

Department of Water Resources

Written Submission in Support of C20242

Cover Sheet

Proposed Covered Action: 2024-2026 Proposed Geotechnical Activities

Certification Number: C20242

Party Submitting the Document: Department of Water Resources

Date of Submittal: December 13, 2024

Document Title: Department of Water Resources Written Submission in Support of The Delta Conveyance Project: Final Certification of Consistency for 2024-2026 Proposed Geotechnical Activities (C20242)

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Section 1 Introduction

This document is the Department of Water Resources' (DWR) written submission for responding to allegations from the appeals received on DWR's Delta Conveyance Project: Final Certification of Consistency for the 2024–2026 Proposed Geotechnical Activities (Certification). The written submission responses are organized by common themes raised by the four appellants and the Delta Protection Commission's (DPC) comment letter dated 11/27/2024¹ regarding the Certification. The purpose of organizing the responses by theme is to provide a concise and non-redundant written submission, addressing the relevant substantive allegations of appellant's appeals and was informed by the 60-page limit stated in the Delta Stewardship Council's (DSC or Council) Notice of Hearing and Schedule of Written Submissions.

The Delta Reform Act (DRA) and the DSC's administrative procedures governing appeals, direct that the appellant has the burden to show that the certification of consistency is not supported by substantial evidence in the record. Furthermore, an appeal must set forth the basis for an alleged inconsistency with the Delta Plan and provide:

- (4) A statement of the factual allegations upon which the appeal is based.
- (5) A list of the specific Delta Plan policies that the appellant alleges the proposed covered action is inconsistent with, and for each policy identified, both of the following:
 - (A) A concise statement of the authority, evidence, and arguments relied on to support the appellant's claim that the proposed covered action is inconsistent with the Delta Plan policy.
 - (B) How the claimed inconsistency will have a significant adverse impact on one or both of the coequal goals or the implementation of a government-sponsored flood control program to reduce risks to people and property in the Delta.

(Cal. Code Regs., tit. 23, § 5022.)

This written submission complies with Cal. Code Regs., tit. 23, § 5029 and responds directly to the relevant substantive allegations raised in the appeals and supporting appellants' written submissions, citing to the substantial evidence in the record to

¹ Although DWR has chosen to address the DPC's allegations, DWR requests that the DSC clarify the validity of the comment letter considering the DPC's specific role in the appeal process as described in Cal. Code Regs., tit. 23, § 5028. Specifically, should the comment letter from DPC's Executive Director constitute DPC comments "regarding issues raised by an appellant" (Cal. Code Regs., tit. 23, § 5028, subd. (b)) when the comment letter was submitted before any appeals were posted, the comment letter does not mention any appeal or appellant directly, and DPC did not subsequently file a written submission responding directly to any of the appeals?

support the Certification. Each theme discussion includes a heading followed by a footnote. The footnote includes appeal and page number references from the original appeal documents to identify the portions of each appeal that the theme discussions address.² Each theme discussion starts with a summary of the topic and continues with responses to related allegations. Additionally, as the November 14, 2024, Notice of Hearing from the Delta Stewardship Council stated:

Each written submission may include a request to supplement the certified record with additional documentation written or information pursuant to California Code of Regulations, title 23, sections 5026 and 5032. To be considered for admission to the record, any documentation that is not part of the certified record submitted by Respondent must be included with the written submission pursuant to this notice and comply with these regulations.

(Cal. Code Regs., tit. 23, §§ 5026 and 5032.)

As stated in the DRA:

After a hearing on an appealed action, the council shall make specific written findings either denying the appeal or remanding the matter to the state or local public agency for reconsideration of the covered action *based on the finding that the certification of consistency is not supported by substantial evidence in the record* before the state or local public agency that filed the certification.

(CA Water Code § 85225.25 (emphasis added))

The DSC's role in adjudicating an appeal under the substantial evidence standard is limited to determining whether substantial evidence in the record supports DWR's Certification, not to re-weigh record and extra-record evidence to decide who has the better argument. (See *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512 [under the substantial evidence standard of review, a reviewing court may not grant any appeal "on the ground that an opposite conclusion would have been equally or more reasonable" because when reviewing factual issues, the court's task is "not to weigh conflicting evidence and determine who has the better argument[,] citations and internal quotation marks omitted].) Substantial evidence means evidence that is "reasonable in nature, credible, and of solid value..." (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335.) It includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (*Determination Regarding Appeal of the Certification of Consistency by San Joaquin Area Flood Control Agency for Smith Canal Gate Project* (March 21, 2019) (*Smith Gate*), p. 23.) Speculation or conjecture alone is not substantial evidence. (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286, 308.) And, "a disagreement among experts considering the same facts in the record does not establish a lack of substantial evidence in the record." (*Smith Gate*, at p. 23.) "Only if no reasonable person could reach the conclusion reached by the administrative agency, based on the entire record before it, will a court conclude

² Appeal references are formatted as follows 1) appellant name (A1-A4), 2) appeal or written submission (A or WS) and pdf page number, example: A1-A-p. 1.

that the agency's findings are not supported by substantial evidence.” (*Akella v. Regents of University of California* (2021) 61 Cal.App.5th 801, 814.)

While appeals should cite inconsistencies with specific Delta Plan policies and how those inconsistencies result in significant impacts on the coequal goals or implementation of a government sponsored flood control program, all appeals and the DPC comment letter also included procedural arguments. Section 2 of this written submission responds to the procedural arguments raised by appellants. Sections 3 through 8 of this written submission respond to appellants’ substantive arguments alleging inconsistencies with specific Delta Plan policies. Section 9 of this written submission includes DWR’s objections to record requests made by appellants in their written submissions. Finally, Section 10 identifies records that DWR is requesting to supplement the record.

Section 2

Procedural Arguments

As discussed below, the DRA and the California Environmental Quality Act (CEQA) are separate and distinct statutory schemes which require DWR to prepare different documents for different purposes. No law supports appellants' argument that the "Covered Action" addressed by DWR's Certification must mirror the "Project" analyzed in an agency's CEQA document. Appellants are wrong when they assert that CEQA governs the DSC's certification of consistency process. The DSC is an independent agency governed by its own authorizing Act, regulations, and procedures – CEQA's "piecemealing" caselaw is not relevant.

2.1 The Certification is consistent with the Delta Reform Act.³

The DRA does not include a requirement that related proposed actions must be evaluated in a single certification of consistency. To determine whether proposed related actions must be evaluated in a single certification of consistency, it is important to consider the purpose of the DRA's certification of consistency requirement.

As set forth in the DRA, the purpose of the certification of consistency requirement is to ensure that a proposed action is "consistent with the Delta Plan." (Water Code, § 85022, subd. (a); see also Cal. Code Regs., tit. 23, § 5002, subd. (b)(1) [Delta Plan consistency is demonstrated through consistency with the regulatory policies set forth in California Code of Regulations, title 23, sections 5002-5015].)

Consistency is ensured through an administrative appeal process. (*Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1068 [reasoning that "[t]he Legislature established a specific [certification and appeal] process by which the [DSC] ensures that proposed covered actions are consistent (i.e., comply) with the Delta Plan. (§§ 85225–85225.25.)"].)

Under the certification process, a state or local agency proposing a covered action must submit to the DSC a written certification of consistency with the Delta Plan before it may initiate implementation of the action. (Water Code, § 85225.) If no one timely appeals, "the state or local public agency may proceed to implement the covered action." (Water Code, § 85225.15.) But if anyone timely appeals a certification to the DSC, the DSC must hold a hearing and issue a written determination based on whether substantial evidence in the record before the certifying agency supports the agency's certification of consistency. (Water Code, §§ 85225.20, 85225.25; Cal. Code Regs., tit. 23, §§ 5030, subd. (a), 5033, subd. (a).) The certifying agency may not implement the covered action unless the DSC dismisses or denies the appeal. (Cal. Code Regs., tit. 23, § 5034.) For instance, if the appeal is denied because the DSC has found that no appellant has shown that the certification of consistency is not supported by substantial evidence in the record on any

³ A1-A-pp. 1-9, A1-WS-pp. 5-11, A2-A-pp. 1-6, A2-WS-pp. 2-9, A3-A-pp. 3 and 5-7, A3-WS-pp. 2-3, A4-A-pp. 5-9, A4-WS-p. 1, DPC-Letter 2-pp. 2-3.

appealed issue, the certifying agency may implement the covered action. (Cal. Code Regs., tit. 23, § 5034, subd. (a).)

But if the DSC grants the appeal, the DRA explains that:

Upon remand, the state or local agency may determine whether to proceed with the covered action. If the agency decides to proceed with the action or with the action as modified to respond to the findings of the council, the agency shall, prior to proceeding with the action, file a revised certification of consistency that addresses each of the findings made by the council and file that revised certification with the council.

(Water Code, § 85225.25.)

If the certifying agency submits a revised certification after a remand, it is subject to appeal to the DSC, although the grounds for such an appeal are limited to “[a]n alleged failure to address each of the council’s findings on the remanded issues [or] . . . [i]ssues resulting from material changes to the covered action.” (Cal. Code Regs., tit. 23, § 5035.) Only if no one timely appeals or the DSC dismisses or denies the subsequent appeal may the certifying agency proceed with implementation. (Cal. Code Regs., tit. 23, § 5035, subd. (b).)

Thus, the certification and appeal procedures ensure that covered actions are consistent with the substantive Delta Plan policies before covered actions may be implemented. (*Delta Stewardship Council Cases, supra*, 48 Cal.App.5th at p. 1068.)

Submission of a certification of consistency for preconstruction soil explorations, as detailed in the Certification, that is separate from the construction and operation of the Delta Conveyance Project does not thwart the function of the certification and appeal process to ensure consistency with the applicable Delta Plan policies.

As held by the California Supreme Court in *Property Reserve Inc. v. Superior Ct.* (2016) 1 Cal.5th 151, the types of geotechnical data collection activities proposed in the Certification’s 2024-2026 proposed geotechnical activities, “do not involve any continued or permanent occupation of any portion of the landowners’ property that would effectively impinge upon the owner’s right to possess, use, or control the area in question.” (*Id.* at p. 211.) Therefore, completing these types of temporary data collection activities neither hinders full consideration of the Delta Conveyance Project’s consistency with the Delta Plan (Water Code, § 85022, subd. (a)) nor limits the DWR’s discretion in the event of a future remand of a certification of consistency for the Delta Conveyance Project to allow DWR to consider whether “to proceed with the action or with the action as modified to respond to the findings of the council . . .” (Water Code, § 85225.25; see also San Francisco Baykeeper et al. Appeal re: Covered Action C20242, p. 6 [“The Proposed Geotechnical Activities will not construct the Tunnel nor will they cause the two decades of pollution, noise, and other consequences that will come with it.”].)

Rather, the 2024-2026 Proposed Geotechnical Activities would allow DWR to collect data that may inform a future certification of consistency for the Delta Conveyance Project as well as future approvals and funding decisions that are required by DWR and

other responsible agencies before DWR may implement the Delta Conveyance Project. This type of information collection enhances the DSC's and the public's interest in robust and informed decision-making concerning Delta Conveyance Project and does not diminish the future certification and administrative appeal process to which the Delta Conveyance Project will be subjected. In consideration of the purposes of the 2024-2026 Proposed Geotechnical Activities, it does not constitute the type of proposed activity that may only be evaluated as part of a future certification of consistency for a related infrastructure project.

Appellants argue that “[i]f a project proponent could subdivide a covered action into as many bite-sized pieces as it desired, there would never be an assessment of the cumulative effect from all of the pieces of the covered action together on the coequal goals and the Delta Plan’s policies.” (A2-A-pp. 1-4; A2-WS-pp. 3-7) As discussed further in Section 4.1, Coequal Goals, the 2024–2026 Proposed Geotechnical Activities, which involve only temporary activities at discrete locations to test soil and water quality conditions, would have no impact (and therefore would not have the potential to result in a significant impact) on the achievement of one or both of the coequal goals or on the implementation of a government-sponsored flood control program. (Administrative Record (AR) DCP.X2.1.00020.pdf, p. 30.) Appellants assert that this conclusion cannot be correct because the Delta Conveyance Project will have a significant impact on the achievement of one or both of the coequal goals or the implementation of a government-sponsored flood control program to reduce risks to people, property, and State interests in the Delta.

DWR acknowledges that the Delta Conveyance Project will have a significant impact on the achievement of one or both of the coequal goals or the implementation of a government-sponsored flood control program to reduce risks to people, property, and State interests in the Delta. (See, AR DCP.D1.1.00015.pdf, pp. 4-5.) As articulated in this written submission, DWR’s position is not that an agency may file any number of separate certifications of consistency for a larger infrastructure project to avoid full, cumulative, evaluation of the larger infrastructure project in a certification of consistency. Rather, DWR’s position is that the DRA does not require all related proposed actions to be evaluated in a single certification of consistency. Where an activity, like the 2024-2026 Proposed Geotechnical Activities, has separate utility from, and the activity does not legally or practically presume development of, a larger infrastructure project, then it is consistent with the objectives of the DRA and the DSC’s certification of consistency process to pursue separate certifications.

Here, in December 2023, DWR certified the Delta Conveyance Project EIR and selected the Bethany Reservoir Alignment as the approved project for continued planning and design. The 2024-2026 Proposed Geotechnical Activities are proposed to further study the Bethany Reservoir Alignment to inform its design, including potential modifications to above-ground features and the tunnel alignment. (AR DCP.X2.1.0001035.pdf, pp. 10-16.) The 2024-2026 Proposed Geotechnical Activities does not legally or practically presume development of the Delta Conveyance Project. Rather, the 2024-2026 Proposed Geotechnical Activities would allow DWR to collect data that may inform future decision

making on approvals and funding decisions that are required by DWR and other responsible agencies before DWR may implement the Delta Conveyance Project.

Furthermore, appellants have not identified any regulatory policies set forth in California Code of Regulations, title 23, sections 5002-5015, that require consideration of cumulative impacts. Based on their plain language, each of the policies only require an evaluation of the proposed action. (Cal Code Regs. tit. 23, §§ 5002-5015.) Even if DSC's regulatory policies could be interpreted to require consideration of a proposed action's cumulatively considerable contributions to cumulative policy inconsistencies, DWR's Certification demonstrates no such cumulatively considerable contributions will occur. As demonstrated in the Certification, the 2024–2026 Proposed Geotechnical Activities are not covered by one or more regulatory Delta Plan policies contained in Article 3 of the DSC's regulations codified at California Code of Regulations, Title 23, Sections 5003–5015. (AR DCP.X2.1.00020.pdf, p. 30.) An activity, like the 2024–2026 Proposed Geotechnical Activities, which is not covered by one or more regulatory Delta Plan policies necessarily does not contribute to an alleged cumulative policy inconsistency. (*City of Hayward v. Trustees of California State Univ.* (2015) 242 Cal.App.4th 833, ["zero when added to any other sum results in no change to the final amount"].)

2.2 The DSC's Covered Action Checklist cautions against filing a certification of consistency prior to finalizing the design and operational elements of a project to ensure that covered actions do not change significantly after certification and any appeals.⁴

The DSC's Covered Action Checklist explains:

The timing of filing the Certification with the Delta Stewardship Council is project specific but should occur after filing of the Notice of Determination and prior to project implementation. When other permits are required for implementation, project proponents should consult with Council staff on appropriate timing for filing the Certification. Filing a Certification of Consistency prior to finalizing the design and operational elements of the project may result in a proposed covered action that is significantly altered through the [California Environmental Quality Act (CEQA)] or other processes.

(AR DCP.X2.1.00020.pdf, p. 111, emphasis added.)

As recommended in the Covered Action Checklist, DWR has participated in separate early consultation with DSC staff relating to both the 2024-2026 Proposed Geotechnical Activities and the Delta Conveyance Project to address, among other topics, the "appropriate timing for filing the Certification of Consistency" for each proposed action. (AR DCP.X2.1.00020.pdf, p. 111.) In determining the appropriate timing for filing a Certification of Consistency for Delta Conveyance Project, relevant considerations included the numerous state, federal and participating public water agencies (PWAs) permit, decision, approval or other actions required before DWR can implement the Delta Conveyance Project. (See AR DCP.D1.1.00006.pdf, pp. 1-41 – 1-44 [Table 1-1], 1-48

⁴ A1-A-pp. 1-9, A1-WS-pp. 5-7, A2-A-pp. 1-6, A3-A-pp. 3 and 5-7, A3-WS-pp. 3-6, A4-A-pp. 5-9, A4-WS-p. 1.

to 1-49 [Table 1-2]; see also AR DCP.D1.1.00241.pdf, p. 106 [letter from DSC to DWR “advis[ing] DWR to submit a petition for and obtain a Change in Point of Diversion from the Water Board prior to submitting a certification of consistency [for the Delta Conveyance Project] to the Council”].)

For projects “subject to multiple discretionary approvals,” CEQA requires a lead agency to complete the CEQA process before the first approval. (*Guerrero v. City of Los Angeles* (2024) 98 Cal.App.5th 1087, 1100.) Given the required timing of CEQA review, obtaining permits and approvals, particularly for large infrastructure projects like Delta Conveyance Project, commonly require the sponsor agency to gather additional information and perform further studies, such as the 2024-2026 Proposed Geotechnical Activities, after CEQA review is completed.

Appellants argue that DWR could submit a certification of consistency on the Delta Conveyance Project now. However, the Delta Conveyance Project “stage of design is ‘conceptual’ and would generally be considered a 10% design level.” (AR DCP.X2.1.00034.pdf, p. 25.) And, “the tunnel portions of the project remain at a lower level of design development (i.e. 2%) due to lack of subsurface information.” (*Ibid.*) Thus, filing a certification of consistency at this early stage in the planning and design process would not advance the objectives of the DRA because the design may change in light of information gathered in the proposed geotechnical activities. (AR DCP.X2.1.000020.pdf, p. 111)

As the DSC’s Covered Action Checklist cautions, “[f]iling a Certification of Consistency prior to finalizing the design and operational elements of the project may result in a proposed covered action that is significantly altered through the CEQA or other processes.” (AR DCP.X2.1.00020.pdf, p. 111.) If certifying an environmental impact report (EIR) means that continued investigatory work acknowledged in an EIR cannot be completed prior to filing a certification of consistency as appellants urge, then it will often be impossible for an agency to obtain permits and refine the design and operational elements of a project prior to filing the certification of consistency. Requiring a certification of consistency at an early stage of project development before design and operational elements are further defined would not serve to inform decision makers and the public’s interest in robust and informed decision making.

Furthermore, if geotechnical evaluations included in an EIR for a water infrastructure project could not be completed before the agency completes the certification of consistency process for a water infrastructure project, then a certification of consistency could never be informed by geotechnical evaluations contemplated in the EIR. For example, in the draft staff determination regarding appeals to the certification of consistency for California WaterFix, DSC staff recommended remanding the certification to DWR on the grounds that substantial evidence did not support DWR’s determination of consistency with DP P2 based on noise impacts, in part, because “the Department lack[ed] the geotechnical information necessary to demonstrate feasibility [of noise mitigation]” because “geotechnical evaluations [were] to be completed at a later stage of design.” (AR DCP.X2.1.00038.pdf, p. 173.) If those geotechnical evaluations could not be completed by DWR in advance of completing the certification of consistency process for California WaterFix, then DWR would not have been able to complete the geotechnical

evaluations on a potential remand as recommended by DSC staff. (Cal. Code Regs., tit. 23, § 5034 [a revised certification process must be completed before the certifying agency may move forward with the covered action].) Therefore, interpreting the DRA to prohibit an agency from filing a certification of consistency for geotechnical data collection activities identified in the EIR separately from a certification of consistency on a water infrastructure project would unnecessarily limit the information that may otherwise be available to the public and DSC, which would not advance the objectives of the DRA.

2.3 The Legislature did not incorporate CEQA's piecemealing concept into the Delta Reform Act.⁵

In arguing that DWR may not file a certification of consistency of the 2024-2026 Proposed Geotechnical Activities because the activities are related to Delta Conveyance Project, appellants argue that the DRA incorporates the CEQA's piecemealing concept. The appellants are incorrect.

Water Code section 85057.5 provides:

(a) "Covered action" means a plan, program, or project as defined pursuant to Section 21065 of the Public Resources Code that meets all of the following conditions:

- (1) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.
- (2) Will be carried out, approved, or funded by the state or a local public agency.
- (3) Is covered by one or more provisions of the Delta Plan.
- (4) Will have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta.

(Emphasis added.)

Public Resources Code section 21065, in turn, defines a "project" as:

[A]n activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following:

- (a) An activity directly undertaken by any public agency.
- (b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.
- (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

⁵ A1-A-pp. 1-9, A1-WS-pp. 5-7, A2-A-pp. 1-6, A2-WS-pp. 2-9, A3-A-pp. 3 and 5-7, A4-A-pp. 5-9, A4-WS-p. 1.

The 2024-2026 Proposed Geotechnical Activities are “an activity which may cause ... a direct physical change in the environment” that is “directly undertaken by any public agency.” (Pub. Resources Code, § 21065.) Therefore, the 2024-2026 Proposed Geotechnical Activities meet the definition of a “project” as defined in Public Resources Code section 21065.

Ignoring the plain language of Water Code section 85057.5 and Public Resources Code section 21065, appellants urge the DSC to conclude that because DWR certified the Delta Conveyance Project EIR, which acknowledges the need for preconstruction planning and design geotechnical activities, the 2024-2026 Proposed Geotechnical Activities can only be considered as part of a certification of consistency for the Delta Conveyance Project. However, the fact that DWR certified the Delta Conveyance Project EIR does not change the fact that the 2024-2026 Proposed Geotechnical Activities themselves separately meet the definition of a “project” pursuant to Public Resources Code section 21065.

If the Legislature intended a “covered action” to mean something broader than a “project” as defined by the plain language of Public Resources Code section 21065, the Legislature could have expressly included such a requirement in Water Code section 85057.5. For example, the Legislature could have mandated that a “covered action” be defined consistent with the project description in a final CEQA document (as appellants are now urging) or could have incorporated CEQA’s piecemealing concept by citing or using language from CEQA’s relevant statutory and regulatory provisions addressing that concept, which pre-date the Legislature’s enactment of the DRA in 2009 (see, e.g. Pub. Resources Code, § 21159.27; see also Cal. Code Regs., tit. 14, §§ 15003, subd. (h) and 15378 [two of the so-called CEQA Guidelines codifying the prohibition on piecemealing of a CEQA project]; *Marina Coast Water Dist. v. County of Monterey* (2023) 96 Cal.App.5th 46, 85 [discussing Public Resources Code sections 21065 and 21081 and explaining that, unlike the statutes, the CEQA “Guidelines use a different definition of ‘[p]roject’ to expressly refer to “the whole of an action”].) The Legislature chose not to define “covered action” as a proposed CEQA project analyzed in an EIR or negative declaration, and it declined to define it with reference to the CEQA Guidelines and caselaw concepts of what constitutes the “whole of an action.” Instead, the Legislature only incorporated the Public Resource Code section 21065 definition of a “project” and four non-CEQA conditions into the definition. Therefore, based on the plain language of Water Code section 85057.5 and Public Resources Code section 21065, the DSC should reject appellants’ attempt to read CEQA’s piecemealing concept into the DRA.

2.4 The 2024-2026 Proposed Geotechnical Activities certification of consistency does not violate CEQA’s piecemealing prohibition.⁶

Even if it were proper to implicitly read CEQA’s piecemealing concept, and related CEQA case law, into Water Code section 85057.5 as appellants urge, DWR did not violate CEQA’s piecemealing prohibition. This is not a situation where DWR seeks to “allow environmental considerations to become submerged by chopping a large project into

⁶ A1-A-pp. 1-9, A1-WS-pp. 5-7, A2-A-pp. 1-6, A2-WS-pp. 2-9, A3-A-pp. 3 and 5-7, A3-WS-pp. 3-4, A4-A-pp. 5-9, A4-WS-p. 1.

many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.” (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1222, internal citations omitted.) This Certification in no way diminishes a future Delta Conveyance Project consistency certification and administrative appeal review. On the contrary, DWR is pursuing this certification of consistency to continue to collect data that may inform a future certification of consistency for the Delta Conveyance Project as well as future permits and approvals required by DWR and other responsible agencies before DWR may implement the Delta Conveyance Project. This approach enhances, rather than diminishes, the DSC’s and the public’s interest in the robust and informed consideration and analysis of the Delta Conveyance Project.

2.4.1 The 2024-2026 Proposed Geotechnical Activities have independent utility from a future decision to implement the Delta Conveyance Project, so this Certification does not constitute unlawful piecemealing under CEQA.⁷

The 2024-2026 Proposed Geotechnical Activities do not commit DWR, PWAs, or any other entity to implementing the Delta Conveyance Project. Pursuant to CEQA, improper piecemealing does not occur simply because two activities are “related to” each other. (*Plan. & Conservation League v. Dep’t of Water Res.* (2024) 98 Cal.App.5th 726, 752 (*PCL*)). “To be consistent with CEQA’s purposes, the line must be drawn neither so early that the burden of environmental review impedes the exploration and formulation of potentially meritorious projects, nor so late that such review loses its power to influence key public decisions about those projects.” (*Save Tara v. City of W. Hollywood* (2008) 45 Cal.4th 116, 130.) Improper piecemealing occurs “when the reviewed project legally compels or practically presumes completion of another action.” (*PCL, supra*, 98 Cal.App.5th at 752, quoting *Banning Ranch Conservancy, supra*, 211 Cal.App.4th at p. 1224 [rejecting a piecemealing argument and holding that construction of an access road to a park was “only a baby step toward [a housing] project” that would use the same access road].) Here, appellants do not argue – nor does any evidence support the conclusion – that completing the 2024-2026 Proposed Geotechnical Activities legally compels or practically presumes completion of the Delta Conveyance Project. Rather than compelling or presuming completion of the Delta Conveyance Project, the 2024-2026 Proposed Geotechnical Activities are proposed to allow DWR to continue to explore and refine the design of the approved Delta Conveyance Project alignment concept in order to further inform future permitting and funding decisions that are prerequisites to implementation of Delta Conveyance Project.

Completing the 2024-2026 Proposed Geotechnical Activities does not, as a matter of fact or law, compel or practically presume completion of the Delta Conveyance Project because DWR may not initiate construction of the Delta Conveyance Project unless and until the PWAs that elect to participate in the project authorize funding for project construction and mitigation (Water Code, § 85089, subd. (a)) and the California State

⁷ A1-A-pp. 1-9, A1-WS-pp. 5-7, A2-A-pp. 1-6, A2-WS-pp. 2-9, A3-A-pp. 3 and 5-7, A3-WS-pp. 3-4, A4-A-p. 2, A4-A-pp. 5-9, A4-WS-p. 1.

Water Resources Control Board exercises its discretion to issues an order approving a change in the point of diversion of the State Water Project (Water Code, § 85088).⁸ As appellants County of San Joaquin et al. (San Joaquin) acknowledge in their appeal, funding for construction of the Delta Conveyance Project has not been approved by PWAs and PWA decisions relating to additional planning and design funding for 2026-2027 are ongoing. (County of San Joaquin, Central Delta Water Agency, and Local Agencies of the North Delta Appeal, p. 3; see also AR DCP.X2.1.00020.pdf, p. 5, fn. 2 [“[s]ubsequent funding approvals are required to authorize construction and operations of the Delta Conveyance Project before DWR may initiate implementation and construction of the Delta Conveyance Project.”] And, California State Water Resources Control Board has not made a decision on DWR’s petition for a change in the point of diversion. (AR DCP.X2.1.00020.pdf, p. 5, fn. 3.)

Continued planning and design is necessary to inform future permitting and funding decision making because, as discussed previously, the Delta Conveyance Project “stage of design is ‘conceptual’ and would generally be considered a 10% design level.” (AR, DCP.X2.1.00034.pdf, p. 25.) And, “the tunnel portions of the project remain at a lower level of design development (i.e. 2%) due to lack of subsurface information.” (*Ibid.*) “Soil samples obtained from soil borings will be analyzed to determine the engineering properties of the soil to validate, and if needed modify, conceptual design and layout of project features.” (*Id.* at p. 22.) The 2024-2026 Proposed Geotechnical Activities will also provide data necessary for the continued evaluation of potential project innovations that have the potential to reduce the project construction footprint, construction timeline, and related construction impacts. (*Id.* at p. 23.) Further developing the project design and evaluating potential project innovations will allow for increased accuracy of project cost estimates to, in part, assist stakeholders in project decision making including future funding decisions by PWAs. (*Id.* at p. 25.)

As the 2024-2026 Proposed Geotechnical Activities are proposed to inform future permitting and funding decisions and do not compel or presume implementation of the

⁸ In addition to these future PWA and California State Water Resources Control Board decisions, other future permitting and funding decisions required before DWR may move forward with implementation of the Delta Conveyance Project include: (1) DWR (authorization of funding for construction and operation of the Delta Conveyance Project and acquisition of real property), (2) Delta Conveyance Design and Construction Authority (authorization of contracts for final design and construction of the Delta Conveyance Project), (3) California Department of Fish and Wildlife (incidental take permit), (4) State Water Resources Control Board (Section 401 Water Quality Certification), (5) U.S. Army Corps of Engineers (compliance with Clean Water Act Section 404, Rivers and Harbors Act Section 10, Rivers and Harbors Act Section 14, and National Environmental Protection Act), (6) U.S. Fish and Wildlife Service (compliance with Section 7 of the Endangered Species Act), and (7) National Marine Fisheries Service (compliance with Section 7 of the Endangered Species Act and Marine Mammal Protection Act). (See AR DCP.D1.1.00006.pdf, pp. 1-41 – 1-44 [Table 1-1], 1-48 to 1-49 [Table 1-2].)

Delta Conveyance Project, the 2024-2026 Proposed Geotechnical Activities have “independent utility.” (See, e.g., *Del Mar Terrace Conservancy, Inc. v. City Council* (1992) 10 Cal.App.4th 712, 720-725, 736-737 [holding that the decision to pursue construction of a highway segment when funding issues and other problems hindered development of the full highway did not constitute improper CEQA piecemealing].) “‘Independent utility,’ like the concept of ‘piecemealing’ ..., is a term of art used in connection with an applicant’s decision to engage in CEQA analysis of a particular project in isolation, rather than as part of a larger plan of which it is a part.” (*Yerba Buena Neighborhood Consortium, LLC v. Regents of Univ. of California* (2023) 95 Cal. App. 5th 779, 808 (*Yerba*).) “[T]wo projects may be kept separate when, although the projects are related in some ways, they serve different purposes or can be implemented independently’—i.e., have independent utility.” (*Ibid.*)

In *Yerba*, the court found that separate phases of a project analyzed in a single EIR (i.e., a hospital, a research building, and a housing project) had independent utility. (*Ibid.*; see also *Paulek v. Dep’t of Water Res.* (2014) 231 Cal. App. 4th 35 [holding that a project that DWR originally included in the Perris Dam Remediation Project EIR could be evaluated separately without violating CEQA’s piecemealing prohibition].) Although analyzed in the same EIR like in *Yerba*, the 2024-2026 Proposed Geotechnical Activities have independent utility from implementation of the Delta Conveyance Project because the purpose of the 2024-2026 Proposed Geotechnical Activities is to further refine the project concept and associated cost estimates, information that will inform future decisions by DWR and numerous other agencies whether to issue permits and approvals, and authorize funding, required to implement the Delta Conveyance Project. (AR DCP.X2.1.00034.pdf, p. 22.)

Thus, rather than compelling or presuming construction of the Delta Conveyance Project, the 2024-2026 Proposed Geotechnical Activities inform future decision makers and the public’s interest in robust and informed decision making.

2.4.2 Continued Planning and Design work, such as the 2024-2026 Proposed Geotechnical Activities, undertaken to inform future project decision making is a distant step towards implementation of the Delta Conveyance Project.⁹

Earlier this year, the Third District Court of Appeal rejected an argument that DWR improperly piecemealed the long-term contract amendments from the Delta Conveyance Project. In rejecting petitioners’ piecemealing argument, the court explained:

Even if viewed as a necessary step toward financing a Delta conveyance project, the revenue bond amendment is a distant step toward several other hurdles facing such a project. The history of an additional Delta conveyance, as discussed ante, indicates that such a conveyance lacks certainty and would require an enormous undertaking.

(*PCL, supra*, 98 Cal.App.5th at p. 754.)

⁹ A1-A-pp. 1-9, A1-WS-pp. 5-7, A2-A-pp. 1-6, A2-WS-pp. 2-9, A3-A-pp. 3 and 5-7, A3-WS-pp. 3-4, A4-A-p. 2, A4-A-pp. 5-9, A4-WS-p. 1.

While DWR has now certified the Delta Conveyance Project EIR to allow DWR to focus available funding for project planning and design on a single preferred alignment (the Bethany Reservoir Alignment), an extensive list of funding and permitting decisions are required before DWR could implement the Delta Conveyance Project. (See AR DCP.D1.1.00006.pdf, pp. 41 – 44 [Table 1-1], 48 – 49 [Table 1-2] (listing state, federal and participating PWA permit, decision, approval or other actions required to implement Delta Conveyance Project); see also Water Code, § 85088 [DWR may not commence Delta Conveyance Project construction until the State Water Resources Control Board approves a change in point of diversion for the new water intakes on the Sacramento River in the north Delta].) In other words, the 2024-2026 Proposed Geotechnical Activities that DWR seeks to perform to advance the project design beyond its current 10% level remains “a distant step toward several other hurdles facing such a project.” (*PCL, supra*, 98 Cal.App.5th at p. 754.)

Therefore, as in *PCL*, evaluating the currently proposed planning and design activities separately from the larger Delta Conveyance Project does not violate CEQA’s piecemealing concept.

2.5 DWR’s Certification is not inconsistent with the trial court’s ruling.¹⁰

Appellants allege that the June 20, 2024, trial court ruling requires DWR to file a certification of consistency for Delta Conveyance Project rather than for the 2024-2026 Proposed Geotechnical Activities. Appellants are incorrect. The trial court stated that “it makes sense that the Department certify that [the geotechnical work] is consistent with the Delta Plan before, rather than after, it is conducted.” (AR DCP.X2.1.00020.pdf, p. 123, original emphasis.) The ruling prohibits DWR “from undertaking the geotechnical work described in Chapter 3 of the FEIR prior to completion of the certification procedure that the Delta Reform Act requires.” (*Id.* at pp. 11-12.)

At the time the ruling was issued, DWR had not filed the certification of consistency for the 2024-2026 Proposed Geotechnical Activities. Therefore, the ruling does not address whether DWR’s Certification for data collection activities is consistent with the “certification procedure that the Delta Reform Act requires.” (*Ibid.*) “It is well established that a case is not authority for a proposition it did not consider.” (*Alameda Health Sys. v. Alameda Cnty. Employees’ Ret. Assn.* (2024) 100 Cal.App.5th 1159, 1179.)

As demonstrated above, DWR’s Certification complies fully with the “certification procedure that the DRA requires.” (AR DCP.X2.1.00020.pdf, p. 7.) Therefore, DWR’s Certification is not inconsistent with the trial court’s ruling.

2.6 DSC’s evaluation of the Certification of consistency appeals is not subject to CEQA.¹¹

Appellants County of Sacramento et al. allege that the DSC’s action on the pending appeals would violate CEQA. The DSC has previously rejected this argument in response

¹⁰ A1-A-pp. 1-9, A2-A-pp. 1-6, A2-WS-p. 8, A3-A-p. 7, A3-WS-pp. 4-5, A4-A-pp. 5-9.

¹¹ A3-A-p. 4, A3-WS-p. 13, DPC-Letter 2-pp. 7-9.

to the appeals to the Lookout Slough certification of consistency (C202110). There, the DSC explained:

The Council’s findings on the appeals of the Certification of Consistency for the Lookout Slough Project do not constitute a “project” for purposes of CEQA. That is because the Council’s action is not a “discretionary project proposed to be carried out or approved” by a public agency. (Pub. Resources Code, § 21080, subd. (a).) As the Council’s role in the appeal process is described in the Delta Reform Act, Water Code sections 85225– 85225.25, we do not have the authority to modify or deny a covered action, which is before the Council on appeal regarding consistency with the Delta Plan, for environmental reasons. (See *Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 299, 302 (explaining that a project is discretionary only if the agency that is taking an action can deny or modify the project on the basis of environmental consequences); see also, CEQA Guidelines § 15375 (“‘Discretionary project’ means a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity . . .”).) The Council does not have the authority to approve or disapprove a covered action on appeal, nor does it have the authority to modify or deny an appealed covered action for environmental reasons. Rather, the Council only has the authority to “den[y] the appeal or reman[d] the matter to the state or local public agency for reconsideration of the covered action based on the finding that the Certification of Consistency is not supported by substantial evidence in the record.” (Water Code, § 85225.25.) Therefore, the Council’s issuance of findings on the appeals of the Department’s Certification of Consistency with the Delta Plan is not a project for purposes of CEQA.

DWR agrees with the DSC. Courts have established a “functional test” in defining a discretionary action subject to CEQA review. (*Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, 22.) “CEQA does not apply to an agency decision simply because the agency may exercise some discretion in approving the project or undertaking. Instead[,] to trigger CEQA compliance, the discretion must be of a certain kind; it must provide the agency with the ability and authority to ‘mitigate ... environmental damage’ to some degree.” (*Id.* at p. 23, quoting *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 934.) The DSC’s resolution of a certification appeal does not vest the DSC with the authority to approve, deny or modify a proposed action. Those discretionary decisions are left to the certifying agency. The outcome of a certification appeal may lead to potential project delays if the DSC remands the certification back to the certifying agency. However, the “authority to *delay* a project” does not render an agency’s action discretionary for purposes of CEQA review. (*Protecting Our Water & Env’t Res. v. County of Stanislaus* (2020) 10 Cal.5th 479, 494, original emphasis, citing *Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 308.) Therefore, the DSC is not required to make a CEQA determination prior to resolving the pending appeals.

Furthermore, DWR’s determination that no subsequent environmental review is required pursuant to CEQA is documented in detail in the 2024-2026 Proposed Geotechnical Activities – Evaluation of Consistency with Delta Conveyance Project’s

Final EIR Memorandum (2024-2026 Proposed Geotechnical Activities CEQA Memo). (AR DCP.X2.1.00020.pdf, pp. 151-212.) As explained in the 2024-2026 Proposed Geotechnical Activities CEQA Memo, the Final EIR Mapbook 3-3 for the Bethany Reservoir Alignment (Approved Project) depicts the zones in which geotechnical investigations would occur (i.e., geotechnical investigation zones and project feature construction boundaries). (*Id.* at p. 155.) Within the geotechnical investigation zones and project feature construction boundaries identified in the Final EIR, the Final EIR analyzes the potential impacts associated with 392 Cone Presentation Tests (CPTs) and 827 soil borings during the design phase for the Delta Conveyance Project. (*Id.* at pp. 156-157, AR DCP.D1.1.00026.pdf, pp. 2-4, 6-8, 11-12, 15-16, 18, and 20.) The Final EIR conservatively assumes that all of these CPTs and soil borings would be completed in a two-year period. (DCP.D1.1.00010.pdf, pp. 134-135.)

All of the CPTs and soil borings included in the 2024-2026 Proposed Geotechnical Activities are located within the geotechnical investigation zones and project feature construction boundaries identified in the Final EIR. (AR DCP.X2.1.00020.pdf, pp. 201-212.)

Additionally, the 2024-2026 Proposed Geotechnical Activities only propose completion of a subset of the total number of CPTs and soil borings assumed to be completed within the geotechnical investigation zone over a two-year period within the Final EIR. Specifically, the 2024-2026 Proposed Geotechnical Activities propose 15 of the 392 CPTs (or ~3.8%) and 261 of the 827 soil borings (or ~31.5%) contemplated in the Final EIR. (*Id.* at p. 156.) The 2024-2026 Proposed Geotechnical Activities CEQA Memo concludes, on the basis of substantial evidence in light of the whole record, that completing the proposed subset of the design phase geotechnical activities over the period of time (2 years) in which the Final EIR conservatively assumed all 392 CPTs and 827 soil borings in the design phase would be completed does not have the potential to trigger any of the criteria requiring subsequent CEQA review (see Pub. Resources Code, § 21166; CEQA Guidelines, §§ 15162-15164). (*Id.* at pp. 151-154.) Therefore, while the DSC is not required to comply with CEQA before resolving the appeals, DWR nevertheless complied fully with CEQA before approving the 2024-2026 Proposed Geotechnical Activities.

2.7 Resolution of the appeals requires the DSC to address the appeals on their merits.¹²

DWR did not originally plan to submit a certification of consistency for these 2024–2026 Proposed Geotechnical Activities. DWR understands the 2024-2026 Proposed Geotechnical Activities to be preliminary investigations related to the Delta Conveyance Project’s planning and design, which DWR understands to be separate from the Delta Conveyance Project’s implementation. However, on June 20, 2024, the Sacramento Superior Court (referring to the Delta Reform Act [DRA]) enjoined DWR “from undertaking the geotechnical work described in Chapter 3 of the Final EIR,” which includes the 2024-2026 Proposed Geotechnical Activities, “prior to completion of the certification procedure that the DRA requires” (AR DCP.X2.1.00020.pdf, pp. 114-125).

¹² A1-A-pp. 1-9, A1-WS-pp. 5-7, A2-A-pp. 1-6, A2-WS-pp. 2-9, A3-A-p. 7, A3-WS-pp. 3-4, A4-A-pp. 5-9, A4-WS-p. 1.

DWR prepared the Certification to comply with the order of the Superior Court of California, County of Sacramento.

As demonstrated in the Certification, DWR concluded, based on substantial evidence, that:

because the 2024-2026 Proposed Geotechnical Activities would have no impact (and therefore would not have the potential to result in a significant impact) on the achievement of one or both of the coequal goals or on the implementation of a government-sponsored flood control program to reduce risks to people, property, and State interests in the Delta, the DRA does not require this certification to . . . include an evaluation of the regulatory Delta Plan policies contained in Article 3 provisions of the DSC's regulations.

(AR DCP.X2.1.00020.pdf, p. 32.)

Appellants argue the above conclusion demonstrates that the 2024-2026 Proposed Geotechnical Activities is not a covered action and, for that reason, appellants assert that the DSC should grant their appeals.

Appellants are incorrect. Preliminarily, if the 2024-2026 Proposed Geotechnical Activities are not a covered action, that would support DSC issuing a decision *denying* the appeals. Furthermore, each appellant has advanced arguments alleging that the 2024-2026 Proposed Geotechnical Activities are (1) inconsistent with one or more of the regulatory Delta Plan policies contained in Article 3 of the DSC's regulations codified at California Code of Regulations, Title 23, Sections 5003–5015 or DSC's general policy codified at California Code of Regulations, Title 23, Section 5002, or (2) will have a significant impact on the achievement of one or both of the coequal goals or on the implementation of a government sponsored flood control program to reduce risks to people, property, and State interests in the Delta. If appellants' arguments had merit, then the 2024-2026 Proposed Geotechnical Activities would constitute a covered action and DWR's Certification would be inadequate. Therefore, resolution of the appeals requires DSC to consider the merits of the appeals.

As demonstrated in this written response, all of appellants' arguments lack merit. DWR's Certification is supported by substantial evidence. Therefore, DWR respectfully requests that the DSC issue a detailed decision denying the appeals in full.

Section 3

Coequal Goals

The Public Resources Code declares the coequal goals as a policy of the State for the Delta, and the DRA directed the DSC to develop the Delta Plan for the furtherance of the coequal goals. (Pub. Resources Code, § 29702, subd. (a); Water Code, § 85300, subd. (a).) Individual covered actions do not bear the burden of achieving the coequal goals. However, to be consistent with the coequal goals a covered action should demonstrate that it will not impede the State’s ability to achieve the coequal goals. As explained in the Certification at pages 30-32 and discussed further below, the 2024–2026 Proposed Geotechnical Activities will not impede the State’s ability to achieve the coequal goals through implementation of the objectives identified in the Delta Reform act and expanded upon in the Delta Plan.

3.1 The 2024-2026 Proposed Geotechnical Activities will not have a significant impact on the achievement of the coequal goals.¹³

The Certification is not a certification of consistency for the Delta Conveyance Project and therefore does not propose to evaluate the Delta Conveyance Project’s consistency. The certification of consistency is limited to certain preliminary geotechnical work related to the Delta Conveyance Project’s planning and design. DWR plans to submit a separate certification of consistency for the implementation of the Delta Conveyance Project at a later date in consideration of the existing geotechnical data, associated design refinements, status of future permits, approvals and funding decisions including conditions imposed therein. This approach does not improperly segment a certification of consistency for the Delta Conveyance Project (as discussed in the Procedural Arguments section of this response). It enhances, rather than diminishes, the DSC’s and the public’s interest in the robust and informed consideration and analysis of a proposed action.

As discussed above, the proposed action will not impede the state’s ability to achieve the coequal goals (through implementation of the objectives identified in the DRA and expanded upon in the Delta Plan). The question regarding the coequal goals is if a proposed action would “have a significant impact on the achievement of . . .” the coequal goals. (Water Code, § 85057.5, subd. (a)(4), emphasis added.) Appellants assert, based largely on speculation, that potential impacts could occur. Speculation is not evidence. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 864-865.) Their burden of proof is to show that there is no substantial evidence in the record to support DWR’s Certification. Even if they had provided substantial evidence of a conflict, they would still lose because substantial evidence in the record demonstrates that there is no conflict. (See *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512 [under the substantial evidence standard of review, a reviewing court may not grant any appeal “on the ground

¹³ A1-WS-p. 8, A3-A-pp. 8-9, A3-WS-p. 12, A4-A-pp. 10-12, A4-WS-pp. 1-2, DPC-Letter 2-pp. 3-5.

that an opposite conclusion would have been equally or more reasonable” because when reviewing factual issues, the court’s task is “not to weigh conflicting evidence and determine who has the better argument[.]” citations and internal quotation marks omitted[.]

Appellants argue that by siting activities within “Natural Landscape Blocks” and “Essential Connectivity Areas,” a substantial effect on terrestrial wildlife connectivity and movement would occur, and therefore a substantial effect on the coequal goal of “protecting, restoring, and enhancing the Delta ecosystem” would result. However, the connectivity maps in the Final EIR for the Delta Conveyance Project depict large areas of habitat for a broad range of species to help prioritize conservation, mitigation, and other land-based decisions and were not intended to be areas of direct avoidance of any activities. (AR DCP.D1.1.00112.pdf, p. 38) Not all activities within a wildlife connectivity corridor are considered to significantly impact movement of wildlife in that area. As discussed in the Certification, the work area for each individual geotechnical activity is approximately 0.022 acres, or 10 feet by 100 feet, and each investigation would last between one and fourteen days (AR DCP.X2.1.00020.pdf, pp. 24 and 28).

Furthermore, a qualified team of biologists will conduct a habitat assessment and reconnaissance level surveys approximately two weeks prior to the onset of ground disturbing soil investigation activities for any special status plants and wildlife that have the potential to occur within the project area. If, based on the habitat assessment and reconnaissance level surveys, the biologists identify the potential for special status wildlife impacts, the location will be shifted to a suitable location as identified by the qualified team of biologists, which is defined as a location that achieves the following performance standards: (1) is the minimum distance necessary (informed by mitigation measures BIO-2a through BIO-53 from the Delta Conveyance Project EIR), to ensure that no special status plants and wildlife with the potential to occur is disturbed during the work activities, (2) does not increase impacts to other resources to above a level of significance, and (3) the qualified biologist team must determine that commencing activities does not have the possibility to cause unpermitted take under federal or State law. If a suitable location, as defined above, cannot be determined within adjacent areas by the qualified team of biologists, then the soil investigation at that location will not be conducted. (*Id.* at p. 227.)

Given the limited size and duration of the geotechnical activities, the biological surveys described above, and the commitment to move or abandon activities, if the biologists determine it is necessary, to avoid potential special status wildlife impacts, substantial evidence demonstrates that the activities do not have the potential to substantially impede wildlife connectivity or movement. Additionally, implementation of Delta Conveyance Project Environmental Commitments EC-1: Conduct Environmental Resources Worker Awareness Training, and EC-14: Construction Best Management Practices for Biological Resources include BMPs regarding general avoidance, buffers, and monitoring including clearances, and relocation or abandonment which would be available to address any potential wildlife connectivity impacts. (AR DCP.X2.1.00020.pdf, pp. 168-170)

In Appeal C20242-A4, on pages 1-3 of the G P1(b)(1), Coequal Goals section, the appellant also makes a statement that DWR's discussion of the coequal goals fails to mention a consideration of Delta as a place. The discussion of the coequal goals in the Certification focuses on the covered action checklist's "question 4[.]" which directs DWR to consider whether the 2024–2026 Proposed Geotechnical Activities:

Will have a significant impact on the achievement of one or both of the coequal goals or the implementation of a government-sponsored flood control program to reduce risks to people, property, and State interests in the Delta.

The Certification, based on substantial evidence, answers this question in the negative. (AR DCP.X2.1.00020.pdf, pp. 30-32.) Neither the DRA nor the DSC's covered action checklist supports the conclusion that an activity that does not have a significant impact on achieving the coequal goals could nevertheless impact the ability to achieve the coequal goals in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place. Furthermore, as explained in Chapter 5 of the Delta Plan, protecting and enhancing the Delta as an evolving place does not mean maintaining the status quo or "exempt it from change. . . . Protecting the Delta as an evolving place means accepting that change will not stop, but that the fundamental characteristics and values that contribute to the Delta's special qualities and that distinguishes it from other places can be preserved and enhanced while accommodating these changes (Delta Vision Blue Ribbon Task Force 2008). It does not mean that the Delta should be a fortress, a preserve, or a museum (Delta Stewardship Council 2013:167; see also Cal. Code Regs., tit. 23, § 5001, subd. (h)(3))." (AR DCP.D1.1.00015.pdf, p. 19.)

The Delta Plan Program EIR illustrates that data collection, including geotechnical investigations, are an important tool for ensuring change in the Delta is consistent with strategies for protecting and enhancing the unique values of the Delta as a place. Specifically, the Delta Plan Program EIR requires "[g]eotechnical investigations . . . [to] be conducted during design [of projects] at and near the locations of facilities to the depths necessary to characterize the subsurface conditions." (Delta Plan Program EIR, p. 11-41; see also Delta Plan Program EIR, Mitigation Measures 11-3, 11-5, 11-8, 11-9 [requiring geotechnical investigations to be performed].) Furthermore, completing activities such as those included in the 2024–2026 Proposed Geotechnical Activities "do not involve any continued or permanent occupation of any portion of the landowners' property that would effectively impinge upon the owner's right to possess, use, or control the area in question." (*Prop. Rsrv. Inc. v. Superior Ct.* (2016) 1 Cal.5th 151, 201.) Therefore, substantial evidence in the record supports the conclusion that undertaking geotechnical activities to inform the design of, and approvals and funding decisions for, water infrastructure projects does not impede the State's ability to achieve the coequal goals in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.

As described in Delta Plan Policy ER P5, Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species, this policy covers a proposed action that has the reasonable probability of introducing or improving habitat conditions for nonnative invasive species. Proposed actions that are subject to this policy must fully consider and avoid or mitigate new introductions or improved habitat conditions for nonnative invasive species, striped bass, or bass.

4.1 The 2024-2026 Proposed Geotechnical Activities do not have a reasonable probability to introduce, or improve the habitat for, nonnative invasive species¹⁴

In appeal C20242-A2, on page 11, the appellant argues that the potential for new introductions or improved habitat conditions for nonnative invasive species is not fully considered and mitigated to appropriately protect the ecosystem because DWR has only committed to clean equipment and not vehicles or clothing. To clarify, the word “equipment” in the quotation from the appellant includes vehicles used as part of the 2024–2026 Proposed Geotechnical Activities. (AR DCP.X2.1.00020.pdf, p. 67 [stating that “[t]he 2024–2026 Proposed Geotechnical Activities would require the use of heavy equipment such as drill rigs, CPT trucks, grout trucks, water trucks, and work vehicles”].) With respect to clothing, as discussed in *Preventing the Spread of Invasive Plants: Best Management Practices for Transportation and Utility Corridors*: “These voluntary BMPs were developed with the understanding that each situation and entity has different needs, constraints and resources. The applicability and effectiveness of BMPs will vary with existing land uses, degree of human disturbance, the objectives of the landowners, and the resources available for management activities.” (AR DCP.X2.1.00010.pdf, p. 8.) The 2024–2026 Proposed Geotechnical Activities require a limited number of field personnel to access proposed geotechnical investigations sites within the Delta. (AR DCP.X2.1.00041.pdf, p. 80 [CPTs may include up to four personnel and borings may include up to six personnel per site].) Appellants merely speculate that clothing of visitors to the Delta may create the reasonable probability of introducing or improving habitat conditions for nonnative invasive species. Not only is speculation not evidence (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at pp. 864-865), the assertion is illogical. If the need to access sites within the Delta created a “reasonable probability” of introducing or improving habitat conditions for nonnative invasive species from clothing, then all Delta tourism and virtually all activities proposed within the Delta would implicate this policy. Furthermore, even if the requirement to access sites within the Delta could be viewed as creating a “reasonable probability” of introducing or improving habitat conditions for nonnative invasive species from clothing, the 2024–2026 Proposed Geotechnical Activities are consistent with the policy because measures are incorporated into the geotechnical activities in order to appropriately protect the ecosystem. (Cal. Code Regs., tit. 23, § 5009, subd. (a).) Specifically, (1) activities are

¹⁴ A2-A-p. 11.

generally completed on the side of roads and in other disturbed areas where soil is generally compacted (AR DCP.X2.1.00020.pdf, p. 38), (2) sites will be restored to as close to pre-project conditions as possible directly following the completion of the field investigation activity (AR DCP.X2.1.00020.pdf, p. 170), (3) a qualified team of biologists conduct habitat assessment and reconnaissance level surveys prior to start of the work and a biologist is onsite while the geotechnical activities are completed (AR DCP.X2.1.00020.pdf, p. 227), and (4) environmental awareness training is provided for all new field personnel prior to the start of each workday (AR DCP.X2.1.00020.pdf, p. 230). Through implementing these practices, DWR has found no evidence, and appellants have not identified any evidence, that previous geotechnical work has led to any new introductions or improved habitat for nonnative invasive species. Thus, substantial evidence supports the conclusion that practices used ensure that the activities do not have a "reasonable probability of introducing or improving habitat conditions for nonnative invasive species" and therefore ER P5 is not applicable to the 2024–2026 Proposed Geotechnical Activities. (Cal. Code Regs., tit. 23, § 5009, subd. (b).)

Section 5

Delta Plan Policy DP P2

As described in *Delta Plan Policy DP P2, Respect Local Use When Siting Water or Flood Facilities or Restoring Habitats*, this policy covers proposed actions that involve the siting of water management facilities, ecosystem restoration, and flood management infrastructure. Proposed actions that are subject to this policy must site facilities to avoid conflicts with existing uses.

5.1 The 2024-2026 Proposed Geotechnical Activities do not involve the siting of water management facilities.¹⁵

As described in *Delta Plan Policy DP P2, Respect Local Use When Siting Water or Flood Facilities or Restoring Habitats*, DP P2 covers proposed actions that involve the siting of water management facilities, ecosystem restoration, and flood management infrastructure. While the proposed geotechnical activities will help inform the siting of potential future water management facilities, the borings themselves are not water management facilities or habitat restoration projects, nor will they be part of the physical siting of those facilities (will not “involve the siting”). The collection of data at a given location does not commit DWR to site facilities in that location. In fact, the data collected may result in the need to adjust the location of that facility during the design process. As discussed in Section 4.2.9.1 titled “DP P2 Detailed Findings” of the Certification, DP P2 does not apply because the 2024-2026 Proposed Geotechnical Activities does not involve the siting of water management facilities, ecosystem restoration, or flood management infrastructure. (AR DCP.X2.1.00020.pdf, p. 40.)

The DPC alleges because the purpose of the geotechnical work is to support water management facilities and will leave permanent facilities consisting of survey markers, it is thus a “water management facility” that conflicts with the prevailing land use in the Delta, which is agriculture. The 2024-2026 Proposed Geotechnical Activities do not include placement of any monuments or survey markers. (AR DCP.X2.1.00020.pdf, p. 24.) Additionally, the borings themselves are not water management facilities, nor will they be part of those facilities (will not “involve the siting”).

Furthermore, even if the 2024-2026 Proposed Geotechnical Activities could be considered to “involve the siting of water management facilities[,]” the 2024-2026 Proposed Geotechnical Activities are consistent with Delta Plan Policy DP P2. Delta Plan Policy DP P2 requires water management facilities to be sited to avoid or reduce conflicts with existing uses or those uses described or depicted in city and county general plans for their jurisdictions or spheres of influence when feasible. (Cal Code Regs., tit. 23, § 5011, subd. (a).) “Because siting of geotechnical investigations is conducted with avoidance of sensitive resources in mind and reducing any potential conflicts with on-going agricultural practices, most of the planned geotechnical

¹⁵ A2-A-pp. 11-12, A3-A-pp. 20-21, A3-WS-pp. 9-11, A4-A-pp. 20-24, A4-WS-p. 3, DPC-Letter 2-pp. 5-7.

investigations are sited on agricultural farm roads or regularly used agricultural staging areas.” (AR DCP.X2.1.00034.pdf, p. 238.) Additionally, unless otherwise authorized by a landowner, the 2024-2026 Proposed Geotechnical Activities will be completed more than 100 feet from all residences and small business operations and not include the removal of any vegetation (AR DCP.X2.1.00020.pdf, p. 227), will only occur weekdays from 7:00 am to 7:00 pm excluding specified holiday periods (*id.* at p. 218), and will not occur between September 1 and October 15 on vineyards or other planted land or between October 1 and February 25 on hunting land (*ibid.*). Any proposed geotechnical investigation activities that occur on agricultural lands would be grouted with materials from the full depth to 5 feet (1.5 meters) below the surface, with the final 5 feet of topsoil replaced to return the affected area to as close to pre-activity conditions as possible. (AR DCP.X2.1.00020.pdf, p. 172.) In completing the 2024-2026 Proposed Geotechnical Activities, DWR has also committed to comply with any general rules or regulations of a reclamation district applicable to the underlying property owner, for example, regarding use or weight of vehicles on its easement area, or restricted access to pumping stations, or digging near levees. (AR DCP.X2.1.00020.pdf, p. 219.)

The 2024-2026 Proposed Geotechnical Activities would not result in a change to the underlying land use of any properties because the geotechnical activities are temporary and all affected areas would be returned to as close to pre-activity conditions as possible.¹⁶ Similarly, field-investigation work would not result in permanent incompatibilities with land use plans, policies, or designations, nor would investigations result in the permanent conversion of lands to another land use. Activities such as the geotechnical activities are generally allowed in all land use designations by policy and regulation. (AR DCP.X2.1.00020.pdf, pp. 171-172.) Therefore, substantial evidence demonstrates that the 2024-2026 Proposed Geotechnical Activities are sited to avoid or reduce conflicts with existing uses or those uses described or depicted in city and county general plans for their jurisdictions or spheres of influence when feasible. (Cal. Code Regs., tit. 23, § 5011, subd. (a).)

5.2 If the DP P2 did apply, the Harvest Water Program was not an existing use at the time of the certification and no conflict exists.¹⁷

As stated above, the 2024-2026 Proposed Geotechnical Activities do not involve the physical siting of water management facilities. However, even assuming the policy was applicable to the 2024-2026 Proposed Geotechnical Activities, DP P2 requires that, “Water management facilities, ecosystem restoration, and flood management infrastructure must be sited to avoid or reduce conflicts with existing uses or those uses described or depicted in city and county general plans for their jurisdictions or spheres of influence when feasible, considering comments from local agencies and the Delta Protection Commission.” (Cal. Code Regs., tit. 23, § 5011, subd. (a).) As of the submittal

¹⁶ Pre- and post- activity photograph are required to be taken to document that each geotechnical investigation site is returned to as close to pre-activity conditions as possible. (DCP.X2.1.00020.pdf, p. 227.)

¹⁷ A3-A-pp. 20-21

of the Certification (October 8th, 2024) the Harvest Water Program was neither fully constructed, nor operational, nor is it described or depicted in Sacramento County's general plan, and therefore any perceived future conflicts with a future land use would not trigger DP P2's requirement to site facilities to avoid or reduce conflicts.

Furthermore, the Harvest Water Program construction is scheduled to be completed in 2026, and the system is anticipated to be operational in 2027, after the 2024-2026 Proposed Geotechnical Activities will be completed. Therefore, the 2024-2026 Proposed Geotechnical Activities will not conflict with this future use because the 2024-2026 Proposed Geotechnical Activities are planned to be completed in 2026, before the Harvest Water Program is anticipated to be operational.

The Harvest Water Program includes a new pump station and recycled water transmission and distribution pipelines to deliver water from Regional San's treatment facility near Elk Grove to irrigation systems in the Program area in southern Sacramento County. (AR DCP.D1.1.00247.pdf, p. 60.) Appellant asserts that the 2024-2026 Proposed Geotechnical Activities would result in significant negative effects to the Harvest Water Program. However, appellant does not articulate any specific conflicts between the two proposed activities. The Harvest Water Program Technical Memorandum was prepared after DWR filed the Certification and, therefore, DWR objects to the extra record evidence (see *infra* Section 9). Even if the memorandum was not improper extra record evidence, the memorandum does not identify a conflict between the Harvest Water Program and the 2024-2026 Proposed Geotechnical Activities.

The memorandum raises biological resource and traffic concerns, but the memorandum does not explain how these concerns result in a land use conflict between the 2024-2026 Proposed Geotechnical Activities and the Harvest Water Program. Thus, the argument is waived. (See *Old East Davis Neighborhood Assn. v. City of Davis* (2021) 73 Cal.App.5th 895, 915. [“Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived[.]” quoting *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99].) The concerns are also meritless. The 2024-2026 Proposed Geotechnical Activities CEQA Memo (AR DCP.X2.1.000020.pdf, pp. 151-212) did not identify any potential impacts that would conflict with the activities of the Harvest Water Program. As discussed in Section 6.3 of this written submission, substantial evidence demonstrates that DWR has incorporated measures that are equal or greater than required by Delta Plan Mitigation Measure 4-2 to ensure the geotechnical activities will not result in significant impacts to special status wildlife. Substantial evidence also demonstrates that the 2024-2026 Proposed Geotechnical Activities will not result in a traffic conflict because no public roads, waterways or land access will be closed (AR DCP.X2.1.000020.pdf, p. 228.) and DWR vehicles or equipment shall not unreasonably block access by other vehicles on levee roads or other reclamation district operated roadways. (AR DCP.X2.1.000020.pdf, p. 219.) Furthermore, DWR must comply with EC-18 Minimize Construction-Related Disturbances to Delta Community Events and Festivals to avoid potential conflicts with community events or festivals. (AR DCP.X2.1.000020.pdf, p. 223.) Therefore, while the memorandum is untimely and DWR objects to the extra record evidence, the memorandum does not refute the substantial evidence demonstrating that the 2024-2026 Proposed Geotechnical Activities have been sited to avoid or reduce conflicts with existing uses or

those uses described or depicted in city and county general plans for their jurisdictions or spheres of influence when feasible consistent with DP P2.

Regarding vague allegations about conflicts with agriculture, as discussed in the Certification, the work area for each individual geotechnical activity is approximately 0.022 acres, or 10 feet by 100 feet which, along with the work being primarily cited on roads and out of agricultural fields (AR DCP.X2.1.00020.pdf, p. 38), would limit conflicts with agricultural uses. Additionally, unless otherwise authorized by a landowner, the geotechnical investigations will not occur between September 1 and October 15 on vineyards or other planted land to avoid potential conflicts during common harvesting seasons. (AR DCP.X2.1.00020.pdf, p. 218.)

Any proposed investigation activities that occur on agricultural lands would be grouted with materials from the full depth to 5 feet (1.5 meters) below the surface, with the final 5 feet of topsoil replaced to return the affected area to as close to pre-activity conditions as possible. (Section 3.2.12 of the 2024-2026 Proposed Geotechnical Activities CEQA Memo (AR DCP.X2.1.00020.pdf, p. 172.) "Bentonite grout hardens into a type of cement, but because it lacks the aggregate materials (sand and gravel) found in concrete, bentonite grout when hardened is similar in texture to the native subsurface material that it would replace, is soft enough to be shaved with a pen knife, would not interfere with or damage farm machinery [(including machinery for the installation of and use of irrigation systems)], and would not adversely affect the filled land for agricultural or other purposes." (AR DCP.X2.1.00025.pdf, p. 5; see also *Prop. Rsrv., Inc. v. Superior Ct.*, *supra*, 1 Cal.5th at p. 172.) Use of bentonite grout provides stability and avoids groundwater contamination. (AR DCP.X2.1.00025.pdf, p. 5.) Therefore, consistent with DP P2, the 2024-2026 Proposed Geotechnical Activities are proposed and sited in a manner that avoids or reduces conflicts with agricultural activities on agricultural land.

Furthermore, DWR has held several coordination meetings with SacSewer regarding the Delta Conveyance Project actions within the Harvest Water Program area and is committed to continuing to discuss SacSewer's perceived conflicts going forward

5.3 General allegations regarding potential impacts of the 2024-2026 Proposed Geotechnical Activities do not satisfy appellants' burden to establish that substantial evidence does not support DWR's findings under DP P2¹⁸

While the proposed geotechnical activities will help inform the siting of potential future water management facilities, the borings themselves will not be part of the physical siting of those facilities. The collection of data at a given location does not commit DWR to site facilities in that location. In fact, the data collected may result in the need to adjust the location of that facility during the design process. As discussed in Section 4.2.9.1 titled "DP P2 Detailed Findings" of the Certification (DCP.X2.1.00020.pdf, pp. 40-41), DP P2 does not apply because the 2024-2026 Proposed Geotechnical Activities does not involve the siting of water management facilities, ecosystem restoration, or flood management infrastructure. Regarding the appellants' allegation that the 2024-2026

¹⁸ A2-A-pp. 11-12, A3-A-pp. 20-21, A3-WS-pp. 9-11, A4-A-pp. 20-24, A4-WS-p. 3, DPC-Letter 2, pp. 6-7

Proposed Geotechnical Activities will result in disruptive and destructive features to agricultural practices, the activities would occur within a set number of hours between 7am-7pm, M-F, unless alternative arrangements are made in consultation with the landowner; no entries would occur on vineyards or planted lands between Sept 1-Oct. 15 (unless authorized by the landowner); and vegetation would not be removed unless in consultation with the landowner (AR DCP.X2.1.00020.pdf, pp. 218 and 227).

Additionally, as stated in Section 3.2.11 of the 2024-2026 Proposed Geotechnical Activities CEQA Memo, (AR DCP.X2.1.00020.pdf, pp. 170-171) the geotechnical activities may temporarily interfere with the existing land uses where sampling is taking place, however the activities are not expected to result in changes to the underlying land use of any properties, because all sites would be returned to pre-activity conditions. Similarly, the activities would not result in permanent incompatibilities with land use plans, policies, or designations, conversions. The appellants do not provide a specific perceived existing land use conflict to analyze per DP P2.

The appellants allege that the Certification does not address whether the activities would involve permanent changes to property. The temporary geotechnical work proposed by the Department does not constitute a permanent occupation of property. In *Prop. Rsrv., Inc. v. Superior Ct.* (2016) 1 Cal.5th 151 (*Prop. Rsrv.*), the California Supreme Court rejected the petitioners' argument that the Department's "proposed boring and refilling activity must be viewed as ... [a] permanent appropriation of a property interest..." (*Id.* at p. 209 (original emphasis).) The Court explained that "[w]ith respect to the proposed geological testing, ... the Department is not seeking to obtain title to private property, to permanently maintain bored holes on the landowners' property, or to obtain exclusive possession of any portion of the property for a significant period of time." (*Id.* at p. 212.) In short, "a public entity [such as the Department] that, after digging up soil or conducting other activities on private property that temporarily alter the property's condition, returns the property to the same or a comparable state as the property previously enjoyed, ... [does not] undertake[] a permanent physical occupation of the property that amounts to a per se taking of a property interest." (*Id.* at p. 210.)

The appellants alleges that the project would disrupt local land uses including school related traffic, agricultural equipment transportation, and other local commercial activity. The 2024-2026 Proposed includes considerations for these types of conflicts including, no public roads, waterways or land access will be closed (AR DCP.X2.1.00020.pdf, p. 228) and DWR vehicles or equipment shall not unreasonably block access by other vehicles on levee roads or other reclamation district operated roadways (AR DCP.X2.1.00020.pdf, p. 219). Furthermore, DWR must comply with EC-18 Minimize Construction-Related Disturbances to Delta Community Events and Festivals to avoid potential conflicts with community events or festivals.

The appellants mixes aspects of G P1 (b)(2) and DP P2 alleging because DWR didn't utilize certain Delta Plan Mitigation Measures (7-2, 8-1, and 17-1) there would be land use conflicts under DP P2. The 2024-2026 Proposed Geotechnical Activities' temporary impact on agricultural land would be less than significant, as the geotechnical activities will not convert Important Farmland, land subject to Williamson Act contract, or land in Farmland Security Zones. As the 2024-2026 Proposed Geotechnical Activities will have

a less-than-significant impact, Delta Conveyance Project Mitigation Measure AG-1: Preserve Agricultural Land is not applicable.

The 2024–2026 Proposed Geotechnical Activities’ temporary impact on aesthetics and visual resources would be less than significant. As the 2024–2026 Proposed Geotechnical Activities will have a less-than-significant impact, Delta Conveyance Project Mitigation Measures AES-1a: Install Visual Barriers between Construction Work Areas and Sensitive Receptors, AES-1b: Apply Aesthetic Design Treatments to Project Structures, and AES-1c: Implement Best Management Practices in Project Landscaping Plan are not applicable.

The traffic allegation raised by the appellants is not a singular identifiable existing land use that can be considered by DP P2 but regardless per the 2024-2026 Preconstruction Field Investigations Environmental Compliance, Clearance, and Monitoring Plan, no public roads, waterways or land access will be fully closed (AR DCP.X2.1.00020.pdf, p. 228). Throughout past fieldwork for the Delta Conveyance Project, full road closures have never been requested, only lane or shoulder closures. (X1.1.00004.pdf, p. 239, X2.1.00020.pdf, p. 228.) All appropriate permits have been and will continue to be obtained and safety measures abided by. Additionally, to minimize temporary disturbances, all project-related vehicle traffic and material storage will be restricted to established and/or designated ingress/egress points, construction areas, and other designated staging/storage areas. These areas will also be included in preconstruction surveys and, to the extent possible, will be established in locations disturbed by previous activities. (AR DCP.X2.1.00020.pdf, p. 2) The 2024–2026 Proposed Geotechnical Activities will not result in a potentially significant impact requiring implementation of Delta Plan Mitigation Measure 17-1. Therefore, Delta Plan Mitigation Measure 17-1 is not applicable to the 2024–2026 Proposed Geotechnical Activities, and a comparison of Delta Conveyance Project mitigation measure(s) to Delta Plan Mitigation Measure 17-1 is not required.

Section 6

G P1 Mitigation Measures

As described in *Delta Plan* Policy G P1, covered actions not exempt from CEQA must include applicable feasible mitigation measures identified in the Delta Plan's Program EIR (PEIR) (unless the measure(s) are within the exclusive jurisdiction of an agency other than the agency that files the certification of consistency), or substitute mitigation measures that the agency that files the certification of consistency finds are equally or more effective.

As discussed in the Certification (AR DCP.X2.1.00020.pdf, p. 49):

The *Delta Plan* and the Delta Conveyance Project are two different individual and separate projects (i.e., a plan vs. a project), and the Delta Plan PEIR broadly evaluates the potential actions that proponents of covered activities could pursue in the Delta. The *Delta Plan* is a long-term management plan for the Delta prepared pursuant to the DRA, which was adopted in 2013 and was last amended in 2024. The Delta Plan PEIR is a programmatic EIR that evaluates the potential effects of the policies and recommendations of the *Delta Plan*, including an evaluation of a broad range of projects that could occur as a result of *Delta Plan* implementation. The *Delta Plan* and the Delta Conveyance Project have very different scopes and levels of effects on the environment that lead to different mitigation needs. Additionally, the 2024–2026 Proposed Geotechnical Activities include subsurface exploration and testing to help inform the Delta Conveyance Project, but they do not include all of the activities described in Chapter 3, *Description of the Proposed Project and Alternatives*, of the Delta Conveyance Project Final EIR. As such, even if a Delta Plan mitigation measure is applicable to the Delta Conveyance Project, it may not be applicable to the 2024–2026 Proposed Geotechnical Activities.

The Certification (AR DCP.X2.1.00020.pdf, pp., 48-96), provides a detailed analysis of how the 2024–2026 Proposed Geotechnical Activities' environmental commitments and mitigation measures are the same as, equal to, or more effective than the applicable measures identified in the Delta Plan Program Environmental Impact Report (Delta Plan PEIR) at reducing impacts on the environment related to the 2024–2026 Proposed Geotechnical Activities evaluated in the Certification.

6.1 Appeals on G P1(b)(2) that do not reference specific Delta Plan mitigation measures should be dismissed.¹⁹

As explained in the Certification, the 2024–2026 Proposed Geotechnical Activities are consistent with Delta Plan Policy G P1 (b)(2) because the 2024–2026 Proposed Geotechnical Activities' environmental commitments and mitigation measures are the same as, equal to, or more effective than the applicable measures identified in the Delta Plan PEIR at reducing impacts on the environment related to the 2024–2026 Proposed

¹⁹ A2-A-pp. 7, A3-A-pp. 9-17, A3-WS-p. 6, A4-A-pp. 18-19, DPC-Letter 2-p. 4.

Geotechnical Activities evaluated in the Certification (AR DCP.X2.1.00020.pdf, p. 48). Appellants disagree but often fail to identify specific applicable Delta Plan mitigation measures that were not addressed. To comply with the DSC's appeal procedures, appeals must cite how a proposed covered action is inconsistent with the Delta Plan, and how as a result of that inconsistency, that action will have a significant impact on the achievement of one or both of the coequal goals or implementation of government-sponsored flood control programs (Water Code, § 85225.10, subds. (a)-(b); Cal. Code Regs., tit. 23, § 5022, subd. (c)(5)). As discussed in Sections 6.2 and 6.3 below, appellants fail to meet this threshold requirement to create an appealable issue, so their appeals should be dismissed. (Water Code, § 85225.10, subds. (a)-(b).) In the alternative, they have waived the argument by failing to discuss the record evidence supporting DWR's Certification or by failing to support their arguments with any evidence at all. (See *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192, 206 [failure to set forth all material evidence "is deemed a concession that the evidence supports the findings"]; *Old East Davis Neighborhood Assn. v. City of Davis, supra*, 73 Cal.App.5th at p. 915.)

Additionally, even when specific Delta Plan mitigation measures are identified, as discussed in Sections 6.2 and 6.3 below, appellants arguments suffer from numerous other flaws including: (1) Delta Plan Policy G P1 (b)(2) only requires an agency to implement Delta Plan Program EIR mitigation measures, or equivalent measures, where the measures are "applicable" (Cal. Code Regs., tit. 23, § 5002, subd. (b)(2)) and appellants raise Delta Plan Program EIR mitigation measures that are not applicable to the 2024–2026 Proposed Geotechnical Activities, (2) many of the Delta Plan PEIR impacts mentioned by the appellants do not have a corresponding potentially significant impact on the environment requiring mitigation related to the 2024–2026 Proposed Geotechnical Activities evaluated in the Certification, and (3) appellants fail to articulate why the 2024–2026 Proposed Geotechnical Activities environmental commitments or mitigation measures are not be equally or more effective than the related applicable feasible Delta Plan mitigation measures.

6.2 Delta Plan Mitigation Measures 7-1 and 7-2 are not applicable to the 2024-2026 Proposed Geotechnical Activities.²⁰

Appellants allege that because the 2024-2026 Proposed Geotechnical Activities do not include Delta Plan Mitigation Measure 7-1 or 7-2 or any feasible substitute, the Activities are inconsistent with Policy G P1, subdivision (b)(2). As discussed in the Delta Plan Resource Area: Agriculture and Forestry Resources section pp. 65-66 of the Certification, the 2024–2026 Proposed Geotechnical Activities will not result in a potentially significant impact regarding the conversion of farmland to nonagricultural use or conflicts with existing zoning for agricultural use of a Williamson act contract on the environment requiring implementation of Delta Plan Mitigation Measure 7-1 or 7-2. Therefore, Delta Plan Mitigation Measures 7-1 and 7-2 are not applicable to the 2024–

²⁰ A3-A-pp. 11-13, A3-WS-pp. 7-8.

2026 Proposed Geotechnical Activities, and a comparison of Delta Conveyance Project mitigation measure(s) to Delta Plan Mitigation Measures 7-1 and 7-2 is not required.

General concerns regarding potential impacts not resulting in conversion of farmland to nonagricultural use or conflicts with existing zoning (applicability of Delta Plan Mitigation Measures 7-1 and 7-2) are not relevant to GP 1(b)(2), however the appellant raises general concerns regarding potential impacts to agricultural operations. The appellant raises concerns over the number of borings being proposed. The 2024–2026 Proposed Geotechnical Activities include up to 261 soil borings (including 31 soil borings with water quality tests) and up to 15 CPTs. They would not all be conducted at the same time. The 2024-2026 Proposed Geotechnical Activities CEQA Memo assumes a total of approximately 1 CPT and 4 boring drill rigs operating on the same day within Contra Costa or Alameda Counties, 2 CPTs and 6 boring drill rigs operating on the same day in San Joaquin County, and 1 CPT and 4 boring drill rigs operating on the same day in Sacramento County based on the number and location of proposed activities in each county, equipment, and staffing constraints.

On the days a geotechnical activity is being undertaken, the activity may temporarily interfere with agricultural operations in the vicinity where sampling is taking place. However, field investigation work would not result in conversion of agricultural properties to nonagricultural use or fragmenting of farmland. Any proposed investigation activities that occur on agricultural lands would be grouted with materials from the full depth to 5 feet (1.5 meters) below the surface, with the final 5 feet of topsoil replaced to return the affected area to as close to pre-activity conditions as possible. (Section 3.2.12 of the 2024-2026 Proposed Geotechnical Activities CEQA Memo (AR DCP.X2.1.00020.pdf, p. 172).) "Bentonite grout hardens into a type of cement, but because it lacks the aggregate materials (sand and gravel) found in concrete, bentonite grout when hardened is similar in texture to the native subsurface material that it would replace, is soft enough to be shaved with a pen knife, would not interfere with or damage farm machinery [(including machinery for the installation of and use of irrigation systems)], and would not adversely affect the filled land for agricultural or other purposes." (AR DCP.X2.1.00025.pdf, p. 5; see also *Prop. Rsrv., Inc. v. Superior Ct., supra*, 1 Cal.5th at p. 172.) Use of bentonite grout provides stability and avoids groundwater contamination. (AR DCP.X2.1.00025.pdf, p. 5.) Therefore, the 2024-2026 Proposed Geotechnical Activities will not negatively impact tilling, emplacement of irrigation systems, or other agricultural activities on agricultural land once the geotechnical activities are completed.

Additionally, the appellant claims a potential impact to agriculture due to contamination of groundwater. All explorations will be backfilled/sealed in accordance with State of California Water Well Standards (Bulletins 74-81 & 74-90). Sealing methods for the proposed activities include the use of bentonite clay to stabilize the boreholes and transport the cuttings to the surface. The drilling mud coats the borehole walls and prevents losses of drilling mud into the formation. At the completion of drilling and CPT push, cement-bentonite grout is injected at the base of the boring (or CPT hole) via a tremie pipe, displacing the drilling mud from the borehole and sealing the hole (see *infra* Section 10, Request to Supplement, Delta Conveyance Design & Construction Authority

Technical Memorandum – Exploration and Testing Work Procedures Overview (Exploration Procedures), Section 3.6 and Attachment 3). In this way, the project ensures that groundwater will not be contaminated by the proposed activities in a way that would cause groundwater quality to be substantially degraded.

The appellant additionally makes allegations that IS/MND measures are omitted from the Certification. The appellant is incorrect. As set forth in the EC-14: 2024-2026 Preconstruction Field Investigations Environmental Compliance, Clearance, and Monitoring Plan, in addition to requiring the 2024-2026 Proposed Geotechnical Activities comply with all applicable mitigation measures included in the Delta Conveyance Project EIR (AR DCP.X2.1.00020.pdf, pp. 223-226), DWR required that the 2024-2026 Proposed Geotechnical Activities comply with all applicable mitigation measures from the prior IS/MND (*id.* at p. 227-229). Furthermore, prior to approving the 2024-2026 Proposed Geotechnical Activities, DWR prepared 2024-2026 Proposed Geotechnical Activities CEQA Memo to determine whether the Delta Conveyance Project EIR adequately evaluates the potential impacts of the 2024-2026 Proposed Geotechnical Activities. (AR DCP.X2.1.00020.pdf, pp. 151-212.) The project description for the 2024-2026 Proposed Geotechnical Activities in the CEQA Memo incorporates, and the analysis evaluates, applicable mitigation measures set forth in the Delta Conveyance Project EIR as well as applicable best management practices and environmental commitments including the EC-14 Plan and associated IS/MND mitigation measure commitments. (See, e.g., AR DCP.X2.1.00020.pdf, pp. 159 [discussing the EC-14 Plan in the 2024-2026 Proposed Geotechnical Activities project description], 227-229 [EC-14 Plan commitment to applicable IS/MND mitigation measures].) Therefore, the record demonstrates that DWR exercised its discretion to implement applicable mitigation measures from *both* the Delta Conveyance Project EIR and prior IS/MND in approving the 2024-2026 Proposed Geotechnical Activities.

6.3 The 2024-2026 Proposed Geotechnical Activities include mitigation measures that are equal to or more effective than Delta Plan Mitigation Measure 4-2.²¹

The appellant partially quotes Delta Plan Mitigation Measure 4-2(a), the full language of the measure reads: “Select project site(s) that would avoid habitats of special-status species (which may include foraging, sheltering, migration and rearing habitat in addition to breeding or spawning habitat), and to the maximum extent practicable, (re)design project elements to avoid effects on such species.” (AR DCP.X2.1.00032.pdf, p. 14) As explained below, substantial evidence demonstrates that the 2024-2026 Proposed Geotechnical Activities includes commitments and mitigation measures that are equal to or more effective than Delta Plan Mitigation Measure 4-2.

Analysis of impacts on special-status species from the Delta Conveyance Project can be found in the Final Environmental Impact Report Chapter 13, Terrestrial Biological Resources (AR DCP.D1.1.00112.pdf) and a specific consideration of the 2024-2026 Proposed Geotechnical Activities is in Section 3.2.10 of the 2024-2026 Proposed Geotechnical Activities CEQA Memo (AR DCP.X2.1.00020.pdf, pp. 151-212).

²¹ A3-A-pp. 13-17, A3-WS-pp. 6-8, DPC Letter 2-p. 4.

As discussed in the Certification, the work area for each individual geotechnical activity is approximately 0.022 acres, or 10 feet by 100 feet, and each investigation would last between one and fourteen days (AR DCP.X2.1.00020.pdf, p. 24.) Therefore, the geographic area and duration of potential impact associated with each geotechnical investigation site is limited in both scope and duration. Furthermore, before any geotechnical activity may proceed, a qualified team of biologists will conduct a habitat assessment and reconnaissance level surveys approximately two weeks prior to the onset of ground disturbing soil investigation activities for any special status plants and wildlife that have the potential to occur within the project area. If, based on the habitat assessment and reconnaissance level surveys, the biologists identify the potential for special status wildlife impacts, the location will be shifted to a suitable location as identified by the qualified team of biologists, which is defined as a location that achieves the following performance standards: (1) is the minimum distance necessary (informed by mitigation measures BIO-2a through BIO-53 from the Delta Conveyance Project EIR),²² to ensure that no special status plants and wildlife with the potential to occur is disturbed during the work activities, (2) does not increase impacts to other resources to above a level of significance, and (3) the qualified biologist team must determine that commencing activities does not have the possibility to cause unpermitted take under federal or State law. (AR DCP.X2.1.00020.pdf, p. 227.) Therefore, consistent with Delta Plan Mitigation Measure 4-2, the 2024-2026 Proposed Geotechnical Activities require that proposed sites for geotechnical activities are relocated to avoid effects on such species.

Moreover, if a suitable location, as defined above, cannot be determined within adjacent areas by the qualified team of biologists, then the soil investigation at that location will not be conducted. (AR DCP.X2.1.00020.pdf, p. 227.) Thus, if through redesigning/locating proposed sites for geotechnical activities, potential for special status wildlife impacts cannot be avoided, then the proposed activity will not move forward. DWR's commitment to abandon sites where potential special status wildlife impacts cannot be avoided exceeds Delta Plan Mitigation Measure 4-2's requirement to avoid impacts "to the maximum extent practicable."

The appellant's allegations that the "Additional Compliance Parameters for 2024-2026 Preconstruction Field Investigations Based on Past Soil Investigation" are not mitigation measures as defined by the Delta Plan, nor are they enforceable are false. The "Additional Compliance Parameters" are part of the 2024-2026 Preconstruction Field Investigations Environmental Compliance, Clearance, and Monitoring Plan (AR DCP.X2.1.00020.pdf, pp. 227-229.) This document constitutes the activity-specific environmental compliance monitoring plan required by Delta Conveyance Project's Final EIR Environmental Commitment (EC) – 14 (Construction Best Management Practices for Biological Resources) for the 2024-2026 Proposed Geotechnical Activities. The Delta Conveyance Project includes all the mitigation measures formulated for the

²² Delta Conveyance Project MMRP Mitigation Measures BIO 2a through BIO-53 include species specific standards for habitat assessment, surveys for individuals, and spatial or temporal buffers for work activities. (DCP.C.1.00002.pdf, pp. 44-97.)

project through the Final EIR, and it also includes project features called “environmental commitments.” Like the formal mitigation measures prescribed in the Final EIR, these environmental commitments, which sometimes take the form of BMPs, have been adopted to avoid or minimize potential significant impacts. (AR DCP.D1.1.00012.pdf) These commitments are incorporated into the project description in the Delta Conveyance Project EIR and are set forth in the associated MMRP. Therefore, the commitments are binding, and compliance will be monitored and documented in the same manner as all other measures included in the MMRP.

Appellant references a technical memorandum from the Harvest Water Program that includes analysis outside of the record which was not before DWR before submitting the Certification to the Delta Stewardship Council. It is not DWR’s role to judge extra record evidence provided by an appellant and DWR objects to the memo being added to the record. (See Section 9 regarding objections to supplement the certified record with additional documentation.) Even if the memorandum is admitted, the DSC’s role in adjudicating the Appeal under the substantial evidence standard is limited to determining whether substantial evidence in the record supports DWR’s Certification, not to re-weigh record and extra-record evidence to decide who has the better argument. (See *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512 [under the substantial evidence standard of review, a reviewing court may not grant any appeal “on the ground that an opposite conclusion would have been equally or more reasonable” because when reviewing factual issues, the court’s task is “not to weigh conflicting evidence and determine who has the better argument[,]” citations and internal quotation marks omitted].)

Delta Plan Mitigation Measure 4-2 includes avoiding habitats of special-status species both spatially and temporally, conducting surveys, establishing buffers, construction monitoring, relocating special-status species (when necessary), and compensating for impacts. As discussed, the 2024–2026 Proposed Geotechnical Activities will avoid take of listed species and habitat loss and will not require relocation of listed species or compensatory mitigation for impacts to special-status species. Implementation of Delta Conveyance Project Environmental Commitments EC-1: Conduct Environmental Resources Worker Awareness Training, EC-2: Develop and Implement Hazardous Materials Management Plans, EC-3: Develop and Implement Spill Prevention, Containment, and Countermeasure Plans, and EC-14: Construction Best Management Practices for Biological Resources include BMPs regarding general avoidance, buffers, and monitoring. Delta Conveyance Project mitigation measures 2a, 14, 18, 21, 22a, 23, 24a, 25, 26, 30-35, 36a, 36b, 37, 39, 40, 42, 44,45b, 46, and 47 include species-specific commitments regarding spatially and temporally avoiding habitat of special-status species, conducting surveys, establishing buffers, and monitoring construction. Implementation of the previously mentioned Delta Conveyance Project environmental commitments and mitigation measures is the same as, equal to, or more effective than the applicable portions of Delta Plan Mitigation Measure 4-2. (AR DCP.X2.1.00020.pdf, pp. 55-57.)

With regards to the vehicle activity hours that were calculated in the Harvest Water Memo, it is not clear what assumptions were used in determining those calculations,

what presumed impact those calculations would be associated with, or how it is relevant to Delta Plan Mitigation Measure 4-2 and the substantial evidence provided demonstrating that Delta Conveyance Project environmental commitments and mitigation measures are the same as, equal to, or more effective. Appellant raises allegations regarding Sandhill Cranes related to vehicle hours but does not connect to noise impacts or acknowledge that the first step of Delta Conveyance Project Mitigation Measure MM BIO-33 is avoidance either by distance or temporally. Appellant raises additional allegations that MM BIO-33 implies that the window for avoiding the crane wintering season requires only the determination of a contractor or engineer, not a biologist. To be clear, the contractor/engineer determines the extent feasible for adjusting the construction activity schedule (i.e. for safety reasons) not the timing of the species' presence or the need to stop or abandon a geotechnical site to avoid impacts, that would be determined by a qualified biologist. (AR DCP.D1.1.00112.pdf, p. 279, AR DCP.X2.1.00020.pdf, pp. 227.)

Section 7

G P1 Best Available Science

As described in *Delta Plan Policy G P1*, as relevant to the purpose and nature of the project, all covered actions must document use of best available science.

7.1 Substantial evidence demonstrates that the 2024-2026 Proposed Geotechnical Activities use best available science.²³

The Appellant alleges that DWR did not provide adequate documentation that best available science has been or will be used when planning and conducting the 2024-2026 Proposed Geotechnical Activities. California Code of Regulations, Title 23, Section 5002, subdivision (b)(1) states: “As relevant to the purpose and nature of the project, all covered actions must document use of best available science.” Appellants have failed to meet the burden of discussing the record evidence in support of DWR’s Certification and showing it is not substantial (Water Code, § 85225.25; Cal. Code Regs., tit. 23, § 5029(c)-(d)) and have waived the argument. (*Old East Davis Neighborhood Assn. v. City of Davis*, *supra*, 73 Cal.App.5th at p. 915.) Nevertheless, substantial evidence in the record supports that the 2024-2026 Proposed Geotechnical Activities are supported by best available science.

The Delta Plan Program EIR provides that “[g]eotechnical investigations and preparation of geotechnical reports shall be performed in the responsible care of California licensed geotechnical professionals including professional civil engineers, certified geotechnical engineers, professional geologists, certified engineering geologists, and certified hydrogeologists, all of whom should be practicing within the current standards of care for such work.” (Delta Plan Program EIR, p. 11-74.) As demonstrated in the Certification, the 2024-2026 Proposed Geotechnical Activities will be performed in a manner consistent with this guidance. (AR DCP.X2.1.00020.pdf, pp. 48-49.)

Furthermore, in addition to meeting industry standards by the following the standards set forth in State of California Bulletin 74-81/74-90 and local county standards (AR DCP.X2.1.00020, p. 227), the 2024-2026 Proposed Geotechnical Activities are informed by lessons learned from past geotechnical investigations and methods used for sealing geotechnical investigations as outlined in the project specific field exploration standards. (See *infra* Section 10, Request to Supplement, Exploration Procedures, Section 3.6 and Attachment 3) These methods are considered best available science per industry standards (*Ibid*; AR DCP.X2.1.00033.pdf, AR DCP.X2.1.00020, p. 227). DWR has also committed to comply with any general rules or regulations of a reclamation district applicable to the underlying property owner, for example, regarding use or weight of vehicles on its easement area, or restricted access to pumping stations, or drilling near levees. (AR DCP.X2.1.00020.pdf, p. 219.) Compliance with these standards and rules and

²³ A3-A-pp. 17-20, A3-WS-pp. 8-9.

lessons learned from prior geotechnical activities ensures that the 2024-2026 Proposed Geotechnical Activities are informed by best scientific information and data.

This conclusion is further supported by information submitted by appellants. Specifically, appellant A4 requested to add an ENGEO letter to the record. While DWR opposes the addition due to the timing of the materials (see *infra* Section 9), they state "In our opinion, geotechnical explorations can safely be performed in the Sacramento/San Joaquin River Delta without creating substantive flood control and other risks, provided that both the exploration and exploration abandonment guidelines in Reference 1 are followed." Reference 1 is DWR's California Well Standards, Bulletin 74-90. Bulletin 74-90 is the guideline that DWR has complied with, and will continue to comply with, in undertaking geotechnical investigations for the Delta Conveyance Project.

Appellants have advanced speculation regarding potential impacts that could occur if DWR did not comply with Bulletin 74-90. Not only is speculation not evidence, appellants have failed to provide any evidence to suggest that compliance with Bulletin 74-90 is not consistent with the best available science policy, and have waived the argument. (*Old East Davis Neighborhood Assn. v. City of Davis, supra*, 73 Cal.App.5th at p. 915.) As the 2024-2026 Proposed Geotechnical Activities will comply with Bulletin 74-90, substantial evidence in the record (as well as appellant A4's untimely ENGEO letter) demonstrate that the geotechnical explorations can safely be performed by following Bulletin 74-90 for both the exploration and abandonment processes.

Section 8 Miscellaneous

Appeals should cite how a proposed covered action is inconsistent with the Delta Plan, and how as a result of that inconsistency, that action will have a significant impact on the achievement of one or both of the coequal goals or implementation of government-sponsored flood control programs (Water Code, § 85225.10; Cal. Code Regs., tit. 23, § 5022, subd. (c)(5)). In addition, appellants bear the burden of discussing the record evidence in support of DWR's Certification and showing it is not substantial. (Water Code, § 85225.25; Cal. Code Regs., tit. 23, § 5029(c)-(d).) This section is intended to capture allegations brought up in appeals that were not directly linked by the appellant to a specific inconsistency with a Delta Plan policy. Therefore, the Council should reject these arguments.

8.1 Delta Conveyance Project Mitigation Measures are adequate, however general adequacy under CEQA is not an issue subject to the Council's jurisdiction.²⁴

Cal. Code Regs., tit. 23, § 5002, subd. (b)(2) states that covered actions not exempt from CEQA must include all applicable feasible mitigation measures adopted and incorporated into the Delta Plan or substitute mitigation measures that are equally or more effective. While appellants dispute the general effectiveness of Delta Conveyance Mitigation Measures, that is not what is required by the policy. Other than those discussed above, appellants do not reference any specific Delta Plan Mitigation Measures that the proposed action is inconsistent with in the portions of their appeals and written submissions cited in footnote 24. Thus, they have failed to carry their burden of discussing the record evidence supporting DWR's Certification and showing that it is not substantial. (Cal. Code Regs., tit. 23, § 5029(c)-(d).)

8.2 Delta Conveyance Project Tribal consultation is adequate, however general adequacy under CEQA is not an issue subject to the Council's jurisdiction.²⁵

Regarding Delta Conveyance Project Tribal consultation, as discussed in more detail in (AR DCP.X2.1.00034.pdf, pp. 9-12), DWR provides updates regarding upcoming field opportunities to consulting Tribes through multiple venues including quarterly Tribal project update meetings, regular emails, and phone calls. If human remains are found DWR is bound by law to coordinate with the county coroner and California Native American Heritage Commission (NAHC) to make the determinations and perform the management steps prescribed in California Health and Safety Code Section 7050.5 and California Public Resources Code Section 5097.98. Consultation was conducted under AB 52 and DWR's Tribal Engagement Policy with additional outreach to Tribal communities through informational meetings, workshops, tours, letters and other methods. DWR remains committed to meaningful, productive and responsive

²⁴ A1-A-pp. 9-14, A1-WS-pp. 11-12, A2-A-p. 7, A3-A-pp. 9-11, A3-WS-pp. 6-8, A4-A-pp. 18-19, A4-WS-p. 2.

²⁵ A1-A-pp. 9-10, A1-WS-pp. 11-12.

engagement with Tribal Nations and communities while acknowledging their concerns and opposition to the Delta Conveyance Project. While appellant's discussion of these issues does not evince a Delta Plan inconsistency, ongoing Tribal engagement has been, and will continue to be, an important component of the Delta Conveyance Project planning process and future decision making on the project.

8.3 Appeals are required to be specific to the covered action, revisions to the Delta Plan are irrelevant.²⁶

Appeals are required to show how DWR's record supporting its conclusion that the covered action is consistent with the Delta Plan policies is not supported by substantial evidence, how the covered action is inconsistent with the Delta Plan, and how as a result of that inconsistency, that action will have a significant impact on the achievement of one or both of the coequal goals do implementation of government-sponsored flood control programs (Cal. Code Regs., tit. 23, § 5022, subd. (c)(5)). Arguments regarding the development and amendment of the Delta Plan should be dismissed because they are outside the scope of a certification appeal. The certifying agency must submit a certification based on the existing Delta Plan policies at the time of the certification.

8.4 Adopted methods for sealing boreholes and CPTs ensure the work is properly sealed.²⁷

Appellants demonstrate that they are concerned about the alleged issues of an improperly sealed geotechnical activity. Appellants, however, do not cite any evidence in the record that any site specific geotechnical activities previously authorized by DWR in support of Delta conveyance has been improperly sealed. Speculation is not evidence. DWR has conducted geotechnical borings in the Delta in support of Delta conveyance over the last several years and has not encountered the issues described (AR DCP.X2.1.00039.pdf, p. 93). The conclusions reached by DWR, DCA, and consulting engineers based on DWR's past geotechnical activities and compliance with applicable standards including Bulletin 74-90 constitutes substantial evidence supporting the conclusion that the borings can, and will be, properly sealed.

Drillers for geotechnical activities in support of Delta conveyance keep boring logs that record the grouting methods. Following completion of the soil investigation, each hole is grouted in accordance with State of California Bulletin 74-81/74-90 and local county standards from the full depth to five feet below the surface under the supervision of a certified geotechnical engineer, a professional geologist, or a certified engineering geologist. (AR DCP.X2.1.00020.pdf, p. 227.) The final five feet are backfilled with topsoil to return the area to as close to pre-activity conditions as possible. This volume is recorded daily in the boring log. This information is not shared publicly because of the entry permit requirement to keep personal landowner information private. (AR DCP.X2.1.00029.pdf, 5 and AR DCP.X2.1.00040.pdf, p. 51-52) However, upon request, the information is made available to the landowner. (AR DCP.X2.1.00020.pdf, p. 220 ["Following compilation of the data gathered and within one hundred fifty (150) days of

²⁶ A1-A-pp. 10-14

²⁷ A2-A-pp. 7-10, A2-WS-pp. 10-11, A4-A-pp. 22-23, A4-WS-p. 3.

a written request by the landowner, DWR will provide the landowner with all data, including, but not limited to notes, surveys, reports, and photographs, obtained from any investigation on the landowner's property"].)

Regarding appellant's allegations concerning settlement, TEP and/or COEs provide the landowner with contact info in the event of concerns. (AR DCP.X2.1.00029.pdf, pp. 4 and 6 and AR DCP.X2.1.00040.pdf, p. 39.) For the work completed under the IS/MND and EIR to date, no property owner has contacted DWR regarding these issues. There have never been any concerns identified regarding seepage due to a Delta Conveyance related geotechnical activity (AR DCP.X2.1.00039.pdf, p. 93).

Appellant reference a recent levee incident on Victoria Island but this incident in no way shows how DWR's record supporting its conclusion that the 2024-2026 Proposed Geotechnical Activities is consistent with the Delta Plan policies is not supported by substantial evidence. There have been no conveyance related geotechnical activities within roughly half a mile of the levee incident and there is no evidence of a connection between any geotechnical activities and the levee incident. (AR DCP.X1.1.00008.pdf, p. 17, AR DCP.X1.1.00006.pdf, pp. 11, 89, 433-436) Furthermore, while we oppose appellant A4's request to add an ENGEO letter to the record due to the timing of the materials (see *infra* Section 9), DWR notes that even ENGEO acknowledges that "there is no direct evidence that exploration abandonment techniques contributed to the recent levee damage at Victoria Island in October 2024. . ." Therefore, appellant's improper sealing concerns and reference to the Victoria Island incident to support those concerns lack merit.

8.5 The 2024-2026 Proposed Geotechnical activities do not include any activities within levees.²⁸

Appellant argues that there are potential adverse impacts to levees however it is not clear what inconsistency with the Delta Plan, if any, they are alleging. Regardless, there are no investigations planned on or within levees or levee toes as discussed in the Certification project description and mapbooks (AR DCP.X2.1.00020.pdf, pp. 24, 32, and 10-20, respectively) and visible in more detail in the KMZ (AR DCP.X2.1.00030.kmz). None of the proposed geotechnical activities are less than 50 feet from a levee toe. Only four of the geotechnical activities are proposed between 50-200 feet of a levee toe, five are proposed between 200-300 feet of a toe of a levee, and the remainder are more than 300 feet of a levee toe. (DCP.X2.1.00030.kmz.) Furthermore, per the 2024-2026 Preconstruction Field Investigations Environmental Compliance, Clearance, and Monitoring Plan, DWR shall not perform any borings or CPT holes within three hundred (300) feet of a landside levee toe, without first giving ten (10) days' notice of the change of site plan and proposed work to both the affected reclamation district and the landowner to ensure an adequate buffer is maintained between the geotechnical activity and the levee toe. (AR DCP.X2.1.00020.pdf, p. 219.)

²⁸ A1-A-p. 7; A2-A-p. 7-8 and 12; A2-WS-p. 12, A4-Respect Local Land Use-pp. 3-4.

With regards to limitations on wet season work, through the court ordered entry process DWR has agreed to limit borings and CPTs during the “wet/high water season” from December 1st through April 30. (AR DCP.X2.1.00040.pdf, p. 61.) DWR will comply with the conditions of the relevant entry order at the time of the activity. In addition, DWR will comply with all other timing restrictions set for in Delta Conveyance Project EIR mitigation measures and the EC-14 Plan. (See, e.g., AR DCP.X2.1.00020.pdf, p. 228 [“No project activities will be conducted during or within 24 hours following a rain event in locations that have a potential for special status amphibians to occur or are near wetlands or other water features.”].)

8.6 Delta Plan recommendations are not subject to consideration under appeals.²⁹

Applying recommendations in the covered action process would be prohibited by the Administrative Procedures Act. (Gov. Code, §§ 11340 et seq.) The DSC is very clear that it has not and “will not use recommendations to assess the consistency of . . . any [] covered action with the Delta Plan.” (Determination Regarding Appeals of the Certification of Consistency by the California Department of Water Resources for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Program (July 16, 2021), p. 17-18; (see also Cal. Code Regs., tit. 23, § 5001, subd. (k)(1)(E) [the screening criteria asks if a proposed action is covered by one or more “regulatory policies”].) As the Court of Appeal stated, “[t]he recommendations are nonregulatory . . . By contrast, the policies are regulatory in nature; state and local agencies proposing to undertake a ‘covered action’ . . . must comply with the policies.” (*Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1042.)

However in considering Delta Plan Recommendations it should be noted that Delta Plan recommendations WR R12a and WR R12b include new recommendations specifically relevant to the concept of a dual-conveyance option for the Delta. Many of these new recommendations have already been incorporated into the Delta Conveyance Project and environmental analysis. Attachment 3E.1 of the Delta Conveyance Project Final EIR (AR DCP.D1.1.00016.pdf) outlines where the public can find information in the Final EIR and Engineering Project Reports related to the recommendations outlined in WR R12a and WR R12b. With the adoption of WR R12a and WR R12b, the DSC recognized that a dual-conveyance system with new screened intakes in the north Delta offers the potential to reduce environmental conflicts while addressing risks to the amount or quality of Delta exports from levee failure and climate change. (AR DCP.D1.1.00016.pdf, p. 20.)

8.7 Appellants’ arguments about DWR’s participation in early consultation, as described in statute and recommended by the Council in guidance documents, are irrelevant.³¹

The DRA (section 85225.5) directed the DSC to develop procedures for early consultation with the council on a proposed covered action to assist state and local public agencies in preparing the required certification. As recommended in the Covered Action Checklist, DWR has participated in separate early consultation with DSC staff

²⁹ A3-A-p. 5, A3-A-pp. 21-22

relating to both the 2024-2026 Proposed Geotechnical Activities and the Delta Conveyance Project to address, among other topics, the “appropriate timing for filing the Certification of Consistency” for each proposed action. (AR DCP.X2.1.00020.pdf, p. 111.) Early consultation procedures, as directed by the DSC, do not include public participation.

8.8 The technical memorandum prepared by ENGEO, was not before DWR prior to the certification, but nevertheless supports DWR’s field methods.³⁰

Appellant references a technical memorandum prepared by ENGEO. DWR objects to this extra record evidence being entered into the record (see *infra* Section 9). Regardless, the ENGEO memo referenced includes contradictory language to several allegations appellants have made. The ENGEO memo states, “In our opinion, geotechnical explorations can safely be performed in the Sacramento/San Joaquin River Delta without creating substantive flood control and other risks, provided that both the exploration and exploration abandonment guidelines in Reference 1 are followed.” Reference 1 is DWR’s California Well Standards, Bulletin 74-90 which DWR and the 2024-2026 Proposed Geotechnical Activities already adhere to. The memo goes on to say “...there is no direct evidence that exploration abandonment techniques contributed to the recent levee damage at Victoria Island in October 2024.” An assessment that DWR agrees with. And lastly the memo recommends measures to reduce risk, “Measures to reduce risk from each of these conditions can include implementation planning, local soil maps, locally experienced drilling crews, senior geologists and geotechnical engineers at the jobsite, careful documentation, and independent post-completion inspection to identify and correct any improper abandonment techniques.” Measures recommended by ENGEO are regularly implemented by DWR as part of geotechnical activities. As confirmed by the ENGEO memo DWR implements the best available science by following the protocols outlined in Bulletin 74-90. (See *infra* Section 10, Request to Supplement, Exploration Procedures, Section 3.6 and Attachment 3.)

³⁰ A4-A-pp. 22-23, A4-WS-p. 5.

Section 9

DWR's Objections To Appellants' Requests To Supplement The Record

9.1 Introduction

Because they do not satisfy the requirements of sections 5026, 5027, or 5032 of the Council's regulations governing Appeals of Certifications of Consistency, DWR respectfully objects to and asks the Council to reject the following requests by appellants to supplement the record with, or to take official notice of, additional documents.

9.2 Legal Standards

The Council's Notice of Hearing And Schedule Of Written Submission ("Notice") states: Except as provided in sections 5026 and 5032, evidence is limited to the record that was before the certifying agency prior to the council's receipt of the certification of consistency.

(Cal. Code Regs., tit. 23, § 5027, subd. (d).)

Appellants bear the burden to submit "[s]pecific evidence" satisfying section 5026's or section 5032's substantive and procedural requirements. (See Cal. Code Regs., tit. 23, §§ 5026, subds. (b), (c), 5027, subd. (d); see also *id.* § 5027, subds. (b), (c).) Appellants also must prove that the documents that they seek to submit are relevant – i.e., that they constitute nonspeculative evidence tending to prove that DWR's Certification of consistency was not supported by substantial evidence in the certified record. (See Cal. Code Regs., tit. 23, § 5027, subd. (d); see also *People v. Cash* (2002) 28 Cal.4th 703, 727 (*Cash*) ["Only relevant evidence is admissible"]; see also *Malek Media Grp. LLC v. AXQG Corp.* (2020) 58 Cal.App.5th 817, 825 (*Malek*) ["Any matter to be judicially noticed must be relevant to a material issue."]; see also Evid. Code, § 210 [defining "relevant" evidence]; see also Evid. Code, §§ 140, 702, 801, 802 [speculation is not "evidence"].)

Section 5026(c) states that the Council will not consider a request to supplement the record unless the requesting party satisfies "all of the following" requirements:

- (1) Specification that the request is being submitted pursuant to this section.
- (2) The documentation or information that is the subject of the request. Each document or information that is the subject of a request shall be provided as a separate electronic document or file. Multiple documents or information submitted as one electronic file shall not be considered for admission.
- (3) Specific evidence that the document or information requested for admission was part of the record before the certifying agency prior to the date of the council's receipt of the certification.

Section 5032(c) states that the Council will not consider a request for official notice unless the requesting party satisfies “all of the following” requirements:

- (1) Specification that the request is being submitted pursuant to this section.
- (2) The documentation or information that is the subject of the request. Each document or information that is the subject of a request shall be provided as a separate electronic document or file. Multiple documents or information submitted as one electronic file shall not be considered for admission.
- (3) Specific evidence that the information requested for admission is of the following:
 - (A) A generally accepted technical or scientific matter within the council’s jurisdiction.
 - (B) A fact that may be judicially noticed by a court [pursuant to Evidence Code section 452].

9.3 Objections

Because appellants did not comply with the Council’s regulatory requirements, DWR respectfully requests that the Council exclude the following documents from the record and refuse to consider them when ruling on appellants’ appeals.

Appellants’ Proffered Documents	Reasons Document Is Inadmissible
<p>Appeal C20242-A1, Ex. 1 Appeal C20242-A3, Ex. 2 Appeal C20242-A3, Ex. 3 (See Brief Of Appellants, Appeal C20242-A1, A1-A-pp. 2-4.)</p>	<p>§ 5027 Objection – Appellants’ Proffered Documents Are Irrelevant Speculation: DWR respectfully requests that the Council exercise its authority to exclude and refuse to consider appellants’ proffered documents because they are irrelevant – i.e., because they do not tend to prove or disprove whether DWR’s Certification is supported by “substantial evidence” in the record. (Cal. Code Regs., tit. 23, § 5027, subd. (d); Notice, p. 3; <i>Cash, supra</i>, 28 Cal.4th at p. 727 [“Only relevant evidence is admissible”]; see also <i>Malek, supra</i>, 58 Cal.App.5th at p. 825 [“Any matter to be judicially noticed must be relevant to a material issue.”].)</p> <p>At most, appellants’ proffered documents show that three individuals are “concerned” about events that “may” (or may not) happen in the future. Because speculative concerns about the future are not relevant to the question of whether DWR’s certified record here contains “enough relevant information and reasonable inferences so that a fair argument can be made to support [DWR’s] conclusions, even though other conclusions may also be reached,” DWR asks the Council to deny appellants’ request to add their proffered documents to the record. (Delta Stewardship Council’s <i>Determination Regarding Appeal of the Certification of Consistency by San Joaquin Area Flood Control</i></p>

Appellants' Proffered Documents

Reasons Document Is Inadmissible

Agency for Smith Canal Gate Project (Smith Gate) (March 21, 2019), p. 6.)

§ 5027 Objection – Appellants' Proffered Documents Are Irrelevant To The Adequacy Of DWR's Certified Record: DWR also asks the Council to refuse to consider appellants proffered records because those records do not tend to prove or disprove whether DWR's Certification was supported by "substantial evidence" at the time that DWR submitted its consistency certification. (Cal. Code Regs., tit. 23, § 5027, subd. (d); Notice, p. 3; *Cash, supra*, 28 Cal.4th at p. 727 ["Only relevant evidence is admissible"]; see also *Malek, supra*, 58 Cal.App.5th at p. 825 ["Any matter to be judicially noticed must be relevant to a material issue."].)

"Substantial evidence" means "enough relevant information and reasonable inferences so that a fair argument can be made to support [DWR's] conclusions, even though other conclusions may also be reached." (*Smith Gate*, p. 6.) "*If such substantial evidence be found, it is of no consequence that the [decisionmaker] believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.*" (*Antelope Valley Groundwater Cases* (2021) 63 Cal.App.5th 17, 44, original emphasis original.)

Here, appellants do not carry their burden to show that their proffered documents tend to prove or disprove whether DWR's record contains "enough relevant evidence to support a fair argument" to support DWR's Certification's conclusions. At most, appellants offer these documents only for the improper purpose of showing that evidence *other* than that in DWR's certified record might cause someone to draw other inferences or to reach other conclusions.

Therefore, appellants' proffered documents are irrelevant to this proceeding and appellants' request to supplement the record should be denied.

§ 5032 Objection – Appellants' Proffered Documents Should Not Be Officially Noticed For Their Truth: Because they are irrelevant to the sole issue before the Council – i.e., whether DWR's Certification is supported by substantial evidence – DWR respectfully requests that the Council deny appellants' requests for official notice of appellants' proffered documents. (See *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1064 (*Mangini*) [matter to be judicially noticed must be relevant to a material issue].)

Appellants’ Proffered Documents

Reasons Document Is Inadmissible

If the Council decides to grant appellants’ request, however, then DWR asks the Council to follow the well-established rules that govern court declarations – such as appellants’ proffered arguments here – and decline to assume that the statements contained in the documents are true. Under California law, a decisionmaker has discretion to notice the existence of court declarations. A decisionmaker should not, however, consider the truth of statements made in those declarations. (See *Mangini*, supra, 7 Cal.4th at pp. 1063-1064; see also *Determination Regarding Appeals of the Certification of Consistency by the California Department of Water Resources for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Program (Lookout Slough)* (July 16, 2021), p. B-1, fn. 57.) Furthermore, the Council should deny appellants’ requests for official notice of appellants’ proffered documents because they consist of disputed facts and opinions. (See *Barri v. Workers’ Comp. Appeals Bd.* (2018) 28 Cal.App.5th 428, 459 (*Barri*) [“It is improper to rely on judicially noticed documents to prove disputed facts because judicial notice, by definition, applies solely to undisputed facts.”].)

Appeal C20242-A1: Early consultation documents.
(See Brief Of Appellants, Appeal C20242-A1; A1-A-pp 2-4.)

§§ 5027, 5026 & 5032 Objection: Appellants’ request should be denied because appellants do not carry their burden to prove that any such documents or information are relevant to the only issue in this appeal: “whether [DWR’s] Certification is supported by substantial evidence in the certified record.” (Notice, p. 3; Cal. Code Regs., tit. 23, § 5027, subd. (d); *Cash*, supra, 28 Cal.4th at p. 727 [“Only relevant evidence is admissible”]; see also *Malek*, supra, 58 Cal.App.5th at p. 825 [“Any matter to be judicially noticed must be relevant to a material issue.”].)

As authorized by the Water Code and the Council’s Administrative Procedures, DWR did engage in early consultation with the DSC. (See Wat. Code, § 85225.5; see also Delta Plan, Appendix D (amended Feb. 2024), Part I, § 2.) But appellants provide no evidence (much less the requisite “specific evidence”) that those consultations produced any documents or information that tend to prove or disprove whether DWR’s Certification is supported by “substantial evidence” – i.e., whether DWR’s certified record here contains “enough relevant information and reasonable inferences so that a fair argument can be made to support [DWR’s] conclusions, even though other conclusions may also be reached.” (*Smith Gate*, at p. 6.)

Appellants’ speculative “concerns” about what “these materials are *likely* to contain” do not satisfy this Council’s requirement

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that record-supplementation requests be supported by “substantial evidence.” (See Cal. Code Regs., tit. 23, § 5026, subd. (c); see also Cal. Code Regs., tit. 23, § 5032, subd. (c).) Appellants offer no argument or evidence to explain, furthermore, why “a complete picture of the decision-making process” is relevant to determine whether the Certification which actually is before the Council “is supported by substantial evidence in the certified record.” (Notice at p. 3.)

§ 5032 Objection: Appellants’ request should be denied because appellants do not carry their burden to prove that any such documents or information are subject to official notice. (Cal. Code Regs., tit. 23, § 5032, subd. (c).) Appellants offer no argument or evidence – let alone the requisite “specific evidence” – indicating that any early-consultation-related document or information satisfies section 5032’s official-notice requirements – i.e., appellants do not carry their burden to prove that any such document or information constitutes “a generally accepted technical or scientific matter within the council’s jurisdiction,” or a “fact that may be judicially noticed by a court.” (Cal. Code Regs., tit. 23, § 5032, subd. (c).)

As explained above, furthermore, appellants fail to offer any “specific evidence” satisfying official notice’s relevance requirement. (See *Cash, supra*, 28 Cal.4th at p. 727 [“Only relevant evidence is admissible”]; see also *Malek, supra*, 58 Cal.App.5th at p. 825 [“Any matter to be judicially noticed must be relevant to a material issue.”].)

Appeal C20242-A2: Documents 1, 2, 6
(See South Delta Water Agency’s Written Submission in Support of its Appeal (C20242-A2), A2-WS-pp. 12-13.)

§ 5026 Objection: Appellant’s request should be denied because appellant does not carry its burden to produce “specific evidence that the documents or information requested for admission were part of the record before the certifying agency prior to the date of the council’s receipt of the certification.” (Cal. Code Regs., tit. 23, § 5026, subd. (c).) Appellant’s bare assertion that the “documents are public records available to DWR” is not the “specific evidence” that the Council’s regulations require. (*Ibid.*)

§ 5027 Objection: Appellant’s request should be denied because appellant does not carry its burden to prove that any such documents or information are relevant to the question of whether DWR’s Certification was supported by “substantial evidence” in the record at the time that DWR submitted its certification. (Cal. Code Regs., tit. 23, § 5027, subd. (d); Notice, p. 3; see also *Cash* and *Malek* citations above.)

Appellants' Proffered Documents	Reasons Document Is Inadmissible
	<p>§ 5032 Objection: Appellant's request should be denied because appellant does not carry its burden to prove that any such documents or information are subject to official notice. (Cal. Code Regs., tit. 23, § 5032, subd. (c).) Appellant's bare and conclusory assertion that the "documents are publicly available 'generally accepted technical or scientific matter[s] within the council's jurisdiction'" is not the requisite "specific evidence" that the facts contained in those documents are beyond dispute.</p>
<p>Appeal C20242-A2: Document 3 (See South Delta Water Agency's Written Submission in Support of its Appeal (C20242-A2), A2-WS-pp. 12-13.)</p>	<p>§§ 5026, 5027 & 5032 Objections: Appellant's request should be denied because appellant does not carry its burden to provide "specific evidence" proving that this document is relevant, that it is subject to official notice, or that it was part of the record before the certifying agency prior to the date of the council's receipt of the certification. (See objections to Appeal C20242-A2: Documents 1, 2, 6 above.)</p> <p>§ 5027 Objection: Appellant's request also should be denied because appellant has not carried its burden to show that this document – which relates solely to drilling on levees managed by the U.S Corps of Engineers – is relevant to DWR's Certification here, which relates solely to geotechnical activities that will <i>not</i> involve drilling on levees. (See Cal. Code Regs., tit. 23, § 5027, subd. (d).)</p>
<p>Appeal C20242-A2: Document 4 (See South Delta Water Agency's Written Submission in Support of its Appeal (C20242-A2), A2-WS-pp. 12-13.)</p>	<p>§§ 5026 & 5027 Objections: Appellant's request should be denied because appellant does not carry its burden to provide "specific evidence" proving that this document is relevant or that it was part of the record before the certifying agency prior to the date of the council's receipt of the certification. (See objections to Appeal C20242-A2: Documents 1, 2, 6 above.)</p> <p>§ 5027 Objection: Appellant's request also should be denied because appellant has not carried its burden to prove that comments on a prior CEQA document relating separate geotechnical activities performed by DWR are relevant to the only issue before the Council: whether appellant has carried its burden to prove that "the certification of consistency is supported by substantial evidence in the certified record." (Notice at p. 3; see also Cal. Code Regs., tit. 23, § 5027, subd. (d); see also <i>Cash, supra</i>, 28 Cal.4th at p. 727 ["Only relevant evidence is admissible"]; see also <i>Malek, supra</i>, 58 Cal.App.5th at p. 825 ["Any matter to be judicially noticed must be relevant to a material issue."].)</p> <p>At most, appellant's proffered document implies that Mr. Cosio might have reached conclusions different from those that are</p>

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	<p>reflected in DWR's Certification. Under the substantial evidence standard, however, it is irrelevant whether someone might disagree with DWR's determinations. The only issue here is "whether the certification of consistency is supported by substantial evidence in the certified record – i.e., whether DWR's certified record contains "enough relevant information and reasonable inferences so that a fair argument can be made to support [DWR's] conclusions, even though other conclusions may also be reached. (See Cal. 21 Code Regs., tit. 14, § 15384.)" (<i>Smith Gate</i>, p. 6.) As the Court of Appeal reaffirmed in <i>Antelope Valley Groundwater Cases</i> (2021) 63 Cal.App.5th 17, 44:</p> <p>"When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court <i>begins</i> and <i>ends</i> with the determination as to whether, <i>on the entire record</i>, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. <i>If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.</i>" (Original emphasis, quoting <i>Bowers v. Bernards</i> (1984) 150 Cal.App.3d 870, 873–874 (<i>Bowers</i>)).</p>
<p>Appeal C20242-A2: Documents 5</p> <p>(See South Delta Water Agency's Written Submission in Support of its Appeal (C20242-A2), A2-WS-pp. 12-13.)</p>	<p>§§ 5026 & 5027 Objections: Appellant's request should be denied because appellant does not carry its burden to provide "specific evidence" proving that this document is relevant or that it was part of the record before the certifying agency prior to the date of the council's receipt of the certification." (See objections to Appeal C20242-A2: Documents 1, 2, 6 above.)</p> <p>§ 5027 Objection: Appellant's request also should be denied because appellant has not carried its burden to show that this document is relevant to DWR's certification or to the 2024-2026 Proposed Geotechnical Activities. (See Cal. Code Regs., tit. 23, § 5027, subd. (d).) Specifically, there is no evidence that the boils depicted in these pictures were caused by geotechnical activities, by DWR, or even by humans (rather than by some natural non-human cause(s)).</p>
<p>Appeal C20242-A2: Three Information Requests at pages 10-11 of South Delta Water Agency's</p>	<p>Objection – Improper Request: Appellant's requests should be denied because the "substantial evidence" standard does not require DWR (or any agency) to create new documents or information. Instead, the standard only asks whether the</p>

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Written Submission in Support of its Appeal (C20242-A2); A2-WS-pp. 10-11.	agency's certified record includes "enough relevant information and reasonable inferences so that a fair argument can be made to support [DWR's] conclusions, even though other conclusions may also be reached." (<i>Smith Gate</i> , p. 6.) "If such substantial evidence be found, it is of no consequence that the [decisionmaker] believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." (<i>Antelope Valley Groundwater Cases</i> (2021) 63 Cal.App.5th 17, 44, original emphasis.)
Appeal C20242-A3: Exhibits 1, 2, 4 (See Appellants' Written Submission re: C20242-A3; A3-WS-p. 13.)	<p>§ 5027 Objection – Relevance: Because appellants have not carried their burden to prove that these documents are relevant to this appeal, DWR respectfully requests that the Council deny appellants requests to add them to the record under Sections 5026 and 5032. (Cal. Code Regs., tit. 23, § 5027, subd. (d); Notice, p. 3; see also <i>Cash</i> and <i>Malek</i> citations above.) Certainly, these documents impacted DWR's decision to submit a certification specific to its 2024-2026 Proposed Geotechnical Activities. But appellants provide no evidence that these documents impacted DWR's determination that these Activities are consistent with the Delta Plan – i.e., appellants have not shown that these documents tend to prove or disprove whether "substantial evidence" supports any conclusion in DWR's consistency certification.</p> <p>§ 5032 Objection – Appellants' Proffered Documents Should Not Be Officially Noticed For Their Truth: Because they are irrelevant to the sole issue before the Council – i.e., whether DWR's certification of consistency is supported by substantial evidence – DWR respectfully requests that the Council deny appellants' requests for official notice of appellants' proffered documents. (See <i>Mangini, supra</i>, 7 Cal.4th at p. 1064 [matter to be judicially noticed must be relevant to a material issue].)</p> <p>If the Council decides to grant appellants' request, however, then DWR asks the Council to follow the well-established rules that govern officially noticed documents and decline to rely on that the statements contained in the documents to resolve any material fact. Under California law, a decisionmaker has discretion to notice the existence of court documents. A decisionmaker should not, however, consider the content of statements made in those declarations to resolve disputed facts. (See <i>Mangini, supra</i>, 7 Cal.4th at pp. 1063-1064; see also <i>Lookout Slough</i>, p. B-1, fn. 57; see also <i>Barri, supra</i>, 28 Cal.App.5th at p. 459 ["It is improper to rely on judicially noticed documents to</p>

Appellants’ Proffered Documents	Reasons Document Is Inadmissible
<p>Appeal C20242-A3: Exhibit 3 (See Appellants’ Written Submission re: C20242-A3; A3-WS-p. 13.)</p>	<p>prove disputed facts because judicial notice, by definition, applies solely to undisputed facts.”])</p> <p>§ 5027 Objection – Relevance: Because this document did not even exist at the time that DWR submitted its certification of consistency, DWR respectfully requests that the Council exclude it from the record and refuse to consider its contents. Clearly, evidence that was created <i>after</i> DWR submitted its certification cannot tend to prove or disprove whether DWR’s certification of consistency was supported by substantial evidence at the time that DWR submitted its certification. (See Water Code, § 85225.25; see also <i>Lookout Slough</i>, p. 12.)</p> <p>§ 5032 Objection – Appellants’ Arguments Are Not Officially Noticeable Facts: DWR also asks the Council to exclude this document because appellants have not carried their burden to show that this document is a “generally accepted technical matter within the council’s jurisdiction” or a “fact that may be judicially noticed by a court.” (Cal. Code Regs., tit. 23, § 5032, subd. (c).)</p> <p>To the contrary, this document memorializes arguments by <i>one of the appellants themselves</i> – Sacramento Area Sewer District (acting through its Harvest Water Project) – about several of the very issues which are in dispute here. Official notice is intended to establish undisputed facts, not to permit appellants to mischaracterize their own opinions as “evidence.” (See <i>Barri, supra</i>, 28 Cal.App.5th at p. 459 [“It is improper to rely on judicially noticed documents to prove disputed facts because judicial notice, by definition, applies solely to undisputed facts.”].)</p> <p>Also, appellants’ proffered document at most implies that the Harvest Water Project might have reached conclusions different from those that are reflected in DWR’s certification of consistency. Under the substantial evidence standard, however, it is irrelevant whether someone might disagree with DWR’s determinations. The only issue here is “whether the certification of consistency is supported by substantial evidence in the certified record – i.e., whether DWR’s certified record contains “enough relevant information and reasonable inferences so that a fair argument can be made to support [DWR’s] conclusions, even though other conclusions may also be reached. (See Cal. 21 Code Regs., tit. 14, § 15384.)” (<i>Smith Gate</i>, p. 6.) As the Court of Appeal reaffirmed in <i>Antelope Valley Groundwater Cases</i> (2021) 63 Cal.App.5th 17, 44:</p>

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“When a trial court’s factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins and ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.*” (Original emphasis, quoting *Bowers, supra*, 150 Cal.App.3d at pp. 873–874.)

§ 5032 Objection – Appellants’ Proffered Documents Should Not Be Officially Noticed For Their Truth: Because they are irrelevant and improper, DWR respectfully requests that the Council deny appellants’ requests for official notice of appellants’ proffered document. (See *Mangini, supra*, 7 Cal.4th at p. 1064.)

If the Council decides to grant appellants’ request, however, then DWR asks the Council to follow the well-established rule that a decisionmaker should not rely on statements in such a document to resolve any factual dispute in this matter. (See *Mangini, supra*, 7 Cal.4th at pp. 1063-1064; see also *Lookout Slough*, p. B-1, fn. 57; see also *Barri, supra*, 28 Cal.App.5th at p. 459 [“It is improper to rely on judicially noticed documents to prove disputed facts because judicial notice, by definition, applies solely to undisputed facts.”].)

Appeal C20242-A3:
Early Consultation Documents
(See Appellants’ Written Submission re: C20242-A3; A3-WS-p. 15.)

§§ 5027, 5026 & 5032 Objection: Appellants’ request should be denied because appellants do not carry their burden to prove that any such documents or information are relevant to the only issue in this appeal: “whether [DWR’s] certification of consistency is supported by substantial evidence in the certified record.” (Notice at p. 3; Cal. Code Regs., tit. 23, § 5027, subd. (d); *Cash, supra*, 28 Cal.4th at p. 727 [“Only relevant evidence is admissible”]; see also *Malek, supra*, 58 Cal.App.5th at p. 825 [“Any matter to be judicially noticed must be relevant to a material issue.”].)

As authorized by the Water Code and the Council’s Administrative Procedures, DWR did engage in early consultation with the DSC. (See Wat. Code § 85225.5; see also Delta Plan, Appendix D (amended Feb. 2024), Part I, § 2.) But appellants provide no evidence (much less the requisite “specific

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evidence") that those consultations produced any documents or information that tend to prove or disprove whether DWR's Certification is supported by "substantial evidence" – i.e., whether DWR's certified record here contains "enough relevant information and reasonable inferences so that a fair argument can be made to support [DWR's] conclusions, even though other conclusions may also be reached." (*Smith Gate*, at p. 6.)

§ 5032 Objection: Appellants' request also should be denied because appellants do not carry their burden to prove that any such documents or information are subject to official notice. (Cal. Code Regs., tit. 23, § 5032, subd. (c).) Appellants offer no argument or "specific evidence" indicating that any early-consultation-related document or information satisfies section 5032's official-notice requirements – i.e., appellants do not carry their burden to prove that any such document or information constitutes "a generally accepted technical or scientific matter within the council's jurisdiction," or a "fact that may be judicially noticed by a court." (Cal. Code Regs., tit. 23, § 5032(c).)

As explained above, furthermore, appellants fail to offer any "specific evidence" satisfying official notice's relevance requirement. (See *Cash, supra*, 28 Cal.4th at p. 727 ["Only relevant evidence is admissible"]; see also *Malek, supra*, 58 Cal.App.5th at p. 825 ["Any matter to be judicially noticed must be relevant to a material issue."].)

Appeal C20242-A4:
Exhibit SJC-1
(See Appellants' Written Submission, A4-WS-pp. 3-4.)

§ 5026 Objection: Appellants' request should be denied because appellants do not carry their burden to produce "specific evidence that the document or information requested for admission was part of the record before the certifying agency prior to the date of the council's receipt of the certification." (Cal. Code Regs., tit. 23, § 5026, subd. (c).)

§ 5027 Objection -- Relevance: Appellants' request should be denied because appellants do not carry their burden to prove that any such documents or information are relevant. (Cal. Code Regs., tit. 23, § 5027, subd. (d).) In fact, appellants do not even point to any information in this document that relates directly to DWR's 2024-2026 Proposed Geotechnical Activities. Appellants' vague assertion that some comments in this document relate generally to Delta Conveyance Project as a whole does not satisfy the Council's regulations' requirements for "specific evidence" connecting proffered documents to the certification at issue here.

§ 5032 Objection: Appellants' request should be denied because appellants do not carry their burden to prove that any such

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documents or information are subject to official notice. (Cal. Code Regs., tit.23, § 5032, subd. (c).) To the contrary, appellants concede that this document consists of individuals' opinions about facts that are disputed in this appeal. Official notice should not be used to include such opinions in the record. (See *Barri, supra*, 28 Cal.App.5th at p. 459 ["It is improper to rely on judicially noticed documents to prove disputed facts because judicial notice, by definition, applies solely to undisputed facts."].)

§ 5032 Objection – Appellants' Proffered Documents Should Not Be Officially Noticed For Their Truth: Because they are irrelevant and improper, DWR respectfully requests that the Council deny appellants' requests for official notice of appellants' proffered document. (See *Mangini, supra*, 7 Cal.4th at p. 1064.)

If the Council decides to grant appellants' request, however, then DWR asks the Council to follow the well-established rule that a decisionmaker should not rely on statements made in such a document to resolve factual disputes. (See *Mangini, supra*, 7 Cal.4th at pp. 1063-1064; see also *Lookout Slough*, p. B-1, fn. 57; see also *Barri, supra*, 28 Cal.App.5th at p. 459 ["It is improper to rely on judicially noticed documents to prove disputed facts because judicial notice, by definition, applies solely to undisputed facts."].)

Appeal C20242-A4:
Exhibit SJC-3
(See Appellants' Written Submission, A4-WS-pp. 3-4.)

§ 5027 Objection – Relevance: Because this document did not even exist at the time that DWR submitted its Certification, DWR respectfully requests that the Council exclude it from the record and refuse to consider its contents. Clearly, evidence that was created *after* DWR submitted its certification of consistency cannot tend to prove or disprove whether that certification was supported by substantial evidence at the time that it was submitted. (See Water Code, § 85225.25; see also *Lookout Slough*, p. 12.)

§ 5032 Objection – Appellants' Arguments Are Not Officially Noticeable Facts: DWR also asks the Council to exclude this document because appellants have not carried their burden to show that this document is a "generally accepted technical matter within the council's jurisdiction" or a "fact that may be judicially noticed by a court." (Cal. Code Regs., tit. 23, § 5032, subd. (c).)

To the contrary, this document memorializes arguments by appellants' own engineers, which appellants are submitting to support their own arguments about disputed issues in this

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appeal. Official notice is intended to establish undisputed facts, not to permit appellants to mischaracterize their own opinions as "evidence" for the purpose of resolving factual disputes (See *Barri, supra*, 28 Cal.App.5th at p. 459 ["It is improper to rely on judicially noticed documents to prove disputed facts because judicial notice, by definition, applies solely to undisputed facts."].)

At most, appellant's proffered document implies that appellant's engineers might have reached conclusions different from those that are reflected in DWR's Certification. Under the substantial evidence standard, however, it is irrelevant whether someone might disagree with DWR's determinations. The only issue here is "whether the certification of consistency is supported by substantial evidence in the certified record – i.e., whether DWR's certified record contains "enough relevant information and reasonable inferences so that a fair argument can be made to support [DWR's] conclusions, even though other conclusions may also be reached. (See Cal. 21 Code Regs., tit. 14, § 15384.)" (*Smith Gate*, p. 6.) As the Court of Appeal reaffirmed in *Antelope Valley Groundwater Cases* (2021) 63 Cal.App.5th 17, 44:

"When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins and ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.*" (Original emphasis, quoting *Bowers, supra*, 150 Cal.App.3d at pp. 873–874.)

§ 5032 Objection – Appellants' Proffered Documents Should Not Be Officially Noticed For Their Truth: Because they are irrelevant and improper, DWR respectfully requests that the Council deny appellants' requests for official notice of appellants' proffered document. (See *Mangini, supra*, 7 Cal.4th at p. 1064.)

If the Council decides to grant appellants' request, however, then DWR asks the Council to follow the well-established rule that a decisionmaker should not rely on statements made in such a document to resolve factual disputes. (See *Mangini, supra*, 7

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	Cal.4th at p. 1063-1064; see also <i>Lookout Slough</i> , p. B-1, fn. 57; see also <i>Barri, supra</i> , 28 Cal.App.5th at p. 459 ["It is improper to rely on judicially noticed documents to prove disputed facts because judicial notice, by definition, applies solely to undisputed facts."].)
Appeal C20242-A4: Exhibit SJC-5 (See Appellants' Written Submission, A4-WS-pp. 3-4.)	§ 5027 Objection -- Relevance: Appellants' request should be denied because they do not carry their burden of proving that this document is relevant to the only issue in this appeal: whether "substantial evidence" supported DWR's Certification at the time that it was submitted. (Cal. Code Regs., tit. 23, § 5027, subd. (d).) Nor could they. This document is a non-substantive scheduling email. It contains no information except a date, a time, a bare-bones draft agenda, and a list of invitees (who may or may not have attended the meeting).
Appeal C20242-A4: Exhibit SJC-6 (See Appellants' Written Submission, A4-WS-pp. 3-4.)	§ 5027 Objection -- Relevance: Appellants' request should be denied because they do not carry their burden of proving that this document is relevant to the only issue in this appeal: whether "substantial evidence" supported DWR's Certification at the time that it was submitted. (Cal. Code Regs., tit. 23, § 5027, subd. (d).) Nor could they. This is not a DWR document. DWR did not create it. Nobody from DWR is listed amongst its recipients. Instead, this is an internal Delta Stewardship Council document. § 5026 Objection: Appellants' request should be denied because appellants do not carry their burden to produce "specific evidence that the document or information requested for admission was part of the record before the certifying agency prior to the date of the council's receipt of the certification." (Cal. Code Regs., tit. 23, § 5026, subd. (c).)

Section 10

Request to Supplement the Record

DWR respectfully requests that the Council supplement the record to include the Delta Conveyance Design & Construction Authority Technical Memorandum – Exploration and Testing Work Procedures Overview (Technical Memorandum) which is submitted herewith as a “as a separate electronic document or file.” (Cal. Code Regs., tit. 23, § 5026, subd. (c).)

DWR makes this request pursuant to section 5026 of the Council’s procedures for Appeals of Certifications of Consistency, on the ground that the Technical Memorandum “was part of the record before the certifying agency [DWR] at the time of certification but was not included in the certifying agency’s record submitted to the council.” (Cal. Code Regs., tit. 23, § 5026, subd. (a).)

The Technical Memorandum includes a description of the field procedures that DWR and its consultants will be required to follow when they perform the 2024-2026 Proposed Geotechnical Activities that are the subject of the instant appeals. It is part of the record on which DWR relied when it determined that the 2024-2026 Proposed Geotechnical Activities are consistent with the Delta Plan. Thus, the Technical Memorandum is an appropriate addition to the record supporting DWR’s Certification. (See Cal. Code Regs., tit. 23, § 5026, subd. (a).)

Section 11 Conclusion

As demonstrated above, the DRA does not prohibit consideration of the 2024-2026 Proposed Geotechnical Activities separately from the Delta Conveyance Project. As an alternative argument, appellants assert that the DSC should grant the appeals because the geotechnical activities are inconsistent with several of the Council's adopted regulatory policies (California Code of Regulations, title 23, sections 5003-5015) as well as general policy G P1 (California Code of Regulations, title 23, section 5002). As explained in DWR's Certification and addressed further above, appellants' substantive challenges to DWR's policy consistency determinations lack merit; the Certification is supported by substantial evidence based on the certified record. (Water Code, § 85225.25; Cal. Code Regs., tit. 23, § 5029, subd. (c)(1).) Appellants have not met their burden of proof to show that no substantial evidence in the record supports DWR's Certification. (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626 [the burden is on the appellants "to affirmatively show there was no substantial evidence in the record" to support the agency's findings], original emphasis; *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192, 206 [failure to set forth all material evidence "is deemed a concession that the evidence supports the findings"].) Even if appellants had provided substantial evidence of a conflict, appellants' appeals would still fail because, under the substantial evidence standard of review, the DSC does not weigh conflicting evidence and determine who has the better argument. (See *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512 [under the substantial evidence standard of review, a reviewing court may not grant any appeal "on the ground that an opposite conclusion would have been equally or more reasonable" because when reviewing factual issues, the court's task is "not to weigh conflicting evidence and determine who has the better argument[,] " citations and internal quotation marks omitted].) DWR respectfully requests that the DSC issue a decision rejecting each of appellants' arguments and denying the appeals.