

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

DELTA STEWARDSHIP COUNCIL
CASES.

Case No. C082944
Sacramento County Superior
Court Case No. JCCP4758,
34201380001534CUWMGDS
Judge: Michael P. Kenny

**RESPONDENT/CROSS-APPELLANT
SAVE THE CALIFORNIA DELTA ALLIANCE'S
REPLY BRIEF**

MICHAEL A. BRODSKY
State Bar No. 219073
Law Offices of Michael A. Brodsky
201 Esplanade
Upper Suite
Capitola, CA 95010
Telephone: (831) 469-3514
Fax: (831) 471-9705
Email: michael@brodskylaw.net

Attorney for Appellant Save the California Delta Alliance

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Overview

This reply brief focuses on the question of whether the California Administrative Procedure Act ("APA") requires adoption of the Delta Plan Performance Measures and Recommendations in compliance with APA adoption procedures, separate and apart from any requirements of the Delta Reform Act. Delta Alliance here responds to the Council's arguments that the "non-regulatory" provisions of the Delta Plan are immune from the APA because they do not require affirmative conduct of third parties. The Council is mistaken: Where an agency policy "does not require [any third party] to engage in any affirmative conduct" but "goes beyond merely prioritizing or allocating internal resources and may significantly affect others outside the agency" it "is subject to adoption as a regulation under the APA." (*Ctr. for Biological Diversity v. Dep't of Fish & Wildlife* (2015) 234 Cal. App. 4th 214, 261–262.)

Delta Alliance stated the de novo standard of review for an agency's compliance with the APA in its Opening Brief on Cross-Appeal at page 42. The Council has disputed the standard of review for other questions but has not disputed the de novo standard of review for APA compliance. Further, "any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA." (*California School Bds. Assn. v. State Bd. of Education* (2010) 186 Cal. App. 4th 1298, 1328.)

I. The Delta Plan Recommendations and Performance Measures Significantly Affect Others Outside The Agency And Must Be Adopted Pursuant To APA Procedures Regardless Of Whether They Require Affirmative Conduct Of Third Parties.

Both Appellant/Respondent/Cross-Respondent Delta Stewardship Council ("Council") and Respondents/Appellants State Water Contractors Et Al. and Federal Water Contractors Et Al. ("Contractors" or "Water

Contractors") take issue with Respondent / Cross-Appellant Save the California Delta Alliance's ("Delta Alliance") arguments in our Opening Brief on cross-appeal that "non-regulatory" provisions of the Delta Plan, including the Performance Measures and Recommendations, must be adopted in conformance with the Administrative Procedure Act ("APA"). Contractors and the Council argue that the "non-regulatory" provisions either do not, or cannot, require affirmative conduct of third parties and therefore cannot be "regulations" within the meaning of the APA.¹

Since the disputed provisions are not "regulatory" in the Contractors' and the Council's view, they need not comply with the APA. (Council Response Brief, p. 92 ["APA only applies to rules, that is provisions that have teeth"]; Contractors Response Brief, p.40 [APA cannot convey authority to adopt "regulations" where Council's organic statute, the Delta Reform Act, provides no such authority].)

Contractors and the Council are mistaken. Where an agency policy "does not require [any third party] to engage in any affirmative conduct" but "goes beyond merely prioritizing or allocating internal resources and may significantly affect others outside the agency" it "is subject to adoption as a regulation under the APA." (*Ctr. for Biological Diversity v. Dep't of Fish & Wildlife* (2015) 234 Cal. App. 4th 214, 261–262.)

Further, the Council states that the "Council is not aware of any case in which a court has held that a measure that is purely advisory nevertheless must comply with the APA." (Council Response Brief, p. 93.) However, several cases do hold expressly that "purely advisory" measures were subject to the APA. Although the "ACS [advisory committee] provides

¹ The Council has not engaged Delta Alliances explication of the regulatory effect of performance measure 3.1, which does require affirmative conduct of third parties. (*see* Delta Alliance Opening Brief at pp. 78–80.)

recommendations to the State Board that are *purely advisory*", this "fact does not exempt its policies and procedures from the APA." (*California School Bds. Assn. v. State Bd. of Education* (2010) 186 Cal. App. 4th 1298, 1330–1331, emphasis added; *see also Engelmann v. State Bd. of Education* (1991) 2 Cal. App. 4th 47, 51–52, 62 [policies adopted by advisory body for assessment of textbooks were subject to APA even though advisory body used policies to make only non-binding recommendations to State Board of Education regarding text book selection].)

Under the very expansive definition in the APA (Gov. Code § 113432.600), the term "regulation," includes many types of agency enactments that do not require affirmative conduct of third parties but are still subject to APA adoption procedures specified in Government Code section 11340.5, subd. (a).²

As shown below, the Delta Plan Performance Measures and Recommendations go "beyond merely prioritizing or allocating internal resources and may significantly affect others outside the agency" and are therefore regulations within the meaning of Government Code section 11342.600. (*Ctr. for Biological Diversity v. Dep't of Fish & Wildlife* (2015) 234 Cal. App. 4th at 262.)

² Regulations may include "agency guidelines, criteria, bulletins, manuals, instructions, orders, standards of general application or other rules." (Gov. Code § 11340.5.)

II. The Delta Plan Performance Measures Must Be Adopted As Regulations Because They: A) Affect Others Outside The Agency; B) Interpret, Make Specific, And Implement The Delta Reform Act; And C) Govern The Council's Procedures.

A. Implementation Of The Performance Measures Will Affect Third Parties And Cause Substantial Change To The Physical Environment.

In its principle brief, Delta Alliance explicated the two principle identifying characteristics of a regulation: 1) that the agency intends them to apply generally rather than to a specific case; and 2) that they interpret, implement, and make specific the law administered by the agency, here the Delta Reform Act. (See Delta Alliance Opening Brief, pp. 55–58 [explicating *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 571].)

The Council does not dispute these essential traits but argues that the Performance Measures and Recommendations cannot be regulations because they do not require affirmative conduct of any third party, do not "have teeth" in the Council's words. (Council Response Brief, p. 92.) Delta Alliance here shows that the performance fall within the APA definition of regulation, even though they do not require affirmative conduct of third parties, because they significantly affect third parties outside the agency.

The performance measures are not passive metering devices limited to measuring the progress of other Delta Plan components. Rather, they are policy enactments in their own right that the Council foresees being "implemented" and thereby causing numerous activities to be undertaken by third parties. The activities undertaken will result in substantial changes to the physical environment significantly affecting third parties.

The Delta Plan Amendments Programmatic Environmental Impact Report ("DPAPEIR") Chapter 4 discusses "General Types of Activities,

Potential Projects, And Construction Methods That Could Result With Implementation Of The Proposed Delta Plan Amendments." (SCDA MJN 001.)³ Chapter 4 then separately assesses the activities expected to result from the three distinct components of the Delta Plan Amendments: 1) "Implementation of the Proposed Delta Levee Investment and Risk Strategy Amendment" (§ 4.2, SCDA MJN 002); 2) "Implementation of the Proposed Conveyance, Storage Systems, and the Operation of Both Amendment" (§ 4.3, SCDA MJN 007); and 3) "Implementation of Performance Measures" (§ 4.4, SCDA MJN 016).

Implementation of the performance measures is considered as a project in its own right, with activities and impacts separate from the Policies and Recommendations of the Delta Plan.

Implementation of the performance measures is expected to result in numerous activities by third parties outside the agency . (See SCDA MJN 016 § 4.4 "General Types of Activities for Implementation of Performance Measures" [listing dozens of expected actions by third parties, such as "water supplier develop water management strategies to increase the conjunctive use of surface water and groundwater within the supplier service area" (SCDA MJN 019); "[i]ncreased surface water and groundwater storage," and [f]looding agricultural land during fallow or dormant periods" (SCDA MJN 021)].)

Implementation of the performance measures is expected to cause substantial change to the physical environment, including numerous

³ As explained in Delta Alliance's Motion for Judicial Notice filed herewith, Delta Alliance offers the Delta Plan Amendment PEIR, completed after judgment was rendered in the trial court, to show generally how performance measures are understood and may reasonably be expected to operate and not to contradict any record evidence that the Council relied upon in making its decisions.

significant and unavoidable adverse environmental impacts occurring throughout California. These performance measure implementation impacts are reported as separate from the impacts accruing to the Delta Plan's formal regulatory policies and recommendations. (*See, e.g.*, Table 5.11-24, SCDA MJN 041 [seven significant and unavoidable performance measure impacts for hydrology and water quality reported as distinct from hydrology and water quality impacts from implementation of strategies, policies, and recommendations].)

Implementation of the performance measures "could substantially change water supply availability to users of Delta water or require new or expanded entitlements." (SCDA MJN 042.) This impact to users of Delta water is considered significant and unavoidable. (*Id.* [impact 5.11-3 water supply availability].) Performance measure implementation that could affect water supply includes:

More gradual recession flows from the spring peak to the summer baseflow (Performance Sub-Measure 4.2 More Gradual Recession Flows at the End of the Wet Season) also have the potential to impact water supply reliability. A more gradual recession in flow would require greater release volumes from reservoirs in the late spring and early summer when there is generally no available export capacity (under existing regulations) in the Delta. This, combined with reduced storages north of the Delta that result from these releases, could reduce water supplies available to users in the Delta export area.

(SCDA MJN 050: 25–32.)

Twenty-five million Californians receive some or all of their drinking water from the Delta and over two million acres of farmland are irrigated with Delta water. (Wat. Code § 85004, subd. (a).) Implementation of the performance measures could reduce water supply to all of these users to the point that water supply impacts from the performance measures are considered "significant and unavoidable" under CEQA. (SCDA MJN 042.)

Given the actual conclusions of the subsequent environmental impact report on updated performance measures, it would have been reasonable to understand that the performance measures ultimately "may significantly affect others outside the agency" and were therefore regulations within the meaning of Government Code section 11342.600. (*Ctr. for Biological Diversity v. Dep't of Fish & Wildlife* (2015) 234 Cal. App. 4th at 262.)

B. The Performance Measures Include Policy Enactments Not Contained Elsewhere In The Delta Plan That Interpret, Make Specific, And Implement The Delta Reform Act, And Significantly Affect Third Parties.

The reader will recall the overall structure adopted by the Council for the Delta Plan: the Coequal Goals, the inherent objectives, and the other measures specified by the Delta Reform Act are translated into Delta Plan Core Strategies for achieving these objectives by the Council. The Core Strategies are then implemented by the Council in the Delta Plan through a set of Policies and/or Recommendations that carry into effect each strategy. (*See* B505 Structure of the Delta Plan).

However, much of the actual interpretation and implementation of the requirements of the Delta Reform Act is not found in the Policies or Recommendations at all, but rather is made specific and implemented *only* by the performance measures. The performance measures define "success" by setting policies for changes that the Delta Plan seeks to bring about in the physical environment even though those policy choices are not announced in any of the Delta Plan's Core Strategies or formal Policies or Recommendations.

A review of three portions of the Delta Plan submitted by the Council with its Motion for Judicial Notice filed with its Opening Brief on July 10, 2018 ("Council July 10, 2018 MJN"), will demonstrate how the

Delta Plan performance measures implement, interpret, and make specific the Delta Reform Act in a way not contained anywhere else in the Delta Plan and that significantly affects others outside the agency.

The three documents are: 1) Revised Delta Plan Chapter 3, A More Reliable Water Supply for California [Exhibit 1 to Declaration of Jessica Pearson filed with the Council's July 10, 2018 MJN ("Pearson Declaration")]; 2) Revised Delta Plan Appendix E, Performance Measures for the Delta Plan [Pearson Declaration Exhibit 2]; and 3) Performance Measure Data Sheets [Pearson Declaration Exhibit 3].

First, turning to Delta Plan Chapter 3, each chapter of the Delta Plan contains a "Policies and Recommendations" section found at the end of each chapter. The first part and bulk of each chapter describes the problems to be remedied and the Policies and Recommendations sections at the end of each chapter concisely sets out the formal policies and recommendations designed to take action to address those problems. (*See* B505.) The entirety of Chapter 3 is devoted to "Achieving A More Reliable Water Supply for California." (DSC MJN 002.) This remains unchanged from the adoption of the original Delta Plan in 2013. (B529.) The Policies and Recommendations section for Chapter 3 begins at bates stamped page DSC MJN 065. In the original Delta Plan it begins at B568.

Set out at the top left of page DSC MJN 065 and in the original at B568 are the four core strategies that the Council has devised to implement the Delta Reform Act requirement of providing California with a more reliable water supply:

- Increase water conservation and expand local and regional [water] supplies
- Improve groundwater management
- Improve conveyance and expand storage
- Improve water management information

(Pearson Decl., Exh. 1, DSC MJN 065; B568)

Turning next to revised Delta Plan Appendix E, Performance Measures, these same four core strategies are again set out in bold under the heading "Chapter 3: A More Reliable Water Supply for California," and here labeled as strategies 3.1–3.4. (Pearson Decl., Exh 2, DSC MJN 100.) The performance measures to implement each of core strategies 3.1–3.4 are set out on following pages DSC MJN 100–105 and there each performance measure is keyed to the strategy it implements.

At the top of page DSC MJN 101 is set out performance measure 3.9⁴, which implements Strategy 3.3:

A decrease in Delta exports during critically dry years, and an increase in Delta exports during wet years, with an overall decrease in Delta exports.

(DSC MJN 101.) Below the text of the performance measure are set out the "Metrics," "Baseline," and "Target" sections for this performance measure. The targets include a "significant decrease in annual total exports during critically dry years," a "significant increase in total exports during wet years," and most significantly:

Fifteen-year average total exports during all year types decreases by 5 percent or more from the average historical deliveries for the years 2000–2014 (5.1 million acre-feet (MAF)). This target is to be achieved by 2030.

(DSC MJN 101.)

This target establishes that, as the Council has determined, progress toward the Delta Reform Act requirement to "reduce reliance on the Delta in meeting California's future water supply needs," (Wat. Code § 85021),

⁴ In the Delta Plan Amendments PEIR this performance measure, and others, were given identifying numbers that do not always appear in the final documents.

will be achieved if the fifteen year average of total Delta exports decreases by 5% by the year 2030. The performance measure data sheet that explains this performance measure is Exhibit 3 to Delta Alliance's Motion for Judicial Notice filed herewith.⁵ As it is elsewhere in the developmental documents, this performance measure is titled "Matching exports to available water." (SCDA MJN 053.) At page SCDA MJN 056 the performance measure's implementation of Water Code section 85021's reduced reliance requirement is stated. At SCDA MJN 057 "reduce reliance on the Delta" as required by Water Code section 85021 is again stated as a basis for the performance measure.

However, none of the Policies or Recommendations for Chapter 3 at pages DSC MJN 065–079 contain any statement of matching exports to available water or any requirement or recommendation to reduce aggregate Delta exports. This has not changed from the original Delta Plan at B568–573. Policy WR P1, which is the Policy directed at reduced Delta reliance, allows for individual water suppliers to demonstrate reduced reliance by a "reduction in the amount of water used, or the percentage of water used, from the Delta watershed." (B568–569.) All water suppliers could meet this policy while *increasing* net Delta exports by diversifying their supply portfolio and reducing Delta water as a percentage of their overall supply. (See also Delta Plan Appendix G at B1314–1315 [noting water suppliers may comply with WR P1 by showing "as significant reduction in the

⁵ The Council submitted with its MJN the performance measure data sheets attached to the Council's resolution 2018-1 adopting the revised performance measures on April 26, 2018. For some reason, the data sheet supporting and explaining performance measure 3.9 was not included in the packet, however it was relied on by the Council throughout the development of the Performance Measure Amendment and CEQA process for the amendment.

amount of water used or in the percentage of water used from the Delta watershed"].)

An express goal of the Council and Delta Plan to reduce exports by 5% is introduced and expounded *only* in performance measure 3.9. This measure is not tracking progress on a requirement of some other aspect of the Delta Plan, but rather announcing a goal and implementing it. The 5% aggregate reduction supplements duly adopted regulation WR P1 and therefore itself must be adopted as a regulation: "'Regulation' means every rule, regulation, order, or standard of general application or the amendment, *supplement*, or revision [thereof]." (Gov. Code § 11342.600, emphasis added.)

The fundamental nature of this performance measure as a policy choice to implement the Delta Reform Act is illustrated by the different versions of this performance measure that were analyzed in the DPAEIR as alternative projects. In addition to the No Project Alternative, three alternatives to the Proposed Project for Delta Plan Amendments were evaluated in the DPAEIR. Alternative 1 is named the "Reduced Reliance on the Delta Emphasis." (SCDA MJN 082) The most significant difference, and one that causes significant changes in the respective environmental impacts, between the Reduced Reliance Alternative and the Proposed Project is in Performance Measure 3.9.

The DPAEIR describes differences between the Proposed Project and the Reduced Reliance Alternative:

This alternative would include implementation of revised performance measures as described in the Proposed Project, except PM 3.9 would be revised to reflect more aggressive targets for reducing Delta exports, in keeping with the emphasis of this alternative, which is to reduce reliance on the Delta. Specifically, PM 3.9 would be revised to seek a 5% decrease in Delta exports during below normal years, dry years, and critical years (as opposed to critical years only in

the Proposed Project); a 10 percent decrease in monthly exports during the months of July through September would be achieved by 2030; and a revised target for reducing 10-year average total exports during all year types by 20 percent, would be accomplished by 2040.

(SCDA MJN 090: 4–13.)

The Reduced Reliance Alternative was suggested to the Council for study in the EIR in written comments submitted by Delta Alliance. Delta Alliance's underlying interest is to reduce Delta exports to a manageable level and concomitantly increase through-Delta flows of fresh water. Delta Alliance's July 26, 2017, comment letter suggesting the Reduced Reliance Alternative is Exhibit 5 to Delta Alliances MJN filed herewith. Attachment Five to the letter is a redline version of Performance Measure 3.9 produced by Delta Alliance suggesting the revisions to reduced export targets that were adopted by the Council for study in the Reduced Reliance Alternative. (*See* SCDA MJN 116.)

While Delta Alliance is interested in reducing exports, Contractors, on the other hand, are interested in maximizing Delta exports and enjoying the water supply benefits of exported Delta water. The Contractors objected to Performance Measure 3.9, as it was in the Proposed Project, pointing out the significant negative effect on them as water suppliers of PM 3.9's reduction of long-term Delta exports by 5 percent or more:

the Draft PEIR confirms that the amended Performance Measure 3.9, "... specifically targets a reduction in long term average annual Delta exports of 5 percent or more, so impacts [to water supplies for users of water diverted from the Delta] are possible depending how other components of the Proposed Project are implemented and when water supplies are actually delivered versus timing of exports." (Draft PEIR, p. 5.11-210.) This reduction in the quantity of water that may be conveyed through the Delta appears to be one of the bases underlying the Council's conclusion that water supply impacts

will be significant and unavoidable within both the primary and extended study areas under CEQA.

(SCDA MJN 120[alterations original].)

Contractors further objected to Delta Alliance's Reduced Reliance Alternative PM 3.9 targets:

The Draft PEIR similarly states that the Council is considering alternatives that would revise PM 3.9 to seek "a 5% decrease in Delta exports during below normal years, dry years, and critical years (as opposed to critical years only in the Proposed Project); a 10 percent decrease in monthly exports during the months of July through September would be achieved by 2030; and a revised target for reducing 10-year average total exports during all year types by 20%, would be accomplished by 2040." (Draft PEIR, p. 5.11-208.) For all the reasons set forth herein, such revisions to PM 3.9 would be equally problematic and legally infeasible under the Delta Reform Act and CEQA.

(SCDA MJN 120, n.1.)

Performance Measure 3.9 significantly affects third parties outside the agency by reducing water supplies available for export. It also significantly affects third parties outside the agency in a positive way by increasing freshwater flows through the Delta and benefiting persons who swim, fish, boat, water-ski, wakeboard and otherwise recreate in the Delta by benefiting water quality, including Delta Alliance members. (VI CT 1740: 8–18.) This provides an example of how performance measures can be reasonably expected to affect others outside the agency.

It is telling that the interests in the competing demands of water supply versus through-Delta freshwater flows are contested over the benchmarks set in Delta Plan performance measures as much or more than in the language of Delta Plan Policies of Recommendations. The performance measures are significant policy enactments that interpret,

make specific, and implement the Delta Reform Act with profound effect on third parties outside the agency.

C. The Performance Measures Govern The Council's Procedures For Amending The Delta Plan And Will Thereby Significantly Affect Others Outside The Agency.

Having seen examples of how the performance measures may be expected to function in sections A and B above, partially using materials requested for judicial notice, we now return to showing that the performance measures are regulations relying only on the administrative record that was before the agency.

The pace and degree of success in achieving the performance measure policies and targets will largely determine when and how the Delta Plan will be amended. First, "the Delta Reform Act requires that the Delta Plan include performance measures to evaluate whether it is achieving its objectives over time." (B505.) The Delta Reform Act also requires the Council to periodically revisit the Delta Plan for consideration of amendments. (Wat. Code § 85300, subd., (c).) And the performance measures play a central role in determining when amendments will take place and what the content of those amendments will be:

Information learned from performance measures will be an important part of how the Council determines when and how to update the Delta Plan as part of the Evaluate and Respond phase of the adaptive management process.

(B505.)

The performance measures, therefore, govern the Council's procedures in assessing amendments to the Delta Plan and set standards for what future amendments should be crafted to achieve.

Where an agency's enactment is utilized to "govern its procedure" it is a regulation, unless subject to the very narrow internal management

exception. (Gov. Code § 11342.600.)⁶ The internal management exception applies "only to the internal management of the state agency." (Gov. Code § 11340.9, subd. (d).) The internal management exemption "applie[s] only to purely internal rules which govern an agency's procedure, not to rules that ha[ve] an external impact." (*Id.* at 261.) "Further, whether a regulation requires affirmative conduct by an affected party is not dispositive." (*Grier v. Kizer* (1990) 219 Cal. App. 3d 422, 437, overruled on other grounds by *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557.) "According to *Grier*, whether a rule requires affirmative conduct by an affected party is not dispositive." (*Ctr. for Biological Diversity v. Dep't of Fish & Wildlife* (2015) 234 Cal. App. 4th 214, 261.)

The internal management exception does not apply where an agency enactment designed to govern the agency's procedure may significantly affect others outside the agency. If the policy significantly affects others outside the agency, "it is subject to adoption as a regulation under the APA." (*Ctr. for Biological Diversity v. Dep't of Fish & Wildlife* (2015) 234 Cal. App. 4th 214, 262.)

⁶ Prior to 1987, agency enactments prescribing an agency's organization or procedure were subject to only limited application of the APA. Former Government Code section 11421(a) (1978) provided that only former sections 11421 and 11422 of the APA applied to such enactments. (*Winzler and Kelly v. Dept. of Indus. Relations* (1981) 121 Cal. App. 3d. 120, 126.) However, the 1987 amendments to the APA removed enactments prescribing an agency's organization or procedure from the list of exceptions to full application of the APA. (*See* Gov. Code § 11346.1 (2019) Law Revision Commission Comments.) The 1987 amendments remove any doubt whatsoever that the full ambit of APA requirements apply to "every rule, regulation, order, or standard of general application ... adopted by any state agency ... to govern its procedure." (Gov. Code § 11342.600.)

1. ***Center for Biological Diversity v. Dep't of Fish & Wildlife* provides authority for determining that the performance measures are regulations.**

In *Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, the agency adopted a mitigation measure, as part of its environmental review process, requiring agency biologists to evaluate a large number of water bodies in order to determine which water bodies would be stocked with fish for its Fishing in the City program. The Fishing in the City Program provided opportunities for children to enjoy fishing and also for vendors to win fish stocking contracts.

The measure imposed no obligation on citizens (including children) who might fish in the affected water bodies and imposed no obligation on fish stocking vendors. However, the agency's choice of which water bodies to select, and its adopted procedure for making those decisions, would *affect* both the vendors and citizens:

While BIO-226 does not require fish farmers and vendors to engage in any affirmative conduct, it will detrimentally affect them. Implementing BIO-226 will likely eliminate a number of water bodies from the Fishing in the City program to the detriment of farmers' businesses and the citizens who enjoy participating in the program

(*Ctr. for Biological Diversity v. Dep't of Fish & Wildlife* 234 Cal. App. 4th at 261.)

The agency argued that BIO-226 was "exempt from the APA as a rule governing the Department's internal management practices" because "the rule applies only to the Department and its biologists in making stocking decisions" and any impacts on vendors or the public were "incidental." (*Ctr. for Biological Diversity v. Dep't of Fish & Wildlife* 234 Cal. App. 4th at 260.)

The Court rejected the agency's arguments, holding that:

Where the challenged policy goes beyond merely prioritizing or allocating internal resources and may significantly affect others outside the agency ... such a policy goes beyond the agency's internal management and is subject to adoption as a regulation under the APA.

(*Ctr. for Biological Diversity v. Dep't of Fish & Wildlife* 234 Cal. App. 4th at 262.)

Here, the Council's performance measures fall squarely within the holding of *Biological Diversity*. The performance measures set the agency's policy, procedure, and criteria as to how it will evaluate the Delta Plan and will guide the agency's decisions in revising the Delta Plan. Amendment of the Delta Plan determined by the performance measures, including amendment of the regulatory and non-regulatory portions of the Delta Plan, has a significant impact on the physical environment and substantially affects others outside the agency. Like BIO-226, the performance measures do not impose obligations directly on the public but rather guide the Council and its staff in making decisions that will work to the detriment of some segments of the public (and to the benefit of others).

Implementation of the Delta Plan Policies and Recommendations has significant detrimental effects on others outside the agency. (*See, e.g.*, C15 ["the Delta Plan could encourage projects that expose people or structures to a significant loss, injury or death involving flooding, including flooding as a result of the failure of a levee or dam"]; C18 ["the Delta Plan could encourage projects that cause physical division of an established community"]; C19 ["the Delta Plan could encourage projects that convert farmland to nonagricultural use"]; C49 ["the Delta Plan could encourage projects that impair, degrade, or eliminate recreation facilities and activities"].)

An agency enactment "which concerns a matter of import generally to those dealing with the interpreting agency cannot escape scrutiny on the

ground it does no more than govern the agency's internal affairs." (*Goleta Valley Community Hospital v. Dept. of Health Servs.* (1983) 149 Cal. App. 3d 1124, 1128–1129.) Amendment of Delta Plan policies will increase detrimental effects in some areas on some Delta Plan constituencies where more aggressive action is taken and will decrease or eliminate these effects in some areas on other Delta Plan constituencies where less aggressive implementation is determined through the amendment process.

In short, among the public, there will be winners and losers in the Delta Plan amendment process. How and in what direction these policies will be amended, and who wins and who loses, will be largely determined by the standards and targets set forth in the performance measures. Like the standards for assessing water bodies set out in BIO-226, the performance measure standards for assessing amendments to the Delta Plan will significantly affect others outside the agency.

2. *California School Boards Association v. State Board of Education* provides authority for determining that the performance measures are regulations.

As explained in *California School Boards Association v. State Board of Education* (2010) 186 Cal. App. 4th 1298, the Advisory Commission on Charter Schools ("ACCS") was "created in 2001, as authorized by statute, and serves as an advisory body to the State Board [of Education]." (*Id.* at 1310.) Among other duties, the ACCS provided purely advisory recommendations to the State Board of Education ("State Board") as to whether petitions to establish charter schools should be approved or not. "ACCS provides recommendations to the State Board that are purely advisory" including any recommendations to approve or disapprove a petition to establish a charter school. (*Id.* at 1330.)

In 2007, the State Board approved a petition from Aspire Public Schools ("Aspire") for a statewide charter. (*Id.* at 1305.) Several parties

filed an action challenging this approval on several grounds including violation of the APA. (*Id.*) The APA claim alleged, *inter alia*, that policies and procedures used by the ACCS to assess petitions for charter schools and to formulate recommendations to the State Board with regard to those petitions had not been adopted pursuant to APA procedures. (*Id.* at 1329.) The State Board demurred to the APA claims on grounds, *inter alia*, that the "ACCS provides recommendations to the State Board that are purely advisory" and such non-binding advisory recommendations are not subject to the APA. (*Id.* at 1330.) The Court overruled the demurrer and held that "although it is undisputed that the ACCS is only an advisory body, this fact does not exempt its policies and procedures from the APA." (*Id.* at 1330–31.)

The metrics and parameters that the ACCS would use to determine whether or not to recommend approval or disapproval of a petition are analogous to the Delta Plan Performance Measures. The Performance Measures contain the metrics and parameters that will be used to determine if a particular policy of the Delta Plan is failing or succeeding and consequently what action should be taken as to amendment (or perhaps repeal) of that policy. Although neither the ACCS metrics or ultimate recommendations required any affirmative conduct of a third party (did not "have teeth" in the Council's words) and indeed were not binding on the State Board, they were both regulations within the meaning of the APA.

The impact of the Delta Plan Performance measures, although in most cases not directly binding on third parties, is more direct than were the procedures of the ACCS. The Delta Plan Performance Measures guide the actions of the Council in making decisions that *are* binding on third parties, including the amendment of its regulatory policies--and without the intercession of any intermediary advisory body.

3. *Engelmann v. State Bd. of Education* provides authority for determining that the performance measures are regulations.

In *Engelmann v. State Bd. of Education* (1991) 2 Cal. App. 4th 47, the State Board of Education ("State Board") utilized a Curriculum Framework and Criteria Committee ("Committee"), which recommended a curriculum framework "along with criteria for evaluating textbooks for compliance with the framework." (*Id.* at 51.) The framework and criteria were applied by a Commission through its subcommittees to evaluate textbooks being considered for adoption. (*Id.*) The full Commission then submitted recommendations on the adoption (or rejection) of textbooks to the State Board. (*Id.* at 52.) Following a public meeting, the State Board then made the final textbook determinations. (*Id.*) The Commission and its recommendations on textbooks were purely advisory. "The Commission is the body charged by the Legislature with *recommending* minimum standards, frameworks, evaluation criteria, and textbooks (after initially evaluating them) to the Board." (*Id.* at n. 4, emphasis added.)

Engelmann was a textbook publisher whose product, DISTAR, was evaluated by the Commission--applying the framework and criteria:

In connection with the framework and its evaluation criteria, the Department developed worksheets for use by the evaluation panels. These worksheets assigned weighted factors to the various criteria which cumulated in a total score intended to measure compliance with framework objectives....The Panels gave an unfavorable evaluation of DISTAR....in its July 1988 recommendations, the Commission specifically *recommended* DISTAR not be adopted.

(*Id.* at 52, emphasis added.) The State Board ultimately rejected DISTAR.

Engelmann filed a petition for a writ of mandate. "He asserted the procedures and criteria under which DISTAR was evaluated and found

wanting in 1988 are contained in regulations which are void for failure to comply with the APA." (*Id.* at 50–51.) The trial court "issued a writ of mandate commanding the Board to refrain from using those procedures and criteria until they had been promulgated as prescribed by the APA." (*Id.* at 50.) The Court of Appeal affirmed. (*Id.*)

The holding of the trial court and court of appeal that the APA applied was directed at procedures and criteria used by the Commission to formulate purely advisory recommendations to the Board. (*See California School Bds. Assn. v. State Bd. of Education* (2010) 186 Cal. App. 4th 1298, 1331 [citing *Engelmann* with the parenthetical "process utilized to select textbooks, including policies and procedures of advisory committees, is subject to APA"].)

The "assigned weighted factors" applied "to the various criteria which cumulated in a total score intended to measure compliance with framework objectives" used to evaluate the success or failure of a textbook are functionally indistinguishable from the Delta Plan performance measures used to evaluate the success or failure of a Delta Plan Policy or recommendation in achieving the objectives of the Delta Plan and Delta Reform Act.

III. The Delta Plan Recommendations Must Be Adopted As Regulations Because They Significantly Affect Others Outside The Agency.

The Delta Plan Recommendations bear the two essential attributes of a regulation: 1) the agency must intend it to apply generally rather than to a specific case; and 2) it must implement, interpret, or make specific the law administered by the agency. (*Tidewater*, *supra*, 14 Cal. 4th at 571.) Please see Delta Alliance's Opening Brief on Cross Appeal at pp.55–58 for application of the *Tidewater* test to the Delta Plan Recommendations. Like the Performance Measures, the Council has not disputed that the

Recommendations meet the *Tidewater* test but generally argues no enactment can be a regulation if it does not require affirmative conduct of third parties. The Council argues that the Recommendations cannot be subject to the APA because the Council "is not aware of any case in which a court has held that a measure that is purely advisory nevertheless must comply with the APA." (Council Response Brief, p. 93.).

California School Boards and *Engelmann* discussed above do, however, hold that purely advisory measures are subject to the APA. As established at length above, the test is not, as the Council argues, whether the measure requires affirmative conduct of third parties. (*Grier v. Kizer*, 219 Cal. App. 3d 422, 437, overruled on other grounds by *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557.) ; *Ctr. for Biological Diversity*, supra, 234 Cal. App. 4th at 261.) Rather the test for a measure that does not require affirmative conduct of third parties is whether the enactment bears the *Tidewater* attributes of a regulation *and* may significantly affect others outside the agency. (*Ctr. for Biological Diversity*, supra, 234 Cal. App. 4th at 261–262.)

Biological Diversity follows long-established California Supreme Court precedent that the APA should apply liberally to any "matter of serious consequence involving an important public interest." (*Armistead v. State Personnel Board* (1978) 22 Cal. 3d 198, 204, n.3 (en banc), quoting *Poschman v. Dumke* (1973) 31 Cal. App. 3d 932, 943.)

Here, the Delta Plan Recommendations are formatted in the same style and with imperative language similar to its regulatory Policies and could be readily submitted to the Office of Administrative Law. (See B455–465 for a compilation of all Policies and Recommendations in the original 2013 Delta Plan.) The Delta Plan describes the Recommendations as "priority recommendations, which are nonregulatory but call out actions essential to achieving the coequal goals." (B455.) The Council

acknowledges that it "firmly believes that its recommendations are well reasoned, and thus will be followed" (Council Response Brief, p. 92.)

The Delta Plan Program Environmental Impact Report (PEIR) attributes impacts to the Delta Plan's Policies, which were adopted as regulations pursuant to the APA, and to the Recommendations, which were not. Both are expected to cause changes in the physical environment and effects on third parties. (D6808: 5–11 ["Some of the policies and recommendations could directly or indirectly lead to construction of new or modified facilities throughout California"].)

The PEIR generally treats the Policies as having more influence than the Recommendations. (D6915.) However, in some cases the Recommendations are expected to have more significant environmental impacts than the Policies. (D7033: 6–9 [because other agencies implementing Delta Plan Policies would be required to implement Delta Plan mitigation measures, but agencies implementing Delta Plan Recommendations would not be required to implement the accompanying mitigation measures, Recommendations could have more significant impacts].)

The Council disputes the statement of Professor Asimow that "rulemaking provisions apply to the adoption of guidance documents, whether they are legally binding or not." (Council Combined Reply and Cross-Respondent's Brief, p. 92, quoting Asimow, Cal. Practice Guide: Administrative Law (The Rutter Group 2018) ¶ 25.32.) As shown above, the APA does apply to measures that bear the attributes of regulations and may significantly affect the public, regardless of whether they are legally binding. Professor Asimow is correct.

Professor Asimow indeed correctly asserts that *most* agency enactments found by courts to be unlawful underground regulations *are not legally binding*:

Most underground regulations are “guidance documents,” meaning agency pronouncements that are not legally binding but are intended to furnish guidance to the public or to the agency's staff (e.g., interpretations of statutes or regulations, rulings, bulletins and policy statements).

(Asimow, Administrative Law ¶ 25:1.) And again at section 25:70:

Guidance documents are *not legally binding* but are intended to provide guidance to the public and the agency staff. A guidance document adopted without APA compliance is invalid, unless it qualifies for an exemption from the APA rulemaking requirements.

(Asimow, Administrative Law ¶ 25:70, emphasis original.) “[G]uidance documents [often] state an agency's legal interpretation of a statute or prior regulation.” (*Id.*)

The Council's argument that Professor Asimow's citation to *Tidewater* misstates *Tidewater* is incorrect. The passage cited by the Council as standing for the proposition that an enactment must impose legally binding obligations in order to be a regulation subject to the APA is as follows:

A written statement of policy that an agency intends to apply generally, that is unrelated to a specific case, and that predicts how the agency will decide future cases is essentially legislative in nature even if it merely interprets the law.

(Council Response Brief, p. 93, quoting *Tidewater*, supra, at 574–575.) However, what the Court is saying is that an enactment that “merely interprets the law,” whether or not it has any binding effect on the conduct of third parties, is still legislative in nature.

“Legislative in nature” is not the same as imposing a legally binding obligation on third parties. “Legislative” is used in juxtaposition to “adjudicative.” Adjudicative determinations of law made in the course of administrative hearings disposing of an individual case are *not* subject to the APA. It is when an agency is acting in a quasi-legislative capacity (not in the course of adjudicating an individual case) that the APA expressly applies pursuant to the terms of Government Code section 11346, which states that “rulemaking procedures apply to the exercise of any quasi-legislative power.” (*Tidewater*, supra, at 575.)

The APA may also apply in many other non-adjudicatory settings as well, but it surely applies in a quasi-legislative setting, and that was the point the *Tidewater* court was making in the passage quoted by the Council. (*See Tidewater*, Supra, at 575.)

Here, the Delta Plan Recommendations interpret, implement, and make specific the Delta Reform Act by recommending specific actions that, in the Council's view, will be consistent with the mandates of the Delta Reform Act. It intends for a vast array of state, regional, and local public agencies to rely on its interpretation of the Delta Reform Act as found in the Recommendations as they implement the Delta Reform Act. Those agencies reliance on the Delta Plan Recommendations and implementation thereof will cause or contribute to 27 significant and unavoidable impacts affecting others outside the agency. (C8–C60). Impacts include "Substantial adverse effects on sensitive natural communities, including wetlands and riparian habitat," (C9), "substantial adverse effects on fish or wildlife species habitat," (C11), "exposure of people or structures to potential substantial adverse effects, including the risk of loss, injury, or death due to strong ground motion associated with seismic shaking," (C36), and "exposure of people or structures to potential substantial adverse effects, including the risk of loss, injury, or death involving landslides." (C41.)

The Delta Plan Recommendations bear the *Tidewater* attributes of a regulation and may significantly affect others outside the agency as elaborated in *Ctr. for Biological Diversity*. The Council was also acting in a quasi-legislative capacity within the meaning of Government Code section 11346 throughout promulgation of the Delta Plan. The Delta Plan Recommendations must be adopted in accordance with APA procedures.

Delta Alliance believes that its explication of which provisions of the Delta Plan must be legally enforceable as stated in its principle brief is correct, and that many provisions of the Delta Reform Act carried out by Recommendations should be adopted as legally binding policies that do require affirmative conduct of third parties. However, the

Recommendations do affect third parties and should also be adopted in compliance with APA procedures even where they do not require affirmative conduct of third parties.

IV. Conclusion.

In addition to the other issues argued in our Opening Brief, Delta Alliance respectfully urges the Court to hold that the Delta Plan performance measures and Delta Plan Recommendations must be adopted in accordance with APA procedures, submitted to the Office of Administrative Law, and Published in the California Code of Regulations.

Dated: April 8, 2019

Respectfully submitted,

Michael A. Brodsky
Law Offices of Michael A. Brodsky

/s/Michael A. Brodsky
Michael A. Brodsky
Attorney for Cross-Appellant / Respondent
Save the California Delta Alliance

CERTIFICATE OF COMPLIANCE

I certify that the attached **CROSS-APPELLANT/RESPONDENT Save the California Delta Alliance's Reply Brief** uses a 13 point Times New Roman font and contains 7,392 words. Dated: April 8, 2019
Michael A. Brodsky

/s/ Michael A. Brodsky

Michael A. Brodsky
Law Offices of Michael A. Brodsky
*Attorneys for Appellant/Respondent Save
the California Delta Alliancke*

DECLARATION OF SERVICE BY E-SERVICE

Case name: Delta Stewardship Council Cases
No.: C082944

I declare:

I am a member of the Bar of this State. I am 18 years of age or older and not a party to this matter; my business address is 201 Esplanade, Upper Suite, Capitola, CA 95010.

On April 8, 2019 I electronically served the attached Cross-**APPELLANT/RESPONDENT Save The California Delta Alliance's Reply Brief and Motion For Judicial Notice** by transmitting true copies via this Court's TrueFiling system addressed to the counsel of record as follows.

SEE ATTACHED SERVICE LIST

On the same date, I served the same document by placing a true copy thereof enclosed in a sealed envelope with an overnight delivery service, addressed as follows:

Clerk of the Court
Sacramento County Superior Court
720 Ninth Street
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 8, 2019, at Capitola, California.

Michael A. Brodsky
Declarant

/s/ Michael A. Brodsky
Signature

ELECTRONIC SERVICE LIST

Adam C. Kear, Chief Deputy General
Counsel
Robert C. Horton, Sr. Deputy General
Counsel
The Metropolitan Water District of Southern
CA
P.O. Box 54153
Los Angeles, CA 90054-0153
akear@mwdh2o.com
rhorton@mwdh2o.com

*Attorneys for The
Metropolitan Water
District of Southern
California*

Osha R. Meserve
Patrick M. Soluri
Soluri Meserve, a Law Corporation
510 8th Street
Sacramento, CA 95814
osha@semlawyers.com
patrick@semlawyers.com

*Attorneys for Local
Agencies of the North
Delta*

Daniel J. O'Hanlon
Rebecca Harms
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814
dohanlon@kmtg.com
rharms@kmtg.com

*Attorneys for San Luis &
Delta-Mendota Water
Authority and Westlands
Water District*

Rebecca R. Akroyd
San Luis & Delta-Mendota Water Authority
400 Capitol Mall, 28th Floor
Sacramento, CA 95814
rebecca.akroyd@sldmwa.org

*Attorneys for San Luis &
Delta-Mendota Water
Authority*

ELECTRONIC SERVICE LIST

Jon D. Rubin
Westlands Water District
400 Capitol Mall, 28th Floor
Sacramento, CA 95814
JRubin@WestlandsWater.org

*Attorneys for Westlands
Water District*

Charity Schiller
Best Best & Krieger LLP
3390 University Avenue, 5th Floor
P.O. Box 1028
Riverside, CA 92502
Charity.Schiller@bbklaw.com
Jennifer.Lynch@bbklaw.com

*Attorneys for State Water
Contractors, Alameda
County Flood Control and
Water Conservation
District, Zone 7, and San
Bernardino Valley
Municipal Water District*

Stephan C. Volker
Daniel P. Garrett-Steinman
Law Offices of Stephan C. Volker
1633 University Avenue
Berkeley, CA 94703
svolker@volkerlaw.com
dgarrett@volkerlaw.com

*Attorneys for North Coast
Rivers Alliance, Pacific
Coast Federation of
Fishermen's Associations,
San Francisco Crab Boat
Owners Association, and
Winnemem Wintu Tribe*

John Buse
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
jbuse@biologicaldiversity.org

*Attorneys for Center for
Biological Diversity*

Michael B. Jackson
429 West Main Street, Suite D
P.O. Box 207
Quincy, CA 95971
mjatty@sbcglobal.net

*Attorneys for C-WIN,
SCPA, AquAlliance, and
Restore the Delta*

E. Robert Wright
Friends of the River
1418 20th Street, Suite 100
Sacramento, CA 95811
bwright@friendsoftheriver.org

*Attorneys for Friends of
the River*

ELECTRONIC SERVICE LIST

Thomas H. Keeling
Freeman Firm
1818 Grand Canal Blvd., Suite 4
Stockton, CA 95207
tkeeling@freemanfirm.com

*Attorneys for Central Delta
Water Agency, South Delta
Water Agency, Lafayette
Ranch, Inc., and Cindy
Charles*

Steven A. Herum
Herum Crabtree Suntag
5757 Pacific Avenue, Suite 222
Stockton, CA 95207
sherum@herumcrabtree.com

*Attorney for City of
Stockton*

John M. Luebberke
City of Stockton
425 N. El Dorado Street
Stockton, CA 95202
john.luebberke@stocktongov.com

*Attorney for City of
Stockton*

Dante John Nomellini
Dante John Nomellini, Jr.
Daniel A. McDaniel
Nomellini, Grilli & McDaniel
Professional Law Corporations
235 East Weber Avenue
Stockton, CA 95202
ngmplcs@pacbell.net
dantejr@pacbell.net
damplc@pacbell.net

*Attorneys for Central Delta
Water Agency, South Delta
Water Agency, Lafayette
Ranch, Inc., and Cindy
Charles*

John H. Herrick
Law Offices of John H. Herrick
4255 Pacific Avenue, Suite 2
Stockton, CA 95207
jherrlaw@aol.com

*Attorneys for Central Delta
Water Agency, South Delta
Water Agency, Lafayette
Ranch, Inc., and Cindy
Charles*

S. Dean Ruiz
Mohan, Harris, Ruiz, Wortmann,
Perisho & Rubino, LLP
3439 Brookside Road, Suite 208
Stockton, CA 95219
dean@mohanlaw.net

*Attorneys for Central Delta
Water Agency, South Delta
Water Agency, Lafayette
Ranch, Inc., and Cindy
Charles*

ELECTRONIC SERVICE LIST

Andrea A. Matarazzo
Pioneer Law Group, LLP
1122 S Street
Sacramento, CA 95811
andrea@pioneerlawgroup.net

*Attorneys for Westlands
Water District*

Stefanie Morris
State Water Contractors
1121 L Street, Suite 1050
Sacramento, CA 95814
smorris@swc.org

*Attorney for State Water
Contractors*

Stanly Yamamoto, District Counsel
Anthony T. Fulcher, Senior Assistant District
Counsel
Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, CA 95118-3686
syamamoto@valleywater.org
afulcher@valleywater.org

*Attorneys for Santa Clara
Valley Water District*

William J. Brunick
Leland McElhaney
Brunick, McElhaney & Kennedy
1839 Commercenter West
San Bernardino, CA 92408-3303
bbrunick@bmblawoffice.com
lmcclhaney@bmblawoffice.com

*Attorneys for Mojave
Water Agency and
Antelope Valley-East Kern
Water Agency*

Xavier Becerra, Attorney General of
California
Mark W. Poole
Clifford T. Lee
Deputy Attorneys General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Mark.Poole@doj.ca.gov
Cliff.Lee@doj.ca.gov

*Attorneys for Amicus
Curiae Department of
Water Resources*

ELECTRONIC SERVICE LIST

Xavier Becerra
Attorney General of California Daniel A. Olivas
Senior Assistant Attorney General Deborah M. Smith
Supervising Deputy Attorney General Jeremy Brown
Daniel L. Siegel
Deputy Attorneys General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7829
Facsimile: (916) 327-2319
Email: dan.siegel@doj.ca.gov
Email: deborah.smith@doj.ca.gov
Email: jeremy.brown@doj.ca.gov

Attorney for Delta
Stewardship Council