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BEFORE THE DELTA STEWARDSHIP COUNCIL

IN RE APPEAL NO. C20185-A2 APPEAL OF CALIFORNIA DEPARTMENT OF WATER RESOURCES CERTIFICATION OF CONSISTENCY OF CALIFORNIA WATERFIX/BDCP ALTERNATIVE 4A	**PROTESTANT SAVE THE CALIFORNIA DELTA ALLIANCE'S OPENING BRIEF**

On September 28, 2018, the Delta Stewardship Council ("Council") issued a Supplement to the Notice of Public Hearing ("Hearing Supplement") directing questions at specified parties in these appeal proceedings. In the first part of this brief, Save the California Delta Alliance ("Delta Alliance") herein answers the questions directed to it, as well as answering/commenting upon select questions directed to other parties. In the second part of this brief, Delta Alliance further expands upon and supplements the arguments and evidence submitted with its appeal, Appeal ID: C20185-A2, submitted on August 26, 2018.

PART 1: ANSWERS TO QUESTIONS POSED IN HEARING SUPPLEMENT

I. Questions 2a And 2b On Supplement Page 4 Directed To The California Department Of Water Resources ('DWR").

The questions appear to confuse or conflate the 2016 California WaterFix Aquatic Science Peer Review with the 2003 "Strategic Review of CALSIM II and its Use for Water Planning, Management, and Operations in Central California." Questions 2a and 2b refer to Delta Alliance's Appeal at page 5, which discusses both the Aquatic Science Peer Review and the Strategic Review. The questions ask only if DWR ever responded to the Aquatic Science Peer Review whereas Delta Alliance pointed out that DWR never attempted to document the validity of its model as pointed out in the Strategic Review. It is the Strategic Review that remains uncontradicted as to a fatal flaw in all of DWR's modeling for WaterFix.

The fatal flaw in all of DWR's extensive modeling, confirmed by the Strategic Review, is that it is undisputed that the model cannot predict accurately in absolute terms. Despite knowing this, DWR posits that the model predicts accurately in relative terms and is therefore useful in comparing various scenarios even though none of the scenarios is predicted accurately. The Strategic Review rejects this assumption and states that "this feature of the model is something that would need to be documented rather than merely assumed." (Strategic Review, p.9.) The appropriate question to be directed at DWR is, has DWR ever documented this feature of the model (ability to predict accurately in relative terms even though it cannot predict accurately in absolute terms)?

Absent an answer from DWR, the modeling flaw confirmed by the Strategic Review stands as uncontradicted expert evidence reflecting the generally accepted view in the relevant scientific community that the modeling is fatally flawed. Therefore, there is no evidence, substantial or otherwise, in the record before the agency to support any of DWR's claims with regard to WaterFix's ability to meet D-1641, or to support any of DWR's contentions about impacts or lack thereof on water quality, aquatic species, and water supply. All of DWR's contentions with regard to these matters rely entirely on its fatally flawed modeling.

II. Question 9 On Supplement Page 7 Directed To DWR.

Question 9 flags DWR's argument that it need not comply with all elements of WR P1 because "compliance with WR P1(c)(1)(B) and (c)(1)(C) is neither feasible nor required to demonstrate reduced reliance," and compliance with WR P1 is not the "exclusive means" to demonstrate reduced reliance. (DWR WR P1 Attachment, p. 3-50.) DWR is mistaken. The core compliance requirements of WR P1 are WR P1(c)(1)(A), (B) & (C). DWR may not ignore core compliance requirements (B) & (C) or propound its own alternative means of demonstrating reduced reliance.

A. The Object Of WR P1 Is The Water Management Planning Process And Water Suppliers Cannot Demonstrate Compliance Outside Their Water Management Plans.

The import of WR P1 is to require urban and agricultural water suppliers who receive Delta water to adopt Urban and Agricultural Water Management Plans and to include specified provisions in those plans--or to risk any covered action undertaken in the Delta that provides them with water being found inconsistent with the Delta Plan. The object of the regulation *is* the water management planning process.

Early on, the Council identified the lack of participation in the state-law required water management planning process as a significant impediment to reducing reliance on the Delta. Just before the draft text of WR P1, the Fifth Staff Draft Delta Plan explains the problem that WR P1 was crafted to address:

> Many agricultural and urban water suppliers throughout the state are taking action to improve water conservation and efficiency and to expand their local and regional water supplies. However, many others are not. Despite laws requiring preparation and implementation of Urban Water Management Plans and Agricultural Water

> Management Plans, many agencies still regard these plans as voluntary because the only consequence of not completing them is that the water supplier becomes ineligible to receive State grant and loan funding for water projects

(Fifth Staff Draft Delta Plan, p.81.)

Under "Problem Statement" immediately preceding the draft of WR P1, the Fifth Staff Draft Delta Plan noted:

> The lack of full participation by water suppliers throughout the state in planning and implementing plans and projects that will improve California's water supply reliability and reduce reliance on the Delta is a significant impediment to achieving the coequal goals.

(Fifth Staff Draft Delta Plan, p.81–82.) The text of the then-draft regulation goes on to require that both urban and agricultural water suppliers "adopt and implement an Urban [or agricultural] Water Management Plan." (Fifth Staff Draft Delta Plan, p.82.)

Various water suppliers have argued in court that that there was no substantial evidence before this Council to support the need for WR P1 when the Council adopted the regulation in 2013. The Council responded in its trial court briefing:

> Additional evidence shows that while some regions are taking significant steps to reduce their reliance on Delta waters, others are not. For example, the most recent data indicate that 15 percent of urban agencies are out of compliance with a state law requirement that they submit a water management plan to the Department of Water Resources (DWR). Moreover, DWR did not review the submitted plans for completeness, and in prior years many submitted plans failed to even include conservation measures. Water Contractors assert that the Council engaged in pure speculation because it assumed that some delinquent agencies rely on Delta waters. But because more than two-thirds of the residents of the state received Delta waters, it is likely that a significant number of noncompliant agencies receive Delta waters.
>
> Finally, WR P1 does not only address agencies that have failed to submit their plans. It goes further and calls upon agencies that did submit plans to have commenced implementation of locally cost effective and technically feasible projects which reduce reliance on the Delta.
>
> The need for WR P1 is therefore fully supported by substantial evidence in the record.

(Delta Stewardship Council Cases, JCCP 4785, Respondent and Defendant Delta Stewardship Council's Opposition Brief, p.39–40, filed April 6, 2015 [citations and quotation marks omitted].) The evidence upon which the Council relied in justifying the need for WR P1 was a failure of water suppliers to comply with state law requirements regarding their water management plans.

WR P1 is intended to raise the stakes for water suppliers of not completing adequate water management plans. It would frustrate the intent of the regulation to allow DWR to propound its own, alternative means outside the water management planning process to purportedly demonstrate reduced reliance.

B. WR PI (c)(1)(A), (B) & (C) Are The Delta Plan's Three Core Compliance Requirements For Demonstrating Reduced Reliance And Water Suppliers Must Comply With All Of Them Within Their Water Management Plans.

1. The Plain Text Of The Regulation Shows That WR P1(c)(1)(A), (B) & (C) Are All Mandatory Elements Of Demonstrating Reduced Reliance.

The plain text of WR P1, as currently codified in the California Code of Regulations at 23 CCR § 5003, makes clear that the adoption of Water Management Plans and inclusion of certain elements in those plans is mandatory and failure to comply will render a future covered action to export water from, or transfer water through, the Delta inconsistent with the Delta Plan if that action has a significant adverse environmental impact in the Delta and the need for the action was significantly caused by a water supplier's failure to comply with 23 CCR § 5003.

23 CCR § 5003 provides in pertinent part:

> (a) Water shall not be exported from, transferred through, or used in the Delta if all of the following apply:
> (1) One or more water suppliers that would receive water as a result of the export, transfer, or use have failed to adequately contribute to reduced reliance on the Delta and improved regional self-reliance *consistent with all of the requirements listed in paragraph (1) of subsection (c);*

(23 CCR § 5003, emphasis added.) DWR argues that water suppliers may demonstrate reduced reliance by complying with some, but not all requirements of paragraph 1 of subsection (c) of WR P1. However the plain text of the regulation states failure occurs where there is not compliance consistent with *all of the requirements listed in paragraph (1) of subsection (c)*.

The requirements of paragraph 1 of subsection (c) are in turn stated as follows:

> (c)(1) Water suppliers that have done all of the following are contributing to reduced reliance on the Delta and improved regional self-reliance and are therefore consistent with this policy:
>
> (A) Completed a current Urban or Agricultural Water Management Plan (Plan) which has been reviewed by the California Department of Water Resources for compliance with the applicable requirements of Water Code Division 6, Parts 2.55, 2.6, and 2.8;
>
> (B) Identified, evaluated, and commenced implementation, consistent with the

> implementation schedule set forth in the Plan, of all programs and projects included in the Plan that are locally cost effective and technically feasible which reduce reliance on the Delta; and
>
> (C) Included in the Plan, commencing in 2015, the expected outcome for measurable reduction in Delta reliance and improvement in regional self-reliance. The expected outcome for measurable reduction in Delta reliance and improvement in regional self-reliance shall be reported in the Plan as the reduction in the amount of water used, or in the percentage of water used, from the Delta watershed. For the purposes of reporting, water efficiency is considered a new source of water supply, consistent with Water Code section 1011(a).

(23 CCR § 5003(c)(1)(A), (B) & (C).) Summarized, the three requirements of WR P1 listed above are (A) to *comply* with state water management laws by adopting a current water management plan that has been reviewed by DWR; (B) to *analyze and implement* all technically feasible, locally cost-effective programs specified in the Water Management Plan; and (C) to *report*, commencing in 2015, in the Water Management Plan the expected reduction in Delta reliance and improvement in regional self-reliance brought about as a result of implementing (B). These are the three core compliance requirements of WR P1 ("compliance requirements").

2. Delta Plan Appendix G Explains That The Three Mandatory Core Compliance Requirements Of WR P1 Are WR P1(c)(1)(A), (B) & (C).

DWR argues that they may demonstrate achieving reduced reliance on the Delta and improved regional self-reliance by means alternative to those specified in the three WR P1 core compliance requirements. However, Appendix G to the Delta Plan is titled "Achieving Reduced Reliance on the Delta and Improved Regional Self-Reliance, and makes clear that the three compliance requirements are "core" and are the mandatory means of achieving reduced reliance. Appendix G states that "There are three core compliance requirements in WR P1. Water Suppliers *must*:"

> 1. **Comply with specified water management laws.** Water suppliers *must* have a current urban or agricultural water management plan that has been reviewed for compliance with applicable laws by the California Department of Water Resources (DWR).
>
> 2. **Analyze and Implement.** Water suppliers *must* have identified, evaluated, and commenced implementation, consistent with the schedule they identify in their plan, of the technically feasible, locally cost-effective programs that will reduce their reliance on the Delta.
>
> 3. **Report.** Water suppliers *must* report on the expected outcome for measurable reduction in the amount of water used, or in the percentage of water used, from the Delta watershed, starting in 2015.

(Delta Plan, Appendix G, p. G-4, emphasis on must added.) These are the same three core compliance requirements stated in 23 CCR § 5003(c)(1)(A), (B) & (C). DWR contends it need not comply with (B) or (C), however the regulation is mandatory as to all three and nothing in the regulation, or the Council's contemporaneous interpretation of the regulation in Appendix G, allows any alternative means of compliance.

3. There Is No Doubt That Core Requirements (A), (B) & (C) Must Be Achieved By And Demonstrated Within The Water Management Plan Of Each Water Supplier.

There is no doubt that core compliance requirements (A), (B) & (C) must be achieved within the Water Management Plan of each water supplier. In the context of an example consistency certification, Delta Plan Appendix G provides the following:

> Water Supplier A will need to provide a finding in the consistency certification form as to whether one or more water suppliers that will receive water as a result of its proposed transfer have failed to comply with the three requirements. The three compliance requirements are:
>
> 1. *Comply with specified water management laws*. Each water supplier has a *current water management plan* that has been reviewed for compliance with applicable laws by the California Department of Water Resources.
>
> 2. *Analyze and implement*. Each water supplier has identified, evaluated, and commenced implementation, consistent with the schedule they identify *in their plan*, of the technically feasible, locally cost-effective programs and projects that will reduce reliance on the Delta.
>
> 3. *Report. Commencing with the 2015 Plan*, each water supplier has *documented in its current plan* the expected outcome for measurable reduction in Delta reliance and improvement in regional self-reliance from implementation of their programs and projects. This shall be reported as the reduction in the amount of water used, or in the percentage of water used, from the Delta watershed.

(Delta Plan, Appendix G, p. G-3, emphasis added)

Appendix G is the Council's longstanding interpretation of its own regulation and was adopted by the Council in 2013 after notice and comment from the public contemporaneous with promulgation of WR P1. The Fifth Staff Draft quoted above was circulated for comment in August of 2011 and reflects the agency's considered understanding of WR P1, as that regulation was in development. The text of WR P1, the Council's own longstanding interpretation of WR P1, and the administrative history of WR P1 point only in one direction: water suppliers *must* meet the letter of

all three core compliance requirements to be in conformance with WR P1. The Council cannot now vacillate and accept a completely contrary position proffered by DWR as an "alternative" to WR P1.

A court will defer to an agency's interpretation of its own regulation if there is "evidence that the agency has consistently maintained the interpretation in question, especially if it is long-standing." (*Yamaha Corp of America v, State Bd, of Equalization* (1998) 19 Cal. 4th 1, 13 [quotation marks and citations omitted].) However, "A vacillating position is entitled to no deference." (*Id*.)

The only court to interpret WR P1 held that compliance with the core compliance requirements is *mandatory*:

> WR P1 *requires* Delta water suppliers to perform specified actions prior to water usage, including completion of an Urban or Agricultural Water Management Plan. Water Suppliers also *must* implement projects included *in the plan* that reduce reliance and which are locally cost effective and technically feasible.

(Delta Stewardship Council Cases, JCCP 4785, Ruling on Submitted Matter: Petitions for Writ of Mandate, Filed May 18, 2016, p.11, emphasis added.) ("Ruling on Submitted Matter") (Attachment 1)

In reaching its holding, the Delta Stewardship Council Cases trial court summarized this Council's position, consistent with the mandatory nature of the provisions, as follows: "Additionally, Respondent asserts that WR P1 (23 CCR section 5003) prevents the use of Delta water if a receiving water supplier fails to 'adequately contribute to reduced reliance on the Delta' *as shown by*:" compliance with WR P1 (c)(1)(A), (B) & (C), which are set out in full after the colon. (Ruling on Submitted Matter, p. 11, emphasis added.)

DWR cannot show compliance with WR P1, or demonstrate reduced reliance, in any way other than complying with the letter of WR P1(c)(1)(A), (B) & (C).

C. DWR Has Waived Its Argument That Compliance with WR P1(c)(1)(B)&(C) Is Infeasible Because DWR's Own Misconduct Substantially Contributed To Water Supplier's Failure To Comply With WR P1.

DWR participated in the development of the Delta Plan and provided written comments to the Council during the development process. DWR did not raise any questions with regard to the feasibility of implementing WR P1. Further, DWR is a member of the committee of agencies

statutorily charged with implementing the Delta Plan under the Council's oversight. Water code section 85204 provides that "The council shall establish and oversee a committee of agencies responsible for implementing the Delta Plan. Each agency shall coordinate its actions pursuant to the Delta Plan with the council and the other relevant agencies." The Council has established the Delta Plan Interagency Implementation Committee ("DPIIC"), which DWR participates in. (*See* Council DPIIC Factsheet Flyer) (Attachment 2). However, rather than carry out its statutory duty to implement WR P1, DWR is complicit in the failure of water suppliers throughout the state to comply with WR P1.

DWR participated in the development of the Delta Plan and knew well ahead of the Delta Plan's adoption in May of 2013, and final approval of its regulations by the Office of Administrative Law in September of 2013, that water suppliers' 2015 Urban and Agricultural Water Management Plans were required to contain the core compliance requirements of WR P1. However, rather than provide guidance to water suppliers to help them comply with WR P1, DWR failed to carry out its statutory duty by remaining silent. In its extensive engagement with water suppliers throughout the state with regard to their 2015 Water Management Plans, DWR acted as if the Delta Reform Act, the Council, the Delta Plan, and WR P1 did not exist.

DWR's 2015 Urban Water Management Plan Guidebook, including appendices, as well as a power point it presented to gatherings of water suppliers as guidance for developing their 2015 Water Management Plans, make no mention of the Delta Reform Act, the Council, the Delta Plan, or WR P1. The words "reduced reliance" do not appear in these documents. (Attachment 3) In its guidance for 2015 Water Management Plans, DWR engaged in, at best, a course of conduct characterized by gross negligence towards its statutory duty to implement WR P1.

DWR comes to the WR P1 compliance question with unclean hands. DWR cannot now argue "infeasibility" when it substantially caused the WR P1 compliance failure by its own misconduct, whether grossly negligent or willful.

The Council must find a covered action inconsistent with the Delta Plan where: (1) one or more water suppliers who will receive Delta water as a result of a covered action fail to meet the letter of *all* of WR P1(c)(1)(A), (B) & (C); (2) the covered action has a significant adverse

environmental impact on the Delta; and (3) the failure to comply with all of WR P1(c)(1)(A), (B) & (C) by one or more water suppliers who will receive water as a result of the covered action significantly caused the need for the covered action. DWR has admitted that water suppliers who will receive water as a result of WaterFix have not complied with WR P1(c)(1)(B) & (C); element 1 for a finding of non-consistency is met. As shown below in section ___ of this brief, elements 2 and 3 are also met, requiring the Council to find that California WaterFix is inconsistent with WR P1. The Council has stated that WR P1 "is the very core of the Delta Plan." (Delta Stewardship Council Cases, JCCP 4785, Respondent and Defendant Delta Stewardship Council's Reply to Electing Petitioners' and Water Contractors' Opposition to Bifurcation, p. 3:6–9, filed May 9, 2014.) A finding of inconsistency with WR P1, therefore, requires that California WaterFix be found inconsistent with the Delta Plan and this appeal sustained.

III. Question 1 On Supplement Page 2 Directed To Delta Alliance.

Question 1 asks for citations to the record demonstrating that WaterFix Mitigation Measures TRANS-1a, and AMM7 are not as effective as Delta Plan PEIR mitigation measures 19-1, 19-2, 19-3 and 19-4.

A. AMM7 Barge Operations Plan Contains No Measures To Mitigate Impacts Of Barge Operations On Marine Or Roadway Traffic And Lacks Specified Measures Called For in Delta Plan PEIR Mitigation Measure 19-1.

There is no barge operations plan, but only a promise to develop a barge operations plan at some unspecified future time. The "barge operations plan" is described in 3/4 of a page at page 3B-30 of FEIR Appendix 3B, and half a page at page 3B-107. A cursory review of Attachment 2 reveals the lack of substance.

The barge operations plan will not contain *any* measures aimed at mitigating substantial impacts on roadway traffic that will be caused by frequent drawbridge openings to allow barges to pass. (*See* WaterFix FEIR pages 3B-30:6–32 and 3B-107:2–22 which constitute the entire description of the barge operations plan. In fact, the barge operations plan will contain no measures to mitigate *any* impacts on marine or road traffic, or on recreation. The barge operations plan's only components will be "[t]o address the following potential impacts on aquatic habitat and species from barge and tugboat operations associated with water conveyance facilities construction."

(WaterFix FEIR, p. 3B-30:6–7.) The complete list of potential impacts the barge operations plan will address is found at WaterFix FEIR page 3B-30:18–26 and repeated at page 3B-107:10–17.

The complete ineffectiveness of the Barge Operations Plan and Mitigation Measure Trans-1a are also established by the testimony of Captain Frank Morgan. (SCDA-301, x.4.000013, pp.17–19.)

The Delta Plan PEIR Mitigation Measure 19-1 calls for "taking into account all modes of transportation." (Delta Plan PEIR, p.19-46:4–5.) The WaterFix barge operations plan does not take account of impacts on *any* means of transportation but focuses solely on the impacts of barge operations on species. The Delta Plan PEIR Mitigation Measure 19-1 calls for "a waterway traffic control plan" that "will identify and implement alternate detour routing" for boaters. (Delta Plan PEIR, p. 19-47:25, 33.) The barge operations plan does not address marine traffic at all.

The barge operations plan is to be developed at some future unspecified date, not by agencies with a duty to protect the public, but by WaterFix construction contractors. (Barge operations plans "will be developed and submitted by the construction contractors… ." (WaterFix FEIR, Appendix 3B, p. 3B-107:3–4.)

B. WaterFix Mitigation Measure Trans-1a Lacks Specified Measures Called For in Delta Plan Mitigation Measure 19-1.

WaterFix Mitigation Measure Trans-1a does not contain the following measures included in Delta Plan mitigation measure 19-1: a temporary channel closure plan (PEIR, p. 19-47:32); identify alternate detour routing for boats in case of channel closure (PEIR, p. 19-47:33); vessel traffic control measures to minimize congestion (PEIR, p. 19-47:27). WaterFix does not to the extent feasible, ensure that safe boat access to public launch and docking facilities, businesses, and residences is maintained (PEIR, p.19-47:36–37.) In particular, access to Bullfrog Marina will be blocked by channel closure and construction activity, likely driving this mainstay of Delta recreation out of business. (Attachment 11, letter from Bullfrog Marina.) Access to the Clarksburg public fishing access area / boat launch will also be effectively blocked by deafening noise from WaterFix pile driving across the river. (SCDA-65, testimony of acoustical engineer Charles Salter, X.4.000015, p.5:19–24 and p.6:1–2 ["Clarksburg Fishing Access Area will be subject to noise

levels of up to 91 dBA from pile driving directly across the river" and individuals "will avoid the Clarksburg Fishing Access Area" due to the noise].)

Feasible mitigations to avoid the noise from pile driving exist but DWR has refused to adopt them. (SCDA-125, testimony of structural engineer Rune Storesund, x.4.000025, p.1:2–8; Letter from Malcolm Drilling Company attached to Storesund testimony.) Delta Alliance has provide DWR with a technical brochure describing alternative techniques that would avoid the devastating noise impacts from pile driving, (SCDA-127, x.4.000025, brochure attached to testimony of Rune Storesund), and has provided a bid from a leading foundations company of $250 per lineal foot to install drilled piers for the WaterFix intake foundation structures. (x.4.000025, SCDA-127, Letter from Malcolm Drilling Company, p.2, attached to Storesund testimony.)

Impacts on roadway traffic will be particularly severe at the Old River Bridge on Highway 4, near Discovery Bay, which may be opened eight or more times per day to allow passage of WaterFix Barges bound for the Clifton Court Forebay Barge Landing. (*See* SCDA-301, testimony of Captain Frank Morgan, p. 9:26–28; p. 10:1–3.) The California WaterFix FEIR entirely failed to recognize impacts on roadway traffic due to WaterFix barge-caused bridge openings. (SCDA-100, x.4.000024, testimony of traffic engineer Chris Kinzel, p. 1:22–27 and p. 2:1–5 [project planners assumption that "additional raising of draw bridges in the study area would not be required (WaterFix FEIR, p.19-232)" is "a startling engineering error on the part of Project planners"].) Currently, the bridge on Highway 4 at Old River is rarely opened for marine traffic, perhaps once a month at most, as this is not a popular route for pleasure boaters. (SCDA-301, x.4.000013, testimony of Captain Frank Morgan, p.10:1–2.) This traffic impact, unaddressed in the WaterFix FEIR, will cause Highway 4 to be gridlocked from Byron Highway to Middle River. (SCDA-301, p.9:28; p.10:1.). This impact will be caused by a combination of bridge openings and heavy usage of this stretch of Highway 4 for WaterFix truck traffic.

The Highway 4 Bridge at Old River provides minimal clearance for a large barge, even when the bridge is open. The Bridge is old and dilapidated. (See Attachments 14, 15, 16, pictures of Old River Highway 4 Bridge.) The WaterFix Barges are estimated to be approximately 50 feet wide and 250 feet long with tug boats measuring 35 feet wide and 65 to 100 feet long. (SCDA-103, p.

152, 154.) A picture of a representative barge and tug is seen at SCDA-72. (x.4.000016.) Passage of the WaterFix barges and tugs past the Old River Bridge is sure to lead to a traffic catastrophe.

Delta Plan PEIR Mitigation Measure 19-1 calls for a number of roadway improvements as mitigation measures: Roadway widening to add lanes or shoulders; flaring intersections to add turn lanes, provision of passing lanes or turnouts; and protected left-turn pockets. (Delta Plan PEIR, p. 19-47:10–23.) WaterFix Mitigation Measure Trans-1a specifies that the only instance in which projects proponents will implement a roadway improvement will be a single right hand turn lane on Hood Franklin Road. WaterFix FEIR, p. 19-56: 6.

Roadway improvements are essential at Highway 4 between Byron Highway and Middle River due to the traffic impacts described above, yet none are included.

Consistent with the above evidence, Traffic Engineer Chris Kinzel reviewed WaterFix mitigation measures trans-1a, 1b, and 1c, and concluded they would be ineffective. (SCDA-100, x.4.000014, p.7.)

IV. Question 1 on Supplement Page 9 Directed to DWR.

This question relates to the fact that WaterFix changes the point where Sacramento River inflow is measured from Freeport to a point downstream of the new intakes and excludes all NDD diversions form the export total for purposes of calculating the D-1641 export/inflow ratio.

A. WaterFix Changes The Export Inflow Compliance Point And Excludes All NDD Diversions From The Export Term of The E-I Ratio, Allowing Increased Summer Exports: This Substantial Increase In Export Capacity Is Not Consistent With ER P1 Because it Does Not Comply with D-1641.

There is no doubt that WateFix changes this D-1641 compliance point. There is also no doubt that all of DWR's assertions, based upon Calsims modeling, that WaterFix will continue to meet D-1641 are misleading because they mean that WaterFix will meet D-1641 *as DWR proposes to redefine the export/inflow ratio*. Under the "new" D-1641 export/inflow ratio, *none* of the water exported through the new North Delta Intakes counts as exported water for purposes of the export/inflow ratio. Therefore, DWR could export unlimited water through the NDD without ever exceeding the export/inflow ratio. This is a startling and significant change in D-1641 allowing substantially more water to be exported under WaterFix than would currently be allowed.

Under cross-examination (under oath) DWR witness Jennifer Pierre admitted the change in the export/inflow compliance point and admitted that all of DWR's modeling that purports to show that WaterFix will meet D-1641 shows only that it will meet D-1641 as DWR has redefined D-1641:

> Mr. Brodsky: It's a yes or no question. You're changing the location of where the flow of the Sacramento River is measured to calculate the export-inflow ratio; yes or no?
>
> Witness Pierre: That's correct.
>
> Mr. Brodsky: To the right there, it says "Summary of CALSIMS modeling assumptions." It says, "Combined export rate is defined as the diversion rate of the Banks Pumping Plant and Jones Pumping Plant from the South Delta Channels. Delta inflow is defined as the sum of the Sacramento river flow downstream of the proposed North Delta diversion intakes, the Old Bypass flow, Mokelumne River flow, Cosumnes flow," et cetera, et cetera. The Point there is that inflow is measured downstream of the new intake. So for purposes of the CALSIMS modeling that was presented to the Board, you took the measurement of Sacramento River flow at a point different from Freeport; isn't that correct?
>
> Witness Pierre: Yes, that's what's being proposed in this criteria, and that's how it was also modeled.

(State Water Resources Control Board California WaterFix Hearing Transcript, July 29, 2016, Part 1A, Transcript Vol. 4, p.231:12–25; p,232:1–8 [transcript attached to Delta Alliance Appeal No. C20185-A2; the transcript is also included as attachment 1 to Delta Alliance's FEIR comments of July 9, 2017, and included at x.4.000410].)

The June 23, 2017, United States Fish and Wildlife Service Final Biological Opinion for the California WaterFix ("USFWS BiOp") includes Table 6.1.2. New and existing water operations flow criteria and relationship to assumptions in CalSim II modeling, beginning at page 23 of the BiOp. The last box in the table, on page 28, provides that:

> The D-1641 export/inflow (E/I) ratio calculation was largely designed to protect fish from south Delta entrainment. For the PA [proposed action, i.e., California WaterFix], Reclamation and DWR propose that the NDD be excluded from the E/I ratio calculation. In other words, Sacramento River inflow is defined as flows downstream of the NDD and only south Delta exports are included for the export component of the criteria.

(USFWS BiOp, p. 28) (Attachment 4) A footnote at the bottom of page 28 directs the reader to "CWF BA Table 3.3-2 for PA Calsim Modeling Assumptions."

The July 2016 Biological Assessment ("BA") for the California WaterFix, in turn, provides table 3.3-2 beginning on page 3-90. On page 3-96, in the last box in the table, it provides that:

> In computing the E-I Ratio in the CALSIM II model, the North Delta Diversion is not included in the export term and the Sacramento River inflow is as modeled downstream of the North Delta Intakes.

(Attachment 5.) It is beyond dispute that DWR proposes to change the E-I ratio to something significantly different than that required by D-1641. DWR could export 9,000 CFS through the NDD and count it as "zero" exports for purposes of the E-I ratio. This is particularly significant as there is no other effective CWF operating constraint on NDD diversions during the summer months. Table 6.1.2 of the USFWS BiOp provides on page 24 that "July, August, September: Minimum flow of 5,000 cfs required in river after diverting at the NDD." This is the bypass flow requirement that serves to restrict how much water may be diverted by the NDD at various times of the year and under various river conditions.

With an average summer flow of about 16,000 cfs at the NDD, under the revised E-I criteria DWR could divert over 50% of river flow at the NDD, not run afoul of the E-I limit, and be within the CWF bypass flow requirement of 5,000 cfs. With the E-I limit compliance point as it currently is, at Freeport, and with *all* diversions "counted" in the export term, this massive new diversion capability would be prohibited.

Under cross-examination during SWRCB California WaterFix Hearings, DWR Director of Operations John Leahigh admitted that he could point to nothing in CWF operating criteria that would prohibit diverting 9,000 cfs through the NDD with a Sacramento River flow of 19,747 cfs--a flow reduction of 45%. (Delta Alliance WaterFix FEIR/S Comments, July 9, 2017, x.4000019, p.3 of comment letter and p.145:5–20 of attachment 2 to comments, SWRCB hearing transcript.)

This is a significant change from D-1641, effectively eliminating export limits. California WaterFix is not consistent with Policy ER P1 because it does not comply with D-1641.

V. Question 2 On Supplement page 11 Under DP P2 Directed At Delta Alliance.

The question asks for citations to record evidence to support Delta Alliance's contentions that WaterFix does not respect local land uses and will have severe negative impacts on Delta communities and Delta recreational uses.

A. WaterFix Is Not Consistent With Policy DP P2 Because It Does Not Respect The Existing Land Use Of Delta Legacy Communities Clarksburg And Hood.

1. Clarksburg And Hood Will Be Ground Zero In A Construction Impact Catastrophe.

DWR has chosen to locate the three massive intake structures immediately adjacent to the legacy communities of Hood and Clarksburg. Please refer to SCDA-70, which is attached to SCDA-65, testimony of acoustical engineer Charles Salter and indexed in the record at x.4.000015. A copy of SCDA-70 is attached hereto as attachment 6 for the convenience of the reader. SCDA-70 shows how the town of Hood is dwarfed by construction sites and ripped in half by a geotechnical exploration trench cut right through the middle of homes and businesses in the center of town.

SCDA-71 is also attached to engineer Salter's testimony indexed at x.4.000015 and attached here as attachment 7 as well for convenience. SCDA-71 shows the proximity of intake 2 to the town of Clarksburg, including distances of pile driving at intake 2 to the Clarksburg Library, Clarksburg School Campus, and Clarksburg Marina.

Attachment 1 to Delta Alliance's July 6, 2017, WaterFix FEIR comments, indexed at x.4.00009, is a map showing the six-mile long intense construction zone surrounding Clarksburg and Hood. Heavy construction, including blasting, pile driving, helicopter over-flights, rock drills, and heavy equipment operations will be ongoing, as shown and attached here as attachment 8 for convenience. DWR projects that the construction at the intakes will last six years. (SCDA-83, DWR proposed construction schedule, page 2, attached to testimony of Charles Salter indexed at x.4.000015.) An impact lasting six years is considered permanent under CEQA. DWR's estimates will likely prove optimistic and construction activity will likely last much longer as most large engineering projects go substantially longer than originally projected.

Construction workers and vehicles swamping the area will substantially outnumber town residents over this period of time. A cursory review and a bit of common sense reveal that DWR has made a blunder in locating these massive engineering structures next to two fragile legacy communities. These small modest towns cannot survive this construction onslaught. The WaterFix

FEIR admits as much. "Under Alternative 4A":

> Construction activities associated with BDCP water conveyance facilities would be anticipated to result in changes to the rural qualities of these communities during the construction period (characterized by predominantly agricultural land uses, relatively low population densities, and low levels of associated noise and vehicular traffic), particularly for those communities in proximity to water conveyance structures, including Clarksburg, Hood, and Walnut Grove. Effects associated with construction activities could also result in changes to community cohesion if they were to restrict mobility, reduce opportunities for maintaining face-to-fact relationships, or disrupt the functions of community organizations or community gathering places (such as schools, libraries, places of worship and recreational facilities).
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> ***
>
> [N]egative visual-or noise-related effects on residential property could lead to localized abandonment of buildings. While water conveyance construction could result in beneficial effects relating to economic welfare of a community, adverse social effects could also arise as a result of declining economic stability in communities closest to construction effects and in those most heavily influenced by agricultural and recreational activities.

(WaterFix FEIR, p.16-165:2–11; 28–33.)

Clarksburg and Hood have *only* recreation and agriculture as the basis for their communities. As shown in the next section of this brief, DWR has substantially understated the amount of noise that the communities of Hood and Clarksburg will be subjected to. Intake construction noise, particularly pile-driving noise, will disrupt the functions of the Clarksburg School Campus, the Clarksburg Library, the Clarksburg Marina, the Clarksburg public fishing access area, and generally make face to face conversation out of doors impossible, and indoors difficult, for five months out of the year, day in and day out, for years on end.

2. Clarksburg And Hood Cannot Survive The Construction Impacts, Including Deafening Pile-Driving Noise From Intake Construction.

Construction of WaterFix includes driving 23,900 piles at twelve construction areas spread across the Delta. (SCDA-82, p. 3E-4–3E-5, attached to Salter testimony, indexed at x.4.000015) A total of 10,909,704 strikes from impact hammers will be required to drive the piles home. (SCDA-82, p.3E-4–3E-5) The majority of these piles will be driven at the three intake structures located near Clarksburg, Hood, Locke, and Walnut Grove. Intakes 2, 3, and 5 will each experience 90,000 pile strikes per day during pile driving activities. (SCDA-82, p.3.E-4.) Over an eight hour shift, that is three strike per second.

The WaterFix construction schedule projects that pile driving will occur from June 1 to October 31 for three seasons in a row at the intakes. (SCDA-83, p.1). This is likely overly-optimistic and pile driving may take much longer. It is reasonably foreseeable that pile driving will occur every season for six seasons, rather than three.

Acoustical engineer Charles Salter performed an acoustical analysis to determine the sound levels that would be generated by pile driving at the intakes. Salter's analysis was far more thorough than that included in the WaterFix EIR. The WaterFix EIR simply took a general rule-of-thumb estimate for pile driving noise, without any regard to the size of the piles or other factors specific to the WaterFix pile driving. Salter, on the other hand, "performed an analysis based on the pile size, pile type, energy delivered from the impact hammer and record data available from measurements of noise generated by similar pile-driving in the past." (SCDA-65, p.3:19–21.) When confronted with Salter's superior analysis, DWR declined to dispute it.

Salter calculated that a conservative estimate of the sound levels generated by each of the millions of pile strikes on WateFix's 48" diameter steel foundation piles, will be 115dBA at a distance of 50 feet from the noise source. (SCDA-65:21–22.) "115 dBA is very loud, roughly equivalent to the sound produced by a siren on an emergency vehicle. The United States Department of Health and Human Services, National Institute for Occupational Safety and Health, promulgated a recommended standard of 28 seconds as the maximum safe amount of time that a worker should be exposed to sounds as loud as 115 dBA." (SCDA-65, p.3:22–25; p.4:1; *see also* WaterFix FEIR p.23-3 [115 dBA louder than an automobile horn at 3 feet].)

Salter calculated that the noise levels would reach 80dBA at the Town of Hood. The FEIR compares 80 dBA to the sound of a pneumatic hammer at 50 feet, and, in an understatement, classifies this level of noise as "annoying." (WaterFix FEIR, p.23-3.) Salter calculates that noise levels will reach 75 dBA at the Clarksburg Marina, 79 dBA at the edge of the Town of Clarksburg, 76 dBA in the center of Clarksburg, and 76 dBA at the Clarksburg Library and School Campus. (SCDA-65, p.2:12–16.) Salter characterized the impacts of these levels of construction noise as follows:

> Because of the intruding construction and pile driving noise is of a different character from ambient noise in these quiet rural locations and because the intruding

> noise is impulsive, it will have an annoyance factor even greater than the extreme increase over ambient noise levels would indicate. The construction noise and pile driving noise will significantly interfere with some recreational activities, and will substantially deter use of the Clarksburg Marina. It will interfere considerably with speech communication in the communities of Hood and Clarksburg, requiring people to raise their voices. Interference with such a basic activity as speech is likely to have a significant negative impact on the communities, making them unattractive places to live and visit.

(SCDA-65, p.2:17–25.)

Although the WaterFix FEIR substantially understates the level of construction noise, the FEIR concludes that intake construction noise will constitute a significant and unavoidable adverse environmental impact. (FEIR, Figure 23-0.) In reality, the construction noise combined with the general overall devastation brought by the overwhelming scale of the construction will cause large-scale abandonment of Hood and Clarksburg.

Intake Construction impacts on Clarksburg are further evidenced by a July 6, 2017, letter from Don and Kathleen Updegraff, owners of the Clarksburg Marina, submitted as a comment on the WaterFix FEIR and included in the record--attached here as Attachment 9[1]. "Don's father, Don Sr., built the marina in the 1960's," and the Marina is a family operation. (Attachment 9, p.2.). The letter continues:

> At Clarksburg Marina, we pride ourselves on the relaxing and wonderful experience the Delta offers. The area offers fantastic fishing opportunities, gorgeous river vistas, fabulous recreational boating as well as local merchants and wine tasting. These amenities can only exist if the Delta remains a peaceful and serene location, but construction of the tunnels will turn the Delta, and in particular the six mile long intake construction zone, into a war zone. This six mile long stretch of river contains several well-established recreational facilities which will all experience permanent loss due to construction. Our customers fish off of our dock and we know the fisherman who use this area well. They will desert this entire 6 mile stretch of river. Nine or more years of construction at the intakes is permanent, and it is likely none of the businesses will return even after construction is complete because the whole area will be an industrial zone due to the intakes.

(Attachment 9 hereto, p.2.) The Updegraffs conclude that noise from WaterFix construction will "drive all our customers away and put us out of business." (*Id.*)

Further evidence of intake construction impacts on Clarksburg and Hood is provided by 26

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[1] This letter and its attachments are part of the record before DWR. It was submitted as a comment on the WaterFix Final FEIR after the close of the Federal Register Notice Period. DWR considered it and provided a response in its final response to comments. However, DWR included only a reproduction of the text of the letter in Table 3-3 of the FEIR and did not reproduce the original letter or its attachments. The letter and attachments are provided here in full.

year Clarksburg resident Barbara Daly. Ms. Daly's July 10, 2017, letter was submitted as a comment on the WaterFix FEIR, is included in the record, and is attached here as attachment 10[2]. Ms. Daly comments:

> These are small towns and people here do not have a lot of money and there is not a lot of opportunity to make money here. Our communities are held together by sense of place and home. We gather in public, at the library, at church, and in each others' homes. We stay here because it is quiet and peaceful and the outside world doesn't much intrude.
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> ***
>
> People will not want to come here to boat and fish in the middle of what will feel like a war zone.
>
> ***
>
> Hood will likely be abandoned entirely to become a ghost town. There will be large scale abandonment in Clarksburg. The historical integrity of Locke and Walnut Grove, situated within their historical vernacular landscape, will be lost forever.
>
> ***
>
> It seems as though those who prepared the FEIR/S have a cavalier attitude and will say just about anything, shooting from the hip without knowledge or expertise. The proposed "mitigation measure" of putting up a viewing platform and using the construction as a tourist attraction is insulting and demeaning to our community. It is as if you are thumbing your nose at us and perhaps intentionally causing us grief for your amusement. Please show some respect and remove that from the document.
>
> Really, to show respect, and obey the law, you must go back to the drawing board and consider the devastating impacts on our communities so you can place the tunnel intakes somewhere else.

(Attachment 10 hereto, p.2, 3.) In addition to being a long-time Clarksburg resident, Ms. Daly runs a Delta tour business, and, unlike ICF personnel who prepared the WaterFix FEIR, Ms. Daly is an expert on Delta communities and Delta recreation.

Further evidence of construction impacts on Delta legacy communities Clarksburg, Hood, Locke, and Walnut Grove is provided by Traffic Engineer Chris Kinzel's SWRCB sworn Part 2 testimony documenting traffic impacts resulting from the decision to cite the WaterFix intakes

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adjacent to legacy communities. (SCDA-100, x.000024, pp.5–7.)

WaterFix is not consistent with Delta Plan Policy DP P2 because it does not respect the existing land use of the Delta Legacy Communities of Clarksburg and Hood.

B. WaterFix Is Not Consistent With Policy DP P2 Because It Does Not Respect The Delta-Wide Land Use Of Recreation.

Chapter 15 of the WaterFix FEIR concludes that impacts on recreation in the Delta will be significant and unavoidable. (WaterFix FEIR, Figure 15-0.) Impacts on recreation are substantially understated in the narrative portion of the FEIR, however significant adverse impacts on existing land uses under Alternative 4A are described at Bullfrog Marina, Wimpy's Marina, the Clarksburg Boat Launch and Fishing Access Area, the Lazy M Marina, the Delta Meadows Park and anchorage area, the Stone Lakes National Wildlife Refuge, and the Cosumnes River Preserve. (WaterFix FEIR, pp.15-468–469.) "[T]hese impacts are considered significant and unavoidable." (WaterFix FEIR, p. 15-469:36–37.)

The WaterFix FEIR concludes that because construction activity will be so long lasting and widespread throughout the Delta, "a decline in visits to Delta recreational sites as a result of facility construction would be expected to reduce recreation-related spending, creating an adverse effect throughout the Delta region." (WaterFix FEIR, p.16-167:11–13[3].) The WaterFix FEIR concludes that "Overall, the multi-year schedule and geographic scale of construction activities and the anticipated decline in recreational spending would be considered an adverse effect." (WaterFix FEIR, p.1-168:6–7.) Because of this adverse effect "recreation-dependent businesses including marinas and recreational supply retailers may not be able to economically weather the effects of multiyear construction activities and may be forced to close as a result… ." (WaterFix FEIR, p,16-168:3–4.)

An examples of adjacent WaterFix construction activity putting marinas out of business is provided by the letter from Don and Kathleen Updegraff cited above and documenting the ruinous

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[3] This quote is from the section discussing Alternative 4. The text in the section discussing Alternative 4A states that socio-economic impacts for Alternative 4A will be identical to those for Alternative 4. Where sections of the FEIR are quoted in this brief for Alternatives other than 4A, the FEIR has referenced that those sections are applicable to Alternative 4A.

effects of construction on their family-run Clarksburg Marina. (Attachment 9 hereto, pp. 1–3 & attachment 1 to the letter.) A July 7, 2017, WaterFix FEIR comment letter from Carl Wenske, Manager of Bullfrog Marina, provides further evidence of WaterFix putting marinas out of business:

> Bullfrog Marina is located on Middle River at Railroad Slough and it will be within the construction zone once construction begins. FEIR/S figure M15-4, sheet 5 of 8. Bullfrog Marina will face river passage blockage due to the mid-river geological exploration zone located adjacent to the marina on middle river, continuous noise, heave barge traffic and congestion from anchored barges on Middle River and adjacent slough--which will result in river closures and extensive areas of 5 mph zones, effects of blasting, truck traffic, and visual disturbance. Or Marina will not be able to survive the lengthy construction and we will have to close our business.

(Attachment 11 hereto, p.1[4].) Attachment 1 to Mr. Wenske's letter provides a pictorial representation of the proximity of construction activities and their impact on the marina.

A July 10, 2017, WaterFix FEIR comment letter from Captain Frank Morgan concludes that "construction impacts of California WaterFix will destroy the Delta as we know it, and the Delta will never recover… Many Delta commercial recreational facilities will be put out of business and informal recreational facilities will also be lost forever." (Attachment 12 hereto, p.3[5].) Captain Morgan runs a recreational charter business in the Delta and, unlike ICF personnel who prepared the WaterFix FEIR, is qualified as an expert on Delta recreation. Captain Morgan concludes "The Clarksburg Marina, for sure, will be driven into bankruptcy by this project." (Attachment 12 hereto, p.4.) Likewise, Captain Morgan concludes that "Bullfrog Marina, in the heart of the most intense construction activity, will be put out of business by this construction." (*Id.*)

Attachment 2 to Captain Morgan's letter provides a map showing construction impacts adjacent to Bullfrog Marina and in the vicinity of Discovery Bay. Captain Morgan's letter also

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[4] This letter and its attachments are part of the record before DWR. It was submitted as a comment on the WaterFix Final FEIR after the close of the Federal Register Notice Period. DWR considered it and provided a response in its final response to comments. However, DWR included only a reproduction of the text of the letter in Table 3-3 of the FEIR and did not reproduce the original letter or its attachments. The letter and attachments are provided here in full.

[5] This letter and its attachments are part of the record before DWR. It was submitted as a comment on the WaterFix Final FEIR after the close of the Federal Register Notice Period. DWR considered it and provided a response in its final response to comments. However, DWR included only a reproduction of the text of the letter in Table 3-3 of the FEIR and did not reproduce the original letter or its attachments. The letter and attachments are provided here in full.

documents the significant adverse impacts of the Clarksburg / Hood six mile long construction zone at page 4 of his letter, documents the substantial adverse impacts on Bullfrog Marina at pages 4–5, and documents the substantial adverse impacts on the Meadows Slough at pages 5–6. Attachments 6 to Captain Morgan's letter provides an annotated Google Earth view of impacts on the Meadows Slough and Attachment 7 provides photographs of peaceful Upper Snodgrass Slough and the Meadows Slough that will be destroyed by WaterFix construction activity.

Barbara Daly's comment letter also documents incompatibility of WaterFix construction with recreational land uses: "I can tell you for sure that the Clarksburg Marina cannot survive the onslaught of noise and industrial activity disrupting this peaceful stretch of river;" "The picnic area and you-pick-your-own-fruit recreational facilities at R. Kelly [farms] will be abandoned. Scribner Bend Vineyards is located at 9051 River Road, again at ground zero *inside* the massive 6 mile long construction zone. The Vineyards has regular wine-tasting and is a wedding party venue. These facilities will be lost." (Attachment 10, p. 3.)

After summarizing the effects of WaterFix, Delta Chamber of Commerce Executive Director Bill Wells that at least 20% of Delta marinas will be forced out of business by WaterFix in his Part 2 case in chief sworn testimony in WaterFix hearings before the SWRCB:

> To us here in the Delta, California WaterFix is massive amounts of barge traffic (at least 9400 barge trips), massive amounts of pile driving (over 23,000 piles with over 10,000,000 strikes from giant pile driving rigs), massive amounts of traffic on two lane Delta roadways (1,000% increases in car trips on formerly lonely roads), massive influxes of construction workers, massive amounts of tunnel muck dumped on Delta islands (30,000,000 cubic yards), and a commensurate massive negative impact on Delta recreation and those of us who make our living on the recreation industry in the Delta. The impacts are massive and occur all throughout the Delta. (SCDA-72[6].)
>
> These massive impacts are not disputed: “The multi-year schedule and geographic scale of project-related construction activities and the anticipated incremental decline in recreational spending would be cumulatively considerable.” (FEIR, p. 16-343.) Nor is it disputed that many of us here in the Delta will not survive the WaterFix economically: “recreation-dependent businesses including marinas and recreational supply retailers may not be able to economically weather the effects of multiyear construction activities and may be forced to close as a result”(FEIR, p.16-343.) In my opinion, 15% to 20% of our Delta marinas will be forced out of business by WaterFix. I do not think DWR will disagree with this estimate. But DWR has done nothing to protect Delta recreation.

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[6] Authenticate footnote same as Slater

(SCDA-150, p.1:15–28; p.2:1–2, indexed at x.4.000014.) Unlike ICF personnel who prepared the WaterFix FEIR, Commodore Wells is an expert in Delta recreation.

Commodore Wells Part 2 case in chief testimony also documents significant adverse impacts to Delta Legacy communities and Delta Boating (SCDA-150, pp. 3–5) and details how WaterFix will shutter 20% or more of Delta marinas (SCDA-150, pp. 5–7).

The substantial abandonment of the Delta by boaters due to WaterFix construction impacts is established by the Delta Alliance Boaters Survey conducted at the 2017 Rio Vista Bass Derby and Festival. The survey and its results are described in the SWRCB WaterFix Part 2 Rebuttal testimony of Michael Brodsky:

"The survey was conducted at the Rio Vista Bass Derby on October 14 and October 15, 2017. The Rio Vista Bass Derby is an annual event that draws thousands of Delta boaters to a fair held on the Streets of Rio Vista, California.

"The surveys were administered to Delta boaters attending the fair by 15 survey takers over the two days. 220 surveys were obtained over that period. 220 surveys is an adequate sample to provide valid representative results of the opinions of Delta boaters as a whole. All of the individuals who completed the surveys were boaters who use the Delta for their recreational boating. The survey takers did not reveal who was sponsoring the survey or if they were for or against the tunnel project. The survey takers were instructed not to, and did not, attempt to influence the responses. I did not conduct any of the surveys or make myself visible to respondents as the surveys were being taken to avoid recognition and any implicit influence on respondents. The language of the survey is designed to be objective and not to sway respondents one way or the other. The multiple choice questions included answers that respondents could choose that would indicate that they were not bothered by CWF construction and that they would not change their boating habits in response to CWF. The description of the project that was given to respondents was read directly from the survey forms, including language quoted directly from CWF proponent's description of Project impacts in the EIR. The graphic depiction of the project shown to respondents was that found at SCDA-72.

"The raw survey sheets, with responses, are submitted as SCDA-352-1–SCDA-352-5. Due to file size and scanning issues the 220 surveys are provided in five pdf files. SCDA-352-1–SCDA-352-5 are true and correct copies of the survey forms and responses that were administered at the Rio Vista Bass Derby on October 14 and 15, 2017.

"Pertinent Questions and results are as follows:

14. Once the tunnel construction project begins, which of the following best describes the likely change in the frequency of your boating activity in the Delta overall in response to the construction described above?

A. No change in frequency of boating activity in the Delta overall
B. Some reduction in frequency of boating activity in the Delta overall
C. Significant reduction in frequency of boating activity in the Delta overall
D. Increase in frequency of boating activity in the Delta overall.
E. I will stop boating in the Delta altogether.

"Forty-four percent of respondents answered C, a significant reduction in their use of the Delta, twenty-one percent answered B, some reduction in their use of the Delta, and twenty-two percent answered E, that they would stop boating in the Delta altogether, for a total of eighty-seven percent of respondents who said they would reduce, or stop altogether, their use of the Delta for recreational boating in response to CWF construction activities.

15. Once tunnel construction begins, which of the following best describes the likely change in the location of your boating activity?

A. No change in location of my boating activity.
B. I would change the location of my boating within the Delta to avoid construction activity but would not switch to boat at locations other than the Delta.
C. I would occasionally avoid the Delta by switching to boat at locations other than the Delta.
D. I would often avoid the Delta by switching to boat at locations other than the Delta.
E. I would always avoid the Delta by switching to boat at locations other than the Delta.

"Twenty-six percent of respondents answered E, that they would always avoid the Delta by switching their boating to locations other than the Delta once tunnel construction began. Twenty-four percent answered D, that they would often avoid the Delta by switching their boating to locations other than the Delta once tunnel construction began. Eighteen percent answered C, that they would occasionally switch their boating to locations other than the Delta once tunnel construction began. This represents a total of 68% of respondents who said they would switch some

or all of their boating activity away from the Delta in response to CWF construction activities. The answers to questions 14 and 15 are consistent with each other.

"After answering questions 14 and 15, respondents were informed of DWR's promises to implement a barge operations plan and use their best efforts thereby to reduce or avoid barge impacts on recreation. Question 17 was designed to measure boater's confidence in DWR's promise to avoid impacts through a barge operations plan.

17. Which of the following best describes your reaction to DWR's intention to implement a barge operations plan?

A. I have no reaction one way or the other.
B. I am somewhat confident that DWR will make a good faith effort to reduce muddy water and general impacts to recreation.
C. I am very confident that DWR will make a good faith effort to reduce muddy water and general impacts to recreation.
D. I somewhat confident that DWR will not make a good faith effort to reduce muddy water and general impacts to recreation.
E. I am very confident that DWR will not make a good faith effort to reduce muddy water and general impacts to recreation.

"Seventy-six percent answered E, that they were very confident that DWR would not make a good faith effort to reduce impacts to recreation. Fourteen percent answered D, that they were somewhat confident that DWR would not make a good faith effort to reduce impacts to recreation, for a total of ninety percent of respondents who somewhat or very much lacked confidence in DWR's good faith.

"After answering questions 17, boaters were given additional information about construction impacts taken directly from Project Proponent's EIR--specifically with regard to impacts on traffic on Delta roadways including Highway 12. Boaters were also given information about draw bridge openings that would be required if barges are to be used to supply construction activities. Boaters were then asked question 18, which asks specifically about their likely response to CWF construction impacts on road traffic in the Delta.

18. Which of the following best describes your response to construction vehicles using Delta roadways and bridge openings for barge traffic?

A. Construction vehicles and bridge openings will not affect my use of the Delta for recreation.
B. Construction vehicles and bridge openings will cause me to use the Delta for recreation somewhat more often.
C. Construction vehicles and bridge openings will cause me to use the Delta for recreation much more often.

D. Construction vehicles and bridge openings will cause me to use the Delta for recreation somewhat less often.
E. Construction vehicles and bridge openings will cause me to use the Delta for recreation much less often.
F. Construction vehicles and bridge openings will cause me to stop using the Delta for recreation altogether.

Forty-seven percent answered E, that construction vehicles and bridge openings would cause them to use the Delta for recreation much less often. Twenty-nine percent answered F, that construction vehicles and bridge openings would cause them to stop using the Delta for recreation altogether, for a total of seventy-six percent who would use the Delta much less often or stop using the Delta for recreation entirely in response to impacts from CWF on road traffic in the Delta." (SCDA-351, x.4.000017, pp.1–4.)

The results of the survey are consistent, that substantial majority of those surveyed would significantly reduce, or stop altogether, their use of the Delta for recreation in response to WaterFix. It is inevitable that the FEIR prediction that "recreation-dependent businesses including marinas and recreational supply retailers may not be able to economically weather the effects of multiyear construction activities and may be forced to close as a result," will be born out. (WaterFix FEIR, p,16-168:3–4.) At least 20% of Delta marinas and other recreation-related businesses will be forced to close and likely the number will be much higher.

The testimony of traffic engineer Chris Kinzel establishes that substantial WaterFix traffic impacts on Delta recreational facilities are due to poor decisions as to the siting of WaterFix facilities:

> The decision of California WaterFix Project planners to locate a 15,000,000 cubic yard dump and major construction staging area on Bouldin Island, off of State Route 12, combined with Project planners' major engineering error in mistaking the bridge clearance for the Highway 12 bridge over the Sacramento River, will cause substantial undisclosed traffic impacts on Highway 12 between Rio Vista and Interstate 5. An increase of 41% in traffic crossing the Rio Vista Bridge, combined with frequent openings of the Rio Vista Bridge and Mokelumne River Bridge, will back up traffic on SR 12 so severely that this major recreational gateway to the Delta will become untenable for many recreational users. Many recreational users will likely abandon the Delta as a recreational destination due to hours of traffic delay that will ensue during the eleven year construction period of California WaterFix. In light of its errors and the severe impacts, DWR should relocate the Bouldin Island Muck dump to another location where it will not cause such severe traffic impacts.
>
> Traffic impacts on the small communities of Hood, Clarksburg, Walnut Grove, Locke, and the rural surrounding countryside are unreasonable and location of a large industrial construction zone in this designated Delta legacy region was a poor

> planning decision. If feasible alternatives to the WaterFix Project exist, the impacts on quiet country towns and Delta recreation are reason enough not to build the WaterFix Project.

(SCDA-100, x.4.000024, p.1:4–20.)

C. WaterFix Is Not Consistent With DP P2 Because Of The Proposed Decision To Site The Bouldin Island Muck Dump Directly Adjacent To The Tower Park Resort.

It is unclear how the pending changes to the California WaterFix described in the WaterFix Draft Supplemental Environmental Impact Report will be addressed by the Council. One of those proposed changes is to move the Bouldin Island Muck Dump to within a few hundred feet of the Tower Park Resort. The impacts of that proposed change are described by Commodore Bill Wells:

"The configuration of the Bouldin Island muck dump has been changed by the Project changes included in the ADSEIR. The muck dump previously extended to within approximate one mile of the Tower Park Resort. Please see FEIR Map Book figure M15-4, sheet 4, for the extent of the Bouldin Island muck dump relative to the Tower Park Resort in the Approved Project. Please see ADSEIR Map Book M15-4, sheet 3, for the extent of the muck dump relative to the Tower Park Resort in the Proposed Project. Please notice that the muck dump has been shifted to the north so that it now extends to directly across the slough from the resort, within a few hundred feet of the resort.

"The ADSEIR states that the changes to the Bouldin Island muck dump will not adversely impact the Tower Park Resort because, in part, the dump "would not be within the direct view of the Resort," and "the views from the resort are not expected to change because the Bouldin Island levees would block the views of RTM [tunnel muck] storage." (ADSEIR, p.15-3:32–33; 37–38.) These statements are incorrect.

"The Tower Park resort is elevated above the levee and sits higher than the Bouldin Island Levee. There is a direct view from the Tower Park Resort over the Bouldin Island levee onto Bouldin Island and the entire muck dump will be visible. SCDA-317[7] is a photograph taken on

[7] SCDA-317 is a true and correct copy of a photograph accurately depicting Tower Park Resort,

Potato Slough approaching the Tower Park Resort and Terminous Bridge. On the left, is the Bouldin Island Levee referenced in the ADSEIR. On the right is the Tower Park Resort. While the gas dock and other docks sit at an elevation below the levee, the resort itself, including deck area, restaurant, ice cream parlor, store, and other facilities sit on the elevated deck at an elevation above the levee. There is a clear line of sight from the resort deck over the Bouldin Island Levee and down onto Bouldin Island. I visit this resort regularly and enjoy dining in the restaurant while taking in the view across the slough, over the levee, and onto the Delta landscape of Bouldin Island.

"SCDA-318 is a photograph of the resort deck area, with ice cream parlor on the right and store, restaurant, and bar on the left. SCDA-319 is a photograph of the Tower Park Grille. Notice the diner seated at the outside dining area taking in the view of Bouldin Island across the slough. SCDA-320–323[8] are photographs taken from the Tower Park deck area, looking across Potato Slough and down onto Bouldin Island over the top of the Bouldin Island Levee.

"Locating a massive muck dump within plain view and only a few hundred feet from a major resort facility is not reasonably protective of recreation. SCDA-327[9] is a google earth shot showing the locations of the resort and muck dump.

"SCDA-324 and SCDA-325[10] are photographs of children playing at the Tower Park beach. The muck dump is directly across the slough, within 350 feet of this beach. The prevailing winds are from the west, and will blow the stench and contamination from the muck dump onto this beach. When the muck dries out and turns to dust, potentially toxic dust particles will blanket this beach. SCDA-328[11] is a Google Earth shot showing the location and proximity of the muck dump and children's beach. It was patently unreasonable for DWR to move the location of this muck dump to within a few hundred feet of a children's play area and this change endangers the health and safety

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[8] SCDA-318–323 are true, correct, and accurate copies of photographs taken from the Tower Park Marina in July 2018.

[9] SCDA-327 is a true and correct copy of a Google Earth image of the Tower Park Resort and accurate representation.

[10] SCDA-324 and 325 are true and correct copies of photographs accurately depicting the Tower Park beach taken in July 2018.

[11] SCDA-328 is a true and correct copy of a Google Earth image of the Tower Park Resort and accurate depiction.

of children. I do not believe that locating this dump on top of a children's play area could possibly comply with applicable state and federal health and safety laws and regulations.

"Highway 12 is a major gateway to the Delta used by many Delta boaters to access the Delta. Many boaters trailer their boats into the Delta for the weekend via highway 12 arriving on Friday and staying through the weekend. Many other trailer boaters access the Delta via highway 12 during the week in the summer season.

The increase in activity at the Bouldin Island facility brought by changes in the Proposed Project will increase truck traffic to and from the facility on Highway 12 above that previously contemplated in the Approved Project. This will worsen traffic impacts on Highway 12." (SCDA-308, x.4.000012, pp. 5–7.)

D. Further Impacts On Delta Recreation Due To DWR's Poor Decision To Site Its Largest Muck Dump In The Heart Of Delta Recreation: Impacts On The Bedrooms Anchorage.

Further impacts on recreation by DWR's poor decision to site its largest muck dump in the center of prime Delta recreation and site a Barge landing in the midst of the well-established Potato Slough "Bedrooms" anchorage are also established by Commodore Wells testimony:

"The reader is asked to kindly turn to ADSEIR Map Book M15-4, sheet 3 of 6. The Bouldin Island facility and muck dump are shown as the hatched area near the middle of the page. Just beneath the left side of the hatched area, one finds the legend "Barge Unloading Facility." The waterway underneath that legend is Potato Slough. One can observe a series of coves directly across the slough from the arrow pointing to the barge dock. These coves are the anchorages known to locals as "the bedrooms." The map lacks detail and there are small islands interspersed throughout this area that are not shown on the map. Some of the bedrooms boast docks and makeshift improvements on the adjacent islands, such as barbeques, makeshift cabins, and shaded lounging areas. Exhibits SCDA-309–SCDA-316 are photographs of boats at anchor in the bedrooms taken on a recent afternoon[12]. SCDA-326[13] is a google earth shot showing that the proposed barge dock is within a few hundred feet of bedrooms anchorages.

[12] SCDA-309–316 are true and accurate copies of photographs of the bedrooms taken in July 2018.

"Hall Schell described the Potato Slough anchorages shown in the photographs in his classic work on the Delta as follows:

> Potato ("Big") Slough is a beautiful broad stretch of water with a string of lovely islands along much of its center. It thus provides two distinct cruising routes for the skipper on the move, as well as some nice exploring waters for one who wishes to poke around the islands. Toward the western end of the slough is a good-sized island called Fig Island, although it is not so marked on the charts. Fig has a gentle curl to its eastern side and all summer long there is a good-sized fleet at anchor here.
>
> It generally harbors a number of large sailing craft. And the anchorage is a favorite of Bay Area skippers who slip in off the channel and enjoy its deep water and amiable setting. It is isolated, yet handy for a quick runabout hop to Moore's Riverboat, Spindrift or other favorite spots on the channel or this end of the Mokelumne. The island also has a private cabin and landing owned by a grizzled Stockton skipper called "Balky". Balky complains long and loudly about trespassing on both his dock and his property . Of course, it only takes a single bad apple to mess up the barrel. Yet it is surprising that with so many places to go, boatmen will still trespass on posted property.
>
> But the vibes in this anchorage are primarily good ones. Groups get together in little raftups. Dinghies are constantly on the move and there is a lot of swimming and lazing around on air mattresses . When the wind comes in strong, it is here that you see daring youngsters dangling from lines off flapping spinnakers They put on a pretty good show for all in the anchorage .
>
> Farther in on the slough there are other clusters of islands that see near -equal anchorage activity . And there are skippers who leave their boats here all sum mer. Fishing is surprisingly good in this slough also. I once made a run through here in the company of Jay Sorenson, a fisherman of great skill. Although we were not fishing , Jay stopped, baited a hook and dropped a line in a certain spot. " That 's my fishing hole, " he said. " Whenever I'm on my way in, I always stop here and give that hole a couple minutes . You 'd be surprised

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[13] SCDA-326 is an accurate depiction of the location of the barge dock and bedrooms anchorages and true and correct copy of Google Earth image.

how many big stripers I've pulled out of there ."
He did not get one this day.

(SCDA-152, pp. 92–93.) These Delta treasures are a few hundred yards from the barge facility.

"DWR proposes to turn this stretch of Potato Slough into an industrial scale barge landing. This is patently unreasonable. This is not an industrial area and siting this industrial scale barge landing and industrial facility here, where barges will be clogging the slough awaiting unloading and barge traffic will be incessant, speaks to a complete lack of understanding or concern on the part of DWR for the consequences of their actions.

SCDA-72 contains a picture of a tug boat and barge representative of the tugs and barges that will clog Potato Slough. This type of activity does not belong in this place. Locating it here is not reasonably protective of recreation." (SCDA-308, x.4.000012, pp.4–5.)

E. Virtually All Of The Impacts On Delta Land Uses, Including Impacts On Marinas And Other Delta Recreational Land Uses Are Due To DWR's Poor Decisions When Siting WaterFix Water Facilities.

1. Poor Decision In Siting The Intakes At Legacy Communities.

DWR chose to locate the WaterFix intakes adjacent to the legacy communities of Hood and Clarksburg when there is no hydrodynamic or engineering reason why these facilities could not have been located elsewhere on the Sacramento River, away from these sensitive communities. The construction impacts, which are of long enough duration to be considered permanent impacts under California law, could have all been avoided by siting the intakes elsewhere. DWR chose the worse place possible to put these intakes from the perspective of respecting local land uses.

We have established the massive impacts of intake construction on adjacent land uses in Clarksburg and Hood. These are permanent impacts and fall within the purview of DP P2.

Siting the intakes at this location also violates DP P2 because of the impacts after construction is complete. The very qualities for which Clarksburg and Hood were designated Delta legacy communities will be severely eroded by the presence of massive WaterFix engineering structures on their doorsteps (in the unlikely event that any part of the towns survive construction).

While the WaterFix FEIR drastically understates the impacts, it recognizes these impacts after construction, "during operations and maintenance":

> Agricultural contributions to the character and culture of the Delta would be likely to decline commensurate with the projected decline in agricultural-related employment and production. This could result in the closure of agriculture-dependent businesses or those catering to agricultural employees, particularly in areas where conversion of agricultural land would be most concentrated, including near the intakes in the vicinity of Hood and Clarksburg … .
>
> [T]he visual appearance of intakes and other permanent features would compromise the predominantly undeveloped and agricultural nature of communities like Clarksburg, Courtland, and Hood, which would be located closest to the permanent water conveyance features. Lasting effects on areas made less desirable which to live, work, shop, or participate in recreational activities as a result of BDCP operations could lead to localized abandonment of buildings. Such lasting effects could also result in changes to community cohesion … adverse social effects could linger in communities closest to the character-changing effects and in those most heavily influenced by agricultural and recreational activities.

(WaterFix FEIR, p.16-173:15–19; 29–40.)

2. Poor Decision When Siting The Tunnel Route Through The Heart Of The Delta.

Almost all of the impacts on recreation are due to DWR's poor decision to select a tunnel route through the heart of the Delta. Many of the substantial impacts on Delta recreation are due to the need to run thousands of large barges and tugboats in the Delta in prime boating season because the tunnel route runs through Delta islands not accessible by road. The location of large tunnel muck dumps on Delta islands is also caused by the route through the center of the Delta. If the tunnel route were to skirt the eastern edge of the Delta, most of these impacts would be avoided.

DWR considered an eastern alignment for a canal, and determined that there was feasible eastern alignment right of way. (FEIR, Figure 3-4.) However, part of the reason to select a tunnel, rather than a canal, was that a tunnel could be run through the center of the Delta, tracing a more direct route from Hood to Tracy. This may have saved some money in direct construction costs, but the costs to the Delta and its residents is unacceptable. DWR appears blind to the costs of this project that it is foisting on others. Economists call these kind of costs "negative externalities." One justification for government regulation, is to force actors to internalize the negative externalities they would otherwise create. Here, there is a simple solution that forces water suppliers to bear the true costs of tunnel construction impacts: route the tunnels around the eastern edge of the Delta,

albeit a bit longer route with more construction costs, but one that places the true costs of the project on those who will reap the benefits: the water suppliers.

Captain Morgan described the need for an eastern alignment:

> Mr. Rischbieter [DWR's expert] testified that impacts from barge operations on recreational boating "would be significant and unavoidable during construction." (DWR-1024, p.7:5–7.) I disagree with Mr. Rischbieter's statement that impacts from barge operations are unavoidable. If a tunnel or tunnels are to be built, the tunnels can feasibly be routed around the eastern edge of the Delta along the route shown on FEIR Figure 3-4. (submitted as SCDA-305[14].) This would facilitate moving muck dumps, staging areas, and access shafts away from Delta waterways, eliminating barge traffic on Delta waterways to service these construction elements and avoiding the impacts to Delta recreational boating. This would avoid running the construction area through the heart of the Delta on the current alignment as shown on FEIR Figure 3-9 (submitted as SCDA-306[15].) Access shafts, staging areas, and muck dumps could be accessed by trucks from Highway 5, which has the capacity to handle large amounts of heavy truck traffic. Contrary to the testimony of Mr. Rischbieter, impacts from barge operations are avoidable.

(SCDA-301, x.4.000013, p.3:27–28, p.4:1–10.)

F. The Foregoing Also Establishes That CWF Is, On The Whole, Not Consistent With Achieving The Coequal Goals.

The foregoing establishes that WaterFix is not reasonably protective of Delta recreation, and destroys much of the unique cultural value found in the Delta. Regardless of any particular Delta Plan Policy, an action must be found inconsistent with the Delta Plan on the whole if it fails to "protect[] and enhance[] the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place." (Water Code § 85054.) WaterFix fails this basic test.

PART 2: WATERFIX IS INCONSISTENT WITH POLICY WR P1, WHICH REQUIRES A FINDING OF INCONSISTENCY WITH THE DELTA PLAN.

A. A Finding Of Inconsistency With WR P1 Requires A Finding Of Inconsistency With The Delta Plan On The Whole.

WR P1 "is the very core of the Delta Plan." (Delta Stewardship Council Cases, JCCP 4785, Respondent and Defendant Delta Stewardship Council's Reply to Electing Petitioners' and Water Contractors' Opposition to Bifurcation, p. 3:6–9, filed May 9, 2014.) A covered action found to be

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[14] SCDA-305 is a true and correct copy of FEIR Figure 3-4 with the approximate Alternative 4A alignment and approximate location of several recreational impacts drawn in.
[15] SCDA-306 is a true and correct copy of FEIR Figure 3-9.

inconsistent with WR P1, therefore cannot be consistent with the Delta Plan on the whole. A finding of inconsistency with WR P1, therefore, necessarily requires a finding of inconsistency with the Delta Pan on the whole.

B. WaterFix Is Inconsistent With WR P1.

A finding of inconsistency with WR P1 is required where:

1. The proposed action is a covered action within the meaning of the Delta Reform Act and Delta Plan regulations.

2. The proposed covered action will have significant adverse environmental impact in the Delta. WaterFix will have numerous and substantial adverse environmental impacts in the Delta. For the purposes of WR P1, adverse environmental impacts include *all* adverse environmental impacts in the Delta and are in no way limited to impacts on water quality or any other particular category of impact.

3. One or more urban or agricultural water suppliers that will receive water as a result of the covered action failed to comply with the three core requirements listed in WR P1 (23 CCR § 5003(c)(1)(A), (B) & (C)).

4. The failure of one or more water suppliers to comply with the three core requirements of WR P1 significantly caused the need for the proposed covered action.

1. WaterFix Is A Covered Action.

The parties agree that California WaterFix is a covered action. Element 1 is met.

2. WaterFix Will Have Significant Adverse Environmental Impacts In The Delta.

WaterFix will have numerous and substantial adverse environmental impacts in the Delta. For the purposes of WR P1, adverse environmental impacts include *all* adverse environmental impacts in the Delta and are in no way limited to impacts on water quality or any other particular category of impact.

As established above at pages 15–31 of this brief, WaterFix will have substantial adverse environmental impacts on recreation. Although DWR grossly understates these impacts, the FEIR agrees that WaterFix impacts on recreation in the Delta will be "significant and unavoidable." (FEIR, Figure 15-0.) Impacts on Delta recreation are permanent and long-term, significant, and

cannot be mitigated to level of insignificance within the meaning of the California Environmental Quality Act ("CEQA"), according to DWR's own findings:

> ***CEQA Conclusion:*** Construction of Alternative 4A intakes and related water conveyance facilities would result in permanent and long-term (i.e., lasting over 2 years) impacts on well-established recreational opportunities and experiences in the study area because of access, noise, and visual setting disruptions that could result in loss of public use. These impacts would occur year-round. the mitigation measures described below, in combination with environmental commitments, would reduce some construction-related impacts by compensating for effects on wildlife habitat and species; minimizing the extent of changes to the visual setting, including nighttime light sources; manage construction-related traffic; and implementing noise reduction and complaint tracking measures. However, the level of impact would not be reduced to a less-than-significant level because it is not certain the mitigation would reduce the level of these impacts to less than significant in all the instances occurring in the entire study area. Therefore, these impacts are considered significant and unavoidable.

(WaterFix FEIR, p.15-469:26–37.)

The impacts from WaterFix generated noise are also permanent and long-term, significant, and cannot be mitigated to a level of insignificance within the meaning of CEQA. As demonstrated by the testimony of acoustical engineer Charles Salter, DWR substantially understates the noise impacts. (SCDA-65, x.4.000015, pp.1–8.) However, according to DWR's own findings the noise impacts of Alternative 4A are significant and unavoidable. (WaterFix FEIR, Figure 23-0.) Noise impacts from construction of intakes, construction of conveyance and associated facilities, truck traffic, construction of power transmission lines, and activities associated with borrow/spoil areas would all produce significant adverse impacts. "This [Impact NOI-1] would therefore be significant and unavoidable." (WaterFix FEIR, p. 23-193–23–196.) Impact NOI-2 is also "considered significant and unavoidable," (WaterFix FEIR, p.23-196–23-197), as is Impact NOI-4 (WaterFix FEIR, p.23-198.)

WaterFix Alternative 4A will also have significant unavoidable adverse environmental impacts on groundwater (WaterFix FEIR, Figure 7-0), transportation (WaterFix FEIR, Figure 19-0), agricultural resources (WaterFix FEIR, Figure 14-0), aesthetics and visual resources (WaterFix FEIR, Figure 17-0)

Element 2 is met.

3. One or more urban or agricultural water suppliers that will receive water as a result of the covered action failed to comply with the three core requirements listed in WR P1 (23 CCR § 5003(c)(1)(A), (B) & (C)).

As established in section II of this brief, compliance with the three core compliance requirements is mandatory and reduced reliance cannot be demonstrated or achieved in any other way.

The Metropolitan Water District of Southern California ("Met") will receive the largest share of WaterFix water deliveries. Met's 2015 Urban Water Management Plan is attached as Attachment 13. Met has not complied with WR P1.

This element is met.

4. The failure of one or more water suppliers to comply with the three core requirements of WR P1 significantly caused the need for the proposed covered action.

The report *The Untapped Potential of California's Water Supply: Efficiency, Reuse, and Stormwater* ("Untapped Potential") is attached to Delta Alliance's Appeal C20185-A2 with the file name NRDC-4. Untapped Potential concludes that agricultural water conservation and efficiency can save 5.6–6.6 million acre feet per year; urban water conservation and efficiency can save 2.9–5.2 million acre feet per year; water reuse can save 1.2–1.8 million acre feet per year; and storm water capture can save .4–.6 million acre feet per year. (Untapped Potential, p.4.)

Attached to Untapped Potential are the reports *Agricultural Water Conservation and Efficiency Potential in California* ("Agricultural Conservation") and *Urban Water Conservation and Efficiency Potential in California*("Urban Conservation"). At page 2 of Urban Conservation: "The majority of the state's urban water use is in the South Coast hydrologic region, home to over half the state's population." The South Coast hydrologic region is largely encompassed in Met's service area. Approximately 1.4 to 2.4 million acre feet could be saved within the South Coast region, substantially reducing Met's need for imported water from the Delta.

The testimony of Doug Obegi before the SWRCB is also attached to Delta Alliance's appeal as NRDC-1. Mr. Obegi's testimony provides:

> Plans, reports, and other information developed by water districts, the State of California, and independent studies demonstrate that here are opportunities to create millions of acre feet of water supply through local and regional water projects within the service areas of contractors of the State Water Project (SWP) and Central Valley Project (CVP). Regional and local water supply projects including improved

> agricultural and urban water use efficiency, water recycling, and stormwater capture are technically feasible, cost-effective, and could create significant jobs in these communities.

(NRDC-1, p.2:4–11.)

Mr. Obegi's testimony demonstrates that Met's Urban Water Management Plan fails to account for the savings attributable to these projects and thereby over-projects the need for imported Delta water. (NRDC-1:1–9.) "The *Mismatched* report provides compelling evidence that continued improvements in water use efficiency and investments in local and regional water supply projects will enable the region [Met's service area] to significantly reduce the demand for water from the Delta, leaving more water for fish and wildlife." (NRDC-1, p.3:18–21)

However, the failure of Met to comply with WR P1 and thereby include in its projections the savings from all technically feasible, cost-effective local and regional projects substantially caused it to overestimate its need for imported Delta Water and significantly caused the impetus for WaterFix.

The availability of millions of acre feet of "new water" that would obviate the need for WaterFix is borne out by the Delta Plan itself. In the section titled "New Water For California" the Delta Plan discusses "local water supply opportunities [and] the importance of local and regional water management planning." (Delta Plan, p. 107.) The Delta Plan estimates an available supply of new water from agricultural water use efficiency, recycled municipal water, and urban water use efficiency at up to 7.4 million acre feet per year.

A substantial portion of these savings would accrue to water suppliers receiving Delta Water through California WaterFix, obviating the need for WaterFix.

Any perceived ecological advantage to a new point of diversion (reducing OMR reverse flows, for example) would be more than offset by substantial reductions in exports that could be achieved with proper local and regional water management planning.

The burden is on DWR and its water suppliers to show their failure to meet WR P1 has not significantly caused the impetus for WaterFix. Without inclusion of the core compliance requirements for WR P1 in their water management plans, they cannot do so.

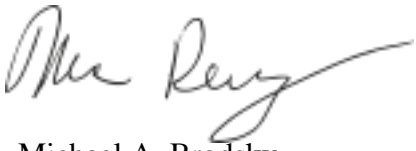
Element 4 is met and WaterFix should be found inconsistent with the Delta Plan for failure

to be consistent with WR P1.

CONCLUSION

For the foregoing reasons, Delta Alliance respectfully requests that the Council sustain this appeal. DWR can, if it chooses, resubmit the WaterFix project after water suppliers comply with WR P1 and DWR remedies the other inconsistencies in the Project.

October 15, 2018



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