were necessary to implementing the coequal goals. (WC,
5 §85301.)

6 The DSC fails to explain the relationship between the ESP proposals and the coequal goals, and
7 overstates the extent to which the DPC’s proposals were adopted. (Opp. 87; K7709-7713) While the
8 DSC provided some discussion of the ESP (G47110) and followed with a chart comparing DPC
9 Proposals with Delta Plan (K7709-7713), the DSC only marks “Accept/Partially Accept/Defer/Reject”
10 with respect to the text of the ESP and corresponding Plan Policy or Recommendation (K7712). For
11 those proposals partially accepted, the DSC does not describe which parts were accepted, nor does it
12 explain how any of these Proposals do or do not meet the co-equal goals. (G5887)

13 The DSC contends that one DPC proposal was adopted in the form of DPP1 (Opp. 88-89), which
14 limits new residential, commercial, and industrial development to certain areas within the Delta. The
15 main threat to Agriculture in the Delta is not urbanization, given the existing restrictions on
16 development. (WC, §85022(d)(1)-(6) (listing other threats).) The Plan recognizes that the main threats to
17 agriculture are a lack of freshwater flows and ecosystem decline: “continued viability of agriculture in
18 the Delta will require the protection of sufficient farmland and fresh water to support commercially
19 viable operations and provide ways for agriculture to coexist with habitat restoration.” (B661) Even
20 though DPP1 only addresses urbanization and is duplicative, the Plan uses DPP1 (Regs., §5010; B455)
21 as its flagship for the statutory directive to “[p]rotect and enhance the unique cultural, recreational, and
22 agricultural values of the California Delta as an evolving place.” (WC, §§85020(b), 85054.) DPP1,
23 however, does nothing to address the very real threats to the Delta as a Place. (I4-5 (Dept. of
24 Conservation), 6 (State Lands Commission), 353 (DPC).)

25 **5. The Delta Plan Fails to Improve Water Quality to Protect Human Health** 26 **and the Environment**

27 DSC claims that its policy regarding SWRCB adoption of flow standards (ERP1; B451, 614) and
28 its 12 nonbinding Recommendations address its obligations to protect water quality under the DRA

1 (WC, §85302(d)(3)); Opp. 72) While the Delta Plan mentions salinity and sediment, it is in the context
2 of quality of water for export, not overall human health, and certainly not health within the Delta.

3 (B614) In fact, the “Problem” statement in the Plan supporting the adoption of ERP1 complains that the
4 “predictability of water exports cannot be improved, and the BDCP cannot be implemented without
5 timely SWRCB action to update flow objectives.” (B614)

6 Even if the DRA mandate includes some flexibility (Opp. 73), none of the recommendations
7 discussed by the DSC require anything (WQR1-WQR12), and none even attempt to address selenium
8 and salts contamination from the San Joaquin River, recognized as a problem in the Plan (B694-695).

9 The one thing the DSC points to in its brief that the Delta Plan does regarding selenium is not even a
10 Recommendation but simply an item in a list of “Issues for Future Evaluation and Coordination.”

11 (B701-702) Thus, the Plan utterly fails to improve water quality in any cognizable manner, contrary to
12 the DRA’s express mandate. (WC, §85302(d)(3).)

13 **6. The Delta Plan Fails to Reduce Risk to People, Property, and State Interests** 14 **in the Delta**

15 DSC characterizes the Petitioners’ arguments regarding risk as “unconsequential.” (Opp. 90:23)
16 Yet under the DRA, the coequal goals include “Reduc[ing] risks to people, property, and state interests
17 in the Delta by effective emergency preparedness, appropriate land uses, and investments in flood
18 protection. (WC, §§85020(g), 85305(a)) To reduce risks in the Delta, the DSC adopted RRP1
19 (prioritization of state investments in levees), RRP2 (require flood protection for residential
20 development) and two additional policies. These policies do not reduce the risks that the Legislature was
21 concerned about – including risks to the state’s water supply identified in the Delta Plan (B713).

22 The DSC must show that it followed BAS and the advice of the DISB for its risk reduction
23 policies. (B1178-1180; WC, §§85020, 85302(g), 85305(a), §85308(a)) The DSC points to other
24 agencies, studies and conclusions (Opp. 92-98), but ultimately fails to substantiate compliance with the
25 BAS standard (B1178-1180) or how it addressed the comments and concerns of the DISB on risk-
26 reduction issues. The DSC also overstates certain risks while understating others to justify its policies.
27 (Opp. 90-100) These exaggerations are prejudicial, as the conclusions supported by these misstatements
28 are imbedded throughout risk reduction policies and recommendations. (B460-465; OB 35-38) This is

1 particularly true for levee system statements and potential impacts related to earthquake risk. None of
2 the examples provided by the DSC followed the DISB recommendations with respect to risk reduction.
3 (Opp. 92-98) Nowhere is this prejudice more evident than in the selective use of data previously rejected
4 by the engineering and scientific community regarding levee risk. The DSC ignored repeated
5 admonitions by Reclamation District (“RD”) engineers and levee scientists that their basis for the levee
6 risk and standards was incomplete, incorrect, and misleading in their development of the Plan. (G5893-
7 95, K377 (MBK), M6866 (Cosio), I1-2 (CVFPB), 1416 (RD 830), 1417 (RD 999), 383 (LAND), 6
8 (State Lands Commission) The economic, social and environmental costs of ignoring the levee experts
9 will become evident as the Plan moves forward.

10 Contrary to DSC’s argument, RRP2 assumes a uniform elevation change within the Delta, does
11 not account for the relative strength of urban levees or recent levee repairs, and as a result does not
12 comply with BAS. (Opp. 94) RRP2 (B463) imposes on new residential development flood-proofing 12
13 inches above the 100-year base flood elevation and additional elevation as required to protect against a
14 55-inch SLR. As discussed *ante*, section II.A.3.b, this SLR prediction does not constitute BAS (J9455,
15 9662, 9492; OB 29; Opp. 64)

16 As a result of these deficiencies, the DSC’s Plan and Regulations must be set aside.

17 **B. THE DSC FAILED TO MEET BASIC PUBLIC TRUST MANDATES**

18 **1. Petitioners’ Opening Brief Did Not “Assume” DSC Has a Duty to Show How** 19 **It Complies With the Public Trust Doctrine**

20 **a. The DSC’s Duty is Described in Core Public Trust Decisions**

21 The DSC objects that Petitioners “improperly assume[] that the Council had a legal duty to
22 allocate water resources” and it dismisses Petitioners’ contention that the DSC must demonstrate
23 compliance with the public trust doctrine, claiming [t]hat is not the law.” (Opp. 68:8-9, 20) This
24 mischaracterizes both Petitioners’ position and the law.

25 “[T]he public trust is more than an affirmation of state power to use public property for public
26 purposes. It is an affirmation of the duty of the state to protect the people’s common heritage of streams,
27 lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the
28 abandonment of that right is consistent with the purposes of the trust.” (*Audubon, supra*, 33 Cal.3d at

1 441.) This duty extends to preservation of water resources from harmful diversions by state and federal
2 water right holders in the Delta, and it asserts that no one has a vested right to use water in a manner
3 harmful to the state’s waters. (*US v. SWRCB* (1986) 182 Cal.App.3d 106, citing *Audubon, supra*, 33
4 Cal.3d at 445-448.)

5 **b. DSC Improperly Contends that “Promoting” Public Trust Values Is**
6 **Sufficient to Comply with the Public Trust Doctrine**

7 The DSC argues that the public trust doctrine grants it “extensive discretion, and that the Plan
8 fully complies with the Act and the doctrine because it promotes public trust values.” (Opp. 68:5-7) The
9 DSC provides no citations to case law or statute to support either a claim to extensive discretion or to
10 promotion of public trust values as sufficient to meet public trust duties.

11 Petitioners’ OB sets forth the DRA’s assignment of public trust-related duties and powers to the
12 DSC (OB 41-43.) The DRA provides DSC with powers typical of other departments of the State, with
13 responsibility for enforcing the public trust doctrine (WC, §85023) and the DRA by preparing a Delta
14 Plan as the vehicle for achieving two coequal goals, including eight objectives that inhere in the coequal
15 goals, four of which directly relate to public trust resources. (WC, §85054; OB 41:9-18.) The DRA
16 tasked the DSC with considering hydrological information, employing BAS, devising and achieving
17 performance measures, and measurable targets based on BAS. (See *ante*, section II.A.1.) The DSC is
18 also to consider flow criteria from SWRCB (WC, §85086(c)(1)) and biological objectives from DFG
19 (WC §85084.5) to establish instream Delta flows in the Plan sufficient to restore the Delta ecosystem.
20 (OB, 41:19-28, 42:1-7; WC §§ 85086(b), 85021.) The DRA authorizes the DSC as a managing agency,
21 a steward, actively guiding and coordinating the actions of other state agencies, who “shall coordinate
22 [their] actions pursuant to the Delta Plan” (OB, 42:14-16; WC, §85204.) However, the Delta Plan
23 merely mentions the “public trust” descriptively, rather than applying the public trust to implement
24 enforceable policies (WC, §85001(c); B479, B499, B527, B528, B530, B531, B539, B540, B552, B568,
25 B580, and B781.) By overlooking its statutory duties, the DSC abused its discretion, failing to follow the
26 DRA’s mandate to create an “enforceable plan” that would implement the public trust doctrine in the
27 Delta. (WC, §§85001(c), 85023.)
28

1 **2. In Improperly Overlooking Its Procedural/Analytical Duties Required by the**
2 **DRA, the DSC Also Failed to Use Best Available Science in Its Water**
3 **Resource Planning**

4 The DSC mischaracterizes its public trust role. (Opp. 69:16-27, 70:1, citing *Audubon, supra*, 33
5 Cal.3d at 425, 426 and *SWRCB Cases, supra*, 136 Cal.App.4th at 778.) The DSC failed to discharge its
6 planning role in Delta public trust resource protection. Failure to analyze the effects of the Delta Plan
7 (including its required instream Delta flow needs) on public trust resources of the Delta is unlawful.
8 (*Audubon, supra*, 33 Cal.3d at 443-444, 446; WC, §§85023, 85020, 85086(b), 85204.) Ironically, the
9 DSC claims extensive discretion to defend its inaction and delegation of its DRA responsibilities to
10 other agencies. DSC claims Petitioners “rewrite the Act” (Opp. 70:27, 71:1-2) when actually
11 Petitioners’ OB described the exact process through which the DRA compels the DSC to use BAS to
12 determine instream flow needs for the Delta in the Plan, based upon direct, often verbatim, citations to
13 DRA sections that apply mandates forcing action from the DSC, as well as to sections that describe
14 specific content for the Plan. (WC, §85086(b); OB 41:19-21, 43:19-23, 43:26-28, 44-49.) The SWRCB
15 flow objectives and DFG quantified biological objectives were required to inform BAS in the process.
16 (WC, §§ 85084.5, 85086(c)(1).) The DRA proclaims the public trust doctrine to be a foundation of state
17 water management policy. (WC, §85023.) The required instream flow determinations are critical tools
18 for achieving the coequal goals, fulfilling the State’s duties to implement the public trust doctrine, and
19 protecting Delta public trust resources, whenever feasible. (WC, §§85001(a), (c), 85020, 85021, 85023,
20 85054, 85086(b), 85086(c)(1), 85204, 85302(g), and 85308(a).) “The public trust doctrine serves the
21 function in that integrated system of preserving the continuing sovereign power of the state to protect
22 public trust uses, a power which precludes anyone from acquiring a vested right to harm the public trust,
23 and imposes a continuing duty on the state to take such uses into account in allocating water resources.”
(*Audubon, supra*, 33 Cal.3d at 452.)

24 **3. DSC Improperly Presumes It Has Extensive Discretion to Avoid Applying**
25 **the DRA’s Mandate to Reduce Reliance on the Delta for Water Supplies**

26 The DSC’s claimed extensive discretion is limited by the presence of action-forcing mandates in
27 the DRA. The policy mandate to reduce reliance on the Delta in meeting California’s future water
28 supply needs is another such instance of refusal to follow DRA requirements. First, DSC alleges

1 Petitioners overstate the requirements of WC, §85021. Petitioners do not. In fact, we quote it verbatim in
2 our opening brief. (OB 7:8-11; see also Opp. 35:8-11) Petitioners analyzed how the Plan’s formulation
3 of “reduced reliance” does not actually reduce reliance on the Delta for water supplies. (OB 16:4-25,
4 43:6-16) The plain language of the statute imposes a mandate to reduce reliance by exporters of Delta
5 waters for meeting local and regional supplies. Its first sentence reads in part: “The policy of the State of
6 California is to reduce reliance on the Delta in meeting California’s future water supply needs”
7 (WC, §85021.) Exporters relying on the Delta at the time of the DRA’s enactment must set about
8 reducing their dependence on the Delta.

9 The DRA finds that the Delta is in crisis now. (WC, §85001(a).) To resolve this crisis and still
10 rely on any Delta water supply, the DRA requires a Plan sufficient to achieve the DRA’s coequal goals
11 by using, among other tools, the DRA’s “miscellaneous provisions” and the reduced Delta reliance
12 mandate. (WC, §§12200-12220, 85022(c), 85021, 85023, 85031(a) and (b), 85054, 85300(a), 85302(a).)
13 The DSC has not done so in this Plan.

14 Second, Petitioners are alleged to have ignored the DSC’s lack of authority over routine
15 operation of water projects. (Opp. 40:23-24; WC §85057.5(b)(2).) This again, misrepresents
16 Petitioners’ argument, which concerns the Plan’s failure to enforce the reduced Delta reliance mandate.
17 The DSC has the requisite authority: the policy mandate of WC, §85021 authorizes a broad planning
18 role whereby the DSC, through its Plan, retains continuing jurisdiction statewide over implementation of
19 Delta water management policy. (WC, §85023)

20 Third, DSC alleges that it did acknowledge the need for reduced reliance on Delta water supply.
21 DSC’s brief directs the Court’s attention to just one instance, a reference to Appendix G of the Plan.
22 (Opp. 42:4-5; B568) Actually, Appendix G underscores Petitioners’ contention that WRP1 and its
23 implementing regulations fail to require reduced Delta reliance to meet California’s future water supply
24 needs. No implementing policies or regulations can be found in Appendix G; Appendix G contains only
25 examples of the Plan’s unenforceable policies and regulations. (B1313-B1318) DSC further alleges that
26 Petitioners ignore the Plan’s inclusion of conceptual models and an adaptive management framework.
27 The DSC confines conceptual models and an adaptive management framework to mere description and
28 promotion rather than applying them to analysis and action. Conceptual models are referred to only in

1 passing. (B446, 520, 501, 622, 692, 625, 771) This problem with the Plan was identified in the Fifth
2 Draft of Delta Plan in 2012 by the DISB. (G5880) “The absence of any reference to conceptual models
3 guiding development of the Plan and of individual actions is a serious omission that needs to be
4 corrected.” Yet it was not corrected in the adopted Plan. Thus, the DSC failed to meet minimum public
5 trust mandates.

6 **C. THE DELTA PLAN FAILS TO COMPLY WITH CEQA**

7 In evaluating an EIR for CEQA compliance, a reviewing court must determine whether the
8 agency has prejudicially abused its discretion. (PRC, §21168.5.) CEQA specifies two distinct grounds
9 for finding that the agency abused its discretion: “An abuse of discretion is established if the agency has
10 not proceeded in a manner required by law or if the determination or decision is not supported by
11 substantial evidence.” (*Ibid.*; see also PRC, §21005(a); see also *Vineyard Area Citizens for Responsible*
12 *Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (*Vineyard*)). “[A] reviewing court
13 must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is
14 predominantly one of improper procedure or a dispute over the facts.” (*Ibid.*; *San Diego Citizenry Group*
15 *v. County of San Diego* (2013) 219 Cal.App.4th 1, 12 (*San Diego*)).

16 The DSC’s assertion that all of its EIR-related decisions should be “given substantial deference”
17 and be “presumed correct” (with Petitioners bearing the burden of proving otherwise) ignores the critical
18 distinction between these two CEQA inquiries.¹⁸ (Opp. 125, 128.) Challenges to an agency’s failure to
19 proceed in the manner required by CEQA are subject to a less deferential standard than challenges to an
20 agency’s substantive factual conclusions. (*Vineyard, supra*, 40 Cal.4th at 435.) An agency’s decision
21 that rests on a failure to comply with any of CEQA’s “mandatory procedures” is *presumptively*
22 *prejudicial* and must be set aside. (*Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1236.)
23 “Noncompliance by a public agency with CEQA’s substantive requirements ‘constitute[s] a prejudicial
24 abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different
25

26
27 ¹⁸ Contrary to the DSC’s claims (Opp. 23), Petitioners have cited to the relevant authority and have
28 forfeited nothing. (*People v. Simon* (2001) 25 Cal.4th 1082, 1107 (“‘forfeiture’ is [simply] the failure to
make the timely assertion of a right”).)

1 outcome would have resulted if the public agency had complied with those provisions.” (*RiverWatch v.*
2 *Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1199 (citing PRC, §21005(a))
3 (*RiverWatch*).

4 The substantial evidence standard of review applies to disputes regarding the correctness of
5 conclusions such as a dispute over a finding that mitigation measures adequately mitigate project
6 impacts. (*Vineyard, supra*, 40 Cal.4th, at 435; *San Diego, supra*, 219 Cal.App.4th at 12.) While a court
7 reviewing an agency’s decisions under CEQA does not pass on the correctness of an EIR’s
8 environmental conclusions, it must determine whether these conclusions are supported by substantial
9 evidence. (PRC, §21082.2(c).)

10 Finally, a programmatic EIR is legally adequate only when it contains sufficient information that
11 allows a lead agency to consider broad policy alternatives and program- wide mitigation measures at an
12 early time when the agency has greater flexibility to deal with basic problems or cumulative impacts.
13 (Guidelines, §§15152(c), 15168(b)(2) & (b)(4)).) “[D]esignating an EIR as a program EIR [] does not by
14 itself decrease the level of analysis otherwise required in the EIR,” since all EIR’s must still cover the
15 same general content as a project EIR. (*Cleveland Nat. Forest Found. v. San Diego Assn. of*
16 *Governments* (2014), 231 Cal.App.4th 1056, 1067 (*SANDAG*) (citing *Friends of Mammoth v. Town of*
17 *Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511, 533 (*Mammoth*)).) The specificity
18 of the EIR is determined by the rule of reason, which focuses on what type and amount of information is
19 appropriate and reasonably feasible for that EIR to include, rather than any “semantic label accorded to
20 the EIR.” (*Mammoth, supra*, 82 Cal.App.4th at 533; Guidelines, §15151.) The guiding inquiry is
21 whether the EIR provided “decision makers with sufficient analysis to intelligently consider the
22 environmental consequences of the project.” (*Citizens for a Sustainable Treasure Island v. City and*
23 *County of San Francisco* (2014) 227 Cal.App.4th 1036, 1052.)

24 **1. The EIR Established an Inadequate and Inaccurate Baseline**

25 The DSC alleges that Petitioners fail to cite all material evidence, a test that is only relevant
26 under the substantial evidence standard that does not apply to this claim. (Opp. 130.)¹⁹ Instead,

27 _____
28 ¹⁹ In any case, the DSC ignores the ample evidence that Petitioners cite, including those that support the
DSC’s findings. (OB 50-52 (citing B451, ERP1, WRR18; B448, W R5, B450, WRR15; D4399-4693;
WC, §85086(c)(1) & 85308(a)-(b) (mandating quantified and measured decision-making for the Delta

1 Petitioners have repeatedly pointed out the need for the EIR to analyze realistic, quantified water supply
2 conditions, and that failure to analyze these conditions fail the fundamental legal requirement standard
3 since it “undermines the statutory goals of an EIR to inform decision makers and the public of
4 potentially significantly adverse effects on the physical environment,” including adverse water resources
5 and biological impacts. (OB 52; see also OB 50; *Communities for a Better Environment v. City of*
6 *Richmond* (2010) 184 Cal.App.4th 70, 83-85 (*CBE Richmond*); see also *Laurel Heights Improvement*
7 *Association v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123 (*Laurel Heights II*);
8 *Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, 622-23).²⁰
9 Petitioners do not argue the environmental baseline should only include lawful or sustainable activities
10 as the DSC suggests. (Opp. 166) Instead, Petitioners contend that the EIR vaguely alludes to but does
11 not actually assess the unsustainable and illegal water uses that would have allowed DSC to establish a
12 baseline from realistic water supply conditions. (OB 49-50.)²¹

13 The DSC misreads *Neighbors for Smart Rail v. Exposition Metro* (2013) 57 Cal.4th 439
14 (*Neighbors*). (Opp. 171) As Petitioners discuss in the OB, the Supreme Court in *Neighbors* explicitly
15 held that in order to fulfill “the fundamental goal of an EIR [] to inform decision makers and the public
16 of any significant adverse effects a project is likely to have on the physical environment,” an EIR must
17 define a baseline “against which predicted effects can be described and quantified.” (*Neighbors, supra*,
18 57 Cal.4th at 447; OB 50-52.) Since an adequately informative EIR must contain quantified impacts, a
19 baseline against which effects are measured must also be quantified. (*Ibid.*) Only when the DSC
20 expressly quantifies the water availability in the Delta as the DRA mandates, which includes current

21
22 Plan.) Thus, the facts here differ drastically from both *Al Larson, supra*, 18 Cal.App.4th at 749 (failure
23 to identify or suggest any manner in which omission of more detailed information prejudicial) and
24 *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1572-73 (no attempt to set forth
25 evidence supporting the traffic baselines used in EIR) cited by DSC (Opp. 164).

26 ²⁰ In addition, as Petitioners emphasize (OB 50) the DRA also mandates the EIR to complete a
27 quantified supply baseline to inform decisionmaking and to meet objectives for the Delta Plan, (WC §§
28 85086(c)(1), 85308(a)-(b)), including managing the Delta’s water resources over the long term;
promoting statewide water conservation, water use efficiency, and sustainable water use; and improving
the water conveyance and storage system (WC, §§85020(a), (d), and (f).)

²¹ See also D6792-95 (providing a portion of Delta water is diverted within the Delta watershed, and a
portion of the water is diverted at south Delta intakes; providing difficulty assessing stressors to Delta
ecosystem); D6797 (alluding but failing to explicitly address or quantify over-allocation of water
entitlements and current unsustainable exports by stating “the full amount of water originally envisioned
when the SWP was planned is no longer visible”); D6955 (stating generally “continued reliability of
CVP and SWP water supplies in the Delta has been reduced over the past 20 years”)

1 water over-allocation and exploitation, will the DSC and the public be able to fully understand the dire
2 conditions of the Delta and participate in intelligent decision-making. (*Ibid.*)

3 The DSC justifies its deferral of the development of a quantified, realistic water availability
4 analysis by providing that the “EIR provides far greater detail regarding the environmental setting than
5 [Petitioners] would have the Court believe[,]” (Opp. 169; see also Opp. 170, 172 (citing D6969-6952))
6 The DSC attempts to distinguish *Neighbors from County of Amador v. El Dorado County Water Agency*
7 (1999) 76 Cal.App.4th 931 (*Amador*) by insisting that the DSC “documents current exports” and
8 provides “copious information about actual conditions” of the Delta (Opp. 165, 171; see Opp. 169
9 (citing D6943-7016 (on water resources).) While the DSC may have devoted a large number of pages to
10 describe water resources, its presentation of vague descriptions and piecemeal, conflicting data are far
11 from a quantified water availability analysis necessary to establish an adequate baseline for the planning
12 area.²² (*Amador, supra*, 76 Cal.App.4th at 955-56 (adequate EIR requires not only raw data but
13 sufficient analysis for intelligent decision-making); *Vineyard, supra*, 40 Cal.4th at 442 (“data in an EIR
14 must not only be sufficient in quantity, it must be presented in a manner calculated to adequately inform
15 the public and decision makers, who may not be previously familiar with the details of the project”).)
16 Additionally, the EIR promises but fails to deliver impact analyses that would assume “existing sea level
17 and hydrological conditions and a range of future conditions due to sea level rise and changes in storm
18 patterns [],” which necessarily depends on an existing and future environmental baseline (D9113;
19 *Neighbors, supra*, 57 Cal.4th at 449 (citation omitted).)²³

20 The DSC is also wrong in contesting that “the level of detail requested by Petitioners is
21 inappropriate” given the programmatic nature of the EIR. (Opp. 169; see also Opp. 171-172 (citing *In re*

22
23 ²² See Opp. 165; see also D6960-62, 6970 (presenting 5-year water supply data and various water users
24 and exporters of the Sacramento and San Joaquin River Watersheds without further analysis); D7056-
25 7063 (generally discussing decline of Delta ecosystem); D6949-50 (stating range of water flow *into* the
26 Delta, not range of water available for various uses including in-Delta agricultural use or exports);
27 D6962-65 (presenting no flow data regarding the surface water hydrology of the San Joaquin River
28 Watershed); D6970 (presenting 1998-2005 water supply data in the San Joaquin River Watershed
without further analysis); D6970, 6974 (conflicting information regarding groundwater supply in the
San Joaquin River Watershed); D6984 (stating generally that Tulare Lake watershed groundwater is
overdrafted without any data); D6990 (presenting one year (2005) of data regarding water used in San
Francisco Bay Area imported from the Delta); D7008, 7014 (providing conflicting data on recycled
water in Southern California region).

²³ See D6949 (sea levels are projected to increase rapidly); see also *post*, section II.A.3.b. regarding the
DSC’s failure to consider a range of sea level rise scenarios in the EIR’s cumulative impacts analysis.

1 *Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th
2 1143, 1172 (*In re Bay-Delta*.) Courts adopt the rule of reason to assess whether the EIR conducts a
3 sufficient analysis and intelligently weigh the consequences of the program as “specifically and
4 comprehensively as possible.” (*Mammoth, supra*, 82 Cal.App.4th at 253; see *SANDAG, supra*, 361
5 Cal.App.4th at 1067; *In re Bay-Delta, supra*, 43 Cal.4th at 1169; Guidelines, §§15151, 15152(c), &
6 15168(b).) Petitioners are not requesting the DSC to engage in speculation by providing a water
7 availability analysis for each potential water source at the project level as the petitioners did in *In re*
8 *Bay-Delta*. Instead, Petitioners have appropriately pointed out the DSC’s failure to describe and analyze
9 quantified, realistic water availability for the Delta region as a whole, and consequently, its failure to
10 accurately assess the program-wide effects of implementing the Delta Plan. (*Id.* at 1173; OB 50-52.)
11 “The fact more precise information may be available during the next tier of environmental review does
12 not excuse an agency from providing what information it reasonably can now.” (*SANDAG, supra*, 231
13 Cal.App.4th at 1086.) Given that it was reasonably feasible for the DSC to produce a quantified water
14 supply analysis at the program level that would otherwise escape review, the DSC’s failure to do so
15 demonstrates its lack of good faith effort to establish a complete and accurate baseline. (OB 51, citing
16 D4399-4693)²⁴; Guidelines, §15151; *SANDAG, supra*, 231 Cal.App.4th at 1086.)

17 The EIR fails to conduct a programmatic, comprehensive analysis of water supplies, including an
18 accounting of the high water export rates and over-allocation of water rights necessary for the DSC and
19 the public to accurately assess the significant impacts of the Delta Plan and its alternatives. The EIR
20 baseline precludes informed public participation and decision-making on the fate of the Delta.
21 (Guidelines, §§15151, 15125(a); *SANDAG, supra*, 231 Cal.App.4th at 1085-86; *Mammoth, supra*, 82
22 Cal.App.4th at 533.) Such error is prejudicial. (*SANDAG, supra*, 231 Cal.App.4th at 1086.)

23 **2. The DSC Failed to Develop and Consider a Range of Reasonable** 24 **Alternatives**

25 The DSC failed to develop and consider a reasonable range of alternatives in the EIR. (OB 69-73.)
26 “The core of an EIR is the mitigation and alternatives sections.” (See, e.g., *Habitat and Watershed*

27 _____
28 ²⁴ See also J1552 & 2352 (estimated daily average Delta outflow data); I5463 (analytical tool available to assess various flow in Sacramento River); J046949 (San Joaquin River flow data); B1178, G5882-5884.

1 *Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1302 (*Habitat*.) This is a CEQA
2 procedural issue. Whether an agency has employed the correct CEQA procedures is reviewed de novo.
3 (*Vineyard, supra*, 40 Cal.4th at 435.)

4 **a. Alternatives That Increase Delta Flows by Reducing Exports Were**
5 **Obvious Alternatives to Accomplish a Fundamental Purpose for the**
6 **Delta Plan**

7 The Legislature found that the Delta watershed is “in crisis and existing Delta policies are not
8 sustainable.” (WC, §85001(a).) The DSC, however, evaded and ignored development, consideration,
9 and analysis of the obvious alternative of increasing Delta flows by reducing exports.

10 The DSC points out in a subheading that “the EIR’s Range of Alternatives is Governed by the
11 Fundamental Purposes of the Project.” (Opp. 216:7-8) The DSC goes on to say that the DRA
12 “establishes the ‘underlying fundamental purpose’ of the project for purposes of CEQA.” (Opp. 216:23-
13 24) The DRA includes as a mandatory command that: “The Delta Plan *shall* include measures that
14 promote all of the following characteristics of a healthy Delta ecosystem: [including among the
15 measures set forth] (1) Viable populations of native resident and migratory species. . . (4) *Reduced*
16 *threats and stresses* on the Delta ecosystem. (5) Conditions conducive to meeting or exceeding the goals
17 in existing species recovery plans and state and federal goals with respect to *doubling salmon*
18 *populations*.” (WC, §85302(c), italics added.) Also, “The following sub goals and strategies for
19 restoring a healthy ecosystem *shall* be included in the Delta Plan: [including among the measures set
20 forth] (4) *Restore Delta flows* and channels to support a healthy estuary and other ecosystems.” (WC,
21 §85302(e).) Moreover, “The Council *shall consider*, for incorporation into the Delta Plan, actions
22 designed to implement the sub goals and strategies described in subdivision (e).” (WC, §85302(f), italics
23 added.)

24 Indeed, the fundamental purpose of the Delta Plan is supposed to be development of “the
25 comprehensive, long-term management plan for the Delta as adopted by the Council in accordance with
26 this division.” (WC, §85059.) Leaving aside climate change and changes in precipitation, the
27 immediate, direct way for humans to increase flows through the Delta is to take less water out.
28 Nevertheless, despite specific comments and warnings, the dsc failed to consider a range of reasonable
alternatives.

1 Finally, DSC evaded alternatives reducing exports by refusing to analyze the environmental
2 impacts of the “elephant in the room” -- the massive Water Tunnels proposed under the BDCP process -
3 - intended to divert enormous quantities of water upstream of the Delta. DSC’s evasion of environmental
4 analysis of the Water Tunnels sought by its sister State agency, DWR, is discussed *post*, section II.C.3.2.

5 **b. The EIR Selection and Discussion of Alternative Did Not Foster**
6 **Informed Decision-Making and Informed Public Participation**

7 ““The key issue is whether the selection and discussion of alternatives fosters informed decision-
8 making and informed public participation.”” (*Laurel Heights Improvement Assn. v. Regents of*
9 *University of California* (1988) 47 Cal.3d 376, 404 (*Laurel Heights*); Guidelines, §15126.6(a), (d);
10 *accord Habitat, supra*, (2013) 213 Cal.App.4th at 1304.) In addition, facts and analysis are necessary in
11 the EIR’s selection and discussion of alternatives, not just conclusions or opinions. (*Laurel Heights,*
12 *supra*, 47 Cal.3d at 404; *Habitat, supra*, 213 Cal.App.4th at 1304.)

13 Establishing “significant reduction in the amount of water used, or the percentage of water used,
14 from the Delta watershed” is a goal of the Delta Plan. (Opp. 189:12-13) As the DSC says, “The
15 reasonableness of the range of alternatives selected for analysis in an EIR is determined by the scope
16 and purpose of the project under review.” (Opp. 215:8-9) Here, the obvious and direct broad policy
17 alternatives are to: (1) maintain existing export levels and Delta flows; (2) reduce existing export levels
18 and thereby increase Delta flows; and (3) further reduce Delta flows by establishing a massive new
19 diversion upstream from the Delta. The CEQA procedural issue is whether the selection and discussion
20 of alternatives by the DSC fostered informed decision-making and informed public participation.

21 The DSC mischaracterizes the issue by saying “. . . [Petitioners’] arguments are based on their
22 policy disagreement with Alternative 2 rather than CEQA’s legal requirements.” (Opp. 219: 12-16) In
23 fact, there was no CEQA-required selection and discussion of the broad policy alternative of reducing
24 export levels to increase Delta flows in the EIR including facts and analysis as opposed to conclusions
25 or opinion.²⁵ Since the Delta Plan is “the comprehensive, long-term management plan for the Delta,”
26 failure to include an alternative that reduces exports is especially is inexplicable.

27 _____
28 ²⁵ “Consideration of otherwise reasonable alternatives in the administrative record cannot replace the
CEQA mandated discussion of alternatives in the EIR.” (*Citizens of Goleta Valley v. Board of*
Supervisors (1990) 52 Cal.3d 553, 569.)

1 Several CEQA cases address the issue of adequacy of alternatives with varying outcomes and,
2 “Each [CEQA alternatives] case must be evaluated on its own facts, which in turn must be reviewed in
3 light of the statutory purpose. [citation].” (Opp. 215:11-12)²⁶ As explained in *Village Laguna of Laguna*
4 *Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1028, fn.3, “Because CEQA was
5 modeled on the National Environmental Policy Act [NEPA], judicial interpretation of the latter is
6 persuasive authority in interpreting CEQA.” Pertinent programmatic NEPA alternatives decisions
7 address broad policy choices similar to the foundational decisions involved here.

8 In *California v. Block* (9th Cir. 1982) 690 F.2d 753, 765-769 (*California*), for instance, the
9 “project” at issue involved allocating to wilderness, non-wilderness, or future planning remaining
10 roadless areas in national forests throughout the United States that had not already been allocated. The
11 court held that the EIS violated NEPA because of failure to consider the alternative of increasing timber
12 production on federally owned lands currently open to development; and also because of failure to
13 allocate to wilderness a share of the subject acreage “at an intermediate percentage between 34% and
14 100%.” (*Id.* at 766.) The NEPA alternatives analysis standard is identical to the CEQA standard --
15 “whether an EIS’s selection and discussion of alternatives fosters informed decision-making and
16 informed public participation.” (690 F.2d at 767.) Like the Delta Plan situation involving a trade-off
17 between water exports and Delta restoration (Opp. 221: 1-2), the Forest Service program involved “a
18 trade-off between wilderness use and development. This trade-off, however, cannot be intelligently
19 made without examining whether it can be softened or eliminated by increasing resource extraction and
20 use from already developed areas.” (690 F.2d at 767.)

21 As to the percentages alternatives issue in *California*:

22 Whether the RARE [roadless area review and evaluation] II decision is viewed as a
23 decision to develop or merely as the first step in a protracted planning process, it is
24 puzzling why the Forest Service did not seriously consider an alternative that allocated
25 more than a third of the RARE II acreage to Wilderness. 690 F.2d at 767-8. While
26 nothing in NEPA prohibits the Forest Service from ultimately implementing a proposal

26 ²⁶ See, e.g., *Laurel Heights*, 47 Cal.3d 376, 399-407 (treatment of alternatives “cursory at best”);
27 *Habitat, supra*, (2013) 213 Cal.App.4th at 1300-1305 (failure to discuss limited-water alternative);
28 *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 882-
885(failure to give alternative more in-depth discussion); and *Save Round Valley Alliance v. County of*
Inyo (2007) 157 Cal.App.4th 1437, 1454-1465 (no meaningful information included about alternative).

1 that allocates more acreage to Non-wilderness than to Wilderness, it is troubling that the
2 Forest Service saw fit to consider from the outset only those alternatives leading to that
end result.

3 (690 F.2d at 768.) The court concluded “it was unreasonable for the Forest Service to overlook the
4 obvious alternative of allocating more than a third of the RARE II acreage to a Wilderness designation.”
5 (690 F.2d at 769; *accord, Oregon Natural Desert Assn. v. Bureau of Land Management* (9th Cir. 2010)
6 625 F.3d 1092, 1122-1124 (EIS uncritical alternatives analysis privileging of one form of use over
7 another violated NEPA).)

8 Here, likewise, trade-offs cannot be intelligently analyzed without examining whether the
9 impacts of alternatives reducing exports can be softened or eliminated by increasing water conservation,
10 recycling, and eventually retiring certain poisoned agricultural lands from production. The DSC has
11 pointed to decisional inputs and criteria and claimed the objectives are complex and interdependent in
12 attempting to justify overlooking the obvious alternative of increasing Delta flows by reducing exports.
13 (Opp. 216-224) That focus on criteria over results was rejected in *California, supra*, 690 F.2d at 769.

14 *In re Bay-Delta, supra*, 43 Cal.4th at 1143 was discussed and distinguished in Petitioners’ OB.
15 (OB 71-72; Opp. 221, fn. 103) The court upheld the conclusion that a reduced export alternative would
16 not achieve the “CalFed Program’s fundamental purpose and thus was not feasible.” (*In re Bay-Delta,*
17 *supra*, 43 Cal.App.4th at 1166.) Here, in stark contrast, the DSC concedes that an alternative that would
18 reduce exports, even “severely,” is a feasible “alternative that could feasibly meet most of the project
19 objectives.” (Opp. 224:5-6.) In addition, the *Bay-Delta* decision was prior to the 2009 DRA. The
20 CALFED regime addressed by the court in its decision was superseded by the enactment of the DRA,
21 which revised statewide policy with respect to the Delta. (E.g., WC, §§85020 (coequal goals), 85021
22 (reduced reliance on Delta).)

23 **c. The EIR Deliberately Ignored Obvious Alternatives Increasing Flows**
24 **by Reducing Exports**

25 The DSC concedes that the EIR “does not include quantitative impact analyses, because such
26 quantitative details are not known at this time. (Opp. 225:15-19) The DSC concedes that Alternative 2
27 (reducing exports to increase flows) would reduce reliance on Delta water supplies and encourage
28 greater ecosystem restoration compared to the Revised Project, “but would do so at the cost of greater

1 overall environmental impacts on water supply reliability and the conversion of productive agricultural
2 land.” (Opp. 227:3-6) The DSC also claims “it is not possible to quantify the differences between these
3 impacts” and concedes that it found the Environmental Water Caucus (“EWC”) suggested Alternative 2
4 only “slightly environmentally inferior to the Revised Project.” (Opp. 227:3-10) But the DRA required
5 the Delta Plan to “Include quantified or otherwise measurable targets . . .” (WC, §85308(b).) The
6 omission of quantification from the EIR is fatal because in the absence of quantification it was not
7 possible to provide the necessary facts and analysis as opposed to mere conclusions or opinions in
8 rejecting reduction of exports in order to increase Delta flows and in calling for new upstream water
9 diversions.

10 The DSC tries to justify its inclusion of poison pills in Alternative 2 under two Argument
11 subheadings. (Opp. 222-224) The DSC says the Delta Plan is programmatic, establishing policies that
12 will guide future physical projects but itself “does not require any particular physical project.” (Opp.
13 141:18-20) In any case, DSC modified Alternative 2 to add a “particular physical project” -- a water
14 storage reservoir (Opp. 219:8-10), which was a “poison pill” “thereby dooming this alternative to
15 rejection.” (Opp. 223:3-5)²⁷ The DSC in trying to justify ignoring increased Delta flow alternatives
16 appears to actually suggest that water is just a “facet” of the Delta plan like the grading and asset roads
17 in *Big Rock Mesas Prop. Owners Assn. v. Los Angeles County Bd. of Supervisors* (1977) 73 Cal.App.3d
18 218. (Opp. 222:3-13) That is not a worthy suggestion as the crisis in the Delta is primarily *about* water.

19 “It is the project proponent’s responsibility to provide an adequate discussion of alternatives”
20 “not dependent in the first instance on a showing by the public that there are feasible alternatives.”
21 (*Laurel Heights, supra*, 47 Cal.3d 376, 405.) The EWC and Friends of the River (“FOR”) proposed
22 alternatives. The DSC concedes that it failed to analyze two variations on Alternative 2 proposed by the
23 EWC and FOR. (Opp. 219:10-11) The DSC characterizes Alternative 2 as “severely decreasing water
24 exports from the Delta” (Opp. 218:9-11) and wrongly asserts that the two variations “would have further
25 reduced Delta exports and increased Delta flows” (Opp. 219:11). *The DSC has it backwards*. In fact,
26

27 ²⁷ The EWC commented on the Draft EIR that it “fails to accurately characterize the EWC’s proposed
28 Alternative 2 and instead piles on ‘poison pills’ intended to portray Alternative 2 as ‘slightly
environmentally inferior’ to the Revised Project. Thus, the Draft EIR fails to present Alternative 2 for
serious consideration.” (D4918)

1 proposed but ignored Alternative 2B called for developing a range of export reductions *less* severe than
2 called for by Alternative 2. (OB 69:24-70:2; 70:26-28;Opp. 227:6-11) An obvious alternative was that
3 the DSC:

4 [S]hould not simply reject Alternative 2 by characterizing the export reductions as being
5 too severe. Rather, the [DSC] should undertake to develop an alternative that on the one
6 hand, like Alternative 2 does not call for new conveyance, but on the other hand, does not
7 reduce exports to as great a degree as is done by Alternative 2.

8 (K10783) Like *California, supra*, 690 F.2d at 768, it was unreasonable for the DSC to overlook an
9 obvious alternative, in this case, reducing exports less severely than proposed by Alternative 2.

10 Proposed Alternative 2A set forth that alternatives decisions, including whether to encourage
11 new conveyance “would await the determination of such fundamental issues as water supply availability
12 and the impacts of supplying the water under CEQA” (K10782) Instead of developing and
13 considering obvious alternatives, the DSC summarily ignored doing that, stating: “The Delta Plan does
14 not include a Delta conveyance facility of the type described in the comment, and thus the EIR neither
15 analyzes the impacts of such a facility nor considers alternatives to one.” (OB 71:1-8; D4971) That
16 incoherent brush-off is not the facts and analysis required by CEQA for the selection and discussion of
17 alternatives. Like *Laurel Heights, supra*, 47 Cal.3d at 403, “This is not a sufficient discussion of. . .
18 alternatives, it is merely an admission that such alternatives were not considered. The DSC’s key,
19 ignored CEQA task was to develop reasonable alternatives, not play games to reject or ignore
20 alternatives proposed by commenters.

21 The Record establishes that the “Revised Project” would have significant and unavoidable
22 environmental impacts including substantial degrading of water quality and significant adverse effects
23 on special status species. (OB 60; D6560; 6514; 6542; Opp. 143, 147-149) Consequently, it will be
24 necessary for the DSC to recirculate a new Draft EIR. The Guidelines require recirculation for several
25 different defects including:

26 A feasible project alternative or mitigation measure considerably different from others
27 previously analyzed would clearly lessen the significant environmental impacts of the
28 project, but the project’s proponents decline to adopt it.

(Guidelines, §15088.5(a)(3).)²⁸

²⁸ The failure to develop and consider alternatives reducing flows such as Alternative 2 and proposed

1 The refusal to provide quantification and refusal to develop and consider a range of reasonable
2 alternatives increasing Delta flows by reducing exports allowed the DSC to unlawfully evade
3 consideration of alternatives that would clearly lessen the admitted significant adverse environmental
4 impacts of the Revised Project. When the project would have significant adverse environmental effects,
5 agencies are “required to consider project alternatives that might eliminate or reduce the Project’s
6 significant adverse environmental effects.” (*Friends of the Eel River v. Sonoma County Water Agency*
7 (2003) 108 Cal.App.4th 859, 873.)

8 The DSC claims it analyzed alternatives at a sufficient level of detail and that the EIR was not
9 too general or vague. (Opp. 224-225) That is simply not the case. On the one hand, as shown above, the
10 DSC failed to develop and analyze broad policy alternatives increasing Delta flows by reducing exports.
11 On the other hand, as discussed below, the DSC ignored the “elephant in the room” – the enormous
12 Water Tunnels included in the BDCP process that would divert massive quantities of water upstream
13 from the Delta under vague, to the point of meaningless, language masked as encouraging new facilities.
14 This end run on CEQA was aided by the DSC’s refusal to quantify impacts.

15 **3. The EIR Failed to include an Accurate, Stable and Finite Project**
16 **Description, and Unlawfully Segmented and Deferred Environmental**
17 **Analysis**

18 There are four separate, related CEQA violations accomplished by the admitted absence of
19 quantification and obfuscated evasion of the elephant in the room—the Water Tunnels—during the Delta
20 Plan CEQA process. First, the EIR failed to include the CEQA- required accurate, stable, and finite
21 project description. (OB 52-56.) Second, the DSC violated CEQA by segmenting and deferring
22 environmental analysis of the true conveyance project-the Water Tunnels. (OB 56-60) Third, the EIR
23 failed to disclose impacts from new conveyance. (OB 60-64.) Fourth, as explained *post*, section II.C.4,
24 the EIR failed to adequately analyze the Water Tunnels as a cumulative project. (OB 65-68)

25 CEQA requires that “an agency must use its best efforts to find out and disclose all that it
26 reasonably can” about the project being considered and its environmental impacts. (*Vineyard, supra*, 40
27 Cal.App.4th 412, 428; Guidelines, §15144.) The DSC admits that the “courts require an ‘accurate,

28 Alternatives 2A and B also required recirculation of a new Draft EIR.” (D4972-4973, citing Guidelines, §15088.5(a)(3))

1 stable, and finite’ description that is not ‘curtailed, enigmatic, or unstable.’” (Opp. 158:10-11.) The issue
2 of the true scope of the project “centers on the question of whether pertinent information was omitted
3 from the EIR.” If so, the agency has failed to proceed in a manner required by law. The standard of
4 review is de novo. (*CBE Richmond, supra*, 184 Cal.App.4th at 82-83.) The DSC also admits that the
5 whole of the action must be considered and that the agency may not “segment” or “piecemeal” for
6 purposes of environmental review. (Opp. 131:26-27) The standard of review of what constitutes the
7 “whole of an action” with respect to the piecemealing or segmenting issue is also de novo. (*CBE*
8 *Richmond, supra*, 184 Cal.App.4th at 98.)

9
10 **a. The DSC Is Still Trying to Evade Environmental Analysis of the Water Tunnels**

11 It is *undisputed* that the EIR “does not evaluate the potential environmental consequences of
12 various BDCP options that DWR may be considering.” (OB 56; D59) The DSC amongst grudging
13 recognition of CEQA requirements tries to avoid reality. The claim that the Water Tunnels are not part
14 of the Delta Plan (Opp. 131) ignores the DRA command that the DSC “shall incorporate the BDCP into
15 the Delta Plan” if certain conditions are met. (B449 (WRR12); WC, §85320(e).)

16 The DSC claims it “has no direct influence over the content of the BDCP” and “has a limited
17 statutory role with regard to Delta water conveyance.” (Opp. 134:8-9) As discussed *ante*, in section
18 II.A.3, the BDCP was recently modified to include a “Tunnels Only” alternative called the “Water
19 Fix.”²⁹ This revised approach jettisons the prior restoration component of the BDCP into a stand-alone
20 program called “Eco-Restore.” Without HCP/NCCP status, incorporation of the Water Fix alternative
21 into the Delta Plan would no longer be mandatory under WC, §85320(e). Importantly, however, the
22 Water Tunnels remain unchanged, heightening the need for the DSC to protect water flows in the Delta
23 and scrutinize proposed major new water diversions to protect the Delta.

24 Even without considering the recent modification of the BDCP alternatives under consideration,
25 the DSC’s role could not be greater, given its responsibility to develop “the comprehensive long-term
26 management plan for the Delta,” including such commands as to “restore Delta flows” and to develop
27 the Delta Plan consistent with the federal Clean Water Act. The Water Tunnels would have the capacity
28

²⁹ See accompanying Request for Judicial Notice Regarding Changes to BDCP, Exhibits 1-3.)

1 to divert enormous quantities of water upstream from the Delta thereby drastically reducing Delta flows.
2 As shown above, the DSC found Alternative 2 to be “slightly environmentally inferior” to the selected
3 project. By the admitted absence of quantification and by deferring analysis of project specific impacts
4 to the future (OB 56-57; D6002), the DSC made a determination untethered to the real world including
5 quantification and actual factual analysis. With one hand, the EIR concluded that the reduction in
6 exports by Alternative 2 would be too severe. With the other hand, the EIR completely ignored the
7 severity of the reduction in Delta flows that would result from the Water Tunnels.

8 There is no dispute that under *Laurel Heights, supra*, 47 Cal.3d at 396, an EIR must include an
9 analysis of the environmental effects of future expansion *or other action* if it is (1) a reasonably
10 foreseeable consequence of the initial project and (2) the future expansion or action will be significant in
11 that it will likely change the scope or nature of the initial project or its environmental effects. (OB 57;
12 Opp. 135) Moreover, the DSC admits that DWR’s planning and environmental review processes for the
13 BDCP were already underway when the Delta Plan EIR Notice of Preparation was published. (Opp.
14 137:4-6) “Hence, the BDCP is a reasonably foreseeable, probable future project under the authority of
15 other agencies that are conducting their own comprehensive environmental review.” (Opp. 137:6-8)

16 However, the DSC contends the first prong of the *Laurel Heights* test is not met because other
17 agencies must approve the BDCP Water Tunnels. (Opp. 135) That is directly contrary to the CEQA
18 Guidelines definition of “project.” “The term ‘project’ refers to the activity which is being approved and
19 which may be subject to several discretionary approvals by government agencies. The term ‘project’
20 does not mean each separate governmental approval.” (Guidelines, §15378(b).)

21 The DSC admits that it is a “responsible agency” in the development of the BDCP EIR and that
22 DWR was required by the DRA to consult with the DSC during the development of the BDCP. (Opp.
23 133) Thus it is established that the DSC is a responsible agency for the development of the BDCP EIR.
24 As a “responsible agency,” by the definition in CEQA, the DSC is a public agency “other than the lead
25 agency, which has responsibility for carrying out or approving a project.” (PRC, §21069, Guidelines,
26 §15831.) The Water Tunnels therefore are not an immaculate surprise with little to do with the DSC.

27 The DSC argues that all it did was simply encourage completion of the BDCP planning process
28 by a date certain, December 31, 2014. (Opp. 136:12-14, fn. 63) The DSC thus endorsed, ratified, and

1 facilitated the Water Tunnels. Moreover, theoretical independence is not a permissible excuse for
2 segmenting environmental analysis of the Water Tunnels from the Delta Plan. (OB 58, citing *Tuolumne*
3 *County Citizens for Responsible Growth v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1230.) The
4 DSC facilitated the Water Tunnels by refusing to even develop and consider, let alone actually adopt, an
5 alternative that would increase Delta flows by reducing exports and that would reject new upstream
6 conveyance. That alternative would be in conflict with the Water Tunnels.

7 The Delta Plan and its EIR also aided and facilitated the Water Tunnels by foreclosing
8 consideration of alternatives that would increase Delta flows by reducing exports. Yet, the DSC
9 concedes that the Water Tunnels will be reviewed in separate environmental review documents. (Opp.
10 138:9-12) Thus, analysis of the environmental impacts of the Revised Project and the Water Tunnels has
11 undeniably been segmented and deferred from the Delta Plan CEQA process. That is true even though
12 the Delta Plan CEQA process has made the basic programmatic planning decision reflected in “the
13 comprehensive, long-term management plan for the Delta” to not develop or consider alternatives that
14 would increase Delta flows by reducing exports. (D59, 68)

15 **b. The Cases Cited by the DSC Illustrate What the DSC Failed to Do**

16 The DSC attempts to rely on the segmenting portion of *CBE Richmond, supra*, 184 Cal.App.4th
17 70, to support its argument that an analysis of environmental effects of “other action” – the BDCP Water
18 Tunnels – was not necessary in the Delta Plan CEQA process. (Opp. 135-136) But as the court
19 explained in *CBE Richmond*, “The Project at issue here and the hydrogen pipeline project, are not
20 interdependent. In fact, they perform entirely different, unrelated functions.” (184 Cal.App.4th at 101.)
21 Here, in contrast, the BDCP Delta Water Tunnels could hardly be more related to the Delta Plan. The
22 DSC also attempts to rely on *National Parks & Conservation Assn. v. County of Riverside* (1996) 42
23 Cal.App.4th 1505 to support its argument. (Opp. 136) In that case, the court applied the rules that more
24 analysis of other cumulative projects is not required if obtaining more detailed useful information was
25 not meaningfully possible at the time. (*Id.* at 1518-1520.) Also, it was not necessary to have “additional
26 information at an earlier stage in determining intelligently whether to proceed with this project.” (*Id.* at
27 1520.) Here, in contrast, the DSC had a wealth of information about the Water Tunnels. And that
28 information, including quantification of resulting reduction in Delta flows was essential to be able to

1 determine intelligently whether to adopt the Revised Project alternative while rejecting development and
2 consideration of alternatives that would increase Delta flows by reducing exports.

3 In *Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 234 Cal.App.4th
4 214, 237 (*CBD*) (Opp. 146), the EIR at issue was comprehensive. That comprehensiveness allowed the
5 court to distinguish the case from its earlier decision in *Mammoth, supra*, 82 Cal.App.4th 511 that had
6 determined a program EIR to be inadequate. (*CBD, supra*, 234 Cal.App.4th at 237.)

7 **4. The EIR Fails to Properly Analyze Cumulative Impacts of Implementing the** 8 **Delta Plan**

9 A program EIR ensures a reasonable “consideration of cumulative impacts that might be slighted
10 in a case-by-case analysis,” (Guidelines, §15168(b)(2).) “[I]t is vitally important that an EIR avoid
11 minimizing the cumulative impacts. Rather, it must reflect a conscientious effort to provide public
12 agencies and the general public with adequate and relevant detailed information about them.” (*San*
13 *Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 79
14 (citing PRC, §21061) (*San Franciscans*)). An adequate cumulative impacts is *especially* important at the
15 program level so that the agency and the public can fully understand, minimize, and mitigate cumulative
16 impacts that would otherwise escape review at the project level. (Opp. 210; Guidelines, §15168(b);
17 *SANDAG, supra*, 231 Cal.App.4th at 1067; *San Franciscans, supra*, 151 Cal.App.3d at 79.) Despite the
18 need to address cumulative impacts as a program the EIR fails to properly analyze cumulative impacts
19 related to the water tunnels, water resources, and sea level rise.

20 The DSC argues that the EIR exceeds the level of detail required by CEQA regarding cumulative
21 impacts from the BDCP. (Opp. 139 (citing *Al Larson Boat Shop, Inc. v. Bd. of Harbor Comrs. of the*
22 *Ciyt of Long Beach* (2012) 18 Cal.App.4th 729, 748-50 (*Al Larson*)).) However, the cursory information
23 that Chapter 22 includes regarding the BDCP as a cumulative project minimizes the ability for DSC and
24 the public to understand and assess the extent of these its collective impacts with the Delta Plan and
25 other cumulative projects (See, e.g., D6515 (BDCP could lead to “changes in instream flow or water
26 quality conditions” without providing further details); see also B517, 43, 436, 482, 753-757; G5886)
27 This case is different from *Al Larson, supra*, 18 Cal.App.4th at 747, where the court found that omission
28 of costs was not prejudicial since it had no material effect on informed decision-making or public

1 participation. Although detailed data on the effects of BDCP on various resources was available for
2 quantitative analysis as demonstrated by the Record, it was ignored by DSC. (See OB 65-67; J143361 et
3 seq. (March 2011 BDCP ADEIR/S); I1723 et seq. (BDCP)) Here, the DSC’s failure to conduct a
4 reasonable cumulative analysis based on quantities data available in the administrative draft of the
5 BDCP underestimates the true cumulative impacts of the BDCP with the Delta Plan. (Guidelines,
6 §15130(b)(5); *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 427, 431;
7 *Kings County Farm Bureau v. City of Hartford* (1990) 221 Cal.App.3d 692, 729 (*Kings County*)).

8 The DSC also relies on Chapter 23 of the EIR (Opp. 139), which only discusses the impacts of
9 the BDCP and the Delta Plan, and does so inadequately. (See OB 65-66; see, e.g., D6542 (similarly
10 failing to explain impacts to biological resources due to “changes” to instream flow or water quality
11 conditions); D8216-17 (changes in Through-Delta conveyance could change water quality in central and
12 Delta if barriers were used to convey water flows through Old River without further explanation).)³⁰ The
13 DSC also fails to provide an explanation for its conclusion that loss of farmland due to restoration
14 projects is significant (Opp. 139), especially since the DSC knows the acres and types of farmland that
15 would be converted by the Twin Tunnels at the time of the NOP. (J143990-91 (total agricultural land
16 proposed for conversion under Chapter 14 of BDCP but not included in Record); *Kings County, supra*,
17 221 Cal.3d at 729; *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 320
18 (*Lodi*) (explanation of the total amount of farmland lost due to cumulative projects satisfied CEQA’s
19 requirement of “adequacy, completeness, and a good faith effort at full disclosure”).)³¹

20 The DSC argues that the EIR’s cumulative analysis on water resources “fully complies with
21 CEQA and is supported by substantial evidence” and that no “perfection” and “quantification” is
22 required. (Opp. 202, 204-05) However, *In re Bay-Delta* is inapposite because it addresses the adequacy
23 of a baseline analysis. (43 Cal.4th at 1171.) The EIRs in *Lodi* actually support the need for a quantitative
24 cumulative impacts analysis since they provide the acres of farmland that would be lost due to the
25

26
27 ³⁰ Additionally, simply explaining various agencies’ roles in the BDCP process does not inform the
28 public on the cumulative impacts of the Delta Plan with the BDCP as the DSC seems to suggest. (Opp.
139; Guidelines, §15355.)

³¹ Moreover, the DSC does not address conflicting portions of the EIR where it claims addresses
cumulative impacts but found that these impacts were not significant. (D6544, 8218.)

1 project as well as from other projects. (205 Cal.App.4th, *supra*, at 320.)³² The DSC cites portions of the
2 EIR that provide no or inadequate cumulative impacts analysis. (Opp. 210-211)³³

3 Furthermore, as the DSC points out, the scope of the EIR may only deviate from the range of
4 future conditions due to SLR in light of “new and unforeseen insights” that may emerge during the
5 process. (Opp. 211) However, the DSC fails to explain why the EIR adopts a 2030 study period instead
6 of a range of conditions as promised in the NOP. (*Ibid.*)³⁴ It is clear that DSC has failed to use the
7 standard of reasonableness and its best efforts to fully disclose cumulative impacts of the Plan related t
8 to the BDCP, water resources, or SLR. (Guidelines, §§15130(b), 15144, 15151; *CBE Richmond, supra*,
9 184 Cal.4th at 96; *Lodi, supra*, 205 Cal.App.4th at 320; see also OB 64.) DSC’s lack of effort in
10 analyzing the Delta Plan’s cumulative impacts regarding these crucial topics thwarts the fundamental
11 informational purpose of the EIR and is therefore prejudicial. (*RiverWatch, supra*, 170 Cal. App.4th at
12 1199; *Al Larson, supra*, 18 Cal.App.4th 729, 748.)

13 Thus, the DSC failed to comply with the minimum CEQA mandates and the EIR must be set
14 aside.

15 ///

16 ///

17 ///

19 ³² Additionally, the DSC states that “since the EIR’s analysis is inherently cumulative and considers the
20 potential effects of multiple future actions in the context of various past and ongoing actions that
21 constitute the baseline, the related impacts of other projects are considered throughout the EIR.” (Opp.
22 203-04 (citing D8145-47)) While the EIR does cross-reference various discussions regarding impacts,
23 they do not address cumulative impacts.

24 ³³ Chapter 21 discusses only impacts of sea level rise from the Delta Plan itself. (Opp. 210) Chapter 22
25 provides only a conclusory statement that cumulative projects “could be affected by climate change []
26 and sea level rise” (Opp. 210 (citing D8162-83)), with no supporting analysis, or any explanation of the
27 type or extent of impact. This conclusory statement is so devoid of analysis that it violates the
28 fundamental informational purpose of CEQA, and constitutes prejudicial error. (*Kings County, supra*,
221 Cal.App.3d, at 729; *Whitman v. Board of Supervisors* (1979) 88 Cal.App.3d 397, 411-12 (use of
phrases such as “increased traffic” and “minor increases in air emissions” in cumulative impacts
discussion, without further definition and explanation, failed to provide even a “minimal degree of
specificity of detail” required by CEQA); see also *San Joaquin Raptor v. County of Stanislaus* (1994) 27
Ca.4th 713.)

³⁴ In fact, the DSC cites a portion of Chapter 21 (D8106-07) that suggests the study period ending in
2030 is arbitrary since it states that “most climate models projected similar amounts of sea level rise
through 2050,” but provides that sea level rise was considered through 2030. (D8107) Furthermore, the
DSC does not address the glaring discrepancy between the EIR’s discussion for SLR and the treatment
of the issue in the Plan. (OB 68; Opp. 211)

1 **D. THE DSC FAILED TO MEET MINIMUM ADMINISTRATIVE PROCEDURE**
2 **ACT REQUIREMENTS FOR THE DELTA PLAN REGULATIONS**

3 **1. The DSC Failed to Respond to Comments Regarding the Effect of**
4 **Proposition 218 on New Setback Levee Requirement**

5 Here, public agencies commented regarding the likely barrier posed by Proposition 218 (Cal.
6 Const., Art. XIII D, §4(a) (“Prop. 218”)) to imposition of special assessments to pay for ERP4/Regs.,
7 §5008 setback levee requirements. (N3112, 3199) Recently, in *City of San Buenaventura v. United*
8 *Water Conservation Dist.* (2015) 235 Cal.App.4th 228, 234, groundwater pumping fees were determined
9 to not be properly related, thereby precluding assessments under Prop. 218. Since the express purpose of
10 these setback levees is to “possibly expand floodplains and riparian habitats in the Delta” (N3085),
11 commenters explained that the “broad” public benefits of setback levees assumed in the Plan (B452,
12 616, 716, 725-26, 741) likely precluded cost recovery through Prop. 218 assessments that “may only be
13 imposed upon parcels which receive a special benefit . . .” (N3199; see also K12471)

14 The APA requires the DCS to provide “an explanation of how the proposed action has been
15 changed to accommodate each objection or recommendation, or the reasons for making no change.”
16 (Gov. Code, §11346.9(a)(3).) DSC sidesteps the applicable review standard, claiming an “exceptionally
17 deferential” or “highly deferential” standard. (Opp. 106:4-7) Neither of these phrases is found in the
18 case upon which DSC relies. Rather, *BOE, supra*, 57 Cal.4th at 448, makes clear that the standard of
19 review is ordinary substantial evidence, which requires the agency to support its reasoned position with
20 “facts, evidence, documents, testimony, or other evidence” rather than speculation.

21 DSC raises “four reasons” that purportedly work in concert to demonstrate why this concern is
22 “not particularly significant.” (Opp. 110:3-9) These arguments, however, are speculative, irrelevant as
23 well as internally inconsistent.

24 Contrary to its representations (Opp. 109:18- 111:18), the DSC failed to specifically address
25 comments about the limitations imposed by Prop. 218. Without mentioning Prop. 218, the DSC stated
26 that it “has also determined that many if not all local agencies and school districts have existing legal
27 authority to recover costs of consistency certification and compliance with applicable policies through
28 the use of fees, assessments, and charges.” (N3199) “In the event, however, that any agency does not
have or is unable to exercise such authority, section 41 of the [DRA] provides for the Commission on

1 State Mandates to determine costs mandated by the state and for reimbursement to local agencies . . .”
2 (N3199) This vague response suggests that setback levees *would be considered economically feasible*
3 because: (1) compliance costs are recoverable through unspecified “assessments”; and (2) the balance of
4 any unrecoverable costs might be reimbursed through the Commission on State Mandates. (N3199) This
5 argument (Opp. 111:11-14) is inconsistent with DSC’s argument that feasibility provisions (Regs.,
6 §5001(p) will save the RRP1, as well as its other responses to comments on this same issue.

7 In its responses to comments on the Cost Analysis, the DSC states that it:

8 understands the limitations on financial capacity of some [RDs]. Economic facts
9 including financial capacity are considerations that would be used to determine whether
10 the setback levee (or other habitat improvement) is feasible (see definition of “feasible,”
11 5001(p).) The Council also recognizes that costs would be incurred in such determination
12 and the costs for an agency to determine feasibility are likely to vary widely depending
on the circumstance. However, the revised cost analysis recognizes that some
determinations may be very straightforward and inexpensive, such as *in cases where*
construction of a setback levee would be well outside the economic capacity of the local
agency and no state or federal funding was available.

13 (N3085, italics added) This incoherent response fails to provide an explanation meeting APA standards.
14 (Gov. Code, §11346.9(a)(3).) If setback levee costs actually *can* be recovered through a combination of
15 Prop. 218 assessments and Commission on State Mandate reimbursements (N3199), then setback levee
16 construction costs would not be “well outside the economic capacity of the local agency.” (N3085)
17 DSC’s OB never addresses this inconsistency or the exorbitant costs of conducting the mile by mile
18 analysis required to support an infeasibility finding. (See Opp. 111:24-112:14)

19 Rather than addressing the inherent inconsistency in the DSC’s treatment of the availability of
20 funding given Prop. 218 restrictions, the DSC attempts to minimize the issue, arguing that “the state
21 often funds the habitat improvement portion of local levee projects,” which the DSC “expects [] will
22 continue.” (Opp. 110:13, citing N3112) This is nothing but speculation. DSC also suggests that the harm
23 is somehow lessened by the fact that the setback levee requirement does not apply to all 1,335 (Opp. 4)
24 miles of Delta levees (B477) which does nothing to address the burden on RDs currently within the
25 geographic scope of ERP4/Regs., §5008.

26 The DSC failed to address in a reasoned, good faith manner the critical question of what role the
27 limitations on Prop. 218 assessments will have on making determinations of “feasibility” under Regs.,
28 §5008. (B729, 736, 752) Instead, DSC responses to comments provide that this determination is left to

1 “the project proponent/lead agency of a major levee project” (N3081), creating significant new costs for
2 every levee project within the 200 miles of Delta levees upon which the DSC the setback levee
3 requirement applies under Regs., §5008 (N867).

4 **2. The Cost Analysis Fails to Address the Costs Associated With Impairing**
5 **Agricultural Activity in the Delta**

6 Petitioners’ OB described how the Cost Analysis failed to quantify the costs associated with how
7 the Delta Plan regulations impair existing agricultural operations in the Delta. (OB 78:19-27) The DSC
8 ignores these arguments entirely (Opp. 114:10-22) in favor of its own conclusory assertion that the Delta
9 Plan benefits Delta agricultural by “promoting the ‘critical mass’ of farms needed for Delta agriculture
10 to operate effectively.” (Opp. 114:17-18) The inclusion of policies designed to prevent urbanization of
11 agricultural land,³⁵ however, is completely irrelevant to whether Delta Plan policies impair economic
12 viability of these agricultural operations as a practical matter. The DSC’s Cost Analysis failed to address
13 these costs, and the DSC compounds that deficiency by failing to address the issue in its briefing. As a
14 result of these and other procedural deficiencies, the Regs. must be set aside so that compliance with the
15 APA may occur. (See *BOE, supra*, 57 Cal.4th at 431 (striking down regulation for failure to provide
16 adequate cost analysis in substantial compliance with APA).)

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28 ³⁵ See *ante* section II.A.4 regarding the failure of the Delta Plan to enhance the Delta as a place as
required under the DRA, and specifically the misguided focus of the DSC on preventing urbanization in
a region that already has very stringent prohibitions on development. (See also L28325, 28497)

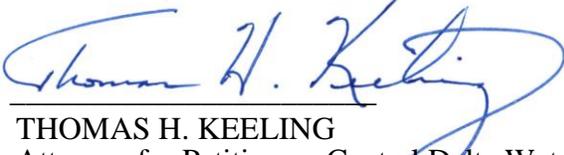
1 **III. CONCLUSION**

2 For the reasons described in detail herein, Petitioners respectfully request issuance of a writ of
3 mandate and declaratory relief that results in setting aside the Delta Plan, the Delta Plan EIR, and the
4 Delta Plan Regulations, as well as any such other relief as the Court deems just and proper.

5 Respectfully submitted,

6 Dated: May 21, 2015

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12 Dated: May 21, 2015

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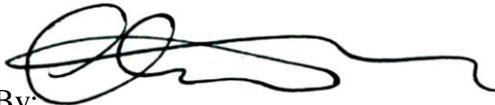
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1 Dated: May 21, 2015

CENTER FOR BIOLOGICAL DIVERSITY

2 

3 By: _____
4 CHELSEA H. TU
5 Attorney for Petitioner
6 Center for Biological Diversity

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1 **PROOF OF SERVICE**

2 I hereby declare that I am employed in the City of Sacramento, County of Sacramento,
3 California. I am 18 years of age or older and not a party to the action. My business address is 1010 F
4 Street, Suite 100, Sacramento, California 95814.

5 On May 21, 2015, I served the attached document: **PETITIONERS CDWA ET AL. AND C-**
6 **WIN ET AL.’S JOINT REPLY BRIEF ON THE MERITS IN SUPPORT OF FIRST AMENDED**
7 **VERIFIED PETITIONS FOR WRIT OF MANDATE AND COMPLAINTS FOR**
8 **DECLARATORY AND INJUNCTIVE RELIEF**, on the following parties or attorneys for parties, as
9 shown below in the attached SERVICE LISTS.

10 The document was served by the following means:

11 ✓ **BY OVERNIGHT DELIVERY:** I enclosed the documents in an envelope or package
12 provided by an overnight delivery carrier and addressed to the persons at the addresses as listed below
13 in the attached, “Service List via Overnight Delivery.” Copies have been provided to the designated
14 recipient of service in each included action in the Delta Stewardship Council Cases, Judicial Council
15 Coordination Proceedings No. 4758, which designated recipient has been established by prior written
16 agreement to receive service and physical mailing of documents and correspondence related to this
17 matter. I placed the envelope or package for collection and overnight delivery at an office or a
18 regularly utilized drop box of the overnight delivery carrier; and by

19 ✓ **BY ELECTRONIC MAIL:** I caused a copy of the document(s) to be sent by electronic mail
20 from e-mail address mae@semlawyers.com to the addressees at the e-mail addresses listed below in the
21 attached, “Service List via Electronic Mail.” I did not receive, within a reasonable time after the
22 transmission, any electronic message or other indication that the transmission was unsuccessful.

23 I declare under the penalty of perjury that the foregoing is true and correct and that this
24 declaration was executed at Sacramento, California on May 21, 2015.

25
26 
27 _____
28 Mae Ryan Empleo

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