

# South Delta Water Agency's

**Presentation in Support of its Appeal (C20257-A8)  
of DWR's DCP Certification of Consistency  
(February 26 & 27, 2026 Hearing)**

# DWR's Certification Must Be REMANDED to DWR.

- DWR's Certification contains a shocking lack of substantial evidence that the DCP is consistent with the Delta Plan's policies and the Co-equal goals.
- In many instances, the Certification contains ZERO evidence that the DCP is consistent with the Delta Plan's policies and the Co-equal goals.
- The topics I intend to cover are the following:
  - DWR's new undisclosed objective to use the DCP to max out its Delta Export water rights.
  - Inconsistency with the Delta Flow Objectives Policy.
  - Inconsistency with the Reduced Reliance Policy.
  - Major Operational and Constructional data deficiencies.
  - Lack of verification of the efficacy of DWR's sealing of geotechnical borings and CPTs.

# There is ZERO Evidence to Support the Consistency of DWR's Undisclosed Objective to Use the DCP to Max Out its Delta Export Water Rights.

- On January 21, 2025 (approx. 9 months prior to filing its Certification), DWR filed a “Petition for Extension of time” requesting an additional 76 years to max out its Delta Export water rights.
- In that Petition, DWR informed the world that it specifically intended to use the DCP to max out those water rights.
- Maxing out those water rights means two things:
  - (1) Exporting more water than DWR has ever exported from the Delta; and
  - (2) Sustaining those increased exports in perpetuity (because if you don't sustain them, you lose them).

- In its Certification, DWR did not even attempt to provide substantial evidence to support the consistency of its objective to max out its Delta export water rights with any of the Delta Plan's regulatory policies or the Co-equal goals.
- DWR did not even mention this objective in its Certification.
- Accordingly, and for example, there is literally ZERO evidence that using the DCP to max out its Delta exports is consistent with:
  - The Reduced Reliance on Delta Exports regulatory policy;
  - The Reduced Reliance on Delta Exports statutory mandate;
  - The Delta Flow Objective regulatory policy; or
  - The Co-Equal Goals.
- **The Certification must be remanded to DWR to fix these deficiencies.**

# There is NO Substantial Evidence that the DCP is Consistent with the “Delta Flow Objectives” Policy (ER P1).

- Policy ER P1 (“Delta Flow Objectives”) provides:

*“(a) 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. . . .”*

- **Fatal Deficiency No. 1: DWR omitted all salinity-based flow objectives.**
  - ZERO evidence of consistency with those objectives.
- **Fatal Deficiency No. 2: DWR omitted any analysis of its use of the DCP to max out its Delta export rights.**
  - ZERO evidence that such use is consistent with the flow-based objectives.

# There is NO Substantial Evidence that the DCP is Consistent with the “Delta Flow Objectives” Policy (ER P1) (cont’d).

- **Fatal Deficiency No. 3: DWR omitted any analysis of its use of the DCP to address Levee Failures.**
  - One of the fundamental purposes of the DCP is to use the DCP to divert freshwater away from the Delta when the Delta needs that freshwater the most, i.e., when the Delta needs that water to maintain the D-1641 Delta Flow Objectives in the event of one or more levee failures.
  - Accordingly, one of the fundamental purposes of the DCP is to **DIRECTLY VIOLATE the D-1641 Delta Flow Objectives** in the event of one or more levee failures, rather than use the available freshwater to meet and maintain those objectives (as DWR is required to do in its water right permits and under various laws, including the Delta Protection Act of 1959 [Wat Code, § 12200 et seq.]).

- **There are numerous fundamental problems with DWR's express intent to violate the D-1641 Flow Objectives in the event of one or more levee failures, including the following:**
  - **PROBLEM NO. 1: DWR provides NO description whatsoever of its operation plan to violate the D-1641 Flow Objectives to address levee failures. For example:**
    - How degraded must the water get as a result of one or more levee failures before DWR will decide to violate the D-1641 Flow Objectives?
    - How much water does DWR plan to export away from the Delta through the DCP that is needed to meet and maintain the D-1641 Flow Objectives?
    - What mitigation measures, if any, will DWR implement to mitigate the exacerbation of degraded water quality in the Delta from its export of freshwater through the DCP that is needed to restore that quality?
    - When will DWR decide to resume maintaining the D-1641 Flow Objectives after it abandons that maintenance in the wake of one or more levee failures?
    - **DWR provides NO answers to any of these questions.**

- **There are numerous fundamental problems with DWR's express intent to violate the D-1641 Flow Objectives in the event of one or more levee failures, including the following (cont'd):**
  - **PROBLEM NO. 1:** DWR provides NO description whatsoever of its operation plan to violate the D-1641 Flow Objectives to address levee failures.
  - **PROBLEM NO. 2:** As a result, there is ZERO evidence to support the consistency of that nonexistent operation plan with the D-1641 Flow Objectives.
  - **PROBLEM NO. 3:** There is also ZERO evidence that it is **infeasible** for DWR to **refrain** from diverting freshwater into the DCP that is needed to maintain the D-1641 Flow Objectives.
    - DWR does not even assert that such would be infeasible.
    - Much less does DWR attempt to demonstrate with any evidence under what circumstances the recipient of DCP water that is needed to maintain the D-1641 Flow Objectives in the event of levee failures could not be obtained from other non-DCP sources.
- **DWR must demonstrate that its operations of the DCP in the event of Levee Failures will comply with the D-1641 Flow Objectives or that compliance is infeasible. DWR DID NEITHER.**

# There is NO Substantial Evidence that the DCP is Consistent with the “Delta Flow Objectives” Policy (ER P1) (cont’d).

- **Fatal Deficiency No. 4: DWR omitted any analysis of its use of the DCP to address Sea Level Rise.**
  - Another one of the fundamental purposes of the DCP is to address sea level rise.
  - DWR designed the DCP so that the Tunnel intakes would be high enough, i.e., upstream enough, so they would not be vulnerable to salinity intrusion from sea level rise.
  - What that means is that if DWR were to stop maintaining the D-1641 Flow Objectives (which include salinity control) and let the Delta water quality substantially degrade as a result of sea level rise, then DWR could use the Tunnel to export freshwater from the Delta because it is upstream enough to not be affected by that degradation.
  - **DWR performed an economic study in 2018 for the CA WaterFix (a substantially similarly located Tunnel project), wherein it contended that:**  
*“Indeed, the California WaterFix maintains future SWP and CVP deliveries through the Delta at roughly their current levels, while without north Delta intakes, yields fall significantly in response to sea level rise. This result makes adaptation to climate change one of the strongest arguments in favor of investing in the California WaterFix.”*

- What that economic study was saying is that “one of the strongest arguments in favor of investing in the California WaterFix” (i.e., a substantially similar Tunnel as the DCP) was the ability to let the water quality degrade in the Delta as a result of sea level rise and export water that would otherwise be used to maintain good water quality in the Delta through the Tunnel.
- In that study, DWR is talking about using the CA WaterFix’s Tunnel as a means to abandon maintaining water quality within the Delta as a result of sea level rise.
- DWR can never abandon maintaining water quality within the Delta as a result of sea level rise with its existing facilities because its existing facilities export from the South Delta, and it needs to maintain good water quality in the Delta so that it is good quality at those intakes.
- The CA WaterFix and DCP’s Tunnels completely and irreversibly change that.
- **The DCP’s Tunnel is an existential threat to the ongoing maintenance of good water quality in the Delta.**
- With the DCP’s Tunnel, DWR will, for the first time in the history of the SWP and CVP, be able to let the water quality substantially degrade in the Delta as a result of sea level rise (or other conditions) and still continue to export freshwater from the northern tip of the Delta.

- **How DWR Mishandled Sea Level Rise in its Consistency Determination:**

- DWR is proposing to construct a Tunnel high enough upstream so that it can still export freshwater if the salinity in the Delta substantially degrades as a result of sea level rise.
- **The only reason the salinity in the Delta will substantially degrade as a result of sea level rise is if DWR stops maintaining adequate water quality in the Delta.**
- The D-1641 Flow Objectives require DWR to maintain adequate water quality in the Delta.
- DWR provided NO operation plan whatsoever in its Certification explaining how DWR intends to use the DCP to address sea level rise.
- Accordingly, there is ZERO evidence to demonstrate that DWR's operation of the DCP to address sea level rise will be consistent with the D-1641 Flow Objectives.
- Instead, there is every reason, including DWR's design of the DCP and its own economic study, to believe DWR will operate the DCP in a manner that is INCONSISTENT with those objectives.
- There is also ZERO evidence that it would be INFEASIBLE for DWR to operate the DCP consistent with the D-1641 Flow Objectives in the wake of sea level rise.

# There is NO Substantial Evidence that the DCP is Consistent with the “Delta Flow Objectives” Policy (ER P1) (cont’d).

- **Fatal Deficiency No. 5: DWR omitted any analysis of its use of the DCP to address Droughts.**
  - DWR once again provides NO operation plan whatsoever in its Certification explaining how DWR intends to use the DCP to address droughts, under emergency or non-emergency conditions.
  - For example, during drought conditions, does DWR intend to divert freshwater through the DCP that is needed to maintain D-1641 Flow Objectives?
    - If so, when and how much?
    - Why is it necessary to take freshwater away from the Delta when the Delta needs it the most?
      - Under what conditions, if any, is it **infeasible** for exporters to obtain freshwater from alternative non-DCP sources during drought conditions?
  - **Because there is NO operations plan whatsoever for droughts, there is ZERO evidence to demonstrate that DWR’s operation of the DCP under drought conditions will be consistent with the D-1641 Flow Objectives.**
  - **Moreover, there is ZERO evidence that it would be INFEASIBLE to operate the DCP consistent with the D-1641 Flow Objectives during drought conditions.**

## There is NO Substantial Evidence that the DCP is Consistent with the “Delta Flow Objectives” Policy (ER P1) (cont’d).

- DWR was required to do two things:
  - (1) Provide substantial evidence that the DCP will be operated in compliance with the D-1641 Flow Objectives.
  - (2) Or, if DWR determines that compliance is infeasible, it was required to state that it is infeasible and provide substantial evidence to support that infeasibility.
- DWR failed to do either:
  - DWR omitted **all salinity-based flow objectives**.
  - DWR omitted any analysis of its use of the DCP **to max out its Delta export rights**.
  - DWR omitted any analysis of its use of the DCP **to address Levee Failures**.
  - DWR omitted any analysis of its use of the DCP **to address Sea Level Rise**.
  - DWR omitted any analysis of its use of the DCP **to address Droughts**.
  - DWR did NOT state that compliance with the D-1641 Flow Objectives under any of these situations would be infeasible.
  - DWR did NOT provide ANY evidence to support a finding of infeasibility under any of these situations.
- **The Certification must be remanded to DWR to fix these deficiencies.**

# There is NO Substantial Evidence that the DCP is Consistent with the “Reduced Reliance on the Delta” Policy (WR P1).

- For the largest Delta export project since the inception of the CVP and SWP, it is nothing short of astounding how poorly and incorrectly DWR handled compliance with this policy.
  - DWR grossly miscalculated the number of water suppliers who failed to demonstrate reduced reliance.
    - The number was not 8 as DWR stated. The number was at least 194 out of the 257 export water suppliers.
  - DWR failed to demonstrate that ANY of the 257 export water suppliers actually “commenced implementation” of all cost-effective and feasible measures in their water plans that will reduce reliance on Delta exports.
  - Accordingly, there was not a failure of 8 of the 257 export water suppliers to demonstrate reduced reliance as required by WR P1. Nor was there a failure of 194. **It was a failure of every single one of the 257 export water suppliers.**

- DWR's suggestion that it does not matter that NONE of the 257 export water suppliers properly demonstrated reduced reliance because reduced reliance is not a "significant cause" of the need for exports of water through the DCP is **ENTIRELY WRONG**.
- The DCP is a new export facility that supplements the existing through-delta export facility.
- There is an obvious direct and significant relationship between the degree to which the 257 export suppliers reduce their reliance on the Delta and their need for the DCP's supplemental export facility to deliver more export water than the existing export facilities.
- The need for ANY supplemental export water through the DCP, even under levee failures or other conditions, would go to ZERO if all 257 sufficiently reduced their reliance on Delta exports.

- DWR's undisclosed objective to use the DCP **to max out its Delta export water rights** makes a mockery of the Reduced Reliance regulatory policy (WR P1) as well as the statutory Reduced Reliance mandate (Wat. Code, § 85021).
- Maxing out its Delta export water rights means using the DCP to export more water than DWR has ever historically exported and to sustain such exports in perpetuity.
- One could not devise an objective that is more offensive to, and fundamentally irreconcilable with, the Reduced Reliance policy and statutory mandate than this objective.
- **The Certification must be remanded to DWR on the grounds that DWR has grossly failed to provide substantial evidence that the DCP is consistent with the Reduced Reliance policy and statutory mandate.**

# The Certification Must Be Remanded to Address MAJOR Data Deficiencies.

- Essential Operational Details Are Not Presently Available.
  - It is undisputed that the details of how DWR can and will operate the DCP are not presently available.
  - Those details will be determined at the conclusion of the pending proceeding before the State Water Resources Control Board to consider adding new DCP points of diversion to DWR's water rights.
  - Those operational details are essential to Consistency determinations, such as the determination of how DWR will operate the DCP to comply with the Delta Flow Objectives policy, or whether such compliance is infeasible.
  - **The Certification must be remanded so those operation details can be incorporated into the Certification.**

- Essential Construction Details Are Not Presently Available.
  - According to DWR’s own sworn statements under penalty of perjury and DWR’s attorneys’ statements in judicial proceedings, DWR needs to complete hundreds of additional preconstruction geotechnical investigations before it will have sufficient data to support the Certification of the DCP.
    - “The current stage of Delta Conveyance Project design is “conceptual” and would generally be considered at an approximately 10% design level.” (DCP.X2.1.00001, p. 3-14.)
    - [T]he data [from the preconstruction geotechnical activities, which include the 2024-2026 Proposed Geotechnical Activities] is also necessary to determine the DCP’s consistency with the Delta Reform Act of 2009, and for DWR’s application to the Delta Stewardship Council (DSC) for certification of consistency.” (DCP.AA3.2.00002, “PDF” pp. 8-9.)
  - It is undisputed that not a single one of those hundreds of additional preconstruction geotechnical investigations has yet been performed.

- To maintain any semblance of credibility, not to mention to avoid prosecution for perjury and a breach of ethical duties of due candor to the judicial system, DWR's concession that the DCP has not yet advanced to a design stage that is capable of Certification must be treated as dispositive on the issue of whether this current Certification must be remanded.
- In DWR's own sworn words, the DCP's design is too conceptual to be Certified.
- **The instant Certification must therefore be remanded and not resubmitted until all the preconstruction investigations have been performed and the results of those investigations have been incorporated into the revised Certification.**

# There is NO Substantial Evidence to Confirm the Efficacy of DWR's Sealing of the Hundreds of Past and Future Borings and CPTs for the DCP.

- It is well-established that improperly sealed borings or CPT holes can adversely impact **Levee Integrity** and **Groundwater and Surface Water Quality**.
- Nevertheless, there is NO substantial evidence to confirm that DWR has properly sealed ANY of the hundreds of past borings or CPTs.
- DWR can easily determine the degree to which those past borings and CPTs were properly sealed.
- **The Certification must be remanded so that DWR can include information regarding the efficacy of its sealing of past borings and CPTs into the Certification.**
- Evidence confirming that efficacy is essential to determining whether DWR's future performance of hundreds of additional borings and CPTs (both before and during construction) is properly mitigated, in compliance with Best Available Science, and consistent with the Delta Plan and the Co-equal goals.