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BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

HEARING REGARDING PETITION FILED BY THE DEPARTMENT OF WATER RESOURCES AND U.S. BUREAU OF RECLAMATION REQUESTING CHANGES IN WATER RIGHTS FOR THE CALIFORNIA WATERFIX PROJECT	MOTION OF PROTESTANTS PACIFIC COAST FEDERATION OF FISHERMEN’S ASSOCIATIONS AND INSTITUTE FOR FISHERIES RESOURCES TO DISQUALIFY PETITIONERS’ WITNESSES AND EXCLUDE THEIR TESTIMONY AND EXHIBITS Hearing Date: July 26, 2016 Time: 9:00 a.m.
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1 **I. INTRODUCTION**

2 The Change Petition submitted by the Department of Water Resources and the U.S.
3 Bureau of Reclamation (“petitioners”) is easily the most important matter pending on this Board’s
4 current docket. It may well be the most significant water rights proceeding this Board will decide
5 for decades to come. According to every state and federal agency that manages its fish and
6 wildlife, the Bay-Delta ecosystem is collapsing. The National Marine Fisheries Service
7 (“NMFS”) and the Fish and Wildlife Service (“FWS”) concluded in 2008 and 2009, respectively,
8 that continued operation of the Central Valley Project (“CVP”) and the State Water Project
9 (“SWP”) would jeopardize the existence of Delta smelt, winter-run Chinook salmon, green
10 sturgeon, and other imperiled fish species. *San Luis & Delta Mendota Water Authority v. Jewell*,
11 747 F.3d 581, 592 (9th Cir. 2014) (quoting FWS’ Biological Opinion); *San Luis & Delta*
12 *Mendota Water Authority v. Locke*, 776 F.3d 971, 981 (9th Cir. 2014) (quoting NMFS’ Biological
13 Opinion). The Environmental Protection Agency (“EPA”) agrees. As stated in its comments on
14 the Recirculated Draft EIR/Supplemental Draft EIS (“RDEIR/SDEIS”) for the California
15 WaterFix dated October 30, 2015, “[t]hese species have experienced sharp population declines in
16 the last decade and showed record low abundance over the last five years.” *Id.* at 3.

17 Far from protecting those species, the WaterFix will *hasten their demise*. EPA warned
18 that “[i]nformation presented in the [RDEIR/]SDEIS shows that the WaterFix project could
19 reduce habitat conditions for Delta smelt, winter-run Chinook salmon, green and white sturgeon,
20 striped bass, and American shad, and result in a decline of long fin smelt abundance.” *Id.* EPA
21 cautioned further that the WaterFix will cause a wholesale increase in salinity throughout the
22 Bay-Delta, posing potentially catastrophic impacts on both fish and wildlife and municipal uses.
23 *Id.*

24 It gets worse. Not only is the Bay-Delta ecosystem in free fall, all three safety nets that
25 state law requires for protection of this dying estuary have been ruled inadequate. EPA has given
26 the RDEIR/SDEIS a failing grade of “‘3’ (Inadequate).” *Id.* at 4. The Sacramento Superior Court
27 has set aside the Delta Stewardship Council’s Delta Plan – the very plan that the Legislature
28 mandated to reverse the Delta’s “crisis” – because it fails to prescribe measureable and

1 enforceable targets for restoring the Delta’s natural flows, reducing environmental harms and
2 curtailing diversions of its flows.¹ And, most important of all, it is indisputable that the Bay-Delta
3 Water Quality Control Plan adopted by this Board in 1995 (Decision-1641) is obsolete. It has
4 failed to protect the Delta’s fish and wildlife and must therefore be updated as required by the
5 Clean Water Act and the California Water Code.

6 The upshot? Unless and until all three of these fundamental gaps in the Delta’s required
7 protection are rectified, there is no regulatory regime in place to provide an evidentiary basis for
8 the Change Petition. Because there are no valid water quality standards in place, the petitioners’
9 assurances that the WaterFix’s claimed compliance with environmental standards will prevent
10 harm to other legal users of water rings hollow. For this reason, as detailed below, the evidence
11 proposed by petitioners is neither relevant nor reliable as required by settled principles of
12 administrative and evidentiary law. Accordingly, this Board must reject petitioners’ proffered
13 evidence and with it, their Change Petition.

14 **II. THE LEGAL PREDICATES FOR PETITIONERS’ TESTIMONY ARE ABSENT.**

15 Petitioners’ testimony and exhibits are neither relevant nor reliable because they rest on
16 the false premise that compliance with existing environmental standards will prevent harm to
17 other legal users of the Delta’s water. 23 Cal. Code Regs. (“CCR”) §648.5.1 directs that this
18 Board’s adjudicative proceedings must “be conducted in accordance with the provisions and rules
19 of evidence set forth in Government Code section 11513.” Although that section instructs that
20 this Board’s “hearing need not be conducted according to technical rules relating to evidence and
21 witnesses,” it is settled law that “even in such [administrative] proceedings, with the relaxed
22 standards of admissibility, the evidence must be relevant and reliable.” *Aengst v. Board of*
23 *Medical Quality Assurance* (1980) 110 Cal.App.3d 275, 283. Indeed, the standard for
24 determining the admissibility of scientific evidence in this adjudicatory hearing is the same as it

25
26 ¹ Ruling on Submitted Matter: Petitions for Writ of Mandate, Bifurcated Proceeding on Statutory
27 Challenges filed May 18, 2016 (“Ruling”), in Delta Stewardship Council Cases (Judicial Council
28 Coordination Proceeding No. 4758) at 26, setting aside the Delta Plan adopted by the Delta
Stewardship Council in May, 2013 because it violates the Delta Reform Act, Water Code sections
85001 et seq. A true copy of this Ruling is annexed as Exhibit 1 to this Motion.

1 would be in a judicial proceeding. *Seering v. Department of Social Services* (1987) 194
2 Cal.App.3d 298, 310. In 1976 the California Supreme Court approved the venerable rule of
3 admissibility for new scientific methodologies adopted by the District of Columbia Circuit Court
4 of Appeals in 1923. *People v. Kelly* (1976) 17 Cal.3d 24, 30 (approving and applying *Frye v.*
5 *United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). “Under the *Kelly-Frye* Rule, evidence based
6 on a new scientific method of proof is admissible only upon a showing that the procedure has
7 been generally accepted as reliable in the scientific community in which it was developed.” *In re*
8 *Amber B.* (1987) 191 Cal.App.3d 682, 686. Petitioners’ proffered evidence fails to meet this
9 fundamental standard of general acceptance by the relevant scientific community because it is
10 erroneously premised on the false assumption that compliance with existing environmental
11 standards will assure the WaterFix will harm no legal users of water. To the contrary, since the
12 primary environmental standards governing management of the Delta have been deemed
13 inadequate, petitioners’ premise is a logical fallacy, as discussed below.

14 **A. THE 1995 BAY-DELTA PLAN HAS NOT BEEN UPDATED.**

15 The Water Quality Control Plan for the San Francisco Bay/San Joaquin-Sacramento Delta
16 Estuary (WQCP) (Water Rights Decision 1641, D-1641) was adopted in 1995, and amended
17 without substantive changes in 2006. “The State Water Board is in the process of a periodic
18 update of the WQCP, which is occurring in phases.” (Reference DWR-51, Jennifer Pierre
19 testimony at 4 n.4). Indeed, as this Board recognized in its February 11, 2016, Ruling: “The
20 appropriate Delta flow criteria will be more stringent than petitioners’ current obligations and
21 may well be more stringent than petitioners’ preferred project.” (*Id.* at 4.) This Board further
22 acknowledged “that the WaterFix, if approved, would be a significant component of Delta
23 operations, and it would be preferable to have Phase 2 [of the Plan update] completed prior to
24 acting on the change petition.” (*Id.* at 4-5).

25 Moreover, the Delta Reform Act mandates that any order by this Board approving a
26 diversion point change “shall include appropriate Delta flow criteria and shall be informed by the
27 analysis conducted pursuant to this section.” Water Code § 85086(c)(2). But contrary to this
28 express mandate of the Delta Reform Act, this Board has failed to adopt appropriate Delta flow

1 criteria before considering the Change Petition. This cart-before-the-horse error is prejudicial and
2 must be corrected before the Change Petition may be considered.

3 Because existing standards are known to be inadequate, testimony that the Waterfix will
4 comply with existing standards is not relevant. Comprehensive and adequate Bay-Delta water
5 quality planning needs to take place before, not after, this Board may proceed with a hearing on
6 the Change Petition.

7 **B. THERE HAS BEEN NO COMPLIANCE WITH THE DELTA REFORM**
8 **ACT.**

9 There is currently no valid Delta Plan in effect. On May 18, 2016, the Sacramento
10 Superior Court issued its 73 page ruling in the seven coordinated Delta Stewardship Council
11 Cases (Judicial Council Coordinated Proceeding No. 4758). In pertinent part, the Ruling ordered
12 that:

13 A peremptory writ shall issue from this Court to Respondent [the
14 DSC], ordering Respondent to revise the Delta Plan and any applicable
regulations to:

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

18
19 (*Id.* at 26, 38.) This Board may and should take official notice of this Ruling under 23 C.C.R.
20 section 648.2 because judicial notice would be proper under Evidence Code sections 451(a),
21 452(a) and 453. The Delta Plan is designated as “the comprehensive, long-term management plan
22 for the Delta as adopted by the [Delta Stewardship Council] in accordance with this division.”
23 (Water Code § 85059.) As the Ruling explains, Water Code section 85308(b) “provides that the
24 Delta Plan shall, ‘include quantified or otherwise measurable targets associated with achieving the
25 objectives of the Delta Plan.’” (Ruling at 8.) The Ruling further explains that quantified or
26 measurable targets would include a numeric designation or an amount that can be identified. (*Id.*
27 at 8-9). The Court also noted on page 9 of its Ruling that there is “legislative direction that the
28 Delta Plan be ‘legally enforceable.’ (§ 85001.)” In addressing the DSC's arguments, the Court

1 found that “WR R1 is not an enforceable policy and does not describe how progress will be
2 measured.” (Ruling at 12.) The Court found “the Delta Plan fails to ‘include quantified or
3 otherwise measurable targets associated with achieving’ reduced Delta reliance as required by the
4 Delta Reform Act.” (*Id.* at 12.)

5 Accordingly, the Ruling directed that:

6 A peremptory writ of mandate shall issue from this court to
7 Respondent, ordering Respondent to revise the Delta Plan and any
8 applicable regulations to:

- 9 1) Provide a flow policy that includes 'quantified or otherwise
10 measurable targets;

11 *Id.* at 38.)

12 The Court ruled that “the Delta Plan fails to 'include quantified or otherwise measurable
13 targets associated with' restoring more natural flows as required by the Delta Reform Act.” (*Id.* at
14 36.) The Court explained that section 85302(e)(4) “provides [that] [t]he following sub goals and
15 strategies for restoring a healthy ecosystem shall be included in the Delta Plan... (4) Restore
16 Delta flows and channels to support a healthy estuary and other ecosystems.” (*Id.* at p. 34.) The
17 Court pointed out that a goal of “progress”:

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

25 (*Id.* at 36.)

26 For these additional reasons, the Ruling directed further that:

27 A peremptory writ of mandate shall issue from this Court to
28 Respondent, ordering Respondent to revise the Delta plan and any
applicable regulations to:

Promote options for war conveyance and storage systems.

1 (Ruling at 38, 72.) The Court reasoned that “simply recommending the BDCP's completion does
2 not promote any options.” (*Id.* at 37.) “[T]he Delta Reform Act. . . does require Respondent to
3 promote options for water conveyance.” (*Id.* at 59). The Court therefore held that the failure to
4 promote options for water conveyance is a violation of the Delta Reform Act. (*Id.* at 37-38, 59.)
5

6 On June 24, 2016, the Court issued a further Order in response to motions for clarification,
7 adhering to and expanding upon its earlier Ruling, and explaining that “Specifically, with regard
8 to reduced Delta reliance, the Court found the Plan failed to include targets that would ensure
9 reduced reliance, as required by the Delta Reform Act.” See Exhibit 2 hereto.² The Court
10 repeated its previous ruling that the Delta Plan must be revised “to include quantified or otherwise
11 measurable targets associated with achieving reduced Delta reliance, . . . restoring more natural
12 flows, and increased water supply reliability,” and emphasized that “[t]o be clear, the Delta Plan
13 is invalid and must be set aside until proper revisions are completed.” *Id.*
14

15 More stringent Delta flow criteria are clearly necessary. The Delta Reform Act requires
16 measures to “[r]estore Delta flows and channels to support a healthy estuary and other
17 ecosystems.” Water Code § 85302(e)(4). The Act establishes State policy “to reduce reliance on
18 the Delta in meeting California's future water supply needs through a statewide strategy of
19 investing in improved regional supplies, conservation, and water use efficiency.” Water Code §
20 85021. State policy is also to “[r]estore the Delta ecosystem, including its fisheries and wildlife,
21 as the heart of a healthy estuary and wetland ecosystem.” Water Code § 85020(c).
22

23 The status quo does not satisfy the Delta Reform Act. Instead, reliance on the Delta by
24 consumptive users must be reduced, and more natural Delta flows must be restored.
25

26
27 ² As with the Court’s May 18, 2016 Ruling, this Board should take official notice under 23 C.C.R.
28 section 648.2 because judicial notice would be proper under Evidence Code sections 451(a),
452(c) and 453.

1 Consequently, testimony that the Waterfix will comply with existing standards is not relevant, and
2 testimony about a lack of negative effects to legal users of water is neither relevant nor reliable.

3 Like the Delta Stewardship Council, this Board will be sent back to the starting line for
4 violating the law if it continues to consider the Change Petition without adopting the adequate
5 flow criteria required by the Delta Reform Act, Water Code section 85086.
6

7 **C. THE WATERFIX/BDCP EIR/EIS IS PRELIMINARY AND INADEQUATE.**

8 Petitioners have not prepared or approved a Final EIR/EIS for the WaterFix. The
9 WaterFix's RDEIR/SDEIS, including the Draft EIR/EIS that it modifies and incorporates, is
10 merely a preliminary document. It does not identify a Project, nor does it address public concerns
11 regarding the deficiencies in its analysis. Because it is still an incomplete draft, its analysis and
12 conclusions are subject to change. It has not been certified as complete or accurate by *any*
13 decisionmaking body.

14 The RDEIR/SDEIS is further inadequate because it does not present a reasonable range of
15 alternatives, as required by CEQA. *North Coast Rivers Alliance v. Kawamura* (2015) 243
16 Cal.App.4th 647, 666-673. Its range of alternatives is improperly and artificially curtailed by the
17 petitioners' project objectives, in violation of CEQA. *Id.* The RDEIR/SDEIS fails to study any
18 alternative that would hinder the ability of the SWP and CVP to deliver full contract amounts,
19 despite multiple comments requesting such an analysis. The Environmental Water Caucus
20 prepared one such alternative, which was attached to the January 21, 2016, letter to this Board
21 submitted by Friends of the River, *et al.*

22 Pursuant to 23 C.C.R. section 648.2 and Evidence Code section 452(c), protestants hereby
23 request official notice of the contents of EPA's October 30, 2015 letter reviewing the
24 RDEIR/SDEIS pursuant to Evidence Code section 452(c).³ In that letter, the EPA gave the
25 RDEIR/SDEIS a rating of "'3' (*Inadequate*)." *Id.* at p. 4. The EPA findings about missing
26

27 ³ The October 30, 2015 EPA letter was attached to the November 24, 2015, letter to this Board
28 submitted by protestants California Sportfishing Protection Alliance, Environmental Water
Caucus, Friends of the River, and Restore the Delta.

1 information are consistent with this Board’s October 30, 2015, comment letter on the
2 RDEIR/SDEIS, which stated on page 2 that “there is a large degree of uncertainty regarding the
3 exact effects of the project due to a number of factors.” Because the RDEIR/SDEIS is a
4 preliminary, incomplete draft, this Board cannot rely upon it for its decision in this proceeding.

5 The starting point for determining whether there will be negative effects to legal users of
6 water should be an adequate Final EIR/EIS with a robust analysis of alternatives, including an
7 alternative of reducing water exports. Instead, petitioners present testimony and exhibits that
8 have never been examined in any final and adequate analysis of environmental impacts under
9 California law. Rather than comply with CEQA, petitioners insist that this Board unlawfully
10 proceed on the basis of petitioners’ own self-serving testimony and exhibits. Their attempted
11 evasion of CEQA’s requirements must not be rewarded by allowing their premature Change
12 Petition to proceed to hearing. Accordingly, their testimony and exhibits must, along with their
13 Change Petition, be rejected.

14
15 **III. THIS BOARD SHOULD DISQUALIFY PETITIONERS’ WITNESSES AND
16 EXCLUDE THEIR TESTIMONY AND EXHIBITS.**

17 As noted, the legal predicates for petitioners’ testimony and exhibits are absent, since the
18 1995 Bay-Delta Plan is obsolete, the 2013 Delta Plan has been invalidated by the court, and there
19 is no CEQA-required final EIR/EIS for the WaterFix Project. Absent valid, updated and adequate
20 environmental standards against which to measure the impacts of the WaterFix, there is no basis
21 for petitioners’ witnesses’ claims that the WaterFix will not harm legal users of water because it
22 will conform to applicable environmental standards. Furthermore, this Board should disqualify
23 petitioners’ witnesses and exclude their testimony and exhibits because petitioners have failed to
24 provide evidence that identifies the specific impacts of the WaterFix on legal users of water. As
25 shown below, despite this Board’s clear instruction that petitioners must provide this specific
26 information, they have failed to do so. Accordingly, their witnesses, testimony and exhibits
27 should be excluded, and their petition must be denied.
28

1 **A. THIS BOARD MUST EXCLUDE EVIDENCE THAT IS NOT RELEVANT**
2 **AND RELIABLE.**

3 As noted, “even in [administrative] proceedings, with the relaxed standards of
4 admissibility, the evidence must be relevant and reliable.” *Aengst, supra*, 110 Cal.App.3d at 283.
5 In recognition of this fundamental principle of administrative law, this Board has repeatedly
6 instructed petitioners to make sure that their witnesses and evidence provided sufficient
7 specificity based on fact rather than assumptions to demonstrate that other legal users of water
8 would not be harmed by the Project. The Board’s October 30, 2015 Notice of Petition, for
9 example, required that all “[e]xhibits based on technical studies or models shall be accompanied
10 by sufficient information to clearly identify and explain the logic, assumptions, development, and
11 operation of the studies or models.” *Id.* at 33. Further, the Board warned that “[e]xhibits that rely
12 on unpublished technical documents *will be excluded* unless the unpublished technical documents
13 are admitted as exhibits.” *Id.* at 34, emphasis added.

14 Petitioners failed to comply with this direction. Consequently, in its February 11, 2016
15 Pre-Hearing Conference Ruling, this Board warned petitioners that “the available information” –
16 upon which petitioners had based their petition and which included many of the exhibits
17 petitioners have now submitted as proposed evidence –

18 lack[ed] clarity in several ways, including whether operation criteria are intended
19 to constrain project operations or are identified for modeling purposes only, areas
20 where a specific operational component or mitigation measure is not yet chosen or
21 identified, operational parameters that are not defined and deferred to an adaptive
 management process, and lack of clarity concerning some mitigation measures.

22 *Id.* at 6. Because of this lack of clarity, the Board directed petitioners to provide “the information
23 required by section 794 of our regulations in a succinct and easily identifiable format. The other
24 parties will then be able to more accurately assess whether the proposed changes would cause
25 injury.” *Id.* at 7. Among other information deemed vital to a petition for change of point in
26 diversion, section 794 requires “the proposed division, release and return flow schedules,” “any
27 effects of the proposed change(s) on fish, wildlife, and other instream beneficial uses,” and
28

1 “identification in quantitative terms of any projected change in water quantity, water quality,
2 timing of diversion or use, consumptive use of the water, reduction in return flows, or reduction in
3 the availability of water within the streams affected by the proposed change(s).” 23 C.C.R. §
4 794(a)(6), (8), (9).

5 Petitioners now admit that they cannot provide the information required by the Board with
6 particularity. “Since the BiOp has not been issued,” petitioners explain, “and DWR and
7 Reclamation do not know the initial operational criteria, the analytical framework presented for
8 Part 1 is a boundary analysis.” DWR 51 at 10:8-10. While this “boundary analysis” attempts to
9 “provide a broad range of operational criteria,” the conclusions stated in the written testimony
10 offered by petitioners are not supported by the necessary data or analysis and do not contain the
11 specificity necessary to satisfy the informational requirements of the Board's October 30 Notice,
12 February 11 Ruling, or regulations. DWR 51 at 10:10.

13 All testimony by petitioners’ witnesses on project modeling must be excluded because it is
14 not based on principles or procedures that have gained general acceptance in their field. *People v.*
15 *Kelly, supra*, 17 Cal.3d at 32 (adopting the rule in *Frye v. United States, supra*, 293 F. at 1014);
16 *People v. Leahy* (1994) 8 Cal.4th 587, 594. The *Kelly* rule, known as the “general acceptance
17 test,” allows for the admission of expert opinion grounded in a scientific theory or technique if the
18 theory or technique is generally accepted as reliable in the relevant scientific community. Under
19 this rule, evidence based on a new scientific method must satisfy three requirements to be
20 admissible: (1) the technique has gained general acceptance in its field; (2) the witness furnishing
21 the testimony is qualified to give evidence on the acceptance of the technique; and (3) correct
22 scientific procedures were used. *People v. Diaz* (1992) 3 Cal.4th 495, 526. Petitioners’ witnesses
23 have not satisfied these criteria.

24 The modeling results relied upon by petitioners’ witnesses do not meet the *Kelly* rule
25 because they have failed to provide a proper foundation in actual data and understandable analysis
26 to “provide a reasonable basis for the particular opinion offered.” *Lockheed Litigation Cases*
27 (2004) 115 Cal.App.4th 558, 564. Under Evidence Code section 803, this Board “shall . . .
28

1 exclude” opinion testimony in the form of an opinion that is based in whole or in significant part
2 on matter that is not a proper basis for such an opinion.”

3 This Board is well aware of the importance of providing adequate documentation of model
4 assumptions, validation through testing, and adjustment by calibration. In 2012 this Board
5 convened its own scientific panel to provide specific recommendations as to the requirements for
6 assuring that hydrologic models are accurate and reliable. Neither of the models on which
7 petitioners rely – CalSim II and DSM2 – have ever been validated for use by any external and
8 disinterested experts. The absence of this required validation requires exclusion of petitioners’
9 testimony based upon these models. *Seering, supra*, 194 Cal.App.3d at 311. Petitioners fail to
10 address this fatal deficiency.

11 But this defect strikes at the heart of the entire basis for petitioners’ claim that the
12 WaterFix will not harm legal users of water. Numerous independent experts familiar with these
13 models have questioned their validity. According to one review, “Better quality control is needed
14 both for the model and its current version and the input data. Procedures for model calibration
15 and verification are also needed. Currently many users are not sure of the accuracy of the results.
16 A sensitivity and uncertainty prediction capability and analysis is needed.” California Bay Delta
17 Science Program, *A Strategic Review of CalSim II and its Use for Water Planning, Management,*
18 *and Operations in Central California*, p. 8 (Dec. 4, 2003) (“2003 Peer Review”). The lack of
19 acceptance of CalSim II has been persistent, as a subsequent peer review found that “CalSim II
20 work fails to adequately report technical results that would give knowledgeable readers some
21 sense of the quality, accuracy, sensitivity, or uncertainty present in the results. This issue was
22 prominent in the previous CalSim review panel report.” CALFED Science Program, *San Joaquin*
23 *River Valley CalSim II Model Review*, p. 10 (Jan. 12, 2006) (“2006 Peer Review”). The U.S. Fish
24 and Wildlife Service (“FWS”) also criticized petitioners’ modeling and had to develop its own
25 alternative because it felt that CalSim II was unusable.

26 The inaccuracies in CALSIM lead us to use actual data to develop an empirical baseline
27 We calculated monthly or multiple month averages or medians based on these daily
28 hydrology data sets. The historical time series are intended to show where changes in
water project operations have caused or contributed to changed Delta hydrology and to

1 serve as an empirical baseline of SWP and CVP operations for comparison to proposed
2 futures modeled using CALSIM II.

3 2008 Fish and Wildlife Service Formal Endangered Species Act Consultation on the Proposed
4 Coordinated Operations of the Central Valley Project (CVP) and State Water Project (SWP)
5 (Exhibit SWRCB-87, p. 205). FWS also thereby demonstrated that use of actual data for an
6 empirical baseline was not only desirable, but also possible, further implicating petitioners'
7 failure to use the best available science.

8 CalSim II has never been calibrated, in direct contradiction to recommendations by
9 qualified and disinterested experts who served on the 2003 and 2006 peer review panels, quoted
10 above. Moreover, this lack of calibration is in direct contradiction to petitioners' own responses
11 to those peer reviews. *Peer Review Response: A Report by DWR/Reclamation in Reply to the*
12 *Peer Review of the CalSim-II Model Sponsored by the CALFED Science Program in December*
13 *2003*, p. 19 (Aug. 2004).

14 The 2006 Peer Review panel also recommended documentation of model assumptions and
15 error analyses. Under "Uncertainty in Model Results," the reviewers noted that "[c]urrently no
16 general guidance is available to indicate whether differences of 1 taf, 50 taf, 100 taf, or 500 taf are
17 significant enough to rise above the level of error and noise inherent in the model." 2006 Peer
18 Review, p. 6. As a result, the reviewers recommended, "[a]t a minimum, error analyses should be
19 conducted, combining a sensitivity analysis of critical model results to some of the largest and
20 least well supported model assumptions with an assessment of the likely range of error in these
21 major model parameters and assumptions." *Id.* While the 2007 Peer Review Response (Exhibit
22 DWR-507) attempts to do the mandated error analyses for the San Joaquin River component, the
23 analyses were never externally reviewed. Other components of the model lack any detailed or
24 meaningful error analysis. Without adequate error analysis, general acceptance by the scientific
25 community is not possible, and petitioners' modeling is not admissible evidence in an
26 adjudicative hearing before the Board.

1 Petitioners have also failed to demonstrate that their models are based on “best available
2 science.” A model is only as good as the data it utilizes, and petitioners have failed to
3 demonstrate the accuracy and validity of the data on which their models rely. Supporting
4 evidence should have been submitted with the Petition, so protestants would be able to review it
5 in a timely manner. If modeling is not in evidence, protestants are deprived of their due process
6 right to question petitioners’ witnesses about that modeling. “[I]n civil proceedings a party has a
7 due process right under the Fifth and Fourteenth Amendments to the Federal Constitution to
8 cross-examine and confront witnesses.” *Seering, supra*, 194 Cal.App.3d at 304, quoting *In re*
9 *Mary S.* (1986) 186 Cal.App.3d 414, 419. “[In] a civil proceeding the constitutional right
10 involves general notions of procedural due process.” *Id.* Because petitioners’ testimony based
11 on their modeling fails to identify the underlying data as necessary to permit petitioners’ informed
12 cross-examination, both the model and the testimony based thereon are objectionable on due
13 process grounds. *Id.* Moreover, since the underlying data is not in evidence, such testimony is
14 objectionable for the additional reason that it assumes facts not in evidence. *Dee v. PCS Property*
15 *Management, Inc.* (2009) 174 Cal.App.4th 390, 404 (an opinion based on assumed facts, without
16 adequate foundation for concluding that those facts exist, is unreliable and therefore should be
17 excluded).

18 Finally, petitioners’ failure to disclose the basis of their exclusion of environmentally
19 more protective alternatives (such as alternatives that would restore natural flows as required by
20 the Delta Reform Act) is objectionable. For example, Appendix 3I of the Draft Bay Delta
21 Conservation Plan (Exhibit SWRCB-4) states that certain alternatives for flow criteria were
22 eliminated from consideration by petitioners during preliminary modeling, with the Board’s
23 agreement. This premature elimination of alternatives from consideration by the public – let
24 alone the parties to this proceeding – impermissibly sidesteps the hearing process and protestants’
25 due process right to cross-examine petitioners’ witnesses as to the basis for their testimony.

26 In summary, petitioners’ witnesses have failed to demonstrate that the modeling on which
27 they rely is “the sort of evidence on which responsible persons are accustomed to rely in the
28 conduct of serious affairs.” Government Code section 11513(c). Petitioners have failed to

1 provide a sufficient foundation for their modeling to demonstrate its reliability and accuracy.
2 And, most importantly, petitioners have failed to demonstrate that the methodology employed in
3 their modeling is generally accepted by the relevant scientific community as required under the
4 *Kelly* standard. Accordingly, all of petitioners' testimony and exhibits that are based on the
5 CalSim II and DSM2 models must be excluded.

6 **B. THIS BOARD MUST DISQUALIFY WITNESSES WHOSE TESTIMONY**
7 **WAS NEVER DISCLOSED.**

8 Twelve of petitioners' witnesses must be excluded because their testimony was not
9 provided to the hearing participants by the May 31 deadline prescribed by this Board. On April
10 25, 2016, this Board ruled that noon on May 31, 2016 was the:

11 Deadline for receipt and service of petitioners' case in chief, including witnesses'
12 proposed testimony, witness qualifications, exhibits, list of exhibits, and a
13 statement of service for Part 1A of the hearing.

14 (Ruling, April 25, 2016 at 4) (emphasis added).

15 This Ruling is clear, and petitioners never sought a further extension of time to submit
16 their testimony. They elected to file proposed testimony for only 7 witnesses. As to 12 other
17 witnesses, petitioners provided only one sentence stating that the witness helped review, or
18 contributed information to, another witness' testimony. Each of these 12 witnesses' one sentence
19 of proposed "testimony" is set forth below. Each of these witnesses' testimonies should either be
20 limited to the single sentence provided, or excluded entirely.

21 **1. Steve Centerwall, DWR-52**

22 "I testify that I helped review the written testimony of Jennifer Pierre."

23 **2. Michael Anderson, DWR-64**

24 "I testify that I contributed information about the extreme conditions of recent years to the
25 testimony of John Leahigh."

26 **3. Eric Reyes, DWR-67**

27 "I reviewed and contributed to the written testimony of Mr. Munevar. In particular, I was
28 relied upon by Mr. Munevar for my particular expertise in modeling."

1 **4. Michael D. Bryan, DWR-73**

2 “I testify that I helped review the written testimony of Parviz Nader-Tehrani. Specifically,
3 I was relied upon by Parviz Nader-Tehrani for my particular expertise in water quality.”

4 **5. Jamie Anderson, DWR-69**

5 “I testify that I reviewed and contributed to the written testimony of Parviz Nader-Tehrani.
6 In particular, I was relied upon by Parviz Nader-Tehrani for my particular expertise in Delta
7 Modeling.”

8 **6. Tara Smith, DWR-70**

9 “I testify that I reviewed and contributed to the written testimony of Parviz Nader-Tehrani.
10 In particular, I was relied upon by Parviz Nader-Tehrani for my particular expertise in Delta
11 Modeling.”

12 **7. Kristin White, DOI-6**

13 “I have participated in the modeling testimony for this hearing by reviewing drafts and
14 making comments on CVP-related matters.”

15 **8. Gwendolyn Buchholz, DWR-72**

16 “I testify that I am closely involved in the creation of the BDCP/California WaterFix
17 EIR/EIS.”

18 **9. Mark A. Holderman, DWR-62**

19 “I testify that I can speak knowledgeably about the Department of Water Resources’
20 Temporary Barriers Project.”

21 **10. Shanmugam (Praba) Pirarooban, DWR-54**

22 “I testify that I contributed significantly to the engineering testimony of John Bednarski.
23 In particular, I was relied upon by John Bednarski for my experience in the project’s conceptual
24 design.”

25 **11. Sergio Valles, DWR-58**

26 “I testify that I contributed significantly to the engineering testimony of John Bednarski.
27 In particular, I was relied upon by John Bednarski for my experience in the project’s conceptual
28 design.”

1 **12. Robert Cooke, DWR-60**

2 “I testify that I can provide historical perspective on water contracts and Delta water
3 transfer facility activities, SWP water rights, long-term water supply contracts, and SWP
4 settlement agreements.”

5 Any request by petitioners to expand the testimony of any of these witnesses should be
6 denied. Protestants were entitled to receive proposed testimony, if any, from each of the above
7 witnesses by May 31, 2016. “It is the policy of the State and Regional Boards to discourage the
8 introduction of surprise testimony and exhibits.” 23 Cal. Code Regs § 648.4(a).

9 Allowing their testimony would not only violate this Board’s April 25, 2016 Ruling, but
10 also deprive protestants of due process by denying them their right to review the proposed
11 testimony, *including the witnesses’ opinions and the basis/reasons for their opinions*, well in
12 advance of the commencement of the Hearing. Admission of any additional testimony from these
13 witnesses would prejudice protestants and therefore, under 23 Cal. Code Regs section 648.4(e),
14 must be excluded.

15
16 **C. THIS BOARD MUST DISQUALIFY WITNESSES AND EXCLUDE
17 TESTIMONY AND EXHIBITS THAT ARE NEITHER RELEVANT
18 NOR RELIABLE.**

18 As explained above, petitioners have a duty to provide this Board with evidence that is
19 both relevant and reliable. *Aengst, supra*, 110 Cal.App.3d at 283. They have failed to do so.
20 Accordingly, the following testimony and exhibits must be excluded, as discussed below.

21 **1. Jennifer Pierre, DWR-51**

22 **General objections for which Ms. Pierre’s testimony should be struck in its entirety.**

23 Ms. Pierre’s testimony must be excluded to the extent it relies on modeling because it is
24 not based on principles or procedures that have gained general acceptance in their field and are
25 not based on “best available science,” as detailed above.

26 **Specific objections.**

27 Ms. Pierre’s testimony purporting to characterize the legal effect of various agreements
28 cannot be used to prove the contents of those agreements where those agreements are also

1 submitted as exhibits. Specifically, Ms. Pierre’s testimony concerning a “Summary of CWR
2 Specific Background” contains many such references, and as a paraphrase of these documents this
3 section should be struck in its entirety. DWR-51, p. 6-8. Further, the rest of Ms. Pierre’s
4 testimony contains numerous additional attempts to characterize the legal effect of submitted
5 agreements, and each such reference should be stricken. To the extent that such testimony
6 constitutes an opinion on a question of law it must be considered incompetent because it usurps
7 the role of the decisionmaker. *Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 867, 884
8 (“*Sheldon*”) (not proper for attorneys to be called as experts on questions of law).

9 Ms. Pierre’s testimony is often vague, irrelevant, or unreliable, and where this is so must
10 be excluded. For instance, Ms. Pierre’s statement that “[e]ach intake has a maximum capacity to
11 divert 3000 cfs (a total of 9000 cfs from the NDD), although actual operations will be governed
12 by the operational criteria and based on hydrologic conditions and fish presence” is not relevant
13 and is not reliable in reciting operations and impacts. DWR-51, p. 9:6-8. It is vague and
14 meaningless to assert that actual operations will be changed based on “conditions” and whether or
15 not there are fish without any further explanation. *Sargon Enterprises, Inc. v. University of*
16 *Southern California* (2012) 55 Cal.4th 747, 771-772 (estimates of lost profits based on
17 unachieved market share were too speculative).

18 Ms. Pierre’s statement at DWR-51, page 3:9 that operations will “include new or
19 additional criteria” is likewise vague and unsupported. No specific reference is given to these
20 new criteria, so this testimony is speculative and based on assumptions not supported by the
21 record. *Id.* Ms. Pierre’s statement at DWR-51, page 5:16-19 that North Delta diversion structures
22 will improve conditions in the Delta is also speculative and based on assumptions not supported
23 in the record. *Id.* Furthermore, it should be excluded because it is an attempt to improperly opine
24 as to the environmental conditions that the law requires. *Summers v. A. L. Gilbert Co.*
25 (“*Summers*”) (1999) 69 Cal.App.4th 1155, 1183 (witness not allowed to give opinions on law).
26 Further, this testimony must be excluded because it is unsupported by the material on which the
27 expert relies. *Sargon*, 55 Cal.4th 771-772.

1 Ms. Pierre’s conclusions that alternatives have been considered, including that “[t]he
2 inclusion of alternative operating scenarios responds to the State Water Board’s request that the
3 EIR/EIS evaluate a sufficiently broad range of alternatives in order for the State Water Board to
4 consider changes to water rights,” must be excluded. DWR-51, p. 10-12, 12:3-5. This testimony
5 is an attempt to improperly usurp the fact-finding function of the trier of fact. *Summers*, 69
6 Cal.App.4th at 1183. Moreover, it is not relevant or reliable and is contrary to the evidence. The
7 Draft EIR/EIS, and RDEIR/SDEIS do not, in fact, include a reasonable range of alternatives.
8 Among the obvious alternatives that must be included pursuant to CEQA but have not been
9 included are alternatives increasing through-Delta flows by reducing exports and alternatives that
10 do not establish new conveyance upstream from the Delta for exporters.

11 Exhibit DWR-115 contains no identifying information and should be struck accordingly.
12 Without any indication of where this map came from or who made it or for what purpose, it has
13 no indicia of reliability. Likewise, the tables at DWR-114 and 116 contain no identifying
14 information and should be struck.

15 **2. John Leahigh, DWR-61**

16 **General objections.**

17 Mr. Leahigh’s testimony must be excluded to the extent it relies on modeling because it is
18 not based on principles or procedures that have gained general acceptance in their field and is not
19 based on “best available science,” as detailed above.

20 Mr. Leahigh’s testimony purporting to characterize the legal effect of various agreements,
21 reports, or decisions cannot be used to prove the contents of such documents, especially where
22 those documents are also submitted as exhibits. Evidence Code § 1521.

23 Mr. Leahigh’s proposed testimony must be excluded where it is unsupported by the
24 material on which he relies and constitutes an opinion on a question of law that usurps the role of
25 the decisionmaker. *Sheldon*, 47 Cal.3d at 884; *see also Cooper Companies v. Transcontinental*
26 *Ins. Co.* (1995) 31 Cal.App.4th 1094 (expert contract interpretation in appropriate); *Asplund v.*
27 *Selected Investments* (2000) 86 Cal.App.4th 26, 50 (expert may not give opinion on legal
28 question).

1 **Specific objections.**

2 Mr. Leahigh's qualifications do not extend to the subject matter at issue in his testimony.
3 As a civil engineer, Mr. Leahigh is not qualified to give testimony on salinity, water quality, and
4 fisheries objectives. DWR-61, p. 17:5-11. Because such testimony is outside the scope of his
5 experience and he is not qualified to testify as to whether the WaterFix will meet such objectives,
6 this testimony should be struck.

7 Protestants hereby timely object to Mr. Leahigh's hearsay evidence to the extent that it is
8 used to support his findings. DWR-61, p. 7:13-22 (reliance on other experts), 10:4-8; Gov. Code
9 § 11513. Mr. Leahigh's statements purporting to summarize the testimony of other witnesses to
10 justify his own testimony that water quality objectives can be met must be stricken as
11 inadmissible hearsay. These witnesses can and should speak for themselves.

12 Mr. Leahigh's opinion as to future regulatory compliance is not relevant and not reliable.
13 Mr. Leahigh states that his "opinion is that regulatory compliance with the CWF will be at least as
14 good, if not better, as today given that CWF will add infrastructure flexibility to system
15 operations." DWR-61, p. 7:25-27; repeated at DWR-61, p. 17, 20. Regulatory reliance must be
16 with a lawfully updated Bay-Delta Plan, and Delta Plan – as explained above – updated flow
17 criteria will be more stringent than current obligations. Likewise, Mr. Leahigh's testimony that
18 existing Delta water quality and fisheries objectives will be met is not relevant because there will
19 be new fisheries objectives established by a new Biological Opinion. DWR-61, p. 17.
20 Accordingly, this testimony must be excluded.

21 Exhibit DWR-401 contains no identifying information and should be struck accordingly.
22 Without any indication of where this table came from or who made it or for what purpose, it has
23 no indicia of reliability. Likewise, Exhibits DWR-402, 404-412 contain no identifying
24 information and should be struck accordingly. The "California Data Exchange Center," cited
25 without further explanation in connection to some exhibits, does not provide sufficient
26 authentication to admit the exhibits into evidence. Finally, Mr. Leahigh's references to webpages
27 that are not submitted as evidence should be struck as they have not been authenticated. *See, e.g.,*
28 DWR-61, p. 13 n. 13, 14 n. 14 & 16.

1 **3. Parviz Nader-Tehrani, DWR-66**

2 **General Objections**

3 As discussed above, the hydrologic or water operations modeling relied on by the
4 petitioners, CalSim II and DSM2, is inadmissible because it is not: (1) based on principles or
5 procedures that have gained general acceptance in their field; and (2) based on the best available
6 science. Mr. Nader-Tehrani’s testimony attempts to authenticate this modeling, especially as
7 regards DSM2, but cannot in the face of the general acceptance and best available science
8 objections already detailed. DSM2 as it is used by petitioners has not been validated for use by
9 any external and disinterested experts. *Seering v. Department of Social Services, supra*, 194
10 Cal.App.3d at 311.

11 This Board convened a panel of leading scientists and technical experts to review existing
12 models, including DSM2. Board, *Analytical Tools for Evaluating Water Supply, Hydrodynamic
13 and Hydropower Effects* (2012). Appendix 2 to that report includes a June 9, 2009 letter from 24
14 hydrodynamics modelers who compiled a list of “Improved Modeling Capabilities Needed for the
15 Bay-Delta Planning Effort” that states that the models show a need for comparison of 2D and 3D
16 model outputs, and states that “[g]iven the controversial nature of policy-making in the Bay-
17 Delta, these needs must be met with a high level of scientific transparency, proper verification and
18 validation, adequate documentation, and rigorous peer review.” *Id.* at Appendix 2. Without these
19 vital elements, Mr. Nader-Tehrani, and petitioners generally, cannot maintain that the DSM2
20 model has been accepted as reliable by experts in the field, and Mr. Nader-Tehrani’s opinion “that
21 the modeling results are accurate” and that “DSM2 represents the best available planning model”
22 must be struck because it is neither relevant nor reliable. DWR-66, p. 2:15-16 (first quote), 3:22-
23 23 (second quote).

24 Mr. Nader-Tehrani’s testimony purporting to characterize the legal effect of various
25 agreements, reports, or decisions cannot be used to prove the contents of such documents,
26 especially where those documents are also submitted as exhibits. Evidence Code § 1521.

27 Mr. Nader-Tehrani’s proposed testimony must be excluded where it is unsupported by the
28 material on which he relies and constitutes an opinion on a question of law that usurps the role of

1 the decisionmaker. *Sheldon, supra*, 47 Cal.3d at 884; *see also Cooper Companies v.*
2 *Transcontinental Ins. Co.* (1995) 31 Cal.App.4th 1094 (expert contract interpretation in
3 appropriate); *Asplund v. Selected Investments* (2000) 86 Cal.App.4th 26, 50 (expert may not give
4 opinion on legal question).

5 Protestants hereby timely object to Mr. Nader-Tehrani's hearsay evidence to the extent
6 that it is used to support his findings. Gov. Code § 11513.

7 Specific objections.

8 Mr. Nader-Tehrani's testimony states several times that there will be no negative effects to
9 legal users of water due to water level changes, even though operational decisions cannot be
10 accurately modeled. DWR-66, p. 3, 10, 11. These statements are inadmissible because they are
11 based on speculation that assumes facts that are not in evidence, and are therefore neither relevant
12 nor reliable.

13 Mr. Nader-Tehrani's testimony is based on monthly averages for the no action alternative
14 and all operational scenarios. DWR-66, p. 3:1-6. This fails to show impacts in particular water-
15 year types, such as successive dry years. Likewise, Mr. Mr. Nader-Tehrani's statement that
16 "water quality is shown to meet the water quality objectives" lacks foundation because most of
17 the objectives are dependent on water year type. DWR-66, p. 3:2-4, 8-11. Thus, this testimony
18 should be precluded as it lacks the proper foundation, and Exhibit DWR-513 cannot be relied on.

19 Mr. Nader-Tehrani's testimony that the project will not have "negative effects [on] legal
20 users of water" is without sufficient foundation. DWR-66, p. 10:14-15. Mr. Nader-Tehrani's
21 analysis was performed for water levels, but does not address reliability or delivery. Furthermore,
22 "negative effects" is not defined by Mr. Mr. Nader-Tehrani, and such effects are a legal question
23 that Mr. Mr. Nader-Tehrani is precluded from offering.

24 Exhibit DWR-513 contains no identifying information and should be struck accordingly.
25 Without any indication of where this table came from or who made it or for what purpose, it has
26 no indicia of reliability.

1 **4. Armin Munévar, DWR-71**

2 **General objections.**

3 As discussed above, the hydrologic or water operations modeling relied on by the
4 petitioners, CalSim II and DSM2, is inadmissible because it is not: (1) based on principles or
5 procedures that have gained general acceptance in their field; and (2) based on the best available
6 science. Mr. Munévar’s testimony attempts to authenticate this modeling, especially as regards
7 CalSim II, but cannot in the face of the general acceptance and best available science objections
8 already detailed. CalSim II has never been validated for use by any external and disinterested
9 experts. *Seering v. Department of Social Services, supra*, 194 Cal.App.3d at 311.

10 Mr. Munévar does not account for the fact that output from the CalSim model has not
11 been accepted as reliable by experts in the field, in large part because of the failure by petitioners
12 to document adequate model testing and calibration. According to one review, “Better quality
13 control is needed both for the model and its current version and the input data. Procedures for
14 model calibration and verification are also needed. Currently many users are not sure of the
15 accuracy of the results. A sensitivity and uncertainty prediction capability and analysis is needed.”
16 California Bay Delta Science Program, *A Strategic Review of CalSim II and its Use for Water*
17 *Planning, Management, and Operations in Central California*, p. 8 (Dec. 4, 2003) (“2003 Peer
18 Review”). The lack of acceptance of CalSim II has been persistent, as a subsequent peer review
19 found that “CalSim II work fails to adequately report technical results that would give
20 knowledgeable readers some sense of the quality, accuracy, sensitivity, or uncertainty present in
21 the results. This issue was prominent in the previous CalSim review panel report.” CALFED
22 Science Program, *San Joaquin River Valley CalSim II Model Review*, p. 10 (Jan. 12, 2006).

23 Mr. Munévar’s resume states that he has been the Integration Lead for the modeling
24 analysis for the petitioners and oversaw the development and application of the CalSim II model
25 versions used as inputs for all of the BDCP and WaterFix modeling. As such, Mr. Munévar’s
26 testimony is necessary to certify the CalSim modeling for its proposed use in the hearing. Yet
27 Mr. Munévar himself stated in his testimony that the CalSim model “cannot be calibrated.”
28 DWR-71, p. 13:1. “Because it is a simulation, based on a combination of historical hydrology,

1 the current regulatory environment and projected changes to the hydrology due to climate change,
2 CalSim II cannot be calibrated and therefore, should not be used in a predictive manner.” *Id.* at
3 12-13. This statement is in direct contradiction to recommendations by qualified and
4 disinterested experts who served on the 2003 and 2006 peer review panels, quoted above.
5 Moreover, this statement is in direct contradiction of petitioners’ own responses to those peer
6 reviews. *Peer Review Response: A Report by DWR/Reclamation in Reply to the Peer Review of*
7 *the CalSim-II Model Sponsored by the CALFED Science Program in December 2003*, p. 19 (Aug.
8 2004).

9 Mr. Munévar’s testimony purporting to characterize the legal effect of various agreements,
10 reports, or decisions cannot be used to prove the contents of such documents, especially where
11 those documents are also submitted as exhibits. For instance, Mr. Munévar’s testimony
12 concerning the RDEIR/REDIS and EIR/EIS is irrelevant. DWR-71, p. 2.

13 Mr. Munévar’s proposed testimony must be excluded where it is unsupported by the
14 material on which he relies and constitutes an opinion on a question of law that usurps the role of
15 the decisionmaker. *Sheldon, supra*, 47 Cal.3d at 884; *see also Cooper Companies v.*
16 *Transcontinental Ins. Co.* (1995) 31 Cal.App.4th 1094 (expert contract interpretation in
17 appropriate); *Asplund v. Selected Investments* (2000) 86 Cal.App.4th 26, 50 (expert may not give
18 opinion on legal question).

19 Protestants hereby timely object to Mr. Munévar’s hearsay evidence to the extent that it is
20 used to support his findings. Gov. Code § 11513.

21 **Specific objections.**

22 Mr. Munévar’s testimony that “CalSim II is the state of the art model for the purposes of
23 comparing various CWF scenarios” is unsupported and should be stricken because it is not the
24 “sort of evidence on which responsible persons are accustomed to rely in the conduct of serious
25 affairs.” Gov. Code. § 11513. In order to be admissible, petitioners would have needed to satisfy
26 its “burden of making the necessary showing of compliance with Frye, i.e., of demonstrating by
27 means of qualified and disinterested experts that the new technique is generally accepted as
28 reliable in the relevant scientific community.” *Seering, supra*, 194 Cal.App.3d at 311, *quoting*

1 *People v. Shirley* (1982) 31 Cal.3d 18, 54. The 2003 Peer Review, quoted above, showed that the
2 CalSim II modeling approach lacked essential steps such as model verification, testing,
3 calibration, and validation. While such steps were recommended by the peer reviewers, they were
4 never completed. 2003 Peer Review, p. 6.

5 Mr. Munévar testifies that the CalSim II model can be used in relative mode, stating that

6 CalSim II results are intended to be used in a comparative manner, which allows
7 for assessing the changes in the SWP/CVP system operations and resulting
8 incremental effects between two scenarios. The model should be used with caution
9 where absolute results are needed in instances such as determining effects based on
a threshold, prescribing seasonal operations, or predicting flows or water deliveries
for any real-time operations.

10 In summary, the CalSim II and DSM2 results should only be used comparatively.

11 DWR-71, p. 13:2-9. However, the 2003 Peer Review panel was “somewhat skeptical” of
12 petitioners’ proposed use of the model, and stated that the feature would need to be “documented
13 rather than merely assumed.” 2003 Peer Review, p. 9. Petitioners’ proposed use relies on the
14 assumption that model errors do not affect the forecast of change in outcome, an assumption that
15 would need to be, and has not yet been, documented. 2003 Peer Review, p. 6. Without such
16 documentation, Mr. Munévar’s statement that CalSim II can be used in relative mode is without
17 basis and must be dismissed.

18 Mr. Munévar makes reference to documents that are not admitted into evidence, and
19 testimony relating to such documents must be disregarded as without basis. DWR-71, p. 8-9
20 (reference to a “CALSIM Generalized Model for Reservoir System Analysis, Journal of Water
21 Resources Planning and Management” not authenticated).

22 Finally, Mr. Munévar’s references to webpages that are not submitted as evidence should be
23 struck as they have not been authenticated. *See, e.g.*, DWR-71, p. 7:28, 8:5, 8:9, .

24 **5. Marueen Sergent, DWR 53**

25 **General objections for which Ms. Sergent’s testimony should be struck in its entirety.**

26 Ms. Sergent’s testimony must be excluded to the extent it relies on modeling because it is
27 not based on principles or procedures that have gained general acceptance in their field, and is not
28 based on “best available science,” as detailed above.

1 Ms. Sergent’s testimony purporting to characterize the legal effect of various agreements
2 cannot be used to prove the contents of those agreements where those agreements are also
3 submitted as exhibits. For instance, Ms. Sergent’s testimony concerning D-1641, the Delta Smelt
4 Biological Opinion, the anadromous fish species Biological Opinion, and the Incidental Take
5 Permit for long-fin smelt should be stricken. DWR-53, p. 4:9-16. As the entirety of Ms.
6 Sergent’s testimony consists of numerous additional attempts to characterize the legal effect of
7 submitted agreements, and each such reference must be stricken, Ms. Sergent’s testimony should
8 be stricken in its entirety.

9 Ms. Sergent’s proposed testimony as to water rights must be excluded because it is
10 unsupported by the material on which she relies and constitutes an opinion on a question of law
11 that usurps the role of the decisionmaker. *Sheldon, supra*, 47 Cal.3d at 884; *see also Cooper*
12 *Companies v. Transcontinental Ins. Co.* (1995) 31 Cal.App.4th 1094 (expert contract
13 interpretation in appropriate); *Asplund v. Selected Investments* (2000) 86 Cal.App.4th 26, 50
14 (expert may not give opinion on legal question). As Ms. Sergent’s entire testimony appears to
15 solely consist of her legal opinion (e.g., “[i]t is my understanding that Water Code Section 1701
16 allows a permittee or licensee to . . . ,” DWR-53, p. 9:15) and legal interpretation of water rights,

17 Ms. Sergent’s testimony should be stricken in its entirety.

18 **Specific objections.**

19 Protestants hereby timely object to Ms. Sergent’s hearsay evidence to the extent that it is
20 used to support her findings. Gov. Code § 11513. Specifically, Ms. Sergent’s opinion that “the
21 CWF can be constructed and operated without injuring other legal users of water” is based on the
22 testimony of other witnesses and cannot be used to support her findings. DWR-53, p. 3:23-25.
23 Ms. Sergent’s statements purporting to summarize the testimony of other witnesses – including
24 Armin Munevar, John Leahigh, and Parviz Nader-Terhani – to justify her own testimony that the
25 CWF can be operated without injuring other legal users of water must be stricken as inadmissible
26 hearsay. DWR-53, p. 3-4, 5 (n. 6 & 7), 8:25, 10, 11-13, 24. These witnesses can and should
27 speak for themselves; Ms. Sergent’s long quotations of their testimony are unnecessary and
28 irrelevant. *See, e.g.*, DWR-53, p. 12-13 (7 lines quoted from Dr. Nader-Tehrani).

1 Ms. Sergent's reliance on the Board's Order WR 2009-0061 is misplaced. DWR-53, p. 9-
2 10. That order concerned a permit for storage, while the present project proposes three new
3 points of diversion, a fundamental difference. 23 C.C.R. §791(a). WR 2009-0061 also does not
4 define a new water right, as Ms. Sergent asserts. DWR-53, p. 9-10. The proffered expert
5 testimony must be excluded because it is unsupported by the material on which the expert relies.

6 Exhibit DWR-330 contains no identifying information and should be struck accordingly.
7 Without any indication of where this table came from or who made it or for what purpose, it has
8 no indicia of reliability. Finally, Ms. Sergent's references to webpages that are not submitted as
9 evidence should be struck as they have not been authenticated. *See, e.g.*, DWR-53, p. 6:17, 6 n. 9,
10 7:3-4, 7:17, 9:18-20,17:8-9, 20:2.

11 **7. Ron Milligan, DOI-7**

12 To the extent Mr. Milligan's testimony is based on modeling for which insufficient
13 documentation and authentication has been provided, this testimony is inadmissible hearsay and
14 should not be considered by the Board. DOI-7. For instance, Mr. Milligan's statement that "it is
15 anticipated that the new diversion points can be operated in a manner that will not impede
16 Reclamation's ability to meet its requirements and may add flexibility to the coordinated
17 operations of the projects" is based solely on "the modeling of Project operations to support the
18 petition before the Board." DOI-7, p. 4. Because Mr. Milligan has little experience with direct
19 modeling, authentication of modeling, or documentation of modeling, this testimony should not
20 be considered by the Board. Mr. Milligan's testimony is irrelevant and misleading in so far as it
21 is being used to support the accuracy of Reclamation's or DWR's modeling.

22 **8. Ray Sahlberg, DOI-4**

23 To the extent Mr. Sahlberg's testimony is "based on project and real time hydrologic and
24 hydrodynamic information more fully explained in testimony on the operations of the CVP by
25 Mr. Ron Milligan," this testimony is inadmissible hearsay and should not be considered by the
26 Board. DOI-4, p. 2. Likewise for Mr. Sahlberg's testimony that the proposed change will not
27 injure other legal users of water, purportedly supported by "modeling testimony," is inadmissible
28 hearsay. DOI-4, p. 6 ("the modeling testimony supports that operation of the CWF will still result

1 in full compliance with the terms of D-1641, and the CVP will continue to meet D-1641 Delta
2 water quality objectives.” There is insufficient documentation and authentication of this
3 modeling, protestants have not been given access, and Mr. Sahlberg himself cannot explain the
4 basis for his own opinions.

5 This expert testimony proffered by Mr. Sahlberg must be excluded because the witness’s
6 qualifications do not extend to the subject matter at issue, i.e., the proffered testimony is beyond
7 the scope of the witness’s expertise. Evid. Code § 720; *People v. Ramos* (1997) 15 Cal.4th 1133,
8 1174-1175.

9 In light of petitioners’ refusal to consider alternatives that do not allow for full exports,
10 such as alternatives that would meet the 2010 Flow Criteria, Mr. Sahlberg’s statement that
11 “Reclamation operates its facilities to meet all statutory and regulatory requirements prior to
12 satisfying contractual obligations” is clearly in error. DOI-4, p. 2.

13 **8. John Bednarski, DOI-57**

14 **General objections.**

15 Mr. Bednarski’s testimony must be excluded to the extent it relies on modeling because it
16 is not based on principles or procedures that have gained general acceptance in their field, and is
17 not based on “best available science,” as detailed above.

18 Mr. Bednarski’s testimony purporting to characterize the legal effect of various
19 agreements, reports, or decisions cannot be used to prove the contents of such documents,
20 especially where those documents are also submitted as exhibits. For instance, Mr. Bednarski’s
21 testimony concerning the EIR/EIS and Stormwater General Permit should be stricken. DWR-57,
22 p. 2. As the entirety of Mr. Bednarski’s testimony consists of numerous additional attempts to
23 characterize the legal effect of submitted agreements, reports, and decisions, and each such
24 reference must be stricken, Mr. Bednarski’s testimony should be stricken in its entirety.

25 Mr. Bednarski’s proposed testimony must be excluded where it is unsupported by the
26 material on which he relies and constitutes an opinion on a question of law that usurps the role of
27 the decisionmaker. *Sheldon, supra*, 47 Cal.3d at 884; *see also Cooper Companies v.*
28 *Transcontinental Ins. Co.* (1995) 31 Cal.App.4th 1094 (expert contract interpretation in

1 appropriate); *Asplund v. Selected Investments* (2000) 86 Cal.App.4th 26, 50 (expert may not give
2 opinion on legal question).

3 Protestants hereby timely object to Mr. Bednarski's hearsay evidence to the extent that it
4 is used to support his findings. Gov. Code § 11513.

5 **Specific objection**

6 Exhibit DWR-220 contains no identifying information and should be struck accordingly.
7 Without any indication of where this table came from or who made it or for what purpose, it has
8 no indicia of reliability. Likewise, Exhibit DWR-221 contains no identifying information and
9 should be struck accordingly.

10 **9. DWR-505, 507, 513, 514, 515 Objections**

11 These five exhibits are the results of CalSim II and DSM2 modeling. The modeling done in
12 CalSim II and DSM2 does not meet the proper standards to be relied upon as an exhibit, as
13 detailed previously. The models both lack proper verification, validation, accreditation, and peer
14 review. The verification, validation, external peer review, and accreditation steps are an essential
15 part of scientific and engineering practice, and the completion of these steps in developing a
16 simulation is part of the "best available science."

17 The 2003 and 2006 Peer Reviews were insufficient and required additional action that was
18 never taken. In 2003 a general Peer Review was conducted that nonetheless found problems with
19 the modeling and recommended solutions. The 2006 Peer Review declined to endorse the use of
20 the model for any purpose, while also recommending the provision of error estimates, which
21 recommendation has not yet been complied with.

22 For the foregoing reasons, these exhibits should be excluded.

23 **10. DWR-5 Objections**

24 Modeling PowerPoint slides should be excluded because relying on CalSim II and DSM2
25 to support the WaterFix Project would be relying on models that fail to conform to basic systems
26 engineering standards, as documented above, which would invalidate any conclusions from the
27 modeling. These models have never been validated, and without documentation of model
28 assumptions and error analyses petitioners' modeling should not be admitted. Because the

1 PowerPoint slides rely on CalSim II and DSM2 modeling as a foundation, they must also be
2 excluded.

3 **11. DWR-3 Objections**

4 Water Rights PowerPoint slides must be excluded in part or whole because they are based
5 on testimony that is not relevant and not reliable, and are based on the faulty reasoning in Ms.
6 Sergent's testimony. Water Right Order 2009-0061 does not give the definition of a new water
7 right for the current proceeding, but rather provides an incomplete definition that is not reliable.
8 The PowerPoint's slides stating that the WaterFix will not injure other legal users of water must
9 be excluded as speculation and contrary to fact and law.

10 **12. DWR-404, SWRCB-21, SWRCB-27, SWRCB-30 Objections**

11 Water Right Decision 1641 (D-1641) standards should be excluded because D-1641
12 cannot form a valid basis for determining water rights. D-1641 has not been updated in 21 years,
13 during which the Delta has seen ever worsening conditions. D-1641 does not set acceptable
14 standards to be presented as an exhibit pursuant to *Aengst v. Board of Medical Quality Assurance*,
15 *supra*, 110 Cal.App.3d at 283. The increased exports, combined with climate change's resulting
16 reduced mountain runoff and increased sea level rise, have all exacerbated the salinity problem in
17 the Delta. None of these changes are reflected in D-1641. Therefore, D-1641 is not reliable and
18 should be excluded.

19 **13. DWR-401, 402, 413 Objections**

20 These Bay-Delta Compliance Metrics exclude years when water periods were waived.
21 Furthermore, the periods of compliance covered by the metrics are only pro forma, rather than
22 substantive, introducing yet more uncertainty into the use of these metrics. These incomplete
23 metrics are unreliable and should be excluded on that basis.

24 **14. DWR-511 Objections**

25 The memorandum to C. Crothers dated August 22, 2013 was not authenticated or
26 finalized. The memo is a draft. Since it is not a final version, it should not be relied upon. The
27 purpose of the memo is also unclear and there is no explanation as to its relevance. With no such
28

1 explanation, the draft memo should be excluded because it is incomplete and has no purpose or
2 relevance.

3 **15. SWRCB-3, SWRCB-4, SWRCB-5, SWRCB-102 Objections**

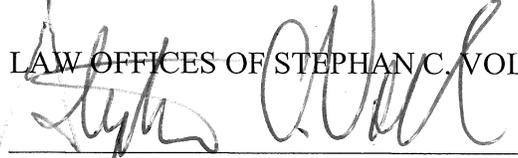
4 The 2015 California WaterFix RDEIR/SDEIS, and the 2013 BDCP Draft EIR/EIS that it
5 modifies and incorporates, must both be excluded because they are legally and factually
6 inadequate. Neither presents a reasonable range of alternatives, including an alternative that
7 reduces water exports. EPA's October 30, 2015 letter reviewing the RDEIR/SDEIS gives it a
8 rating of "'3' (*Inadequate*)." EPA Letter, October 30, 2015, p. 4. Since the RDEIR/SDEIS is
9 inadequate, is not a Final ER/EIS, fails to include a reasonable range of alternatives and fails to
10 include the comments on the 2013 Draft and 2015 RDEIR/SDEIS, these documents must be
11 excluded as they are not relevant and are not reliable.

12 **IV. CONCLUSION**

13 For the foregoing reasons, petitioners' proffered witnesses, testimony and exhibits are
14 objectionable. Accordingly, they should be excluded for the reasons set forth above.

15 Dated: July 12, 2016

LAW OFFICES OF STEPHAN C. VOLKER

16 
17 STEPHAN C. VOLKER

Attorney for Protestants

18 PACIFIC COAST FEDERATION OF FISHERMEN'S
19 ASSOCIATIONS and INSTITUTE FOR FISHERIES
20 RESOURCES

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STATEMENT OF SERVICE

CALIFORNIA WATERFIX PETITION HEARING
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

MOTION OF PROTESTANTS PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS AND INSTITUTE FOR FISHERIES RESOURCES TO DISQUALIFY PETITIONERS' WITNESSES AND EXCLUDE THEIR TESTIMONY AND EXHIBITS 1 AND 2

to be served by Electronic Mail (email) upon the parties listed in Table 1 of the Current Service List for the California WaterFix Petition Hearing, dated June 9, 2016, posted by the State Water Resources Control Board at

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml

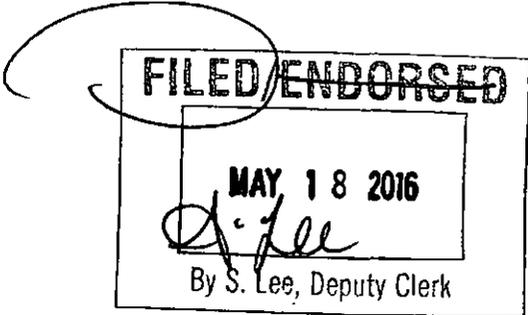
I certify that the foregoing is true and correct and that this document was executed on July 12, 2016.



Name: Teddy Ann Fuss
Title: Legal Secretary
Party/Affiliation: Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources
Address: 436 14th Street, Suite 1300
Oakland, CA 94612

EXHIBIT 1

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

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

**DELTA STEWARDSHIP COUNCIL
CASES**

**Judicial Council Coordination Proceeding
No. 4758**

**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.

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

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

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

28 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

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

6 The Delta Reform Act provides that the state’s policy is to reduce Delta reliance through a
7 strategy of investing in improved regional supplies, conservation, and water use efficiency. It
8 calls for each “region that depends on water from the Delta watershed [to] improve its regional
9 self-reliance for water through investment in water use efficiency, water recycling, advanced
10 water technologies, local and regional water supply projects, and improved regional coordination
11 of local and regional water supply efforts.” (§ 85021.) Furthermore, the Delta Reform Act refers
12 to the Bay Delta Conservation Plan² (hereinafter the “BDCP”) and requires the Council to
13 consider the BDCP for inclusion in the Delta Plan itself. Section 85320 provides, in part,

14
15 “(a) The Bay Delta Conservation Plan (BDCP) shall be considered for inclusion
16 in the Delta Plan in accordance with this chapter.

17 (b) The BDCP shall not be incorporated into the Delta Plan and the public
18 benefits associated with the BDCP shall not be eligible for state funding, unless
19 the BDCP does all of the following:

20 (1) Complies with Chapter 10 (commencing with Section 2800) of
21 Division 3 of the Fish and Game Code.

22 (2) Complies with Division 13 (commencing with Section 21000) of the
23 Public Resources Code, including a comprehensive review and analysis of all of
24 the following:

25 (A) A reasonable range of flow criteria, rates of diversion, and
26 other operational criteria required to satisfy the criteria for
27 approval of a natural community conservation plan as provided
28 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.

27 ² The BDCP is a project that has been undertaken by a group of state and federal water contractors. As of the date of
28 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.

1 (B) A reasonable range of Delta conveyance alternatives,
2 including through-Delta, dual conveyance, and isolated
3 conveyance alternatives and including further capacity and
4 design options of a lined canal, an unlined canal, and pipelines.

5 (C) The potential effects of climate change, possible sea level
6 rise up to 55 inches, and possible changes in total precipitation
7 and runoff patterns on the conveyance alternatives and habitat
8 restoration activities considered in the environmental impact
9 report.

10 (D) The potential effects on migratory fish and aquatic resources.

11 (E) The potential effects on Sacramento River and San Joaquin
12 River flood management.

13 (F) The resilience and recovery of Delta conveyance alternatives
14 in the event of catastrophic loss caused by earthquake or flood or
15 other natural disaster.

16 (G) The potential effects of each Delta conveyance alternative
17 on Delta water quality.”

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

28 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:

<u>Court</u>	<u>Case Number</u>	<u>Short Title</u>
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.

///

1 **II. STANDARD OF REVIEW**

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

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

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

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

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

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

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

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

19 III. DISCUSSION

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

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

- 23
- 24 1. The Delta Plan fails to include “quantified or otherwise measurable targets associated
25 with achieving the objectives of the Delta Plan” as required by section 85308(b).
- 26 2. The Delta Plan’s flow criteria are not “based on the best available scientific
27 information” as required by section 85308(a).
- 28 3. The Delta Plan’s measures for reducing reliance on the Delta fail to meet the statutory
requirements set forth in sections 85021.

- 1 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.
- 2 5. The regulations are invalid.

- 3 1. Quantified or otherwise measurable targets

4
5 At the heart of the Court's analysis in these cases is section 85308, titled "Requirements
6 of the Delta Plan." The first question is the degree to which this section informs the other
7 provisions of the Delta Reform Act. The section's title suggests that the requirements it lays out
8 are the lens through which the Delta Plan must be viewed in determining Delta Reform Act
9 compliance. Section 85308 provides that the "Delta Plan *shall meet* all of the following
10 requirements..." further bolstering a finding that the section provides a checklist for Delta Plan
11 content. (emphasis added.) Accordingly, the Court performs its analysis of the Delta Plan with a
12 view that a failure to include a section 85308 component is a failure to comply with section
13 85308, and a violation of the Delta Reform Act.

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

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

25 ///

26
27 ³ http://www.oxforddictionaries.com/us/definition/american_english/quantify.

28 ⁴ <http://www.merriam-webster.com/dictionary/quantify>.

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

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

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

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

24 Respondent points to its regulatory policies to establish compliance. Specifically,
25 Respondent contends WR P2 provides for transparency in water contracting (23 CCR section
26 5004). However, WR P2 does not provide any measurable reductions that must be achieved or
27 that will be achieved via such a “publicly transparent” contracting process.

28

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

4 “(A) Complet[ing] a current Urban or Agricultural Water Management Plan
5 (Plan) which has been reviewed by the California Department of Water
6 Resources for compliance with the applicable requirements of Water Code
7 Division 6, Parts 2.55, 2.6, and 2.8;

8 (B) Identif[ying], evaluat[ing], and commenc[ing] implementation, consistent
9 with the implementation schedule set forth in the Plan, of all programs and
10 projects included in the Plan that are locally cost effective and technically
11 feasible which reduce reliance on the Delta; and

12 (C) Includ[ing] in the Plan, commencing in 2015, the expected outcome for
13 measurable reduction in Delta reliance and improvement in regional self-
14 reliance. The expected outcome for measurable reduction in Delta reliance and
15 improvement in regional self-reliance shall be reported in the Plan as the
16 reduction in the amount of water used, or in the percentage of water used, from
17 the Delta watershed. For the purposes of reporting, water efficiency is
18 considered a new source of water supply, consistent with Water Code section
19 1011(a).”

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

24 There is no evidence in the record, however, that completion of these water management
25 plans will actually result in reduced reliance. WR P1 does not set a goal or target for measurable
26 reduced reliance, instead hypothesizing that these plans will identify mandatory projects to reduce
27 Delta reliance. In the absence of such evidence, WR P1 does not contain quantified or otherwise
28 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,

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

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

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

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

19 *Reduced environmental harm from invasive species*

20 Section 85302, subdivision (e)(3) provides that the Delta Plan shall “[p]romote self-
21 sustaining, diverse populations of native and valued species by reducing the risk of take and harm
22 from invasive species.” Petitioners argue the Delta Plan merely identifies the goal of
23 “[p]rogress toward decreasing annual trends in both the number of new and
24 existing aquatic and terrestrial nonnative species, and the abundance and
25 distribution of existing aquatic and terrestrial nonnative species in the Delta
26 over the next decade. These trends will be derived from long-term animal and
27 plant monitoring surveys conducted by the Interagency Ecological Program
28 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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1 Petitioners argue this goal is not a “quantified or otherwise measurable target” of any
2 decrease. The phrase “progress toward decreasing” does not, by itself reduce any risks, as
3 required by section 85302, subdivision (e)(3). It does not require overt action resulting in a
4 reduced risk outcome, but simply suggests that steps may be made *toward* initiating action that
5 would reduce the risk of take and harm from invasive species. This clearly falls short of section
6 85302, subdivision (e)(3)’s mandate.

7 Respondent contends Petitioners have ignored “significant evidence in the record
8 concerning non-native species.” (Opposition, p. 103.) Respondent points to Appendix E, which
9 describes the administrative performance measures for ER P5⁷ -- “Avoid Introductions of and
10 Habitat Improvements for Invasive Nonnative Species” as,

11
12 “100 percent of all proposed actions that have the reasonable probability of
13 introducing, or improving the habitat conditions for, nonnative invasive species
14 have demonstrated that the potential for new introductions of and/or improved
15 habitat conditions for nonnative invasive species have been fully considered and
16 avoided or mitigated in a way that appropriately protects the ecosystem.” (AR,
17 B1296.)

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

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

28 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.”

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

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

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

12 *Restoring more natural flows*

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

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

23 Respondent cites to the performance measure for ER P1 (Delta Flow Objectives) which
24 provides “[p]rior to the establishment of revised flow objectives, 100 percent of proposed actions
25 that could significantly affect flow in the Sacramento-San Joaquin Delta are consistent with the
26 existing Bay Delta Water Quality Control Plan objectives.” (AR, B1294.) However, compliance
27 with the Bay Delta Water Quality Control Plan is not, by itself, a “quantified or otherwise
28

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

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

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

13 *Increased water supply reliability*

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

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

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

3 2. Best available science

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

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

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

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

24 The SWRCB finds “[r]ecent Delta flows are insufficient to support native Delta fishes for
25 today’s habitats.” (AR, L11844.) However, the SWRCB qualified this statement in a footnote,
26 which is significant for purposes of a “best available science determination. The footnote reads,
27
28

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

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

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

21 The report provides that the current Bay-Delta flow requirements are contained in the
22 2006 Bay-Delta Plan and in D-1641. (AR, L11858.) The new flow criteria are listed in a series of
23 Tables at the end of the report. (AR, L11970-75.)

24 The Delta Plan does not incorporate the 2010 report flow criteria. Instead, Respondent
25 determined that “the next steps are for the SWRCB to develop flow and water quality objectives
26 to address all beneficial uses, including public trust resources, in the Delta and upstream
27 tributaries...After the SWRCB adopts flow and water quality criteria, the flow objectives will be
28 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

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

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

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

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

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1 3. Implementing policy of reduced Delta reliance

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

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

18 Respondent argues that section 85021 does not mandate a reduction. Instead, Respondent
19 argues that section 85021 reflects a legislative policy of reduced reliance through specified
20 regional and local actions. Respondent contends the Delta Reform Act does not require it to take
21 specified steps to further the policy. Instead, such a decision is within Respondent's discretion.
22 (Opposition, p. 41.) Respondent further cites to sections 85020 and 85302. Section 85020,
23 subdivision (d) states a management objective to "[p]romote statewide water conservation, water
24 use efficiency, and sustainable water use." Section 85302, subdivision (d) provides that the Delta
25 Plan "shall include measures to promote a more reliable water supply..." Respondent argues that
26 the term "promote" in both of these sections gives the Council significant discretion.
27
28

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

6 4. Implementing the policy of Delta restoration

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

15 *Improving water quality*

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

22 Petitioners argue this failure is underscored by the exemption provided by Code of
23 Regulations, Chapter 23, section 5001, subdivision (dd)(3), which exempts from “covered action”
24 all “temporary water transfers of up to one year in duration.” This exemption is in effect through
25 December 31, 2016 and is automatically repealed as of January 1, 2017 unless Respondent acts to
26 extend the provision. Petitioners maintain these one-year transfers are repeatedly approved in a
27 serial manner over consecutive years creating a significant impact on the coequal goals. (AR,
28

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

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

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

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

21
22 "the Legislature gave the department a general mandate: to use its expertise and
23 power of continuous regulation as it sees fit to 'promote orderly marketing and
24 distribution.' One tool available to accomplish this goal was the prohibition of
25 quantity discounts. In not mentioning this method, the Legislature left the
26 question of its propriety for the department." (*Id.* at 183.)

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

⁸ <http://www.merriam-webster.com/dictionary/promote>.

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

6 Respondent cites to Chapter 6 of the Delta Plan, “Improve Water Quality to Protect
7 Human Health and the Environment” and argues that the inclusion of such a chapter promotes
8 improved water quality. In Chapter 6, the Delta Plan lists 12 recommendations “critical to
9 protecting human health and improving the environment.” (AR, B672, 696-99.) Many of these
10 recommendations suggest other agencies should take specific steps to protect Delta water. Section
11 85302, subdivision (d)(3) is one that requires promotion. As is clear from the *Ralph’s Grocery*
12 case, significant discretion is vested in the implementing agency. Consequently,
13 recommendations that promote water quality improvement (even if they are not implemented) are
14 sufficient to satisfy Respondent’s obligation.

15 With regard to temporary water transfers, the record indicates there was evidence both
16 supporting temporary water transfers, as well as supporting a finding that they have been used
17 improperly in a serial manner with significant impact on the Delta. (AR, E1178, 1287.) It was not
18 arbitrary or capricious for Respondent to determine that there remained uncertainty concerning
19 the nature and impact of temporary water transfers. Accordingly, it is not a violation of
20 Respondent’s discretion to exempt temporary transfers from the Delta Plan’s regulations through
21 2016 to enable Respondent to gather the needed information.

22 *Restoring Delta habitat*

23 Section 85302, subdivision (c) provides that the Delta Plan shall include measures
24 promoting viable populations of native resident and migratory species, functional corridors for
25 migratory species, and diverse and biologically appropriate habitats and ecosystem processes. (§
26 85302(c)(1)-(3).) Section 85302, subdivision (e) provides that the following subgoals and
27

28 ⁹ <http://www.oxforddictionaries.com/definition/english/promote>.

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

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

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

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

28

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

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

19 *Restoring Delta Flows*

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

24 As discussed above, the Delta Reform Act did not require Respondent to implement the
25 exact flow objectives presented in the “Development of Flow Criteria for the Sacramento-San
26 Joaquin Delta Ecosystem; Prepared Pursuant to the Sacramento-San Joaquin Delta Reform Act of
27 2009.” While the 2006 report is admittedly out-of-date when considering Delta fishes, there is no
28 evidence before the Court that Respondent ignored flow criteria data that fully analyzes all

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

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

9 5. Validity of regulations

10 Petitioners contend the regulations promulgated to carry out the Delta Plan violate the
11 APA because they fail to comply with the Delta Plan requirements. Petitioners also contend the
12 regulations improperly impair the scope of the Act. Petitioners cite to Code of Regulations
13 chapter 23, section 5001, subdivision (dd)(3) exempting temporary water transfers, and section
14 5002, subdivision (b)(1) which allows for covered actions to proceed even though they may not
15 be fully consistent with all relevant regulatory policies. Petitioners argue this limits the direction
16 set by the Act that an action is appealable if it "will have a significant adverse impact on the
17 achievement of *one or both* of the coequal goals..." (§ 85225.10(a))(emphasis added.)

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

23 On its face, the regulation does not impair the scope of the Delta Reform Act, as it still
24 requires a covered action to be consistent with both of the coequal goals. Subdivision (b)(1)
25 merely anticipates that full consistency with all Delta Plan "regulatory policies" may not be
26 feasible, but a project may still be in furtherance of the coequal goals. An agency's determination
27 that such circumstances exist is subject to review by the Council on appeal. Consequently, the
28

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

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

7 Conclusion

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

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

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

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

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

24 Petitioner City of Stockton contends that “[t]he Delta Plan conflicts with or impermissibly
25 intrudes with state law and vested rights created by statutory and common law.” (Opening Brief,
26 p. 29.) Citing to Water Code section 11460, Petitioner argues it is entitled to “watershed of
27 origin” protections designed to address Northern California concerns about transferring water
28

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

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

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

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

16 “diminish, impair, or otherwise affect in any manner whatsoever any area of
17 origin, watershed of origin, county of origin, or any other water rights
18 protections, including, but not limited to, rights to water appropriated prior to
19 December 19, 1914, provided under the law. This division does not limit or
20 otherwise affect the application of Article 1.7 (commencing with Section 1215)
21 of Chapter 1 of Part 2 of Division 2, Sections 10505, 10505.5, 11128, 11460,
22 11461, 11462, and 11463, and Sections 12200 to 12220, inclusive.”

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

27 California Code of Regulations, Title 23, section 5002 details the certifications of
28 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

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

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

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

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

26 (A) An adaptive management plan that describes the approach to
27 be taken consistent with the adaptive management framework in
28 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

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

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

5 (1) One or more water suppliers that would receive water as a result of the
6 export, transfer, or use have failed to adequately contribute to reduced reliance
7 on the Delta and improved regional self-reliance consistent with all of the
8 requirements listed in paragraph (1) of subsection (c);

9 (2) That failure has significantly caused the need for the export, transfer, or use;
10 and

11 (3) The export, transfer, or use would have a significant adverse environmental
12 impact in the Delta.”

13 Subsection (c) provides,

14 “(c)(1) Water suppliers that have done all of the following are contributing to
15 reduced reliance on the Delta and improved regional self-reliance and are
16 therefore consistent with this policy:

17 (A) Completed a current Urban or Agricultural Water Management Plan
18 (Plan) which has been reviewed by the California Department of Water
19 Resources for compliance with the applicable requirements of Water Code
20 Division 6, Parts 2.55, 2.6, and 2.8;

21 (B) Identified, evaluated, and commenced implementation, consistent
22 with the implementation schedule set forth in the Plan, of all programs and
23 projects included in the Plan that are locally cost effective and technically
24 feasible which reduce reliance on the Delta; and

25 (C) Included in the Plan, commencing in 2015, the expected outcome for
26 measurable reduction in Delta reliance and improvement in regional self-
27 reliance. The expected outcome for measurable reduction in Delta reliance and
28 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

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

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

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

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

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

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

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

11 “(b) ‘Covered action’ does not include any of the following:
12 (1) A regulatory action of a state agency.”

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

20 Section 85023 provides “[t]he longstanding constitutional principle of reasonable use and
21 the public trust doctrine shall be the foundation of state water management policy and are
22 particularly important and applicable to the Delta.” Accordingly, the Legislature affirmed its
23 intent that these principles continue to apply to limit an owner’s interest in water. (*Alegretti & Co*
24 *v. County of Imperial* 138 Cal.App.4th 1261, 1279 [water rights are restricted to a “reasonable
25 beneficial use” consistent with article X, section 2 of the California Constitution]; *National*
26 *Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 437 [“parties acquiring rights in trust
27 property...can assert no vested right to use those rights in a manner harmful to the trust.”]) If an
28

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

7 Conclusion

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

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

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

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

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

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

3 Petitioner asserts Respondent has made enactments finding that BDCP projects are
4 exempt from the Delta Plan, and that these enactments are unlawful underground regulations.

5 (Opening Brief, p. 8.) Petitioner points to Appendix A, which provides,

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

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

18 “The Delta Reform Act describes a specific process for the potential
19 incorporation of BDCP into the Delta Plan. If the BDCP is incorporated, an
20 agency proposing a qualifying ‘covered activity’ under BDCP that also meets
21 the statutory definition of a covered action must file a short form certification of
22 consistency with findings indicating only that the covered action is consistent
23 with the BDCP. Consistency for these purposes shall be presumed if the
24 certification filed by the agency includes a statement to that effect from DFW.”
25 (AR, B517.)

26 Accordingly, Petitioner contends Respondent interpreted and implemented Water Code
27 sections 85057.5 and 85225 without properly adopting regulations through the process provided
28 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

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

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

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

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

17 3. The flow policy violates the Delta Reform Act

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

22 Water Code section 85302, subdivision (e)(4) provides, “The following subgoals and
23 strategies for restoring a healthy ecosystem shall be included in the Delta Plan...(4) Restore Delta
24 flows and channels to support a healthy estuary and other ecosystems.” Petitioner contends
25 Respondent has ignored this subgoal requirement, and failed to include a legally enforceable
26 Delta flow policy. Delta Plan policy ER P1 (23 CCR section 5005) (Delta Flow Objectives)
27 addresses flows. It states, “(a) The State Water Resource Control Board’s Bay Delta Water
28 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

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

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

8 The Delta Plan describes flow objectives as follows:

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

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

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

27 Respondent argues the goal of “[p]rogress toward restoring in-Delta flows to more natural
28 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”

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

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

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

12 4. The Delta Plan does not contain any conveyance or storage policies

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

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

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

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

5 Respondent argues the BDCP will contain a conveyance approach, and cites to section
6 85320, subdivision (b)(1)(B). However, section 85320 does not define what will be included in
7 the BDCP, only that the BDCP may be considered for inclusion in the Delta Plan, and cannot be
8 so incorporated if it does not provide a reasonable range of Delta conveyance alternatives. (§
9 85320, subdivision (b)(2)(B).) As this Court has previously indicated, there is no evidence before
10 the Court that the BDCP will be finalized, nor any evidence as to what content the BDCP will
11 include. Respondent then argues that a “BDCP conveyance choice of a tunnel or other option
12 would occupy the field” and so it would not make sense for Respondent to recommend
13 conveyance options that would be overridden if the BDCP is incorporated. (Opposition, p. 53.) In
14 making this argument, Respondent does not attempt to argue that the Delta Plan currently
15 contains *any* conveyance options or storage systems.

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

21 It is true that *if* a BDCP is finalized, it *will likely* contain a conveyance choice, and *may* be
22 considered for incorporation into the Delta Plan. However, Respondent has certified that it has
23 completed the Delta Plan, and any future modifications are not relevant to a determination of
24 whether the Delta Plan currently complies with the Delta Reform Act. The Delta Reform Act
25 requires the Delta Plan to “*promote options* for new and improved infrastructure relating to the
26 water conveyance in the Delta, storage systems, and for the operation of both to achieve the
27 coequal goals.” (§ 85320.) The Delta Plan currently before the Court fails to do so. Accordingly,
28

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

3
4 5. The BDCP may only be included in the Delta Plan if it complies with section 85321

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

12 Conclusion

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

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

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

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

27 ///

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

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

11 Subsection (c) provides,

12 “(c)(1) Water suppliers that have done all of the following are contributing to
13 reduced reliance on the Delta and improved regional self-reliance and are
14 therefore consistent with this policy:

15 (A) Completed a current Urban or Agricultural Water Management Plan
16 (Plan) which has been reviewed by the California Department of Water
17 Resources for compliance with the applicable requirements of Water Code
18 Division 6, Parts 2.55, 2.6, and 2.8;

19 (B) Identified, evaluated, and commenced implementation, consistent
20 with the implementation schedule set forth in the Plan, of all programs and
21 projects included in the Plan that are locally cost effective and technically
22 feasible which reduce reliance on the Delta; and

23 (C) Included in the Plan, commencing in 2015, the expected outcome for
24 measurable reduction in Delta reliance and improvement in regional self-
25 reliance. The expected outcome for measurable reduction in Delta reliance and
26 improvement in regional self-reliance shall be reported in the Plan as the
27 reduction in the amount of water used, or in the percentage of water used, from
28 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.”

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

9 The Blue Ribbon Task Force “Delta Vision Strategic Plan” provides that it is designed to
10 “outline the major steps necessary to achieve our co-equal goals of a viable Delta ecosystem and
11 water for Californians.” (AR, L3232.) Pursuant to the DVSP, “statewide efforts to conserve water
12 and more responsibly use existing supplies directly influence success in the Delta” and
13 “[i]ncreased storage capacity, surface and ground, plus changed operations are also required to
14 improve water supply reliability. Concurrently, Californians need to become less dependent on
15 water supply from the Delta, both to reduce risk from a failed Delta conveyance system and to
16 reduce risks to the ecosystem.” (AR, L3205.) Furthermore, the Delta Reform Act itself, in section
17 85021, provides that it is state policy to “reduce reliance on the Delta in meeting California’s
18 future water supply needs...” Consequently, there is both statutory support, as well as substantial
19 evidence in the record, that reduced Delta reliance supports water supply reliability.

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

23 *Authority to prohibit exports from or transfer through the Delta*

24 Petitioners contend WR P1 is invalid because it exceeds Respondent’s authority to control
25 water diversions. Petitioners argue “the Council claims authority to prevent export or transfer of
26 Delta Water regardless of whether such actions are authorized by the State Water Resources
27 Control Board” in violation of the Delta Reform Act.” (Joint Opening Brief, p. 15.)
28

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

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

15 Respondent contends section 85023 serves to clarify sections 85031 and 85032 by
16 providing that the “constitutional principle of reasonable use and the public trust doctrine shall be
17 the foundation of state water management policy and are particularly important and applicable to
18 the Delta.” Accordingly, the Legislature affirmed its intent that these principles continue to apply
19 to limit an owner’s interest in water. (*Alegretti & Co v. County of Imperial* 138 Cal.App.4th 1261,
20 1279 [water rights are restricted to a “reasonable beneficial use” consistent with article X, section
21 2 of the California Constitution]; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d
22 419, 437 [“parties acquiring rights in trust property...can assert no vested right to use those rights
23 in a manner harmful to the trust.”]) Because WR P1 is an assessment of whether a water-supplier
24 is compliant with reasonable use and the public trust doctrine, it neither changes water rights nor
25 interferes with the Water Resources Control Board’s water rights process.

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

1 California; and (2) protecting, restoring, and enhancing the Delta ecosystem. (§ 85054.) This is
2 especially true in light of the state’s policy to reduce Delta reliance through a strategy of investing
3 in improved regional supplies, conservation, and water use efficiency. (§ 85021.) While section
4 85021 provides that each “region” shall improve its regional self-reliance, Petitioners have not
5 identified any authority that such regional self-reliance may not be achieved by requiring water
6 suppliers themselves to demonstrate reduced reliance. In the absence of such limiting language,
7 the Court relies on the broad authority granted Respondent via section 85210, subdivision (i) to
8 “adopt regulations or guidelines as needed to carry out the powers and duties identified in this
9 division.”

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

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

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

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

5 *WR P1 is not reasonably necessary*

6 Lastly, with regard to WR P1, Petitioners argue the record lacks substantial evidence that
7 WR P1 is reasonably necessary. Petitioners contend there is no evidence that water suppliers have
8 failed to implement measures to reduce Delta reliance. Petitioners also contend that Respondent
9 has failed to consider all relevant factors and demonstrate a rational connection between those
10 factors and the statute. (citing *Am. Coatings Assn. v. S. Coast Air Quality Dist.* (2012) 54 Cal.4th
11 446, 460-61.)

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

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

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

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1 2. The consistency certification appeals process

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

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

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

22 Petitioners contend section 85225.25 allows an agency to proceed with a covered action
23 even if Respondent has found a lack of substantial evidence for certification, so long as the
24 agency files a revised certification addressing the Council’s findings. Thus, the certifying agency
25 has final say over whether a covered action proceeds. This interpretation is at odds with the Delta
26 Plan, which provides that “[i]f the covered action is found to be inconsistent, the project may not
27 proceed until it is revised so that it is consistent with the Delta Plan.” (AR, B518.) Further,
28 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;

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

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

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

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

12 Petitioners contend this approach, allowing for a subsequent appeal to a revised
13 certification of consistency, violates the plain language and legislative history of section
14 85225.25. Petitioners point to the February 26, 2009 version of SB 12, a precursor to the Delta
15 Reform Act, which included, "the council shall do all of the following: (d) Ensure that federal and
16 state actions are consistent with the plan." (Pet. RJN, Exh. 2, p. 11.) Then on September 9, 2009,
17 Proposed Conference Report No. 1. For SB 12 included a version of section 85225.25 providing,

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

25 In the October 23, 2009 version of SBX7-1, the section 85225.25 language was amended
26 to reflect its current wording. (Pet. RJN, Exh. 4.) Petitioners argue this language revision reflects
27 a decision to deny Respondent the power to stop a covered action from proceeding, whether
28 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.

1 Respondent argues the Delta Reform Act requires a legally enforceable Delta Plan.
2 (§85001, subd. (c).) Respondent contends the Delta Plan is only legally enforceable if Respondent
3 is *able* to hear appeals of consistency certifications until determining that the covered action
4 complies. Respondent cites to section 85225.10, subdivision (a), “[a]ny person who claims that a
5 proposed covered action is inconsistent...may file an appeal with regard to *a certification of*
6 *consistency* submitted to the council.” (emphasis added.) Respondent argues Petitioners’
7 interpretation would change the language to “may file an appeal with regard to an *initial*
8 *certification of consistency*” in section 85225.10. Respondent argues Petitioners’ interpretation is
9 contrary to the plain language of the statute.

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

13 “[t]he bill ensures consistency with the state’s Delta Plan by requiring state and
14 local agencies that propose to implement ‘covered actions’ to submit
15 consistency certifications and subjecting those certifications to appeal to the
16 council...[if a project is found inconsistent] the proponent must determine
17 whether to proceed with the project, but must amend and submit a new
18 certification if it decides to proceed with the project.

17 The Council’s role in developing and enforcing consistency with the Delta Plan
18 will provide a critical component of crafting a coherent and sustainable long-
term state policy for the Delta.” (AR, L21568.)

19 Accordingly, Respondent contends, in order to ensure consistency with the Delta Plan, all
20 consistency certifications must be subject to appeal and review. The Court agrees. The
21 Legislature has made clear that the Delta Plan is to be legally enforceable. If an agency can
22 choose to proceed with a project that has been found to be inconsistent with the Delta Plan, the
23 appeals process would be a sham – and the Delta Plan would be nothing more than an advisory
24 document. The plain language of section 85225.10 subjects any certification of consistency to an
25 appeal, and section 85225.25 does not alter this language such that a revised certification is
26 exempt. The better view of the legislative history cited by Petitioners is that it reflects a
27 Legislative intent to eliminate mandatory revised certification reviews by Respondent, and to
28

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

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

5 3. The Delta Plan's interaction with the BDCP

6 The Delta Plan requires agencies implementing BDCP projects to file certifications of
7 consistency. "If BDCP is incorporated, an agency proposing a qualifying 'covered activity' under
8 BDCP that also meets the statutory definition of a covered action must file a short form
9 certification of consistency with findings indicating only that the covered action is consistent with
10 the BDCP. Consistency for these purposes shall be presumed if the certification filed by the
11 agency includes a statement to that effect from DFW." (AR, B517.) Petitioners argue this would
12 "subject BDCP implementation to unnecessary certifications and appeals, and unduly delay
13 implementation of a core component of the Delta Plan." (Joint Opening Brief, p. 31.)
14 Accordingly, BDCP consistency certifications are contrary to the Delta Reform Act.

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

19 Respondent acknowledges that the language does not have any regulatory effect, as it has
20 not been adopted pursuant to the APA. (Opposition, p. 56.) Respondent asserts the need for such
21 a process, should the BDCP come to fruition and be incorporated into the Delta Plan, arises from
22 a possibility that the BDCP will not describe specific projects, but will instead contain general
23 guidelines. As a result, there could be disputes as to whether proposals are actually BDCP
24 projects. Respondent contends it is authorized to require such a certification, as anyone
25 undertaking a covered action "shall submit" a certification of consistency. (§ 85225.)
26
27
28

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

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

8 4. Temporary water transfers

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

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

22 Petitioners contend temporary water transfers are exempt from CEQA pursuant to section
23 1729, and must be exempt from the Delta Plan. Petitioners also cite to section 85031, subdivision
24 (d) which provides, "Unless otherwise expressly provided, nothing in this division supersedes,
25 reduces, or otherwise affects existing legal protections, both procedural and substantive, relating
26 to the state board's regulation of diversion and use of water, including, but not limited to, water
27 right priorities, the protection provided to municipal interests by Sections 106 and 106.5, and
28

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

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

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

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

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

26 Respondent also argues temporary water transfers are not “routine maintenance and
27 operation” activities subject to the section 85057.5, subdivision (b)(2) exemption. Respondent
28

1 asserts statutory exemptions must be narrowly construed¹⁰, and temporary transfers cannot fall
2 within any reasonably narrow definition of “routine.” This is because “the participating water
3 suppliers, the amount of the transfer, when the transfer will occur, or even the need for a transfer
4 cannot be anticipated in advance with any certainty.” (AR, E1178.)

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

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

22 Lastly, Petitioners argue the consistency appeals process would conflict with the coequal
23 goal of water supply reliability. Respondent argues there is no evidence that the appeals process
24 would create delays such that Petitioners’ water supply would be unreliable. Although the Court
25 recognizes that every process requires some time to complete, it would be pure speculation to
26

27 ¹⁰ Respondent cites to *Sac. County Employees’ Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440,
28 463, “[w]e return now to the familiar rule that we must construe statutory exemptions narrowly.”

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

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

5 5. Transparency in water contracting

6 Next, Petitioners contend the regulation mandating transparency in water contracting
7 exceeds Respondent's statutory authority, and is unnecessary and duplicative. This argument
8 references WR P2 (23 CCR § 5004, subd. (a)) which provides that
9

10 "(a) The contracting process for water from the State Water Project and/or the
11 Central Valley Project must be done in a publicly transparent manner consistent
12 with applicable policies of the California Department of Water Resources and
13 the Bureau of Reclamation referenced below.

14 (b) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E)
15 of this Chapter, this policy covers the following:

16 (1) With regard to water from the State Water Project, a proposed action
17 to enter into or amend a water supply or water transfer contract subject to
18 California Department of Water Resources Guidelines 03-09 and/or 03-10 (each
19 dated July 3, 2003), which are attached as Appendix 2A; and

20 (2) With regard to water from the Central Valley Project, a proposed
21 action to enter into or amend a water supply or water transfer contract subject to
22 section 226 of P.L. 97-293, as amended or section 3405(a)(2)(B) of the Central
23 Valley Project Improvement Act, Title XXXIV of Public Law 102-575, as
24 amended, which are attached as Appendix 2B, and Rules and Regulations
25 promulgated by the Secretary of the Interior to implement these laws.."

26 Petitioners again point to section 85057.5, subdivision (b)(2), and argue the
27 administration of water project contracts is "[r]outine maintenance and operation." Furthermore,
28 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

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

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

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

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

21 6. Economic impacts of requiring reduced Delta reliance

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

24 Government Code Section 11342.535 defines “cost impact” as “the amount of reasonable
25 range of direct costs, or a description of the type and extent of direct costs, that a representative
26 private person or business necessarily incurs in reasonable compliance with the proposed action.”
27 Government Code section 11346.3 requires a state agency proposing to adopt a regulation, to
28

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

7 “(A) The creation or elimination of jobs within the state.

8 (B) The creation of new businesses or the elimination of existing
9 businesses within the state.

10 (C) The expansion of businesses currently doing business within the
11 state.

12 (D) The benefits of the regulation to the health and welfare of California
13 residents, worker safety, and the state’s environment.” (Gov. Code §
14 11346.3.)

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

23 Respondent argues that Courts must use a highly deferential standard in reviewing
24 economic impact assessments under the APA. The APA has a “modest requirement of rationality
25 and transparency” in determining whether a regulation will have a “significant adverse economic
26 impact on businesses.” (*Western States Petroleum Assn. v. Board of Equalization* (2013) 57
27 Cal.4th 401, 413.) Respondent alleges the three categories of documents within which it
28 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

1 individuals, as well as the environment. (AR, N194.025-.28, 194.010, 194.006-.008, N858-61,
2 837-43.)

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

8 The Court finds that Respondent did provide a sufficient analysis of potential economic
9 impacts resulting from WR P1 (referred to as section 5005(e)(1)) in the initial cost analysis, AR,
10 N194.017.) While the analysis does not appear to include the actual costs that potential reduced
11 water reliance projects themselves may require, Respondent did undertake an economic analysis
12 of the regulation itself. Section 11342.535 only defines cost impact as including direct costs,
13 those incurred directly as a result of reasonable compliance with a regulation. Respondent’s
14 analysis admits that preparing a new water management plan may range from \$20,000 to
15 \$100,000 per plan. (AR, N194.035.) Respondent also found the regulation applies to “water
16 suppliers that are already subject to the water management planning and implementation of
17 existing law, and so [the regulation] does not mandate substantial new costs on water suppliers.”
18 Accordingly, Respondent specifically considered and enumerated the direct costs associated with
19 WR P1 compliance.

20 With regard to Government Code section 11346.3, the agency is required to assess jobs,
21 creation or elimination of business, expansion of business, and health and welfare, worker safety,
22 and environmental benefits. Respondent has identified numerous instances in the record where
23 such an analysis was undertaken in connection with the Delta Plan’s regulations. (AR, N194.006-
24 .008, N 194.010, N194.025-.028, N837-40, N858-61.) Petitioners argue Respondent was required
25 to analyze the cost of achieving reduced reliance, or the specific costs associated with recycled
26 water and desalination projects.

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

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

5 Conclusion

6 The petition for writ of mandate with regard to the statutory challenges heard in this
7 bifurcated proceeding is **DENIED** in accordance with the above-ruling. In accordance with Local
8 Rule 1.06, counsel for Respondent is directed to prepare an order denying the petition,
9 incorporating this ruling as an exhibit to the order, and a separate judgment; submit them to
10 counsel for Petitioner for approval as to form in accordance with Rule of Court 3.1312(a); and
11 thereafter submit them to the Court for signature and entry in accordance with Rule of Court
12 3.1312(b).

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

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

- 18 1. The Delta Plan does not actually reduce Delta reliance, in violation of the Delta
19 Reform Act.
- 20 2. WR P1 does not rely on best available science.
- 21 3. WR P1 impairs area of origin, watershed of origin, county of origin, and other water
22 right protections.
- 23 4. Respondent promotes the BDCP, in violation of the Delta Reform Act.
- 24 5. The Delta Plan's flow criteria do not promote restoration of healthy ecosystems.
- 25 6. ER P1 fails to ensure only surplus Delta water is diverted.
- 26 7. ER P2 lacks sufficient scientific basis.
- 27 8. ER P3 is not based on best available science.
- 28 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.

1 13. The Delta Plan violates the public trust doctrine.

2 1. The Delta Plan does not reduce Delta reliance

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

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

13 2. WR P1 does not rely on best available science

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

24 Respondent argues the Delta Plan in its entirety utilized the Independent Science Board's
25 "nine-step Adaptive Management Framework." (AR, B503-12.) Respondent further argues the
26 Delta Plan describes in detail the different stressors on the Delta ecosystem and how they should
27 be addressed. (AR, B590-623.)
28

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

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

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

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

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

24 Petitioners’ stated concern is that WR P1 permits a Southern-California water user to
25 achieve priority in obtaining water. As the Court has already found in *City of Stockton v. Delta*
26 *Stewardship Council*, the plain language of WR P1 does not affect water right priorities. WR P1
27 does not provide that if a consistency certification is undergoing the appeals process, another
28 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

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

4 4. Respondent promotes the BDCP

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

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

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

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

2 The Delta Reform Act provides,

3
4 “For the purpose of informing planning decisions for the Delta Plan and the Bay
5 Delta Conservation Plan, the [Delta Independent Science Board] shall, pursuant
6 to its public trust obligations, develop new flow criteria for the Delta ecosystem
7 necessary to protect public trust resources. In carrying out this section, the board
8 shall review existing water quality objectives and use the best available
9 scientific information. The flow criteria for the Delta ecosystem shall include
10 the volume, quality, and timing of water necessary for the Delta ecosystem
11 under different conditions.” (§ 85086, subd. (c)(1).)

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

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

25 Respondent argues the Delta Plan calls for “more natural functional flows” in the Delta as
26 one of its core strategies. (AR, B582.) The Delta Plan also contains a description of how more
27 natural flows could be achieved. (AR, B600.) Respondent also argues Delta Plan
28 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.)

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

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

11 ER P1 (23 CCR section 5005) provides that the SWRCB's "Bay Delta Water Quality
12 Control Plan flow objectives shall be used to determine consistency with the Delta Plan. If and
13 when the flow objectives are revised...the revised flow objectives shall be used..." Petitioners
14 argue this section fails to ensure that Delta exports are limited to water supplies legally available
15 for export, as required by section 11460.¹¹ Petitioners maintain Respondent should have required
16 as a prerequisite to any decision that a study be conducted to determine the amount of surplus
17 water available for export that incorporates all beneficial uses within the Delta.

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

22 7. ER P2 lacks sufficient scientific basis

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

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

27 _____
28 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.

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

6 Petitioners argue the Draft Conservation Strategy ("DCS") report (identified in ER P2 as
7 the basis for the Appendix 3 habitat restoration requirement) contains inaccurate information.
8 Petitioners argue the DCS report is based on an assumption of a rise in sea level of approximately
9 55 inches over the next 50-100 years. However, Petitioners argue the actual modeled sea level
10 rise predicted in the data utilized for the DCS report is 13.8 inches by 2050 and 35 inches by
11 2100. Petitioners conclude that ER P2 is based on flawed data, and not the best available
12 science.¹²

13 With regard to the 55-inch potential sea rise, Respondent cites to the Ocean Protection
14 Council resolution adopted on March 11, 2011. (AR, L38257.) The resolution provides that
15 "senior staff from 16 state agencies of the Coastal and Ocean Working Group of the California
16 Climate Action Team (CO-CAT) reached agreement on a Sea-Level Rise Interim Guidance
17 Document...with science-based input from the OPC's Science Advisory Team and the California
18 Ocean Science Trust." (AR, L38255.) The included Sea-Level Rise Projections table indicates a
19 potential range of seal-level rise in 2100 between 40 inches and 55 inches. (AR, L38257.) The
20 report determines that the 55 inch sea-level rise places approximately 480,000 people and nearly
21 \$100 billion of property at risk. (AR, L38255.) The Guidance Document provides that the
22 projections do not account for catastrophic ice melting. Consequently, they may underestimate
23 actual sea-level rise. (AR, L33595.)

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

27 ¹² Petitioners support this contention by citing, in a footnote, to a webpage that purportedly contains the text of the
28 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.

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

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

13 8. ER P3

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

18
19 “contains no scientific assessment, developed habitat model, or any substantive
20 technical analysis as to why the areas in the map are suitable for restoration, or
21 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.)

22 Respondent argues ER P3 is supported by the sea-level rise information contained in ER
23 P2. Respondent further contends elevation is a starting point, and that ER P2, in connection with
24 ER P3, enables project proponents to deviate “based on best available science.” Respondent
25 provides that it can adjust the restoration area map as needed, and, pursuant to section 85300,
26 must review the Delta Plan at least once every five years. As the Court held above, the sea-level
27 rise information utilized in ER P2 is not patently incorrect such that Respondent violated the
28

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

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

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

14 9. The Delta Plan’s treatment of setback levees violates the coequal goals

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

24 Respondent argues Petitioners have failed to cite to any evidence that Respondent failed to
25 weigh the environmental tradeoffs, or that ER P4 is not based on best available science.

26 Respondent also argues the record clearly supports ER P4, including the Delta Risk Management
27 Strategy Phase 2 report which concluded that setback levees “provide benefits through enhanced
28

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

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

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

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

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

20 Petitioners contend Respondent improperly describes one of its core strategies as being to
21 “[s]ustain a vital Delta economy that includes a mix of agriculture, tourism recreation,
22 commercial and other industries...” whereas the goal should have been to *enhance* the Delta
23 economy. (AR, B630.) Petitioners argue, pursuant to the ESP, that the Delta Plan should have
24 recognized agriculture as the primary driver of the Delta economy. (AR, L28527.) Petitioners
25 maintain the Delta Plan does not contain any enforceable policies to promote agriculture, and
26 consequently fails to protect and enhance Delta agriculture.
27
28

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

6 Petitioners also argue temporary water transfers should not have been exempted from the
7 definition of a covered action. The Court refers to its analysis of this issue in *North Coast Rivers*
8 *Alliance, et al. v. Delta Stewardship Council*. The record indicates there was evidence both
9 supporting temporary water transfers, as well as supporting a finding that they have been used
10 improperly in a serial manner with significant impact on the Delta. (AR, E1178, 1287.) It was not
11 arbitrary or capricious for Respondent to determine that there remained uncertainty concerning
12 the nature and impact of temporary water transfers. Accordingly, it is not a violation of
13 Respondent’s discretion to exempt temporary transfers from the Delta Plan’s regulations through
14 2016 to enable Respondent to gather the needed information.

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

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

1 “adopt regulations or guidelines as needed to carry out the powers and duties identified in this
2 division.”

3 To the extent Petitioners contend the Delta Plan should have further considered the impact
4 of water exports, Petitioners do not cite to any authority requiring Respondent to do so. With
5 regard to the ESP, and the importance of agriculture in the Delta, Respondent contends the
6 entirety of the Delta Plan’s Chapter 5 considers the protection and enhancement of the Delta as an
7 evolving place pursuant to section 85020, subdivision (b). (AR, B629-70.) Pursuant to section
8 85301, Respondent did consider the ESP, including preparing a staff report with an in-depth
9 analysis of the proposal. (AR, G4711-24.) Respondent then held two days of public meetings to
10 address the proposal, ultimately accepting 17 of the 38 recommendations. (AR, F294, K7709-10.)

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

15 11. The Delta Plan fails to improve water quality to protect human health and the
16 environment

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

21 Petitioners argue the Delta Plan fails to address ongoing selenium contamination from
22 recipients of CVP water exported from the Delta, and fails to address the relationship of
23 increasing salinity to adequate flows. Petitioners then argue that Respondent is aware the BDCP
24 will degrade water quality, yet has done nothing to influence or impede the BDCP.¹³
25

26
27
28 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.

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

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

8 Section 85020, subdivision (g) provides the state's policy is to achieve the objective of
9 reducing "risks to people, property, and states interest in the Delta by effective emergency
10 preparedness, appropriate land uses, and investment in flood protection." Accordingly, section
11 85305 provides that the Delta Plan "shall attempt to reduce" these risks by "promoting effective
12 emergency preparedness, appropriate land uses, and strategic levee investments."¹⁴ Petitioners
13 contend the Delta Plan fails to comply with section 85305.

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

25 Petitioners also argue Respondent failed to utilize best available science in evaluating the
26 Delta's levee system, relying on a letter from MBK Engineers commenting on Chapter 7 of the
27

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

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

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

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

15 “[t]he DWR Delta Risk Management Strategy Phase 1 study evaluated the
16 performance of Delta levees under various seismic threat scenarios, and
17 analyzed potential consequences for water supply, water quality, ecosystem
18 values, and public health and safety. The study concluded that a major
19 earthquake of magnitude 6.7 or greater in the vicinity of the Delta Region has a
20 62 percent probability of occurring sometime between 2003 and 2032.” (AR,
21 B717.)

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

27 Respondent argues the Delta Plan concludes, “[a]lthough the probabilistic nature of
28 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

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

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

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

25 Respondent further argues that the Delta Reform Act itself, in section 85320 considers this
26 55-inch sea-level rise figure, by providing that the BDCP can only be incorporated into the Delta
27 Plan if it includes a comprehensive review of the potential effects of climate change including
28 possible sea level rise up to 55 inches. Respondent finally cites to a 2012 National Research

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

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

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

16 13. The public trust doctrine

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

26 Section 85023 provides, “[t]he longstanding constitutional principle of reasonable use and
27 the public trust doctrine shall be the foundation of state water management policy and are
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1 particularly important and applicable to the Delta.” Petitioners essentially argue that Respondent
2 failed to comply with the public trust doctrine in drafting the Delta Plan by placing the policies in
3 separate plan chapters, failing to demonstrate how its programs comply with the public trust
4 doctrine, failing to require reduced Delta reliance, failing to adopt updated flow criteria, and
5 failing to account for how much water is available to meet public trust protection while still
6 providing exports.

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

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

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

15 Conclusion

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

- 20 1) Promote options for water conveyance and storage systems.

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

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

3 **IV. FURTHER HEARINGS**

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

7 DATED: May 18, 2016

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9 _____
10 Judge MICHAEL P. KENNY
11 Superior Court of California,
12 County of Sacramento

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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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JUDICIAL COUNCIL OF CALIFORNIA
Administrative Office of the Courts
455 Golden Gate Avenue
San Francisco, CA 94102-3660

Superior Court of California,
County of Sacramento

Dated: May 18, 2016

By: 
S. LEE
Deputy Clerk

EXHIBIT 2

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE**

MINUTE ORDER

DATE: 06/24/2016

TIME: 09:00:00 AM

DEPT: 31

JUDICIAL OFFICER PRESIDING: Michael P. Kenny

CLERK: Susan Lee

REPORTER/ERM: K. Greiner CSR# 3690

BAILIFF/COURT ATTENDANT: Larry Moorman

CASE NO: **JCCP 4758**

CASE INIT.DATE: 07/31/2013

CASE TITLE: **Delta Stewardship Council Cases**

CASE CATEGORY: Civil - Unlimited

EVENT ID/DOCUMENT ID: ,13740646

EVENT TYPE: Motion - Other - Writ of Mandate

MOVING PARTY: Alameda County Flood Control & Water Conservation District Zone 7, Antelope Valley-East Kern Water Agency, Westlands Water District, Mojave Water Agency, Santa Clara Valley Water District, State Water Contractors, San Luis & Delta-Mendota Water Authority, Metropolitan Water District of Southern California, San Bernardino Valley Municipal Water District

CAUSAL DOCUMENT/DATE FILED: Notice - Other State and Federal Water Contractor Petitioners' Joint Amended Notice of Motion and Joint Motion for Clarification of Court's May 18, 2016 Ruling; Memorandum of Points and Authorities, 06/02/2016

EVENT ID/DOCUMENT ID: ,13737891

EVENT TYPE: Motion - Other - Writ of Mandate

MOVING PARTY: Delta Stewardship Council

CAUSAL DOCUMENT/DATE FILED: Motion - Other for Clarification on Ruling on Submitted Matter, 06/01/2016

EVENT ID/DOCUMENT ID: ,13731808

EVENT TYPE: Motion - Other - Writ of Mandate

MOVING PARTY: City of Stockton

CAUSAL DOCUMENT/DATE FILED: Motion - Other of Clarification on Ruling, 05/31/2016

ASSOCIATED CASES: 34-2013-80001500-CU-WM-GDS, 34-2013-80001530-CU-WM-GDS, 34-2013-80001534-CU-WM-GDS

APPEARANCES

Daniel L. Siegel, Supervising Deputy Attorney General, and Sarah H. Sigman, counsel present for Respondent/Defendant Delta Stewardship Council.

The certified court reporter is requested by the Respondent/Defendant.

Daniel J. O'Hanlon, counsel present for Petitioners/Plaintiffs and Interveners San Luis & Delta-Mendota Water Authority and Westlands Water District (Case No. **34-2013-80001500**).

Andrea A. Matarazzo, counsel present for Petitioners/Plaintiffs Westlands Water District (Case No. **34-2013-80001500**).

Charity B. Schiller, counsel present for Petitioners/Plaintiffs and Interveners State Water Contractors, Alameda County Flood Control and Water Conservation District, Zone 7, and San Bernardino Valley Municipal Water District (Case No. **34-2013-80001530**).

Leland P. McElhaney, counsel present telephonically for Petitioner/Plaintiff and Interveners Mojave Water Agency and Antelope Valley-East Kern Water Agency (Case No. **34-2013-80001530**).

DATE: 06/24/2016

MINUTE ORDER

Page 1

DEPT: 31

Calendar No.

Robert C. Horton, Senior Deputy General Counsel, counsel present for Petitioner/Plaintiff and Intervener The Metropolitan Water District of Southern California (Case No. **34-2013-80001530**).

Stephan C. Volker, counsel present for Petitioners/Plaintiffs North Coast Rivers Alliance, Pacific Coast Federation of Fisherman's Associations, San Francisco Crab Boat Owners Association, and the Winnemem Wintu Tribe (Case No. **34-2013-80001534**).

E. Robert Wright, Senior Counsel, counsel present for Petitioner/Plaintiff Friends of the River (Case No. **CPF-13-513047**).

Michael B. Jackson, counsel present for Petitioners/Plaintiffs California Water Impact Network, California Sportfishing Protection Alliance, AquAlliance, and Restore the Delta (Case No. **CPF-13-513047**).

Special Appearance by E. Robert Wright for John Buse, counsel present for Petitioners/Plaintiffs Center for Biological Diversity and California Water Impact Network (Case No. **CPF-13-513047**).

Osha R. Meserve, counsel present for Petitioners/Plaintiffs Central Delta Water Agency, South Delta Water Agency, Lafayette Ranch, Inc., Cindy Charles and Local Agencies of the North Delta (Case No. **CPF-13-513048**).

Thomas H. Keeling, counsel present for Petitioners/Plaintiffs Central Delta Water Agency, South Delta Water Agency, Lafayette Ranch, Inc., and Cindy Charles (Case No. **CPF-13-513048**).

Michael A. Brodsky, counsel present for Petitioner/Plaintiff Save the California Delta Alliance (Case No. **CPF-13-513049**).

Steven A. Herum, counsel present for Petitioner/Plaintiff City of Stockton (Case No. **39-2013-00298188-CU-WM-STK**).

NATURE OF PROCEEDINGS: MOTIONS FOR CLARIFICATION

TENTATIVE RULING

The following shall constitute the Court's tentative ruling on the various motions for clarification, which are scheduled to be heard by the Court on Friday June 24, 2016 at 9:00 a.m. in Department 31. The tentative ruling shall become the final ruling of the Court unless a party wishing to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

In the event that a hearing is requested, oral argument shall be limited to no more than 20 minutes per side.

Should any party request oral argument, such argument will be limited to discussion of the following issue: Whether any party believes review of the EIR can or must proceed despite the Court's ruling that the Delta Plan must be set aside pending ordered revisions.

Any party desiring an official record of this proceeding shall make arrangements for reporting services with the Clerk of the Department where the matter will be heard not later than 4:30 p.m. on the day before the hearing. The fee is \$30.00 for civil proceedings lasting under one hour, and \$239.00 per half day of proceedings lasting more than one hour. (Local Rule 1.12(B) and Government Code § 68086.)

Payment is due at the time of the hearing.

The Court hereby issues this ruling in response to various motions for clarification concerning its May 18, 2016 Ruling on Submitted Matter. In ascertaining the Court's final ruling, the Ruling on Submitted Matter should be read in conjunction with this ruling on the Motions for Clarification. No further ruling will be issued on the merits.

Respondent's Motion for Clarification

The Court notes that, while presented as a motion for clarification, some of Respondent's arguments appear to re-argue issues already addressed in the briefing and the Court's ruling. To the extent that arguments address issues already decided, as opposed to requesting clarification, the Court will not address such arguments. The Court also notes that Respondent did not raise in its motion any request for clarification as to whether the Delta Plan must be set aside. This issue is discussed in response to the other two pending motions for clarification. Consequently, the Court notes at the outset that in light of the Court's finding of deficiencies in the Delta Plan, it is invalid and must be set aside until proper revisions are completed.

1. Respondent's first inquiry provides, "[t]he language calling upon the Council 'to revise the Delta Plan *and any applicable regulations*' to include measurable targets can be misinterpreted. (See Ruling, pp. 26 and 38 [emphasis added.]) This motion seeks clarification that the Court is not calling upon the Council to adopt, or revise, its performance measures *as regulations*. Moreover, the motion seeks clarification of the phrase 'and any applicable regulations.' "

In its ruling, the Court noted that section 85001 subdivision (c) directed the development of a "legally enforceable Delta Plan." The Court also found that the Delta Plan was deficient in several areas requiring measurable or otherwise quantifiable targets. Specifically, with regard to reduced Delta reliance, the Court found the Plan failed to include targets that would ensure reduced reliance, as required by the Delta Reform Act. None of the recommendations proffered by Respondent as complying with this requirement appeared to be designed to achieve measurable reduced Delta reliance.

In its opposition, Respondent argued that it adopted regulatory policies to establish compliance with this requirement. Respondent pointed to WR P2, and WR P1. The Court found these regulations did not require reduced reliance and did not set a goal or target for measurable reduced reliance. Consequently, these regulations were inadequate and failed to comply with the Delta Reform Act.

The Court noted in its ruling that,

"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 85001 requires the Delta Plan to be "legally enforceable." As section 85308 is the lens through which the Court views the Delta Plan, and the Delta Plan is required to be legally enforceable, so must the section 85308 components. Accordingly, the Court reiterates that Respondent must revise the Delta Plan, and any applicable regulations to 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. Consequently, to achieve Delta Reform Act compliance with section 85308's requirements for quantifiable or otherwise measurable targets, Respondent must adopt legally enforceable regulations. Merely providing recommendations to comply

with section 85308 is insufficient.

Accordingly, the wording in the ruling, combined with this clarification is sufficient to convey the Court's intent that Respondent must comply with its obligation to create a legally enforceable Delta Plan that includes the section 85308 components.

2. Respondent's second inquiry provides, "[t]he language on page 38, lines 15-18, calling upon the Council to 'Provide a flow policy that includes 'quantified or otherwise measurable targets,' can be interpreted in one of two ways: As requiring a revised performance measure associated with flows, or as a [sic] requiring a revision of the Council's flow policy (regulation) itself. This motion seeks clarification that the Court is calling for a revised performance measure associated with flows, but not a revision of the Council's flow policy (regulation) itself."

The Court assumes Respondent is referring to ER P1 (23 CCR section 5005) which Respondent repeatedly referred to as its flow policy in its brief. 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.)

However, with regard to measurable targets concerning Delta flows, the Delta Plan only set a vague goal of "[p]rogress toward restoring in-Delta flows to more natural functional flow patterns to support a healthy estuary..." (AR, B623.) The Court determined "progress" does not provide a quantified or otherwise measurable target upon which Delta users can gauge compliance. This "progress" language was found in ER R1, a recommendation identified as an outcome performance measure.

As the Court has provided above, quantified or otherwise measurable targets must be part of a legally enforceable plan. Accordingly, the Court believes the wording in the ruling is accurate, and sufficient to convey the Court's intent that Respondent must comply with its obligation to create a legally enforceable Delta Plan that includes the section 85308 components. The Court does not opine whether Respondent should revise section 5005, instead finding that the Delta Plan fails to contain legally enforceable measurable targets concerning Delta Flows as required by section 85308.

3. Respondent's third inquiry provides, "[t]he language calling upon the Council 'to revise the Delta Plan *and any applicable regulations* to...Promote options for water conveyance and storage systems' can be misinterpreted. (See Ruling, pp. 38 and 72 [emphasis added].) This motion seeks clarification that the Court is not requiring the Council to promote options with regulations, as opposed to with a non-regulatory Delta Plan revision."

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 parties argue whether this means Respondent must adopt regulations or recommendations to achieve the section 85320 requirements. The Court finds that the language "promote options" does not implicate a regulatory requirement, and so the Court leaves it to Respondent's discretion whether to "promote options" by regulation or recommendation.

State and Federal Water Contractors' Motion for Clarification

The Court acknowledges that it improperly referred to this matter as having been bifurcated. Indeed, by minute order dated May 21, 2014, the Court *denied* the motion for bifurcation, finding "issues arising under the Delta Reform Act and issues arising under CEQA are sufficiently intertwined that a formal order of bifurcation would not be feasible and would not significantly improve the manageability of this

case or contribute to judicial economy and efficiency." The Court indicated that from a review of the parties' briefing, it would "determine whether a phased approach involving more than one hearing is appropriate for case management purposes and will schedule the hearing or hearings accordingly. Given the scope and number of issues in this case, the parties should anticipate the possibility of multiple hearings."

The Court strikes all references to "bifurcated" from the Ruling on Submitted Matter. Further, the title of the ruling is modified to read, "RULING ON SUBMITTED MATTER: PETITIONS FOR WRIT OF MANDATE."

However, in light of the Court's finding of statutory violations and its finding that the Delta Plan is invalid, there is no longer a project with an EIR for which to conduct a CEQA analysis and review. Accordingly, the Court provided that the CEQA matters were moot, by which the Court implied, without expressly ordering, that there is no project, and consequently no EIR to currently review. The Court acknowledges that the ruling was unclear, and left the parties to guess as to the status of the Delta Plan and CEQA issues.

To be clear, the Delta Plan is invalid and must be set aside until proper revisions are completed. As Respondent itself argued previously, in light of an invalid Delta Plan, there is no proposed project, and consequently nothing before the Court to review under CEQA. The Court does not believe that piece-meal CEQA review is feasible under circumstances in which significant Plan revisions are required.

Because Respondent must comply with its CEQA obligations following completion of a revised Delta Plan, Petitioners will have the opportunity to file CEQA challenges to this new certified document. Consequently, no party is deprived of the opportunity to present challenges to the EIR at such time as a final project (Delta Plan) has been properly approved.

With regard to a request for a determination of prevailing party status and cost apportionment, these issues are premature. Once the Court enters its final order, and issues judgments, the parties may submit whatever motions they deem appropriate concerning costs and litigation expenses, and prevailing party status. The Court declines to rule on the issue of prevailing party status via a motion for clarification.

The City of Stockton's Motion for Clarification

The Court acknowledges that it improperly referred to this matter as having been bifurcated. Indeed, by minute order dated May 21, 2014, the Court *denied* the motion for bifurcation, finding "issues arising under the Delta Reform Act and issues arising under CEQA are sufficiently intertwined that a formal order of bifurcation would not be feasible and would not significantly improve the manageability of this case or contribute to judicial economy and efficiency." The Court indicated that from a review of the parties' briefing, it would "determine whether a phased approach involving more than one hearing is appropriate for case management purposes and will schedule the hearing or hearings accordingly. Given the scope and number of issues in this case, the parties should anticipate the possibility of multiple hearings."

The Court strikes all references to "bifurcated" from the Ruling on Submitted Matter. Further, the title of the ruling is modified to read, "RULING ON SUBMITTED MATTER: PETITIONS FOR WRIT OF MANDATE."

However, in light of the Court's finding of statutory violations and its finding that the Delta Plan is invalid, there is no longer a project with an EIR for which to conduct a CEQA analysis and review. Accordingly,

the Court provided that the CEQA matters were moot, by which the Court implied, without expressly ordering, that there is no project, and consequently no EIR to currently review. The Court acknowledges that the ruling was unclear, and left the parties to guess as to the status of the Delta Plan and CEQA issues.

To be clear, the Delta Plan is invalid and must be set aside until proper revisions are completed. As Respondent itself argued previously, in light of an invalid Delta Plan, there is no proposed project, and consequently nothing before the Court to review under CEQA. The Court does not believe that piece-meal CEQA review is feasible under circumstances in which significant Plan revisions are required.

Because Respondent must comply with its CEQA obligations following completion of a revised Delta Plan, Petitioners will have the opportunity to file CEQA challenges to this new certified document. Consequently, no party is deprived of the opportunity to present challenges to the EIR at such time as a final project (Delta Plan) has been properly approved.

With regard to the City of Stockton's arguments that it was a prevailing party with regard to "the Plan's failure to provide quantified or other [sic] measurable targets to restore natural flows," the Court has reviewed the arguments on pages 27:21-28:14 of City of Stockton's brief (as the City of Stockton claims these pages represent its raising of the issue, and the basis for its argument that the Court failed to properly address these statutory arguments.).

Pages 27 and 28 appear within the City of Stockton's challenges that "the EIR failed to evaluate information about future natural flow regimes." The argument is that "Petitioner expressly commented that the EIR omitted relevant data and information by failing 'to identify the potential environment risks associated with requiring the various water and flood control projects to operate in such a way as to provide a more natural flow regime.'" (Opening Brief, pp. 27:26-28:2.) The language City of Stockton refers to from its petition is identical.

This language does not raise the argument that the Delta Plan fails to include "quantified or otherwise measurable targets" concerning Delta flows. It instead argues the EIR failed to adequately evaluate the effects of a more natural flow regime. The statement that the "City incorporates by reference the analysis and arguments presented by other Petitioners on this issue" limits such incorporation to arguments concerning this specific issue, not arguments concerning quantified or otherwise measurable targets.

The City of Stockton also argues that the Court's proceedings were unfair in that the City of Stockton relied on being able to present its CEQA case subsequent to oral arguments on the statutory challenges. While the Court acknowledges the City of Stockton's CEQA challenges will be delayed, the Court has discussed above the necessity for such a delay. Furthermore, a review of the City of Stockton's written pleadings and its oral presentation does not indicate that the City of Stockton withheld oral argument concerning statutory issues in anticipation of the CEQA hearings.

CONCLUSION

The Delta Plan is invalid and must be set aside pending revisions. In light of this finding, there is nothing currently before the Court to review under CEQA. As provided in the introduction to this ruling, in ascertaining the Court's final ruling, the Ruling on Submitted Matter should be read in conjunction with this ruling on the Motions for Clarification. No further ruling will be issued on the merits.

//

In the event that this tentative ruling becomes the final ruling of the Court, in accordance with Local Rule

1.06, counsel are directed to meet and confer as to who will prepare the order; the order shall be prepared attaching this ruling as an exhibit and submitted to all parties for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submitted to the Court for signature and entry in accordance with Rule of Court 3.1312(b).

COURT RULING

The matter is argued and submitted.

The Court AFFIRMS the tentative ruling with the following modification:

The following stipulation of the parties shall be included in the judgment:

The judgment shall reflect as stipulated by the parties the Court has not resolved any of the party's claims pursuant to Public Resources Code section 21000, et seq, CEQA stated in the pleadings in this action.

As stipulated by the parties all existing CEQA claims are preserved regardless of the outcome of any appeals of this judgment.

As stipulated by the parties any defenses arising out of this judgment, including but not limited to: Statute of limitations, laches, exhaustion of administrative remedies and estoppel, shall not apply to the Petitioners re-pleading or resurrection of their existing CEQA claims at a later date.

The following are not part of the parties' stipulation but the parties do agree they should be part of the judgment.

To the extent the Council relies on the 2013 program EIR, in the future the Council shall as part of that reliance adopt new CEQA findings and re-certify the 2013 program EIR along with taking action on any other CEQA documentation it deems appropriate.

The Council shall also file a CEQA notice of determination that reflects the full extent of this reliance.

Charity B. Schiller, counsel for Petitioners/Plaintiffs and Interveners State Water Contractors, Alameda County Flood Control and Water Conservation District, Zone 7, and San Bernardino Valley Municipal Water District is ordered to prepare a formal order, submit to opposing counsel for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit to the Court for signature in accordance with Rule of Court 3.1312(b).