SOMACH SIMMONS & DUNN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

500 CAPITOL MALL, SUITE 1000, SACRAMENTO, CA 95814
OFFICE: 916-446-7979 FAX: 916-446-8199
SOMACHLAW.COM

November 7, 2024

Via Delta Stewardship Council Online
Appeal Submission Process

Julie Lee
Chair of the Delta Stewardship Council
715 P Street, 15-300
Sacramento, CA 95814

Re: Appeal of Department of Water Resources' Certification of Consistency for 2024-2026 Proposed Geotechnical Activities (C20242)

Dear Chair Lee:

This appeal (Appeal) of the Department of Water Resources' (DWR) Certification of Consistency (Certification) for the 2024-2026 Proposed Geotechnical Activities (Activities) is submitted to the Delta Stewardship Council (DSC) on behalf of the County of Sacramento, Sacramento County Water Agency, the Sacramento Area Sewer District (SacSewer), and the City of Stockton (collectively, "Appellants"). The adverse effects threatened by the Activities will impact each of these public agency's efforts in providing critical public services to residents of the Delta, and their efforts to preserve, protect and enhance Delta surface and groundwater quality, agriculture, species and habitat. Appellants' Appeal is based on the impropriety of the Certification, as well as expert evidence demonstrating that the Activities are inconsistent with Delta Plan policies, and as such, the Activities will significantly impact the achievement of the statutorily prescribed coequal goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. For the reasons set forth herein, DSC should reject DWR's consistency determination.

I. Requirements for Appeal

A. Appellants' names and addresses:

County of Sacramento
c/o William Burke, Deputy County Counsel
827 7th Street
Sacramento, CA 95814

Sacramento County Water Agency
Matt Satow, Director of Water Resources
827 7th Street, Room 301
Sacramento, CA, 95814

Sacramento Area Sewer District
Christoph Dobson, General Manager/District Engineer
10060 Goethe Road
Sacramento, CA 95827

City of Stockton
C. Mel Lytle, Ph.D., Director of Municipal Utilities
425 N. El Dorado Street
Stockton, CA 95202

Appellants' contact and representative:

Kelley M. Taber
Louinda V. Lacey
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: (916) 446-7979
Email: ktaber@somachlaw.com
llacey@somachlaw.com

B. Name and address of the party whose proposal is the subject of the Appeal:

California Department of Water Resources
Katherine Marquez
1516 9th Street, 2nd Floor
Sacramento, CA 95814
Telephone: (866) 924-9955
Email: 2024_2026_geotechcert@water.ca.gov

C. Description of the action that is the subject of the state or local public agency certification:

2024-2026 Proposed Geotechnical Activities (see section II below).

D. Specific grounds for the Appeal:

See section IV below.

E. Detailed statement of facts on which the Appeal is based:

See section IV below.

II. Description of the Purported Covered Action

The Delta Conveyance Project (DCP) would be one of the State's largest public works projects. It would include constructing and operating large-scale water conveyance facilities, including two new quarter-mile-long diversion structures on the Sacramento River in the north Delta, as well as a 39-foot diameter, 45-mile-long conveyance tunnel running underneath the Delta, ancillary facilities, and new project operations for the State Water Project (SWP). The DCP would divert up to 6,000 cubic feet per second (cfs) of water from the Sacramento River at the Town of Hood – more than half the capacity of the existing SWP Banks Pumping Plant, and more than the capacity of the federal Central Valley Project Jones Pump at Tracy. As described in more particularity in Appellants' Protests of DWR's Petition Requesting Changes in Water Rights of the DWR for the DCP (Change Petition) and Petitions for Writ of Mandate and Complaint challenging the Final Environmental Impact Report, the DCP will result in serious environmental, social, and economic impacts that DWR has not adequately analyzed or mitigated.

While DWR maintains that the Activities may be viewed as an independent "project" and "covered action" for purposes of the Certification, the Activities cannot be viewed independently from the DCP. That is because the Activities *are a part of* the DCP; indeed, it is undisputed that the Activities comprise a portion of the geotechnical activities included in the DCP. (Certification, pp. 3-13, 3-16 [Record Index No. DCP.X2.1.00020].) The Activities are included in the Project Description of the Final Environmental Impact Report for the DCP (DCP FEIR)[1] which DWR certified when it approved the DCP on December 21, 2023. (See Certification, p. 3-13; see also DCP FEIR, Ch. 3.15 [Record Index No. DCP.D1.1.00010].)

DWR now proposes to segregate the following subsurface exploration and testing Activities from the remainder of the DCP and to define those Activities as a "covered action" separate from the DCP:

- Up to 261 soil borings "with small-diameter (less than 8-inch diameter) auger and/or mud rotary drill and soil and rock sampling" (31 of which will include water quality tests) and up to 15 cone penetration tests (CPTs). (Certification, p. 3-16.)

- "CPTs using a truck-mounted rig equipped with a 1-to-2-inch diameter cone." (*Ibid*.)

[1] See DWR DCP FEIR (Dec. 2023) and Notice of Determination (NOD), both available at https://www.deltaconveyanceproject.com/planning-processes/california-environmental-quality-act/final-eir/final-eir-document [Record Index Nos. DCP.A.1.00001, DCP.D1.1.0001-00027].

- "Installation and removal of a temporary slotted polyvinyl chloride (PVC) pipe with a small submersible pump and water level transducer inside for water quality testing." (*Ibid*.)

The Activities are proposed to occur within Sacramento, San Joaquin, Contra Costa, and Alameda Counties, from north of the town of Hood to Bethany Reservoir. (*Id*., p. 3-2, Fig. 1.)

III. Additional CEQA Review Is Required to Address New Information of Substantial Importance Resulting From the Activities

DSC must require that DWR perform additional environmental analysis before it can even consider reviewing the Certification. DSC is a Responsible Agency pursuant to the California Environmental Quality Act (CEQA)[2] Guidelines[3] section 15381, tasked with "consider[ing] the environmental effects of the project as shown in the EIR" and then requiring a "subsequent or supplemental EIR" (CEQA Guidelines, § 15096, subd. (f)) if there is "[n]ew information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete" that the Activities "will have one or more significant effects not discussed in the previous EIR" and/or that "[s]ignificant effects previously examined will be substantially more severe than shown in the previous EIR" (*id.*, § 15162). DWR concludes that "no conditions exist triggering the requirement for subsequent CEQA review" (Certification, p. 3-1) and purportedly evaluates the Activities' consistency with the DCP FEIR (*id*., Attach. 4), but this Appeal demonstrates that DWR's consistency conclusion is not supported by substantial evidence. Conversely, this Appeal presents substantial evidence that there will be new significant effects and/or substantially more severe effects as a result of implementation of the Activities that were not analyzed in the DCP FEIR and that have only recently been discernible based on information provided by DWR well after FEIR certification. (CEQA Guidelines, § 15162.) These effects, discussed in detail below, include but are not limited to impacts to agricultural land uses, special-status species, and water quality, including some cumulative effects that are categorically omitted from DWR's consistency evaluation but that CEQA requires be analyzed. (*Id.*, §§ 15065, subd. (a)(3), 15130.)

Should DSC deny the Appeal, it would be approving a project under CEQA and it cannot lawfully do so on the record before it. Subsequent or supplemental environmental review, and compliance with all CEQA substantive and procedural requirements, is required before DSC can act on the Appeal.

---

[2] Pub. Resources Code, § 21000 et seq.

[3] Cal. Code Regs., tit. 14, div. 6, ch. 3, § 15000 et seq.

IV. Grounds for Appeal

The Delta Reform Act (Act) requires state agencies to submit certifications of consistency with the Delta Plan before proceeding to implement certain actions. (Wat. Code, § 85225.) This requirement does not apply to every action, but instead applies only to "covered actions" as defined under the Water Code and DSC's own regulations. "Covered actions" include plans, programs, or projects as defined by the CEQA. (Wat. Code, § 85057.5, subd. (a); Cal. Code Regs., tit. 23, § 5001, subd. (k); see Pub. Resources Code, § 21065.) Such a project may be a covered action if it is carried out, approved, or funded by a public agency, is covered by one or more provisions of the Delta Plan, and 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. (Wat. Code, § 85057.5, subd. (a).)

If a consistency certification is required, the agency must attest to the project's consistency with the coequal goals and each of the regulatory policies contained in the Delta Plan. (Cal. Code Regs., tit. 23, § 5002.) Relevant to this certification are the priority recommendations contained in the Delta Plan which, although non-regulatory, identify actions "essential to achieving the coequal goals." (Delta Plan, p. ES-16.) Also relevant are Delta Plan performance measures. (Delta Plan, Appen. E: Performance Measures for the Delta Plan, as amended June 23, 2022.)

A. The Certification of Consistency Is Improper and Must Be Rejected Because the Activities Are Not a Covered Action

The Activities do not qualify as a "covered action" subject to a certification of consistency. DWR purports to submit the Certification "for the sake of thoroughness and to err on the side of facilitating DSC's informed decision-making process…." (Certification, p. 4-19.) In reality, however, and as discussed below, the Certification is a thinly veiled and ill-advised attempt to circumvent a court order. Because the Activities are not a covered action, Appellants respectfully request that DSC outright reject DWR's Certification as improper and without legal basis. Appellants also explain why the Activities are not consistent with Delta Plan policies and recommendations (see below) to provide DSC an abundance of information on the problems associated with the Activities without conceding that the Activities themselves constitute a covered action.

1. The Activities Are Not a Separate Project Under Public Resources Code Section 21065

The Act limits "covered actions" to those that qualify as plans, programs, or projects under CEQA, as described by Public Resources Code section 21065 (Section 21065). (Wat. Code, § 85057.5, subd. (a); Cal. Code Regs., tit. 23, § 5001, subd. (k).) DWR repeatedly has admitted that the Activities are part of the DCP as defined under CEQA. (DCP FEIR, Ch. 3.15; NOD, p. 4.)

In spring 2024, DWR attempted to conduct the Activities without filing a certification of consistency for the DCP. (See Certification, Attach. 4, pp. 1-2.) The Sacramento County Superior Court granted Appellants' (and other petitioners') motions for preliminary injunction in the related[4] proceedings challenging DWR's compliance with various statutes, including CEQA, the Act, and the Delta Protection Act, as well as the public trust doctrine, for the DCP, and enjoined DWR from undertaking the Activities before filing a certification of consistency with the Delta Plan for the covered action, i.e., the entire DCP, pursuant to the Act. That Ruling[5] is included as Attachment 2 of the Certification and as Record Index No. DCP.X2.1.00003. The court recognized that "[DWR] defined the DCP to include the geotechnical work at issue here. The [DCP] FEIR analyzed the geotechnical work as part of the project [citation], and the Notice of Determination described it as a 'key component' of the project [citation]…." (Certification, Attach. 2 [Ruling, p. 4].) As such, the court held that the Activities are "necessarily part of a 'covered action' within the meaning of [the Act]" (*ibid*.), and that DWR is "enjoined from undertaking the [Activities] prior to completion of the certification process that the ... Act requires" (*id*., pp. 11-12). DWR appealed the Ruling to the Third District Court of Appeal where the appeal remains pending. (See Certification, p. 1-3, fn. 7.) DWR further filed a petition for writ of supersedeas, which was denied by the Court of Appeal.[6] In other words, the preliminary injunction set forth in the Ruling remains in effect.

Contrary to DWR's assertion, the Certification does not comply with the Ruling. The trial court directed DWR to certify consistency for *the DCP in its entirety*, inclusive of the Activities, before undertaking *any* of the geotechnical activities that form part of the DCP. (Certification, Attach. 2 [Ruling, pp. 4, 11].) DWR cannot piecemeal certification of its project by defining different pieces of the whole of the project as separate covered actions. DWR's assertion that identification of the Activities as a separate covered action from the DCP does not constitute piecemealing because the Activities are "completely independent of the implementation of the [DCP] itself – and, therefore, they may be analyzed independently" is wrong. (Certification, p. 1-2.)

A covered action is *the project described under CEQA*. (Wat. Code, § 85057.5, subd. (a); Cal. Code Regs., tit. 23, § 5001, subd. (k); see also *Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266 [court considered whether separate review of actions was piecemealing by separating review of a single project as defined by Pub. Resources Code, § 21065]; Certification, Attach. 2 [Ruling, p. 4].) It is undisputed that the Activities are included in the project description for the DCP. (See DCP FEIR, Ch. 3.15; NOD, p. 4.)

---

[4] The Sacramento County Superior Court subsequently ordered the cases consolidated on October 21, 2024.

[5] Sacramento County Superior Court Ruling on Submitted Matter – Petitioners' Motions for Preliminary Injunction (June 20, 2024).

[6] Third District Court of Appeal Order Denying Petition for Writ of Supersedeas (Oct. 18, 2024) (Order), attached hereto as **Exhibit 1**.

"CEQA forbids 'piecemeal' review of the significant environmental impacts of a project." (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1358.) Piecemealing occurs when future expansion or other action (a) is a reasonably foreseeable consequence of the initial project; and (b) will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. (*Laurel Heights Improvement Assn. v. Regents of Univ. of California* (1988) 47 Cal.3d 376, 396.) The DCP is a reasonably foreseeable consequence of the Activities because they are an integral part of DCP implementation, which DWR already has approved, and the DCP will undeniably change (expand) the scope and nature of the Activities' environmental effects. Separate consideration of the Activities and the remaining components of the DCP accordingly constitute impermissible piecemealing under both CEQA and the Act, as explained in the trial court's Ruling. (Certification, Attach. 2 [Ruling, p. 4: "Because the geotechnical work is part of the 'project' within the meaning of CEQA, it is necessarily part of a 'covered action' within the meaning of Water Code section 85225"].) Where, as here, if two actions cannot be reviewed as independent projects under CEQA, they are necessarily part of the same "covered action" for purposes of the certification of consistency. Any interpretation to the contrary "does not withstand scrutiny." (Certification, Attach. 2 [Ruling, p. 8].)

DSC must reject the Certification for noncompliance with the Act because the Activities do not constitute a "covered action."

2. If, as DWR Claims, the Activities Would Not Independently Impact the Achievement of the Coequal Goals or a Government-Sponsored Flood Control Program, They Cannot Comprise a Covered Action

DWR admits that the Activities are not a "covered action" but skirts the obvious consequences of that determination – that the Certification is therefore procedurally improper and contrary to law. (See Certification, pp. 4-2 – 4-4 ["because the [Activities] would have no impact … on the achievement of one or both of the coequal goals or on the implementation of a government-sponsored flood control program…, the [Act] does not require this certification to [evaluate consistency with Delta Plan policies]," 4-4 ["because the [Activities] are not covered by one or more of the Article 3 regulatory policies evaluated here, the DRA does not require this certification to include an evaluation of the four general Article 2 subdivisions of DSC's regulations"]; see also *id*., pp. 4-5 – 4-19.) By submitting its Certification for only the Activities rather than the entire DCP, DWR seeks to circumvent the trial court's Ruling, the Act, and DSC's own implementing regulations. (See Wat. Code, § 85057.5, subd. (a); Cal. Code Regs., tit. 23, § 5001, subd. (k).) DWR is "enjoined from undertaking [this] geotechnical work … prior to completion of the certification procedure [for the entirety of the DCP] that the Delta Reform Act requires." (Certification, Attach. 2 [Ruling, pp. 11-12].) DSC should reject DWR's efforts to defy the trial court's Ruling, and reject the Certification on these grounds rather than proceed with an unlawful proceeding that will consume significant public and private resources.

B. The Activities Are Inconsistent With Delta Plan Policies and Recommendations and Will Have Significant Adverse Impacts on the Delta Plan's Coequal Goals

Appellants herein demonstrate that the Activities are inconsistent with several Delta Plan policies and recommendations and commensurately result in significant and adverse impacts to the coequal goals. This analysis highlights inconsistencies resulting from both: (a) the Activities not being a covered action for which a consistency determination can be made (see Section IV.A., *ante*); and (b) the Activities themselves lacking consistency with Delta Plan policies and recommendations.[7]

1. The Activities Are Inconsistent With Delta Plan Policy G P1 (Detailed Findings to Establish Consistency With the Delta Plan)

a. DWR Has Not Demonstrated That There Is a Covered Action (Policy G P1, subds. (a), (b))

Policy G P1,[8] subdivision (a), specifies what must be addressed in a "certification of consistency filed by a State or local public agency with regard to a covered action." Subdivision (b) lists the requirements that must be addressed in the detailed findings of a certification of consistency for "[c]overed actions." These provisions expressly require that a certification of consistency: (1) determine consistency; and (2) address mandatory requirements in the agency's findings:

> (b)(1) "Covered actions, in order to be consistent with the Delta Plan, must be consistent with this regulatory policy…."
>
> (b)(2) "Covered actions not exempt from CEQA must include all applicable feasible mitigation measures…."

This policy is "pertinent to the coequal goal of protecting, restoring, and enhancing the Delta ecosystem." (Delta Plan, p. 4-1.) The consistency determination required by Policy G P1, subdivision (a) and the requirements included in subdivision (b) are critical to ensure that a covered action protects, restores, and enhances the Delta ecosystem by being consistent with integral regulatory policies, including appropriate mitigation measures, use of best available science, and proper application of adaptive management – all mechanisms put in place by DSC to protect, restore, and enhance the Delta ecosystem. (See Delta Plan, p. ES-17.) Here, however, because DWR has not included all appropriate and applicable mitigation measures necessary to avoid or substantially lessen significant impacts to the Delta environment (see Section IV.B.1.c., *infra*), the Activities are inconsistent with Policy G P1, subdivisions (a)

---

[7] By analyzing the lack of consistency, Appellants do not concede that the Activities themselves constitute a covered action.

[8] See also Cal. Code Regs., tit. 23, § 5002.

and (b). As a result, the Activities fail to protect, restore, and enhance the Delta ecosystem, which will have a significant adverse impact on this coequal goal.

b. DWR Has Not Demonstrated That the Activities Are Consistent with Delta Plan Policies or Coequal Goals (Policy G P1, subds. (a), (b))

Policy G P1, subdivision (b)(1) requires consistency with Delta Plan policies and, if that is not feasible, overall consistency with the coequal goals. As demonstrated throughout this Appeal, the Activities are inconsistent with several Delta Plan policies (and recommendations) and likewise inconsistent with the Delta Plan's coequal goal of protecting, restoring, and enhancing the Delta ecosystem. Accordingly, the Activities are inconsistent with Policy G P1, subdivision (b)(1).

c. DWR Has Not Demonstrated That The Activities Include All Applicable Feasible Mitigation Measures That Have Been Adopted in the Delta Plan (Policy G P1, subd. (b)(2))

Policy G P1, subdivision (b)(2), requires that the Activities include "all applicable feasible mitigation measures adopted and incorporated into the Delta Plan as amended April 26, 2018 … or substitute mitigation measures that the agency that files the certification of consistency finds are equally or more effective." As explained below, the Activities do not adhere to this policy. But, before embarking on that discussion, Appellants provide some background information on the mitigation measures associated with the Activities to illustrate the inadequacy of the mitigation measures adopted by DWR for the Activities and the environmental analysis performed for this integral component of the DCP.

d. DWR Has Not Demonstrated That Environmental Analysis and Mitigation Measures for the Activities Are Adequate

DWR claims that the Activities are "completely independent of the implementation of the Delta Conveyance Project itself." (Certification, p. 1-2.) Incongruous to this claim, however, is DWR's inclusion of the Activities in the DCP's project description in the certified DCP FEIR (DCP FEIR, p. 3-134 [Section 3.15, Field Investigations]), and the supposed analysis of the Activities throughout the EIR as a part of the DCP (see Section IV.A.1., *ante*). DWR's Petition for Writ of Supersedeas is equally contradictory, asserting that the Activities are the necessary first step in implementation.[9] This incongruence aside, the DCP EIR does not adequately analyze the impacts associated with the Activities, as evidenced (in part) by the lack of adequate mitigation measures in the DCP EIR addressing the Activities.

[9] DWR Petition for Writ of Supersedeas to Stay Enforcement of June 20, 2024, Order Granting Motions for Preliminary Injunction; Memorandum of Points and Authorities (Aug. 29, 2024), pp. 20, 23-24, attached hereto as **Exhibit 2**.

The Activities that DWR now seeks to perform would be very similar, if not the same, as those performed under the 2020 Final Initial Study/Mitigated Negative Declaration prepared by DWR for a previous round of DCP geotechnical borehole drillings[10] (2020 Final IS/MND). Appellants refer to the 2020 Final IS/MND and the associated documents throughout this Appeal for several reasons: (1) the similarity of those geotechnical borehole drillings to the Activities; (2) the relevancy of the IS/MND[11]; and (3) the absence of any analysis of the Activities in the DCP FEIR. Indeed, DWR failed to include several mitigation measures in the DCP FEIR that were a part of the last adopted Mitigation Monitoring and Reporting Program (MMRP) for the prior round of geotechnical borehole drillings.[12] There is no reasonable explanation for omitting these mitigation measures from the DCP FEIR – the 2020 Final IS/MND MMRP was adopted in July 2023 and the DCP FEIR was not certified until December 2023, more than five months later. The 2020 Final IS/MND is even cited and discussed in the DCP FEIR. The geotechnical borehole drillings addressed in the 2020 Final IS/MND (and its several addenda) relied on these measures to ensure impacts from the borehole drilling in the Delta are reduced to a less-than-significant level. This is *necessary* mitigation omitted from the DCP FEIR and the consistency certification.

For example, one measure requires grouting of any "proposed soil investigation activities that occur on agricultural lands … in accordance with materials that conform to ANSI and ASTM standards from the full depth to five feet (1.5 meters) below the surface. The final five feet (1.5 m) of topsoil will be replaced to return the Impact Area to as close to pre-activity conditions as possible. The backfill procedure will be in accordance with State of California Bulletin 74-81/74-90 and local county standards." (Certification, Attach. 5, p. 14; see also 2023 Final IS/MND MMRP, p. 3 [MM AGR-1].) Without backfilling the holes with grout, they remain open and can introduce contaminants into the groundwater and aquifer that can negatively impact water quality. Unfilled holes can also leach toxic drilling fluid into the groundwater and aquifer (discussed in Section IV.B.1.h, *infra*). (See 2020 Final IS/MND Appen. D, Responses to Comments, p. 31.) Without this measure, the impact to groundwater water quality would be significant and unavoidable.

As an apparent afterthought, DWR includes 19 of these mitigation measures in Attachment 5 to the Certification (see Table 3), rebranded as "Additional Compliance Parameters") without any legally binding mechanism, to Appellants' knowledge, that ensures

---

[10] DWR Soil Investigations for Data Collection in the Delta Final Initial Study/Mitigated Negative Declaration (July 2020), SCH# 2019119073, available online at https://water.ca.gov/Programs/State-Water-Project/Delta-Conveyance/Environmental-Planning [Record Index No. DCP.X1.1.00004].

[11] Notably, DWR refers to the 2020 Final IS/MND in the Certification (p. 3-15), lists it in the Record Index included in Attachment 3, and discusses it in Attachment 4 (p. 4), so it is relevant here.

[12] DWR Modifications to the Mitigation Monitoring and Reporting Program for the Soil Investigations for Data Collection in the Delta Project (Jan. 2023), available online at https://water.ca.gov/Programs/State-Water-Project/Delta-Conveyance/Environmental-Planning [Record Index No. DCP.X1.00011].

their enforceability. Nevertheless, no matter if these "Additional Compliance Parameters" are legally binding and enforceable, they are not mitigation measures as defined in the Delta Plan[13] and thus cannot be considered mitigation measures for purposes of the consistency determination. Moreover, their omission from the DCP FEIR illustrates just how little attention the Activities and their environmental impacts were given in the environmental review document that DWR claims encompasses the Activities.

e. DWR Has Not Demonstrated That the Activities Include Delta Plan Mitigation Measures 7-1 and 7-2, or Any Substitute Measures Required to Protect Agricultural Land Uses

Turning to the substance of Policy G P1, subdivision (b)(2), the mitigation measures adopted for the Activities do not include "all applicable feasible mitigation measures" of the Delta Plan. For example, Delta Plan Mitigation Measure 7-1(h)[14] requires the "[establishment of] buffer areas between projects and adjacent agricultural land that are sufficient to protect and maintain land capability and agricultural operation flexibility." The measure further specifies:

> Design buffers to protect the feasibility of ongoing agricultural operations and reduce the effects of construction- or operation-related activities.… The width of the buffer shall be determined on a project-by-project basis to account for variations in prevailing winds, crop types, agricultural practices, ecological restoration, or infrastructure. Buffers can function as drainage swales, trails, roads, linear parkways, or other uses compatible with ongoing agricultural operations.

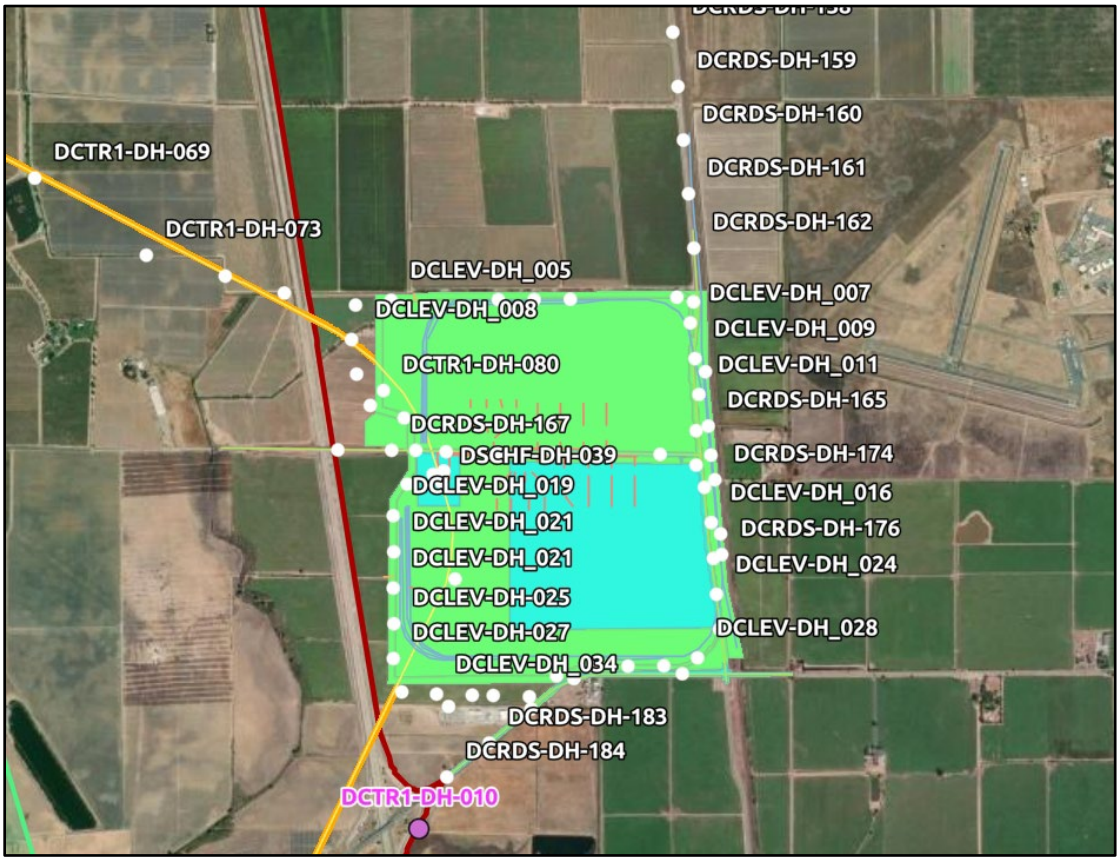
No such agricultural buffers are required in the DCP FEIR mitigation measures, which are listed in brief in Attachment 5 of the Certification, or in the "Additional Compliance Parameters" also included in Attachment 5.

This is a critical omission because a large portion of the investigatory holes will be drilled in and around active agricultural land. To illustrate the encroachment of the Activities on agricultural land, below is a graphic depicting the planned borings near the launch shaft site at the DCP's Twin Cities complex (see DCP FEIR, pp. 3-12 – 3-14) overlaid on an aerial photograph showing the scope of the agricultural uses. (See Certification, Fig. 1, p. 2, for mapped locations of these borings.) The borings will clearly occur *on* (e.g., DCLEV-DH_008, DCLEV-DH_034) and immediately adjacent to agricultural land – including land of Local and Statewide Importance, and potentially Prime or Unique Farmland. (FEIR, Vol. 1,

[13] "Public Resources Code section 21081.6 requires a public agency to adopt a mitigation monitoring or reporting program (MMRP) to ensure compliance with the mitigation measures adopted by the agency at the time of project approval." (Delta Plan, p. 51.)

[14] Appellants refer to those mitigation measures in the Revised Delta Mitigation Measures (Sept. 2021), https://deltacouncil.ca.gov/pdf/delta-plan/2021-09-27-draft-peir-eco-amendment-appendix-b-revised-mitigation-measures.pdf.

Mapbook 15-1, Sheet 2 [Record Index No. DCP.D1.1.00138].) The buffers required by Delta Plan Mitigation Measure 7-1 are necessary to protect these agricultural operations, yet DWR offers no such comparable measure for the Activities. In its analysis of this policy provision, DWR does not even acknowledge the express and meaningful language in Delta Plan Mitigation Measure 7-1 requiring agricultural *buffers*. (Certification, p. 4-37.) Because the Activities do not include Delta Plan Mitigation Measure 7-1 or any feasible substitute, the Activities are inconsistent with Policy G P1, subdivision (b)(1).



The Activities are also inconsistent with Delta Plan Mitigation Measure 7-1(b), which requires the "[minimization of], to the greatest extent feasible, conflicts and inconsistencies with land protected by agricultural zoning or a Williamson Act contract and the terms of the applicable zoning/contract." The vast majority, if not all, of the land that will be affected by the Activities is protected by agricultural zoning or Williamson Act contracts. DWR claims that there would be a less-than-significant impact, concluding in a cursory manner that "the geotechnical activities will not convert Important Farmland, land subject to Williamson Act contract, or land in Farmland Security Zones." (Certification, p. 4-38.) However, conversion of farmland is not the only way that conflicts arise.

There will be numerous conflicts with these agricultural land uses associated with, but not limited to, air pollution, noise, traffic, issues pertaining to roadway safety and access, and

impacts to groundwater quality. It is impossible to drill hundreds of holes in and around active agricultural land without conflicts. The Activities will require diesel-powered drilling rigs, heavy duty trucks, water trucks, liftgate trucks, other vehicles and major equipment, potentially required the laying of ground tracks, and required teams of people to be onsite for up to 11 days in any given location, bringing dust, noise, increased traffic, roadway impediments, etc. (Certification, pp. 3-16 – 3-17.) There is a potential for contamination of groundwater that Delta agricultural operations rely upon and cumulative impacts to special-status species (discussed in Section IV.B.1.d., *infra*).

These inherent conflicts between the Activities and existing agricultural uses may be reduced somewhat with additional requirements. For example, a measure that requires DWR to time borings on lands in close proximity to one another could reduce some conflicts – especially those associated with noise and local roadway disruptions. Or perhaps a requirement that DWR must obtain voluntary landowner permission when drilling boreholes instead of resorting to "court-ordered entry" (Certification, p. 3-15) might reduce conflicts by ensuring that drilling occurs only at times, and on terms, acceptable to the landowner and that do not conflict with agricultural operations. Because the Activities do not include Delta Plan Mitigation Measure 7-1(b) or any feasible substitute, the Activities are inconsistent with Policy G P1, subdivision (b)(1).

f. DWR Has Not Demonstrated That The Activities Include Delta Plan Mitigation Measure 4-2 Or Any Substitute Measure Required to Avoid Sensitive Habitat

Delta Plan Mitigation Measure 4-2(a) requires project proponents to, among other things, "[s]elect 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)…." The sites selected for the Activities do not consider the presence of special-status species' habitat – they were chosen to obtain geotechnical data to inform the refinement of DCP features and alignment. (Certification, p. 3-14.) DWR did not consider whether it could select sites with less sensitive habitat – which is abundant in the areas planned for drilling.

The DCP FEIR includes several mitigation measures to avoid or minimize impacts on special-status species (Certification, Attach. 5, Table 2; see also p. 4-29), but those measures do not extend to the selection of the project site itself, as required by Delta Plan Mitigation Measure 4-2(a). The "Additional Compliance Parameters" include a provision to shift the "location" of a boring within a given project site, but not to shift the entire site. (Certification, Attach. 5, Table 3.) Nor does this parameter indicate that a new project site or boring location would be selected based on habitat avoidance; rather, it merely aims to reduce disturbance to special-status species, which is not the same as avoiding habitat. In any event, as explained just above, these are not mitigation measures as defined by the Delta Plan, nor are they enforceable. In its analysis of this policy provision, DWR does not mention this important provision of Delta Plan Mitigation Measure 4-2(a), instead focusing on the "minimal footprint" of the boring project sites. (Certification, p. 4-28.) It is, however, not the size of the footprint that matters. Nor does any post-hoc avoidance of special-status species mitigate

for the failure to select these boring project sites to avoid sensitive habitat in the first instance. DWR's failure to do so creates an inconsistency with the Delta Plan policy.

Delta Plan Mitigation Measure 4-2 also requires project proponents to "(re)design project elements to avoid effect on [special-status species]." DWR has not considered the specific effects of the Activities on certain special-status species and accordingly has not provided any redesign to avoid such effects. This failing is of particular importance in relation to SacSewer's Harvest Water Program, California's largest agricultural water recycling project which will provide up to 50,000 acre-feet of reliable, high quality recycled water to up to 16,000 acres (with a delivery area of approximately 22,000 acres) of agricultural lands and existing habitats in southern Sacramento County near the lower Cosumnes River and adjacent to the Stone Lakes National Wildlife Refuge. Harvest Water will provide many benefits, including providing a safe and reliable supply of tertiary-treated water for agricultural operations, reducing groundwater pumping by providing for in lieu recharge, raising groundwater levels, improving Delta inflows, and supporting habitat protection efforts. The Harvest Water Program is also a core project of the South American Subbasin Groundwater Sustainability Plan developed under the Sustainable Groundwater Management Act. The Program will improve stream flows in the lower Cosumnes River by raising the groundwater table along the river corridor, significantly improve Fall-Run Chinook salmon migration, and sustain riparian trees and shrubs through access to shallow groundwater – particularly during dry periods. In recognition of its importance, the Harvest Water Program was awarded $277.5 million from the California Water Commission's Water Storage Investment Program (the first project to receive such funding), as well as $30 million in federal funds and $14.3 million in other State funds.[15] SacSewer and the people of the State of California are making a significant investment in the achievement of Harvest Water's water supply and ecosystem benefits, for the benefit of the Delta, and it is of particular concern to SacSewer that the DSC exercise its authority and discretion to ensure that these benefits are not compromised.

As explained by engineers and biologists affiliated with the Harvest Water Program in a technical memorandum,[16] the concentration and extended timing of borings and CPT activities within the Program area will not just have "obvious direct and indirect effects on the implementation and benefits of [Harvest Water]," but will impact foraging for the Swainson's Hawk, White-Tailed Kite, and Sandhill Crane – all species protected by the Migratory Bird Treaty Act – and will likely impact habitat for the federally and state protected Giant Garter Snake as well as the Northwestern Pond Turtle, a species of special concern in the state and a candidate specie for federal listing. (Exh. 3 [Harvest Water Memo, pp. 3-4].) Per the experts at Harvest Water:

---

[15] For more detail on the Harvest Water Program, please visit https://www.sacsewer.com/harvest-water/.

[16] Harvest Water Program, Memorandum re. Assessment of Potential Impacts on the Harvest Water Program Area of the 2024-2026 Proposed Delta Conveyance Project Geotechnical Activities (Nov. 6, 2024) (Harvest Water Memo), attached hereto as **Exhibit 3**.

> The scale of the impact is concentrated on a critical location for Swainson's Hawk (*Buteo swainsoni*) and White-Tailed Kite (*Elanus leucurus*) summer foraging, and Sandhill Crane (*Antigone canadensis*) winter foraging. The subject fields surrounded by the proposed borings and CPT sites are intended for the proposed Twin-Cities Complex. These fields, and other locations along the alignment, specifically their vegetated margins or hedgerows are high value nesting and foraging habitat for birds protected under the Migratory Bird Treaty Act. Further, there are numerous drainages along the alignment and the Complex which are suitable habitat for giant garter snake (*Thamnophis gigas*). Modeled habitat for Giant Garter Snake often coincides with Northwestern Pond Turtle (Athene cunicularia), making this a likely impacted species.

(*Ibid*.)

Based on information provided by DWR, the Harvest Water team calculated that Activities within the Harvest Water Program area will add an impact of 121,874 vehicle activity hours, "including 9,350 hours of drill rig or CPT truck operation," to the current bucolic agrarian conditions, concentrated "on a critical location" for these special-status species. (Exh. 3 [Harvest Water Memo, Table 1].) Per Harvest Water:

> The ground disturbing activities proposed just for the [Harvest Water] footprint (97 sites with an average of 9 days per site) over 5-day work weeks is 175 weeks of activity largely around a single area for the Complex, which could occur simultaneously as there does not appear to be any enforceable measure or condition that prevents ground disturbing activities from individual boring and CPT sites located in the same area to occur at the same time.

(*Id*., p. 5.)

"Nowhere in the DEIR is this degree of focused impact from geotechnical drilling activities and their various impacts [on special-status species] described." (Ibid.) For example:

> … Appendix 13G Construction Sound Level Impacts Sandhill Cranes, does not apparently account for the type of noise, vibration, or scale of disturbance or even the impact itself of the proposed geotechnical study. As another example, the DEIR's chapter on Cranes: Impact BIO-33: Impacts of the Project on Greater Sandhill Crane and Lesser Sandhill Crane, field investigations were contemplated and their generalized impacts articulated … [h]owever, the chapter fails to describe the timing, degree or extent of the impacts of the geotechnical investigations on these species. As identified in the certification, there are over a hundred thousand vehicle activity hours largely just in one location, a few fields

> within [Harvest Water]. Nowhere in the DEIR is this degree of focused impact from geotechnical drilling activities and their various impacts described.

(*Id.*, p. 3.)

Without an adequate evaluation of impacts to special-status species, such as the Swainson's Hawk, White-Tailed Kite, Sandhill Crane, Giant Garter Snake, and Northwestern Pond Turtle, including the cumulative impacts of simultaneous borehole drilling (Exh. 3 [Harvest Water Memo], p. 5), DWR cannot – and has not – provided adequate mitigation to ameliorate these Activities' impacts. (*Id*., p. 3.)

DCP Mitigation Measure BIO-3, Avoid and Minimize Disturbance of Sandhill Cranes, for example, requires the following:

> Surface construction and restoration activities will be avoided during the sandhill [sic] crane wintering season (September 15 through March 15) to the extent feasible, as determined by the contractor in coordination with project engineers. DWR recognizes that sandhill cranes may arrive earlier and stay later than the dates specified in the EIR because the project will take many years to construct.

(*Id*., p. 6.) In addition to the measure using nonmandatory language (i.e., "to the extent feasible"), the window for avoiding the crane wintering season is too narrow, using amorphous "'may arrive' and 'stay later' provisions" that require only the determination of a contractor or engineer, notably not a biologist – "two parties that are unqualified to make any kind of ecological determination." (*Ibid*.) The remainder of the mitigation for other special-status species birds "apply virtually the same boilerplate impacts and proposed mitigation, and does not adequately mitigate for potential impacts on Burrowing Owl, which is currently a candidate species for listing under the California Endangered Species Act (CESA)." (*Ibid*.) Furthermore:

> Given that the mitigation's timing overlap to protect cranes from disturbance is also the window to avoid breeding bird impacts, it is unclear which of these significant impacts on special status species will be unmitigated, but one clearly would have to go unaddressed. Perhaps even both of these measures would be overridden to meet contractor schedules. Either scenario is unacceptable for HW.

(*Id*., pp. 6-7.)

Another example – DCP Mitigation Measures BIO-30, Avoid and Minimize Impacts on Giant Garter Snake – requires implementation "only … for surface construction and restoration activities." This mitigation measure does not even apply to geotechnical activities, which, to Appellants understanding, are not considered construction or restoration activities.

Thus, ostensibly, there are no mitigatory protections for this endangered species. (Exh. 3 [Harvest Water Memo], p. 7.) Notwithstanding, the measure "does not cover the majority of potential [Giant Garter Snake] habitat as shown in" a graphic taken from the DCP FEIR, found in the DCP FEIR MMRP, Appendix 13B, p. 13B-349." (*Ibid*.)

DWR clearly has not provided measures pursuant to Delta Plan Mitigation Measure 4-2 to "(re)design project elements to avoid effect on [special-status species]." Because the Activities do not include Delta Plan Mitigation Measure 4-2 or any feasible substitute, the Activities are inconsistent with Policy G P1, subdivision (b)(1).

Inconsistency with Policy G P1, subdivision (b)(2), will result in a significant adverse impact on the coequal goal of protecting, restoring, and enhancing the Delta ecosystem. Delta Plan mitigation measures are necessary to protect the Delta ecosystem. These measures ensure that impacts associated with projects in the Delta will avoid or minimize effects to Delta ecological resources like agricultural uses, groundwater, sensitive habitat, and special-status species. The Activities do not include, at a minimum, Delta Plan Mitigation Measures 7-1(a), 7-1(b), and 4-2(a), or equivalent substitutes, and therefore are inconsistent with Policy G P1, subdivision (b)(2). The Activities accordingly do not adequately protect the Delta ecosystem and significantly and adversely impact this coequal goal.

g. DWR Has Not Demonstrated That the Activities Use Best Available Science (Policy G P1, subd. (b)(3))

Policy G P1, subdivision (b)(3) requires that all covered actions "must document use of best available science" (BAS), and for good cause: "the Legislature created the [DSC] as an independent agency of the state [citation] and charged it with adopting and implementing a legally enforceable 'Delta Plan,' a comprehensive, long-term management plan for the Delta that is built upon the principles of adaptive management and uses the *best available science* to further two coequal goals." (*Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1028, emphasis added.) DWR does not provide adequate documentation that BAS has been or will be used when planning and conducting the Activities. Consequently, the Activities are inconsistent with this policy in several ways.

h. DWR Does Not Apply the Delta Plan's Six Criteria (Nor Does It Obtain Peer Review) When Determining Whether BAS Has Been Used

First, DWR does not apply the Delta Plan's criteria for determining whether BAS has been used. The Delta Plan defines BAS in Appendix 1A. Table 1A-1 identifies the six criteria used to determine whether a project uses BAS as (1) relevance, (2) inclusiveness, (3) objectivity, (4) transparency and openness, (5) timeliness, and (6) peer review. (Delta Plan, Appen. 1A, pp. 1A-1 – 1A-2.) "Proponents of covered actions should document their scientific rationale for applying the criteria in Table 1A-1 (i.e., the format used in a scientific grant proposal)." (Delta Plan, Appen. 1A, p. 1A-2.) No such documentation appears in DWR's Certification. In the Certification, DWR concludes, with no proof or citation to

supporting evidence, that the Activities use "state-of-the-practice methods and techniques." (Certification, p. 4-70.) DWR generally and briefly describes these techniques and mentions adherence with several codes and governmental/trade manuals, but it does not explain or provide scientific rationale for how adherence to these codes and manuals results in the use of BAS or meets the Delta Plan's six BAS criteria. Technology changes rapidly and adopted guidance does not always keep up with those changes. As explained in the Delta Plan, "[b]est available science changes over time, and decisions may need to be revisited as new scientific information becomes available." (Delta Plan, Appen. 1A, p. 1A-1.) The Certification does not demonstrate that DWR is using the most up-to-date scientific and technological information and tools available.

As one example, in its 2020 Final IS/MND, DWR claimed that there will be no groundwater contamination during borehole drilling using a mud-rotary drill because the "drilling mud," also known conventionally as drilling fluid, used during this process "coats the borehole walls and prevents losses of drilling mud into the formation." (2020 Final IS/MND Appen. D, Response to Comments, pp. 31 [Response 14], 39 [Response 20].) Groundwater contamination from drilling fluid used during boring, however, was a principal concern of the Central Delta Water and South Delta Water Agencies[17] when those agencies commented on the 2020 Final IS/MND. Drilling fluid groundwater contamination is indeed a problem acknowledged by industry experts when drilling wells. (See, e.g., *Clark Bros., Inc. v. North Edwards Water Dist.* (2022) 77 Cal.App.5th 801, 809 [drilling expert expressing concern that contamination may occur from one well to another during boring from "chemicals and drilling fluid"].) Groundwater quality is also a key concern of Appellants, as groundwater impacts threaten drinking water in domestic and municipal wells in and around the town of Hood and the groundwater benefits being provided by SacSewer. DWR claims that "groundwater will not be contaminated by the borings in a way that would cause groundwater quality to be substantially degraded" (2020 Final IS/MND Appen. D, Response to Comments, p. 31 [Response 14]), but it provides no scientific support for this claim (see 2020 Final IS/MND, pp. 169-170 [evaluation of impact to groundwater quality omitting any science-based support]) and fails to consider information to the contrary.

The California Department of Toxic Substances Control (DTSC),[18] arguably an expert on this subject, is one such source of contrary information. DTSC explains that drilling mud "has the potential to alter borehole fluid chemistry"; that "lubricants used during the drilling process can contaminate the borehole fluid and soil/rock samples"; and that "[d]uring drilling, the aquifer or formation near the borehole is damaged." (DTSC Drilling, p. 11.) Conversely, per DTSC, hollow-steam augers can be used instead of mud-rotary drills to a depth of 300 feet without using contaminating drilling fluids or lubricants. (*Id*., p. 12.) DWR discusses the limited use of augers for geotechnical borehole drillings in its 2020 Final IS/MND but,

[17] Located online at https://www.centraldeltawateragency.org/ and https://southdeltawater.org/, respectively.

[18] DTSC, Drilling, Logging, and Sampling at Contaminated Sites (June 2013) (DTSC Drilling), available at https://dtsc.ca.gov/wp-content/uploads/sites/31/2024/04/Drilling-Logging-Sampling-Cont-Sites_accessible.pdf.

apparently, relies primarily on mud-rotary drills when borehole drilling. (2020 Final IS/MND, pp. 13-14.)

It is not evident that DWR consulted with DTSC during its years-long process designing the Activities, nor is there evidence that DWR had its methodology peer reviewed, which is the most important factor in the Delta Plan for determining scientific credibility. (Delta Plan, Appen. 1A, p. 1A-1.) While obtaining records from related prior geotechnical investigations may inform DWR's approach (Certification, p. 4-68), the Delta Plan requires that approach be supported through peer review. This is just one example of DWR's failure to demonstrate the use of BAS or document BAS pursuant to the Delta Plan's six criteria when planning and pursuing the Activities. DWR also fails to demonstrate the use of BAS in its environmental analysis of and mitigation measures for, or lack thereof, the impacts that the Activities would have on agricultural operations, special-status species, etc. The Activities are accordingly inconsistent with Policy G P1, subdivision (b)(3).

i. DWR Does Not Adhere to the Delta Plan's Steps (Nor Does It Obtain Peer Review) When Determining Whether BAS Has Been Used

DWR further ignores the Delta Plan's steps for achieving "the best science." (Delta Plan, Appen. 1A, p. 1A-1.) These steps include "[w]ell-stated objectives; [a] clear conceptual or mathematical model; [a] good experimental design with standardized methods for data collection; [s]tatistical rigor and sound logic for analysis and interpretation; [and] [c]lear documentation of methods, results, and conclusions." (*Ibid*.) "The best science is understandable; it clearly outlines assumptions and limitations … is also reputable [and] it has undergone peer review conducted by active experts in the applicable field(s) of study." (*Ibid*.)

DWR's reliance on nondescript and vague "*in situ* data" and testing does not comply with any of the Delta Plan's steps for BAS. (Certification, p. 4-70.) DWR does not provide a clear concept or mathematical model for this data or testing, and does not describe a good experimental design with standardized methods for data collection, include statistical rigor or clear documentation of any kind. Nor does DWR support its Certification with any peer-reviewed evidence that its methodology for the proposed work – particularly in areas that will adversely affect sensitive species and their habitat – utilizes BAS. As noted by North Delta C.A.R.E.S., a community-based Delta-protection organization, "it is not possible to collect in-situ 'soil' samples using the techniques described [by DWR] when drilling with mud. It is possible to obtain partial grab or chip samples while drilling with mud, but it is not possible to know the exact depth from which the samples originated." (2020 Final IS/MND Appen. D, Response to Comments, p. 172 [Response 289].) The Activities are accordingly inconsistent with Policy G P1, subdivision (b)(3).

j. DWR Ignores the Scope of Impacts Because It Does Not Use BAS

DWR further ignores the scope of the impacts that the Activities will have on habitat and wildlife, including special-status species such as the Giant Garter Snake, Swainson's Hawk, White-Tailed Kite, and Sandhill Crane, discussed above, because it does not base its assessment on BAS.

For example, in the 2020 Final IS/MND, in the two short paragraphs where DWR analyzed whether geotechnical borehole drillings in the Delta "would have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special-status species," it states that ground disturbing activities "would be limited and temporary in nature." (2020 Final IS/MND, p. 48.) This assessment, however, does not consider simultaneous borings concentrated in the same area, which will cumulatively impact these and potentially other special-status species. The DCP FEIR provides zero discussion in that regard, as explained and discussed above. Moreover, Appellants are unaware of anything in any mitigation measure or condition of approval that would prevent DWR from conducting simultaneous borings in a manner that inevitably will result in cumulative impact increases to these and potentially other special-status species. Furthermore, DWR has not supported its Certification with any "peer-reviewed publications" or even any "[o]ther scientific reports and publications" or "[s]cience expert opinion" demonstrating that multiple simultaneous borings in close proximity to one another would not cumulatively increase impacts to special-status species. (Delta Plan Appen. 1A, p. 1A-1.) In contrast, experts at Harvest Water show how there would be an increased and unmitigated impact to certain special-status species, demonstrating that the Activities are inconsistent with Policy G P1, subdivision (b)(3). (See Exh. 3 [Harvest Water Memo].)

Inconsistency with Policy G P1, subdivision (b)(3), will result in a significant adverse impact on the coequal goal of protecting, restoring, and enhancing the Delta ecosystem. DWR's failure to document use of BAS, and the documented lack of using BAS leads to the reasonable conclusion that the Activities will not use BAS in the manner required by the Delta Plan. The failure to document use of BAS and to use BAS results in potentially increased significant, adverse impacts to groundwater quality, habitat, and special-status species, as described above. Groundwater quality and the presence of special-status species and their habitat are integral to the Delta's ecosystem. Any unmitigated increase in impacts to these resources is antithetical to the protection, restoration, and enhancement of the Delta ecosystem. Accordingly, this coequal goal is significantly and adversely impacted.

2. The Activities Are Inconsistent With Delta Plan Policy DP P2 (Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats)

Policy DP P2 requires water management facilities and proposed actions "that involve the siting of water management facilities" to "be sited to avoid or reduce conflicts with existing uses…when feasible, considering comments from local agencies and the Delta

Protection Commission." Per DWR, the Activities are required to determine the ultimate siting and alignment of DCP water management and conveyance facilities. (See, e.g., Certification, p. 1-1.) As explained above, however, the Activities will result in conflicts with local agricultural land uses. Several local agencies, including Appellants, have articulated these conflicts to DWR to no avail. As explained above, SacSewer is implementing the Harvest Water Program, which is a core project of the South American Subbasin Groundwater Sustainability Plan that will provide a safe and reliable supply water for agricultural operations, reduce groundwater pumping, raise groundwater levels, improve Delta inflows, support habitat protection efforts, improve stream flows in the lower Cosumnes River, significantly improve Fall-Run Chinook salmon migration, etc. The Activities would result in several significant negative effects to the Program and its goals and aims, discussed above, and thus is inconsistent with the land uses within the Program area. Instead of resolving these conflicts and respecting local land uses, DWR purports to obtain "court-ordered entry" when drilling its holes, when voluntary agreements with landowners cannot be procured. (Certification, p. 3-15.) The need to obtain a court order, in and of itself, is evidence that a conflict exists. Accordingly, the Activities are inconsistent with Policy DP P2.

Inconsistency with Policy DP P2 will result in a significant adverse impact on the coequal goal of protecting, restoring, and enhancing the Delta ecosystem. The current Delta ecosystem relies on its agricultural land uses. For example, local agricultural land uses provide and protect sensitive habitat for special-status species (discussed above). Conflicts with these local land uses likely will result in the degradation or destruction of this habitat and its species, contributing toward significant and adverse impacts to the overall Delta ecosystem. Accordingly, this coequal goal is significantly and adversely impacted by DWR's failure to ensure consistency with Policy DP P2.

3. The Activities Are Inconsistent With Delta Plan Recommendation DP R9 (Encourage Agritourism)

Recommendation DP R9 states that "[l]ocal governments and economic development organizations, in cooperation with the Delta Protection Commission and the Delta Conservancy, should support growth in agritourism, particularly in and around legacy communities. Local plans should support agritourism where appropriate." One member of the Delta Protection Commission Advisory Committee, however, criticized the impacts that DCP construction in the Delta would have on agricultural tourism, stating: "I don't see anything good coming out of the tourism or the area or anything else because of all that traffic congestion." (FEIR Vol. 2, Table 4-2, p. 53, Comment 482-6 [Record Index No. DCP.D1.1.00241].) The State Water Resources Control Board and Central Valley Regional Water Quality Control Board similarly commented that impacts like "undesirable visuals, loud noises, increased congestion" associated with DCP construction would negatively impact "local tourism." (*Id*., pp. 237-238, Comment 533-118; see also *id*. pp. 258-259, Comment 533-149.) The Activities would have impacts similar to those at issue with regard to DCP construction, particular when boreholes would be drilled simultaneously within the same area, as discussed above. The noise, dust, and roadway impediments

generated by the Activities would negatively impact agritourism in the Delta instead of supporting its growth. The Activities are accordingly inconsistent with Recommendation DP R9.

This inconsistency will have a significant adverse impact on the coequal goal of protecting, restoring, and enhancing the Delta ecosystem. Many of the agricultural operations that exist within the Delta and contribute to its ecosystem rely on agritourism to fund their operations. Impacts to agritourism will impact these operations, potentially resulting in disruption in operations that in turn will disrupt the Delta ecosystem, contrary to the coequal goal.

4. The Activities Are Inconsistent With Delta Plan Recommendation WQ R2 (Identify Covered Action Impacts)

Recommendation WQ R2 states that "[c]overed actions should identify any significant impacts to water quality."[19] As explained previously, the Activities will likely impact groundwater quality during borehole drilling using a mud-rotary drill and drilling fluid, which is the primary method DWR will use for the Activities. Two local agencies expressed concern that groundwater would be contaminated by drilling fluid, and DTSC has opined that the use of drilling fluid "has the potential to alter borehole fluid chemistry"; "can contaminate the borehole fluid and soil/rock samples"; and can damage "the aquifer or formation near the borehole." (DTSC Drilling, p. 11.) Yet DWR has provided no science-based support for its claim that "groundwater will not be contaminated by the borings in a way that would cause groundwater quality to be substantially degraded." (2020 Final IS/MND Appen. D, Response to Comments, p. 31; see also 2020 Final IS/MND, pp. 169-170.) Without further science-based support, there is no basis for stating that the Activities are consistent with Recommendation WQ R2.

The Activities propose hundreds of borings throughout the Delta. Any additional, unmitigated significant impacts to water quality in and around the Delta would result in a significant and adverse impact to the protection, restoration, and enhancement of the Delta ecosystem, which relies on maintaining certain water quality conditions.

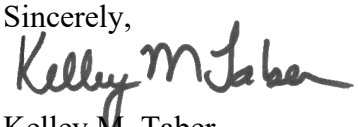
V. Conclusion

DWR's Certification, by its own admission, has no legal basis. It exists only as a misguided attempt to circumvent the Sacramento County Superior Court's Ruling disallowing the Activities to proceed unless DWR submits a proper certification for the DCP (not a subcomponent of the DCP). The Activities do not comprise a "covered action" within the

[19] In order to implement this recommendation, there must be a covered action. Here, however, because DWR has not demonstrated that the Activities are a covered action (see Section IV.A.1, *ante*), the Activities cannot be consistent with any recommendation that expressly relies on the existence of a covered action. The Activities are accordingly fundamentally inconsistent with Recommendation WQ R2.

meaning of the Act. That fact notwithstanding, the Activities are also inconsistent with multiple Delta Plan policies and recommendations and would result in significant and adverse impacts on the coequal goals. Appellants therefore respectfully request that DSC reject the Certification in its entirety and require DWR to provide a certification of consistency for the DCP (i.e., the "covered action") as a whole (consistent with the Ruling) or, in the alternative, find that the Activities would be inconsistent with the Delta Plan.

Sincerely,



Kelley M. Taber
Louinda V. Lacey

Attachments:

Exhibit 1: Third District Court of Appeal Order Denying Petition for Writ of Supersedeas (Oct. 18, 2024)

Exhibit 2: DWR Petition for Writ of Supersedeas to Stay Enforcement of June 20, 2024, Order Granting Motions for Preliminary Injunction; Memorandum of Points and Authorities (Aug. 29, 2024)

Exhibit 3: Harvest Water Program, Memorandum re. Assessment of Potential Impacts on the Harvest Water Program Area of the 2024-2026 Proposed Delta Conveyance Project Geotechnical Activities) (Nov. 7, 2024)

KMT/LVL:gl

Exhibit 1

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

TULARE LAKE BASIN WATER STORAGE DISTRICT et al.,
Plaintiffs and Respondents,
v.
DEPARTMENT OF WATER RESOURCES,
Defendant and Appellant.

C101878
Sacramento County
Nos. 24WM000006, 24WM000008, 24WM000009, 24WM000010, 24WM000011, 24WM000012, 24WM000014, 24WM000017, 24WM000062, 24WM000076

BY THE COURT:

Respondents' request for judicial notice is granted as to the material attached to the request. The petition for writ of supersedeas is denied.

Mauro

MAURO, Acting P.J.

---

cc: See Mailing List

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: Tulare Lake Basin Water Storage District et al. v. Department of Water Resources
C101878
Sacramento County Super. Ct. No. 24WM000006, 24WM000008, 24WM000009, 24WM000010, 24WM000011, 24WM000012, 24WM000014, 24WM000017, 24WM000062, 24WM000076

Copies of this document have been sent by mail to the parties checked below unless they were noticed electronically. If a party does not appear on the TrueFiling Servicing Notification and is not checked below, service was not required.

Aubrey Alison Mauritson
Ruddell, Cochran, Stanton, Smith, Bixler & Wisehart, LLP
1102 N. Chinowth Street
Visalia, CA 93291

Josh Todd Fox
Ruddell, Cochran, Stanton, Smith, Bixler & Wisehart, LLP
1102 N Chinowth St
Visalia, CA 93291-4113

Peter James Kiel
Law Office of Peter Kiel PC
P.O. Box 422
Live Oak, CA 95953

E. Robert Wright
Sierra Club California
909 12th Street, Suite 202
Sacramento, CA 95814

Adam Keats
Law Office of Adam Keats, PC
2489 Mission Street, Suite 16
San Francisco, CA 94110

Riley Frances Tinney
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612

John T. Buse
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612

Lori Marie Asuncion
Stockton City Attorney's Office
425 N. El Dorado Street
City Hall
Stockton, CA 95202-1951

Kelley Morgan Taber
Somach Simmons & Dunn
500 Capitol Mall, Suite 1000
Sacramento, CA 95814

Louinda Vosloo Lacey
Somach Simmons & Dunn
500 Capitol Mall, Suite 1000
Sacramento, CA 95814

Thomas H. Keeling
Freeman Firm
1818 Grand Canal Boulevard, Suite 4
Stockton, CA 95207

Roger B. Moore
Law Office of Roger B. Moore
337 17th Street, Suite 211
Oakland, CA 94612

Edward J. Kiernan
Office of the County Counsel
44 N. san Joaquin Street, Suite 679
Stockton, CA 95202

Kirnpreet Kaur
Office of the County Counsel
44 N. San Joaquin Street, Suite 679
Stockton, CA 95202

Osha Rose Meserve
Soluri Meserve, A Law Corporation
510 8th Street
Sacramento, CA 95814

Patrick M. Soluri
Soluri Meserve, A Law Corporation
510 8th Street
Sacramento, CA 95814

Thomas Lawrence Geiger
Contra Costa County Counsel
651 Pine Street, 9th Floor
Martinez, CA 94553

Stephen Michael Siptroth
Contra Costa County Counsel
651 Pine Street, 9th Floor
Martinez, CA 94553

Bernadette Shilts Curry
Solano County Counsel
675 Texas Street, Suite 6600
Fairfield, CA 94533

Holly E. Tokar
Solano County Counsel
675 Texas Street, Suite 6600
Fairfield, CA 94533

Philip John Pogledich
Office of the County Counsel
625 Court Street, Room 201
Woodland, CA 95695-3490

Eric May
Office of the County Counsel
625 Court Street, Room 201
Woodland, CA 95695

Dante John Nomellini Sr.
Nomellini, Grilli & McDaniel
235 East Weber Avenue
P.O. Box 1461
Stockton, CA 95201

Dante J. Nomellini Jr.
Nomellini, Grilli & McDaniel
235 East Weber Avenue
P.O. Box 1461
Stockton, CA 95201

Bradley Justin Stephens
Office of the County Counsel
25 County Center Drive, Suite 210
Oroville, CA 95965-3380

Diane E. McElhern
Office of the County Counsel
700 H Street, #2650
Sacramento, CA 95814

William Corbin Burke
Office of the County Counsel
700 H Street, Suite 2650
Sacramento, CA 95814

Jason Robert Flanders
Aqua Terra Aeris Law Group
490 43rd Street, Suite 108
Oakland, CA 94609

Erica Ann Maharg
Aqua Terra Aeris Law Group
490 43rd Street, Suite 108
Oakland, CA 94609-2138

Harrison Beck
Aqua Terra Aeris Law Group
490 43rd St
Ste 108
Oakland, CA 94609-2138

Eric J Buescher
San Francisco Baykeeper
1736 Franklin Street, Suite 800
Oakland, CA 94612

Marcus Benjamin Eichenberg
San Francisco Baykeeper
1736 Franklin Street, Suite 800
Oakland, CA 94612

S. Dean Ruiz
Mohan, Harris, & Ruiz, LLP
1806 W. Kettleman Lane, Suite L
Lodi, CA 95242

Brett George Baker
Nomellini Grilli & McDaniel
235 E Weber Ave
PO Box 1461
Stockton, CA 95201

John H. Herrick
Law Office of John H. Herrick
1806 W. Kettleman Lane, Suite L
Lodi, CA 95242

Kevin M. O'Brien
Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814

Kathryn Louise Oehlschlager
Downey Brand LLP
455 Market Street, Suite 1500
San Francisco, CA 94105-2442

Brian Edward Hamilton
Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814

Austin C. Cho
Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814

Dustin Donald Peterson
Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814

Stephen Anthony Sunseri
Office of the State Attorney General
600 W Broadway Ste 1800
San Diego, CA 92101-3375

L. Elizabeth Sarine
Office of the State Attorney General
PO Box 944255
Sacramento, CA 94244

David M Meeker
Office of the State Attorney General
P.O. Box 944255
Sacramento, CA 94244

Sacramento County Superior Court
720 Ninth Street
Sacramento, CA 95814
(e-mail)

Exhibit 2

No. C101878

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

CALIFORNIA DEPARTMENT OF WATER RESOURCES,
Defendant and Appellant,

v.

TULARE LAKE BASIN WATER STORAGE DISTRICT,
Plaintiff and Respondent.

Sacramento County Superior Court, Case No. 24WM000006
[and related cases]
The Honorable Stephen P. Acquisto, Judge, Dept. 36
(916) 874-7661

PETITION FOR WRIT OF SUPERSEDEAS TO STAY ENFORCEMENT OF JUNE 20, 2024, ORDER GRANTING MOTIONS FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES

STAY REQUESTED

ROB BONTA (SBN 202668)
Attorney General of California
TRACY L. WINSOR (SBN 186164)
Senior Assistant Attorney General
EVAN EICKMEYER (SBN 166652)
SIERRA ARBALLO (SBN 278885)
Supervising Deputy Attorneys General
LINDSAY DERIGHT (SBN 344649)
KATE FRITZ (SBN 336966)
TIFFANY YEE (SBN 197861)
COLIN SMITHEY (SBN 295919)
KRISTIN MCCARTHY (SBN 273814)
*L. ELIZABETH SARINE (SBN 285631)
STEPHEN A. SUNSERI (SBN 207030)
DAVID M. MEEKER (SBN 273814)
Deputy Attorneys General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7800
Elizabeth.Sarine@doj.ca.gov
Attorneys for Defendant and Appellant California Department of Water Resources

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

Case Name:	Court of Appeal No.:
Tulare Lake Basin Water Storage District v. California Department of Water Resources	C101878

CERTIFICATE OF INTERESTED PARTIES OR ENTITIES OR PERSONS

(Cal. Rules of Court, rule 8.208)

(Check One)	**INITIAL CERTIFICATE**	[X]	**SUPPLEMENTAL CERTIFICATE**	[ ]

Please check the applicable box:

[X] There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(e).

[ ] Interested entities or persons are listed below:

Full Name of Interested Entity or Party	Party *Check One*	Non-Party *Check One*	Nature of Interest *(Explain)*
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	

The undersigned certifies that the above listed persons or entities (corporations, partnerships, firms or any other association, but not including government entities or their agencies), have either (i) an ownership interest of 10 percent or more in the party if an entity; or (ii) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Attorney Submitting Form	Party Represented
Stephen A. Sunseri Deputy Attorney General State Bar No. 207030 600 W. Broadway, Suite 1800 P.O. Box 85266 San Diego, CA 92186-5266 Telephone: (619) 738-9625 E-mail: Stephen.Sunseri@doj.ca.gov	Attorneys for Defendant and Appellant California Department of Water Resources

Stephen A. Sunseri
Digitally signed by Stephen A. Sunseri
Date: 2024.08.29 14:43:19 -07'00'

(Signature of Attorney Submitting Form)

August 29, 2024
(Date)

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION AND STATEMENT OF THE CASE

(Cal. Rules of Court, rule 8.112(a)(4)(A))

Tens of millions of Californians' lives and livelihoods depend on infrastructure that captures the State's water in rainy northern California during wet months and moves it to populous central and southern California for use year-round. But that infrastructure—a network of aqueducts, levees, dams, and reservoirs—is decades old and increasingly vulnerable to disaster. It faces serious risk, both from catastrophic earthquakes and from the many effects of climate change, including saltwater intrusion from sea level rise and weather whiplash between periods of extreme drought and torrential rainfall and flooding.

To meet these threats, the State is working as quickly as possible to advance a critical infrastructure modernization project, the Delta Conveyance Project (DCP), which includes a new, earthquake-resilient underground tunnel to transport water. Among the environmental and regulatory reviews that the Department of Water Resources (DWR or the Department) must pursue before beginning the project is a certification that the DCP is consistent with the Delta Plan under the Delta Reform Act—a critically important 2009 law governing the use of the Sacramento-San Joaquin Delta that courts have rarely had the opportunity to interpret and apply.

To support that the DCP is consistent with the Delta Plan, the Department must complete certain so-called "geotechnical investigation activities": soil borings, cone penetration tests, water quality samples, and the like. These tests are necessary to

confirm structural capabilities of the Delta's soil in light of the DCP's current design. This will, in turn, give the Department the information it needs to finalize the footprint and design of the DCP, which will provide substantial evidence to support the Department's certification of consistency with the Delta Plan and help the Department to defend its consistency certification before the agency that enforces the Delta Reform Act (the Delta Stewardship Council), and ultimately begin the project.

The trial court has blocked the Department from conducting those important threshold steps, however.

In ten related lawsuits challenging the DCP, the court below issued a preliminary injunction prohibiting the Department from conducting any preliminary, geotechnical investigation activities. The trial court's June 20, 2024, "Ruling on Submitted Matter – Petitioners' Motions for Preliminary Injunction" (Injunction Ruling) reasoned that the Department must go through the Delta Reform Act's consistency certification process before conducting its proposed field investigations—even as those very same field investigations are proposed to inform the Delta Reform Act's consistency certification process for the DCP. This result is illogical, misreads the statute, and leaves Californians in harm's way. The trial court's preliminary injunction—which is based on a novel and mistaken reading of the Delta Reform Act—warrants this Court's immediate review and issuance of a writ of supersedeas to stay the trial court's Injunction Ruling pending the Department's appeal.

The central question of statutory interpretation in this case concerns the Delta Reform Act's requirement that "prior to initiating the implementation of [a] covered action," an agency must submit a "certification of consistency" to the Delta Stewardship Council with "detailed findings as to whether the covered action is consistent with the Delta Plan." (Wat. Code, § 85225.) All agree that the DCP itself is a "covered action" within the meaning of the Act. But in the trial court's view, even preliminary investigation activities—like the geotechnical investigations at issue here—amount to "initiating the implementation" of the DCP, despite the fact that such preliminary investigations will support the "detailed findings" required in a "certification of consistency" in the first place.

That reading of the Delta Reform Act is wrong. Neither the plain text of the Act nor the Delta Stewardship Council's regulations and guidance documents require government agencies to file a "certification of consistency" *before* they have gathered information to support that certification. Instead, the usual tools of statutory construction establish that an agency does not "initiat[e] the implementation of [a] covered action" until some point *after* it has conducted early planning and design activities—including, as relevant here, the Department's proposed geotechnical activities. Supersedeas is therefore appropriate—not only because the Department's understanding of its obligations under the Delta Reform Act is likely to prevail on appeal, but also because this litigation turns on an important

and difficult question of first impression about the scope of the Act.

Supersedeas is also appropriate in this case to avoid various forms of irreparable harm—that is, harm that could not be undone if the Department's understanding of the Delta Reform Act ultimately prevails on appeal. For example, the Department *must* complete at least a limited subset of its proposed geotechnical activities to ensure that the DCP remains on-schedule. Undue delays to the DCP caused by the erroneous preliminary injunction could cause increased project costs in excess of one billion dollars—costs that would not be recoverable from the project's challengers, and that would instead be borne by California ratepayers and taxpayers. Delay also continues to leave three in five Californians vulnerable to the escalating impacts of climate change and the looming threat of a catastrophic earthquake—both of which the DCP is designed to combat. These irreparable harms are particularly noteworthy, given that the Department's proposed geotechnical work would impose no countervailing harms on Plaintiffs or the environment in the Delta.

This Court should therefore grant the Department's petition for writ of supersedeas and allow the Department to conduct its proposed geotechnical investigation activities while the appeal of the Injunction Ruling is pending.

VERIFIED PETITION FOR WRIT OF SUPERSEDEAS

Appellant California Department of Water Resources seeks a writ of supersedeas to stay enforcement of an injunction entered

by the Sacramento County Superior Court. The Department petitions this Court under rule 8.112 of the California Rules of Court to exercise its authority under Code of Civil Procedure section 923 as follows.

I. THE RELATED APPEALS

1. On August 19, 2024, the Department filed ten timely notices of appeal of the trial court's June 20, 2024, "Ruling on Submitted Matter – Petitioners' Motions for Preliminary Injunction" (Injunction Ruling). The appeals were consolidated in this Court in No. C101878. This petition seeks a writ of supersedeas or other appropriate stay order in connection with those appeals pending their disposition.

2. The Injunction Ruling granted motions for preliminary injunction that were filed by five different sets of plaintiffs/petitioners in *City of Stockton v. Department of Water Resources* (Case No. 24WM000009), *San Joaquin County, et al. v. Department of Water Resources* (Case No. 24WM000010), *Sacramento Area Sewer District v. Department of Water Resources* (Case No. 24WM000012), *County of Sacramento, et al. v. Department of Water Resources* (Case No. 24WM000014), and *San Francisco Baykeeper, et al. v. Department of Water Resources* (Case No. 24WM000017). The trial court filed the Injunction Ruling and entered it into the Register of Actions in all ten related cases even though the plaintiffs/petitioners in the five remaining matters were not the moving parties.

II. PARTIES

3. Defendant and Appellant California Department of Water Resources is the named respondent/defendant in the ten underlying related actions: Sacramento Superior Court Case Nos. 24WM000006, 24WM000008, 24WM000009, 24WM000010, 24WM000011, 24WM000012, 24WM000014, 24WM000017, 24WM000062, and 24WM000076.

4. Respondent Tulare Lake Basin Water Storage District is petitioner in one of the ten related actions below: Sacramento Superior Court Case No. 24WM000006.

5. Respondents Sierra Club, et al. are petitioners/plaintiffs in one of the ten related actions below: Sacramento Superior Court Case No. 24WM000008.

6. Respondent City of Stockton is petitioner/plaintiff in one of the ten related actions below: Sacramento Superior Court Case No. 24WM000009.

7. Respondents County of San Joaquin, et al. are petitioners/plaintiffs in one of the ten related actions below: Sacramento Superior Court Case No. 24WM000010.

8. Respondent County of Butte is petitioner in one of the ten related actions below: Sacramento Superior Court Case No. 24WM000011.

9. Respondent Sacramento Area Sewer District is petitioner/plaintiff in one of the ten related actions below: Sacramento Superior Court Case No. 24WM0000012.

10. Respondents County of Sacramento, et al. are petitioners/plaintiffs in one of the ten related actions below: Sacramento Superior Court Case No. 24WM000014.

11. Respondents San Francisco Baykeeper, et al. are petitioners in one of the ten related actions below: Sacramento Superior Court Case No. 24WM000017.

12. Respondents South Delta Water Agency, et al. are petitioners/plaintiffs in one of the ten related actions below: Sacramento Superior Court Case No. 24WM000062.

13. Respondent North Delta Water Agency is petitioner in one of the ten related actions below: Sacramento Superior Court Case No. 24WM000076.

III. AUTHENTICITY OF EXHIBITS

14. The documents in the Appellant's Exhibits to Writ of Supersedeas are true and correct copies of the original documents on file with the trial court. Citations to the Appellant's Exhibits are as follows: Volume [Number] of Exhibits to Writ of Supersedeas [WS], and Page [Number].

15. The ten related cases were not consolidated in the trial court. Accordingly, in the five cases in which the Plaintiffs filed preliminary injunction motions, the parties filed nearly identical copies of the Plaintiffs' motions for preliminary injunction (and the opposition and reply papers concerning those motions), and the Department's ex parte applications to modify or stay the preliminary injunction (and the related opposition and reply papers). These documents included thousands of pages of duplicative exhibits filed in multiple cases, and briefs with insignificant distinctions (such as the caption pages, case titles in footers, and signature blocks changed for each case). To avoid unnecessarily including voluminous copies of these documents

with no material differences between them in Appellant's Exhibits, the Department includes only one set of such documents in its Exhibits.

IV. RELEVANT FACTUAL AND PROCEDURAL HISTORY

16. On December 21, 2023, the Department, as lead agency, approved the Delta Conveyance Project (DCP) and certified the DCP Final Environmental Impact Report (DCP FEIR or DCP EIR). (18 WS 4449, 4455.) The Department also filed a Notice of Determination on December 21, 2023, under the California Environmental Quality Act (CEQA).

17. Between January and May 2024, ten groups of plaintiffs filed timely complaints and/or petitions challenging the certification of the DCP EIR and the approval of the DCP. Some, but not all, of the plaintiffs/petitioners alleged violations of the Delta Reform Act. All the plaintiffs/petitioners alleged violations of CEQA.

18. Chapter 3 (Section 3.15) of the DCP EIR, titled "Field Investigations," describes the Department's "data collection efforts to inform more detailed design and construction" related to the DCP. (17 WS 4293.) The field investigations described in this chapter are divided into three categories: (a) investigations to support the Department's Section 408 permit application to the U.S. Army Corps of Engineers, (b) other field investigation activities that will occur prior to the DCP construction phase, and (c) activities that will occur during the construction phase. (17 WS 4293–4300.) The first two categories must be conducted in the early stages of planning and design for the DCP because they

are needed for the project itself to be permitted. These preliminary geotechnical investigations and activities include soil borings and cone penetration tests that collect information "used to develop detailed design criteria for structure foundations" and "to determine the specific structural capabilities of the soil." (17 WS 4294–4295.)

19. In May 2024, five plaintiff groups (City of Stockton; County of San Joaquin, et al.; Sacramento Area Sewer District; County of Sacramento, et al.; and San Francisco Baykeeper, et al.) filed motions for preliminary injunctions, which sought to enjoin the Department's proposed geotechnical investigations, and alleged that the Department had violated the Delta Reform Act. (10 WS 2622–2640; 11 WS 2963–2967; 12 WS 2991–3026; 13 WS 3177–3179, 3181–3199; 14 WS 3456–3458; 3460–3467; 15 WS 3822–3824, 3826–3833.)

20. On June 20, 2024, the Sacramento County Superior Court issued a preliminary injunction enjoining the Department "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." (21 WS 5100–5101.) The trial court filed the Injunction Ruling in all ten related cases and entered it into the Register of Actions for all ten cases.

21. On August 22, 2024, the trial court denied the Department's request to stay or modify the preliminary injunction pending appeal. (See 27 WS 6989–6996 [tentative ruling and minute order].) Therefore, the Department exhausted

all available trial court remedies prior to seeking relief from this Court.

V. WRIT RELIEF IS NECESSARY AND APPROPRIATE

All requirements for a writ of supersedeas are satisfied here. The Department sought relief from the trial court, but it was not granted any relief. The Department has no alternative plain, speedy, or adequate remedy at law. The Department's appeal raises novel and difficult questions of law that implicate how agencies must comply with the Delta Reform Act. As described in more detail below, the trial court improperly based the Injunction Ruling on erroneous legal interpretations of the Delta Reform Act, and the trial court relied on unsupported conclusions that the proposed geotechnical activities amount to "initiating the implementation" of a "covered action," or are, by themselves, a "covered action" under the Delta Reform Act. And a writ of supersedeas will avert various irreparable harms during the pendency of the appeal—harms that are particularly acute given that Plaintiffs will incur minimal (if any) harm as a result of the Department's proposed geotechnical activities.

VI. PRAYER

WHEREFORE, appellant California Department of Water Resources prays that this Court:

1. Issue a writ of supersedeas declaring that the June 20, 2024, Injunction Ruling, and all matters related to enforcement of the Injunction Ruling, are stayed during the pendency of this appeal; and

2. Award the Department such other and further relief as may be deemed just and proper.

Respectfully submitted,

ROB BONTA
Attorney General of California
EVAN EICKMEYER
SIERRA ARBALLO
Supervising Deputy Attorneys General

Stephen A. Sunseri

Digitally signed by Stephen A. Sunseri
Date: 2024.08.29 14:43:41 -07'00'

L. ELIZABETH SARINE
STEPHEN A. SUNSERI
DAVID M. MEEKER
LINDSAY DERIGHT GOLDASICH
KATE FRITZ
KRISTEN MCCARTHY
TIFFANY YEE
COLIN SMITHEY
Deputy Attorneys General
Attorneys for Defendant and Appellant California Department of Water Resources

August 29, 2024

VERIFICATION

I, Carolyn Buckman, state that I am employed as the Environmental Program Manager for the Delta Conveyance Office of the California Department of Water Resources. I make this verification in my official capacity and none other. I have read the foregoing Verified Petition for Writ of Supersedeas and know its contents. The facts stated in the Petition are true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 29, 2024, at Sacramento, California.

CAROLYN BUCKMAN

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Court should grant the requested writ of supersedeas. The Department's appeal involves difficult questions of statutory interpretation concerning the scope and meaning of the Delta Reform Act—an important and relatively recent law that has received little judicial scrutiny. And supersedeas is particularly warranted in this case because the trial court's answers to those difficult questions were wrong and led the court to incorrectly enjoin the Department as a result. The preliminary injunction threatens the Department with harms that cannot be repaired even if the Department prevails on appeal. For example, if the Department is prevented from conducting its proposed geotechnical investigation activities while its appeal is pending, the DCP's timeline could be delayed, which could, in turn, cause extraordinary (and unrecoverable) costs and would leave Californians vulnerable to risks related to climate change and catastrophic earthquakes. Because those irreparable harms greatly outweigh any minimal countervailing harms to Plaintiffs, supersedeas is warranted.

II. BACKGROUND

A. The Delta Conveyance Project

The DCP is essential to ensuring that California's existing, twentieth-century water infrastructure known as the State Water Project (SWP) can continue to meet Californians' water needs in the face of twenty-first century threats. (25 WS 6248–6250.) The SWP services three-fifths of California's population with some or

all of their water supplies and some 750,000 acres of farmland that grow food for much of the nation. (25 WS 6249.) The DCP will add new water intakes along the Sacramento River and convey water through an underground tunnel to the Bethany Reservoir south of the Sacramento San-Joaquin Delta (Delta)—a reservoir that is connected to the California Aqueduct that, in turn, transports water to southern California. (18 WS 4442–4443, 4450–4451.) Without the DCP, the State's water supply will continue to rely on aging facilities and levees that are vulnerable to the effects of climate change through increasingly unreliable weather patterns, sea level rise, and potentially catastrophic seismic events. (21 WS 5187–5190; see generally 21 WS 5258–25 WS 6285.)

Climate change models indicate that as sea levels rise, saltwater intrusion likely will threaten the State's freshwater supplies if protective measures are not carried out soon. (21 WS 5187–5190; see generally 23 WS 5659–25 WS 6245.) When built, the DCP will enable the SWP to safely capture, move, and store water from big, infrequent storm events—which is especially important because climate change means that California can expect more rain (which must be captured promptly for movement later) and less snow (which is captured in snowpacks and melts gradually over time). (*Ibid.*) The DCP will also protect against major seismic events that are predicted to occur in the Bay Area in the next 20 years. (21 WS 5187–5190; see generally 21 WS 5258–23 WS 5657, 5773–5848.) By safeguarding against climate change and seismic risk, the DCP will preserve necessary

and life-supporting freshwater supplies to a majority of Californians and hundreds of thousands of acres of farmland. (25 WS 6248–6250.)

Approximately half of California's water supply flows through the Delta. (18 WS 4449.) To deliver this water, California currently relies on the SWP, which consists of dams, reservoirs, storage tanks, pumping plants, aqueducts, pipelines, and canals designed to capture, store, and transport water throughout the state. (See 18 WS 4497.) In the Delta, over 1,000 miles of levees prevent the inundation of lands that are in some places "several feet below sea level due to subsidence and oxidation of shallow peat soils." (18 WS 4439.)

However, the SWP was designed long ago when California faced very different hydrological conditions. California now "faces a future of water instability, more rain, less snow, and more frequent extreme events like drought and flood," all of which "reduce the ability of the SWP's current infrastructure to capture water, especially because there will be less . . . snowmelt available." (18 WS 4449.) Models of future climate change scenarios "indicate that more precipitation will fall as rain in the winter months," resulting in "more runoff and river flows in the winter than in past years." (18 WS 4450.) Also, as sea levels rise, saltwater intrusion will threaten "fresh water supplies flowing through the existing south Delta" pumps. (18 WS 4451; 21 WS 5187; 18 WS 4446–4447.)

The DCP is designed to address these risks. The DCP will add north Delta intake locations that "are not vulnerable to

salinity intrusion from sea level rise," and that will allow for "operational flexibility in the events of catastrophic levee failure from seismic activity, flooding events, or other disasters that could temporarily disrupt water supply or affect water quality at the existing south Delta pumping facilities." (18 WS 4451; see also 18 WS 4439–4440 [explaining that DCP facilities are designed to withstand a 200-year flood event].) For example, if there were an earthquake at particularly vulnerable points within the Delta, "strong shaking" could combine with the "saturated and poorly-consolidated soils" to result in "the potential to catastrophically fail embankments in the Delta" that would disrupt the State's water supply to 27 million people and 750,000 acres of farmland. (18 WS 4439–4440, 4449.) The DCP will help improve California's resiliency against such disruption because its facilities will "convey water through a tunnel constructed in consolidated mineral soil deposits at depths below anticipated liquefaction." (18 WS 4439–4440.)

B. The Challenged Geotechnical Activities

As a general matter, geotechnical investigations must be conducted before any major water infrastructure development project design can be finalized so that the project can be built. (18 WS 4530–4531.) And that is particularly true with respect to major water infrastructure projects in the Delta. Before constructing such projects, state agencies must submit a "certification of consistency" to the Delta Stewardship Council. Those certifications must be supported by "substantial evidence," and must use the "best available science." (Wat. Code,

§ 85225.25; Cal. Code Regs., tit. 23, § 5002, subd. (b)(3).) In the context of a major infrastructure project, geotechnical data—scientific evidence about the ground in which the project will be constructed—is therefore important to support an agency's certification of consistency with the Delta Plan. (21 WS 5180; 26 WS 6562–6563.)

These general considerations apply to the DCP. In the specific context of that project, early geotechnical investigations are necessary to inform the engineering teams about the hydrogeologic properties of Delta soils, the groundwater quality, and the "nature and limits of historic faults" located in the southern Delta. (21 WS 5180; 26 WS 6562–6563.) To make the DCP as resilient as possible to seismicity effects (like the effects of a predicted catastrophic earthquake that the DCP is intended to guard against), it is necessary to collect "good subsurface information" that allows the Department to "construct the tunnel in more consolidated deposits below the surface." (18 WS 4439–4440.) Without this information, the Department will not know required engineering properties for the soil—which is critical to the final design, certification, and construction of this tunnel project. (18 WS 4531–4532, 4442–4443.) Any "gaps in subsurface information" will limit the Department's "ability to refine DCP configurations and preliminary designs," particularly because Delta soils are highly variable. (18 WS 4442–4445, 4530–4531.) For all of these reasons, the Department must complete additional geotechnical investigations *before* initiating the implementation of the DCP. (*Ibid.*)

In 2020, the Department adopted a Final Initial Study/Mitigated Negative Declaration (IS/MND) for initial geotechnical investigations in the Delta. (18 WS 4531.) The Department proceeded to conduct geotechnical investigation under that IS/MND. The geotechnical investigations conducted under the 2020 IS/MND collected "data on soil conditions to help determine the composition, location, and geotechnical properties of rock and soil materials commonly found in and around the Delta." (*Ibid.*) By December 2023, the information gathered enabled the Department to reach an approximate "10% design level for each of the proposed project alternatives" analyzed in the DCP EIR. (18 WS 4443–4445.) The Department did not file a certification of consistency with the Delta Stewardship Council before undertaking this geotechnical work; no party argued that it was required to do so.

On December 21, 2023, the Department, as the lead agency for the DCP under CEQA, certified the DCP EIR. (18 WS 4449, 4455.) In order for the Department to meet CEQA's expansive definition of the project to include the "whole of the action," the Department described all the relevant activities, including necessary data collection for continued planning and design, that it planned to conduct after project approval. (Cal. Code Regs., tit. 14, §§ 15003, subd. (h), 15378, subd. (a).) As a result, Chapter 3 of the DCP EIR, titled "Field Investigations," includes the geotechnical investigations being challenged in the present litigation. (17 WS 4291–4300.)

Following the Department's approval of the DCP EIR, the Department's geotechnical investigations have focused on the chosen project alternative—the Bethany Reservoir Alignment. (18 WS 4444, 4531.) The geotechnical investigations "are necessary to advance the conceptual design of the" Bethany Reservoir Alignment and to inform the Department's future "certification of the DCP's consistency" with the Delta Plan. (18 WS 4531; 21 WS 5180; 26 WS 6562–6563.) These geotechnical activities include, among other things, soil borings, cone penetration tests, and water quality tests that serve to: (1) study the soils, groundwater, and fault lines in the DCP's underground alignment; (2) inform the Department's final planning and design efforts for the DCP; and (3) support eventual full certification of consistency with the Delta Plan. (18 WS 4441–4443, 4530–4531; 26 WS 6561–6563.)

On May 3 and May 8, 2024, plaintiffs San Francisco Baykeeper, et al., County of Sacramento, et al., Sacramento Area Sewer District, City of Stockton, and County of San Joaquin, et al. (collectively, Moving Plaintiffs) filed nearly identical motions for a preliminary injunction, which sought to enjoin the Department from undertaking the geotechnical field investigations specified in Chapter 3 of the DCP EIR. (10 WS 2622–2640; 11 WS 2963–2967; 12 WS 2991–3129; 13 WS 3177–3179, 3181–3199; 14 WS 3456–15 WS 3742; 15 WS 3822–16 WS 4108.)

C. The Trial Court's Preliminary Injunction Ruling

On June 20, 2024, the trial court issued a preliminary injunction that prevented the Department "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." (21 WS 5100–5101.)

The trial court's ruling turned on whether the geotechnical work is a "covered action" under the Delta Reform Act, set forth in Water Code sections 85000 et seq. Under the Act, a "covered action" is "a plan, program, or project as defined pursuant to Section 21065 of the Public Resources Code"—which defines a "project" under CEQA—that meets certain specified criteria. (Wat. Code, § 85057.5, subd. (a).) To be a "covered action," an activity must, among other criteria, "have a significant impact on achievement of one or both of the coequal goals" of the Delta Reform Act or on the implementation of flood control programs. (Wat. Code, § 85057.5, subd. (a)(1)–(4); Cal. Code Regs., tit. 23, § 5001, subd. (k)(1).) If an activity is a covered action, the relevant public agency must "prepare a written certification of consistency with detailed findings as to whether the covered action is consistent with the Delta Plan," to be submitted to the Delta Stewardship Council. (Wat. Code, § 85225.) And this "certification of consistency" must be completed "prior to initiating the implementation of that covered action." (*Ibid.*)

The trial court adopted a broad interpretation of "covered action," and applying that broad definition, concluded that the term extended to the Department's geotechnical activities as a result. That meant the Department could not conduct its

proposed geotechnical activities without first filing a "certification of consistency" with the Delta Stewardship Council. (21 WS 5100–5101.) To support that conclusion, the court noted that the Environmental Impact Report for the entire DCP "analyzed the geotechnical work as part of the project" under CEQA. (21 WS 5093.) From there, the court reasoned that "[b]ecause the geotechnical work is part of the 'project' within the meaning of CEQA, it is necessarily part of a 'covered action' within the meaning of Water Code section 85225." (*Ibid.*)

The trial court also embraced a theory not previously briefed by any party, concluding that the Department's proposed geotechnical work could—on its own—be considered a "covered action" separate and apart from the DCP.[1] The court concluded that these geotechnical activities (including all geotechnical work described in Chapter 3 of the DCP EIR) amounted to activities "that would cause 'physical change in the environment' . . . and have 'a significant impact on the achievement of one or both of

[1] In the trial court's pre-hearing questions on the preliminary injunction motions, the trial court asked the parties to address a new topic that had not been raised in Moving Plaintiffs' opening briefs or the Department's opposition briefs: "Do the geotechnical investigations at issue fall within the definition of 'covered action' as defined in Water Code section 85057.5, subdivision (a)?" (21 WS 5088.) The Department requested an opportunity to submit supplemental briefing so that the Department would not be prejudiced by the trial court's consideration of this issue. (Transcript, pp. 45–46.) However, the court issued the Injunction Ruling without allowing supplemental briefing.

the coequal goals' of the Delta Plan." (21 WS 5094.) The court reasoned that "the extensive geotechnical work at issue here . . . will likely—*on its own*—have a physical impact on the Delta ecosystem." (21 WS 5099, original italics.) The court therefore concluded 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." (*Ibid*, original italics.) The court thus enjoined all geotechnical work outlined in Chapter 3 of the DCP EIR until the Department completes the Delta Reform Act's certification procedure.

D. 2024–2026 Proposed Geotechnical Activities

To ensure that the DCP is not delayed, the Department must proceed with at least a limited subset of its proposed geotechnical activities from 2024 to 2026 (the "2024–2026 Proposed Geotechnical Activities") during the potential pendency of this appeal. As described below, these activities are limited in scope and intensity. (25 WS 6247–6248; 26 WS 6561–6562.) And performance of this limited work while this appeal is pending is crucial to protecting Californians from several immense harms, and would impose minimal (if any) countervailing harms on Moving Plaintiffs. (See *post*, sections IV.B and IV.C.)

This proposed temporary and limited work would not cause any adverse change to the Delta ecosystem, would not have an impact on achievement of one or both of the coequal goals of the Delta Reform Act, and would not implicate any of the Delta Plan's substantive policies. (26 WS 6562–6570.) Over a two-year period, the Department proposes to complete minimal soil and

water tests. (25 WS 6247–6248.) These limited activities will not include any overwater work, trench digging, work on levees, or construction of permanent survey monuments. (26 WS 6561–6562.) The Department expects that each particular instance of these limited activities could be completed within two weeks (and sometimes much less). (18 WS 4533–4535.) Furthermore, there would be no permanent components of the geotechnical tests left behind when the data collection activities are completed, and the land would be returned to essentially its original condition. (26 WS 6563–6566 [pre-boring, active boring, and post-boring photos].)

All of this work would comply with the environmental commitments and mitigation measures described in the DCP EIR. (26 WS 6653–6566; 25 WS 6353–6354.) Those protective measures include the "Proposed 2024–2026 Preconstruction Field Investigations - Environmental Compliance, Clearance, and Monitoring Plan" (EC-14 Plan) and the Tribal Cultural Resources Management Plan: Phase I. (26 WS 6563–6566.) And as required by the EC-14 Plan, the Department's limited work would avoid sensitive resources, wetlands, and waters of the United States. (26 WS 6563–6564, 6567–6570.)

The Department has previously completed countless activities similar to the 2024–2026 Proposed Geotechnical Activities without triggering any concerns under the Delta Reform Act. (18 WS 4531.) There is no evidence that these activities have caused any "significant impact on achievement of one or both of the coequal goals" of the Delta Plan. (*Cf.* Wat.

Code, § 85057.5, subd. (a)(4).) Indeed, the Department has a long track record of successfully completing such activities without any lasting, significant physical impacts.

III. LEGAL STANDARD

This Court may issue a writ of supersedeas to "suspend or modify an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction." (Code Civ. Proc., § 923; Cal. Rules of Court, rule 8.112.) "Whether the circumstances justify the issuance of the writ lies in the sound discretion of the court, and where it appears that petitioner has in good faith attempted to comply with the law and the respondent will not suffer injury, liberality should characterize the exercise of that discretion to the end that the status quo may be maintained and the fruits of the appeal preserved." (*Kim v. Chinn* (1942) 20 Cal.2d 12, 15.)

"A discretionary writ of supersedeas is appropriate where 'difficult questions of law are involved and the fruits of a reversal would be irrevocably lost unless the status quo is maintained.'" (*Daly v. San Bernardino County Bd. of Supervisors* (2021) 11 Cal.5th 1030, 1039.) "[A]ppellate courts engage in a balancing of the equities in deciding whether to issue a writ of supersedeas pursuant to Code of Civil Procedure section 923." (*Id.* at p. 1054.) Where petitioner will suffer irreparable injury and a stay will not result in "disproportionate injury to respondent," the equities tip in favor of issuing the writ. (*Mills v. Cty. of Trinity* (1979) 98 Cal.App.3d 859, 861.) "[C]ourts will grant supersedeas in appeals

where to deny a stay would deprive the appellant of the benefit of a reversal of the judgment against him." (*People ex rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville* (1968) 69 Cal.2d 533, 537.)

IV. THE COURT SHOULD STAY THE INJUNCTION RULING PENDING APPEAL

This Court should grant the Department's writ of supersedeas and stay the trial court's Injunction Ruling. As described below, this appeal concerns "difficult questions" of law regarding the scope and meaning of the Delta Reform Act—questions that the trial court got wrong. And the requested stay would ensure that the State does not lose "the fruits of a reversal"—a loss that would otherwise occur if the preliminary injunction continues to bar the Department's proposed geotechnical investigations while this appeal is pending.

A. The Trial Court Erred in Its Analysis of "Difficult Questions" Of First Impression Concerning the Delta Reform Act

Here, the trial court's Injunction Ruling touches on difficult and novel questions about the meaning of the Delta Reform Act. This Court should therefore grant a writ of supersedeas so that it can review and address those difficult questions on the merits with a more fulsome review of the legal and factual record—particularly because the trial court answered those difficult questions incorrectly.

1. The trial court misunderstood what it means to "initiat[e] the implementation" of a "covered action"

First, the trial court erred in interpreting the Delta Reform Act's requirement that a certification of consistency be prepared "prior to initiating the implementation" of a covered action. (Wat. Code, § 85225.) Under the trial court's mistaken reading of the Delta Reform Act, a state agency "initiat[es] the implementation of [a] covered action" whenever it undertakes any activity described in an EIR prepared under CEQA for an infrastructure project. (See Pub. Resources Code, § 21065 [definition of CEQA project].) In other words, in the trial court's view, the mere inclusion of the Department's proposed geotechnical work in the project description of the DCP EIR necessarily means that performing such geotechnical work amounts to "implementation" of the DCP under the Delta Reform Act. That understanding of the Act is wrong, for the reasons described below.

As an initial matter, and to be clear, there is no dispute that the DCP itself—meaning the infrastructure project—is a "covered action" under the Delta Reform Act. Because the DCP is a covered action, the Department will, of course, prepare a certification of the DCP's consistency with the Delta Plan at an appropriate time. (See 18 WS 4452–4453, 4460–4461; Wat. Code, § 85225.) But just because the DCP is indisputably a "covered action" under the Delta Reform Act does not mean that the Department must file a certification of consistency before it can proceed with the very investigative activities that are used to fully inform preparation of a certification of consistency for the DCP.

The statute's plain meaning suggests that the Department is not, in fact, required to file such a premature certification of consistency. As noted above, the Department is required to file a certification of consistency "prior to initiating the implementation" of a covered action. (Wat. Code, § 85225.) The key question, then, is what it means to "implement" the infrastructure project at issue here. "'Implement' means 'to carry out, accomplish; to give practical effect to and ensure actual fulfillment by concrete measures.'" (*2710 Sutter Ventures, LLC v. Millis* (2022) 82 Cal.App.5th 842, 858 [citing Webster's New Collegiate Dictionary (1981) p. 571].) The preliminary investigations at issue here fall far short of "actual fulfillment by concrete measures." They do not "carry out," "accomplish," or "give practical effect" to the DCP. They are, instead, a threshold inquiry to inform the DCP's ultimate planning and design. In this light, the statutory text strongly suggests that these preliminary geotechnical investigations do not "initiat[e] the implementation" of the DCP, and, thus, do not require DWR to file a consistency certification for the DCP to undertake them.

This straightforward reading is backed by other textual sources—including other provisions of the Delta Reform Act, the Act's implementing regulations, and other provisions of the Water Code. (See *Dyna-Med, Inc. v. Fair Employment & Housing Comm*. (1987) 43 Cal.3d 1379, 1387 ["The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other,

to the extent possible"].) When the Legislature enacted the Delta Reform Act, it used language consistent with other provisions of the Water Code: it used terms like "implementation" and "construction" to reference activities that were different from "design" and "planning" activities (like the proposed geotechnical activities at issue here). (See, e.g., Wat. Code, §§ 85089 ["planning, design, [and] construction"], 85052 ["planning and implementation"].) The Delta Reform Act's implementing regulations maintain this same distinction: they refer to "implementation" as something separate from planning and design activities. (Cal. Code Regs., tit. 23, §§ 5001, subd. (a) ["planning and implementation"], 5007, subd. (b) ["designed and implemented"].) Other provisions of the Water Code also maintain this same distinction: Water Code section 16103, subdivision (b), for example, provides that "[a] county, city, special district, or combination thereof may *plan, design*, *implement*, construct, operate, and maintain controls and facilities to improve water quality." (Italics added.) These additional textual sources confirm that "implementation" is not the same thing as "planning" and "design."

Even if the statutory text were "susceptible to more than one reasonable interpretation," this Court should "look to 'extrinsic aids. . . .'" (*Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 519.) One such aid is an administrative construction by the agency charged with administering the Act. For example, the Delta Stewardship Council's "Covered Action Checklist" provides advice to state agencies about the certification-of-

consistency process. (18 WS 4576.) That guidance document advises prospective applicants not to file a certification of consistency "prior to finalizing the design and operational elements of the project"—that is, before the preliminary planning and design stages are complete, and when other permits are still needed. (See 19 WS 4675 [Covered Action Checklist].) In other words, the Council has advised applicant agencies that they should gather sufficient planning and design specification information to finalize both the design and operation of their proposed Delta projects *before* submitting any certification of consistency. (*Ibid.*)

The purpose and structure of the relevant statutes point towards this common-sense reading. In concluding otherwise, the trial court conflated the Delta Reform Act and CEQA by improperly equating the timing of the filing of the certification of consistency with the conclusion of the CEQA process. (21 WS 5095–5096.) But the two statutes are different, and it makes sense that they would require different timing. Under CEQA, agencies must complete environmental review "as early as feasible in the planning process to enable environmental considerations to influence project program and design." (Cal. Code Regs., tit. 14, § 15004, subd. (b).) Given CEQA's direction to start environmental review as early as possible, a lead agency generally "acts to approve a proposed course of action when it makes its *earliest* firm commitment to it." (*North Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal.App.4th 832, 859 [emphasis in original].) And where a CEQA project is

"subject to multiple discretionary approvals," the lead agency must complete the CEQA process before the first approval. (*Guerrero v. City of Los Angeles* (2024) 98 Cal.App.5th 1087, 1100.)

As the Delta Stewardship Council recognizes, the Delta Reform Act is different. Whereas CEQA must be satisfied before the first discretionary approval, the Council discourages premature certifications of consistency. Indeed, it recommends that agencies consult with Council staff regarding the "appropriate timing for filing the Certification of Consistency" where "other permits are required for implementation" of a covered action so that the certification can come later in the process and reflect a more finalized plan. (19 WS 4675; 18 WS 4576.) Thus, where CEQA prioritizes starting environmental review as early as possible, the Council emphasizes the importance of "*finalizing* the design and operational elements" before filing a certification of consistency. (19 WS 4675, italics added.)

That difference in timing makes good sense. Whereas an EIR under CEQA need only be supported by "substantial evidence" (see, e.g., *Clover Valley Found. v. City of Rocklin* (2011) 197 Cal.App.4th 200, 212), Delta Plan Policy G-P1(b)(3) requires that "all covered actions must document use of best available science." (Cal. Code Regs., tit. 23, § 5002, subd. (b)(3).) "Best available science" may well require additional information beyond CEQA's "substantial evidence" standard. As a result, completing the Delta Reform Act's certification process may

require additional information-gathering activities between CEQA review and the certification of consistency with the Delta Plan—like preliminary, investigatory geotechnical activities. (See 26 WS 6559–6560.)

There are other important differences between CEQA and the Delta Reform Act that the trial court overlooked. For example, the trial court believed that because the geotechnical activities were "part of the 'project' within the meaning of CEQA," they were "necessarily part of a 'covered action' within the meaning of" the Delta Reform Act. (21 WS 5093–5094.) That is wrong. To be sure, the definition of "covered action" in the Delta Reform Act incorporates the CEQA definition of "project" found in Public Resources Code section 21065. But there are nevertheless distinctions between CEQA "projects" and Delta Reform Act "covered actions." Most notably, CEQA's implementing regulations—but not Public Resources Code section 21065—specify that a CEQA "project" means "the whole of an action." (Cal. Code Regs., tit. 14, §§ 15003, subd. (h), 15378, subd. (a).) The Delta Reform Act does not incorporate that expansive whole-of-the-action terminology from the CEQA Guidelines into the definition of "covered action" as the trial court erroneously assumed. If the Legislature had intended to incorporate CEQA's "whole of an action" concept into the Delta Reform Act definition of a "covered action," it could have done so expressly. But it did not. The trial court erred in expansively reading CEQA's "project" requirements into the Delta Reform Act's "covered action" definition. (See *Jackpot Harvesting Co., Inc. v. Superior*

Court (2018) 26 Cal.App.5th 125, 140–142 [courts do not rewrite statutes to conform to a presumed intention not expressed]; *Rapid Transit Advocates, Inc. v. Southern Cal. Rapid Transit Dist.* (1986) 185 Cal.App.3d 996, 1002 ["An intention to legislate by implication is not to be presumed"].)

2. The trial court erred in suggesting that the geotechnical work, "on its own," is a covered action

The trial court's Injunction Ruling fares no better if it is read to hold that the Department's geotechnical work is, itself, a "covered action" under the Delta Reform Act separate from the DCP. (See 21 WS 5099.) Under the Act, the geotechnical work could be a "covered action" only if, among other things, it would "have a significant impact on achievement of one or both of the coequal goals" of the Act or the implementation of flood control programs. (Wat. Code, § 85057.5, subd. (a)(4).) The coequal goals are (1) "providing a more reliable water supply for California," and (2) "protecting, restoring, and enhancing the Delta ecosystem." (Pub. Resources Code, § 29702, subd. (a); Wat. Code, § 85054.) And "significant impact" means "a *substantial* positive or negative impact." (Cal. Code Regs., tit. 23, § 5001, subd. (jj), italics added.) Here, there are at least two problems with the trial court's suggestion that the Department's proposed geotechnical work is, on its own, a "covered action."

First, the trial court failed to distinguish between different kinds of DCP-related geotechnical work—only some of which is actually at issue here. In its Injunction Ruling, the trial court considered *all* of the geotechnical activities described in Chapter

3 of the DCP EIR to be a "covered action." (21 WS 5099.) But the court failed to differentiate between: (1) preliminary, investigatory geotechnical activities that would occur before the Department submitted a certification of the DCP's consistency to the Delta Stewardship Council; and (2) later-stage geotechnical work that can be undertaken concurrent with future DCP construction and, therefore, would occur after such a certification of consistency. Here, the Department is seeking to conduct only preliminary, investigatory geotechnical activities before presenting a certification of consistency to the Delta Stewardship Council, and it was legal error for the trial court to fail to consider whether that limited subset of activities amounts to a "covered action" under the Delta Reform Act.

The trial court's second error flows from its first: The trial court could not have correctly found that the Department's proposed geotechnical activities were, themselves, a "covered action," because there is no evidence in the record to show that the preliminary geotechnical activities would have a significant impact on achievement of one or both of the coequal goals of the Delta Reform Act. Indeed, in seeking a preliminary injunction, the Moving Plaintiffs did not even argue that the Department's proposed geotechnical activities were by themselves a covered action, focusing instead on their argument that the activities are *part of* the DCP. (Transcript, pp. 22–27.) The trial court thus raised its novel theory sua sponte, and it declined to allow the parties to submit supplemental briefing (or additional evidence) on this point. (See Transcript, pp. 44–46.) The upshot is that the

trial court's Injunction Ruling is built on a theory without factual support and is therefore legally erroneous. (See *People v. Cluff* (2001) 87 Cal.App.4th 991, 998 ["A trial court abuses its discretion when the factual findings critical to its decision find no support in the evidence"].)

Had the trial court allowed the parties to submit additional evidence, it could have concluded only that the Department's preliminary geotechnical activities are not, themselves, a "covered action" because they will *not* have a significant impact on achievement of the Delta Reform Act's coequal goals. While the investigative field tests would cause minor land disturbances, those disturbances would be temporary, and any effects would be redressed because the land will essentially be returned to its original condition when the work is completed. (26 WS 6563–6567.)

When seeking a stay of the Injunction Ruling, the Department provided detailed evidence demonstrating that none of the proposed geotechnical activities, themselves, are a covered action. The Department's declarants made clear the 2024–2026 Proposed Geotechnical Activities that DWR proposes to perform will not implicate any of the Delta Plan's substantive policies, which is part of the regulatory definition of a "covered action." (Cal. Code Regs., tit. 23, § 5001, subd. (k)(1)(E).) (See 26 WS 6567–6570.) Neither Moving Plaintiffs nor the trial court identified any evidence to the contrary which is further proof that the trial court erred in issuing the preliminary injunction.

The absence of evidence supporting the trial court's Injunction Ruling is especially telling because the Department has already undertaken comparable geotechnical work without raising any concerns under the Delta Reform Act to support an injunction. In May and June 2024—i.e., before the Injunction Ruling was issued—the Department completed a series of geotechnical investigations that were the same or similar to the geotechnical activities that the Department proposes to conduct next year. (26 WS 6563–6566.) There has been no suggestion that these activities implicated the Delta Reform Act's coequal goals or impacted the implementation of flood control programs. Moreover, Moving Plaintiffs conceded that the Department has previously completed "hundreds" of geotechnical investigations in the Delta prior to the DCP's approval. (19 WS 4748 ["DWR's previous investigations were in the 100's"].) If these previous geotechnical activities actually had an impact on achievement of the Delta Reform Act's coequal goals, one would expect to see some evidence of that impact by now—or at the very least a suggestion from the Delta Stewardship Council or others that a certification of consistency was required to conduct such activities. Moving Plaintiffs have identified no evidence that any of the Department's prior work raised any concerns under the Delta Reform Act.

3. The Delta Stewardship Council's "early consultation" process confirms the trial court's error

The Delta Stewardship Council's understanding of the Delta Reform Act's "early consultation" process further confirms the

trial court's interpretive error. Although the trial court concluded otherwise, the Council staff's "early consultation" with the Department establishes that the relevant "covered action" is the DCP—not the data collection activities at issue here—and that the implementation of the DCP has not yet begun.

The Delta Reform Act contemplates that the Delta Stewardship Council will engage in "early consultation" prior to the implementation of a covered action. (Wat. Code, § 85225.5 [requiring the Council to "develop procedures for early consultation . . . on the proposed covered action"].) Indeed, as explained by the Council's Deputy Executive Officer, the Council "engage[s] with project proponents in 'early consultation' to discuss and *assist with the preparation* of the required certification of consistency . . . . of the proposed covered action and make recommendations as appropriate." (18 WS 4575, italics added.) The Council has therefore established a process for "early consultation" that is intended to *precede* the filing of a certification of consistency; i.e., "early consultation" with the Council is meant to occur before an agency "initiat[es] the implementation" of a "covered action" under the Delta Reform Act. (Wat. Code, § 85225.5.)

Here, there can be no question that the Department and the Delta Stewardship Council are still engaged in this pre-certification, "early consultation" phase of proceedings—and thus implementation of the DCP has not yet begun. The Department has been engaged in early consultation with the Council concerning the DCP since approximately February 2020. (18 WS

4575; 19 WS 4685.) Throughout this early consultation—which continues to this day—both the Council and the Department have understood the relevant "proposed covered action" to be the DCP itself, rather than the geotechnical work underlying the DCP. From the beginning, the Department has been committed to filing a certification of consistency for the DCP and has informed the Council of its intent to file that certification as early as the end of 2025. (18 WS 4575, 4441–4442.)

For its part, the Council understands that the purpose of its early consultation with the Department is "to advise DWR regarding preparation of its certification of consistency *for DCP*." (18 WS 4575, italics added.) Through this ongoing early consultation process, the Department has provided to Council staff "DCP data collection, planning, design, and permitting updates (including anticipated timing of submission of DWR's certification of consistency with the Delta Plan)." (19 WS 4685.) And at no point in this early consultation process has the Council indicated to the Department that it was required to pursue certification *before* undertaking the geotechnical work at issue here. That should come as no surprise. As described above, the Council understands that some geotechnical work must precede the submission of a certification of consistency, because that work will *inform* the certification. (See section IV.A.1, *ante*.)

* * *

In sum, the Department has not yet initiated the implementation of a covered action in connection with the DCP. The challenged geotechnical work is not a covered action under

the Delta Reform Act merely because the Department included that work in the project description section of the DCP's EIR under CEQA. Nor is the geotechnical work, on its own, a separate covered action—it will not significantly impact the Delta Reform Act's coequal goals, and it will not affect the implementation of any flood control programs. Indeed, the Delta Stewardship Council's continued engagement in "early consultation" with the Department confirms the trial court's error: Contrary to the Injunction Ruling, the relevant "covered action" here is the DCP, and its implementation has not yet begun. In concluding otherwise, the trial court undoubtedly grappled with difficult and novel legal questions about the meaning of the Delta Reform Act. Unfortunately, the trial court erred in answering those questions, and this Court should grant the Department's writ of supersedeas to avoid irreparable harm.

B. A Stay Is Appropriate to Avoid Irreparable Harm And Ensure the State Does Not Lose The Fruits of Reversal on Appeal

This Court should also grant the Department's writ because—if the Injunction Ruling remains in force during the pendency of the Department's appeal—the Department will be deprived of the benefit of a reversal of the trial court's ruling. Here, the Injunction Ruling raises the specter of a number of irreparable harms, including: (1) intolerable risks to Californians' water supplies; (2) enormous, unrecoverable costs resulting from delays to the DCP; and (3) an unnecessary multiplicity of administrative proceedings before the Delta Stewardship Council.

1. Intolerable climate and seismic risks

Delay to the DCP presents intolerable climate and seismic risks—risks that threaten water supplies for millions of Californians and hundreds of thousands of acres of farmland. Delay to the DCP exposes these water supplies to the twin threats of advancing sea level rise due to climate change and the predictable risk of a major seismic event in the Bay Area. (21 WS 5187–5190; see generally 21 WS 5257–25 WS 6344.)

Recent earthquake prediction models indicate that a major seismic disaster is highly likely to occur in the Bay Area in the next 20 years. (21 WS 5187–5190; 23 WS 5652–5657.) The USGS estimates that the probability of a catastrophic seismic event in the San Francisco Region—which extends into the Delta—in that time frame is: (1) 72 percent for an earthquake measuring magnitude 6.7 or greater; (2) 51 percent for an earthquake measuring magnitude 7 or greater; and (3) 20 percent for an earthquake measuring magnitude 7.5 or greater. (*Ibid.*) When a strong earthquake occurs in the Bay Area, it could lead to catastrophic failure of earthen and fragile levee embankments that currently prevent salt water from intruding into critical parts of the Delta ecosystem. (21 WS 5187–90; see generally 21 WS 5257–23 WS 5690; 23 WS 5698–25 WS 6245.) Many of the faults studied in the modeling extend under and through the Delta. (21 WS 5187–5190; 23 WS 5755.) If these levees fail, operations of the existing SWP facilities in the Delta could be disrupted for a year or more. (21 WS 5187–5190; 23 WS 5757; see generally 23 WS 5652–5772.) Disruption at this scale would be calamitous to the State, its communities, and the economy.

(21 WS 5187–5190; 23 WS 5780–5888.) It could result in more than $15 billion in damages (using 2005 dollars) and also fatalities. (21 WS 5187–5190; 23 WS 5780–5812.)

Moreover, the continuing effects of climate change on the Delta are very serious. As the climate changes, sea levels continue to rise, and salt water will continue to intrude further into the Delta, reducing the State's ability to divert freshwater from existing south Delta pumps. (21 WS 5187–5190; see generally 23 WS 5698–5812; 23 WS 5895–25 WS 6245.) The DCP—with its intakes in the north Delta—will help mitigate water supply losses that are otherwise likely to occur due to sea level rise. (See 21 WS 5187–5190; see generally 23 WS 5698–5812; 23 WS 5895–25 WS 6245.)

In the absence of the DCP, these seismic and climate risks will be borne by millions of Californians. The two largest SWP contractors are Metropolitan Water District of Southern California (Metropolitan) and Kern County Water Agency (KCWA). Under their contractual rights, they may receive up to approximately 46% and 25% of available SWP supplies, respectively. (26 WS 6738, 6764.) Metropolitan, comprised of 26 member agencies, serves water to its member agencies that reach 19 million people—almost half the California population—in the counties of Ventura, Los Angeles, Riverside, San Bernardino, Orange, and San Diego. (26 WS 6737–6738.) KCWA serves water to its members, which supply water to agricultural and municipal customers. (26 WS 6763.) On average, Metropolitan

obtains 30 percent of its water supplies from the SWP, and KCWA obtains 40 percent. (26 WS 6738, 6764.)

The risks associated with delays to the DCP are especially troubling at a time when water supplies are already under stress. Metropolitan is entitled to receive up to 1.911 million acre-feet (AF) per year of SWP supplies, and KCWA is entitled to up to 982,730 AF per year.[2] (26 WS 6738, 6764.) However, the amount these entities actually receive is often lower because of unpredictable precipitation in the Delta watershed, as well as regulatory restrictions on SWP operations to meet environmental regulations. (26 WS 6738–6740, 6764–6765.) For instance, in 2022, KCWA's SWP allocation was only 49,137 AF. (26 WS 6764.) And in dry years (like 2014, 2021, and 2022) Metropolitan's SWP allocation dropped as low as 96,000 AF. (26 WS 6738.)

The Department's biannual SWP Delivery Capability Reports model long-term average SWP deliveries accounting for regulatory restrictions and climate change. Those reports show a roughly 20-percent decline in long-term average annual deliveries, from 2,958 thousand AF per year in the 2005 Delivery Capability Report to 2,401 thousand AF per year in the Draft 2023 Delivery Capability Report—a drop of 557,000 AF. (26 WS 6738–6740, 6764–6765; 25 WS 6250–6251, 6269–6344; see also 21 WS 5187–5190; 23 WS 5773–5854.)

[2] One AF equals about 326,000 gallons, or enough water to cover an acre of land one foot deep, and to serve three families in a year. (26 WS 6738.)

The Department's modeling of a 2070 scenario with climate change and sea level rise shows an additional 570,000 AF decline in long-term average annual SWP deliveries from the Delta without the DCP. However, if the DCP were constructed and operated, the models show substantial improvement: Water supply reductions would be cut to a 167,000 AF decline, erasing 403,000 AF of additional declines. (26 WS 6740, 6750–6758, 6766, 6769–6777, 6764–6766; 25 WS 6250–6251; see generally 25 WS 6269–6344; see also 21 WS 5187–5190, 23 WS 5773–58484.)

Both Metropolitan and Kern must manage highly variable water supplies to store water when it is abundant and draw on storage and implement other measures to conserve water and manage demand when SWP supplies are short. (26 WS 6744–6747, 6764–6766.) Investments in storage, water supply forecasting, and integrated water management make achieving these goals possible. (26 WS 6740–6745.) KCWA has invested $38.2 million in the planning and design for the DCP to attempt to safeguard its SWP supplies, in light of projected reductions due to climate change and regulatory restrictions. (26 WS 6766.)

The DCP would help safeguard these threatened water supplies. The Department conducted a "hindcast" calculation for the SWP allocation for 2021 that modeled SWP supplies assuming the DCP had been in place and operating in compliance with regulatory standards for protection of fisheries and water quality objectives. (26 WS 6747–6748, 6767.) The 2021-2022 water year was a "critical" dry year but had DCP been operating as proposed to comply with all environmental regulations, the

SWP could have diverted an additional 236,000 AF—enough water for roughly 850,000 households for a year. (26 WS 6747–6748, 6759–6761; 6767, 6778–6780; 25 WS 6251, 6257–6259.) The Department conducted a similar "hindcast" for the start of 2024 and found that an additional 909,000 AF of water could have been captured between January 1 and April 11, 2024—enough water for nearly 3.1 million households for one year. (26 WS 6748,6759–6761, 6767, 6778–6780; 25 WS 6251, 6257–6259.) The hindcast modeling indicates that the DCP would expand on this objective by capturing supplies during high flows from periodic storms which can occur even in "below normal," "dry," or "critical" water years. (26 WS 6748–6749.) Delays to the DCP will significantly affect Metropolitan and KCWA's ability to supply water to millions of Californians. (26 WS 6747, 6768.)

In sum, the DCP is essential to safeguarding the State's water supply. Any delay to the DCP—that is, delay to hardening California's water supply against looming seismic and climate risks—constitutes irreparable harm.

2. Enormous, unrecoverable costs

Delay also threatens to cause enormous, unrecoverable costs to California ratepayers and taxpayers. (Cf. *Mississippi Power & Light Co. v. United Gas Pipe Line Co.* (5th Cir. 1985) 760 F.2d 618, 623-624 [finding economic harm to the public interest for ratepayer charges].) The Department's planning and technical efforts are spearheaded by the Delta Conveyance Design and Construction Authority (DCA), a joint powers authority established by various public water agency members. (21 WS

5177–5178.) The DCA recently released an updated cost estimate for the DCP in the amount of $20.1 billion in 2023 dollars. (21 WS 5185–5186.) If the 2024–2026 Proposed Geotechnical Activities are further delayed, the DCP project timeline and critical path could be significantly delayed, causing cost increases that could reach $1.2 billion. (21 WS 5185–5187.)

Compounding the issue is that these delays will also prevent the Department from developing money-saving project innovations that would be informed by the 2024–2026 Proposed Geotechnical Activities. (21 WS 5186–5187.) Savings from project innovations could amount to an additional $1.23 billion. (*Ibid.*) The trial court did not require any of the Moving Plaintiffs to post a bond to offset the Department's costs or expenditures. Unless this Court stays the injunction to allow the Department to perform the 2024–2026 Proposed Geotechnical Activities, billions of dollars of public funds could be wasted—even if the Injunction Ruling is ultimately reversed on appeal. (See *Mills v. Cty. of Trinity*, *supra*, 98 Cal.App.3d at p. 861 [stays are "necessary to protect the appellants from the irreparable injury they will necessarily sustain in the event their appeal is deemed meritorious"].)

3. Needlessly multiplied proceedings

Nor can the Department be sure to avoid irreparable harm simply by submitting a certification of consistency for the geotechnical work, standing alone, to the Delta Stewardship Council, in an effort to comply with the Injunction Ruling. Bifurcating the Delta Stewardship Council's proceedings on the

DCP in this way—that is, submitting one certification for the geotechnical work to inform complete certification for the DCP, and then submitting that second certification for the actual DCP—creates additional potential for delay and uncertainty. Even if the Council agrees with the Department (as the Department expects that it would, given the geotechnical work's lack of impact on achievement of the coequal goals), the Council's proceedings take time. Moreover, even a favorable decision from the Council would likely be followed by further litigation—much like the litigation already before this Court. There is no need to force the Department through this piecemeal exercise. Indeed, such a needless multiplication of proceedings is, itself, an independent source of irreparable harm. (See *People v. Superior Court (Farley)* (2024) 100 Cal.App.5th 315, 325 [justifying writ relief based on the need to "obviate[] the need for multiple trials involving the same facts and avoid[] unduly delaying the matter"].)

It is also no response to say that the Department could attempt to pursue a certification of consistency for the entire DCP without first conducting preliminary geotechnical work. Past experience suggests that geotechnical data—like the geotechnical data still to be gathered here—is important to the Council when evaluating a large infrastructure project like the DCP. For example, in 2018, the Department submitted a certification of consistency for a previously proposed Delta tunnel project, called the "California WaterFix." (26 WS 6554–6555, 6557.) Similar to the DCP, WaterFix's CEQA project description

included a phased geotechnical investigation approach. (26 WS 6559.) During the WaterFix certification process, the Council's staff informed the Department that staff would be recommending that the Council remand the certification back to the Department. (26 WS 6557–6558; see also 25 WS 6361–6362, 6518; see Cal. Code Regs., tit. 23, § 5011.) This remand was based, in part, on the Department's plan to complete certain geotechnical activities identified in the WaterFix EIR *after*—rather than before—its certification of consistency.[3] (25 WS 6361–6362, 6375; 26 WS 6559.) That outcome further undermines the trial court's view of the Delta Reform Act—in which a certification of consistency is needed to complete the analysis that is required for a certification of consistency.

As illustrated by this past experience, the Council may direct the Department to conduct additional geotechnical activities on remand after an appeal to the certification of consistency for the DCP. However, the Council could not require DWR to perform additional geotechnical activities on remand because the Injunction Ruling prevents DWR from doing so. And if the Department instead proceeds first with a separate

[3] If Council staff concluded that completing geotechnical activities identified in the WaterFix EIR constituted implementation of a covered action, Council staff would not have directed the Department to complete further geotechnical activities on remand because an agency may not implement a covered action on remand. (Cal. Code Regs., tit. 23, § 5034 [covered action "shall not be implemented" until "[a]fter remand"]; Wat. Code, § 85225.25 ["revised certification" required "prior to proceeding with the action"].)

certification of consistency limited to the relevant geotechnical work, that piecemeal approach would not promise to avert the irreparable harm described above—although it does seem likely to promise further litigation, including in this very Court. The Court should avoid this needless multiplicity of proceedings and issue a writ of supersedeas now.

C. Moving Plaintiffs Have Shown, at Most, Minimal Harm from the Geotechnical Work

In stark contrast to the likely irreparable harms to DWR and the public interest described above, the Moving Plaintiffs will suffer little to no harm if the Department's geotechnical work is allowed to proceed during the pendency of this appeal. This, too, counsels in favor of granting the Department's writ and staying the trial court's Injunction Ruling. (See *Mills*, *supra*, 98 Cal.App.3d at 861 [finding that the equities favor issuing a writ where petitioner will suffer irreparable injury, and a stay will not result in "disproportionate injury to respondent"].)

1. Moving Plaintiffs fail to establish any physical harms associated with the proposed geotechnical activities

To start, as previously noted, the Department has already undertaken geotechnical work that is comparable to the proposed geotechnical investigations at issue here—and the Moving Plaintiffs have no harm to show for it. In May and June 2024, before the Injunction Ruling was issued, the Department completed significant geotechnical work. Moreover, Moving Plaintiffs do not dispute that the Department has already completed hundreds of geotechnical investigations in the Delta. (19 WS 4748.) Despite this substantial, comparable geotechnical

work, Moving Plaintiffs have not identified any physical harms resulting from those prior activities.

Nor have Moving Plaintiffs shown that future geotechnical work (such as the 2024–2026 Proposed Geotechnical Activities) would cause them harm. (27 WS 6903–6904 [absence].) In Moving Plaintiffs' motions for a preliminary injunction, they failed to adequately establish any physical or actual harms associated with the geotechnical work described in the EIR. The physical harms Moving Plaintiffs asserted were without evidentiary support and some concerns were about work that the Department does not actually propose to conduct in 2024 to 2026—for example, over water work, on-levee work, trenching, and permanent monuments. Aside from these physical harms based on geotechnical activities DWR has not actually proposed to conduct before certification, Moving Plaintiffs based their arguments regarding physical or actual harm on speculative evidence that falls well short of their burden of proof. (See *Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471 (*Tahoe Keys*); see *post*, section IV.C.2.)

Regardless, Moving Plaintiffs had two attempts to muster evidence of harm stemming from the Department's geotechnical work, and they have been unable to do so. This is because the Department will conduct that geotechnical work only after environmental and cultural site assessments have been completed, and those geotechnical activities: (a) generally will occur on agricultural roads or staging areas that are already in

use; and (b) will be performed under similar standards established under prior court orders for previous geotechnical work. (18 WS 4424–4431, 4535; 19 WS 4679.) Additionally, none of the work will leave anything permanent at the location of the work, and the five- to eight-inch wide boring created by the borings will be backfilled. (18 WS 4532–4535.)

In fact, in April 2024, the Department voluntarily disclosed to Moving Plaintiffs detailed environmental and cultural compliance plans outlining all the ways the Department would minimize or avoid harm to special status species and their habitats, cultural resources, homes, levees, businesses, agricultural interests, and hunting lands. (19 WS 4726.) The Department provided information about where its proposed geotechnical activities would take place, when they would be performed, and under what conditions. (*Ibid.*) Even with all of this information, Moving Plaintiffs were unable to show that the Department's work would cause any substantive harm. (See 17 WS 4271–4275 [explaining how each Moving Plaintiff failed to demonstrate substantive harm].)

The trial court's Injunction Ruling concludes as much. The court declined to find that Moving Plaintiffs had actually shown that they would suffer substantive harm if the geotechnical work were allowed to proceed. Instead, the court emphasized that—given its analysis of the merits of the Moving Plaintiffs' claims—it would require only "a minimal showing" of harm for purposes of injunctive relief. (21 WS 5099.) And the "harm" that the trial court cited was, indeed, minimal: It identified no concrete,

substantive harm to Moving Plaintiffs; instead, the court below relied entirely on "the procedural harm of being denied the opportunity to appeal the Department's certification [of consistency under the Delta Reform Act] prior to the completion of geotechnical investigations." (*Ibid.*)

This theory of harm cannot be separated from the trial court's erroneous view of the merits of Moving Plaintiffs' claims, and it fails for the same reasons. That is, Moving Plaintiffs cannot suffer harm from an alleged loss of procedural rights that, as a matter of law, they do not hold in the first place. Moving Plaintiffs would only have the right to an administrative appeal if the Department had submitted a certification of consistency to the Delta Stewardship Council. (*In re Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1044.) But because the 2024–2026 Proposed Geotechnical Activities are not themselves a "covered action" under the Delta Reform Act, they do not trigger the Act's certification-of-consistency process. Indeed, Moving Plaintiffs do not argue that the 2024–2026 Proposed Geotechnical Activities are, by themselves, a covered action. (See 27 WS 6892, 6896 [arguing only that the geotechnical activities are "part of" the DCP covered action].) With no procedural right to an administrative appeal, the trial court's theory of procedural harm is illusory.

And even assuming Moving Plaintiffs were entitled to some additional administrative process before the Department proceeds with its geotechnical work, they have failed to connect that additional process to any substantive impacts to the coequal

goals of the Delta Reform Act. As explained above, Moving Plaintiffs failed to show that the limited geotechnical work proposed by the Department will impact the achievement of either of the Act's coequal goals or otherwise conflict with any of the Delta Plan's policies. (E.g., 27 WS 6880–6913 [absence]; see 26 WS 6567–6570.) Moving Plaintiffs also failed to show how these temporary, preliminary, information-gathering activities—which are subject to over 70 different protective measures that will essentially return the worksites to their undisturbed conditions—will impact achievement of the coequal goals. (19 WS 4696–4699; e.g., 19 WS 4748 [admitting there are over 70 relevant measures].) Given this lack of evidence, any alleged harm to Moving Plaintiffs pales in comparison to the threat of irreparable harm to the State if the geotechnical work remains enjoined. As a result, the equities weigh heavily in favor of issuing the writ. (*Mills, supra,* 98 Cal.App.3d at p. 861.)

2. Specific Plaintiffs fail to show additional Harm

The separate groups of Moving Plaintiffs have likewise failed to establish harms sufficient to defeat the Department's request for a stay pending appeal. (See *Mills*, *supra*, 98 Cal.App.3d at 861.)

a. The County Plaintiffs cannot show harm

The County Plaintiffs suggest that they can show harm merely because the proposed geotechnical activities will occur within the boundaries of their counties. (12 WS 3005; 13 WS 3197.) However, the County Plaintiffs fail to explain how the activities (or whether any specific type of activity) will result in

harm to them. (*Tahoe Keys, supra,* 23 Cal.App.4th at p. 1471.) Instead, the County Plaintiffs asserted that because the Department intends to provide compensation for temporary use of properties for potential damages arising from its activities, the Department has somehow admitted that the activities will cause physical harm.

But that argument only underscores the absence of any irreparable harm to Moving Plaintiffs. (*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 726 & fn. 6 [contractual provision does not support irreparable harm finding where injury adequately compensated at law].) Under the agreements with property owners that Moving Plaintiffs cited in the court below, the Department promises to compensate landowners for any potential damage caused by its activities. (18 WS 4562 [template temporary entry permit (TEP) agreement, p. 3, ¶ 4].) Moreover, Moving Plaintiffs failed to show any harm to the landowners or the Counties, because the agreements voluntarily entered into by those landowners also include an agreement by the Department to indemnify the landowners for any damage resulting from the geotechnical activities. (18 WS 4531–4532, 4562.) Accordingly, there is no irreparable harm to the County Plaintiffs.

b. The Sacramento Area Sewer District cannot show harm

The allegations of harm from the Sacramento Area Sewer District (Sacramento Sewer) also fall short. Sacramento Sewer argues that "it is presently unclear whether the geotechnical investigations will occur on SacSewer property." (14 WS 3467.)

But this uncertainty about the location of any geotechnical activities is not harm. (*Tahoe Keys, supra,* 23 Cal.App.4th at p. 1471.) Sacramento Sewer also argues that the DCP facility locations will conflict with a recycled water delivery system that Sacramento Sewer plans to build. (14 WS 3466.) However, Sacramento Sewer provides no evidence to support that argument. A stay therefore would not cause any irreparable harm to Sacramento Sewer.

c. The Baykeeper Plaintiffs cannot show harm

Baykeeper also fails to show irreparable harm. (See *Tahoe Keys, supra,* 23 Cal.App.4th at p. 1471.) Baykeeper first attempts to show harm by asserting that the Department's geotechnical activities put at risk its interests in potential cultural resources. (10 WS 2637–2638; 27 WS 6904.) But Baykeeper largely ignores the numerous processes the Department has already undertaken and will undertake before, during, and after each geotechnical activity to safeguard cultural resources and wildlife. (26 WS 6563–6566, 6634–6735; see also 18 WS 4425, 4535; 19 WS 4679, 4680–4683, 4716–4717.) For example, the Department conducts preliminary research and, two weeks before any investigation, conducts an onsite clearance with Tribal representatives, geologists, biologists, and others, to evaluate cultural and environmental resources. (26 WS 6729, 6647; 19 WS 4680–4683, 4716–4717; 18 WS 4425.) Baykeeper fails to explain how cultural resources and wildlife are "likely" to be impacted with these substantial safeguards in place.

Contrary to Baykeeper's unfounded speculation, the Department is engaging in ongoing, extensive outreach regarding cultural resources and will continue to do so throughout the geotechnical work. (26 WS 6718–6736; 18 WS 4426–4431 [detailing outreach, including with Baykeeper's declarant, James Sarmento]; 19 WS 4680, 4713 [monthly project meetings and weekly communication].) To the extent the Baykeeper Plaintiffs have any lingering concerns about these efforts, those concerns will be addressed through the Department's established and robust outreach process. (18 WS 4426–4431; 19 WS 4680, 4713.)

The remainder of Baykeeper's arguments similarly rely on speculation and conclusory statements that fail to show any harm. (*E.H. Renzel Co. v. Warehousemen's Union* (1940) 16 Cal.2d 369, 373.) For example, Baykeeper argues that the geotechnical activities *may* impair the Delta's "fragile ecosystem and vulnerable species"—a speculative statement that cites to no record evidence demonstrating the activities will cause harm. (10 WS 2639.) Baykeeper offers similar conclusory statements regarding enjoyment of the Delta "for recreational and ceremonial purposes" that likewise fail to explain how the geotechnical work will cause irreparable harm. (*Ibid.*) In fact, Baykeeper cannot show any irreparable harm to its "recreational" interests because the geotechnical work will be conducted with appropriate safeguards in place. (18 WS 4424–4431; 19 WS 4679–4680; see generally 26 WS 6634–6735.) Finally, Baykeeper's concerns about sediment issues and potential contamination resulting from the geotechnical work are

speculative and ignore the safeguards that the Department will take when performing the work. (18 WS 4535; see generally 26 WS 6635–6717.) The bottom line is that there is no harm to the Baykeeper Plaintiffs—or any of the other plaintiff groups.

D. The Department Has Exhausted Its Trial Court Remedies

On July 24, 2024, before the Department filed its notices of appeal, it filed ex parte applications requesting a stay or modification of the Injunction Ruling in the trial court. (21 WS 5124–5149.) The Department timely appealed on August 19. Subsequently, on August 27, 2024, the trial court issued a ruling denying the Department's ex parte applications and referenced the reasoning set forth in the Injunction Ruling. (See 27 WS 6989–6996 [tentative ruling and minute order].) The Department has thus exhausted all available trial court remedies before filing its writ with this Court.

V. CONCLUSION

For the foregoing reasons, the Department respectfully requests that this Court issue a writ of supersedeas staying the trial court's Injunction Ruling during the pendency of the Department's appeal.

Respectfully submitted,

ROB BONTA
Attorney General of California
EVAN EICKMEYER
SIERRA ARBALLO
Supervising Deputy Attorneys General

Stephen A. Sunseri
Digitally signed by Stephen A. Sunseri
Date: 2024.08.29 14:44:13 -07'00'

L. ELIZABETH SARINE
STEPHEN A. SUNSERI
DAVID M. MEEKER
LINDSAY DERIGHT GOLDASICH
KATE FRITZ
KRISTIN MCCARTHY
TIFFANY YEE
COLIN SMITHEY
Deputy Attorneys General
Attorneys for Defendant and Appellant California Department of Water Resources

August 29, 2024

CERTIFICATE OF COMPLIANCE

I certify that the attached Petition for Writ of Supersedeas to Stay Enforcement of June 20, 2024, Order Granting Motions for Preliminary Injunction uses a 13-point Century Schoolbook font and contains 2,335 words. The Memorandum of Points and Authorities section contains 10,704 words and the total word count for both sections is 13,039, inclusive of footnotes.

ROB BONTA
Attorney General of California

Stephen A. Sunseri
Digitally signed by Stephen A. Sunseri
Date: 2024.08.29 14:44:27 -07'00'

STEPHEN A. SUNSERI
Deputy Attorney General
Attorneys for Defendant and Appellant
California Department of Water Resources

August 29, 2024

SA2020302290

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **California Department of Water Resources v. Tulare Lake Basin Water Storage District, et al.**

Case No.: **C101878**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive a copy of said correspondence via electronic mail, and the Superior Court of Sacramento County will receive a copy through the mail via the United States Postal Service or a commercial carrier.

On August 29, 2024, I electronically served or I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, the following documents:

(1) **PETITION FOR WRIT OF SUPERSEDEAS TO STAY ENFORCEMENT OF JUNE 20, 2024, ORDER GRANTING MOTIONS FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES**
(2) **REPORTER'S TRANSCRIPT ON APPEAL, MAY 31, 2024**
(3) **MANUAL FILING NOTIFICATION (CAL. RULES OF COURT, RULE 8.74(A)(6))**

addressed to the following:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on August 29, 2024, at San Diego, California.

J. Llorens	*/s/ J. Llorens*
Declarant	Signature

CASE INFORMATION	**COUNSEL FOR PARTIES**
Case No. 24WM000006 ***Tulare Lake Basin Water Storage v. California Department of Water Resources (CDWR)***	Peter J. Kiel (SBN 221548) LAW OFFICE OF PETER KIEL PC P.O. Box 422 Petaluma, California 95953 Telephone: (707) 387-0060 Email: pkiel@cawaterlaw.com Aubrey A. Mauritson (SBN. 272055) Josh T. Fox (State Bar No. 282072) RUDDELL, BIXLER, MAURITSON, EVANS, FOX & BUSS, LLP 1102 North Chinowth Street Visalia, California 93291 Emails: amauritson@visalialaw.com jfox@visalialaw.com *Attorneys for Petitioner* *Tulare Lake Basin Water Storage District*
Case No. 24WM000008 ***Sierra Club et al. v. CDWR***	E. Robert Wright (SBN 51861) SIERRA CLUB CALIFORNIA 909 12th Street, Suite 202 Sacramento, CA 95814 Telephone: (916) 557-1104 Facsimile: (916) 557-9669 Email: bwrightatty@gmail.com *Attorney for Petitioners and Plaintiffs* *Sierra Club, Friends of the River, California Water Impact Network, Planning and Conservation League, AquAlliance, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, and California Sportfishing Protection Alliance* John Buse (SBN 163156) Frances Tinney (SBN 346927) CENTER FOR BIOLOGICAL DIVERSITY 1212 Broadway, Suite 800 Oakland, California 94612 Telephone: (510) 844-7100 Facsimile: (510) 844-7150

	Emails: jbuse@biologicaldiversity.org ftinney@biologicaldiversity.org *Attorneys for Petitioners and Plaintiffs* *Center for Biological Diversity, Friends of Stone Lakes National Wildlife Refuge, Save Our Sandhill Cranes, Environmental Council of Sacramento, North Coast Rivers Alliance, and Sacramento Audubon Society*
Case No. 24WM000009 ***City of Stockton v. CDWR***	CITY OF STOCKTON Lori Asuncion (SBN 238240) City Attorney 425 N. El Dorado Street Stockton, California 95202-195 l Telephone: (209) 937-8333 Facsimile: (209) 93 7-8898 Email: lori.asuncion@stocktonca.gov SOMACH SIMMONS & DUNN A Professional Corporation Kelley M. Taber (SBN 184348) Louinda V. Lacey (SBN 275888) 500 Capitol Mall, Suite 1000 Sacramento, California 95814 Telephone: (916) 446-7979 Facsimile: (916) 446-8199 Emails: ktaber@somachlaw.com llacey@sornachlaw.com *Attorneys for Petitioner and Plaintiff* *City of Stockton*
Case No. 24WM000010 ***County of San Joaquin et al. v. CDWR***	Thomas H. Keeling (SBN 114979) FREEMAN FIRM 1818 Grand Canal Boulevard, Suite 4 Stockton, California 95207 Telephone: (209) 474-1818 Facsimile: (209) 474-1245 Email: tkeeling@freemanfirm.com *Attorney for Petitioners and Plaintiffs* *County of San Joaquin, County of Contra Costa, Contra Costa County Water Agency, County of Solano, County of Yolo and Central Delta Water Agency* Osha R. Meserve (SBN 204240) Patrick M. Soluri (SBN 210036)

	SOLURI MESERVE, A LAW CORPORATION 510 8th Street Sacramento, California 95814 Telephone: (916) 455-7300 Facsimile: (916) 244-7300 Emails: osha@semlawyers.com patrick@semlawyers.com *Attorneys for Petitioners and Plaintiffs County of San Joaquin, County of Contra Costa, Contra Costa County Water Agency, County of Solano, County of Yolo, Central Delta Water Agency, and Local Agencies of the North Delta* Roger B. Moore (SBN 159992) LAW OFFICE OF ROGER B. MOORE 337 17th Street, Suite 211 Oakland, California 94602 Telephone: (510) 548-1401 Email: rbm@landwater.com *Attorney for Petitioners and Plaintiffs County of San Joaquin, County of Contra Costa, Contra Costa County Water Agency, County of Solano, County of Yolo and Central Delta Water Agency* Edward James Kiernan (SBN 189243) County Counsel Kirnpreet Kaur Virk (SBN 221369) Deputy County Counsel Office of the County Counsel COUNTY OF SAN JOAQUIN 44 N San Joaquin Street, Suite 679 Stockton, California 95202 Telephone: (209) 468-2980 Facsimile: (209) 468-0315 Emails: ekiernan@sjgov.org, kvirk@sjgov.org *Attorneys for Petitioner and Plaintiff County of San Joaquin* Thomas L. Geiger (SBN 199729) County Counsel Stephen M. Siptroth (SBN 252792) Assistant County Counsel CONTRA COSTA COUNTY 1025 Escobar Street, 3rd Floor

	Martinez, California 94553 Telephone: (925) 655-2200 Facsimile: (925) 655-2263 Emails: stephen.siptroth@cc.cccounty.us thomas.geiger@cc.cccounty.us *Attorneys for Petitioner and Plaintiff* *County of Contra Costa, and* *Contra Costa County Water Agency* Bernadette Curry (SBN 197203) County Counsel Holly E. Tokar (SBN 334288) Deputy County Counsel SOLANO COUNTY 675 Texas Street, Suite 6600 Fairfield, California 94533 Telephone: (707) 784-6140 Facsimile: (707) 784-6862 Emails: BSCurry@SolanoCounty.com, HETokar@SolanoCounty.com *Attorneys for Petitioner and Plaintiff County of Solano* Philip J. Pogledich (SBN 197110) County Counsel Eric May (SBN 245770) Senior Deputy County Counsel COUNTY OF YOLO 625 Court Street, Room 201 Woodland, California 95695 Telephone: (530) 666-8172 Facsimile: (530) 666-8279 Emails: philip.pogledich@yolocounty.org eric.may@yolocounty.org *Attorneys for Petitioner and Plaintiff* *County of Yolo* Dante John Nomellini (SBN 040992) Dante John Nomellini, Jr. (SBN 186072) NOMELLINI, GRILLI & McDANIEL LAW OFFICE 235 East Weber Avenue Stockton, California 95202

	Telephone: (209) 465-5883 Facsimile: (209) 465-3956 Emails: ngmplcs@pacbell.net; dantejr@pacbell.net *Attorneys for Petitioner and Plaintiff Central Delta Water Agency*
Case No. 24WM000011 ***County of Butte v. CDWR***	Roger B. Moore (SBN 159992) LAW OFFICE OF ROGER B. MOORE 337 17th Street. Suite 211 Oakland, California 94612 Telephone: (510) 548-1401 Email: rbm@landwater.com Bradley J. Stephens (SBN 212246) BUTTE COUNTY COUNSEL 25 County Center Drive Oroville, California 95965 Telephone: (530) 538-7621 Facsimile: (530) 538-6891 Email: bstephens@buttecounty.net *Attorneys for Petitioner* *County of Butte*
Case No. 24WM000012 ***Sacramento Area Sewer District v. CDWR***	Lisa A.Travis (SBN 184793) County Counsel Diane E. Mcelhern (SBN 167460) Deputy County Counsel COUNTY OF SACRAMENTO 700 H Street, Suite 2650 Sacramento, California 95814 Telephone: (916) 874-5544 Facsimile: (916)874-8207 Email: mcelhernd@saccounty.gov SOMACH SIMMONS & DUNN A Professional Corporation Kelley M. Taber (SBN 184348) Louinda V. Lacey (SBN 275888) 500 Capitol Mall, Suite 1000 Sacramento, California 95814 Telephone: (916) 446-7979

	Facsimile: (916) 446-8199 Emails: ktaber@somachlaw.com llacey@somachlaw.com *Attorneys for Petitioner and Plaintiff* *Sacramento Area Sewer District*
Case No. 24WM000014 ***County of Sacramento, et al. v. CDWR***	Lisa A.Travis (SBN 184793) County Counsel William C. Burke (SBN 213279) Deputy County Counsel COUNTY OF SACRAMENTO 700 H Street, Suite 2650 Sacramento, California 95814 Telephone: (916) 874-5544 Facsimile: (916)874-8207 Email: mcelhernd@saccounty.gov *Attorneys for Petitioners and Plaintiffs*
Case No. 24WM000017 ***SF Baykeeper, et al. v. CDWR***	Jason R. Flanders (SBN 238007) Email: jrf@atalawgroup.com ERICA A. MAHARG (SBN 279396) Email: eam@atalawgroup.com HARRISON M. BECK (SBN 341717) Email: hmb@atalawgroup.com AQUA TERRA AERIS LAW GROUP 4030 Martin Luther King Jr. Way Oakland, California 94609 Telephone: (916) 202-3018 ERIC J. BUESCHER (SBN 271323) Email: eric@baykeeper.org M. BEN EICHENBERG (SBN 270893) Email: ben@baykeeper.org SAN FRANCISCO BAYKEEPER 1736 Franklin Street, Suite 800 Oakland, CA 94612 Telephone: (510) 735-9700 *Attorneys for Petitioners San Francisco Baykeeper, Shingle Springs Band of Miwok Indians, California Indian Environmental Alliance, Restore The Delta, Golden State Salmon Association, and The Bay Institute*

Case No. 24WM000062 ***South Delta Water Agency, et al. v. CDWR***	S. Dean Ruiz, Esq. (SBN 213515) MOHAN HARRIS RUIZ LLP 1806 W. Kettleman Lane, Suite L Lodi, California 95242 Telephone: (209) 888-6039 Facsimile: (209) 957-0595 Email: dean@mohanlaw.net Dante John Nomellini, Jr. (SBN 186072) NOMELLINI, GRILLI & McDANIEL LAW OFFICE 235 East Weber Avenue Stockton, California 95202 Telephone: (209) 465-5883 Facsimile: (209) 465-3956 Email: dantejr@pacbell.net *Attorneys for Petitioners and Plaintiffs South Delta Water Agency and Rudy Mussi Investment L.P.*
Case No. 24WM000076 ***North Delta Water Agency v. CDWR***	Downey Brand LLP KEVIN M. O'BRIEN (Bar No. 122713) kobrien@downeybrand.com KATHRYN L. OEHLSCHLAGER (Bar No. 226817) koehlschlager@downeybrand.com BRIAN E. HAMILTON (Bar No. 295994) bhamilton@downeybrand.com AUSTIN C. CHO (Bar No. 307145) acho@downeybrand.com 621 Capitol Mall, 18th Floor Sacramento, California 95814 Telephone: 916.444.1000 Facsimile: 916.444.2100 *Attorneys for Petitioner North Delta Water Agency*
All Related Cases	Rob Bonta Attorney General of California Tracy L. Winsor Senior Assistant Attorney General Sierra Arballo

	Evan Eickmeyer Supervising Deputy Attorneys General Lindsay N. DeRight Goldasich (SBN 344649) Kate D. Fritz (SBN 336966) Kristin K. McCarthy (SBN 328196) David M. Meeker (SBN 273814) *L. Elizabeth Sarine (SBN 285631) Colin D. Smithey (SBN 295919) Stephen A. Sunseri (SBN 207030) Tiffany S. Yee (SBN 197861) Deputy Attorneys General 1300 I Street, Suite 125 P.O. Box 944255 Sacramento, California 94244-2550 Telephone: (916) 210-7800 Email: Sierra.Arballo@doj.ca.gov Lindsay.DeRight@doj.ca.gov Evan.Eickmeyer@doj.ca.gov Kate.Fritz@doj.ca.gov Kristin.McCarthy@doj.ca.gov David.Meeker@doj.ca.gov Elizabeth.Sarine@doj.ca.gov Colin.Smithey@doj.ca.gov Stephen.Sunseri@doj.ca.gov Tiffany.Yee@doj.ca.gov *Attorneys for Appellant and Defendant California Department of Water Resources*
Clerk of the Court	Sacramento County Superior Court Clerk of the Court Hon. Stephen P. Acquisto, Dept. 36 720 9th Street, Room 102 Sacramento, CA 95814

Exhibit 3

November 7, 2024

Technical Memorandum: Assessment of Potential Impacts on the Harvest Water Program Area of the 2024-2026 Proposed Delta Conveyance Project Geotechnical Activities

To: Somach, Simmons & Dunn
From: The Harvest Water Program

Background

In September of 2024, the California Department of Water Resources (DWR) published a draft certification of consistency[1] and subsequently published a final certification of consistency[2] (certification) in October of 2024 for proposed preliminary geotechnical investigations to support planning and design of the Delta Conveyance Project (DCP). These investigations are planned to take place between 2024 and 2026. The Harvest Water Program (HW) has identified that many of these planned activities would occur within its Program Area footprint. The memorandum outlines the potential impacts these proposed geotechnical investigations would have on HW and its ability to meet its goals.

Overview of Impacts

The certification identifies 97 borings, 6 borings with water quality tests, and 4 Cone Penetration Tests (CPT) within the HW Program Area. Each of these work areas is estimated to compromise a 10-foot by 100-foot area (0.022 acre). Borings are proposed to range in depth from 15 to 250 feet. This work area does not appear to include staging, maintenance or storage areas, which are not quantified. Soil borings are estimated to take up to 9 working days on average and a maximum of 11 days to complete, depending on depth (the certification does not provide planned depths for each boring, so within this document all calculations are based on the estimations provided for the deepest borings). For soil borings where water quality tests are planned, the certification identifies that the water quality tests are estimated to take on average an additional 3 days, with a maximum of 5 days, in addition to the time needed to complete the initial boring. CPTs are estimated to take an average of 2 days to complete, with a maximum of 4 days.

[1] California Department of Water Resources. (2024) *Delta Conveyance Project: Draft Certification of Consistency for 2024-2026 Proposed Geotechnical Activities*
[2] California Department of Water Resources. (2024) *Delta Conveyance Project: Final Certification of Consistency for 2024-2026 Proposed Geotechnical Activities*

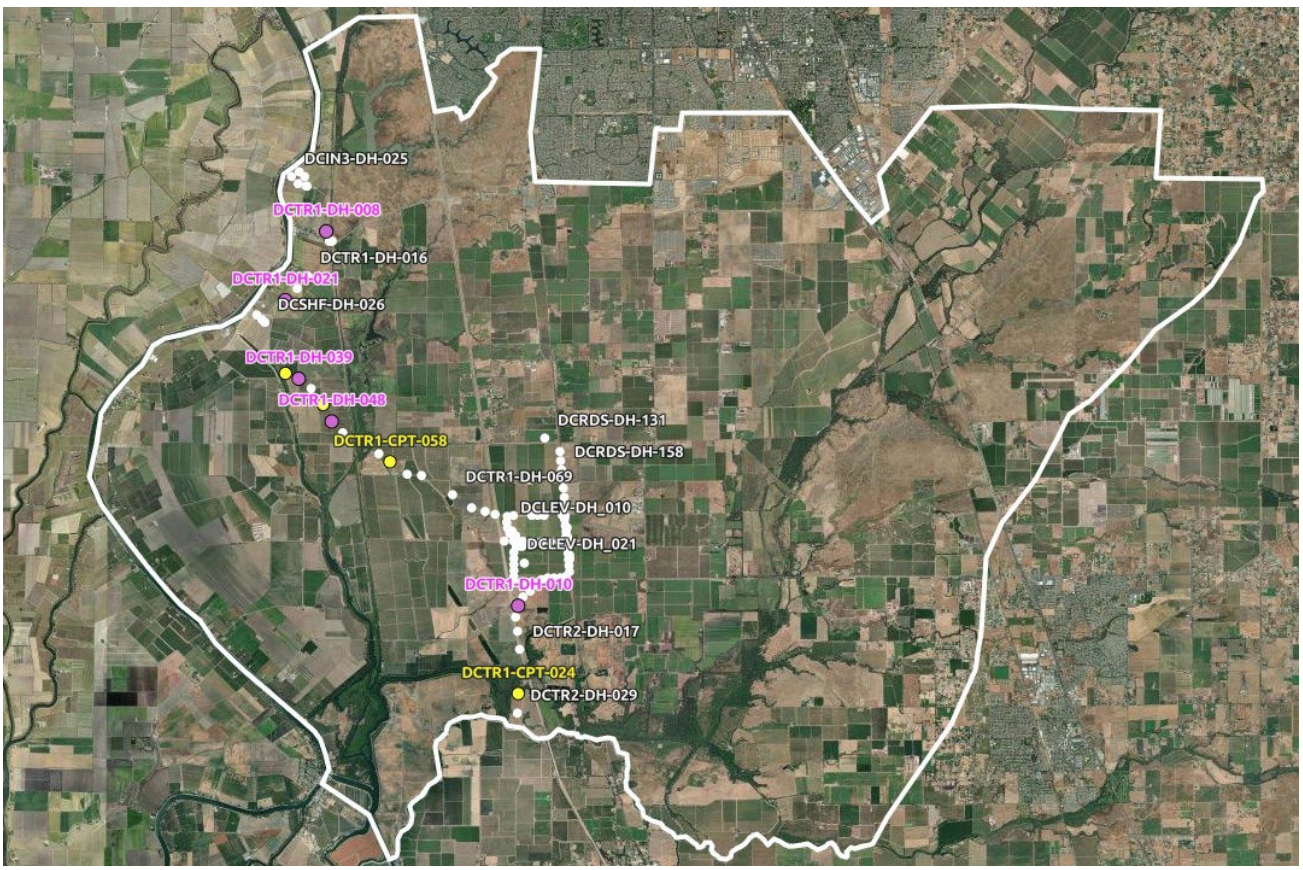


Figure 1. Proposed locations for Delta Conveyance Project preliminary geotechnical activities within the Harvest Water Program Area (white outline), including soil borings (white dots), soil borings with water quality tests (pink dots), and Cone Penetration Tests (yellow dots).

Based on the estimations provided in the certification, the HW team has calculated that these proposed activities would add an impact of 121,874 vehicle activity-hours to the HW Program Area, including 9,350 hours of drill rig or CPT truck operation (see Table 1).

Table 1. Estimated surface impacts to the Harvest Water Program Area from vehicles related to the proposed 2024-2026 geotechnical activities related to the Delta Conveyance Project

Investigation Type	**Number of Sites within HW Program Area**	**Average Days to Complete Investigation**	**Average Vehicle Hours[4] Per Day Per Investigation**	**Total Vehicle Hours within HW Program Area**
Soil Boring[1]	97	9	130	113,490
Soil Boring with Water Quality Test[2]	6	12	105	7,560
Cone Penetration Test (CPT)[3]	4	2	103	824
Sub-Totals	*107*	*13*	*338*	---
			Total Estimated Vehicle Activity Hours	121,874

[1]Based on 200' to 250' Boring on Land estimations from the Delta Conveyance Project: Certificate of Consistency for 2024-2026 Proposed Geotechnical Activities.

[2]Based on 200' to 250' Boring for Water Quality Tests and Pumping Assumptions For Water Quality Tests estimations from the Delta Conveyance Project: Certificate of Consistency for 2024-2026 Proposed Geotechnical Activities.

[3]Based on Up to 250' CPT on Land estimations from the Delta Conveyance Project: Certificate of Consistency for 2024-2026 Proposed Geotechnical Activities.

[4]Including 10 hours per day per site just for a drill rig or CPT truck, for a total of 9,350 hours.

The significant number of borings and CPT activities in a concentrated location (Figure 1. Central box-shape reflecting the proposed Twin-Cities Complex, which is comprised of the proposed permanent and non-permanent surface impacts of the Twin Cities Shaft, and the proposed Twin Cities Reusable Tunnel Material permanent surface impact) has obvious direct and indirect effects on the implementation and benefits of HW (Figure 2. Detail). The scale of the impact is concentrated on a critical location for Swainson's Hawk (*Buteo swainsoni*) and White-Tailed Kite (*Elanus leucurus*) summer foraging, and Sandhill Crane (*Antigone canadensis*) winter foraging. The subject fields surrounded by the proposed borings and CPT sites are intended for the proposed Twin-Cities Complex (Complex). These fields, and other locations along the alignment, specifically their vegetated margins or hedgerows are high value nesting and foraging habitat for birds protected under the Migratory Bird Treaty Act such as Swainson's Hawk, White-Tailed Kite, and Burrowing Owl (*Athene cunicularia*).

Further, there are numerous drainages along the alignment and the Complex which are suitable habitat for Giant Garter Snake (*Thamnophis gigas*). Modeled habitat for Giant Garter Snake often

coincides with Northwestern Pond Turtle (*Athene cunicularia*), making this a likely impacted species. Figure 3 displays the occurrences listed in the California Natural Diversity Database (CNDDB) for all the rare plants and animals within the Harvest Water Program Area.[3]

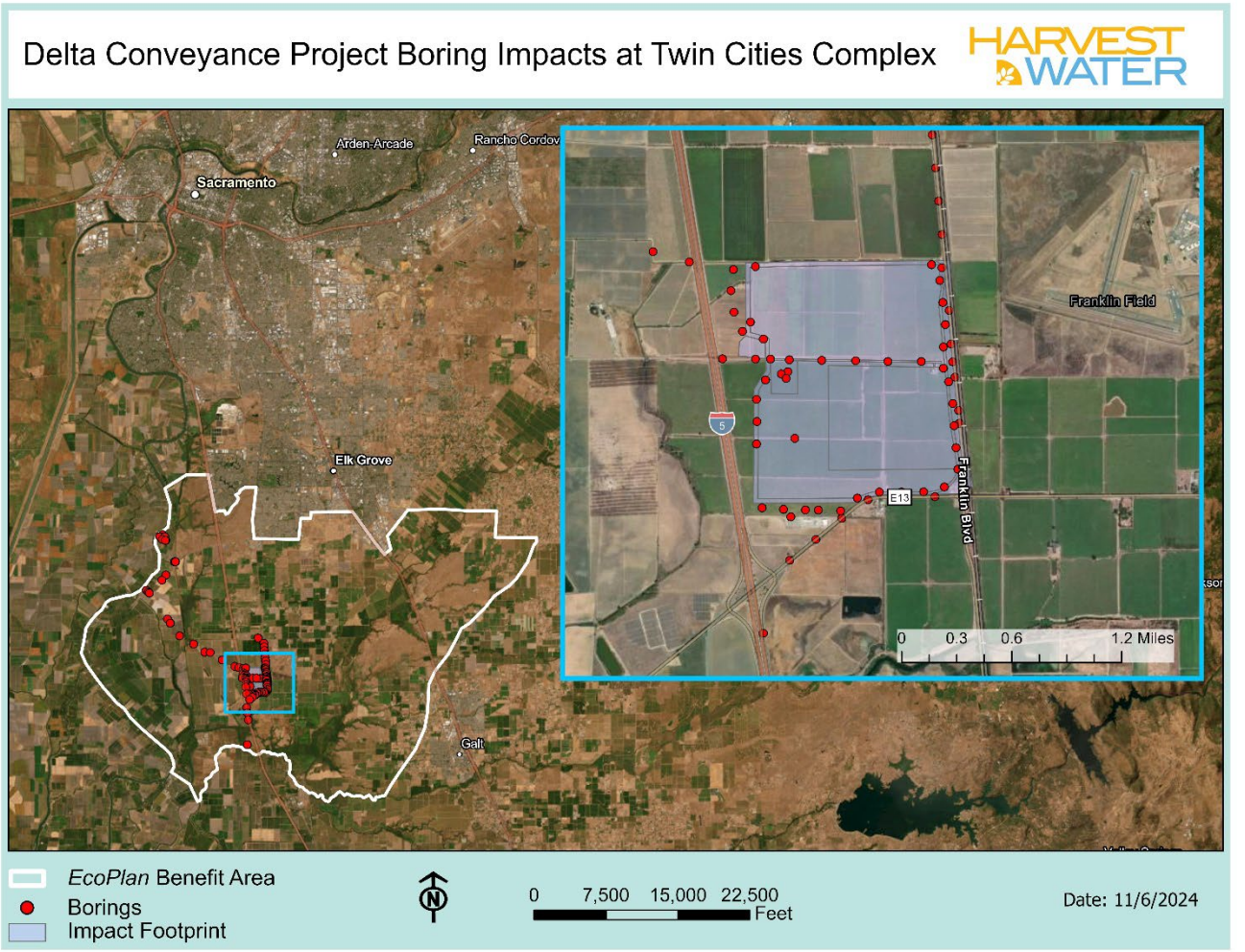


Figure 2. Proposed locations for Delta Conveyance Project preliminary geotechnical activities within the Harvest Water Program Area (white outline) with detail at the Twin Cities Complex location.

The concentrations and extended timing (Table 1.) of these activities, and the associated noise, vibration, traffic, and human occupancy of an otherwise undisturbed (the fence lines) or rarely disturbed (the field except for harvesting) areas is not appropriately accounted for in the certification or its underlying environmental document.[4] For example Appendix 13G Construction Sound Level Impacts Sandhill Cranes, does not apparently account for the type of noise, vibration, or scale of disturbance or even the impact itself of the proposed geotechnical study. As another example, the DEIR's chapter on Cranes: Impact BIO-33: Impacts of the Project on Greater Sandhill Crane and Lesser Sandhill Crane, field investigations were contemplated and their generalized impacts articulated (pg. 13-266). However, the chapter fails to describe the timing, degree or extent of the impacts of the geotechnical investigations on these species. As identified in the certification, there

[3] https://wildlife.ca.gov/Data/CNDDB

[4] https://www.deltaconveyanceproject.com/planning-processes/california-environmental-quality-act/final-eir

are potentially over a hundred thousand vehicle activity hours largely just in one location, a few fields within HW.

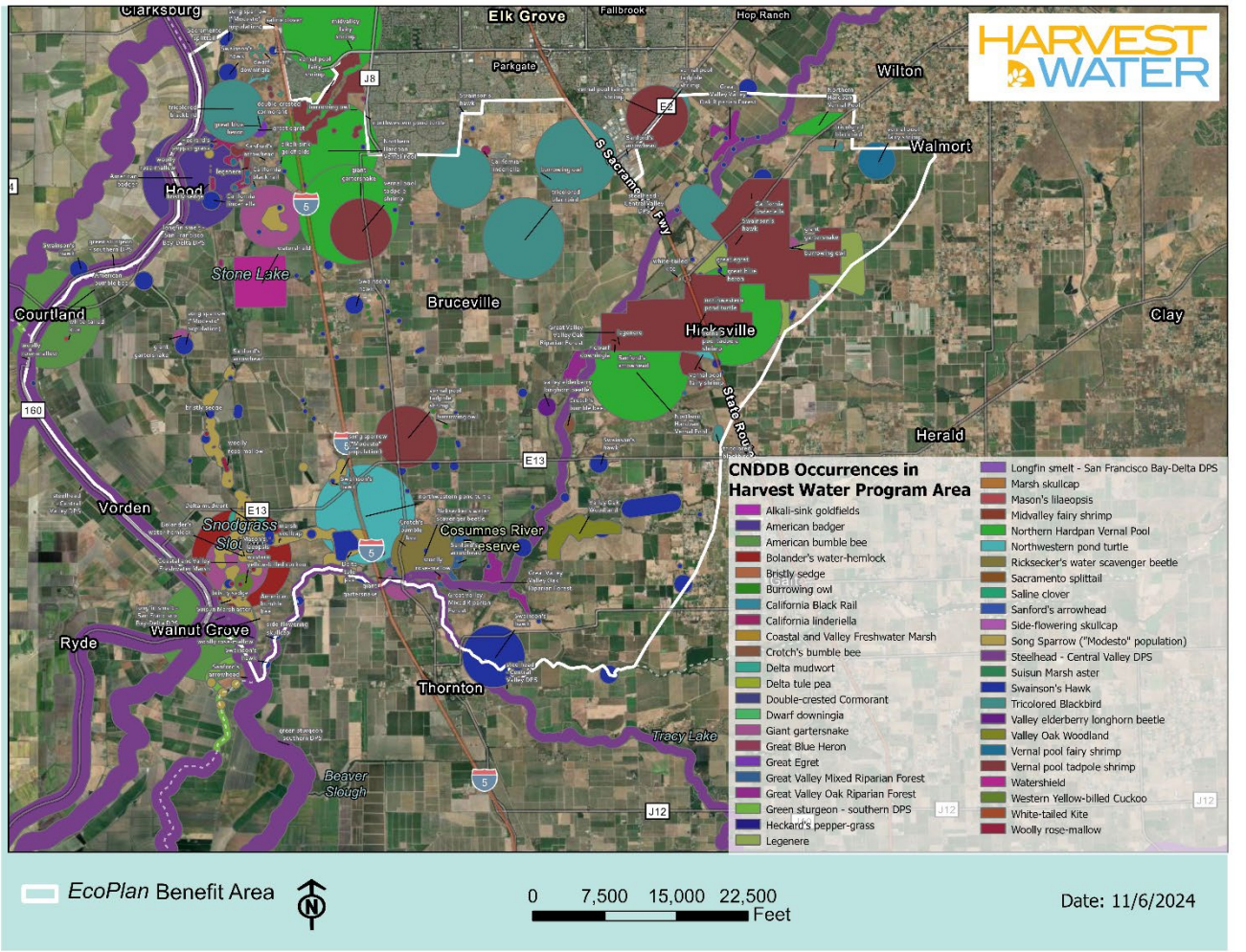


Figure 3. California Natural Diversity Database occurrences for the Harvest Water Program Area and surrounding area.

Nowhere in the DEIR is this degree of focused impact from geotechnical drilling activities and their various impacts described. The only relevant analysis appears to be the following appears to be for the entirety of the impact footprint: "…ground-disturbing activities that would vary in duration from several hours to approximately 6 weeks." (DEIR Pg. 13-266) Subsequent to the DEIR, there has been the development of *2024-2026 Preconstruction Field Investigations Environmental Compliance, Clearance, and Monitoring Plan* (Plan). The Plan is supposed to be a refined site-specific approach, however it appears to be just a confusing recitation of the DEIR and MMRP, without adding new details. The ground disturbing activities proposed just for the HW footprint (97 sites with an average of 9 days per site) over 5-day work weeks is 175 weeks of activity largely around a single area for the Complex, which could occur simultaneously as there does not appear to be any enforceable measure or condition that prevents ground disturbing activities from individual boring and CPT sites located in the same area to occur at the same time. This additional, previously *unquantified* set of impacts to these special-status species should be assessed in light of the cumulative impacts of the construction and operational phases of this project.

Sufficiency of Proposed Mitigation Measures

It appears that both the focal nature and extended timeframe of individual and cumulative impacts were not adequately characterized for the geotechnical activities within the HW footprint. As a result, the proposed mitigation measures did not appropriately contemplate and thus mitigate the potential impacts. Finally, the measures themselves allow for unilateral override with wide discretion, and further in some cases directly contradict each other, failing to provide mitigation even if they were appropriate. The following are a few illustrations out of several similar problems:

Impact BIO-33: Impacts of the Project on Greater Sandhill Crane and Lesser Sandhill Crane (DEIR Pg. 13-263). The potential impacts do not specify mitigation for geotechnical activities, Timing section "c." appears to be separate and distinct from construction, section "a.". (DEIR Pg. 13-276) A specific distinction is also provided for impacts to other, specific, geographies that do not include HW. (DEIR Pgs. 13-278 through 280) This is a global issue as the only substantive connection between these geotechnical activities and the impact analysis and mitigation is the packaging of these in the Plan on Table 2 (noted above), along with other measures that seem inapplicable to the described activities.

MM BIO-33 Avoid and Minimize Disturbance of Sandhill Cranes. (Delta Conveyance Project Mitigation Monitoring and Reporting Program Pg. 3-57 [MMRP]) "Surface construction and restoration activities will be avoided during the sandhill [sic] crane wintering season (September 15 through March 15) to the extent feasible, as determined by the contractor in coordination with project engineers. DWR recognizes that sandhill cranes may arrive earlier and stay later than the dates specified in the EIR because the project will take many years to construct."

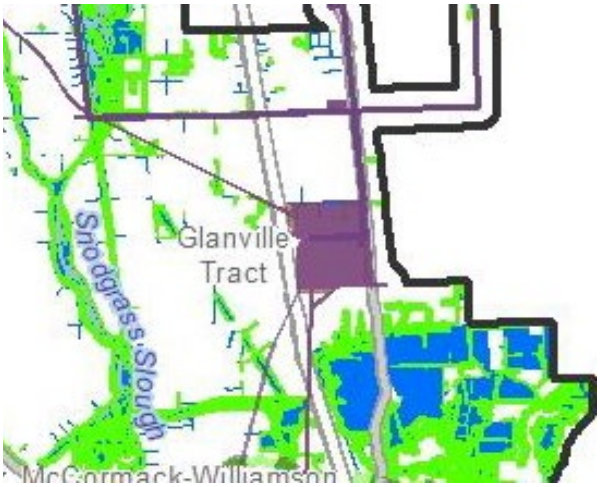
If it does apply, it does not appear to be protective since the 'avoidance window' is admittedly too narrow as identified as "may arrive" and "stay later" provisions. Even within that avoidance window, avoidance is "…determined by the contractor in coordination with project engineers." two parties that are unqualified to make any kind of ecological determination.

Impact BIO-36(a): Impacts of the Project on Osprey [*Pandion haliaetus*], White-Tailed Kite, Cooper's Hawk [*Astur cooperii*], and Other Nesting Raptors and Impact BIO-39: Impacts of the Project on Swainson's Hawk (DEIR Pg. 13-302 and Pg. 13-332 respectively) apply virtually the same boilerplate impacts and proposed mitigation, and does not adequately mitigate for potential impacts on Burrowing Owl, which is currently a candidate species for listing under the California Endangered Species Act (CESA). Notably the timing language directly conflicts with BIO-33: "To reduce impacts on nesting birds, DWR will implement the measures listed below prior to surface construction and restoration activities. 1. Timing Restrictions. To the maximum extent feasible, as determined by the contractor in coordination with a qualified biologist, construction activities, vegetation removal, and trimming will be scheduled during the nonbreeding season of birds (September 1 through January 31)" (MMRP pg. 3-64).

Given that the mitigation's timing overlap to protect cranes from disturbance is also the window to avoid breeding bird impacts, it is unclear which of these significant impacts on special status species will be unmitigated, but one clearly would have to go unaddressed. Perhaps even both of these

measures would be overridden to meet contractor schedules. Either scenario is unacceptable for HW.

MM BIO-30 Avoid and Minimize Impacts on Giant Garter Snake (MMRP pg. 3-53). "The following measures for giant garter snake will **only** be required for surface construction and restoration activities occurring within suitable habitat as defined in Appendix 13B, Section 13B.55, Giant Garter Snake, and by additional assessments conducted during project implementation and prior to project construction in a given area." [Bolding added] This mitigation measure does not appear to apply to geotechnical activities. However, if this measure is applicable, it does not cover the majority of potential habitat as shown in the following figure (MMRP Appendix 13B Pg 13B-349):



As typical of the information provided in the DEIR figures, it lacks the degree of detail to understand where the species' modeled habitat suitability overlaps with proposed project features, in this case the purple square denoting the Complex. The green areas under the dotted tunnel alignment and the square are modeled habitat which appears to arbitrarily leave off the water features and drainages that connect the green habitat features. One modeled habitat feature does extend across a small portion of the north-eastern edge. However, that feature is not some isolated model artifact, but in actuality part of a significant drainage network with many areas of suitable habitat and movement corridors that are not shown around the Complex and therefore not subject to that mitigation measure.