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BEFORE THE  
DELTA STEWARDSHIP COUNCIL  
A California State Agency

CALIFORNIA WATERFIX APPEALS )  
OF THE CERTIFICATION OF )  
CONSISTENCY )

RAMADA INN  
WEST SACRAMENTO - CONFERENCE CENTER  
1250 HALYARD DRIVE  
WEST SACRAMENTO, CALIFORNIA

Thursday, November 15, 2018

9:00 a.m.

WORKSHOP

Volume 1 of 2

Pages 1 - 252

Reported By: Candace Yount, CSR No. 2737, RMR, CCRR  
Certified Realtime Reporter

Computerized Transcription By Eclipse

1 APPEARANCES:

2 DELTA STEWARDSHIP COUNCIL

3 Councilmembers Present

4 Randy Fiorini, Chair  
5 Frank C. Damrell Jr., Councilmember  
6 Skip Thomson, Councilmember  
7 Mike Gatto, Councilmember

8 Staff Present

9 Jessica Pearson, Chief Executive Officer  
10 Bethany Pane, Chief Counsel  
11 John Callaway, Chief Scientist  
12 Lita Brydie, Delta Stewardship Council Clerk

13 Also Present

14 Deborah Smith, Los Angeles Regional Water Quality  
15 Control Board  
16 Jeremy Brown, Attorney General's Office

17 For California Department of Water Resources

18 Kenneth Bogdan, Chief Counsel  
19 Stefanie Morris, Attorney at Law, Best Best & Krieger  
20 Katherine Marquez, Program Manager  
21 John Leahigh, Water Operations Manager

22 FOR APPELLANTS:

23 Appellant Group 2, Save the California Delta Alliance

24 Michael Brodsky

25 Appellant Group 3, Friends of the River, Restore the  
Delta, California Sportfishing Protection Alliance

Robert Wright  
Chris Shutes

Appellant Group 4, North Delta C.A.R.E.S. Action  
Committee

Barbara Daly  
Deirdre Des Jardins

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APPEARANCES (Continued)  
  
FOR APPELLANTS (Continued):  
  
Appellant Group 5, City of Stockton and the Sacramento  
Regional County Sanitation District  
  
Kelley Taber  
  
Appellant Group 7, San Joaquin County, Local Agencies  
of the North Delta  
  
Tom Keeling  
Osha Meserve  
  
Appellant Group 8, Central Delta Water Agency, South  
Delta Water Agency  
  
Dante Nomellini Jr.  
  
Appellant Group 9, County of Sacramento, Sacramento  
County Water Agency  
  
William Burke  
  
Delta Protection Commission  
  
Oscar Villegas, Yolo County Supervisor  
Erik Vink, Delta Protection Commission Executive  
Director

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1 Thursday, November 15, 2018

9:00 a.m.

2 PROCEEDINGS

3 ---000---

4 CHAIR FIORINI: Good morning. I'm Randy  
5 Fiorini, Chair of the Delta Stewardship Council. And  
6 this is the time and place for the public workshop to  
7 receive comments orally and/or in handwriting on the  
8 draft findings of the appeals of the Certification of  
9 Consistency for California WaterFix which, for  
10 convenience, we will refer to as WaterFix appeals.

11 Let the record reflect that it is 9 o'clock on  
12 Thursday, November 15th. And we are here today at the  
13 Ramada Inn West Sacramento Conference Center, 1250  
14 Halyard Drive, West Sacramento, California.

15 Councilmembers Mike Gatto, Frank Damrell and  
16 Skip Thomson are present with me for this workshop.

17 Before we begin, I have some general  
18 announcements.

19 First, please look around now and identify the  
20 exits closest to you. Should an alarm sound, we will  
21 be required to evacuate this room immediately. In that  
22 event, please take your valuables with you.

23 Second, bathrooms are located out the main  
24 doors to my left, your right, and down the hall.

25 Third, the hotel asks that we do not park in

1 hotel guest parking and, instead, park across the  
2 street in the public lot.

3 And, last, please silence your cellphones or  
4 other devices now.

5 Now, turning to the subject of today's  
6 workshop.

7 The 2009 Delta Reform Act granted the Council  
8 specific regulatory and appellate authority over  
9 certain actions that take place in whole or in part in  
10 the Sacramento-San Joaquin Delta and Suisun Marsh which  
11 are referred to in the Act as covered actions.

12 In order to be a covered action, a plan or  
13 project must meet a five-way test: Be a CEQA Project  
14 as defined by law; take place in whole or in part in  
15 the Delta; be a public Project or be funded or approved  
16 by a public agency; be occurred by one or more  
17 regulations in the Delta Plan; and have a significant  
18 impact on the achievement of one or both of the coequal  
19 goals or a government-sponsored flood control project.

20 State and local agencies are required to  
21 demonstrate consistency with 14 regulatory policies  
22 identified in the Delta Plan when carrying out,  
23 approving or funding a covered action prior to  
24 initiating the implementation of that action by  
25 submitting a written Certification of Consistency with

1 detailed findings as to whether the covered action is  
2 consistent with the Delta Plan.

3 The Council received the Certification of  
4 Consistency for WaterFix as a covered action from the  
5 Department of Water Resources on July 27th, 2018. It  
6 was marked as filed on the same day.

7 Nine appeals of the Certification of  
8 Consistency for WaterFix have been filed, and issues  
9 raised by the appeals are within the Council's  
10 jurisdiction.

11 We held a public hearing on the Council's  
12 review of the WaterFix appeals on October 24th through  
13 20 -- through October 26th and have since considered  
14 all written and oral comments concerning the WaterFix  
15 appeals submitted by October 26.

16 Thank you for the input. And I want to  
17 especially thank those that were in the audience for  
18 the respect and courtesy extended at the October  
19 hearings.

20 Near the close of the hearing on October 26th,  
21 I directed staff to prepare draft findings based on the  
22 materials submitted by the parties and taking into  
23 consideration the comments received over the course of  
24 the hearing.

25 I asked staff to present those draft findings

1 to us at today's workshop. Those findings were posted  
2 on our website and shared to the Listserv and Service  
3 List on Thursday, November 8.

4 We will consider the oral comments received  
5 during this workshop and written comments received  
6 through next Monday, November 19th, by 5 p.m. on  
7 Staff's Draft Findings regarding WaterFix appeals.

8 I want to be clear that we will not be taking  
9 any action at this workshop. Instead, we will hold a  
10 public hearing during the Council's December meeting on  
11 December 20th and 21st if needed.

12 Following this final hearing, we anticipate  
13 adopting findings and either denying the appeals or  
14 remanding the Certification of Consistency for WaterFix  
15 Project back to the Department of Water Resources. The  
16 public hearing in December will be publicly noticed  
17 soon.

18 Let me also remind you that the scope of the  
19 Council's review is limited to whether or not the  
20 Certification of Consistency was supported by  
21 substantial evidence in the record before the  
22 Department of Water Resources when it was submitted.  
23 They, or ultimately it, will not be a vote based on  
24 policy preference.

25 As a reminder, given the adjudicatory nature

1 of the appeal before the Council, all Councilmembers  
2 and staff are under an ex-parte communication  
3 prohibition.

4 This means until we reach a final decision on  
5 the WaterFix appeals, Councilmembers and staff are not  
6 available to comment or receive comments on matters at  
7 issue here in the WaterFix proceedings outside of a  
8 noticed public meeting such as the workshop today.

9 To those representing the Department of Water  
10 Resources, Delta Protection Commission, Appellant  
11 Groups, and members of the public here today to comment  
12 on the WaterFix appeals, here are some important  
13 instructions.

14 Commenters speaking today will not be sworn  
15 in.

16 This entire workshop will be recorded by a  
17 Certified Court Reporter. The rough transcript of the  
18 hearing and all written materials presented during the  
19 hearing will be shared with the Listserv -- the Service  
20 List and posted on the Council's WaterFix website in  
21 approximately two weeks.

22 If you're interested in purchasing final  
23 transcripts from the reporters in the interim, please  
24 coordinate with them directly.

25 California Reporting is represented today by

1 Candace Yount, seated to my right, and they --  
2 California Reporting can be reached at 510-224-4476, or  
3 you can see Candace during a break.

4 We will be taking 15-minute breaks each  
5 morning and afternoon, as well as a one-hour lunch  
6 break.

7 As with all public Council meetings, this  
8 meeting is being Webcast on the Internet and the audio  
9 and video will be available for later review.

10 We will first hear from staff who will walk us  
11 through their draft analysis and recommended findings.

12 We will then hear from the Department of Water  
13 Resources. Next the Appellant Groups will be heard in  
14 order of the appeal number from Appellant 1 through  
15 Appellant 9.

16 We will then hear from the Delta Protection  
17 Commission.

18 Upon completion of all presentations, we will  
19 commence with public comment.

20 The Department, the respective Appellant  
21 Groups and the Delta Protection Commission will each be  
22 allowed 15 minutes for oral presentations.

23 Some Appellant Groups have asked to  
24 consolidate their time. We have approved North Coast  
25 River Alliance, Appellant Group A1, ceding its 15

1 minutes to San Joaquin County, Appellant Group A7.

2 San Joaquin County will have a -- their  
3 presentation -- 25-minute presentation ceding five  
4 minutes to Save the California Delta Alliance,  
5 Appellant Group A2, a 20-minute presentation. And the  
6 City of Stockton, Appellant Group A5, and Sacramento  
7 Regional County Sanitation District, Appellant Group  
8 A6, will have a combined 30-minute presentation.

9 If that's not -- If my explanation's not  
10 clear, it will become clear as we proceed through the  
11 presentations.

12 No additional requests will be accepted.

13 Councilmembers, I'd encourage you to hold your  
14 questions for presenters speaking until the conclusion  
15 of their respective presentations. At that point, I  
16 will open the opportunity for Councilmember questions  
17 before proceeding on to the next party.

18 When the presentations portion has ended, we  
19 will proceed to receive public comment. Any other  
20 person -- Any other interested parties who want to  
21 provide public comment will be allowed three minutes  
22 for oral presentation. Additional time will be allowed  
23 if there are any questions by Councilmembers or Council  
24 staff.

25 If you want to provide public comment and are

1 not a speaker on behalf of one of the Appellant Groups,  
2 the Delta Protection Commission or the Department of  
3 Water Resources, we ask that you fill out a blue  
4 speaker card available from our clerk Lita Brydie,  
5 seated over here (indicating).

6 The cards are marked in groups designated A,  
7 B, C and so on. Your comments will be heard in the  
8 group order we receive the completed blue speaker  
9 cards.

10 Given the number of parties and the time  
11 allotted to each, we anticipate that public comment for  
12 all other interested parties will begin tomorrow at  
13 9 o'clock.

14 So, for certainty sake, we will reconvene  
15 tomorrow at 9 o'clock. But that's an estimate in terms  
16 of when public comment may start.

17 If the presentations end early and there's  
18 time for public comment this afternoon, we will  
19 accommodate members of the public who are here today.

20 For scheduling certainty for people in this  
21 room and for those watching on the website, we will  
22 also, as I've said, reconvene tomorrow in this room at  
23 9 o'clock for public comment.

24 After we hear from everyone who's filled out a  
25 blue speaker card, we will close the public comment

1 portion of The WorQshop and hear from Councilmembers.

2 Please keep in mind when providing comments  
3 today that the scope of the Council's review is limited  
4 to whether or not the Certification of Consistency is  
5 supported by substantial evidence in the record before  
6 the Department of Water Resources when it was  
7 submitted.

8 When you come to speak, we ask that you do a  
9 couple of things so that the Council, audience and the  
10 court reporter may hear you and so that your comments  
11 are entered into the record and can be responded to  
12 appropriately.

13 First, please speak into the microphone; and,  
14 second, please begin by stating your name and  
15 identifying your organization, if you represent any.

16 Finally, there is a three-minute timer --  
17 there will be three minutes when public comment starts  
18 located at the end of this table. Please respect the  
19 three-minute time allowance.

20 That concludes my introductory comments,  
21 albeit lengthy.

22 At this point, I would like to call on our  
23 Executive Officer, Jessica Pearson, to proceed with the  
24 staff's presentation.

25

1 MS. PEARSON: Thank you and good morning.

2 Given the scope of the matter before us, I'll  
3 keep my remarks brief.

4 As stated in the Notice, the purpose of this  
5 workshop is to provide an opportunity for the Council,  
6 parties and the public to provide input on the Staff's  
7 Draft Recommended Findings.

8 Today and throughout the day today, staff will  
9 be available to the Council to answer questions and  
10 discuss potential modifications. This is also your  
11 opportunity to seek information or clarification from  
12 the Department, the Delta Protection Commission, and  
13 Appellants on the issues at hand.

14 What we ask of you, Councilmembers, at this  
15 workshop is clear direction regarding any proposed  
16 modifications, and direction to prepare a proposed  
17 determination for your consideration and a decision in  
18 December.

19 Given the complexity of the task and the  
20 relatively short amount of time afforded for such a  
21 review under statute, I'd like to acknowledge my  
22 sincere appreciation for Council's staff for their  
23 tremendous effort to this point. I'm proud of their  
24 work and I take responsibility for any errors.

25 To the extent there are errors, it's my hope

1 today that we approve the draft based on the  
2 discussion.

3 As Chair Fiorini stated, no decision will be  
4 made today but the Council will be asked to vote on a  
5 final proposed staff determination in December.

6 I look forward to a productive discussion.

7 And now I'll turn to Jeff Henderson, who's our  
8 Deputy Executive Officer for Planning for presentation  
9 of the Staff's Recommended Findings.

10 Thank you.

11 MR. HENDERSON: Good morning, Chair,  
12 Councilmembers.

13 It's my privilege to present the Staff  
14 Recommendation to you on behalf of your staff and the  
15 efforts -- the great efforts of the folks who are  
16 sitting behind me today.

17 By way of overview, today's presentation is  
18 going to cover the Council's covered action authority  
19 and process, and Chair Fiorini summarized much of that  
20 in his opening remarks.

21 We'll provide a summary of the Staff Report  
22 that's been prepared and the draft staff -- Staff Draft  
23 Determination that's before you today.

24 And then we'll outline our analysis and the  
25 Draft Recommendation that's before you.

1 By way of summary, that Recommendation is:

2 The staff recommends that the Council conclude  
3 that substantial evidence does not exist in the record  
4 to support a finding of consistency for this Project.

5 And then staff recommends that the Council  
6 remand that matter back to the Department for  
7 reconsideration. And we'll outline the reasons behind  
8 that Staff Recommendation throughout our presentation.

9 To touch briefly on the Council's authority,  
10 this stems ultimately from the 2009 Delta Reform Act,  
11 which is the State's policy regarding how to achieve  
12 the coequal goals. And that Act through statute  
13 granted the Council certain regulatory and appellate  
14 authority over covered actions.

15 The Delta Plan is ultimately the document that  
16 presents the regulatory policies that are used to meet  
17 the objectives that the legislature said were inherent  
18 in the coequal goals.

19 And that covered action authority granted to  
20 the council from the Delta Reform Act requires State  
21 and local agencies to demonstrate consistency with  
22 Delta Plan policies when carrying out, approving or  
23 funding covered actions, and that that documentation is  
24 to occur prior to implementation.

25 Documenting consistency with the Delta Plan is

1 addressed through what's known as a Certification of  
2 Consistency. A project proponent ultimately determines  
3 if a project is a covered action, and those covered  
4 actions then require written Certification to the  
5 Council accompanied by detailed findings.

6           Once a Certification is submitted, any person  
7 who claims a covered action is inconsistent with the  
8 Delta Plan may file an appeal of that Certification  
9 within 30 days.

10           The appeal must include specific factual  
11 allegations that help to define what it is that the  
12 Council considers with regard to the appeal. And  
13 Certifications of Appeals for all covered actions are  
14 noticed and listed on the Council's website.

15           Once an appeal is received, the Council's  
16 obligated to conduct a hearing on the appeal within 60  
17 days of filing and then, following that hearing, the  
18 Council must make a decision regarding the appeal  
19 within 60 days of conduct of the hearing.

20           There are essentially two options with regard  
21 to the determination: The first being to deny the  
22 appeals, under which case the project may proceed; the  
23 second being to remand the project to the proponent for  
24 reconsideration.

25           It's important to note on appeal, failure to

1 demonstrate consistency on one policy may result in the  
2 remand.

3           During the hearing, the Department provided an  
4 extensive description of the project before us today;  
5 namely, California WaterFix. By way of summary, the  
6 WaterFix Project includes physical improvements to the  
7 State Water Project, including three new North Delta  
8 intakes, expanded South Delta intakes, and underground  
9 tunnels that connect the two.

10           The project would enable the State Water  
11 Project to operate using dual conveyance, providing  
12 diversions from the North Delta as well as option to  
13 divert from South Delta intakes under certain  
14 conditions.

15           It's important to note that the project that  
16 the Department has certified is consistent with the  
17 Delta Plan is California WaterFix as described in the  
18 2017 Final EIR/EIS approved by the Department.

19           It's worth noting that there are several other  
20 overlapping review and approval processes that are also  
21 under way. These include a Draft Supplemental  
22 Environmental Impact Report and Environmental Impact  
23 Statement analyzing proposed project refinements that  
24 is currently being processed by the Department.

25           It also includes the State Water Resource

1 Control Board hearings on the change in point of  
2 diversion for WaterFix, which is ongoing, and also  
3 includes the State Water Project contract amendments  
4 extensions. All of these are separate parts of the  
5 overall process but connected to the project.

6 But these are not part of the Certification  
7 that the Department has submitted to the Council for  
8 consideration at this time. The features of these  
9 projects generally are not considered in the  
10 Certification.

11 The Department's Certification was posted to  
12 the Council's -- I'm sorry.

13 The Certification was posted on the  
14 Department's website on July 17th and then submitted to  
15 the Council on July 27th of this year.

16 The Certification provides background and  
17 descriptive information about the project. It offers  
18 detailed findings for each Delta Plan policy and cites  
19 portion of the record that the Department offers as  
20 substantial evidence to support its Certification.  
21 And, again, the Certification is available on the  
22 Council's website.

23 The table before you identifies essentially  
24 the Department's Certification relative to each of the  
25 Delta Plan's regulatory policies.

1           There are 17 regulatory policies in the Delta  
2 Plan, technically 14, one which has four parts, thus  
3 the 17. And the Department's finding for 14 of the 17  
4 policies is that WaterFix is consistent with the  
5 relevant policy.

6           The Department's finding for three of the 17  
7 policies, as indicated in the table, is that those  
8 policies are not applicable to the California WaterFix  
9 Project.

10           Moving to the appeals.

11           We've received nine appeals -- Nine Appellants  
12 submitted timely appeals which were deemed filed on  
13 August 27th of this year.

14           The appeals included numerous challenges to  
15 the Department's Certification related to 12 of the  
16 Delta Plan policies. It included also some general  
17 CEQA and legal issues.

18           It included -- The appeals system included  
19 assertions that the Council's consideration of the  
20 Certification was premature. The appeals also included  
21 numerous requests to supplement the Department's record  
22 on the matter.

23           And all of the appeals are also available on  
24 the Council website.

25           The slide before you identifies the individual

1 parties that submitted appeals of the groups that  
2 submitted appeals and the specific Delta Plan policies  
3 that their appeals implicate.

4           We've heard a bit about substantial evidence  
5 in the opening remarks. I'd just like to remind again  
6 that the scope of the Council's review is whether the  
7 Certification is supported by substantial evidence.

8           It's important to note that substantial  
9 evidence consists of facts, reasonable assumptions  
10 based upon facts, and expert opinions supported by  
11 facts.

12           Substantial evidence does not include  
13 argument, speculation, unsubstantiated opinion, or  
14 evidence that is erroneous or inaccurate.

15           And our attorneys are available today to the  
16 Council to address any questions concerning substantial  
17 evidence as they apply to the individual policies in  
18 question.

19           It's important also to note that the Council's  
20 review and the Council's staff's analysis and findings  
21 are -- essentially occur within a fairly precise frame.  
22 That frame consists of the project that's submitted by  
23 the Department, the issues that are raised on the  
24 appeal, or appeals, and the substantial evidence in the  
25 record.

1           The Council does not independently review the  
2 project to determine if the project is consistent with  
3 the Delta Plan.

4           But the Council does determine if substantial  
5 evidence in the record supports the Department's  
6 Certification that the project is consistent with the  
7 Delta Plan, and that occurs in light of the appeals.

8           So, again, just trying to really illustrate  
9 that frame, that the analysis is based on the project  
10 as it's submitted by the Department, the issues that  
11 are raised on the appeals, and the substantial evidence  
12 in the record.

13           Concerning the record, the Department  
14 certified its record as full and complete on  
15 September 7th, 2018.

16           The record itself contains more than 26,000  
17 individual documents. And several recommended  
18 additions to the record are described in the Staff --  
19 in the Staff Draft Determination based on standards  
20 identified in the Council's administrative procedures  
21 for appeal.

22           The slide outlines -- This slide outlines the  
23 number of different types of documents that comprise  
24 the record. Suffice to say the record is remiss.  
25 Staff has not reviewed every part of every document,

1 and it is ultimately the Department's responsibility to  
2 show in the Certification what part of the record  
3 supports the Certification.

4 In turn, it's the Appellants' responsibility  
5 to describe specifically where in the record there may  
6 be a potential issue. And these, again, are the  
7 framework that we used to complete our analysis.

8 The Delta Protection Commission has a very  
9 important advisory role in Council proceedings. That  
10 advisory role stems from Public Resources Code  
11 Section 29773, which states that the Commission may  
12 review and provide comments and recommendations to the  
13 Council on projects that are within the scope of the  
14 Delta Plan, including projects that affect Delta as a  
15 place of use.

16 The Council's procedures for appeal,  
17 additionally, invite the Commission to address the  
18 Council regarding appeals during public hearings.

19 The Commission submitted comments and  
20 recommendations to the Council on October 16th of this  
21 year concerning this matter, and the Staff Draft  
22 Determination before you considers the Commission's  
23 comments and recommendations as they're related to  
24 issues that have been raised by the Council.

25 Chair Fiorini noted the hearing that occurred

1 on October 24th through 26th in this room. At that  
2 hearing, the Department, Appellants, the Commission and  
3 other persons all provided testimony to the Council  
4 concerning certification of appeals.

5 And those -- That testimony as it applies to  
6 the appeal issues under consideration is addressed in  
7 the Staff Draft Determination before you.

8 Regarding the Staff Draft Determination, the  
9 workshop that we're hosting today was noticed on  
10 October 29th of this year, and the Staff Draft  
11 Determination was released one week ago, on November  
12 the 8th.

13 The Determination -- the Draft Determination  
14 includes staff's analysis and findings regarding the  
15 appeals that are based on the record and information  
16 offered at the hearing.

17 Today's workshop is an opportunity for the  
18 Council to discuss -- or for Councilmembers to discuss  
19 and offer direction to staff regarding our recommended  
20 findings.

21 There is a public comment period open for the  
22 Staff Draft Determination that will run through noon on  
23 Monday, November 19th. And the final Council action on  
24 this matter is anticipated following a hearing in  
25 December. That hearing has yet to be noticed,

1 currently planned for the December Council meeting,  
2 which is December 20th and 21st.

3 Stepping into the Draft Findings.

4 The first -- The first matter that we'd like  
5 to address is, a number of appellants have asserted  
6 that the timing of the Department's submittal of the  
7 Certification of Consistency is premature. And much of  
8 that is based on, again, the related activities that we  
9 touched upon earlier, including the Draft Supplemental  
10 EIR/EIS on project modifications that was identi --  
11 that were identified last spring, future operations of  
12 the Central Valley Project, and Reclamation's future  
13 participation in the project, ongoing change in point  
14 of diversion hearings at the Water Board and the State  
15 Water Project contract amendments and extensions.

16 Each of these may result in future changes to  
17 the project that's before you for Certification today.

18 Staff's Recommendation regarding this matter  
19 is that staff recommends a finding that the timing of  
20 the Certification is not legally premature.

21 What staff does recommend in this matter is an  
22 early and robust consultation going forward to  
23 determine if proposed changes resulting from these or  
24 other matters would result in new covered actions that  
25 may be subject to the Certification process.

1           With regard to the individual policies and the  
2 analysis of consistency of those policies, the table  
3 before you now presents a summary of draft -- of  
4 Staff's Draft Findings concerning those matters.

5           We're presenting these in a slightly different  
6 order than is presented in the Staff Report or the --  
7 and the Determination. It's because we've essentially  
8 grouped them by outcome for ease of reference.

9           For three policies, the Staff Recommendations  
10 that we determine -- the Council determine that  
11 policies do not apply to California WaterFix. Those  
12 are indicated in this table by "NA" under the column of  
13 "Substantial evidence supports the Department's  
14 Certification."

15           For four policies, Staff's Recommendation is  
16 to deny the appeals related to those policies. Those  
17 are indicated in this table by "Yes" under the  
18 right-hand column.

19           In these cases, Appellants failed to demon --  
20 Staff's Recommendation is the finding that Appellants  
21 failed to demonstrate that the Department's  
22 Certification is not supported by substantial evidence.

23           For five policies, the Staff Recommendation is  
24 to remand the project concerning consistency with the  
25 individual policies. These are marked by "No" in the

1 right-hand column on the table before you.

2 On these issues, Staff's Recommended Finding  
3 is that the Department fails to demonstrate substantial  
4 evidence in the record to support its findings.

5 For each policy, the balance of our  
6 presentation today will summarize the content of the  
7 Department's Certification, the key issues that are  
8 raised on appeals, staff's analysis, and staff's  
9 conclusion and recommended finding, so step through  
10 three individual policies.

11 The first grouping -- And we essentially have  
12 put them in the three groups described previously on  
13 the previous slide.

14 The first group are for the policies where  
15 Staff's Draft Findings -- Recommended Findings are that  
16 the policies do not apply to California WaterFix.  
17 These include Policy WR P2, which is our policy  
18 requiring transparency in water contracting.

19 Ultimately, the Staff's Recommended Finding is  
20 that the contract amendments that are associated with  
21 WaterFix but not a part of the project before you today  
22 are outside of the Certification's project's scope but  
23 may be future covered actions and should be addressed  
24 with Council staff as they proceed.

25 The second is Policy ER P2, which is our

1 policy requiring restoration of habitats at appropriate  
2 elevations.

3           Ultimately in the Department's Certification,  
4 it's determined that it's not possible at this time to  
5 determine the elevation proposed for each restoration  
6 site that may be required as mitigation associated with  
7 the project. And for that reason, it's not possible to  
8 analyze the consistency of those sites with the policy,  
9 with the notation that future restoration activities  
10 resulting from the project may themselves be covered  
11 actions and subject to future Certifications of the  
12 Council.

13           The third of the policies that we recommend  
14 the finding that the policy does not apply is RR P1,  
15 our policy for prioritization, State investments and  
16 Delta levees and risk reduction.

17           Ultimately, this policy applies to covered  
18 actions that are discretionary State investments and  
19 flood-risk management projects. And, ultimately, the  
20 Staff's Recommended Finding is that the Proposed  
21 Project here is neither of those and, therefore, the  
22 policy does not apply to California WaterFix.

23           As we move to the second group of Staff Draft  
24 Findings, this is a group of four policies,  
25 essentially, where staff recommends that the Council

1 deny appeals because Appellants failed to demonstrate  
2 that the Department's Certification is not supported by  
3 substantial evidence.

4 On these policies, we'll walk through an  
5 individual discussion of each.

6 The first is Policy G P1(B)(1). This is a  
7 policy that requires for -- It applies to projects that  
8 are not exempt from CEQA and requires inclusion of  
9 applicable, feasible Mitigation Measures that are equal  
10 to or more effective than Mitigation Measures that are  
11 described in the Program Environmental Impact Report  
12 that was prepared for the Delta Plan upon its adoption.

13 The Department's finding with regard to this  
14 policy is that it is -- that the WaterFix Project is  
15 consistent with the policy. The Department provides a  
16 crosswalk between the WaterFix Mitigation Measures that  
17 are proposed as part of that project's Environmental  
18 Impact Report/Environmental Impact Statement and the  
19 Mitigation Measures that are proposed -- that are  
20 adopted as part of the Program Environmental Impact  
21 Report for the Delta Plan.

22 The key appeal issues included challenges  
23 to -- sort of more traditional CEQA challenges to  
24 mitigation regarding potentially mitigation being vague  
25 or unenforceable or deferred, but also included

1 challenges equal to or more effective standard  
2 described in the policy, using example measures that  
3 are pulled from the WaterFix -- the WaterFix Project  
4 EIR.

5           And it's worth noting that Mitigation Measures  
6 in this context includes Mitigation Measures included  
7 in the EIR as well as Environmental Commitments,  
8 Avoidance and Minimization Measures, and other  
9 commitments that are part of the Project Description  
10 itself.

11           The staff analysis regarding this policy is  
12 that Appellants do not identify potential example --  
13 while Proponents identify potential examples of  
14 inconsistent measures, they do not identify measures  
15 that fall short of the Delta Plan equal to or more  
16 effective standard.

17           The Department in many cases cites -- in all  
18 cases cites the enforceable Mitigation Measures in the  
19 FEIR/EIS as well as a commitment to implement those  
20 measures prior to construction.

21           For a number of these measures, the timeframe  
22 associated with the measure is that it be completed  
23 prior to construction, not necessarily that it be  
24 completed at the point in time of Certification.

25           For these reasons, our conclusion -- our

1 recommended conclusion here that the Appellants failed  
2 to demonstrate that the Certification is not supported  
3 by substantial evidence.

4 We move to the next policy. I'll ask  
5 Dr. Calloway to summarize our findings relative to that  
6 measure.

7 DR. CALLOWAY: Thank you, Jeff.

8 So, for adaptive management issues, this is  
9 Policy G P1(b) (4), and it requires that covered actions  
10 related to ecosystem restoration and water management  
11 includes adequate provisions to support adaptive  
12 management and that these adaptive management efforts  
13 are appropriate with the scope of the covered action.

14 In particular, this policy requires an  
15 Adaptive Management Plan that describes the approach to  
16 adaptive management for a covered action, and this plan  
17 must be consistent with the framework that's outlined  
18 in Appendix 1B of the Delta Plan.

19 The appendix identifies the three broad phases  
20 of adaptive management: The plan do and evaluate  
21 phases, and the more detailed nine steps that are a  
22 part of the adaptive management deal that the Council  
23 has developed.

24 Second, the policy also requires documentation  
25 of adequate resources and specific delineated authority

1 to implement the proposed adaptive management process.

2           So in their consistency document, the  
3 Department finds that it is consistent with both  
4 aspects of the Adaptive Management Policy, having an  
5 appropriate Adaptive Management Plan and adopting the  
6 resources to implement the plan.

7           As part of its detailed findings in support of  
8 this, the Department submitted a proposed Project-wide  
9 Adaptive Management Program, or PAMP, for California  
10 WaterFix.

11           And it's important to note that the PAMP  
12 includes the earlier Biological Opinion Adaptive  
13 Management Program, which you'll see referred to as the  
14 biolo -- as the BiOp AMP.

15           And, then, beyond this, the PAMP also  
16 identifies additional adaptive management efforts to  
17 address uncertainties associated with the  
18 implementation of Mitigation Measures with  
19 Environmental Commitments, and with Avoidance and  
20 Mitigation Measures, all of which are included in the  
21 Mitigation Monitoring and Reporting Program for the  
22 California WaterFix Final EIR/EIS.

23           Appellants raise issues on both aspects of the  
24 Adaptive Management Policy, providing a plan as well as  
25 documentation of adequate resources.

1           In evaluating these claims, the staff found  
2 that, for the first issue, the consistency with the  
3 appendix and a framework for adaptive management,  
4 Appellants raise a number of general issues, but these  
5 claims are not tied to specific policy requirements  
6 regarding adaptive management.

7           So, as an example, multiple Appellants raise  
8 issues regarding the lack of enforceable triggers or  
9 criteria for adaptive management and that these are not  
10 included in the plan. However, there are no  
11 requirements in Appendix A1 (sic), the framework for  
12 those specific components of the Adaptive Management  
13 Plan.

14           Appellants also raise issues around the  
15 deficiencies identified in the Adaptive Management  
16 Program for the Biological Opinions. However, these  
17 issues that are raised around the BiOp AMP are  
18 addressing the subsequent PAMP and so those really are  
19 covered.

20           Applicants -- Appellants also raise questions  
21 whether adequate resources were identified for the  
22 Adaptive Management Program.

23           In evaluating the record, staff found that the  
24 Department has provided substantial evidence that does  
25 document that adequate resources and delineated

1 authority are provided.

2 So, given this, and the analysis of the  
3 policy, the staff recommends that the Appellants fail  
4 to demonstrate the Certification is not supported by  
5 substantial evidence.

6 MR. HENDERSON: Thank you.

7 I'll now turn to Dan Constable to summarize  
8 our Recommended Findings concerning the separate  
9 policies addressed in the ecosystem restoration.

10 MR. CONSTABLE: Thank you, Jeff.

11 Good morning.

12 Policy ER P3 requires Projects to avoid or  
13 mitigate significant adverse impacts to the opportunity  
14 to restore habitat and establish habitat restoration  
15 areas which are described in the Delta Plan.

16 The Department's finding is that it was  
17 consistent with this policy.

18 Appellants assert the evidence does not  
19 support the Department based on three primary areas:

20 First, that infrastructure and construction  
21 will contaminate habitat and the construction period  
22 will limit restoration opportunities.

23 Secondly, that the Mitigation Measures  
24 proposed rely on future plans that are yet to be  
25 developed.

1           And, lastly, because the Project will reduce  
2 freshwater flows through the Delta and that this, in  
3 turn, would negatively impact restoration  
4 opportunities.

5           Staff's analysis is that the Department cites  
6 to evidence in the record that supports this finding.  
7 Specifically, the Department describes how concrete  
8 batch plants and fuel stations will be temporary and  
9 will be reviewed.

10           It describes performance standards that will  
11 be developed for future plans, and it also describes or  
12 notes that Appellants do not cite the detailed findings  
13 explaining how the project would preclude restoration  
14 opportunities. For example, due to the alleged  
15 reduction in fresh water flows.

16           And for these reasons, our recommendation is  
17 that the Appellants fairly demonstrate the Department  
18 Certification is not supported by substantial evidence.

19           Next, I'd like to go through Policy ER P5.

20           This policy requires reductions of or include  
21 habitat conditions for nonnative invasive species to be  
22 considered and avoided or mitigated.

23           The Department finds that they are consistent  
24 with this policy and cites to evidence in the Final  
25 EIR/EIS and enforceable mitigation measures and other

1 actions in the program that it addresses.

2 The Appellant on this policy asserts that  
3 construction is likely to introduce or disburse  
4 invasive species and that the mitigation proposed is  
5 insufficient or misplaced.

6 The staff note that the Department does  
7 acknowledge potential opening of habitat to invasive  
8 species. However, the Department also cites to  
9 enforceable measures that are supported by substantial  
10 evidence in the record.

11 In addition, for some assertions, the  
12 Appellant makes only general claims that are not tied  
13 to ER P5's requirements.

14 And for these reasons, staff recommended  
15 termination, that the Appellant fails to demonstrate  
16 the Department's Certification is not supported by  
17 substantial evidence.

18 MR. HENDERSON: Thank you, Dan.

19 So we'll now move to the third group of Staff  
20 Draft Findings related to the policies.

21 This is a group of five policies that form  
22 ultimately the basis of the Staff Recommendation to  
23 remand the project.

24 And this is a group of findings for which the  
25 recommended finding is that the Department fails to

1 demonstrate substantial evidence in the record to  
2 support its finding of concern in the Certification.

3 And we'll begin with Dr. Calloway summarizing  
4 our findings relative to best-available science.

5 DR. CALLOWAY: Great.

6 So, with regard to best-available science  
7 issues, the Delta Plan requires that all covered  
8 actions must document the use of best-available  
9 science.

10 This requirement is expanded upon in  
11 Appendix 1A of the Delta Plan, which identifies the six  
12 criteria that are used to evaluate best-available  
13 science and that are illustrated here on the slide.  
14 These criteria are also summarized on the next slide.

15 So, in their Certification of Consistency, the  
16 Department stated that the project is consistent with  
17 all of these six criteria that are required for  
18 best-available science.

19 Related to relevance, they identify that they  
20 use a wide range of sources that are germane to the  
21 Delta ecosystem and the physical and biological  
22 components of interest.

23 In terms of inclusiveness, they -- these  
24 sources came from a wide range of disciplines.

25 For objectivity, they used non-biased

1 analyses.

2 In terms of transparency and openness, they  
3 incorporate a public review and input.

4 For timeliness, they identified that they used  
5 up-to-date information in their evaluation of the  
6 project.

7 And for peer review, they used peer-reviewed  
8 literature and processes throughout.

9 Six Appellants raise a number of issues  
10 regarding best-available science, and we've organized  
11 those -- these appeals into four major areas that are  
12 identified here on this slide, along with the specific  
13 criteria for best-available science that were raised in  
14 each of these issues, and that's shown in bold on the  
15 right side of the slide.

16 In terms of modeling claims, these focus on  
17 the adequacy of the modeling analysis that's completed,  
18 primarily considering hydrologic and water quality  
19 modeling.

20 There were broad issues that were raised  
21 regarding missing content within the Final EIR. The  
22 Appellants claim that the information that was  
23 considered was not inclusive or had some bias.

24 Questions were also raised regarding the  
25 impact analysis that was completed for harmful algae

1 and Microcystis, for salinity effects on agriculture,  
2 for impacts to Sandhill Cranes, and impacts to air  
3 quality.

4 And then, finally, questions were raised  
5 regarding the approach that was used to evaluate future  
6 sea-level rise projection, focusing on the lack of  
7 incorporation of more recent science regarding  
8 sea-level rise or the timeliness of the science that  
9 was used.

10 So, for the first three issues, staff analysis  
11 concluded that the Appellants' claims were not  
12 supported by the record.

13 In terms of the modeling issues, Appellants  
14 questioned the hydrologic models that were used;  
15 namely, CalSim II and DSM-2. But no better  
16 alternatives were identified by the Appellants, and the  
17 Department provides evidence in the record to support  
18 that these are best-available science.

19 In terms of missing content, the issues that  
20 were raised were broad and lack specific information  
21 relating to issues of the particular criteria that are  
22 used to evaluate best-available science.

23 So given this lack of specificity, there's no  
24 basis for the staff to evaluate the issues that are  
25 raised and these appeals are not supported.

1           And, similarly, for the adequacy of impacts  
2 analysis, a clear link to the best-available science  
3 policy is not supported in the appeals. Furthermore,  
4 the Department cites to the record showing analysis of  
5 impacts that have been performed using appropriate  
6 methods and best-available science.

7           So, as I mentioned for each of those cases,  
8 the staff concluded Appellants' claims are not  
9 supported by the record.

10           For the last issue, in the case of sea-level  
11 rise, the appeal was raised that the Department did not  
12 consider current recommendations for future sea-level  
13 rise projections and, therefore, did not consider  
14 timely and appropriate science.

15           In particular, the Department's sea-level rise  
16 modeling does not consider higher rates of sea-level  
17 rise over longer time horizons, approaches that are  
18 appropriate for high-risk scenarios, as recommended in  
19 reports by NOAA in 2012 and by the California Ocean  
20 Protection Council earlier this year.

21           Rather, the sea-level rise scenarios that were  
22 considered would be appropriate for low-risk projects  
23 like a coastal trail but are not appropriate for  
24 infrastructure with a long life cycle.

25           While the Department indicated at the hearing

1 last month that sensitivity analysis had been completed  
2 to consider higher-risk scenarios, staff at the Council  
3 could not find evidence in the record for modeling or  
4 sensitivity analyses that were -- that considered these  
5 higher-risk scenarios beyond 2060.

6 So, as indicated on the slide, based on the  
7 issues of timeliness for sea-level rise projections,  
8 staff recommends that the Department's Certification  
9 that its sea-level rise modeling reflects the  
10 best-avail -- the best-available science is not  
11 supported by substantial evidence in the record.

12 MR. HENDERSON: All right. Thank you.

13 We'll now turn to Ryan Stanbra to summarize  
14 our approach to Policy WR P1.

15 MR. STANBRA: Thank you, Jeff.

16 WR P1, the reduced reliance policy, states  
17 that Delta waters shall not be exported, transferred or  
18 used if all of the following conditions apply:

19 The project would have a significant adverse  
20 environmental impact in the Delta.

21 One or more water suppliers that would receive  
22 water from the project has failed to contribute to  
23 reduced reliance as demonstrated through Urban or  
24 Agricultural Water Management Plans that include  
25 quantitative data demonstrating a measurable reduction.

1           And, finally, the failure by at least one  
2 water supplier to reduce reliance has caused the need  
3 for the project.

4           If one or more of these conditions are not  
5 applicable, the project is consistent with WR P1.

6           For the purposes of this policy, staff  
7 analyzed three aspects.

8           The first: Does WR P1 apply to this project?

9           The second: Does substantial evidence support  
10 the Department's finding of consistency with WR P1?

11           And, third: If substantial evidence is found  
12 to be lacking in support of the Department's finding,  
13 is the project nevertheless consistent with the coequal  
14 goals under Policy G P1(B)(1).

15           Turning to the first issue: Does WR P1 apply  
16 to this project?

17           In its Certification, the Department states  
18 that WR P1 only applies to a new water export, transfer  
19 or in-Delta water use project. Therefore, the  
20 Department contends that since California WaterFix does  
21 not propose new exports and would instead amend  
22 existing water rights to the three new Points of  
23 Diversion, WR P1 could be interpreted as not applicable  
24 to the project.

25           Multiple Appellants, however, dispute the

1 Department's assertion, stating that such an  
2 interpretation would not reduce the current reliance of  
3 water suppliers on the Delta.

4 Council staff finds that nothing in WR P1  
5 suggests that the application of the policy should be  
6 limited to a new or expanded water right. Therefore,  
7 staff recommends that WR P1 applies to California  
8 WaterFix.

9 Moving on to the first component of WR P1 and  
10 whether the project would have a significant adverse  
11 environmental impact on the Delta.

12 In its Certification, the Department contends  
13 that the project would not have such an impact, citing  
14 that there would be no significant change in the amount  
15 of water exported from the Delta.

16 However, in its responses to hearing  
17 questions, the Department does acknowledge that  
18 criterion for A3 has been met.

19 Appellants challenge the Department's initial  
20 contention that the project would not have a  
21 significant impact and take issue with not only the  
22 Department's export projections but also the  
23 Department's conclusion that the amount of water  
24 exported would ensure that the project would not have a  
25 significant impact on the Delta.

1 Council staff is recommending that A3 does  
2 apply to this project as substantiated by the  
3 Department's response to the hearing questions in  
4 October.

5 The second component to consider is the  
6 reduced reliance provision and whether one or more  
7 water suppliers receiving water as a result of this  
8 project has failed to reduce reliance on the Delta.

9 In its Certification, the Department provides  
10 extensive information for some water suppliers as well  
11 as a qualitative explanation for how some agricultural  
12 water suppliers have reduced reliance.

13 The Department also recognizes partial  
14 compliance with this particular policy component,  
15 stating that certain aspects of the reduced reliance  
16 provision, such as the implementation of actions noted  
17 in Water Management Plans, and quantifying measurable  
18 reductions in plans, is neither feasible nor required.

19 In other words, the Department contends that  
20 the three elements of the reduced reliance provision in  
21 C1, which is in the lower left-hand side of the slide,  
22 are but one way to demonstrate reduced reliance.

23 Multiple Appellants note that strict  
24 interpretation of the policy is required and emphasized  
25 that WR P1 requires all water suppliers to have done

1 all of the elements required under C1.

2 Council staff interprets the reduced reliance  
3 provision and its associated elements as required.  
4 WR P1 in staff's view does not provide for an  
5 alternative pathway for demonstrating reduced reliance,  
6 nor does it allow for partial compliance.

7 Therefore, the Department's information is  
8 incomplete and lacks the quantitative elements  
9 necessary to substantiate reduced reliance.

10 As a result, Council staff is recommending  
11 that A1, the reduced reliance provision, is applicable  
12 to the project.

13 The third and final component of WR P1 to  
14 consider is whether the failure to reduce reliance by  
15 one or more water supplier significantly caused the  
16 need for the project.

17 The Department contends that the need for the  
18 project was not significantly caused by the failure to  
19 adequately reduce reliance.

20 Instead, the Department asserts that the need  
21 for the project was caused by factors that predate and  
22 exist independently of the reduced reliance policy,  
23 such as the decline of fish populations in the Delta,  
24 leading to reduced pumping and less reliable water  
25 deliveries.

1 Appellants dispute this conclusion stating  
2 that the need for the project is directly the result of  
3 a failure to reduce reliance by one or more water  
4 suppliers.

5 The Council Staff Recommendation is that,  
6 absent complete and quantitative data required in the  
7 reduced reliance provision A1, which we previously  
8 discussed, the Department cannot properly analyze  
9 whether the failure to reduce reliance caused the need  
10 for the project. As a result, Council staff recommends  
11 that A2 is also applicable to this project.

12 So, in conclusion, Council staff finds that,  
13 based upon substantial evidence in the record, the  
14 project meets the criterion of all three provisions in  
15 WR P1 and, therefore, the Department's finding of  
16 consistency with WR P1 is not supported.

17 And since the Staff Recommendation is that the  
18 project's consistency with WR P1 is not supported,  
19 staff further assessed whether the project is  
20 nevertheless consistent overall with the coequal goals.

21 Recognizing that full consistency with all  
22 Delta Plan regulatory policies may not always be  
23 possible, the Delta Plan includes Policy G P1(B)(1)  
24 which enables the project Proponents to be inconsistent  
25 with a specific policy but, on the whole, consistent

1 with the coequal goals.

2           Such a determination requires explanation as  
3 to why consistency is not feasible and how the project  
4 nevertheless is consistent with the coequal goals.

5           At the October hearing, the Department stated  
6 that it was invoking G P1(b) (1) for Policies DP P1 and  
7 WR P1.

8           For WR P1, the Department does not contend  
9 that reducing actual reliance is infeasible but,  
10 rather, that demonstrated reduced reliance in the  
11 manner required by the reduced reliance provision is  
12 infeasible for three reasons.

13           First, the Department contends that compliance  
14 with the reduced reliance provision is infeasible  
15 because water management planning laws do not require  
16 water suppliers to include reduced reliance elements.

17           The second point the Department raises with  
18 regards to infeasibility is the Department's lack of  
19 legal authority to require water suppliers to include  
20 quantitative data illustrating reduced reliance in  
21 their Water Management Plans.

22           Finally, the third point that the Department  
23 raises is that the quantitative data required under the  
24 reduced reliance provision is not required to be  
25 included in the 2015 Water Plans. Therefore,

1 information does not exist in the format required by  
2 WR P1.

3 In response, Appellants contend that the lack  
4 of statutory requirement does not prohibit water  
5 supplies from including the required information in  
6 WR P1. The lack of the Department's authority does not  
7 excuse water suppliers from providing the required  
8 information. And while compiling the data required  
9 under the reduced reliance provision in the manner  
10 necessary may not require significant time and effort,  
11 that alone does not demonstrate infeasibility of the  
12 project complying with WR P1.

13 For the reasons stated by the Appellants,  
14 Council Staff's Recommendation is that the Department  
15 has failed to identify or consistency with WR P1 is not  
16 feasible.

17 And, as a result, it's also the Staff's  
18 Recommendation that the Council need not consider  
19 whether the project is consistent overall with the  
20 coequal goals.

21 MR. HENDERSON: Thank you.

22 We'll now turn to Dan Constable to summarize  
23 our approach to Delta flow objectives.

24  
25

1 MR. CONSTABLE: Thank you, Jeff.

2 Turn to Policy ER P1.

3 This policy requires demonstration of  
4 consistency with the State Water Resources Control  
5 Board, Bay Delta Water Quality Control Plan as  
6 described in Water Rights Decision 1641, which is also  
7 referred to as D-1641.

8 The Department finds that they are consistent  
9 with ER P1 in light of two broad areas of evidence to  
10 support its finding.

11 First, modeling of future operations; and,  
12 secondly, historical compliance with D-1641 and its  
13 predecessor, D-1485.

14 Appellants raise a number of assertions on  
15 these same two areas.

16 For modeling, Appellants assert the Department  
17 must model compliance using different criteria for the  
18 export/inflow ratio that is required by D-1641.

19 In addition, Appellants also assert  
20 inconsistency of a range of additional issues, such as:  
21 How Rio Vista flows are considered in modeling;  
22 operation of the Delta Cross Channel, or DCC; how  
23 models have been downscaled in some instances in  
24 compliance with D-1641 if the Delta should experience  
25 widespread levee failure.

1           For historical rates of compliance, Appellants  
2 assert that the calculation of the compliance rate  
3 include periods of relaxed -- permanent relaxed  
4 standards between Temporary Urgency Change Petition, or  
5 TUCP, was in effect, and that the compliance rate is  
6 calculated by combining different compliance locations  
7 in multiple years.

8           Staff's analysis of modeling claim operations  
9 in areas raised by Appellants which focuses on evidence  
10 related to export/inflow ratio.

11           D-1641 requires a specific ratio between  
12 exports from and inflows to the Delta and specifies  
13 where these must be measured.

14           As defined under D-1641, inflow is calculated  
15 based on a number of inflow locations, including at  
16 Freeport on the Sacramento River, which is shown in red  
17 on the circle here in the slide.

18           This is upstream of the proposed work Delta  
19 diversions and locations where the Department has  
20 modeled inflow downstream, and the diversions are shown  
21 here in the darker circle on the slide.

22           Similarly, D-1641 also defines how exports  
23 must be calculated as a combination of inflows in the  
24 Clifton Court Forebay and exports from the Tracy  
25 Pumping Plant.

1           We also note the Department cites its  
2 sensitivity analysis for modeling the effect of using  
3 different compliance point locations. However, the  
4 scenario cited to is not for the exact operations  
5 proposed for WaterFix and does not show the effect on  
6 other standards beyond the export/inflow ratio.

7           So the evidence on its own does not  
8 alternatively support the Department's findings for the  
9 export/inflow locations.

10           Lastly on this issue, the Department describes  
11 why it has selected alternate compliance points.  
12 However, regardless of their justification, Council  
13 staff cannot speculate as to locations of potential  
14 future compliance points that may be changed by the  
15 Water Board. Rather, they are limited to the  
16 definitions as currently described in D-1641.

17           For a number of other assertions that I  
18 mentioned on the previous slide, such as the goal of  
19 Reclamation or operation of the Delta Cross Channel,  
20 the Department does cite to evidence that supports its  
21 finding. These are further described in the Draft  
22 Determination.

23           Turning to the historical record, staff  
24 considered evidence cited to by the Department in its  
25 finding that it can avoid future exceedances in

1 real-time operations.

2 Appellants assert, and staff noted, that the  
3 reported compliance rate includes periods of permanent  
4 relaxed standards, such as when Temporary Urgency  
5 Change Petition, or TUCP, was granted.

6 While TUCPs are allowed under Water Code,  
7 citing to evidence that the Department can comply with  
8 the standards in TUCPs does not necessarily support an  
9 ability to comply with D-1641.

10 Secondly, the compliance rate is based on an  
11 approach that counts as days of compliance any day in  
12 which water quality met one of the applicable standards  
13 on that day.

14 However, this does not equate to evidence of  
15 compliance of D-1641 on its own. For example, if there  
16 were 10 standards in effect on a different day, and  
17 nine were met, this could be considered as 90 percent  
18 of timely compliance.

19 However, on the evidence presented, Stockton  
20 maintains a similar compliance rate may have been nine  
21 different days of compliance or a single day with nine  
22 standards in compliance.

23 So, based on the above points, staff's  
24 analysis is that the evidence cited to you by the  
25 Department does not support its finding with regards to

1 modeling, reliance, and the determination of historical  
2 record and, therefore, our recommendation is that the  
3 Department fails to support its findings with  
4 substantial evidence.

5 MR. HENDERSON: Thank you.

6 I'll now summarize staff's analysis relative  
7 to Policy DP P2, a policy to respect local land use  
8 when siting water or flood facilities in restoring  
9 habitats.

10 This policy essentially requires the water  
11 management facilities must be sited to avoid or reduce  
12 conflicts with existing uses in City and County General  
13 Plans when feasible, considering comments from local  
14 agencies and the Delta Protection Commission.

15 The Department's finding relative to this  
16 policy is that WaterFix project is consistent with  
17 Policy DP P2.

18 Six parties appealed that Consistency  
19 Determination, identifying 11 issues related to the  
20 Certification of Consistency.

21 I'll note a great deal of the determination is  
22 devoted to these issues.

23 I'll ask those following along in the  
24 presentation to go ahead and skip forward to Slide  
25 Number 14. There's simply an additional slide in the

1 packet that's not in the presentation.

2 (Pause in proceedings.)

3 MR. HENDERSON: I want to highlight some  
4 distinctions between CEQA and Policy DP P2.

5 Ultimately, CEQA requirements, many parts --  
6 Ultimately, many parts of our regulatory process are  
7 extensions of the California Environmental Quality Act.  
8 As a result, considerable portions of the Certification  
9 and the record rely on CEQA and the Department's  
10 Environmental Impact Report/Environmental Impact  
11 Statement for California WaterFix.

12 There are several ways in which the  
13 requirements for CEQA are different than those for  
14 Policy DP P2.

15 State agencies are not normally subject to  
16 local land use regulations. However, Delta Plan  
17 regulations, including DP P2, apply to State agencies.

18 Specifically, DP P2 applies to siting water  
19 management facilities, ecosystem restoration, and flood  
20 management infrastructure, and requires siting to avoid  
21 or reduce land use conflicts when feasible.

22 In CEQA, land use conflict is not necessarily  
23 an environmental impact. And social and economic  
24 impacts must have significant environmental and  
25 physical effects to be considered.

1 DP P2 is different from CEQA in that it  
2 focuses on existing and planned land use conflicts,  
3 which is a concept that is fundamentally different from  
4 environmental physical impact.

5 In CEQA, significant environmental physical  
6 impacts must be mitigated, to the extent feasible, and  
7 significant and unavoidable impacts may remain after  
8 litigation.

9 DP P2 requires that conflicts be avoided or  
10 reduced when feasible, considering comments from local  
11 agencies and the Commission.

12 This means that, for DP P2, our drafted  
13 findings are based on substantial evidence as it  
14 relates to whether the conflicts were avoided or  
15 reduced when feasible.

16 These distinctions are acknowledged by the  
17 Department during the October hearing and supported by  
18 comments from the Commission.

19 In summary, DP P2 offers enhanced protections  
20 and considerations for Delta land uses and communities  
21 for facility siting and the resulting effects.

22 11 issues, as I indicated previously, were  
23 identified by the appeals, including conflicts with  
24 local Land Use Plans, conflicts with existing Delta  
25 communities, a range of environmental effects resulting

1 from land use conflicts, and indicated here by (c)  
2 through (j) in particular, and consideration of  
3 comments from Reclamation Districts.

4 For five of these issues, the Staff's  
5 Recommendation is to deny the appeals based on  
6 Appellants failing to demonstrate the Department's  
7 Certification is not supported by substantial evidence.

8 For six of these issues, Staff's  
9 Recommendation is to remand the project. And in these  
10 cases, the Department fails to demonstrate substantial  
11 evidence in the record to support the findings.

12 And, again, as with the previous table, those  
13 items we're recommending denying appeal is indicating  
14 by "Yes" and those items where we're recommending  
15 remanding the project are identified by "No."

16 For five topics, the record supports --  
17 staff's finding is the record supports the Department's  
18 Certification for DP P2.

19 Given the importance and the nuance of our  
20 findings relating to agricultural impacts, I'd like to  
21 highlight our recommend findings on that matter.

22 The evidence shows -- The evidence in the  
23 record shows how the Mitigation Measures and  
24 commitments that the Department identifies would reduce  
25 or avoid conflicts with agricultural uses.

1           These include such things as the reduction of  
2 the overall footprint to the agricultural conversion of  
3 the project through refinements over the years as  
4 alleged in the current project before the Council.

5           And for agricultural conflicts that are  
6 unavoidable, the Mitigation and Monitoring and  
7 Reporting Program identifies an Agricultural Land  
8 Stewardship Plan Program.

9           The Agriculture Land Stewardship Plans would  
10 be developed between the Project Proponents, so the  
11 Department, and landowners, and would involve local and  
12 regional interests, including local governments and  
13 potentially the Commission and Council to further  
14 reduce or avoid potential conflicts.

15           These are essentially voluntary agreements.

16           If an ALSP with a landowner and the other  
17 parties cannot be reached for some reason, if the  
18 consensus around that cannot be reached, traditional  
19 one-to-one land mitigation through agricultural  
20 conservation easements is required by the mitigation if  
21 it's feasible.

22           Ultimately, our finding is that the ALSPs are  
23 a preferred approach or -- or a stronger approach to  
24 the traditional one-on-one mitigation associated with  
25 that land conversion given the unique constraints

1 within the Delta on the availability of land suitable  
2 for conservation easements.

3 And it also allows for specific  
4 characteristics of individual properties that can be  
5 affected to be taken into account.

6 This -- We do, though, want to contrast with  
7 our findings regarding the socioeconomic impacts of  
8 lost agricultural production on Delta communities. On  
9 that matter, Staff's Recommended Findings do not  
10 support that.

11 For six issues, the record -- You'll recall  
12 that previous comments on the DP P2 focuses on  
13 conflicts with Land Use Plans and existing uses which  
14 are created at times by CEQA impacts as well as other  
15 factors.

16 For six issues, the record does not support  
17 the finding that the Department reaches regarding  
18 consistency with Policy DP P2.

19 For non-CEQA conflicts, reduction and  
20 avoidance measures generally are not proposed. And no  
21 evidence is cited that provides detailed information  
22 about the proposed Community Benefits Fund, including  
23 that it constitutes an enforceable commitment.

24 Working through the Community Benefits Fund  
25 with local partners, making it an enforceable

1 commitment creating a nexus between the fund and the  
2 land use and economic impacts, can improve the  
3 project's posture relative to Policy DP P2.

4 For CEQA impacts, the Department has failed --  
5 For several CEQA impacts, the Department has failed to  
6 identify mitigation measures to reduce significant and  
7 unavoidable impacts resulting from land use conflicts  
8 when feasible.

9 As an example, project noise from pile driving  
10 and other construction activities was discussed at  
11 length during the October hearing. And while  
12 implementation of Mitigation Measures proposed --  
13 adopted by the Department could include maximizing the  
14 use of alternative, less impactful techniques, to the  
15 extent to which those alternative techniques are  
16 feasible is to be determined with secondary evaluations  
17 to be completed at a later stage of design.

18 Our Recommended Findings on this conclude:

19 That the Department lacks the information  
20 necessary to demonstrate feasibility;

21 That no remedy for noise in excess of  
22 established standards is provided by the proposed  
23 Mitigation Measure associated with pile driving in the  
24 event that alternative pile-driving techniques are not  
25 feasible;

1           And no performance standards or criteria for  
2 selecting alternative pile-driving techniques are  
3 proposed.

4           For those reasons, and similar -- similar  
5 analysis supports our findings related to the other  
6 existing use impacts or conflicts identified here. For  
7 these reasons, the Department fails -- our finding --  
8 Recommended Finding is that the Department fails to  
9 demonstrate substantial evidence in the record to  
10 support its findings.

11           Returning in summary, then, to Policy  
12 G P1(B) (1), this is the policy regarding overall  
13 consistency with the coequal goals.

14           This policy requires that a covered action be  
15 consistent with each of the planned policy implements.  
16 It recognizes that, in some cases, full consistency  
17 with all policies may not be feasible.

18           And in those cases, the project proponent may  
19 nevertheless determine that the covered action is  
20 consistent with the coequal goals but must identify  
21 areas where consistency is infeasible.

22           The Department's Certification asserts  
23 infeasibility as an alternative approach for  
24 consistency for numerous policies. And, as Mr. Stanbra  
25 indicated earlier, at the October hearing, the

1 Department clarified its intent to invoke G P1(b) (1)  
2 for Policies DP P1 and WR P1.

3 With regard to Policy DP P1, which is the  
4 Council's policy to locate and view urban development  
5 wisely, no appeal has asserted inconsistency with that  
6 policy, so our recommendation is that the Council find  
7 it not applicable.

8 And as stated previously by Mr. Stanbra for  
9 Policy WR P1, the record does not support a finding of  
10 infeasibility for numerous reasons.

11 So, in conclusion, the Staff's Recommendation  
12 is that the Department fails to demonstrate substantial  
13 evidence in the record to support its findings  
14 regarding Policy G P1(B) (1) for overall consistency.

15 So, in conclusion, Staff's Recommendation is  
16 that the Council find the Department fails to  
17 demonstrate consistency for Policy G P1(b) (3), Policy  
18 WR P1, Policy ER P1, Policy DP P2 and Policy  
19 G P1(B) (1).

20 As a result, staff recommends that the Council  
21 remand the matter to the Department for reconsideration  
22 pursuant to Water Code Section 85225.3.

23 That concludes our staff presentation and your  
24 staff team is happy and available to respond to  
25 questions at this time.

1 CHAIR FIORINI: Thank you, Jeff.  
2 Councilmembers, any questions of staff at this  
3 time?

4 (No response.)

5 CHAIR FIORINI: Okay. We need to take a  
6 15-minute break sometime this morning. I think this is  
7 the most appropriate time to do it.

8 We'll give the court reporter a rest before we  
9 begin hearing from presenters, starting with the  
10 Department of Water Resources.

11 So it's now approximately 10:13. We'll  
12 reconvene at 10:30.

13 Thank you.

14 (Recess taken at 10:13 a.m.)

15 (Proceedings resumed at 10:32 a.m.:)

16 CHAIR FIORINI: Okay. Welcome back. We are  
17 ready to reconvene.

18 One -- One correction that I want to offer:

19 In regards to staff presentation, on Slide 15  
20 of the PowerPoint, it was indicated that comment period  
21 would extend through noon on Monday, November 19th.

22 The comment period will extend till 5 p.m. on  
23 Monday, the 19th.

24 Just to clarify: You just gained five more  
25 hours for public comment.

1           We will now begin with the presentations,  
2 hearing first from the Department of Water Resources,  
3 who has 15 minutes.

4           MR. BOGDAN: Good morning. My name is Ken  
5 Bogdan and I'm here representing Department of Water  
6 Resources.

7           First, I'd -- I'd like to acknowledge staff's  
8 effort in going through the mountain of information  
9 that was submitted both for the record supporting DWR's  
10 Certification of Consistency as well as the nine  
11 appeals. It's a lot of work in a short amount of time,  
12 and I appreciate that effort that staff went through.

13           What we're going to focus on today is some  
14 information hopefully to add clarity to the issues that  
15 the staff has raised related to the Certification of  
16 Consistency for DWR.

17           I'm sorry. I don't have the control for  
18 the . . .

19           (Remote control handed to counsel.)

20           MR. BOGDAN: Thank you.

21           And, first, I'd like to touch on the -- the  
22 foundational component, of course, of the Council's  
23 review of the Certification of Consistency and whether  
24 DWR presented substantial evidence as part of our  
25 record to support the detailed findings related to the

1 Certification of Consistency.

2 As staff's determination points out, that --  
3 that is -- includes enough relevant information and  
4 reasonable inferences so that a fair argument may be  
5 made to support DWR's conclusion, even though other  
6 conclusions may also be reached.

7 This, of course, does not mean staff is  
8 reviewing specifically for errors or not submitting --  
9 substituting their own findings for that of DWR.

10 DWR is going to focus on the four major  
11 components that were outlined by staff previously  
12 related to where staff recommended granting the appeals  
13 and remanding related to DWR's Certification of  
14 Consistency.

15 Best-available science as it relates to the  
16 climate change and sea-level rise, the reduced reliance  
17 requirement associated with the water suppliers, as  
18 well as the G P1 component related to the feasibility  
19 of meeting those requirements and showing that WaterFix  
20 on the whole was consistent with the coequal goals.

21 We'll discuss the Delta flow objectives, of  
22 course, related to the E/I ratio, and also the M&I  
23 Chloride standard that staff also focused on.

24 And then -- And discussing DP P2 related to  
25 the local land use conflicts when citing water

1 facilities.

2           So, first -- Oh, and I should offer a couple  
3 things.

4           One, we submitted yesterday a detailed  
5 writing -- in writing a detailed discussion of all of  
6 these components. It was circulated to the Listserv  
7 last night.

8           We had attempted to get it out as quickly as  
9 possible for today's hearing and wanted to do it  
10 certainly before Monday.

11           So, I'm not going to go into detail of each of  
12 those elements, but I certainly refer to you to look at  
13 that -- those detailed discussions there.

14           Also, when we are answering questions, or if  
15 you have questions, we have some of the experts that  
16 put together a lot of the record that DWR utilized to  
17 support our Certification of Consistency. We have them  
18 here. And I'm happy to have them come up and explain  
19 what's in the record supporting our decisions related  
20 to these issues.

21           So, when there are questions and answers, I  
22 might be calling on a few people to help discuss the  
23 record.

24           So, first, best-available science. DWR -- Or,  
25 I should say, staff said that DWR should have followed

1 the NOAA and the OPC recommendations related to  
2 infrastructure design and projecting to the year 2100  
3 for analyzing sea-level rise.

4 Staff appears to have mixed that standard  
5 which relates to risk and policy recommendations for  
6 infrastructure design with what should be  
7 best-available science for modeling -- hydrologic  
8 modeling in preparing an impact analysis. Two  
9 different things.

10 The NOAA/OPC policy recommendation is not a  
11 scientific standard for modeling purposes but, instead,  
12 again, policy recommendations related to the design of  
13 long-term infrastructure.

14 We should note that DWR and WaterFix design is  
15 consistent with NOAA and OPC's recommendations in  
16 designing WaterFix and the intakes associated with it  
17 and the infrastructure, incorporating a 200-year flood  
18 event, 55 inches at the Golden Gate.

19 So, in the design of WaterFix which these  
20 standards, if you will -- well, not standards but these  
21 recommendations were mentioned is one component.

22 The other component: How does this fit into  
23 the hydrologic modeling to perform an impact analysis,  
24 which is a different question.

25 And that question, our experts looked at the

1 variety of input from a number of sources, including  
2 the NOAA/OPC to determine what was the appropriate  
3 method of analyzing impacts, not projecting so far in  
4 the future that the impacts would be wholly  
5 speculative.

6 And going out, one could argue that 2100 might  
7 do that. But, instead, looking within a range of  
8 estimates for analyzing the potential resource effects.

9 So, our experts -- We believe we have  
10 information on the record, substantial evidence, that  
11 our experts supported using the appropriate climate  
12 change assumptions related to the hydrologic modeling.

13 Focusing on reduced reliance, the staff  
14 determination applied their interpretation of WR P1 to  
15 basically determine that it mandates that the Urban and  
16 Ag Water Management Plans contain the information  
17 related to Subsection (c) -- excuse me -- (c) (1) (A)  
18 through (C).

19 Staff determined that, absent compliance with  
20 those components, that DWR/WaterFix could not then move  
21 to the issue of whether WaterFix and the lack of  
22 showing of this information significantly caused the  
23 project to be proposed.

24 And, then, separate from that, the staff had  
25 mentioned that -- or had found that DWR would not be

1 able to show that WaterFix on the whole was consistent  
2 with the coequal goals, the whole reason for the Delta  
3 Reform Act, the acknowledgment in the Delta Reform Act  
4 that BDCP, with this conveyance component, was, one  
5 could argue, critical to the -- meeting the coequal  
6 goals. We couldn't demonstrate that because we had not  
7 demonstrated that it was infeasible to meet the reduced  
8 reliance component.

9 So I'll go through those elements.

10 As staff acknowledged, that (a)(1), (a)(2) and  
11 (a)(3) all act independently in whether the WaterFix  
12 was consistent, will, as a side note, acknowledge that,  
13 although Appendix G is guidance, it is not a regulation  
14 that requires that we follow that.

15 The Certification includes substantial  
16 evidence showing that reduced reliance on the Delta for  
17 urban and ag Water Contractors was present.

18 The requirement is not to follow explicitly  
19 what is delineated in (c)(1)(A) through (C). The  
20 policy says "must show it is consistent with." That's  
21 the words they used. They don't say "you must  
22 explicitly follow." It says "you must be consistent  
23 with these requirements."

24 DWR created a record that shows we are  
25 consistent with the components related to this. We

1 don't follow them explicitly. We don't -- aren't able  
2 to show that each of the Urban Water Management Plans  
3 and Ag Water Management Plans have a component that  
4 analyzes in specificity related to (c)(1)(A) through  
5 (C) but, instead, create a record with what we feel is  
6 extensive information on how the water contractors and  
7 potential participants in WaterFix have addressed  
8 reduced reliance and also have discussed regional  
9 self-reliance.

10 Oh, the other issue I wanted to make sure we  
11 cover is that other component of (a)(2), which staff  
12 had said, because we can't show the reduced reliance  
13 component, we don't get to show that the project -- the  
14 need for the project was independent of the reduced  
15 reliance element.

16 WaterFix and its predecessor BDCP preceded the  
17 Delta Reform Act. It came before it. It -- The need  
18 was identified and has been supported extensively in  
19 the record related to addressing climate change,  
20 addressing earthquake risk and, of course, addressing  
21 water supply reliability related to the restrictions  
22 associated with the current regula -- regulatory  
23 environment as well as the fish population decline.

24 So, we believe that we have shown in the  
25 record that the need is not based on a failure to show

1 reduced reliance.

2 I'm going to have to move on a little bit  
3 quicker here.

4 Also, in terms of feasibility, we -- if  
5 Council follows staff's interpretations of WR P1, we  
6 feel that we have shown sufficiently in the record that  
7 DWR lacks the legal authority to require the specifics  
8 that are in (a) through (c) related to the Urban and Ag  
9 Water Management Plans, or require revisions at this  
10 time.

11 And, therefore, we believe that that showing  
12 allows for us to find that WaterFix is consistent  
13 with -- on the whole is consistent with the coequal  
14 goals.

15 Delta flow objectives. The -- Two issues that  
16 staff focused on: The E/I ratio and the Contra Costa  
17 Canal M&I chloride standard.

18 The E/I ratio cannot be modeled with WaterFix.  
19 E/I ratio was put in place related to current Delta  
20 configuration that doesn't include WaterFix.

21 If we were to follow Staff's Recommendation to  
22 attempt to model it, it would, in fact, change the E/I  
23 ratio.

24 DWR looked at the intent of D-1641 in order to  
25 address how we were going to do water quality modeling

1 to assess impact analysis. We believe we created a  
2 more restrictive regulatory operation that address  
3 D-1641 intent.

4 In addition, the M&I standard. The project  
5 information shows that we actually -- WaterFix doesn't  
6 create any impacts over and above the No-Action. So  
7 there actually isn't an impact associated with this  
8 issue.

9 The modeling shows that there's a 5 percent  
10 exceedance in certain times equivalent to the  
11 No-Project. And I will say that our historic evidence  
12 greatly supports the compliance with D-1641 related to  
13 this issue.

14 The TUCPs. There's never been a TUCP  
15 requested related to deviation of the M&I Chloride  
16 standard.

17 With respect to local land use issues, staff  
18 determined on a number of local land use issues that  
19 DWR was inconsistent with the -- the policy.

20 The staff reads into the policy a requirement  
21 to mitigate where feasible, where the policy states  
22 specifically that facilities must be sited to avoid a  
23 reduced conflict with existing uses when feasible. It  
24 does not discuss adopting all mitigation where  
25 feasible.

1           However, DWR has adopted mitigation, 50-plus  
2 Mitigation Measures to address various land use  
3 conflicts.

4           It appears that staff has independently  
5 reviewed each of those Mitigation Measures to determine  
6 how they feel they are not adequate to address those  
7 land use conflicts.

8           So, in sum, we request that the Council direct  
9 staff to revise their determination to deny the  
10 appeals. We believe that there is substantial evidence  
11 on the record to support our determination that  
12 California WaterFix is consistent with the relevant  
13 Delta Plan policies.

14           And I will note, of course, that WaterFix  
15 certainly furthers the coequal goals and is, on the  
16 whole, consistent with the coequal goals in the Delta  
17 Reform Act.

18           Happy to answer questions.

19           CHAIR FIORINI: Thank you for your  
20 presentation.

21           COUNCILMEMBER GATTO: Thank you, counsel, for  
22 being here.

23           I want to ask three questions. Two are  
24 probably best described as 30,000-foot questions and  
25 one is probably more -- more in the weeds.

1           I want to reference a statutory section that  
2 appeared in staff's presentation that I haven't seen  
3 too much discussion on. This is Public Resources Code  
4 29773 (b) .

5           And this Code provision, I read it to put a  
6 duty upon us, the Council. And it says (reading):

7           "If the Council, in its discretion,  
8 determines that a recommendation of the  
9 Delta Protection Commission is feasible  
10 and consistent with the objectives of the  
11 Delta Plan and the purposes of this  
12 division, the Council shall adopt the  
13 recommendation."

14          And I wanted to give you, counsel, a chance to  
15 tell us what you think that provision means.

16          MR. BOGDAN: When the Delta Stewardship  
17 Council was developing the Delta Plan, we believe that  
18 input -- this section relates to that in -- to input in  
19 developing the Delta Plan.

20          For appeals on the consistency with the Delta  
21 Plan, though, there are separate provisions that you  
22 have in your Administrative Code that do not separately  
23 provide for the Delta Protection Commission to sidestep  
24 the appeals process and direct the Stewardship Council  
25 to find one way or another.

1 COUNCILMEMBER GATTO: Is that -- Is that  
2 provision not in effect any longer? Or is it -- You're  
3 saying --

4 MR. BOGDAN: I don't believe it's applicable  
5 to cover hearings on appeals for consistency.

6 COUNCILMEMBER GATTO: So even if they put out  
7 an official finding, they had a noticed public hearing  
8 themselves, the Commission, and they put out a specific  
9 finding that some other course of conduct was feasible,  
10 that has no effect on this right now.

11 MR. BOGDAN: I believe it helps inform your  
12 decision in reviewing our substantial evidence.

13 COUNCILMEMBER GATTO: Got it. Okay.

14 The -- The second question I want to ask  
15 is . . .

16 This pertains to Finding WR P1, and this, of  
17 course, is reduced reliance.

18 From a -- From a big-picture level, we heard  
19 some of the Appellants say at the past meeting, the  
20 October hearings, that -- and also this was -- this was  
21 something of public comment and I want to give you a  
22 chance to address this.

23 They articulated this concept -- and I hope I  
24 don't do it an injustice -- which is, of course, the  
25 whole point of WaterFix is to increase reliance on the

1 Delta.

2 What do you say to that?

3 MR. BOGDAN: I would say that it -- it doesn't  
4 increase reliance.

5 So, WaterFix was proposed to address some very  
6 serious components related to the ecological challenges  
7 within our current system.

8 And there's a needed improvement to an  
9 outdated system. We -- I don't think there's anybody  
10 that would disagree with that.

11 So WaterFix is trying to address, looking  
12 forward, how to best accommodate the needs of existing  
13 water users who are all trying to address this reduced  
14 reliance and conservation and other issues.

15 So, with this component, it's to ensure that  
16 water becomes more reliable but not necessarily more  
17 plentiful. There's not -- The -- The -- In fact, the  
18 modeling shows in certain years WaterFix would not -- I  
19 don't want to use the word "produce." But there would  
20 be less diversions in certain water year-types with  
21 WaterFix because of the projected additional  
22 restrictions that would occur in certain year-types  
23 with our current and expected regulatory environment.

24 So, if you look at the No-Action with all  
25 these restrictions as tightening up further and further

1 the ability to access water, and then look at it in  
2 comparison with what WaterFix does to add flexibility  
3 to the system, it's trying to address that issue but  
4 not create -- or increase reliance on the Delta.

5 COUNCILMEMBER GATTO: Got it.

6 Okay. Now, getting to the more specifics a  
7 bit.

8 Going to the staff findings, in this concept  
9 of just you talk about maybe one minute, 30 seconds.

10 The Department states that WaterFix was not  
11 significantly caused by a failure to adequately reduce  
12 reliance but, rather, by factors that predate and exist  
13 independently of the reduced reliance policy.

14 And the Appellants make the conclusion that  
15 Delta exports resulted in the environmental problem  
16 that DWR has now maintained causing a need for  
17 WaterFix.

18 So we have a bit of a circularity issue with  
19 some of the things that the staff noted.

20 And I just wonder, could you specifically -- I  
21 grasp the concept that some of the policies that we are  
22 now applying, the statutes and regulations, they arose  
23 later -- they arose within the last, say, 10 or 20  
24 years.

25 But I'd like you to address this conclusion

1 that the exports have resulted in the environmental  
2 problems. Because, I mean, we -- We have heard that  
3 from our scientists before. So I'd like you to address  
4 that.

5 MR. BOGDAN: Well, certainly our existing  
6 facilities don't require a Certification process.  
7 So -- So you're assuming legislature understood we have  
8 this existing system and then try to project, well, how  
9 do, looking forward, we create a process in order to  
10 address the ecological issues associated with the Delta  
11 as well as water supply reliability, rights, the  
12 coequal goals. It wasn't saying get rid of that  
13 component; right? And they were explicit.

14 So, from this standpoint, when you look at the  
15 availability of water and -- from the State Water  
16 Project and the declining ability to -- or I should say  
17 the increasing restrictions related to operations in  
18 the South Delta, it became apparent that DWR was going  
19 to need to figure out a way to try and address the  
20 declining population of the species in relation to the  
21 reliability along with this increasing concern on  
22 sea-level rise and salinity intrusion for the South  
23 Delta.

24 And the estimates of the South Delta, where  
25 there are more challenges associated with this, led the

1 Engineers to determine that dual conveyance was an  
2 appropriate proposal to try and address that.

3 So it wasn't relate -- in relation to increase  
4 in exports. Of course, we're not asking to increase  
5 exports.

6 It was focused on trying to solve the existing  
7 decline of species issues that were, to some extent --  
8 well, to a large extent, present in the South Delta  
9 where the existing facilities are, but also trying to  
10 do some long-range planning in terms of trying to  
11 address sea-level rise and trying to address the  
12 concerns related to levee failure due to earthquake  
13 which, again, when you add flexibility to the system,  
14 you're addressing that. That need has nothing to do  
15 with reduced reliance.

16 COUNCILMEMBER GATTO: Thank you.

17 COUNCILMEMBER DAMRELL: What is your  
18 definition of the word "consistent"?

19 MR. BOGDAN: That you meet the spirit and  
20 intent of the policy.

21 COUNCILMEMBER DAMRELL: Is that a dictionary  
22 definition or is this your personal thought about what  
23 consistent means?

24 MR. BOGDAN: Well, I didn't -- No. So --

25 COUNCILMEMBER DAMRELL: You said it's a big

1 difference. The word "consistent" means something to  
2 me but I want to hear what is the definition of that in  
3 common parlance in terms of the dictionary definition.  
4 Do you have one?

5 MR. BOGDAN: I don't have one in terms of a  
6 dictionary definition but, to me --

7 COUNCILMEMBER DAMRELL: That would be helpful  
8 to us.

9 MR. BOGDAN: Sure. We -- We can supply that  
10 in an amended submittal before Monday at 5:00.

11 COUNCILMEMBER DAMRELL: The response, the  
12 spirit --

13 MR. BOGDAN: Yes.

14 COUNCILMEMBER DAMRELL: -- where you do that.

15 MR. BOGDAN: Yes.

16 Well, and if you also look at what the WR P1  
17 talks about and the Delta Reform Act talks about in  
18 terms of a policy of the State to reduce reliance and  
19 that individual Water Contractors are focused on  
20 self-reliance, the general self-reliance.

21 It doesn't talk about in terms of specific  
22 accounting that has to be done one way or another.  
23 These are recommendations on how you could do it but  
24 it's not the only way to do it is my definition of  
25 "consistent."

1 COUNCILMEMBER DAMRELL: With respect to the  
2 best-available science, wouldn't the law be termed  
3 horizon, such as the lifespan of the project, be the  
4 best way to determine best-available science?

5 MR. BOGDAN: Best-available science isn't  
6 always worst case. Best-available science --

7 COUNCILMEMBER DAMRELL: Not the worst case.  
8 What is the lifespan of this project?

9 MR. BOGDAN: It's estimated a hundred years.

10 COUNCILMEMBER DAMRELL: Wouldn't that be  
11 logical to look at that horizon to determine the  
12 best-available science?

13 MR. BOGDAN: It would be logical where it's  
14 reasonably foreseeable to estimate impacts. And our  
15 experts said, when you go out that far, it's  
16 speculative to estimate impacts on how you factor in  
17 sea-level rise.

18 COUNCILMEMBER DAMRELL: So you would disagree  
19 with NOAA or CORE or other available projections with  
20 respect to that estimate.

21 MR. BOGDAN: Well, so, we actually --

22 COUNCILMEMBER DAMRELL: Would that --

23 MR. BOGDAN: I'm sorry.

24 COUNCILMEMBER DAMRELL: Would that be  
25 considered speculative in your mind?

1 MR. BOGDAN: So I would use the word  
2 "speculative" on NOAA's recommendation.

3 NOAA's recommendation is basically a policy  
4 recommendation on design, of infrastructure, on how  
5 much risk you can stomach in terms of designing a  
6 project.

7 So, from that standpoint, designers probably,  
8 if we're a long-term type of project, want to be risk  
9 adverse.

10 And so they're going to design something with  
11 a bit more of a flavor of worst case, but that's  
12 design, which is different than impact analysis.

13 And so, from an impact analysis, we are  
14 focused on what is reasonably foreseeable in terms of  
15 estimating the potential effects of WaterFix from a  
16 hydrologic modeling perspective.

17 COUNCILMEMBER DAMRELL: Would -- Doesn't that  
18 logic apply to DWR that you described?

19 MR. BOGDAN: Yes, yes.

20 COUNCILMEMBER DAMRELL: So the worst possible  
21 case would be something that you would be interested  
22 in.

23 MR. BOGDAN: So -- And I'm sorry if I wasn't  
24 clear on presentation.

25 We have designed it consistent with the NOAA

1 standard. We've designed WaterFix consistent with the  
2 NOAA standard. And I have our Engineers here who would  
3 be happy to discuss that further if you like.

4 COUNCILMEMBER DAMRELL: When -- When the DWR  
5 says, quoting your language, it will take months to  
6 review each water supplier's Water Management Plan,  
7 both to determine if and under what circumstances they  
8 receive water from other supplies up to a level of SWP  
9 or CVP that would receive water supplies reliability  
10 benefits of California WaterFix, is this a better -- In  
11 other words, what I'm getting at here is, are you  
12 saying, if given more time, we could get this  
13 information with respect to agriculture and water  
14 supply. Is that what you're saying?

15 MR. BOGDAN: Well, so --

16 COUNCILMEMBER DAMRELL: You could do that.

17 MR. BOGDAN: So, I believe the way the staff  
18 determination is written, if we did that with more  
19 time, we still wouldn't meet the standards, I would  
20 say, because we wouldn't have followed (a) through (c)  
21 explicitly.

22 COUNCILMEMBER DAMRELL: Well, but you are  
23 saying, with more time, we could do a better job. Is  
24 that what you're saying?

25 MR. BOGDAN: With more time, we could have

1 compiled additional support on that next level of  
2 downstream water user on which molecules of water they  
3 receive from the Delta.

4 So we would have been able to get to that next  
5 level to compile a list of those entities.

6 COUNCILMEMBER DAMRELL: Would --

7 MR. BOGDAN: Now, I don't believe that would  
8 have meet the standards that was set to --

9 COUNCILMEMBER DAMRELL: The question is  
10 whether you would or you wouldn't?

11 The question I have is, wouldn't that put you  
12 in a better position with respect to what you  
13 described, whether or not this would reduce reliance on  
14 the Delta? If you had that information, wouldn't you  
15 be in a better position to make that statement than you  
16 would now?

17 MR. BOGDAN: I think that the -- the amount of  
18 information that we have compiled in our record  
19 currently addresses those issues.

20 It doesn't go to the X level of water entity  
21 deliverer of water on a local level, the suppliers of  
22 water.

23 So -- So that's what we were trying to address  
24 is, we -- we expected in the questions that the -- the  
25 intent of the questions that we were responding to was:

1 Why didn't you give us that next level of information  
2 in terms of the list of potential water users?

3 I believe the issue has turned slightly  
4 related to the standard that staff feels is necessary  
5 to meet this. And you give me three months, five  
6 months, 10 months, a year to compile that information  
7 that we listed, and I would argue that it still doesn't  
8 meet the staff determination standard.

9 COUNCILMEMBER DAMRELL: Well, when the WR P1  
10 refers to water suppliers that have done all the  
11 following, of contributing to reduce reliance, and it  
12 says, completed a current Urban and Agriculture Water  
13 Management Plan, do you think that that means that  
14 you'd have to complete a Management Plan before you  
15 could proceed under WR P1?

16 MR. BOGDAN: No.

17 COUNCILMEMBER DAMRELL: You don't think it  
18 does.

19 MR. BOGDAN: No.

20 COUNCILMEMBER DAMRELL: It's something  
21 different.

22 MR. BOGDAN: Our record shows we're consistent  
23 with that. We've done the analyses, the water  
24 agencies. We've supplied substantial evidence to show  
25 the analysis that the water agencies did related to

1 reduced reliance, the measures that they've taken to  
2 show regional self-reliance.

3 And so we believe that we've produced a record  
4 that is consistent with that requirement but would not  
5 equal --

6 COUNCILMEMBER DAMRELL: It kind of turns on  
7 your definition of "consistent."

8 MR. BOGDAN: Correct.

9 COUNCILMEMBER DAMRELL: The spirit, as opposed  
10 to anything that -- anything more stringent that we  
11 would apply under WR P1; is that correct?

12 MR. BOGDAN: Yes.

13 COUNCILMEMBER DAMRELL: When -- When you  
14 say -- quoting your language -- that W -- that it's  
15 difficult to ascertain with certainty which agriculture  
16 suppliers may benefits from WaterFix, that's the same  
17 thinking that you just expressed.

18 MR. BOGDAN: Exactly.

19 COUNCILMEMBER DAMRELL: Certainly, it's not  
20 something you're required to do and it doesn't  
21 necessarily affect WR P1 at all.

22 MR. BOGDAN: Correct.

23 COUNCILMEMBER DAMRELL: With respect to Delta  
24 flow objectives, can compliance -- the compliance point  
25 for the required E/I ratio be different than what

1 D-1641 specifies?

2 MR. BOGDAN: We believe it has to be. That --

3 COUNCILMEMBER DAMRELL: It has to be -- It has  
4 to be inconsistent.

5 MR. BOGDAN: It has to be different than the  
6 current D-1641, because D-1641 and the conditions that  
7 D-1641 were promulgated to function in would not be the  
8 same with WaterFix because it was a requirement to the  
9 E/I ratio based on the CVP and SWP only drawing water  
10 from the South Delta.

11 Once you add that new diversion point, you  
12 have to look at how E/I is calculated and reconfigure  
13 it in order to address the new component of the  
14 facilities.

15 COUNCILMEMBER DAMRELL: So, under these  
16 circumstances, you wouldn't apply the word  
17 "consistent," I take it.

18 MR. BOGDAN: I would say we're consistent with  
19 the intent of D-1641, and the intent of D-1641 is to  
20 address entrainment.

21 COUNCILMEMBER DAMRELL: The staff indicates,  
22 with respect to the data that you showed with respect  
23 to the -- I'll just read from the staff report. In  
24 98.8 percent compliance rate, the DWR's own data shows  
25 that 60 percent of the days in 2009, water quality fell

1 short, 60 percent of at least one applicable standard,  
2 while under their metric it exceeded just 3.7 percent  
3 of the time.

4 You're familiar with that reference.

5 MR. BOGDAN: I am familiar with that  
6 reference.

7 We believe that staff got that wrong. So --  
8 And I've asked --

9 COUNCILMEMBER DAMRELL: How did they get it  
10 wrong?

11 MR. BOGDAN: I've asked Stef Morris, who's  
12 General Counsel for the Design and Construction  
13 Authority, to come --

14 COUNCILMEMBER DAMRELL: What I'd like to do is  
15 have staff respond to this answer so we know what we're  
16 talking about; okay?

17 Go ahead.

18 MS. MORRIS: So, in regard to D-1641 and the  
19 Chloride objective, there is substantial evidence in  
20 the record directly on this, and it is cited in DWR's  
21 response. It is a chart showing the exceedance metrics  
22 and when they were and were not met. And that is  
23 marked as DWR-402 in the Change Petition proceedings.

24 What staff referred to in terms of the  
25 Chloride, they did not look at the actual data, which

1 did not change with TUPCs.

2           If you look at the record overall for -- from  
3 1985 when D-1641 was in effect, there was 7,670 days  
4 that the 250-milligram meter standard had to be met,  
5 and there was only 13 exceedances, so 13 days out of  
6 the whole 7,670-day period. And those are actual.  
7 That's not modeled.

8           In addition to that, in 2009, it appears what  
9 staff looked at is that they can't determine which  
10 standards weren't met.

11           But if you look at this chart, it's one  
12 standard that wasn't met, and that was the -- that was  
13 the -- In 2009, it's on the second page of DWR-402.  
14 And I am summarizing evidence that's in the record to  
15 be clear here. There was only one standard that wasn't  
16 met and that's the South Delta salinity at -- sorry --  
17 at Old Middle River.

18           And all of the -- I'm sorry. Not only Old  
19 Middle River. At the ORT location.

20           And all of those were one standard. Every  
21 other standard was met.

22           And if you look at DWR's response, it explains  
23 that those reasons that that salinity standard wasn't  
24 met are beyond DWR and the Bureau's control. And  
25 there's evidence in the record from the Operators

1 describing this, as well as it's been evidenced by the  
2 State Water Resources Control Board.

3 So, I would just summarize to say that it was  
4 one standard that was outside of the control of the  
5 Department, and the evidence in the record did  
6 demonstrate that.

7 And then the second point was on the Contra  
8 Costa Chloride. There's actually never been any  
9 variances in that standard and it has been all but 13  
10 days since 1995.

11 COUNCILMEMBER DAMRELL: May I have a response  
12 from staff, please?

13 MR. CONSTABLE: Yes. Thank you for  
14 highlighting the locations in the evidence for that  
15 point.

16 I'd also like clarification on that as well.

17 COUNCILMEMBER DAMRELL: Please speak into the  
18 microphone.

19 MR. CONSTABLE: Yes. I'm sorry.

20 The example that we gave for 2009 was one  
21 example. Staff's analysis, however, considered how we  
22 were to ascertain if the evidence supported compliance  
23 with D-1641 and, therefore, ER P1.

24 Overall, we are unable to ascertain. Our  
25 interpretation was that there could be other standards

1 that were not met.

2 So, for example, we don't know if it was  
3 recorded that the actual number of days that a given  
4 standard was or wasn't -- was not met or if there was a  
5 day where multiple standards were not met.

6 The clarification helps with that, but I think  
7 there's two -- there's two different issues. One is  
8 Contra Costa, which we'll take a look at that. The  
9 other one is the overall compliance. And I'm not sure  
10 if you can clarify on that. Was that a single standard  
11 as well?

12 MS. MORRIS: In 2009, it was a single  
13 standard. And if you want to look at the evidence  
14 showing the exact date -- And it's not only one date  
15 because, as you know, D-1641 standard was averaged over  
16 months or certain day periods. And if you look at  
17 Exhibit DWR-402 that's part of the record, you can see  
18 the whole compliance standard, and the testimony of  
19 John Leahigh summarizes how that was done.

20 MR. CONSTABLE: Thank you.

21 I guess I would like to also add that when we  
22 were looking at the table, at the summary, it provides  
23 overall percentages and compliance for an elongated  
24 period of time for 1485 and D-1641.

25 We were not able to ascertain, when we looked

1 at it, what the -- what the rate might be at different  
2 times. 2009 was highlighted for other years, for  
3 example, and it was difficult for us to rely on the  
4 evidence to understand if D-1641 was or was not  
5 complied with in a given period of time.

6 MS. MORRIS: I'd just like to respond if  
7 possible.

8 The basis of the finding was that the  
9 Chloride -- that -- There's two Chloride standards in  
10 D-1641. There's a 250-milligram liter and 150. And  
11 the record shows that the 150 milligrams as the mean  
12 average has never been exceeded. It was only the 250,  
13 which was 13 days.

14 And, so, if you look at the evidence in the  
15 record on that, it supports that there's substantial  
16 evidence that the standards are met.

17 COUNCILMEMBER DAMRELL: All right. Let me  
18 just move to a -- a place that I have not been -- has  
19 not been defined, and I don't know whether it's  
20 consistent with what it means, and that's called the  
21 Community Benefit Fund.

22 Is that kind of an afterthought or did you  
23 think enough of that that it required to be more  
24 flushed out in a precise discussion? And I don't find  
25 that discussion.

1 MR. BOGDAN: So, the -- In our early  
2 consultation with staff from the Delta Stewardship  
3 Council, we discussed how we addressed land use issues  
4 that, from a CEQA standpoint and, as staff points out,  
5 from beyond a CEQA standpoint.

6 The measures that we developed from a CEQA  
7 standpoint encompassed components of land use conflicts  
8 that went beyond CEQA in terms of outreach, developing  
9 plans not in isolation but in coordination with the  
10 local communities, whether it be marinas for barge  
11 traffic issues, local transportation agencies,  
12 communities, landowners.

13 So, the approximately 50 measures that we  
14 outline in our Certification of Consistency go through  
15 various components related to addressing these land use  
16 conflicts.

17 We also, within our CEQA discussion, included  
18 a series of what we called other measures that weren't  
19 to mitigate CEQA impacts but were to address more broad  
20 Delta concerns and conflicts that go beyond a physical  
21 effect on the environment.

22 So we had -- I'm getting -- a long roundabout  
23 way to get to the community benefits, but I'm sorry.

24 COUNCILMEMBER DAMRELL: Yeah.

25 MR. BOGDAN: So, as a part of that, the staff

1 said it might be good to develop some kind of fund and  
2 pointed to the Delta Protection Commission. And we  
3 said, "Okay. We'll try and incorporate something like  
4 that."

5 In addition, we felt that without the  
6 Community Benefits Fund, we were consistent with the  
7 land use citing the restriction or, where feasible,  
8 component of the Delta Plan policy.

9 But we thought in -- in order to further  
10 offset potential concerns within the Delta, that we'd  
11 offer a Community Benefit Fund.

12 So it wasn't an afterthought. It was  
13 something that had been discussed for several years.

14 As I mentioned at the hearing last month, the  
15 idea was to try and develop that in coordination with  
16 the Delta Stewardship Council. We didn't have  
17 sufficient time to do that as we were moving through  
18 the development of the project.

19 It has to do with timing. The large component  
20 of the design and construction of WaterFix has been  
21 coordinated with a new Joint Powers Authority, the  
22 Design and Construction Authority that Stef Morris is  
23 General Counsel for.

24 And, so, with the late development of that, it  
25 was difficult to add more definition beyond how we've

1 proposed it.

2 And, in addition, we were limited on the  
3 amount of discussions we could have with the  
4 Stewardship Council as ex-parte kicked in.

5 So, we offered this in addition to all the  
6 other elements that we feel address the land use  
7 conflict issues as something else that we feel will  
8 additionally minimize those issues.

9 COUNCILMEMBER DAMRELL: Doesn't this get to  
10 the issue of time? I mean, if you had more time, you  
11 would have fleshed out what this really means and how  
12 much it's going to cost and who's going to benefit.

13 Isn't this a place to start as opposed to a  
14 place to end up?

15 MR. BOGDAN: One of the challenges associated  
16 with a number of these properties: We have a Delta  
17 Reform Act that requires that we do certain things, get  
18 the Change Petition authorized from the State Water  
19 Board prior to construction.

20 Those aren't -- wouldn't have been a  
21 requirement. We could easily have started construction  
22 before finalizing the Change Petition process on land  
23 that DWR owned, or whatever, possibly without  
24 completing the Change Petition process.

25 But the Delta Reform Act added that

1 requirement and some other requirements, including  
2 completing the consistency process.

3 So, we were left with the challenge of timing  
4 in having a project that was defined enough that went  
5 through the environmental review process sufficiently  
6 to, we feel, be able to certify consistency with the  
7 Delta Plan.

8 There are components related to access to  
9 property that we weren't able to have because a lot of  
10 the property owners wouldn't give us access and we had  
11 to work through all the way up to the Supreme Court to  
12 address that issue. That's why we don't have some of  
13 the technical studies that normally would have been  
14 completed.

15 So there's a lot of timing issues that are a  
16 challenge with an environmental review process for a  
17 project this big.

18 I would argue that we have the information  
19 that is sufficient to support our determination of  
20 consistency and that, sure, if folks had more time, we  
21 would be able to have more information but that doesn't  
22 mean we haven't met the standard. I believe we have  
23 met the standard.

24 COUNCILMEMBER DAMRELL: All right. So the --  
25 With respect to the Community Benefit Fund, I mean,

1 it's -- it's in the -- in the record. But there's no  
2 definition of it, there's no indication of how it  
3 operates, what it is.

4 Is that a fair statement?

5 MR. BOGDAN: That's a fair statement.

6 COUNCILMEMBER DAMRELL: All right. Do you  
7 think the DWR had an obligation to -- to spend more  
8 time on that subject matter given the fact that you're  
9 looking at DP P2 as a very serious obstacle to this  
10 project.

11 Wouldn't that -- Wouldn't that make sense, to  
12 really concentrate on that so that the residents would  
13 know something about what might happen should there be  
14 the kind of -- kinds of results that have been -- that  
15 the Council presented, rather than taking time and  
16 effort to do that?

17 MR. BOGDAN: Well, the DWR appreciates that  
18 there are many land use conflict concerns in the Delta  
19 and we tried to address that from a number of different  
20 resource issues. Looking at a resource issue,  
21 determining if there's construction, conflict issues,  
22 use issues, and trying to develop measures to  
23 accommodate each one of those in relation to input from  
24 Delta communities.

25 This additional measure we thought was an

1 added way to minimize the effect, and we believe that  
2 that -- the . . . framework for it in, you know,  
3 presenting it, consistent with -- And we talk about  
4 good neighbor policies. I don't have the exact quote  
5 from our Certification.

6 But it has a few sentences to discuss the  
7 intent of the Community Benefits Fund, and, in fact,  
8 you know, in our submittal in October 15, we -- we talk  
9 about the -- the -- how we perceive this evolving. And  
10 we've already started discussions with the Delta  
11 Protection Commission, for instance, although not part  
12 of this record.

13 So, we -- we feel like we are taking the  
14 necessary steps to develop additional information  
15 related to this, but we feel that the Certification as  
16 it stands, with the measures that we've proposed,  
17 address DP P2.

18 COUNCILMEMBER DAMRELL: One final thought with  
19 respect to the noise issue and you alluded to.

20 It's the idea that you couldn't really get on  
21 the property to make the -- the test -- I guess  
22 alternate pile driving. Is that what you're  
23 suggesting?

24 MR. BOGDAN: Correct, yeah. You need to do  
25 geotechnical studies to see if that feasible to do

1 the . . .

2 COUNCILMEMBER DAMRELL: So -- So, pile driving  
3 in your mind, it would be a -- seems like a pretty  
4 significant impact. Would you agree? The sound of  
5 pile driving?

6 MR. BOGDAN: Is it? Yeah, um-hmm. And we've  
7 proposed --

8 COUNCILMEMBER DAMRELL: Over the years.

9 MR. BOGDAN: Yeah. And we've proposed  
10 mitigation.

11 So the other thing that I believe that staff  
12 maybe didn't take the time to really focus on, or maybe  
13 they're independently determining that those Mitigation  
14 Measures aren't adequate.

15 There's a number of Mitigation Measures to  
16 talk about the next steps related to determining where  
17 pile driving needs to occur from the low impact versus  
18 the -- the -- the higher.

19 COUNCILMEMBER DAMRELL: Can you avoid pile  
20 driving?

21 MR. BOGDAN: Yes, in -- in certain areas  
22 where, geotechnically, it'll --

23 COUNCILMEMBER DAMRELL: It's part of the  
24 project, isn't it, pile driving?

25 MR. BOGDAN: Yes. So -- But pile driving of a

1 certain type. So there's types that have less effect  
2 related to noise; right? And so this is the  
3 difference.

4           There's certain pile-driving techniques -- And  
5 I'm happy to have the Engineer come up and discuss this  
6 in a little more detail.

7           There are certain pile-driving techniques that  
8 have a much lower impact in terms of noise, but we need  
9 geotechnical analysis to support those.

10           And we've set up measures to first do those  
11 next-level geotechnical analyses, to then discuss  
12 whether that -- those are feasible. And we have other  
13 Mitigation Measures to address those that are affected.

14           And, so, from that standpoint, we believe that  
15 we're not -- it's not an all-or-nothing. It's not  
16 we're going to do pile driving and you're going to have  
17 to live with the noise, or possibly we can do the pile  
18 driving that has less effect.

19           If it's found not to be feasible, there are  
20 several very detailed Mitigation Measures -- if this,  
21 then this -- that we have in place to further minimize  
22 the effects associated with pile driving.

23           COUNCILMEMBER DAMRELL: Thank you.

24           CHAIR FIORINI: I . . . The -- The -- Just  
25 one last thought on the pile driving.

1           The Mitigation Measures. Would the Community  
2 Benefits Fund apply to some of those Mitigation  
3 Measures related to mitigating the sound?

4           MR. BOGDAN: So, the Community Benefits Fund  
5 was envisioned as something over and above the  
6 mitigation that is necessary to address physical  
7 effects in the environment. It was over and above the,  
8 you know, replacement of . . . conflicts with a  
9 specific land type or -- or use.

10           So the Community Benefits Fund would be -- is  
11 envisioned for addressing kind of broader conflict  
12 issues.

13           We believe that the mitigation that was  
14 associated with noise is funded separately. So this  
15 would be over and above that.

16           CHAIR FIORINI: In terms of reduced reliance,  
17 you've stated that the information is available to do  
18 the calculations, to do the quantitative analysis.

19           But you stated that you didn't feel that that  
20 would be adequate in terms of the way staff used this.  
21 Why -- Why not?

22           MR. BOGDAN: The calculations -- So, I -- I  
23 may have misspoke.

24           I believe there's another level of information  
25 that we could do to delineate the water suppliers at

1 kind of the downstream level within each Water Agency  
2 and Water Contractor who -- and what supply of their  
3 water is connected to the -- the Delta.

4 I believe what would be impossible for us to  
5 require is an actual amendment to each Urban Water  
6 Management Plan and Agriculture Water Plan, to  
7 incorporate those -- that analysis.

8 So that's the part where I'm saying, if -- if  
9 the standard is "must have it in an Urban and Ag Water  
10 Management Plan" or "must go amend those plans to  
11 include this with this detailed schedule," that's  
12 something that we don't think is feasible.

13 CHAIR FIORINI: Okay. And -- And you've  
14 stated in the record why you didn't -- why the agency  
15 didn't pursue that as a requirement. So that's pretty  
16 quick.

17 I understand Jeremy Brown has a question  
18 related to the reduced reliance.

19 MR. BROWN: Two questions.

20 CHAIR FIORINI: Step up to the microphone.

21 MR. BROWN: The first question --

22 MS. PEARSON: Please introduce yourself.

23 MR. BROWN: Oh, right.

24 Jeremy Brown, Attorney General's Office, on  
25 behalf of the Council.

1           The first question relates to a discussion  
2 that appears on Pages 55 to 56 of the Draft  
3 Determination.

4           And you --

5           MR. BOGDAN: I don't have it with me.

6           MR. BROWN: If you don't have an answer, I'm  
7 just fine -- that's fine. We're grateful for any  
8 response you give us prior to the deadline on Monday.

9           The question is: What are your thoughts on  
10 the amounts or nature of consideration that the Council  
11 should give to CVP water suppliers in the WR P1  
12 analysis?

13           MR. BOGDAN: First, we would be happy to  
14 supplement our submittal that we distributed yesterday  
15 to elaborate on this.

16           So the -- the CVP -- As we -- The CVP  
17 Contractor involvement in WaterFix is something we  
18 discussed in our October 15 submittal and that we  
19 weren't able to define the specific CVP Contractors  
20 other than the Santa Clara Valley Water District who  
21 would likely be participating.

22           But, instead, what we pointed to is the  
23 programs that Bureau of Reclamation have -- has in  
24 place related to their CVP participation and addressing  
25 in a broad sense the regional self-reliance.

1           So we believe we've created a record that  
2 allows for that reasonable inference, that we've met  
3 the reduced reliance component, because right now, it  
4 is not possible to pinpoint which of the CVP  
5 Contractors are going to participate.

6           MR. BROWN: Okay. Thank you.

7           Second question: You mentioned your  
8 submittal. Do you have a copy of that in front of you?

9           MR. BOGDAN: I don't.

10          MR. BROWN: Okay.

11          MR. BOGDAN: But Stef here does.

12          MR. BROWN: Perfect.

13          If you look at Page 9, the first full  
14 paragraph, Lines 8 to 10, there is a sentence that says  
15 (reading):

16                 "Because of the way water is  
17 delivered in California, some suppliers  
18 have no idea how much of their water  
19 ultimately comes from the SWP or whether  
20 it will receive any water supply  
21 reliability benefits of WaterFix."

22          And I believe that there are similar  
23 statements made in the October 15 submittal.

24          In whatever supplement you provide to this, we  
25 would appreciate it if you could point toward any

1 specific pages in the Administrative Record that  
2 support that statement.

3 MS. MORRIS: We'll do that, and I'll just give  
4 you a brief explanation now.

5 Metropolitan, for example, is a wholesaler of  
6 water to a number of people and -- a number of  
7 supplemental water agencies. And they have several  
8 different water supply sources, so State Water Project  
9 water, Colorado River water.

10 And some -- Because of the way that the  
11 delivery systems are set up, some of their water  
12 agencies can only get SWP water and some can only get  
13 Colorado River water. So a large percentage of them  
14 get some amount of blended water.

15 And so it would be nearly impossible to say X  
16 came from SWP, because they also, in their -- and this  
17 goes to that sort of layering, almost like an onion,  
18 where you have -- some water agencies have other  
19 additional water supplies like groundwater and they  
20 rely on that as part of their portfolio as well.

21 And, so, in some instances, it's almost  
22 impossible to say, "I'm, you know, a submember agency  
23 of a member agency and I am using X amount of SWP  
24 water," because there could be up to four or five  
25 layers of people who are ultimately getting water from

1 a wholesaler and it's trickling down through other  
2 wholesalers, through a number of agencies, and then  
3 ultimately being delivered to houses.

4 MR. BROWN: Thank you for that explanation.

5 COUNCILMEMBER GATTO: A little followup on  
6 that answer.

7 Is it -- Isn't it, though -- Isn't it a little  
8 more precise than that?

9 I mean, can't -- can't Metropolitan tell -- I  
10 mean, you know, Water, like electrons, are sponges;  
11 right? I mean -- But the world of power trading, you  
12 know, there will be very precise contracts where they  
13 will say, "You drew this power from this plant at this  
14 time," you know.

15 Isn't that the same in the water world?  
16 Doesn't Metropolitan have very precise contracts where  
17 they say, "Well, you're allowed this much. We sold you  
18 this many acre-feet of Colorado River water, and  
19 because you couldn't draw this from groundwater, we're  
20 going to allow you to get this from this other source,  
21 from the State Water Project." And they have it down  
22 to acre-feet.

23 MS. MORRIS: The issue isn't can Met determine  
24 what their portfolio water supplies are. It's what --  
25 Where does that water go from there?

1           And so there are a commingling of those water  
2 supplies. So, yes, Met can -- and that is in the  
3 record -- telling you what portion of their water  
4 supply is State Water Project.

5           The complication becomes, as it moves down  
6 through their member agencies, and then member agencies  
7 down to their member agencies. They're not necessarily  
8 coordinating with DWR and -- and complying with this  
9 reduced reliance in this very specific way that Council  
10 staff has presented in the Draft Determination.

11           And, so, that's really the issue is, can it be  
12 done from a macro precisely. Yes. But as we move down  
13 to the submember agencies that would require amendment  
14 to Water Management Plans, which are on a schedule by  
15 law, and they only get updated every so often.

16           COUNCILMEMBER THOMSON: Thank you, Mr. Chair.

17           You know, one of the things that I've always  
18 wondered about, and that -- and your colleague  
19 mentioned, salinity.

20           How would you explain the effect on the X2  
21 with this project? Does it have an effect, I guess, is  
22 the first question?

23           MS. MORRIS: So, there's a number of X2  
24 requirements. Are you talking about Spring X2 or  
25 Fall X2?

1 COUNCILMEMBER THOMSON: I'm talking from a  
2 layperson's point of view, a farmer on the river that  
3 is now starting to pump salinity instead of freshwater  
4 and --

5 MS. MORRIS: So X2 actually is not -- is  
6 really an outflow measurement. And your staff could  
7 probably explain this better than I can.

8 But what you're talking about is asaline  
9 (phonetic) standings which are requirements in D-1641.  
10 And, as the testimony has shown -- And I think maybe  
11 John Leahigh should come up, who's the operator.

12 He can explain that the asalinity (phonetic),  
13 the standards are still met, and the modeling shows the  
14 standards will continue to be met for D-1641.

15 COUNCILMEMBER THOMSON: I guess if you think  
16 about it logically, if you move the intake from the  
17 South Delta up to the north, and you're going to draw  
18 up to 9,000 cfs, the flows are going to be reduced, and  
19 that -- what I call the X2 line is going to move into  
20 the Delta.

21 How do you, you know, without going into this  
22 Ph.D. dissertation, explain to those of us and the  
23 audience how this is not going to affect water quality  
24 in the Delta?

25 MR. BOGDAN: So if we can have John Leahigh,

1 who's with the Department of Water Resources, add to  
2 that.

3 And, John, I don't know if you're a Ph.D.,  
4 so . . .

5 MR. LEAHIGH: No, I'm not a Ph.D.

6 Again, John Leahigh, DWR Water Operations  
7 Manager.

8 I'm not a Ph.D. but I do have well over 20  
9 years of experience operating the State Water Project,  
10 and the Delta being a big part of that operation.

11 To get to your -- Your question, I think, is  
12 regarding water quality.

13 The State Board is -- is the entity that sets  
14 those standards. And I think what our record is  
15 showing is that we would continue to meet the  
16 standards, as we do today, with WaterFix. And so there  
17 should be no change in those -- in the water quality  
18 generally as part of the project.

19 MS. MORRIS: And I -- Again, because X2 is  
20 different than the water quality control standards,  
21 this project has higher spring outflows than are  
22 currently required under D-1641.

23 So, if you're talking about outflows in  
24 different time periods, they are actually higher and  
25 the X2 would likely be pushed out, especially in

1 spring.

2 And the Fall X2 requirements are under the  
3 Biological Opinions, and those are not changing with  
4 WaterFix, so they would be the same.

5 MR. LEAHIGH: So I -- I -- What was whispered  
6 in my ear is:

7 Part of the question is evolving around times  
8 when the proposed project, the new North Delta  
9 diversion, would be diverting 9,000 cfs. Is that part  
10 of the question?

11 COUNCILMEMBER THOMSON: Okay. It's the  
12 diversion where it's 9,000 --

13 MR. LEAHIGH: Yes.

14 COUNCILMEMBER THOMSON: -- cfs.

15 It's a diversion that those that I talked to  
16 are concerned about how it's going to affect their ag  
17 operations.

18 MR. LEAHIGH: Yes.

19 COUNCILMEMBER THOMSON: As that -- As that  
20 line that I call the X2 moves further north in the  
21 Delta.

22 MR. LEAHIGH: Right.

23 So, these higher export -- or diversion  
24 volume -- rates would only occur when there was ample  
25 supply in the system, excess flows in the system.

1           So, that -- that wouldn't have an  
2 appreciable -- shouldn't have an appreciable impact on  
3 folks downstream. Because, again, these are -- these  
4 are in conditions where we're flush with -- with --  
5 with water.

6           I mean, the project essentially is an  
7 opportunity to pick up these massive flows that we see  
8 during certain periods in certain -- certain year-types  
9 that are above and beyond any requirements, where the  
10 water is already extremely fresh.

11           That's the purpose of the project, is to be  
12 able to take the opportunity to pick those -- those  
13 flows up. Gives us flexibility.

14           COUNCILMEMBER THOMSON: I don't want to parse  
15 words here, but you said "would" and then you changed  
16 it to "should." Is it "would" or "should"? Or are you  
17 just -- We're going to wing it and figure it out later?

18           MR. LEAHIGH: No. I -- I -- No. It's --  
19 It's -- We have to comply with certain criteria, and  
20 that is always the case.

21           COUNCILMEMBER THOMSON: But you said "should,"  
22 so that -- to me, that leads me to believe that you're  
23 not quite sure.

24           MR. LEAHIGH: I'm sorry. Could you repeat?  
25           Where did I use the word "should" because I'm

1 having a hard time.

2 COUNCILMEMBER THOMSON: About the flows. The  
3 salinity. You said, "Well, it wouldn't have an effect  
4 or shouldn't have an effect." Those were those words.

5 I'm just wanting to know whether or not you're  
6 sure that it won't or there's a chance that it might  
7 affect salinity.

8 MR. LEAHIGH: It won't have an effect that's  
9 significant enough to change compliance with  
10 requirements.

11 COUNCILMEMBER THOMSON: Okay.

12 MR. LEAHIGH: Yeah.

13 COUNCILMEMBER THOMSON: All right.

14 CHAIR FIORINI: Let me try and help.

15 If and when you receive a -- a change in the  
16 Point of Diversion Permit, won't that clarify these  
17 matters? In terms of a concern about water quality?

18 MS. MORRIS: The change in Point of Diversion  
19 Permit would incorporate the Op -- the initial  
20 Operating Criteria into the Permit, which would set  
21 those standards at D-1641 or, as I mentioned earlier,  
22 for Spring X2, higher than D-1641.

23 And, for example, OMR are more restricted than  
24 the existing Biological Opinions.

25 CHAIR FIORINI: Staff, I have a -- Rather than

1 wait until the end of the proceedings to ask for  
2 further information, this issue of the -- that has been  
3 brought up in regards to complying with WR P1 and the  
4 reduced reliance component that is lacking in the Urban  
5 and Ag Water Management Plans, it has been suggested  
6 that, because of that technical absence of that  
7 component in the -- in the ag and Urban Water  
8 Management Plans, that they would be unable to satisfy  
9 you.

10 The question -- and I don't need an answer  
11 now, but eventually -- would the equivalent of that  
12 information that is available, and after analysis,  
13 would that satisfy the -- the requirement of WR P1?

14 MR. HENDERSON: I think I would ask Ryan and  
15 perhaps Jeremy to address that question.

16 MR. STANBRA: I -- I would be -- I'm hesitant  
17 to -- to -- without actually seeing what the particular  
18 information would be and the particulars of that  
19 information, I think I'd be hesitant to say one way or  
20 the other.

21 That said, I think staff's current  
22 recommendation is that the information is required to  
23 be included in the Plans themselves. That is the plain  
24 reading of WR P1 and a requirement of that.

25 There was a discussion with regards to when

1 and how such plans could be updated. It is -- They are  
2 on a five-year schedule, ending in five zero years.

3 However, I do believe statute does allow for  
4 those Plans to be updated more often in terms of, there  
5 is language that suggests at least every five years.

6 So -- And -- And -- And I think I would just  
7 also add that the requirements associated with the  
8 Plans are separate from what's required in WR P1.

9 The requirements in WR P1 apply specifically  
10 to projects, to covered actions, that are occurring in  
11 the Delta. And the information, while similar, is not  
12 necessary -- not necessarily intended to be a  
13 one-for-one for the terms of -- for the purposes of  
14 compliance with WR P1.

15 MR. BROWN: I agree with all that.

16 The -- Mr. Chair, the Draft Determination does  
17 read Subdivision (c)(1) literally to require the  
18 inclusion of that information in -- in the Management  
19 Plan. That is an interpretation that was reached in  
20 part by consulting Appendix G.

21 It -- It appears that the Department and  
22 Council currently view Appendix G somewhat differently,  
23 and that's something that I assume will be discussed  
24 later today.

25 I'm happy to address it now but don't want to

1 take us down too much of a journey.

2 CHAIR FIORINI: I'm satisfied to wait till  
3 later.

4 Unless anyone else is . . .

5 Okay. Any further questions of the project  
6 Proponent?

7 (No response.)

8 CHAIR FIORINI: Thank you. Thank you all very  
9 much.

10 MR. BOGDAN: Thank you.

11 CHAIR FIORINI: Okay. We have time for one  
12 more presentation, I believe.

13 Appellant Group Number 1, North Coast Rivers  
14 Alliance has ceded their full 15 minutes.

15 Next up will be Appellant Group Number 2, Save  
16 the California Delta Alliance, represented by Michael  
17 Brodsky, who has received five extra minutes, I  
18 believe, from North Coast Rivers.

19 So you --

20 MR. BRODSKY: From the county -- From north  
21 coast to the counties and then to me. It's a little  
22 market-based cap and trade.

23 (Laughter.)

24 CHAIR FIORINI: Like I said, it would become  
25 evident once we get started.

1           So you have 20 minutes. Please proceed.

2           MR. BRODSKY: Thank you, Mr. Chairman.

3           Good morning, Mr. Chairman, the rest of the  
4 Council and staff. Michael Brodsky on behalf of Save  
5 the California Delta Alliance.

6           Let me say first that your staff has done a  
7 remarkable job on this report, even where I disagree  
8 with them.

9           In the places where they overruled us, they  
10 brought up each and every one of the arguments we made  
11 and they dealt with it.

12           In the -- In the places where they overruled  
13 DWR, they brought up each and every one of the  
14 arguments that DWR made on that point and they dealt  
15 with it.

16           And that's better than most Federal appellate  
17 opinions, which are worked on for months on end. So  
18 congratulations to your staff.

19           I'd like to start by addressing a few things  
20 that were said by DWR previously.

21           With regard to WR P1, this idea that it's been  
22 feasible for them to work with the water suppliers to  
23 include the required information for WR P1 in the Water  
24 Management Plans is simply a post hoc litigation  
25 excuse.

1           During the development of the Delta Plan, DWR  
2 submitted 10 comment letters. They commented  
3 thoroughly on the development of WR P1.

4           And in their comment letter of June 20th,  
5 2012, after an extensive discussion of the Water  
6 Management Plan process, and their engagement with the  
7 water suppliers being warned of the planning process,  
8 they said, quote (reading):

9                   "DWR plans to work with its  
10                   Contractors and other water suppliers to  
11                   meet the policy . . ." end quote.

12           And that is found -- Your staff has compiled  
13 the entire Administrative Record of the development of  
14 the Delta Plan. That quote is found on Page K7492 of  
15 the Administrative Record.

16           And I think a full reading of all of 10 DWR's  
17 comment letters, and that comment letter will dispel  
18 any notion that there's any infeasibility.

19           DWR just simply dropped the ball, for whatever  
20 reason. Whether there was an institutional gap and  
21 people left. For whatever reason, they just didn't  
22 work with the water suppliers, in their -- which I  
23 submitted into evidence through official notice in  
24 their handbook that they use to advise all their water  
25 suppliers for the development of the 2015 Water

1 Management Plans, and through their extensive meetings  
2 and engagement with all of their water suppliers  
3 through the development of the 2015 Water Management  
4 Plans.

5 The Delta Stewardship Council is not mentioned  
6 once. The Delta Reform Act is not mentioned once. And  
7 WR P1 is not mentioned once. They just acted as if you  
8 didn't exist and the Delta Plan didn't exist.

9 And it would be really a travesty to comment  
10 that by allowing them to get around the explicit  
11 requirements of WR P1.

12 I'd also like to state for the record -- and  
13 Mr. Brown will probably be delighted to hear this --  
14 Appendix G is not an underground regulation.

15 First of all, it doesn't interpret a statute.  
16 It's a contemporaneous reading of your own regulation.

17 Second, when you read Appendix G next to the  
18 text of WR P1, it's not that Appendix G is mandating  
19 something in addition. It's that Appendix G is  
20 persuasive that the lone legally tenable reading of the  
21 WR P1 is that they must include that information in  
22 their Water Management Plans. And so that falls  
23 outside the definition of any -- any other ground  
24 regulation.

25 Okay. On the -- On the noise, Judge Damrell

1 asked about that.

2           So, just to clarify: The current project that  
3 is before you has 23,900 piles that are driven by the  
4 impact method with 10,909,704 impact strikes at 115  
5 decibels each.

6           There is no possible mitigation for that.  
7 These are 48-inch-diameter steel piles. They're  
8 100 feet tall. They have to go down through the river  
9 and then be driven into the riverbed until they meet  
10 resistance. So that pile-driving rig is sitting on a  
11 barge on the river. It's starting out 100 feet high  
12 and it's hammering.

13           The Mitigation Measures in the -- in the EIR  
14 do things like put shields around noise sources, like  
15 if you have a backhoe working or something. There's --  
16 There's no possibility of any mitigation for that  
17 noise.

18           The only possibility is to use drill piers, or  
19 CFA piles, which we have -- And forgive the pun. We've  
20 been hammering on DWR to agree to that for two years  
21 now. We said, "We got a bid form." They just insist  
22 that they're not going to agree to it until they do  
23 more geotechnical exploration.

24           There are no access issues. This -- This  
25 problem -- The majority of these piles on the north

1 zone are foundation piles for the intakes, which are in  
2 the river.

3           There's no reason why DWR can't go tomorrow to  
4 the Army Corps of Engineers and get a permit -- or  
5 apply for the permit and shortly thereafter get it and  
6 put a barge out on the Sacramento River at those intake  
7 foundation locations and begin doing whatever  
8 geotechnical exploration they feel they need to do.

9           So that's going to lead me to start my slide  
10 show.

11           If I could have that Group (a) (2).

12           UNIDENTIFIED SPEAKER: Is this it?

13           UNIDENTIFIED SPEAKER NO. 2: Yeah.

14           MR. BRODSKY: Oh, good. Okay.

15           All right. So, with findings for remand, they  
16 can revise the project to address one or more of the  
17 Council's findings. They can address one or more of  
18 the Council's findings by providing more information.  
19 And they can file a revised Certification of  
20 Consistency incorporating the changes in the new  
21 annular information.

22           So, one of the things they can do on remand  
23 is, they can go put the barge out there, and they can  
24 get the information that they feel they need to have  
25 before they can tell us that they won't do the impact

1 pile driving.

2           So, we believe that the Department has not  
3 taken seriously the construction impacts, and we urge  
4 the Department to take the many unaddressed,  
5 significant, long-term construction impacts to heart.

6           Left unaddressed, the impacts from 11 or more  
7 years of construction would destroy the Delta as we  
8 know it.

9           WaterFix construction impacts are not  
10 temporary. They are long-term impacts and are  
11 considered permanent.

12           DWR has mischaracterized the construction  
13 impacts as temporary. They say, quote (reading):

14                   "Regarding Captain Morgan's  
15 testimony on recreational boat navigation  
16 traffic, it is important to note that the  
17 significant and unavoidable effects are  
18 from construction and not operation, and  
19 are, thus, temporary."

20           Well, that's just wrong.

21           Their use of "temporary" is directly  
22 contradicted by the project Environmental Impact  
23 Report. Quote (reading):

24                   "Construction of the Alternative 4A  
25 intakes and related conveyance facilities

1           would result in permanent and long-term  
2           (i.e. lasting over two years) impacts on  
3           well-established recreational  
4           opportunities and experiences in the  
5           study area."

6           There are some examples of permanent and  
7           long-term impacts from Table 15-15 of the FEIR.  
8           Wimpy's Marina, quote, "up to two and a half years  
9           (long term), Bull Frog Marina, up to 11 years (long  
10          term), Lazy M Marina, ongoing up to 11 years (long  
11          term)."

12           The use of "long-term" and "permanent" is the  
13          EIRs who said it. Those aren't my words. That's their  
14          document.

15           The FEIR emphasizes the adverse effects of the  
16          multi-year construction schedule.

17           And one of the quotes(reading):

18                   "Low recreation-dependent  
19           businesses, including marinas and  
20           recreational supply retailers, may not be  
21           able to economically weather the effects  
22           of multiyear construction activities and  
23           may be forced to close as a result."

24           And that's a Delta-wide impact.

25           Here again is the Delta-wide impact (reading):

1           ". . . A decline in visits creating an  
2           adverse effect throughout the Delta  
3           Region."

4           Here's just a recap of our Rio Vista where we  
5 surveyed boaters. And that slide's a little hard to  
6 read.

7           But the majority of boaters surveyed said that  
8 they would either reduce their use of the Delta or  
9 abandon the Delta entirely because of WaterFix.

10           And that was -- Only 17 percent said they  
11 would not reduce their use of the Delta in -- in  
12 reaction to WaterFix construction impacts.

13           We have uncontradicted expert testimony that  
14 at least 20 percent of Delta marinas will go out of  
15 business, probably more. Those are sworn testimony  
16 from Bill Wells, the Executive Director of the Delta  
17 Chamber of Commerce, and Captain Frank Morgan.

18           Captain Morgan says that he believes  
19 Mr. Wells' estimate of 20 percent is low.

20           So this is why. This is an overview -- All  
21 those dotted red lines there are barge routes, and all  
22 the features you see there are construction activities  
23 spread through the heart of the Delta.

24           Here is a description of the barges. This is  
25 from the Biological Opinion. They're going to be 200

1 to 250 feet long and 50 feet-wide. The tugboats  
2 pushing them will be 65 to 100 feet long and 35 feet  
3 wide.

4 That's a representation of what that kind of  
5 rig looks like. There are 18,800 one-way barge trips  
6 on Delta sloughs over five and a half to six years.  
7 That's from the NMFS file Biological Opinion.

8 Here's a closeup. You can see the red dotted  
9 lines. The -- You know, the barges are just  
10 everywhere. They're going up the Mokelumne River to  
11 reach the barge landing at the Meadows Slough.

12 The Mokelumne River is not trafficked by  
13 commercial vessels now. It's just a quiet lazy slough.

14 This is an overview of where the Meadows area  
15 is. We'll show you a closeup of that.

16 So, on the right, there's two photographs of  
17 the Meadows Slough. And that circled area there, you  
18 have the Meadows Slough Staging Area, barge dock, muck  
19 dumps, fuel station, concrete batch plant. That's a  
20 very pastoral and wide and picturesque area.

21 This is tau shells dawdling on the Delta,  
22 which is the classic work on Delta recreation and Delta  
23 culture.

24 And how it says (reading):

25 "If popularity awards were given for

1 Delta anchorages, the Meadows would win  
2 hands down. You feel a man could go in  
3 there and never be found."

4 Captain Morgan comments that (reading):

5 "DWR chose this location as a barge  
6 route, muck dump and construction staging  
7 area complete with concrete batch plant  
8 and fuel station."

9 So here's another example of something that  
10 can be fixed on remand. That doesn't have to be at the  
11 Meadows Slough, and that fuel staging area doesn't have  
12 to be there. And, in fact, DWR is considering moving  
13 it.

14 So the project you're -- that's in front of  
15 you has that impact. On remand, they can go through  
16 their process, they can fix that problem, and when it  
17 comes back to you, that impact can be gone.

18 Turning away from the Meadows, one of the most  
19 significant impacts that DWR missed entirely is the  
20 impact of increased road traffic on Highway 4 combined  
21 with opening the Highway 4 Old River Bridge eight times  
22 per day to accommodate WaterFix barges.

23 And the way that works, as you can see down  
24 there at the very bottom, there's the CCF barge  
25 landing, Clifton Court Forebay barge landing. And then

1 just upstream from that there's the Highway 4 Old River  
2 Bridge. So the barges that go in CCF barge landing  
3 have to go under that -- that Highway 4 Old River  
4 Bridge.

5 That's the Highway 4 Old River Bridge. This  
6 isn't much clearance, height or width.

7 There it is again. It's a low bridge. It's  
8 an old bridge. It was built in 1915. It doesn't  
9 operate very well. It sticks on hot days.

10 So, here, we see eight times a day, one of  
11 these trying to go through there. It's going to be a  
12 disaster.

13 And here's where we get the eight times per  
14 day. This is from the Biological -- NMFS Biological  
15 Opinion (reading):

16 "The assumed number of one-way trips  
17 to CCF is 2185 and to Bouldin Island is  
18 3344. It is assumed there will be four  
19 trips to each of these barge landings per  
20 day and four returning trips back to the  
21 port of origin for a total of 16 trips  
22 per day combined for both sites."

23 So that's eight trips per day to -- four there  
24 and four back. Eight times that bridge has to open  
25 every day.

1           The EIR missed this entirely. Your staff  
2 deals with this somewhat in the report, but they  
3 say, DWR says (reading):

4                   "Additional raising of drawbridges  
5                   in the study area would not be required."

6           That's just false, and they provide no  
7 evidence for that statement.

8           Here's from Captain Morgan, who's consulted  
9 the bridge heights and the routes of the barges. And  
10 the only bridge that the barge routes go under that  
11 will not have to be open is the Antioch Bridge, and I  
12 give the citation there.

13           Okay. The road traffic across that Highway 4  
14 Old River Bridge will increase by 258 percent due to  
15 WaterFix construction trucks and worker traffic.

16           And I've excerpted a portion of the EIR which  
17 shows those increases. The numbers are a little too  
18 small to see. But that's what it says, and that's Page  
19 19-213.

20           So, here, you have Discovery Bay. You have  
21 Discovery Bay Boulevard, which is the main access to  
22 Discovery Bay, population 13,500.

23           We've got the Discovery Bay Marina. The only  
24 way in and out of the marina is on Discovery Bay toll  
25 road off of Highway 4.

1           And then you've got the Highway 4 Old River  
2 Bridge opening eight times a day for WaterFix barges.

3           So you've got a 258 percent increase in  
4 traffic on that road, and then you've got that bridge  
5 opening eight times a day. It's going to have to stay  
6 open 20 to 30 minutes each time for the barge to clear.  
7 That's just going to create a traffic nightmare on  
8 Highway 4. It'll back up past Discovery Bay Boulevard.  
9 It will affect traffic and it will also affect  
10 recreation because it would be untenable to get to the  
11 marina.

12           And here is Captain Morgan's statement to the  
13 effect of what I just said, the sworn testimony.

14           Okay. The pile driving. In addition to what  
15 we've said before, the FEIR underestimates the noise  
16 level of the pile driving. The FEIR shows that it's  
17 going to be 60 dBA or less at Clarksburg which is in  
18 Appendix 23A. Our expert Charles Salter states that  
19 the noise will be 75 to 79 dBA at locations in  
20 Clarksburg.

21           It's important to understand that the decibel  
22 scale is logarithmic. So 75 dBA is more than twice as  
23 loud as 60 dBA.

24           The FEIR correctly states that a 10 dB change  
25 in sound level is considered to be a doubling in

1 loudness.

2 DWR has two primary errors. They're source  
3 and attenuation errors.

4 They used the wrong source. They used 102 dBA  
5 for the source noise for pile driving when actually  
6 it's 115 dBA.

7 They use an attenuation rate of 8 dBA for  
8 doubling the distance, meaning if the sound starting  
9 out was 100 at 50 feet, then at 100 feet, it'll go down  
10 to 92, according to them. The correct rate is six. It  
11 would only go down to 94.

12 Over short distances, that's not that big a  
13 deal, but over the significant distances we're dealing  
14 with, that's a very substantial, much more louder than  
15 what they say it is.

16 They also make a fundamental error in their  
17 community annoyance factor. And they assume that  
18 communities in the locales where the pile driving will  
19 take place, quite rural communities, the large amount  
20 of intruding sound from pile driving will be less  
21 disruptive to community life.

22 So they assume that where you have a quiet  
23 little town and you have a large increase in noise,  
24 that's less of an annoyance than if you were in a loud  
25 place like San Francisco and then you use pile driving.

1 And they've got that exactly backwards.

2 Common sense tells us that. And Mr. Salter's  
3 report here says clearly that they -- they made the  
4 wrong assumption, that, actually, if you're going to  
5 introduce compulsive loud noise in a quiet place,  
6 there's, quote-unquote, penalty of an additional five  
7 to 12 decibels.

8 So, the point of this -- Here is their noise  
9 expert, and I was cross-examining him. And I say  
10 (reading):

11 "Do I understand that the intent of  
12 your testimony is not to dispute  
13 Mr. Salter's number of 115 dBA?"

14 The Hearing Officer objects, but to emphasize  
15 the number that was used by DWR.

16 And DWR's witness Bednarski says (reading):

17 "That's correct. That's the purpose  
18 of writing this section up."

19 The Hearing Officer says (reading):

20 "All right. Mr. Brodsky, let's move  
21 on."

22 Hearing Officer (reading):

23 "Mr. Brodsky, let's move on.

24 Declare a victory and move on,

25 Mr. Brodsky."

1           So they have declined to dispute Mr. Salter's  
2 findings on all their errors.

3           So the point of this, again, is on remand.  
4 Please take this seriously and do a serious noise  
5 analysis.

6           In my view, because of what I've just said,  
7 there is no substantial evidence as to any noise level  
8 that DWR's presenting. It's simply -- It's not  
9 presented -- It's not supported by facts as required  
10 for a substantial evidence showing.

11           And that's the end of my presentation with 35  
12 seconds left.

13           CHAIR FIORINI: Very good. Thank you.

14           Any questions of Mr. Brodsky?

15           COUNCILMEMBER DAMRELL: (\*) (\*) (\*) mr. Brodsky,  
16 you indicated that -- several times that remand would  
17 result in a change in this plan, the project plan.

18           And can you quantify the Meadows and a couple  
19 aspects of the project that would change?

20           Is there -- Do you have a list or a number of  
21 those prospects where remand might prove to be helpful?

22           MR. BRODSKY: I don't have a complete list  
23 offhand. I can tell you certainly, the removal of that  
24 area of the Meadows. And the other things, as far as  
25 the barges and all the barge routes that I showed you,

1 just virtually every slough and backwater is beset by  
2 barges.

3 We're moving into a phase now at the Water  
4 Board hearings where we'll be submitting our requests  
5 for permit conditions.

6 So one of our requests for conditions would be  
7 that the barges would operate only in the San Joaquin  
8 River ship channel.

9 And that these massive muck dumps and other  
10 staging areas that are within the Delta recreation  
11 areas would be moved out of the Delta recreation area,  
12 someplace like the Port of Stockton.

13 Other -- Other things that obviously would be  
14 addressed would be the pile-driving noise.

15 The E/I ratio could also be addressed.  
16 Mr. Leahigh was here earlier in terms of the E/I ratio  
17 and, in our colloquy at the Water Board, the E/I ratio  
18 is not just a technical thing. Currently, there's a  
19 35 percent cap export-to-inflow ratio. If you remove  
20 that 35 percent cap -- I took Mr. Leahigh through an  
21 example on a summer day where the flow was 19 -- about  
22 19,000 cfs and showed him that they could -- that they  
23 could divert 45 percent on that day absent the E/I  
24 ratio and asked him to point to anything in the  
25 WaterFix operating conditions that would show me that I

1 was wrong, and he could not.

2 And that was at . . .

3 That occurred on . . .

4 I believe that was August 16th, 2018. I'll  
5 get the exact date and submit that with my -- my  
6 comments on the Certification.

7 So that E/I ratio could be addressed.

8 Another thing that could be addressed is that,  
9 as your staff noted, because of that change in the E/I  
10 ratio and because also of the way the operating rules  
11 are set up, they basically have free rein to export as  
12 much water as they want to in the summer. The summer  
13 bypass requirement is only 5,000 cfs.

14 So this -- In the other months, we have things  
15 like Miss Morris was talking about, the X2  
16 requirements, the Fall X2, the spring outflow,  
17 et cetera, et cetera. Those are all requirements to  
18 benefit the fish.

19 And, so, outside of the summer months, they  
20 have a lot of requirements, complicated formulas, of  
21 what they can divert through the North Delta  
22 diversions.

23 So, on remand, they could address this issue  
24 of the E/I ratio and put in place a more realistic  
25 Operating Criteria so that they wouldn't be draining so

1 much water in the summer months.

2 The whole -- The original rationale for  
3 WaterFix for a new point of diversion was big gulp,  
4 little sip.

5 When there are very large winter flows and  
6 storms and there's more water than anybody knows what  
7 to do with, we can take a big gulp. At all other  
8 times, we're going to just take minimum amounts of  
9 water.

10 The way the project has evolved, it's exactly  
11 the opposite. Where they hope to get more water and  
12 where they hope to get their reliability for the water  
13 supply is by taking more water in the summer. So that  
14 whole thing could be addressed.

15 So those -- those are a number of things.

16 COUNCILMEMBER DAMRELL: Well, are there some  
17 matters upon remand that could not be addressed because  
18 it's infeasible?

19 MR. BRODSKY: Well, there's the -- there's  
20 the -- you know, the overall policy idea of many of us  
21 that the way to solve this problem is through a  
22 portfolio approach through developing local and  
23 regional supplies, not through locking in the Delta.

24 I forget if it was your question or  
25 Commissioner Gatto's question? Are you willing to swap

1 the Delta source in the reply.

2 So that would be a major thing to address, but  
3 it could be addressed if it was incorporated in a  
4 portfolio approach, that it was a true Big Gulp, Little  
5 Sip project with -- with the development of local and  
6 regional supplies, that -- that could be addressed.

7 I mean, I think this is -- We've been doing  
8 this since 2006. It's 12 years now. And five or  
9 \$600 million.

10 I think that effort had been -- If half of  
11 that had been put in to developing local and regional  
12 supplies, as Mr. Obegi's testimony indicates that I  
13 submitted into the record here, substantial pressure  
14 would have been taken off of the Delta but, instead,  
15 it's really been a single-solution focus on getting a  
16 point of diversion that gets our diversion point away  
17 from the Smelt and gets our diversion point way  
18 upstream so that, when sea-level rise happens and salt  
19 comes in, we'll be away from the salt water.

20 CHAIR FIORINI: Okay. Any other questions of  
21 Mr. Brodsky?

22 (No response.)

23 CHAIR FIORINI: All right. Thank you very  
24 much --

25 MR. BRODSKY: Thank you.

1 CHAIR FIORINI: -- for your presentation.

2 We will now break for lunch. I show 12:07.

3 I'm going to cut you short seven minutes. We'll

4 reconvene at 1 o'clock.

5 (Lunch recess at 12:07 p.m.)

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1 Thursday, November 15, 2018

1:00 p.m.

2 PROCEEDINGS

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4 CHAIR FIORINI: Welcome back from lunch.

5 We are reconvening, and we'll proceed with  
6 Appellant --

7 If I could get everybody's attention.

8 We're going to proceed hearing next from  
9 Appellant Group 3, Friends of the River, represented by  
10 Robert Wright.

11 Good afternoon.

12 MR. WRIGHT: Good afternoon.

13 Members of the Council, Bob Wright  
14 representing Friends of the River, Appellant Group 3.

15 But Chris Shutes, the Water Rights Advocate  
16 for the California Sportfishing Protection Alliance, is  
17 actually going to make our -- our presentation to you  
18 this afternoon.

19 CHAIR FIORINI: Bob, if I could interrupt you  
20 for just a minute.

21 Lita, we need to start the timer, please.

22 Sorry for that. Please proceed.

23 MR. SHUTES: Good afternoon. Chris Shutes,  
24 for the California Sportfishing Protection Alliance on  
25 behalf of Appellant Group B3.

1 Can we pull up our presentation, please.

2 Thank you very much.

3 Our presentation is organized in two parts:

4 Comments in support of Staff's Recommended  
5 Findings;

6 And key items on which we feel the Council  
7 should make findings different from those recommended  
8 by staff.

9 I'd like to first start out by agreeing with  
10 Mr. Brodsky in his commentary about the thoroughness  
11 and professional -- professionalism shown in developing  
12 the Staff Determination.

13 I work in many different venues for many  
14 different regulatory agencies. This is almost unique  
15 in my experience in terms of how thorough and detailed  
16 and how far into the record a staff has gone in  
17 preparing a document. And we appreciate it very much,  
18 even though we don't agree with all the findings.

19 So, to start, we agree with staff on the E/I  
20 ratio.

21 On its face, as staff points out, DWR has  
22 proposed a different project than one that does not  
23 comport with D-1641.

24 Almost anticipating a -- some pushback, they  
25 did a sensitivity analysis that would show compliance

1 with the existing requirement, and they mentioned this  
2 at the previous meeting on October 15.

3           It's really not appropriate to sort of say,  
4 Well, "we think you should do this but, if you don't,  
5 just go ahead and do this and let's have a do-over  
6 right away rather than remanding something that isn't  
7 consistent."

8           And it seems to us that this is an effort by  
9 DWR to basically design the outcome in a way that they  
10 wanted to, and -- and staff found that it was  
11 inappropriate.

12           The right thing to do here is to have DWR go  
13 back, and if there's technical difficulties complying  
14 or showing how they would meet the existing  
15 requirements, DWR has the opportunity to present those  
16 in -- in a full and straightforward way.

17           We also support the Staff Determination on  
18 historic operations.

19           And -- And I thought staff did a very good job  
20 on Pages 74 and 75 of the Staff Determination  
21 deconstructing the way DWR has marketed its historical  
22 rate compliance.

23           One of the things that is cited there is John  
24 Leahigh's testimony in Part 1 of WaterFix.

25           A line that he doesn't cite is that some of

1 the standards govern operations much more frequently  
2 than others.

3 And, so, by mixing in all the different points  
4 of compliance and adding them all up and saying, "Well,  
5 gee, we're complying at all these different points, but  
6 on this one or this one, we're not complying so our  
7 compliance is very high," ignores the fact that there  
8 are specific points that are the pinch points, that are  
9 the ones that are governing.

10 And when you're evaluating compliance, you  
11 really need to look at how the -- the project overall  
12 is complying with certain key elements.

13 There was some discussion earlier about the  
14 2009 exceedances. To me, that's more valuable as an  
15 example than as a specific issue that substantively  
16 this Council needs to deal with. It's just how you  
17 evaluate compliance.

18 That's an extreme example perhaps. But even  
19 if, in that case, DWR did not have control the way that  
20 they're trying to argue the amount of time that they do  
21 have control is -- overstates the frequency with which  
22 they're able to comply with D-1641.

23 I also, frankly, didn't follow the discussion  
24 this morning about compliance with variances -- under  
25 variances. They clearly should not be allowed.

1           If -- If you ask for a variance to D-1641 and  
2 then you're complying with the variance that you've  
3 asked for, that really isn't complying with D-1641.  
4 And -- And so I think some further evaluation of that  
5 would probably be in order.

6           Briefly, we support the findings on sea-level  
7 rise. That's not our issue but we thought it was  
8 important.

9           On reducing reliance in the Delta, we're among  
10 those who've maintained for a long time that the  
11 project really is, as someone asked about earlier,  
12 designed to -- in a way that increases reliance on the  
13 Delta.

14           Going into the details of the Staff's Finding,  
15 it was very well enumerated. It's not limited to a new  
16 or expanded water right, and -- and trying to invoke  
17 some legal theory about why it's not applicable just  
18 really doesn't comport with what we understand the  
19 Delta Reform Act to say on its face.

20           The policy should apply to CVP Contractors.

21           The -- DWR has really tried to exclude that  
22 entire class of Contractors. It's not just the details  
23 of what they do.

24           But, first, they argued, Well, "they don't  
25 count because they're Federal and there's nothing we

1 can do about them." And they said, "It would be hard  
2 to get the information."

3 Well, part of the reason that it's hard is  
4 because we don't know which Contractors are actually  
5 going to be involved.

6 And that leads us back to the issue of, is  
7 this something that we should wait until at least the  
8 State Water Board issues a Permit for before we decide  
9 what information DWR has to go out and gather.

10 Otherwise, I think it is appropriate that DWR  
11 go and perform -- provide the necessary information for  
12 all those who potentially would be recipients of water  
13 under this Proposed Action.

14 We think all three of the factors under  
15 Subdivision (a) apply. There are significant adverse  
16 impacts.

17 And, as far as we know, we're not reducing  
18 demand, and we don't have records that show that water  
19 recipients have reduced reliance.

20 So, we believe that staff really got it right  
21 on this. And the appropriate thing is to remand this  
22 and get the information that you all need.

23 Briefly, we support the various findings on  
24 land use. Those, again, are not our issues, but we  
25 want to acknowledge the work that staff did, and many

1 of our colleagues today will be providing the kinds of  
2 details on this that are appropriate.

3 We disagree with the finding -- or the  
4 Recommended Finding by staff that the Adaptive  
5 Management Plans are supported by substantial evidence.

6 So there are two basic kinds of Adaptive  
7 Management Plans that we're talking about. One is  
8 the -- those focusing on Endangered Species Act-listed  
9 species.

10 But the Delta Plan, under Water Code 85308,  
11 is -- requires a formal adaptive management strategy  
12 for ongoing ecosystem restoration and water management  
13 decisions. This is not listed -- limited to listed  
14 species.

15 And, as far as we can tell, the project-wide  
16 Adaptive Management Plan just contains an outline of  
17 what adaptive management would look like for the  
18 non-listed species and the other aspects that would be  
19 covered under the Water Code, the Delta Plan.

20 This is what we found in the -- in the  
21 project-wide Adaptive Management Plan that was  
22 submitted to you all as a part of DWR's filing on  
23 consistency.

24 And there's a description of DWR's  
25 responsibility and how they're going to do some things,

1 but we really don't see them develop the Plan. It's  
2 nothing on the level of what DWR developed for the  
3 endangered species.

4 And we think that there needs to be -- Leaving  
5 aside our disagreements with the issues related to  
6 the -- the adaptive management on endangered species,  
7 there's nowhere near the level of detail and we think  
8 that's required and appropriate in order for you to  
9 find consistency.

10 Regarding Delta flow objectives, we disagree  
11 with Staff's Recommendation that you do not take  
12 official notice of the various Federal documents that  
13 FOR and others submitted. These are shown in Exhibit C  
14 of the Draft Staff Determination.

15 These documents are extraordinarily important  
16 and relevant in light of the recent Federal assertions  
17 that State law may not or does not apply.

18 And the idea that any change in . . . in the  
19 relationship between Reclamation and the Department can  
20 be dealt with at a later time, we don't really  
21 understand how that works in terms of your procedure.

22 There's a suggestion by staff that changes  
23 could be made -- or a new sort of project could be  
24 brought to you because of any changes but -- between  
25 the relationship between Reclamation and DWR.

1           But is that really a new project or is that  
2 simply a revision of the old project? And do you  
3 really have authority, once you approve and find  
4 consistency, to go back and revisit that? And what is  
5 the public process for that? And what are the  
6 opportunities for legal review?

7           We don't understand how that would play out,  
8 and we think it's important that -- that that be a find  
9 but, more importantly and better, we simply think the  
10 right way to do this is not following the business  
11 model of approve now and revise later but, rather, wait  
12 to approve until you've got something that's clear and  
13 defined where you're not going to have to make  
14 revisions in the future.

15           We continue to maintain that the State Water  
16 Board should ask -- act on the Petition for Change  
17 that's before their really sufficient project  
18 definition to allow you to determine whether or not  
19 there's consistency.

20           Not just -- There were a number of other  
21 issues, and people have raised those regarding  
22 completion of the NEPA and CEQA processes and the  
23 importance of doing that before you find consistency,  
24 and -- and we agree with those.

25           But the one . . . Allowing the Water Board to

1 act certainly would rise to the top, in our view, of  
2 something that really needs to happen before we really  
3 know what the project is going to be.

4 In closing, the summary that we're presenting  
5 today is necessarily abbreviated and incomplete.

6 And we'd like to thank the Council for the  
7 opportunity to highlight our areas of support and  
8 concern.

9 CHAIR FIORINI: That completes your  
10 presentation?

11 MR. SHUTES: It does.

12 CHAIR FIORINI: Thank you very much.  
13 Councilmembers, any questions?

14 COUNCILMEMBER DAMRELL: I have one question.

15 CHAIR FIORINI: Yes.

16 COUNCILMEMBER DAMRELL: Some of the questions  
17 I asked Mr. Brodsky.

18 If the Council decides to remand this matter,  
19 what do you hope to accomplish in terms of the --  
20 the -- the project development or changes that DWR  
21 could address if it is remanded?

22 And those general questions -- a general  
23 answer would be satisfactory to me.

24 MR. SHUTES: First of all, I think that it's  
25 clear, and it's fairly well known, that we don't

1 approve or agree with the project.

2 But assuming, for the -- in order to answer  
3 your question, that ultimately will be approved,  
4 clarity on how the project will be operated, clarity on  
5 the role of the Bureau of Reclamation.

6 I think those two are -- are some of the  
7 biggest issues that -- that we have raised and  
8 consistently had concerns about.

9 Let's see if there's others.

10 I think also the -- the questions having to do  
11 with whether people are reducing reliance on the Delta  
12 are things that we really don't have information about  
13 in many cases. It's spotty; it's sporadic.

14 I don't think that the sense that -- I mean, I  
15 don't know where you draw the line between the intent  
16 of the law and sort of approximating something.

17 But just saying that, "Well, we've tried to  
18 get as much information as we could but not having that  
19 in any kind of detail," and that's kind of, as I  
20 understand it, an acceptable compliance with the intent  
21 of the law.

22 I don't think that's really right. And so I  
23 think more detail on some of the issues that we and  
24 other folks have raised today. There's a whole rash of  
25 issues that Mr. Brodsky stated that I think could be

1 addressed and he stated them much better than I can.  
2 That's really not our set of issues.

3 Those are ones that come to mind right off the  
4 top of my head.

5 COUNCILMEMBER DAMRELL: Thank you.

6 CHAIR FIORINI: Okay. Thank you both very  
7 much.

8 MR. SHUTES: Thank you.

9 CHAIR FIORINI: Next up, North Delta  
10 C.A.R.E.S. Action Committee, Appellant Group 4, Barbara  
11 Daly.

12 MS. DALY: Good afternoon. My name is Barbara  
13 Daly. I am with North Delta C.A.R.E.S., and I have  
14 with me Dierdre Des Jardins and I will let her  
15 introduce herself.

16 And she will begin our comments this  
17 afternoon, and then I will finish them up.

18 MS. DES JARDINS: My --

19 MS. DALY: North Delta C.A.R.E.S. Action  
20 Committee.

21 MS. DES JARDINS: My name is Dierdre  
22 Des Jardins and representing California Water Research.

23 Can you put up North Delta C.A.R.E.S.' first  
24 PowerPoint, please?

25 So . . . No, that's not it. That's the

1 individual one. North Delta C.A.R.E.S., A41. There it  
2 is.

3 And California Water Research has been working  
4 with a team to analyze WaterFix construction impacts  
5 and North Delta C.A.R.E.S.

6 North Delta C.A.R.E.S. raised issues that the  
7 project mitigation was inadequate, including all of  
8 these -- all of these issues.

9 The staff -- We support the Staff Findings  
10 that said the Department has not cited evidence in the  
11 record demonstrating mitigation measures or  
12 alternatives which would lead you to the point that  
13 impacts aren't infeasible.

14 We don't feel the Community Benefits Fund  
15 would address all the issues.

16 One is construction noise. It's potentially  
17 24/7. The commitment in the Draft EIR/EIS to follow  
18 local noise ordinances has been deleted. It's very  
19 severe for Hood, and it could interfere with teaching  
20 at Clarksburg schools.

21 This is the calculated noise contours as  
22 Mr. Brodsky testified. These are inadequate.

23 But just to show the level of noise that can  
24 be expected in Hood and Clarksburg.

25 Frazier Shilling testified for LAND that

1 nighttime levels would be above 50 dBA which is above  
2 threshold sound to disturb human health. He also said,  
3 despite the literature on negative health outcomes, the  
4 Final EIR/EIS only considers noise increase.

5 For air quality, there's huge areas next to  
6 Hood and across the river from Clarksburg. And  
7 fugitive dust emissions calculated in the Air Quality  
8 Analysis don't include wind erosion so we end picking  
9 up dust from -- from these areas is not included.

10 This is Hood. There's an enormous workstation  
11 area. DWR's turning what looks like an entire parcel  
12 next to Hood into a work area. This is really -- It's  
13 larger than the town.

14 This only shows -- This is from the 2015  
15 Conceptual Engineering Report. On the left, it shows  
16 the work area and, again, you can see Clarksburg down  
17 at the bottom, and it's enormous.

18 There's not just a noise issue. It's also  
19 dust, and there's issues that there could be hazardous  
20 materials in the dust.

21 Sensitive receptor maps do not include  
22 Clarksburg schools or the Community Park at Hood. And  
23 tests of the reusable tunnel material show Chromium VI  
24 in the tunnel muck, potentially hazardous.

25 This is a diagram of sensitive receptors, a

1 closeup. It doesn't show any of the schools in  
2 Clarksburg or the Community Park.

3 The Reasonable Tunnel Material Testing Report  
4 said that, if it's to be placed in the environment,  
5 people could be contacted either directly or as an  
6 airborne particulate, that a Human Health Risk  
7 Assessment needed to be developed. None has been.

8 Gas wells. The internal -- DHCCP Engineering  
9 Review recommended that the tunnel alignment avoid any  
10 active or idle gas wells and minimize intersection with  
11 plugged wells.

12 This is a diagram of all the gas wells in the  
13 Delta. They're very large numbers and these are what  
14 are known.

15 The Outside Review Panel recommended, given  
16 that well coordinates aren't necessarily accurate, that  
17 DWR conduct a survey to determine their exact location.

18 This has not been done.

19 And they recommended avoid all wells to the  
20 extent practical, and avoid tunneling over wells, and  
21 that they would need to address each well specifically.

22 This is a closeup of the active well areas,  
23 plugged wells in the area. It's a significant issue.  
24 There's a significant number of wells along the tunnel  
25 alignment near these Legacy towns.

1           The proposed mitigation in the 2015 Conceptual  
2 Engineering Report only indicates that the State of  
3 California may classify the tunnels as potentially  
4 gassy. This is not mitigation.

5           And proposing to identify the minimum  
6 allowable distance in the future is not mitigation,  
7 either.

8           Haul routes go right by Courtland, Locke, and  
9 Walnut Grove on 160. They have 24/7 traffic.

10           This is a picture of the haul routes.

11           Reza Moghissi testified that there would be  
12 systematic and unprecedented increases in traffic  
13 levels for the County of Sacramento.

14           This is a picture from the Conceptual  
15 Engineering Report. There's tunnel reaches, and  
16 they're proposing to excavate Reaches 4, 5, 6 and 7,  
17 all of the main tunnel reaches, simultaneous, which  
18 greatly exacerbates traffic problems.

19           Now I'll turn it over to Barbara.

20           MS. DALY: Thanks, Dierdre.

21           First of all, I'd like to thank you all and  
22 your staff for your hard work and all of your efforts  
23 on this appeal process.

24           We in North Delta C.A.R.E.S. actually really  
25 do disagree with the staff's findings on the impacts on

1 the visual and esthetics character of the Delta.

2 And my comments are to focus on the North  
3 Delta, this time from Rio Vista north where the three  
4 proposed intakes are planned to be constructed.

5 And we'd like to reinforce our comments on the  
6 visual and the esthetic effects.

7 So, I'm only going to go into the traffic haul  
8 routes that Dierdre just brought up in the North Delta.  
9 They follow much of the historical route of the  
10 Sacramento River.

11 State Route 160 will greatly adversely affect  
12 the visual and esthetic qualities of that area. There  
13 is no mitigation that I can think of, other than to  
14 move the project to somewhere else or change the  
15 project. I don't know if it's infeasible to be  
16 addressed on remand or not, but I would leave that up  
17 to you.

18 I'm going to show you some pictures of  
19 buildings and structures -- if we could bring those up,  
20 please -- that will experience direct negative effects,  
21 impacts, whether it's extreme noise, vibrations, visual  
22 disturbances or road crowding, access, because of heavy  
23 truck traffic on the haul routes per the map which I  
24 will show you Figure 23A-09.

25 So if you would bring that up, please? DSC.3.

1           And we do request that you support your  
2 Staff's Recommendation to remand the WaterFix back to  
3 the Department of Water Resources.

4           This is the map. It's a little hard to see,  
5 but this is the route that the trucks will take.

6           And I made a key that the -- And the trucks  
7 are going to go 24 hours a day seven days a week for  
8 the 13-year construction period back-to-back hauling  
9 construction materials on Delta roads, which will  
10 devastate the Delta history and the historic  
11 communities. And the keys are State Route 160, also  
12 River Road, the Franklin Road, Lambert Road, Sutter  
13 Slough Bridge, Walnut Grove and Twin Cities Road.

14           So, I have these Key 1, 2, 3, 4, 5, 6  
15 throughout these pictures and I'm going to go through  
16 them pretty fast. But you can see how narrow the river  
17 is up here.

18           So, on the right is 160, the route of the  
19 trucks. And that's the east side where they would be  
20 putting in the water intake facilities. The left side  
21 is where Clarksburg is.

22           This is Freeport Bridge, and it came out a  
23 little dark. Built in 1929, it is on the State  
24 Historic Bridges Register.

25           And it's very hard to see. Can you lighten

1 that at all?

2 We have SR -- State Route 160. This is the  
3 Scribner Bend Winery. This is right on the road, right  
4 on State Route 160 where the trucks will be going by,  
5 two a minute.

6 State Route 160, this is a home right next to  
7 the shoulder of the road. You can see the lines in the  
8 road there.

9 Rosebud Ranch is -- was built in 1850.

10 There we go. There's Rosebud Ranch, built in  
11 1850. It's right next to the road, right next to State  
12 Route 160, where the trucks will be going by.

13 This is on the other side of the road but  
14 the -- As you could see, the river's fairly narrow.  
15 There's a winery there. We have the Old Sugar Mill  
16 that has 15 wineries. That's right on the river road.

17 On the other side we have the Dinky Diner in  
18 Clarksburg, so close to where the batch plants of the  
19 cement will be right across the river.

20 And I'm going to start to just go through  
21 here.

22 You can see Clarksburg was established in  
23 1850. It's over 100 years old.

24 This is the Community Church just a block from  
25 the river road, just a block from the water. And

1 their -- The Community Church you can see is very well  
2 attended. Right at the top of the trees is where the  
3 road is.

4 And this is the Clarksburg Library, very well  
5 attended. The children go there -- The grade school  
6 children go there once a week every week to get their  
7 books.

8 The high school is within a block and a half  
9 from the River Road where all the trucks will be going  
10 back and forth, as well as the Middle School, as well  
11 as the Elementary School right there.

12 This is -- You can see the line in the road.  
13 That's the River Road where the trucks and the batch  
14 plants are right on the other side of the river. It's  
15 so close to the construction.

16 This is Hood. This is right on -- at Hood  
17 Franklin Road.

18 And this is Hood Franklin Road and State  
19 Route 160 where they intersect. There's a restaurant  
20 there.

21 Hood Community Park is right on Hood Franklin  
22 Road where all the trucks are going by two a minute.

23 Right -- Going back up to State Route 160, and  
24 on the water we have another older home.

25 We have the Henley Pear Farm, that old

1 beautiful historic home there.

2 The Elliots' family home.

3 This is the Courtland Docks, right there on  
4 the water.

5 And another family home.

6 This is the Sutter Slough Bridge. You'll see  
7 here that the trucks will be going over this bridge.  
8 It is on the State Historic Register.

9 This is the Paintersville Bridge, also on the  
10 State Historic Register.

11 This is the Walnut Grove Bridge, also on the  
12 State Historic Register.

13 This is the family farm of Tim Newhart. And  
14 the sign up there, you can't see it, but it says it was  
15 established in 1848. And he has just put in a new  
16 restaurant there right on the road where the trucks  
17 will be going by at Sutter Slough.

18 You can see how narrow the roads are with pear  
19 fields on the left and the Sacramento River's on the  
20 right. The traffic jams are going to be pretty --  
21 pretty difficult.

22 This is the Sutter Slough Bridge.

23 We have the Grand Island Mansion that was  
24 established in 1917, many weddings events out there,  
25 Sunday brunches.

1 More homes.

2 Walnut Grove. This is -- Where that boat is,  
3 that is a public dock. Those building behind it are  
4 the route that the trucks will be on. That's the main  
5 street right along the route.

6 We have Deckhands Marine on the other side.  
7 The environmental reviews that that building will be  
8 gone.

9 As you can see, Walnut Grove was established  
10 by Chinese and Japanese, two different districts, and  
11 this is what it looks like today.

12 These are very recent pictures. This is the  
13 Imperial Theater. It's on the National Historic  
14 Register, established in 1920.

15 And a park, a Community Park, just a block  
16 from where all of the trucks will be going back and  
17 forth. Behind it is a school. The Tong Building,  
18 another building, most -- many of the shops will show  
19 that they were built in the 1870s.

20 This is a park. In fact, it is the gateway to  
21 the Delta Meadows, which isn't very well kept by the  
22 State. People are not even allowed to walk down there  
23 or drive down there right now.

24 Now we're in Locke. As you can see, Locke is  
25 right here. It's very hard to see. The shadows didn't

1 look like when I put it there. But they -- This --  
2 This is a road right there. It's right on the highway.

3 Right at the top of that little incline is  
4 State Route 160. As you can see, it comes down.  
5 There's a museum there. That's a Chinese museum.  
6 Children's Elementary School.

7 And this is the Town of Locke. And Locke --  
8 The EIR/EIS says that the historic buildings will fall.  
9 They will -- They will be severely damaged.

10 And another building in Locke, just to show  
11 you some of the Locke buildings.

12 This is a Memorial Park in Locke to the  
13 Chinese who built the Transcontinental Railroad and who  
14 began to build the Delta levees which are fashioned  
15 after the levees in the Pearl River Valley in Canton,  
16 China.

17 So it's -- It is also affected by Twin Cities  
18 Road. That's what the six means. And one is State  
19 Route 160.

20 This is the oldest building in Locke. It is  
21 Locke Garden, a Chinese restaurant directly on 160.

22 And we have the Isleton Bridge. This is a  
23 one-lane bridge for trucks and buses. It's not a  
24 two-way when you have large vehicles.

25 This is a sign that shows that it was

1 established in 1874, and State Route 160 goes across  
2 and through Isleton.

3 We have the Rio Vista Bridge and -- which --  
4 and Highway 12 connects 80 with 5.

5 And I'm almost done. I have only maybe three  
6 more.

7 At Bouldin Island, the traffic jams are  
8 already unbearable by the public.

9 Mt. Diablo, the Delta's compass.

10 And our Water Code which people have been  
11 reciting to you.

12 The coequal goals shall be achieved in a  
13 manner that protects and enhances the unique cultural,  
14 recreational, natural resource and agricultural values  
15 of the Delta as an evolving place.

16 To the Delta Stewardship Council, thank you  
17 for your hard work and for protecting and being good  
18 stewards of the Delta.

19 From the North Delta C.A.R.E.S. Action  
20 Committee.

21 CHAIR FIORINI: Does that complete your  
22 presentation?

23 MS. DALY: Yes.

24 CHAIR FIORINI: Thank you.

25 Any questions?

1 COUNCILMEMBER DAMRELL: Yes. The same  
2 question.

3 Are there feasible changes that you can --  
4 that should be made if this matter was remanded to the  
5 DWR?

6 MS. DALY: Well, that's interesting because I  
7 know one of the things that's out in the public right  
8 now is that we're hearing that maybe one tunnel  
9 wouldn't be as devastating to the Delta as two.

10 And from the people who live there, we feel  
11 that the construction of one tunnel would be just as  
12 devastating as two tunnels.

13 I don't know what you could do. As far as the  
14 trucks, maybe a different route. I don't know. But  
15 the routes that have been selected are just not  
16 workable for us.

17 It's just in the wrong place, and it's the  
18 wrong plan, in our opinion.

19 MS. DES JARDINS: I -- I just wanted to add  
20 that the sign in Hood is just terrible for these small  
21 Legacy towns. And you can see the -- the noise  
22 impacts, and there aren't plans for sound walls.

23 There aren't plans to locate work areas  
24 further away from schools and parks.

25 There isn't an adequate Air Quality Analysis.

1           And there's no justification for the  
2 aggressive schedule of boring all four reaches of the  
3 main tunnels at once. But, you know, it's like this  
4 almost wartime schedule that's just going to impact  
5 every part of the Delta.

6           COUNCILMEMBER DAMRELL: Thank you.

7           CHAIR FIORINI: Okay. Thank you very much.

8           Next up, City of Stockton, and the Sacramento  
9 Regional County Sanitation District, represented by  
10 Kelley Taber for a combined 30 minutes.

11           Welcome.

12           MS. TABER: Good afternoon. Kelley Taber on  
13 behalf of City of Stockton and Regional Sanitation  
14 District.

15           Chair Fiorini, members of the Council, staff,  
16 thank you for the opportunity to comment on the Draft  
17 Determination.

18           Stockton and Regional San support the overall  
19 recommendation that you find that the WaterFix Project  
20 is not consistent with the Delta Plan.

21           But we do believe that the Determination  
22 doesn't go far enough in recognizing impacts to  
23 Stockton and Regional San, and so we're hoping today  
24 that our presentation will encourage staff to go back  
25 and take a second look, and a really hard look at some

1 of these issues. And I'll try to quickly summarize  
2 them.

3 I have two presentations. I'll go through  
4 Stockton's first and then we'll switch the PowerPoint  
5 for Regional San.

6 And we will submit written comments by the  
7 Monday deadline that provides all of the detailed  
8 evidentiary citations that supports the statements that  
9 I'll be making today.

10 The Draft Staff Determination for Stockton's  
11 issues relies on the WaterFix Final EIR and a report  
12 from the water rights change proceeding, DWR-652, to  
13 find that DWR analyzed the implications of the project  
14 with respect to the potential impacts to Stockton's  
15 water quality and that DWR substantiated its model  
16 choices and calculations.

17 And Stockton maintains that when the evidence  
18 in the record is viewed in light of the entire record,  
19 not just DWR's report and the Final EIR, that the  
20 evidence that DWR is relying on, both in terms of its  
21 modeling and its impact conclusions that are drawn from  
22 that modeling does not meet the Delta Plan requirement  
23 for best-available science for -- on the criteria of  
24 relevance, inclusiveness, objectivity and transparency.

25 And the consequences of the failure to use and

1 demonstrate the use of best-available science is that  
2 impacts to Stockton's water supply reliability have not  
3 been recognized or mitigated.

4           You've heard a lot of talk about the standard  
5 of review. We just want to emphasize that a  
6 requirement is recognized in your staff's determination  
7 that evidence has to be of solid value. And, again,  
8 you're looking at evidence in light of the whole  
9 record. And remand is required where a reasonable  
10 person could not have reached the Agency's conclusion.

11           And if you look at the entire record of  
12 evidence before you, I think you'll agree, and your  
13 staff will agree, that a reasonable person could not  
14 have found that this project will not make Stockton's  
15 water supply less reliable.

16           The Approved Project, CWF H3+, increases the  
17 amount of time that Stockton cannot use its intake and  
18 have access to its drinking water supply from the  
19 San Joaquin River by 48 percent compared to DWR's  
20 No-Action Alternative.

21           That was documented in Stockton's evidence,  
22 Stockton-61, the Water Rights Hearing, Pages 3 to 4.

23           This translates into up to two months per year  
24 that Stockton's unable to use its water supply,  
25 depending on the water type, compared to the No-Action

1 Alternative.

2 DWR's failed to demonstrate the use of  
3 best-available science. It's -- Best-available science  
4 is defined as the best scientific information and data  
5 for informing management and policy decisions, the  
6 factors I mentioned, relevance, inclusiveness,  
7 objectivity, transparency.

8 Inclusiveness, as it's recognized in the  
9 determination by your staff, requires that scientific  
10 information incorporate a thorough review of relevant  
11 information.

12 So we'll walk through that right now.

13 DWR's impact assessment and determination for  
14 Stockton wasn't based on the Approved Project CWF H3+,  
15 which has the most severe water quality impacts.

16 The modeling that they relied on uses  
17 inaccurate assumptions about sea-level rise. This is  
18 something that your staff has recognized.

19 And that failure infects the value,  
20 evidentiary value, of all of the modeling analysis for  
21 water quality, water levels. It's -- You can't find  
22 that the essential assumptions in the modeling are  
23 invalid and that the impact determinations that are  
24 drawn based on that modeling are valid.

25 Your staff's already determined that that has

1 to go back to them.

2           And they also assume D-1641 compliance in  
3 their impact determinations. Your staff again found  
4 that that was not reasonable, that there's no evidence  
5 to support that because they are not relying on the  
6 current standard.

7           The impact analyses aren't based on relevant  
8 evidence for water quality due to the way that DWR  
9 averaged the results of its modeling.

10           By developing a mean monthly average for  
11 salinity -- which is a big concern for Stockton and  
12 agricultural purveyors and others -- it effectively  
13 averaged 15-minute data into daily data. Then it  
14 averaged the daily data into monthly data. Then it  
15 averaged the monthly data into mean monthly data, which  
16 was averaged over the 16-year model period.

17           And the result of all of this averaging is  
18 that the actual change in salinity from the California  
19 WaterFix scenarios was masked and, in particular, the  
20 daily changes in salinity that dictate whether Stockton  
21 and other Delta water suppliers can access their water  
22 were hidden.

23           And DWR certified to you that its methodology  
24 was subject to review and comment but that  
25 Certification failed to recognize and acknowledge that

1 experts who commented on the EIR and testified in the  
2 Water Board hearing universally condemned the approach  
3 that DWR took as misleading and inadequate for informed  
4 decision-making, and irrelevant to drinking water  
5 purveyors who have to assess and respond to water  
6 quality changes on a daily basis or even more  
7 frequently.

8           And this issue was not just Stockton's issue.  
9 The experts in the water rights proceeding and in the  
10 EIR commenting on behalf of all of the Delta entities,  
11 Antioch, Brentwood, Contra Costa County, Solano County,  
12 North Delta Water Agency, universally those experts  
13 said, "This is not good enough. It doesn't tell all of  
14 the story and it doesn't tell the relevant story."

15           So the impact analysis. DWR had a choice in  
16 the methodology it would use to assess impacts and it  
17 chose the method that obscured relevant information  
18 regarding potential impacts.

19           And we've -- You've heard Dr. Mel Lytle here  
20 last month tell you our evidence in the record shows  
21 that Stockton's ability to use its water supply is  
22 dictated by daily Chloride levels.

23           And so the lack of evidence in DWR's  
24 Certification on the changes in the time-scale and  
25 quarry levels -- are relevant to Delta water purveyors,

1 including Stockton -- doesn't answer the question of  
2 what the effect will be on water supply or reliability  
3 for Delta water purveyors.

4           You have the criteria -- again, the criteria  
5 of relevance and inclusiveness.

6           DWR's opinion that these daily changes in  
7 water quality would not matter to Stockton was based on  
8 flawed assumptions and irrelevant information.

9           DWR submitted a response to you on October  
10 23rd that cited testimony of a witness that it produced  
11 in the water rights proceeding, Doug Owen, as evidence  
12 that short-term increases in Chloride wouldn't pose any  
13 impact to Stockton.

14           But his testimony was not best-available  
15 science, and it wasn't relevant, because Mr. Owen had  
16 no experience with the specific type of Treatment Plant  
17 that Stockton operates, which is known as a T5 Plant.

18           And his opinion wasn't based on any relevant  
19 information about how it actually operates. And this  
20 came out in cross-examination. We'll provide you with  
21 all the citations to his testimony.

22           Other Delta water purveyors can manage higher  
23 Chloride levels because they divert to reservoirs. But  
24 Stockton doesn't divert to reservoirs. It diverts  
25 directly to its treatment system and straight to its

1 customers. So in less than 24 hours, in the time water  
2 is diverted, its customers use it in their homes and in  
3 their businesses.

4 And, so, daily changes are noticeable and they  
5 are -- can't be managed at a certain level -- above a  
6 certain level by the Treatment Plant.

7 And had Mr. Owen consulted with Stockton  
8 before he formed his opinion about the impacts, he  
9 would have known that Stockton's system is different  
10 from other plants that he might be familiar with, and  
11 different even than some other Delta water purveyors.

12 But Mr. Owen never spoke to anyone at Stockton  
13 about how its Treatment Plant was designed or operates.  
14 And the only source of information that he relied on in  
15 forming his opinion was watching a YouTube video that  
16 he found online that the City had posted to inform its  
17 citizens about its water right changes.

18 Recalling that best-available science  
19 criteria, inclusiveness requires that scientific  
20 information incorporates a thorough review of relevant  
21 information.

22 DWR did not conduct a thorough review of  
23 relevant information in assessing the impacts to  
24 Stockton, and it hasn't demonstrated the use of  
25 best-available science.

1           You also have a criteria of transparency and  
2     objectivity.

3           Notwithstanding his written testimony and  
4     conclusions in the EIR for the WaterFix that couched  
5     impacts to water quality in terms of whether the  
6     WaterFix would result in long-term substantial  
7     degradation of water quality, the author of DWR's water  
8     quality impact analyses, and the ones cited by DWR,  
9     cited in your Draft Determination, that Mike Bryan  
10    admitted upon cross-examination that a short-term  
11    substantial increase in the water quality constituent  
12    could result in an adverse impact even if it didn't  
13    exceed a water quality standard, and that he would  
14    consider any increase that rendered source water  
15    unusable for simple purposes to be an adverse impact.

16           None of this was recognized in the EIR or the  
17    Water Quality Reports that the Department produced.  
18    And I've already commented on the amount of time that  
19    Stockton cannot use its intake. 48 percent increase  
20    compared to the No-Action Alternative as demonstrated  
21    by modeling. We disaggregate the daily data from these  
22    long-term monthly averages that I'll describe.

23           Relevant -- Best-available science relevance.  
24    The determination does seem to rely on DWR's statements  
25    that it can avoid impacts in what DWR calls real-time

1 operations.

2 But this isn't relevant or accurate as to  
3 Stockton and particularly whether the project is  
4 consistent with the coequal goal of ensuring a reliable  
5 water supply, because the D-1641 Water Quality  
6 Standards are higher than any level at which impacts  
7 will occur to Stockton.

8 And DWR's not required to meet those standards  
9 at Stockton's intake or anywhere on the San Joaquin  
10 River.

11 So just saying that you can adjust your  
12 operations to avoid harm is incorrect and  
13 unsubstantiated with respect to Stockton's water  
14 supply. Again, it's not relevant. It's not  
15 best-available science.

16 And if meeting D-1641 standards were  
17 sufficient or feasible, the Department wouldn't have  
18 agreed to provide Contra Costa Water District with a  
19 substitute water supply of 30 milligrams per liter.

20 So, Stockton's comments on the EIR and its  
21 testimony in the Water Rights Hearing raised concerns  
22 about the effect of numerous constituents that are not  
23 regulated by D-1641. Bromide is an example.

24 And it's interesting, if you look at DWR's  
25 evidence and conclusions with regard to Bromide -- and

1 a number of constituents, they, again, fail to  
2 demonstrate transparency and objectivity that's  
3 required by your best-available science criteria.

4 Not only was the data that the Department  
5 relied on for its evaluation of water quality impacts  
6 to Stockton fundamentally misleading and inadequate  
7 because they used long-term averaging and exceedance  
8 probability graphs, but the conclusions that were drawn  
9 from that data are in many instances at odds with the  
10 data itself, and they're misleading, and they don't  
11 meet the best-available science requirements for  
12 transparency and objectivity.

13 And before you, it's hard to read and see, but  
14 I've included a graph from DWR-652, the section that  
15 talks about Bromide, because this -- and Bromide  
16 impacts to Stockton.

17 And although this is a long -- you know, a  
18 graph that's based on the long-term average data,  
19 you'll note that the orange line, which represents the  
20 WaterFix operating scenario, is significantly higher  
21 than the black No-Action Alternative line for a  
22 substantial portion of this time.

23 And Stockton's expert pointed out in the Water  
24 Board hearing that the text of this report really  
25 doesn't fairly characterize DWR's own water quality

1 modeling results. And the text that accompanies this  
2 graph characterizes the graph as showing, quote,  
3 "similar or somewhat higher monthly mean Bromide  
4 concentrations."

5 But the graph here shows substantially higher  
6 Bromide concentrations relative to the No-Action  
7 Alternative by as much as 100 micrograms per liter for  
8 a significant portion of the time.

9 And this is notable because the Bromide  
10 threshold DWR used was 100 micrograms per liter, yet  
11 their text of the report, the conclusions drawn from  
12 this data, concluded that an increase of double the  
13 threshold wouldn't have an adverse impact and that that  
14 increase would be similar.

15 And I -- Stockton thinks that was not  
16 objective. It's not transparent. It doesn't meet your  
17 criteria for best-available science.

18 Quickly -- I apologize. This is tedious but I  
19 do want to address a couple of points cited in the  
20 Determination. We'll follow up in our written comments  
21 as well.

22 Some objections by the DWR that the staff  
23 specifically quoted in the Determination what that --  
24 citing testimony of DWR's expert, Dr. Nader-Terani,  
25 that -- as evidence that Stockton's expert used an

1 incorrect Chloride conversion factor and, thus,  
2 overstated impacts is really a red herring because the  
3 real issue is not whether Stockton's expert could have  
4 made a different choice in the Chloride conversion  
5 factor that she used in her testimony, but whether the  
6 Department, in considering project impacts to Delta  
7 water quality and making a determination that the  
8 WaterFix is consistent with the goal of them showing  
9 our reliable water supply used best-available science.

10           And it's notable that, in his testimony,  
11 Dr. Nader-Terani did not say that Dr. Paulsen had used  
12 an incorrect factor. He merely noted that she could  
13 have used a different conversion factor. And he cited  
14 one example of how Chloride levels might have been  
15 different if she used something different, but he -- he  
16 did not say she should have used that factor.

17           And, in fact, there is no single conversion  
18 factor that's clearly the most appropriate. DWR used  
19 only one for the entire Delta and its analysis of  
20 impacts to Stockton included.

21           And so it made no attempt to tailor its  
22 evidence and analysis to the actual site-specific  
23 conditions that were relevant to Stockton's water  
24 supply. They used a conversion equation for the  
25 Western Delta that assumed that pretty much all of the

1 Chloride comes from seawater.

2           Stockton used a conversion equation that was  
3 calibrated at a location which has a similar  
4 composition of water to Stockton's intake, certainly  
5 much more similar than the Western Delta, and DWR did  
6 not do that.

7           Stockton's expert acknowledged the location he  
8 used was the one nearest Stockton's intake in terms of  
9 the water composition; that it wasn't a perfect match  
10 but it was closer than anything else. It was the  
11 best-available science.

12           And it was actually more conservative than  
13 what DWR used, and DWR does not dispute this, that it  
14 was more conservative.

15           And, so, as a result of that choice by  
16 Stockton's expert, the results that I described today  
17 and that are cited in our testimony and our appeal  
18 actually underestimate slightly the impacts to Stockton  
19 compared to what would have been shown if DWR had gone  
20 to the effort of disaggregating all of that long-term  
21 method -- data and actually describing and presenting  
22 the water quality achievements that would be meaningful  
23 to an assessment of how this project affects Stockton's  
24 water supply reliability.

25           And contrary to the evidence that's cited in

1 the Staff Determination, Draft Determination,  
2 Dr. Paulsen didn't limit her analysis to a comparison  
3 with existing conditions. They are evaluated against  
4 the No-Action Alternative that . . .

5 The statistics I quoted earlier about the  
6 impact to Stockton are all based on comparison with the  
7 No-Action Alternative.

8 The October 23rd response from DWR regarding  
9 impacts to Stockton misleadingly suggests that a  
10 Final EIR commitment, this 3B 31, provides assurance  
11 that the Department will address water quality impacts  
12 to Stockton.

13 And the Draft Determination doesn't  
14 specifically reference this, but because it's in the  
15 response, and it wasn't entirely clear if the staff had  
16 relied on this, I'll briefly note that this measure  
17 offers no assurance that any of the WaterFix impacts to  
18 Stockton will be mitigated.

19 DWR commits in this measure only to assist  
20 those Delta -- in-Delta water purveyors that DWR  
21 determines will have a significant unavoidable water  
22 quality impact from operating the water conveyance  
23 facilities.

24 And DWR's refused to recognize that this  
25 project will have an impact on Stockton's water supply,

1 so this measure does nothing for Stockton. It provides  
2 no assurance and no substantial evidence to demonstrate  
3 that impacts to Stockton will be mitigated.

4 I guess I would say that if the Department  
5 intends to rely on this measure, it must clarify when  
6 it comes back to you with a revised Consistency  
7 Determination that this measure will be applied to  
8 Stockton in a way that fully mitigates the impacts of  
9 the WaterFix Project, addressing the impact to Stockton  
10 and its lost water supply for all of the days in which  
11 the WaterFix causes the Chloride levels to exceed  
12 Stockton's usability threshold.

13 So, just to wrap up for Stockton. The burden  
14 of proof is not on Stockton to prove how or to what  
15 degree it will be impacted, although we have done so  
16 with substantial evidence that meets your criteria for  
17 best-available science.

18 The burden is on the Department to demonstrate  
19 that it used best-available science and that its  
20 determination is supported by substantial evidence in  
21 light of the whole record.

22 We believe that our submittal shows it hasn't  
23 done that and that the project is not consistent with  
24 the coequal goals or the Delta Plan because it makes  
25 Stockton's water supply less reliable.

1           You are the entity that is tasked with  
2 protecting the Delta by ensuring that projects like the  
3 WaterFix are consistent with the coequal goals in the  
4 Delta Plan.

5           And, in many respects, you are the last resort  
6 for Delta communities that will be harmed by the  
7 WaterFix construction and operation.

8           The Draft Determination appropriately  
9 recognizes many of those unmitigated impacts. But we  
10 submit that it doesn't go far enough because it fails  
11 to recognize the impact to the drinking water supply of  
12 the largest municipality in the Delta, 300,000 people  
13 in Stockton.

14           And I guess last for Stockton, I'll note that  
15 you heard today from the Department that it's trying to  
16 address long-range problems such as the impact of  
17 sea-level rise.

18           And I'll note that, in trying to solve that  
19 problem for its South-of-Delta water users, it's  
20 exacerbating that problem for in-Delta water users.

21           And Councilmember Thomson alluded to that in  
22 his questions about the effect of diverting 9,000 cfs  
23 of flow from the North Delta.

24           That water is not flowing through the Delta.  
25 It's not help -- It will not be available to help push

1 back against seawater intrusion. It'll be leaving  
2 Delta -- in-Delta users to suffer the effects of  
3 sea-level rise with no mitigation.

4           And I guess, from Stockton's perspective, it's  
5 as if the Department of Water Resources is saying,  
6 "Pull up the ladder, I'm aboard. We're going to solve  
7 sea-level rise for the people south of the Delta who  
8 don't want to have to deal with the effects of  
9 salinity, and the effects for in-Delta water users will  
10 be left to them for figure out."

11           And that is fundamentally unfair and we hope  
12 that, when it goes back to DWR, that they will take --  
13 that you will direct them with the finding they didn't  
14 use best-available science or demonstrate consistency  
15 with the coequal goals, that they need to take a harder  
16 look at how they can achieve their objectives while not  
17 making things less reliable for Delta water users.

18           Thank you for that.

19           That concludes my presentation for Stockton,  
20 and I have just a very short few remarks to make for  
21 the Regional Counsel Sanitation District.

22           If we could put up the presentation for Group  
23 A6, please. It's just a couple slides.

24           Thank you.

25           So the Sacramento Regional County Sanitation

1 District's appeal focused primarily on the Policy DP P2  
2 that requires that DWR respect local land uses when  
3 siting new water facilities.

4 The requirements are to avoid or reduce  
5 impacts to the extent feasible. And your determine --  
6 The Draft Determination focuses on whether there's  
7 substantial evidence of effective mitigation.

8 And Regional San's position would be that  
9 simply doing an alternative site analysis and  
10 concluding that there are no feasible alternative  
11 locations for the project is not sufficient to  
12 demonstrate compliance with the standard that requires  
13 that you respect local land uses when you're siting  
14 water facilities.

15 The determination seems to focus on DWR's  
16 alternative site locations. Our position would be, if  
17 this truly were the only feasible location to put these  
18 facilities -- and they will have an adverse effect on  
19 Stockton's Treatment Plant operations and its  
20 facilities -- then the Department needs to show that it  
21 has done everything possible to reduce the effects of  
22 putting the intakes -- and this goes to the intakes --  
23 in the location that it sited them.

24 And so far, it hasn't done that. It did  
25 include a commitment in its EIR and in an appendix to

1 come up with an Operating Plan that would avoid effects  
2 to Regional San, but there's nothing in the record to  
3 demonstrate that that's feasible. They haven't  
4 coordinated with Regional San or try to demonstrate how  
5 it could be done.

6 If it can be done, that would be great. That  
7 would address Regional San's concerns.

8 Regional San has been before you many times.  
9 They are actively involved in the Delta and protecting  
10 the Delta and Delta interests.

11 They have consistently advanced the position  
12 that the beneficiaries of projects must pay for the  
13 impacts of those projects.

14 There will be an impact to Regional San. The  
15 water users who benefit from the WaterFix Project  
16 should mitigate those impacts, and they should  
17 demonstrate to you, through the use of best-available  
18 science, that those impacts have been mitigated to the  
19 extent feasible before you certify -- or accept their  
20 Certification that the WaterFix Project is consistent  
21 with Policy DP P2.

22 And I'll -- I'll just -- On this point, the  
23 Draft Determination does require -- focus on the lack  
24 of effective mitigation for other local land use  
25 impacts. Regional San appreciates that because it's an

1 interesting use in the Delta. It wants to ensure that  
2 all the uses are protected.

3 This determination is being remanded -- Or the  
4 Staff Recommendation is that you remand the Consistency  
5 Certification of DWR. And Regional San is simply  
6 asking that it be treated like all of the other  
7 existing uses in the Delta with respect to the question  
8 of adequacy of mitigation, and that your staff find  
9 that, as of -- We're sitting here today with the record  
10 before you, there is no substantial evidence that the  
11 DWR has mitigated impacts to the regional -- Sacramento  
12 Regional Wastewater Treatment Plant to the extent  
13 that's feasible.

14 And so we would ask that you just apply that  
15 same standard of review and hold DWR's feet to the fire  
16 for impacts to the local land use of the regional  
17 Wastewater Treatment Plan as you did for the other  
18 Delta communities and land uses.

19 And that concludes my presentation for  
20 Regional San, and I'm happy to answer questions for --  
21 about Stockton's or Regional San's appeals.?

22 CHAIR FIORINI: Miss Taber, thank you.

23 Questions?

24 COUNCILMEMBER DAMRELL: Would it be fair to  
25 say that what you just presented to us is basically a

1 summary of the change -- feasible changes that you  
2 think should be made in the project or in the  
3 recommendations of the staff?

4 MS. TABER: For -- I was more specific maybe  
5 for Regional San, so -- Yes. I think Regional San's  
6 concerns could be addressed with the -- if it were  
7 assured that the impacts to its operations would be  
8 mitigated and its facilities.

9 And that there are multiple concerns raised in  
10 this appeal. Some deal with that how the intakes are  
11 operated. Others deal with the financial impact if  
12 those operational effects cannot be adequately  
13 mitigated.

14 So, all of that is addressed in our evidence  
15 before the Council. It may well be possible that those  
16 can be addressed, but, so far, that assurance doesn't  
17 exist.

18 For Stockton, there -- I mentioned when I was  
19 here in October, and I think Dr. Lytle's testimony  
20 suggested, Stockton feels that it has been treated  
21 differently and unfairly compared to some other Delta  
22 entities that the Department settled with.

23 If Stockton had the same assurances that  
24 Contra Costa Water District has been given about  
25 providing an alternative water supply or otherwise

1 mitigating the impacts to the project, it could very  
2 well be that Stockton's concerns are fully addressed.

3           Those -- The issues -- There -- And Stockton  
4 raised many issues over the years of concern with  
5 regard to this project. But it's focused, for purposes  
6 of this appeal and in the water rights proceeding, on  
7 the reliability of its water supply. It's simply  
8 looking to have that -- the impacts acknowledged and  
9 mitigated to the extent feasible.

10           I -- We think that the Department feels that  
11 it's feasible to mitigate it because it's done it for  
12 other entities in the Delta -- Contra Costa Water  
13 District -- that might satisfy Stockton.

14           COUNCILMEMBER DAMRELL: Thank you.

15           CHAIR FIORINI: In your opinion, will the --  
16 If the State Water Resources Control Board issues a  
17 change in the Point of Diversion Permit, would that  
18 likely address the concerns -- the water quality  
19 concerns of the City of Stockton?

20           MS. TABER: We certainly hope it will.

21           But we -- Right now, we -- there's -- I  
22 couldn't predict how that decision would go.

23           We feel that Stockton and other in-Delta water  
24 users have presented a very compelling case, but I  
25 couldn't prejudge what the Water Board would decide on

1 this, so . . .

2 But I think that goes to the question raised  
3 in Regional San's and Stockton's appeals. This --  
4 Staff is recommending denying these appeals on the  
5 ground that it's -- WaterFix Certification is  
6 premature.

7 But, certainly, I think it goes back to the  
8 question that we raised, is, it really is probably  
9 premature to be here. A lot of these issues might be  
10 addressed.

11 The D-1641 compliance is an issue that we've  
12 talked extensively about. Were the Water Board to  
13 approve a change in that -- and who knows when that  
14 might be -- that issue might come off the table and it  
15 would be something you wouldn't have to deal with.

16 Were the Water Board to condition the Water  
17 Rights Permits in ways that address many of the issues  
18 here, it could certainly narrow the scope of issues  
19 that your Council is required to determine.

20 So we still -- We accept the Staff's  
21 Recommendation on that point, but we would say, I  
22 think, today's workshop only highlights the fact that  
23 we feel it's premature to be here before the Water  
24 Board has ruled on that Water Rights Change Petition.

25 CHAIR FIORINI: Okay. Thank you very much.

1 MS. TABER: Thank you.

2 CHAIR FIORINI: Candace, 25 more minute  
3 presentation good?

4 THE REPORTER: Sure, um-hmm.

5 CHAIR FIORINI: All right. Then next up will  
6 be San Joaquin County, et al., Appellant Group A7,  
7 represented by Osha Meserve.

8 (Pause in proceedings.)

9 MR. KEELING: Good morning. Tom Keeling and  
10 Osha Meserve representing the Delta counties and Local  
11 Agencies of the North Delta.

12 Like everyone else, I very sincerely wish to  
13 express our appreciation to the Council for this  
14 opportunity and its staff, in particular, for this --  
15 this terrifically difficult Draft Determination. I  
16 don't know how you slog through it in such short order,  
17 but congratulations.

18 Today, we'd like to do two things. We'd like  
19 to highlight some information that further supports the  
20 findings of inconsistency.

21 And we'd like to provide some information that  
22 we believe weighs strongly in favor of reconsidering a  
23 few instances as to which the Draft Determination did  
24 find consistency.

25 First, though, a word about the question of

1     prematurity.

2             In our earlier presentations, we pointed out  
3     that this proceeding is premature:

4             An incomplete CEQA process, the increasing  
5     uncertainty about the role of the Reclamation District,  
6     the conditions being imposed by the State Water  
7     Resources Control Board in its Change Petition hearing,  
8     the incomplete Army Corps of Engineer permitting  
9     process, and, in fact, incomplete permitting before  
10    the -- under the ESA and in the Fish and Wildlife  
11    Service Biological Opinion.

12            Could we turn to that quickly.

13            MS. MESERVE: Yes. And just to highlight that  
14    point, since the --

15            UNIDENTIFIED SPEAKER: Could you turn your mic  
16    on?

17            CHAIR FIORINI: Turn that microphone on.

18            MS. MESERVE: Just to highlight the point  
19    regarding the Biological Opinion issued by Fish and  
20    Wildlife Service in 2017, I don't think it's been  
21    highlighted here.

22            But that document had a mixed programmatic and  
23    project-level approach. So that document actually  
24    doesn't provide take authority at the Federal level for  
25    either operation -- for either construction of the

1 intakes and several other major components of this  
2 project, as well as operation of the project.

3 So that's another layer of future reinitiation  
4 of Consultation that the Fish and Wildlife Service  
5 expects to have in the future that would likely lead to  
6 additional changes to the project.

7 MR. KEELING: The bottom line is, we believe  
8 that further consistency reviews for this project --  
9 which by the way is only 10 percent through its  
10 conceptual planning stage -- very likely would be  
11 required.

12 As to each of these incomplete -- incompleting  
13 processes, the Department of Water Resources says,  
14 quote (reading):

15 "The Department has committed to  
16 coordinate with the Council through early  
17 consultation and determine how the change  
18 effects -- affects the WaterFix  
19 certification and what compliance is  
20 necessary for the Delta Reform Act."

21 As to -- As to these issues, the Draft  
22 Determination states, quote (reading):

23 "The Council expects the Department  
24 to pursue an early and robust  
25 consultation."

1           That's from Page 10.

2           (Reading) :

3                   "The Council strongly encourages the  
4           Department to pursue an early and robust  
5           consultation."

6           Also from Page 10.

7           (Reading) :

8                   "The Council reiterates that it  
9           strongly encourages the Department to  
10          pursue an early and robust consultation."

11          That's Page 11, having to do with the Board  
12          hearing.

13          And, quote (reading) :

14                   "The Council expects the Department  
15          to pursue an early and robust  
16          consultation in the event that changes to  
17          the project are approved."

18          That's Page 9, Footnote 5.

19          We submit that this approach does not address  
20          the prematurity of this proceeding. Rather, it creates  
21          vague and unenforceable expectations with respect to  
22          future proceedings.

23                  This is not a respo -- a response that makes  
24          any sense to the prematurity of this proceeding.

25          Moreover, the Draft Determination leaves

1 unanswerd a series of questions. For example, what  
2 are the triggering events for these, quote, "early and  
3 robust consultations"?

4 In fact, what is meant by "early" and "robust"  
5 in this context?

6 Would DWR's assurances on this point be  
7 legally enforceable by the Council or by others?

8 Could the Council itself initiate such an  
9 early and robust consultation if it saw fit to do so?

10 What Consistency Determination authority would  
11 the Council have in the context of such a consultation?

12 What sort of public notice and public  
13 participation would there be?

14 Something that's particularly important as  
15 many of these changes that are anticipated will be  
16 substantial in our view.

17 And what about assurances that the present  
18 prohibition against ex-parte communications will remain  
19 in place between now and the completion of any later  
20 consultation?

21 We think that, instead of the approach taken  
22 in the Draft Determination, the Council should confront  
23 the prematurity of DWR's Consistency Determination head  
24 on and remand the matter to DWR on the ground that it's  
25 simply premature.

1           Alternatively, we think the Council must  
2 demand enforceable commitments if it's not going to  
3 remand on prematurity.

4           For example, we think the Council in that case  
5 should establish clear and enforceable triggers for  
6 these, quote, "early and robust consultations."

7           We think the Council should require DWR --  
8 require DWR to initiate the early and robust  
9 consultations.

10          We think the Council should provide a  
11 cost-effective procedure for commencement of early and  
12 robust consultation by the Council itself.

13          We think the Council should provide that any  
14 later consultation, whether it's early and robust or  
15 not, will not be deemed -- excuse me -- will be deemed  
16 a continuation of this proceeding subject to the  
17 continuing prohibition against ex-parte communications.  
18 That's a big concern of ours.

19          We think the Council should provide for  
20 meaningful public notice and participation and within  
21 this proceeding provide Appellants the right to  
22 initiate such a consultation if both DWR and the future  
23 Council should not do so, despite the occurrence of a  
24 triggering event.

25          Miss Meserve.

1 MS. MESERVE: Thank you.

2 I'll just -- I'll go through -- I have a lot  
3 of slides and I'm sure I won't get through them all and  
4 we will submit something in writing with more detail,  
5 so please don't be upset.

6 I'll kind of dwell on the ones with the  
7 pictures. I know it's been a long day.

8 The -- So, first of all, just to touch on the  
9 Mitigation Measure issue.

10 Policy GP -- G P1(b) (2) is very important.

11 The -- The Consistency Determination should  
12 have explained how each Mitigation Measure that is --  
13 that is actually required of this project is as  
14 effective as the Delta Plan Program EIR Mitigation  
15 Measures.

16 The crosswalk table really doesn't do that.  
17 It just throws out what the other -- what the relevant  
18 Mitigation Measures might be without going into the  
19 detail of whether they are as or more effective.

20 So we would encourage the Council -- Council  
21 staff to look at the crosswalk table again and really  
22 consider whether DWR has carried its burden to meet the  
23 requirements of G P1(b) (2) with respect to showing that  
24 equally or more effective.

25 Because what the crosswalk table really does

1 is just provide a list of things you might look at and  
2 then the public, the Council, the Appellants are left  
3 to go and try to characterize how they may or may not  
4 be the same.

5 I'm just going to touch on two, about special  
6 status species, and the conversion of ag land today.

7 Looking at the Program EIR Mitigation Measure  
8 4-2, it requires several things:

9 Selecting fights to avoid special status  
10 species; scheduling construction to avoid special  
11 status species; and then compensating for those things.

12 Now, here in the siting, this is just from the  
13 EIR but it shows that basically the whole Delta's Great  
14 Sandhill Crane habitat area, the foraging is the green  
15 and then the actual roosting and nesting sites are in  
16 the blue and the red.

17 And you can kind of imagine where the tunnel  
18 cuts down right through the middle of all of that.

19 So -- And this is just one species, obviously,  
20 within, you know, hundreds of species that occur in the  
21 Delta that are important to the communities and to the  
22 environment to sustain, now and in the future.

23 But, you know, the Crane is -- is important,  
24 too, because the PEIR Mitigation Measure kind of  
25 assumes that you could get take authority as a -- as a

1 third option once you did the other things.

2 And for the Crane -- oh, yeah, it does go  
3 dark -- there really isn't any commitment to -- to do  
4 that.

5 And the -- And in particular, the construction  
6 as planned right now from the documents in front of us  
7 in Conceptual Construction Plan during a winter Crane  
8 season, which is directly in conflict with the  
9 Mitigation Measure that the Delta Council adopted.

10 Also, just thinking about best-available  
11 science as well, the -- the project says it will rely  
12 on bird diverters on power -- new power lines they must  
13 construct in order to power the project, which does not  
14 run on gravity, in fact, because it does require a lot  
15 of power to construct and also operate. So that's kind  
16 of a misnomer.

17 But, anyway, the study relied upon by DWR was  
18 actually in Colorado, and it's hard to read there but  
19 that big bar chart is how many days you might have fog  
20 in the Delta in the winter and the little bars are how  
21 much you might have fog in Colorado where the study  
22 comes from.

23 In any case, the bird diverters in the study  
24 are as -- are assumed to be effective 60 percent of the  
25 time.

1           So just imagine that there's 10 Cranes flying  
2 on Staten Island one day, and if it's 60 percent  
3 effective, six of them would be prevented from hitting  
4 the line and four wouldn't.

5           There are other measures within AMM 20 that  
6 are all modified by "if feasible and other things,"  
7 kind of a list of options approach.

8           But there really isn't substantial evidence  
9 anywhere in this record about how AMM 20 in particular  
10 meets best-available science, or is equally or more  
11 effective than the Mitigation Measure or, even more  
12 importantly, would comply with the no take requirement  
13 of the fully protected species Sandhill Crane.

14           So I think that's one area where the Draft  
15 Determination could dig a little deeper into the  
16 evidence that has been developed around the Sandhill  
17 Crane as -- as an example.

18           Now, with respect to conversion of  
19 agricultural land, obviously, a very important issue  
20 for the county and individuals in the Delta and really  
21 state why the Delta is the largest swath of contiguous  
22 prime farmland in the whole state.

23           It's one of the only areas probably where  
24 long-term we will be able to protect a huge amount of  
25 prime farmland in the long term if we don't have this

1 project coming through and taking out thousands of  
2 acres directly and then indirectly.

3 But looking at Mitigation Measure 7-1 from the  
4 Program EIR, it's talking about designing a project to  
5 minimize the impacts on ag, then doing ag easements,  
6 and then also avoiding interference with the ag  
7 operations.

8 Now, what we see with the Mitigation Measure  
9 put forth by DWR, AG-1, is that it kind of has an  
10 either/or approach.

11 It says, "Oh. Well, we will try to do this  
12 alternative way of kind of a list of measures that  
13 might be more adapted to the Delta," which is actually  
14 a great list of things to think about doing and which  
15 may be helpful in certain situations.

16 And then it says, "If that's not feasible,  
17 then we'll do the easements."

18 Your Mitigation Measure 7-1 doesn't allow that  
19 either/or approach. So I would definitely -- And in  
20 and of -- And in addition, the Mitigation Measure issue  
21 is also relevant to whether the reduction in conflicts  
22 with local land uses under DP P2 has been accomplished,  
23 particularly in the siting issue.

24 With respect to the best-available science, we  
25 agree that the timeliness requirement for the

1 higher-risk climate change scenarios was not  
2 considered.

3           And I just want to point out that the -- the  
4 little -- the bit of modeling that was done in, I  
5 believe, 2013 regarding a longer range production from  
6 2060 was actually for the BDCP Alternative 4, which is  
7 a completely different project that had over  
8 100,000 acres of -- of habitat in it. And so it really  
9 had quite a different effect.

10           So there's never been a more recent attempt to  
11 try to look at the issue of what long-term 2060, which  
12 I believe there was a question around, is if this  
13 project is meant to be in place for 100 years, for a  
14 long time, are -- does this project even attempt to  
15 Plan for that?

16           So -- And I just listed some of the sites here  
17 that show that really all they looked at is a 2025 or a  
18 2030 climate scenario for the currently configured  
19 project.

20           Now, the other point I want to make about  
21 best-available science is this aggregation issue.

22           Trying to aggregate averages -- And you heard  
23 from -- you heard from Stockton about this just now but  
24 it kind of permeates all the different water quality  
25 concerns that folks have about what the difference will

1 be when about half the average flow of the Sacramento  
2 River would be diverted into tunnels at the very  
3 northernmost portion of the Delta and from the freshest  
4 water coming into the Delta really, in large  
5 quantities, the Sacramento River.

6 And, really, aggregation, you might look at  
7 everything together and say, "Oh. Well, on average, if  
8 you go from 1922 to 2003, it's only 4.6 percent of the  
9 time."

10 But it's really important to break that out by  
11 month and also by day, as was explained with respect  
12 to -- Stockton is similar to someone trying to farm in  
13 that if I have baby plants that have just been planted,  
14 and I apply very salty water to that, in that  
15 particular moment, that may have a large impact on the  
16 crop yield at that time.

17 And, so, this averaging really doesn't do  
18 justice to the kind of on-the-ground effects of -- on  
19 both the -- on agriculture. As well as this, as I  
20 mentioned, relates to best-available science. And also  
21 the ability of DWR to try to show that they can meet  
22 your flow requirement ER P1 to at least meet D-1641.

23 And I heard some discussion this morning about  
24 how, well, with respect to save the Contra Costa  
25 Chloride standard, that if you looked at the actual

1 data, it hadn't been exceeded all that much.

2 But I believe that the Draft Determination  
3 really focuses on the modeling that DWR provided and  
4 that the modeling showed that there would be  
5 exceedances.

6 And so I think that was a little bit  
7 misleading, that discussion this morning. I'll try to  
8 address that more in writing.

9 Very concerned also about the best-available  
10 science, or lack thereof, for harmful algal blooms. I  
11 just want to emphasize there that the timeliness and  
12 other factors for best-available science were not met.

13 There was an excuse made that there wasn't a  
14 Delta-specific model available. I think with the  
15 amount of resources being poured into this project and  
16 the potential for this project to dramatically change  
17 the hydrology of the entire Delta, and how concerning  
18 harmful algal blooms and cyanobacteria in particular  
19 are, that it may have been appropriate to develop a  
20 model for this.

21 And the modeling that was relied upon by DWR  
22 was -- was built in order to try to measure things like  
23 compliance with D-1641, and so it was really an  
24 adaptation to try to pick parts of that model and try  
25 to see what could be done in terms of inferences for

1 cyanobacteria formation.

2           So this -- In addition, it is not timely  
3 because that modeling that was relied upon by Dr. Bryan  
4 and in the EIR, for instance, actually was looking at a  
5 different model run, not CWF H3+ which is the current  
6 proposed operating scenario.

7           And it's also -- And I just put the picture of  
8 the boat in there to emphasize that cyanobacteria is  
9 not just a technical issue, it's also about how people  
10 can -- will they still be able to experience the Delta  
11 in a post-project world, in a way that, you know,  
12 you'll be able to swim, fish, drink the water,  
13 et cetera?

14           Now, Mr. Shutes discussed with -- the adaptive  
15 management. We would like staff and Council to take  
16 another look at that.

17           The Adaptive Management Plan is very general  
18 and, really, does not have all the components in it  
19 that are required by the Council's policy.

20           And, in particular, one thing to focus on is  
21 whether there's any role at all for stakeholders.  
22 There really isn't in this Plan.

23           I think the Draft Determination refers to some  
24 other documents that maybe assist in adaptive  
25 management, but I think Mr. Shutes effectively pointed

1 out that those other things, like the JPA or whatever,  
2 that's -- if there's a requirement for what needs to be  
3 an Adaptive Management Plan, we need to look to the  
4 four corners of the Plan and having some references to  
5 other things that may happen by other groups, such as  
6 the construction JPA is really relevant to that  
7 inquiry.

8 On the flow objective, there are issues with  
9 the -- obviously, with best-available science in  
10 addition.

11 And with respect to the -- to WR P1 applying  
12 to the project, it certainly does increase the  
13 potential for export.

14 So you've got about 11,280 cfs potential for  
15 export right now with your existing projects. It goes  
16 up by up to almost 15,000 cfs with these new  
17 diversions.

18 So, this is just a picture that shows that  
19 this is an increase.

20 And, in addition, you may also want to  
21 consider the fact that the -- there is an ongoing  
22 process that hasn't even started challen -- that is  
23 challenging the fact that the ex-- the Bureau and DWR  
24 Permits on the Sacramento River expired years ago. And  
25 there's been protests filed on that and that's been put

1 on ice.

2 So the idea that somehow this is an existing  
3 water right is really not correct.

4 I'll skip over these.

5 I think something that it kind of crosscuts  
6 across a lot of the Council's policies, but -- and  
7 Miss Taber commented on it as well.

8 And I think we really need to look on it how  
9 are we implementing the coequal goals? And what about  
10 water supply reliability for in the Delta? It  
11 shouldn't just be about water supply reliability for  
12 outside the Delta.

13 And, in addition, the respecting local land  
14 uses, DP P2, also requires us to protect that  
15 agricultural water quality, municipal water quality,  
16 and all those values within the Delta.

17 Now, with respect to the agricultural water  
18 use, there is the Ag Water Standard in the South Delta.  
19 Unfortunately, the Water Board's looking at making that  
20 standard more relaxed, which is going the wrong way.

21 But the one thing that the -- we don't think  
22 has been done with this project and doesn't meet  
23 best-available science is, there never was any study of  
24 what the long-term implications of having even slightly  
25 elevated levels of salinity in the Delta on agriculture

1 would be.

2           And I think this was also touched upon by  
3 others, but -- and it kind of permeates the whole story  
4 about what this project is.

5           But there's nothing in this project that  
6 requires it to take more water when it's wet and less  
7 water when it's dry.

8           And this was an important point in the  
9 recommendations, which I know aren't required here, but  
10 I think even looking at water supply reliability and  
11 trying to implement the coequal goals, it -- there  
12 should be something in this project that requires you  
13 to take more when it's wet and less when it's dry.

14           And if you look at that red line that's going  
15 diagonal, that could be, like, some kind of permit term  
16 that would say, "Hey, you only take water when there's  
17 a lot of outflow."

18           There's nothing like that here. Instead, the  
19 maximum amount of diversions would be that purple line  
20 going straight across, and then there's other  
21 limitations that -- about what the projects could take  
22 out.

23           But they don't want to be subject to the  
24 inflow-to-export ratio, and -- and they are only  
25 proposing 5,000 cfs minimum bypass during the fall

1 months when we're most concerned about water quality,  
2 and our farmers are needing water as well for finishing  
3 up their crops.

4 So, there's no reason to think that these new  
5 diversions would be excluded from the ratio.

6 And with that, I just want to go to a picture  
7 about respecting local land uses.

8 I'm going to skip over that.

9 This goes right through the heart of the  
10 Delta. It wasn't designed in the first place to  
11 respect local land uses.

12 So we need to go back to the drawing board and  
13 think about: How can we do these things in a way that  
14 respects local land uses?

15 And we would ask that the Council remand for  
16 these and other reasons so that that could be done.

17 CHAIR FIORINI: Does that complete your  
18 presentation?

19 MR. KEELING: Yes.

20 CHAIR FIORINI: Thank you both very much.  
21 Questions from the Council?

22 (No response.)

23 CHAIR FIORINI: Okay. Then, at this time, we  
24 will take a 15-minute break and we will reconvene at  
25 2:48. 2:48.

1 (Recess taken at 2:34 p.m.)

2 (Proceedings resumed at 2:48 p.m.):)

3 CHAIR FIORINI: Welcome back, and take a seat  
4 and we will resume hearing from appellants.

5 We are now to Appellant Group 8, Central  
6 Delta, South Delta Water Agency, represented by Dante  
7 Nomellini Jr.

8 Welcome.

9 MR. NOME LLINI: Good afternoon, Council  
10 members. I'm here on behalf of the Central Delta Water  
11 Agency and the South Delta Water Agency. And I'd like  
12 to thank you for this opportunity.

13 And I have to thank the staff. I, too, was --  
14 was blown away by how they prepared that size of a  
15 document that comprehensive in that short of a time.  
16 That's something I've never seen. I'm glad I didn't  
17 have to do it but good work.

18 I'm going to try to keep this brief. There's  
19 just two topics I'm going to discuss.

20 There was a lot of things that the staff said  
21 and did in that report that we were very in favor of.  
22 I thought they handled reduced reliance perfectly.

23 And so I won't talk about all the things they  
24 did good. I'm going to go straight to the things that  
25 I think need to be fixed. There's still time to fix

1 it.

2 The two things I'm going to talk about is  
3 the -- the WaterFix is not consistent with the Delta  
4 Flow Objectives Policy. For two reasons: The absence  
5 of the U.S. Bureau of Reclamation, and levee failures.

6 The Bureau's failure to make commitment that  
7 it will operate the WaterFix in compliance with the  
8 State Board's D-1641 Flow Objectives is a fatal  
9 deficiency.

10 As the Staff's Draft Findings state (reading):

11 "In order to demonstrate consistency  
12 with ER P1, a Certification of  
13 Consistency must be supported by  
14 substantial evidence that demonstrates  
15 that the project will comply with  
16 D-1641."

17 We believe "will" is the keyword. "May  
18 comply" is not sufficient to support a Certification.

19 If the project Operators are not sure whether  
20 the WaterFix will be operated in compliance with  
21 D-1641, then the project Operators have no business  
22 seeking certification of the WaterFix. In that event,  
23 the WaterFix is simply not right for certification.

24 As the WaterFix currently stands, neither DWR  
25 nor any one of us can be sure that the Bureau will, in

1 fact, operate the WaterFix in compliance with D-1641.  
2 The Bureau might. But, again, "might" is not good  
3 enough to support a certification.

4 Unlike DWR, the Bureau has not yet approved  
5 the WaterFix. It's undisputed that the Bureau has not  
6 yet issued a Record of Decision for its EIS for the  
7 WaterFix declaring that it approves the WaterFix; I.e.,  
8 that it actually wants to carry it out.

9 Much less has the Bureau made any confirmation  
10 whatsoever that it wants to carry it out in a manner  
11 that fully complies with D-1641.

12 Accordingly, at the present time, there is  
13 zero evidence in the record confirming that the Bureau  
14 will, in fact, operate the WaterFix at all, much less  
15 operate it in compliance with D-1641. Any such  
16 operations are purely speculative.

17 That wouldn't be a problem except for the  
18 small fact that the WaterFix has been presented in  
19 every respect in these proceedings as a joint project  
20 operated jointly by both DWR and the Bureau.

21 Accordingly, without any evidence, much --  
22 much less the requisite substantial evidence that the  
23 joint Operator of the WaterFix will indeed operate the  
24 WaterFix in compliance with D-1641, DWR's Certification  
25 must be rejected.

1           Thus far, DWR has only made it halfway towards  
2 demonstrating that the WaterFix will, in fact, be  
3 operated in compliance with D-1641.

4           DWR has, in effect, jumped the gun and  
5 prematurely sought Certification before its co-Operator  
6 was ready to join in that Certification and ready to  
7 make the essential joint commitment that it will  
8 operate the WaterFix along with DWR in full compliance  
9 with D-1641 as required by the Delta Plan's Flow  
10 Objective Policy. DWR's premature Certification must,  
11 therefore, be rejected on this ground.

12           So we request that the staff revisit that. I  
13 think they said, "well, we can just deal with the  
14 Bureau later," but because it's a joint project, I  
15 don't think it should do that or can do that legally.  
16 There's no substantial evidence backing up the Bureau's  
17 commitment.

18           Now, switching over to levee failures. This  
19 is a favorite topic of mine. In the Delta, the Central  
20 Delta South, we live with levees. Levees are our life.  
21 We do everything we can to maintain the levees and keep  
22 them strong. We don't want them to fail any more than  
23 the exporters. Trust me on that. People's livelihoods  
24 are at stake in the Delta and depend on those levees.

25           So, providing a method to address anticipated

1 levee failures that cause significant degradation of  
2 the water quality at the project's existing Southern  
3 Delta export pumps is one of the primary touted  
4 benefits of the WaterFix.

5           As we previously explained, the method DWR  
6 came up with to address those failures will violate the  
7 D-1641 flow objectives and, therefore, that method  
8 cannot be found to be consistent with those objectives  
9 and must be rejected.

10           Now, this is not a situation where DWR says,  
11 "Look, don't worry about it. We've been operating  
12 these projects in a manner that complies with all the  
13 standards, so you're not going to be hurt."

14           This is not that situation. They are telling  
15 you that they are going to violate the standards in the  
16 event of levee failures.

17           And I want to explain why really quick. And  
18 then how staff handled that was very interesting and I  
19 think needs to be adjusted.

20           Real quick. The problem DWR's trying to  
21 address with the WaterFix is when one more levee  
22 failures cause the water quality at the Southern Delta  
23 intakes to become too salty for them to export the  
24 water.

25           When that happens -- i.e. when the water

1 quality becomes too salty -- DWR and USBR are  
2 necessarily in noncompliance with the D-1641 flow  
3 objectives. That's because, if they were in full  
4 compliance with those objectives, the water quality at  
5 those intakes would not be too salty for them to  
6 export, because those objectives ensure that the water  
7 is of adequate quality.

8 Thus, the problem DWR is trying to address  
9 with the WaterFix is when one or more levee failures  
10 cause DWR and USBR to be in noncompliance with the  
11 D-1641 flow objectives.

12 Now, DWR has two choices in that situation of  
13 noncompliance. They can allow Sacramento River water  
14 to flow into the Delta and help meet those objectives,  
15 or they can take the Sacramento River water away from  
16 the Delta and put it in the tunnels and export it out  
17 of the Delta.

18 And I don't need to tell you what choice they  
19 picked, but I'm going to tell you, anyway. They picked  
20 the second choice, to take that Sacramento water and  
21 not use it to meet the standards but to export it out  
22 of the Delta.

23 And this is a recap of that.

24 In the event levee failures significantly  
25 degrade water quality and cause DWR and USBR to be in

1 noncompliance with the D-1641 flow objectives, DWR came  
2 up with the brilliant idea that, rather than allow  
3 Sacramento River fresh water to flow into the Delta to  
4 meet those objectives and freshen it up so it can  
5 resume exporting that water, DWR could instead simply  
6 take that Sacramento River freshwater and divert it  
7 directly into the WaterFix Tunnels for export.

8           Because it could take a significant -- Because  
9 it could take significant time to freshen up the Delta  
10 after levee failures, with the WaterFix's tunnels, DWR  
11 could avoid having to wait for the Delta to freshen up  
12 and immediately start exporting water through the  
13 tunnels after such failures.

14           For DWR's Delta Export Contractors, this most  
15 likely sounds like a wonderful use of the tunnels.  
16 This sounds like, you know, why didn't they think of  
17 this sooner?

18           Unfortunately for such exporter, such use of  
19 the WaterFix's tunnels after levee failures is  
20 completely 100 percent prohibited by D-1641. That is  
21 because D-1641 prohibits DWR and the USBR from  
22 exporting any water from the Delta through the  
23 WaterFix's tunnels or otherwise when DWR and the USBR  
24 are in noncompliance with the D-1641 flow objectives.

25           Thus, if levee failures significantly degrade

1 water quality and cause DWR and the USBR to be in  
2 noncompliance with the D-1641 flow objectives, DWR  
3 cannot lawfully export any water through the WaterFix's  
4 tunnels. Thus, to the extent D-1641 is complied with,  
5 the WaterFix's tunnels are useless after levee  
6 failures.

7 The only way DWR can make the WaterFix Tunnels  
8 useful, in the event levee failures significantly  
9 degrade water quality and cause DWR and the USBR to be  
10 in noncompliance with the D-1641 flow objectives, is to  
11 violate D-1641's prohibition against any exports during  
12 such noncompliance.

13 Compliance with the Delta Plan's Flow  
14 Objective Policy, however, requires the DWR and USBR to  
15 the demonstrate that they will operate the WaterFix in  
16 compliance with D-1641. Thus, there's a monumental  
17 problem for purposes of the instant Consistency  
18 Determination.

19 DWR and the USBR are telling you and everyone  
20 else in their Certification that they are planning on  
21 using the WaterFix's tunnels after levee failures in  
22 violation of D-1641. Such planned use of the  
23 WaterFix's tunnels should obviously not be sanctioned.

24 Now, how does the DWR and the Council's staff  
25 address this inconsistency? They both effectively

1 concede that DWR and the USBR must continue to comply  
2 with D-1641 in the event of small or large levee  
3 failures, and that exceptions to such compliance will  
4 have to be obtained from the State Water Board to  
5 authorize the use of the WaterFix's tunnels to export  
6 water, notwithstanding the fact that D-1641's flow  
7 objectives are being violated.

8           So they are agreeing to the point you're  
9 trying to make. The point is, the intended use of the  
10 WaterFix tunnels to export water from the Delta after  
11 levee failures will violate D-1641 and require an  
12 exception to compliance with D-1641.

13           Hence, the intended use of the WaterFix to  
14 improve the reliability of water supplies for Delta  
15 exporters in the event of levee failures cannot be  
16 sanctioned as being consistent with the Delta Flow  
17 Objective Policy because that policy requires  
18 compliance with D-1641. Such use must, therefore, be  
19 rejected.

20           Now, that sounds simple enough. However,  
21 there is a twist. And this is the twist that the staff  
22 hung their hat on, which I think they should go back  
23 and fix.

24           The Council's staff suggest that it's not a  
25 deal breaker that DWR's proposed use of the WaterFix's

1 tunnels will require an exception to D-1641 because the  
2 Department's task in its Certification is to show that  
3 California WaterFix use comply with D-1641 in the  
4 conditions in which the decision was designed to  
5 function.

6 The staff agrees with DWR that D-1641 was not  
7 designed to function in the wake of catastrophic --  
8 catastrophic levee failure and salinity intrusion.

9 Now, my own jaw drops when I heard DWR come up  
10 with this reason. Unsurprisingly, neither the staff  
11 nor DWR, however, cite to any authority from the State  
12 Water Board, or otherwise, to suggest that any, much  
13 less all of D-1641's numerous flow objectives and  
14 requirements on DWR and the USBR, and on others, are  
15 somehow not designed to function in the event of  
16 so-called catastrophic levee failure and salinity  
17 intrusion.

18 If the State Water Board did not speak to the  
19 topic -- which we believe it absolutely did not -- then  
20 how does one define catastrophic levee failure and  
21 salinity intrusion? And who should define those terms:  
22 DWR: The Council: The State Water Board?

23 Once those terms are defined, it is only -- is  
24 it only sufficient for consistency purposes for DWR to  
25 seek exemptions from D-1641 after such catastrophic

1 levee failure and salinity intrusion but not after any  
2 lesser type of levee failure or salinity intrusion?

3 This opens a can of worms.

4           Going down this road of tolerating exceptions  
5 to compliance with D-1641 in circumstances that the  
6 Council believes D-1641 should not apply is going too  
7 far.

8           The Council's Delta Flow Objective Policy is  
9 clear and easy to implement. The project Proponents  
10 must demonstrate that they will operate the covered  
11 action in compliance with the State Water Board's  
12 then-current flow objectives which currently are D-1641  
13 objectives.

14           Here, it is undisputed that DWR and USBR  
15 intend to operate the WaterFix in noncompliance with  
16 those objectives. Such intended use should, therefore,  
17 be rejected.

18           If DWR -- Or here's a solution to the problem.

19           If DWR and/or the USBR want to change the  
20 State Water Board's D-1641 objectives to make  
21 exceptions for catastrophic levee failures or other  
22 circumstances, then they can take appropriate action to  
23 petition for such changes. There is a process to do  
24 that where anybody could go and request amendments to  
25 D-1641.

1           The Instant Certification process which  
2 requires DWR and the USBR to demonstrate full  
3 compliance with D-1641 objectives as those objectives  
4 presently exist is not the place to make those  
5 exceptions.

6           For all of these reasons, the Council should  
7 reject DWR and the USBR's intended use of the WaterFix  
8 to violate D-1641 objectives after levee failures as  
9 inconsistent with the Council's Delta Flow Objectives  
10 Policy.

11           DWR and the USBR should, accordingly,  
12 eliminate this use of the WaterFix in connection with  
13 any future Recertification of the WaterFix.

14           In 10 seconds: If DWR can successfully change  
15 the D-1641 standards to allow them to violate them  
16 during levee failures, then they could come back and  
17 recertify based on those changed standards.

18           But right now, the standards don't allow it  
19 and you shouldn't allow them to violate it.

20           Thank you.

21           CHAIR FIORINI: Does that complete your  
22 presentation?

23           MR. NOME LLINI: Yes. Thank you very much.

24           CHAIR FIORINI: Questions for Mr. Nomellini?

25                           (No response.)

1 CHAIR FIORINI: Very good. Thank you very  
2 much.

3 Next up, County of Sacramento, Sacramento  
4 County Water Agency, Appellant Group Number 9, William  
5 Burke.

6 MR. BURKE: Good afternoon. Am I coming  
7 through? Sounds like I am.

8 My name is Bill Burke. I'm representing the  
9 County of Sacramento and the Sacramento County Water  
10 Agency.

11 I guess I'm the one Appellant who doesn't have  
12 a PowerPoint, so I won't trouble you with having to  
13 read anything.

14 But I will be submitting my comments --

15 COUNCILMEMBER GATTO: And thank you for that.

16 (Laughter.)

17 MR. BURKE: When I submit my written comments,  
18 I'll have all the page citations I'm about to read off  
19 right now.

20 My comments are going to be directed towards  
21 some issues that -- where staff went against, arguments  
22 that we made previously, although I am pleased and  
23 encouraged that staff did seem to agree with us on some  
24 other arguments.

25 So, in particular, I'm going to be looking at

1 Policy DP P2 that involves the project's respect for  
2 local land use, or whether the project respects local  
3 land use.

4 And, mostly, I'll be looking at the issues on  
5 agricultural impacts or impacts to agricultural uses,  
6 conflicts with ag uses, and a little bit briefly about  
7 transportation impacts to land uses.

8 So, certainly it wouldn't hurt to read the reg  
9 one more time, Section 5011(a) reading):

10 "Water management facilities . . .  
11 must be sited to avoid or reduce  
12 conflicts with existing uses or those  
13 uses described or depicted in city and  
14 county regional plans for their  
15 jurisdictions or spheres of influence  
16 when feasible . . ."

17 I'm going to start out with something that  
18 might be viewed as a technicality but it really isn't.

19 At Page 131 of the Draft Staff Report, there's  
20 a reference to the permanent conversion of ag land, and  
21 I believe the figure there used is about 3900 acres of  
22 ag land. Per the Supplemental EIR, that is up to  
23 4,305, so it's more than a technicality. That's 400  
24 more acres and a total massive amount.

25 And we did mention that -- that updated figure

1 in our presentation here a few weeks ago.

2 At Page 132 of the Staff Report, there's a  
3 discussion about DWR's project refinements or changes  
4 to the project to show how kind of the project evolved  
5 to reduce conflicts on local land use.

6 In that discussion, and in the Department's  
7 Certification documents, there's a table, a Project  
8 Refinements Table, that shows a reduction of 1,215  
9 acres of impacts to ag land.

10 I would just ask staff and the Council to seek  
11 specificity and clarification on where those 1200 acres  
12 of reduction came from.

13 There's a discussion about how some of the  
14 design aspects of the facilities were changed, but  
15 there's no specific explanation of how 1200 acres of ag  
16 impacts were reduced.

17 So these -- I see these as a -- I'm still on  
18 Page 132. These were project design modifications as  
19 described in the project refinement section of the  
20 Consistency Certification.

21 These are not equivalent to siting decisions,  
22 which is the focus of the policy.

23 DWR's project refinements discussion does not  
24 explain how this relates to siting of the facilities  
25 other than in terms of downsizing them.

1           Project refinements do not explain how the  
2 various project facilities have been sited to reduce  
3 conflicts with ag land.

4           One other specific point to make about that  
5 discussion, that narrative, is, there's a reference to  
6 a change in the sedimentation basins, that the basins  
7 were originally going to be concrete, I believe, and  
8 then were changed now to what they call earthen bays.

9           It was not clear to me how that change  
10 resulted in any kind of reduction in the footprint of  
11 the facility.

12           So, at Pages 92 and 105, the Staff Report --  
13 and, in particular, I'm looking at the third full  
14 paragraph on Page 92.

15           The Staff Report discusses the rationale of  
16 siting decision -- of the siting decision in terms of  
17 avoiding impacts to, quote, "existing structures,  
18 businesses, historical interests and current use of the  
19 land."

20           But it does not explain or show how the  
21 project facilities were sited to reduce conflicts with  
22 ag land, and that's because the reality is, they can't  
23 make that showing because the project facilities are  
24 not sited to reduce conflicts with agriculture.

25           In fact, the direct impacts of siting the

1 proposed facilities, especially in Sac County, are  
2 almost completely on ag land and ag uses.

3 This -- This point also refers to Page 99.  
4 There's a handful of bullet points.

5 And in the discussion of intake siting,  
6 there's no mention of how siting of facilities would  
7 avoid or reduce conflicts with ag land.

8 Now I want to get into the Ag Mitigation  
9 Measures. That's Mitigation Measure AG-1 and its  
10 component parts. It's three elements.

11 DWR has failed to show how Mitigation Measure  
12 AG-1 -- that's the Ag Land Stewardship Plan --  
13 meaningfully affects the siting of project facilities  
14 and how AG-1 would reduce conflicts with ag uses. This  
15 is because the measure in all of its components is  
16 voluntary, optional, indefinite and does not constitute  
17 an enforceable commitment.

18 Measure AG-1a says that it promotes ag  
19 productivity. This is not a definite or enforceable  
20 commitment. The consultation is voluntary and depends  
21 upon cooperation of multiple other project public  
22 entities.

23 Measure AG-1a also requires DWR to identify  
24 impacted lands and consider if the project is  
25 consistent with Land Use Plans.

1 Well, with respect to the intakes, the  
2 Intermediate Forebay, and the RTM areas in Sacramento  
3 County, we already know that it is not.

4 Lastly, with respect to AG-1a, it requires  
5 DWR, in consultation with various local agencies,  
6 landowners and Federal agencies, to perform analysis --  
7 that's the quote from the report -- perform analysis to  
8 determine -- it's from the EIR really -- perform  
9 analysis to determine if they can reduce the project  
10 footprint or identify other parcels that would minimize  
11 impacts on ag resources.

12 To borrow a concept from CEQA law, this is --  
13 would be a deferral of the formulation of mitigation  
14 requiring DWR, the project Proponent, to go and figure  
15 out what the mitigation is at a later date. And that's  
16 another thing that makes this measure illusory.

17 And the record contains no evidence that any  
18 of the facility footprints would or could be  
19 meaningfully reduced at this point or that any parcel  
20 other than ag-designated parcels would be used for the  
21 three intakes or the Intermediate Forebay.

22 So the illusory nature of measure AG-1a  
23 immediately requires a default to measure AG-1b. And  
24 if the land does not involve a Williamson Act contract  
25 property, then you have to default to measure AG-1c.

1           That is the Optional Ag Land Stewardship  
2 Approach. And right there in the name of that  
3 Mitigation Measure is the word "optional" which, again,  
4 reflects how it is not a definite or concrete  
5 commitment.

6           As with the ALSP, the Optional Stewardship  
7 Approach lacks definiteness in that DWR determines the  
8 nature and form of the necessary additional mitigation,  
9 and the implementation of the measure depends upon a  
10 voluntary agreement with local agencies and property  
11 owners.

12           At Page 134 of the Staff Report, the report  
13 states that ALSPPs would provide a greater opportunity  
14 to avoid conflicts in one -- one-for-one ag land  
15 conservation through easements or planning  
16 requirements.

17           This is not the standard that the Department  
18 is required to meet. That is comparatively  
19 demonstrating a greater opportunity to avoid conflicts.

20           Rather, DWR is required to show through  
21 substantial evidence that the project infrastructure  
22 will be sited to reduce conflicts with existing uses.

23           DWR has not made the required showing for the  
24 reasons I just explained.

25           I would also note that these Mitigation

1 Measures, it's virtually impossible for them to achieve  
2 complete avoidance of conflicts with ag land. All  
3 we're looking at at this point is whether or not the  
4 measures can reduce those conflicts.

5 The Draft Staff Report notes DWR's position  
6 that ag conservation easements have limited value as  
7 mitigation.

8 If this is the case, then DWR cannot rely upon  
9 these conservation easements as a component of the  
10 Optional Stewardship Approach or as a last-ditch option  
11 for mitigation.

12 Page 134 still, the second full paragraph.

13 The report states that use of ag land  
14 stewardship plans provides substantial evidence to  
15 support DWR's finding that they attempt to avoid  
16 conflict with ag land use where feasible.

17 Again, a, quote-unquote, attempt is not the  
18 proper standard, much like the use of the word  
19 "opportunity to mitigate."

20 Policy DP P2 requires that the facility must  
21 be sited to reduce conflicts. Use of the word  
22 "attempt" reinforces the problem with ALSPs and the  
23 optional land stewardship approach being indefinite.

24 In the second full paragraph at the end, still  
25 on Page 134, it notes that the ALSP would include

1 avoidance and on-site Mitigation Measures, siting  
2 project features to minimize fragmenting or isolated  
3 farmland.

4 Well, the sheer scale of the impacts requires  
5 DWR to describe how such measures would significantly  
6 or meaningfully reduce the ag land conflicts created by  
7 the construction of the major infrastructure.

8 Relative to the conflicts created, these  
9 measures would likely be nominal or superficial  
10 reductions in the conflict. Otherwise, this evidence  
11 should not be considered substantial.

12 I do want to note, on Page 135, the first full  
13 paragraph, there is a conclusion that is potentially  
14 inconsistent with another passage in the Staff Report.

15 The Staff Report justifies the permanent loss  
16 of ag land by noting DWR's intention to provide  
17 compensation to property owners for economic losses.

18 This justification is potentially inconsistent  
19 with the Staff Report's treatment of the same  
20 mitigation approach at Page 101 with respect to land  
21 use conflicts of constructing the water conveyance  
22 facility.

23 There, the Staff Report critiques DWR's  
24 reliance on the payment of compensation as mitigation  
25 by noting that (reading):

1                    "No further description of this  
2                    compensation is provided."

3                    The Staff Report thereafter immediately finds  
4 there's no evidence in the record cited which supports  
5 the conclusion, but that impact will be reduced to the  
6 extent feasible.

7                    The Staff Report should reconcile these two  
8 conclusions.

9                    Now I want to get in, in the minute and a half  
10 I have left, to traffic impacts still within the  
11 context of the respect for local land use and conflicts  
12 with local land use.

13                    The county and the -- Especially the county  
14 submitted pretty detailed evidence and argument on  
15 traffic impacts. We did it mainly in the context of  
16 the discussion of coequal goals.

17                    We didn't specifically do it in the context of  
18 this category, this policy on land use impacts, but the  
19 substance of our arguments is equally relevant.

20                    In particular, we submitted the written  
21 testimony of the county's Chief of Transportation,  
22 maintenance and operations, Reza Moghissi. He had his  
23 own critique of the transportation Mitigation Measures.

24                    And the Staff Report doesn't mention our  
25 evidence is why I'm -- one reason I'm bringing this up.

1 I think that our arguments are equally relevant to this  
2 discussion and staff should take a look at what we  
3 presented.

4 And in our live presentation here a few weeks  
5 ago, we did mention traffic impacts in the context of  
6 this Policy DP P2.

7 We noted that the transportation Mitigation  
8 Measures place a burden on local agencies to mitigate  
9 impacts that will be exacerbated by the WaterFix  
10 construction trips.

11 And we also pointed out that Measure TRANS-1c  
12 is dependent upon voluntary agreements and, therefore,  
13 does not constitute an enforceable commitment.

14 At Page 130 of the Staff Report, your staff  
15 calls for Proponents to specify how DWR has failed to  
16 avoid reduced impacts or that additional reduction in  
17 impacts is feasible. Our evidence has shown that.

18 Two points to make there.

19 With respect to Measure TRANS-1b, that's the  
20 measure that purports to limit construction activities  
21 so the traffic levels remain below acceptable LOS  
22 levels of service.

23 In the expert opinion of our witness, he found  
24 the Measure to be inefficient, impractical and  
25 unenforceable.



1 CHAIR FIORINI: Okay. Thank you very much.

2 MR. BURKE: Thank you very much.

3 CHAIR FIORINI: Last presenter will be the  
4 Delta Protection Commission. And I believe Supervisor  
5 Villegas and Erik Vink will be presenting.

6 SUPERVISOR VILLEGAS: Good afternoon,  
7 Mr. Chair, Councilmembers and staff.

8 My name's Oscar Villegas, Yolo County  
9 Supervisor, but I want to be clear today, I'm here on  
10 behalf of the Delta Protection Commission with some  
11 prepared comments.

12 I'd like to begin by, first of all, saying I'm  
13 going to be less than five minutes, so don't let that  
14 spoil you. So my comments will be brief and I don't  
15 have a 100-page PowerPoint.

16 COUNCILMEMBER THOMSON: Again, I want to thank  
17 you.

18 SUPERVISOR VILLEGAS: All right. So the  
19 Commission, first of all, appreciates the diligent  
20 effort made by Council staff in reviewing the  
21 Consistency Determination, the appeals and information.

22 We especially appreciate the careful review of  
23 our comments.

24 As the Council's Draft Staff Recommendation  
25 acknowledges, the legislature has found that the Delta

1 Protection Commission -- I know you heard this this  
2 morning but it seems like it might have been a month  
3 ago, but it was stated this morning. It's worth 100  
4 coins.

5 I just want to briefly say that, in quotes  
6 (reading):

7 "The appropriate agency to identify  
8 and provide recommendations to the Delta  
9 Stewardship Council is the Delta  
10 Protection Commission as the Delta  
11 Stewardship Council develops and  
12 implements the Delta Plan."

13 The Public Resources Code further states that  
14 (reading):

15 "The Commission may review and  
16 provide comments and recommendations to  
17 the Delta Stewardship Council on any  
18 significant project or proposed project  
19 within the scope of the Delta Plan,  
20 including but not limited to" --

21 And I wanted to clarify that point because  
22 there was some confusion about that this morning.

23 ". . . But not limited to actions by the  
24 State and Federal agencies that may  
25 affect the unique cultural, recreational

1           and agricultural values within the  
2           primary and secondary zones."

3           The Code also says in quote (reading):

4                   "The Council shall take into  
5           consideration the recommendations of the  
6           Commission if the Council in its  
7           discretion determines that the  
8           recommendations of the Commission is  
9           feasible and consistent with the  
10          objectives of the Delta Plan and for the  
11          purposes of the -- and the purposes of  
12          this division the Council shall adopt the  
13          recommendations."

14          So the Commission believes that the Council  
15          has correctly recognized the Commission's statutory  
16          authority to make recommendations, that it's quite  
17          broad and not limited.

18          So I wanted to underscore that because that  
19          might have gotten lost in the translation over the  
20          course of the last several hours of testimony. So  
21          thank you for considering that once again.

22          So the Commission's unique position makes it  
23          well suited to recommend actions that may avoid, reduce  
24          or mitigate impacts to the cultural, recreational and  
25          agricultural values of the Delta.

1           The Council has recognized that it is not  
2 required to agree with the Commission recommendations  
3 concerning actions within the scope of the Delta Plan.

4           The Council can reach its own determination as  
5 to the feasibility of the limitation of any Commission  
6 recommendations and, indeed, has taken that path.

7           The Commission has always taken seriously its  
8 statutory role to advise the Council on how best to  
9 protect unique Delta values, beginning with the  
10 development of the Economic Sustainability Plan, and  
11 the subsequent recommendations are included in the  
12 Delta Plan, and continuing with the ongoing involvement  
13 that the Commission staff have with Council staff in  
14 reviewing Delta development proposals.

15           The Commission reviews all covered actions  
16 submitted -- submittals, and ensures that any previous  
17 comments made to protect Proponents are also conveyed  
18 to the Council, assuming that our concerns were not  
19 already addressed by the project Proponent.

20           This is certainly the model we followed on the  
21 California WaterFix, extensive comments during the  
22 environmental review process, and then conveying  
23 similar comments to the Council as part of the  
24 statutory role to advise the Council on significant  
25 projects that will impact the Delta as a place.

1 I'd like to highlight specific areas where the  
2 Council's staff, in finding for Appellants, concurred  
3 with the Commission's conclusions on the  
4 inconsistencies within the Delta Plan to DP 2 (sic),  
5 respecting local land use when siting water facilities.

6 These areas include:

7 First, land use conflicts within the existing  
8 Delta communities, in particular impacts to community  
9 character and how the proposed Community Benefit Plan  
10 would reduce project impacts.

11 Number 2, cultural, historical resource  
12 impacts, in particular, impacts to Legacy communities,  
13 scenic byways and cultural tourism.

14 And, third, parks, recreation and traffic  
15 impacts and, in particular, impacts to recreational  
16 boating and recreational access due to construction  
17 traffic.

18 So the most important areas of concurrence  
19 relate to the feasibility and the enforceability of  
20 mitigations proposed by DWR.

21 The Council Staff Draft Determination provides  
22 the opportunity to overcome fatal flaws with respect to  
23 the Delta as place.

24 The Commission trusts that its recommendations  
25 for mitigating California WaterFix impacts to cultural,

1 recreational and agricultural values of the Delta  
2 consistently offered dating back to the BDCP iteration  
3 of this project can inform DWR's future planning  
4 processes.

5           There are also areas where we disagree with  
6 the Council staff conclusions; for example,  
7 agricultural impacts.

8           The Commission suggested utilization of the  
9 Delta Plan EIR Mitigation Measure 7-1 mitigating  
10 farmland loss by protecting other farmland on a  
11 one-to-one ratio as a means of mitigating the  
12 significant and unavoidable loss of nearly 4,900 acres  
13 of important farmland, the very foundation of the  
14 Delta's agricultural economy.

15           Council staff concurred with DWR's contention  
16 that agricultural conservation easements would impose  
17 relatively few restrictions on farmland within the  
18 Primary Zone because the Primary Zone is already  
19 largely precluded from development.

20           While that is true, it ignores the more than  
21 135,000 acres of important farmland in the Delta  
22 Secondary Zone, lands that are subject to development  
23 pressures.

24           It is entirely appropriate for DWR to mitigate  
25 the nearly 4,900 acres of important farmland by

1 acquiring agricultural conservation easements on land  
2 within the Delta Secondary Zone.

3 So, in anticipation of what I think may be a  
4 question, I'd like to reiterate on behalf of the Delta  
5 Protection Commission, notwithstanding our comments  
6 letter -- comment letter that was submitted in October,  
7 that we stand ready to continue to pursue a solution  
8 that is not at the expense of the Delta's agricultural,  
9 recreational and cultural values.

10 And so that offer still stands.

11 But what I would like to do is defer to Erik  
12 Vink, just a very brief comment that he has regarding  
13 the community benefits conversation from early this  
14 morning.

15 MR. VINK: Thank you, Chair Villegas and Chair  
16 Fiorini and Councilmembers.

17 There was discussion from the Council this  
18 morning about the Community Benefits Fund, and I just  
19 wanted to add a little bit of information on that.

20 It is certainly -- Well, first off, to note  
21 that the Commission's advocated going back to our EIR  
22 comment letter on BDCP for a Delta Compensation Fund  
23 that, in our formulation, is really designed more to  
24 respond quickly and to immediate needs that are created  
25 through construction activities throughout the Delta

1 Region.

2 We know that there will be impacts to people.  
3 We know that it can be a very long and lengthy process  
4 to go through a claims process through a public agency.

5 And so that was the thrust of our  
6 recommendation for a Delta Compensation Fund. In many  
7 respects, it's not too different from a Community  
8 Benefits Fund. But we have been consistently asking  
9 for that in our EIR comment letters.

10 And it's true I did have preliminary  
11 discussions, a conversation with DWR staff, about the  
12 proposed Community Benefits Fund. The idea was  
13 presented as a concept without any details.

14 I've asked for additional details: What will  
15 it cover? Who will administer it? How much is the  
16 project Proponent willing to invest in the Fund?

17 I don't have answers. I'm still waiting for  
18 answers to those questions.

19 But because of the conversation this morning,  
20 yes, there has been a preliminary discussion. No,  
21 there have been no details proposed by DWR nor the  
22 project Proponent.

23 CHAIR FIORINI: Does that complete your  
24 testimony -- presentation?

25 MR. VINK: Yes.

1 CHAIR FIORINI: Thank you.

2 Any questions of the Delta Protection  
3 Commission?

4 COUNCILMEMBER THOMSON: Erik, when did the  
5 State approach you on the Community Benefits Fund? Was  
6 that recent?

7 MR. VINK: Sometime within the last year.

8 COUNCILMEMBER THOMSON: Okay. Thank you.

9 CHAIR FIORINI: Okay. Gentlemen, thank you  
10 very much.

11 That completes the presentations.

12 Can I see a show of hands of those of you who  
13 are here that would like to provide public comment.

14 Okay. All right. Well, I want to afford the  
15 time for that.

16 But, Councilmembers, before I call upon those  
17 who wish to address the Council, I'd like to offer --  
18 I'd like to exercise the Chair's prerogative and offer  
19 some observations.

20 First of all, I agree with much -- many of the  
21 presenters today. I'm very pleased with the work that  
22 our staff has done.

23 Jessica Pearson, Dr. John Calloway, Jeff  
24 Henderson, Dan Constable, Ryan Stanbra, Bethany Pane  
25 are all team leaders who have helped to prepare the

1 Staff Draft that we have been reviewing, and I'm  
2 impressed and appreciate your team's help as we've  
3 waded through the record before us.

4 The document, the Staff Draft Findings,  
5 reflect an extraordinary effort to provide a thorough  
6 analysis. And on behalf of the Council, I wish to  
7 thank each one of you and your team members.

8 As I've listened to the staff presentation,  
9 the parties today, the notion of time or timing that we  
10 keep hearing about, I think is really the central theme  
11 here.

12 Fundamentally, my take-away so far, after  
13 reviewing the record, listening to the testimony at the  
14 October hearings and today, I think the Department has  
15 filed its Certification of Consistency before it was  
16 ready to demonstrate consistency with the Delta Plan.

17 Today, I haven't heard anything that would  
18 compel me to think that the Staff Draft Findings are  
19 going to change much before we take action in December.  
20 And, again, we're not taking action today.

21 But I'm particularly concerned about the  
22 issues related to flow objectives, reduced reliance,  
23 and Delta as a place.

24 The goal here is to demonstrate consistency  
25 with the Delta Plan's regulations that this body

1 administers to further the coequal goals.

2 Political expediency is not the goal here for  
3 such an important and significant project.

4 Frankly, I'm frustrated. This project came  
5 to us before it was ready. At this point, with the  
6 weaknesses identified -- and, obviously, in my opinion,  
7 there's more work to do -- I would strongly encourage  
8 the Department to consider withdrawing the  
9 Certification of Consistency.

10 If you do so choose to do that, let us know as  
11 soon as possible so we can resume early consultation.

12 So, members, thank you for your indulgence.

13 Would anyone else like to comment?

14 Frank?

15 COUNCILMEMBER DAMRELL: Yeah. I would like to  
16 echo the Chair's comments.

17 We've heard a lot about timing, prematurity,  
18 on this area and -- and the -- not only this particular  
19 workshop as well as the prior hearing.

20 It seems clear to me that the record is not  
21 complete, particularly on key issues. And those  
22 shortcomings are precisely the areas where early  
23 consultation benefits everyone in this room.

24 This is an judicative process. This is not a  
25 forum to work out shortcomings. That's not its

1 purpose. It's judicative by nature.

2 I agree that I think good government here  
3 would -- would . . .

4 The Department should surely consider  
5 withdrawing its Certification and immediately resume  
6 early consultation.

7 That said, all sides of this debate have a  
8 responsibility to find a path forward. All sides. All  
9 sides.

10 No party believes that the status quo is  
11 vital. Reasonableness must, in the end, prevail.

12 Thank you.

13 CHAIR FIORINI: Thanks, Frank.

14 Anyone else wish to speak?

15 (No response.)

16 CHAIR FIORINI: Okay. Then let's proceed to  
17 public comment.

18 If you want to provide public comment and are  
19 not a speaker on behalf of one of the Appellant groups,  
20 the Delta Commission or the Department of Water  
21 Resources, we ask that you fill out the blue speaker  
22 card available from our clerk.

23 Remember, the scope of the Council's review is  
24 limited to whether or not the Certification of  
25 Consistency is supported by substantial evidence in the

1 record.

2           You may recall from this morning that the  
3 cards are marked in groups designated A, B, C and so  
4 on. Your comments will be heard in the group order we  
5 received the completed blue speaker cards.

6           We will start using the mic here to my left,  
7 to your right. Please provide staff at the table with  
8 your completed card as you approach the microphone.

9           We will now begin comment with Group A. In  
10 the interest of time, we also respectfully request that  
11 if you agree with comments made by a prior speaker,  
12 simply state that fact and add any new information you  
13 feel is pertinent to the issue.

14           There is a timer located at the end of this  
15 table. Please respect the three-minute time allowance.

16           Additionally, I will not accept any request to  
17 cede your time to another individual.

18           I urge the audience to extend the courtesy to  
19 all commenters and refrain from jeers and cheers.

20           With that, proceed.

21           MS. DES JARDINS: Thank you.

22           My name's Dierdre Des Jardins, and the staff  
23 findings on sea-level rise are based on my testimony.

24           I had prepared an 18-point PowerPoint but I  
25 guess it's not feasible to give that.

1           The Climate Change Analysis is not  
2 best-available science. It's not thorough. It's not  
3 objective. Nor does it take into account the 2014  
4 comments of the Delta Independent Science Board.

5           For design of the project, DWR is assuming  
6 that there will be, at most, 18 inches of sea-level  
7 rise in the Delta by 2100 with 55 inches of sea-level  
8 rise at the Golden Gate. They got that from a very  
9 simple back-of-the-envelope calculation.

10           3-D modeling by the U.S. Army Corps of  
11 Engineers, which I provided to them in comments, show  
12 that 5.5 feet of sea-level rise at the Golden Gate  
13 translates to an increase of over 5 feet in the Delta.

14           Current best-available science estimates of  
15 the high sea-level rise at the Golden Gate are over  
16 6 feet by 2100 and NOAA says potentially up to 10 feet  
17 given disintegration of polar ice sheets.

18           If you're going to use 18 inches as an  
19 intermediate value -- and that is within the 66 percent  
20 range -- then why build a \$20 billion project when you  
21 can just raise the levees? This is simply no way to  
22 design a \$19 billion project to mitigate for sea-level  
23 rise.

24           DWR also eliminated use of the drier-climate  
25 change scenarios to balance potential drying in the

1 Sacramento and San Joaquin River watersheds due to  
2 climate change.

3 All of their climate change modeling uses  
4 essential tendency scenario, and this does not match  
5 western climate model well. It matched the East Coast  
6 and Europe but not the West Coast. And they have  
7 eliminated evaluation under the dry scenario which was  
8 proposed to deal with this regional climate modeling  
9 problem.

10 So, I thoroughly agree with the staff's  
11 consideration that it's not the best-available science  
12 at sea-level rise. I would say it's not the  
13 best-available science on climate change, period. And  
14 it's absolutely critical that this project get it  
15 right.

16 MS. SUARD: Nicki Suard with Snug Harbor  
17 Steamboat Slough in the North Delta region.

18 Thank you so much for the time to just speak  
19 briefly.

20 There are a lot of us that attend the WaterFix  
21 hearings. And I continue to be offended when DWR says  
22 things like what I heard today, that they were in  
23 compliance with water quality.

24 If you look at the WaterFix hearing records,  
25 Mr. Patrick Porgans, he submitted a bunch of records of

1 thousands of incidences when DWR were not in compliance  
2 with water quality in different areas of the Delta.

3 I also submitted evidence showing that there  
4 were times during 2015 when water quality wasn't met on  
5 Steamboat Slough because of drought situations and  
6 withholding flow.

7 My -- I submitted a lot of comments. My  
8 comments in WaterFix, it's SHR-701-R for "revised."

9 My main focus has been: What happens to our  
10 drinking water quality in the Delta? If you don't send  
11 down freshwater to refresh our aquifer, we don't have  
12 drinking water quality.

13 There's already a change going on,  
14 particularly in Solano County, because of restoration  
15 actions and other things. And so I would request that  
16 you remand and say please analyze impacts to us.

17 They only -- DWR only provided evidence of  
18 impacts to a few wells along the tunnel pathway. What  
19 about the rest of us? We have a right to drinking  
20 water.

21 I also submitted mitigation suggestions,  
22 including the Community Fund, a prohibition of use of  
23 certain roads in the Delta.

24 And I also request that you look at what DWR  
25 proposed for residual flow on each of the five water

1 waterways in the North Delta. It is insufficient and  
2 it suspends us, if operated as they recommend.

3 That's SHR-350 and -352. Please look at that,  
4 because it recommends a splitting of 5,000 cubic feet  
5 per second of the bypass flow between five waterways in  
6 the North Delta, and that's insufficient for keeping  
7 anybody water fresh.

8 Thank you.

9 And if you have questions, I'm going to be  
10 submitting more on this. Thank you.

11 MR. ARAKAWA: Good afternoon, Chair Fiorini,  
12 and members of the Council, and staff.

13 My name's Steve Arakawa and I work for  
14 Metropolitan Water District of Southern California as  
15 Manager of Delta Bay initiatives. And we submitted  
16 comments, but I wanted to highlight some key issues for  
17 you today.

18 Metropolitan disagrees with the Staff  
19 Determination regarding appeal of the Certification of  
20 Consistency. This is the most extensively examined  
21 infrastructure project in the history of the State,  
22 given more than 11 years of planning, tens of thousands  
23 of pages of analysis, and more than a million hours of  
24 dedicated staff time.

25 The Draft Determination -- Staff Determination

1 proposes unprecedented levels of new documentation and  
2 unspecified changes that are counterproductive to  
3 advancing the coequal goals for the Delta.

4           Since 2009, California water policy has called  
5 for all regions of the State to re -- that rely on the  
6 watershed to reduce reliance on this water supply and  
7 future needs by improving regional self-reliance.

8           And Metropolitan has a long-term Integrated  
9 Regional Water Resources Plan and Urban Water  
10 Management Plan that demonstrates consistency with that  
11 policy.

12           The Council's Staff Draft Determination  
13 suggests a lengthy delay in the review process as about  
14 200 Southern California local water agencies that may  
15 receive -- may receive some of Metropolitan State  
16 Project supplies to revise their management plans to  
17 incorporate Metropolitan's overall plan to reduce  
18 reliance through improved regional self-compliance.

19           DWR's provided thousands of pages of evidence  
20 that support Certification that water suppliers that  
21 will receive reliability benefits are improving  
22 self-reliance.

23           In a separate determination, the need for  
24 California WaterFix was not significantly caused by any  
25 alleged failure to reduce reliance but, rather, other

1 factors recognized long before and even in the Delta  
2 Reform Act; namely, diminishing reliability of Delta  
3 exports due to more restrictive regulations to address  
4 declining fish populations, risk to Delta levees and  
5 climate change.

6 In closing, the regulatory burdens and  
7 uncertainties surrounding the staff proposals are  
8 beyond reason for any proposal to advance the coequal  
9 goals and address the unacceptable status quo.

10 The Council should refocus on the Department's  
11 substantial evidence and direct staff to revise the  
12 Draft Recommendations accordingly.

13 We think that there is an opportunity to  
14 revisit that documentation, and the Council should not  
15 succumb to many, many months or years of paralysis by  
16 analysis.

17 Inaction is doing not the Delta any good nor  
18 the State of California.

19 Thank you.

20 MR. KREMEN: Chair, Committee, members of  
21 staff, public.

22 My name's Gary Kremen. I'm one of the seven  
23 elected Directors in Santa Clara Valley Water District.

24 Our District urges you to reject and deny  
25 these un -- unwarranted appeals of the DWR certificate.

1           A little bit about Santa Clara Valley Water  
2 District. We're the water wholesaler for over  
3 2 million people in Santa Clara County and Silicon  
4 Valley. We do flood control, environmental  
5 stewardship.

6           We're a county that is recovering from a great  
7 recession, full of people, disadvantaged members,  
8 they're Latino, they're Asian, who water rates are very  
9 important. This is our lowest cost water.

10           We're doing things like recycled water, taking  
11 wastewater, bringing it to purify. That's 2700 hours  
12 an acre-foot. This is 600.

13           Our citizens are seeing their water rates  
14 going up at twice the rate of inflation. 40 percent of  
15 our water comes from the Delta. We are doing things  
16 like recycling. We're reducing our reliance. We've  
17 invested in the last 25 years over \$300 million. It's  
18 similar to what our retailers are doing as wholesalers.

19           Big planned \$650 million spend in recycling.  
20 But that is so expensive, this is our lowest cost  
21 water. We're not resting on it. We're doing a lot of  
22 conservation funding, et cetera.

23           But despite all of those things, all of the  
24 above, recycling, other means, the Delta, we're  
25 dependent on it.

1           And we're urging you -- And we care. I mean,  
2 this project that, when flows are high, will be able to  
3 capture -- I think you need to -- While you have your  
4 criteria, you need to look at this from a social  
5 justice point of view.

6           Don't let wealthy Delta interests with shill  
7 environmental groups get in front of you and tell their  
8 story. The reality at the end of the day, this is  
9 about the 20-plus million people in California who  
10 depend on the Delta.

11           Thank you for your service.

12           MS. TERRY: Good afternoon. Melinda Terry  
13 with the California Central Valley Flood Control  
14 Association.

15           I was not planning on making comments but  
16 after hearing some of the appellants' testimony and the  
17 comments by the Chair, I just want to add some things  
18 related to the prematurity topic.

19           It's been mentioned, but the last Conceptual  
20 Engineering Design we saw from DWR said it was only at,  
21 like, 10 percent design.

22           That's very important because many of the  
23 components of this project, like building intakes or  
24 five or six barge loading facilities will all happen on  
25 levees. I believe most of them, if not all, are

1 project levees that the State is responsible for.

2 And to do that, you have to get permission  
3 from the Army Corps of Engineers, a 408, and  
4 authorization. And you have to be at at least  
5 60 percent design to even do that.

6 And, as we've seen with the Supplemental EIR,  
7 there have been changes to this project as they've gone  
8 from eight to 10 percent.

9 Well, actually, I would say it's also based on  
10 their listening to some of the comments, comments on  
11 the EIR.

12 You saw some alignment changes, some barge  
13 facilities moved. So it's different levees that will  
14 be impacted.

15 My review of the chapters of the EIR and the  
16 construction and transportation appendices, and then  
17 looking at their maps of where all of these facilities  
18 would go. And I'm including things like the muck sites  
19 in addition to the barge facilities, the intakes, a  
20 forebay being built, cement plants, fueling stations,  
21 all of those things.

22 There is more than 30 Reclamation Districts,  
23 when you look at that full alignment, that would have  
24 some level of impacts like that.

25 So it's quite extensive in terms of the number

1 of RDs that will be impacted. And some of those  
2 impacts as 13 years construction goes on will be quite  
3 significant.

4 In order to construct, you actually have to  
5 dewater, so there are coffer dams and other things put  
6 in, and then they actually pump out that water to dry  
7 out the land. The chapters mention land subsidence  
8 that really could occur from that.

9 From the levee perspective, the million -- the  
10 vibration that will happen from millions of pile  
11 driving, as well as the road traffic that we heard  
12 about, a truck every 10 seconds, each truck making  
13 eight trips per day, that's a lot of vibration.

14 But on top of that, their transportation  
15 consultant only looked at two things. One was the  
16 traffic volume, and the pavement. It didn't analyze  
17 what was underneath the pavement, which is the levee.

18 I have spoken to the two engineering firms  
19 that do the levee work for more than 80 per --  
20 85 percent of the districts, the RDs. And they said,  
21 "Yeah, these were not designed by the Army Corps or  
22 constructed to withstand that amount of traffic.  
23 You'll have serious degradation of the levee itself  
24 underneath." So for the RDs, we're talking a real  
25 increase in -- in the operation that they have.

1           But, really, when you look at your policies, I  
2 want you to think about the -- their ability to do  
3 their daily maintenance, for them to improve whether  
4 it's the HMP or Bulletin 192.

5           And more importantly for them to do their  
6 seasonal flood fighting when you have to compete with  
7 that level of traffic or those other things that are  
8 being constructed within your purview.

9           And . . . they just really can't operate with  
10 that level of destruction.

11           I will say that the -- there are ways to  
12 mitigate that. They've not really had good discussions  
13 and been approached on that, but there is opportunity  
14 to do that.

15           And I appreciate your staff's recommending a  
16 remand because there's a lot of these things that can  
17 be relooked at.

18           Thank you.

19           CHAIR FIORINI: Are there any more in Group A?

20           Oh, we're on Group B. Any more on Group B?

21           Okay. Please proceed

22           MR. DULAC: Good afternoon, Chair members. My  
23 name's Charles Dulac. I'm a legislative aide here  
24 today on behalf of Assemblymember Jim Frazier.

25           The Assemblymember would like to thank the

1 Delta Stewardship Council staff for their thorough and  
2 accurate analysis of DWR's Certification of  
3 Consistency.

4 The Draft Recommendations to remand the  
5 Certification of Consistency is the right choice, for  
6 the Delta and for the Council.

7 As clearly stated in the Staff Report, DWR  
8 failed to respect both the land use, ensure reduced  
9 reliance on the Delta, comply with required Delta  
10 export/inflow objectives, or utilize the best-available  
11 science during the California WaterFix Project.

12 These findings are consistent with arguments  
13 made by the nine Appellant groups, as well as the  
14 long-standing opposition from thousands of Delta  
15 residents, including Assemblymember Frazier.

16 The Tunnels Project remains a travesty and an  
17 unjust Proposed Action against the residents of the  
18 Delta, which would create intolerable disruptions to  
19 the lives and livelihoods of Delta farmers, boaters and  
20 community members.

21 The arguments made by the nine Appellant  
22 groups and the Delta Protection Commission recognize  
23 this, and all of their recommendations ought to be  
24 included in the proposed determination.

25 Assemblymember Frazier feels that the Council

1 has no choice but to reject DWR's Certification of  
2 Consistency as out of compliance with the Delta Plan  
3 and the coequal goals of the Delta Reform Act.

4 Thank you.

5 MS. BETTERERS: Good afternoon. Karen  
6 Betterers from Walnut Grove. I'm a Delta resident.

7 And I wanted to take a few moments to thank  
8 the Council's staff for your preliminary remanding. It  
9 is very, very much appreciated by myself and a whole  
10 lot of people that are out working and don't have the  
11 time to come here or the ability to come here.

12 And I did take exception to the comment of  
13 in-Delta wealthy grassroots, what have you. I'd like  
14 to know where they are because I pay for myself to be  
15 here, and the idea that you're going to steamroll  
16 through the Delta -- and that's what this is in its  
17 current form -- is wrong. It's morally wrong. And I  
18 think it just -- it is.

19 And then people sitting here on the side of  
20 the room, unless you live with the consequences of your  
21 decisions and pencil marks and ink on a piece of paper,  
22 you don't.

23 And when you retire and you go away, you go  
24 off and do whatever it is the rest of your life is but  
25 yet we have to live and deal with the destruction of a



1 application.

2           What is the practical difference between the  
3 two?

4           CHAIR FIORINI: Well, in my estimation, based  
5 on what I explained, withdrawing the Certification of  
6 Consistency would allow early consultation to begin,  
7 and that could begin sooner than if the Council were to  
8 make a decision to remand the project.

9           The alternative is to wait until December and  
10 see how the vote goes and go from there.

11           COUNCILMEMBER GATTO: Okay. Thank you.

12           CO-HEARING OFFICER DODUC: All right. Then  
13 thanks for all of today's participants and attendees.

14           Councilmembers and staff are still subject to  
15 ex-parte communication prohibition on this matter.

16           This workshop is in recess. We will reconvene  
17 in this room tomorrow, November 16th, 2018, at 9 a.m.

18           Thank you.

19           (Proceedings adjourned at 3:57 p.m.)

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1 State of California )  
2 County of Sacramento )

3

4 I, Candace L. Yount, Certified Shorthand Reporter  
5 for the State of California, County of Sacramento, do  
6 hereby certify:

7 That I was present at the time of the above  
8 proceedings;

9 That I took down in machine shorthand notes all  
10 proceedings had and testimony given;

11 That I thereafter transcribed said shorthand notes  
12 with the aid of a computer;

13 That the above and foregoing is a full, true, and  
14 correct transcription of said shorthand notes, and a  
15 full, true and correct transcript of all proceedings  
16 had and testimony taken;

17 That I am not a party to the action or related to  
18 a party or counsel;

19 That I have no financial or other interest in the  
20 outcome of the action.

21

22 Dated: November 24, 2018

23

24

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Candace L. Yount, CSR No. 2737