

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
COMBINED OPENING/RESPONSE BRIEF**

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons that must be listed in this certificate under Cal. Rules of Court, rule 8.208.

Dated: October 30, 2018

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I. Introduction.

The Delta Stewardship Council ("Council") was appointed by the Legislature through the Sacramento-San Joaquin Delta Reform Act of 2009, Water Code §§ 85000–85350 ("Delta Reform Act" or "Act"), to address the crisis destroying the Sacramento-San Joaquin Delta ecosystem, which is the ecologically most important estuarine ecosystem on the West coast of the Americas.

The ecosystem is in collapse because excessive diversions of water from the Delta to irrigate croplands of the Central Valley and provide domestic supplies for Southern California deprive the ecosystem of crucial freshwater flows needed to nourish the estuary. The conflict between water system diversions and ecosystem needs also makes California's water system unreliable due to frequent curtailments and shutdowns wrought by court orders enforcing the federal Endangered Species Act and other irreconcilable conflicts with in-stream freshwater requirements.

The Legislature directed that the Council implement the Coequal Goals: to restore the health of the Delta 's ecosystem and make California's water system more reliable. Both goals depend on the Act's requirement for water suppliers throughout the state to increase their local and regional self-sufficiency in order to reduce the need for them to divert water from the Delta.

To accomplish these ambitious goals the Legislature directed that the Council promulgate the Delta Plan, to be the long-range, legally enforceable, management plan for the Delta. The Council largely failed in its mission because it refused to adopt legally enforceable regulations to implement most of the legislatively required components of the Delta Plan, instead opting for non-binding recommendations. In its effort to avoid properly adopting regulations, the Council failed to comply with the Delta Reform Act and also ran afoul of the rulemaking procedures required by the California Administrative Procedure Act.

It also failed to promulgate meaningful targets to measure progress in restoring the health of the estuary and adopted policies in key areas, particularly the pivotally important area of restoring the Delta's freshwater flows, that are hollow and ineffective.

The trial court agreed that the Delta Plan was defective and set it aside pending completion of ordered revisions to bring the Plan into compliance with the Act. In some areas, the trial court's orders do not fully bring the Plan into compliance with the Act and Delta Alliance here appeals from those portions of the trial court's judgement. The Council appeals from the trial court's orders correcting important aspects of the Delta Plan that the Council omitted or improperly implemented.

In the Cross-Appeal section of this brief, Delta Alliance urges this Court to: 1) require that the Council adopt legally binding regulations to

implement legislatively required components of the Act, particularly with regard water conveyance and water storage facilities, that the Council omitted entirely or inadequately addressed; 2) require that the Council revise its policy in the pivotal area of restoring freshwater flows through the Delta to comply with the requirements of the Act; and 3) comply with the rulemaking requirements of the APA.

In the Response section, set out separately, Delta Alliance urges this Court to affirm the trial court's holdings that: 1) the Council must adopt meaningful targets to measure progress in restoring the health of the estuary in compliance with the Act; 2) these targets must be adopted as legally binding regulations in compliance with the Act and the APA; 3) the Delta Plan must be revised to address the key infrastructure components necessary for a reliable water system--conveyance and storage--in compliance with the Act; and 4) in the crucial area of freshwater flows, the Plan must be revised to include quantified or otherwise measurable targets to track progress in restoring flows in compliance with the Act.

CROSS-APPELLANT'S OPENING BRIEF

II. Statement of Appealability And Jurisdiction

A. Appellate Jurisdiction And Venue.

Cross-Appellant Delta Alliance has appealed the final judgment in *Save the California Delta Alliance v. Delta Stewardship Council*, San Francisco Super. Ct. Case No. CPF-13-513049. Final judgments are

appealable. (Code Civ. Proc., § 904.1, subd. (a)(1)); *Griset v. Fair Political Practices Com* (2001) 25 Cal.4th 688, 700.) Final judgment granting in part and denying in part Delta Alliance's First Amended Petition for a writ of mandate and Complaint for Injunctive and Declaratory Relief was entered on November 28, 2016. (XXXIII CT 9837.¹) A writ of mandate commanding the Council to set aside the Delta Plan and Delta Plan regulations was issued by the Clerk on November 28, 2016. (XXXIII CT 9842.)

This district has appellate jurisdiction. (October 16, 2013, Revised Order Assigning Coordination Trial Judge, p.2 ["The coordination motion judge has designated the Court of Appeal, Third Appellate District, as the reviewing court having appellate and writ jurisdiction. (Code Civ. Proc., § 404.2; Cal Rules of Court rule 3.505(a).") [VII CT 1956].])

B. Nature Of The Action

Delta Alliance filed a petition for a writ of mandate pursuant to Code Civ. Proc., § 1085 and a complaint for declaratory relief pursuant to Code Civ. Proc., § 1060 seeking to set aside the Council's adoption of the Delta Plan and certification of the Delta Plan environmental impact report. Delta Alliance also sought declaratory relief to set aside the Council's adoption of

¹ Delta Alliance adopts the Council's record citation format: The Roman numeral is the clerk's designation of the document's volume number; the Arabic numeral is the clerk's page number for the page being cited.

the Delta Plan Regulations pursuant to Gov. Code, §§ 11342.2 & 11350.
(VI CT 1736.)

The trial court set aside the Delta Plan and the Delta Plan Regulations. The trial court found the CEQA issues to be moot and did not reach them. (XXIV CT 7124; XXVI CT 7509.)

C. Relief Sought In The Trial Court.

Delta Alliance sought to set aside the Delta Plan, Delta Plan Regulations, and Delta Plan Environmental Impact Report and a writ of mandate commanding the Council to revise the Delta Plan and Delta Plan Regulations to conform to law. Delta Alliance sought a declaration stating that the Council's actions approving the Delta Plan and Final Regulations are inconsistent with the Delta Reform Act and other applicable laws and that the approvals are therefore invalid and have no force and effect.

D. Judgment and Order appealed from.

The Judgment appealed from was entered on November 28, 2016. ((XXXIII CT 9837.) The trial court's May 18, 2016, Ruling on Submitted Matter, granting in part and denying in part Delta Alliance's petition for writ of mandate (XXIV CT 7161); and the trial court's July 11, 2016, Order Granting in Part and Denying in Part Motions for Clarification of Court's May 18, 2016, Ruling (XXVI CT 7509) are incorporated into the judgment and appealed from.

III. Statement of Fact

This statement of facts is included in both Delta Alliance's Cross-Appellant's Opening Brief and Delta Alliance's Respondent's Brief. (CRC 8.216, subd. (b)(2).)

A. Overview: The Delta, The Delta Reform Act, The Delta Stewardship Council, The Delta Plan, And The Bay Delta Conservation Plan.

1. The Delta And Its Crisis.

The Sacramento, San Joaquin, Cosumnes, and Mokelumne Rivers, along with their tributaries, drain the vast Delta watershed, which covers 45,000 square miles (30,000,000 acres) stretching from Fresno to the Oregon border. The Delta is formed at the confluence of these rivers and covers an area of approximately 1,300 square miles located in a triangular area roughly between Sacramento, Manteca, and Benicia. The Delta is the “largest estuarine system on the West Coast of the Americas.” (B429.²) The Delta’s myriad branching sloughs, marshes, and islands provide critical habitat for numerous species, a boating and recreational wonderland

² This is a citation to the administrative record that has been provided to the Court on hard drive. The administrative record is divided in to sections A–N. B505 refers to page 505 of section B. Leading zeros and the designation AR have been omitted for clarity.

enjoyed by hundreds of thousands of Californians each year, and a productive agricultural landscape rich in culture and history. (B469–477.)

The Delta is also the hub of California’s water infrastructure system; more than two-thirds of the state’s residents and over two million acres of farmland receive water exported from the Delta through state and federal pumping plants and canals. (Wat. Code § 85004, subd. (a).) The federally operated Central Valley Project (“CVP”), state-operated State Water Project (“SWP”), and locally operated regional canals form one of the largest contiguous pieces of water supply infrastructure in the world, reaching as far south as San Diego. (B429.) “Approximately half of the water that historically flowed into and through the Delta is now diverted for human use, never reaching the sea.” (B429.)

The vast amount of water exported through this water conveyance system from the Delta’s critical aquatic habitat causes an “ever spiraling tension over water exports and ecosystem decline.” (B470.) “After years of slow decline, the condition of the Delta’s watery ecosystem, as measured especially by the population of wild salmon and other native fishes, has gone critical. The list of causes begins, but does not end, with all those water withdrawals, a kind of tax that leaves the system in a condition of chronic drought.” (B430.)

2. The Legislative Response To The Delta Crisis: The Delta Reform Act Of 2009 Created The Delta Stewardship Council And Charged The Council With Promulgating The Delta Plan.

Respondent, the Delta Stewardship Council (“Council”), came to life because in 2009 the legislature found that the “Sacramento-San Joaquin Delta watershed and California’s water infrastructure are in crisis and existing Delta policies are not sustainable.” (Wat. Code § 85001, subd. (a).) The legislature responded to the crisis by enacting the Sacramento-San Joaquin Delta Reform Act of 2009, Water Code §§ 85000–85350 (“Delta Reform Act” or “Act”).

The Delta Reform Act is premised on the understanding that “[r]esolving the crisis requires fundamental reorganization of the state’s management of Delta watershed resources.” (Wat. Code § 85001, subd. (a).) To achieve the requisite reorganization the legislature determined that a “legally enforceable Delta Plan,” (Wat. Code § 85001, subd. (c)), was needed. It therefore created the Council and charged it with developing the Delta Plan, which is the “comprehensive, long-term management plan for the Delta” (Wat. Code § 85059.) Because of the urgency, vast scale, and complexity of the problem, the Delta Plan and the Council were intended by the legislature to be the “governance structure that will direct efforts

across state agencies” to manage the Delta. (Wat. Code § 85001, subd. (c).)

In the broadest terms, the purpose of the Delta Plan is to achieve the “coequal goals,” which are “providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.” (Wat. Code § 85054.)

3. Water Contractors’ Delta Initiative: The Bay Delta Conservation Plan.

The Bay Delta Conservation Plan (“BDCP”) was begun in 2006, (D8194), at the initiative of water agencies who contract to receive water from the Delta through the CVP and SWP (“Water Contractors”). (D8188.) The Water Contractors have financed the BDCP planning process to date. (D8192.)

The BDCP had two basic components. The first is to build two water diversion tunnels, each 40 feet in diameter, with the capacity to divert 9,000 cubic feet per second (“cfs”) from the Sacramento River at a point near the town of Hood, a few miles south of Sacramento. (I3820.) The Water Contractors will pay for the construction of the tunnels. (Wat. Code § 85089.) The cost of the tunnels has been estimated by the Water Contractors at close to \$17,000,000,000. (I9556.) The tunnels themselves have a design capacity of 15,000 cfs, which is the maximum carrying capacity of the canal network of the CVP and SWP. (D8207.) The BDCP calls for three intakes with a total capacity of 9,000 cfs., (I3820), which

could be increased to 15,000 cfs by adding additional intakes at some time in the future. (I3820; I9499.) By way of comparison, the total flow of the Sacramento River at Hood during the summer months is approximately 16,000 cfs. Whether at 9,000 cfs or 15,000 cfs, addition of the tunnels will substantially increase the ability of the CVP and SWP to divert water from the Delta.

Water is currently diverted from the Delta and into the CVP and SWP systems by the Jones and Banks pumping stations that are located near Tracy, about 50 miles south of the BDCP's proposed new intakes at Hood. Water that currently flows through the myriad of Delta channels and sloughs to reach those export pumps will be diverted at Hood and conveyed instead through the new tunnels directly to the pumps without flowing through the Delta. (L5125.)

The second component of the BDCP was to undertake habitat restoration or habitat creation projects in the Delta on an unprecedented scale as mitigation for the impact of water diversions on endangered species. The BDCP proposed to restore or create approximately 150,000 acres of habitat. (D8197–8200.) The Water Contractors have estimated the cost of habitat restoration and associated measures at close to \$5,000,000,000. (I9556.) Proponents of the BDCP intended to have it approved as a Habitat Conservation Plan (“HCP”) and a Natural Communities Conservation Plan (“NCCP”) by the respectively responsible

state and federal agencies under state and federal endangered species acts.

(D8192.)

However, during the planning process, the much touted Habitat Conservation Plan approach to the BDCP was dropped, the billions of dollars of restoration deleted from the project, and final approval given to BDCP Alternative 4A, which is a tunnels only project. (DSC MJN 352.) The 9,000/15,000 cfs diversion capacity of the tunnels remains as a massive water supply project. Alternative 4A has been named "California WaterFix." Its legal identity is still BDCP Alternative 4A.

WaterFix is highly controversial. Its claims that the new tunnels are themselves "conservation measures" is hotly disputed by opponents of the project. Opponents claim that new WaterFix diversions would result in massive adverse changes to the environment, including water quality, water levels and quantity throughout the Delta, and Sacramento River, and degradation of critical habitat for imperiled fish, terrestrial, and avian species. (DSC MJN 352–53.) It is also controversial for the unprecedented role given to the Water Contractors, who have a financial interest in diverting more water, in managing the Delta Ecosystem and making decisions about how much water may be diverted at any given time.

(L5173.)

B. The Relationship Of The BDCP / WaterFix To The Delta Plan And The Council's Interpretation Of The Delta Reform Act Allowing It To Omit Substantial Components Of The Delta Plan In Deference To The BDCP.

In 2009, after the BDCP planning process had been underway for three years, the Delta Reform Act included provisions providing that the BDCP “shall be considered for inclusion in the Delta Plan,” if certain specified criteria are met by the BDCP. (Wat. Code § 85320(a).) The Council determined that it would omit substantial portions of the Delta Plan, deferring responsibility for those aspects to the state and federal agencies pursuing the BDCP with the Water Contractors. (B470.)

Presenting staff recommendations at a Council meeting on November 15, 2012, as the Delta Plan was nearing completion, senior Council staff person Dan Ray summarized the Delta Plan's approach to the BDCP:

It will become part of the Delta Plan and it kinda docks in to the Delta Plan and we've left the Delta Plan in many ways deliberately sparse so that there is room for it to dock up, essentially.

(F418 at timestamp 1:03 [video of Council meeting].)

Examples of leaving the Delta Plan deliberately sparse in many ways include the following: Water Code section 85020(f) charges the Council to “[i]mprove the water conveyance system and expand statewide water

storage.” However, the Council determined that it had no authority at this time and would take no position on conveyance, including making no recommendations as to conveyance options whatsoever, due to the existence of the BDCP. (B1156.) The Delta Plan also has no legally enforceable provisions regarding expanding statewide storage. (B572 [“No policies with regulatory effect are included in this section”].)

The Delta Reform Act directs that the Delta Plan include measures to “[r]estore Delta flows and channels to support a healthy estuary and other ecosystems.” (Wat. Code § 85302, subd. (e)(4).) The legislature directed that specially developed Delta Flow Criteria inform Delta Plan measures to restore Delta flows. (Wat. Code § 85086, subd. (b).) However, the “Council has determined that the BDCP agencies are in the best position to complete the planning process, including defining acceptable ranges of exports and through-Delta flows.” (D59, emphasis added.) Therefore, the “Delta Plan does not suggest any particular [flow] objectives.” (D45.)

With regard to conveyance, Council Chair Isenberg initially believed that the Delta Reform Act required the Council to take action on conveyance. In a February 14, 2011, email to legislators, Chair Isenberg wrote, “[W]e will ultimately make some recommendations or take action” on “a preferred Delta water export facility” in future Delta Plan drafts. (M98.)

The subsequent decision to omit portions of the Delta Plan, including those dealing with conveyance and flow, tracks statutory construction of the Delta Reform Act that reads it as not conferring “broad regulatory authorities and jurisdiction” upon the Council. (M1178.004.) This interpretation of the Delta Reform Act was conducted in secret, deliberately shielded from public view, through correspondence and meetings between the California Resources Agency, California Department of Water Resources, the Water Contractors, and the Council.

Four months after Chair Isenberg’s “take action” on conveyance email, on May 23, 2011, Deputy California Resources Agency Secretary Jerry Meral, who was Governor Brown’s chief facilitator for the BDCP, wrote to Council Executive Officer Joseph Grindstaff, Council Chair Isenberg, BDCP official Karla Nemeth, and California Department of Water Resources Director Mark Corwin. Meral attached to his email “an analysis prepared by [Water Contractor representative] Greg Zlotnick at my request of the impacts of the draft Delta Plan on BDCP.” (M1178.)

Mr. Zlotnick’s statutory analysis concludes that “legislative history” shows that the Council’s “regulatory purview was very narrowly focused on the Delta, and particularly land-use decisions there that could negatively affect capabilities to achieve the coequal goals. The legislation was also specifically intended to insulate the BDCP from” Delta Plan requirements. (M1178.004.)

Secretary Meral asked that Mr. Zlotnick's memo be kept secret and that interpretation of the Delta Reform Act continue through private meetings: "I would ask that you not consider it 'input' to the process and not post it to the Web since it isn't a formal submittal on our or Greg's part. Perhaps the most productive way to proceed is for us to meet in person" to "go through the issues raised in Greg's memo." (M1178.)

Mr. Zlotnick's and Secretary Meral's input ultimately led to the Council promulgating Interpretive Appendix A to the Delta Plan, which interprets the Delta Reform Act consistent with Mr. Zlotnick's suggestions and is the basis for the Council deciding not to enact regulatory policies governing conveyance and for numerous other shortcomings in the Delta Plan.

Appendix A was not promulgated in conformance with the rulemaking procedure of the California Administrative Procedure Act, Government Code sections 11340–11530 ("APA"). It is "clear that the rulemaking procedures of the APA apply to any regulation and the definition of regulation includes every rule adopted to interpret the law." (*Capen v. Shewry* (2007) 155 Cal. App. 4th 378, 896, internal quotations and citations omitted) Interpretive rules not adopted in conformance with APA rulemaking procedures are "underground regulations" and void.

The guiding approach to the Delta Plan, founded on Appendix A, was to steer clear of the BDCP / now California WaterFix, and especially to

steer clear of any policy influencing conveyance or Delta flows that could impact the ability of the tunnels to export more water from the Delta. (B469 ["At this time, the Delta Plan does not make recommendations regarding Delta conveyance (see Appendix A)"].)

That approach was continued into the 2018 amendments to the Delta Plan regarding conveyance and storage. In response to the trial court's judgments against it finding that it failed to "Promote options for water conveyance and storage systems," as required by the Delta Reform Act, (XXIV CT 7161:18), the Council adopted amendments to "Improve Conveyance, Expand Storage, and improve the Operation of Both." (DSC MJN 068.) However, those amendments, especially the decision not to adopt any legally binding regulations, are still founded on the Council's underground regulation in Appendix A: "No policies with regulatory effect are included in this section. See Appendix A, The Delta Stewardship Council's Role Regarding Conveyance." (DSC MJN 069.)

IV. The Legislatively Defined Structure Of The Delta Plan And Its Components: Achievement Of The Coequal Goals; The Eight Inherent Objectives; The Five Ecosystem Measures; The Three Reliable Water Supply Measures; And The Six Ecosystem Subgoals.

A. The Coequal Goals.

The Coequal Goals describe the overarching policy imperatives of the Delta Reform Act and Delta Plan:

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

(Wat. Code, § 85054.) The fundamental purpose of the Delta Plan is to achieve the Coequal Goals.

B. The Eight Inherent Objectives.

The Legislature further expanded upon the Coequal Goals by declaring eight objectives to be achieved by the Delta Plan because they are legislatively determined to be "inherent" in the Coequal Goals:

The policy of the State of California is to achieve the following objectives that the Legislature declares are inherent in the coequal goals for management of the Delta:

(a) Manage the Delta’s water and environmental resources and the water resources of the state over the long term.

(b) Protect and enhance the unique cultural, recreational, and agricultural values of the California Delta as an evolving place.

(c) Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem.

(d) Promote statewide water conservation, water use efficiency, and sustainable water use.

(e) Improve water quality to protect human health and the environment consistent with achieving water quality objectives in the Delta.

(f) Improve the water conveyance system and expand

statewide water storage.

(g) Reduce risks to people, property, and state interests in the Delta by effective emergency preparedness, appropriate land uses, and investments in flood protection.

(h) Establish a new governance structure with the authority, responsibility, accountability, scientific support, and adequate and secure funding to achieve these objectives.

(Wat. Code, § 85020.)

C. The Measures, Subgoals, And Strategies.

The Coequal Goals and the eight Inherent Objectives are the requirements, stated in general form, that must be achieved by the Delta Plan. Further detail, that expands upon the requirements of the eight Inherent Objectives and the Coequal Goals is provided at Water Code section 85302, subdivisions (c), (d) & (e). These subdivisions mandate "measures" and "subgoals and strategies" that must be included in the Delta Plan.

1. The Five Ecosystem Measures.

Water Code section 85302, subd. (c) provides:

(c) The Delta Plan shall include measures that promote all of the following characteristics of a healthy Delta ecosystem:

(1) Viable populations of native resident and migratory species.

(2) Functional corridors for migratory species.

(3) Diverse and biologically appropriate habitats and ecosystem processes.

(4) Reduced threats and stresses on the Delta ecosystem.

(5) Conditions conducive to meeting or exceeding the goals in existing species recovery plans and state and federal goals with respect to doubling salmon populations.

The above measures all expand upon Inherent Objective (c), to restore the Delta ecosystem, by providing characteristics, that when achieved, will indicate a "healthy estuary and wetland ecosystem," that is mandated by inherent objective (c). (Wat. Code §85020, subd. (c).)

2. The Three Water System Reliability Measures.

Water Code section 85302, subd. (d) provides:

(d) The Delta Plan shall include measures to promote a more reliable water supply that address all of the following:

- (1) Meeting the needs for reasonable and beneficial uses of water.
- (2) Sustaining the economic vitality of the state.
- (3) Improving water quality to protect human health and the environment.

As stated in the text of subdivision (d) above, these measures all expand on the portion of the Coequal Goals that requires the Delta Plan to provide "a more reliable water supply for California." (Wat. Code, § 85054.)

3. The Six Ecosystem Subgoals and Strategies.

Water Code section 85302, subd. (e) provides:

(e) The following subgoals and strategies for restoring a healthy ecosystem shall be included in the Delta Plan:

- (1) Restore large areas of interconnected habitats within the Delta and its watershed by 2100.
- (2) Establish migratory corridors for fish, birds, and other animals along selected Delta river channels.

(3) Promote self-sustaining, diverse populations of native and valued species by reducing the risk of take and harm from invasive species.

(4) Restore Delta flows and channels to support a healthy estuary and other ecosystems.

(5) Improve water quality to meet drinking water, agriculture, and ecosystem long-term goals.

(6) Restore habitat necessary to avoid a net loss of migratory bird habitat and, where feasible, increase migratory bird habitat to promote viable populations of migratory birds.

These ecosystem subgoals in paragraphs (1)–(6) all relate back to ecosystem inherent objective (c), (Wat. Code § 85020, subd. (c) ["Restore the Delta ecosystem, including its fisheries and wildlife as the heart of a healthy estuary and wetland ecosystem"]), and provide the concrete ecosystem "goals" that are to be achieved by the ecosystem "measures" specified in Water Code section 85302, subd. (d).

The fundamental purpose of the Delta Plan is to achieve the two Coequal Goals (Wat. Code §85054.). The Coequal Goals are to be achieved through implementing the eight Inherent Objectives. (Wat. Code § 85020.) Further, achievement of the Coequal Goals and eight Inherent Objectives requires implementing the measures, subgoals and strategies of Water Code section 85302. This is the structure the Delta Reform Act requires the Delta

Plan to take.³

D. The Requirement For A Legally Enforceable Delta Plan: The Disagreement Between The Council And Delta Alliance.

The Council set out essentially the above understanding of the Delta Reform Act's requirements for the Delta Plan in a section of the Delta Plan Environmental Impact Report titled "Delta Plan Purpose And Project Objectives" found at pages D6788–6789 of the administrative record. There, the Council concluded that "The fundamental purpose of the Delta Plan, therefore, is to achieve the coequal goals and all of the inherent subgoals and objectives listed above [in Wat. Code § 85020]." (D6789.)

The disagreement between the Council and Delta Alliance is the extent to which the legislatively required components of the Delta Plan must be adopted as legally enforceable regulations, promulgated in compliance with the APA, and published in the California Code of Regulations.

The Legislature directed that the Delta Plan is to be a “legally enforceable Delta Plan,” (Water Code § 85001, subd. (c)), that is “the comprehensive, long-term management plan for the Delta as adopted by the council in accordance with this division.” (Wat. Code § 85059.)

³ The legal requirements for the Council to include and adopt as regulations performance measures for the Delta Plan, and the application of Water Code section 85308, are addressed separately in the Respondent's section of this brief.

Accordingly, the Delta Plan must contain legally enforceable regulatory policies that comprehensively advance the two Coequal Goals and each of the eight Inherent Objectives. The role of the Delta Plan is as a regulatory document. In addition, even those portions of the Delta Plan that are not regulations, but are "guidelines," as defined by the APA, must also be adopted in conformance with APA requirements for guidelines and published in the Code of Regulations.

The Council has promulgated legally enforceable regulations in only a fraction of the areas addressed by the eight Inherent Objectives. The Council views the Delta Plan as primarily an educational and hortatory document that provides guidance and non-binding recommendations. The Council's "Statement of Reasons" for the Delta Plan explains the Council's position: "Primarily, the Delta Plan functions as a strategic document because it provides guidance and recommendations to cities, counties, and State, federal, and local agencies to restore the Delta ecosystem and provide a more reliable water supply for California." (N204.)

Despite the requirement for a "legally enforceable Delta Plan," (Wat. Code § 85001, subd. (c)), the Delta Plan is composed mostly not of legally enforceable provisions but rather of generalized discussions about the problems facing the Delta followed by nonbinding "Recommendations."

As the Delta Plan itself explains, the “73 Recommendations,” (B415, 432), within the Delta Plan are “nonregulatory” and merely “call attention to tasks being done or to be done by others.” (B432, 445.) The Delta Plan also contains “14 Policies” that are “legal requirements.” (B432.) These 14 Delta Plan Policies have been adopted as regulations and approved by the California Office of Administrative Law in conformance with the APA (codified at 23 CCR § 5001–5016.⁴) However, the 14 Policies do not come close to addressing all of the Inherent Objectives and other mandatory requirements of the Act.

V. The Trial Court Ruling In *Save The California Delta Alliance v. Delta Stewardship Council*, Super. Ct. of Cal., Co. of S.F., Case No. CPF13513049.

A. The Trial Court's Holding.

1. The trial court held that the Council is not required to adopt legally enforceable regulations with regard to conveyance and storage pursuant to Inherent Objective (f) ("Improve the water conveyance system and expand statewide storage"). (XXVI CT 7516.)

Implicit in the trial court's holding as to conveyance and storage was rejection of Delta Alliance's argument that the Delta Plan must contain

⁴ The Delta Plan regulations are found at N1 of the administrative record. 23 CCR 5001 is the definitions section and 23 CCR 5002 prescribes the form of findings required. 23 CCR 5003–5016 are the fourteen regulatory policies that substantively implement select portions of the Delta Reform Act.

legally enforceable regulatory policies that advance the two Coequal Goals (Wat. Code §85054), the eight Inherent Objectives (Wat. Code § 85020), and the six ecosystem subgoals. (Wat. Code § 85302.)

2. The trial court held that Delta Alliance's claims that interpretive Appendix A and the BDCP Covered Activity Consistency Rule contained unlawful underground regulations were not ripe for review. (CT XXIV 7156–57.)

3. The trial court held that the Delta Plan's flow policy did not violate the Delta Reform Act as Delta Alliance had argued. (CT XXIV 7159:8–11.)

B. The Trial Court's Reasoning.

1. Enforceable Regulations for Conveyance and Storage.

The trial court's holding is found by reading its May 18, 2016, Ruling on Submitted Matter (XXIV CT 7155–7161) in conjunction with its July 11, 2016, Order Granting in Part and Denying in Part Motions for Clarification of Court's May 18, 2016 Ruling. (XXVI CT 7509.)

Before the trial court, Delta Alliance alleged that "The Council Has Adopted Numerous Underground Regulations" (VII CT 1808) and alleged that all of the Delta Plan Recommendations, even though not legally enforceable, were illegally adopted because they are "guidelines" as defined by the APA but were not adopted pursuant to APA requirements applicable to guidelines. (VII CT 1811:17–25; 1812:1–7.)

Delta Alliance further argued that the Delta Reform Act requires that the Delta Plan include one or more legally enforceable provisions that advance each of the two Coequal Goals, the eight Inherent Objectives, and the six ecosystem subgoals. (XV CT 4442–4443.) Delta Alliance expanded, in particular, on the Council's failure to adopt legally enforceable regulations to advance Inherent Objective (f): "Improve the water conveyance system and expand statewide water storage." (Wat. Code § 85020, subd. (f).) (XV CT 4451–4453.)

The trial court did not adopt Delta Alliance's explanation of the structure of the Delta Reform Act with regard to which elements of the Delta Plan must be legally enforceable, and instead turned to Water Code section 85308 for guidance.

The trial court held that the six subdivisions of section 85308 provide a checklist of the legally enforceable components required to be included in the Delta Plan. "Section 85308 provides that the 'Delta Plan shall meet all of the following requirements ...' further bolstering a finding that the section provides a checklist for Delta Plan content. ... As section 85308 is the lens through which the Court view the Delta Plan, and the Delta Plan is to be legally enforceable, so must the section 85303 components." (XXVI CT 7514.)

The Delta Plan contained no regulatory policies with regard to conveyance or storage. (B572.) With regard to conveyance, the council

elected to remain entirely silent, refraining from even adopting any Recommendations. (B1157 [the "Delta Plan likewise does not include any Recommendations (i.e. opinion preferences) regarding conveyance"].)

In its May 18, 2016, Ruling on Submitted Matter, the trial court acknowledged that "Petitioners argue the Delta Reform Act requires the Delta Plan to include legally enforceable policies regarding conveyance and storage" and quoted Delta Alliances citation to Inherent Objective (f) at Water Code section 85020, subd. (f). (XXIV CT 7159:23–28.)

The trial court then noted that "The Delta Reform Act requires the Delta Plan to "*promote options* for new and improved infrastructure relating to the water conveyance in the Delta, storage systems, and for the operation of both to achieve the coequal goals." (XXIV CT 7160:24–27 [quoting Wat. Code § 85304].) The trial court held that "failure to promote options for water conveyance and storage systems is a violation of the Delta Reform Act." (XXIV CT 7161:1–2.) The trial court ordered that the Delta Plan and any applicable regulations be revised to, *inter alia*, "Promote options for water conveyance and storage systems." (XXIV CT 7161:18.)

Delta Alliance understood the trial court's ruling to require that the Delta Plan be revised to include legally binding regulations for both conveyance and storage. However, the Council filed a motion for clarification of the trial court's ruling. (XXV CT 7256.) The Council sought "clarification that the Court is not requiring the Council to promote options

with regulations, as opposed to non-regulatory Delta Plan revisions."

(XXVI CT 7516.)

The trial court's Order on Motions for Clarification provided that "'promote options' does not implicate a regulatory requirement, and so the Court leaves it to Respondent's discretion whether to 'promote options' by regulation or recommendation." (XXVI CT 7516.)

2. Appendix A As Unlawful Underground Regulation.

The trial court held these issues would not be ripe until and unless a BDCP project comes before the Council. (XXIV CT 7157.) A BDCP project, BDCP Alternative 4A / California Waterfix, is now currently before the Council.

3. Flow Policy.

The trial court held that the Council had utilized best available science making the flow policy consistent with the Delta Plan. (XXIV CT 7159:8–11.)

VI. Argument.

A. The Trial Court's Reversible Errors

1. Enforceable Regulations For Conveyance And

Storage/ Appendix A As Unlawful Underground Regulation.

The trial court committed reversible error when it held that there is no requirement for the Council to implement legally enforceable conveyance and storage provisions and no requirement to conform with APA procedures because:

1) The Delta Reform Act requires the Council to promulgate legally enforceable regulations to advance each of the Eight Inherent Objectives, including Inherent Objective (f) "Improve the water conveyance system and expand statewide storage." (Wat. Code § 85020, subd. (f).) These regulations that must be adopted pursuant to APA procedures.

2) All Delta Plan components that meet the definition of "guideline" in Government Code section 11340.5, subd. (a) must be adopted through APA rulemaking procedures, regardless of whether the guideline is legally enforceable, and all of the Council's Recommendations, including those directed to Conveyance and Storage are guidelines within the meaning of section 11340.5, subd. (a).

3) The Council relied on Appendix A for its interpretation of the Act allowing it to avoid addressing conveyance. Appendix A is an underground regulation and the Council's actions founded thereon are void.

2. Flow Policy.

The trial court referred to its decision in *North Coast Rivers Alliance* that the Delta Plan utilized best available science in connection with flow objectives. (XXIV CT 7159 [referring to reasoning at XXIV CT 7139–7149].) Delta Alliance made different arguments than North Coast. Delta Alliance argued that the Act requires the Council to take steps to restore Delta Flows and that the Council's flow policy does not advance restoring Delta flows at all, but instead defers to the BDCP. Delta Alliance *did not* argue that the Council must adopt flow criteria in a report called the 2010 Flow Criteria Report. The court did not address Delta Alliance's arguments.

B. Standard of Review.

1. The Question of Whether The Council Correctly Interpreted The Delta Reform Act Is Reviewed De Novo.

Adoption of the Delta Plan and Delta Plan regulations were quasi-legislative acts of the Council, reviewed by the trial court pursuant to Code Civ. Proc., § 1085. Under traditional mandate, and C.C.P. § 1085, all purely legal questions are reviewed de novo. (*City of Alhambra v. County of Los Angeles* (2012) 55 Cal. 4th 707, 718.) In “a traditional mandamus proceeding ... legal issues, such as issues of statutory construction, are reviewed de novo.” (*Cal. Chamber of Commerce v. Brown* (2011) 196 Cal. App. 4th 233, 248 n.1.) All questions of statutory construction are reviewed

de novo. (*California Chamber of Commerce v. Brown* (2011) 196 Cal. App. 4th 233, 248.) “A court independently determines” whether “the agency acted within the scope of its authority.” (*Plastic Pipe & Fittings Ass’n v. Cal. Bldg. Standards Com.* (2004) 124 Cal. App. 4th 1390, 1406.) The Court must conduct an independent review to determine if the agency correctly interpreted its legislative mandate, without deference to the agency’s interpretation. (*Clovis Unified Sch. Dist. v. Chiang* (2010) 188 Cal. App. 4th 794, 798 [articulating “respectful non-deference” standard].)

2. Compliance With The APA Is Reviewed De Novo,

“Whether an agency action constitutes a regulation is a question of law that we review de novo.” (*County of San Diego v. Bowen* (2008) 166 Cal. App. 4th 501, 517.) Courts “determine the lawfulness of agencies' compliance with those rule-making procedures [of the APA] entirely de novo, simply substituting their judgment on that question for that of the agencies.” (*Cal. Advocates for Nursing Home Reform v. Bonta* (2003) 106 Cal. App. 4th 498, 506.)

Underground interpretations receive no deference from courts. “To give weight to an improperly adopted regulation ... would permit the agency to flout the APA We conclude we can give no weight to the DLSE’s interpretation” at issue. (*Tidewater*, *supra*, 14 Cal. 4th at 576.) An administrative interpretation, unless validly adopted, “merits no weight as

an agency interpretation.” (*Armistead v. State Pers. Bd.* (1978) 22 Cal. 3d 198, 205.)

3. Questions Of An Exercise Of Agency Discretion Are Reviewed Under The Arbitrary And Capricious Standard.

In “[a] traditional writ of mandate under Code of Civil Procedure section 1085 ... the trial court reviews the challenged administrative action to determine if it was arbitrary, capricious, or entirely lacking in evidentiary support” (*Sheldon v. Marin County Empls. Ret. Ass’n.* (2010) 189 Cal. App. 4th 458, 463.) *See also* California Civil Writ Practice § 2.38B (CEB 2014) (“[in] a traditional mandamus action, the reviewing court applies an abuse of discretion standard”). Out of respect for the separation of powers and the agency’s presumed expertise within its scope of authority, review is limited and a court may not reweigh the evidence or substitute its judgment for that of the agency. (*Cal. Hotel & Motel Ass’n v. Indus. Welfare Comm’n* (1979) 25 Cal. 3d 200, 212.) The California Supreme Court has articulated the standard of review as follows:

A court will uphold the agency action unless the action is arbitrary, capricious, or lacking in evidentiary support. A court must ensure that an agency has adequately considered all the relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.

C. The Issues Are Not Moot.

The Council argues that the trial court's ruling requiring new conveyance and storage provisions is moot because the Council has adopted new conveyance and storage provisions, which it argues comply with the trial court's writ. (Council Opening Brief, pp.41–44.) The trial court ordered, and the Council adopted, only non-binding recommendations.

The Council does not claim that it adopted any legally binding regulations with regard to conveyance. (Council Opening Brief, p.42 [subsequent to trial court ruling, Council adopted "recommendations concerning water conveyance, system storage and the operation of both"].)

At page 51 of its Opening Brief, the Council claims that the 2013 Delta Plan did include a storage regulation. It points to language mentioned in Regulation WR P1. However, "stormwater capture and use," and "conjunctive use projects" do not "expand statewide storage" and may not involve any new storage capacity at all. The reference to "local and regional water supply and storage projects" in WR P1 is also tangential and not intended to fulfill any requirement for a regulation addressing storage.

This is made clear by both the original 2013 Delta Plan and the updated 2018 Chapter 3. At the end of the section in each document headlined "Improve Conveyance, expand Storage, and Improve the Operation of Both" the Delta Plan states that "No policies with regulatory effect are included in this section" (DSC MJN 069; B572.) The Council

purposely intended *not* to adopt any policies with regulatory effect for conveyance and storage and it carried out its intention. The Council's post hoc litigation strategy of scouring the Delta Plan for disparate language mentioning storage or conveyance must fail.

In any event, the Council's argument that it adopted conveyance regulations in the 2013 Delta Plan would not moot the issue on appeal as it remains disputed on the same facts in existence at trial.

The Council does not claim that it adopted its Recommendations for conveyance and storage in compliance with APA rulemaking requirements for guidelines pursuant to Government Code section 11340.5, subd. (a).

Therefore, the Council's mootness argument does not reach these issues.

The Council continues to rely on Interpretive Appendix A. Its status as an underground regulation is not moot.

The Council did not amend flow policy ER P1, challenged by Delta Alliance, so that issue is not moot.

D. The Delta Reform Act Requires That The Council Enact Legally Enforceable Regulations To Advance

**The Inherent Objective To Improve the water
Conveyance System And Expand Statewide Storage.**

**1. The Entire Structure Of The Delta Plan Does Not Comply
With Legislative Intent For A Legally Enforceable Delta
Plan.**

In its briefing before this Court and in the trial court, the Council points to its 73 non-binding Recommendations as implementing substantial portions of the Act. This is a post-hoc litigation rationale that does not comport with the Council's contemporaneous and binding Statement of Reasons. In the Statement of Reasons, the Council explained that legislative intent was fulfilled exclusively through the 14 adopted regulations and not the 73 non-binding Recommendations:

The Delta Plan serves as a comprehensive management plan in guiding the State and local agency actions related to the Delta to achieve the coequal goals (Water Code section 85300). Primarily, the Delta Plan functions as a strategic document because it provides guidance and recommendations to cities, counties, and State and federal, and local agencies to restore the Delta ecosystem and provide a more reliable water supply for California. The Delta Plan also contains a number of significant regulatory policies with which cities, counties, and state and local agencies are expected to comply. Collectively, these regulatory policies will further the legislative intent contained in the Delta Reform Act, codified in Water Code sections 85000 to 85350. The Delta Plan provides the basis for the regulatory policies included in this document and fulfills the legislative intent of serving as a legally enforceable plan.

(N204.) The Statement of Reasons justifies a Plan where the "regulatory policies will further the legislative intent contained in the Delta Plan," but where, in fact, most of the legislatively required components of the Plan are

not covered at all by the regulations. The Delta Plan, therefore, does not in fact further most of the legislative intent of the Act.

The last sentence of the Statement of Reasons is particularly paradoxical. "The Delta Plan provides the basis for the regulatory policies included in this document and fulfills the legislative intent of serving as a legally enforceable plan." The statement that the non-regulatory, non-enforceable bulk of the Delta Plan that provides the basis for the 14 regulations, thereby itself becomes "a legally enforceable plan" has no basis in law or logic.

The Statement of Reasons in actuality establishes that the Delta Plan itself is *not* legally enforceable but serves as an explanation for the 14 regulations that cover only a small fraction of the Act's requirements. The Council got off on the wrong foot early on when it chose this structure for the Delta Plan. The Act calls for a legally enforceable *Delta Plan*. It does not call for an unenforceable Delta Plan that explains a few regulations.

The question of which components of the Delta Plan must be legally enforceable is one of statutory construction and the task of the parties and Court is to determine legislative intent. "Under the rules of statutory construction, our primary task is to determine the Legislature's intent. The first step in the interpretive process is to examine the Legislature's chosen language, which is the best indicator of legislative intent." (*Joannou v. City of Rancho Palos Verdes* (2013) 219 Cal. App. 4th 746, 752.)

The Legislature's chosen language is that the Delta Plan is to be a “legally enforceable Delta Plan,” (Water Code § 85001, subd. (c)), that is “the comprehensive, long-term management plan for the Delta as adopted by the council in accordance with this division.” (Wat. Code § 85059.) The plain meaning of these provisions is that the Delta Plan is to be comprehensive and legally enforceable. "In accordance with this division" can only mean that the Delta Plan must contain all of the components specified by Division 35 of the Water Code, and that all of those components must be legally enforceable.

The Act defines "Delta Plan" as: “'Delta Plan' means the comprehensive, long-term management plan for the Delta as adopted by the council in accordance with this division.” (Wat. Code § 85059.) Black's Law Dictionary defines "management" as "The act or system of controlling and making decisions for a business, department, etc." (Black's Law Dictionary (10th ed. 2014).) "Control" is inherent in management. Control cannot be accomplished through recommendation or advice. By “enacting this division, it is the intent of the Legislature to ... establish a governance structure that will direct efforts across state agencies to develop a legally enforceable Delta Plan.” Water Code § 85007(c). "Governance structure" and "direct efforts" are not compatible with the Council's soft reading of the Act.

"In reviewing this question of statutory construction de novo, we begin with several guiding principles. We start with the statute's words, which are the most reliable indicator of legislative intent. We interpret relevant terms in light of their ordinary meaning, while also taking account of any related provisions and the overall structure of the statutory scheme to determine what interpretation best advances the Legislature's underlying purpose." (*In re R.T.* (2017) 3 Cal. 5th 622, 627.) Everything surrounding the Legislature's enumeration of required Delta Plan components expressly and impliedly indicates these components are all supposed to be legally enforceable.

"We read the language of a statute in context and in light of the nature and purpose of the statutory scheme." (*Modesto City Schools v. Education Audits Appeal Panel*, 123 Cal. App. 4th 1365, 1375 (2004).) The Legislature found that the "Sacramento-San Joaquin Delta watershed and California's water infrastructure are in crisis and existing Delta policies are not sustainable." (Water Code § 85001, subd. (a).) The nature of the Delta Reform Act is crisis management. The purpose of the Delta Reform Act is to address the water system and Delta ecology crisis through a legally enforceable and "comprehensive" management plan. The plain import is that the legislatively prescribed components of the Delta Plan are to be legally enforceable.

The Council has interpreted the Delta Reform Act to require only a

Delta Plan that is mostly composed of discussions about problems facing the Delta and California followed by non-binding recommendations. It sees its role as a motivational coach, and not a regulator. The Council's reading is not consistent with the crisis nature and management purpose of the Delta Reform Act. The Council's Statement of Reasons is not consistent with the requirements of the Act for a legally enforceable Delta Plan. To comply with the Act, the entire Plan must be extensively and structurally revised and put in a form that can be submitted to OAL and approved as a comprehensive set of regulations implementing all components required by the Act.

2. The Delta Plan Must Contain Legally Enforceable Provisions To Address Conveyance And Storage.

The Council disagrees with the trial court's holding that the six subdivisions of section 85308 provide a checklist of the legally enforceable components required to be included in the Delta Plan. (XXVI CT 7514 ["As section 85308 is the lens through which the Court views the Delta Plan, and the Delta Plan is to be legally enforceable, so must the section 85303 components].)")

The Council relies on Water Code section 85304, which provides that the Delta Plan "shall promote options" for conveyance and storage, and argues that "promote options" does not implicate a regulatory requirement.

However, there is nothing in the phrase "promote options" as used in

section 85304 that would indicate a non-regulatory approach.

"[A]dministrative officers [have] the power to ‘fill up the details’ by prescribing administrative rules and regulations to *promote* the purpose of the legislation and carry it into effect." (*Kugler v. Yocum* (1968) 69 Cal. 2d 371, 376, emphasis added.) "The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the “power to fill up the details” by prescribing administrative rules and regulations *to promote* the purposes of the legislation and to carry it into effect." (*First Industrial Loan Co. of California v. Edwin M. Daugherty* (1945) 26 Cal.2d 545, 549, emphasis added.)

The Delta Plan is to be the comprehensive long-term management plan for the Delta, the fundamental purpose of the Delta Plan is to achieve the Coequal Goals, and the eight Objectives of Water Code section 85020 are "inherent in the coequal goals for management of the Delta." (Wat. Code § 85020.) However, of the eight Inherent Objectives, no legally binding regulations at all are included in the Delta Plan for the following Inherent Objectives:

"(e) Improve water quality to protect human health and the environment consistent with achieving water quality objectives in the Delta." (Wat. Code § 85020, subd. (f).) All of Delta Plan Chapter 6 addresses Inherent Objective (f), as the chapter is titled "Improve Water

Quality to Protect Human Health and the Environment." (B675.) However, "No policies with regulatory effect are included in this section." (B696.)

"(f) Improve the water conveyance system and expand statewide storage." (Wat. Code § 85020, subd. (f).) Delta Plan Chapter 3 describes the problem addressed by this Inherent Objective: "Current storage and conveyance configuration is not adequate for providing a more reliable water supply to south-of-delta users under modern operating rules." (B554.) The Delta Plan describes "Improve conveyance and expand storage" as one of "four core strategies." (B568.) But the original 2013 Delta Plan provided no regulations with regard to conveyance. (B571-72.) The 2013 "Delta Plan likewise does not include any Recommendations (i.e. opinion preferences) regarding conveyance." (B1157.) The updated 2018 Chapter 3 provides Recommendations for conveyance and storage but no regulations. (DSC MJN 069 ["No policies with regulatory effect are included in this section"].)

For the other Inherent Objectives, the Delta Plan often implements only a small part of the objective. For example Inherent Objective (b) is only partially implemented:

"(b) Protect and enhance the unique cultural, recreational, and agricultural values of the California Delta as an evolving place." (Wat. Code § 85020, subd (b).) No regulatory policies address protecting and

enhancing agriculture nor do any regulatory policies address protecting and enhancing recreation. (B662.)

The Delta Plan provides no explanation at all as to why it adopted regulations for only some portions of Inherent Objective (b). Even if the Act did allow for piecemeal implementation, the Council's choice is arbitrary and capricious because it gives no reason for the choice.

“Requiring an administrative agency to articulate publicly its reasons for adopting a particular order, rule, regulation, or policy induces agency action that is reasonable rather than arbitrary” (*McBail v. Solano County Local Agency Formation Com’n*. (1998) 62 Cal. App. 4th 1223, 1229 (citation and quotation marks omitted).)

At B493–95, the Delta Plan lays out the "Relevant Legislation" to compiling the Delta Plan. Four code sections call for implementation through recommendations: "85302(h) The Delta Plan shall include recommendations regarding state agency management of lands in the Delta;" "85302(b) The Delta Plan may include recommended ecosystem projects outside the Delta that will contribute to achievement of the coequal goals;" "85306 The council, in consultation with the Central Valley Flood Protection Board, shall recommend in the Delta Plan priorities for state investments in levee operation, maintenance, and improvement in the Delta, including both levees that are a part of the State Plan of Flood Control and nonproject levees;" 85308(e) "Where appropriate, recommend integration

of scientific and monitoring results into ongoing Delta water management."
(B495.)

Where the Legislature intended the Delta Plan to be merely hortatory in nature and to act by recommendation, it said so expressly. This indicates that all the Act's other specifications of Delta Plan content, that do not provide an exception to the general rule that the Delta Plan be "legally enforceable," must be implemented by regulation. "[U]nder the canon of statutory construction of *expressio unius est exclusio alterius*, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed, absent a discernible and contrary legislative intent." (*People v. Buycks* (2018) 5 Cal. 5th 857, 888.) "When language is included in one portion of a statute, its omission from a different portion addressing a similar subject suggests that the omission was purposeful." (*In re R.T.* (2017) 3 Cal. 5th 622, 627.)

The Act requires that each of the eight Inherent Objectives be implemented through legally binding regulations to achieve a legally enforceable Delta Plan. Conveyance and storage are addressed by Inherent Objective (f). Therefore, the Delta Plan must contain legally enforceable regulations to address conveyance and storage

The Council retains significant discretion to determine the content of those conveyance and storage policies, and Delta Alliance refrains from entering the content debate here.⁵

E. Even If The Act Did Allow The Council To Advance, Or Promote Options For, Conveyance And Storage Through Non-Binding Recommendations, The APA Requires That Those Recommendations Be Adopted As Regulations In Conformance With The APA.

The APA “applies to all generally applicable administrative interpretations of a statute.” (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal. 4th 324, 335.) In addition, every generally applicable agency enactment to “implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency’s procedure” is a regulation subject to the APA. (*Tidewater Marine Western, Inc. v. Bradshaw* (1997) 14 Cal. 4th 557, 571.) “If an agency adopts a regulation without complying with the APA requirements it is deemed an ‘underground regulation’ and is invalid.” (*Naturist Action Comm. v. Cal. State Dept. of Parks & Recreation* (2009) 175 Cal. App. 4th 1244, 1250.)

"Most underground regulations are “guidance documents,” meaning agency pronouncements that are not legally binding but are intended to

⁵ Several parties have sued the Council over the content of its updated Delta Plan components, including new recommendations for conveyance and storage, provided to the Court through the Council's Request For Judicial Notice. (See Council RJN, Exhibit 2 to Pearson Declaration.) Delta Alliance is not a party to any of these new actions.

furnish guidance to the public or to the agency's staff." (Asimov, California Practice Guide, Administrative Law § 25.1 (Rutter 2018).) "Moreover, Gov.C. § 11340.5(a) makes clear that the Legislature intended the rulemaking provisions to apply to the adoption of guidance documents, whether or not they are legally binding." (*Id.* at § 25.32 [citing *Tidewater, supra*, 14 Cal 4th at 574-575].)

Government Code section 11340.5, subd. (a) provides:

No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

Government Code section 11342.600 provides:

“Regulation” means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision to any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

An agency enactment is a regulation within the meaning of section 11342.600 if it has two characteristics: 1) the agency must intend the rule to apply generally rather than to a specific case; and 2) the rule must implement, interpret, or make specific the law administered by the agency. (*Tidewater, supra*, 14 Cal.4th at 571.) Pursuant to section 11340.5, subd.

(a), the enactment need not be legally binding to qualify as a regulation within the meaning of the APA.

The Delta Plan's Recommendations are "guidelines" within the meaning of Government Code section 11340.5, subd. (a). The Delta Plan Recommendations interpret, implement, and make specific the law administered by the Council, i.e., the Delta Reform Act. As discussed above, most of the required components of the Delta Plan are implemented solely through Recommendations. Therefore, most of the Delta Reform Act is made specific and implemented through the Recommendations.

The Recommendations do the work of the Delta Plan: "The working parts of the Plan are the *73 Recommendations* and *14 Policies*." (B432.) The recommendations are essential to achievement of the Coequal Goals: "The Delta Plan also contains priority recommendations, which are nonregulatory but call out actions essential to achieving the coequal goals." (B445.)

The Delta Plan Recommendations apply generally to all future actions affecting the Delta or implicating the Coequal Goals, over a very long time. "[T]he planning timeframe for the Delta Plan runs to the year 2100" (B751.) The Recommendations seek to get other agencies to take specific actions that will impact the Delta, California's water system, and the public. "The Delta Plan [Recommendation] asks the Department of Fish

and Wildlife to change the angling rules to permit heavier fishing and somewhat suppress the bass population." (B438.)

None of the Delta Plan Recommendations were submitted to OAL or published in the California Code of Regulations. This Court should hold that all of the required components of the Delta Plan must be adopted as legally binding regulations. To the extent any provisions are left, Delta Alliance respectfully urges the Court to hold that Delta Plan Recommendations must be adopted as guidelines pursuant to Government Code section 11340.5, subd. (a).

F. The Council Relied On Appendix A, An Underground Regulation, Which Voids Its Decisions.

Government Code section 11342.600 provides that "No state agency shall issue, utilize, or enforce, or attempt to enforce" any underground regulation. These provisions of the APA "prohibit state agencies *from relying in any way* on uncodified rules" (California Forms of Pleading and Practice § 472.20[1] (Mathew Bender 2012.)

The Council relied on Appendix A in the 2013 Delta Plan in making its choices with regard to implementing Inherent Objective (f), Improve Conveyance and Expand Storage. The Improve Conveyance and Expand Storage Policy section begins at B571. At the top left corner of B572, the section concludes "No policies with regulatory effect are included in this

section. See Appendix A, The Delta Stewardship Council's Role Regarding Conveyance." (B572.)

Likewise with the 2018 conveyance and storage amendments. Inherent Objective (f) is stated at page DSC MJN 068: "Improve Conveyance, Expand Storage, and Improve the Operation of Both." At the bottom left corner of the next page, the section concludes: "No policies with regulatory effect are included in this section. See Appendix A. The Delta Stewardship Council's Role Regarding Conveyance." (DSC MJN 069.)

The Council's decisions to avoid entirely any recommendation or regulation for conveyance in the 2013 Delta Plan, and not to adopt legally binding regulations for conveyance and storage in the 2018 update are void because they are founded in an underground regulation.⁶

Appendix A interprets the Council's authority to regulate and recommend options regarding conveyance. It construes Water Code sections 85303, 85057.5, 85225, 85320(e) and the Delta Reform Act on the whole. The Council determined thereby that it had authority to "prescribe conveyance" and the "authority to dictate in the Delta Plan conveyance improvements" (B1155.) However, the Council interpreted the

⁶ The 2018 update is not before the Court and Delta Alliance provides this observation, and several other references to the 2018 update, for general background only.

provisions governing the BDCP to make its conveyance authority "contingent." "For this reason, the Delta Plan does not include any regulatory policies regarding conveyance," (B1156), and to limit the sphere of recommendations it could make.

The Council's decision not to adopt conveyance regulations or recommendations founded on Appendix A should be set aside.

G. The Council's Choice Of A Flow Policy That Does Nothing To Restore Delta Flows Was Arbitrary And Capricious.

The Council found that restoring Delta flows is indispensable to achieving the coequal goal of restoring the Delta ecosystem:

The effort to improve the fortunes of the Delta ecosystem has two components that are vital: [one of which is] guaranteeing adequate flows from the rivers feeding into and through the Delta channels

(B436);

To revitalize the Delta ecosystem, we *must* provide adequate seaward flows in Delta channels, on a schedule more closely mirroring historical rhythms: what the Plan calls natural, functional flows.

(B431, emphasis added.)

However the flow policy that it adopted (and retains) ER P1 (codified at 23 CCR § 5005) indisputably fails to advance the goal of restoring Delta flows. Policy ER P1 is titled "Delta Flow Objectives" and states in pertinent part that the "State Water Resources Control Board's Bay Delta Water Quality Control Plan flow objectives shall be used to

determine consistency with the Delta Plan.” (B614) (hereafter “Flow Objectives”).

The Council knows that a policy requiring a covered action to meet current Flow Objectives in the SWRCB’s 2006 Bay-Delta Plan *does not* advance the goal of restoring Delta flows and fails to carry out the Council’s public trust obligations with regard to Delta flows.

Water Code section 85023 provides that “the public trust doctrine shall be the foundation of state water management policy and [is] particularly important and applicable to the Delta.” The SWRCB has concluded that “[t]here is sufficient scientific information to support the need for increased flows to protect public trust resources,” (L11843), because “[r]ecent Delta flows [as controlled by] existing regulatory requirements included in the 2006 Bay-Delta Plan are insufficient to support native Delta fishes for today’s habitats.” (L11844 & n. 3.) The Council also agrees that “the best available science suggests that currently required [2006 Bay-Delta Plan] flow objectives within and out of the Delta are insufficient to protect the Delta ecosystem.” (B614.)

Under the arbitrary and capricious standard of review, “a court must ensure that an agency has adequately considered all the relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.” (*Cal. Hotel & Motel Ass’n v. Indus. Welfare Comm’n*, 25 Cal. 3d 200, 212 (1979).)

Here the agency found an urgent need to increase flow. The Council also interpreted the Delta Reform Act to require that the Delta Plan advance the subgoal of “[r]estor[ing] Delta Flows ... to support a healthy estuary and other ecosystems.” (D6789.) The Council’s lead scientist informed the Council that restoring flows is crucial because “[f]low can be modified to benefit native fishes and is one of the *few immediate actions available*.” (G2112.031, emphasis added.)

However, the Council failed to make a rational connection between these facts and its policy choice. It has failed to show how Policy ER P1 will advance the statutory mandate of restoring Delta flows, therefore it has not “demonstrated a rational connection between [relevant] factors, the choice made, and the purposes of the enabling statute.” (*Cal. Hotel*, 25 Cal. 3d at 212.) Nor has it made “a rational connection between the facts found and the choice made.” (*State Farm*, 463 U.S. at 43.)

Coupling the lone regulatory flow requirement, ER P1, with the single recommendation on flow in the 2013 Delta Plan does not help. ER R1 recommends that the SWRCB update its failing Delta flow objectives by June 2, 2014, and update its flow objectives for tributaries by 2018. (B451.) The Delta flow objectives have still not been updated and the Council knew full well that there was no possibility the objectives would be updated any time soon when it adopted the recommendation. The Council's own finding that “[f]low can be modified to benefit native fishes and is one

of the few immediate actions available,” (G2112.03)1, cannot be rationally connected to its decisions to wait, what it knew would be many years, for the SWRCB to act.

The net effect is to stand aside and allow the Delta's watery ecosystem to collapse due to lack of fresh water flowing through it. This was not the intent of the Act and the Council's choices to act in this way were arbitrary and capricious.

Delta Alliance *does not* argue that the Council was obliged to adopt the 2010 Flow Criteria Report. But the Council was required to take *some* step to restore Delta flows. What that step is remains largely within its discretion but the Act does not permit it to do nothing.

VII. Conclusion.

Delta Alliance respectfully urges the Court to **REVERSE** the trial court's holdings with regard to Delta Alliance's claims argued in this cross-appeal and **HOLD** that: 1) the Council is required to adopt legally binding regulations to improve the water conveyance system and expand statewide storage; 2) Interpretive Appendix A is an unlawful underground regulation; 3) The Delta Plan's flow Policy, ER P1, 23 CCR § 5005, violates the Delta Reform Act because it is arbitrary and capricious and does not comply with the Act's requirement to advance the goal of restoring Delta flows as required by Water Code section 85302, subd. (e)(4) and Water Code section 85020, subd. (c); and 4) the Delta Plan Recommendations must be

adopted in compliance with APA procedures for guidelines as required by Government Code section 11340.5, subd. (a).

RESPONDENT'S BRIEF

VII. The Trial Court's Rulings Pertinent To Delta Alliance's Response Brief.

A. The Trial Court's Holdings.

The trial court held that: 1) the Delta Plan's quantified targets must be adopted as regulations (XXVI CT 7515); 2) that Delta Plan policies for reduced Delta reliance, reduced environmental harm from invasive species, restoring more natural flows, and increased water system reliability were not quantified or otherwise measurable and must be revised (XXXIII CT 9839.); and 3) that the Delta Plan must be revised to adequately address conveyance and storage.

B. The Trial Court's Reasoning.

1. The Trial Court's Decision That Quantified Or Measurable Targets Must Be Adopted As Regulations Rested On Water Code Section 85308 And Did Not Adopt Delta Alliance's APA Arguments.

Delta alliance pled a statutory cause of action in its Petition alleging that the Council violated the APA because the Delta Plan's quantified targets were not adopted as regulations. (VII CT 1808–1810.) Delta Alliance argued in its briefing that the Delta Plan's quantified targets must be adopted as regulations pursuant to the APA and, specifically, that the quantified targets were required to be adopted as regulations because they

are "performance standards" as that term is defined by the APA. (XXV CT 7324–7326 [citing Govt. Code § 11342.570].)

The trial court agreed with Delta Alliance that the Delta Plan's quantified targets must be adopted as regulations, but on different reasoning. The trial court based its decision on Water Code section 85308.

As discussed above, the trial court held that the six subdivisions of section 85308 provide a checklist of the legally enforceable components required to be included in the Delta Plan. (XXVI CT 7514 ["As section 85308 is the lens through which the Court views the Delta Plan, and the Delta Plan is to be legally enforceable, so must the section 85303 components].") Because Water Code section 85308, subd. (b) provides that the Delta Plan "Include quantified or otherwise measurable targets associated with achieving the objectives of the Delta Plan," The trial court held that the Delta Plan's quantified targets must be adopted as regulations. (XXVI CT 7515.)

2. The Trial Court's Decision That The Delta Plan's Targets Were Inadequately Quantified Rested On Water Code Section 85308 As Argued By Delta Alliance.

Delta Alliance argued that the Council's "placeholder" quantified targets were vague and amorphous and did not comply with the requirement of Water Code § 85308 for quantified or otherwise measurable targets. (XV CT 4450.) The trial court agreed with Delta Alliance's

reasoning. (XXIV CT 7158–59.)

3. The Trial Court's Decision That The Delta Plan Must Address Conveyance And Better Address Storage Rested On Water Code § 85304.

The trial court held that "The Delta Reform Act requires the Delta Plan to "*promote options* for new and improved infrastructure relating to the water conveyance in the Delta, storage systems, and for the operation of both to achieve the coequal goals." (XXIV CT 7160:24–27 [quoting Wat. Code § 85304].) The trial court held that "failure to promote options for water conveyance and storage systems is a violation of the Delta Reform Act." (XXIV CT 7161:1–2.)

C. The Council's Issues On Appeal Addressed In This Response Brief.

The Council appeals and argues that: (1) the Delta Reform Act does not require quantified targets to be adopted as legally binding regulations (Council Opening Brief, p. 74.); (2)(a) the issue of inadequately quantified or otherwise measurable targets for reduced Delta reliance, reduced environmental harm from invasive species, restoring more natural flows, and increased water system reliability is moot; (2)(b) even if the issue is not moot the Council's original targets were adequate and do not have to be revised; and (3) the original Delta Plan adequately addressed conveyance and storage.

VIII. The APA And The Delta Reform Act Require That All Delta Plan Performance Measures Be Adopted As Regulations.

The Council argues that the Delta Reform Act, Water Code section 85308, permits Delta Plan "performance measures," which implement the requirement for quantified or otherwise measurable targets, to be adopted as non-regulatory provisions. As elaborated in this section, the Delta Reform Act does require that the Delta Plan performance measures be adopted as regulations.

However, even if not expressly required by the Delta Reform Act, the APA imposes an independent requirement that Delta Plan performance measures be adopted as regulations. Among other arguments, Delta Alliance alleged before the trial court:

As the Council itself indicates, the performance measures implement and make specific Cal. Water Code § 85308(b) & (d), which require the Delta Plan to contain "measurable targets," and to "[d]escribe the methods by which the council shall measure progress toward achieving the coequal goals." The APA defines this type of performance standard as a regulation: "'[p]erformance standard' means a regulation that describes an objective with the criteria stated for achieving the objective." Cal Gov. Code § 11342.570. But the performance measures have not been adopted as regulations and are therefore invalid.

(VII CT 1809:19–25.)

Even though the trial court did not rely on the APA sections extensively relied upon by Delta Alliance in its pleadings and argument

before the trial court, "it is a settled appellate principle that if a judgment is correct on any theory, the appellate court will affirm it regardless of the trial court's reasoning." (*Young v. California Fish and Game Commission* (2018) 24 Cal.App.5th 1178, 1192–1193, *reh'g denied* (July 20, 2018), *review denied* (Sept. 26, 2018).)

A. Standard of Review.

1. The Question of Whether The Council Correctly Interpreted The Delta Reform Act Is Reviewed De Novo.

The Court must conduct an independent review to determine if the agency correctly interpreted its legislative mandate, without deference to the agency's interpretation. (*Clovis Unified Sch. Dist. v. Chiang* (2010) 188 Cal. App. 4th 794, 798 [articulating "respectful non-deference" standard].)

2. Compliance With The APA Is Reviewed De Novo.

"Whether an agency action constitutes a regulation is a question of law that we review de novo." *County of San Diego v. Bowen*, 166 Cal. App. 4th 501, 517 (2008). Courts "determine the lawfulness of agencies' compliance with those rule-making procedures [of the APA] entirely de novo, simply substituting their judgment on that question for that of the agencies." (*Cal. Advocates for Nursing Home Reform v. Bonta* (2003) 106 Cal. App. 4th 498, 506.)

B. The Council Implemented The Act's Requirement For Quantified Targets Through Its Delta Plan Performance Measures.

In addition to the basic structure that the Delta Reform Act requires of the Delta Plan--to achieve the Coequal Goals, eight Inherent Objectives, and the measures, subgoals, and strategies--the Delta Reform Act provides additional requirements for the contents, quality, and administration of the Delta Plan in various sections of the Act, including the requirement for "quantified or otherwise measurable targets."

Water Code section 85308 subdivision (b) provides that the Delta Plan shall "Include quantified or otherwise measurable targets associated with achieving the objectives of the Delta Plan." These "objectives" are the eight Inherent Objectives specified in Water Code section 85020 as discussed above. Water Code section 85308, subdivision (d) provides that the Delta Plan shall "Describe the methods by which the council shall measure progress toward achieving the coequal goals." Water Code section 85211 provides that the "Delta Plan shall include performance measurements that will enable the council to track progress in meeting the objectives of the Delta Plan."

The Council chose to meet the requirements of Water Code section 85308, subs. (b) & (d) and Water Code section 85211 by including "performance measures" for each Policy and Recommendation in the Delta Plan. "This Delta Plan contains preliminary performance measures

developed to monitor performance of Delta Plan policies and recommendations." (B511.)

Each Delta Plan policy chapter discusses a problem or set of problems to be remedied by the Delta Plan. Each chapter then concludes with a "Policies and Recommendations" section that sets out the text of any regulatory policies adopted and those recommendations adopted to address the issues of that chapter. (*See, e.g.*, B568–73.) "Output" and "Outcome" performance measures then follow, with the Policy or Recommendation each performance measure is implementing in parenthesis after the text of the performance measure. (*See, e.g.*, B576–77.) In the Delta Plan as adopted in 2013, additional "Administrative" performance measures for each Policy and Recommendation are listed in Appendix E. (B1289–1303.)

In its chapter describing the structure of the Delta Plan, the Council explains the Delta Plan's performance measures and links them to Water Code section 85308, subdivisions (b) and (d) : "Finally, each policy chapter concludes with a set of performance measures. The Delta Reform Act requires that the Delta Plan include performance measures to evaluate whether it is achieving its objectives over time." (B505.)

Although the Delta Plan language did not cite section 85308, subdivision (b) the language clearly refers to 85308, subdivision (b)'s requirement that the Delta Plan "Include quantified or otherwise measurable targets associated with achieving the objectives of the Delta

Plan." The Delta Plan's definitions section also provides that performance measures "will enable the Delta Stewardship Council to track progress in meeting the objectives of the Plan." (B780.) The Council's brief indicates that its performance measures implement section 85308, subdivision (b) as well. (Council Opening Brief, p.52.)

The Delta Plan further makes clear that the performance measures are also intended to implement section 85308, subdivision (d). In a section of the Delta Plan titled "Monitoring Progress toward Achieving the Coequal Goals" the Delta Plan provides:

The Council will use existing monitoring efforts (such as the efforts of the Interagency Ecological Program, California Water Quality Monitoring Council, and California Statewide Groundwater Elevation Monitoring) and new monitoring efforts to inform progress toward achieving the performance measures in the Delta Plan.

(B510–511.) Achieving the targets in the performance measures marks progress towards achieving the coequal goals overall. This is intended by the Council to fulfill section 85308, subdivision (d)'s requirement that the Delta Plan "Describe the methods by which the council shall measure progress toward achieving the coequal goals."

The performance measures, then, are the measure of achieving the Coequal Goals overall (§ 85308, subd. (d)), of achieving the Inherent Objectives of the Delta plan (§ 85308, subd. (b)), and of achieving the health of the Delta's ecosystem and reliability of California's water supply

as described in Water Code section 85211. The performance measures implement and make specific these three important sections of the Delta Reform Act.

The performance measures must state a quantified or otherwise measurable target and describe how progress towards that objective will be measured. By definition, as required by the APA, these performance measures are regulations. The APA requires that these performance measures must be adopted in conformance with APA rulemaking requirements and must be published in the California Code of Regulations.

C. The APA Requires That The Delta Plan Performance Measures Be Adopted As Regulations.

The California Supreme Court has explained the two elements of a regulation subject to the APA: 1) the agency must intend the rule to apply generally rather than to a specific case; and 2) the rule must implement, interpret, or make specific the law administered by the agency:

A regulation subject to the APA thus has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must “implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure.

(Tidewater, supra, 14 Cal.4th 557, 571, internal quotation marks and citations omitted.)

As shown below, the Delta Plan performance measures meet the *Tidewater* test and therefore must be adopted in conformance with APA rulemaking procedures.

1. The APA Is Extremely Broad And Requires Every Generally Applicable Agency Enactment Implementing A Statute To be Adopted As A Regulation.

The APA “applies to all generally applicable administrative interpretations of a statute.” (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal. 4th 324, 335.) In addition, every generally applicable agency enactment to “implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency’s procedure” is a regulation subject to the APA. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 571.)

The APA requires that such enactments be adopted as regulations, following procedures specified in the APA, including submission of the proposed regulation to the California Office of Administrative Law (“OAL”), (*Morning Star Co.*, 38 Cal. 4th at 333), and filing with the Secretary of State for publication in the California Code of Regulations. (Gov. Code § 11340.5(a).)

These provisions of the APA “prohibit state agencies from relying in any way on uncodified rules that modify or supplement duly adopted provisions of law.” (California Forms of Pleading and Practice § 472.20[1])

(Mathew Bender 2012.) “If an agency adopts a regulation without complying with the APA requirements it is deemed an ‘underground regulation’ and is invalid” and “cannot be enforced.” (*Naturist Action Comm. v. Cal. State Dept. of Parks & Recreation* (2009) 175 Cal. App. 4th 1244, 1250.)

The Supreme Court has taken pains to stress that the APA “defines ‘regulation’ very broadly” under Gov. Code § 11342. (*Tidewater, supra*, 14 Cal. 4th at 571; *see also* California Forms of Pleading and Practice § 472.20[2] [“The definition of ‘regulation’ in the APA is very broad” and “has been broadly interpreted by the courts, notably by the California Supreme Court”].)

California’s “definition of regulation, that is, those agency enactments that are invalid absent adoption through the formal rulemaking process, is much more inclusive than the definition contained in the federal Administrative Procedure Act,” which, unlike California, provides exceptions for interpretive documents. (*Id.*) It is “clear that the rulemaking procedures of the APA apply to any regulation and the definition of regulation includes every rule adopted to interpret the law.” (*Capen v. Shewry* (2007) 155 Cal. App. 4th 378, 896.)

2. The Delta Plan Performance Measures Interpret, Implement And Make Specific Water Code Sections 85308, Subd. (b) & (d), And Wat. Code Section 85211.

The Council chose to effectuate the requirements of Water Code section 85308(b) for "quantified and measurable targets," and Water Code section 85308(d)'s requirement to specify the methods by which progress would be measured through a suite of stand-alone performance measures set out separately from its Policies and Recommendations. The Council also chose to implement Water Code section 85211's requirement for "performance measurements" for the "health of the Delta's estuary" and the "reliability of California water supply" through the same suite of stand-alone performance measures.

The Council also exercised discretion by dividing its performance measures into three categories: Output, Outcome, and Administrative, measuring different aspects of Delta Plan progress. Nothing in the Delta Reform Act required this particular division of performance measures into these three categories.

The Council's choices interpreted and made specific provisions of the Delta Reform Act, which could have been interpreted otherwise and implemented otherwise. The performance measures, therefore, do not fall within the APA's "only legally tenable interpretation of a provision of law," exception to APA rulemaking requirements found at Government Code section 11340.9(f).

The “lone legally tenable reading of the law applies only in situations where the law can reasonably be read only one way.” (*Morning Star Co.*, 38 Cal. 4th at 336, citation and quotation marks omitted.) Only where “the agency’s actions or decisions in applying the law are essentially rote, ministerial, or otherwise patently compelled by, or repetitive of, the statute’s plain language,” does the exception apply. (*Morning Star Co.*, 38 Cal. 4th at 337.)

The performance measures also involve critical policy choices as to "how much" or "how many" or "how far" is far enough, and as to exactly what is to be measured in order to measure progress. Indeed, the trial court struck down numerous Delta Plan performance measures precisely because the measures did "not provide quantified or otherwise measurable targets upon which Delta users can gauge compliance." (XXIV CT 7158:27–28; 7159:1.)

The performance measures interpret, implement, and make specific provisions of the Delta Reform Act requiring the measurement of progress toward achieving the objectives of the Delta Reform Act. The performance measures implicate an extensive exercise of policy discretion in implementing and making specific the Delta Reform Act. They do not fall within the "lone legally tenable" exception.

3. Delta Plan Performance Measures Must Be Adopted As Regulations Because They Are Standards Of General Application That Will Decide A Class Of Cases.

Where an agency enactment affects only a "discrete and specific project" it is not a standard of general application within the meaning of the APA. (*Californians for Pesticide Reform v. Dept. of Pesticide Regulation* (2010) 184 Cal.App.4th 887, 907.) "Interpretations that arise in the course of case-specific adjudication are not regulations" subject to the APA. (*Tidewater, supra*, 14 Cal. 4th at 571.) However, "[t]he APA applies to the exercise of *any quasi-legislative power* conferred by *any statute* heretofore or hereafter enacted" unless expressly exempted. (*Tidewater* 14 Cal. 4th at 570, emphasis original, quotation marks and citation omitted).

In promulgating the Delta Plan and its performance measures the Council acted in a quasi-legislative manner and was not adjudicating a specific case or a discrete project.

Where the agency enactment "will have a broad and long-term application, we conclude the policy was intended as a rule of general application." (*Id.*) "The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided." (*Tidewater, supra*, 14 Cal 4th at 571.)

The Delta Plan performance measures have broad and long-term application to a broad class of programs and projects, current and future:

"The Council will monitor the progress of programs and projects toward achieving the administrative, output, and outcome performance measures in the current Delta Plan and those developed in the future." (B511.)

The Delta Plan performance measures also regulate third parties and determine how a certain class of cases will be decided through their application in the consistency certification process.

The legislative intent that the Delta Plan be a "legally enforceable Delta Plan," (Wat. Code § 85001(c)), is carried out through the Delta Reform Act's consistency certification requirement. The Delta Reform Act defines the term "covered action" as a project undertaken in the Delta by a state or local agency that will implicate the achievement of the coequal goals. (*See* Wat. Code §§ 85057.5(a)(1)–(4).)

Water Code section 85225 in turn provides that a state or local agency that proposes to undertake a covered action shall submit to the Council a "written certification of consistency" showing that the action is consistent with the Delta Plan. Any person who claims that the proposed action is actually inconsistent with the Delta Plan may challenge the filed consistency certification and the Council will then conduct a hearing to determine if the proposed action is consistent with the Delta Plan. (Wat. Code §§ 85225.10–85225.25.)

If the Council determines that the action is not consistent with the Delta Plan, the project may not proceed until and unless the project is

revised or new information is presented so that upon rehearing the Council finally determines that the action is consistent. (B1281.)

Part of the determination of consistency rests on whether or not the regulated entity has met applicable performance measures. For example, Policy WR P1 requires water suppliers who would undertake a covered action to receive exported Delta water to demonstrate that they have "Reduce[d] Reliance on the Delta through Improved Regional Self-Reliance." (B568.) If the water supplier fails to demonstrate reduced reliance on the Delta, and other conditions are met, the water export will be prohibited. (B568–69.)

The original Delta Plan Outcome Performance measure for Policy WR P1 provides that water suppliers must demonstrate: "Progress toward increasing local and regional water supplies, measured by the amount of additional supplies made available (reported in 5-year increments from 2000). (WR P1)." (B577.) The updated Outcome Performance measure sets a target "for those relying on water from the Delta watershed" to "project shortages no greater than 20 percent during single and multiple dry years by 2020." (DSC MJN 100.)

Thus, for all covered actions to export water coming before the Council, the water suppliers must demonstrate that they have met the targets set by WR P1 performance measures, or risk having their proposed export being found inconsistent with the Delta Plan and thereby being

prohibited. The WR P1 performance measures are standards of general applicability that determine how a certain class of cases will be decided, but that the Council failed to adopt in conformance with APA requirements.

4. The Delta Plan Performance Measures Must Be Adopted As Regulations Because They Govern The Council's Procedure In Updating the Delta Plan And Do Not Fall Within The Internal Management Exception.

Achievement of the Coequal Goals, recovery of the Delta's ecosystem and attaining a reliable water supply for California, are matters of exceptional and very wide ranging public importance. (Wat. Code § 85002 [Legislative finding that the Delta is a "critically important natural resource for California and the nation;]" Wat. Code § 85004 [Legislative finding that "more than two-thirds of the residents of the state" rely on water exported from the Delta].)

The Council will use the performance measures to determine the content and timing of future amendments to the Delta Plan in order for the Delta Plan to achieve the Coequal Goals. As the Delta Plan explains:

The Delta Reform Act requires that the Delta Plan include performance measures to evaluate whether it is achieving its objectives over time. 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 govern the Council's procedure in updating the Delta Plan and in determining what it must do to stay on track

for achieving the Coequal Goals. Amendments to Delta Plan Policies indicated by tracking Delta Plan performance measures will include those policies that regulate third parties, such as WR P1.

Even where performance measures do not directly regulate third parties, an agency's adopted standards of general application that "govern its procedure" are regulations subject to APA requirements. (Gov. Code § 11342.600.) All such standards are regulations except those that relate "only to the internal management of the agency." (Gov. Code § 11340.9(d).)

Determining how and when to amend the Delta Plan is not a matter of internal management, but rather of great public impact and importance. Courts interpret internal management "narrowly so as to encompass accounting techniques and the like." (*City of San Marcos v. Cal. Highway Com.* (1976) 60 Cal. App. 3d 383, 408.) Matters "of serious consequence involving an important public interest" are not matters subject to the internal management exception. (*City of San Marcos, supra*, 60 Cal. App. 3d at 408.)

"Accordingly, even internal administrative matters do not per se fall within the internal management exception." (*Grier v. Kizer* (1990) 219 Cal. App. 3d 422, 436, *overruled on other grounds by Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557.) "The internal management exception, however, is a narrow one, as demonstrated by a

line of cases consistently rejecting its application--even where the policies govern internal administrative matters--if the policies or procedures affect the interest of persons other than the agency itself." (*California School Bds. Ass'n v. State Bd. of Educ.* (2010) 186 Cal. App. 4th 1298, 1334.)

Many Californians have an interest in seeing the Delta's ecosystem restored, sooner rather than later, and at least two thirds of the state's residents have an interest in attaining a reliable water supply sooner rather than later. The selection of performance measure targets and timing will determine the pace of progress on these public goals.

The Delta Plan acknowledges the interest of other public agencies, stakeholders outside the Council, and the general public in the performance measures: "Upon adoption of the Delta Plan, staff will take the lead, working with scientific, agency, and stakeholder experts to continue to refine the Delta Plan's performance measures." (B511.) The Council will also "issue periodic public reports on the status of performance measures." (B511.) The Council will "report regularly on Delta Plan performance measures and the Delta Plan's progress in advancing the coequal goals. These reports will be made available to the public." (B511.)

The Council also emphasizes the pivotal importance of the performance measures and their far reaching public policy significance: "The vision of the Delta in 2100 will be realized through a series of near-

term and long-term actions informed by performance measures,” that are “associated with the various policies and recommendations.” (B484, 486.)

5. Delta Plan Administrative Performance Measures Are Intended To Guide Other Agencies And Implement Regulation Of The Public And Do Not Fall Within The Internal Management Exception.

The administrative performance measures for each policy and recommendation contained in the Delta Plan are set out in Appendix E to the Delta Plan, and organized by Delta Plan chapter. (*See* B1289–1303.)

The administrative performance measures are intended by the Council to be used by “policy makers” to “finalize plans or approve resources for implementation of projects” and are “part of the Delta Plan.” (D57.)

These performance measures are aimed at agencies outside the Council. For example, WR R8 provides that “State agencies report to Delta Stewardship Council annually on their actions to . . . increase water efficiency, used recycled water,” etc. (B1292.) Administrative performance measures also implicate regulating the general public. For example, ER R6 provides that “The California Department of Fish and Wildlife develops for consideration by the Fish and Game Commission proposals for new or revised fishing regulations. . . .” (B1296.)

6. The Delta Plan Performance Measures Meet The APA Definition of Performance Standards That Must Be Adopted As Regulations.

Government Code section 11342.570 provides that “‘Performance standard’ means a regulation that describes an objective with the criteria stated for achieving the objective.” Pursuant to section 11342.570, any agency provision that describes an objective and states the criteria for achieving that objective is a regulation within the meaning of the APA and subject to APA rulemaking procedures. (*See Engine Manufacturers Association v. California Air Resources Bd.* (2014) 231 Cal. App. 4th 1022, 1037 [Where “provisions describe an objective” and “set criteria for achieving that objective” the “provisions qualify as performance standards within the meaning of Government Code section 11342.570” and are regulations within the meaning of the APA].)

Water code section 85308, subs. (b) & (d), which the performance measures implement and make specific, require the Delta Plan to contain “measurable targets,” and to “[d]escribe the methods by which the council shall measure progress toward achieving the coequal goals.” The Delta Plan performance measures are therefore performance standards as defined by Government Code section 11342.570.

The Council’s performance measures set out in the original Delta Plan stated their objectives but fell short in providing quantified or measurable targets that would satisfy the objective. Judgement in the trial

court requires the Council to provide the missing quantifications. (XXXIII CT 9839:4–6.)

The updated performance measure for reduced Delta reliance provide an example of an APA performance standard where the provision "describes an objective" and "set criteria for achieving that objective" as defined by Government Code section 11342.570. The objective is "an overall average decrease in Delta exports." The criteria for achieving the objective is "Fifteen-year average total exports during all year types decreases by 5 percent or more from the average historical deliveries This target is to be achieved by 2030." (DSC MJN 101.)

By statutory requirement in Water code section 85308, subds. (b) & (d), and in the implementation, the Delta Plan performance measures are performance standards required to be adopted by regulations according to Government Code section 11342.570.

For all the reasons stated above in sections VII(B)(1)–(6), the Delta Plan performance measures are regulations within the meaning of the APA but the Council failed to follow APA requirements when promulgating the performance measures. The performance measures, therefore, are void as underground regulations and must be re-promulgated following proper procedure.

IX. The Council's Failure To Adopt Adequately Quantified Or Measurable Targets Is Not Moot.

The Council argues that it has complied with the trial court's holdings with regard to adequately quantifying its targets by adopting new performance measures. "The Council has updated its targets in a manner that is consistent with the trial court's call for specificity." (Council Opening Brief, p. 53.) The Council argues, therefore that the trial court's ruling on targets is now moot.

The Council had argued extensively that terms such as "adequately contribute," "significant reduction," "progress toward," and other similar non-quantified terms were acceptable targets. (XXIV CT 7132–7135.) Whether or not these vague measures are acceptable remains a live controversy as the Council has adopted a posture of non-acquiescence, continuing to use vague terms in its updated performance measures and avoiding returning the trial court's writ.

The question of whether the Council's revised performance measures fulfill the trial court's mandate is not before the Court. The Council should not be allowed to circumvent the trial court. If the Council wants confirmation that its performance measures satisfy the trial court's judgment, it can return the writ to the trial court in the first instance.

X. The Trial Court Correctly Held That The Council's Targets Were Not Quantified Or Otherwise Measurable.

The Council argues that its vague targets complied with the Delta Reform Act because 1) these were only "initial performance measure targets" that will be expanded later (Council Opening Brief, p. 53); and 2) even though the targets did not contain numbers, they were measurable and the Delta Reform Act does not require numeric targets. (Council Opening Brief, p.62.)

A. The Council's Initial Performance Measure Argument Fails.

The Delta Plan effectively admits that the original performance measures do not comply with the Act and that they are merely placeholders that will be revised to comply with the Act's requirements for quantified targets at an unspecified future time. The Council's rationale was that establishing performance measures is difficult and they were unable to get them done on time.

For example, the Council adopted an outcome performance measure for restoring Delta flows as follows:

Progress toward restoring in-Delta flows to more natural functional flow patterns to support a healthy estuary. Metrics: results from hydrological monitoring and hydrodynamic modeling. (ER R1).

(B623.) The Council prefaced this performance measure by stating that:

Development of informative and meaningful performance measures is a challenging task that will continue after the

adoption of the Delta Plan. Performance measures need to be designed to capture important trends and to address whether specific actions are producing expected results. Efforts to develop and track performance measures in complex and large-scale systems like the Delta are commonly multiyear endeavors. The recommended output and outcome performance measures listed below are provided as examples and subject to refinement as time and resources allow.

(B622.) The Council effectively admitted that its proffered performance measure was not "informative and meaningful." It was put in as a placeholder with no quantified or otherwise measurable target, presumably to achieve superficial compliance with the statute until it could achieve actual compliance by figuring out how to design effective and meaningful performance measures at some later date.

However, the Act mandates that “[o]n or before January 1, 2012, the council shall develop, adopt, and commence implementation of the Delta Plan.” (Wat. Code § 85300(a).) When a statute mandates issuance of regulations by a date certain, the agency must satisfy the minimum requirements of the statute on the first pass. (*Sierra Club v. U.S. Env'tl. Protection Agency* (D.C. Cir. 1993) 992 F.2d 337, 346 [In “cases in which an agency has in fact acted before a compulsory deadline, but is alleged nonetheless to have fallen short of statutory requirements ... when the deadline for issuing regulations has passed, the regulations promulgated to date constitute the agency's complete response in compliance with the statutory requirements,” internal citations and quotations omitted]; *In re*

Bluewater Network (D.C. Cir. 2000) 234 F.3d 1305, 1314 [“[W]hen the statutory deadline for issuing regulations has passed, the promulgated regulation must be deemed the agency’s complete response in compliance with the statutory requirements ... even if the agency promulgates additional rules sometime in the future,” internal citations and quotations omitted].)

Of course the Council can amend, modify, and strengthen its performance measures as time goes by and experience is gained. But it was required to satisfy the *minimum* requirements of the Act for quantified or otherwise measurable performance measures and it failed to do so.

B. The Performance Measures Did Not, And Do Not Comply With The Act's Requirement For Quantified Or Otherwise Measurable Targets.

The trial court specifically directed that the Delta Plan be revised to "include quantified or otherwise measurable targets associated with achieving reduced Delta reliance, reduced environmental harm from invasive species, restoring more natural flows, and increased water system reliability, in accordance with the Delta Reform Act." (XXXIII CT 9843.) Each of the performance measures the Council had adopted to establish targets was inadequate, by any reading of "quantified or otherwise measurable" and the trial court's finding should be upheld.

The Council purposely avoided setting quantified or otherwise measurable targets to restore Delta flows because that might interfere with

the BDCP / WaterFix choice of export levels. The “Council has determined that the BDCP agencies are in the best position to complete the planning process including defining acceptable ranges of exports *and through-Delta flows.*” (D59, emphasis added.) The “Delta Plan [therefore] does not suggest any particular [flow] objectives.” (D62.)

The Delta Plan "does not suggest any particular flow objectives" is an admission, in the Council's own estimation, that the flow performance measures are *not* quantified or otherwise measurable targets.

The performance measure for restoring more natural flows provides:

Progress toward restoring in-Delta flows to more natural functional flow patterns to support a healthy estuary. Metrics: results from hydrological monitoring and hydrodynamic modeling. (ER R1).

(B623.) This performance measure, in addition to being unquantified, provides no reasonable basis upon which an objective observer could determine whether progress was being made to meet it or not.

For something to be "measurable" one has to know *what* to measure and what *unit of measurement* will be used. Even assuming no quantified target need be included for the flow performance measure, one would not even know what to measure or what unit of measurement to use.

Hydrological monitoring and hydrodynamic modeling cover a wide range of parameters. Is water temperature included, to be measured in degrees? Is lag to peak included, to be measured in hours and minutes? Is peak flow

included, to be measured in cubic feet per second? Is the rising limb or the recession limb to be measured and what direction from existing baseline would constitute progress? Do we want more or less, faster or slower?

The Council had informative and meaningful flow performance measures presented to it by its scientific staff and could have adopted them on time but refused to do so. This decision, as so much else missing from the Delta Plan, was due to the Council's desire not to do anything that would reduce exports or intrude on what it considers to be the primacy of the BDCP/California WaterFix in establishing Delta flows.

At the January 27, 2011, Council meeting on “Setting Flow Criteria,” (G2019) the Council heard from its lead scientist that a performance measure for restoring Delta flows could be as simple and elegant as achieving the target of 75% of unimpaired flow. (G2112.003, 2112.031.) The Council’s scientists explained that another available measure is the export to inflow ratio for each month, which allows for increased exports when flows are highest and exports do the least damage. “You can still maintain that pattern [of a natural hydrograph] and withdraw significant amounts of water ... as simple as that.” (F146: 2:38:00–2:39:06.) The Council could have readily set an export to inflow ration at a specified percentage or range of percentages,

In addition to its flow performance measure, for ER RI, The Council posits its requirement that proposed actions be consistent with State Water

Resources Control Board ("SWRCB") "existing Bay Delta Water Quality Control Plan objectives" in satisfaction of a quantified flow target. (Council Opening Brief, p.71.) The Legislative directive was to "Restore Delta flows and channels to support a healthy estuary and other ecosystems." (Wat. Code § 85302, subd. (e)(4).) The Council interpreted this to mean "create more natural functional flows." (B582.) The existing Bay Delta Water Quality Control Plan objectives, known as D-1641 objectives, are the *problem* that is largely responsible for creating the need to restore Delta flows. These D-1641 objectives cannot be a measure of "restoring" Delta flows.

The D-1641 flow objectives are inadequate to serve as a policy for restored flows as discussed more fully above at section VI(G). For the same reasons they cannot serve as performance measures.

In addition, the Council posits Recommendation ER R1, that the SWRCB update its Delta flow objectives by 2014 (which still has not been done) and update its flow objectives for tributaries by 2018. (Council Opening Brief, p. 71.) The Council recasts Recommendation ER R1 as two "output" performance measures. These two "Output Performance Measures" are not really performance measures at all because they simply repeat two non-binding recommendations in Recommendation ER R1. (B614.) ER R1 cannot serve as the flow performance measure for the same reasons it fails to implement the Act's requirements to restore Delta flows,

as described above in section VI(G).

Recommendation ER R1 also does not comply with the trial court's holding that Delta Plan targets be established by legally binding regulations (and do not comply with Delta Alliance's independent showing that performance measure must be adopted as legally binding regulations pursuant to the APA).

Recommending that another agency adopt objectives does not fulfill the mandate to promulgate numeric or otherwise measurable targets that measure the health of the estuary. The Council's role is to set targets, such as flow in cubic feet per second or other metrics that can be used to measure whether progress towards restoring the estuary is being made or not.

The Council's other posited performance measures are similarly unavailing. The trial court's discussion of targets correctly rejected the Council's arguments for various and sundry provisions in the Delta Plan, particularly non-binding recommendations, to fill the requirement for quantified or measurable targets. (XXIV CT 7131–7139.)

The Council intimates that the trial court held that only some targets need to be quantified. (Council Opening Brief, p.p. 52–53.) However the trial court's ruling was clear that all targets must be quantified or otherwise measurable. "[T]he Court finds that any analysis of the Delta plan must be informed by numeric goals ... or the measure of progress that has been

accomplished." (XXIV CT 7132:6–9, emphasis added.) Therefore, the Council's argument that it may comply with the trial court's ruling where some of its performance measures are unquantified and unmeasurable as long as others are quantified must fail.

XI. The Trial Court Correctly Held That The Council Failed To Implement The Act's Requirements For Conveyance And Storage.

A. The Trial Court, As Far As It Went, Was Correct That The Act Requires The Plan To Address Conveyance And The Council Failed To Do So Entirely.

The trial court held that the Act requires the Council to "promote options for new and improved infrastructure" for conveyance and storage. (XXIV CT 7160 [quoting Wat. Code § 85304].) In addition, Delta Alliance argued that Water Code section 85320, subd. (f) requires the Council to adopt provisions to "Improve the water conveyance system and expand statewide storage." The Legislature unambiguously wanted the Council to act on conveyance and storage.

The Council, based on its interpretation of the Act in Appendix A, determined that it would purposely express no opinion at all with regard to conveyance in the 2013 Delta Plan. No recommendations, no regulations, no expression of any opinion preference. This is plainly a violation of the Act's express terms and it is founded on the underground regulations within Appendix A.

The Council rests its argument that it could and should stand aside with regard to conveyance on Water Code section 85320, subd. (e). (Council Opening Brief, pp. 42,46.) This reading of the Act, that the BDCP displaces the Delta Plan, is not consistent with the structure and purpose of the Act. If section 85320, subd. (e) means the Council may not promote options for conveyance or take steps to improve the water conveyance system then section 85320 renders section 85304 and section 85320, subd. (f) surplusage. "It is a maxim of statutory interpretation that courts should give meaning to every word of a statute and should avoid constructions that would render any word or provision surplusage." (*Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154, 179.)

The overall structure of the Act makes clear that the Legislature did not intend the Council to stand down in anticipation of the BDCP / California WaterFix with regard to conveyance, or anything else. Section 85059 provides that "'Delta Plan' means the comprehensive, long-term management plan for the Delta as adopted by the council in accordance with this division." By "enacting this division, it is the intent of the Legislature to ... establish a governance structure that will direct efforts across state agencies to develop a legally enforceable Delta Plan." (Wat. Code § 85007(c).) The legislature intended for the Delta Plan and the Council "to provide for the sustainable management" of the Delta. (Wat. Code § 85001(c).)

There would be little point in promulgating a comprehensive management plan for the Delta and appointing it and the Council to direct efforts across state agencies when the BDCP / California WaterFix would actually displace the Delta Plan and take precedence.

The Council can provide no comprehensible argument that it was not at least required to adopt recommendations with regard to conveyance.

As argued in section VI(D) above, the Act requires legally enforceable provisions for conveyance and storage. The trial court was clearly correct, as far as it went, in holding that the Council's failure to do anything at all with regard to conveyance was a violation of the Act.

B. The Council Failed To Meet The Act's Requirements For Storage.

The Council argues that scattered references to storage in non-storage regulations constitute a storage regulation. (Council Opening Brief, p.51.) This post hoc litigation position directly contradicts the Council's own contemporaneous statement with regard to storage. Both the original 2013 Delta Plan and the updated 2018 Chapter 3 contain a summation section titled "Improve Conveyance, expand Storage, and Improve the Operation of Both." At the conclusion of these sections, the Delta Plan states that "No policies with regulatory effect are included in this section." (DSC MJN 069; B572.) The Council's argument that it adopted a storage regulation is further refuted at section VI(C) above.

The Council points to Recommendations WR R9–WR R11; WR R13–WR R15 as its recommendations to promote and expand storage. (Council Opening Brief, pp. 50–51.) WR R9–WR R11 and WR R15 do not use the word "storage" and do not relate to expanding storage. (B571–72.)

The Council posits text in the Delta Plan outside of the Recommendations section that discusses using groundwater aquifers for storage. (Council Opening Brief, p.50–51 [quoting B435].) The text at B435, in the Delta Plan's Executive Summary, characterizes Recommendations WR R9, R10, R11, and R14 as calling for "using aquifers like bank accounts." (B435.) However, a perusal of the text of WR R9–WR R11 shows that they do not discuss increasing groundwater storage and do not use the word "storage."

As the Council itself describes it, the Act is implemented through the Policies and Recommendations sections. "The working parts of the Plan are the *73 Recommendations* and *14 Policies*." (B432.) To adequately promote options for storage, the Recommendation itself would have to clearly indicate to third parties what they are being asked to do, expressly with respect to increasing storage. The bulk of the text of the Delta Plan outside the Policies and Recommendations section is a sort of primer on water policy and cannot serve to implement the Act.

The text of WR 15 deals with water transfers, does not use the word "storage" and would not serve to guide any reader to understand what is being asked of them with respect to expanding storage.

WR R13 only calls for the completion of an existing study and WR R14 calls for the convening of a committee to begin an investigation. The trial court was correct that these too fell short of meaningfully promoting options for storage.

XIII. Conclusion

For the foregoing reasons Delta Alliance respectfully urges the Court to **AFFIRM** the trial court's holdings that: 1) The Delta Plan's performance measures implementing quantified or otherwise measurable targets must be adopted as regulations in compliance with Government Code section 11340.5, subd. (a); 2) The Delta Plan must be revised to contain adequate quantified or otherwise measurable targets associated with achieving reduced Delta reliance, reduced environmental harm from invasive species, restoring more natural flows, and increased water system reliability; 3) The Delta Plan must be revised to promote options for water conveyance and storage systems; and 4) the Delta Plan must be revised to provide a flow policy that includes quantified or otherwise measurable targets.

Dated: October 30, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **CROSS-APPELLANT/RESPONDENT Save the California Delta Alliance's Combined Opening/Response Brief** uses a 13 point Times New Roman font and contains 18, 853 words.

Dated: October 30, 2018 Michael A. Brodsky

/s/ Michael A. Brodsky

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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 November 20, 2018, I electronically served the attached Cross-**APPELLANT/RESPONDENT Save The California Delta Alliance's Combined Opening/Response brief** by transmitting a true copy 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 November 20, 2018, at Sacramento, California.

Michael A. Brodsky
Declarant

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