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

California Sportfishing Protection Alliance; Friends  
of the River; Center for Biological Diversity; Sierra  
Club California; California Water Impact Network;  
AquAlliance; Restore the Delta; Center for Food  
Safety; Friends of Stone Lakes National Wildlife  
Refuge; Planning and Conservation League; and  
Save Our Sandhill Cranes,

Petitioners and Plaintiffs,

vs.

California Department of Water Resources; and  
DOES 1-20,

Respondents and Defendants,

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DOES 21-50,

Real Parties in Interest.

Case No.:

**VERIFIED PETITION FOR WRIT OF  
MANDATE AND COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF**

(Code of Civ. Proc. §§ 1060, 1085, 1094.5; Water  
Code §§ 85000 et seq., Gov. Code 11342.1; Pub.  
Resources Code §§ 21000 et seq.; Fish and Game  
Code § 3511; Public Trust Doctrine)

**CEQA CASE**

Action Filed: August 21, 2017

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## INTRODUCTION

1. Petitioners and Plaintiffs California Sportfishing Protection Alliance, Friends of the River, Center for Biological Diversity, Sierra Club California, California Water Impact Network, AquAlliance, Restore the Delta, Center for Food Safety, Friends of Stone Lakes National Wildlife Refuge, Planning and Conservation League, and Save Our Sandhill Cranes (“Petitioners”) seek a writ of mandate and declaratory and injunctive relief under California Code of Civil Procedure sections 1085, 1094.5 and 1060, and Government Code section 11350 directing the California Department of Water Resources (“DWR”) to vacate its approval of the Bay Delta Conservation Plan (“BDCP”)/California WaterFix Project (“WaterFix Tunnels” or the “Project”), the Findings and Statement of Overwriting Considerations for the WaterFix Tunnels, and the July 21, 2017 certification of the Final Environmental Impact Report (“EIR”) for the Project, and to revise its findings to conform with the law.

2. The WaterFix Tunnels Project would divert large quantities of fresh water from the San Francisco Bay-Delta estuary for export south. The Project would initially consist of three new water intakes each capable of diverting 3,000 cubic feet per second of water from the Sacramento River in the North Delta into two 40-foot wide, 35-mile long tunnels 150 feet underground (“Tunnels”), which would transport the water to existing pumping plants in the South Delta. The Tunnels would have the capacity to transport about 15,000 cubic feet per second of water. Due to the new points of diversion in the North Delta, freshwater flows that presently contribute to water quality, water supply, fish, fish habitat, Delta agriculture, and public health by flowing through the already impaired Delta before being diverted, in what is known as “through-Delta conveyance,” would instead no longer provide these benefits within the lower Sacramento River, sloughs, and Delta. The new water intakes and Tunnels would add to, rather than replace, the existing pumping facilities in the Delta of the Central Valley Project and State Water Project, in what is known as “dual-conveyance.”

3. The construction and operation of the Project will significantly degrade environmental conditions in the San Francisco Bay-Delta estuary, including reduced flows in the Sacramento River and Bay-Delta estuary, increased salinity levels, reduced food supply, increased harmful algal blooms, harm to endangered and threatened fish species, and adverse modification of their designated critical

1 habitat.

## 2 THE PARTIES

3 4. Petitioner CALIFORNIA SPORTFISHING PROTECTION ALLIANCE (“CSPA”) is a  
4 California non-profit public benefit organization with its principal place of business in Stockton,  
5 California. CSPA’s organizational purpose is the protection, preservation, and enhancement of fisheries  
6 and associated aquatic and riparian ecosystems of California’s waterways, including Central Valley  
7 rivers leading into the Bay-Delta. This mission is implemented through active participation in water  
8 rights and water quality processes, education and organization of the fishing community, restoration  
9 efforts, and vigorous enforcement of environmental laws enacted to protect fisheries, habitat and water  
10 quality. Members of CSPA reside along the Central Valley watershed and in the Bay-Delta where they  
11 view, enjoy, and routinely use the Delta ecosystem for boating, fishing, and wildlife viewing. CSPA’s  
12 members derive significant and ongoing use and enjoyment from the aesthetic, recreational, and  
13 conservation benefits of the Bay-Delta ecosystem.

14 5. Petitioner FRIENDS OF THE RIVER (“FOR”) is a non-profit organization dedicated to  
15 preserving and restoring California’s rivers, streams, and their watersheds as well as advocating for  
16 sustainable water management. FOR accomplishes this goal by influencing public policy and inspiring  
17 citizen action through grassroots organizing. FOR was founded in 1973 during the struggle to save the  
18 Stanislaus River from the New Melones Dam. Following that campaign, the group grew to become a  
19 statewide river conservation organization. FOR currently has nearly 3,000 members. Members of FOR  
20 enjoy the scenic beauty of the Delta and the Sacramento River and its tributaries and sloughs upstream  
21 from the Delta and raft, kayak, boat, fish, and swim in these waters.

22 6. Petitioner CENTER FOR BIOLOGICAL DIVERSITY (“The Center”) is a non-profit,  
23 public interest organization with over 58,000 active members. The Center has offices in Oakland, Los  
24 Angeles, and Joshua Tree, California, as well as offices in Arizona, Florida, New Mexico, Oregon,  
25 Colorado, and Washington, D.C. The Center and its members are dedicated to protecting diverse native  
26 species and habitats through science, policy, education, and environmental law. The Center’s members  
27 reside and own property throughout California as well as those areas to be served by the Project, and  
28 use the waters and lands affected by the proposed Project for wildlife observation, recreation, scientific

1 research, environmental education, and aesthetic enjoyment.

2           7.       Petitioner SIERRA CLUB CALIFORNIA is a nonprofit organization of approximately  
3 180,000 members in California. Sierra Club California is dedicated to exploring, enjoying, and  
4 protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's  
5 ecosystems and resources; to educating and encouraging humanity to protect and restore the quality of  
6 the natural and human environment; and to using all lawful means to carry out these objectives. Sierra  
7 Club California's concerns encompass our members continued ability to enjoy the unique aesthetic and  
8 recreational nature of the Bay-Delta ecosystem, our desire for California to develop a climate change-  
9 resilient water system that is protective of both natural environments and fulfilling the human right to  
10 water, and the proper application of the California Environmental Quality Act to provide the public  
11 with vital information about decisions made concerning their health and mitigation from environmental  
12 harms. The Club's particular interest in this case and the issues which the case concerns are addressed  
13 herein.

14           8.       Petitioner CALIFORNIA WATER IMPACT NETWORK ("C-WIN") is a California  
15 non-profit public benefit organization with its principal place of business in Santa Barbara, California.  
16 C-WIN's organization purpose is the protection and restoration of fish and wildlife resources, scenery,  
17 water quality, recreational opportunities, agricultural uses, and other natural environmental resources  
18 and uses of the rivers and streams of California, including the Bay-Delta, its watershed and its  
19 underlying groundwater resources. C-WIN has members who reside in, use, and enjoy the Bay-Delta  
20 and inhabit and use its watershed. They use the rivers of the Central Valley and the Bay-Delta for  
21 nature study, recreation, and aesthetic enjoyment.

22           9.       Petitioner AQUALLIANCE ("AquAlliance") is a California public benefit corporation.  
23 Its mission is to defend northern California waters and the ecosystems these waters support and to  
24 challenge threats to the hydrologic health of the Sacramento River watershed. This includes escalating  
25 attempts to divert and withdraw more water from the hydrologic region. AquAlliance's members  
26 include farmers, scientists, businesses, educators, and residents all of whom have significant financial,  
27 recreational, scientific, aesthetic, educational, and conservation interests in the aquatic and terrestrial  
28 environments that rely on waters of the Sacramento River Watershed and Bay-Delta estuary. This

1 hydrologic system provides water for orchards, homes, gardens, businesses, wetlands, streams, rivers,  
2 terrestrial habitat, and myriad species, which in turn allows AquAlliance members to live, fish, hunt,  
3 cycle, photograph, camp, swim, and invest in northern California.

4       10.     Petitioner RESTORE THE DELTA (“RTD”) is a non-profit public benefit organization  
5 based in Stockton, California. RTD is a coalition of Delta residents, business leaders, civic  
6 organizations, community groups, faith-based communities, union locals, farmers, fishermen, and  
7 environmentalists seeking to strengthen the health of the Bay-Delta estuary and to protect the  
8 environmental and economic interests of the Sacramento-San Joaquin Delta, including but not limited  
9 to public health, fishing, farming, recreation, and tourism. With over 50,000 members statewide, RTD  
10 advocates on behalf of local Delta stakeholders to ensure that they have a direct impact on water  
11 management decisions affecting the water quality and well-being of their communities, and water  
12 sustainability policies for all Californians. RTD works through public education and outreach so that all  
13 Californians recognize the Sacramento-San Joaquin Delta as part of California’s natural heritage,  
14 deserving of restoration, seeking a Delta whose waters are fishable, swimmable, drinkable, and  
15 farmable, supporting the health of the San Francisco Bay-Delta Estuary, and the ocean beyond. RTD’s  
16 coalition envisions the Sacramento-San Joaquin Delta as a place where a vibrant local economy,  
17 tourism, recreation, farming, wildlife, and fisheries thrive as a result of resident efforts to protect our  
18 waterway commons. Members of RTD reside in and along the Bay-Delta and its watershed and use the  
19 waters of the Central Valley and Bay-Delta for drinking, farming, and industry and for aesthetic,  
20 recreational, and educational enjoyment.

21       11.     Petitioner CENTER FOR FOOD SAFETY (“CFS”) is a national nonprofit public  
22 interest and environmental advocacy organization working to protect human health and the  
23 environment by promoting sustainable agriculture. CFS has over 750,000 members across the country,  
24 with approximately 92,000 residing in California, including farmers, businesses, and consumers whose  
25 economic and personal wellbeing depends upon decisions regarding food production and equitable  
26 water distribution. CFS takes a holistic approach in pursuing its mission, using legal actions, scientific  
27 and policy reports, educational events, marketing campaigns, and grassroots organizing. CFS members  
28 farm, fish, eat, drink, research, and recreate within the Delta ecosystem, the Central Valley, and the San

1 Francisco Bay Area and would be affected by the Project and its significant impacts.

2       12.     Petitioner FRIENDS OF STONE LAKES NATIONAL WILDLIFE REFUGE  
3 (“Friends,” formerly known as the Stone Lakes National Wildlife Refuge Association) is a  
4 membership-based California nonprofit public benefit corporation organized for the purposes of  
5 protecting, promoting and enhancing the Stone Lakes National Wildlife Refuge (“Stone Lakes NWR”  
6 or “Refuge”), which will be severely and adversely affected by the unmitigated impacts associated with  
7 the construction and operation of the Project. Friends and its members submitted comments on the  
8 Project, and expressed concern that the lead agencies had not adequately demonstrated that Preferred  
9 Alternative 4A would satisfy the “zero-take” standard required by the Fully Protected Species statute,  
10 among other deficiencies in the environmental analysis. Members of Friends use the Refuge, the greater  
11 Delta, the Sacramento River, and the San Joaquin river to hike, birdwatch, view wildlife, engage in  
12 scientific study, including monitoring activities, and promoting education about Delta wildlife  
13 conservation, especially of avian species. Friends’ members have enjoyed viewing wildlife, including  
14 special status and/or Fully Protected Species such as the greater sandhill crane, in the Refuge and  
15 elsewhere in the Delta. This species’ numbers and vitality depend on an intact and healthy Delta  
16 ecosystem, and the continued existence of suitable habitat. Where elements of the ecosystem suffer, or  
17 the greater sandhill crane population suffers adverse impacts, Friends’ members’ recreational uses and  
18 aesthetic enjoyment of those areas are reduced through decreased opportunities to observe wildlife.

19       13.     Petitioner PLANNING AND CONSERVATION LEAGUE is a nonprofit advocacy  
20 organization empowered to protect and restore California’s natural environment and to promote and  
21 defend the public health and safety of the people of California, through legislative, administrative, and  
22 judicial action. Founded in 1965, PCL was the first organization devoted to bettering Californians’  
23 quality of life through environmental legislation. One of the organization’s earliest accomplishments  
24 was the enactment in 1970 of the California Environmental Quality Act (“CEQA”), which PCL helped  
25 draft and has continually supported over the years, and which lies at the heart of this action. As a party  
26 and an *amicus curiae*, PCL—in behalf of its twenty-seven institutional members and thousands of  
27 individual members—has contributed to some of the leading cases interpreting CEQA’s provisions.  
28 PCL has also submitted detailed comments addressing environmental review issues in numerous



proceedings before public agencies, including those culminating in the final agency decisions challenged here. Beyond agency proceedings and the courtroom, PCL has published and updated *The Community Guide to CEQA* and has sponsored CEQA workshops throughout the state. These workshops advise interested individuals, governmental and non-governmental organizations, and locally elected and appointed officials about CEQA's two-fold purpose of environmental protection and informed self-government. PCL members reside and own property throughout California as well as those areas to be served by the Project, and use the waters and lands affected by the proposed Project.

14. Save Our Sandhill Cranes ("SOS Cranes") is a 501(c)(3) non-profit organization that formed over a decade ago to protect sandhill crane wintering habitat in the Sacramento region through outreach, education, and direct engagement in both policy and projects that effect that habitat. SOS Cranes is especially concerned about threats to the remaining suitable winter habitats for cranes in the Central Valley of California. The Delta Tunnels, combined with urban development and shifts from annual row crops to permanent crops would dramatically diminish what little remains of the winter migratory habitat of the sandhill cranes in the Delta, and threatens to directly and unlawfully kill, harm, and otherwise "take" cranes, which are fully protected birds under California law. Members of SOS Cranes use the Refuge, and the greater Delta, the Sacramento River, and the San Joaquin river to hike, birdwatch (including viewing and enjoying the presence of fully protected greater sandhill cranes), view wildlife, engage in scientific study, including monitoring activities, and promoting education about Delta wildlife conservation, especially of avian species. Where elements of the ecosystem suffer, or the greater sandhill crane population suffers adverse impacts, SOS Cranes' members' recreational uses and aesthetic enjoyment of those areas are reduced through decreased opportunities to observe wildlife.

15. Respondent and Defendant CALIFORNIA DEPARTMENT OF WATER RESOURCES (DWR), is a Department of the State of California subject to all California law. DWR is the State lead agency for the approval of the Project under CEQA.

#### **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

16. Petitioners have exhausted all administrative remedies by submitting written comments during several stages of the Project approval and EIR processes, including but not limited to written

1 comments objecting to approval of the project and highlighting Delta Reform Act (Water Code sections  
2 85000 *et seq.*) and CEQA (Pub. Resources Code sections 21000, *et seq.*) violations and deficiencies in  
3 the draft and supplemental draft EIR and Final EIR. All issues raised in this petition were raised by  
4 Petitioners, other members of the public, and/or public agencies prior to approval of the Project and  
5 certification of the EIR.

6 17. Petitioners presented both oral and written comments during the administrative process  
7 and hearings on the matters being challenged in this petition.

8 18. Petitioners have complied with Public Resources Code section 21167.5 by prior service  
9 of a notice upon DWR indicating their intent to file this Petition. Proof of Service of this notification,  
10 with the notification, is attached as Exhibit A to this Petition.

11 19. Petitioners have complied with Public Resources Code section 21167.7 and Code of  
12 Civil Procedure section 388 by serving a copy of this petition on the Attorney General.

13 20. Petitioners have elected to prepare the record of proceedings in the above-captioned  
14 proceeding or to pursue an alternative method of record preparation pursuant to Public Resources Code  
15 section 21167.6(b)(2). A true and correct copy of the notification of the Election to Prepare the  
16 Administrative Record is attached as Exhibit B to this Petition.

17 21. This petition is timely filed in accordance with Public Resources Code section 21167  
18 and CEQA Guidelines section 15112 (the CEQA Guidelines are codified at 14 Cal. Code Regs. §§  
19 15000 *et seq.*).

20 22. Petitioners and their members are directly, adversely and irreparably affected, and will  
21 continue to be prejudiced by the approval of the Water Fix Tunnels project and by the failure of DWR  
22 to comply with the Delta Reform Act, CEQA, the fully protected species statutes, and the California  
23 Public Trust Doctrine, unless or until this Court provides the relief prayed for in this petition.

#### 24 **JURISDICTION AND VENUE**

25 23. This Court has jurisdiction over this action pursuant to Code of Civil Procedure sections  
26 1085, 1094.5, and 1060, Public Resources Code sections 21168 and 21168.5, and Government Code  
27 sections 11342.2 and 11350.

28 24. Venue for this action properly lies in the Sacramento County Superior Court because the

1 water diversion intakes for the Project and much of the Project itself would be constructed and operated  
2 within Sacramento County. In addition, Petitioners Friends of the River, Planning and Conservation  
3 League, Sierra Club California, Friends of Stone Lakes National Wildlife Refuge, and SOS Cranes, as  
4 well as Respondent DWR and the Attorney General, who will be representing Respondent DWR in this  
5 action, have offices in Sacramento County.

## 6 **GENERAL ALLEGATIONS**

7 25. In 2009, the California Legislature declared that “the Sacramento-San Joaquin Delta  
8 watershed and California’s water infrastructure are in crisis and existing Delta policies are not  
9 sustainable,” and responded by passing the Delta Reform Act, codified in the California Water Code at  
10 sections 85000 *et seq.*

11 26. Policies established by the Delta Reform Act include “the policy of the State of  
12 California is to reduce reliance on the Delta in meeting California’s future water supply needs through a  
13 statewide strategy of investing in improved regional supplies, conservation, and water use  
14 efficiency...” (Water Code § 85021.)

15 27. DWR is the lead agency responsible for complying with CEQA including preparation of  
16 the EIR for the Project.

17 28. The U.S. Bureau of Reclamation (“Reclamation”) is the federal lead agency responsible  
18 for complying with the National Environmental Policy Act (“NEPA”), 42 U.S.C. section 4321 *et seq.*,  
19 including preparation of an Environmental Impact Statement (“EIS”) for the Project.

20 29. The Delta Reform Act includes specific provisions applicable to the BDCP, including  
21 Water Code sections 85320, 85321, and 85322. Water Code section 85320 mandates that the BDCP  
22 could not be incorporated into the Delta Plan and could not be eligible for state funding unless among  
23 other things, the BDCP complies with CEQA, and includes “a comprehensive review and analysis of”  
24 (among the listed subjects):

25 A reasonable range of Delta conveyance alternatives, including through-Delta,  
26 dual conveyance, and isolated conveyance alternatives and including further  
27 capacity and design options of a lined canal, an unlined canal, and pipelines.  
(Water Code § 85320(b)(2)(B).)

28 30. In about April 2015, DWR and Reclamation dropped the elements of a habitat

1 conservation plan and natural community conservation plan from the BDCP project and began calling it  
2 the California WaterFix.

3 31. On July 9, 2015, DWR and Reclamation jointly released the “BDCP/California  
4 WaterFix Partially Recirculated Draft EIR / Supplemental Draft EIS” (“Draft EIR/EIS”) under CEQA  
5 and NEPA.

6 32. The public review and comment period for the Draft EIR/EIS closed on October 30,  
7 2015.

8 33. On October 30, 2015, the United States Environmental Protection Agency (“EPA”)  
9 gave the Draft EIR/EIS a failing grade rating of “3” (Inadequate). (October 30, 2015, EPA Review, p.  
10 4.) Instead of requiring revision and recirculation for public review, the EPA expected that the missing  
11 information will be “supplied as later regulatory processes proceed.” (EPA Review, p. 4.) The later  
12 regulatory processes, however, did not supply the missing information.

13 34. “In 2009, in response to the Revised Notice of Preparation for the BDCP EIR/EIS, the  
14 SWRCB [State Water Resources Control Board] requested that a reduced diversion alternative be  
15 analyzed to inform the SWRCB and others of the potential trade-offs between water exports and  
16 protection of fish and wildlife beneficial uses.” (EIR, App. 5B at 5B-8.)

17 35. EPA had reviewed several versions of the BDCP/WaterFix drafts over the years  
18 pursuant to its authority under Section 309 of the Clean Water Act. In its August 26, 2014, review, EPA  
19 deferred its rating of the earlier December 2013 draft EIR/EIS because the lead agencies were going to  
20 prepare a Supplemental Draft and circulate it for public review and comment. (EPA Review, August  
21 26, 2014 p. 4.) EPA had expected “that the Draft EIS would present a range of fully evaluated  
22 alternatives that clarifies the environmental and water supply trade-offs being considered.” In addition,  
23 EPA explained that “[o]ther reasonable alternatives could be developed by incorporating a suite of  
24 measures, including Integrated Water Management, water conservation, levee maintenance, and  
25 decreased reliance on the Delta. Such alternatives would be consistent with the purpose and need for  
26 the project, as well as with the California Bay Delta Memorandum of Understanding among federal  
27 agencies and the Delta Reform Act of 2009.” (EPA Review, p. 5.)

28 36. In November 2015, the California Natural Resources Agency and DWR obtained from

1 their economic consultant for the project, David Sunding of The Brattle Group, the draft *Cal WaterFix*  
2 *Economic Analysis*. The *Economic Analysis* presumes that the federal government or some other entity  
3 would need to provide a subsidy of \$ 6.5 billion to make the Tunnels a breakeven proposition for  
4 agricultural users of the water. (*Economic Analysis*, pp. 2–4). DWR concealed the *Economic Analysis*  
5 from the public instead of disclosing it during the project review and approval process.

6 37. The *Economic Analysis* also assumes that water yields (the difference in export water  
7 delivery with and without the Tunnels) are four times higher than in the Recirculated Draft  
8 EIR/Supplemental Draft EIS.

9 38. In 2011, the National Academy of Sciences declared in reviewing the then-current  
10 version of the draft BDCP that: “[c]hoosing the alternative project before evaluating alternative ways to  
11 reach a preferred outcome would be post hoc rationalization—in other words, putting the cart before  
12 the horse. Scientific reasons for not considering alternative actions are not presented in the plan.”  
13 (National Academy of Sciences, Report in Brief at p. 2, May 5, 2011). From 2012 through January  
14 2017 Petitioners have regularly requested and demanded orally and in writing that DWR (and  
15 Reclamation) include a proper range of reasonable alternatives to the Project in compliance with the  
16 Delta Reform Act, CEQA, and NEPA, including through-Delta alternatives that would increase  
17 freshwater flows through the Delta by reducing exports. Petitioners have also regularly presented to  
18 DWR (and Reclamation) during that time a written alternative, a carefully conceived modern plan  
19 calling for reducing reliance on the Delta by such measures as “improved regional supplies,  
20 conservation, and water use efficiency” as well as “water recycling” and “advanced water  
21 technologies.” The most recent version of that alternative is *A Sustainable Water Plan for California*  
22 (Environmental Water Caucus, May 2015).

23 39. Expert agencies including the State Water Resources Control Board have concluded that  
24 it is necessary to decrease diversions in order to increase Delta outflows. (Including *Evaluation of San*  
25 *Joaquin River Flow and Southern Delta Water Quality Objectives and Implementation*, Executive  
26 Summary, ES 1, 21, September 2016; *Working Draft Scientific Basis Report for New and Revised Flow*  
27 *Requirements on the Sacramento River and Tributaries, Eastside Tributaries to the Delta, Delta*  
28 *Outflow, and Interior Delta Operations*, 1-3, 1-13, October 2016.)

1           40.     DWR (and Reclamation) have at all times failed to develop and consider the range of  
2 reasonable alternatives to the BDCP/WaterFix Tunnels required by the Delta Reform Act, CEQA, and  
3 NEPA, including through-Delta alternatives that would increase through-Delta freshwater flows by  
4 reducing exports. As explained by the Final WaterFix EIR/EIS (December 2016):

5           The 18 action alternatives are variations of alternative water conveyance plans and  
6 restoration actions or Environmental Commitments that differ primarily in the location,  
7 design, conveyance capacity, and rules that would determine the operation of water  
8 conveyance facilities. For instance, the alternatives range from the proposed  
construction of one 3000-cubic feet per second (cfs) intake to five such intake facilities,  
representing a range of north Delta conveyance capacities from 3000 cfs to 15,000 cfs.

9 (Final EIR/EIS, Vol. I, Chapter 3, Alternatives, p. 3-2.)

10           41.     On July 25, 2016, the Ninth Circuit Court of Appeals issued its decision in *Pacific Coast*  
11 *Federation of Fishermen's Assn's v. U.S. Dept. of the Interior*. (\_\_\_Fed.Appx.\_\_\_, 2016 WL 3974183  
12 [9th Cir., No. 14-15514, July 25, 2016][not certified for publication].) The court held that the  
13 challenged environmental document issued by Reclamation under NEPA on renewal of interim two-  
14 year water contracts “did not give full and meaningful consideration to the alternative of a reduction in  
15 maximum water quantities.” (*Id.* at p. \*3.)

16           42.     The Delta Reform Act prohibits initiation of “construction of a new Delta conveyance  
17 facility” unless the exporters have made arrangements to pay for all costs including planning, design,  
18 construction, and mitigation. (Water Code § 85089.)

19           43.     DWR has always represented that the users of water conveyed by the Project would pay  
20 all Project costs.

21           44.     Petitioners regularly requested and demanded during the CEQA review process that a  
22 new draft EIR/EIS be prepared and circulated for public review and comment by DWR. Preparation of  
23 a new draft EIR/EIS and recirculation for public review and comment were required by law including  
24 CEQA Guidelines section 15088.5, because the Draft EIR/EIS and earlier drafts were so fundamentally  
25 and basically inadequate and conclusory in nature that meaningful public review and comment were  
26 precluded, and because a feasible project alternative considerably different from others previously  
27 analyzed would clearly lessen the significant environmental impacts of the project.

28           45.     On July 21, 2017, DWR certified the BDCP/California WaterFix Final Environmental

1 Impact Report (“EIR”), despite the numerous legal deficiencies identified in the Draft and Final EIR  
2 and demands to prepare and recirculate a new draft document. On the same day, DWR approved the  
3 WaterFix Project, released its Final Statement of Reasons and CEQA Findings of Fact, and filed the  
4 Notice of Determination pertaining to certification of the EIR, thereby violating the Delta Reform Act  
5 and CEQA. Reclamation has not yet issued its Record of Decision approving the Project. DWR has  
6 abused its discretion and failed to proceed in the manner required by law. As a result of the DWR  
7 approval of the Project and certification of the EIR, Petitioners and their members will suffer great and  
8 irreparable harm to their interests, including recreation, boating, kayaking, fishing, conservation,  
9 wildlife viewing, and other activities as described herein. Petitioners have no adequate remedy at law  
10 for this irreparable harm.

11 46. As approved, the Project would consist of the three new North Delta intake structures,  
12 each capable of diverting 3,000 cubic feet per second of water from the Sacramento River in the North  
13 Delta into the Tunnels, and the Tunnels, which would transport the water to existing pumping plants in  
14 the South Delta. The Tunnels would have the capacity to transport about 15,000 cubic feet per second  
15 of water. The Project also includes related infrastructure associated with construction and operation of  
16 the intakes and Tunnels, including construction of new above-ground power transmission lines.

17 47. The Project will harm pelagic and anadromous fisheries in the Bay-Delta and its  
18 watershed and other natural resources held in trust by the State of California on behalf of its people by  
19 failing to consider the timing and quantity of flows to ensure ecosystem health, by encouraging and  
20 catalyzing the construction of new water delivery conveyance and upstream water storage, and by  
21 prioritizing water deliveries over ecosystem restoration. Harm to the pelagic and anadromous fishery in  
22 the Bay-Delta and its watershed harms Petitioners and their members by threatening impairment of  
23 their use and enjoyment of these species and their habitat.

24 48. The Project will also harm ratepayers of those water contractors who pay for the Project  
25 by unnecessarily raising their water rates to promote a project that yields less water supply than less  
26 expensive local alternatives. This is contradictory to the Human Right to Water, which recognizes  
27 water affordability as a barrier to access to water. These ratepayers include many members of  
28 Petitioners’ organizations, who have limited resources to develop a sustainable water supply that can

1 withstand climate change.

2 49. DWR's failure to proceed in the manner required by the Delta Reform Act and CEQA  
3 prior to approving the Project, and the resulting certification of the EIR, will result in a new, upstream  
4 conveyance that has the capacity to further reduce the already significantly depleted freshwater flows in  
5 the Sacramento River, its tributaries, sloughs, and the Delta and the Bay. Petitioners and their members  
6 have never had the opportunity to review and comment on an adequate Draft EIR/EIS. Petitioners and  
7 their members will suffer great and irreparable injury caused by the reduced flows that will result from  
8 implementation of the WaterFix Project which in turn will harm fisheries habitat and recreational  
9 opportunities in areas in and upstream of the Delta.

#### 10 **FIRST CAUSE OF ACTION**

##### 11 **(Delta Reform Act, Water Code §§ 85000 *et seq.*, Gov. Code § 11342.2)**

12 50. Petitioners hereby incorporate all of the allegations in the paragraphs above as if fully  
13 set forth herein.

14 51. The Project is in conflict with the declared water policy of the State of California  
15 established by the Delta Reform Act including, but not limited to, the policy "to reduce reliance on the  
16 Delta in meeting California's future water supply needs through a statewide strategy of investing in  
17 improved regional supplies, conservation, and water use efficiency ...." (Water Code § 85021.) The  
18 Project would instead increase reliance on the Delta in meeting California's future water supply needs  
19 by increasing the capacity to divert more water from the Delta than is presently being diverted.

20 52. The Project is in conflict with the declared policy of the State of California confirmed by  
21 the Delta Reform Act that "[t]he long-standing constitutional principle of reasonable use and the public  
22 trust doctrine shall be the foundation of state water management policy and are particularly important  
23 and applicable to the Delta." (Water Code § 85023.) The Project would instead make maximizing  
24 exports the foundation of state water management policy applicable to the Delta.

25 53. The Project is in conflict with the law established by the Delta Reform Act that the  
26 "'BDCP' means a multi-species conservation plan." (Water Code §85053.) The Project as modified in  
27 April 2015 and as approved is now simply a water diversion project and is not a multi-species  
28 conservation plan.



1        54.     The Project is in conflict with the Delta Reform Act which mandates that:

2        “Coequal goals” means the two goals of providing a more reliable water supply for  
3        California and protecting, restoring, and enhancing the Delta ecosystem. The coequal  
4        goals shall be achieved in a manner that protects and enhances the unique cultural,  
5        recreational, natural resource, and agricultural values of the Delta as an evolving place.

6        (Water Code § 85054.)

7        55.     The Project does not provide a more reliable water supply for California by determining  
8        actual water rights as opposed to “paper” water rights, and the operational requirements and flows  
9        necessary for recovering the Delta ecosystem in order to identify the remaining water available for  
10       export and other beneficial uses. The Project would further degrade instead of protecting, restoring, and  
11       enhancing the Delta ecosystem by taking away from the Delta substantial quantities of freshwater flows  
12       that presently flow through the Delta before being diverted at the South Delta.

13       56.     The Project is in conflict with the Delta Reform Act which mandates that the BDCP  
14       could not be incorporated into the Delta Plan and could not be eligible for state funding unless among  
15       other things, the BDCP complies with CEQA, and includes “a comprehensive review and analysis of”  
16       (among the listed subjects):

- 17       • operational requirements and flows necessary for recovering the Delta ecosystem and restoring  
18       fisheries under a reasonable range of hydrologic conditions, which will identify the remaining  
19       water available for export and other beneficial uses. (Water Code § 85320(b)(2)(A).)
- 20       • A reasonable range of Delta conveyance alternatives, including through-Delta, dual  
21       conveyance, and isolated conveyance alternatives and including further capacity and design  
22       options of a lined canal, an unlined canal, and pipelines. (Water Code § 85320(b)(2)(B).)
- 23       • The potential effects of each Delta conveyance alternative on Delta water quality. (Water  
24       Code § 85320(b)(2)(G).)

25       The Project and the Project approval process have not determined the operational requirements and  
26       flows necessary to recover the Delta ecosystem in order to identify the remaining water available for  
27       export and other beneficial uses; have not developed a reasonable range of Delta conveyance  
28       alternatives including through-Delta, and have not determined the potential effects of through-Delta  
conveyance alternatives on Delta water quality.

1           57.     The Project is in conflict with the Delta Reform Act which prohibits initiation of  
2 “construction of a new Delta conveyance facility” unless the exporter beneficiaries have made  
3 arrangements to pay for all costs including planning, design, construction, and mitigation. (Water Code  
4 § 85089.) Instead of the exporters paying for all costs, a substantial public subsidy would be necessary  
5 to make the Project, which is estimated to cost up to \$67 billion, a breakeven proposition for  
6 agricultural users of the water. DWR filed a Complaint for Validation entitled *California Department*  
7 *of Water Resources v. ALL PERSONS INTERESTED IN THE MATTER of the Authorization of*  
8 *California Water Fix Revenue Bonds*, Case Number 34-2017-00215965, in Superior Court, County of  
9 Sacramento on July 21, 2017. In its notice of the action, DWR states it “seeks a judgment confirming  
10 the validity of revenue bonds the Department would issue to pay for the CWF facilities, the resolutions  
11 the Department adopted authorizing those revenue bonds, . . .” In the Summons, DWR asserts “On July  
12 21, 2017, the Department adopted resolutions authorizing, among other matters, the issuance of  
13 revenue bonds, in multiple series, the proceeds of which would be used to pay the costs of the planning,  
14 design, acquisition, and construction of the California WaterFix.” DWR’s Validation action confirms  
15 DWR’s violation of the Delta Reform Act by having the State pay for all or a portion of the  
16 development of the Project instead of the exporter beneficiaries.

17           58.     Because of the changes in the Project to obviate compliance with federal law regarding  
18 habitat conservation plans, the Project requires approvals from numerous federal and state agencies,  
19 including the Delta Stewardship Council. This changed circumstance has made compliance with the  
20 requirements of the Delta Reform Act, including its mandate of achievement of the dual goals of  
21 restoring and enhancing the Bay/Delta, difficult or impossible.

22           59.     Petitioners seek declaratory relief pursuant to Code of Civil Procedure section 1060 and  
23 Government Code section 11350 as well as mandamus and injunctive relief determining that the  
24 approval of the Project was arbitrary and unreasonable under the Delta Reform Act, in conflict with the  
25 Delta Reform Act, and relief prohibiting initiation of construction of the Project.

## 26                               **SECOND CAUSE OF ACTION**

### 27                               **(CEQA, Pub. Resources Code § 21000, et seq.)**

28           60.     Petitioners hereby incorporate all of the allegations in the paragraphs above as if fully

1 set forth herein.

2           61. CEQA requires that “an agency must use its best efforts to find out and disclose all that  
3 it reasonably can” about a project being considered and its environmental impacts.” (*Vineyard Area*  
4 *Citizens v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 428.) CEQA applies to most public agency  
5 decisions to carry out, authorize, or approve projects that could have adverse effects on the  
6 environment. (Pub. Resources Code §§ 21000; 21001, subd. (g).) CEQA requires that public agencies  
7 refrain from approving projects with significant environmental effects if “there are feasible alternatives  
8 or mitigation measures” that can substantially lessen or avoid those effects. (Pub. Resources Code §  
9 21002.) Under CEQA, a “project” includes the whole of an action that may result in either a direct or  
10 reasonably foreseeable indirect physical change in the environment. (CEQA Guidelines § 15378(a).)  
11 CEQA requires agencies to inform themselves about the environmental effects of their proposed  
12 actions, consider all relevant information before taking action, give the public an opportunity to  
13 comment, and avoid or reduce significant environmental impacts when it is feasible to do so. (Pub.  
14 Resources Code § 21000.) The agency’s factual conclusions must be supported by substantial evidence  
15 in the light of the whole record. (Pub. Resources Code §§ 21168, 21168.5; CEQA Guidelines §  
16 15384(b).) “Substantial evidence” is defined as relevant, reasonable information and inferences that a  
17 fair argument can be made to support a conclusion, including facts, reasonable assumptions predicated  
18 upon facts, and expert opinion supported by facts. (CEQA Guidelines § 15384.) Argument, speculation,  
19 unsubstantiated opinion, inaccurate or erroneous evidence does not constitute substantial evidence.

20           62. The EIR certified by DWR is replete with omitted facts and inaccurate evidence  
21 presented in a manner that is confusing and misleading to the public. The EIR’s alternatives analysis,  
22 Project description, analysis of Project impacts, proposed mitigation measures, and ultimate  
23 assessments are so speculative and lacking in practical analysis that the conclusions rendered directly  
24 violate CEQA.

25           63. DWR prejudicially abused its discretion in approving the Project and certifying the EIR.  
26 DWR did not proceed in the manner required by law and/or its decisions in approving the Project and  
27 certifying the EIR are not supported by substantial evidence.

28                   **Failure to Analyze a Reasonable Range of Alternatives**

1           64.     An EIR must describe a reasonable range of alternatives to the project, or the location of  
2 the project, that could feasibly attain most of the basic objectives of the project while avoiding or  
3 substantially lessening any of the significant effects of the project. (CEQA Guidelines § 15126.6(a) and  
4 (f).) An EIR must contain a “quantitative, comparative analysis” of the relative environmental impacts  
5 of project alternatives. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692,  
6 730-737.) “Evaluation of project alternatives and mitigation measures is ‘the core of an EIR.’”  
7 (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918 at p. 937.) State policy  
8 declared by the Legislature in CEQA is that EIR’s “omit unnecessary descriptions of projects and  
9 emphasize feasible mitigation measures and feasible alternatives to projects.” (Public Resources Code §  
10 21003(c).) CEQA requires that public agencies refrain from approving projects with significant  
11 environmental effects if “there are feasible alternatives or mitigation measures” that can substantially  
12 lessen or avoid those effects. (Pub. Resources Code § 21002.

13           65.     The EIR concedes that the Project would have a number of significant and unavoidable  
14 adverse environmental impacts. (Executive Summary, Table ES – 8, pp. ES 57 – 146; Ch. 31, Table 31  
15 – 1, pp. 31 – 9 – 15.) Because the EIR identified significant, unavoidable adverse environmental  
16 impacts, DWR pursuant to CEQA had to adopt a Statement of Overriding Considerations attempting to  
17 justify approval of the Project. The adopted Statement admitted that “43 impacts may not be or cannot  
18 feasibly be mitigated to less than significant, and are determined to be significant and unavoidable.”  
19 (Statement of Overriding Considerations, p. 106, July 21, 2017.) When a project would have significant  
20 adverse environmental effects, agencies are “required to consider project alternatives that might  
21 eliminate or reduce the project’s significant adverse environmental effects.” (*Friends of the Eel River v.*  
22 *Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 873.)

23           66.     Pursuant to CEQA, and state policy including the Delta Reform Act provisions set forth  
24 in the General Allegations and the First Cause of Action above, DWR had to develop, consider, and  
25 analyze a reasonable range of alternatives including through-Delta alternatives that did not require  
26 construction of a new conveyance system and that would increase freshwater flows through the Delta  
27 by reducing exports.

28           67.     DWR failed to proceed in the manner required by law because it did not develop,

1 consider, and analyze such through-Delta alternatives and alternatives increasing freshwater flows  
2 through the Delta by reducing exports in the Final EIR. DWR also failed to proceed in the manner  
3 required by CEQA because it did not develop, consider, and analyze such alternatives in a Draft or  
4 Supplemental Draft EIR and circulate such Draft for decision-maker and public review and comment.  
5 Instead, the action alternatives in the Final EIR are simply different new Delta conveyance facilities  
6 ranging in “conveyance capacities from 3000 cfs to 15,000 cfs.” (Final EIR/EIS, Vol. I, Chapter 3,  
7 Alternatives, p. 3-2.) “The 18 action alternatives analyzed in the EIR/EIS differ in the location, design,  
8 and operation of conveyance facilities and improvements.” (CEQA findings of Fact, p. 52, July 21,  
9 2017.) Likewise, the action alternatives set forth in the Draft EIR were simply different new Delta  
10 conveyance facilities ranging in conveyance capacities from 3000 to 15,000 cfs. (Draft EIR/EIS, ES p.  
11 26). All of the so-called “alternatives” were simply the same diversion project dressed up in different  
12 outfits; peas out of the same pod.

13         68. An obvious, foundational, and feasible alternative to the Project would be to combine  
14 the existing through-Delta conveyance with reduced Delta exports, especially in times of low water  
15 supply and drought. Such an alternative would maintain the environmental benefits provided by  
16 freshwater flows in the Delta while reducing reliance on the Delta for satisfying California’s future  
17 water supply needs. Such an alternative would comply with the policy of the State of California  
18 established by the Delta Reform Act. (Water Code § 85021.) An example of such an alternative is the  
19 Environmental Water Caucus alternative, *A Sustainable Water Plan for California* referenced above,  
20 which has been presented several times in substantially similar forms to DWR since May of 2012  
21 through January of 2017.

22         69. The EIR’s formulation of Project purposes and objectives improperly constrains and  
23 narrows consideration of feasible alternatives.

24         70. The EIR fails to disclose the readily available alternatives that would meet the basic  
25 Project objectives.

26         71. DWR failed to adopt an alternative that is not itself infeasible because it requires a  
27 public subsidy prohibited by the Delta Reform Act and would adversely modify designated critical  
28 habitat prohibited by the Endangered Species Act.

1           72.     DWR’s failure to develop, consider, analyze, and circulate for decision-maker and  
2 public review and comment any such alternatives violates CEQA’s alternatives analysis requirements.  
3 As set forth above, Petitioners and others (including the National Academy of Sciences), have  
4 repeatedly requested that DWR develop, consider, analyze, and circulate for public review and  
5 comment a reasonable range of alternatives including alternatives that would maintain through-Delta  
6 conveyance, not require new conveyance facilities, and begin to increase freshwater flows through the  
7 impaired Delta by reducing exports. The persistent refusal of DWR to develop, consider, analyze, and  
8 circulate for decision-maker and public review and comment any such alternatives violates CEQA’s  
9 alternatives analysis requirements.

10           73.     DWR must be required to vacate its Project approval and EIR certification and prepare  
11 and circulate for public review and comment a new draft EIR including the required range of  
12 reasonable alternatives, including a reasonable range of alternatives maintaining through-Delta  
13 conveyance and increasing freshwater flows through the Delta by reducing exports. Such alternatives  
14 must also identify and discuss the environmental and water supply trade-offs being considered.

15                   **Inadequate Analysis of the “No Project” Alternative**

16           74.     Pursuant to CEQA, “[t]he purpose of describing and analyzing a no project alternative is  
17 to allow decision makers to compare the impacts of approving the proposed project with the impacts of  
18 not approving the proposed project.” (15126.6(e)(1)) The description offered by DWR is inadequate, as  
19 it does not provide sufficient information to allow decision makers to make such comparison. DWR has  
20 also not provided adequate information to give decision makers a full understanding of the existing  
21 conditions.

22                   **Inadequate Project Description**

23           75.     Pursuant to CEQA, “[a]n accurate, stable and finite project description is the *sine qua*  
24 *non* [absolutely indispensable requirement] of an informative and legally sufficient EIR. However, a  
25 curtailed, and enigmatic or unstable project description draws a red herring across the path of public  
26 input. Only through an accurate view of the project may the public and interested parties and public  
27 agencies balance the proposed project’s benefits against its environmental cost, consider appropriate  
28 mitigation measures, assess the advantages of terminating the proposal and properly weigh other

alternatives.” (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654 [internal citations omitted].) The description of a project must contain the “precise location and boundaries of the proposed project” on a detailed map, as well as a “general description of the project's technical, economic, and environmental characteristics.” (CEQA Guidelines § 15124.)

76. The EIR fails to provide the accurate, stable and finite project description required by CEQA. DWR, in the EIR and in public statements made throughout the review process, has repeatedly stated that all costs for the Project will be paid by the water exporters (which is consistent with the requirements of the Delta Reform Act). But in private, the State’s secret *Economic Analysis* referred to above, and now the recently filed Validation action referred to above, reveals that a public subsidy of billions of dollars is required for all or part of the Project. CEQA requires “governmental agencies at all levels to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment.” (Public Resources Code § 21001(g).) DWR failed to satisfy this requirement by failing to adequately disclose the need for a public subsidy for the project.

77. Similarly, the EIR states one thing about water yields and corresponding impacts on Delta water quantity and water quality, while secret documents reveal financial feasibility assumptions of far higher water yields. DWR’s failure to adequately disclose information regarding water yields and impacts on Delta water quantity and water quality violated the requirement to adequately consider economic and technical factors, long-term benefits and costs, and short-term benefits and costs in considering alternatives to the Project.

78. CEQA requires that “[a]ll phases of the project must be considered when evaluating its impact on the environment: planning, acquisition, development, and operation.” (CEQA Guidelines § 15126.) The EIR improperly confines its analysis to the construction of the tunnels, and fails to adequately describe the operation of the Project.

79. The EIR improperly describes the purpose of the Project as being the construction of the new intakes and tunnels. But the purpose of the Project is to establish and operate a new taking or diversion of substantial freshwater flows from the Sacramento River upstream from the Delta for export. The improperly limited project description confines the EIR’s analysis to the construction phase

1 of the Project, while failing to adequately analyze the long-term operation of the Project, and also  
2 results in an improperly constrained alternatives analysis.

3 80. There is no controlling operations plan for the Project. The Final Biological Opinions for  
4 the Project were issued pursuant to the Endangered Species Act by the National Marine Fisheries  
5 Service and U.S. Fish and Wildlife Service on June 26, 2017. The Biological Opinions purport to be  
6 project level Opinions on construction, but are only “programmatic” Biological Opinions on operations.  
7 According to the Biological Opinions, a detailed operations plan will be developed by DWR and  
8 Reclamation prior to the new facilities becoming operational. (USWFS Biological Opinion, pp. 12 –  
9 13; NMFS Biological Opinion, pp. 16-17.) According to the EIR, “Alternative 4A starting operations  
10 will be determined through the continued coordination process as outlined in Section 7 [of the  
11 Endangered Species Act] consultation process and 2081(b) permit prior to the start of construction.”  
12 (EIR/EIS, Chapter 3, p. 3 – 44.)

13 81. The Project is a public project. Pursuant to CEQA, an agency “shall not undertake  
14 actions concerning the proposed public project that would have a significant adverse effect or limit the  
15 choice of alternatives or mitigation measures, before completion of CEQA compliance.” (CEQA  
16 Guideline § 15004(b)(2).) An agency shall not “[o]therwise take any action which gives impetus to a  
17 planned or foreseeable project in a manner that forecloses alternatives or mitigation measures that  
18 would ordinarily be part of CEQA review of that public project.” (CEQA Guidelines §  
19 15004(b)(2)(B).)

20 82. Construction of the Project, which would take many years and cost many billions of  
21 dollars, would have significant adverse environmental effects and would foreclose meaningful  
22 consideration of alternatives to the intakes and tunnels ranging from no tunnels and reduced exports to  
23 fewer and/or smaller tunnels.

24 83. The absence of the required accurate, stable, and finite project description results in the  
25 absence of the required presentation of a range of reasonable alternatives alleged above. The absence of  
26 accuracy and finite detailing of quantities and timing of water diverted and disclosure of the expected  
27 public subsidy for the Project misled the public during its opportunity to comment on the proposed  
28 Project.



1           84.     The EIR fails to provide an “accurate, stable, and finite” description of the Project by  
2 improperly excluding requirements of existing state and federal law, and hindering a real review of  
3 what would be possible if existing law is followed. The EIR misleads the public into believing that  
4 there was some uncertainty about whether conveyance projects could take additional water from the  
5 Bay/Delta. By withdrawing and redesigning the BDCP and the NCCP, and moving forward with an  
6 altered project containing the same infrastructure project, and requiring the public to digest tens of  
7 thousands of pages of draft environmental reviews, DWR made it impossible to follow the details of  
8 this Project. By failing to provide the required accurate, stable, and finite project description, DWR  
9 failed to proceed in the manner required by CEQA.

10           85.     DWR must be required to vacate its Project approval and EIR certification and prepare  
11 and circulate for public review and comment a new EIR including the required accurate, stable and  
12 finite Project description including a detailed operations plan, assessment of the environmental impacts  
13 resulting from operations, and disclosure of how much the Project would really cost and whether the  
14 Project will be subsidized by the public.

15                   **Failure to Adequately Analyze Long-Term Water Operations and Supplies**

16           86.     Under CEQA, future water sources “and the impacts of exploiting those sources are not  
17 the type of information that can be deferred for future analysis.” (*Vineyard Area Citizens*, 40 Cal.4th at  
18 p. 431.) “An EIR that neglects to explain the likely sources of water and analyze their impacts, but  
19 leaves long-term water supply considerations to later stages of the project, does not serve the purpose  
20 of sounding an environmental alarm bell before the project has taken on overwhelming bureaucratic  
21 and financial momentum.” (*Id.*, at p. 441.)

22           87.     The absence of a detailed operations plan including quantification and timing of  
23 freshwater flow diversions during operations of the tunnels is an unlawful omission and unlawfully  
24 defers analysis of this critical long-term water supply information.

25           88.     The EIR fails to include an adequate discussion and analysis of California’s over-  
26 appropriated water rights system, the fact that Delta exports are legally limited to water surplus to both  
27 the needs of the Delta and upstream areas of origin, and the implications of impending climate change  
28 on future water deliveries for the Project. For example, reduced runoff caused by climate change would

draw the ecologically critical low salinity zone eastward, necessitating corresponding increases in Delta outflow to protect Delta and longfin smelt, endangered salmon, and important agricultural land with water rights superior to DWR. But increased outflow to protect the Delta estuary would decrease south-of-Delta exports, worsening the ratio by which Project costs exceed Project benefits.

### **Unlawful Piecemealing**

89. CEQA prohibits the piecemealing or segmentation of environmental analysis. A lead agency must not piecemeal the analysis of several smaller projects that are part of a larger project, in order to ensure “that environmental considerations not become submerged by chopping a large project into many little ones, each with a potential impact on the environment, which cumulatively may have disastrous consequences.” (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592.)

90. The deferral of determination of the operations plan for the Project and project-level analysis of the resulting environmental impacts of operations constitutes unlawful piecemealing of the environmental analysis of Project construction from environmental analysis of future Project operations.

91. The EIR fails to disclose the Project’s reliance on approximately 1.3 million acre-feet (“MAF”; an acre-foot of water is equivalent to 325,851 gallons) of water purchases that will be required to make up flows removed from the Sacramento River. The Project’s failure to disclose related water transfers, including groundwater substitution transfers, that are a necessary component of the Project amount to unlawful segmentation and piecemealing. Water transfers are expected to increase and are an integral part of the Project and groundwater substitution transfers are a significant piece of water transfer practices, plans, and programs either directly or indirectly through reservoir reoperation. The failure to disclose the amount of water that could be transferred, the source of the water, and the impacts from transferring water from the Sacramento Valley violates CEQA. In addition, the EIR does not reveal that the current Project is part of multi-decade planning and implementation process to develop groundwater in the Sacramento Valley, to develop a “conjunctive” system for the Sacramento Valley, and to integrate Sacramento Valley groundwater into the state’s water supply.

### **Failure to Adequately Analyze the Project’s Cumulative Impacts**

1           92.     An EIR must discuss cumulative impacts, or the collectively significant changes in the  
2 environment resulting from the incremental impacts of the project “when added to other closely related  
3 past, present, and reasonably foreseeable probable future projects.” (Guidelines, §§ 15355(b), 15130(a)  
4 (1).) An agency must use standards of practicality and reasonableness as well as its best efforts to fully  
5 disclose cumulative impacts of a project. (Guidelines, §§ 15130(b), 15144, 15151.)

6           93.     The EIR fails to adequately consider the Project’s cumulative effects by focusing solely  
7 on the Project while ignoring the Project’s relationship to the long-term operations of the Central  
8 Valley Project and State Water Project facilities, including operation of the upstream Central Valley  
9 Project and State Water Project reservoirs. In the alternative, this constitutes unlawful piecemealing.

10          94.     Planned long-term operations of the Central Valley Project and State Water Project  
11 system determine whether the Water Tunnels might arguably make any sense for water supply  
12 purposes. In turn, whether or not the new conveyance proposed by the Project is approved will make a  
13 major difference in the actual long-term operations of the Central Valley Project and State Water  
14 Project system. Despite this extremely close relationship, separate environmental review processes for  
15 the Project and the long-term operation of the Central Valley Project and State Water Project were  
16 conducted. The EIR fails to adequately consider the environmental review conducted for the  
17 Coordinated Long-Term Operation of the Central Valley Project and State Water Project.

18          95.     The EIR admits the complete interconnection of the Project and the long-term operation  
19 of the Central Valley Project and State Water Project, but fails to adequately analyze the cumulative  
20 impacts of these projects as a whole. As the EPA commented, “Upstream/Downstream Impacts: The  
21 Federal and State water management systems in the Delta are highly interconnected, both functionally  
22 and physically. The Draft EIS does not address how changes in the Delta can affect resources in  
23 downstream waters, such as San Francisco Bay, and *require changes in upstream operations, which*  
24 *may result in indirect environmental impacts that must also be evaluated*. We recommend that the  
25 Supplemental Draft EIS include an analysis of upstream and downstream impacts.” (EPA comments on  
26 Draft EIR, p. 3 (emphasis added).

27          96.     The EIR fails to properly analyze cumulative impacts in that it provides an unduly  
28 limited cumulative projects list, fails to include all the elements of Governor Brown’s California Water

1 Plan, and fails to include continuing SWRCB proceedings as a cumulative project. It also fails to  
2 sufficiently analyze cumulative impacts on Delta, upstream and downstream water and biological  
3 resources, and fails to properly analyze cumulative impacts regarding changing storm patterns, sea level  
4 rise, and other impacts of climate change.

5 97. The EIR systematically failed to disclose even the most basic information about the new  
6 upstream facilities (Shasta Dam enlargement, a new Temperance Flat Dam and Reservoir on the San  
7 Joaquin River, and the proposed Sites Reservoir adjacent to and dependent upon the existing  
8 Sacramento River water supply) proposed to be constructed in the foreseeable future that will have  
9 potentially significant cumulative environmental effects in combination with the Project.

10 **Failure to Adequately Analyze the Project's Significant Impacts**

11 98. The EIR fails to adequately disclose and discuss significant past, present, and future  
12 groundwater and streamflow depletion throughout the Bay/Delta watershed. Streamflow depletion is  
13 not mentioned at all in the Final EIR and it is mentioned sparingly in the Draft EIR. While the EIR  
14 acknowledges that “[a]ccounting for the impact of the transfer on streamflow is essential to determining  
15 the amount of real water available for transfer and to avoid injury to downstream water users,” and  
16 admits that “[t]he amount and timing of the impacts ... can be estimated through the use of  
17 mathematical models,” the EIR does not reveal any of these models or calculations and fails to conduct  
18 the required analysis.

19 99. The EIR fails to adequately describe sources of additional spring outflow, a necessary  
20 component for analyzing the environmental effects of the Project and for determining what effects  
21 implementing the Project would have on non-participating Central Valley Project and State Water  
22 Project contractors and other Sacramento Valley water users. The EIR fails to provide information  
23 regarding willing sellers, including their identity, location, timing, and ability to provide water,  
24 information that is essential for adequately assessing the environmental effects of providing additional  
25 spring outflow.

26 100. The EIR fails to adequately analyze the Project's impacts on upstream reservoir  
27 operations, and in turn fails to adequately analyze the impacts of the upstream reservoir operations on  
28 the Project and on other downstream users and the greater environment. The EIR's claims that reservoir

operations are “conservative” and will not change as a result of the Project is without support. The EIR does not describe, and the Project does not provide for, any minimum carryover storage requirements for any of the major State Water Project and Central Valley Project reservoirs. The EIR does not describe any enforceable or binding mitigation requirements regarding reservoir levels. The result is that real world operators will have significant discretion to draw down reservoirs lower than the levels shown in modeling results. The State Water Project and Central Valley Project will thus be under tremendous pressure to increase export of reservoir water, particularly in wetter water years. Increased export of water stored in State Water Project and Central Valley Project reservoirs would exacerbate storage conditions in those reservoirs in subsequent dry water years, particularly when subsequent dry water years become part of dry year sequences. Increased exports of stored water in wetter water years will increase the risk that during dry year sequences, storage in reservoirs will be insufficient to meet in-Basin uses.

101. The EIR uses flawed modeling analysis in describing and analyzing upstream reservoirs. The EIR describes upstream operations for all modeled alternatives as “[historical] with modifications for operations upstream of rim reservoirs and with changed climate at Year 2030.” The EIR shows that reservoir assumptions are unchanged from the No Action Alternative, which is the same as the baseline adjusted for climate change. There is no substantial discussion of model uncertainty in the EIR. Beyond a rudimentary sensitivity analysis of how the results of computational models used in the EIR respond to changes in key parameters, the topic of model uncertainty is barely addressed. A model for a natural system needs a formal effort to quantify uncertainty, so that the various benefits and costs can be put into perspective.

102. The EIR fails to assess the seismic risks to the Project, deferring it to the design and construction phases of the project.

103. The EIR fails to adequately analyze the potential for subsidence effects during both the construction and operation of the project. The EIR fails to disclose the fundamental scientific assumptions that form the foundation of its assertions regarding subsidence, preventing the public and decisionmakers from evaluating the accuracy of the assertions. The EIR also fails to apply validation measures when analyzing for subsurface effects on the Project.

1           104.    The EIR both ignores and fails to adequately analyze the real trend, extent and  
2 magnitude of continuing declines in pelagic and anadromous fisheries. Since 1967, the California  
3 Department of Fish and Wildlife’s Fall Midwater Trawl abundance indices for striped bass, Delta  
4 smelt, longfin smelt, American shad, splittail and threadfin shad have declined by 99.7, 97.8, 99.9,  
5 91.9, 98.5 and 97.8 percent, respectively. Every single survey of Delta smelt in late 2014 through mid-  
6 2015 identified new historic lows in species abundance. The U.S. Fish and Wildlife Service’s  
7 Anadromous Fisheries Restoration Program documents that, since 1967, in-river natural production of  
8 Sacramento winter-run Chinook salmon and spring-run Chinook salmon have declined by 98.2 and  
9 99.3 percent, respectively, and are only at 5.5 and 1.2 percent, respectively, of doubling levels  
10 mandated by the Central Valley Project Improvement Act, California Water Code, and California Fish  
11 & Game Code. In addition, population year classes of naturally reproducing Sacramento River winter-  
12 run, spring-run and fall-run Chinook salmon were virtually destroyed by lethal temperatures in 2014  
13 and 2015. Failure to accurately disclose and compare this current information and to design alternatives  
14 and mitigations for the continuing species decline violates CEQA.

15           105.    The EIR’s conclusion that new fish screens in the North Delta will protect fish and  
16 wildlife habitat in the Delta is unsupported by fact and scientific analysis. The EIR claims that fish  
17 screens on the new diversion will be protective of aquatic life but fails to acknowledge and discuss that  
18 the proposed screens are highly experimental and many of the studies required to determine if the  
19 screens will actually work are unlawfully postponed for later analysis. As the Delta Independent  
20 Science Board (“DISB”) observed, these “measures are assumed to function as planned, with no  
21 evidence to support the assumptions.” (DISB review of the Revised Draft EIR [“RDEIR”], September  
22 30, 2015, page 17.) The EIR also fails to properly account for the fact that the proposed screens will be  
23 located in close proximity to critical spawning and rearing habitat areas and will not prevent  
24 entrainment of eggs or larval Delta smelt, longfin smelt, Sacramento splittail and smaller lamprey  
25 ammocetes that will be present during periods of diversion.

26           106.    The EIR fails to disclose and analyze the impacts of the continued use of the existing  
27 South Delta project pumps since they will be used in low water years to provide the largest amount of  
28 water diverted from the Bay Delta under the new project operational plans.

1           107. The EIR contains simple admissions of obvious and significant environmental impacts  
2 without accompanying exploration and analysis of those significant impacts. The EIR admits:  
3 “Operations of new water supply facilities whether ... tunnels, ... water intakes or diversions may  
4 create long-term changes in local mixtures of source waters within water bodies, ... Operation of  
5 facilities within the rivers and streams upstream of the Delta or in the Delta could result in changes in  
6 salinity in the Delta by reducing Delta freshwater inflows during some periods of the year.” The EIR  
7 admits that the Project would have significant and unavoidable environmental impacts including  
8 violation of water quality standards or substantial degrading of water quality and substantial adverse  
9 effects on special status species and on fish or wildlife species and habitat and movement. This cursory  
10 analysis does not, however, describe what the changes and their environmental impacts might be and/or  
11 the full consequences of those impacts.

12           108. The EIR fails to adequately disclose and analyze the effects of Project construction on  
13 groundwater movement and dependent surface vegetation.

14           109. The EIR fails to adequately disclose or quantify the amounts of water that would be  
15 taken by the Project.

16           110. The EIR fails to adequately disclose the effects of construction traffic on wildlife, plants,  
17 and natural communities, including the extensive traffic that would occur within and in close proximity  
18 to Stone Lakes National Wildlife Refuge.

19           111. The EIR fails to adequately disclose or evaluate the environmental impacts of supplying  
20 the quantities of water for export by Project operations.

21           112. The EIR fails to disclose or address that the only benefit cost analysis of the Project  
22 demonstrated the costs would exceed benefits by several times and consequently, the Project would not  
23 make economic sense.

24           113. The EIR fails to adequately disclose and analyze Project construction and operational  
25 impacts on recreation.

26           114. The EIR fails to adequately disclose and analyze the Project’s noise impacts on sensitive  
27 wildlife receptors associated with Project construction and operation.

28           115. The EIR fails to adequately disclose and analyze Project construction and operational

1 impacts on aesthetics and visual resources.

2 116. The EIR fails to adequately disclose and analyze Project construction and operational  
3 impacts on public health.

4 117. The EIR adopts thresholds of significance to analyze environmental impacts that are not  
5 supported by substantial evidence.

6 118. The EIR fails to adequately disclose and analyze environmental justice impacts of  
7 Project construction and operations.

8 119. The EIR fails to disclose and evaluate the Project's inconsistencies with the Delta  
9 Reform Act.

10 **Failure to Adequately Mitigate Significant Impacts**

11 120. The EIR fails to provide realistic mitigation plans for the very real risk that liquefaction  
12 could destroy the Project once it is built (or even damage components of the system during  
13 construction). Mitigation schemes that might prove virtually impossible to implement in practice (e.g.,  
14 removing liquefiable soil deposits and replacing them with more stable materials) for a project of this  
15 scale are mentioned, but accurate estimates of costs required to mitigate this particular seismic hazard  
16 are absent.

17 121. The Project's Findings label certain environmental impacts as significant without  
18 adequately analyzing those significant impacts. The Findings concede numerous substantial adverse  
19 effects likely to be caused by the construction and "operation of reliable water supply" projects that  
20 cannot be avoided and that cannot be mitigated to a "less-than-significant level." These admitted  
21 substantial adverse effects include: effects on "special status species", "sensitive natural communities,  
22 including wetlands and riparian habitat", "substantial degradation of visual qualities", "scenic vistas  
23 and scenic resources", and exposure of "sensitive receptors to substantial pollutant concentrations."

24 122. New state-of-the-art fish screens for the South Delta were not proposed or analyzed even  
25 though they were required mitigation measures in the previous CalFed program. Evaluation of the  
26 success of any new fish screens was to occur before further consideration of a peripheral canal. New  
27 screens in the South Delta should have been considered as potential mitigation for the Project in the  
28 EIR and the failure to do so violates CEQA.



123. Mitigation measures proposed to reduce or avoid the Project's effects on fully protected sandhill cranes are inadequate. On the contrary, the EIR describes measures that are ineffective or improperly deferred.

124. Mitigation measures proposed to reduce or avoid the Project's effects on the giant garter snake, a state- and federally-listed threatened species, are inadequate. On the contrary, the EIR describes measures that are ineffective or improperly deferred.

125. Mitigation measures proposed to reduce the air quality, traffic, noise, and other environmental impacts associated with the Project's construction and operations are inadequate.

126. Numerous measures are described in the EIR that would purportedly reduce or avoid the Project's environmental effects as "Environmental Commitments" or "Avoidance and Minimization Measures." These measures are not adopted as binding and enforceable mitigation measures under CEQA and therefore cannot be relied on to reduce or avoid the Project's environmental effects.

#### **Inconsistency with California's Public Trust Doctrine and Constitutional Requirements**

127. The EIR fails to properly analyze how the Project is consistent with either the Public Trust Doctrine or Article 10, Section 2 (the reasonable use, and unreasonable method of diversion provisions in the California Constitution). CEQA requires that DWR determine whether the Project is lawful before approving the tunnels and the new diversions that will further reduce presently inadequate flows in the rivers and decrease inflow into both the Delta and San Francisco Bay. This failure is a violation of Water Code 85086 which requires the State Water Board to provide the Delta Stewardship Council with recommendations as to the amount of flow necessary to recover the Bay Delta estuary before approving "any permit in connection with a final BDCP."

#### **Inadequate and Improper Analytical Baseline**

128. The EIR's formulation of baseline environmental conditions is fundamentally flawed and deceptive because, among other flaws, it fails to provide accurate information regarding existing surface water and groundwater supply and demand. Additionally, the EIR falsely cites ongoing unsustainable and illegal Delta water exports to establish a baseline for future exports when DWR has known at least since 1960 that they could not deliver more than 3.1 MAF of water to state and federal contractors without additional water sources. (DWR Bulletin 76.) The vague and inaccurate

1 environmental baseline established in the EIR violates CEQA and makes any analysis of the Project's  
2 impacts impossible. The EIR's omission of required information in its baseline analysis violates the  
3 foundational CEQA mandate for informed decision-making. (*California Native Plant Soc. v. City of*  
4 *Santa Cruz* (2009) 177 Cal.App.4th 957, 987.)

5 129. The EIR also fails to discuss over-allocated water entitlements that create unrealistic  
6 demands for Delta water, or "paper water." In fact, the SWP only supplies approximately half of its  
7 entitlements to contract water per year. (*PCL v. DWR* (2000) 83 Cal.App.4th 892, 908.) Courts have  
8 criticized planning based on paper water, recognizing the "huge gap between what is promised and  
9 what can be delivered." (*PCL v. DWR, supra*, 83 Cal.App.4th at 903 ["'Entitlements' is a misnomer,  
10 for contractors surely cannot be entitled to water nature refuses to provide or the body politic refuses to  
11 harvest, store and deliver"].) The EIR's failure to include realistic water supply data in its  
12 environmental baseline is prejudicial because it undermines the statutory goals of an EIR to inform  
13 decision makers and the public of potentially significant adverse effects on the physical environment.  
14 The vague and cursory water supply and demand conditions as described by the EIR without adequate  
15 support by quantitative data does not provide sufficient baseline information that would allow decision-  
16 makers or the public to evaluate the significant adverse water resources and biological impacts that the  
17 tunnels and diversions will have on the environment thereby violating CEQA Guideline section  
18 15125(a).

### 19 **Inadequate Analysis of Climate Change**

20 130. Climate change impacts fit squarely within a cumulative impacts analysis. (*Ctr. for*  
21 *Biological Diversity v. Nat. Highway Traffic Safety Admin.* (9th Cir. 2008) 538 F.2d 1172, 1217.)  
22 However, the EIR and the Findings do not adequately address the Project's foreseeable cumulative  
23 impacts on the Bay Delta watershed in light of future climate change, particularly with regards to water  
24 supplies in the context of sea level rise, changes in storm patterns, and watershed run-off. The EIR fails  
25 to adequately address the project's cumulative impacts on the environment of the Bay Delta watershed  
26 in a situation that includes less river inflow and higher evaporation and transpiration rates throughout  
27 the watershed. The EIR fails to adequately disclose or analyze expected changes in hydrologic  
28 conditions and water supply forecasted for the 21st century. The cursory treatment in the EIR does not

adequately inform decision-makers or the public about these expected impacts.

131. The EIR's discussion of sea level impacts on water resources relies on different assumptions that contradict the planning for flood protection in anticipation of 55 inches of sea level rise by 2100, but sea level impacts will be experienced long before 2100.

132. The EIR's discussion and analysis of the effect of climate change in the areas of changing snowpack, increased water temperature, increased evapotranspiration, rim dam water management, flood flows, and upstream fishery habitat is inadequate. The failure of the EIR to adequately analyze potential climate change effects on Delta hydrology makes it impossible for the public and the decision-makers to evaluate the alternatives, the mitigations, and the true nature of the environmental impacts of the Project, all of which are violations of CEQA's fair disclosure requirements to afford the fullest possible protection of the environment resulting in violation of the Public Resources Code section 21001(a).

**Findings that there would Not be Significant and Unavoidable Adverse Water Supply, Water Quality and Fishery Impacts Are Not Supported by Substantial Evidence or Common Sense**

133. The EIR, and previous Drafts were supposed to be environmental full disclosure documents. Despite that, the EIR claims there would be no significant, unavoidable adverse impacts from the Delta losing all the Project-related freshwater flow on water supply, water quality (with almost no exceptions), or on fish and aquatic resources. (RDEIR/SDEIS Table ES-9, pp. ES 41-60; Appendix A, Ch. 31, Table 31-1, pp. 31-3 through 31-8; EIR Table ES-8, p. ES-57.)

134. CEQA defines "significant effect on the environment" to mean "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, *water*, minerals, flora, *fauna*, ambient noise, and objects of historic or aesthetic significance." (CEQA Guidelines § 15382.)

135. "Law is not required to abandon common sense. Here, our common sense informs us that the mitigation measures will not effectively replace the water that could be lost by the neighboring landowners." (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1116-7.) The EIR defies common sense in claiming that a project constructed for the purpose and with the capacity to take away freshwater flows from the Sacramento River approximately equal to the typical entire freshwater flow

1 of the Sacramento River at the point of diversion would not substantially and unavoidably adversely  
2 change, regardless of claimed mitigation measures, downstream water quantities, water quality,  
3 fisheries, and fish habitat including designated critical habitat for listed threatened and endangered  
4 species of fish.

5 136. DWR must be required to vacate its Project approval and EIR certification and prepare  
6 and circulate for public review and comment a new Draft EIR that accomplishes environmental full  
7 disclosure including disclosure of the substantial and unavoidable adverse impacts on Delta water  
8 quantities, water quality, fish, and fisheries resulting from operation of the Project.

9 **Failure to Adequately Disclose and Analyze Water Quality Impacts**

10 137. The EIR fails to adequately disclose and analyze the impacts to water quality and  
11 contaminant control by diverting large amounts of water in the North Delta. Water quality and quantity  
12 are flip sides of the same coin; changes in flow change assimilative capacity, residence time and the  
13 fate and transport of contaminants. Hydrologic changes modify constituent concentration and  
14 bioavailability, which in turn can adversely impact the aquatic ecosystem and other beneficial uses.  
15 Over mere decades, water project operations have deprived the Delta estuary of half its flow; turned the  
16 natural hydrograph on its head, reduced temporal and spatial variability; eliminated crucial habitat,  
17 complexity and diversity and deprived the estuary of dilution necessary to assimilate pollutant mass  
18 loading. Water from the Sacramento River is the largest source of inflow to the Delta and is  
19 significantly less polluted than water entering the Delta from the San Joaquin River. Sacramento River  
20 water drawn across the Delta to the export pumps is a major reason water quality in the Central and  
21 South Delta is better than it would otherwise be. Diversion of millions of acre-feet of better quality  
22 Sacramento River water under the Delta will increase the concentration of numerous constituents in the  
23 water remaining in the Delta. It will also increase the residence time of water in the Delta, thereby  
24 enhancing the opportunity for pollutants to interact with the environment. This effect is exacerbated in  
25 tidal environments where pollutants tend to move back and forth with the tides.

26 138. The EIR's use of tiered highly criticized comparative models to identify water quality  
27 impacts is technically flawed and legally insufficient to predict exceedances of state and federally  
28 promulgated water quality standards. Water quality criteria for aquatic life are established on a one-

hour or four-day basis not to be exceeded more than once in three years. Exceedances of human health criteria have direct adverse impacts to people. Exceedances of criteria protecting other identified beneficial uses of water will adversely impact those who rely on the beneficial use. Multiple exceedances of a pollutant within a waterway qualify the waterway for listing as an impaired waterbody and/or significantly impact issuance of NPDES and Waste Discharge permits. The RDEIR employed CalSim II, a highly complex monthly time-step model, to establish boundary condition data for DSM2, a one-dimensional hydrodynamics, water quality and particle tracking simulation model used to simulate hydrodynamics, water quality and particle tracking in the Delta. It is a highly criticized data-intensive model that runs for a limited period (only 16 years) and has never been peer-reviewed. It is technically inappropriate to use DSM2 in a predictive fashion to represent short-term (daily or weekly) constituent water quality concentration in an exceedingly complex Delta with more than 700 miles of myriad meandering small channels and constantly changing flows because DSM2 modeling output inadequately accounts for varying velocities and secondary currents, channel junctions and open waters, stratification, fluctuating channel beds, turbulent mixing, surface waves, sediment resuspension and agricultural, municipal and industrial inputs and diversions. And, as previously noted, DSM2 is dependent on flawed CalSim II output data regarding flows and boundary conditions. There are a number of sophisticated peer-reviewed water quality models that accurately track the fate and transport of pollutants that could have been but were not used in the RDEIR analyses.

139. The Screening Analysis employed by the RDEIR was inappropriate and insufficient to identify constituents that would potentially cause adverse environmental affects under the proposed Project. Through every step in the screening and evaluative process, professional judgment was used in determining whether a constituent had the potential to exceed thresholds of significance, should be carried forward for further assessment, was a ‘constituent of concern,’ whether it should be addressed qualitatively or quantitatively and whether the project could result in significant impacts to specific constituents. Of the 182 constituents that were analyzed, detailed assessments were performed on 24 and of those, 8 were assessed quantitatively (modeling, ratios) and 16 were assessed qualitatively (professional judgment). The RDEIR does not indicate whether professional judgment followed a rigorous step-by-step formal process or if a Ouija board, crystal ball or fortune-teller was involved. It

1 fails to adequately discuss the methodology, science, criteria or analysis used to add, remove or modify  
2 constituent inclusion in the screening analysis or to determine the degree of impact significance. There  
3 is no discussion of why limited data sets were relied upon or why the more extensive data sets from  
4 regulatory programs were ignored. Inadequate data limits professional judgments. There is no  
5 discussion justifying the reliance on boundary water quality conditions and the exclusion of the  
6 extensive pollutant loading that occurs in the Delta in reaching conclusions. There is no discussion  
7 regarding the use of average or median constituent concentrations or the 95th or average percentile for  
8 assessing the potential to violate one-hour or four-day criteria that should not be violated more than  
9 once in three years. There is no discussion or attempted quantification regarding the uncertainty of  
10 conclusions. Nor is there any discussion of how heavily criticized comparative models, used outside  
11 their temporal, spatial and resolution limits, may or may not be sufficient for making explicit  
12 determinations regarding the potential effects of the Project on constituents and impacts to water  
13 quality standards caused by a modified hydrology, reduced dilution and increased residence time. The  
14 EIR fails to comport with prevailing standards for technical analysis, which is why the environmental  
15 assessment is inappropriate, technically invalid, unsupported by substantial evidence, and fails to meet  
16 the fair disclosure requirements of CEQA.

17 140. The RDEIR's reliance upon outdated, truncated and inadequate data sets to screen,  
18 evaluate and predict impacts to water quality is technically indefensible and prevents any accurate  
19 assessment and disclosure of adverse project impacts. While the RDEIR acknowledges that water  
20 quality data in the Delta has been collected by a myriad of public and private organizations, it used only  
21 limited data sets that are relatively old and that ignores an enormous quantity of data collected,  
22 pursuant to stringent protocols, by other agencies, as evidenced by the extremely few samples of  
23 numerous constituents collected. A number of priority pollutants were infrequently or never sampled.  
24 Source waters entering the Delta were collected at three locations on the upstream Sacramento River,  
25 upstream San Joaquin River and Chipps-Mallard-Suisun area representing the Delta's western  
26 boundary. Interior Delta sites for source water assessment were not considered because the  
27 Environmental Consequences Impact Assessments assumed no new sources of water quality  
28 constituents, and water quality concerns were assumed to arise primarily through altered mixing of

Delta source waters. This assumption excluded vast ambient data sets collected by various agencies monitoring discharges of municipal wastewater and stormwater, agricultural return flow from irrigated agriculture, marinas and recreational boating, pesticides to control aquatic weeds and drift from aerial spray operations and dredging operations, among many others. The permitted discharge from municipal wastewater treatment plants in the Delta (excluding Sacramento) frequently exceeds the flow in the San Joaquin River entering the Delta. Failure to consider and analyze the extensive mass loading and ambient concentration of an astonishing array of contaminants within the Delta not only renders the screening analysis technically insufficient, it renders all of the subsequent assessments of water quality impacts technically invalid. Existing water quality in the Delta was evaluated using limited data sets, at only three locations: San Joaquin River at Buckley Cove, Franks Tract at Russo's Landing and Old River at Rancho del Rio. The use of only three sites to represent potential impacts to water quality in an 841 square mile Delta containing 700 miles of meandering waterways is technically indefensible and renders any assessment of impacts to water quality invalid. For example, ambient water quality data at the Stockton drinking water diversion point on the San Joaquin River was not sampled or evaluated.

141. The EIR fails to evaluate water quality impacts from a number of toxic chemicals because the arbitrarily selected data sets omitted analysis of those chemicals. Bis(2-ethylhexyl)phthalate (DEHP) is one example of a number of chemicals that are known to be highly toxic to human health and/or aquatic life and for which monitoring data exists. Yet, because these constituents were not included in the very limited data sets used in evaluating impacts for BDCP, there is no analysis of the Project's impacts for these constituents.

142. Evaluation of water quality and the Project's potential adverse impacts is flawed because the EIR fails to analyze the potential to exceed water quality standards with respect to permitting requirements pursuant to the federal Clean Water Act. The RDEIR's water quality analyses compare long-term averages instead of focusing on pollutant concentration and potential exceedances of water quality standards within applicable time frames. As previously noted, aquatic life criteria is predicated on one-hour and four-day standards not to be exceeded more than once in three years. Federal permitting requirements for municipal and industrial wastewater discharge permits require preparation of a reasonable potential analysis to determine the potential of a discharge to exceed a water quality

1 standard. This potential to exceed a water quality standard analysis must be based upon a worst-case  
2 potential; i.e., the lowest identified ambient surface water concentration in ten years. If a pollutant is  
3 found to have a reasonable potential to exceed a standard, discharge limits must be included in any  
4 issued NPDES waste discharge permit. New water quality limits may require installation of new or  
5 additional treatment equipment costing many millions or tens of millions of dollars and would represent  
6 a significant adverse impact. Beyond the array of pollutants identified as already exceeding water  
7 quality standards in the Delta, which already require waste discharge limits, are numerous constituents  
8 that are close to exceeding water quality criteria. Even a relatively small increase in residence time for  
9 pollutants to interact with the environment and/or loss of dilution resulting in a loss of assimilative  
10 capacity has the potential to result in a constituent exceeding a water quality standard that would  
11 require additional limits in waste discharge permits. The EIR found that the Project will significantly  
12 increase residence time within the Delta and the diversion of millions of acre-feet of the best quality  
13 water entering the Delta will reduce dilution. The failure of the EIR to evaluate potential impacts to  
14 waste dischargers regulated under state and federal clean water statutes violates CEQA fair disclosure  
15 requirements.

16 143. The assessment of hardness dependent metals is wrong and leads to significant errors of  
17 analysis. Copper, cadmium, lead, silver and zinc are examples of hardness dependent metals, which  
18 exhibit greater freshwater aquatic life toxicity at lower hardness. The RDEIR concludes that hardness  
19 dependent metals do not have potential to exceed water quality standards for aquatic life or drinking  
20 water. Had the RDEIR not limited itself to limited data sets and examined the more comprehensive  
21 NPDES ambient monitoring and United States Geological Survey data it would have realized that the  
22 San Joaquin and Sacramento Rivers have a reasonable potential to exceed both the acute (one hour) and  
23 chronic (four day) criteria for a number of hardness dependent metals, including copper, cadmium,  
24 lead, silver and zinc. Moreover, the RDEIR selected the average, 5th and 95th percentile hardness  
25 values rather than the required lowest observable hardness value.

26 144. Potential adverse impacts to existing mixing zones are ignored in the EIR. The Central  
27 Valley Regional Water Quality Control Board has issued waste discharge permits that allow for mixing  
28 zones for numerous constituents in ambient waters. Mixing zones are controversial and only allowed



1 following detailed analysis and modeling that defines the specific dimensions of a zone of initial  
2 dilution. Mixing zones are especially difficult in tidal areas as incoming and outgoing tides cause  
3 constituents to slosh back and forth: this tidal-action essentially re-doses the area. There must always be  
4 a zone of passage, because a mixing zone cannot legally prevent passage of aquatic life. The EIR fails  
5 to identify, discuss mixing zones or provide maps of existing mixing zones in the Delta. Altering  
6 hydrology has clear potential to impact assimilative capacity available for mixing zones. Failure to  
7 evaluate mixing zones within the Delta could have significant adverse impacts to the beneficial uses of  
8 receiving waters. Mixing zones are also issued based in part on the economic impact to wastewater  
9 dischargers to fully treat their waste-stream to meet end-of-pipe limitations and modification or  
10 elimination of a mixing zone would likely have significant economic impacts to wastewater  
11 dischargers. The EIR's failure to identify and analyze the Project's potential impacts on existing mixing  
12 zones is inconsistent with CEQA's analytical and disclosure requirements.

13       145. Even though the RDEIR acknowledges that the Delta is identified as an impaired  
14 waterbody because of numerous pollutants including unknown toxicity and, in effect, is a gigantic  
15 mixing bowl for an astonishing array of chemicals, it failed to consider the additive and synergistic  
16 impacts of multiple pollutants mixing together. If two or more constituents are present together in  
17 water, they may exert a combined adverse effect on beneficial uses of water even though none of the  
18 constituents individually exceeds a water quality standard. The Central Valley Regional Water Quality  
19 Control Board's Central Valley *Water Quality Control Plan for the Sacramento and San Joaquin River*  
20 *Basins* includes an implementation policy regarding assessment of additive and synergistic effects. The  
21 Final EIR's chapter on water quality contains a single sentence observing that aquatic life toxicity can  
22 be caused by additive and synergistic interaction of multiple constituents and the chapter on fish and  
23 wildlife contains a single sentence observing that, when various types of pyrethroid pesticides are  
24 present together, toxicity can be additive. However, there is no discussion or analysis of individual or  
25 cumulative adverse impacts resulting from the additive and/or synergistic effects of multiple pollutants  
26 interacting together from a massive hydrologic project that proposes to deprive an estuary of millions  
27 of acre-feet of its freshest inflow, thereby altering the existing flow regime, increasing residence time,  
28 reducing dilution and affecting the fate and transport of pollutants in an already highly degraded Delta.

1           146. The EIR’s assessment of pesticide impacts fails to meet minimum requirements for a  
2 disclosure document. Limited pesticide monitoring data sets were used in the RDEIR that ignored  
3 much of the pesticide monitoring data that has been acquired in recent years by the U.S. Geological  
4 Survey and municipal and agricultural coalition monitoring programs. The assessment of pesticide  
5 impacts is a largely qualitative analysis based upon best professional judgment from source water  
6 modeling. There is no information in the analysis that would justify the subjective conclusion that,  
7 “These modeled changes in source water fractions are not of sufficient magnitude to substantially alter  
8 the long-term risk of pesticide-related toxicity to aquatic life, nor adversely affect other beneficial uses  
9 of the Delta.” (RDEIR/SDEIS, p. 8-269.) Source water fingerprint modeling reveals that the  
10 distribution and mixing of Delta source water would significantly change. Modeling shows that for  
11 Scenarios H1-H4 of Alternative 4 (preferred project), relative to the Existing Conditions Alternative,  
12 the source water fraction of San Joaquin River water at Rock Slough would increase 15-22% during  
13 September through March (11-15% during drought periods). At Contra Costa PP No. 1, the fraction  
14 would increase 15-23% during September through March (11-15% during October and November of  
15 droughts). At Franks Tract, the San Joaquin fraction would increase 11-16% during October through  
16 April and February through June. At Buckley Cove, the fraction would increase 11% in July and 16%  
17 in August during droughts. The other scenarios resulted in different fractions, as did comparisons with  
18 the No Action Alternative. For example, relative to the No Action Alternative, the fraction of San  
19 Joaquin water at Buckley Cove would increase 16-17% in July (31-34% in drought conditions) and 24-  
20 25% in August (47-49% during droughts). Delta agricultural fractions are also projected to increase up  
21 to 8%, depending on location. (RDEIR/SDEIS, p. 8-269, 270.) The Delta Independent Science Board  
22 in their review of the Draft EIR observed, “Despite the acknowledged difficulty in predicting water  
23 quality impacts of the project, caused by lack of observational field data, as far as we could see there  
24 was no call for enhanced monitoring of pesticides in the Delta. As stated above, reliance on model  
25 outputs without their validation by comparison to observational data is a flawed approach, especially  
26 for assessing the effects of water quality constituents with high levels of uncertainty surrounding them,  
27 such as pesticides.” (Delta Independent Science Board, Review of the Draft BDCP EIR/EIS, 15 May  
28 2014, p. B-24.) Given the increased concentration of pesticides in San Joaquin River water coupled

1 with the loss of Sacramento River dilution flows, the San Joaquin River will comprise a greater  
2 percentage of volume in eastern and southern Delta channels and the increase in residence time ensures  
3 that the suite of pesticides and other pollutants flowing down the river will have a longer period in  
4 which to mix with local municipal, industrial and agricultural inputs of pesticides, including aquatic  
5 herbicides, and other pollutants and to interact with the environment. Considering that virtually all of  
6 the pesticides (excepting pyrethroids) evaluated are already included on the state's 303(d) list and  
7 identified as already exceeding water quality standards and impairing beneficial uses, any increased  
8 concentration would be an exceedance of a water quality standards and a significant adverse impact.  
9 There is no credible discussion in the water quality chapter of the EIR of the suite of pesticides actually  
10 present in Delta waters. Applied pesticides are constantly changing because of cropping patterns and  
11 the introduction of new, often less expensive, and frequently more toxic pesticides, as older and more  
12 regulated pesticides are phased out. Many of the newer pesticides are not monitored for or have no  
13 promulgated water quality standard, which is why adequate dilution and low residence time is of  
14 critical importance. Nor is there discussion of bioaccumulation or the additive and synergistic effects of  
15 the universe of pesticides found in Delta waters. For example, diazinon and chlorpyrifos are additive in  
16 toxicity, as are diazinon and esfenvalerate. Carbamate and organophosphate insecticides interact  
17 synergistically. There is an expansive scientific literature on the toxicity and sublethal effects of  
18 pesticide mixtures. While there is a very brief acknowledgment of existing regulatory programs  
19 regarding pesticides, there is no discussion of the effectiveness of these programs or how they will  
20 become effective in controlling pesticides and aquatic toxicity in the future. The EIR's failure to  
21 identify and analyze the Project's impacts of pesticides is inconsistent with CEQA's analytical and  
22 disclosure requirements.

23       147. While the RDEIR identifies state and federal antidegradation policies and requirements,  
24 there is no discreet, defensible analysis of the Project's consistency with these antidegradation policies  
25 and requirements, as required by CEQA. Section 101(a) of the Clean Water Act, the basis for the  
26 antidegradation policy, states that the objective of the Act is to "restore and maintain the chemical,  
27 biological and physical integrity of the nation's waters." Section 303(d)(4) of the Clean Water Act  
28 carries this further, referring explicitly to the need for states to satisfy the antidegradation regulations

1 before taking action to lower water quality. These regulations (40 CFR § 131.12(a)) describe the  
2 federal antidegradation policy and dictate that states must adopt both a policy at least as stringent as the  
3 federal policy as well as implementing procedures. The Clean Water Act requires the full protection of  
4 identified beneficial uses. The federal antidegradation policy states “[t]he antidegradation policy and  
5 implementation methods shall, at a minimum, be consistent with the following: (1) Existing instream  
6 water uses and the level of water quality necessary to protect the existing uses shall be maintained and  
7 protected.” (40 CFR § 131.12.) U.S. EPA Region 9’s guidance on implementing antidegradation policy  
8 states, “[a]ll actions that could lower water quality in Tier II waters require a determination that existing  
9 uses will be fully maintained and protected.” (EPA, Region 9, Guidance on Implementing the  
10 Antidegradation Provisions of 40 CFR 131.12, page 7.) The Delta is classified as a Tier II, “high  
11 quality,” waterbody by U.S. EPA and the State Water Resource Control Board. California’s  
12 antidegradation policy is composed of both the federal antidegradation policy and the State Board’s  
13 Resolution 68-16 (State Water Resources Control Board, Water Quality Order 86-17, p. 20;  
14 Memorandum from Chief Counsel William Attwater, SWRCB to Regional Board Executive Officers,  
15 “Federal Antidegradation Policy,” pp. 2, 18 [Oct. 7, 1987] [“State Antidegradation Guidance”].)  
16 Implementation of the state’s antidegradation policy is guided by the State Antidegradation Guidance,  
17 SWRCB Administrative Procedures Update 90-004, 2 July 1990 (“APU 90-004”) and USEPA Region  
18 IX, “Guidance on Implementing the Antidegradation Provisions of 40 CFR 131.12” (3 June 1987,  
19 Region IX Guidance), as well as Water Quality Order 86-17. The state must apply the antidegradation  
20 policy whenever it takes an action that will lower water quality. (State Antidegradation Guidance, pp.  
21 3, 5, 18, and Region IX Guidance, p. 1.) Application of the policy does not depend on whether the  
22 action will actually impair beneficial uses. (State Antidegradation Guidance, p. 6.) As noted above,  
23 federal antidegradation policy requires full protection of beneficial uses. California’s antidegradation  
24 policy (Resolution 68-16) requires, among other things, that existing high quality water will be  
25 maintained until it has been demonstrated that any change will be with the maximum benefit to the  
26 people of the State; that the change will not unreasonably affect present and anticipated beneficial uses;  
27 and that the change will not result in water quality less than prescribed in the policies. The Project, as  
28 defined by the alternatives described in the EIR, will result in reduced flows and lower water quality in

1 the Delta for numerous constituents. The RDEIR acknowledges that “[w]ithin the south, west, and  
2 interior Delta, a decrease in the percentage of Sacramento River sourced water and a concurrent  
3 increase in San Joaquin River-sourced water can increase the concentrations of numerous constituents  
4 (e.g., boron, bromide, chloride, electrical conductivity, nitrate, organic carbon, some pesticides,  
5 selenium). This source water replacement is caused by decreased exports of San Joaquin River water  
6 (due to increased Sacramento River water exports), or effects of climate change on timing of flows in  
7 the rivers. Changes in channel flows also can affect water residence time and many related physical,  
8 chemical, and biological variables.” (RDEIR/SDEIS, Chapter 8, Water Quality, page 8-204.) It also  
9 observes that “... sea water intrusion as a result of sea level rise or decreased Delta outflow can  
10 increase the concentration of salts (bromide, chloride) and levels of electrical conductivity.” (*Id.*) A  
11 number of the constituents identified as increasing in concentration are included as impairing pollutants  
12 on the state’s 303(d) list of impaired waterways. Consequently, there is no remaining assimilative  
13 capacity and any increase in constituent concentration will exceed a water quality standard. These  
14 include electrical conductivity, selenium and various pesticides. Other constituents are likely to exceed  
15 water quality standards and impair beneficial uses if concentrations increase. Numerous constituents do  
16 not have promulgated water quality standards but have the potential to impair beneficial uses if  
17 constituent concentrations increase or if increased concentrations trigger additive or synergistic effects  
18 with other constituents. The Project will require a number of waste discharge permits from the State or  
19 Regional Water Quality Control Boards for construction and operation. As the Project will require a  
20 Clean Water Act section 404 permit from the U.S Army Corps of Engineers, it will also require a Clean  
21 Water Act section 401 Water Quality Certification, which is necessary for any “federal license or  
22 permit to conduct and activity...[that] may result in any discharge into navigable waters.” (33 U.S.C. §  
23 1341(a)(1).) In order to obtain a 401 certification, a project must meet the water quality requirements of  
24 Clean Water Act section 303 (33 U.S.C. § 1341(d).) The state cannot issue a section 401 Certification if  
25 there is no reasonable assurance that the Project will meet water quality standards. As confirmed by the  
26 Supreme Court, section 401 Certification considers the impacts of the entire activity and not simply the  
27 impacts of a particular discharge that triggers section 401. (*PUD No. 1 of Jefferson County v.*  
28 *Washington Department of Ecology*, 511 U.S. 700 (1994).) Water quantity is related to water quality

1 because a sufficient lowering of the water quantity in a waterbody can destroy its designated uses,  
2 which the Clean Water Act is designed to prevent. Since water quality standards consist of both the  
3 water quality criteria and the designated uses of the navigable waters involved, an antidegradation  
4 analysis is required to ensure that the “existing instream water uses and the level of water quality  
5 necessary to protect the existing uses shall be maintained and protected.” (40 CFR § 131.12.) An  
6 antidegradation analysis must analyze whether: such degradation is consistent with the maximum  
7 benefit to the people of the state; the activity is necessary to accommodate important economic or  
8 social development in the area; the highest statutory and regulatory requirements and best management  
9 practices for pollution control are achieved; and resulting water quality is adequate to protect and  
10 maintain existing beneficial uses. There is no such analysis in the EIR. There is no analysis of water  
11 quality in the vicinity of the myriad diversion points within the Delta and how the resulting quality of  
12 water will fully protect beneficial uses, with the exception of several municipal diversion points in the  
13 western Delta. There is no comprehensive analysis of why degradation of water quality is consistent  
14 with the maximum benefit to the people or evidence showing why diminished water quality is  
15 necessary to accommodate important economic or social development in the area. Nor is there any  
16 analysis of whether the highest statutory and regulatory requirements and best management practices  
17 for pollution control have been achieved and whether such requirements are likely to be successful in  
18 the future or that resulting water quality is adequate to protect and maintain beneficial uses, especially  
19 in the face of collapsing fishery populations. The EIR’s failure to conduct the required antidegradation  
20 analysis is inconsistent with CEQA’s analytical and disclosure requirements.

21 148. The EIR’s analysis of electrical conductivity, a measure of salinity, does not comport  
22 with CEQA’s requirements. The most recent State Water Resources Control Board’s Clean Water Act  
23 Section 303(d) List/305(b) Report identifies the southern, northwestern, western and Delta export area  
24 as impaired and incapable of supporting identified beneficial uses because of exceedances of water  
25 quality standards for electrical conductivity (“EC”). By definition any project that would increase EC  
26 concentration would violate water quality standards for EC. Between 2007 and 2015, EC standards in  
27 the southern Delta were exceeded 1,186 days and EC standards at Collinsville, Emmaton and Jersey  
28 Point were exceeded 31, 50 and 8 days, respectively. These exceedances do not reflect the many, many

1 days EC standards were waived under numerous Temporary Urgency Change Petitions requested by  
2 the Project proponents because of drought conditions. The EIR fails to accurately identify the many  
3 exceedances of EC standard under current Project operations. The EIR also ignores and fails to  
4 identify, discuss or analyze the federally promulgated EC standards. (40 CFR § 131.37.) Those  
5 standards include estuarine habitat criteria for salinity at Chipps Island, Roe Island and Suisun Marsh  
6 plus a criteria of 0.44 micro-mhos between 1 April and 31 May for striped bass and splittail spawning  
7 and migration on the San Joaquin River at Jersey Point, San Andreas Landing, Prisoners Point, Buckley  
8 Cove, Rough and Ready Island, Brandt Bridge, Mossdale and Vernalis when the San Joaquin Index is  
9 greater than 2.5 MAF and at Jersey Point, San Andreas landing and Prisoners Point when the San  
10 Joaquin Index is less than 2.5 MAF. Nevertheless, the EIR, based upon highly questionable modeling,  
11 acknowledges that “[i]n the Plan Area, Alternative 4, Scenarios H1–H4, would result in an increase in  
12 the frequency with which Bay-Delta WQCP EC objectives are exceeded for the entire period modeled  
13 (1976–1991) in the San Joaquin River at Jersey Point, and the San Joaquin River at Prisoners Point”  
14 and that “... average EC levels at Emmaton would increase by <1–14% for the entire period modeled  
15 and 8–13% during the drought period modeled. These increases in long-term and drought period  
16 average EC levels would potentially contribute to adverse effects on the agricultural beneficial uses in  
17 the western Delta.” (RDEIR/RDEIS, p. 8-242.) The EIR further acknowledges “that, relative to  
18 Existing Conditions, Alternative 4, Scenarios H1–H4, could result in substantial increases in long-term  
19 average EC during the months of October through May in Suisun Marsh. The increases in long-term  
20 average EC levels that would occur in Suisun Marsh could further degrade existing EC levels and thus  
21 contribute additionally to adverse effects on the fish and wildlife beneficial uses.” (RDEIR/RDEIS, p.  
22 8-243.) The changes in EC in comparison to existing conditions are attributed to both, “Alternative 4  
23 operations and climate change/sea level rise.” (RDEIR/RDEIS, p. 8-238.) It claims that it is “unlikely  
24 that there would be increased frequency of exceedance of agricultural EC objectives in the interior or  
25 southern Delta,” but admits that, “... the modeling has limited ability to estimate salinity accurately in  
26 this region.” (RDEIR/RDEIS, p. 8-238.) It further claims that source water EC would not be expected  
27 to worsen because of the “state’s aggressive regulation of point-source discharge effects on Delta  
28 salinity-elevating parameters and the expected further regulation as salt management plans are

1 developed; the salt-related TMDLs adopted and being developed for the San Joaquin River; and the  
2 expected improvement in Water Quality lower San Joaquin River average EC levels commensurate  
3 with the lower EC of the irrigation water deliveries from the Delta.” (RDEIR/RDEIS, p. 8-241.)  
4 However, this conclusion is highly speculative and contrary to the historical record. The modeling itself  
5 is contrary to empirical knowledge and common sense. The diversion of millions of acre-feet of low  
6 EC water from the Sacramento River and corresponding increase in the percentage of high EC San  
7 Joaquin River water in the interior and southern Delta coupled with decreased dilution and increased  
8 residence time evidence that EC will increase throughout the Delta. The proposed mitigation measures  
9 are highly speculative, discretionary, may never be successfully implemented and fail to comply with  
10 CEQA mitigation requirements. The EIR’s Chapter 8 (Water Quality) and Chapter 11 (Fish and  
11 Aquatic Resources) virtually ignore the water quality and habitat needs of striped bass and splittail in  
12 the eastern Delta and lower San Joaquin River. Both species are highly sensitive to EC during  
13 spawning. The studies US EPA relied upon in establishing EC criteria protective of the migration and  
14 spawning beneficial uses of striped bass and splittail are still applicable today. Nor does the EIR  
15 adequately survey, analyze or discuss the impacts of EC, modified hydrology and increased residence  
16 time on freshwater invertebrates (especially their egg and sensitive life stages) in the eastern and  
17 southern Delta and lower San Joaquin River. Zooplankton is a critical source of food to numerous fish  
18 species. Different zooplankton species tend to inhabit freshwater, low salinity zones or high salinity  
19 zones. Populations of native copepod and mysid species have plummeted by magnitude. The same  
20 concerns apply to the phytoplankton community. With respect to native aquatic and adjacent riparian  
21 plant species, the EIR acknowledges that field surveys were limited by continuing legal challenges to  
22 efforts to obtain entry permits. There is virtually no discussion or analysis in the EIR regarding impacts  
23 of elevated EC levels on native aquatic and riparian plants in the southern Delta or lower San Joaquin  
24 River, which can be highly salt sensitive. The EIR’s failure to adequately analyze and discuss the  
25 potential impacts of increased and elevated concentrations of EC is inconsistent with CEQA’s  
26 analytical and disclosure requirements.

27 149. DWR must be required to vacate its Project approval and EIR certification and prepare  
28 and circulate for public review and comment a new draft EIR including adequate water quality impact



analysis.

### **Failure to Recirculate EIR**

150. CEQA requires that if significant new information is added to an EIR after a draft EIR is prepared, but before certification of the final EIR, the EIR must be recirculated for public review and comment. (Pub. Resources Code § 21092.1; CEQA Guidelines § 15088.5.)

151. Prior to certification of the Final EIR, DWR added significant new information to the EIR, including but not limited to information referenced above, information in the comments and responses to comments in the Final EIR, information in DWR's document issued in July 2017 entitled "Developments after Publication of the Proposed Final Environmental Impact Report, " and information on boundary analysis, adaptive management, and other topics presented in DWR's testimony on the Project before the State Water Resources Control Board. This information was not available when the Draft EIR and RDEIR were circulated for public review and comment.

152. DWR's failure to recirculate the EIR in light of this information is not supported by substantial evidence and represents a failure to proceed in the manner required by law.

### **Findings Not Supported By Substantial Evidence**

153. CEQA requires that DWR adopt certain findings in connection with their certification of the EIR and approval of the Project.

154. No substantial evidence supports DWR's findings that no feasible alternatives or mitigation measures exist to eliminate or reduce the Project's unavoidable significant adverse environmental impacts.

155. No substantial evidence supports DWR's findings that the Project's purportedly "unavoidable" environmental impacts are in fact unavoidable.

156. No substantial evidence supports DWR's findings in support of the Statement of Overriding Considerations that the Project's purported benefits outweigh its unavoidable significant adverse environmental impacts.

157. No substantial evidence supports DWR's findings that the Project is consistent with applicable plans, policies, and other guidance.

158. No substantial evidence supports DWR's findings that construction and operations of

1 the Project would not have significant and unavoidable adverse environmental impacts on Delta  
2 freshwater flows, water supplies, water quality, public health, and fisheries including listed endangered  
3 and threatened fish species and their designated critical habitat.

#### 4 **Inadequate Responses to Comments**

5 159. DWR failed to respond adequately to comments submitted by Petitioners, other  
6 members of the public, and other agencies. Instead, the responses given to numerous comments  
7 regarding the Project's biological resources impacts, water quality impacts, water supply impacts,  
8 hydrological impacts, traffic impacts, cumulative impacts, growth inducing impacts, consistency with  
9 applicable plans and policies, public services, recreation, adequacy of mitigation measures, and  
10 alternatives are conclusory, evasive, confusing, or otherwise non-responsive, contrary to the  
11 requirements of CEQA. In addition, DWR failed to provide an adequate rationale for rejecting  
12 alternatives in its responses to comments.

13 160. As a result of the foregoing defects alleged in this cause of action, DWR prejudicially  
14 abused its discretion by certifying the EIR that does not comply with CEQA and by approving the  
15 project in reliance thereon. Accordingly, DWR's certification of the EIR and approval of the project  
16 must be set aside.

#### 17 **THIRD CAUSE OF ACTION**

##### 18 **(Violation of Fully Protected Species Statutes, Fish and Game Code § 3511)**

19 161. Petitioners hereby incorporate all of the allegations in the paragraphs above as if fully  
20 set forth herein.

21 162. Fish and Game Code section 3511 lists the avian species that are considered "fully  
22 protected." Several such fully protected bird species, including the greater sandhill crane and white-  
23 tailed kite, occur in area affected by the Project.

24 163. Except for limited exceptions not applicable here, "fully protected birds or parts thereof  
25 may not be taken or possessed at any time." (Fish & G. Code, § 3511, subd. (a)(1).) DWR's approval of  
26 the Project is subject to this prohibition; DWR may not authorize the take of fully protected birds, and  
27 may not approve the Project if it will result in the take of fully protected birds.

28 164. DWR's authorization of the Project will result in the unauthorized and prohibited take of

greater sandhill cranes and white-tailed kites through, among other things, collisions with transmission lines and habitat destruction and modification associated with the Project.

165. Project construction and operations may also result in the unauthorized and prohibited take of winter resident greater sandhill cranes in Stone Lakes National Wildlife Refuge.

166. Measures proposed by DWR purporting to conserve greater sandhill cranes will likely not fully avoid take of cranes associated with the Project.

167. By authorizing the take of fully protected bird species, DWR failed to act in the manner required by law and prejudicially abused its discretion.

#### **FOURTH CAUSE OF ACTION**

##### **(Violation of the California Public Trust Doctrine)**

168. Petitioners hereby incorporate all of the allegations in the paragraphs above as if fully set forth herein.

169. In approving the Project, DWR violated its “duty ... to protect the people’s common heritage of streams, lakes, marshlands and tidelands” by “surrendering that right of protection” to advance and favor non-trust interests, including the financial and economic concerns of the corporate agriculture sector in the southern San Joaquin Valley. (See *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 441.)

170. In approving the Project, DWR ignored the “significant limitation on water rights” that is imposed by the Public Trust Doctrine. (See *United States v. SWRCB* (1986) 182 Cal.App.3d 82, 106.) DWR failed to properly consider and protect public trust interests and uses. To the extent that DWR considered trust interests at all, it failed to properly balance these interests against the non-trust interests that the Project solely benefits.

171. DWR’s approval of the Project violates its public trust duties articulated in California Fish and Game Code section 5937, which requires that “[t]he owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam.”

///

1 **FIFTH CAUSE OF ACTION**

2 **(Declaratory Relief)**

3 172. Petitioners hereby incorporate all of the allegations in the paragraphs above as if fully  
4 set forth herein.

5 173. Petitioners contend that the approval of the project and certification of the EIR have  
6 been adopted in violation of the Delta Reform Act, CEQA, the fully protected species statutes, and the  
7 California Public Trust Doctrine. DWR denies these contentions.

8 174. An actual controversy has arisen and now exists between the Petitioners and DWR  
9 regarding the respective rights and duties under the Delta Reform Act, CEQA, the fully protected bird  
10 statute, and the California Public Trust Doctrine.

11 175. Petitioners desire a judicial determination and declaration of the parties' respective  
12 rights and duties pursuant to Code of Civil Procedure section 1060, including a declaration of whether  
13 DWR failed to proceed in the manner required by CEQA when it certified the EIR and approved the  
14 project. Such a declaration is necessary and appropriate at this time.

15  
16 **PRAYER FOR RELIEF**

17 WHEREFORE, Petitioners pray for relief as follows:

- 18 1. For alternative and peremptory writs of mandate, commanding Respondent DWR to:
- 19 a. Vacate and set aside approval of the Project and findings supporting the approval;
- 20 b. Vacate and set aside certification of the EIR and Notice of Determination;
- 21 c. Suspend any and all activity that can result in an adverse change or alteration to the
- 22 physical environment, including but not limited to issuance of revenue bonds to pay for the Project,
- 23 until Respondent has complied with all requirements of CEQA and all other applicable state and local
- 24 laws and regulations as directed by this Court pursuant to Public Resources Code section 21168.9;
- 25 2. For a stay, temporary restraining order, preliminary injunction, and permanent
- 26 injunction prohibiting any actions by Respondent, including but not limited to issuance of revenue
- 27 bonds to pay for the Project, pursuant to Respondent's approval of the project and certification of the
- 28 EIR until Respondent has fully complied with all requirements of the Delta Reform Act, CEQA, the

1 fully protected species statutes, the public trust doctrine, and all other applicable state laws, policies,  
2 and regulations;

3 3. For a declaration that the project and certification of the EIR are inconsistent with the  
4 Delta Reform Act, CEQA, the fully protected species statutes, and the public trust doctrine;

5 4. For costs of suit;

6 5. For attorney's fees pursuant to law including Code of Civil Procedure section 1021.5;  
7 and

8 6. For such other and further relief as the Court deems just and proper.  
9  
10

11 DATED: August 21, 2017

E. Robert Wright  
FRIENDS OF THE RIVER

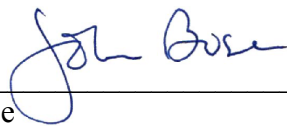
14 By: \_\_\_\_\_  
15 E. Robert Wright  
16 Attorney for Petitioners/Plaintiffs Friends of the River,  
17 Sierra Club California, Restore the Delta, and Planning  
18 and Conservation League

18 Michael B. Jackson  
19 Attorney at Law


21 By: \_\_\_\_\_  
22 Michael B. Jackson  
23 Attorney for Petitioners/Plaintiffs  
24 California Sportfishing Protection Alliance,  
25 California Water Impact Network, and  
26 AquAlliance  
27  
28

1 John Buse

Aruna Prabhala  
CENTER FOR BIOLOGICAL DIVERSITY

2  
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4 By:   
5 John Buse  
6 Attorney for Petitioners/Plaintiffs Center for Biological  
7 Diversity, Friends of Stone Lakes National Wildlife  
8 Refuge, and Save Our Sandhill Cranes

9 Adam Keats  
10 CENTER FOR FOOD SAFETY

11  
12 By:   
13 Adam Keats  
14 Attorney for Petitioner/Plaintiff  
15 Center for Food Safety  
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## VERIFICATION

I, William Jennings, am the Executive Director of petitioner California Sportfishing Protection Alliance and am authorized to execute this verification on their and other petitioners' behalf. I have read the foregoing Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief and am familiar with its contents. The facts recited in the Petition and Complaint are true of my personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Verification was executed on August 18, 2017 in Stockton, California.

A handwritten signature in cursive script, reading "William Jennings". The signature is written in dark ink and is positioned above the printed name.

William Jennings

# EXHIBIT A



1 E. Robert Wright (SBN 51861)  
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8 *Attorney for Petitioners and Plaintiffs*  
9 *Friends of the River, Sierra Club California,*  
10 *Restore the Delta, and Planning and Conservation*  
11 *League*

12 *(additional counsel on following page)*

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

California Sportfishing Protection Alliance; Friends  
of the River; Center for Biological Diversity; Sierra  
Club California; California Water Impact Network;  
AquAlliance; Restore the Delta; Center for Food  
Safety; Friends of Stone Lakes National Wildlife  
Refuge; Planning and Conservation League; and  
Save Our Sandhill Cranes,

Petitioners and Plaintiffs,

vs.

California Department of Water Resources; and  
DOES 1-20,

Respondents and Defendants;

DOES 21-50,

Real Parties in Interest.

Case No.

**NOTICE OF COMMENCEMENT OF  
LEGAL ACTION PURSUANT TO THE  
CALIFORNIA ENVIRONMENTAL  
QUALITY ACT**

[Pub Res. Code § 21167.5]

1 ***Additional counsel:***

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13 *AquAlliance*

14 John Buse (SBN 163156)  
15 Aruna Prabhala (SBN 278865))  
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22 *Attorneys for Petitioners and Plaintiffs*  
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*Attorney for Petitioner and Plaintiff*  
*Center for Food Safety*

1 TO RESPONDENT CALIFORNIA DEPARTMENT OF WATER RESOURCES:

2 Please take notice that on or before August 21, 2017, Petitioners and Plaintiffs California  
3 Sportfishing Protection Alliance; Friends of the River; Center for Biological Diversity; Sierra Club  
4 California; California Water Impact Network; AquAlliance; Restore the Delta; Center for Food Safety;  
5 Friends of Stone Lakes National Wildlife Refuge; Planning and Conservation League; and Save Our  
6 Sandhill Cranes, intend to commence a legal action seeking a writ of mandate to overturn, set aside,  
7 void, and annul Respondent CALIFORNIA DEPARTMENT OF WATER RESOURCE'S approval of  
8 the California WaterFix project and certification of the Final Environmental Impact Report ("EIR") for  
9 the California WaterFix Project, State Clearinghouse No. 2008032062. This action will be based on the  
10 grounds that Respondents' approval of the Project and certification of the EIR was in violation of the  
11 California Environmental Quality Act ("CEQA," Public Resources Code Section 21000 *et seq.*) and  
12 other applicable laws.

13  
14  
15 DATED: August 17, 2017

John Buse  
Aruna Prabhala  
CENTER FOR BIOLOGICAL DIVERSITY

16  
17  
18 By: 

19 John Buse  
20 Attorney for Petitioners/Plaintiffs Center for Biological  
21 Diversity, Friends of Stone Lakes National Wildlife  
22 Refuge, and Save Our Sandhill Cranes

23 E. Robert Wright  
24 FRIENDS OF THE RIVER

25 By:  JB by permission

26 E. Robert Wright  
27 Attorney for Petitioners/Plaintiffs Friends of the River,  
28 Sierra Club California, Restore the Delta, and Planning  
and Conservation League

1  
2 Michael B. Jackson  
3 Attorney at Law  
4

5 By: Michael B. Jackson JB by permission  
6 Michael B. Jackson 8-17-17  
7 Attorney for Petitioners/Plaintiffs  
8 California Sportfishing Protection Alliance,  
9 California Water Impact Network, and  
10 AquAlliance

11 Adam Keats  
12 CENTER FOR FOOD SAFETY

13 By: Adam Keats JB by permission  
14 Adam Keats 8-17-17  
15 Attorney for Petitioner/Plaintiff  
16 Center for Food Safety  
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1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF ALAMEDA

3 I am employed in Oakland, California. I am over the age of 18 and not a party to the  
4 foregoing action. My business address is Center for Biological Diversity, 1212 Broadway,  
5 Suite 800, Oakland, California 94612. My email address is ckilmer@biologicaldiversity.org.

6 On August 17, 2017, I served a true and correct copy of the following document(s):

7 **NOTICE OF COMMENCEMENT OF LEGAL ACTION PURSUANT TO CEQA**

8 [x] BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy  
9 through Center for Biological Diversity's electronic mail system to the email address(s) shown  
10 on the following service list.

11 [x] BY MAIL: By placing a true and correct copy thereof in sealed envelope(s). Such  
12 envelope(s) were addressed as shown on the following service list. Such envelope(s) were  
13 placed for collection and mailing following ordinary business practices with which I am  
14 readily familiar.

15 [x] STATE: I declare under penalty of perjury under the law of California that the  
16 foregoing is true and correct.

17 Executed on August 17, 2017 at Oakland, California.

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21 Colyn Kilmer

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10 *Restore the Delta, and Planning and Conservation*  
11 *League*

12 *(additional counsel on following page)*

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

California Sportfishing Protection Alliance; Friends  
of the River; Center for Biological Diversity; Sierra  
Club California; California Water Impact Network;  
AquAlliance; Restore the Delta; Center for Food  
Safety; Friends of Stone Lakes National Wildlife  
Refuge; Planning and Conservation League; and  
Save Our Sandhill Cranes,

Petitioners and Plaintiffs,

vs.

California Department of Water Resources; and  
DOES 1-20,

Respondents and Defendants;

DOES 21-50,

Real Parties in Interest.

Case No.

**NOTICE OF ELECTION TO PREPARE  
ADMINISTRATIVE RECORD**

[Pub Res. Code § 21167.6]

Original Date of Filing: August 21, 2017

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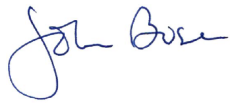
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*Attorney for Petitioner and Plaintiff Sierra Club California*

1 TO RESPONDENT CALIFORNIA DEPARTMENT OF WATER RESOURCES:

2 Petitioners and Plaintiffs California Sportfishing Protection Alliance; Friends of the River;  
3 Center for Biological Diversity; Sierra Club California; California Water Impact Network; AquAlliance;  
4 Restore the Delta; Center for Food Safety; Friends of Stone Lakes National Wildlife Refuge; Planning  
5 and Conservation League; and Save Our Sandhill Cranes elect to prepare the record of proceedings in  
6 the above-captioned proceeding pursuant to Public Resources Code section 21167.6(b)(2).

7  
8 DATED: August 20, 2017

John Buse  
Aruna Prabhala  
CENTER FOR BIOLOGICAL DIVERSITY

10  
11 By:   
12 John Buse  
13 Attorney for Petitioners/Plaintiffs Center for Biological  
14 Diversity, Friends of Stone Lakes National Wildlife  
Refuge, and Save Our Sandhill Cranes


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