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24 *SALMON ASSOCIATION, and THE BAY*
25 *INSTITUTE*

26 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

27 **COUNTY OF SACRAMENTO**

28 SAN FRANCISCO BAYKEEPER, SHINGLE
29 SPRINGS BAND OF MIWOK INDIANS,
30 CALIFORNIA INDIAN ENVIRONMENTAL
31 ALLIANCE, RESTORE THE
32 DELTA, GOLDEN STATE SALMON
33 ASSOCIATION, and THE BAY INSTITUTE,

34 Petitioners,

35 vs.

36 CALIFORNIA DEPARTMENT OF
37 WATER RESOURCES,

38 Respondent.

Case No.:

**VERIFIED PETITION FOR WRIT OF
MANDATE (California Environmental
Quality Act, Pub. Resources Code § 21100
et seq.; Code of Civil Procedure §§ 1094.5
and 1085)**

CEQA CASE

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1 Petitioners SHINGLE SPRINGS BAND OF MIWOK INDIANS, CALIFORNIA INDIAN
2 ENVIRONMENTAL ALLIANCE, SAN FRANCISCO BAYKEEPER, RESTORE THE DELTA,
3 GOLDEN STATE SALMON ASSOCIATION, and THE BAY INSTITUTE (“Petitioners”) bring
4 this action for writ of mandate under the California Environmental Quality Act (“CEQA”)
5 (“Petition”) and Code of Civil Procedure section 1094.5, or in the alternative Code of Civil
6 Procedure section 1085, on behalf of Petitioners’ interested members, residents, and the public
7 interest.

8 **I. INTRODUCTION**

9 1. This is a civil suit brought pursuant to the California Environmental Quality Act
10 (“CEQA”), Public Resources Code §§ 21000 et seq., and the Public Trust Doctrine.

11 2. This action is brought by a federally recognized Tribe, a Tribal organization, and
12 several environmental justice, and water conservation organizations to challenge the California
13 Department of Water Resources’ (“Respondent” or “DWR”) environmental review and approval of
14 Delta Conveyance Project (or “Project”). According to Respondent, the purpose of the Project is to
15 improve the reliability of the State Water Project (“SWP”) and, potentially, the Central Valley
16 Project (“CVP”) south of the Delta. (Final Environmental Impact Report at ES-1 (hereinafter
17 “FEIR”).)

18 3. The Delta Conveyance Project proposes to construct a tunnel that would divert water
19 from the Sacramento River beneath the Sacramento-San Joaquin Delta (“the Delta”), denying
20 critical freshwater flows to the Delta and the San Francisco Bay. The Project will have devastating
21 impacts on the Delta. The Delta faces interrelated problems of inadequate water supply, instream
22 flow deficits, water quality impairments, and degraded aquatic habitats. This Project would worsen
23 those existing problems, with pronounced effects to environmental justice and Tribal communities,
24 by further reducing freshwater flows in the Delta.

25 4. The Project will have terrible consequences on fish, wildlife, and the Delta’s aquatic
26 ecosystem, including for the threatened and endangered species present in the Delta and in the San
27 Francisco Bay (that rely on the Delta), including Chinook Salmon, Delta Smelt, Longfin Smelt,
28 Central Valley Steelhead, and others.

1 5. On December 8, 2023, DWR released its Final Environmental Impact Report for the
2 Project, which purports to thoroughly and properly evaluate the Project’s likely significant
3 environmental impacts, as required by CEQA. (FEIR at ES-1.)

4 6. On December 21, 2023, DWR formally and finally approved the Project.

5 7. The FEIR for the Project fails to adequately analyze many of the Project’s most
6 significant environmental impacts, including the significant burden the Project will place on
7 environmental justice communities and Tribes, the likely implications climate change will have on
8 the efficacy and impacts associated with the Project, the Project’s implications for water quality in
9 the Delta and in the San Francisco Bay, and the Project’s likely impacts on the threatened and
10 endangered species present in the Delta and the San Francisco Bay.

11 8. Respondent violated CEQA, and this Court must vacate the FEIR and Project
12 authorization to prevent the Project’s likely devastating impacts.

13 **II. THE PARTIES**

14 9. Petitioner SHINGLE SPRINGS BAND OF MIWOK INDIANS is a federally
15 recognized Indian Tribe committed to protecting and enhancing the quality of life of its members by
16 preserving, protecting, and promoting its history, culture, and traditions, promoting self-sufficiency
17 and a strong work ethic, and exercising the powers of self-government and sovereign immunity,
18 while also providing social, health, economic, and educational resources, opportunities, and services
19 to contribute to the well-being of the Tribal community.

20 10. Petitioner CALIFORNIA INDIAN ENVIRONMENTAL ALLIANCE is a Tribal
21 organization committed to serving California Tribes and Tribal members of California Indian Tribal
22 Nations, including those recognized by federal, state, or local governments or non-recognized. Its
23 work focuses on future generations, including those most at risk from toxins. Its strategy integrates
24 watershed and regional approaches, providing technical assistance, and facilitating strategic
25 planning and consensus building. The Alliance’s work is respectful of the knowledge and lifeways
26 of Indigenous Peoples. The California Indian Environmental Alliance encourages policies and
27 actions supporting Tribal sovereignty and Tribal self-advocacy.

28

1 11. Petitioner RESTORE THE DELTA is a grassroots campaign of residents and
2 organizations committed to restoring the Sacramento-San Joaquin Delta so that fisheries,
3 communities, and family farming can thrive there together again; so that water quality is protected
4 for all communities, particularly environmental justice communities; and so that Delta communities
5 are protected from flood and drought impacts resulting from climate change while gaining improved
6 public access to clean waterways. Ultimately, Restore the Delta’s goal is to connect communities to
7 regional rivers and to empower local communities to become the guardians of the estuary through
8 participation in government planning and waterway monitoring. Restore the Delta advocates for
9 local Delta stakeholders to ensure that they have a direct impact on water management decisions
10 affecting the well-being of their communities, and water sustainability policies for all Californians.

11 12. Petitioner SAN FRANCISCO BAYKEEPER is an environmental non-profit public
12 benefit corporation organized in accordance with the laws of the State of California. Its
13 approximately three-thousand-five hundred (3,500) members live and recreate in and around the
14 San Francisco Bay Area and the Delta. San Francisco Baykeeper’s mission is to defend San
15 Francisco Bay from its biggest threats and hold polluters and government agencies accountable to
16 create healthier communities and help wildlife thrive. The organization investigates and stops
17 pollution at the source and advocates for resilient flows throughout the watershed with the end goal
18 of a San Francisco Bay that is healthy for wildlife and safe for recreation. Additionally, San
19 Francisco Baykeeper actively seeks regulatory implementation of federal and state environmental
20 laws and initiates enforcement actions on behalf of itself and its members when necessary. San
21 Francisco Baykeeper has worked to protect and restore the health of San Francisco Bay, including
22 its Delta and tributaries, since its founding in 1989.

23 13. Petitioner BAY.ORG d/b/a THE BAY INSTITUTE (“The Bay Institute”) is a non-
24 profit environmental organization, located in San Francisco, California, and dedicated to protecting,
25 restoring, and inspiring conservation of the ecosystems of the Bay and its watershed. Since 1981,
26 the Bay Institute’s scientists and policy experts have worked to save the San Francisco Bay estuary's
27 unique fish and wildlife species from extinction, restore the flows, habitats, and processes that
28 support a healthy ecosystem, promote sustainable water and land management practices, and

1 measure how well the ecosystem – and management efforts to protect it – is doing. To achieve these
2 goals, the Bay Institute staff conduct technical analyses, engage in regulatory, legislative, and
3 voluntary decision-making processes, and educate media, decision-makers, and the public on key
4 issues.

5 14. Petitioner GOLDEN STATE SALMON ASSOCIATION is an environmental non-
6 profit that works closely with state and federal elected and unelected policy makers at water
7 agencies to enhance salmon hydrology, habitat, and hatcheries. Its approximately one-thousand-
8 seven hundred (1,700) members include commercial and recreational salmon fishermen and
9 women, related businesses, restaurants, Tribes, environmentalists, elected officials, families, and
10 communities that rely on salmon. The organization employs myriad strategies to this end, including
11 public relations and social media, grassroots mobilization and empowerment, strategic litigation,
12 hands-on restoration, stewardship, and education. Golden State Salmon Association has been
13 working to restore California salmon for their economic, recreational, commercial, environmental,
14 cultural and health values since 2010.

15 15. Respondent CALIFORNIA DEPARTMENT OF WATER RESOURCES is an
16 agency of the State of California. DWR manages California's water resources, systems, and
17 infrastructure. Established in 1956, DWR's directives and responsibilities include, among other
18 things, protecting, conserving, developing, and managing California's water supply. Respondent
19 DWR is both the Project proponent (and applicant) here and the lead agency for the purposes of
20 preparing and issuing the Draft and Final Environmental Impact Reports at issue in this lawsuit.

21 **III. JURISDICTION AND VENUE**

22 16. This Court has jurisdiction to issue a writ of mandate to set aside Respondent's
23 decision to approve the Project under California Code of Civil Procedure section 1094.5 (or
24 alternatively, section 1085) and Public Resources Code section 21168.5 (or alternatively, section
25 21168) and section 21168.9.

26 17. Venue is proper in the County of Sacramento under California Code of Civil
27 Procedure section 393 and 401 and California Government Code section 955.3.

28

1 18. Respondent has taken final agency actions with respect to approving the Project and
2 certifying the FEIR. Respondent has a duty to comply with applicable state laws, including but not
3 limited to CEQA, prior to undertaking the discretionary approvals at issue in this lawsuit.

4 19. Petitioners have complied with the requirements of Public Resources Code section
5 21167.5 by serving a written notice of Petitioner’s intention to commence this action on Respondent
6 on January 19, 2024. A copy of the written notice and proof of service is attached hereto as **Exhibit**
7 **A.**

8 20. Petitioners have complied with the requirements of Public Resources Code section
9 21167.6 by concurrently notifying Respondent of Petitioners’ request to prepare the record of
10 administrative proceedings relating to this action. A copy of the Petitioners’ Election to Prepare
11 Administrative Record of Proceedings is attached hereto as **Exhibit B.**

12 21. Petitioners have performed any and all conditions precedent to filing this instant
13 action and have exhausted any and all administrative remedies to the extent required by law,
14 including, but not limited to, timely submitting extensive comments objecting to the approval of the
15 Project and identifying in writing to Respondent the deficiencies in Respondent's environmental
16 review for the Project.

17 22. Petitioners submitted comments on the Draft Environmental Impact Report
18 (“DEIR”) on December 14, 2022 (for Petitioners San Francisco Baykeeper, Restore the Delta,
19 Golden State Salmon Association, CIEA, and the Bay Institute (“Group Comments”)), on
20 December 16, 2022 (for Petitioner Restore the Delta, separately (“RTD Comments”)), on December
21 16, 2022 (for Petitioner Shingle Springs Band of Miwok Indians (“Shingle Springs Comments”)),
22 and on December 16, 2022 (for California Indian Environmental Alliance, separately (“CIEA
23 Comments”)). Copies of these comments are attached hereto and incorporated by reference as
24 **Exhibits C through F.**

25 23. This Petition is timely filed in accordance with Public Resources Code section 21167
26 and CEQA Guidelines section 15112.

1 **IV. PRIVATE ATTORNEY GENERAL DOCTRINE**

2 24. Petitioners bring this action as private attorneys general pursuant to California Code
3 of Civil Procedure section 1021.5, and any other applicable legal theory, to enforce important rights
4 affecting the public interest.

5 25. Issuance of the relief requested in this Petition will confer significant benefits on the
6 general public by, among other benefits, requiring Respondents to properly identify, disclose,
7 analyze, and mitigate the direct, indirect, and cumulative impacts of the Project that were not
8 properly disclosed, analyzed, or mitigated in the Draft and Final Environmental Impact Reports for
9 the Project.

10 26. Issuance of the relief requested in this Petition will result in the enforcement of
11 important rights affecting the public interest. By compelling Respondent to complete a legally
12 adequate analysis of the Project, Respondent will be required to properly and publicly disclose and
13 analyze all of the potentially significant, adverse environmental effects and to ensure that all
14 feasible mitigation measures or alternatives that would reduce or avoid such potentially significant,
15 adverse environmental impacts are implemented and/or explored.

16 27. The necessity and financial burden of enforcement are such as to make an award of
17 attorneys' fees appropriate in this proceeding. Absent enforcement by Petitioners, the Project might
18 otherwise be deemed valid despite its legally and factually inadequate disclosures, analyses,
19 conclusions, mitigation measures, and alternatives, among other things. As a result, potentially
20 significant, adverse environmental effects might otherwise have evaded legally adequate
21 environmental review and mitigation in accordance with the California Legislature's policy of
22 affording the greatest protections to the environment within the scope of CEQA.

23 **V. FACTUAL BACKGROUND**

24 28. If fully constructed and operated as contemplated by Respondent, the Delta
25 Conveyance Project will devastate the Sacramento-San Joaquin Delta and the San Francisco Bay
26 connected to it.

27 29. The Delta is an expansive inland river delta and the upper part of the San Francisco
28 Estuary in Northern California spanning portions of six counties (Alameda, Contra Costa,

1 Sacramento, San Joaquin, Solano, and Yolo). (FEIR at ES-1.) Flows enter the Delta from a roughly
2 60,000 square mile watershed, primarily from the Sacramento River and San Joaquin River. This
3 water flows through the Delta and into San Francisco Bay. Together, the Delta and San Francisco
4 Bay comprise the San Francisco Estuary.

5 30. According to Respondent, the Delta exists at the confluence of the Sacramento and
6 San Joaquin Rivers on the western edge of the Central Valley. (*Id.*) Local Tribes consider the Delta
7 to extend up into the rivers' watersheds.

8 31. The Delta provides important habitat for more than five hundred (500) species of fish
9 and wildlife and supports a number of endangered and threatened species, including Chinook
10 Salmon, Delta Smelt, Longfin Smelt, and Central Valley Steelhead, among others. (FEIR at ES-1.)
11 And freshwater flows from the Delta are also important for many species (and for water quality) in
12 the San Francisco Bay. (*Id.* at 12-1.)

13 32. Specifically, the Delta provides essential habitat for winter-run Chinook Salmon,
14 which are listed as "endangered" under both the California Endangered Species Act ("CESA") and
15 the federal Endangered Species Act ("ESA"), spring-run Chinook Salmon, which are listed as
16 "threatened" under both the ESA and CESA, fall-run Chinook Salmon, which are listed as a
17 "species of concern" by California Department of Fish and Wildlife (CDFW), Delta Smelt, which
18 are listed as "threatened" under the ESA and "endangered" under the CESA, Longfin Smelt, which
19 are a candidate for listing under the ESA and are listed as "threatened" under the CESA, Central
20 Valley Steelhead, which are listed as "threatened" under the ESA but are not listed under the CESA,
21 Green Sturgeon, which are listed as "threatened" under the ESA and as a "species of special
22 concern" by CDFW, and White Sturgeon, which are listed as a "species of special concern" by
23 CDFW, among others. (FEIR at 12-8.)

24 33. Chinook Salmon and Central Valley Steelhead are anadromous fish, which means
25 that they spend most of their lives at sea, in saltwater, but spawn and rear as juveniles upstream in
26 freshwater rivers. (*Id.* at 12A-21; *id.* at 12A-45.) Juveniles migrate to the ocean within months to 2
27 years of spawning. Consequently, they need sufficient river flows into and out of the Delta to
28 complete their life cycle. They also require that the water in which they migrate, rear, and incubate

1 is cold enough to support their completion of freshwater life stages (warm water impacts salmon
2 and Steelhead reproductive success). (*Id.* at 12A-37.)

3 34. Millions of salmon and Steelhead once returned to spawn in the foothills and
4 mountains surrounding California's Central Valley. Streams fed by rainfall, snowmelt, and cold-
5 water springs encircled the Valley, fostering a diversity and abundance of Chinook Salmon and a
6 sizeable population of Central Valley Steelhead.

7 35. Several “evolutionarily significant units” (distinct populations or runs, as they are
8 sometimes called) of Chinook Salmon spawn in the Sacramento-San Joaquin River system, named
9 for the season when the majority of the run enters freshwater as adults. (FEIR at 12A-21 – 12A-36.)

10 36. Fall-run Chinook Salmon migrate upstream as adults from July through December
11 and spawn from early October through late December. (*Id.* at 12A-41.) Late-fall-run Chinook
12 Salmon migrate into the rivers from mid-October through December and spawn from January
13 through mid-April. (*Id.* at 12A-37.) The majority of young fall-run Chinook Salmon migrate to the
14 ocean during the first few months following emergence, although some may remain in freshwater
15 and migrate as yearlings. (*Id.*)

16 37. Spring-run Chinook Salmon enter the Delta from late March through September. (*Id.*
17 at 12A-28.) Adults hold in cool water habitats through the summer, then spawn in the fall from mid-
18 August through early October. (*Id.*) Spring-run Chinook Salmon juveniles migrate soon after
19 emergence or remain in freshwater and migrate as yearlings. (*Id.*) Spring-run Chinook Salmon were
20 historically the most abundant distinct population in the Central Valley, but now only remnant
21 populations remain in Butte, Mill, Deer, Antelope, and Beegum Creeks, tributaries to the
22 Sacramento River. (*Id.* at 12A-29.)

23 38. For millennia, winter-run Chinook Salmon spawned in the upper reaches of
24 Sacramento River tributaries. (*Id.* at 12A-21 – 12A-22.) These fish are unique among Chinook
25 Salmon in that they spawn during the summer months when air temperatures usually approach their
26 warmest. (*Id.* at 12A-21.) As a result, winter-run Chinook Salmon require stream reaches with cold
27 water sources that will protect their incubating eggs from the warm ambient conditions; as a result,
28 winter-run Chinook Salmon historically occurred only in rivers and creeks fed by cold water

1 springs, such as the Little Sacramento, McCloud, and Pit rivers, and Battle Creek. (*Id.* at 12A-24.)
2 The Shasta and Keswick dams blocked access to their historic spawning areas. (*Id.* at 12A-21.)
3 Winter-run Chinook Salmon, however, were able to take advantage of summertime cool water
4 releases downstream of Keswick Dam and, in the 1940's and 1950's, the population somewhat
5 recovered. (*Id.* at 12A-22.) However, beginning in 1970, the population experienced a dramatic
6 decline and is now extremely vulnerable. (*Id.*) The one remaining winter-run Chinook Salmon
7 population has persisted in large part due to agency-managed cold-water releases from Shasta
8 Reservoir during the summer and artificial propagation from Livingston Stone National Fish
9 Hatchery's winter-run Chinook Salmon conservation program. (*Id.*)

10 39. The Delta Smelt is a small fish that is endemic to California and that only occurs in
11 the San Francisco Estuary. (*Id.* at 12A-1.) The Delta Smelt life cycle follows the four seasons—
12 spring spawning in fresh water, summer migration/rearing in the low salinity zone, fall maturation
13 in the low salinity zone, and winter upstream migration into fresh water shortly before spawning.
14 (*Id.* at 12A-1 – 12A-3.) Most spawning happens in tidally influenced backwater sloughs and
15 channel edgewater. (*Id.* at 12A-2.) Delta Smelt populations have declined considerably as a result
16 of reductions in freshwater Delta outflows, entrainment losses to CVP and SWP water diversion
17 systems, and changes in food supply, among other reasons. (*Id.* at 12A-5 – 12A-6.)

18 40. Likewise, the Longfin Smelt is a small fish found along the Pacific coast of the
19 United States from Alaska to California. (*Id.* at 12A-12.) In California, Longfin Smelt have
20 historically been found in the San Francisco Estuary, Humboldt Bay, and the estuaries of the Eel
21 River and Klamath River—and use a variety of habitats from nearshore waters to estuaries and
22 lower portions of freshwater streams. (*Id.* at 12A-14.) Longfin Smelt are also anadromous,
23 depending on fresh to brackish water for spawning, and brackish to marine waters for rearing. (*Id.* at
24 12A-12.) Larval survey data indicate spawning occurs from November through May, with a peak
25 from February through April. (*Id.* at 12A-15.) Like Delta Smelt, scientists are seriously concerned
26 about the decline of Longfin Smelt, which is the result of reductions in freshwater Delta outflows
27 and entrainment losses to CVP and SWP water diversion systems, among other reasons. (*Id.* at 12A-
28 16.) In the Bay-Delta, the abundance of young-of-the-year Longfin Smelt increases with the amount

1 of freshwater outflow. (*Id.* at 12A-18.) And the fish seems to have a low tolerance to warm waters.
2 (*Id.* at 12A-16.) Consequently, in the Bay-Delta, the reduction in Delta outflows, in part due to
3 water exports, threatens survival and recovery. (*Id.*)

4 41. The Sacramento River is home to the only known spawning population of the Green
5 Sturgeon southern distinct population segment. (*Id.* at 12A-50.) Green Sturgeon reach maturity
6 around fourteen (14) to sixteen (16) years of age and can live to be seventy (70) years old, returning
7 to their natal rivers every three (3) to five (5) years for spawning. (*Id.* at 12A-51.) Green Sturgeon
8 southern distinct population segment adults move through the Delta from February through April,
9 arriving at spawning locations between April and June. (*Id.*) Much of their habitat in the upper
10 Sacramento River and Feather River has been lost, and the Sacramento River and Delta face
11 mounting threats to both habitat quality and quantity. (*Id.* at 12A-50.) In part because of their
12 bottom-oriented feeding habits, sturgeon are at risk of harmful accumulations of toxic pollutants in
13 their tissues, especially pesticides such as pyrethroids, selenium, and heavy metals such as mercury.
14 (*Id.* at 12A-51.) They are also susceptible to mortality caused by recent red-tide algal blooms in San
15 Francisco Bay.

16 42. White Sturgeon are assumed to be generally similar to Green Sturgeon in terms of
17 their ecological requirements. Like Green Sturgeon and other sturgeon species, White Sturgeon are
18 late-maturing and infrequent spawners, which makes them vulnerable to overexploitation and other
19 sources of adult mortality. (*Id.* at 12A-54 – 12A-55.) Within the San Francisco Estuary, White
20 Sturgeon are believed to be abundant in the Delta region; both non-spawning adults and juveniles
21 can be found throughout the Delta year-round. (*Id.* at 12A-55.) The San Francisco Estuary
22 population of White Sturgeon spawns mainly in the Sacramento and Feather Rivers, with occasional
23 spawning in the San Joaquin River. (*Id.*) Reproductive success is adversely affected by insufficient
24 river and Delta flows, predation, decreased dissolved oxygen, chemical toxicants in the water, and
25 entrainment at diversions. (*Id.* at 12A-56.)

26 43. Prior to the 1850s, when Delta reclamation began, the Delta region was a largely
27 natural habitat for wildlife: seasonal wetlands crossed by rivers and sloughs that flooded frequently.
28 (*Id.* at ES-2.) These natural assets were also favorable to habitation, resource collection, or other

1 uses by early Native Peoples. (*Id.*) However, as discussed above regarding salmon and Steelhead,
2 development of water diversion and impoundment systems in the Central Valley has devastated the
3 ecosystem, imperiling many species present therein and other species in San Francisco Bay that rely
4 on freshwater outflows from the Delta. As a result, the California Legislature to pass the Delta
5 Reform Act of 2009, which set out a new state policy “to reduce reliance on the Delta in meeting
6 California’s future water supply needs through a statewide strategy of investing in improved
7 regional supplies, conservation, and water use efficiency.” (Water Code § 85021.)

8 44. Since the 1850s, the hydrodynamics of the Delta, as well as downstream locations
9 including Suisun Bay and Suisun Marsh, have been transformed by flood control and water
10 diversion projects, including the SWP and the CVP, sedimentation from upstream mining, and
11 navigation improvements. (FEIR at ES-2.)

12 45. The SWP is the largest state-built water storage and conveyance project in the United
13 States, and includes thirty-six (36) storage facilities, twenty-one (21) pumping plants, five (5)
14 hydroelectric power plants, four (4) pumping- generating plants, and approximately seven hundred
15 (700) miles of canals, tunnels, and pipelines. (*Id.* at 1-7.) And the CVP is another major water
16 storage and conveyance system located in the Central Valley. (*Id.* at 1-8.) The watersheds of the
17 Sacramento and San Joaquin Rivers are at the core of California’s SWP and CVP water systems,
18 which convey water to millions of Californians in Northern California, the San Francisco Bay Area,
19 Central Valley, Central Coast, and Southern California. (*Id.* at ES-1.)

20 46. The Delta Conveyance Project is intended to augment the SWP and CVP (and other
21 water storage and conveyance systems) in order to provide more resiliency and flexibility for
22 allocating, storing, and conveying water supplies. (*Id.*)

23 47. Indeed, according to Respondent’s website for the Project, “California faces a future
24 of water instability, more rain, less snow, and more frequent extreme events like drought and
25 flood.” (DWR, Delta Conveyance (Sept. 07, 2023), available at
26 [https://water.ca.gov/Programs/State-Water-Project/Delta-Conveyance.](https://water.ca.gov/Programs/State-Water-Project/Delta-Conveyance)) And, according to DWR,
27 “[t]hese changes will reduce the ability of the SWP’s current infrastructure to capture water,
28 especially because there will be less snow and snowmelt available.” (*Id.*) Accordingly, the Project,

1 Respondent hopes, will help to “protect[] against future water supply losses caused by climate
2 change, sea level rise, and earthquakes.” (*Id.*)

3 48. Heat index projections are dramatic for Central Valley counties during the rest of this
4 century. For Sacramento Valley counties, for example, the historical (1971-2000) average number
5 of days with the heat index exceeding ninety (90) degrees Fahrenheit will increase on average at
6 mid-century by eighty-two (82) percent (from about fifty-eight (58) to one-hundred-and-three (103)
7 days per year) and by the end of the century by about one-hundred-and-thirty-eight (138) percent
8 (from about fifty-eight (58) to one-hundred-and-thirty-two (132) days per year). (RTD Comments at
9 20.) In other words, the hot season in the Sacramento Valley is projected to nearly double by mid-
10 century and could triple by the end of the century.

11 49. For Delta counties in general, the expected increases for the ninety (90) degree
12 Fahrenheit heat index are one-hundred-and-three (103) percent (from about forty (40) days
13 historically to eighty-two (82) days at mid-century, more than doubling) and about one-hundred-
14 and-eighty-six (186) percent (from forty (40) days to one-hundred-and-fifteen (115) days), nearly
15 tripling by 2100. (*Id.* at 21.) In San Joaquin Valley counties, the 1971-2000 period saw about fifty-
16 one (51) days on average with the heat index at or above ninety (90) degrees Fahrenheit —less than
17 two months typically in the summer. By midcentury, these counties will see about eighty-six (86)
18 such days per year on average by mid-century and about one-hundred-and-nine (109) by the end of
19 the century where the heat index exceeds (90) degrees Fahrenheit. (*Id.*) The experiential change
20 would be from just shy of two months to about three months by mid-century, to over three and a
21 half months by 2100.

22 50. To construct the Project, DWR plans to build and operate new water diversion and
23 conveyance facilities in the Delta that would be operated in coordination with existing facilities
24 associated with the SWP. (*Id.* at ES-13.) The new water conveyance facilities would divert up to
25 six-thousand (6,000) cubic-feet-per-second (“cfs”) of water from two new north Delta intakes
26 through fish screens and convey it via a single tunnel on an eastern alignment directly to a new
27 pumping plant and aqueduct complex between Byron Highway and Mountain House Road near
28 Mountain House in the south Delta, ultimately discharging it to the Bethany Reservoir for delivery

1 to existing SWP export facilities. (*Id.*) The vast new infrastructure would be constructed and
2 operated on, near, and around land sacred to the Shingle Springs Band of Miwok Indians as well as
3 culturally significant areas for other Tribes.

4 51. As noted, a stated purpose of the Tunnel Project is to invest billions of dollars to
5 maintain the *status quo* of water deliveries by the SWP. It does little to address climate adaptation
6 in the Delta and continues to over-rely on through-Delta conveyance into the future.

7 52. Notably, DWR proposed a similar, though larger project years ago called the
8 California WaterFix Project; but, on May 2, 2019, that project was withdrawn as a result of
9 concerns for its environmental impacts and CEQA litigation. (Group Comments at 2.)

10 53. DWR initiated the CEQA review process for the Delta Conveyance Project on
11 January 15, 2020, and issued the Draft Environmental Impact Report (“DEIR”) for public comment
12 on July 27, 2022.

13 54. Petitioners submitted extensive comments on the DEIR for the Project and
14 participated orally at several hearings. (Group Comments at 1; RTD Comments at 1; Shingle
15 Springs Comments at 1; California Indian Environmental Alliance Comments at 1.) These
16 comments criticized the DEIR for failing to consider a reasonable range of operational alternatives,
17 as required by CEQA, stating an improper “Project Purpose and Objectives” and using that
18 articulation of Project needs to exclude feasible alternatives, utilizing an unlawful and arbitrary
19 “Environmental Baseline” that misleads the public and decisionmakers by, among other things,
20 excluding adequate accounting of the impacts of climate change, failing to consider the likely
21 cumulative impacts of the Project when considered alongside other state water-supply proposals and
22 projects, failing to accurately assess and mitigate potential impacts to salmon and other native fish
23 species, and for failing to adequately analyze and protect against impacts to water quality. (Group
24 Comments at 1-2.)

25 55. Further, Petitioners’ comments criticized the FEIR for failing to accurately analyze
26 the Project’s environmental justice impacts. (RTD Comments at 1.) Project impacts will be
27 disproportionately borne by environmental justice communities already bearing a disproportionate
28

1 burden of pollution and environmental resource degradation effects. For example, the FEIR
2 included Delta survey data showing that:

- 3 • Of the 2117 survey participants, nine-hundred-and-seventy-nine (979) were categorized as
4 living or working (or both) in the Delta region. Of those, five-hundred-and-forty (540) were
5 categorized as being from disadvantaged communities (“DAC”), and one-hundred-and-
6 sixty-six (166) of them were further subcategorized as severely disadvantaged community
7 (“SDAC”) respondents. (FEIR at 29A-10.)
- 8 • Two-thirds (66 percent) of DAC respondents from the Delta region identify as an ethnicity
9 other than white, and fifty-three (53) percent of Delta-region SDAC respondents identify as
10 other than white. (*Id.*)
- 11 • Nearly one-fifth (19 percent) of Delta-region DAC respondents and twenty-three (23)
12 percent of those subcategorized as SDAC respondents report a primary language other than
13 English. (*Id.*)
- 14 • Additionally, ***ninety (90) percent of respondents from DACs rely on Delta fish to feed their***
15 ***families on a nearly costless basis—subsistence fishing.*** (*Id.* at 29A-90.)

16 56. Since time immemorial, the Delta has been the heart of traditional, cultural,
17 ecological, and subsistence practices and values of Tribal communities in the Delta region and is
18 central to the identity of many of these communities, including Petitioner Shingle Springs Band of
19 Miwok Indians.

20 57. Tribal communities look to the Delta for livelihood, ecological knowledge,
21 ceremony and spirituality, and heritage.

22 58. Impacts to fish, wildlife, and water within the Delta are impacts to the traditional and
23 cultural values of tribal communities, and these impacts would materially impair these
24 communities’ ability to experience character-defining features of the Delta physically, spiritually,
25 and ceremonially.

26 59. Despite the widespread adverse impacts to people and the environment, DWR
27 released the FEIR on December 8, 2023, and finally authorized the Project on December 21, 2023,
28 without meaningfully addressing Petitioners’ critiques. (*Id.* at ES-1.)

1 **VI. LEGAL BACKGROUND**

2 **A. CALIFORNIA ENVIRONMENTAL QUALITY ACT**

3 60. CEQA is intended to ensure that environmental interests are protected to the fullest
4 extent feasible and to guarantee that, when making major decisions, government officials have all
5 the relevant information necessary to make informed, well-reasoned decisions. (*Woodward Park*
6 *Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal. App. 4th 683, 690-691). CEQA is “to be
7 interpreted to afford the fullest possible protection to the environment within the reasonable scope
8 of the statutory language.” (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal. 4th
9 105, 134). Put simply, CEQA requires agencies to “take all action necessary to protect, rehabilitate,
10 and enhance the environmental quality of the state.” (Pub. Resources Code, § 21001(a).)

11 61. These obligations extend not only to environmental resources, but also to the people
12 of the State. In passing CEQA, the Legislature determined:

- 13 • “The maintenance of a quality environment for the people of this state now and in the future
14 is a matter of statewide concern.” (Pub. Resources Code § 21000(a).)
- 15 • We must “identify any critical thresholds for the health and safety of the people of the state
16 and take all coordinated actions necessary to prevent such thresholds from being reached.”
17 (*Id.* § 21000(d).)
- 18 • “[M]ajor consideration [must be] given to preventing environmental damage, while
19 providing a decent home and satisfying living environment for every Californian.” (*Id.* §
20 21000(g).)
- 21 • We must “[t]ake all action necessary to provide the people of this state with clean air and
22 water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and
23 freedom from excessive noise.” (*Id.* § 21001(b).)

24 62. Prior to approving any discretionary project, an agency must fully disclose and
25 analyze all the project’s potentially significant direct, indirect, and cumulative environmental effects
26 and must avoid or minimize such environmental damage where feasible. (14 C.C.R. § 15002(f); *id.*
27 § 15021(a).) No public agency may approve or carry out a project where one or more significant
28

1 effects on the environment may occur if the project is approved unless certain narrow findings are
2 made. (*Id.* §§ 15091, 15093.)

3 63. Pursuant to CEQA, a “project” is an activity which may cause either direct physical
4 change in the environment, or reasonably foreseeable indirect physical change in the environment
5 and a “discretionary” project is one that is subject to judgmental controls, where the agency can use
6 its judgment to decide whether and how to carry out a project. (Pub. Resources Code § 21065(a); 14
7 C.C.R. § 15002(i).) CEQA broadly defines a “project” as the whole of the action, even where
8 separate governmental approvals are required. (14 C.C.R. §15378; Pub. Resources Code § 21065.)

9 64. EIRs must analyze “any significant environmental effects a project might cause or
10 risk exacerbating.” (14 C.C.R. § 15126.2.) Put another way, an EIR must include reasonably
11 foreseeable consequences that will result from a project’s approval. (*Laurel Heights Improvement*
12 *Ass’n v. Regents of Univ. of Cal.* (1988) 47 Cal. 3d 376, 396.) Impacts are reasonably foreseeable
13 where (1) they are reasonably foreseeable consequences of the initial project and (2) the future
14 impact (or action) “will be significant in that it will likely change the scope or nature of the initial
15 project or its environmental effects.” (*Id.*)

16 65. Where a project may have significant environmental impacts, an agency must
17 prepare an Environmental Impact Report (“EIR”) that considers the whole of the action, “giving due
18 consideration to both the short-term and long-term effects.” (14 C.C.R. § 15026.2 (a).)

19 66. Impacts are significant within the ambit of CEQA where they “have the potential to
20 substantially degrade the quality of the environment,” including water quality, or may “substantially
21 reduce the number or restrict the range of an endangered, rare or threatened species.” (*Id.* §
22 15065(a)(1).)

23 67. EIRs must include a detailed statement setting forth “[a]ll significant effects on the
24 environment of the proposed project.” (Pub. Resources Code § 21100(b)(1).) An EIR must also
25 include a detailed statement of “[a]ny significant effect on the environment that cannot be avoided if
26 the project is implemented,” “[a]ny significant effect on the environment that would be irreversible
27 if the project is implemented,” and “[m]itigation measures proposed to minimize significant effects
28

1 on the environment, including, but not limited to, measures to reduce the wasteful, inefficient, and
2 unnecessary consumption of energy.” (*Id.* § 21100(b)(2)-(3).)

3 68. Such findings must be supported by “substantial evidence” in the administrative
4 record. (14 C.C.R. § 15384(a).) And the Guidelines define "substantial evidence" as "enough
5 relevant information and reasonable inferences from this information that a fair argument can be
6 made to support a conclusion, even though other conclusions might also be reached." (*Id.*)

7 69. EIRs must further include “a statement [] indicating the reasons for determining that
8 various effects on the environment of a project are not significant and consequently have not been
9 discussed in detail in the environmental impact report.” (Pub. Resources Code § 21100.) EIRs
10 cannot simply label an impact “significant” without first providing a discussion and analysis.
11 (*Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comm'rs* (2001) 91 Cal. App. 4th 1344,
12 1370; *see also Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts* (2017) 3 Cal. 5th 497,
13 514.)

14 70. EIRs must also consider projects’ cumulative impacts. CEQA defines a cumulative
15 impact as an impact resulting from the combination of the proposed project “with other projects
16 causing related impacts.” (14 C.C.R. § 15130(a)(1).) Adequate cumulative impacts analysis is
17 essential under CEQA because “the full environmental impact of a proposed project cannot be
18 gauged in a vacuum. One of the most important environmental lessons that has been learned is that
19 environmental damage often occurs incrementally from a variety of small sources. These sources
20 appear insignificant when considered individually but assume threatening dimensions when
21 considered collectively[.]” (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124
22 Cal. App. 4th 1184, 1213-1215 (citations omitted).) CEQA requires more particularity where the
23 cumulative impact is significant. (14 C.C.R. § 15130.)

24 71. Cumulative impacts include environmental justice impacts. It is well established that
25 “[t]he significance of an activity depends upon the setting.” (*Kings County Farm Bureau v. City of*
26 *Hanford* (1990) 221 Cal.App.3d 692, 718 (citing 14 C.C.R. § 15064(b)); *see also id.* at 721; 14
27 C.C.R. § 15300.2(a) (noting that availability of listed CEQA exceptions “are qualified by
28 consideration of where the project is to be located – a project that is ordinarily insignificant in its

1 impact on the environment may in a particularly sensitive environment be significant.”.) A lead
2 agency therefore should similarly take special care to determine whether the project will expose
3 “sensitive receptors” to adverse effects; if it will, the impacts of that project are more likely to be
4 significant.

5 72. Under state law “environmental justice” means the fair treatment of people of all
6 races, cultures, and incomes with respect to the development, adoption, implementation, and
7 enforcement of environmental laws, regulations, and policies. (Gov. Code § 65040.12(e).) Fairness
8 in this context means that the *benefits* of a healthy environment should be available to everyone, and
9 the *burdens* of pollution or other environmental harms should not be focused on sensitive
10 populations or on communities that already are experiencing its adverse effects. To protect
11 environmental justice communities, where a local agency has determined that a project may cause
12 significant impacts to a particular community or over-burdened subgroup, the alternative and
13 mitigation analyses should address ways to reduce or eliminate the project’s impacts on that
14 community or subgroup. (14 C.C.R. § 15041(a) (noting need for “nexus” between required changes
15 and project’s impacts).)

16 73. CEQA also requires consultation with California Native American tribes when
17 Tribal resources, customs, or cultural traditions and places would be impacted by a proposed
18 project. In furtherance of Tribal sovereignty, the Legislature adopted Assembly Bill 52 (“AB 52”)
19 in 2014, amending CEQA to mandate government-to-government consultations on CEQA projects
20 and formal Tribal involvement in identification and protection of Tribal cultural resources. (Pub.
21 Resources Code § 21080.3.1.) Under AB 52, public agencies must consult with Tribes traditionally
22 and culturally affiliated with the geographic area affected by a project prior to project approval and
23 “avoid damaging effects to any tribal cultural resource” whenever feasible. (*Id.* § 21080.3.1.)
24 “Consultation” means “the meaningful and timely process of seeking, discussing, and considering
25 carefully the views of others, in a manner that is cognizant of all parties’ cultural values and, where
26 feasible, seeking agreement.” (Gov. Code § 65352.4.) Consultation must be conducted in a way that
27 is mutually respectful of each party’s sovereignty and must also recognize the tribes’ potential
28 needs for confidentiality. (*Id.*)

1 74. These mandated consultations must occur prior to and during CEQA review, and
2 were designed to position California Native American Tribes as the experts on cultural resources
3 within their own geographical areas. (Heather Dadashi, *CEQA Tribal Cultural Resource Protection:
4 Gaps in the Law and Implementation*, 39:2 UCLA J. ENVIRONMENTAL L. POL’Y 231 (2021).

5 75. The primary goal of AB 52 is to assure the direct and meaningful involvement of
6 California Native American Tribes in decision-making processes that impact the sites, features,
7 places, cultural landscapes, and other resources that have cultural significance to a Tribal
8 community. AB 52 provides greater legal protections for resources and requires more stringent
9 consultation requirements than many other statutes, including more than CEQA did at the time. (*See*
10 *e.g., id.* at p. 233, and Part II.)

11 76. AB 52 specifies that a project that may “cause a substantial adverse change in the
12 significance of a tribal cultural resource” is a “project that may have a significant effect on the
13 environment.” (Pub. Resources Code § 21084.2.) To determine whether a project may have such an
14 effect, public agencies are required to consult with any Tribes that request consultation and are
15 traditionally and culturally affiliated with the geographic area of a proposed project. (*Id.* §
16 21080.3.1(b).) Tribal consultation under AB 52 must begin prior to the release of a negative
17 declaration, mitigated negative declaration, or environmental impact report for a project. (*Id.*)

18 77. If a lead agency determines through consultation that a project may cause a
19 substantial adverse change to Tribal cultural resources, it must consider measures to mitigate that
20 impact. Statutorily identified examples of mitigation include avoidance and preservation of the
21 resources in place, treatment of the resource with culturally appropriate dignity, protection of the
22 traditional use of the resource, protection of the confidentiality of the resource, and permanent
23 conservation easements with culturally appropriate management criteria. (*Id.* § 201884.3(b)(2).)

24 78. Tribal consultation is also stated as a core priority to California outside of the CEQA
25 context. In 2011, Governor Brown issued Executive Order B-10-11 requiring government-to-
26 government consultation on policies that may affect Tribal communities. (Exec. Order B-10-11
27 (2011).) Governor Newsom extended these commitments in 2019 through Executive Order N-15-
28 19, which formally apologized to California Tribes for the “attempted destruction of tribal

1 communities” and discriminatory laws and policies that “den[ie]d the existence of tribal
2 government powers that persisted well into the twentieth century” and reaffirmed the state policy of
3 government-to-government consultation with Tribes on matters affecting Tribal communities.
4 (Exec. Order N-15-19 (2019).) The Executive Order also established a Truth and Healing Council
5 to clarify the historical record of the relationship between the State and Native communities. (*Id.*)

6 79. Moreover, EIRs must describe a range of reasonable alternatives to the project or to
7 its location that would feasibly attain most of the basic objectives of the project but would avoid or
8 substantially lessen any of the significant effects of the project and evaluate the comparative merits
9 of the alternatives. (*Id.* § 15126.6(a); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52
10 Cal. 3d 553, 566.)

11 80. An EIR is not required to consider alternatives which are infeasible, but agencies
12 may not define a project’s purpose to artificially narrow the scope of alternatives and/or rule out
13 some alternatives. (14 C.C.R. § 15126.6(a); *North Coast Rivers Alliance v. Kawamura* (2015) 243
14 Cal. App. 4th 647, 668.) “Among the factors that may be taken into account when addressing the
15 feasibility of alternatives are site suitability, economic viability, availability of infrastructure,
16 general plan consistency, other plans or regulatory limitations, jurisdictional boundaries (projects
17 with a regionally significant impact should consider the regional context), and whether the
18 proponent can reasonably acquire, control or otherwise have access to the alternative site (or the site
19 is already owned by the proponent).” (14 C.C.R. § 15126.6(e).) And “[b]ecause an EIR must
20 identify ways to mitigate or avoid the significant effects that a project may have on the environment
21 (Public Resources Code Section 21002.1), the discussion of alternatives [must] focus on alternatives
22 to the project or its location which are capable of avoiding or substantially lessening any significant
23 effects of the project, even if these alternatives would impede to some degree the attainment of the
24 project objectives, or would be more costly.” (*Id.* § 15126.6(b).)

25 81. “The [CEQA] Guidelines specifically call for consideration of related regulatory
26 regimes, like the Coastal Act, when discussing project alternatives.” (*Banning Ranch Conservancy*
27 *v. City of Newport Beach* (2017) 2 Cal. 5th 918, 936-937.)

28

1 82. Agencies must also consider a “no action” (or “not project”) alternative “to allow
2 decisionmakers to compare the impacts of approving the proposed project with the impacts of not
3 approving the proposed project.” (14 C.C.R. § 15126.6(d).) The "no project" analysis must “discuss
4 the existing conditions at the time the notice of preparation is published, or if no notice of
5 preparation is published, at the time environmental analysis is commenced, as well as what would
6 be reasonably expected to occur in the foreseeable future if the project were not approved, based on
7 current plans and consistent with available infrastructure and community services.” (*Id.*)

8 83. Further, “[a]n EIR must include a description of the physical environmental
9 conditions in the vicinity of the project.” (14 C.C.R. § 15125(a).) “This environmental setting will
10 normally constitute the baseline physical conditions by which a lead agency determines whether an
11 impact is significant.” (*Id.*) Project alternatives are evaluated for feasibility and project impacts (and
12 the impacts of proposed alternatives) are evaluated for significance based on comparison with this
13 baseline. (*Id.*)

14 84. In preparing the environmental baseline, the agency preparing the EIR should
15 “describe physical environmental conditions as they exist at the time the notice of preparation is
16 published, or if no notice of preparation is published, at the time environmental analysis is
17 commenced, from both a local and regional perspective. Where existing conditions change or
18 fluctuate over time, and where necessary to provide the most accurate picture practically possible of
19 the project's impacts, a lead agency may define existing conditions by referencing historic
20 conditions, or conditions expected when the project becomes operational, or both, that are supported
21 with substantial evidence. In addition, a lead agency may also use baselines consisting of both
22 existing conditions and projected future conditions that are supported by reliable projections based
23 on substantial evidence in the record.” (*Id.* § 15125(a)(1).)

24 85. Agencies “may use projected future conditions (beyond the date of project
25 operations) baseline as the sole baseline for analysis only if [they] demonstrate[] with substantial
26 evidence that use of existing conditions would be either misleading or without informative value to
27 decision-makers and the public” and “[u]se of projected future conditions as the only baseline must
28

1 be supported by reliable projections based on substantial evidence in the record.” (*Id.* §
2 15125(a)(2).)

3 86. However, environmental baselines cannot “include hypothetical conditions, such as
4 those that might be allowed, but have never actually occurred, under existing permits or plans, as
5 the baseline.” (*Id.* § 15125(a)(2).)

6 87. Likewise, EIRs must also contain a statement of the objectives sought by the
7 proposed project. (*Id.* § 15124(b).) The project objectives should drive the agency’s selection of
8 alternatives for analysis and potential approval. (*Id.*) As stated in the CEQA Guidelines, “[a] clearly
9 written statement of objectives will help the lead agency develop a reasonable range of alternatives
10 to evaluate in the EIR and will aid the decision makers in preparing findings or a Statement of
11 Overriding Considerations, if necessary.” (*Id.* § 15124(b).)

12 88. Agencies may not give a project’s purpose an artificially narrow definition so as to
13 preliminarily rule out would-be alternatives. (*We Advocate Thorough Environmental Review v.*
14 *County of Siskiyou* (2022) 78 Cal. App. 5th 683, 692; *North Coast Rivers Alliance*, 243 Cal.App.4th
15 at 668-671.)

16 89. When making findings throughout the CEQA review process, agencies must also
17 provide “a brief explanation of the rationale for each finding.” (14 C.C.R. § 15091(a).) Findings
18 cannot be based on bare conclusions; findings must set forth the basis for the agency’s conclusions
19 in detail. (*Rio Vista Farm Bureau Ctr. v. County of Solano* (1992) 5 Cal. App. 4th 351, 373;
20 *Sacrament Old City Ass'n v. City Council* (1991) 229 CA3d 1011, 1034; *Resource Defense Fund v.*
21 *LAFCO* (1987) 191 Cal. App. 3d 886.).)

22 90. One fundamental purpose of EIRs is to identify ways in which a proposed project's
23 significant environmental impacts can be mitigated or avoided. (Pub. Resources Code §§
24 21002.1(a), 21081(a)(1).) To implement this statutory purpose, EIRs must describe feasible
25 mitigation measures that can minimize a project's significant environmental effects. (Pub. Resources
26 Code §§ 21061, 21100(b)(3); 14 C.C.R. §§ 15121(a), 15126.4(a); *Environmental Council of*
27 *Sacramento v. City of Sacramento* (2006) 142 Cal. App. 4th 1018, 1039.) When approving projects,
28 agencies *must* adopt *any* feasible mitigation measures that *may* mitigate or avoid a project’s

1 significant environmental impacts. (Pub. Resources Code §§ 21002.1(b); 21081(a)(1); 14 C.C.R. §§
2 15021(a)(2), (3), 15091(a)(1).) The EIR must therefore propose and describe mitigation measures to
3 minimize the significant environmental effects identified in the EIR. (Pub. Resources Code §§
4 21002.1(a), 21061, 21100(b)(3); 14 C.C.R. § 15126.4(a)(1).) Any action that is designed to
5 minimize, reduce, or avoid a significant environmental impact qualifies as a mitigation measure. (14
6 C.C.R. § 15370.)

7 91. A project may not include “environmental commitments” that are part of the project
8 description, where such components are in reality mitigation measures designed to reduce or avoid
9 significant effects. In *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, the court
10 invalidated an EIR for incorporating effective mitigation measures into its description of the project.
11 By compressing the analysis of impacts and mitigation measures into a single issue, an EIR
12 disregards the requirements of CEQA. (*Id.* at 655-656 (citing Pub. Resources Code §§ 21100(b),
13 21081; 14 C.C.R. §§ 15126, 15091.)) This error undermines CEQA review, since “[a]bsent a
14 determination regarding the significance of the impacts . . ., it is impossible to determine whether
15 mitigation measures are required or to evaluate whether other more effective measures than those
16 proposed should be considered.” (*Id.*)

17 92. Of course, EIRs may include (and must consider) mitigation measures that will
18 reduce but not fully mitigate an environmental impact. (*Sierra Club v. County of Fresno* (2018) 6
19 Cal. 5th 502, 525; *see also King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal. App. 5th
20 814, 866.) To lawfully determine that a mitigation measure is infeasible, agencies must “describe
21 the specific reasons” for the agency’s decision to reject the mitigation measure or alternative. (14
22 C.C.R. § 15091(c).)

23 93. Furthermore, EIRs must indicate whether the project’s environmental impacts would
24 be potentially significant if mitigation measures were not adopted and separately determine whether
25 the mitigation measures described in the EIR would substantially reduce or avoid the identified
26 significant impacts. (*Lotus*. 223 Cal. App. 4th at 656.)

27 94. Where a project’s impacts on the environment may still be significant even after
28 implementation of required mitigation measures, CEQA requires agencies to prepare and issue

1 statements of overriding considerations. (14 C.C.R. § 15092(b)(2)(B).) That said, a finding that a
2 project’s benefits override its significant environmental impacts cannot serve as a substitute for
3 findings rejecting mitigation measures or alternatives as infeasible. (*Id.* § 15091(f); *Village Laguna*
4 *of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal. App. 3d 1022, 1034.) Rather,
5 statements of overriding considerations supplement those findings by explaining the agency’s
6 reasons for deciding to proceed with a project despite its significant environmental impacts.
7 (*California Native Plant Soc’y v. City of Santa Cruz* (2009) 177 Cal. App. 4th 957, 983; *Federation*
8 *of Hillside & Canyon Ass’ns v. City of Los Angeles* (2004) 126 Cal. App. 4th 1180, 1201.)

9 95. The standard of review in a CEQA case is abuse of discretion. (*Sierra Club*, 6 Cal.
10 5th at 512; Pub. Resources Code § 21005.) An agency may abuse its discretion under CEQA either
11 by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported
12 by substantial evidence. (*Sierra Club*, 6 Cal. 5th at 512.) Judicial review of these two types of errors
13 differs significantly. While courts “scrupulously” police EIRs for compliance with CEQA’s
14 mandates, (*Citizens of Goleta Valley*, 52 Cal.3d at 564), they overturn factual findings based on the
15 substantial evidence standards where, based on the information in the record, there is not a “fair
16 argument” to support the agency’s conclusion. (14 C.C.R. § 15384(a).)

17 96. Respondent’s approval of the Project violated these requirements.

18 **B. DELTA REFORM ACT**

19 97. As noted above, in response to the impacts the SWP and upstream dams had on the
20 Delta and the species that rely on it, including, most notably, Chinook Salmon, the California
21 Legislature passed the Delta Reform Act of 2009, which established a State policy “to reduce
22 reliance on the Delta in meeting California’s future water supply needs through a statewide strategy
23 of investing in improved regional supplies, conservation, and water use efficiency.” (Water Code §
24 85021.)

25 98. The act established an independent state agency – the Delta Stewardship Council – to
26 develop and implement a plan that facilitates this goal. (*Id.*)

1 **C. PUBLIC TRUST DOCTRINE**

2 99. In California, pursuant to the Public Trust Doctrine, governmental entities and
3 agencies are required to consider impacts to and prioritize public trust uses including navigation,
4 protection of fisheries, recreation, and preservation of trust lands in their natural state. (*Marks v.*
5 *Whitney* (1971) 6 Cal. 3d 251, 259–260; *National Audubon Society v. Superior Court* (1983) 33
6 Cal.3d 419, 416.) These duties apply not only to state agencies but also to regional and local
7 governmental entities. (*See, Zack's, Inc. v. City of Sausalito* (2008) 165 Cal. App. 4th 1163, 1180;
8 *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal. App. 4th 1349, 1370.)
9 Indeed, “[a]ny action which will adversely affect traditional public rights in trust lands is a matter of
10 general public interest and should therefore be made only if there has been full consideration of the
11 state’s public interest in the matter.” (*San Francisco Baykeeper, Inc. v. California State Lands*
12 *Comm.* (2015) 242 Cal. App. 4th 202, 234; *Envtl. Law Foundation v. State Water Resources*
13 *Control Bd.*, (2018) 26 Cal. App. 5th 844.)

14 100. Uses and resources protected by the public trust doctrine “include the right to fish,
15 hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the
16 state[.]” (*Marks*, 6 Cal. 3d at 259-260.) “[O]ne of the most important uses” of public trust resources
17 is “the preservation of those lands in their natural state, so that they may serve as ecological units
18 for scientific study, as open space, and as environments which provide food and habitat for birds
19 and marine life, and which favorably affect the scenery and climate of the area.” (*Id.*)

20 101. CEQA review of a project does not necessarily or automatically satisfy the agency’s
21 affirmative duties to take the trust into account and protect public trust uses whenever feasible. (*San*
22 *Francisco Baykeeper Inc.*, 29 Cal. App. 5th at 571.) “[T]he determinative fact is the impact of the
23 activity on the public trust resource.” (*Envtl. Law Foundation*, 26 Cal. App. 5th at 859.)

24 102. Respondent’s approval of the Project also violated the Public Trust Doctrine, as
25 described below.

26 **D. FEDERAL ENDANGERED SPECIES ACT**

27 103. Section 7 of the ESA requires that all federal agencies must “insure that any action
28 authorized, funded, or carried out by such an agency (hereinafter in this section referred to as an

1 ‘action agency’) is not likely to jeopardize the continued existence of any endangered species or
2 threatened species or result in the destruction or adverse modification of [critical] habitat.” (16
3 U.S.C. § 1536(a)(2).) An agency must consult with either the U.S. Fish and Wildlife Service (if the
4 species at issue is an inland species) or the National Marine Fisheries Service (if the species at issue
5 lives at least part of its life at sea) to determine the likely effects of their proposed actions on
6 endangered or threatened species and their critical habitats. (*Id.*; 50 C.F.R. § 402.14(a).)

7 104. Formal consultation will result in the relevant Service issuing a “biological opinion,”
8 which describes the impacts on the listed species from the action and the Service’s opinion
9 regarding whether the action will cause jeopardy or adverse habitat modification. (16 U.S.C. §
10 1536(b)(3)(A).) “If jeopardy or adverse modification is found, the Secretary [must] suggest those
11 reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can
12 be taken by the Federal agency or applicant in implementing the agency action.” (*Id.*)

13 105. If the biological opinion concludes that jeopardy is not likely and that there will not
14 be an adverse modification of critical habitat, or that implementation of “reasonable and prudent
15 alternatives” to the agency action (the equivalent of mitigation measures in the CEQA context) can
16 avoid jeopardy and adverse modification, the consulting Service can issue an incidental take
17 statement, which, if followed, exempts the action agency from the prohibition on takings found in
18 Section 9 of the ESA (discussed immediately below). The statement must authorize and anticipate
19 any incidental take that may result from the proposed project and explain how such take will not
20 jeopardize the continued existence of the endangered or threatened species. (*Id.* § 1536(b)(4); 50
21 C.F.R. § 402.14(i).) “Any taking in compliance with an incidental take statement’s terms and
22 conditions is then exempt from the general take prohibition of ESA Section 9.” (*White v. United*
23 *States Army Corps of Eng’rs*, No. 22-cv-06143-JSC, 2023 U.S. Dist. LEXIS 35981, at *4 (N.D. Cal.
24 Mar. 3, 2023), citing 16 U.S.C. § 1536(b)(4)(iv), (o)(2).) However, the inverse is true as well: the
25 permittee must comply in order “to remain eligible for the Endangered Species Act exemption
26 under Section 7(o)(2).” (*White*, 2023 U.S. Dist. LEXIS 35981, at *6.)

27 106. Under section 9 of the ESA, it is “unlawful for any person . . . to . . . take any
28 [endangered] species within the United States.” (16 U.S.C. § 1538(a)(1).) Section 3 of the Act

1 defines “take” broadly to include any activity that kills or harms listed species, including significant
2 habitat modification or degradation that “actually kills or injures wildlife by significantly impairing
3 essential behavioral patterns, including breeding, feeding, or sheltering.” (50 C.F.R. § 17.3.) In
4 *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Supreme Court upheld the
5 regulation defining “take” broadly, but emphasized that the regulation only bars modification of
6 species’ habitat “where significant habitat modification, by impairing essential behaviors,
7 proximately (foreseeably) causes actual death or injury to identifiable animals that are protected
8 under the Endangered Species Act.” (515 U.S. 687, 714 (1995) (O’Connor, J., concurring).)

9 107. When the take at issue is the result of habitat modification, as opposed to the direct
10 take of a listed species (for example by trapping or hunting), courts typically require a
11 demonstration that the offending conduct is causing or will imminently cause species-level harm to
12 the listed species at issue. (*See, e.g., National Wildlife Federation v. Burlington N. R.R.*, 23 F.3d
13 1508, 1513 (9th Cir. 1994) (requiring plaintiff to “show significant impairment of the species’
14 breeding or feeding habits and prove that the habitat degradation prevents, or possibly, retards,
15 recovery of the species,” to demonstrate take in the habitat modification context); *Palila v. Hawai’i*
16 *Dept. of Land and Natural Resources*, 852 F.2d 1106, 1108 (9th Cir. 1988) (requiring species-level
17 harms to justify habitat modification take claim); *Greenpeace Foundation v. Mineta*, 122 F. Supp.
18 2d. 1123, 1134 (D. Hi. 2000) (denying motion for summary judgment on the grounds that there was
19 a fact dispute as to whether the management of lobster fishing would “doom[] the monk seal to
20 extinction” by eliminating prey supply); *Coalition v. McCamman*, 725 F. Supp. 2d 1162, 1168 (E.D.
21 Cal. 2010) (denying motion for summary judgment in part because the plaintiff conservation groups
22 did not prove that conduct at issue would imminently cause species-level harm).)

23 **E. CALIFORNIA ENDANGERED SPECIES ACT**

24 108. In enacting CESA, the Legislature expressly recognized that certain species of
25 wildlife face extinction “because their habitats are threatened with destruction, adverse
26 modification, or severe curtailment, or because of overexploitation, disease, predation, or other
27 factors.” (Fish & G. Code § 2051(b).) The Legislature further declared that “it is the policy of the
28

1 state to conserve, protect, restore, and enhance any endangered species or any threatened species
2 and its habitat." (*Id.* § 2052.)

3 109. Under CESA, a native species of bird, mammal, fish, amphibian, reptile, or plant is
4 considered "endangered" when it "is in serious danger of becoming extinct throughout all, or a
5 significant portion, of its range." (*Id.* § 2062). A species is "threatened" when it "is likely to become
6 an endangered species in the foreseeable future in the absence of . . . special protection and
7 management efforts." (*Id.* § 2067.)

8 110. The Commission is responsible for maintaining lists of endangered and threatened
9 species. (*Id.* § 2070.) CESA requires the Commission to add or remove species from either list "if it
10 finds, upon the receipt of sufficient scientific information . . . that the action is warranted." (*Id.*)

11 111. Per CESA, "[n]o person [may] import [], export [], or take, possess, purchase, or sell
12 [], any species, or any part or product thereof, that the commission determines to be an endangered
13 species or a threatened species, or attempt any of those acts." (*Id.* § 2080; 14 C.C.R. § 783.1.)
14 "Take" means to "[h]unt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or
15 kill." (Fish & G. Code § 86.) Take must be minimized and fully mitigated and may not jeopardize
16 the continued existence of the species. (*Id.* § 2081(b); 14 C.C.R. §§ 783.2-783.8.)

17 112. Take is only allowed where authorized by permit. (Fish & G. Code § 2081(a).)

18 **VII. STANDING**

19 113. Members of Petitioners reside in and recreate in and on the San Francisco Bay and
20 throughout the Delta, the Sacramento River valley, and the San Joaquin River valley. Petitioners'
21 members play an active role in water education, planning, policy, and protection, and actively
22 participate in water rights, water quality, and water supply processes, conduct restoration efforts,
23 and vigorously enforce environmental laws enacted to protect wildlife, habitat, and water quality.

24 114. Petitioners' members reside and own property throughout California as well as in
25 those areas served by the SWP and CVP (and that would be served by the Project), and use the
26 waters affected by the Project to fish for food, for work, for ceremonial and spiritual purposes, and
27 for recreation.

28

1 115. Petitioners’ members use the San Francisco Bay, Delta, the Sacramento River and its
2 tributaries, and the San Joaquin River and its tributaries to fish, sail, boat, kayak, swim, birdwatch,
3 hike, view wildlife, and engage in scientific study, including monitoring activities. Petitioners’
4 members have enjoyed fishing for salmon and other fish in the Delta, San Francisco Bay, and the
5 Sacramento River watershed, whose numbers and vitality depend on an intact and healthy
6 ecosystem in the Delta, San Francisco Bay, and the Sacramento River watershed. When elements of
7 that ecosystem are reduced or eliminated, Petitioners’ members’ recreational uses and aesthetic
8 enjoyment of those areas are reduced by their awareness of the waterway and habitat degradation.
9 As the degradation of the rivers, their tributaries, and the Delta’s ecosystem is further exacerbated,
10 Petitioners’ members’ catch fewer fish and observe less wildlife.

11 116. Petitioners and their members are deeply concerned about the adverse consequences
12 of the Project, particularly as those impacts relate to water quality in the Delta and in San Francisco
13 Bay and the well-being of listed threatened and endangered species present in the Bay and in the
14 Delta (like Chinook Salmon).

15 117. Moreover, and significantly, Petitioners’ Tribal members use the Delta for fishing,
16 recreation, ceremonial, and spiritual purposes, and their use and enjoyment of the Delta, San
17 Francisco Bay, and upstream watersheds would be diminished by the Project and its impacts on
18 water and river access, access to sacred sites, sensitive and endangered species, and cultural
19 resources.

20 118. Respondent’s failure to ensure that the Project does not impact listed species and
21 their habitats harms Petitioners’ members’ interests in the species.

22 119. Unless the requested relief is granted, Petitioners’ interests will continue to be
23 injured. The injuries described above are actual, concrete injuries that will occur unless relief is
24 granted by this Court. The relief sought herein would redress Petitioners’ injuries. Petitioners have
25 no other adequate remedy at law, and they bring this action on behalf of their adversely affected
26 members.

27
28

1 **VIII. CAUSES OF ACTION**

2 **FIRST CAUSE OF ACTION**

3 **Violations of CEQA – Inadequate EIR (Public Resources Code § 21000, et seq.,**

4 **14 C.C.R. § 15000 et seq.)**

5 120. Petitioners hereby incorporate by reference each and every allegation set forth above.

6 121. As stated *supra*, and as articulated in Petitioners’ comments on the DEIR (and by
7 other individuals’ and entities’ comments thereon), the FEIR violates CEQA for the following
8 reasons.

9 **A. IMPROPER PURPOSE AND OBJECTIVES**

10 122. The FEIR lists several purposes for the Project: restoring and improving the
11 flexibility of the SWP in the face of sea level rise and climate change; improving the resiliency of
12 the SWP system to earthquakes; and increasing the reliability of water supply in relation to
13 changing hydrologic conditions (as a result of climate change). (Common Response to Comments at
14 1-12 – 1-13.)

15 123. These stated purposes and objectives ignore relevant state laws that establish co-
16 equal goals for the Delta that include restoring the health of the Bay-Delta ecosystem and its native
17 fisheries, Cal. Water Code §§ 85001, 85020, and reducing reliance on the Delta, *id.* § 85021. And
18 they likewise ignore the facts that DWR has an affirmative obligation to protect and conserve
19 endangered fish species, Cal. Fish and Game Code § 2052, and is subject to the Public Trust
20 Doctrine.

21 124. Moreover, to the extent that the federal CVP participates in the Project, the federal
22 Central Valley Project Improvement Act requires that the CVP be operated for co-equal purposes
23 that include protecting salmon and other fish and wildlife, as well as complying with state law. (P.L.
24 102-575, §§ 3406(a), (b).) And the Project’s purposes and objectives, as articulated in the FEIR,
25 likewise ignores these directives.
26
27
28

1 125. Instead, the objectives focus exclusively on increasing water diversions from the
2 Delta, even though increasing water diversions demonstrably harms native fish and wildlife, fails to
3 reduce reliance on the Delta, adversely affects environmental justice communities, and abuses
4 California’s system of water rights.

5 126. Deliveries to senior water rights contractors have repeatedly depleted reservoir
6 storage to the point of violating salinity and other water quality standards in the Delta. Senior water
7 rights contractors take water, which reduces storage. During droughts, there has not been enough
8 water to continue to deliver water to all the CVP and SWP contractors (upstream and south of the
9 Delta) while still maintaining minimum water quality standards. In response to these conflicting
10 uses of water, the state has opted to violate water quality standards, apply and grant waivers from
11 water quality standards, and violate even the weakened temporary standards.

12 127. A Project purpose that continues application of the doctrine of prior appropriation
13 under these circumstances constitutes an unreasonable use and diversion of water precisely because
14 it undermines present operations that entail through-Delta conveyance of stored supplies for export
15 to CVP and SWP contractors. This further harms the legal interests of environmental justice
16 communities with small community water systems, and other communities reliant on Delta supplies
17 for drinking water. Loss of salinity control would worsen drought conditions for native and
18 introduced fish and wildlife species dependent on these water ways, as well as migratory waterbird
19 populations.
20

21 128. Taking water from Delta farmers, who have riparian water rights, and redistributing
22 Delta water to a more powerful set of farmers in the San Joaquin Valley is not a legitimate Project
23 purpose, nor mitigation; it is an abuse and redistribution of water rights.
24

25 129. By so narrowly tailoring the Project’s purposes and objectives, Respondent
26 unlawfully constrained its review of would-be alternatives, as explained in greater detail below. (*We*
27 *Advocate Thorough Environmental Review*, 78 Cal. App. 5th at 692 (holding that a project’s
28

1 purposes and objectives were unlawfully narrow where they precluded alternatives other than the
2 proposed project); *North Coast Rivers Alliance*, 243 Cal. App. 4th at 668 (EIR that had a stated
3 objective of eradicating a certain type of moth, when the underlying objective was really to protect
4 California's native plants and agricultural crops from damage, was unreasonably narrow).)

5 130. Had the FEIR included as a purpose and objective a goal of improving the reliability
6 and flexibility of the State's water supply and allocation system, as opposed to just the reliability
7 and flexibility of the SWP and its attendant systems, Respondent could have more thoroughly
8 evaluated would-be alternatives that did not mandate increased outflows from the Delta, as CEQA
9 mandates. (14 C.C.R. § 15126.6.)
10

11 **B. FAILURE TO CONSIDER A REASONABLE RANGE OF ALTERNATIVES**

12 131. The FEIR violates CEQA because it fails to properly consider a reasonable range of
13 alternatives, as required. (Pub. Resources Code §§ 21002, 21061, 21100; 14 C.C.R. § 15126.6.)
14

15 132. Reasoning that doing so would deviate from the unlawfully narrowed Project
16 purposes and objectives, the FEIR fails to consider *any* alternatives that would decrease water
17 diversions from the Delta or reduce outflows therefrom. (FEIR at 3-15 – 3-18; *see also* Common
18 Responses to Comments at 3-11.) As a result, it reaches identical conclusions regarding impacts to
19 threatened and endangered fish species from operations and maintenance for all of the alternatives
20 evaluated. (FEIR at 3-15 – 3-18.)

21 133. Likewise, the FEIR unlawfully considers only a single operational alternative. (14
22 C.C.R. § 15126.6; Common Responses to Comments at 3-11.) As a result, all of the alternatives
23 considered involve continued implementation of biological opinions for the operations of the SWP
24 and CVP for Delta species that were issued by the Trump Administration and that have since been
25 challenged in federal court by the California Natural Resources Agency (and others) as unlawful
26 and inadequately protective of listed species. (Common Responses to Comments at 1-5.) The
27 Trump biological opinions have been abandoned by the federal government and the CVP is the
28 subject of reconsultation. (*Id.*; *see also* Bureau of Reclamation, Notice of Intent to Prepare and

1 Environmental Impact Statement and Hold Scoping Meetings on the 2021 Endangered Species Act
2 Section 7 Consultation on the Long Term Operations of the Central Valley Project and State Water
3 Project, 87 Fed. Reg. 11093, 11094-95 (Feb. 28, 2022).)

4 134. Incorporating these unlawful biological opinions was justified because, according to
5 Respondent, they were the legal schemes governing the management of the SWP and CVP for
6 protection of the Delta’s threatened and endangered species in effect at the time the agency began
7 the CEQA process. (Common Responses to Comments at 1-6.)

8 135. This argument misses the mark, and ignores the law, for two reasons. First, the 2019
9 and 2020 biological opinions were not in effect at the time the Notice of Preparation (“NOP”) was
10 issued. The NOP was issued on January 15, 2020, before the Record of Decision to implement the
11 biological opinions was adopted (on February 18, 2020). Accordingly, the biological opinions in
12 effect at the time Respondent began its CEQA review were those issued in 2008 and 2009, not those
13 issued during the Trump Administration. Second, once the 2019 and 2020 biological opinions
14 ceased controlling operations due to California’s legal challenges to those opinions pending
15 reconsultation, Respondent should have utilized the previous biological opinions (from 2008 and
16 2009), since those biological opinions complied with the Endangered Species Act and more closely
17 reflected the kinds of requirements needed to restore the Delta’s threatened and endangered species.
18 (14 C.C.R. § 15125(a)(2) (agencies “may use projected future conditions (beyond the date of project
19 operations) baseline as the sole baseline for analysis only if [they] demonstrate[] with substantial
20 evidence that use of existing conditions would be either misleading or without informative value to
21 decision-makers and the public” and “[u]se of projected future conditions as the only baseline must
22 be supported by reliable projections based on substantial evidence in the record”).)

23 136. This is particularly concerning both because operations of the CVP and SWP have
24 exceeded the incidental take levels in those biological opinions in recent years and because the State
25 of California and federal regulators have elsewhere repeatedly asserted that outflows from the Delta
26 need to be increased beyond the requirements imposed by the 2008, 2009, 2019, and 2020
27 biological opinions to protect endangered and threatened species therein. (*See, e.g.*, State Water
28 Resources Control Board, July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta

1 Plan, at 5-7 (“Though various state and federal agencies have adopted requirements to protect the
2 Bay-Delta ecosystem, the best available science indicates that the existing requirements are
3 insufficient. Existing regulatory minimum Delta outflows are too low to protect the ecosystem, and
4 without additional regulatory protections, existing flows will likely be reduced in the future as new
5 storage and diversion facilities are constructed, and as population growth continues. ... Given these
6 potential future demands and limited existing flow requirements in the Bay-Delta watershed, it is
7 imperative that updated flow requirements be established in order to protect fish and wildlife
8 beneficial uses in the Bay-Delta watershed.”).)

9 137. In fact, the operational criteria in the FEIR appear to be premised on the assumption
10 that the Project can divert water in excess of existing regulatory requirements without causing
11 environmental harm even though state and federal agencies have repeatedly rejected that premise
12 for more than one decade, including the State Water Board’s 2010 Public Trust Flows Report, that
13 expressly stated that “[t]he best available science suggests that current flows are insufficient to
14 protect public trust resources” and consequently recommended increases in Delta outflow
15 protections. See also 2017 Scientific Basis Report at 1-8.

16 138. Unsurprisingly, the State Water Board’s comments during the scoping process for
17 the Project identified the need to consider a wider range of operational alternatives, stating that
18 “[t]he EIR should include ... [o]perating scenarios ... that improve conditions for native fish species
19 that are currently in poor condition by improving Delta outflows, reducing entrainment and
20 impingement related effects of SWP ... diversions, [and] improving cold water management,”
21 among other things.

22 139. Moreover, Respondent’s reasoning in refusing to properly consider alternatives that
23 do not increase outflows from the Delta is an abuse of discretion and is not supported by substantial
24 evidence, as required by CEQA. If, in fact, the goal of the Project is to increase the flexibility and
25 reliability of the SWP given a changing climate (and the changing precipitation and melt patterns
26 attendant to that), as stated in the FEIR, then alternatives that could reduce demand for water,
27 improve water retention (by decreasing evapotranspiration from reservoirs and diversion channels,
28 for example), and increase supply elsewhere (perhaps through stormwater capture) other than

1 building a new diversion from the Delta should have been considered. (14 C.C.R. § 15126.6(b)
2 (“[T]he discussion of alternatives [must] focus on alternatives to the project or its location which
3 are capable of avoiding or substantially lessening any significant effects of the project, even if these
4 alternatives would impede to some degree the attainment of the project objectives, or would be
5 more costly.”); *Preservation Action Council v. City of San Jose* (2006) 151 Cal. App. 4th 1336,
6 1357 (holding that city violated CEQA by rejecting proposed alternative based on a finding that
7 there would be a “reduced level of benefit,” rather than pointing to any substantial evidence
8 showing that the alternative is infeasible and city needed to show that the alternative “would be so
9 much less [beneficial] that the project would be impractical”).)

10 140. The FEIR simply asserts, without explanation, that other, would-be alternatives other
11 than building a massive tunnel under the Delta to drain the watershed of the water its species rely on
12 would not provide the SWP-specific flexibility DWR needs to respond to a changing climate.
13 (Common Responses to Comments at 3-5.) This violates CEQA’s requirement that agencies explain
14 and justify their decisions with substantial evidence. (Pub. Resources Code § 21100 (requiring EIRs
15 to include “a statement [] indicating the reasons for determining that various effects on the
16 environment of a project are not significant and consequently have not been discussed in detail in
17 the environmental impact report”); *County of Marina v. Bd of Trustees of Calif. State Univ.* (2006)
18 39 Cal. 4th 341, 369 (rejected alternatives must be “truly infeasible”).)

19 141. Further, the FEIR’s analysis of alternatives also violates CEQA because it ignores
20 other applicable laws relevant to the Delta and water management therein, including the Delta
21 Reform Act, the California Endangered Species Act, the federal Endangered Species Act, California
22 Constitution Article X, section 2, and the Public Trust Doctrine. (*Banning Ranch Conservancy*, 2
23 Cal. 5th at 936-937 (holding that EIR for a residential/commercial development in a protected
24 coastal zone violated CEQA where the lead agency “ignored its obligation to integrate CEQA
25 review with the requirements of the Coastal Act”).)

26 142. Finally, no alternatives were put forward that seek to devise non-Delta export means
27 of preserving and protecting water supplies to these same contractors served south of the Delta by
28

1 the SWP and CVP. Each alternative assumes that the Delta must be altered and amended to preserve
2 existing contractual arrangements.

3 143. The billions to be spent on the Project could be used instead for more effective
4 climate adaptation purposes like flood protection investments throughout the Delta. There are many
5 flood facilities that need funding now and soon but are deferred and delayed actions. DWR ignores
6 deferred maintenance for State Plan of Flood Control (“SPFC”) levees needed to account for
7 climate change impacts. (FEIR at 7-14.) SPFC includes one-thousand-six hundred (1,600) miles of
8 levees and one-hundred-and-fifty (150) reservoirs that protect the Central Valley. This is of
9 particular concern for cities like Stockton, Lathrop, and Manteca. (*Id.*)

10 C. UNLAWFUL ENVIRONMENTAL BASELINE

11 144. First, the FEIR violates CEQA by including the Trump Administration’s biological
12 opinions and the SWP’s Incidental Take Permit in the environmental baseline. (14 C.C.R. §
13 15125(a)(2).) As noted *supra*, the biological opinions from 2019 and 2020 and the SWP’s
14 Incidental Take Permit were not in effect at the time Respondent began the CEQA review process.
15 The NOP was issued on January 15, 2020, and the incidental take permit for the State Water Project
16 was adopted on March 27, 2020, and the Record of Decision to implement the Trump biological
17 opinions was adopted on February 18, 2020. (Group Comments at 8.) The environmental baseline
18 should therefore include the 2008 and 2009 biological opinions and other regulations affecting the
19 operations of the SWP and CVP at the time the NOP was issued, absent substantial evidence
20 demonstrating a different baseline is necessary to accurately assess the impacts of the Project. (14
21 C.C.R. § 15125(a).)

22 145. This failure is particularly significant given the fact that the State of California has
23 publicly declared that the Trump Administration’s biological opinions were unlawful. (*See, e.g.*,
24 Office of the Attorney General, press release, Attorney General Becerra Files Lawsuit Against
25 Trump Administration for Failing to Protect Endangered Species in the Sacramento and San
26 Joaquin Rivers, February 20, 2020, available online at: [https://oag.ca.gov/news/press-
27 releases/attorney-general-becerra-files-lawsuit-against-trump-administration-failing](https://oag.ca.gov/news/press-releases/attorney-general-becerra-files-lawsuit-against-trump-administration-failing).)

1 146. Further, the Trump biological opinions have been abandoned by the federal
2 government and the CVP is the subject of reconsultation. Thus, in addition to being improper
3 because they were not in effect at the time DWR began CEQA review, they are also not reasonably
4 likely to occur again in the future.

5 147. It is misleading to rely on unlawfully lenient management regimes that are no longer
6 in effect. The FEIR provides no substantial evidence to justify this decision and there is nothing in
7 the record to suggest that the operational dynamics mandated in the Trump biological opinions and
8 SWP Incidental Take Permit will be reliably similar to those mandated in 2040 when Project
9 operations begin, especially considering the fact that both state and federal agencies have repeatedly
10 criticized these biological opinions as unlawfully lax and asserted, quite publicly, that more is
11 needed to protect the endangered and threatened species that rely on the Delta. Those statements
12 have translated into action as both agencies are re-writing those opinions now.

13 148. Even assuming *arguendo* that it was appropriate to incorporate the Trump biological
14 opinions and the 2020 Incidental Take Permit into the environmental baseline, the FEIR still
15 unlawfully includes operational criteria that allow for more water export pumping than has occurred
16 before. (14 C.C.R. § 15125(a)(3) (“An existing conditions baseline shall not include hypothetical
17 conditions, such as those that might be allowed, but have never actually occurred, under existing
18 permits or plans, as the baseline.”).) For example, the FEIR’s baseline includes the so called “OMR
19 storm flex” provisions of the State’s Incidental Take Permit and the Trump biological opinions even
20 though implementation of these permit provisions has never actually occurred. (FEIR at 3-151.)
21 Since these provisions have never been implemented, they cannot be incorporated into the baseline.
22 (14 C.C.R. § 15125(a)(3).)

23 149. In addition, the environmental baseline (and the consideration of the “No Action”
24 alternative) ignores a 2018 update to the Bay Delta Water Quality Control Plan adopted by the State
25 Water Resources Control Board that requires increased instream flows in the months of February to
26 June in the Stanislaus, Tuolumne, Merced, and Lower San Joaquin Rivers. This violates CEQA’s
27 general requirement that environmental baselines reflect the conditions and management regimes
28 applicable at the time the CEQA process begins. (14 C.C.R. § 15125(a)(1).)

1 150. Further, the FEIR’s environmental baseline violates CEQA because it excludes the
2 effects of climate change and therefore misleads decisionmakers and the public.

3 151. Despite the fact that the stated justification for pursuing the Project in the first place
4 was (and is) the need to respond to changing hydrological conditions attendant to a changing
5 climate, the environmental baseline by which the Project’s potential impacts were analyzed does not
6 include the effects of sea level rise and climate change, and instead simply repeats the hydrologic
7 conditions of 1922 to 2015 without accounting for the observed effects of climate change since
8 1922. (Common Responses to Comments at 9-2.) And, importantly, the baseline does not account
9 for the fact that extreme drought conditions are occurring (and will continue to occur) at much more
10 frequent rates as a result of climate change. (FEIR at 4-6.) The FEIR does so despite the fact that, as
11 recently as October 2022, Respondent declared that “[t]he current drought from 2020 to 2022 is
12 now the driest three-year period on record, breaking the old record set by the previous drought from
13 2013 to 2015.” (DWR, New Water Year Begins Amid Preparations for Continued Drought, October
14 3, 2022, online at: [https://water.ca.gov/News/News-Releases/2022/Oct-22/New-Water-Year-
15 Begins-Amid-Preparations-for-Continued-Drought.](https://water.ca.gov/News/News-Releases/2022/Oct-22/New-Water-Year-Begins-Amid-Preparations-for-Continued-Drought))

16 152. According to Respondent, incorporating climate change projections into the
17 environmental baseline would mislead the public and “introduce[] unnecessary uncertainty into
18 CEQA-required analyses and significance conclusions without substantial evidence to indicate that
19 such assumptions would have improved the informative value of the analyses for decision makers.”
20 (Common Responses to Comments at 1-6.)

21 153. This contention ignores the copious record evidence demonstrating the effects that
22 climate change *is* having, *has already* had, and *will continue* to have on the Delta and California’s
23 water supply (and hydrology) generally. DWR asserts that climate change is sufficiently urgent,
24 known, and measurable to justify this Project, yet states that climate change-related impacts are too
25 speculative, unknown, and unknowable to incorporate into the environmental baseline by which the
26 Project’s impacts and alternatives are analyzed. This violates CEQA, is an abuse of discretion, and
27 is not supported by substantial evidence.
28

1 154. In fact, as further evidence that climate impact modeling is available, the FEIR
2 incorporates some of the effects of climate change in the “no action” alternative. (FEIR at 4-6.) This
3 analysis, though, is excluded from the alternatives review (and the environmental baseline). In
4 DWR’s words, “[t]hese longer-term analyses were performed outside of CEQA requirements to
5 provide information about possible future environmental conditions once conveyance facilities are
6 operational. Because these analyses are provided for informational purposes, no CEQA significance
7 conclusions are presented for potential impacts, and no mitigation measures are recommended to
8 reduce potential impacts.” (*Id.*)

9 155. The FEIR’s failure to incorporate climate change impacts into the environmental
10 baseline and alternatives review also violates Respondent’s own guidance (from 2018), which states
11 that “DWR projects should consider how expected changes in climate could exacerbate the
12 environmental consequences of the project or generate new consequences that would not have
13 otherwise occurred. This is typically done by comparing estimates of potential project impacts
14 between a project alternative under existing climate conditions to the estimates of potential project
15 impacts for a project alternative under expected future conditions 20–50 years into the future.”
16 (DWR, Climate Action Plan, Phase 2: Climate Change Analysis, Guidance September 2018, at V,
17 available online at: [https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/All-
18 Programs/Climate-Change-Program/Climate-Action-Plan/Files/CAP2-Climate-Change-Analysis-
19 Guidance.pdf](https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/All-Programs/Climate-Change-Program/Climate-Action-Plan/Files/CAP2-Climate-Change-Analysis-Guidance.pdf).)

20 156. Similarly, the FEIR’s modeling of the effects of climate change is unsupported by
21 substantial evidence and misleads the public about the likely effects of the Project in light of the
22 climate crisis.

23 157. The main model for the FEIR is CalSim 3, which simulates operational interactions
24 and produces a variety of reservoir storage, stream flow, Delta flows and exports, and water
25 contractor delivery estimates for SWP and CVP operations. Reliance on hydrologic and system
26 operations modeling (*e.g.*, CalSim 3) continues acceptance that the past is a guide to the future of
27 California weather and climate, embodying the concept of “stationarity.” CalSim 3 fails to take
28

1 account of the potential for extended drought, extreme heat events and lengthened hot seasons,
2 recurring extreme storms, and eventual sea level rise.

3 158. The modeling further includes an assumption that overstates future winter
4 precipitation and results in higher long-term average reservoir storage, stream flows, and exports.
5 The FEIR's modeling assumptions predict that climate change will *increase* runoff compared to the
6 historical record even though the text of the FEIR and other in-record documents predict climate
7 change will result in reduced precipitation and runoff, more frequent and severe droughts, and a
8 hotter, drier future. (FEIR at 4-6.) As a result, the FEIR's modeling and quantitative analyses fail to
9 adequately account for the likely effects of climate change and dramatically underestimate those
10 effects.

11 159. For example, the FEIR's modeling of climate change does not account for the
12 increased frequency and duration of droughts as a result of climate change compared to the
13 historical record. The FEIR explains that, "[b]y 2050, extreme Delta drought conditions are
14 projected to occur five to seven times more frequently," and "[o]ver the next several decades, dry
15 years will become drier." (FEIR at 30-19.) Similarly, the FEIR warns that, "[b]etween 1906 and
16 1960, one third of the water years in California were considered by the California Department of
17 Water Resources (DWR) to have been 'dry or critical'; that percentage increased to 46% from 1961
18 to 2017." (FEIR at 5-4.)

19 160. Yet, the FEIR's climate change modeling does not reflect that extreme drought
20 conditions will occur five (5) to seven (7) times more frequently, or that dry years become drier.
21 Instead, the FEIR's climate modeling assumes wetter conditions with increased runoff, including
22 increased runoff in dry and critically dry years. (FEIR at 4-6.) These conclusions violate CEQA
23 because they are not supported by substantial evidence in the record. (14 C.C.R. § 15384(a).)

24 161. This flaw in DWR's modeling leads to biased analysis of the effects of climate
25 change on fish and wildlife populations. For example, because the survival of juvenile salmon down
26 the Sacramento River and into and through the Delta is a function of river flow, the flawed climate
27 change modelling in the FEIR asserts that climate change will *increase* survival of juvenile salmon
28 migrating through the Delta in the winter and spring months. (Compare FEIR at 12-107 with FEIR

1 at 12C-12 to 12C-13.) This conclusion is based on DWR’s modelled predictions of increased flow
2 despite the evidence demonstrating that reality will mean more frequent and dryer dry years. This
3 too violates CEQA and is unsupported by substantial evidence, as it conflicts with the FEIR’s
4 analysis of salmon-related impacts elsewhere in the FEIR. (14 C.C.R. § 15384(a).)

5 162. Elsewhere in the FEIR, Respondent acknowledges that climate change has already
6 had (and will continue to have) significant impacts on water availability. (FEIR at 5-4 (“Between
7 1906 and 1960, one third of the water years in California were considered by the California
8 Department of Water Resources (DWR) to have been ‘dry or critical’; that percentage increased to
9 46% from 1961 to 2017 (Bureau of Reclamation 2019:H-2).”))

10 163. And climate modeling from the FEIR that was not incorporated into the
11 environmental baseline or utilized for consideration in the alternatives analysis predicts that impacts
12 between the 2020 baseline and 2040 (when Project operations are expected to begin) will be quite
13 significant. (FEIR at 5-17 to 5-19.) For example, that modeling predicts significant reductions in
14 upstream reservoir storage at Shasta Reservoir and Oroville Reservoir, significant increases in water
15 temperatures below Shasta Dam, and, as a result, substantial increases in temperature-dependent
16 mortality in winter-run Chinook Salmon below Shasta Dam. (*Id.*; *id.* At Appendix 5A, Table 5A-
17 D1.13.1-B; *id.* at Appendix 5A, Table 5A-E2.1-B.)

18 164. The FEIR’s climate model is also insensate with respect to climate change’s effects
19 on the future of harmful algal blooms, especially in light of projected increases in extreme heat
20 index days and expansion of the hot season in the five Delta counties.

21 165. DWR’s approach to climate change is to take the likelihood of extreme storms and
22 assumes supplies could be skimmed from their runoff, but to discount other major climate change
23 effects. It is arbitrary to pick and choose which climate change effects to analyze when striving to
24 comply with full disclosure laws like CEQA. As a result, the Project is out of step with the looming
25 realities of climate change and should be discontinued immediately so that other climate mitigation,
26 adaptation, and resilience investments may be planned and implemented sooner than later.

27 166. If DWR’s modeling premises turn out to be incorrect and in fact future winter
28 precipitation would be no greater than at present, then DWR, water contractors, and joint power

1 authorities could find themselves wasting a great deal of their ratepayers' capital pushing the
2 Project forward. In particular, the FEIR fails to recognize that certain climate tipping points that
3 compound the Project risk.

4 **D. FAILURE TO ANALYZE THE WHOLE ACTION, INCLUDING CUMULATIVE IMPACTS**

5 167. The FEIR violates CEQA because it fails to consider the whole of the action, as
6 required. (14 C.C.R. § 15026.2 (a).)

7 168. For instance, despite the fact that it is self-evident that the Project would be
8 operational for many decades into the future and that there is no question that the effects of climate
9 change significantly alter the effects of the proposed Project and alternatives, the FEIR excludes
10 consideration of long-term effects of the Project under CEQA, such as effects in 2040 or 2070 that
11 include the effects of climate change, and only considers the effects of the proposed Project
12 compared with the existing condition baseline. (FEIR at 4-6 (“These longer-term analyses were
13 performed outside of CEQA requirements to provide information about possible future
14 environmental conditions once conveyance facilities are operational.”); *id.* (explaining that the
15 DEIR’s approach excludes consideration of the effects of climate change from the analysis). This
16 violates CEQA’s mandate that agencies consider the whole action, including long-term effects.

17 169. Likewise, even though the FEIR admits that the Project could affect upstream
18 reservoir storage and flows, DWR does not propose any measures to ensure that upstream
19 operations adequately protect fish and wildlife and comply with state and federal environmental
20 laws, particularly in light of the effects of climate change. (FEIR at ES-47 (“However, because of
21 the effect that integration of the proposed north Delta intakes has on the overall system, their
22 operation could lead to changes in river flows and upstream storages.”).) This also violates CEQA’s
23 mandate that agencies consider the whole action, including long-term, foreseeable impacts. (14
24 C.C.R. § 15026.2 (a).)

25 170. And this is particularly problematic because the FEIR shows that the effects of
26 climate change will result in even lower upstream reservoir storage and thereby result in more
27 severe impacts on fish and wildlife from upstream operations of the CVP and SWP (and the
28 Project). (FEIR, Appendix 5A, Table 5A-E4.1-B.)

1 171. Further, the FEIR fails to disclose the significant adverse effects that are reasonably
2 foreseeable to occur from operations of the Project and alternatives during drought conditions,
3 particularly the use of Temporary Urgency Change Petitions (“TUCPs”) to allow DWR to violate
4 minimum Delta water quality objectives. (Common Responses to Comments at 1-24 – 1-25.)
5 Analyses by state and federal agencies have demonstrated that previous TUCPs – which reduced
6 flows into and through the Delta below the minimums required by the 2006 Water Quality Control
7 Plan and Water Rights Decision 1641 – have caused significant harm to fish species. (*See, e.g.*,
8 State Water Resources Control Board, Water Rights Order 2015-0043 (Corrected January 19,
9 2016); *id.*, Water Rights Order 2022-0095 (Feb. 15, 2022).) Implementation of TUCPs has also
10 contributed to and exacerbated harmful algal blooms in the Delta, and peer reviewed research has
11 concluded that reduced Delta outflow significantly contributes to the abundance of toxic
12 cyanobacteria (that cause harmful algal blooms). (Group Comments at 25.) Yet, the FEIR never
13 analyzes or considers the adverse environmental impacts on fish and water quality from the use of
14 TUCPs that are reasonably certain to occur as part of the Project. Instead, Respondent simply
15 asserts, without much (if any) explanation, that TUCPs are not part of the Project and therefore need
16 not be considered. Plainly put, this reasoning ignores the law, as CEQA broadly defines a “project”
17 as the whole of the action, even where separate governmental approvals are required. (*Id.* §15378;
18 Pub. Resources Code § 21065.)

19 172. In addition, the FEIR fails to consider the effects of water transfers, claiming
20 wrongly that the Project would not result in increased water transfers. (FEIR at 3-147.) However,
21 the FEIR also acknowledges that water transfers through the new Delta tunnel could result in
22 reduced water loss during transfer of water across the Delta to the South Delta pumps (so-called
23 “carriage losses”). (*Id.*) Even if there is not an increase in water transfers, reducing carriage water
24 losses, which are typically twenty to thirty percent of water transfers, would result in reduced Delta
25 outflow, which likely would result in significant adverse impacts including reduced survival of
26 Delta Smelt, increased salinity, and increased harmful algal blooms that threaten human health and
27 safety. (*Id.*)
28

1 173. Moreover, and finally, the FEIR’s analysis of cumulative impacts violates CEQA.
2 For instance, although the FEIR includes the proposed Sites Reservoir on its list of projects
3 considered for cumulative impacts, it devotes only three pages to consider cumulative impacts of
4 construction and operation of the Project and all other cumulative projects on fish species. (FEIR at
5 12-259 – 12-261.) These three pages grossly understate the severity and significance of the
6 cumulative impacts of implementing both the Project and Sites Reservoir, as well as other projects
7 that will increase water diversions from the Bay-Delta. No modeling included in the FEIR includes
8 the cumulative effects of water diversions by the Project in combination with the Sites Reservoir
9 project, even though state agencies have reviewed and commented on two CEQA documents for the
10 Sites Reservoir project, and the State Water Resources Control Board has conditionally accepted a
11 water rights application for that project. (FEIR at 12-260 (stating that effects from some projects
12 that are considered in the analysis of cumulative impacts are included in the modeling, but that the
13 modeling excludes the effects of Sites Reservoir).) The cumulative effects of Sites Reservoir and
14 the Project would result in even greater reductions in flows into and through the Delta (with more
15 resultant impacts on species therein). Yet, the FEIR simply states that the cumulative impacts would
16 be “potentially significant for some species.” (FEIR at 12-147.) CEQA requires more specific
17 analysis, particularly where, as here, cumulative impacts are likely to be significant (since they
18 would impact endangered species like winter-run Chinook Salmon). (14 C.C.R. § 15130.)

19 **E. FAILURE TO ADEQUATELY ANALYZE IMPACTS ON THREATENED AND**
20 **ENDANGERED SPECIES**

21 174. The FEIR’s analysis of the Project’s likely impacts on threatened and endangered
22 species violates CEQA in at least eight separate ways.

23 175. First, the FEIR’s conclusion that, with mitigation, Project construction and
24 operations will result in less than significant impacts on winter-run Chinook Salmon is contrary to
25 the evidence before the agency. (FEIR at ES-33; 14 C.C.R. § 15384(a); *see also id.* § 15065(a)(1)
26 (impacts are significant where they “have the potential to ... substantially reduce the number or
27 restrict the range of an endangered, rare or threatened species”).)
28

1 176. The analyses in the FEIR show that the Project is likely to reduce the survival of
2 juvenile winter-run Chinook Salmon migrating through the Delta and reduce the abundance of this
3 critically endangered species. (FEIR at 12-3.) With respect to juvenile survival through the Delta,
4 the models used in the FEIR show that the Project is likely to reduce survival through the Delta
5 compared to the already unsustainable status quo, as a result of diversions that reduce flows into and
6 through the Delta. (FEIR at 12-106 (finding that “through Delta survival under the Project
7 alternatives was 0-4% lower than existing conditions,” and was reduced further in the fall months
8 and in June).) Given the fact that the status quo for winter-run Chinook Salmon is declining
9 abundance towards extinction, even seemingly small reductions in survival of this critically
10 endangered species increase the risk that the population will be extinguished, constituting a
11 significant impact that warrants changes in operations to avoid these impacts. (14 C.C.R. §
12 15065(a)(1).)

13 177. The FEIR then erroneously concludes that tidal marsh and channel margin habitat
14 restoration will mitigate these impacts to a less than significant level. (FEIR at ES-33.) Respondent
15 claims that the mandated tidal marsh and channel margin habitat restoration will improve salmon
16 rearing in the Delta and cites a study (Perry et al. 2018) to support that proposition. (FEIR at 12-
17 110; *id.* at Appendix 3-F (“DWR will undertake channel margin habitat restoration to mitigate
18 potential flow-related impacts on riparian and wetland bench habitat used by juvenile Chinook
19 Salmon for *rearing*.”).) However, that study analyzed the effects of reduced flows on survival of
20 salmon *migrating* through the Delta, not salmon that are rearing in the Delta, and the FEIR presents
21 no scientific evidence showing that restoring channel margin habitat will mitigate the effects of
22 reduced flow to *migrating* salmon and improve their survival. To the contrary, peer-reviewed
23 studies have found that there is already adequate rearing habitat in the Delta for salmon and have
24 concluded that rearing habitat in the Delta is not a limiting factor for salmon at current population
25 levels. (*See, e.g.*, Munsch et al 2020; Group Comments at 35.) Instead, these studies suggest that
26 without increased flows, habitat restoration in the Delta is unlikely to improve productivity or
27 provide substantial population-level benefits. (*See, e.g.*, Munsch et al 2020.) Moreover, and as the
28 FEIR admits, approximately 47,000 linear feet (8.9 miles) of channel margin habitat has been

1 restored in recent decades as part of other projects, and the FEIR presents no evidence that these
2 channel habitat restoration projects have improved the survival of winter-run Chinook Salmon
3 through the Delta. (FEIR at 12-106.) Here, notably, the FEIR proposes only to restore “up to 4,900”
4 linear feet of channel margin habitat. (FEIR at 3F-18, 3F-56.)

5 178. Likewise, the FEIR also relies on another study (Hellmair et al 2018) to claim that
6 channel margin habitat restoration has been demonstrated to be effective. (*Id.* at 3F.1-14.) However,
7 while that study found that salmon were more likely to occupy natural or restored channel habitats,
8 the study did not analyze, let alone demonstrate, that channel margin habitat restoration increased
9 survival of migrating or rearing salmon. (Group Comments at 36.)

10 179. The mitigation measure imposed by the FEIR to reduce the Project’s impacts on
11 Chinook Salmon is therefore not supported by substantial evidence. (14 C.C.R. § 15065(a)(1).)

12 180. Second, the FEIR fails to mandate necessary and feasible mitigation measures, as
13 required. (Pub. Resources Code §§ 21002.1(b); 21081(a)(1); 14 C.C.R. §§ 15021(a)(2), (3),
14 15091(a)(1).) The FEIR, for example, shows that even slight increases in water temperature can
15 have devastating impacts on Chinook Salmon eggs. (FEIR, Appendix 12B, at 12B-116.) And,
16 importantly, the FEIR underestimates the significance of these impacts. For example, the FEIR’s
17 models rely on a 1999 study by the U.S. Fish and Wildlife Service to estimate temperature
18 mortality, *id.*, even though the State of California and federal agencies (including in biological
19 opinions) have rejected use of this study in favor of more recent peer reviewed scientific studies that
20 conclude temperature dependent mortality of winter-run Chinook Salmon begins at even lower
21 temperatures. (Group Comments at 33, citing Martin et al., 2016.)

22 181. However, the FEIR provides no mitigation measures designed to protect salmon eggs
23 from rising water temperatures despite acknowledging water temperatures will increase in the future
24 under the Project. This violates CEQA. (*County of San Diego v. Grossmont-Cuyamaca Community*
25 *College Dist.* (2006) 141 Cal. App. 4th 86, 98 (holding that agencies may not approve projects that
26 will have significant impacts if “there are feasible ... mitigation measures” that can substantially
27 lessen or avoid those effects); *Mountain Lion Foundation*, 16 Cal. 4th at 134; *see also* Pub.
28 Resources Code § 21002 (“The Legislature finds and declares that it is the policy of the state that

1 public agencies should not approve projects as proposed if there are feasible alternatives or feasible
2 mitigation measures available which would substantially lessen the significant environmental
3 effects of such projects[.]”.)

4 182. Third, the FEIR’s conclusion that the Project will not result in increased predation or
5 impingement (in fish screens) is unsupported by substantial evidence. (14 C.C.R. § 15384(a).) The
6 FEIR concludes that the new fish screens and diversion facilities in the North Delta will not result in
7 increased predation or impingement even though the Project will require the construction of new
8 large fish screens in the Delta, creating potential hot spots for predation, and many existing
9 structures in the Delta have been identified as predation hot spots by widely regarded scientific
10 studies. (FEIR at 12-97.)

11 183. Fourth, and similarly, the FEIR’s conclusion that the Project would have less than
12 significant impacts on fall-run Chinook Salmon before mitigation is contrary to the evidence before
13 the agency and unsupported by substantial evidence. (14 C.C.R. § 15384(a).) Even though the FEIR
14 explains that the “operations of the north Delta intakes would have negative effects on fall- and late
15 fall-run Chinook in a generally similar manner to what was discussed for winter- and spring-run
16 Chinook Salmon,” the FEIR concludes that the impacts to fall-run Chinook Salmon would be less
17 than significant *before* mitigation. (FEIR at 12-149.)

18 184. In reaching this conclusion, Respondent unlawfully ignored significant impacts the
19 Project is likely to have on fall-run Chinook Salmons’ migratory behavior. As the FEIR admits, fall-
20 run Chinook Salmon migrate through the Delta throughout the winter and spring months. (FEIR at
21 12-137.) However, Respondent plans to allow more diversions, and require lower bypass flows, in
22 the spring, which would impair migration during those months by decreasing the flow of water.
23 (*Id.*) And the FEIR neglects to meaningfully speak to this issue for fall-run Chinook Salmon at all.
24 This is a significant impact that needs to be, but is not, mitigated. (Pub. Resources Code §§
25 21002.1(b); 21081(a)(1); 14 C.C.R. §§ 15021(a)(2), (3), 15091(a)(1).)

26 185. Fifth, the mitigation measures mandated to protect Central Valley steelhead are not
27 supported by substantial evidence. (14 C.C.R. § 15384(a).) Like for winter-run Chinook Salmon,
28 the FEIR finds that the Project is likely to result in significant impacts on Central Valley steelhead

1 as a result of reduced flows through the Delta. (FEIR at 12-157.) And like for winter-run Chinook
2 Salmon, the FEIR erroneously concludes that tidal marsh and channel margin habitat restoration
3 will mitigate these impacts to a less than significant level. (*Id.*)

4 186. To justify this determination, the FEIR cites studies that are focused on the relation
5 between channel habitat restoration and salmon survival, not Steelhead survival. (FEIR at 12-158.)
6 Without research specific to Central Valley Steelhead, Respondent simply states that the proposed
7 habitat modification program “would have *the potential* for positive effects on steelhead.” (*Id.*
8 (emphasis added).) However, if species-specific evidence supporting the creation of shallow water
9 habitat for Central Valley Steelhead is not available, any comparison of Chinook Salmon usage of
10 shallow water habitat to that of Steelhead must be size-specific, at minimum. Migrating juvenile
11 Steelhead are the size of very large juvenile Chinook Salmon. The scientific literature cited provides
12 no evidence that large juvenile Chinook Salmon benefit from shallow-water rearing habitats (*see*,
13 *e.g.*, Iglesias et al. 2017; Henderson et al. 2018; Pope et al. 2018). Yet, the FEIR misleadingly and
14 unlawfully relies on these studies to avoid having to mandate more meaningful protections for
15 Central Valley Steelhead. (14 C.C.R. § 15384(a).)

16 187. Sixth, the FEIR erroneously claims that the Project would result in less than
17 significant impacts on Delta Smelt despite the extremely dire status of the species. (FEIR at ES-72;
18 14 C.C.R. § 15384(a).) The FEIR identifies a number of adverse effects on Delta Smelt from the
19 Project, including reduced abundance of important prey species, increased water clarity that results
20 from sediment entrainment in the North Delta intakes (which decreases Delta Smelt’s food supply),
21 and reduced summer and fall habitat. (FEIR at 12-5.) Given the fact that the population is declining
22 towards extinction under existing conditions, the FEIR fails to provide a reasoned explanation why
23 *any* adverse impacts to Delta Smelt would not constitute a significant adverse impact under CEQA.
24 (14 C.C.R. § 15065(a)(1).) Any harm to a species on the brink of extinction is significant. (*Id.*)

25 188. Further, the FEIR’s analysis of Delta Smelt-related impacts is not supported by
26 substantial evidence, as required. (*Id.* § 15384(a).) For example, the FEIR repeatedly asserts that
27 food availability is a limiting factor for Delta Smelt. (FEIR at 12-13.) Its modeling to this effect,
28 relying on a study (Hammock et al 2019), predicts that the Project would reduce food supply by

1 zero (0) to eight (8) percent. (*Id.* at 12-171.) However, although the FEIR mentions Hammock et al
2 2019, it neglects to disclose the conclusion of Hammock et al 2019 that current Delta pumping
3 reduces Delta Smelt food supply abundance by seventy-four (74) percent.

4 189. Seventh, the FEIR understates the Project’s likely impacts on Longfin Smelt and
5 fails to justify its conclusion that the mitigation measures mandated are sufficient to reduce the
6 Project’s impacts on Longfin Smelt to less than significant levels. (14 C.C.R. § 15384(a); Pub.
7 Resources Code § 21100.)

8 190. The FEIR admits that Project-related reductions in Delta outflows would reduce the
9 population of Longfin Smelt by four (4) to ten (10) percent, which would constitute a significant
10 impact under CEQA; but even this grim conclusion downplays the Project’s likely impacts on the
11 species. (FEIR at 12-198.) For instance, the FEIR mischaracterizes widely recognized scientific
12 conclusions regarding the adverse effects of reducing Delta outflow on Longfin Smelt by describing
13 the effects as “uncertain,” by claiming that changes in abundance are “were very small relative to
14 the variability in the predicted values, which spans several orders of magnitude,” and by
15 erroneously claiming that Napa River flows are more important than Delta outflow for Longfin
16 Smelt population dynamics. (FEIR at 12-200 – 12-203.) Notwithstanding DWR’s attempts to
17 obfuscate the scientific consensus, numerous peer reviewed scientific studies going back decades
18 have consistently found that Delta outflows are a driving factor for Longfin Smelt recruitment and
19 population dynamics. (*See, e.g.*, Nobriga and Rosenfield 2016; Thomson et al 2010; MacNally et al
20 2010; Kimmerer 2002; Rosenfield and Baxter 2007; Kimmerer 2009; Jassby et al 1995.) Most
21 recently, in proposing to list Longfin Smelt as endangered under the federal Endangered Species
22 Act, the U.S. Fish and Wildlife Service concluded that “reduced and altered freshwater flows
23 resulting [are] the main threat facing the Bay-Delta longfin smelt due to the importance of
24 freshwater flows to maintaining the life-history functions and species needs[.]” (U.S. Fish and
25 Wildlife Service, Endangered and Threatened Wildlife and Plants; Endangered Species Status for
26 the San Francisco Bay-Delta distinct population segment of the Longfin Smelt, 87 Fed. Reg. 60957,
27 60963 (Oct. 7, 2022).)

1 191. In addition, Respondent’s conclusion that restoration of tidal marshes would reduce
2 these impacts to a less than significant level is unsupported by substantial evidence, as the FEIR
3 does not cite *any* scientific studies demonstrating that restoring tidal marsh habitat will increase the
4 abundance of Longfin Smelt, nor is there *any* credible scientific basis to conclude that the scale of
5 tidal marsh habitat proposed in the DEIR would lead to measurable increases in abundance. (FEIR
6 at 12-203.) While Longfin Smelt may have been found near a restored tidal marsh, there is no
7 indication that the fish did not occur at the site before restoration, and the mere presence of larval
8 Longfin Smelt at a restoration site does not provide scientific evidence demonstrating that
9 restoration of more acres of tidal marsh habitat would increase abundance of Longfin Smelt. (*Id.*)

10 192. The FEIR cites Lewis et al 2020 to suggest that restored tidal marshes *might* benefit
11 Longfin Smelt, but neither a previous study by the same scientific researchers (Lewis et al 2019)
12 nor that study (Lewis et al 2020) supports the FEIR’s conclusion. (*Id.*) The 2019 study states clearly
13 that the value of restored shallow subtidal environments “remains unknown,” and the 2020 study
14 merely reports findings from “...previously undescribed aggregations of Longfin Smelt that were
15 attempting to spawn in restored and underexplored tidal wetlands of South San Francisco Bay.”
16 (Group Comments at 47.) In other words, Longfin Smelt were not previously described from this
17 marsh because it had not been systematically surveyed prior to the marsh restoration project. In fact,
18 according to these same studies, Longfin Smelt occupancy of and recruitment in restored shallow
19 marsh habitat appears to be dependent on freshwater flow. (*Id.*) This is not substantial evidence that
20 the mitigation measure mandated to protect Longfin Smelt is sufficient to avoid significant impacts
21 and does not justify DWR’s decision to bet the fate of the Longfin Smelt on habitat restoration that
22 shows no signs of supporting their continued existence (let alone restoration). (14 C.C.R. §
23 15384(a); *Save the Agoura Cornell Knoll v. City of Agoura Hills* (2020) 46 Cal. App. 5th 665, 692-
24 94 (holding that City violated CEQA by relying on outdated surveys and finding that “an updated
25 survey would . . . be necessary to formulate an adequate mitigation measure for these affected plant
26 species”))

27 193. Eighth, the FEIR’s conclusions that Project-related impacts on Green Sturgeon and
28 White Sturgeon will be less-than-significant are not supported by substantial evidence. (14 C.C.R. §

1 15384(a); FEIR at ES-34.) Both populations experienced extreme rates of mortality in 2022
2 following an unprecedented bloom of the harmful algae; this has raised concerns over the viability
3 of both populations in the San Francisco Bay estuary. (FEIR at 12-214.) For example, even though
4 the FEIR indicates that Project-related reductions in Delta outflows from March to July would
5 likely reduce White Sturgeon recruitment and migration substantially, it erroneously claims that
6 such reductions in abundance are less than significant because of uncertainty. (*Id.*) The relationship
7 between Delta outflow and White Sturgeon recruitment is well documented within the scientific
8 literature, so even if there is some uncertainty, this likely impact is significant under CEQA given
9 the dire status of the species. (14 C.C.R. § 15384(a).) Similarly, the FEIR fails to consider the likely
10 impacts increased predation will have on these species even though the Project is likely to cause
11 waters in the Delta to become clearer (less turbid), which has been shown to increase predation of
12 Green Sturgeon and White Sturgeon.

13 **F. FAILURE TO SUFFICIENTLY CONSIDER EFFECTS ON WATER QUALITY**

14 194. The FEIR's conclusion that the Project will have less than significant impacts on
15 water quality fails as a matter of law, and is not supported by substantial evidence, as required.
16 (FEIR at 9-1 – 9-100; 14 C.C.R. § 15091.)

17 195. For example, the FEIR states that the Project would increase salinity at several
18 locations in the Delta, including Emmaton and Three Mile Slough, and would increase the
19 frequency of violating the water quality standards for the Sacramento River at Emmaton, the San
20 Joaquin River at Jersey Point, and the San Joaquin River at Prisoner's Point. (FEIR at 9-28.)
21 However, the FEIR's discussion of water quality impacts ignores the routine violation of salinity
22 standards in the Bay-Delta Water Quality Control Plan during critically dry years since 2014 that
23 has resulted from the frequent use of TUCPs, the reasonably foreseeable continuation of such
24 violations in future droughts, and the adverse environmental impacts that result of use of TUCPs.
25 (*Id.*)

26 196. The FEIR fails to consider the likelihood that construction activities and the
27 installation, operation, and maintenance of new North Delta intakes may disturb channel sediments,
28 thereby releasing contaminants like methylmercury and bioavailable selenium present on the

1 sediment floor. (RTD Comments at 37-38.) This is particularly concerning given the likely interplay
2 such disturbances may have with high runoff from extreme storm events that may scour channel
3 beds and further mobilize contaminants. (*Id.*) Any legacy pesticide contaminants could also become
4 bioavailable ecologically and in drinking water supplies drawn from Delta channels. (*Id.*)

5 197. The FEIR fails to disclose where the most at-risk small community drinking water
6 systems may likely co-occur in Delta channels. California’s drinking water maximum contaminant
7 load for mercury is two (2) micrograms/liter (“µg/L”) while in the California Toxics Rule it is set at
8 0.05 µg/L in water. (*Id.* at 43.) It appears from Appendix 9A that there is no set standard for
9 methylmercury, which is far more toxic than elemental mercury. (FEIR at 9A-24.)

10 198. Deposition downstream by storm events causes erosion in the selenium-rich soils of
11 the western San Joaquin Valley. (FEIR at 9-23.) Past hydrologic and selenium monitoring indicate
12 that pulses of selenium loading supply new increments of available selenium to the San Joaquin
13 River and south Delta channels where, once flow peaks subside and residence time of water
14 increases, selenium partitioning resumes. (RTD Comments at 44.) Such events, as they may affect
15 both methylmercury and selenium, are not examined in the FEIR. (*Id.*) The FEIR therefore fails to
16 adequately address these pathways for methylmercury and selenium contamination in the Delta.

17 199. Likewise, the FEIR fails to consider the adverse effects of reduced Delta outflows on
18 the increased magnitude, duration, and intensity of harmful algal blooms. (FEIR at 9-156 – 9-180.)
19 Peer reviewed scientific studies by DWR researchers conclude that even small shifts in the location
20 of Delta outflows may increase harmful algal blooms. (Group Comments at 51.) Yet, the FEIR
21 neglects to incorporate these issues into its review.

22 200. The Project will increase violations of salinity drinking water standards in Rock
23 Slough by sixteen (16) percent. Rock Slough is the entry point for Contra Costa Water District’s
24 (“CCWD”) Contra Costa Canal intake to water treatment. CCWD serves hundreds of thousands of
25 eastern and central Contra Costa County residents with affordable, fresh drinking water direct from
26 the Delta.

27 201. The FEIR improperly discounts the effects of reverse flows in the vicinity of
28 Freeport from North Delta intakes operation, basing its analysis on present conditions, instead of

1 those expected around 2040, when the tunnel would realistically begin operation. The potential for
2 extreme heat and extended heat seasons in the Central Valley, particularly during the summer and
3 early autumn, undermines the FEIR’s blithe assurances that reverse flow risks would be “very
4 slight.” Reverse flows are already occurring during droughts in the Delta, and were evident on
5 September 7, 2022, during the recent extreme heat event that California experienced.

6 202. Operation of the north Delta intakes on the Sacramento River removes water from
7 that river which would normally flow through the Delta Cross Channel (when open) and Georgiana
8 Slough (especially), leaving the central Delta channels, such as the mainstem San Joaquin and the
9 lower Mokelumne distributaries, to receive both more tidal flow and more San Joaquin River flow,
10 which is saltier than the Sacramento generally. The FEIR shows, but fails to address, that the
11 Project’s Bethany Alignment removes substantial volumes of fresh water from the Delta and would
12 result in poorer water quality in the central and south Delta than at present. FEIR Table 4B-6 also
13 indicates that there would be a thirteen (13) percent increase in the frequency with which the Jersey
14 Point salinity objective in D-1641 would be violated between the Project and existing conditions,
15 and an eleven (11) percent increase in Jersey Point salinity violations with the Project’s reprioritized
16 north Delta intakes.

17 203. Because a violation of water quality standards constitutes a significant impact under
18 CEQA, the FEIR’s neglect in these regards not only constitutes a failure to consider all of the
19 environmental impacts of the Project, Pub. Resources Code § 21100(b)(1), but also a failure to
20 comply with CEQA’s mandate to review and mitigate significant impacts. (14 C.C.R. § 15065(a)(1)
21 (stating that impacts are significant within the ambit of CEQA where they “have the potential to
22 substantially degrade the quality of the environment,” including water quality).)

23 **G. FAILURE TO ANALYZE, MITIGATE, OR AVOID ENVIRONMENTAL JUSTICE IMPACTS**

24 204. Environmental justice cannot be achieved simply by adopting generalized policies
25 and goals. Instead, environmental justice requires an ongoing commitment to identifying existing
26 and potential problems, and to finding and applying solutions, both in approving specific projects
27 and planning for future development. The Project and FEIR fail in this regard.

28

1 205. DWR ignored its own “Your Delta Your Voice” Survey as a basis for informing how
2 and what kind of environmental, environmental justice, and community impacts the Project would
3 impose on the Delta environmental justice community. It is plainly obvious that 1) the Legal Delta
4 as well as the Delta Region are *bona fide* environmental justice communities, with relatively small
5 proportions of white and wealthy populations; 2) Delta residents and Delta region community
6 members rely substantially on the Delta directly, and the north Delta in particular, for subsistence
7 fishing, and it is thus an environmental impact to have both fishing spots taken away from anglers
8 and fish removed from the vicinity for North Delta Intakes construction activities; and 3) in the
9 operational phase, lost flows in the Delta will increase salinity in the Delta as it reduces flows in
10 north and central Delta channels, thereby contributing to the spread of harmful algal blooms which
11 will disproportionately injure Delta people who rely on fishing and broad outdoor activities to enjoy
12 the Delta.

13 206. The FEIR considers Stockton, with about half of its population living in the
14 secondary zone, outside of the footprint for the majority of impacts discussed elsewhere in the
15 document despite likely significant water quality impacts on beneficial uses of water there,
16 including drinking water. In addition, construction staging that will rely heavily on the Port of
17 Stockton will also increase the air pollution burden within Stockton’s AB 617 community. (AB 617
18 communities are communities that the California Air Resources Board has identified as suffering
19 from extremely high levels of air pollution; as a result of this designation, AB 617 communities are
20 prioritized under the law for reductions in emissions.) Ignoring the disparate impacts on urban Delta
21 populations from the construction and operation of the Project, particularly those impacts as they
22 relate to the Port of Stockton community, ignores the civil rights of communities of color under
23 state and federal law.

24 207. The FEIR misleads the public where its data tables for population and “Income and
25 Poverty Levels” present data for counties not just in the Delta but throughout the service area of the
26 SWP—the South Bay area, San Joaquin Valley, Central Coast counties, and Southern California,
27 another fifteen (15) counties in all in these two instances. However, all other tables (the other
28 fifteen) present data on just Delta counties, and some include Alameda County while others do not.

1 208. The FEIR ignores that the construction of the North Delta Intakes will have
2 disproportionate impacts on DACs in these north Delta communities. The communities in this table
3 are located in a range from Freeport in the north Delta to Isleton in the central Delta area, the area
4 where immediate and direct impacts of both North Delta Intakes construction and operations will be
5 direct and pronounced. The construction period for these intakes will destroy fishing access along
6 the left (east) bank of the Sacramento River between Hood and Courtland, which could generate
7 greater congestion among anglers for remaining fishing spots, or otherwise discourage fishing
8 altogether in this area of the Delta. A twelve-to-fourteen-year construction period at North Delta
9 fishing spots will greatly impair environmental justice communities’ access to Delta fish for their
10 diets disproportionately relative to the Delta Region and add travel costs to their fishing activities—
11 a direct environmental effect. The FEIR fails to recognize these as significant environmental justice
12 impacts.

13 209. In the operational period of the Tunnel Project, two principal water quality impacts
14 go ignored as to their effects on Delta environmental justice communities: increased salinity
15 downstream from North Delta Intake operations and increased risk Delta-wide of harmful algal
16 blooms.

17 210. DWR contends that complying with local permit conditions are “environmental
18 commitments” that would reduce or avoid Project effects, but ignores that the State is immune from
19 compliance with local regulations, in contravention of *Lotus*. These commitments, therefore, are
20 unenforceable unless included as binding commitments of the mitigation monitoring program plan.
21 Without adhering to local regulation, the Project will impose a disproportionate burden of
22 environmental effects upon disadvantaged communities.

23 211. Similarly, the Community Benefits Program does not ensure that it will effectively
24 benefit ecological and economic impacts to Delta communities, especially environmental justice
25 communities. In particular, the Program has no mechanism to engage with the diverse class, race,
26 and gender segments of the community that may not be sufficiently politically organized to extract
27 the benefits of this Program from DWR.

28 212. Finally, Environmental Justice impacts to Tribes are not adequately assessed.

1 **H. THE TRIBAL RESOURCES ANALYSIS IS ARBITRARY, LIMITED, AND INADEQUATE**

2 213. The Study Area itself should extend to all areas where there could be operational
3 impacts, but it is too small and excludes Tribal communities with impacted interests by improperly
4 excluding areas upstream of the Delta or the south-of-Delta SWP and CVP services areas. (FEIR, at
5 32-8.)

6 214. Moreover, the FEIR indicates that the Project’s study area includes areas upstream of
7 the Delta, including the Sacramento, Trinity, and Feather River systems that have been impounded
8 by dams for the SWP and CVP. (DEIR Figures 1-4 to 1-8.) Yet, for the purposes of the FEIR’s
9 discussion of Tribal Resources, the FEIR improperly limits the Tribal cultural resources study area
10 to a much smaller region. (FEIR at 32-7; *Id.* at 32-6 – 32-8.) The Delta should not be treated as a
11 single resource. There are more individual Tribal cultural resources that will be impacted than just
12 the Delta Tribal Cultural Landscape (“TCL”), and DWR failed to conduct a sufficient analysis to
13 reach the conclusion that no other Tribal cultural resources exist or will be impaired. (*See* FEIR at
14 32-4.)

15 215. Specifically, individual Tribal cultural resources, such as village sites, fishing sites,
16 mound structures, and other traditional cultural places, can be significant on their own in addition to
17 their context within the cultural landscape of the Delta. For example, “Stone Lake is a landscape
18 feature that contributes to the Delta TCL but is also independently significant.” (Shingle Springs
19 Comment Letter at 5.)

20 216. Tribes do not recognize boundaries on the landscape, particularly in the Delta. The
21 FEIR’s treatment of the TCL and other cultural resources is inadequate where it imposes
22 boundaries. The idea of cultural group boundaries has been forced on Tribes since European
23 colonization, but the Delta is a shared, co-managed, and expansive landscape to the Indigenous
24 communities who live there.

25 217. Because operation of the SWP and CVP would be altered in direct and indirect
26 responses to this Project, including changes in upstream releases on the Sacramento, American, and
27 Feather Rivers, the Tribal Cultural Resources discussion in the FEIR should have detailed the
28

1 Project’s potential impacts on Tribal cultural resources that depend upon and interact with the
2 tributary watersheds.

3 218. Impacts to fish, wildlife, and water are also impacts to traditional cultural values, but
4 the FEIR fails to adequately incorporate these impacts into its discussion of Tribal cultural
5 resources.

6 219. Mitigation for TCL and its resources is insufficient because the FEIR does not
7 provide any actual mitigation for these impacts, and proposed mitigation consists of vague plans
8 with no real standards by which to measure the effectiveness of the mitigation despite the FEIR’s
9 admission that “the project as a whole would materially impair character-defining features and
10 result in a substantial adverse change to the significance of the Delta TCL.” (FEIR 32-4; ES-119;
11 see also *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467, 520
12 (finding inadequate a mitigation measure that set a “generalized goal” for reducing emissions and
13 then, to achieve that goal, relied on “unspecified and undefined” protocols); *Preserve Wild Santee v.*
14 *City of Santee* (2012) 210 Cal.App.4th 260, 281 (finding inadequate a mitigation measure that
15 required the future approval of a habitat management plan but did not “describe the actions
16 anticipated for active management” or “specify performance standards or provide other guidelines
17 for the active management requirement”); see also CEQA Guidelines, § 15126.4, subd. (a)(1)(B).))

18 220. According to the FEIR, “Project impacts on individual Tribal cultural resources
19 would remain significant and unavoidable for all project alternatives after implementation of
20 Mitigation Measures TCR-1a, TCR-1b, TCR-1c, TCR-1d, and TCR-2: *Perform an Assessment of*
21 *Significance, Known Attributes, and Integrity for Individual CRHR Eligibility*, because complete
22 avoidance or protection is unlikely.” (FEIR at 32-54.)

23 221. The Project’s Statement of Overriding Considerations is inadequate to justify these
24 significant and unavoidable effects. 14 Cal Code Regs §15091(f); *Village Laguna of Laguna Beach,*
25 *Inc. v Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1034; *California Native Plant Soc’y v City*
26 *of Santa Cruz* (2009) 177 Cal.App.4th 957, 983; *Federation of Hillside & Canyon Ass’ns v City of*
27 *Los Angeles* (2004) 126 Cal.App.4th 1180, 1201.

1 222. Mitigation measures for biological, water quality, environmental justice, and
2 aesthetic resource impacts do not mitigate cultural resource impacts. (Pub. Resources Code §
3 21080.3.1.) Tribal Cultural Resources are nonrenewable, cannot be moved, and DWR does not have
4 the capability to culturally engage with the spiritual and ceremonial characteristics of the Delta. For
5 example, mercury accumulation impacts a Tribe's ability to use waters and harms cultural practices
6 by limiting safe Tribal engagement. Protracted construction timelines also have unmitigated cultural
7 impacts. Yet, the FEIR focuses on the physical impacts of the Project, and neglects to adequately
8 study or mitigate for impacts to Tribal cultural ceremonies, restriction of access, and the destruction
9 and disruption of the TCL qualities and characteristics.

10 223. Moreover, all mitigation focuses on individual features; there is no landscape-scale
11 mitigation in the FEIR. Avoidance of individual resources is not sufficient mitigation for the Delta
12 TCL as a whole. For example, moving the Project a small distance may avoid a given resource in a
13 literal sense, but that resource's cultural, spiritual, ecological, and aesthetic values will still be
14 impacted.

15 224. Future development of a Tribal Cultural Resources Management Plan ("TCRMP") is
16 deferred mitigation and therefore insufficient because it does not include Tribal consultation and
17 provisions for Tribal monitoring, no standards or criteria are set concerning the treatment of cultural
18 resources that are discovered later, treatment will be applied at least two (2) years after certification,
19 built-environment and archeological treatment plans are not currently available, and archaeological
20 monitoring and development of protocols for field investigations have not been completed. (14
21 C.C.R. § 15126.4(a)(1)(B); *see also POET, LLC v. State Air Resources Bd.* (2013) 218 Cal. App.
22 4th 681, 735.)

23 225. Furthermore, substituting lands and resources as mitigation measures is offensive
24 and there are insufficient criteria to evaluate how these substitutes would mitigate impacts.

25 226. Finally, the FEIR contains mitigation measures that are not mitigation. For example,
26 neither incorporation of Tribal knowledge nor cultural resource sensitivity is valid CEQA
27 mitigation, especially not after the fact. (FEIR at 32-69 to 32-70.)
28

1 **I. INSUFFICIENT TRIBAL CONSULTATION AND ENGAGEMENT IN WATER**
2 **GOVERNANCE**

3 227. In furtherance of Tribal sovereignty, the Legislature adopted Assembly Bill 52 (“AB
4 52”) in 2014, amending CEQA to mandate government-to-government consultations on CEQA
5 projects and formal Tribal involvement in identification and protection of Tribal cultural resources.
6 Under AB 52, public agencies must consult with Tribes traditionally and culturally affiliated with
7 the geographic area affected by a project prior to project approval and “avoid damaging effects to
8 any tribal cultural resource” whenever feasible. (Pub. Resources Code § 21080.3.1.)

9 228. “Consultation” with a California Native American Tribe means “the meaningful and
10 timely process of seeking, discussing, and considering carefully the views of others, in a manner
11 that is cognizant of all parties’ cultural values and, where feasible, seeking agreement.” (Cal. Gov.
12 Code § 65352.4.)

13 229. Consultation must be conducted in a way that is mutually respectful of each party’s
14 sovereignty and shall also recognize the tribes’ potential needs for confidentiality. (*Id.* § 65352.4.)

15 230. Yet, here, Respondent did not conduct sufficient consultation and engagement with
16 individual Tribes or with Tribes in general. Indeed, the FEIR explains, the “precise nature of the
17 impact on individual Tribal cultural resources is not currently known because DWR has not
18 identified any individual Tribal cultural resources at this time.” (FEIR at 32-4.) Had Tribal
19 consultation been remotely adequate, DWR would have been both better able to identify, by
20 listening to Tribes, specific cultural resources that will be impacted by the Project and understood
21 that the overall impacts on Tribal culture, cultural resources, and way of life would be significantly
22 harmed by the Project separate and apart from the damage to individual cultural resources.

23 **J. FAILURE TO SUFFICIENTLY CONSIDER EFFECTS ON ARCHAEOLOGICAL**
24 **RESOURCES**

25 231. The FEIR fails to adequately identify and define archeological resources, and DWR
26 failed to adequately consult with relevant Tribal stakeholders regarding those resources. Instead, the
27 FEIR defers this process for future mitigation. This failure to consult and improper deferral of
28 archeological studies violates CEQA. (14 C.C.R. § 15126.4(a)(1)(B); *see also POET, LLC*, 218 Cal.
App. 4th at 735.)

1 232. The FEIR defines Tribal archaeological resources by limiting its discussion to those
2 that existed before 1500 AD. This is arbitrary; DWR never explains its justification for so limiting
3 its consideration of archeological resources. (FEIR at 19-9.)

4 233. Further, only known archaeological resources are included, but additional surveys
5 and efforts should have been made to identify unknown resources. Those surveys were required to
6 be conducted in valid consultation with the appropriate Tribes. (Pub. Resources Code § 21080.3.1.)
7 They were not.

8 234. Moreover, the FEIR fails to evaluate the eligibility for the California Register of
9 Historical Resources (“CRHR”) and/or the National Register of Historic Places (“NRHP”) of the
10 identified archaeological resources, as required. (*Id.* at § 21080.3.2.)

11 **K. FAILURE TO SUFFICIENTLY CONSIDER EFFECTS ON FLOODING**

12 235. The FEIR fails to accurately disclose the baseline flood risk in the Delta, which is
13 based in part on both sea level rise and the growing risk of extreme storms. Current Flood insurance
14 rate maps from the Federal Emergency Management Agency (“FEMA”) are presented in the FEIR.
15 (FEIR at 7-9.) The FEIR implies that the current 100- and 500-year floodplains maps adequately
16 address flood concerns, but, in actuality, the maps have expired and take as long as seven years to
17 revise. (*Id.* at 7-11.) A recent *Washington Post* analysis of videos from residents experiencing
18 destructive floods found that current FEMA mapping irrelevant, as flood destruction occurred in
19 homes far from water sources and which were unaccounted for in flood insurance rate maps.
20 Reliance on the FEMA maps therefore understates the flood threat to Delta communities and
21 adjacent cities and leads to environmental justice impacts.

22 236. Expected increases in extreme storm frequency also brings the daunting consequence
23 of scouring flows during flood events that can facilitate the motion of sediment particles. This raises
24 concerns over sediment build-up at the North Delta Intakes. Though the FEIR mentions some
25 mitigation for the anticipated normal hydrological build-up of sediment in the Delta, it is evident
26 that there is no solid plan or mitigation tactic put in place to prevent or stop sediment from building
27 up during an extreme storm or flood event. (FEIR at 7-55.) Sediment may also be contaminated
28 with pollutants and other contaminants.

1 237. Modeling in the FEIR suggests that there will be very gradual capturing of wet
2 winter flows and that on average there will be 0.08-foot increment increase of water surface
3 elevation during flood flows because intakes crowd the channel. (*Id.* at 7-44.) The 0.08-foot value is
4 not an accurate depiction of projected climate changes that will occur in the next fifty years. The
5 FEIR unlawfully evaluates the probability of floods and associated impacts from the North Delta
6 Intakes almost entirely based on current climate conditions and is therefore unsupported by
7 substantial evidence. (14 C.C.R. § 15091.)

8 **L. THE FEIR DOES NOT INCLUDE SUFFICIENT INFORMATION TO ALLOW**
9 **RESPONSIBLE AGENCIES TO DISCHARGE THEIR DUTIES UNDER THE DELTA**
10 **REFORM ACT AND OTHER LAWS**

11 238. The FEIR must include sufficient information and analysis for other agencies, like
12 the State Water Resources Control Board, to discharge their duties because responsible agencies
13 rely upon lead agencies' environmental documents when determining whether to issue a later
14 approval for a project. (*Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213
15 Cal.App.4th 1277, 1298 ("[T]he EIR was required to provide both [the lead agency] and [the
16 responsible agency] with information about the environmental consequences of the decisions that
17 they would be making with regard to the whole project."); *Banning Ranch Conservancy*, 2 Cal. 5th
18 at 939-941 (EIR must be comprehensive in addressing related reviews by other agencies, citing
19 *Habitat and Watershed Caretakers*)).)

20 239. Examples of factors that responsible agencies must consider that are left out of the
21 FEIR include alternatives that would substantially increase in-stream flows. For example, the FEIR
22 fails to examine any alternative that would satisfy the minimum flows identified in the Water
23 Board's 2010 Delta Flow Criteria Report as necessary to protect and restore public trust resources
24 and uses.

25 **M. DWR FAILED TO PERFORM AND ADEQUATE ECONOMIC ANALYSIS**

26 240. As described in subsection G, *supra*, the FEIR's analysis of economic impacts of the
27 Project is deficient.

28 241. DWR ignored the results of its own survey, excluded Stockton, and in particular the
Port of Stockton, from the footprint of the majority of the Project's impacts, misled the public with

1 confusing data tables which present a inaccurate and inconsistent portrayal of the economic
2 consequences of the Project and the people who will suffer them, ignored the economic
3 consequences to DACs, and failed to account for the economic impacts of increases in harmful algal
4 blooms or salinity increases. And there is also inadequate mitigation of the economic impacts of the
5 Project, as described above.

6 **SECOND CAUSE OF ACTION**

7 **Violations of the Public Trust Doctrine**

8 242. Petitioners incorporate by reference each and every allegation contained above as
9 though fully set forth herein.

10 243. The FEIR's analysis omits information essential to an informed analysis of the
11 documented public trust impacts.

12 244. It is indisputable that the Project will adversely affect numerous public trust
13 resources, including flows and habitat necessary for fish, wildlife, and recreation.

14 245. In 2010 the Water Board concluded that much higher flows are necessary to protect
15 public trust resources throughout the Delta. (State Water Board, Delta Flow Criteria Report (2010).)
16 The Delta Flow Criteria Report was mandated by the Delta Reform Act. That statute directed all
17 state agencies, most obviously the agency responsible for management of the California Water
18 Project – DWR – to fundamentally reform their practices to assure that the Delta is restored and
19 protected. DWR did not use or consider the Flow Criteria Report.

20 246. DWR also did not conduct an adequate public trust analysis. DWR's reliance upon
21 the FEIR to satisfy its public trust obligations is unsupportable. It does not acknowledge the Water
22 Board's definitive report documenting the substantially increased flows that are necessary to restore
23 the Delta. It does not address the Legislature's directly controlling findings that "[t]he Sacramento-
24 San Joaquin Delta watershed and California's water infrastructure are in crisis and existing Delta
25 policies are not sustainable. Resolving the crisis requires fundamental reorganization of the state's
26 management of Delta watershed resources." (Water Code § 85001(a) (emphasis added).)

1 253. For a declaration that Respondent's actions in certifying the EIR and approving the
2 Project violated CEQA and the CEQA Guidelines, and that the certification and approvals are
3 invalid and of no force or effect, and that the Project is inconsistent with other applicable plans,
4 policies, or regulations, including the Public Trust Doctrine;

5 254. For costs of the suit;

6 255. For attorney's fees as authorized by Code of Civil Procedure section 1021.5 and
7 other provisions of law; and,

8 256. For such other and future relief as the Court deems just and proper.

9

10 DATED: January 22, 2024

AQUA TERRA AERIS LAW GROUP

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BAYKEEPER, SHINGLE
SPRINGS BAND OF MIWOK
INDIANS, CALIFORNIA INDIAN
ENVIRONMENTAL ALLIANCE,
SAN FRANCISCO BAYKEEPER,
RESTORE THE DELTA, GOLDEN
STATE SALMON ASSOCIATION,
and THE BAY INSTITUTE

VERIFICATION

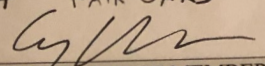
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GARY BOBKER
I, [INSERT NAME OF MEMBER], am an authorized representative and member of

Petitioner The Bay Institute. I have read the foregoing Petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this [INSERT DATE], in [INSERT LOCATION], California.

20 JAN 2024 FAIR OAKS

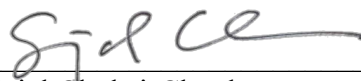

[INSERT NAME OF MEMBER]

VERIFICATION

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I, Sejal Choksi-Chugh, am an authorized representative and member of Petitioner San Francisco Baykeeper. I have read the foregoing Petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this January 22, 2024 in Lafayette, California.


Sejal Choksi-Chugh

VERIFICATION

1
2 I, Scott Artis, am an authorized representative and member of Petitioner the Golden State
3 Salmon Association. I have read the foregoing Petition and know the contents thereof. The same is
4 true of my own knowledge, except as to those matters that are alleged on information and belief,
5 and as to those matters, I believe them to be true.

6 I declare under penalty of perjury under the laws of the State of California that the foregoing
7 is true and correct. Executed this January 21, 2024], in American Canyon, California.

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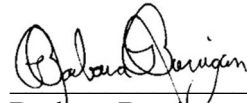
10 Scott Artis, Executive Director
11 Golden State Salmon Association
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VERIFICATION

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I, Barbara Barrigan, am an authorized representative and member of Petitioner Restore the Delta. I have read the foregoing Petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this January 20th, 2024, in Stockton, California.



Barbara Barrigan

VERIFICATION

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I, Regina Cuellar, am an authorized representative and member of Petitioner Shingle Springs Band of Miwok Indians. I have read the foregoing Petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 22nd day of January 2024, in Placerville, California.


Regina Cuellar, Chairwoman