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Statewide Coalition of Fishing, Wildlife, Farming Community Advocates Sues to Halt Delta Plan, Water Export Tunnels

*“Arbitrary, Destructive” State Action Violates Delta Reform Act and CEQA;
Lawsuit Aims to “Set Aside” State Plan, Require Study of Alternatives*

SAN FRANCISCO, CA - A statewide coalition of fishing, wildlife and farming community groups today announced the filing of a lawsuit against the Delta Stewardship Council’s Delta Plan, which includes a proposal to build two 35-mile tunnels to siphon water away from the Sacramento River and San Joaquin Bay Delta. The lawsuit asserts that the Delta Plan violates both the 2009 Delta Reform Act and the California Environmental Quality Act (CEQA), and the state Administrative Procedure Act, and seeks to have it set aside. The groups said that the \$54.1 billion project would have devastating impacts on California’s farming and fishing, and put several endangered species – including salmon - at increased risk of extinction. The lawsuit was filed in San Francisco Superior Court on behalf of groups from both northern and southern California.

The 2009 Delta Reform Act, which established the council, required it to create the Delta Plan as a framework for its permitting authority over actions affecting the

Delta. According to the Act, the council must approve only actions that serve the coequal goals of environmental protection and water-supply reliability. Instead the council approved a plan that excludes most water transfers from permitting requirements and lays the groundwork for Delta water-export tunnels.

The coalition's lawsuit seeks to have the Delta Plan and its programmatic environmental impact report (PEIR) set aside for failing to disclose and analyze the devastating adverse environmental consequences on Northern California rivers, the Delta, and endangered fish species, resulting from taking enormous quantities of fresh water out of the Sacramento River upstream from the Delta. The lawsuit urges the court to suspend any activity based on the plan that could change the physical environment until the council has met its legal requirements. This would include delaying construction of the Brown Administration's proposed water-export tunnels.

"The Delta Reform Act gave the Delta Stewardship Council an historic opportunity to remedy 40 years of water policy failures. Instead, the council failed to use the best available science - biological or economic - and adopted a status quo program that fails to fix the Delta or the water supply problem," said Santa Barbara resident Carolee Krieger, executive director of the California Water Impact Network (C-WIN), a statewide water advocacy organization. "The council failed to honor its own mandate: the adoption of an effective strategy for the distribution of water and the preservation of the Delta."

Bob Wright, senior counsel for Friends of the River, said: "Seeking relief from the courts is now necessary to protect our rivers and fish from this arbitrary, destructive action. The council's plan is part of the worst threat to Northern California rivers in history, and continues state agencies' efforts to take the water regardless of the adverse consequences. The Delta Plan calls for the Delta Water Tunnels with one hand. But, with the other hand, the Delta Stewardship Council violated the California Environmental Quality Act by failing to disclose and analyze the devastating adverse environmental consequences on Northern California rivers, the Delta, and endangered species of fish resulting from taking enormous quantities of fresh water out of the Sacramento River upstream from the Delta."

Bill Jennings, executive director of the California Sportfishing Protection Alliance, said, "California is in a water crisis and the biological tapestry of the Delta is hemorrhaging. The causes are obvious: we've overpromised, wasted and inequitably allocated limited water resources. We've deprived the estuary of more than half its flow, turned its hydrograph on its head and used its waters as sewers. This crisis evolved because state and federal agencies egregiously failed to enforce and comply with the broad suite of laws enacted to prevent it.

We implored the council to undertake a series of necessary analyses because the responsible agencies have refused to conduct them. Because the council failed to identify and analyze the root causes of California's water crisis – over-appropriation, unreasonable use, failure to balance the public trust – the plan and EIR are little more than a ratification of an unsustainable status quo. It largely recommends that agencies should continue to do the same things that created the crisis in the first place. The Plan and EIR ignore history and are predicated on an artificial reality. They're little more than omelets of half-truth and distortion to justify predetermined conclusions."

Adam Lazar, a staff attorney at the Center for Biological Diversity, said: "No matter how you slice it, this plan is bad news for endangered fish, wildlife and the long-term health of the Delta. Unfortunately the Delta Stewardship Council seems more interested in catering to special interests than the communities it was supposed to protect."

Barbara Vlamis, of Chico, executive director of AquAlliance, said, "We join this lawsuit because we are the heart of the area of origin for the Sacramento River watershed. The Tuscan Aquifer in Butte, Glenn and Tehama counties is the groundwater foundation that supports the streams and rivers that are vital for farms, fish, and communities throughout California. The Delta Plan's goal to expand groundwater storage north of the Delta is a fool's errand. The State of California has failed to protect its groundwater, and has acknowledged serious overdraft in 11 basins. The only reason we don't know of more overdraft conditions is because the State Department of Water Resources hasn't studied this since 1980! If water transfers increase in scope and duration, particularly when groundwater is substituted for surface water, it will escalate the losses already underway in the Sacramento River watershed's creeks and rivers and will jeopardize what remains of the hydrologic system that supports the majority of California's economy, the Central Valley's fish and flyway, and the largest estuary in North America: the Sacramento/San Joaquin Bay Delta."

Barbara Barrigan-Parrilla, executive director of Restore the Delta, said, "This lawsuit challenges the foundation that is being laid to build the water export tunnels. Without the Delta Plan in place, the tunnels cannot win approval for the needed permits. This is the opening salvo in what will be an epic legal battle over California's water future. The Delta Stewardship Council failed their legislative mandate to address the protection and enhancement of Delta agriculture, and the Delta as a place, including failing to analyze the plan's regional and statewide economic impacts. The council failed to conduct a comprehensive benefit/cost analysis indispensable for maximizing the use of limited resources for the greatest good for all Californians. And by not conducting this essential piece of work, they have forgotten the impacts of water diversions on the \$5.2 billion annual Delta

agriculture economy, the \$750 million per year Delta recreation economy, and the \$1.5 billion per year California coastal salmon economy. We believe the reason the council refused to perform all the above analyses is that they expect the science would not support the construction of the Peripheral Tunnels. There is a better solution that includes upgrading Delta levees, reducing exported water to a sustainable level that restores fisheries and investing in regional water projects.”

Mike Jackson, attorney for C-WIN, Restore the Delta, California Sportfishing Protection Alliance, and AquAlliance, said: “The Delta Plan violates CEQA in ten different ways. It fails to achieve the co-equal goals of Delta ecosystem restoration and water supply reliability established by the Act. The Delta Plan may be the most incomplete environmental document I’ve even seen. The council ignored three critical documents they were obligated to use: a State Water Resources Control Board water flow recommendation; a Department of Fish and Wildlife report on biological objectives, and the Delta Protection Commission’s economic sustainability report. In all three cases, the documents were inconvenient to the approval of the tunnels.”

The legal complaint can be found at http://www.c-win.org/webfm_send/313.

“The Coastal Branch: A Cautionary Tale” can be found at http://www.c-win.org/webfm_send/314.



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The Coastal Branch: A Cautionary Tale

Carolee Krieger
Executive Director
California Water Impact Network

The sales pitch for the Twin Tunnels is a lot like the spiels of the patent medicine men who roamed the Old West, hawking bogus remedies to credulous settlers along the frontier. In this case, though, what's being hyped isn't a cure-all tonic – it's a panacea for all our water woes.

Don't buy it. We've heard this all before, with the Coastal Branch of the State Water Project. Its story provides some broad insights into the flawed reasoning behind California's water conveyance system. It also serves as a red flag, warning us all of the folly of Jerry Brown's Twin Tunnels project.

In 1991, Central Coast residents – including those served by water agencies in Santa Barbara, Montecito, Carpinteria, and Goleta – responded positively to state overtures for a subsidiary canal to bring State water from the California Aqueduct to Santa Barbara and San Luis Obispo counties.

As advocates for the "Coastal Branch" presented it, the project made sense. Costs were pegged at \$270 million – a tolerable price tag for ratepayers. And for the first time, it seemed, Central Coast residents would enjoy true water security, free from the shortages and rationing that loom during the region's periodic droughts.

But that's not how things played out. The Coastal Branch was constructed – but at a final cost of \$1.76 billion, not \$270 million. Costs were underestimated: proponents failed to reveal interest on the debt, and over runs in both planning and construction were extravagant. The result has been a crushing economic burden for the region's ratepayers, one that is literally generational; it will take up to 40 years to pay off.

Moreover, the Central Coast's "water security" remains as shaky as ever. The Coastal Branch, after all, did little to secure a reliable water supply for Central Coast residents. It is merely a feeder canal, a conveyance system. Whenever water shortages hit the state – which are virtually every year, given oversubscriptions to the State Water Project and the federal Central Valley Project – the Central Coast's allocations are cut along with those for all other contractors. Since the feeder aqueduct came on line in 1998, Central Coast ratepayers have received only 36% of their promised Coastal Branch supplies despite promises of 97% deliveries in the 1991 countywide vote.

Today, in Yogi Berra's words, it's déjà vu all over again. Once again, the state is promoting a water conveyance scheme that will solve all our problems -- even though its proponents admit it provides no new water. The Twin Tunnels, advocates vow, will provide water security and protect the Delta -- and at a reasonable cost. Brown pushed a near-identical scheme during his first tenure as governor in the 1980s; but Californians saw through the persiflage, and rejected the so-called Peripheral Canal at the polls.

Now, claiming he needs legacy projects to cap his long political career, Brown is back, pushing the same basic scheme -- albeit one dolled up with a little lipstick and a few ribbons. He's even couched the project in a document titled the Bay Delta Conservation Plan.

The Twin Tunnels have nothing to do with conservation or new water supplies, and everything to do with soaking ratepayers to benefit powerful agribusiness interests south of the Delta. Ultimately, the lion's share of the water from the Twin Tunnels will be used to irrigate the highly toxic, selenium-impaired soils of the western and southern San Joaquin Valley, while permanently degrading the Bay/Delta.

And what's the bottom line for rank-and-file ratepayers? Grim. Santa Barbara County alone will be forced to pony up an additional \$1.77 billion to \$7.84 billion through 2060 to finance the Twin Tunnels. Of course, that's in addition to the \$1.76 billion county ratepayers will have to spend through 2035 for the Coastal Branch.

Brown learned his lesson from the Peripheral Canal in the 1980s, and he's not going to risk the Twin Tunnels by subjecting them to the will of the people. Implementation of the project rests solely with the Department of Water Resources, not on voter approval. But this costly and environmentally destructive boondoggle can still be stopped. The courts are one avenue.

Grassroots resistance also will help stop the Twin Tunnels. Several California counties already have made their opposition to the Bay Delta Conservation Plan known. Santa Barbara County -- still stung from the Coastal Branch imbroglio -- appears on the cusp of doing the same with urging from C-WIN. For people who care about fiscal responsibility and environmental stability, that can only be construed as good news.

In sum, it's not too late. We can -- we must -- stop this thing.

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12 **SUPERIOR COURT OF CALIFORNIA**
13 **COUNTY OF SAN FRANCISCO**

14 California Water Impact Network; Friends of) Case No.: _____
15 the River; California Sportfishing Protection)
16 Alliance; AquAlliance; Restore the Delta,) **VERIFIED PETITION FOR WRIT OF**
17 and Center for Biological Diversity) **ADMINISTRATIVE MANDATE AND**
18) **COMPLAINT FOR DECLARATORY**
19) **AND INJUNCTIVE RELIEF**
20)
21) **(Code of Civ. Proc. §§ 1060, 1085, 1094.5;**
22) **Water Code § 85000 et seq., Gov't Code §**
23) **11342.1; Public Resources Code §§ 21000 et**
24) **seq.)**
25) **CEQA CASE**
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I. INTRODUCTION

1. Petitioners California Water Impact Network, Friends of the River, California Sportfishing Protection Alliance, AquAlliance, Restore the Delta, and Center for Biological Diversity (“Petitioners”) file this complaint seeking a writ of mandate under California Code of Civil Procedure §§ 1085 and 1094.5 and under Code of Civil Procedure § 1060 and Government Code § 11350 directing the California Delta Stewardship Council to vacate its approval of the Delta Plan (“Project”), the Delta Plan Regulations (“Regulations”), the Findings and Statement of Overwriting Considerations for the Delta Plan (“Findings”), the May 17, 2013 certification of the Final Programmatic Environmental Impact Report (“PEIR”), and to revise its findings to conform with the law.

II. THE PARTIES

2. Petitioner AQUALLIANCE (“AquAlliance”) is a California public benefit corporation organized to protect Northern California’s waters to sustain family farms, recreation opportunities, vernal pools, creeks, rivers, and the Bay-Delta estuary. AquAlliance has members who regularly use the waters of the Delta and its tributaries for recreation, including kayaking, paddling, fishing, and wildlife viewing. AquAlliance members also routinely participate in conservation activities in and around the Bay-Delta estuary and its tributary vernal pools, creeks, and rivers.

3. Petitioner CALIFORNIA SPORTFISHING PROTECTION ALLIANCE (“CSPA”) is a California non-profit public benefit organization with its principal place of business in Stockton, California. CSPA’s organization purpose is the protection, preservation, and enhancement of fisheries and associated aquatic and riparian ecosystems of California’s waterways, including Central Valley rivers leading into the Bay-Delta. This mission is implemented through active participation in water rights and water quality processes, education and organization of the fishing community, restoration efforts, and vigorous enforcement of environmental laws enacted to protect fisheries, habitat and water quality. Members of CSPA reside along the Central Valley watershed and in the Bay-Delta where they view, enjoy, and

1 routinely use the Delta ecosystem for boating, fishing, and wildlife viewing. CSPA's members
2 derive significant and ongoing use and enjoyment from the aesthetic, recreational, and
3 conservation benefits of the Bay-Delta ecosystem.

4 4. Petitioner CALIFORNIA WATER IMPACT NETWORK ("C-WIN") is a
5 California non-profit public benefit organization with its principal place of business in Santa
6 Barbara, California. C-WIN's organization purpose is the protection and restoration of fish and
7 wildlife resources, scenery, water quality, recreational opportunities, agricultural uses, and other
8 natural environmental resources and uses of the rivers and streams of California, including the
9 Bay-Delta, its watershed and its underlying groundwater resources. C-WIN has members who
10 reside in, use, and enjoy the Bay-Delta and inhabit and use its watershed. They use the rivers of
11 the Central Valley and the Bay-Delta for nature study, recreation, and aesthetic enjoyment.

12 5. Petitioner CENTER FOR BIOLOGICAL DIVERSITY ("The Center") is a non-
13 profit, public interest organization with over 39,000 active members and over 400,000 online e-
14 activists. The Center has offices in San Francisco, Los Angeles, and Joshua Tree, California, as
15 well as offices in Arizona, Florida, New Mexico, Oregon, Vermont, and Washington, D.C. The
16 Center and its members are dedicated to protecting diverse native species and habitats through
17 science, policy, education, and environmental law. The Center's members reside and own
18 property throughout California as well as those areas to be served by the Project, and use the
19 waters and lands affected by the proposed Project.

20 6. Petitioner FRIENDS OF THE RIVER ("FOR") is a non-profit organization
21 dedicated to preserving and restoring California's rivers, streams, and their watersheds as well as
22 advocating for sustainable water management. FOR accomplishes this goal by influencing
23 public policy and inspiring citizen action through grassroots organizing. FOR was founded in
24 1973 during the struggle to save the Stanislaus River from the New Melones Dam. Following
25 that campaign, the group grew to become a statewide river conservation organization. FOR
26 currently has nearly 3,000 members. Members of FOR enjoy the scenic beauty of the Delta and
27 the Sacramento River and its tributaries and sloughs upstream from the Delta and raft, kayak,
28 boat, fish, and swim in these waters.

1 7. Petitioner RESTORE THE DELTA (“RTD”) is a non-profit public benefit
2 organization based in Stockton, California. RTD is a coalition of Delta residents, business
3 leaders, civic organizations, community groups, faith-based communities, union locals, farmers,
4 fishermen, and environmentalists seeking to strengthen the health of the Bay-Delta estuary and to
5 protect the economic interests of the Sacramento-San Joaquin Delta, including but not limited to
6 fishing, farming, recreation, and tourism. With over 10,000 members statewide, RTD advocates
7 on behalf of local Delta stakeholders to ensure that water management decisions will protect and
8 benefit Delta communities. Members of RTD reside in and along the Bay-Delta and its
9 watershed and use the waters of the Central Valley and Bay-Delta for aesthetic, recreational, and
10 educational enjoyment.

11 8. Respondent CALIFORNIA DELTA STEWARDSHIP COUNCIL (“DSC”) is an
12 independent agency of the State of California subject to all California law, and created under
13 Sacramento-San Joaquin Delta Reform Act of 2009 (“Delta Reform Act”)(Wat. Code § 85000 *et.*
14 *seq.*). The DSC is the lead agency for the preparation and certification of the Delta Plan under
15 the California Environmental Quality Act (CEQA), and the author of the Delta Plan Regulations.

16 9. Petitioners are currently unaware of the true names and capacities of Does 1
17 through 20, inclusive, and therefore sue those parties by such fictitious names. Does 1 through
18 20, inclusive, are agents of the State government who are responsible in some manner for the
19 conduct described in this petition, or other persons or entities presently unknown to the
20 Petitioners who claim some legal or equitable interest in the program that is the subject of this
21 action. Petitioners will amend this petition to show the true names and capacities of Does 1
22 through 20 when such names and capacities become known.

23 **III. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

24 10. Petitioners have exhausted all administrative remedies by submitting written
25 comments during several stages of the Delta Plan and Regulation approval and Environmental
26 Impact Report (EIR) process, including but not limited to submitting comments highlighting
27 Delta Reform Act, CEQA, and public trust deficiencies on the draft Plan and Draft Programmatic
28

1 EIR posted in November 2011, the final Draft Plan, Regulations, and Recirculated Draft EIR
2 posted November 30, 2012, and the proposed modifications to the Regulations posted on April 8,
3 2013. All issues raised in this petition were raised before by Petitioners, other members of the
4 public, and/ or public agencies prior to approval of the Delta Plan, Regulations, and certification
5 of the Programmatic EIR.

6 11. Petitioners presented both oral and written comments during the administrative
7 process and hearings on the matters being challenged in this petition.

8 12. Petitioners have complied with Pub. Resources Code § 21167.5 by prior service
9 of a notice upon the DSC indicating their intent to file this Petition. Proof of Service of this
10 notification, with the notification, is attached as Exhibit A to this Petition.

11 13. Petitioners have complied with Pub. Resources Code § 21167.7 and Code of
12 Civil Procedure § 388 by serving a copy of this petition on the Attorney General.

13 14. The Petitioners have elected to prepare the record of proceedings in the above-
14 captioned proceeding or to pursue an alternative method of record preparation pursuant to Pub.
15 Resources Code § 21167.6(b)(2). A true and correct copy of the notification of the Election to
16 Prepare the Administrative Record is attached as Exhibit B to this Petition.

17 15. This petition is timely filed in accordance with Pub. Resources Code § 21167 and
18 CEQA Regulation § 15112.

19 16. The Petitioners and their members are directly, adversely and irreparably
20 affected, and will continue to be prejudiced by the Delta Plan and Regulations and by the failure
21 of the DSC to comply with the Delta Reform Act, CEQA, and the public trust unless or until this
22 Court provides the relief prayed for in this petition.

23 **IV. JURISDICTION AND VENUE**

24 17. This Court has jurisdiction over this action pursuant to California Code of Civil
25 Procedure §§ 1085, 1094.5, and 1060, Pub. Resources Code §§ 21168 and 21168.5, and
26 Government Code §§ 11342.2 and 11350.

27 18. Venue for this action properly lies in the San Francisco County Superior Court
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1 because the adopted plan and regulations would increase diversions of freshwater upstream from
2 the Delta resulting in adverse environmental impacts as a result of reducing the flushing of San
3 Francisco Bay by outflows from the Sacramento River and Delta (see, Delta Plan 84). In
4 addition, Petitioner Center for Biological Diversity, and the Office of the Attorney General, who
5 will be representing Respondent DSC in this action, both have offices in San Francisco County.

6 V. GENERAL ALLEGATIONS

7
8 19. In 2009, the California Legislature declared that “the Sacramento-San Joaquin
9 Delta watershed and California’s water infrastructure are in crisis and existing Delta policies are
10 not sustainable,” and responded by passing the Delta Reform Act (“Act”), California Water Code
11 § 85000 *et seq.*

12 20. The Act was intended to further the “co-equal goals” of increased environmental
13 protection and increased water reliability for the Delta. To meet the environmental protection
14 part of the co-equal goals, the Delta Reform Act mandates: “the policy of the State of California
15 is to reduce reliance on the Delta in meeting California’s future water supply needs through a
16 statewide strategy of investing in improved regional supplies, conservation, and water use
17 efficiency [. . .]” (Wat. Code § 85021).

18 21. The Act established the Delta Stewardship Council to provide for “the
19 sustainable management of the Sacramento-San Joaquin Delta ecosystem, to provide for a more
20 reliable water supply for the state, to protect and enhance the quality of water supply from the
21 Delta, and to establish a governance structure that will direct efforts across state agencies to
22 develop a legally enforceable Delta Plan.” (Wat. Code § 85001(c)).

23 22. To inform the planning processes of the Delta Plan and the Bay Delta
24 Conservation Plan, the Act mandated the State Water Resources Control Board (“SWRCB” or
25 “Board”), pursuant to its public trust obligations, to develop new flow criteria for the Delta
26 ecosystem necessary to protect public trust resources. (Wat. Code § 85086(c)(1). The Board
27 complied by issuing a report titled *Development of Flow Criteria for the Sacramento-San*
28 *Joaquin Delta Ecosystem* on 3 August 2010. The DSC and PEIR failed to disclose, consider,

1 analyze or incorporate the findings, flow criteria and other recommendations contained in the
2 report.

3 23. The Delta Reform Act also mandated the California Department of Fish and
4 Game, in consultation with the United States Fish and Wildlife Service (“USFWS”) and the
5 National Marine Fisheries Service (“NMFS”) and based on the best available science, to develop
6 flow criteria and quantifiable biological objectives for aquatic and terrestrial species of concern
7 dependent on the Delta. (Wat. Code § 85084.5). The Department complied by issuing a report
8 titled *Quantifiable Biological Objectives and Flow Criteria for Aquatic and Terrestrial Species*
9 *of Concern Dependent on the Delta* on November 23, 2010. The DSC and PEIR failed to
10 disclose, consider, analyze or incorporate the findings, specific biological objectives and flow
11 recommendations of the report.

12 24. The Act further mandated the Delta Protection Commission to develop, for
13 consideration and incorporation into the Delta Plan, a proposal to protect, enhance, and sustain
14 the unique cultural, historical, recreational, agricultural, and economic values of the Delta an
15 evolving place, in a manner consistent with the coequal goals. (Wat. Code § 85301). The
16 Commission complied by issuing a report titled *Economic Sustainability Plan for the*
17 *Sacramento-San Joaquin Delta* on 19 January, 2012. The DSC and PEIR failed to disclose,
18 consider, analyze or incorporate many of the findings and recommendations of the report.

19 25. In 2012, as part of the measures taken to develop the Delta Plan, the DSC held
20 administrative proceedings and circulated two drafts of the Delta Plan and its Program
21 Environmental Impact Report (“PEIR”) for comments. The DSC also circulated proposed
22 implementing regulations for the Delta Plan, to be codified at California Code of Regulations,
23 Title 23, Division 6.

24 26. Petitioners, along with members of the public, a number of government agencies,
25 and numerous other organizations, submitted comments voicing significant concerns regarding
26 the drafts’ systemic legal deficiencies, including numerous violations of the Delta Reform Act,
27 the California Government Code, CEQA (Pub. Resources Code, § 21000 *et. seq.*), and the
28 Public Trust doctrine.

1 27. Despite the numerous legal deficiencies identified in the Delta Plan, its
2 implementing Regulations, and the regulatory process in which the Plan, the Regulations and the
3 PEIR were created, the DSC certified the PEIR, approved the Delta Plan and implementing
4 Regulations, released its Final Statement of Reasons and CEQA Findings of Fact and filed the
5 Notice of Determination pertaining to certification of the PEIR on May 17, 2013, thereby
6 violating the state Administrative Procedure Act, the Delta Reform Act, CEQA, and the Public
7 Trust doctrine.

8 28. The DSC has abused its discretion and failed to act as required by law. As result
9 of the DSC approval of the Delta Plan, the implementing Regulations, and certification of the
10 PEIR, Petitioners and their members will suffer great and irreparable harm to their interests,
11 including recreation, boating, kayaking, fishing, conservation, wildlife viewing, and other
12 activities as described herein. Petitioners have no adequate remedy at law for this irreparable
13 harm.

14 29. The Plan will harm pelagic and anadromous fisheries in the Bay-Delta and its
15 watershed by failing to consider the timing and quantity of flows to ensure ecosystem health, by
16 encouraging and catalyzing the construction of new water delivery conveyance and upstream
17 water storage, and by prioritizing water deliveries over ecosystem restoration. Harm to the
18 pelagic and anadromous fishery in the Bay-Delta and its watershed harms Petitioners and their
19 members by threatening impairment of their use and enjoyment of these species and their habitat.

20 30. The DSC's failure to proceed in the manner required by law, failure to comply
21 with CEQA prior to adopting the Delta Plan and Regulations, and the resulting certification of
22 the PEIR, will result in a new, upstream conveyance that has the capacity to further reduce the
23 already significantly depleted freshwater flows in the Sacramento River, its tributaries, sloughs,
24 and the Delta and the Bay. Petitioners and their members will suffer great and irreparable injury
25 caused by the reduced flows that will result from implementation of the Delta Plan policies and
26 recommendations which in turn will harm fisheries habitat and recreational opportunities in areas
27 in and upstream of the Delta.

28 31. The PEIR and the DSC's violation of the law in creating the Delta Plan and its
VERIFIED PETITION FOR WRIT OF MANDATE; COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1 implementing Regulations will cause harm to Bay-Delta fisheries. Harm to the Bay-Delta
2 fisheries has had, and continues to have, a substantial negative impact on Petitioners’
3 organizational members use and enjoyment of the Bay-Delta.

4 32. Mismanagement of water resources in the Bay-Delta as a result of the Delta Plan,
5 including over-pumping of the Bay-Delta and by the over-appropriation of water for excess
6 water delivery south of the Bay-Delta, will deplete local rivers, sloughs, and lakes, and harm
7 salmonids that travel through the lakes and streams used and enjoyed by Petitioners and their
8 members.

9 **VI. FIRST CAUSE OF ACTION**

10 **(Delta Reform Act)**

11 **(Cal. Water Code §§ 85000 *et seq.*)**

12 **(Cal. Gov’t Code § 11342.2)**

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14
15 33. Petitioners hereby incorporate all of the allegations in the paragraphs above as if
16 fully set forth herein.

17 34. The Legislature requires the Delta Plan to contain specific, reasoned, measurable
18 objectives for Delta restoration, as well as thoughtful, reasoned paths towards achieving the co-
19 equal goals in the Delta. The Delta Plan that was certified on May 17, 2013 utterly fails to
20 achieve these mandates.

21 35. The Delta Reform Act established DSC as an independent agency of the state,
22 empowering it to achieve the state mandated “coequal goals for the Delta.” (Wat. Code § 85200).
23 Those goals are: (1) to provide a more reliable water supply for California, and (2) to protect,
24 restore, and enhance the Delta ecosystem. (Wat. Code § 85054).

25 36. The DSC and the PEIR fail to define how the Delta Plan achieves the “coequal
26 goals,” and failed to establish quantifiable goals, or measurements for achieving the goals of the
27 plan.

28 37. The Delta Reform Act mandates several clear and unequivocal duties for the

1 creation of a valid Delta Plan. These duties include establishing performance measures that
2 promote: (1) viable populations of native resident and migratory species; (2) functional corridors
3 for migratory species; (3) diverse and biologically appropriate habitats and ecosystem processes;
4 (4) reduced threats and stresses on the Delta ecosystem; and (5) conditions conducive to meeting
5 or exceeding the goals in existing species recovery plans and state and federal goals with respect
6 to doubling salmon populations. (Wat. Code § 85302(c)(1)-(5)).

7 **Best available science and measurable targets to achieve goals**

8
9 38. The Act requires the use of best available science in determining performance
10 measures for achieving co-equal goals, specifically in the area of flow criteria for the Delta:

11 For the purpose of informing planning decisions for the Delta Plan and the Bay
12 Delta Conservation Plan, the board [SWRCB] shall, pursuant to its public trust
13 obligations, develop flow criteria for the Delta ecosystem necessary to protect
14 public trust resources. In carrying out this section, the board shall review existing
15 water quality objectives and use the best available scientific information. The
16 flow criteria for the Delta ecosystem shall include the volume, quality, and timing
17 of water necessary for the Delta ecosystem under different conditions. . . .
18 (Water Code § 85086(c)(1).)

19 39. Water Code § 85086(e) required the Board to submit flow criteria determinations
20 to the DSC, which the Board did in August of 2010. The DSC, however, failed to use the
21 information to inform its planning decisions for the Delta Plan in violation of the Delta Reform
22 Act. In the final version of the PEIR, the DSC maintained that “California does not have a clear
23 understanding of its water demands, the amount of water available to meet those demands, how
24 water is being managed, and how that management can be improved to achieve the coequal
25 goals.” (Delta Plan 114-115). However, information directly relevant to water demands, water
26 availability, and water management towards the achievement of the co-equal goals was readily
27 available, yet not disclosed in the PEIR or incorporated into the Delta Plan. The DSC not only
28 failed to include any of the information contained in the SWRCB 2010 flow report, but they
failed to even disclose the existence of the report or its findings. The failure of the DSC to
incorporate the instream flow needs of the Delta into the Delta Plan and the PEIR directly

1 violates Wat. Code § 85086(b).

2 40. Wat. Code § 85084.5 requires the California Department of Fish and Game, in
3 consultation with the Service and NMFS to develop and recommend Delta flow criteria and
4 quantifiable biological objectives for aquatic and terrestrial species of concern that are dependent
5 on the Delta. On November 23, 2010, Fish and Game released the report which identified 27
6 terrestrial and 20 aquatic species biological objectives and recommended flow criteria regarding
7 for eight identified species of concern in the Delta. The DSC and PEIR failed to disclose, let
8 alone consider or analyze, this critical information. The failure of the DSC to disclose, consider,
9 analyze and incorporate the findings, specific biological objectives, and flow recommendations
10 directly violates Wat. Code § 85084.5.

11 **Performance measures necessary to track progress towards meeting goals**

12
13 41. The DSC and the Delta Plan fail to establish the performance measures as
14 required by Wat. Code § 85302. The Delta Plan is required to include measures to promote a
15 more reliable water supply, restore a healthy ecosystem using the best available science, and
16 incorporate quantified, measurable targets for achieving the objectives of the Plan. (Wat. Code
17 §§ 85302, 85308). The Delta Reform Act requires that the implementation of the Delta plan
18 further these goals while describing the measures by which the DSC can measure progress
19 towards furthering those goals. In doing so, the Delta Plan requires that these measures promote
20 all of the following:

- 21 (1) Viable populations of native resident and migratory species;
- 22 (2) Functional corridors for migratory species;
- 23 (3) Diverse and biologically appropriate habitats and ecosystem processes;
- 24 (4) Reduced threats and stresses on the Delta ecosystem;
- 25 (5) Conditions conducive to meeting or exceeding the goals in existing species
26 recovery plans and state and federal goals with respect to doubling salmon
27 populations.

28 (Wat. Code § 85302.)

1 42. The Delta Plan was required to contain specific, reasoned, measurable objectives
 2 for Delta restoration, as well as thoughtful, reasoned paths towards achieving the co-equal goals
 3 in the Delta. The DSC and the Delta Plan failed to include or consider Delta flow objectives
 4 which specified the amount and timing of water necessary to restore the Delta, and further failed
 5 to include quantified, measurable targets for achieving Delta Plan objectives as required by
 6 Water Code §§ 85302 and 85308. The Delta Plan must include performance measurements that
 7 will enable the DSC to track progress in meeting the objectives of the Delta Plan. (Wat. Code §
 8 85211). The performance measurements must be measurable assessments of the ability of the
 9 Delta’s estuary to support viable species and their habitats, as well as measurable assessments of
 10 the reliability of water imported from the Sacramento River or the San Joaquin River watershed.
 11 (Wat. Code § 85211).

12 43. Without determining the volume, quality, and timing of water necessary for the
 13 health of the Delta ecosystem, the DSC is incapable of developing meaningful performance
 14 measurements that will track progress towards the objectives in the Delta plan as required by
 15 Water Code § 85211. The DSC’s approval of a Delta Plan that omits meaningful performance
 16 measurements violates the Delta Reform Act pursuant to Water Code § 85211.

17 **Delta Plan Regulations and Exclusion of Activities**
 18

19 44. An adopted regulation shall be within the scope of authority conferred and in
 20 accordance with standards prescribed by other provisions of law. (Cal. Administrative Procedure
 21 Act, Gov’t Code § 11342.1). Whenever by the express or implied terms of any statute a state
 22 agency has authority to adopt regulations to implement, interpret, make specific or otherwise
 23 carry out the provisions of the statute, no regulation adopted is valid or effective unless
 24 consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose
 25 of the statute. (Gov’t Code § 11342.2)

26 45. The Regulations passed by DSC for implementation of the Delta Plan exceed the
 27 scope of authority provided by the legislature in the Delta Reform Act, and are not reasonably
 28 necessary to effectuate the Act’s purpose.

1 46. The Regulations exclude water transfers classified as “temporary” from inclusion
2 as covered actions under the Delta Plan. (Cal. Code Regs. Tit. 23, Div. 6, § 5001 subd. (dd)(3).)
3 The Regulations accomplish this exclusion through classifying temporary transfers as projects
4 which will not have a significant impact. (§ 5001 subd. (dd).)

5 47. The provision exempting temporary transfers states that it shall only remain in
6 effect until December 31, 2016 and is repealed as of January 1, 2017 unless the DSC acts to
7 extend the provision prior to that date. (§5001 subd. (dd)(3).)

8 48. The DSC failed to adequately support its conclusion that temporary transfers do
9 not have a significant effect on the Delta and do not qualify as covered actions. The finding,
10 and thus the exemption of temporary transfers from covered actions, is both unsupported by
11 substantial evidence and exceeds the authority provided to DSC under the Act.

12 49. The December, 2016 sunset provision of the temporary transfers exemption is
13 arbitrary, unsupported by substantial evidence, and exceeds the authority provided to DSC under
14 the Act. In addition, the sunset provision constitutes an admission that temporary transfers
15 *should* be covered by the Delta Plan, but are not.

16 50. The Act defines “covered actions” in part as a plan, program or project defined
17 pursuant to § 21065 of the Pub. Resources Code. (Water Code § 85057.5 subd. (a).) This
18 section of the Pub. Resources Code is the same section which defines a “project” under CEQA.

19 51. The Delta Plan Regulations exempt projects which are also exempt under CEQA,
20 with certain limited exceptions. (Cal. Code Regs. Tit. 23, Div. 6, § 5001 subd. (dd)(1, 2 and 4).)
21 However, projects which are exempted from CEQA are nonetheless considered to be projects as
22 defined in § 21065 of the Pub. Resources Code.

23 52. The Delta Plan and its Regulations do not adequately support excluding activities
24 (subject to limited exceptions) from covered actions which are exempt from CEQA. CEQA is a
25 statute with different purpose from the Act, and the Act’s scope extends beyond environmental
26 impacts.

27 53. The exemption of activities from covered actions due to their exemption from
28 CEQA is arbitrary and exceeds the authority provided to DSC under the Act.

Establishing Water Exports' Consistency with the Delta Plan

1
2 54. The Act's implementing Regulations require detailed findings to establish
3 consistency of covered actions with the Act and with the Delta Plan's Regulatory Policies. (Cal.
4 Code Regs. Tit. 23, Div. 6, §§ 5002 subd. (b) and 5003.)

5 55. Under the Regulations, export of water from, through, or used in, the Delta, is
6 allowed unless a series of findings are made regarding the activity: (1) the recipient failed to
7 contribute to reduced reliance on the Delta; (2) the failure has caused the need for the export,
8 transfer or use; and (3) the export, transfer or use would have a significant adverse impact on the
9 Delta. (§ 5003 subds. (a)(1) through (3).)

10 56. These measures arbitrarily transform a prohibition on water exports harming the
11 Delta into a prohibition on the prohibition. Contrary to § 5003(a)(1), under the Delta Reform
12 Act water must not be exported unless an agency can demonstrate that the recipient reduced
13 reliance on the Delta; otherwise, the co-equal goals have not been met. As written, the provision
14 is arbitrary because an export of water from the Delta could adversely impact the Delta even if
15 the recipient meets the (likewise arbitrary) "contributed to reduced reliance" provision of the
16 Regulation.

17 57. The determination of "contributing to reduced reliance" on the Delta (§ 5003
18 subd. (c)(1)) is arbitrary and not supported by substantial evidence, because the requirements set
19 forth at section 5003 subd. (c)(1)(A) through (C) do not demonstrate a contribution to reduced
20 reliance on the Delta. The completion of an Urban Water Management Plan (§ 5003(c)(1)(A))
21 does not ensure a contribution to reduced reliance on the Delta. The requirement to implement a
22 subset of this Plan (§5003(c)(1)(B)) does not ensure a contribution towards reduced reliance on
23 the Delta. Measuring the expected outcome for measureable reduction in the Delta
24 (§5003(c)(1)(C)) also does not ensure a contribution towards reduced reliance on the Delta.

25 58. Further, § 5003(c)(2) is arbitrary because programs that reduce water use in
26 general do not necessarily reduce reliance on the Delta. For example, the source of water from
27 another source could be curtailed due to reduced water use, instead of curtailing the use of the
28 Delta as a source.

1 59. The condition in §5003(a)(2) that water exports are only prohibited when a
2 failure to reduce reliance expressly caused the need for export is arbitrary and unsupported by
3 the evidence. The export may harm the Delta even if the need for the export is not actually
4 caused by a failure to reduce reliance on the Delta.

5 60. The limitation in §5003(b) that the “proposed policy” on water exports is
6 inapplicable unless a “water supplier” (as defined in § 5001 subd. (c)) receives water as a result
7 of the proposed action is arbitrary, unsupported by substantial evidence and outside of the
8 authority provided to DSC by the Act. For example, an agribusiness or industrial concern is not
9 a “water supplier,” but their receipt of export water may nonetheless adversely impact the Delta
10 and fail to meet the co-equal goals.

11 61. Petitioners seek declaratory relief pursuant to Code of Civil Procedure §1060 and
12 Government Code §11350 as well as Writ of Mandate determining that the Plan and Regulations
13 conflict with the Delta Reform Act and are not reasonably necessary to effectuate the purposes of
14 the Act.

15 **VII. SECOND CAUSE OF ACTION**

16 **VIOLATIONS OF CEQA**

17 **(Public Resources Code § 21000, et seq.)**

18
19 62. Petitioners hereby incorporate all of the allegations in the paragraphs above as if
20 fully set forth herein.

21 63. CEQA applies to most public agency decisions to carry out, authorize, or
22 approve projects that could have adverse effects on the environment. (Pub. Resources Code, §§
23 21000; 21001, subd. (g).) CEQA requires that public agencies refrain from approving projects
24 with significant environmental effects if “there are feasible alternatives or mitigation measures”
25 that can substantially lessen or avoid those effects. (*Mountain Lion Foundation v. Fish and*
26 *Game Commission* (1997) 16 Cal.4th 105, 134; Pub. Resources Code § 21002.) Under CEQA, a
27 “project” includes the whole of an action that may result in either a direct or reasonably
28 foreseeable indirect physical change in the environment. (CEQA Guidelines, § 15378, subd. (a)).

1 CEQA requires agencies to inform themselves about the environmental effects of their proposed
2 actions, consider all relevant information before taking action, give the public an opportunity to
3 comment, and avoid or reduce significant environmental impacts when it is feasible to do so.
4 Pub. Resources Code, § 21000. The agency’s act or decision must be supported by substantial
5 evidence in the light of the whole record. (CEQA, §§ 21168, 21168.5; CEQA Guidelines, §
6 15384(b); *Neighbors of Cavitt Ranch v. County of Placer* (2003) 106 Cal.App.4th 1092, 1099-
7 1100). “Substantial evidence” is defined as relevant, reasonable information and inferences that a
8 fair argument can be made to support a conclusion, including facts, reasonable assumptions
9 predicated upon facts, and expert opinion supported by facts. (CEQA Guidelines § 15384.)
10 Argument, speculation, unsubstantiated opinion, inaccurate or erroneous evidence of social or
11 economic impacts which do not contribute to or are not caused by physical impacts on the
12 environment does not constitute substantial evidence.

13 64. The PEIR certified by the DSC is replete with omitted facts and inaccurate
14 evidence presented in a manner that is confusing and misleading to the public. The DSC’s
15 project description, analysis of project impacts and alternatives, proposed mitigation measures,
16 and ultimate assessments are so speculative and lacking in practical analysis that the conclusions
17 rendered directly violate CEQA.

18 **Improper Piecemealing of the Delta Plan, BDCP, and Other**
19 **Reasonably Foreseeable Projects**

20
21 65. The term “project” is given a broad interpretation in order to maximize
22 protection of the environment. (*McQueen v. Board of Directors of the Mid-Peninsula Regional*
23 *Open Space District* (1988) 202 Cal.App.3d 1136, 1143.) A lead agency must not piecemeal the
24 analysis of several projects that are subsumed by one larger project, in order to ensure “that
25 environmental considerations not become submerged by chopping a large project into many little
26 ones, each with a potential impact on the environment, which cumulatively may have disastrous
27 consequences.” (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233
28 Cal.App.3d 577, 592.)

1 66. The challenged Plan and Regulations plan for and encourage construction and
2 operation of new water supply projects, meaning new conveyance upstream from the Delta to
3 transport water south. The accompanying EIRs, however, do not analyze the new conveyance
4 and obscure and virtually ignore this foundational planning decision to develop new conveyance
5 upstream from the Delta with the capacity to export more water away from the Sacramento River
6 and the Bay-Delta. This new conveyance would be the Bay Delta Conservation Plan (BDCP)
7 Delta Water Tunnels. In spite of the fact that two rounds of preliminary drafts of the BDCP and
8 its EIR/EIS have already been circulated to the DSC and are scheduled for formal public release
9 in October 2013, the Delta Plan EIR erroneously concludes that the impacts associated with the
10 BDCP cannot be analyzed at this early stage. This failure to analyze a reasonably foreseeable
11 project that is in fact a vital component of the Delta Plan violates CEQA.

12 67. Many details of the BDCP have already been established and could have been
13 analyzed in the Delta Plan EIR. The BDCP involves three intakes for the dual Tunnels between
14 river miles 37 and 41, near Clarksburg on the Sacramento River. Each intake would have the
15 capacity to divert 3,000 cubic feet per second (cfs). The dual Tunnels would be 35 miles long,
16 150 feet under the ground, with a conveyance capacity of 15,000 cfs. The water diverted would
17 no longer flow through the lower Sacramento River and the Bay-Delta. Instead, the water would
18 be transported through the Tunnels to the State Water Project (SWP) and Central Valley Project
19 (CVP) pumping plants near Tracy in Alameda County for export to the south. 15,000 cfs is about
20 the entire average summer flow of the Sacramento River near Clarksburg. The intakes for the
21 Tunnels would be far enough upstream to take the water and thus reduce the freshwater flows in
22 the Sacramento River and Bay- Delta and also in the Elk, Georgianna, Miners, Steamboat, Sutter
23 and other sloughs.

24 68. Substantial quantities of water are already taken out of the Sacramento River
25 and away from the Bay-Delta. Taking additional significant quantities of water out of the
26 Sacramento River and away from the Bay-Delta would have numerous adverse environmental
27 impacts including but not limited to: adversely affecting designated critical habitat for listed
28 endangered fish species including winter-run and spring-run Chinook salmon; reducing flows

1 and degrading water quality in the lower Sacramento River, sloughs, and the Bay-Delta; and
2 cumulative adverse impacts including but not limited to exacerbating increasing salinity in the
3 Delta in conjunction with continuing exports of water and rising sea levels resulting from climate
4 change. Other effects would include adversely impacting flows and fish as well as fish habitat
5 all the way upstream to the Shasta, Trinity, Oroville, and Folsom reservoirs.

6 69. On November 4, 2011, the DSC posted a Draft Programmatic Environmental
7 Impact Report (DPEIR) on the Draft Delta Plan. The DPEIR explained that “conveyance options
8 are currently being studied in detail by the agencies and interested parties preparing the BDCP
9 and the related EIR/EIS. A public draft of the BDCP and the related EIR/EIS is planned for
10 release by mid-2012.” (DPEIR 23-3). The DPEIR explained that the BDCP would be required to
11 comply with CEQA including a comprehensive review and analysis of a reasonable range of
12 flow criteria, rates of diversion, identification of water remaining available for export, a
13 reasonable range of Delta conveyance alternatives including through-Delta, potential effects of
14 climate change including possible sea level rise up to 55 inches, possible changes in total
15 precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities
16 considered in the EIR, potential effects on migratory fish and aquatic resources, and potential
17 effects of each Delta conveyance alternative on Delta water quality. (DPEIR 23-3, 4).

18 70. In February, 2012, the BDCP agencies released preliminary drafts of the BDCP
19 and the EIR/EIS. In April, 2012, NMFS and USFWS issued “red flag” comments (early warning
20 signals of impaired recovery) expressing serious concern over the quality of the analysis in the
21 BDCP and the potential impacts to threatened and endangered species. The USFWS’ red flag
22 comments mentioned that, in light of downward trends in covered fish species, “the document
23 should clearly and accurately lay out what is known of the foundations of each species’
24 population dynamics ... and discuss how BDCP actions will influence these processes.”(USFWS
25 comment 1.2). Also noted as a “red flag” was the project’s proposal to extract more freshwater
26 from the Delta: “Preliminary Project proposes to extract larger volumes of freshwater from the
27 Delta than are currently exported against a backdrop of rising sea level and a re-design of the
28 estuary landscape that will change tidal flows. Whether this can be accomplished while other

1 parts of the plan simultaneously contribute to recovery of covered species is an unanswered
2 question of central importance.” (USFWS comment 2.1).

3 71. On November 30, 2012, the DSC posted the final Draft Plan and a Recirculated
4 Draft Programmatic Environmental Impact Report (RDEIR) for public review and comment.
5 However, the DSC did not incorporate or rely on the analysis in the BDCP Draft EIR/EIS
6 because it was not released by the time the DSC released the RDEIR. In fact, the BDCP Draft
7 EIR/EIS has still not been released for public review and comment as of the date of the filing of
8 this complaint. Consequently, the DSC has adopted the Delta Plan and Regulations, and
9 certified the PEIR even though the public did not and does not have information and analysis
10 critical to determine the amount of water actually available for export, analyze a reasonable
11 range of Delta conveyance alternatives (including through-Delta, potential cumulative effects of
12 climate change and sea level rise), or analyze the potential effects of the Delta Water Tunnels on
13 Delta water quality, migratory fish, and aquatic resources.

14 72. The RDEIR did not analyze, discuss or respond to the “red flag” comments of
15 the NMFS and USFWS on the BDCP alleged above or to any of the other “red flag” comments
16 made in April 2012. Moreover, the RPDEIR did not even disclose the existence of the April
17 2012 “red flag” comments that had been made by the federal fish and wildlife agencies. In
18 failing to address the rapidly progressing BDCP process, the DSC failed to analyze and disclose
19 the impacts of a reasonably foreseeable project that may have a significant effect on the
20 environment.

21 73. The Delta Plan will streamline approval of additional projects without providing
22 any analysis of these projects as evidenced by the Plan’s own admissions:

23 a. The Revised Project encourages certain types of actions including
24 “Conveyance facilities (pipelines and pumping plants)” (RDEIR 3-11), “various actions which, if
25 taken, could lead to construction and/or operation of projects that could provide a more reliable
26 water supply” (RDEIR 2-5) and, “Surface water projects (water intakes, treatment and
27 conveyance facilities, reservoirs, hydroelectric facilities)” (RDEIR 2-5). The Findings refer
28 throughout to encouraging “construction and operation of new reliable water supply, . . . projects

1 (Findings pp. 7, 8, 20, 21, 26, 57, 58);

2 b. “The Delta Plan defines an integrated and legally enforceable set of
3 policies, strategies, and actions that will serve as a basis for future findings of consistency by
4 state and local agencies with regard to specified ‘covered actions,’” (PEIR 2-1);

5 c. “[T]he PEIR conservatively assumes that the Delta Plan policies and
6 recommendations will encourage other agencies to take actions that may have an effect on the
7 physical environment, thus indirectly leading to significant environmental impacts in some
8 cases.” (PEIR 3-8,9);

9 d. Future covered actions, meaning those actions that will occur in whole or
10 in part in the Delta, will be subject to review for consistency with the Delta Plan. (PEIR 3- 9);

11 e. BDCP actions must be consistent with the Delta Plan (PEIR 3-12) and
12 inclusion of the BDCP upon completion in the Delta Plan is mandatory. (DPEIR 23-1);

13 f. Delta Plan policies are mandatory. (PEIR 3-12);

14 g. The Delta Plan encourages successful completion of the BDCP by
15 December 31, 2014 (Delta Plan 114) (PEIR 3-14), which has been declared by the State in June
16 and July 2012 to be the Delta Water Tunnels;

17 h. The DSC is a CEQA responsible agency for the BDCP EIR and has been
18 consulting with DWR during the development of the BDCP. (PEIR 3-15);

19 i. The Delta Plan could influence the nature of decisions and actions by
20 other agencies that may have significant effects on the physical environment by influencing or
21 encouraging other agencies to construct new facilities. (PEIR 3-24);

22 74. In spite of these multiple admissions that the Delta Plan will influence, catalyze,
23 and ensure the adoption of multiple other projects and plans, it fails to include meaningful
24 analysis of any of these plans. The DSC has violated CEQA by approving the Delta Plan and
25 Regulations in May of 2013 planning for new conveyance while unlawfully segmenting (or
26 piecemealing) and postponing (or deferring), environmental disclosure and evaluation of new
27 conveyance including the true project and its environmental impacts until that is done in the
28 future by a different agency, the Department of Water Resources (DWR) in the BDCP Delta

1 Water Tunnels planning process.

2 **Inadequate Project Description**

3
4 75. Knowledge of the regional setting is critical to the assessment of environmental
5 impacts. (CEQA Guidelines § 15125). The description of a project must contain the “precise
6 location and boundaries of the proposed project” on a detailed map, as well as a “general
7 description of the project's technical, economic, and environmental characteristics.” (CEQA
8 Guidelines § 15124.) Pursuant to CEQA, an accurate, stable and finite project description is the
9 *sine qua non* of an informative and legally sufficient EIR. (*County of Inyo v. City of Los Angeles*
10 (1977) 71 Cal.App.3d 185, 193.) “A curtailed or distorted project description may stultify the
11 objectives of the reporting process.” (*Id.* at pp. 192-193.)

12 76. Instead of doing what CEQA requires, the DSC has instead failed to provide the
13 accurate, stable and finite project description required by CEQA even though the Delta Water
14 Tunnels project was announced by both the Governor and the Resources Agency as the project
15 during the summer of 2012 months prior to the release of the RDEIR. In February 2012, the
16 California Resources Agency commenced releasing Administrative Draft chapters of the BDCP.
17 The released chapters describe the Delta Water Tunnels project as set forth above, however they
18 assume that the true analysis will be conducted by the BDCP lead agencies: “This EIR assumes
19 that the BDCP agencies and the BDCP EIR/EIS agencies will complete the planning and
20 permitting process in accordance with the published schedules; and that this EIR does not
21 include the same extensive policy, scientific, and environmental analysis that is being completed
22 for the BDCP EIR/EIS.” (Delta Plan Draft EIR, p. 23-4.)

23 77. Instead of accurately describing the true project and finding out and disclosing all
24 that it can about the environmental impacts of the true project, the PEIR deferred analysis of the
25 BDCP, even though it claimed that the only realistic “conveyance” option was the BDCP, “It is
26 highly unlikely that a non-BDCP conveyance project would be proposed as a covered action to
27 come before the Council prior to BDCP completion (in accordance with the anticipated deadline
28 for BDCP completion) unless the BDCP process is terminated prior to completion.” (Delta Plan

1 DEIR, p. 23-.4)

2 78. Following revisions to the project after the first draft of the EIR was circulated,
3 the DSC failed to revise the project description (other than to note that the geographic scope of
4 the project extended “upstream”) or plot the boundaries of the revised project on a map, as
5 required by CEQA. The DSC has therefore failed to provide an accurate, stable and finite project
6 description as required by CEQA.

7 **Inadequate Project Objectives**

8
9 79. CEQA Guideline 15124(b) requires an EIR to contain a statement of objectives
10 sought by the proposed project to help develop a reasonable range of alternatives for evaluation
11 and aid decision makers in preparing findings or a statement of overriding considerations. When
12 project objectives are incorrectly described, there is a substantial risk that potentially feasible
13 alternatives and mitigations that would reduce or eliminate significant environmental impacts
14 will not be considered. (See *Habitat and Watershed Caretakers v. City of Santa Cruz* (2012) 213
15 Cal.App.4th 1277 (pet. for review pending)). CEQA further requires a statement briefly
16 describing the intended uses of the EIR. (CEQA Guidelines § 15124(d)).

17 80. The PEIR Project Description and Project Objectives violate CEQA guideline
18 15124 in that it neglects the statutory requirements of Water Code § 85054 (“coequal goals be
19 achieved in a manner that protects and enhances the unique cultural, recreational, natural
20 resource, and agricultural values of the Delta as an evolving place”), thereby impacting the
21 consideration of projects under the BDCP, as well as project alternatives that could more
22 properly protect and enhance the value of the Delta.

23 81. Additionally, the PEIR fails to include a comprehensive statement of intended
24 uses of the document, leaving it vulnerable to misuse in the future. (CEQA Guidelines § 15124,
25 subd. (d).) These deficiencies directly violate CEQA.

26 **Failure to Analyze a Reasonable Range of Alternatives**

27 82. An EIR must describe a reasonable range of alternatives to the project, or the
28

1 location of the project, that could feasibly attain most of the basic objectives of the project while
2 avoiding or substantially lessening any of the significant effects of the project. (CEQA
3 Guidelines, § 15126.6, subd. (a) and (f).) An EIR must contain a “quantitative, comparative
4 analysis” of the relative environmental impacts of project alternatives. (*Kings County Farm
5 Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 730-737.) CEQA requires that public
6 agencies refrain from approving projects with significant environmental effects if “there are
7 feasible alternatives or mitigation measures” that can substantially lessen or avoid those effects.
8 (*Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 134; Pub.
9 Resources Code § 21002.)

10 83. The Environmental Water Caucus (EWC), a coalition (including Petitioners) that
11 calls for water conservation measures and a reduction in water exports, proposed an alternative
12 to the Delta Tunnels project identified as Alternative 2 in the PEIR. This alternative was not only
13 feasible, but it did not require the construction of a new conveyance system. The DSC selected
14 the Revised Project over Alternative 2, although it admitted that, with respect to water resources,
15 “Alternative 2 would have less water quality impacts than the Revised Project, because it
16 involves fewer facilities and less diversions of water from the Delta and Delta watershed.”
17 (RDEIR 25-6). After noting that the “[b]iological resources in the Delta have been in decline for
18 many years...[and that] decline is expected to continue,” the RDEIR found that “Alternative 2
19 contributes more to improving conditions for biological resources and arresting ecosystem
20 decline than the Revised Project.” Although the DSC admits that Alternative 2 would avoid or
21 substantially lessen many of the significant impacts that would occur from implementation of the
22 Delta Plan, the DSC rejected Alternative 2.

23 84. The DSC refused to consider variants on Alternative 2 suggested by FOR on
24 January 11, 2013, including Alternative 2A to not encourage or recommend new or improved
25 conveyance, water intakes, conveyance facilities, or exporting more water in the wet years until
26 the determination of such fundamental issues as water supply availability and the environmental
27 impacts of supplying the water and performance of public trust doctrine analysis, and Alternative
28 2B to not recommend new conveyance prior to a robust CEQA, water supply and public trust

1 doctrine analysis but not reducing exports to the degree proposed by Alternative 2 and/or phasing
2 in reductions in exports over time by phasing out exports to impaired agricultural lands that will
3 or should eventually cease production. The DSC dismissed consideration of proposed
4 Alternatives 2A and 2B, stating “The Delta Plan does not include a Delta conveyance facility of
5 the type described in the comment, and thus the EIR neither analyzes the impacts of such a
6 facility nor considers alternatives to one.” (Response to comment ROR010-3). The DSC rejected
7 Alternative 2 as being “slightly environmentally inferior” to the Revised Project based on the
8 severity of the proposed export reductions.

9 85. The DPEIR, RDEIR, and PEIR did not evaluate the potential environmental
10 consequences of the alternatives including the Delta Water Tunnels that the State has announced
11 as the BDCP project or an alternative under consideration (PEIR 3-15, 27) and did not evaluate
12 the severity and extent of project-specific impacts on the physical environment. (Final Response
13 to comment OR102-7; RDEIR 2-26).

14 86. The refusal by the DSC to even consider variants on Alternative 2 including not
15 developing new upstream conveyance and export reductions to a lesser extent than Alternative 2
16 constituted failure to develop and consider a reasonable range of alternatives and also constituted
17 an unlawful effort to evade consideration of an alternative that would be undeniably
18 environmentally superior to the Revised Project;

19 **Inadequate Analysis of the “No Project” Alternative**

20
21 87. CEQA requires that an EIR compare its proposed project with the conditions that
22 would likely occur if the project would not occur (the “No Project Alternative”). The No Project
23 Alternative allows the agency “to compare the impacts of approving the proposed project with
24 the impacts of not approving the proposed project.” (CEQA Guidelines, § 15126.6, subd. (e)(1).)
25 “The ‘no project’ analysis shall discuss the existing conditions at the time the notice of
26 preparation is published. . . as well as what would be reasonably expected to occur in the
27 foreseeable future if the project were not approved, based on current plans and consistent with
28 available infrastructure and community services.” (§ 15126.6, subd. (e)(2).) When the project is

1 the revision of an existing land use or regulatory plan, policy or ongoing operation, the “no
2 project” alternative will be the continuation of the existing plan, policy or operation into the
3 future. (§ 15125 subd. (a).)

4 88. The PEIR failed to describe or rationalize which current plans are incorporated
5 into the Delta Plan’s No Project Alternative. The PEIR also fails to provide quantification of
6 water supplies, water quality performance, percentage of fish or wildlife restoration goals met to
7 date, or other resource areas, therefore frustrating its inability to actually compare the other
8 alternatives to the No Project Alternative.

9 **Improper Environmental Baseline**

10
11 89. CEQA Guideline § 15125 subd. (a) requires an EIR to include a description of
12 the physical environmental conditions in the vicinity of the project to serve as a baseline by
13 which the agency determines whether an impact is significant. The EIR must disclose the
14 environmental setting such that project impacts and alternatives can be appropriately analyzed.
15 The PEIR fails to adequately describe the environmental baseline of the intended project, in that
16 it fails to adequately disclose the overextended entitlements of water coming from the Delta,
17 thereby undermining the fair disclosure component of CEQA and obscuring numerous Delta
18 vulnerabilities and dangers which affect the analysis of the project and its environmental
19 impacts. The failure to establish a valid baseline undermines the entire impacts analysis of the
20 PEIR. (CEQA Guidelines § 15125, subd. (c).)

21 **Failure to Analyze Project Impacts**

22 90. An EIR must provide sufficient environmental analysis such that decision-
23 makers can intelligently consider environmental consequences when acting on proposed projects.

24 91. CEQA requires that EIRs identify a project’s significant effects on the
25 environment, identify alternatives, and indicate the manner in which those effects can be
26 mitigated or avoided. (Pub. Resource Code § 21002.1)

27 92. CEQA Guidelines require “direct and indirect significant effects of the project on
28

1 the environment” to be “clearly identified and described, giving due consideration to both the
2 short-term and long-term effects. . . [including the] [s]ignificant irreversible environmental
3 changes which would be caused by the proposed project should it be implemented.” (CEQA
4 Guidelines, § 15126.2, subd. (a) and (c).

5 93. The Delta Plan and Regulations would culminate in massive and myriad adverse
6 physical changes to the environment including water quality and quantity in the Delta,
7 Sacramento River, and area sloughs and including further degradation of critical habitat for
8 endangered fish species.

9 94. The DSC has admitted without providing any details about what the impacts are
10 or how severe they might be that the Revised Project would have significant and unavoidable
11 environmental impacts including:

12 a. “violation of water quality standards or waste discharge requirements or
13 substantially degrade water quality” (RDEIR 24-10)(Findings, p. 58);

14 b. “substantial adverse effects on sensitive natural communities, including
15 wetlands; substantial adverse effects on special-status species; substantial adverse effects on fish
16 or wildlife species habitat; interfere substantially with the movement of any native resident or
17 migratory fish or wildlife species or with established natural resident or migratory wildlife
18 corridors” (RDEIR 24-10)(Findings pp. 7, 8, 26);

19 c. “operations of new water supply facilities. . . such as pipelines, tunnels,
20 canals, pumping plants, water intakes or diversions, may create long-term changes in local
21 mixtures of source waters within water bodies” (RDEIR 3-3);

22 d. operation of facilities within the rivers and streams upstream of the Delta
23 could result in changes in salinity in the Delta by reducing Delta freshwater inflows (RDEIR 3-
24 13);

25 e. changes in instream flow and water quality conditions created by
26 operation of the projects could constitute considerable contribution to the significant cumulative
27 impact on fish and wildlife species and habitat (RDEIR 22-3)(Findings pp. 77,);

28 f. project operations causing conflicts due to climate change and sea level

1 rise (Findings p. 57);

2 g. substantial degradation of visual qualities and adverse effects on scenic
3 vistas and resources (Findings pp. 20-21).

4 95. On about April 4, 2013, the federal fish and wildlife agencies issued new “red
5 flag” comments on the new BDCP Administrative Draft document. The “red flag” issues were
6 many, including as just one example: “the fact that the cumulative effects of the project when
7 combined with effects of climate change and other baseline conditions is showing the potential
8 extirpation of mainstream Sacramento River populations of winter-run and spring-run Chinook
9 salmon over the term of the permit remains as a serious concern.” (NMFS comment 1.17, p. 12).
10 The DSC, however, did not revise and recirculate its PEIR in light of this new information, nor
11 did it acknowledge the concerns of the fish agencies at all.

12 96. The DSC did not use the Board flow criteria in preparing the Delta Plan,
13 Regulations, and RDPEIR as summarized above in this Complaint. For example, the PEIR notes
14 that the projects the Delta Plan encourages will result in long-term environmental impacts, many
15 of which will likely be significant, but it fails to describe these impacts, or determine supported
16 by substantial evidence that the economic, legal, social, technological, or other benefits of the
17 program were overriding considerations that permitted approval despite significant impacts on
18 the environment, or propose mitigation. By failing to incorporate all the relevant information
19 from these sources, the DSC failed to capture the full extent of the Delta Plan’s likely
20 environmental impacts. This approach violates CEQA.

21 **Failure to Conduct Adequate Investigation and Consultation**

22
23 97. CEQA Guidelines § 15125 requires that an EIR demonstrate that the significant
24 environmental impacts of the proposed project were adequately investigated and discussed such
25 that significant effects of the project are considered in the full environmental context. The PEIR
26 fails to adequately investigate and disclose numerous, relevant environmental facts that bear
27 directly on the potential and likely impacts of the proposed project.

28 98. For example, the PEIR does not disclose the flow determinations made by the

1 SWRCB in accordance with Water Code § 85086(e). These determinations, as required by the
2 Delta Reform Act, quantified the flows (as percentages of natural or unimpaired flow) that would
3 be necessary for Delta health: 75% of unimpaired Delta outflow from January through June;
4 75% of unimpaired Sacramento River inflow from November through June; and 60% of
5 unimpaired San Joaquin River inflow from February through June.

6 99. Despite the determinations made by the Board, the DSC maintained that
7 “California does not have a clear understanding of its water demands, the amount of water
8 available to meet those demands, how water is being managed, and how that management can be
9 improved to achieve the coequal goals.” (Delta Plan 114-115). Information directly relevant to
10 the achievement of the co-equal goals was readily available, yet not disclosed in the PEIR. The
11 DSC not only failed to include any of the flow determinations rendered by the Board, but it
12 failed to even disclose the existence of the report or its findings. The failure of the DSC to
13 determine the instream flow needs of the Delta violates the public disclosure requirements of
14 CEQA.

15 **Failure to Properly Analyze Significant Effects**

16
17 100. CEQA requires EIRs to focus on the significant effects of the project on the
18 environment. CEQA Guidelines § 15143. The significant effects should be discussed with
19 emphasis in proportion to their severity and probability of occurrence.

20 101. In several instances, the PEIR notes that an impact may be “Less Than
21 Significant” or “Significant” without any substantial evidence or science to support such a
22 conclusion. For example, the discussion of Impact 3-3b in the PEIR states:

23 [b]ecause of the availability of alternative water supplies and continued
24 availability of Delta water supplies, there is substantial evidence that this
25 impact would not be significant. This conclusion is based on the inability to
26 identify a reasonably plausible scenario in which a potential significant impact
27 would occur. It is therefore concluded that this impact would likely be less
28 than significant. Future project specific analyses may develop adequate
information to arrive at a different conclusion; however, for purposes of this
program-level analysis, there is no available information to indicate that
another finding is warranted or supported by substantial evidence.

1 A lack of substantial evidence to support a significance determination does not imply that
2 there is substantial evidence to support a less than significant determination. The PEIR is
3 therefore inadequate because it fails to adequately analyze, discuss and disclose the findings and
4 information contained in the above entitled scientific reports, and how the information from
5 these reports affects the various alternatives.

6 102. However, the PEIR lists numerous reservoir projects that would be affected by
7 the Delta Plan without conducting even a superficial analysis of these projects, other than to say
8 that certain impacts may be “significant and unavoidable.” The failure to analyze reasonably
9 foreseeable significant impacts that would occur as a result of the Delta Plan violates CEQA.

10 103. The PEIR fails to incorporate or consider readily available science to analyze the
11 significance of environmental impacts of the project. The Stewardship Council largely ignored
12 the Delta Protection Commission’s Economic Sustainability Analysis, the Department of Fish
13 and Game’s flow criteria and biological objectives report and the State Water Resource Control
14 Board’s flow criteria for the Delta. These reports were mandated by the Legislature to inform
15 the Delta planning process and their results must be discussed and incorporated into the Delta
16 Plan.

17 **Failure to Properly Analyze Cumulative Impacts**

18 104. CEQA defines “cumulative impacts” as “two or more individual effects which,
19 when considered together, are considerable or which compound or increase other environmental
20 impacts.” Guideline § 15355. The cumulative impact from several projects is the change in the
21 environment which results from the incremental impact of the project “when added to other
22 closely related past, present, and reasonably foreseeable probable future projects.” Guideline §
23 15355(b).

24 105. The discussion of cumulative impacts in an EIR is required to reflect “the
25 severity of the impacts and their likelihood of occurrence.” Guideline § 15130(b). Required
26 contents include either a list of past, present, and probable future projects producing related or
27 cumulative impacts, or a summary of projections that describe and evaluate the conditions
28

1 contributing to the cumulative effect. Guideline § 15130(b)(A), (B).

2 106. The BDCP is mentioned in a sentence including 11 other items under the Water
3 Resources portion of the Cumulative Impact Assessment. (RDPEIR 22-2). The only cumulative
4 impact information about the BDCP project is provided in the Cumulative Impact Assessment in
5 the Draft EIR. There, a brief description in a table states that the BDCP permits and related
6 EIR/EIS were scheduled to be completed by December 2012. That, of course, has not happened.
7 The only additional information provided in the table is “modify SWP and CVP Delta water
8 conveyance facilities and operations in the Delta.” (RDPEIR 22-24). The chapter devoted to the
9 BDCP (chapter 23) similarly fails to include more than a non-specific, speculative analysis of the
10 impacts that would result from the construction and operation of the BDCP’s Delta Water
11 Tunnels.

12 107. The RPDEIR has failed to take into account the impact of diverting 15,000 cfs
13 upstream from the Delta on whether existing and future water supplies and minimum stream
14 flow requirements can be satisfied, and has failed to evaluate the environmental impacts of
15 diverting 15,000 cfs. Having claimed that the BDCP project is a cumulative project, the DSC
16 must evaluate cumulative impacts including those caused by the cumulative project. Moreover,
17 this is *not* a defect that can be cured by responses to comments in a Final EIR. Consequently,
18 neither the public nor the decision-makers have before them basic, foundational information on
19 which to enable one to even start in evaluating the cumulative impacts of this project together
20 with other related projects.

21 108. Pursuant to Guideline § 15130(b)(1)(A), CEQA requires an agency to assess the
22 changing environment resulting from the incremental impacts of the project “when added to
23 other closely related past, present, and reasonably foreseeable probable future projects.” “The
24 Agency must interpret this requirement in such a way as to ‘afford the fullest possible protection
25 of the environment.’” *Friends of the Eel River*, 108 Cal.App.4th 859, 868.

26 109. The DSC fails to disclose and reasonably consider the large number of potential
27 effects on California water resources due to global warming. While the PEIR references some
28 uncertainty regarding the effects of global warming, responsible planning requires consultation

1 with experts to gather information and reduce uncertainties. The “harms associated with climate
2 change are serious and well recognized.” (*Massachusetts v. Environmental Protection Agency*
3 (2007) 127 S. Ct. 1438, 1455).

4 110. In 2006, the California Legislature passed Assembly Bill 32, which states that
5 “[g]lobal warming poses a serious threat to the economic well-being, public health, natural
6 resources, and the environment of California,” including a “reduction in the quality and supply of
7 water to the state from the Sierra snowpack, a rise in sea levels resulting in the displacement of
8 thousands of coastal businesses and residences, damage to marine ecosystems and the natural
9 environment, and an increase in the incidences of infectious diseases, asthma, and other human
10 health-related problems.” (Health & Safety Code, § 38501(a).) The Legislature went on to list
11 multiple uses of water it expects to be reduced or threatened by global warming, including the
12 quality and supply of water from Sierra snowpack, hydropower generation, the protection of
13 recreational uses, fisheries, marine life, and public health. Health & Safety Code, § 38501(b).

14 111. In addition to the Legislature’s recognition of the perils of climate change,
15 several studies sponsored by the California Climate Change Center have been published that
16 directly address the effects of climate change on California hydrology in the future. And while an
17 agency is not expected to foresee the unforeseeable, it is expected to use its “best efforts to find
18 out and disclose all that it reasonably can.” (CEQA Guidelines § 15144; see also *City of*
19 *Richmond*, 184 Cal.App.4th at p. 96; *Vineyard*, 40 Cal.4th at p. 428.) Yet, despite the seeming
20 recognition of climate change by the Legislature, the courts, and other organizations, climate
21 change goes virtually unmentioned in the PDEIR’s discussion of the program, its potential
22 facilities, and the existing environmental setting.

23 112. The RDPEIR fails to perform cumulative impact analysis in the RDPEIR of how
24 revised and related projects would affect water availability, environmental conditions, and
25 fisheries throughout the Sacramento River and San Joaquin River watersheds upstream from the
26 Delta now and in the future. These climate change projections need to be an essential part of
27 cumulative impact evaluation of the Revised Project, together with other diversions and with
28 actions to maintain sufficient flows to protect the Delta as well as upstream waters under the

1 public trust doctrine.

2 113. The failure of the PEIR to disclose and analyze potential climate change effects
3 on the Delta hydrology makes it impossible for the public and the decision-makers to evaluate
4 the alternatives, the mitigations, and the true nature of the environmental impacts of the proposed
5 DSC program, all of which are violations of CEQA's fair disclosure requirements.

6 **Inadequate Mitigation Measures**

7
8 114. CEQA requires that a project's environmental impacts be mitigated or avoided
9 whenever it is feasible to do so. (Pub. Resource Code 21002.1(b)). CEQA further requires that
10 lead agencies describe the impacts that will result from the mitigation measures themselves.
11 (CEQA Guidelines § 15126.4, subd. (a)(1)(D).)

12 115. CEQA Guidelines § 15126.4 states that "[w]here several measures are available
13 to mitigate an impact, each should be discussed and the basis for selecting a particular measure
14 should be identified. Formulation of mitigation measures should not be deferred until some
15 future time." However, measures may "specify performance standards which would mitigate the
16 significant effect of the project and which may be accomplished in more than one specified
17 way." (CEQA Guidelines 15126.4). Performance standards are particularly appropriate in first
18 tier approvals or other planning decisions that will necessarily be followed by additional, project-
19 level environmental review. (Remy, et al., Guide to the California Environmental Quality Act
20 (11th Ed. 2007), p. 552, internal citation omitted.)

21 116. Lead agencies must analyze not only the impacts of their proposed projects, but
22 also of their proposed mitigation measures if such measures may have a significant effect on the
23 environment. (CEQA Guidelines, § 15126.4; *Save Our Peninsula Committee v. Monterey*
24 *County Bd. Of Supervisors* (6th Dist. 2001) 87 Cal.App.4th 99.) Mitigation measures must be
25 directly connected to an impact. Assigning mitigation measures to a group of impacts defeats the
26 intention of demonstrating whether the measures will actually mitigate the impacts.

27 117. The mitigation measures discussed in the PEIR are general, rather than specific
28 mitigation measures, making it impossible to determine if they will be able to effectively

1 mitigate the impacts of the project. For example, the Revised Project allegedly adds performance
2 measures to assist in implementation of the policies and recommendations in the Plan but it is
3 unclear whether (1) some or all of the proposed mitigation must be adopted in order to be
4 considered a “Covered Action” or “Recommended Action,” (2) whether the stated mitigation
5 measures would reduce impacts to a less than significant level, or (3) when or how the mitigation
6 measures are to be implemented. In several instances, the PEIR offers potential land purchases or
7 water transfer purchases as mitigation measures without conducting any analysis on the
8 availability of such mitigation. This approach violates CEQA, as there can be no assurance that
9 such mitigation measures are either available or adequate. (See *Kings County Farm Bureau v.*
10 *City of Hanford* (5th Dist. 1990) 221 Cal.App. 3d 692.)

11 **Failure to Respond to Comments**

12
13 118. The DSC failed to adequately respond to comments submitted by the public and
14 governmental agencies during review of the DPEIR and RDEIR;

15 119. Pub. Resources Code § 21003, subd. (b), holds that documents prepared pursuant
16 to CEQA “be organized and written in a manner that will be meaningful and useful to
17 decisionmakers and to the public.” Pub. Resources Code § 21091, subd. (d) requires the DSC to
18 evaluate comments on the draft environmental document and include written responses,
19 including the disposition of each comment, in the final document. (Pub. Resources Code, §
20 21091, subd. (d). For each significant environmental issue raised in the comments that object to
21 the draft environmental document’s analysis, responses must be provided that demonstrate a
22 reasoned, good faith response. (CEQA Guidelines, § 15088, subd. (a).) Failure to respond
23 adequately to comments before approving a proposed project invalidates the disclosure objective
24 of CEQA. (*Flanders Foundation v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603, 615)

25 120. The DSC failed to adequately respond to comments submitted by Petitioners, as
26 well as other members of the public, that raised significant environmental issues and offered
27 feasible alternatives. Many of DSC’s responses to Petitioners were entirely lacking in detail or
28 analysis, saying only “this is a comment on the project, not on the Plan,” “n/a,” or “see master

1 response.” On April 8, 2013, the DSC proposed some modifications to the text of the draft
2 Regulations, and established a new 15 day written comment period. The proposed modifications
3 also did not address Petitioners’ previous comments or concerns. The DSC’s failure to
4 meaningfully consider and respond to Petitioner’s comments violates Pub. Resource Code §
5 21091 subd. (d).

6 **Improper Use of a Programmatic EIR**

7
8 121. Using a programmatic EIR affords a lead agency no cover for a CEQA document
9 that “does not provide decision-makers, and the public, with the information about the project
10 required by CEQA.” (*Planning and Conservation League v. Department of Water Resources*
11 (2000) 83 Cal.App.4th 892, 916.) A program EIR cannot rationalize vague or evasive analysis.
12 The CEQA guidelines’ list of “advantages” to preparing a program EIR include a “more
13 exhaustive” examination of effects and alternatives, “full consideration” of cumulative impacts,
14 and allowance for analysis of “broad policy alternatives and program wide mitigation measures”
15 at a time when the lead agency has the best opportunity to address them properly. (Cal. Code
16 Regs., tit. 14, § 15168(b).)

17 122. Without an understanding of the effects and alternatives of the project, a full
18 consideration of cumulative impacts, and an analysis of the types of projects that will follow, the
19 PDEIR cannot possibly contain substantial evidence to support its conclusions (CEQA
20 Guidelines, § 15384), thus failing to uphold the requirements of CEQA. (See *Planning and*
21 *Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 916)
22 (CEQA not satisfied if document fails to provide decision-makers and the public with the
23 required information about the project.)

24 **Additional CEQA Violations**

25 123. Additional violations of CEQA carried out by the DSC CEQA process include
26 that the DSC:

- 27
28 1. Failed to evaluate the impact on the environment of all phases of the project

1 which include “planning, acquisition, development, *and operation*” pursuant to
2 CEQA Regulation § 15126;

- 3 2. Failed to provide quantification including but not limited to failing to provide a
4 consistent and coherent description of the future demand for new water and the
5 amount of surface water potentially available from the Delta and Delta watershed
6 to meet that demand;
- 7 3. Failed to analyze the environmental impacts of supplying the quantities of water
8 for export through new, upstream conveyance;
- 9 4. Failed to address or even disclose in the RDEIR and PEIR that the only benefit
10 cost analysis of new conveyance to date has demonstrated that costs would exceed
11 benefits by 2.5 times and consequently, that new conveyance would not make
12 economic or financial sense;
- 13 5. Failed to perform or await performance of cost benefit analysis and public trust
14 doctrine analysis to inform the planning decisions made in the Delta Plan and
15 Regulations and the environmental review pursuant to CEQA thereof;
- 16 6. Improperly circulated a DPEIR and RDEIR so fundamentally and basically
17 inadequate and conclusory in nature that meaningful public review and comment
18 were precluded. Pursuant to Guideline § 15088.5(a)(4) preparation and
19 recirculation of a new Draft EIR is required;
- 20 7. Failed to recirculate the DPEIR, or the RDEIR, despite the availability of
21 significant new information within the meaning of Pub. Resources Code §
22 21092.1 and CEQA Regulation § 15088.5;
- 23 8. Failed to adequately describe the environmental setting, tainting its description of
24 environmental baseline conditions and the impacts analysis that relies on the
25 baseline conditions;
- 26 9. Failed to provide the PEIR to the public and to other agencies during the comment
27 period on the Delta Plan and the Regulations so that the public and agencies did
28 not have available the project description, informational context, and
environmental impact assessment afforded by the PEIR including the comments
thereon to be able to have a meaningful understanding of the Plan and
Regulations and be in position to provide informed comments on the Plan and
Regulations. Instead, the Department closed the comment period on RDEIR on
January 14, 2013 and on the modifications to the Regulations on April 15, 2013 ,
but did not issue the PEIR until May 6, 2013 and improperly segregated
environmental review from project approval;
10. Failed to adopt adequate findings supported by substantial evidence that
alternatives to the Revised Project and proposed mitigation measures and
alternatives that would have avoided or lessened the significant impacts of the
project including but not limited to the alternatives proposed by EWC and FOR
were infeasible and failed to disclose the readily available mitigation measures
and alternatives that would meet the basic project objectives;
11. Failed to properly determine that economic, legal, social, technological, or other
benefits of the program were overriding considerations that permitted approval
despite significant impacts on the environment.

1 124. Using a programmatic EIR affords a lead agency no cover for a CEQA document
2 that “does not provide decision-makers, and the public, with the information about the project
3 required by CEQA.” (*Planning and Conservation League v. Department of Water Resources*
4 (2000) 83 Cal.App.4th 892, 916.) A program EIR cannot rationalize vague or evasive analysis.
5 The CEQA guidelines’ list of “advantages” to preparing a program EIR include a “more
6 exhaustive” examination of effects and alternatives, “full consideration” of cumulative impacts,
7 and allowance for analysis of “broad policy alternatives and program wide mitigation measures”
8 at a time when the lead agency has the best opportunity to address them properly. (Cal. Code
9 Regs., tit. 14, § 15168(b).)

10 125. Without an understanding of the effects and alternatives of the project, a full
11 consideration of cumulative impacts, and an analysis of the types of projects that will follow, the
12 PDEIR cannot possibly contain substantial evidence to support its conclusions (CEQA
13 Guidelines, § 15384), thus failing to uphold the requirements of CEQA. (See *Planning and*
14 *Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 916)
15 (CEQA not satisfied if document fails to provide decision-makers and the public with the
16 required information about the project.)

17 126. As a result of the foregoing defects, Respondent prejudicially abused its
18 discretion by certifying the PEIR that does not comply with CEQA and by approving the Delta
19 Plan and Regulations in reliance thereon. Accordingly, Respondent’s certification of the PEIR
20 and approval of the Delta Plan and Regulations must be set aside.

21 **VIII. THIRD CAUSE OF ACTION**

22 **DECLARATORY RELIEF**

23 **(CEQA)**
24

25 127. Petitioners hereby incorporate all of the allegations in the paragraphs above as if
26 fully set forth herein.

27 128. Petitioners contend that the Delta Plan, Regulations, and selected project
28 alternative have been adopted in violation of CEQA because the DSC failed to proceed in the

1 manner required by CEQA including the failures to adequately identify, disclose, and evaluate
2 the environmental impacts including but not limited to impacts on water quality and endangered
3 fish species resulting from new upstream conveyance including the Delta Water Tunnels, along
4 with the additional violations of CEQA alleged above.

5 129. Respondent admits that “the PEIR does not evaluate the potential environmental
6 consequences of various BDCP options that DWR may be considering” (Final EIR, Master
7 Response 1, p. 3-14, 3.2) but contends that the Delta Plan “does not make any recommendations
8 regarding conveyance at this time. . . .” (*Id.*) and that the Delta Plan, Regulations, and PEIR
9 were adopted and certified in compliance with CEQA.

10 130. An actual controversy has arisen and now exists between the Petitioners and the
11 Respondent regarding their respective rights and duties under the Delta Plan and Regulations,
12 and CEQA.

13 131. The Petitioners desire a judicial determination and declaration of the parties’
14 respective rights and duties pursuant to Code of Civil Procedure § 1060, including a declaration
15 of whether the DSC failed to proceed in the manner required by CEQA when it adopted and
16 certified the Delta Plan, Regulations, and PEIR or in the alternative whether the Delta Plan and
17 Regulations do not call for, plan for, encourage, recommend, authorize, or require development
18 of new upstream conveyance, intakes, Delta Water Tunnels or optimizing diversions in wet years
19 when more water is available and that nothing in the Delta Plan, Regulations, or PEIR
20 establishes any support whatsoever for any future decision including but not limited to the BDCP
21 process to favor selection of an alternative of development of new conveyance and diversions
22 upstream from the Delta as opposed to other alternatives such as reducing exports and/or
23 maintaining the existing through-Delta conveyance. Such a declaration is necessary and
24 appropriate at this time.

25 **IX. FOURTH CAUSE OF ACTION**

26 **(Common Law Public Trust Doctrine)**

27
28 132. Petitioners hereby incorporate all of the allegations in the paragraphs above as if

1 fully set forth herein.

2 133. The State of California, as a sovereign entity, owns “all of its navigable
3 waterways and the lands lying beneath them 'as trustee of a public trust for the benefit of the
4 people.'" (*Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks.* (1967) 67 Cal.2d 408.) The
5 State acquired title as trustee to such lands and waterways upon its admission to the union. (*City
6 of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 521.)

7 134. The public trust doctrine, as recognized and developed in California decisions,
8 encompasses all navigable lakes and streams, and protects navigable waters from harm caused by
9 diversion of non-navigable tributaries. The Delta Plan applies to and directly affects navigable
10 waters.

11 135. The public trust is an affirmation of the duty of the state to protect the people's
12 common interest in California's streams, lakes, marshlands and tidelands. The State therefore,
13 has “an affirmative duty to take the public trust into account in the planning and allocation of
14 water resources, and to protect public trust whenever feasible.” (*National Audubon Society v.
15 Superior Court of Alpine County*, (1983) 33 Cal.3d 419.)

16 136. In pursuing the coequal goals set out in the 2009 Delta Reform Act, the
17 Legislature acknowledged the public trust's application to DSC's Delta Plan by declaring, “[t]he
18 longstanding constitutional principle of reasonable use and the public trust doctrine shall be the
19 foundation of state water management and are particularly important and applicable to the
20 Delta.” (Wat. Code § 85023).

21 137. The people's interest under the public trust include the right to fish, hunt, bathe,
22 swim, to use for boating and general recreation purposes the navigable waters of the state. There
23 is also a growing public recognition that one of the most important public uses of the
24 preservation of those lands in their natural state, so that they may serve as ecological units for
25 scientific study, as open space, and as environments which provide food and habitat for birds and
26 marine life, and which favorably affect the scenery and climate of the area." (*National Audubon
27 Society v. Superior Court of Alpine County*, (1983) 33 Cal.3d 419.)

28 138. As a part of the public trust analysis under the Delta Reform Act, a flow criterion
VERIFIED PETITION FOR WRIT OF MANDATE; COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1 that quantifies the volume, quality, and timing of water necessary for the Delta ecosystem to
2 thrive must be submitted to the DSC in order to inform its public trust analysis. The Delta Plan
3 does not contain any water availability analysis that would show, at a minimum, what water will
4 be available to meet the Reform Act's goals. Additionally, the DSC acted prematurely by
5 adopting the Delta Plan and Regulations and certifying the PEIR before the SWRCB develops
6 flow and water quality objectives to address all beneficial uses including public trust resources in
7 the Delta and upstream tributaries.

8 139. The DSC rejected multiple comments from various groups to develop a public
9 trust analysis to satisfy the California Supreme Court's holding that the state must protect the
10 public trust in water supply planning decisions. Both the Delta Plan and the PEIR fail to do so.

11 140. Petitioners are informed and believe, and thereupon allege, that the DSC's failure
12 to consider and analyze the public trust in creating and approving Delta Plan and accompanying
13 PEIR's will harm trust resources and the petitioners' and the people's rights and interests in
14 those resources, including fishing, hunting, bathing, swimming, boating, and preserving
15 navigable waters of the state, and thus violates the public trust.

16 141. Petitioners are informed and believe, and thereupon allege, that by failing to
17 consider and analyze the public trust, the DSC violated the state's duty to protect public trust
18 resources.

19 142. As a state trustee agency of the Public Trust, the DSC must also certify that
20 covered actions are consistent with the public trust doctrine and the adequate protection of trust
21 resources; the Delta Reform Act itself repeats the need. Despite containing a complex system to
22 determine consistency of covered actions with the Plan, the Plan and its implementing
23 Regulations lack any provision to determine consistency of covered actions with the public trust
24 doctrine. Failure to include such a provision is a violation of the DSC public trust obligations,
25 violates the doctrine, and is arbitrary, capricious and not in accordance with law.

26 **PRAYER FOR RELIEF**

27 WHEREFORE, Petitioners pray for relief as follows:

- 28 1. For alternative and peremptory writs of mandate, commanding Respondent to:
VERIFIED PETITION FOR WRIT OF MANDATE; COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

- 1 a. vacate and set aside approval of the Delta Plan and Regulations and findings
- 2 supporting the approval;
- 3 b. vacate and set aside certification of the PEIR;
- 4 c. suspend any and all activity pursuant to Respondent’s approval of the Delta
- 5 Plan and Regulations that could result in an adverse change or alteration to the physical
- 6 environment until Respondent has complied with all requirements of CEQA and all other
- 7 applicable state and local laws, policies, ordinances, and regulations as are directed by this Court
- 8 pursuant to Pub. Resources Code § 21168.9.

9 2. For a stay, temporary restraining order, preliminary injunction, and permanent

10 injunction prohibiting any actions by Respondent pursuant to Respondent’s approval of the Delta

11 Plan and Regulations and certification of the PEIR until Respondent has fully complied with all

12 requirements of CEQA and all other applicable state laws, policies, and regulations;

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- 3. For a declaration that the Delta Plan and Regulations are inconsistent with CEQA and the Government Code;
- 4. For costs of the suit;
- 5. For attorney's fees pursuant to the Code of Civil Procedure § 1021.5; and
- 6. For such other and further relief as the Court deems just and proper.

DATE: June 14, 2013

By: _____

MICHAEL B. JACKSON, Attorney for Petitioners
CALIFORNIA WATER IMPACT NETWORK;
CALIFORNIA SPORTFISHING PROTECTION
ALLIANCE; AQUALLIANCE; and RESTORE
THE DELTA

DATE: June 14, 2013

By: _____

E. ROBERT WRIGHT, Attorneys for Petitioner
FRIENDS OF THE RIVER

DATE: June 14, 2013

By: _____

ADAM LAZAR, Attorneys for Petitioner
CENTER FOR BIOLOGICAL DIVERSITY

1 VERIFICATION

2
3 I, Michael B. Jackson, am the attorney for Petitioners herein and am authorized to
4 execute this on their behalf. I have read the foregoing Petition for Writ of Mandate and
5 Complaint for Injunctive and Declaratory Relief and am informed and believe, and thereon
6 allege, that the matters stated therein are true and correct. I sign this verification on behalf of
7 Petitioners pursuant to Code of Civil Procedure § 446, as Petitioners are located outside the
8 county in which my office is located.

9 I declare under penalty of perjury under the laws of the State of California that the
10 foregoing is true and correct and that this verification was executed on June 14, 2013 in Quincy,
11 California.

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13 _____
14 Michael B. Jackson
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