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June 21, 2016

VIA EMAIL AND U.S. MAIL

Delta Stewardship Council
Attention: Pat Rogers, Clerk to the Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814
pat.rogers@deltacouncil.ca.gov

Re: Comments of NCRA, Winnemem Wintu Tribe, PCFFA, SFCBOA, and IFR for June 23, 2016 Delta Stewardship Council Meeting and Delta Plan Amendments

Delta Stewardship Council Members:

The North Coast Rivers Alliance ("NCRA"), Winnemem Wintu Tribe, Pacific Coast Federation of Fishermen's Associations ("PCFFA"), San Francisco Crab Boat Owners Association ("SFCBOA"), and Institute for Fisheries Resources ("IFR") (collectively, "Conservation Groups") appreciate the opportunity to comment in advance of the Delta Stewardship Council's ("Council's") June 23, 2016 meeting. Agenda Item 9 for that meeting concerns the "Development of Delta Plan Amendment(s) Regarding Conveyance, Storage and the Operations of Both to Meet the Coequal Goals (Water Codes §85004(b), 85020(f), and 85304)."[1] This Agenda item appears to assume, incorrectly, that the Delta Plan is currently lawful and valid. It is neither.

Instead of investing further time and resources in tinkering with a plan that has been declared fundamentally flawed by the Superior Court, the Council should take a step back from the precipice, read and digest the Court's Ruling, and begin the process of revising the Plan to correct its profound defects. Accordingly, we respectfully request that you now revise the Delta Plan as ordered by Judge Kenny on May 18, 2016 and prepare and circulate for public review and comment a new Draft Programmatic Environmental Impact Report ("Draft PEIR") to address those revisions as required by the Delta Reform Act ("DRA") and the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 *et seq.*, as discussed below.

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[1] Delta Stewardship Council June 23, 2016 Meeting Agenda, *available at* http://deltacouncil.ca.gov/docs/delta-stewardship-council-june-23-2016-meeting-agenda.

The Sacramento-San Joaquin River Delta is the largest and most productive estuarine system on the west coast of the Americas. In 2009 the California Legislature declared in the DRA that "[t]he Sacramento-San Joaquin Delta watershed and California's water infrastructure are in crisis and existing Delta policies are *not sustainable*." Water Code § 85001(a), emphasis added. The Legislature found that "[r]esolving the crisis requires *fundamental reorganization* of the state's management of Delta watershed resources." *Id.,* emphasis added. The Legislature declared that "'the Delta' . . . is a critically important natural resource for California and the nation. It serves Californians concurrently as both the hub of the California water system and the most valuable estuary and wetland ecosystem on the west coast of North and South America." Water Code § 85002.

The Legislature therefore resolved "to provide for the sustainable management of the Sacramento-San Joaquin Delta ecosystem, to provide for a more reliable water supply for the state, to protect and enhance the quality of water supply from the Delta, and to establish a governance structure that will direct efforts *across state agencies* to develop a *legally enforceable* Delta Plan." Water Code § 85001(c), emphasis added.

To achieve this goal, the Legislature adopted two principal overarching policies to protect and restore the Delta. The first comprises eight "policy objectives" designed to restore and enhance the Delta's ecological health while maintaining sustainable water usage. Water Code § 85020(a)-(h). The second is a new State policy to *reduce* diversions of water from the Delta because the Legislature recognized that the existing level of diversions was incompatible with restoration and enhancement of the Delta's ecosystem, and thus not a "sustainable" management scheme for the Delta's imperiled resources. Water Code § 85021. The Legislature also announced that

> [t]he longstanding constitutional principle of reasonable use and the public trust doctrine *shall be the foundation of state water management policy* and are particularly important and applicable to the Delta.

Water Code § 85023, emphasis added.

These principles and objectives represent the Legislature's commitment to preserving the Delta as a "distinct and valuable natural resource." Water Code § 85022(c)(1), (c)(3). To accomplish this task, the Legislature understood that strong, specific and enforceable measures were necessary to break the management impasse that had pushed the Delta into a calamitous downward spiral. Water Code §§ 85001(C), 85211, 85302(D) and (e), 85300(d)(1)(A). In particular, these measures "shall . . . [i]nclude *quantified or otherwise measurable targets* associated with achieving the objectives of the Delta Plan" and "*quantitative or otherwise measurable assessments* of the status and trends . . . of . . . [t]he health of the Delta's estuary and

wetland ecosystem for supporting viable populations of Delta fisheries and other aquatic organisms." Water Code §§ 85308(b) and 85211, emphasis added; *see also* Water Code §§ 85001(c), 85084.5, 85086(c)(1) and (e), 85302(c). And, the Legislature mandated that these measurable targets be "legally enforceable." Water Code § 85001(c).

The Delta Plan did not comply with these statutory mandates. Judge Michael P. Kenny, of the Sacramento County Superior Court, has issued a Ruling holding that the Delta Plan is deficient. *Delta Stewardship Council Cases* Ruling on Submitted Matter: Petitions for Writ of Mandate, Bifurcated Proceeding on Statutory Challenges filed May 18, 2016 ("Delta Plan Ruling"), *see* Attachment 1.[2] In that Ruling, Judge Kenny adopted Conservation Groups' position that the Delta Plan must be revised to "[i]nclude quantified or otherwise measurable targets associated with achieving reduced Delta reliance, reduced environmental harm from invasive species, restoring more natural flows, and increased water supply reliability, in accordance with the Delta Reform Act." Delta Plan Ruling p. 26. These targets must be "legally enforceable." *Id.* at 9, 12.

And, Judge Kenny also held that "[t]he Delta Reform Act requires the Delta Plan to 'promote options for new and improved infrastructure relating to the water conveyance in the Delta, storage systems, and for the operation of both to achieve the coequal goals.' (§85320.) The Delta Plan currently before the Court fails to do so. Accordingly, this failure to promote options for water conveyance and storage systems is a violation of the Delta Reform Act." *Id.* at 37-38.

For these reasons the Superior Court ruled that the Delta Plan is deficient and consequently there is no CEQA "project" as required by Public Resources Code section 21061. Because these Plan defects are so fundamental, they require substantial Plan revisions. Accordingly, Judge Kenny held that challenges to the PEIR were "moot." Delta Plan Ruling p. 73. Because the existing Plan must be substantially revised to conform to Judge Kenny's ruling, it is inappropriate to consider any other amendments that erroneously assume – as do the amendments the Council is now reviewing – that the Plan is lawful. It is, to the contrary, manifestly *un*lawful.

Judge Kenny grasped the significance of the Delta Plan's failure to comply with the DRA, and especially the DRA's mandate for enforceable, quantified standards which will require far-reaching improvements in the Delta Plan. Because the existing Plan is fundamentally flawed – and therefore must be *substantially* revised – Judge Kenny ruled that "the CEQA challenges currently pending in this coordinated proceeding are moot." Delta Plan Ruling p. 73. The quantified standards for the four DRA objectives required by Judge Kenny's ruling will result in

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[2] Because Judge Kenny has not yet issued a final ruling, Conservation Groups reserve the right to comment further based on the Court's final ruling.

a revised Delta Plan that will be far more environmentally informed, focused, and detailed. Thus, the revised Delta Plan will clearly require new CEQA review in the form of a new Draft PEIR. The new Draft PEIR will have to include an analysis of alternatives not previously considered such as options for water conveyance. FEIR 3-15 (no existing recommendations regarding conveyance).

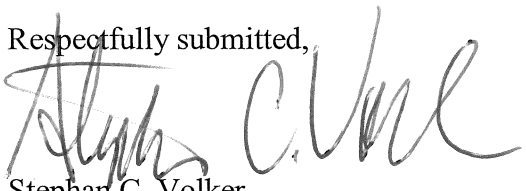
The Delta Reform Act provides that "'[t]he following subgoals and strategies for restoring a healthy ecosystem shall be included in the Delta Plan . . . (4) Restore Delta flows and channels to support a healthy estuary and other ecosystems.'" Delta Plan Ruling p. 14 (quoting Water Code § 85320(e)(4)). Thus, the revised Delta Plan will have to include quantified and measurable targets to achieve those flows. *Id.* at 15. And, those new flow targets will govern and inform any decision on Delta conveyance and system storage. Water supply reliability must also be achieved through quantified and measurable targets. Those new water supply targets will govern and inform any decision on Delta conveyance and system storage. *Id.* Likewise, the revised Delta Plan will have to include quantified and measurable targets to achieve reduced environmental harm from invasive species. *Id.* at 14. Those new targets for reducing harm from invasive species will govern and inform any decision on Delta conveyance and system storage. And finally, the revised Delta Plan must include a requirement that agencies "reduce reliance by [a] measurable amount," and must "include quantified targets to achieve this objective." Those new targets to reduce reliance on the Delta will govern and inform any decision on Delta conveyance and system storage. *Id.* at 9.

Until all of these court-ordered Plan revisions are adopted, the Council may not take any action that assumes – incorrectly – that the existing Plan is valid. Hence the Council may not proceed with the contemplated amendments regarding conveyance, storage and operations. Instead the Council must *first* make the revisions ordered by the Court, and do so through a public process that is fully informed by adequate CEQA review. Once the Delta Plan's fundamental flaws are rectified as ordered by the Court, then the Council may consider any further amendments accompanied by additional required CEQA review. Without an adequate CEQA document, there is no adequate informational basis upon which to develop those amendments.

For each of these reasons the Council must first revise the Delta Plan to correct the fundamental defects Judge Kenny has identified. In doing so, the Council must prepare a new Draft PEIR, including a full evaluation of these court-ordered revisions. Only after the Council brings the Plan into compliance with the Delta Reform Act may the Council consider additional amendments to alter conveyance, storage, and operations to further meet the coequal goals.

Anything less would violate Judge Kenny's Delta Plan Ruling and the Council's statutory duties under the Delta Reform Act and CEQA.

Respectfully submitted,



Stephan C. Volker
Attorney for North Coast Rivers Alliance, Winnemem Wintu Tribe, Pacific Coast Federation of Fishermen's Associations, San Francisco Crab Boat Owners Association, and Institute for Fisheries Resources

SCV:taf

Enclosure: Judge Michael P. Kenny, Sacramento Superior Court, May 18, 2016, Ruling on Submitted Matter: Petitions for Writ of Mandate, Bifurcated Proceeding on Statutory Challenges, in *Delta Stewardship Council Cases*, Judicial Council Coordination Proceeding No. 4758

ATTACHMENT
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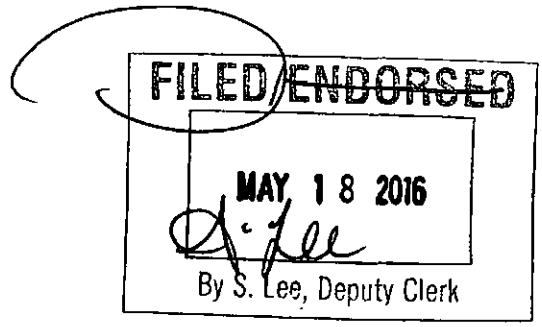

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

Coordination Proceeding Special Title (Rule 3.550),	**Judicial Council Coordination Proceeding No. 4758**
DELTA STEWARDSHIP COUNCIL CASES	**RULING ON SUBMITTED MATTER: PETITIONS FOR WRIT OF MANDATE, BIFURCATED PROCEEDING ON STATUTORY CHALLENGES**

I. FACTUAL BACKGROUND

"Originally, the Delta was a shallow wetland with water covering the area for many months of the year. Natural levees, created by deposits of sediment, allowed some islands to emerge during the dry summer months. Salinity would fluctuate, depending on the season and the amount of precipitation in any one year, and the species that comprised the Delta ecosystem had evolved and adapted to this unique, dynamic system." (Wat. Code § 85003, subdivision (a).)[1] The Delta is now the hub of California's water system, with more than two-thirds of the residents of the state and more than two million acres of highly productive farmland receiving water exported from the Delta Watershed. (§ 85004.)

[1] Unless otherwise noted, all statutory references herein are to the Water Code.

In 2009, the Legislature declared, "[t]he Sacramento-San Joaquin Delta watershed and California's water infrastructure are in crisis and existing Delta policies are not sustainable. Resolving the crisis requires fundamental reorganization of the state's management of Delta watershed resources." (§ 85001, subdivision (a).) Accordingly, the Legislature enacted the Sacramento-San Joaquin Delta Reform Act of 2009 (hereinafter, the "Delta Reform Act") and created the Delta Stewardship Council (hereinafter, the "Council" or "Respondent").

The Legislature provided that its intent was to "provide for the sustainable management of the Sacramento-San Joaquin Delta ecosystem, to provide for a more reliable water supply for the state, to protect and enhance the quality of water supply from the Delta, and to establish a governance structure that will direct efforts across state agencies to develop a legally enforceable Delta Plan." (§ 85001, subdivision (c).) The Legislature's "fundamental goals for managing land use in the Delta are to do all of the following:

> (1) Protect, maintain, enhance, and, where feasible, restore the overall quality of the Delta environment and its natural and artificial resources.
> (2) Ensure the utilization and conservation of Delta resources, taking into account the social and economic needs of the people of the state.
> (3) Maximize public access to Delta resources and maximize public recreational opportunities in the Delta consistent with sound resources conservation principles and constitutionally protected rights of private property owners.
> (4) Encourage state and local initiatives and cooperation in preparing procedures to implement coordinated planning and development for mutually beneficial uses, including educational uses, in the Delta.
> (5) Develop new or improved aquatic and terrestrial habitat and protect existing habitats to advance the goal of restoring and enhancing the Delta ecosystem.
> (6) Improve water quality to protect human health and the environment consistent with achieving water quality objectives in the Delta." (*Id.*, subdivision (d).)

The Delta Reform Act called for the Council to create this "Delta Plan" as a "comprehensive, long-term management plan." (§ 85059.) The Delta Plan must further the "coequal goals" of (1) providing a more reliable water supply for California; and (2) protecting, restoring, and enhancing the Delta ecosystem. (§ 85054.) The coequal goals must be achieved in a manner that "protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place." (*Id.*) Furthermore, the Delta Plan shall

"include subgoals and strategies to assist in guiding state and local agency actions related to the Delta. In developing the Delta Plan, the council shall consider each of the strategies and actions set forth in the Strategic Plan and may include any of those strategies or actions in the Delta Plan. The Delta Plan may also identify specific actions that state or local agencies may take to implement the subgoals and strategies." (§ 85300, subdivision (a).)

The Delta Reform Act provides that the state's policy is to reduce Delta reliance through a strategy of investing in improved regional supplies, conservation, and water use efficiency. It calls for each "region that depends on water from the Delta watershed [to] improve its regional self-reliance for water through investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts." (§ 85021.) Furthermore, the Delta Reform Act refers to the Bay Delta Conservation Plan[2] (hereinafter the "BDCP") and requires the Council to consider the BDCP for inclusion in the Delta Plan itself. Section 85320 provides, in part,

> "(a) The Bay Delta Conservation Plan (BDCP) shall be considered for inclusion in the Delta Plan in accordance with this chapter.
> (b) The BDCP shall not be incorporated into the Delta Plan and the public benefits associated with the BDCP shall not be eligible for state funding, unless the BDCP does all of the following:
> (1) Complies with Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code.
> (2) Complies with Division 13 (commencing with Section 21000) of the Public Resources Code, including a comprehensive review and analysis of all of the following:
> (A) A reasonable range of flow criteria, rates of diversion, and other operational criteria required to satisfy the criteria for approval of a natural community conservation plan as provided in subdivision (a) of Section 2820 of the Fish and Game Code, and other operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses.

[2] The BDCP is a project that has been undertaken by a group of state and federal water contractors. As of the date of this ruling, it has not been completed. Accordingly, the sufficiency or legality of the BDCP is not before the Court and the Court cannot and will not speculate as to what the BDCP will entail.

(B) A reasonable range of Delta conveyance alternatives, including through-Delta, dual conveyance, and isolated conveyance alternatives and including further capacity and design options of a lined canal, an unlined canal, and pipelines.
(C) The potential effects of climate change, possible sea level rise up to 55 inches, and possible changes in total precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities considered in the environmental impact report.
(D) The potential effects on migratory fish and aquatic resources.
(E) The potential effects on Sacramento River and San Joaquin River flood management.
(F) The resilience and recovery of Delta conveyance alternatives in the event of catastrophic loss caused by earthquake or flood or other natural disaster.
(G) The potential effects of each Delta conveyance alternative on Delta water quality."

The Council adopted a Delta Plan containing 14 regulatory policies and 73 recommendations on May 16, 2013. (AR, B2, 445-465.) As required under the Administrative Procedure Act, the Council submitted the regulatory policies to the Office of Administrative Law (OAL) as proposed regulations. On August 7, 2013, the OAL approved the regulations. (AR, N1-100.) The regulations took effect on September 1, 2013 and are located in California Code of Regulations, title 23, sections 5001-5016. The recommendations are not enforceable. Respondent contends the recommendations "encourage agencies to take various steps that will further one or both of the coequal goals in a manner that protects and enhances Delta values as an evolving place." (Opposition, p. 11.) To achieve these goals, the Plan requires consistency certifications by agencies undertaking "covered actions".

Pursuant to the Delta Plan, a state or local public agency that proposes to undertake a "covered action" must first submit to the Council a written certification with detailed findings concerning Delta Plan consistency. (§ 85225.) Section 85057.5 defines "covered actions" subject to these consistency certifications as, "a plan, program, or project as defined pursuant to Section 21065 of the Public Resources Code that meets all of the following conditions:

(1) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.

(2) Will be carried out, approved, or funded by the state or a local public agency.
(3) Is covered by one or more provisions of the Delta Plan.
(4) Will have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta."

Multiple parties have challenged the Delta Plan as adopted by the Council. The following cases have been coordinated into this proceeding, involving challenges by Petitioners to the sufficiency and legality of the Delta Plan, as well as challenges to the sufficiency of the Environmental Impact Report prepared pursuant to the California Environmental Quality Act:

Court	Case Number	Short Title
Superior Court of California, County of Sacramento	34-2013-80001500	San Luis & Delta-Mendota Water Authority v. Delta Stewardship Council
Superior Court of California, County of Sacramento	34-2013-80001530	State Water Contractors, et al. v. Delta Stewardship Council
Superior Court of California, County of Sacramento	34-2013-80001534	North Coast Rivers Alliance, et al. v. Delta Stewardship Council
Superior Court of California, County of San Francisco	CPF13513047	California Water Impact Network, et al. v. Delta Stewardship Council
Superior Court of California, County of San Francisco	CPF13513048	Central Delta Water Agency, et al. v. Delta Stewardship Council
Superior Court of California, County of San Francisco	CPF13513049	Save the California Delta Alliance v. Delta Stewardship Council
Superior Court of California, County of San Joaquin	39201300298188 CUWMSTK	City of Stockton v. Delta Stewardship Council

The Court ordered the trial of this coordinated action bifurcated into two separate proceedings: (1) the statutory challenges, and (2) the CEQA challenges. This matter came on for a hearing on the merits of the statutory challenges on March 7, 2016 and March 8, 2016. All parties appeared and presented oral argument, after which the Court took the matter (with regard to this bifurcated first issue) under submission.

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II. STANDARD OF REVIEW

The interpretation of statutes is an issue of law on which the court exercises its independent judgment. (See, *Sacks v. City of Oakland* (2010) 190 Cal.App.4th 1070, 1082.) In exercising its independent judgment, the Court is guided by certain established principles of statutory construction, which may be summarized as follows. The primary task of the court in interpreting a statute is to ascertain and effectuate the intent of the Legislature. (See, *Hsu v. Abbara* (1995) 9 Cal.4th 863, 871.) This extends to a challenge that a regulation exceeds the agency's authority, although the Court gives great weight to the agency's interpretation. (*Nick v. City of Lake Forest* (2014) 232 Cal.App.4th 871.)

The starting point for the task of interpretation is the words of the statute itself, because they generally provide the most reliable indicator of legislative intent. (See, *Murphy v. Kenneth Cole Productions* (2007) 40 Cal.4th 1094, 1103.) The language used in a statute is to be interpreted in accordance with its usual, ordinary meaning, and if there is no ambiguity in the statute, the plain meaning prevails. (See, *People v. Snook* (1997) 16 Cal.4th 1210, 1215.) The court should give meaning to every word of a statute if possible, avoiding constructions that render any words surplus or a nullity. (See, *Reno v. Baird* (1998) 18 Cal.4th 640, 658.) Statutes should be interpreted so as to give each word some operative effect. (See, *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 390.)

Beyond that, the Court must consider particular statutory language in the context of the entire statutory scheme in which it appears, construing words in context, keeping in mind the nature and obvious purpose of the statute where the language appears, and harmonizing the various parts of the statutory enactment by considering particular clauses or sections in the context of the whole. (See, *People v. Whaley* (2008) 160 Cal.App.4th 779, 793.)

Pursuant to Government Code section 11350 "[a]ny interested person may obtain a judicial declaration as to the validity of any regulation…" "[N]o regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Gov. Code § 11342.2.) A regulation may be declared invalid if the agency's determination that the "regulation is reasonably necessary to effectuate the

purpose of the statute…that is being implemented…is not supported by substantial evidence." (Gov. Code § 11350, subdivision (b)(1).) If a regulation is within the authority delegated by the Legislature and reasonably necessary, the Court shall defer to the agency's findings. (*Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401.)

When an administrative regulation is challenged for vagueness, the standard is less strict than when a criminal law is challenged; the court does not view the regulation in the abstract, but considers whether it is vague when applied to the complaining party's conduct in light of the specific facts of the particular case. If the regulation can be given a reasonable and practical construction that is consistent with the probable legislative intent and encompass the conduct of the complaining party, the regulation must be upheld. (See, *Teichert Construction v. California Occupational Safety and Health Appeals Board* (2006) 140 Cal. App. 4th 883, 890-91.)

In determining whether an agency failed to perform a legal, and usually ministerial duty, the Court reviews the challenged administrative action to determine whether it was arbitrary, capricious, or entirely lacking in evidentiary support, or whether the agency failed to follow the procedure and give the notices the law requires. (*Shelden v. Marin County Employees' Retirement Assn.* (2010) 189 Cal.App.4th 458, 463.)

Allegations that an agency has adopted underground regulations are questions of law requiring de novo review. (*County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501, 517.)

III. DISCUSSION

A. *North Coast Rivers Alliance, et al. v. Delta Stewardship Council*

Petitioners North Coast Rivers Alliance, et al. argue that the Delta Plan is deficient in the following five areas:

1. The Delta Plan fails to include "quantified or otherwise measurable targets associated with achieving the objectives of the Delta Plan" as required by section 85308(b).
2. The Delta Plan's flow criteria are not "based on the best available scientific information" as required by section 85308(a).
3. The Delta Plan's measures for reducing reliance on the Delta fail to meet the statutory requirements set forth in sections 85021.

4. The Delta Plan's measures for restoring the Delta ecosystem fail to satisfy the Delta Reform Act requirements set forth in sections 85054 and 85302.
5. The regulations are invalid.

1. Quantified or otherwise measurable targets

At the heart of the Court's analysis in these cases is section 85308, titled "Requirements of the Delta Plan." The first question is the degree to which this section informs the other provisions of the Delta Reform Act. The section's title suggests that the requirements it lays out are the lens through which the Delta Plan must be viewed in determining Delta Reform Act compliance. Section 85308 provides that the "Delta Plan *shall meet* all of the following requirements..." further bolstering a finding that the section provides a checklist for Delta Plan content. (emphasis added.) Accordingly, the Court performs its analysis of the Delta Plan with a view that a failure to include a section 85308 component is a failure to comply with section 85308, and a violation of the Delta Reform Act.

Section 85308, subdivision (b) provides that the Delta Plan shall, "include quantified or otherwise measurable targets associated with achieving the objectives of the Delta Plan." Petitioners argue the Delta Plan fails to comply with subdivision (b), as detailed herein. "Quantified or otherwise measurable" is not defined or used elsewhere in the Delta Reform Act. Case law does not provide a definition for either term outside of their ordinary meaning. Accordingly, the Court is guided by the common definition of the terms. Respondent refers to the Oxford dictionary in its brief, but falls short of thoroughly defining "quantified" or "measurable".

The Oxford Dictionary defines "quantify" as "express or measure the quantity of."[3] Merriam-Webster defines "quantify" as "to find or calculate the quantity or amount of (something)."[4] Clearly, a quantified target includes a numeric designation or an amount that is identified.

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[3] http://www.oxforddictionaries.com/us/definition/american_english/quantify.

[4] http://www.merriam-webster.com/dictionary/quantify.

The Oxford Dictionary defines "measurable" as "large enough to be measured; noticeable; definite."[5] Merriam-Webster defines "measure" as "the dimensions, capacity, or amount of something ascertained by measuring."[6] Measurable, like quantified, requires a numeric component, capable of being calculated via measurement. A measurable target would therefore be a numeric goal that can be identified.

Accordingly, to satisfy the requirement of "quantified or otherwise measurable targets" the Court finds that any analysis of the Delta Plan must be informed by numeric goals that will be evaluated at a date certain to determine compliance or the measure of progress that has been accomplished. This is also consistent with the legislative direction that the Delta Plan be "legally enforceable". (§ 85001.)

Reduced Delta reliance

Section 85021 provides that California's policy is to "reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency." Petitioners argue that although the Delta Plan acknowledges the need to reduce reliance on the Delta, the Plan fails to require agencies to reduce reliance by any measureable amount and that it fails to include quantified targets to achieve this objective. Petitioners contend the only target identified in the Plan is the goal of "a significant reduction" in Delta Water use, as identified in Appendix G. (AR, B1314.) Petitioners assert such a generic goal fails to meet the statutory requirement that the Delta Plan must include quantified or otherwise measurable targets.

Petitioners further argue that the Delta Plan must include "quantified or otherwise measurable targets" applicable to individual suppliers in order to achieve the target of reduced reliance. Petitioners acknowledge that WR P1 requires water suppliers to comply with certain specific requirements associated with the goal of achieving reduced reliance. However,

[5] http://www.oxforddictionaries.com/us/definition/american_english/measurable.

[6] http://www.merriam-webster.com/dictionary/measure.

Petitioners argue that WR P1 does not require suppliers to achieve any *amount* of reduced Delta reliance as part of the reporting requirement.

Respondent contends that not every aspect of the Delta Plan must be measurable, only that the Delta Plan shall "include" measurable targets. Respondent highlights that the Delta Plan contains 24 administrative performance measures to track progress toward a more reliable water supply, WR P1-P2, and WR R1-R19. (AR, B1291-1294.) However, all parties concede that WR R1-R19 are recommendations -- and thus are not enforceable. Consequently, even assuming WR R1-R19 recommend quantified or otherwise measurable Delta reliance reductions, they are not legally enforceable.

For example, WR R8 ("Demonstrate State Leadership") provides that "[a]ll State agencies should take a leadership role in designing new and retrofitted State-owned and –leased facilities … to increase water efficiency, use recycled water, and incorporate stormwater runoff capture and low-impact development strategies." In the appendices, Respondent specifies WR R8 will be monitored by state agencies reporting annually to the Council concerning their actions in these categories. (AR, B1292.) However, WR R8 does not include an amount or percentage measurement that must be reported, and does not include a target that agencies should achieve by a date certain. An agency could report that they have taken no such actions, and yet still comply with WR R8.

Respondent also argues that performance measures track the number of water suppliers who have completed water management plans and who have developed groundwater management plans. (AR, B1291, 1293.) However, tracking the number of suppliers who have undertaken certain activities does not amount to a quantified target intended to achieve the objective of reduced Delta reliance.

Respondent points to its regulatory policies to establish compliance. Specifically, Respondent contends WR P2 provides for transparency in water contracting (23 CCR section 5004). However, WR P2 does not provide any measurable reductions that must be achieved or that will be achieved via such a "publicly transparent" contracting process.

Additionally, Respondent asserts that WR P1 (23 CCR section 5003) prevents the use of Delta water if a receiving water supplier fails to "adequately contribute to reduced reliance on the Delta" as shown by:

> "(A) Complet[ing] a current Urban or Agricultural Water Management Plan (Plan) which has been reviewed by the California Department of Water Resources for compliance with the applicable requirements of Water Code Division 6, Parts 2.55, 2.6, and 2.8;
>
> (B) Identif[ying], evaluat[ing], and commenc[ing] implementation, consistent with the implementation schedule set forth in the Plan, of all programs and projects included in the Plan that are locally cost effective and technically feasible which reduce reliance on the Delta; and
>
> (C) Includ[ing] in the Plan, commencing in 2015, the expected outcome for measurable reduction in Delta reliance and improvement in regional self-reliance. The expected outcome for measurable reduction in Delta reliance and improvement in regional self-reliance shall be reported in the Plan as the reduction in the amount of water used, or in the percentage of water used, from the Delta watershed. For the purposes of reporting, water efficiency is considered a new source of water supply, consistent with Water Code section 1011(a)."

WR P1 requires Delta water suppliers to perform specified actions prior to water usage, including the completion of an Urban or Agricultural Water Management Plan. Water suppliers also must implement projects included in the plan that reduce Delta reliance and which are locally cost effective and technically feasible.

There is no evidence in the record, however, that completion of these water management plans will actually result in reduced reliance. WR P1 does not set a goal or target for measurable reduced reliance, instead hypothesizing that these plans will identify mandatory projects to reduce Delta reliance. In the absence of such evidence, WR P1 does not contain quantified or otherwise measurable targets by which users must reduce Delta reliance.

Respondent next cites to what it calls output targets to establish compliance with the Delta Reform Act's requirements. Respondent asserts the Delta Plan will measure Delta reduced reliance progress by looking for "a significant reduction in the amount of water used… or the percentage of water used from the Delta watershed." (AR, B575.) Respondent cites to WR R1,

which seeks "[p]rogress toward meeting California's conservation goal of achieving a 10 percent reduction in statewide urban per capita water usage by 2015 and a 20 percent reduction by 2020." (AR, B577.) Respondent argues that "significant" is measurable because it is a term used in the Delta Reform Act. (§ 85057.5(a)(4).) However, Respondent does not cite to any provision in the Delta Reform Act so defining the term.

Respondent simply states that it is looking for a "significant reduction"; however, that does not provide a quantified or otherwise measurable target when no definition is provided as to what constitutes a "significant reduction". Respondent highlights the target of "progress toward" the statewide conservation goal. However, one is left without any understanding of how much progress, if less than the goal, constitutes success. As Petitioners persuasively argue, there is no measureable reduction of reduced water reliance that must occur in connection with the *Delta* in the statewide objective.

Finally, WR R1 is not an enforceable policy and does not describe how progress will be measured. It only recommends that "progress" should be made. If using the word "progress" was sufficient, the Delta Reform Act would not have required the Delta Plan to "describe the methods by which the Council shall measure progress toward achieving the coequal goals." (§ 85308(d).)

The Court finds the Delta Plan fails to "include quantified or otherwise measurable targets associated with achieving" reduced Delta reliance as required by the Delta Reform Act.

Reduced environmental harm from invasive species

Section 85302, subdivision (e)(3) provides that the Delta Plan shall "[p]romote self-sustaining, diverse populations of native and valued species by reducing the risk of take and harm from invasive species." Petitioners argue the Delta Plan merely identifies the goal of

> "[p]rogress toward decreasing annual trends in both the number of new and existing aquatic and terrestrial nonnative species, and the abundance and distribution of existing aquatic and terrestrial nonnative species in the Delta over the next decade. These trends will be derived from long-term animal and plant monitoring surveys conducted by the Interagency Ecological Program agencies, the California Department of Boating and Waterways, the U.S. Department of Agriculture, the San Francisco Estuary Institute, and others." (AR, B623.)

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Petitioners argue this goal is not a "quantified or otherwise measurable target" of any decrease. The phrase "progress toward decreasing" does not, by itself reduce any risks, as required by section 85302, subdivision (e)(3). It does not require overt action resulting in a reduced risk outcome, but simply suggests that steps may be made *toward* initiating action that would reduce the risk of take and harm from invasive species. This clearly falls short of section 85302, subdivision (e)(3)'s mandate.

Respondent contends Petitioners have ignored "significant evidence in the record concerning non-native species." (Opposition, p. 103.) Respondent points to Appendix E, which describes the administrative performance measures for ER P5[7] -- "Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species" as,

> "100 percent of all proposed actions that have the reasonable probability of introducing, or improving the habitat conditions for, nonnative invasive species have demonstrated that the potential for new introductions of and/or improved habitat conditions for nonnative invasive species have been fully considered and avoided or mitigated in a way that appropriately protects the ecosystem." (AR, B1296.)

While this does require that 100 percent of projects improve or address habitat for invasive species to avoid or mitigate those impacts in a "way that appropriately protects the ecosystem" it does not identify measures that "reduc[e] the risk of take and harm from invasive species." The provision may prevent an increase in the risk of harm; however, it fails to reduce the current risk of harm – something that is required by the Act.

Respondent also cites to the administrative performance measures for ER R7, which recommends that the "California Department of Fish and Wildlife and other appropriate agencies prioritize the list of 'Stage 2 Actions for Nonnative Invasive Species." (AR, B1296.) However, Respondent does not indicate how the "Stage 2 Actions for Nonnative Invasive Species" provides a measurable reduction of harm from nonnative invasive species. Instead, Respondent argues that

[7] The actual language of ER P5 is in 23 CCR section 5009, and provides, "The potential for new introductions of or improved habitat conditions for nonnative invasive species, striped bass, or bass must be fully considered and avoided or mitigated in a way that appropriately protects the ecosystem."

it can measure whether these items have been completed or not, and that is sufficient as a "quantified or otherwise measurable target." The Court is not persuaded.

Finally, Respondent argues "progress toward decreasing annual trends" of nonnative species is a quantified or otherwise measurable target. However, Respondent does not identify what "progress toward" means. Instead, Respondent contends the language allows a decrease in trends, which is contrary to the plain language that requires a reduction in the risk of take and harm from invasive species. Respondent would have the Court accept that slowing an upward trend is equivalent to a reduction. The Act requires a reduction, not simply a slower increase.

The Court finds that the Delta Plan fails to "include quantified or otherwise measurable targets" to reduce environmental harm from invasive species as required by the Delta Reform Act.

Restoring more natural flows

Section 85302, subdivision (e)(4) provides "[t]he following subgoals and strategies for restoring a healthy ecosystem shall be included in the Delta Plan…(4) Restore Delta flows and channels to support a healthy estuary and other ecosystems." Petitioners argue that the Delta Plan only sets a vague goal of "[p]rogress toward restoring in-Delta flows to more natural functional flow patterns to support a healthy estuary…" (AR, B623.) Petitioners maintain this goal is not a "quantified or otherwise measurable target" for any kind of "natural functional flow patterns" and fails to identify any criteria for measurement.

Petitioners also argue there are no measurable water quality targets. Instead, the Delta Plan provides that "[p]erformance measures need to be designed to capture important trends and to address whether specific actions are producing expected results." (AR, B702.)

Respondent cites to the performance measure for ER P1 (Delta Flow Objectives) which provides "[p]rior to the establishment of revised flow objectives, 100 percent of proposed actions that could significantly affect flow in the Sacramento-San Joaquin Delta are consistent with the existing Bay Delta Water Quality Control Plan objectives." (AR, B1294.) However, compliance with the Bay Delta Water Quality Control Plan is not, by itself, a "quantified or otherwise

measurable target" of restoring more natural flows. Although it requires compliance with a preexisting Control Plan, it fails to establish a restorative plan.

Respondent argues the goal of ER P1 provides a generalized measurement, and that the Council "intends to refine its performance measures." (Opposition, p. 104.) Again, "progress" is not defined. It does not provide a quantified or otherwise measurable target upon which the Delta Plan can be gauged. While Respondent may intend to refine its performance measurements, the Delta Reform Act requires such measurable targets to be included in the Delta Plan. As Respondent has certified that it has completed the Delta Plan, any future modifications are not relevant to a determination of whether the Delta Plan currently complies with the Delta Reform Act.

The Court finds the Delta Plan fails to "include quantified or otherwise measurable targets associated with" restoring more natural flows as required by the Delta Reform Act.

Increased water supply reliability

Section 85054 provides that a more reliable California water supply is one of the Delta Reform Act's coequal goals. Petitioners contend the Delta Plan fails to include "quantified or otherwise measurable targets" to achieve this goal. (§ 85308(b).) Petitioners maintain this stems from the failure to include measurable targets for reduced Delta reliance, and from vague targets such as "significant reduction in" the use or export of Delta Water. (AR, B1314.)

Respondent, citing to the performance measures for WQ R8, argues it is tracking whether the State Water Resources Control Board (hereinafter, "SWRCB") has adopted regulatory measures concerning nutrients, pesticides, and other specified contaminants by certain dates. (AR, B1300-01.) Respondent also cites to WQ R1 ([w]ater quality in the Delta meets objectives established in the applicable water quality control plan), WQ R8 ([t]rends in measurable toxicity from pesticides and other pollutants in Delta waters will be downward over the next decade) and WQ R8 (TMDLs for critical pesticides [for example diazinon, chlorpyrifos, and pyrethroids] in the waters and sediments of the Delta are met by 2020). These provisions are all recommendations, instead of legally enforceable policy regulations. Furthermore, terms such as "downward" do not provide quantified or otherwise measurable targets.

The Court finds the Delta Plan fails to "include quantified or otherwise measurable targets" associated with increased water supply reliability as required by the Delta Reform Act.

2. Best available science

Section 85308, subdivision (a) provides that the Delta Plan shall be "based on the best available scientific information and the independent science advice provided by the Delta Independent Science Board." Petitioners contend the Delta Plan violates section 85308, subdivision (a) because the flow objectives utilized inadequate and outdated data rather than updated SWRCB flow criteria.

The Delta Plan recommendation ER R1 indicates that the SWRCB should update flow objectives for the Delta as necessary to achieve the coequal goals by June 2, 2014. It also recommends that by June 2, 2018, the SWRCB should adopt and implement flow objectives necessary to achieve the coequal goals for high-priority tributaries in the Delta watershed. (AR, B614.)

In 2010 the SWRCB approved a report titled "Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem; Prepared Pursuant to the Sacramento-San Joaquin Delta Reform Act of 2009." (AR, L11828, 11832.) It "suggests the flows that would be needed in the Delta ecosystem if fishery protection was the sole purpose for which its waters were put to beneficial use." (AR, L11827.)

The report identifies flow improvements that the SWRCB contends are "necessary to protect public trust resources..." noting that "current policies have been disastrous for desirable fish." (AR, L11832, 11846, 11969.) The report contains the SWRCB's summary determinations for appropriate Delta outflows, Sacramento inflows, San Joaquin River inflows and hydrodynamics. (AR, L11968.)

The SWRCB finds "[r]ecent Delta flows are insufficient to support native Delta fishes for today's habitats." (AR, L11844.) However, the SWRCB qualified this statement in a footnote, which is significant for purposes of a "best available science determination. The footnote reads,

> "This statement should not be construed as a critique of the basis for existing regulatory requirements included in the 2006 Bay-Delta Plan and biological opinions. Those requirements were developed pursuant to specific statutory requirements and considerations that differ from this proceeding. Particularly when developing water quality objectives, the State Water Board must consider many different factors including what constitutes reasonable protection of the beneficial use and economic considerations. In addition, the biological opinions for the SWP and CVP Operations Criteria and Plan were developed to prevent jeopardy to specific fish species listed pursuant to the federal Endangered Species Act; in contrast, the flow criteria developed in this proceeding are intended to halt population decline and increase populations of certain species." (AR, L11844, FN 3.)

Accordingly, the SWRCB acknowledged that the flow criteria identified in the 2010 report, while addressing fishery protection, ignored other factors that must be considered in developing an updated Bay-Delta Plan.

The SWRCB indicated it would submit the flow criteria determinations to Respondent to inform the Delta Plan. (AR, L011848.) The report acknowledges that due to the short time-frame for developing new criteria it "is limited to consideration of flow criteria needed under the existing physical conditions, so therefore does not consider or anticipate changes in habitat or modification of water conveyance facilities." (AR, L11853.)

The report provides that the current Bay-Delta flow requirements are contained in the 2006 Bay-Delta Plan and in D-1641. (AR, L11858.) The new flow criteria are listed in a series of Tables at the end of the report. (AR, L11970-75.)

The Delta Plan does not incorporate the 2010 report flow criteria. Instead, Respondent determined that "the next steps are for the SWRCB to develop flow and water quality objectives to address all beneficial uses, including public trust resources, in the Delta and upstream tributaries...After the SWRCB adopts flow and water quality criteria, the flow objectives will be presented to the Council for incorporation into the Delta Plan)" (AR, D62.) Pursuant to ER P1 (23 CCR section 5005) the SWRCB's Bay Delta Water Quality Control Plan flow objectives shall be used to determine Delta Plan consistency. Upon revision, the new objectives shall control.

Respondent argues it is taking a "balanced, one-step-at-a-time approach, recognizing other agencies' expertise and existing, ongoing efforts." (Opposition, p. 57.) Respondent contends the

Act's requirements concerning flows are limited and that it does not require any entity to adopt the SWRCB's flow criteria. Respondent points to section 85086, subdivision (c)(1) and contends the Board's new flow criteria were only to "inform[] planning decision for the Delta Plan" and are "not to be considered predecisional with regard to any subsequent board consideration of a permit, including any permit in connection with a final BDCP." Respondent also cites to the SWRCB's comment in the flow criteria report that it did not assess "many other important beneficial uses that these waters support such as municipal and agricultural water supply and recreational uses." (AR, L11827.) Respondent finally argues it considered the report and used the report to craft provisions promoting Delta flow restoration even though it did not include the flow criteria in the Delta Plan.

The Delta Reform Act did not require Respondent to implement the exact flow objectives presented in the "Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem; Prepared Pursuant to the Sacramento-San Joaquin Delta Reform Act of 2009." The report itself acknowledges that it has limited application in light of its narrowed focus, eliminating from consideration other factors essential to the development of updated flow criteria. The Board did not consider "minimum or maximum flows needed to protect public health and safety" or perform any "balancing between potentially competing public trust resources." (AR, L011851.) The administrative record supports Respondent's contention that it fully considered the 2010 report at its August 26, 2010 Council meeting. (AR, F95.)

While the 2006 report is admittedly out-of-date when considering Delta fishes, there is no evidence before the Court that Respondent ignored flow criteria data that fully analyzes all beneficial uses in the Delta. Accordingly, as the 2010 report does not contain best available science for all beneficial uses, Respondent's decision not to institute its flow criteria is not a violation of the Delta Reform Act.

The Court finds the Delta Plan utilizes best available science in connection with flow objectives as required by the Delta Reform Act.

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3. Implementing policy of reduced Delta reliance

Petitioners contend the Delta Plan fails to comply with the Delta Reform Act because it does not include any enforceable policies to reduce reliance on the Delta. This argument appears to be distinct from Petitioners' argument that the Delta Plan must include quantified or otherwise measurable targets to reduce Delta reliance. Section 85021 provides that California's policy is to "reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency." Section 85001, subdivision (c) directs the development of a "legally enforceable Delta Plan." Accordingly, Petitioners contend, the Council was required to develop a Delta Plan with legally enforceable measures to reduce Delta reliance. Petitioners contend that although WR P1 requires agencies to report how much they expect to reduce reliance, it would be possible for an agency to increase Delta reliance so long as it properly documented the increase.

Petitioners argue that an Urban or Agricultural Water Management Plan does not necessarily result in reduced Delta reliance. Consequently, an agency could comply with WR P1 without implementing any reduction projects or measures (AR, E1209). Arguably, this result, combined with the lack of any specific quantifiable reduction target, means that the Delta Plan does not require agencies to establish reduced reliance.

Respondent argues that section 85021 does not mandate a reduction. Instead, Respondent argues that section 85021 reflects a legislative policy of reduced reliance through specified regional and local actions. Respondent contends the Delta Reform Act does not require it to take specified steps to further the policy. Instead, such a decision is within Respondent's discretion. (Opposition, p. 41.) Respondent further cites to sections 85020 and 85302. Section 85020, subdivision (d) states a management objective to "[p]romote statewide water conservation, water use efficiency, and sustainable water use." Section 85302, subdivision (d) provides that the Delta Plan "shall include measures to promote a more reliable water supply..." Respondent argues that the term "promote" in both of these sections gives the Council significant discretion.

The Court agrees that Respondent has discretion to determine the proper mechanism for reducing Delta reliance; however, as discussed above, it must do so by requiring quantified or otherwise measurable targets. Section 85021 clearly enunciates the policy of the State for addressing Delta issues. What it does not do, however, is direct any specific mechanism. That task is left to the Council.

4. Implementing the policy of Delta restoration

Pursuant to section 85054, one of the coequal goals is "protecting, restoring, and enhancing the Delta ecosystem." Section 85302 provides that Delta Plan implementation shall further the restoration of the Delta ecosystem, and the Delta plan must include certain measures that promote characteristics of a healthy Delta ecosystem, a more reliable water supply, and restoring a healthy Delta ecosystem. (§ 85032, subdivisions (a), (c)-(e).) However, Petitioners contend the Delta Plan contains no legally enforceable measures to improve the Delta ecosystem. This argument can be categorized into three main areas: 1) Improving water quality; 2) Restoring Delta habitat; and 3) Restoring Delta flows.

Improving water quality

Section 85302 provides that the Delta Plan shall include measures to promote a more reliable water supply that address "[i]mproving water quality to protect human health and the environment...." (§ 85302(d)(3).) Further, the Delta Plan shall include subgoals and strategies for restoring a healthy ecosystem, including "[i]mprov[ing] water quality to meet drinking water, agriculture, and ecosystem long-term goals. (§ 85302(e)(5).) Petitioners contend the Delta Plan does not contain any regulatory policies designed to improve water quality.

Petitioners argue this failure is underscored by the exemption provided by Code of Regulations, Chapter 23, section 5001, subdivision (dd)(3), which exempts from "covered action" all "temporary water transfers of up to one year in duration." This exemption is in effect through December 31, 2016 and is automatically repealed as of January 1, 2017 unless Respondent acts to extend the provision. Petitioners maintain these one-year transfers are repeatedly approved in a serial manner over consecutive years creating a significant impact on the coequal goals. (AR,

E1083, K12475-77.) Petitioners argue this is a violation of the requirement to improve water quality to protect the environment because water transfers harm the environment by removing Delta water. Petitioners contend the transferred water is frequently applied to lands that are contaminated by selenium, resulting in toxic return flows. (AR, B694.)

Respondent contends it adopted 12 specific recommendations aimed at improving water quality. (B458-59, 696-99.) Respondent also argues the flow policy contained in ER P1 promotes improved water quality. ER P1 (23 CCR section 5005) requires the SWRCB's Water Quality Control Plan flow objectives to be used to determine consistency with the plan. Respondent maintains these flow objectives will improve water quality by addressing salinity and sediment in the Delta. (AR, B451, 614.) However, Respondent fails to explain how the implementation of pre-existing flow objectives serves to improve water quality. *Improve* suggests a change in the status quo.

Respondent also argues the Delta Reform Act does not require a water quality regulation, instead leaving the manner of improving water quality to Respondent's discretion. In support of this contention, Respondent highlights the terms "promote" and "address" in section 85302, subdivision (d)(3). Respondent maintains "promote" includes nonregulatory recommendations and "address" means to "think about and begin to deal with." (Opposition, p. 73.)

In *Ralphs Grocery Co. v. Reimel*, the California Supreme Court found that an agency charged with promoting a policy had the discretion to do so by adopting a regulation prohibiting an activity. ((1968) 69 Cal.2d 172.) Specifically, the Court found,

> "the Legislature gave the department a general mandate: to use its expertise and power of continuous regulation as it sees fit to 'promote orderly marketing and distribution.' One tool available to accomplish this goal was the prohibition of quantity discounts. In not mentioning this method, the Legislature left the question of its propriety for the department." (*Id.* at 183.)

Merriam-Webster defines "promote" as (among other meanings) "to contribute to the growth or prosperity of; to help bring (as an enterprise) into being."[8] The Oxford Dictionary

[8] http://www.merriam-webster.com/dictionary/promote.

defines it as "support or actively encourage (a cause, venture, etc.); further the progress of."[9] With regard to non-regulatory provisions, the question becomes, if an agency chooses to ignore the recommendations, do they effectively help bring improved water quality to fruition? Is the inclusion of a legally enforceable regulation necessary to effectively promote "[i]mproving water quality to protect human health and the environment?"

Respondent cites to Chapter 6 of the Delta Plan, "Improve Water Quality to Protect Human Health and the Environment" and argues that the inclusion of such a chapter promotes improved water quality. In Chapter 6, the Delta Plan lists 12 recommendations "critical to protecting human health and improving the environment." (AR, B672, 696-99.) Many of these recommendations suggest other agencies should take specific steps to protect Delta water. Section 85302, subdivision (d)(3) is one that requires promotion. As is clear from the *Ralph's Grocery* case, significant discretion is vested in the implementing agency. Consequently, recommendations that promote water quality improvement (even if they are not implemented) are sufficient to satisfy Respondent's obligation.

With regard to temporary water transfers, the record indicates there was evidence both supporting temporary water transfers, as well as supporting a finding that they have been used improperly in a serial manner with significant impact on the Delta. (AR, E1178, 1287.) It was not arbitrary or capricious for Respondent to determine that there remained uncertainty concerning the nature and impact of temporary water transfers. Accordingly, it is not a violation of Respondent's discretion to exempt temporary transfers from the Delta Plan's regulations through 2016 to enable Respondent to gather the needed information.

Restoring Delta habitat

Section 85302, subdivision (c) provides that the Delta Plan shall include measures promoting viable populations of native resident and migratory species, functional corridors for migratory species, and diverse and biologically appropriate habitats and ecosystem processes. (§ 85302(c)(1)-(3).) Section 85302, subdivision (e) provides that the following subgoals and

[9] http://www.oxforddictionaries.com/definition/english/promote.

strategies for ecosystem restoration shall be included in the Delta Plan: "(1) Restore large areas of interconnected habitats within the Delta and its watershed by 2100; (2) Establish migratory corridors for fish, birds, and other animals along selected Delta river channels...(6) Restore habitat necessary to avoid a net loss of migratory bird habitat and, where feasible, increase migratory bird habitat to promote viable populations of migratory birds." Petitioners contend the Delta Plan does not include any legally enforceable policies concerning habitat restoration.

Section 85057.5, subdivision (b)(4) exempts from "Covered Action" all projects "consistent with either a sustainable communities strategy or an alternative planning strategy that the State Air Resources Board has determined would, if implemented, achieve the greenhouse gas emission reduction targets by that board pursuant to subparagraph (A) of paragraph (2) of subdivision (b) of Section 65080 of the Government Code." Section 85212 provides that the Council shall review and provide timely advice to agencies concerning the consistency of such projects with the Delta Plan. "The Council's input shall include, but not be limited to, reviewing the consistency of local and regional planning documents with the ecosystem restoration needs of the Delta and reviewing whether the lands set aside for natural resource protection are sufficient to meet the Delta's ecosystem needs." (*Id.*)

Respondent has not refined this language, instead simply stating that its review will consist of determining "whether these plans set aside sufficient lands for natural resource protection to meet the Delta ecosystem needs." (AR, B639.) Petitioners contend it is impossible to review the Delta Plan and know whether a particular sustainable communities strategy "set[s] aside sufficient lands for natural resource protection." Petitioners contend the Delta Plan fails to include any quantified or otherwise measurable targets for habitat or ecosystem restoration.

Respondent argues that the Delta Reform Act does not authorize the Council to order an agency to undertake a project. Consequently, the Delta Plan cannot include regulations requiring agencies to engage in habitat restoration outside a covered action. Respondent also contends the Delta Plan *does* contain five legally enforceable policies concerning habitat restoration, ER P1-P5. (AR, B451-54.)

ER P3 (23 CCR section 5007) provides, "[w]ithin the priority habitat restoration areas depicted in Appendix 5, significant adverse impacts to the opportunity to restore habitat as described in section 5006, must be avoided or mitigated." (AR, B453.) This section clearly is legally enforceable and promotes habitat restoration by forbidding adverse impacts to restoration opportunities. ER P4 (23 CCR section 5008) requires that levee projects be evaluated and, where feasible, incorporate alternatives to increase floodplains and riparian habitats. Such a regulation requires overt action concerning habitat restoration by agencies undertaking levee projects. Accordingly, Petitioners' argument that the Delta Plan is completely void of enforceable measures concerning habitat restoration is without merit.

Respondent does not address Petitioners' section 85212 arguments. However, the statutory language designates that Respondent is tasked with "reviewing the consistency of local and regional planning documents with the ecosystem restoration needs of the Delta and reviewing whether the lands set aside for natural resource protection are sufficient to meet the Delta's ecosystem needs." Petitioners do not point to any requirement that Respondent develop criteria or a definition as to what land set-asides are necessary to meet the Delta's ecosystem needs. Respondent's interpretation of its duty tracks the statutory language, and consequently neither exceeds nor impairs its authority. The Delta's ecosystem needs are likely to be ever evolving, and so it is not a violation of the Delta Reform Act to evaluate each project individually.

Restoring Delta Flows

Section 85302, subdivision (e)(4) provides the Delta Plan must include subgoals and strategies to "[r]estore Delta flows and channels to support a healthy estuary and other ecosystems." However, Petitioners contend the Delta Plan improperly codifies existing flow criteria, inadequate to protect public trust resources. (AR, B614.)

As discussed above, the Delta Reform Act did not require Respondent to implement the exact flow objectives presented in the "Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem; Prepared Pursuant to the Sacramento-San Joaquin Delta Reform Act of 2009." While the 2006 report is admittedly out-of-date when considering Delta fishes, there is no evidence before the Court that Respondent ignored flow criteria data that fully analyzes all

beneficial uses in the Delta. Accordingly, as the 2010 report does not contain best available science for all beneficial uses, Respondent's decision not to institute its flow criteria is not a violation of the Delta Reform Act.

The Delta Plan recommendation ER R1 indicates that the SWRCB should update flow objectives for the Delta as necessary to achieve the coequal goals by June 2, 2014. It also recommends that by June 2, 2018, the SWRCB should adopt and implement flow objectives necessary to achieve the coequal goals for high-priority tributaries in the Delta watershed. (AR, B614.) This clearly is a subgoal and strategy to restore Delta Flows to support a healthy estuary.

5. Validity of regulations

Petitioners contend the regulations promulgated to carry out the Delta Plan violate the APA because they fail to comply with the Delta Plan requirements. Petitioners also contend the regulations improperly impair the scope of the Act. Petitioners cite to Code of Regulations chapter 23, section 5001, subdivision (dd)(3) exempting temporary water transfers, and section 5002, subdivision (b)(1) which allows for covered actions to proceed even though they may not be fully consistent with all relevant regulatory policies. Petitioners argue this limits the direction set by the Act that an action is appealable if it "will have a significant adverse impact on the achievement of *one or both* of the coequal goals..." (§ 85225.10(a))(emphasis added.)

With regard to section 5002, subdivision (b)(1), Respondent argues the provision seeks to avoid barring a plan or program that "overall, advances the coequal goals." (Opposition, p. 99.) Furthermore, Respondent argues the Delta Reform Act requires actions to be consistent with the Delta Plan, and because the exemption *is part* of the Delta Plan, any action complying with subdivision (b)(1) complies with the Delta Plan.

On its face, the regulation does not impair the scope of the Delta Reform Act, as it still requires a covered action to be consistent with both of the coequal goals. Subdivision (b)(1) merely anticipates that full consistency with all Delta Plan "regulatory policies" may not be feasible, but a project may still be in furtherance of the coequal goals. An agency's determination that such circumstances exist is subject to review by the Council on appeal. Consequently, the

Covered Action is still subject to appeal, and still must be consistent with the coequal goals. This does not impair the scope of the Delta Reform Act.

To the extent the Court has already found the Delta Plan regulations fail to comply with the Delta Reform Act, the Court agrees the regulations also violate the APA. With regard to temporary water transfers, for the reasons detailed above, the Court finds Respondent did not violate the Delta Reform Act in exempting temporary water transfers until the end of 2016.

Conclusion

The petition for writ of mandate with regard to the statutory challenges heard in this bifurcated proceeding is **GRANTED** in part and **DENIED** in part in accordance with the above ruling. A peremptory writ shall issue from this Court to Respondent, ordering Respondent to revise the Delta Plan and any applicable regulations to:

1) Include quantified or otherwise measurable targets associated with achieving reduced Delta reliance, reduced environmental harm from invasive species, restoring more natural flows, and increased water supply reliability, in accordance with the Delta Reform Act.

Nothing in the writ shall limit or control in any way the discretion legally vested in Respondent. The writ shall also command Respondent to make and file a return within 120 days after issuance of the writ, setting forth what it has done to comply with the writ.

In accordance with Local Rule 1.06, counsel for Petitioners is directed to prepare an order granting the petition in part and denying it in part, incorporating this ruling as an exhibit to the order, and a separate judgment and writ of mandate; submit them to counsel for Respondent for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit them to the Court for signature and entry in accordance with Rule of Court 3.1312(b).

B. *City of Stockton v. Delta Stewardship Council*

Petitioner City of Stockton contends that "[t]he Delta Plan conflicts with or impermissibly intrudes with state law and vested rights created by statutory and common law." (Opening Brief, p. 29.) Citing to Water Code section 11460, Petitioner argues it is entitled to "watershed of origin" protections designed to address Northern California concerns about transferring water

south through state financed water delivery facilities. (Opening Brief, p. 30.) Section 11460 provides,

> "[i]n the construction and operation by the [Department of Water Resources] of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein."

Pursuant to section 12203 it is the policy of the State of California "that no person, corporation or public or private agency or the State or the United States should divert water from the channels of the Sacramento-San Joaquin Delta to which the users within said Delta are entitled."

The Delta Reform Act specifically provides that it does not modify or infringe on these rights. Section 85031, subdivision (a) provides that the Delta Reform Act does not,

> "diminish, impair, or otherwise affect in any manner whatsoever any area of origin, watershed of origin, county of origin, or any other water rights protections, including, but not limited to, rights 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."

Section 85032 provides that the Delta Reform Act does not affect, among others, any water right, or the application of the public trust doctrine. Petitioner contends the regulations promulgated by Respondent in the Delta Plan impermissibly infringe on "watershed of origin" rights.

California Code of Regulations, Title 23, section 5002 details the certifications of consistency that those proposing "covered actions" must provide concerning compliance with the Delta Plan:

> "(b) Certifications of consistency must include detailed findings that address each of the following requirements:
>
> > (1) Covered actions, in order to be consistent with the Delta Plan, must be consistent with this regulatory policy and with each of the regulatory

policies contained in Article 3 implicated by the covered action. The Delta Stewardship Council acknowledges that in some cases, based upon the nature of the covered action, full consistency with all relevant regulatory policies may not be feasible. In those cases, the agency that files the certification of consistency may nevertheless determine that the covered action is consistent with the Delta Plan because, on whole, that action is consistent with the coequal goals. That determination must include a clear identification of areas where consistency with relevant regulatory policies is not feasible, an explanation of the reasons why it is not feasible, and an explanation of how the covered action nevertheless, on whole, is consistent with the coequal goals. That determination is subject to review by the Delta Stewardship Council on appeal;

(2) Covered actions not exempt from CEQA must include applicable feasible mitigation measures identified in the Delta Plan's Program Environmental Impact Report (unless the measure(s) are within the exclusive jurisdiction of an agency other than the agency that files the certification of consistency), or substitute mitigation measures that the agency that files the certification of consistency finds are equally or more effective;

(3) As relevant to the purpose and nature of the project, all covered actions must document use of best available science;

(4) Ecosystem restoration and water management covered actions must include adequate provisions, appropriate to the scope of the covered action, to assure continued implementation of adaptive management. This requirement shall be satisfied through both of the following:

(A) An adaptive management plan that describes the approach to be taken consistent with the adaptive management framework in Appendix 1B; and

(B) Documentation of access to adequate resources and delineated authority by the entity responsible for the implementation of the proposed adaptive management process.

(c) A conservation measure proposed to be implemented pursuant to a natural community conservation plan or a habitat conservation plan that was:

1) Developed by a local government in the Delta; and

(2) Approved and permitted by the California Department of Fish and Wildlife prior to May 16, 2013 is deemed to be consistent with sections 5005 through 5009 of this Chapter if the certification of consistency filed with regard to the conservation measure includes a statement confirming the nature of the conservation measure from the California Department of Fish and Wildlife."

Article 3 regulatory policies include reduced reliance on the Delta as found in WR P1 (23 CCR section 5003) and the section 5011 policy regarding respecting local land use when siting

water facilities or restoring habitats. Pursuant to 23 CCR section 5003, subsection (a), water shall not be,

> "exported from, transferred through, or used in the Delta if all of the following apply:
>
> (1) One or more water suppliers that would receive water as a result of the export, transfer, or use have failed to adequately contribute to reduced reliance on the Delta and improved regional self-reliance consistent with all of the requirements listed in paragraph (1) of subsection (c);
> (2) That failure has significantly caused the need for the export, transfer, or use; and
> (3) The export, transfer, or use would have a significant adverse environmental impact in the Delta."
> Subsection (c) provides,
>
> "(c)(1) Water suppliers that have done all of the following are contributing to reduced reliance on the Delta and improved regional self-reliance and are therefore consistent with this policy:
> (A) Completed a current Urban or Agricultural Water Management Plan (Plan) which has been reviewed by the California Department of Water Resources for compliance with the applicable requirements of Water Code Division 6, Parts 2.55, 2.6, and 2.8;
> (B) Identified, evaluated, and commenced implementation, consistent with the implementation schedule set forth in the Plan, of all programs and projects included in the Plan that are locally cost effective and technically feasible which reduce reliance on the Delta; and
> (C) Included in the Plan, commencing in 2015, the expected outcome for measurable reduction in Delta reliance and improvement in regional self-reliance. The expected outcome for measurable reduction in Delta reliance and improvement in regional self-reliance shall be reported in the Plan as the reduction in the amount of water used, or in the percentage of water used, from the Delta watershed. For the purposes of reporting, water efficiency is considered a new source of water supply, consistent with Water Code section 1011(a).
>
> (2) Programs and projects that reduce reliance could include, but are not limited to, improvements in water use efficiency, water recycling, stormwater capture and use, advanced water technologies, conjunctive use projects, local and regional water supply and storage projects, and improved regional coordination of local and regional water supply efforts."

Petitioner argues reduced Delta reliance may be impossible for an in-Delta supplier, thus preventing section 5003 compliance. Petitioner also argues the consistency appeal process allows any person to file an appeal, thus allowing a competing Southern California water supplier to

delay an in-Delta supplier's application. Petitioner maintains this effectively allows such a challenger to cut ahead in the water priority line because the Delta Plan fails to provide priority protections. (§ 85225.)

Petitioner argues that the Delta Plan consistency requirements burden its preexisting statutorily granted water rights. Petitioner maintains the Delta Plan "requires agencies such as Stockton, before enjoying the important statutory priority to water arrived at as a delicate compromise between competing water users, to additionally demonstrate as a new burden that exercising this statutorily granted priority right is 'consistent with the Delta Plan.'" (Opening Brief, p. 33.) As this burden is contrary to the section 85031 policy that water rights protections should not be diminished, impaired, or otherwise affected, Petitioner contends the regulations are invalid pursuant to Government Code section 11342.2.

> "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Gov. Code § 11342.2.)

Respondent acknowledges that WR P1 applies to projects that will export water from the Delta, as well as to in-Delta uses. However, Respondent argues Petitioner can reduce Delta reliance by pursuing "conservation and related efficiency measures." (Opposition, p. 43.) Respondent also cites to the fact that reduced reliance projects are only required to the extent they are "locally cost effective and technically feasible." Accordingly, if an in-Delta supplier is unable to reduce reliance, there will be no "technically feasible" and "cost effective" projects identified by the subject Urban or Agricultural Water Management Plan.

As the plain language of WR P1 only requires "locally cost effective and technically feasible" reduced Delta reliance projects, the Court is not persuaded by Petitioner's argument that an in-Delta supplier may be unable to comply with WR P1 because its location in the Delta makes reducing Delta reliance impossible. Petitioner has failed to identify circumstances or examples where consistency compliance would create such a burden as to implicate section 85031.

Petitioner's stated concern is that WR P1 permits a Southern-California water supplier to achieve priority in obtaining water. However, the plain language of WR P1 does not affect water right priorities. WR P1 does not provide that if a consistency certification is undergoing the appeals process, another water supplier may come in and usurp the challenged party's water rights or priority. Clearly, Respondent has no authority over water-priority determinations, and any plan or project subject to WR P1 would only be valid to the extent it sought water that a supplier was entitled to via its water rights. Accordingly, the Court finds WR P1 does not alter or affect water rights or priorities.

With regard to whether WR P1 affects water right applications, Respondent argues water rights applications are not covered actions pursuant to section 85057.5, subdivision (b)(1):

> "(b) 'Covered action' does not include any of the following:
> (1) A regulatory action of a state agency."

WR P1 cannot apply to the granting or denial of a water rights application, a matter controlled by the SWRCB (§§ 1250, et seq.). Petitioner argues that the plain language of WR P1 could prevent action pursuant to a granted water rights application. While the SWRCB may grant appropriation rights pursuant to section 1253, those rights are still subject to a certification of Delta Plan consistency pursuant to 23 CCR section 5002. However, the requirement of reducing Delta reliance to the extent feasible and cost effective is merely a statutory enumeration of the principle of reasonable use and the public trust doctrine.

Section 85023 provides "[t]he longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta." Accordingly, the Legislature affirmed its intent that these principles continue to apply to limit an owner's interest in water. (*Alegretti & Co v. County of Imperial* 138 Cal.App.4th 1261, 1279 [water rights are restricted to a "reasonable beneficial use" consistent with article X, section 2 of the California Constitution]; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 437 ["parties acquiring rights in trust property...can assert no vested right to use those rights in a manner harmful to the trust."]) If an

in-Delta supplier seeks to exercise its water rights without undertaking locally cost effective and technically feasible projects that reduce reliance on the Delta, such an undertaking is contrary to both the principle of reasonable use and the public trust doctrine. Consequently, WR P1 is an assessment of whether a water supplier is compliant with reasonable use and the public trust doctrine. As such, it does not modify water rights in contravention of the Delta Reform Act or preexisting water rights protections.

Conclusion

The petition for writ of mandate with regard to the statutory challenges heard in this bifurcated proceeding is **DENIED** in accordance with the above ruling.

In accordance with Local Rule 1.06, counsel for Respondent is directed to prepare an order denying the petition, incorporating this ruling as an exhibit to the order, and a separate judgment; submit them to counsel for Petitioner for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit them to the Court for signature and entry in accordance with Rule of Court 3.1312(b).

C. *Save the California Delta Alliance v. Delta Stewardship Council*

Petitioner Save the California Delta Alliance argues the Delta Plan is deficient in the following five areas:

1. Appendix A and the BDCP Covered Activity Consistency Rule contain unlawful underground regulations determining that BDCP projects are exempt from the Delta Plan.
2. The BDCP exemption rule impairs the scope of the Delta Reform Act.
3. The flow policy violates the Delta Reform Act.
4. The Delta Plan does not contain any conveyance or storage policies, in violation of the Delta Reform Act.
5. The Council has effectively "rubber-stamped" the BDCP for Delta Plan inclusion, contrary to Section 85321.

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1. Appendix A and the BDCP Covered Activity Consistency Rule contain unlawful underground regulations determining that BDCP projects are exempt from the Delta Plan

Petitioner asserts Respondent has made enactments finding that BDCP projects are exempt from the Delta Plan, and that these enactments are unlawful underground regulations. (Opening Brief, p. 8.) Petitioner points to Appendix A, which provides,

> "Upon successful completion of the BDCP process, and if the BDCP meets certain requirements explained in Water Code section 85320(e), the BDCP becomes part of the Delta Plan. Subsequently, if another government agency (California Department of Water Resources, most likely) proposes to implement the new conveyance project that is selected by BDCP as the preferred conveyance option and that project qualifies as a "covered action" (it would qualify, most likely), the project would be consistent with the Delta Plan regardless of whether the Delta Plan had previously endorsed a different conveyance option." (AR, B1156.)

Petitioner contends Respondent has thus approved the BDCP, even to the extent it otherwise conflicts with the Delta Plan. Petitioner points to the BDCP Covered Activity Consistence Certification rule, which provides,

> "The Delta Reform Act describes a specific process for the potential incorporation of BDCP into the Delta Plan. If the BDCP is incorporated, an agency proposing a qualifying 'covered activity' under BDCP that also meets the statutory definition of 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." (AR, B517.)

Accordingly, Petitioner contends Respondent interpreted and implemented Water Code sections 85057.5 and 85225 without properly adopting regulations through the process provided by the California Administrative Procedure Act. Petitioner argues the BDCP Exemption Rule and Appendix A were not submitted to OAL for approval as regulations or filed with the Secretary of State for publication in the California Code of Regulations, as required pursuant to *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557.

In *Tidewater*, the Supreme Court found,

> "A regulation subject to the APA thus has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather

than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure." (*Id.* at 571)(citations omitted.)

The Court finds this argument is premature. The Appendix A treatment of those projects in compliance with the BDCP only becomes applicable if the BDCP meets certain criteria and becomes part of the Delta Plan. An evaluation of the effect of Appendix A and the Covered Activity Consistency Certification rule requires a determination that a covered action could be consistent with the BDCP and still be inconsistent with the Delta Plan. Such a determination is impossible in the absence of a finalized BDCP. As it is unclear what the final BDCP will contain, whether there will even *be* a BDCP, and whether the BDCP will in fact be incorporated into the Delta Plan, Respondent's treatment of the BDCP is not yet ripe for review.

2. The BDCP exemption rule impairs the scope of the Delta Reform Act

For the same reasons provided above, the Court also finds Petitioner's argument that the BDCP exemption rule contradicts the Delta Reform Act is not ripe for review.

3. The flow policy violates the Delta Reform Act

Petitioner also argues the fourteen Delta Plan Policies fail to fulfill the Delta Reform Act's objectives and subgoals. The "Council's choice[] to enact a flow policy that does not advance the goal of restoring Delta Flows...impair[s] the scope of the Delta Reform Act and [was] arbitrary and capricious." (Opening Brief, p. 24.)

Water Code section 85302, subdivision (e)(4) provides, "The following subgoals and strategies for restoring a healthy ecosystem shall be included in the Delta Plan...(4) Restore Delta flows and channels to support a healthy estuary and other ecosystems." Petitioner contends Respondent has ignored this subgoal requirement, and failed to include a legally enforceable Delta flow policy. Delta Plan policy ER P1 (23 CCR section 5005) (Delta Flow Objectives) addresses flows. It states, "(a) The State Water Resource Control Board's Bay Delta Water Quality Control Plan flow objectives shall be used to determine consistency with the Delta Plan. If and when the flow objectives are revised by the State Water Resources Control Board, the

revised flow objectives shall be used to determine consistency with the Delta Plan." (AR, B614.) Petitioner asserts this Policy fails to achieve the Delta Reform Act's goal of restoring Delta flows because the SWRCB already implements its own objectives. Consequently, ER P1 does not change the status quo. (Opening Brief, p. 26.) The Delta Plan describes flow criteria as follows:

> "The development of specific criteria by the State Water Resources Control Board for flows for the Delta ecosystem, including the volume, quality, and timing of water necessary for the Delta ecosystem under different conditions (Water Code section 85086(c)(1))." (AR, B776.)

The Delta Plan describes flow objectives as follows:

> "Where protection of beneficial uses requires specific flow volumes at certain times regional water quality control boards may establish flow objectives in watery quality control plans. They differ from typical water quality objectives in that they are implemented by the State Water Resources Control Board through modifications and limitations of existing or future water rights to make sure these flows are met." (AR, B776.)

Respondent found "[t]he effort to improve the fortunes of the Delta ecosystem has two components that are vital: [one of which is] guaranteeing adequate flows from the rivers feeding into and through the Delta Channels…" (AR, B436.) Furthermore, Respondent acknowledged "best available science suggests that currently required flow objectives within and out of the Delta are insufficient to protect the Delta ecosystem." (AR, B614.) Accordingly, Petitioner argues Respondent admitted an obligation to include legally enforceable updated flow criteria, yet failed to do so within the Delta Plan.

Petitioner also argues the Delta Plan does not include "quantified or otherwise measurable targets" concerning Delta flow. Petitioner argues the Delta Plan only sets a vague goal of "[p]rogress toward restoring in-Delta flows to more natural functional flow patterns to support a healthy estuary..." (AR, B623.) Petitioner argues this "progress" goal fails to identify any measurable target.

Respondent argues the goal of "[p]rogress toward restoring in-Delta flows to more natural functional flow patterns to support a healthy estuary…" provides a generalized measurement, and that the Council "intends to refine its performance measures." (Opposition, p. 104.) As the Court has already found in *North Coast Rivers Alliance, et al. v. Delta Stewardship Council*, "progress"

does not provide a quantified or otherwise measurable target upon which Delta users can gauge compliance. While Respondent may intend to refine its performance measurements, the Delta Reform Act requires measurable targets to be included in the Delta Plan. As Respondent has certified that it has completed such a Delta Plan, any future modifications are not relevant to a determination of whether the Delta Plan currently complies with the Delta Reform Act.

The Court finds the Delta Plan fails to "include quantified or otherwise measurable targets associated with" restoring more natural flows as required by the Delta Reform Act.

With regard to the failure to enact a flow policy that advances the goal of restoring Delta flows, the Court finds, for the reasons discussed in *North Coast Rivers Alliance, et al. v. Delta Stewardship Council*, that the Delta Plan utilizes best available science in connection with flow objectives as required by the Delta Reform Act.

4. <u>The Delta Plan does not contain any conveyance or storage policies</u>

Petitioner argues the Delta Plan lacks policies concerning conveyance or storage, in violation of the Delta Reform Act. Respondent answers that the "Council has determined that the BDCP agencies are in the best position to complete the planning process including defining acceptable ranges of exports and through-Delta flows." (AR, D59.) Appendix A to the Delta Plan provides,

> "The Act…gives the Council the authority to opine generally about improving conveyance as it may relate to the rest of the Delta Plan and the coequal goals. Accordingly, the Council has authority to recommend to BDCP preferred conveyance options that the BDCP should evaluate. Nevertheless, for the same reasons the Delta Plan at this time does not include any regulatory policies regarding conveyance, the Delta Plan likewise does not include any Recommendations…regarding conveyance. At this time, the agencies pursuing BDCP are best positioned to develop possible options, evaluate them, and decide on the best one." (AR, B1156-57.)

Petitioners argue the Delta Reform Act requires the Delta Plan to include legally enforceable policies regarding conveyance and storage. Section 85020 provides "[t]he policy of the State of California is to achieve the following objectives that the Legislature declares are inherent in the coequal goals for management of the Delta:…(f) Improve the water conveyance system and expand statewide water storage." Section 85304 provides "[t]he Delta Plan *shall*

promote options for new and improved infrastructure relating to the water conveyance in the Delta, storage systems, and for the operation of both to achieve the coequal goals." (emphasis added.) However, as provided in Appendix A, the Delta Plan does not include any regulatory policies or any recommendations regarding conveyance.

Respondent argues the BDCP will contain a conveyance approach, and cites to section 85320, subdivision (b)(1)(B). However, section 85320 does not define what will be included in the BDCP, only that the BDCP may be considered for inclusion in the Delta Plan, and cannot be so incorporated if it does not provide a reasonable range of Delta conveyance alternatives. (§ 85320, subdivision (b)(2)(B).) As this Court has previously indicated, there is no evidence before the Court that the BDCP will be finalized, nor any evidence as to what content the BDCP will include. Respondent then argues that a "BDCP conveyance choice of a tunnel or other option would occupy the field" and so it would not make sense for Respondent to recommend conveyance options that would be overridden if the BDCP is incorporated. (Opposition, p. 53.) In making this argument, Respondent does not attempt to argue that the Delta Plan currently contains *any* conveyance options or storage systems.

Respondent does argue that the Delta Plan promotes options for conveyance and storage via WR R12, which recommends that the appropriate agencies should complete the BDCP and receive required incidental take permits by December 31, 2014. However, Respondent admits it has no authority to direct the BDCP's contents. (Opposition, p. 53.) Thus, simply recommending the BDCP's completion does not promote any options.

It is true that *if* a BDCP is finalized, it *will likely* contain a conveyance choice, and *may* be considered for incorporation into the Delta Plan. However, Respondent has certified that it has completed the Delta Plan, and any future modifications are not relevant to a determination of whether the Delta Plan currently complies with the Delta Reform Act. The Delta Reform Act requires the Delta Plan to "*promote options* for new and improved infrastructure relating to the water conveyance in the Delta, storage systems, and for the operation of both to achieve the coequal goals." (§ 85320.) The Delta Plan currently before the Court fails to do so. Accordingly,

this failure to promote options for water conveyance and storage systems is a violation of the Delta Reform Act.

5. The BDCP may only be included in the Delta Plan if it complies with section 85321

Lastly, Petitioner argues the Council must determine the BDCP complies with Water Code section 85321 before the BDCP may be incorporated into the Delta Plan. This argument is, again, premature, as the BDCP has not been completed, and, consequently, the decision whether to incorporate it into the Delta Plan has not been made. It is not appropriate at this time for the Court to speculate as to whether comments made by the Council concerning this process indicate whether it *will or will not* proceed as directed by the Delta Reform Act in making the incorporation decision.

Conclusion

The petition for writ of mandate with regard to the statutory challenges heard in this bifurcated proceeding is **GRANTED** in part and **DENIED** in part in accordance with the above ruling. A peremptory writ of mandate shall issue from this Court to Respondent, ordering Respondent to revise the Delta Plan and any applicable regulations to:

1) Provide a flow policy that includes "quantified or otherwise measurable targets;"
2) Promote options for water conveyance and storage systems.

Nothing in the writ shall limit or control in any way the discretion legally vested in Respondent. The writ shall also command Respondent to make and file a return within 120 days after issuance of the writ, setting forth what it has done to comply with the writ.

In accordance with Local Rule 1.06, counsel for Petitioner is directed to prepare an order granting the petition in part and denying it in part, incorporating this ruling as an exhibit to the order, and a separate judgment and writ of mandate; submit them to counsel for Respondent for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit them to the Court for signature and entry in accordance with Rule of Court 3.1312(b).

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D. *San Luis & Delta-Mendota Water Authority v. Delta Stewardship Council; State Water Contractors, et al. v. Delta Stewardship Council*

Petitioners in the above-referenced cases filed a joint brief referring to themselves as the State and Federal Contractors (collectively as "Water Contractor Petitioners"). Petitioners argue the Delta Plan is deficient in the following six areas:

1. WR P1 is unlawful.
2. The consistency certification appeals process violates the Delta Reform Act.
3. The Delta Plan's interaction with the BDCP violates the Delta Reform Act.
4. Respondent lacks the authority to treat temporary water transfers as "covered actions."
5. The regulation mandating transparency in water contracting is void.
6. Respondent failed to comply with APA requirements to assess the economic impact of proposed regulations.

1. <u>WR P1 is unlawful</u>

Providing a more reliable water supply for California is one of the Delta Reform Act's coequal goals, and consequently something the Delta Plan must further. (§§ 85300, subdivision (a), 85054.) Petitioners argue WR P1 fails to provide more reliable water supplies from the Delta, in violation of the Delta Reform Act.

Reduced reliance is contrary to water supply reliability

WR P1 applies to a "covered action." Section 85057.5 identifies "covered actions" as "a plan, program, or project as defined pursuant to Section 21065 of the Public Resources Code that meets all of the following conditions:

(1) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.
(2) Will be carried out, approved, or funded by the state or a local public agency.
(3) Is covered by one or more provisions of the Delta Plan.
(4) Will have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta.

Pursuant to WR P1 (23 CCR § 5003) subsection (a), water shall not be,

"exported from, transferred through, or used in the Delta if all of the following apply:

(1) One or more water suppliers that would receive water as a result of the export, transfer, or use have failed to adequately contribute to reduced reliance on the Delta and improved regional self-reliance consistent with all of the requirements listed in paragraph (1) of subsection (c);
(2) That failure has significantly caused the need for the export, transfer, or use; and
(3) The export, transfer, or use would have a significant adverse environmental impact in the Delta."

Subsection (c) provides,

"(c)(1) Water suppliers that have done all of the following are contributing to reduced reliance on the Delta and improved regional self-reliance and are therefore consistent with this policy:
(A) Completed a current Urban or Agricultural Water Management Plan (Plan) which has been reviewed by the California Department of Water Resources for compliance with the applicable requirements of Water Code Division 6, Parts 2.55, 2.6, and 2.8;
(B) Identified, evaluated, and commenced implementation, consistent with the implementation schedule set forth in the Plan, of all programs and projects included in the Plan that are locally cost effective and technically feasible which reduce reliance on the Delta; and
(C) Included in the Plan, commencing in 2015, the expected outcome for measurable reduction in Delta reliance and improvement in regional self-reliance. The expected outcome for measurable reduction in Delta reliance and improvement in regional self-reliance shall be reported in the Plan as the reduction in the amount of water used, or in the percentage of water used, from the Delta watershed. For the purposes of reporting, water efficiency is considered a new source of water supply, consistent with Water Code section 1011(a)."

Petitioners argue a regulation limiting water usage cannot increase water supply reliability, and consequently is contrary to the Delta Reform Act. Petitioners cite to section 85302, subdivision (d) which provides, "[t]he Delta Plan shall include measures to promote a more reliable water supply that address all of the following: (1) Meeting the needs for reasonable and beneficial uses of water. (2) Sustaining the economic vitality of the state. (3) Improving water quality to protect human health and the environment." Petitioners contend "WR P1 threatens a forced reduction in use of water from the Delta, even if that water is needed to serve existing reasonable and beneficial uses or sustain economic activity."

Respondent argues WR P1 furthers water reliability by encouraging "water users to lessen their dependence on Delta water supplies, and increase their focus on more reliable local and regional measures." (Opposition, p. 27.) The Delta Plan provides that "[c]hanging rules to curtail pumping and increase Delta outflow have compounded water supply uncertainty for agencies that use water conveyed through the Delta, particularly in drier years when ecosystem conflicts are most pronounced. Some of those agencies have contributed to the uncertainty by becoming increasingly reliant on Delta exports that were intended to be supplemental supplies, but in some cases are now relied upon as core water supplies." (AR, B477.)

The Blue Ribbon Task Force "Delta Vision Strategic Plan" provides that it is designed to "outline the major steps necessary to achieve our co-equal goals of a viable Delta ecosystem and water for Californians." (AR, L3232.) Pursuant to the DVSP, "statewide efforts to conserve water and more responsibly use existing supplies directly influence success in the Delta" and "[i]ncreased storage capacity, surface and ground, plus changed operations are also required to improve water supply reliability. Concurrently, Californians need to become less dependent on water supply from the Delta, both to reduce risk from a failed Delta conveyance system and to reduce risks to the ecosystem." (AR, L3205.) Furthermore, the Delta Reform Act itself, in section 85021, provides that it is state policy to "reduce reliance on the Delta in meeting California's future water supply needs..." Consequently, there is both statutory support, as well as substantial evidence in the record, that reduced Delta reliance supports water supply reliability.

Petitioners have failed to identify evidence that WR P1 will not further water reliability, and a finding that it will further water reliability is supported by substantial evidence in the record.

Authority to prohibit exports from or transfer through the Delta

Petitioners contend WR P1 is invalid because it exceeds Respondent's authority to control water diversions. Petitioners argue "the Council claims authority to prevent export or transfer of Delta Water regardless of whether such actions are authorized by the State Water Resources Control Board" in violation of the Delta Reform Act." (Joint Opening Brief, p. 15.)

Petitioners assert Respondent's sole powers are those listed in section 85210, and consequently Respondent does not have the power to prohibit exports when a water supplier has failed to take reduced reliance measures outside the Delta. The Court is not persuaded. The statute clearly provides that Respondent is authorized to "adopt regulations or guidelines as needed to carry out the powers and duties identified in this division." (§ 85210, subdivision (i).) The question is whether WR P1 is necessary to carry out Respondent's Delta Reform Act duties.

Petitioners argue Respondent is only authorized to hear appeals of consistency certifications concerning covered actions, which by definition "[w]ill occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh." (§ 85057.5.) Petitioners contend that WR P1 attempts to regulate the *causes* of covered actions, which causes may occur outside the Delta. Petitioners point to Section 85032, subdivision (i) which provides that the Delta Reform Act does not affect "[a]ny water right" and that pursuant to section 174, only the SWRCB may condition water rights. Petitioners also argue section 85021 only requires each "region" to improve its regional self-reliance, not each water supplier.

Respondent contends section 85023 serves to clarify sections 85031 and 85032 by providing that the "constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta." Accordingly, the Legislature affirmed its intent that these principles continue to apply to limit an owner's interest in water. (*Alegretti & Co v. County of Imperial* 138 Cal.App.4th 1261, 1279 [water rights are restricted to a "reasonable beneficial use" consistent with article X, section 2 of the California Constitution]; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 437 ["parties acquiring rights in trust property...can assert no vested right to use those rights in a manner harmful to the trust."]) Because WR P1 is an assessment of whether a water-supplier is compliant with reasonable use and the public trust doctrine, it neither changes water rights nor interferes with the Water Resources Control Board's water rights process.

Furthermore, if Respondent were not authorized to require reduced Delta reliance to demonstrate Delta Plan consistency, the Delta Plan would be an unenforceable document, at least with regard to furthering the coequal goals of (1) providing a more reliable water supply for

California; and (2) protecting, restoring, and enhancing the Delta ecosystem. (§ 85054.) This is especially true in light of the state's policy to reduce Delta reliance through a strategy of investing in improved regional supplies, conservation, and water use efficiency. (§ 85021.) While section 85021 provides that each "region" shall improve its regional self-reliance, Petitioners have not identified any authority that such regional self-reliance may not be achieved by requiring water suppliers themselves to demonstrate reduced reliance. In the absence of such limiting language, the Court relies on the broad authority granted Respondent via section 85210, subdivision (i) to "adopt regulations or guidelines as needed to carry out the powers and duties identified in this division."

To the extent section 85021 refers to "future water supply needs" this does not indicate that current water usage cannot be taken into account when determining how to best serve California's future water supply needs. The plain language of section 85021 requires all water supply needs beyond the date of its adoption to be balanced, and reduced reliance must be a part of this balancing. There is no indication that section 85021 only affects water uses above current levels. Such a finding would be contrary to the coequal goal of protecting, *restoring*, and enhancing the Delta ecosystem. To the extent 85021 is intended to state a Delta Reform Act policy, there is no limiting language preventing Respondent from implementing such policies via legally enforceable regulations.

Petitioners' argument that WR P1 seeks to regulate the *causes* of covered actions, even when such causes take place outside of the Delta is equally unpersuasive. WR P1 only applies to covered actions, which must "occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh." (§85057.5.) Accordingly, WR P1 only impacts the use of Delta water. While an Urban or Agricultural Water Management Plan may identify non-Delta projects necessary to establish reduced Delta reliance, the Delta Plan does not regulate those non-Delta projects. The Delta Plan only conditions Delta water usage on complying with certain criteria. There is nothing in the Delta Reform Act that supports the argument that such a regulation is contrary to Legislative intent. If the Court were to adopt Petitioners' argument, the Delta Plan would be limited to regulating area-of-origin suppliers, while allowing other suppliers to divert water

without regulation. This is contrary to both area of origin protections, as well as the plain language of the Delta Reform Act.

The court finds that WR P1 does not exceed Respondent's authority to control Delta water usage.

WR P1 is not reasonably necessary

Lastly, with regard to WR P1, Petitioners argue the record lacks substantial evidence that WR P1 is reasonably necessary. Petitioners contend there is no evidence that water suppliers have failed to implement measures to reduce Delta reliance. Petitioners also contend that Respondent has failed to consider all relevant factors and demonstrate a rational connection between those factors and the statute. (citing *Am. Coatings Assn. v. S. Coast Air Quality Dist.* (2012) 54 Cal.4th 446, 460-61.)

Respondent argues the Delta Reform Act itself proves that WR P1 is necessary by declaring "existing Delta policies are not sustainable" and by identifying a policy of "reduced reliance." (§§ 85001, subd. (a), 85021.) Furthermore, Respondent points to data that in 2011, fifteen percent of urban agencies failed to submit the required urban water management plan. (AR, B562.) Of the plans submitted, no assessment for completeness had been performed. However, in prior years, of the seventy-five percent of agencies that submitted such plans, fifty percent failed to include the required conservation or drought contingency plans. (*Id.*)

In light of Respondent's conclusion that more than two-thirds of state residents receive Delta water, it is not unreasonable to conclude that additional conservation and reduced reliance measures are necessary to achieve the coequal goals. It is also reasonable to conclude that such reduction may be attained via an Urban or Agricultural Water Management Plan.

The Court finds that WR P1 is necessary to carry out the powers and duties identified in the Delta Reform Act.

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2. The consistency certification appeals process

Petitioners argue Respondent interprets the Delta Reform Act's consistency certification appeals process too broadly, improperly giving itself authority to veto those actions it finds are inconsistent with the Delta Plan.

Section 85225 requires a state or local public agency proposing to undertake a covered action to prepare a "written certification of consistency with detailed findings as to whether the covered action is consistent with the Delta Plan and [to] submit that certification to the council." Pursuant to section 85225.10, any person who claims that a proposed covered action is in fact *inconsistent*, causing the action to have a significant adverse impact on one or both of the coequal goals, may file an appeal with Respondent. Section 85225.25 provides,

> "After a hearing on an appealed action, the council shall make specific written findings either denying the appeal or remanding the matter to the state or local public agency for reconsideration of the covered action based on the finding that the certification of consistency is not supported by substantial evidence in the record before the state or local public agency that filed the certification. Upon remand, the state or local agency may determine whether to proceed with the covered action. If the agency decides to proceed with the action or with the action as modified to respond to the findings of the council, the agency shall, prior to proceeding with the action, file a revised certification of consistency that addresses each of the findings made by the council and file that revised certification with the council."

Petitioners contend section 85225.25 allows an agency to proceed with a covered action even if Respondent has found a lack of substantial evidence for certification, so long as the agency files a revised certification addressing the Council's findings. Thus, the certifying agency has final say over whether a covered action proceeds. This interpretation is at odds with the Delta Plan, which provides that "[i]f the covered action is found to be inconsistent, the project may not proceed until it is revised so that it is consistent with the Delta Plan." (AR, B518.) Further, Appendix D provides,

> "No covered action which is the subject of an appeal shall be implemented unless one of the following conditions has been met:
>
> a) The council has denied the appeal;

b) The public agency has pursuant to Water Code section 85225.5 decided to proceed with the action as proposed or modified and has filed with the council a revised certification of consistency addressing each of the findings made by the council, 30 days has elapsed and no person has appealed the revised certification; or

c) The council or its executive officer has dismissed the appeal for one or both of the following reasons:

1. The appellant has failed to provide information in her possession or under her control within the time requested or

2. The issue raised is not within the council's jurisdiction or fails to raise an appealable issue." (AR, B1281.)

Petitioners contend this approach, allowing for a subsequent appeal to a revised certification of consistency, violates the plain language and legislative history of section 85225.25. Petitioners point to the February 26, 2009 version of SB 12, a precursor to the Delta Reform Act, which included, "the council shall do all of the following: (d) Ensure that federal and state actions are consistent with the plan." (Pet. RJN, Exh. 2, p. 11.) Then on September 9, 2009, Proposed Conference Report No. 1. For SB 12 included a version of section 85225.25 providing,

> "Upon remand, the state or local public agency may determine not to proceed with the covered action or may modify the appealed action and resubmit the certification of consistency to the council. A proposed covered action appealed pursuant to these provisions and remanded to the state or local public agency shall not be implemented until the council has adopted written findings, based on substantial evidence in the record, that the covered action, as modified, is consistent with the Delta Plan." (Pet. RJN, Exh. 3, p. 12.)

In the October 23, 2009 version of SBX7-1, the section 85225.25 language was amended to reflect its current wording. (Pet. RJN, Exh. 4.) Petitioners argue this language revision reflects a decision to deny Respondent the power to stop a covered action from proceeding, whether through direct oversight or through a subsequent appeal made to a revised certification. Petitioners then argue that other contemporaneously approved laws demonstrate that the "Legislature knows how to grant land use authority when it wants to, and could have, but chose not to endow the Council with such authority." (Joint Opening Brief, p. 29.) Accordingly, Petitioners maintain the appeals process allowing for consecutive appeals of revised certifications is contrary to section 85225.25.

Respondent argues the Delta Reform Act requires a legally enforceable Delta Plan. (§85001, subd. (c).) Respondent contends the Delta Plan is only legally enforceable if Respondent is *able* to hear appeals of consistency certifications until determining that the covered action complies. Respondent cites to section 85225.10, subdivision (a), "[a]ny person who claims that a proposed covered action is inconsistent...may file an appeal with regard to *a certification of consistency* submitted to the council." (emphasis added.) Respondent argues Petitioners' interpretation would change the language to "may file an appeal with regard to an *initial certification of consistency*" in section 85225.10. Respondent argues Petitioners' interpretation is contrary to the plain language of the statute.

Respondent also argues the legislative history supports a finding that all consistency certifications are subject to appeal. Respondent cites to the final legislative analysis of SB 1x, on November 3, 2009, which provides,

> "[t]he bill ensures consistency with the state's Delta Plan by requiring state and local agencies that propose to implement 'covered actions' to submit consistency certifications and subjecting those certifications to appeal to the council...[if a project is found inconsistent] the proponent must determine whether to proceed with the project, but must amend and submit a new certification if it decides to proceed with the project.
> The Council's role in developing and enforcing consistency with the Delta Plan will provide a critical component of crafting a coherent and sustainable long-term state policy for the Delta." (AR, L21568.)

Accordingly, Respondent contends, in order to ensure consistency with the Delta Plan, all consistency certifications must be subject to appeal and review. The Court agrees. The Legislature has made clear that the Delta Plan is to be legally enforceable. If an agency can choose to proceed with a project that has been found to be inconsistent with the Delta Plan, the appeals process would be a sham – and the Delta Plan would be nothing more than an advisory document. The plain language of section 85225.10 subjects any certification of consistency to an appeal, and section 85225.25 does not alter this language such that a revised certification is exempt. The better view of the legislative history cited by Petitioners is that it reflects a Legislative intent to eliminate mandatory revised certification reviews by Respondent, and to

permit a process whereby a revised consistency certification is reviewed only upon the filing of a new appeal.

The Court finds that the consistency certification appeals process does not violate the Delta Reform Act.

3. The Delta Plan's interaction with the BDCP

The Delta Plan requires agencies implementing BDCP projects to file certifications of consistency. "If BDCP is incorporated, an agency proposing a qualifying 'covered activity' under BDCP that also meets the statutory definition of 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." (AR, B517.) Petitioners argue this would "subject BDCP implementation to unnecessary certifications and appeals, and unduly delay implementation of a core component of the Delta Plan." (Joint Opening Brief, p. 31.) Accordingly, BDCP consistency certifications are contrary to the Delta Reform Act.

Petitioners argue the Delta Reform Act reflects the legislature's view of the importance of the BDCP and the recognition that it be implemented without interference from the consistency appeals process. Petitioners cite to sections 85320, 85004, subdivision (b), 85020, subdivision (f) and 85304.

Respondent acknowledges that the language does not have any regulatory effect, as it has not been adopted pursuant to the APA. (Opposition, p. 56.) Respondent asserts the need for such a process, should the BDCP come to fruition and be incorporated into the Delta Plan, arises from a possibility that the BDCP will not describe specific projects, but will instead contain general guidelines. As a result, there could be disputes as to whether proposals are actually BDCP projects. Respondent contends it is authorized to require such a certification, as anyone undertaking a covered action "shall submit" a certification of consistency. (§ 85225.)

Respondent has not adopted a regulation for this Court to review, and acknowledges that should it require BDCP projects to certify consistency, it would need to adopt a pertinent regulation pursuant to the APA. As a result, the Court finds the issue is not ripe for review.

Petitioners' remaining arguments concerning the Delta Plan's interaction with the BDCP are also premature. As the Court has already held, it is unclear what the final BDCP will contain, whether there will even *be* a BDCP, and whether the BDCP will in fact be incorporated into the Delta Plan. Accordingly, Respondent's treatment of the BDCP is not yet ripe for review.

4. Temporary water transfers

California Code of Regulations, title 23, section 5001 contains definitions of terms used in the Delta Plan. (AR, B763.) "Significant impact" for purposes of determining whether a project is a "covered action" expressly exempts all "temporary water transfers of up to one year in duration. This provision shall remain in effect only through December 31, 2016, and as of January 1, 2017, is repealed, unless the Council acts to extend the provision prior to that date." (23 CCR § 5001, subd. (j)(1), (dd)(3).)

Petitioners argue it is improper for Respondent to establish a transitory exemption for temporary water transfers because they are permanently exempt as routine State Water Project and Central Valley Project operations. Petitioners cite to section 85057.5, subdivision (b)(2) which provides that "covered action" does not include "[r]outine maintenance and operation of the State Water Project or the federal Central Valley Project." Petitioners argue that these projects already supply water via temporary water transfers, and as such, they should be categorized as "routine maintenance and operation" activities within the covered action exemption.

Petitioners contend temporary water transfers are exempt from CEQA pursuant to section 1729, and must be exempt from the Delta Plan. Petitioners also cite to section 85031, subdivision (d) which provides, "Unless otherwise expressly provided, nothing in this division supersedes, reduces, or otherwise affects existing legal protections, both procedural and substantive, relating to the state board's regulation of diversion and use of water, including, but not limited to, water right priorities, the protection provided to municipal interests by Sections 106 and 106.5, and

changes in water rights…" Thus, Petitioners maintain, 23 CCR section 5001 alters the regulatory standards and criteria applicable to water transfers, in violation of section 85031.

Petitioners further contend temporary water transfers must be granted on an expedited basis, and treatment as a "covered action" would impede water usage for urgent needs. Finally, Petitioners argue such a regulatory approach thwarts the requirement that the Delta Plan improve water supply reliability.

Respondent contends the Delta Reform Act mandates that covered actions must be consistent with the plan, and that a covered action includes "a plan, program, or project as defined pursuant to Section 21065 of the Public Resources Code that meets all of the following conditions:

> (5) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.
> (6) Will be carried out, approved, or funded by the state or a local public agency.
> (7) Is covered by one or more provisions of the Delta Plan.
> (8) Will have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta."

As Respondent is obligated to enforce compliance with regard to covered actions, Respondent contends it was proper to provide a temporary exemption for temporary water transfers that otherwise qualify as covered actions. The record indicates there was evidence both supporting temporary water transfers, as well as evidence supporting a finding that they have been used improperly in a serial manner with significant impact on the Delta. (AR, E1178, 1287.) It was not arbitrary or capricious for Respondent to determine that there remained uncertainty concerning the nature and impact of temporary water transfers. Accordingly, it is not a violation of Respondent's discretion to exempt temporary transfers from the Delta Plan's regulations through 2016 to enable Respondent to gather the needed information.

Respondent also argues temporary water transfers are not "routine maintenance and operation" activities subject to the section 85057.5, subdivision (b)(2) exemption. Respondent

asserts statutory exemptions must be narrowly construed[10], and temporary transfers cannot fall within any reasonably narrow definition of "routine." This is because "the participating water suppliers, the amount of the transfer, when the transfer will occur, or even the need for a transfer cannot be anticipated in advance with any certainty." (AR, E1178.)

The Court has reviewed the record and finds no evidence suggesting that temporary water transfers are "[r]outine maintenance and operation of the State Water Project or the federal Central Valley Project." While temporary water transfers may occur with regularity, Petitioners have failed to identify evidence that, when taken individually, the transfers themselves are routine operation of the projects. In fact, the record supports a finding to the contrary: such transfers are more akin to improvised measures. They have not been a routine or predictable event. The fact that such transfers are exempt from CEQA does not require their exemption from the Delta Plan. If the Legislature intended to so exempt them, it could have done so.

Respondent argues section 85031 does not prohibit the eventual consistency review of temporary water transfers because it leaves SWRCB's regulation untouched, and merely creates a new level of regulation on water management. Respondent argues there are many circumstances when agency responsibilities overlap, including those involving water use and impacts. (*Pacific Lumber Co. v. State Water Resources Control Board* (2006) 37 Cal.4th 921.) The Court agrees. The plain language of section 85031 does not prohibit Respondent from regulating in an area the SWRCB already regulates. The record does not even establish that such regulation would create a regulatory conflict. Petitioners have not identified any legislative history or other authority that section 85031 prohibits regulation concerning temporary water transfers.

Lastly, Petitioners argue the consistency appeals process would conflict with the coequal goal of water supply reliability. Respondent argues there is no evidence that the appeals process would create delays such that Petitioners' water supply would be unreliable. Although the Court recognizes that every process requires some time to complete, it would be pure speculation to

[10] Respondent cites to *Sac. County Employees' Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440, 463, "[w]e return now to the familiar rule that we must construe statutory exemptions narrowly."

assume that the process will be so lengthy and burdensome as to impact water supply reliability. Consequently, the Court is not persuaded by Petitioners' argument.

The Court finds that Respondent did not violate the Delta Reform Act by determining that it may subject temporary water transfers to Delta Plan consistency certifications at a future date.

5. Transparency in water contracting

Next, Petitioners contend the regulation mandating transparency in water contracting exceeds Respondent's statutory authority, and is unnecessary and duplicative. This argument references WR P2 (23 CCR § 5004, subd. (a)) which provides that

> "(a) The contracting process for water from the State Water Project and/or the Central Valley Project must be done in a publicly transparent manner consistent with applicable policies of the California Department of Water Resources and the Bureau of Reclamation referenced below.
> (b) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E) of this Chapter, this policy covers the following:
> (1) With regard to water from the State Water Project, a proposed action to enter into or amend a water supply or water transfer contract subject to California Department of Water Resources Guidelines 03-09 and/or 03-10 (each dated July 3, 2003), which are attached as Appendix 2A; and
> (2) With regard to water from the Central Valley Project, a proposed action to enter into or amend a water supply or water transfer contract subject to section 226 of P.L. 97-293, as amended or section 3405(a)(2)(B) of the Central Valley Project Improvement Act, Title XXXIV of Public Law 102-575, as amended, which are attached as Appendix 2B, and Rules and Regulations promulgated by the Secretary of the Interior to implement these laws.."

Petitioners again point to section 85057.5, subdivision (b)(2), and argue the administration of water project contracts is "[r]outine maintenance and operation." Furthermore, Petitioners argue, there is nothing in the Delta Reform Act authorizing Respondent to regulate the contract renewal process. Finally, Petitioners contend WR P2 is unnecessary, in violation of Government Code section 11342.2, because the water projects already have transparency in their contracting processes. (AR, B1190-1207.)

Respondent argues there is no evidence in the record that the contracting process is a routine operation of the water projects. Respondent references similar CEQA exclusions that exempt operation and maintenance activities, while still applying CEQA to contracts. (See 14

CCR § 15301; *Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 897-98.) Respondent also argues WR P2 is necessary to provide information on the management of California water supplies in order to enhance reliability. (AR, B572.) Furthermore, Respondent highlights that to the extent the water projects already utilize transparency, it is achieved through guidelines and not enforceable regulations. (AR, B1192.)

Petitioners reply that the water project guidelines were adopted as a result of a settlement agreement entered in *Planning and Conservation League v. DWR* (2009) 83 Cal.App.4th 892, 905. Accordingly, the guidelines contain mandatory language, making regulation unnecessary and duplicative.

The Court agrees that Petitioners have failed to identify evidence in the record that the contracting process is "routine maintenance and operation" of the water projects. Accordingly, it is not expressly exempt from the Delta Plan as an exception to a "covered action." Substantial evidence in the record supports Respondent's finding that mandating such transparency will provide information concerning California water supplies, aiding in the attainment of the coequal goal of making California's water supply more reliable. While Petitioners cite to the record for evidence that federal law exists concerning water project contracting, Petitioners provide no analysis as to how this renders WR P2 unnecessary. While the water project guidelines may be enforceable via a settlement agreement, Petitioners have not identified any authority for the proposition that in such a situation, regulation of the subject matter is precluded.

The Court finds that WR P2 is not a violation of the Delta Reform Act.

6. <u>Economic impacts of requiring reduced Delta reliance</u>

Lastly, Petitioners argue that Respondent failed to fully assess the potential for adverse economic impacts on California.

Government Code Section 11342.535 defines "cost impact" as "the amount of reasonable range of direct costs, or a description of the type and extent of direct costs, that a representative private person or business necessarily incurs in reasonable compliance with the proposed action." Government Code section 11346.3 requires a state agency proposing to adopt a regulation, to

"assess the potential for adverse economic impact on California business enterprises and individuals, avoiding the imposition of unnecessary or unreasonable regulations or reporting, recording, or compliance requirements." Accordingly, the agency must provide adequate information concerning the need for the regulation, shall consider the impact on business, including the ability to compete with business in other states, and must assess whether the regulation will affect:

> "(A) The creation or elimination of jobs within the state.
> (B) The creation of new businesses or the elimination of existing businesses within the state.
> (C) The expansion of businesses currently doing business within the state.
> (D) The benefits of the regulation to the health and welfare of California residents, worker safety, and the state's environment." (Gov. Code § 11346.3.)

Petitioners argue that although Respondent's cost analysis concedes WR P1 may require water suppliers to demonstrate reduced Delta reliance, Respondent failed to estimate or assess the costs associated with achieving said reliance. (AR, N821-79.) Petitioners assert that the economic impact statement addresses the costs that private businesses may incur to make a proposed action consistent, but fails to assess the costs of reducing Delta reliance. (AR, N825, 838.) Petitioners then cite to evidence of high costs associated with water supply shortages. Petitioners finally argue Respondent failed to analyze the cost associated with developing and securing alternative water supplies.

Respondent argues that Courts must use a highly deferential standard in reviewing economic impact assessments under the APA. The APA has a "modest requirement of rationality and transparency" in determining whether a regulation will have a "significant adverse economic impact on businesses." (*Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 413.) Respondent alleges the three categories of documents within which it completed its cost analysis assess each regulation and describe the economic impacts. (AR, N194.016-.025, N849-58.) Furthermore, both the initial and final analyses include discussions and estimates concerning the effect on jobs, small businesses, housing, private businesses and

individuals, as well as the environment. (AR, N194.025-.28, 194.010, 194.006-.008, N858-61, 837-43.)

With regard to WR P1, Respondent maintains that it only requires implementation of measures that are "locally cost effective and technically feasible" and Petitioners have failed to identify any evidence that cost effective measures will have a "significant adverse economic impact on businesses." Respondent also cites to evidence that water efficiency projects improve business activities, and increase jobs. (AR, L19791, 19803.)

The Court finds that Respondent did provide a sufficient analysis of potential economic impacts resulting from WR P1 (referred to as section 5005(e)(1)) in the initial cost analysis, AR, N194.017.) While the analysis does not appear to include the actual costs that potential reduced water reliance projects themselves may require, Respondent did undertake an economic analysis of the regulation itself. Section 11342.535 only defines cost impact as including direct costs, those incurred directly as a result of reasonable compliance with a regulation. Respondent's analysis admits that preparing a new water management plan may range from $20,000 to $100,000 per plan. (AR, N194.035.) Respondent also found the regulation applies to "water suppliers that are already subject to the water management planning and implementation of existing law, and so [the regulation] does not mandate substantial new costs on water suppliers." Accordingly, Respondent specifically considered and enumerated the direct costs associated with WR P1 compliance.

With regard to Government Code section 11346.3, the agency is required to assess jobs, creation or elimination of business, expansion of business, and health and welfare, worker safety, and environmental benefits. Respondent has identified numerous instances in the record where such an analysis was undertaken in connection with the Delta Plan's regulations. (AR, N194.006-.008, N 194.010, N194.025-.028, N837-40, N858-61.) Petitioners argue Respondent was required to analyze the cost of achieving reduced reliance, or the specific costs associated with recycled water and desalination projects.

The Court disagrees. Respondent adequately assessed, pursuant to the "modest requirement of rationality and transparency" the potential for adverse economic impacts on

California business as a result of Delta Plan regulations. Respondent undertook a thorough analysis of the Government Code section 11346.3 factors, and while some indirect costs were not enumerated, the statute does not require Respondent to analyze and quantify a regulation's *every* potential indirect cost.

Conclusion

The petition for writ of mandate with regard to the statutory challenges heard in this bifurcated proceeding is **DENIED** in accordance with the above-ruling. In accordance with Local Rule 1.06, counsel for Respondent is directed to prepare an order denying the petition, incorporating this ruling as an exhibit to the order, and a separate judgment; submit them to counsel for Petitioner for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit them to the Court for signature and entry in accordance with Rule of Court 3.1312(b).

E. *California Water Impact Network, et al. v. Delta Stewardship Council; Central Delta Water Agency, et al. v. Delta Stewardship Council*

Petitioners in the above-referenced cases filed a joint brief referring to themselves as CDWA et al. and C-Win et al. Petitioners argue the Delta Plan is deficient in the following thirteen areas:

1. The Delta Plan does not actually reduce Delta reliance, in violation of the Delta Reform Act.
2. WR P1 does not rely on best available science.
3. WR P1 impairs area of origin, watershed of origin, county of origin, and other water right protections.
4. Respondent promotes the BDCP, in violation of the Delta Reform Act.
5. The Delta Plan's flow criteria do not promote restoration of healthy ecosystems.
6. ER P1 fails to ensure only surplus Delta water is diverted.
7. ER P2 lacks sufficient scientific basis.
8. ER P3 is not based on best available science.
9. The Delta Plan's treatment of setback levees violates the coequal goals.
10. The Delta Plan fails to protect and enhance the Delta.
11. The Delta Plan fails to improve water quality to protect human health and the environment.
12. The Delta Plan fails to reduce risk to people, property, and state interests in the Delta.

13. The Delta Plan violates the public trust doctrine.

1. The Delta Plan does not reduce Delta reliance

Petitioners argue WR P1 (23 CCR § 5003) does not ensure that reliance on the Delta is actually reduced, in violation of the Delta Reform Act. Petitioners assert completion of an Urban or Agricultural Water Management Plan does not ensure a contribution to reduced Delta reliance. Accordingly, Petitioners contend WR P1 violates section 85021's policy to reduce reliance on the Delta in meeting California's future water supply needs.

The Court refers to its analysis concerning this issue in *North Coast Rivers Alliance, et al. v. Delta Stewardship Council*, supra. The Court agrees that Respondent has discretion to determine the proper mechanism for reducing Delta reliance. Section 85021 clearly enunciates the policy of the State for addressing Delta issues. What it does not do, however, is direct any specific action. That task is left to the Council.

2. WR P1 does not rely on best available science

Pursuant to section 85302, subdivision (g), in carrying out Delta planning, Respondent "shall make use of the best available science." Petitioners contend best available science requires "including clear statements of assumptions, the use of conceptual models, description of methods used, and presentation of summary conclusion [and] [s]ources of data used are cited and analytical tools used in analyses and syntheses are identified. (AR, B1178.) Petitioners argue Respondent was required to utilize the scientific process, which includes well-stated objectives, clear conceptual models, good experimental design, statistical rigor and sound logic, and clear documentation of methods, results and conclusions. (*Id.*) Petitioners maintain that WR P1 is not based on best available science as it will not actually lead to reduced reliance in the Delta, and does not contain any Adaptive Management metrics.

Respondent argues the Delta Plan in its entirety utilized the Independent Science Board's "nine-step Adaptive Management Framework." (AR, B503-12.) Respondent further argues the Delta Plan describes in detail the different stressors on the Delta ecosystem and how they should be addressed. (AR, B590-623.)

The Court notes Petitioners have failed to identify which scientific evidence Respondent failed to consider in determining WR P1 is representative of best available science. In the absence of an identification of the specific scientific evidence Respondent failed to consider, the Court is unable to find that Respondent ignored best available science in formulating WR P1.

3. WR P1 impairs area of origin, watershed or origin, county of origin, and other water right protections

Petitioners assert, "[n]othing in the [Delta Reform Act] suggests that in-Delta users should curtail their diversions to accommodate lower-priority exports or that higher-priority in-Delta users should be treated the same as lower-priority water exporters in terms of curtailing diversions." (Joint Opening Brief, p. 21.) Accordingly, in-Delta suppliers cannot be required to reduce their existing lawful diversions for the benefit of exports. Petitioners cite to section 85301, subdivision (d), which provides,

> "[u]nless otherwise expressly provided, nothing in this division supersedes, reduces, or otherwise affects existing legal protections, both procedural and substantive, relating to the state board's regulation of diversion and use of water, including, but not limited to, water right priorities, the protection provided to municipal interests by Sections 106 and 106.5, and changes in water rights. Nothing in this division expands or otherwise alters the board's existing authority to regulate the diversion and use of water or the courts' existing concurrent jurisdiction over California water rights."

Respondent argues that Petitioners' contention that WR P1 will divert Delta water for the benefit of exporters is not supported by factual evidence and consequently Petitioners have forfeited the argument.

Petitioners' stated concern is that WR P1 permits a Southern-California water user to achieve priority in obtaining water. As the Court has already found in *City of Stockton v. Delta Stewardship Council,* the plain language of WR P1 does not affect water right priorities. WR P1 does not provide that if a consistency certification is undergoing the appeals process, another water supplier may come in and usurp the challenged party's water rights or priority. Clearly, Respondent has no authority over water-priority determinations, and any plan or project subject to

WR P1 would only be valid to the extent it sought water that a supplier was entitled to via its water rights. Accordingly, the Court finds WR P1 does not, on its face, alter or affect water rights or priorities.

4. Respondent promotes the BDCP

Petitioners argue WR R12, which recommends that the relevant federal, State, and local agencies should complete the BDCP, fails to protect the Delta and is thus a violation of the Delta Reform Act. Petitioners also argue this recommendation falls short of complying with the Delta Reform Act requirement that the Delta Plan shall promote options for new and improved infrastructure relating to water conveyance in the Delta. (§ 85304.)

With regard to WR R12, Petitioners contend the BDCP will result in significant adverse impacts to every resource area in the Delta in contravention of the coequal goals. Petitioners then cite to evidence they assert demonstrates the destruction that will result from the BDCP to sensitive Delta land and biological resources. Petitioners argue Respondent should have provided guidance to the BDCP regarding implementation of the coequal goals, including recommendations on what the BDCP should contain.

Although the Delta Reform Act does not require Respondent to participate in the development of the BDCP, it does require Respondent to promote options for water conveyance. With regard to section 85304, as the Court held in *Save the California Delta Alliance v. Delta Stewardship Council*, the Delta Reform Act requires the Delta Plan to "promote options for new and improved infrastructure relating to the water conveyance in the Delta, storage systems, and for the operation of both to achieve the coequal goals." Since Respondent has certified that it has completed the Delta Plan – a plan that does not promote options – the Delta Plan fails to comply with the Delta Reform Act.

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5. The Delta Plan's flow criteria do not promote restoration of healthy ecosystems

The Delta Reform Act provides,

> "For the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan, the [Delta Independent Science Board] shall, pursuant to its public trust obligations, develop new flow criteria for the Delta ecosystem necessary to protect public trust resources. In carrying out this section, the board shall review existing water quality objectives and use the best available scientific information. The flow criteria for the Delta ecosystem shall include the volume, quality, and timing of water necessary for the Delta ecosystem under different conditions." (§ 85086, subd. (c)(1).)

Section 85302, subdivision (e)(4) specifies that a subgoal/strategy for restoring a healthy ecosystem that must be included in the Delta Plan is to, "[r]estore Delta flows and channels to support a healthy estuary and other ecosystems." Petitioners argue Respondent failed to comply with section 85302, subdivision (e)(4) because it merely directed the SWRCB to update Delta flow objectives, without adopting any flow criteria itself. (See 23 CCR § 5005.) Petitioners contend Respondent had an obligation to adopt flow criteria in connection with the goal of restoring anadromous fish to levels not less than twice the average levels attained during the period of 1967-1991. (102 P.L. 575.)

Section 85032, subdivision (c)(5) provides the Delta Plan shall include measures to promote conditions "conducive to meeting or exceeding the goals in existing species recovery plans and state and federal goals with respect to doubling salmon populations." Petitioners maintain the absence of appropriate flow criteria violates Respondent's section 85032, subdivision (c)(5) obligation.

Respondent argues the Delta Plan calls for "more natural functional flows" in the Delta as one of its core strategies. (AR, B582.) The Delta Plan also contains a description of how more natural flows could be achieved. (AR, B600.) Respondent also argues Delta Plan recommendations guide agencies concerning the restoration of flows, including ER R2, which calls for projects that will help restore Delta flows and channels. (AR, B452-53.)

Petitioners do not cite to any evidence in the record that more natural functional flows will fail to properly restore anadromous fish. Petitioners do not cite to any scientific data in the record concerning the restoration of anadromous fish, and whether particular flow criteria was necessary to accomplish said restoration. With regard to the failure to enact a flow policy that advances the goal of restoring Delta flows, for the reasons discussed in *North Coast Rivers Alliance, et al. v. Delta Stewardship Council*, the Court finds the Delta Plan utilizes best available science in connection with flow objectives as required by the Delta Reform Act. The Court also finds the recommendations concerning restoration of flows is sufficient to promote conditions for species recovery.

6. ER P1 fails to ensure only surplus Delta water is diverted

ER P1 (23 CCR section 5005) provides that the SWRCB's "Bay Delta Water Quality Control Plan flow objectives shall be used to determine consistency with the Delta Plan. If and when the flow objectives are revised...the revised flow objectives shall be used..." Petitioners argue this section fails to ensure that Delta exports are limited to water supplies legally available for export, as required by section 11460.[11] Petitioners maintain Respondent should have required as a prerequisite to any decision that a study be conducted to determine the amount of surplus water available for export that incorporates all beneficial uses within the Delta.

Petitioners have not cited to any requirement that the Delta Plan itself must monitor what water supplies are legally available for export. As the Court has already determined, the Delta Plan does not affect water rights or priorities, accordingly Petitioners have failed to prove the Delta Plan violates section 11460.

7. ER P2 lacks sufficient scientific basis

ER P2 (23 CCR section 5006), subdivision (a) provides,

> "[h]abitat restoration must be carried out consistent with Appendix 3, which is Section II of the Draft Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone and the Sacramento and San

[11] Section 11460 provides that the Central Valley Project may not deprive in-Delta suppliers of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed.

Joaquin Valley Regions (California Department of Fish and Wildlife 2011). The elevation map attached as Appendix 4 should be used as a guide for determining appropriate habitat restoration action based on an area's elevation. If a proposed habitat restoration action is not consistent with Appendix 4, the proposal shall provide rationale for the deviation based on best available science."

Petitioners argue the Draft Conservation Strategy ("DCS") report (identified in ER P2 as the basis for the Appendix 3 habitat restoration requirement) contains inaccurate information. Petitioners argue the DCS report is based on an assumption of a rise in sea level of approximately 55 inches over the next 50-100 years. However, Petitioners argue the actual modeled sea level rise predicted in the data utilized for the DCS report is 13.8 inches by 2050 and 35 inches by 2100. Petitioners conclude that ER P2 is based on flawed data, and not the best available science.[12]

With regard to the 55-inch potential sea rise, Respondent cites to the Ocean Protection Council resolution adopted on March 11, 2011. (AR, L38257.) The resolution provides that "senior staff from 16 state agencies of the Coastal and Ocean Working Group of the California Climate Action Team (CO-CAT) reached agreement on a Sea-Level Rise Interim Guidance Document...with science-based input from the OPC's Science Advisory Team and the California Ocean Science Trust." (AR, L38255.) The included Sea-Level Rise Projections table indicates a potential range of seal-level rise in 2100 between 40 inches and 55 inches. (AR, L38257.) The report determines that the 55 inch sea-level rise places approximately 480,000 people and nearly $100 billion of property at risk. (AR, L38255.) The Guidance Document provides that the projections do not account for catastrophic ice melting. Consequently, they may underestimate actual sea-level rise. (AR, L33595.)

Respondent further contends that the Delta Reform Act itself, in section 85320, considers this 55-inch sea-level rise figure. It provides that the BDCP can only be incorporated into the Delta Plan if it includes a comprehensive review of the potential effects of climate change

[12] Petitioners support this contention by citing, in a footnote, to a webpage that purportedly contains the text of the DCS report. Respondent objects to this cite, arguing that the Court must ignore extra-record evidence. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559.) However, subsequent to the filing of Respondent's opposition brief, Respondent agreed to include this document in the administrative record, and the parties agreed Petitioners' motion to augment the record, which was filed with their reply, was now moot.

including possible sea level rise up to 55 inches. Respondent finally cites to a 2012 National Research Council report that projects a range of sea-level rise between 16.7 and 65.5 inches. (AR, M5597, J161029.) Accordingly, the 55-inch number is within the range of potential sea-level rise identified by both scientific studies.

Petitioners do not dispute that the 55-inch number is utilized as a possible scenario by these studies, but argue that Respondent should have adopted a middle-range number instead of the "high" 55-inch number. Essentially Petitioners argue Respondent failed to properly choose between conflicting expert opinions, neither of which is patently incorrect. In such a situation, it is within the agency's discretion to make the choice based on all of the evidence before it. (*Save our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 120.) The Court finds that Petitioners have failed to establish that adopting the higher potential sea-level rise number is a failure to use best available science.

8. ER P3

ER P3 (23 CCR section 5007) provides that "[w]ithin the priority habitat restoration areas depicted in Appendix 5, significant adverse impacts to the opportunity to restore habitat as described in section 5006 must be avoided or mitigated." Petitioners argue the habitat priority map displayed in Appendix 5 (AR, B1232) is not based on best available science as it

> "contains no scientific assessment, developed habitat model, or any substantive technical analysis as to why the areas in the map are suitable for restoration, or what types of restoration projects are envisioned for which species, relying entirely on a 'gray' literature summary of potential elevational rationale for habitat." (Joint Opening Brief, p. 30.)

Respondent argues ER P3 is supported by the sea-level rise information contained in ER P2. Respondent further contends elevation is a starting point, and that ER P2, in connection with ER P3, enables project proponents to deviate "based on best available science." Respondent provides that it can adjust the restoration area map as needed, and, pursuant to section 85300, must review the Delta Plan at least once every five years. As the Court held above, the sea-level rise information utilized in ER P2 is not patently incorrect such that Respondent violated the

Delta Reform Act in relying on it. Petitioners do not identify any evidence in the record that contradicts the habitat priority map, or any scientific data identifying a more appropriate priority map. Accordingly, Petitioners have failed to prove ER P3 is not based on best available science.

Petitioners further contend ER P3 is vague, creating a scientifically unsubstantiated mitigation requirement for the thousands of acres depicted on the map, creating a new burden for otherwise permissible land uses in the Delta. Petitioners argue, absent a definition of "opportunity to restore habitat" that an individual is left to guess as to the application of section 5007.

Respondent provides no response to Petitioners' contention that the language is unclear, however, the Court finds the language is not patently vague such that an individual would be unable to comply. 23 CCR section 5006 describes the circumstances under which habitat restoration must be carried out, and how it should be completed. It is clear that parties should avoid significantly impacting the opportunity to complete these restoration projects pursuant to ER P3. Accordingly, the Court finds ER P3 is not void for vagueness.

9. <u>The Delta Plan's treatment of setback levees violates the coequal goals</u>

ER P4 (23 CCR § 5008) provides, "[l]evee projects must evaluate and where feasible incorporate alternatives, including the use of setback levees, to increase floodplains and riparian habitats." Petitioners argue that "[s]etting back levees in the Delta involves placement of the new levee at a different location, requiring significant additional volumes of fill solids that must be imported from distant locations, to construct a new levee. (See generally, D6235, G6276) In developing ER P4, the DSC failed to weigh the environmental tradeoffs of these excavation and fill projects, which could outweigh any perceived biological benefits." (Joint Opening Brief, p. 31.) Petitioners also contend the mapped areas providing for setback levee assessment are not based on best available science.

Respondent argues Petitioners have failed to cite to any evidence that Respondent failed to weigh the environmental tradeoffs, or that ER P4 is not based on best available science. Respondent also argues the record clearly supports ER P4, including the Delta Risk Management Strategy Phase 2 report which concluded that setback levees "provide benefits through enhanced

and additional habitat and ecosystem restoration. " (AR, L34072.) The Central Valley Flood Protection Board concluded that setting back levees "provides significant opportunities to restore native habitat quantity, quality, and connectivity and to restore natural processes necessary to support healthy ecosystems." (AR, L37010.)

The Court finds that the record provides substantial evidence for the ecological benefits of setback levees, and Petitioners have not established that ER P4 does not represent best available science.

10. The Delta Plan fails to protect and enhance the Delta

Pursuant to section 85020, subdivision (b), the state's policy is to achieve the following objective, which is inherent in the coequal goals: "[p]rotect and enhance the unique cultural, recreational, and agricultural values of the California Delta as an evolving place." The Delta Protection Commission prepared an Economic Sustainability Plan (hereinafter, the "ESP") that included recommendations for carrying out this statutory policy. (AR, L28317.) The ESP provides that it is intended to inform Respondent's development of the Delta Plan. (AR, L28316.)

Pursuant to section 85301, Respondent was to consider the proposal, and "may include any portion of the proposal in the Delta Plan if the council, in its discretion, determines that the portion of the proposal is feasible and consistent with the objectives of the Delta Plan and the purposes of this division." Petitioners contend the ESP's findings and recommendations were not incorporated into the Delta Plan and Respondent did not explain why this occurred.

Petitioners contend Respondent improperly describes one of its core strategies as being to "[s]ustain a vital Delta economy that includes a mix of agriculture, tourism recreation, commercial and other industries..." whereas the goal should have been to *enhance* the Delta economy. (AR, B630.) Petitioners argue, pursuant to the ESP, that the Delta Plan should have recognized agriculture as the primary driver of the Delta economy. (AR, L28527.) Petitioners maintain the Delta Plan does not contain any enforceable policies to promote agriculture, and consequently fails to protect and enhance Delta agriculture.

Petitioners further argue the Delta Plan should have addressed the impact water exports have had on the Delta ecosystem, instead of focusing on land use within the Delta. Petitioners maintain the Delta Plan should address the approach to be taken when a "covered action" conflicts with the protection of the cultural, recreational, and agricultural values of the Delta. (23 CCR § 5002, subd. (b).)

Petitioners also argue temporary water transfers should not have been exempted from the definition of a covered action. The Court refers to its analysis of this issue in *North Coast Rivers Alliance, et al. v. Delta Stewardship Council*. The record indicates there was evidence both supporting temporary water transfers, as well as supporting a finding that they have been used improperly in a serial manner with significant impact on the Delta. (AR, E1178, 1287.) It was not arbitrary or capricious for Respondent to determine that there remained uncertainty concerning the nature and impact of temporary water transfers. Accordingly, it is not a violation of Respondent's discretion to exempt temporary transfers from the Delta Plan's regulations through 2016 to enable Respondent to gather the needed information.

DP P1 (223 CCR section 5010) requires new urban development to be located "wisely" and provides that new residential, commercial, and industrial development is limited to those areas shown in Appendix 6 and Appendix 7. Development is permitted outside of these areas if "it is consistent with the land uses designated in county general plans as of May 16, 2013, and is otherwise consistent with this Chapter." (AR, B455.) Petitioners argue DP P1 conflicts with existing local land use authority and planning. Petitioner cites to Government Code section 65100 to support this argument, but provides no analysis as to how section 65100 limits Respondent's authority. Accordingly, the Court dismisses this argument. Petitioners also argue DP P1 conflicts with sections 85022, subdivision (c)(4), 85212, 85300, subdivision (a), 85305, subdivision (a), and 85054. It appears Petitioners are attempting to argue Respondent exceeded its authority by regulating land use, specifically by restricting further development.

Petitioners do not cite to any language in the Delta Reform Act prohibiting Respondent from regulating land use as it has done in DP P1. In the absence of such limiting language, the Court relies on the broad authority granted Respondent via section 85210, subdivision (i) to

"adopt regulations or guidelines as needed to carry out the powers and duties identified in this division."

To the extent Petitioners contend the Delta Plan should have further considered the impact of water exports, Petitioners do not cite to any authority requiring Respondent to do so. With regard to the ESP, and the importance of agriculture in the Delta, Respondent contends the entirety of the Delta Plan's Chapter 5 considers the protection and enhancement of the Delta as an evolving place pursuant to section 85020, subdivision (b). (AR, B629-70.) Pursuant to section 85301, Respondent did consider the ESP, including preparing a staff report with an in-depth analysis of the proposal. (AR, G4711-24.) Respondent then held two days of public meetings to address the proposal, ultimately accepting 17 of the 38 recommendations. (AR, F294, K7709-10.)

It is clear to the Court that Respondent complied with its section 85301 obligation to consider the proposal, and exercised its broad discretion in determining which recommendations to include within the Delta Plan. The Court finds that Petitioners have failed to demonstrate that the Delta Plan does not adequately protect and enhance the Delta.

11. <u>The Delta Plan fails to improve water quality to protect human health and the environment</u>

Section 85302, subdivision (d)(3) provides that the Delta Plan shall include measures to promote a more reliable water supply that address "[i]mproving water quality to protect human health and the environment." Petitioners contend the Delta Plan does not include any enforceable policies concerning water quality.

Petitioners argue the Delta Plan fails to address ongoing selenium contamination from recipients of CVP water exported from the Delta, and fails to address the relationship of increasing salinity to adequate flows. Petitioners then argue that Respondent is aware the BDCP will degrade water quality, yet has done nothing to influence or impede the BDCP.[13]

[13] As the Court has already considered and rejected Petitioners similar arguments concerning the BDCP, the Court will not provide further analysis of this issue. Instead, the Court directs the parties to its analysis under subpart 4.

The Court refers to its analysis of this issue in *North Coast Rivers Alliance, et al. v. Delta Stewardship Council*. Adopting the reasoning provided therein, the Court finds section 85302, subdivision (d)(3) is one that requires promotion. As is clear from the *Ralph's Grocery* case, significant discretion is vested in the implementing agency. Consequently, recommendations that promote water quality improvement (even if they are not implemented) are sufficient to satisfy Respondent's obligation.

12. The Delta Plan fails to reduce risks to people, property, and state interests in the Delta

Section 85020, subdivision (g) provides the state's policy is to achieve the objective of reducing "risks to people, property, and states interest in the Delta by effective emergency preparedness, appropriate land uses, and investment in flood protection." Accordingly, section 85305 provides that the Delta Plan "shall attempt to reduce" these risks by "promoting effective emergency preparedness, appropriate land uses, and strategic levee investments."[14] Petitioners contend the Delta Plan fails to comply with section 85305.

Respondent argues the Delta Plan's reduced risk chapter includes four policies and ten regulations that attempt to reduce risks. (AR, B735-42.) Recommendation RR R1 encourages local, state, and federal agencies to consider and implement the recommendations of the Sacramento-San Joaquin Delta Multi-Hazard Coordination Task Force, that the DWR should expand its emergency stockpiles to make them regional in nature, and local levee-maintaining agencies should consider developing their own emergency action plans. (AR, B735.) A review of the remaining recommendations reveals that the Delta Plan does indeed attempt to reduce the subject risks by "promoting" emergency preparedness, land use, and levee investments. This is all that the Delta Reform Act requires. Petitioners have failed to identify any language in the Delta Reform Act requiring Respondent to adopt a specific legally enforceable policy. Accordingly, the Court is not persuaded by Petitioners' argument.

Petitioners also argue Respondent failed to utilize best available science in evaluating the Delta's levee system, relying on a letter from MBK Engineers commenting on Chapter 7 of the

[14] Petitioners never cite to this language in the arguments presented under this heading.

Sixth Staff Draft of the Delta Plan. (AR, M3913.) The letter suggests the Delta Plan "utilizes references that are either erroneous or outdated." (*Id.*) For example, the letter provides that the Delta Plan utilizes a map that improperly identifies levees, even including levees that do not actually exist. (AR, M3914.) Petitioners also argue the Delta Plan fails to examine its levee standards and requirements using best available science. Petitioners further contend the Delta Plan overstated the number of miles of levees that fall below the standard, resulting in a conclusion that funding has been inadequate to obtain the objective. (AR, B725.)

Respondent argues the data concerning levees is based on a map created by DWR in 2011 and DWR's 2012 hazard calculations. (AR, B722, L37130.) Petitioners fail to provide data identifying the flaws in these sources (other than the comment letter) and accordingly the Court cannot find that Petitioners have proven it was arbitrary and capricious for Respondent to rely on the data it utilized.

Petitioners then contend the Delta Plan overstated risks associated with earthquakes and levee failures in the Delta. The Delta Plan provides,

> "[t]he DWR Delta Risk Management Strategy Phase 1 study evaluated the performance of Delta levees under various seismic threat scenarios, and analyzed potential consequences for water supply, water quality, ecosystem values, and public health and safety. The study concluded that a major earthquake of magnitude 6.7 or greater in the vicinity of the Delta Region has a 62 percent probability of occurring sometime between 2003 and 2032." (AR, B717.)

Petitioners argue the DWR report found this earthquake risk present in the San Francisco Bay Region, not the Delta. (J78930-31.) Petitioners also argue the levee map included is unrealistic, inaccurate, and that the Delta Plan fails to note the measures that may be taken to alleviate the duration of elevated salinity periods in the Delta. Accordingly, Petitioners contend, the Delta Plan is not based on best available science.

Respondent argues the Delta Plan concludes, "[a]lthough the probabilistic nature of earthquake prediction makes it difficult to quantify the timing and magnitude of seismic threats, it is important to address the threats posed by earthquakes to the Delta Levee system because of the potential adverse effects of such events." (AR, B717.) Petitioners do not challenge this

conclusion, instead challenging the data cited to support the conclusion. Respondent asserts there is nothing improper about asserting a potential for a "6.7 or greater [earthquake] in the vicinity of the Delta Region" as the cited report found this risk in the nearby San Francisco Bay region. The Court agrees. Petitioners have cited no evidence that it is improper to cite to a study of a nearby area and conclude that this area could impact the Delta.

RR P2 (23 CCR section 5013) provides "[n]ew residential development of five or more parcels shall be protected through floodproofing to a level 12 inches above the 100-year based flood elevation, plus sufficient additional elevation to protect against a 55-inch rise in sea level at the Golden Gate, unless the development is located within" certain specified areas. (AR, B739.) Petitioners argue RR P2 is not reflective of best available science as it exceeds the scientifically supported seal level rise predictions currently available.

Respondent contends the RR P2 standards are supported by substantial evidence and would not be overly costly, considering that it protects property and lives. (Opposition, p. 91.) With regard to the 55-inch potential sea rise, Respondent cites to the Ocean Protection Council resolution adopted on March 11, 2011. (AR, L38257.) The resolution provides, "senior staff from 16 state agencies of the Coastal and Ocean Working Group of the California Climate Action Team (CO-CAT) reached agreement on a Sea-Level Rise Interim Guidance Document...with science-based input from the OPC's Science Advisory Team and the California Ocean Science Trust." (AR, L38255.) The included Sea-Level Rise Projections table indicates a potential range of seal-level rise in 2100 between 40 inches and 55 inches. (AR, L38257.) The report analyzes that the 55 inch sea-level rise places approximately 480,000 people and nearly $100 billion of property at risk. (AR, L38255.) The Guidance Document provides that the projections do not account for catastrophic ice melting. Consequently, they may underestimate actual sea-level rise. (AR, L33595.)

Respondent further argues that the Delta Reform Act itself, in section 85320 considers this 55-inch sea-level rise figure, by providing that the BDCP can only be incorporated into the Delta Plan if it includes a comprehensive review of the potential effects of climate change including possible sea level rise up to 55 inches. Respondent finally cites to a 2012 National Research

Council report that projects a range of sea-level rise between 16.7 and 65.5 inches. (AR, M5597, J161029.)

Petitioners do not dispute that the 55-inch number is utilized as a possible scenario by these studies, but argue Respondent should have adopted a middle-range number, instead of the "high" 55-inch number. Petitioners have failed to prove that adopting the high potential sea-level rise number is a failure to use best available science. To the extent Petitioners also argue RR P2 "does not reflect a uniform elevation change within the Delta", the Court also agrees with Respondent that RR P2 acknowledges that it is based on a Golden Gate rise of 55-inches, which may vary depending on the location of the proposed residential development.

While Petitioners may have disagreements with Respondent over the data utilized, they have failed to prove that any of the data was inaccurate such that it did not represent the use of best available science. Furthermore, to the extent Petitioners posit this section of their brief as Respondent's failure to "reduce risks to people, property, and state interests in the Delta," the Delta Plan in fact "attempts to reduce" the risks by "promoting" certain strategies. The court finds that Petitioners have failed to identify how the Delta Plan falls short of this mandate.

13. <u>The public trust doctrine</u>

The public trust doctrine in the United States covers all navigable streams, ecological preservation, wetland areas, underground water, artificially enlarged waters, and wild animals. (AR, L7812-18.) The public trust is "an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." (*Nat'l Audubon Soc'y v. Superior Court* (1983) 33 Cal.3d 419, 441.) The core of the doctrine is the state's authority to exercise continuous supervision and control over the navigable waters and underlying lands. (*Id.* at 425-26.) The state is also responsible for the protection of wild fish. (*People v. Murrison* (2002) 101 Cal.App.4th 349.)

Section 85023 provides, "[t]he longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are

particularly important and applicable to the Delta." Petitioners essentially argue that Respondent failed to comply with the public trust doctrine in drafting the Delta Plan by placing the policies in separate plan chapters, failing to demonstrate how its programs comply with the public trust doctrine, failing to require reduced Delta reliance, failing to adopt updated flow criteria, and failing to account for how much water is available to meet public trust protection while still providing exports.

With regard to reduced Delta reliance, the Court refers to its analysis in *North Coast Rivers Alliance, et al. v. Delta Stewardship Council* concerning this issue.

With regard to failing to adopt updated flow criteria, the Court again refers to its analysis in *North Coast Rivers Alliance, et al. v. Delta Stewardship Council* concerning this issue. The Court finds the Delta Plan's treatment of flow objectives does not violate the Delta Reform Act.

With regard to the remaining issues, Petitioners have not demonstrated that Respondent has fallen short of any duty required by the Delta Reform Act, or that the Delta Plan is in violation of the public trust doctrine with regard to the issues asserted.

Conclusion

The petition for writ of mandate with regard to the statutory challenges heard in this bifurcated proceeding is **GRANTED** in part and **DENIED** in part in accordance with the above-ruling. A peremptory writ shall issue from this Court to Respondent, ordering Respondent to revise the Delta Plan and any applicable regulations to:

1) Promote options for water conveyance and storage systems.

Nothing in the writ shall limit or control in any way the discretion legally vested in Respondent. The writ shall also command Respondent to make and file a return within 120 days after issuance of the writ, setting forth what it has done to comply with the writ.

In accordance with Local Rule 1.06, counsel for Petitioners is directed to prepare an order granting the petition in part and denying it in part, incorporating this ruling as an exhibit to the order, and a separate judgment and writ of mandate; submit them to counsel for Respondent for

approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit them to the Court for signature and entry in accordance with Rule of Court 3.1312(b).

IV. FURTHER HEARINGS

In light of the above-rulings, the Court finds the CEQA challenges currently pending in this coordinated proceeding are moot. The Court hereby vacates the hearings set in this matter for May 26, 2016 and May 27, 2016.

DATED: May 18, 2016

Judge MICHAEL P. KENNY
Superior Court of California,
County of Sacramento

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled **RULING ON SUBMITTED MATTER** in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9th Street, Sacramento, California.

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Dated: May 18, 2016

By: S. LEE
Deputy Clerk