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25 SUPERIOR COURT OF THE STATE OF CALIFORNIA
26 COUNTY OF SAN JOAQUIN

27 SOUTH DELTA WATER AGENCY and RUDY
28 MUSSI INVESTMENT L.P.

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF WATER
RESOURCES and DOES 1-50, inclusive,

Defendants;

DOES 51-100,

Real Parties in Interest.

CASE NO.:

STK-CV-2024-816

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

(Code Civ. Proc., §§ 526, 527, 1085, 1094.5;
Pub. Resources Code, §§ 21168, 21168.5, 29700
et seq.; Wat. Code, §§ 11100 et seq., 12200 et
seq., 11460 et seq., 85000 et seq.; Public Trust
Doctrine; Proposition 9)

CEQA CASE

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GLOSSARY OF TERMS

Term	Definition
1959 DPA	1959 Delta Protection Act (Wat. Code, §§12200 et seq.)
1992 DPA	1992 Delta Protection Act (Pub. Resources Code, § 29700 et seq.)
2008 FWS BO	2008 National Oceanic and Atmospheric Administration Biological Opinion
2009 DRA	Delta Reform Act of 2009 (Wat. Code, § 85000 et seq.)
2009 NOAA BO	2009 National Oceanic and Atmospheric Administration Biological Opinion
2017 BA	June 2017 Biological Assessment
2017 FWS BO	2017 U.S. Fish and Wildlife Service Biological Opinion
2017 NOAA BO	2017 National Oceanic and Atmospheric Administration Biological Opinion
ALSP	Agricultural Lands Stewardship Plan
AMMP	Adaptive Management and Monitoring Program
AMMs	Avoidance and Minimization Measures
BDCP	Bay Delta Conservation Plan
BDCP/CWF EIR/S	Bay Delta Conservation Plan/California WaterFix Environmental Impact Report//Environmental Impact Statement
BMPs	Best Management Practices
BO	Biological Opinion
CALFED	CALFED Bay-Delta Program
CAP	Climate Action Plan
CCF	Clifton Court Forebay
CDWA	Central Delta Water Agency
CEQA	California Environmental Quality Act (Pub. Resources Code, §§ 21000 et seq.)
CEQA Findings	California WaterFix CEQA Findings and Statement of Overriding Consideration
CEQA Guidelines	23 Cal. Code Regs, §§ 15000 et seq.
CESA	California Endangered Species Act (Fish and Game Code section 2050 et seq.)
cfs	Cubic feet per second
CVP	Central Valley Project
D-1641	California State Water Resources Control Board's Water Right Decision 1641
Defendant	DWR
Delta	Sacramento-San Joaquin River Delta
Project or DCP	Delta Conveyance Project approved by DWR on December 21, 2023
DFW	California Department of Fish and Wildlife
DISB	Delta Independent Science Board
DPC	Delta Protection Commission
DSC	Delta Stewardship Council
DWR	California Department of Water Resources
ESA	Endangered Species Act (16 U.S.C., section 1531 et seq.)

Term	Definition
GHG	Greenhouse Gas
HABs	Harmful Algal Blooms such as toxic <i>Microcystis</i>
HCP	Habitat Conservation Plan
HORB	Head of Old River Barrier (or Gate)
ITP	Incidental Take Permit
MMRP	Mitigation Monitoring and Reporting Plan
muck	Reusable Tunnel Material
NAS	National Academy of Sciences
NCCP	Natural Community Conservation Plan
NDDs	North Delta Diversions
NEPA	National Environmental Policy Act of 1969 (42 U.S.C. section 4321 et seq.)
NOAA Fisheries	National Oceanic and Atmospheric Administration Fisheries
NOP	Notice of Preparation
Planning Agreement	Planning Agreement Regarding the BDCP (October 2006)
Project	The Project adopted by DWR, EIR Alternative 5
RD	Reclamation District
Reclamation	United States Bureau of Reclamation
RPA	Reasonable and Prudent Alternatives
RTM	Muck or reusable Tunnel Material
SDWA	South Delta Water Agency
2018 Phase 1 SED	Substitute Environmental Document WQCP updates related to San Joaquin River Flows and Southern Delta Water Quality
2023 Phase 2 SED (Draft)	Substitute Environmental Document WQCP updates related to the Sacramento River and its Tributaries, Delta Eastside Tributaries, and Delta
SGMA	Sustainable Groundwater Management Act (Wat. Code, §§ 10720 et seq.)
SMARA	Surface Mining and Reclamation Act (Pub. Resources Code, §§ 2710 et seq.)
SWP	State Water Project
SWRCB	California State Water Resources Control Board
USACE	U.S. Army Corps of Engineers
USBR	United States Bureau of Reclamation
USEPA	U.S. Environmental Protection Agency
USFWS	U.S. Fish and Wildlife Service
Wildlife Refuge	Stone Lakes National Wildlife Refuge
WQCP	State Water Resources Control Board's Bay-Delta Water Quality Control Plan
Yolo Bypass project	Yolo Bypass Salmonid Habitat Restoration and Fish Passage project

1 1. Petitioners and Plaintiffs South Delta Water Agency and Rudy Mussi Investment L.P.
2 (collectively “Plaintiffs”) hereby allege as follows:

3 2. This Petition and Complaint (“Petition”) is brought pursuant to the California
4 Environmental Quality Act (“CEQA”) (Pub. Resources Code, § 21000 et seq.), the Central Valley Project
5 Act (Wat. Code, §11100 et seq.), the 1959 Delta Protection Act (Wat. Code, § 12200 et seq.), the 1992
6 Delta Protection Act (Pub. Resources Code, § 29700 et seq.), the Watershed Protection Act (Wat. Code,
7 § 11460 et seq.), the Delta Reform Act of 2009 (Wat. Code, § 85000 et seq.), the Public Trust doctrine,
8 and Proposition 9.

9 3. Plaintiffs herein challenge Defendant California Department of Water Resources’ (“DWR”
10 or “Defendant”) environmental review and approval of the construction and operations of the Delta
11 Conveyance Project (or Delta Tunnel project) (“Project”), which, if implemented, would devastate the
12 Sacramento River and the Sacramento-San Joaquin Delta (“Delta”).

13 4. The Project involves the construction of a massive tunnel with an external diameter of 39
14 feet, with a capacity of 6,000 cubic feet per second (“cfs”) (or potentially more) of water to be diverted
15 from the Sacramento River via two new diversions in the northern Delta adjacent to the legacy towns of
16 Hood and Courtland. The tunnel would then run 45 miles at about 150 feet below ground surface to the
17 Bethany Reservoir Pumping Plant and Surge Basin, which is south of the existing State Water Project’s
18 (“SWP”) Clifton Court Forebay in Contra Costa County.

19 5. Even without this harmful Project, the Delta is burdened by overstressed water supplies,
20 diminishing water quality, instream flow deficits, water quality impairments, water level problems caused
21 by the operation of the SWP and federal Central Valley Project (“CVP”), and degraded aquatic habitats.
22 This Project if implemented, would exponentially increase these burdens and thereby devastate the Delta.

23 6. DWR purported to analyze the environmental impacts of the Project in its Environmental
24 Impact Report (“EIR”) prepared pursuant to CEQA. However, impermissibly narrow Project objectives,
25 legally impermissible predetermination with respect to alternatives and a failure to consider alternatives
26 that do not rely on new conveyance, flawed assumptions, wholly missing or inadequate impact analyses,
27 insufficient and incomplete project description, and ineffective and unenforceable mitigation measures
28 (among other defects) render the EIR fatally defective as an informational document under CEQA. DWR

1 purports to have examined thousands of alternatives before settling on the nine (9) alternatives included
2 in the EIR. However, since as early as 2007, it became clear DWR would only pursue alternatives whose
3 central feature was new diversions from the Sacramento River and an isolated conveyance facility. As
4 expected, all nine of the alternatives in the EIR feature the construction of new diversions from the
5 Sacramento River and an isolated conveyance facility.

6 7. The Project proposes the most significant transformation of the Delta since the initial
7 construction of the CVP and SWP and pumping facilities in the South Delta, which were completed in
8 1961 and 1969, respectively. The Project would fundamentally alter the hydrodynamics of the Delta,
9 creating entirely new impacts in the North Delta and significantly worsening conditions throughout the
10 remainder of the Delta.

11 8. As a result of numerous and compounding deficiencies in the EIR, the public remains very
12 much in the dark about what the Project actually entails, its environmental impacts, and the efficacy of
13 the mitigation measures proposed by DWR to lessen the Project's impacts. As such, the fundamental
14 purposes of CEQA are frustrated by the EIR. Moreover, in approving the Project, DWR violated other
15 state laws designed to protect fish and wildlife, the Delta watershed, water supplies, water rights, the
16 public trust, and the Delta's unique cultural, recreational, natural resource, and agricultural values. Unless
17 DWR meets the requirements of CEQA and these other vital safeguards under California law, the Project
18 may not proceed.

19 9. The United States Army Corps of Engineers ("USACE") prepared a Draft Environmental
20 Impact Statement ("DEIS") for the Project pursuant to the National Environmental Policy Act of 1969
21 ("NEPA"), 42 U.S.C. section 4321 et seq., which was circulated for public review in December 2022.
22 This document analyzed impacts associated only with *construction* of the Project, not with its *operation*.
23 It is not known how, when or by whom the impacts of operating the Project will be analyzed pursuant to
24 NEPA. To date, DWR and other agencies have not completed the bulk of the review and permitting that
25 would be required to construct and operate this disastrous Project.

26 **JURISDICTION AND VENUE**

27 10. This Court has jurisdiction over this action pursuant to sections 1060, 1085, and 1094.5 of
28 the California Code of Civil Procedure, and sections 21168 and 21168.5 of the Public Resources Code.

1 11. Venue for this action properly lies in San Joaquin County Superior Court because the
2 Project will be constructed and operated in part within San Joaquin County. (Code Civ. Proc., § 393,
3 subd. (b).)

4 12. This Petition is timely filed in accordance with Public Resources Code section 21167,
5 subdivision (c), and California Code of Regulations, title 14, section 15112 (“CEQA Guidelines”), as well
6 as Code of Civil Procedure sections 1094.5 and 1085.

7 **PARTIES**

8 13. Plaintiff SOUTH DELTA WATER AGENCY (“SDWA”) is a political subdivision of the
9 State of California created by the California Legislature under the South Delta Water Agency Act, chapter
10 1089 of the statutes of 1973 (Wat. Code, Appendix, § 116-1.1 et seq.), by the provisions of which SDWA
11 came into existence in January of 1974. SDWA’s boundaries are specified in Water Code Appendix
12 section 116-9.1 and encompass approximately 148,000 acres, which are located entirely within both the
13 south-western portion of San Joaquin County and the “Sacramento-San Joaquin Delta” as defined in Water
14 Code section 12220. While the lands within the agency are primarily devoted to agriculture, said lands
15 are also devoted to numerous other uses including recreational, wildlife habitat, open space, residential,
16 commercial, municipal and institutional uses. SDWA is empowered to “sue and be sued” and to take all
17 reasonable and lawful actions, including pursuing legislative and legal actions, that have for their general
18 purpose: (1) to protect the water supply of the lands within the agency against intrusions of ocean salinity;
19 and/or (2) to assure the lands within the agency a dependable supply of water of suitable quality sufficient
20 to meet present and future needs. The agency may also undertake activities to assist landowners and local
21 districts within the agency in reclamation and flood control matters. (See Wat. Code, Appendix, §§ 116-
22 4.2, subd. (b), & 116-4.1, subds. (a) and (b), respectively.) SDWA may assist landowners, districts, and
23 water right holders within its boundaries in the protection of their vested water rights and may represent
24 the interests of those parties in water right proceedings and related proceedings before courts of both the
25 State of California and the United States to carry out the purposes of the agency. (See Wat. Code,
26 Appendix, § 116-4.2, subd. (b).) Those vested water rights include post-1914 water permits and licenses
27 issued by the State Water Resources Control Board (“SWRCB”) and its predecessor agencies, pre-1914
28

1 rights, overlying rights, statutory rights, contract rights, riparian rights, prescriptive rights, salvage rights,
2 rights to recycled and recaptured water, and rights to artesian flow.

3 14. Plaintiff RUDY MUSSI INVESTMENT L.P. owns land within the SDWA and the Central
4 Delta Water Agency (Wat. Code, Appendix, § 117-1.1 et seq.), and is directly impacted by the Project.

5 15. Defendant CALIFORNIA DEPARTMENT OF WATER RESOURCES (“DWR”) is an
6 agency of the State of California located in Sacramento, California. DWR is the Project’s lead agency
7 under CEQA. DWR was established in 1956 for the purpose of building and operating the SWP. In
8 addition to operating the SWP, DWR’s major responsibilities include overseeing the statewide process of
9 developing and updating the California Water Plan (Bulletin 160 series); protecting and restoring the
10 Sacramento-San Joaquin Delta; regulating dams; providing flood protection; and assisting in emergency
11 management.

12 16. The true names and capacities, whether individual, corporate, associate, governmental,
13 coconspirator, partner or alter-ego of those Defendants sued herein under the fictitious names of DOES 1
14 through 50, inclusive, are not known to Plaintiffs, who therefore sue those Defendants by such fictitious
15 names. Plaintiffs will ask leave of court to amend this Petition and insert the true names and capacities of
16 these defendants and respondents when the same have been ascertained. Plaintiffs are informed and
17 believe, and on that basis allege, that Defendants designated herein as DOE defendants and respondents
18 are legally responsible in some manner for the events and happenings alleged in this Petition, and that
19 Plaintiffs’ alleged injuries were proximately caused by said Defendants’ conduct.

20 17. The true names and capacities, whether individual, corporate, associate, governmental,
21 coconspirator, partner or alter-ego of those Real Parties in Interest sued herein under the fictitious names
22 of DOES 51 through 100, inclusive, are not known to Plaintiffs, who therefore sue those Real Parties in
23 Interest by such fictitious names. Plaintiffs will ask leave of Court to amend this Petition and insert the
24 true names and capacities of these Real Parties in Interest when the same have been ascertained. Plaintiffs
25 are informed and believe, and on that basis allege, that Real Parties in Interest designated herein as DOE
26 real parties in interest are legally responsible in some manner for the events and happenings alleged in this
27 Petition, and that Plaintiffs’ alleged injuries were proximately caused by said Real Parties in Interest’s
28 conduct.

1 **FACTUAL AND PROCEDURAL BACKGROUND**

2 **Delta History**

3 18. The Delta is the largest freshwater estuary on the west coast of the Americas. The Delta
4 supports some of the most productive farmland in the world, wineries and other agriculture-related
5 enterprises. Of the approximately 500,000 acres of farmland in the Delta, approximately eighty percent
6 (80%) is classified as Prime Farmland. This is the largest contiguous swath of Prime Farmland in the
7 state. The Delta also supports a substantial sports-fishing and recreation industry, many cities and
8 communities, and hundreds of aquatic and terrestrial species (many of which are unique to the Delta and
9 at risk of extinction). Rich in history and culture, the Delta is also a core component of California’s water
10 system, from which water flows to rural and urban users throughout California. The Delta is a critical
11 component of the San Francisco Bay Delta Estuary. In 1959, the Legislature enacted Water Code sections
12 12200 through 12205. This legislation, commonly referred to as the Delta Protection Act of 1959 (“1959
13 DPA”), was enacted to retain the Delta as the common pool, stating: “water surplus to the needs of the
14 areas in which it originates is gathered in the Delta and thereby provides a common source of fresh water
15 supply for water-deficient areas.” (Wat. Code, § 12200.) The 1959 DPA makes clear that “among the
16 functions to be provided by the State Water Resources Development System, in coordination with the
17 activities of the United States in providing salinity control through operation of the [CVP], shall be the
18 provision of salinity control and an adequate water supply for the users of water in the Sacramento-San
19 Joaquin Delta.” (Wat. Code, § 12202.) In Water Code section 12205, the Legislature sought to ensure
20 that the adequacy of the common pool for in-Delta users by requiring that “the operation and management
21 of releases from storage into the Sacramento-San Joaquin Delta of water for use outside the area in which
22 such water originates shall be integrated to the maximum extent possible in order to permit the fulfillment
23 of the objectives of this part.” The proposed tunnel, which would isolate the water for export from the
24 Delta pool, are inconsistent with the objectives of providing salinity control and an adequate supply for
25 the Delta.

26 19. The 1959 DPA has been the subject of administrative and judicial interpretations that there
27 can be no export of water from the Delta unless the Delta users are first provided salinity control and an
28

1 adequate water supply. In *United States vs. State Water Resources Control Board* (1986) 182 Cal.App.3rd
2 82, 139, the court determined:

3 In 1959, when the SWP was authorized, the Legislature enacted the Delta
4 Protection Act. (Secs. 12200-12220.) The Legislature recognized the unique
5 water problems in the Delta, particularly “salinity intrusion,” which mandates the
6 need for such special legislation “for the protection, conservation, development,
7 control and use of waters in the Delta for the public good.” (Sec. 12200.) The act
prohibits project exports from the Delta of water necessary to provide water to
which Delta users are “entitled” and water which is needed for salinity control
and an adequate supply for Delta users. (Secs. 12202, 12203, 12204.)

8 The court further explained: “Section 12201 clarifies that an adequate water supply is a supply sufficient
9 1) to maintain and expand agriculture, industry, urban and recreational development in the Delta and 2)
10 to provide a common source of fresh water for export to water-deficient areas, subject to the provisions of
11 the watershed and county-of-origin statutes.” (*Id.*, p. 139, fn. 37.)

12 20. DWR’s December 1960 Bulletin 76 Report to the Legislature contemporaneously
13 interpreted the 1959 DPA, explaining at page 12: “In 1959 the State Legislature directed that water shall
14 not be diverted from the Delta for use elsewhere unless adequate supplies for the Delta are first provided.”
15 In this same report, at page 44, referencing alternative plans for Delta facilities, DWR explained: “Under
16 any of the foregoing projects, water of very good quality would continue to be supplied to about 90 percent
17 of the Delta lowlands through existing facilities. It is estimated that the mineral quality of the supplies
18 would range between 15 to 80 parts of chlorides and between 100 and 350 parts of total dissolved solids
19 per million parts water. The quality of water in the southern portion of the Delta would be improved.”
20 As the 1959 DPA and other authority direct, the export of water from the Delta was expressly conditioned
21 on their first being provided an adequate supply for in-Delta users as defined in Water Code section 12201.

22 21. In reliance on these promises and legislative mandates, the two major water infrastructure
23 projects that serve California’s water needs, the SWP and the CVP, were ultimately constructed to include
24 major diversions in the South Delta. DWR operates the SWP, which includes pumping plants,
25 hydroelectric power plants, water storage, as well as conveyance structures. SWP exports Delta water
26 from the SWP system at Clifton Court Forebay from the Harvey O. Banks pumping plant in Contra Costa
27 County. The SWP operates under long-term contracts with water contractors throughout California.
28

1 These water contractors, in turn, deliver water to wholesalers or retailers or deliver it directly to
2 agricultural, municipal, and industrial water users.

3 22. The CVP is comprised of reservoirs, power plants, and more than 500 miles of major canals
4 and aqueducts. The U.S. Bureau of Reclamation (“Reclamation” or “USBR”) operates and maintains the
5 CVP, which is generally operated as an integrated project, and coordinates operations with the SWP.
6 Reclamation has entered into approximately 250 long-term contracts with water districts, irrigation
7 districts, and others for delivery of CVP water. Reclamation exports water into the CVP system at the C.
8 W. “Bill” Jones Pumping Plant, which supplies the Delta-Mendota Canal.

9 23. In the early 1960s, an Interagency Delta Committee was convened to coordinate water
10 resources planning for the SWP, CVP, and local agencies. Although no isolated peripheral canal or tunnel
11 was contemplated or included in DWR’s 1960 Report to the Legislature, a 1963 report acknowledged that
12 Delta export pumps were a threat to Delta fish populations and proposed a “peripheral canal” to allow
13 balanced growth of Delta activities.

14 24. Following nearly a decade of further study of this proposal, DWR released a draft EIR for
15 a proposed “Peripheral Canal Project” in 1974, describing the canal as an isolated facility to convey
16 freshwater from the Sacramento River via a diversion near Hood to the SWP and CVP pumping plants
17 with up to 12 release facilities to distribute water from the canal to Delta channels. The proposal included
18 43 miles of above-ground, open earth channel that would have had a total carrying capacity of 23,300 cfs,
19 as well as four large siphons 18 to 25 feet in diameter to move water under the Mokelumne River, San
20 Joaquin River, Disappointment Slough, and Old River. The Peripheral Canal would have permanently
21 impacted 5,800 acres of agricultural land in the eastern Delta, in addition to land that would be affected
22 by disposal of dirt and construction materials. In 1972, the California Legislature passed the Wild and
23 Scenic Rivers Act, protecting the north coast’s remaining free-flowing rivers from development. In 1980,
24 these state-designated wild and scenic rivers were placed under federal Wild and Scenic Rivers Act
25 protection. Protection of these rivers effectively cut off the prospect of new water supplies from northern
26 California being routed into the Delta and distributed to SWP and/or CVP users. In 1982, in a statewide
27 referendum election known as Proposition 9, California voters, by a margin of 62.7 percent to 37.3 percent,
28 definitively rejected the act that would have authorized construction of the Peripheral Canal facilities.

1 25. The SWP and CVP water infrastructure are operated in a coordinated manner, pursuant to
2 a 1986 Coordinated Operations Agreement. An Addendum to the 1986 Coordinated Operations
3 Agreement was entered into on December 12, 2018. Joint points of diversion allow the use of one project's
4 diversion facility by the other under certain conditions. In part, both the SWP and CVP water delivery
5 systems rely on runoff and reservoir releases in areas upstream of the Delta to deliver contracted water via
6 the Sacramento and San Joaquin Rivers to Delta export pumps in the South Delta.

7 26. The flows of both the San Joaquin River System and the Sacramento River System vary
8 greatly from year to year and from season to season within each year. In the late summer and early fall,
9 the flow is usually low and it rises in the winter, spring, and early summer as a result of rains and run-off
10 from the melting snow. Sacramento River flows in the vicinity of the proposed North Delta Diversions
11 vary broadly over the course of the year from just over 10,000 cfs to over 50,000 cfs. San Joaquin River
12 Flows at Vernalis before flowing into the South Delta can range from 30 cfs to almost 80,000 cfs.
13 Operation of the state and federal pumping systems in the Delta rely on a through-Delta conveyance
14 approach that allows fresh water from the Sacramento River to freshen the Delta prior to the water being
15 exported from the South Delta. The pathway of the water is referred to as the "Freshwater Pathway."

16 27. The lands within the boundaries of the Delta are riparian to Delta channels and the
17 Sacramento and San Joaquin Rivers. Delta water users claim the right to the waters flowing into the Delta
18 from the west, including water flowing with the tides, water flowing from the Sacramento and San Joaquin
19 Rivers, and water from all other tributaries and other sources. These claims are based on riparian rights,
20 prescriptive rights, pre-1914 rights, salvage rights, overlying rights, statutory rights, rights to recycled and
21 recaptured water, rights to artesian flow and post-1914 appropriative rights based on applications made
22 and permits granted by the State Water Resources Control Board and its predecessor agencies. These
23 landowners also claim vested rights in the underground water supply where it is available and which is
24 fed by the rivers, channels, canals and sloughs in the Delta. If the surface water quality is degraded, the
25 groundwater is also gradually degraded.

26 28. Dams and diversions on the Sacramento and San Joaquin Rivers and their tributaries
27 decrease flows entering the Delta, which adversely affects in-Delta quality by, among other things,
28 reducing net flows in Delta channels. Changes in the flows in the rivers, channels, canals and sloughs in

1 or tributary to the Delta have a material effect on the farming operations conducted on the lands irrigated
2 from these sources. At times of low flows, the source of water used for irrigation, domestic and other
3 beneficial uses may become degraded because of: (1) the poor-quality drainage water from lands lying
4 upstream, particularly on the San Joaquin River; and (2) the incursion of salt water from San Francisco
5 Bay. At such times, poor quality causes reduction in crop yields and values, and increases irrigation costs.

6 29. The operation of the CVP and SWP causes other adverse effects in the South Delta. The
7 operation of the CVP and SWP export pumps, if not carefully controlled, substantially decreases the height
8 of water levels in the South Delta, especially the low tide level, to the point where local siphons and pumps
9 cannot operate properly. The operation of the CVP and SWP export facilities also alters the flow in the
10 channels, creating reverse flows and stagnant zones. This results in insufficient flushing of Delta waters
11 and the concentration of all constituents, including municipal effluent and salts from upstream return
12 flows. In addition, such stagnation exacerbates the conditions that promote proliferation of invasive water
13 weeds and harmful algal blooms (“HABs”) such as toxic *Microcystis*. Delivery of Delta water to the
14 CVP’s San Joaquin Valley service area results in the importation thereto of upwards of 1,000,000 tons of
15 salt into the San Joaquin Valley. After this exported water is used, much of the salt is delivered to the San
16 Joaquin River in concentrations which exceed downstream Water Quality Objectives. This drainage also
17 includes high levels of other constituents such as selenium and boron.

18 30. As indicia of DWR’s long held predetermination that the central feature of the Project must
19 be an isolated canal or tunnel, in 2007, as a part of the Bay Delta Conservation Plan (“BDCP”), which
20 was led by DWR, a 2007 Conservation Strategy Options Report confirmed DWR and other Steering
21 Committee members’ predetermination that the BDCP process would focus only on alternatives that
22 included new North Delta diversions, and would not analyze other alternatives to improve export water
23 supplies in compliance with state and federal species requirements. While the report initially considered
24 options that relied on Existing Through-Delta Conveyance and Improved Through-Delta Conveyance,
25 those options were summarily dismissed, never to be considered again by the Project proponents.

26 31. As fish numbers in the Delta continued to decline, the United States Fish and Wildlife
27 Service (“USFWS”) issued a Biological Opinion (“2008 FWS BO”) concluding that the effects of the
28 proposed long-term operations of the SWP and CVP were likely to jeopardize the continued existence of

1 Delta smelt. As one measure to avoid jeopardy to Delta smelt and adverse modification of its critical
2 habitat, the 2008 FWS BO required the creation of 8,000 acres of tidal habitat restoration by the SWP
3 contractors.

4 32. In 2009, the National Oceanic and Atmospheric Administration Fisheries (“NOAA
5 Fisheries”) issued a biological opinion (“BO”) (“2009 NOAA BO”) concluding that the effects of
6 proposed long-term SWP and CVP operations were likely to jeopardize the continued existence of the
7 Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, Central Valley
8 steelhead, and Southern Distinct Population Segment of North American green sturgeon. To avoid
9 jeopardy and adverse modification of critical habitat, the 2009 NOAA BO additionally required the
10 creation of 17,000+ acres of enhanced floodplain habitat by the SWP and the CVP contractors.

11 33. In 2009, the California Legislature passed the Sacramento-San Joaquin Delta Reform Act
12 of 2009 (“2009 DRA”) (Wat. Code, § 85000 et seq.) The 2009 DRA aptly describes the Delta as “a
13 critically important natural resource for California and the nation,” which “serves Californians
14 concurrently as both the hub of the California water system and the most valuable estuary and wetland
15 ecosystem on the west coast of North and South America.” (Wat. Code, § 85002.)

16 34. In August 2015, DWR and Reclamation submitted a joint Water Rights Change Petition to
17 the SWRCB for the California WaterFix Project with the intent to add three new 3,000 cfs intakes on the
18 Sacramento River for the Project. In January 2016, SDWA among others, filed protests to DWR’s and
19 Reclamation’s joint petition, alleging, among other things, that the WaterFix project would result in
20 significant environmental impacts in the Delta. In July 2018, DWR submitted its Certification of
21 Consistency with the Delta Plan for the WaterFix project with the Delta Stewardship Council (“DSC”)
22 pursuant to Water Code section 85225. DWR’s Certification of Consistency was challenged through an
23 appeal in which SDWA participated. In November 2018, the DSC issued a draft determination finding
24 that DWR’s consistency finding was not supported by substantial evidence. One week later, members of
25 the DSC encouraged DWR to withdraw its Certification of Consistency, which DWR did in December
26 2018.

27 35. Having suffered numerous legal and other setbacks, and with the feasibility of the WaterFix
28 project in serious question, DWR rescinded its approvals of the project in May 2019, including the CEQA

1 Notice of Determination, findings of fact, statement of overriding considerations, and the mitigation
2 monitoring and reporting program. DWR also withdrew its Petition for Change in Points of Diversion
3 and Rediversion and its Application for Section 401 Certification from the SWRCB. DWR also adopted
4 a resolution rescinding the Bond Resolutions that were the basis of its 2017 Validation Action re the same.
5 In July 2019, SDWA and other public agencies filed a request for dismissal of their challenges to the
6 WaterFix project.

7 **Other Related Processes**

8 36. Concurrently with the Project’s (and prior iterations of the Project) review, the SWRCB
9 has proceeded to update the Bay Delta Water Quality Control Plan (“WQCP”).

10 37. On December 12, 2018, the SWRCB adopted amendments to the WQCP for the San
11 Francisco Bay/Sacramento–San Joaquin Delta Estuary related to San Joaquin River Flows and Southern
12 Delta Water Quality (“2018 WQCP Amendments”). In the 2018 WQCP Amendments, the SWRCB
13 weakened the South Delta Salinity Objective, which would allow higher salinity in the surface waters and
14 would impair South Delta agriculture. The SWRCB’s analysis provided no scientific justification for the
15 increase in salinity, but instead relied on the fact that increasing permissible levels of salinity in the South
16 Delta would result in fewer violations of the standard. While the 2018 WQCP Amendments are subject
17 to legal challenges, they are in the process of being implemented by the SWRCB.

18 38. In April 2019, Governor Newsom signed Executive Order N-10-19 directing the
19 California Natural Resources Agency, California Environmental Protection Agency, and California
20 Department of Food and Agriculture to develop a comprehensive strategy to build a climate-resilient water
21 system and ensure healthy waterways through the twenty-first century. Executive Order N-10-19 directed
22 DWR to “inventory and assess” planning for a downsized Delta conveyance facility and to conduct
23 extensive outreach to stakeholders in planning processes.

24 39. After receiving public input that provided numerous other actions and combinations of
25 actions that could meet the goals of the Governor’s Water Resilience Portfolio, the California Water
26 Resilience Portfolio was released in July 2020. The report identified a suite of actions for water supplies,
27 flood protection, and waterways for the state’s communities, economy, and environment. Without any
28

1 analysis of the necessity for new Delta diversions, the Portfolio also included new diversion and
2 conveyance facilities in the Delta:

3 Proposal 19.1:

4 Plan, permit, and build new diversion and conveyance facilities (such as a tunnel)
5 in the Sacramento-San Joaquin Delta to safeguard State Water Project, and,
6 potentially, Central Valley Project deliveries drawn from the Sacramento and San
7 Joaquin river systems. New conveyance should complement existing and
8 improved through-Delta conveyance to promote operational flexibility, protect
9 water quality, and improve aquatic habitat conditions while limiting local impacts.

10 40. On September 28, 2023, the SWRCB issued its Draft Staff Report/Substitute
11 Environmental Document in Support of Potential Updates to the WQCP related to the Sacramento River
12 and its Tributaries, Delta Eastside Tributaries, and Delta (“2023 Phase 2 SED”). The last major update to
13 the flow objectives for the protection of fish and wildlife beneficial uses in the Sacramento River
14 watershed and Delta occurred in 1995.

15 41. The 2023 Phase 2 SED recognizes that the Bay-Delta ecosystem is experiencing an
16 ecological crisis; explains the rapidly declining population abundance of anadromous salmonids, smelt
17 and winter-run chinook salmon, among other species; and explains the need for substantial increases in
18 Delta outflows to protect the environment, including prevention of extinctions of endangered and
19 threatened fish species. In addition to water quality impairment from low dissolved oxygen, mercury,
20 nutrients, salinity, and/or temperature, the 2023 Draft Phase 2 SED recognizes the relationship between
21 low flows through the Delta and increased formation of Harmful Algal Blooms (“HABs”). In stark
22 contrast to the identified need to increase outflows in the 2023 Draft Phase 2 SED, DWR’s Delta
23 Conveyance Project (the Project at issue in this Petition) would result in substantial decreases in Delta
24 outflows.

25 **The Delta Conveyance Project**

26 42. In January 2020, DWR proposed to design and construct the Delta Conveyance Project
27 (the Project at issue in this Petition) comprised of two diversion facilities, each at 3,000 cfs capacity, on
28 the Sacramento River; a single isolated tunnel for conveyance; tunnel shafts; and a pumping plant and
appurtenant facilities. DWR’s Notice of Preparation (“NOP”) for the Project’s EIR identified the
proposed project as either the central or eastern alignment with pumping facilities in the South Delta near
Clifton Court Forebay. After the process of identifying and screening alternatives evaluated in DWR’s

1 Draft EIR for the Project, DWR selected the Bethany Reservoir Alignment with a 6,000 cfs capacity
2 (Alternative 5) as the proposed Project to analyze in the Draft EIR. Alternative 5 proposes to discharge
3 water from the tunnel directly to the Bethany Reservoir along the California Aqueduct.

4 43. The Project proposes a drastic change to the current through Delta conveyance approach
5 in the Delta. Construction and operation of the Project would occur within the legal Sacramento-San
6 Joaquin Delta and Suisun Marsh.

7 44. The Project would include a main 39-foot exterior diameter underground water conveyance
8 tunnel, 45 miles in length, that will divert up to 6,000 cfs of water from the Sacramento River in the north
9 Delta to a new pumping plant at Bethany Reservoir.

10 45. The Project would divert water through two intakes on the east bank of the Sacramento
11 River near Hood and Courtland, respectively, just west of the Stone Lakes National Wildlife Refuge
12 (“Wildlife Refuge”). These two intakes are referred to as the North Delta Diversions (“NDDs”). The new
13 intakes would each extend nearly a third of a mile along the river, thus encompassing nearly a mile of
14 river frontage over a three-mile length of the river. Water would travel from the two intakes, each with a
15 3,000 cfs capacity, into the isolated 39-foot external diameter underground tunnel and travel through that
16 tunnel 45 miles to the Bethany Reservoir Pumping Plant and Surge Basin, south of the existing SWP’s
17 Clifton Court Forebay in the South Delta.

18 46. Completing a Project of such mammoth proportions would take a significant amount of
19 time; DWR has estimated that construction would take 14 years. DWR’s CEQA Findings indicate that
20 the soonest the Project could be operational would be 15 to 20 years, from now, in 2039 or later.

21 47. Rural Delta communities would bear the burden of living with the direct construction
22 impacts for more than a decade. Project construction would cause traffic and circulation impacts of an
23 unprecedented magnitude in largely rural, agricultural areas. The increase in traffic would make crop
24 harvests difficult or, in some cases, impossible.

25 48. Reclamation districts (“RDs”), local agencies responsible for protecting Delta
26 communities, agriculture, and industry from flood damage and ensuring adequate drainage and, in many
27 cases, also ensuring an adequate and reliable water supply, would also pay a price for DWR’s Project.
28 These districts, and their landowners, have invested substantial resources in levees, drainage ditches,

1 pumps, and other infrastructure to prevent flooding in their service areas and to provide drainage and
2 irrigation. Many of these districts are located within the Project footprint. The Project’s intakes and other
3 facilities would be constructed directly on or under RD levees, potentially damaging them in the process.

4 49. Project construction would also interfere with Delta channels, water delivery and runoff
5 facilities, placing increased stress on water supply and flood infrastructure. The Project also proposes
6 large muck storage areas within RD 1002 at Twin Cities Road and at Roberts Island, near the Port of
7 Stockton.

8 50. The Project seriously threatens Delta agriculture throughout the Delta. A broad range of
9 crops is grown in the Delta and provides important economic and environmental benefits.

10 51. The Delta Protection Commission (“DPC”) 2012 Economic Sustainability Plan estimated
11 that increased salinity in Delta water could result in agricultural losses between \$20 million and \$80
12 million per year, and that number will be significantly higher when updated to 2024. According to that
13 report, Delta agriculture generated about \$795 million in direct agricultural production in 2008. This
14 production was estimated to create 9,681 jobs, \$683 million in value added and \$1.416 billion in output
15 in the five Delta counties. Across all of California, the economic impact of Delta agriculture is estimated
16 to be 12,934 jobs, \$819 million in value added, and \$1.642 billion in output.

17 **Project Review and Approvals**

18 52. On December 18, 2023, DWR released a Final EIR (“EIR”), including responses to
19 comments on the DEIR.

20 53. DWR’s decision to release the behemoth EIR on December 18th, one week before
21 Christmas, minimized the potential for public scrutiny and participation, contrary to CEQA’s intent. The
22 public’s ability to evaluate the EIR was further hampered due to the length and organization of the EIR.
23 The comment response tables alone comprise almost 5,000 pages of the 27,300-page EIR. In addition,
24 the comment response tables were poorly labeled and formatted and did not include commenter names,
25 instead requiring cross-reference to separate commenter tables for identification. The location of changes
26 made to the EIR in response to comments were also difficult to locate as specific page or section numbers
27 were not provided and the EIR did not include tracked changes identifying changes made to the DEIR in
28 response to comments and other developments subsequent to release of the DEIR.

1 54. On December 21, 2023, DWR certified the EIR, adopted Findings and Statement of
2 Overriding Considerations (“CEQA Findings”) and a Mitigation Monitoring and Reporting Plan
3 (“MMRP”), and executed and filed its Notice of Determination that it approved the Project.

4 55. Also on December 21, 2023, DWR made a “track changes” version of the EIR available to
5 public commenters, but did not provide, summarize, or respond to multiple comments criticizing the EIR
6 and/or identifying Project matters not ready for final determination.

7 56. The United States Army Corps has yet to respond to public comments on its Draft
8 Environmental Impact Statement (“EIS”) for the Project, complete a Final EIS, or issue a Record of
9 Decision pursuant to NEPA recording its final decision on the Project. In addition, no clear plan (including
10 identification of a lead agency) for analyzing operations of the Project under NEPA has been articulated
11 by DWR.

LEGAL FRAMEWORK

California Environmental Quality Act

14 57. CEQA has two purposes: environmental protection and informed self-government. CEQA
15 must “be interpreted to afford the fullest possible protection to the environment within the reasonable
16 scope of the statutory language.” (*Mountain Lion Foundation v. Fish & Game Comm’n*. (1997) 16 Cal.4th
17 105, 134.) CEQA requires agencies to “take all action necessary to protect, rehabilitate, and enhance the
18 environmental quality of the state.” (Pub. Resources Code, § 21001, subd. (a).)

19 58. A “project” under CEQA is an activity which may cause either direct physical change in
20 the environment, or reasonably foreseeable indirect physical change in the environment (Pub. Resources
21 Code, § 21065, subd. (a)); and a “discretionary” project is one that is subject to judgmental controls, where
22 the agency can use its judgment to decide whether and how to carry out a project. (Cal. Code Regs., tit.
23 14, Ch. 3 (“CEQA Guidelines”), § 15002, subd. (i).) Prior to approving a discretionary project, an agency
24 must fully disclose and analyze all of the project’s potentially significant direct, indirect, and cumulative
25 environmental effects. (See, e.g., CEQA Guidelines, § 15002, subd. (f).) Public agencies must avoid or
26 minimize such environmental damage where feasible. (CEQA Guidelines, § 15021, subd. (a).) Pursuant
27 to this duty, no public agency may approve or carry out a project where one or more significant effects on
28

1 the environment may occur if the project is approved, unless certain narrow findings are made. (CEQA
2 Guidelines, §§ 15091, 15093.)

3 **Legislative Protections for the Delta**

4 59. Over the course of California’s water development history, the Legislature has enacted
5 measures to protect the Delta and other areas in which water serving other parts of the states originates.

6 60. The Delta Protection Act of 1959 (“1959 DPA”): (1) requires the SWP and CVP to provide
7 salinity control and an adequate water supply for the Delta (Wat. Code, §§ 12201, 12202); (2) prohibits
8 the export of water from the Delta to which in-Delta users are entitled through water rights and water
9 which is necessary for salinity control and an adequate supply “to maintain and expand agriculture,
10 industry, urban and recreational development in the Delta” (Wat. Code, § 12204); (3) requires
11 maintenance of a “common source of fresh water” in the Delta to serve both in-Delta water needs and
12 export water needs when water surplus to the in-Delta needs is available (Wat. Code, § 12201); and (4)
13 requires all releases of water from storage reservoirs into the Delta for export from the Delta to be
14 integrated to the “maximum extent possible” in order to fulfill the objectives of the Act (Wat. Code, §
15 12205).

16 61. The 1992 Delta Protection Act (“1992 DPA”) (Pub. Resources Code, § 29700 et seq.) and
17 the Watershed Protection Act (Wat. Code, § 11460 et seq.) were enacted to further protect the Delta and
18 ensure that protected areas are not deprived of adequate supplies of water.

19 62. The Delta Reform Act of 2009 (“2009 DRA”) (Pub. Resources Code, § 85000 et seq.)
20 includes substantive protections for the Delta. The Legislature declared state policy in pertinent part in
21 the act as: “The policy of the State of California is to **reduce reliance on the Delta** in meeting California’s
22 future water supply needs through a statewide strategy of investing in improved regional supplies,
23 conservation, and water use efficiency” (Wat. Code, § 85021, emphasis added.)

24 63. The 2009 DRA expressly preserves area of origin and related water rights protections:

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

1 **Public Trust Doctrine**

2 64. The State of California, as a sovereign entity, owns “all of its navigable waterways and
3 the lands lying beneath them ‘as trustee of a public trust for the benefit of the people.’” (*Colberg, Inc. v.*
4 *State of California ex rei. Dept. Pub. Wks.* (1967) 67 Cal.2d 408.) The Public Trust doctrine, as recognized
5 and developed in California decisions, encompasses all navigable lakes and streams, and protects
6 navigable waters from harm caused by diversion of non-navigable tributaries. DWR has a duty to take
7 the public trust into account in the planning and allocation of water resources, and to protect public trust
8 whenever feasible. As a lead agency under CEQA, DWR has an independent duty to perform a public
9 trust consistency analysis, based on substantial evidence in the record, as part of an adequate CEQA
10 review.

11 **STANDING**

12 65. SDWA’s boundaries are located in the South Delta. SDWA’s landowner constituents
13 own land within the SDWA and will be directly affected by the implementation of the Project. SDWA is
14 empowered to “sue and be sued” and to take all reasonable and lawful actions, including pursuing
15 legislative and legal actions, that have for their general purpose: (1) to protect the water supply of the
16 lands within the agency against intrusions of ocean salinity; and/or (2) to assure the lands within the
17 agency a dependable supply of water of suitable quality sufficient to meet present and future needs. The
18 agency may also undertake activities to assist landowners and local districts within the agency in
19 reclamation and flood control matters. (See Wat. Code, Appendix, §§ 116-4.2, subd. (b) & 116-4.1, subds.
20 (a) and (b), respectively.) SDWA may assist landowners, districts, and water right holders within its
21 boundaries in the protection of their vested water rights and may represent the interests of those parties in
22 water right proceedings and related proceedings before courts of both the State of California and the
23 United States to carry out the purposes of the agency. (See Wat. Code, Appendix, § 116-4.2, subd. (b).)
24 Those vested water rights include post-1914 water permits and licenses issued by the SWRCB and its
25 predecessor agencies, overlying rights, statutory rights, contract rights, riparian rights, prescriptive rights,
26 salvage rights, rights to recycled and recaptured water, and rights to artesian flow. SDWA’s landowner
27 constituents also use the Delta for other beneficial uses including recreation, hunting, and fishing.
28

1 **ELECTION TO PREPARE RECORD**

2 71. Plaintiffs elect to prepare the administrative record in this proceeding pursuant to Public
3 Resources Code section 21167.6, subdivision (b)(2), and any other applicable laws.

4 **PRIVATE ATTORNEY GENERAL DOCTRINE**

5 82. Plaintiffs bring this action as private attorneys general pursuant to California Code of Civil
6 Procedure section 1021.5, California common law, and any other applicable legal theory, to enforce
7 important rights affecting the public interest.

8 83. Issuance of the relief requested in this Petition will confer significant benefits on the
9 general public by enforcing the mandates of CEQA, the 2009 DRA, the public trust doctrine and the other
10 laws alleged to have been violated herein which are intended to protect the environment and/or the Delta
11 and its watershed.

12 84. Issuance of the relief requested in this Petition will result in the enforcement of important
13 rights affecting the public interest.

14 85. The necessity and financial burden of enforcement are such as to make an award of
15 attorneys' fees appropriate in this proceeding. Absent enforcement by Plaintiffs, the Project might
16 otherwise be deemed valid despite violating the laws alleged to have been violated herein.

17 **CAUSES OF ACTION**

18 **FIRST CAUSE OF ACTION**
19 **VIOLATIONS OF CEQA**
20 **(Pub. Resources Code, § 21000 et seq.)**

21 86. Plaintiffs incorporate by reference each and every allegation in the preceding paragraphs
22 of this Petition as though fully set forth herein.

23 ***The EIR Content and the Process Leading Up to***
24 ***Its Certification Violated Key Requirements of CEQA***

25 87. DWR prejudicially abused its discretion in certifying the EIR. DWR did not proceed in
26 the manner required by law, and its decisions in approving the Project and certifying the EIR are not
27 supported by substantial evidence. (Pub. Resources Code, § 21168.5.) These legal deficiencies include,
28 without limitation, the following:

88. A court evaluating an agency's procedural compliance "determine[s] de novo whether the
agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA

1 requirements.” (*Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014)
2 227 Cal.App.4th 1036, 1045.) “[T]he existence of substantial evidence supporting the agency’s ultimate
3 decision . . . is not relevant when one is assessing a violation of [CEQA’s] information disclosure
4 provisions.” (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82
5 (*CBE*).

6 89. Thus, an allegation that the EIR does not contain required information is an allegation of
7 procedural error and is reviewed *de novo*. Examples include: failure to describe the entire project
8 (*Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d
9 151, 165-166), failure to describe the environmental setting and baseline (*San Joaquin Raptor/Wildlife*
10 *Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722-723); and deferral of the
11 development of mitigation measures (*CBE, supra*, 184 Cal.App.4th at 90).

12 90. DWR committed a number of procedural errors in performing its environmental review of
13 the Project, as further described herein below.

14 ***The Project Objectives are Impermissibly Narrow***

15 91. The project objective must illuminate all elements of the project’s underlying purpose.
16 (*Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1300.) However,
17 project objectives must not be so narrowly defined that they preclude consideration of reasonable
18 alternatives for achieving the project’s underlying purpose. (*North Coast Rivers Alliance v. Kawamura*
19 (2015) 243 Cal.App.4th 647, 668.) The EIR impermissibly narrowed the Project objectives in precisely
20 this way.

21 92. For example, DWR misused Project objectives to foreclose the possibility of analyzing
22 Project alternatives that satisfy the Project’s basic purpose, but not the agency’s predetermined preference
23 for new conveyance structures. DWR’s intent to foreclose all alternatives without new conveyance
24 structures has been evident in BDCP planning since at least 2007, when DWR barred any entity from
25 participating in the BDCP Steering Committee unless it signed onto the Planning Agreement endorsing
26 the construction of isolated conveyance.

27 93. The inclusion of a Project objective requiring “new” conveyance thus impermissibly
28 narrows the Project’s objectives and the EIR’s analysis of a reasonable range of alternatives.

1 *The Project Description Is Shifting, Incomplete and Inadequate*

2 94. The EIR's Project description describes Project elements in such indefinite terms, or omits
3 descriptions entirely, that the EIR lacks a Project description that permits analysis of Project impacts at a
4 "project" level.

5 95. CEQA requires that an EIR include an accurate project description and fully disclose and
6 fairly evaluate the nature and objective of a project. (*San Joaquin Raptor Rescue Center v. County of*
7 *Merced* (2007) 149 Cal.App.4th 646, 655.) An EIR must contain a "sufficient degree of analysis to
8 provide decision-makers with information which enables them to make a decision which intelligently
9 takes account of environmental consequences." (CEQA Guidelines, § 15151.)

10 96. The EIR's project description is legally deficient because it omits significant components
11 of a legally sufficient project description that would permit informed decision-making. Some examples
12 of this deficiency are described below.

13 97. The EIR fails to provide sufficient technical information about the preferred Project
14 Alternative 5 to allow informed decision-making.

15 98. Project alignment, alignment features, and alignment geotechnical information are
16 currently considered preliminary. Project engineering is at the preliminary stage.

17 99. The EIR is deficient as an informational document for the public and decision-makers
18 because it treats Project facility locations, dimensions, and elevations as being approximate, not specific.

19 100. The EIR fails to include Delta levees and channels and their required maintenance as a
20 Project component, despite the fact that the Project includes continued reliance on through-Delta
21 conveyance/continued use of the Freshwater Pathway for operation of the South Delta pumps. Failure to
22 include these structures and to identify their required maintenance in the Project description precludes a
23 legally sufficient impacts analysis in the EIR.

24 101. The EIR fails to provide sufficient locations, maps, figures, and boundaries showing
25 precisely where various Project elements would be constructed and which parcels are considered to be
26 within the Project's footprint.

27 102. The EIR fails to adequately disclose the specific location and design of transmission
28 facilities to provide power for construction and operation of the new conveyance facilities. While existing

1 power lines would purportedly be used to the extent possible, the location or required load of some
2 facilities would require either new aboveground power towers with lines or, depending on site-specific
3 parameters, underground conduit to serve those specific areas.

4 103. The EIR fails to disclose critical information about proposed tunnel muck (referred to as
5 “reusable tunnel material” or “RTM” in the EIR) disposal sites, including precise location, size, shape,
6 water infiltration rates, and peak rainfall events and other site-specific plans. This information is necessary
7 to disclose and analyze the Project’s impacts, including impacts to local water supply and drainage
8 facilities, agricultural and biological resources, as well as water quality impacts due to runoff or
9 sedimentation from these sites.

10 104. The EIR fails to fully disclose relevant information about proposed borrow pitting activities
11 associated with Project construction. The EIR does not identify the origin of the borrow fill or the
12 locations of borrow pits necessary to construct the Project. This information is necessary to disclose and
13 analyze water quality, hazardous materials, traffic, air quality and other impacts due to extraction and
14 transportation of and runoff from these materials.

15 105. Project construction would require the removal of substantial amounts of soil via borrow
16 pitting, resulting in significant unanalyzed impacts. Due to the geology and geography of the Delta,
17 locations with usable soil for borrowing are limited. If borrow is obtained locally, it would need to either
18 be barged or trucked in for dewatering treatment and unfilled borrow pits would be left throughout the
19 Project area. Local borrow fill could also contain toxic constituents that would create potentially
20 significant hazard impacts; no testing has been done to evaluate this risk. The EIR fails to analyze these
21 potentially significant impacts.

22 106. The EIR fails to adequately define the processes necessary for reclamation of borrow pits.
23 Under the Surface Mining and Reclamation Act (Pub. Resources Code, § 2710 et seq. [“SMARA”])
24 borrow pitting constitutes a surface mining activity. The EIR fails to disclose all of the reclamation plans
25 required pursuant to local and/or state authority.

26 107. The EIR fails to disclose information about the exact sizes and locations of the construction
27 areas that would surround the intake sites during multi-year construction, and the locations of the batch
28 plant and fuel stations that would be located at each site.

1 108. Elements of the Project characterized as “Environmental Commitments” are uncertain and
2 may not be enforceable.

3 109. To the extent supplemental water supplies from areas north of the Delta would be relied
4 upon to meet bypass flow requirements, that water may be obtained via groundwater substitution and lead
5 to undisclosed groundwater impacts in those areas; the EIR does not sufficiently address these
6 environmental impacts.

7 110. The EIR fails to provide a Project operations plan constituting a stable project, instead only
8 providing preliminary proposed operations criteria. As a result, the effects analysis provided is merely a
9 simulation of one possible scenario of how the Project “might” be operated.

10 111. The EIR also states that it is not expected that operations would shift from the South Delta
11 intakes to the north Delta intakes unless there is an operational advantage to do so at DWR’s discretion.
12 Thus, DWR has the ability to change the Project at any time based on its own discretion. This language
13 allows DWR to utilize the north Delta intakes as it sees fit to provide an “operational advantage.” This
14 language creates an unstable project description because DWR has given itself the unilateral ability to
15 drastically change the operations described and analyzed in the EIR.

16 112. The certified EIR does not analyze the potentially significant impacts associated with the
17 full range of operational scenarios.

18 113. Operational changes throughout the environmental review process include substantially
19 reduced Delta outflows in late summer and fall months, which would cause potentially significant impacts
20 to water quality. These impacts include but are not limited to the increased proliferation of HABs, such
21 as toxic *Microcystis*. The EIR fails to disclose these ongoing changes.

22 114. The EIR discusses the importance of monitoring with respect to evaluating operational
23 impacts; however, it provides no information on the objectives, types, geographic distributions, data
24 management, assessment and reporting for the monitoring program.

25 115. The EIR’s operational analysis is also fundamentally flawed because the EIR fails to
26 describe how DWR will foreseeably operate the Project to address sea level rise, levee failures and drought
27 conditions and, hence, fails to subject those operations to the full range of CEQA analysis. Addressing
28 sea level rise and levee failures are two of the fundamental purposes of the Project, yet there is no

1 discussion or CEQA analysis of how DWR will foreseeably operate the Project to achieve those purposes.
2 The lack of such a description and analysis violates numerous CEQA procedural and substantive
3 mandates, including the following:

- 4 • the duty to provide an accurate and complete description of the Project;
- 5 • the duty to "examine all phases of the project including planning, construction, and
6 *operation*" (Cal. Code Regs., tit. 14, § 15161, emphasis added);
- 7 • the duty to investigate and analyze the potential direct and reasonably foreseeable indirect
8 individual and cumulative environmental impacts from such operations;
- 9 • the duty to discuss and analyze, and ultimately adopt, feasible mitigation measures that
10 would avoid any potentially significant impacts from such operations or mitigate them to
11 a level of insignificance; and
- 12 • the duty to discuss and analyze a reasonable range of alternatives that would avoid any
13 potentially significant impacts from such operations or mitigate them to a level of
14 insignificance, and potentially adopt one of those alternatives.

15 116. Moreover, the failure to describe and analyze how DWR will foreseeably operate the
16 Project to address sea level rise, levee failures and drought conditions also violates the principal set forth
17 in *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, which
18 requires "an EIR [to] include a analysis of the environmental effects of future expansion or other action
19 if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or
20 action will be significant in that it will likely change the scope or nature of the initial project or its
21 environmental effects." (*Id.*, p. 396.) It is a "reasonably foreseeable consequence" of the Project that
22 DWR will operate the Project it to address sea level rise, levee failures and drought conditions (i.e., address
23 the fundamental purposes of the Project), and the addition of the entire range of environment impacts
24 resulting from such operations will greatly expand the scope and nature of the impacts from the Project.

25 117. The EIR fails to adequately describe and analyze the environmental impacts from the
26 Project's Adaptive Management operations, including its Adaptive Management and Monitoring Program
27 ("AMMP"). An adaptive management plan may properly be part of a complete project description and/or
28 provide mitigation under CEQA if the lead agency adopts enforceable performance standards. (See CEQA

1 Guidelines, § 15126.6, subd. (a)(2).) Among other deficiencies, the Adaptive Management described in
2 the EIR lacks critical information such as species-specific thresholds and timelines for action, specific
3 scenarios with target thresholds and alternatives, and commitments and funding needed for the
4 development of effective adaptive management.

5 118. The EIR fails to provide sufficient locations, maps, figures, boundaries, and other site-
6 specific information showing precisely where the extensive geotechnical and environmental investigations
7 (including borings, test-pits, cone penetrometer tests and other activities) will be performed to gather
8 construction design information and other construction and implementation related information, nor does
9 the EIR provide sufficient information describing the nature and extent of those surveys. As with the
10 other omitted information, such information is necessary to adequately investigate, analyze, disclose,
11 discuss and mitigate the potentially significant site-specific and cumulative impacts from those expansive
12 investigations.

13 119. DWR also failed to investigate, analyze, disclose and discuss (1) the hundreds of prior
14 geotechnical and environmental investigations that have been performed in furtherance of the Project and
15 its predecessor variants (and other projects); (2) the geotechnical and environmental investigations that
16 are ongoing and in furtherance of the Project (and other projects); and (3) the geotechnical and
17 environmental investigations that will be performed in probable future projects. Such failure results in a
18 failure to examine whether the impacts from the Project’s investigations (and impacts from all other
19 aspects of the Project) are “cumulatively considerable” “when viewed in connection with the effects of
20 past projects, the effects of other current projects, and the effects of probable future projects,” projects
21 that contain the same type of investigations as the Project as well as other features that impact the same
22 types of environmental resources impacted by the Project. (Cal. Code Regs., tit. 14, § 15064, subd. (h)(1).)

23 120. The EIR fails to provide accurate information regarding the Project costs. DWR, both in
24 the EIR and in public statements made during the review process, has repeatedly stated that all costs for
25 the Project would be paid by Project beneficiaries. However, DWR’s 2019 validation action reveals that
26 the Project would require billions of dollars in subsidies. CEQA requires “government agencies at all
27 levels to consider . . . economic and technical factors.” (Pub. Res. Code, § 21001, subd. (g).) DWR failed
28 to do so by not disclosing the Project’s need for public subsidies.

1 ***The EIR Impermissibly Piecemeals Environmental Review of the Project***

2 121. A lead agency must perform a comprehensive review of the full environmental
3 consequences of a project, referred to as the “whole of the action,” prior to taking a necessary first step
4 toward that project. A lead agency under CEQA may not avoid including analysis of smaller or related
5 projects that actually comprise part of the larger project. This rule prohibiting “piecemealing” is intended
6 to assure “that environmental considerations not become submerged by chopping a large project into many
7 little ones, each with a potential impact on the environment, which cumulatively may have disastrous
8 consequences.” (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577,
9 592.) The EIR violated CEQA by failing to analyze the whole of the action. Some examples of this
10 deficiency are described below.

11 122. Several remaining approvals would likely change the Project in ways that require
12 comprehensive review under CEQA. Approvals not yet completed at the time of EIR certification include,
13 but are not limited to: Section 401 of the Clean Water Act Water certification by the SWRCB; Lake and
14 Streambed Alteration Agreement by DFW; Clean Water Act Section 404 fill permit from the U.S. Army
15 Corps of Engineers (“USACE”); Clean Water Act section 408 fill permit from the USACE; approval of a
16 water rights change petition by the SWRCB to permit diversion of water from the Sacramento River in
17 the north Delta; review of any appeal from a consistency determination at the DSC; issuance of Biological
18 Opinions by the USFWS and NOAA Fisheries, and numerous other state, regional and local approvals.
19 These remaining approvals will likely lead to new and different terms and conditions, mitigation measures
20 or project changes that have not yet been disclosed or analyzed pursuant to CEQA.

21 123. Delaying analysis and mitigation of an impact until the permitting phase of a project
22 conflicts with CEQA’s policy of integrated review (Pub. Resources Code, § 21003, subd. (a)), and such
23 deferral is therefore impermissible. (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2
24 Cal.5th 918, 939-41.)

25 124. The EIR segments and piecemeals environmental review of the Project by failing to
26 provide an adequate description of the long-term operations of the CVP and SWP, actions required by the
27 2008 and 2009 BOs, and other requirements of state and federal law that will be imposed on Project
28 construction and operation.

1 125. DWR has impermissibly deferred analysis of Project impacts, including impacts to
2 flooding and flood control measures, indicating that analysis will occur following certification of the EIR,
3 without any commitment that independent CEQA review will be performed on these impacts at that later
4 date. DWR could have performed this analysis as part of CEQA review of the Project and this constitutes
5 an impermissible piecemealing of review of Project impacts.

6 ***The EIR Fails to Adequately Define the Project's Baseline***

7 126. In order to determine whether a project's impacts will be significant, CEQA requires lead
8 agencies to compare the impact of a proposed project to the "physical environmental conditions [in the
9 vicinity of the project] as they exist at the time the notice of preparation is published [and/or] [w]here
10 existing conditions change or fluctuate over time, and where necessary to provide the most accurate picture
11 practically possible of the project's impacts, a lead agency may define existing conditions by referencing
12 historic conditions, or conditions expected when the project becomes operational, or both, that are
13 supported with substantial evidence." (CEQA Guidelines, § 15125, subd. (a)(1).) These conditions serve
14 as the project's "baseline." (*Ibid.*) The description of the project's baseline ensures that the public has
15 "an understanding of the significant effects of the proposed project and its alternatives." (CEQA
16 Guidelines § 15125, subd. (a).) Accurately determining the baseline environmental conditions is crucial
17 to accurately evaluating a project's impact. (E.g., *San Joaquin Raptor/Wildlife Rescue Ctr. v. County of*
18 *Stanislaus* (1994) 27 Cal.App.4th 713, 722-723.) The EIR failed to accurately establish proper baselines
19 to meaningfully evaluate the significance of the Project's impacts and the comparative merits of the
20 alternatives.

21 127. The EIR fails to comply with the requirement that the baseline must be "realistic" and give
22 the "most accurate picture possible" of the Project's likely impacts. (*Neighbors for Smart Rail v.*
23 *Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439, 507.) Here the baseline fails to meet the
24 required standard of realism and accuracy.

25 128. The EIR fails to include an up-to-date description of the environmental baseline. The EIR
26 uses an environmental setting baseline that is tied to the January 2020 NOP of the EIR. The EIR also fails
27 to discuss over-allocated water entitlements that create unrealistic demands for Delta water, or "paper
28 water." For example, the SWP only supplies approximately half of its entitlements to contract water per

1 year. (*Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892,
2 899.) Courts have criticized planning based on paper water, recognizing the “huge gap between what is
3 promised and what can be delivered.” (*Id.* at 908, fn. 5.) The EIR baseline should have been adjusted to
4 include conditions existing close to the time of its release. Failure to use accurate and current data,
5 including updated modeling and other information, constitutes a failure to proceed in the manner required
6 by law.

7 129. The EIR impermissibly treats the No Action Alternative, including actions that must be
8 taken pursuant to the 2008 and 2009 BOs, as the baseline condition. Yet many of the actions required by
9 the 2008 and 2009 BOs have not yet been evaluated, approved, or implemented.

10 130. The baseline conditions fail to analyze how much water is needed to meet existing
11 obligations and priorities in the watershed. The EIR formulation of baseline environmental conditions
12 fails to provide accurate information regarding existing surface water and groundwater supply and
13 demand; it falsely cites ongoing unsustainable and illegal Delta water exports to establish a baseline for
14 future exports and fails to describe existing over-allocated water entitlements. Further, it fails to describe
15 how many water rights and diversions exist in the Project area, and their locations.

16 131. The EIR fails to disclose baseline conditions for existing groundwater supplies, uses and
17 infrastructure in the vicinity of the proposed tunnel. Standing alone, this failure renders the EIR
18 inadequate as an informational document.

19 132. The EIR description of baseline environmental conditions fails to properly disclose that
20 DWR and the United States Bureau of Reclamation (“Reclamation” or “USBR”) consistently violate
21 existing water quality standards in the south and other portions of the Delta and consistently seek
22 Temporary Urgency Change Petitions to relax Delta water quality standards.

23 133. The EIR description of baseline environmental conditions fails to disclose the restrictions
24 and limitations on DWR and USBR’s water rights and rights of other water users that impact DWR and
25 USBR’s operations.

26 134. The EIR concedes that most of the Project footprint has not been surveyed for cultural
27 resources, including architectural artifacts, so it is unknown what the baseline conditions for those
28 resources is; this renders the EIR deficient as an informational document.

1 135. The EIR fails to disclose the environmental baseline of soils and seismic conditions for
2 much of the Project footprint because DWR failed to obtain access to the private land within the proposed
3 Project footprint to perform drilling, boring, and petrologic analysis.

4 136. The instant situation is one of those situations where future baselines are also necessary to
5 address the fact that the "existing conditions [such as climate change and sea level rise will] change or
6 fluctuate over time" and, as a result, future baselines that capture those changes are "necessary to provide
7 the most accurate picture practically possible of the project's impacts" (CEQA Guidelines, § 15125,
8 subd. (a)(1).) Because of the sheer magnitude of the Project, it is not expected to become operational until
9 year 2040. A baseline analysis of the Project's operational impacts measured against the environmental
10 conditions at the time it becomes operational is "necessary to provide the most accurate picture practically
11 possible of the project's [operational] impacts" (Cal. Code Regs., tit. 14, § 15125, subd. (a)(1).)
12 Similarly, in light of its 100-year lifespan and the undisputed recognition that the climate, and the
13 hydrologic and other environmental resources impacted by the climate, will be dramatically changing over
14 the course of that lifespan, an additional baseline that reaches out even further, such as year 2070, is
15 likewise "necessary to provide the most accurate picture practically possible of the project's [operational]
16 impacts" (*Ibid.*)

17 ***The EIR Does Not Reflect DWR's Independent Judgment***

18 137. CEQA requires a lead agency to prepare and circulate an EIR that reflects the lead agency's
19 independent judgment, and not the judgment of the applicant. CEQA also requires the lead agency to
20 independently review and analyze the EIR that is prepared for a project. (Pub. Resources Code, §
21 21082.1.) DWR failed to prepare and circulate an EIR that reflects DWR's independent judgment.

22 138. The entire formulation of the Project and the subsequent environmental review has been
23 tainted by improper influence from the water contractors that expect to receive water as a result of the
24 Project. DWR has allowed the water contractors to make decisions about how to prepare the EIR and how
25 to comply with CEQA and agreed to develop a project based on the water contractors' decision-making,
26 rather than DWR's own independent judgment. A lead agency cannot delegate its own legal
27 responsibilities under CEQA to a third party. (*California Clean Energy Committee v. City of Woodland*
28 (2014) 225 Cal.App.4th 173, 194; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307.)

1 On information and belief, the EIR reflects the water contractors’ judgment and not DWR’s independent
2 judgment.

3 139. By failing to prepare, circulate, and certify an EIR reflecting its own independent judgment,
4 DWR failed to proceed in a manner required by law.

5 ***DWR Failed to Adequately Analyze Alternatives***
6 ***to Its Predetermined Tunnel Project***

7 140. The EIR failed to include an adequate analysis of alternatives to the Project. The EIR’s
8 deficiencies include, but are not limited to, the following examples.

9 141. DWR unreasonably constrained the initial formulation of alternatives to those alternatives
10 that included some form of new conveyance in the North Delta. DWR never considered non-conveyance
11 alternatives that would reduce the potentially significant impacts of the Project as required by CEQA in
12 the initial formulation of alternatives. This predetermination that new conveyance must be included in all
13 alternatives unreasonably constrained the EIR alternatives analysis in violation of CEQA Guidelines
14 section 15004, subdivision (b)(2), which provides, “[P]ublic agencies shall not undertake actions
15 concerning the proposed public project that would have a significant adverse effect or limit the choice of
16 alternatives or mitigation measures, before completion of CEQA compliance.”

17 142. The No Project Alternative is deficient because it is impermissibly speculative. The EIR
18 makes judgments about future conditions related to climate change and incorporates those into the No
19 Project Alternative. The EIR fails to adequately account for the fact that future climate change impacts,
20 and the timeline on which they may occur, are uncertain

21 143. The EIR also uses various “predictable” actions in its No Project Alternative; however,
22 several of these predictable actions are not in the project area, nor are they water conveyance projects.
23 Thus, the inclusion of these other “predictable” projects in the No Project Alternative assumptions violates
24 CEQA. Including actions that are unlike the proposed conveyance project violates CEQA because these
25 types of actions would not be the “consequence” of the No Project Alternative.

26 144. The EIR failed to include a reasonable range of alternatives and to provide adequate detail
27 about the alternatives to allow the public to assess those alternatives’ ability to meet Project objectives or
28 to assess their respective environmental impacts. (Pub. Resources Code, § 21002; CEQA Guidelines, §§
15126.6, 15002.)

1 145. A Project objective to restore and protect the ability of the CVP and SWP to deliver full
2 contract amounts improperly constrained the identification and development of Project alternatives.
3 Among other deficiencies, this Project objective does not properly relate to the environmental impacts of
4 the Project and is therefore a non-basic Project objective that cannot be used to reject any alternative.

5 146. Reduced export alternatives would reduce take of state and federally listed species, reduce
6 DWR and its contractor's reliance on the Delta, and reduce countless impacts from the Project should
7 have been considered and included in the reasonable range of alternatives. (See *Habitat & Watershed*
8 *Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1304 [potentially feasible alternative that
9 might avoid a significant impact must be discussed and analyzed in an EIR so as to provide information
10 to the decision maker about the alternative's potential for reducing environmental impacts].)

11 147. The EIR failed to provide a good faith, reasoned response to commenters who suggested
12 the inclusion of alternatives that would mitigate significant environmental impacts while achieving most
13 Project objectives, including but not limited to: an alternative that utilized conservation and desalination,
14 an alternative location for intakes, alternatives that include improvements to the South Delta diversions to
15 reduce take of protected fish species, and an alternative that would significantly increase Delta outflows.

16 148. The EIR did not consider any alternatives that maintained and improved existing
17 infrastructure. The EIR considered only alternatives relying on new conveyance, as opposed to
18 consideration of any through-Delta conveyance alternatives that would reduce exports.

19 149. As an example, improvements to the existing South Delta export pumps, coupled with
20 maintenance and improvements to the Delta levee system, could meet the Project objectives relating to
21 improved water supplies by facilitating export of water without take of state and federally listed species.
22 The EIR failed to include any alternative that included improvements and/or fish screen installation at the
23 South Delta export pumps without new NDDs.

24 150. The EIR's reasonable range of alternatives must be comprised of alternatives that are legally
25 and otherwise "feasible." Because, as explained elsewhere herein, all of the alternatives included in that
26 range contain an isolated conveyance facility and other components that are contrary to one or more laws
27 and are otherwise infeasible, none of those alternatives meets the requisite "feasibility" to be eligible for
28

1 inclusion in that mandatory range. The EIR’s mandatory reasonable range of feasible alternatives is,
2 accordingly, fatally deficient.

3 151. The EIR’s screening process for alternatives was mishandled and inadequate in numerous
4 respects, and included the misrepresentation of suggested alternatives to foster their rejection.

5 152. The EIR wrongfully eliminated consideration of alternatives required to be considered
6 under NEPA, which also applies to the Project.

7 153. The EIR fails to integrate a discussion of other actions by agencies with permitting
8 authority over sensitive natural resources. When there is credible evidence that sensitive natural resources,
9 for instance, are within the project area, an EIR must discuss other agencies’ authority over those resources
10 and discuss how the project alternatives have been devised to anticipate that authority. (*Banning Ranch
11 Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 938.) This failure to integrate and disclose
12 the ramifications of other agencies’ actions for the project alternatives renders the EIR discussion of
13 alternatives inadequate.

14 ***The EIR Failed to Adequately Respond to Comments***

15 154. The EIR failed to respond in good faith to public comments raising deficiencies with the
16 document, and in one or more instances entirely failed to acknowledge timely submitted public comments.
17 For comments that it did acknowledge, the EIR offers a litany of boiler plate language, conclusory
18 statements, and vague documentary references unsupported by specific reference to explanatory
19 information, which are insufficient to comply with CEQA’s public participation requirements. (CEQA
20 Guidelines, § 15088, subd. (c).)

21 155. Where experts disagree about an EIR’s data or methodology, the EIR should summarize
22 main points of disagreement and explain why expert comments have been rejected. (CEQA Guidelines, §
23 15151; see also *Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Commissioners* (2001) 91
24 Cal.App.4th 1344, 1367, 1371.) The EIR fails to include these critical disclosures.

25 156. The EIR’s failure to adequately respond to comments renders it “fatally defective.”
26 (*People v. County of Kern* (1974) 39 Cal.App.3d 830, 842.)

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1 ***DWR Unreasonably Restrained the Public’s Ability to Comment on the EIR***

2 157. On December 8, 2023, DWR published the EIR, which included revised EIR chapters and
3 responses to comments. DWR illegally restrained public comment on the EIR by failing to include a
4 readily available way to understand how the DEIR had been modified in response to public comments and
5 other changes.

6 158. SDWA, and others requested additional time beyond the minimum 10 days to review the
7 EIR prior to certification and Project approval due to the voluminous EIR and other factors. DWR denied
8 these reasonable requests and issued its Project approvals on December 21, 2023.

9 159. As a result of DWR’s rush to approve the Project, the public had only 13 days during the
10 winter holiday period to scour, review and respond to 27,000 pages to look for changes and new
11 information.

12 160. DWR’s actions constitute a failure to proceed in a manner prescribed by law.

13 ***The EIR Presents Information in a Fragmented and Incoherent Manner,***
14 ***Precluding the EIR from Serving as an Effective Informational Document***

15 161. EIRs must be organized and written in a manner that will make them “meaningful and
16 useful to decision-makers and to the public.” (Pub. Resources Code, § 21003, subd. (b).) EIRs must be
17 written in plain language, and graphic means of presenting information should be used to enhance an
18 EIR’s clarity. (CEQA Guidelines, §§ 15140, 15147.) An EIR must not be written in a way that requires
19 the reader “to sift through obscure minutiae or appendices” to find important components of the analysis.
20 (*San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 649.)

21 162. The EIR is so lengthy, poorly organized, and difficult to understand that it fails egregiously
22 to satisfy CEQA’s most fundamental objective of informing decisionmakers and the public of a project’s
23 potentially significant environmental effects. The EIR’s organizational deficiencies include, but are not
24 limited to, the following.

25 163. The EIR contains numerous contradictory and confusing statements that obfuscate the
26 Project’s true impacts. These contradictory statements create confusion and obscure Project impacts.

27 164. DWR’s actions constitute a failure to proceed in a manner prescribed by law.

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1 ***The EIR Distorts the Concept of Mitigation in Violation of CEQA***

2 165. DWR failed to adopt all feasible mitigation measures and alternatives to reduce or avoid
3 significant impacts, in direct contravention of CEQA. (CEQA Guidelines, §§ 15126.6, 15126.4.)

4 166. An EIR cannot incorporate “the proposed mitigation measures into its description of the
5 project and then conclude[] that any potential impacts from the project will be less than significant.”
6 (*Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 655-57 [*Lotus*].) Changes in the
7 EIR to the Groundwater impact determinations and mitigation approach, among other examples, violate
8 the requirement for an EIR to disclose to the public how the level of significance was determined and how
9 mitigation was developed.

10 167. The adopted mitigation measures and other measures deemed to be part of the Project
11 description—and included separately as “Environmental Commitments” and Avoidance and
12 Minimization Measures (“AMMs”) in the MMRP—fail to meet basic legal requirements of enforceability.
13 The failure to separately identify and analyze the significance of impacts without these Environmental
14 Commitments and AMMs “subverts the purposes of CEQA by omitting material necessary to informed
15 decision-making and informed public participation.” (*Id.* at 658.)

16 168. The EIR fails to account for the potential undermining of mitigation commitments due to
17 (1) the Project’s potential cost overruns, far exceeding DWR’s estimated costs; and (2) major gaps
18 remaining in the Project’s anticipated financing, including still absent commitments of water contractor
19 Project beneficiaries, the federal government, and the outcome of pending proceedings relating to the
20 lawfulness and validity of DWR’s proposed revenue bonds

21 169. “Mitigation measures must be fully enforceable through permit conditions, agreements, or
22 other legally binding instruments.” (CEQA Guidelines, § 15126.4, sub. (a)(2).) The EIR fails to
23 sufficiently identify any such permit conditions, agreements or other legally binding instruments that
24 would ensure adequate funding and other conditions are in place to fully implement all of the adopted
25 and/or deferred Mitigation Measures, Environmental Commitments and AMMs.

26 170. The EIR fails to integrate a discussion of other actions by agencies with permitting
27 authority over other resources. As with the discussion of project alternatives, when there is credible
28 evidence that resources, including sensitive natural resources, are within the Project area, an EIR must

1 discuss other agencies' authority over those resources and discuss how mitigation measures have been
2 devised to anticipate that authority. (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2
3 Cal.5th 918, 938.) The full scope of other agencies' permitting authority over the project is not disclosed
4 in the EIR, nor did DWR adequately consult with the agencies with responsibility for these resources. A
5 discussion or analysis of mitigation measures relating to a resource is inadequate if it does not sufficiently
6 integrate other agencies' authority and likely actions.

7 ***The EIR Includes a Flawed and Incomplete Analysis of***
8 ***Environmental Impacts and Mitigation***

9 171. The EIR fails to adequately disclose and/or analyze the Project's impacts on the
10 environment. (Pub. Resources Code, § 21100; CEQA Guidelines, § 15126.)

11 172. Though the EIR purports to analyze the Project at a "project" level of review, the EIR fails
12 to include the level of detail required to conduct project-level review of its widespread and severe impacts,
13 particularly in the Delta itself. Given the enormous scale of the Project, this may be challenging. But
14 with no further environmental review specifically contemplated, as with any project subject to CEQA,
15 this EIR was required to, and fails to meet applicable project-level review requirements.

16 173. While DWR identified hundreds of environmental impacts from the Project, DWR failed
17 to analyze some impacts at all, and failed to adequately inform the public and decision-makers about the
18 impacts the EIR purports to analyze. In addition, DWR's impact determinations (less-than-significant,
19 significant and unavoidable, no impact) are contrary to law and not supported by substantial evidence.

20 174. The impact analysis in the EIR is inadequate across multiple resource areas due to its
21 unlawfully truncated scope of impact analysis. Direct and indirect significant effects of the Project on the
22 environment must be clearly identified and described, giving due consideration to both the short-term and
23 long-term effects. (CEQA Guidelines, § 15126.2, subd. (a).) The EIR unlawfully limits the scope of its
24 analysis of both direct and indirect impacts. Such limitations include geographical limits which prevent
25 a proper analysis of the full scope of the Project's direct and indirect impacts across the expansive areas
26 throughout the state that are impacted by the Project.

27 ***Impacts from Diverting Delta Flushing Flows through the Delta Tunnel***

28 175. The EIR contemplates that DWR will be able to export more water from the Delta with
the Project than in the absence of the Project. DWR, however, failed to adequately investigate, analyze,

1 disclose and discuss the Project's potentially significant individual and cumulative impacts from exporting
2 that additional water through the Project's tunnel. For example, because DWR and the USBR must meet
3 and maintain Delta water quality standards throughout the entire year, any upstream water that flows
4 through the Delta contributes to the attainment of those standards. The greater the amount of upstream
5 water that flows through the Delta the greater the flushing of salts (and other contaminants) from the Delta
6 and, hence, the greater the improvement of Delta water quality. The converse is that the lesser the amount
7 of upstream water that flows through the Delta, the lesser the flushing of salts (and other contaminants)
8 from the Delta and, hence, the lesser the improvement of Delta water quality. The EIR is devoid of any
9 discussion or analysis of the environmental impacts from DWR's intended use of the Project to reduce the
10 amount of flushing flows through the Delta by diverting those flushing flows through the Project's tunnel
11 before they can reach and, hence, flush the salts (and other contaminants) from the Delta.

12 176. Because DWR and USBR must meet and maintain Delta water quality standards
13 throughout the entire year, the diversion of flushing flows into the Project's tunnel could foreseeably lead
14 to expansive environmental (and economic) impacts upstream and downstream of the tunnel in the event
15 DWR and USBR must release storage water (or purchase transfer water) to offset the water quality
16 degradation caused by diverting those flushing flows into the tunnel. An example of such foreseeable
17 impacts is the foreseeable curtailment of appropriative water right holders within the Delta Watershed that
18 are subject to Term 91. Such curtailment could be triggered sooner in the year than it would otherwise be
19 triggered in the absence of the Project's diversion of flushing flows into the tunnel, or it could be triggered
20 in situations where it otherwise would not have been triggered at all during the year in the absence of such
21 diversions. Such curtailment of the water supplies for Term 91 appropriators could result in a wide range
22 of potentially significant direct and indirect adverse environmental (and economic) impacts throughout
23 the Delta Watershed.

24 177. The Project's diversion of flushing flows into the Project's tunnel could also foreseeably
25 result in a situation where the water quality in the Delta is degraded to the point that DWR and USBR
26 seek Temporary Urgency Changes from the State Water Resources Control Board to relax the Delta water
27 quality standards on the grounds that they do not have sufficient storage or other water supplies to meet
28 and maintain those standards. This could happen, for example, in drought years, especially in drought

1 years that begin with abundant rainfall but rainfall that is short-lived. In such a situation, DWR could
2 foreseeably divert substantial amounts of flushing flows into the Project's tunnel while it is raining, and
3 thereby substantially degrade Delta water quality, only to find itself with substantially degraded Delta
4 water quality later in the year as a result of such diversions and the lack of sufficient storage or other water
5 supplies to meet and maintain the Delta water quality standards throughout the remainder of the year (and
6 future years).

7 178. The need for DWR and USBR to offset the Delta water quality degradation from DWR's
8 diversion of flushing flows into the Project's tunnel could also foreseeably result in the reduction of
9 available DWR and USBR storage water for cold water storage releases for fishery resources and for any
10 other uses.

11 179. The EIR is devoid of any analysis of the potential widespread environmental (and
12 economic) impacts from DWR's diversion of flushing flows into the Project's tunnel, and devoid of any
13 discussion or adoption of mitigation measures or alternatives to avoid or lessen those impacts. Potential
14 mitigation measures include the release of those diverted flushing flows back into the Delta from DWR's
15 San Luis Reservoir (where such flows are initially stored) to offset the degradation to Delta water quality
16 caused by the export of those flushing flows.

17 ***Surface Water Impacts – EIR Chapter 5***

18 180. The scale of the proposed diversions is large enough to radically alter the hydrodynamics
19 of the Delta. For instance, the Project would fundamentally change the way waters are conveyed through
20 the Delta channels, which are part of the State's Plan of Flood Control, interfere with operation of local
21 water diversion and discharge facilities, and generally disrupt surface water conditions throughout the
22 Delta.

23 181. The EIR includes an inadequate disclosure and analysis of the Project's surface water
24 impacts during both Project construction and operation.

25 182. The EIR fails to adequately analyze Project impacts stemming from the low-flow
26 conditions that would be created during Project operation, creating flow levels typically only seen during
27 a drought period, on the Sacramento River. These lower flows would be a nearly continuous occurrence
28

1 with the Project. The impacts of such conditions, especially during the late summer period, which is a
2 critical agricultural water use period, are not adequately analyzed in the EIR.

3 183. The EIR provides only a cursory description of flood-related impacts.

4 184. The EIR fails to adequately disclose and assess Project surface water impacts arising from
5 construction of sedimentation basins.

6 185. The EIR fails to fully disclose and analyze how construction and presence of in-channel
7 facilities such as the Project's barge facilities and cofferdams would limit the volume of water that the
8 channel can hold, the related flood control impacts due to both the single channel blockage and the
9 cumulative impacts arising from similar Project-generated blockages throughout the Delta.

10 186. The EIR fails to fully disclose and adequately analyze flood control impacts that may occur
11 due to the lowered water elevations downriver of the proposed NDDs.

12 187. The EIR fails to analyze the surface water elevation changes that may occur during
13 construction due to the creation of coffer dams, gabions, and other in-river structures. These features
14 narrow the cross-section of the river or slough and raise the flood elevation, potentially exceeding levee
15 design requirements. These localized flood impacts are not described in sufficient detail to understand
16 potential impacts to levees, levee roads, docks, bridges, and agricultural intakes. These construction-
17 related in-channel elements would need to be in place for a significant amount of time. Yet the EIR
18 performed no analysis to determine the impact of any failure of these structures during a winter storm.

19 188. The EIR is inadequate because the modeling upon which the impacts analysis is based
20 contains dramatically incorrect assumptions. The DSM2 model results are inconsistent with actual
21 conditions in South Delta channels. The model periodically shows water quality is worsening when it is
22 improving, and sometimes shows water quality is improving when it is actually worsening.

23 189. DSM2 contains calculations that predict how water flows through the South Delta
24 channels, how much water flows and what happens to that water. The amounts in the channels are
25 determined by the cross sections in the model and those calculations determine the supposed volume of
26 water in the channels. The model incorrectly assumes the deepest part of a critical section of Middle River
27 to be minus 4 feet MSL, though recent soundings show the channel to be plus 3 feet MSL. This is a seven-
28 foot difference and demonstrates just one of likely many grossly inaccurate model assumptions. The

1 modeling is fatally flawed, rendering the impacts analysis for water levels and water quality similarly
2 flawed.

3 190. Project operations would change CVP and SWP reservoir operations, but the EIR does not
4 identify, characterize, quantify or disclose the significant impacts from those altered reservoir operations.

5 191. The EIR fails to disclose and analyze the extent of the Project-created reverse flows in the
6 Sacramento River and their associated impacts.

7 192. The EIR fails to fully disclose and analyze impacts to flows in the South Delta from the
8 operation of the Project including but not limited to an increase in reverse flows on Old and Middle River.

9 193. The EIR also fails to adequately identify, analyze or mitigate any Project-caused impacts
10 to upstream reverse flows on the Sacramento River at the proposed Project intakes.

11 194. The EIR fails to adequately analyze how Project operations will impact salinity levels in
12 the South Delta and all other regions of the Delta, and how such impacts can be mitigated.

13 195. The EIR fails to provide effective, enforceable mitigation that addresses Project-generated
14 changes in surface water levels.

15 196. DWR's determination that all surface water impacts would be mitigated to less than
16 significant levels is not supported by substantial evidence.

17 197. The surface water impacts of the Project, in combination with past, present and reasonably
18 foreseeable future Projects are cumulatively significant. DWR's failure to adequately analyze the Project-
19 level surface water impacts rendered DWR's attempted cumulative impact analysis inadequate.

20 ***Water Supply Impacts – EIR Chapter 6***

21 198. The Project is intended to improve water supplies for export areas but would jeopardize
22 the area of origin-protected needs of Delta farms, communities, cities and industries. In particular, the
23 smaller farms of the Delta principally rely on their own water diversion facilities to grow their crops,
24 rather than taking delivery from a district, as do larger farms situated away from water sources outside the
25 Delta.

26 199. Given the relationship of Delta channels to sea level, there is an adequate supply of water
27 in the channels to support all in-Delta beneficial uses, assuming that supply is of adequate water quality.
28 When operation of the SWP and CVP unnaturally lowers channel water levels, the local in-Delta

1 diversions are impaired or prevented. The supply can also become unusable when the operation of the
2 projects increases salinity and other constituents in the water. This occurs both when the constituents are
3 added and when in-Delta flow patterns are altered to create stagnant or null zones where constituents
4 collect.

5 200. The disclosure and analysis of the Project's water supply impacts during both construction
6 and operation in the EIR is inadequate.

7 201. The EIR fails to include a water availability analysis. Prior analyses of the Delta water
8 supply revealed that the in-basin needs of the Delta exceed the available water by millions of acre-feet.
9 The original development of the SWP and CVP guaranteed that in-Delta water requirements would always
10 be met prior to exporting flows to out-of-basin users. The EIR does not take that statutory requirement
11 into consideration in its analysis of impacts to in-basin Delta water users.

12 202. The EIR does not adequately analyze the Project's effect on local water supplies in the
13 water supply analysis.

14 203. The EIR water supply analysis is inadequate because it fails to evaluate and mitigate
15 potentially significant impacts to water supply for water users who rely on water stored in project
16 reservoirs. Changes in the amount of water delivered to a location constitute a physical change to the
17 environment. (See Pub. Resources Code, § 21060.5.)

18 204. The Project will increase the north to south water transfers. The EIR fails to analyze the
19 impacts from these transfers, including impacts to the areas transferring the water and the areas receiving
20 the water, as well as all to other areas and environmental resources directly or indirectly impacted by the
21 transfers. Such an analysis must include an examination of where and how the transferred water would
22 have been used in the absence of the Project and a comparison of where and how it will be used with the
23 Project. Legal restrictions on the direct or indirect export of groundwater via a water transfer must also
24 be discussed and analyzed, including but not limited to Water Code section 1220.

25 205. The EIR fails to analyze the quantity of Delta water available for export after complying
26 with in-Delta water provision requirements for fisheries, and under what circumstances such water would
27 be available.

1 206. The EIR fails to fully disclose and analyze the effects from DWR’s reduction in carryover
2 storage for SWP reservoirs in a way that will further stress water conditions in dry years, and, therefore,
3 the EIR water supply analysis is premised on incomplete information.

4 207. The EIR fails to adequately analyze Project impacts on water supply quality, availability,
5 and reliability for several classes of Delta water users, including domestic, agricultural, and the wildlife
6 habitat.

7 208. The EIR fails to identify additional water supply for the new mitigation requirements
8 defined for habitat restoration, which consumptively uses almost twice as much water as most Delta crops.

9 209. The EIR fails to mitigate Project impacts arising from the fact that the Project would not
10 meet Water Quality Control Basin Plan Flow Criteria requirements for the Sacramento River and for Delta
11 Outflows.

12 210. The EIR fails to adequately mitigate both Project-level and cumulative water supply
13 impacts.

14 211. The EIR fails to clearly segregate the Project’s mitigation requirements from the mitigation
15 required by CVP and SWP operations, depriving decision-makers and the public of the ability to discern
16 whether the Project would mitigate its impacts.

17 212. DWR’s determination that all water supply impacts would be mitigated to less than
18 significant levels is not supported by substantial evidence and DWR’s own modeling work.

19 213. The water supply impacts of the Project, in combination with past, present and reasonably
20 foreseeable future projects, are cumulatively significant, and must be re-evaluated to properly understand
21 potential impacts.

22 214. DWR’s failure to adequately analyze the Project-level water supply impacts renders
23 DWR’s attempted cumulative impact analysis inadequate.

24 ***Flood Protection Impacts – EIR Chapter 7***

25 215. DWR failed to adequately investigate, analyze, disclose and discuss the Project’s
26 potentially significant individual and cumulative impacts on flood control and drainage facilities, and the
27 operation, maintenance, rehabilitation, and improvement of those facilities, and failed to adequately
28

1 investigate, analyze, disclose, discuss and adopt mitigation measures that would avoid or lessen those
2 impacts.

3 216. For example, the EIR fails to fully disclose and adequately analyze how the construction
4 of Project facilities on, under or near Delta levees may impair levee integrity from the operation of the
5 massive tunnel boring machines, pile-driving, dewatering operations, seepage inducement, erosion, and
6 fails to fully disclose and adequately analyze the impacts that could result from such impairment. For
7 example, the levees are susceptible to compaction, subsidence, and liquefaction from vibrations from
8 construction-related activity.

9 217. The EIR fails to fully disclose and adequately analyze how impacts from the construction
10 and operation of the Project would prevent or impede reclamation districts from performing inspections,
11 operations, maintenance, and improvements to levees and drainage systems that are essential to protect
12 against flood risks and to provide adequate drainage. Such impediments include impacts to roadways,
13 bridges, culverts, levee access ramps and damages to or interferences with levees, drainage canals, pump
14 stations, and other facilities necessary to perform those actions.

15 ***Water Quality Impacts – EIR Chapter 9***

16 218. Delta water quality is currently recognized as being impaired for several constituents, either
17 through Clean Water Act Section 303(d) listings adopted by the SWRCB or through other documents
18 issued by the Central Valley Regional Water Quality Control Board. In particular, three water quality
19 constituents cause impaired conditions to exist in the Delta, including HABs, mercury, and electrical
20 conductivity. Such impacts are unacceptable under the Clean Water Act and associated state and federal
21 regulations and policies (including the antidegradation policy), which protect water quality through the
22 attainment and maintenance of conditions which comply with water quality standards, and generally limit
23 water quality degradation.

24 219. The diversion capacity of the Project could be operated to remove up to half of the average
25 freshwater inflow from the Sacramento River. According to the initial operating criteria discussed in the
26 EIR, the Project would remove freshwater from the River at all times of the year, including late summer,
27 when water quality in the Delta is already at its worst. The Project has the potential to create a permanent
28

1 drought condition in some areas of the Delta during the late summer period, further stressing the aquatic
2 system upon which farms, communities and aquatic wildlife require.

3 220. The EIR is inadequate because the DSM2 model contains significantly incorrect
4 assumptions regarding the depth of South Delta channels.

5 221. The EIR is inadequate because DSM2 is used as a comparative and not a predicative tool.
6 This approach renders the model results, and the impacts analysis upon which they are based, meaningless.
7 Additionally, the EIR compares monthly average EC for comparison with the modeled effects. Monthly
8 averages for the entire period of analysis masks the actual impacts resulting from increases in EC during
9 in real time.

10 222. The EIR is inadequate because it fails to analyze the impacts resulting from the failure of
11 the SWP and CVP to comply with D-1641.

12 223. The EIR is inadequate because it fails to analyze the impacts resulting from the failure of
13 the SWP an CVP to comply South Delta Water Quality standards.

14 224. The Delta is a tidally driven system. Water movement and water quality in the system
15 responds on a time scale of the diurnal tide cycle. The EIR does not sufficiently analyze the details of the
16 tidal system and evaluate the Delta on a mean monthly time-step averaged over multiple years, as is
17 typically done in a riverine system, or in a water supply analysis. That is totally inappropriate and resulted
18 in erroneous results. If California climate characteristics were evaluated on a mean monthly basis,
19 averaged over multiple years, one would conclude that California has no droughts or floods. All of the
20 highs and lows that show up on a shorter time scale are averaged out, i.e., “masked” in order to conceal
21 adverse Project impacts.

22 225. According to DWR, 16 of the 17 Water Quality impacts analyzed in the EIR would be less
23 than significant even prior to the imposition of mitigation. Only mercury would actually require
24 mitigation. As explained in extensive comments on the DEIR, including water quality experts with
25 extensive experience in the Delta, Project impacts would be "significant.” Under CEQA, DWR must
26 disclose and properly mitigate these impacts to the extent feasible.

27 226. In response to public comments, DWR reiterated the findings in the DEIR that the
28 identified adverse impacts associated with HABs (and associated production of toxins) and increases in

1 electrical conductivity at various locations in the Delta are less than significant and do not require
2 mitigation. DWR also reiterated its finding in the DEIR that proposed mitigation for mercury would
3 reduce potentially significant impacts to less than significant levels.

4 227. A critical flaw in the EIR is the failure to include a stable definition with respect to
5 operations. Although the infrastructure could be operated under a range of scenarios, the EIR relies on a
6 single arbitrary and unrealistic scenario to evaluate water quality impacts. The EIR's modeling suggests
7 that the north Delta intakes would only be utilized for roughly 13.5 percent of the Delta's total exports.
8 This low utilization rate indicates that the EIR has provided low-end operational criteria, thus artificially
9 limiting, and masking, the environmental impacts of the project.

10 228. As a consequence of not defining and analyzing the full range of likely Project operations,
11 the EIR does not adequately analyze or disclose, and unduly minimizes, Project impacts to water quality.
12 This approach fails to present a full evaluation of the Project's likely water quality impacts and constitutes
13 a failure to proceed in the manner required by law. Furthermore, DWR's simulation of Project operations
14 failed to include the relaxation of operations rules, such as has occurred in recent critically dry years, and as
15 such does not accurately simulate and represent the likely operations and impacts of the proposed project.

16 229. Salinity, which is already at critical levels in some areas of the Delta, directly impacts
17 agricultural productivity and drinking water supplies. Any increase in existing salinity levels would be a
18 degradation of water quality in the Delta. While the Project could potentially deliver better quality water
19 to the water exporters for export to areas south of the Delta, water quality for local in-Delta uses would
20 worsen as a result of the Project.

21 230. The EIR fails to account for the effect of relatively small increases in applied water salinity
22 on soils and plant productivity in analyzing water quality impacts to Delta agriculture. Small increases in
23 surface water salinity (water which is applied to crops for irrigation) can adversely affect soil salinity,
24 which adversely affects agricultural plant growth and crop production. Because of the unique soil
25 characteristics of the Delta and high groundwater tables, actions by agricultural water users to avoid or
26 minimize these adverse impacts, such as applying additional water, may not be practical or effective
27 during the plant growing season.
28

1 231. The EIR includes an inadequate disclosure and analysis of the Project's surface water
2 impacts during both Project construction and operation. An increase in turbidity due to the construction
3 of the intakes was not adequately evaluated. The potential destabilization, and potential failure, of Delta
4 levees due to construction, as well as traffic by heavy machinery on the levees, was also inadequately
5 analyzed.

6 232. The EIR fails to adequately analyze the potential for increased aquatic weeds as a result of
7 reductions in freshwater flows through the Delta caused by the Project.

8 233. The model was not used to analyze Project compliance with all water quality standards and
9 predicted salinity levels at only selected nodes. Nor did the modelling analyze the Project's impacts during
10 a period of extended drought, similar to those recently experienced in the State, as the period of record in
11 the model ended in 2015.

12 234. The data sets used in screening and evaluating water quality impacts in the EIR are
13 outdated, truncated, and prevent accurate assessment and disclosure of adverse project impacts. Interior
14 Delta sites for source water were not considered, and a number of priority pollutants were infrequently or
15 never sampled. This failure renders screening analysis technically insufficient and renders all subsequent
16 assessments of water quality impacts invalid.

17 235. DWR's water quality analysis is presented in the form of long-term averages, masking
18 important information needed to assess the impacts of the proposed project on water quality within the
19 Delta. The water quality modeling for the EIR used a 15-minute time step, but most of the flow data that
20 was input to the water quality model were monthly data. The use of monthly time step input flow data
21 masked significant exceedances of daily and D-1641 salinity standards. The input flow data should have
22 been daily data in order to fully disclose both the severity and frequency of these exceedances of the
23 SWRCB water quality standards. Importantly, water quality objectives for salinity in the Delta are
24 specified using shorter time periods. For example, water quality objectives for municipal and industrial
25 uses are specified as maximum mean daily chloride concentrations; water quality objectives for
26 agricultural beneficial uses are specified as "the maximum 14-day running average of mean daily EC."

27 236. Presenting information in the EIR in the form of monthly average concentrations, or as
28 long-term statistical distributions derived from monthly average concentrations, does not allow the reader

1 to assess whether or when D-1641 water quality objectives for the Delta are exceeded. By presenting
2 water quality information in the form of statistically-aggregated, long-term averages, DWR failed to
3 present information needed to evaluate the impacts of the Project. To fully disclose the likely water quality
4 effects of the Project, DWR should have provided information regarding water quality changes on shorter
5 timescales and analyzed exceedances of the D-1641 water quality objectives for salinity, for both the
6 Project and alternative scenarios, and for both existing conditions and conditions in 2040 and 2070 with
7 climate change.

8 237. Similarly, the EIR assumes that some water quality impacts in the form of D-1641 salinity
9 exceedances could be resolved through real-time operations, which is different than the assumptions used
10 throughout the EIR. The EIR fails to perform any analysis that would disclose whether that assumption
11 is accurate, and what other impacts may arise from this alternative means of operating the Project.

12 238. The EIR fails to sufficiently analyze water quality impacts to local water supplies due to
13 Project-related increases in a wide range of water quality constituents, including chloride, bromide, nitrate,
14 pesticides, increased temperatures, and the potential for increased occurrence of HABs such as toxic
15 *Microcystis*. Increases in these constituents would threaten water users' ability to use their water supply,
16 rendering it unusable under existing treatment technologies, and require implementation of additional
17 water treatment processes at significant costs. The EIR's characterization of changes as "minor" is
18 inaccurate and fails to account for the existing treatment processes used in the local areas reliant on Delta
19 water supplies.

20 239. The EIR fails to adequately disclose or analyze water quality impacts due to Project-related
21 increases in selenium concentrations. The EIR concludes that selenium impacts are unlikely to increase
22 in the western Delta but fails to analyze whether the Project may cause these impacts where they are most
23 likely to occur, the eastern Delta. The EIR performs water quality modelling for a point at which the
24 Project is unlikely to be operable.

25 240. The EIR must perform modelling for the long term to adequately analyze Project water
26 quality impacts. To understand the difficulty of interpreting water quality data presented as statistically-
27 aggregated, long-term average values, consider Figure 3. Figure 3 was generated from DWR's DSM2
28 model results for the no project scenarios (the 2020 existing condition and 2040, which incorporates sea

1 level rise) and for the proposed project Alternative 5 (both for 2020 and 2040). Figure 3 aggregates water
2 quality modeling results for the month of July in the 1922-2015 simulation period by water year type,
3 combining results to show predicted EC for critical, dry, below normal, above normal, and wet water
4 years.

5 241. The EIRs water quality modelling did not account for other water management and
6 environmental activities likely to occur in and upstream of the Delta that may influence water quality
7 impacts.

8 242. The EIR fails to adequately analyze how the Project may affect dissolved oxygen levels in
9 Delta aquatic habitat and drinking supplies; the EIR fails to analyze impacts to dissolved oxygen levels in
10 the Central, South, and East Delta caused by increased residence time in these areas.

11 243. DWR's analysis of impacts to Harmful Algal Blooms ("HABs") fails to consider all factors
12 that lead to increased HABs formation, including light, temperature, nutrients, and water-column
13 dynamics. It is undisputed that both humans and animals can suffer health impacts due to consuming
14 HABs-tainted water. The EIR makes an unsupported determination that Project impacts due to HABs
15 would be less than significant.

16 244. The EIR's analysis of HABs impacts is flawed due to errors in estimating residence time
17 and analyzing the impacts of velocity, among other reasons. The EIR's use of a scientifically unsupported
18 and arbitrary method of evaluating residence time masked the impacts of the Project. Because the Project
19 would reduce inflows to the Delta as a whole, it would increase the residence time of water in the Delta
20 (long-term mean monthly residence time would increase by 8%-15%), increasing the likelihood that
21 HABs would occur as compared to existing conditions.

22 245. The EIR's reliance on a velocity analysis is irrelevant to the potential for the formation of
23 HABs and misleads the public as to the potential for increased HABs under the Project. The EIR's "15-
24 minute absolute velocity" is not relevant because it demonstrates only that the Delta is a strongly tidal
25 system. Algal blooms already form within the Delta under current conditions, particularly in channels
26 with less flushing (i.e., where tidally or daily averaged velocities are low), even though those channels
27 currently experience "15-minute absolute velocity" values identical or similar to those modeled using
28 DSM2 and depicted in the EIR. The EIR's reliance on an irrelevant indicator that would not change as a

1 result of the Project renders the conclusion that the Project would not affect the likelihood or frequency
2 of algal blooms unsupported.

3 246. The EIR's evaluation of temperature change and its effect on algal growth, along with its
4 conclusion that there will not be an increase in temperature from the Project leading to additional HABs
5 formation in the Delta channels, is unsupported. Reduced flushing flow from the Sacramento River under
6 the Project would result in longer residence times, allowing for a greater amount of radiant energy to be
7 absorbed from the sun. By miscalculating temperature and nutrient increases and relying inappropriately
8 on modeled mean channel velocity to analyze water temperature changes (among other errors), the EIR
9 does not provide a good faith evaluation of Project impacts from increased HABs.

10 247. The Project's removal of up to half of the flow of the Sacramento River would result in
11 higher nutrient concentrations, promoting more frequent formation of HABs.

12 248. The EIR fails to adequately analyze the Project's effects on water temperature.

13 249. The EIR does not account for requirements that may appear in the WQCP update and did
14 not analyze whether modeled operations could comply with such new requirements. Violation of those
15 requirements would constitute a significant environmental impact requiring CEQA disclosure and
16 potentially mitigation.

17 250. The EIR fails to adequately disclose or analyze Project water quality impacts due to
18 increased contaminants generally. The EIR concludes that impacts for a number of water contaminants-
19 including selenium, nutrients, total suspended solids, and pesticides-are not significant, or are less than
20 significant, without comparing expected Project levels to existing levels, or protective standards for these
21 contaminants.

22 251. The EIR fails to adequately analyze potential impacts due to increased methylmercury and
23 other carcinogens in Delta water supplies. The EIR fails to disclose or analyze how the Project's water
24 quality impacts may impair the use of public trust resources for protected public trust uses such as
25 swimming fishing, and boating.

26 252. As discussed elsewhere herein, the 1959 DPA's mandate that exports from the Delta be
27 taken from the "common pool" within the Delta, and not from the uppermost northern tip of the Delta as
28 enabled by the Project's tunnel, has ensured that the state and federal government, as well as the millions

1 of people who receive Delta export water and the owners and operators of hundreds of thousands of acres
2 of farmland that utilize such water, have a direct stake in ensuring that the Delta water quality always
3 remains adequately fresh. The Project's tunnel, which would bypass the Delta by design, is intended to
4 precisely (and unlawfully) circumvent the common pool.

5 253. The EIR fails to adequately discuss, analyze and mitigate the environmental impacts caused
6 by circumvention of the common pool. Such impacts include, but are not limited to, impacts to Delta
7 water quality and flow from the bypass of freshwater through the Project's tunnel that would have
8 otherwise flowed through the Delta towards the existing South Delta export pumps in the absence of the
9 Project. Such impacts would occur any time DWR diverts freshwater through the Project's tunnel and
10 would be aggravated during events such as the following: (1) declared drought emergencies leading to
11 suspension of Delta water quality and flow requirements, such as those that occur as a result of Temporary
12 Urgency Change Petitions ("TUCPs") issued in the critically dry years of 2014 and 2015, as well as well
13 as the years of 2016, 2021 and 2022, thereby enabling the bypass of such freshwater flows in lieu of
14 utilizing those flows to maintain Delta water quality for the existing South Delta export pumps; (2)
15 individual or widespread levee failures which draw sea water into the Delta, thereby motivating DWR to
16 divert available freshwater through the tunnel rather than allowing that water to flow through the Delta to
17 freshen and restore Delta water quality for the benefit of DWR's South Delta export pumps; and (3) sea
18 level rise, which may similarly motivate DWR to temporarily or otherwise abandon its South Delta export
19 pumps and, hence, abandon the preservation and restoration of water quality within the Delta, in favor of
20 diverting the available freshwater through the proposed tunnel.

21 254. The EIR fails to adequately examine, and compare and contrast, how Delta water quality,
22 and all other aspects of the environment, would fare with and without the tunnel in such events, and the
23 EIR fails to adequately discuss, and DWR fails to ultimately adopt, mitigation measures that would
24 mitigate the environmental impacts that would result from the use of the tunnel in such events.

25 255. Such impacts include impacts to the short and long-term operation, maintenance,
26 rehabilitation and improvement of levees within the Delta, which provide significant water quality benefits
27 by repelling the intrusion of salinity into the Delta for the benefit of DWR's existing South Delta export
28 pumps and all other beneficiaries of Delta water quality. Under existing conditions, DWR has a strong

1 interest in the operation, maintenance, rehabilitation and improvement of such levees because of the
2 significant water quality benefits they provide to DWR's existing South Delta export pumps. The Project's
3 tunnel, by design, would substantially impair that interest by affording DWR the ability to entirely bypass
4 the Delta, and, hence, the water quality therein, via exports through the Project's tunnel.

5 256. The EIR fails to adequately mitigate both Project-level and cumulative water quality
6 impacts.

7 257. The EIR does not provide specific, formulated, enforceable mitigation for water quality
8 impacts.

9 258. System operators do have some flexibility to respond to unique or anomalous events that
10 may occur in the Delta. However, the degradation of water quality shown in Project modeling results not
11 from a unique or anomalous event, but, rather, from the proposed operations of the Project. Mitigation
12 and Environmental Commitments in the EIR rely on changes in Project operations to correct for
13 anticipated water quality degradation. Prior to certification of the EIR, a Project operations plan was
14 required. Deferring future operations to a future plan is not a proper mitigation.

15 259. DWR's determination that all water quality impacts other than WQ-6 would be less than
16 significant or would be mitigated to less than significant levels is not supported by substantial evidence.

17 260. The water quality impacts of the Project, in combination with the impacts of past, present
18 and reasonably foreseeable future projects, are cumulatively significant.

19 261. The EIR fails to consider the additive and synergistic impacts of pollutants mixing together
20 as a result of the Project. Constituents present together in water supplies can combine to create adverse
21 effects on water quality, yet the EIR includes only two brief sentences on how additive and synergistic
22 interactions of constituents affect wildlife. The issue is ignored with respect to impacts on water supply
23 use.

24 262. The EIR fails to adequately discuss, address and implement the state and federal anti-
25 degradation policies in general, and in the context of its discussion and formulation of mitigation measures
26 and alternatives. (See 40 C.F.R. 131.12; Wat. Code, § 13000; State Water Resources Control Board
27 Resolution 68-16.)
28

1 263. DWR's failure to adequately analyze the Project-level water quality impacts rendered
2 DWR's attempted cumulative impact analysis inadequate.

3 ***Geology and Seismicity Impacts – EIR Chapter 10***

4 264. Objectives of the Project include reducing perceived seismic risks to SWP and CVP water
5 supplies. However the EIR includes an inadequate disclosure and analysis of geology and seismicity
6 impacts.

7 265. The EIR fails to adequately disclose and analyze Project seismicity impacts as a result of
8 the fact that it relies on geotechnical analysis which has not yet occurred. The EIR claims that this analysis
9 will occur prior to construction, but sufficient evidence has not been gathered to support the claim that
10 geology and soils impacts will be less than significant. Nor is effective mitigation of potential impacts
11 possible without this analysis.

12 266. The EIR fails to adequately disclose or analyze Project-generated seismic impacts resulting
13 from levees being compromised or weakened due to Project construction, and therefore becoming more
14 vulnerable to a seismic event that may occur during construction.

15 267. The EIR fails to adequately disclose and analyze how the intensive, long-term dewatering
16 and tunnel boring operations, and other construction and implementation activities associated with the
17 Project, may destabilize soils, farms and levees, resulting in sinkholes, subsidence, levee failures and other
18 impacts within and outside of the Project footprint.

19 268. The EIR fails to adequately disclose and analyze Project impacts resulting from the
20 vulnerability of Project components, including the Tunnel and shafts, to seismic events that occur during
21 Project construction and operation. Nor does it analyze secondary impacts that may occur if Project
22 components suffer damage or fail completely during such an event.

23 269. The EIR fails to adequately mitigate Project-level and cumulative geology and seismicity
24 impacts.

25 270. DWR's determination that all geology and seismicity impacts would be mitigated to less
26 than significant levels is not supported by substantial evidence.

27 271. The geology and seismicity impacts of the Project, in combination with the impacts of past,
28 present and reasonably foreseeable future projects, are cumulatively significant.

1 272. DWR's failure to adequately analyze the Project-level geology and seismicity impacts
2 renders DWR's attempted cumulative impact analysis inadequate.

3 ***Soils Impacts – EIR Chapter 11***

4 273. The magnitude of the Project necessitates vast amount of soil movement, and the operation
5 of the Project changes Delta hydrology in a manner that will fundamentally affect the soils in the Delta.

6 274. The EIR fails to include adequate disclosure or analysis of a number of soils impacts,
7 examples of which are provided below.

8 275. The EIR fails to fully disclose the characteristics of the tunnel muck (RTM) that would be
9 generated by the Project. The EIR concedes that it will perform soil borings to determine strength,
10 compressibility composition, and other characteristics in the future, but this information is not included in
11 the EIR. As a result, it is impossible to predict how much of the muck may be reusable, and for what
12 purposes.

13 276. Because the EIR fails to predict how much of the muck would be reusable, it is also
14 impossible to disclose or analyze impacts related to muck disposal. The EIR failed to disclose or analyze
15 how Project tunnel muck disposal may alter the natural soil profiles and horizons and change soil type,
16 drainage, range of usage and productivity of the soil. The EIR also fails to disclose the impacts associated
17 with the reuse of tunnel muck, which may require trucking to various locations, and conditioning it prior
18 to use. Reuse may also generate habitat impacts and change flood risks.

19 277. The EIR did not adequately analyze how saltwater intrusion into the Delta as a result of the
20 Project, and subsequent application of water to lands via irrigation, as well as natural seepage, will affect
21 the salinity of soil and its agricultural productivity.

22 278. The EIR fails to adequately disclose and analyze Project-related soil erosion of levees,
23 which can result in decreased levee stability and increased seepage.

24 279. The EIR fails to adequately mitigate both Project-level and cumulative soils impacts.

25 280. The soils impacts of the Project, in combination with the impacts of past, present, and
26 reasonably foreseeable future projects, are cumulatively significant.

27 281. DWR's failure to adequately analyze the Project-level soils impacts renders DWR's
28 attempted cumulative impacts analysis inadequate

Land Use Impacts – EIR Chapter 14

1
2 282. The Project would fundamentally alter land uses in the Delta, contrary to the careful
3 planning of Delta counties and state and local agencies charged with Delta land use planning.

4 283. The EIR fails to disclose or analyze all Project impacts to land use.

5 284. The EIR fails to adequately analyze the Project’s consistency with the 2009 DRA, which
6 requires that the coequal goals “shall be achieved in a manner that protects and enhances the unique
7 cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.” (Wat.
8 Code, § 29702, subd. (a).)

9 285. The Project is inconsistent with the 2009 DRA in a number of ways, including, but not
10 limited to, the fact that it promotes increased reliance on the Delta, impairs Delta water quality; impairs
11 agricultural operations during Project construction; damages agricultural infrastructure; fails to protect the
12 Delta as a place, and fails to use best available science in Delta water management.

13 286. DWR’s claim that it is not obligated to protect the Delta as a place beyond mitigating
14 significant impacts pursuant to CEQA is incorrect. DWR failed to analyze and mitigate the Project’s
15 impacts on land use that relate to DWR’s obligation to protect the Delta as a place.

16 287. The EIR fails to adequately assess whether the Project complies with the flow criteria or
17 biological objectives contained in the DFW document, “Quantifiable Biological Objectives and Flow
18 Criteria for Aquatic and Terrestrial Species of Concern Dependent on the Delta Prepared pursuant to the
19 Sacramento-San Joaquin Delta Reform Act of 2009.”

20 288. The EIR provides an inadequate analysis of potentially significant impacts due to Project
21 construction and mitigation conflicting with ongoing habitat conservation plans and the general plans of
22 San Joaquin, Yolo, Solano, Contra Costa and Sacramento counties, and fails to propose or require
23 adequate mitigation for these impacts.

24 289. The EIR fails to adequately mitigate Project-level and cumulative impacts to land use.

25 290. The EIR relies on mitigation measures and environmental commitments that may
26 themselves conflict with land use policies, but the EIR fails to disclose adequate information about the
27 nature and location of these measures to determine what these impacts may be. For instance, the Project
28 includes components that have not yet been designed or sited. Without knowing how and where these

1 components would be constructed, the EIR cannot properly disclose conflicts with existing land use
2 designations.

3 291. Project impacts to land use, in combination with the impacts of past, present, and
4 reasonably foreseeable future projects, are cumulatively significant.

5 292. DWR's failure to adequately analyze the Project-level land use resources impacts renders
6 DWR's attempted cumulative impacts analysis inadequate.

7 ***Agricultural Resources Impacts – EIR Chapter 15***

8 293. The Delta includes the largest contiguous acreage of Prime Farmland in the state. The
9 Project would directly destroy over 3,787.9 acres of farmland, of which 2,154.2 acres are "important"
10 (prime farmland, farmland of statewide importance, unique farmland, farmland of local importance), and
11 1,217.8 acres are under Williamson Act or Farmland Security Zone contracts, and indirectly impact
12 thousands of additional acres of currently productive and sustainable Delta agricultural land by destroying
13 or degrading local water supplies, changing water levels such that local supplies become inaccessible,
14 interfering with agricultural operations, interfering with irrigation and drainage systems, and blocking
15 access to agricultural markets, among other negative impacts.

16 294. The EIR includes an inadequate disclosure and analysis of both the Project's construction
17 and operational impacts to agricultural resources.

18 295. The Agricultural Impacts chapter fails to disclose either the total acreage of agricultural
19 land that will suffer permanent conversion as a result of the Project nor how many acres will suffer indirect
20 Project impacts.

21 296. The EIR fails to disclose when "temporary" loss of agricultural land may become
22 permanent, or whether land returned to production after a temporary loss may suffer permanent effects to
23 productivity.

24 297. The EIR fails to adequately analyze how Project construction's interference with local
25 surface and groundwater supplies would affect Delta agriculture and fails to account for the fact that even
26 a "temporary" interference can disrupt an entire crop season and/or destroy permanent crops.

1 298. The EIR fails to meaningfully analyze the impacts associated with the thousands of acres
2 of farmland that would be lost or made less productive, on either a temporary or permanent basis, due to
3 Project construction and operations.

4 299. The EIR fails to adequately analyze how Project-generated changes in groundwater
5 elevations—either by lowering them with groundwater pumping for construction dewatering or cutting
6 off the seepage through cutoff walls at the intakes, or at shafts, etc. as the Project proposes—would have
7 both direct and indirect impacts on Delta agriculture.

8 300. The EIR fails to disclose or analyze how potential Project-related increases in salinity of
9 surface water and soils would impact agricultural resources. The EIR fails to address the special
10 vulnerabilities to salt loading of soils in the Delta, and the inability of many areas of the Delta to manage
11 salt loading through typical means such as water application/leaching.

12 301. The EIR fails to adequately disclose or analyze how Project impacts to water reliability
13 would affect the production of agricultural land and the quality of crops produced.

14 302. The EIR acknowledges the importance of intricate Delta drainage systems, which manage
15 the interaction of surface water and groundwater through collaborative actions at the farm and local scale,
16 to agriculture in the Project area. Yet the EIR fails to adequately disclose and analyze how the systems
17 work; nor does it describe how Project disruption of these systems could impact Delta agriculture in either
18 the immediate or broader Project area.

19 303. The EIR fails to analyze how the decreases in Delta water levels would impact local
20 agriculture, as this water level decline would interfere with irrigating through existing water diversion
21 systems designed for existing flow and water level ranges.

22 304. The EIR fails to adequately analyze how the Project's impacts to water quality, by
23 promoting increased nutrient levels and therefore higher levels of toxic and non-toxic organisms,
24 including HABs and hyacinth, may impact Delta agriculture. Some organisms may decrease agricultural
25 intake efficiency, while others can harm livestock or diminish crop economic values.

26 305. The EIR fails to adequately analyze or disclose how Project interference with farm access
27 and infrastructure over the 14-year or longer construction period will impact Delta agricultural resources.
28 The lack of disclosure constitutes a failure to proceed in a manner required by law.

1 306. DWR's claim that it is not obligated to protect the Delta as a place beyond mitigating
2 significant impacts pursuant to CEQA is incorrect. DWR failed to analyze and mitigate the Project's
3 impacts on agriculture that relate to DWR's obligation to protect the Delta as a place.

4 307. The EIR fails to adequately mitigate both Project-level and cumulative impacts to
5 agricultural resources.

6 308. The EIR does not propose adequate mitigation for Project impacts to agriculture related to
7 Delta drainage systems.

8 309. The EIR fails to adequately analyze potential impacts to agriculture created by the "no
9 spray" zones that the Project's open water restoration would create.

10 310. The EIR also improperly defers analysis and formulation of mitigation measures.

11 311. The EIR fails to analyze the Project's cumulative impacts to agriculture. There are impacts
12 in nearly a dozen other resource areas that will also create negative impacts (e.g., surface water,
13 groundwater, water quality, land use). To comport with CEQA's requirement of facilitating informed
14 decision-making, the EIR must analyze the compounding effects of these impacts on agriculture.

15 312. DWR's determination that impacts to agricultural resources would be mitigated to less than
16 significant levels is not supported by substantial evidence.

17 313. Project impacts to agricultural resources, in combination with the impacts of past, present,
18 and reasonably foreseeable future projects, are cumulatively significant.

19 314. DWR's failure to adequately analyze the Project-level agricultural resources impacts
20 renders DWR's attempted cumulative impacts analysis inadequate.

21 ***Recreation Impacts – EIR Chapter 16***

22 315. The Delta currently provides a wide array of recreational opportunities. A survey of the
23 Delta at every time of the year will find members of the public from locations near and far enjoying the
24 unique scenery, culture and environment of the Delta. Disruption caused by the proposed Project would
25 alter the character of the Delta during both construction and operation of the Project, severely hindering
26 the Delta's currently rich recreational offerings.

27 316. The EIR includes an inadequate disclosure and analysis of the Project's recreational
28 impacts during construction and operation.

1 317. The baseline used in assessing recreational impacts improperly obscured the significance
2 of the Project's effects on recreation and access to recreational facilities by including sea level rise
3 projected to occur as a consequence of climate change. The flawed baseline diminished the actual
4 significance of the Project's effects on recreation and access to recreational facilities.

5 318. The EIR fails to adequately assess the impact on recreational activities of increases in
6 populations of mosquitoes and other vectors due to the introduction of sedimentation basins, lagoons, and
7 other temporary and permanent Project features.

8 319. The EIR fails to adequately disclose and analyze how Project operations may affect water
9 quality and quantity, including through promoting HABs and affecting salinity, which will in turn cause
10 impacts to recreational uses of the Delta such as swimming, fishing and boating.

11 320. The EIR fails to adequately disclose and analyze how Project construction impacts will
12 affect water-based recreation. The EIR proposes to concentrate construction activities during the spring
13 and summer months, when people are most likely to use water recreation. The impacts to air quality,
14 increased noise, and the dramatically increased traffic on the roads and in the rivers and channels of the
15 Delta will interfere with use of Delta water bodies for recreation.

16 321. The EIR fails to disclose or analyze how the Project's impacts may impair the use of public
17 trust resources for protected public trust recreational uses such as swimming fishing, and boating.

18 322. Delta recreation includes agritourism activities, such as farm and winery tours and special
19 events. The EIR fails to disclose or analyze Project impacts to agritourism activities in Delta towns that
20 will be in the path of Project construction for more than a decade.

21 323. There are over 25 wineries in the Delta, many of which have tasting rooms for visitors.
22 There are over a dozen other Delta agritourism sites, including some located in Delta legacy towns such
23 as Isleton, Locke, Hood, Walnut Grove, and Courtland. These towns will suffer Project impacts from
24 increased traffic, diminished air quality, impacts to water supply and water quality, and noise pollution.
25 All of these will negatively impact agritourism activities, which rely heavily on their natural setting to
26 attract visitors.

27 324. The EIR fails to adequately disclose and analyze impacts to recreation by limiting
28 opportunities for wildlife viewing. The public uses the Wildlife Refuge and other locations in the Delta

1 as sites for viewing wildlife. Recreational uses of areas impacted by Project construction and operation
2 will be impaired by the Project.

3 325. The EIR fails to adequately disclose and analyze impacts to hunting and to the wildlife and
4 waterfowl propagation in support thereof.

5 326. DWR's claim that it is not obligated to protect the Delta as a place beyond mitigating
6 significant impacts pursuant to CEQA is incorrect. DWR failed to analyze and mitigate the Project's
7 impacts on recreation that relate to DWR's obligation to protect the Delta as a place.

8 327. DWR's determination that impacts to recreational resources would be mitigated to less
9 than significant levels is not supported by substantial evidence.

10 328. Project impacts to recreational resources, in combination with the impacts of past, present,
11 and reasonably foreseeable future projects, are cumulatively significant.

12 329. DWR's failure to adequately analyze the Project-level recreational resources impacts
13 renders DWR's attempted cumulative impacts analysis inadequate.

14 ***Socioeconomic Impacts – EIR Chapter 17***

15 330. The EIR includes an inadequate disclosure and analysis of the Project's socioeconomic
16 impacts during both Project construction and operation.

17 331. The EIR fails to support its conclusion that undesirable social effects would be “minimal”
18 in communities closest to potential character-changing effects of the Project and in those most heavily
19 influenced by agricultural and recreational activities that the Project would disrupt.

20 332. The EIR is not supported by a cost estimate, benefit-cost analysis, financial feasibility
21 analysis, cost-effectiveness analysis or any economic and financial analysis that would typically support
22 the planning of a project of this scale.

23 333. The EIR fails to disclose that a majority of south-of-Delta agricultural water agencies have
24 already opted out of the Project due to cost, including the entire Central Valley Project which represents
25 nearly half of Delta water exports. Despite providing no evidence regarding cost-effectiveness, and the
26 readily observable actions of agricultural water agencies that already opted out over cost-concerns, the
27 EIR implausibly makes unsupported statements about all the benefits to agriculture south-of-the-Delta,
28 claiming that the Project would reduce costs to agricultural suppliers in these regions.

1 334. The EIR’s discussion of “Effects in the South-of-Delta SWP/CVP Export Service Areas”
2 including the finding “ECON-7: Socioeconomic Effects in the South-of-Delta SWP/CVP Export Service
3 Areas” is unsupported due to the lack of appropriate cost estimates, economic and financial analysis in
4 addition to the contradictory evidence observed in the opt-out behavior of agricultural contractors served
5 by the CVP.

6 335. The EIR fails to provide an adequate analysis of socioeconomic effects in the Delta,
7 including effects on agriculture and communities as a result of disruptions during Project construction, as
8 well as reduced water quality for beneficial uses during Project operation.

9 336. The socioeconomic impacts of the Project, in combination with the impacts of past, present
10 and reasonably foreseeable future projects, are cumulatively significant.

11 337. DWR’s failure to adequately analyze Project-level socioeconomic impacts renders DWR’s
12 attempted cumulative impacts analysis inadequate.

13 ***Aesthetics and Visual Resources Impacts – EIR Chapter 18***

14 338. The Project would forever change the Delta, and, in particular, would mar currently bucolic
15 farming communities throughout the Project area. The scale of the Project would dwarf area landmarks
16 and scar the Sacramento River and other Delta waterways where Project components are proposed to be
17 built.

18 339. The EIR includes an inadequate disclosure and analysis of the Project’s aesthetics impacts
19 during both Project construction and operation.

20 340. The EIR fails to analyze whether Project construction or operation would conflict with
21 local guidelines on visual quality.

22 341. The EIR fails to adequately analyze the Project’s security lighting would create a new
23 source of glare, especially at night.

24 342. The EIR fails to adequately analyze Project impacts to visual resources by disrupting views
25 in the Delta, including the Delta Scenic Loop, which brings visitors to many marinas and harbors.

26 343. The EIR fails to adequately analyze the Project’s impacts on visual resources due to the
27 construction of up to five facilities distributed over ten miles within view of California Scenic Highway
28 160, which would re-route the highway during construction and destroy the scenic view afterwards.

1 344. The EIR fails to adequately analyze the Project’s impacts on visual resources caused by
2 permanent Project components that would stand above the ground, including the intakes, forebays, surge
3 towers, tunnel shafts, and tunnel boring operations.

4 345. Surge towers would be located all along the Project route and two of the 40-foot diameter,
5 100-foot high surge towers would be within one mile of the Wildlife Refuge. The surge towers would
6 become the most dominant visible feature in the region, creating extreme visual conflict with area’s
7 existing wildlife habitat and farmland scenery.

8 346. The EIR fails to adequately mitigate both Project-level and cumulative impacts to visual
9 resources.

10 347. DWR’s determination that aesthetics and visual resources impacts would be mitigated to
11 less than significant levels is not supported by substantial evidence.

12 348. The aesthetic and visual resources impacts of the Project, in combination with the impacts
13 of past, present and reasonably foreseeable future projects, are cumulatively significant.

14 349. DWR’s failure to adequately analyze Project-level aesthetic and visual resources impacts
15 renders DWR’s attempted cumulative impacts analysis inadequate.

16 ***Transportation Impacts – EIR Chapter 20***

17 350. The Delta’s levee roads and bridges are notoriously dangerous and lack capacity for any
18 increased industrial use. The Project’s 10 to 14-year construction period would tax these already
19 dangerous roads with thousands of new construction vehicle trips, many of which would be taken in
20 oversized vehicles that would endanger Delta drivers, hinder Delta agriculture and damage Delta roads.

21 351. The EIR includes an inadequate disclosure and analysis of the Project’s transportation
22 impacts during both Project construction and operation.

23 352. The EIR fails to adequately disclose or analyze Project construction impacts to traffic, in
24 part because DWR failed to prepare the intersection analysis necessary to determine Project-level impacts

25 353. The EIR fails to disclose the fact that Project-related traffic increases on Delta roads would
26 occur in large part on “levee roads” and, therefore, fails to analyze impacts to levee stability caused by
27 increased traffic and, especially, increased traffic from heavy trucks.

1 354. The EIR determines, without analysis, that the increase in traffic, including heavy trucks
2 carrying Project construction materials, would not necessitate bridge improvements. In addition, the EIR
3 fails to disclose whether the Project would require bridge construction. If it did, that construction would
4 generate significant additional impacts that must be analyzed in the EIR.

5 355. The EIR does not evaluate impacts to navigation of commercial ships in the Delta channels
6 due to the construction of in-channel Project construction, including cofferdams, which would
7 significantly decrease the area for boat passage at a dozen Delta locations.

8 356. The EIR fails to analyze how the Project-generated traffic and road closures and detours
9 would interfere with the ability of large vehicles required to harvest Delta crops throughout the year to
10 serve Delta farms.

11 357. The EIR fails to adequately mitigate both Project-level and cumulative traffic and
12 transportation impacts.

13 358. DWR's failure to adequately analyze Project-level transportation impacts renders DWR's
14 attempted cumulative impacts analysis inadequate.

15 ***Climate Change Impacts – EIR Chapter 30***

16 359. The Project purports to be a response to future climate change yet imposes an outdated
17 19th Century “plumbing solution” that fails to provide the adaptability needed as conditions change in the
18 future. Instead of providing realistic climate change scenarios and analysis, the EIR shamelessly exploits
19 the threat of climate change to try to mask the overwhelming negative impacts of the Project on the Delta
20 environment.

21 360. The EIR includes an inadequate disclosure and analysis of the Project's climate change
22 impacts during both construction and operation.

23 361. The EIR fails to analyze how the speed, magnitude, and intermittent nature of climate
24 change may alter Project outcomes and exacerbate other project impacts. The EIR also fails to clearly
25 and consistently analyze the hydrologic consequences of climate change. The exclusion of such an
26 analysis renders analysis of other resource areas inadequate, as they are not based on all necessary
27 information.

1 362. The EIR relies on flawed climate change assumptions in describing the baseline, which
2 obscures the Project's climate change impacts.

3 363. The EIR relies on unsupported climate change assumptions in describing the No Project
4 Alternative and does not provide an alternative which does not include these unsupported assumptions.
5 As a result, the EIR does not adequately disclose the Project's impacts because it compares Project impacts
6 to a scenario that includes unsupported climate change projections.

7 364. The flawed analysis of GHG impacts in the EIR results in an inadequate disclosure and
8 analysis of the Project's contribution to climate change. The EIR's contention that the Project would be
9 GHG-neutral is unsupported; the EIR must disclose the Project's actual contribution to climate change.

10 365. The EIR fails to incorporate the best available science into its analysis of climate change
11 impacts by using the most recently available scientific information, including climate extremes, computer
12 simulations of ecological futures, and unprecedented drought risk.

13 366. The EIR fails to adequately mitigate both Project-level and cumulative climate change
14 impacts.

15 367. DWR's determination that all climate change impacts would be mitigated to less than
16 significant levels is not supported by substantial evidence.

17 368. The climate change impacts of the Project, in combination with the impacts of past, present
18 and reasonably foreseeable future projects, are cumulatively significant.

19 369. DWR's failure to adequately analyze the Project-level climate change impacts renders
20 DWR's attempted cumulative impacts analysis inadequate.

21 ***Growth-Inducing Impacts***

22 370. DWR failed to adequately investigate, analyze, disclose and discuss the Project's
23 potentially significant individual and cumulative growth-inducing impacts, including the purported
24 increase in exports facilitated by the Project (including increased water transfers), and failed to adequately
25 investigate, analyze, disclose, discuss and adopt mitigation measures that would avoid or lessen those
26 impacts.

27 ***Fish and Wildlife Impacts***

28 371. DWR failed to adequately investigate, analyze, disclose and discuss the Project's

1 potentially significant widespread individual and cumulative impacts on fish and wildlife resources and
2 failed to adequately investigate, analyze, disclose, discuss and adopt mitigation measures that would avoid
3 or lessen those impacts. Such impacts include impacts to wetlands and impacts to the primary wintering
4 area for waterfowl of the Pacific Flyway.

5 ***The EIR's Cumulative Impacts Analysis Is Deficient***

6 372. CEQA requires that the lead agency analyze cumulative impacts. (Pub. Resources Code,
7 § 21083, subd. (b)(2); CEQA Guidelines § 15064, subd. (h)(1).) A cumulative impact is an impact created
8 as a result of the project when evaluated together with other past, present, and reasonably foreseeable
9 future projects causing related impacts. In performing a cumulative impacts analysis, an EIR must assess
10 the significance of the incremental addition of a project to the combined individual effects of one or more
11 separate projects. The analysis must provide sufficient data to ensure that the cumulative effects are
12 identified and disclosed and must make a good faith and reasonable effort at disclosing all cumulative
13 impacts.

14 373. The EIR includes an inadequate disclosure and analysis of the Project's cumulative impacts
15 during both construction and operation. The EIR's deficiencies include, but are not limited to, the
16 following examples.

17 374. The EIR fails to include a single, unified section that addresses cumulative impacts.

18 375. The EIR fails to acknowledge the scale of the Project in proportion to all other past, present,
19 and reasonably foreseeable future projects causing related impacts. The Project proposes to fundamentally
20 change the flow of the Sacramento River and the hydrology of the Delta. Project impacts dwarf impacts
21 from all other cumulative projects for several resource areas. The EIR thus fails to disclose the
22 significance of the Project's incremental impacts in relation to cumulative projects.

23 376. The EIR fails to adequately analyze cumulative impacts to Delta agriculture from the
24 combined impacts from land conversion, seepage damage, water quality degradation, soil contamination,
25 blocked access to parcels, and reduced water elevations from the Project.

26 377. The EIR fails to sufficiently analyze the Coordinated Long-Term Operations of the SWP
27 and CVP from any cumulative impacts analysis, even though it was already foreseeable at the beginning
28 of the Project CEQA process and bears on both the need for the Project and Project impacts.

1 378. The EIR fails to adequately analyze cumulative impacts due to climate change, including
2 changed rainfall patterns and sea level rise; the limited discussion of these impacts ignores, among other
3 issues, changing snowpack, increased water temperature, increased evapotranspiration, flood flows, and
4 upstream fishery habitat.

5 379. The EIR does not adequately analyze the planned changes to operations of the Yolo Bypass
6 under the Yolo Bypass project as a cumulative project that may cause related impacts; the Yolo Bypass
7 project would divert additional water from the Sacramento River, further limiting freshwater flows
8 through the Delta. The Project, in combination with planned changes to operations of the Yolo Bypass
9 would contribute to cumulative impacts to water supply, surface water, water quality, aquatic resources,
10 and other environmental resources. These impacts must be assessed cumulatively with the Project
11 impacts.

12 380. Use of the NDDs to facilitate additional water transfers is a reasonably foreseeable outcome
13 of the Project, and would cause additional surface water impacts, yet the EIR fails to perform a cumulative
14 analysis of surface water impacts that would result from these additional transfers. Increased water
15 transfers would cause additional groundwater, agricultural and other impacts in transferor areas, such as
16 the Sacramento Valley and in the American River Watershed, yet the EIR fails to perform a cumulative
17 analysis of groundwater, agricultural and other impacts that would result from these additional transfers.

18 381. The EIR fails to adequately mitigate the Project's contribution to significant cumulative
19 effects.

20 ***DWR's CEQA Findings and Statement of Overriding Considerations***
21 ***Are Not Supported by Substantial Evidence***

22 382. A thin veil for DWR having predetermined the outcome and having utilized an otherwise
23 legally deficient process, DWR's CEQA Findings violate CEQA, and are not supported by substantial
24 evidence. (CEQA Guidelines, § 15091, subd. (b).)

25 383. The Findings improperly conclude without substantial evidence that hundreds of Project
26 impacts have been mitigated to less than significant levels.

27 384. Where a project for which an EIR has been certified has a significant environmental effect,
28 an agency may not carry out that project unless the agency makes findings for each of those significant
effects. (*Id.* at subd. (a); Pub. Resources Code, § 21081, subd. (a).) One possible finding is that “[c]hanges

1 or alterations have been required in, or incorporated into, the project which avoid or substantially lessen
2 the environmental effect.” (Pub. Resources Code, § 21081, subd. (a)(1).) The CEQA Findings do not
3 include any findings for numerous impacts that were potentially significant, but later determined to be less
4 than significant for reasons including but not limited to reliance on Project features deemed
5 “Environmental Commitments” or “Avoidance and Minimization Measures” by DWR. These types of
6 impacts are squarely within Guidelines section 15091 as the type of impact for which the agency must
7 make CEQA Findings describing what has been done to reduce the impact.

8 385. The failure to include findings to support impact determinations prevents the public from
9 understanding the full range of Project impacts, and critically, the reasons why the agency has determined
10 the impacts are less than significant. DWR’s omission of findings for these impacts constitutes a failure
11 “to bridge the analytic gap between the raw evidence and ultimate decision.” (*Topanga Ass’n for a Scenic*
12 *Cmty. v. County of L.A.* (1974) 11 Cal.3d 506, 515; see also Pub. Resources Code, § 21081, subd. (a)(1).)

13 386. To the extent that DWR’s CEQA Findings do discuss particular impacts, DWR’s
14 determination that these impacts would be less than significant is unsupported by substantial evidence.

15 387. DWR failed to properly determine that economic, legal, social, technological, or other
16 benefits of the Project were overriding considerations that permitted approval of the Project despite
17 significant and unavoidable impacts on the environment. (CEQA Guidelines, § 15091.)

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

20 ***Recirculation of the EIR is Required***

21 389. Recirculation under Public Resources Code section 21092.1 and CEQA Guidelines section
22 15088.5, subdivision (a), was required due to the addition of “significant new information” that “deprives
23 the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the
24 project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that
25 the project's proponents have declined to implement.” (CEQA Guidelines, § 15088.5, subd. (a).)

26 390. As pointed out by public commenters, and as acknowledged by DWR in its EIR, substantial
27 new information became available prior to certification of the EIR. That new information constituted
28 “significant new information” requiring the recirculation of the EIR.

1 391. Additionally, Plaintiffs and numerous other commenters presented information to DWR
2 and identified fundamental omissions and deficiencies in the EIR’s analysis, which, if properly addressed
3 by DWR, would have required substantial revisions to the EIR necessitating recirculation.

4 **SECOND CAUSE OF ACTION**
5 **VIOLATION OF THE CENTRAL VALLEY PROJECT ACT**
6 **(Wat. Code, § 11100 et seq.)**

7 392. Plaintiffs incorporate by reference each and every allegation in the preceding paragraphs
8 of this Petition as though fully set forth herein.

9 393. DWR’s approval of the Project exceeds its statutory authority in Water Code section 11260
10 to “modify” the “Feather River and Sacramento-San Joaquin Delta Diversion Projects” because the Project
11 constitutes a substantial deviation from that project. (Wat. Code, § 11260.)

12 394. DWR’s approval of the Project also exceeds its statutory authority in Water Code section
13 11290 to “add additional units” to the Central Valley Project because the Project is not “consistent with
14 [the Central Valley Project]” and not “in furtherance of the single object contemplated by this part.” (Wat.
15 Code, § 11290.) As explained below, the Project is directly inconsistent with the 1959 Delta Protection
16 Act (Wat. Code, § 12200 et seq.) and the Watershed Protection Act (Wat. Code, § 11460 et seq.). Because
17 those acts are included as part of the Central Valley Project Act, that inconsistency prohibits DWR from
18 adding the Project to the Central Valley Project.

19 395. Because DWR intends to operate the Project as part of the Central Valley Project and
20 because DWR lacks statutory authority to approve the Project under the Central Valley Project Act (Wat.
21 Code, § 11100 et seq.) or under any other act or authority, DWR’s approval of the Project is contrary to
22 law.

23 **THIRD CAUSE OF ACTION**
24 **VIOLATIONS OF THE 1959 DELTA PROTECTION ACT**
25 **(Wat. Code, § 12200 et seq.)**

26 396. Plaintiffs incorporate by reference each and every allegation in the preceding paragraphs
27 of this Petition as though fully set forth herein.

28 397. In 1959, the Legislature found and declared that:

[T]he maintenance of an adequate water supply in the Delta sufficient to maintain and
expand agriculture, industry, urban, and recreational development in the Delta . . . and to
provide a common source of fresh water for export to areas of water deficiency is necessary
to the peace, health, safety and welfare of the people of the State

1 (Wat. Code, § 12201, emphasis added.) Providing that “common source of fresh water” within the Delta
2 for both water users within and outside of the Delta is not optional for DWR. Water Code section 12205
3 provides:

4 It is the policy of the State that the operation and management of releases from storage into
5 the Sacramento-San Joaquin Delta of water for use outside the area in which such water
6 originates *shall be integrated to the maximum extent possible in order to permit the
fulfillment of the objectives of this part.*

7 (Emphasis added; see also, Wat. Code, § 107 [“all . . . declarations of policy in this [Water] code
8 shall be given their full force and effect”].)

9 398. Because one “of the objectives of this part” is the provision of a “common source of fresh
10 water” within the Delta for water users both within and outside of the Delta, DWR has a mandatory duty
11 to integrate its “releases from storage into the [Delta] of water for use outside the area in which such water
12 originates . . . to the maximum extent possible in order to permit the fulfillment of [that] objective[.]”
(Wat. Code, §§ 12201 & 12205.)

13 399. The hallmark of the proposed Project, however, is the circumvention of that duty. The
14 Project’s central feature is the proposed export of water that would otherwise flow into the Delta (i.e.,
15 water that DWR releases from storage into the Delta) by diverting that water into a tunnel located in the
16 northernmost tip of the Delta *before* that water reaches that “common source of fresh water” within the
17 Delta and, hence, *before* that water provides a common source of fresh water for both water users within
18 and outside of the Delta.

19 400. Such export of water from the northernmost region of the Delta therefore constitutes a
20 direct violation of DWR’s duty under Water Code section 12205 to “integrate [its releases of storage water
21 into the Delta for export from the Delta] to the maximum extent possible in order to permit the fulfillment
22 of the objective” of providing that “common source of fresh water.” DWR’s Project is manifestly intended
23 to do just the opposite, i.e., to avoid integrating its releases from storage into the Delta to provide that
24 supply. The Project is designed to impermissibly segregate some or all of those releases from that common
25 supply. Because such segregation is directly prohibited by Water Code section 12205, the Project conflicts
26 with, and would violate, the 1959 DPA.
27
28

1 401. Additional objectives of the 1959 DPA include “the provision of salinity control and an
2 adequate water supply for the users of water in the [Delta].” (Wat. Code, § 12202; see also, Wat. Code,
3 § 12201.)

4 402. Under Water Code section 12205, DWR therefore has an additional duty to integrate its
5 “releases from storage into the [Delta] of water for use outside the area in which such water originates . .
6 . to the maximum extent possible in order to permit the fulfillment of the objectives” of providing that
7 “salinity control and an adequate water supply for the users of water in the [Delta].” (Wat. Code, § 12202.)

8 403. As proposed, however, the Project would breach that duty by exporting water through the
9 Project’s tunnel in the northern Delta that is needed to maintain that “salinity control and an adequate
10 water supply for the users of water in the [Delta].” (Wat. Code, § 12202.)

11 404. Examples of the Project’s unlawful intent and effect include DWR’s planned deprivation
12 of such salinity control and an adequate water supply via the export of Sacramento River fresh water
13 through the Project’s tunnel in the event of extended droughts, individual or widespread levee failures,
14 and sea level rise. When the Delta is experiencing degraded water quality (i.e., high salinity levels) as a
15 result of those events, in lieu of allowing Sacramento River fresh water to flow into the Delta to provide
16 salinity control by restoring that water quality, DWR’s plan under the Project is, instead, to export that
17 water through the Project’s tunnel, thereby depriving the Delta of that water and, hence, depriving it of
18 that salinity control.

19 405. This abrogation of Delta salinity control constitutes a direct violation of DWR’s duty in
20 Water Code section 12205 to “integrate[its releases of storage water into the Delta for export from the
21 Delta] to the maximum extent possible in order to permit the fulfillment of the objectives” of providing
22 “salinity control and an adequate water supply for the users of water in the [Delta].” (Wat. Code, § 12202.)
23 For this reason, also, the Project, as proposed, fails as a matter of law and cannot be allowed to proceed.

24 406. Additionally, the Project, as proposed, violates DWR’s duties under Water Code section
25 12204, which provides:

26 In determining the availability of water for export from the Sacramento-San
27 Joaquin Delta no water shall be exported which is necessary to meet the
28 requirements of Sections 12202 and 12203 of this chapter.

1 407. Water Code section 12202, as discussed, requires DWR to provide “salinity control and an
2 adequate water supply for the users of water in the [Delta].” Water Code section 12204, accordingly,
3 prohibits DWR from exporting water through the Project’s tunnel that is necessary to provide salinity
4 control and an adequate water supply.

5 408. Notwithstanding that duty, the Project would, by design, violate that duty by exporting
6 water through the tunnel that is needed to provide that salinity control and an adequate water supply. As
7 discussed above, examples of such instances include DWR’s planned deprivation of the statutorily
8 required salinity control and an adequate water supply in the event of extended droughts, individual or
9 widespread levee failures, and sea level rise. When the water quality (i.e., salinity level) in the Delta is
10 substantially degraded as a result of those events, DWR’s proposed Project would export Sacramento
11 River fresh water through the tunnel that is needed to restore that water quality and provide that adequate
12 water supply. Such planned exports therefore directly violate Water Code section 12204 and cannot
13 lawfully proceed.

14 409. Additionally, as discussed above, DWR’s export of flushing flows through the tunnel could
15 also violate Water Code section 12204, for example, by causing (1) the premature triggering of Term 91;
16 (2) the triggering of Term 91 when it would not otherwise be triggered in the absence of such exports; (3)
17 the alleged need for, and securing, of Temporary Urgency Changes which relax the Delta water quality
18 standards and degrade the water quality in the Delta; and (4) violations of the Delta water quality standards
19 due to the lack of available DWR and/or United States Bureau of Reclamation (“Reclamation” or
20 “USBR”) storage supplies. In each of those instances, DWR’s export of flushing flows did not constitute
21 the export of surplus water. Instead, such export was the export of non-surplus water that was needed
22 later in the year (or even in subsequent years) to provide “salinity control and an adequate water supply
23 for the users of water in the [Delta].” (Wat. Code, §§ 12202 & 12204.) Such export of non-surplus water
24 is prohibited by Water Code section 12204.

25 **FOURTH CAUSE OF ACTION**
26 **VIOLATIONS OF THE 1992 DELTA PROTECTION ACT**
27 **(Pub. Resources Code, § 29700 et seq.)**

28 410. Plaintiffs incorporate by reference each and every allegation in the preceding paragraphs
of this Petition as though fully set forth herein.

1 411. In the 1992 DPA, the Legislature makes numerous findings and declarations for the
2 protection of the Delta, including the following set forth in Public Resources Code sections 29701 and
3 29702, respectively:

4 “[T]he Sacramento-San Joaquin Delta is a natural resource of statewide, national, and
5 international significance, containing irreplaceable resources, and it is the policy of the
6 state to recognize, *preserve, and protect* those resources of the delta for the use and
7 enjoyment of current and future generations.” (Wat. Code, § 29701, emphasis added.)

8 “[T]he basic goals of the state for the delta are the following: (b) *Protect, maintain, and,*
9 *where possible, enhance and restore* the overall quality of the delta environment, including,
10 but not limited to, agriculture, wildlife habitat, and recreational activities.” (Wat. Code, §
11 29702, emphasis added.)

12 412. DWR’s compliance with the policies and goals in the 1992 DPA is mandatory. (See e.g.,
13 *Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 995 (*Klajic*) [“The trial court reviews
14 an administrative action pursuant to Code of Civil Procedure section 1085 to determine [among other
15 things] whether the agency's action was . . . contrary to established public policy”].) “Generally, a writ
16 [under Code of Civil Procedure section 1085] will lie when there is no plain, speedy, and adequate
17 alternative remedy; the respondent has a duty to perform; and the petitioner has a clear and beneficial right
18 to performance.” (*Pomona Police Officers’ Ass’n v. City of Pomona* (1997) 58 Cal.App.4th 578, 584
19 (*Pomona Police*), quoting *Payne v. Superior Court* (1976) 17 Cal.3d 908, 925.)

20 413. As is the case with the 2009 DRA, which contains substantially similar findings and
21 declarations (and which is discussed below), far from “preserv[ing],” “protect[ing],” “maintain[ing],”
22 much less “enhance[ing]” the Delta’s “irreplaceable resources” and the “overall quality of the Delta
23 environment,” the EIR confirms that the Project’s construction and operation would substantially impair,
24 and in many cases permanently destroy, those resources and qualities, in direct contravention of the
25 policies and goals set forth in the 1992 DPA.

26 414. The construction and operation of the Project is also contrary to the co-equal goals set forth
27 in Public Resources Code section 29702 (which are also set forth in the 2009 DRA and also discussed
28 below). Public Resources Code section 29702, subdivision (a), provides:

 The Legislature further finds and declares that the basic goals of the state for the Delta are
the following: (a) Achieve the two coequal goals of providing a more reliable water supply
for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal
goals shall be achieved in a manner that protects and enhances the unique cultural,
recreational, natural resource, and agricultural values of the Delta as an evolving place.

1 415. The Project’s noncompliance with these co-equal goals includes the Project’s failure to
2 “provid[e] a more reliable water supply for [Delta exporters]” “in a manner that protects and enhances the
3 unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.”
4 (Pub. Resources Code, § 29702.)

5 416. The Project seeks to provide a more reliable water supply for Delta exporters during events
6 such as extended droughts, levee failures, and sea level rise by depriving the Delta of fresh water flows
7 needed to maintain salinity control and an adequate water supply for water users within the Delta during
8 such events, should they occur. Improvements to the reliability of the water supply for Delta exporters
9 during such events would therefore be achieved by directly impairing the reliability of the water supply
10 for water users within the Delta during those events. Such impairment harms, rather than “protects [much
11 less] enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as
12 an evolving place.” Such impairment directly contradicts Public Resources Code section 29702 and, for
13 this reason as well, the Project, as proposed, cannot proceed.

14 **FIFTH CAUSE OF ACTION**
15 **VIOLATIONS OF THE WATERSHED PROTECTION ACT**
16 **(Wat. Code, § 11460 et seq.)**

17 417. Plaintiffs incorporate by reference each and every allegation in the preceding paragraphs
18 of this Petition as though fully set forth herein.

19 418. Water Code section 11460 of the Watershed Protection Act provides:

20 In the construction and operation by the department [i.e., DWR and USBR] of any project
21 under the provisions of this part a watershed or area wherein water originates, or an area
22 immediately adjacent thereto which can conveniently be supplied with water therefrom,
23 shall not be deprived by the department directly or indirectly of the prior right to all of the
24 water reasonably required to adequately supply the beneficial needs of the watershed, area,
25 or any of the inhabitants or property owners therein.

26 419. Despite this prohibition against operating the Project in a manner that “directly or
27 indirectly” deprives the Delta of its “prior right to all of the water reasonably required to adequately supply
28 the beneficial needs of the [Delta] or any of the inhabitants or property owners therein,” DWR intends to
operate the Project in a manner that does precisely that. Instances of such deprivations include DWR’s
planned use of the Project’s tunnel to export Sacramento River fresh water away from the Delta that is
“reasonably required to adequately supply the beneficial needs” of the Delta and its inhabitants during

1 events that result in substantial degradation of the water quality in the Delta, such as extended droughts,
2 levee failures, and sea level rise.

3 420. It is during and after such events, that the Delta and its inhabitants would require that fresh
4 water the most. Yet, in direct contravention of its duties under Water Code section 11460, the Project
5 would deprive the Delta and its inhabitants of such fresh water. Such deprivations would be unlawful
6 under the Watershed Protection Act and, therefore, the Project, as proposed, cannot proceed.

7 421. Additionally, as discussed above, DWR's export of flushing flows through the tunnel could
8 directly and/or indirectly deprive diverters within and upstream of the Delta of their prior right to use their
9 watershed's water, for example, by causing (1) the premature triggering of Term 91; (2) the triggering of
10 Term 91 when it would not otherwise be triggered in the absence of such exports; (3) the alleged need
11 for, and securing, of Temporary Urgency Changes which relax the Delta water quality standards and
12 degrade the water quality in the Delta; and (4) violations of the Delta water quality standards due to the
13 lack of available DWR and/or USBR storage supplies. In each of those instances, DWR's export of
14 flushing flows did not constitute the export of surplus water. Instead, such export was the export of non-
15 surplus water that was needed later in the year (or even in subsequent years) "to adequately supply the
16 beneficial needs of the watershed, area, or any of the inhabitants or property owners therein." (Wat. Code,
17 § 11460.)

18 422. Additionally, the anticipated adverse impacts to surface water and groundwater quality and
19 quantity within the Delta and other areas of origin that would result from the construction and operation
20 of the Project, as proposed, likewise would result in direct and/or indirect deprivations of those areas'
21 prior rights to that water, and to the unimpaired quality of that water, in violation of Water Code section
22 11460.

23 **SIXTH CAUSE OF ACTION**
24 **VIOLATIONS OF THE 2009 DELTA REFORM ACT**
25 **(Wat. Code, § 85000 et seq.)**

26 423. Plaintiffs incorporate by reference each and every allegation in the preceding paragraphs
27 of this Petition as though fully set forth herein.
28

1 424. The 2009 DRA provides comprehensive protections for the Delta. As with the other acts,
2 DWR’s approval of the Project and its certification of the EIR violate the 2009 Delta Reform Act in
3 numerous substantial respects.

4 425. The 2009 DRA sets out numerous policies of the State of California that apply to the
5 management of the Delta. These policies constitute the “coequal goals” of the 2009 Delta Reform Act
6 and are generally applicable provisions of the Water Code.

7 426. The 2009 DRA also directs the DSC to adopt a Delta Plan for long-term management of
8 the Delta. The Delta Plan is the mechanism by which the DSC may review covered actions. (See Wat.
9 Code, § 85059.) The DSC evaluates covered actions for consistency with the Delta Plan when a party
10 challenges an agency’s certification of consistency. (Wat. Code, § 85225.10.) This review process
11 pertains specifically to the Delta Plan and is separate from the 2009 DRA’s policies.

12 427. The 2009 DRA defines the coequal goals of Delta water management as “the two goals of
13 providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta
14 ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique
15 cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.” (Wat.
16 Code, § 85054.) As the policies of the State of California, the coequal goals apply generally to the Project
17 and are not exclusively the purview of the DSC. The coequal goals are judicially enforceable. (See e.g.,
18 *Klajic, supra*, 90 Cal.App.4th at 995; *Pomona Police, supra*, 58 Cal.App.4th at 584.)

19 428. DWR’s approval of the Project and certification of the EIR conflict directly with the 2009
20 DRA’s co-equal goal of creating a more reliable water supply in California. No water availability analysis
21 has been performed to determine the Project’s impacts to water supply; had a water availability analysis
22 been performed, it would have disclosed the fact that the Project relies on “paper water,” i.e., water that
23 exists only on paper.

24 429. DWR’s approval of the Project and certification of the EIR also violate the 2009 DRA’s
25 co-equal goal of protecting, restoring, and enhancing the Delta ecosystem. The Project simply relocates
26 impacts from the export of Delta water to a different region of the Delta and includes no protective,
27 restoration or enhancement measures in excess of mitigation required to reduce project impacts pursuant
28 to other laws, e.g., CEQA, and, as alleged elsewhere herein, even those measures are themselves deficient

1 as a matter of law and/or when reviewed under a substantial evidence standard. Operation of the Project,
2 if implemented, would also significantly degrade water quality, thereby impairing or precluding
3 development of other habitat restoration projects.

4 430. DWR’s approval of the Project and certification of the EIR also conflict directly with the
5 2009 DRA’s requirement that Delta water be managed in a manner that protects and enhances the unique
6 cultural, recreational, natural resource, and agricultural values of the Delta. (Wat. Code, § 85054.) The
7 Project would instead cripple the Delta’s sustainable and wildlife-friendly agricultural operations, destroy
8 special status species Delta habitat in and out of the water, and plague the Project area with overwhelming
9 and lengthy construction activity. Project operations would impair or destroy currently reliable local
10 surface and groundwater supplies and, eventually, the Delta communities that depend on those supplies.

11 431. In the 2009 DRA, the Legislature declared State policy, in pertinent part, as follows: “The
12 policy of the State of California is to reduce reliance on the Delta in meeting California’s future water
13 supply needs through a statewide strategy of investing in improved regional supplies, conservation, and
14 water use efficiency” (Wat. Code, § 85021.) The Project does precisely the opposite. For example,
15 the Project directly conflicts with the policy of reduced reliance because it would export growth-inducing
16 water supplies from the Delta that increase—rather than decrease—reliance on the Delta to meet present
17 and future water supply needs outside the Delta. In addition to increasing reliance on Delta water, the
18 Project’s enormous cost would also reduce availability of funding for projects that actually would reduce
19 reliance on Delta water. Incurring this increased public debt from the bonds would impair the ability of
20 water contractor agencies to secure funds for other water projects that improve regional water self-reliance
21 and reduce reliance on the Delta. The EIR fails to adequately disclose and analyze the full nature and
22 extent to which the Project would directly and indirectly increase reliance upon the Delta, nor does it
23 identify and analyze measures to mitigate or avoid that increase in reliance upon the Delta.

24 432. In approving the Project and certifying the EIR, DWR abrogated its affirmative duty to
25 comply with the mandates and promote the express objectives of the foregoing enactments and laws.

26 433. For the foregoing reasons, DWR failed to act in the manner required by law and
27 prejudicially abused its discretion in approving the Project and certifying the EIR.
28

**SEVENTH CAUSE OF ACTION
VIOLATION OF THE COMMON LAW PUBLIC TRUST DOCTRINE**

1
2 434. Plaintiffs incorporate by reference each and every allegation in the preceding paragraphs
3 of this Petition as though fully set forth herein.

4 435. The State of California, as a sovereign entity, owns “all of its navigable waterways and the
5 lands lying beneath them ‘as trustee of a public trust for the benefit of the people.’” (*Colberg, Inc. v. State*
6 *of California ex rei. Dept. Pub. Wks.* (1967) 67 Cal.2d 408, 416.) The State acquired title as trustee to
7 such lands and waterways upon its admission to the union. (*City of Berkeley v. Superior Court* (1980) 26
8 Cal.3d 515, 521.)

9 436. The public trust doctrine in California encompasses all navigable lakes and streams and
10 protects navigable waters from harm caused by diversion of non-navigable tributaries, including those
11 diverted from and harmed by the Project. The public trust doctrine also applies to extractions of
12 groundwater that adversely affect navigable waterways.

13 437. The public trust doctrine provides for protecting people’s common interest in California’s
14 streams, lakes, marshlands and tidelands, and DWR has “an affirmative duty to take the public trust into
15 account in the planning and allocation of water resources, and to protect public trust whenever feasible.”
16 (*National Audubon Society v. Superior Court of Alpine County* (1983) 33 Ca1.3d 419, 446.)

17 438. The Legislature has acknowledged that “[t]he longstanding constitutional principle of
18 reasonable use and the public trust doctrine shall be the foundation of state water management and are
19 particularly important and applicable to the Delta.” (Wat. Code, § 85023).

20 439. The people’s interests under the public trust include the right to fish, hunt, bathe, and swim
21 and to use the navigable waters of the state for boating and general recreation purposes. Preservation of
22 public trust resources in their natural state is also essential to the public trust doctrine. (See *National*
23 *Audubon Society v. Superior Court of Alpine County* (1983) 33 Cal.3d 419, 434-35.)

24 440. An agency’s duty to perform a public trust analysis prior to approving a project is not
25 necessarily discharged by virtue of performing CEQA review. (*S.F. Baykeeper, Inc. v. State Lands Com.*
26 (2015) 242 Cal.App.4th 202, 242.) Instead, public agencies have an independent duty to perform a public
27 trust consistency analysis, based on substantial evidence in the record, as part of an adequate CEQA
28 review. (*Ibid.*)

1 441. The public trust doctrine protects public waterways in their natural state for use by all
2 people and does not countenance the removal of water from waterways for use elsewhere.

3 442. The Project EIR does not contain any water availability analysis that would show, at a
4 minimum, what water will be available to satisfy existing obligations, including protection of the public
5 trust, in addition to Project-facilitated exports. The EIR also fails to include sufficient analysis of how
6 Project groundwater extraction activities during construction and diversions during operations would
7 affect public trust resources.

8 443. DWR rejected multiple comments from various groups to develop a public trust analysis
9 to satisfy the California Supreme Court's holding that the state must protect the public trust in water supply
10 planning decisions. The Project approval documents fail to adequately address DWR's public trust duties.

11 444. The above-described violations of the 1959 DPA and Watershed Protection Act are
12 additional examples of the many ways the Project will adversely impact public trust resources—there,
13 through the deprivation of an adequate supply of water of suitable quality that is necessary to protect those
14 resources.

15 445. Plaintiffs are informed and believe, and thereon allege, that DWR's failure to adequately
16 consider and analyze the public trust in approving the Project will harm trust resources and the Plaintiffs'
17 and the people's rights and interests in those resources—including fishing, hunting, bathing, swimming,
18 boating, and preserving navigable waters of the state—and thus violates the public trust doctrine.

19 446. The above-described violations of the 1959 DPA and Watershed Protection Act are
20 additional examples of the many ways the Project will adversely impact public trust resources.

21 447. Plaintiffs are informed and believe, and thereupon allege, that by failing to adequately
22 consider, analyze and protect the public trust, DWR violated the state's duty to protect public trust
23 resources.

24 **EIGHTH CAUSE OF ACTION**
25 **THE PROJECT IS CONTRARY TO PROPOSITION 9**

26 448. Proposition 9 was a referendum statute that was passed by California voters in 1982 in
27 response to the prior adoption of Senate Bill 200, which authorized the addition of a peripheral canal
28 conveyance facility as an additional feature to the Central Valley Project. The effect of Proposition 9 was
to remove authorization of a component of the Central Valley Project which would move Sacramento

1 River water around the eastern and southern edge of the Delta rather than allow that water to move through
2 the Delta channels. No subsequent statute has been enacted to supersede the effects of Proposition 9.
3 Thus, DWR has no legal authority to construct the Project's tunnel which is the centerpiece of the Project
4 and which likewise bypasses the Delta when diverting Sacramento River water for export from the Delta.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiffs pray for relief as follows:

- 7 1. Vacate DWR's Notice of Determination for the Project;
- 8 2. Issue a peremptory writ of mandate commanding DWR to vacate and set aside its
9 certification of the EIR, its approval of the Project, and any and all approvals rendered pursuant to and/or
10 in furtherance of all or any part of the Project;
- 11 3. Preliminarily and permanently enjoin DWR from taking any action in furtherance of
12 constructing or operating the Project unless and until DWR complies with the requirements of CEQA, the
13 Central Valley Project Act, the 1959 DPA, the 1992 DPA, the Watershed Protection Act, the 2009 DRA,
14 the public trust doctrine and Proposition 9.
- 15 4. Award Plaintiffs the costs of this action, including their reasonable attorneys' fees; and
- 16 5. Grant other such relief as the Court deems just and proper.

17
18 Dated: January 22, 2024

MOHAN HARRIS RUIZ LLP

19 

20 _____
21 S. Dean Ruiz, Esq.
22 Attorney for Petitioners/Plaintiffs
23 SOUTH DELTA WATER AGENCY and
24 RUDY MUSSI INVESTMENT L.P.
25
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28

1 **VERIFICATION**

2 I, S. Dean Ruiz, am counsel of record for Plaintiffs South Delta Water Agency and Rudy Mussi
3 Investment L.P. I sign for Plaintiffs absent from the county and/or because facts contained in the Petition
4 and Complaint are within the knowledge of counsel. I have read the foregoing Petition and Complaint
5 and know the contents thereof. The same is true of my own knowledge, except as to those matters that
6 are alleged on information and belief, and as to those matters, I believe them to be true.

7 I declare under penalty of perjury under the laws of the State of California that the foregoing is
8 true and correct. Executed this 22nd day in January, 2024, in Lodi, California.

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11 _____
12 S. Dean Ruiz, Esq.
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EXHIBIT "A"

Notice of Commencement of Action against
California Department of Water Resources

Mohan Harris Ruiz LLP

Attorneys at Law

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January 18, 2024

Via U.S. Mail & Email: DWRLegalService@water.ca.gov

California Department of Water Resources

P.O. Box 942836

Sacramento, CA 94236-0001

**Re: Notice of Commencement of Action against California Department
of Water Resources**

To the California Department of Water Resources:

Please take notice, under Public Resources Code section 21167.5, that Petitioners and Plaintiffs, SOUTH DELTA WATER AGENCY and RUDY MUSSI INVESTMENT L.P., (“Plaintiffs”) intend to file a petition for writ of mandate and complaint for injunctive relief under the provisions of the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq. [“CEQA”]), the Central Valley Project Act (Wat. Code, §11100), the 1959 Delta Protection Act (Wat. Code, § 12200 et seq.), the 1992 Delta Protection Act (Pub. Resources Code, § 29700 et seq.), the Watershed Protection Act (Wat. Code, § 11460 et seq.), the Delta Reform Act of 2009 (Wat. Code § 85000 et seq.), Proposition 9, and the Public Trust doctrine against the California Department of Water Resources (“DWR”).

Plaintiffs challenge DWR’s environmental review and approval of the construction and operations of the Delta Conveyance Project or Delta Tunnel Project (“Project”). The lawsuit will be based on violations of CEQA and other applicable statutes. The exact nature of the allegations and relief sought is described in the Verified Petition for Writ of Mandate and Complaint for Injunctive Relief that Plaintiffs plan to file on or before January 22, 2024.

Very Truly Yours,

MOHAN HARRIS RUIZ LLP



S. DEAN RUIZ, ESQ.

SDR/tag
Enclosures

PROOF OF SERVICE

I hereby declare that I am employed with Mohan Harris Ruiz LLP in the City of Lodi, County of San Joaquin, California. I am over the age of 18 years and not a party to the action. My business address is 1806 W. Kettleman Lane, Suite L, Lodi, California 95242.

On January 18, 2024, I served the attached document:

**NOTICE OF COMMENCEMENT OF ACTION AGAINST CALIFORNIA
DEPARTMENT OF WATER RESOURCES**

on the following parties or attorneys for parties, as shown below:

California Department of Water Resources
P.O. Box 942836
Sacramento, CA 94236-0001
Email: DWRLegalService@water.ca.gov

Service was caused as follows:

✓ **BY FIRST CLASS MAIL:** I am readily familiar with this business’s practice for collecting and processing correspondence for mailing with the U.S. Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service. On the date written above, following ordinary business practices, I placed for collection and mailing at my place of business the attached document in a sealed envelope, with postage fully prepaid, addressed as shown above.

✓ **BY ELECTRONIC MAIL:** I caused each such document to be sent by electronic mail to the addressees at the email addresses listed above. The document was served electronically from my place of business at 1806 W. Kettleman Lane, Suite L, Lodi, CA, from my electronic service address at teresa@mohanlaw.net.

I declare under the penalty of perjury that the foregoing is true and correct. Executed at Lodi, California on January 18, 2024.



Teresa Alcala-Gonzalez