From:	2024GeoTechProject, DeltaCouncil@DeltaCouncil
To:	Dante Nomellini, Jr.; Bush, Eva@DeltaCouncil; 2024GeoTechProject, DeltaCouncil@DeltaCouncil; 2024_2026_geotechcert@water.ca.gov; eric@baykeeper.org; caleenwintu@gmail.com; gary@ranchriver.com; matayaba@ssband.org; kmoreno@ssband.org; gbobker@friendsoftheriver.org; keiko@friendsoftheriver.org; barbara@restorethedelta.org; cintia@restorethedelta.org; scott@goldenstatesalmon.org; jbuse@biologicaldiversity.org; sherri@cieaweb.org; blancapaloma@msn.com; regina@californiasalmon.org; dantejr@comcast.net; ktaber@somachlaw.com; llacey@somachlaw.com; osha@semlawyers.com; Blodgett, Bruce@DPC; "Avina, Mike@DPC"; 2024GeoTechProject, DeltaCouncil@DeltaCouncil; Bogdan, Kenneth M.@DWR; Butcher, Christopher@DWR; Barnhart, Bryan@DWR; legal@semlawyers.com; trobancho@freemanfirm.com; tkeeling@freemanfirm.com; gloomis@somachlaw.com; "Pennie MacPherson"
Cc:	Delta Engage
Subject:	RE: SDWA"s Written Comments on DSC Draft Decision re DWR"s Consistency Certification for 2024-2026 Geotech Activities
Date:	Wednesday, January 22, 2025 10:50:08 AM
Attachments:	image001.png

Thank you, Dan, your letter was received.

Eva E Bush
Regulatory Review Unit
C: (916) 284-1619

From: Dante Nomellini, Jr. <dantejr@pacbell.net>
Sent: Wednesday, January 22, 2025 8:39 AM
To: Bush, Eva@DeltaCouncil <Eva.Bush@deltacouncil.ca.gov>; 2024GeoTechProject, DeltaCouncil@DeltaCouncil <deltacouncil.2024geotechproject@deltacouncil.ca.gov>; 2024_2026_geotechcert@water.ca.gov; eric@baykeeper.org; caleenwintu@gmail.com; gary@ranchriver.com; matayaba@ssband.org; kmoreno@ssband.org; gbobker@friendsoftheriver.org; keiko@friendsoftheriver.org; barbara@restorethedelta.org; cintia@restorethedelta.org; scott@goldenstatesalmon.org; jbuse@biologicaldiversity.org; sherri@cieaweb.org; blancapaloma@msn.com; regina@californiasalmon.org; dantejr@comcast.net; ktaber@somachlaw.com; llacey@somachlaw.com; osha@semlawyers.com; Blodgett, Bruce@DPC <Bruce.Blodgett@delta.ca.gov>; 'Avina, Mike@DPC' <Mike.Avina@delta.ca.gov>; 2024GeoTechProject, DeltaCouncil@DeltaCouncil <deltacouncil.2024geotechproject@deltacouncil.ca.gov>; Bogdan, Kenneth M.@DWR <Kenneth.Bogdan@water.ca.gov>; Butcher, Christopher@DWR <Christopher.Butcher@water.ca.gov>; Barnhart, Bryan@DWR <Bryan.Barnhart@water.ca.gov>; legal@semlawyers.com; trobancho@freemanfirm.com; tkeeling@freemanfirm.com; gloomis@somachlaw.com; 'Pennie MacPherson' <pmacpherson@somachlaw.com>
Cc: Delta Engage <delta.engage@deltacouncil.ca.gov>
Subject: SDWA's Written Comments on DSC Draft Decision re DWR's Consistency Certification for 2024-2026 Geotech Activities

Attached are the SDWA’s written comments on the DSC’s Draft Determination (Decision No. D20242) in the Matter of DWR’s Certification of Consistency for its 2024-2026 Proposed Geotechnical Activities.

Many thanks,
Dan Jr.

Attorney for Appellant SDWA

Dante J. Nomellini, Jr. ("Dan Jr.")
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From: Bush, Eva@DeltaCouncil <Eva.Bush@deltacouncil.ca.gov>
Sent: Friday, January 17, 2025 2:39 PM
To: 2024_2026_geotechcert@water.ca.gov; eric@baykeeper.org; caleenwintu@gmail.com; gary@ranchriver.com; matayaba@ssband.org; kmoreno@ssband.org; gbobker@friendsoftheriver.org; keiko@friendsoftheriver.org; barbara@restorethedelta.org; cintia@restorethedelta.org; scott@goldenstatesalmon.org; jbuse@biologicaldiversity.org; sherri@cieaweb.org; blancapaloma@msn.com; regina@californiasalmon.org; dantejr@pacbell.net; dantejr@comcast.net; ktaber@somachlaw.com; llacey@somachlaw.com; osha@semlawyers.com; Blodgett, Bruce@DPC <Bruce.Blodgett@delta.ca.gov>; Avina, Mike@DPC <Mike.Avina@delta.ca.gov>; 2024GeoTechProject, DeltaCouncil@DeltaCouncil <deltacouncil.2024geotechproject@deltacouncil.ca.gov>; Bogdan, Kenneth M.@DWR <Kenneth.Bogdan@water.ca.gov>; Butcher, Christopher@DWR <Christopher.Butcher@water.ca.gov>; Barnhart, Bryan@DWR <Bryan.Barnhart@water.ca.gov>; legal@semlawyers.com; trobancho@freemanfirm.com; tkeeling@freemanfirm.com; gloomis@somachlaw.com; Pennie MacPherson <pmacpherson@somachlaw.com>
Subject: Draft Determination released

Good afternoon,

Attached please find the Draft Determination being considered by the Council at the January 23, 2025, meeting.

If there are any questions, please include the service list in your reply.

Thank you,

Eva E. Bush (She/Her/Hers)
Environmental Program Manager
Delta Stewardship Council
Planning & Performance Division

C: (916) 284-1619

715 P Street, 15-300
Sacramento, CA 95814

South Delta Water Agency's Cover Sheet

Proposed Covered Action:	2024-2026 Proposed Geotechnical Activities
Certification Number:	C20242
Party Submitting the Document:	Appellant South Delta Water Agency (Appeal No. C20242-A2)
Date of Submittal:	January 22, 2025
Document Title:	South Delta Water Agency's Written Comments on the DSC's "Draft Determination (Decision No. D20242)" in the Matter of DWR's Certification of Consistency for 2024-2026 Proposed Geotechnical Activities.

South Delta Water Agency's

South Delta Water Agency's Written Comments on the DSC's "Draft Determination (Decision No. D20242)" in the Matter of DWR's Certification of Consistency for 2024-2026 Proposed Geotechnical Activities.

1. The Draft Decision Correctly Rejects DWR's Attempt to Certify its 2024-2026 Geotechnical Activities, but it Does So for the Wrong Reason.

After many years of planning and investigations, on December 21, 2023, DWR approved its "Delta Conveyance Project" ("DCP"). Specifically, DWR approved "the construction, operation, and maintenance" of the DCP. (December 21, 2023 Notice of Determination [DCP.A.1.00001.pdf, p. 3].) According to DWR, the instant 2024-2026 Geotechnical Activities ("Geotech Activities") are a "key component" of that approved project. (*Ibid*.)

The Draft Decision correctly rejects DWR's attempt to certify the consistency of the Geotech Activities; however, it rejects that attempt for the wrong reason. The Draft Decision incorrectly rejects that attempt because it determines that the Geotech Activities, by themselves, in isolation from all other components of the DCP, are not a "covered action." Because only "covered actions" can be certified, the Draft Decision concludes the Geotech Activities cannot be certified.

The Draft Decision must be revisited and revised to reach the same outcome (the rejection of DWR's certification attempt), but for the **correct** reason. The correct reason to reject DWR's attempt to certify the Geotech Activities is because those activities are only a bite-sized piece of the larger DCP that DWR approved on December 21, 2023, and the Delta Reform Act does not allow certification of bite-sized pieces of an approved project. The Delta Reform Act only allows certification of the entirety of the approved project, i.e., the "whole of the action" that comprises the approved project.

This reason to reject DWR's attempted certification is legally and factually correct because **it is based on the application of the Delta Reform Act <u>as it is currently written</u>**. The reason the Draft Decision's basis for rejecting the attempted certification is wrong is because **it is based on <u>modifying</u> the Delta Reform Act**, in particular, modifying Water Code section 85057.5, something the DSC has no authority to do. Only the Legislature (the body that created the Delta Reform Act) can modify the Delta Reform Act.

There is nothing inherently wrong with the DSC's members or staff, or DWR, or anyone else wanting to modify the Delta Reform Act (or any other law) in various respects. Laws are constantly modified by the Legislature, sometimes for the better, sometimes for the worse. What is unequivocally wrong, is the Draft Decision's modification of the Delta Reform Act outside of the legislative process. Because that is precisely what the Draft Decision has done, the Draft Decision must be rejected and substantially revised to reject DWR's attempted certification based on the Delta Reform Act as it is currently written.

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2. **The Delta Reform Act, <u>As it is Currently Written</u>, Only Allows Certification of "the Whole of the Action" that Comprises the Delta Conveyance Project.**

As SDWA has previously explained in these proceedings, the legal analysis that confirms that the Delta Reform Act, **as it is currently written**, only allows certification of "the whole of the action" that comprises the DCP is as simple and straightforward as it gets. One does not need to be an attorney, a legislator, a seasoned water expert, or any other expert to understand it. That analysis is the following:

(1) Only a "covered action" can be certified as consistent with the Delta Plan. (Wat. Code, § 85225.)

(2) The Legislature defined "covered action" as a "plan, program, or project **as defined pursuant to Section 21065 of the Public Resources Code** . . . ." (Wat. Code, § 85057.5.)

(3) Section 21065 is CEQA's official definition of a project. Section 21065 defines "project" as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . ."

(4) Prior to the creation of the Delta Reform Act in 2009, it was well-established in CEQA's case law and regulations that "project" under Section 21065 means "**the whole of the action**" that may cause direct or indirect physical changes in the environment. (Several case citations confirming the same are set forth below.)

(5) It is a bedrock and fundamental principal of statutory interpretation that "the Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them." (*People v. Overstreet* (1986) 42 Cal.3d 891, 897, with internal quotations omitted.)

(6) Accordingly, when the Legislature stated that a "covered action" is a project "as defined pursuant to Section 21065" (i.e., pursuant to CEQA's official definition of a "project"), the Legislature knew that "project" under section 21065 meant "**the whole of the action**" and, therefore, intended that a "covered action" include "the whole of the action" of the underlying project.

Thus, according to how the Legislature meticulously and purposefully crafted the Delta Reform Act, a "covered action" means "the whole of the action" of the underlying project.

Here, it is undisputed that DWR's "Delta Conveyance Project" ("DCP"), which DWR approved on December 21, 2023, is a "covered action." It is also undisputed that the Geotech Activities are not only a component of that covered action, but they are a "key component and action" of the DCP. (December 21, 2023 Notice of Determination [DCP.A.1.00001.pdf, p. 3].)

Hence, because the Delta Reform Act, **as it is currently written**, only allows certification of covered actions, and because covered actions must include "the whole of the action" that comprises the underlying project, the only certification DWR can obtain pertaining to the DCP is a certification of "the whole of the action" that comprises the DCP, i.e., a certification of the entirety of the DCP, and not merely one or more of its components.

The DSC must, therefore, reject the current Draft Decision and issue a new Draft Decision that rejects DWR's attempted certification of the Geotech Activities on the grounds that DWR has improperly attempted to certify only a bite-sized piece of the DCP (a piece of the pre-construction component of the construction component). That attempt is improper and unlawful because the Delta Reform Act, **as it is currently written**, only allows the certification of "the whole of the action" that comprises the DCP, something DWR undisputedly failed to do.

The analysis is that simple and that straightforward and could and should end here. Nevertheless, the SDWA will press on with further analysis for good measure.

3. **The Draft Decision Improperly <u>Modifies</u> Water Code Section 85057.5 of the Delta Reform Act to Allow Certification of Bite-Sized Pieces of Covered Actions; A Modification that Only the Legislature Can Make.**

As noted above, Water Code section 85057.5, subdivision (a), of the Delta Reform Act, **as it is currently written**, states (with emphasis added):

> "Covered action" means a plan, program, or project **as defined pursuant to Section 21065 of the Public Resources Code** . . . .

As also noted above, it is well-established that decades of CEQA case law, as well as CEQA's regulations, make it crystal clear that Section 21065 defines a "project" as "the whole of the action" that comprises that activity or activities that will impact the environment. As also noted above, it is equally well-established that:

> [T]he Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them.

(*People v. Overstreet* (1986) 42 Cal.3d 891, 897, with internal quotations omitted.)

Rather than accept the foregoing, the Draft Decision, in effect, **modifies** Water Code section 85057.5 to read as follows (with bolded and italicized language added):

> "Covered action" means a plan, program, or project as defined pursuant to Section 21065 of the Public Resources Code ***as that section is literally written and disregarding the decades of judicial interpretations and clarifications of that language since the inception of that language in 1972***.

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Again, while the Legislature most certainly could modify section 85057.5 in such a manner, thus far, it has chosen not to. Neither the DSC's staff nor its members can simply ignore such a bedrock and foundational principle of statutory interpretation as the principle that "the Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them." (*People v. Overstreet* (1986) 42 Cal.3d 891, 897, with internal quotations omitted.) Only the Legislature can override such a well-established and fundamental principle of statutory construction, and here, it chose not to do so.

Notwithstanding the foregoing bedrock and foundational principle of statutory construction and the decades of judicial interpretations and clarifications that a "project" under Section 21065 means "the whole of the action" that comprises the activity or activities that will impact the environment, the Draft Decision states:

> [T]he CEQA concept of "piecemealing" [i.e., the requirement that the project be the "whole of the action"] does not apply to the certification of consistency process and cannot supersede or displace the Council's regulations.

(Draft Decision, p. 16.) This is a shockingly misplaced statement because statutes, such as Water Code section 85057.5 (which imposes "the whole of the action" requirement through its reference to CEQA's section 21065), can absolutely 100% supersede and displace the Council's regulations. Statutes are always, without exception, superior to regulations that implement them; regulations are constrained by and must fall within the scope of the statutes that they implement. In any event, the Council's regulations (just like Water Code section 85057.5) directly and expressly incorporate CEQA's section 21065:

> (k)(1) "Covered action" means a plan, program, or project that meets all of the following criteria . . . (A) **Is a "project," as defined pursuant to section 21065 of the Public Resources Code**; . . .

(Cal. Code Regs., tit. 23, § 5001, emphasis added.)

Here we have both the Legislature through Water Code section 85057.5 and the DSC through its own regulations, directly and expressly incorporating CEQA's "whole of the action" definition of a project into the Delta Reform Act. Hence, for the Draft Decision to assert that "the CEQA concept of 'piecemealing' [i.e., "the whole of the action" requirement] does not apply to the certification of consistency process and cannot supersede or displace the Council's regulations" is simply grossly misplaced and 100% legally and factually incorrect.

4. **The Legislature Would Not Have Specifically and Expressly Incorporated CEQA's "Whole of the Action" Definition of a Project into the Definition of a Covered Action If it Did Not Want to Incorporate it into That Definition.**

According to the Draft Decision, the Legislature did not intend to incorporate CEQA's "whole of the action" definition of a project in Water Code section 85057.5. Instead, it merely intended to incorporate the <u>text</u> of section 21065, but not any of the decades of judicial interpretations and clarifications of that text. In other words, the Draft Decision concludes that

when the Legislature stated in Water Code section 85057.5 that a "covered action" is a "plan, program, or project as defined pursuant to Section 21065," the Legislature merely meant that a plan, program or project is the following:

> an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: . . . .

(Pub. Resources Code, § 21065.)

However, if the Legislature only meant to incorporate the literal language in section 21065, and intended to entirely disregard the decades of judicial interpretation and clarification of that language, then why did the Legislature specifically and expressly state that a covered action is a "plan, program, or project **as defined pursuant to Section 21065**"? In that event, the Legislature could have simply eliminated the specific and express incorporation of section 21065 and, instead, simply stated the following in Water Code section 85057.5, subdivision (a) (with bolded and italicized language added):

> "Covered action" means a plan, program, or project ***~~as defined pursuant to Section 21065 of the Public Resources Code~~ that is an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following:***
> **. . . .**

That fact that the Legislature specifically and expressly incorporated section 21065 means the Legislature specifically and expressly intended to incorporate CEQA's definition of project, i.e., it intended to incorporate section 21065 as it has been judicially interpreted and clarified for decades. There is no other reason why the Legislature would make such a specific and express incorporation rather than simply "cut and paste" the bare language of section 21065 into Water Code section 85057.5. Again, as noted above, "[T]he Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them." (*People v. Overstreet* (1986) 42 Cal.3d 891, 897, with internal quotations omitted.) When the Legislature decided to specifically and expressly incorporate section 21065 into Water Code section 85057.5, it was fully aware of the decades of judicial decisions that had interpreted and clarified that language.

Instead of applying the Delta Reform Act as the Legislature has purposefully and meticulously crafted it, the Draft Decision simply rewrites Water Code section 85057.5 and entirely undermines the Legislature's intent.

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5. **Examples of Decades of Judicial Interpretations and Clarifications that "Project" Under Public Resources Code Section 21065 Means "the Whole of the Action."**

Public Resources Code section 21065, which defines a "project" under CEQA, was adopted in 1972. Soon thereafter, courts interpreted and clarified that a "project" under section 21065 means the "whole of the action." The following are just a few examples:

> "[CEQA's] requirements cannot be avoided by chopping up proposed projects into bite-size pieces which, individually considered, might be found to have no significant effect on the environment or to be only ministerial." (*Plan for Arcadia, Inc. v. City Council of Arcadia* (1974) 42 Cal.App.3d 712, 726.)

> "One final overwhelming consideration . . . is the mandate of CEQA that environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences." (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283–284.)

> "A public agency is not permitted to subdivide a single project into smaller individual sub-projects in order to avoid the responsibility of considering the environmental impact of the project as a whole. 'The requirements of CEQA, "cannot be avoided by chopping up proposed projects into bite-size pieces which, individually considered, might be found to have no significant effect on the environment or to be only ministerial." [Citation.]' [Citation]." (*Orinda Assn v. Board of Supervisors* (1986) 182 Cal.App.3d 1145, 1171.)

> "CEQA broadly defines a 'project' as 'an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . .' (Pub. Resources Code, § 21065.) [¶] The statutory definition is augmented by the Guidelines, which define a 'project' as 'the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment....' (Guidelines, § 15378, subd. (a), italics added; see Remy et al., Guide to the Cal. Environmental Quality Act (CEQA) (10th ed.1999) pp. 75–77 (Remy) ['whole of an action' requirement].)" (*Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1222.)

The Draft Decision's determination that when the Legislature specifically incorporated CEQA's definition of a project in the Delta Reform Act in 2009, the Legislature had no intention of incorporating the decades of judicial interpretation and clarification of that definition is frankly absurd. There is hardly a more well-established and well-known definition in all of CEQA than the definition of a "project." The Legislature specifically chose to incorporate that definition when it specifically and expressly stated in Water Code section 85057.5 that a "covered action" is a "project as defined pursuant to Section 21065 of the Public Resources Code . . . ."

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The DSC has a duty to carry out the Legislature's intent and enforce the Delta Reform Act's statutes as they are currently written. The Draft Decision fails to do that and must, accordingly, be rejected and revised to conform with that intent.

6. **The Draft Decision Allows DWR and Other Project Proponents to Carry Out Components of a Project that Result in Incrementally Significant Adverse Impacts on the Co-Equal Goals or a Specified State-Sponsored Flood Control Program Without Consequence or Accountability.**

The Draft Decision states:

> The Council's regulatory definition of "significant impact," used in the covered action analysis to determine whether there is such an impact to one or more of the coequal goals or a specified state-sponsored flood control program, requires that "the project's incremental effect is considered together with the impacts of other closely related past, present, or reasonably foreseeable future projects." (Cal. Code Regs, tit. 23, § 5001, subd. (jj)). This definition ensures that even if covered activities are phased for certification purposes, they would not evade the Council's "significant impact" threshold. If preliminary planning activities that serve to inform a future project are certified to the Council independently, the "substantial impact" of that activity on the coequal goals or a government-sponsored flood control program must include consideration of the impact of the future project. (Cal. Code Regs, tit. 23, § 5001, subd. (jj).)

(Draft Decision, p. 18.)

The glaring oversight in these statements is that DWR's duty to analyze the Geotech Activities' incremental adverse effects on the co-equal goals or a specified state-sponsored flood control program is non-existent if the Geotech Activities are not a covered action (e.g., because they are not covered by any of the Delta Plan's regulatory policies.) If DWR (and the Council) determine the Geotech Activities, or any other piece of the larger DCP, are not a covered action, then it does not matter if that piece has significant incremental adverse effects on the co-equal goals or a specified state-sponsored flood control program). If the particular piece is not a covered action, then Delta Reform Act as a whole is inapplicable, and the Delta Reform Act will turn a blind eye to such effects, regardless of their significance.

Such would <u>not</u> be the case if the Delta Reform Act is interpreted how the Legislature intended it to be interpreted. If a covered action is defined as the Legislature intended, i.e., it must include "the whole of the action," then here, the <u>entire</u> DCP must be certified because it is undisputed that it is a covered action. Accordingly, <u>all</u> of the activities that comprise the DCP, including the Geotech Activities, must be certified as being consistent with the Delta Plan. In that event, the fact that some or all of the activities will have significant incremental adverse effects on the co-equal goals or a specified state-sponsored flood control program <u>does matter</u>. Those incremental effects will need to be addressed in the certification process and those effects could ultimately lead or contribute to a determination that the entire DCP is not consistent with the Delta Plan.

Accordingly, the Draft Decision is incorrect to the extent it asserts that significant incremental adverse effects will not be evaded if DWR is allowed to chop up the DCP into as many pieces as it likes. To the contrary, such a piecemealed approach will directly allow physical activities to be irreversibly performed even though they have significant incremental adverse effects on the co-equal goals or a specified state-sponsored flood control program.

That is, in fact, precisely what will happen under the Draft Decision. The Draft Decision states:

> [W]hen considered together with the impact of the closely related Delta Conveyance Project, **the Council finds that the Proposed Geotech will have a significant impact on the achievement of one or both of the coequal goals**.

(Draft Decision, p. 21, emphasis added.) Notwithstanding that finding, the Draft Decision nevertheless presumably allows the Geotech Activities to be irreversibly performed even though it found those activities will have significant incremental effects on the co-equal goals. Because the Draft Decision finds that the Geotech Activities are not covered by any Delta Plan regulatory policies, the Draft Decision concludes the Geotech Activities are not a covered action and do not need to be certified. Accordingly, those significant incremental effects are of no consequence. Those activities can be freely performed, and the co-equal goals can be freely impaired, without holding DWR accountable for those effects.

Once again, if the entirety of the DCP must be certified together in the same certification as the Legislature intended, DWR will be held accountable for those significant incremental effects. DWR will be required to address those significant effects in its certification for the DCP as a whole, and DWR will be prohibited from carrying out the activities that will cause those effects until it properly addresses them in the certification process.

Therefore, to the extent the Draft Decision suggests that incremental effects from individual components of a larger project are handled the same under the Draft Decision's piecemealed approach versus the Legislature's intended "whole of the action" approach, the Draft Decision is clearly wrong. The Delta Plan's co-equal goals, which are the very heart of the Delta Reform Act, would be substantially more protected from such effects under the Legislature's intended "whole of the action" approach.

7. **The Draft Decision Fails to Address the Project that DWR Approved on December 21, 2023.**

The Draft Decision's entire discussion fails to discuss and address the project that DWR actually approved in DWR's Notice of Determination that it filed on December 21, 2023, i.e., the "construction, operation, and maintenance" of the DCP. (December 21, 2023 Notice of Determination [DCP.A.1.00001.pdf, p. 3].) That approved project is what defines the "whole of the action" that must be certified, yet the Draft Decision does not appear to even mention the Notice of Determination nor what DWR actually approved. Instead, the Draft Decision frequently makes general statements to the effect that a covered action does not necessarily have to be the entire project that is defined in an EIR or other CEQA document. It is true that an EIR or other CEQA document could include features of a proposed project that are ultimately

rejected by the lead agency and not ultimately approved. That is why it is necessary to focus on what project components discussed in an EIR or other CEQA document were actually approved, something the Draft Decision fails to do.

Here, DWR approved the "construction, operation, and maintenance" of the DCP. (DWR's December 21, 2023 Notice of Determination, DCP.A.1.00001.pdf, p. 3.) Accordingly, "the whole of the action" of that approved project includes everything associated with that construction, operation, and maintenance, including the Geotech Activities, which are merely a small portion of the pre-construction component of the construction component of that approved project. The Draft Decisions' repeated statements that a covered action does not necessarily have to be the project as defined in an EIR or other CEQA document are, therefore, misplaced and miss the mark on what the DSC is required to focus on in this consistency appeal—DWR's approved project, and every piece of that approved project.

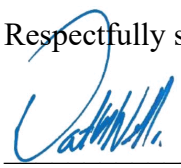
8. **Conclusion.**

For the foregoing reasons, while the Draft Decision correctly rejects DWR's attempted certification of its Geotech Activities, it does so for the wrong reason. The Draft Decision must, therefore, be redrafted to reject that attempted certification on the grounds that under the Delta Reform Act, "the whole of the action" that comprises DWR's approved DCP must be certified together in the same certification before DWR can implement any piece of that project. A simple and straightforward interpretation of Water Code section 85057.5's specific and express incorporation of CEQA's "whole of the action" definition of a project into the definition of a covered action readily compels such a rejection. Here, it is undisputed that DWR failed to certify "the whole of the action" that comprises the DCP.

As explained above, there are also substantial benefits to implementing the Legislature's intended "whole of the action" approach to covered actions, including the protection against, and mitigation of, cumulative adverse impacts from the individual activities that comprise the covered action on the co-equal goals and/or specified state-sponsored flood control programs. Impacts that would otherwise go completely unaddressed and unmitigated in the Draft Decisions' erroneous piecemealed approach.

It is not the DSC's staff's or members' choice whether to carry out the Legislature's intent in the Delta Reform Act; it is their duty to do so. The Draft Decision substantially misconstrues and circumvents that intent. The Draft Decision must, accordingly, be revisited and revised to uphold that intent.

Respectfully submitted,



Dante J. Nomellini, Jr.
Attorney for the
South Delta Water Agency