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Project Name of Covered Action:

Delta Conveyance Project

Covered Action ID:

C20257

Parties Submitting:

County of Sacramento and Sacramento County Water Agency (C20257-A3)

Sacramento Area Sewer District (C20257-A6)

City of Stockton (C20257-A7)

Date Submitted:

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Document Title:

**Written Submission in Support of Appeal Nos. C20257-A3, C20257-A6, and C20257-A7
on the Appeals of the Department of Water Resources' Certification of Consistency for
the Delta Conveyance Project
and Request to Supplement Record
and for Council to Take Notice of Additional Documentation**

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I. INTRODUCTION

The County of Sacramento, Sacramento County Water Agency (SCWA), Sacramento Area Sewer District (SacSewer), and the City of Stockton (Stockton) (collectively, “Appellants”) hereby submit a written statement in support of their Appeals of the Department of Water Resources’ (DWR) Certification of Consistency for the Delta Conveyance Project (DCP) (C20257) (Certification). Included in this submittal is a request for the Delta Stewardship Council (“DSC” or “Council”) to supplement the record and to take notice of additional documentation, pursuant to Council Regulations (Cal. Code Regs., tit. 23, § 5032). As set forth in the Appeals and explained herein, Appellants demonstrate that DWR has failed to provide substantial evidence that the DCP is consistent with the Delta Reform Act’s Coequal Goals or Delta Plan policies. Appellants thus request that the Council uphold their Appeals and reject the Certification.

In reviewing the Appeals, the DSC must be mindful of its role as a steward of the Delta, and the Legislature’s findings in both the 1992 Delta Protection Act and the 2009 Delta Reform Act. “Stewardship” is the “careful and responsible management of something entrusted to one’s care.”¹ The Council is an independent state agency entrusted with the care of the Delta whose decisions must be governed not by the current administration’s project or political objectives but rather State policy for the Delta. Overarching among its policy directives, the “Legislature finds and declares that the Sacramento-San Joaquin Delta is a natural resource of statewide, national, and international significance, containing irreplaceable resources, and it is the policy of the state to recognize, preserve, and protect those resources of the delta for the use and enjoyment of current and future generations.”² In considering whether a “covered action” is consistent with the Delta Plan, the DSC must take into account, first and foremost, that:

- (1) The Delta is a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balanced estuary and wetland ecosystem of hemispheric importance.
- (2) The permanent protection of the Delta’s natural and scenic resources is the paramount concern to present and future residents of the state and nation.
- (3) To promote the public safety, health, and welfare, and to protect public and private property, wildlife, fisheries, and the natural environment, it is necessary to protect and enhance the ecosystem of the Delta and prevent its further deterioration and destruction.³

There has not been, and likely never will be, a covered action that is more consequential for the Delta and the achievement of the Coequal Goals than the DCP. Despite

¹ <https://www.merriam-webster.com/dictionary/stewardship>.

² 1992 Delta Protection Act, Pub. Resources Code, § 29701.

³ Wat. Code, § 85022, subd. (c).

the Legislature’s direction for the Delta, and over the objection of all five Delta counties, the largest city located wholly within the Delta, and numerous other Delta public agencies, businesses, and residents, DWR has presented the DSC with a proposal to address risks to water exports by siting a Delta conveyance facility in the heart of the Delta legacy communities,⁴ in a location that will have significant and permanent impacts to the Delta’s natural and scenic resources, and local land uses, including the landmark Harvest Water recycled water and ecosystem restoration project, and the Sacramento-San Joaquin Delta National Heritage Area (NHA), and that will make water supplies for water users in the Delta less reliable.⁵ The DCP does not protect, restore, nor enhance the Delta’s natural and scenic resources, and the Council must reject DWR’s determination that the DCP is on the whole consistent with the Delta Plan.

As explained here, and in the Appeals, DWR’s Certification, although accompanied by a voluminous record, remains incomplete and unsupported by substantial evidence because the record does not reflect best available science (BAS), and substantial evidence in the record, including expert testimony from DCP water rights hearing and findings of the State Water Resources Control Board (SWRCB) Administrative Hearing Office (AHO), demonstrates the fatal flaws in DWR’s evidence. Notably, the Certification is unsupported by any information from proposed geotechnical activities that DWR has asserted were essential for it to successfully submit a certification that was supported by BAS. DWR repeatedly asserted that the geotechnical work was necessary to determine whether the DCP was consistent with the Delta Plan under the Delta Reform Act. These contentions were made both in sworn declarations and in arguments to the Sacramento County Superior Court, by DWR’s attorneys:

As explained below, the [geotechnical] data 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.⁶

⁴ As set forth in the Delta Plan (fn. 19, at pp. 101 & 312), “A ‘legacy community’ is a rural community registered as a Historic District by either a State or federal entity. Bethel Island, Clarksburg, Courtland, Freeport, Hood, Isleton, Knightsen, Rio Vista, Ryde, Locke, and Walnut Grove are the Delta’s legacy communities (Public Resources Code section 32301(f)).”

⁵ See Record No. DCP.V2.23.00039 [“Flyover” Film, NDWA-030] and Record No. DCP.V1.1.00030 [Water Rights Tr., vol. 27] pp. 140-146 for a visual overview and narration of locations within the Delta, showing the Delta as a place.

⁶ May 16, 2024 Declaration of Graham Bradner in Support of DWR’s Oppositions to Motions for Preliminary Injunction (Bradner PI Decl.) at 5:1-7 (emphasis added); see also *id.* at 6:21-23, 8:27-9:9; July 19, 2024 Declaration of Graham Bradner in Support of DWR’s Ex Parte Application for Order to Modify or Stay Preliminary Injunction (Bradner Ex Parte Decl.) at 5:7-9, 22:28-23:2.

Q[uestion by the (Sacramento County Superior) Court]: [Doesn't DWR already know enough with the full final certified EIR for DWR to prepare a certificate of consistency?]

A[nswer by DWR's counsel]: We do not.⁷

“For example, the Delta Reform Act includes a requirement that the covered action be consistent with policies that are location dependent. If DWR cannot perform the geotechnical investigations, it won’t know where the facilities will be located, because [DWR] won’t know where they can be located …”], at 42:1-6, 45:13-21 [“And as we’ve explained some of those [Delta Plan] policies are location dependent and DWR does not have the information right now, even though it has a whole bunch of other information in the EIR.

Q[uestion (by the Court)]: You need to do the geotechnical investigative work?

A[nswer by DWR's counsel]: In order to get the information necessary to certify the Delta Conveyance Project’s consistency.”⁸

If the exploratory planning and design geotechnical investigations continue to proceed as planned, it is anticipated that the Bethany Reservoir Alternative will be between Class 4 and Class 3 by the end of 2026—at which point the DCP project planning will have progressed to overall approximate 15 to 30% design level, with better understanding of ground conditions, existing or abandoned utilities, and other constraints along the tunnel alignment. This design level will provide greater specificity regarding all DCP features, including refining the tunnel route and location and design of aboveground facilities. **While DCP will remain in early stages of planning and design, it is anticipated that, by the end of 2026, enough project details will be available to inform DWR’s evaluation and written certification of consistency with the Delta Plan.⁹**

Yet DWR submitted its Certification without having done any of the so-called essential geotechnical work. The Council should take DWR at its word that completing the geotechnical work was necessary to an adequate certification of consistency and remand the premature, incomplete, and unsupported Certification to DWR with direction to resubmit it only after (1) DWR conducts the “essential” geotechnical work, and (2) the DCP has been modified to avoid the substantial conflicts with local land uses and the NHA and impacts to the municipal and agricultural water supplies of Delta residents. Avoiding these impacts will require a fundamental reimagining of the project, including meaningful consideration of more

⁷ Transcript (Tr.) of May 31, 2024 Hearing on Motion for Preliminary Injunction at 33:22-25, 40:25-41:5 (emphasis added).

⁸ May 31, 2024 Hearing Tr. at 52:16-53:4 (emphasis added), and 60:11-25.

⁹ Bradner PI Decl. at 8:7-9:9 (emphasis added).

cost effective and less damaging alternatives that can be supported by Delta residents as well as export water users. The Delta, and its residents, deserve nothing less.

II. LEGAL STANDARD

The Notice of Hearing and Schedule of Written Submissions instructs that written submissions must “address how the Certification of Consistency is or is not supported by substantial evidence based on the certified record.”¹⁰ Neither the Notice nor DSC’s regulations define substantial evidence. The legal meaning of “substantial evidence” is evidence of “ponderable legal significance” that is “reasonable, credible, and of solid value.”¹¹ Substantial evidence is not “any” evidence; instead, it is “substantial proof of the essentials which the law requires.”¹² The emphasis is on the quality of the evidence rather than its quantity.¹³ “Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence.”¹⁴ Such logic, however, is not supported by substantial evidence if it “is flawed, or if it is contrary to the evidence.”¹⁵ As explained *post*, the Certification is not supported by substantial evidence.

III. GROUNDS FOR APPEAL

A. DWR has Not Provided Substantial Evidence to Support Its Finding that the DCP Is Consistent with Delta Plan Policy G P1 (23 CCR § 5002)

1. The DCP Is Inconsistent with Delta Plan Policies and Coequal Goals (23 CCR § 5002, subd. (b)(1))

Title 23, section 5002, subdivision (b)(1) of the California Code of Regulations (CCR) provides that covered actions must be consistent with each of the Delta Plan’s regulatory policies implicated by the covered action. It further states that, if full consistency is not feasible, the certifying agency must demonstrate that the covered action is consistent with the Delta Plan because it is, on whole, consistent with the Coequal Goals. This requires “a clear identification of areas where consistency with relevant regulatory policies is not feasible, an explanation of the reasons why it is not feasible, and an explanation of how the covered action

¹⁰ DSC, *Notice of Hearing and Schedule of Written Submissions* (Nov. 24, 2025).

¹¹ *Cal. Assn. of Medical Products Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286, 308, citing *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651 (citations omitted).

¹² *Ibid.*

¹³ *Ibid.* (“ ‘Very little solid evidence may be “substantial,” while a lot of extremely weak evidence might be “insubstantial.” ’ ”).

¹⁴ *Ibid.*

¹⁵ *Cal. Assn. of Medical Products Suppliers, supra*, 199 Cal.App.4th at p. 308, quoting *Cal. Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist.* (2009) 178 Cal.App.4th 1225, 1241.

nevertheless, on whole, is consistent with the coequal goals.”¹⁶ As Appellants have demonstrated herein and in their Appeals, DWR has not provided substantial evidence in the record to support its determination that the DCP is consistent with Delta Plan Policies G P1, WR P1, ER P1, DP P2, and Delta Plan Recommendation DP R9.¹⁷

Moreover, DWR has not met the Delta Plan’s requirements to establish that the DCP is nonetheless consistent with the Coequal Goals “of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem,” which “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.”¹⁸ DWR has failed to satisfy this standard because it: (1) provided inadequate evidence to show that the DCP will ensure a more reliable water supply for the State, while expert evidence in the record actually establishes that the DCP will make Delta water supply less reliable;¹⁹ (2) neglected to even attempt to show that the DCP furthers the coequal goal of protecting, restoring, and enhancing the Delta ecosystem, instead incorrectly asserting that it is sufficient that the DCP is not adverse to the goal, while substantial evidence in the record shows that it will actually substantially damage and degrade the Delta ecosystem, and conflict with and impede an existing landmark State-funded program to restore and enhance the Delta ecosystem;²⁰ and (3) failed to protect and enhance any of the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place, instead choosing to pursue an outdated infrastructure project conceived in the 20th century that has not evolved consistent with the significant developments that have occurred in the natural evolution of the Delta.²¹

¹⁶ 23 CCR § 5002, subd. (b)(1).

¹⁷ See sections III.B, III.C, and III.D, *infra*; see also Letter Supporting Sacramento County and SCWA’s Appeal of DWR’s Certification of Consistency for DCP (Letter Supporting C20257-A3), pp. 8-40; see also Letter Supporting SacSewer’s Appeal of DWR’s Certification of Consistency for DCP (Letter Supporting C20257-A6), pp. 8-52; see also Letter Supporting Stockton’s Appeal of DWR’s Certification of Consistency for DCP (Letter Supporting C20257-A7), pp. 8-40.

¹⁸ Wat. Code, § 85054; see also Letter Supporting C20257-A3, pp. 4-8; see Letter Supporting C20257-A6, pp. 4-8; see Letter Supporting C20257-A7, pp. 4-8.

¹⁹ Letter Supporting C20257-A3, pp. 5-6; Letter Supporting C20257-A6, pp. 5-6, 27; Letter Supporting C20257-A7, pp. 4-5, 17-18; see also Detailed Findings of Consistency (Detailed Findings) at 190:20-21, 190-193, 228:9-12, and Record Nos. DCP.V1.2.00088, DCP.V1.2.00089, DCP.V1.2.00094, DCP.V1.1.00020, DCP.V1.1.00021, and DCP.V2.12.00002 [Water Rights Hearing Testimony of Susan Paulsen, Ph.D., P.E., DPWA-002], ¶¶ 17, 54-61.

²⁰ Letter Supporting C20257-A3, pp. 6-7; Letter Supporting C20257-A6, pp. 6-7; Letter Supporting C20257-A7, pp. 5-6; citing Detailed Findings at 193:15-16, 193:20-25, 194:3-4, and Record No. DCP.AA5.1.00001.

²¹ Letter Supporting C20257-A3, p. 7; Letter Supporting C20257-A6, p. 7; Letter Supporting C20257-A7, pp. 6-7.

Therefore, as explained in detail in the Appeals and in light of the numerous deficiencies identified, the DSC must reject DWR's determination that the DCP is on the whole consistent with the Delta Plan.²²

2. DWR has Not Provided Substantial Evidence Establishing that the DCP Includes All Applicable and Feasible Delta Plan Mitigation Measures or Provided Equally or More Effective Substitute Measures (23 CCR § 5002, subd. (b)(2))

Delta Plan Policy G P1(b)(2) requires that the DCP include “all applicable feasible mitigation measures adopted and incorporated into the Delta Plan as amended April 26, 2018 ... or substitute mitigation measures that the agency that files the certification of consistency finds are equally or more effective.” As detailed in the Appeals,²³ Appellants have identified five Delta Plan Mitigation Measures that were improperly excluded from the DCP, and DWR has not provided substantial evidence to establish that adequate substitute measures were included to protect the corresponding resource areas.

i. Delta Plan Mitigation Measures 4-1 and 4-2

Delta Plan Mitigation Measures 4-1(a), 4-2(a), and 4-2(f) require project proponents to, in relevant part, “[a]void siting project features that would result in the removal or degradation of sensitive natural communities, including jurisdictional wetlands and other waters, vernal pools, alkali seasonal wetlands, riparian habitats, and inland dune scrub” and “[s]elect project site(s) that would avoid habitats of special-status species (which may include foraging, sheltering, migration and rearing habitat in addition to breeding or spawning habitat) ...” and “avoid habitats of special-status plant species.”

Sacramento County and SCWA’s Appeal establishes that each of these measures should have been included in the DCP and that there is no substantial evidence that the DCP was sited to ensure that the project did not result in the removal of or degradation to sensitive natural communities, or that DWR sited facilities to avoid special-status species habitat (i.e., because DWR focuses on ameliorating impacts rather than avoiding impacts entirely), despite evidence that the DCP would “destroy special status species Delta habitat in and out of the water.”²⁴ Sacramento County and SCWA’s Appeal identifies similar objections that were

²² Letter Supporting C20257-A3, pp. 7-8; Letter Supporting C20257-A6, pp. 7-8; Letter Supporting C20257-A7, pp. 7-8; citing November 19, 2018 WaterFix Draft Determination, p. 132; also citing Wat. Code, §§ 85001, subd. (c), 85002, and 23 CCR § 5002, subd. (b)(1).

²³ Letter Supporting C20257-A3, pp. 9-13; Letter Supporting C20257-A6, pp. 9-10; Letter Supporting C20257-A7, p. 9.

²⁴ Letter Supporting C20257-A3, pp. 11-12, citing Record No. DCP.D2.3.00493, p. 49; Record No. DCP.V2.17.00005 [Water Rights Hearing Testimony of Gary Ivey, expert wildlife biologist specializing in Sandhill cranes]; Record No. DCP.V2.27.00009 [Water Rights Hearing Testimony of Dr. Jaymee Marty, senior research ecologist]; Record

raised in the testimony of experts in the Water Rights Hearing with respect to the Greater Sandhill Crane and Crotch bumble bee.²⁵ SacSewer's Appeal addresses Mitigation Measure 4-2(a) and (f), specifically identifying with substantial evidence (facts, expert opinion based on facts) DWR's failure to site DCP facilities to avoid Greater Sandhill Cranes,²⁶ a fully protected species under California law, and corresponding failure to provide substantial evidence that adequate substitute measures were included.²⁷

Moreover, the mitigation measures identified by DWR are inadequate.²⁸ DWR asserts that DCP factors such as design features and mitigation measures related to effects on sensitive natural communities, such as wetlands and riparian habitats, and on special-status species "are meant to reduce, avoid, or minimize construction and operation impacts," and therefore, these factors "are the same as, equal to, or more effective" than Delta Plan Mitigation Measures 4-1 and 4-2.²⁹ However, evidence in the record indicates that the design features and mitigation measures identified by DWR are inadequate to avoid, reduce, or minimize the construction and operations impacts to the Greater Sandhill Crane and Crotch bumble bee. For example, DWR asserts that Mitigation Measures BIO-2a and BIO-2b would avoid and minimize potential impacts by avoiding sensitive natural communities where special-status species may occur, and that BIO-2c is "the same as, equal to, or more effective than the DP P2 MM 4-2 strategy to select project site(s) that would avoid habitats of special-status species."³⁰ However, as explained in more detail below in Appellants' analysis of DWR's DP P2 consistency, construction of the DCP, specifically the Twin Cities Complex (TCC) and the intake facilities, will impact several species, including the Greater Sandhill

No. DCP-AA1.2.00020 [G P1(b)(2), Attach. 1: Delta Plan and Delta Conveyance Project Mitigation Crosswalk Table], pp. 4, 7-8; *Vasquez v. State of California* (2008) 45 Cal.4th 243, 253 (courts construe language "to ascertain and declare what the [provision] contains, not to change its scope by reading into it language it does not contain or by reading out of it language it does").

²⁵ Letter Supporting C20257-A3, p. 11, citing Record Nos. DCP.V2.17.00005 & DCP.V2.27.00009.

²⁶ See Record No. DCP.V2.17.00005, ¶ 4 ("Collectively the impacts from the DCP have the potential to result in significant harm to Greater Sandhill Cranes, including mortality, and substantially impair recovery efforts, including by significantly reducing the Delta and Harvest Water Program benefits to cranes, and threaten the viability of the species in the Delta along the Pacific Flyway. I conclude that DWR has not demonstrated that the DCP will avoid or mitigate these serious and unreasonable impacts").

²⁷ Letter Supporting C20257-A6, pp. 9-10, citing Record Nos. DCP.V2.17.00005 & DCP-AA1.2.00020, pp. 4, 7-8; *Vasquez, supra*, 45 Cal.4th at p. 253 (courts construe language "to ascertain and declare what the [provision] contains, not to change its scope by reading into it language it does not contain or by reading out of it language it does").

²⁸ Record No. DCP-AA1.2.00020, pp. 4-11.

²⁹ *Id.*, pp. 4, 7.

³⁰ *Id.*, p. 8.

Crane, since these project features were sited directly adjacent or near the Cosumnes River Preserve (CRP) and Stone Lakes National Wildlife Refuge (SLNWR), disrupting the contiguous corridor and failing to avoid the habitats of these special-status species.³¹

ii. Delta Plan Mitigation Measure 7-1

Sacramento County and SCWA's Appeal establishes that Delta Plan Mitigation Measure 7-1(h), which requires buffer areas meeting certain criteria to be established between projects and adjacent agricultural land sufficient to protect agricultural land uses, should have been included in the DCP.³² It further supports the determination that DWR has not provided substantial evidence establishing that adequate substitute measures have been included (i.e., because DWR relies primarily on fencing, which is not an adequate buffer, not all DCP facilities will be set back from the fence line, and DWR does not provide evidence to show how or why setbacks from fences or fences themselves will create a sufficient buffer to meet the objectives of Mitigation Measure 7-1(h)).³³ Additionally, the appeal sets forth substantial evidence in the form of expert testimony that confirms that the buffers included for the DCP are inadequate given the anticipated heavy volume of construction traffic and other construction activities that will seriously disrupt agricultural activities on both a temporary and, potentially, permanent basis.³⁴

iii. Delta Plan Mitigation Measure 18-1(a)

Delta Plan Mitigation Measure 18-1(a), which requires in part that “[p]rojects shall be sited in areas that will not impair, degrade, or eliminate recreational facilities and opportunities. If this is not feasible, projects shall be designed such that recreational facilities and access to recreational opportunities (including bird-watching, hunting, recreational fishing, walking, and on-water recreation (e.g., boating or kayaking) will be avoided or minimally affected),” was also improperly excluded. Sacramento County and SCWA's Appeal explains that recreation at the CRP and SLNWR will be irreparably impacted by the DCP, as a result of DWR siting the DCP directly adjacent to those areas.³⁵ DWR does not acknowledge these recreational impacts and provides no evidence to support its presumed determination that neither the measure nor comparable alternative measures should be included.³⁶

³¹ See Section III.D.3.a.iii, *infra*.

³² Letter Supporting C20257-A3, pp. 9-11.

³³ *Id.*, p. 10, citing Record No. DCP-AA1.2.00020, p. 25; see also Record No. DCP-AA1.2.00020, pp. 24-26.

³⁴ Letter Supporting C20257-A3, pp. 10-11, citing Record No. DCP.V2.5.00028, ¶¶ 16, 17.

³⁵ Letter Supporting C20257-A3, p. 12.

³⁶ Record No. DCP-AA1.2.00020, pp. 58-59 [no mention of CRP and the SLNWR].

iv. Delta Plan Mitigation Measure 20-1

Finally, Stockton’s Appeal establishes that Mitigation Measure 20-1, which ensures that projects will avoid exceeding the permitted capacity of local landfills or cause conflicts with statutes and regulations relating to solid waste, should have been included. As Stockton highlighted, DWR has failed to provide substantial evidence establishing that adequate substitute measures were included (i.e., because it is unclear how much of the tunnel spoils generated by the DCP will be hazardous, and therefore will be required to be transported to a landfill, and DWR must meet its obligations to ensure that there are no relevant solid waste impacts if more hazardous or otherwise unusable waste is generated than anticipated).³⁷

v. DWR’s Exclusion of Applicable Mitigation Measures Will Significantly and Adversely Impact the Coequal Goals

As detailed by all three Appeals, inconsistency with Delta Plan Policy G P1 will result in a significant adverse impact on the coequal goal of protecting, restoring, and enhancing the Delta ecosystem by causing unmitigated impacts to ongoing agricultural operations, special-status species and their habitat, recreational facilities and opportunities, and solid waste management impacts, as described above. These resources are integral to the Delta’s ecosystem, and any unmitigated increase in impacts to these resources is antithetical to the protection, restoration, and enhancement of the Delta ecosystem. Accordingly, this coequal goal is significantly and adversely impacted. For these reasons as well the DCP is inconsistent with the Legislature’s mandate that the Coequal Goals 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.”

3. DWR has Not Provided Substantial Evidence Establishing that the DCP Uses BAS, Therefore Failing to Document Such Use (23 CCR § 5002, subd. (b)(3))

Delta Plan Policy G P1(b)(3) requires that all covered actions “must document use of best available science,” and for good cause: “the Legislature created the [DSC] as an independent agency of the state [citation] and charged it with adopting and implementing a legally enforceable ‘Delta Plan,’ a comprehensive, long-term management plan for the Delta that is built upon the principles of adaptive management and uses the *best available science* to further two Coequal Goals.”³⁸

The Delta Plan provides six criteria for BAS: relevance; inclusiveness; objectivity; transparency and openness; timeliness; and peer review.³⁹ “Proponents of covered actions should document their scientific rationale for applying the criteria in Table 1A-1 (i.e., the

³⁷ Letter Supporting C20257-A7, p. 9, citing Record No. DCP-AA1.2.00020, pp. 50, 64.

³⁸ *Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1028 (emphasis added).

³⁹ DSC, *Delta Plan*, appen. 1A, Table 1A-1 Criteria for Best Available Science.

format used in a scientific grant proposal).⁴⁰ DWR’s failure to provide substantial evidence demonstrating that it complied with several of these criteria is discussed in greater detail in the Appeals, and summarized below.⁴¹ As discussed in the Appeals, relevant scientific information is germane to the Delta ecosystem and/or biological and physical components (and/or processes) affected by the proposed decisions.⁴² The “quality and relevance of the data and information used shall be clearly addressed.”⁴³ Inclusive scientific information used when analyzing covered actions shall include “a thorough review of relevant information and analysis across multiple disciplines” and utilize the “[m]any analysis tools [that] are available to the scientific community.”⁴⁴ As established in the Appeals,⁴⁵ DWR does not uniformly use BAS and therefore cannot and does not provide adequate documentation that BAS has been or will be used in planning, constructing, and operating the DCP. These failures result in a lack of substantial evidence to support findings that the DCP will protect, restore, and enhance the Delta, or that it will protect and enhance the unique cultural, recreational, and natural resource values of the Delta as an evolving place.

a. The DISB’s Findings that DWR Relied on Faulty Science for Critical Environmental Analyses Demonstrates DWR Failed to Use BAS

As Appellants explain in their Appeals, the Delta Independent Science Board (DISB) has repeatedly informed DWR that the Final Environmental Impact Report (EIR) for the DCP, which DWR relies on for its Certification, relies on flawed science.⁴⁶ These concerns were expressed in DISB’s September 20, 2024 letter to DWR and in discussions during DISB’s February 21, 2024, April 22, 2024, May 22, 2024, August 15, 20204, and September 12, 2024 meetings.⁴⁷ DISB’s comments “are expected to increase scientific credibility, improve research clarity, advance the debate about Delta issues, and seek better

⁴⁰ *Id.*, p. 1A-2.

⁴¹ Letter Supporting C20257-A3, pp. 20-29; Letter Supporting C20257-A6, pp. 16-29; Letter Supporting C20257-A7, pp. 16-19.

⁴² *Ibid.*; *Delta Plan* at appen. 1A, Table 1A-1.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Letter Supporting C20257-A3, pp. 14-29; Letter Supporting C20257-A6, pp. 10-29; Letter Supporting C20257-A7, pp. 10-19.

⁴⁶ Letter Supporting C20257-A3, pp. 14-29; Letter Supporting C20257-A6, pp. 10-29; Letter Supporting C20257-A7, pp. 10-19.

⁴⁷ Record No. DCP.AA5.1.00001 [DISB Comment on Final EIR]; Feb. 21, 2024, DISB Meeting, https://cal-span.org/meeting/disb_20240221/, Agenda Item No. 6; Apr. 22, 2024, DISB Meeting, https://cal-span.org/meeting/disb_20240422/, Agenda Item No. 8; May 22, 2024, DISB Meeting, https://cal-span.org/meeting/disb_20240522/, Agenda Item No. 3; Aug. 15, 2024, DISB Meeting, https://cal-span.org/meeting/disb_20240815/, Agenda Item No. 8; Sept. 12, 2024, DISB Meeting, https://cal-span.org/meeting/disb_20240912/, Agenda Item No. 7.

connectivity between science, management, and policy.”⁴⁸ DISB’s expert comments illuminate that DWR’s evidence in each of the areas discussed below and laid out in full in the Appeals, is “extremely weak” and not “reasonable, credible” or “of solid value”⁴⁹ and thus does not constitute substantial evidence. DISB’s concerns as the legislatively mandated scientific advisor to the DSC, therefore, show that in areas critical to a defensible determination of Delta Plan consistency DWR has not relied on BAS; thus, its determination to the contrary is not supported by substantial evidence.⁵⁰

i. *Climate Change*

DISB concluded the Final EIR did not realistically represent climate change when projecting watershed hydrological and ecosystem response to climate change (e.g., by not reflecting the potential range of plausible future conditions).⁵¹ The DISB’s critique demonstrates that DWR’s evidence fails to meet BAS standards for, at a minimum, inclusiveness, objectivity, transparency and openness, and peer review. The failure to accurately assess climate effects undermines DWR’s findings as to water supply impacts and benefits, and fish and ecosystem benefits, its finding of consistency with Delta Plan Policy ER P1, and to its overall findings of consistency with the Coequal Goals.

ii. *Ecological Outcomes*

DISB found the models used to project important ecological outcomes were temporally and spatially mismatched (e.g., by obfuscating temporal variability in flows and using low temporal resolution predictions for fish effects).⁵² The DISB’s findings demonstrate that DWR’s evidence fails to meet BAS standards for, at a minimum, inclusiveness, objectivity, transparency and openness, and peer review. The failure to accurately assess ecological outcomes undermines DWR’s findings regarding project impacts as well as its purported benefits, and to its overall findings of consistency with the Coequal Goals.

iii. *Fish Impacts*

DISB concluded that fish impacts may be mischaracterized and missing from the Final EIR because effects may not have been fully captured by the methods DWR employed (e.g., by failing to synthesize how the life stage-specific effects will combine to result in responses, by using universally applied threshold levels and failing to determine higher-level responses,

⁴⁸ Letter Supporting C20257-A3, p. 19.

⁴⁹ *Cal. Assn. of Medical Products Suppliers*, *supra*, 199 Cal.App.4th at p. 308 (quoting definition of substantial evidence set forth in *Roddenberry*, *supra*, 44 Cal.App.4th at p. 651).

⁵⁰ *Ibid.*; see also Wat. Code, § 85230.

⁵¹ Record No. DCP.AA5.1.00001, pp. 4-5.

⁵² *Id.*, pp. 5-6.

and by omitting important details regarding water quality effects on biota).⁵³ The DISB’s critique demonstrates that DWR’s evidence regarding fish impacts fails to meet BAS standards for, at a minimum, inclusiveness, objectivity, transparency and openness, and peer review. The failure to accurately assess impacts to fish undermines DWR’s findings regarding project impacts and policy consistency,⁵⁴ as well as its purported benefits, and to its overall findings of consistency with the Coequal Goals.

iv. *Terrestrial Species Impacts*

DISB found the Final EIR’s analysis of effects to terrestrial species had high uncertainty due to missing information, including the uncertainties inherent in the implementation of restoration programs, weak criteria to assess wetland mitigation performance, the vague nature of the Compensatory Mitigation Plan, and the weakness of the cumulative impact discussion.⁵⁵ The DISB’s critique demonstrates that DWR’s evidence regarding terrestrial species impacts fails to meet BAS standards for, at a minimum, inclusiveness, objectivity, transparency and openness, and peer review. The failure to accurately assess impacts to fish undermines DWR’s findings regarding project impacts as well as its purported benefits, and to its overall findings of consistency with the Coequal Goals.

v. *Seismic Impacts*

DISB criticized the misleading nature of DWR’s discussion of the seismic hazard in the Delta, which references the 30-year probability of a magnitude 6.7 or greater earthquake in the San Francisco Bay Area, which does not apply to the Delta,⁵⁶ relies on outdated data, and does not provide sources for key conclusions.⁵⁷ Regarding seismic threats, the DISB’s critique demonstrates that DWR’s evidence fails to meet BAS standards for, at a minimum, inclusiveness, objectivity, transparency and openness, timeliness, and peer review. The failure to accurately assess seismic threats undermines DWR’s findings regarding the need for the project as well as its purported benefits, and to its overall findings of consistency with the Coequal Goals. The DISB experts demonstrate that DWR has not supported its claims that the project is necessary to improve State Water Project (SWP) export water supply reliability due to seismic risk. Moreover, if the seismic risk were as great as DWR claims, it would also affect the reliability of existing conveyance facilities, including the California Aqueduct. The DCP does nothing to reduce those other risks, and DWR has provided no substantial evidence that the DCP would make the SWP export supply more reliable in light of the asserted seismic risk.

⁵³ *Id.*, pp. 6-7.

⁵⁴ See Attachment Supporting C20257-A5, p. 11.

⁵⁵ Record No. DCP.AA5.1.00001, pp. 8-9.

⁵⁶ *Id.*, p. 6.

⁵⁷ *Id.*, p. 10.

b. Issues Identified by Sacramento County and SCWA

Sacramento County and SCWA's Appeal demonstrates that DWR has not provided substantial evidence sufficient to demonstrate that it used BAS in evaluating impacts to noise, water quality, water supply, and roadways.⁵⁸

i. *Failure to Establish Use of BAS to Evaluate Noise Impacts*

First, with respect to noise, DWR has not provided substantial evidence demonstrating that it employed BAS to evaluate noise impacts because the evidence that it does rely on has not taken into account the long-term nature of the DCP or the DCP's setting, which has "a unique and rural character, recognized as a Natural Heritage Area by the U.S. Congress, where ambient noise levels are relatively low and the surrounding residential community enjoys a quiet environment."⁵⁹ DWR has not provided reasonable construction noise reduction measures at the commencement of construction activities, has not evaluated the expected construction noise after noise mitigation measures are implemented, and has not provided mitigation measures requiring quieter pile construction methods, instead using "unclear and unreasonable" noise monitoring exceedance thresholds.⁶⁰ These failures mean that DWR has not provided substantial evidence sufficient to establish that it has used BAS when evaluating and mitigating noise impacts. This is particularly true with respect to DWR's failure to include any analysis or evidence that the longevity of construction noise on communities will not have significant impacts on communities, and particularly the town of Hood and homes and animals being raised adjacent to the Twin Cities Complex (TCC), despite the fact that excessive noise has been increasingly shown to be a health hazard.⁶¹ As Sacramento County and SCWA have shown, the use of BAS with respect to noise impacts necessitates consideration of these elements, and DWR has provided no evidence, let alone substantial evidence, to do so. Sacramento County and SCWA's Appeal demonstrates that DWR's evidence fails to meet BAS criteria for, at minimum, relevant, inclusiveness, transparency and openness, and timeliness.

⁵⁸ Letter Supporting C20257-A3, pp. 19-29.

⁵⁹ Letter Supporting C20257-A3, pp. 20-21, citing Record No. DCP.V2.5.00007, ¶¶ 1-2, 6-7.

⁶⁰ *Ibid.*, citing Record No. DCP.V2.5.00007, ¶¶ 10-11, 13, 14-15, 18.

⁶¹ *Ibid.*, citing Record No. DCP.AA1.2.00021 [Detailed Findings, G P1(b)(3), Attach. 1], §§ 4.16.1-4.16.2; Record No. DCP.V2.5.00007, ¶¶ 7, 8; UC Davis, Center for Occupation and Environmental Health, *How noise pollution quietly affects your health* (Jun. 2, 20205), <https://coeh.ucdavis.edu/research/how-noise-pollution-quietly-affects-your-health>; National Library of Medicine, Public Health Reports, *Decreasing Noise Exposure Should Be a Public Health Priority* (Oct. 30, 20205), <https://pmc.ncbi.nlm.nih.gov/articles/PMC12575277/>.

ii. *Failure to Establish Use of BAS to Evaluate Water Quality Impacts*

Second, Sacramento County and SCWA similarly established that DWR has not provided substantial evidence showing that it employed BAS when considering impacts to water quality.⁶² Specifically, though DWR has acknowledged that the DCP will increase groundwater salinity and that increased salinity can impact crops, it must provide adequate mitigation of salinity impacts that may substantially and adversely affect farmland in a manner other than by triggering conversion to nonagricultural use.⁶³

As further explained in Sacramento County and SCWA’s Appeal, DWR’s failure to establish use of BAS to evaluate water quality impacts is substantiated by expert testimony in the certified record.⁶⁴ DWR is obligated under a 1981 contract with the North Delta Water Agency (NDWA) to operate the SWP to meet specific year-round water quality criteria and maintain flows for the benefit of water users within NDWA’s boundaries.⁶⁵ During the Water Rights Hearing, experts from MBK Engineers, testifying on behalf of NDWA, stated that DWR’s analysis of modeled long-term monthly average salinity increases of 8-9% at certain Delta monitoring locations failed to capture the full extent of those impacts by excluding shorter-term salinity fluctuations that would *contribute to additional exceedances* of the NDWA’s and DWR’s 1981 water quality criteria.⁶⁶ A technical memorandum prepared by Dr. Shankar Parvathinathan provides additional support for the MBK Engineers’ analysis. As described in the report, DWR’s modeling for the DCP showed “consistent monthly increase in the Electrical Conductivity throughout the simulation period, with an average increase of 5% and a maximum increase of up to 164% under DCP conditions.”⁶⁷ The MBK experts also testified that DWR’s Operations Plan for the DCP does not reflect that diversions through the DCP intakes would be limited to ensure DWR will continue to meet its water quality or water supply obligations under the 1981 contract.⁶⁸

As demonstrated in the record, DWR’s analysis failed to capture the full extent of salinity increases, and thus impacts to Delta water users, by excluding shorter-term salinity fluctuations. Sacramento County and SCWA’s Appeal demonstrates that DWR’s evidence fails to meet BAS standards for, at a minimum, relevance, inclusiveness, transparency and

⁶² See Letter Supporting C20257-A3, pp. 21-23.

⁶³ See *id.*, citing Record No. DCP.V2.5.00028, ¶ 9.

⁶⁴ See Letter Supporting C20257-A3, pp. 21-23.

⁶⁵ See *id.*, pp. 22-23, citing to Record No. DCP.V1.2.00126 [DWR and NDWA 1981 Contract for the Assurance of a Dependable Water Supply of Suitable Quality].

⁶⁶ See *ibid.*, citing to Record No. DCP.V2.23.00012 [Water Rights Hearing Testimony of Anne Williams, MBK Engineers], ¶ 34.

⁶⁷ See *ibid.*, citing to Record No. DCP.V2.23.00035 [MBK Engineers technical Comments on Delta Conveyance Project Modeling], p. 2.

⁶⁸ See *ibid.*, citing to Record No. DCP.V2.23.00012, ¶ 36.

openness, and timeliness. DWR thus has not supported, with substantial evidence, that it used BAS when considering impacts to water quality.

iii. *Failure to Establish Use of BAS to Evaluate Water Supply Impacts*

Third, Sacramento County and SCWA establish that, by failing to quantitatively assess water level and quality impacts to groundwater wells and relying on post-impact mitigation measures rather than identifying water wells of concern and preventative measures, DWR has failed to provide substantial evidence that it has used BAS with respect to water supply impacts.⁶⁹ “At minimum, DWR should conduct water quality monitoring of the wells on a regular basis before, during, and after construction to ensure water supply and water quality are not impaired.”⁷⁰ SCWA’s expert explained numerous deficiencies with DWR’s analysis of groundwater impacts that stem from its failure to provide substantial evidence relating to impact analysis and sufficiency of mitigation, as detailed in Sacramento County and SCWA’s Appeal.⁷¹ The Appeal demonstrates that DWR’s evidence fails to meet BAS standards for, at a minimum, inclusiveness, objectivity, transparency and openness, timeliness, and peer review.

iv. *Failure to Establish Use of BAS to Evaluate Roadway Impacts*

Fourth, DWR has not considered the physical characteristics of Delta roads when making impact determinations, taking into account only visible pavement conditions (as opposed to subsurface conditions), failing to take into account appropriate roadway segments, and failing to consider the ability of local roadways to withstand an additional 6,500 daily vehicle trips.⁷² Given these failures to present any evidence regarding these essential factors, DWR has certainly not presented substantial evidence to conclude that it used BAS in evaluating roadway impacts. Sacramento County and SCWA’s Appeal demonstrates that DWR’s evidence fails to meet BAS standards for, at a minimum, inclusiveness, objectivity, transparency and openness, timeliness, and peer review.

⁶⁹ See Letter Supporting C20257-A3, pp. 23-27, citing Record No. DCP.V2.23.00012, ¶¶ 18, 20; Record No. DCP.V2.20.00037 [Water Rights Hearing Testimony of Karen Mann, real estate appraiser for Delta properties, HCC-SCDA-075], ¶ 38; Record

No. DCP.V2.29.00012 [Water Rights Hearing Testimony of Laura Foglia, Ph.D.], ¶¶ 1-2, 13.

⁷⁰ See *id.*, p. 24, citing to Record No. DCP.V2.29.00012, ¶ 15.

⁷¹ See *id.*, pp. 25-26, citing Record No. DCP.V2.29.00012, ¶¶ 16-27.

⁷² See Letter Supporting C20257-A3, pp. 27-28, citing Record No. DCP.V2.5.00031 [Water Rights Hearing Testimony of Lupe Rodriguez, P.E., T.E., Chief Operations Division of the Sacramento County Department of Transportation, SACO-025], ¶¶ 1, 7, 10, 12, 14; DCP.AA1.2.00021, §§ 4.14.1-4.14.2.

c. Issues Identified by SacSewer

As discussed in SacSewer’s Appeal, DWR failed to use BAS when evaluating impacts specific to Stockton.⁷³ SacSewer operates EchoWater, an advanced tertiary treatment facility located ten miles south of Sacramento, near Elk Grove, which receives wastewater from SacSewer and the cities of Folsom, Sacramento, and West Sacramento.⁷⁴ SacSewer completed a decade-long, \$1.7 billion upgrade to the facility in 2023.⁷⁵ As described in SacSewer’s Appeal, EchoWater operates pursuant to a stringent National Pollutant Discharge Elimination System (NPDES) permit, with a permitted capacity based on average dry weather flow of 181 million gallons per day (MGD), and up to 330 MGD of peak wet weather flows, with the current average dry weather flow being approximately 108 MGD.⁷⁶ EchoWater is critically important to Sacramento County.

A second key component of SacSewer’s operations is Harvest Water, a recycled water program that will support agricultural irrigation while creating, protecting, and enhancing critical wildlife habitat and contributing to groundwater sustainability efforts by serving as a foundational project and management action to support the Sustainable Groundwater Management Act (SGMA) for the South American and Consumnes groundwater subbasins.⁷⁷ The specific components of Harvest Water, a large proportion of which are located within the DCP area, are detailed in SacSewer’s Appeal.⁷⁸ Development of Harvest Water is progressing quickly, with construction anticipated to be complete by the end of 2026 and deliveries expected to begin in 2027.⁷⁹

As discussed in SacSewer’s Appeal, DWR failed to provide substantial evidence to establish that it used BAS to evaluate numerous impacts related to EchoWater and Harvest Water.⁸⁰ For example, SacSewer has provided expert testimony highlighting that DWR has not evaluated the impacts from the DCP on reverse flows under key scenarios (i.e., under the 2025 Incidental Take Permit [ITP] or for the timeframes and climate conditions under which the DCP will operate).⁸¹ The DISB’s objections to DWR’s climate modeling, in addition to

⁷³ See Letter Supporting C20257-A6, pp. 16-29.

⁷⁴ See *id.*, p. 17, citing to Record No. DCP.V2.27.00016 [Water Rights Hearing Testimony of Christoph Dobson, District Engineer for SacSewer, SASD-015], ¶¶ 1, 6.

⁷⁵ *Id.* at ¶ 4.

⁷⁶ *Id.* at ¶ 7.

⁷⁷ Record No. DCP.V2.27.00001 [Water Rights Testimony of Bryan Young, Environmental Program Manager for SacSewer, SASD-001], ¶¶ 5-7; Record No. DCP.V2.27.00016, ¶¶ 11-13.

⁷⁸ See Letter Supporting C20257-A6, p. 19; DCP.V2.27.00001, ¶ 6.

⁷⁹ Record No. DCP.V2.27.00016, ¶ 20.

⁸⁰ See Letter Supporting C20257-A6, pp. 17-28.

⁸¹ See *id.*, p. 18, citing Record No. DCP.V2.27.00013 [Water Rights Hearing Testimony of Susan Paulsen, Ph.D., P.E., SASD-012], ¶¶ 10, 29.

the deficiencies identified by the AHO are relevant here as well.⁸² Because DWR has not evaluated such key scenarios, there is no substantial evidence to support a conclusion that DWR used BAS.

Additionally, with respect to Harvest Water, SacSewer has established that DWR failed to consider impacts specific to groundwater zones and related impacts to groundwater-dependent ecosystems, which are necessary for the application of BAS, and which will result in serious impacts to SacSewer and the surrounding ecosystems.⁸³ DWR also failed to include key scientific information regarding Greater Sandhill Crane impacts in its analysis, resulting in additional failures to demonstrate use of BAS.⁸⁴ The DISB, AHO, and SacSewer's Appeal demonstrate that DWR's evidence fails to meet BAS standards for, at a minimum, inclusiveness, objectivity, transparency and openness, timeliness, and peer review.

d. Issues Identified by Stockton

As discussed in Stockton's Appeal, DWR failed to use BAS when evaluating impacts specific to Stockton.⁸⁵ Stockton operates the Delta Water Supply Project (DWSP) and treats wastewater at its Regional Wastewater Control Facility (RWCF). The DWSP, which is located on the San Joaquin River at the tip of Empire Tract, includes a 30 MGD Water Treatment Plant (WTP).⁸⁶ The RWCF, which provides sewage treatment service for Stockton, the Port of Stockton, and the surrounding unincorporated areas of San Joaquin County, discharges highly treated water to the San Joaquin River.⁸⁷ Stockton has invested over \$460 million in the DWSP and RWCF to support Stockton's water rights. However, as discussed in Stockton's Appeal, current infrastructure at the facilities is insufficient to address decreases in water quality that may result from the DCP.⁸⁸ Critically, as demonstrated by the preeminent expert in Delta water quality, DWR failed to use BAS to evaluate salinity impacts and bromide concentrations because it used long-term averages and summary statistics, which do not reflect real-time exceedances, and because it is not clear that DWR's bromide

⁸² Record No. DCP.V3.1.00042 [SWRCB AHO Letter to A. Carroll at DWR requesting additional information]; see section III.C, *infra*.

⁸³ See Letter Supporting C20257-A6, pp. 23-24, citing SASD-004c [corrected version of Record No. DCP.V2.27.00004, SASD-004, Water Rights Hearing Testimony of Steffen Mehl, Ph.D.], ¶¶ 1, 4, 14; Record No. DCP.V2.27.00016, ¶¶ 2, 5, 7, 8, 9, 10, 17.

⁸⁴ See *id.*, pp. 25-26, citing Record No. DCP.V2.17.00005 [Water Rights Hearing Testimony of Gary Ivey, FSL-21], ¶¶ 3, 4, 16.

⁸⁵ See Letter Supporting C20257-A7, pp. 16-19.

⁸⁶ STKN-001c [corrected version of Record No. DCP.V2.3.00001, Water Rights Hearing Testimony of C. Mel Lytle, Ph.D., Director of Municipal Utilities District for the City of Stockton], ¶ 9.

⁸⁷ See Letter Supporting C20257-A7, p. 16, citing Record No. DCP.V2.3.00004 [Water Rights Hearing Testimony of Robert Granberg, P.E.], ¶ 29.

⁸⁸ *Id.*, p. 16.

calculation methodology accurately reflects concentrations at Stockton’s intake.⁸⁹ These deficiencies result in a lack of substantial evidence to support conclusions about water quality and water supply impacts to the largest municipality located wholly within the Delta. Stockton’s Appeal demonstrates that DWR’s evidence fails to meet BAS standards for, at a minimum, inclusiveness, objectivity, transparency and openness, timeliness, and peer review.

e. Issues Identified by SacSewer and Stockton

Finally, DWR failed to use BAS when evaluating water quality impacts. As detailed in SacSewer’s and Stockton’s Appeals, and further supported by the DISB, DWR did not present operations and impacts of the DCP during the time it would actually operate, did not appropriately account for sea level rise, climate patterns that are expected due to climate change, and their corresponding impacts to salinity, water quality, and residence time in the Delta, and relied on incomplete and uncertain methodologies that did not, at times, consider the full range of future conditions or consider realistic water quality impacts.⁹⁰ These deficiencies were recognized by the SWRCB’s Administrative Hearing Officer’s request for additional information to clarify and supplement information in the administrative record for the ongoing Water Rights Hearing.⁹¹ DWR similarly failed to use BAS in evaluating impacts related to Harmful Algal Blooms (HABs), relying on a method that does not account for tidal sloshing, relies on arbitrary sub-regions in the Delta that led to unreliable residence time estimates, fails to account for the fact that water may pass through multiple sub-regions, and is inconsistent with DWR’s prior evaluations of residence time.⁹² The incomplete and flawed modeling and methodologies DWR relied upon cannot provide substantial evidence for its determination that it employed BAS with respect to water quality and climate change impacts. Stockton’s and SacSewer’s Appeals demonstrate that DWR’s evidence fails to meet BAS standards for, at a minimum, inclusiveness, objectivity, transparency and openness, timeliness, and peer review.

f. Lack of Peer Review

Moreover, DWR provides *no* evidence that DCP environmental analysis was peer reviewed by an “[i]ndependent external scientific review[er]” that: “(1) has no conflict of interest with the outcome of the decision being made, (2) can perform the review free of persuasion by others, (3) has demonstrable competence in the subject as evidenced by formal training or experience, (4) is willing to utilize his or her scientific expertise to reach objective

⁸⁹ *Id.*, pp. 18-19; Record No. DCP.V2.3.00020 [Water Rights Testimony of Dr. Susan Paulsen, Ph.D., P.E. for Stockton], ¶¶ 11, 12, 17, 18-28; Record No. DCP.V2.12.00002, ¶¶ 12, 18, 27.

⁹⁰ See Letter Supporting C20257-A6, pp. 26-27; see Letter Supporting C20257-A7, pp. 17-18; Record No. DCP.V2.12.00002, ¶¶ 12, 13, 17, 27, 54-61.

⁹¹ See Record No. DCP.V3.1.0042.

⁹² Letter Supporting C20257-A6, p. 28; Letter Supporting C20257-A7, p. 18, citing Record No. DCP.V2.12.00002, ¶¶ 18, 62-69, 18; Record No. DCP.V2.3.00020, ¶¶ 14, 27, 28.

conclusions that may be incongruent with his or her personal biases, and (5) is willing to identify the costs and benefits of ecological and social alternative decisions.”⁹³ This is true with respect to its analysis of noise,⁹⁴ agricultural resources,⁹⁵ surface water quality and water supply,⁹⁶ impacts to protected terrestrial species,⁹⁷ including the fully protected Greater Sandhill Crane and Crotch bumble bee, and groundwater,⁹⁸ among other areas.

g. DWR’s Failure to Use BAS, Significantly and Adversely Affects the Coequal Goals

As described in the Appeals, DWR’s failure to use BAS and resulting failure to document the use of BAS means that the DCP is inconsistent with Delta Plan Policy G P1. This will result in significant and adverse impacts on the coequal goal of providing a more reliable water supply for California, because it will lead to significant impacts to the water supply for Delta water users. It also will result in significant and adverse impacts on the coequal goal of protecting, restoring, and enhancing the Delta ecosystem because the DCP will lead to impacts to the broad range of environmental resources described herein. As a result of DWR’s failure to document the use of BAS, the DCP also will fail to protect and enhance the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.

B. DWR has Not Provided Substantial Evidence to Support Its Finding that the DCP Is Consistent with Delta Plan Policy WR P1

DWR has also failed to provide substantial evidence demonstrating that the DCP is consistent with Delta Plan Policy WR P1, which provides that water shall not be exported from, transferred through, or used in the Delta, if certain conditions are present.⁹⁹ These conditions include: (1) that one or more water suppliers that would receive water from the DCP have failed to adequately contribute to reduced reliance on the Delta and improved regional self-reliance, consistent with several enumerated requirements; (2) that failure significantly caused the need for the export, transfer, or use; and (3) that the export, transfer, or use would have a significant adverse environmental impact in the Delta.¹⁰⁰ As described in the Appeals, DWR’s determination of consistency with Policy WR P1 relies on unequivocal legal errors, failing to provide *any* evidence of consistency in several regards, and relying on

⁹³ *Delta Plan*, appen. 1A, p. 1A-1.

⁹⁴ Detailed Findings, Record No. DCP.AA1.2.00021, § 4.16.6.

⁹⁵ *Id.*, § 4.11.6.

⁹⁶ *Id.*, §§ 4.2, 4.6.6.

⁹⁷ *Id.*, § 4.10.6.

⁹⁸ *Id.*, § 4.5.6; *Delta Plan*, appen. 1A, p. 1A-1.

⁹⁹ 23 CCR § 5003.

¹⁰⁰ *Id.* at subd. (a).

incomplete or misleading evidence to the extent that any is provided.¹⁰¹ Contrary to the clear intent of the Delta Reform Act and the policy, the record demonstrates that DCP funders and beneficiaries actually plan to *increase* their reliance on the Delta, which has undoubtedly caused the purported need for the DCP and will result in numerous significant and unavoidable environmental impacts.

1. DWR has Not Demonstrated Reduced Reliance and Increased Regional Self-Reliance for the Majority of Reporting Entities

DWR's consistency determination is based on the faulty premise that the first requirement of Delta Plan Policy WR P1 is satisfied if water suppliers either improve regional self-reliance *or* reduce reliance on the Delta.¹⁰² As discussed in the Appeals, the clear and unambiguous text of the regulation, which is controlling in judicial interpretation,¹⁰³ provides that *both* reduced Delta reliance and improved regional self-reliance must be demonstrated.¹⁰⁴ “[A] literal construction contrary to the legislative intent apparent in the statute that the regulation is implementing” may also be rejected.¹⁰⁵ Because DWR’s interpretation is plainly contrary to the Delta Reform Act’s stated policy to reduce reliance on the Delta, and explicit legislative intent that the protection of the Delta is of paramount concern, DWR’s determination must fail.¹⁰⁶ DWR cites no legislative intent or legal provisions to support its interpretation.¹⁰⁷ If DWR were correct that the two prongs are effectively equivalent, DWR would doubtless have concluded that all entities that demonstrated improved regional self-reliance had also demonstrated reduced reliance on the Delta. Instead, DWR found that only 63 of 257 reporting entities demonstrated reduced Delta reliance, while 186 entities demonstrated improved regional self-reliance.¹⁰⁸ DWR has therefore provided no evidence, substantial or otherwise, that 194 of 257 reporting entities, representing over 75% of water users who rely on SWP exports from the Delta, comply with the first requirement under Policy WR P1. To the contrary, DWR has admitted that these 194 entities have not

¹⁰¹ Letter Supporting C20257-A3, pp. 29-37; Letter Supporting C20257-A6, pp. 29-37; Letter Supporting C20257-A7, pp. 19-26.

¹⁰² See Record No. DCP-AA1.2.00001, pp. 50-56.

¹⁰³ *Cal. Charter Schools Assn. v. Los Angeles Unified School Dist.* (2015) 60 Cal.4th 1221, 1237.

¹⁰⁴ Letter Supporting C20257-A3, pp. 30-22; Letter Supporting C20257-A6, pp. 30-32; Letter Supporting C20257-A7, pp. 20-22; 23 CCR § 5003, subd. (a)(1).

¹⁰⁵ *Cal. Charter Schools*, *supra*, 60 Cal.4th at p. 1237.

¹⁰⁶ Wat. Code, § 85022.

¹⁰⁷ Letter Supporting C20257-A3, pp. 30-32; Letter Supporting C20257-A6, pp. 30-32; Letter Supporting C20257-A7, pp. 20-22.

¹⁰⁸ Record No. DCP-AA1.2.00001, p. 56.

demonstrated consistency, despite DWR's persistent efforts to counsel the export-reliant State Water Contractors (SWC) to demonstrate reduced reliance on the Delta.¹⁰⁹

Even with respect to the contractors that DWR claims have demonstrated reduced reliance on the Delta, it has not provided substantial evidence supporting its findings. As detailed in the Appeals, DWR concluded that contractors with steady Delta demand demonstrated reduced reliance because the percentage of their overall water use attributable to the Delta decreased.¹¹⁰ Evidence of a reduced proportionate burden on the Delta when compared to total water use by a reporting entity is not relevant to the question of overall Delta water use, which is the primary concern under the Delta Reform Act and thus is not substantial evidence.¹¹¹ The data DWR relies on for population projections and demand growth is similarly deficient.¹¹²

2. DWR has Not Provided Substantial Evidence that Water Suppliers' Failure to Reduce Reliance on the Delta Did Not Significantly Cause the Need for the DCP

As discussed in the Appeals and above, DWR has failed to show that approximately 75% of reporting entities reduced Delta reliance. DWR therefore cannot support its conclusion that the failure of these entities to contribute to reduced reliance did not cause the purported need for the DCP. DWR also fails to provide substantial evidence supporting its conclusion that the need for the DCP exists regardless of any failure to reduce reliance on the Delta, as overwhelming evidence in the record establishes that DWR omitted key factors from its analysis of the DCP (e.g., by not realistically representing climate change scenarios, applying a seismic hazard that applies to a different region, and relying on unreliable population growth scenarios to estimate demand).¹¹³ DWR admits that it plans to use the

¹⁰⁹ Letter Supporting C20257-A3, pp. 32-35; Letter Supporting C20257-A6, pp. 32-35; Letter Supporting C20257-A7, pp. 22-25; Record No. DCP-AA1.2.00001, pp. 51-62.

¹¹⁰ Letter Supporting C20257-A3, pp. 31-32; Letter Supporting C20257-A6, pp. 31-32; Letter Supporting C20257-A7, pp. 21-22; Record No. DCP-AA1.2.00009, p. A2-1; Record No. DCP.V2.34.00003 [Water Rights Hearing Testimony of Valerie Pryor, General Manager], ¶ 11.

¹¹¹ 14 CCR § 15384 [substantial evidence is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusion might also be reached" based on the "entire record"]; *Cal. Assn.* at p. 308 ["Substantial evidence ... is not synonymous with 'any' evidence." Instead, it is "'substantial' proof of the essentials which the law requires.' " (Citations.)].

¹¹² Letter Supporting C20257-A3, p. 33; Letter Supporting C20257-A6, p. 33; Letter Supporting C20257-A7, p. 23; see Record No. DCP.V2.7.0001 [Water Rights Hearing Testimony of Dr. Jeffrey Michael, SOL-1].

¹¹³ Letter Supporting C20257-A3, pp. 33-35; Letter Supporting C20257-A6, pp. 32-35; Letter Supporting C20257-A7, pp. 22-25; Record No. DCP-AA1.2.00010, pp. 6-13; Record No. DCP-AA5.1.00001, pp. 4-5; Record No. DCP.V2.12.00002, pp. 12-14, 20-24; Record

DCP as a strategy to respond to the unlikely possibility of a catastrophic levee failure in the Delta that significantly disrupt exports,¹¹⁴ rather than proactively mitigating the damage such failures would cause by reducing Delta reliance consistent with Delta Plan Policy WR P1.¹¹⁵ Moreover, multiple SWC have made repeated statements making clear that they intend to rely more than ever on the DCP and Delta water supplies.¹¹⁶ DWR has also represented that it would use the DCP to divert 500,000 acre-feet of water from the North Delta intakes in 50% of years, and at least 250,000 acre-feet in 75% of years. In June 2025, DWR touted that, “[i]f the DCP was operational October 1, 2024 through June 5, 2025 we could have moved 956,000 acre-feet of water” above and beyond its current exports.¹¹⁷ DWR’s own public statements are evidence of intent to increase reliance on the Delta to a remarkable degree.

Even assuming that DWR is correct that the quantity of water consumption caused by a failure to reduce Delta reliance is only 40,198 acre-feet (which is certainly a dramatic understatement), this represents approximately 8% of 500,000 acre-feet and 16% of 250,000 acre-feet. This comprises a significant fraction of the total diversion through the DCP. DWR’s own evidence therefore supports the conclusion that the second subdivision of Delta Plan Policy WR P1 applies. Additionally, as discussed in the Appeals, inadequacies in DCP modeling and uncertainties regarding its operations result in a lack of substantial evidence regarding the expected diversion through the DCP and therefore the proportion attributable to the failure to reduce reliance on the Delta. For these reasons, DWR has not provided substantial evidence to demonstrate that the need for the DCP was not caused by the failure of water suppliers to reduce reliance on the Delta—either considering only the 8 DWR identified as noncompliant based on DWR’s legal error, or considering the needs of all 194 water suppliers who have not demonstrated reduced Delta reliance.

No. DCP-AA5.1.00001, p. 6; Record No. DCP.V2.22.00001 [Water Rights Hearing Testimony of Gilbert Cosio, LAND-1], p. 2; Record No. DCP.V2.9.00001 [California State Auditor Report 2022-106 (May 2023)], pp. 2-5, 11; Record No. DCP.V2.7.00001.

¹¹⁴ The time to fix a levee breach is estimated at one month or less and \$70 million. (LAND-9, Metropolitan Water District [MWD], Delta Islands Strategic, Fiscal, and Risk Analysis, PDF p. 70 [DCP.V2.22.00008].) MWD also estimated a total cost of approximately \$400 million to \$700 million to improve the entire thru-Delta freshwater pathway sufficient to withstand sea level rise and seismic risk. (LAND-9, PDF p. 104 [DCP.V2.22.00008].)

¹¹⁵ Record No. DCP.V2.12.00002, pp. 4, 16-18.

¹¹⁶ Record No. DCP.V2.34.00003, ¶ 11; Record No. DCP.V2.34.00005, p. 7; Record No. DCP.V2.34.00006 [Water Rights Hearing Testimony of Craig Wallace, Kern County Water Agency State Water Project Manager, SWC-301], ¶ 7; Record No. DCP.V2.34.00008 [Water Rights Hearing Testimony of Matthew Stone, Santa Clarita Valley Water Agency General Manager, SWC-400], ¶ 11; Record No. DCP.V2.34.00010 [Water Rights Hearing Testimony of Brandon Goshi, Metropolitan Water District of Southern California Water Resource Management Group Manager], ¶ 12.

¹¹⁷ Record No. DCP.D6.3.00013.

3. DWR has Provided No Evidence that the DCP Would Not Cause Significant Adverse Environmental Impacts in the Delta

DWR makes no findings as to the DCP's potential to result in significant adverse impacts in the Delta, incorrectly concluding that it is not necessary to do so given the inapplicability of subdivision (2) of Delta Plan Policy WR P1. As such, given the fact that the Final EIR concluded that the DCP will have 16 significant and unavoidable impacts related to agricultural, aesthetic, cultural, transportation, air quality, noise, paleontological, and tribal and cultural resources,¹¹⁸ as well as substantial evidence in the record of other significant impacts to water supply and water quality, recreation, and terrestrial species, subdivision (3) applies. The DCP is therefore inconsistent with Policy WR P1, and the Coequal Goals, including the Legislature's direction that they "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." DWR has not provided substantial evidence to the contrary.

C. DWR has Not Provided Substantial Evidence to Support Its Finding that the DCP Is Consistent with Delta Plan Policy ER P1

As explained in the Appeals, DWR does not demonstrate with substantial evidence that the DCP is consistent with Delta Plan Policy ER P1.¹¹⁹ Policy ER P1 provides that flow objectives established by the Bay-Delta Water Quality Control Plan shall be used to determine consistency with the Delta Plan.¹²⁰ DWR asserts consistency with Policy ER P1 because modeling shows that, under the DCP's currently described operational criteria, the project will meet D-1641 flow objectives, the SWP has historically met D-1641 flow objectives 99.8% of the time, and modeling shows that the addition of the DCP would not hinder the SWP's ability to meet D-1641 flow objectives.¹²¹ DWR also asserts that neither the issuance of Temporary Urgency Change Orders (TUCOs), which temporarily modify D-1641 requirements, nor historic Central Valley Project (CVP)/SWP operations to meet those terms, indicate evidence of inconsistency with Policy ER P1.¹²² Nevertheless, DWR does not anticipate DCP operations to lead to an increase in the issuance of TUCOs by SWRCB.¹²³

To demonstrate consistency with Delta Plan Policy ER P1, DWR relies on the CalSim 3 operations planning models which were updated from the Final EIR models to include updated baseline and ITP scenarios.¹²⁴ However, written testimony and an expert report in the Water Rights Hearing by Dr. Susan Paulsen finds that DWR's CalSim 3

¹¹⁸ See Record No. DCP.D1.1.00005.

¹¹⁹ Letter Supporting C20257-A3, pp. 37-42; Letter Supporting C20257-A6, pp. 37-42; Letter Supporting C20257-A7, pp. 27-31.

¹²⁰ 23 CCR § 5005.

¹²¹ Record No. DCP.AA1.2.00001, p. 120.

¹²² *Id.*, p. 99.

¹²³ *Ibid.*

¹²⁴ Record No. DCP.AA1.2.00001, p. 101.

modeling under 2070 future climate conditions demonstrates *chronic noncompliance* with D-1641 requirements.¹²⁵ Dr. Paulsen found that DWR’s Delta Simulation Model 2 (DSM2) does not reflect the operations and impacts of the DCP based on conditions that are projected to exist when the DCP would be operational (i.e., after 2040).¹²⁶ Indeed, DWR concluded in a technical memorandum that “ ‘[b]y 2070, [temporary urgency change petition (TUCP)]-like actions are likely to become more frequent—potentially occurring in about 15% of years,’ and would likely require actions such as relaxing water quality standards *and flow requirements.*”¹²⁷ DWR did not perform DSM2 modeling to characterize Delta water quality or residence time in 2070 (or beyond), thus, it is not possible to determine the impacts of the DCP during this timeframe.¹²⁸ Moreover, DWR’s Semi-implicit Cross-scale Hydroscience Integrated System Model (SCHISM) evaluation of future sea level rise scenarios demonstrated that several millions of acre-feet of additional freshwater flowing to the Delta would be required to maintain D-1641 compliance.¹²⁹ DWR provides *no* evidence that such flows would or could be provided.

The DISB shared similar concerns that demonstrate that DWR’s evidence is not substantial. In their comments on the Final EIR, the DISB notes that “the methods used to project climate change effects on future water inflows, which were used to modify historical time series by monthly change factors (‘perturbations’) *are not providing a realistic representation of the future*, given the expected implications of climate change.”¹³⁰ Although DWR updated its CalSim 3 modeling from the Final EIR, the updates were insufficient. The updated baseline and DCP ITP scenarios evaluate only 2020 climate conditions and sea level.¹³¹ No DWR model runs in the record have evaluated the climate adjusted baseline or DCP ITP operations for 2040 (or later).¹³²

DWR’s assertion that TUCOs do not indicate evidence of inconsistency and that DWR does not anticipate an increase in the issuance of TUCOs is also unsupported by substantial evidence. As noted in the testimony of Dr. Paulsen, DWR asserts in the DCP Final EIR that TUCPs are issued “under unique and very extreme circumstances, and as such, neither their frequency nor scope is foreseeable.” In the same document, however, DWR asserts the “frequency of extreme conditions is *expected to increase* in the future under the combined effects of climate change and sea level rise.”¹³³ Yet, DWR’s model simulations “do not

¹²⁵ Record No. DCP.V2.12.00002, ¶ 33.

¹²⁶ *Id.*, Opinion 1.

¹²⁷ *Id.*, ¶ 22, citing Record No. DCP.V2.5.00004 [Water Rights Hearing Exhibit CalSim 3 Results for 2070, SAC-004], p. 27.

¹²⁸ *Id.*, ¶ 34.

¹²⁹ *Id.*, ¶ 35.

¹³⁰ Record No. DCP.AA5.1.00001, p. 4 (emphasis added).

¹³¹ Record No. DCP.V2.12.00002, ¶ 36.

¹³² *Ibid.*

¹³³ Record No. DCP.V2.12.00002, ¶ 41.

include temporary relaxation of non-discretionary regulatory requirements such as occurred in 2014 and 2015 as a result of TUCPs submitted to the State Water Board.”¹³⁴

Dr. Paulsen’s analysis looked at the historical record of TUCP issuance and the likelihood of TUCCOs in the years modeled by DWR. As she notes, “TUCPs have been issued in six of the past thirteen years: 2014 (Critical), 2015 (Critical), 2016 (Below Normal/Dry), 2021 (Critical), 2022 (Critical), 2023 (Wet).¹³⁵ DWR has also reported numerous exceedances of D-1641 WQS during these years.”¹³⁶ To evaluate the likelihood that TUCPs would be needed during the years modeled by DWR, Exponent plotted the water year supply index for the Sacramento Valley and San Joaquin Valley from 1901-2024.¹³⁷ The Final EIR simulation period of 1923-2015 includes 15 critically dry years and 21 dry years, or 39% of the simulation period.¹³⁸ As mentioned, DWR’s analysis also found that by 2070, TUCP-like actions would likely become more frequent, in about 15% of years.¹³⁹ Since the historical record includes years that were comparably dry to years in which TUCPs were requested, Dr. Paulsen’s analysis concludes that it is foreseeable that TUCPs may be adopted and project operation may be modified during critically dry and dry years in the future.¹⁴⁰ Both DWR and Dr. Paulsen thus agree that TUCPs will be much more frequent in the future when the DCP is operating, and it is therefore reasonable to assume that the frequency with which DWR cannot achieve water quality standards also will increase.¹⁴¹ However, DWR’s modeling evaluation and Final EIR does not disclose or evaluate the water supply and water quality impacts of the DCP under TUCPs, either for 2020 or future climate conditions.¹⁴² DWR’s Certification thus lacks substantial evidence to support its consistency determination.

Significantly, following completion of Dr. Paulsen’s testimony in the Water Rights Hearing, the AHO stated that DWR has not developed adequate evidence “to inform the [SWRCB’s] decision concerning what Delta flow criteria would be appropriate for the DCP, as required by the Delta Reform Act, and to evaluate requirements that may be necessary to ensure consistency with the proposed updates to the [Bay-Delta Water Quality Control Plan].”¹⁴³ The AHO requested additional modeling that is “relevant to the Board’s findings whether the proposed changes … [would] be *consistent* with the Bay-Delta Plan applicable at

¹³⁴ *Id.*, citing Record No. DCP.D1.1.00040, p. B-66.

¹³⁵ *Id.*, ¶ 42.

¹³⁶ *Ibid.*

¹³⁷ *Id.*, citing to Record Nos. DCP.V2.12.00001, DCP.V2.12.00005.

¹³⁸ *Id.*, ¶ 42.

¹³⁹ *Id.*, citing to Record No. DCP.V2.5.00004, PDF p. 27.

¹⁴⁰ *Id.*, ¶ 43.

¹⁴¹ See 14 CCR § 15834, subd. (b) (substantial evidence includes reasonable assumptions based on facts, and expert opinion based on facts).

¹⁴² *Ibid.*

¹⁴³ Record No. DCP.V3.1.00042, p. 3.

the time the Board acts on the petitions.”¹⁴⁴ No such modeling is included in the record. The SWRCB has found DWR’s evidence insufficient to establish consistency between the DCP and the Delta Plan, and this is fatal to DWR’s Certification.

The demonstrated inconsistency with Delta Plan Policy ER P1 has a significant adverse impact on the Coequal Goals. The Delta Reform Act sets forth policies of the State of California that are “inherent in” the Coequal Goals, which include protecting and enhancing the unique cultural, recreational, and agricultural values of the Delta as an evolving place, restoring the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem, and promoting statewide water conservation and efficiency of use.¹⁴⁵ The Bay-Delta Water Quality Control Plan protects beneficial uses, including “fish and wildlife, agricultural use, and municipal and industrial uses.”¹⁴⁶ Accordingly, compliance with the Bay-Delta Water Quality Control Plan furthers compliance with those policies inherent in the Coequal Goals. DWR has failed to show that it has provided substantial evidence of DCP compliance with the Bay-Delta Water Quality Control Plan flow objectives, thus significantly impairing the achievement of the Coequal Goals.

D. DWR has Not Provided Substantial Evidence to Support Its Finding that the DCP Is Consistent with Delta Plan Policy DP P2

As explained in the Appeals, DWR does not demonstrate with substantial evidence that the DCP is consistent with Delta Plan Policy DP P2.¹⁴⁷ Policy DP P2 requires that “proposed actions that involve the siting of water management facilities, ecosystem restoration, and flood management infrastructure … be sited to avoid or reduce conflicts with existing uses or those uses described or depicted in city and county general plans … when feasible, considering comments from local agencies and the Delta Protection Commission.” In its Certification, DWR concluded that it was “infeasible to site the project to fully avoid conflicts with existing Delta land uses,”¹⁴⁸ but where it did conflict with existing land uses, “substantial evidence supports DWR’s determination that the covered action’s siting, when feasible, will reduce such conflicts.”¹⁴⁹ As explained herein, DWR’s determination that the DCP is consistent with Policy DP P2 is not supported by substantial evidence.

¹⁴⁴ *Ibid.*

¹⁴⁵ Wat. Code, § 85020, subds. (b)-(d).

¹⁴⁶ Record No. DCP.AA1.2.00001, p. 96.

¹⁴⁷ See Letter Supporting C20257-A3, pp. 42-61; Letter Supporting C20257-A6, pp. 42-52; Letter Supporting C20257-A7, pp. 31-40.

¹⁴⁸ Record No. DCP.AA1.2.00001, p. 164.

¹⁴⁹ *Id.* at p. 166.

1. DWR Fails to Provide Substantial Evidence that It Meaningfully Considered the Feasibility of Alternative Siting Locations for DCP Water Diversions

Siting is “the process of selecting an appropriate location for a project” which “involves evaluating various factors to ensure the chosen site meets the project’s requirements and objectives and is feasible from an engineering perspective.”¹⁵⁰ According to DWR, in siting the water diversions for the DCP, DWR used “outcomes of nearly two decades of analyses and evaluations.”¹⁵¹ These analyses and evaluations included draft reports and recommendations developed in 2008 and 2011 that informed the intake locations for the abandoned Bay-Delta Conservation Plan (BDCP).¹⁵² Without citing to any evidence, DWR asserts, “[d]uring the early planning process for the project, it was determined that the findings made during the BDCP siting evaluations for the north Delta intakes were overall still valid.”¹⁵³ DWR did not engage in a “process of selecting an appropriate location” for the *present* DCP based on existing siting conditions, including the current condition of affected fish species. In doing so, DWR fails to have given meaningful consideration to alternative locations for the DCP intakes that would fully or even substantially avoid conflicts with existing uses. Indeed, the original BDCP intake locations, incorporated in the DCP, were selected prior to any environmental review under the Environmental Quality Act (CEQA) or adoption of the Delta Plan.

DWR’s cited justification for rejecting alternative intakes further downstream does not account for the current status of species and relative risks to smelt and salmonids, and whether any actual risks to smelt at a downstream location could be avoided through temporal diversions, such as those imposed on Stockton’s diversion.¹⁵⁴ Further, the record indicates that DWR omitted consideration of alternative intake locations and included strawman alternatives in its CEQA process. DWR asserted in its Draft EIR that it omitted from consideration a diversion location in the western Delta near Antioch combined with desalination because of land use and energy impacts associated a 15,000 cubic feet per second (cfs) diversion, with secondary consideration of higher salinity in western Delta waters and factors such as potential presence of Delta smelt. However, these factors do not support rejecting this as an alternative to the DCP in its present form—two intakes for up to 6,000 cfs total. DWR’s reasons for rejecting a western Delta diversion alternative are irrelevant, unreasonable, and not credible because they are based on outdated (more than a decade old) analysis for the BDCP that relied primarily on assumed impacts for a 15,000 cfs diversion, and secondarily on postulated smelt-related diversion restrictions during high flow periods

¹⁵⁰ Record No. DCP-AA1.2.00018, p. 6.

¹⁵¹ *Id.*, p. 8.

¹⁵² *Id.*, pp. 8-14.

¹⁵³ *Id.*, p. 14.

¹⁵⁴ Record No. DCP.V2.3.00004 [Water Rights Testimony of Robert Granberg, P.E., STKN-004], ¶ 22.

and higher salinity during times when smelt were not present.¹⁵⁵ DWR made no effort to compare the relative land use impacts of siting the DCP, a much smaller diversion alternative than the EIR's strawman western Delta alternative, outside of the Delta legacy communities and Harvest Water program area, and downstream of Stockton's intake, nor did it provide any substantial evidence or analysis comparing the relative energy impacts of the much smaller DCP diversion in the western Delta with the energy impacts of the DCP with diversion at Hood. The fact that Antioch can successfully divert water from the western Delta for municipal use (with desalination)¹⁵⁶ undermines DWR's purported basis for rejecting a western Delta diversion alternative. DWR also claims that it sited the tunnel alignment farther east than the WaterFix project as evidence that it respected local land uses in siting DCP facilities. However, in 2019, an Independent Technical Review Panel (ITRP) showed that the WaterFix alignment was logically infeasible.¹⁵⁷ Despite this determination by the ITRP, published *before* the *Draft EIR*, DWR kept the western alignment in the EIR as a strawman alternative—further evidence that DWR did not meaningfully consider feasible alternatives.

DWR's Certification also did not analyze an alternative of creating a freshwater or armored pathway formed by Delta levees that guide fresh water from the Sacramento River to the south Delta and points of diversion for export.¹⁵⁸ Expert testimony in the record by Gilbert Cosio, a consulting engineer with 41 years of experience working on levee maintenance and upgrade engineering in the Delta, supports that an armored through-Delta conveyance approach would "protect the ability to export water and to ensure the water quality of those exports."¹⁵⁹ His testimony also provides that "existing science and engineering technology makes improvement of Delta levees for through-Delta conveyance a more cost-effective and viable method of continued conveyance for water exported from the Delta."¹⁶⁰ MWD also estimated a total cost of approximately \$400 million to \$700 million to improve the entire through-Delta freshwater pathway sufficient to withstand sea level rise and seismic risk.¹⁶¹

The Certification also does not demonstrate with substantial evidence that it considered the alternative of a through-Delta diversion with brackish water desalination.

¹⁵⁵ Record No. DCP.D1.1.00011 at p. 3-16.

¹⁵⁶ DWR, *New Desalination Facility is Major Milestone for Drought-Smart Infrastructure Solutions in the Delta*, <https://water.ca.gov/News/Blog/2025/Sep-25/New-Desalination-Facility-Major-Milestone-for-Drought-Smart-Infrastructure> (Sept. 15, 2025).

¹⁵⁷ Record No. DCP.V2.5.00001 [Internal Technical Review Panel Memorandum (Jan. 31, 2025), SAC-001].

¹⁵⁸ Record No. DCP.V2.22.00001 [Water Rights Hearing of Gilbert Cosio, LAND-1], ¶ 7.

¹⁵⁹ *Id.*, ¶ 24.

¹⁶⁰ *Id.*, ¶¶ 2-11, 24.

¹⁶¹ Record No. DCP.V2.22.00008 [Metropolitan Water District of Southern California Board Report, LAND-9], PDF p. 103.

Recent construction of the Antioch Brackish Water Desalination Plant demonstrates that a through-Delta diversion with brackish water desalination is feasible.¹⁶² Combined with levee improvements this alternative would address DWR’s objectives of mitigating salinity and seismic risks, avoid conflicts with local land uses, and likely have support of all the parties who oppose the DCP.

Moreover, although DWR’s discussion of the siting of the tunnel shafts lists “Existing Water Supply Wells” as a criterion for consideration, as explained above, DWR failed to consider impacts to groundwater.¹⁶³ Thus, DWR’s evidence is insufficient to show it could not have sited the project to avoid or reduce impacts to groundwater wells and their associated land uses.

Finally, DWR and the Delta Conveyance Design and Construction Authority’s (DCA)¹⁶⁴ disregard for DCP Stakeholder Engagement Committee (SEC) member and Delta Protection Commission comments further show that DWR did not consider the feasibility of alternative siting locations, despite Governor Newsom’s April 2019 order that DWR “inventory and assess … Current planning to modernize conveyance through the Bay Delta with a new single tunnel project.”¹⁶⁵ Written testimony by SEC member Karen Mann explains that when SEC participants asked about alternative intake locations, the DCA representatives who ran the meetings would respond that “the intakes must be in the locations they had chosen,” or “[t]hey would say that there are none.”¹⁶⁶ She continued that “[t]he location of the intakes was of great concern to me and other members of the [SEC]. We wanted to see what the other possible locations would be like. We were always told there are no other possible locations.”¹⁶⁷ A letter by Ms. Mann to a DCA representative, also in the certified record, stated, “[a]lthough you admit that the location of the intakes is a construction feature theoretically within the purview of this Committee, you have said the location of the intakes is largely a matter of administrative requirements and no alternative intake locations can be considered” (no locations other than 2, 3, and 5).¹⁶⁸ She is also informed that DCA took the position that it “was directed by DWR not to discuss other [intake] locations with

¹⁶² DWR, *New Desalination Facility is Major Milestone for Drought-Smart Infrastructure Solutions in the Delta*, <https://water.ca.gov/News/Blog/2025/Sep-25/New-Desalination-Facility-Major-Milestone-for-Drought-Smart-Infrastructure> (Sept. 15, 2025).

¹⁶³ Record No. DCP.V2.29.00012, ¶¶ 15-27.

¹⁶⁴ Through a joint exercise of powers agreement, DWR tasked DCA with designing the DCP.

¹⁶⁵ Executive Order N.10-19 (Apr. 29, 2029).

¹⁶⁶ Record No. DCP.V2.20.00037 [Water Rights Hearing of Karen Mann, HCC-SCDA-075], ¶¶ 21, 22.

¹⁶⁷ *Id.*, ¶ 31.

¹⁶⁸ *Id.*, ¶ 36, citing to DCP.V2.20.00043 [Letter of Resignation from the SEC from Karen Mann to Graham Bradner (Nov. 16, 2021), HCC-SCDA-081].

anybody.”¹⁶⁹ Instead of complying with Governor Newsom’s directive to actually assess the Delta conveyance facilities it had been pursuing for over a decade, DWR simply doubled down on the most critically impactful component of the DCP, the intake locations (which drive impacts to the Delta legacy community of Hood, the Delta NHA, the Harvest Water Program, the SLNWR and CRP, SGMA compliance for the South American Subbasin, and water supplies for Sacramento County, the NDWA, and City of Stockton, among others). DWR provides no substantial evidence to support the claim that intake location was dictated by “administrative requirements.”

In the Delta Protection Commission’s DCP Draft EIR comments, the Commission identifies that the project alternatives did not avoid or mitigate the most damaging impacts to Delta communities.¹⁷⁰ As stated in its letter, the Commission “continues to recommend that [DWR] and the EIR should seriously analyze an alternative that promotes water reliability by strengthening Delta levees and dredging key Delta channels, … while also reducing other region’s [sic] reliance on water from the Delta by investing in water use efficiency, water recycling, and other advanced technologies.”¹⁷¹ DWR’s failure to demonstrate with substantial evidence that the alternatives proposed by the Commission were not feasible does not comply with Delta Plan Policy DP P2’s explicit requirements to site water management facilities to avoid or reduce conflicts with existing uses “considering comments from local agencies and the Delta Protection Commission.”

In conclusion, DWR’s determination that it was “infeasible to site the project to fully avoid conflicts with existing land uses” is not supported by substantial evidence. DWR’s determination, and its focus on “fully” avoiding impacts, is further inconsistent with the spirit of Policy DP P2 and the Delta Reform Act; even if it were not feasible to site the project to fully avoid conflicts with existing land uses, DWR does not demonstrate that it was infeasible to site the project to *minimize* conflicts with existing land uses. DWR fails to show that it evaluated the feasibility of siting the DCP water diversions in alternative locations, and in particular locations that would avoid or minimize conflicts with existing land uses, and therefore, the Certification is inconsistent with Policy DP P2.

2. DWR Did Not Consider City and County General Plans, and Therefore Failed to Provide Substantial Evidence that the DCP’s Siting Avoided or Reduced Conflicts with Those Uses

DWR erroneously asserts that there are two possible approaches to evaluate consistency with Delta Plan Policy DP P2: DWR could either consider existing uses, *or* DWR could consider uses depicted in city and county general plans.¹⁷² To make this assertion,

¹⁶⁹ Record No. DCP.V2.20.00037, ¶ 37, citing to Record No. DCP.V2.20.00041 [Letter from Jan McCleer, HCC-SCDA-079].

¹⁷⁰ Record No. DCP.D2.3.00061.

¹⁷¹ *Ibid.*

¹⁷² See Record No. DCP.AA1.2.00018, p. 2 (emphasis added).

DWR relies on a sentence in the Council's Determination No. C20185 regarding appeals of the certification of consistency for the California WaterFix (WaterFix Determination).¹⁷³ However, DWR misconstrues this sentence in the WaterFix Determination to support their assertion. In the WaterFix Determination, the Council considered comments from Sacramento County that asserted that DWR's agricultural mitigation measures were not consistent with Sacramento County's policy for farmland mitigation.¹⁷⁴ The Council determined that Delta Plan Policy DP P2 did not require land use conflicts to "be avoided or reduced through compliance with methods described in a general plan policy," referring to Sacramento County's farmland mitigation policy.¹⁷⁵ The Council *did not* state that Policy DP P2 did not require consideration of *uses* described in city and county general plans, contrary to DWR's assertion.

Without applicable authority, DWR misinterprets the language of Delta Plan Policy DP P2 and fails to include a consideration that is required for a determination of consistency. The language of Policy DP P2 is properly read to require an analysis of both existing uses *and* those uses depicted in city and county general plans. The regulation does not provide that DWR may take either approach "A" or approach "B," but rather that DWR's activity may not *result in* "A" or "B."¹⁷⁶

Even if the use of "or" were ambiguous, the DSC must look to the intent apparent in the authorizing statute it is charged with implementing. The Delta Reform Act confirms the Legislature's specific intent that "[e]xisting developed uses, *and* future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state and especially to persons living and working in the Delta."¹⁷⁷ DWR's interpretation, which protects only existing developed uses or future developments, and not both, is therefore contrary to the legislative intent underpinning Policy DP P2.

Acting under this misinterpretation, DWR did not analyze uses described or depicted in city and county general plans. This failure, and the subsequent failure to consider related comments, leads to a definitive failure of DWR's consistency determination. With *no* evidence that the DCP was sited to avoid or reduce conflicts with uses described or depicted in general plans, DWR cannot support its determination with substantial evidence that the DCP is consistent with Delta Plan Policy DP P2.

¹⁷³ Record No. DCP.AA2.7.00005 [Determination No. C20185 Regarding Appeals of the Certification of Consistency for California WaterFix], p. 134.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.* (emphasis added).

¹⁷⁶ *Vasquez, supra*, 45 Cal.4th at p. 253 (courts construe language "to ascertain and declare what the [provision] contains, not to change its scope by reading into it language it does not contain or by reading out of it language it does").

¹⁷⁷ Wat. Code, § 85022, subd. (c)(4) (emphasis added).

Still, DWR “included a consideration of land uses depicted in general plans.”¹⁷⁸ However, the Certification’s “General Plan Considerations” falls short of any meaningful consideration. First, DWR provides no consideration of city general plans, including Stockton’s. Second, DWR’s “consideration” of county general plans is a single paragraph summation of the general plan, without any analysis of how the DCP has been sited to avoid or reduce conflicts.¹⁷⁹

For example, DWR’s “consideration” of the Sacramento County General Plan includes five sentences that lists the General Plan’s key strategies, describes the County’s Land Use Designation Diagram, identifies DCP facilities within the County, and provides a general list of land use designations where those facilities will be located.¹⁸⁰ Likewise, DWR’s “consideration” of the San Joaquin County General Plan includes four sentences that recite the overarching vision for the General Plan, lists the General Plan designations, identifies the DCP facilities within the County, and provides a general list of the General Plan designations where those facilities will be located. In these “considerations,” DWR provides no analysis of whether the DCP would conflict with existing uses authorized under those designations, identify avoidance or reduction measures, or consider comments on the subject.¹⁸¹ Without analyzing conflicts between the DCP and the uses described or depicted in general plans, it cannot be determined that DWR’s Certification is supported by substantial evidence.

3. DWR Did Not Provide Substantial Evidence that the DCP’s Siting, When Feasible, Would Reduce Such Conflicts

As stated by DWR in its Certification, “Delta Plan Policy DP P2 calls for state and local public agency proponents of projects of water management facilities … to ‘[consider] comments from local agencies and the Delta Protection Commission.’ ”¹⁸² DWR’s method for addressing comments provided only a cursory review and fails to adequately engage with the conflicts raised by the local agencies. In doing so, DWR fails to adequately support its consistency determination with substantial evidence.

DWR’s consideration of local agency and Delta Protection Commission comments requires the review of two or more multi-page tables, which provide only a generalized, non-specific consistency determination for identified conflicts. In four tables, DWR summarizes local agency and Commission Draft EIR comments on an existing use conflict and provides its corresponding Final EIR response. In those tables, DWR also provides a constrained and effectively inconsequential “consideration” regarding Delta Plan Policy DP P2’s applicability

¹⁷⁸ Record No. DCP-AA1.2.00018, p. 2.

¹⁷⁹ *Id.*, pp. 3-4.

¹⁸⁰ Record No. DCP-AA1.2.00018, pp. 3-4

¹⁸¹ *Id.*, p. 4.

¹⁸² Record No. DCP-AA1.2.00018, p. 52.

to the comment.¹⁸³ Thereafter, in a subsequent table, DWR simplifies those “considerations” into a list of potential existing land uses (e.g., Recreation, Water Supply, Flood Protection), organized by project element (e.g., North Delta Intakes, Tunnel, Tunnel Shafts), and provides a “Consistency Finding” after determining if an identified conflict has been avoided or reduced.

Within this analysis, DWR ignores evidence in the certified record from the Water Rights Hearing. DWR simply asserted that issues raised by protestants in the Water Rights Hearing related to consideration of existing uses or siting elements are already “within the scope of comments” raised by the same entity in the development of the EIR.¹⁸⁴ In other words, DWR asserts that it did not need to examine the evidence presented at the Water Rights Hearing to demonstrate consistency with Delta Plan Policy DP P2. Appellants disagree. The Water Rights Hearing evidence is part of the certified record, and, as explained below, and throughout this submittal and the Appeals, shows that the Certification is not supported by substantial evidence.

In relying solely on the EIR, DWR does not meet its burden to support its Certification with substantial evidence. The EIR’s analysis on numerous issues relevant to the Certification has been shown by expert testimony in the Water Rights Hearing to be wholly inadequate. The definition of “substantial evidence” employed by the DSC is evidence “reasonable in nature, credible, and of solid value,” and “substantial proof of the essentials which the law requires in a particular case. The focus is on the quality, rather than the quantity, of the evidence.¹⁸⁵ The Water Rights Hearing testimony elaborates on comments made on the DCP EIR, and identifies additional issues of concern, supported by substantial evidence. The Water Rights Hearing testimony shows that the DCP EIR evidence, while voluminous, is extremely weak and therefore insubstantial as it pertains to the issues raised in the Appeals. When viewed in the light of the whole record, DWR’s evidence cited in support of its various consistency determinations is not substantial.

Assuming for the sake of argument that an isolated Delta conveyance facility is necessary to mitigate water supply risks to Delta exports, DWR has not demonstrated with substantial evidence that the DCP, as designed and approved by DWR, is the appropriate solution, due to its numerous conflicts with existing land uses that result primarily from the decision to site the intakes at the locations approved by DWR.

¹⁸³ See Record No. DCP-AA1.2.00018, Tables 3-6, column *Delta Plan Policy DP P2 Considerations*.

¹⁸⁴ Record No. DCP-AA1.2.00018, p. 53.

¹⁸⁵ *Cal. Ass’n of Medical Products Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286, 308 (“Very little solid evidence may be ‘substantial,’ while a lot of extremely weak evidence might be ‘insubstantial.’ ”).

a. Conflicts with the County of Sacramento and SCWA's Existing Uses

As explained in Sacramento County and SCWA's Appeal, the DCP will conflict with Sacramento County's agricultural, residential/commercial, and recreational uses, and the Delta's designation as a NHA, and SCWA's water supply infrastructure.¹⁸⁶ DWR fails to provide substantial evidence that the DCP was sited to avoid or reduce these conflicts when feasible.

i. *Agricultural Uses*

Sacramento County commented that the DCP intake facilities conflict with existing agricultural uses, resulting in a temporary and permanent loss of Important Farmland and adverse effects on local roadways, which will significantly affect the local farmers' use of those roadways to operate their farms and timely deliver their seasonal produce.¹⁸⁷ Despite recognizing that the intake facilities will remove 450 acres of Important Farmland, DWR determined the record demonstrates substantial evidence that intake facilities and agricultural production conflicts were reduced through mitigation measures and by locating the concrete batch plant off-site to minimize intake construction site sizes.¹⁸⁸ This determination is not supported by substantial evidence.

DWR identifies Mitigation Measure AG-1, which requires the conservation of off-site farmland within Delta counties at a 1:1 ratio.¹⁸⁹ However, Mitigation Measure AG-1 is insufficient to reduce impacts to agricultural production, as supported by evidence in the certified record. First, Mr. Dirk Huevel, Vice President of McManis Family Vineyards, explains that fragmentation of agricultural parcels will cut off access to irrigation water and access to the property, making continued agriculture on the remaining parcels unviable.¹⁹⁰ Second, Ms. Chrisandra Flores, Sacramento County Agricultural Commissioner/Sealer of Weights and Measures, explains that the DCP's cumulative toll on Delta agriculture from the permanent or temporary loss of farmland, degradation of water quality, disruption of transportation systems, and indirect economic consequences, "would be profound and long-lasting" and for Delta farmers, these disruptions may be irreparable.¹⁹¹ Moreover, conservation of existing agricultural land cannot compensate for loss—there is still a

¹⁸⁶ Letter Supporting C20257-A3, pp. 42-54.

¹⁸⁷ Letter Supporting C20257-A3, pp. 43-44; Record No. DCP-AA1.2.00018, p. 61; see Record No. DCP.V2.1.00006 ["Seed to Plate" Video, BBID-006], demonstrating existing Delta agricultural uses.

¹⁸⁸ Record No. DCP-AA1.2.00018, p. 95.

¹⁸⁹ Record No. DCP-AA1.2.00018, p. 95.

¹⁹⁰ Record No. DCP.V2.35.00001 [Water Rights Hearing Testimony of Dirk Heuvel, Vice President of McManis Family Vineyards currently leasing and managing Wurster Ranches for winegrape production].

¹⁹¹ Record No. DCP.V2.5.00028 [Water Rights Hearing Testimony of Chrisandra Flores, Sacramento County Agricultural Commissioner/Sealer of Weights and Measures], ¶ 17.

significant net reduction in these valuable lands, and the impact and conflict with Delta Plan Policy DP P2 remains substantial.

As another mitigation measure, DWR provides that it will “coordinate with identified remnant farmland owners to determine the best use of these remnant areas, including whether the landowners would like to retain these areas for continued farming operations.”¹⁹² Coordination after destruction is not avoidance. DWR’s offer to “coordinate” provides no assurance, and therefore, no substantial evidence, that conflicts will be avoided or reduced. Indeed, substantial evidence in the record shows DWR did *not coordinate* effectively, or at all, to reduce conflicts with existing uses at the TCC site. Rancher Duane Martin, who lives and raises 500 cattle a year on the ranch where DWR chose to site the TCC, advised DWR and the DSC in December 2024 that DWR never consulted with him about how the DCP would impact his business or his home.¹⁹³ He further testified about DWR’s failure to mitigate impacts from DCP geotechnical drilling it conducted on the ranch, tearing up roads but then failing to fix them in time to avoid impacts to his business, such that Mr. Martin was required to repair DWR’s damage himself.¹⁹⁴ Further, where DWR did coordinate, the coordination fails to “determine the best use” of those remnant areas. For Mr. Heuvel’s remnant farmland as a result of the DCP’s siting, DWR suggested replacing his DCP-destroyed high-quality Sacramento River water diversion with water from Snodgrass Slough, which is “full of weeds and is of poorer quality” than his current diversions.¹⁹⁵ Compliance with Delta Plan Policy DP P2 required that DWR site the DCP facilities to avoid or reduce conflicts with Mr. Martin’s and Mr. Heuvel’s existing uses. As demonstrated in the record, DWR did not avoid or reduce these conflicts.

DWR’s measure to avoid conflicts, which includes locating a concrete batch plant needed for construction of the intakes at the Lambert Road Concrete Batch Plant Site near Franklin Boulevard, does not avoid all conflicts between agricultural production and the intake siting. Conflicts between DCP intake locations and agricultural production result in adverse effects on local roadways, significantly affecting the local farmers’ use of those roadways to operate their farms and timely deliver their seasonal produce.¹⁹⁶ At the peak of construction, there will be as many as 6,500 employee and truck trips *per day*.¹⁹⁷ Evidence in the record from Sacramento County Department of Transportation Chief of the Maintenance and Operations Division, Lupe Rodriguez, provides that Delta roadways, which are “critical”

¹⁹² Record No. DCP-AA1.2.00018, p. 95.

¹⁹³ See Duane Martin comments regarding DCP geotechnical activities at 3:44.23-3:47:25, available at https://www.adminmonitor.com/ca/delta/council_meeting/20241219/.

¹⁹⁴ *Ibid.*

¹⁹⁵ Record No. DCP.V2.35.00001, ¶ 6.

¹⁹⁶ See Record No. DCP.V2.5.00031, ¶¶ 8-14; Record No. DCP.V2.5.00028, ¶ 16; DCP-AA1.2.00018, p. 64.

¹⁹⁷ Record No. DCP.V2.5.00031, ¶ 12, citing to Final EIR, p. 20A-35 [Fig. 20A-11].

to ensure produce is timely delivered, will not hold up to this heavy ongoing traffic.¹⁹⁸ Mr. Rodriguez also identifies insufficiency in DWR’s analysis, stating that “DWR has not sufficiently addressed likely impacts to roadways and traffic,” which will cause “a significant impact on local farmers.”¹⁹⁹

As explained above, DWR also provides no evidence supporting a determination of consistency with the uses depicted or described in Sacramento County’s General Plan. The losses to Important Farmland, inherently conflict with the County’s General Plan Agricultural Element Policies AG-1 and AG-21 to protect and preserve Important Farmland and General Plan Policy AG-34 to support agritourism.²⁰⁰ DWR does not consider these conflicts in their “consideration” of Sacramento County’s General Plan, and, therefore, DWR does not provide substantial evidence that the DCP was sited to avoid or reduce these conflicts.

Lastly, DWR did not adequately consider the impacts to agricultural groundwater wells, as discussed above in section III.A.3.c, *infra*, and thereby water quantity and quality, by siting its intake facilities, or to water quality for water users within NDWA’s boundary. Thus, the Certification’s determination that the DCP’s siting will reduce conflicts to Sacramento County’s existing agricultural uses is insufficient to show substantial evidence.

ii. *Residential and Commercial Uses*

Sacramento County identifies that noise from the construction of the DCP intake facilities will result in a major conflict with the residential and commercial uses in Hood, a historic Delta legacy community. Moreover, the DCP would remove a total of 71 existing structures, including 15 homes.²⁰¹

The Certification’s determination that the DCP’s siting will reduce conflicts to Sacramento County’s existing residential and commercial uses is not supported by substantial evidence. In DWR’s consistency findings for north Delta intakes and housing conflicts, DWR provides no analysis of noise conflicts with housing. Similarly, in DWR’s consistency findings for north Delta intakes and commerce,²⁰² DWR provides no analysis of noise conflicts on commercial uses.²⁰³ DWR’s failure to consider noise conflicts from the north Delta intakes for housing and commerce conflicts shows that DWR did not consider these

¹⁹⁸ See Record No. DCP.V2.5.00031, ¶¶ 10, 12, 14.

¹⁹⁹ *Id.*, ¶ 14.

²⁰⁰ See Record No. DCP.D3.1.03808 [Agricultural Element in Sacramento County General Plan of 2005-2030].

²⁰¹ See Record No. DCP.D1.1.00126 [Final EIR, ch. 14, Land Use], pp. 14-22.

²⁰² See Record No. DCP-AA1.2.00018, p. 5-6 [DWR organized existing uses into broad categories. The broad category of “commerce” includes “retail stores, grocery stores, office buildings, restaurants, permanently parked food trucks, farm stands.”].

²⁰³ Record No. DCP-AA1.2.00018, p. 94.

conflicts. Therefore, DWR cannot show that their determination of consistency is supported by substantial evidence.

The certified record, however, contains substantial evidence that noise from the construction activities associated with the intakes conflicts with existing uses, and that these conflicts cannot be avoided or reduced (unless the intakes are sited in another location where they will not conflict with existing or planned homes and businesses). Construction activities are expected to occur for 10 hours a day, Monday through Friday, for most of the construction period, which will last more than a decade.²⁰⁴ Charles Salter, an acoustical engineer for over 50 years and professor at the University of California at Berkeley, stated in his Water Rights Hearing testimony that local residents will be affected by noise from construction, and that “[e]ven if construction noise is modestly reduced, it could become the dominant source of daily noise for the long period of planned construction.”²⁰⁵

The certified record also provides evidence that noise impacts from DCP construction will conflict with Hood’s existing commercial uses. Angelica Whaley, owner and operator of the Willow Ballroom, an event venue on the banks of the Sacramento River in Hood, testified in the Water Rights Hearing that tourists and Ballroom guests who visit Hood “tell us that the peacefulness and rural landscape of our setting is what makes their event feel so special” and that “long-term operation of the [DCP], with large industrial facilities at the intake locations, will severely degrade the scenic and peaceful nature of the Hood locale.”²⁰⁶ Among her serious concerns are “noise, dust, constant parade of construction trucks, and industrialization of our area” that “would deter clients seeking a serene, elegant venue for their event.”²⁰⁷ Mr. Salter calculated that the level of noise reaching the Willow Ballroom from pile driving at the intakes “would interfere considerably with quiet conversation and require people to raise their voices in order to have an intelligible conversation. At a quiet event, such as a funeral, the intruding noise of 72 dBA would be very annoying to most people.”²⁰⁸

Importantly, in DWR’s analysis of the conflicts with the north Delta intakes and Delta commerce, DWR admits that “no specific analysis was conducted to discern the economic effects of the north Delta intake construction in isolation.”²⁰⁹ DWR’s failure to consider the economic effects of the north Delta intake construction shows that DWR’s determination is not supported by substantial evidence.

²⁰⁴ Record No. DCP-AA1.2.00018, p. 94.

²⁰⁵ Record No. DCP.V2.5.00007 [Water Rights Testimony of Charles Salter, P.E., SACO-001], ¶ 7.

²⁰⁶ Record No. DCP.V2.20.00003, ¶¶ 11, 36.

²⁰⁷ *Id.*, ¶ 64.

²⁰⁸ Record No. DCP.V2.20.00030 [Water Rights Testimony of Charles Salter, P.E., HCC-SCDA-060], ¶¶ 20-22.

²⁰⁹ Record No. DCP-AA1.2.00018, p. 94.

Further, as discussed above in section III.A.3.b, *infra*, evidence in the record supports that the DCP could significantly impact Hood’s only water supply for its residents and commercial operations, and no measures have been provided that would sufficiently mitigate those potential impacts.

DWR also provides no evidence supporting its determination of consistency with the uses depicted or described in Hood’s Community Action Plan. The Hood Community Action Plan is an action-oriented planning document reflecting Hood’s community issues and priorities, with an intended use “as a guide for both policymakers and the community in enhancing and preserving the area’s quality of life.”²¹⁰ The Hood Community Action Plan is included within the Delta Plan under Performance Measures for the vitality and protection of legacy communities.²¹¹ According to the Delta Plan, “[e]ach chapter of the Delta Plan includes strategies to achieve the goals of the plan. These strategies are general guidance on achieving the objective laid out in the plan and in the Delta Reform Act of 2009. Associated with these strategies are recommendations. The recommendations describe more specific and implementable actions to support the achievement of Delta Plan strategies. Strategies may also have associated performance measures. Delta Plan performance measures track progress in achieving desired outcomes for the Delta Plan.”²¹² The strategies and recommendations associated with this performance measure are the Delta Plan strategy “Plan to Protect the Delta’s Lands and Communities,” and the Delta Plan Recommendation “Plan for the Vitality and Preservation of Legacy Communities.”²¹³ Regarding this performance measure, the Delta Plan states,

The Delta has many communities with unique character and histories. The legacy communities have rich and unique natural, agricultural, and cultural heritages. In order to ensure that the Delta legacy communities remain vital areas, community action plans are being developed for each legacy community.

Vital communities are areas where residents work together to achieve a balance of positive social, economic, and environmental outcomes. Improving community vitality increases the likelihood of enduring economic downturns, natural disasters, social difficulties, and unforeseen stressors.

Tracking community action plans will help determine if legacy communities have plans to maintain their vitality. Tracking the implementation of those

²¹⁰ See Hood Community Action Plan (Sept. 2018), p. 4.

²¹¹ Performance Measures are required by the Delta Reform Act, Water Code, section 85211. “The Delta Plan shall include performance measurements that will enable the council to track progress in meeting the objectives of the Delta Plan.”

²¹² <https://viewperformance.deltacouncil.ca.gov/index.php/pm/legacy-communities>.

²¹³ *Ibid.*

plans will help determine if these communities are achieving designated objectives that preserve Delta vitality.²¹⁴

The persistent construction noise conflicts with the Hood Community Action Plan goal of increasing tourism and enjoyment of Hood's cultural and natural heritage. The conflict between the DCP and Hood's water supply conflicts with the Hood Community Action Plan goal of providing infrastructure that supports the community's needs. As a result, the DCP conflicts with the Delta Plan Strategy, Recommendation and Performance Measure for Legacy Communities. Without providing any evidence or consideration of Hood's Community Action Plan, DWR cannot provide substantial evidence to support that the DCP was sited to avoid or reduce these conflicts, when feasible. Because the DCP will directly impair implementation of the Hood Community Action Plan, it is inconsistent with the Delta Plan.

iii. *Recreational Uses*

Sacramento County and SCWA's Draft EIR comments expressed various concerns regarding the DCP's conflicts with Sacramento County recreational opportunities.²¹⁵ Particularly, Sacramento County identified conflicts between the TCC and CRP and SLNWR and the DCP construction and operation with recreational facilities, such as local waterways and wineries.²¹⁶

The Certification fails to meaningfully consider comments regarding DCP's conflicts at the CRP and SLNWR, and in doing so, fails to provide substantial evidence to support DWR's determination that conflicts between the north Delta intakes and tunnel shafts with the existing uses of recreation and tourism have minimal conflicts when factoring in measures to reduce conflicts.²¹⁷

Critically, DWR's consistency findings provide *no* evidence of the DCP having been sited to avoid or reduce conflicts at CRP. Despite four separate Draft EIR comments from Sacramento County and SCWA on the conflicts between the DCP and CRP, DWR does not even mention the CRP in its consistency findings. Thus, DWR lacks substantial evidence in the record to support its consistency with Delta Plan Policy DP P2. Rather, evidence in the record, in the form of written testimony by Amber Veselka, who has more than 20 years of experience working in recreation in the Delta, shows that DCP's conflicts with the CRP are significant and have not been avoided or reduced, as required by Policy DP P2.

²¹⁴ <https://viewperformance.deltacouncil.ca.gov/index.php/pm/legacy-communities>.

²¹⁵ See Record No. DCP-AA1.2.00018, pp. 61-66.

²¹⁶ *Id.*, p. 65.

²¹⁷ Record No. DCP-AA1.2.00018, pp. 95, 98, 99.

As Ms. Veselka explains, the CRP encompasses 52,000 acres of protected land, centered along the Cosumnes River floodplains and riparian habitat.²¹⁸ During the fall/winter migratory season, the CRP frequently has over 100,000 birds.²¹⁹ The CRP has an estimated 100,000 annual visitors (based on a 2024 study), and therefore is a significant attractor of sensitive receptors (recreation users).²²⁰ Annual visitation of the CRP has increased since the release of the Draft EIR and continues to grow.²²¹

However, DWR sited the TCC directly adjacent to the CRP, disturbing these protected habitats and impacting recreational opportunities, especially those related to birds, such as birdwatching and photography. The TCC will contain a double launch shaft, tunnel segment, storage, a slurry grout mixing plant, shops and offices, material laydown and erection areas, access roads, reusable tunnel material (RTM) conveyer and handling facilities, a 214-acre, 15-foot-high permanent RTM stockpile, a water treatment plant, emergency response facilities, and a helipad.²²²

The 12-year construction period will significantly impact recreation at the CRP, through noise and visual disturbances to wildlife and visitors.²²³ For wildlife, DCP construction noise and vibrations will impact threatened species including sandhill cranes, western pond turtles, yellow warblers, Swainson's hawks, tri-colored blackbirds, burrowing owls, and more.²²⁴ As Ms. Veselka explains, during construction of the Highway 99 bridge near Dillard Road in 2019, "CRP had one of the largest, if not the largest rookery, of egrets, herons, and cormorants in [Sacramento County] at the Horseshoe Lake property near Dillard Road."²²⁵ During that construction, however, "bird numbers started to decline, and the nest sites that were once in the hundreds of active nests are now down to around 60 active nests." For visitors, construction noise, dust, traffic, and visual disturbances is likely to detract visitors.²²⁶ Particularly, the permanent 214-acre, 15-foot tall RTM stockpile, sited "just north and south of the surrounding CRP" will create a "drastic, unnatural change in grade and surrounding scenery," leading to "a detrimental visual impact in the context of the historically/typically flat Delta landscape."²²⁷

DWR also failed to meaningfully address Sacramento County and SCWA's Draft EIR comments regarding DCP conflicts with SLNWR. DWR asserts that conflicts with the DCP

²¹⁸ Record No. DCP.V2.5.00025 [Water Rights Testimony of Amber Veselka], ¶ 2.

²¹⁹ *Id.*, ¶ 16.

²²⁰ *Id.*, ¶ 14.

²²¹ *Ibid.*

²²² Record No. DCP.V2.5.00025, ¶ 10.

²²³ Record No. DCP.V2.5.00025, ¶ 15.

²²⁴ *Id.*, ¶ 9.

²²⁵ *Id.*, ¶ 16.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

intakes and SLNWR will be minimal “because construction activities will not generally occur on weekends and most tourism activities occur on weekends.”²²⁸ Further, it states that “Intake B is located about 2.5 miles from the main entrance for [SLNWR],” without mentioning the proximity of Intake C and SLNWR.²²⁹ DWR also asserts that conflicts with the DCP tunnel shafts and SLNWR will be minimal because the “tunnel boring machine will be launched from the [TCC] rather than at the intakes” to minimize traffic volume near SLNWR, and because “the [TCC] was moved to the eastern side of I-5 to be located farther from [SLNWR].”²³⁰ DWR also relied on pollutant offset mitigation measures to reduce conflicts.

DWR’s determination regarding conflicts with the DCP and SLNWR is not supported by substantial evidence. First, DWR fails to mention that Intake C is one mile from SLNWR, and the tunnel alignment is 100-200 feet away from SLNWR.²³¹ The SLNWR is a national wildlife refuge along the Pacific Flyway, consisting of wetland, grasslands, and riparian areas home to over 200 species of birds and other fish and wildlife.²³² However, in DWR’s consistency determination, DWR provides no reduction or avoidance measures related to impacts on wildlife, which, as Ms. Veselka explained, “is the key component of recreational opportunity and experience at SLNWR.”²³³ The DCP Final EIR acknowledges significant and unavoidable impacts, including impacts to visual character, air quality, noise, and dust.²³⁴ Impacts outside the project footprint resulting from artificial light, geotechnical boring, and vibration will also impact species.²³⁵ Impacted species will include sandhill cranes, western pond turtles, yellow warblers, tri-colored blackbirds, burrowing owls, and more.²³⁶

Second, moving the TCC to the eastern side of Interstate 5 does not reduce conflicts to wildlife, as the TCC’s location, immediately adjacent to the CRP, conflicts with the contiguous corridor for Delta plant and wildlife, including for wintering migratory Pacific Flyway birds, created by the CRP and SLNWR.²³⁷ This disruption to the wildlife corridor is inconsistent with Mitigation Measure 4-4(d), which requires the protection, restoration, and enhancement of “connectivity of habitats, including but not limited to wetland and riparian habitats that function as migration corridors for wildlife species.”²³⁸

²²⁸ Record No. DCP-AA1.2.00018, p. 95.

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ Record No. DCP.V2.5.00025, ¶ 6.

²³² *Id.*, ¶ 3.

²³³ *Id.*, ¶ 8.

²³⁴ *Id.*, ¶ 7.

²³⁵ *Id.*, ¶ 9.

²³⁶ *Ibid.*

²³⁷ *Id.*, ¶ 13.

²³⁸ Record No. DCP-AA1.1.00020, p. 15.

Together, the CRP and SLNWR provide essential habitat for plants, migratory birds, and other wildlife species, as well as an abundance of recreational opportunities. These opportunities are critical existing uses in Sacramento County as the County continues to develop. DWR has failed to provide substantial evidence to support its consistency determination that the DCP has been sited to avoid or reduce conflicts at CRP and SNLWR.

DWR also did not meaningfully consider Sacramento County and SCWA's comments on DCP impacts to recreational facilities, such as wineries in Clarksburg. DWR states that effects on tourism in Clarksburg will be minimal because construction activities will not generally occur on weekends.²³⁹ However, this fails to consider how farms and agricultural operations that contribute to the Delta's agritourism will be affected by DCP construction, as mentioned in the previous section regarding DCP's impacts to Sacramento County's agricultural uses, or how the adverse visual impact of massive long term industrial construction in and around the area of wineries and along designated Scenic Highway 160, which "meanders through historic Delta agricultural areas and small towns along the Sacramento River,"²⁴⁰ will deter visitors by significantly disrupting and degrading the Delta's unique visual and cultural landscape.

²³⁹ Record No. DCP-AA1.2.00018, p. 95.

²⁴⁰ <https://dot.ca.gov/caltrans-near-me/district-3/d3-programs/d3-maintenance/d3-scenic-hwy-program>. According to Caltrans:

1. A scenic highway designation protects the scenic values of an area. Official designation requires a local jurisdiction to enact a scenic corridor protection program that protects and enhances scenic resources. A properly enforced program can:
 - Protect from encroachment of inappropriate land uses such as junkyards, dumps, rendering plants and gravel pits.
 - Mitigate uses which detract from scenic values by proper siting, landscaping or screening.
 - Prohibit billboards and regulate on-site signs so that they do not detract from scenic views.
 - Make development more compatible with the environment by requiring building siting, height, colors and materials that are harmonious with the surroundings.
 - Regulate grading to prevent erosion and cause minimal alteration of existing contours and to preserve important vegetative features along the highway.
 - Protect the hillsides by allowing only low density development on steep slopes and along ridge lines.
 - Prevent the need for noise barriers (sound walls) by requiring a minimum setback for residential development adjacent to a scenic highway.

In the certified record, David Ogilvie, a fourth generation farmer and winery owner in Clarksburg, stated that people “are attracted to visit the Delta, especially its wineries and business, for relaxation and to experience an agrarian lifestyle.”²⁴¹ Mr. Ogilvie is concerned, however, that “tourism, and as a result, the economy, will suffer from the construction impacts of the DCP,” including noise, traffic, roadway access, and closures.²⁴² He is also worried that an “overall change in local character from the DCP facilities [] will detract visitors from the region and will ultimately hurt local businesses.”²⁴³ The Certification fails to demonstrate with substantial evidence in the record that the DCP was sited to avoid or reduce conflicts with the existing use of recreation in Sacramento County.

iv. *Delta as a NHA*

As explained in Sacramento County and SCWA’s Appeal, the DCP will conflict with the Delta’s existing use as a historic place and unique cultural landscape, particularly as a NHA, and DWR has provided no evidence that it has sited facilities to avoid or reduce this conflict.²⁴⁴ DWR, in its Delta Plan Policy DP P2 Considerations, recognizes that the NHA designation for the Delta “is expected to further develop the brand identity of the region and help boost tourism providers and the local tourism economy.”²⁴⁵ However, DWR never analyzes how the DCP will conflict with this existing use, and therefore, DWR cannot show that its consistency determination is supported by substantial evidence.

b. SacSewer Existing Uses

The DCP will “irreparably change and degrade the unique character of the Delta.”²⁴⁶ Expert testimony, and common sense, demonstrates that this kind of irreparable change most certainly conflicts with the Delta as a cultural landscape and historic place of national significance, and DWR has not sited facilities to avoid or reduce this conflict.²⁴⁷ According

2. A scenic highway designation can enhance community identity and pride, encouraging citizen commitment to preserving community values.
3. By preserving scenic resources, a scenic highway designation will enhance land values and make the area more attractive.
4. A scenic highway designation can be used to promote local tourism that is consistent with the community scenic values.

²⁴¹ Record No. DCP.V2.28.00002, ¶ 13.

²⁴² *Id.*, ¶¶ 17-19.

²⁴³ *Id.*, ¶ 18.

²⁴⁴ Letter Supporting C20257-A3, pp. 51-54.

²⁴⁵ Record No. DCP.AA1.2.00018, p. 61.

²⁴⁶ Record No. DCP.V2.5.00036 [Water Rights Testimony of Don Nottoli, SACO-031], ¶ 16.

²⁴⁷ DWR is likely to argue that the NHA designating legislation precludes the DSC from considering the impact of the DCP on the NHA or its management plan. Specifically, DWR may point to Title VI, National Heritage Areas, section 6001(a)(4), establishing the Delta NHA, subsection (c) Effect, which provides, “[t]his paragraph shall not be interpreted or

to Dr. Nancy Morgan, Principal of Point | Heritage Development Consulting and project coordinator for the [Sacramento-San Joaquin Delta National Heritage Area Management Plan](#) (2020-2035) that was completed in March of 2024, in her Water Rights Hearing testimony in the certified record, the DCP poses substantial and compounding threats to the mission, vision, and goals articulated in the [NHA] Management Plan, severely curtailing the NHA's ability to implement key strategies across preservation, sustainable development, and community resilience.²⁴⁸ The importance of the Delta as a historic place, as an NHA, cannot be ignored by DWR or the DSC. As explained by Dr. Morgan, "*Delta Vision*, the 2008 Governor's Blue Ribbon Task Force report that helped shape subsequent legislation and policy, emphasized that recognition of the 'Delta as a place' must be the third foundational pillar, alongside water supply and ecosystem health."²⁴⁹ DWR's analysis of potential conflicts between the DCP and potential existing land uses (Attach. 1, Table 7) does not evaluate, nor does it even mention, the conflicts between the DCP and the Delta's existing use as an NHA.²⁵⁰ Therefore, the Certification does not demonstrate with substantial evidence that the DCP was sited to avoid or reduce this conflict.

As explained in SacSewer's Appeal, the DCP will conflict with SacSewer's existing uses of EchoWater, Harvest Water, and other essential SacSewer infrastructure such as pipelines and pump stations.²⁵¹ DWR fails to provide substantial evidence that the DCP was sited to avoid or reduce these conflicts when feasible.

i. *EchoWater*

The Certification's analysis that the DCP's siting will reduce conflicts to SacSewer's existing uses at the EchoWater facility is insufficient to demonstrate substantial evidence. DWR analyzed the conflicts with the EchoWater facilities in Delta Plan Policy DP P2 Attachment 2, which analyzed operation effects relevant to existing land uses.²⁵² Like Attachment 1, DWR considered SacSewer's EIR comments in a table, and in another table,

implemented in a manner that directly or indirectly has a negative effect on the operations of the Central Valley Project, the State Water Project, or any water supply facilities within the Bay-Delta watershed." However, this language is plainly limited to *operations* of water supply facilities, not new water facility siting, and there is no legislative history that would suggest otherwise. (*Vasquez, supra*, 45 Cal.4th at p. 253 [courts construe language "to ascertain and declare what the [provision] contains, not to change its scope by reading into it language it does not contain or by reading out of it language it does"].).

²⁴⁸ Record No. DCP.V2.5.00010, ¶¶ 1, 4, 31.

²⁴⁹ *Id.*, ¶ 38 (emphasis in original).

²⁵⁰ See DCP.AA1.2.00018, Table 7.

²⁵¹ See Letter Supporting C20257-A6, pp. 42-45; see section III.A.3.c, *infra*, for an explanation of EchoWater and Harvest Water and critical benefits that they provide to the region.

²⁵² Record No. DCP.AA1.2.00019.

Table 6, provided a generalized summary of conflicts with the DCP's components and a consistency determination.

In SacSewer's EIR comments, SacSewer expressed concern that the DCP will create river conditions that would force a commitment of EchoWater facilities to address conditions created by the DCP in order to meet its NPDES permit obligations, thereby reducing SacSewer's operational flexibility and creating unknown risks to SacSewer's obligations.²⁵³ DWR stated that it considered this comment as "potentially relevant" in siting conditions for the north Delta intakes (as explained in Table 6), and that, "[i]n response to this and other similar comments, DWR conducted detailed water quality modeling."²⁵⁴

In Table 6, DWR concludes that substantial evidence in the record supports that the north Delta intakes will minimally conflict with water supply uses, including those identified by EchoWater, when factoring in measures to reduce those conflicts.²⁵⁵ DWR relies on the water quality modeling in its Final EIR to show substantial evidence, including DSM2 modeling based on the 92-year CalSim 3 simulation of existing conditions against DCP conditions to evaluate reverse flow frequency during DCP operation.²⁵⁶ These modeling results show "no increase in the frequency of stronger reverse flow events caused by project operations."²⁵⁷

However, substantial evidence in the certified record establishes that DWR's DSM2 model runs indicate that reverse flows at SacSewer's discharge location *will increase* in number, duration, and severity as a result of future climate change and would likely increase further as a result of DCP operations, and that DWR's analysis of reverse flow conditions during the period of DCP operation is insufficient.²⁵⁸ Thus, DWR's DSM2 modeling is flawed, and as such, it is not substantial evidence. Substantial evidence in the record also shows that DWR has not evaluated whether operations of the DCP under the 2025 ITP issued by the California Department of Fish and Wildlife would worsen reverse flows in the Sacramento River during future conditions.²⁵⁹

Moreover, as mentioned in section III.C, *infra*, in the Water Rights Hearing, the AHO indicated in an October 10, 2025 letter to DWR that its climate scenario modeling was insufficient and that the administrative record developed to date was inadequate to inform the SWRCB's decision concerning what Delta flow criteria is appropriate for the DCP.²⁶⁰ This

²⁵³ Record No. DCP-AA1.2.00019, p. 24.

²⁵⁴ *Ibid.*

²⁵⁵ Record No. DCP-AA1.2.00019, p. 34.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.* (emphasis added).

²⁵⁸ Record No. DCP.V2.27.00013 [Water Rights Hearing Testimony of Susan Paulsen, Ph.D., P.E., SASD-012], ¶ 10 (emphasis added).

²⁵⁹ *Id.*, ¶ 29.

²⁶⁰ Record No. DCP.V3.1.00042.

determination by the AHO shows that DWR’s consistency finding, which relies on the insufficient DSM2 modeling, is inadequate to demonstrate substantial evidence.²⁶¹

Finally, additional evidence in the record, provided by DWR, also undermines DWR’s consistency with Delta Plan Policy DP P2. In DWR Engineer Molly White’s May 27, 2025 testimony in the Water Rights Hearing, Ms. White indicated that DWR would not modify DCP operations to minimize reverse flow impacts, and that DWR’s coordination with SacSewer would be limited to information sharing.²⁶² Under DWR’s Proposed Permit Term 04, “DWR will coordinate operations with [SacSewer] … and share projections of tidal reverse flows and any [DCP] diversions that may be anticipated.”²⁶³ DWR’s offer to share forecasts of reverse flow events is insufficient as data sharing does not provide a mechanism to mitigate reverse flow impacts.²⁶⁴ Additionally, DWR has not proposed a method to be used once the DCP becomes operational to assess whether, and to what extent, reverse flows are made worse by the operation of the DCP. Simply sharing forecasts does not substitute for meaningful action, and DWR’s refusal to commit to operational adjustments leaves SacSewer vulnerable to potential harm from reverse flows in a manner that conflicts with the existing EchoWater facility and is inconsistent with Policy DP P2. Thus, DWR has failed to show substantial evidence that DWR sited the DCP to avoid conflict with EchoWater.

ii. *Harvest Water*

The Certification’s analysis that the DCP’s siting will reduce conflicts to SacSewer’s existing and planned uses with Harvest Water is unsupported by any evidence, let alone substantial evidence. In DWR’s responses to SacSewer’s EIR comments, which informed DWR of the conflict mechanisms to be evaluated in the Delta Plan Policy DP P2 consistency analysis, DWR makes patently false statements that are unsupported by the certified record, stating that the TCC is not located on a site that will impact SacSewer and that DWR has and will coordinate and consult with SacSewer.²⁶⁵ None of this is true as to Harvest Water. Then, in DWR’s Table 7, which generally analyzes conflicts with existing land uses and determines a “Consistency Finding,” DWR finds that the TCC “will potentially conflict with the implementation of the Harvest Water,” however, without citing *any* evidence in the record, finds consistency because the conflicts were minimized “during design of the covered action”

²⁶¹ DWR cannot claim it was unaware of the AHO’s determination. The letter to DWR from the AHO was sent on October 10, 2025. The Certification was submitted one week later, on October 17, 2025.

²⁶² Record No. DCP.V1.1.00018 [DCP Hearing Tr., vol. 16], pp. 117–118.

²⁶³ Record No. DCP.V2.27.00013, ¶ 27; see also Record No. DCP.V1.2.00309 [Draft Proposed Permit Terms Revised], p. 2, Permit Term 04.

²⁶⁴ Record No. DCP.V2.27.00016, ¶¶ 16-21, 26-29; Record No. DCP.V2.27.00010 [Water Rights Hearing Testimony of Clarence Lundy, SacSewer Director of Operations, EchoWater Operations Department], ¶¶ 19-20, 26-27.

²⁶⁵ Record No. DCP.AA1.2.00018, p. 81.

and will be mitigated through Mitigation Measure AG-3: *Replacement of Relocation of Affected Infrastructure Supporting Agricultural Properties.*²⁶⁶ DWR also states that it “has not been made aware that the parcels located at the [TCC] site have been issued a Recycled Water Use Permit to participate in the [Harvest Water] program and therefore cannot confirm the potential conflict with the specific location.”²⁶⁷ This is patently false as SacSewer’s EIR comments provide that the Harvest Water Program had already “secured recycled water pipeline alignments within the public rights-of-way directly in the path of some of the Project’s proposed construction and road improvement locations … in proximity to the Twin Cities Complex,” and SacSewer’s July 2025 Water Rights Hearing testimony all advised DWR about SacSewer’s recycled water right and the details of the Harvest Water Program.²⁶⁸

DWR’s consistency finding that DCP conflicts with Harvest Water were mitigated through the design of the covered action and Mitigation Measure AG-3 is unsupported by substantial evidence in the record. Mitigation Measure AG-3 suggests that “designs for the covered action will be modified to avoid any conflicts with irrigation drainage infrastructure servicing farmland located outside the covered action’s construction footprint,” and, for any impacts that cannot be avoided, DWR will replace or relocate water wells until diversion connection is established and ongoing agricultural uses are supported.²⁶⁹ Avoiding conflicts with irrigation infrastructure has no effect on DCP impacts to Harvest Water’s program objective, and contract requirement, to raise groundwater levels, or other program objectives. As shown in the certified record in the written testimony of Dr. Steffen Mehl, professor of Civil Engineering at California State University Chico teaching fluid mechanics, hydrology, and hydraulics, with a Ph.D. in Civil Engineering, DWR did not consider the impacts specific to groundwater zones and related impacts to groundwater-dependent ecosystems or DCP-related impacts to Harvest Water’s other ecological benefits.²⁷⁰ The losses in irrigation demand as a result of TCC construction and operation directly conflict with Harvest Water’s existing and planned use and future agricultural production. The losses of groundwater and reduced stream leakage will reduce groundwater levels, which will in turn increase the amount of recharge required by Harvest Water to reach program goals and contract requirements. Any replacement or relocation of irrigation infrastructure offered by Mitigation Measure AG-3 cannot reduce or avoid the impacts that result in the conflict in the first instance, and will not mitigate these losses, and is not equivalent to siting facilities to avoid impacts in the first instance as the Delta Plan requires.

²⁶⁶ *Id.*, p. 99.

²⁶⁷ *Ibid.*

²⁶⁸ Record No. DCP.D2.3.00509 [SacSewer Draft EIR Comments (Dec. 16, 2022)]; Record No. DCP.V2.27.00016, ¶ 13.

²⁶⁹ Record No. DCP.AA1.2.00018, p. 99.

²⁷⁰ See SASD-004c [corrected version of Record No. DCP.V2.27.00004 to be included in the final Record], ¶¶ 1, 4, 14; Record No. DCP.V2.27.00016, ¶ 17.

Further, not only did DWR not consider the impacts to irrigation infrastructure servicing farmland located outside the TCC in the Harvest Water area, DWR did not even attempt to do so despite comments from SacSewer. According to written testimony in the certified record by Mr. Christoph Dobson, District Engineer for SacSewer, DWR has failed to consider SacSewer's comments of the DCP impacts to Harvest Water since 2020.²⁷¹ The Harvest Water Program was defined and had received its initial Proposition 1 funding in 2018.²⁷² SacSewer advised DWR of the DCP impacts, including Harvest Water, in its March 2020 comments on the DCP EIR notice of preparation and in comment letters on the DCP Draft and Final EIRs, totaling over 500 pages, with supporting technical reports and evidence.²⁷³ SacSewer urged DWR to consider alternatives that would avoid impacts to Harvest Water.²⁷⁴ Despite these efforts, DWR still chose to locate the TCC in the middle of a key Harvest Water Program area and did not contact SacSewer regarding the District's concerns until just weeks before DWR released the Final EIR and approved the DCP on December 23, 2023. SacSewer met with DWR several times during that short period and urged it to delay its consideration of the DCP and EIR, so that impacts to Harvest Water and other concerns could be resolved.²⁷⁵ DWR instead certified the EIR and approved the DCP, filed a water right change petition, and now files its Certification of Consistency. DWR's failure to consider SacSewer's comments, as required by Delta Plan Policy DP P2, further undermine DWR's consistency determination with the policy.

Lastly, and as further explained in SacSewer's Appeal,²⁷⁶ DWR provides no analysis in its Policy DP P2 Consistency Findings of Harvest Water's existing and planned land uses related to sandhill crane habitat. In addition to many other significant environmental benefits of the Harvest Water Program, as stated in the Mr. Bryan Young's Water Rights Hearing testimony in the certified record, Harvest Water's *EcoPlan* includes 3,500 acres of additional habitat for sandhill cranes, potentially supporting up to 700 individuals.²⁷⁷ As described by Dr. Gary Ivey, “[c]ollectively the impacts from the DCP have the potential to result in significant harm to Greater Sandhill Cranes, including mortality, and substantially impair recovery efforts, including by significantly reducing the Delta and Harvest Water Program benefits to cranes, and threaten the viability of the species in the Delta along the Pacific Flyway.”²⁷⁸ Dr. Ivey further states that siting of the proposed TCC “would remove 644 acres

²⁷¹ Record No. DCP.V2.27.00016, ¶ 14.

²⁷² *Ibid.*

²⁷³ Record No. DCP.V3.3.00033 [SacSewer Protest to Petition Requesting Changes in Water Rights of DWR for the DCP], Attach. 1A (SacSewer's Comments on the DCP Draft EIR), Attach 1B (SacSewer's Comments on Final EIR).

²⁷⁴ *Id.*, Attach. 1A, pp. 5-9.

²⁷⁵ *Id.*, Attach. 1B, pp. 3-4.

²⁷⁶ Letter Supporting C20257-A6, pp. 25-26, 44.

²⁷⁷ Record No. DCP.V2.27.00001 [Water Rights Testimony of Bryan Young, SacSewer Environmental Program Manager, SASD-001], ¶ 11.

²⁷⁸ Record No. DCP.V2.17.00005, ¶ 4.

of high-quality wintering crane habitat from inclusion in the Harvest Water Program” which is “one of only two such suitable areas in the entirety of the Program area, making it especially valuable both in its habitat quality and in its potential efficiency in terms of habitat management.”²⁷⁹ Accordingly, DWR’s determination is not supported by substantial evidence in the record.

c. Stockton Existing Uses

As explained in Stockton’s Appeal, the DCP will conflict with Stockton’s existing uses of its DWSP and treatment of wastewater at its RWCF.²⁸⁰ By reducing the reliability of Stockton’s water supply, through degradation of surface water quality and related risks to wastewater discharge operations, the DCP will have adverse impacts to existing land uses and constrain Stockton’s ability to develop under its General Plan, thus conflicting with Stockton’s planned land uses.

DWR considered Stockton’s Draft EIR comments related to Delta Plan Policy DP P2 in two separate attachments, Attachment 1 and Attachment 2. In Attachment 1, DWR posits that it has considered Stockton’s comments on (1) the location and operation of the DCP intakes, resulting in impacts on water quality that will conflict with Stockton’s water supply, its operation of its RWCF and ability to divert water at its intake, and (2) conflicts with tunnel and other facility construction which may significantly and adversely impact environmental justice communities through criteria pollutant and toxic emissions.²⁸¹

However, in its “consideration” and subsequent generalized analysis of conflicts between existing uses and the Delta intakes, DWR provides no analysis regarding Stockton’s water quality and air quality concerns.²⁸² Indeed, DWR does not even consider Stockton’s air quality concern.²⁸³ Despite providing no analysis of conflicts with Stockton’s existing water supply uses and the DCP intakes, DWR concludes that substantial evidence in the record demonstrates that the intakes will have minimal conflicts with existing water supply uses when factoring in reduction measures.²⁸⁴ The measures include Mitigation Measure AG-3: *Replacement or Relocation of Affected Infrastructure Supporting Agricultural Properties*, and compensation for production losses and other infrastructure disruptions.²⁸⁵ DWR also states that “during the conceptual and final design phases, approaches for avoidance or mitigation will be selected on a site-specific basis” in coordination with the water rights holder.²⁸⁶

²⁷⁹ *Id.*, ¶ 20.

²⁸⁰ Letter Supporting C20257-A7, pp. 32-35.

²⁸¹ Record No. DCP-AA1.2.00018, p. 85.

²⁸² Record No. DCP-AA1.2.00018, pp. 85, 93.

²⁸³ *Id.*, p. 85.

²⁸⁴ *Ibid.*

²⁸⁵ See *id.*, p. 93.

²⁸⁶ *Ibid.*

DWR's consideration and analysis provides *no* evidence that addresses Stockton's water quality concerns or DCP impacts to its municipal water supply validated by expert evidence from Dr. Paulsen. None of the referenced mitigation measures or approaches are relevant to impacts to Stockton's municipal water supply and wastewater discharge. DWR's purported claim that it will select approaches for avoidance or mitigation on a site-specific basis with the water rights holder provides no proof that DWR has already avoided or reduced conflicts, as is required by Delta Plan Policy DP P2. Rather, it provides proof that for some conflicts with water rights holders, DWR has yet to identify adequate and feasible avoidance and reduction measures at all. Thus, DWR provides no evidence to support its determination.

In Attachment 2, which evaluates operations effects relevant to Policy DP P2 on existing land uses, DWR lists comments from Stockton related to the City's water quality concerns. These comments include: (1) the location and operation of DCP intakes may have significant adverse impacts on the operation of RWCF; (2) the location and operation of DCP intakes may limit the City's ability to use its DWSP due to increases in chloride, cyanobacteria, bromide, and other constituents; (3) DWR omits how the DCP will shift diversions from south Delta intakes to the north Delta intakes in real-time operations, and this omission is significant because the DCP will increase total SWP/CVP diversions from the Delta, resulting in decreases in Delta outflow and increases in Delta salinity and residence time, affecting the formation of harmful cyanobacteria and exacerbating public health risks to Delta residents; (4) the DCP may compromise Stockton's ability to recycle water or recharge groundwater due to an increased need for surface water treatment or to limit diversions altogether depending on the timing and volume of a north Delta diversion; (5) increases in bromide concentrations at its drinking water intake; and (6) DWR has not evaluated or disclosed potential for levee failure or overtopping that would result from a higher stage in the Delta or the significant water quality changes that would occur under these circumstances.²⁸⁷

For all six Attachment 2 comments, DWR finds no connection between the conflicts identified by Stockton and the Policy DP P2 siting conditions, stating, "DWR considered this comment in the context of Delta Plan Policy DP P2 and did not identify a specific connection to siting conditions."²⁸⁸ Thus, when DWR later concludes that substantial evidence in the record supports its determination that the north Delta intakes will minimally conflict with water supply uses when factoring in reduction measures, DWR does so without providing any analysis or evidence that the DCP was sited to avoid conflicts with Stockton's existing water supplies.

To the contrary, evidence in the certified record undermines DWR's consistency findings. All of the impacts to Stockton's existing land uses identified by the City, flow

²⁸⁷ Record No. DCP.AA1.1.00019, pp. 29-32.

²⁸⁸ See Record No. DCP.AA1.1.00019, pp. 29-32.

directly from the DWR decision to site the DCP diversion upstream of the City's intake²⁸⁹ in a location that will substantially affect the quality of water diverted at the DWSP, and HABs formation downstream of the intakes as a result of reduced Delta inflow.²⁹⁰ Testimony by Dr. Paulsen in the Water Rights Hearing demonstrates that DWR did not disclose the impacts of the proposed DCP operations at Stockton's intake for future climate conditions when the DCP would operate (i.e., after 2040).²⁹¹ DWR also evaluated salinity impacts of the DCP at a threshold of 250 milligram per liter (mg/L) chloride, which does not reflect Stockton's operational threshold of 110 mg/L chloride.²⁹² DWR has only provided long-term averages and improperly calculated summary statistics, and therefore, the data upon which DWR relies is insufficient to review hourly or sub-hourly impacts to determine the full extent of impacts to Stockton's ability to divert water from the San Joaquin River to support its existing uses.²⁹³

DWR has also not provided sufficient information to determine that the DCP will not increase bromide concentrations at Stockton's intake.²⁹⁴ It is unclear whether DWR's calculation methodology for bromide accurately represents bromide concentrations measured at Stockton's intake, which display a weak negative relationship between chloride and bromide, and DWR's model results indicate that bromide concentrations will increase at Stockton's intake.²⁹⁵ Additionally, the DCP would increase the likelihood and severity of HABs at Stockton's drinking water intake, impacting Stockton's ability to use its diverted water.²⁹⁶ Accordingly, established herein, and further supported in Stockton's Appeal, DWR's consistency determination is unsupported by substantial evidence.

d. Conclusion

The certified record does not support that it was infeasible to site the DCP to avoid or reduce conflicts with existing uses and DWR provided insufficient evidence to support its conclusion otherwise. Further, despite Delta Plan Policy DP P2's requirement that DWR analyze uses "described or depicted in city and county general plans," DWR did not actually *consider*²⁹⁷ city and county general plans and therefore failed to provide substantial evidence

²⁸⁹ See Record No. DCP.V2.3.00020 [Expert Report of Susan C. Paulsen, Ph.D., P.E., SKTN-020], Fig. 1 [Map of central Delta with Stockton's intake location], PDF p. 12.

²⁹⁰ See Record No. DCP.V2.3.00020, ¶¶ 12, 18-20, 26-28.

²⁹¹ Record No. DCP.V2.3.00020, ¶¶ 11, 17; Record No. DCP.V2.12.00002, ¶¶ 12, 27; see Record No. DCP.V3.1.00042.

²⁹² Record No. DCP.V2.3.00020, ¶¶ 12, 18.

²⁹³ *Id.*, ¶¶ 18-20.

²⁹⁴ Record No. DCP.V2.3.00020, ¶¶ 21-25.

²⁹⁵ *Id.*, ¶¶ 22-25.

²⁹⁶ *Id.*, ¶¶ 26-28; Record No. DCP.V2.12.00002, ¶ 18.

²⁹⁷ <https://www.merriam-webster.com/dictionary/consider> ("consider" means "to think about carefully: such as a: to think of especially with regard to taking some action" or "b: to take into account" or to "reflect, deliberate").

that the DCP's siting avoided or reduced conflicts with those uses. Lastly, DWR did not provide substantial evidence that the DCP's *siting*, when feasible, would reduce such conflicts. Thus, the Certification is unsupported by substantial evidence.

4. Impact on Coequal Goals

The Certification fails to provide substantial evidence that the DCP intake facilities were sited to "avoid or reduce conflicts with existing uses or those uses described or depicted in city and county general plans, considering comments from the Delta Protection Commission and local agencies," as required by Delta Plan Policy DP P2. This demonstrated inconsistency will result in a significant adverse impact on both Coequal Goals.

First, inconsistency with Policy DP P2 will have a significant adverse impact on the coequal goal of protecting, restoring, and enhancing the Delta ecosystem. As demonstrated in Sacramento County and SCWA's Appeal, DWR's failure to site DCP intake facilities to avoid or reduce conflicts with existing uses such as agriculture, recreation, tourism, and the Delta as a unique and historical landscape, will result in adverse impacts to the Delta's ecosystem, rather than protecting, restoring, and enhancing. As demonstrated in SacSewer's Appeal, DCP's conflicts with Harvest Water will significantly conflict with existing Proposition 1, federal, and local ratepayer-funded efforts to restore and enhance the Delta ecosystem. Adverse impacts that may appear to be minimal can cause disruption in the ecosystem, reverberating through all of the Delta's interconnected system. For example, if DCP construction and operations conflict with Delta agriculture, taking significant portions of fields out of production, or water quality and quantity reduction as a result of the DCP cause crops to perish, species that rely upon the Delta's agricultural fields for foraging or other habitat will be impacted. If roadway congestion or damage impairs or prevents produce harvest, the economic loss can result in a reduction or cessation of agricultural operations, further disrupting the ecosystem. These collective DCP conflicts with existing Delta uses will prevent protection, restoration, and enhancement of the Delta ecosystem as required by the Coequal Goals.

Second, inconsistency with Policy DP P2 will have a significant adverse impact on the coequal goal of providing a more reliable water supply. As demonstrated in SacSewer's Appeal, evidence in the record supports that the DCP will result in significant adverse impacts on EchoWater and Harvest Water, meaning SacSewer's ability to provide a reliable supply of recycled water will be reduced. As demonstrated in Stockton's Appeal, expert evidence in the record supports that DCP water quality impacts that result from the siting of DCP facilities upstream of Stockton's DWSP and RWCF will impair operations, damaging a vital water supply that supports the largest city wholly within the Delta and creating unacceptable public health risks from increased occurrence of HABs. The DCP's conflicts with the existing facilities at EchoWater, DWSP, and RWCF, and the DCP's conflicts with Harvest Water, result in a less reliable Delta water supply, at odds with the Coequal Goals.

IV. REQUESTS FOR COUNCIL TO TAKE NOTICE AND TO SUPPLEMENT THE RECORD

Pursuant to section 5032, subd. (b)(1) of the Council's regulations, Appellants request the Council take notice of the following additional evidence, which, to the extent feasible, is included with this submission:

Exhibit 1: May 16, 2024 Declaration of Graham Bradner in Support of DWR's Opposition to Motion for Preliminary Injunction.

Exhibit 2: July 19, 2024 Declaration of Graham Bradner in Support of DWR's Ex Parte Application

Exhibit 3: Transcript of May 31, 2024 Hearing before Sacramento County Superior Court.

Exhibit 4: Video Record of February 21, 2024 DISB Meeting of Agenda Item No. 6.

Exhibit 5: Video Record of April 22, 2024 DISB Meeting Agenda Item No. 8.

Exhibit 6: Video Record of May 22, 2024 DISB Meeting Agenda Item No. 3.

Exhibit 7: Video Record August 15, 2024 DISB Meeting Agenda Item No. 8.

Exhibit 8: Video Record of September 12, 2024 DISB Meeting Agenda Item No. 7.

Exhibit 9: Hood Community Action Plan (Sept. 2018).

Exhibit 10: Department of Water Resources, *New Desalination Facility is Major Milestone for Drought-Smart Infrastructure Solutions in the Delta*, <https://water.ca.gov/News/Blog/2025/Sep-25/New-Desalination-Facility-Major-Milestone-for-Drought-Smart-Infrastructure> (Sept. 15, 2025).

Exhibits 1 through 9 each is a "fact that may be judicially noticed by a court" and therefore should be noticed by DSC and included in the certified record. Exhibits 1, 2, and 3 are court records.²⁹⁸ Exhibits 4 through 8 are video recordings of public meetings created and maintained by the DSC and accessed through the DSC's website.²⁹⁹ Exhibit 9 is the Hood

²⁹⁸ Evid. Code, § 452, subd. (d).

²⁹⁹ The video recordings of Exhibits 4 through 8 are available via a link on the DSC's website (<https://deltacouncil.ca.gov/delta-isb/meetings>) at the following locations: February 21, 2024 DISB Meeting, Agenda Item No. 6, https://cal-span.org/meeting/disb_20240221/; April 22, 2024 DISB Meeting, Agenda Item No. 8, https://cal-span.org/meeting/disb_20240422/; May 22, 2024 DISB Meeting, Agenda Item No. 3, https://cal-span.org/meeting/disb_20240522/; August 15, 2024 DISB Meeting, Agenda Item No. 8, <https://cal-span.org/meeting/>

Community Action Plan, which is included in the Delta Plan as a performance measure.³⁰⁰ Exhibits 1, 2, 3, 4, 5, 6, 7, 8, and 9 are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.³⁰¹ The exhibits are relevant to the instant matter and useful for DSC’s consideration of the Appeals because of the significant overlap in law and fact present between that DCP litigation matter and the DISB’s role as a scientific adviser to the DSC, including its analysis of documents included in DWR’s certified record, and the matter at hand.³⁰² Pursuant to Evidence Code section 453, courts “shall take judicial notice of any matter specified in Section 452 if a party requests it, and that party gives each adverse party sufficient notice of the request and furnishes the court with sufficient information to take judicial notice of the matter.” Thus, Exhibits 1 through 9 are subject to notice and should be included in the certified record. Exhibit 10 is a September 25, 2025 DWR publication that pertains to the Delta and salinity management in Delta diversions. Exhibits 1 through 10 all were in existence prior to the date of DSC’s receipt of the Certification, and are appropriately part of the record before DWR prior to the date of the DSC’s receipt of the Certification; Appellants thus further request that the documents be added to the certified record under California Code of Regulations, title 23, section 5026.

In addition to the specific exhibits identified above, Appellants request that DWR and DSC supplement the certified record to include all documents related to the “early consultation” regarding the DCP that DWR and DSC engaged in up to the date of the Certification.³⁰³ DSC has produced numerous documents in response to Public Records Act requests that reveal that so-called “early consultation” meetings and communications have occurred between DWR and DSC over the course of many years up until at least just before DWR submitted its Certification. As revealed in the DSC’s disclosed records, this information included copies of the draft Certification submitted to DSC staff for review and recalled by DWR. The documents may include DSC staff notes and direction to DWR regarding the proposed Certification. The documents pertinent to the meetings between DWR and DSC was information before DWR at the time of Certification and was not included in the record submitted to DSC. Any documents pertaining to the “early consultation” should be included in the certified record under title 23 of the California Code of Regulations, section 5026 because: (1) the request is being made pursuant to that section; (2) the

[disb_20240815/](https://calspan.org/meeting/disb_20240912/); September 12, 2024 DISB Meeting Agenda Item No. 7, https://calspan.org/meeting/disb_20240912/.

³⁰⁰ See <https://viewperformance.deltacouncil.ca.gov/pm/legacy-communities> (Prepare and implement plans for the vitality and preservation of each Delta legacy community).

³⁰¹ Evid. Code, § 452, subd. (h).

³⁰² See, e.g., *Julian Volunteer Fire Co. Assn. v Julian-Cuyamaca Fire Protection Dist.* (2021) 62 Cal.App.5th 583, 600 [“a court may take notice not only of the fact of the document but also facts that can be deduced, and/or clearly derived from, its legal effect, such as the names and dates contained in the document, and the legal consequences of the document”].

³⁰³ DCP.D1.1.00015 (Final EIR, § 3E.3.2).

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documentation and information that is the subject of the request is (a) developed pursuant to the Delta Reform Act and DSC procedures governing appeals and consistency certifications,³⁰⁴ (b) within the custody and control of DWR and (c) was part of the record before DWR prior to the DSC's receipt of the Certification; and (3) pertains to the current Certification.

V. CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, Appellants request that DSC take notice and supplement the record as requested herein, grant their Appeals submitted on November 17, 2025, and find that DWR's Certification is not supported by substantial evidence demonstrating consistency with the Delta Reform Act and the Delta Plan policies. In remanding the Certification to DWR, the DSC should make clear to DWR that any revised Certification should demonstrate that impacts to local land uses, including Harvest Water and Delta legacy communities, and water supplies for Delta municipal and agricultural uses have been avoided through modifications to the DCP intake locations and DCP operations.

³⁰⁴ Wat. Code, § 85225.5 (“To assist state and local public agencies in preparing the required certification, the council shall develop procedures for early consultation with the council on the proposed covered action.”), cited at Delta Plan p. 27; Delta Plan appen. D, Administrative Procedures Governing Appeals, Statutory Provisions Requiring Other Consistency Reviews, and Other Forms of Review or Evaluation by the Council, p. 1, ¶ 2: “Review of certifications of consistency with Delta Plan: Any state or local public agency (certifying agency) proposing to undertake a covered action, as defined in Water Code section 85057.5 is encouraged to consult with the council at the earliest possible opportunity, preferably no later than 30 days before submitting its certification to the council pursuant to Water Code section 85225. The council’s staff will meet with the agency’s staff to review the consistency of the proposed action and to make recommendations, as appropriate. During this early consultation, the agency’s staff may also seek clarification on whether the proposed project is a “covered action”; provided that the ultimate determination on whether it is a covered action shall be made by the agency, subject to judicial review.”

DELTA STEWARDSHIP COUNCIL**SERVICE LIST FOR DELTA CONVEYANCE PROJECT
CERTIFICATION OF CONSISTENCY APPEAL**

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DELTA STEWARDSHIP COUNCIL

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Current as of: November 24, 2025 (Updated)