



DELTA STEWARDSHIP COUNCIL

A California State Agency

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Determination Regarding Appeals of the Certification of Consistency
by the California Department of Water Resources for
California WaterFix

Appealed by:

Appellant Group	Defined Term
North Coast Rivers Alliance, Institute for Fisheries Resources, Pacific Coast Federation of Fishermen’s Associations, San Francisco Crab Boat Owners Association, Winnemem Wintu Tribe	NCRA
Save the California Delta Alliance	SCDA
Friends of the River, California Sportfishing Protection Alliance, California Water Impact Network, Planning and Conservation League, AquAlliance, Environmental Water Caucus, Sierra Club California, Restore the Delta	FOR
North Delta CARES Action Committee	North Delta Cares
City of Stockton	Stockton
Sacramento Regional County Sanitation District	Regional San
San Joaquin County, Contra Costa County, Solano County, Yolo County, Local Agencies of the North Delta	San Joaquin County
Central Delta Water Agency, South Delta Water Agency	CDWA
County of Sacramento, Sacramento County Water Agency	Sacramento County

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In this Determination Regarding Appeals of the Certification of Consistency by the California Department of Water Resources for California WaterFix (Determination), the Delta Stewardship Council (Council) finds that substantial evidence *does not* exist in the record before us to support the Department of Water Resources’ (Department’s or DWR’s) finding that California WaterFix is consistent with the Delta Plan. Because the Department’s certification of consistency for California WaterFix (Certification or Certification of Consistency) *is not* supported by substantial evidence in the record, we *remand* the matter to the Department for reconsideration, pursuant to Water Code section 85225.25.

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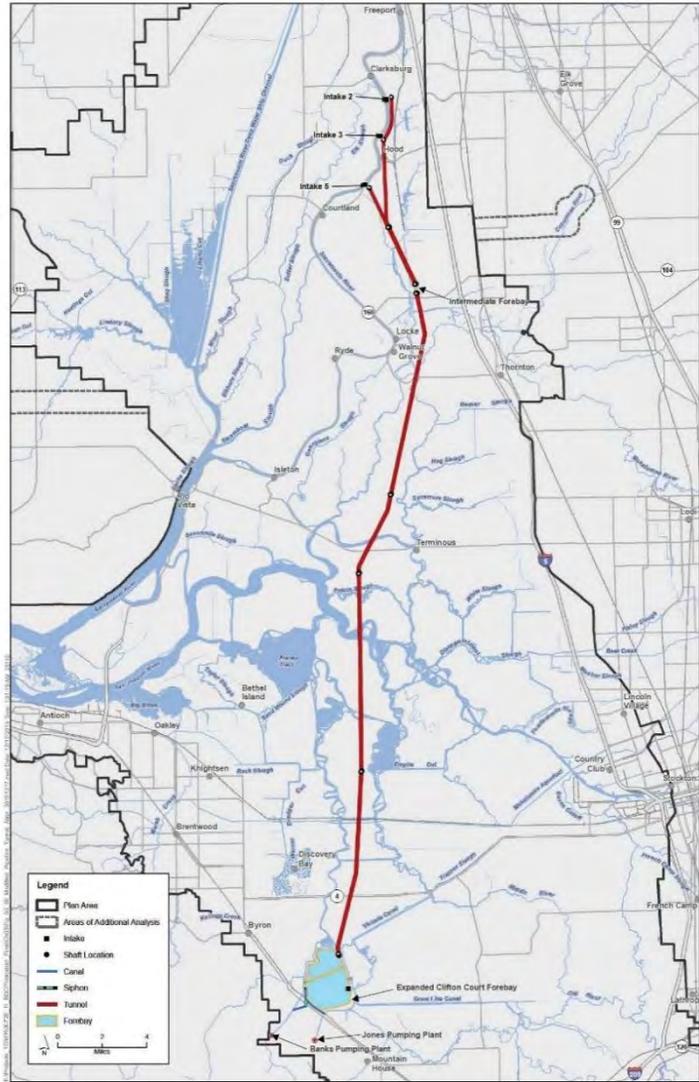
I. BACKGROUND

A. Brief Description of Project

The Delta Reform Act of 2009 charges the Council with implementing the Delta Plan. (Wat. Code, § 85204.) As part of this charge, we must ensure that agency actions in the Delta are consistent with the Delta Plan’s policies. (Wat. Code, § 85225.) An agency undertaking a qualifying action in the Delta—called a covered action—must certify to the Council that its action is consistent with the Delta Plan. (*Ibid.*)

California WaterFix is a covered action. On July 27, 2018, the Department filed a Certification of Consistency for the California WaterFix covered action. (See Certification Record.)

California WaterFix proposes large physical and operational improvements to the State Water Project in the Delta: new intake facilities in the north Delta, expanded south Delta intake facilities, and underground tunnels to connect the two. (*Supra* at pp. 1-2; California WaterFix Final EIR/EIS (Final EIR/EIS), pp. 1-6; see also Department’s map below, in its Certification, [Project Description](#), p. 9.)



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1 The new north Delta intake facilities will consist of three separate intakes along the east
2 bank of the Sacramento River between Clarksburg and Courtland. (Final EIR/EIS, p. 3-111.)
3 These fish-screened intakes will divert water through a complex sedimentation system before
4 conveying it to two large tunnels. (*Ibid.*) Once complete, these tunnels, up to 40 feet in
5 diameter, will have the capacity to convey up to 9,000 cubic feet per second. (*Id.* at p. 3-91.)
6 The water will travel by gravity through these tunnels to expanded south Delta intake facilities.
7 (*Id.* at p. 3-111.) These facilities will undergo physical improvements to isolate water flowing
8 from the north Delta and manage the relative quantities diverted from the north and south.
9 (*Ibid.*) Diversions from existing south Delta facilities will also continue. (*Ibid.*)

10 California WaterFix would enable the State Water Project to operate using a dual-
11 conveyance system: water would primarily be diverted from the north Delta, with the option of
12 diverting water from the south Delta based on conditions. (Certification, Project Description, p.
13 2.) California WaterFix would also include mitigation measures, such as fish screens, habitat
14 restoration, and management activities. (*Id.* at p. 4.) The Department maintains that, through
15 construction and mitigation, California WaterFix could reduce the State Water Project's ongoing
16 reliance on diversions from the south Delta, increase the flexibility of operations in order to
17 protect fish, and capture more water during times of high flow. (*Id.* at pp. 1, 3.)

18 **B. Brief Description of Appeals & Procedural History**

19 Any person who claims that a proposed covered action is inconsistent with the Delta
20 Plan may file an appeal of the certification of consistency. (Wat. Code, § 85225.10, subd. (a).)
21 An appeal must identify with specificity how the certification of consistency is not supported by
22 substantial evidence in the record certified by the project proponent, and provide necessary
23 factual support. (Wat. Code, § 85225.10, subd. (c); see also Appeals Procedures § 6 and subd.
24 (e) and (f).) The Council may dismiss claims that fail to provide this specificity. (*Ibid.*) Parties
25 have 30 days from the submission of the certification of consistency to file an appeal with the
26 Council. (Wat. Code, § 85225.15.)

27 We received nine timely appeals from the following entities (Appellants or Appellant
28 Groups):

- 29 1. North Coast Rivers Alliance, Pacific Coast Federation of Fishermen's Associations,
30 Institute for Fisheries Resources, San Francisco Crab Boat Owners Association, and the
31 Winnemem Wintu Tribe (NCRA);
- 32 2. Save the California Delta Alliance (SCDA);
- 33 3. Friends of the River, California Sportfishing Protection Alliance, California Water Impact
34 Network, Planning and Conservation League, AquAlliance, Environmental Water
35 Caucus, Sierra Club California, and Restore the Delta (FOR);
- 36 4. North Delta CARES Action Committee (North Delta Cares);
- 37 5. City of Stockton (Stockton);
- 38 6. Sacramento Regional County Sanitation District (Regional San);
- 39 7. Counties of San Joaquin, Contra Costa, Solano and Yolo, and Local Agencies of the
40 North Delta (San Joaquin County);
- 41 8. Central Delta Water Agency and South Delta Water Agency (CDWA); and
- 42 9. County of Sacramento and Sacramento County Water Agency (Sacramento County).

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1 The Department certified the administrative record in this matter on September 7, 2018.¹
2 We held a hearing on the appeals on October 24-26, 2018, in West Sacramento, California,
3 where: the Department and Appellants offered written and oral testimony; the Delta Protection
4 Commission (Commission) provided written and oral comments and recommendations pursuant
5 to Public Resources Code section 29773; and we received public comment on the Certification
6 and Appeals.

7 Upon conclusion of the hearing, the Presiding Officer directed Council staff to prepare
8 draft findings regarding the appeals based on the record and comments received in the matter,
9 and to schedule a public workshop to receive input on the draft findings. Staff's proposed draft
10 findings for consideration at the public workshop were issued on November 8, 2018.

11 II. BRIEF SUMMARY OF FINDINGS

12
13 Appellants substantively challenged the Certification's findings of consistency with nine
14 Delta Plan policies, one of which (G P1 (23 CCR § 5002)), has four subdivisions under which
15 Appellants challenged the Department's Certification. For clarity of analysis in this
16 Determination, we treat the challenges under the four G P1 subdivisions as individual Delta Plan
17 policy challenges (i.e., a total of twelve, rather than nine, Delta Plan policies are implicated).
18

19 In Section VI of this Determination (Analysis & Findings), the Council finds that:

- 20
21 1. The Department's Certification of Consistency with respect to the following five Delta
22 Plan policies is *not supported* by substantial evidence in the record:

- 23
24 ■ G P1, subd. (b)(1) (23 CCR § 5002, subd. (b)(1)) ("G P1(b)(1)": Full consistency
25 infeasible, but on the whole the covered action is consistent with the coequal
26 goals
27
28 ■ G P1, subd. (b)(3) (23 CCR § 5002, subd. (b)(3)) ("G P1(b)(3)": Best Available
29 Science
30
31 ■ WR P1 (23 CCR § 5003) ("WR P1"): Reduce Reliance on the Delta Through
32 Improved Regional Water Self Reliance
33
34 ■ ER P1 (23 CCR § 5005) ("ER P1"): Delta Flow Objectives
35
36 ■ DP P2 (23 CCR § 5011) ("DP P2"): Respect Local Land Use When Siting Water
37 or Flood Facilities or Restoration Habitats
38

- 39 2. Appellants failed to show that there is not substantial evidence in the record to support
40 the Department's Certification of Consistency with respect to the following four Delta
41 Plan policies, and we therefore *deny* the portions of the appeals that challenge the
42 Certification on these grounds:

- 43
44 ■ G P1, subd. (b)(2) (23 CCR § 5002, subd. (b)(2)) ("G P1(b)(2)": Detailed
45 Findings to Establish Consistency with the Delta Plan Mitigation Measures
46

¹ The record in this matter is voluminous. For ease of reference, when citing documents in the record, our Determination also links to the record posted on our webpage.

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1 Procedures Governing Appeals, Part I [Administrative Procedures], section 4, subd. (a).) We
2 may supplement the agency's record submission with any information we conclude was before
3 the agency but nevertheless was not included in the submission to us. (Administrative
4 Procedures section 10.) We may also take official notice of any accepted technical or scientific
5 fact, as well as any fact that may be judicially noticed. (*Id.*, section 29.)
6

7 We review a certification of consistency to determine whether it is supported by the
8 administrative record, rather than simply reviewing it for error. (*Sierra Club v. California Coastal*
9 *Comm.* (1993) 19 Cal.App.4th 547, 557.) The entire record will be reviewed, including evidence
10 detracting from the decision. (*Utility Reform Network v. Public Utilities Commission* (2014) 223
11 Cal.App.4th 945, 959.) However, the Council does not substitute its own findings or inferences
12 for the Department's. (See *Sierra Club v. California Coastal Comm.* (1993) 19 Cal.App.4th 547,
13 557.) In some instances, evaluating the Certification requires the interpretation of the Delta
14 Plan and documents incorporated therein. The Council, as drafter and administrator of the Delta
15 Plan, will interpret the Plan pursuant to its expertise. We will consider interpretations that the
16 parties offer but will ultimately arrive at an independent determination reflecting our expertise.
17 (See *Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1234.)
18

19 In arguing that certain findings are not based upon substantial evidence, Appellants
20 carry the burden of demonstrating that the administrative record does not contain sufficient
21 evidence to support the Department's findings. (*State Water Res. Control Bd. Cases* (2006)
22 136 Cal.App.4th 674, 749.) "A recitation of only the part of the evidence that supports the
23 Appellant's position is not the demonstration contemplated under the above rule." (*Ibid.* [internal
24 citation and quotation marks omitted].) Thus, if an appellant fails to set forth specific facts
25 showing that a finding is not supported by the evidence, it has failed to raise an appealable
26 issue, and its claim must be dismissed. (Administrative Procedures, sections 6, subds. (e), (f),
27 and 15, subd. (c); *Salas v. Cal. Dept. of Transportation* (2011) 198 Cal.App.4th 1058, 1074 [the
28 Council is not required to search the record to ascertain whether it contains support for the
29 Appellants' contentions].)
30

31 We may grant the appeal and remand the matter to the agency if, after examining the
32 entirety of the record, a reasonable person could not have reached the agency's conclusion(s)
33 in its consistency determination. (See *Patterson Flying Serv. v. California Dept. of Pesticide*
34 *Regulation* (2008) 161 Cal.App.4th 411, 426.)
35

36 IV. DELTA PROTECTION COMMISSION

37 The Commission has a unique and important role in representing the interests of Delta
38 communities. (Commission Letter, p. 1; see also Wat. Code, §§ 85085, subd. (a), 85200, subd.
39 (b)(1), and 85301.) The architecture of the Delta Reform Act reflects this role and establishes a
40 process for the Commission to provide recommendations to the Council on various issues.
41 (Pub. Res. Code, § 29773.) That process requires us to adopt a recommendation if, in our
42 discretion, we determine it to be feasible. (*Id.*, § 29773, subd. (b).)
43

44 Out of respect for both the Commission and the spirit of the Delta Reform Act, our
45 Administrative Procedures expressly encourage the Commission to provide testimony and
46 comment "regarding an appeal." (Appeals Procedures, § 11.) On September 14, 2018, we
47 issued a Notice of Public Hearing that incorporated language from our Appeals Procedures and
48 invited the Commission to provide comments on the California WaterFix appeals. On October
49 16, 2018, the Commission submitted written comments asserting three policies – DP P1, DP

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1 P2, and GP 1. On October 24 and 25, 2018, multiple Commission representatives provided oral
2 testimony.
3

4 Per the Appeals Procedures and the hearing notice, we may only consider comments
5 and testimony from the Commission “regarding an appeal.” Certain of the appeals filed against
6 California WaterFix raise DP P2 and G P1; thus, we consider the Commission’s DP P2 and GP
7 1 arguments in the sections below addressing those policies. No appeals raised DP P1,
8 however. Consequently, we must refrain from considering arguments related to that policy.³

9 V. ADMINISTRATIVE RECORD

10 On October 30, 2018, Executive Officer Jessica Pearson admitted the State Water
11 Resources Control Board (SWRCB) docket regarding the change of point of diversion
12 proceedings for the WaterFix Project (SWRCB hearing docket) through July 27, 2018 (the date
13 that the Department filed its Certification). (See Appeals Procedures, § 10.)

14 Appellants and the Commission requested that additional documents be added to the
15 record before us. They assert that such documents are either: (a) part of the record before the
16 Department, but were not included in the Department’s submission to the Council (see Appeals
17 Procedures, § 10); or, (b) generally accepted technical or scientific matter within the Council’s
18 jurisdiction (see Appeals Procedures, § 29). The Department objected to certain of those
19 requests for admissions. Our rulings on these admissions requests are as follows: documents
20 admitted pursuant to section 10 are listed in Exhibit A attached hereto; documents admitted
21 pursuant to section 29 are listed in Exhibit B attached hereto; documents that we decline to
22 admit into the record are listed in Exhibit C attached hereto.

23 Because they may be judicially noticed by the courts of this State and/or are generally
24 accepted technical or scientific matter within our jurisdiction, pursuant to section 29 of our
25 Appeals Procedures, we hereby take official notice of the following facts:

- 26 1) The existence of the pending updates to the SWRCB Water Quality Control Plan for the
27 San Francisco Bay-Sacramento-San Joaquin Delta Estuary (Bay-Delta WQCP) (see our
28 Analysis in Section VI.H. below).
29
- 30 2) That following a major levee failure, saltwater would move farther into the Delta, harming
31 water quality. In the present system, the Delta itself is a part of the conveyance facilities,
32 so the Department would need to mitigate water quality there in order to protect the
33 quality of the water it is exporting south (see our Analysis in Section VI.H. below).
34
35

³ The Commission requests that we add 19 documents to the record pursuant to Section 10 of our Appeals Procedures. But the Commission offers no argument or evidence that any of these documents were before the Department at the time it certified. We note, however, that the documents are all government records and susceptible to notice under Section 29 of our Appeals Procedures. We therefore convert the request to supplement pursuant to Section 10 into a request for official notice pursuant to Section 29, and grant the request for 18 of the 19 documents. (See Exhibit B.) The sole document for which we deny the request is described by the Commission as “10-11-18 email inquiry from the Commission (Erik Vink) to DWR (Greg Farley) and DWR’s 10-12-18 reply.” The document postdates the filing of the Certification and is not relevant to a determination of whether the Department had substantial evidence to support its Certification (see Exhibit C).

1 VI. ANALYSIS & FINDINGS

2 Our analysis is organized by general legal issues raised by Appellants, and then by
3 Delta Plan policy.

4
5 A. General Legal Issues

6
7 1. **Validity of the Current Delta Plan**

8
9 At least two Appellants assert that the 2013 Delta Plan is invalid. (NCRA Appeal Letter,
10 pp. 1-2; FOR Appeal Letter, pp. 3-4.) They base their assertions on the fact that Sacramento
11 Superior Court Judge Michael Kenny entered judgments directing issuance of traditional writs of
12 mandate ordering us to set aside our approval of the Delta Plan until we had added certain
13 specified provisions to the plan.⁴ (*Ibid.*) We filed notices of appeal of those judgments between
14 November and December 2016 and, as the Department observes, “[t]hose notices automatically
15 stayed the effect of Judge Kenny’s ruling, leaving the Delta Plan in place pending the outcome
16 of the appeals in the cases on appeal.” (Department, October 15, 2018 Supplement, § 2.)

17 The Department is correct. By law, our appeals automatically stayed the judgments and
18 related matters. The Rutter-Group California Practice Guide summarizes the law as follows:

19
20 Civil writ of mandate: An appeal automatically stays proceedings on a judgment
21 directing issuance of a writ of mandate. (*Hayworth v. City of Oakland* (1982) 129
22 CA3d 723, 727, 181 CR 214, 217; *Johnston v. Jones* (1927) 74 CA 272, 273,
23 239 P 862.) However, both the trial and appellate court have discretion to lift the
24 stay if a stay would cause irreparable damage to petitioner's business or
25 profession. (CCP § 1110b; *Hayworth v. City of Oakland, supra*, 129 CA3d at 728,
26 181 CR at 217.)

27
28 (Rutter Group-California Practice Guide: Civil Appeals & Writs, Cal. Prac. Guide Civ. App. &
29 Writs Ch. 7-B [7:79].) No party has sought to lift the automatic stay. The Delta Plan is therefore
30 valid and remains in effect. Any agency wishing to implement a covered action must submit a
31 certification of consistency that demonstrates consistency with the Delta Plan based upon a
32 substantial evidence standard. (Wat. Code, § 85225.)

33
34 2. **Delta Plan Recommendations**

35
36 The Delta Plan describes its “working parts” as “recommendations” and “policies.”
37 (Delta Plan, ES-4.) “Recommendations call attention to tasks being done or to be done by
38 others.” (*Ibid.*) “Policies are legal requirements that anyone undertaking a significant project in
39 the Delta must meet.” (*Ibid.*)

40 At varying points in the present proceedings, the Department and Appellants have
41 invoked certain recommendations. (See, e.g., Certification of Consistency: WR P1, p. 3-31;
42 FOR Appeal Letter, p. 7; October 24, 2018 Transcript, p. 119, line 24, and p. 124, line 3.)
43 Certain Appellants have faulted California WaterFix for allegedly failing to comply with these

⁴ Judgments were entered on October 21, 2016, in *North Coast Rivers Alliance, et al., v. Delta Stewardship Council, et al.*; on November 23, 2016, in *Central Delta Water Agency, et al. v. Delta Stewardship Council and California Water Impact Network, et al. v. Delta Stewardship Council*, and on November 28, 2016, in *Save the California Delta Alliance v. Delta Stewardship Council*.

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1 recommendations. (FOR Appeal Letter, p. 7.) Others have recognized that the
2 recommendations do not have regulatory effect. (October 24, 2018 Transcript, p. 124, line 3.)
3 We wish to make it clear that we have not and will not use recommendations to assess the
4 consistency of California WaterFix or any other covered action with the Delta Plan. To do
5 otherwise would be to improperly convert the recommendations into underground regulations.
6 (See *Center for Biological Diversity v. Dept. of Fish and Wildlife* (2015) 234 Cal.App.4th 214,
7 259.)

8 **3. Delta Plan's Regulatory History**

9
10 A court may consider regulatory history when construing an ambiguous regulation.
11 (See, e.g., *De La Torre v. California Horse Racing Bd.* (2017) 7 Cal.App.5th 1058, pp. 1069
12 [citing “response to pre-enactment comments”] and 1070 [citing “Statement of Reasons”
13 submitted to Office of Administrative Law]; *Butts v. Bd. of Trustees of California State University*
14 (2014) 225 Cal.App.4th 825, 839 [observing that legislative history rules also apply to
15 regulations], and *Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181
16 Cal.App.4th 175, 189 [citing initial statement of reasons and taking judicial notice of rulemaking
17 file].)

18 The regulatory history for the Delta Plan regulations is found in the rulemaking file that
19 we submitted to the Office of Administrative Law in support of those regulations in 2013. It
20 includes, among other documents, the narrative Delta Plan, the associated environmental
21 impact report, and an initial statement of reasons. In the present proceeding, as we consider the
22 proper interpretation of certain Delta Plan regulations, we will look to that file and the documents
23 in it for guidance as appropriate.

24 **4. Prematurity**

25
26
27 Many Appellants argue that, because certain project features of California WaterFix are
28 still unresolved, the Department's filing of its Certification—and the Council's attendant review—
29 are premature. (NCRA Appeal Letter, p. 2; Stockton Appeal Letter, p. 4; Regional San Appeal
30 Letter, p. 4; San Joaquin County Appeal Letter, p. 3; CDWA Appeal Letter, p. 1.) As support,
31 Appellants raise three discrete but related issues to show that WaterFix could change based on
32 future actions.⁵ The Council concludes that review of the certification at this time is *not*
33 *premature*.⁶

34 **a. Draft Supplemental Environmental Impact Report**

35 First, many Appellants argue that California Environmental Quality Act (CEQA) review of
36 the project is incomplete because the Department has not yet completed the CEQA process for
37 changes to the project that are analyzed in the draft supplemental environmental impact report

⁵ San Joaquin County also raises a fourth issue, arguing that the incomplete U.S. Army Corps of Engineers permitting process is another source of uncertainty. (San Joaquin County Appeal Letter, p. 10.) The Delta Reform Act does not require the Department to wait until all permits are issued before it may submit the certification. However, the Department has promised that “any potential significant change would be evaluated to ensure...continued compliance with ...the Delta Reform Act.” (Department October 23, 2018 Submittal - San Joaquin County, p. 15, no. 10.) The Council expects the Department to pursue an early and robust consultation in the event that changes to the project are approved.

⁶ To the extent that the Appellants' prematurity arguments relate to specific policies, they will be addressed in the analyses for those policies, below.

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1 (DSEIR). (San Joaquin County Appeal Letter, p. 6; CDWA Appeal Letter, p. 1; NCRA Appeal
2 Letter, p. 2; Stockton Appeal Letter, p. 4; Regional San Appeal Letter, p. 2.) According to
3 Appellants, these proposed changes may result in environmental impacts that the current
4 project does not address, and thus too much uncertainty exists to determine whether the project
5 is consistent with the Delta Plan. (*Ibid.*)

6 The Department does not rely on the DSEIR in its Certification. It admits that the
7 covered action “does not include the proposed design refinements...as those project changes
8 are not yet approved.” (Department October 15, 2018 Letter, p. 9.) Consequently, these project
9 changes are “not presented to form any part of the substantial evidence supporting [the
10 Department’s] certification for WaterFix.” (*Ibid.*; see also Department October 15, 2018 Letter,
11 p. 6.) Speculative impacts due to a proposed change that has not yet been approved are not
12 part of the project for which the Department submitted a Certification of Consistency. Therefore,
13 the DSEIR and any proposed project changes analyzed in that document are not relevant in the
14 instant appeal proceedings.

15 The Department acknowledges, however, that these project changes “may or may not
16 cause the need for additional CEQA compliance as well as the need for compliance with the
17 Delta Reform Act.” (Department October 15, 2018 Letter, p. 5.) Once these project changes
18 are final, the Department has committed to “coordinate with the Council through early
19 consultation and determine how the change affects the WaterFix certification” and “what
20 compliance is necessary for the Delta Reform Act.” (Department October 15, 2018 Letter, p. 5.)
21 Should the Department approve these design changes after this Certification, the Council
22 expects the Department to pursue an early and robust consultation.

23 **b. Central Valley Project Operations**

24 Many Appellants also point to uncertainty surrounding the United States Bureau of
25 Reclamation’s (Reclamation or USBR) future participation in California WaterFix, which could
26 undermine the current conclusions regarding the extent of environmental impacts and
27 consistency with the Delta Plan. (San Joaquin County Appeal Letter, p. 3; NCRA Appeal Letter,
28 p. 2; Stockton Appeal Letter, p. 6; Regional San Appeal Letter, p. 6.) They allege that
29 Reclamation’s lack of participation in the Certification of Consistency, its upcoming renegotiation
30 of the Coordinated Operation Agreement, and Reclamation’s stated intent to operate the Central
31 Valley Project in a manner not evaluated in the Final EIR/EIS all create uncertainty around how
32 California WaterFix will operate. (*Ibid.*) Uncertainty in California WaterFix’s operations,
33 according to these Appellants, renders the Council’s current review premature.

34 The Department has stated on the record that, should “Reclamation’s participation in
35 WaterFix change[] in a way that results in a change in WaterFix, [the Department] will
36 coordinate with the Council through early consultation and determine how the change affects
37 the WaterFix certification” as well as “what compliance is necessary for the Delta Reform Act.”
38 (Department October 15, 2018 Letter, pp. 8, 13.) Again, the Council strongly encourages the
39 Department to pursue an early and robust consultation.

40 **c. State Water Resources Control Board Proceedings**

41 Some Appellants further point to the ongoing SWRCB hearing as another source of
42 uncertainty. (San Joaquin County Appeal Letter, p. 9; CDWA Appeal Letter, p. 1.) As with the
43 DSEIR and Reclamation’s future actions, any outcome of the SWRCB proceeding and any
44 resulting project changes are speculative at this time.

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1 The Department has committed on the record to “coordinate with the Council through
2 early consultation and determine how the change affects the WaterFix certification” and “what
3 compliance is necessary for the Delta Reform Act” should “the State Water Resources Control
4 Board’s final decision on [the Department’s] and Reclamation’s petition or a change in the point
5 of diversion results in a change in WaterFix.” (Department October 15, 2018 Letter, p. 10.) The
6 Council reiterates that it strongly encourages the Department to pursue an early and robust
7 consultation.

8 For the foregoing reasons, we conclude that the timing to hear the Certification is *not*
9 *premature*. We proceed to the substance of the Certification for the project the Department
10 adopted on July 21, 2017, and described in the Final EIR/EIS.

11 **B. Policy G P1(b)(1) (23 CCR Section 5002(b)(1)): Full Consistency Infeasible, but on**
12 **the Whole the Covered Action is Consistent with the Coequal Goals**

13
14 G P1, subdivision (b)(1), requires that a covered action be consistent with each Delta
15 Plan policy that it implicates. Subdivision (b)(1) recognizes, however, that “in some cases,
16 based upon the nature of the covered action, full consistency with all relevant regulatory policies
17 may not be feasible.” In those cases, “the agency that files the certification of consistency may
18 nevertheless determine that the covered action is consistent with the Delta Plan because on
19 whole, that action is consistent with the coequal goals.” The Delta Plan defines “feasible” to
20 mean “capable of being accomplished in a successful manner within a reasonable period of
21 time, taking into account economic, environmental, legal, social, and technological factors.”
22 (Cal. Code Reg., tit. 23, § 5001, subd. (p).)

23 The Department asserts infeasibility under GP 1(b)(1) as an alternative theory for
24 consistency with numerous policies. (E.g., Certification of Consistency: ER P1, p. 1, fn. 1
25 [“Nevertheless, California WaterFix should still be found to be consistent with the Delta Plan
26 pursuant to subdivision (b)(1) of section 5002 of title 23 of the California Code of Regulations”];
27 Certification of Consistency, DP P2, p. 2, fn. 1 [“If it is determined by the DSC Delta Council [*sic*]
28 that a Delta Plan policy DWR finds to be not applicable to California WaterFix, in fact does apply
29 to portions of California WaterFix, and/or full consistency with the policy as interpreted by the
30 Council is not feasible”].) But with limited exception, the Department provides little analysis or
31 argument in support of these assertions.

32
33 At the October 25, 2018 hearing, the Department clarified that it wishes to invoke the
34 subdivision for only two policies – DP P1 and WR P1. (October 25, 2018 Transcript, p. 64, line
35 7.) No appeal has asserted inconsistency with DP P1. Consequently, under the Reform Act,
36 we must presume that California WaterFix is consistent with DP P1 for the reasons set forth in
37 the Certification of Consistency, and we need not consider the applicability of subdivision (b)(1).
38 (Wat. Code, § 85225.15; Appeals Procedures, § 6, subd. (e) [mandating that an appeal set forth
39 “[t]he specific grounds for appeal”].) We consider the applicability of the subdivision to WR P1
40 in the section on that policy below.

41
42 **C. Policy G P1(b)(2) (23 CCR Section 5002(b)(2)): Detailed Findings to Establish**
43 **Consistency with the Delta Plan Mitigation Measures**

44
45 The Department certifies that California WaterFix is consistent with G P1(b)(2). Six
46 Appellants – NCRA, SCDA, FOR, North Delta Cares, Stockton, and San Joaquin County – raise
47 substantive arguments that it is not. In its October 16, 2018, written statement, the Commission
48 comments on mitigation, both with regard to the mitigation requirements of DP P2 (which are

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1 discussed in Section VI.L. of this Determination) and as to California WaterFix’s consistency
2 with G P1(b)(2). This analysis considers Appellants’ arguments that certain California WaterFix
3 measures are not equally or more effective than the applicable Delta Plan measures. For the
4 reasons discussed below, the Council finds that Appellants failed to show that the Certification
5 of Consistency with G P1(b)(2) is not supported by substantial evidence in the record. We
6 therefore *deny* the appeals on these grounds.

8 **1. Policy Requirements**

9 G P1(b)(2) states:

10 (b) Certifications of consistency must include detailed findings that address each of the
11 following requirements:

12
13 (2) Covered actions not exempt from CEQA must include applicable feasible
14 mitigation measures identified in the Delta Plan’s Program EIR (unless the
15 measure(s) are within the exclusive jurisdiction of an agency other than the
16 agency that files the certification of consistency), or substitute mitigation
17 measures that the agency that files the certification of consistency finds are
18 equally or more effective;”
19

20 Because California WaterFix is a covered action subject to CEQA, it must comply with
21 this requirement. The Department has not included measures identified in the Delta Plan’s
22 Program EIR (“Delta Plan Measures”). Instead, California WaterFix includes measures⁷ that the
23 Department claims are equally or more effective than the applicable Delta Plan Measures.

24 **2. Department’s Certification**

25 In its Certification, the Department provided a “mitigation crosswalk” table, which
26 identified each applicable Delta Plan Measure, identified for each such measure the California
27 WaterFix Measures that the Department found to be equally or more effective, and provided a
28 brief narrative explanation of that finding. ([Certification G P1\(b\)\(2\) Findings pp. 1-1 through 1-
29 68.](#)) The mitigation crosswalk identifies the substantial evidence the Department claims
30 supports its G P1(b)(2) finding. The substance of the California WaterFix Measures is in the
31 Final EIR/EIS Mitigation Monitoring and Reporting Program (“MMRP”) (Document code:
32 [X.3 000116](#)).

33 **3. Appeals and Analysis**

34 Appellants frequently challenge the efficacy or sufficiency of California WaterFix
35 Measures under CEQA’s standards for mitigation. These arguments are not properly before the
36 Council, which may consider only whether California WaterFix is consistent with the Delta
37 Plan—in the immediate context, whether substantial evidence supports the Department’s
38 findings that each challenged California WaterFix Measure is equally or more effective than the
39 applicable Delta Plan Measure.

⁷ California WaterFix includes “mitigation measures,” “environmental commitments,” and “avoidance and minimization measures.” The parties do not distinguish among them: all three categories are considered to be measures that could demonstrate consistency with G P1(b)(2). This analysis refers to any measure in one of the three categories as a “California WaterFix Measure,” but uses specific measures’ full titles, such as “Environmental Commitment 7” or “Mitigation Measure TRANS-1.”

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1 Appellants also frequently make arguments challenging the consistency of broad
2 categories of California WaterFix Measures, then provide examples of the alleged flaw. This
3 analysis only considers the consistency of California WaterFix Measures that Appellants
4 specifically identified.

5 a. GP 1(b)(2) Issue 1: Measures are Vague and Unenforceable

6 Appellants contend that because many of California WaterFix Measures are too vague,
7 they are inconsistent with GP 1(b)(2). Furthermore, they argue California WaterFix Measures
8 lack enforceable commitments described in Delta Plan Measures.

9 Appellants provide three examples of this contention:

- 10 1) Environmental Commitment 3 (EC 3, Natural Communities Protection and Restoration)
11 does not identify what measures will be utilized to protect natural communities. ([NCRA
12 Appeal Letter](#), p. 3)
13
- 14 2) Environmental Commitment 7 (EC 7, Riparian Natural Community Restoration) provides
15 no information on how it would restore 251 acres of riparian natural community habitat.
16 ([NCRA Appeal Letter](#), p. 3)
17
- 18 3) The project fails to include enforceable mitigation measures because Reclamation is not
19 party to the Certification of Consistency and the federal government is claiming the right
20 to maximize water export deliveries. ([FOR Appeal Letter](#), p. 6).
21

22 i. Environmental Commitment 3

23
24 California WaterFix Environmental Commitment 3 (“EC 3”) provides for the acquisition
25 and restoration of natural communities and habitat for special-status species. Because the
26 Department has not identified what measures will be utilized to protect natural communities
27 under EC 3, NCRA argues, EC 3 “does not qualify as enforceable mitigation measures that
28 would satisfy CEQA,” and is therefore inconsistent with G P1(b)(2). (NCRA Appeal Letter, pp. 3-
29 4.)

30 In the mitigation crosswalk table, the Department identifies EC 3, along with other
31 California WaterFix Measures, as equally or more effective than Delta Plan Measures 4-1, 4-2,
32 4-3, 4-4, 4-5, 6-2, all of which concern the protection of natural communities, special-status
33 species, and habitat.

34 NCRA does not identify any Delta Plan Measure for which EC 3 falls short of the “equally
35 or more effective” standard, nor does it argue that EC 3 is otherwise inconsistent with the Delta
36 Plan. NCRA therefore has not raised any issue within the scope of the Council’s review as to
37 EC 3, and we *deny* its appeal as to this issue.
38

39 ii. Environmental Commitment 7

40
41 California WaterFix Environmental Commitment 7 (“EC 7”) would restore 251 acres of
42 riparian natural communities to mitigate for an equivalent area impacted by project construction.
43 Because the Department has provided no information in the record describing how EC 7 would
44 do so, NCRA argues, EC 7 “does not qualify as enforceable mitigation measures that would
45 satisfy CEQA,” and is therefore inconsistent with G P1(b)(2). (NCRA Appeal Letter, pp. 3-4.)

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1 In the mitigation crosswalk table, the Department identifies EC 7 (along with other
2 California WaterFix Measures) as equally or more effective than Delta Plan Measures 4-1, 4-2,
3 4-3, 4-4, 4-5, and 6-2.

4 NCRA does not identify any Delta Plan Measure for which EC 7 falls short of the “equally
5 or more effective” standard, nor does it argue that EC 7 is otherwise inconsistent with the Delta
6 Plan. NCRA therefore has not raised any issue within the scope of the Council’s review as to
7 EC 7, and we *deny* its appeal as to this issue.

8 **iii. Mitigation Measures and Reclamation**

9
10 Appellant FOR argues that California WaterFix fails to include applicable enforceable
11 mitigation measures because Reclamation, a subdivision of the federal Department of the
12 Interior, is not party to the Certification. (FOR Appeal Letter, p. 5-6.) The Certification states that
13 the Department, along with Reclamation, jointly prepared the Final EIR/EIS and are lead
14 agencies on the project. ([Final Project Description](#), p. 4.) The Council has no authority over
15 federal agencies. Federal agencies are not required to be party to any certification of
16 consistency.

17 Appellant FOR asserts that the federal government is claiming the right to maximize
18 water export deliveries, and that the “mitigation measures are meaningless” given recent
19 statements from Secretary of the Interior Ryan Zinke ([FOR Appeal Letter](#), p.6). In support of this
20 claim assertion, FOR cites two articles from the Sacramento Bee newspaper from August 20
21 and August 21, 2018 ([FOR Appeal Letter](#), p. 5). These articles describe a memo issued by
22 Secretary Zinke, which is attached to FOR’s Appeal Letter. The memo from Secretary Zinke in
23 turn was issued on August 17, 2018. All of these documents were issued after the Department’s
24 Certification and were therefore not “before” the Department at the time of certification. We
25 decline FOR’s request to admit them into the record submitted to the Council by the
26 Department. (See Wat. Code, § 85225.25.; [Exhibit C](#) attached hereto.)

27 FOR does not identify any Delta Plan Measure for which the corresponding California
28 WaterFix Measure falls short of the “equally or more effective” standard because of
29 Reclamation’s position, nor does it argue that California WaterFix is otherwise inconsistent with
30 G P1(b)(2) for that reason. FOR therefore has not raised any issue within the scope of the
31 Council’s review as to Reclamation’s position, and we *deny* its appeal as to this issue.
32

33 **b. Measures are Improperly Deferred**

34
35 Appellants NCRA and SCDA assert that the mitigation measures identified in the Final
36 EIR/EIS are improperly deferred and are therefore inconsistent with GP 1(b)(2). The appeals
37 illustrate this contention as follows:

- 38 1) WaterFix Avoidance and Minimization Measure AMM 27 (Selenium Management) is
39 improperly deferred mitigation. (NCRA Appeal Letter, p. 3)
- 40
41 2) WaterFix Avoidance and Minimization Measure AMM 31 (Noise Abatement) is
42 improperly deferred mitigation. (NCRA Appeal Letter, p. 3)
- 43
44 3) WaterFix Avoidance and Minimization Measure AMM 32 (Hazardous Material
45 Management) is improperly deferred mitigation. (NCRA Appeal Letter, p. 3)
- 46

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- 1 4) All measures identified in the Final EIR/EIS Master Response 22 are inadequate
2 because they are improperly deferred. (SCDA Appeal Form, p. 4)
3

4 AMM 27 (Selenium Management) (MMRP 3-76), AMM 31 (Noise Abatement) (MMRP 3-
5 34), and AMM 32 (Hazardous Materials Management) (MMRP 3-39) all provide for mitigation
6 plans to be developed at a future date. NCRA argues that each fails to “qualify as enforceable
7 mitigation measures that would satisfy CEQA and is therefore inconsistent with G P1(b)(2).
8 (NCRA Appeal Letter, pp. 3-4).

9 NCRA does not identify any Delta Plan Measures for which the identified “deferred”
10 California WaterFix measures fall short of the “equally or more effective” standard, nor does it
11 argue that these measures are otherwise inconsistent with the Delta Plan. NCRA therefore has
12 not raised any issue within the scope of the Council’s review as to these measures, and we
13 *deny* its appeal as to this issue.

14 NCRA additionally asserts that this argument applies to “all of the ECs identified in the
15 FEIR.” (NCRA Appeal Letter, p. 3.) NCRA does not make any specific argument or direct the
16 Council to any evidence regarding these other ECs. We will consider the consistency only of the
17 measures that Appellants identify and discuss specifically, and we *deny* its appeal as to this
18 issue.

19 **c. Stockton Water Quality Impacts**

20
21 Stockton contends that California WaterFix does not include any mitigation measures
22 that would mitigate water quality impacts to Stockton. According to Stockton, California
23 WaterFix would decrease the volume of higher quality Sacramento River water at Stockton’s
24 intake in the north Delta, while increasing the volume of more saline and lower quality San
25 Joaquin River water. (Stockton Appeal Letter, p. 6). This change would substantially degrade
26 the water quality at Stockton’s drinking water intake and wastewater discharge locations by
27 increasing concentrations of chloride and other water quality constituents to levels that render
28 the water unusable for Stockton’s Municipal & Industrial uses under its existing treatment
29 technology. Chloride concentrations that exceed 110 mg/L in the City’s source water increase
30 chlorides in its wastewater discharge, presenting a risk of non-compliance with its National
31 Pollutant Discharge Elimination System. (Stockton Appeal Letter, p.7)

32 Stockton argues that the Department has adopted no mitigation measures to address
33 unmitigated impacts of California WaterFix that would substantially degrade the water quality at
34 Stockton’s drinking water intake and wastewater discharge locations. No Delta Plan Measure,
35 however, mitigates these impacts. Therefore, there is no “applicable” measure for which G
36 P1(b)(2) requires California WaterFix to adopt an equally or more effective measure. Stockton
37 therefore has not raised any issue within the scope of the Council’s review as to water quality
38 mitigation, and we *deny* its appeal as to this issue.

39 **d. Measures are not Equally or More Effective**

40
41 Appellant San Joaquin County argues that the Department has failed “to demonstrate
42 that any of the [California WaterFix Measures] are consistent or comparable to the [Delta Plan]
43 Measures.” (San Joaquin County Appeal Letter, p. 27.) San Joaquin County provides the
44 following examples of this failure:

- 45 1) California WaterFix Mitigation Measure WQ-11e fails to provide equally or more effective
46 mitigation than Delta Plan Measure 3-1 to avoid violation of water quality standards,

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1 because it is inadequate and does not include a firm commitment to fully offset salinity
2 increases. (San Joaquin Appeal Letter, p. 28.)
3

4 2) California WaterFix Mitigation Measure GW-1 fails to provide equally or more effective
5 mitigation than Delta Plan Measure 3-2 to avoid groundwater recharge impacts because
6 it does not include any enforceable requirements and represents improperly deferred
7 mitigation. (San Joaquin County Appeal Letter, p. 29.)
8

9 3) California WaterFix fails to provide equally or more effective mitigation for potential
10 impacts to groundwater than Delta Plan Measure 21-2, which provides measures to
11 reduce or avoid impacts on project operations caused by climate change. Appellant
12 argues that the Department incorrectly claims that Mitigation Measure 21-2 does not
13 apply to WaterFix. (San Joaquin County Appeal Letter, p. 29.)
14

15 4) California WaterFix fails to provide equally or more effective mitigation than Delta Plan
16 Measure 4-1, which requires advanced mitigation planning for ecosystem restoration
17 prior to construction, because the Department has not identified specific locations for
18 ecosystem restoration, nor conducted any of the necessary subsequent environmental
19 review. (San Joaquin County Appeal Letter, p. 30.)
20

21 5) California WaterFix fails to provide equally or more effective mitigation than Delta Plan
22 Measure 4-2, which requires restoration or preservation of in-kind suitable habitat to
23 offset take of special-status species, because the substitute measures fail to
24 demonstrate that the Department can and will restore or preserve in-kind suitable habitat
25 for Greater Sandhill Crane. (San Joaquin County Appeal Letter, p. 30.)
26

27 6) California WaterFix fails to provide equally or more effective mitigation than Delta Plan
28 Measure 4-4, which requires the expansion of existing wildlife refuges for migratory
29 birds, because the substitute measures lack enforceable requirements and constitute
30 improperly deferred mitigation. (San Joaquin County Appeal Letter, p. 30.)
31

32 7) California WaterFix fails to provide equally or more effective mitigation than Delta Plan
33 Measure 7-1 to avoid impacts to agricultural land. Measure 7-1 requires compensatory
34 preservation of agricultural land, but WaterFix Mitigation Measure AG-1 allows for
35 consideration of an "Optional Agricultural Land Stewardship Approach." (San Joaquin
36 County Appeal Letter, pp 30-31.)
37

38 SCDA similarly argues that California WaterFix fails to provide equally or more effective
39 mitigation than Delta Plan Measure 19-1, which provides for various measures to reduce or
40 avoid impacts to marine and roadway traffic. (SCDA October 15, 2018 Letter., pp. 9-10).⁸
41
42
43

8 Additionally, the Commission comments that California WaterFix fails to provide mitigation equally or more effective than Delta Plan Measures 18-2 (to reduce or avoid impacts to recreation facilities caused by users displaced from facilities subject to "substantial temporary or permanent impairment, degradation, or elimination"), 19-1 (requiring a waterway traffic control plan), 17-1 (regarding land and water emergency response routes), and 7-1 (providing for 1:1 compensatory preservation for agricultural land converted to other uses). (Delta Protection Commission October 16, 2018 Letter, pp. 8-13.)

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1 **i. Delta Plan Measure 3-1**
2

3 Appellant San Joaquin County asserts that California WaterFix Mitigation Measure WQ-
4 11e is not equally or more effective mitigation than Delta Plan Measure 3-1 because WQ-11e
5 would not reduce or avoid salinity increases at various locations including the south Delta. (San
6 Joaquin County Appeal Letter, p. 28.)

7 Delta Plan Measure 3-1 includes several different measures to reduce or avoid the
8 violation of water quality standards during the construction of projects pursuant to the Delta
9 Plan. Measure 3-1 does not address the impacts of project operation and does not require the
10 reduction or avoidance of salinity increases. Any alleged shortcoming in California WaterFix
11 measure WQ-1 related to salinity is not inconsistent with policy G P1(b)(2). San Joaquin County
12 therefore has not raised any issue within the scope of the Council’s review as to salinity
13 mitigation, and we *deny* its appeal as to this issue.

14 **ii. Delta Plan Measure 3-2**
15

16 Delta Plan Measure 3-2 would reduce or avoid construction impacts to groundwater
17 availability by requiring pre-construction surveys, monitoring wells during dewatering operations,
18 and various remedial measures if adjacent wells are affected. Appellant San Joaquin County
19 asserts that California WaterFix Mitigation Measure GW-1 fails to propose equally or more
20 effective mitigation than Mitigation Measure 3-2 because Mitigation Measure GW-1 requires
21 monitoring for only five years and only within a corridor approximately two miles on either side of
22 the California WaterFix project. (San Joaquin County Appeal Letter, p. 29). “Project impacts
23 may take years to reveal themselves,” San Joaquin County argues, “and would continue
24 indefinitely as long as the Project was operated.” (*Id.*). Moreover, Appellant argues, GW-1 “does
25 not describe the method for identifying potentially impacted wells, and it does not account for
26 the possibility that Project operations would result in reduced well yields.” (*Id.*).

27 Delta Plan Measure 3-2 applies only to the construction period. Appellant identifies no
28 evidence that construction impacts may continue beyond the construction period or outside of
29 the specified corridor. For construction impacts, GW-1, consistent with Measure 3-2, describes
30 the monitoring protocol and lists potential responses if wells are affected. ([MMRP 2-4 to 2-7.](#))
31 Because Delta Plan Measure 3-2 does not apply to project operations, the operations-related
32 provisions of GW-1 are not inconsistent with Policy G P1(b)(2). San Joaquin County has failed
33 to show that there is not substantial evidence in the record to support the Department’s finding
34 of consistency with G P1(b)(2) as to Delta Plan Measure 3-2, and we *deny* San Joaquin
35 County’s appeal as to this issue.

36 **iii. Delta Plan Measure 21-2**
37

38 Delta Plan Measure 21-2 would reduce or avoid impacts to project operations due to
39 climate change or sea-level rise. San Joaquin County claims that the Department has failed to
40 identify measures that are equally or more effective than two of the provisions within Measure
41 21-2. Appellant notes that the measure requires that intakes and diversions are designed for
42 operation “at multiple surface water elevations,” but makes no argument that California WaterFix
43 fails to provide equally or more effective mitigation as compared to this requirement. Appellant
44 instead argues that the Department has failed to meet the requirement in Measure 21-2 for a
45 hydrogeologic study to assess long-term groundwater recharge and safe yield of wells under a
46 sustainable groundwater management plan.

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1 The Department asserts that California WaterFix “does not rely on groundwater and
2 therefore the mitigation measure related to a sustainable groundwater plan is not applicable.”
3 (Certification G P1(b)(2) Finding, p. 1-66.) With reference to evidence from the SWRCB hearing,
4 Appellants argue that the operation of California WaterFix will have impacts on the South
5 American and Eastern San Joaquin groundwater sub-basins, and that the project therefore must
6 provide a measure equally or more effective than the hydrogeologic study required under Delta
7 Plan Measure 21-2. ([San Joaquin County Appeal Letter, p.29](#)). Appellants cite testimony from
8 John Lambie during the SWRCB hearing, which states that “the depletion of the groundwater
9 stored in these Subbasins by the proposed diversions would be substantial on an annual basis
10 in terms of acre-feet per year removed from each Subbasin’s water budget. It also indicates the
11 depletions will be substantial in terms of the acre-feet of water stored in the groundwater aquifer
12 beneath each Subbasin over both the 20-year implementation horizon and a 50-year planning
13 horizon described the SGMA.” (San Joaquin County October 15, 2018 Letter, pp. 5-6, citing
14 [SJC 223 Lambie, p.7](#)).⁹

15 San Joaquin County further argues that the mitigation measure to reduce groundwater
16 dewatering impacts is unproven and could have permanent impacts on surrounding areas (San
17 Joaquin County October 15, 2018 Letter, pp. 5-6). Appellants cite evidence from SWRCB
18 hearing testimony by Josef Tootle which states, “There exists a substantial possibility that
19 adjacent property owners that rely on drainage of shallow groundwater for agriculture production
20 and/or use of shallow groundwater aquifers for irrigation water will be significantly adversely
21 impacted by this introduction of nearly impermeable barriers to groundwater flow, i.e., by the
22 proposed slurry cutoff walls” (*Id.*, citing LAND-35, Tootle, pp.4-5).

23 The Department acknowledges that the detailed hydrogeological studies were not
24 completed for the Final EIR/EIS. ([D.8 Draft 022888](#), pp. 2-12). However, the Department states
25 that it will conduct such studies during further project design, prior to construction, and that
26 mitigation measures would be implemented if groundwater elevations declined due to the
27 project (*Ibid.*, p. 3). The Department goes on to cite evidence that groundwater levels would not
28 be affected near or to the east of Interstate 5, due to the project (*Ibid.*, pp. 3-4). The Department
29 also cites SWRCB hearing testimony by Parviz Nader-Tehrani ([D.8 DRAFT 022590](#), p. 3)
30 showing changes of 0.5 to 1.2 feet in Sacramento River water surface level near the intakes
31 (*Id.*).

32 In the Delta Plan Final PEIR, Delta Plan Measure 21-2 would reduce the effects
33 described as Impacts 21-3a, 21-3c, and 21-3e: “Conflict with Operations of Proposed Facilities
34 Due to Climate Change and Sea Level Rise.” (Delta Plan FPEIR, p. 21-32.) Those impacts
35 concern the effects of climate change and sea-level rise on the proposed project, not the
36 proposed project’s impacts on others. For example, Impact 21-3a, considering such impacts for
37 water supply projects encouraged by the Delta Plan, states that “[i]f the intakes/diversions were
38 not constructed for variable surface water elevations, there could be periods of time when the
39 facilities would not be operable.” (Delta Plan FPEIR, p. 21-14; *see also id.*, p. 21-18 (“If future
40 projects to protect and enhance the unique resources and values of the California Delta as an
41 evolving place are located at elevations below the highest projected surface water elevation, the
42 facilities may not be operable due to local flooding conditions.”)). San Joaquin County has not
43 identified any impact to California WaterFix that a hydrogeologic study would reduce or avoid.
44 The requirement of a hydrogeologic study in Delta Plan Measure 21-2 does not apply to

⁹ SJC 223 was withdrawn from Water Board testimony but remains a part of the record of this proceeding pursuant to Executive Officer Jessica Pearson’s October 30, 2018, email order re WaterFix C20185 SWRCB hearing docket.

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1 California WaterFix. Moreover, California WaterFix Measure GW-1 commits the Department to
2 monitoring and, as needed, mitigation of construction-related impacts to groundwater levels in
3 the vicinity of the construction site. The Appellant has therefore failed to show that there is not
4 substantial evidence in the record to support the Department's Certification of Consistency with
5 G P1(b)(2) as to this aspect of Delta Plan Measure 21-2, and we *deny* the appeal as to this
6 issue.

7 **iv. Delta Plan Measure 4-1**

8
9 San Joaquin County argues that California WaterFix fails to propose equally or more
10 effective mitigation than Delta Plan Measure 4-1, which requires advanced mitigation planning
11 for ecosystem restoration prior to construction. Specifically, San Joaquin County argues that the
12 Department concedes that it has not identified specific locations for ecosystem restoration, nor
13 conducted any of the necessary subsequent environmental review and that this failure to
14 implement advanced mitigation planning is inconsistent with Delta Plan Measure 4-1. (San
15 Joaquin County Appeal Letter p. 30.)

16 Delta Plan Measure 4-1 requires, in part, that a project “[i]mplement advanced mitigation
17 planning for ecosystem restoration prior to construction.” San Joaquin County asserts that the
18 Department has failed to carry out the necessary planning. (San Joaquin County Appeal Letter,
19 p. 30.) However, Delta Plan Measure 4-1 requires such planning only prior to construction, not
20 at the time of project approval or certification of consistency with the Delta Plan. The Council
21 finds that Appellant has failed to show that there is not substantial evidence in the record to
22 support the Department's Certification of Consistency with G P1(b)(2) as to Delta Plan Measure
23 4-1.

24 **v. Delta Plan Measure 4-2**

25
26 Delta Plan Measure 4-2 provides for the avoidance of impacts to special-status species
27 (including Greater Sandhill Crane) and, if such impact is unavoidable, for the restoration or
28 preservation of compensatory habitat for the affected species. San Joaquin County argues that
29 California WaterFix fails to comply with this measure because it concedes the project will impact
30 Greater Sandhill Cranes but does not include any measure requiring compensatory habitat.
31 (San Joaquin County Appeal Letter, p. 30.)

32 San Joaquin County asserts that the Department acknowledges that California WaterFix
33 will “take”¹⁰ Greater Sandhill Crane, because the Department's mitigation for Greater Sandhill
34 Crane impacts includes fitting new transmission line “with bird diverters, which have been
35 shown to reduce avian mortality by 60%.” ([WaterFix Final EIR/EIS](#), p. 12-3542.) The
36 Department, however, goes on to state that these diverters and other transmission line
37 measures, along with a suite of measures focused on Greater Sandhill Cranes, would result in
38 “no take of greater sandhill crane from the project and . . . a less-than-significant impact on
39 greater sandhill crane.” (*Id.*) San Joaquin County identifies no evidence showing that this
40 conclusion lacks the support of substantial evidence. Because California WaterFix measures
41 avoid impacts to Greater Sandhill Cranes, they are equally or more effective than Delta Plan
42 Measure 4-2. The Council finds that Appellant has failed to show that there is not substantial

¹⁰ “Take,” under the California and federal Endangered Species Acts, means to harm a protected species in the manner forbidden under the acts. For purposes of this analysis, “take” is equivalent to significant impact under CEQA.

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1 evidence in the record to support the Department's Certification of Consistency with G P1(b)(2)
2 as to Delta Plan Measure 4-2.

3 **vi. Delta Plan Measure 4-4**

4
5 San Joaquin County argues that the Department has failed to demonstrate consistency
6 with Delta Plan Measure 4-4, which in part provides for expanding existing wildlife refuges for
7 migratory birds ([San Joaquin County Appeal Letter](#), p. 30). Appellant argues that California
8 WaterFix measures fail to set out a timeframe for and standards for grassland community sites
9 for such expansion. (*Id.*)

10 Measure 4-4 does not specify a timeframe for expanding refuges. California WaterFix's
11 lack of a timeframe therefore does not prevent it from being equally effective as Measure 4-4.

12 As to the standards for expansion sites, the Department's crosswalk identifies a number
13 of California WaterFix measures as equally or more effective than Measure 4-4 including
14 Environmental Commitment 8: Grassland Natural Community Restoration (EC 8). EC 8 would
15 "meet the commitments set out in Tables 5-1 and 5-2" of the MMRP. ([MMRP](#), pp. 5-1, 5-3, 5-6.)
16 Table 5-2, in turn, provides a list of principles for grassland restoration. ([MMRP](#), p. 5-3.) These
17 principles are equally or more effective than Delta Plan Measure 4-4, which does not include
18 any specific standards for such land. The Council finds that Appellant has failed to show that
19 there is not substantial evidence in the record to support the Department's Certification of
20 Consistency with G P1(b)(2) as to Delta Plan Measure 4-4.

21 **vii. Delta Plan Measure 7-1**

22
23 San Joaquin County asserts that the Department fails to propose mitigation equally or
24 more effectively than Delta Plan Measure 7-1, which would reduce or avoid impacts related to
25 the conversion of agricultural land to other uses. Among other measures, 7-1 provides that
26 projects resulting in permanent conversion shall preserve agricultural land "at a target ratio of
27 1:1," either by acquiring conservation easements or by monetary contributions to a preservation
28 entity. In its mitigation crosswalk, the Department describes preservation at the 1:1 ratio "as the
29 basis for mitigation" pursuant to that California WaterFix Mitigation Measure AG-1 (MM AG-1).
30 (Certification G P1(b)(2) Findings, p. 1-18.). The Department supports its certification by
31 describing how the project will implement an Agricultural Land Stewardship Program (ALSP) to
32 "reduce agricultural land impacts from construction of the Project. (*Id.*, p. 16). The ALSP could
33 include a variety of strategies "to help maintain farming in the Delta." (Department MMRP,
34 Document Code: [C_DRAFT_000002](#), p. 2-47.) If the ALSP is not implemented, the MM AG-1
35 requires the acquisition of Agricultural Conservation Easements (ACEs) at a "target ratio" of 1:1
36 ratio. (Certification G P1(b)(2) Findings, p. 1-18.)

37 San Joaquin County specifically argues that MM AG-1 is not "consistent" with Measure
38 7-1 because AG-1, by directing the Department to undertake (or attempt) the ALSP approach,
39 does not mandate compensatory preservation for converted lands. (San Joaquin County Appeal
40 Letter, p. 30.)¹¹

41 Initially, the Department states that it would pursue compensatory preservation through
42 Agricultural Conservation Easements "[f]or the loss of farmland that cannot be avoided."

¹¹ Sacramento County makes a similar argument, but in the context of arguing that California WaterFix is inconsistent with DP P2. (Sacramento County October 14, 2018 Letter, pp. 3-4). This claim is discussed below under DP P2.

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1 (Department Supplemental Responses, p. 16; see also *id.* (“[ALSP] remains an optional strategy
2 in place of and in addition to conservation easements “).) The MMRP, however, directs the use
3 of such easements “where necessary and feasible,” only if “DWR, despite a good faith effort,
4 cannot succeed in achieving the consensus necessary to carry out a feasible Optional
5 Agricultural Land Stewardship Approach.” (DWR MMRP, p. 2-49.) We therefore must determine
6 whether substantial evidence supports the conclusion that the ALSP, plus compensatory
7 preservation only when there is lack of consensus on the ALSP, is equally or more effective
8 than the strict requirement of 1:1 compensation pursuant to Delta Plan Measure 7-1.

9 As explained by the Department, the ALSP approach is driven by the lack of land in the
10 Delta available for conventional mitigation. (Department October 15, 2015 Letter, p. 16.)
11 Further, the Department notes that ACEs are not as valuable to farmers within the primary zone
12 of the Delta, because development is already restricted in this area, and thus would be difficult
13 to acquire. (*Id.*)

14 The ALSP approach would include “measures to promote agricultural productivity
15 through early planning, site specific avoidance and mitigation, onsite mitigation, and landowner
16 participation.” (*Id.*, citing the MMRP, pp. 2-44 to 2-48.) Importantly, the Department notes that
17 the ALSP approach will require consensus of the affected land owner or owners, as well as local
18 and regulatory agencies (and consultation with the Council). The affected land owners have
19 incentive to ensure that the ALSP is effective at preserving agriculture in the Delta. The
20 consensus requirement gives them an effective veto over any ALSP that fails to effectively
21 mitigate the agricultural impacts of California WaterFix. If landowners exercise this veto and the
22 ALSP approach fails, then MM AG-1 requires compensatory preservation through easements, in
23 accordance with Delta Plan Measure 7-1.

24 In summary, the Department has provided substantial evidence that the optional
25 Agricultural Land Stewardship Plan approach, in combination with the commitment to
26 preservation of agricultural land in the event that the ALSP does not achieve consensus among
27 the affected parties, is equally or more effective than the mandatory compensatory preservation
28 in Delta Plan Measure 7-1. Therefore, the Council finds that Appellant has failed to show that
29 there is not substantial evidence in the record to support the Department’s Certification of
30 Consistency with G P1(b)(2) as to Delta Plan Measure 7-1, and we *deny* San Joaquin County’s
31 appeal as to this issue.
32

33 **viii. Delta Plan Measure 19-1**

34
35 SCDA challenges the efficacy of two California WaterFix measures, arguing that neither
36 AMM 7 nor Mitigation Measure Trans-1 provides mitigation that is equally or more effective than
37 Delta Plan Measure 19-1, which would reduce or avoid traffic impacts.

38 Appellant states that Avoidance and Minimization Measure: Barge Operations Plan
39 (AMM 7) has no enforceable protective or mitigating components and therefore is not equally or
40 more effective than Delta Plan Measure 9-1. (SCDA October 25, 2018 Letter, pp. 9-10.) AMM 7,
41 however, is not a measure for reducing impacts to marine or roadway traffic). It is, rather, a plan
42 to avoid or reduce “aquatic habitat and species from barge and tugboat operations.” (MMRP, p.
43 3-23. The Department determines that it, along with other measures, is equally or more effective
44 than Delta Plan Measures that would reduce or avoid such impacts. (Certification G P1(b)(2)
45 Findings, pp. 1-3 to 1-11.) No Appellant challenges that determination.

46 SCDA further argues that California WaterFix Measures Trans-1 and AMM 7 are not
47 equally or more effective than Delta Plan Measure 19-1 because they do not include measures

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1 that 19-1 requires for reducing or avoiding impacts to marine traffic, including a temporary
2 channel closure plan, identification of alternate detours for boats, vessel congestion
3 minimization plans, and safe access to boat launch and dock facilities. (SCDA October 15, 2018
4 Letter, p. 10.) The California WaterFix Final EIR/EIS concludes that the project would have less
5 than significant impacts to marine traffic and that no mitigation is required. (California WaterFix
6 Final EIR/EIS, p. 19-233.) For purposes of consistency with G P1(b)(2), because California
7 WaterFix would not cause a potentially significant marine-traffic impact there is no applicable
8 Delta Plan measure for which the covered action must provide equally or more effective
9 mitigation. SCDA does not identify any failure of the evidence supporting the Department's
10 conclusion that impacts to marine traffic would be less than significant. The only potential
11 marine-traffic problems SCDA describes involve access to Bullfrog Marina and Clarksburg
12 fishing access area. As to Bullfrog Marina, SCDA identifies no marine traffic impact, but an
13 economic impact to the Marina ("access to Bullfrog Marina will be blocked by channel closure
14 and construction activity, likely driving this mainstay of Delta recreation out of business.")
15 (SCDA October 15, 2018 Letter, p. 10.) As to Clarksburg, SCDA asserts that access will be
16 "effectively blocked" by California WaterFix construction noise. SCDA has not explained how
17 this construction noise relates to any failure of California WaterFix to provide mitigation equally
18 or more effectively than the Delta Plan's. SCDA identifies no provision of Delta Plan Measure
19 19-1 (or any other Delta Plan measure) that would mitigate these noise impacts, including either
20 their direct noise effects or their asserted effects on traffic. SCDA thus has not explained any
21 way in which the record lacks substantial evidence to support the Department's finding that no
22 mitigation is required for marine traffic impacts.

23 SCDA raises extensive concerns about the California WaterFix Final EIR/EIS's analysis
24 impacts on traffic on Highway 4, particularly as to an error in the Department's analysis
25 regarding the height of the Rio Vista Bridge and the frequency with which it will need to be
26 opened to accommodate barge traffic, and as to the condition of Highway 4. (*Id.*) SCDA does
27 not identify any Delta Plan Measure that would mitigate impacts related to the height of the
28 bridge, and thus does not identify any failure of California WaterFix to provide equal or more
29 effective mitigation. As to road conditions, SCDA notes that Delta Plan Measure 19-1 lists a
30 variety of roadway improvements as potential mitigation measures, while the California
31 WaterFix Measure Trans-1a includes only one such improvement (a right turn lane on Hood
32 Franklin Road). SCDA does not identify any additional roadway improvement, or other measure,
33 that California WaterFix would need to include in order to provide mitigation equally or more
34 effectively than Delta Plan measure 19-1. SCDA further does not explain how any flaws in the
35 California WaterFix Final EIR/EIS's traffic analysis would lead to the conclusion that substantial
36 evidence does not support the Department's Certification of Consistency with G P1(b)(2).

37 Therefore, the Council finds that Appellant has failed to show that there is not substantial
38 evidence in the record to support the Department's Certification of Consistency with G P1(b)(2)
39 as to traffic mitigation. We *deny* the appeal as to this issue.

40 **e. San Joaquin County's Late Claims**

41 In its October 15, 2018 submittal, San Joaquin County discusses several further points
42 of inconsistency with G P1(b)(2). Although these claims are not properly before the Council, as
43 they were not raised in the appeal filing, we address them here for the benefit of the parties.
44 San Joaquin County challenges the consistency of California WaterFix Measures SOILS-1 and
45 WQ-11e. (San Joaquin County October 15, 2018 Letter, pp. 4-5.) The Department identified
46 each as part of its overall provision of measures equally or more effective than Delta Plan
47 Measure 3-1, which would reduce or avoid construction-related water-quality impacts.

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1 (Certification G P1(b)(2) Finding, p. 1-1.) San Joaquin County additionally challenges California
2 WaterFix Measure GW-5 (San Joaquin County October 15, 2018, p. 7), which the Department
3 identifies as applicable to Delta Plan Measure 21-2, concerning climate change and sea-level
4 rise impacts to the project (Certification G P1(b)(2) Finding, p. 1-66.). San Joaquin County
5 argues that these measures cannot be consistent with G P1(b)(2) because they defer
6 development of a mitigation plan and/or are unenforceable. San Joaquin County, however, does
7 not identify any relevant aspect of Delta Plan Measure 3-1 or 21-2 for which California WaterFix
8 fails to provide an equally or more effective substitute measure. San Joaquin County has not
9 shown that there is not substantial evidence in the record to support the Department's
10 Certification of Consistency with G P1(b)(2) on this basis.

11 **D. Policy G P1(b)(3) (23 CCR 5002(b)(3)): Best Available Science**

12
13
14 The Department certifies that California WaterFix is consistent with G P1(b)(3). Six
15 Appellants – NCRA; SCDA; FOR; Stockton; San Joaquin County; and, Sacramento County –
16 raise substantive arguments that it is not. For the reasons discussed below, the Council
17 concludes that the Department's Certification of Consistency with G P1(b)(3) is not supported by
18 substantial evidence.

19 **1. Policy Requirements**

20
21 G P1(b)(3) requires "as relevant to the purpose and nature of the project, all covered
22 actions must document use of best available science." Best available science is defined in the
23 Delta Plan as the best scientific information and data for informing management and policy
24 decisions. Best available science shall be consistent with the guidelines and criteria found in
25 Appendix 1A, which lists six criteria for best available science: relevance, inclusiveness,
26 objectivity, transparency and openness, timeliness, and peer review. (Cal. Code Regs, tit. 23, §
27 5001, subd. (f).) Best available science is further described in Delta Plan Appendix 1A, as
28 follows:

29 "The Delta Reform Act requires the Council to make use of best available science in
30 implementing the Delta Plan. Best available science is specific to the decision being
31 made at the time frame available for making that decision. Best available science is
32 developed and presented in a transparent manner consistent with the scientific process
33 (Sullivan et al. 2006), including clear statements of assumptions, the use of conceptual
34 models, description of methods used, and presentation of summary conclusions.
35 Sources of data used are cited and analytical tools used in analyses and syntheses are
36 defined. Best available science changes over time and decisions may need to be
37 revisited as new scientific information becomes available. Ultimately, best available
38 science requires scientists to use the best information and data to assist management
39 and policy decisions. The process used should be clearly documented and effectively
40 communicated to foster improved understanding and decision making."

41 **2. Department's Certification**

42 The Department's Certification states that development of California WaterFix and
43 analysis of its environmental impacts utilized a wide range of relevant data, literature, and tools,
44 including some specific to the Delta. The Department certifies that it used the best available
45 scientific information to produce analyses of the effects of the project, drawing on a number of
46 scientific and engineering disciplines that include geology, hydrology, biology, ecology,
47 chemistry, engineering, and climatology. The data, models and literature are publicly available
48 and the methodologies used to apply these tools and information are described in the analyses.

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1 (Certification, *Final_G P1 (b)(3) (23 CCR Sec 5002) Best Available Science_7_27_18.pdf*,
2 hereafter Certification BAS, p. 5)

3 The Department certifies that the data, models, literature, and analyses have been
4 subjected to review either as part of the customary practices of scientific publication or as part of
5 legal and regulatory processes. The findings state that the impact analyses produced for
6 California WaterFix were subject to review and comment by the general public (e.g., the
7 California Environmental Quality Act (CEQA)), experts in relevant scientific disciplines (e.g., the
8 Delta Independent Science Board (Delta ISB)), and expert staff from regulatory agencies having
9 jurisdiction over one or more aspects of the project or its permitting (e.g., National Marine
10 Fisheries Service (NMFS), U.S. Fish and Wildlife Service (USFWS), California Department of
11 Fish & Wildlife (CDFW), and the United States Army Corps of Engineers (USACE). ([Certification](#)
12 [BAS](#), p. 5)

13 The Department also states:

14 “The California WaterFix certification of consistency is based on DWR’s interpretation of
15 the Delta Plan policies, which was developed with support from DSC staff through the
16 early consultation process. If it is determined by the DSC Delta Council that a Delta Plan
17 policy DWR finds to be not applicable to California WaterFix, in fact does apply to
18 portions of California WaterFix, and/or full consistency with the policy as interpreted by
19 the Council is not feasible, California WaterFix should still be found to be consistent with
20 the Delta Plan pursuant to subdivision (b)(1) of section 5002 of title 23 of the California
21 Code of Regulations. That provision states that, where full consistency with all relevant
22 regulatory policies may not be feasible, an agency proposing a covered action may
23 nevertheless certify that the action is consistent with the overall Delta Plan by certifying
24 that the action is consistent with the coequal goals themselves. As demonstrated in the
25 Final EIR/EIS and described in California WaterFix and the Coequal Goals of this
26 certification, California WaterFix is consistent with the coequal goals themselves.”
27 ([Certification BAS](#), p. ii)

28 The BAS Certification provides a table of contents, description of Delta Plan best
29 available science criteria (each criterion is presented as a chapter), and detailed findings
30 supporting consistency with each of the six criteria for best available science provided in Delta
31 Plan Appendix 1A. It also includes an accompanying appendix (Attachment 1) describing
32 technical modeling completed in support of California WaterFix. A brief summary of the
33 Department’s finding for each of the six criterion is provided below.

34 a. Relevance

35 The Department certifies California WaterFix consistent with G P1(b)(3), best available
36 science criterion for Relevance, stating it used directly applicable information when available or
37 conservative assumptions based on similar species or similar regions. The Department cites the
38 reference list for the Final EIR/EIS and the Biological Assessment as substantial evidence. It
39 also states that is has committed to an Adaptive Management Program that it states will provide
40 a mechanism for identifying uncertainties, implementing research actions to reduce those
41 uncertainties, and making adjustments based on that new information. ([Certification BAS](#), pp. 1-
42 1-2.)

43

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1 **b. Inclusiveness**

2 The Department certifies California WaterFix consistent with G P1(b)(3), best available
3 science criterion for Inclusiveness, stating that information from 26 different disciplines were
4 considered during the design and analysis of the project. It states that “peer-reviewed
5 publications about the resource within the project location were generally preferred, although
6 peer-reviewed documents outside the project location, as well as appropriately vetted, non-
7 peer-reviewed reports and data from agencies and other reliable sources, were incorporated
8 when necessary.” Regarding the selection of modeling tools, the Department states that the
9 “lead agencies selected widely accepted and frequently utilized tools that provide reliable and
10 pertinent outputs regarding the environmental effects of the proposed action alternatives and
11 the extent to which future conditions would differ as between various alternatives.” The
12 Department states that, “although some analytical tools used in the Final EIR/EIS may have
13 been updated since the time these analyses began, lead agencies’ expert staff and consultants
14 deemed the models chosen the best available at the time they were utilized” and cites
15 Attachment 1. ([Certification BAS](#), pp. 2-1-2.)

16 **c. Objectivity**

17 The Department certifies California WaterFix consistent with G P1(b)(3), best available
18 science criterion for Objectivity, stating it collected data and performed analyses “that meet the
19 standards of the scientific method and are void of nonscientific influences to make decisions.”
20 The Department cites the “Methods for Analysis” and “Determination of Effects” sections in its
21 Final EIR/EIS. It further states that with the Bay Delta Conservation Plan (BDCP) Analytical
22 Tools Team in 2008, there was regular agency, scientific community, general public, and
23 independent peer review of analytical tools used. Also several analytical tools and analyses
24 were used at the suggestion of the agencies and independent peer review panels, which were
25 vetted prior to their use. ([Certification BAS](#), p. 3-1.)

26 **d. Transparency and Openness**

27 The Department certifies California WaterFix consistent with Policy G P1(b)(3), best
28 available science criterion for Transparency and Openness, stating that “all sources and
29 methods (including modeling) used in the scientific analyses, have been clearly identified
30 throughout the California WaterFix documents.” The Department states that uncertainty or
31 limitations in the research were disclosed extensively in the documents. The Department states
32 it made unprecedented efforts for transparency and openness with the release of administrative
33 drafts to the public, extending public comment periods, and holding multiple public meetings.
34 Specific events and outreach activities were described as substantiation of this claim.
35 ([Certification BAS](#), p. 4-1.)

36 **e. Timeliness**

37 The Department certifies California WaterFix consistent with Policy G P1(b)(3), best
38 available science criterion for Timeliness, stating it collected data, performed analyses, and took
39 into account new and updated information and data as it became available to dynamically
40 inform management decisions. The Department states that it reviewed and updated as
41 appropriate the “Environmental Setting/Affected Environment” sections of its 2015
42 RDEIR/SDEIS and the 2016 Final EIR/EIS, and considered and addressed all comments in
43 response to the final document. The Department also states, “[a]s additional information has
44 come to DWR’s attention through stakeholder comments, State Water Board change petition
45 process proceedings, or as a result of CEQA litigation, DWR has been taking this information

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1 into account and will release a supplemental or subsequent environmental document if needed
2 to address this information.” ([Certification BAS](#), p. 5-1-2.)

3 f. Peer Review

4 The Department certifies California WaterFix consistent with Policy G P1(b)(3), best
5 available science criterion for Peer Review, stating independent peer reviews occurred at
6 multiple points during the process of project development. The Department states it engaged
7 independent scientific advice through the planning process and enlisted well-recognized
8 experts, and independent scientific peer review was formally applied at several steps during the
9 project development. The Department cites several publications that provide timelines and
10 information about the science reviews, input processes, and additional information about
11 scientific review panels and their members. ([Certification BAS](#), p. 6-1-8.)

12 3. Appeals

13 The Council received appeals regarding Department’s Certification of Consistency with
14 GP 1(b)(3) from the following parties:

- 15 • North Coast Rivers Alliance, et.al. (NCRA)
- 16 • Save the California Delta Alliance (SCDA)
- 17 • Friends of the River, et.al. (Friends of the River)
- 18 • City of Stockton (Stockton)
- 19 • San Joaquin County, et.al. (San Joaquin County)
- 20 • County of Sacramento (Sacramento County)

21 Each of the issues raised in these appeals is briefly described below, with an analysis of the
22 issue related to consistency of the California WaterFix project with GP 1(b)(3). The appeal
23 issues are grouped by topic area.

24 a. Sea-Level Rise

25
26 NCRA states that the Department’s Final EIR/EIS used outdated assumptions about
27 climate change and sea-level rise projections, which it claims do not constitute the use of best
28 available science. ([NCRA Letter Attached to Appeal of Certification](#), p. 5.) NCRA does not cite
29 the specific best available science criterion in Appendix 1A that it asserts that the Department is
30 not consistent with, but it appears to be related to the criterion of Timeliness (Delta Plan,
31 Appendix 1A, Table 1A-1), which requires that data collection shall occur in a manner sufficient
32 for adequate analyses before a management decision is needed, and scientific information used
33 shall be applicable to the current situation. Further, the Council’s regulations (Cal. Code Regs.,
34 tit. 23, § 5001, subd. (f)) state that, “Best available science changes over time and decisions
35 may need to be revisited as new scientific information becomes available.”

36 NCRA cites the Department’s Certification ([Certification BAS](#), Attachment 1, p. 9-2),
37 where the Department states that the information used for climate change assumptions, while
38 several years old as of the Final EIR/EIS issuance “remains reasonably current.” ([NCRA Appeal](#)
39 [Letter](#), p. 5.) In its supplemental submission, NCRA cites as further evidence the comments of
40 Deirdre Des Jardins of California Water Research on the Final EIR/EIS, dated January 2017,
41 and the Department’s response to those comments ([D.1 DRAFT 000716](#), pp. 2-3). ([NCRA](#)
42 [October 15, 2018](#) Letter, p. 2-3.) NCRA states that the Final EIR/EIS improperly “focuses on
43 2025 and 2060 as the relevant time-frame, and not 2100 or 2135 (the end of the project’s
44 anticipated 100-year life).” (*Id.* p. 3.)

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1 The comments of Deirdre Des Jardins cited by NCRA state “[f]or the National Climate
2 Assessment in 2012, the Climate Change Program Office of the National Oceanic and
3 Atmospheric Association (NOAA) derived a high estimate of 2 meters by 2100. The U.S. Army
4 Corps of Engineers estimated that sea-level rise could reach 1.6 meters by 2100.” ([D.1 DRAFT](#)
5 [000716](#), p. 2.) Des Jardins further states, “NOAA recommended that the highest levels be used
6 where there is little tolerance for risk, such as in a new infrastructure process. Unfortunately, the
7 highest estimate of sea-level rise estimated by DWR’s modelling for the Draft EIR/EIS was
8 about 94 cm (3.1 feet or 37 inches) by 2100, about 50% of NOAA’s 2012 empirical estimate.
9 DWR’s 95% confidence projection of 3.9 feet or 46 inches by 2100 was about 60% of NOAA’s
10 empirical estimate. These values were used to derive the estimate of 15 cm (0.5 ft or 6 inches)
11 of sea-level rise by 2025, and 45 cm (1.5 ft or 18 inches) by 2060 used in the RDEIR/SDEIS.”
12 ([D.1 DRAFT 000716](#), p. 3.)

13 The Department responded to the comments of Deirdre Des Jardins in the Final
14 EIR/EIS, stating that “the sea-level rise assumptions for the CVP-SWP [Central Valley Project-
15 State Water Project] operations modeling for CWF are within the range of projections and
16 appropriate values selected based on the best available science.” ([D.1 DRAFT 000716](#), p. 3.)
17 The Department’s supplemental submissions further state, “[t]he changes to climate and sea-
18 level rise are well documented. [] Appendix 5A, BDCP/California WaterFix FEIR/FEIS Modeling
19 Technical Appendix, for example, describes the scientific basis for the EIR/EIS’s use of an 18-
20 inch sea-level rise projection by 2060 for the alternatives analysis ([D.1 DRAFT 000037](#), p. 5A-
21 A69). The projection was based on an evaluation of the best available science at the time of the
22 analysis. Current and well-supported research shows the projected sea-level rise for 2060 is
23 approximately 12 inches to 24 inches (hence the 18-inch mid-point). This sea-level rise estimate
24 was found to be consistent with those outlined by the U.S. Army Corps of Engineers 2009
25 guidance for incorporating sea level changes in civil works programs.” ([Department October 15,](#)
26 [2018 Letter](#) pp. 32-33; [Department Oct. Hearing Submittal - NCRA](#), pp. 9-10.) The Department
27 also cites the testimony of Armin Munevar at the SWRCB hearing as evidence that its
28 assumptions reflect the best available science, and states that its projections are consistent with
29 the “likely range” for years 2030 and 2060 in the latest guidance on sea-level rise for planning
30 from the California Ocean Protection Council.¹² (*Ibid.*)

31 NCRA’s claim, however, is that based on current best available science, the Department
32 should have utilized the U.S. Army Corps of Engineers’ “high” sea-level rise estimate of 1.6
33 meters (5.22 feet) by 2100, based a project anticipated 100-year lifetime. ([NCRA October 15,](#)
34 [2018](#), p. 3.) The NOAA report cited by Deirdre Des Jardins also focuses on estimates for global
35 sea-level rise by 2100, based on four different scenarios that reflect different degrees of ocean
36 warming and ice sheet loss. ([D.8 DRAFT 022450](#).) The NOAA report states “[t]he Highest
37 Scenario should be considered in situations where there is little tolerance for risk (e.g. new
38 infrastructure with a long anticipated life cycle such as a power plant).” ([D.8 DRAFT 022450](#), p.
39 2.)

40 While the sea level projections selected by the Department are within the recommended
41 “mid-range” projections for the years 2025 and 2060 in the U.S. Army Corps of Engineers’
42 online calculator (Exhibit PCFFA-64, Appendix, [D.8 DRAFT 022452](#)) cited by NCRA, there is
43 no evidence that the Department considered the higher estimates for year 2100 as

¹² The Department cites and relies upon this document not included in the record submitted with the Certification: Ocean Protection Council, [State of California Sea-Level Rise Guidance](#), 2018 Update. We admit this document as a technical and scientific matter within our jurisdiction per our Appeals Procedures, § 29, in [Exhibit B](#).

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1 recommended by NOAA for projects with a long anticipated life cycle. The modeling technical
2 Appendix 5A explains the Department’s selection of those narrower timeframes stating,
3 “[c]orresponding to the long-term timelines of the BDCP analysis, in which climate change is
4 likely to be relevant, future climate periods are identified as approximately 2025 (2011-2040)
5 [early long-term] and 2060 (2046-2075) [late long-term].” ([D.1 DRAFT 000037](#), p. 5A-A64.) It
6 then explains that it used “the mid-range of the estimates for each BDCP timeline: 15 cm (6
7 inches) by 2025, and 45 cm (18 inches) by 2060.” ([D.1 DRAFT 000037](#), p. 5A-A69.)

8 The Department stated in its Certification that as new information became available it
9 incorporated it into the relevant analyses to dynamically inform management decisions.
10 (Certification BAS, p. 5-1.) However, the Department itself acknowledges in its Certification
11 section specific to sea-level rise that it did not use more currently available information, stating
12 its information was the best available at the time of the analysis, but that the information
13 remains sufficient for CEQA and NEPA purposes. ([Certification BAS](#), Attachment 1, p. 9-2.) The
14 SWRCB hearing testimony of Armin Munevar, which the Department cites to support that its
15 assumptions still reflect the best available science, focuses only on the more limited timeframes
16 selected for the modeling as described in Appendix 5A, and does not address why the
17 Department need not address a long-term time horizon or higher risk scenarios as
18 recommended in the NOAA report for new infrastructure with a long anticipated life cycle.
19 Furthermore, the Department’s reference to the UnTRIM modeling (Final EIR/EIS-Appendix 5A-
20 UnTRIM (D.1. _Draft 000045) is similarly not helpful, because, while that report examined
21 several other higher sea-level rise scenarios, there is no evidence in the record that the
22 Department incorporated those higher scenarios into its modeling.

23 Finally, the Department stated its assumptions still reflect the use of best available
24 science because they are consistent with the recommended estimates for the sea-level rise
25 under the “likely range” reported for years 2030 and 2060 in the latest guidance from the
26 California Ocean Protection Council for sea-level rise planning. The California Ocean Protection
27 Council, however, recommends the “likely range” for use in low risk aversion decisions, such as
28 a coastal unpaved trail. (Ocean Protection Council, 2018 Update, p. 25.) Whereas, it
29 recommends use of the H++ scenario, which is extreme risk aversion, for projects with a
30 lifespan beyond 2050. (*Ibid.*) The California Ocean Protection Council report recommendations,
31 which provide science-based guidance to help state and local governments analyze the risk
32 associated with sea-level rise and incorporate sea-level rise into planning, permitting and
33 investment decisions, are consistent with the NOAA recommendations cited by NCRA. In
34 response to further questioning from the Council at the October hearing, the Department
35 reiterated these points and stated that it conducted a “sensitivity analysis” based on a range of
36 projections, which showed that no changes to its modeling were required, and cited to Appendix
37 5A. (October 25 Hearing Transcript, pp. 59-60.) However, the only reference to sensitivity
38 scenarios the Council found in Appendix 5A states, “sensitivity scenarios will be prepared to
39 consider sea-level rise of up to 60 cm by 2060.” ([D.1 DRAFT 000037](#), p. 5A-A69.) This does
40 not support that the Department considered the higher risk scenarios for a long-term time
41 horizon as recommended by NOAA and the California Ocean Protection Council. The
42 Department has not cited to, and the Council could not find, evidence in the record that the
43 Department conducted modeling and sensitivity analyses that considered higher risk scenarios
44 beyond 2060 (e.g., for 2100 or beyond), as recommended by NOAA and the California Ocean
45 Protection Council for new infrastructure with a long anticipated life cycle, such as the Project,
46 where there is little tolerance for risk. Therefore, the Council finds the Department’s Certification
47 that its sea-level rise modeling reflects the best available science is *not supported* by substantial
48 evidence in the record.

1 **b. Modeling**

2 **i. Adequacy of modeling approach (NCRA)**

3 NCRA states the Department failed to use the best available science for modeling
4 impacts to water quality stating, “[t]he model used must be representative of the actual process
5 in order to understand the impacts. Without an accurate model, DWR fails to use the best
6 available science.” ([NCRA Appeal Letter](#), p. 5.) NCRA does not cite the specific best available
7 science criterion with which the modeling is allegedly inconsistent. It appears to be related to the
8 criterion of Relevance (Delta Plan, Appendix 1A, Table 1A-1), which requires that scientific
9 information used should be germane to the Delta ecosystem and/or biological and physical
10 components (and/or processes) affected by the proposed decisions.

11 To substantiate its claim, NCRA cites pages 14-125 of the Final EIR/EIS, which is in a
12 section that discusses the effects on agriculture as a result of changes in salinity. (Final
13 EIR/EIS, [D.1 DRAFT 000106](#), at p. 14-125). ([NCRA Appeal Letter](#), p. 5.) The Department uses
14 the CALSIM II model to evaluate these effects. The Department points out some limitations of
15 CALSIM II, noting that “many [] modeled exceedances are a result of modeling artifacts or a
16 result of operating rules used by the CALSIM II model under extreme hydrologic and operational
17 conditions where there is not enough water supply to meet all requirements. In these cases,
18 CALSIM II uses a series of operating rules to reach a solution that is a simplified version of the
19 very complex decision processes that SWP and CVP operators would use in actual extreme
20 conditions.” (Final EIR/EIS, [D.1 DRAFT 000106](#), at p. 14-125). The Certification explains the
21 use of hydrologic and hydraulic modeling tools, including CALSIM II, which the Department
22 explains has been subject to peer review, that it responded to those reviews, and that “there is
23 no alternative model that could be considered for this application.” ([Certification BAS](#),
24 Attachment 1, pp. 1-1 – 1-5.)

25 NCRA does not address this evidence supporting the Department’s use of CALSIM II as
26 consistent with the best available science criteria for Relevance, nor does NCRA provide
27 evidence of an alternative model that the Department could or should have used instead of
28 CALSIM II. Therefore, NCRA has failed to demonstrate that the Department’s use of CALSIM II
29 as the best available science is not supported by substantial evidence in the record, and we
30 *deny* its appeal as to this issue.

31 **ii. Adequacy of CALSIM modeling (Sacramento County)**

32 Sacramento County broadly states that the expert reports of MBK Engineers on the
33 DEIR/EIS and RDEIR/EIS are evidence of the Department’s failure to document the use of best
34 available science. ([Sacramento County Letter Attached to Appeal of Certification](#), p. 3.) In its
35 supplemental submission, Sacramento County cites exhibits from the SWRCB hearing, which
36 include CALSIM II model runs and reviews by MBK Engineers. ([Sacramento County October](#)
37 [14, 2018 Letter](#), p. 7.) Sacramento County states MBK used the “best available information” to
38 select operational assumptions for its runs of CALSIM II that it determined would reflect how the
39 Project would be operated. It asserts the Department ignored this information, and thus did not
40 utilize best available science for its CALSIM II modeling. (*Id.* at pp. 10-11.) Sacramento County
41 does not cite the specific best available science criterion it asserts that Department is not
42 consistent with. This issue appears to be related to the criterion of Inclusiveness (Delta Plan,
43 Appendix 1A, Table 1A-1), which requires that scientific information used shall incorporate a
44 thorough review of relevant information and analyses across relevant disciplines.

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1 The Department responded to the comments related to the modeling by the MBK
2 Engineers in the Final EIR/EIS, stating that MBK’s independent modeling relied on different
3 assumptions than used by the Department. (Final EIR/EIS Volume II, [D.1 DRAFT 000188](#), p. 1-
4 271.) The Department explained that its modeling assumptions were based on “DWR and
5 Reclamation’s vast experience in developing the underlying modeling” and “their understanding
6 of the nuances of operational modeling,” and that the “modeling provides the appropriate
7 assessment for supporting the EIR/EIS, because the operating criteria are consistent across the
8 No Action Alternative and project alternatives, allowing for an ‘apples-to apples’ comparison to
9 estimate potential project effects.” (*Id.* at p. 1-272.) In the 2017 NOD *Developments after*
10 *Publication of the Proposed Final EIR*, the Department further responded to the comments of
11 MBK, stating: “The consulting firm MBK developed its own scenarios with different assumptions
12 than utilized by DWR experts and ran CALSIM II to produce results, which other parties to the
13 water rights hearing presented. These scenarios, although not thoroughly documented, were
14 discussed at length by MBK and addressed by DWR through the course of cross-examination
15 and within the materials submitted by DWR and Reclamation for rebuttal. Based on this, MBK’s
16 use of the CALSIM II model was shown to have violated many common modeling practices. [...
17] Despite MBK’s difference of opinion on certain assumptions used in the CALSIM II modeling,
18 the modeling and assumptions within the modeling relied upon by DWR and Reclamation reflect
19 their own expertise, as supported by the record, and is considered appropriate to support the
20 analysis of environmental impacts associated with the Proposed Project.” (DWR and USBR
21 2017, [X.3 000127](#), p.97-98.) In its supplemental materials, the Department again cites
22 testimony from the SWRCB hearing rebutting the MBK modeling information cited by
23 Sacramento County. ([Department October 23, 2018 Submittal-Sac.County](#), p. 4.) Sacramento
24 County does not address this evidence supporting the Department’s CALSIM II modeling, and
25 has failed to show why the Department’s modeling assumptions are not supported by the
26 record. Therefore, Sacramento County has failed to demonstrate that the Department’s
27 documentation of its use of best available science for its CALSIM II modeling is not supported
28 by substantial evidence, and we *deny* its appeal as to this issue.

29 **iii. Comparative vs. predictive capabilities of models (SCDA)**

30 SCDA states the Department fails to document that its use of CALSIM II for modeling
31 hydrodynamic effects is valid for comparative purposes, citing as evidence the report “A
32 Strategic Review of CALSIM II and its Use for Water Planning, Management, and Operations in
33 Central California” (2003 Strategic Review, Close et al 2003, [D.8 DRAFT 005048](#)) and
34 Department statements at the SWRCB hearing. ([SCDA Appeal Form](#), p. 5.) In its supplemental
35 submission, SCDA further states the Department has not documented the validity of its model to
36 predict accurately in absolute terms, as it states was pointed out in the Strategic Review. ([SCDA](#)
37 [October 15, 2018 Letter](#), pp.1-2.) SCDA further states the Strategic Review modeling critique
38 remains uncontradicted, and therefore, there is no evidence to support the Department’s
39 modeling of California WaterFix’s ability to meet D-1641, or to accurately analyze water quality,
40 water supply, and aquatic species impacts. (*Ibid.*) SCDA does not cite the specific best available
41 science criterion it asserts that the modeling is not consistent with. It appears to be related to
42 the criterion of Relevance (Delta Plan, Appendix 1A, Table 1A-1), which requires that scientific
43 information used should be germane to the Delta ecosystem and/or biological and physical
44 components (and/or processes) affected by the proposed decisions.

45 The Department’s Certification cites the 2003 Strategic Review and also the peer review
46 response in 2004 (DWR and USBR 2004, [D.8 DRAFT 021050](#)), a quasi-validation study by the
47 Department in 2003 (DWR 2003, [X.3 0000162](#)), and a *San Joaquin Valley CALSIM II External*
48 *Review* (DWR 2006, [D.8 DRAFT 005069](#)). ([Certification BAS](#), Attachment 1, p.1-1 to 1-2.) The

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1 Department states these reports all conclude that, despite some concerns, the CALSIM II model
2 is the best available planning model for the State Water Project and Central Valley Project
3 system operations for flow-routing optimization and that there is no alternative model that could
4 be considered for the environmental analysis, also citing CALFED 1994, [X.3 000158](#); DWR and
5 USBR 2004, [D.8 DRAFT 021050](#); USBR 2008a, [X.3 000240](#). (*Ibid.*) In its supplemental
6 submission, the Department reiterated that CAISIM II and DSM2 “are the best available tools for
7 such an analysis, which allow simulating the with- and without- project over a large range of
8 hydrologic conditions,” citing the expert testimony of Parviz Nader-Tehrani as the SWRCB
9 hearing ([D.8 DRAFT 022884](#), p. 30). ([Department October 23, 2018 Submittal - SCDA](#), pp. 6-
10 7.)

11 SCDA does not address the evidence in the reports cited in the Certification BAS,
12 including the Department’s responses to the 2003 Strategic Review, and other cited CALSIM II
13 reports, or the expert testimony cited, which all support the Department’s use of CALSIM II as
14 the best available model, despite its limitations. SCDA fails to explain why this evidence is
15 lacking. Therefore, SCDA has failed to demonstrate that the Department’s use of CALSIM II as
16 best available science is not supported by substantial evidence in the record, and we *deny* its
17 appeal as to this issue.

18 iv. Salinity modeling (San Joaquin County)

19 San Joaquin County states that the evaluation of salinity impacts is not consistent with G
20 P1(b)(3) best available science criteria for Relevance and Inclusiveness because the
21 Department did not use predictive models (only comparative), failed to apply operational
22 impacts, and employed poor data selection. ([San Joaquin County Appeal Letter](#), p. 34.) The
23 Relevance criterion (Delta Plan, Appendix 1A, Table 1A-1) requires that scientific information
24 used should be germane to the Delta ecosystem and/or biological and physical components
25 (and/or processes) affected by the proposed decisions. The Inclusiveness criterion (Delta Plan,
26 Appendix 1A, Table 1A-1) requires that scientific information used shall incorporate a thorough
27 review of relevant information and analyses across relevant disciplines.

28 San Joaquin County cites the SWRCB hearing testimony of Erik Ringelberg, which
29 asserts that the project impacts on salinity are difficult to determine because the model is
30 comparative (vs. operational or predictive), and that the Department could have completed
31 modeling that would demonstrate predictive impacts to the North Delta but failed to do so. (II-24
32 revised, Ringelberg, [D.8 DRAFT 023145](#)). However, Mr. Ringelberg proposed no alternative
33 models and does not substantiate his assertions. Mr. Ringelberg’s testimony also asserts that
34 for agriculture and the ecosystem, the highest (not average), instantaneous concentration of
35 salinity and the net salinity load are most important to consider. (*Id.*, p.3). He also asserts that
36 reducing flow from the Sacramento River would reduce the capacity to flush the Delta of
37 accumulated salts from irrigation, wetlands, and wildlife management. (*Id.*, p. 6). He cites a
38 USGS fact sheet from 2016, which he says draws the “same conclusions,” however the quote
39 from the fact sheet merely states that tunnels would alter transport and reduce the tides. The
40 USGS fact sheet does not say anything about effects on salinity control.

41 In its supplemental submission, the Department states that DSM2 is the most
42 appropriate model to assess salinity changes in the Delta and represents the best available
43 science, citing the testimony of Parviz Nader-Tehrani and others as supporting evidence.
44 ([Department October 15, 2018 Letter](#), pp. 39-40). The SWRCB decision, D-1641, controls how
45 salinity intrusion is managed by setting compliance levels for salinity at several points within the
46 Delta. (SWRCB and US EPA, 2000, [D.8 DRAFT 001391](#)) The Department states that the
47 Project will continue to meet D-1641 water quality standards established for various beneficial

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1 uses in the Delta, consistent with the No Action Alternative. ([Department October 23, 2018](#)
2 [Submittal-San Joaquin](#), p. 62.) The Department further rebuts San Joaquin County's claim by
3 citing the testimony of Joel Kimmelshue from the SWRCB hearing, which describes why San
4 Joaquin County's assertions are unfounded and critiques the studies its concerns are premised
5 upon. ([Department October 23, 2018 Submittal-San Joaquin](#), p. 23.)

6 In its supplemental submission, San Joaquin County cites a document developed by the
7 Department during early consultation with the Council, which includes Council staff comments
8 on the Department's salinity modeling. ([San Joaquin County October 15, 2018 Letter](#), p. 20.)
9 San Joaquin County asserted in their letter, and reiterated in testimony at the hearing, that the
10 Department has failed to give adequate responses to concerns raised by Council staff during
11 early consultation. However, San Joaquin County does not provide any specific discussion of
12 the Department's failure to meet the criteria of the policy, so we cannot evaluate the potential
13 validity of this issue.

14 The Council finds that the evidence relied upon by San Joaquin County does not
15 demonstrate how the salinity model or data used for salinity modeling is not germane to the
16 physical processes as required by the Relevance criterion, nor does it demonstrate a specific
17 failure to incorporate thorough review of information, as required by the Inclusiveness criterion.
18 Therefore, San Joaquin County has failed to demonstrate that the Department's salinity
19 modeling as best available science is not supported by substantial evidence in the record, and
20 we *deny* its appeal as to this issue.

21 **v. Water quality modeling at Stockton (Stockton)**

22 Stockton states the Department failed to appropriately evaluate impacts at Stockton's
23 intakes, for example by failing to represent day-to-day changes in water quality. Specifically,
24 Stockton asserts the Department's use of flawed scientific methodology (such as long-term
25 averages) resulted in underestimates of project impacts on water quality at the intakes.
26 ([Stockton Appeal Letter](#), pp. 10-11.) Stockton does not cite the specific best available science
27 criteria in Appendix 1A that it asserts that the Department is not consistent with for this issue. It
28 appears to be related to the criteria of Relevance and Inclusiveness. The Relevance criterion
29 (Delta Plan, Appendix 1A, Table 1A-1) requires that scientific information used should be
30 germane to the Delta ecosystem and/or biological and physical components (and/or processes)
31 affected by the proposed decisions. The Inclusiveness criterion (Delta Plan, Appendix 1A, Table
32 1A-1) requires that scientific information used shall incorporate a thorough review of relevant
33 information and analyses across relevant disciplines.

34 The Department responded to comments on the time-step of the model in the Final
35 EIR/EIS Response to comments (Final EIR/EIS, Response to Comments, Vol II Part 1,
36 [D.1 DRAFT 000188](#), p. 1-123 to 1-124), acknowledging that daily time steps could not be used
37 due to modeling limitations. It stated, that "[d]ue to the assumptions involved in the input data
38 sets and model logic, care must be taken to select the most appropriate time-step for the
39 reporting of model results. Sub-monthly (e.g. weekly or daily) reporting of model results is
40 inappropriate for all models and the results should be presented on a monthly basis [...] While
41 there would be days within a month in which parameter concentrations/levels at a given location
42 would be higher than the monthly average at that location (just as there would be days when it
43 is lower), given the modeling limitations, comparing alternatives and baselines based on the
44 monthly average at those locations is considered appropriate for the purposes of NEPA and
45 CEQA." (*Ibid.*)

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1 The Department also responded to Stockton's appeal by citing that potential water
2 quality changes at the City of Stockton's intake were analyzed in a report presented during the
3 SWRCB hearing (DWR-652, [D.8 DRAFT 022804](#), pp. i-66). ([Department October 23, 2018](#)
4 [Submittal -Stockton](#), p.15.) The Department cites information specific to Stockton's intake
5 location and claims that modeling at that location did not differ substantially from the results that
6 were presented in the Final EIR/EIS upstream and downstream of the City of Stockton. (*Ibid.*)

7 At the October hearing, Stockton elaborated that chloride levels at their intakes would
8 exceed acceptable levels (>110 mg/L) on an additional 364 days in their 16-year model
9 simulation, as a result of the project compared to the No Action Alternative (citing the SWRCB
10 hearing testimony of Susan Paulsen). (Oct. 24 Hearing Transcript, p. 114, ll. 1-18.) The
11 Department refuted this point, saying that Paulsen "uses a comparison of a model run without
12 climate change to a model run that includes climate change, thus attributing impacts from
13 climate change to WaterFix" (citing DWR-86 errata, Testimony of Armin Munevar, [D.8 DRAFT](#)
14 [022911](#), p. 47-48). ([Department October 23, 2018 Submittal -Stockton](#), p.19.) In the
15 Department's closing statements at the hearing, as well as in its written responses to Stockton,
16 it states that the chloride conversion formula used by Stockton was incorrect and overestimated
17 impacts, pointing to the Nader-Tehrani testimony as supporting evidence (Exhibit DWR-932,
18 Testimony of Parviz Nader-Tehrani, [D.8 DRAFT 022953](#), pp. 8-13). (Oct. 25 Hearing
19 Transcript, p. 24, ll. 8-19; [Department October 23, 2018 Submittal -Stockton](#), p.19.) In its closing
20 statements, Stockton mentioned a work product developed by its expert Dr. Paulsen that it
21 asserts validates her choice of chloride conversion formula. (Oct. 25 Hearing Transcript, p. 85-
22 86) That evidence, however, is not part the record because it was submitted to the SWRCB
23 hearing after the Certification was submitted to the Council.¹³ The Department also contends in
24 its closing statements that modeled exceedances overestimate impacts because the model
25 cannot be reflective of real-time operations, which they assert would be used to control
26 compliance with water quality standards (citing Exhibit DWR-932, Testimony of Parviz Nader-
27 Tehrani, [D.8 DRAFT 022953](#)). (Oct. 25 Hearing Transcript, p. 24, ll. 8-19)

28 The Council's review of Chapter 8, Water Quality, of the Final EIR/EIS ([D.1 DRAFT](#)
29 [000062](#)) found that it did specifically analyze the implications of the project with regards to the
30 potential impacts to Stockton's water supply with regards to water quality. The more recent
31 Department report presented during the SWRCB hearing (DWR-652, WQ report Sktn,
32 [D.8 DRAFT 022804](#), pp. i-66) address issues specific to the source waters of the City of
33 Stockton. The Department has also provided in the record specific analyses of water quality at
34 Stockton's intakes, and substantiated its model choices and calculations. Therefore, the Council
35 finds that Stockton has not demonstrated that the Department failed to use best available
36 science to evaluate water quality impacts at the Stockton intake, and we *deny* its appeal as to
37 this issue.

38 vi. The Department's response to independent review of models (SCDA)

39 SCDA alleges the Department's modeling is not best available S=science, citing the
40 2016 California WaterFix Aquatic Science Peer Review (2016 IRP Report, Simenstad et al.
41 2016, [X.3 000118](#)). ([SCDA Appeal Form](#), p. 5.) SCDA does not cite the specific best available
42 science criterion it asserts that the modeling is not consistent with. It appears to be related to
43 the criterion of Relevance (Delta Plan, Appendix 1A, Table 1A-1), which requires that scientific

¹³ We decline to admit this document for this reason (see [Exhibit C](#)).

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1 information used should be germane to the Delta ecosystem and/or biological and physical
2 components (and/or processes) affected by the proposed decisions.

3 The Department responded to the 2016 IRP Report in the *2017 NOD Developments*
4 *after Publication of the Proposed Final EIR*. (DWR and USBR 2017, [X.3 000127](#), pp. 187-190.)
5 The Department's Certification also addresses this report and the Department's responses to it.
6 (Certification BAS, pp. 6-7- 6-8.) Exhibits cited in that section of the Certification include
7 Response Panel Comments on California WaterFix Adaptive Management ([X.3 000135](#), pp. 1-
8 2) and Response to Independent Review Panel Request for Information Regarding Longfin
9 Smelt Analysis Changes ([X.3 000137](#), pp. 1-2). The Department also provided specific
10 responses to the IRP regarding changes to fish models in a November 4, 2016 memorandum
11 (ICF 2016c, [X.3 000136](#)). This document describes several updates and modifications to the
12 models and the data used. Further, in its supplemental submission, the Department notes that
13 on page 12 of the IRP Report it states "The BA [Biological Assessment] models represent the
14 'best science available' for predictive purposes." ([Department October 23, 2018 Submittal -](#)
15 [SCDA](#), p.8.)

16 SCDA does not address this evidence cited in the Certification BAS, including the
17 Department's responses to the IRP report, the updates or modification made to the models in
18 response, and the IRP's statement that the model represent the best available science. SCDA
19 fails to explain how this evidence is lacking. Therefore, SCDA has failed to demonstrate that the
20 Department's use of the BA models and its response to independent science peer review of the
21 models is not supported by substantial evidence in the record, and we *deny* its appeal as to this
22 issue.

23 **c. Appeal issues alleging broad categories of content missing or general** 24 **failure to use BAS**

25 **i. Delta ISB reviews regarding missing content (Sacramento County,** 26 **Stockton)**

27 Sacramento County alleges the Department failed to document use of best available
28 science, citing Delta Independent Science Board (Delta ISB) reviews in 2014 of the BDCP Draft
29 EIR/EIS (Delta Independent Science Board, 2014, [X.3 000130](#)) and in 2015 of the Recirculated
30 Draft EIR/ Supplemental Draft EIS (Delta Independent Science Board, 2015, [X.3 000131](#)),
31 stating that the reviews "are highly critical of the data and methodologies supporting the Project
32 and its environmental studies." ([Sacramento County Appeal Letter](#), p. 2.) Sacramento County
33 states the Delta ISB's "detailed comments lament the RDEIR/SDEIR's 'missing content,'
34 including key information about adaptive management and collaborative science, how levee
35 failures would affect operation of dual conveyance systems, the effect of climate change on
36 expected water exports from the Delta and system operations, and effects of changes in
37 operations of the State Water Project and Central Valley Project or other changes in water
38 availability, on agricultural practices in the San Joaquin Valley." (*Id.* at pp. 2-3.) Stockton
39 similarly alleges the Department failed to resolve flaws identified by the Delta ISB's 2015 review
40 of the RDEIR/SDEIS and the Delta ISB's 2017 review of the Final EIR/EIS (Delta Independent
41 Science Board, 2017, [X.3 000132](#)). ([Stockton Appeal Letter](#), p. 10.) Stockton states the Delta
42 ISB concluded that "broad categories of content were missing from the Final EIR/EIS, such as
43 the necessary 'evaluation of environmental effects of water use south of the Delta.'" (*Ibid.*)

44 The Department responded to the 2014 and 2015 Delta ISB Comments in Volume II of
45 the Final EIR/EIS as part of its response to comments. (Comment Letter 1448 in DEIR/DEIS;
46 Vol II, Responses to Comments, DEIRS Comment Response Letters 1400-1499 at pp. 80-180

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1 [\[D.1 DRAFT 000205\]](#) and Comment Letter 2546 in RDEIR/RDEIS; Vol II Responses to
2 Comments, RECIRC Comment Response Letters 2500-2549 at pp. 175-201 [\[D.1 DRAFT](#)
3 [000258\]](#)). The Department responded to the six main topics (adaptive management, informative
4 summaries and comparisons, levee and earthquake analysis, potential uncertainties including
5 the Sustainable Groundwater Management Act (SGMA), San Joaquin water reliability, and
6 restoration and mitigation) raised in the 2017 Delta ISB review of the Final EIR/EIS
7 (Independent Science Board, 2017, [X.3 000132](#)) in the 2017 NOD *Developments after*
8 *Publication of the Proposed Final EIR* (DWR and USBR 2017, [X.3 000127](#), p. 89-91) and also
9 provided those responses in its Certification ([Certification BAS](#), p. 6-4 to 6-6). The Department's
10 overall response to the Delta ISB's 2017 review is that "much of the review focused on
11 perceived missing content that is outside the scope of the CEQA/NEPA process." The
12 Department points this out specifically when addressing San Joaquin water reliability: "The
13 Delta ISB requested a discussion of the environmental effects of water use south of the Delta.
14 Such an analysis is outside the scope of the Final EIR/EIS and is too speculative as to analyze
15 under CEQA/NEPA." (DWR and USBR 2017, [X.3 000127](#), p. 91).

16 In its supplemental submission, Sacramento County points out that the Delta ISB still
17 found that the Department's treatment of its comments in the Final EIR was inadequate (Delta
18 Independent Science Board, 2017, [X.3 000132](#), p. 3). ([Sacramento County October 14 Letter](#),
19 p. 6.) Stockton states in its supplemental submission that the Department's justification that the
20 Delta ISB's requests relate to analyses outside the scope of CEQA and NEPA is inadequate
21 because it ignores the requirements of the Delta Plan. ([Stockton October 15, 2018 Letter](#), p. 4.)

22 The Council agrees that the Delta Plan best available science policy requirements are
23 not limited to what is required by CEQA and NEPA. Nonetheless, the allegations by Sacramento
24 County and Stockton related to the Delta ISB reviews fail to specify what missing content
25 identified by the Delta ISB show inconsistency with the requirements of GP 1(b)(3) and the
26 criteria in Appendix 1A. Therefore, the Council cannot evaluate the potential validity of these
27 issues. The Council finds that Sacramento County and Stockton have not raised a valid
28 appealable issue regarding the Department's consistency with the best available science policy,
29 and their appeals as to this issue are *denied*.

30 ii. Citation to outside experts (San Joaquin County)

31
32 San Joaquin County states that to meet the criteria of Inclusiveness and Objectivity the
33 Department should have cited analyses by outside experts, including experts appearing at the
34 SWRCB hearing, and that the Department failed to show evidence of use of the scientific
35 method. ([San Joaquin County Appeal Letter](#), pp. 36-37.) The Inclusiveness criterion requires
36 that scientific information used shall incorporate a thorough review of relevant information and
37 analyses across relevant disciplines. The Objectivity criterion requires that data collection and
38 analyses considered shall meet the standards of the scientific method and be void of
39 nonscientific influences and considerations. (Delta Plan, Appendix 1A, Table 1A-1.) San
40 Joaquin County allegations are not supported by specific examples or citation to specific
41 failures, and therefore, the Council cannot evaluate the potential validity of this issue. Further,
42 the Department's response to San Joaquin County's appeal states that the relevant points from
43 the SWRCB testimony are addressed in the rebuttal testimony provided in the record by the
44 Department. ([Department October 23, 2018 Submittal- San Joaquin County](#), p. 69). The Council
45 finds that San Joaquin County has not raised a valid appealable issue regarding the
46 Department's consistency with the best available science policy; its appeal as to this issue is
47 *denied*.

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1 iii. **Discussion of invasive species, effects on watersheds, salmon and**
2 **other species (NCRA)**
3

4 NCRA alleges the Department failed to fully discuss invasive species, ignored potential
5 effects on the Delta’s source watersheds, salmon, and other species that depend on salmon.
6 ([NCRA Appeal Letter](#), p. 4.) NCRA’s allegations are not supported by specific examples or
7 citation to specific failures, and therefore, the Council cannot evaluate the potential validity of
8 this issue. Therefore, NCRA has not raised a valid appealable issue regarding the Department’s
9 consistency with the best available science policy, and we *deny* its appeal as to this issue.

10 iv. **Incorporating additional information (San Joaquin County)**
11

12 San Joaquin County states that the Department fails to meet the criterion of Timeliness
13 by deferring the incorporation of additional information into “a supplemental or subsequent
14 environmental document.” ([San Joaquin County Appeal Letter](#), pp. 36-37.) The Timeliness
15 criterion (Delta Plan, Appendix 1A, Table 1A-1) requires that data collection shall occur in a
16 manner sufficient for adequate analyses before a management decision is needed, and
17 scientific information used shall be applicable to the current situation. Further, the Council’s
18 regulations (Cal. Code Regs., tit. 23, § 5001, subd. (f)) state that, “Best available science
19 changes over time and decisions may need to be revisited as new scientific information
20 becomes available.” The Department responded to San Joaquin County’s appeal, stating that “it
21 is important to reiterate that uncertainties in potential project effects are to be addressed
22 through the work of several technical teams being informed by pre- and post-construction
23 studies to aid final planning, design, and implementation (see, for example, the DFW Incidental
24 Take Permit, [X.1 DRAFT 000003](#), p.163-172); these are important to address issues for which
25 there may not be sufficient information to address effects at the current planning stage.”
26 ([Department Oct. Hearing Submission -San Joaquin County](#), p. 69.) San Joaquin County’s
27 allegations are not supported by specific examples or citation to specific failures, and therefore,
28 the Council cannot evaluate the potential validity of this issue. Therefore, San Joaquin County
29 has not raised a valid appealable issue regarding the Department’s consistency with the best
30 available science policy, and the Council denies its appeal as to this issue.

31 d. **Adequacy of Impact Analysis**
32

33 i. ***Microcystis* and Harmful Algal Blooms (HABs) (Stockton)**

34 Stockton states the Department failed to adequately address potential for increases in
35 *Microcystis* blooms. Specifically, Stockton asserts the Department used an inappropriate
36 approach for estimating residence time (average length of time water is at a given location
37 before being flushed out either by tides or by river flow), and therefore, it underestimated the
38 potential for *Microcystis* blooms. ([Stockton Appeal Letter](#), p. 11. [citing the expert testimony of
39 Susan Paulsen at the SWRCB hearing (Water Right Change Proceeding, Part Two Rebuttal
40 Testimony of Susan Paulsen, Ph.D., P.E., Stockton 18, pp. 4-5)].) In a related claim, San
41 Joaquin County states that the Department failed to discuss the project’s effects on ecological
42 drivers of harmful algal bloom (HAB) formation, and failed to analyze the acute toxicity, human
43 and animal health dangers presented by harmful algal blooms. ([San Joaquin County Appeal](#)
44 [Letter](#), pp. 33-34.)

45 Stockton and San Joaquin County do not cite the specific best available science criterion
46 they assert the Department is not consistent with. This issue appears to be related to the criteria
47 of: Inclusiveness (Delta Plan, Appendix 1A, Table 1A-1), which requires that scientific

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1 information used shall incorporate a thorough review of relevant information and analyses
2 across relevant disciplines; Timeliness (Delta Plan, Appendix 1A, Table 1A-1), which requires
3 that data collection shall occur in a manner sufficient for adequate analyses before a
4 management decision is needed, and scientific information used shall be applicable to the
5 current situation; and Relevance (Delta Plan, Appendix 1A, Table 1A-1), which requires that
6 scientific information used should be germane to the Delta ecosystem and/or biological and
7 physical components (and/or processes) affected by the proposed decisions.

8 The Department notes in the NOD *Developments after Publication of the Proposed Final*
9 *EIR* (DWR and USBR 2017, [X.3 000127](#), p. 100-101) that “[c]oncerns raised by other parties in
10 the water rights hearing focused primarily on the residence time aspects related to creating
11 potential conditions for *Microcystis* issues. However, as shown in the DWR and Reclamation
12 testimony, it is only a portion of the information understood to influence cyanobacteria life
13 history. The testimony and exhibits of Dr. Michael Bryan (DWR-81 [[D.8 DRAFT 022898](#)] and
14 exhibits reference within) and the oral testimony of Dr. Ellen Preece [DWR-83, [D.8 DRAFT](#)
15 [022900](#)] describe the known thresholds of water velocity tolerance for *Microcystis* and
16 demonstrate that the California WaterFix will not create circumstances that increase the
17 frequency of *Microcystis* blooms.”

18 San Joaquin County suggested alternative modeling tools that could have been used for
19 analyzing HAB formation, based on testimony of Mr. Ringelberg (Ringelberg, [D.8 DRAFT](#)
20 [023506](#), p. 2 and p. 5). The Tango (2009) model (SJC-47, Tango, 2009, [D.8 DRAFT 023533](#))
21 was developed for *Microcystis* in the Potomac River (Maryland) in 2009 and demonstrates that
22 analysis is possible but was not performed. Also cited in the Ringelberg testimony (SJC-4,
23 Ringelberg, [D.8 DRAFT 023506](#), p. 2 and p. 5) is the Lake Erie model, which has been
24 predicting HAB formation since 2009. Based on the Relevance criterion, a Delta-specific model
25 would be most appropriate and preferable to one from another system, if such a model is
26 available. The Durand model (SJC-46, Durand, 2008, [D.8 DRAFT 023532](#)) is Delta specific but
27 it is a conceptual model, not numerical, so cannot be used to estimate impacts for a
28 CEQA/NEPA analysis.

29 The Department has previously been made aware of these limitations and responded by
30 explaining the limitations of the modeling approaches; specifically, how integrating across
31 different models limits choice of alternative models for specific constituents (such as
32 *Microcystis*) or ability to change the time step of specific models. The Department's response to
33 Stockton cites a report on the Effects of WaterFix on Harmful Algal Blooms in the Delta (DWR-
34 653, [D.8 DRAFT 022805](#)) to substantiate that the “small differences in water temperature
35 between the WaterFix and No Action Alternative (NAA) scenarios modeled for various locations
36 across the Delta would not substantially increase the frequency or magnitude of cyanobacteria
37 blooms within the Delta.” ([Department October 23, 2018 Submittal -Stockton](#), p. 13) They further
38 cite the report to substantiate that “the WaterFix will not create hydrodynamic conditions that
39 would be substantially more conducive to the occurrence of *Microcystis* blooms in the Delta
40 relative to the NAA.” (*Ibid.*) The Council's review of the report confirmed that there is no Delta-
41 specific model for modeling *Microcystis* (DWR-653, [D.8 DRAFT 022805](#)). The Department also
42 cites Master Response 14 of the Final EIR/EIS ([D.1 DRAFT 000188](#), pp.1-135 through 1-137),
43 which discusses additional analyses performed in response to comments on *Microcystis*. Based
44 on this information in the record, the Council finds that Stockton and San Joaquin County have
45 not demonstrated that the Department failed to use best available science to evaluate
46 *Microcystis* blooms and HAB formation, and therefore, their appeals as to this issue are *denied*.

47

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ii. Salinity effects on agriculture (San Joaquin County)

San Joaquin County alleges inconsistency with the Relevance and Inclusiveness criteria of Appendix 1A of the Delta Plan, stating the Department ignored the effects of salinity increases on agricultural resources and cites existing methodologies that it asserts could have been used. (LAND-78, Leinfelder-Miles Testimony, [D.8 DRAFT 023725](#), pp. 2-3; LAND-79, Leinfelder-Miles Testimony, 2016, [D.8 DRAFT 023726](#)). San Joaquin County also claims that the Department did not consider (from an agronomist or soil expert perspective) the detrimental impacts of soil salinity on agricultural yields. ([San Joaquin County Appeal Letter](#), p. 34.) The Relevance criterion (Delta Plan, Appendix 1A, Table 1A-1) requires that scientific information used should be germane to the Delta ecosystem and/or biological and physical components (and/or processes) affected by the proposed decisions. The Inclusiveness criterion (Delta Plan, Appendix 1A, Table 1A-1) requires that scientific information used shall incorporate a thorough review of relevant information and analyses across relevant disciplines.

The cited testimony of Leinfelder-Miles (LAND-79, Leinfelder-Miles Testimony, 2016, [D.8 DRAFT 023726](#)) argues that the salinity of surface waterways is not an accurate representation of what the crop actually uses, nor are monthly averages an accurate representation (LAND-78, [D.8 DRAFT 023725](#), p.3-4). Therefore, Leinfelder-Miles asserts, the analysis is inadequate to conclude no injury to Delta agricultural water users. On p. 2-3 of the testimony, Leinfelder-Miles provided an alternate method of analyzing potential salinity impacts to soil salinity and crop yield. The methods involve analyzing effects to individual water right holders (sampling of irrigation water focused on sensitive, widely planted, and/or high-value crops). The Department cites the rebuttal testimony of Joel Kimmelshue ([D.8 DRAFT 022954](#)), which concludes that the methodologies proposed have not yet meet the standards of peer-reviewed science and therefore cannot be evaluated as more appropriate than the methods employed by the Department. ([Department October 15, 2018 Letter](#), pp. 41-42.)

The Department is required to comply with State Water Board Revised Decision 1641 (D-1641) for the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Bay-Delta Estuary. These standards are in place to protect “beneficial uses,” which includes agriculture (SWRCB and US EPA, 2000, [D.8 DRAFT 001391](#)). The Department also states that economic effects on agricultural production are beyond the scope of environmental analysis: “To the extent that these potential effects are solely economic effects on agricultural production, they do not fall within the customary examination of impacts to the environment that is the primary purpose of the Final EIR/EIS. To the extent that there are physical changes to land and waters associated with seepage and water quality, they are examined in the Final EIR/EIS. But effects such as seepage and reduced water quality are either addressed as impacts in other resource sections or considered to be temporary or transient effects, and their economic cost identified. These effects do not appear to impair the long-term quality or capability of Delta soils, and therefore they are not environmental impacts to the Important Farmland resources. Impact AG-2 in Chapter 14, Agricultural Resources, addresses seepage and water quality.” (Final EIR/EIS, Response to Comments, Vol II Part 1, [D.1 DRAFT 000188](#), p. 1-166.)

The Supplemental Notice includes a question to the Department asking what specific substantial evidence in the record shows that the Department used best available science to analyze potential impacts to agriculture related to salinity. The Department responded that “[t]he Bay-Delta Water Quality Control Plan objectives for Electrical Conductivity were created for the protection of agricultural beneficial uses and therefore the water quality assessment relied in part on evaluation of compliance with those objectives for making impact determinations. Those objectives were developed with consideration of salinity effects on soils and agriculture productivity.” Salinity compliance standards fall within the jurisdiction of the SWRCB’s Bay Delta

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1 Water Quality Control Plan and ER P1 (23 CCR Section 5005) states that flow objectives
2 therein shall be used to determine consistency with the Delta Plan. The Council finds it would be
3 inappropriate to hold the Department to a standard other than D-1641 for evaluating salinity
4 standards. Therefore, San Joaquin County has not raised a valid appealable issue regarding the
5 Department's consistency with the best available science policy as it relates to salinity effects on
6 agriculture, and we *deny* its appeal as to this issue.

7 **iii. Impacts to Greater Sandhill Cranes (San Joaquin County)**

8 San Joaquin County states the Department's analysis of impacts and mitigation
9 measures for Greater Sandhill Cranes is under-inclusive and did not use best available science.
10 ([San Joaquin County Appeal Letter](#), p. 35.) San Joaquin County cites testimony from the
11 SWRCB hearing that critiques the assumptions used in the Final EIR/EIS about powerline
12 impacts and effectiveness of flight diverters. (*Ibid.*) The applicable best available science
13 criterion for this issue is Inclusiveness (Delta Plan, Appendix 1A, Table 1A-1), which requires
14 that scientific information used shall incorporate a thorough review of relevant information and
15 analyses across relevant disciplines. In the Final EIR/EIS, the Department explains that the
16 California WaterFix project's avoidance and minimization measures, which includes
17 performance standards, ensures no take of Greater Sandhill Cranes, as defined by Section 86
18 of the California Fish and Game Code, and the minimization of noise and other construction
19 impacts. (Final EIR/EIS, Master Response 17, Volume II., [D.1 DRAFT 000188](#), pp. 1-148 - 1-
20 149.) Appendix 3B of the Final EIR/EIS provides more detailed information about the
21 performance standard for bird strike hazards, stating "[t]he most effective and appropriate
22 diverter for minimizing strikes with Greater Sandhill Crane on the market according to best
23 available science will be selected." (Final EIR/EIS Vol I, Appendix 3B, [D.1 DRAFT 000023](#), p.
24 3B-136.) It further states "the best available science will be used to estimate bird strike reduction
25 associated with powerline diverters installed on existing lines in highest risk zones for the
26 species and to design and implement roost site surveys." (*Id.* at p. 3B-137.) In its supplemental
27 submission, the Department explains that the analysis of potential impacts to Greater Sandhill
28 Cranes in the Final EIR/EIS is based on the initial BDCP analysis developed in cooperation with
29 California Department of Fish and Wildlife, U.S. Fish and Wildlife and Friends of Stone Lakes,
30 and was based on a highly conservative analysis of powerline collision risk developed by Dr.
31 Ivey. ([Department October 23, 2018 Submittal- San Joaquin County](#) p. 67.) The Department
32 cites the testimony of Dr. Christopher Earle at the SWRCB hearing to rebut the testimony relied
33 upon by San Joaquin County regarding risk of transmission line collision and effectiveness of
34 diverters. (*Id.* at p. 67-68; [X.2 DRAFT 000170](#), p. 15-19.) Based on this information in the
35 record, the Council finds that San Joaquin County has not demonstrated that the Department
36 failed to use best available science to evaluate impacts to Greater Sandhill Cranes, and
37 therefore, its appeal as to this issue is *denied*.

38
39 San Joaquin County also alleges the Department used an inappropriate noise threshold
40 for calculating construction noise impacts, citing the testimony of Dr. Fraser Shilling at the
41 SWRCB hearing and a 2007 study cited in his testimony (Dooling and Popper, 2007). (San
42 Joaquin County Appeal Letter, p. 35.) San Joaquin County does not cite the relevant criterion
43 for this issue, and the Council finds this issue is more related to the effectiveness of the
44 Department's mitigation measures under GP 1(b)(2) than an issue related to best available
45 science under GP 1(b)(1). However, San Joaquin County did not raise this issue under that
46 policy. Nonetheless, the 2007 study relied upon by Dr. Shilling does not support San Joaquin
47 County's claims. The study appears to focus on traffic and road construction noise impacts to
48 bird communication more generally, and is not evidence of best available science related to
49 Greater Sandhill Cranes, and the Department's use of 60 dB is within the guideline range of 50-

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1 60dB cited in the study. Therefore, San Joaquin County has not raised a valid appealable issue
2 regarding the Department's consistency with the best available science policy, and we *deny* its
3 appeal as to this issue.

4 **iv. Air quality modeling approach (San Joaquin County)**

5 San Joaquin County states that the Department used an "incorrect modeling approach"
6 that underestimates air quality impacts because of failure to consider interbasin transport. It
7 cites testimony from the SWRCB hearing submitted with its letter that is not yet in the record
8 (ECOS-11, Lamare Testimony, p. 4-5). ([San Joaquin County Appeal Letter](#), p., 36.) San Joaquin
9 County does not cite the specific best available science criterion it asserts the Department is not
10 consistent with for its air quality modeling, and the Council cannot discern which criteria is
11 implicated. Analysis of interbasin transport is not a required practice in NEPA/CEQA analyses,
12 and not part of the standard methodology used for such analyses. The Department's response
13 to San Joaquin County discusses how the air district thresholds and mitigation requirements
14 apply, and point to the application of that guidance in the Final EIR/EIS. ([Department October
15 23, 2018 Submittal- San Joaquin County](#), p. 68.) San Joaquin County has not provided
16 evidence that the Department deviated from the best practices for air quality modeling.
17 Therefore, San Joaquin County has not raised a valid appealable issue regarding the
18 Department's consistency with the best available science policy as it relates to air quality
19 modeling, and we *deny* its appeal as to this issue.

20 **e. Addressing the 2010 Flow Criteria Report (SCDA, FOR)**

21 SCDA, under its best available science appeal section, states that California WaterFix
22 runs counter to the 2010 SWRCB Flow Criteria Report, the Public Trust Doctrine, and the Delta
23 Reform Act's Public Trust requirements. ([SCDA Appeal Form](#), p. 5.) Similarly, FOR states the
24 Department's Certification fails to address the 2010 SWRCB Flow Criteria Report. ([FOR Appeal
25 Letter](#), p. 6.)

26 SCDA and FOR do not cite the specific best available science criterion they assert the
27 Department is not consistent with for this issue related to 2010 Flow Criteria Report, and it is not
28 clear to the Council how this issue is relevant to G P1(b)(3). The 2010 Flow Criteria Report
29 "suggests the flows that would be needed in the Delta ecosystem if fishery protection was the
30 sole purpose for which its waters were put to beneficial use." (2010 Flow Criteria Report,
31 [D.8 DRAFT 018632](#), p. "Note to Readers".) In response to SCDA and FOR's appeals, the
32 Department explains that, while the criteria are intended to inform the Delta Plan, the BDCP,
33 and the WQCP, it does have any binding regulatory effect. ([Department October 23, 2018
34 Submittal - SCDA](#), pp. 9-10.) Therefore, SCDA and FOR have not raised an appealable issue
35 regarding the Department's consistency with the best available science policy related to the
36 2010 SWRCB Flow Criteria Report, and we *deny* their appeals as to this issue.

37 **E. Policy G P1(b)(4) (23 CCR Section 5002(b)(4)): Adaptive Management**

38
39 The Department certifies that California WaterFix is consistent with G P1(b)(4). Five
40 Appellants – NCRA, SCDA, FOR, San Joaquin County, and Sacramento County – raise
41 substantive arguments that it is not. For the reasons discussed below, the Council finds that
42 Appellants have failed to demonstrate that the Department's Certification is inconsistent with G
43 P1(b)(4), and we *deny* the appeals as to this policy.

44

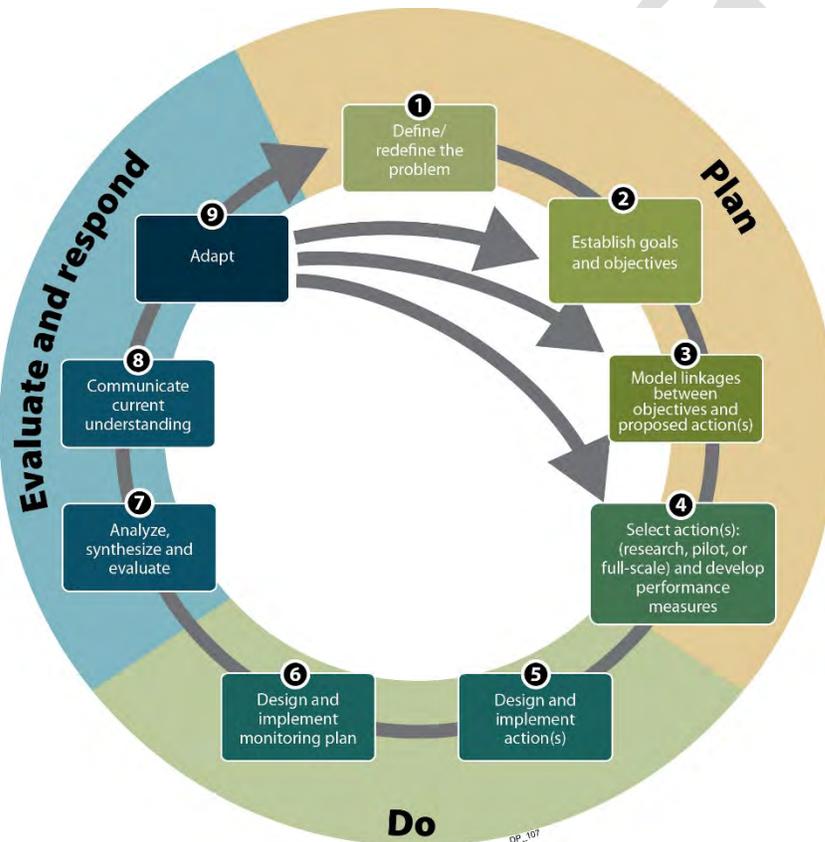
45

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1. Policy Requirement

G P1(b)(4) requires that ecosystem restoration and water management covered actions include “adequate provisions, appropriate to the scope of the covered action...,” which includes both (a) an adaptive management plan that describes the approach to be taken consistent with the framework in Appendix 1B and (b) “documentation of access to adequate resources and delineated authority...” to implement the proposed adaptive management process.

Delta Plan Appendix 1B, referenced in Policy G P1(b)(4), describes the three-phase, nine-step Adaptive Management Framework used by the Council for reviewing proposed covered actions involving ecosystem restoration and water management. Figure 1B-1 (p. 1B-2) shows a graphic depiction of the framework. Proposed ecosystem and water management covered actions should include an adaptive management plan that considers all nine steps of the framework, but the steps need not be rigidly included or implemented in the order described in the framework. (Appendix 1 B, p. 1B-1.)



14
15 Figure 1B-1. A Nine-step Adaptive Management Framework. (Delta Plan Appendix 1B, p. 1B-2.)

2. Department's Certification

17 The Department states the Project is consistent with G P1(b)(4). The Department
18 submitted as its detailed findings a proposed “Project-wide Adaptive Management Program”
19 (PAMP) describing the approach to be taken, which the Department states is consistent with the
20 adaptive management framework in Appendix 1B and documents access to adequate
21 resources and delineated authority. (California WaterFix Project-Wide Adaptive Management
22 Program (Certification AM, [X.6 000010](#).)

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1 The Department documents its findings for both (a) the adaptive management plan
2 approach, and (b) adequate resources and delineated authority in the PAMP as follows:

3 a. Adaptive Management Plan Approach

4 The PAMP provides a summary of adaptive management, which includes the Delta
5 Reform Act definition and attributes of adaptive management drawn from scientific literature
6 cited in the “Supporting Documents” section of the PAMP. Among those attributes is reducing
7 uncertainty. (Certification AM, p. 1-5.) The Department describes the key area of uncertainty
8 addressed by the PAMP as follows: “Considerable scientific uncertainty exists regarding the
9 adequacy of existing regulatory standards and processes, and the effectiveness of prescribed
10 measures.” To address this uncertainty, the Department proposes the PAMP as a robust
11 program of collaborative science, monitoring, and adaptive management. (Certification AM, p. 1-
12 5.)

13 The PAMP includes the “Adaptive Management Program for the California Water Fix
14 and Current Biological Opinions on the Coordinated Operations of the Central Valley and State
15 Water Projects” (BiOp AMP; [X.3 000269](#)). The BiOp AMP was developed in conjunction with
16 the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (USFWS)
17 Biological Opinions and California Department of Fish and Wildlife (CDFW) Incidental Take
18 Permit (ITP). The BiOp AMP was prepared by the “Five Agencies” (the Department,
19 Reclamation, CDFW, NMFS, and USFWS) concurrently with the Biological Opinions and the
20 CDFW ITP for Longfin Smelt ([X.3 000267](#)). In addition to the BiOp AMP, the PAMP includes
21 adaptive management to address uncertainties associated with implementation of mitigation
22 measures, environmental commitments, and avoidance and minimization measures (AMMs) of
23 the “California WaterFix Final EIR/EIS Mitigation Monitoring and Reporting Plan” (WaterFix
24 MMRP; [X.3 000268](#); Certification AM, p. 1-4).

25 The PAMP is divided into four phases (Plan, Assess, Integrate, Adapt), which the
26 Department states correspond with the Appendix 1B three-phase, nine-step framework as
27 follows:

28 California WaterFix Phase 1: The “Plan” phase corresponds to the following four steps of
29 *Delta Plan (DP) Phase 1 (Plan)*:

- 30 • Step 1: Define/redefine the problem
- 31 • Step 2: Establish goals and objectives
- 32 • Step 3: Model linkages between objectives and proposed action(s)
- 33 • Step 4: Select action(s): (research, pilot or full-scale) and develop performance
34 measures

35 (Certification AM, p. 3-1)

36
37 California WaterFix Phase 2: The “Assess” phase corresponds to the following two steps of
38 *DP Phase 2 (Do)*:

- 39 • Step 5: Design and implement actions
- 40 • Step 6: Design and implement monitoring plan

41 (Certification AM, pp. 3-1 – 3-2)

42
43 California WaterFix Phase 3: The “Integrate” phase corresponds to the following two steps
44 of *DP Phase 3 (Evaluate and respond)*:

- 45 • Step 7: Analyze, synthesize and evaluate
- 46 • Step 8: Communicate current understanding

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1 (Certification AM, p. 3-2)

2
3 California WaterFix Phase 4: The “Adapt” phase corresponds to the following final step of
4 *DP Phase 3 (Evaluate and respond)*:

- 5 • Step 9: Adapt

6 (Certification AM, p. 3-3)

7 8 **b. Documentation of Adequate Resources and Delineated Authority**

9 The PAMP describes decision-making under the BiOp AMP as follows:

10
11 “Under the BiOp adaptive management program, new information gained during
12 implementation will inform operational decisions within the ranges of criteria and
13 effects analyzed in applicable BiOps and CESA authorizations. The entities involved
14 commit to working through the collaborative process outlined in the Agreement for
15 Implementation of an Adaptive Management Program for Project Operations (MOA;
16 AMP pages 72-86) to reach consensus on operational decisions and other
17 management actions to the extent possible and to elevate any disputes over
18 decisions to appropriate levels of officials for each agency. Each agency retains
19 discretion to make decisions as appropriate within its authority after considering the
20 available information and taking into account the input of relevant groups described
21 in this document. If any operational decisions are not within the ranges of criteria and
22 effects analyzed in applicable BiOps or CESA authorizations, Reclamation will
23 reinstate formal consultation under ESA section 7 and implementing regulations (50
24 CFR 402.16), if necessary, and/or DWR will commence a permit amendment
25 process under California law, if necessary.” (Certification, AM, p. 4-1)

26
27 The PAMP describes decision-making under the PAMP as follows:

28
29 “The Department of Water Resources (DWR) entered into a Joint Exercise of Powers
30 Agreement with the Delta Conveyance Design and Construction Joint Powers
31 Authority (DCA), forming a partnership for the design and construction of California
32 WaterFix. The DCA is a public agency composed of local public water agencies who
33 are investing in California WaterFix. Through the [Delta Conveyance Office (DCO)],
34 the State of California will retain authority and oversight of WaterFix regulatory
35 obligations, environmental mitigation and quality assurance. The DCO will oversee
36 the work of the DCA. The DCO will be committed to transparency. The DCO will lead
37 implementation of this PAMP acknowledging that technical support from the DCA
38 may be necessary to develop the PAMP Annual Status Report and corresponding
39 Decision Memo.” (Certification, AM, p. 4-3)

40
41 For Funding, the PAMP states:

42
43 “Payment of the costs of constructing and operating the State Water Project,
44 including associated mitigation projects, is assured by DWR’s long term water
45 supply contracts and applicable state law. DWR is a party to a long-term water
46 supply contract with each of its 29 water supply customers, who are generally
47 referred to as ‘Contractors.’ These contracts are the foundation of the State Water
48 Project’s fiscal strength. The Department has not experienced payment
49 delinquencies or defaults by Contractors that have had a materially adverse effect

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1 on the operation or maintenance of the State Water Project, or the ability of the
2 Department to pay its obligations when due.” (Certification, AM, p. 5-1.)

3
4 “The proposed water conveyance facilities will be owned by the state. All
5 construction costs of the proposed project including the costs of mitigation and
6 monitoring activities described in the MMRP, USFWS and NMFS BiOps, CDFW
7 ITP, and other permits as applicable, will be paid by DWR and charged to
8 participating PWAs. DWR and/or one or more of the SWP contractors will likely
9 issue revenue bonds, as generally described above, to fund the portion of the
10 construction [and property acquisition] costs accruing to SWP contractors. The
11 contracts between DWR and the participating state water contractors will be
12 amended to provide for the payment debt service and ongoing operation and
13 maintenance costs, including all mitigation and monitoring costs incurred during
14 construction, operation, maintenance and monitoring associated with the project.
15 Funding for the long-term management and monitoring of the mitigation sites will be
16 paid by DWR and charged to the participating PWAs.

17
18 The participating PWAs will comply with the requirements of Water Code section
19 85089 with respect to the costs of the environmental review, planning, design,
20 construction, and mitigation as a condition precedent to the commencement of any
21 construction activities associated with the proposed project.” (Certification, AM, pp.
22 5-2 - 5-3.)

23
24 The Agreement for Implementation of an Adaptive Management Program for Project
25 Operations (MOA; BiOp AMP, [X.3 000269](#), pp. 72-86) identifies the Interagency Implementation
26 Coordination Group (IICG) as having “primary responsibility for support, coordination and
27 implementation of the [BiOp] Adaptive Management Program,” including identifying and
28 securing “needed infrastructure and resources to support scientific activities/monitoring.” The
29 MOA includes sections 5.4.1.1 Staff Resources and 7.9 Availability of Funds.

30 **3. Appeals**

31 Five Appellants challenged the Department’s Certification of Consistency with GP
32 1(b)(4): NCRA, SCDA, FOR, San Joaquin County, and Sacramento County.

33 Each of the issues raised in these appeals is briefly described below, with an analysis of
34 the issues related to consistency with GP 1(b)(4). The issues are organized under the two
35 primary components of the policy: (1) adaptive management plan approach consistent with
36 Appendix 1B and (2) adequate resources and delineated authority. The organization of the
37 issues is based on the Council’s interpretation of the Appellants’ claims where Appellants have
38 not stated which aspect of the policy their allegation relates to.

39 **a. Consistency with Adaptive Management Framework in Appendix 1B**

40 Several appeals raised issues that appear primarily related to the Department’s adaptive
41 management plan approach, which must be consistent with the framework in Appendix 1B.
42 Each of the issues is organized and addressed below by sub-issues and Appellant.

43

44

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1 i. Requirements for overall plan development

2 (a) SCDA

3 SCDA alleges the Department's adaptive management plan approach is inconsistent
4 with G P1(b)(4) because it is "only a promise to develop an effective adaptive management plan
5 at a future date," and that the plan "must be fully developed and reviewed prior to a finding of
6 consistency with the Act." ([SCDA Appeal Form](#), p. 6.) SCDA points to and incorporates its
7 comments on the 2015 Recirculated Draft EIR/Supplemental Draft EIS (RDEIR/SDEIS), its July
8 2014 comments on the Draft EIR/EIS, and all comments responded to in the Department's Final
9 EIR/EIS Master Response 33. (*Ibid.*)

10 SCDA does not state specifically with which aspects of G P1(b)(4) and the adaptive
11 management framework in Appendix 1B it alleges the Department's Certification is not
12 consistent. SCDA cites its and others' comments on older Bay Delta Conservation Plan (BDCP)
13 or WaterFix adaptive management plan materials, and does not address the PAMP submitted
14 by the Department in its Certification. Because SCDA does not address the components of the
15 Department's PAMP relative to the adaptive management framework in Appendix 1B, it fails to
16 demonstrate the Department's Certification is not supported by substantial evidence in the
17 record, and we *deny* SCDA's appeal on this issue.

18 (b) San Joaquin County

19 San Joaquin County alleges several issues related the Department's adaptive
20 management plan approach, including: the Department improperly started with a preferred
21 action before identifying the goals; its plan is insufficiently detailed by failing to show that it
22 would lead to substantive results or account for a prolonged construction phase; the plan too
23 narrowly focuses on only four listed species; and, it does not consider the possibility of
24 nonoperation of the project if certain events occur. ([San Joaquin County Appeal Letter](#), pp. 43-
25 44.) The appeal also alleges the plan lacks meaningful triggers, which is addressed below with
26 other appeals that raised a similar issue. As support for its allegations, San Joaquin County
27 relies on the testimony of Dr. Shilling and Mr. Stokely at the SWRCB hearing.

28 San Joaquin County does not specify which of the three-phases/nine-steps of the
29 Appendix 1B framework its allegations relate to. San Joaquin County cites the testimony of Dr.
30 Shilling for its assertion that the Department improperly started with a preferred action before
31 identifying the goals. Dr. Shilling's statement, however, appears unsubstantiated because it is
32 not supported by any facts or other evidence. Further, the G P1(b)(4) requires covered actions
33 to include an adaptive management plan that considers all nine steps of the Appendix 1B
34 framework, but the steps need not be rigidly included and implemented in the order described
35 "and should not be used as a means to prevent action, but rather as a tool to enhance decision
36 making." (Delta Plan Appendix 1B, p. 1B-1.) San Joaquin County also does not provide specific
37 examples, with citation to evidence in the record to support its claim that the Department's plan
38 is "insufficiently detailed" and wouldn't "lead to the substantive results required by the Delta
39 Plan." (San Joaquin County Appeal Letter, p. 43.)

40 As to the assertion that the Department's plan fails to account for the prolonged
41 construction phase, the PAMP addresses "implementation of mitigation measures,
42 environmental commitments, AMMs of the MMRP and permit conditions," and therefore, covers
43 the construction phase. (Certification AM, pp. 3-1 to 3-3.) The PAMP also addresses a broader
44 suite of issues, and not just the few listed species as Appellant alleges. (Certification AM,
45 Attachment 1.) Further G P1(b)(4) does not prescribe the range of management actions or

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1 responses to be part of an adaptive management plan, including scope of species addressed or
2 possibility of non-operation. Rather, project proponents are responsible for developing clear
3 goals and objectives that link to the problem statement and to make adaptive revisions during
4 the “Adapt” step when current understanding suggests doing so. (Appendix 1B.) Therefore, San
5 Joaquin County has failed to demonstrate that the Department’s Certification is not supported
6 by substantial evidence in the record, and we *deny* its appeal on this issue.

7 (c) Sacramento County

8 Sacramento County alleges the Department’s overall plan development was inadequate,
9 citing the Delta Independent Science Board (Delta ISB) 2015 review of the RDEIR/SDEIS (Delta
10 Independent Science Board 2015, [X.3 000131](#), pp.5-6). ([Sacramento County Appeal Letter](#),
11 p.3.) The 2015 Delta ISB Review, however, did not address the PAMP submitted by the
12 Department for its Certification. Sacramento County also points to the written testimony of
13 Thomas Stokely from the SWRCB hearing. In its supplemental submission, Sacramento County
14 cites specific pages of Thomas Stokely’s testimony to elaborate on its initial claim. (Sacramento
15 County October 14, 2018 Letter, pp. 7-8.) The Council’s review of that testimony, however, finds
16 that Thomas Stokely addresses only best practices for adaptive management more generally
17 based on his experience with the Trinity River Restoration Program’s Adaptive Environmental
18 Assessment and Management Program, and does not discuss the requirements of the
19 Appendix 1B framework, which the Council uses to assess consistency with G P1(b)(4).
20 Therefore, this testimony, and the allegations of Sacramento County related to adaptive
21 management more generally, fail to demonstrate that the Department’s Certification is not
22 supported by substantial evidence, and we *deny* its appeal on this issue.

23 b. Requirement for decision points, performance measures, or “triggers”

24 i. SCDA, San Joaquin County, Sacramento County

25 SCDA asserts the Department’s “Adaptive Management Plan”¹⁴ must contain a complete
26 suite of specific triggers for action and specific actions to be taken in response to each trigger.
27 (SCDA Appeal Form, p. 6.) It provides some specific examples of triggers and responses,
28 including salinity measurements at particular locations. (*Ibid.*) Similarly, San Joaquin County
29 asserts that the PAMP’s lack of enforceable triggers is inconsistent with the Delta Plan, citing
30 the testimony of Dr. Shilling at the SWRCB hearing. (San Joaquin County Appeal Letter, p. 44.)
31 Sacramento County asserts that the Department’s Final EIR does not meet Appendix 1B’s
32 requirement for performance measures because it relies on vague and undefined processes to
33 quantify and mitigate the project’s impacts. Sacramento County cites SWRCB July 2014
34 comments on the BDCP, BDCP DEIR/DEIS and Implementing Agreement ([D.1 DRAFT](#)
35 [000414](#)). (Sacramento County Appeal Letter, p. 3.)

36 Appendix 1B discusses the need to have clear objectives and to adapt in response to
37 new understanding and/or conditions. It also calls for “decision points” and “performance
38 measures.” (Appendix 1B, pp. 1B-1, 1B-3-4.) Appendix 1B states that “[p]erformance measures
39 must be designed to capture important trends and to address whether specific actions are
40 producing expected results.” (Appendix 1B, 1B-4.) Performance measures could include triggers
41 or thresholds, but Appendix 1B does not require triggers or legally enforceable actions in
42 response to a given measurement. Therefore, SCDA and San Joaquin County’s assertions that

¹⁴ SCDA uses the phrase “Adaptive Management Plan” in their appeal form and does not reference the PAMP or the BiOp AMP.

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1 the Department's adaptive management plan is inconsistent with G P1(b)(4) because it does not
2 include specific or enforceable triggers does not raise a valid appeal issue because the
3 Council's policy does not specifically require triggers or legally enforceable responses, and
4 Appellants have not explained how their assertion relates to what Appendix 1B does require.

5 Appendix 1B does call for performance measures, as Sacramento County notes.
6 However, G P1(b)(4)(A) requires an "adaptive management plan that describes the *approach*
7 [emphasis added] to be taken consistent with the adaptive management framework in Appendix
8 1B." The Department identifies the approach it will take on p. 4-2 of the PAMP, for example,
9 describing the responsibilities of the Interagency Implementation and Coordination Group:
10 "Establish mechanisms for developing and implementing adaptive management changes (e.g.,
11 identifying performance measures/triggers to assess progress/outcomes, providing venues for
12 synthesis and evaluation of available information, peer review, and developing
13 recommendations in the face of new/refined understanding)." Sacramento County fails to show
14 that the Department's adaptive management plan lacks an approach that includes development
15 of performance measures as required by Appendix 1B. Sacramento County states, but with no
16 citation to record evidence, that the Department's Final EIR/EIS relies on a vague and
17 undefined process. Sacramento County also cites 2014 SWRCB comments on the BDCP,
18 which are not relevant to the Department's PAMP submitted for California WaterFix. Therefore,
19 Appellants have failed to demonstrate that the Department's Certification is not supported by
20 substantial evidence, and we *deny* their appeals on this issue.

21 **c. Requirement for Documentation of Adequate Resources and Delineated** 22 **Authority**

23 **i. Requirement for documentation of adequate resources**

24 **(a) NCRA and FOR**

25 NCRA alleges that federal agencies, including NMFS, USFWS, and Reclamation, "have
26 testified about their significantly limited resources in appearances before the SWRCB [at the
27 SWRCB hearing]," and that "it is unclear whether federal policies will support the goals of the
28 Delta Reform Act. Therefore, any real time management that requires federal analysis,
29 personnel or infrastructure cannot be depended upon for real time decisionmaking." ([NCRA](#)
30 [Appeal Letter](#), p. 5-6.) In its supplemental submission, NCRA cites as supporting evidence
31 March 15, 2017 written comments from Donald Ratliff, USFWS, and January 3, 2017 testimony
32 from Donald Ratliff and Jeff McLain, NMFS, to the SWRCB regarding Amendment to the Water
33 Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary: San
34 Joaquin River Flows and Southern Delta Water Quality and on the Adequacy of the Supporting
35 Recirculated Draft Substitute Environmental Document (SED)¹⁵. (NCRA October 15, 2018
36 Letter, p. 4.) Similarly, FOR states the Department's Plan lacks adequate provisions to ensure
37 continued implementation because there is nothing binding Reclamation to comply with the plan
38 and the federal government is "now claiming the authority to maximize water export deliveries."
39 ([FOR Appeal Letter](#), p. 6.) In its supplemental materials, FOR further states that because
40 Reclamation did not sign the Consistency determination provided to the Council, nor has it
41 "submitted to the jurisdiction" of the Council, "there is no basis to assume or conclude the
42 Bureau will comply with adaptive management." (FOR October 15, 2018 Letter, p. 6.)

¹⁵ These are comments presented to SWRCB as part of its public process on a different project and there is no evidence that these comments were considered by the Department.

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1 The testimony relied upon by NCRA is not in the record and is not about WaterFix or the
2 Department's PAMP. Rather it is about the SWRCB Bay-Delta WQCP update for San Joaquin
3 River Flows and Southern Delta Water Quality SED. NCRA fails to show how that testimony is
4 relevant to the PAMP or how it demonstrates the PAMP is inconsistent with G P1(b)(4).

5 As to FOR's allegations, federal agencies are not required to be party to any certification
6 of consistency, and the Council has no authority over federal agencies, so there is no
7 inconsistency issue related to Reclamation not signing the Department's Certification or it not
8 being subject to the Council's jurisdiction. Nonetheless, in its supplemental submissions, the
9 Department states that Reclamation has made commitments to implement adaptive
10 management. (Department October 15, 2018 Letter, p. 44; Department October 23, 2018
11 Submittal-FOR, pp.8-9.) The Department states that adaptive management is required pursuant
12 to the terms and conditions of the Biological Opinions (BiOps) issued by NMFS and USFWS to
13 Reclamation as the lead federal action agency for Section 7 of the Endangered Species Act
14 ([X.1 DRAFT 000001](#) pp. 1192-1194; [X.1 DRAFT 000002](#) pp. 13-14); failure to implement the
15 terms and conditions would be ground for revoking the BiOp authorization for incidental take.
16 (*Ibid.*) The Department explains, "that to utilize these authorizations DWR and Reclamation
17 have no alternative but to comply with the terms and conditions of the BiOps, including those
18 addressing adaptive management, or risk revocation or prosecution for unauthorized incidental
19 take." (Department October 23, 2018 Submittal-FOR, pp.8-9.)

20 Therefore, NCRA and FOR have failed to demonstrate the Department's Certification is
21 not supported by substantial evidence, and we *deny* their appeals on this issue.

22 (b) San Joaquin County

23 San Joaquin County states the PAMP fails to note there are no mandatory funding
24 requirements, fails to include binding commitments to funding, and does not address cost
25 allocation. (San Joaquin County Appeal Letter, p. 44.) San Joaquin County cites the testimony
26 of Dr. Shilling and Mr. Stokely at the SWRCB hearing.

27 G P1(b)(4)(B) requires project proponents to document access to "adequate resources,"
28 but it does not require mandatory funding requirements or binding commitments to funding. The
29 PAMP states "[a]ll construction costs of the proposed project including the costs of mitigation
30 and monitoring activities described in the MMRP, USFWS and NMFS BiOps, CDFW ITP, and
31 other permits as applicable, will be paid by DWR and charged to participating PWAs [Public
32 Water Agencies]." (Certification AM, p. 5-2.) The PAMP further states "[f]unding for the long-
33 term management and monitoring of the mitigation sites will be paid by DWR and charged to the
34 participating PWAs," and "participating PWAs will comply with the requirements of Water Code
35 section 85089 with respect to the costs of the environmental review, planning, design,
36 construction, and mitigation as a condition precedent to the commencement of any construction
37 activities associated with the proposed project." (Certification AM, p. 5-3.) In its supplemental
38 submission, the Department states that adaptive management for fish is required pursuant to
39 the terms and conditions of the BiOps issued by NMFS ([X.1 DRAFT 000001](#), p. 1192-1194) and
40 USFWS ([X.1 DRAFT 000002](#), p. 13-14), as well as by CDFW for the incidental take permit ([X.1](#)
41 [DRAFT 000003](#), p. 1, 175-176, 225-227), which creates a requirement for providing the needed
42 funding. (Department October 15, 2018 Letter, p. 44.) Therefore, San Joaquin County has failed
43 to demonstrate the Department's Certification is not supported by substantial evidence, and we
44 *deny* its appeal as to this issue.

45

46

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1 ii. **Requirement for documentation of delineated authority**

2 **(a) NCRA**

3 NCRA states that the Department’s adaptive management plan does not further the
4 coequal goal of protecting and enhancing the Delta ecosystem because “any adaptive
5 management that relies upon a super majority or consensus of multiple stakeholders, including
6 stakeholders with competing and conflicting priorities will be left unable to approve vital
7 decisions to protect vulnerable species in real time.” (NCRA Appeal Letter, p. 6.) It is unclear to
8 which group or groups NCRA is referring to, and NCRA provides no supporting evidence or
9 further explanation to substantiate its claim. Therefore, NCRA fails to raise a valid appeal issue
10 related to G P1(b)(4), and we *deny* its appeal as to this issue.

11 **(b) San Joaquin County**

12 San Joaquin County states the PAMP conflicts with the coequal goals because it
13 excludes community stakeholders and responsible agencies from having a role in the
14 management process and fails to establish a cohesive structure with its five controlling
15 agencies. (San Joaquin County Appeal Letter, p. 45 [generally citing the testimony of Dr.
16 Shilling and Mr. Stokely at the SWRCB hearing].)

17 The Council’s Adaptive Management Framework states “[d]ecisions made within the
18 adaptive management process for ecosystem restoration and water management actions
19 should be made by decision makers for the entity responsible for implementing adaptive
20 management.” (Appendix 1B, p. 1B-6.) It also states, “[g]overnance for adaptive management
21 should provide a decision-making structure that fosters communication among scientific experts,
22 independent scientific reviewers, the relevant decision making authorities (e.g., state and
23 federal fisheries agencies on issues related to aquatic ecosystem restoration) and a balanced
24 approach to the involvement of interested stakeholders.” (Appendix 1B, p. 1B-1.) The testimony
25 of Mr. Stokely and Dr. Shilling address only the BiOp AMP and not the entire PAMP that
26 supports the Department’s Certification. Further, the testimony of Mr. Stokely discusses
27 observations related to Trinity River and does not directly support San Joaquin County’s
28 allegations related to G P1(b)(4) and the Appendix 1B framework requirements. Further, San
29 Joaquin County’s allegations are not supported by specific examples or citation to specific
30 failures, and therefore, the Council cannot evaluate the potential validity of this issue. Therefore,
31 the Council finds San Joaquin County has not raised a valid appealable issue regarding the
32 Department’s consistency with G P1(b)(4)(B), and we *deny* its appeal as to this issue.

34 **F. Policy WR P1 (23 CCR Section 5003): Reduce Reliance on the Delta Through** 35 **Improved Regional Water Self Reliance**

36
37 The Department certifies that California WaterFix is consistent with WR P1, Reduce
38 Reliance on the Delta through Improved Regional Water Self-Reliance (“WR P1”). Seven
39 Appellants – NCRA, SCDA, FOR, Stockton, San Joaquin County, CDWA, and Sacramento
40 County – raise substantive arguments that it is not. For the reasons discussed below, the
41 Council finds that the Appellants have shown that the Department’s Certification of Consistency
42 with WR P1 is not supported by substantial evidence.

43 **1. Applicability of WR P1 to a Change in Point of Diversion**

44 The Department certifies that “WR P1 can be interpreted as applying only to a new water
45 export, water transfer, or in-Delta water use projects that qualify as covered actions and not to a

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1 change in a point of diversion with no expansion of the water right associated with the total
2 existing export.” (Certification, p. 5.) The Department further contends that it is not applying for
3 new or expanded water rights for California WaterFix but is merely “seeking an amendment to
4 its existing water rights to add the three new points of diversion.” (*Ibid.*) Consequently, it
5 concludes, WR P1 should not apply to the project.

6 Multiple Appellants dispute this interpretation. (NCRA Appeal Letter, p. 6; San Joaquin
7 County Appeal Letter, WR-P1 p. 1; Stockton Appeal Letter, p. 12; Sacramento County Appeal
8 Letter, p. 6.) These Appellants argue, in short, that interpreting WR P1 in the manner put
9 forward by the Department would not reduce the current reliance of water suppliers on the
10 Delta. (*Ibid.*) Based upon the plain meaning, the statutory context, and the regulatory history,
11 we agree with these Appellants that WR P1 applies to California WaterFix.

12 a. Plain Meaning of WR P1

13 Whether WR P1 would apply to a change in point of diversion raises a question of
14 regulatory interpretation. In answering it, we are guided by the same standards that a court
15 would apply when interpreting a statute. (See, e.g., *Consumer Cause, Inc., v. Weider Nutrition*
16 *Int'l, Inc.* (2001) 92 Cal.App.4th 363, 368.)

17 When a court construes a statute, it must begin by considering the plain meaning of the
18 statutory language. (See *California School Employees Assn. v. Governing Bd.* (1994) 8 Cal.4th
19 333, 338 [observing that the legislature’s chosen language is the most reliable indicator of its
20 intent because “it is the language of the statute itself that has successfully braved the legislative
21 gauntlet”].) Thus, by extension, in construing WR P1, we must begin by considering the plain
22 meaning of the regulatory language.

23 WR P1, subdivision (a), provides that “[w]ater shall not be exported from, transferred
24 through, or used in the Delta” if three factors – set forth in subdivisions (a)(1), (a)(2), and (a)(3)
25 – apply. Subdivision (b) further clarifies: “For purposes of Water Code section 85057.5(a)(3)
26 and section 5001(j)(1)(E) of this Chapter, this policy covers a proposed action to export water
27 from, transfer water through, or use water in the Delta.”

28 Nothing in the express language of subdivisions (a) or (b) suggests that the terms
29 “export,” “transfer” or “use” should be limited to a new or expanded water right. The plain
30 meaning of those terms would encompass new points of diversion and new infrastructure
31 projects such as California WaterFix. (See *Di-Campli-Mintz v. County of Santa Clara* (2012) 55
32 Cal.4th 983, 992 [“A court may not, under the guise of construction, rewrite the law or give the
33 words an effect different from the plain and direct import of the terms used”].)

34 b. Context of WR P1

35 To the extent that WR P1, subdivision (a) is ambiguous, we may look to its statutory and
36 regulatory context. (See *Coalition of Concerned Communities, Inc. v. City of Los Angeles*
37 (2004) 34 Cal.4th 733, 737.) The Delta Reform Act directs the Council to develop a Delta Plan
38 “that furthers the coequal goals.” (Wat. Code, § 85300, subd. (a).) It declares that “existing
39 Delta policies are not sustainable.” (Wat. Code, § 85001, subd. (a).) It goes on to declare a
40 new policy: “reduced reliance.” (Wat. Code, § 85021.) Moreover, the Legislature created the
41 Council so that it would have “authority” to “promote statewide water conservation, water use
42 efficiency, and sustainable water use.” (Wat. Code, § 85020, subd. (d) and (h).) Thus, the
43 Legislature expected that the Council would adopt regulations affecting any water export that fit

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1 the criteria for a covered action, regardless of whether that export were connected with a water
2 right existing at the time it enacted the Delta Reform Act.

3 i. Regulatory History of WR P1

4 To the extent WR P1 remains ambiguous, we may look to the history of the regulation.
5 (See section VI.A.3. of this Determination.)

6 The Initial Statement of Reasons filed with the Office of Administrative Law on behalf of
7 the Delta Plan regulations states that WR P1 is aimed at reducing reliance on the Delta and
8 improving regional self-reliance “by requiring a *significant* reduction in the amount of water used,
9 or in the percentage of water used, from the Delta Watershed.” (Initial Statement of Reasons, p.
10 4 [emphasis added].) Such a “significant” reduction could not be achieved if the phrase “new
11 water export, water transfer, or in-Delta water use projects” in WR P1 were interpreted to apply
12 only to new or expanded water rights. (Compare WR P1, subd. (a), and Certification, p. 5.)

13 2. Consistency with WR P1

14 WR P1, subdivision (a), states that “water shall not be exported from, transferred
15 through, or used in the Delta” if three factors apply:

- 16 (1) One or more water suppliers that would receive water as a result of the
17 export, transfer, or use have failed to adequately contribute to reduced
18 reliance on the Delta and improved regional self-reliance consistent with all
19 of the requirements listed in paragraph (1) of subsection (c);
20
21 (2) That failure has significantly caused the need for the export, transfer, or use;
22 and
23
24 (3) The export, transfer, or use would have a significant adverse environmental
25 impact in the Delta.
26

27 As the Department explains: “In other words, if one or more of these three conditions are not
28 applicable, the project is consistent with WR P1 because the prohibition in subdivision (a) would
29 not apply.” (Certification, p. 5.)
30

31 a. Compliance with WR P1, subdivision (a)(1)

32 In considering the applicability of subdivision (a)(1) to California WaterFix, we address
33 the following issues raised by the Department and Appellants: (i) the relationship between
34 subdivisions (a)(1) and (c)(1); the water suppliers that must comply with subdivision (c)(1); (iii)
35 the degree of compliance required; and (iv) infeasibility as a justification for noncompliance.¹⁶

36 i. Relationship Between Subdivisions (a)(1) and (c)(1)

37 For WR P1, subdivision (a)(1) to apply, “[o]ne or more water suppliers that would receive
38 water as a result of the export, transfer, or use must have failed to adequately contribute to

¹⁶ For a fuller discussion of the parties’ views, please see: Certification of Consistency: WR P1; Certification of Consistency, p. 5-7; October 15, 2018, Written Statement, pp. 49-59; NCRA Letter, pp. 5-9; SCDA Appeal Form, p. 7, SCDA Opening Brief, pp. 2-9, 34-38; FOR, pp. 6-8; Stockton Letter, pp. 12-14; San Joaquin County, pp. 50-52; CDWA pp. 8-13; and Sacramento County pp. 4-7.)

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1 reduced reliance on the Delta and improved regional self-reliance consistent with all of the
2 requirements listed in paragraph (1) of subsection (c).” Paragraph (1) of subsection (c), in turn,
3 states:

4 Water suppliers that have done all of the following are contributing to reduced
5 reliance on the Delta and improved regional self-reliance are therefore consistent
6 with this policy:

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

11
12 (B) Identified, evaluated, and commenced implementation, consistent with the
13 implementation schedule set forth in the Plan, of all programs and projects
14 included in the Plan that are locally cost effective and technically feasible
15 which reduce reliance on the Delta; and

16
17 (C) Included in the Plan, commencing in 2015, the expected outcome for
18 measurable reduction in Delta reliance and improvement in regional self-
19 reliance. The expected outcome for measurable reduction in Delta reliance
20 and improvement in regional self-reliance shall be reported in the Plan as
21 the reduction in the amount of water used, or in the percentage of water
22 used, from the Delta watershed. For the purposes of reporting, water
23 efficiency is considered a new source of water supply, consistent with Water
24 Code section 1011(a).

25
26 The Department states that “the plain language of the provision does not prescribe that
27 including a separate Reduced Reliance element in 2015 UWMPs or AWMPs is the only way to
28 demonstrate reduced reliance.” (Department October 23, 2018, Submittal SCDA, pp. 11-12, no.
29 8.) Inherent in this statement are two contentions – first, that subdivision (a)(1) requires
30 compliance with subdivision (c)(1), and second, that this compliance must take the form of a
31 “Reduced Reliance element.” (See also WR P1 Attachment, p. 3-50 [“WR P1(c)(1) provides
32 *one way* for water suppliers to demonstrate reduced reliance, but as state[d] in the policy, this is
33 not the exclusive means to do so”] [emphasis added].)

34 35 (a) Required Information

36
37 SCDA argues that (c)(1)(A), (c)(1)(B), and (c)(1)(C) are “three core compliance
38 requirements in WR P1.” (SCDA Opening Brief, p. 5.) We agree. By its terms, subdivision
39 (a)(1) applies if “[o]ne or more water suppliers that would receive water as a result of the export,
40 transfer, or use have failed to adequately contribute to reduced reliance on the Delta and
41 improved regional self-reliance *consistent with all of the requirements listed in paragraph (1) of*
42 *subsection (c).*” (Emphasis added.) We find that this language mandates that a certification of
43 consistency must comply with the reduced reliance requirement in subdivision (a)(1) by
44 satisfying subdivision (c)(1). It does not provide any alternative pathway for demonstrating
45 reduced reliance. To interpret it as providing such a pathway would leave the word “all” out of
46 the subdivision and would effectively rewrite the regulation.

47 To the extent that the text of the regulation leaves any doubt, however, SCDA quotes
48 extensively from Delta Plan Appendix G, which it characterizes as “the Council’s longstanding

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1 interpretation of its own regulation.” (SCDA Opening Brief, p. 6 [quoting Delta Plan, Appendix
2 G, p. G-4].) As discussed above, we agree that the narrative Delta Plan reflects our
3 understanding of the implementing regulation. And as further discussed above, we submitted
4 the full Delta Plan to the Office of Administrative Law as part of the rulemaking package for the
5 Delta Plan regulations. Thus, we may properly consult Delta Plan Appendix G when interpreting
6 our intention in adopting WR P1.

7 Appendix G, as SCDA notes, leaves “no doubt that core compliance requirements (A),
8 (B) & (C) must be achieved within the Water Management Plan of each water supplier.” (SCDA
9 Opening Brief, p. 6.) It explains that water suppliers “must” have current and compliant water
10 management plans, “must” have evaluated in those plans feasible programs to reduce reliance,
11 and “must” have reported on the expected outcomes of those programs. (*Id.*, p. 5 [quoting Delta
12 Plan Appendix G, p. G-4].) And in describing how WR P1 would apply to a proposed water
13 transfer, it further explains that the water suppliers that would receive water as a result of the
14 water transfer would have to satisfy these “three compliance requirements.” (*Id.*, p. 6 [quoting
15 Delta Plan Appendix G, p. G-3].)

16 (b) Reduced Reliance Element

17 We agree with the Department that the text of WR P1 does not refer to a reduced
18 reliance “element” and that the regulation does not require an “element.” (See WR P1, subd.
19 (c)(1).) What it does require is certain information. (*Ibid.*) Whether water suppliers choose to
20 package such information in the form of an “element” is immaterial.

21 ii. Water Suppliers That Must Comply

22 The Department and Appellants debate exactly which water suppliers must comply with
23 the requirements of WR P1 in order for the Department to demonstrate consistency with the
24 policy. Subdivision (a)(1) provides that a project may not proceed if “one or more” water
25 suppliers that would receive water as a result of the project have failed to satisfy “all” of the
26 requirements of subdivision (c)(1). Appellants interpret this language as literally requiring “all”
27 water suppliers to comply. (See, e.g. San Joaquin County Appeal Letter, p. 52; SCDA Appeal
28 Form, p. 7; NCRA Appeal Letter, pp. 7-8.) The Department interprets it more loosely. (See
29 Department, October 15, 2018 Written Statement, p. 57 [*If the Council takes the position that*
30 *showing consistency with subdivision (a)(1) requires every water supplier,*” then compliance is
31 not feasible] [emphasis added].)

32 In resolving this issue, we must consider two categories of water suppliers – those that
33 are associated with the State Water Project and have committed to receive deliveries from
34 California WaterFix and those that are associated with the Central Valley Project and have not
35 yet committed to receive deliveries from California WaterFix. We will address each in turn.
36 (NCRA Appeal Letter, pp. 7-8.)

37 (a) State Water Project Water Suppliers

38 The Department explains California WaterFix is “a project to modernize the State Water
39 Project,” and it attempts to show consistency with WR P1 by demonstrating that the State Water
40 Project suppliers have complied with the policy’s planning requirements. (Certification, p. 5.)
41 Like the water management planning laws upon which WR P1 builds, the Department
42 distinguishes between urban and agricultural water suppliers and provides separate analyses of
43 each. (See WR P1, subd. (c)(1)(A).)

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1 (i) Urban Water Suppliers

2 The Department is inconsistent on the point of whether it has identified all water suppliers
3 that may receive water deliveries as a result of the California WaterFix. On one hand, it states
4 that “[t]he specific urban water suppliers that may receive water supply reliability benefits from
5 California WaterFix are listed in Table WR P1-1.” (Department, October 15, 2018 Written
6 Statement, p. 49.) On the other hand, the Department states that it is “difficult to ascertain” and
7 only “theoretically possible” to determine which suppliers “may receive water from the project.”
8 (*Id.*, pp. 49-50 [underline in original].)

9 What we understand the Department to mean, in light of its other statements on the
10 record on this issue, is that it has identified the State Water Project contractors but not the full
11 universe of water suppliers that may ultimately receive deliveries. (See *id.*) But as Appellants
12 point out, WR P1 requires a showing of consistency for *all* water suppliers. (San Joaquin
13 County Appeal Letter, p. 52; SCDA Appeal Letter, p. 7.)

14 The Department claims that certain obstacles would complicate its ability to identify the
15 water suppliers who may receive deliveries as a result of California WaterFix. (Department,
16 October 15, 2018 Written Statement, pp. 49-50.) The Department states, for instance, that “it
17 would likely require months” to review each water supplier’s management plan “to determine if
18 and under what circumstances they receive water from other suppliers up to the level of an
19 SWP or CVP contractor that will receive water supply reliability benefits of California WaterFix.”
20 (*Id.*, p. 49.) We recognize that demonstrating consistency with WR P1 may require resources
21 and effort, but that does not give us the authority to overlook the plain meaning of the regulation.

22 (ii) Agricultural Water Suppliers

23 As with the urban water suppliers, the Department takes an inconsistent position. On one
24 hand, it states that “[t]he specific agricultural water suppliers that may receive water supply
25 reliability benefits from California WaterFix are listed in Table WR P1-3.” (Department, October
26 15, 2018 Written Statement, p. 51.) On the other hand, the Department states that it is “difficult
27 to ascertain with certainty” which agricultural water suppliers may receive benefits. (*Ibid.*) The
28 Department explains that “[t]his exercise is straight-forward” for certain agricultural water
29 suppliers that “are also water contractors and directly serve water to landowners in their service
30 areas,” but it is less so for situations in which “the relationships between the water contractor
31 and land-owners is not as clear.” (*Ibid.*) We interpret these statements as meaning that the
32 Department has not identified all of the agricultural water suppliers that would receive water as a
33 result of the California WaterFix.

34 For the agricultural water suppliers that it has identified, the Department recognizes that
35 they do not comply with the requirements of (c)(1)(C). (Department, October 15, 2018 Written
36 Statement, p. 53 [“None of the agricultural water suppliers identified above have provided the
37 data in the format specified in WR P1, subdivision (c)(1)(C) to the Department”].) Appellant
38 NCRA faults the Department for this. (NCRA Appeal Letter, pp. 7-8.) As discussed above, we
39 interpret the phrase “[o]ne or more water suppliers” in subdivision (a)(1) as expecting
40 compliance from each and every water supplier that “would receive water as a result” of the
41 California WaterFix. We do not have the authority to read a new meaning into the regulation or
42 otherwise relax its terms. While the Department may not have full control over what documents
43 or information individual water suppliers give it, it is still, as the certifying agency for California
44 WaterFix, responsible for demonstrating consistency with WR P1.

45

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1 (b) Central Valley Project Water Suppliers

2 Appellants raise numerous arguments about the proper role of Reclamation in the current
3 proceedings. (E.g., San Joaquin County Appeal Letter, p. 3; FOR Appeal Letter, pp. 7-8.)
4 These arguments have generally focused on the ripeness of California WaterFix for our review
5 and on the potential implications for consistency with ER P2. They are relevant to WR P1,
6 however, in that the policy requires certain showings for water suppliers that will receive
7 deliveries as the result of a covered action, and, as Appellants NCRA and CDWA point out,
8 certain Central Valley Project water suppliers may receive deliveries as result of the California
9 WaterFix. (NCRA Appeal Letter, pp. 7-8; CDWA Appeal Letter, pp. 9-10.)¹⁷

10 The Department puts forward two theories about the Central Valley Project water
11 suppliers. The first is that they have satisfied the requirements of WR P1. The second is that
12 they need not satisfy the requirements of WR P1. We find both arguments unavailing.

13 (i) Adequacy of Compliance

14 The Certification states: “While it is unknown which, if any, other CVP suppliers, will opt in
15 to receive water supply reliability benefits from WaterFix, DWR has, in fact, presented
16 substantial evidence that those other CVP contractors have invested in projects and programs
17 that improve regional self-reliance.” (Department, October 15, 2018, Written Statement, p. 56.)
18 In support of this statement, the Department cites section 3.2.5 of its Certification of
19 Consistency: WR P1. We have reviewed that section. It describes various statutory schemes
20 and programs concerning water management, but does not name the specific Central Valley
21 Project water suppliers who would potentially receive deliveries from California WaterFix.
22 (Certification of Consistency: WR P1, pp. 3-48 and 3-49.) It does not present evidence or
23 analysis attempting to show that the specific water suppliers have complied with WR P1. (*Ibid.*)

24 (ii) Need for Compliance

25 The Department argues at greater length that it need not show the Central Valley Project
26 water suppliers have complied with WR P1 because, with the exception of the Santa Clara
27 Valley Water District, none of the Central Valley Project water suppliers have committed “100
28 percent” to either receiving or not receiving deliveries from the California WaterFix. (Draft
29 October 25, 2018 Transcript p. 62, line 15 to p. 63, line 19.)

30 At the same time, however, the Department states that: (1) “California WaterFix is
31 designed to improve the reliability of State Water Project *and* Central Valley Project (CVP) water
32 supplies, with the ultimate goal of enabling the SWP *and* CVP to more reliably deliver up to full
33 water contract amounts;” (2) the Department has analyzed the project “*assuming* the
34 participation of CVP contractors;” (3) it has performed its operational modeling “with CVP
35 contractors as part of the operations for WaterFix;” (4) the Central Valley Project water suppliers
36 “continue to have communications” about receiving deliveries from California WaterFix; (5)
37 Reclamation is acting as a co-petitioner in the SWRCB change petition proceeding “with the
38 understanding” that Central Valley Project will have “connectivity” to the California WaterFix;
39 and (6) Central Valley Project water suppliers may “opt in to receive water supply reliability
40 benefits from WaterFix.” (Certification, p. 5 [emphasis added]; Draft October 25, 2018
41 Transcript p. 62, line 15 to p. 63, line 19; Department, October 15, 2018, Written Statement, p.

¹⁷ The Appellants have offered no evidence that would support the conclusion that Reclamation itself – as the manager of the Central Valley Project, as opposed to a recipient of Central Valley Project deliveries – would be relevant to an analysis of the specific provisions of WR P1.

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1 56; see also *id.*, p. 49 [envisioning water suppliers receiving deliveries “up to the level of an
2 SWP or CVP water contractor”].)

3 The Department cannot both include Central Valley Project water suppliers in the
4 California WaterFix for the purpose of receiving benefits, but exclude them for the purpose of
5 demonstrating compliance with WR P1. If the Department wishes to leave the door open for
6 Central Valley Project water suppliers to “opt in to receive water supply reliability benefits from
7 WaterFix,” it must demonstrate their compliance. (Department, October 15, 2018 Written
8 Statement, p. 56.) If the Department wishes not to demonstrate their compliance, it must define
9 the California WaterFix covered action in a manner that does not give them an opportunity to
10 “opt in.” (*Ibid.*)

11 **iii. Degree of Compliance Required by Subdivision (a)(1)**

12 Subdivision (c)(1)(A) requires the Department to have reviewed water management
13 plans for the water suppliers for completeness under Water Code Division 6, Parts 2.55, 2.6,
14 and 2.8. Subdivision (c)(1)(B) requires that the plans include an implementation schedule for
15 programs and projects capable of reducing reliance on the Delta. And subdivision (c)(1)(C)
16 requires that the plans include “the expected outcome for measurable reduction in Delta
17 reliance and improvement in regional self-reliance.”

18 The Department recognizes that California WaterFix does not fully comply with these
19 requirements. (Certification WR P1 Attachment, p. 2-1, fn. 1, pp. 3-50 to 3-51.) Nonetheless,
20 the Department provides extensive information regarding efforts that certain water suppliers
21 have undertaken to reduce their reliance on the Delta.¹⁸ (See *id.*, pp. 3-35 to 3-49; Certification,
22 p. 6.) In addition, the Department proposes that it may demonstrate consistency with WR P1 by
23 presenting, outside the context of water management plans, the type of information that
24 subdivisions (c)(1)(B) and (c)(1)(C) require to be in those plans. (E.g., Department, October 15,
25 2018, Written Statement, p. 50 [“Thus, projections of future reliance on Delta supplies and
26 improvements in regional self-reliance for the urban water agencies listed in Table WR P1-1
27 reflect the cumulative plans of all of the retail agencies below them”], p. 52 [“WR P1(c)(1) does
28 not state that if water suppliers have failed to include information in the specific format set forth
29 in subdivisions (c)(1)(B) and (c)(1)(C), then they have not or cannot otherwise demonstrate
30 reduced reliance”]; see also Certification of Consistency: WR P1, p. 3-51.)

31 The Appellants maintain that water suppliers must satisfy the specific requirements of
32 subdivision (a)(1), as set forth in subdivision (c)(1), in order for the California WaterFix to be
33 consistent with WR P1. (San Joaquin County Appeal Letter, p. 51; SCDA Opening Brief, pp. 4-

¹⁸ The Department and Appellants disagree about whether the water suppliers that would receive water from California WaterFix actually have reduced their reliance on the Delta. (See, e.g., NCRA Appeal Letter, p. 7 [“the data that [the Department] cites show that urban water contractors are forecasting increases in Delta supplies to meet future water needs”]; FOR Appeal Letter, p. 7 [“Spending billions of dollars and 20 years to construct enormous new conveyance facilities to export significant quantities of freshwater flows before rather than after flowing through the Delta would increase rather than reduce reliance on the Delta”]; CDWA Appeal Letter, p. 9 [“A project that is designed to bring about an average increase of 1.3 million acre feet of exports cannot by any stretch of the imagination be deemed consistent with the state policy to reduce current levels of exports”].) But as discussed above, subdivision (a)(1) offers a precise formulation of what is required to reduce reliance on the Delta and improve regional self-reliance – compliance with subdivision (c)(1). Inasmuch as contentions about reduced reliance made by either the Department or the Appellants do not address compliance with subdivision (c)(1), they are not relevant.

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7; CDWA Appeal Letter, p. 10; Sacramento County Appeal Letter, p. 5.) SCDA argues that “[t]he import of WR P1 is to require urban and agricultural water suppliers who receive Delta water to adopt Urban and Agricultural Water Management Plans and to include specified precisions in those plans.” (SCDA Opening Brief, p. 2.) It maintains that “[t]he object of the regulation is the water management planning process” and that “[i]t would frustrate the intent of the regulation to allow DWR to propound its own, alternative means outside the water management planning process to purportedly demonstrate reduced reliance.” (*Id.*, pp. 2, 4.)

We agree that subdivision (c)(1) establishes requirements for the planning process. We further agree that text of subdivision (c)(1) does not offer an alternative means of satisfying those requirements outside of the planning process.

iv. Infeasibility as a Justification for Noncompliance

The Delta Plan, through G P1, subdivision (b)(1), recognizes that, “in some cases, based upon the nature of the covered action, full consistency with all relevant regulatory policies may not be feasible.” In those instances, the project proponent may determine that the “covered action is consistent with the Delta Plan because, on whole, that action is consistent with the coequal goals.” Such a determination “must include a clear identification of areas where consistency with relevant regulatory policies is not feasible, an explanation of the reasons why it is not feasible, and an explanation of how the covered action nevertheless, on whole, is consistent with the coequal goals.” (G P1, subd. (b)(1).) “Feasible” is defined to mean “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors.” (Cal. Code Reg., tit.23, § 5001, subd. (p).)

The Department does not contend that reducing actual reliance is infeasible but rather that demonstrating reduced reliance in the manner required by subdivision (a)(1) is infeasible. It states:

If it is determined by the DSC Delta Council [*sic*] that a covered action must demonstrate full consistency with (a)(1), and thereby (c)(1), then full consistency with this policy is not feasible because (c)(1)(C) of WR P1 would require all water suppliers that would receive water, as a result of the export, to report in their 2015 Urban or Agricultural Management Plans a measurable reduction in Delta reliance and improvement in regional self-reliance.

(Certification of Consistency: WR P1, p. 2-1, fn. 1.) G P1, subdivision (b)(1), calls for a two-step analysis. First, we must consider whether the Department has shown feasibility. Second, if it has, we must consider whether California WaterFix is nonetheless consistent with the coequal goals.

(a) Analysis of Infeasibility

The Department certifies that compliance with subdivision (c)(1) is not feasible for three reasons. The first regards water management planning statutory requirements. The second regards an assertion related to the limits of the Department’s authority. The third regards the difficulty in either creating or assembling certain data. We find that none of these reasons supports a determination of infeasibility.

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1

(i) Water Management Planning Statutory Requirements

2 The Department states that the Urban Water Management Planning Act and Agricultural
3 Water Management Planning Act do not require water suppliers to include WR P1-compliant
4 reduced reliance elements in their water plans. (Certification, WR P1 Attachment, fn. 1.) That
5 may be, but we agree with CDWA’s reasoning that “[t]he fact that those two acts may not
6 require the specific information the Delta Plan is requiring does not mean that such information
7 cannot be added to those water management plans.” (CDWA Appeal Letter, p. 11.) The lack of
8 a requirement is not the same thing as prohibition. Consequently, the mere lack of a
9 requirement in the water management planning statutes does not mean that compliance would
10 not be “capable of being accomplished in a successful manner within a reasonable period of
11 time, taking into account economic, environmental, legal, social, and technological factors.”
12 (Cal. Code Reg., tit. 23, § 5001, subd. (p).) The Department has not offered any reason to
13 conclude that the requirements in the planning statutes may not coexist with the requirements in
14 WR P1. (See *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921
15 [explaining that “a system of overlapping jurisdiction [is] an uncontroversial concept under our
16 law” and holding that both the SWRCB and the Department of Forestry could regulate the water
17 quality impacts of a proposed timber harvest; *Sonoma Cnty. Water Coal. v. Sonoma Cnty.*
18 *Water Agency* (2010) 189 Cal. App. 4th 33, 37, fn. 4 [referring to “overlapping regulatory
19 environments”].)

20

(ii) Limits of the Department’s Authority

21 The Department claims that it “lacks the legal authority to require any urban or
22 agricultural water supplier to include a Delta-specific Reduced Reliance element in its UWMP or
23 AWMP, or to undertake the specific planning, tracking, and reporting requirements described in
24 WR P1(c)(1)(B)-(C).”

25 As to the first point about the authority to require a “Delta-specific Reduced Reliance
26 element” we reiterate here that WR P1 requires the information described in subdivisions
27 (c)(1)(B)-(C); whether a water supplier frames that information as part of a distinct element or
28 not is immaterial.

29 As to the second point about the authority to require compliance with subdivisions
30 (c)(1)(B)-(C), the Department never explains why it needs such authority. WR P1, subdivision
31 (a)(1), is triggered if one or more water suppliers that would receive water as a result of the
32 covered action have failed to adequately contribute to reduced reliance. Put simply, if a water
33 supplier wishes to receive Delta water from a covered action, it must comply with the planning
34 requirements of WR P1. As stated in the San Joaquin County Appeal Letter: “That [the
35 Department] ‘lacks the legal authority to require . . . water suppliers to include a Delta-specific
36 Reduced Reliance element[s]’ does not excuse these water suppliers from compliance with all
37 of the subdivision (c)(1) requirements.” (San Joaquin County Appeal Letter, WR-P1 p. 2) This is
38 true whether a water supplier undertakes the covered action itself or whether a separate entity
39 such as the Department undertakes the covered action for the water supplier’s ultimate benefit.

40 In sum, WR P1 requires compliance with its terms. The Department does not need the
41 “legal authority” to require the compliance that WR P1 already requires. By claiming infeasibility
42 based solely on the alleged lack of such authority, the Department has failed to show by
43 substantial evidence that compliance would not be “capable of being accomplished in a
44 successful manner within a reasonable period of time, taking into account economic,
45 environmental, legal, social, and technological factors.” (See Cal. Code Reg., tit. 23, § 5001,
46 subd. (p).)

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1 (iii) Nonexistent Data

2 In a similar vein, the Department states that water management planning acts “did not
3 require that the type of data referenced in WR P1 (c)(1)(C) be included in the 2015 Plans.
4 Therefore, the information does not exist in the format required by the policy and it would [be]
5 infeasible to demonstrate full [*sic*] consistency with this section.” (Certification, WR P1
6 Attachment, p. 2-1, fn. 1.) CDWA counters that, “[w]hile it may indeed take time for all of the
7 water suppliers within the SWP and CVP to fully comply with the requirements in regulation
8 5003 (i.e., complete and/or update their water management plans), the fact that it requires time
9 and effort to comply with new regulations, such as these, is by no means a basis to bypass
10 them.” (CDWA Appeal Letter, p. 11)

11 SCDA points that we adopted WR P1 in 2013 – that is, *before* the current round of water
12 management plans. (SCDA Opening Brief, p. 8.) Indeed, SCDA explains that “DWR
13 participated in the development of the Delta Plan and knew well ahead of the Delta Plan’s
14 adoption in May of 2013 . . . that water suppliers’ 2015 Urban and Agricultural Water
15 Management Plans were required to contain the core compliance requirements of WR P1.”
16 (*Ibid.*) But, SCDA continues, “[i]n its extensive engagement with water suppliers throughout the
17 state with regard to their 2015 Water Management Plans, DWR acted as if the Delta Reform
18 Act, the Council, the Delta Plan, and WR P1 did not exist.”¹⁹ (*Ibid.*) In support of this
19 contention, SCDA submits as an attachment the Department’s 2015 Urban Water Management
20 Plan Guidebook. (*Ibid.*)

21 Because the guidebook was prepared and distributed by the Department, it was in the
22 Department’s possession at the time of Certification; we therefore add it to the record under
23 Section 10 of our Appeals Procedures. We have reviewed the guidebook and agree that it
24 provides no mention of WR P1 and no direction on how to comply with it. We agree with SCDA
25 that the infeasibility that the Department alleges is in part a problem of its own making. We see
26 no reason, however, that the water suppliers that will receive deliveries from the California
27 WaterFix could not supplement their water management plans to comply with subdivision (a)(1).

28 (b) Consistency with Coequal Goals

29 Because the Department has failed to clearly identify where consistency with WR P1
30 was not feasible, the Council need not consider the Department’s alternative contention that WR
31 P1 is consistent overall with the coequal goals. (See, e.g., *People v. Thomas* (1977) 19 Cal.3d
32 630, 644 fn. 12.)

33 34 b. Compliance with WR P1, subdivision (a)(2)

35 WR P1, subdivision (a)(1), applies if “one or more water suppliers that would receive
36 water . . . have failed to adequately contribute to reduced reliance.” (WR P1, subd. (a)(1).)
37 Subdivision (a)(2), in turn, applies if – assuming that one or more water suppliers has indeed
38 failed to adequately contribute to reduced reliance – that “failure has significantly caused the
39 need for the export, transfer, or use.” (*Id.*, subd. (a)(2).)

¹⁹ SCDA also argues that “DWR participated in the development of the Delta Plan and provided written comments during the development process. DWR did not raise any questions with regard to the feasibility of implementing WR P1.” (SCDA Opening Brief, p. 7.) But SCDA does not cite any evidence in support of these contentions. Thus we must disregard them as unsupported factual allegations.

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1 The Department states that the need for California WaterFix was not significantly caused
2 by a failure to adequately reduce reliance. (Certification, p. 6.) Rather, according to the
3 Department:

4 [T]he need for California WaterFix was caused by factors that pre-date and exist
5 independently of the reduced reliance policy. The need arose and was
6 recognized decades ago as sensitive fish species populations declined in the
7 Delta, which led to increasingly stringent environmental regulations on the
8 coordinated operations of the SWP and CVP pumps in the south Delta to protect
9 those species, which, in turn, reduced the reliability of the SWP and CVP
10 supplies. In addition, the need arose in view of well recognized threats to reliable
11 SWP/CVP exports, including seismic risks to Delta levees on subsiding lands,
12 and the middle-and long-term threat of salinity intrusion from sea-level rise.

13 (*Ibid.*) Appellants dispute this conclusion on essentially two grounds. The first regards the
14 alleged causes of the need for California WaterFix. The second regards the sufficiency of
15 evidence on which the Department bases its conclusions.

16 i. Causes of Need for California WaterFix

17 Appellants raise certain arguments about what did or did not cause the need for the
18 California WaterFix. (See, e.g., NCRA Letter, pp. 6-7; FOR Letter, p. 7; San Joaquin County
19 Appeal Letter, p. 50; Sacramento County Appeal Letter, p. 5; CDWA Appeal, p. 10.) Often,
20 however, they do so without any citation to factual evidence; thus, we need not consider their
21 assertions. (*Ibid.*) To the extent that the Appellants do cite evidence, they generally fail to
22 connect their allegations about what caused the need for California WaterFix with what is or is
23 not in the water management plans of the water suppliers that may receive water deliveries.
24 (*Ibid.*) Subdivision (a)(2) focuses its inquiry on whether the need for a covered action was
25 “significantly caused” by the failure to comply with the water planning requirements set forth in
26 subdivision (a)(2). (See SCDA Opening Brief, p. 2 “[t]he object of [WR P1] is the water
27 management planning process”] [emphasis in the original].)

28 Only one Appellant examines an actual water management plan – SCDA, which finds
29 fault with a plan adopted by the Metropolitan Water District of Southern California (“Met”).
30 (SCDA Opening Brief, pp. 36-38.) It argues that the plan fails “to include in its projections all
31 technically feasible, cost-effective local and regional projects” and that this failure “substantially
32 caused it to overestimate its need for imported Delta Water and significantly caused the impetus
33 for WaterFix.” (*Id.*, p. 37.) In support of its argument, SCDA cites an excerpt from the Delta
34 Plan and testimony given by Mr. Doug Obegi at the SWRCB hearing.²⁰ (SCDA Opening Brief,
35 pp. 36-37.) But these sources do not address what Met has or has not included in its urban
36 water management plan.

37 Regarding the Delta Plan, SCDA states that it “estimates an available supply of new
38 water from agricultural water use efficiency, recycled municipal water, and urban water use
39 efficiency at up to 7.4 million acre feet per year.” (SCDA Opening Brief, p. 37.) SCDA
40 concludes that “a substantial portion of these savings would accrue to water suppliers receiving
41 Delta Water through California WaterFix, obviating the need for WaterFix.” (*Ibid.*) But the

²⁰ In addition, SCDA attempts to cite a report from the Natural Resources Defense Council. (SCDA Opening Brief, p. 36.) But SCDA provides no argument or evidence that would support the conclusion that the report was before the Department at the time of certification or would be amenable to judicial notice.

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1 estimate in the Delta Plan is for savings that could be achieved statewide; it is not for savings
2 that could be achieved by Met or any other specific water supplier that has been identified as
3 potential recipient of WaterFix deliveries. Thus, the estimate is not relevant to an analysis under
4 subdivision (a)(2).

5 Regarding Mr. Obegi's testimony, the quoted portion contends that water supply
6 savings could be achieved "within the service areas of contractors of the State Water
7 Project (SWP) and Central Valley Project." (SCDA Opening Brief, p. 36.) It does not
8 discuss what savings could be achieved specifically by Met or otherwise attempt to show
9 that Met's urban water management plan falls short of the WR P1 criteria. (*Ibid.*)

10 ii. Sufficiency of Evidence

11 Subdivision (a)(2) inquires whether, if a project proponent fails to demonstrate reduced
12 reliance as required under subdivision (a)(1), "[t]hat failure has *significantly caused* the need for
13 the export, transfer, or use." (WR P1, subd. (a)(2) [emphasis added].) Appellant NCRA argues
14 that the Department failed to provide complete and quantitative information as required under
15 subdivision (a)(1) and, as a result, it cannot show that that failure did not "significantly cause"
16 the need for the California WaterFix. We agree.

17 (a) Lack of Complete Information

18 The Department has not provided all of the information required under subdivision (a)(1).
19 Notably, it has not required *any* of the information for State Water Project agricultural water
20 suppliers or Central Valley Project suppliers. Without that information, the Department cannot
21 reasonably show that the failure to comply with subdivision (a)(1) did not cause the need for
22 California WaterFix or that it was not a significant cause.

23 (b) Lack of Quantitative Information

24 NCRA argues that the subdivision (a)(1) requires quantitative information:

25 [The Department] evaluated whether some of these agricultural water suppliers –
26 SWP contractors – are measuring the water they deliver, whether they are using
27 volume-based pricing, and whether they have implemented any of the
28 conditionally required efficient water management practices. Reduced Reliance
29 Analysis 3-45 to 3-48. But none of these factors show any *reduced* reliance on
30 the Delta without a quantitative measurement . . . And for CVP contractors, [the
31 Department] provides even less information, and instead relies on Reclamation's
32 compliance with the SECURE Water Act without any data demonstrating how
33 such compliance reduces reliance on the Delta.

34 (NCRA Appeal Letter, p. 8; see also San Joaquin County Appeal Letter, p. 51.) NCRA implies
35 that the lack of such information would prevent the Department from showing that a failure to
36 reduce reliance did not significantly cause the need for California WaterFix. (*Ibid.*)

37 We agree. Subdivision (c)(1)(C) requires that water management plans include the
38 expected outcome for "*measurable* reduction" in Delta reliance and improvement and regional
39 self-reliance." (Emphasis added.) Additionally, it requires that the expected outcome be
40 reported in "the *amount* of water used" or "in the *percentage* of water used." (Emphasis added.)
41 Thus, the regulation recognizes that there is no way to reasonably weigh the relative
42 significance of the various potential causes without metrics. Narrative alone cannot establish a
43 lack of "significant" causation regarding a matter for which subdivision (c)(1)(C) – and by

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1 extension subdivision (a)(1) – seeks a “measurable reduction” expressed in an “amount” or in a
2 “percentage.”

3 **d. Compliance with Subdivision (a)(3)**

4 WR P1, subdivision (a)(3), applies if “[t]he export, transfer, or use would have a
5 significant adverse environmental impact in the Delta.” Initially, in its Certification, the
6 Department stated that California WaterFix would not have “a significant adverse environmental
7 impact.” (Certification, p. 6.) Subsequently, however, the Department has stated that California
8 WaterFix would have a significant adverse environmental impact for the purpose of subdivision
9 (a)(3).

10 On October 15, 2018, the Department stated: “DWR is not arguing that the criterion in
11 subdivision (a)(3) has not been met.” (Department, October 15, 2018, Written Statement, p. 58.)
12 On October 23, 2018, the Department stated: “If the Delta Stewardship Council understands
13 ‘export’ to mean ‘diversion,’ then, as DWR has acknowledged, the criterion in (a)(3) has been
14 satisfied.” On October 25, 2018, the Department stated that WR P1 “prohibits export projects if
15 all three of the conditions” are met and that, for the California Water Fix, only “two of the three
16 are not met. (Draft October 25, 2018 Transcript, p. 25, line 25, to page 26, line 2.)

17 To the extent that the Department stands by its original position in the Certification, we
18 address it here. The Certification raises two arguments. The first regards the volume of exports.
19 The second regards the types of environmental impacts subdivision (a)(3) encompasses. The
20 Appellants dispute these arguments. As set forth below, the Council finds that the Department
21 fails to show based upon substantial evidence that California WaterFix will not have a significant
22 adverse environmental impact in the Delta.

23 **i. Volume of Exports**

24 The Department states:

25 As demonstrated in Chapter 5, Water Supply in the Final EIR, total long-term
26 average annual Delta exports under Alternative 4A (California WaterFix) would
27 remain about the same or decrease slightly as compared to exports under
28 existing conditions, reflecting both changes in operations due to the north Delta
29 diversion, less negative Old and Middle River (OMR) flows, implementation of
30 Fall X2 and modified spring outflows, as well as the anticipated effects of sea
31 level rise and climate change. Thus, there is no significant change in amount of
32 water exported that could cause a significant adverse environmental impact in
33 the Delta. (Certification, p. 6.)

34 Appellants raise essentially two counter-arguments. First, they take issue with the volume of
35 exports projected by the Department. (See, e.g., Stockton Appeal Letter, pp. 12-13; NCRA
36 Appeal Letter, pp. 8-9.) Second, they challenge the Department’s assumption that having “no
37 significant change in the amount of water exported” will necessarily ensure that the project will
38 not have a significant adverse environmental impact in the Delta. (Sacramento County Appeal
39 Letter, p. 6; see also CDWA Appeal Letter, p. 9; Stockton Appeal, p. 13.)²¹

²¹ In the context of their appeals of other policies, Appellants present other allegations about the environmental impacts of the California WaterFix. For its analysis of WR P1, we consider only the

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1 We have reviewed the only evidence cited by the Department in support of its conclusion
2 – Chapter 5 of the Final EIR. (Final EIR/EIS, Ch. 5.) While Chapter 5 does discuss exports, it
3 does not discuss the environmental consequences of those exports. Thus, it does not provide
4 evidentiary support for the conclusion for which the Department cites it. We therefore find that
5 the assertion in the Certification about the relationship between exports and environmental
6 impacts does not demonstrate consistency with the requirements of WR P1, subdivision (a)(3).

7 ii. Types of Impacts

8 The Department and the Appellants disagree as to the sort of “environmental impact[s]”
9 subdivision (a)(3) encompasses. The Department states:

10 the only significant adverse environmental impact that is arguably relevant to
11 subdivision (a)(3) is the impact from operating the new points of diversion on the
12 earliest life stages of the American shad and striped bass, two nonnative species
13 introduced decades ago for sportfishing (WR P1 Certification at p. 2-3) because
14 subdivision (a)(3) asks whether “[t]he export [of water] . . . would have a
15 significant adverse environmental impact in the[;] not whether the project
16 enabling the export would have such an impact.

17 (Department, October 15, 2018 Written Statement, pp. 58-59 [underlining in original].) Appellant
18 SCDA argues, in turn, that “[f]or the purposes of WR P1, adverse environmental impacts include
19 all adverse environmental impacts in the Delta and are in no way limited to impacts on water
20 quality or on any other particular category of impact.” (SCDA Opening Brief, p. 34; see also
21 (Sacramento County Appeal Letter, p. 6.)

22 We agree with Appellants. Subdivision (a)(3) refers to “export, transfer, or use.” The
23 Department suggests that we read the words “transfer” and “use” out of this phrase and
24 interpret it simply to mean “export.” (Department, October 15, 2018 Written Statement, pp. 58-
25 59.) The Department further suggests that we distinguish between the “export” and the “project
26 enabling export.” (*Ibid.*) And finally, on that basis, it suggests that we construe subdivision
27 (a)(3) so as to exclude the environmental impacts associated with the “project enabling export.”
28 (*Ibid.*) This construction fails for two reasons.

29 First, as discussed above, the Department would read the words “transfer” and “use” out
30 of the regulation, in violation of one of the cardinal rules of statutory construction. (See *White v.*
31 *County of Sacramento* (1982) 31 Cal.3d 676, 681 [“[E]very word, phrase and provision
32 employed in a statute is intended to have meaning and to perform a useful function”].) And
33 doing so would be particularly problematic here because the two terms that the Department
34 seeks to read out of the regulation – “transfer” and “use” – could capture types of environmental
35 impacts that a narrow definition of “export” would not.

36 Second, the Department has not offered any basis for distinguishing between an “export”
37 and a “project enabling export.” Throughout this proceeding, the Department has regularly
38 used the term “project” to refer to the California WaterFix. (E.g., Certification of Consistency, p.
39 6 [“project is consistent with WR P1”], *ibid.* [“one or more water suppliers that will receive water
40 from the project”]; October 15, 2018 Written Statement, p. 49 [“receive water from the project”],
41 p. 50 [“receive water from the project”], p. 51 [“the project has been analyzed”].) Thus, the
42 Department seems to be suggesting a construction of subdivision (a)(3) that would have us

allegations raised within the context of the WR P1 appeals; we do not import arguments made in the
context of other policies into a WR P1 analysis.

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1 disregard the impact of the “project” for which we are assessing consistency and, for reasons
2 that are never explained, look only at one aspect of that “project.” (Department, October 15,
3 2018 Written Statement, pp. 58-59.)

4 The Appellants have pointed to numerous significant and unavoidable impacts identified
5 in the Final EIR/EIS. The Department, meanwhile, has offered no evidence that would support
6 the conclusion that we should not consider those impacts to be proximately caused by the
7 “export, transfer, or use” of water. (SCDA Opening Brief, pp. 34-35; Sacramento County
8 Appeal Letter, p. 6.)²² Thus, the Council finds that the Appellants have shown that the
9 Department has failed to demonstrate consistency with WR P1, subdivision (a)(3).

10 **3. Conclusion**

11 For the foregoing reasons, we conclude that WR P1, subdivisions (a)(1), (a)(2), and
12 (a)(3) apply to the California WaterFix as that project is described in the Certification now before
13 us. Based upon that conclusion and the analysis set forth above, the Council finds that the
14 Department’s Certification of Consistency with WR P1 is *not supported* by substantial evidence
15 in the record.

16 **G. Policy WR P2 (23 CCR Section 5004): Transparency in Water Contracting**

17
18
19 The Department contends that the State Water Supply Contract Amendments (Contract
20 Amendments) are not part of California WaterFix, and so WR P2 does not apply. We agree.
21 Thus, there is no need to assess California WaterFix’s consistency with WR P2.

22 **1. Policy Requirements**

23 Under WR P2, contracts for water from the State Water Project or the Central Valley
24 Project must comply with transparency requirements established by the Department and
25 Reclamation. And so, in order for WR P2 to apply, the scope of any covered action must include
26 the contracting process for water from either the State Water Project or the Central Valley
27 Project.

28 **2. Department’s Consistency Certification**

29 Here, the Department certifies that WR P2 does not apply because the Contract
30 Amendments are a separate process outside the scope of the California WaterFix.
31 (Certification, pp. 6-7.) In its Certification, the Department defines the scope of the California
32 WaterFix as “physical and operational improvements to the State Water Project,” incorporating
33 by reference the Final Project Description from the Final EIR/EIS. (*Id.* at 3; *see also*
34 Certification: Project Description.)

35

36

37

38

²² NCRA raises factual contentions regarding the impacts on aquatic species but fails to cite supporting evidence. (NCRA Appeal, p. 7.) Thus, the Council does not consider those contentions here.

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1 **3. Appeal**

2
3 **a. Applicability of WR P2**

4 Appellants FOR and San Joaquin County contend that WR P2 does apply, and so the
5 Department must certify consistency with WR P2. (FOR Appeal Letter, p. 8; San Joaquin
6 County Appeal Form, WR P2, p. 1.)

7 The Final Project Description submitted by the Department does not include the Contract
8 Amendments. In fact, the Contract Amendments are currently undergoing a separate
9 environmental review.²³ It is not within the Council’s purview to assess the adequacy of the
10 project description in the Final EIR/EIS. Thus, we take the project description in the EIR as
11 given. Because the covered action as presented does not include the Contract Amendments,
12 WR P2 does not apply here. (See section I.A. of this Determination.)

13 The Department has committed, however, prior to implementing the California WaterFix
14 contract amendments, to “coordinate with the Council through early consultation and determine
15 what compliance is necessary for the Delta Reform Act.” (Department October 23, 2018
16 Submission – San Joaquin County, pp. 81-82, no. 60.) The Council expects the Department to
17 pursue an early and robust consultation with respect to the Contract Amendments.

18 Appellants FOR and San Joaquin County argue that Contract Amendments are part of
19 the covered action because they would have “undisclosed consequences” on the Project. (FOR
20 Appeal Form, p. 11; San Joaquin County Appeal Form, WR P2 p. 3.) Appellants have cited
21 numerous officials who are concerned with the effect the Contract Amendments may have on
22 California WaterFix. (FOR Appeal Form, p. 10-11; San Joaquin County Appeal Form, WR P2 p.
23 3-4.) Because the Council takes the covered action as presented, we may not consider the
24 Contract Amendments as part of the California WaterFix.

25 **b. Consistency with WR P2**

26 Because the Contract Amendments are not now before the Council, the Council may not
27 consider Appellants’ arguments concerning whether the Contract Amendments are consistent
28 with WR P2, or whether consistency is feasible.

29
30 **H. Policy ER P1 (23 CCR Section 5005) (“ER P1”): Delta Flow Objectives**

31
32 The Department certifies that California WaterFix is consistent with ER P1. Six
33 appellants – NCRA, SCDA, FOR, Stockton, San Joaquin, and CDWA – raise substantive
34 arguments that it is not. For the reasons discussed below, we find that the Department has
35 failed to demonstrate substantial evidence in the record that California WaterFix is consistent
36 with ER P1.

37
38 **1. Policy Requirements**

39
40 ER P1 requires that a covered action demonstrate consistency with the State Water
41 Resources Control Board’s (Water Board) current flow objectives. It states:

²³ The Department is currently undergoing two CEQA processes for the contracts that are separate and independent from California WaterFix: one to extend the current contracts, and another to amend the contracts in order to address the cost allocation of California WaterFix. (Department October 23, 2018 Letter, no. 60.)

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1
2 (a) The State Water Resources Control Board's Bay Delta Water Quality Control Plan
3 flow objectives shall be used to determine consistency with the Delta Plan. If and when
4 the flow objectives are revised by the State Water Resources Control Board, the revised
5 flow objectives shall be used to determine consistency with the Delta Plan.

6
7 (b) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E) of this
8 Chapter, the policy set forth in subsection (a) covers a proposed action that could
9 significantly affect flow in the Delta.

10
11 Current Water Board flow objectives are described in Decision-1641 (D-1641, Document Code:
12 [D.8 DRAFT 001391](#))²⁴. In order to demonstrate consistency with ER P1 a certification of
13 consistency must be supported by substantial evidence that demonstrates that the project will
14 comply with D-1641.

15
16 Any ruling by the Council as to the consistency of a project with ER P1 does not
17 preclude a decision by the SWRCB at a later date that the project does or does not meet D-
18 1641. In addition, if and when D-1641 is updated, ER P1 will refer to the subsequent flow
19 objectives as soon as they gain regulatory force. As part of its hearing on a change of point in
20 diversion for California WaterFix, the SWRCB will consider project-specific flow objectives. If
21 and when these objectives take effect, California WaterFix would need to meet such revised
22 flow objectives.²⁵

23
24 Updates to the Bay-Delta WQCP are currently underway.²⁶ This update could alter the
25 flow objectives in D-1641. However, a covered action must be certified as consistent with the
26 Delta Plan, as the Plan exists at the time of certification. Potential future changes to D-1641,
27 though they would be incorporated into ER P1, are not relevant to the Certification or to the
28 Council's determinations on appeal of the Certification.

29 30 **2. Department's Certification**

31
32 The Department finds that the California WaterFix project is consistent with ER P1
33 because California WaterFix will be operated to comply with D-1641. The Department offers two
34 lines of evidence to support its claim that California WaterFix's proposed operations will comply
35 with D-1641: First, it describes the historic performance of the State Water Project (SWP) in
36 complying with SWRCB water rights decisions D-1641 and its predecessor D-1485. Second, it
37 projects the flow and water-quality effects of California WaterFix using computer models which
38 show that the project, operated as proposed, will comply with D-1641, with a small number of
39 exceedances. The Department states that with California WaterFix "[t]he CVP/SWP would
40 continue to be operated based on real-time data to avoid exceedances and meet all applicable
41 operational criteria. Thus, modeled exceedances do not reflect actual outcomes." (Certification
42 ER P1 Finding, p. 12.) The Department thus asserts that exceedances suggested by the models

²⁴ D-1641 was first approved in 1995 and revised in March 2000. The latest March 2000 version is the current version considered here: Document Code: [D.8 DRAFT 001391](#).

²⁵ "The flow criteria imposed as a condition of any approval would be an interim requirement until Phases 2 and 3 of the Bay-Delta WQCP update and subsequent implementation processes are complete, at which point the flow criteria would be revisited." (SWRCB [February 11, 2016 Ruling](#), p. 4.)

²⁶ Because no party has provided evidence in the record, we take official notice of the existence of the pending updates pursuant to paragraph 29 of our Appeals Procedures.

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1 would be reduced in actuality by using real-time operations that are beyond the models'
2 capability to fully replicate. (Ibid.)
3

4 a. Historical Operations

5
6 The Department states that historically the SWP and CVP operators have met water
7 quality objectives 98.9% of the time between 1978 and 2015 ([Certification ER P1 Finding](#), p. 7-
8 9). Evidence from the SWRCB hearing is provided as support to this statement ([DWR-
9 401/Document Code: X.3 000046](#) and [DWR-402/Document Code: X.3 000047](#)).
10

11 As noted in DWR-401, the exceedance metrics reported are only for standards “for
12 which both projects (SWP and CVP) are jointly responsible. It does not include those standards
13 for which only one Project [meaning the CVP] is operationally responsible, e.g. Vernalis
14 standards” (Document Code: [X.3 000046](#)). For D-1485 these joint responsible locations had
15 exceedances of 0.5%. For D-1641, the Department reports exceedances of 1.5% for the period
16 1995 (when D-1641 came into effect) to 2015. Together, the Department reports a combined
17 exceedance rate of 1.1% for jointly responsible objectives for the period 1978 to 2015.
18

19 b. Modeling

20
21 The Department also supports its Certification of Consistency for ER P1 with a physically
22 based, comparative modeling approach (Certification ER P1 Findings, pp. 9-24). The
23 Department describes how models CalSIM II, DSM2, and an Artificial Neural Network (ANN)
24 were used and linked together to analyze compliance with specific requirements of D-1641. The
25 Department also describes the general methodology and assumptions underlying portions of
26 these models, including sea-level rise projections for a period centered on the year 2025 and
27 assuming 15 cm (5.9 in) of sea-level rise at the Golden Gate by 2030 ([Certification ER P1
28 Finding](#), p. 10).
29

30 The Department certifies that the models demonstrate that California WaterFix will
31 comply with current D-1641 water quality and flow standards, except under certain conditions at
32 specific locations, especially in the South Delta ([Certification ER P1 Finding](#), p. 8). It further
33 certifies that the model results are intended to be used comparatively, not predictively
34 ([Certification ER P1 Finding](#), p. 10). The Department states that this means the model results
35 can appropriately be used as “comparative tools” to assess relative changes in effects, such as
36 comparing the no action alternative (NAA) to California WaterFix. It states this comparative
37 nature is necessary because the models are generalized and cannot accurately reflect what a
38 system operator would do in real time, nor account for changes in the system such as the 2009
39 NMFS Biological Opinion and 2008 USFWS Biological Opinion ([Certification ER P1 Finding](#),
40 p. 10-12). Where the model results project exceedance, the Department asserts, real-time
41 operations may be adjusted to keep conditions in compliance with D-1641. In support of its
42 ability to make such adjustments, the Department presents historical data showing, the
43 Department claims, that actual exceedances have been minimal.
44

45 The Department presents the following modeling results in support of its Certification of
46 Consistency with ER P1:
47

- 48 • “...in general all scenarios including the NAA [No Action Alternative] meet D-1641 water
49 quality objectives most of the time. The data shows a similar or an increased ability for

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1 all operational scenarios (compared to the NAA) to meet D-1641 water quality objectives
2 at all locations except Emmaton.” ([Certification ER P1 Finding](#), p. 24.)
3

- 4 • “The fish and wildlife beneficial use objectives for the Suisun Marsh locations were
5 mostly met under all the scenarios. The small percentage of exceedances (less than
6 5%) that occurred for a few locations under the [California WaterFix as certified] scenario
7 was in line with the percentage that occurred for the NAA.” ([Certification ER P1 Finding](#),
8 p. 3.1)
9
- 10 • “For the fish and wildlife beneficial use objectives for the San Joaquin River reach
11 between Prisoners Point and Jersey Point, the objective was exceeded for
12 approximately 10% of the time under California WaterFix . . . relative to [the No Action
13 Alternative], due to the presence of a greater proportion of higher [salinity] San Joaquin
14 water at this location.” ([Certification ER P1 Finding](#), p. 31.)
15
- 16 • “The fish and wildlife beneficial use objectives for the Suisun Marsh locations were
17 mostly met under all the scenarios. The small percentage of exceedances (less than
18 5%) that occurred for a few locations under the California WaterFix . . . scenario was in
19 line with the percentage that occurred for the NAA.” ([Certification ER P1 Finding](#), p. 31.)
20
- 21 • “For the fish and wildlife beneficial use objectives for the San Joaquin River reach
22 between Prisoners Point and Jersey Point, the objective was fully met at Jersey Point
23 and San Andreas Landing for all alternatives. At Prisoners Point, the objective was
24 exceeded for approximately 10% of the time under California WaterFix . . . relative to
25 NAA, due to the presence of a greater proportion of higher [salinity] San Joaquin water
26 at this location.” ([Certification ER P1 Finding](#), p. 31.)
27
- 28 • “California WaterFix . . . fully complies with the Delta Outflow requirements in D-1641.”
29 ([Certification ER P1 Finding](#), p. 32.)
30
- 31 • “...DWR has consistently met Delta flow objectives in the past....” and “...show general
32 compliance at three objective locations on Old River and the San Joaquin River.”
33 ([Certification ER P1 Finding](#), p. 35.)
34

35 c. Other Considerations

36
37 The Department also states that climate and sea level are considered the boundary
38 constraints on analysis of consistency with D-1641, but that these constraints are outside the
39 influence of California WaterFix and are therefore considered external factors. It states that the
40 effects of these external factors are incorporated into some models used to analyze the No
41 Action Alternative and California WaterFix. Sea-level rise methodology is centered on
42 projections for the year 2025 and is considered representative of the 2011-2040 period. This
43 also assumes sea-level rise of 15 cm (5.9 in) at the Golden Gate Bridge from 1990 to 2025.
44 ([Certification ER P1 Finding](#), p. 10.)
45

46 The Department also states that California WaterFix does not propose or anticipate
47 using the Temporary Urgency Change Petition (TUCP) process. Under Water Code sections
48 1435 et seq., the SWRCB may, pursuant to a TUCP, allow a user with “urgent needs” to change
49 its operations, diverging from its usual water quality and flow standards, in order to meet
50 applicable Delta flow objectives. ([Certification ER P1 Finding](#), p. 2-3.)

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3. Appeals

NCRA, SCDA, FOR, Stockton, CDWA, and San Joaquin County appealed the Department's Certification of Consistency with ER P1 as follows:

a. Modeling and Model Results

Appellants make a series of arguments about the quality of the modeling.

- SCDA ([Appeal](#), p. 8), FOR ([Appeal Letter](#), p. 12), Stockton ([Appeal Letter](#), p. 14) and San Joaquin County ([Appeal Letter](#), pp. 60-61) argue that the Department's modeling incorrectly concludes that California WaterFix will comply with the export/inflow ratio requirement of D-1641, because it models the inflow side of that ratio at a site other than the one specified in D-1641 and excludes exports through California WaterFix from the export side of the ratio.
- San Joaquin County argues that the modeling assumes a flow level at Rio Vista that is not required by D-1641 and that the Department has not committed to meeting in the California WaterFix operational criteria. (San Joaquin County [Appeal Letter](#), p. 58.) Therefore, San Joaquin County argues, this modeling assumption is unsupported.
- San Joaquin County argues that the Department incorrectly specifies Delta Cross Channel (DCC) operations in the CalSim II model. (*Id.*, p. 60.)
- San Joaquin County argues that the modeling shows an exceedance of the applicable standard for municipal and industrial (M&I) water quality near the intake for the Contra Costa Canal. (*Id.*, p. pp. 59-60.)
- San Joaquin County argues that the Department's modeling shows that California WaterFix will cause exceedances of water quality standards in D-1641 intended to protect municipal and industrial (M&I) users. (*Id.*)

b. Historical Operations

NCRA argues that the Department's reported 98.9% historical compliance rate with D-1641 does not support the consistency finding, because that calculation counts as compliance periods when the SWP and CVP were complying not with D-1641 but with different standards during periods of drought, temporary urgency change petitions, and other orders, and because it overstates the time in which water quality met all of the D-1641 standards. ([NCRA Appeal Letter](#), p. 9.)

c. Role of Reclamation

Appellants FOR ([Appeal Letter](#), pp. 14-15), NCRA ([Appeal Letter](#), p. 9), CDWA ([appeal Letter](#), pp. 2-3.) and San Joaquin County ([Appeal Letter](#), p. 58) all argue that evidence shows that Reclamation does not intend to comply with, or cooperate with the Department in complying with, D-1641. Thus, they assert, the conclusion that California WaterFix can so comply lacks the support of substantial evidence.

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1 d. Bay-Delta WQCP Updates

2 NCRA (Appeal Letter, p. 9) and FOR (Appeal Letter, pp. 13-14) argue that the
3 Department cannot demonstrate consistency with ER P1 because SWRCB is in the process of
4 updating the Bay-Delta WQCP.

5 e. Flow and Operations Criteria

6
7 Multiple Appellants raised issues with the variability or lack of specificity regarding flow
8 criteria, or other operational criteria, for the future project. San Joaquin County states that "...
9 the Project includes adaptive management with the range of the Boundary 1 and Boundary 2
10 scenarios. (See DWR-1143 Second Revision.) Additionally, the Boundary 1 scenario has no Fall
11 X2 requirement." (San Joaquin County Appeal Letter, p. 59.) Stockton makes the same
12 argument: Boundary 1, that "...does not include additional spring Delta outflow, additional OMR
13 [Old and Middle River] flows, existing I/E ratio, and the existing Fall X2 flow requirement
14 imposed in the existing BiOp [federal Biological Opinion] for Delta Smelt." (Stockton Appeal
15 Letter, p. 14.)

16
17 FOR also argues that operations criteria were not set, but rather "will be defined through
18 further discussion," and that "[a]ctual operations will be based on real-time monitoring of
19 hydrologic conditions and fish presence/movement" (FOR Appeal Letter, p. 12).

20
21 San Joaquin County additionally argues that "The Delta Independent Science Board in a
22 September 30, 2015 letter stated in no uncertain terms that [California WaterFix] is 'sufficiently
23 incomplete and opaque to deter its evaluation and use by decision makers, resource managers,
24 scientists and the broader public.'" (San Joaquin County Appeal Letter, p. 59, citing (CCC-SC-
25 20).)

26 f. Operations After Levee Failure

27
28 CDWA argues that the Department has not provided substantial evidence that California
29 WaterFix is consistent with ER P1 because the Department will not operate WaterFix to comply
30 with D-1641 in the event of future levee failures. ([CDWA Appeal Letter](#), pp. 3-5). Following a
31 major levee failure, saltwater would move farther into the Delta, harming water quality. In the
32 present system, the Delta itself is a part of the conveyance facilities, so the Department would
33 need to mitigate water quality there in order to protect the quality of the water it is exporting
34 south.²⁷ CDWA claims California WaterFix, by conveying water in a facility beyond the reach of
35 salinity intrusion, removes that incentive and gives the Department "the option of walking away
36 from resorting that water quality." (*Id.*, p.4.) CDWA, moreover, asserts that the Department *will*
37 do so and thus will not comply with D-1641 following a levee failure.

38 g. Stockton Water Quality

39
40 The City of Stockton argues that California WaterFix will degrade water quality at Stockton's
41 intakes. (Stockton Appeal Letter, p. 14).
42
43
44
45
46

²⁷ Because no party has provided citations to the record, we take official notice of these generally accepted scientific facts pursuant to Paragraph 29 of our Appeals Procedures.

1 **4. Analysis**

2
3 **a. Modeling and Model Results**

4
5 **i. Compliance with D-1641 Export-Inflow Ratio**

6
7 D-1641 requires a specific ratio between inflows into the Delta and exports through the
8 SWP and CVP, and specifies where inflow and export must be measured. As defined in D-1641,
9 the Delta inflow variable is calculated based on the inflows of the Sacramento River,
10 Sacramento Regional Treatment Plant, Yolo Bypass, Eastside Streams, combined flows of Bear
11 Creek and other streams, and the San Joaquin River at Vernalis.²⁸ For the Sacramento River,
12 inflow is calculated at Freeport ([D-1641](#), Table 3, p. 190), which is upstream of the proposed
13 North Delta Diversion and the point used in the model. The export rate is the combination of
14 Clifton Court Forebay inflows (which would include water delivered from the North Delta
15 Diversion to Clifton Court Forebay (Certification [Project Description](#), p. 2)) and exports from the
16 Tracy pumping plant. ([D-1641](#), Table 3, p. 185, 190) Appellants SCDA, FOR, and San
17 Joaquin argued that the Department has not demonstrated consistency with the D-1641 export-
18 inflow ratio standard because the Department has modeled compliance at a compliance point
19 different than the one required by D-1641 and excluded California WaterFix exports. ([SCDA](#)
20 [Appeal Form](#), p. 8; [FOR Appeal Letter](#), p. 12; [San Joaquin County Appeal Letter](#), p. 61).

21 D-1641 requires that the export/inflow ratio must not exceed 35% for March to June and
22 65% from July to January. For February, the requirement varies between 35% and 45% ([D-](#)
23 [1641](#), p. 184). In its Certification, the Department finds that the modeling shows that California
24 WaterFix as proposed “complies with the Export/Inflow” ratio requirements in D-1641 ([DWR ER](#)
25 [P1 Detailed Findings](#), p. 27, citing [Exhibit DWR-1069](#), Figure 26, 27).

26 Appellants argue that this conclusion is unsupported because the Department’s model
27 calculates the inflow component of the calculation at a different point, downstream of the North
28 Delta Diversion intakes, rather than at Freeport and omits North Delta Diversion exports.

29 The Department justifies its choice of a compliance point and export calculation by
30 referring to the purpose of the E/I ratio standard: “[T]he existing D-1641 export/inflow ratio is a
31 requirement to protect against potential entrainment at the existing south Delta intakes...” (DWR
32 Written Statement, p. 62). This, the Department argues, means that the proposed North Delta
33 Diversion intakes should not contribute to the ratio: “For [California WaterFix], Reclamation and
34 [the Department] propose that the [North Delta Diversion] be excluded from the E/I ratio
35 calculation. In other words, Sacramento River inflow is defined as flows downstream of the
36 [North Delta Diversion] and only south Delta exports are included for the export component of
37 the criteria.” (Certification ER P1 Findings, p. 7.) Evidence in the record supports this
38 interpretation of the original purpose of the E/I ratio standard in D-1641. (Final EIR-EIS
39 Appendix 5A - Additional Modeling - Section D ([D.1 DRAFT 000042](#) p. 5A-D148; [CCC-SC-62](#),
40 p. 2-18, 2-23, 2-26, 2-30).

41 When assessing consistency with ER P1, however, we must consider California
42 WaterFix’s compliance with D-1641 in its current form. While the intent of the D-1641 E/I ratio is
43 to minimize entrainment in the south Delta export facilities, D-1641 clearly defines the point of
44 measurement for compliance with the E/I ratio and the components of the export rate. Updates

²⁸ The inflow measurements are based on mean flows and use different mean time periods at different locations. See [D-1641](#), Table 3, p. 190, for a full description of the Delta inflow and export terms.

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1 to the Bay-Delta WQCP may shift that compliance point and export calculation for a variety of
2 reasons. There is no evidence in the record as to where a new compliance point might be, or
3 where it would need to be to provide the protection that is the purpose of the present point.
4 There is similarly no evidence in the record as to where a compliance point might appropriately
5 be placed to provide *other* water-quality or biological-resource protection – for example, to
6 protect against entrainment at the North Delta Diversion, as San Joaquin County suggests. (San
7 Joaquin County October 15, 2018 Letter, pp. 11-12.) The same holds true for the export
8 calculation: there is no evidence in the record pointing to a substitute for the current requirement
9 in D-1641. The Department invites us to speculate that, in light of the proposed project's
10 alterations to the system, a new compliance point would be at its chosen location and a new
11 export rate would exclude California WaterFix. In the absence of evidence, we *cannot* do so.
12 Pursuant to ER P1, we must apply D-1641 in its present form, including the Freeport
13 compliance point for the Sacramento River component of the E/I ratio, and all Clifton Court
14 Forebay inflows included in the export rate.

15 The Department also provides a sensitivity analysis of different scenarios measuring
16 Sacramento River inflow both upstream and downstream of the North Delta Diversion.
17 ([D.1 DRAFT 000042](#) p. 5A-D149). A summary states:

18 “In summary, the results from the sensitivity run for A4_ESO_ELТ [a WaterFix scenario
19 with certain climate and operation assumptions] with E/I ratio approach recommended
20 by NMFS [using Sacramento River flows measured at Freeport, above the North Delta
21 Diversion] showed that on a long-term average, there are minor changes in the flow and
22 storage operations compared to the A4_ESO_ELТ results included in the current effects
23 analysis [with Sacramento River flows measured downstream of the North Delta
24 Diversion]. The north Delta bypass flows and Delta outflow are increasing slightly in
25 June using the NMFS recommended approach.” (Ibid., p. 150)

26 The evidence provided by the Department also includes figures graphically demonstrating the
27 modeled differences between these multiple operational scenarios. While similar in most cases,
28 the simulation which uses the current X2 standards and therefore most closely adheres to D-
29 1641 shows significant differences. Under this scenario, Figure 3 shows that under the
30 Department's proposed operating criteria, measuring inflow above the North Delta Diversion as
31 required by D-1641 and exports from both south delta and the North Delta Diversion would lead
32 to June E/I ratios exceeding the D-1641 limit nearly 40% of the time in June. (Ibid., p. 152). This
33 same figure also shows that the D-1641 E/I ratio *could* be met under different operating
34 scenarios that are not part of California WaterFix as it is currently proposed.

35 Because it relies on a compliance point for the required E/I ratio that is different from
36 what D-1641 specifies, and because using the correct compliance point would lead to
37 exceedances of that ratio, substantial evidence *does not* support the Department's certification
38 of the covered action's consistency with ER P1 as to compliance with the E/I ratio standard of
39 D-1641.

40 ii. Rio Vista Flow Standards

41
42 San Joaquin County argues that the Department's model specifies flows at Rio Vista that
43 are not required in either D-1641's standard or the Department's California WaterFix operational
44 standards, asserting that discrepancies between modeled and planned operational criteria
45 undermine the model's ability to accurately represent real conditions. (San Joaquin County
46 Appeal Letter, p. 58.) The Department explains that the Incidental Take Permit issued by the
47 Department of Fish and Wildlife for California WaterFix requires the 3,000 cfs flow at Rio Vista.

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1 (Department October 5, 2015 Letter, p. 66, citing X.1_DRAFT 000003, p. 181.) Because the
2 Incidental Take Permit requires the Rio Vista flow used in the model, Appellants have not shown
3 any failure of substantial evidence in support of the Department's approach to modeling Rio
4 Vista flow, and we *deny* San Joaquin County's appeal as to this issue.

5 **iii. Delta Cross Channel (DCC)**

6
7 San Joaquin County argues that the Department incorrectly specifies Delta Cross
8 Channel (DCC) operations in the CalSim II model. San Joaquin County writes, "as stated by
9 DWR in exhibit DWR-1143 second revision (p. 7), this operating criterion is required by NMFS
10 (2009) BiOp Action IV.1 and D-1641, and the DCC closure for downstream flood control would
11 be based on Sacramento River flow at Freeport, upstream of the proposed north Delta
12 diversions. With the Delta Tunnels Project, DCC closures are required to be based on the
13 Sacramento flow at Freeport, but the CALSIM II operations model incorrectly bases closures on
14 the much smaller flow just upstream of the DCC." (San Joaquin Appeal Letter, p. 60.)

15 In Exhibit DWR-1143, the Department plainly states that "DCC closure for downstream
16 flood control will be based on Sacramento River flow at Freeport." (DWR-1143 second revision
17 p. 6). In its filing, the Department states that it uses "monthly average Sacramento River flow
18 upstream of the DCC" in specifying downstream flood closures, which indicates fidelity to real
19 DCC operations. (Certification ER P1 Findings, p. 19.) The Department has reiterated this in its
20 response to supplemental questions ([Department October 15, 2018 Letter](#), p. 61) and cites
21 evidence in the record ([X.2_DRAFT 000168](#) pp. 2-6). As described in the testimony of Chandra
22 Chilmakuri at the SWRCB hearing:

- 23 1) [California WaterFix] does not include any changes to the DCC gate operations
24 criteria compared to the NAA. (DWR-1143.) All the criteria and the real-time
25 decision-making processes that govern DCC operations under the NAA, included in
26 D1641 and 2009 NMFS BiOp, are proposed to continue with CWF; and
27
28 2) The NMFS BiOp for CWF states that the DCC closure during high Sacramento River
29 flows (>25,000 cfs) should be triggered based on the flows measured at Freeport
30 gage, which is upstream of the proposed intakes.

31 (DWR-1217, Testimony of Chandra Chimakuri, p.3, citing SWRCB-106 p. 1036.)

32 This evidence shows that with California WaterFix, the DCC Gate will be operated as required
33 by current authorities. Evidence in the record further shows that CALSIM II bases its model of
34 DCC operations on the assumption that operations will continue in this manner. (DWR 1142,
35 Appx 5.A, p.31.) Appellants have thus failed to show that the Department lacks substantial
36 evidence in support of its representation of DCC operations in modelling the effects of California
37 WaterFix, and we therefore *deny* the appeal as to this issue.

38 **iv. Municipal and Industrial (M&I) Chloride Concentration**

39
40 To protect M&I water users, D-1641 includes chloride concentration standards at Contra
41 Costa Canal: year-round, chloride concentration must be below 150 mg/L for at least a specified
42 number of days and may not exceed 250 mg/L. D-1641 (D-1641, Table 3, p. 181.) San Joaquin
43 County argues that "the simulated daily-averaged salinities in Old River at Bacon Island for
44 [California WaterFix] are well in excess of the 250 mg/L chloride standard in D-1641." (San
45 Joaquin County Appeal Letter, p. 60.) The Appellant contends that the station at Old River at
46 Bacon Island informs compliance with Contra Costa Canal water quality standards because it is

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1 “very near the intake to the Contra Costa Canal.” (*Id.*) San Joaquin County relies on SWRCB
2 hearing Exhibit CCC-SC-60 to allege that under California WaterFix operations, chloride
3 concentrations at Old River at Bacon Island in November would frequently exceed the D-1641
4 standard of 250 mg/L chloride with the highest exceedance being 761 mg/L (San Joaquin
5 County Appeal Letter, p. 60). Appellant argues that “[b]ecause [California WaterFix] fails to
6 comply with the daily M&I chloride concentration standard in D-1641, the modeling results are
7 useless for decision makers like the Council and SWRCB and fail to accurately analyze and
8 disclose the impacts of the proposed Project. Until the Department carries out model studies
9 that comply with the SWRCB’s D-1641 standards, the Council cannot make an informed
10 decision regarding the consistency of the Project with the Delta Plan.” ([San Joaquin](#), p. 60).

11 The Department’s Certification cites Exhibit DWR-1071, p.16, Figure C13, which “shows
12 the number of days in a year meeting the 150 mg/l mean daily chloride concentration at the
13 Contra Costa Canal Intake.” (Certification ER P1 Findings, p. 24.) That Exhibit, however, does
14 not show the days in a year where the Contra Costa Canal Intake would meet the 150 mg/l
15 mean daily chloride standard, but rather the probability of meeting the 250 mg/L year-round
16 standard at the Contra Costa Canal Intake. The evidence is not contradictory with San
17 Joaquin’s.

18 Each party’s cited evidence shows that California WaterFix would cause exceedances at
19 the Contra Costa Canal Intake, some of which are substantially above the D-1641 limit. Exhibit
20 DWR-1071, p.16, Figure C13 shows that the standard would be exceeded roughly 5% of the
21 year. Evidence in the record supports the conclusion that these exceedances are likely a result
22 of the model’s limitations, especially related to the interaction between the CalSim II and DSM2
23 models. (DWR-79, [Testimony of Dr. Parviz Nader-Tehrani](#), pp. 36-42). CalSim II is
24 acknowledged as the best available model for such this analysis. (See section B.3.i of the
25 discussion of G P1(b)(3), above.).

26 To the extent that San Joaquin County challenges the Department’s modelling on this
27 ground, Appellant has not shown a lack of substantial evidence supporting the Department’s
28 modeling approach. However, to the extent that Appellant is arguing that the modeled
29 exceedances render California WaterFix inconsistent with D-1641 and ER P1, this
30 determination regarding the Department’s modeling is not sufficient to support a determination
31 of consistency with this aspect of D-1641., The Department claims daily operations of California
32 WaterFix will I be able avoid modeled exceedances, including the M&I chloride exceedances.
33 (Certification ER P1 Finding, p. 12.) We therefore must consider the evidence supporting the
34 Department’s claimed ability to successfully operate California WaterFix in this manner.

35 **b. Historical Operations**

36 Appellants assert that the Department shows that historical operations have achieved a
37 high compliance rate only because “Temporary Urgency Change Petitions (TUCP) and Orders
38 relaxed the standards applicable to the SWP and CVP.” (NCRA, p. 9). The Department states
39 that the “... historical compliance record included compliance with the applicable standards on
40 the day ...the record reflects complying with the modified requirements under TUCPs.”
41 ([Department October 15, 208 Letter](#), p. 67). The Department relies on its historical operations
42 data to support its assertion that it can prevent exceedances through real-time operations.
43 Where the modeling shows potential exceedances, the Department claims, it will be able to alter
44 operations to prevent them. The claimed historical compliance rate of 98.9%, the Department
45 claims, shows that it has the ability to make such adjustments. The Department’s ability to
46 comply with the standards in TUCPs, however, does not necessarily support its ability to comply
47 with the standards of D-1641. Water-quality or flow standards under TUCPs may be less

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1 rigorous than under D-1641, and thus may be attainable through the Department's proposed
2 operations in circumstances where operations could not avoid exceedances of D-1641. Without
3 evidence regarding the particular circumstances and standards of the relevant TUCPs, we
4 cannot determine whether the Department's compliance with such standards supports a finding
5 that will be able to operate California WaterFix to comply with D-1641. The inclusion of TUCP
6 compliance in the reported compliance rate thus inflates the compliance rate without actually
7 supporting the Department's finding of consistency.

8
9 Moreover, NCRA points out that Department arrived at its 98.9% compliance rate "by
10 combining all compliance years and locations." (NCRA Appeal Letter, p. 9.) The Department's
11 approach to calculating days of compliance count as a day in "compliance" any day on which
12 water quality met one of "the applicable standards on the day." ([Department](#) October 15, 2018
13 Letter, p. 67, citing DWR-61 Section VI (D.8_DRAFT 023114), p. 9.) If there were, for example,
14 ten standards in effect on a given day and water quality met nine of them, then the
15 Department's calculation would count ten total days and nine days in compliance. That day
16 would contribute 90% to the calculation of average time in compliance. (*See id.*) The
17 Department's reported 98.9% compliance rate thus does not mean that water quality met all
18 applicable standards on 98.9% of all days. Indeed, the Department's data shows that on about
19 60% of days in 2009, water quality fell short of at least one applicable standard, while under
20 their metric it only exceeded approximately 3.7% of the time. (*See id.*; DWR-403.)

21
22 For these reasons, substantial evidence does not support the Department's claim of a
23 historical 98.9% rate of compliance with D-1641. Because the reported compliance rate is not
24 reliable, there is a lack of substantial evidence supporting the Department's certification that
25 daily operations of California WaterFix can prevent modeled exceedances generally or Contra
26 Costa Canal M&I chloride exceedances specifically. Therefore, substantial evidence *does not*
27 support the Department's certification that California WaterFix will be consistent with ER P1 as
28 to its general approach to daily operations or as to its compliance with the Contra Cost Canal
29 M&I chloride standard.

30 31 **c. Role of Reclamation**

32
33 Appellants CDWA, FOR, NCRA, and San Joaquin County assert that the Department
34 has not demonstrated that Reclamation will continue to cooperate with the Department in
35 operating the CVP and SWP (including California WaterFix) and that without evidence of such
36 coordination, there is not substantial evidence supporting the Certification of Consistency with
37 ER P1.

38 As the Department explains, a key to the federal agency's role in the Delta is the federal
39 Reclamation Act, which requires "Reclamation to 'proceed in conformity' with state laws 'relating
40 to the control, appropriation, [and] distribution of water used in irrigation.' 43 U.S.C § 383."
41 (Department October 15, 2018 Letter, p. 11 (quoting July 27, 2018 letter from the Commissioner
42 of Reclamation to the Chair of the State Water Resources Control Board, which letter is not in
43 the record here). In some circumstances Reclamation may assert federal interests that would
44 preempt state law, but absent such a claim, Reclamation must acquire state-law water rights for
45 the CVP. It must comply with conditions on those rights, and with State requirements such as D-
46 1641.

47 To this end, the Department and Reclamation have a Coordinated Operation Agreement
48 (COA) to assist both agencies to address regulation requirements in the Delta, such as D-1641
49 standards. The Department explains that the COA identifies formulas for sharing joint

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1 responsibilities for meeting Delta standards as they existed under D-1485. The Department
2 also states that “Requirements set forth under various regulations (e.g., D-1641, BiOps) that
3 were not in D-1485 have been shared by the CVP and SWP per informal agreements.”
4 (Certification, ER P1 Findings, p 14.) Additionally, the Department states, “the [Department] and
5 [Reclamation] have been and will continue to coordinate with SWRCB to find alternative
6 methods to meet salinity objectives in the south Delta” (*Id.*, p 8). Reclamation, moreover, is the
7 NEPA lead agency for the California WaterFix Final EIR/EIS and a co-petitioner with the
8 Department seeking a change in the point of diversion to facilitate the project. (Department
9 October 15, 2018 Letter, pp. 7-8.)

10 Appellants and the Department have each provided communications from the federal
11 government, including the President, Department of the Interior, and Reclamation, the indicating
12 dissatisfaction with California’s water-quality regulations, including D-1641. These
13 communications are not in the record of this proceeding. (Pursuant to the ruling in Exhibit C of
14 this Determination, we will not add to the record or take official notice of the August 17, 2018
15 memo from the Secretary of the Interior, the July 27, 2018 and August 17, 2018 letters from the
16 Commissioner of the Bureau of Reclamation, or the October 19, 2018 Presidential
17 Memorandum.) No evidence in the record indicates that Reclamation will abandon its role as
18 proponent of California WaterFix or seek to free itself from California regulation. We note that if
19 any change to the relationship between Reclamation and the Department constitutes or leads to
20 a covered action, that action would be subject to the Delta Reform Act’s consistency
21 requirements.

22 On this topic, Appellants demonstrate no failure of substantial evidence supporting the
23 certification that the covered action is consistent with ER P1. We therefore *deny* the appeal as
24 to this issue.

25 **d. Flow and Operations Criteria**

26
27 The Department states that there will be flexibility in their operations, and that this is
28 necessary because “The SWP is conditioned by water rights permits and D-1641 issued to the
29 Department by the State Water Resources Control Board. The Department must also comply
30 with the regulatory requirements contained in the 2008 U.S. Fish and Wildlife biological opinion
31 for the protection of Delta Smelt, the 2009 National Marine Fisheries Service biological opinion
32 for the protection of anadromous fish species, and the 2009 California Department of Fish and
33 Wildlife incidental take permit for the protection of Longfin Smelt.” ([Certification ER P1 Finding](#),
34 p. 2).

35 Appellants raise issues with the lack of specificity regarding flow criteria, or other
36 operational criteria, for California WaterFix. For example, San Joaquin states, “... the Project
37 includes adaptive management with the range of the Boundary 1 and Boundary 2 scenarios.
38 (See DWR-1143 second revised.) Additionally, the Boundary 1 scenario has no Fall X2
39 requirement.” (San Joaquin County Appeal Letter, p. 59.) FOR also argues that operations
40 criteria were not set, but rather “will be defined through further discussion,” and that “[a]ctual
41 operations will be based on real-time monitoring of hydrologic conditions and fish
42 presence/movement.” (FOR Appeal Letter, p. 12.) San Joaquin County additionally states that
43 “The Delta Independent Science Board in a September 30, 2015 letter stated in no uncertain
44 terms that the BDCP/CWF is ‘sufficiently incomplete and opaque to deter its evaluation and use
45 by decision makers, resource managers, scientists and the broader public.’ (CCC-SC-20.)”
46 (San Joaquin County Appeal Letter, p. 59.)

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1 These arguments generally claim that because in the future California WaterFix may be
2 operated differently than currently proposed, the Certification of Consistency with ER P1, which
3 is based on the currently-proposed operational criteria, lacks the support of substantial
4 evidence. As the Department points out, however, it is legally bound to operate WaterFix in
5 compliance with D-1641; the purpose of its certification is to demonstrate that it is possible to do
6 so with the California WaterFix operating criteria as proposed. Flexibility alone does not prevent
7 the Department from certifying consistency with ER P1: the policy does not require that project
8 proponents commit to a specific set of operations in perpetuity. (As described elsewhere in this
9 determination, other aspects of the record do fail to support the Department's certification.) As a
10 matter of policy, we support flexibility in operations of infrastructure in order to better meet both
11 ecosystem and water supply needs, as long as such adjustments are still in compliance with D-
12 1641 (as it may be modified or replaced). As long as California WaterFix, with its proposed
13 operating criteria, is capable of complying with D-1641 as it currently stands, then the fact that
14 the Department may adjust operations in response to future changed regulations is irrelevant.
15 Appellants have not shown that the flexibility in California WaterFix's operating criteria creates a
16 failure of substantial evidence in support of the Department's certification that California
17 WaterFix is consistent with ER P1. We therefore *deny* the appeals as to this issue.

18 San Joaquin County additionally states that "As discussed in detail in CCC-SC-51, the
19 82-year averaged SWP and CVP exports from the Delta for a number of months of the year are
20 very different for [California WaterFix] than for BA H3+ and Alternative 4A, scenarios H3 and
21 H4. In other words, they are not similar to H3 and H4 and are not nearly identical to the NAA
22 results [as claimed by the Department]." (San Joaquin County Appeal Letter, p. 59, citing CCC-
23 SC-59, Figure 1.) The cited evidence does show difference between these scenarios for certain
24 months. However, the Appellant fail to demonstrate that this particular difference between
25 versions of California WaterFix demonstrates a flaw in the Department's finding that it will
26 comply with D-1641 or its certification that WaterFix is consistent with ER P1. We therefore
27 *deny* the appeal as to this issue.

28 **e. Updated Delta Flow Objectives**

29
30 Appellants FOR (Appeal Letter, p. 13), NCRA (Appeal Letter pp. 9), and San Joaquin
31 County (Appeal Letter, p. 61) argue that the Department does not demonstrate consistency with
32 ER P1 because of ongoing updates to the Bay-Delta WQCP. ER P1, however, requires
33 compliance with SWRCB flow objectives as exist at the time of certification (i.e., D-1641). The
34 potential for future changes to water quality standards does not prevent certification now. (As
35 discussed elsewhere in this Determination, other failures of substantial evidence do require us
36 to remand the Certification to the Department.) Appellants have not shown that Bay-Delta
37 WQCP updates cause a lack of substantial evidence supporting the Department's Certification
38 of Consistency with ER P1. We *deny* the appeal as to this issue.

39 **f. Operations After Levee Failure**

40
41 CDWA asserts that the Department will not operate California WaterFix to comply with
42 D-1641 in the event of future levee failures. ([CDWA Appeal Letter](#), pp. 3-5). CDWA does not
43 identify any evidence in the record showing "for WaterFix [the CVP and SWP] have taken the
44 unwarranted liberty of carving out a major exception to compliance with [D-1641]." (CDWA
45 Appeal Letter, p. 4.) In response, the Department states that it would be legally bound to
46 comply with D-1641 following a levee failure:

47 Although there are emergency protocols that may allow for different procedures, it's
48 important to note that without special dispensation, California WaterFix operations would

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1 still be required to operate under federal and state regulations (e.g. Biological Opinions,
2 Fish and Game Code Section 2081(b), State Water Resources Control Board Decision
3 D-1641) and operating criteria in the event of a levee failure situation. Any deviations
4 from project operating criteria would have to be approved by the applicable regulatory
5 agencies.

6 (Department October, 2018 Letter, p. 68, quoting Final EIR/EIS, Vol. II, Master Response 16,
7 [D.1 DRAFT 000188](#), p. 1-142).

8 The Department does not identify evidence in the record showing that California
9 WaterFix could be operated to comply with D-1641 following major levee failure. Instead the
10 Department asserts that in addition to the mandate of D-1641, the existing south Delta
11 diversions would still be operating, giving the Department strong incentive to manage operations
12 of California WaterFix and the south Delta facilities to mitigate salinity intrusion. (Department
13 October 15, 2018 Letter, p. 69.) Moreover, the Department states that California WaterFix
14 “could add to the options available to manage an emergency response to salinity intrusion in the
15 south and west Delta. It would be speculative however to estimate a specific response to salinity
16 intrusion as the specific levee failure circumstances would dictate the appropriate response.”
17 (Department October, 2018 Letter, p. 68, quoting Final EIR/EIS, Vol. II, Master Response 16,
18 [D.1 DRAFT 000188](#), p. 1-142.)

19 SDWA correctly notes that the Department has not provided substantial evidence of its
20 ability to comply with D-1641 following major levee failure. The Department, however, is also
21 correct that D-1641 is “premised on the current configuration of rivers and sloughs in the Delta,
22 which are bounded by the existing levees,” and does not “contemplate[] flow criteria or
23 responsibility for meeting flow criteria in the wake of catastrophic levee failure and salinity
24 intrusion.” (Department October 15, 2018 Letter, p. 68.) There is no way now to provide
25 evidence of the eventual solution without undue speculation about the circumstances and
26 results of such a failure. The Department’s task in its certification is to show that California
27 WaterFix can comply with D-1641 in the conditions in which the decision was designed to
28 function. Although, as the Department acknowledges, D-1641 would technically still apply, \all
29 parties, including SWRCB, would need to engage in appropriate processes to solve the dual
30 problems of protecting Delta water quality and providing water to all users, including those south
31 of the Delta – in other words, to advance our coequal goals. We therefore find that as to
32 operations after a levee failure, CDWA has not shown a lack of substantial evidence supporting
33 the Department’s Certification that California WaterFix is consistent with ER P1, and we *deny*
34 the appeal as to this issue.

35 **g. Stockton Water Quality**

36
37 Stockton acknowledges that “there are no D-1641 water quality compliance criteria for
38 M&I uses that apply at or near Stockton’s intake.” (Stockton Appeal Letter, p. 14.) Stockton
39 therefore has not raised any issue within the scope of the Council’s review as to the model’s
40 time steps, and we *deny* its appeal as to this issue.

41 **5. Conclusion**

42
43 The Department relies on two main sources of evidence: modeling studies and its
44 historical record of compliance. The historical record is meant to show that the Department is
45 capable of using daily operations to meet water quality standards at a greater rate than
46 suggested by monthly models. However, neither the models nor the historical record
47 demonstrates complete compliance with the D-1641 chloride standard for municipal and

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1 industrial uses at the Contra costa Canal. In addition, the Department's model does not provide
2 substantial evidence so support the conclusion that California WaterFix can be operated to meet
3 D-1641's export/inflow ratio measured as D-1641 requires. Therefore, the Department's
4 Certification of Consistency with ER P1 is *not supported* by substantial evidence in the record.
5

6 **I. Policy ER P2 (23 CCR Section 5006): Restore Habitats at Appropriate Elevations**

7

8 ER P2 requires that habitat restoration projects be carried out in a particular manner. The
9 Department has certified that California WaterFix is consistent with ER P2. Two Appellants –
10 NCRA and FOR – have raised substantive arguments that it is not. We disagree with both the
11 Department and those Appellants and find that the ER P2 does not apply to the covered action
12 now before us.

13 **1. Policy Requirements**

14 ER P2 establishes a basis for restoration planning in the Delta and Suisun Marsh that
15 considers land elevations, urban development constraints, and sea-level rise. It provides:

- 16 (a) Habitat restoration must be carried out consistent with Appendix 3, which
17 is Section II of the Draft Conservation Strategy for Restoration of the
18 Sacramento-San Joaquin Delta Ecological Management Zone and the
19 Sacramento and San Joaquin Valley Regions (California Department of
20 Fish and Wildlife 2011). The elevation map attached as Appendix 4
21 should be used as a guide for determining appropriate habitat restoration
22 actions based on an area's elevation. If a proposed habitat restoration
23 action is not consistent with Appendix 4, the proposal shall provide
24 rationale for the deviation based on best available science.
- 25 (b) For purposes of Water Code section 85057.5(a)(3) and section
26 5001(j)(1)(E) of this Chapter, this policy covers a proposed action that
27 includes habitat restoration.

28 The policy incorporates two documents by reference. The first – which it attaches as Appendix 3
29 – is Section II of the Draft Conservation Strategy for Restoration of the Sacramento-San
30 Joaquin Delta Ecological Management Zone and the Sacramento and San Joaquin Valley
31 Regions. It provides guidance for habitat restoration and prioritization and also includes
32 descriptions of broad habitat types. The second document – which the policy attaches as
33 Appendix 4 – is an elevation map showing habit types described in Appendix 3 and setting
34 priorities for restoring them. (See also Delta Plan, p. 149 [describing the operation of ER P2].)

35 **2. Certification and Appeals**

36 In the Certification, the Department concludes that California WaterFix is consistent with
37 ER P2. Its conclusion is based on the expected implementation of habitat restoration actions
38 described in Environmental Commitments 3, 4, 6, 7, 8, 9, and 10 as presented in the Final
39 EIR/EIS and Mitigation Monitoring Reporting Program. (Certification of Consistency: ER P2, p.
40 1.)

41 The Certification does not identify the specific locations for all of the commitments. It
42 explains that the Department has not settled upon the appropriate sites yet, let alone acquired
43 them, and that it is therefore not possible to document the elevation being proposed for each
44 specific site. Nevertheless, the Department describes the process by which it will select sites,

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1 and it certifies that it will carry out its habitat restoration actions consistent with ER P2.
2 (Certification, p. 7.)

3 **3. Appellants' Positions**

4 NCRA and FOR claim that California WaterFix is not consistent with ER P2. In support
5 of this claim, the Appellants raise two arguments. The first regards the lack of specific locations
6 in the Certification. The second regards the sufficiency of habitat restoration activities. These
7 arguments do not establish that the Certification lacked substantial evidence to demonstrate
8 consistency with ER P2.

9 **a. Lack of Specific Locations in the Certification**

10 NCRA argues: "Until such time that the Department can identify the locations of habitat
11 restoration activities, any consistency determination would be premature." (NCRA Appeal
12 Letter, p. 9.) The text for ER P2 does not expressly require identification. Nor does NCRA cite
13 any authority that would suggest that it would be improper for the Department to submit its
14 Certification of Consistency at this time or for the Council to rule on the Certification. (*Ibid.*)

15 In detailed findings, the Department asserts that it will use best available science and will
16 consult Appendix 3 and Appendix 4, with particular reference to the elevation map in Appendix
17 4, as guides when determining appropriate elevations for Environmental Commitments
18 consistent with ER P2" (Certification, p. 2).²⁹ When the Department selects sites and is
19 prepared to undertake habitat restoration activities, we expect that the Department will submit
20 certifications of consistencies for those activities, assuming they satisfy the criteria for covered
21 actions.

22 **b. Habitat Restoration Activities**

23 Both FOR and NCRA raise arguments that broadly address habitat restoration, but that
24 do not directly relate to EP P2. FOR states: "The Delta Plan and Regulations require habitat
25 restoration. (Delta Plan, ch. 4, p. 149; Regulations, Art. 3, § 5006.)" FOR then states:

26 The very purpose of [California WaterFix] is to reduce the freshwater flows
27 through the lower Sacramento River and Delta by taking those flows away from
28 the river and transporting them through underground tunnels to the pumps in the
29 south Delta. That will do the opposite of restoring the habitat for the fish. That
30 will instead degrade their habitat.

31 (FOR Appeal Letter, pp. 15-16.) FOR misreads both the Delta Plan and ER P2. The narrative
32 portions of the Delta Plan cited by FOR are self-explanatory. They do not have regulatory
33 effect, and do not "require" anything. ER P2 is a regulation, but does not "require" habitat
34 restoration. Rather, the policy provides that, when habitat restoration is "carried out," it must be

²⁹ Additionally, NCRA states: "the Delta Stewardship Council cannot rely upon the Department's insufficient mitigation measures and environmental commitments." (NCRA Appeal Letter, p. 9.) NCRA provides no further argument or evidence in support of this point. While NCRA does discuss at length its position regarding the adequacy of certain mitigation measures under CEQA, it does not explain the relevance of this position to ER P2, which is separate from CEQA and calls for a separate analysis. Thus, the Council finds that NCRA's argument regarding the adequacy of mitigation measures is irrelevant as to ER P2.

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1 carried out in a particular way. (ER P2, subd. (a).) FOR does not address the specific
2 requirements of ER P2 nor attempt to argue that the habitat restoration activities the
3 Department has proposed would be inconsistent with them. (FOR Appeal Letter, p. 16.)
4 Consequently, its allegations are not relevant to an analysis under ER P2.

5 For its part, NCRA states: “[The Department] cannot show that WaterFix’s purported
6 habitat restoration activities will satisfy the co-equal goal of ‘protecting, restoring, and enhancing
7 the Delta ecosystem.’” (NCRA Appeal Letter, pp. 9-10 [citing Water Code section 85054].)
8 NCRA does not cite any evidence in support of its statement. Nor does it explain the relevance
9 of the statement to analyzing consistency with ER P2. Thus, the Council finds NCRA’s
10 contention unavailing.

11
12 **J. Policy ER P3 (23 CCR Section 5007): Protect Opportunities to Restore Habitat**

13
14 The Department certifies that California WaterFix is consistent with ER P3. Two
15 Appellants – NCRA and FOR – raise substantive arguments that it is not. For the reasons
16 discussed below, the Council finds that NCRA and FOR have failed to show that the
17 Department’s Certification of Consistency with ER P3 is not supported by substantial evidence
18 in the record. Thus, we *deny* the appeals on these grounds.

19
20 **1. Policy Requirements**

21
22 ER P3 states:

23
24 (a) Within the priority habitat restoration areas depicted in
25 Appendix 5, significant adverse impacts to the opportunity to restore habitat
26 as described in section 5006, must be avoided or mitigated.

27
28 (b) Impacts referenced in subsection (a) will be deemed to be
29 avoided or mitigated if the project is designed and implemented so that it will
30 not preclude or otherwise interfere with the ability to restore habitat as
31 described in section 5006.

32
33 (c) Impacts referenced in subsection (a) shall be mitigated to a
34 point where the impacts have no significant effect on the opportunity to
35 restore habitat as described in section 5006. Mitigation shall be determined,
36 in consultation with the California Department of Fish and Wildlife,
37 considering the size of the area impacted by the covered action and the type
38 and value of habitat that could be restored on that area, taking into account
39 existing and proposed restoration plans, landscape attributes, the elevation
40 map shown in Appendix 4, and other relevant information about habitat
41 restoration opportunities of the area.

42
43 (d) For purposes of Water Code section 85057.5(a)(3) and
44 section 5001(j)(1)(E) of this Chapter, this policy covers proposed actions in
45 the priority habitat restoration areas depicted in Appendix 5. It does not
46 cover proposed actions outside those areas.

47
48 The Delta Reform Act defines “restoration” as the “application of ecological principles to
49 restore a degraded or fragmented ecosystem and return it to a condition in which its biological
50 and structural components achieve a close approximation of its natural potential, taking into

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1 consideration the physical changes that have occurred in the past and the future impact of
2 climate change and sea level rise.” (Wat. Code, § 85066.)
3

4 **2. Department’s Certification**

5 The Department finds that California WaterFix is consistent with ER P3, because it does
6 not create significant adverse impacts to the opportunity to restore habitat as described in ER
7 P3. (Certification ER P3 Finding, p. 1.)
8

9 The detailed findings characterize the project features as described in Final EIR/EIS
10 Chapter 3, Section 3.6.1, that are in Priority Habitat Restoration Areas (PHRAs). The
11 Department states that all temporary project features sited in a PHRA would be returned to
12 previous conditions after construction is complete, and would not result in a significant adverse
13 impact to the opportunity to restore habitat. The findings also state that where permanent
14 features are sited in a PHRA, they: (a) represent a small acreage impact to the opportunity to
15 restore habitat in comparison to the overall size of the PHRA, and (b) do not result in a
16 significant adverse impact to the opportunity to restore habitat.
17

18 California WaterFix would have project features in two of the six areas identified as
19 PHRA in the Delta Plan: the Cosumnes River-Mokelumne River confluence and the Lower San
20 Joaquin River floodplain between Stockton and Manteca. (Certification ER P3 Finding, p. 2.)
21

22 The total acreage for the Cosumnes-Mokelumne River confluence PHRA is
23 approximately 7,401 acres. Construction of California WaterFix features within this area would
24 require approximately 288 acres (Certification ER P3 Finding, p. 3), which includes the following
25 permanent features located within the PHRA: (1) the intermediate forebay and spillway
26 (approximately 204 acres); and (2) portions of a Reusable Tunnel Material area (approximately
27 17 acres). The habitat considerations used in selection of the intermediate forebay and spillway
28 location included a reduction of impact on Greater Sandhill Crane foraging habitat. (Certification
29 ER P3 Finding, p. 3.) The detailed findings state that while Reusable Tunnel Material is
30 considered a permanent surface impact, the Final EIR/EIS, Appendix 3B, Section 3B.2.18,
31 describes the process through which it can be reused. The Department states that Reusable
32 Tunnel Material can be used as fill material for habitat restoration projects, and would not cause
33 significant adverse impacts to the opportunity to restore habitat. (Certification ER P3 Finding, p.
34 4.) Temporary features account for the remaining acreage in the PHRA (approximately 67
35 acres). Temporary features include safe haven work areas, or small-diameter shafts requiring
36 about 10 acres, which will be backfilled to preexisting conditions after construction, and will not
37 cause a significant adverse impact to the opportunity to restore habitat. (Certification ER P3
38 Finding, p. 4.)
39

40 The total acreage for the Lower San Joaquin River floodplain between Stockton and
41 Manteca PHRA is approximately 61,831 acres. Construction of California WaterFix features
42 within this area would require approximately five acres of land for the operable barrier sited at
43 the head of Old River. Because this feature would occupy 0.0085% of the overall area of the
44 PHRA, is sited on the edge of the PHRA, and is beneficial for aquatic species, the Department
45 finds that it will not cause a significant adverse impact to the opportunity to restore habitat.
46 (Certification ER P3 Finding, p. 3.)
47
48
49
50

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3. Appeals

We received two appeals (from NCRA and FOR) regarding the Department's Certification of Consistency with ER P3. NCRA made the following assertions:

- (a) The concrete batch plant and adjacent fuel station have the potential to contaminate the habitat on which they are constructed and “[b]ulk fuel would be stored at fuel stations and potentially pose the risk of vehicle fueling spills and leakage from above-ground storage tanks at fuel stations” as described in the Final EIR/EIS 24-45. Measures to minimize or avoid spills “do not address the impact of spills on the PHRA.” (NCRA Appeal Letter, p. 10.) NCRA further explained in its letter dated October 15, 2018, at page 5, that this temporary loss is expected to last over a duration of years, from late 2018 to 2031, during which “priority habitat restoration areas will remain occupied by heavy machinery, construction supplies, and other construction-related activities” and that these uses “have the potential to degrade the quality of the habitat and drive away adjacent animal species during this time-period.”
- (b) In addition, NCRA argues that the measures to minimize or avoid spills are dependent on formulation of future plans. (NCRA Appeal Letter, p. 10.) NCRA further explained in its October 15, 2018 letter at page 5 that “DWR failed to provide specific, enforceable mitigation measures that are sufficient to prevent such contamination.”

FOR made the following assertion:

- (c) “The Delta Plan and Regulations require the protection of opportunities to restore habitat (Delta Plan, ch. 4, p. 149; Regulations, Art. 3, 5007). Reducing freshwater flows through the Delta will cause significant adverse impacts to the opportunity to restore habitat. The Covered Action is not consistent with this policy.” (FOR Appeal Letter, p. 6.) In its October 15, 2018 letter, FOR further explained that the evidence supporting this statement includes an August 17, 2018 memorandum from the Secretary of the Interior and the fact that DWR has altered the project to not comply with SWRCB decision D-1641. According to FOR, these actions will “maximize, not avoid or mitigate, potential impacts to freshwater flows.”

We address each of these three contentions in turn below:

- (a) NCRA asserts that the temporary project features, a concrete batch plant and adjacent fuel station, “do not address the impact of spills on the PHRA.” (NCRA Appeal Letter, p.10.) NCRA cites the following evidence presented in the Final EIR/EIS 24-45 and 24-48, Chapter 24 on Hazards and Hazardous Materials ([Final EIR/EIS p.24-45](#)):

In addition to fuel use and bulk fuel storage, oils, lubricants, and other hazardous materials would be stored onsite and used in equipment, such as compressors, generators, pile drivers, cranes, forklifts, excavators, pumps, or soil compactors throughout the study area during construction. Spills and releases could occur during transfer and use of these materials in the field and over water or adjacent to waterways. Hazardous materials, including

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1 paints, solvents, and sealants, would be used in construction of
2 water conveyance facilities features (e.g., intakes, pumping plants,
3 conveyance piping). Fueling and transfer of oils, lubricants, and
4 other materials would be performed on work barges and watercraft
5 used for building temporary and permanent in-river facilities, such
6 as intake structures, and could be spilled or otherwise released to
7 the environment and result in a hazard.... As described in Appendix
8 3B, Environmental Commitments, AMMs, and CMs, SWPPPs,
9 HMMPs, and SPCCPs would be developed and implemented by
10 DWR as part of the construction process for Alternative 1A. *The*
11 *SPCCPs would minimize effects from spills of oil, oil-containing*
12 *products, or other hazardous chemicals during construction and*
13 *operation of the project. The plan would be comprehensive in that it*
14 *would address actions used to prevent spills and specify actions*
15 *that would be taken should any spills occur, including emergency*
16 *notification procedures”*

17
18 (Final EIR/EIS p. 24-45, emphasis added.)
19

20 ER P3 requires that significant adverse impacts to the opportunity to restore habitat as
21 described in section 5006 must be avoided or mitigated. Figure 4-7 of the Delta Plan states that
22 projects can comply with ER P3 by allowing temporary uses and requiring the removal of
23 structures and cleanup afterward to protect opportunities for habitat restoration. In its
24 Certification, the Department acknowledges that a temporary concrete batch plant and fuel
25 station will be located within the Cosumnes-Mokelumne River confluence PHRA on Glanville
26 Tract ([Certification ER P3 Finding, p.2](#)). However, the Department finds that “All temporary
27 project features sited in a PHRA will be returned to previous conditions after construction is
28 complete and will not result in a significant adverse impact to the opportunity to restore habitat.”
29 (Certification [ER P3 Finding, p.1.](#)) In addition, the Department identifies numerous measures
30 incorporated into the project that are aimed at preventing spills and other contamination.
31 (Department October 15, 2018 Letter, pp. 71-72 [citing Appendix 3B of the Final EIR/EIS].)
32 While these measures do not specifically mention priority habitat restoration areas, the
33 Department confirms that these measures “would remain applicable to concrete batch plants
34 and fuel stations in priority habitat restoration areas.” (*Id.* at p. 71.) In contrast, NCRA fails to
35 identify any permanent impacts to the opportunity to restore habitat in these areas.
36

37 Therefore, NCRA has failed to show that there is not substantial evidence in the record
38 to support the Department’s Certification of Consistency with ER P3 on this basis.
39

40 (b) NCRA asserts that the measures to minimize or avoid potential impacts from
41 temporary project features, a concrete batch plant and adjacent fuel station, are
42 dependent on formulation of future plans. ([NCRA Appeal Letter](#), p. 10.)

43 As discussed above, the Department cites numerous measures incorporated into
44 California WaterFix that are aimed at preventing spills and other contamination, all of which
45 would apply to PHRAs. (Department October 15, 2018 Letter, pp. 71-72 [citing Appendix 3B of
46 the Final EIR/EIS].) A review of these measures shows that while the precise details of the
47 plans are not in final form, they are supported by detailed performance standards. (See, e.g.,
48 DEIR/EIS pp. 3B-42 [hazardous materials management plans]; 43-45 [spill prevention,
49 containment, and countermeasure plans].) By way of analogy, this approach is acceptable
50 under CEQA. (CEQA Guidelines § 15126.4, subd. (a)(1)(B) [“measures may specify

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1 performance standards which would mitigate the significant effect of the project and which may
2 be accomplished in more than one specified way.”]; see also *Center for Biological Diversity v.*
3 *Dep't of Fish & Wildlife* (2015) 234 Cal.App. 4th 214, 240-241 [future development of aquatic
4 biodiversity management plans and hatchery genetic management plans did not impermissibly
5 defer formulation of mitigation measures because they provided sufficient performance
6 standards for future mitigation to meet].)

7 Therefore, NCRA has failed to show that there is not substantial evidence in the record
8 to support the Department’s finding of consistency with ER P3 on this basis.

9 (c) FOR asserts that a reduction of freshwater flows through the Delta will cause
10 significant adverse impacts to the opportunity to restore habitat. (FOR Appeal Letter,
11 p. 16.)
12

13 FOR relies on two theories to support its argument: 1) it argues that the “declared policy
14 of the Department of the Interior, which governs Reclamation, is now to maximize exports
15 regardless of the environmental consequences.” (FOR October 15, 2018 letter, p. 7); and 2)
16 “DWR has altered the project to not comply with State Water Board decision D-1641.” (*Ibid.*)
17

18 As to its first theory, FOR relies upon and seeks official notice of an August 17, 2018
19 memorandum from the Secretary of the Interior. As referenced in Exhibit C, this document is
20 dated after the Department’s July 27, 2018 Certification. Therefore, it is not relevant and we
21 decline to take official notice of this document.³⁰
22

23 As to its second theory, FOR asserts that the Department has “altered the project to not
24 comply with SWRCB decision D-1641.” (FOR October 15, 2018 letter, p. 7.) FOR cites and
25 seeks official notice of the July 19, 2018, Exhibit DWR-1143 Second Revision, filed by the
26 Department in the SWRCB hearing. (*Ibid.*) According to FOR, this change will “maximize, not
27 avoid or mitigate, potential impacts to freshwater flows.” As discussed in section V, above,
28 Executive Officer Jessica Pearson has already included the entire SWRCB hearing docket
29 through July 27, 2018 in the Department’s record pursuant to our Administrative Procedures
30 section 10. Therefore, it is not necessary for us to also officially notice the document.
31 Additionally, FOR makes this identical argument as to ER P1, which has been addressed in
32 section VI.H., above. For purposes of compliance with ER P3, FOR fails to explain how, even if
33 it were true that the Department has “altered the project to not comply with SWRCB decision D-
34 1641,” this would preclude, or otherwise interfere with, the ability to restore habitat in Priority
35 Habitat Restoration Areas. The Council does not consider conclusory or speculative statements
36 when weighing whether substantial evidence supports the certification. (*California Assn. of*
37 *Medical Products Suppliers v. Maxwell-Jolly, supra*, at p. 308.)
38

39 Therefore, FOR fails to show that there is not substantial evidence in the record to
40 support the Department’s finding of consistency on this basis.
41

³⁰ We note that even if we did take official notice of this document, FOR fails to show how this letter will cause “significant adverse impacts to the opportunity to restore habitat in the Priority Habitat Restoration Areas.” (FOR October 15, 2018 letter, p. 7.) The Council does not consider conclusory or speculative statements when weighing whether substantial evidence supports the certification. (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly, supra*, 199 Cal.App.4th at p. 308.)

1 **K. Policy ER P5 (23 CCR Section 5009): Avoid Introductions of and Habitat**
2 **Improvements for Invasive Nonnative Species**
3

4 The Department contends that California WaterFix is consistent with ER P5. One
5 Appellant – NCRA – raises substantive arguments that it is not. For the reasons discussed
6 below, the Council finds that NCRA has failed to show that the Department’s Certification is not
7 supported by substantial evidence in the record. Thus, we *deny* the appeal on these grounds.

8
9 **1. Policy Requirements**

10 ER P5 states:

11 (a) The potential for new introductions of, or improved habitat
12 conditions for, nonnative invasive species, striped bass, or bass must be fully
13 considered and avoided or mitigated in a way that appropriately protects the
14 ecosystem.
15

16 (b) For purposes of Water Code Section 85057.5(a)(3) and Section
17 5001(j)(1)(E) of this Chapter, this policy covers a proposed action that has the
18 reasonable probability of introducing, or improving habitat conditions for,
19 nonnative invasive species.
20

21 The Delta Plan defines “nonnative invasive species” for purposes of section 5009 as
22 “species that establish and reproduce rapidly outside of their native range and may threaten the
23 diversity or abundance of native species through competition for resources, predation,
24 parasitism, hybridization with native populations, introduction of pathogens, or physical or
25 chemical alteration of the invaded habitat.” (23 CCR 5001, subd. (v).)
26

27
28 **2. Department’s Certification**

29 While implementation of conveyance facility construction and some of California
30 WaterFix’s habitat restoration actions ([Environmental Commitments 3, 4, 6, 7, 8, 9, 10](#), see
31 [Final EIR/EIS, Appendix 3B](#)) could potentially open new habitat to nonnative invasive species
32 that are already present in the Delta environment, the Department finds that California WaterFix
33 is consistent with ER P5 because, “California WaterFix Environmental Commitments, Avoidance
34 and Minimization Measures, Mitigation Measures, permit requirements, habitat restoration
35 adaptive management actions, and Department-wide invasive species programs demonstrate
36 that [the Department] has fully considered and avoided new introductions of or improved habitat
37 conditions for nonnative invasive species occurring from habitat restoration.” ([Certification ER](#)
38 [P5 Finding](#), p. 1.)
39

40 With regard to how the project fully considers the potential for new introductions of, or
41 improved habitat conditions for, nonnative invasive species to occur, the detailed findings
42 reference analysis within the California WaterFix Final EIR/EIS in Chapter 11, Fish and Aquatic
43 Resources (Certification Record [\[X.3 000082\]](#), p. 11-165), and Chapter 12, Terrestrial
44 Biological Resources (Certification Record [\[X.3 000083\]](#), p. 12-112). Specific emphasis is
45 placed on Impact BIO-186: Adverse Effects on Natural Communities Resulting from the
46 Introduction and Spread of Invasive Plant Species (Certification Record [\[X.3 000083\]](#), p. 12-
47 3781). The detailed findings also note that nonnative species impacts and presence in the
48 project area are also considered in the National Marine Fisheries Service and U.S. Fish and

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1 Wildlife Service Biological Opinions (Certification Record [[X.3 000086](#)]), and the California
2 Department of Fish and Wildlife Incidental Take Permit (Certification Record [[X.3 000080](#)]).
3

4 With regard to how the project avoids or mitigates the potential for new introductions of,
5 or improved habitat conditions for, nonnative invasive species, the detailed findings summarize
6 a variety of environmental commitments, avoidance and minimization measures, mitigation
7 measures, permit requirements, habitat restoration adaptive management actions, and
8 Department-wide invasive species programs. These include summaries of 13 specifically
9 referenced measures from the California WaterFix Final EIR/EIS (Certification Record
10 [[X.3 000081](#)]) and MMRP (Certification Record [[X.3 000084](#)]), four specifically referenced
11 requirements from the National Marine Fisheries Service and U.S. Fish and Wildlife Service
12 Biological Opinions (BiOps) (Certification Record [[X.3 000086](#)]), and three specifically
13 referenced requirements from the California Department of Fish and Wildlife Incidental Take
14 Permit (Certification Record [[X.3 000080](#)]). ([Certification ER P5 Finding](#), pp. 2-7.) These
15 measures are primarily applicable to construction activities and habitat restoration actions.
16

17 The Department's findings conclude by summarizing its ongoing policies and
18 participation in interagency programs addressing invasive species. (Certification ER P5 Finding,
19 pp. 7-8.)
20

21 3. Appeal

22
23 We received one appeal (from NCRA) regarding the Department's Certification of
24 Consistency with ER P5. NCRA made the following three assertions:
25

- 26 (a) WaterFix construction is likely to introduce or disperse invasive aquatic and
27 terrestrial species. ([NCRA Appeal Letter](#), p. 10.) NCRA asserts that this likely
28 introduction or dispersal would be caused by the use of barges and construction
29 equipment in the Delta.
30
- 31 (b) The Department's post-introduction mitigation to fund the Division of Boating and
32 Waterway's aquatic weed control program is insufficient. ([NCRA Appeal Letter](#), p.
33 10.)
34
- 35 (c) The Department's reliance on mitigation measures and environmental commitments
36 made in connection with its CEQA approvals is misplaced. ([NCRA Appeal Letter](#), p.
37 10.)
38

39 We address each of NCRA's three contentions in turn below:
40

- 41 (d) WaterFix construction is likely to introduce or disperse invasive aquatic and
42 terrestrial species. ([NCRA Appeal Letter](#), p. 10.)

43 NCRA asserts that this likely introduction or dispersal would be caused by the use of
44 barges and construction equipment in the Delta. The Appellant contends that the Department's
45 Mitigation Monitoring and Reporting Program (MMRP) indicates the Department will prepare a
46 barge operations plan, but the effectiveness of the plan, and whether it would specifically
47 address dispersal of invasive aquatic vegetation such as water hyacinth and Brazilian
48 waterweed, is unknown because it is not yet developed. ([NCRA October 15, 2018 Letter](#), p. 6.)

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1 The Department does acknowledge the potential of California WaterFix construction and
2 habitat restoration actions opening new habitat to nonnative invasive species already present in
3 the system. However, the Department contends that through environmental commitments,
4 avoidance and minimization measures, mitigation measures, permit requirements, habitat
5 restoration adaptive management actions, and Department-wide invasive species programs the
6 Department has “fully considered and avoided” new introductions of, or improved habitat
7 conditions for, nonnative invasive species. ([Certification ER P5 Finding](#), pp. 1-2.) The
8 Department describes these mitigation measures, environmental commitments, and avoidance
9 and minimization measures in detail. (Certification [ER P5 Finding](#), pp. 2-5.)

10 Relevant to NCRA’s assertions, the Department cites mitigation measure *AES-1d*:
11 *Restore Barge Unloading Facility Sites Once Decommissioned* (MMRP p. 2-57), *Environmental*
12 *Commitment: Develop and Implement a Barge Operations Plan*, and *AMM7: Barge Operations*
13 *Plan* (MMRP pp. 3-24, 3-25) for evidence of how barge operations will be conducted to minimize
14 the introduction or spread of invasives. AMM7 describes specific requirements of the barge
15 operations plan to include consideration of introduction of aquatic invasive species, protection of
16 aquatic species and habitat (including submerged aquatic vegetation), operating vessels safely,
17 and following reasonable measures to prevent adverse effects on aquatic resources of the
18 Delta. (Certification Record [\[X.3 000081\]](#), p. 3-25.) In addition, the plan calls for a Biological
19 Monitor to conduct visual inspections for invasive aquatic species on in-water equipment, such
20 as barges and boats. (Certification Record [\[X.3 000081\]](#), p. 3-26.)

21 Therefore, NCRA has failed to show that there is not substantial evidence in the record
22 to support the Department’s finding of consistency with ER P5 on this basis.

23 (e) NCRA argues that California WaterFix’s post-introduction mitigation through funding
24 the Division of Boating and Waterway’s aquatic weed control program is insufficient.
25 ([NCRA Appeal Letter](#), p. 10.)

26 NCRA supports this claim with an argument that post-introduction mitigation activities
27 typically cannot completely eradicate invasive aquatic vegetation (NCRA response letter, p. 6.)

28 ER P5 requires covered actions to mitigate for potential introductions of, or improved
29 habitat conditions for, invasive species in the event that avoidance is not feasible. The
30 Department describes the commitment to fund the Division of Boating and Waterways as one of
31 a suite of measures to address invasive species and points to the Division of Boating and
32 Waterways as the entity with legal authority and effective tools to treat invasive aquatic
33 vegetation in the Delta. (Department October 15, 2018 Letter, p. 75.)

34 The Appellant additionally argues that using herbicides to control invasive aquatic
35 vegetation exposes “Delta waterways to chemicals that can harm human and environmental
36 health.” ([NCRA October 15, 2018 Letter](#), p. 7.) However, ER P5 does not prohibit the use of
37 herbicides.³¹

38 Therefore, NCRA has failed to show that there is not substantial evidence in the record
39 to support the Department’s finding of consistency with ER P5 on this basis.

³¹ In support of its argument, NCRA cites and requests that the Council take official notice of an article from the *Sacramento Bee* dated September 24, 2018, by Ryan Sabalow, *A Delta farmer says the state poisoned his crops. Is California’s water supply safe?* This document is dated after the Department’s July 27, 2018, Certification. Therefore, it is not relevant and the Council declines to take official notice of this document (see [Exhibit C](#)).

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1 (f) Reliance on mitigation measures and environmental commitments made in
2 connection with its CEQA approvals is misplaced. ([NCRA Appeal Letter](#), p. 10.)

3 The main argument presented in NCRA’s appeal regarding mitigation measures and
4 environmental commitments is that they are “invalid” due to being “vague and improperly
5 deferred.” However, no specific reference is made in the appeal to any mitigation measure or
6 environmental commitment with respect to this policy with the exception of those discussed
7 under section (b) above. The Council is not required to search the record to ascertain whether it
8 contains support for the Appellants’ contentions. (*Salas v. Cal. Dept. of Transportation* (2011)
9 198 Cal.App.4th 1058, 1074.)

10 Therefore, NCRA has failed to show that there is not substantial evidence in the record
11 to support the Department’s finding of consistency with ER P5 on this basis.

12
13 **L. Policy DP P2 (23 CCR Section 5011): Respect Local Land Use When Siting Water or**
14 **Flood Facilities or Restoration Habitats**

15
16 The Department certifies that California WaterFix is consistent with DP P2. Six parties
17 appealed the substance of the Department’s Certification of Consistency with DP P2: NCRA,
18 SCDA, North Delta Cares, Regional San, San Joaquin County, and Sacramento County. For the
19 reasons discussed below, the Council finds that the Department has failed to demonstrate
20 substantial evidence in the record that California WaterFix is consistent with DP P2.

21
22 **1. Policy Requirements**

23 DP P2 states:

24
25 (a) Water management facilities, ecosystem restoration, and flood management
26 infrastructure must be sited to avoid or reduce conflicts with existing uses or those
27 uses described or depicted in city and county general plans for their jurisdictions or
28 spheres of influence when feasible, considering comments from local agencies and
29 the Delta Protection Commission. Plans for ecosystem restoration must consider
30 sites on existing public lands, when feasible and consistent with a project’s purpose,
31 before privately owned sites are purchased. Measures to mitigate conflicts with
32 adjacent uses may include, but are not limited to, buffers to prevent adverse effects
33 on adjacent farmland.
34

35
36 (b) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E) of this
37 Chapter, this policy covers proposed actions that involve the siting of water
38 management facilities, ecosystem restoration, and flood management infrastructure.
39

40 As a threshold matter, the Department asserts that “state and federal agencies involved
41 with the location or construction of facilities for the production, generation, storage, treatment, or
42 transmission of water are not subject to local land use regulations and inconsistency with a
43 specific local land use regulation is not by itself an adverse effect on the environment” for
44 purposes of CEQA (Certification, [DP P2](#), p.6). However, independent from state law related to
45 local land use authority and the requirements of CEQA, DP P2 is a directive to state and local
46 public agency proponents of covered actions, and it specifically requires water management
47 facilities, ecosystem restoration projects, and flood management infrastructure to “be sited to
48 avoid or reduce conflicts with existing uses or those uses described or depicted in city and
49 county general plans for their jurisdictions or spheres of influence when feasible, considering

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1 comments from local agencies and the Delta Protection Commission.” The Department
2 acknowledged the Council’s unique role in relationship to CEQA at the Council hearing on
3 October 25, 2018 as follows:
4

5 “To address community concerns that go beyond CEQA – as I said we have almost 50
6 CEQA measures, but CEQA talks about physical effects on the environment, and the
7 Delta as an evolving place goes beyond that, and so we recognize that there’s an
8 importance that is due to Delta Protection Commission the Delta Stewardship Council
9 related to those issues. And so we wanted to develop this [the Community Benefits
10 Fund] collaboratively with the appropriate local entities to try and come up with
11 something that can best work through community concerns and address them, whether
12 that’s business related, agricultural, or recreational.” (October 25, 2018 Hearing
13 Testimony, Ken Bogdan, Transcript p. 50).
14

15 The Commission also comments that CEQA requirements are different obligations than
16 what consistency with DP P2 requires (Delta Protection Commission, [October 16, 2018 Written
17 Statement](#), p.6). The Commission further comments that the project “will have substantial
18 impacts on the economics and quality of life of legacy communities, particularly those closest to
19 the construction and related impacts. The [Department’s] Certification of Consistency should
20 pursue measures beyond the bounds of CEQA to address the larger socioeconomic impacts of
21 the project” (Delta Protection Commission, [October 16, 2018 Written Statement](#), p.14).
22

23 With this in mind, these findings address the issues raised by Appellants, by issue,
24 below:
25

26 **2. Appeals & Certification**

27

28 The appeals identify 11 issues related to consistency of the project with DP P2. They
29 are: (a) conflicts with local land use plans; (b) conflicts with existing Delta communities, (c)
30 existing uses - cultural and historical resources impacts, (d) existing uses - parks and recreation
31 impacts, (e) existing uses - impacts on visual and aesthetic character, (f) existing uses - public
32 health and hazards, (g) existing uses - impacts on wastewater discharge facilities, (h) existing
33 uses - traffic impacts, (i) existing uses - impacts on agriculture, and (j) existing uses – noise
34 impacts; and (k) consideration of comments from reclamation districts. Each of these issues is
35 addressed separately, below:
36

37 **a. Conflicts With Local Land Use Plans**

38

39 **i. Appeals & Certification - Conflicts With Local Land Use Plans**

40

41 Appellants allege that California WaterFix is inconsistent with DP P2 because the project
42 would not avoid or reduce conflicts with local land use plans. (NCRA Appeal Letter, p. 11; SCDA
43 Appeal Form, p. 9; North Delta Cares Appeal Letter, pp. 4-5; San Joaquin County Appeal Letter,
44 pp. 7, 64-69; Sacramento County Appeal Letter, pp. 6-7.) Appellants describe conflicts that
45 temporary and permanent California WaterFix project structures would create on lands
46 designated for other uses in general plans adopted by Sacramento, San Joaquin, Contra Costa,
47 and Alameda Counties (NCRA Appeal Letter, p. 11; SCDA Appeal Form, p. 9; North Delta
48 Cares Appeal Letter, p. 4; Sacramento County Appeal Letter, p. 7;). Two Appellants,
49 Sacramento County and SCDA, cite testimony submitted at the SWRCB hearing as evidence of
50 the project’s conflicts with local land uses.
51

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1 Specifically, the appeals allege:
2

- 3 1) The project would require placement of temporary and permanent structures on lands
4 designated for other uses by the plans of Sacramento, San Joaquin, Contra Costa, and
5 Alameda Counties. (North Delta Cares, [Appeal Letter](#), pp. 4-5)
6
- 7 2) The project conflicts with county general plans, the Commission's Land Use and
8 Resource Management Plan for the Primary Zone of the Delta, and the California State
9 Parks Brannan Island and Franks Tract State Recreation Area General Plan (North
10 Delta Cares, [Appeal Letter](#), p. 5).
11
- 12 3) The project is inconsistent with the Sacramento County General Plan (Sacramento
13 County [Appeal Letter](#), pp. 6-7). Pursuant to Section 11 of the Council's Administrative
14 Procedures Governing Appeals, Sacramento County submitted supplemental appeal
15 material providing evidence showing the project's conflicts with land planned for long-
16 term agricultural production (Sacramento County [Letter](#) 10-14-18, pp.1-5).
17
- 18 4) The project would create significant, unavoidable conflicts with local land use plans as
19 described in Final EIR/EIS Figure 13-0 (NCRA [Appeal Letter](#), p. 11).
20
- 21 5) The project is incompatible with the Commission's Land Use and Resource
22 Management Plan (LURMP) for the Primary Zone of the Delta, and the California State
23 Parks Brannan Island and Franks Tract State Recreation Area General Plan³² (North
24 Delta Cares [Appeal Letter](#), p.5).
25

26 The Department's Certification cites evidence in the record showing that since 2006, a
27 multi-agency public process has incorporated input from various agencies, stakeholders,
28 independent scientists, and the public that included "extensive analysis of potential conflicts with
29 local uses, including input from local and regional entities and local landowners and users of
30 Delta resources. While it is inevitable that any project of the import and magnitude of California
31 WaterFix will have an impact on local land uses, significant changes have been made during the
32 planning process to reduce such impacts." (Certification, [DP P2](#), p.2.) The Certification cites
33 evidence in the record documenting responses to comments from the Commission and Delta
34 counties in Volume II of the Final EIR/EIS (Certification, DP P2, Volume II, Table 2-2, pp. 22-
35 23). The Department's responses to comments made by counties are found in the following
36 locations in the record:
37

- 38 • Contra Costa County: [Final EIR/EIS, Volume II, comment letter 2502](#) (53 pages of
39 individual responses)
- 40 • Sacramento County: [Final EIR/EIS, Volume II, comment letter 2511](#) (21 pages of
41 individual responses)
- 42 • San Joaquin County: [Final EIR/EIS, Volume II, comment letter 2503](#) (3 pages of
43 individual responses)
- 44 • Solano County: [Final EIR/EIS, Volume II, comment letter 2657](#) (13 pages of individual
45 responses)

³² Comments by California State Parks on Brannan Island and Franks Tract State Recreation Area General Plan, if any, were not found in the record. However, DP P2 does not require consideration of comments from state agencies such as California State Parks.

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- 1 • Yolo County: [Final EIR/EIS, Volume II, comment letter 2573](#) (3 pages of individual
2 responses)

3
4 The Department's responses to comments by the Commission are located at [Final EIR/EIS,
5 Volume II, comment letter 2581](#) (13 pages of individual responses).
6

7 In addition, the Department cites evidence in the record regarding refinements to the
8 project that were made between 2013-2015, which included changes to a gravity-fed operation
9 at the northern intakes reducing energy, air, and visual impacts; use of earthen-lined bays rather
10 than concrete; reduced visual impacts near Hood; elimination of permanent power lines near
11 Stone Lakes Wildlife Refuge; reduced project features on Staten Island; elimination of large
12 access pads at vent structures; removal of a siphon from Italian Slough; and maximization of
13 state land for RTM and pumping facilities. For a detailed description, see the Project
14 Refinements Table ([Certification, DP P2](#), p. 4).
15

16 The Department provides evidence showing consideration of project water intake
17 impacts to "existing structures, businesses, historical interests and current use of the land"
18 ([Final EIR/EIS, Appendix 3F](#), p. 3F-11), including the location of proposed water intakes near
19 Hood, were analyzed by engineers and resource experts as described in Appendix 3F to the
20 Final EIR/FEIS ([DWR DP P2, p.4](#)). Avoiding areas with a "high concentration of cultural and
21 historic resources" was a "general consideration" in refining intake locations within Appendix 3F
22 of the Final EIR/EIS ([Final EIR/EIS, Appendix 3F](#), p. 3F-9). Three intakes were selected for
23 analysis as part of the proposed project (intakes 2,3, and 5) after considering the higher costs of
24 alternatives, impacts to sandhill cranes, proximity to the intermediate forebay, and the
25 opportunity to avoid direct impact to structures in Hood ([Final EIR/EIS, Appendix 3F](#), p. 3F-15).
26

27 The Department acknowledges the land use conflicts identified by Appellants, as
28 described in Chapter 13 (Land Use) of the Final EIR/EIS, and describes existing land uses and
29 planned future land uses that could be affected by project construction and operation as
30 described in the general plans for Alameda, Contra Costa, Sacramento San Joaquin, Solano,
31 Sutter, and Yolo counties ([DWR DP P2](#), pp.6-7). In the Certification of Consistency, the
32 Department provides a table listing project "Water Conveyance Incompatibilities With County
33 Land Use Designations" by acreage (Attachment 1, [DWR DP P2](#), p.29).
34

35 For the two impacts on land use plans referred to by the Department, and discussed
36 below, the Department has not cited substantial evidence that the impacts would be reduced to
37 the extent feasible; therefore, the Department's certification is *not supported* by substantial
38 evidence in the record:
39

- 40 • **Impact LU-1: Incompatibility with Applicable Land Use Designations, Goals, and**
41 **Policies as a Result of Constructing the Proposed Water Conveyance Facility.** The
42 Department acknowledges incompatibility with land use plans as an impact in
43 Attachment 1 to its detailed findings (Final EIR/EIS, Chapter 13, Table 13-1), which
44 documents, in acres, temporary and permanent project incompatibilities with land use
45 designations by county ([DWR DP P2, p.29](#)). In general, the Final EIR/EIS states that
46 "As discussed in Section 13.3.2, Determination of Effects, the physical effects
47 [suggested by land use incompatibilities] are discussed in the respective resource
48 chapters throughout this document. The relationship between plans, policies, and
49 regulations and impacts on the physical environment is discussed in Section 13.3.1,
50 Methods for Analysis." ([Chapter 13, Final EIR/EIS](#), p. 13-164).
51

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1 No evidence in the record is cited which supports the conclusion that this impact would
2 be reduced to the extent feasible, as required by subdivision (a) of Policy DP P2.
3

- 4 • **Impact LU-4: Incompatibility with Applicable Land Use Designations, Goals, and**
5 **Policies as a Result of Implementing the Proposed Environmental Commitments 3, 4,**
6 **6–12, 15, and 16:** “Although there is uncertainty regarding the specific locations where
7 Environmental Commitments 3, 4, 6-12, 15, and 16 will be implemented, this impact
8 discusses the possible compatibilities and incompatibilities of these Environmental
9 Commitments with the applicable county, local, and regional land use designations,
10 goals, and policies. These issues will also be addressed in the site-specific
11 environmental documents for proposed restoration activities” ([DWR DP P2](#), p.7). This
12 statement is not supported by the evidence in the Final EIR/EIS, which states that for
13 Impact LU-4, “Because specific locations for the implementation of many of these land-
14 intensive actions are unknown at this point, there is some uncertainty about whether
15 new land uses related to these Environmental Commitments would be incompatible with
16 existing land uses. A conclusion about the compatibility of this alternative with local land
17 use regulations cannot be made. However, the restoration associated with these
18 Environmental Commitments would be consistent with open space and would generally
19 be similar to the study area, which predominantly consists of agricultural areas.”
20 ([Chapter 13, Final EIR/EIS](#), p.13-167).
21

22 No evidence in the record is cited which supports the conclusion that this impact would
23 be reduced to the extent feasible as required by subdivision (a) of Policy DP P2.
24

25 As evidence of how it would address project impacts due to land use conflicts, the
26 Department also states that it “has committed to the implementation of a Community Benefits
27 Fund, or its equivalent. This Fund would incorporate good neighbor policies to avoid negative
28 impacts on agricultural lands, residents and business by providing a mechanism for
29 communication with local government and community members and disburse funds to protect
30 and enhance the Delta as an evolving place” ([DWR DP P2, p.21-22](#)). However, no further
31 evidence is cited that provides additional information about the Fund, including that it constitutes
32 an enforceable commitment.
33

34 **ii. Conclusion Regarding Conflicts With Local Land Use Plans**

35

36 The Certification cites evidence in the record showing the manner in which the
37 Department has acknowledged California WaterFix’s conflicts with planned local land uses, and
38 identifies feasible measures to reduce some, but not all of the conflicts with land use plans
39 identified by Appellants. The Department also cites evidence in the record showing that it
40 responded to comments from Delta counties and the Commission related to land use conflicts.
41 Significant and unavoidable adverse impacts remain, and Appellants North Delta Cares and
42 Sacramento County argue correctly, as described in the following issue sections below, that the
43 Department has not cited evidence in the record demonstrating that mitigation measures or
44 alternatives which would reduce nor avoid conflicts with local land use plans are infeasible or
45 how the Community Benefits Fund would reduce project impacts. Therefore, the Department’s
46 Certification of Consistency with DP P2 on the issue of compatibility with local land use plans is
47 *not supported* by substantial evidence in the record.
48

1 **b. Conflicts With Existing Delta Communities**

2
3 **i. Appeals & Certification - Conflicts With Existing Delta Communities**

4
5 The Appellants state the following:

- 6
7 1) Construction of intakes for the project near legacy communities,³³ including Clarksburg,
8 Courtland, and Hood, would cause substantial adverse effects to the community and its
9 surroundings. (North Delta Cares, [Appeal Letter](#), pp. 2, 5.) These impacts would remain
10 significant and unavoidable despite mitigation measures having been adopted (North
11 Delta Cares, [Appeal Letter](#), pp. 5-13; North Delta Cares, [Supplemental Response](#), p.12).
12
13 2) Appellant North Delta Cares asserts that the project would result in significant and
14 unavoidable socioeconomic impacts. (North Delta Cares, [Appeal Letter](#), p.6)
15
16 3) The project would irreparably damage the communities of Hood, Clarksburg, and
17 Courtland and substantially degrade the unique scenic qualities, the cultural, historical,
18 and economic values in perpetuity. (Sacramento County [Appeal Letter](#), p.7,9)
19
20 4) Removal of existing permanent structures would be an adverse effect (North Delta
21 Cares [DSC.3 Consistency w Delta Plan Appeal August 2018](#), p. 4).
22
23 5) The Certification fails to provide relevant information or analysis of the project’s impacts
24 on land use including changes to Reusable Tunnel Material (RTM) storage, tunnel
25 alignment, Clifton Court, and Stone Lakes National Wildlife Refuge (San Joaquin County
26 [Appeal Letter](#), pp. 7, 64.) See Figure M13-4 (Location of Clifton Court and project
27 features) in Impacts on Public Recreation and Nature Areas, below, on page 111.
28
29 6) The project does not respect local land uses (SCDA [Appeal](#), p. 9 [citing SWRCB Hearing
30 testimony of Frank Morgan, Bill Wells, Chris Kinzel, and Rune Storesund]).

31
32 In its appeal, North Delta Cares asserts that the location of the project intakes on the
33 banks/levees of the Sacramento River between the legacy towns of Clarksburg, Courtland and
34 Hood “is inconsistent with the policies of the Delta Plan (North Delta Cares, [Appeal Letter](#), p. 2).
35 Sacramento County asserts the project “will conflict with and irreparably damage the existing
36 Delta communities of Hood, Clarksburg and Courtland by permanently altering the physical
37 landscape, including agricultural and cultural/historic uses, substantially degrading its unique,
38 secure qualities and cultural/historical and economic values in perpetuity” (Sacramento County
39 [Appeal Letter](#), p.7).

40
41 North Delta Cares further contends that “impacts on the Delta recreation, aesthetics,
42 land use, socioeconomics, cultural resources etc., and their significant adverse impacts on the
43 Delta Region as a whole, WOULD have a cumulative impact on recreation and tourism in the
44 Delta” (North Delta Cares, [Appeal Letter](#), p. 6 [*emphasis in original*]). Appellant does not cite
45 evidence to support this claim, however, except a quote from Chapter 15 (Recreation) in the

³³ The legacy communities are defined in Chapter 5 of the Delta Plan as follows: “Bethel Island, Clarksburg, Courtland, Freeport, Hood, Isleton, Knightsen, Rio Vista, Ryde, Locke, and Walnut Grove are the Delta’s legacy communities (Public Resources Code section 32301(f)).” (Delta Plan, [Chapter 5](#), p. 175.) See figures in this subsection, below.

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1 Draft SEIR/SEIS, which states that “the level of impact would not be reduced to a less than
2 significant level and would remain significant and unavoidable” (North Delta Cares, [Appeal
3 Letter](#), p. 6, SEIR/S (SEIR/S, p. 15-4, L 19-31)). The quoted language is the same as the
4 conclusion for Impact REC-2 in the Final EIR/EIS, which finds that “the level of impact would not
5 be reduced to a less-than-significant level because it is not certain the mitigation would reduce
6 the level of these impacts to less than significant in all the instances occurring within the entire
7 study area. Therefore, these impacts are considered significant and unavoidable” ([Chapter 15,
8 Final EIR/EIS](#), p. 15-469).

9
10 The following testimony submitted in the SWRCB hearing, and cited by Appellants,
11 describes the project’s impacts to Delta communities (Sacramento County [Appeal Letter](#), p.7):
12

- 13 • Testimony by Sacramento County Supervisor Don Nottoli provides a narrative
14 discussion of project impacts on Delta communities (Sac County [DSC CWF appeal with
15 attachments](#), p. 12).
16
- 17 • Testimony by Professor Robert Benedetti that the Final EIR/EIS Chapter 18 does not
18 adequately evaluate impacts on current and future cultural tourism resources including
19 businesses, property values, and the potential designation of the Delta as a National
20 Heritage Area, and that mitigation measures are insufficient (Sac County [DSC CWF
21 appeal with attachments](#), pp. 18-31).
22
- 23 • Testimony by Sacramento County Agricultural Commissioner Julie Jensen cites
24 evidence of project construction impacts on agricultural revenues, jobs, and incomes.
25 Potential permanent impacts could include small and medium agricultural operations
26 from construction traffic related disruption and water quality degradation. In addition, she
27 asserts there could be economic challenges associated with re-entering into Williamson
28 Act contracts (Sac County [DSC CWF appeal with attachments](#), pp. 32-37).
29
- 30 • Testimony by Virginia Hemly Chhabra describes project impacts resulting from
31 placement of three intakes near Greene and Hemly, a grower, packer, and shipper of
32 pears and apples. Intakes would prevent access to Greene and Hemly’s office, facilities,
33 and homes; could negatively water affect supplies and degrade water quality for crops;
34 could have adverse impacts from noise and vibration; could have adverse distribution
35 impacts; could have adverse impacts on recreation; could have adverse impacts on
36 Hood; and gradual economic losses could accumulate permanent economic losses (Sac
37 County [DSC CWF appeal with attachments](#), pp. 38-41).
38
- 39 • Testimony by Chrisandra Flores, Chief Deputy Agricultural Commissioner for
40 Sacramento County, cites additional permanent impacts to agricultural lands and the
41 local economy by proposed project changes in the Draft SEIR/EIS. These impacts
42 include placement of RTM that would impact an additional 44 acres of Important
43 Farmland and 119 acres of land in Williamson Act contracts with resulting losses in
44 agricultural revenues, job losses, and incomes (Sac County [DSC CWF appeal with
45 attachments](#), pp. 42-45).³⁴

³⁴ Important Farmland for the purpose of the California WaterFix Final EIR/FEIS is defined as land in the United States Department of Agriculture and California Department of Conservation farmland categories Prime Farmland, Farmland of Statewide Importance, Unique Farmland, and Farmland of Local Importance ([DWR DP P2](#), p.11).

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- Testimony by Dr. Jeffrey Michael, Executive Director of the Center for Business and Policy Research and Professor of Public Policy at the University of the Pacific, acknowledges that the Final EIR/EIS states, "recreation dependent businesses including marinas and recreational supply retailers may not be able to economically weather the effects of multiyear construction activities and may be forced to close as a result (Page 16-168, Final EIR)" (Sac County [DSC CWF appeal with attachments](#), p. 92; [Chapter 16 Final EIR/EIS](#), p. 16-168). As "Delta recreation businesses are predominantly small independent enterprises that typically have limited resources to endure an extended loss in business", Dr. Michael notes that it is not unusual for large infrastructure projects that negatively impact local businesses to receive compensation for those impacts (Sac County [DSC CWF appeal with attachments](#), p. 91). Dr. Michael asserts "At this time, the WaterFix does not include any such fund even though the project will have extended, and likely permanent, negative effects to the region without any offsetting long-run benefit from the infrastructure" (Sac County [DSC CWF appeal with attachments](#), p. 92). As an example of another project that has done this, Los Angeles has provided compensation to local businesses impacted by Metro Rail tunneling through the Business Interruption Fund (BIF), provides \$10 million annually to small businesses affected. The testimony goes on to state, "the Project should provide a similar fund for Delta businesses, although higher compensation thresholds would be appropriate given the length of the construction period, vulnerability of Delta businesses, and the fact that Delta businesses will not receive any long-run benefits from the WaterFix after construction is complete" (Sac County [DSC CWF appeal with attachments](#), p .93).

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The Department's Certification cites evidence in the record regarding project refinements made between 2013-2015, which included the elimination of pumping plants, permanent power lines, sediment basins at the northern intakes, and a reduction of visual impacts near Hood that resulted in fewer acres overall being impacted and fewer acres of private land being used for the project ([DWR DP P2](#), p.3-4); specifically, 1,844 fewer acres for the footprint of the water facility, 722 fewer acres for the intermediate forebay, 1,677 fewer acres of private land with permanent or temporary impacts, and 1,250 fewer acres of agricultural land impacted – or a total reduction of approximately 5,493 acres ([DWR DP P2](#), p. 4).

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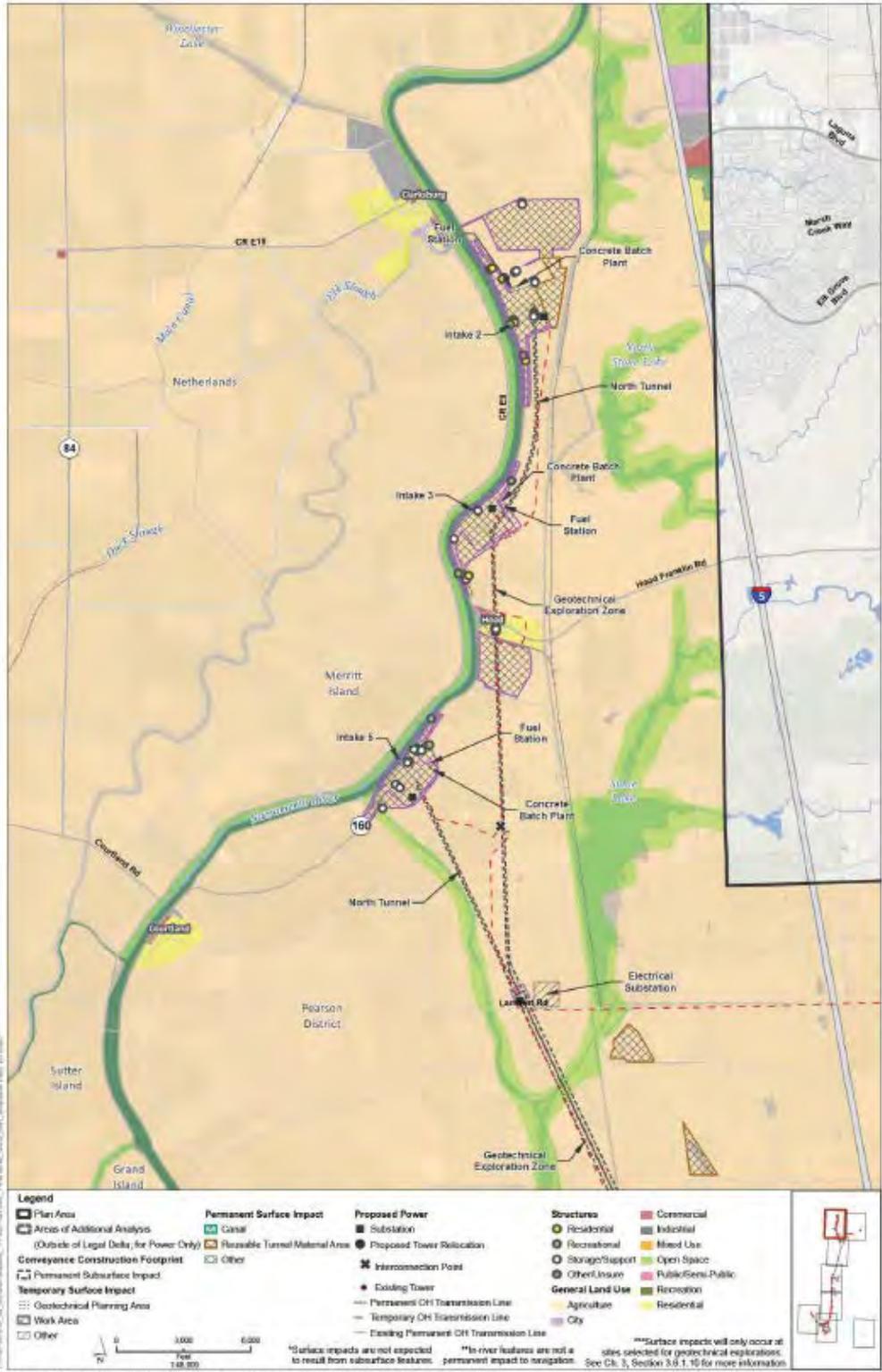


Figure M13-4: Sheet 1 of 8
General Plan Land Use Designations — Modified Pipeline/Tunnel Alignment (Alternative 4)

- 1
- 2 Location of Hood, Clarksburg, Courtland, and Stone Lakes National Wildlife Refuge (DWR DP P2, Figure
- 3 M13-4 Sheet 1 of 8, p. 32)

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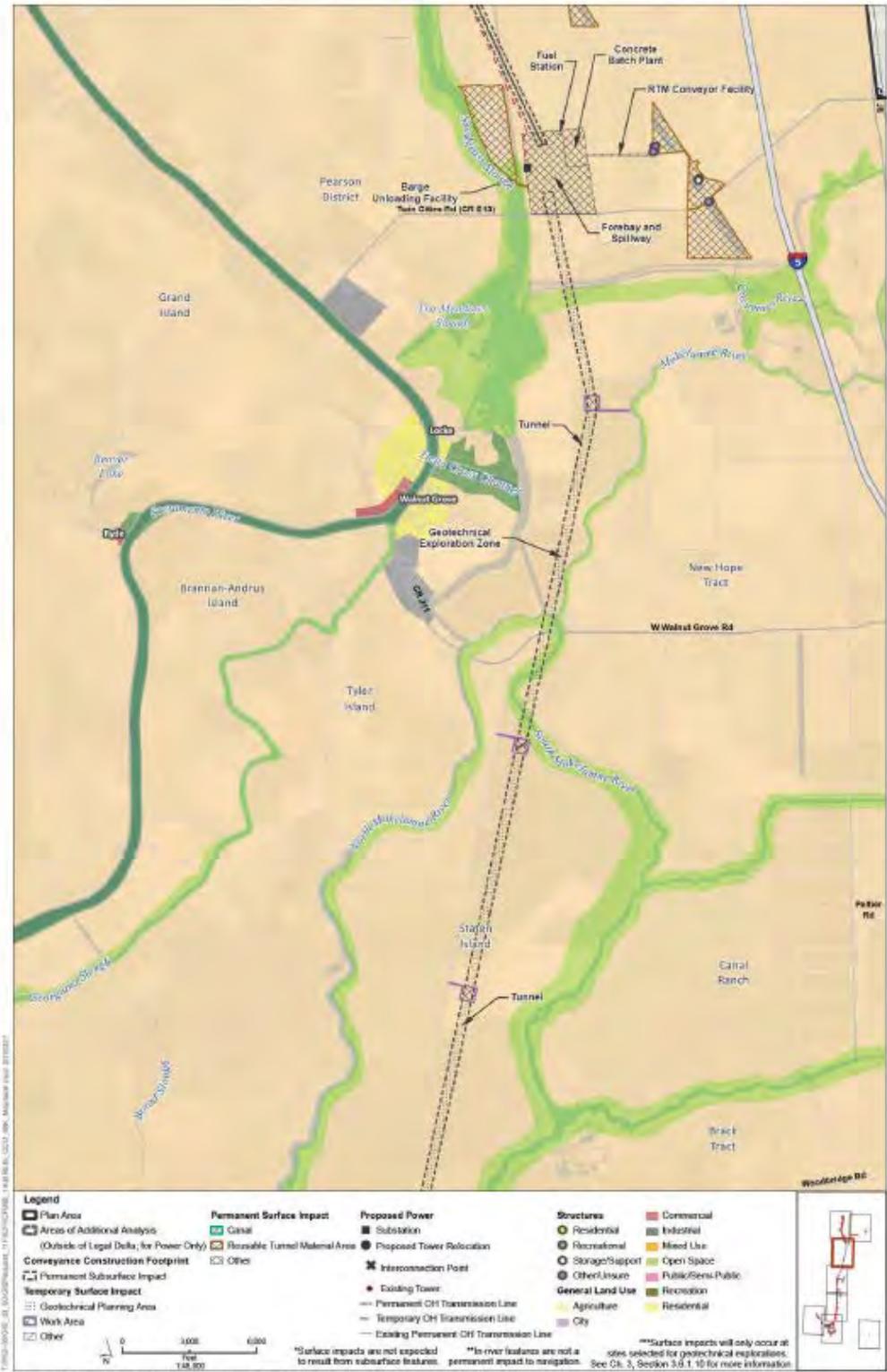


Figure M13-4: Sheet 3 of 8
 General Plan Land Use Designations — Modified Pipeline/Tunnel Alignment (Alternative 4)

- 1
- 2 Location of Locke, Walnut Grove, and Ryde (DWR DP P2, Figure M13-4 Sheet 3 of 8, p. 34)
- 3

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1 With regard to the location of intake sites, the Department states that an initial range of
2 intake sites was developed by a Fish Facilities Technical Team (FFTT) whose members were
3 tasked with evaluating a range of intake locations that would be optimal to avoid effects on
4 sensitive fish species (Department's [October 15, 2018 Written Statement](#), pp. 80). These initial
5 intake locations and designs underwent an iterative vetting process to meet project goals and
6 objectives, including intake diversion capacity, depth and length of the fish screens, sweeping
7 velocities to protect sensitive fish species and allow for debris bypass, approach velocities, and
8 potential impacts to agriculture and other adjacent land uses. ([Final EIR/EIS, Appendix 3F](#), p.
9 3F-2). Following the FFTT review, project footprint location considerations, including the location
10 of proposed water intakes near Hood and other legacy Delta communities, were analyzed by
11 engineers and resource experts (EIR and Engineering Teams) as described in Appendix 3F to
12 the Final EIR/FEIS ([DWR DP P2, p.4](#)). Twelve possible intake site locations were identified as
13 potentially suitable locations. The potential sites were then further screened by the Department
14 based on site visits, scoping comments, and land use considerations. In developing proposed
15 sites for the intakes, a set of 11 "general considerations" was used. Among these considerations
16 were the following:

- 17
- 18 • Minimize visual and noise disturbance, as well as construction-related impacts, to land
19 owners, residents, and commercial areas;
- 20 • Avoid/minimize displacing land owners and residents; and
- 21 • Avoid known areas with high concentration of cultural and historic resources.
- 22

23 ([Final EIR/EIS, Appendix 3F](#), p. 3F-9)

24

25 Potential intake sites were then compared using four criteria, one of which was "Impact
26 to existing structures, businesses, historical interests and current use of the land" ([Final
27 EIR/EIS, Appendix 3F](#), p. 3F-11). Three intakes were selected for analysis as part of the
28 proposed project (intakes 2,3, and 5) after considering the higher costs of alternatives, impacts
29 to sandhill cranes, proximity to the intermediate forebay, and the opportunity to avoid direct
30 impact to structures in Hood ([Final EIR/EIS, Appendix 3F](#), p. 3F-15).

31

32 In its Written Statement submitted October 15, 2018, the Department describes
33 numerous modifications to the originally proposed configuration of intake sites, specifically to
34 avoid the community of Hood, including eliminating the proposed intake located closest to Hood
35 (Intake 4), moving pumping stations out of the remaining intake location nearest Hood,
36 converting previously-proposed concrete sedimentation basins into two earthen bays at each
37 intake site, and relocating electric transmission line alignments to avoid impacts to Hood
38 (Department's [October 15, 2018 Written Statement](#), pp. 83-84).

39 Deirdre Des Jardins of California Water Research submitted material on behalf of
40 Appellant North Delta Cares on October 15, 2018. In this material, Ms. Des Jardins reviews
41 various parts of the administrative record, including those described above by the Department,
42 and concludes that the record does not show evidence that alternative locations for the intakes
43 are infeasible and that the range of the potential impacts also includes Clarksburg, Courtland,
44 Locke, and Walnut Grove. In considering the initial evaluation by the FFTT and EIR and
45 Engineering Teams, Ms. Des Jardins concludes that the selected sites were chosen not
46 because other sites were infeasible, but because they presented the best trade-offs among the
47 general siting criteria, which included limited consideration of landowner and community
48 impacts. (North Delta Cares October 15, 2018 Written Statement by Deirdre Des Jardins, p. 5)
49 This material also describes additional refinements resulting in the sites considered as part of
50 Alternative 4A, and challenges whether the selected intakes are optimal to reduce impacts to

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1 Delta smelt or salmonids, and whether they represent the best options to adapt to both sea-level
2 rise and salinity intrusion. (North Delta Cares October 15, 2018 Written Statement by Deirdre
3 Des Jardins, pp. 7, 15-16). Ms. Des Jardins also presented this material to the Council on behalf
4 of Appellant North Delta Cares at the hearing conducted on October 24, 2018.

5 The Final EIR/EIS discusses the impacts of seven alternative locations of new intakes in
6 various configurations as part of the analysis of 18 project alternatives. In its CEQA Findings of
7 Fact, the Department described the considerations listed above and those referenced by North
8 Delta Cares during the alternative selection process. The Findings of Fact also describe why all
9 the other project alternatives (which include various alternative configurations of intake sites)
10 are infeasible. ([C DRAFT 000001](#), pp. 2-3, 49-83, 106-118.)

11 The Commission also comments that there was a lack of consultation with local land use
12 agencies in the selection of intake and forebay locations to minimize impacts on the
13 communities of Hood, Clarksburg and Courtland (Delta Protection Commission, [October 16,
14 2018 Written Statement](#), p.16). The Commission cites evidence in the record, Final EIR/EIS
15 Appendix 3H, that describes the criteria for location of intermediate forebay and notes that the
16 report lacks “documentation of a single communication with the Hood community or County of
17 Sacramento staff that detailed any dialogue about the options, and Glanville Tract was
18 ultimately selected in 2012” (Delta Protection Commission, [October 16, 2018 Written Statement](#),
19 p.16). However, within Appendix 3H, in analysis of the five different forebay sites, consideration
20 was given to “Minimizing impacts on the town of Hood during the construction and operation of
21 the IF [intermediate forebay]- the current location minimizes the need to relocate residences and
22 businesses,” (Final EIR/EIS [Appendix 3H](#), p.3H-4) and Glannville Tract was selected instead of
23 the four other options because of “consideration of geological conditions, local drainage
24 collection system impacts, land use impacts, construction costs and long-term operating costs
25 . . . In addition to natural community impacts, considerations of impacts to agriculture and
26 infrastructure were evaluated” (Final EIR/EIS [Appendix 3H](#), p.3H-7).The Department, North
27 Delta Cares, and the Commission consider similar evidence within the record, reaching different
28 conclusions regarding the feasibility of alternative intake and intermediate forebay site locations.
29 Therefore, substantial evidence *supports* the Department’s Certification of Consistency relative
30 to the issue of the feasibility of alternative intake and intermediate forebay locations.

31 With regard to impacts on Delta communities due to construction, the Department
32 acknowledges that “Construction activities associated with water conveyance facilities would be
33 anticipated to result in changes to the rural qualities of these communities during the
34 construction period (characterized by predominantly agricultural land uses, relatively low
35 population densities, and low levels of associated noise and vehicular traffic), particularly for
36 those communities in proximity to water conveyance structures, including Clarksburg, Hood,
37 and Walnut Grove” ([DWR DP P2](#), pp. 8-9). Specific impacts include changes to community
38 cohesion, a reduction of opportunities for maintaining face-to-face relationships, or disruptions
39 to the functions of community organizations or community gathering places (such as schools,
40 libraries, places of worship, and recreational facilities) as described in Chapter 16
41 (Socioeconomics) of the Final EIR/EIS. In addition, “Several gathering places that lie in the
42 vicinity of construction areas could be indirectly affected by noise and traffic associated with
43 construction activities, including Delta High School, the Clarksburg Library, Clarksburg
44 Community Church, Resurrection Life Community Church, Citizen Land Alliance, Discovery Bay
45 Chamber of Commerce, Courtland Fire Department, and several marinas or other recreational
46 facilities” ([DWR DP P2](#), p. 9).³⁵

³⁵ The Department also states that “the Final EIR/EIS concludes that construction of the water conveyance facilities could affect community character in the Delta region during the construction time

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1 In its Written Statement submitted October 16, 2018, the Commission also summarizes
2 the project's impacts on community character and highlights the Department's findings that the
3 project's construction impacts could include declining property values, blight, and abandonment.
4 The Commission goes on to comment that none of the mitigation measures or other
5 commitments are directed at "supporting local communities as they address the impacts to their
6 community character" (Delta Protection Commission, [October 16, 2018 Written Statement](#), p.6).

7 For evidence that project impacts to existing Delta communities would be reduced, the
8 Department finds that the specific Avoidance and Minimization Measures, Environmental
9 Commitments, and Mitigation Measures (AMM/EC/MMs) within the Mitigation Monitoring and
10 Reporting Program (MMRP) "related to noise, visual effects, transportation, agriculture, and
11 recreation will reduce the extent of these [social] impacts" ([DWR DP P2](#), p. 9).

12
13 Of the three impacts that the Department summarizes from Chapter 13 of the Final
14 EIR/EIS that are related to the project's conflicts with existing land uses raised by Appellants;
15 there is *no substantial evidence in the record* that the Department reduced impacts to the extent
16 feasible ([DWR DP P2](#), p.6 -7):

- 17
18 • **Impact LU-2: Conflicts with Existing Land Uses as a Result of Constructing the**
19 **Proposed Water Conveyance Facility.** The Department states, "Where applicable, the
20 Lead Agencies will provide compensation to property owners for losses due to
21 implementation of the California WaterFix, which will reduce the severity of the economic
22 effects." ([DWR DP P2](#), p.7.) The Final EIR/EIS states for LU-2, "Where applicable,
23 project proponents will provide compensation to property owners for losses due to
24 implementation of Alternative 4A. This compensation would not constitute mitigation for
25 any related physical impact; however, it would reduce the severity of economic effects."
26 ([Chapter 13, Final EIR/EIS](#), p.13-165). No further description of this compensation is
27 provided.

28
29 No evidence in the record is cited which supports the conclusion that this impact would
30 be reduced to the extent feasible, as required by subdivision (a) of Policy DP P2.

- 31
32 • **Impact LU-3: Create Physical Structures Adjacent to and through a Portion of an**
33 **Existing Community as a Result of Constructing the Proposed Water Conveyance**
34 **Facility (CM1).** The Final EIR/EIS states that "Implementation of Mitigation Measures
35 TRANS-1a and TRANS-1b would reduce the severity of this impact by supporting
36 continued access to and from the community on transportation routes; however,
37 permanent structures [Intakes 3 and 5] in the community's vicinity would remain, and
38 the impact would be significant and unavoidable." ([Chapter 13, Final EIR/EIS](#), p.13-
39 166.)

40
41 No evidence in the record is cited which supports the conclusion that this impact would
42 be reduced to the extent feasible, as required by subdivision (a) of Policy DP P2.
43

period. Because the impacts are social in nature, rather than physical, they are not considered impacts under CEQA" ([DWR DP P2, p. 9](#)). However, DP P2 specifically requires water management facilities, ecosystem restoration projects, and flood management infrastructure to "be sited to avoid or reduce conflicts with existing uses or those uses described or depicted in city and county general plans for their jurisdictions or spheres of influence when feasible, considering comments from local agencies and the Delta Protection Commission." See Section L.1 (Policy Requirements), above, regarding this issue.

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- 1 • **Impact LU-5: Conflicts with Existing Land Uses as a Result of Implementing the**
2 **Proposed Environmental Commitments 3, 4, 6–12, 15, and 16:** “Where applicable, the
3 Lead Agencies will provide compensation to property owners for losses due to
4 implementation of the California WaterFix Environmental Commitments, which will
5 reduce the severity of the economic effects” ([DWR DP P2](#), p.7). However, this assertion
6 is not supported by the analysis in the Final EIR/EIS, which states that for LU-5,
7 “Because specific locations and types of restoration to be implemented are unknown at
8 this point, there is some uncertainty about whether new land uses related to these
9 Environmental Commitments would conflict with existing land uses or result in the
10 permanent conversion of land uses. A conclusion about the compatibility of this
11 alternative with local land uses cannot be made. However, the restoration associated
12 with these Environmental Commitments would be consistent with open space, and
13 would generally be similar to the study area, which is a predominantly agricultural area.”
14 ([Chapter 13, Final EIR/EIS](#), p.13-168).

15
16 No evidence in the record is cited which supports the conclusion that this impact would
17 be reduced to the extent feasible, as required by subdivision (a) of Policy DP P2.
18

19 As evidence of how it would address project impacts on Delta communities, the
20 Department also states that it “has committed to the implementation of a Community Benefits
21 Fund, or its equivalent. This Fund would incorporate good neighbor policies to avoid negative
22 impacts on agricultural lands, residents and business by providing a mechanism for
23 communication with local government and community members and disburse funds to protect
24 and enhance the Delta as an evolving place” ([DWR DP P2, p.21-22](#)). However, no further
25 evidence is cited that provides additional information on the Fund, including that it constitutes an
26 enforceable commitment.
27

28 The Commission concludes that there is no detail or documentation concerning the
29 Community Benefit Fund (Delta Protection Commission, [October 16, 2018 Written Statement](#),
30 p.6). The Commission recommends to the Department that it reduce economic impacts using
31 strategies such as “investing in public facilities and infrastructure through the Delta Investment
32 Fund (PRC section 29778.5), funding implementation of the Commission’s Delta Community
33 Action Planning project (the Commission has prepared community action plans in Clarksburg,
34 Courtland, Hood, and Walnut Grove, and is currently preparing a plan in Isleton to promote
35 physical and quality of life improvements in legacy communities), and supporting agricultural,
36 cultural, recreational, and tourism programs and projects through the newly created Delta
37 Regional Foundation. The Commission’s Economic Sustainability Plan provides detail on
38 strategies that DWR can use to mitigate built environment impacts” (Delta Protection
39 Commission, [October 16, 2018 Written Statement](#), p.14). In terms of structure, the Commission
40 recommends “a ‘Delta Compensation Fund’, funded by the project proponent and administered
41 by an impartial and independent third party. The Fund would be designed to address damages
42 created by CWF construction. The administrator of the Delta Compensation Fund would act
43 quickly to assess claims of damage caused by CWF construction and make payments directly
44 to affected parties. This would avoid a lengthy and drawn-out public agency claim process that
45 would be especially challenging for many in the Delta’s socioeconomically-challenged rural
46 communities most affected by CWF construction” (Delta Protection Commission, [October 16,](#)
47 [2018 Written Statement](#), p.14).
48

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ii. Conclusion Regarding Conflicts with Existing Delta Communities

The Certification cites evidence in the record showing how and where the Department acknowledges project conflicts with existing Delta communities, and identifies measures to reduce some, but not all, of the impacts to Delta communities identified by Appellants. Significant and unavoidable adverse impacts remain, including socioeconomic impacts, and the Department has not cited evidence in the record demonstrating that mitigation measures or alternatives which would reduce or avoid impacts on existing Delta communities are infeasible, or how the Community Benefits Fund would reduce project impacts. Therefore, the Department's Certification of Consistency with DP P2 on the issue of conflicts with land uses in existing Delta communities is not supported by substantial evidence in the record.

c. Conflicts With Existing Uses – Cultural and Historical Resources Impacts

i. Appeals & Certification - Cultural and Historical Resources Impacts

The Appellants state the following:

- 1) The project would not avoid nor reduce conflicts with the existing Locke Historic District and existing historic vernacular landscapes. ([SCDA Appeal](#), p. 9; [SCDA spk-2008-00861 comments Save the California Delta Alliance as submitted](#), p. 12)
- 2) The project would conflict with and irreparably damage Hood, Clarksburg, and Courtland by permanently altering the physical landscape, including agricultural and cultural/historic uses, and substantially degrading unique scenic qualities and cultural/historical and economic values in perpetuity. ([Sac County DSC CWF appeal with attachments](#), pp. 6-7, 8-9)
- 3) Appellant quotes from the Department's Draft SEIR/EIS, which states that direct and indirect effects of construction of the project would result in significant and unavoidable impacts to eligible and potentially eligible historical resources and unique archeological resources; Mitigation Measures CUL-1 and CUL-2 fail to avoid or reduce this impact to a less-than-significant level. (North Delta Cares, [Appeal Letter](#), pp. 8-9)
- 4) The project will have multiple significant and unavoidable impacts on cultural resources in the Delta. Construction would affect 10 identified archeological resources likely to qualify as historical resources or unique archeological resources under CEQA. In addition, 10 identified historic-era built environment resources have potential to be directly or indirectly affected by construction, including the Mosher House and the George Cornish House of Clarksburg, which are eligible for listing on the National Register of Historic Places and California Register of Historic Places. ([Sac County DSC CWF appeal with attachments](#), pp. 8-9)

Appellant SCDA asserts that the project intake structures would destroy the aesthetic and cultural significance of the Locke Historic District and the historic vernacular landscape, and that a Programmatic Agreement under Section 106 would not avoid nor reduce these conflicts ([SCDA, spk-2008-00861 comments, p.11-12](#)).

North Delta Cares asserts that MM CUL-1 and MM CUL-2 fail to avoid or reduce construction impacts on eligible and potentially-eligible historical resources and unique archeological resources to the extent feasible (North Delta Cares, [Appeal Letter](#), pp. 8-9). The

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1 evidence Appellant cites is from the Draft SEIR/EIS, which states that MM CUL-1 “would not
2 ensure preservation of the physical integrity of the resources or ensure that all of the
3 scientifically important material would be retrieved because feasible archaeological excavation
4 only typically retrieves a sample of the deposit, and the portions of the site containing important
5 information may remain after treatment. The impact on identified archaeological sites would be
6 adverse (NEPA) and significant and unavoidable (CEQA) because construction could damage
7 the remaining portions of the deposit, the same as what would result under the approved
8 project” (SEIR/S, pp. 18-4, L 23-25, 31-38). Regarding the effectiveness of MM CUL-2, North
9 Delta Cares cites evidence from the Draft SEIR/SEIS that states, “Ground-disturbing
10 construction for both the approved project or the proposed project may materially alter the
11 significance of these resources by disrupting the depositional context of the resource and the
12 spatial relationship between the physical constituents of the resource.... Mitigation Measure
13 CUL-2 would address the impacts of both prehistoric and historic resources through conducting
14 inventories, evaluating significance, and proposing treatment of archaeological and historic
15 resources as well as monitoring during the construction phase. For these reasons, the impact
16 would be adverse, significant and unavoidable” (SEIR/S, Pg. 18-4, 5, 6; L 11-12, 14-23, 41-43,
17 1-9). The Final EIR/EIS Chapter 18 (Cultural Resources) reached the same conclusion as the
18 SEIR/EIS, which is that even with implementation of MM CUL-1 and MM CUL-2, impacts would
19 remain significant and unavoidable ([Final EIR/EIS, Ch. 18, pp.18-99, 18-100](#)).

20

21 Appellant Sacramento County cites testimony by Professor Robert Benedetti at the
22 SWRCB hearing as additional evidence regarding the project’s impacts on cultural and historic
23 resources ([Sac County DSC CWF appeal with attachments](#), p.9). Dr. Benedetti cites evidence
24 of the following significant and unavoidable impacts:

25

- 26 • *Prehistoric Cultural Resources, Accessible Properties* (Impacts to the Greene home and
27 about 55 structures of potential historical value)
- 28 • *Inaccessible Properties* (12 sites were not evaluated for historical or cultural value)
- 29 • *Inadequate Mitigation for Historic Resources* (Relocation could jeopardize future uses;
30 for example, because a substantial part of the value of these residences is based on
31 their location. If the Mosher House, Greene House, or Rosebud Rancho were moved, it
32 could substantially lessen their value and degrade the visitor experience)
- 33 • *Historic Communities* (The Final EIR/EIS does not fully discuss the magnitude of
34 temporary construction impacts on community life)
- 35 • *Historic Transportation Routes* (Significant and permanent impacts on State Highway
36 160)
- 37 • *Cultural Tourism* (Final EIR/EIS Chapter 18 does not adequately evaluate impacts on
38 current and future resources, businesses, property values, and designation of the Delta
39 as a National Heritage Area that supports cultural tourism, and that mitigation measures
40 are insufficient).

41 (Sac County [DSC CWF appeal with attachments](#), pp.18-31).

42 The Commission comments that project impacts could permanently damage designation
43 of the Delta as a National Heritage Area and the emerging heritage tourism industry (Delta
44 Protection Commission, [October 16, 2018 Written Statement](#), p.7). The Commission also

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1 comments that the cultural resources mitigation measures focus on a limited set of properties or
2 sites, and recommends that the Department consider Delta cultural values in a larger context,
3 as suggested by the cultural landscape approach discussed in the Secretary of the Interior's
4 Standards for the Treatment of Historic Properties and Guidelines for the Treatment of Cultural
5 Landscapes (Delta Protection Commission, [October 16, 2018 Written Statement](#), p.7). More
6 specifically, the Commission comments that Mitigation Measure CUL-5: *Consult with Relevant*
7 *Parties, Prepare and Implement a Built Environment Treatment Plan* offers “vague assurance
8 that project proponents will consult with relevant parties prior to demolition or ground-disturbing
9 activities” (Delta Protection Commission, [October 16, 2018 Written Statement](#), p.7).

10 The Department’s Certification cites evidence in the record regarding refinements to the
11 project that were made between 2013-2015, which avoided or reduced impacts to local land
12 use. These refinements included eliminating pumping plants, permanent power lines, and
13 sediment basins at the northern intakes, as well as reducing visual impacts near Hood, which is
14 a Delta legacy community ([DWR DP P2, p.3-4](#)).

15
16 The Department states that project footprint location considerations, including the
17 location of proposed water intakes near Hood, were analyzed by engineers and resource
18 experts as described in Appendix 3F to the Final EIR/FEIS ([DWR DP P2, p.4](#)). Avoiding areas
19 with a “high concentration of cultural and historic resources” was a “general consideration” in
20 refining intake locations ([Final EIR/EIS, Appendix 3F, p. 3F-9](#)). Intake sites were then compared
21 using four criteria, one of which was “Impact to existing structures, businesses, historical
22 interests and current use of the land” ([Final EIR/EIS, Appendix 3F, p. 3F-11](#)). Three intakes
23 were selected for analysis as part of the proposed project (intakes 2,3, and 5) after considering
24 the higher costs of alternatives, impacts to sandhill cranes, proximity to the intermediate
25 forebay, and the opportunity to avoid direct impact to structures in Hood ([Final EIR/EIS,](#)
26 [Appendix 3F, p. 3F-15](#)).

27
28 The Department acknowledges project impacts on cultural resources as described in
29 Chapter 18 of the Final EIR/EIS,³⁶ and that “significant or adverse impacts that will result from
30 California WaterFix. Construction of the water conveyance facilities may require removal or
31 alteration of certain historic built-environment resources, which is considered a significant
32 effect.” ([DWR DP P2, p.13.](#))

33
34 To reduce or eliminate impacts where feasible, the Department identifies the following
35 Mitigation Measures that relate to cultural resources:

- 36
37 • **MM CUL-1:** *Prepare a Data Recovery Plan and Perform Data Recovery Excavations on*
38 *the Affected Portion of the Deposits of Identified and Significant Archaeological Sites*
39 ([Final EIR/EIS MMRP p. 2-66](#)).
- 40
41 • **MM CUL-2:** *Conduct Inventory, Evaluation, and Treatment of Archaeological Resources*
42 ([Final EIR/EIS MMRP p. 2-69](#)).
- 43
44 • **MM CUL-3:** *Implement an Archaeological Resources Discovery Plan, Perform Training*
45 *of Construction Workers, and Conduct Construction Monitoring* ([Final EIR/EIS MMRP p.](#)
46 [2-73](#)).

³⁶ Final EIR/EIS, Chapter 18, defines “cultural resources” as prehistoric and historic archaeological resources, architectural/built-environment resources, places important to Native Americans and other ethnic groups, and human remains ([Final EIR/EIS, Ch. 18, p.18-1](#)).

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- 1
- 2 • **MM CUL-4:** *Follow State and Federal Law Governing Human Remains if Such*
- 3 *Resources Are Discovered during Construction* ([Final EIR/EIS MMRP p. 2-75](#)).
- 4
- 5 • **MM CUL-5:** *Consult with Relevant Parties, Prepare and Implement a Built Environment*
- 6 *Treatment Plan* ([Final EIR/EIS MMRP p. 2-77](#)).
- 7
- 8 • **MM CUL-6:** *Conduct a Survey of Inaccessible Properties to Assess Eligibility, Determine*
- 9 *if These Properties Will Be Adversely Impacted by the Project, and Develop Treatment*
- 10 *to Resolve or Mitigate Adverse Impacts* (Final EIR/EIS [MMRP p. 2-82](#)).
- 11
- 12 • **MM CUL-7:** *Conduct Cultural Resource Studies and Adopt Cultural Resource Mitigation*
- 13 *Measures for Cultural Resource Impacts Associated with Implementation of*
- 14 *Environmental Commitments 3, 4, 6-12, 15, and 16* ([Final EIR/EIS MMRP p. 2-84](#)).
- 15

16 Significant and unavoidable adverse impacts would remain following implementation of these
17 mitigation measures, and the Department has not cited evidence in the record demonstrating
18 that additional mitigation measures or alternatives which would reduce or avoid impacts on
19 cultural and historical resources are infeasible ([Final EIR/EIS, Ch. 18](#), p.18-213 through p.18-
20 219; p. 18-142).

21
22 In addition to these mitigation measures, as evidence of how it would address impacts
23 on cultural resources, the Department states that it “has committed to the implementation of a
24 Community Benefits Fund, or its equivalent. This Fund would incorporate good neighbor policies
25 to avoid negative impacts on agricultural lands, residents and business by providing a
26 mechanism for communication with local government and community members and disburse
27 funds to protect and enhance the Delta as an evolving place”(DWR DP P2, p.21-22). However,
28 no further evidence is cited that provides additional information regarding the Fund, including
29 that it constitutes an enforceable commitment.

30 31 **ii. Conclusion Regarding Cultural and Historical Resources Impacts**

32
33 Appellants cite evidence in the record showing significant and unavoidable adverse
34 impacts to cultural and historic resources, including archaeological sites, affecting about 55
35 structures on accessible properties, and 12 sites on inaccessible properties. The Certification
36 cites evidence in the record showing the manner in which the Department has acknowledged
37 the project’s impacts on existing cultural and historical resources, and identifies measures to
38 reduce impacts. However, appellants cite evidence in the record showing that the mitigation
39 measures would not address impacts due to relocation of historic structures, which could
40 jeopardize the future use such structures, and that impacts on archeological sites would
41 remain significant despite implementation of mitigation measures related to treatment of
42 archaeological sites. Appellants also cite evidence in the record showing that the Department
43 did not consider project impacts on cultural tourism in legacy communities and potential
44 designation of the region as a National Heritage Area. The Department has not cited evidence
45 in the record identifying mitigation measures that would reduce or avoid impacts on legacy
46 communities, scenic highways, and cultural tourism. No further evidence is cited that provides
47 additional information about the Community Benefits Fund, and how it would reduce project
48 impacts to Delta community life, historic routes, and cultural tourism. Therefore, the
49 Department’s Certification of Consistency with DP P2 on the issue of conflicts with existing land

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1 uses due to impacts on cultural and historical resources is *not supported* by substantial
2 evidence in the record.

3 4 **d. Conflicts With Existing Uses – Parks and Recreation Impacts**

5 6 **i. Appeals & Certification**

7 8 **(a) Impacts on Marinas and Recreational Boating**

9
10 Appellants SCDA, North Delta Cares, and Sacramento County assert that WaterFix will
11 conflict with marinas as an existing land use. In its appeal, SCDA cites testimony originally
12 submitted at the SWRCB hearing regarding a change in point of diversion for WaterFix and to
13 comments on the Final EIR/EIS. SCDA cites testimony from Bill Wells, which includes the
14 following statement on the potential impact on marinas: “In my opinion, at least 20 percent of
15 our Delta marinas will be forced out of business by WaterFix.” ([SCDA-150](#), p. 1). Impacts on
16 marinas as a Delta land use and marina closures are also asserted by SCDA in its references to
17 the following comments on the California WaterFix Project Final EIR/EIS, which are listed in the
18 SCDA Appeal Form (p. 9): Barbara Daly (July 10, 2017; Document Code: [D.1 DRAFT 000418](#));
19 Bill Wells / Delta Chambers and Visitors Bureau (August 2, 2017; Document Code: [D.1 DRAFT](#)
20 [000198](#)); Bullfrog Marina / Carl Wenske (July 7, 2017; [SCDA Response to Supplemental](#)
21 [Questions](#), pp. 380-384); Clarksburg Marina / Don and Kathleen Updegraff (July 6, 2017;
22 Document Code: [D.1 DRAFT 000198](#)); Frank Morgan (July 10, 2017, Document Code:
23 [D.8 DRAFT 023274](#)).

24
25 SCDA asserts that the project would impact recreational boaters in the Delta in large
26 numbers (SCDA [Appeal](#), p. 9). SCDA’s appeal cites testimony submitted during Part 2 of the
27 SWRCB hearing on a change in point of diversion for California WaterFix. In this testimony,
28 Frank Morgan provides his opinion as to the likely impacts to in-Delta boat recreation ([SCDA-](#)
29 [25](#)). SCDA also asserts that project construction would result in adverse impacts to Delta
30 recreational boating during the summer season by disrupting navigation within the Delta and at
31 an operable gate at Old River that is also part of the project ([SCDA spk-2008-00861 comments](#),
32 pp.11-13). In their testimony, Mr. Wells and Mr. Morgan assert that the new gate and speed
33 limits will inhibit recreational boating by interrupting the unrestricted recreational navigation and
34 that recreational boaters will abandon the Delta in large numbers due to the project’s
35 construction impacts ([SCDA Appeal](#), p. 9; [SCDA Response to Supplemental Questions](#), p. 23).
36 In support of this assertion, Mr. Wells and Mr. Morgan refer to survey research conducted for
37 SCDA, which was submitted to the SWRCB, showing that, at a Delta boating event in 2017, 68
38 percent of respondents stated “...they would switch some or all of their boating activity away
39 from the Delta in response to CWF construction activities” (SCDA-351, p. 2).

40
41 North Delta Cares also asserts that the project would result in significant and
42 unavoidable impacts to recreational navigation opportunities in the Delta (North Delta Cares,
43 [Appeal Letter](#), p. 6). Appellants North Delta Cares and Sacramento County assert that the
44 project’s conflicts with marinas will arise in part due to project construction noise which, as
45 described below in the discussion of Noise impacts, may deter visitors to recreational land uses
46 such as the Clarksburg Marina. (North Delta Cares, [Appeal Letter](#), pp. 5-6; [Sac County](#), pp. 7,
47 9). SCDA asserts that traffic congestion on roads leading to Delta marinas, including Highway
48 160 and Highway 4 and local roads, as described below in the discussion of Traffic impacts, will
49 further deter visitors from using the affected marinas ([SCDA Response to Supplemental](#)
50 [Questions](#)).

51

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1 North Delta Cares also asserts that changes in waterside scenery, as described under
2 Visual and Aesthetic Character, will discourage marina visitors. Appellants assert that three
3 marinas (Wimpy's Marina, Bullfrog Landing Marina, and Lazy M Marina) and a popular
4 anchorage at Delta Meadows are within the 1,200 to 1,400-foot indirect impact area of WaterFix
5 construction. Appellants further assert that proposed mitigation fails to avoid or reduce these
6 impacts to the extent feasible and, therefore, will conflict with Delta recreation land use (North
7 Delta Cares, [Appeal Letter](#), pp. 5-6).

8
9 North Delta Cares asserts that in-water features of project construction will create other
10 deterrents to recreational boating that will harm use of marinas (North Delta Cares, [Appeal](#)
11 [Letter](#), p. 6). These deterrents include the new operable gate across Old River and barge traffic
12 to new landings that will be constructed at the Meadows on Snodgrass Slough east of Locke
13 and in the south Delta. Appellants assert that estimates of barge traffic used by the Department
14 are contradictory and unreliable ([SCDA-25](#), p. 11-13).

15
16 Appellants assert that mitigation measures proposed by the Department will not reduce
17 these impacts, because the objective of the mitigation measures is protection of wildlife and fish,
18 not recreational boating. ([SCDA spk-2008-00861 comments](#), p. 11). Appellant SCDA asserts
19 that barge operations plans are intended to address potential impacts to aquatic habitat and
20 species from barge and tugboat operations; they do not include specific measures related to
21 recreation, and do not provide for consultation about the plans with recreation interests. SCDA
22 also asserts that the Department's proposal to mitigate effects on recreational boating by
23 funding expanded herbicide treatments to control aquatic weeds that impede boating is
24 inadequate, because it does not describe the amount or objective of any expanded funding
25 (SCDA-301). Finally, SCDA cites the SWRCB hearing testimony of Mr. Wells, which urges
26 consideration of other measures to mitigate the impacts on recreational boating that will harm
27 marinas, including measures to control noise, relocate reusable tunnel material storage sites out
28 of the Delta, and place major staging areas away from prime Delta recreation areas (SCDA -
29 150).

30
31 The Commission concludes, in the context of comments on policy G P1(b)(2), that
32 mitigation measures for recreation impacts are insufficient, and states, "No mitigation has been
33 proposed for the substantial 'temporary' impacts to recreation in the Delta by the project
34 proponents, other than creation of site-specific 'construction traffic management plans' which
35 are deferred to the future. There is no analysis in the record of temporary impacts, although
36 Final EIR/EIS Chapter 15 defines 'temporary' as longer than 2 years, and construction could
37 take from 5-10 years depending on location and facility" (Delta Protection Commission, [October](#)
38 [16, 2018 Written Statement](#), p.8).

39
40 The Commission also comments that barge impacts on recreational boating traffic are
41 not meaningfully addressed by the mitigation measures, and that the Department "should
42 ensure dedicated funds for construction of new recreation opportunities, as well as for protection
43 of existing recreation opportunities as outlined in Recommendation DP R11 of the Delta Plan...
44 mitigation measures ought to be clearly specified and their linkages to impacts of construction,
45 operation, and maintenance of the facilities should be plainly identified. Open-ended pledges or
46 vaguely described commitments to avoid or reduce adverse effects will not satisfy the charge of
47 the law" (Delta Protection Commission, [October 16, 2018 Written Statement](#), p.9, 11). The
48 Commission goes on note that the Department could reduce the significant and unavoidable
49 impacts to recreational boaters if it engages with recreation facility owners, park managers
50 (California State Parks), and the Commission.

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1 In its Certification, the Department acknowledges impacts to recreational activities from
2 construction ([DP P2 Certification](#), p. 9-10). The Department cites the following mitigation
3 measures and Avoidance and Minimization Measures to support its finding of consistency with
4 DP P2 in this area ([DP P2 Certification](#), p. 9-10):

- 5
6 • **Mitigation Measure REC-2: Provide alternative bank fishing access sites.** The
7 Department cites Mitigation Measure REC-2 as evidence of avoiding and reducing
8 impacts to recreation. This mitigation measure focuses on providing alternative bank
9 fishing sites ([MMRP, p. 2-49](#)).
- 10
11 • **Avoidance and Minimization Measures, Environmental Commitments, and Best**
12 **Management Practices.** The Department states that the adopted MMRP includes a
13 number of measures to avoid or reduce impacts on recreational resources. Specifically,
14 the Department states that among these measures are “fugitive dust control measures,
15 development and operation of erosion and sediment control plans, and development and
16 implementation of fish rescue and salvage plans” ([DP P2 Certification](#), p. 10). The
17 Department also commits to implement *Environmental Commitment: Provide Notification*
18 *of Maintenance Activities in Waterways & AMM36: Notification of Activities in Waterways*
19 ([MMRP, p. 3-76](#)).
- 20
21 • **Appendix 3B.** The Department states that Appendix 3B of the Final EIS/EIR includes
22 other commitments to reduce impacts to recreation, including “Enhance Recreation
23 Access in the Vicinity of the Proposed Impacts (3B.3.2); Fund Efforts to Carry Out the
24 Recommendations Adopted in the Delta Plan (3B.3.3); and Fund the California
25 Department of Boating and Waterways’ Programs for Aquatic Weed Control (3B.3.4)”
26 ([DP P2 Certification](#), p. 10).
- 27
28 • **Appendix 15B, Delta Recreation.** The Department states that there are other “plans,
29 policies, and programs” that focus on enhancement of recreational opportunities in the
30 Delta, and these are described in Appendix 15B of the Final EIR/EIS.

31
32 In its Certification, the Department also cites Mitigation Measures REC-6 *Provide a*
33 *temporary alternative boat launch to ensure access to San Luis Reservoir* and TRANS-1a
34 *Implement Site-Specific Construction Traffic Management Plan*. Of these two mitigation
35 measures, only TRANS-1a includes some aspects related to avoiding or reducing impacts to in-
36 Delta recreation. While the Department identifies several mitigation measures, avoidance and
37 minimization measures, and environmental commitments that could incidentally affect marinas
38 and recreational boating, none directly address conflicts with existing recreational boating uses.
39 In its Written Statement submitted October 15, 2018, the Department states that for project
40 impacts on recreational boat traffic that “the significant and unavoidable effects are from
41 construction, and not operation, and thus are temporary” (Department’s [October 15, 2018](#)
42 [Written Statement](#), p. 18). The Department acknowledges that boaters could experience minor
43 delays related to construction speed zones, and asserts that mitigation measures will reduce
44 impacts on navigation by “development and implementation of site-specific construction traffic
45 management plans [*Mitigation Measure TRANS-1a: Implement site-specific construction traffic*
46 *management plan*], including specific measures related to management of barges and
47 stipulations to notify the commercial and leisure boating communities of proposed construction
48 and barge operations in the waterways [*Environmental Commitment: Provide Notification of*
49 *Maintenance Activities in Waterways & AMM36*]” (Department’s [October 15, 2018 Written](#)
50 [Statement](#), p. 18). The Department does not explain how development of barge operations and

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1 traffic management plans address conflicts with recreational boating. The Department does not
2 cite any other specific mitigation measures, AMMs or Other Commitments that would reduce the
3 impacts of construction activities on recreational uses, instead stating that “Some of the
4 Avoidance and Minimization Measures, and Environmental Commitments described above are
5 designed to address impacts on recreational resources.” ([DP P2 Certification](#), p. 10).

6 (b) Impacts on Public Recreation and Nature Areas

7
8 Appellants assert that the project would result in significant conflicts with public use of
9 recreation and nature areas (North Delta Cares, [Appeal Letter](#), p. 5). North Delta Cares and
10 Sacramento County assert that these impacts include reduced access, noise, and visual setting
11 disruptions that could impair public use of these areas. To support this assertion, North Delta
12 Cares cites Chapter 15 of the Supplemental EIR, and in particular to impacts REC-1, REC-2,
13 and REC-3 (North Delta Cares, [Appeal Letter](#), p. 5-6). Although the Draft Supplemental EIR/EIS
14 does not analyze the approved project for which the Department submitted a Certification of
15 Consistency on July 27, 2018, this assertion has been considered for its relevance to the Final
16 EIR, which also describes these impacts and finds for REC-2 and REC-3 that the impacts would
17 be significant and unavoidable ([Final EIR/EIS, Ch. 15](#), pp.15-467 through 15-472).

18
19 Sacramento County asserts that the project will impact recreational opportunities and
20 cites the Final EIR/EIS, which states that the project would “... result in permanent and long-
21 term (i.e., lasting over 2 years) impacts on well-established recreation opportunities and
22 experiences in the study area because of access, noise, and visual setting disruptions that
23 could result in loss of public use” (Sacramento County [Appeal Letter](#), p. 9).

24
25 Sacramento County also asserts that two public recreation and nature areas are within
26 the California WaterFix construction footprint – Clifton Court Forebay, and Cosumnes River
27 Preserve which includes the Nature Conservancy’s Staten Island (Sacramento County [Appeal](#)
28 [Letter](#), pp. 7, 9). Other public recreation areas that will be affected by the project include Stone
29 Lakes National Wildlife Refuge, Clarksburg Boat Launch, and California State Parks property at
30 Delta Meadows, which are within the 1,200 to 1,400 foot indirect impact area. (Sac County
31 [Appeal Letter](#), pp. 7, 9). Project construction would locate tunnel shafts, reusable tunnel material
32 storage areas, other facilities, and new power lines on or near these sites. Appellants assert that
33 because the value of these areas depends on their quiet and undisturbed auditory and visual
34 character, project construction will impair recreational use of them (Sac County [Appeal Letter](#), p.
35 20).

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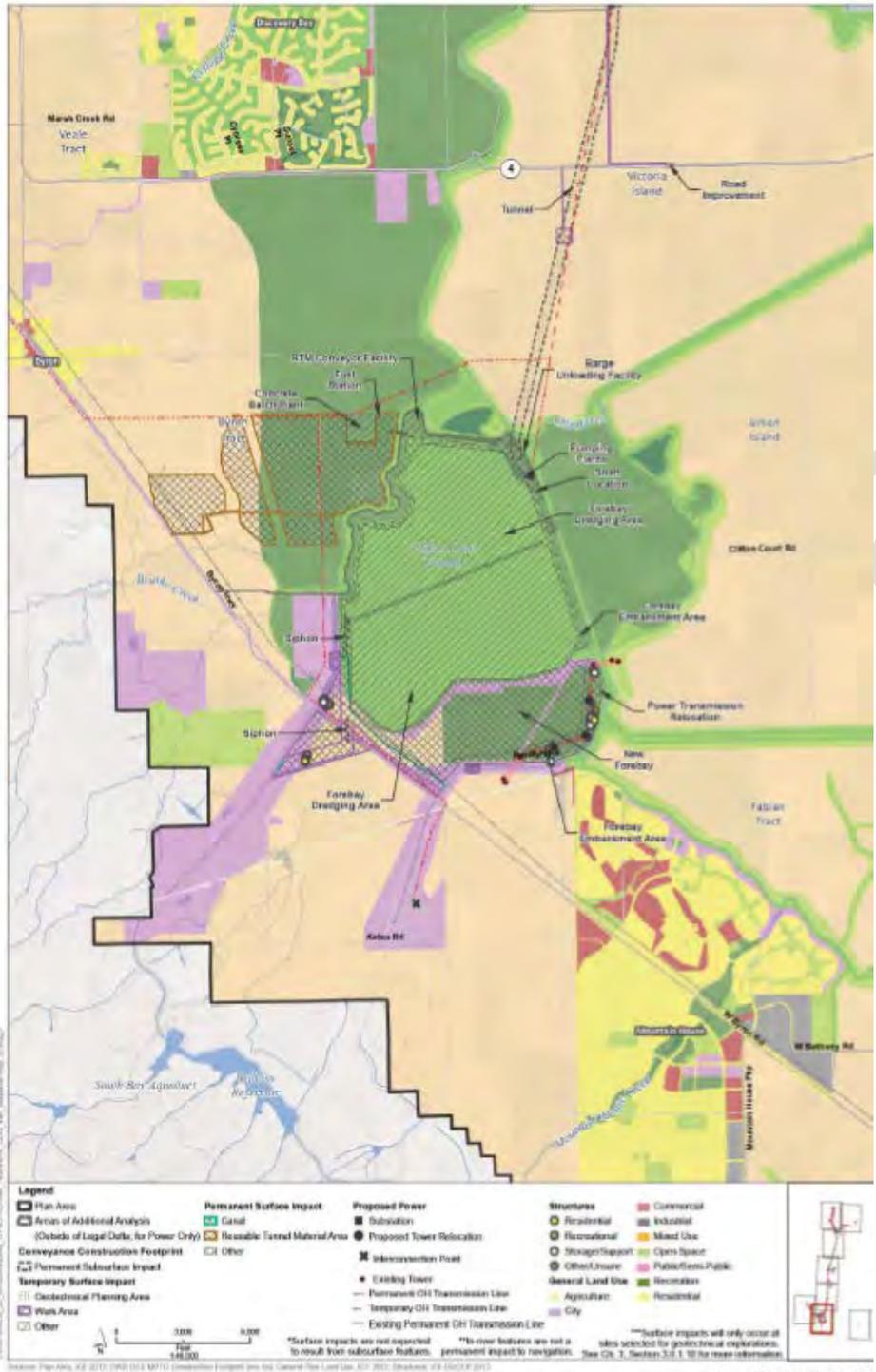
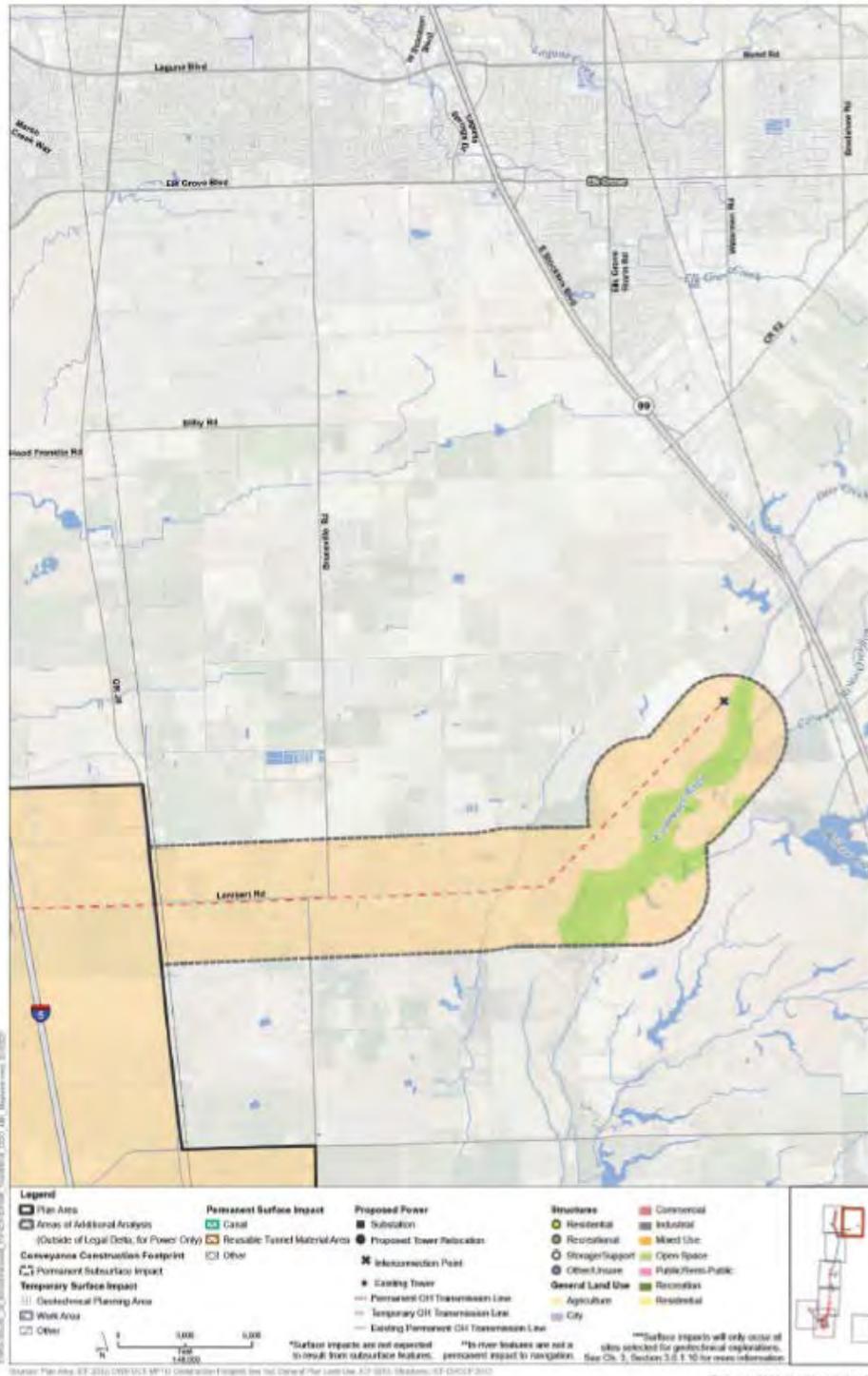


Figure M13-4: Sheet 5 of 1
General Plan Land Use Designations — Modified Pipeline/Tunnel Alignment (Alternative 4)

Location of Clifton Court Forebay (DWR DP P2, Figure M13-4 Sheet 6 of 8, p. 37)

- 1
- 2
- 3
- 4

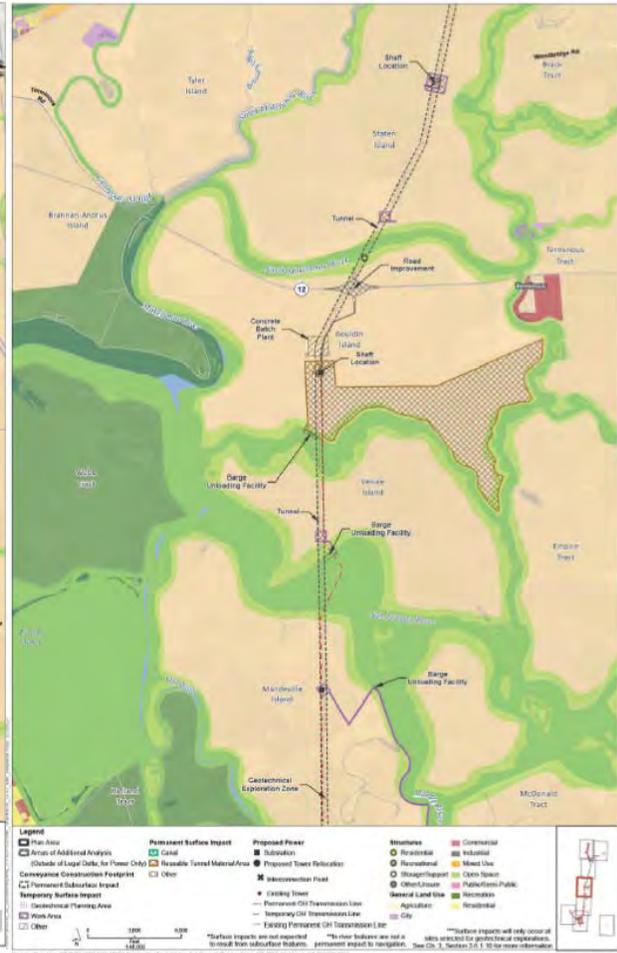
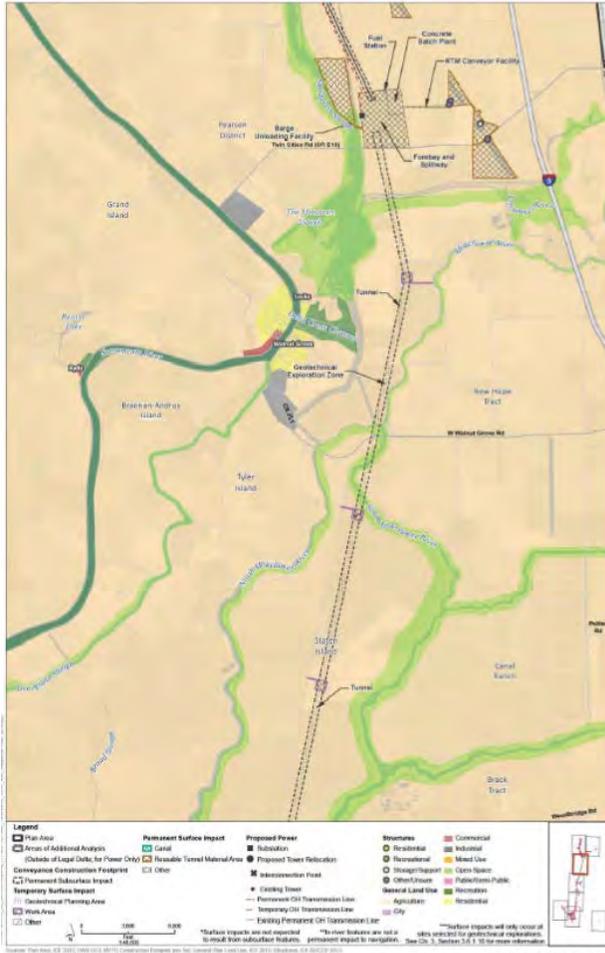
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Draft

1
 2 Location of Cosumnes River Preserve (DWR DP P2, Figure M13-4 Sheet 2 of 8, p. 33)
 3

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- 1
- 2
- 3

Location of Staten Island ((DWR DP P2, Figure M13-4 Sheet 2 of 8, pp. 34-35)

Staten

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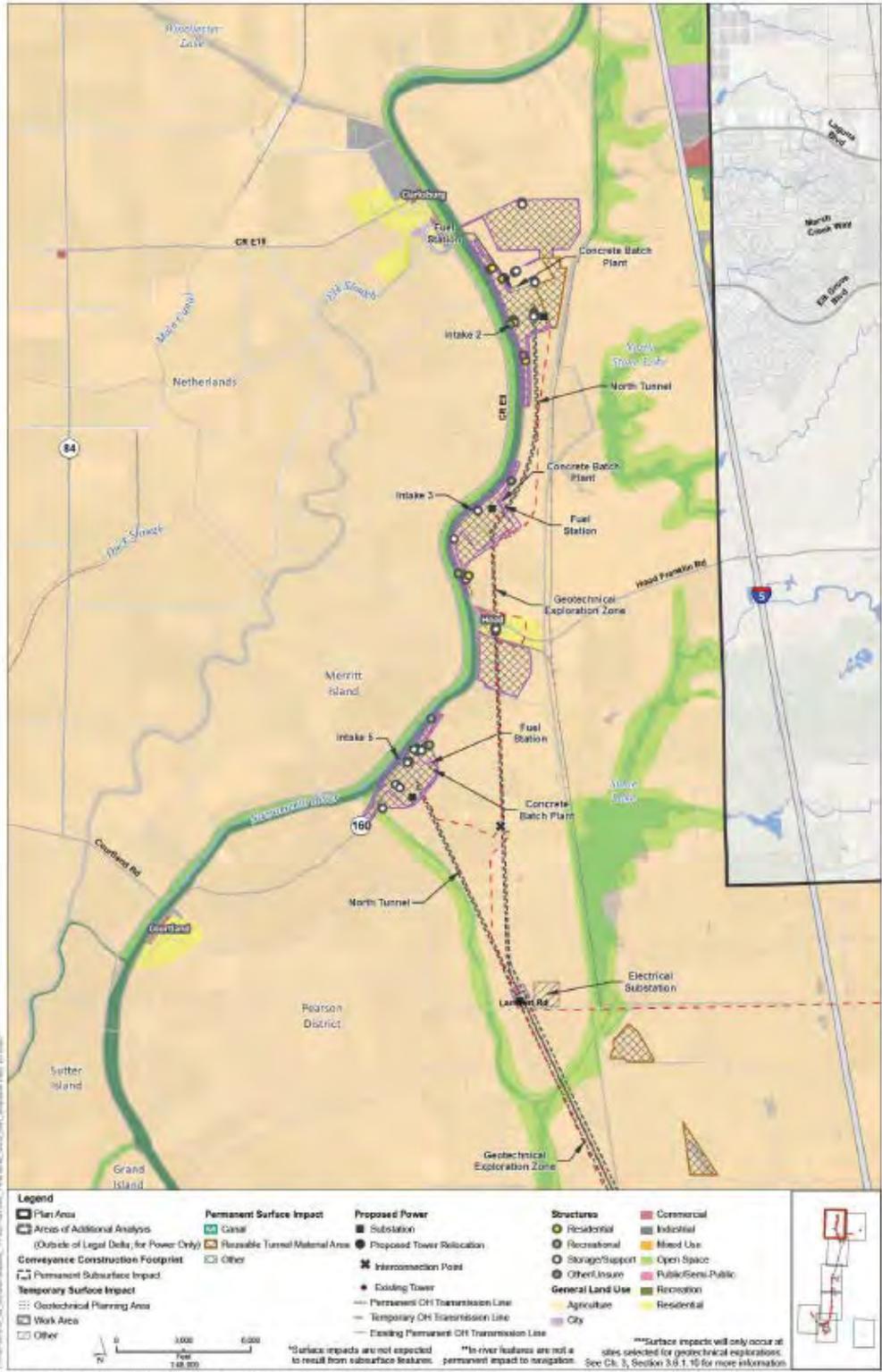


Figure M13-4: Sheet 1 of 8
 General Plan Land Use Designations — Modified Pipeline/Tunnel Alignment (Alternative 4)

- 1
- 2 Location of Stone Lakes National Wildlife Refuge (DWR DP P2, Figure M13-4 Sheet 1 of 8, p. 32)

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1 Appellants assert that mitigation proposed for these effects is inadequate. The
2 Clarksburg Boat Launch, which the Department proposes to improve to compensate for lost
3 fishing access, will be exposed to loud noises during project construction and so is unlikely to be
4 used by bank fisherpeople displaced from other areas during project construction (SCDA
5 [Appeal](#), testimony of Salter [X.4_000015](#), pp. 5-6). Sacramento County asserts that at sites in
6 Sacramento County proposed to compensate for lost bank fishing areas, the Department has
7 not defined the improvements proposed to the Georgiana Slough Fishing Access and Cliffhouse
8 Fishing Access, and has not proposed to reimburse the County for additional management
9 costs as use of these areas increases (Sacramento County [Appeal Letter](#), testimony of Jeff
10 Leatherman, p. 20).

11
12 In its Certification, the Department states that there will be construction impacts on
13 certain aspects of recreation within the Delta, but that “. . . because the Delta is so expansive
14 with 700,000 acres and 500 miles of navigable waterways, recreation would be able to occur
15 throughout the Delta during and after construction.” ([DP P2 Certification](#), p. 10). The
16 Department also states that it has identified feasible mitigation measures for these impacts, but
17 that the impacts will remain significant and unavoidable. (*Ibid.*) The Department does not
18 clearly identify reasons that avoiding or reducing these impacts would be infeasible, however
19 (DWR, [DP P2 Certification](#), p. 17).

20 21 (c) Impacts of Construction Traffic on Recreational Uses

22
23 Appellant Sacramento County asserts that California WaterFix will cause traffic that
24 negatively impacts “Delta lifestyle and economy” from traffic (Sacramento County [Appeal Letter](#),
25 p. 9). Specifically, Sacramento County cites the SWRCB hearing testimony of Reza Moghissi,
26 who asserts that increases in traffic will negatively affect residents and visitors (Sacramento
27 County [Appeal Letter](#), p. SACO-18-1 through SACO-18-13). Although these assertions may be
28 relevant to recreation, Sacramento County has only cited to evidence noting that there will be an
29 impact to Delta residents and visitors, and not clearly explained the impact to recreational land
30 uses (*Ibid.*).

31
32 In its appeal, SCDA asserts that there will be significant impacts to a range of
33 recreational uses within the Delta (SCDA [Appeal](#), p. 9) and cites SWRCB hearing testimony of
34 Frank Morgan that describes impacts to traffic and recreation from operation of the Highway 4
35 bridge at Old River (SCDA [Appeal](#), SCDA-301, p. 9). In SCDA-301, Mr. Morgan asserts that
36 barge traffic will utilize Old River and require raising the Highway 4 bridge and therefore impact
37 traffic throughout the region (SCDA [Appeal](#), SDDA-301, pp. 9-10). To support this, Mr. Morgan
38 cites the Department’s Final EIR/EIS, the SWRCB hearing testimony of the Department’s
39 witness Mr. Bednarski, and Mr. Morgan’s own opinion, stating “In my view, there is too much
40 uncertainty and contradiction regarding barge operations to open the door to frequent openings
41 of the Highway 4 Bridge over Old River (SCDA [Appeal](#), SCDA-301, p. 9). Mr. Morgan also
42 asserts that barge operations are not reasonably protective of recreation and that recreational
43 boating will be affected (SCDA [Appeal](#), SCDA-301, pp. 18-19). Mr. Morgan proposed that to
44 address these asserted impacts to recreation, the Department could have considered an
45 eastern tunnel alignment, which would have feasibly addressed impacts to recreational boating
46 from barge traffic (*Ibid.*). SCDA adds to this assertion in its response to supplemental questions
47 (SCDA Supplemental Questions, p. 11). SCDA asserts that the Department has “failed to
48 recognize impacts on roadway traffic due to WaterFix barge-caused bridge openings”, and
49 asserts that these openings will impact traffic and access to recreation sites (SCDA
50 [Supplemental Questions](#), pp. 10-12).

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1 In its Certification, the Department cites the project design and formulation, including
2 several different alternatives that used different tunnel alignments (DWR, [DP P2 Certification](#), p.
3 3-4). The Department has also cited mitigation measures TRANS-1a, TRANS-1b, and TRANS-
4 1c to reduce impacts to traffic in the Delta. These measures include the following:

- 5
6 • **Mitigation Measure TRANS-1a: Implement Site-Specific Construction Traffic
7 Management Plan (MMRP 2-87).** The Department commits to contract with one or more
8 construction management firms to coordinate schedules and ensure development of
9 site-specific traffic management plans, prior to construction. This includes coordination
10 with the California Department of Parks and Recreation (Final EIR/EIS [MMRP](#), p. 2-87).
11
- 12 • **Mitigation Measure TRANS-1b: Limit Hours or Amount of Construction Activity on
13 Congested Roadway Segments (MMRP 2-91).** The Department commits, where
14 feasible, to limit construction activity so that it does not negatively impact roadway level
15 of service. This potentially would be achieved by limiting activity to avoid commute
16 periods (Final EIR/EIS [MMRP](#), p. 2-19).
17
- 18 • **Mitigation Measure TRANS-1c: Make Good Faith Efforts to Enter into Mitigation
19 Agreements to Enhance Capacity of Congested Roadway Segments (MMRP 2-92).**
20 The Department commits, prior to construction, to “make a good faith effort” to put in
21 place mitigation agreements with affected agencies and identify the fair share of costs to
22 reduce traffic congestion on identified roadways (Final EIR/EIS [MMRP](#), p. 2-92).
23

24 In the Department’s response to supplemental questions issued by the Council, the
25 Department provides more detail about Mitigation Measure TRANS-1a (Implement Site-Specific
26 Construction Traffic Management Plan) and Avoidance and Minimization Measure AMM7
27 (Barge Operations Plan) (Department’s [October 15, 2018 Written Statement](#), pp. 17-20). The
28 Department states that both measures include detailed elements and performance measures,
29 and cites the Final EIR/EIS MMRP ([C DRAFT 000002](#), p. 3-24 through 3-30 [barge operations
30 plan]; p. 2-87 through 2-94 [site-specific construction traffic management plan]). The
31 Department further states:

32
33 *DWR, in undertaking construction at the construction sites, will develop a barge
34 operations plan that includes the requirements set forth below, unless equally effective
35 strategies are developed.*

- 36
37 • *Bottom scour from propeller wash.*
- 38
39 • *Bank erosion or loss of submerged or emergent vegetation from propeller
wash and/or excessive wake.*
- 40
41 • *Accidental material spillage.*
- 42
43 • *Sediment and benthic (bottom-dwelling) community disturbance from
accidental or intentional barge grounding or deployment of barge spuds
44 (extendable shafts for temporarily maintaining barge position).*
- 44
45 • *Hazardous materials spills (e.g., fuel, oil, hydraulic fluids).*
- *Introduction of aquatic invasive species.*

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1 *The plan will be developed to limit barge-related effects on aquatic species. The plan will*
2 *include provisions to minimize or reduce effects on aquatic species. ([C DRAFT 000002](#),*
3 *p. 3-25)*

4
5 In its Certification, the Department states that it will:

6
7 *Develop and Implement a Barge Operations Plan & AMM7: Barge Operations Plan*
8 *(MMRP 3-23). To address the following potential impacts on aquatic habitat and species*
9 *from barge and tugboat operations associated with water conveyance facilities*
10 *construction, DWR will ensure that a barge operations plan is developed and*
11 *implemented for each project that requires the use of a barge. ([Certification, DP P2](#), p.*
12 *16).*

13
14 AMM7 (Barge Operations Plan) is further described in the Final EIR/EIS MMRP (p. 3-24). In the
15 MMRP, the Department describes the components of such the operations plan, which focus on
16 a variety of impacts, including that “The plan will be developed to limit barge-related effects on
17 aquatic species. The plan will include provisions to minimize or reduce effects on aquatic
18 species.” (MMRP p. 3-25). However, as the Appellants have asserted, this mitigation measure
19 does not demonstrate avoidance or reduction of impacts to recreational land uses in the Delta.

20
21 SCDA states that AMM7 “...will contain no measures to mitigate *any* impacts on marine
22 or road traffic, or on recreation” ([SCDA](#) Supplemental Responses, p. 9). For marine impacts, the
23 Department states under AMM7 that “The barge operations plan will be part of a comprehensive
24 traffic control plan coordinated with the Coast Guard for large channels” (WaterFix MMRP,
25 [C DRAFT 000002](#), pp. 3-24 through pp. 3-25). Given the Coast Guard’s authority over marine
26 and commercial traffic and the Department’s commitment under Mitigation Measure TRANS-1a
27 ([WaterFix MMRP](#), pp. 2-86 through 2-90) this addresses the assertion on marine traffic impacts.

28
29 In its supplemental response to Council questions, SCDA again asserts that AMM7 will
30 not adequately reduce roadway traffic and cites Final EIR/EIS Appendix 3B, pp. 30 and 107
31 ([D.1 DRAFT 000024](#)). These sections of the Final EIR/EIS describe the barge operations plan,
32 and the Department does not list AMM7 as focused on roadway traffic. Instead, the Department
33 cites transportation mitigation measures that it will implement to reduce impacts to roadway
34 traffic, including TRANS-1a, TRANS-1b, TRANS-1c, TRANS-2a, TRANS-2b, and TRANS-2c
35 ([DWR DP P2](#), p. 19). Similarly, for recreation, the Department does not state that AMM7 is
36 intended to address impacts to recreation, and instead has included mitigation measures such
37 as TRANS-1a (discussed above) that would include commitments to working with local partners
38 to avoid or reduce impacts to traffic, including in-water traffic such as boating.

39
40 SCDA also cites the Final EIR/EIS and states that the Department has incorrectly
41 characterized the height of the Rio Vista Bridge on State Route 12 ([SCDA](#) Supplemental
42 Responses, p. 9). SCDA further asserts that the combination of this error with the increase in
43 barge operations during project construction will result in negative traffic impacts ([SCDA](#)
44 [Response](#), p. 11). SCDA offers support for this assertion by questioning the evidence submitted
45 by the Department, and cites the SWRCB hearing testimony of Chris Kinzel ([SCDA-100](#)). In his
46 testimony, Mr. Kinzel cites a 2012 report on the Highway 12 corridor and states that the height
47 of the closed Rio Vista Bridge is “18 feet above ordinary high tide” ([SCDA-107](#), p. 50). In the
48 Final EIR/EIS, the Department states that “There is 135 feet of open air clearance at the Antioch
49 UPRR bridge and 144 feet at the Rio Vista bridge, and additional raising of draw bridges in the
50 study area would not be required.” (Final EIR/EIS, p. 19-232.) In its certification the Department
51 does not cite evidence that addresses this discrepancy or provide evidence that barges can or

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1 cannot pass under the Rio Vista Bridge without raising the bridge, thereby impacting traffic and
2 access to recreational land uses. Therefore, on the issue of increased bridge openings that
3 create traffic impacts on recreation, the Department has not provided substantial evidence that it
4 has avoided or reduced conflicts with recreation land uses to the degree feasible.

5 6 **ii. Conclusion Regarding Parks and Recreation Impacts**

7
8 Appellants assert that the project will conflict with existing recreational uses, including
9 marinas and recreational boating, parks and recreational areas, and public recreation access
10 (such as bank fishing). The Certification cites evidence in the record showing the manner in
11 which the Department has acknowledged the project's conflicts with existing parks and
12 recreation uses (including marinas, public recreation and nature areas including bank fishing,
13 visitor-serving businesses, and recreational boating areas), and identifies feasible measures to
14 reduce some, but not all, of the conflicts with parks and recreation uses identified by Appellants.
15 Although the Department also cites evidence that construction traffic and barge operations
16 plans will be prepared to minimize disturbance to aquatic species, it does not allege that these
17 measures are intended to reduce impacts on marinas or other recreational boating uses.
18 Therefore, the Department has not provided substantial evidence that mitigation measures
19 which address invasive species control, lost bank fishing access, and a barge operations plan
20 will reduce impacts on recreational boating use or roadway traffic to recreational uses in a
21 manner that will reduce conflicts with recreational uses to the extent feasible. Therefore, the
22 Department's Certification of Consistency with DP P2 related to conflicts with existing Delta
23 parks and recreation land uses *is not supported* by substantial evidence in the record.
24

25 **e. Conflicts With Existing Uses – Impacts on Visual and Aesthetic Character**

26 27 **i. Appeals & Certification - Impacts on Visual and Aesthetic Character**

28
29 The Appellants state the following:

- 30
31 1) The project would result in significant and unavoidable impacts to scenic highways in the
32 Delta. Project Mitigation Measures AES-1a, AES-1c, and AES-1e fail to avoid or reduce
33 these impacts to the extent feasible. (North Delta Cares, [Appeal Letter](#), p.7)
34
35 2) The project would result in significant and unavoidable daytime and nighttime light and
36 glare impacts. Project Mitigation Measure AES-4A fails to avoid or reduce this impact to
37 the extent feasible. (North Delta Cares, [Appeal Letter](#), p.7)
38
39 3) The project would result in unmitigated cumulatively considerable effects on scenic
40 vistas and scenic highways due to temporary and permanent conversion of agricultural
41 land to nonagricultural uses. (North Delta Cares, [Appeal Letter](#), p. 7-8)
42
43 4) The project would introduce adverse unavoidable aesthetic impacts to boaters, users of
44 scenic Highway 160, the Locke Historic District, and the historic character of the area.
45 ([SCDA](#), p.9; [SCDA spk-2008-00861 comments Save the California Delta Alliance as](#)
46 [submitted](#), p. 11-12).
47

48 North Delta Cares cites the Draft SEIR/EIS which describes project impacts on Aesthetic
49 and Visual Resources in Chapter 17 (Aesthetics and Visual) of the Final EIR/EIS that are
50 significant and unavoidable (North Delta Cares, [Appeal Letter](#), pp. 6-8). While the Council's

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1 analysis of the Department's Certification of Consistency does not rely on the Draft SEIR/EIS,³⁷
2 Chapter 17 of the Final EIR/EIS contains similar conclusions for *Impact AES-1, Impact AES-2,*
3 *Impact AES-3, Impact AES-4, and Impact AES-6*, which is that the project would result in
4 significant and unavoidable impacts on the existing visual quality, character, and public views in
5 the study area ([Final EIR/EIS, Ch. 17](#), pp. 17-320 through 17-326).
6

7 Appellant SCDA asserts that the project would impact aesthetic character and recreation
8 due to placement of Reusable Tunnel Material (RTM) on Bouldin Island and near Potato
9 Slough. In support of this assertion, SCDA cites the Draft SEIR/EIS ([SCDA Response to](#)
10 [Supplemental Questions](#), p. 27). In its Written Statement submitted on October 15, 2018, the
11 Department summarizes the potential impacts of the reconfiguration of RTM locations on
12 Bouldin Island, as described in the Draft Supplemental EIR/EIS as not resulting in significantly
13 different impacts than those identified in the 2017 certified Final EIR (Department's [October 15,](#)
14 [2018 Written Statement](#), pp. 77). However, these assertions are based on potential impacts that
15 are not part of the project before the Council as part of the covered action.³⁸
16

17 The Department cites evidence in the record regarding project refinements made
18 between 2013-2015, which included elimination of pumping plants in the North Delta,
19 elimination of power lines, and changing sediment basins from cement to earthen-lined, among
20 other actions in support of its finding of consistency with DP P2 ([DWR DP P2, p. 3-4](#)).
21

22 The Department acknowledges that despite these actions to avoid or reduce impacts,
23 project impacts on aesthetic and visual resources would remain in some areas. These impacts
24 are described in Chapter 17 of the Final EIR/EIS ([DWR DP P2, p. 14](#)). For example, the Final
25 EIR/EIS describes impacts due to project light or glare from construction that could affect
26 daytime or nighttime public views in the area ([Final EIR/EIS, Ch. 17](#), p. 17-324).
27

28 The Department identifies specific Avoidance and Minimization Measures,
29 Environmental Commitments, and Mitigation Measures (AMM/EC/MMs) in the Mitigation
30 Monitoring and Reporting Program (MMRP) for the Final EIR/EIS and Other Commitments that
31 would reduce or minimize adverse effects on visual resources ([DWR DP P2, pp. 14, 21](#)). The
32 mitigation measures are AES-1a, AES-1b, AES-1c, AES-1d, AES-1e, AES-1f, AES-1g, AES-4a,
33 AES-4b, AES-4c and AES-4d. ([Final EIR/EIS MMRP](#), pp. 2-52 through 2-66.) These mitigation
34 measures are summarized below.
35

- 36 • **AES-1b: Install Visual Barriers between Construction Work Areas and Sensitive**
37 **Receptors.** The Department will install temporary visual barriers at construction sites
38 that are visible from sensitive receptors, such as homes, schools, and other locations.

³⁷ It should be noted that North Delta CARES relies on the California WaterFix Draft SEIR/SEIS for evidence supporting this assertion. In this instance, to the extent that the Draft SEIR/SEIS describes impacts similar to those identified in the California WaterFix project Final EIR/EIS (i.e., does not modify the Final EIR/EIS conclusions), the Council relies on the Draft SEIR/SEIS to summarize those effects, noting that the Final EIR/EIS provides the substantial evidence in the record to support the Department's conclusion.

³⁸ Appellants assert that Mitigation Measures AES-1a, AES-1c, AES-1e and AES-1d identified in the Draft SEIR would not fully mitigate the adverse effects from the project including increased lighting impacts, permanent changes to regional landscapes visible from land or by boat, and impacts on scenic highways such as SR 160 ([SCDA Response to Supplemental Questions](#), p. 27). The approved project before the Council is described in the July 2017 Final EIR. Therefore, these assertions are not considered at this time.

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1 These barriers will be placed so that work areas that would degrade the existing visual
2 quality are not visible. ([Final EIR/EIS MMRP](#), p. 2-54.)
3

- 4 • **RTM Area – AES-1c: Develop and Implement a Spoil/Borrow and Reusable Tunnel
5 Material (RTM) Area Management Plan.** The Department will develop and implement
6 a spoil/borrow and RTM area management plan to reduce impacts to existing visual
7 quality or character. This will be done through remediation of terrain and revegetation.
8 ([Final EIR/EIS MMRP](#), p. 2-55.)
9
- 10 • **Visual Impacts from Intakes – AES-1e: Apply Aesthetic Design Treatments to All
11 Structures to the Extent Feasible.** The Department will use designs, where and to the
12 extent feasible, that minimize the impact on existing visual quality and character in the
13 study area, including at intake facilities, pumping plants, control structures, fish screens,
14 operable barriers, and bridges. ([Final EIR/EIS MMRP](#), p. 2-58.)
15
- 16 • **Roadway and Riverfront Experience –**
 - 17 ○ **AES-1b: Install Visual Barriers between Construction Work Areas and
18 Sensitive Receptors** ([Final EIR/EIS MMRP](#), pp. 2-53 through 2-54) (see above)
 - 19 ○ **AES-1e: Apply Aesthetic Design Treatments to All Structures to the Extent
20 Feasible** ([Final EIR/EIS MMRP](#), p. 2-58) (see above)
 - 21 ○ **AES-1g: Implement Best Management Practices to Implement Project
22 Landscaping Plan.** The Department will implement landscaping and use best
23 management practices to restore and maintain character, reduce visual scale of
24 impacts, and improve aesthetics. ([Final EIR/EIS MMRP](#), p. 2-61.)
25

26 The Department finds ([DWR DP P2](#), pp.14. 17-18) that these measures will reduce
27 visual impacts through placement of temporary visual barriers, and use of aesthetic design
28 where and to the extent feasible to minimize the impact on existing visual quality and character
29 in the study area; realignment of SR 160 and landscaping of South River Road in a manner that
30 visually ties the new alignment to the old alignment by implementing roadside landscaping
31 (AES-1g); use of landscape treatments and best management practices as part of implementing
32 the project landscaping plan to restore and maintain local character, quality aesthetics, and
33 reduce the visual scale of the water conveyance elements. ([Final EIR/EIS MMRP](#) pp. 2-53
34 through 2-62)
35

- 36 • **Light and glare –**
 - 37 ○ **AES-4a: Limit Construction Outside of Daylight Hours within 0.25 Mile of
38 Residents at the Intakes** ([Final EIR/EIS MMRP](#), p. 2-64)
 - 39 ○ **AES-4b: Minimize Fugitive Light from Portable Sources Used for
40 Construction** ([Final EIR/EIS MMRP](#), p. 2-64)
 - 41 ○ **AES-4c: Install Visual Barriers along Access Routes, Where Necessary, to
42 Prevent Light Spill from Truck Headlights toward Residences** ([Final EIR/EIS
43 MMRP](#), p. 2-65)
 - 44 ○ **AES-4d: Avoid the Use of Blue Rich White Light LED Lighting** ([Final
45 EIR/EIS MMRP](#), p. 2-66)
46

47 The Department finds that these mitigation measures will minimize the effect of nighttime
48 construction light and glare on residences within 0.25 miles of the intake construction sites by
49 limiting non-tunnel related surface construction past daylight hours, minimize the use of high-

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1 wattage lighting sources to operate in the dark, and minimize introduction of new nighttime light
2 and glare sources in these areas, among other actions.

4 • **Boating and recreation -**

- 5 ○ **AES-1c: Develop and Implement a Spoil/Borrow and Reusable Tunnel**
6 **Material (RTM) Area Management Plan** ([Final EIR/EIS MMRP](#), pp. 2-54
7 through 2-56). The Department further describes actions related to RTM sites
8 and boating in the Final EIR/EIS (Final EIR/EIS, Document Code: [D.1_DRAFT](#)
9 [000121](#), p. 17-48).
- 10 ○ **AES-1e: Apply Aesthetic Design Treatments to All Structures to the Extent**
11 **Feasible** ([Final EIR/EIS MMRP](#), pp. 2-57 through 2-59)
- 12 ○ **AES-1f: Locate Concrete Batch Plants and Fuel Stations Away from**
13 **Sensitive Visual Resources and Receptors and Restore Sites upon**
14 **Removal of Facilities** ([Final EIR/EIS MMRP](#), pp. 2-60 through 2-62)
- 15 ○ **AES-1g: Implement Best Management Practices to Implement Project**
16 **Landscaping Plan** ([Final EIR/EIS MMRP](#), p. 2-61).

17
18 The Department finds that these mitigation measures and other commitments provide
19 evidence that the Department will reduce or avoid visual impacts to boating and recreation,
20 where applicable. The Department will develop and implement a spoil/borrow and RTM area
21 management plan to reduce the extent of negative visual alteration of existing visual quality
22 from water-based recreation viewers to the extent feasible. In addition, the Department will
23 prepare a Recreation Opportunity Study that will “1) evaluate the effectiveness of mitigation
24 measures at reducing impacts to the environment and if necessary, 2) identify and fund
25 appropriate Recommendations” (3B.3.3., [Final EIR/EIS, APP 3B](#), 3B-79). The Department will
26 also “ensure the posting of information regarding the maintenance of any in-water project
27 facilities (e.g., intakes for the water conveyance facility) at nearby affected Delta marinas and
28 public launch ramps” ([Final EIR/EIS MMRP](#), p.3-76).

30 ii. **Conclusion Regarding Impacts on Visual and Aesthetic Character**

31
32 The Certification cites evidence in the record showing the manner in which the
33 Department has acknowledged project conflicts with visual and aesthetic resources and
34 identifies measures to reduce the conflicts identified by Appellants. Although aesthetic impacts
35 will remain, the Department cites mitigation measures that will avoid or reduce impacts on
36 existing visual quality and character in the project area to the extent feasible. Therefore,
37 substantial evidence in the record *supports* the Department’s Certification of Consistency with
38 DP P2 on the issue of conflicts with existing land uses due to impacts on the visual and
39 aesthetic character of the Delta.

41 f. **Conflicts With Existing Uses – Impacts on Public Health and Hazards**

42
43 The Appellants state the following:

- 44
45 1) The project does not avoid or reduce hazards to sensitive receptors from hazardous
46 materials, natural gas accumulation, release of existing contaminants, and hazardous
47 constituents present in Reusable Tunnel Material. Project Mitigation Measures HAZ-1A,
48 HAZ-1B, UT-6a, UT-6c, and TRANS -1a fail to avoid or reduce this impact to the extent
49 feasible. (North Delta Cares, [Appeal Letter](#), p. 11)

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- 1 2) The project does not avoid or reduce hazards to sensitive receptors related to a potential
2 gas well or gas field explosion during construction of the conveyance facilities. (North
3 Delta Cares, [Appeal Letter](#), p. 13)
4

5 Quoting portions of Chapter 24 (Hazards and Hazardous Materials) in the 2018 Draft
6 SEIR/EIS, Appellant North Delta Cares describes potential hazards of the project including
7 “routine use of hazardous materials (as defined by Title 22 CCR Division 4.5); natural gas
8 accumulation in water conveyance tunnels; the inadvertent release of existing contaminants in
9 soil, sediment, and groundwater, or release of hazardous materials from existing infrastructure;
10 disturbance of electrical transmission lines; and hazardous constituents present in RTM. These
11 impacts are considered significant, because the potential exists for substantial hazard to the
12 public or environment to occur related to conveyance facility construction” (North Delta Cares,
13 [Appeal Letter](#), p. 11). Appellant North Delta Cares also cites a portion of the Draft SEIR/EIS that
14 lists the mitigation measures and environmental commitments identified in the Final EIR/EIS
15 that “would reduce these impacts to a less-than-significant levels” (from Draft SEIR/EIS, Pg. 24-
16 6, L 3-13, North Delta Cares, [Appeal Letter](#), p. 11).
17

18 Appellant North Delta Cares states that although the Department has not identified any
19 sensitive receptors within 0.25 miles of the construction site, Hood is located 0.25 miles from
20 Project Intake 3 and 0.5 miles from Intake 5. In addition, Appellant North Delta Cares states that
21 Clarksburg is across the Sacramento River and on the north edge of Intake 2 (North Delta
22 Cares, [Appeal Letter](#), p. 11), asserting that the Department has “not identified sensitive
23 receptors within .25 mile of the construction footprint” according to the Final EIR/EIS (Section
24 24.3.4.2) and, by extension, no impacts were found on sensitive receptors because, according
25 to the Final EIR/EIS, “there are no schools, parks or hospitals located within 0.25 mile of the
26 water conveyance facilities alignment. Therefore, no sensitive receptors would be exposed to
27 hazardous materials, substances, or waste as a result of construction of the water conveyance
28 facilities under the proposed project.” (North Delta Cares, [Appeal Letter](#), pp. 11-12.) Appellants
29 do not cite any evidence in the record, however, that supports their assertion that the
30 conclusions in the Final EIR/EIS are incorrect.
31

32 Appellants further assert that there is a “large number of gas wells and the gas field in
33 the CA Waterfix tunnels alignment” which could introduce gas well and tunneling accidents
34 (North Delta Cares, [Appeal Letter](#), p. 13). Appellants cite evidence described in a letter to
35 Metropolitan Water District of Southern California (July 9, 2018)³⁹ showing *Gas Wells in the*
36 *Construction Zone of the Tunnels’ Alignment* in Figure 13-1 in a 2015 Conceptual Engineering
37 Report by the Department ([DWR-212](#)).
38

39 The Department’s Certification cites Final EIR/EIS Chapter 25 (Public Health), which
40 “focuses on human health and safety issues that could be affected by implementation of the
41 project, particularly with respect to water quality, waterborne illness, the habitat for disease-
42 carrying vectors, and other issues” ([DWR DP P2, p.15](#)). The Department also cites Final
43 EIR/EIS Chapter 28 (Environmental Justice), which analyzes “the potential for the project to
44 cause disproportionately high and adverse human health or environmental effects on minority
45 and low-income populations” ([DWR DP P2, p.15](#)).

³⁹ The July 9, 2018 letter from North Delta Cares to Metropolitan Water District (MWD) was submitted by North Delta Cares as an attachment to its October 15, 2018 letter in response to a question in the Council’s September 28, 2018 Supplemental Notice asking how the MWD letter demonstrates that the project is inconsistent with DP P2 (Council, [Supplement to Notice of Public Hearing](#), pp. 11-12). Therefore, we take official notice of this document pursuant to Appeals Procedures (see [Exhibit B](#)).

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1 The Department also cites the Avoidance and Minimization Measures, Environmental
2 Commitments, and Mitigation Measures (AMM/EC/MMs) within the Mitigation Monitoring and
3 Reporting Program (MMRP) ([DWR DP P2](#), pp. 16-21). Of the 48 AMM/EC/MMs that the
4 Department summarizes in the document supporting its Certification of Consistency, it identifies
5 the following three mitigation measures and one environmental commitment that would reduce
6 potential hazards and public health impacts raised by Appellants:
7

- 8 • **Mitigation Measure UT-6a:** *Verify locations of utility infrastructure.* “Before beginning
9 construction, DWR will confirm utility/infrastructure locations through consultation with
10 utility service providers, preconstruction field surveys, and services such as
11 Underground Service Alert. The DWR will find the exact location of underground utilities
12 by safe and acceptable means, including use of hand and modern techniques as well as
13 customary types of equipment. Information regarding the size, color, and location of
14 existing utilities must be confirmed before construction activities begin. DWR will confirm
15 the specific location of all high priority utilities (i.e., pipelines carrying petroleum
16 products, oxygen, chlorine, toxic or flammable gases; natural gas in pipelines greater
17 than 6 inches in diameter, or with normal operating measures, greater than 60 pounds
18 per square inch gauge; and underground electric supply lines, conductors, or cables that
19 have a potential to ground more than 300 volts that do not have effectively grounded
20 sheaths) and such locations will be highlighted on all construction drawings” ([Final
21 EIR/EIS MMRP, p.2-98](#)).
22
- 23 • **Mitigation Measure UT-6c:** *Relocate utility infrastructure in a way that avoids or
24 minimizes any effect on worker and public health and safety.* “While any excavation is
25 open, DWR will protect, support, or remove underground utilities as necessary to
26 safeguard employees. DWR and/or construction contractors will notify local fire
27 departments if a gas utility is damaged causing a leak or suspected leak, or if damage to
28 a utility results in a threat to public safety” ([Final EIR/EIS MMRP, p. 2-101](#)).
29
- 30 • **Environmental Commitment:** *Develop and Implement a Fire Prevention and Control
31 Plan (MMRP 3-42).* “DWR will develop and implement a fire prevention and control plan
32 in consultation with the appropriate fire suppression agencies to verify that the
33 necessary fire prevention and response methods are included in the plan. The plan will
34 include fire prevention and suppression measures, and will consider the policies and
35 standards in the affected jurisdictions” ([Final EIR/EIS MMRP, p.3-43](#)).
36

37 The Department acknowledges potential hazards from oil and gas production and
38 processing in the project area in Chapter 24 of the Final EIR/EIS, which states that “active oil
39 and gas extraction fields are present throughout the Delta” ([Final EIR/EIS](#), Ch. 24, pp. 24-5). As
40 stated in the Final EIR/EIS, California Occupational Safety and Health Act, “CCR Title 8,
41 Division 1, Chapter 4, Subchapter 20, Sections 8400–8469 “Tunnel Safety Orders,” sets forth
42 safety standards and provisions, intended to protect workers during tunneling operations.
43 Section 8425, “Operation of Gassy and Extrahazardous Tunnels” identifies safety measures to
44 ensure safe work in tunnels classified as “gassy” or “extrahazardous” by Cal-OSHA’s Mining
45 and Tunneling Unit” ([Final EIR/EIS](#), Ch. 24, p. 24-22).
46

47 ii. Conclusion Regarding Public Health and Hazards

48
49 The Certification cites evidence in the record showing the manner in which the
50 Department has acknowledged the project’s conflicts with existing land uses due to impacts on
51 public health and hazards, and identifies regulations and mitigation measures to reduce the

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1 impacts identified by Appellants. Therefore, substantial evidence in the record *supports* the
2 Department’s Certification of Consistency with DP P2 on the issue of conflicts with existing land
3 uses due to impacts on public health and hazards.

4
5 **g. Conflicts With Existing Uses – Impacts on Wastewater Discharge Facilities**

6
7 **i. Appeal & Certification - Impacts on Wastewater Discharge Facilities**

8
9 The Appellants state the following:

- 10
11 1. Project operations would impact water quality and the number and duration of low-flow
12 and reverse flow periods in the Sacramento River at Freeport and increase operating
13 costs for Regional San. As a result, in order to meet its National Pollution Discharge
14 Elimination System (NPDES) permit obligations, the SRWTP would need to divert
15 effluent to emergency storage basins for longer durations and in larger quantities than
16 under existing conditions or the future No Action scenario described in the Final EIR/EIS
17 for the project. Increased diversions of effluent to storage have significant cost impacts
18 and reduce Regional San’s operational flexibility. (Regional San [Appeal](#), pp. 8-11).
19
20 2. The North Delta Diversion structures have been characterized by the Department as
21 “drinking water intakes.” If this characterization were accepted by the Regional Water
22 Quality Control Board (RWQCB), it could result in substantial additional capital costs and
23 NPDES permit compliance challenges for Regional San. Due to the possible location of
24 intakes within or near the edge of the current SRWTP human health mixing zone for the
25 calculation of trihalomethane (THM) effluent limitations, the RWQCB may disallow the
26 mixing zone, which would require Regional San to meet end-of-pipe THM effluent
27 limitations. Regional San is engaged in an ongoing effort to design and construct capital
28 facilities based on compliance with existing permit conditions. If Regional San’s permit
29 conditions were to change based on the effects of locating the proposed intakes near the
30 mixing zone, Regional San would need to construct alternative facilities with additional
31 capital and operational costs to ratepayers. (Regional San [Appeal](#), pp. 9-10). Appellants
32 state there is no evidence in the record that it was infeasible to have sited the intakes in
33 locations that would avoid impacts to Regional San operations after Regional San
34 brought it the Department’s attention in comment letters, and no evidence that the
35 impacts to Regional San could be avoided or reduced through mitigation. (Regional San
36 [Appeal](#), pp. 10-11)
37

38 Appellants assert that “There is no evidence in DWR’s record that it was infeasible to
39 have sited the Project intakes in locations that would avoid impacts to Regional San’s
40 operations, and no evidence that the impacts to Regional San from the approved Project
41 locations could be mitigated. Not only did DWR fail to evaluate these impacts after Regional
42 San brought them to DWR’s attention in comments on the Project’s various draft EIRs, but it
43 also failed to adopt feasible mitigation to avoid or substantially lessen these impacts” ([Regional
44 San, p.10-11](#)).

45
46 Appellants cite evidence in SWRCB hearing testimony provided by Ruben Robles, P.E.
47 on how project operation “will alter the conditions of the Sacramento River at Freeport, such that
48 Regional San will need to divert effluent to emergency storage basins for longer durations and
49 in larger quantities than under existing conditions or the future No Action scenario presented by
50 DWR in the Project’s EIR... Increased diversions of effluent to storage have significant
51 economic impacts and reduce operational flexibility” ([Regional San, p.9](#)).

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1 The Department's Certification cites evidence in the record consisting of a general
2 description of a project Footprint Location Considerations analysis, which is documented in
3 Final EIR/EIS, Appendix 3F, and included input from engineers and resource experts (DWR
4 [DP P2](#), p. 4). Avoiding intake placement hydraulic conflicts with existing facilities was a "general
5 consideration" for location refinements within that analysis, and the concluding recommendation
6 to "locate the furthest upstream intake downstream of where complete mixing is reported to
7 occur with effluent discharge from the Sacramento Regional Wastewater Treatment Facility"
8 ([Final EIR/EIS, Appendix 3F, p. 3f-7, 3F-9, 3F-12](#)) further reflects consideration of avoiding
9 impacts to the SRWTF. The Department states that an initial range of intake sites was
10 developed by a Fish Facilities Technical Team (FFTT) whose members were tasked with
11 evaluating a range of intake locations that would be optimal to achieve avoid effects on sensitive
12 fish species (Department's [October 15, 2018 Written Statement](#), pp. 80). These initial intake
13 locations and designs underwent an iterative vetting process to meet project goals and
14 objectives, including intake diversion capacity, depth and length of the fish screens, sweeping
15 velocities to protect sensitive fish species and allow for debris bypass, approach velocities, and
16 potential impacts to agriculture and other adjacent land uses. ([Final EIR/EIS, Appendix 3F, p.](#)
17 [3F-2](#)). Following the FFTT review, project footprint location considerations were analyzed by
18 engineers and resource experts (EIR and Engineering Teams) as described in Appendix 3F to
19 the Final EIR/EIS ([DWR DP P2, p.4](#)). Twelve possible intake sites were identified as potentially
20 suitable locations. The potential sites were then further screened by the Department based on
21 site visits, scoping comments, and land use considerations. In developing proposed sites for the
22 intakes, a set of 11 "general considerations" was used. Among these considerations was to
23 "Avoid placing intakes where hydraulic conflicts with existing facilities could occur." ([Final](#)
24 [EIR/EIS, Appendix 3F, p. 3F-9](#))

25
26 Intake sites were then compared using four criteria, one of which was "Impact to existing
27 structures, businesses, historical interests and current use of the land" ([Final EIR/EIS, Appendix](#)
28 [3F, p. 3F-11](#)). Three intakes were selected for analysis as part of the proposed project (intakes
29 2,3, and 5) after considering the higher costs of alternatives, impacts to sandhill cranes,
30 proximity to the intermediate forebay, and the opportunity to avoid direct impact to structures in
31 Hood ([Final EIR/EIS, Appendix 3F, p. 3F-15](#)).

32
33 In its October 15, 2018 Written Statement, the Department describes numerous
34 modifications to the originally proposed configuration of intake sites specifically to avoid conflicts
35 with Regional San's treatment facility, including eliminating a proposed intake near Regional
36 San's facility. (Department's [October 15, 2018 Written Statement](#), p. 81). With regard to
37 allegations concerning impacts to Regional San's treatment facility, the Department offers
38 testimony of Dr. Chandra Chilmakuri before the SWRCB with respect to potential for increase in
39 salinity. Dr. Chilmakuri's testimony challenges testimony of Dr. Susan Paulsen also offered to
40 the SWRCB regarding potential salinity increases supporting Regional San's appeal. This
41 testimony indicates that modeling of flow conditions under California WaterFix Operational
42 Scenario H3+ (CWF H3+) shows that salinity would not change relative to the No Action
43 Alternative. (DWR-1217 ([X.2 DRAFT 000168](#) pp. 15-16.)

44 Appellant Regional San's Written Statement submitted October 15, 2018 presents a
45 supplemental expert report by Dr. Susan Paulsen and Dr. Aaron Mead of Exponent, rebutting
46 the Department's evidence (Regional San [Written Statement October 15, 2018](#), p.3), for which
47 Regional San has requested official notice. However, the Exponent report is dated October 15,
48 2018, and thus was not before the Department at the time it made its Certification and,
49 therefore, is not part of the record. For this reason, the Council does not consider the Exponent
50 report in these proceedings (see [Exhibit C](#)).

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1 The Final EIR/EIS discusses impacts of seven alternative locations of new intakes in
2 various configurations across 18 alternatives. In the CEQA Findings of Fact, the Department
3 described the considerations listed above during the alternative selection process. The Findings
4 of Fact also describe why all of the other project alternatives (which included various alternative
5 configurations of intake sites) are infeasible. ([C DRAFT 000001](#) pp. 2-3, 49-83, 106-118.)

6 Therefore, substantial evidence exists within the record to support the Department's
7 Certification of Consistency for this issue.

8 The Department identifies Avoidance and Minimization Measures, Environmental
9 Commitments, and Mitigation Measures (AMM/EC/MMs) within the Mitigation Monitoring and
10 Reporting Program (MMRP), as well as Other Commitments ([Final EIR/EIS, Appendix 3B](#)), that
11 relate to reducing water quality impacts. One of these actions is *Other Commitment: Assist
12 Water Purveyors in Developing Methods to Reduce Potential Water Quality Effects*. This Other
13 Commitment states that "The project proponents commit to assisting in-Delta municipal,
14 industrial, and agricultural water purveyors that will be subject to significant unavoidable water
15 quality effects from operation of the water conveyance facilities and effects on dissolved organic
16 carbon (DOC) due to habitat restoration activities" (DWR DP P2, p. 21). The assistance "is
17 intended to fully offset any increased treatment or delivery costs attributable to the water
18 conveyance facilities, or for DOC attributable to habitat restoration activities and may take the
19 form of financial contributions, technical contributions, or partnerships" ([Final EIR/EIS, APP 3B](#),
20 3B-76). Regional San is not a water purveyor, however, so this Other Commitment would not
21 apply to reduce the impacts that Appellants have raised.

22 23 **ii. Conclusion Regarding Conflicts With Wastewater Discharge Facilities**

24
25 The Certification and the Department's October 15, 2018 Written Statement cite
26 evidence in the record that other intake sites that would have avoided water quality conflicts
27 were considered and rejected as infeasible. Therefore, substantial evidence in the record
28 supports the Department's Certification of Consistency with DP P2 on the issue of conflicts with
29 existing wastewater discharge facilities.

30 31 **h. Conflicts With Existing Uses – Traffic Impacts**

32 33 **i. Appeals & Certification - Traffic Impacts**

34
35 Appellants San Joaquin and SCDA assert that the Department has not provided
36 substantial evidence demonstrating avoidance, or the infeasibility of avoidance, of traffic
37 impacts. San Joaquin makes two main assertions: first that traffic will impact daily life and harm
38 economic interests in the Delta ([San Joaquin Appeal Letter](#), p. 65 [citing [LAND-205](#), p. 9]) and,
39 second, that increased traffic will impact the physical condition of Delta roads (San Joaquin
40 Appeal Letter, p. 66). SCDA asserts that WaterFix will result in negative traffic impacts due to
41 barge-caused bridge openings that are not captured in the Department's analysis ([SCDA
42 Response](#), p. 11).

43
44 Specifically, San Joaquin County and SCDA state the following:

- 45
46 1) The project would result in significant and unavoidable impacts resulting from
47 construction traffic increases. Proposed mitigation fails to avoid or reduce these impacts
48 to the extent feasible. Mitigation is not mandatory, is unfunded, and focuses only on the
49 worst road segments rather than a Delta-wide approach. ([San Joaquin County](#), p. 66)

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- 2) Construction traffic would also have an impact on the physical conditions of Delta roads, leading to degradation over time due to higher traffic volumes, which would ultimately restrict movement throughout the Delta. ([San Joaquin County](#), p. 66)
- 3) The project fails to identify and avoid or reduce construction traffic impacts to all affected San Joaquin County, Sacramento County, and Yolo County road segments, including some critically important segments. The analysis also failed to address many critical aspects of likely adverse impacts. ([San Joaquin County](#), p. 5; Sac County [DSC CWF appeal with attachments](#), p. 9)
- 4) The project fails to identify and avoid or reduce construction traffic impacts to transportation infrastructure projects in San Joaquin County. ([San Joaquin County](#), p. 67)
- 5) Construction traffic is expected to increase on parts of Twin Cities Road (by 2.5 to 4 times) and River Road (by 4.3 to 11 times) depending on the time of day. Other routes into and out of the North Delta could be overwhelmed by traffic during the construction period. Ten years of truck and other construction related traffic on other road segments throughout the North Delta would make farming the area impossible. ([San Joaquin County](#), p. 65)
- 6) Increased traffic throughout the Delta would affect the agricultural chain of production by disrupting movement of resources, employees, and crops. Traffic and road damage from heavy construction equipment also frustrates the farm-to-market process. If getting agriculture out of the Delta becomes too time-consuming, distribution and processing firms will look outside the Delta for business. Delta crops have specific delivery windows; if they are not met, entire shipments could be lost. ([San Joaquin County](#), pp. 65-66)
- 7) The project would endanger the lives of Delta residents by preventing timely responses of local emergency responders. ([San Joaquin County](#), p. 66.)
- 8) The project fails to accurately capture traffic impacts from barge operations and bridge openings, due to an error in representing bridge heights and clearance for barges at bridges at Rio Vista State Route 12 bridge, Mokelumne State Route 12 bridge, and a bridge on State Route 12 across Potato Slough at Terminous. ([SCDA Response](#), p. 11)

The Department cites evidence in the record that describes the effects of the project due to construction traffic ([Detailed Findings for DP P2](#), p. 14; [Final EIR/EIS, Chapter 19](#), section 19.3.3.2, and [Appendix 19A](#)). This evidence describes the Department's analysis of traffic impacts and associated mitigation measures. Specifically, the Department analyzes traffic and concluded that traffic impacts and impacts to roadway surfaces would increase for all alternatives in the Final EIR/EIS including the No Action Alternative ([Final EIR/EIS, Chapter 19](#), p. 19-1). The Department has adopted and incorporated into the project the following mitigation measures relevant to traffic impacts ([DWR DP P2](#), p. 19):

- **TRANS-1a: Implement Site-Specific Construction Traffic Management Plan**
- **TRANS-1b: Limit Hours or Amount of Construction Activity on Congested Roadway Segments**
- **TRANS-1c: Make Good Faith Efforts to Enter into Mitigation Agreements to Enhance Capacity of Congested Roadway Segments**

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- 1 • **TRANS-2a: Prohibit Construction Activity on Physically Deficient Roadway**
- 2 **Segments**
- 3 • **TRANS-2b: Limit Construction Cctivity on Physically Deficient Roadway Segments**
- 4 (when TRANS-2a is not feasible)
- 5 • **TRANS-2c: Improve Physical Condition of Affected Roadway Segments as**
- 6 **Stipulated in Mitigation Agreements or Encroachment Permits**
- 7

8 San Joaquin asserts that construction traffic is expected to increase on parts of Twin
9 Cities Road (by 2.5 to 4 times) and River Road (by 4.3 to 11 times) depending on the time of
10 day. San Joaquin cites the [Final EIR/EIS](#) (pp. 19-210 and 19-215) in support of this assertion.
11 This section of the Final EIR/EIS is a table that lists level of service (LOS) and traffic conditions
12 for various road segments. San Joaquin also asserts that other routes into and out of the North
13 Delta could be affected by traffic during the construction period and that “Ten years of truck and
14 other construction related traffic on other road segments throughout the North Delta would make
15 farming the area impossible.” ([San Joaquin County](#), p.65)

16
17 San Joaquin also asserts that increased traffic throughout the Delta would affect the
18 “agricultural chain of production by disrupting movement of resources, employees, and crops.”
19 (San Joaquin, p. 65 [citing LAND-130, [SDWA-141](#), [DPC Economic Sustainability Plan](#)].)
20 Appellant also asserts that traffic and road damage from construction equipment affects the
21 farm-to-market process. ([San Joaquin County](#), pp. 65-66.)

22
23 In its Certification, the Department cites Final EIR/EIS Chapter 19 (Transportation), and
24 specifically to section 19.3.3.2. This section of the Final EIR/EIS is a description of traffic
25 impacts for Alternative 1, however, and not Alternative 4A (WaterFix). Accordingly, the Council
26 has considered and discussed Section 19.3.4.2, below, which describes the impacts of
27 WaterFix. In Section 19.3.4.2, the Final EIR/EIS states:

28
29 *“Alternative 4A would therefore exacerbate an already unacceptable LOS under BPBG*
30 *[Baseline Plus Background Growth Plus Project (BPBGPP)⁴⁰] conditions on 15 roadway*
31 *segments (38 minus the 23 that would already be operating at an unacceptable LOS*
32 *under BPBG conditions). The effect of increased traffic volumes in excess of LOS*
33 *thresholds would be adverse..... Mitigation Measures TRANS-1a through TRANS-1c are*
34 *available to reduce this effect, but not necessarily to a level that would not be adverse,*
35 *as the project proponents are not solely responsible for the timing, nature, or complete*
36 *funding of required improvements.”* (Final EIR/EIS, p. 19-357)

37
38 With regard to impacts on the physical condition of roadways, the Final EIR/EIS states:

39
40 *“Damage to roadway pavement is also expected throughout the study area on various*
41 *local and state roads, as well as on a few interstates. The effect of roadway damage in*
42 *excess of PCI [Pavement Condition Index] thresholds would be adverse..... Mitigation*
43 *Measures TRANS-2a through TRANS-2c are available to reduce this effect, but not*
44 *necessarily to a level that would not be adverse, as the project proponents cannot*

⁴⁰ Baseline Plus Background Growth Plus Project (BPBGPP) uses the year 2009 as the baseline, and includes the change in traffic anticipated to occur to occur regardless of WaterFix, plus change in traffic as a result of construction of the project. The methodology assumes a construction period of 14 years, with different activities taking place at different times during this period.

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1 *ensure that the agreements or encroachment permits will be obtained from the relevant*
2 *transportation agencies.” (Final EIR/EIS, p. 19-358)*
3

4 In both cases, the Department has provided evidence that mitigation measures identified
5 in the Final EIR/EIS and adopted and incorporated into the project would reduce the impact
6 from what it otherwise would be. In addition, the Department commits to “Schedule construction
7 traffic to minimize impacts to agricultural transportation operations between agricultural areas
8 and processing or marketing facilities during harvest season.” (Final EIR/EIS, p. 19-220).
9 However, the impacts to traffic and roadway surfaces would remain significant and unavoidable.

10 The Commission comments that there is no mitigation for indirect project impacts and,
11 as an example, describes the traffic volume increases that Scribner Bend Vineyards near
12 Clarksburg and historic houses along State Route 160 between Walnut Grove Bridge and A
13 Street in Isleton are expected to experience (Delta Protection Commission, [October 16, 2018](#)
14 [Written Statement](#), p.8).
15

16 San Joaquin also asserts that the project would endanger the lives of Delta residents by
17 preventing timely responses of local emergency responders ([San Joaquin County](#), p. 66). This
18 assertion is based on the testimony of David Robinson before the SWRCB and cited by San
19 Joaquin ([LAND-188](#)). In his testimony, Mr. Robinson, who is a volunteer firefighter, states that:
20

21 *“When a roadside incident occurs in the Delta, traveling to the location is difficult for*
22 *emergency responders. Those involved will like be unable to clear the road, given the*
23 *lack of shoulders on levee roads to pull off on. The vehicles behind the accident would*
24 *not be able to pull around the incident because of the narrow width of the roads and*
25 *oncoming traffic. If the incident blocks both lanes, oncoming traffic would be stuck as*
26 *well. This creates a gridlock scenario with little room and considerable delays for*
27 *emergency responders.” ([LAND-188](#), p. 3)*
28

29 In addition, the Commission comments that Delta Plan PEIR Mitigation Measure 17-1 requires
30 mitigation for impacts to emergency response routes for both land and water access. The
31 Commission comments that the Department’s methodology for determining emergency
32 response impacts does not include potential impacts on water-based emergency response,
33 including law enforcement and flood emergencies (Delta Protection Commission, [October 16,](#)
34 [2018 Written Statement](#), p.11). The evidence supporting this comment is in Chapter 19
35 (Transportation) of the Final EIR/EIS. The impact analysis for emergency services in Chapter 19
36 includes “Interfere with emergency management and evacuation routes. For the purposes of
37 this analysis, an increase in the amount of trucks using the transportation system in the study
38 area is defined as a potential interference with emergency services” ([Final EIR/EIS, Chapter 19,](#)
39 p.19-39). However, WaterFix Mitigation Measure TRANS-1a, discussed below, involves
40 development of plans to address such impacts.
41

42 In its Certification, the Department cites Chapter 20 (Public Services and Utilities) of the
43 Final EIR/EIS, which “analyzes how public services and utilities will be affected by construction,
44 operations, and maintenance of the project.” ([DWR DP P2](#), p. 15). In this case, “public services
45 and utilities” includes such emergency services as fire protection, emergency response, and law
46 enforcement (*ibid.*). The Final EIR/EIS also includes the following mitigation measures, which
47 were adopted and incorporated into the project, to address such impacts:
48

- 49 • **Mitigation Measure TRANS-1a: Implement Site-Specific Construction Traffic**
50 **Management Plan.** This mitigation measure will involve contracting with a construction
51

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1 management firm(s) prior to construction to “assist in ensuring that construction
2 contractors’ crews and schedules are coordinated and that the plans and specifications
3 are being followed.” The plans must also be developed in coordination with relevant
4 transportation stakeholders, including Caltrans, local agencies (including emergency
5 responders), transit providers, rail operators, the U.S. Coast Guard, city and county
6 parks departments, and the California Department of Parks and Recreation) (Final
7 EIR/EIS, p. 19-218; [WaterFix MMRP](#), pp. 2-86 through 2-90).

- 8
9 • **Mitigation Measure TRANS-1c: Make Good Faith Efforts to Enter into Mitigation**
10 **Agreements to Enhance Capacity of Congested Roadway Segments.** The
11 Department has developed Mitigation Measure TRANS-1c in response to Impact
12 *TRANS-3: Increase in Safety Hazards, Including Interference with Emergency Routes*
13 *during Construction.* Mitigation Measure TRANS-1c would require the Department to,
14 prior to construction, make a “good faith effort” to develop mitigation agreements with
15 affected state, regional, or local agencies. These mitigation agreements would focus on
16 verification of the location, timing, and extent, and cost share to be paid for reducing
17 congestion for select roadway segments (Final EIR/EIS, p. 19-221).

18 The Department has cited to evidence of how it would work to avoid or reduce impacts
19 to emergency services prior to construction of the project.

20
21 SCDA asserts that the Department made an error when analyzing the impact of barge
22 operations on roadway traffic ([SCDA Response](#), p. 11). SCDA asserts that the Department
23 mischaracterized the height of the Rio Vista Bridge as 144 feet, when in fact it is 18 feet (when
24 in the operable roadway position) and that the frequency that other bridges may be required to
25 be opened along potential barge routes (Ibid.). In support of these assertions SCDA cites the
26 SWRCB hearing testimony of Chris Kinzel. ([SCDA-100.](#)) In this testimony, Mr. Kinzel asserts
27 that the Rio Vista Bridge, Mokelumne State Route 12 bridge, and a bridge on State Route 12
28 across Potato Slough at Terminous will need to be raised more frequently than stated by the
29 Department. In his testimony, Mr. Kinzel sites to a 2012 report on the Highway 12 corridor and
30 states that the height of the closed Rio Vista Bridge is “18 feet above ordinary high tide.”
31 ([SCDA-107](#), p. 50.) The Department provides no evidence in the record that addresses the
32 potential impact, if any, on traffic due to a lower Rio Vista Bridge height. Therefore, on this issue
33 the Department has not provided substantial evidence that it has avoided or reduced traffic
34 impacts to the degree feasible. Therefore, substantial evidence does not support the
35 Department’s Certification of Consistency related to this issue.

36 37 ii. Conclusion Regarding Traffic Impacts

38
39 The Department’s certification cites evidence in the record that describes the effects of
40 the project on and due to traffic ([DWR DP P2](#), p. 14; [Final EIR/EIS, Chapter 19](#), section 19.3.3.2
41 and [Appendix 19A \[Bay Delta Conservation Plan Construction Traffic Impact Analysis\]](#)). The
42 documents cited by the Department show that the project will result in increased traffic and
43 reduced levels of service along several roadway segments. The Department has also cited to
44 mitigation measures that would reduce the traffic impacts of the project. While Appellants cite
45 additional evidence from the Water Board change in point of diversion hearing that illustrate the
46 impacts described. In most cases, however, San Joaquin and SCDA have not specified how the
47 Department has failed to avoid or reduce impacts, or that additional reduction in impacts is
48 feasible, other than by moving the location of the intakes, reusable tunnel material, and other
49 infrastructure sites. An exception is the issue of traffic impacts due to an incorrect
50 representation of the Rio Vista Bridge height when in the operable roadway position. For this

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1 matter, the Department has not cited to evidence in the record that demonstrates that this
2 impact was adequately considered, and therefore whether it would be avoided or reduced to the
3 extent feasible. Therefore, the Department's Certification of Consistency with DP P2 on the
4 issue of conflicts to existing land uses due to traffic impacts is not supported by substantial
5 evidence in the record.

6 7 i. Conflicts With Existing Uses – Impacts on Agriculture

8 9 i. Appeal & Certification - Impacts on Agriculture

10
11 The Appellants state the following:

- 12
13 1) The project would result in significant and unavoidable impacts from temporary
14 conversion of 1,495 acres of Important Farmland, permanent conversion of 3,909 acres
15 of Important Farmland, and permanent conversion of 2,035 acres of land subject to
16 Williamson Act contracts to other uses. Proposed mitigation fails to avoid or reduce
17 these impacts to the extent feasible. ([San Joaquin](#), p. 68)
- 18
19 2) The project would create additional indirect but adverse impacts to Important Farmland
20 from disruption of drainage and irrigation facilities during construction, and through
21 changes to groundwater elevation in localized areas. ([Sac County](#), pp. 9-10)
- 22
23 3) The project would be inconsistent with county general plans that value and protect Delta
24 agricultural resources and recognize that agriculture is the foundation of the Delta
25 economy. ([San Joaquin](#), p. 68)
- 26
27 4) Temporary conversion of farmland would last for more than a decade, causing lasting
28 harm to agricultural parcels. Delta fruit crops take years to bring into production;
29 temporary use of existing orchards for project construction would delay their productive
30 use beyond the project construction period. ([San Joaquin](#), p. 68)
- 31
32 5) Construction of intakes for the project near legacy communities in Sacramento County
33 would permanently convert 270 acres of agricultural land. Proposed mitigation fails to
34 avoid or reduce this impact. ([Sac County](#), p. 7)
 - 35
36 a. Testimony provided by Chrisandra Flores, Chief Deputy Agricultural
37 Commissioner for Sacramento County at the SWRCB hearing cites additional
38 permanent impacts to agricultural lands and the local economy by proposed
39 project changes. These impact changes include placement of Reusable Tunnel
40 Material (RTM) that would impact an additional 44 acres of Important Farmland
41 and 119 acres of land in Williamson Act contracts with resulting losses in
42 agricultural revenues, job losses, and incomes (Sac County [DSC CWF appeal
43 with attachments](#), pp. 42-45).
 - 44
45 b. Testimony provided by Sacramento County Agricultural Commissioner Julie
46 Jensen at the SWRCB hearing cites additional evidence of project construction
47 impacts on lost agricultural revenues, jobs, and incomes. Potential permanent
48 impacts on small and medium agricultural operations from construction traffic
49 related disruption. Degradation of water quality and potential economic
50 challenges of re-entering into Williamson Act contracts (Sac County [DSC CWF
51 appeal with attachments](#), pp. 32-37).

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- 3 6) Traffic and road damage from heavy construction equipment also frustrates the “farm-to-
- 4 market” process; if getting agriculture out of the Delta becomes too time-consuming (and
- 5 therefore costly), distribution and processing firms will look outside the Delta for
- 6 business. Delta crops, such as wine grapes, have specific delivery windows, and if this
- 7 window is not met, an entire shipment could be lost. ([San Joaquin](#) , p. 66)
- 8
- 9 7) Salinity increases in the regional water supply would affect agricultural production ([San](#)
- 10 [Joaquin](#), p.68).

11 A number of Appellants note that the loss of agriculture would affect other community
12 land uses (SCDA Reponses, p. 16) such as recreation through agri-tourism and off-farm parts of
13 the agricultural production chain ([San Joaquin](#), p. 65). As the Commission commented, “[t]he
14 foundation of the Delta’s agricultural economy is its productive farmland” (Delta Protection
15 Commission, [October 16, 2018 Written Statement](#), p.13). Because of this, agricultural land loss
16 would create land use conflict beyond the farms themselves in the community and under the
17 policy, the Department is required to reduce or avoid those conflicts where feasible. Our
18 determination on community land-use conflicts was treated in a previous section.

19

20 Appellants contend that adopted mitigation fails to avoid or reduce these impacts to the
21 extent feasible ([San Joaquin](#), p. 68). Appellants assert that the footprint of the project and its
22 inconsistency with agricultural uses create impacts that conflict with existing agricultural
23 operations ([San Joaquin](#), p. 68, [Sac County](#), p. 9). Appellants contend that while the
24 Department characterizes the loss of some agricultural lands as temporary ([DWR DP P2](#), pp.
25 11-13), such temporary loss would likely cause permanent damage ([Sac County](#), Jensen
26 testimony, p.14-4 line 26, p.14-5 lines 20-27). Additionally, salinity increases attributable to the
27 project could degrade water quality and result in millions of dollars of economic losses on an
28 annual basis ([San Joaquin](#), p. 68).

29

30 The Department cites evidence in the record showing that since 2006, a multi-agency
31 public process has incorporated input from various agencies, stakeholders, independent
32 scientists, and the public that included “extensive analysis of potential conflicts with local uses,
33 including input from local and regional entities and local landowners and users of Delta
34 resources. While it is inevitable that any project of the import and magnitude of California
35 WaterFix will have an impact on local land uses, significant changes have been made during the
36 planning process to reduce such impacts” ([DWR DP P2](#), p.2) In addition, the Department cites
37 evidence in the record regarding refinements to the project made between 2013-2015 that
38 resulted in fewer acres of agricultural land being impacted ([DWR DP P2](#), p. 4). As part of these
39 refinements to the proposed project, the total area of agricultural lands impacted by the project
40 was reduced from 6,105 acres to 4,890 acres as of the 2014 refinements, which is a reduction
41 of 1,215 acres of agricultural impact (Project Refinements Table, [DWR DP P2](#), p. 3-4).

42

43 In its Certification of Consistency, the Department acknowledges that the project would
44 have significant impacts to agricultural land in the Delta, as described in Chapter 14 (Agricultural
45 Resources) of the Final EIR/EIS ([DWR DP P2](#), p. 11). The California WaterFix project would
46 result in significant and unavoidable impacts from temporary conversion of 1,495 acres of
47 Important Farmland, permanent conversion of 3,909 acres of Important Farmland, and
48 permanent conversion of 2,035 acres of land subject to Williamson Act contracts to other uses
49 ([DWR DP P2](#), p. 12).

50

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1 In addition, the Department describes *Mitigation Measure AG-1: Develop an Agricultural*
2 *Land Stewardship Plan (ALSP) to Maintain Agricultural Productivity and Mitigate for Loss of*
3 *Important Farmland and Land Subject to Williamson Act Contracts or in Farmland Security*
4 *Zones*, which will reduce the nature, duration, and permanence of the impacts ([DWR DP P2](#), p.
5 12). The ALSPs in Mitigation Measure AG-1 are described as voluntary agreements between
6 the project proponents, land owners, counties and local agencies, and federal agencies ([Final](#)
7 [EIR/EIS](#), Ch. 14, p. 14-40). The Final EIR/EIS states that the ALSPs will be developed prior to
8 the commencement of any construction activities or other physical activities that would involve
9 impacts on Important Farmland or land subject to Williamson Act contracts or in Farmland
10 Security Zones ([Final EIR/EIS](#), Ch. 14, p. 14-40). As described in the Final EIR/EIS, these
11 ALSPs are a mechanism for addressing site-specific impacts from the project ([Final EIR/EIS](#),
12 [Ch. 14](#)). The Department states that through the ALSPs it “will ensure implementation of such
13 activities as siting project footprints to encourage continued agricultural production; relocating or
14 replacing agricultural infrastructure in support of continued agricultural activities; engaging
15 counties, owners/operators, and other stakeholders in developing optional agricultural
16 stewardship approaches; and preserving agricultural land through off-site easements or other
17 agricultural land conservation interests” ([DWR DP P2](#), p. 12). If voluntary agreements cannot be
18 reached, project proponents will implement conventional agricultural mitigation measures.
19 Additional aspects of the ALSP are described in the following three sub-measures (Final
20 EIR/EIS [MMRP, p. 2-41](#)).

- 21
22 • **AG-1a: Promote agricultural productivity of Important Farmland** – This measure
23 commits project proponents to several specific activities. First, project proponents
24 identify impacted lands through consultation with farmers, local and federal agencies
25 and consider if the project is consistent with land use plans ([Final EIR/EIS, Ch. 14, p. 14-](#)
26 [40 to 14-41](#)). Second, project proponents in consultation with local agencies,
27 landowners, and federal agencies, perform analysis to develop site-specific activities to
28 avoid conflicts which include reducing the footprint of the project or identifying parcels for
29 the footprint of the project that would minimize impacts on agricultural resources ([Final](#)
30 [EIR/EIS, Ch. 14, p. 14-41 to 14-42](#)). Where project proponents cannot avoid conflicts,
31 the plans include mitigation measures such as ensuring access to land, adjusting
32 construction activities, compensation, top soil restoration, measures for impacted water
33 diversions, and others ([Ibid. at p. 14-42 to 14-43](#)). The ALSPs require project proponents
34 to “[c]onsult with landowners and agricultural operators on what role they can take if they
35 wish to be involved in project development” ([Ibid. at p. 14-43](#)). These plans also require
36 reporting and monitoring “to show that the actions agreed to were being carried out”
37 ([Ibid. at p. 14-44](#)). The Final EIR/EIS identifies 25 mitigation strategies in Chapter 14
38 ([Ibid. at p. 14-46 to 14-47](#)). These strategies are described in greater detail in the Final
39 EIR/EIS Appendix 14B ([Final EIR/EIS, Appendix 14B](#)).
- 40
41 • **AG-1b: Minimize impacts on land subject to Williamson Act contracts or in**
42 **Farmland Security Zones** – Project proponents commit to following California
43 Government Code in acquiring land subject to Williamson Act contracts and lay out the
44 steps they will follow ([Final EIR/EIS, Ch. 14, p. 14-44](#)).
- 45
46 • **AG-1c: Consideration of an Optional Agricultural Land Stewardship Approach or**
47 **Conventional Mitigation Approach** – Where project proponents determine that
48 mitigation under AG-1a and AG-1b are inadequate or an agreement cannot be reached
49 after a good faith effort by the Department, the Department will undertake conventional
50 1:1 agricultural mitigation where feasible ([Final EIR/EIS, Ch. 14, p. 14-119](#)). Where

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1 feasible, the agricultural land conservation interests should be acquired in the county in
2 which the agricultural conversion would take place ([Ibid. at p. 14-123](#))
3

4 In its October 14, 2018 Supplemental Materials, Sacramento County refers to
5 Sacramento County General Plan Policy AG-5, which states that projects resulting in the
6 conversion of more than 50 acres of farmland shall be mitigated on a 1:1 basis through farmland
7 resource protections such as planning requirements or easements, and asserts that the
8 Department's agricultural mitigation measures are inconsistent with the County's General Plan
9 because it does not assure this level of mitigation (Sacramento County [Supplement Materials](#),
10 pp. 3-4). However, DP P2 does not require the Department to demonstrate consistency with
11 county general plan policies. Instead, it requires that "Water management facilities . . . must be
12 sited to avoid or reduce conflicts with . . . those uses described or depicted in city and county
13 general plans for their jurisdictions or spheres of influence when feasible." DP P2 does not
14 specify that land use conflicts must be avoided or reduced through compliance with methods
15 described in a general plan policy. In this case, there is substantial evidence that the ALSPs, as
16 a preferred option for mitigation, would provide a greater opportunity to avoid conflicts.

17 In the Department's response to supplemental questions issued by the Council, the
18 Department further describes ALSPs as preferred over conventional agricultural conservation
19 easements (ACEs) because agricultural land in the Delta primary zone already has substantial
20 protections from development (Department's [October 15, 2018 Written Statement](#), p.16). The
21 Department explains that "ACEs in the primary zone will impose relatively few additional
22 restrictions on such farmers other than the perpetual nature of the restriction. Accordingly,
23 prices that can be offered to farmers for new ACEs may be relatively low" (Department's
24 [October 15, 2018 Written Statement](#), p.16). Additionally, ALSPs allow for avoidance of conflicts
25 at the farm scale rather than just the regional/county scale, making them a potentially beneficial
26 option for impacted farmers experiencing land use conflicts. This offers more opportunities to
27 avoid land use conflicts with willing land owners in addition to reducing conflicts through
28 mitigation and, as a result, provides substantial evidence to support the Department's finding
29 that they attempt to avoid conflict with agricultural land use where feasible. This is because
30 Mitigation Measure AG-1a "also includes a number of avoidance and on-site mitigation
31 measures, including implementing activities such as siting project features to minimize
32 fragmenting or isolating farmland, avoiding, relocating or replacing agricultural infrastructure in
33 support of continued agricultural activities, and managing the project to minimize the
34 introduction of invasive species or weeds that may affect agricultural production (Department's
35 [October 15, 2018 Written Statement](#), p.15).

36 Sacramento County also raises the issue that the Department's approach for
37 circumstances in which ALSPs cannot be agreed upon after a good faith effort, is to offer the
38 option for "enhancements" ([Final EIR/EIS MMRP, p. 2-48](#)) as an alternative to ACEs.
39 Sacramento County argues that this would allow the Department to prefer enhancements over
40 ACEs, which would not adequately reduce or avoid conflicts. The Commission also comments
41 that for agricultural impacts, the Department considers a conventional farmland mitigation
42 program with 1:1 ratios, consistent with the Delta Plan mitigation measures, but the fact that it
43 "may not be feasible because of cost or availability of land" is insufficient (Delta Protection
44 Commission, [October 16, 2018 Written Statement](#), p.13). There is no evidence in the record that
45 an enhancement would be less effective than ACEs in reducing conflicts with agricultural land
46 uses in the Delta, however. As the Department states, "ACEs for farmers operating in the Delta
47 primary zone are not as valuable to the landowner or the farming community as are ACEs in
48 other locations because of the already existent restrictions on development in the primary Delta"
49 (DWR, [Supplemental Statement](#), p. 16). Based on substantial evidence in the record, it would

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1 be possible to conclude that enhancements offer similar or greater community benefit than
2 ACEs and, therefore, do more to reduce impacts than ACEs.
3

4 Appellants contend that the permanent agricultural land losses associated with the
5 project would be inconsistent with county general plans that value and protect Delta agricultural
6 resources and recognize that agriculture is the foundation of the Delta economy ([San Joaquin](#),
7 p. 6). For example, Sacramento County identifies 270 acres of agricultural land that would be
8 lost. In addition, temporary agriculture losses could harm agricultural operations well beyond the
9 scope of the project, especially in the case of orchards where temporary losses could be felt for
10 more than a decade ([San Joaquin](#), p. 68). However, the Department acknowledges that the
11 project “will reduce the total value of agricultural production in the Delta Region” and will, “where
12 required, provide compensation to property owners for economic losses due to implementation
13 of the project” ([DWR DP P2, p. 13](#))⁴¹.
14

15 In summary, none of the Appellants specifically and clearly describe how these
16 measures would fail to avoid or reduce project impacts when feasible. For each specific land
17 use conflict identified by Appellants, measures to avoid or reduce those conflicts when feasible
18 have been identified in the record.
19

20 In addition to losing land, Appellants assert that the project would create additional
21 indirect but adverse impacts to Important Farmland from disruption of drainage and irrigation
22 facilities during construction, and through changes to groundwater elevation in localized areas
23 ([Sac County](#), p. 9). In its appeal, San Joaquin contends that the project would also effect
24 agriculture by increasing salinity in Delta water upon which farmers rely. The Delta Protection
25 Commission Economic Sustainability Plan, which provides Appellant’s evidence for the
26 increased salinity and its economic impacts, does not describe how the project would increase
27 salinity, however ([SDWA 141 DPC Econ Sust Plan](#)). The mechanism identified in the evidence
28 for this effect is a change in water quality standards ([SDWA 141 DPC Econ Sust Plan](#));
29 however, any such change by the SWRCB would be outside the scope of the proposed project.
30

31 In the Detailed Findings for DP P2, the Department cites evidence of measures to
32 reduce impacts through *Other Commitment: Assist Water Purveyors in Developing Methods to*
33 *Reduce Potential Water Quality Effects (Final EIR/EIS, APP 3B, 3B-76)*. In this commitment,
34 “The project proponents commit to assisting in-Delta municipal, industrial, and agricultural water
35 purveyors that will be subject to significant unavoidable water quality effects from operation of
36 the water conveyance facilities and effects on dissolved organic carbon (DOC) due to habitat
37 restoration activities” ([DWR DP P2, p. 21](#)). The Department also refers to hydrological modeling
38 of the Delta which indicates that the project would avoid salinity increases that affect in-Delta
39 agriculture. In its Certification of Consistency for ER P1, the Department includes modeling of
40 California WaterFix project operations using Cal-Sim II and DSM2 ([DWR ER P1](#), p. 9-10).
41 Based on this modeling, the Department finds that the project could meet or exceed D-1641
42 water quality standards for agricultural uses when compared to the No Action Alternative ([DWR](#)
43 [ER P1 p. 26](#)). The Department commits to reducing impacts to in-Delta agriculture water
44 quality, where feasible, in the MMRP. Mitigation Measure GW-5 requires monitoring of
45 “groundwater levels and salinity and associated impacts on agricultural field conditions” ([Final](#)
46 [EIR/EIS MMRP, p. 2-7](#)). Mitigation Measure GW-7 requires the Department to provide an
47 alternative water source where salinity requirements are exceeded ([Ibid. at p. 2-9](#)). Mitigation

⁴¹ The project commitments regarding agricultural resources can be found in Final EIR/EIS Chapter 14, pp. 14-42 and 14-47.

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1 Measures WQ-11 requires the Department to operate the project in a manner that achieves
2 Bay-Delta WQCP EC objectives for in-Delta agricultural water standards where feasible ([Ibid. at](#)
3 [pp. 2-13 to 2-14](#)).
4

5 According to Sacramento County, the project would disrupt drainage and irrigation
6 facilities during construction, and through changes to groundwater elevation in localized areas
7 ([Sac County](#), p. 9). Mitigation Measures GW-1 ([Final EIR/EIS, Ch. 7, p. 7-51](#)) and GW-5 ([Final](#)
8 [EIR/EIS, Ch. 7, pp. 7-55 to 7-56](#)) provide commitments to maintain ground water levels and
9 avoid seepage. Furthermore, the ALSPs provide specific commitments to avoid disrupted
10 drainage and irrigation ([Final EIR/EIS, Ch. 14, p. 14-116](#)).

11 Appellant San Joaquin County asserts that the project would have an adverse impact on
12 agriculture by increasing traffic on congested roads, thereby slowing market access for
13 agricultural products ([San Joaquin](#), p. 66). The Department has committed to a number of
14 actions to avoid or reduce this conflict. The ALSPs would ensure access to farmland ([Final](#)
15 [EIR/EIS, Ch. 14 p. 14-116](#)), and other mitigation measures would create site specific traffic
16 management plans ([Final EIR/EIS MMRP, p. 2-87](#)), limit hours and construction traffic volumes
17 on congested roadways ([Ibid. at p. 2-91](#)), mitigation measures to enhance the capacity of
18 roadways ([Ibid. at p. 2-92](#)), and improve the conditions of affected roadways ([Ibid. at p. 2-96](#)).
19

20 In summary, Appellants identify a number of conflicts between the proposed project and
21 agricultural land uses in the Delta. The impacts of the project include loss of agricultural land
22 and obstructions to farm operations by the project. However, the Department has demonstrated
23 efforts to reduce conflicts between the project and agricultural resources to the extent feasible
24 through the following actions:
25

- 26 1. Reducing the overall footprint of the project through refinements.
- 27 2. For agricultural conflicts that are unavoidable, the Department will develop ALSPs with
28 land owners and other local/regional interests. ALSPs would include measures to further
29 reduce or avoid conflicts.
- 30 3. Where agreements to enter into ALSPs with land owners and other local/regional
31 interests cannot be reached, the Department will engage in traditional 1:1 mitigation
32 through agricultural conservation.
- 33 4. For other conflicts, specific measures outside the ALSPs and conventional agricultural
34 mitigation would avoid or reduce conflicts. For example, Mitigation Measures GW-1 and
35 GW-5 would reduce groundwater impacts raised by Appellants.
- 36
- 37
- 38
- 39

40 ii. Conclusion Regarding Impacts on Agriculture

41
42 The Certification cites evidence in the record of mitigation measures and commitments
43 to reduce or avoid conflicts with agricultural land uses. Appellants have failed to demonstrate
44 that the Department's commitments are not substantial evidence of consistency with DP P2
45 related to conflicts with agricultural land uses. Therefore, substantial evidence in the record
46 *supports* the Department's certification of consistency with DP P2 on the issues of conflicts with
47 agricultural land uses.
48

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j. Conflicts With Existing Uses – Noise Impacts

i. Appeals & Certification - Noise Impacts

The Appellants state the following:

- 1) Noise impacts from pile driving for the intake foundations have not been avoided or reduced, and could cause abandonment of Delta legacy communities. (SCDA [Appeal C20185-A2](#), p. 9)
- 2) Significant and unavoidable construction noise impacts would reduce quality of life for Delta wildlife and residents across many different land uses, pile driver noise would hurt restaurants and other businesses in the area, and noise annoyance would have public health outcomes. (San Joaquin [DCL Appeal](#), pp. 35, 65)
- 3) Averaging noise levels over time periods masks peaks, thereby casting doubt on the conclusions in the Final EIR/EIR concerning noise impacts (San Joaquin County [Appeal Letter](#), p.35).

Appellants contend that construction noise impacts from the project would reduce quality of life for existing and future Delta residents and other land uses, including education, recreation, and commercial activities, for over a decade. The appeals allege a wide range of potential noise impacts resulting from construction and operations of the project that would have detrimental effects to Delta communities. Appeals from SCDA and San Joaquin specifically identify pile driver noise impacts during construction as the primary effect leading to conflicts with existing uses, and offer expert testimony from the SWRCB Petition Hearing as evidence of these claims. Appellants assert that evidence supports the following claims:

- a) The Department underestimated noise levels that would result from pile driving in the California WaterFix project Final EIR/FEIS. (SCDA)
- b) Mitigation measures adopted by the Department to reduce noise impacts are ineffective and result in significant, unavoidable impacts. (SCDA and DCL)
- c) Additional feasible mitigation exists to further reduce noise impacts from pile driving and resultant conflicts with existing uses that the Department did not incorporate within the project. (SCDA)

Appellants also contend that the Department underestimated the noise levels that would result from project construction, and challenge the Department’s application of thresholds for acceptable levels of construction noise for residences, businesses, schools, recreation sites, and other sensitive uses within the Delta. SWRCB testimony and other supporting evidence offered by Appellants illustrate this as follows:

- Pile driving “would occur only between dawn and sunrise” over a period of seven years, accounting for up to 30 million pile-driving strikes and disrupt Delta residents’ lives. Approximately one-third of the strikes will be done using impact hammers, a louder technique. SWRCB testimony from Stirling and Salter (San Joaquin County [LAND205 Stirling](#), p. 7, lines 8-18; SCDA [X.4 000015](#), p. 3, lines 17-20).

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- 1 • Noise will reach 76-80 dBA at Hood, and 75 to 79 dBA at Clarksburg, including the
2 Clarksburg school campus, the Clarksburg library, and the Clarksburg Marina. SWRCB
3 testimony from Salter and Final EIR/EIS Comments from Salter & Associates (SCDA
4 [X.4 000015](#), p. 2, lines 10-24; p. 5 line 10-13; p. 22).
5
- 6 • Noise from pile driving would impact Delta High School, Clarksburg Middle School, the
7 Clarksburg Charter School in Clarksburg, and Bates Elementary School in Courtland.
8 SWRCB testimony from Stirling (San Joaquin County [LAND205 Stirling](#), p. 7 lines 3 to
9 18).
10
- 11 • The Delta communities of “Clarksburg, Hood, and various unincorporated areas in
12 Sacramento, Yolo, and San Joaquin counties would be subject to night-time and day-
13 time construction noise levels above 50 dBA, which is above thresholds found to disturb
14 human health. Furthermore, the methods used to estimate noise propagation do not
15 account for noise propagation over mixed landscapes and through urban areas, and the
16 analysis does not account for health impacts at 50 dBA – 55 dBA levels. SWRCB
17 testimony from Shilling. (San Joaquin County [LAND135 Shilling](#), p. 4, lines 19-25; p. 5,
18 lines 16-18, 5-7).
19
- 20 • The 20 dBA increase in noise between estimated baseline levels of 40 dBA and the 60
21 dBA threshold would be a significant increase that would disturb residents and visitors
22 (Final EIR/EIS Comments from Salter & Associates (SCDA [X.4 000015](#), pp. 19, 23).
23
- 24 • At Hood, use of Hood Supply, a restaurant serving Delta visitors, could be impacted by
25 noise levels reaching 78 dBA from simultaneous pile driving and typical construction
26 activities. Final EIR/EIS Comments from Salter & Associates. (SCDA [X.4 000015](#), p.23).
27

28 In Final EIR/EIS, Chapter 23 (Noise), the Department describes the existing ambient
29 noise conditions in the project area, analyzes potential impacts related to the construction and
30 operation of the conveyance facilities and conservation measures, and identifies Mitigation
31 Measures and Environmental Commitments to mitigate significant impacts.
32

33 Delta towns and rural areas are generally quiet. Current levels of noise range from 40
34 dBA to 50 dBA ([Final EIR/EIS](#), Ch. 23, p. 23-8). During project construction, noise would be
35 generated by both construction equipment, such as pile drivers, graders, and air compressors,
36 and by trucks delivering construction material. In the Final EIR/EIS, the Department uses a
37 noise threshold for daytime construction activities of 60 dBA Leq (1hr) at noise-sensitive land
38 uses where the ambient noise level is less than 60 dBA. If the ambient noise level is already
39 greater than 60 dBA, the applicable noise threshold is an increase of 5 dB or more in the
40 ambient noise level at residential locations (pursuant to Section 01570 of Department
41 Specification 05-16). For nighttime construction activities, the noise threshold is 50 dBA at
42 noise-sensitive land uses where the ambient noise level is less than 50 dBA. If the nighttime
43 ambient noise level is already greater than 50 dBA, the applicable noise threshold is an
44 increase of 5 dB or more in the ambient nighttime noise level at residential locations ([Final](#)
45 [EIR/EIS](#), Ch. 23, p.23-27).
46

47 The lower noise threshold for nighttime activity is based on the 5 to 10 dB reduction in
48 noise performance standards that is commonly applied to noise levels during nighttime hours as
49 used in local noise ordinances in the Plan Area. For example, “Section 01570 of DWR
50 Specification 05-16 identifies DWR noise thresholds that are reasonably consistent with local

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1 standards with regard to construction noise. [T]he 60 dBA noise standard in DWR Specification
2 05-16 has been established by consensus of experts, local and resource agencies, including
3 USFWS, as a threshold for establishing noise impacts” ([Final EIR/EIS](#), Ch. 23, p. 23-27). Noise
4 thresholds established by the Delta counties for various use types are summarized in the Final
5 EIR/EIS in Section 23.2.3, Regional and Local Plans, Policies, and Regulations. ([Final EIR/EIS](#),
6 Ch. 23, p. 23-15) Although some local governments have adopted quieter standards, these local
7 thresholds are generally equivalent to the thresholds used by the Department.⁴²

8
9 To analyze this appeal issue, the Council has examined evidence in the Department’s
10 record related to construction of the proposed intakes that are described as part of Alternative 4
11 in the Final EIR/EIS ([Final EIR/EIS](#), Ch. 23, pp. 23-120 – 23-132).⁴³ WaterFix construction
12 would generate noise that exceeds these levels near construction sites and along roads used to
13 deliver construction materials. Near the north Delta diversion sites, this noise may create
14 conflicts with existing residences and businesses. Areas of noise exceeding both daytime and
15 nighttime thresholds of the EIS/EIR would extend on both sides of the Sacramento River from
16 Hood through Clarksburg and south to Lambert Road. As shown in Table 23-60 ([Final EIR/EIS](#),
17 Ch. 23, p. 23-121), daytime noise levels resulting from combined use of pile drivers and other
18 construction equipment at intake locations would result in a combined noise level of 102 dBA
19 Leq (1hr) at a distance of 50 feet from the intake location, attenuating to a level of 49 dBA Leq
20 (1hr) at a distance of 5,280 feet (1 mile). Similarly, nighttime noise levels resulting from
21 combined use of pile drivers and other construction equipment at intake locations would result in
22 a combined noise level of 96 dBA Leq (1hr) at a distance of 50 feet from the intake location,
23 attenuating to a level of 43 dBA Leq (1hr) at a distance of 5,280 feet (1 mile).

24
25 The predicted noise levels shown in Final EIR/EIS Table 23-60 ([Final EIR/EIS](#), Ch. 23,
26 p.23-121) indicate that during periods of pile driving, residences within 2,000 feet of an active
27 intake construction site could be exposed to construction noise in excess of the 60 dBA Leq
28 (1hr) daytime threshold. The nighttime threshold of 50 dBA Lmax would be exceeded at a
29 distance of 2,800 feet. As shown in Final EIR/EIS Table 23-61 ([Final EIR/EIS](#), Ch. 23, p.23-
30 122), 114 residential parcels, 8 natural/recreational parcels, and 249 agricultural parcels would
31 be affected by daytime noise levels in excess of this threshold during construction. Clarksburg
32 Middle School is identified among the affected uses. The nighttime threshold would be
33 exceeded at 177 residential parcels, 10 natural/recreational parcels, and 277 agricultural
34 parcels. In the Final EIR/EIS, DWR found that these factors, among others, contributed to
35 significant impacts requiring mitigation. ([Final EIR/EIS](#), Ch. 23, p.23-132) The affected
36 residential parcels are located predominately in Hood and Clarksburg, and comprise most of the
37 existing uses in those communities. These parcels would be subject to construction noise in
38 excess of established thresholds, both day and night, for the duration of periods of construction
39 involving pile driving. In its Written Statement of October 15, 2018, Appellant SCDA further
40 asserts that it is reasonably foreseeable that pile driving will occur daily over the course of up to
41 six construction seasons (June 1 to October 31). (Written Submission of SCDA, October 15,
42 [SCDA Response to Supplemental Questions](#), 2018, p. 17, lines 1-4). In addition to noise from

⁴² Sacramento County’s general plan contains a standard of 55 dBA for daytime noise and 50 dBA at night in residential areas. The San Joaquin County’s general plan noise standards are 50 dBA for daytime and 45 dBA for nighttime in residential areas. ([Final EIR/EIS, Ch. 23](#), pp. 23-14, 23-16).

⁴³ The Final EIR/EIS states that “the potential for Alternative 4A to expose noise-sensitive land uses to noise from construction and operation of the water conveyance facilities would be identical to impacts described under Alternative 4” ([Final EIR/EIS](#), Ch. 23, p. 23-193). Therefore, the balance of this discussion focuses on the Final EIR/EIS analysis of Alternative 4.

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1 pile driving and construction activities, transportation-related noise from truck trips and worker
2 commutes also impacts these communities, as discussed in the Final EIR/EIS. ([Final EIR/EIS](#),
3 Ch. 23, p.23-123 – 23-128.)
4

5 While Appellants have offered differing expert accounts of anticipated noise impacts
6 from pile driving activities that would exceed the estimates provided in the Final EIR/EIS, the
7 Department has provided substantial evidence disclosing the impacts to residences,
8 businesses, schools, recreation sites, and other sensitive uses in the Delta. These impacts are
9 significant and unavoidable for purposes of CEQA, and would substantially degrade the cultural
10 values of Hood, Clarksburg, and other legacy Delta communities.
11

12 With regard to noise mitigation, Appellants contend that mitigation measures adopted by
13 the Department to reduce noise impacts are ineffective and would result in significant,
14 unavoidable impacts. SWRCB testimony and other evidence offered by Appellants support
15 these claims as follows:
16

- 17 • Noise abatement measures proposed to mitigate these impacts are inadequate,
18 inaccurate, and only partially effective (SCDA -- Shilling p. 4, line 11 to p. 5 line 21;
19 SCDA -- Decker p. 1 and 4-5).
20
- 21 • The promise to limit noise depends on placement of barricades around noise sources,
22 but this is impractical because noise sources are ubiquitous throughout the construction
23 zone and because barriers could not be installed at in-water pile driving sites, especially
24 where constant barge access is required. Limiting pile driving to daylight hours provides
25 no protection for schools, Clarksburg's library, or businesses affected by noise (San
26 Joaquin County -- Stirling p. 7 lines 13-18).
27
- 28 • The noise complaint system proposed will not be effective because once construction
29 begins there will be few ways to reduce noise effects (SCDA -- Brodsky to Murillo p. 2;
30 SCDA -- Decker p. 4).
31

32 The project Mitigation Monitoring and Reporting Program (MMRP) describes the
33 adopted Avoidance and Minimization Measures, Environmental Commitments and Mitigation
34 Measures that require the Department to reduce noise levels during daytime hours.
35 Implementation of Mitigation Measures NOI-1a and NOI-1b, set forth below, would reduce the
36 effects of noise during construction. Pursuant to these measures, the Department and
37 contractors hired to construct any conveyance components of the project will implement a site-
38 specific noise abatement plan to avoid or reduce potential construction-, maintenance-, and
39 operation-related noise impacts.
40

- 41 • **Mitigation Measure NOI-1a:** Employ noise-reducing construction practices during
42 construction ([Final EIR/EIS MMRP](#), p.2-127).
43
- 44 • **Mitigation Measure NOI-1b:** Prior to construction, initiate a complaint/response tracking
45 program ([Final EIR/EIS MMRP](#), p.2-128).
46

47 Mitigation Measure NOI-1a requires that, prior to construction activities, the Department
48 must select and employ site-specific noise reduction strategies “such that construction noise
49 levels at noise sensitive receptors do not exceed 60 dBA (1hr Leq) during daytime hours ... and
50 50 dBA (1hr Leq) during nighttime hours measured at sensitive receptors. Some construction

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1 activities that are required to occur during nighttime hours, such as activities at tunnel boring
2 launch pads and tunnel shaft locations, would not be subject to these construction time
3 limitations.” ([Final EIR/EIS MMRP](#), p.2-127). Pursuant to these measures, the Department and
4 contractors hired to construct any conveyance components of the project will implement a site-
5 specific noise abatement plan to avoid or reduce potential construction-, maintenance-, and
6 operation-related noise impacts. Implementation of Mitigation Measures NOI-1a and NOI-1b
7 would reduce the effects of noise during construction.

8
9 The project MMRP contains the following description regarding the effectiveness and
10 feasibility of these measures in the MMRP ([Final EIR/EIS MMRP](#), pp. 2-128):

11
12 “Achievable noise reduction varies by measure. Shutting off a piece of equipment would
13 eliminate its contribution to ambient noise. Noise barriers and enclosures would provide
14 noise reduction within the discrete area shielding noise from surrounding noise sensitive
15 receptors. Barriers can provide 5 to 15 dB of noise reduction depending [on]
16 configuration relative to surrounding terrain.”

17
18 In the Final EIR/EIS ([Final EIR/EIS](#), Ch. 23, p. 23-132), The Department states that:

19
20 “Although implementation of these measures will reduce the impact, it is not anticipated
21 that feasible measures will be available in all situations to reduce construction noise to
22 levels below the applicable thresholds. This impact would therefore be significant and
23 unavoidable.”

24
25 Therefore, while Appellants have asserted that proposed mitigation will be ineffective,
26 the Department has provided substantial evidence disclosing the potential effectiveness of
27 proposed mitigation strategies that are tied to performance standards equivalent to the noise
28 thresholds described above. The Department concludes that feasible mitigation may not be
29 available in all situations involving exposure of existing uses to construction noise. These
30 impacts are significant and unavoidable for purposes of CEQA, and would substantially degrade
31 the cultural values of Hood, Clarksburg, and other legacy Delta communities.

32
33 In addition to claiming that the proposed mitigation will be ineffective, Appellants contend
34 that additional feasible mitigation exists to further reduce noise impacts from pile driving and
35 resultant conflicts with existing uses, which the Department did not incorporate within the
36 project. Evidence offered by Appellants in support of these claims is as follows:

- 37
38
- 39 • Mitigation options to reduce noise should be further explored. Noisy activities could be
40 set back from sensitive land uses. Less noisy construction methods could also be
41 implemented (SCDA -- Salter Decker page 5).
 - 42 • For example, noise from pile driving can be avoided by using alternative methods of
43 constructing piles. Use of CFA piles (Augercast, Augered Cast in Place Piles, or Auger
44 Pressure Grouted Piles) rather than driven piles as proposed by DWR would diminish
45 noise and can be done at the same or lower cost as use of impact piles (SCDA --
46 Storesund 1 lines 2-11).
- 47

48 Supporting evidence for Mr. Storesund’s testimony includes correspondence from Peter Faust
49 of Malcolm Drilling Company, recommending use of CFA piles rather than driven piles. Mr.
50 Faust quoted a budget price of \$250 per lineal foot for the installation of CFA piles on California
51 WaterFix. According to Mr. Storesund:

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1 "I believe that DWR should find that price attractive compared to the cost of driven 42-
2 inch steel piles, without the noise and community disturbance. CFA piles do not require
3 the use of casing as the concrete is placed in the excavated hole as the auger is
4 removed after it has reached its target depth. A reinforced rebar cage is then
5 immediately lowered into the fresh concrete, thus creating a reinforced concrete pier."
6

7 The question of setting noisy activities back from sensitive land uses is inherently related
8 to questions regarding whether the Department considered the feasibility of siting intake
9 locations away from legacy communities and existing noise-sensitive uses, as described
10 previously under section (K)(3)(b) *Conflicts with Existing Delta Communities* of this
11 Determination.
12

13 Final EIR/EIS Appendix 3C contains the assumptions used by the Department in
14 analyzing the potential impacts of pile driving as part of intake construction. In Appendix 3C, the
15 Department acknowledges that the "type, dimensions, and number of piles and installation
16 methods [are] subject to change based on future site-specific geotechnical data and engineering
17 design. If CIDH [Cast-In-Drilled-Hole] is chosen for foundation, impact pile driving will not be
18 required." (Final EIR/EIS, [Appendix 3C](#), p. 3C-5.) The project MMRP describes the following
19 mitigation measure adopted to reduce project impacts associated with pile driving:
20

- 21 • **Mitigation Measure NOI-2: Employ vibration-reducing construction practices**
22 **during construction of water conveyance features** ([Final EIR/EIS MMRP](#), p.2-129).
23 Under this mitigation measure, the Department will implement the following measures if
24 applicable and feasible:
 - 25 ○ Locating equipment as far as practical from vibration-sensitive (and noise-
26 sensitive) land uses (at least 100 feet)
 - 27 ○ Use of alternative pile driving methods such as vibratory driving, hydraulic press-
28 in driving, or use of pre-drilled pile holes. ([Final EIR/EIS MMRP](#), pp.2-129 – 2-
29 130)

30
31 Mitigation Measure NOI-2 was adopted by the Department primarily to reduce vibration
32 impacts associated with pile driving, although it also indirectly reduces noise impacts, and the
33 Department concedes that employing these techniques may not be feasible in all situations to
34 reduce vibration levels (and any associated groundborne noise) to below applicable thresholds.
35 The Department concludes that even with implementation of Mitigation Measure NOI-2, impacts
36 due to pile driving at the intakes would be significant and unavoidable. ([Final EIR/EIS](#), Ch. 23,
37 p.23-197) It should be noted that the remedies afforded to affected property owners by
38 Mitigation Measure NOI-2 in the event that alternative pile driving techniques are not feasible
39 address damage resulting from *vibration* in excess of established performance standards – the
40 measure does not provide a remedy for *noise* in excess of established performance standards.
41

42 Appellant SCDA asserts that no information in the record before the Department at the
43 time of certification identifies the use of CFA piles as an infeasible approach to avoid
44 construction noise and vibration from pile driving, which would reduce conflicts with existing
45 Delta land uses. In its Written Submittal of October 15, 2018, Appellant SCDA states that in
46 estimating the noise resulting from pile driving, the Department did not consider the size of piles
47 or other factors specific to the proposed pile driving activity ([SCDA Response to Supplemental](#)
48 [Questions](#), p.17 lines 7-12). A separate analysis prepared by Charles Salter and summarized at
49 the SWRCB hearing considered pile size, pile type, energy delivered from the impact hammer,
50 and record data available from measurements of noise generated by similar pile-driving in the
51 past." (SCDA [X.4 000015](#), p.19-21.)

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1 With regard to avoiding noise-related land use conflicts associated with pile driving by
2 using alternative technologies, the expert testimony of Rune Storesund before the SWRCB
3 submitted by Appellant SCDA states that:

4
5 “the extensive amount of impact pile driving currently proposed for the California
6 WaterFix project intake structures is not necessary. Alternative techniques, with
7 dramatically lower vibration and noise levels, such as drilled piers or CIDH, deep soil
8 mixing, or jet grouting are all plausible and feasible techniques to provide a suitable
9 foundation for the proposed intake structures and associated features. No evidence has
10 been presented that precludes the use of these lower vibration/lower noise techniques
11 for construction of the California WaterFix inlet structures.” (SCDA-125 SWRCB Hearing
12 Transcript, [X.4 000025](#), April 23, 2018).
13

14 As summarized above, the Department disclosed that the proposed mitigation measures
15 would not be sufficient to reduce pile driving noise levels at the intakes below applicable
16 significance thresholds, and the Department concluded that the impacts due to pile driving noise
17 at the intakes would therefore be significant and unavoidable. However, as stated in Appendix
18 3C and Mitigation Measure NOI-2, the Department has committed to evaluating the potential to
19 use non-impact pile driving methods once geotechnical investigations are complete, and that
20 such investigations will occur as part of subsequent phases of project design.
21

22 At the Council’s hearing on October 24, 2018, Appellant SCDA reiterated and
23 summarized its claims, as follows:
24

25 “Let me just comment for a moment on DWR’s argument that even though the project as
26 described now includes all this impact pile driving, and they admit that it’s a significant
27 adverse effect after the project is approved, and after the appeals are denied, they’ll
28 consider using some other method for the piles, such as poured piles or caissons. But
29 that’s not the project that’s before you, the project before you defines impact pile driving.
30 And it’s your duty to find that this project with impact pile driving is consistent with the
31 Delta Plan or not. What DWR represents they might or might not do after you render
32 your decision is irrelevant.” (October 24, 2018 Hearing Testimony, Mr. Michael Brodsky,
33 Transcript p. 64)
34

35 At the continuation of Council’s hearing on the following day (October 25, 2018), the
36 Department reiterated its commitment to pursue alternative means to pile driving, as follows:
37

38 “The issue is that DWR is committed to trying to use non-impact driving [...] but without
39 the further geotechnical work, they can’t commit to it at this point in time because it may
40 not be feasible. But the mitigation measures that are cited in DWR’s responses directly
41 deal with that issue.” (October 25, 2018 Hearing Testimony, Ms. Stef Morris, Transcript
42 p. 62)
43

44 “We have analyzed impact pile driving because we wanted to disclose the worst case
45 scenario when it comes to pile installation. [...] We are looking at utilizing drilled piers
46 that wouldn’t need any pile driving for intake foundations and that’s the method that was
47 used for Freeport intake construction. And we believe that’s doable for this project, but
48 because of the lack of technical information at [this] point, we are unable to make that
49 commitment.” (October 25, 2018 Hearing Testimony, Mr. Praba Pirabarooban,
50 Transcript p. 65.)
51

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1 The record shows that the project before the Council includes extensive pile driving that
2 the Department finds would result in significant and unavoidable noise and vibration impacts
3 that would conflict with existing sensitive uses in Delta communities. The Department has
4 adopted and incorporated into the project Mitigation Measures NOI-1a, NOI-1b, and NOI-2,
5 which will be implemented during subsequent project design and during construction to avoid or
6 reduce these impacts. Mitigation Measure NOI-2 requires the Department to use alternative
7 techniques to impact pile driving, such as CIDH techniques, if feasible based on geotechnical
8 conditions. While significant and unavoidable impacts are anticipated if the project is completed
9 exclusively with impact pile driving, full implementation of these mitigation measures would
10 reduce or avoid the impact to the extent feasible by maximizing use of alternative, less-impactful
11 techniques. However, no remedy for exposure to noise in excess of established standards is
12 provided by Mitigation Measure NOI-2 in the event that alternative pile driving techniques are
13 not feasible.

14 **ii. Conclusion Regarding Noise Impacts**

15
16
17 The Department's Certification and October 15, 2018 Written Statement cite evidence in
18 the record that feasible mitigation for exposure of noise sensitive uses to construction noise in
19 excess of applicable thresholds may not be available in all situations. The project would result in
20 significant and unavoidable noise impacts that would conflict with existing Delta land uses. Such
21 a conclusion, together with the Department's CEQA Findings of Fact and Statement of
22 Overriding Considerations, may be sufficient for purposes of compliance with CEQA, but they
23 do not address reducing the noise conflicts with existing Delta land uses to the extent feasible
24 as DP P2 requires.

25
26 Project noise resulting from pile driving and other construction activities will substantially
27 degrade the cultural values of Hood, Clarksburg, and other legacy Delta communities. While
28 Appellants have offered differing expert accounts of anticipated noise impacts from pile driving
29 activities, the Department has provided substantial evidence disclosing the impacts to noise-
30 sensitive uses in the Delta. Appellants also discuss evidence in the record concerning
31 alternative construction approaches that would avoid noise and vibration impacts from pile
32 driving. While significant and unavoidable impacts are anticipated if the project is completed
33 exclusively with impact pile driving, full implementation of the adopted mitigation measures
34 would reduce or avoid this impact to the extent feasible by maximizing use of alternative, less-
35 impactful techniques.

36
37 The extent to which alternative techniques are feasible will be determined through
38 geotechnical evaluations to be completed at a later stage of design. However, there is no
39 substantial evidence in the record that significant and unavoidable noise impacts from pile
40 driving can be reduced to the extent feasible, as required by DP P2 section (a), because: a) the
41 Department lacks the geotechnical information necessary to demonstrate feasibility at this time,
42 and b) no remedy for noise in excess of established standards is provided by Mitigation
43 Measure NOI-2 in the event that alternative pile driving techniques are not feasible. Therefore,
44 the Department's Certification of Consistency with DP P2 on the issue of conflicts with existing
45 uses due to noise impacts is not supported by substantial evidence in the record.

1 **k. Consideration of Comments from Reclamation Districts**

2
3 **i. Appeals & Certification - Consideration of Comments from Reclamation**
4 **Districts**

5
6 Appellant San Joaquin asserts that the Department failed to consider comments from
7 Delta reclamation districts charged with responsibility for maintaining and repairing levees. Delta
8 levees are critical infrastructure that protect the Delta as a place and its economic, cultural,
9 agricultural, and environmental values. ([San Joaquin County](#), p. 69). Appellant asserts that the
10 Department failed to coordinate with the Delta reclamation districts charged with maintaining
11 over 1,000 miles of levees that protect Delta communities and transportation infrastructure. As
12 evidence, Appellant cites evidence from testimony by Chris Neudeck at the SWRCB hearing
13 which asserts that the Department had little coordination with the reclamation district on levee
14 monitoring during construction, formation of a plan for use on levee roads during construction,
15 and construction on secondary levees (San Joaquin County [DCL-101, SWRCB Hearing](#)
16 [Transcript, March 15, 2018](#), pp. 148-151).

17
18 In its October 15, 2018 Written Statement, the Department described its commitment to
19 consult with local reclamation districts to ensure that construction activities would not conflict
20 with reclamation district flood protection measures and routine maintenance. As evidence, the
21 Final EIR/EIS, states that the Department “will also seek to enter agreements with local flood
22 control maintenance entities whose flood management activities may be affected by the project”
23 ([D.1 DRAFT 000058](#), pp. 6A-27, line 26-27).

24
25 With respect to the assertions by Mr. Neudeck that the Department failed to coordinate
26 with reclamation districts, the Department cites evidence from SWRCB testimony by John
27 Bednarski which responds to Mr. Neudeck’s claims by stating, “Due to the conceptual nature of
28 the CWF engineering plans to date, DWR has not conducted extensive discussions with the
29 Reclamation Districts.” ([X.2 DRAFT 000165](#), pp. 26). Mr. Bednarski provides examples of
30 specific engagement that the Department has undertaken with Reclamation District 756 and
31 Reclamation District 751 as detailed planning has begun for those areas, concluding that the
32 Department “is committed to replicating this proactive approach with other Reclamation Districts
33 in the Delta as work on CWF investigations and designs commence.” ([X.2 DRAFT 000165](#), pp.
34 27).

35
36 The Certification and the Department’s October 15, 2018 Written Statement also cite
37 evidence showing that the Department received and responded to written comments from local
38 and regional Delta interests in preparing the Final EIR/EIS for the project ([DWR DP P2](#), p. 22-
39 23). Below is a list reclamation district comments, and responses when found, indicating that the
40 Department considered reclamation district comment letters ([Final EIR/EIS, Volume II Index of](#)
41 [Commenters](#)).

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RECIRC Letter Number	First_Name	Last Name	Organization Name	Included in DWR Response to Comments	Comment Letter Link in record
2591	Michael	Van Zandt	Reclamation District 501	Yes	2570-2599
2495	Andrea	Clark	Reclamation District 551	Yes	2400-2499
409	Patrick	Markham	Reclamation District 765	No Record Found	400-499
2426	David	Dal Porto	Reclamation District 830	Yes	2400-2499
2640	Dominick	Gulli, PE, PLS	Reclamation District No 2072 Woodward Island	Yes	2600-2649
5	Daniel	McDaniel	Reclamation District No. 2038	No Record Found	1-99
2849	Daniel	McDaniel	Reclamation District No. 2038	Yes	2800-2899
2568	Jeffrey	Conway	Reclamation District No. 800, Byron Tract	Yes	2550-2569
			Reclamation District 813	Yes	D.1 DRAFT 000195 , p. 70
			Reclamation District 1004	Yes	D.1 DRAFT 000213 , p. 304
			Reclamation District 3,150,551,99	Yes	D.1 DRAFT 000214 , p.163-169
			Reclamation District 2068, 2098	Yes	D.1 DRAFT 000224 , p.15
			Reclamation District Union Island 1+2	Yes	D.1 DRAFT 000229 , p.77-78
			Reclamation District 544	Yes	D.1 DRAFT 000229 , p. 79-81
			Reclamation District 2089	Yes	D.1 DRAFT 000229 , p. 81-82
			Reclamation District 2107	Yes	D.1 DRAFT 000229 , p. 82-83

ii. Conclusion Regarding Consideration of Comments from Reclamation Districts

The Certification and October 15, 2018 Written Statement cite evidence in the record that the Department considered and responded to comments from reclamation districts as part

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1 of the CEQA environmental review process and at other project stages, and has committed to
2 seek to enter into agreements with local flood control maintenance entities that could be
3 impacted by the project. Therefore, substantial evidence in the record supports the
4 Department’s Certification of Consistency with DP P2 with regard to consideration of comments
5 by local agencies, in this case reclamation districts.
6

7 **M. Policy RR P1 (23 CCR Section 5012): Prioritization of State Investments in Delta**
8 **Levees and Risk Reduction**
9

10 In the Certification, the Department states both that California WaterFix does not trigger
11 RR P1 and that California WaterFix is consistent with RR P1. (Compare Certification of
12 Consistency, p. 10 [“California WaterFix is not a flood risk management project subject to the
13 interim priorities for discretionary state investments in Delta flood risk management”] and
14 Certification of Consistency: RR P1, p. 6 [“Therefore, the project is consistent with the Delta
15 Plan policy RR P1”].) The Certification does not frame these arguments as being raised in the
16 alternative, but we interpret them as such. (See, e.g., *Eng. v. Brown* (2018) 21 Cal.App.5th 675,
17 701 [recognizing the “permissible practice of advancing alternative arguments before a final
18 decision is reached”].) Appellant San Joaquin County assumes without explanation that
19 California WaterFix does trigger RR P1 and states that it is inconsistent with the policy. We
20 conclude that RR P1 does not apply; thus, there is no need to assess consistency.
21

22 **1. Structure of RR P1**
23

24 RR P1 implements Delta Reform Act section 85306, which mandates that “the council, in
25 consultation with the Central Valley Flood Protection Board, shall recommend in the Delta Plan
26 priorities for state investments in levee operation, maintenance, and improvements in the Delta,
27 including both levees that are a part of the State Plan of Flood Control and nonproject levees.”
28

29 It covers “a proposed action that involves discretionary State investments in Delta flood
30 risk management, including levee operations, maintenance, and improvements.” (RR P1, subd.
31 (b).) Thus, in order for RR P1 to apply, two conditions must be met: (1) the covered action must
32 involve “flood risk management” and (2) it must concern “discretionary state investments.”
33 (*Ibid.*) If either of those conditions is not met, a covered action may proceed without having to
34 demonstrate consistency with RR P1. If both conditions are met, RR P1 sets forth goals to
35 guide funding decisions. (*Id.*, subd. (a).)
36

37 The Delta Plan does not define the terms “flood risk management” or “discretionary
38 State investments,” but it does offer context.⁴⁴ It describes a “government-sponsored flood
39 control program” as “[a]ny State or federal project, approval, funding, or other effort that is
40 intended to reduce the likelihood and/or consequence of flooding of real property and/or
41 improvements, including risks to people, property, and State interests in the Delta, that is carried
42 out pursuant to applicable law, including but not limited to” certain statutory schemes. (Delta
43 Plan, p. 253.)

⁴⁴ In April 2018, the Council voted to: (1) certify the environmental impact report for a proposed amendment to RR P1; (2) submit the proposed amendment to the Office of Administrative Law (“OAL”) for review; and (3) update the corresponding chapter of the Delta Plan. OAL has not yet approved the proposed amendment, however, and the original version of RR P1 remains in effect. Thus, for purposes of this analysis, the Council is considering the relevant Delta Plan chapter as it read at the time that the Council adopted the original version of RR P1 rather than as it reads in the most current version of the Delta Plan.

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1
2 The Delta Plan divides levees into two categories – “project levees” and “nonproject
3 levees.”⁴⁵ (*Id.*, p. 261.) It explains that the “project levees are authorized as part of the federal
4 flood control project and so are eligible for federal funding” and that the “nonproject levees are
5 distributed according to guidelines and criteria of the Delta Levees Maintenance Subvention
6 Program or Delta Levees Special Flood Control Projects.” (*Ibid.*)
7

8 **2. Applicability of RR P1**

9

10 RR P1 applies only if two conditions are met: (1) the covered action must involve “flood
11 risk management” and (2) it must concern “discretionary state investments.” (RR P1.)
12

13 **a. Flood Risk Management**

14

15 The Department certifies that “California WaterFix is not a flood risk management
16 project” in that “California WaterFix includes actions such as levee modifications to ensure that
17 there will be no change in flood risk as a result of the project, but the project objectives do not
18 include reducing or managing Delta flood risk.” (Certification, p. 10.)
19

20 Two Appellants invoke RR P1 – San Joaquin County and NCRA.⁴⁶ But they do not
21 dispute the contention that California WaterFix is not a flood risk management project. Quite
22 the contrary: they agree with it. (San Joaquin County Appeal Letter, p. 74 [“As conceded by the
23 Department, the Delta Tunnels are not a flood risk management project”]; NCRA Appeal Letter,
24 p. 11 [“WaterFix, as DWR concedes, is not a flood risk management project”].)
25

26 In light of the positions taken by the Department and the Appellants, the Council finds
27 California WaterFix is not a “flood risk management project.” Thus, the Council concludes that
28 California WaterFix does not meet one of the two conditions required for RR P1 to apply.
29

30 **b. Discretionary State Investments**

31

32 The Department certifies that California WaterFix “will not be funded by programs
33 designed to improve Delta flood risk management, but instead will be funded by participating
34 water contractors to fulfill the project objectives described in the Final EIR/EIS, Chapter 2,
35 Project Objectives and Purpose and Need.”⁴⁷ (*Ibid.*) The Appellants do not address funding in
36 their RR P1 analysis. Thus, we conclude that California WaterFix does not meet the second
37 condition required for RR P1 to apply.
38

39 **3. Consistency with RR P1**

40

41 The Department argues in the alternative that California WaterFix is consistent with RR
42 P1. (Certification: RR P1, pp. 4-6.) San Joaquin County argues the opposite – that California

⁴⁵ “Project levees” refer to those that are a part of the State Plan of Flood Control,

⁴⁶ NCRA does not cite the policy by name but includes a subheading titled “Prioritization of State Investments in Delta Levees and Risk Reduction.” (NCRA Appeal Letter, p. 11.)

⁴⁷ Chapter 2 of the EIR/EIS, in turn, does not mention flood risk. (EIR/EIS, pp. 2-1 through 2-4.) It does not refer to levees other than to explain that seismic risk to levees threatens SWP and CVP water supplies and that WaterFix would serve to minimize this risk. (*Id.*, p. 2-1, 2-3, 2-4.) And it does not refer to discretionary state investments.

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1 WaterFix is inconsistent with certain of the goals set forth in RR P1 and thus inconsistent with
2 RR P1 as a whole. (San Joaquin Appeal Letter, pp. 72-74.) Because the Council has
3 determined that RR P1 does not apply, these arguments are moot and the Council need not
4 address them. (E.g. *Surrey v. TrueBeginnings* (2008) 168 Cal.App.4th 414, 420 [recognizing
5 the mootness of an alternative argument].)
6

7 VII. DETERMINATION

8 Based on the Analysis and Findings set forth in Section VI above, the Council concludes
9 that substantial evidence *does not* exist in the record before us to support the Department's
10 finding that California WaterFix is consistent with the Delta Plan. The matter is hereby
11 *remanded* to the Department for reconsideration, pursuant to Water Code section 85225.25.

12 In addition, we encourage the Department to meaningfully engage with the Commission
13 on the DP P2 matters for which we found for Appellants (i.e., Conflicts with Existing Delta
14 Communities, in particular impacts to community character and further definition of the
15 proposed Community Benefit Fund; Cultural and Historical Resources Impacts; and Parks and
16 Recreation and Traffic Impacts, in particular impacts on recreational boating and on access to
17 recreation due to construction traffic), because in those instances we consider the
18 Commission's recommendations to be feasible for the Department and Commission to pursue,
19 and consistent with the objectives of the Delta Plan (see Public Resources Code section
20 29773).
21

22 The Council's findings on the appeals of the Certification of Consistency for California
23 WaterFix do not constitute a "project" for purposes of CEQA. That is because the Council's
24 action is not a "discretionary project proposed to be carried out or approved" by a public agency.
25 (Pub. Resources Code § 21080(a).) As the Council's role in the appeal process is described in
26 the Delta Reform Act, Water Code sections 85225–85225.25, we do not have the authority to
27 modify or deny a covered action, which is before the Council on appeal regarding consistency
28 with the Delta Plan, for environmental reasons. (See *Friends of Juana Briones House v. City of*
29 *Palo Alto* (2010) 190 Cal.App.4th 286, 299, 302 (explaining that a project is discretionary only if
30 the agency that is taking an action can deny or modify the project on the basis of environmental
31 consequences); see also, CEQA Guidelines § 15375 ("Discretionary project" means a project
32 which requires the exercise of judgment or deliberation when the public agency or body decides
33 to approve or disapprove a particular activity . . .).) The Council does not have the authority to
34 approve or disapprove a covered action on appeal, nor does it have the authority to modify or
35 deny an appealed covered action for environmental reasons. Rather, the Council only has the
36 authority to "den[y] the appeal or remand[] the matter to the state or local public agency for
37 reconsideration of the covered action based on the finding that the Certification of Consistency
38 is not supported by substantial evidence in the record." (Water Code, § 85225.25.) Therefore,
39 the Council's issuance of findings on appeals of certifications of consistency with the Delta Plan
40 are not projects for purposes of CEQA.
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Exhibit A

Documents Admitted pursuant to Appeals Procedures section 10

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The Council hereby admits the documents listed below pursuant to section 10 of our Appeals Procedures.

Paragraph 10 of the Council’s Appeals Procedures provides as follows: “10. The council or its executive officer may supplement the record submitted by the state or local agency if the council or its executive officer determines that additional information was part of the record before the agency, but was not included in the agency’s submission to the council.”

On October 30, 2018, Executive Officer Pearson admitted the SWRCB hearing docket through July 27, 2018 (the date that the Department filed its Certification) pursuant to Appeals Procedures section 10. Due to the voluminous nature, these documents are not listed separately below, but have been uploaded to the Council’s website.

Based on the Council’s review, we have determined that the documents identified below were part of the record before the Department but were not fully included in the record submission to the Council.

Document
sdwa_316 Meeting Transcript.pdf (Metropolitan Water District of Southern California WaterFix Workshop Transcript (March 27, 2018)) Official Notice request, 10/15/18
sdwa_315 MWD Presentation.pdf (California WaterFix Board Workshop Presentation (March 27, 2018)) Official Notice request, 10/15/18
2015 Urban Water Management Plan Guidebook

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Exhibit B

Documents Admitted pursuant to Appeals Procedures section 29

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4 The Council hereby admits the documents listed below pursuant to section 29 of our Appeals
5 Procedures.

6 Paragraph 29 of the Council’s Appeals Procedures provides as follows: “29. Notwithstanding
7 any provision of these procedures to the contrary, the council may take official notice in any
8 hearing that it conducts, of any generally accepted technical or scientific matter within the
9 council’s jurisdiction, and of any fact that may be judicially noticed by the courts of this State.”

10 Based on the Council’s review, we have determined that the documents identified below were
11 either generally accepted technical or scientific matter within the Council’s jurisdiction, or may
12 be judicially noticed by the courts of this State.

Document
State of California Sea-Level Rise Guidance, 2018 Update, California Ocean Protection Council http://www.opc.ca.gov/webmaster/ftp/pdf/agenda_items/20180314/Item3_Exhibit-A OPC SLR Guidance-rd3.pdf Included in Department October 15, 2018 Letter and October 23, 2018 Submittal
July 9, 2018 letter from North Delta Cares to Metropolitan Water District of Southern California showing Gas Wells in the Construction Zone of the Tunnels’ Alignment in Figure 13-1 in a 2015 Conceptual Engineering Report by the Department
1996 SIS Guidelines for Treatment of Cultural Landscapes
Letter of Sacramento County;10/28/08; topic of “Implementing Structure/Governance”
Transcript of Public Comment Meeting March 26, 2009 in Clarksburg
HR 6329 To establish the Sacramento-San Joaquin Delta National Heritage Area
S. 3927 To establish the Sacramento-San Joaquin Delta National Heritage Area
S. 29 To establish the Sacramento-San Joaquin Delta National Heritage Area
2012 Feasibility Study for a National Heritage Area
Letter of National Park Service; 6/11/12; topic of “Feasibility Study”

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Letter of Delta Stewardship Council; 7/11/13; topic of "Responsible Agency Comments 2013 Administrative Draft"
Letter of Delta Protection Commission 07/24/14, topic of "Bay Delta Conservation Plan EIR / EIS"
Letter of Delta Protection Commission;10/30/15; topic of "Recirculated Draft EIR"
HR 1738 To establish the Sacramento-San Joaquin Delta National Heritage Area
S. 731 To establish the Sacramento-San Joaquin Delta National Heritage Area
2017 Secretary's Guidelines for Treatment of Properties
Recreational Boating Use of the Sacramento- San Joaquin Delta by CSU Sacramento, 2017
2015 Inventory of Recreational Facilities
Proposal of Delta Protection Commission; 01/26/12 as presented at Council Meeting held February 9-10, 2012
Reply of Council to Commission on Proposal to Protect the Delta as Evolving Place; 08/07/12
May 18, 2016 Ruling in JCCP 4758

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Exhibit C

Denied Document Admission Requests (see Appeals Procedures, section 10 and 29)

Document	Reason for denial
NCRA et al Appeal of WaterFix.pdf (08/24/18 Appeal of California WaterFix Certification of Consistency, Exhibit 1, August 17, 2018 Letter from Reclamation to DWR Notice of Negotiation- Coordinated Operation Agreement (COA))	Post-dates July 27, 2018 certification date
Exhibit 1 – March 15, 2017 Comments of Donald Ratcliff, U.S. Fish and Wildlife Service to State Water Resources Control Board (WaterFix C20185 North Coast Rivers Alliance, et al.’s Written Materials in Support of Appeal, 10/15/18)	These are comments presented to SWRCB on Bay-Delta Plan and Substitute Environmental Document and no evidence document was presented to or considered by the Department as part of California WaterFix
Exhibit 2- Excerpts from January 3, 2017 Transcript of Public Hearing in the Matter of the Amendment to the Water Quality Control Plan for the San Francisco Bay/Sacramento-SanJoaquin Delta Estuary: San Joaquin River Flows and Southern Delta Water Quality and the Adequacy of the Supporting Recirculated Draft Substitute Environmental Document: Testimony of Jeff McLain, Donald Radcliff	These are comments presented to SWRCB on Bay-Delta Plan and Substitute Environmental Document and no evidence document was presented to or considered by the Department as part of California WaterFix
Exhibit 3- Sacramento Bee, Ryan Sabalow, A Delta farmer says the state poisoned his crops. Is California’s water supply safe? Sacramento Bee September 24, 2018 (WaterFix C20185 North Coast Rivers Alliance, et al.’s Written Materials in Support of Appeal, 10/15/18)	Post-dates July 27, 2018 certification date
8 17 18 COA ltr.pdf (8/17/18 letter from USBR to K.Nemeth re: Notice of Negotiation –COA) Requests for Official Notice, 10/15/18 F.O.R. Letter, p.9	Post-dates July 27, 2018 certification date

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Letter from David Murillo to Karla Nemeth.pdf (Notice of Negotiation - Coordinated Operation Agreement (COA) (August 17, 2018))	Post-dates July 27, 2018 certification date
Stockton 3 – Memorandum from Secretary of Interior to Solicitor et al.pdf (California Water Infrastructure Letter (August 17, 2018))	Post-dates July 27, 2018 certification date
Regional San 2 – Memorandum from Secretary of Interior to Solicitor et al.pdf, California Water Infrastructure (August 17, 2018), Letter from Secretary of the Interior	Post-dates July 27, 2018 certification date
DCL-221 Consolidated Contract.pdf (Contract Between the Metropolitan Water District of Southern California and the State of California Department of Water Resources for a Water Supply and Selected Related Agreements (2005)) Official Notice request, 10/15/18	Irrelevant, WR P2 inapplicable
DCL-222 BOR Notice of Neg COA.pdf (Notice of Negotiation-Coordinated Operation Agreement (COA) (2018)) Official Notice request, 10/15/18	Post-dates July 27, 2018 certification date
DCL-223 PCL Comment Letter.pdf (Comments on Draft EIR for the Water Supply Contract Extension Project (October 17, 2016)) Official Notice request, 10/15/18	Irrelevant, WR P2 inapplicable
CL-224 CWIN Letter to Sen Jackson.pdf (letter to Senator Jackson (July 1, 2018)) Official Notice request, 10/15/18	Irrelevant, WR P2 inapplicable
DCL-225 CCWD Letter to BOR.pdf (California WaterFix Cost Repayment Proposal Request	Irrelevant, WR P2 inapplicable

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(March 1, 2016), CCWD et al letter to USBR) Official Notice request, 10/15/18	
DCL-233, Water and the California Dream, Maria Mehranian, Water and the California Dream (January 29, 2018) Official Notice request, 10/15/18	Moot
Secretary of Interior's Aug 17 2018 ltr to Federal Officials.pdf (Dept. of Interior, Secretary to Solicitor et al. re California Water Infrastructure) Official notice request 10/18/18	Post-dates July 27, 2018 certification date
DWR-1415 Stockton's Response to Ruling to Produce Information; Water Right Change Proceeding, Transcript of Hearing Part 2 Rebuttal, Aug. 24, 2018	Post-dates July 27, 2018 certification date
Expert report from Dr. Susan Paulsen and Dr. Aaron Mead of Exponent (October 15, 2018)	Post-dates July 27, 2018 certification date
DCL-1 WIFIA Solic.pdf (July 27, 2018 letter to USEPA from Delta Conveyance Finance Authority re: WIFIA Program)	This letter was presented to SWRCB on Bay-Delta Plan and Substitute Environmental Document and no evidence document was presented to or considered by the Department as part of California WaterFix
July 27 2018 Letter from Commissioner of Reclamation	This letter was presented to SWRCB on Bay-Delta Plan and Substitute Environmental Document and no evidence document was presented to or considered by the Department as part of California WaterFix
October 19, 2018 Presidential memorandum	Post-dates July 27, 2018 certification date
10-11-18 email inquiry from the Commission (Erik Vink) to DWR (Greg Farley) and DWR's 10-12-18 reply	Post-dates July 27, 2018 certification date

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3/27/18 MWD WaterFix Workshop Presentation Outline	No evidence this document was presented to or considered by the Department as part of California WaterFix
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