Before Delta Stewardship Council

Appeal of Covered Action Certification of Consistency
Delta Conveyance Project, C20257
Appeal No. C20257-A5

Written Submission in support of Appeal by San Francisco Baykeeper, Shingle Springs Band of Miwok Indians, Winnemem Wintu, Center for Biological Diversity, California Sportfishing Protection Alliance, Little Manila Rising, Friends of the River, California Indian Environmental Alliance, Sierra Club California, and Restore the Delta

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I. INTRODUCTION

The Delta Conveyance Project ("DCP"), a proposed new massive diversion of water from the Sacramento River, would have devastating consequences on the Sacramento-San Joaquin Delta and San Francisco Bay. The DCP is flatly inconsistent with the Delta Reform Act and the Delta Plan. The Delta Stewardship Council's ("DSC") adoption of the Delta Plan, as required by the Delta Reform Act, includes at least seven separate policies with which the DCP is inconsistent and for which there is no substantial evidence that the DCP would support or further them: WR P1, ER P1, ER P2, ER P3, ER P4, ER P5, and DP P2.

More, the Department of Water Resources' ("DWR") consistency determination fails to use, and often ignores, the best available science in connection with analysis of water supply needs throughout the state, Delta flow objectives, climate change, and the respect for local land use and the Delta as a place, including as a Tribal Cultural Landscape, making it inconsistent with Delta Plan Policy G P1.

Further, in asserting consistency, DWR has failed to show, based on substantial evidence, that the DCP will further the Delta Reform Act's "coequal" goal of protecting, restoring, and enhancing the Delta ecosystem, or that the DCP will provide a more reliable water supply in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place, including the Delta as a Tribal Cultural Landscape, and tribal cultural resources, uses, and locations within the Delta.

In short, the DCP would increase reliance on water exports from the Delta, harm ecosystems and species already in crisis, and irrevocably change the Delta as a place for the Tribes, communities, farmers, fisheries, and wildlife that the Delta Reform Act was passed to protect, preserve, and restore. DWR's determination of consistency with the Delta Plan is arbitrary, is not supported by substantial evidence, relies on misinterpretation of the Water Code and Delta Plan, and is not based on the best available science.

The appeal submitted by San Francisco Baykeeper, Shingle Springs Band of Miwok Indians, Winnemem Wintu, Center for Biological Diversity, California Sportfishing Protection

Alliance, Little Manila Rising, Friends of the River, California Indian Environmental Alliance, Sierra Club California, and Restore the Delta should be sustained.

II. THE DCP IS INCONSISTENT WITH THE DELTA REFORM ACT AND THE DELTA PLAN

A. The DCP Is Inconsistent with WR P1 of the Delta Plan [Appeal of Consistency with WR P1]

Core to the Delta Plan and to achieving the Delta Reform Act's coequal goals is the principle that new water exports from the Delta can only be justified when water suppliers have shown a decrease in reliance on the Delta and an increase in regional self-reliance for water supply. (See Delta Plan, Chapter 3 at 122-24.) DWR's asserted compliance with this portion of the Delta Plan is not supported with substantial evidence: DWR fails to provide substantial evidence for (1) its misinterpretation of the plain language of section 5003(a)(1); (2) its arbitrary use of different data regarding Delta reliance and regional self-reliance; and, (3) its attempt to sidestep the reality that increasing water exports from the Delta cannot and does not reduce reliance on the Delta.

1. DWR Ignores the Plain Language of Delta Plan Section 5003(a)(1) and Impermissibly Inserts Its Own Language

Throughout the Delta Plan's section on WR P1, Reduce Reliance on the Delta through Improved Regional Self-Reliance, and the portions of the California Water Code that enshrine that portion of the Plan in law, two objectives are repeatedly recognized: (1) a reduction in reliance on the waters of the Delta, and (2) an increase in regional self-reliance. For example, to be eligible to receive new water exports from the Delta, the law requires water suppliers to show that they have (1) reduced their reliance on the Delta and (2) increased their regional self-reliance. (23 CCR § 5003(a)(1).) The Delta Plan notes that the purpose of this showing is to ensure that water suppliers are adhering to "the State's policy of [(1)] reducing reliance on the Delta and [(2)]] the related mandate of improving regional self-reliance." (Delta Plan Appendix G, at G-2.) And in complying with WR P1, water suppliers must report their "expected outcome for measurable [(1)] reduction in Delta reliance and [(2)] improvement in regional self-reliance." (23 CCR § 5003(c)(1)(C).) Not once does the Delta Plan suggest that the coequal goals of the Delta Reform Act will be achieved

if water suppliers choose to either reduce reliance on the Delta or increase regional self-reliance, but fail to do both.

Yet, in preparing its Certification of Consistency, DWR chose to ignore this "and," replacing it with "or." DWR's evidence is overwhelmingly focused on water suppliers' increases in regional self-sufficiency, but omits discussion of how, or whether, those water suppliers had separately decreased their reliance on the Delta, likely because they had not. Had DWR been true to the language of section 5003(a)(1), it would have to acknowledge that the evidence it submitted demonstrates that few, if any, water suppliers meet both requirements contained in the law. Had DWR analyzed Delta reliance, not solely regional self-reliance, the evidence would demonstrate that suppliers seeking water from the DCP would have substantially greater demand for Delta water due to their failure to reduce reliance on the Delta – undercutting DWR's claim that DCP demand due to the failure of suppliers to meet WR P1 is insignificant.

In attempting to justify its circumvention of the legal requirement that water suppliers must show both (1) reduced reliance on the Delta and (2) increased regional self-reliance to legally receive exports from the DCP, DWR claims that the concepts are "two sides of the same coin." (DCP.AA1.2.00001 at 54.) But while the two concepts can be related, and often closely so, DWR's assertion overstates the connection. Rather than hewing to the well-established rule against surplusage and accepting the two concepts as related but distinct, DWR contends that compliance with one necessarily and identically supports compliance with the other. But neither the Delta Plan nor the Water Code says, means, or claims that reduced Delta reliance is the same as increased regional self-reliance.

It is not difficult to identify scenarios in which the two concepts diverge. An urban water supplier could implement water use efficiency programs and invest in water recycling, while at the same time maximize its Delta water allotments and exports. While the water supplier would have increased its self-reliance, it would have failed to decrease its reliance on the Delta. Similarly, a reduction in population could allow for reduced Delta exports without any increase in regional reliance or local water supplies and sources. Indeed, DWR's own evidence shows that since 2015

the amount of water delivered from the Delta to regional wholesalers is has increased in each five year reporting period, undermining DWR's assertion that local urban water agencies receiving exports from the Delta through these regional wholesalers have decreased reliance on the Delta for water supply.

Ultimately, the failure to achieve both prongs of section 5003(a)(1) means potential recipients of DCP water are not contributing to reduced reliance on the Delta and should have been included by DWR as those contributing to increased demand for Delta water. (23 CCR § 5003(a)(2).) DWR's construction of theoretical compliance with WR P1 by nearly every entity that would receive DCP water ignores this reality, meaning substantial evidence does not support DWR's claim of consistency with WR P1.

2. DWR Fails to Provide Substantial Evidence Supporting Its Conclusions Regarding Increased Regional Self-Reliance and Decreased Reliance on the Delta

Even under DWR's erroneous interpretation of section 5003(a)(1), DWR's own reports of Urban Watershed Management Plan ("UWMP") data regarding reduction in reliance on the Delta and increases in regional self-reliance fail to provide substantial evidence of consistency with WR P1 for at least three reasons. First, DWR relies on an unrepresentative baseline for measuring purported reductions in reliance on the Delta. Second, DWR uses multiple sets of data regarding regional self-reliance that are often at odds with each other, making its conclusions arbitrary and outcome driven not evidence based. And third, DWR contends that insignificant changes between amounts of imports or regional reliance are sufficiently "adequate contributions" to both reduced Delta reliance and increased regional self-reliance to demonstrate compliance and consistency.

First, in determining the degree to which water suppliers have decreased their reliance on the Delta, DWR relies on data reported in regional UWMPs. (DCP.AA1.2.00009, App. 3 at A3-3, tbl. A.3-2.) These numbers generally appear in appendices in the regional UWMPs and record the actual or expected volumes of water deliveries received from Delta sources in the years 2010, 2015, 2020, 2025, 2030, 2035, 2040, and 2045. (*Id*.) For nearly all regional water agencies, 2010 represents a year with unusually high water deliveries. (*Id.*). 2010 is also the year that DWR

chooses as its baseline against which reductions in Delta reliance are measured, meaning that total exports in all subsequent years appear to decrease. But the majority of this decrease is due to the "benchmark" for exports coming from a particularly high export year and then being compared to projections based on modelled averages in typical or normal years.

More, the use of a single year benchmark, combined with California's widely varying hydrology is not substantial evidence, let along evidence based on the best available science, that can support a conclusion of reduced Delta reliance. DWR's submission disguises actual impacts by comparing a limited number of actual samples of prior usage to modelled averages going forward. Had DWR compared average, long-term use based on actual exports or modelled hydrology the results would likely be different and would highlight the failure of the DCP to be consistent with WR P1. Indeed, between 2030 and 2040, DWR predicts that water suppliers will increase their reliance on the Delta by roughly 10,000 acre-feet every five years. (*Id*.) DWR expects a total of nearly 24,000 acre-feet of *increased* rather than decreased reliance on the Delta. (*Id.*) Given total reliance on the Delta is expected to increase, DWR can only assert reduced reliance by relying on an unrepresentative baseline for comparison. This is an arbitrary conclusion and result driven outcome, not one based on substantial evidence or the best available science and data.

Second, when measuring increases in self-reliance and decreases in Delta reliance, rather than adhering to a single, consistent methodology, DWR picks and chooses different metrics, relying on outcome determinative decision-making, not consistent lines of evidence. In tracking self-reliance, DWR uses results and projections for "supplies contributing to regional self-reliance" reported in both absolute quantities and as a portion of total usage or demand. (See DCP.AA1.2.00009, App. 2 at A2-3-A2-8, tbl. A.2-3.) But these numbers—one a volume and the other a percentage—often diverge. For example, in Table A.2-3 for 14 water suppliers, the percentage of regional water increased while the total amount of supplies contributing to regional self-sufficiency decreased or remained constant from 2010 to 2030. Conversely, for 13 water suppliers, the raw quantity of regional water increased while the percentage decreased or stayed

the same from 2010 to 2030. (*Id.*) Notably, between 2010 and 2030, five water suppliers saw a decrease or no change in both the raw quantity and the percentage of regional water supply. (*Id.*)

For water suppliers that were categorized by DWR as having reduced reliance on the Delta as shown in Table A.2-1, five water suppliers showed a decrease in total quantity of Delta supplies, while the values for Delta supplies as a percentage of total demand increased or remained constant. (DCP.AA1.2.00009, App. 2 at A2-1-A2-2, tbl. A.2-1.) Vice versa, for 10 water suppliers, the percentage shrank while the total quantity of Delta supplies increased or remained constant. (*Id.*)

In total, for 47 potential DCP water recipients, at least one of DWR's chosen metrics indicated a decrease or no change in either regional self-reliance or an increase in Delta reliance from 2010 to 2030.[1] Despite this evidence of noncompliance with section 5003(a)(1), DWR categorized all 47 of those water suppliers as having reduced reliance on the Delta through regional self-reliance. (See DCP.AA1.2.00009, App. 1 at A1-1-A1-7, tbl. A.1-1.) DWR provides no explanation or reasoning for this overly inclusive characterization of the facts and ignores that it skews the calculations of total demand for Delta water relied on by DWR to demonstrate consistency with WR P1.

Third, beyond the prior to errors, DWR's accepts de minimis reductions in Delta reliance or increases in regional reliance as substantial evidence of "adequate" compliance. This too is inconsistent with the Delta Plan and Delta Reform Act. In Tables A.2-1 and A.2-3, DWR categorizes water suppliers showing any improvement in either reduced reliance or increased self-reliance, no matter how small the change, as complying with section 5003(1)(a)'s requirement that water suppliers "adequately contribute to reduced reliance on the Delta and improved regional self-reliance." (23 CCR § 5003(a)(1) [emphasis added].) A close look at the numbers reveals that a plethora of potential recipients of DCP water supply project only minimal improvements with respect to Section 5003(1)(a).

[1] DWR does not explain its chosen "end" comparison year is, though frequently it uses 2030 for its comparisons. Using 2030 is arbitrary, likely chosen because it shows the trend most consistent with DWR's chosen and desired outcome, and does not provide substantial evidence for impacts of the DCP, which is not scheduled to be potentially operational until 2043, at earliest.

For example, from 2010 to 2030, of the 56 water suppliers surveyed, DWR projects that 15 water suppliers will decrease their total quantity of Delta supplies by 10% or less, with 6 decreasing their quantity of Delta supplies by 5% or less. (DCP.AA1.2.00009, App. 2 at A2-1-A2-2, tbl. A.2-1.) For Delta supplies as a percent of total demand, DWR projects that 26 water suppliers will decrease their reliance by 10% or less, with 15 of those water suppliers decreasing by 5% or less. (*Id.*)

Similarly, from 2010 to 2030, of the 185 water suppliers surveyed for increased regional self-reliance, DWR projects that 13 water suppliers will increase their total quantity of supplies contributing to regional self-reliance by 10% or less, with 8 of those water suppliers improving by 5% or less. (DCP.AA1.2.00009, App. 2 at A2-3-A2-8, tbl. A.2-3.) For supplies contributing to regional self-reliance as a percentage of total demand, 44 water suppliers improved demand by 10% or less, with 28 increasing by 5% or less. (*Id.*) DWR offers no explanation for how these small improvements are "adequate" contributions under the Delta Plan. Given the crises in the Delta resulting from water exports and the urgent need for reduced exports and reduced Delta reliance, such minimal contributions are not adequate under the Delta Plan.

3. DWR Ignores the Reality that the DCP, Which Extracts and Exports More Water from the Delta, Increases Reliance on the Delta for Water Supply

Without substantial evidence to support its interpretation, DWR takes a contorted view of "reducing reliance on the Delta" under section 5003, allowing massive increases of water exported from the Delta so long as UWMPs predict that the water suppliers receiving these Delta waters will increase their regional self-reliance by some non-zero amount, including the de minimis increments discussed above. DWR's view allows it to conclude that a large net increase of exported water from the Delta will reduce reliance on the Delta for water supply.

There is no way to reduce reliance on the Delta by increasing the overall amount of water removed from the Delta—more water taken from the Delta means more water taken from the Delta. And diminishing flows into, through, and out of the Delta puts already imperiled species at risk of further harm and pushes the Delta ecosystem closer to complete collapse. DWR's mangled

interpretation of "reducing reliance of the Delta" is unjustifiable given the purpose of WR P1 and the Delta Plan and is a direct affront to the Delta Reform Act's coequal goals of "providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem." (Water Code § 85054, emphasis added).

DWR's conclusion that the DCP is consistent with Delta Plan policy WR P1 is not supported by substantial evidence and should be remanded.

B. The DCP Does Protect or Support the Delta as a Place, DWR's Contrary Assertion is not Supported by Substantial Evidence [Appeal of Consistency with DP P2 and with Delta Plan Requirement to protect and enhance the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place]

The Delta supports a wide variety of land uses, recreational activities, and cultural resources. These uses, resources, and activities, are core to the Delta as a place and to the agricultural, urban, legacy, Tribal, and environmental justice communities that exist in and depend on the Delta and its watershed. (See, e.g., DCP.D1.1.00241 [Comments by Delta Stewardship Council] at 21.) The DCP's impacts are inconsistent with protecting and supporting the Delta as a place, and there is not substantial evidence to support a finding of consistency with Delta Plan policy DP P2. The evidence relied upon by DWR focused on the full project scale, ignoring that impacts on these communities and uses in the Delta "may not be detectable by evaluating environmental impacts" through that lens. (*Id.*) Because the DCP is inconsistent with DP P2, the covered action should be remanded to DWR.

First, the DCP will have significant, negative, and unavoidable impacts on these communities—ones that "currently bear high environmental burdens" or have "other demographic characteristics that heighten their baseline level of social vulnerability to social and environmental stressors." (*Id.*) These consequences may "conflict with their current use of land for residency, livelihood, recreation or other purposes." (*Id.*; see also DCP.V2.14.00058.) And these disproportionate impacts on Indigenous and Hispanic/Latino communities are so severe and so targeted that it is nearly impossible for them to have been accidental. (See DCP.V2.14.00058 at p. 9.) This is not consistent with Delta Plan policy DP P2.

Second, the DCP is likely to increase the frequency and severity of harmful algal blooms ("HABs"). DWR does not address these impacts in connection with recreational uses in the Delta or based on the existing scientific information about existing uses of Delta waterways that are already impaired by HABs. DWR offers new proposed monitoring of HABs as part of its mitigation measures, but nothing to actually reduce HABs and no evidence to counter the reality that the DCP will increase HABs in the future, largely because DWR's analysis of HABs in the FEIR and the water rights hearings was incomplete and misleading. (See DCP.V2.12.00002.) HABs are currently a problem in the Delta that restrict recreational opportunities, and the DCP is likely to increase the frequency and occurrences of HABs. (*See* DCP.V2.14.00051, DCP.V2.14.00045.) This is not consistent with Delta Plan policy DP P2.

Third, the consistency determination is also not supported by substantial evidence as it relates to tribal cultural resources or the Delta as a Tribal Cultural Landscape. According to impacted Tribes, DWR failed to meaningfully consult with them in connection with the DCP. (*See, e.g.,* DCP.V2.14.00038, DCP.V2.14.00033, DCP.V2.14.00056.) And as the DSC explained to DWR, it "defers to Tribes on [these] matter[s]." (DCP.D1.1.00241, Comment No. 507 [DSC DEIR Comments at 23].) The Tribes' determination is supported by additional evidence, see DCP.V2.14.00081, while DWR's assertions are not. This is not consistent with Delta Plan policy DP P2.

Fourth, and relatedly, DWR admits that the DCP will have a significant, unavoidable, harmful impact on Tribal cultural resources and on the Delta as a Tribal Cultural Landscape. (DCP.C.1.00001 at 8-2.) Despite acknowledging the harms, DWR's consistency certification ignores them, ignores the deep Tribal history in the Delta, and ignores the changes the DCP would cause. DWR also ignores that the DCP will cause irreparable harm to specific Tribal Cultural Resources, including historic village sites and tribal customs and practices that have occurred in the Delta and the watershed for millennia. DWR further ignores that the Delta as a place is inseparable from these historical resources, practices, and uses. These uses and resources are existing uses in the Delta and there is no evidence that the DCP's harm to these uses and resources

is consistent with DP P2. (*See, e.g.,* DCP.D1.1.00241, Comment No. 507 [DSC DEIR Comments at 22-24].) This is not consistent with Delta Plan policy DP P2.

Fifth, recreational opportunities—important and significant existing uses of the Delta—will also be lost due to construction and eventual operation of the DCP. In addition to the worsened impacts of HABs, DWR acknowledges these losses and then asserts that the losses don't matter because similar opportunities exist elsewhere. This is not substantial evidence of anything other than lost recreational opportunities. And as the Council explained, impacts on low-income households and communities in the Delta cannot be eliminated by the existence of opportunities elsewhere. Such a conclusion ignores that environmental justice communities "may face barriers to access (e.g., transportation, mobility) that prevent them from access[ing] alternative locations." (DCP.D1.1.00241 (Comment 507) [DSC DEIR Comments at 22].) This is not consistent with Delta Plan policy DP P2.

And sixth, DWR's assertion that the Community Benefits Program, the various mitigation measures, or other alleged benefits from the DCP make up for these harms are not supported by substantial evidence. DWR relies on speculation about economic benefits from temporary non-agricultural jobs to claim the DCP will not have a negative effect on the Delta economy. But DWR's own conclusion was that the DCP would have significant unavoidable impacts on Delta agriculture and farmland. (DCP.C.1.00001 at 8-1.) To date, the CBPs are a set of illusory promises with no actual benefits, that fail to address or mitigate harms to environmental justice communities and will do nothing to ensure that the consequences of construction and operation will avoid extinguishing or diminishing existing uses of the Delta. But the CBPs have existed for multiple years, yet DWR provides no evidence that there are any actual benefits to date, any public contracts yet entered, or any demonstration that the funds DWR touts will be spent, let alone be spent in ways that benefit the communities that will be harmed by the DCP.

Additionally, the harms DWR says will be mitigated or avoided by temporary CBPs or other actions are not "temporary" harms. While construction will not last forever, DWR ignores that a decade-plus of construction impacts are likely to be permanent, especially for the businesses

like marinas, restaurants, bate shops, and others that have historically been part of the fabric of the Delta. Few businesses can afford to lose revenue for a decade or more, yet DWR simply assumes these entities will return to business as usual after ten or more years of construction negatively impacting their operations. (*See, e.g.,* DCP.V2.8.00030.) This is not consistent with Delta Plan Policy DP P2.

Instead of addressing the harms to the Delta, listening to the Tribes and communities who have sought inclusion in the DCP's design, siting, and operation, or acknowledging the inconsistency of the DCP with the Delta as a place, DWR instead asserts that the DCP's harmful consequences and changes to the Delta are consistent with DP P2, because the Delta is an "evolving" place. But there is not substantial evidence to support DWR's claim that forever negatively changing the existing uses and character of the Delta as a place is consistent with preserving the Delta as an "evolving" place. DWR's linguistic sleight of hand should be rejected.

The goal of the Delta Reform Act is not to forever change the Delta in ways that are contrary to its history, to the desires and needs of the communities in the Delta, and to the unique and remarkable benefits it provides. Instead, they are to protect and enhance the Delta in ways that are consistent with those characteristics. The covered action should be remanded to DWR as no substantial evidence supports a determination of consistency with Delta Plan policy DP P2.

C. The DCP is Inconsistent with Flows that Support the Delta Ecosystem, and DWR Ignores Evidence of Its Own Noncompliance with the Existing Inadequate Regulatory Requirements in the Delta [Appeal of Consistency with ER P1]

Substantial evidence, including conclusions in the Delta Plan itself, demonstrates that more flow is needed to support the Delta's ecosystem, beneficial uses of water, fish, wildlife, fisheries, and the Tribes and communities that depend on them. The Delta Plan recognizes the importance of updating flow objectives, of requiring increased flows, of having more natural timing and fluctuation of flows, and of restoring ecosystem functions through better flows. (See Delta Plan, Ch.4 at 4-27 to 4-32.) These conclusions in the Delta Plan are consistent with a host of State Water Resources Control Board findings over the last fifteen plus years.

As the State Board explained in 2018, "[w]hile natural conditions have not existed in the Bay-Delta watershed for more than a hundred years, many of the native fish and wildlife species that are now at the verge of extinction maintained healthy populations until the past several decades when water development intensified." (DCP.V3.00003 at 5.) This was consistent with the State Board's determination in 2017 that "[f]ish species have continued to experience precipitous declines since the last major update and implementation of the Bay-Delta Plan in 1995 that was intended to halt and reverse the aquatic species declines occurring at that time." (DCP.V2.2.00001 at 1-4.) And with the State Board's conclusion in 2010, pursuant to the Delta Reform Act, that "current policies have been disastrous for desirable fish." (DCP.V2.30.00121 at 1.)

DWR asserts that the DCP is consistent with ER P1 and with flows that support the Delta ecosystem. However, this assertion is based solely on DWR's contention that the DCP can be operated while DWR meets the flow requirements in Water Rights Order D-1641. This conclusion is not based on substantial evidence and is inconsistent with the best available science. "Existing regulatory minimum Delta outflows would not be protective of the ecosystem, and without additional instream flow protections, existing flows may be reduced in the future, particularly with climate change and additional water development" such as the DCP. (DCP.V3.3.00002 at 1-9.)

DWR claims that it meets the flow requirements of D-1641 nearly all the time. But it leaves out of its analysis that in six years since 2014—half of the last dozen years—DWR has sought and received permission from the State Board to not meet those requirements via the use of Temporary Urgency Change Petitions and Orders ("TUCPs"), and ignores that during TUCPs there has been harmful to fish and the Delta's ecosystem. (See DCP.V2.30.00011 at 20; see also DCP.V3.3.00002 at 7.24-4; DCP.V2.30.00122 at 39-40.) DWR's determination that it operates to meet D-1641 currently, and will do so in the future, is only possible if half of the prior twelve years of operations are ignored. This prevents a conclusion that substantial evidence supports DWR's consistency determination. Ignoring evidence that contradicts a conclusion is not the same as substantial evidence supporting that conclusion.

Moreover, "the best available science indicates that the existing requirements [aka D-1641] are insufficient and that a comprehensive regulatory strategy addressing the watershed as a whole is needed." (DCP.V3.00003 at 6.) But DWR does not analyze any requirements other than the "existing" inadequate ones. This explicitly avoids the best available science and cannot be substantial evidence that the DCP can be operated in a manner which would provide the flows necessary to support the Delta's ecosystem, wildlife, fish, fisheries, or the communities and Tribes that depend on those things.

D. The DCP Does Not Support Ecosystem Recovery, and the Uncertain and Ineffective Mitigation of Harm is not Improvement or Enhancement of the Ecosystem [Appeal of Consistency with ER P2, ER P3, ER P4, and ER P5, and of the Coequal Goal of Ecosystem Restoration]

DWR relies solely on mitigation of harms the DCP will cause to support its determination of consistency with Delta Plan policies ER P2, ER P3, and ER P4, as well as its determination that the DCP will not interfere with achieving the co-equal goal of protecting, restoring, and enhancing the Delta's ecosystem. There is not substantial evidence that the DCP will protect, restore, or enhance the Delta's ecosystem—in fact the opposite is true. And there is not substantial evidence that the proposed mitigation measures will eliminate, avoid, or make up for the harms the DCP will cause, let alone that they will improve conditions in the Delta.

To mitigate is to reduce the seriousness of an effect, not to improve a condition over the status quo. DWR's assertion is that by causing less harm than it conceivably could, it is actually providing a benefit. The evidence is clear that the Delta, the "most valuable estuary and wetland ecosystem on the west coast of the Americas," Water Code section 85002, is in a "crisis," *id.* section 85001(a). DWR does not identify any evidence of any action associated with the DCP that will resolve the underlying ecosystem crisis or improve, protect, restore, or enhance the Delta's ecosystem.

DWR's assertion that the uncertain mitigation offered in connection with the DCP supports a finding of consistency with ER P2, ER P3, ER P4, or the coequal goal of ecosystem restoration is not supported by any evidence. Instead, the evidence shows that the proposed DCP, even with

the mitigation efforts identified by DWR will cause harm to the ecosystem, not benefit, restore, enhance, or protect it. (*See, e.g.*, DCP.V2.30.00011 at 46-48, 60-62, 69-70, 79-83, 88-90, 93-95; see also DCP.V2.18.00006 at 4-5, 6-13.)

Additionally, DWR's assertion that the DCP is consistent with ER P5 is also not supported by substantial evidence. Contrary to DWR's conclusion, the evidence shows the DCP will provide habitat and improve conditions for invasive species, including through reduced flows, and DWR fails to address the impact substantial new infrastructure will have on invasive species like the Golden Mussel—providing new habitat for those species at the expense of native, desirable ones.

The determination of consistency with the coequal goal of protecting, enhancing, and restoring the Delta's ecosystem and with Delta Plan policies ER P2, ER P3, ER P4, and ER P5, is not supported by substantial evidence and should be remanded to DWR.

III. DWR'S CONSISTENCY DETERMINATION DOES NOT USE THE BEST AVAILABLE SCIENCE

In the context of the Delta Reform Act, the DCP, and the Delta, the best available science is information that is relevant to the Delta and its ecosystem, objective and void of non-scientific (political) influence, open and transparent, inclusive across different disciplines and communities, and peer reviewed where possible. DWR has failed to use the best available science to support its determination of consistency. As a result, the determination is not consistent with the Delta Plan, the law, is not supported by substantial evidence, and should be remanded.

A. The "Need" for More Water from the Delta is Based on Inaccurate and Arbitrary Population Growth and Water Use Projections

Serving the forever increasing water demands of forever increasing populations is core to DWR's consistency determination with WR P1 and promotion of the DCP. But the data DWR relies on in determining population growth are not the best available science. DWR's numbers come from disparate sets of data contained in nearly 300 UWMPs, which in turn base their population projections on a wide variety of sources. These data lack consistency in not just data sourcing, but also in analysis methodologies. Moreover, the data sources are historically plagued by chronic overestimations of population growth, compounding the reliability of any data derived

from these sources. And finally, the UWMPs only project population growth through the year 2045 at the latest, obscuring the fact that data sources generally expect a decrease in California's population as little as five years after that date, or concurrently with the start of potential DCP operations.

First, DWR relies on inconsistently sourced population growth datasets, resulting in a patchwork of data that cannot be systematically compared across the various regions or add up to substantial evidence based on the best available science. From a sampling of 24 different UWMPs from 2020, water suppliers generated their population growth projections from at least ten different sources, including the Southern California Association of Governments, the San Diego Association of Governments, the Association of Bay Area Governments, the California Department of Finance, the Center for Demographic Research, and five different General Plans or similar planning documents. Each of the sources generates population growth data according to different methodologies, precluding any single source of projection for population growth metrics in DWR's water demand analyses. This is not the best available science or substantial evidence—instead it continues DWR's pattern of outcome driven thinking based on cherry-picked information.

Moreover, differences in segmentation of population areas between the different population growth data sources and water service areas recorded in UWMPs prevents any meaningful review DWR's population growth analyses. This is not best available science or information. Water district service areas are often a collection of parts or entireties of multiple cities and unincorporated areas. However, the various sources for population growth data do not measure based on service area but rather use their own particular segmentation. Without access to the proper GIS programs and files, overlaying a water district service area and the corresponding population growth dataset areas is nearly impossible. DWR's effort to provide GIS layers and other information for water surface areas does not resolve this problem, and is not made publicly available for review, again, belying any claim that the UWMPs population projects are based on the best available science. And for some population growth datasets, access to even just the reports (let alone the more specific underlying raw data) is prohibitively expensive. Altogether, these barriers interfere with any

meaningful public participation in the review process and are inconsistent with the Delta Plan's requirement that determinations be made based on the best available science.

Second, as there is no single method that UWMP authors must adhere to in generating their own population growth projections, DWR relies on population growth data with at least two layers of inconsistency and uncertainty. UWMP authors describe a variety of tactics for generating their population growth projections, including utilizing their own (often neither defined nor explained) models, simply "basing" their numbers on an underlying dataset without attempting to define what "based on" means, or illogically assuming a steady growth rate from year to year over the course of decades. (*See, e.g.*, DCP.AA2.3.00059 at 3-6 (City of Brentwood utilizing its own models and the "law of growth" for its projections); DCP.AA2.3.00078 at 16-17 (City of East Palo Alto assuming steady growth rate of 1% each year from 2020 to 2045); DCP.AA2.3.00038 at 3-8 (Calleguas Municipal Water District using projections "based on" SCAG data.) The employment of such vague models and terms prevents any clear or accessible review of UWMP population growth projections, while unsupported assumptions about population growth do not reflect reality and have the potential amplify small errors in the data. This is not best available science.

Third, DWR justifies its megaproject with a myopic view of population growth, hiding projected trends in the near future that undercut supposed increases in water demand. Generally, DWR relies on population growth information that projects through the years 2040 or 2045. This masks the reality that California expects the statewide population to begin decreasing by as soon as 2051 and to continue to do so for the foreseeable future thereafter. (See as 2051 and to continue to do so for the foreseeable future thereafter. (See California Dep't Fin., P2-A Total Population for California and Counties (as of Jan. 2, 2026), Sheet "Data", Row 2, Columns AJ-BD.) Notably, the decline in population in Southern California counties is expected to begin even sooner. (See *id.*, rows 22, 33, 36, 40, 45, 59 and Column X.) By 2038, before the DCP could even be operational, the total population of Los Angeles, Orange, San Diego, Riverside, Santa Barbara, and Ventura counties is expected to begin contracting. (See *id.*, rows 22, 33, 36, 40, 45, 59 and Columns K, AK.) By 2051, the total population of those six Southern California counties is expected to fall

below the population in 2025. (See *id*.) Moreover, as the per capita demand for water continues to decrease, the total demand for water in Southern California counties should be lower in 2045, when the DCP is expected to be operational, than it is today. (See DCP.V2.7.00001.)

Instead of using the best available science, DWR relies on higher demand, higher populations, and higher per capita use. Only by using inaccurate, incomplete, and unlikely data and information, can DWR assert that the DCP is necessary to ensure the reliability of California's water supply. In reality, the best available data plainly shows that the Delta Plan's "coequal" goal of a reliable water supply for all of California can be achieved without the DCP and the harm it would cause to the Delta and the Delta Reform Act's other "coequal" goal.

B. Climate Change

The Delta Plan acknowledges that "[c]limate change will have major implications for the future of the Delta ecosystem[,] and will lead to increased temperatures, changing precipitation and runoff patterns, increased frequency of extreme weather events, and rising sea levels." (Delta Plan at 4-16 [citations omitted].) The Plan requires that "these climatic trends must be accounted for in both water management and ecosystem sustainability strategies to improve system robustness and resiliency[.]" (*Id*.) Covered actions must thus document the use of the best available science in accounting for the effects of climate change. (23 Cal. Code Regs. § 5002(b)(3).) DWR has failed to document the use of the best available climate science in several critical respects.

First, DWR failed to account for recent scientific information that indicates that the DWR's climate modeling is not representative of current or future conditions. Specifically, DWR engaged in climate modeling to inform its CalSim 3 hydrological modeling. However, this climate modeling relied on data from 1922-2015. (DCP.V2.18.00085.) A considerable body of scientific evidence indicates that data from this period does not adequately account for climate trends that affect precipitation patterns, snowpack, runoff volumes and timing, and other factors affecting the quantity of water available for the DCP and the timing of when that water would be available. For example, a review of the period selected by DWR reveals that the frequency of dry and critically dry water year types has increased by almost 50 percent, from 33 percent of years for the 1922-

1979 period to 47 percent of years for the 1980-2015 period. (DCP.V2.18.00006 at 14; *see also* DCP.V2.18.00086.) And analysis of tree rings dating back to 800 CE show that the period from 1978 to 1999 was the single wettest period recorded in western North America. (DCP.V2.32.00010.) Thus, DWR arbitrarily based its hydrological analyses on climate data for an unusually wet aberration in the broader record that is not representative of the conditions under which the DCP will be operating, rather than the best available climate science.

DWR acknowledged that the 1922-2015 period is not representative of current and future conditions when it performed additional model runs in 2024, after it issued the DCP Final EIR. The additional modeling, however, did not remedy DWR's failure to use the best available climate science. While the modeling accounted for *some* of the observed shifts in California's climate hydrology, such as the greater variability in annual precipitation (e.g., wetter wet years and drier dry years) and the shift toward an earlier onset of snowmelt (DCP.V2.12.00005 at 39-40), it does not address others, such as increased evaporation due to higher temperatures and the effects of wildfires, which are anticipated to increase the extent of burned areas in California by 77 percent by the end of the century under a high greenhouse gas emissions scenario. (*Id*. at 40-42.)

Similarly, DWR modeled the effects of salinity intrusion on the Delta and DCP operations by relying on data from a 689-day period from February 10, 2009 to December 31, 2010. This period is not representative of future conditions, as it necessarily fails to account for science-based predictions of future sea level rise, a driver of Delta salinity intrusion, and does not include any "critically dry" periods when the effects of salinity intrusion in the Delta are the greatest due to reduced freshwater inflows to the Delta. (DCP.V2.12.00005 at 33-34.)

Second, published, peer-reviewed studies from leading climate scientists show that the climate models DWR used to inform its CalSim 3 hydrological modeling fail to predict observed trends regarding tropical warming patterns in the Pacific Ocean and related trends regarding atmospheric rivers in California and the Pacific jet stream, each of which affect California's water system in significant ways. (*See, e.g*., DCP.V2.32.00020; DCP.V2.32.00021; DCP.V2.32.00023; DCP.V2.32.00026.) These trends include the observed poleward shift of atmospheric rivers in

recent years, which means that major precipitation events are more likely to miss California, possibly contributing to the megadrought the region experienced from 2000-2022. (DCP.V2.32.00026.) Scientists have also observed a poleward shift in the North Pacific jet stream in the last decades, and these studies similarly show that the models relied on by DWR fail to capture that reality. (DCP.V2.32.00020.)

Third, DWR did not include climate analyses beyond the year 2070 in its DCP environmental review, despite its anticipation that the DCP would not be operational before 2045 and that its operational lifetime would span well beyond 2070, because such projections "would be too speculative to provide any meaningful information." (DCP.D1.1.00029 at 4A-2; DCP.V2.18.00006 at 17.) But while climate conditions in and after 2070 cannot be predicted with certainty, the best available climate science makes it possible to evaluate a range of climate scenarios that the DCP might operate under, including modeling the increasingly adverse effects of climate change on hydrology and sea level rise in the Sacramento River Basin and Delta. Indeed, DWR developed 2070 climate scenarios for other purposes, including operational assessments and cost-benefit analyses. (DCP.V2.18.00006 at 17-19.) DWR thus failed to document using the best available climate science how the DCP would affect fish, wildlife, habitats, salinity, and water reliability under increasingly severe climate change conditions.

Collectively, DWR's decisions to rely on historical weather data that is not representative of current or future conditions, to rely solely on climate models that have failed to accurately predict observed trends in the Pacific Ocean that affect California's hydrodynamics, and to ignore the impacts of climate change beyond 2070, mask the likely effects of climate change on the DCP's ability to deliver its promised benefits and downplay the Project's adverse environmental effects. DWR's own, albeit flawed, analyses show that the DCP's initial operations in 2045 would be substantially affected by different climate change assumptions. (DCP.D1.1.00203; DCP.V2.18.00006 at 16.) According to DWR, even with a flawed representation of 2045 climate conditions, the Project's water supply performance and environmental impacts worsen. (*See, e.g.,* DCP.D1.1.00203; DCP.V2.18.00006 at 16.)

DWR's decisions to omit or ignore relevant scientific information that constitutes the best available climate science is not consistent with the Delta plan's mandate to account for "climatic trends" in "water management and ecosystem sustainability strategies[;]" nor is it consistent with the requirement for covered actions to document the use of the best available science. (Delta Plan at 4-16; 23 Cal. Code Regs. § 5002(b)(3).)

C. Tribal Ecological Knowledge

Traditional tribal ecological knowledge is part of the "best available science" under the Delta Plan. (Delta Plan Appendix 1A at 1A-1.) The Delta Stewardship Council has recognized the need to incorporate tribal knowledge and TEK into decision-making in the Delta and acknowledged that such knowledge must come from Tribes and Tribal members, not from state agencies. ((DCP.V2.14.00041 at 66-68.) Yet DWR did not incorporate tribal knowledge into the DCP—instead it ignored Tribal concerns about the consequences the DCP would have on fish, wildlife, Tribal uses of water, harmful algal blooms, and Tribal cultural and religious practices.

The Delta is a Tribal Cultural Landscape that contains innumerable tribal cultural resources and supports tribal cultural uses of the land and the water. For many Tribes, the Delta and its watershed as a place is central to their way of life and existence. Without a healthy Delta, a healthy watershed, a healthy ecosystem, and thriving native fish populations, those Tribes would cease to exist as they have for time immemorial. (*See, e.g.,* DCP.V2.14.00033, DCP.V2.14.00038, DCP.V2.14.00056.)

DWR's failure to meaningfully consult with Tribes and to incorporate Tribal ecological knowledge into decision-making related to the DCP means DWR has not relied upon the best available science.

IV. CONCLUSION

Because there is not substantial evidence of the DCP's consistency with Delta Plan, DWR's consistency determination should be rejected and remanded.