

1 Michael A. Brodsky
2 Law Offices of Michael A. Brodsky
3 201 Esplanade, Upper Suite
4 Capitola, CA 95010
5 Telephone: (831) 469-3514
6 Facsimile: (831) 471-9705
7 Email: michael@brodskylaw.net

8 Attorney for Petitioner Save the California Delta Alliance

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

11 **Coordination Proceeding**
12 **Special Title (Rule 3.550),**

13 **DELTA STEWARDSHIP**
14 **COUNCIL CASES**

15 **JUDICIAL COUNCIL COORDINATION**
16 **PROCEEDING NO. 4758**

17 **PETITIONER SAVE THE CALIFORNIA DELTA**
18 **ALLIANCE'S REPLY TO RESPONDENT AND**
19 **DEFENDANT DELTA STEWARDSHIP**
20 **COUNCIL'S OPPOSITION TO ALL OPENING**
21 **BRIEFS**

22 [Pub. Res. Code §§ 21167.4(c) & 21167.6(e)(10);
23 Code Civ. Proc. § 1085; Govt. Code §§ 11347.3 &
24 11350]

25 **Hearing: Not Set**

26 **Time:**

27 **Dept: 31**

28 **Judge: Honorable Michael P. Kenny**

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1 **I. OVERVIEW**

2 The Council argues that its limited response to Delta flows was justified because “the Act’s
3 requirements concerning flows are very limited.” Council 57. Delta Alliance shows at section B
4 (pages 16–22), focusing on the text of the Act and using traditional tools of statutory construction,
5 that the Act does not offer a “very limited” response to flows in the face of the legislative finding
6 that the Delta watershed is “in crisis.” Wat. Code § 85001(a). Resolving this question is purely a
7 matter of statutory construction where courts are the experts.

8 The Council’s findings of fact show that its decision to adopt State Water Resources Control
9 Board (“SWRCB”) flow objectives was also arbitrary and capricious. The Council found that “flow
10 is a master variable ... driving the ecological health of rivers,” B594, and that SWRCB flow
11 objectives allow a “Delta flow regime [that] is generally harmful to many native aquatic species.”
12 B597. Yet it adopted SWRCB flow objectives while refraining from suggesting any content. To
13 resolve this question, the Court need only apply the law to the Council’s facts (which Delta Alliance
14 sets out at section A.2.g, pages 12–13).

15 Delta Alliance shows that even if the Council were permitted to adopt the flow objectives of
16 other agencies, the Council failed to consider critical relevant factors. It failed, among other things,
17 to consider National Marine Fisheries Service and United States Fish and Wildlife Service flow
18 objectives. These federal environmental standards are more protective of the Delta than SWRCB
19 flow objectives. It also relied on factors the legislature did not intend it to consider, including its
20 desire to stand down and allow the BDCP (driven by water exports) to determine Delta flows. We
21 believe that the legislature appointed the Council to be the steward of the Delta and the Act does not
22 allow the Council to withdraw its independent judgment, no matter how altruistic the Council might
23 think its own motives are. Our discussion of the Council’s failure to consider relevant factors and
24 reliance on irrelevant factors is at section A.2.a–e (pages 3–11).

25 **II. ARGUMENT**

26 **A. The Council’s Adoption Of Policy ER P1 Was Arbitrary And Capricious.**

27 **1. Standard of Review: The Council Muddles The Standards Of Review**
28 **Applicable To Delta Alliance’s Arbitrary and Capricious Challenge To Its Flow**
Policy.

1 Under the arbitrary and capricious label, the Council applies what is in substance rational
2 basis review, conflating it with the arbitrary and capricious standard. To show its flow policy was
3 “reasonable” the Council offers *post hoc* justifications that were never articulated by the Council as
4 the basis for its decisions. Under rational basis review, a statute may be upheld under any rational
5 basis that a court or counsel may offer at any time, regardless of whether the legislature ever
6 articulated that reason. *Johnson v. Dep’t of Justice*, 60 Cal.4th 871, 887 (2015). But the Council is
7 not the legislature. “It is well settled that an agency’s action must be upheld, if at all, on the basis
8 articulated by the agency itself.” *S. Cal. Edison v. Pub. Util. Comm’n*, 85 Cal. App. 4th 1086, 1111
9 (2000) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Aut. Ins. Co.*, 463 U.S. 29, 50
10 (1983)). The agency “action must be measured by what the agency did, not by what it might have
11 done.” *Id.* (quoting *Securities Comm’n v. Chenery Corp.*, 318 U.S. 80, 93–94 (1943)). A “court may
12 not accept appellate [or trial] counsel’s *post hoc* rationalizations for agency action.” *Id.* (quoting
13 *State Farm*, 463 U.S. at 50).

14 Because the Council muddles standards of review, Delta Alliance briefly sets out the
15 standard and the important factors that courts consider on arbitrary and capricious review.

16 “The courts exercise limited review of legislative acts by administrative bodies ... [and]
17 [a]lthough administrative actions enjoy a presumption of regularity, this presumption does not
18 immunize agency action from effective judicial review.” *Cal. Hotel & Motel Ass’n v. Indus.*
19 *Welfare Comm’n*, 25 Cal. 3d 200, 211-12 & n.28 (1979) (citing *Citizens to Preserve Overton Park*
20 *v. Volpe*, 401 U.S. 402, 415 (1971) (holding at 401 U.S. at 416 that on arbitrary and capricious
21 review “the court must consider whether the [agency’s] decision was based on a consideration of
22 the relevant factors ... this inquiry into the facts is to be searching and careful [however] the
23 ultimate standard of review is a narrow one.”).

24 This “[C]ourt must ensure ... that [the Council] has adequately considered all the relevant
25 factors, and has demonstrated a rational connection between those factors, the choice made, and the
26 purposes of the enabling statute.” *Cal. Hotel*, 25 Cal. 3d at 212. In making an inquiry into the
27 relevant factors, courts test agency rulemaking against specific factors. *State Farm*, 463 U.S. at 43.
28 “Normally, an agency rule would be arbitrary and capricious if” the agency 1) failed to make “a

1 rational connection between the facts found and the choice made;” 2) failed to base the decision “on
2 a consideration of the relevant factors;” 3) “relied on factors [the legislature had] not intended it to
3 consider;” or 4) “entirely failed to consider an important aspect of the problem.” *Id. See also* 71
4 C.J.S. *Public Administrative Law and Procedure* § 507 (West 2015) (reciting *State Farm* factors
5 and noting that an “agency decision would normally be arbitrary and capricious ... if the agency has
6 relied on factors which Congress or the state legislature has not intended it to consider”).

7 “In a mandamus proceeding, the ultimate question, whether the agency’s action was
8 arbitrary or capricious, is a question of law.” *Shapell Indus. v. Governing Bd.*, 1 Cal. App. 4th 218,
9 233 (1991).

10 **2. The Council’s Choice Not To Include *Even A Suggestion* As To The Content Of
11 Delta Flow Objectives Was Arbitrary And Capricious.**

12 **a. Overview: The Council Failed To Consider The Relevant Factors,
13 Based Its Choice Of ER P1 and ER R1 On Factors The
14 Legislature Did Not Intend It To Consider, And Failed To Make
15 A Rational Connection Between The Facts Found And Flow
16 Policy Choice Made.**

17 Policy ER P1 has two steps. First, it adopts current SWRCB flow objectives as the standard
18 for the Plan, to remain in place unless and until the SWRCB updates its flow objectives. Second,
19 once the SWRCB updates its flow objectives, the updated objectives will be automatically adopted
20 into the Delta Plan. B614.

21 Step one is arbitrary and capricious because “the best available science suggests that
22 currently required [2006 Bay-Delta Plan] flow objectives within and out of the Delta are insufficient
23 to protect the Delta ecosystem.” B614. Therefore step one does not advance the Council’s mandate
24 to “[r]estore Delta flows and channels to support a healthy estuary and other ecosystems.” Wat.
25 Code § 85302(e)(4). At step one, the Council failed to consider the relevant factor, which is the
26 *effectiveness* of the regulation.

27 At step two, the Plan abstained from addressing in any way SWRCB’s content
28 formulation of updated flow objectives. D62 (“The Delta Plan only recommends that the
SWRCB do ... what the law already requires the SWRCB to do, at least regarding flow
objectives. The Delta Plan does not suggest any particular objectives.”). Further, once the

1 updated flow objectives are formulated they will be *automatically* adopted into the Plan
2 without any opportunity for Council adjustment, regardless of their content. B614.

3 The Council’s definition of “flow objectives” is very limited. It does not include
4 many of the SWRCB’s objectives that are essential to restoring Delta flows. It also excludes
5 critical Delta flow objectives of other agencies that are more protective of the Delta than
6 SWRB flow objectives, including the United States Fish and Wildlife Service, and the
7 National Marine Fisheries Service. The Council failed to consider what content it was
8 adopting and what content it was excluding, for its present and foreordained future
9 regulations.

10 The factor that the Council did give overwhelming weight to was one the legislature
11 did not intend it to rely on: that the SWRCB was more competent and suited than the
12 Council to promulgating flow objectives with the long-term goal of restoring Delta flows. In
13 fact, the SWRCB has candidly informed the Council that the long-term measures needed to
14 shape the healthy Delta of the future “are ahead what SWRCB is trying to do now” in
15 updating the flow objectives that the Council has pre-adopted. K178.007.

16 The Council’s entire approach to flows is predicated on its decision to stand aside
17 and allow the BDCP¹ to dictate Delta flow objectives and define the future shape of the
18 Delta. The Act does not appoint the BDCP to this role or anywhere indicate that the Council
19 should defer to BDCP’s aspirations for Delta flows and concomitant increased exports.

20 Finally, all the facts found and articulated at length by the Council run contrary to its
21 choice not to address the content of flow objectives.

22 **b. The Act Did Not Allow The Council To Stand Aside And Defer All**
23 **Decisions About Delta Flows To The BDCP/SWRCB.**

24 The Council took this path because it believed that standing aside in favor of collaboration
25 between the BDCP and SWRCB was the best course it could pursue to bring the BDCP to fruition.

26 _____
27 ¹ As the Court will become aware through other Petitioners’ requests for judicial notice, the Twin Tunnels project has
28 very recently taken a new direction. The State is pushing ahead with the Tunnels. However, to the best of Delta
Alliance’s understanding, the BDCP is no longer the “preferred alternative” for bringing the tunnels to fruition but will
be re-circulated as an alternative still under consideration.

1 With the Council out of the way, the BDCP process would establish Delta flows and then the
2 SWRCB would synchronize its regulatory flow objectives with the BDCP. As Contractors
3 described the process, “the Board will be reviewing its WQCP [Delta flow objectives] in the near
4 term to reflect the initial implementation of the BDCP, and will need to revise it prior to issuing
5 operational permits for the new [BDCP] conveyance” “This two-step approach” is now
6 “reflected in the Delta Plan,” K3779-80 (Contractors urging this approach) because the Council has
7 expressly “determined that the BDCP agencies are in the best position to complete the planning
8 process, including defining acceptable ranges of exports and *through-Delta flows*.” D59 (emphasis
9 added).

10 As the Council points out, the Act directs that the “(BDCP) shall be considered for inclusion
11 in the Delta Plan.” Wat. Code §85320(a). However, in the same paragraphs that acknowledge the
12 BDCP, the Act also directs the Council to make independent judgments about flow requirements.

13 It is the intent of the Legislature to establish an accelerated process to determine
14 instream flow needs of the Delta for the purposes of facilitating the planning
decisions that are required to achieve the objectives of the Delta Plan.

15 For the purposes of informing planning decisions for the Delta Plan and the Bay
16 Delta Conservation Plan, the board [SWRCB] shall, pursuant to its public trust
17 obligations, develop new flow criteria for the Delta ecosystem necessary to protect
public trust resources [“flow criteria report”].

18 Wat. Code §85086(b) & (c)(1)².

19 The flow criteria report is to be used to inform the judgment of *both* the Council and the
20 BDCP. However, as *amicus curiae* DWR put it, the Council’s only judgment as to Delta flows was
21 “[t]he Council’s decision to acknowledge the SWRCB’s central role in setting” Delta flows and
22 then let it go at that. DWR 14: 11–12.

23 A central role of *the Council* is to “[r]estore Delta flows and channels to support a healthy
24 estuary and other ecosystems.” Wat. Code § 85302(e)(4); *see also* B594 (“[w]ater flow is a ‘master
25

26 ² The Council and *amicus curiae* use flow related terminology inconsistently and in ways that
27 muddle the issues. The SWRCB flow criteria report was issued in 2010 and is designed to provide
28 information to decision-makers to be considered in making future regulatory decisions. It has no
regulatory effect. The “flow criteria” are the numeric content of this report. On the other hand,
“flow objectives” are regulatory requirements contained in the SWRCB 2006 Water Quality
Control Plan that specify how much water must be flowing in a given water course at a given time.

1 variable,’ driving the ecological health of rivers”). It is undisputed, in the Council’s own words, that
2 “[c]urrent flow management regulations [SWRCB flow objectives] provide some protection for
3 ecological functions and native species, but the current Delta flow regime is generally harmful to
4 many native aquatic species.” B597. Despite these facts, Twin Tunnel proponent and *amicus curiae*
5 DWR argues that the Council’s refusal to promulgate any flow objectives, or even suggest the
6 content of flow objectives to be promulgated by others, “was not an abuse of discretion.” DWR 14.
7 Delta Alliance disagrees.

8 **c. The Council Cannot Fulfill Its Mission To Restore Delta Flows By**
9 **Echoing SWRCB Flow Objectives.**

10 By the nature of their respective roles, the Council’s responsibility to restore Delta flows
11 cannot be fulfilled by echoing the SWRCB’s pronouncements. The SWRCB is a traditional
12 regulator. It sets requirements, monitors compliance, issues cease and desist orders, levies fines, and
13 prosecutes civil enforcement. It directly reviews projects by granting or denying permits and
14 certifications. Cal. Wat. Code. §§ 13100–13193.9.

15 The Council has no police powers or authority to order anybody to do anything. Its authority
16 is removed from day-to-day compliance issues because its role is to effect fundamental changes to
17 Delta conditions, water system operations, and conveyance and storage infrastructure over a very
18 long time horizon, stretching to the end of this century. Wat. Code § 85302(e)(1) (“[r]estore large
19 areas of interconnected habitats within the Delta and its watershed by 2100.”).

20 The Council will never be called on, as the SWRCB is called upon, to make the day-to-day
21 management decisions needed to maintain the flow of the Sacramento River at Interagency Station
22 No. RSAC101, Rio Vista, at a monthly average of 3,000 cfs in September, or the flow of the San
23 Joaquin River at station RSAN 112, Airport Way Bridge, Vernalis, at 3420 cfs during April in a
24 water year with precipitation classified as above normal. L32771 (table setting out SWRCB flow
25 objectives). These SWRCB flow objectives are not suited to the Council’s mission.

26 On the other hand, the flow objectives recommended for the Plan by the Council’s own lead
27 scientist are suited to the Council’s long-term mission and amenable to reorienting Delta flows
28 towards “more natural functional Delta flows.” B614 (Plan “core strategy” for achieving restored

1 Delta flows.). For example, the charts at G2112.017–2112.018 (developed by the Delta Science
2 Program) depict a flow objective that would limit exports out of the Delta to 25% of the water that
3 flows into the Delta. The chart at 2112.017 shows that a 25% export/inflow ratio superimposed over
4 actual conditions for water years 1990–2000 would result in a total of 64 million acre feet of water
5 being available for export. The actual amount of water exported under extant regulations with
6 existing infrastructure during those years was 47 million-acre feet.

7 The chart at G2112.018 shows the same information for water years 2000–2009, resulting in
8 50 million-acre feet of exports under the 25% ration as opposed to actual exports of 54 million-acre
9 feet under extant regulations. Summing the two charts for the entire period from 1990–2009 results
10 in total water available for export of 114 million-acre feet as opposed to actual exports of 101
11 million-acre feet. Under this scenario, Delta flows would be substantially benefitted *and* the
12 amount of water *available* for export would also be increased.

13 However, this is not a practical standard to impose today because the water available for
14 export does not manifest in an even distribution. The charts show that in one year there will be more
15 water available for export than historical average exports, but in the next year the available water is
16 less than historical exports. G2112.017–2112.018.

17 Currently, in order to meet export needs, between July and January up to 65% of Delta
18 inflows may be exported and between February and June up to 35% of inflows may be exported.
19 L32771. In 14 of the 22 years between 1988 and 2009, flows through the Delta were less than 50%
20 of “unimpaired flow,” that is what they would have been if there were no water diversions.
21 G2112.030. From 1969–2009, San Joaquin River flows in May were only 28% of unimpaired flow.
22 B591. There is an emerging scientific consensus that the “do no harm” threshold for a watershed is
23 to maintain 75% of unimpaired flow. L11937. The Delta has a long way to go.

24 In order to improve the export to inflow ratio, without diminishing net exports, we need to
25 expand storage capacity and improve the operational flexibility of our conveyance systems. We
26 need to be able to capture and store more water in wet years and months when it is available, and
27 convey it to Contractors in dry years and months so they can provide adequate water supplies to
28 urban and agricultural beneficial uses when they need it most. We need to “[i]mprove the water

1 conveyance system and expand statewide storage” as the Act commands. Wat. Code § 85020(f). If
2 we do as the legislature has directed, we will be able to “[s]tore[] floods to ride out droughts (and
3 give the Delta a Break)” as the Plan pithily describes the concept. B434–35. The result of
4 complying with the specific directives of the statute will be a giant step forward toward achieving
5 the coequal goals.

6 This vision of the future cannot be achieved by SWRCB flow objectives, because the
7 SWRCB is anchored to the present by infrastructure and institutional limitations. In a presentation
8 on its flow objectives during the formative period of the Plan, the SWRCB candidly acknowledged
9 that it does not look to the future that the Plan envisions:

10 What will happen 50 years down the road? That is an important and difficult policy
11 decision. The facilities are not designed for changed conditions. ... It is an important
12 consideration but ahead of what SWRCB is trying to do now.” ISB meeting
13 summary January 12–13, 2012, p.7

14 K178.007.

15 The Plan cannot accomplish its mission to shape the future Delta by rote reliance on SWRCB flow
16 objectives that are not designed to address the “important and difficult policy decision[s]”
17 implicated by long-range planning. Rather, it was the Council and the Plan that were designated by
18 the Act to make the difficult policy decisions that are beyond the reach of other agencies.

19 **d. The Council Can Promulgate Regulations That Will Bring About
20 Restored Delta Flows Over Time.**

21 An example flow objective could read something like the following:

22 In order to be consistent with the Delta Plan, a covered action with the potential to
23 impact Delta flows shall not impair the achievement of an export level limited to
24 25% [or 20 % or 30% as the Council would determine] of Delta inflow by 2040 [or
25 2030 or 2050]. Where feasible, a covered action with the potential to impact Delta
26 flows shall advance the goal of achieving an export level limited to 25% of Delta
27 inflow by 2040. For the purposes of this policy, “feasible means capable of being
28 accomplished in a successful manner within a reasonable period of time, taking into
account economic, environmental, legal, social, and technological factors.” 23 CCR
§ 5001(p) (codified Delta Plan regulations defining “feasible”).

29 This example standard would motivate affected parties to expand storage and improve conveyance
30 with an eye toward operating both to harvest water that is currently unavailable because of system
31 limitations. It would integrate with policies for conveyance and storage (that the Council failed
32 entirely to adopt), and the three policies together would satisfy the now unfulfilled mandate that

1 “[t]he Delta Plan shall promote options for new and improved infrastructure relating to the water
2 conveyance in the Delta, storage systems, and for the operation of both to achieve the coequal
3 goals.” Wat. Code § 85304³.

4 e. **Even If It Did Intend ER P1 To Accomplish Restoration Of Delta
5 Flows By Adopting The Pertinent Standards Of Other Agencies,
6 The Council Failed To Consider The Relevant Factors Because
7 ER P1 Omits Most Of The Relevant Standards.**

8 ER P1 is directed only at SWRCB *flow* objectives. “The State Water Resources Control
9 Board’s Bay Delta Water Quality Control Plan *Flow Objectives* shall be used to determine
10 consistency” with the Delta Plan. B614 (emphasis added).

11 The SWRCB promulgates water quality control plans that are required to contain water
12 quality objectives. L32766 (SWRCB 2006 Bay-Delta Water Quality Control Plan) (citing Porter-
13 Cologne Act, Wat. Code § 13241 (“board shall establish ... water quality objectives in water quality
14 control plans”)). Water quality control plans contain several kinds of water quality objectives. For
15 example, there are “narrative objectives,” such as “Salmon Protection” that are expressed by a
16 “narrative,” L32770, and there are “chloride objectives” that are expressed as maximum permissible
17 milligrams per liter. L32768. “[F]low objectives [are] a special kind of water quality objective.”
18 B682. “A flow objective is a water quality objective based on the amount of water (measured in
19 cubic feet per second) flowing in a watercourse at a given time.” *State Water Resources Control
20 Board Cases*, 136 Cal. App. 4th 674, 689 n.3 (2006) (Robie, J.).

21 The Plan’s definition of “flow objectives” agrees with Justice Robie’s definition that a flow
22 objective is a water quality objective that “requires specific flow volumes at certain times:”

23 **flow objectives** Where protection of beneficial uses requires specific flow volumes
24 at certain times, regional water quality control boards may establish flow objectives
25 in water quality control plans. They differ from typical water quality objectives in
26 that they are implemented by State Water Resources Control Board through
27 modifications and limitations of existing or future water rights to make sure those
28 flows are met.

26 ³ Delta Alliance maintains its challenges to the Plan’s lack of conveyance and storage policies as
27 outlined in our opening brief. Delta Alliance 24–35. The Council’s only defense for not enacting
28 any conveyance policy was that the BDCP would be incorporated into the Plan and the Council
would have to accept the tunnels within the BDCP. Therefore, any conveyance policy would be
irrelevant. Now, the State is moving toward a “tunnels only” project that cannot be incorporated
into the Plan. Thus the Council may well be caught with no policy or standard to evaluate most
significant project it will see in its lifetime.

1 B776 (Plan Definitions Section).

2 For purposes of consistency with the Plan, the Council effectively exempted covered actions
3 from complying with many SWRCB objectives that regulate flows for the benefit of fish, including
4 the following: Salmon Protection Objective, which is a narrative objective; Brackish Tidal Marshes
5 of Suisun Bay Narrative Objective; Delta Cross Channel Gate Closure Objective, expressed as
6 when the gates are closed. L32770–71. These objectives are not “flow objectives” as defined by the
7 Plan.

8 Because ER P1 is limited to *SWRCB* flow objectives, flow objectives of federal agencies are
9 not within the purview of ER P1. To be consistent with the Plan, a covered action *does not* have to
10 comply with United States Fish and Wildlife Service flow objectives, which “focus[] primarily on
11 managing flow regimes” in the Delta: limitation on exports to protect pre-spawning adult smelt;
12 limitation on negative flows in Old and Middle San Joaquin River (“OMR flows”); additional OMR
13 flow limitations triggered by water temperature; and specification of fall X2⁴. L11861–2.

14 Covered actions could also be consistent with the Plan and not comply with the following
15 National Marine Fisheries Service flow objectives: flow requirements and cold water pool
16 management requirements to protect Chinook salmon,⁵ steelhead, and green sturgeon; Delta Cross-
17 Channel Gate operational requirements; net negative flow toward export pump requirements; and
18 export limitations for April and May to protect Chinook salmon and steelhead. The NMFS describes
19 the above requirements “as the minimum flows necessary to avoid jeopardy [to endangered
20 species].” L11862–63.

21 There is no evidence in the record as to why the Council decided to exclude these crucial
22 flow objectives from ER P1. When deciding to adopt flow objectives of other agencies (instead of
23

24 _____
25 ⁴ X2 is “the horizontal distance in kilometers up the axis of the estuary from the Golden Gate
26 Bridge to where the tidally averaged near-bottom salinity is 2 practical salinity units (psu),”
27 L11858. X2 is managed by releasing more water from upstream reservoirs and/or exporting less
28 water, and thereby increasing freshwater river flows which push the salinity zone further
downstream.

⁵ Wat. Code § 85302(c)(5) calls for the Council to promote “conditions conducive to ... doubling
salmon populations.”

1 developing its own) the Council failed to consider the objectives of the United States Fish and
2 Wildlife Service and the National Marine Fisheries Service, which are more protective of the Delta
3 than SWRCB flow objectives. *See, generally, San Luis & Delta-Mendota Water Auth. v. Jewell*,
4 747 F.3d 58 (9th Cir. 2014) (describing United States Fish and Wildlife Service and the National
5 Marine Fisheries Service flow objectives for the Delta). The Council, therefore, failed to consider
6 the relevant factors.

7 **f. Summation Of The Council's Failure To Consider The Relevant**
8 **Factors And Reliance On Factors The Legislature Did Not Intend It To**
9 **Consider In Adopting Policy ER P1 And Recommendation ER R1.**

10 The Council decided to stand aside because it thought itself not competent to develop flow
11 objectives in the face of the BDCP and SWRCB. In pursuing this course, the Council's actions were
12 arbitrary and capricious because the Council relied on factors the legislature did not intend it to
13 consider: 1) that the BDCP/SWRCB were better equipped than the Council to address Delta flows;
14 and 2) that bringing the BDCP to fruition was more important than the Council's duty to address
15 flows. The Council also failed to consider relevant factors by: 1) not recognizing the difference
16 between its role (long-term change) and the SWRCB's role (current enforcement); 2) not
17 considering the ineffectiveness of current SWRCB flow objectives; 3) not considering the
18 SWRCB's narrative flow objectives; 4) not considering the flow objective of the National Marine
19 Fisheries Service and United States Fish and Wildlife Services; and 5) not considering the
20 opportunity to exercise its own judgment at any point by setting future updated SWRCB flow
21 objectives for *automatic* adoption into the plan.

22 *See, e.g., Shapell Indus.* 1 Cal. App. 4th at 237 (striking down agency's legislative act in
23 traditional mandamus proceeding because agency failed to apply "the relevant factor"); *Warmington*
24 *Old Towne Assocs., L.P. v. Tustin Unified School Dist.*, 101 Cal. App. 4th 840, 862 (2002) (striking
25 down "quasi-legislative act" in traditional mandamus proceeding because the record "does not
26 reflect that the School District adequately considered all the relevant factors ... [t]his we decide as a
27 question of law, not a question of fact."); *McBail & Co. v. Solano Cnty. Local Agency Formation*
28 *Comm'n*, 62 Cal. App. 4th 1223, 1230 (1998) (where agency relied on factor legislature did not
intend it to consider, agency failed to "demonstrate[] a rational connection between the basis for its

1 decision and the purposes of the enabling statute.”); *see also id. at* 1227 (court reviewed “legislative
2 acts of administrative bodies” by “ordinary mandamus”) (citing CCP § 1085).

3 **g. The Council Failed To Make A Rational Connection Between The Facts**
4 **Found And The Flow Objective Choice Made.**

5 The Council’s choice not to address the content of flow objectives is contrary to *all* the facts
6 found by the Council.

7 The facts found by the Council are:

8 [R]eliable water supplies have been associated with artificially stabilized flows and a
9 complex human-made system of infrastructure that includes dams, levees, and
10 channelized rivers and sloughs. Yet healthy rivers and estuaries and the native
11 species that live in them depend on naturally variable water flows and a dynamic
12 landscape. B585.

13 More natural variations in water flows and conditions make aquatic habitats, tidal
14 marshes, and floodplains more dynamic, encourage survival of native species, and
15 resist invasive weeds and animal pests. B585.

16 To restore the Delta ecosystem, Californians will need to use water management
17 facilities in new ways. Reservoirs will need to hold and release water for ecosystem
18 purposes as well as for water users. B586.

19 More natural functional flows could include diverting more flow in wet years and
20 less flow in dry years, as described in Chapter 3. B600.

21 The once pronounced seasonal and year-to-year variability of river flows has given
22 way to more stable, artificially regulated conditions. B590.

23 [Ecosystem] stressors include altered flows B590.

24 Habitat for native species has been shaped in the past by natural cycles of river
25 flows. Since the 1960s, our water system, with its upstream reservoirs, diversions,
26 and other management facilities, has changed these patterns in two ways. First,
27 seasonal flows are much less variable and encourage nonnative fish and vegetation,
28 which can crowd out native species that thrive in a more varied environment.
Second, peak flows now come at lower magnitude and occur earlier on the San
Joaquin, this shift affects water temperature, salinity, and access to habitat, causing
stress on native species. B591.

Delta management needs to include actions that mimic, to some extent, the historic
natural variability. B593.

[K]ey principles ... (1) flow determines physical habitat, (2) aquatic species have
evolved life history strategies based on natural flow regimes, ... (4) invasion and
success of nonnative species is facilitated by flow alterations. Altered flow regimes
have been shown to be a major source of degradation to aquatic ecosystems
worldwide. B596.

And significantly:

1 Water flow is a “*master variable*,” driving the ecological health of rivers and their
2 ability to support valued environmental services ... [e]stuarine species are adapted to
complex natural flow B594 (emphasis added).

3 And, in the face of all the above:

4 Current flow management regulations [SWRCB 2006 Water Quality Control Plan]
5 provide some protection for ecological functions and native species, but the current
Delta flow regime is generally harmful to many native aquatic species. B597.

6 These facts do not support the Council’s choice to adopt SWRCB flow objectives--flow
7 objectives that the Council found are failing the Delta and result in Delta flows that are “generally
8 harmful to many native aquatic species.” B597.

9 The Council’s briefing proffers the narrative sections of the Plan to make up for Policy ER
10 P1’s shortcomings. The Council points out that it presented a lot of useful information in the
11 contextual discussions of flow, including the above-listed factual findings. *Amicus Curiae* Simitian
12 points out that the Council held scores of public meetings and received copious testimony from the
13 public and scientific experts. All true. The factual findings are the result of almost three years of
14 consideration. Delta Alliance accepts all the above-listed factual findings.

15 However, the Council’s decision to adopt ER P1 was arbitrary and capricious because it
16 failed to make “a rational connection between the facts found and the choice made.” *State Farm*,
17 463 U.S. at 43. “[E]vidence does not relate to a decision in the abstract, but must be connected to
18 the basis or reason for that decision.” *McBail & Co. v. Solano Cnty. Local Agency Formation*
19 *Comm’n*, 62 Cal. App. 4th at 1227. The Council has not “demonstrated a rational connection
20 between ... the choice made and the purposes of the enabling statute,” *Cal. Hotel*, 25 Cal. 3d at 212.
21 The purpose of the Act is *not* to maintain the failing status quo, but rather to “[r]estore Delta flows
22 and channels to support a healthy estuary and other ecosystems.” Wat. Code § 85302(e)(4). No facts
23 support a conclusion that the Council’s choice of Policy ER P1 and recommendation ER R1 will
24 accomplish the legislative goal of restoring Delta flows.

25 **h. The Council’s New Enforcement Mechanism Argument Is A Post Hoc**
26 **Rationalization That Runs Counter To The Evidence Before The**
Agency.

27 The only claim the Council makes in favor of ER P1 accomplishing something is that it
28 provides “a new enforcement mechanism” for the SWRCB’s flow objectives. Council 60.

1 (“[A]gencies proposing covered actions must comply with ER P1. That helps address concerns that
2 the SWRCB may not have been doing enough to enforce its flow objectives.”). Council 60. The
3 new enforcement mechanism argument is a *post hoc* rationalization that was never advanced or
4 considered by the Council at the time it made its decision to adopt ER P1. “It is well settled that an
5 agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” *S. Cal.*
6 *Edison*, 85 Cal. App. 4th at 1111 (internal citations and quotation marks omitted). The agency
7 “action must be measured by what the agency did, not by what it might have done.” *Id.* A “court
8 may not accept appellate [or trial] counsel’s *post hoc* rationalizations for agency action.” *Id.*

9 The Council repeatedly stated that the SWRCB was effective at enforcing its flow objectives
10 and that the Council was comfortable relying on the SWRCB to do so. B776 (“flow objectives ...
11 are implemented by the State Water Resources Control Board through modifications and limitations
12 of existing or future water rights *to make sure* these flows are met.”) (emphasis added); K4332
13 (Council looking to “the SWRCB [to] complete the work to develop, implement, *and enforce* new
14 updated flow requirements”); K4331 (Council noting that “California law grants the SWRCB
15 considerable authority in the areas of water rights, water quality protection, and the setting of water
16 flow criteria.”).

17 In a footnote, the Council cites Central Delta’s Petition as authority supporting the existence
18 of “regularly occurring violations of its [SWRCB’s] water quality objectives” that the SWRCB does
19 not redress. Council 60 (citing Central Delta Pet. ¶ 15). Central Delta’s Petition, in turn, discusses
20 the southern Delta “salinity standard.” Central Delta Pet. ¶ 15. The footnote also cites testimony of
21 Water Master Craig Wilson (“Wilson”) opining that the “SWRCB’s water right enforcement
22 authority is weak.” Council 60 n.37. Delta Alliance takes the Council’s evidence in turn.

23 **i. Wilson’s Presentation To The Council.**

24 The term “flow objectives” does not appear in the transcript of Wilson’s remarks. Transcript
25 Excerpts from the Administrative Record, filed with Council’s Answering Brief (“Transcript
26 Excerpts”). The report to the SWRCB authored by Wilson, that was the subject of his presentation
27 to the Council, does not use the term “flow objectives,” much less suggest that the Council could, or
28 should, do anything about enforcement of flow objectives. Transcript Excerpts.

1 Wilson did opine that the “SWRCB’s water right enforcement authority is weak.” Transcript
2 Excerpts 7: 12–15. The concerns related to water rights enforcement described in the report involve
3 water right monitoring and reporting, access for investigations, civil liability for failure to file
4 reports, and service of process issues. L21520–22. Wilson’s recommendations to address these
5 problems are directed to the SWRCB, and are in the form of proposed amendments to portions of
6 the Water Code administered by the SWRCB. L21523–26.

7 The proposed amendments address service of process, and compliance with monitoring and
8 reporting requirements. L21521 (report, need for “[s]ervice options”); L21525 (proposed
9 amendments, “Service of Process”); L21520 (report, currently “no Administrative Civil Liability
10 (ACLs) for failure by licensees to provide required reports”); L21523 (proposed amendments,
11 “Civil Liabilities for Permit/License Term Violations and for Violations of Monitoring
12 Requirements”).

13 Flow objectives, the amount of water flowing in a given Delta watercourse at a given time,
14 are met by controlling releases of water from upstream reservoirs operated by DWR and the United
15 States Bureau of Reclamation. J047067.351. Whatever its shortcomings, DWR is not known to
16 evade service of process. Delta Alliance would gladly yield a few minutes of its time at oral
17 argument so *Amicus Curiae* DWR can inform the Court whether or not it ducks service in order to
18 avoid prosecution for illegal activity.

19 **ii. The Southern Delta Salinity Standards Are Not Flow Objectives**
20 **And Are Not Addressed By ER P1.**

21 The Council implies that ER P1 will help address Central Delta’s concerns about southern
22 Delta salinity standards. Council 60 (citing Central Delta Pet. ¶ 15). Of course, Central Delta’s
23 Petition for a Writ of Mandate was not before the Council and is not a part of the record. In any
24 event, ER P1 does not address southern Delta salinity standards. ER P1 is directed only at SWRCB
25 *flow* objectives. “The State Water Resources Control Board’s Bay Delta Water Quality Control Plan
26 *Flow Objectives* shall be used to determine consistency” with the Delta Plan. B614 (emphasis
27 added). The southern Delta salinity objectives are water quality objectives, but they are not flow
28 objectives.

1 As discussed in detail at section A(2)(e) above, “[a] flow objective is a water quality
2 objective based on the amount of water (measured in cubic feet per second) flowing in a
3 watercourse at a given time.” *State Water Resources Control Board Cases*, 136 Cal. App. 4th at 689
4 n.3. The SWRCB southern Delta salinity objectives are expressed as maximum permissible
5 electrical conductivity “EC” at specified locations at specified times. L32769⁶. They are not flow
6 objectives within the Council’s definition of that term as used in ER P1.

7 **B. The Council Has Failed To Refute Delta Alliance’s Showing That Policy ER P1**
8 **Impairs The Scope of The Act Because It Does Not Advance The Goal Of Restoring**
9 **Delta Flows.**

10 **1. Standard of Review: The Council Fails To Address Delta Alliance’s De Novo**
11 **Challenge.**

12 The Council does not directly address Delta alliance’s *de novo* challenge to ER P1 on
13 grounds that it conflicts with and impairs the scope of the Act. Instead it shapes all its arguments as
14 a deferential reasonableness inquiry. “Administrative regulations that alter or amend the statute or
15 enlarge or impair its scope are void. On this issue of statutory interpretation, we exercise de novo
16 review ... [because] the courts are the ultimate arbiters of the construction of a statute.” *Pulaski v.*
17 *Cal. Occupational Safety and Health Standards Bd.*, 75 Cal. App. 4th 1315, 1332 (1999) (internal
18 citations and quotations omitted). The Council also protests, repeatedly, that it was exercising the
19 broad discretion enjoyed by administrative agencies. Council 57 (“Council acted well within that
20 discretion”); 58 (“Act gives the Council broad discretion”). However, “[a]dministrative regulations
21 that violate acts of the Legislature are void and no protestations that they are merely an exercise of
22 administrative discretion can sanctify them.” *Agric. Labor Relations Bd. v. Superior Court*, 48 Cal.
23 App. 4th 1489, 1510 (1996).

24 **2. The Council’s Interpretation Of The Act’s Flow Provisions As “Very Limited”**
25 **Impairs The Scope Of The Act And The Narrative Portions Of The Plan Do Not**
26 **Satisfy The Act.**

27 **a. The Council’s Construction Of The Words “To Assist In Guiding”**
28 **Conflicts With The Act’s Stated Objectives, The Underlying Legislative**
Purpose Of The Act, And The Legislature’s Declaration That The Evil
To Be Remedied By The Act Is The Delta’s Ecosystem Crisis.

⁶ EC is a reliable proxy for salinity and is used as the parameter for several SWRCB salinity objectives.

1 The Council argues that its very limited response to flows satisfies the Act because “the
2 Act’s requirements concerning flows are very limited.” Council 57. (quoting Wat. Code § 85300(a))
3 (“[t]he Delta Plan shall include subgoals and strategies *to assist in guiding* state and local agency
4 actions related to the Delta”) (emphasis added). The Council stresses that the words “to assist in
5 guiding” indicate that the Act may be satisfied by the Council providing nonbinding guidance (that
6 does not even rise to the level of an articulable concrete recommendation) to state and local
7 agencies. Council 59 (Act satisfied because “the Plan’s flow provisions provide extensive
8 [nonbinding] guidance.” (citing B600 narrative)).
9

10 The Council applies the phrase “[t]he Delta Plan shall include subgoals and strategies to
11 assist in guiding state and local agency actions related to the Delta,” found in Section 85300(a), to
12 limit the flow restoration subgoal at Section 85302(e)(4). Council 57. However, Section 85300(a) is
13 not specific to the flow restoration subgoal, but applies generally to Plan “subgoals and strategies.”
14 Wat. Code § 85300(a). If Section 85300(a) limits the flow restoration subgoal to providing general
15 nonbinding guidance to other agencies, without any implementation by the Council, then it similarly
16 limits the entire set of ecosystem restoration subgoals. The ecosystem subgoals are: 85302(e)(1)
17 (restore large areas of interconnected habitats); (e)(2) (establish migratory corridors along Delta
18 channels); (e)(3) (promote diverse native species populations by reducing harm from invasive
19 species); (e)(4) (restore Delta flows); (e)(5) (improve water quality); and (e)(6) (restore habitats for
20 migratory birds).

21 The legislature’s call was to promulgate a “legally enforceable Delta Plan,” that is “a
22 governance structure,” Wat. Code § 85001(c), and is urgently needed because the Delta watershed
23 is “in crisis.” Wat. Code § 85001(a). It formulated the coequal goal of “protecting, restoring, and
24 enhancing the Delta ecosystem” as one of the two pillars of the Act. Achieving the six ecosystem
25 restoration subgoals of Section 85302(e) is the legislative prescription for resolving the ecosystem
26 crisis. The Council’s sweeping limitation, founded on its interpretation of the words “to assist in
27 guiding,” is inconsistent with the Act’s overarching objective of remedying the ecosystem crisis.
28

1 The Council entirely on one statutory phrase in one code section (§85300(a)), taken in
2 isolation, to support its very limited response to the Act. However, parts of a statute cannot be
3 plucked out and read in isolation to produce a litigant’s desired result. “The meaning of the words
4 of a statute ... can only be determined with reference to the context in which the words are used; that
5 is, with reference to such purpose as may be discerned from examining the entire enactment of
6 which the words are part.” *Leslie Salt Co. v. San Francisco Bay Conservation and Dev. Comm’n*,
7 153 Cal.App.3d 605, 614 (1984)); *see also Curle v. Superior Court*, 24 Cal. 4th 1057, 1063 (2001)
8 (Courts “consider portions of a statute in the context of the entire statute and the statutory scheme of
9 which it is a part” in order to determine legislative intent.).

10 Most relevant to statutory construction in this matter, it is “firmly established [that] ... in
11 analyzing the legislative usage of [words] ... the objective sought to be achieved by a statute ... is of
12 prime consideration in the word’s interpretation [and] ... the one which will best attain the purposes
13 of the statute should be adopted, even though the ordinary meaning of the word is thereby enlarged
14 or restricted” by that meaning. *People ex rel. San Francisco Bay Conservation & Dev. Comm’n v.*
15 *Town of Emeryville*, 69 Cal.2d 533, 543–44 (1968) (internal quotations omitted).

16 There is nothing in the words or concepts “assistance” and “guidance” that prevents them
17 from being carried out by mandatory and broad regulation. *See, e.g., E.I. du Pont de Nemours &*
18 *Co. v. Tran*, 430 U.S. 112, 116 (1977) (The EPA Administrator “was to publish regulations
19 providing guidance for effluent limitations on existing point sources [of nationwide pollution].”);
20 *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 360 (2003) (Rehnquist, J., dissenting),
21 *overruled on other grounds by Citizens United v. Federal Elections Comm’n*, 558 U.S. 310 (2010)
22 (“those regulations assist the public in evaluating the message transmitted.”); *Turner v. Safley*, 482
23 U.S. 78, 106 (1987) (“the mail regulation assisted him in his duties”); *U.S. v. Villamonte-Marquez*,
24 462 U.S. 579, 591 (1983) (“They allow for regulation of imports and exports assisting, for example,
25 government officials in the prevention of entry” of illegal goods.).

26 Because “assistance” and “guidance” do not preclude robust, binding, regulatory action,
27 “assist in guiding state and local agency actions” should therefore be given the meaning consistent
28 with the Act’s basic objective: robust action to restore the Delta ecosystem through “a legally

1 enforceable Delta Plan.” Wat. Code § 85001(c). *See* CCP § 4 Code Commission Notes (for “the
2 purpose of ascertaining” the “will of the Legislature, as expressed in a statute ... above all, the evil
3 aimed at and the remedy intended to be applied [are to be resorted to]”); *People ex Rel. San*
4 *Francisco Bay Conservation and Dev. Comm’n v. Emeryville*, 69 Cal.2d at 543 (“the objective
5 sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in
6 [statutory] interpretation”); *Blumenfeld v. San Francisco Bay Conservation and Dev. Comm’n*, 43
7 Cal.App.3d 50, 56 (1974) (“laws providing for the conservation of natural resources are of great
8 public and remedial importance and thus, are given a liberal construction.”); *Curle v. Superior*
9 *Court.*, 24 Cal. 4th at 1063 (California courts “consider portions of a statute in the context of the
10 entire statute and the statutory scheme of which it is a part ... in pursuance of the legislative
11 purpose.”).

12 The Council’s interpretation of the Act is due “respectful non-deference” and “is an issue of
13 law subject to independent review.” *Diageo-Guinness USA, Inc. v. State Bd. of Equalization*, 205
14 Cal.App.4th 907, 915 (2012) (striking down regulations on independent review as conflicting with
15 enabling statute); *Pulaski v. Cal. Occupational Safety and Health Standards Bd.*, 75 Cal.App.4th at
16 1338–39 (striking down Board’s workplace regulations on *de novo* review because even though the
17 agency provided a reasonable explanation for its actions, the regulations were “inconsistent with the
18 mandate of section 6357 ... [and] an administrative agency may not usurp the legislative function,
19 no matter how altruistic its motives are.”) (quoting *City of San Joaquin v. State Bd. of Equalization*,
20 9 Cal.App.3d 365, 374 (1970)); *Ass. of Cal. Ins. Cos. v. Jones*, 235 Cal.App.4th 1009, 1026–36
21 (2015) (striking down Insurance Commissioner’s regulations on *de novo* review); *Friends of*
22 *Oceano Dunes, Inc. v. San Luis Obispo Cnty. Air Pollution Control Dist.*, 235 Cal.App.4th 957,
23 963–66 (2015), *as modified on denial of reh’g* (Apr. 23, 2015) (striking down Air District’s
24 regulations as a question of law, using an “independent judgment” standard of review).

25 On *de novo* review, employing traditional tools of statutory construction, the Act does not
26 support the Council’s litigation position and compels the conclusion that rather than implementing
27 the Act, the Plan impairs the scope of the Act. The legislature’s expectation for restoring Delta
28 flows was not very limited.

1 **b. The Act’s Flow Provisions Call For Action And The Plan’s Generalized**
2 **Background Discussions, That Do Not Even Rise To The Level Of**
3 **Recommendations, Do Not Satisfy The Act.**

4 The shaded box at B600, along with the other narrative passages relied on by the Council,
5 are defined by the Plan as “provid[ing] subject matter context and rationale” for the Council’s
6 choice of recommendations and policies. B505. The Plan’s recommendations and policies are found
7 at the end of each chapter and are labeled as such. B614–620. These recommendations and policies
8 are the Plan’s articulated action elements. B505 (Plan strategies are “broken down into actions: the
9 policies and recommendations.”); *see also* N204 (“collectively these regulatory policies will further
10 the legislative intent” of the Act). The narrative cited by the Council to show that it provided for
11 action, by content and by definition, does not call on anyone to take any actions.

12 The Act calls for implementation, not discussion. First, section 85300(a) directs that the
13 “[C]ouncil *shall* ... commence implementation of the Delta Plan pursuant to this part that furthers
14 the coequal goals.” Next, section 85302(a) directs that “*implementation of the Delta Plan shall*
15 *further the restoration of the Delta ecosystem,*” and section 85302(e) directs that the following
16 subgoals “shall be included in the Delta Plan” as integral components of furthering Delta ecosystem
17 restoration, including the subgoal at section 85302(e)(4), which is “[r]estore Delta flows and
18 channels to support a healthy estuary and other ecosystems.” (all emphasis added).

19 Read from beginning to end, the Act requires *implementation* of the flow restoration
20 subgoal. To “implement” means to “CARRY OUT, ACCOMPLISH; *especially*: to give practical
21 effect to and ensure of actual fulfillment by concrete measures; to begin to do or use (something,
22 such as a plan); to make (something) active or effective.” Merriam-Webster’s Online Dictionary
23 (2015). Ensuring actual fulfillment of the coequal goals or any of the legislative objectives of the
24 Act by concrete measures is what the Council explains the Plan *will not do*. “The Delta Plan’s
25 likelihood of nudging already considered projects forward, and the Delta Plan’s degree of influence
26 on future undefined projects, is unclear.” D6915. “How much influence the Council will have is
27 unclear.” *Id.*

1 The shaded box at B600 and other generalized educational narratives cannot undo the
2 Council’s well-considered decision *not* to take action on flows because it did not want to interfere
3 with the BDCP.

4 **c. The Provisions Offered By The Council In Other Portions Of The Plan
Are *Post Hoc* Rationalizations And Do Not Restore Flows.**

5 The Council also points to Plan provisions in non-flow sections of the Plan and claims they
6 advance the restoration of flows. Council 61 (arguing that recommendation ER R2 also “helps
7 restore Delta flows and channels.”). Turning to ER R2 makes clear that it is a habitat
8 recommendation. B615–16. It follows the heading “Restore Habitat.” B615. ER P3 is also relied on
9 by the Council. Council 61. ER P3 is also clearly labeled as, and is, a habitat policy. B615–16. The
10 Council also cites to ER P5. Council 61. There is no ER P5. The Council likely meant to refer to ER
11 R5, a recommendation. B619. ER R5 is a habitat recommendation, and at that, only asks another
12 agency to update its plan for managing marshlands. B619.
13
14

15 ER P1 and ER R1 occur in the section titled “Create More Natural Functional Flows.” B614.
16 ER P1 and R1 are the Council’s response to restoring Delta flows. The issues addressed in some
17 habitat policies and recommendations will interact with flow in complex ways. However, they do
18 not restore flow. They do not address the timing and quantity of water available for instream flow.
19 Delta flows cannot be restored until instream flow is addressed. These Habitat measures cannot
20 make up for the failings of ER P1 and ER R1, and they cannot have their desired benefit until flow
21 is restored to interact with restored habitat.
22

23 **d. The Council’s One-Step-At-A-Time Defense For Its Incomplete
24 Response To The Act Fails Because Where A Statute Mandates
25 Promulgation Of Regulations By A Date Certain The Agency’s Must
Give A Complete Response In Compliance With Statutory
Requirements.**

26 The Council argues that it “took a balanced one-step-at-a-time approach” and can do more
27 later to satisfy the Act. Council 57. However, the Act mandates that “[o]n or before January 1,
28 2012, the council shall develop, adopt, and commence implementation of the Delta Plan.” Wat.

1 Code § 85300(a). When a statute mandates issuance of regulations by a date certain, the agency
2 must satisfy the minimum requirements of the statute on the first pass. *Sierra Club v. U.S. Envtl.*
3 *Protection Agency*, 992 F.2d 337, 346 (D.C. Cir. 1993) (In “cases in which an agency has in fact
4 acted before a compulsory deadline, but is alleged nonetheless to have fallen short of statutory
5 requirements ... when the deadline for issuing regulations has passed, the regulations promulgated to
6 date constitute the agency's complete response in compliance with the statutory requirements.”)
7 (internal citations and quotations omitted); *In re Bluewater Network*, 234 F.3d 1305, 1314 (D.C.
8 Cir. 2000) (“[W]hen the statutory deadline for issuing regulations has passed, the promulgated
9 regulation must be deemed the agency’s complete response in compliance with the statutory
10 requirements ... even if the agency promulgates additional rules sometime in the future” in further
11 response to the statute.) (internal citations and quotations omitted).

12 Of course the Council can amend, modify, and strengthen its regulations as time goes by and
13 experience is gained. But it was required to satisfy the *minimum* requirements of the Act with the
14 regulations promulgated and it failed to do so.

15 **C. The Council’s Admission That The BDCP Exemption Rule Is Invalid Invalidates The**
16 **PEIR Because The PEIR Relied On The Rule To Determine The Scope Of Analysis.**

17 Delta Alliance argued that the “BDCP Exemption Rule” was an invalid underground
18 regulation. Delta Alliance 8–16. The Council now concedes that the BDCP Exemption Rule was
19 invalid: “The Council agrees” with Delta Alliance because “[t]o be enforceable, the Council would
20 need to adopt the language as a regulation.” Council 56. The Council then promises the Court that it
21 “will not enforce the language” unless and until it re-adopts it in compliance with APA procedures.
22 Council 56.

23 In the face of “a solid case” against it, the Council then “slinks away on the eve of
24 judgment” by implying that it was merely musing about perhaps adopting the BDCP Exemption
25 Rule some day. *Graham v. DaimlerChrysler*, 34 Cal.4th 553, 574 (2004) (quoting *Buckhannon*
26 *Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 618
27 (2001)). The Council posits that the Rule was one of several “potential path[s] forward for how to
28

1 address [consistency certification of BDCP] projects” and “could be adopted as a regulation if
2 needed in the future.” Council 56.

3 Even if a promise to the Court in a legal brief not to enforce an invalid regulation had any
4 legal effect, the BDCP Exemption Rule is still an underground regulation. The APA expressly
5 prohibits administrative agencies from *issuing* anything that meets the APA definition of regulation,
6 whether or not the regulation is ever enforced. Government Code section 11340.5(a) provides that:

7 No state agency shall issue, utilize, enforce, or attempt to enforce [anything] ...
8 which is a regulation as defined in Section 11342.600, unless the [regulation] ... has
9 been adopted as a regulation and filed with the Secretary of State pursuant to this
chapter.

10 The legislature’s specification of separate prohibitions in the disjunctive that an agency shall not
11 “issue” or “utilize” or “enforce” or “attempt to enforce” means that no enforcement or attempted
12 enforcement is required to run afoul of the statute once the underground regulation is issued.

13 The Council’s claim that it did not intend the Rule as a statement of agency policy is
14 inconsistent with the facts. The Council’s treatment of the consistency certification process occupies
15 half of one page in the Plan. B517. First there is a description of the consistency certification
16 process as provided by the Council’s duly adopted regulations. Then there is the BDCP Exemption
17 Rule, exempting BDCP implementation projects from that process:

18 **Bay Delta Conservation Plan Covered Activity Consistency Certification**

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

23 B517 (emphasis added).

24 There is no discussion of alternative courses or possible future regulations as the Council
25 argues, without any citation to anything in the record, in its brief. The Rule’s language is mandatory
26 and directive, employing “must” and “shall” to convey its intent.

1 The Rule appoints the Department of Fish and Wildlife (“DFW”) to verify that BDCP
2 implementation projects are consistent with, and only with, the BDCP. DFW, citing to the Rule’s
3 text, understood the Rule stated there to be regulatory, not a discussion:

4 The proposed *regulations* do not describe the “short form” certification of
5 consistency *that applies* to qualifying “covered activities” under the Bay Delta
6 Conservation Plan (BDCP) if it is approved and incorporated into the Delta Plan (see
7 Final Draft Delta Plan, p. 59).

8 D3371 (emphasis added). The Council’s contemporaneous treatments of the Rule present it as
9 settled agency policy for future application:

10 After BDCP’s incorporation, an agency proposing a covered action that is included
11 in the BDCP or qualifies for credit under the BDCP must file a consistency
12 certification finding only that the covered action is consistent with the BDCP. The
13 Council retains the authority upon appeal to find the covered action inconsistent with
14 the BDCP and therefore the Delta Plan.

15 K3244; *see also* K4309 (same).

16 The Council relied on the rule to determine the scope of analysis in the PEIR. The “PEIR
17 does not evaluate the potential environmental consequences of various BDCP options that DWR
18 may be considering.” D59 (Responses to Comments on the Draft PEIR, Master Response 1: Project
19 Description). Many commenters on the PEIR criticized the Council for this stance and for failing to
20 analyze the effects of Plan policies on BDCP implementation projects. The Council replied, relying
21 on the BDCP Exemption Rule, that there was no basis for analyzing these effects because Plan
22 Policies do not apply to BDCP projects:

23 The Council also does not agree that Delta Plan policies and recommendations that
24 may affect new intakes, diversions, and habitat restoration projects in the Delta (WR
25 R3, WR R12 through WR R15, ER P2 through ER P4, ER R1 through ER R3)
26 constitute specific policies and recommendations regarding the BDCP. On the
27 contrary, the Delta Plan does not make any recommendations or contain any policies
28 about the content of the BDCP. Once the BDCP is incorporated into the Delta Plan,
projects implementing the BDCP must be presumed to be consistent with the BDCP
and the Delta Plan if the certification of consistency includes a statement from the
DFW that the proposed action is consistent with the BDCP, *regardless of any
potentially conflicting Delta Plan policies* or recommendations. Final Draft Delta
Plan, p. 59.

D60–61 (emphasis added).

In other words, because the BDCP is immune from Plan policies, those policies do not affect
it and therefore there is no basis for analyzing the effect of Plan policies on the BDCP. As it stands

1 **SERVICE LIST VIA ELECTRONIC MAIL**

2 **Attorneys for Respondent/Defendant Delta Stewardship Council for all the Delta Stewardship**
3 **Cases:**

4 Deborah M. Smith, Deputy Attorney General (deborah.smith@doj.ca.gov)
5 Jeremy Brown (Jeremy.brown@doj.ca.gov)
6 Office of the Attorney General
7 1300 I Street, Suite 125
8 P.O. Box 944255
9 Sacramento, CA 94244-2550

10 ***California Water Impact Network, Friends of the River, California Sportfishing Protection***
11 ***Alliance, AquAlliance, Restore the Delta, and Center for Biological Diversity v. Delta***
12 ***Stewardship Council***

13 **Attorneys for Petitioner Friends of the River:**

14 E. Robert Wright (bwright@friendsoftheriver.org)
15 Friends of the River
16 141 20th Street, Suite 100
17 Sacramento, CA 95811

18 **Attorneys for Petitioners California Water Impact Network, California Sportfishing**
19 **Protection Alliance, AquAlliance, and Restore the Delta:**

20 Michael B. Jackson (mjatty@sbcglobal.net)
21 Attorney at Law
22 429 West Main Street, Suite D
23 P.O. Box 207
24 Quincy, CA 95971

25 **Attorneys for Petitioner Center for Biological Diversity:**

26 Adam Keats (akeats@biologicaldiversity.org)
27 Chelsea Tu (ctu@biologicaldiversity.org)
28 Center for Biological Diversity
351 California Street, #600
San Francisco, CA 94104

Central Delta Water Agency, South Delta Water Agency, Lafayette Ranch, Inc., Local Agencies
of the North Delta and Cindy Charles v. Delta Stewardship Council

Attorneys for Petitioner Local Agencies of the North Delta:

Osha Meserve (osha@semlawyers.com)
Patrick M. Soluri (patrick@semlawyers.com)
Soluri Meserve, a Law Corporation
1010 F Street, Suite 100
Sacramento, CA 95814

Attorneys for Petitioners Central Delta Water Agency, Lafayette Ranch, Inc., and Cindy
Charles:

1 Dante John Nomellini (ngmplcs@pacbell.net)
2 Dante John Nomellini, Jr. (dantejr@pacbell.net)
3 Daniel. A. McDaniel (dampc@pacbell.net)
4 Nomellini, Grilli & McDaniel
5 Professional Law Corporation
6 235 East Weber Avenue
7 Stockton CA 95202

8 John H. Herrick (jherrlaw@aol.com)
9 Law Office of John H. Herrick
10 4255 Pacific Avenue, Suite 2
11 Stockton, CA 95219

12 S. Dean Ruiz (dean@hpllp.com)
13 Harris, Perisho & Ruiz
14 Brookside Corporate Center
15 3439 Brookside Road, Suite 210
16 Stockton, CA 95219

17 Thomas H. Keeling (tkeeling@freemanfirm.com)
18 Freeman Firm
19 1818 Grand Canal Boulevard, Suite 4
20 Stockton, CA 95207

21 *City of Stockton v. Delta Stewardship Council*

22 **Attorneys for Petitioner City of Stockton:**

23 Steven A. Herum (sherum@herumcrabtree.com)
24 Herum Crabtree Suntag
25 A California Professional Corporation
26 5757 Pacific Avenue, Suite 222
27 Stockton, CA 95207

28 *North Coast Rivers Alliance, Pacific Coast Federation of Fishermen's Associations, San Francisco Crab Boat Owners Association, and the Winnemem Wintu Tribe v. Delta Stewardship Council*

Attorneys for Petitioners North Coast Rivers Alliance, Pacific Coast Federation of Fishermen's Associations, San Francisco Crab Boat Owners Association, and the Winnemem Wintu Tribe:

Stephan C. Volker (svolker@volkerlaw.com)
Daniel P. Garrett-Steinman (dgarrett@volkerlaw.com)
Marcus Benjamin Eichenberg (mbeichenberg@volkerlaw.com)
Lauren E. Pappone (lpappone@volkerlaw.com)
Law Offices of Stephan C. Volker
436 14th Street, Suite 1300, Oakland, CA 94612

San Luis & Delta-Mendota Water Authority and Westlands Water District v. Delta Stewardship Council

1 **Attorneys for Petitioners San Luis & Delta-Mendota Water Authority and Westlands Water**
2 **District**

3 Daniel J. O'Hanlon (dohanlon@kmtg.com)
4 Rebecca R. Akroyd (rakroyd@kmtg.com)
5 Elizabeth L. Leeper (eleeper@kmtg.com)
6 Kronick, Moskovitz, Tiedemann & Girard
7 400 Capitol Mall, 27th Floor
8 Sacramento, CA 95814

9 Jon D. Rubin, Senior Staff Counsel
10 (Jon.Rubin@sldmwa.org)
11 San Luis & Delta-Mendota Water Authority
12 c/o Kronick, Moskovitz, Tiedemann & Girard
13 400 Capitol Mall, 27th Floor, Sacramento, CA
14 95814

15 **Attorneys for Petitioner Westlands Water District:**

16 Andrea A. Matarazzo
17 (andrea@pioneerlawgroup.net)
18 Jeffrey K. Dorso
19 (jeffrey@pioneerlawgroup.net)
20 Pioneer Law Group, LLP
21 1122 J Street, Sacramento, CA 95811

22 Harold Craig Manson, General Counsel
23 (cmanson@westlandswater.org)
24 Westlands Water District
25 c/o Kronick, Moskovitz, Tiedemann & Girard
26 400 Capitol Mall, 27th Floor
27 Sacramento, CA 95814

28 ***State Water Contractors; Alameda County Flood Control and Water Conservation District, Zone
7; Santa Clara Valley Water District; The Metropolitan Water District of Southern California;
Antelope Valley-East Kern Water Agency; Mojave Water Agency; and San Bernardino Valley
Municipal Water District v. Delta Stewardship Council***

29 **Attorneys for Petitioners State Water Contractors, Antelope Valley-East Kern Water Agency,**
30 **Alameda County Flood Control, Water Conservation District, Zone 7 and San Bernardino**
31 **Valley Municipal Water District**

32 Charity Schiller (Charity.Schiller@bbklaw.com)
33 Kira L. Johnson (kira.johnson@bbklaw.com)
34 Best Best & Krieger LLP
35 3390 University Avenue, 5th Floor
36 P.O. Box 1028, Riverside, CA 92502

37 Stefanie Morris (smorris@swc.org)
38 State Water Contractors
39 1121 L Street, Suite 1050, Sacramento, CA 95814

40 **Attorneys for Petitioner Santa Clara Valley Water District:**

41 Stanly Yamamoto, District Counsel (syamamoto@valleywater.org)
42 Anthony T. Fulcher, Senior Assistant District Counsel (afulcher@valleywater.org)
43 Santa Clara Valley Water District
44 5750 Almaden Expressway, San Jose, CA 95118-3686

45 **Attorneys for Petitioner Mojave Water Agency:**

46 William J. Brunick (bbrunick@bmblawoffice.com)
47 Leland McElhaney (lmcElhaney@bmblawoffice.com)
48 Brunick, McElhaney & Kennedy
49 1839 Commercenter West, San Bernardino, CA 92408-3303

50 **Attorneys for Petitioner The Metropolitan Water District of Southern California:**

51 Marcia L. Scully (mscully@mwdh2o.com)
52 Adam C. Kear (akear@mwdh2o.com)

1 Linus S. Masouredis (lmasouredis@mwdh2o.com)
Robert C. Horton (rhorton@mwdh2o.com)
2 The Metropolitan Water District of Southern California
P.O. Box 54153, Los Angeles, CA 90054-0153
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6
7
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9
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14
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