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CALIFORNIA SPORTFISHING ALLIANCE,
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7 ASSOCIATION, AND THE WINNEMEM WINTU
TRIBE

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SACRAMENTO

11	CALIFORNIA SPORTFISHING PROTECTION)	Civ. No. 24WVMO00181
	ALLIANCE, NORTH COAST RIVERS)	
12	ALLIANCE, SAN FRANCISCO CRAB BOAT)	VERIFIED PETITION FOR WRIT OF
	OWNERS ASSOCIATION, and the)	MANDATE AND COMPLAINT FOR
13	WINNEMEM WINTU TRIBE,)	DECLARATORY AND INJUNCTIVE
)	RELIEF AND ATTORNEYS' FEES
14	Petitioners and Plaintiffs,)	
)	
15	v.)	<u>CEQA CASE</u>
)	
16	CALIFORNIA DEPARTMENT OF WATER)	
	RESOURCES, CALIFORNIA DEPARTMENT)	
17	OF FISH AND WILDLIFE, and DOES 1 through)	
	200,)	
18)	
	Respondents and Defendants,)	
19)	
)	
20	UNITED STATES BUREAU OF)	
	RECLAMATION, and DOES 201 through 400,)	
21)	
	Real Parties in Interest.)	
22)	

23
24 Petitioners and Plaintiffs CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, NORTH
25 COAST RIVERS ALLIANCE, SAN FRANCISCO CRAB BOAT OWNERS ASSOCIATION, and the
26 WINNEMEM WINTU TRIBE (collectively "Conservation Groups") hereby petition the Court for a writ
27 of mandate against defendants and respondents California Department of Water Resources ("DWR")
28 and California Department of Fish and Wildlife ("DFW"), and by this Verified Petition for Writ of

1 Mandate and Complaint for Declaratory and Injunctive Relief and for Attorney’s Fees (“Verified
2 Petition”) hereby allege as follows:

3 **INTRODUCTION**

4 1. This is a public interest citizen suit to enforce: the California Environmental Quality Act
5 (“CEQA”), Public Resources Code (“PRC”) section 21000 *et seq.*; the Delta Reform Act (“DRA”),
6 Water Code section 85000, *et seq.*; the California Endangered Species Act (“CESA”), Fish and Game
7 Code (“F&GC”) section 2050, *et al.*; and the Public Trust Doctrine. Petitioners bring this action to set
8 aside Respondents’ approval of a plan for the long-term operation of the State Water Project (“SWP”)
9 that allows the export of approximately 2.5 million acre-feet of water annually (“afa”) from the
10 Sacramento-San Joaquin River Delta causing the continued and accelerated ecological collapse of the
11 Delta and its tributaries. Specifically, Petitioners challenge DWR’s October 28, 2024, Certification of
12 the Final Environmental Impact Report (“FEIR”) for Long Term Operation of the California State Water
13 Project (“Project”), DFW’s November 4, 2024 approval and issuance to DWR of DFW’s Incidental
14 Take Permit (“ITP”) allowing the Project to take (i.e., kill, injure or displace) state-listed endangered
15 species, and all related approvals of the Project by DWR and DFW. In taking these actions DWR and
16 DFW violated CEQA, the Delta Reform Act, CESA, and the Public Trust Doctrine.

17 2. The Project, as approved, is intended to allow DWR to operate the SWP for an indefinite
18 period under a new operational rule allowing a substantial increase in the rate of diversion of the Delta’s
19 freshwater flows for export. According to DWR’s FEIR, the Project increases the maximum daily
20 diversions from the Delta from July through September by 500 cubic feet per second (“cfs”), from 6,990
21 cfs (13,870 acre feet (“af”) per day) to 7,490 cfs (14,860 af per day) – an increase of more than 7
22 percent. FEIR § 2.1.1.3, p. 2-5. The Project would also, apparently for the first time, guarantee DWR a
23 minimum rate of diversion regardless of actual water flow conditions by establishing a “minimum
24 export rate” during which “combined CVP and SWP export rates . . . will not be required to drop below
25 1,500 cfs.” FEIR § 2.3, p. 2-18. The unexamined premise underlying the entire Project is that DWR is
26 entitled to export “excess water,” which it defines as “occur[ing] when releases from upstream
27 reservoirs plus unregulated flow exceed Sacramento Valley in-basin uses and exports.” FEIR § 2.3.1, p.
28 2-20. Instream uses for fish and wildlife, recreation, and other public trust purposes are ignored in

1 DWR’s calculation of “excess water.” *Id.*

2 3. According to its FEIR, “DWR is requesting an ITP [from DFW] for the exercise of
3 discretion in operational decision-making,” but DWR is not requesting an ITP from CDFW for . . .
4 Oroville Dam and Feather River operations,” among others. FEIR § 2.3, p. 2-19. Yet “Oroville Dam
5 and Feather River operations” control the storage and release of the vast majority of water produced and
6 delivered by the SWP, and thus determine the outer boundaries, at least, of the Project’s operation and
7 resulting impacts.

8 4. CEQA is California’s preeminent environmental law enacted to protect California’s
9 extraordinary environmental resources from uninformed and needlessly destructive agency actions. It
10 requires all public agencies to fully examine the potential adverse impacts of their actions before taking
11 them. CEQA also directs agencies to carefully consider alternatives and mitigation measures that would
12 reduce those impacts. Contrary to CEQA, Respondents’ FEIR does neither.

13 5. The Delta Reform Act requires agency actions that impact the Delta (“covered actions”) to
14 be consistent with the Delta Stewardship Council’s (“DSC’s”) Delta Plan, and accordingly requires
15 agencies proposing such actions to adopt detailed written findings, based on substantial evidence, that
16 their proposed actions are consistent with the Delta Plan. Contrary to the Delta Reform Act,
17 Respondents failed to adopt the required plan consistency findings before approving the Project and its
18 ITP.

19 6. CESA forbids DFW from issuing an ITP where doing so would jeopardize the
20 continued existence of a species listed as threatened or endangered under CESA. In making this
21 determination, DFW must support its decision with substantial evidence. Yet contrary to these
22 mandatory statutory duties, DFW failed to support its determination that the ITP, which weakens
23 protections for CESA-listed fish species, will not jeopardize the continued existence of these species.

24 7. The Public Trust Doctrine mandates that Respondents consider public trust resources,
25 including fisheries, before taking actions that impact those resources, and affirmatively take action to
26 protect those resources by all feasible means. Contrary to that mandate, in issuing the Project approvals,
27 Respondents failed to adequately consider and protect these resources.

1 **VENUE AND JURISDICTION**

2 8. This Court has jurisdiction over this proceeding pursuant to: Code of Civil Procedure
3 (“CCP”) sections 526 (injunctive relief), 1060 (declaratory relief), and 1085 (traditional mandamus);
4 PRC sections 21168 and 21168.5 (mandamus review); and article VI, section 10 of the California
5 Constitution.

6 9. Venue is proper in this Court pursuant to CCP sections 393 (actions against public
7 officers), 395 (actions generally), and 401(1) (actions against state agency in any county where Attorney
8 General has office) because both DWR and DFW maintain offices in the County of Sacramento, as does
9 the Attorney General.

10 10. Pursuant to CCP section 388, Petitioners are serving the California Attorney General with a
11 copy of this verified petition and complaint. Consistent with PRC section 21167.5, Petitioners timely
12 served DWR and DFW with notice of this suit. Although not required by PRC section 21167.6.5,
13 Petitioners have also named the Bureau of Reclamation (“Reclamation”) as a real party in interest and
14 are timely serving this verified petition and complaint on Reclamation. Reclamation is neither a
15 necessary party under CCP section 389(a) nor an indispensable party under CCP section 389(b).

16 **PARTIES**

17 11. Petitioner CALIFORNIA SPORTFISHING PROTECTION ALLIANCE (“CSPA”) is a non-
18 profit corporation organized under the laws of the State of California. CSPA has approximately one
19 thousand members including affiliated clubs who reside and recreate throughout California. CSPA’s
20 members, in addition to being duly licensed sport fishing anglers, are vitally interested in the
21 preservation and enhancement of California’s public trust fishery resources and vigorous enforcement of
22 California’s environmental laws. They have been involved for decades in public education and
23 advocacy efforts to protect and restore the public trust resources of California’s rivers. They use
24 California’s rivers, including the Sacramento River, the San Joaquin River, and the Bay-Delta for
25 recreation, scientific study, and aesthetic enjoyment. The interests of CSPA and its members have been,
26 are being, and unless the relief requested herein is granted, will continue to be adversely affected and
27 injured by Respondents’ approval of the Project and its ITP and certification of its FEIR allowing long
28 term operation of the SWP. Enforcement of the environmental laws that Respondents violated when

1 they approved the Project will help restore and preserve water quality, thereby promoting the
2 conservation objectives of CSPA and improving the use and enjoyment of fisheries resources by its
3 members.

4 12. Petitioner NORTH COAST RIVERS ALLIANCE (“North Coast Rivers”) is a non-profit
5 unincorporated association with members throughout Northern California. North Coast Rivers was
6 formed for the purpose of protecting California’s rivers and their watersheds from the adverse effects of
7 excessive water diversions, ill-planned urban development, harmful resource extraction, pollution, and
8 other forms of environmental degradation. Its members use and enjoy California’s rivers and
9 watersheds including those tributary to the Delta for recreational, aesthetic, scientific study, and related
10 non-consumptive uses. The interests of North Coast Rivers and its members have been, are being, and
11 unless the relief requested herein is granted, will be adversely affected and injured by Respondents’
12 approvals of the Project including its FEIR and ITP.

13 13. Petitioner SAN FRANCISCO CRAB BOAT OWNERS ASSOCIATION (“San Francisco
14 Fishermen”) is a century-old association of owners and operators of small, family owned fishing boats
15 that catch Dungeness crab, wild California King salmon, Pacific herring, and other species that live in
16 and depend upon the cold waters of the Pacific Ocean, and San Francisco Bay-Delta and the Sacramento
17 and San Joaquin Rivers and their tributaries. San Francisco Fishermen is also actively involved in
18 community education and advocacy concerning fisheries resources legislation to ensure that the rich
19 heritage of commercial fishing in the Bay Area will survive for future generations. San Francisco
20 Fishermen and its members will be harmed by Respondents’ approvals of the Project, its FEIR and its
21 ITP because these approvals threaten their continued historic use and enjoyment of the fisheries
22 resources of the Delta and its connected ecosystems.

23 14. Petitioner WINNEMEM WINTU TRIBE is a Native American Tribe whose aboriginal
24 territory encompasses the upper watersheds of the Sacramento River including the McCloud River. The
25 Winnemem Wintu Tribe was traditionally dependent on salmon fishing for both subsistence and cultural
26 purposes, and maintains a deep cultural, spiritual and recreational interest in the continued viability of
27 California’s salmon runs that pass through the Delta. The Winnemem Wintu Tribe is a strong proponent
28 of Delta restoration, and will be harmed by the reduced Delta fresh water flows, degradation of water

1 quality, destruction of fish and wildlife species, and other environmental harms that implementation of
2 Respondents' Project will allow.

3 15. Respondent and Defendant CALIFORNIA DEPARTMENT OF WATER RESOURCES
4 ("DWR") is a California state agency established by the Legislature and charged with management of
5 the State Water Project and other water management tasks. Its approval of the Project and certification
6 of the FEIR thereon on October 28, 2024, were subject to and violated the requirements of CEQA, the
7 Delta Reform Act, CESA, and the Public Trust Doctrine. DWR is the lead agency under CEQA for
8 environmental review of the Project.

9 16. Respondent and Defendant CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE
10 ("DFW") is a California state agency established by the Legislature and charged with management of
11 California's fish and wildlife and related management tasks. Its approval of the ITP on November 4,
12 2024 was subject to and violated the requirements of CEQA, the Delta Reform Act, CESA, and the
13 Public Trust Doctrine. DFW is the lead agency under CESA for review, approval and implementation
14 of the ITP.

15 17. The true names and capacities of Respondents DOES 1-200, inclusive, are unknown to
16 Petitioners who therefore sue such Respondents by fictitious names pursuant to CCP section 474.
17 Petitioners are informed and believe, and based on such information and belief allege, that the
18 fictitiously named Respondents are state or local officials or agencies who are responsible, in whole or
19 in part, for the approval and implementation of the Project. Petitioners will, with leave of Court if
20 necessary, amend this Verified Petition if and when the true names and capacities of said Doe
21 Respondents have been ascertained.

22 18. Real Party in Interest UNITED STATES BUREAU OF RECLAMATION ("Reclamation")
23 is a federal agency that operates the CVP. Reclamation and DWR coordinate their operation of the CVP
24 and the SWP, and thus Reclamation may receive a benefit from Respondents' approval of the Project.

25 19. DWR did not identify any real parties in interest in its Notice of Determination announcing
26 its approval of the Project pursuant to PRC section 21167.6.5(a), and Petitioners are not otherwise aware
27 that any specific Real Parties in Interest exist. However, out of an abundance of caution and without
28 conceding that its participation is necessary, Petitioners have identified Reclamation as a potential Real

1 Party in Interest. The true names and capacities of Real Parties in Interest DOES 201-400, inclusive, are
2 unknown to Petitioners who therefore sue such Real Parties in Interest by fictitious names pursuant to
3 CCP section 474. Petitioners are informed and believe, and based on such information and belief allege,
4 that the fictitiously named Real Parties in Interest have a direct interest in approval of the Project.
5 Petitioners will, with leave of Court if necessary, amend this Verified Petition if and when the true
6 names and capacities of said Doe Real Parties in Interest have been ascertained.

7 GENERAL ALLEGATIONS

8 20. Petitioners have authorized their attorneys to file this lawsuit on their behalf to vindicate
9 their substantial beneficial interest in securing Respondents' compliance with the law.

10 21. Petitioners have performed any and all conditions precedent to the filing of this Verified
11 Petition and Complaint and have exhausted any and all available administrative remedies to the extent
12 required by law.

13 22. Petitioners have no plain, speedy, and adequate remedy in the ordinary course of law within
14 the meaning of CCP section 1086 in that, unless this Court issues its writ of mandate setting aside
15 DWR's (1) Certification of the FEIR and (2) approval of the Project, and (3) DFW's approval of its ITP
16 for the Project, and ordering them to comply with the laws whose violation is alleged herein, the
17 environmental interests of Petitioners and the public that are protected by those laws will be
18 substantially and irreparably harmed. No monetary damages or other legal remedy could adequately
19 compensate Petitioners for the harm to their beneficial interests, and to the environment, occasioned by
20 Respondents' unlawful conduct.

21 23. Petitioners are entitled to declaratory relief under CCP section 1060 because, in addition to
22 the parties' dispute over the lawfulness of Respondents' Project, FEIR and ITP for which writ relief is
23 normally the appropriate remedy, an actual controversy exists between Petitioners and Respondents
24 regarding the lawfulness of Respondents' unlawful pattern and practice as evidenced by their past,
25 ongoing and expected future long term operation of the SWP and implementation of its ITP in violation
26 of CEQA, the Delta Reform Act, CESA and the Public Trust Doctrine. Petitioners contend that
27 Respondents have acted, are acting and will continue to act in violation of these laws and therefore
28 declaratory relief is necessary and appropriate to secure Respondents' compliance with these laws.

1 Petitioners are informed and believe that Respondents dispute this contention. A judicial resolution of
2 this controversy is therefore necessary and appropriate.

3 24. Petitioners are also entitled to injunctive relief under CCP section 526 because
4 Respondents' approval of the Project and its ITP threatens irreparable environmental harm. Unless
5 enjoined, Respondents will implement the Project and its ITP despite their lack of compliance with
6 applicable laws, causing undue and unnecessary environmental degradation. Petitioners would thereby
7 suffer irreparable harm due to Respondents' failure to take the required steps to adequately protect the
8 environment. Injunctive relief is thus warranted under CCP section 525 *et seq.* and PRC section
9 21168.9 to prevent irreparable harm to the environment.

10 LEGAL BACKGROUND

11 CEQA

12 25. CEQA is California's primary statutory mandate for environmental protection. It applies to
13 all state and local agencies, and requires them to "first identify the [significant] environmental effects of
14 projects, and then to mitigate those adverse effects through the imposition of feasible mitigation
15 measures or through the selection of feasible alternatives." *Sierra Club v. State Board of Forestry*
16 (1994) 7 Cal.4th 1215, 1233. Its most important substantive imperative requires "public agencies to
17 deny approval of a project with significant adverse effects when feasible alternatives or feasible
18 mitigation measures can substantially lessen such effects." *Sierra Club v. Gilroy City Council* (1990)
19 222 Cal.App.3d 30, 41.

20 26. CEQA's mandate for detailed environmental review "ensures that members of the
21 [governmental decision-making body] will fully consider the information necessary to render decisions
22 that intelligently take into account the environmental consequences" of their proposed action. *Mountain*
23 *Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 133; PRC §§ 21080.5(d)(2)(D),
24 21091(d)(2); 14 C.C.R. [CEQA Guidelines] ("Guidelines") § 15088. The CEQA process thus "protects
25 not only the environment but also informed self-government." *Citizens of Goleta Valley v. Board of*
26 *Supervisors* (1990) 52 Cal.3d 553, 564.

27 27. All California "public agencies" must comply with CEQA when they approve discretionary
28 projects. PRC § 21080(a). DWR and DFW are each a "public agency" and a "state agency" as defined

1 in CEQA. PRC § 21063. Therefore, their discretionary approvals of the Project are subject to CEQA.

2 28. A proposed governmental action requires environmental review under CEQA if (1) the
3 agency is contemplating an “approval” of an action as defined by Guidelines section 15352, (2) the
4 subject matter of the contemplated approval constitutes a “project” under PRC section 21065 and
5 Guidelines section 15378(a), and (3) the project to be approved does not fall within a statutory
6 exemption created by the Legislature under PRC section 21080(b) and recognized under Guidelines
7 sections 15260-15285, or a categorical exemption in the Guidelines as promulgated by the California
8 Resources Agency pursuant to PRC section 21084(a) and Guidelines sections 15061(b)(2), 15300-15333
9 and 15354.

10 29. The lead agency for a CEQA project must prepare an environmental impact report (“EIR”)
11 if it determines that the project may have significant adverse environmental impacts. The EIR must
12 analyze those effects and suggest feasible means, if any, of mitigating or avoiding them including
13 alternatives that would achieve most of the basic objectives of the project without causing significant
14 environmental effects. PRC §§ 21002, 21002.1, 21061; Guidelines §§ 15080-15096, 15120-15132,
15 15160-15170.

16 30. CEQA requires the lead agency to provide a clear description of the Project under
17 consideration. “An accurate, stable and finite project description is the *sine qua non* of an informative
18 and legally sufficient EIR.” *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193;
19 *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929,
20 938; *Washoe Meadows Community v. Department of Parks & Recreation* (2017) 17 Cal.App.5th 277,
21 287.

22 31. The EIR must include “[a] statement of the objectives sought by the proposed project. . . .
23 The statement of objectives should include the underlying purpose of the project and may discuss the
24 project benefits.” Guidelines § 15124(b). “[A] lead agency may not give a project’s purpose an
25 artificially narrow definition.” *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647,
26 668 (*quoting In re Bay-Delta* (2008) 43 Cal.4th 1143, 1166). The agency’s formulation of its
27 underlying purpose and objectives is essential to its consideration of alternatives. *Id.* An agency need
28 not study alternatives that cannot satisfy the Project’s basic goal. *Id.*

1 32. In applying these CEQA procedures, an agency may not segment a project to avoid
2 preparing an EIR on the entirety, or whole, of the project. Guidelines § 15378(a), (c), (d). CEQA’s
3 “requirements cannot be avoided by chopping up proposed projects into bite-size pieces which,
4 individually considered, might be found to have no significant effect on the environment or to be only
5 ministerial.” *Plan for Arcadia, Inc. v. City Council of Arcadia* (1974) 42 Cal.App.3d 712, 726.

6 33. In order to comply with CEQA “an EIR must be performed before a project is approved, for
7 “if postapproval environmental review were allowed, EIR’s would likely become nothing more than
8 *post hoc* rationalizations to support action already taken.” *Save Tara v. City of West Hollywood* (2008)
9 45 Cal.4th 116, 130, bracket omitted, quoting *Laurel Heights Improvement Assn. v. Regents of*
10 *University of California* (1988) 47 Cal.3d 276, 394).

11 34. For every CEQA project that had “a notice of preparation or a notice of negative
12 declaration or mitigated negative declaration filed on or after July 1, 2015” – such as this Project – the
13 lead agency is required to consult with California Indian Tribes. Stats. 2014, ch. 532 (A.B. 52), § 11(c),
14 eff. Jan 1, 2015); PRC § 21080.3.1. For the purposes of CEQA, section 21080.3.1(b) incorporates the
15 definition of “consultation” found in Government Code section 65352.4. Thus, DWR was required to
16 undertake

17 [a] meaningful and *timely* process of seeking, discussing, and considering carefully the
18 views of others, in a manner that is cognizant of all parties’ cultural values and, where
19 feasible, seeking agreement. Consultation between government agencies and Native
20 American tribes shall be conducted in a way that is mutually respectful of each party’s
21 sovereignty. Consultation shall also recognize the tribes’ potential needs for
22 confidentiality with respect to places that have traditional tribal cultural significance.

23 Government Code § 65352.4 (emphasis added).

24 35. Consultation is complete either when parties “*agree* to measures to avoid or mitigate a
25 significant effect on a tribal cultural resource” or “a party, acting in good faith and after reasonable
26 effort, concludes that mutual agreement cannot be reached.” PRC § 21080.3.2.(b)(1)-(2), emphasis
27 added.

The Delta Reform Act

28 36. To address the indisputably perilous state of the Delta, in 2009 the California Legislature
enacted the Delta Reform Act, declaring that “[t]he Sacramento-San Joaquin Delta watershed and

1 California’s water infrastructure are in crisis and *existing Delta policies are not sustainable.*” Water
2 Code § 85001(a), emphasis added. The Legislature found that “‘the Delta’ . . . is a critically important
3 natural resource for California and the nation. It serves Californians concurrently as both the hub of the
4 California water system and the most valuable estuary and wetland ecosystem on the west coast of
5 North and South America.” Water Code § 85002. “Resolving the crisis requires *fundamental*
6 *reorganization* of the state’s management of Delta watershed resources.” Water Code § 85001, subd.
7 (a) (emphasis added). Therefore, the Legislature resolved “to provide for the sustainable management
8 of the [Delta] ecosystem, to provide for a more reliable water supply for the state, to protect and
9 enhance the quality of water supply from the Delta, and to establish a governance structure that will
10 direct efforts *across state agencies* to develop a *legally enforceable* Delta Plan.” Water Code § 85001,
11 subd. (c) (emphasis added).

12 37. The Delta Reform Act was meant to advance the “coequal goals” of restoring the Delta
13 ecosystem and ensuring water supply reliability. Water Code § 85054. The Legislature found that eight
14 “objectives” were inherent in those coequal goals:

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

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

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

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

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

25 (f) Improve the water conveyance system and expand statewide water storage.

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

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

1 objectives.

2 Water Code § 85020 (emphasis added).

3 38. The Legislature also declared that:

4 “The policy of the State of California is to *reduce reliance on the Delta in meeting*
5 *California’s future water supply needs* through a statewide strategy of investing in
6 improved regional supplies, conservation, and water use efficiency. Each region that
7 depends on water from the Delta watershed shall improve its regional self-reliance for
water through investment in water use efficiency, water recycling, advanced water
technologies, local and regional water supply projects, and improved regional
coordination of local and regional water supply efforts.”

8 Water Code § 85021 (emphasis added).

9 **The California Endangered Species Act**

10 39. The California Endangered Species Act, F&GC section 2050 et seq. (“CESA”), was
11 adopted in 1984 to establish “the policy of the state to conserve, protect, restore, and enhance any
12 endangered species or any threatened species and its habitat” and to declare “that it is the intent of the
13 Legislature, consistent with conserving the species, to acquire lands for habitat for these species.”

14 F&GC § 2052. Section 2 of CESA further finds and declares that:

15 “it is the policy of the state that state agencies *should not approve* projects as proposed
16 which would jeopardize the continued existence of any endangered species or threatened species
17 or result in the destruction or adverse modification of habitat essential to the continued existence
of those species, if there are reasonable and prudent alternatives available consistent with
conserving the species or its habitat which would prevent jeopardy.”

18 F&GC § 2053 (emphasis added).

19 40. CESA commands that “[n]o person shall . . . take . . . any species . . . that the [Fish and
20 Game] [C]ommission determines to be an endangered species or a threatened species . . . except as
21 otherwise provided in this chapter . . .” F&GC § 2080. F&GC section 2081 provides that DFW “may
22 authorize acts that are otherwise prohibited pursuant to [the incidental take permit provisions of F&GC]
23 Section 2180,” but imposes stringent requirements on any such authorization, commanding: “No
24 [incidental take] permit may be issued . . . if issuance of the permit would jeopardize the continued
25 existence of the species.” F&GC § 2081, subd. (c). The statute tightly restricts DFW’s discretion to
26 determine that an action will not cause jeopardy by providing further that:

27 “The department *shall* make this determination based on the best scientific and other
28 information that is reasonably available, and *shall* include consideration of the species’
capability to survive and reproduce, and any adverse impacts of the taking on those abilities in

1 light of (1) known population trends; (2) known threats to the species; and (3) reasonably
2 foreseeable impacts on the species from other related projects and activities.”

3 F&GC § 2081, subd. (c) (emphasis added).

4 41. Contrary to these requirements and prohibitions, Respondents approved the Project and its
5 ITP without assuring that DFW utilized the best scientific and other information that is reasonably
6 available, and despite unrefuted evidence that (1) the Project will jeopardize the continued existence of
7 four currently listed, and one candidate, endangered and threatened species, including Sacramento River
8 winter-run Chinook salmon (*Oncorhynchus tshawytscha*), Central Valley spring-run Chinook salmon
9 (*O. tshawytscha*) Delta smelt (*Hypomesus transpacificus*), White sturgeon (*Acipenser transmontanus*)
10 and Longfin smelt (*Spirinchus thaleichthys*) and result in adverse modification of habitat essential to
11 the continued existence of these species, and (2) there are reasonable and prudent alternatives available
12 consistent with conserving these species or their habitat which would prevent jeopardy.

13 **The Public Trust Doctrine**

14 42. Water Code section 85023 states, “the longstanding constitutional principle of reasonable
15 use and the Public Trust Doctrine shall be the foundation of state water management policy and are
16 particularly important and applicable to the Delta.”

17 43. In *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 426, the court noted
18 that the public trust doctrine mandates that “before state courts and agencies approve water diversions
19 they . . . consider the effect of such diversions upon interests protected by the public trust, and attempt,
20 so far as feasible, to avoid or minimize any harm to those interests.” The *National Audubon Society*
21 Court went on to explain:

22 “Just as the history of this state shows that appropriation may be necessary for efficient use
23 of water despite unavoidable harm to public trust values, it demonstrates that an
24 appropriative water rights system administered without consideration of the public trust may
25 cause unnecessary and unjustified harm to trust interests. As a matter of practical necessity
the state may have to approve appropriations despite foreseeable harm to public trust uses.
In so doing, however, the state must bear in mind its duty as trustee to consider the effect of
the taking on the public trust, and to preserve, so far as consistent with the public interest,
the uses protected by the trust.”

26 *Id.*, citations omitted.

27 44. “Public trust easements are traditionally defined in terms of navigation, commerce and
28 fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and

1 general recreation purposes the navigable waters of the state, and to use the bottom of the navigable
2 waters for anchoring, standing, or other purposes.” *Marks v. Whitney* (1971) 6 Cal.3d 251, 259. For
3 nearly 50 years it has been settled law in California that public trust values also “encompass[] . . . the
4 preservation of those lands in their natural state, so that they may serve as ecological units for scientific
5 study, as open space, and as environments which provide food and habitat for birds and marine life, and
6 which favorably affect the scenery and climate of the area.” (*Id.*)

7 45. Although compliance with CEQA “may assist an agency in complying with its duties under
8 the public trust doctrine [,] CEQA review of a project does not necessarily or automatically satisfy
9 the agency’s affirmative duties to take the trust into account and protect public trust uses whenever
10 feasible.” *San Francisco Baykeeper Inc. v. State Lands Com.* (2018) 29 Cal.App.5th 562, 571. “[A]
11 public trust use is not any use that may confer a public benefit, but rather a use that facilitates public
12 access, public enjoyment, or public use of trust land.” *Id.* at 570.

13 **FACTUAL BACKGROUND**

14 46. “[T]he Sacramento-San Joaquin River Delta is a natural resource of statewide, national, and
15 international significance, containing irreplaceable resources.” PRC § 29701. The Delta is the largest
16 and most productive estuarine system on the West Coast of North and South America, but its future is in
17 peril. It is the State of California’s avowed policy “to recognize, preserve, and protect those resources
18 of the delta for the use and enjoyment of current and future generations.” *Id.*

19 47. The Delta’s imminent ecologic collapse is well-recognized and indisputable. It has two
20 principal causes. First, an unsustainable proportion of the Delta’s freshwater flows has been diverted for
21 decades by the Central Valley Project (“CVP”) and the State Water Project (“SWP”). Second, for too
22 long, agricultural diverters have discharged subsurface drainage and surface run-off contaminated with
23 salt, selenium, and other toxic substances into groundwater and the rivers that are tributary to the Delta.
24 This one-two punch of diminished freshwater flows and increased temperature, salinity, herbicides,
25 pesticides, and heavy metals has pushed the Delta to the brink of ecologic collapse.

26 48. Due to excessive diversions of water for consumptive use, many species of fish endemic to
27 the Delta have already gone extinct, including the Sacramento perch, formerly one of the most abundant
28 fishes of the Delta, which disappeared in the 1970s. Just 12 indigenous species remain, and these are in

1 grave danger. Since the SWP and CVP began operation, the Sacramento River winter and spring run
2 Chinook salmon, Central Valley steelhead, North American green sturgeon, White sturgeon, Longfin
3 smelt and Delta smelt have been driven perilously close to extirpation.

4 49. Winter run Chinook salmon were declared threatened under the federal Endangered
5 Species Act (“ESA”) in 1990 (55 Fed.Reg. 46515), and then due to continuing population declines,
6 declared endangered in 2005 (70 Fed.Reg. 37160). Their critical habitat in the Sacramento River and its
7 tributaries was designated in 1993. 58 Fed.Reg. 33212. Spring run Chinook salmon were declared
8 threatened, and their critical habitat designated under the ESA in 2005. 70 Fed.Reg. 37160, 52488.
9 Central Valley steelhead were declared threatened in 2000 (65 Fed.Reg. 52084) and their critical habitat
10 was designated in 2005 (70 Fed.Reg. 52488). The Southern distinct population segment (“DPS”) of
11 North American green sturgeon was declared threatened in 2006 (71 Fed.Reg. 17757) and its critical
12 habitat was designated in 2008 (73 Fed.Reg. 2084). Delta smelt were declared endangered in 1993 (58
13 Fed.Reg. 12854) and their critical habitat was designated in 1994 (59 Fed.Reg. 65256). White sturgeon
14 (*Acipenser transmontanus*) received protection under CESA as a candidate species in July 2024, and
15 may potentially become a CESA-listed species in 2025.

16 50. The SWP, as originally envisioned, would have included additional dams and diversions
17 that would have destroyed the free-flowing rivers of California’s North Coast and removed additional
18 essential spawning and rearing habitat for salmon and steelhead. The unbuilt portion of the SWP was
19 expected to provide between five and 10 million acre feet of water each year to the SWP system. Thus,
20 the SWP’s existing water supply contracts contemplate delivery of much more water than can be
21 delivered in all but the wettest of water years.

22 51. In addition to harming many fish species in the Delta, the excessive use of Delta water
23 exports to irrigate contaminated soils in the San Joaquin Valley pollutes ground and surface waters that
24 flow into the Delta. Irrigation leaches pollutants from the toxic soils underlying many of the areas
25 irrigated with Delta water. The subsurface drainage and surface run off from these contaminated soils
26 contain pollutants including selenium, arsenic, boron, mercury, uranium, chromium, molybdenum and
27 sodium chlorides and sulfates. The resulting pollution of the Delta and its San Joaquin Valley
28 tributaries threatens the Delta’s water quality and the fish and wildlife dependent on them.

1 52. DWR “operates the SWP in coordination with the [CVP], under the Coordinated
2 Operations Agreement (COA) between the federal government and the State of California.” FEIR, p. 2-
3 2. On December 12, 2018, DWR approved the Coordinated Operations Agreement Addendum (“COA
4 Addendum”), which modified DWR’s operation of the SWP in coordination with Reclamation. DWR
5 failed to conduct any environmental review of that action.

6 53. On June 16, 2023, DWR issued a Notice of Preparation (“NOP”) for the Project, notifying
7 the public that it would act as the lead agency for the preparation of an EIR for the Project. That Notice
8 of Preparation did not include a clear description of the Project DWR proposed to undertake. While the
9 NOP indicates that the EIR is intended to facilitate the issuance of an ITP by DFW for DWR’s operations
10 of the SWP, it failed to provide a particularized description of a project under consideration. Instead, the
11 NOP informed the public merely that DWR would continue to operate the SWP “to provide water supply
12 for agricultural, municipal and industrial uses, along with the additional benefits to recreation and the
13 environment in compliance with all applicable laws and regulations” June 16, 2023 NOP, p. 3.

14 54. On May 29, 2024, DWR issued its Draft Environmental Impact Report (“DEIR”) for the
15 Project. The DEIR included a No Project Alternative, as well as Alternatives 1, 2 and 3 to the Proposed
16 Project. DEIR, Ch. 11.

17 55. On August 5, 2024, Conservation Groups timely submitted detailed comments addressing
18 shortcomings in the DEIR and related violations of CEQA, and reminding DWR of its need to comply
19 with the Delta Reform Act, CESA and the Public Trust Doctrine.

20 56. On October 28, 2024, DWR approved the Project and certified the FEIR. On October 29,
21 DWR posted its Notice of Determination confirming its approval of the Project. This Notice was
22 received by the State CEQA Clearinghouse maintained by the Governor’s Office of Planning and
23 Research on October 29, 2024 and published on October 30, 2024. In approving the Project, DWR
24 incorrectly determined that the Project would have no significant impacts.

25 57. On November 4, 2024, DFW approved issuance of its ITP for the Project, and posted its
26 Notice of Determination of its approval of the ITP with the State of California Clearinghouse. In doing
27 so, DFW also acted in its capacity as a Responsible Agency for approval of the Project subject to the
28 requirements of 14 Cal. Code Reg. (“CEQA Guidelines”) section 15096. That section provides in

1 subsection (b) that “[a] responsible agency shall respond to consultation by the lead agency in order to
2 assist the lead agency in preparing adequate environmental documents for the project” and “[b]y this
3 means, the responsible agency *will ensure that the documents it will use will comply with CEQA.*” *Id.*
4 (emphasis added).

5 **FIRST CAUSE OF ACTION**

6 **(Violation of CEQA)**

7 **(Alleged by All Petitioners Against All Respondents)**

8 58. The paragraphs set forth above and below are realleged and incorporated herein by
9 reference.

10 59. Petitioners bring this First Cause of Action pursuant to PRC sections 21168 and 21168.5, on
11 the grounds that Respondents committed a prejudicial abuse of discretion, by failing to proceed in the
12 manner required by law, in approving a deeply flawed Project based on a legally inadequate FEIR and
13 ITP.

14 In brief, Respondents’ FEIR fails to comply with CEQA because it:

- 15 (1) fails to provide an adequate description of the environmental setting by omitting operation of
16 Oroville Reservoir – the lynchpin of the State Water Project;
- 17 (2) artificially narrows the Project objectives;
- 18 (3) omits the required range of reasonable alternatives that would reduce impacts;
- 19 (4) segments its environmental analysis;
- 20 (5) fails to disclose and analyze the Project’s significant adverse environmental impacts including
21 those of the SWP that this Project would enable;
- 22 (6) omits analysis of the Project’s interrelationships with closely related water projects;
- 23 (7) fails to assess an appropriate range of mitigation measures;
- 24 (8) ignores the Project’s conflicts with the Delta Reform Act and the Sacramento-San Joaquin
25 River Delta Plan prepared thereunder, the California Endangered Species Act and the Public Trust
26 Doctrine;
- 27 (9) understates the Project’s impacts during foreseeable sea level rise and droughts; and
28 (10) assumes that future, unformulated and unexamined, “voluntary agreements” will protect

1 threatened and endangered species; and

2 (11) fails to address evidence received after circulation of the DEIR showing that the Project will
3 likely have significantly greater adverse environmental impacts than were acknowledged in the DEIR,
4 triggering CEQA’s requirement for correction and recirculation of the DEIR.

5 These deficiencies, discussed below, require vacation of the Project and its ITP approvals,
6 decertification of the FEIR, recirculation of a corrected DEIR, and potentially, substantive changes to the
7 Project and its ITP to avoid and reduce their significant environmental impacts including in particular,
8 their impacts on imperiled fish and wildlife, to remedy their violations of environmental law.

9 **I. THE FEIR FAILS TO PROVIDE AN ADEQUATE DESCRIPTION OF THE**
10 **ENVIRONMENTAL SETTING AND THE PROJECT BY OMITTING OPERATION OF**
11 **OROVILLE RESERVOIR**

12 60. CEQA requires DWR to provide a clear description of the Project under consideration. “An
13 accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient
14 EIR.” *County of Inyo*, 71 Cal.App.3d at 193; *Concerned Citizens of Costa Mesa, Inc.*, 42 Cal.3d at 938;
15 *Washoe Meadows Community*, 17 Cal.App.5th at 287. In particular, an EIR must include an adequate
16 description of the environmental setting and an accurate, stable and consistent description of the
17 proposed project. Both descriptions must contain sufficient specific information about the project to
18 allow a complete evaluation and review of its environmental impacts. CEQA Guidelines §§ 15125,
19 15124.

20 61. Contrary to this directive, the FEIR omits disclosure and analysis of the operation of
21 Oroville Reservoir, the main source of water used in the State Water Project and the facility whose
22 operation and adjustments therein are the primary means by which the Project’s impacts can be managed
23 and mitigated.

24 Instead, the FEIR states that it need not provide a detailed discussion of the operation of Oroville
25 Reservoir because: “DWR is not requesting an ITP [Incidental Take Permit] from CDFW [California
26 Department of Fish and Wildlife] for the following actions: . . . Oroville Dam and Feather River
27 operations These facilities and operations activities are or *will be* covered under separate permits or
28 addressed by other legal authorities.” FEIR, p. 2-19 (emphasis added.)

62. The FEIR’s factual premise is in error. The State Water Project’s water supply operations

1 for Oroville Dam and the Feather River are not conditioned under the existing FERC license for the
2 hydropower operations of the “Oroville Facilities,” nor under the State Water Board’s water quality
3 certification for the license. Nor are the Oroville Reservoir operations specifically covered under DFW’s
4 2020 ITP for Long-Term Operation of the CVP and the SWP. Nor do the SWP’s consumptive water
5 rights (applications 5630 and 14443) for operation of Oroville Reservoir place specific conditions on the
6 storage operation other than maximum annual diversion and season of diversion. And, according to the
7 State Water Board’s eWRIMS database, the power generation water rights for Oroville Reservoir
8 (application numbers 5629 and 14444) likewise place no restrictions on storage other than maximum
9 annual diversion and season of diversion.

10 63. The absence of any existing independent regulatory control over the operations of Oroville
11 Reservoir is echoed by the lack of any independent environmental review of those operations. Neither
12 the State Water Board, DWR, nor any other agency has ever prepared a CEQA analysis addressing the
13 SWP’s water supply operations for Oroville Dam and the Feather River. Consequently, there is no
14 analysis of baseline conditions, let alone quantification of existing operations and analysis of how they
15 have changed in the past and could reasonably be expected to change in the future. Without that
16 information, the FEIR cannot begin to disclose and assess the impacts of the Project and its ITP on the
17 water supply operations of Oroville Reservoir and, in turn, the Feather and Sacramento Rivers
18 downstream. The FEIR does not attempt to provide that essential evaluation because it does not
19 recognize that it is required by CEQA.

20 64. The FEIR’s legal premise, that it can rely on permits and accompanying environmental
21 reviews that “will be” issued and prepared in the future, is also incorrect. The FEIR cannot lawfully rely
22 upon environmental reviews anticipated to be prepared in the *future* to guide the State Water Board’s
23 *present* approval of the Project’s Long-Term Operation of the State Water Project. As the California
24 Supreme Court explained in *Vineyard Area Citizens for Reasonable Growth v. City of Rancho Cordova*
25 (*“Vineyard”*) (2007) 40 Cal.4th 412:

26 “CEQA’s demand for meaningful information “is not satisfied by simply stating information will
27 be provided in the future.” (*Santa Clarita [Organization for the Environment v. County of Los*
28 *Angeles* (2003)], 106 Cal.App.4th [715], 723) . . . Tiering does not excuse the lead agency from
adequately analyzing reasonably foreseeable significant environmental impacts of the project and

1 does not justify deferring such analysis to a later tier EIR or negative declaration. (Cal.Code
2 Regs., tit. 14, § 15152, subd. (b).)”

3 *Vineyard*, 40 Cal.4th at 431.

4 65. As here, the *Vineyard* Court was faced with the task of evaluating whether an EIR had to
5 address a water management project’s long-term impacts on freshwater flows and water quality in a river
6 that supported an imperiled run of salmonids. *Id.*, 40 Cal.4th at 447-449. The high court set aside the
7 EIR because it failed to address the impacts of the project’s proposed water use on river flows required
8 for the survival of imperiled salmonids. *Id.*

9 66. Further, the required environmental review must be searching and detailed, and explain the
10 relationship between upstream diversions to reservoir storage, management of that storage, and
11 downstream river flows, and how all three aspects of water management impact fish and wildlife. For
12 that reason, California courts have repeatedly overturned water agency approvals of water diversion,
13 storage and release programs that fail to examine all three aspects of this interrelated whole. For
14 example, in *County of Amador v. El Dorado County Water Agency* (“*County of Amador*”) (1999) 76
15 Cal.App.4th 931, the court rejected the water agency’s deficient EIR, explaining:

16 “We agree that a mere recitation of end-of-month [reservoir] lake levels does not provide an
17 adequate description of the existing environment or how PG&E determined [reservoir] water
18 releases. The hydrologist himself referred to this data as ‘a presentation of historical
19 observations, rather than an operational analysis.’

20 The month-end water level is only one element of the operation. Just as important to
21 fisheries, river habitation, and recreational users is how those lake levels were determined. When
22 were releases made and at what rate? What were the factors that determined when releases would
23 be made? Are those factors equally applicable for purposes of power generation and inelastic
24 consumptive use? . . . Reliance on lake levels alone is insufficient to describe the current release
25 program or to assess the impacts of the proposed project.

26 Nor does the FERC license describe existing conditions. Minimum stream flow
27 requirements do not describe actual water releases. An EIR must focus on impacts to the existing
28 environment, not hypothetical situations. . . . The fact that water flow must be kept at a certain
29 minimum level does not reveal what flows were actually maintained; higher flows would comport
30 with FERC requirements, but might adversely affect lake levels and/or the downstream
31 environment.

32 *County of Amador*, 76 Cal.App.4th at 955-956.

33 67. So too in *Friends of the Eel River v. Sonoma County Water Agency* (“*Friends of the Eel*
34 *River*”) (2003), 108 Cal.App.4th 859, the court overturned a water agency’s EIR for a water diversion

1 project because it failed to provide a sufficiently detailed description of the project’s environmental
2 setting, including the operation of a related FERC-licensed water diversion project (the Eel/Russian
3 River Project) that – like Oroville Reservoir in this case – provided the majority of the project’s water
4 supply, explaining:

5
6 “An EIR must contain an accurate description of the project’s environmental setting. An EIR
7 ‘must include a description of the physical environmental conditions in the vicinity of the project.
8 . . . from both a local and regional perspective. This environmental setting will normally constitute
9 the baseline physical conditions by which a lead agency determines whether an impact is
10 significant.’ (Guidelines, § 15125, subd. (a).) There is good reason for this requirement:
11 ‘Knowledge of the regional setting is critical to the assessment of environmental impacts. . . .
12 The EIR must demonstrate that the significant environmental impacts of the proposed project
13 were adequately investigated and discussed and it must permit the significant effects of the
14 project to be
15 considered in the full environmental context.’ (Guidelines, § 15125, subd. (c).) We interpret this
16 Guideline broadly in order to ‘afford the fullest possible protection to the environment.’ (*Kings
17 County Farm Bureau, supra*, 221 Cal.App.3d 692, 720.) In so doing, we ensure that the EIR’s
18 analysis of significant effects, which is generated from this description of the environmental
19 context, is as accurate as possible.”

20 *Friends of the Eel River*, 108 Cal.App.4th at 874.

21 68. *A fortiori* where, as here, the required environmental review of the operation of the Feather
22 River Project’s key reservoir that supplies most of the SWP’s water supply – Oroville Dam – has not
23 occurred in the past and is not being conducted in the State Water Board’s ongoing CEQA review,
24 Respondents cannot defer this essential analysis on the unsubstantiated grounds that it “will” occur in the
25 future. The required environmental assessment must be conducted now, as part of the current CEQA
26 review, before the Project may be approved. *Vineyard*, 40 Cal.4th at 431, 447-449; *County of Amador*,
27 76 Cal.App.4th at 955-956; *Friends of the Eel River*, 108 Cal.App.4th at 874. Much like the deficient
28 environmental reviews that failed to address the water management projects’ potential environmental
impacts on fisheries in *Vineyard*, *County of Amador* and *Friends of the Eel River*, the EIR here likewise
fails to provide information essential to informed public review. That violates CEQA. Guidelines §
15002(a).

29 **A. The FERC Relicensing of the Oroville Facilities Does Not Address Water Supply
30 Operations at Oroville Reservoir.**

31 69. The Federal Energy Regulatory Commission’s (FERC’s) relicensing of the Oroville
32 Facilities (FERC Project No. 2100) expressly *excluded* the water supply operations of Oroville Dam and
33

1 Reservoir and the Feather River downstream to the Sacramento River. The Final Environmental Impact
2 Statement for the Oroville relicensing (“Oroville FEIS”) explains this critical omission by stating:
3 “Water rights in California are regulated under the Water Board’s Division of Water Rights. The
4 Commission does not have jurisdictional authority to resolve California’s water rights issues.” FERC
5 FEIS (May 18, 2007), p. 98. The Oroville FEIS therefore concludes:

6
7 “The Proposed Action would slightly increase flows in the low flow channel; however, such
8 changes would not be expected to produce a major shift in flows downstream of the Oroville
9 Facilities. Under all the alternatives, we would expect average annual Feather River service area
deliveries under existing conditions and year 2020 conditions to remain 994,000 acre-feet, and
average annual South Delta deliveries to increase from the existing 3,051,000 acre-feet to
3,247,000 acre-feet in year 2020.”

10 FERC FEIS, p. 98. Content with this brief summary, the FERC FEIS never addressed the many variables
11 involved in managing the water supply operation of Oroville Reservoir, including draw down release
12 schedules, storage requirements by water year type and date, and the most important parameter, carryover
13 storage. FERC declined to address operation of Oroville Reservoir because the State Water Board has
14 insisted for decades that only it has “jurisdictional authority” to determine water rights to California
15 rivers and to determine how it will manage the lynch-pin of the Feather River Project, Oroville Reservoir.
16 As shown, because DWR is the lead agency for the Project – long-term operation of the State Water
17 Project – DWR has the clear CEQA duty to perform this analysis. *Vineyard*, 40 Cal.4th at 431, 447-449;
18 *County of Amador*, 76 Cal.App.4th at 955-956; *Friends of the Eel River*, 108 Cal.App.4th at 874.

19 70. Respondents’ collective failure, as the lead agency and the principal responsible agency for
20 the Project, to address how the Project requires continued operation of the Oroville Facilities, and how
21 that operation impacts river flows and dependent fish and wildlife, violates CEQA. Guidelines §
22 15126.2; *Friends of the Eel River*, 108 Cal.App.4th at 869-871 (EIR set aside because it failed to address
23 the upstream watershed impacts from river diversions to supply downstream consumptive uses); *County*
24 *of Amador*, 76 Cal.App.4th at 952-956 (EIR set aside because it failed to address adequately the effects
25 on upstream reservoirs of downstream diversion of water for consumptive uses); *Vineyard*, 40 Cal.4th at
26 448-449 (EIR set aside because it failed to address impacts on aquatic and riparian species including
27 salmon from increased pumping of groundwater tributary to river used for salmon spawning and rearing).

28 71. DWR may not claim that it already examined Oroville Reservoir’s water supply operations

1 by participating in the State Water Board’s water quality certification for the FERC relicensing. To the
2 contrary, the operations model that DWR developed for use in that relicensing did not include carryover
3 storage as a variable input. Consequently, relicensing participants were unable to model different
4 possible carryover requirements.

5 72. The Draft Environmental Impact Report (“Oroville DEIR”) prepared for the relicensing and
6 in support of the State Water Board’s water quality certification for the licensing hid disclosure of
7 Oroville’s actual water supply operation behind a veil of undisclosed operating agreements, stating:

8 “The objective of the Proposed Project is the continued operation and maintenance of the Oroville
9 Facilities for electric power generation, including implementation of any terms and conditions to
10 be considered for inclusion in a new FERC hydroelectric license.

11 As an integral part of the SWP, water stored in Lake Oroville is released from the Oroville
12 Facilities to meet a variety of statutory, contractual water supply, flood management, and
13 environmental commitments. These contractual, flood management, fishery, water quality, and
14 other environmental obligations are defined in numerous operating agreements that specify
15 timing, flow limits, storage amounts, and/or constraints on water releases. The Proposed Project
16 is consistent with these existing commitments and no changes to the contractual obligations or to
17 the general pattern of these releases are anticipated.”

18 Oroville DEIR, p. ES-2.

19 73. The subsequent Final Environmental Impact Report (“Oroville FEIR”) that was prepared in
20 support of the State Water Board’s water quality certification for the relicensing likewise did not address
21 changes in water supply operations. Instead, it stated simply:

22 “The principal actions in the SA and analyzed in the DEIR are potential physical changes to the
23 Oroville Facilities, environmental restoration actions in the lower Feather River, and recreational
24 improvements in the Project area. None of the SA actions analyzed in the DEIR would affect net
25 flow releases into the Feather River, and thus could be considered independent of OCAP.

26 Oroville FEIR (June 2008), p. 6-15. Like the DEIR, the FEIR declined to address the current and
27 foreseeable water supply operations of Oroville Reservoir, explaining that “[a]nalysis of future changes
28 to the State Water Project (SWP) statewide operations is *outside the scope* of this EIR.” *Id.*, p. 4-51
(emphasis added).

74. The National Marine Fisheries Service’s 2016 Biological Opinion for the relicensing of the
Oroville Facilities (“Oroville Relicensing BiOp”) likewise confirms that NMFS and its BiOp did not
address the reservoir’s water supply operation:

1 “The proposed action analyzed in this Opinion is FERC’s proposed relicensing of the Oroville
2 Facilities (FERC Project No. 2100-134). The Oroville Facilities were developed as part of the
3 SWP, a water storage and delivery system of reservoirs, aqueducts, power plants and pumping
4 plants. The SWP stores and distributes water to supplement the needs of urban and agricultural
5 water users in Northern California, the San Francisco Bay Area, the San Joaquin Valley, Central
6 Coast, and Southern California. As part of the SWP, the Oroville Facilities are also operated for
7 flood management, power generation, water quality improvement in the Delta, recreation, and
8 fish and wildlife enhancement. The FERC relicensing only applies to the facilities and operations
9 authorized under the Federal Power Act. *The operations and features that are only for the
10 delivery of water are not part of the FERC relicensing, and therefore are not part of the proposed
11 action analyzed in the Opinion.*”

12 NMFS, Oroville Relicensing BiOp, p. 5 (emphasis added).

13 75. In sum, no agency – state or federal – has conducted a detailed CEQA or NEPA
14 environmental review of the water supply operations of the Oroville Facilities as part of any FERC
15 licensing or relicensing process. Respondents’ omission from their FEIR of the required detailed review
16 based on their erroneous premise that this review already exists or will be done in the future fails to
17 provide an adequate description of the Project and how its operation may impact the environment, in
18 violation of CEQA. Guidelines §§ 15124(b), (c); 15126.2 (a); *Vineyard*, 40 Cal.4th at 431, 447-449;
19 *County of Amador*, 76 Cal.App.4th at 955-956; *Friends of the Eel River*, 108 Cal.App.4th at 874.

20 **B. The State Water Board Has Placed No Condition on Operations of Oroville Reservoir
21 Other Than Maximum Annual Diversion to Storage and Season of Diversion.**

22 76. The State Water Board’s water quality certification for the relicensing of the Oroville
23 Facilities likewise did not address the water supply and storage operations of Oroville Reservoir. It
24 placed no conditions on the storage operations of Oroville Reservoir. To the contrary, the certification
25 simply acknowledges the “normal operation” of the Project, stating:

26 “Normal operation is the operation of the State Water Project (SWP) based on standard factors
27 such as hydrology, storage, routine maintenance and SWP obligations. Changes in operation that
28 are the result of unusual events such as flood control releases, accidents, project failures, and
major or unusual maintenance are not considered normal operation.”

State Water Board, Final Water Quality Certification for the Relicensing of the Oroville Facilities, p. 10.

77. The water rights that give DWR the right to store water for water supply operation at
Oroville Reservoir (Applications 5630 and 14443) contain no restrictions on storage operations other
than maximum annual diversion to storage and season of diversion. Of particular relevance, they
include no explicit carryover storage requirements. Consequently, the corresponding water rights for
power generation at Oroville Reservoir place no condition on carryover storage (Applications 5629 and

1 14444).

2 78. Accordingly, the FEIR’s implication that the past, current (or baseline) and foreseeable
3 future water supply operations of the Oroville Facilities have been analyzed in a CEQA or NEPA
4 document is incorrect. As shown, the FEIR’s failure to provide this essential information as part of the
5 environmental baseline and the project description violates CEQA. CEQA Guidelines sections 15124(b),
6 (c); 15125; 15126.2(a); *Vineyard*, 40 Cal.4th at 431, 447-449; *County of Amador*, 76 Cal.App.4th at 955-
7 956; *Friends of the Eel River*, 108 Cal.App.4th at 874. Because the FEIR’s error prevents informed
8 public review, the FEIR must be decertified, the Project approvals vacated, and this matter remanded.
9 Guidelines § 15002(a); *Save Our Capitol!*, 87 Cal.App.5th at 703-705.

10 **II. THE FEIR ARTIFICIALLY NARROWS PROJECT OBJECTIVES**

11 79. CEQA requires that the EIR include “[a] statement of the objectives sought by the proposed
12 project. . . . The statement of objectives should include the underlying purpose of the project and may
13 discuss the project benefits.” Guidelines § 15124(b). “[A] lead agency may not give a project’s purpose
14 an artificially narrow definition.” *North Coast Rivers Alliance*, 243 Cal.App.4th at 668, quoting *In re*
15 *Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (“*In re Bay-Delta*”)
16 (2008) 43 Cal.4th 1143, 1166. Doing so unduly narrows the project’s range of reasonable alternatives,
17 thwarting CEQA’s purpose to force agencies to consider better approaches to accomplishing project
18 objectives that will achieve most of the basic objectives with less environmental harm. *NCRA*, 243
19 Cal.App.4th at 666-669. As the *NCRA* Court explained, “[t]he Guidelines provide: “An EIR shall
20 describe a range of reasonable alternatives to the project . . . which would feasibly attain *most of the*
21 *basic* objectives of the project but would avoid or substantially lessen any of the significant effects of the
22 project, and evaluate the comparative merits of the alternatives.” *Id.*, 243 Cal.App.4th at 666 (quoting
23 Guidelines section 15126.6(a), emphasis in original).

24 80. Contrary to this CEQA rule, the FEIR adopts an artificially narrow definition of the Project’s
25 water delivery objectives that restricts the Project to “store, divert, and convey water in accordance with
26 DWR’s existing water rights to deliver water pursuant to water contracts and agreements up to full
27 contract quantities” FEIR, p. 2-2. But the FEIR’s stated objective of delivering up to the “full
28 contract quantities” is illusory because the State Water Project is substantially over-contracted and

1 cannot deliver such a high volume of water in the vast majority of years.

2 81. As originally envisioned, the State Water Project would have included additional dams and
3 diversions that would have destroyed the free-flowing rivers of California’s North Coast and removed
4 additional essential spawning and rearing habitat for salmon and steelhead – on top of the habitat
5 removed upstream from the Sacramento-San Joaquin River Delta by the State Water Project and Central
6 Valley Project. The unbuilt portion of the State Water Project was expected to provide between five and
7 10 million acre feet of water each year to the SWP system. Thus, the annual “Table A amount” – “the
8 maximum annual amount of water that may be requested to be delivered” in DWR’s existing SWP
9 contracts – contemplates delivery of much more water than can be delivered in all but the wettest of
10 water years.

11 82. Because of this profound disconnect between the water contractors’ so-called “paper water”
12 under their contracts and the quantities that can realistically be delivered, the courts have required DWR
13 to disclose this imbalance in its environmental impact reports on the State Water Project. For example,
14 in *Planning and Conservation League v. Department of Water Resources* (“PCL”) (2000) 83 Cal.App.4th
15 892, the court stated:

16 “The original long-term contracts between DWR and the water contractors were predicated
17 on the state’s contractual obligation to build out the SWP so as to deliver 4.23 maf [million acre
18 feet] of water to the contractors annually. Each of the contractors is allocated a percentage of the
19 4.23 maf in table A of the long-term contracts. The allocation is referred to as an entitlement.
20 Therefore, cumulatively, the contractors are “entitled” to 4.23 maf of water annually. *The SWP,*
21 *however, has never been completed and the state cannot deliver 4.23 maf of water annually.* The
entitlements represent nothing more than hopes, expectations, water futures or, as the parties refer
to them, “paper water.” Actual, reliable water supply from the SWP is more in the vicinity of 2 to
2.5 maf of water annually. *Consequently, there is a huge gap between what is promised and what
can be delivered.”*

22 *Id.*, 83 Cal.App.4th at 908, fn. 5 (emphasis added).

23 83. Contrary to this controlling authority, the FEIR never informs the public that the Project
24 cannot reasonably be expected to deliver anything near “full contract quantities.” Nor does it explore
25 alternatives that reflect that indisputable reality. Instead, the FEIR predicates its entire examination of
26 the Project – and restricts its correspondingly narrow range of alternatives – based on the false premise
27 that the State Water Project can and should be managed to deliver “up to full contract quantities.” The
28 FEIR states:

1 “The underlying purpose of the proposed project is to obtain incidental take authorization from
2 the California Department of Fish and Wildlife (CDFW) pursuant to CESA [the California
3 Endangered Species Act] for five fish species to allow DWR to continue long-term operation of
4 the SWP consistent with applicable laws, contractual obligations, and agreements. Consistent
5 with this underlying purpose, DWR’s project objectives are to store, divert, and convey water *in
accordance with DWR’s existing water rights to deliver water pursuant to water contracts and
agreements up to full contract quantities* and to optimize water supply and improve operational
flexibility while protecting fish and wildlife based on the best available scientific information.”

6 FEIR, p. 2-2 (emphasis added).

7 84. Because the FEIR included delivery of “ up to full contract quantities” within its definition
8 of the Project’s objectives despite the fact that there is a “huge gap” between those largely illusory
9 quantities and what can actually be delivered, it adopted an artificially narrow definition of those
10 objectives. *PCL*, 83 Cal.App.4th at 908, fn. 5. The FEIR should have disclosed this water delivery gap,
11 and acknowledged that decades of excessive diversions from the Delta have pushed its fish and wildlife
12 into a downward spiral of ecological collapse leading to species extinction. That essential information
13 was never presented to the public, preventing it from making an informed choice about whether the
14 Project’s objective should be “business as usual” or instead, a more enlightened approach that would
15 explore reduced levels of diversion consistent with the Legislature’s acknowledgment that “[t]he
16 Sacramento-San Joaquin Delta watershed and California’s water infrastructure are in crisis and *existing
Delta policies are not sustainable.*” Water Code § 85001(a), emphasis added.

18 85. Because the FEIR ignored the “huge” disconnect between continuing to squeeze as much
19 water as possible from the Delta “up to full contract quantities,” and the Legislature’s finding that this
20 “existing Delta polic[y] [is] not sustainable,” it gave this “[P]roject’s purpose an artificially narrow
21 definition.” *NCRA*, 243 Cal.App.4th at 668. This error, in turn, led DWR to fail to provide the public
22 with the range of reasonable alternatives required by CEQA, as discussed next.

23 86. Because the FEIR’s error in presenting an unduly narrow Project objective prevents
24 informed public review, the FEIR must be decertified, the Project approvals vacated, and this matter
25 remanded. Guidelines § 15002(a); *Save Our Capitol!*, 87 Cal.App.5th at 703-705.

26 **III. THE FEIR OMITTS THE REQUIRED RANGE OF REASONABLE ALTERNATIVES**
27 **THAT WOULD REDUCE IMPACTS.**

28 87. CEQA mandates that agencies consider “a range of reasonable alternatives to the project . . .

1 which would feasibly attain most of the basic objectives of the project but would avoid or substantially
2 lessen any of the significant effects of the project.” Guidelines § 15126.6(a). An EIR must focus on
3 alternatives that would lessen significant effects, even if they “would impede to some degree the
4 attainment of the project objectives, or be more costly.” Guidelines § 15126.6(b).

5 88. CEQA requires an EIR to “include sufficient information about each alternative to allow
6 meaningful evaluation, analysis, and comparison with the proposed project.” Guidelines § 15126.6(d).
7 Agencies must prevent “significant, avoidable damage to the environment” through the use of feasible
8 alternatives or mitigation measures. Guidelines § 15002(a)(3); PRC §§ 21002, 21002.1, 21081. Project
9 approval should be withheld where such measures or alternatives exist, but are, as here, ignored.
10 Guidelines § 15021(a)(2).

11 89. These CEQA directives are vigorously enforced because the

12 “The core of an EIR is the mitigation and alternatives sections. The Legislature has declared
13 it the policy of the State to ‘consider alternatives to proposed actions affecting the environment.’
14 [Citations.] . . . [¶] In determining the nature and scope of alternatives to be examined in an EIR,
15 the Legislature has decreed that local agencies shall be guided by the doctrine of ‘feasibility.’ ‘[I]t
16 is the policy of the state that public agencies should not approve projects as proposed if there are
17 *feasible alternatives or feasible mitigation measures* available which would substantially lessen
18 the significant environmental effects of such projects. . . .”

19 *Habitat and Watershed Caretakers v. City of Santa Cruz (“HAWC”)* (2013) 213 Cal.App.4th 1277, 1302
20 (quoting *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564-565 (emphasis in
21 original)). Applying this long-standing principle of CEQA jurisprudence, the *HAWC* Court set aside a
22 city’s extension of water service to enable a massive expansion of the U.C. Santa Cruz campus despite
23 the impact on the city’s scarce water supplies. The court overturned this project approval because the
24 city had failed to analyze an alternative that would reduce the project’s water consumption, stating:

25 “A potentially feasible alternative that might avoid a significant impact must be *discussed and*
26 *analyzed* in an EIR so as to provide information to the decisionmakers about the alternative's
27 potential for reducing environmental impacts. Without analysis, the theory posited by the City and
28 the Regents is purely speculative and is not supported by any facts discussed in the draft EIR or
the final EIR. *Since, as Habitat points out, the draft EIR and the final EIR neither discussed nor*
analyzed a limited-water alternative, the decision makers were not provided with any information
about the effect that such an alternative might have on water supply impacts or other impacts.
CEQA does not permit a lead agency to omit any discussion, analysis, or even mention of any
alternatives that feasibly might reduce the environmental impact of a project on the unanalyzed
theory that such an alternative might not prove to be environmentally superior to the project. The
purpose of an EIR is to provide the facts and analysis that would support such a conclusion so that
the decision maker can evaluate whether it is correct. By failing to mention, discuss, or analyze
any feasible alternatives, the draft EIR and the final EIR failed to satisfy the informational

1 purpose of CEQA, which included providing LAFCO with relevant information.

2 *HAWC*, 213 Cal.App.4th at 1304-1305 (emphasis added).

3 90. So too here, the FEIR fails to present a range of reasonable alternatives that includes an
4 alternative that analyzes reduction in the Project's reliance on the continued excessive exports that have
5 caused the Delta's ecological collapse. Instead, it presents three minor variations of the same Project.
6 Alternative 1 "modifies the Spring Delta Outflow component of the Proposed Project by limiting flows
7 deployed from the Voluntary Agreement program (implemented through tributary inflow from the
8 fallowing program) to the month of May rather than March, April or May under the Proposed Project).
9 *All other components of the Proposed Project are included in Alternative 1.*" FEIR § 11.4, p. 11-8
10 (emphasis added).

11 91. Alternative 2 "modifies the Spring Delta Outflow component of the Proposed Project by
12 limiting the portion of the Voluntary Agreement program that allows flow purchases acquired through
13 SWP diversion fees (implemented through tributary inflow from the fallowing program) to May (rather
14 than March, April, or May under the Proposed Project). [¶] Additionally, DWR will seek a new Section
15 10 Rivers and Harbors Act permit from the U.S. Army Corps of Engineers to expand to December 1
16 through March 31 [rather than December 15 to March 15] the period when diversions into CCF [Clifton
17 Court Forebay] may be increased by one-third of the San Joaquin River flow at Vernalis to December 1
18 through March 31 [sic] when those flows exceed 1,000 cfs [cubic feet per second]. . . . *All other*
19 *components of the Proposed Project are included in Alternative 1.*" FEIR § 11.5, pp. 11-66 to 11-67
20 (emphasis added).

21 92. Alternative 3 "is a variation of the Proposed Project that modifies seasonal operations . . .
22 and keeps the period during which increased diversions from the CCF can occur the same as Baseline
23 Conditions. This keeps operations to a U.S. Army Corps of Engineers notice that allows for CCF
24 diversions to increase above 6,680 cfs from mid-December to mid-March (assumed December 15 to
25 March 15). During this window the CCF diversions can increase by one-third of the San Joaquin River
26 flow at Vernalis. *All other components of the Proposed Project are included in Alternative 3. . . .*" FEIR
27 § 11.6, p. 11-91 (emphasis added).
28

1 93. None of the alternatives proposes a reduction in the level of diversions by the State Water
2 Project, let alone the substantial reduction that would be necessary to begin to repair the severe harm to
3 the Delta ecosystem caused by the State Water Project’s excessive level of diversions over the past five
4 decades. As the State Water Board reported in its seminal analysis – mandated by Water Code section
5 85086, subdivision (c)(1) – confirming the need to restore natural flows in the Delta to prevent the
6 extirpation of its fish and wildlife:

7 “[r]ecent Delta flows are *insufficient to support native Delta fishes* for today’s habitats.”
8 State Water Board, “Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem,”
9 August 3, 2010, p. 5 (emphasis added).

10 94. In light of the State Water Board’s authoritative finding that the State Water Project’s
11 existing levels of diversion deprive the Delta of flows required “to support native Delta fishes,” it is
12 imperative that DWR consider an alternative that would restore flows that would rectify this deficiency.
13 Instead, the FEIR continues business as usual. DWR has failed to heed CEQA’s command that the EIR
14 must

15 “describe a range of reasonable alternatives to the project . . . which would feasibly attain most of
16 the basic objectives of the project *but would avoid or substantially lessen any of the significant*
17 *effects* of the project, and evaluate the comparative merits of the alternatives.”

18 Guidelines § 15126.6(a) (emphasis added). The reasonableness of this request for consideration of an
19 alternative that reduces diversions is shown by the Legislature’s specific command that agencies
20 including DWR do *exactly that*. In adopting the Delta Reform Act in 2009, the Legislature declared that
21 the Delta was “in crisis” and commanded all state agencies that manage the Delta to

22 “*reduce reliance on the Delta* in meeting California’s future water supply needs.”

23 Water Code § 85021. This statutory command means that water management agencies that divert from
24 the Delta must reduce the unsustainable level of diversions that has caused severe harm to the Delta’s
25 ecosystem. Preservation of the four Delta fish species listed under the California Endangered Species
26 Act – Spring-run and Winter-run Chinook Salmon, Longfin Smelt, and Delta Smelt – whose survival
27 hangs in the balance demands no less. “Meaningful analysis of alternatives in an EIR requires an
28 analysis of meaningful alternatives.” *Save Our Capitol!*, 87 Cal.App.5th at 703-705. “CEQA . . .

1 requires the public agency to consider feasible alternatives to the project that would lessen *any*
2 significant adverse environmental impact. ([PRC] §§ 21002, 21081)” *Mountain Lion Foundation*
3 *v. Fish and Game Commission* (1997) 16 Cal.4th 105, 123 (*emphasis added*).

4 95. But contrary to these statutory commands and settled case law requiring DWR to “discuss
5 and analyze” the alternative of reducing the level of diversions, DWR has done the opposite. *HAWC*,
6 213 Cal.App.4th at 1304-1305. As shown, none of the three alternatives are sufficiently different from
7 the Project to provide a reasonable range of alternatives under CEQA. Most importantly, none considers
8 *reducing water deliveries* to avoid or mitigate the adverse environmental impacts of the Project, as
9 CEQA intends. PRC § 21002; Guidelines §§ 15002(a)(3), 15126.6.

10 96. DWR’s decision to exclude from its analysis any alternative that substantially reduced
11 exports contravenes the Legislature’s express mandate that agencies *reduce reliance* upon the Delta.
12 Water Code § 85021. None of the FEIR’s alternatives would achieve any of the habitat restoration goals
13 of the Delta Reform Act, including “[r]estore large areas of interconnected habitats within the Delta”
14 (Water Code §85302(e)(1)), “[e]stablish migratory corridors for fish, birds, and other animals along
15 selected Delta river channels” (*id.*, (e)(2)), “[p]romote self-sustaining, diverse populations of native and
16 valued species by reducing the risk of take and harm from invasive species” (*id.*, (e)(3)), “[r]estore Delta
17 flows and channels to support a healthy estuary and other ecosystems” (*id.*, (e)(4)), “[i]mprove water
18 quality to meet . . . ecosystem long-term goals” (*id.*, (e)(5)), and “[r]estore habitat necessary to avoid a
19 net loss of migratory bird habitat and, where feasible, increase migratory bird habitat to promote viable
20 populations of migratory birds” (*id.*, (e)(6)).

21 97. Because the FEIR failed to analyze any alternatives that would effectively reduce diversions
22 from the Delta (Water Code § 85021) and thereby achieve the habitat restoration goals of the Delta
23 Reform Act (Water Code § 85302(e)), it failed to analyze a reasonable range of alternatives as CEQA
24 requires. *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 17
25 Cal.App.5th 413, 436 (agency’s failure to study alternative that reduces vehicle miles traveled in
26 transportation plan constituted prejudicial abuse of discretion in light of policy goals to reduce vehicle
27 usage); *HAWC*, 213 Cal.App.4th at 1305 (agency’s failure to analyze any alternative that would reduce a
28 project’s water supply impacts violated CEQA).

1 98. Because this CEQA error prevents informed public review, the FEIR must be decertified, the
2 Project approvals vacated, and this matter remanded. Guidelines § 15002(a); *Save Our Capitol!*, 87
3 Cal.App.5th at 703-705.

4 IV. THE FEIR SEGMENTS ITS ENVIRONMENTAL ANALYSIS

5 It is likewise hornbook law that CEQA's commands may not be evaded by segmenting analysis of
6 the project under review and ignoring its cumulative effects. For fifty years courts have agreed that

7 "It is abundantly clear from [CEQA] (e.g., §§ 21083, subd. (b), 21090, 21100, subd. (g)) and the
8 guidelines (e.g., §§ 15069, 15070, 15143, subd. (g)) that careful consideration must be given to
9 the cumulative effect of projects proposed to be undertaken. The courts are enjoined to construe
10 the statute liberally in light of its beneficent purposes. (*Friends of Mammoth v. Board of*
11 *Supervisors* [1972] 8 Cal.3d 247, 259.) The highest priority must be given to environmental
12 considerations in interpreting the statute (*County of Inyo v. Yorty* [1973] 32 Cal.App.3d 795, 804).
13 *Its requirements cannot be avoided by chopping up proposed projects into bite-size pieces which,*
14 *individually considered, might be found to have no significant effect on the environment or to be*
15 *only ministerial.*

16 *Plan for Arcadia, Inc. v. City Council* (1974) 42 Cal.App.3d 712, 726 (emphasis added).

17 99. Contrary to this core CEQA duty, the FEIR includes only the following waters and facilities
18 within the declared "geographic scope of the analysis:"

- 19 • Sacramento River from its confluence with the Feather River to the Delta
- 20 • SWP facilities in the Delta
- 21 • Waters of the Delta
- 22 • SWP facilities in Suisun Marsh and Suisun Bay
- 23 • Suisun Marsh and Suisun Bay"

24 FEIR § 3.1, p. 3-1.

25 100. What the FEIR fails to inform its readers is that by siloing the Project's "geographic scope of
26 analysis" into such an artificially constrained area, the FEIR necessarily excludes from consideration vast
27 portions of the affected watershed, including, among other areas excluded:

28 (1) management of the Trinity River system – despite the fact that much of the water that enters
the Delta each spring and summer via the Sacramento River originates in (and whose diversion
severely dewater) that highly degraded river and its imperiled salmonids;

(2) management of the Sacramento River system upstream of its confluence with the Feather
River, despite the fact that this system includes the highly productive tributaries that supply the

1 State’s largest reservoir, Shasta Dam – the Upper Sacramento, McCloud and Pit Rivers – and
2 other vitally important tributaries that supply critical habitat for winter and spring run salmon or
3 are proposed to be dammed by massive reservoirs such as Sites Reservoir whose development
4 would foreseeably alter how the SWP is operated;

5 (3) management of the Feather River upstream of its confluence with the Sacramento River,
6 including the “Feather River Facilities” – i.e., “Oroville Reservoir and related facilities” – that the
7 FEIR admits are “the principal facilities of the SWP,” despite the fact that their operation
8 determines how much water the entire SWP receives and when (FEIR § 2.1, p. 2-1);

9 (4) management of the Delta’s central and southern tributaries draining the Sierra Nevada
10 mountains including the Yuba River, American River, Cosumnes River, Mokelumne River, San
11 Joaquin River (and its tributaries including the Stanislaus, Tuolumne, Merced and Upper San
12 Joaquin River) upstream of their confluence with the Delta, despite the fact that their
13 management is the subject of a recently approved water planning and CEQA process whose
14 implications for management of the SWP are likewise profound.

15 But as the courts in the *County of Amador* and *Friends of the Eel River* have made clear, an EIR for a
16 water management project must include the entire watershed upstream of the project to assure that both
17 upstream and downstream management options and their respective and cumulative effects are
18 considered together. *County of Amador*, 76 Cal.App.4th at 955-956; *Friends of the Eel River*, 108
19 Cal.App.4th at 874. And as *Vineyard* similarly holds, the EIR on a project that removes water needed by
20 imperiled salmon must fully address that impact. *Vineyard*, 40 Cal.4th at 447-449.

21 101. Moreover, inclusion of the entire affected watershed as CEQA requires, in turn, that ongoing
22 and foreseeable future water management projects within the entire watershed must likewise be
23 addressed in the EIR’s comprehensive and integrated analysis.

24 102. But instead, the FEIR turns a blind eye to the vast majority of the Delta’s watershed that is
25 located outside the narrow boundaries of DWR’s artificial silo. This is not a trivial mistake, and must be
26 rectified. Because this CEQA error prevents informed public review, the FEIR must be decertified, the
27 Project approvals vacated, and this matter remanded. Guidelines § 15002(a); *Save Our Capitol!*, 87
28 Cal.App.5th at 703-705.

1 **V. THE FEIR FAILS TO DISCLOSE AND ANALYZE THE PROJECT’S SIGNIFICANT**
2 **ADVERSE ENVIRONMENTAL IMPACTS INCLUDING THOSE OF THE STATE**
3 **WATER PROJECT THAT THE PROJECT WOULD ENABLE**

4 103. CEQA’s core function is to compel agencies, through preparation of the EIR, “to identify the
5 significant effects on the environment of a project, to identify alternatives to the project, and to indicate
6 the manner in which those significant effects can be mitigated or avoided.” PRC § 21002.1, subd. (a).
7 The Legislature reiterated this overarching principle in its definition of the EIR, which states that its
8 purpose is to provide agencies and the public with information about a proposed project’s potential
9 environmental effects, ways to minimize those effects, and potential alternatives to the project. PRC §
10 21061. The EIR must “include a detailed statement” describing, *inter alia*, all of the proposed project’s
11 significant effects on the environment, alternatives to the project, and potential mitigation measures.
12 PRC § 21100, subd. (b).

13 104. The FEIR falls far short of these mandates because it fails its most fundamental task: to
14 disclose the impacts of the Project. First, DWR improperly limited “the geographic scope for evaluation
15 of direct and indirect impacts of the Long-Term Operations of the State Water Project (SWP) facilities”
16 to the “Sacramento River from the confluence with the Feather River to the Delta[,] SWP facilities in the
17 Delta[,] Waters of the Delta[,] SWP facilities in Suisun Marsh and Suisun Bay[, and] Suisun Marsh and
18 Suisun Bay.” FEIR § 3.1, p. 3-1. DWR included only the areas downstream of the confluence of the
19 Feather and Sacramento rivers to Suisun Marsh, even though the imperiled fishes most impacted by the
20 Project migrate from the upper headwaters of the Delta’s tributaries – including the San Joaquin River
21 and its tributaries – to the Pacific Ocean. Equally improper, it excluded the related CVP facilities from
22 the scope of its analysis, as well as DWR facilities upstream of the Delta. *Id.* Thus, despite the
23 interrelated nature of the SWP and CVP operations, and the manner in which each water project alters
24 the conditions for the other, the FEIR’s “Geographic Scope of Analysis” excludes watersheds and their
25 fish and wildlife, and other water facilities including those of the CVP, that will face changed
26 environmental and operating conditions due to DWR’s Project operation.

27 105. In so doing, DWR avoided disclosing potentially significant impacts that would occur due to
28 the Project’s implementation, including impacts surrounding the operation of Oroville Reservoir and the
Trinity River System, and all CVP water sources that would be primarily under the control of

1 Reclamation including the Trinity, Sacramento and American rivers. This failure led DWR to omit
2 discussions of the impacts to fisheries resources upstream of the confluence of the Feather and
3 Sacramento Rivers, including in the Trinity River, even when the Project may impact flow and
4 temperature in these waterways. This violates CEQA. *Friends of the Eel River*, 108 Cal.App.4th at 870-
5 872 (impacts on interconnected waterways must be examined in EIR).

6 106. DWR's FEIR disclaims any need to study impacts caused by its Project upstream of the
7 confluence of the Sacramento and Feather Rivers because, it argues, DWR has limited ability to take
8 action to mitigate those effects. But this does not excuse DWR's failure to disclose these impacts.
9 CEQA required DWR to do so. Were DWR to have determined that appropriate mitigation measures
10 exist but are outside its jurisdiction to mandate, it was required to make findings that indicate that "those
11 changes or alterations are within the responsibility and jurisdiction of another public agency and have
12 been, or can and should be, adopted by that other agency." PRC § 21081, subd. (a)(2). DWR was not
13 authorized to ignore potentially feasible mitigation measures for significant impacts simply because other
14 agencies may be required to implement them. *HAWC*, 213 Cal.App.4th at 1304-1305 (reversed city's
15 approval of project in part because its EIR failed to provide information needed by a responsible agency,
16 LAFCO); *City of San Diego v. Board of Trustees of California State University* (2015) 61 Cal.4th 945,
17 957.

18 107. DWR's failure to address the impacts of Project approval on river flows and dependent fish
19 and wildlife upstream of the confluence of the Feather and Sacramento rivers, and indeed, in all other
20 watersheds upstream of the Delta, violates CEQA for several reasons. First, the quantity and quality of
21 freshwater flows in the Delta directly impact the timing of fish migrations up and down the watersheds
22 that feed into the Delta. That dependence, in turn, impacts the need for corresponding increases in the
23 release of cold water flows from upstream reservoirs into the tributaries into which those fish seasonally
24 migrate for spawning, and thus affects how those tributaries are (or should be) managed. This fact is
25 particularly true for the anadromous species such as salmon, steelhead and sturgeon, many of which are
26 already listed under either CESA, ESA or both as noted above. Similarly, the timing, rate and volume of
27 water storage and releases in one part of the Delta's watershed affect both the availability of and need for
28 water storage and releases elsewhere in the watershed to maintain flow-dependent water quality

1 standards (such as for salinity, which is directly related to the timing, rate and volume of freshwater
2 inflow from the tributaries) in the Delta including those mandated by D-1641, which the FEIR admits the
3 Project must satisfy. FEIR §§ 2.2.2, p. 2-16; 10.1.5.1, p. 10-22.

4 108. All such interrelated direct, indirect and cumulative project effects, throughout the Project's
5 "affected area" encompassing virtually the Delta's entire watershed, must be examined. Guidelines §§
6 15126.2(a), 15358 (requiring that both "direct" and "indirect" impacts in the "affected area" be
7 examined); 15130, 15355 (requiring that "cumulative" impacts likewise be addressed); *Friends of the*
8 *Eel River*, 108 Cal.App.4th at 869-871 (EIR set aside because it failed to address the upstream watershed
9 impacts from river diversions to supply downstream consumptive uses); *County of Amador*, 76
10 Cal.App.4th at 952-956 (EIR set aside because it failed to address adequately the effects on operation of
11 upstream reservoirs of downstream diversion of water for consumptive uses); *Vineyard*, 40 Cal4th at
12 448-449 (EIR set aside because it failed to address impacts on aquatic and riparian species including
13 salmon from increased pumping of groundwater tributary to river used for salmon spawning and rearing).

14 109. DWR also improperly concludes *without analysis* that "the incremental contribution of the
15 Proposed Project to the cumulative impact on delta salinity would not be cumulatively considerable."
16 FEIR §10.1.5.1, p. 10-23. But as explained, DWR has failed to analyze, let alone assess based on that
17 absent analysis, the adverse impacts of the Project, and as well the State Water Project it enables, on
18 Delta flows and water quality, and on the fish and wildlife that depend on them.

19 110. Even if the State Water Project were considered a separate project – which it plainly is not –
20 DWR would nonetheless have to address its past, current, and foreseeable future effects on the
21 environment as part of the required examination of indirect and cumulative effects. As noted, CEQA
22 requires examination of a project's indirect and cumulative effects on the environment. Guidelines §§
23 15126(a). 15130, 15355(b), 15358. "Environmental impacts of probable future projects must be
24 analyzed because 'consideration of the effects of a project or projects as if no others existed would
25 encourage the piecemeal approval of several projects that, taken together, could overwhelm the natural
26 environment and disastrously overburden the man-made infrastructure and vital community services.
27 This would effectively defeat CEQA's mandate to review the actual effect of the projects upon the
28 environment.'" *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467, 527

1 (*quoting Las Virgenes Homeowners Fed'n v. County of Los Angeles* (1986) 177 Cal.App.3d 300, 306).

2 111. As alleged above, DWR has improperly piecemealed and segmented its consideration of the
3 Project, when it should instead have considered the Project in conjunction with the impacts of the State
4 Water Project which it enables and facilitates. Had DWR also examined the impacts of the State Water
5 Project and the Central Valley Project (which is operated in conjunction with the State Water Project) as
6 CEQA requires, it would have had to disclose that, in conjunction with the Project, they collectively pose
7 many significant impacts on the environment including in particular the Delta's imperiled fisheries.

8 112. Most fundamentally, the FEIR ignores the fact that the State Water Project's past and
9 current operation – which the Project proposes to continue but with even greater rates of diversion – have
10 for decades caused and are causing massive degradation of the Delta's water quality through reduced
11 flows, increased temperatures, diminished dissolved oxygen, elevated turbidity, reduced riverine and
12 wetland habitat, and increased pollutants including toxics such as selenium. This fact is well
13 documented by many authoritative studies including the State Water Board's definitive analysis,
14 "Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem," published in 2010 as
15 noted above, the Biological Opinions prepared by the National Marine Fisheries Service and the U.S.
16 Fish and Wildlife Service in 2009, and the decisions of these agencies in the 1990s and 2000s to list the
17 Delta's previously abundant salmonid and pelagic fisheries as threatened or endangered under the federal
18 Endangered Species Act.

19 113. The growing factual record establishing the Project's direct and irrefutable contribution to
20 the ongoing ecological collapse of the Delta was further confirmed and updated in several authoritative
21 analyses released by expert state and federal fisheries agencies since DWR issued its Notice of
22 Preparation of the DEIR on June 16, 2023, including a very significant publication by the U.S. Fish and
23 Wildlife Service on July 30, 2024, when it listed the Longfin smelt as an endangered species under the
24 federal Endangered Species Act, two months after the DEIR was released on May 29, 2024. As shown in
25 section XI of the First Cause of Action below, these authoritative reports refute the false premise
26 underlying Respondents' approvals that the Project has no significant impacts on the Delta's ecological
27 health and in particular, on its imperiled fish and wildlife species. They also underscore the need for
28 Respondents to decertify their FEIR and recirculate a new DEIR that acknowledges and addresses this

1 now indisputable causal relationship.

2 114. The Delta’s ecological collapse is a well-recognized ongoing crisis. An unsustainable
3 portion of the Delta’s freshwater flows has been diverted for decades by the State Water Project and the
4 federal Central Valley Project. Agricultural diverters have discharged subsurface drainage and surface
5 run-off contaminated with salt, selenium, and other toxic substances into groundwater and the rivers that
6 are tributary to the Delta. This one-two punch of diminished freshwater flows and increased
7 temperature, salinity, herbicides, pesticides, and heavy metals has pushed the Delta ecosystem into a
8 downward spiral of shrinking and degrading habitat and declining and disappearing fish and wildlife
9 populations.

10 115. Many species of fish endemic to the Delta have been extirpated, including the Sacramento
11 perch, formerly one of the most abundant fishes of the Delta, which disappeared in the 1970s. Those
12 indigenous species that remain are in grave danger. Since the SWP and CVP began operation, the
13 Sacramento River winter and spring run Chinook salmon, Central Valley steelhead, North American
14 green sturgeon, and Delta smelt have been driven perilously close to extirpation, as documented in the
15 Federal Register notices explaining why each of these species have been placed on the federal
16 Endangered Species Act lists. Winter run Chinook salmon were declared threatened under the federal
17 Endangered Species Act (“ESA”), 16 U.S.C. section 1531, et seq., in 1990 (55 Fed.Reg. 46515), and then
18 due to continuing population declines, declared endangered in 2005 (70 Fed.Reg. 37160). Their critical
19 habitat in the Sacramento River and its tributaries was designated in 1993. 58 Fed.Reg. 33212. Spring
20 run Chinook salmon were declared threatened, and their critical habitat designated under the ESA, in
21 2005. 70 Fed.Reg. 37160, 52488. Central Valley steelhead were declared threatened in 1998 and their
22 critical habitat was designated in 2005 (70 Fed.Reg. 52488). The Southern distinct population segment
23 (“DPS”) of North American green sturgeon was declared threatened in 2006 (71 Fed.Reg. 17757) and its
24 critical habitat was designated in 2009 (74 Fed.Reg. 52299). Delta smelt were declared endangered in
25 1993 (58 Fed.Reg. 12854) and their critical habitat was designated in 1994 (59 Fed.Reg. 65256).

26 116. Apart from these federally-listed species (which include several species also listed under
27 CESA), two other Delta fish species have received protection under CESA. The Longfin smelt
28 (*Spirinchus thaleichthys*) is listed as an endangered species under CESA, and the White sturgeon

1 (*Acipenser transmontanus*) received protection as a candidate species under CESA in 2024. The Longfin
2 smelt also received protection as an endangered species under the federal Endangered Species Act on
3 July 30, 2024. (89 Fed.Reg. 61209 (effective August 29, 2024)); 50 C.F.R. § 17.11(h). In announcing its
4 listing of the Longfin smelt as “endangered, the U.S. Fish and Wildlife Service stated:

5 *“We consider reduced and altered freshwater flows* resulting from human activities and impacts
6 *associated with current climate change conditions (increased magnitude and duration of drought*
7 *and associated increased temperatures) as the main threat* facing the Bay-Delta longfin smelt due
8 *to the importance of freshwater flows to maintaining the life-history functions and species needs*
9 *of the DPS [distinct population segment]. However, because the Bay-Delta longfin smelt is an*
aquatic species and the needs of the species are closely tied to freshwater input into the estuary,
the impact of many of the other threats identified above are influenced by the amount of
freshwater inflow into the system (i.e., reduced freshwater inflows reduce food availability,
increase water temperatures, and increase entrainment potential).

10 89 Fed.Reg. at 61039 (emphasis added). This authoritative finding by the federal agency charged with
11 assessing the health of the Delta’s non-anadromous aquatic species directly contradicts and refutes the
12 FEIR’s baseless claim that the Project will have a “Less-Than-Significant Impact” on the Delta’s
13 imperiled fish species such as the Delta smelt and the Longfin smelt. FEIR p. ES-11.

14 117. In addition to harming many fish species in the Delta, the State Water Project’s and Central
15 Valley Project’s excessive use of Delta water exports to irrigate contaminated soils in the Central Valley
16 pollutes ground and surface waters that flow into the Delta. Irrigation leaches pollutants from the toxic
17 soils underlying many of the areas irrigated with Delta water in the San Joaquin Valley. The subsurface
18 drainage and surface run off from these contaminated soils contain pollutants including selenium,
19 arsenic, boron, mercury, uranium, chromium, molybdenum, pesticides, nitrates, sodium chlorides and
20 sulfates. The resulting pollution of the Delta and its tributaries, particularly the San Joaquin River,
21 threatens the Delta’s water quality and the fish and wildlife dependent on them.

22 118. This Project’s continuation and expansion of the State Water Project’s excessive rates of
23 diversion of freshwater flows from the Delta would exacerbate a long-standing and critical shortage of
24 water desperately needed to restore imperiled fish and wildlife in the Delta. Yet the FEIR erroneously
25 concludes that this Project has no significant impacts on water hydrology, water quality, aquatic
26 biological resources, Tribal Cultural Resources, aesthetics, and recreation, among dozens of other
27 categories of potential impacts that the FEIR claims will not occur. FEIR, pp. ES10-12.

28 119. The FEIR uses its baseless claim that the Project will have no significant impacts on the

1 Delta’s imperiled fish species to justify and excuse its failure to address the Project’s significant impacts
2 on these species. CEQA’s primary purpose, however, is to compel Respondents to fully examine the
3 Project’s potentially significant environmental impacts and explore alternatives and mitigation measures
4 to avoid or reduce those impacts. PRC §§ 21002, 21002.1, subds. (a), (b), 21100, subds. (b)(1), (2), (3),
5 (4); Guidelines §§ 15126.2(a), 15126.4(a)(1), 15126.6(a), (b). Their erroneous decision to avoid
6 addressing the Project’s potentially significant impacts on the Delta’s imperiled fish species thus evades
7 their primary duty under CEQA to avoid or mitigate the Project’s significant environmental impacts.

8 120. Because this CEQA error prevents informed public review, the FEIR must be decertified,
9 the Project approvals vacated, and this matter remanded. *Save Our Capitol!*, 87 Cal.App.5th at 703-705.

11 **VI. THE FEIR OMITTS ANALYSIS OF THE PROJECT’S INTERRELATIONSHIPS WITH** 12 **CLOSELY RELATED PROJECTS**

13 **A. The FEIR’s Analysis Is Improperly Segmented**

14 121. CEQA requires agencies to prepare EIRs regarding the impacts of “projects” that may have
15 significant environmental impacts. Guidelines § 15064(a)(1). CEQA defines “project” to mean “the
16 whole of an action.” Guidelines § 15378(a). “The term ‘project’ refers to the activity which is being
17 approved and which may be subject to several discretionary approvals by governmental agencies. The
18 term ‘project’ does not mean each separate governmental approval.” Guidelines § 15378(c).
19 Accordingly, agencies “must consider the whole of an action, not simply its constituent parts, when
20 determining whether [the action] will have a significant environmental effect (*Citizens Assoc. for*
21 *Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151).” Guidelines §
22 15003(h), *see also* Guidelines § 15378(a), (c).

23 122. CEQA’s “requirements cannot be avoided by chopping up proposed projects into
24 bite-size pieces which, individually considered, might be found to have no significant effect on
25 the environment or to be only ministerial.” *Plan for Arcadia, Inc. v. City Council of Arcadia,*
26 *supra*, 42 Cal.App.3d at 726; *Association for a Cleaner Environment v. Yosemite Com. College*
27 *Dist.* (2004) 116 Cal.App.4th 629, 638. “It is “improper for an agency to divide a project into
28 separate parts to avoid CEQA review.” *California Farm Bureau Federation v. California*

1 *Wildlife Conservation Board* (2006) 143 Cal.App.4th 173, 191. Thus, CEQA intends to ensure
2 “that environmental considerations do not become submerged by chopping a large project into
3 many little ones – each with a minimal potential impact on the environment – which
4 cumulatively may have disastrous consequences.” *Bozung v. Local Agency Formation Com.*
5 (1975) 13 Cal.3d 263, 283-284.

6 123. Yet DWR did just that here. Instead of studying all of its interdependent actions
7 regarding management of the Delta’s waters together, DWR has improperly segmented its
8 analysis. It isolated this Project – its application “to obtain incidental take authorization from
9 [DFW] pursuant to CESA for five fish species to allow DWR to continue the long-term operation
10 of the SWP. . .” from all its closely related projects affecting the same watershed, including most
11 notably, the State Water Project itself. FEIR § 2.1.1, p. 2-2. It did so despite this Project’s
12 obvious inextricable connection to the State Water Project that it continues, and whose rate of
13 diversion it increases.

14 124. DWR’s separation of interrelated components of the same overall project into
15 different CEQA reviews is the epitome of improper segmentation. DWR’s segmentation
16 violates CEQA’s demand for unified and comprehensive environmental review:

17 “Theoretical independence is not a good reason for segmenting the environmental
18 analysis of the two matters. Doing so runs the risk that some environmental
19 impacts produced by the way the two matters combine or interact might not be
20 analyzed in the separate environmental reviews. Furthermore, if the two matters
21 are analyzed in sequence . . . and the combined or interactive environmental
22 effects are not fully recognized until the review of the second matter, the
23 opportunity to implement effective mitigation measures as part of the first matter
24 may be lost. This could result in mitigation measures being adopted in the second
25 matter that are less effective than what would have been adopted if the matters
26 had been analyzed as a single project.”

27 *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155
28 Cal.App.4th 1214, 1230. DWR’s segmented review subverts CEQA’s informational purposes.
By separating – “segmenting” – its approval of the Project from its operation of the State Water
Project, DWR has precluded a full consideration of the impacts of its actions and potential
mitigations that would otherwise be available through, for example, reexamination of its existing
contracts with water districts that receive water from the State Water Project, including

1 reduction in the unrealistic and excessive Table A delivery volumes.

2 125. In summary, CEQA requires that DWR analyze the impacts of this Project together
3 with those of the State Water Project of which it is an integral part in a coordinated and
4 integrated manner. Guidelines § 15378(a) (“‘Project’ means the whole of an action . . .”), (c)
5 (“The term ‘project’ does not mean each separate governmental approval”). DWR ignored
6 CEQA’s command that EIRs must address the “incremental impact of the project when added to
7 other closely related past, present and reasonably foreseeable probable future projects.”
8 Guidelines § 15355(b).

9 126. Because this CEQA error prevents informed public review, the FEIR must be
10 decertified, the Project approvals vacated, and this matter remanded. *Save Our Capitol!*, 87
11 Cal.App.5th at 703-705.

12 **VII. THE FEIR FAILS TO ASSESS AN APPROPRIATE RANGE OF MITIGATION**
13 **MEASURES**

14 127. CEQA directs that each “EIR shall describe feasible measures which could
15 minimize significant adverse impacts . . .” Guidelines § 15126.4(a)(1). “Mitigation measures
16 must be fully enforceable through permit conditions, agreements, or other legally-binding
17 instruments.” Guidelines § 15126.4(a)(2). However, the FEIR effectively sidesteps this required
18 CEQA procedure because it claims that the Project has no significant environmental impacts.
19 FEIR, pp. ES-10 to ES-12. To reach this conclusion, the FEIR sharply narrows its scope of
20 review by “eliminat[ing] from detailed consideration in this EIR” the Project’s impacts on 18
21 categories of environmental harm including aesthetics, cultural resources, and recreation. FEIR
22 § 3.2, pp. 3-1 to 3-2. Its analysis of the six remaining categories – including impacts on surface
23 water hydrology and quality, aquatic biological resources, Tribal Cultural Resources, and climate
24 change resiliency and adaptation – is likewise artificially circumscribed because in examining
25 each of these categories, the FEIR fails to address the impacts of closely related projects
26 including the State Water Project, as discussed below.

27 128. Because this Project continues and enables the State Water Project, it should have
28

1 addressed the effects of the State Water Project, and analyzed alternatives and mitigation
2 measures that would avoid or reduce those impacts. PRC §§ 21002, 21002.1, subs. (a), (b),
3 21100, subs. (b)(1), (2), (3), (4); Guidelines §§ 15126.2(a), 15126.4(a)(1), 15126.6(a), (b).
4 Because the FEIR failed to provide this discussion and analysis, it violates CEQA’s multiple
5 requirements that EIRs must do exactly that. *Id.*; *e.g.*, Guidelines § 15126.4(a)(1) (“An EIR shall
6 describe feasible measures which could minimize significant adverse impacts . . .”).

7 129. Because this CEQA error prevents informed public review, the FEIR must be
8 decertified, the Project approvals vacated, and this matter remanded. *Save Our Capitol!*, 87
9 Cal.App.5th at 703-705.

10 **VIII. THE FEIR IGNORES THE PROJECT’S CONFLICTS WITH THE DELTA**
11 **REFORM ACT AND THE SACRAMENTO-SAN JOAQUIN RIVER DELTA**
12 **PLAN PREPARED THEREUNDER, THE PUBLIC TRUST DOCTRINE, AND**
13 **THE CALIFORNIA ENDANGERED SPECIES ACT**

14 130. The CEQA Guidelines direct that “[t]he EIR shall discuss any inconsistencies
15 between the proposed project and applicable general plans, specific plans and regional plans.”
16 Guidelines §15125(d). Contrary to this mandate, the FEIR fails to acknowledge and address the
17 Project’s conflicts with the Delta Reform Act and the Delta Plan prepared thereunder, the Public
18 Trust Doctrine, and the California Endangered Species Act.

19 **A. DWR’s Approval of the Project Violates the Delta Reform Act**

20 **1. The Delta Reform Act Applies to the Project**

21 131. The Delta Reform Act was passed by the Legislature in recognition of the fact that
22 the “[t]he Sacramento-San Joaquin Delta watershed and California’s water infrastructure are in
23 crisis” and that “[r]esolving the crisis requires fundamental reorganization of the state’s
24 management of Delta watershed resources.” Water Code § 85001(a). The Legislature’s goal
25 was “to provide for the sustainable management of the Sacramento-San Joaquin Delta
26 ecosystem, to provide for a more reliable water supply for the state, to protect and enhance the
27 quality of water supply from the Delta, and to establish a governance structure that will direct
28 efforts across state agencies to develop a legally enforceable Delta Plan.” *Id.* § 85001(c).

1 132. The Delta Reform Act declares that “[t]he Sacramento-San Joaquin Delta watershed
2 and California’s water infrastructure are in crisis and existing Delta policies are not sustainable.
3 Resolving the crisis requires fundamental reorganization of the state’s management of Delta
4 watershed resources.” Water Code § 85001(a). To address this crisis, the Act establishes “co-
5 equal goals” of “providing a more reliable water supply for California and protecting, restoring,
6 and enhancing the Delta ecosystem.” Water Code §§ 85054, 85300. To achieve these goals, it
7 requires agencies proposing projects that would impact the Delta’s public trust resources and
8 thereby conflict with these goals to submit a certification that the project is consistent with the
9 Delta Stewardship Council’s Delta Plan. *Id.* § 85225. Substantively, it establishes a statewide
10 policy, fully applicable to DWR, to “[r]estore the Delta ecosystem, including its fisheries and
11 wildlife, as the heart of a healthy estuary and wetland ecosystem.” Water Code § 85020(c).

12 133. Particularly pertinent here is the Legislature’s finding that “*existing Delta policies*
13 *are not sustainable.*” Water Code § 85001(a) (emphasis added). It found that “‘the Delta’ . . . is
14 a critically important natural resource for California and the nation. It serves Californians
15 concurrently as both the hub of the California water system and the most valuable estuary and
16 wetland ecosystem on the west coast of North and South America.” Water Code § 85002. The
17 Act was meant to advance the “coequal goals” of restoring the Delta ecosystem and ensuring
18 water supply reliability. Water Code § 85054. The Legislature found that eight “objectives”
19 were inherent in those coequal goals:
20

- 21 (a) *Manage the Delta’s water and environmental resources and the water*
 resources of the state over the long term.
- 22 (b) *Protect and enhance the unique cultural, recreational, and agricultural*
23 *values of the California Delta as an evolving place.*
- 24 (c) *Restore the Delta ecosystem, including its fisheries and wildlife, as the heart*
25 *of a healthy estuary and wetland ecosystem.*
- 26 (d) Promote statewide water conservation, water use efficiency, and *sustainable*
 water use.
- 27 (e) Improve water quality to protect human health and the environment
28 consistent with *achieving water quality objectives in the Delta.*

- 1
- 2 (f) Improve the water conveyance system and expand statewide water storage.
- 3 (g) Reduce risks to people, property, and state interests in the Delta by effective
- 4 emergency preparedness, appropriate land uses, and investments in flood
- 5 protection.
- 6 (h) Establish a new governance structure with the authority, responsibility,
- 7 accountability, scientific support, and adequate and secure funding to
- 8 achieve these objectives.

9 Water Code § 85020 (emphasis added).

10 134. The Legislature also declared that:

11 The policy of the State of California is to *reduce reliance on the Delta in meeting*

12 *California's future water supply needs* through a statewide strategy of investing in

13 improved regional supplies, conservation, and water use efficiency. Each region

14 that depends on water from the Delta watershed shall improve its regional self-

15 reliance for water through investment in water use efficiency, water recycling,

16 advanced water technologies, local and regional water supply projects, and

17 improved regional coordination of local and regional water supply efforts.

18 Water Code § 85021 (emphasis added).

19 135. The Delta Reform Act requires any state agency “that proposes to undertake a

20 covered action” to “prepare a written certification of consistency with detailed findings as to

21 whether the covered action is consistent with the Delta Plan” and submit that written finding to

22 the Delta Stewardship Council. Water Code § 85225. The Act defines “[c]overed action” as “a

23 plan, program or project” as defined by Public Resources Code section 21065 that:

24 (1) Will occur, in whole or in part, within the boundaries of the Delta or Suisun

25 Marsh.

26 (2) Will be carried out, approved, or funded by the state or a local public agency.

27 (3) Is covered by one or more provisions of the Delta Plan.

28 (4) Will have a significant impact on achievement of one or both of the coequal

goals or the implementation of government-sponsored flood control programs to

reduce risks to people, property, and state interests in the Delta.

Water Code § 85057.5(a).

136. Here, the Project meets these criteria. It is indisputable that the SWP's diversions

1 occur within the boundaries of the Delta, and will be carried out by DWR, a state agency. FEIR
2 § 2.1.2, p. 2-3, Figure 2-1 (Map showing the Clifton Court Forebay and Banks Pumping Plant
3 within the Delta). The Delta Plan itself specifically addresses water exports through the Delta.

4 137. Lastly, the Project would have “a significant impact on achievement of one or both
5 of the coequal goals” of the Delta Reform Act. The State Water Project that is continued and
6 enabled by the Project allows continued excessive diversions from the Delta, with resulting
7 impacts on its ecological health. The Project therefore conflicts with the Delta Reform Act’s
8 “co-equal” goal of “protecting, restoring, and enhancing the Delta ecosystem.” Water Code §
9 85054.

10 138. And while the Delta Reform Act states that “[r]outine maintenance and operation of
11 the State Water Project” is not a covered action, the Project should not qualify for that
12 exemption because it is neither routine maintenance nor routine operation of the SWP. Water
13 Code § 85057.5(b) (emphasis added).

14 139. The Project continues, and increases the rate of diversion, of the State Water Project
15 in the face of the Delta’s sharply declining ecological health due in no small measure to DWR’s
16 decades of excessive Delta diversions.

17 140. For these reasons, it is apparent that the Project has sweeping environmental
18 impacts on the Delta that qualify it as a covered action. It would allow not just continued
19 excessive water diversions from the Delta, but increase them, in conflict with the Delta Reform
20 Act’s mandate that DWR *reduce* its contractors’ reliance upon the Delta in meeting future water
21 needs. Water Code § 85021. The Project fails to implement any conservation requirements or
22 take any other action to address the Delta Reform Act’s co-equal goals.

23
24 **2. DWR Failed to Make the Mandatory Consistency Determination Required by
25 the Delta Reform Act**

26 141. DWR has not prepared a written certification of consistency with detailed findings
27 as to whether the covered action is consistent with the Delta Plan. Under the Act, DWR cannot
28 approve the Project without *first* making a determination of consistency with the Delta Plan.

1 Water Code § 85225. Because approval of the Project continues and increases DWR’s excessive
2 diversion of Delta water to the State Water Project without any attempt to address the Project’s
3 conflict with the Delta Plan and the Act’s coequal goals, the Project is inconsistent with both the
4 Delta Plan and the Delta Reform Act.

5 142. The Delta Reform Act unambiguously directs that any “state or local public agency
6 that proposes to undertake a covered action . . . shall prepare a written certification of
7 consistency with detailed findings as to whether the covered action is consistent with the Delta
8 Plan.” Water Code section 85225 (*emphasis added*). The word “shall” is mandatory, not
9 permissive. *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443; *Puerta v.*
10 *Torres* (2011) 195 Cal.App.4th 1267, 127-1273. Because the Project meets the criteria for a
11 “covered action” under Water Code section 85057.5(a) as discussed above, DWR had a
12 mandatory duty to prepare and submit to the Delta Stewardship Council a determination of the
13 Project’s consistency with the Council’s Delta Plan. It failed to do so.

14 143. DWR’s failure to prepare this certification before Project approval, as required by
15 the Delta Reform Act, is directly contrary to the Act’s mandates. Water Code §85225. Because
16 the FEIR fails to acknowledge and address this conflict, it violates CEQA. CEQA Guidelines §
17 15125(d).

18 144. Because this CEQA error prevents informed public review, the FEIR must be
19 decertified, the Project approvals vacated, and this matter remanded. *Save Our Capitol!*, 87
20 Cal.App.5th at 703-705.

21
22 **B. RESPONDENTS’ PROJECT APPROVAL VIOLATES THE PUBLIC TRUST
DOCTRINE**

23 **1. The Public Trust Doctrine Applies to the Project**

24 145. The Public Trust Doctrine protects the Delta’s imperiled fish and wildlife – the
25 state’s public trust resources – from avoidable harm whenever it is feasible to do so. *National*
26 *Audubon Society v. Superior Court* (“*National Audubon*”) (1983) 33 Cal.3d 419, 426. The
27 Legislature has determined that the Public Trust Doctrine has particular relevance to
28

1 management of the Delta. It declared in the Delta Reform Act that “the public trust doctrine
2 shall be the foundation of state water management policy and [is] particularly important and
3 applicable to the Delta.” Water Code § 85023.

4 146. The Public Trust Doctrine mandates that “before state courts and agencies approve”
5 actions that may harm public trust resources, they consider the potential impact “upon interests
6 protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to
7 those interests.” *National Audubon*, 33 Cal.3d at 426. “[T]he pivotal fact is not whether water is
8 diverted or extracted or the fact that it is water itself adversely impacting the water within the
9 public trust. Rather, the determinative fact is the *impact of the activity on the public trust*
10 *resource.*” *Environmental Law Foundation v. State Water Resources Control Board* (2018) 26
11 Cal.App.5th 844, 859 (*emphasis added*).

12 147. In *National Audubon*, 33 Cal.3d at 426, the court explained:

13 “Just as the history of this state shows that appropriation may be necessary for
14 efficient use of water despite unavoidable harm to public trust values, it demonstrates
15 that an appropriative water rights system administered without consideration of the
16 public trust may cause unnecessary and unjustified harm to trust interests. As a
17 matter of practical necessity the state may have to approve appropriations despite
18 foreseeable harm to public trust uses. In so doing, however, the state must bear in
19 mind its duty as trustee to consider the effect of the taking on the public trust, and to
20 preserve, so far as consistent with the public interest, the uses protected by the trust.”

21 *Id.*, citations omitted.

22 148. “Public trust easements are traditionally defined in terms of navigation, commerce
23 and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for
24 boating and general recreation purposes the navigable waters of the state, and to use the bottom
25 of the navigable waters for anchoring, standing, or other purposes.” *Marks v. Whitney* (1971) 6
26 Cal.3d 251, 259-260. For more than 50 years it has been settled law in California that public
27 trust values also “encompass[] . . . the preservation of those lands in their natural state, so that
28 they may serve as ecological units for scientific study, as open space, and as environments which
provide food and habitat for birds and marine life, and which favorably affect the scenery and
climate of the area.” *Id.*

1 149. Although compliance with CEQA “may assist an agency in complying with its
2 duties under the public trust doctrine . . .[,] CEQA review of a project does not necessarily or
3 automatically satisfy the agency’s affirmative duties to take the trust into account and protect
4 public trust uses whenever feasible.” *San Francisco Baykeeper Inc. v. State Lands Commission*
5 (*“Baykeeper II”*) (2018) 29 Cal.App.5th 562, 571. “[A] public trust use is not any use that may
6 confer a public benefit, but rather a use that facilitates public access, public enjoyment, or public
7 use of trust land.” *Id.* at 570.

8 150. By continuing and enabling the State Water Project, the Project will adversely affect
9 numerous public trust resources, including flows and habitat necessary for fish, wildlife, and
10 recreation, as shown above. Indeed, in 2010 the State Water Board concluded that much higher
11 flows are necessary to protect public trust resources throughout the Delta. State Water Board,
12 “Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem,” August 3,
13 2010, p. 5. Yet despite broad public comment asking that DWR address the State Water
14 Project’s massive adverse impacts to public trust resources, DWR declined to do so in the FEIR.

15 151. Under the Public Trust Doctrine, DWR has an affirmative duty to not only consider
16 the impacts of its Project (including the State Water Project that it continues and for which it
17 increase the rate of diversion) on the interests protected by the public trust, but moreover, to
18 “attempt, so far as feasible, to avoid or minimize any harm to those interests.” *National*
19 *Audubon*, 33 Cal.3d at 426. In approving water diversions such as the State Water Project
20 “despite foreseeable harm to public trust [resources] . . . the state must bear in mind its duty as
21 trustee to consider the effect of the taking on the public trust . . . and to preserve, so far as
22 consistent with the public interest, the uses protected by the trust.” *National Audubon*, 33
23 Cal.3d. at 426 (internal citation omitted).

24 152. Therefore DWR has a duty under the Public Trust Doctrine to consider feasible
25 alternatives and mitigations that would mitigate or avoid the Project’s significant impacts,
26 including in particular those impacts caused by continuation of the State Water Project’s
27 excessive levels of diversion. Those alternatives include, for example, a reduced Table A
28 alternative, and an alternative that incorporates water conservation goals. Such alternatives

1 would reduce diversions, have beneficial effects on fish and wildlife, and still attain most of the
2 Project’s basic objectives – securing an incidental take permit for the Project’s impacts on
3 species listed under and protected by CESA. Accordingly, the FEIR should be revised to address
4 the Project’s conflicts with the Public Trust Doctrine.

5 **2. DWR Failed to Comply With the Public Trust Doctrine**

6 153. By approving the Project despite the fact that feasible alternatives exist that would
7 preserve public trust resources to a greater extent than the Project, DWR failed to discharge its
8 affirmative statutory and constitutional “duties to take the trust into account and protect public
9 trust uses whenever feasible,” based on a fair and fully informed balancing of the impacts of
10 these alternatives on public trust resources. *Baykeeper II*, 29 Cal.App.5th at 571.

11 **3. DWR’s CEQA Review Cannot Cure Its Public Trust Failure**

12 154. DWR’s evaluation of the Project in its FEIR is insufficient to discharge its
13 responsibilities under the Public Trust Doctrine because the FEIR is itself severely flawed, as
14 shown above. Even assuming contrary to the irrefutable factual record that the FEIR might
15 otherwise pass CEQA muster, complying with CEQA does not satisfy the requirements of the
16 Public Trust Doctrine. Although preparing CEQA documents “may assist an agency in
17 complying with its duties under the public trust doctrine . . . [,] CEQA review of a project does
18 not necessarily or automatically satisfy the agency’s affirmative duties to take the trust into
19 account and protect public trust uses whenever feasible.” *San Francisco Baykeeper Inc. v. State*
20 *Lands Commission (“Baykeeper II”)* (2018) 29 Cal.App.5th 562, 571. That is certainly the case
21 here. As shown, DWR did not perform its affirmative duties to “protect public trust uses
22 whenever feasible.” *Id.*

23 155. Instead DWR (1) failed to address the impacts of the State Water Project that this
24 Project continues and for which it increases the rate of diversion, (2) failed to consider a
25 reasonable range of alternatives that would include substantially reduced diversions by the State
26 Water Project to protect public trust resources, and (3) dismissed feasible alternatives that would
27 restore and protect those resources as discussed above. Further, DWR never prepared the
28 determination of the Project’s consistency with the Delta Plan that is specifically required under

1 the Delta Reform Act. DWR’s neglect of its mandatory statutory duty to provide “detailed
2 findings” regarding the Project’s impacts on the Delta and its public trust resources, and
3 inconsistency with the Delta Plan, demonstrates DWR’s failure to perform its affirmative duty
4 under the Public Trust Doctrine to “take the trust into account and protect public trust uses
5 whenever feasible.” *Baykeeper II*, 29 Cal.App.5th at 571.

6 156. For each of these reasons, DWR failed to comply with the Public Trust Doctrine.
7 Likewise, it failed to address the Project’s inconsistency with the Public Trust Doctrine in the
8 FEIR despite Petitioners’ requests that it do so, a separate CEQA error. Because this CEQA
9 error prevents informed public review, the FEIR must be decertified, the Project approvals
10 vacated, and this matter remanded. *Save Our Capitol!*, 87 Cal.App.5th at 703-705.

11 **C. DWR’S PROJECT APPROVAL VIOLATES THE ENDANGERED SPECIES ACT**

12 **1. The California Endangered Species Act Applies to the Project**

13 157. As noted, DWR concedes that CESA applies to the Project. Its FEIR states that
14 “DWR is seeking a new ITP [Incidental Take Permit] from CDFW, pursuant to Section 2081 of
15 the California Fish and Game Code” for four currently listed fish species, the Delta Smelt,
16 Longfin Smelt, Bay-Delta Winter Run Chinook Salmon, and Central Valley Spring Run Chinook
17 Salmon, and a candidate species, the White Sturgeon. FEIR, p. ES-5.

18 **2. DWR Has a Duty Under CESA and CEQA to Give Special Consideration to 19 Protection of Listed Species.**

20 158. CESA declares that “it is the policy of the state that public agencies should not
21 approve projects as proposed which would jeopardize the continued existence of any endangered
22 species or threatened species or result in the destruction or adverse modification of habitat
23 essential to the continued existence of those species, if there are reasonable and prudent
24 alternatives available consistent with conserving the species or its habitat which would prevent
25 jeopardy.” F&GC § 2053, subd. (a). The Legislature directed further that “it is the policy of this
26 state and the intent of the Legislature that *reasonable and prudent alternatives shall be*
27 *developed* by the department [of Fish and Wildlife], together with the project proponent and the
28 state lead agency, *consistent with conserving the species*, while at the same time maintaining the

1 project purpose to the greatest extent possible.” *Id.* at subd. (b) (emphasis added). The
2 California Supreme Court recognized in *Mountain Lion Foundation v. Fish and Game Com.*,
3 *supra*, 16 Cal.4th at 125, that “CESA establishes a policy adding significant weight to the CEQA
4 balancing scale on the side favoring protection of a listed species over projects that might
5 jeopardize them or their habitats.” *Id.*, citing F&GC § 2053.

6 159. CEQA echoes this policy, directing that it is state policy to “[p]revent the
7 elimination of fish or wildlife species due to man’s activities, *insure that fish and wildlife*
8 *populations do not drop below self-perpetuating levels*, and preserve for future generations
9 representations of all plant and animal communities” PRC §21001, subd. (c) (emphasis
10 added).

11 **3. The FEIR Fails to Implement These Policies to Protect Listed Species**

12 160. Contrary to the foregoing state policies requiring DFW and DWR to “develop
13 reasonable and prudent alternatives . . . consistent with conserving [listed] species,” and to
14 “insure that fish and wildlife populations do not drop below self-perpetuating levels,” the FEIR
15 fails to develop any alternative consistent with conserving the Delta fish species that are listed
16 under CESA. As shown, the FEIR fails to even recognize that the Project continues, and
17 increases the rate of diversion, of the State Water Project, let alone that doing so poses a well-
18 documented threat to maintaining their habitat and populations at self-sustaining levels.

19 161. Consequently, the FEIR falls short of the requirements of CESA and CEQA to
20 conserve listed species and their habitat to prevent jeopardy to their survival. Because the
21 FEIR’s error prevents informed public review, the FEIR must be decertified, the Project
22 approvals vacated, and this matter remanded. Guidelines § 15002; *Save Our Capitol!*, 87
23 Cal.App.5th at 703-705.

24 **IX. THE FEIR UNDERSTATES THE PROJECT’S IMPACTS DURING** 25 **FORESEEABLE SEA LEVEL RISE AND DROUGHTS**

26 162. CEQA’s mandate that DWR must disclose and analyze the Project’s foreseeable
27 environmental impacts is not relaxed just because global warming and sea level rise will
28 foreseeably change the environment impacted by the Project. Despite the emergence of climate

1 change as a significant driver of future changes in the environment and consequently, the creation
2 of a degree of uncertainty regarding projects’ potential long-term environmental impacts,
3 Guidelines section 15144 has remained unchanged. It commands that, “[w]hile forecasting the
4 unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it
5 reasonably can.” *Id.*, quoted in *Vineyard*, 40 Cal.4th at 428. Likewise, although CEQA and its
6 Guidelines have been amended to recognize the need to address projects’ greenhouse gas
7 emissions and their impacts on global warming, none of those amendments allow an agency to
8 evade its continuing duty to “use its best efforts to find out and disclose all that it reasonably
9 can.” PRC §§ 21083.05, 21100, subd. (b) - (d); Guidelines §§ 15064.4, 15126.4(c), 15144.

10 163. Contrary to this mandate, the DWR did not “use its best efforts” to disclose and
11 analyze the Project’s impacts during foreseeable sea level rise and droughts. The FEIR states that
12 the foreseeable

13 “median sea-level rise for the San Francisco National Oceanic and Atmospheric
14 Administration tide gage (relative to 2000 baseline) may increase by as much as 0.8 foot
15 (0.24 meter; “high” scenario, which is defined according to the target value of global
16 mean sea-level rise in 2100) by 2040 and 6.5 feet (1.98 meters; “High” scenario) by 2100
17 (California Sea Level Rise Science Task Force, et al. 2024).”

18 FEIR § 9.2.3.1, p. 9-13 (emphasis added); *see also*, Table 9-2, p. 9-14.

19 164. Based on this information, a “best efforts” disclosure would explain to the public
20 what the Project’s impacts might be with a 0.8-foot increase in sea level by 2040 and a 6.5-foot
21 increase by 2100. Guidelines § 15144. But instead, the FEIR only provides a projection of the
22 Project’s impacts based on a “15 centimeter” – i.e., *6 inch* – sea level rise. FEIR § 9.4.1, p. 9-26
23 (“modeled climate change conditions account for 15 cm of sea-level rise”). A 6-inch rise is less
24 than two-thirds of the 0.8 (9.6-inch) increase that could occur by 2040, and only *one-thirteenth* of
25 the 6.5-foot rise in sea level that could occur by 2100. Obviously, there is a huge – thirteen-fold –
26 difference between the actual sea level rise that might occur by 2100, and that modeled for the
27 Project and its impacts. No reason is given for this disparity. Most people would view a “6-inch”
28 rise as inconsequential. But a 6.5-foot rise, by contrast, would garner immediate attention and
concern because it is greater than the height of a tall person, placing nearly everyone *completely*
underwater (at 6.5 feet) – as opposed to just getting their ankles wet (at 6 inches).

1 165. This failure to inform the public of the Project’s likely impacts during foreseeable
2 sea level rise is not a minor, technical discrepancy. To the contrary, it obscures an enormous
3 potential impact: that the intakes for the State Water Project’s Delta diversions might be
4 rendered useless due to inundation by saline waters as rising sea levels push upstream. If that
5 occurred, it is foreseeable that maintaining the level of Delta diversions assumed for the Project
6 would require a massive new diversion project – probably by an upstream tunnel or tunnels to
7 protect the intake water from the surrounding saltwater – that would move the existing intakes
8 many miles upstream. At a minimum, the FEIR must alert the public to the risks that the
9 Project’s Delta Facilities would have to be moved at significant environmental cost, if not
10 abandoned altogether.

11 166. The public is left to wonder whether the FEIR’s entire analysis of the Project’s
12 claimed “Climate Change Resiliency and Adaptation” (FEIR, Chapter 9) is useless because it
13 assumes just a 6-inch sea level rise. For example, the FEIR’s discussion of the “[s]ea level-rise
14 driven saltwater intrusion in the Delta” (FEIR § 9.4.1, pp. 9-22 to 9-26) portrays a “modeled
15 location of the gradient between saline, brackish, and fresh water in the San Francisco Bay and
16 Delta”– commonly known as the “X-2” line – somewhere between 45 and 90 kilometers east of
17 the Golden Gate Bridge in the fall. *Id.* And it does so based on a stated “sea-level rise” of just
18 “15 cm.” FEIR , p. 9-26.

19 167. But if sea level rise were in fact 13 times greater as the FEIR elsewhere admits it
20 might be – to a height of 195 cm (1.95 meters) by 2100 – the public might very well ask: would
21 this X-2 line jump many kilometers , or tens of kilometers, more to the east? For the same
22 reason, the public might query: would it reach the intakes for the State Water Project? If so, the
23 public might further inquire, what would that portend for the State Water Project’s viability? The
24 public might then demand to know, why build a project whose viability would fail within the
25 foreseeable future? These are very important questions. But the FEIR leaves each of them
26 unanswered.

27 168. Similarly, the FEIR’s discussion of the Project’s impacts on “State Water Project
28 Exports” (FEIR § 9.4.2, pp. 9-26 to 9-30) estimates that the Project would “generally limit the

1 largest export reductions due to climate change.” FEIR p. 9-27. But left unaddressed is the
2 question, what happens if, due to the double-whammy of reduced rainfall causing decreased river
3 flows, on the one hand, and sea level rise on the other, saltwater enters the intakes for the State
4 Water Project? That question leads to the natural follow-up query, are the State Water Project’s
5 exports then shut down? If that happens, the public might reasonably inquire, what alternate
6 sources of water are proposed to make up the shortfall in the communities dependent on the State
7 Water Project, and at what environmental cost? These questions are never asked, let alone
8 answered.

9 169. The same questions could be asked regarding the scenario in which the maximum
10 foreseeable sea level rise is coupled with “more extreme drought events” – a likelihood the FEIR
11 admits. FEIR § 9.4.1, p. 9-22.

12 170. Because the FEIR does not answer these questions, it fails to provide informed
13 public review, the primary and essential purpose of the CEQA process. Guidelines § 15002(a).
14 Where, as here, there is substantial evidence to support a fair argument that a project may have an
15 adverse impact on the environment that the agency has overlooked, the agency must address that
16 impact in its environmental review. *Voices for Rural Living v. El Dorado Irrigation District*
17 (2012) 209 Cal.App.4th 1096, 1110 (citing *Vineyard*, 40 Cal.4th at 421). Because the FEIR’s
18 error prevents informed public review, the FEIR must be decertified, the Project approvals
19 vacated, and this matter remanded. *Save Our Capitol!*, 87 Cal.App.5th at 703-705.

20 **X. THE FEIR ASSUMES THAT UNFUNDED AND UNEXAMINED**
21 **“VOLUNTARY AGREEMENTS” WILL PROTECT IMPERILED SPECIES**

22 171. The FEIR relies upon undisclosed, unfunded and unexamined flow agreements to
23 avoid the Project’s otherwise significant adverse impacts on the environment including most
24 notably, its impacts on threatened and endangered fish species. It states that “Voluntary
25 Agreement measures that result in Delta Outflow, including during the spring period, will be
26 achieved through a combination of SWP export reductions, water purchases made possible
27 through the collection of diversion fees from SWP contractors, and third-party actions such as
28 reductions in diversions by other water users throughout the watershed.” FEIR § 2.3.5.1, p. 2-33.

1 The FEIR then presents a sparse table claiming that “Total Outflow Volumes” ranging from 0 to
2 167,500 af, depending on water-year types, will result from these voluntary agreements. FEIR §
3 2.3.5.1, p. 2-34, Table 2.6. The FEIR presents only the barest summary of how this voluntary
4 system of Delta outflow augmentation is anticipated to function, relegating nearly its entire
5 discussion to a series of cryptic, impenetrable footnotes. (*Id.*)

6 172. Conspicuous by its absence from this conclusory presentation is disclosure of the fact
7 that its success depends entirely on funding that does not yet, and may never, exist. According to
8 a comment letter submitted by the National Marine Fisheries Service (“NMFS”) dated January
9 19, 2024 responding to the State Water Resources Control Board’s Staff Report/SED [Substitute
10 Environmental Document] respecting the Board’s currently proposed draft Phase II Bay-Delta
11 Water Quality Plan, only a minor portion of the funding required for “currently-identified habitat
12 restoration projects” would be provided by the parties to the Voluntary Agreements. The vast
13 majority of the required funding – \$740 million to be potentially provided by state and federal
14 agencies – “has not been secured.” *Id.* p. 4.

15 173. Moreover, as NMFS also observed, the delayed examination of the Voluntary
16 Agreements’ efficacy renders them of uncertain utility, if not entirely illusory. NMFS explained:
17 “The VAs [voluntary agreements] propose that, in the eighth year of implementation, the
18 Board would consider the reports, analyses, information, and data from the VA Science
19 Program, as well as recommendations from the VA Governance Committee and the Delta
20 Independent Science Board, to decide the future of the VA Program. *This proposed
timeframe for assessing the effectiveness of the VAs is concerning, given the dire status of
native fish species within the Sacramento River Basin and Delta and the urgency in
improving conditions for these species to prevent further declines.*”

21 *Id.* (emphasis added). Environmental analysis delayed is environmental protection denied.

22 174. NMFS also criticized the fact that the Voluntary Agreements’ flow assets would not
23 be deployed in years when ESA-listed species are at their greatest risk of extinction and most
24 need protection: critical water years. *Id.*

25 175. For the foregoing and other related and equally compelling reasons, following a
26 careful review, NMFS concluded that

27 “Based on the information in the [State Water Resources Control Board] Staff Report, we
28 are *highly uncertain that the VAs as currently proposed will provide for the reasonable
protection of fish and wildlife beneficial uses through restoration of the Delta ecosystem*

1 *over time.*”

2 *Id.*, p. 5 (emphasis added). “Highly uncertain” mitigation is insufficient under CEQA.

3 176. In light of the many questions left unanswered by the FEIR’s sparse presentation, the
4 Voluntary Agreements’ apparent lack of reliable funding, the eight-year delay in analysis of their
5 efficacy, and their failure to protect imperiled species when they are most vulnerable, the FEIR’s
6 attempted reliance on these as yet unformulated and unexamined measures to avoid or mitigate
7 the adverse environmental impacts of the Project fails to pass CEQA muster. CEQA requires that
8 mitigations be certain and effective. As the Guidelines instruct, “[m]itigation measures must be
9 fully enforceable through permit conditions, agreements, or other legally-binding instruments.”
10 Guidelines § 15126.4(a)(2). The Voluntary Agreements are not. Conversely, CEQA gives no
11 weight to speculative agency assurances. *Id.*; Guidelines § 15384(a) (“substantial evidence” for
12 purposes of CEQA does not include “speculation”), (b) “substantial evidence” requires “facts,
13 reasonable assumptions predicated on facts, and expert opinion supported by facts”).

14 177. Because the FEIR’s erroneous reliance on these impermissibly vague , unfunded,
15 unexamined and unenforceable Voluntary Agreements prevents informed public review, the FEIR
16 must be decertified, the Project approvals vacated, and this matter remanded. *Save Our Capitol!*,
17 87 Cal.App.5th at 703-705.

18 **XI. RECIRCULATION OF THE EIR IS REQUIRED TO ADDRESS NEW**
19 **INFORMATION**

20 178. CEQA requires agencies to recirculate an EIR for further public and agency review
21 and comment when significant new information bearing on the project’s impacts, or on ways to
22 feasibly avoid or reduce them, comes to light after circulation of the draft EIR. Guidelines
23 section 15088.5(a) requires agencies “to recirculate an EIR when significant new information is
24 added to the EIR after public notice is given of the availability of the draft EIR . . . but before
25 certification.” New information is deemed “significant” where “the EIR is changed in a way that
26 deprives the public of a meaningful opportunity to comment upon [1] a substantial adverse
27 environmental effect of the project or [2] a feasible way to mitigate or avoid such an effect . . .
28 that the project’s proponents have declined to implement.” *Id.*

1 179. Here, as shown above, the FEIR ignores the fact that the State Water Project’s past
2 and current operation – which the Project proposes to continue but with even greater rates of
3 diversion – have for decades caused and are causing massive degradation of the Delta’s water
4 quality through reduced flows, increased temperatures, diminished dissolved oxygen, elevated
5 turbidity, reduced riverine and wetland habitat, and increased pollutants including toxics such as
6 selenium. This fact is well documented by many authoritative studies including the State Water
7 Board’s definitive analysis, “Development of Flow Criteria for the Sacramento-San Joaquin Delta
8 Ecosystem,” published in 2010 as noted above, the Biological Opinions prepared by the National
9 Marine Fisheries Service and the U.S. Fish and Wildlife Service in 2009, and the decisions of
10 these agencies in the 1990s and 2000s to list the Delta’s previously abundant salmonid and
11 pelagic fisheries as threatened or endangered under the federal Endangered Species Act.

12 180. The growing factual record establishing the Project’s direct and irrefutable
13 contribution to the ongoing ecological collapse of the Delta was further confirmed and updated in
14 several authoritative analyses released by expert state and federal fisheries agencies since DWR
15 issued its Notice of Preparation of the DEIR on June 16, 2023, including a very significant
16 publication by the U.S. Fish and Wildlife Service on July 30, 2024, when it listed the Longfin
17 smelt as an endangered species under the federal Endangered Species Act, two months after the
18 DEIR was released on May 29, 2024. These authoritative reports refute the false premise
19 underlying Respondents’ approvals that the Project has no significant impacts on the Delta’s
20 ecological health and in particular, on its imperiled fish and wildlife species, and underscore the
21 need for Respondents to decertify their FEIR and recirculate a new DEIR that acknowledges and
22 addresses this now indisputable causal relationship.

23 181. The Fish and Wildlife Service’s Federal Register notice detailing the indisputable
24 facts that compelled the Service to place the Longfin smelt on the federal endangered species list
25 refutes Respondents’ baseless claims that the Project’s approval allowing the continued operation
26 of the SWP at higher rates of diversion would have “Less-Than-Significant Impacts” on the
27 Delta’s imperiled fish species. FEIR § ES.6, p. ES-10. The Service left no doubt that in its expert
28 view, operation of the SWP and CVP has, together with other similar diversions, collectively

1 resulted in a dramatic reduction in freshwater flows through the Delta, and thereby degraded the
2 freshwater habitat needed by Longfin smelt to survive:

3 *“We consider reduced and altered freshwater flows resulting from human activities and*
4 *impacts associated with current climate change conditions (increased magnitude and*
5 *duration of drought and associated increased temperatures) as the main threat facing the*
6 *Bay-Delta longfin smelt due to the importance of freshwater flows to maintaining the life-*
7 *history functions and species needs of the DPS [distinct population segment]. However,*
8 *because the Bay-Delta longfin smelt is an aquatic species and the needs of the species are*
9 *closely tied to freshwater input into the estuary, the impact of many of the other threats*
10 *identified above are influenced by the amount of freshwater inflow into the system (i.e.,*
11 *reduced freshwater inflows reduce food availability, increase water temperatures, and*
12 *increase entrainment potential). . . .*

13 *The development of dams and water delivery infrastructure built throughout the*
14 *Sacramento and San Joaquin river basins for flood protection and water supply for*
15 *agricultural and human consumption has greatly impacted freshwater flows into the San*
16 *Francisco Bay estuary (Service 2024, section 3.1.1). . . . Operation of this system has*
17 *resulted in a broader, flatter hydrograph with less seasonal variability, thus changing the*
18 *timing, magnitude, and duration of freshwater flows into the San Francisco Bay-Delta. . . .*
19 *It is estimated that the Federal and State water projects annually reduce an average of*
20 *about 5 million acre-feet (MAF) of freshwater into the San Francisco BayDelta, while*
21 *other municipal or private reservoirs or diverters annually divert an additional 8 MAF of*
22 *freshwater into the San Francisco Bay Delta The cumulative effect of this annual*
23 *average of about 13 MAF of freshwater supplies has resulted in a long-term decline in*
24 *freshwater inflow into the estuary during the period of February through June relative to*
25 *estimates of what flows would have been available absent water development This*
26 *situation has further increased the frequency of very low outflow years that, prior to water*
27 *development, would have been very rare and associated only with extreme drought. . . .*

28 *These threats have put the Bay-Delta longfin smelt largely into a state of chronic*
29 *population decline due to habitat loss (reduction in freshwater flows into the estuary) . . .*

30 89 Fed.Reg. 61030, 61039-61040, 61046 (July 30, 2024) (emphasis added). This authoritative
31 finding by the federal agency charged with assessing the health of the Delta’s non-anadromous
32 aquatic species directly contradicts and refutes the FEIR’s baseless claim that the Project will
33 have a “Less-Than-Significant Impact” on the Delta’s imperiled fish species such as the Delta
34 smelt and the Longfin smelt. FEIR p. ES-11.

35 182. This authoritative evidence released after publication of the DEIR on May 29, 2024,
36 requires recirculation of a new DEIR. Guidelines section 15088.5(a)(a) requires recirculation
37 where, as here, “[a] new significant environmental impact would result from the project.”
38 NMFS’s decision to list the Longfin smelt shows that by enabling continuation of the SWP, the
39 Project will have a cumulatively significant impact on the Delta’s imperiled fish species. NMFS
40 has determined, based on overwhelming evidence gathered over decades and now culminating in

1 its dispositive finding, that the Project’s continuation of the State Water Project and increase in
2 its rate of diversion of freshwater flows from the Delta would exacerbate a long-standing and
3 critical shortage of water desperately needed to restore imperiled fish and wildlife in the Delta.
4 Yet the FEIR erroneously concludes that this Project has no significant impacts on water
5 hydrology, water quality, aquatic biological resources, and recreation, among dozens of other
6 categories of potential impacts that the FEIR claims will not occur. FEIR, pp. ES10-12.

7 183. The FEIR must accordingly be decertified, and a revised DEIR addressing NMFS’
8 authoritative findings must be prepared. Respondents’ failure to address NMFS’ listing decision
9 in their FEIR evades their primary duty under CEQA to avoid or mitigate the Project’s significant
10 environmental impacts.

11 184. Because this CEQA error prevents informed public review, the FEIR must be
12 decertified, the Project approvals vacated, and this matter remanded. *Save Our Capitol!*, 87
13 Cal.App.5th at 703-705.

14 **SECOND CAUSE OF ACTION**

15 **(Violation of the 2009 Delta Reform Act)**

16 **(Alleged by All Petitioners Against All Respondents)**

17 185. The paragraphs set forth above and below are realleged and incorporated herein by
18 reference.

19 186. The Delta Reform Act, Water Code sections 85000 *et seq.*, was passed by the
20 Legislature in recognition of the fact that the “[t]he Sacramento-San Joaquin Delta watershed and
21 California’s water infrastructure are in crisis” and that “[r]esolving the crisis requires
22 fundamental reorganization of the state’s management of Delta watershed resources.” Water
23 Code § 85001(a). The Legislature’s goal was “to provide for the sustainable management of the
24 Sacramento-San Joaquin Delta ecosystem, to provide for a more reliable water supply for the
25 state, to protect and enhance the quality of water supply from the Delta, and to establish a
26 governance structure that will direct efforts across state agencies to develop a legally enforceable
27 Delta Plan.” Water Code § 85001(c).

28 187. The Delta Reform Act requires any state agency “that proposes to undertake a

1 covered action” to “prepare a written certification of consistency with detailed findings as to
2 whether the covered action is consistent with the Delta Plan” and submit that written finding to
3 the Delta Stewardship Council. Water Code § 85225.

4 188. The Delta Reform Act defines “[c]overed action” as “a plan, program or project” as
5 defined by PRC section 21065 that:

6 (1) Will occur, in whole or in part, within the boundaries of the Delta or Suisun
7 Marsh.

8 (2) Will be carried out, approved, or funded by the state or a local public agency.

9 (3) Is covered by one or more provisions of the Delta Plan.

10 (4) Will have a significant impact on achievement of one or both of the
11 coequal goals or the implementation of government-sponsored flood control
12 programs to reduce risks to people, property, and state interests in the Delta.

13 Water Code § 85057.5(a). The Project meets these criteria, and is therefore a covered action.

14 While the Delta Reform Act states that “[r]outine maintenance and operation of the State Water
15 Project” is not a covered action, the Project does not qualify for that exemption because it is
16 neither routine maintenance nor routine operation of the SWP. Water Code § 85057.5(b).

17 189. DWR admits that under the Delta Reform Act, “[s]tate and local agencies proposing
18 covered actions that occur in whole or in part in the Delta or Suisun Marsh must file written
19 certifications of consistency with the applicable Delta Plan policies before initiating
20 implementation of such actions. . . .” FEIR § 6.2.2.3, p. 6-34 (citing Water Code § 85225 and 23
21 C.C.R. § 5002). However, the FEIR does not address whether the Project is a covered action
22 under the Delta Reform Act, triggering this statutory duty to prepare a certification of the
23 Project’s consistency with the Delta Plan. It should, because the Project is clearly a “covered
24 action,” and DWR therefore has a duty to prepare a certification of consistency with the Delta
25 Plan. Water Code section 85057.5(b)’s exemption of “[r]outine maintenance and operation of the
26 State Water Project” from the definition of covered action cannot apply to this Project, which
27 encompasses changes to the operation of the SWP, including some DWR claims are needed to
28 comply with DFW’s ITP requirements. Such changes are more than simple “routine operation.”

1 190. Because the Project is a covered action under the Delta Reform Act, DWR cannot
2 approve the Project without *first* making a determination of consistency with the Delta Plan.
3 Water Code § 85225.

4 191. Because DWR failed to “prepare a written certification of consistency with detailed
5 findings as to whether the covered action is consistent with the Delta Plan” as required by the
6 Delta Reform Act, its approval of the Project is an abuse of discretion and must be set aside.
7 Water Code § 85225.

8 9 **THIRD CAUSE OF ACTION**

10 **(Violation of the California Endangered Species Act)**

11 **(Alleged by All Petitioners Against All Respondents)**

12 192. The paragraphs set forth above and below are realleged and incorporated herein by
13 reference.

14 193. As noted above, the California Endangered Species Act, F&GC section 2050 et seq.
15 (“CESA”) was adopted in 1984 to establish “the policy of the state to conserve, protect, restore,
16 and enhance any endangered species or any threatened species and its habitat” and to declare
17 “that it is the intent of the Legislature, consistent with conserving the species, to acquire lands for
18 habitat for these species.” F&GC § 2052. Section 2 of CESA further finds and declares that:

19 “it is the policy of the state that state agencies *should not approve* projects as proposed
20 which would jeopardize the continued existence of any endangered species or threatened
21 species or result in the destruction or adverse modification of habitat essential to the
22 continued existence of those species, if there are reasonable and prudent alternatives
available consistent with conserving the species or its habitat which would prevent
jeopardy.”

23 F&GC § 2053 (emphasis added).

24 194. CESA commands that “[n]o person shall . . . take . . . any species . . . that the [Fish
25 and Game] [C]ommission determines to be an endangered species or a threatened species . . .
26 except as otherwise provided in this chapter” F&GC § 2080. F&GC section 2081 provides
27 that DFW “may authorize acts that are otherwise prohibited pursuant to [the incidental take
28 permit provisions of F&GC] Section 2180,” but imposes stringent requirements on any such

1 authorization, commanding: “No [incidental take] permit may be issued . . . if issuance of the
2 permit would jeopardize the continued existence of the species.” F&GC § 2081, subd. (c). The
3 statute tightly restricts DFG’s discretion to determine that an action will not cause jeopardy by
4 providing further that:

5 “The department *shall* make this determination based on the *best* scientific and
6 other information that is reasonably available, and *shall* include consideration of the
7 species’ capability to survive and reproduce, and any adverse impacts of the taking on
8 those abilities in light of (1) known population trends; (2) known threats to the species;
9 and (3) reasonably foreseeable impacts on the species from other related projects and
10 activities.”

11 F&GC § 2081, subd. (c) (emphasis added).

12 195. Contrary to these requirements and prohibitions, Respondents approved the Project
13 and its ITP without assuring that DFG utilized the best scientific and other information that is
14 reasonably available, and despite overwhelming evidence that (1) the Project will jeopardize the
15 continued existence of four currently listed, and one candidate, endangered and threatened
16 species, including Sacramento River winter-run Chinook salmon (*Oncorhynchus tshawytscha*),
17 Central Valley spring-run Chinook salmon (*O. tshawytscha*), Delta smelt (*Hypomesus*
18 *transpacificus*), White sturgeon (*Acipenser transmontanus*) and Longfin smelt (*Spirinchus*
19 *thaleichtchys*) and result in adverse modification of habitat essential to the continued existence of
20 these species, and (2) there are reasonable and prudent alternatives available consistent with
21 conserving these species or their habitat which would prevent jeopardy.

22 **1. The California Endangered Species Act Applies to the Project**

23 196. DWR concedes that CESA applies to the Project. Its FEIR states that “DWR is
24 seeking a new ITP [Incidental Take Permit} from CDFW, pursuant to Section 2081 of the
25 California Fish and Game Code” for four currently listed fish species, the Delta Smelt, Longfin
26 Smelt, Bay-Delta Winter Run Chinook Salmon, and Central Valley Spring Run Chinook Salmon,
27 and a candidate species, the White Sturgeon. FEIR, p. ES-5.

28 **2. Respondents Have a Duty Under CESA and CEQA to Give Special
Consideration to Protection of Listed Species.**

197. As noted, CESA declares that “it is the policy of the state that public agencies should
not approve projects as proposed which would jeopardize the continued existence of any

1 endangered species or threatened species or result in the destruction or adverse modification of
2 habitat essential to the continued existence of those species, if there are reasonable and prudent
3 alternatives available consistent with conserving the species or its habitat which would prevent
4 jeopardy.” F&GC § 2053, subd. (a). The Legislature directed further that “it is the policy of this
5 state and the intent of the Legislature that *reasonable and prudent alternatives shall be developed*
6 by the department [of Fish and Game], together with the project proponent and the state lead
7 agency, *consistent with conserving the species*, while at the same time maintaining the project
8 purpose to the greatest extent possible.” *Id.* at subd. (b) (emphasis added). The California
9 Supreme Court recognized in *Mountain Lion Foundation v. Fish and Game Com.*, *supra*, 16
10 Cal.4th at 125, that “CESA establishes a policy adding significant weight to the CEQA balancing
11 scale on the side favoring protection of a listed species over projects that might jeopardize them
12 or their habitats.” *Id.*, citing F&GC § 2053.

13 198. As noted above, CEQA echoes and reinforces this species preservation policy,
14 directing that it is state policy to “[p]revent the elimination of fish or wildlife species due to
15 man’s activities, *insure that fish and wildlife populations do not drop below self-perpetuating*
16 *levels*, and preserve for future generations representations of all plant and animal communities . .
17 . .” PRC §21001, subd. (c) (emphasis added).

18 **3. The Project Fails to Implement These Policies to Protect Listed Species**

19 199. On November 4, 2024, in reliance on the FEIR and the ITP, DFW adopted Findings
20 under CESA, including statements that all authorized impacts associated with DFW’s issuance of
21 the ITP to DWR were minimized and fully mitigated, and that issuance of the ITP would not
22 jeopardize the continued existence of any CESA-listed fish species.

23 200. Contrary to the foregoing state policies requiring DFW and DWR to ensure the
24 survival of the Delta fish species that are listed under CESA, and contrary to their own CESA
25 Findings, Respondents failed to “develop reasonable and prudent alternatives . . . consistent with
26 conserving [listed] species,” ensure that impacts to State-listed fish species are minimized and
27 fully mitigated, and “insure that fish and wildlife populations do not drop below self-perpetuating
28 levels.” DFW’s purported Findings are contrary to and refuted by the evidence, including in the

1 respects summarized below.

2 201. Contrary to DFW’s CESA Findings, Respondents failed to develop any alternative
3 such as substantially reduced rates of diversion and export, consistent with conserving the CESA-
4 listed fish species.

5 202. Contrary to DFW’s CESA Findings, the FEIR on which DFW relied fails to even
6 recognize that the Project continues, enables, and exacerbates the effects of, the State Water
7 Project on the Delta’s CESA-listed fish species, let alone that doing so poses a well-documented
8 threat to maintaining their habitat and populations at self-sustaining levels.

9 203. Contrary to DFW’s CESA Findings, the ITP allows DWR to reduce Delta inflows,
10 and outflows, to levels that historically have harmed, and that will foreseeably harm in the future,
11 CESA-listed fish species.

12 204. Contrary to DFW’s CESA Findings, the ITP allows flows in the Sacramento River
13 and its tributaries that are so low they will reduce survival of juvenile Winter-run Chinook salmon
14 and Spring-run Chinook salmon migrating downstream.

15 205. Contrary to DFW’s CESA Findings, the ITP allows Delta outflows that are not
16 sufficient to avoid jeopardizing, and to fully mitigate the Project’s impacts to, CESA-listed fish
17 species that require increased Delta outflows including Longfin smelt and Delta smelt. Instead,
18 the ITP allows DWR to reduce Delta outflows to such an extent that these species are placed at
19 significant risk of extinction.

20 206. Contrary to DFW’s CESA Findings, the ITP allows DWR to replace required
21 conditions of approval with undefined, unfunded, unexamined and unenforceable “Voluntary
22 Agreements” for which sufficient safeguards to protect CESA-listed fish species have not been
23 formulated, let alone required.

24 207. Contrary to DFW’s CESA Findings, the ITP allows increased rates of diversion and
25 export of freshwater flows to consumptive uses, in the face of overwhelming evidence that past
26 and current export levels have already caused significant harm to CESA-listed fish species,
27 through reverse flows, entrainment in diversion structures, reduced Delta outflows, increased
28 Delta water temperatures, loss of essential habitat, and increased concentrations of pollutants.

1 208. Contrary to DFW’s CESA Findings, the ITP relies on unproven and unenforceable
2 mitigation proposals to restore habitat that are not supported by best available science.

3 209. For each of these reasons and other similar ones, in issuing and receiving the ITP for
4 the Project, Respondents abused their discretion under CESA. Collectively, Respondents’ actions
5 fall far short of the requirements of CESA to conserve listed species and their habitat, to fully
6 mitigate the effects of the Project on them, and to prevent jeopardy to their survival.
7 Accordingly, Respondents’ approval of the Project, its FEIR, and the ITP, is an abuse of
8 discretion in violation of CESA, and should be set aside.

9 **FOURTH CAUSE OF ACTION**

10 **(Violation of the Public Trust Doctrine)**

11 **(Alleged by All Petitioners Against All Respondents)**

12 210. The paragraphs set forth above and below are realleged and incorporated herein by
13 reference.

14 211. Water Code section 85023 states, “the longstanding constitutional principle of
15 reasonable use and the Public Trust Doctrine shall be the foundation of state water management
16 policy and are particularly important and applicable to the Delta.”

17 212. In *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 426, the court
18 stated that the public trust doctrine mandates that “before state courts and agencies approve water
19 diversions they . . . consider the effect of such diversions upon interests protected by the public
20 trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.” The
21 *National Audubon Society* Court went on to explain:

22 Just as the history of this state shows that appropriation may be necessary for efficient
23 use of water despite unavoidable harm to public trust values, it demonstrates that an
24 appropriative water rights system administered without consideration of the public
25 trust may cause unnecessary and unjustified harm to trust interests. As a matter of
26 practical necessity the state may have to approve appropriations despite foreseeable
27 harm to public trust uses. In so doing, however, the state must bear in mind its duty
28 as trustee to consider the effect of the taking on the public trust, and to preserve, so
far as consistent with the public interest, the uses protected by the trust.

Id., citations omitted.

213. As noted above, the Public Trust Doctrine protects the Delta’s ecological health.

1 The doctrine not only protects “the right to fish, hunt, bathe, swim, to use for boating and general
2 recreation purposes the navigable waters of the state, and to use the bottom of the navigable
3 waters for anchoring, standing, or other purposes.” *Marks*, 6 Cal.3d at 259. It also
4 “encompass[es] . . . the preservation of those lands in their natural state, so that they may serve as
5 ecological units for scientific study, as open space, and as environments which provide food and
6 habitat for birds and marine life, and which favorably affect the scenery and climate of the area.”
7 *Id.* at 259-260.

8 214. Although compliance with CEQA “may assist an agency in complying with its duties
9 under the public trust doctrine [,] CEQA review of a project does not necessarily or
10 automatically satisfy the agency’s affirmative duties to take the trust into account and protect
11 public trust uses whenever feasible.” *San Francisco Baykeeper*, 29 Cal.App.5th at 571. “[A]
12 public trust use is not any use that may confer a public benefit, but rather a use that facilitates
13 public access, public enjoyment, or public use of trust land.” *Id.* at 570. Agencies tasked with
14 protecting public trust resources have affirmative statutory and constitutional “duties to take the
15 trust into account and protect public trust uses whenever feasible,” based on a fair and fully
16 informed balancing of the impacts of these alternatives on public trust resources. *San Francisco*
17 *Baykeeper*, 29 Cal.App.5th at 571.

18 215. The Project will adversely affect numerous public trust resources, including flows
19 and habitat necessary for fish, wildlife, and recreation, and do so for non-public trust purposes –
20 the diversion of Delta water for consumptive use. Despite public comment regarding the
21 Project’s impacts to public trust resources, and the need to protect those resources from harm by
22 non-public trust uses such as the Project’s diversion of Delta water for consumptive uses, DWR
23 argues that its CEQA analysis is all that was necessary to address or examine the issue in its
24 FEIR. Yet DWR’s public trust duties require DWR to examine whether its activities will protect
25 public trust uses independently of any analysis required by CEQA, and to protect those public
26 trust uses from harm from non-public trust uses.

27 216. By approving the Project and its deficient ITP without appropriate consideration of
28 whether additional feasible alternatives could benefit public trust resources to a greater extent

1 than the Project and its ITP, and without adequately protecting public trust resources and uses
2 from non-public trust uses such as diverting water for consumptive use, Respondents abdicated
3 their affirmative statutory and constitutional “duties to take the trust into account and protect
4 public trust uses whenever feasible,” based on a fair and fully informed balancing of the impacts
5 of these alternatives on public trust resources. *San Francisco Baykeeper*, 29 Cal.App.5th at 571.

6 217. Accordingly, Respondents abused their discretion in violation of the Public Trust
7 Doctrine, and their approvals of the Project, its FEIR, and its ITP should be set aside.

8
9 **FIFTH CAUSE OF ACTION**

10 **(Writ of Mandate, Declaratory and Injunctive Relief to Set Aside
11 Project Approvals as Contrary to CCP §§ 1085 and 1094.5)**

12 **(Alleged by All Petitioners Against All Respondents)**

13 218. The paragraphs set forth above and below are realleged and incorporated herein by
14 reference.

15 219. Respondents proceeded in excess of their jurisdiction and abused their discretion in
16 purporting to approve the Project, certify its FEIR, and approve its ITP, because such approvals
17 violate CCP sections 1085 and 1094.5 in the following respects, among others:

- 18 a. such approvals were not granted in accordance with the procedures required
19 by law;
20 b. such approvals were not based on the findings required by law; and
21 c. such approvals were not based on, or were contrary to, the evidence in the
22 record before Respondents.

23 220. Respondents failed to proceed in the manner required by law in the following
24 respects, among others:

- 25 a. Respondents violated CEQA as alleged hereinabove;
26 b. Respondents violated the Delta Reform Act as alleged hereinabove;
27 c. Respondents violated CESA as alleged hereinabove; and
28 d. Respondents violated the Public Trust Doctrine as alleged hereinabove.

1 221. Respondents' actions in approving the Project, its FEIR and its ITP without
2 complying with the procedures required by CCP sections 1085 and 1094.5 exceeded their
3 jurisdiction and constitute a prejudicial abuse of discretion, and are therefore invalid and must be
4 set aside.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Petitioners pray for relief as follows:

7 1. For a peremptory writ of mandate directing Respondents to set aside and vacate their
8 approval of the Project, certification of its FEIR, and approval of its ITP;

9 2. For declaratory relief declaring Respondents' approval of the Project, its FEIR, and
10 its ITP, as part of Respondents' continuing pattern and practice of such unlawful activity, to be
11 unlawful;

12 3. For a peremptory writ of mandate directing Respondents to suspend all activity
13 implementing the Project, its FEIR, and its ITP that could result in any change or alteration in the
14 physical environment until Respondents have taken all actions necessary to bring their approval
15 of the Project, its FEIR and its ITP into compliance with CEQA, the Delta Reform Act, CESA,
16 the Public Trust Doctrine and the Code of Civil Procedure;

17 4. For attorneys' fees under Code of Civil Procedure section 1021.5;

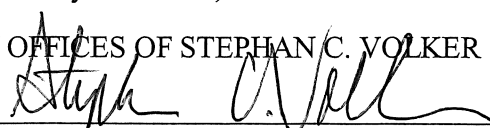
18 5. For costs incurred in this action; and

19 6. For such other equitable or legal relief as the Court may deem just and proper.

20 Dated: November 26, 2024

Respectfully submitted,

21 LAW OFFICES OF STEPHAN C. VOLKER

22 

23 By: STEPHAN C. VOLKER
24 Attorney for Petitioners and Plaintiffs
25 California Sportfishing Protection Alliance,
26 North Coast Rivers Alliance, San Francisco
27 Crab Boat Owners Association, and the
28 Winnemem Wintu Tribe

VERIFICATION

I, Chris Shutes, am the Executive Director of Petitioner/Plaintiff California Sportfishing

1 Protection Alliance (“CSPA”) in this action. I make this verification on behalf of CSPA. I have
2 read the foregoing Verified Petition for Writ of Mandate and Complaint for Declaratory and
3 Injunctive Relief and Attorneys’ Fees and know its contents. I am familiar with the history of and
4 ongoing efforts by state and federal agencies to manage the California State Water Project and the
5 federal Central Valley Project, and the substantial adverse effects of past, ongoing and proposed
6 future operation of those water projects on the fish and wildlife of California’s Central Valley
7 including in particular its Delta Estuary and its tributaries. The facts therein alleged are true and
8 correct to the best of my knowledge and belief, and are based on documents within the public
9 records underlying the approvals herein challenged that I have reviewed.

10 I declare under penalty of perjury under the laws of the State of California that the
11 foregoing is true and correct, and that this Verification was executed in Berkeley, California on
12 November 26, 2024.

13 
14 CHRIS SHUTES

15 **VERIFICATION**

16 I, Stephan C. Volker, am counsel to the Petitioners and Plaintiffs in this action, and make
17 this verification on behalf of each of them because they are absent from Alameda County in
18 which my office is located, except the California Sportfishing Protection Alliance, whose
19 Executive Director Chris Shutes resides in Alameda County and therefore has signed a separate
20 verification which appears above. I have read the foregoing Verified Petition for Writ of
21 Mandate and Complaint for Declaratory and Injunctive Relief and Attorneys’ Fees and know its
22 contents. The facts therein alleged are true and correct to the best of my knowledge and belief,
23 and are based on documents within the public records underlying the approvals herein challenged
24 that I have reviewed.

25 I declare under penalty of perjury under the laws of the State of California that the
26 foregoing is true and correct, and that this Verification was executed in Berkeley, California on
27 November 26, 2024.

28 
STEPHAN C. VOLKER