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

13 Coordination Proceeding Special Title (Rule 3.550), 14 DELTA STEWARDSHIP COUNCIL CASES 15 16 17 18 19	JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4758  <b>PETITIONER CITY OF STOCKTON'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS</b>  Judge: Honorable Michael Kenny Dept.: 31 Date: TBD Time: TBD
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## I. INTRODUCTION.

The opposition brief is largely predicated upon an overarching strategic flaw. The 245 page brief consistently contains numerous references to the record; however, it rarely quotes from the referenced citations, impliedly exalting volume over substance. DSC theories impliedly disrupts the delicate balance between co-equal branches of government by rendering judicial review to a mechanical exercise of looking for something somewhere in the record that the agency claims discusses the disputed topic. Unpacking the naked citations reveals the citation’s substance frequently fails to support the major thesis for which it was offered. This thoughtful process resembles a trial court’s correct responsibility to look hard at the evidence (Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies* (1995) 42 UCLA L. Rev. 1157, 1178), a particularly apt rule when administrative errors are judged by the failure to proceed prong of the abuse of discretion standard that dispenses with judicial deference to a local agency.<sup>1</sup>

## II. DSC FAILURES CONCERNING THE CEQA PROCESS.

15 A. DSC Failed to Adequately Respond to City’s Comments.

16 1. Standard of Judicial Review and Standard for a Response’s Adequacy.

17 The Failure to Proceed Prong of the abuse of discretion standard governs whether an  
18 agency sufficiently responded to comments; thus judicial deference to an agency is unavailable  
19 and a court determines *de novo* if an agency “scrupulously” enforced or strictly complied with  
20 statutory duties.<sup>2</sup> CEQA Guideline section 15088(c) precisely describes this duty:

21  
22  
23 <sup>1</sup> Concerning DSC improperly dispensing with comments by wrongly declaring them to be  
24 comments on the project but not the project’s environmental impact we adopt the analysis  
25 presented in the North Coast Rivers Alliance et.al., CDWA et al. and C-WIN et al.’s reply  
26 briefs. In the interest of time and space we also join these other petitioners concerning our CEQA  
27 allegations about the project description, failing to address the consequences of natural flow  
28 regimes, and a flawed evaluation of cumulative impacts.

26 <sup>2</sup> The failure to proceed prong is followed by determining “de novo whether the agency  
27 employed the correct procedures, ‘scrupulously enforce[ing] all legislatively mandated CEQA  
28 requirements’” (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 131) and  
“ensur[ing] strict compliance with the procedures and mandates of the statute.” *Save Our  
Peninsula Committee v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 118. Thus an  
agency’s “failure to respond to this significant comment violated its duty under CEQA”. *The  
Flanders Foundation v. City of Carmel-by-the-Sea* (2012) 202 Cal. App. 4th 603, 617.

1            “In particular, the major environmental issues raised when the lead  
2 agency’s position is at variance with the recommendations and objections  
3 raised in the comments **must be addressed in detail** giving reasons why  
4 specific comments and suggestions were not accepted.”

4 (Bolding added.) The CEB CEQA Treatise interprets the phrase “be addressed in detail” to  
5 mean providing fact-based responses: “The lead agency must respond to such comments by  
6 either including the omitted information in the final EIR or **providing a reasonable, fact-base**  
7 **explanation** of why there is no need to include it.” Kostka & Zischke Prac. Under the Calif.  
8 Environmental Quality Act §11.40 at 11-41 (CEB CEQA Treatise) (bolding added). Indeed, the  
9 “need for a reasoned factual response is particularly acute when critical comments are supplied  
10 by other agencies or by experts. See *Berkeley Keep Jets Over the Bay Comm. V. Board of Port*  
11 *Comm’rs* (2001) 91 Cal.App.4<sup>th</sup> 1344, 1367, 1371.”<sup>3</sup> *Id.* at §16.7 at 16-6.

12            Here a public agency provided substantial comments on topics within its expertise (and  
13 not within the DSC’s subject matter expertise)—land use, land development and urban decay—  
14 and also within the expertise of the experts it introduced. Accordingly *Berkeley* heightens the  
15 section 15088(c) duty to “address in detail” Stockton’s comment through a “reasonable fact-  
16 based explanation” or “a reasoned factual response” while “[c]onclusory statements unsupported  
17 by factual information will not suffice.” CEQA Guideline §15088(c). In short, CEQA  
18 compliance is attained only if DSC prepared detailed fact supported responses to comments  
19 about altered patterns of growth and urban decay.

20            Dispensing with preparing fact-based responses is fatal: “Failure to comply with the  
21 information disclosure requirements constitutes a prejudicial abuse of discretion when the  
22 omission of relevant information has precluded informed decisionmaking and informed public  
23 participation, regardless whether a different outcome would have resulted if the public agency  
24 had complied with the disclosure requirements. (*Dry Creek, supra*, 70 Cal.App.4<sup>th</sup> at p. 26;

25  
26  
27 <sup>3</sup> “The EIR failed to acknowledge the opinions of responsible agencies and experts... The  
28 conclusory and evasive nature of the response to comments is pervasive, **with the EIR failing to**  
**support its many conclusory statements by scientific or objective data.** The violations of  
CEQA constitute an abuse of discretion.” *Berkley Keep Jets Over the Bay* at 371 (bolding  
added).

1 *Irritated Residents, supra*, 107 Cal.App.4th at p. 1391.)” *Bakersfield Citizens for Local Control*  
2 *v. City of Bakersfield* (2004) 124 Cal. App. 4th 1184, 1198 (*Bakersfield*).

3 2. DSC did not prepare detailed fact-based responses to Stockton’s comments about  
4 the EIR’s failure to study altered growth patterns and urban decay.

5 The issue is squarely presented by DSC’s misunderstanding of their legal duty. Opp.Br.  
6 236-37. DSC’s abbreviated explanation of the relevant CEQA duty omits mentioning that a  
7 compliant CEQA response requires either “detail” or a “fact-based explanation”. This omission  
8 carries two implied assertions: 1) DSC did not prepare fact-based responses to Stockton’s  
9 comment; and, 2) CEQA does not require or excuses omitting fact-based responses. The first  
10 implication is true; the second implication is false.

11 3. Altering patterns of Urban Development Response.

12 The problem is quite straightforward: a comment indicates Plan’s regulations will  
13 influence *future* growth decision by inducing growth away from existing environmental superior  
14 areas and planned infrastructure located within the Plan’s jurisdiction<sup>4</sup> while the response  
15 blandly recites that the statute exempts certain *past* land use actions. The response simply does  
16 not correspond to the comment.

17 The comment explains the Plan could induce changes to existing growth plans found by  
18 earlier CEQA reviews to be environmental superior and thus indirectly encourage altered growth  
19 plans not evaluated: the Plan “could cause growth to be shifted away from planned areas with  
20 resulting unevaluated and potentially greater impacts.” D606. The City plans have not yet been  
21 implemented and require numerous future discretionary approvals. *Id.* Correspondingly, existing  
22 phased master infrastructure plans are correlated to adopted growth plans; altered growth and  
23 infrastructure patterns of development produce new and more intense environmental  
24 consequences. D607. [“The redirection of planned growth as a result of the Delta Plan may also  
25 have significant growth inducing effects if infrastructure such as roads and sewer lines are  
26 required to be extended to areas outside the current urban services boundaries.”] DSC’s

27  
28 <sup>4</sup> A “reasonable inference” that this type of secondary or indirect environmental effect may exist  
is recognized as an ecological impact that should be addressed in a CEQA document. *City of*  
*Redlands v County of San Bernardino* (2002) 96 Cal.App.3<sup>rd</sup> 398, 411.

1 response is flawed because adopting a general plan does not create a vested right to develop or  
2 secure subordinate discretionary land use approvals consistent with an earlier adopted general  
3 plan. *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785,  
4 791. Thus implementing a general plan through subordinate land use actions (zoning  
5 reclassifications, subdivision maps and use permits) are subject to the Plan. [“(T)he Act itself  
6 calls for the council to regulate ‘local land use actions’.” DSC Opp. Br. at 50:11-12.]

7 This unresponsiveness does not cohere to CEQA. Stockton’s comment raises a concern  
8 about future implementation of an existing general plan and phased development of master  
9 infrastructure plans through subordinate discretionary land use actions. The response ignores the  
10 concern and merely notes that a preexisting general plan is not a Covered Action. D606.  
11 However, it omits addressing whether the Plan may induce future growth away from planned  
12 areas subject to Plan and the Covered Action process, and result in environmentally inferior  
13 patterns of growth yielding new and more intense environmental degradation.

14 Indeed the response cites three sections of the Act unrelated to future subordinate land  
15 use actions. D606. Critical to this claim the response never alleged that Plan policies impeded  
16 altered patterns of urban development. Section 85057.5(b)(6) excludes projects in the Delta  
17 “fully permitted” by September 2009. Section 85057.5(b)(7) excludes projects with a certified  
18 EIR before the date the Plan is effective. Finally section 85057(c) excludes project holding a  
19 vested right. None of these three circumstances exist here. In short responses to a comment that  
20 the Plan creates an indirect environmental effect by altering *future* land use patterns  
21 unresponsively concludes projects approved before the Plan was adopted are not Covered  
22 Action. The response is wordage in pursuit of a thought.<sup>5</sup>

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26 <sup>5</sup> Reference to D3504-3521 (Opp.Br. at 241:18) does not help DSC. This generalized 17 page  
27 citation refers the reader to earlier responses without supplying substantively new analysis, data  
28 or information and thus represents flawed reliance on a volume versus substance defense.  
Critically the response never mentions nor relies upon Plan policies that may impede DSC’s  
intrusion into local land use decision making. The response did not perceive Plan policies  
thwarting the claimed environmental effect.

1           4.     Urban Decay Response.

2           For five independent reasons the response to Stockton’s urban decay comment is not  
3 CEQA compliant. First, DSC misunderstands the basis for an urban decay claim. Stockton  
4 argued in detail about a chain of events leading from the Plan to “a resulting increase in  
5 residential and non-residential vacancies and foreclosures which may result in an increased level  
6 of urban blight.” D615. Stockton’s comment did not identify converting agricultural land as a  
7 contributing factor leading to urban decay. D6015. Yet DSC’s response refers Stockton to a  
8 master comment on social and economic factors involving just two sentences about urban decay.  
9 [“Please refer to Master Response 2....”] The first sentence wrongly observes “[c]ommenters  
10 also state the removal of land from agriculture use would result in socioeconomic changes that,  
11 in turn, would cause physical effects on the environment in the form of blight and urban decay.”  
12 D73. The master response dismisses the urban decay comment because no evidence was  
13 supplied that converting agricultural land leads to urban decay. D73. Since Stockton never  
14 claimed converting agricultural land was responsible for urban decay it is axiomatic that it would  
15 not offer evidence for this unasserted claim. The response does not match to the comment  
16 presented.

17           Second, a truncated dismissal of the comment for lacking evidence wrongly reverses  
18 CEQA’s evidentiary burdens. Without evidence the master response’s second sentence asserts  
19 “there is no substantial evidence that these effect would occur”. D73. Yet this reasoning does  
20 not dispense with a duty to evaluate the claim or provide fact-based responses. The CEQA rule  
21 is clear: a public agency shall respond to comments in detail and supply a “reasoned factual  
22 response”. It is a public agency’s duty and not a judicial (*Stanislaus Audubon Society, Inc. v.*  
23 *County of Stanislaus* (1995) 33 Cal.App.4<sup>th</sup> 144, 159 n.6) or public (*Sunstrom v. County of*  
24 *Mendocino* <sup>6</sup>) duty to specify what should be in an EIR. Thus, akin to our situation, “[t]he agency  
25 should not be allowed to hide behind its own failure to gather relevant data....” *Id.* Yet DSC  
26  
27

28  
\_\_\_\_\_ <sup>6</sup> (1988) 202 Cal.App.3d 296,311 “CEQA places the burden of environmental investigation on government rather than the public.”

1 offers no legal precedent that an agency’s feelings about the quality of a comment’s evidence  
2 justifies dispensing with either evaluating the impact or preparing a fact-based response.

3 Furthermore, in the Opening Brief (10:18-26) we argued the urban decay comment  
4 resembles the groundwater comment in *People v. County of Kern* (1976) 62 Cal.App.3d 761,  
5 771-72 or the air resources comment presented in *Cleary v. County of Stanislaus* (1981) 118  
6 Cal.App,3d 348, 357. **Interestingly, although the opposition brief cites 161 cases it never**  
7 **mentions *County of Kern* or *Cleary*.** In *County of Kern* a public agency comment noted in “the  
8 absent ground water studies it is impossible to assess the development upon the ground water  
9 reserves in the valley.” *Id.* at 771. That is, the comment complained about omitted data or  
10 information, it did not supply the missing data or information. The Court characterized the  
11 comment as “rais(ing) serious questions regarding the unavailability of water and the inadequacy  
12 of current data to determine the effect of the development on the future water supply.” *Id.*  
13 Similarly in *Cleary* a public agency “indicated the air quality analysis was inadequate (indeed  
14 nonexistent) and that the potential effect on air quality was unknown.” *Id.* at 357. Again the  
15 comment addressed omitted data and information but did not supply the missing analysis. The  
16 Court invalidated the CEQA document because the comment “raised specific concerns” about  
17 environmental effects. *Cleary* at 358. To put a finer point on it, each comment focused on a lack  
18 of information and data to evaluate a potentially significant impact. Neither comment provide the  
19 missing information or data. Similarly Stockton’s comment raises “serious questions” or  
20 “specific concerns” about the project’s environmental effect, rendering DSC’s cursory and  
21 truncated response legally deficient under *County of Kern* and *Cleary*. DSC impliedly reverses  
22 *County of Kern*, *Cleary* and *Sunstrom* by proposing a conflicting rule that comments about  
23 omitted information in an EIR receive fact-based responses only after a commenter first  
24 produces a CEQA like study evaluating the environmental effect.

25 Third, misunderstanding the law produced a truncated response. The master and  
26 individual response follow a previously rejected notion: socio-economic impacts, such as urban  
27 decay, are outside CEQA’s purview. (D73; D615.) Dispensing with an urban decay comment  
28 by mischaracterizing it as socio-economic contradicts controlling precedent. CEQA Guideline

1 §15131(a). “Case law already has established that in appropriate circumstances CEQA requires  
2 urban decay or deterioration to be considered as an indirect environmental effect of a proposed  
3 project.... The lead agency cannot divest itself of its analytical and informational obligations by  
4 summarily dismissing the possibility of urban decay or deterioration as a ‘social or economic  
5 effect’ of the project.” *Bakersfield* at 1205 and 1207 (underlining added).

6 Fourth, DSC’s reliance on *Friends of Davis* and *Pala Band* (Opp.Br. at 242:3-12) is  
7 misplaced. Each matter asked whether substantial evidence supporting a fair argument of a  
8 significant environmental effect existed to invalidate an approved negative declaration. Each  
9 court concluded project opponents failed to introduce evidence supporting their argument;  
10 therefore, the negative declarations were valid. But whether there is sufficient evidence to  
11 support a fair argument in order to upset a Negative Declaration is a materially different question  
12 than whether DSC can dispense preparing a detailed, fact-based response based on a comment’s  
13 insufficiency. Indeed the Fair Argument standard requires a challenger to supply evidence to  
14 support the claim whereas the Guideline do not excuse a public agency to prepare a fact based  
15 responses to comments. Consequently neither case addresses the question of when an agency  
16 may dispense with the duty to prepare fact-based responses.

17 Fifth, DSC impliedly concedes if evidence exists to support the urban decay comment  
18 then the impact must be evaluated in the draft EIR. DSC wrongly concluded urban decay was a  
19 socio-economic but not environmental effect; it also wrongly evaluated the impact as directly  
20 produced by converting agricultural land rather than indirectly caused by the Plan. Thus the  
21 remaining basis to dispense with the comment in an abbreviated manner is the absence of  
22 substantial evidence. [“In the absence of information concerning specific proposed projects  
23 ...there is no substantial evidence that these effects would occur...” D73.] Critically, the  
24 response did not assert the Plan could cut off a chain of events leading to urban decay—it stated  
25 either urban decay was not a CEQA issue or the comment was undeveloped without evidence—  
26 thereby depriving the agency from subsequently relying at the public hearing on an entirely new  
27 reason to dismiss the urban decay argument, especially after Stockton provide evidence to

28

1 support the comment.<sup>7</sup> A lack of evidence justification for dispensing with fact based responses  
2 is not found in CEQA; however, Stockton affirmatively responded by producing more evidence  
3 during the hearing process.

4 B. DSC Failed to Address Urban Decay.

5 1. Standard of Review.

6 The parties clash over the correct standard of review. DSC embraces the substantial  
7 evidence test (Opp.Br. at 174:5-14) while Stockton explains the Failure to Proceed Prong applies  
8 with the Fair Argument Test incorporated for purposes of evaluating unaddressed environmental  
9 effects in a prepared EIR. *Bakersfield* fully rejects DSC's legal position:

10 "C & C contends that study is not required because the record does not  
11 contain substantial evidence proving that the shopping centers will cause  
12 urban decay. This argument founders because it is premised on the  
13 wrong standard of review. Substantial evidence is the standard applied to  
14 conclusions reached in an EIR and findings that are based on such  
15 conclusions. (Citation omitted.) BCLC is not challenging a conclusion in  
16 the EIR's that the shopping centers would not indirectly cause urban decay  
17 or a finding adopted by the City.... Rather, **BCLC's argument is that the  
18 EIR's failed to comply with the information disclosure provisions of  
19 CEQA because they omitted any meaningful consideration of the  
20 question whether the shopping centers could, individually or  
21 cumulatively, trigger a series of events that ultimately cause urban  
22 decay...BCLC is challenging the City's view that such an analysis  
23 was purely economic and therefore was outside the scope of CEQA.  
24 The substantial evidence standard of review is not applied to this type  
25 of CEQA challenge. The relevant question is whether the lead agency  
26 failed to proceed as required by law. (Citation omitted.) [A]lthough the  
27 agency's factual determinations are subject to deferential review, questions  
28 of interpretation or application of the requirements of CEQA are matters  
of law. [Citations.]...If C & C is contending that claims concerning  
omission of information from an EIR essentially should be treated as  
inquiries whether there is substantial evidence supporting the decision  
approving the projects, we reiterate our rejection of this position for the  
reasons previously expressed in *Irrigated Residents, supra*, 107  
Cal.App.4th at page 1392."**

23 *Bakersfield* at 1207-08 (bolding and underlining added). Hence the more rigorous Failure to  
24 Proceed Test applies to this Urban Decay challenge.

25 \_\_\_\_\_  
26 <sup>7</sup> Defective EIR responses cannot be subsequently cured. "An EIR must include detail sufficient  
27 to enable those who did not participate in its preparation to understand and to consider  
28 meaningfully the issues raised by the proposed project.... "[Whatever] is required to be  
considered in an EIR must be in that formal report; what any official might have known from  
other writings or oral presentations cannot supply what is lacking in the report.'" *Laurel Heights  
Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 405.

1           When a party challenges an agency’s failure to proceed in a manner required by law by  
2 claiming the agency omitted one or more significant environmental effects from an EIR, then the  
3 Third District emphasizes this claim is viewed against the Fair Argument test. DSC, however,  
4 quibbles with legal authorities supporting this principle. It incoherently suggests the cited  
5 passage from *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4<sup>th</sup>  
6 173, 188 (CCEC), (a dispute involving the sufficiency of an EIR and not whether an EIR should  
7 be prepared) offers merely a “background explanation...for determining when an EIR is  
8 required.” Opp.Br. at 174:18-20.

9           A straightforward review of the pivotal paragraph presented at page 188 of the opinion  
10 makes clear the Fair Argument test applies when deciding whether a draft EIR omitted an  
11 evaluation of a significant environmental effect. The operative paragraph’s first sentence states:  
12 “Under CEQA, a lead agency must address the issue of urban decay in an EIR when a fair  
13 argument can be made that the proposed project will adversely affect the physical environment.”  
14 Thus the paragraph’s introductory sentence does not relate to “determining when an EIR is  
15 required” as DSC reads it but instead focuses on determining which environmental issues  
16 deserve comprehensive evaluation within the EIR *after* deciding to prepare an EIR. The second  
17 sentence fortifies this conclusion by citing two CEQA Guidelines. Section 15126.2, entitled  
18 “Consideration and Discussion of Significant Environmental Impacts”, starts as follows: “An  
19 EIR shall identify and focus on the significant environmental effect of the proposed project.”  
20 Similarly section 15064(d)(3) discusses when direct and indirect environmental effects must be  
21 studied in an EIR. Each cited Guideline concerns determining which issues to discuss in an EIR  
22 but does not involve rules determining if an EIR should be prepared. The CCEC paragraph  
23 concludes by explaining when evidence of a socio-economic consequence causing an indirect  
24 environmental impact is present, “such as urban decay or deterioration, then the CEQA lead  
25 agency is obligated to assess this indirect environmental impact.”

26           To the same extent in *Protect the Historic Amador Waterways v. Amador Water Agency*  
27 (2004) 116 Cal.App.4<sup>th</sup> 1109, a dispute about an EIR’s sufficiency and not about whether an EIR  
28 should be prepared, the court wrote:

1           “Once a public agency has determined that a project *may* have one or  
2           more significant effects on the environment and therefore an EIR is  
3           required, the purpose of the EIR ‘is to identify the significant effects on  
4           the environment of [the] project.’ (CEQA, § 21002.1, subd. (a).) Thus, in  
5           preparing the EIR, **the agency must determine whether any of the**  
6           **possible significant environmental impacts of the project will, in fact,**  
7           **be significant...**however, the fact that a particular environmental effect  
8           meets a particular threshold cannot be used as an automatic determinant  
9           that the effect is or is not significant...[¶] **Thus, in preparing an EIR,**  
10           **the agency must consider and resolve every fair argument that can be**  
11           **made about the possible significant environmental effects of a project,**  
12           irrespective of whether an established threshold of significance has been  
13           met with respect to any given effect.”

14 *Id.* (bolding and underlined added).

15           The following illustration explains the soundness of folding a Fair Argument test within  
16           the Failure to Proceed Prong whenever a party claims a draft EIR omitted a significant  
17           environmental effect. After conducting an initial study a public agency decides to prepare an  
18           EIR because traffic congestion is a potentially significant environmental effect. A draft EIR  
19           evaluated traffic congestion. The agency receives a public comment that the proposal will also  
20           result in a significant water pollution effect from storm drain runoff; therefore, to be CEQA  
21           compliant the draft EIR needs to address water pollution. The agency disagrees and further  
22           claims because it prepared an EIR for traffic the water pollution claim should be governed by the  
23           deferential substantial evidence test instead of the more rigorous fair argument test. Yet it is  
24           incoherent for the public agency to obtain a more deferential standard of review when reviewing  
25           whether it erred in dispensing with evaluating water pollution because it decided to study traffic  
26           congestion. Correctly identifying one environmental effect as significant should not constrict a  
27           public agency’s duty to study unrelated environmental effects after initially misidentifying the  
28           effect as insignificance or make the efforts of a concerned environmental group to require an EIR  
29           to study all significant environmental effects substantially more difficult.<sup>8</sup> Instead the  
30           overarching public policy of fully considering the environmental consequences of government

31 \_\_\_\_\_  
32 <sup>8</sup> This expansive reading observes CEQA’s overarching purpose. “The foremost principle under  
33 CEQA is that the Legislature intended the act ‘to be interpreted in such manner as to afford the  
34 fullest possible protection to the environment’ within the reasonable scope of the statutory  
35 language.” *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259. “It is, of  
36 course, too late to argue for a grudging, miserly reading of CEQA.” *Bozung v. Local Agency*  
37 *Formation Com.* (1975) 13 Cal.3d 263, 274.

1 decisions is facilitated by following a more liberal standard setting a low threshold for  
2 compelling comprehensive environmental review.

3 Thus *Bakersfield* teaches us this claim is evaluated by the Failure to Proceed Prong of the  
4 abuse of discretion standard and, following the Third District's direction, claims within the  
5 Failure to Proceed involving an agency's misidentification of an environmental effect as  
6 insignificant, in the context of a draft EIR, are judged by the Fair Argument test.

7 2. The opposition brief depends upon an implied false predicate that the DSC's  
8 Council made formal findings resolving disputed and contradictory evidence.

9 After preparing the EIR and during the public hearings DSC offered two lines of defense  
10 for dispensing with evaluating urban decay: 1) Stockton's evidence is impeachable and the  
11 agency provided contradictory evidence; and 2) Plan's policy DP-P1 thwarts the possibility of  
12 urban decay. (During the public hearings the DSC abandoned the EIR's rationale that urban  
13 decay was a socio-economic but not environmental effect and that converting agricultural land  
14 would not cause a chain of events leading to urban decay. In a strange and contradictory manner  
15 it certified the EIR without modifying or deleting the abandoned rationale.)

16 The major DSC premise about the evidence—that the Council reconciled conflicting  
17 evidence by accepted the staff opinion and rejected Stockton's evidence—is not tethered to the  
18 administrative record and therefore unavailable as a matter of law. Indeed Council members  
19 offered no comments about Stockton's arguments, evidence or the experts' qualifications. While  
20 the staff provided conflicting personal opinions, the Council neither discussed this evidence nor  
21 made specific findings explaining why or offering a rationale for accepting some but discarding  
22 other evidence. As a directly result no administrative record or analytic roadmap was developed  
23 between the raw data and ultimate decision for this Court to follow or basis to determine whether  
24 the Council's analysis of the evidence amounted to an abuse of discretion. An administrative  
25 record devoid of an explanation or rationale for dispensing with Stockton's evidence deprives a  
26 reviewing court of an analytic pathway for conducting judicial review.

27 Findings expose an agency's analysis of facts and bridge the analytical gap between the  
28 raw data and ultimate decision. *Topanga Assn. For A Scenic Community v. County of Los*

1 *Angeles* (1974) 11 Cal.3d 506,515-16. “Findings cannot be implied.” Longtin, Calif. Land Use  
2 (2<sup>nd</sup> ed.) §11.52[1] at 1032. In a CEQA setting the leading case about the credibility of evidence  
3 is *Pocket Protectors v. City of Sacramento* (2004) 124 Cal. App. 4th 903, 932-933: “[I]ts  
4 findings are devoid of reasoning and evidence.... ¶The City Council's findings of fact on this  
5 point are equally open to dispute.” Without specific findings explaining why or indeed if it had  
6 rejected testimony disagreeing with the staff opinion Sacramento deprived the court of an  
7 analytic pathway for judicial review. This failure invalidated the challenged approval: “**before**  
8 **accepting Regis's argument we would have to find that the City Council actually resolved**  
9 **disputed factual questions going to credibility. But the City Council's findings of fact do not**  
10 **discuss any opposing evidence:** they merely recite generally that substantial evidence of a  
11 significant effect on the environment does not exist. **Thus, we see no specific credibility call**  
12 **by the City Council which requires deference.”** *Id.* at 934-35 (bolding added; italicized in  
13 original).

14 DSC commits the identical fatal procedural error. It asserts the Council rejected  
15 Stockton’s evidence and accepted conflicting staff opinion. In fact it designed the opposition  
16 brief as a belated *de facto* and improper *post-hoc* administrative finding. It now raises specific  
17 objections about Stockton’s evidence [“Stockton never identifies how the Plan could somehow  
18 lead to urban decay effects”, Op.Br. at 173:18-19] without offering record citations showing  
19 where the Council actually raised these concerns or actually resolved disputed factual questions.  
20 This record does not disclose the Council exercise independent judgment and adopted the  
21 rationale now urged in courtroom arguments.

22 This record does not reveal if the Council carefully considered but dismissed Stockton’s  
23 evidence for sound and logical reasons or whether it blindly followed a result oriented praxis by  
24 ignoring Stockton’s evidence in order to hastily approve an overdue Plan. In either case *Pocket*  
25 *Protectors* teaches us that failing to “actually resolve disputed questions” is fatal, does not permit  
26 the agency to subsequently operate as though favorable findings were impliedly made or require  
27 a Court to supply missing findings. Instead, to the extent a dispute pivots on conflicting  
28 evidence and testimony, a court is deprived of the ability to review the administrative

1 proceedings when a public agency omits the appointed decision maker's thought process and  
2 rationale for choosing some evidence and rejecting other evidence or the basis for a "specific  
3 credibility call". According to *Pocket Protectors* DSC did not proceed as required by law and  
4 the matter must be remanded.

5 3. The Council's public hearing comments do not cohere to the EIR and are  
6 therefore unavailable to defend the EIR's failure to evaluate urban decay.

7 The Final EIR rejected Stockton's claim about the Plan resulting in significant urban  
8 decay. The Final EIR relied upon three lines of analysis: 1) converting farmland wouldn't  
9 trigger urban decay; 2) the impact is socio-economic; and, 3) Stockton did not introduce  
10 sufficient evidence to support the claim. It never suggested Plan policies would break the chain  
11 of events leading to urban decay. See Section II.A. Indeed, DSC concedes this important point  
12 when explaining the Council rejected the urban decay claim "and stated the reasons for that  
13 conclusion (in the) Final EIR responses to comments". Op.Br. at 174:5-6. At subsequent public  
14 hearings, however, DSC abandoned the Final EIR rationale and switched to a new rationale to  
15 warrant rejecting Stockton's claim. Now in court agency attorneys rely on a rationale the EIR  
16 never expressed: Plan policies discourage urban decay. But this shift in rationale from the EIR  
17 is never explained by findings nor did DSC modify the Final EIR's rationale before it was  
18 certified in order to facilitate judicial review.

19 Whenever a new rationale unsupported in the EIR is advanced for rejecting a comment  
20 that an EIR rejected an alternative or needs to evaluate a potentially significant environmental  
21 effect the new rationale must develop a clearly disclosed analytic pathway. Failing to  
22 acknowledge and explain the decision to embrace a rationale unsupported by an EIR is a failure  
23 to proceed in a manner required by law even if the new rationale and the EIR's rationale reach  
24 the same conclusion:

25 Although the draft and final EIRs rejected the mixed-use alternative on  
26 grounds of *economic* infeasibility, the City approved the project on  
27 grounds the mixed-use alternative was *environmentally* inferior. **The City**  
28 **did not acknowledge it switched from the rationale of "economic**  
**infeasibility" due to "leakage of sales" to one of "greater**  
**environmental impacts" as the ground for rejecting the mixed-use**  
**alternative.** The administrative record does not indicate the City

1 discovered additional information showing the mixed-use alternative to be  
2 an inferior environmental alternative.

3 The City attempts to explain its shift by asserting that “[t]he determination  
4 in the EIR that the Mixed-Use Alternative failed to meet project objectives  
5 *was the opinion of the City's EIR consultants.*” **The City continues that  
6 “[a]s such, the feasibility conclusions in the EIR were not binding on  
7 the City Council, and the Council had discretion to reach conclusions  
8 that differed from those in the EIR.” We disagree.**

9 **The City adopted a rationale unsupported by its EIR analysis. The  
10 City's unexplained switch from a rationale of economic infeasibility to  
11 environmental inferiority as the basis for rejecting the mixed-use  
12 alternative conflicts with CEQA's requirement to “disclose ‘the  
13 “analytic route the ... agency traveled from evidence to action”.**

14 *CCEC* at 205 (bolding and underlined added; italics in original).

15 DSC commits the same mistake exposed by the *CCEC* opinion. Here the EIR response  
16 did not find proposed Plan policies might cut off a chain of events leading to urban decay. Thus  
17 the EIR response treats Plan policies as irrelevant when dispensing with Stockton’s comment.  
18 The Council adopted inconsistent actions: it certified the EIR’s analysis yet switched the  
19 rationale for dispensing with the urban decay comment by inconsistently concluding the Plan’s  
20 policy prevented urban decay. But according to *CCEC* the Council lacked unfettered “discretion  
21 to reach conclusions that differed from those in the EIR.” *Id.* Instead in that instance DSC must  
22 do exactly what DSC failed do: methodically track “the analytic route the...agency traveled.” In  
23 *CCEC* each competing rationale reached an identical conclusion that an alternative was  
24 infeasible; however, the unaccounted for switch in the rationale from economic to environmental  
25 constituted an abuse of discretion. The same problem exists here.

26 4. Summary of Stockton’s evidence.

27 The Opening Brief at pages 1-6 explains that Stockton presented two letters from its  
28 Community Development Director and two letters for its Municipal Service Director testifying  
why the Plan would start a chain of events leading to urban decay and also alter future patterns of  
municipal development with concomitant different significant environmental effects. In the  
interest of time and space the testimony, boiled to its essence, first states that the Delta Plan  
could have a chilling effect on future land use decisions by directing development away from  
land subject to DSC jurisdiction. “An EIR may trace a chain of cause and effect from a proposed

1 decision on a project through anticipated economic or social changes resulting from the project  
2 to physical changes in turn caused by the economic or social changes.” CEQA Guideline  
3 §15131(a). This redirection is contrary to long term and future phased infrastructure plans, and  
4 results in future infrastructure and development being constructed on lands found in earlier  
5 CEQA documents as producing new or more intense environmental damage. Second, the  
6 testimony explains the Plan chills capital formation efforts necessary for urban development or  
7 redevelopment and starts a chain of events leading to urban decay. The testimony highlighted  
8 the absence of information or data in the EIR concerning these potential environmental effects or  
9 the socio-economic effects of the Plan that starts the chain leading to urban decay.

10 Stockton emphasizes on a lack of meaningful data or information about the Plan’s  
11 economic consequence to local areas was fortified by the Modified Economic and Fiscal Impact  
12 Statement. E1359-1370. The report’s conclusion is staggering: it concedes the DSC does not  
13 know the consequence to existing or future businesses or the number of businesses and jobs  
14 eliminated. *Id.* Dr. Lytle concluded “based on our professional judgments...the DSC has not  
15 assembled sufficient and necessary baseline information to study this problem and therefore  
16 agree or disagree with our conclusions.” Opening Brief at 6:1-3. In short, the only DSC prepared  
17 document about the Plan’s socio-economic effects, representing the first chain in a chain of  
18 events leading to urban decay, concluded that the operative socio-economic effects were  
19 unknown. “The agency should not be allowed to hide behind its own failure to gather relevant  
20 data”. *Sunstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

21 5. Plan DP-P1 doesn’t mitigate the Environmental Effect.

22 DSC relies heavily on Mr. Ray’s representation that the Plan, specifically DP P1, does  
23 not reach previously approved land use decisions.<sup>9</sup> However, the Ray testimony does not explain  
24 why DSC switches from the rationale found in the EIR to this new rationale to warrant ignoring  
25 Stockton’s concern. Yet policy DP P1’s actual language does not track Mr. Ray’s creative

26 \_\_\_\_\_  
27 <sup>9</sup> By not acknowledging that *Pala Band of Mission Indians v. County of San Diego* (1998) 68  
28 Cal.App.4<sup>th</sup> 556,568, 580 teaches us attorney arguments do not constitute substantial evidence in  
CEQA matters DSC impliedly concedes attorney Andrew’s utterings about the subject matter are  
not substantial evidence. Thus, Mr. Andrews’ disparaging fact starved diatribe about Stockton  
testimony being “speculative” is of no moment in this litigation.

1 presentation. *To put a finer point on it Stockton’s concern focused on future land use decisions*  
2 *while Mr. Ray’s response focused on DSC’s inability to reach past land use decisions.*

3 Moreover, Mr. Ray clogs the lines of clarity by reviewing but ignoring the General Plan’s actual  
4 land use designations.

5 Unpacking DP P1 confirms the italicized statement in the previous paragraph. B455.  
6 The policy’s first sentence underscores a potential chilling effect on capital formation and the  
7 influence over future development patterns: “**New residential, commercial and industrial**  
8 **development must be limited to the following areas**”. *Id.* (bolding added). The next sentence  
9 proceeds to restrict new development to lands designated “residential, commercial and  
10 industrial” in May 2013. *Id.* Otherwise discretionary approvals are regarded as Covered  
11 Actions. According to Stockton the additional regulatory hurdle posed by Covered Actions  
12 chills economic development and capital formation and starts the chain of events leading to  
13 urban decay.

14 DSC believes DP P1 precludes urban decay and altered patterns of urban development by  
15 allowing lands within the Plan boundary to urbanize if the property was both 1) within  
16 Stockton’s General Plan on May 16, 2013 and 2) designated residential, commercial and  
17 industrial; thus, according to DSC, the DP P1 crafted exception nullifies Stockton’s  
18 environmental concerns. The Opposition Brief deliberately asserts this notion as a controlling  
19 syllogism: “the only actions regulated by the Plan are actions covered by the Plan’s policies, and  
20 policy DP P1 only applies outside the City limits and its sphere of influence...Therefore Mr. Ray  
21 concluded, there was nothing to analyze in the EIR with regards to the effects on land use in  
22 Stockton.” *Opp. Br.* at 184:17-19 and 22-23. If the controlling syllogism breaks then the  
23 switched rationale and the EIR fail.

24 ///

25 ///

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28 ///

1 But details DSC claims to be intimately familiar with emphatically dispute these extreme  
2 statements.<sup>10</sup> The Stockton General Plan Diagram (Request for Judicial Notice at Document 1  
3 [<http://www.stocktongov.com/government/departments/communityDevelop/genPlanMap.html>])  
4 depicts land located outside the municipal limits but within the general plan and assigns land use  
5 designations to this territory. A substantial majority of the land is designated something other  
6 than commercial, industrial or residential. Areas designated commercial, industrial or residential  
7 generally conform to existing approved and constructed developments in the unincorporated  
8 area. The prime area of growth, the area of north of Eight Mile Road, highlights the problem. For  
9 this area no land is designated commercial or industrial with a small portion, about twenty acres,  
10 designated residential. *Id.* Hence DP P1 exempts virtually none of the territory within the general  
11 plan outside of municipal boundaries from Covered Actions. To the same extent the eastern  
12 boundary of the northern sphere of influence terminates at Davis Road. Request of Judicial  
13 Notice at Document 2. DP P1's exclusion from Covered Actions, which pivots on land  
14 designated commercial, industrial and residential, does virtually nothing for Stockton and is  
15 irrelevant to the environmental concerns raised.

16 The obstacle to expand phased municipal infrastructure may be even more profound. For  
17 example, the City's major water treatment plant, the Delta Water Supply Facility, is located  
18 within the General Plan, but beyond the Sphere of Influence, and has been assigned a general  
19 plan designation as "Institutional". Hence, contrary to Mr. Ray's fact starved opinion, the Plan's  
20 policies, providing limited protection from Covered Actions to "residential, commercial and  
21 industrial" designated territory, offer no protection to the City's major multi-million dollar multi-  
22 phased domestic water facility. Dr. Lytle underscores the importance of this risk: the facility  
23 was not designed to accommodate the co-equal goals, which did not exist when the facility was  
24 design, and therefore anticipated phased expansions will conflict with mandatory Plan

25 \_\_\_\_\_  
26  
27 <sup>10</sup> Mr. Ray cited to an unidentified CH2MHill study, which is never cited in the Opposition  
28 Brief, concluding the Plan only reaches a 2,500 acre development southwest of the city not  
depicted on any official Stockton planning document; otherwise the Plan would not affect  
Stockton's development. To reach this remarkable conclusion Mr. Ray and the engineering firm  
needed to review the Stockton general plan. A/R Transcript, pp. 11-13. As Stockton explains  
subsequently Ray and the engineers neither read or understood Stockton's general plan.

1 objectives. K122110.001-K12210.005. (The cost of these infrastructure facilities exceeds \$500  
2 million. K12210.002.) Under that circumstance Stockton may be required to construct parallel  
3 facilities outside the Plan’s jurisdiction resulting in new and/or more intensive environmental  
4 consequences. K12210.003; I532-33. Of course this unaddressed environmental concern does  
5 not encompass wasted taxpayer dollars. Yet DSC concludes the EIR need not address these  
6 environmental concerns because policy DP P1 somehow removes water facility expansions from  
7 amounting to a Covered Action.

8 To date local government has limited experience in dealing with the Plan. However, this  
9 limited experience suggests DSC intends to significantly intrude into local government land use  
10 decisions. In commenting on a county’s draft general plan (Request for Judicial Notice at  
11 Document 3), it: 1) criticized redesignating several areas from agriculture to industrial (*Id.* Exh.  
12 C at page 2); 2) criticized a part of the draft EIR it found sufficient but nevertheless needing  
13 more analysis (*Id.*); 3) argued new factors that should be considered when the County evaluates  
14 future general plan and zoning decisions (*Id.* Document 3, DSC attachment at 2); 4) complained  
15 a proposed general plan policy would “prevent ...development of a new duck hunting club”  
16 (*Id.*); 5) argued redesignating any agricultural land located outside a city’s sphere of influence to  
17 industrial violates the Plan (*Id.* at 3); 6) insisted the County insert Government Code definitions  
18 unrelated to DSC into the General Plan (*Id.* at 6); and 7) opposed redesignating any agriculture to  
19 industrial based on an undated, unidentified Colliers International report and the amount of  
20 vacant industrial land at the Port of Stockton (*Id.* at 8).<sup>11</sup> Overall the comments did not observe  
21 DSC’s jurisdictional boundaries and statutory limitations.

22  
23  
24 <sup>11</sup> Suggesting a moratorium on redesignating land to industrial due to the amount of industrial  
25 land at the Port is ironic in the extreme. During the process of preparing the Plan the DSC  
26 chairman and general counsel met with Port officials, each independently represented over the  
27 Port’s vigorous disagreement that the Delta Reform Act authorized DSC to delay, review and  
28 potentially reject every maritime oriented lease proposed at the Port and also authorized DSC to  
stop federal Corps of Engineer efforts to perform maintenance dredging authorized by an Act of  
Congress designed to facilitate interstate and international commerce. The Port responded to this  
stunning misinterpretation of the Delta Protection Act by obtaining full legislative relief. Wat.  
C. §85057.5 (8) and (9). (The undersigned arranged and participated in this meeting in his  
capacity as the Port’s General Counsel.)

1           6.       DSC’s characterization of the Chase and Dr. Lytle testimony as speculative is  
2                   misplaced and insufficient.

3           Finally DSC disparages the evidence as speculative.<sup>12</sup> But Mr. Chase and Dr. Lytle  
4 offered an analysis of anticipated future events based upon their professional positions,  
5 Community Development Director in charge of implementing Stockton’s General Plan, and  
6 Municipal Services Director in charge of operating and expanding Stockton’s municipal service  
7 facilities, their professional training and their professional experiences. I528; K12210.001. The  
8 DSC is a new state agency exercising entirely new regulatory power from a newly enacted Plan.  
9 There are no historical examples of Covered Action regulations altering growth patterns and  
10 causing urban decay to point to nor could examples exist. Indeed it is axiomatic that predicting  
11 future events requires applying certain sets of assumptions. Here DSC labels the Chase and Dr.  
12 Lytle assumptions as bald speculation and thoughtlessly dismisses the evidence without  
13 explaining why the assumptions offered by Chase and Dr. Lytle are wrong.

14           For instance, Chase’s testimony was based on 38 years of experience in local government  
15 and local economic development, “my educational studies, my review of academic literature and  
16 actual and personal experience in this field.”<sup>13</sup> I528. He explained, “From my experience in  
17 economic development decision by the public and private sectors, the certainty that an expansion  
18 or relocation of a job generating business can be accomplished is a pivotal factor in the decision  
19 making process. Uncertainty in the finality or time a government decision is final is a critical  
20 factor in location decisions....This situation is no different....From my experience I have learned  
21 that capital is fungible and abhors uncertainty and, as a result, will avoid Stockton as a location  
22 for investing capital, especially if competing communities are free and clear of the additional  
23 layer of regulatory uncertainty and delay.” I531. He identified and discussed three separate  
24 chains of events leading to significant environmental effects starting with the Plan’s regulations.  
25 I530. He addressed “three factors contributing substantially to suppress or chill employment

26 \_\_\_\_\_  
27 <sup>12</sup> As explained earlier while court room arguments claim the evidence is speculative the  
28 Council did not reconcile the dispute by adopting formal findings about the evidence’s  
speculative nature.

<sup>13</sup> I528. In CEQA “relevant personal observations are evidence”. *Bakersfield* at 1211.

1 creation and economic growth decisions.” I532. He concluded by stating until Policy DP P1 is  
2 revised to excluding Stockton’s subsequent land use decisions from being Covered Actions the  
3 indirect effect with lead to “foreseeable (and) significant” environmental effects. *Id.*

4 Mr. Chase adds the general plan designations and master public infrastructures are  
5 correlated to “attain orderly and logical growth through the efficient and economic extension of  
6 public services.” I531. DSC regulations “may partially or totally nullify or substantially impede  
7 Stockton’s municipal infrastructure utility plans.” I530. More particularly subordinate decisions  
8 implementing master infrastructure plans would be Covered Actions and could be rejected by the  
9 DSC because the master infrastructure plans and implementation actions were inconsistent with  
10 the co-equal goals. D530. The regulations also results in disrupting orderly planned patterns of  
11 urban development. I531.

12 Similarly Dr. Lytle bases his testimony on his past 11 years as a local government official  
13 developing municipal public works, and “my academic training and professional experience in  
14 this field.” K12210.001. Master infrastructure plans and constructed public infrastructure  
15 facilities did not take into account the co-equal goals (K12210.002) and were designed to  
16 “periodically implement additional features and/or expand the capacity of existing facilities.” *Id.*  
17 The implementation or expansion will be a Covered Action (*Id. at* .003) and could be rejected.  
18 This requires Stockton to construct parallel facilities with new or more intense environmental  
19 effects cascading from this action, including increased energy use, air pollution, greenhouse gas,  
20 vehicle trips and agricultural land converted to urban uses. *Id.*

21 DSC’s plonking bureaucratic response labels the testimony as speculative and asserts  
22 Policy DP P1 cut off environmental effects. Yet DSC never offers an analytic pathway, or  
23 written findings to explain why Chase or Dr. Lytle were unqualified to provide expert opinions  
24 or impeached laypeople reaching conclusion based on personal observation or why the  
25 assumptions and logic presented are unsound and erroneous. Indeed DSC’s only meaningful  
26 written response, Economic and Fiscal Impact Statement (E1359-70), demonstrated DSC had not  
27 assembled any data or information to study the magnitude of an economic impact leading to  
28 secondary physical impacts identified by Stockton.

1 **III. DSC FAILS TO ADEQUATELY ADDRESS THE PLAN'S VIOLATION OF**  
2 **WATER CODE SECTION 85031(A).**

3 A. This Court Must Rule Whether or Not Water Right Applications are Covered  
4 Actions.

5 DSC seems to concede that the Plan cannot apply to directly interfere or seek to frustrate  
6 Stockton's efforts to perfect an Area of Origin water right. The parties clash over whether the  
7 Plan can indirectly frustrate or block efforts perfecting or implementing this water right. This  
8 disagreement pivots on whether the language of Water Code §85031(a) and, in particular, the  
9 limiting phrase "This division does not diminish, impair, or otherwise affect in any manner  
10 whatsoever any area of origin...protections" bars the DSC Plan from directly or indirectly  
11 frustrating or impairing the exercise or implementation of Area of Origin rights and protections.

12 Thus DSC disagrees about the Plan frustrating or impairing Stockton's efforts to perfect  
13 water rights through area of origin, watershed protection and other statutes ("Area of Origin  
14 Laws")<sup>14</sup>. It claims the Plan cannot directly accomplish this mischief:

15 Stockton's argument fails at the first step. Water rights applications are not  
16 covered actions. The Act provides that covered actions do not include "[a]  
17 regulatory action of a state agency." (Wat. Code, §85057.5(b)91.) Parties  
18 seeking a water right are required to file an application with a state  
19 regulatory agency, the State Water Resources Control Board. (Wat. Code,  
20 §§1250, et seq.) A party's water right application is therefore not a  
21 covered action. Thus it is not subject to the Council's regulations. (See  
22 Wat. Code, § 85225.)

23 Thereafter, however, DSC presents a confusing analysis suggesting the Plan may indirectly apply  
24 to frustrate or impede Stockton's enjoyment of a perfected water right obtained through Area of  
25 Origin Laws. Opp.Br. 50:5-13. It implies the Plan's regulates "local land use actions" and  
26 encompasses discretionary decisions about the location and construction of water treatment and  
27 conveyance facilities. Thus DSC confirms Stockton's fear: DSC regulations could apply to  
28 frustrate or impair Stockton's efforts to obtain or implement these water rights after such rights  
are confirmed under Area of Origin Statutes. In that instance DSC could find the design or

14 The rights protected by Water Code §85031(a) include Article 1.7 (commencing with Section 1215) of Chapter 1 of Part 2 of Division 2, Sections 10505, 10505.5, 11128, 11460, 11461, 11462 and 11463, and Sections 12200 to 12220, inclusive, as well as the rights of pre-1914 appropriative water right holders.

1 location of water treatment or conveyance facilities conflicts with the co-equal goals. The DSC  
2 opposition brief raises but never addresses the consequences of such indirect interference.  
3 (Interestingly amici DWR takes an opposite position, arguing the Plan could apply to frustrate  
4 efforts to perfect the water right.)

5       However, should this Court determine the Plan does not directly or indirectly frustrate or  
6 impede Stockton’s effort to perfect and enjoy water rights through the Area of Origin Statute,  
7 then we urge it to make an expressed declaratory statement about this issue or, alternatively  
8 allow Stockton and DSC to stipulate to such a binding interpretation of the law, with Stockton  
9 thereafter dismissing this cause of action with prejudice. Without action binding the future  
10 conduct of DSC as represented in the first part of the response, the second part of DSC’s  
11 opposition brief produces “a wilderness of mirrors”<sup>15</sup> allowing DSC to do indirectly what it  
12 claims the Delta Reform Act prevents it from doing directly. The DSC opposition brief is  
13 unclear whether it disputes it can not violate Water Code Section 85031(a)<sup>16</sup> by affecting the  
14 Area of Origin Laws.

15 B.     No Claim Is Made that DSC Regulations Would Divert Water From In-Delta  
16       Users to Exporters.

17       DSC claims Stockton’s Area of Origin arguments are based upon a factual assertion that  
18 the Council’s regulations would divert Delta water from in-Delta users to exporters. *See* DSC  
19 Opposition Brief at 50. Simply put, this is not Stockton’s argument; hence, DSC’s hapless  
20 contention is misplaced and DSC attempts to obfuscate a straightforward argument that the Plan  
21 indirectly frustrates or impedes Stockton’s water rights in violation of superior State law.  
22 Indeed, the Opposition Brief omits a reasoned response to Stockton’s carefully analysis

23 \_\_\_\_\_  
24 <sup>15</sup> T.S. Eliot. Gerontion, (1920) at 65.

25 <sup>16</sup> Section 85031(a) of the Water code, part of the Act, provides: “This division does not  
26 diminish, impair, or otherwise affect in any manner whatsoever any area of origin, watershed of  
27 origin, county of origin, or any other water rights protections, including, but not limited to, rights  
28 to water appropriated prior to December 19, 1914, provided under the law. This division does not  
limit or otherwise affect the application of Article 1.7 (commencing with Section 1215) of  
Chapter 1 of Part 2 of Division 2, Sections 10505, 10505.5, 11128, 11460, 11461, 11462, and  
11463, and Sections 12200 to 12220, inclusive”.

1 explaining how the Plan directly and indirectly affects and/or restricts and impedes the exercise  
2 and implementation of future rights granted under the Area of Origin Laws. Stockton's  
3 arguments prevail against this non-responsiveness.

4 C. Requirements Imposed by the Delta Plan on Water Right Applications Under  
5 Area of Origin Laws violate Water Code Section 85031(a).

6 Water Code Section 85031(a) prohibits not just the impairment of the protections  
7 provided by Area of Origin Laws, but prohibits the "affect in any manner whatsoever". To the  
8 extent water right applications under the Area of Origin Laws are Covered Actions, they are not  
9 only affected, but diminished and impaired by numerous requirements imposed by the Plan and  
10 its implementing regulations. DSC does not, and cannot, argue to the contrary.

11 A court must observe and attach meaning to the phrase may not "affect in any manner  
12 whatsoever" Area of Origin rights. Commonly understood statutory construction rules insist each  
13 statutory word and phrase be given meaning and importance. (We are bound by a controlling  
14 presumption that the Legislature intended "every word, phrase and provision . . . in a statute . . .  
15 to have meaning and to perform a useful function." (*Clements v. T. R. Bechtel Co.* (1954) 43 Cal.  
16 2d 227, 233. *Valley Crest Landscape, Inc. City Council* (1996) 41 Cal.App.4<sup>th</sup> 1432, 1439 ["If  
17 the Legislature intended 'portion' to mean percentage, it could have simply used the term  
18 'percentage' instead. By using the different term 'portion,' the reasonable inference is the  
19 Legislature intended a different meaning than percentage."].)

20 DSC dispenses with this venerated rule by twisting a statutory phrase prohibiting future  
21 legislation from affecting rights "**in any manner whatsoever**" to mean an optional conditional  
22 prohibition not binding on subsequent legislative enactments. This extreme reading of the statute  
23 frustrates or impairs the earlier created statutory rights and disrupts the delicate legislative  
24 balance created between northern and southern California water interests. If this extreme  
25 interpretation is true then the obvious question is this: *what language must the Legislature insert*  
26 *into a statute to prevent future enactments from frustrating or impairing enjoyment of this*  
27 *statutory right?* The language says what it means and means what it says.

28

1 Reference to other statutes is irrelevant. Those statutory schemes are not at issue here  
2 and the applicability of these other statutes to the Area of Origin statute has not been directly  
3 posed as a question this Court must answer. Thus the fact “no court has even hinted that area of  
4 origin laws apply to state regulations” (Opp.Br. at 50:7-8) is not a stunning disclosure but the  
5 product of mendacity. It merely reveals this precise question has not been squarely presented to  
6 a court for judicial resolution. What previous courts have not been called upon to decide should  
7 be of no moment.

#### 8 IV. CONCLUSION.

9 The City of Stockton, located on the easterly boundary of the Delta estuary, does not  
10 oppose reasonable and effective government efforts to preserve and enhance the Delta’s long  
11 term viability for environmental economic and recreational purposes. The Delta Reform Act of  
12 2009 required the DSC to carefully ventilate all economic and environmental concerns through a  
13 transparent and logically sound process allowing all participants to understand and follow the  
14 agency’s bureaucratic movement from raw data to an ultimate decision adopting the Delta Plan.

15 This did not happen. The DSC failed to proceed with a comprehensive and detailed  
16 evaluation of Stockton’s environmental and water rights concerns as required for sound and  
17 legitimate public policy decisions. It misunderstood or mischaracterized these concerns and  
18 supplied only an abbreviated and incomplete evaluation. Once it understood the error of this  
19 way it switched positions and arguments rather than acknowledge the earlier error and correct it  
20 by conducting the proper investigation and study. It did precisely what Lutheran theologian  
21 Bonhoeffer teaches us in the Opening Brief is a failed strategy: the DSC ran the opposite  
22 direction on a train going the wrong way. This exercise cannot fix this problem.

23 The general decision making process compels DSC to investigate in depth the types of  
24 issues raised by Stockton and then incorporate the information and data assembled from this  
25 comprehensive investigation into a sound decision balancing all competing elements. But when,  
26 as in this instance, a public agency dispenses with this type of in depth investigation then the  
27 decision making process fails. Here the objectives of the Delta Plan can be attained without  
28 producing unneeded and undue harm to Stockton. Since DSC unilaterally bypassed the

1 opportunity to take a hard look at the environmental and water rights concerns raised by  
2 Stockton, concerns raised by Stockton repeatedly during the public process, it was ill-equipped  
3 to devise mitigation measures to lessen the significance of Stockton's concerns. If DSC is  
4 compelled to follow the correct procedure Stockton is confident that it can work collaboratively  
5 with the agency to address the concerns in a meaningful manner. Issuing the Writ would yield  
6 this result.

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DATED: May 20, 2015

HERUM\ CRABTREE\SUNTAG  
*A California Professional Corporation*

By:   
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Attorneys for Petitioner  
CITY OF STOCKTON

1 PROOF OF SERVICE

2 I, LAURA CUMMINGS, certify and declare as follows:

3 I am over the age of 18 years, and not a party to this action. My business address is 5757  
4 Pacific Avenue, Suite 222, Stockton, California 95207, which is located in the county where the  
5 mailing described below took place.

6 I am readily familiar with the business practice at my place of business for collection and  
7 processing of correspondence for mailing. On May 20, 2015 at my place of business a copy of  
8 **PETITIONER CITY OF STOCKTON'S REPLY BRIEF IN SUPPORT OF PETITION  
9 FOR WRIT OF MANDAMUS** was placed for deposit following ordinary course of business as  
10 follows:

11  BY U.S. MAIL with the United States Postal Service in a sealed envelope, with postage  
12 thereon fully prepaid.

13 The envelope(s) were addressed as follows:

14 **SEE SERVICE LIST ATTACHED.**

15  BY ELECTRONIC MAIL (EMAIL). By sending the document(s) to the person(s) at the  
16 email address(es) listed below.

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18  BY FEDERAL EXPRESS/OVERNIGHT MAIL in a sealed envelope, with postage  
19 thereon fully prepaid. [Code Civ. Proc., §§ 1013(c), 2015.5.]

20  BY PERSONAL SERVICE/HAND DELIVERY.

21  BY FACSIMILE at approximately \_\_\_\_\_.m. by use of facsimile machine telephone  
22 number (209) 472-7986. I caused the facsimile machine to print a transmission record of  
23 the transmission, a copy of which is attached to this declaration. The transmission was  
24 reported as complete and without error. [Cal. Rule of Court 2008 and 2003(3).]

25 I certify and declare under penalty of perjury under the laws of the State of California that  
26 the foregoing is true and correct.

27 Dated: May 20, 2015

28   
LAURA CUMMINGS

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