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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

COUNTY OF SACRAMENTO, a California county, SACRAMENTO COUNTY WATER AGENCY, a California water district, CITY OF STOCKTON, a charter city, SACRAMENTO AREA SEWER DISTRICT, a California public agency, CENTRAL DELTA WATER AGENCY, a California public agency, and COUNTY OF SAN JOAQUIN, a California county, Petitioners and Plaintiffs, v. DELTA STEWARDSHIP COUNCIL, a California state agency, Respondent and Defendant, DOES 1 through 50, Real Parties in Interest.	Case No. 25VVM000030 [Deemed Verified Pursuant to Code Civ. Proc., § 446] **EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** **VOLUME 2 OF 2** (Code Civ. Proc., §§ 525 et seq., 1060, 1085, 1094.5; Wat. Code, § 85000 et seq.; Cal. Const., Art. 1, § 7) *Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief filed concurrently herewith*

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Exhibit H

Department of Water Resources Written Submission in Support of C20242 Cover Sheet

Proposed Covered Action:	2024-2026 Proposed Geotechnical Activities
Certification Number:	C20242
Party Submitting the Document:	Department of Water Resources
Date of Submittal:	December 13, 2024
Document Title:	Department of Water Resources Written Submission in Support of The Delta Conveyance Project: Final Certification of Consistency for 2024-2026 Proposed Geotechnical Activities (C20242)

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Section 1
Introduction

This document is the Department of Water Resources' (DWR) written submission for responding to allegations from the appeals received on DWR's Delta Conveyance Project: Final Certification of Consistency for the 2024–2026 Proposed Geotechnical Activities (Certification). The written submission responses are organized by common themes raised by the four appellants and the Delta Protection Commission's (DPC) comment letter dated 11/27/2024[1] regarding the Certification. The purpose of organizing the responses by theme is to provide a concise and non-redundant written submission, addressing the relevant substantive allegations of appellant's appeals and was informed by the 60-page limit stated in the Delta Stewardship Council's (DSC or Council) Notice of Hearing and Schedule of Written Submissions.

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

> (4) A statement of the factual allegations upon which the appeal is based.
>
> (5) A list of the specific Delta Plan policies that the appellant alleges the proposed covered action is inconsistent with, and for each policy identified, both of the following:
>
> > (A) A concise statement of the authority, evidence, and arguments relied on to support the appellant's claim that the proposed covered action is inconsistent with the Delta Plan policy.
> >
> > (B) How the claimed inconsistency will have a significant adverse impact on one or both of the coequal goals or the implementation of a government-sponsored flood control program to reduce risks to people and property in the Delta.
>
> (Cal. Code Regs., tit. 23, § 5022.)

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

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

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

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

As stated in the DRA:

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

(CA Water Code § 85225.25 (emphasis added))

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

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

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

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

Section 2
Procedural Arguments

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

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

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

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

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

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

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

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

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

> Upon remand, the state or local agency may determine whether to proceed with the covered action. If the agency decides to proceed with the action or with the action as modified to respond to the findings of the council, the agency shall, prior to proceeding with the action, file a revised certification of consistency that addresses each of the findings made by the council and file that revised certification with the council.
>
> (Water Code, § 85225.25.)

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

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

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

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

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

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

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

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

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

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

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

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

The DSC's Covered Action Checklist explains:

> The timing of filing the Certification with the Delta Stewardship Council is project specific but should occur after filing of the Notice of Determination and prior to project implementation. When other permits are required for implementation, project proponents should consult with Council staff on appropriate timing for filing the Certification. Filing a Certification of Consistency prior to finalizing the design and operational elements of the project may result in a proposed covered action that is significantly altered through the [California Environmental Quality Act (CEQA)] or other processes.
>
> (AR DCP.X2.1.00020.pdf, p. 111, emphasis added.)

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

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

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

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

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

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

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

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

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

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

Water Code section 85057.5 provides:

> (a) "Covered action" means a plan, program, or project as defined pursuant to Section 21065 of the Public Resources Code that meets all of the following conditions:
>
> (1) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.
>
> (2) Will be carried out, approved, or funded by the state or a local public agency.
>
> (3) Is covered by one or more provisions of the Delta Plan.
>
> (4) Will have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta.
>
> (Emphasis added.)

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

> [A]n activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following:
>
> (a) An activity directly undertaken by any public agency.
>
> (b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.
>
> (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Even if viewed as a necessary step toward financing a Delta conveyance project, the revenue bond amendment is a distant step toward several other hurdles facing such a project. The history of an additional Delta conveyance, as discussed ante, indicates that such a conveyance lacks certainty and would require an enormous undertaking.
>
> (*PCL*, *supra*, 98 Cal.App.5th at p. 754.)

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

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

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

2.5 DWR's Certification is not inconsistent with the trial court's ruling.[10]

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

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

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

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

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

[10] A1-A-pp. 1-9, A2-A-pp. 1-6, A2-WS-p. 8, A3-A-p. 7, A3-WS-pp. 4-5, A4-A-pp. 5-9.
[11] A3-A-p. 4, A3-WS-p. 13, DPC-Letter 2-pp. 7-9.

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

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

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

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

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

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

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

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

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

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

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

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

> because the 2024-2026 Proposed Geotechnical Activities would have no impact (and therefore would not have the potential to result in a significant impact) on the achievement of one or both of the coequal goals or on the implementation of a government-sponsored flood control program to reduce risks to people, property, and State interests in the Delta, the DRA does not require this certification to . . . include an evaluation of the regulatory Delta Plan policies contained in Article 3 provisions of the DSC's regulations.
>
> (AR DCP.X2.1.00020.pdf, p. 32.)

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

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

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

Section 3
Coequal Goals

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 4
Delta Plan Policy ER P5

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

4.1 The 2024-2026 Proposed Geotechnical Activities do not have a reasonable probability to introduce, or improve the habitat for, nonnative invasive species[14]

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

[14] A2-A-p. 11.

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

Section 5
Delta Plan Policy DP P2

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

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

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

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

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

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

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

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

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

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

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

[17] A3-A-pp. 20-21

of the Certification (October 8th, 2024) the Harvest Water Program was neither fully constructed, nor operational, nor is it described or depicted in Sacramento County's general plan, and therefore any perceived future conflicts with a future land use would not trigger DP P2's requirement to site facilities to avoid or reduce conflicts. Furthermore, the Harvest Water Program construction is scheduled to be completed in 2026, and the system is anticipated to be operational in 2027, after the 2024-2026 Proposed Geotechnical Activities will be completed. Therefore, the 2024-2026 Proposed Geotechnical Activities will not conflict with this future use because the 2024-2026 Proposed Geotechnical Activities are planned to be completed in 2026, before the Harvest Water Program is anticipated to be operational.

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

The memorandum raises biological resource and traffic concerns, but the memorandum does not explain how these concerns result in a land use conflict between the 2024-2026 Proposed Geotechnical Activities and the Harvest Water Program. Thus, the argument is waived. (See *Old East Davis Neighborhood Assn. v. City of Davis* (2021) 73 Cal.App.5th 895, 915. ["'Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived[,]'" quoting *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99].) The concerns are also meritless. The 2024-2026 Proposed Geotechnical Activities CEQA Memo (AR DCP.X2.1.000020.pdf, pp. 151-212) did not identify any potential impacts that would conflict with the activities of the Harvest Water Program. As discussed in Section 6.3 of this written submission, substantial evidence demonstrates that DWR has incorporated measures that are equal or greater than required by Delta Plan Mitigation Measure 4-2 to ensure the geotechnical activities will not result in significant impacts to special status wildlife. Substantial evidence also demonstrates that the 2024-2026 Proposed Geotechnical Activities will not result in a traffic conflict because no public roads, waterways or land access will be closed (AR DCP.X2.1.00020.pdf, p. 228.) and DWR vehicles or equipment shall not unreasonably block access by other vehicles on levee roads or other reclamation district operated roadways. (AR DCP.X2.1.00020.pdf, p. 219.) Furthermore, DWR must comply with EC-18 Minimize Construction-Related Disturbances to Delta Community Events and Festivals to avoid potential conflicts with community events or festivals. (AR DCP.X2.1.00020.pdf, p. 223.) Therefore, while the memorandum is untimely and DWR objects to the extra record evidence, the memorandum does not refute the substantial evidence demonstrating that the 2024-2026 Proposed Geotechnical Activities have been sited to avoid or reduce conflicts with existing uses or

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

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

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

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

5.3 General allegations regarding potential impacts of the 2024-2026 Proposed Geotechnical Activities do not satisfy appellants' burden to establish that substantial evidence does not support DWR's findings under DP P2[18]

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

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

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

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

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

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

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

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

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

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

Section 6
G P1 Mitigation Measures

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

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

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

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

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

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

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

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

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

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

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

[20] A3-A-pp. 11-13, A3-WS-pp. 7-8.

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

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

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

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

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

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

6.3 The 2024-2026 Proposed Geotechnical Activities include mitigation measures that are equal to or more effective than Delta Plan Mitigation Measure 4-2.[21]

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

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

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

As discussed in the Certification, the work area for each individual geotechnical activity is approximately 0.022 acres, or 10 feet by 100 feet, and each investigation would last between one and fourteen days (AR DCP.X2.1.00020.pdf, p. 24.) Therefore, the geographic area and duration of potential impact associated with each geotechnical investigation site is limited in both scope and duration. Furthermore, before any geotechnical activity may proceed, a qualified team of biologists will conduct a habitat assessment and reconnaissance level surveys approximately two weeks prior to the onset of ground disturbing soil investigation activities for any special status plants and wildlife that have the potential to occur within the project area. If, based on the habitat assessment and reconnaissance level surveys, the biologists identify the potential for special status wildlife impacts, the location will be shifted to a suitable location as identified by the qualified team of biologists, which is defined as a location that achieves the following performance standards: (1) is the minimum distance necessary (informed by mitigation measures BIO-2a through BIO-53 from the Delta Conveyance Project EIR),[22] to ensure that no special status plants and wildlife with the potential to occur is disturbed during the work activities, (2) does not increase impacts to other resources to above a level of significance, and (3) the qualified biologist team must determine that commencing activities does not have the possibility to cause unpermitted take under federal or State law. (AR DCP.X2.1.00020.pdf, p. 227.) Therefore, consistent with Delta Plan Mitigation Measure4-2, the 2024-2026 Proposed Geotechnical Activities require that proposed sites for geotechnical activities are relocated to avoid effects on such species.

Moreover, if a suitable location, as defined above, cannot be determined within adjacent areas by the qualified team of biologists, then the soil investigation at that location will not be conducted. (AR DCP.X2.1.00020.pdf, p. 227.) Thus, if through redesigning/locating proposed sites for geotechnical activities, potential for special status wildlife impacts cannot be avoided, then the proposed activity will not move forward. DWR's commitment to abandon sites where potential special status wildlife impacts cannot be avoided exceeds Delta Plan Mitigation Measur4-2's requirement to avoid impacts "to the maximum extent practicable."

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

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

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

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

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

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

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

Section 7
G P1 Best Available Science

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

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

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

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

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

[23] A3-A-pp. 17-20, A3-WS-pp. 8-9.

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

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

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

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

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

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

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

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

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

[25] A1-A-pp. 9-10, A1-WS-pp. 11-12.

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

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

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

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

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

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

[26] A1-A-pp. 10-14

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

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

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

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

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

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

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

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

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

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

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

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

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

[29] A3-A-p. 5, A3-A-pp. 21-22

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

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

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

[30] A4-A-pp. 22-23, A4-WS-p. 5.

Section 9

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

9.1 Introduction

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

9.2 Legal Standards

> The Council's Notice of Hearing And Schedule Of Written Submission ("Notice") states: Except as provided in sections 5026 and 5032, evidence is limited to the record that was before the certifying agency prior to the council's receipt of the certification of consistency.
>
> (Cal. Code Regs., tit. 23, § 5027, subd. (d).)

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

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

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

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

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

9.3 Objections

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

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

Appellants' Proffered Documents	Reasons Document Is Inadmissible
	Agency for Smith Canal Gate Project (*Smith Gate*) (March 21, 2019), p. 6.) § 5027 Objection – Appellants' Proffered Documents Are Irrelevant To The Adequacy Of DWR's Certified Record: DWR also asks the Council to refuse to consider appellants proffered records because those records do not tend to prove or disprove whether DWR's Certification was supported by "substantial evidence" at the time that DWR submitted its consistency certification. (Cal. Code Regs., tit. 23, § 5027, subd. (d); Notice, p. 3; *Cash*, *supra*, 28 Cal.4th at p. 727 ["Only relevant evidence is admissible"]; see also *Malek*, *supra*, 58 Cal.App.5th at p. 825 ["Any matter to be judicially noticed must be relevant to a material issue."].) "Substantial evidence" means "enough relevant information and reasonable inferences so that a fair argument can be made to support [DWR's] conclusions, even though other conclusions may also be reached." (*Smith Gate*, p. 6.) "*If such substantial evidence be found, it is of no consequence that the [decisionmaker] believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.*" (*Antelope Valley Groundwater Cases* (2021) 63 Cal.App.5th 17, 44, original emphasis original.) Here, appellants do not carry their burden to show that their proffered documents tend to prove or disprove whether DWR's record contains "enough relevant evidence to support a fair argument" to support DWR's Certification's conclusions. At most, appellants offer these documents only for the improper purpose of showing that evidence *other* than that in DWR's certified record might cause someone to draw other inferences or to reach other conclusions. Therefore, appellants' proffered documents are irrelevant to this proceeding and appellants' request to supplement the record should be denied. § 5032 Objection – Appellants' Proffered Documents Should Not Be Officially Noticed For Their Truth: Because they are irrelevant to the sole issue before the Council – i.e., whether DWR's Certification is supported by substantial evidence – DWR respectfully requests that the Council deny appellants' requests for official notice of appellants' proffered documents. (See *Mangini v. R.J. Reynolds Tobacco Co*. (1994) 7 Cal.4th 1057, 1064 (*Mangini*) [matter to be judicially noticed must be relevant to a material issue].)

Appellants' Proffered Documents	Reasons Document Is Inadmissible
	If the Council decides to grant appellants' request, however, then DWR asks the Council to follow the well-established rules that govern court declarations – such as appellants' proffered arguments here – and decline to assume that the statements contained in the documents are true. Under California law, a decisionmaker has discretion to notice the existence of court declarations. A decisionmaker should not, however, consider the truth of statements made in those declarations. (See *Mangini*, supra, 7 Cal.4th at pp. 1063-1064; see also *Determination Regarding Appeals of the Certification of Consistency by the California Department of Water Resources for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Program* (*Lookout Slough*) (July 16, 2021), p. B-1, fn. 57.) Furthermore, the Council should deny appellants' requests for official notice of appellants' proffered documents because they consist of disputed facts and opinions. (See *Barri v. Workers' Comp. Appeals Bd.* (2018) 28 Cal.App.5th 428, 459 (*Barri*) ["It is improper to rely on judicially noticed documents to prove disputed facts because judicial notice, by definition, applies solely to undisputed facts."].)
Appeal C20242-A1: Early consultation documents. (See Brief Of Appellants, Appeal C20242-A1; A1-A-pp 2-4.)	§§ 5027, 5026 & 5032 Objection: Appellants' request should be denied because appellants do not carry their burden to prove that any such documents or information are relevant to the only issue in this appeal: "whether [DWR's] Certification is supported by substantial evidence in the certified record." (Notice, p. 3; Cal. Code Regs., tit. 23, § 5027, subd. (d); *Cash*, *supra*, 28 Cal.4th at p. 727 ["Only relevant evidence is admissible"]; see also *Malek*, *supra*, 58 Cal.App.5th at p. 825 ["Any matter to be judicially noticed must be relevant to a material issue."].) As authorized by the Water Code and the Council's Administrative Procedures, DWR did engage in early consultation with the DSC. (See Wat. Code, § 85225.5; see also Delta Plan, Appendix D (amended Feb. 2024), Part I, § 2.) But appellants provide no evidence (much less the requisite "specific evidence") that those consultations produced any documents or information that tend to prove or disprove whether DWR's Certification is supported by "substantial evidence" – i.e., whether DWR's certified record here contains "enough relevant information and reasonable inferences so that a fair argument can be made to support [DWR's] conclusions, even though other conclusions may also be reached." (*Smith Gate*, at p. 6.) Appellants' speculative "concerns" about what "these materials are *likely* to contain" do not satisfy this Council's requirement

Appellants' Proffered Documents	Reasons Document Is Inadmissible
	that record-supplementation requests be supported by "substantial evidence." (See Cal. Code Regs., tit. 23, § 5026, subd. (c); see also Cal. Code Regs., tit. 23, § 5032, subd. (c).) Appellants offer no argument or evidence to explain, furthermore, why "a complete picture of the decision-making process" is relevant to determine whether the Certification which actually is before the Council "is supported by substantial evidence in the certified record." (Notice at p. 3.) § 5032 Objection: Appellants' request should be denied because appellants do not carry their burden to prove that any such documents or information are subject to official notice. (Cal. Code Regs., tit. 23, § 5032, subd. (c).) Appellants offer no argument or evidence – let alone the requisite "specific evidence" – indicating that any early-consultation-related document or information satisfies section 5032's official-notice requirements – i.e., appellants do not carry their burden to prove that any such document or information constitutes "a generally accepted technical or scientific matter within the council's jurisdiction," or a "fact that may be judicially noticed by a court." (Cal. Code Regs., tit. 23, § 5032, subd. (c).) As explained above, furthermore, appellants fail to offer any "specific evidence" satisfying official notice's relevance requirement. (See *Cash*, *supra*, 28 Cal.4th at p. 727 ["Only relevant evidence is admissible"]; see also *Malek*, *supra*, 58 Cal.App.5th at p. 825 ["Any matter to be judicially noticed must be relevant to a material issue."].)
Appeal C20242-A2: Documents 1, 2, 6 (See South Delta Water Agency's Written Submission in Support of its Appeal (C20242-A2), A2-WS-pp. 12-13.)	§ 5026 Objection: Appellant's request should be denied because appellant does not carry its burden to produce "specific evidence that the documents or information requested for admission were part of the record before the certifying agency prior to the date of the council's receipt of the certification." (Cal. Code Regs., tit. 23, § 5026, subd. (c).) Appellant's bare assertion that the "documents are public records available to DWR" is not the "specific evidence" that the Council's regulations require. (*Ibid.*) § 5027 Objection: Appellant's request should be denied because appellant does not carry its burden to prove that any such documents or information are relevant to the question of whether DWR's Certification was supported by "substantial evidence" in the record at the time that DWR submitted its certification. (Cal. Code Regs., tit. 23, § 5027, subd. (d); Notice, p. 3; see also *Cash* and *Malek* citations above.)

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

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

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

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

Appellants' Proffered Documents	Reasons Document Is Inadmissible
	"When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.*" (Original emphasis, quoting *Bowers*, *supra*, 150 Cal.App.3d at pp. 873–874.) § 5032 Objection – Appellants' Proffered Documents Should Not Be Officially Noticed For Their Truth: Because they are irrelevant and improper, DWR respectfully requests that the Council deny appellants' requests for official notice of appellants' proffered document. (See *Mangini*, *supra*, 7 Cal.4th at p. 1064.) If the Council decides to grant appellants' request, however, then DWR asks the Council to follow the well-established rule that a decisionmaker should not rely on statements in such a document to resolve any factual dispute in this matter. (See *Mangini*, *supra*, 7 Cal.4th at pp. 1063-1064; see also *Lookout Slough*, p. B-1, fn. 57; see also *Barri*, *supra*, 28 Cal.App.5th at p. 459 ["It is improper to rely on judicially noticed documents to prove disputed facts because judicial notice, by definition, applies solely to undisputed facts."].)
Appeal C20242-A3: Early Consultation Documents (See Appellants' Written Submission re: C20242-A3; A3-WS-p. 15.)	§§ 5027, 5026 & 5032 Objection: Appellants' request should be denied because appellants do not carry their burden to prove that any such documents or information are relevant to the only issue in this appeal: "whether [DWR's] certification of consistency is supported by substantial evidence in the certified record." (Notice at p. 3; Cal. Code Regs., tit. 23, § 5027, subd. (d); *Cash*, *supra*, 28 Cal.4th at p. 727 ["Only relevant evidence is admissible"]; see also *Malek*, *supra*, 58 Cal.App.5th at p. 825 ["Any matter to be judicially noticed must be relevant to a material issue."].) As authorized by the Water Code and the Council's Administrative Procedures, DWR did engage in early consultation with the DSC. (See Wat. Code § 85225.5; see also Delta Plan, Appendix D (amended Feb. 2024), Part I, § 2.) But appellants provide no evidence (much less the requisite "specific

Appellants' Proffered Documents	Reasons Document Is Inadmissible
	evidence") that those consultations produced any documents or information that tend to prove or disprove whether DWR's Certification is supported by "substantial evidence" – i.e., whether DWR's certified record here contains "enough relevant information and reasonable inferences so that a fair argument can be made to support [DWR's] conclusions, even though other conclusions may also be reached." (*Smith Gate*, at p. 6.) § 5032 Objection: Appellants' request also should be denied because appellants do not carry their burden to prove that any such documents or information are subject to official notice. (Cal. Code Regs., tit. 23, § 5032, subd. (c).) Appellants offer no argument or "specific evidence" indicating that any early-consultation-related document or information satisfies section 5032's official-notice requirements – i.e., appellants do not carry their burden to prove that any such document or information constitutes "a generally accepted technical or scientific matter within the council's jurisdiction," or a "fact that may be judicially noticed by a court." (Cal. Code Regs., tit. 23, § 5032(c).) As explained above, furthermore, appellants fail to offer any "specific evidence" satisfying official notice's relevance requirement. (See *Cash*, *supra*, 28 Cal.4th at p. 727 ["Only relevant evidence is admissible"]; see also *Malek*, *supra*, 58 Cal.App.5th at p. 825 ["Any matter to be judicially noticed must be relevant to a material issue."].)
Appeal C20242-A4: Exhibit SJC-1 (See Appellants' Written Submission, A4-WS-pp. 3-4.)	§ 5026 Objection: Appellants' request should be denied because appellants do not carry their burden to produce "specific evidence that the document or information requested for admission was part of the record before the certifying agency prior to the date of the council's receipt of the certification." (Cal. Code Regs., tit. 23, § 5026, subd. (c).) § 5027 Objection -- Relevance: Appellants' request should be denied because appellants do not carry their burden to prove that any such documents or information are relevant. (Cal. Code Regs., tit. 23, § 5027, subd. (d).) In fact, appellants do not even point to any information in this document that relates directly to DWR's 2024-2026 Proposed Geotechnical Activities. Appellants' vague assertion that some comments in this document relate generally to Delta Conveyance Project as a whole does not satisfy the Council's regulations' requirements for "specific evidence" connecting proffered documents to the certification at issue here. § 5032 Objection: Appellants' request should be denied because appellants do not carry their burden to prove that any such

Appellants' Proffered Documents	Reasons Document Is Inadmissible
	documents or information are subject to official notice. (Cal. Code Regs., tit.23, § 5032, subd. (c).) To the contrary, appellants concede that this document consists of individuals' opinions about facts that are disputed in this appeal. Official notice should not be used to include such opinions in the record. (See *Barri*, *supra*, 28 Cal.App.5th at p. 459 ["It is improper to rely on judicially noticed documents to prove disputed facts because judicial notice, by definition, applies solely to undisputed facts."].) § 5032 Objection – Appellants' Proffered Documents Should Not Be Officially Noticed For Their Truth: Because they are irrelevant and improper, DWR respectfully requests that the Council deny appellants' requests for official notice of appellants' proffered document. (See *Mangini*, *supra*, 7 Cal.4th at p. 1064.) If the Council decides to grant appellants' request, however, then DWR asks the Council to follow the well-established rule that a decisionmaker should not rely on statements made in such a document to resolve factual disputes. (See *Mangini*, *supra*, 7 Cal.4th at pp. 1063-1064; see also *Lookout Slough*, p. B-1, fn. 57; see also *Barri*, *supra*, 28 Cal.App.5th at p. 459 ["It is improper to rely on judicially noticed documents to prove disputed facts because judicial notice, by definition, applies solely to undisputed facts."].)
Appeal C20242-A4: Exhibit SJC-3 (See Appellants' Written Submission, A4-WS-pp. 3-4.)	§ 5027 Objection – Relevance: Because this document did not even exist at the time that DWR submitted its Certification, DWR respectfully requests that the Council exclude it from the record and refuse to consider its contents. Clearly, evidence that was created *after* DWR submitted its certification of consistency cannot tend to prove or disprove whether that certification was supported by substantial evidence at the time that it was submitted. (See Water Code, § 85225.25; see also *Lookout Slough*, p. 12.) § 5032 Objection – Appellants' Arguments Are Not Officially Noticeable Facts: DWR also asks the Council to exclude this document because appellants have not carried their burden to show that this document is a "generally accepted technical matter within the council's jurisdiction" or a "fact that may be judicially noticed by a court." (Cal. Code Regs., tit. 23, § 5032, subd. (c).) To the contrary, this document memorializes arguments by appellants' own engineers, which appellants are submitting to support their own arguments about disputed issues in this

Appellants' Proffered Documents	Reasons Document Is Inadmissible
	appeal. Official notice is intended to establish undisputed facts, not to permit appellants to mischaracterize their own opinions as "evidence" for the purpose of resolving factual disputes (See *Barri*, *supra*, 28 Cal.App.5th at p. 459 ["It is improper to rely on judicially noticed documents to prove disputed facts because judicial notice, by definition, applies solely to undisputed facts."].) At most, appellant's proffered document implies that appellant's engineers might have reached conclusions different from those that are reflected in DWR's Certification. Under the substantial evidence standard, however, it is irrelevant whether someone might disagree with DWR's determinations. The only issue here is "whether the certification of consistency is supported by substantial evidence in the certified record – i.e., whether DWR's certified record contains "enough relevant information and reasonable inferences so that a fair argument can be made to support [DWR's] conclusions, even though other conclusions may also be reached. (See Cal. 21 Code Regs., tit. 14, § 15384.)" (*Smith Gate*, p. 6.) As the Court of Appeal reaffirmed in *Antelope Valley Groundwater Cases* (2021) 63 Cal.App.5th 17, 44: "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.*" (Original emphasis, quoting *Bowers, supra,* 150 Cal.App.3d at pp. 873–874.) § 5032 Objection – Appellants' Proffered Documents Should Not Be Officially Noticed For Their Truth: Because they are irrelevant and improper, DWR respectfully requests that the Council deny appellants' requests for official notice of appellants' proffered document. (See *Mangini*, *supra*, 7 Cal.4th at p. 1064.) If the Council decides to grant appellants' request, however, then DWR asks the Council to follow the well-established rule that a decisionmaker should not rely on statements made in such a document to resolve factual disputes. (See *Mangini*, *supra*, 7

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

Section 10
Request to Supplement the Record

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

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

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

Section 11
Conclusion

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

Exhibit I

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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.

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[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.)

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[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)

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[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

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[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.

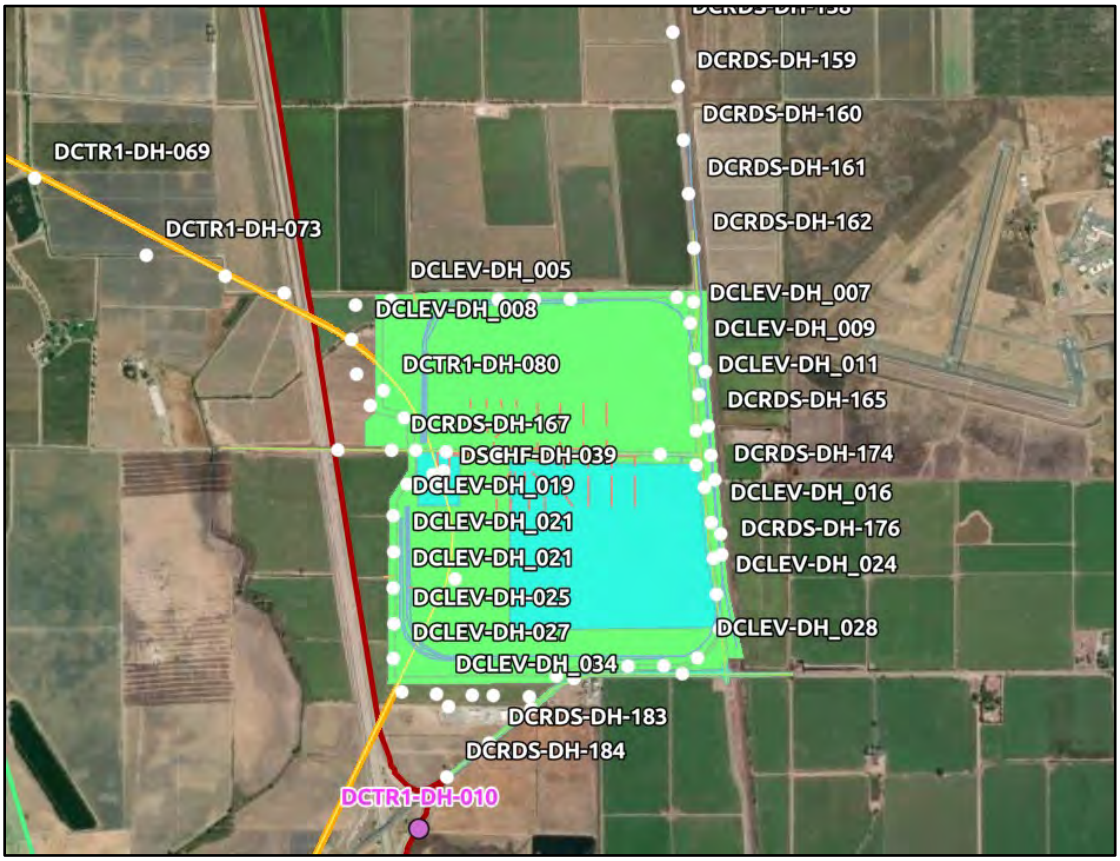
No such agricultural buffers are required in the DCP FEIR mitigation measures, which are listed in brief in Attachment 5 of the Certification, or in the "Additional Compliance Parameters" also included in Attachment 5.

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:

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[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.

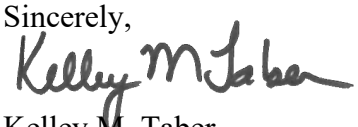
V. Conclusion

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

Court of Appeal, Third Appellate District
Colette M. Bruggman, Clerk
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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.

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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

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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

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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).

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August 29, 2024
(Date)

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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

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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.

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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

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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

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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.

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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.

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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

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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

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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

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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

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

Respectfully submitted,

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August 29, 2024

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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

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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

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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

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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

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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,

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§ 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.*)

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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.)

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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.)

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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

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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.

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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

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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.

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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

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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.

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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.

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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,

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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-

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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

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"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

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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*

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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

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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

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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.

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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

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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

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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

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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.

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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.

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(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

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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.)

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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

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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

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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

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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

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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

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[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"].)

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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

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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

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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,

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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

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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

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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.)

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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.

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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

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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.

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Respectfully submitted,

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L. ELIZABETH SARINE
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Attorneys for Defendant and Appellant California Department of Water Resources

August 29, 2024

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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
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Date: 2024.08.29 14:44:27 -07'00'

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

August 29, 2024

SA2020302290

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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

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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

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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

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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*

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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.*
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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

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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*

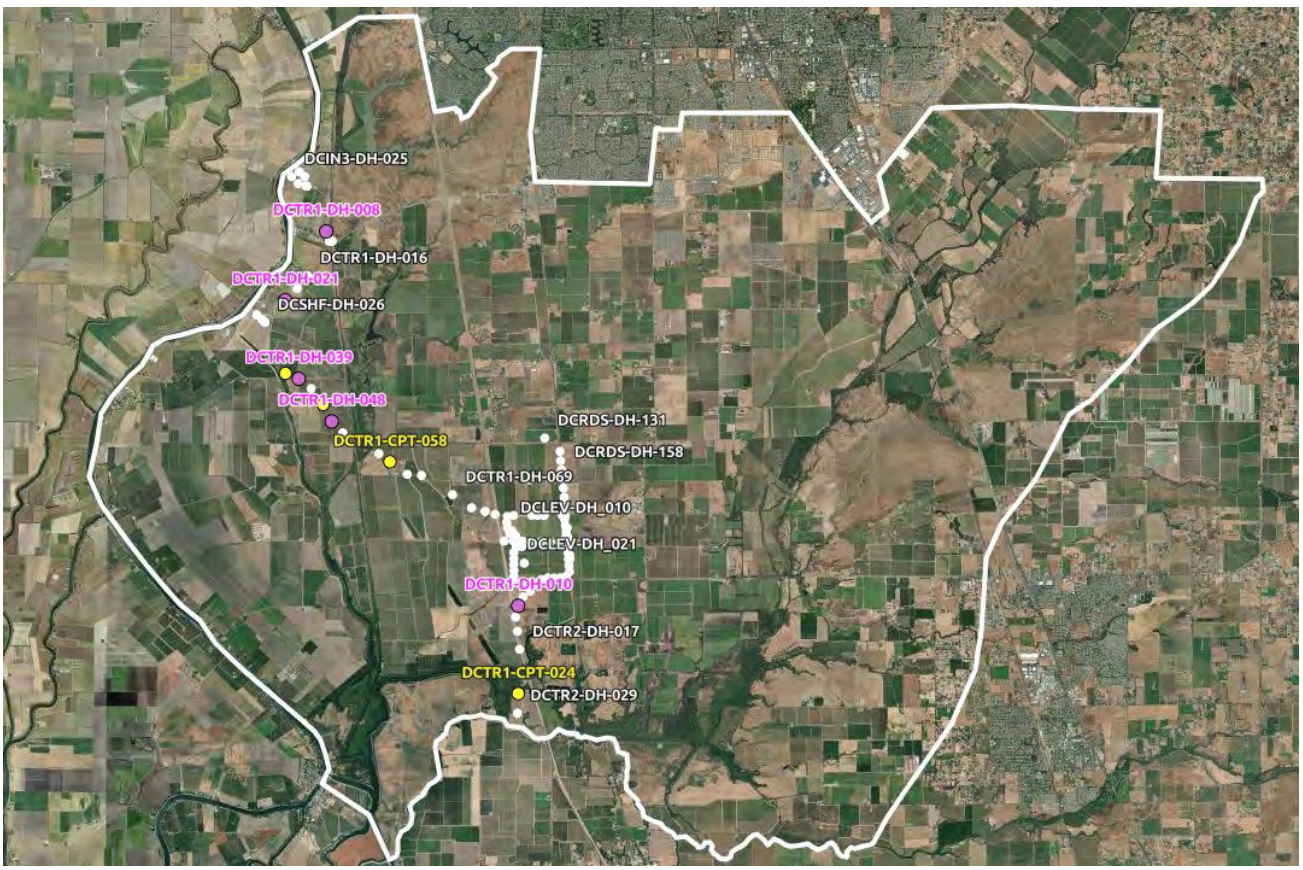


Figure 1. Proposed locations for Delta Conveyance Project preliminary geotechnical activities within the Harvest Water Program Area (white outline), including soil borings (white dots), soil borings with water quality tests (pink dots), and Cone Penetration Tests (yellow dots).

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]

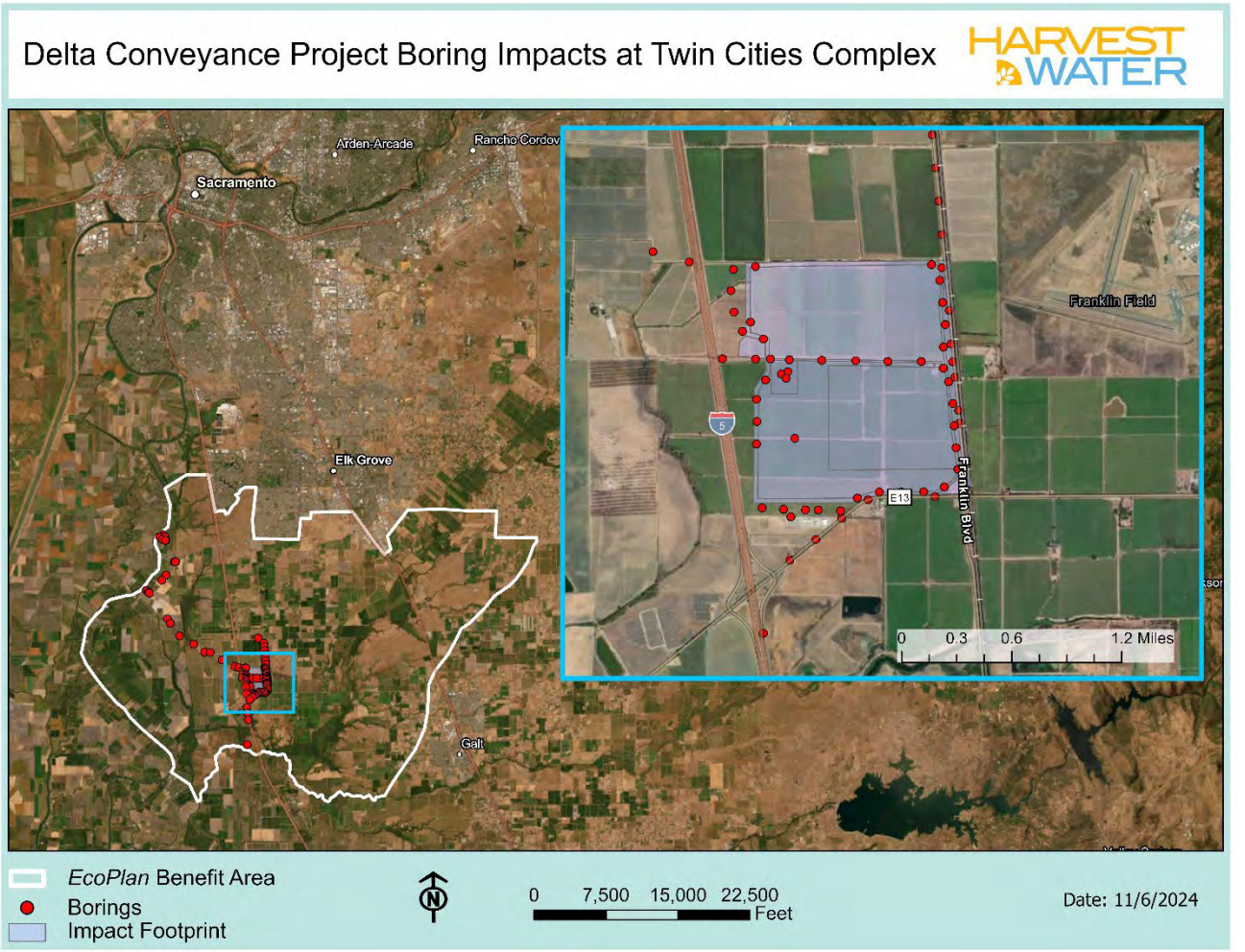


Figure 2. Proposed locations for Delta Conveyance Project preliminary geotechnical activities within the Harvest Water Program Area (white outline) with detail at the Twin Cities Complex location.

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.

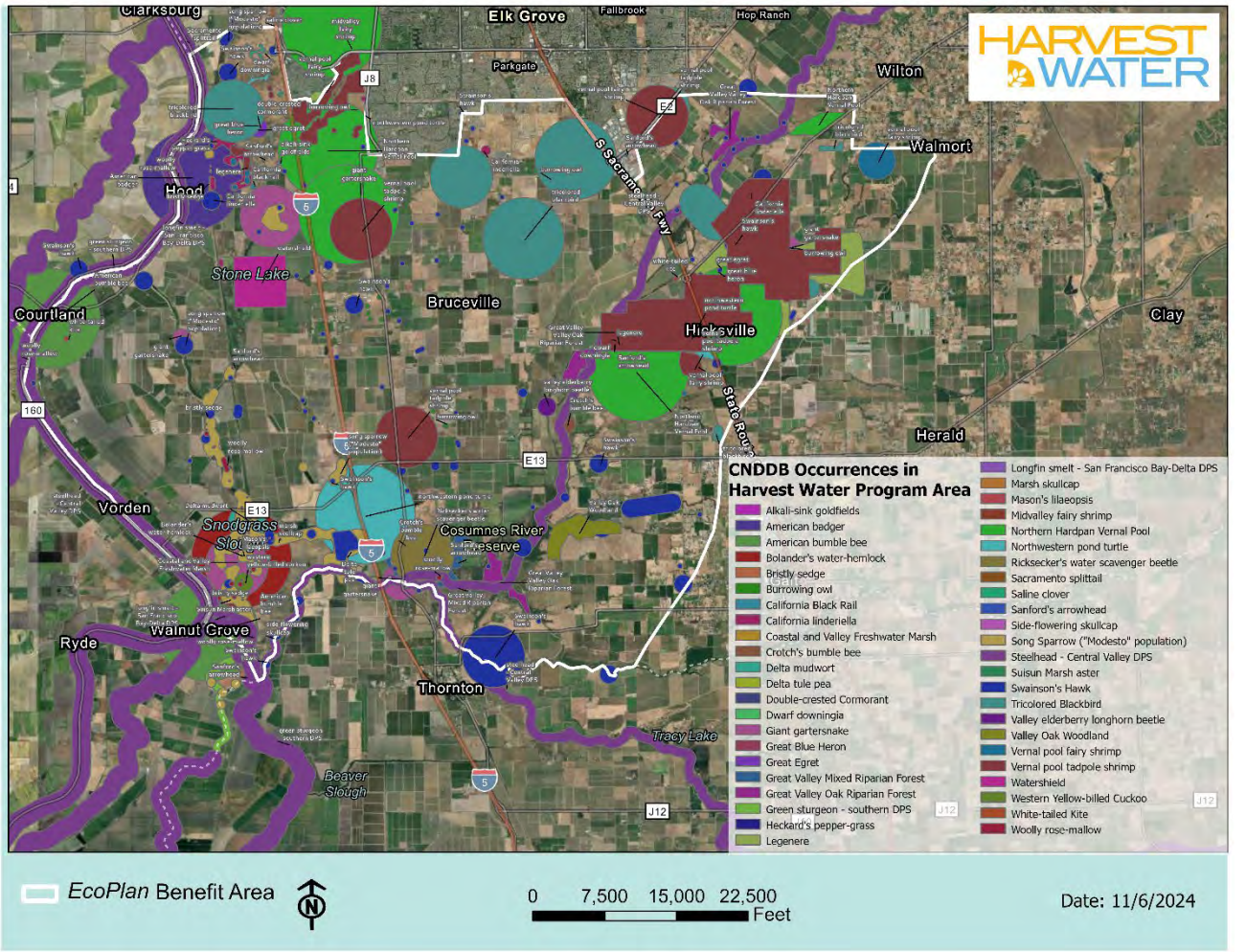


Figure 3. California Natural Diversity Database occurrences for the Harvest Water Program Area and surrounding area.

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."

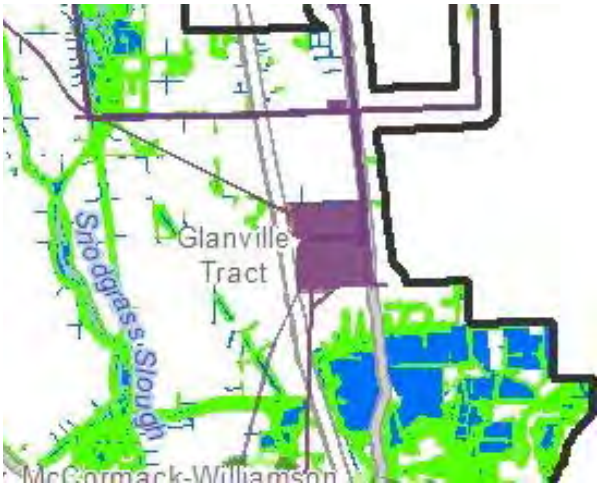
If it does apply, it does not appear to be protective since the 'avoidance window' is admittedly too narrow as identified as "may arrive" and "stay later" provisions. Even within that avoidance window, avoidance is "…determined by the contractor in coordination with project engineers." two parties that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

Exhibit J

Appeal Submitted on Behalf of County of San Joaquin, Central Delta Water Agency, and Local Agencies of the North Delta

Regarding the October 8, 2024 Certification of Consistency (C20242) for the DWR 2024-2026 Proposed Geotechnical Activities for Delta Tunnel

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Primary Contact for Appellants

**DWR 2024-2026 Proposed Geotechnical Activities for Delta Tunnel
Consistency Appeal (Cert. ID: C20242)**
November 7, 2024

Introduction

This appeal is submitted on behalf of the County of San Joaquin ("County"), Central Delta Water Agency ("CDWA"), and Local Agencies of the North Delta ("LAND") (collectively "SJC et al."). The County is a political subdivision of the State of California. Two-thirds of the legal Delta lies within the County, and the Delta comprises over one-third of the County's total area. Approximately 167,000 people live in the San Joaquin County portion of the Delta. CDWA is a political subdivision of the State of California and was created by the California Legislature under the CDWA Act, chapter 1133 of the statutes of 1973 (Wat. Code, Appendix, 117-1.1, et seq.). LAND is a coalition of reclamation districts in the northern Delta. For purposes of this Appeal, these entities are collectively referred to as "SJC et al." The SJC et al. parties were involved in the development of the first Delta Plan in 2013 and the 2018 amendments, as well as the Consistency Appeal process for the Department of Water Resources' ("DWR") Delta Tunnels (a.k.a. "California WaterFix") project in 2018.

The 2009 Delta Reform Act recognizes that the Delta is not a mere conduit in a statewide plumbing system. It aptly describes the Delta as "a critically important natural resource for California and the nation" which "serves Californians concurrently as both the hub of the California water system and the most valuable estuary and wetland ecosystem on the west coast of North and South America." (Wat. Code, § 85002.) The Delta Plan must advance the "coequal goals" (Wat. Code, § 85300, subd. (a)), which means "the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place." (Wat. Code, § 85054.)

No one has a greater stake in the future of the Delta "as an evolving place" than the families, farmers, business owners, workers, and others located in the Delta that the SJC et al. parties represent. The Delta supports a multi-billion-dollar annual agricultural industry, a substantial and growing tourism industry (including agri-tourism), a large and well-established recreational economy, historically significant "legacy" communities, and parks and wildlife preserves that enable residents and others to experience the Delta's unique natural treasures. Over a thousand miles of Delta levees maintained at great expense by reclamation districts protect farms, businesses, and communities from the waters of the Delta. The levee system, transportation and other infrastructure within the

Delta are vital to the local, regional and statewide economies, as well as to the safety and welfare of many thousands of people living in and near the Delta. Beyond statistics and economics—the unique aesthetic, cultural, and environmental characteristics of the Delta are critical to both the current population living and working in the Delta and to future generations of Californians.

According to DWR, this certification of consistency is limited to certain preliminary geotechnical work related to the Delta Conveyance Project's ("Delta Tunnel") planning and design and is not a certification of consistency for the Delta Tunnel (DCP.X2.1.00020 2024, p. 1-1.) But as described in this appeal, because the SJC et al. parties are ground zero for the impacts of the Delta Tunnel, they have reviewed DWR's most recent "Consistency Determination" carefully, with a focus on DWR's claims that the proposed geotechnical activities are consistent with Delta Plan and 2009 Delta Reform Act requirements. Similar to DWR's 2018 Delta Tunnels' Consistency Determination, the geotechnical activities are also seriously deficient in critical areas, including their failure to comply with the requirements of the Delta Plan, the 2009 Delta Reform Act, and the Delta Stewardship Council's ("Council") adopted regulations pertaining to covered actions.

Procedural issues are addressed below, and inconsistency with specific Delta Plan Policies/Regulations are discussed separately.

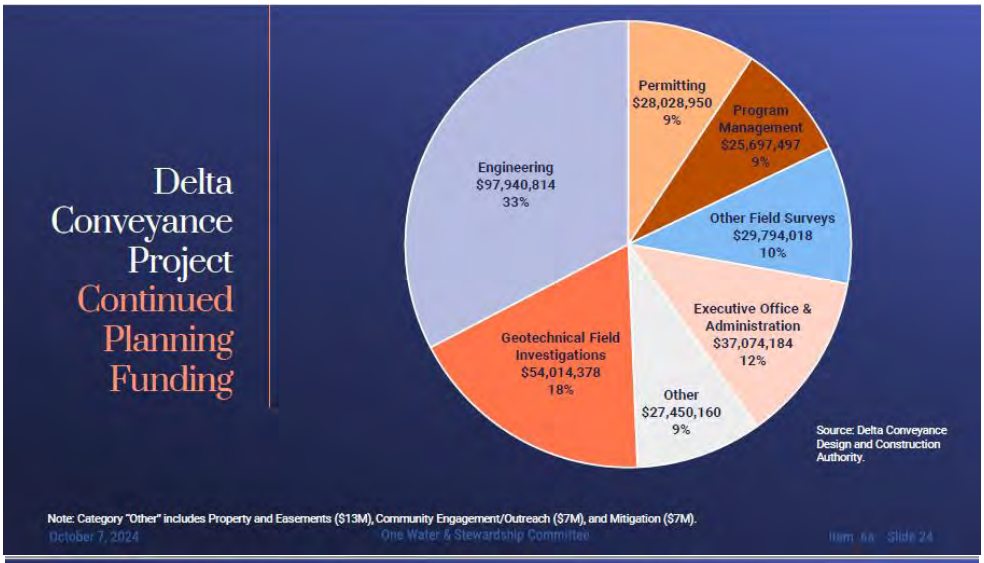
Misleading and Incorrect Information in DWR's Consistency Certification

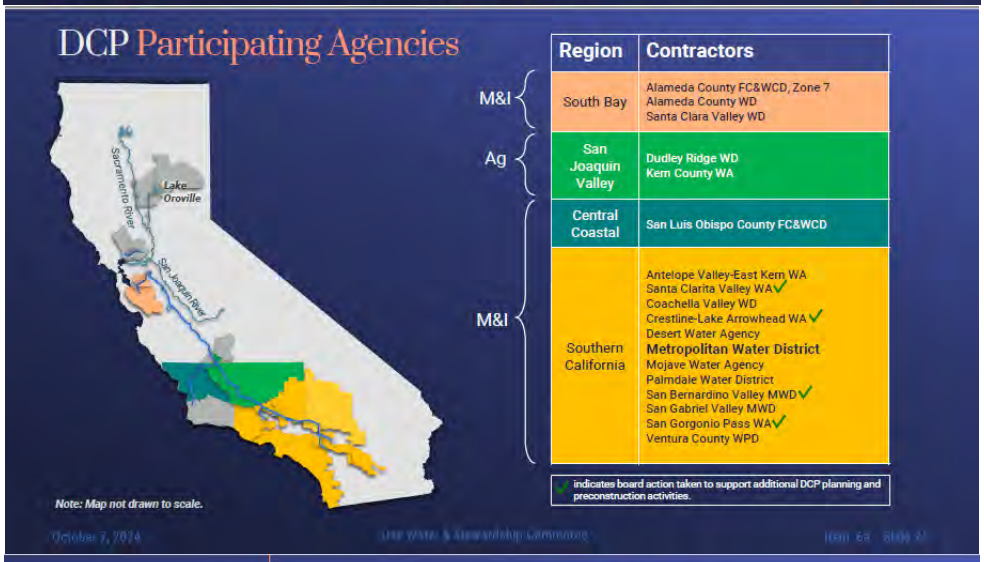
In its Certification, DWR claims that "DWR and participating public water agencies have authorized funding for planning and design of the Delta Conveyance Project." (DCP.X2.1.00020 2024, p. 1-1, fn. 2.) This is incorrect. DWR is currently in the process of obtaining additional funding needed to continue planning for the Delta Tunnel Project. The slides below, for instance, were presented at a Metropolitan Water District ("MWD") One Water Committee meeting on October 7, 2024.[1] These slides show that for planning funds 2026-2027, DWR is currently seeking an *additional* $300 million dollars from Delta Tunnel participating agencies, and about $54 million of which would go toward geotechnical field investigations (slide 24).[2] As of October 7, 2024, only four such agencies had pledged additional planning funds (slide 25).

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[1] Available at: https://mwdh2o.legistar.com/View.ashx?M=F&ID=13349445&GUID=A997325E-6E59-4E4E-92E1-BD31CD990E9C (ppt); https://mwdh2o.granicus.com/player/clip/11105?view_id=12&redirect=true (recording).

[2] DWR estimates that the cost of the work contemplated in the Consistency Certification is $45 million. (DCP.X2.1.00020 2024, p. 3-13.)


Delta Conveyance Project Continued Planning Funding
Permitting $28,028,950 9%
Program Management $25,697,497 9%
Other Field Surveys $29,794,018 10%
Executive Office & Administration $37,074,184 12%
Other $27,450,160 9%
Geotechnical Field Investigations $54,014,378 18%
Engineering $97,940,814 33%
Source: Delta Conveyance Design and Construction Authority.
Note: Category "Other" includes Property and Easements ($13M), Community Engagement/Outreach ($7M), and Mitigation ($7M).
October 7, 2024
One Water & Stewardship Committee


DCP Participating Agencies
Sacramento River
Lake Oroville
San Joaquin River
Note: Map not drawn to scale.
M&I
Ag
M&I
Region
Contractors
South Bay
Alameda County FC&WCD, Zone 7
Alameda County WD
Santa Clara Valley WD
San Joaquin Valley
Dudley Ridge WD
Kern County WA
Central Coastal
San Luis Obispo County FC&WCD
Southern California
Antelope Valley-East Kern WA
Santa Clarita Valley WA ✓
Coachella Valley WD
Crestline-Lake Arrowhead WA ✓
Desert Water Agency
Metropolitan Water District
Mojave Water Agency
Palmdale Water District
San Bernardino Valley MWD ✓
San Gabriel Valley MWD
San Gorgonio Pass WA ✓
Ventura County WPD
✓ indicates board action taken to support additional DCP planning and preconstruction activities.


Permitting, Planning & Litigation Considerations
Full Participation
Close existing funding gap
Pending Litigation
CEQA, Geotech, Bond Validation, etc.
Delta Stewardship Council
Certification of Consistency
Water Rights Permitting
Hearing set to begin in January 2025
Water Boards
October 7, 2024
One Water & Stewardship Committee

Council Lacks Jurisdiction to Consider the Covered Action as Submitted by DWR

DWR is basically submitting this Consistency Certification under protest. "DWR does not understand the 2024–2026 Proposed Geotechnical Activities to constitute 'initiating the implementation of" the Delta Conveyance Project" under Water Code section 85225, and "disagrees with the Superior Court's ruling" on June 20, 2024, which "enjoined DWR 'from undertaking the geotechnical work described in Chapter 3 of the Final EIR,' which includes the 2024–2026 Proposed Geotechnical Activities, 'prior to completion of the certification procedure that the [Delta reform Act requires.'" (DCP.X2.1.00020 2024, p. 2-1 and fn. 7.) In analyzing the potential of the activities to have a significant impact on the coequal goals, DWR states that the activities "will have no impact (and therefore would not have the potential to result in a significant impact) on the achievement of one or both of the coequal goals or on the implementation of any government-sponsored flood control program." (DCP.X2.1.00020 2024, p. 4-4.)

DWR's approach also disregards the applicability of the concept of piecemealing on covered actions, claiming:

> To be clear, this is not "piecemealing" as one might use that term in the context of the California Environmental Quality Act (CEQA) (California Public Resources Code § 21159.27). Regarding thresholds, DWR is unaware of authority to suggest that "piecemealing" concerns apply outside the CEQA context. But even if they did, such concerns are not present here. This is not a situation where DWR seeks to "allow environmental considerations to 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" (*Banning Ranch Conservancy v. City of Newport Beach* [2012] 211 Cal.App.4th 1209, 1222 [internal citations omitted] [*Banning Ranch*]. This certification of consistency in no way diminishes the future review to which the Delta Conveyance Project will be subject; on the contrary, DWR is pursuing this certification of consistency to continue to collect data that may inform a future certification of consistency for the implementation of the Delta Conveyance Project. Indeed, DWR is pursuing this certification of consistency precisely so that a future certification of consistency (for the implementation of the Delta Conveyance Project) will be as thorough and informative as possible. This approach enhances, rather than diminishes, the DSC's and the public's interest in the robust and informed analysis of a proposed action.

(DCP.X2.1.00020 2024, p. 1-2, fn. 4.)

The explanation provided by DWR ignores the fact that the activities for which the Consistency Certification is being submitted is a subset of the overall project DWR defined as a covered action in its Environmental Impact Report ("EIR") for the Delta Tunnel, certified in December 2023.[3] Whether several actions constitute a single project is generally a question of law. (*Tuolomne County Citizens for Respondent Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1223-24.) According to the California Supreme Court: "[A]n EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." (*Laurel Heights Improvement Association v. Regents of the University of California*(1988) 47 Cal.3d 376, 396; see also *County of Ventura v. City of Moorpark* (2018) 24 Cal.App.5th 377, 385 [where two activities are "part of a coordinated endeavor" they may constitute a single project].)

While what constitutes a "reasonably foreseeable consequence" has been described as "murky" (*Banning Ranch*, *supra*, 211 Cal.App.4th at 1222), courts have identified two types of cases where improper piecemealing occurs: (1) "when the purpose of the reviewed project is to be the first step toward future development"; and (2) "when the reviewed project legally compels or practically presumes completion of another action." (*Id*. at 1223.) DWR states that collecting information through the geotechnical investigations will inform a future certification of the Delta Tunnel. (DCP.X2.1.00020 2024, p. 1-2, fn. 4.) But this approach just doubles down on the ultimate purpose of the Geotechnical Activities: to plan the Delta Tunnel.

DWR's claim that piecemealing cannot apply to the Council's consistency review process because that process is not part of CEQA is mistaken. (DCP.X2.1.00020 2024, p. 1-2, fn. 4.) Just as subdividing a large project into parts minimizes environmental impacts, subdivision of a covered action into separate pieces minimizes the effect of the subparts on the achievement of the coequal goals. (See Wat. Code, § 85057.5, subd. (a).) As the Legislature chose, in the Delta Reform Act of 2009, to refer to standards and definitions in CEQA with respect to defining covered actions, it is appropriate to also prohibit piecemealing of covered actions in multiple consistency reviews. Specifically, "Covered actions" include plans, programs, or projects as defined by CEQA. (Wat. Code, § 85057.5, subd. (a); Cal. Code Regs., tit. 23, § 5001, subd. (k); see Pub. Resources Code, § 21065; CEQA Guidelines, § 15378 [defining a 'project' as 'the whole of an

[3] Tellingly DWR's own certification index file naming system labels piece of evidence "DCP", indicating the close relationship between the geotechnical activities and the overall Tunnel Project. (DCP.X2.1.00021, OverallMap.)

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 . . . .") The geotechnical activities should thus be reviewed in one CEQA document (the EIR certified in 2023) and be reviewed as one covered action for purposes of consistency review under Water Code Section 85022.

DWR's Consistency Certification incongruously claims that the geotechnical activities do not implicate *any* of the Council's policies adopted to implement the Delta Plan. (DCP.X2.1.00020 2024, pp. 4-4 to 4-5 [stating that each of the Council's 13 policies "Does not apply"].) At the same time as DWR claims that the geotechnical activities have "no impact" on the achievement of the coequal goals, DWR also purports to consider whether the activities are covered by any of the Delta Plan's regulatory policies. (DCP.X2.1.00020 2024, p. 4-4.) Breaking apart a single covered action into pieces and then claiming that none of the policies apply to the piece under review fails to "facilitate[e] DSC's decision-making process," as claimed by DWR. (DCP.X2.1.00020 2024, pp. 4-4, 4-19.)

DWR's approach also misconstrues the court's order, which required consistency review of the entire covered action defined in the EIR—the Delta Tunnel project. The court held that the Activities are "necessarily part of a 'covered action' within the meaning of [the Act]" and that DWR is "enjoined from undertaking the [Activities] prior to completion of the certification process that the . . . Act requires." (DCP.X2.1.00003, pp. 4, 11.) Here, the court has already ruled that the geotechnical activities and the overall Delta Tunnel project are part of the same covered action and should be reviewed for consistency together. As a result, the Council must reject DWR's attempt to certify consistency with the Delta Plan for only one part of the overall covered action that DWR itself already defined in the 2023 EIR, and that the court has now also affirmed is one covered action.

Evidence Supporting This Appeal

The supporting documents cited herein and uploaded with this appeal were available to DWR prior to DWR's filing of the consistency review, and/or are subject to official notice. (See Cal. Code Regs., tit. 23, § 5026, 5052.) The SJC et al. parties reserve the right to submit additional written factual or evidentiary materials as permitted by the Council's regulations concerning consistency appeals.

Objection to DWR's Continued Planned Ex Parte Communications with the Council

So-called "early consultation" on the Delta Tunnel project has been occurring ever since DWR withdrew its consistency certification for the WaterFix Twin Tunnels project in 2018. The SJC et al. parties disagree that closed meetings between DWR and Council staff in the past six years is early consultation and have a standing objection to these activities outside of the public purview.

Now, in its transmittal letter to the Council, DWR states that in addition to submitting the Consistency Certification for the geotechnical activities, "DWR is also participating in separate early consultation with Council staff on the Delta Conveyance Project." (DCP.X2.1.00022.) The SJC et al. parties strongly object to DWR and Council staff continuing to communicate in violation of the Council's prohibitions on ex parte communications subsequent to the filing of this appeal. (Cal. Code Regs., tit. 23, § 5024, citing Gov. Code, § 11430.10.) An ex parte communication is a "communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication." (*Ibid*.)

DWR's Consistency Certification is clear that the geotechnical activities are "related to the Delta Conveyance Project's planning and design" and that these activities "will ensure that DWR and other agency decisionmakers have sufficient planning and design details to make fully informed permitting and funding decisions necessary before DWR may implement the Delta Conveyance Project." (DCP.X2.1.00020 2024, pp. 1-1, 1-2.) The admittedly close connection between the geotechnical activities and the overall Delta Tunnel project means that it is not possible to continue having "early consultation" on the Delta Tunnel while appeals are pending on the closely related geotechnical activities. To preserve the integrity of the Council's consistency review process, the Council must specify that these secret meetings cannot continue once appeals are filed.

Conclusion

The entire Delta Tunnel project should be reviewed for consistency with the Delta Plan in one certification. Even if reviewed separately, the geotechnical activities are inconsistent with the Council's adopted regulatory policies, including those applicable to the Coequal Goals and Mitigation Measures (G P1) and Respecting Local Land Use (DP

P2). The following sections of this Appeal detail additional specific bases for the inconsistency of the geotechnical activities with the Council's regulatory policies and other applicable requirements. Only by granting this Appeal and remanding the action to DWR, can the Council ensure proper consistency review of the entire Delta Tunnel project.

DWR 2024-2026 Proposed Geotechnical Activities for Delta Tunnel Consistency Appeal (Cert. ID: C20242)
November 7, 2024

The Project Is Not Consistent with the Coequal Goals (G P1; 23 Cal. Code Regs, § 5002)

The Coequal Goals have been described as a "three-legged stool" consisting of a reliable water supply, ecosystem restoration and protecting the Delta as a place.[1] Those goals are all specifically included in the statutory and regulatory definitions of the term. Under the Coequal Goals adopted by the California Legislature in 2009, the basic goals of the state for the Delta are to:

> (a) Achieve the two coequal goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.
> (b) Protect, maintain, and, where possible, enhance and restore the overall quality of the Delta environment, including, but not limited to, agriculture, wildlife habitat, and recreational activities.
> (c) Ensure orderly, balanced conservation and development of Delta land resources.
> (d) Improve flood protection by structural and nonstructural means to ensure an increased level of public health and safety.

(Pub. Resources Code, § 29702; Wat. Code, § 85054, Cal. Code Regs, tit. 23, § 5002, subd. (i).)

DWR's Consistency Certification documents fail to address at least two elements of the coequal goals with respect to the project, as described below.

<u>The Project Does Not Protect, Restore, or Enhance the Delta Ecosystem</u>

DWR's Consistency Certification documents falsely claim that the Geotechnical Activities would have no impact on strategies that protect, restore, or enhance the Delta

[1] See Exhibit SJC-1, Santa Clara Valley Water District BDCP workstudy session, part 3: Russell van Loben Sels gives the in-Delta perspective on the BDCP, Maven's Notebook, Nov. 26, 2024.

ecosystem. (DCP.X2.1.00020 2024, pp. 4-3.) DWR's claim of the project having a "limited scope and impact" is incorrect and lacks substantial evidence support.

The Geotechnical Activities would have a substantial effect on the protection of the Delta ecosystem. (Wat. Code, § 85054.) The proposed Geotechnical Activities include hundreds of investigations that spans the entire eastern and southern Delta, with clusters around the towns of Locke, Hood, and Walnut Grove. (DCP.X2.1.00020 2024, Figure 1. Geotechnical Activities Mapbook, pdf pp. 10-20.) These activities also require heavy equipment, noise, light, and vibration, that would occur over a period of two years in some areas that are mapped connectivity corridors and natural habitat blocks.

DWR claims that "Geotechnical activities will not involve construction, or placement of powerlines, will avoid take of listed species and habitat loss, will not involve surface disturbance that would disrupt terrestrial wildlife connectivity and movement." (DCP.X2.1.00020 2024, pp. 4-24, 4-28, 4-31, and Attachment 4, p. 19.) The FEIR for the Delta Conveyance Project, however, included a detailed appendix for terrestrial wildlife movement. (Appendix 13E; DCP.D1.1.00117.) Figure 13-E2 depicts "Natural Landscape Blocks" and "Essential Connectivity Areas" clustered in the same portion of the Delta where the DWR proposes a vast program of geotechnical work, that will introduce traffic, noise, light, and vibration for extended periods of time. The Consistency Certification documents fail to include this readily available information, and wildlife corridors *are not even mentioned* in DWR's Evaluation of Consistency with Delta Conveyance Project's Final EIR. (DCP.X2.1.00004.pdf.)

DWR's own environmental review documents show that the Geotechnical Activities would have a substantial effect terrestrial wildlife connectivity and movement, and therefore meet the test for a covered action in Water Code Section 85057.5, subdivision (a)(4).

The Project Does Not Protect the Delta as an Evolving Place

As discussed above:

> The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.

(See Pub. Resources Code, § 29702, subd. (a).)

DWR's discussion of the Coequal Goals, however, fails to mention protection and enhancement of "the unique cultural, recreational, natural resource, and agricultural

values of the Delta as an evolving place." (DCP.X2.1.00001.pdf, pp. 4-2 to 4-3.) This omission is critical and telling with respect to DWR's conclusion of the project having no impact on the Coequal Goals. As DWR fails to make a finding with respect to protecting the Delta as a place, its conclusion that the geotechnical activities would have "no impact" on the Coequal Goals is unsupported.

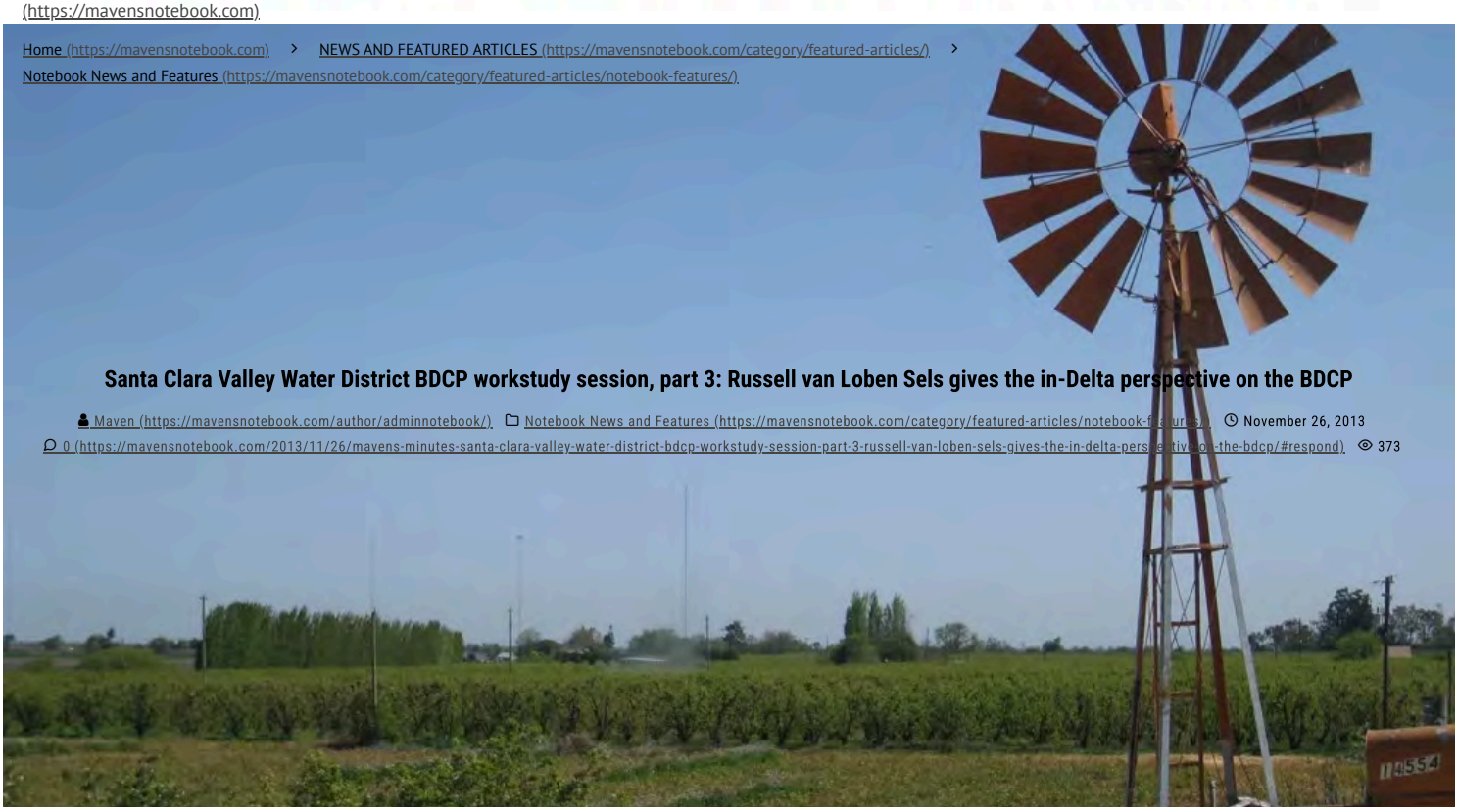
References

Exhibit SJC-1, Santa Clara Valley Water District BDCP workstudy session, part 3: Russell van Loben Sels gives the in-Delta perspective on the BDCP, Maven's Notebook, Nov. 26, 2024

EXHIBIT
SJC-1

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Santa Clara Valley Water District BDCP workstudy session, part 3: Russell van Loben Sels gives the in-Delta perspective on the BDCP

Maven (https://mavensnotebook.com/author/adminnotebook/) Notebook News and Features (https://mavensnotebook.com/category/featured-articles/notebook-features/) November 26, 2013
0 (https://mavensnotebook.com/2013/11/26/mavens-minutes-santa-clara-valley-water-district-bdcp-workstudy-session-part-3-russell-van-loben-sels-gives-the-in-delta-perspective-on-the-bdcp/#respond) 373

What do those that live and farm in the Delta think of the Bay Delta Conservation Plan? Is there a solution for the Delta that the in-Delta interests would support? Russell van Loben Sels, a fourth generation farmer, gives the in-Delta perspective in this last segment of coverage from the Santa Clara Valley Water District's second workstudy session on the BDCP.

Note: Links to all three parts are available at the bottom of this post.



(https://i0.wp.com/mavensnotebook.com/wp-content/uploads/2013/11/Delta-windmill-and-farm.jpg?ssl=1)

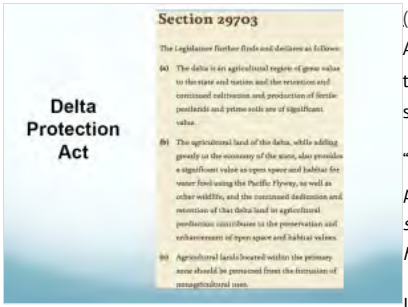
Photo by Maven

Russell van Loben Sels, fourth generation Delta farmer

"*It's interesting to note as we go over time, what it's meant to save the Delta*," began Russell van Loben Sels. "*About four years ago, I tried to read some memoirs that my great grandfather had written in his large script and it was very difficult, but I got through most of it with some help from some professionals. To save the Delta in 1876 would be considered destroying the Delta today. His vision of the Delta was to channelize the rivers, to create farmland, to create a community and use the Delta in that manner. So I don't suggest that that's what we should do today, but it's interesting to me how different today is than it was in 1876.*"

HISTORICAL DEVELOPMENTS

"In the last 20 years, we have worked very hard to save the Delta," he said. "*In 1992, the Delta Preservation Act was passed. It was the first process that I was involved in … the fear at that time was that the Delta was being urbanized.*" He explained that the Act created a primary zone (https://mavensnotebook.com/glossary/delta-primary-zone/) and a secondary zone. The secondary zone is still subject to urbanization, but the primary zone has pretty much been fixed where it was in 1992, 20 years ago; there's been very little development, he said.



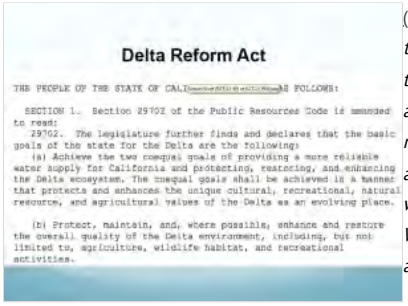
(https://i0.wp.com/mavensnotebook.com/wp-content/uploads/2013/11/Russell-3.jpg?ssl=1)The main focus of the Delta Protection Act was to protect, preserve and enhance the natural resources and all resources, and the cultural and communities in the Delta at the time, he said, pointing out that Section 29703-c of the Act states that 'agricultural lands located within the primary zone should be protected from the intrusion of non-agricultural uses.'

"*The next area that a lot of effort was spent in was the CalFed (https://mavensnotebook.com/glossary/calfed-bay-delta-program/) process, which came to an end basically in 2000 with the Record of Decision*," said Mr. van Lobel Sels. "*I was not involved substantially in that process although I did go to meetings and sound off now and then; but that process ended and much of what happened in CalFed has continued in the BDCP process.*"

In 2007, Governor Schwarzenegger created a Blue Ribbon Task Force to examine the Delta and come up with a vision for the future for the Delta. "*Now things had changed a little bit between 1992 and 2007; there was more of a focus on how the Delta functioned as a water conveyance facility – how the plumbing worked, and so in the Delta Vision process there was a lot more discussion and a lot more examination of the Delta and its many, many roles and the many constituents that depended upon the Delta," he said. "Species became more involved … we became more focused on some different elements of the Delta. Ecosystem restoration and also the Delta's values and uniquenesses were discussed in that process.*"



In 2008, the strategic plan developed from the Delta Vision process articulated 12 goals, said Mr. van Loben Sels. "*The first created the coequal goals (https://mavensnotebook.com/glossary/coequal-goals/) that we have today: reliable water supply and ecosystem restoration. Goal number two recognized the unique values that are in the Delta, including farming, and stated that these values should be preserved in any future Delta. It went on in the narrative of this goal to state that the Delta as a place is a third leg on a three-legged stool, the other two being water supply reliability and ecosystem restoration, and that the stool is the foundation of the entire plan, or the entire vision.*"



(https://i0.wp.com/mavensnotebook.com/wp-content/uploads/2013/11/Russell-8.jpg?ssl=1)"*From Delta Vision, we moved on to the Delta Reform Act*," Mr. van Loben Sels continued. "*In 2009, the Delta Reform Act became law and it attempted to implement the vision. You'll notice in section 129702, it put the coequal goals into law, but it qualified how the coequal goals shall be achieved, it stated 'the coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resources and agricultural values of the Delta as an evolving place.' Section B stated that 'the Act would protect, maintain, and where possible enhance and restore the overall quality of the Delta environment including but not limited to agricultural, wildlife habitat, and recreational activities,' so when we talk about the coequal goals, very frequently, we just talk about two goals. We don't talk about the fact that they shall be achieved in a manner that protects the resources of the Delta to include agriculture.*"

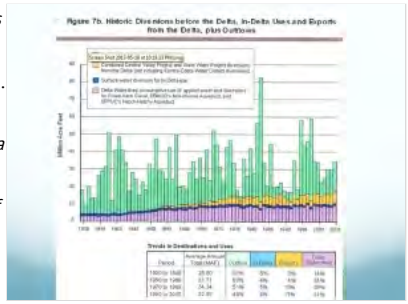
"*The Delta Reform Act did something else*," he added. *"It also stated that in the future, future water supply needs statewide should place less reliance on the Delta.*"

EVALUATION OF THE BAY DELTA CONSERVATION PLAN

"*Now you can imagine what we in the Delta think about BDCP*," said Mr. van Loben Sels. "*The opinion ranges from terrible to very, very, very terrible. But that's BDCP the preferred alternative – the 15,000 cfs tunnels and the 9000 cfs diversions. From the Delta perspective, there are some major flaws in the process. When I say a process flaw, what I mean is if you start off in the wrong direction, you may end up in the wrong direction, so BDCP is directed by a certain set of desires, rules, whatever have you. The goals in BDCP, number 1, do not align with the Delta Reform Act, and that, for me, is the first process flaw. Secondly, there was no analysis to determine the amount of water needed to sustain a healthy Delta and the amount available for export in designing diversions facilities. And the third is limited criteria for selecting alternatives to study.*"

"*If we look at the BDCP process flaw number one, we find that the BDCP conservation plan is driven by two primary goals: Assurances regarding operation of the existing SWP and CVP activities and recovery of the fish*," said Mr. van Loben Sels. "*There's the third item of how you get there in the Delta that is not part of any of the goals of BDCP.*"

(https://i0.wp.com/mavensnotebook.com/wp-content/uploads/2013/11/Russell-14.jpg?ssl=1)"*Flaw number two, there's no analysis to determine how much water is really available to export, and how can you design a facility without knowing how much you can get out of it?*" said Mr. van Loben Sels. He then presented a slide that showed historic diversions from the Delta from 1930 to 2005. "*We've talked about outflow, and this slide really shows what's happened in the last 40-50 years. If you look at the graph on the bottom, the period 1930 – 1949, second column is Delta outflow, 81%. If you look at 1990 – 2005, Delta outflow was 48%. That's a major difference and you can imagine when you take 50% of the water out of any river system, you are going to have some consequences, and that's what we've had in this system. So that's why when I come back to there needs to be an understanding of how much water is really available to export from this system before we start designing facilities to do that job.*"



The third flaw is that there is limited criteria for selection of alternatives. "*It was stated recently in a meeting that if these two criteria are not met, the proposal is not studied: number one, they expect you to pay for it, and number two, they expect the agencies to permit it*," he said. *"I submit that there are some variations of criteria that could be used to determine what a facility would look like that could be supported by a much wider much more robust group of people than just the contractors, so basically what I'm saying to you is we need to look beyond just the contractors paying for conveyance, and I think that there probably are some opportunities there.*"

"*Whether the agencies will permit it or not, that's probably still a very valid criteria, but sometimes you need to really examine things to determine if they can be permitted or not, than just checking it off and saying we're not going to permit that and we're not even going to study to see if we can permit it*," he said, adding that the western Delta conveyance proposal suggested by John Cain was a good example. "*It has some problems with it, but rather than just writing it off as no, that's where Delta smelt live, let's see if we can make it work.*"

The problems with the BDCP project from our perspective are many, he said. "*For one, the amount of water that would be available through this conveyance facility is unknown. I've heard estimates of between 4.3 MAF to 5.8 MAF – that's a very big difference. I think the normal right now is about 5.4 MAF, so you might get a little bit more or you might get a lot less. That's an unknown*."

Another problem is the high cost. "*Costs estimates I've heard range between $25 billion and $50 billion. Again, a pretty big difference and a big unknown*," he said. "*How do you do a cost benefit analysis if you don't know how much water you can get from it and you don't know how much it's going to cost? The cost benefit analysis that I think you're looking at today are nothing more than an exercise of knowing where you want to be and making the assumptions to get there*."

Another unknown is the effect of habitat restoration. "*Habitat restoration may not recover the species, and if they don't recover the species, what happens to the permit?*" he said. "*Other mitigation may not recover species. Is the length of the permit the proper length? As you heard Leo say, maybe 10 years is appropriate or a succession of 10 year periods. And the governing structure, I think we've all thrown darts at the governing structure, and that hopefully has changed in the final document. I'm not sure that the Delta interests will be happy with it. It sure needed a change*."

Those are the problems that the Delta communities see in the BDCP, but the biggest problem is are the negative impacts on the Delta communities, he said. "*The construction impacts are huge. For ten years, between the area of Freeport and Courtland, life will be unbearable. We won't be able to do business, and things will come to an actual halt," he said. "In that area, there are people who are being told that sure, we're going to dewater your area and your wells may not work, but we'll try to get you water somehow. There are 48 negative impacts to the area of the northern Delta that are unmitigated*," he said, citing examples of increased salinity and other water quality issues as some of the 48 negative impacts.

"*Water quality impacts – whenever you take water out of the river, beyond that point flow is going to be less, and so if you take water out of the north, flow to the west through the western tributaries is going to be less, tidal pressure is going to be more coming in the other way, and flow is the hydraulic barrier to the ocean*," he said. "*Flow determines water quality in the Delta. … operations are key, so if you take it out, the hydraulic barrier is reduced and salinity will increase, so the areas where salinity will increase, under the program, are in the western Delta and in the Central Delta. The southern Delta is already pretty well in trouble because only 30% of the San Joaquin River reaches the Delta, and that hardly even has enough pressure to create outflow, it just goes back and forth*."

And finally, the impacts of conversion of agricultural land. "*All of the efforts to save the Delta in the last 20 years have included an effort to maintain agriculture as viable enterprises, and this does not*," he said. "*This has major impacts on agriculture, not only the footprint where the project will be built, but when you start taking out hundreds of thousands of acres for habitat conservation, you restrict other agricultural lands, and you have a major impact on the industry that is the driving force of the economy in the Delta*."

A DELTA SUPPORTED SOLUTION

"*We in the Delta understand*," said Mr. van Loben Sels. "*What's happening today is unsustainable. It's unsustainable for you, it's unsustainable for the fish, and it's unsustainable for us*."

"*It's unsustainable for us because change is going to happen and so we want to be part of that change, we have advocated for change, and we understand that the landscape needs to change*," he said. "*There needs to be more habitat for fish – if we can move fish into the Yolo Bypass away from the Delta exports (https://mavensnotebook.com/glossary/delta-exports/), it takes the pressure off of trying to create a large northern diversion facility*."

"*The way water is moved through the Delta needs to change, we understand that*," he continued. "*We have supported a through Delta facility similar to Corridors, but we're open to discuss other alternatives such as John's – alternatives that help preserve the Delta. We see benefits from through Delta conveyance – these are things that, from our perspective, many of them are going to need to be done anyway, because you are talking about a dual conveyance facility with 51% of the time you're taking water out of the south Delta, you're going to have impacts that are going to have to be mitigated and you're going to have to deal with those. But through-Delta costs less and there's more support*."

Through-Delta conveyance also maintains the common pool concept, he said. "*The common pool concept is basically if we're all taking water out of the same pool, we're all going to work very hard at keeping it at the correct water quality. If the fear with the northern diversion facility site is that if a large amount of water is taken out in the north, then the south has poorer water quality, and so the common pool concept is very important, especially to the central and southern Delta folks*."

Through-Delta conveyance eliminates some of the in-Delta opposition, and it can be accomplished more quickly, he said. "*In addition, it can be accomplished in increments so you can do things and see what happens rather than building a huge facility and saying 'it may work or it may not work*.'"

"*The difficulty I see with building this huge facility is while it's being built, decision tree adaptive management (https://mavensnotebook.com/glossary/adaptive-management/) are going to determine how it's operated and after it's built, operations are still up in the air*," he said. "*As long as the facility is large enough to damage the Delta and the water quality in the Delta, the residents of the Delta will be opposed to it. If we can resolve to get a small facility that physically cannot damage the Delta, then some of the fear is abated*."

"*My hope is that all of us leave a legacy for those who follow in our footsteps that Delta that is responsive to the needs of all of the constituents, and when I say constituents, I don't just mean people*," said Mr. van Loben Sels. "*I mean the critters, the birds, the bees, and us too, and if we work very hard at that, we might end up with something that really works and can be enjoyed by those that follow us*."

Director Kennedy asked if the agricultural interests been heavily involved in the development of the BDCP?

"*Some of the agricultural interests have, but not the Delta agricultural interests*," answered Mr. van Loben Sels. "*The only participant from the Delta was the North Delta Water Agency, and the difficulty with participating in the formation of the BDCP was you had to sign an agreement that you would support the outcome. Well, if you're a very small minority and you see the direction the train is going in and you don't like where it's going to go, you don't want to be in a position that you have to support it*."

Director Kennedy: You talk about the benefits of the through-Delta conveyance. And by through-Delta conveyance, I assume you pretty much mean what we're doing today as far as Delta water flowing through the Delta and pumping from the south.

"*I am the chair of a group called the Delta Caucus which is a group of five county farm bureau organizations that we put together to address many of the different processes that are going on in the Delta, and that's our official position*," Mr. van Loben Sels replied. "*However, I understand the benefits of going beyond that, and the need for perhaps going beyond that, but when we get to 15,000 cfs, 9000 cfs, we're talking about a huge huge project that can ultimately have major negative impacts on the Delta and water quality. We would never support that large a facility; however a smaller facility perhaps, and a smaller facility in conjunction with facilities that, for example, in the western Delta that support the common pool concept, than it becomes even easier to move off of that through-Delta position*."

Director Kennedy asked is there a compromise option … ?

"*The BDCP is perhaps not the end game*," said Mr. van Loben Sels. "*What you've done in BDCP, you've studied, and you've put together a lot of really good information, now we need to employ it to put together the best conveyance alternative that we can, and putting it all in the north is not the best*."

For more information:

- Click here (http://cf.valleywater.org/About_Us/Board_of_directors/Board_meetings/_2013_Published_Meetings/MG52472/AS52485/AI52495/DO52676/1.PDF) to watch the webcast of this meeting.
- Click here (http://cf.valleywater.org/About_Us/Board_of_directors/Board_meetings/_2013_Published_Meetings//MG52472/AS52485/AI52495/DO52678/1.PDF) for Russell van Loben Sels power point.
- Click here (https://mavensnotebook.com/2013/11/25/mavens-minutes-santa-clara-valley-water-district-workstudy-session-dfws-carl-wilcox/) for part 1, Department of Fish and Wildlife's Carl Wilcox.
- Click here (http://wp.me/p2XWwm-2vd) for part 2, American Rivers' John Cain, The Nature Conservancy's Leo Winternitz, and the NDRC's Kate Poole.

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DWR 2024-2026 Proposed Geotechnical Activities for Delta Tunnel Consistency Appeal (Cert. ID: C20242)
November 7, 2024

Introduction

The Delta Plan Programmatic EIR ("PEIR") includes extensive mitigation measures that apply to covered actions through G P1(b)(2) (Cal. Code Regs., tit. 23, § 5002). These mitigation measures are meant to ensure covered actions conform to the Coequal Goals and the Delta Plan. DWR, rather than abide by the Delta Plan PEIR mitigation measures, has failed to integrate these necessary protections into the geotechnical activities.

DWR's Mitigation Measures are Inadequate and are Not Consistent with G P1(b)(2) Requirements

DWR claims that the project does not need to be consistent with G P1(b)(2) in its Certificate of Consistency. (See Certificate, pdf, p. 2; see also DCP.X2.1.00020, pp. 4-19 to 4-21.) Despite the assertion that it does not need to be consistent with G P1(b)(2), DWR provides some narrative for each elements of G P1(b)(2). (DCP.X2.1.00020, pp. 4-22 to 4-68.) However, each narrative finding states that there are no impacts. The findings cite the use of various applicant-developed mitigation measures that are asserted to fully mitigate project impacts. That narrative does not compare how or why those specified substitute measures are equally or more effective than the mitigation measures contained in Delta Plan PEIR Appendix O. Moreover, it does not appear that PEIR Appendix O was even included as a reference document with DWR's Consistency Certification.[1]

Rather than actually show that the project's mitigation measures are as effective or equivalent to the measures in Delta Plan PEIR Appendix O, DWR relies on blanket statements regarding the adequacy of its EIR mitigation measures, failing to demonstrate compliance with G P1(b)(2). DWR's discussion in the "Delta Plan Mitigation Measure Comparison" section of the Certification fails to include a cross-reference table that clearly shows how applicable mitigation measures in the Delta Plan PEIR are being implemented, or how specified substitute measures are equally or more effective.

DWR's Environmental Compliance, Clearance, and Monitoring Plan is also incomplete and fails to support DWR's findings regarding G P1(b)(2).

[1] Available at: https://deltacouncil.ca.gov/pdf/delta-plan/2018-appendix-o-mitigation-monitoring-and-reporting-program.pdf.

(DCP.X2.1.00020, Attachment 5.) The list of mitigation measures and other requirements provided apparently includes measures that DWR has no intention of implementing during the geotechnical activities. (DCP.X2.1.00020, Attachment 5, fn. 5 [explaining that some of the listed mitigation measures are not applicable].) In addition, DWR repeatedly states that key mitigation measures in the Delta Plan are "not applicable". (DCP.X2.1.000202024, 4-50 [SWPPP], 4-56 [Phase I Site Assessment], 4-49 [Noise control Plan].) It is unclear why DWR did not simply provide a list all of the *applicable* mitigation measures necessary to determine consistency with G P1(b)(2).

Conclusion

DWR's approach to the G P1(b)(2) consistency determination is inadequate to support a finding that the mitigation measures that DWR intends to implement are equally or more effective than the applicable portions of the corresponding Delta Plan mitigation measures. (DCP.X2.1.00020, p. 4-20.) Among other flaws, DWR fails to provide a substantive comparative analysis to show compliance with G P1(b)(2). DWR's boilerplate citations to its own mitigation measures (many of which DWR claims do not even apply to the project) fails to support the finding that environmental commitments and mitigation measures in the Delta Tunnel EIR are equally or more effective than the applicable measures identified in the Delta Plan PEIR at reducing impacts on the environment for the geotechnical activities, as required by G P1(b)(2).

DWR 2024-2026 Proposed Geotechnical Activities for Delta Tunnel Consistency Appeal (Cert. ID: C20242)
November 7, 2024

Introduction

DWR's Consistency Certification fails to show that the project would be consistent with DP P2 (Cal. Code Regs., tit. 23, § 5011) and is both procedurally and substantively flawed. The project's disruptive and destructive features indicate it was not developed to avoid conflicts with existing land uses in the Delta.

DP P2 Applies to the Geotechnical Activities

According to DWR, DP P2 "is not applicable to the 2024–2026 Proposed Geotechnical Activities because the proposed action here would only include temporary information collection activities and does not involve the physical placing (siting) of water management facilities, ecosystem restoration, and flood management infrastructure." (DCP.X2.1.00020 2024, pp. 4-12 to 4-13.) To the contrary, the activities would include the placement of permanent components, such as grout for sealing borings. (See, e.g., DCP.X2.1.00020 2024, pp. 3-16 to 3-17, 3-20.) Because the purpose of the geotechnical work is to support water management facilities and will leave permanent facilities on agricultural land, the geotechnical activities are a "water management facility" that would conflict with existing land uses in the Delta.

The Project Is Not Consistent with DP P2

The project would disrupt the Delta for its two (plus) years of activity, and is intended to support the eventual construction of the Delta Tunnel, which would involve over a decade of construction and even more significant changes to local land uses. While DP P2 uses a feasibility qualifier, DWR's Consistency Certification gives little consideration to existing land uses in the Delta. DWR failed to provide relevant information or analysis of the project's impacts on land use. Various impacts of the exploration activity have not been addressed in DWR's consistency review, and DWR has not demonstrated that it has attempted to reduce the disturbance of its activities on existing land uses where feasible.

The project's incompatibility with local land uses and community character would impact various aspects of life for Delta residents and disrupt local land uses, including school related traffic, agricultural equipment transportation, and other local commercial activity. While these activities would purportedly last two years, the reasonably foreseeable later construction phase of the larger Delta Tunnel project would result in

over a decade of relatively continuous construction and disturbance in this rural area served primarily by two-lane roads.

In addition, DWR proposes to enter private property through court-ordered entries if the landowner does not agree to provide DWR with permission to conduct the activities. According to DWR: "Alternatively, where it is not possible to reach an agreement and it is necessary for DWR to enter onto a landowner's property, DWR will file petitions for court-ordered entry. If the court grants the petitions (which would occur after each person who claimed an interest was given a due process opportunity to be heard on all issues), field investigations would occur in a manner consistent with the court's order." (DCP.X2.1.00020 2024, p. 3-15.) Forced entry on private property creates conflicts with existing land uses.

Conflicts with Local Land Uses

Conflicts with Agriculture

DWR fails to address means to reduce conflicts with local agricultural land uses. The Delta Plan PEIR Appendix O identifies specific requirements that are not contemplated in DWR's Consistency Certification. For instance, project proponents should "Design proposed projects to minimize, 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." (Delta Plan PEIR, Appendix O, Mitigation Measure 7-2, pdf p. 15.[1]) Proponents should also "Implement elements of Mitigation Measure 8-1 for temporary construction activities and new facilities that are visible from scenic vistas and designated roads and highways as appropriate. (Delta Plan PEIR, Appendix O, Mitigation Measure 8-2, pdf p. 23.)

Traffic

The geotechnical activities would involve a large number of vehicles over several day periods in the selected locations. (DCP.X2.1.00004, pp. 6-7.) Traffic delays from traffic associated with the investigatory activities may prevent necessary equipment from arriving to farms on time, delaying the entire harvest process. Traffic and road damage from heavy construction equipment also frustrates the "farm-to-market" process; if getting agriculture out of the Delta becomes too time-consuming (and therefore costly), distribution and processing firms will look outside the Delta for business. Increased traffic throughout the Delta would particularly impact the agricultural chain of production

[1] Available at: https://deltacouncil.ca.gov/pdf/delta-plan/2018-appendix-o-mitigation-monitoring-and-reporting-program.pdf.

by disrupting movement of resources, employees, and crops. Delta crops, such as wine grapes and milk have specific delivery windows, and if this window is not met, an entire shipment could be lost.

Similarly, DWR does not identify mitigation measures related to traffic, including the need to develop an emergency response plan; nor a traffic study due to project increases in traffic; or, bike safety as a result of traffic and lane closures. (See Delta Plan PEIR, Appendix O, Mitigation Measure 17-1, pdf p. 65, Mitigation Measure 19-1, pdf p. 57, and Mitigation Measure 19-4 p. 61.) In addition, there is no mention of consultation for emergency routes. (Delta Plan PEIR, Appendix O, Mitigation Measure 19-3, pdf p. 61.)

The Project's failure to reduce conflicts with existing land uses and its impacts on existing Delta infrastructure are further evidenced by over the lack of any details on the traffic management plan. From the disclosed high number of vehicles per site to the expected, undisclosed, likely adverse impacts, including; quantity of trucks versus employee vehicles; the need for turn pockets or temporary traffic signals; seasonal increases in traffic during harvest season; seasonal increases in traffic during hunting season and waterfowl migration season; and the critical need for expedited transport of some harvested produce to the processing facilities. The analysis provided by DWR seems to assume that because the traffic impacts of the geotechnical activities would be less than the overall Delta Tunnel, then there is no conflict with local land uses. This approach fails to support the consistency of the geotechnical activities with DP P2.

Flood Control Facilities and Groundwater Resources

The borings and CPT activities are proposed in areas protected by levees and would in many cases take place on islands or near levees. No analysis is provided by DWR, however, regarding how the sites were selected to reduce conflicts with existing land uses, including these critical flood control facilities. The fact that most borings and CPTs would be within private property, likely in agricultural use, also does not appear to be adequately considered with respect to avoiding conflicts with local land uses,

To address long term risks associated with borings and CPTs placed on local landscapes, DWR refers to sealing borings and CPTs, without consideration of the likely efficacy of those seals. (DCP.X2.1.00005, pp. 7, 14.) As explained in the memorandum prepared by ENGEO (Exhibit SJC-3), DWR's plan to comply with Bulletin 74-90 (SJC-2) for sealing of borings and CPTs does not in itself resolve concerns regarding the risks associated with the widespread placement of borings in the Delta by DWR. When properly implemented, the Bulletin 74-90 standard protects groundwater quality and can

serve to reduce the potential to create detrimental seepage impacts, including impacts through and under levees in the vicinity of the explorations.

As explained by ENGEO,

> Geotechnical activities in the Delta require specific measures to reduce risk associated with mechanical collapse or piping failures of the borehole due to inadequate grouting techniques. The relatively unique geology and history of Delta levees allows them to be considered more as embankments or low-head dams. Additionally, complicating factors potentially present in the Delta can include, for instance, hydraulic head from the adjacent water bodies, localized elevated water tables, complex sand, gravel, and clay lenses as a result of natural overbank deposition, more modern placement of dredged channel materials, and contemporary, geotechnically designed structural improvements.
>
> . . . .
>
> [I]mproper exploration abandonment techniques in the Delta can create detrimental seepage conditions, particularly within, under, and/or adjacent to levees. If the detrimental impact is severe enough, the structural integrity of the levee could be compromised, leading to increased seepage, decreased slope stability, and potentially resulting in levee failure.

(Exhibit SJC-3.)

Unlike other entities that conduct geotechnical explorations with oversight by local county health departments, DWR (as a state agency) does not obtain the authorization of local health departments when conducting borings, and there is no independent oversight to ensure that borings are correctly sealed according to Bulletin 74-90 standards. Anecdotal evidence, and comments on DWR's environmental review for prior geotechnical investigation activities in the Delta (DCP.X1.1.00004, pdf pp. 554-556), suggest that improper or incomplete sealing can potentially lead to reductions in levee performance and other conflicts with existing land uses. Without independent third party permitting and oversight, it is unknown whether DWR's site selection process adequately avoids conflicts with existing land uses. In addition, there is no confirmation that the sealing processes used by DWR and its contractors, who may be unfamiliar with unique Delta geology and hydrology, complies with Bulletin 74-90.

Conclusion

DWR has failed to establish that DP P2 does not apply, or that its geotechnical activities would be consistent with DP P2.

References

Exhibit SJC-2 DWR Bulletin 74-90
Exhibit SJC-3 ENGEO Memorandum, Geotechnical Explorations Sacramento/San Joaquin River Delta: DWR Exploration Abandonment Standards, November 7, 2024

EXHIBIT
SJC-2

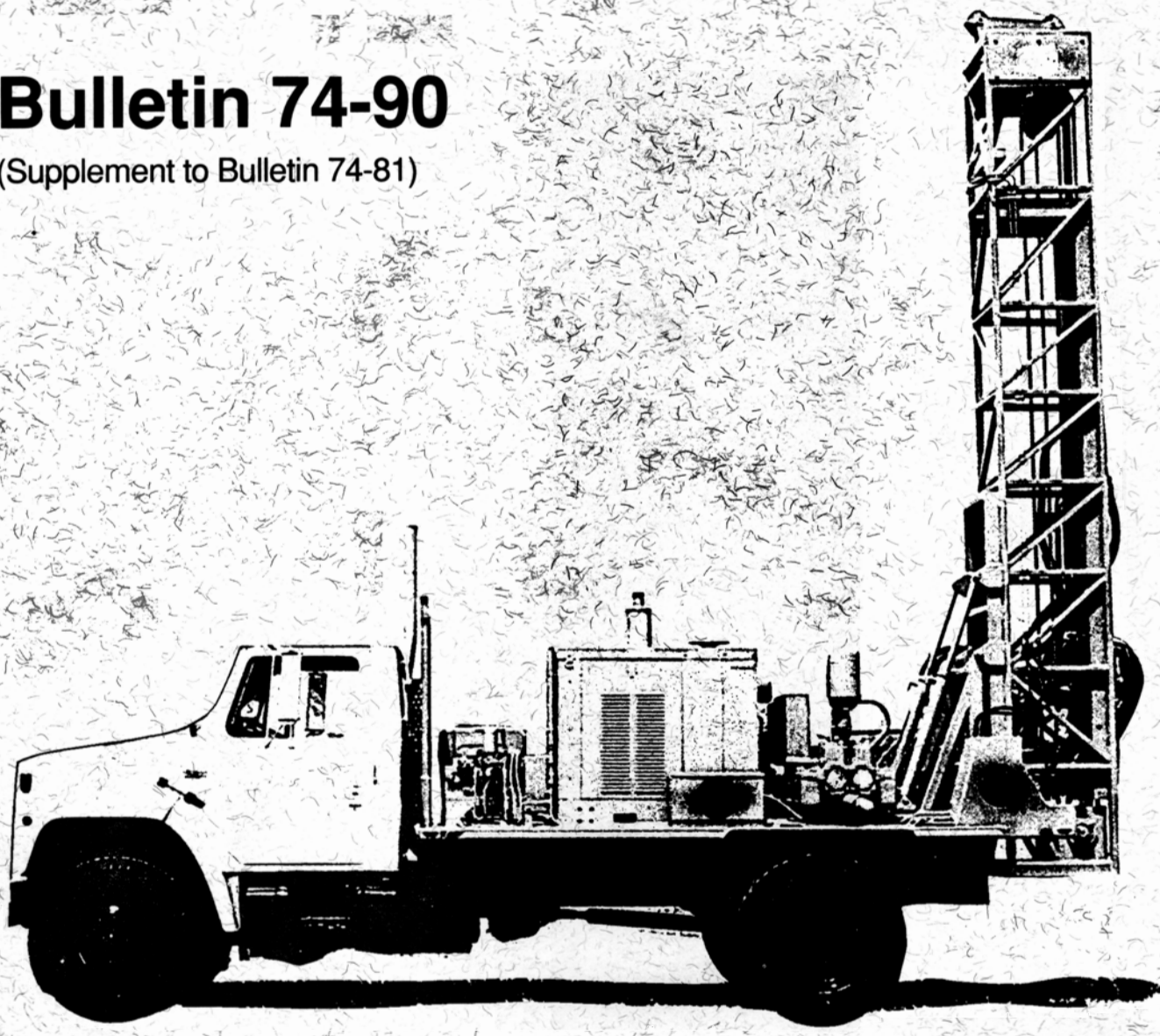
SJC-2

California Well Standards

Water wells • Monitoring wells • Cathodic protection wells

Bulletin 74-90

(Supplement to Bulletin 74-81)



California
Department
of Water Resources
June 1991

This bulletin is available free to all well drillers licensed by the State of California and local agencies that enforce these standards. It is available at a cost of $10 per copy to all others. Make checks payable to Department of Water Resources. California residents add current sales tax.

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Notice

This Bulletin is temporarily considered to be a draft. The California Department of Water Resources plans to adopt this Bulletin as final after a public review and comment period. The Department will announce in the future when this Bulletin is final. The Department will also announce any changes to this Bulletin. Announcement will be made through the Department's well standards mailing list.

This page should be removed from this Bulletin when it is announced that the Bulletin has been approved as final.

SJC-2

California Well Standards

Water wells • Monitoring wells • Cathodic protection wells

Bulletin 74-90

(Supplement to Bulletin 74-81)

David N. Kennedy
Director
Department of Water Resources

Douglas P. Wheeler
Secretary for Resources
The Resources Agency

Pete Wilson
Governor
State of California

California
Department
of Water Resources
June 1991

FOREWORD

During an average year about forty percent of California's water supply comes from ground water. Ground water is used for agricultural, industrial, domestic, and municipal water supplies. Protecting the quality of California's ground water is essential to California's future.

Improperly constructed wells can allow pollution of ground water to the point that the water is either unusable or it requires expensive treatment. The California Water Code requires the Department of Water Resources (DWR) to develop minimum standards for water wells, monitoring wells, and cathodic protection wells to protect ground water quality.

This bulletin is a supplement to DWR Bulletin 74-81, *Water Well Standards: State of California, December 1981*. Standards in Bulletin 74-81 and this bulletin are **minimum** requirements for construction, alteration, maintenance, and destruction of water wells, monitoring wells, and cathodic protection wells in California.

This bulletin was prepared in cooperation with the State Water Resources Control Board. The Board adopted a model water well, monitoring well, and cathodic protection well ordinance that implements DWR well standards. All California cities and counties, and some water agencies are required to enact local well ordinances that meet or exceed DWR standards, or they must enforce the Board's model ordinance as if it were their own.

Sometimes well standards adopted by local agencies must be more stringent than DWR's statewide standards because of local conditions. Local agencies play a critical role in protecting ground water quality.

Continued cooperation is needed between the public, industry, local agencies, and the State to ensure that these well standards remain adequate and are put into practice. California's water supply future depends on this cooperation.

David N. Kennedy, Director
Department of Water Resources

State of California
PETE WILSON, Governor

The Resources Agency
DOUGLAS P. WHEELER, Secretary for Resources

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In Cooperation with the State Water Resources Control Board

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The CALIFORNIA WATER COMMISSION serves as a policy advisory body to the Director of the Department of Water Resources on all California water resource matters. The nine-member citizen commission provides a water resources forum for the people of the State, acts as liaison between the legislative and executive branches of State government, and coordinates federal, State, and local water resources efforts.

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ACKNOWLEDGEMENTS

This bulletin was prepared after consideration of comments and suggestions from public agencies and private parties. State agencies that provided input include:

- State Water Resources Control Board,
- Regional Water Quality Control Boards,
- Department of Health Services, and,
- California Integrated Waste Management Board.

Many comments and suggestions were received from California cities, counties, and water agencies. Private parties that provided input include the California Groundwater Association, individual well contractors, well construction material and equipment suppliers, and consultants. The Department of Water Resources thanks all persons that provided comments during the preparation of this bulletin.

GENERAL INTRODUCTION

GENERAL INTRODUCTION

Improperly constructed, altered, maintained, or destroyed wells are a potential pathway for introducing poor quality water, pollutants, and contaminants to good-quality ground water. The potential for ground water quality degradation increases as the number of wells and borings in an area increases.

Improperly constructed, altered, maintained, or destroyed wells can facilitate ground water quality degradation by allowing:

- Pollutants, contaminants, and water to enter a well bore or casing;
- Poor quality surface and subsurface water, pollutants, and contaminants to move between the casing and borehole wall;
- Poor quality ground water, pollutants, and contaminants to move from one stratum or aquifer to another; and,
- The well bore to be used for illegal waste disposal.

Permanently inactive or "abandoned" wells that have not been properly destroyed pose a serious threat to water quality. They are frequently forgotten and become dilapidated with time, and thus can become conduits for ground water quality degradation. In addition, humans and animals can fall into wells left open at the surface.

History of DWR Standards

The Department of Water Resources has responsibility for developing standards for wells for the protection of water quality under California Water Code Section 231. Water Code Section 231 was enacted in 1949.

Statewide standards for water wells were first formally published in 1968 as DWR Bulletin 74, *Water Well Standards: State of California*. Standards for cathodic protection wells followed in 1973 as Bulletin 74-1, *Cathodic Protection Well Standards: State of California*. Bulletins 74 and 74-1 are now out of print.

A revised edition of Bulletin 74 was published in 1981 as Bulletin 74-81 *Water Well Standards: State of California*. Bulletin 74-81 is enclosed in the back cover of this report.

The law for establishing and implementing well standards was changed significantly in 1986 by Assembly Bill 3127 and Senate Bill 1817 (now Chapters 1152 and 1373, Statutes of 1986). Assembly Bill 3127 (Water Code Section 13801) requires that:

(1) **By September 1, 1989**, the State Water Resources Control Board adopt a model well ordinance implementing DWR standards.

(2) **By January 15, 1990**, all counties and cities, and water agencies where appropriate, adopt a well ordinance that meets or exceeds DWR well standards.

(3) **By February 15, 1990**, the Board's model ordinance is to be enforced by any county, city, or water agency failing to adopt a well ordinance.

Senate Bill 1817 amended the Water Code to specifically include monitoring wells. It was previously assumed that monitoring wells were included in the collective term "well" used in the law.

As a first step in carrying out provisions of the amended law, the State Water Resources Control Board contracted with DWR to:

(1) Review and update water well standards in Bulletin 74-81;

(2) Establish minimum standards for monitoring wells; and,

(3) Update and replace cathodic protection well standards in Bulletin 74-1.

This Bulletin is a supplement to Bulletin 74-81. It was developed to satisfy the Department's contract with SWRCB, to respond to Department responsibilities under the Water Code, and to keep pace with technical advances during the ten-year period following publication of Bulletin 74-81.

An initial draft of this supplement was published in three sections and was sent to interested organizations and individuals for comment during the Fall of 1988. The Department held public hearings in Los Angeles, November 15, 1988 and in Oakland, November 17, 1988 to discuss the draft supplemental standards and receive public comment.

Several sets of written comments for the draft supplemental standards were received by DWR. Written and verbal comments on the standards were reviewed and appropriate changes were incorporated into *Final Draft Bulletin 74-90, California Well Standards; Water Wells, Monitoring Wells, Cathodic Protection Wells; Supplement to Bulletin 74-81*, January 1990.

Final Draft Bulletin 74-90 was published in November 1989 and was sent to interested organizations and individuals for comment. Comments were reviewed and appropriate changes were incorporated into this final bulletin.

Additional discussion on the history of DWR well standards is contained in Bulletin 74-81.

Relationship of DWR Well Standards Publications

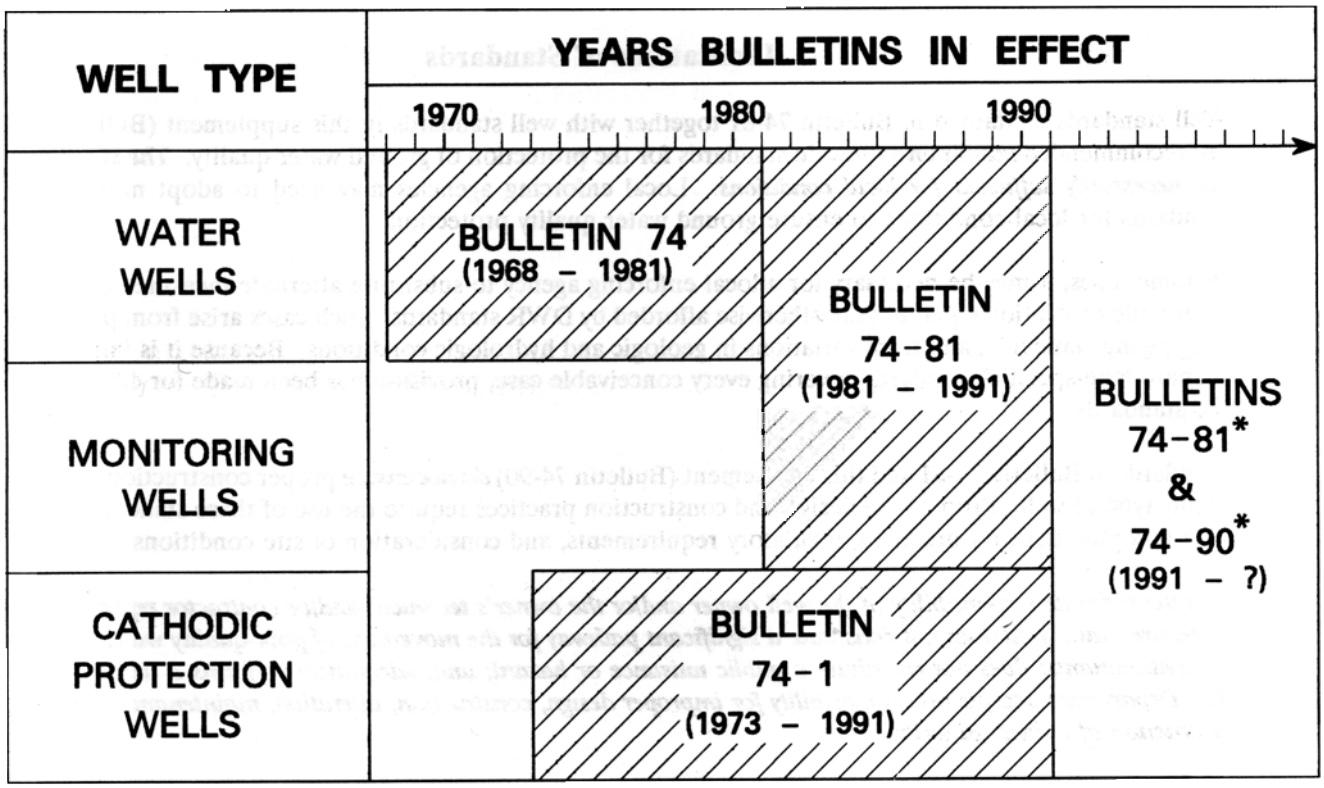
DWR Bulletins 74-81 and 74-1 provided the Department's standards for water wells and cathodic protection wells just prior to this supplement. DWR standards for monitoring wells were generally the same as for water wells prior to this supplement and were included in Bulletin 74-81. The relationship of the various DWR well standards bulletins is illustrated in Figure 1.

Revised standards for water wells in this supplement replace only portions of the water well standards contained in Bulletin 74-81. This supplement is to be used together with Bulletin 74-81 for a complete description of DWR Water Well Standards.

Monitoring well standards are presented separately in this supplement and are in parallel form to the water well standards. Because many physical similarities exist between water wells and monitoring wells, the water well standards are referred to frequently in the monitoring well standards. Water well and monitoring well standards must be considered together for the construction, alteration, maintenance, and destruction of monitoring wells.

Cathodic protection well standards in this supplement replace those in Bulletin 74-1. Because of similarities between cathodic protection wells and water wells, water wells standards are referred to frequently in the cathodic protection well standards. Cathodic protection well standards and water well standards must be considered together for the construction, alteration, maintenance, and destruction of cathodic protection wells.

Figure 1. YEARS DWR WELL STANDARDS BULLETINS IN EFFECT



* Both bulletins are now required for water well, monitoring well, and cathodic protection well standards.

Organization of This Supplement

Standards in this supplement are presented in three parts:

(1) Revisions of some water well standards in Bulletin 74-81.

(2) Standards for monitoring wells.

(3) Updated standards for cathodic protection wells that were originally published in Bulletin 74-1.

Selected technical terms used in this supplement are listed and defined in Appendix A. A list of references is contained in Appendix B.

Limitations of Standards

Well standards contained in Bulletin 74-81 together with well standards in this supplement (Bulletin 74-90) are recommended ***minimum*** statewide standards for the protection of ground water quality. ***The standards are not necessarily sufficient for local conditions.*** Local enforcing agencies may need to adopt more stringent standards for local conditions to ensure ground water quality protection.

In some cases, it may be necessary for a local enforcing agency to substitute alternate measures or standards to provide protection equal to that otherwise afforded by DWR standards. Such cases arise from practicalities in applying standards, and from variations in geologic and hydrologic conditions. Because it is impractical to prepare "site-specific" standards covering every conceivable case, provision has been made for deviation from the standards.

Standards in Bulletin 74-81 and this supplement (Bulletin 74-90) ***do not ensure*** proper construction or function of any type of well. Proper well design and construction practices require the use of these standards together with accepted industry practices, regulatory requirements, and consideration of site conditions.

It is the ultimate responsibility of the well owner and/or the owner's technical and/or contractor representative(s) to ensure that a well does not constitute a significant pathway for the movement of poor-quality water, pollutants, or contaminants; does not constitute a public nuisance or hazard; and, adequately performs a desired function. The Department accepts no responsibility for improper design, construction, alteration, maintenance, function, or destruction of individual wells.

Applicability

Construction standards presented in this supplement apply to all water wells, monitoring wells, and cathodic protection wells constructed after the date of this supplement. Alteration, maintenance, and destruction standards presented in this supplement apply to all water wells, monitoring wells, cathodic protection wells, and "borings" regardless of their original date of construction. Standards contained in Bulletin 74-81 remain in effect except where modified by this supplement (Bulletin 74-90).

WATER WELLS

REVISIONS TO WATER WELL STANDARDS

INTRODUCTION

Revisions to standards in DWR Bulletin 74-81, Chapter II, are presented in this section. All standards in Bulletin 74-81 that are not revised by this supplement (Bulletin 74-90) remain unchanged and in effect. The organization and numbering system used for the revisions is the same as that in Bulletin 74-81.

Table 1, page 10, below, lists portions of Bulletin 74-81 that are replaced by this supplement (Bulletin 74-90). The user of this supplement should strike-out the replaced sections and paragraphs in the copy of Bulletin 74-81 that is enclosed in the back cover of this supplement.

Table 1

Deletions in Bulletin 74-81

Page	Portions of Bulletin 74-81 Replaced by this Supplement, Bulletin 74-90
24	Subsection I
25	Subsections J and L
26	Subsection A of Section 8, and Footnote No. 3
27	Entire Page, Including All Footnotes
29	Entire Page, Including All Footnotes
30	Entire Page, Including All Footnotes
32	Remainder of Item 3
34	Subsection D, and All Footnotes
35	Entire Page, Including All Footnotes
36	Item 2, Item 3, and Item 4
39	Item 5, Subsection B, and All Footnotes
40	Subsection F, and Footnote No. 1
43	Item 3, and Footnote No. 1
44	Remainder of Item 3, and Both Footnotes
45	Item 5, and Item 6, Subsection B, and Both Footnotes
46	Remainder of Subsection B, Section 14
48	Remainder of Section 14
52	Section 21, Footnote No. 2
53	Remainder of Section 21, Item 1
54	Item 1

STANDARDS

Part I. General

Section 1. Definitions.

Definitions A through H, and K (page 23 of Bulletin 74-81) are unchanged. The definition for observation and monitoring wells under Definition I has been deleted and replaced with a definition for "exploration hole." Observation or monitoring wells are now addressed in monitoring well standards in this supplement.

The new definition under Definition I is:

"I. Exploration Hole (or Boring). An uncased, temporary excavation whose purpose is the determination of hydrologic conditions at a site."

Definitions J and L have been revised to read as follows:

"J. Test Wells. Wells constructed to obtain information needed for design of other wells. Test wells should not be confused with "exploration holes", which are temporary. Test wells are cased and can be converted to other uses such as ground water monitoring and, under certain circumstances, to production wells.

L. Enforcing Agency. An agency designated by duly authorized local, regional, or State government to administer and enforce laws or ordinances pertaining to the construction, alteration, maintenance, and destruction of water wells. The California State Department of Health Services or the local health agency is the enforcing agency for community water supply wells."

Sections 2 through 7 (page 25 of Bulletin 74-81) are unchanged.

Part II. Well Construction

Section 8. Well Location With Respect to Pollutants and Contaminants, and Structures.

Note: The title of Section 8 has been revised.

Section 8 (page 26 of Bulletin 74-81) has been revised to read as follows:

"A. Separation. All water wells shall be located an adequate horizontal distance from known or potential sources of pollution and contamination. Such sources include, but are not limited to:

- sanitary, industrial, and storm sewers;
- septic tanks and leachfields;
- sewage and industrial waste ponds;
- barnyard and stable areas;
- feedlots;
- solid waste disposal sites;
- above and below ground tanks and pipelines for storage and conveyance of petroleum products or other chemicals; and,
- storage and preparation areas for pesticides, fertilizers, and other chemicals.

Consideration should also be given to adequate separation from sites or areas with known or suspected soil or water pollution or contamination.

The following horizontal separation distances are generally considered adequate where a significant layer of unsaturated, unconsolidated sediment less permeable than sand is encountered between ground surface and ground water. These distances are based on present knowledge and past experience. Local conditions may require greater separation distances to ensure ground water quality protection.

Potential Pollution or Contamination Source	Minimum Horizontal Separation Distance Between Well and Known or Potential Source
Any sewer line (sanitary, industrial, or storm; main or lateral)	50 feet
Watertight septic tank or subsurface sewage leaching field	100 feet
Cesspool or seepage pit	150 feet
Animal or fowl enclosure	100 feet

If the well is a radial collector well, minimum separation distances shall apply to the furthest extended point of the well.

Many variables are involved in determining the "safe" separation distance between a well and a potential source of pollution or contamination. No set separation distance is adequate and reasonable for all conditions. Determination of the safe separation distance for individual wells requires detailed evaluation of existing and future site conditions.

Where, in the opinion of the enforcing agency adverse conditions exist, the above separation distances shall be increased, or special means of protection, particularly in the construction of the well, shall be provided, such as increasing the length of the annular seal.

Lesser distances than those listed above may be acceptable where physical conditions preclude compliance with the specified minimum separation distances and where special means of protection are provided. Lesser separation distances must be approved by the enforcing agency on a case-by-case basis.

B. Gradients. Where possible, a well shall be located up the ground water gradient from potential sources of pollution or contamination. Locating wells up gradient from pollutant and contaminant sources can provide an extra measure of protection for a well. However, consideration should be given that the gradient near a well can be reversed by pumping, as shown in Figure 3 (page 28 of Bulletin 74-81), or by other influences.

C. Flooding and Drainage. If possible, a well should be located outside areas of flooding. The top of the well casing shall terminate above grade and above known levels of flooding caused by drainage or runoff from surrounding land. For community water supply wells, this level is defined as the:

> "...floodplain of a 100 year flood..." or above "...any recorded high tide...", (Section 64417, *Siting Requirements*, Title 22 of the California Code of Regulations.)

If compliance with the casing height requirement for community water supply wells and other water wells is not practical, the enforcing agency shall require alternate means of protection.

Surface drainage from areas near the well shall be directed away from the well. If necessary, the area around the well shall be built up so that drainage moves away from the well.

D. Accessibility. All wells shall be located an adequate distance from buildings and other structures to allow access for well modification, maintenance, repair, and destruction, unless otherwise approved by the enforcing agency."

Section 9. Sealing the Upper Annular Space.

Note: Sealing requirements are also described in Appendix B, page 67 of Bulletin 74-81.

Section 9 (page 29 of Bulletin 74-81) has been revised to read as follows:

"The space between the well casing and the wall of the drilled hole, often referred to as the annular space, shall be effectively sealed to prevent it from being a preferential pathway for movement of poor-quality water, pollutants, or contaminants. In some cases, secondary purposes of an annular seal are to protect casing against corrosion or degradation, ensure the structural integrity of the casing, and stabilize the borehole wall.

A. Minimum Depth of Annular Surface Seal. The annular surface seal for various types of water wells shall extend from ground surface to the following minimum depths:

Well Type	Minimum Depth Seal Must Extend Below Ground Surface
Community Water Supply	50 feet
Industrial	50 feet
Individual Domestic	20 feet
Agricultural	20 feet
Air-Conditioning	20 feet
All Other Types	20 feet

1. Shallow ground water. Exceptions to minimum seal depths can be made for shallow wells at the approval of the enforcing agency, where the water to be produced is at a depth less than 20 feet. In no case shall an annular seal extend to a total depth less than 10 feet below land surface. The annular seal shall be no less than 10 feet in length.

   Caution shall be given to locating a well with a 'reduced' annular seal with respect to sources of pollution or contamination. Such precautions include horizontal separation distances greater than those listed in Section 8, page 12, above.

2. Encroachment on known or potential sources of pollution or contamination. When, at the approval of the enforcing agency, a water well is to be located closer to a source of pollution or contamination than allowed by Section 8, page 12, above, the annular space shall be sealed from ground surface to the first impervious stratum, if possible. The annular seal for all such wells shall extend to a minimum depth of 50 feet.

3. Areas of freezing. The top of an annular surface seal may be below ground surface in areas where freezing is likely, but in no case more than 4 feet below ground surface. 'Freezing' areas are those where the mean length of the freeze-free period described by the National Weather Service is less than 100 days. In other words, 'freezing' areas are where temperatures at or below 32 degrees Fahrenheit are likely to occur on any day during a period of 265 or more days each year. In general, these areas include:

   portions of Modoc, Lassen, and Siskiyou Counties;

   - portions of the North Lahontan area including the eastern slope of the Sierra Nevada and related valleys north of Mount Whitney and Mono Lake; and,

   - the area of Lake Arrowhead in the San Bernardino Mountains.

4. Vaults. At the approval of the enforcing agency, the top of an annular surface seal and well casing can be below ground surface where traffic or other conditions require, if the seal and casing extend to a watertight and structurally sound subsurface vault, or equivalent feature. In no case shall the top of the annular surface seal be more

than 4 feet below ground surface. The vault shall extend from the top of the annular seal to at least ground surface.

The use of subsurface vaults to house the top of water wells below ground surface is rare and is discouraged due to susceptibility to the entrance of surface water, pollutants, and contaminants. Where appropriate, pitless adapters should be used in place of vaults.

B. Sealing Conditions. The following requirements are to be observed for sealing the annular space.

1. Wells drilled in unconsolidated, caving material. An 'oversized' hole, at least 4 inches greater in diameter than the outside diameter of the well casing, shall be drilled and a conductor casing temporarily installed to at least the minimum depth of annular seal specified in Subsection A, page 14, above. Permanent conductor casing may be used if it is installed in accordance with Item 3, page 16, below, and Item 5 (page 32 of Bulletin 74-81) and if it extends at least to the depth specified in Subsection A, above. One purpose of conductor casing is to hold the annular space open during well drilling and during the placement of the well casing and annular seal.

Temporary conductor casing shall be withdrawn as sealing material is placed between the well casing and borehole wall, as shown in Figure 4A (page 31 of Bulletin 74-81). Sealing material shall be placed at least within the interval specified in Subsection A, above. The sealing material shall be kept at a sufficient height above the bottom of the temporary conductor casing as it is withdrawn to prevent caving of the borehole wall.

Temporary conductor casing may be left in place in the borehole after the placement of the annular seal only if it is impossible to remove because of unforeseen conditions and not because of inadequate drilling equipment, or if its removal will seriously jeopardize the integrity of the well and the integrity of subsurface barriers to pollutant or contaminant movement. Temporary conductor casing may be left in place only at the approval of the enforcing agency on a case-by-case basis.

Every effort shall be made to place sealing material between the outside of temporary conductor casing that cannot be removed and the borehole wall to fill any possible gaps or voids between the conductor casing and the borehole wall. At least two inches of sealing material shall be maintained between the conductor casing and well casing. At a minimum, sealing material shall extend through intervals specified in Subsection A, above.

Sealing material can often be placed between temporary conductor casing that cannot be removed and the borehole wall by means of pressure grouting techniques, as described below and in Appendix B (page 67 of Bulletin 74-81). Other means of placing sealing material between the conductor casing and the borehole wall can be used, at the approval of the enforcing agency.

Pressure grouting shall be accomplished by perforating temporary conductor casing that cannot be removed, in place. The perforations are to provide passages for sealing material to pass through the conductor casing to fill any spaces and voids between the casing and borehole wall. Casing perforations shall be a suitable size and density to allow the passage of sealing materials through the casing and the proper distribution

of sealing material in spaces between the casing and borehole wall. At a minimum, the perforations shall extend through the intervals specified in Subsection A, above, unless otherwise approved by the enforcing agency.

Temporary conductor casing that must be left in place shall be perforated immediately before sealing operations begin to prevent drilling or well construction operations from clogging casing perforations. Once the casing has been adequately perforated, sealing material shall be placed inside the conductor casing and subjected to sufficient pressure to cause the sealing material to pass through the conductor casing perforations and completely fill any spaces or voids between the casing and borehole wall, at least within the intervals specified in Subsection A, above. Sealing material shall consist of neat cement, or bentonite prepared from powdered bentonite and water, unless otherwise approved by the enforcing agency.

Sealing material must also fill the annular space between the conductor casing and the well casing within required sealing intervals.

2. Wells drilled in unconsolidated material with significant clay layers. An 'oversized' hole, at least 4 inches greater in diameter than the outside diameter of the well casing, shall be drilled to at least the depth specified in Subsection A, page 14, above, and the annular space between the borehole wall and the well casing filled with sealing material in accordance with Subsection A, above (see Figure 4B, page 31 of Bulletin 74-81). If a significant layer of clay or clay-rich deposits of low permeability is encountered within 5 feet of the minimum seal depth prescribed in Subsection A, above, the annular seal shall be extended at least 5 feet into the clay layer. Thus, the depth of seal could be required to be extended as much as another 10 feet. If the clay layer is less than 5 feet in total thickness, the seal shall extend through its entire thickness.

   If caving material is present within the interval specified in Subsection A, a temporary conductor casing shall be installed to hold the borehole open during well drilling and placement of the casing and annular seal, in accordance with the requirements of Item 1, page 15, above. Permanent conductor casing may be used if it is installed in accordance with Item 3, below and Item 5 (page 32 of Bulletin 74-81) and it extends to at least the depth specified in Subsection A, above.

3. Wells drilled in soft consolidated formations (extensive clays, sandstones, etc.). An 'oversized' hole, at least 4 inches greater in diameter than the outside diameter of the well casing, shall be drilled to at least the depth specified in Subsection A, page 14, above. The space between the well casing and the borehole shall be filled with sealing material to at least the depth specified in Subsection A, above, as shown by Figure 4C (page 31 of Bulletin 74-81).

   If a permanent conductor casing is to be installed to facilitate the construction of the well, an oversized hole, at least 4 inches greater in diameter than the outside surface of the permanent conductor casing, shall be drilled to the bottom of the conductor casing or to at least the depth specified in Subsection A, above, and the annular space between the conductor casing and the borehole wall filled with sealing material. In some cases, such as in cable tool drilling, it may be necessary to extend permanent conductor casing beyond the depth of the required depth of the annular surface seal in order to maintain the borehole. Sealing material is not required between conductor

casing and the borehole wall other than the depths specified in Subsection A, above, and Section 13, below (page 46 of Bulletin 74-81)."

Items 4 through 7 (page 32 of Bulletin 74-81) are unchanged. Item 8 has been added, as follows:

"8. Wells that penetrate zones containing poor-quality water, pollutants, or contaminants. If geologic units or fill known or suspected to contain poor-quality water, pollutants, or contaminants are penetrated during drilling, and, the possibility exists that poor-quality water, pollutants, or contaminants could move through the borehole during drilling and well construction operations and significantly degrade ground water quality in other units before sealing material can be installed, then precautions shall be taken to seal off or 'isolate' zones containing poor-quality water, pollutants, and contaminants during drilling and well construction operations. Special precautions could include the use of temporary or permanent conductor casing, borehole liners, and specialized drilling equipment. The use of conductor casing is described in Item 1, page 15, above."

Subsection C (page 34 of Bulletin 74-81) is unchanged. Subsections D, E, and F (page 34 of Bulletin 74-81) have been changed to read as follows:

"D. Sealing Material. Sealing material shall consist of neat cement, sand cement, concrete, or bentonite. Cuttings from drilling, or drilling mud, shall not be used for any part of the sealing material.

1. Water. Water used to prepare sealing mixtures should generally be of drinking water quality, shall be compatible with the type of sealing material used, be free of petroleum and petroleum products, and be free of suspended matter. In some cases water considered nonpotable, with a maximum of 2,000 milligrams per liter chloride and 1,500 mg/l sulfate, can be used for cement-based sealing mixtures. The quality of water to be used for sealing mixtures shall be determined where unknown.

2. Cement. Cement used in sealing mixtures shall meet the requirements of American Society for Testing and Materials C150, *Standard Specification for Portland Cement*, including the latest revisions thereof.

Types of Portland cement available under ASTM C150 for general construction are:

Type I - General purpose. Similar to American Petroleum Institute Class A.

Type II - Moderate resistance to sulfate. Lower heat of hydration than Type I. Similar to API Class B.

Type III - High early strength. Reduced curing time but higher heat of hydration than Type I. Similar to API Class C.

Type IV - Extended setting time. Lower heat of hydration than Types I and III.

Type V - High sulfate resistance.

Special cement setting accelerators and retardants and other additives may be used in some cases. Special field additives for Portland cement mixtures shall meet the requirements of ASTM C494, *Standard Specification for Chemical Admixtures for Concrete*, and latest revision thereof.

Hydrated lime may be added up to 10 percent of the volume of cement used to make the seal mix more fluid. Bentonite may be added to cement-based mixes, up to 6 percent by weight of cement used, to improve fluid characteristics of the sealing mix and reduce the rate of heat generation during setting.

Dry additives should be mixed with dry cement before adding water to the mixture to ensure proper mixing, uniformity of hydration, and an effective and homogeneous seal. The water demand of additives shall be taken into account when water is added to the mix.

Minimum times required for sealing materials containing Portland cement to set and begin curing before construction operations on a well can be resumed are:

- Types I and II cement - 24 hours
- Type III cement - 12 hours
- Type V cement - 6 hours

Type IV cement is seldom used for annular seals because of its extended setting time.

Allowable setting times may be reduced or lengthened by use of accelerators or retardants specifically designed to modify setting time, at the approval of the enforcing agency.

More time shall be required for cement-based seals to cure to allow greater strength when construction or development operations following the placement of the seal may subject casing and sealing materials to significant stress. Subjecting a well to significant stress before a cement-based sealing material has adequately cured can damage the seal and prevent proper bonding of cement-based sealants to casing(s).

If plastic well casing is used, care shall be exercised to control the heat of hydration generated during the setting and curing of cement in an annular seal. Heat can cause plastic casing to weaken and collapse. Heat generation is a special concern if thin-wall plastic well casing is used, if the well casing will be subject to significant net external pressure before the setting of the seal, and/or if the radial thickness of the annular seal is large. Additives that accelerate cement setting also tend to increase the rate of heat generation during setting and, thus, should be used with caution where plastic casing is employed.

The temperature of a setting cement seal can be lowered by circulating water inside the well casing and/or by adding bentonite to the cement mixture, up to 6 percent by weight of cement used.

Cement-based sealing material shall be constituted as follows:

a. Neat Cement. For Types I or II Portland cement, neat cement shall be mixed at a ratio of one 94-pound sack of Portland cement to 5 to 6 gallons of 'clean' water. Additional water may be required where special additives, such as bentonite, or 'accelerators' or 'retardants' are used.

b. Sand Cement. Sand-cement shall be mixed at a ratio of not more than 188 pounds of sand to one 94-pound sack of Portland cement (2 parts sand to 1 part cement, by weight) and about 7 gallons of clean water, where Type I or Type II Portland cement is used. This is equivalent to a '10.3 sack mix.' Less

water shall be used if less sand than 2 parts sand per one part cement by weight is used. Additional water may be required when special additives, such as bentonite, or 'accelerators' or 'retardants' are used.

c. Concrete. Concrete is often useful for large volume annular seals, such as in large-diameter wells. The proper use of aggregate can decrease the permeability of the annular seal, reduce shrinkage, and reduce the heat of hydration generated by the seal.

Concrete shall consist of Portland cement and aggregate mixed at a ratio of at least six-94 pound sacks of Portland cement per cubic yard of aggregate. A popular concrete mix consists of eight-94 pound sacks of Type I or Type II Portland cement per cubic yard of uniform 3/8-inch aggregate.

In no case shall the size of the aggregate be more than 1/5 the radial thickness of the annular seal. Water shall be added to concrete mixes to attain proper consistency for placement, setting, and curing.

d. Mixing. Cement-based sealing materials shall be mixed thoroughly to provide uniformity and ensure that no 'lumps' exist.

Ratios of the components of cement-based sealing materials can be varied depending on the type of cement and additives used. Variations must be approved by the enforcing agency.

3. Bentonite. Bentonite clay in 'gel' form has some of the advantages of cement-based sealing material. A disadvantage is that the clay can sometimes separate from the clay-water mixture.

Although many types of clay mixtures are available, none has sealing properties comparable to bentonite clay. Bentonite expands significantly in volume when hydrated. Only bentonite clay is an acceptable clay for annular seals.

Unamended bentonite clay seals should not be used where structural strength of the seal is required, or where it will dry. Bentonite seals may have a tendency to dry, shrink and crack in arid and semi-arid areas of California where subsurface moisture levels can be low. Bentonite clay seals can be adversely affected by subsurface chemical conditions, as can cement-based materials.

Bentonite clay shall not be used as a sealing material if roots from trees and other deep rooted plants might invade and disrupt the seal, and/or damage the well casing. Roots may grow in an interval containing a bentonite seal depending on surrounding soil conditions and vegetation.

Bentonite-based sealing material shall not be used for sealing intervals of fractured rock or sealing intervals of highly unstable, unconsolidated material that could collapse and displace the sealing material, unless otherwise approved by the enforcing agency. Bentonite clay shall not be used as a sealing material where flowing water might erode it.

Bentonite clay products used for sealing material must be specifically prepared for such use. Used drilling mud and/or cuttings from drilling shall not be used in sealing material.

Bentonite used for annular seals shall be commercially prepared, powdered, granulated, pelletized, or chipped/crushed sodium montmorillonite clay. The largest dimension of pellets or chips shall be less than 1/5 the radial thickness of the annular space into which they are placed.

Bentonite clay mixtures shall be thoroughly mixed with clean water ***prior to placement***. A sufficient amount of water shall be added to bentonite to allow proper hydration. Depending on the bentonite sealing mixture used, 1 gallon of water should be added to about every 2 pounds of bentonite. Water added to bentonite for hydration shall be of suitable quality and free of pollutants and contaminants.

Bentonite preparations normally require 1/2 to 1 hour to adequately hydrate. Actual hydration time is a function of site conditions and the form of bentonite used. Finely divided forms of bentonite generally require less time for hydration, if properly mixed.

Dry bentonite pellets or chips may be placed directly into the annular space below water, where a short section of annular space, up to 10 feet in length, is to be sealed. Care shall be taken to prevent bridging during the placement of bentonite seal material.

E. Radial Thickness of Seal. A minimum of two inches of sealing material shall be maintained between all casings and the borehole wall, within the interval to be sealed, except where temporary conductor casing cannot be removed, as noted in Subsection B, page 15, above. A minimum of two inches of sealing material shall also be maintained between each casing, such as permanent conductor casing, well casing, gravel fill pipes, etc., in a borehole within the interval to be sealed, unless otherwise approved by the enforcing agency. Additional space shall be provided, where needed, for casings to be properly centralized and spaced and allow the use of a tremie pipe during well construction (if required), especially for deeper wells.

F. Placement of Seal.

Obstructions. All loose cuttings, or other obstructions to sealing shall be removed from the annular space before placement of the annular seal.

2. Centralizers. Well casing shall be equipped with centering guides or 'centralizers' to ensure the 2-inch minimum radial thickness of the annular seal is at least maintained. Centralizers need not be used in cases where the well casing is centered in the borehole during well construction by use of removable tools, such as hollow-stem augers.

The spacing of centralizers is normally dictated by the casing materials used, the orientation and straightness of the borehole, and the method used to install the casing.

Centralizers shall be metal, plastic, or other non-degradable material. Wood shall not be used as a centralizer material. Centralizers must be positioned to allow the proper placement of sealing material around casing within the interval to be sealed.

Any metallic component of a centralizer used with metallic casing shall consist of the same material as the casing. Metallic centralizer components shall meet the same metallurgical specifications and standards as the metallic casing to reduce the potential for galvanic corrosion of the casing.

3. Foundation and Transition Seals. A packer or similar retaining device, or a small quantity of sealant that is allowed to set, can be placed at the bottom of the interval to be sealed before final sealing operations begin to form a foundation for the seal.

A transition seal, up to 5 feet in length, consisting of bentonite, is sometimes placed in the annular space to separate filter pack and cement-based sealing materials. The transition seal can prevent cement-based sealing materials from infiltrating the filter pack. A short interval of fine-grained sand, usually less than 2 feet in length, is sometimes placed between the filter pack and the bentonite transition seal to prevent bentonite from entering the filter pack. Also, fine sand is sometimes used in place of bentonite as the transition seal material.

Fine-sized forms of bentonite, such as granules and powder, are usually employed for transition seals if a transition seal is to be placed above the water level in a well boring. Coarse forms of bentonite, such as pellets and chips, are often used where a bentonite transition seal is to be placed below the water level.

Transition seals should be installed by use of a tremie pipe, or equivalent. However, some forms of bentonite may tend to bridge or clog in a tremie pipe.

Bentonite can be placed in dry form or as slurry for use in transition seals. Water should be added to the bentonite transition seal prior to the placement of cement-based sealing materials where bentonite is dry in the borehole. Care should be exercised during the addition of water to the borehole to prevent displacing the bentonite.

Water should be added to bentonite at a ratio of about 1 gallon for every 2 pounds of bentonite to allow for proper hydration. Water added to bentonite for hydration shall be of suitable quality and free of pollutants and contaminants.

Sufficient time should be allowed for bentonite transition seals to properly hydrate before cement-based sealing materials are placed. Normally, 1/2 to 1 hour is required for proper hydration to occur. Actual time of hydration is a function of site conditions.

The top of the transition seal shall be sounded to ensure that no bridging has occurred during placement.

4. Timing and Method of Placement. The annular space shall be sealed as soon as practical after completion of drilling or a stage of drilling. In no case shall the annular space be left unsealed longer than 14 days following the installation of casing.

Sealing material shall be placed in one continuous operation from the bottom of the interval to be sealed, to the top of the interval. Where the seal is more than 100 feet in length, the deepest portion of the seal may be installed first and allowed to set or partially set. The deep initial seal shall be no longer than 10 feet in length. The remainder of the seal shall be placed above the initial segment in one continuous operation.

Sealing material shall be placed by methods (such as the use of a tremie pipe or equivalent) that prevent freefall, bridging, or dilution of the sealing material, or separation of sand or aggregate from the sealing material. Annular sealing materials

shall not be installed by freefall unless the interval to be sealed is dry and no deeper than 30 feet below ground surface.

5. Ground Water Flow. Special care shall be used to restrict the flow of ground water into a well boring while placing material, where subsurface pressure causing the flow of water is significant.

6. Verification. It shall be verified that the volume of sealing material placed at least equals or exceeds the volume to be sealed.

7. Pressure. Pressure required for placement of sealing materials shall be maintained long enough for cement-based sealing materials to properly set."

Section 10. Surface Construction Features.

Subsection A, Item 5; Subsection B; and Subsection F (page 39 of Bulletin 74-81) have been changed. The remainder of Section 10 (page 36 of Bulletin 74-81) is unchanged.

"A. Openings.

5. Bases. A concrete base or pad, sometimes called a pump block or pump pedestal, shall be constructed at ground surface around the top of the well casing and contact the annular seal, unless the top of the casing is below ground surface, as provided by Subsection B, page 23, below.

The base shall be free of cracks, voids, or other significant defects likely to prevent water tightness. Contacts between the base and the annular seal, and the base and the well casing, must be water tight and must not cause the failure of the annular seal or well casing. Where cement-based annular sealing material is used, the concrete base shall be poured before the annular seal has set, unless otherwise approved by the enforcing agency.

The upper surface of the base shall slope away from the well casing. The base shall extend at least two feet laterally in all directions from the outside of the well boring, unless otherwise approved by the enforcing agency. The base shall be a minimum of 4 inches thick.

A minimum base thickness of 4 inches is normally acceptable for small diameter, single-user domestic wells. The base thickness should be increased for larger wells. Shape and design requirements for well pump bases vary with the size, weight, and type of pumping equipment to be installed, engineering properties of the soil on which the base is to be placed, and local environmental conditions. A large variety of base designs have been used. The Vertical Turbine Pump Association has developed a standard base design for large lineshaft turbine pumps. This design consists of a square, concrete pump base whose design is dependent on bearing weight and site soil characteristics.

Where freezing conditions require the use of a pitless adapter, and the well casing and annular seal do not extend above ground surface or into a pit or vault, a concrete base or pad shall be constructed as a permanent location monument for the covered well. The base shall be 3 feet in length on each side and 4 inches in thickness, unless

otherwise approved by the enforcing agency. The base shall have a lift-out section, or equivalent, to allow access to the well. The lift-out shall facilitate inspection and repair of the well.

B. Well Pits or Vaults. The use of well pits, vaults, or equivalent features to house the top of a well casing below ground surface shall be avoided, if possible, because of their susceptibility to the entrance of poor-quality water, contaminants and pollutants. Well pits or vaults can only be used if approval is obtained from the enforcing agency. A substitute device, such as a pitless adapter or pitless adapter unit (a variation), should almost always be used in place of a vault or pit.

Pitless adapters and units were developed for use in areas where prolonged freezing occurs, and below ground (frost line) discharges are common. Both the National Sanitation Foundation and Water Systems Council have developed standards for the manufacture and installation of pitless adapters and units. (See Appendix E, Bibliography, page 85 of Bulletin 74-81.)

If a pit or vault is used it shall be watertight and structurally sound. The vault shall extend from the top of the annular seal to at least ground surface.

The vault shall contact the annular seal in a manner to form a watertight and structurally sound connection. Contacts between the vault and the annular seal, and the vault and the well casing, if any, shall not fail or cause the failure of the well casing or annular seal.

Where cement-based annular seal materials are used, the vault shall be set into or contact the annular seal material before it sets, unless otherwise approved by the enforcing agency. If bentonite-based sealing material is used for the annular seal, the vault should be set into the bentonite before it is fully hydrated.

Cement-based sealing material shall be placed between the outer walls of the vault and the excavation into which it is placed to form a proper, structurally sound foundation for the vault, and to seal the space between the vault and excavation.

The sealing material surrounding a vault shall extend from the top of the annular seal to ground surface unless precluded in areas of freezing. If cement-based sealing material is used for both the annular seal and the space between the excavation and vault, the sealing material shall be emplaced in a 'continuous pour'. In other words, cement-based sealing material shall be placed between the vault and excavation and contact the cement-based annular seal before the annular seal has set.

The vault cover or lid shall be watertight but shall allow the venting of gases. The lid shall be fitted with a security device to prevent unauthorized access. The outside of the lid shall be clearly and permanently labeled 'WATER WELL'. The vault and its lid shall be strong enough to support vehicular traffic where such traffic might occur.

The top of the vault shall be set at, or above, grade so that drainage is away from the vault. The top of the well casing contained within the vault shall be covered in accordance with requirements under Subsection A, above, (page 36, Bulletin 74-81) so that water, contaminants, and pollutants that may enter the vault will not enter the well casing. The cover shall be provided with a pressure relief or venting device for gases.

F. Backflow Prevention. All pump discharge pipes not discharging or open to the atmosphere shall be equipped with an automatic device to prevent backflow and/or back siphonage into a well. Specific backflow prevention measures are required for drinking water supply wells, as prescribed in Title 17, Public Health, California Code of Regulations (Sections 7583-7585 and 7601-7605, effective June 25, 1987).

Irrigation well systems, including those used for landscape irrigation, and other well systems that employ, or which have been modified to employ, chemical feeders or injectors shall be equipped with a backflow prevention device(s) approved by the enforcing agency."

Section 12. Casing.

Items 3, 5, and 6 of Subsection A (page 43 of Bulletin 74-81) have been revised. The remainder of Subsection A is unchanged. Subsection B (page 45 of Bulletin 74-81) has been revised. The revisions are as follows:

"A. Casing Material.

3. Plastic. Two basic types of plastic are commonly used for plastic well casing: thermoplastics and thermosets. **Thermoplastics** soften with the application of heat and reharden when cooled. Thermoplastics can be reformed repeatedly using heat and sometimes can unexpectedly deform. Attention should be given to the effect of heat on thermoplastic casing from the setting and curing of cement. Additional discussion on sealing material and heat generation is in Section 9, Subsection D, 'Sealing Material'.

Thermoplastics used for well casing include ABS (acrylonitrile butadiene styrene), PVC (polyvinyl chloride), and SR (styrene rubber). PVC is the most frequently used thermoplastic well casing in California. Styrene rubber is seldom used.

Unlike thermoplastics, **thermoset** plastics cannot be reformed after heating. The molecules of thermoset plastic are 'set' during manufacturing by heat, chemical action, or a combination of both. The thermoset plastic most commonly used for well casing is fiberglass.

Thermoplastics. Thermoplastic well casing shall meet the requirements of ASTM F480, *Standard Specification for Thermoplastic Well Casing Pipe and Couplings Made in Standard Dimension Ratios (SDR), SCH 40 and SCH 80,* including the latest revision thereof. (*Note*: A 'dimension ratio' is the ratio of pipe diameter to pipe wall thickness.)

Pipe made in Schedule 40 and 80 wall thicknesses and pipe designated according to certain pressure classifications are listed in ASTM F480, as well as casing specials referencing the following ASTM specifications:

(1) ABS Pipe. ASTM D1527, *Standard Specification for Acrylonitrile-Butadiene-Styrene (ABS) Plastic Pipe, Schedules 40 and 80.*

(2) PVC Pipe. ASTM D1785, *Standard Specification for (Poly Vinyl Chloride) (PVC) Plastic Pipe, Schedules 40, 80, and 120.*

(3) Pressure-Rated PVC Pipe. ASTM D2241, *Standard Specifications for Poly (Vinyl Chloride) (PVC) Pressure-Rated Pipe (SDR Series).*

Thermoplastic well casing that may be subject to significant impact stress during or after installation shall meet or exceed the requirements for impact resistance classification set forth in Section 6.5 of ASTM F480. Casing that may be subject to significant impact forces includes, but is not limited to; casing that is installed in large diameter, deep boreholes; and casing through which drilling tools pass following installation of the casing in a borehole.

b. Thermoset Plastics. Thermoset casing material shall meet the following specifications, as applicable, including the latest revisions thereof:

(1) Filament Wound Resin Pipe. ASTM D2996, *Standard Specification for Filament Wound Reinforced Thermosetting Resin Pipe.*

(2) Centrifugally Cast Resin Pipe. ASTM D2997, *Standard Specification for Centrifugally Cast Reinforced Thermosetting Resin Pipe.*

(3) Reinforced Plastic Mortar Pressure Pipe. ASTM D3517, *Standard Specification for Reinforced Plastic Mortar Pressure Pipe.*

(4) Glass Fiber Reinforced Resin Pressure Pipe. AWWA[1] C950, *AWWA Standard for Glass-Fiber-Reinforced Thermosetting-Resin Pressure Pipe.*

c. Drinking Water Supply. All plastic casing used for drinking water supply wells, including community supply well and individual domestic wells, shall meet the provisions of National Sanitation Foundation Standard No. 14, *Plastic Piping Components and Related Materials* and any revision thereof. The casing shall be marked or labeled following requirements in NSF Standard No. 14. Standard No. 14 includes the requirements of ASTM F480.

d. Storage, Handling, and Transportation. Plastic casing shall not be stored in direct sunlight or subjected to freezing temperatures for extended periods of time. Plastic casing shall be stored, handled, and transported in a manner that prevents excessive mechanical stress. Casing shall be protected from sagging and bending, severe impacts and loads, and potentially harmful chemicals.

e. Large Diameter Wells. Because large diameter plastic casing has not been used extensively at depths exceeding 500 feet, special care shall be exercised with its use in deep wells.

5. Unacceptable Casing Materials. Galvanized sheet metal pipe such as 'downspout,' tile pipe, or natural wood shall not be used as well casing.

6. Other Materials. Materials in addition to those described above may be used as well casing, subject to enforcing agency approval."

Subsection B (page 45 of Bulletin 74-81) has been revised as follows:

"B. Casing Installation. All well casing shall be assembled and installed with sufficient care to prevent damage to casing sections and joints. All casing joints above intervals of perforations

[1] American Water Works Association.

or screen shall be watertight. Any perforations shall be below the depths specified in Section 9, Subsection A, page 14, above.

Casing shall be equipped with centering guides or 'centralizers' to ensure the even radial thickness of the annular seal and filter pack.

1. Metallic Casing. Metallic casing may be joined by welds, threads, or threaded couplings. Welding shall be accomplished in accordance with the standards of the American Welding Society or the most recent revision of the American Society of Mechanical Engineers Boiler Construction Code. Metallic casing shall be equipped with a 'drive shoe' at the lower end if it is driven into place.

2. Plastic Casing. Plastic casing may be joined by solvent welding or mechanically joined by threads or other means, depending on the type of material and its fabrication. Solvent cement used for solvent welding shall meet specifications for the type of plastic casing used. Solvent cement shall be applied in accordance with solvent and casing manufacturer instructions. Particular attention shall be given to instructions pertaining to required setting time for joints to develop strength.

   The following specifications for solvent cements and joints for PVC casing shall be met, including the latest revisions thereof:

   a. ASTM D2564, *Standard Specification for Solvent Cements for Poly (Vinyl Chloride) (PVC) Plastic Pipe and Fittings.*

   b. ASTM D2855, *Standard Practice for Making Solvent-Cemented Joints with Poly (Vinyl Chloride) (PVC) Pipe and Fittings.*

   Plastic casing or screen shall not be subjected to excessive stress during installation and shall not be driven into place. Care shall be taken to ensure that plastic casing and joints are not subjected to excessive heat from cement-based sealing material.

   A specifically designed adapter shall be used to join plastic casing to metallic casing or screen."

Section 14. Well Development.

Section 14 (page 46 of Bulletin 74-81) has been revised as follows:

"Development, redevelopment, or reconditioning of a well shall be performed with care, by methods that will not damage the well structure or destroy natural barriers to the movement of poor quality water, pollutants, and contaminants.

Acceptable well development, redevelopment, or reconditioning methods include:

- Overpumping;
- Surging or swabbing by use of 'plungers';
- Surging with compressed air;
- Backwashing or surging by alternately starting and stopping a pump;
- Jetting with water;

- Introducing specifically-formulated chemicals into a well; and,
- Combinations of the above.

Hydraulic fracturing (hydrofracturing) is sometimes an acceptable well development and redevelopment method when properly performed. Good quality water shall be used in hydrofracturing. The water shall be disinfected prior to introduction into a well. Material used as 'propping' agents shall be free of pollutants and contaminants, shall be compatible with the use of a well, and shall be thoroughly washed and disinfected prior to placement in a well.

Development, redevelopment, or reconditioning by use of specially designed **explosive charges** is in some cases, another acceptable development method. Explosives shall be used with special care to prevent damage to the well structure and to any natural barriers to the movement of poor-quality water, pollutants, and contaminants. Explosives shall only be used by properly-trained personnel.

Wells subjected to chemicals or explosives during development, redevelopment, or reconditioning operations shall be thoroughly pumped to remove such agents and residues immediately after the completion of operations. Chemicals, water, and other wastes removed from the well shall be disposed of in accordance with applicable local, State, and federal requirements. The enforcing agency should be contacted regarding the proper disposal of waste."

Part III. Destruction of Wells

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Section 21. Definition of "Abandoned" Well.

Section 21 (page 52 of Bulletin 74-81) has been revised as follows:

"A well is considered 'abandoned' or permanently inactive if it has not been used for one year, unless the owner demonstrates intention to use the well again. In accordance with Section 24400 of the California Health and Safety Code, the well owner shall properly maintain an inactive well as evidence of intention for future use in such a way that the following requirements are met:

"(1) The well shall not allow impairment of the quality of water within the well and ground water encountered by the well.

(2) The top of the well or well casing shall be provided with a cover, that is secured by a lock or by other means to prevent its removal without the use of equipment or tools, to prevent unauthorized access, to prevent a safety hazard to humans and animals, and to prevent illegal disposal of wastes in the well. The cover shall be watertight where the top of the well casing or other surface openings to the well are below ground level, such as in a vault or below known levels of flooding. The cover shall be watertight if the well is inactive for more than five consecutive years. A pump motor, angle drive, or other surface feature of a well, when in compliance with the above provisions, shall suffice as a cover.

(3) The well shall be marked so as to be easily visible and located, and labeled so as to be easily identified as a well.

(4) The area surrounding the well shall be kept clear of brush, debris, and waste materials."

If a pump has been temporarily removed for repair or replacement, the well shall not be considered 'abandoned' if the above conditions are met. The well shall be adequately covered to prevent injury to people and animals and to prevent the entrance of foreign material, surface water, pollutants, or contaminants into the well during the pump repair period."

Section 23. Requirements for Destroying Wells.

Subsection A, Item 1 (page 53 of Bulletin 74-81) and Subsection B, Item 1, (page 54, of Bulletin 74-81) have been changed. The remainder of Section 23 is unchanged.

Subsection A, Item 1 has been revised as follows:

"1. Obstructions. The well shall be cleaned, as needed, so that all undesirable materials, including obstructions to filling and sealing, debris, oil from oil-lubricated pumps, or pollutants and contaminants that could interfere with well destruction are removed for disposal.

The enforcing agency shall be notified as soon as possible if pollutants and contaminants are known or suspected to be in a well to be destroyed. Well destruction operations may then proceed only at the approval of the enforcing agency.

The enforcing agency should be contacted to determine requirements for proper disposal of materials removed from a well to be destroyed."

Subsection B, Item 1 has been revised as follows:

"1. Wells situated in unconsolidated material in an unconfined ground water zone. In all cases the upper 20 feet of the well shall be sealed with suitable sealing material and the remainder of the well shall be filled with suitable fill, or sealing material. (See Figure 9A, page 55 of Bulletin 74-81.)"

MONITORING WELLS

MONITORING WELL STANDARDS

INTRODUCTION

Ground water monitoring wells are principally used for observing ground water levels and flow conditions, obtaining samples for determining ground water quality, and for evaluating hydraulic properties of water-bearing strata. Monitoring wells are sometimes referred to as "observation wells."

The quality of water intercepted by a monitoring well can range from drinking water to highly polluted water. In contrast, production or "water wells" are usually designed to obtain water from productive zones containing good-quality water.

The screen or perforated section of a monitoring well usually extends only a short length to obtain water from, or to monitor conditions within, an individual water-bearing unit or zone. Water wells are often designed to obtain water from multiple water-bearing strata. Although there are usually differences between the design and function of monitoring wells and water wells, water wells sometimes are used as monitoring wells, and vice versa.

Monitoring wells, along with other types of wells, can provide a pathway for the movement of poor-quality water, pollutants, and contaminants. Because monitoring wells are often purposely located in areas affected by pollutants and contaminants, they pose an especially significant threat to ground water quality if they are not properly constructed, altered, maintained, and destroyed.

The California Legislature amended the California Water Code in 1986 specifically to include requirements for monitoring well standards. Monitoring wells were previously assumed by the Department to be covered by the collective term "well" in the law.

History of Monitoring Wells

Monitoring wells were first used mainly for water level measurement. These wells were often referred to as piezometers in reference to the "piezometric surface" of ground water. In recent years, the term "piezometric surface" is often replaced by "potentiometric surface." However, the term "piezometer" is still sometimes used for monitoring wells installed only for water level measurement.

Many water level monitoring wells constructed in the past were relatively large in diameter in comparison to today's monitoring wells. Wells up to 10-inches in diameter were often constructed to accommodate various means of water level measurement, including floats for mechanically-operated, continuous water level recorders. Many inactive water wells that could accommodate mechanical water level recording equipment were used as monitoring wells.

Modern electronic water level measuring and recording devices now allow for small-diameter water-level monitoring wells. Some continuous water-level measurement devices can be used in wells less than 2-inches in inside diameter.

The use of monitoring wells for ground water sampling for chemical analysis has increased significantly in the past two decades. The following factors have all served to increase the frequency and scope of ground water quality investigations and the number of monitoring wells constructed:

Advances in analytical and environmental chemistry;

Increased knowledge of the adverse effects of chemicals on humans;

Public awareness of ground water pollution;

The advent of federal ground water quality protection legislation in the 1970s, and,

Statutes relating to ground water quality enacted by the California Legislature.

Since the 1970s an entire industry has developed around ground water quality monitoring and monitoring well construction. Numerous private firms are involved in providing technical services for the design and implementation of ground water quality investigations. Many firms are involved in the manufacture, distribution, and marketing of materials and equipment used in constructing and operating monitoring wells.

Most monitoring wells constructed today are used to assess:

- The nature and distribution of pollutants and contaminants in ground water;
- The nature and distribution of naturally occurring chemical constituents;
- Subsurface hydrologic conditions; and,
- Hydraulic properties of strata as they relate to pollutant and contaminant movement.

Some monitoring wells are designed to be multipurpose. Monitoring wells can sometimes be used as "extraction" or "injection" wells for mitigation of pollution or contamination.

Although a significant number of monitoring wells constructed today are for detection and assessment of ground water quality impairment, many monitoring wells are constructed for evaluating ground water supply conditions by allowing ground water level measurement and/or aquifer testing. Still others are constructed for observing water levels associated with excavations and irrigated agriculture.

During 1989, approximately 20 percent of all well drilling in California was for monitoring wells, based on well driller's reports received by the Department of Water Resources. Monitoring wells have been constructed in nearly all California counties. The largest concentrations of water quality monitoring wells occur in metropolitan areas of the State. Large numbers of monitoring wells are installed for detection and assessment of leaks from underground storage tanks.

Types of Monitoring Wells

For the purpose of these standards, the term "monitoring well" is limited to wells designed to monitor subsurface water in the saturated zone, existing at or above atmospheric pressure (ground water); rather than water, water vapor, and/or gases contained in the unsaturated or vadose zone. Monitoring devices used for the unsaturated zone differ significantly from those used for the saturated (ground water) zone.

As shown in Figure 2, three basic types of monitoring wells or "installations" are:

- Individual monitoring wells;
- Nested monitoring wells; and,
- Clustered monitoring wells.

Individual monitoring wells consist of a single casing "string" within a borehole, as illustrated in Figures 2 and 3. Individual monitoring wells are installed in unique locations apart from one another. They are the most common type of monitoring well constructed in California.

Figure 2. MONITORING WELL TYPES

(NOTE: Schematic, not to scale)

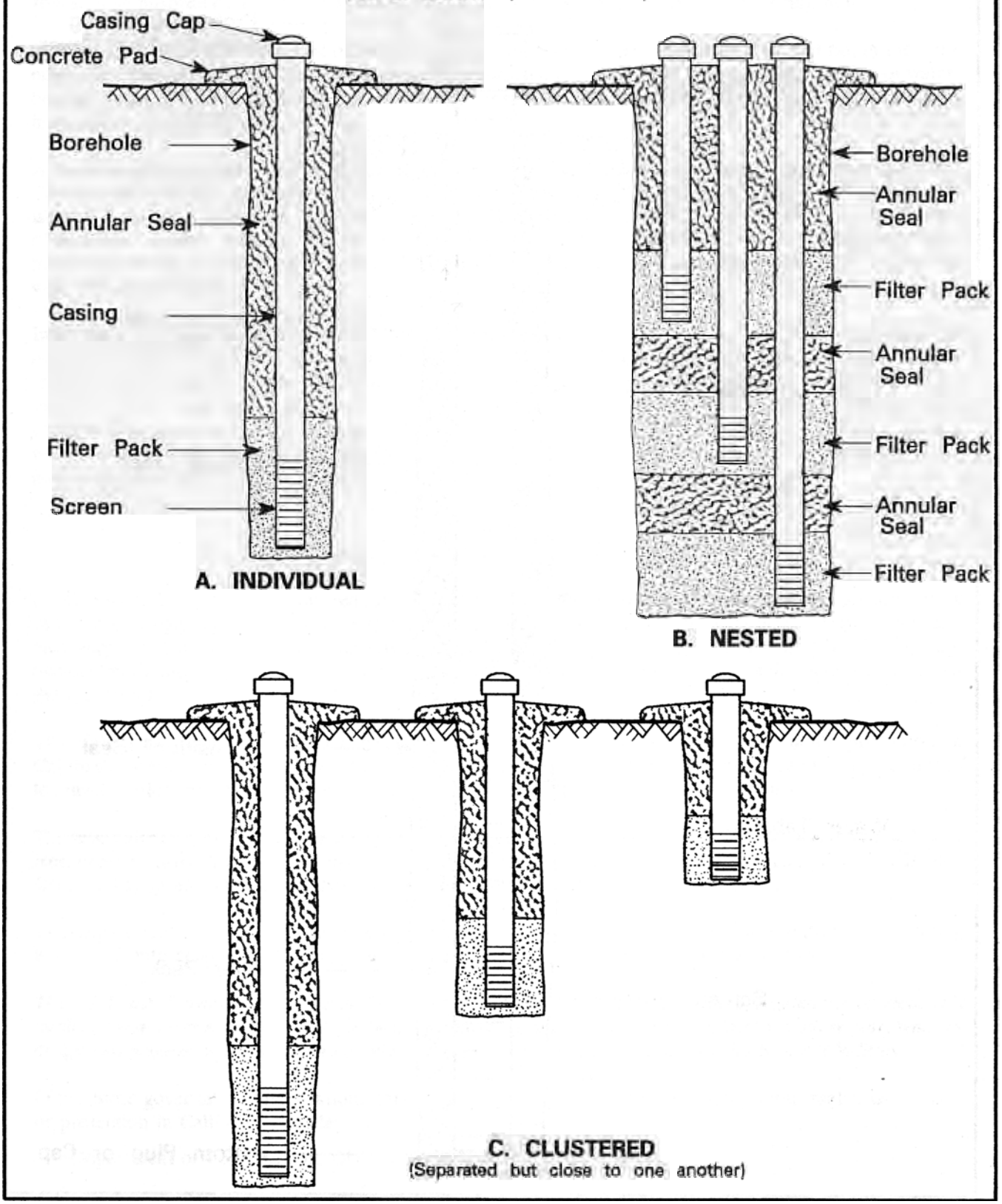
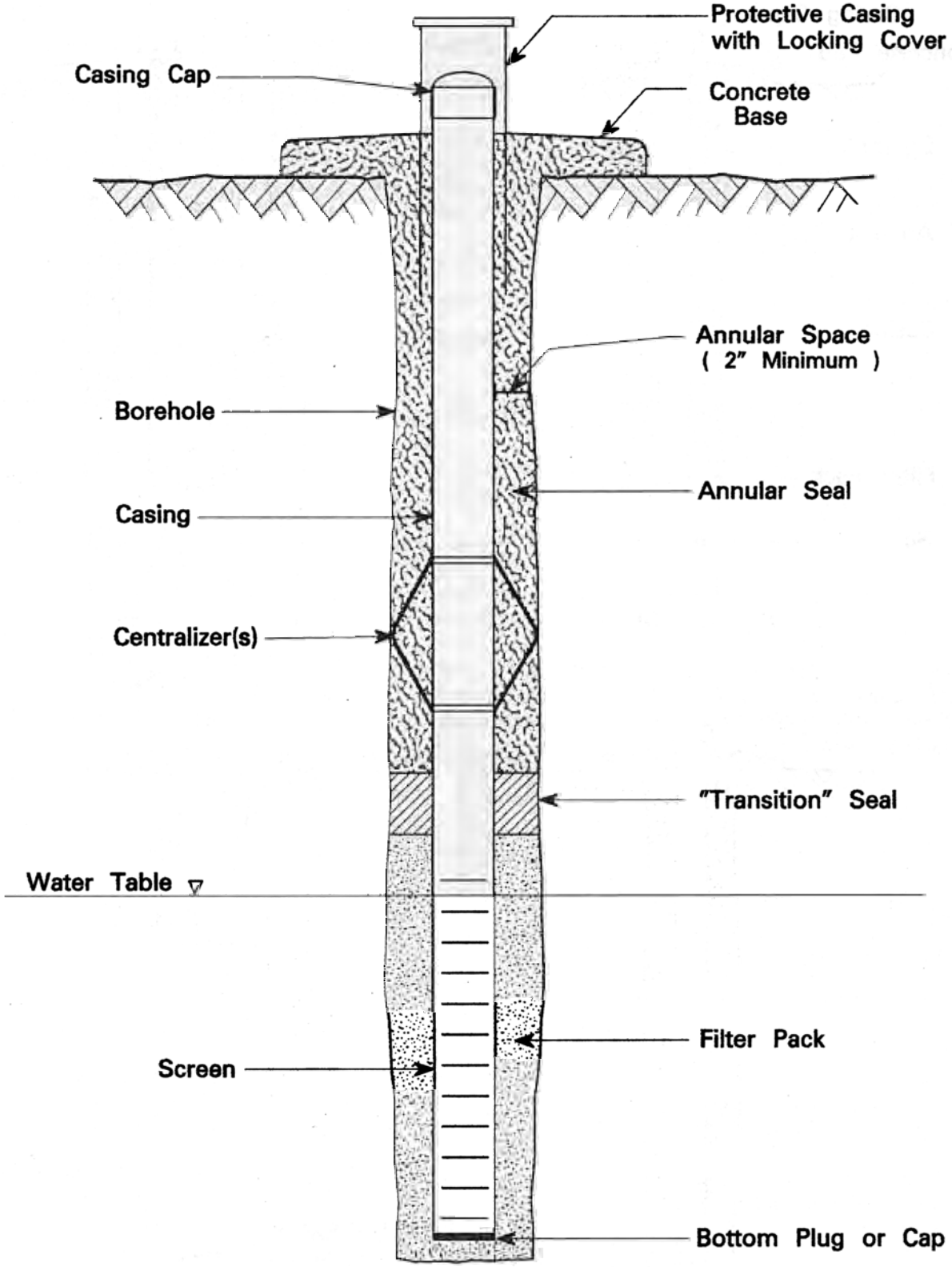


Figure 3. CROSS SECTION OF A TYPICAL MONITORING WELL

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(NOTE: Schematic, not to scale)



Nested monitoring wells consist of two or more casing strings within the same borehole. Normally the screened interval of each casing string is designed to obtain water from different aquifers or water-bearing zones. The purpose of a nested monitoring well is much the same as clustered monitoring wells.

Clustered monitoring wells consist of individual monitoring wells situated close together, but not in the same borehole. The wells within a cluster are normally constructed to obtain water from different aquifers or water-bearing zones. Clustered wells are most often used for monitoring ground water conditions at various depths in roughly the same area.

A nested monitoring well can be difficult to construct because of multiple casings within the same borehole. Care is required during construction to ensure water-bearing zones for each casing string are hydraulically isolated from one another and the annular seals are effective. Some regulatory agencies may prohibit the use of nested monitoring wells for certain contamination or pollution investigations. Normally this can be due to uncertainties about whether water-bearing strata can be isolated and whether the annular seals in a nested well are always effective.

Individual casing strings for the various types of monitoring wells discussed above, are sometimes designed to obtain water from more than one aquifer or water-bearing unit. These casing strings usually have multiple intervals of openings or screen. Such well casing strings, often referred to as "multi-level monitoring wells," can sometimes serve as a preferential pathway for the movement of poor quality water, pollutants, and contaminants from one unit to another. Some regulatory agencies prohibit the use of multi-level monitoring wells for certain pollution or contamination investigations out of concern for water quality protection and data quality requirements.

Authority and Responsibilities of Other Agencies

As discussed above, Congress enacted major legislation dealing with ground water quality protection during the 1970s. Regulatory programs initiated by federal legislation, such as the Resources Conservation and Recovery Act (RCRA) and its amendments, are administered by the U. S. Environmental Protection Agency. Some administration and enforcement activities related to federal legislation have been delegated to California State agencies.

The California Legislature enacted legislation expanding efforts for ground water quality protection in California beyond federal requirements. The Legislature assigned several State agencies various responsibilities for investigation, mitigation, and control of ground water pollution and contamination.

The lead enforcement agency for most ground water quality protection issues in California is the State Water Resources Control Board (State Board) and the nine California Regional Water Quality Control Boards (Regional Boards). The State Board oversees the activities of the nine regional boards.

The Department of Health Services or, under some circumstances, the U. S. Environmental Protection Agency, is the lead enforcement agency for ground water quality issues related to hazardous wastes.

The EPA, the Department of Health Services, and the State Board have adopted regulations or standards establishing monitoring requirements for "waste facilities". These regulations or standards include requirements for design and performance of monitoring wells that are often more stringent than standards in this bulletin.

Other State government organizations concerned or directly involved with ground water quality assessment or protection in California include:

- Department of Conservation, Division of Oil and Gas,

Department of Food and Agriculture,

- Integrated Waste Management Board, and,

Department of Water Resources.

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California cities, counties, and local water agencies are also involved with ground water quality assessment and protection.

The Division of Oil and Gas has authority and responsibility for geothermal wells and other special wells constructed in the State's Geothermal Resources Areas (pursuant to Chapter 4, Division 3, California Public Resources Code). Shallow wells drilled for geothermal observation are subject to regulations and standards established by DOG.

After July 17, 1991 the California Environmental Protection Agency will oversee the activities of the State Water Resources Control Board and the Integrated Waste Management Board. Some of the environmental protection activities of the Department of Health Services and the Department of Food and Agriculture will also come under the California Environmental Protection Agency.

Scope, Organization, and Limitations of Standards

Certain standards that apply to water wells also apply to monitoring wells. Therefore the Monitoring Well Standards refer frequently to the Water Well Standards. Standards that apply only to monitoring wells, or that require emphasis, are discussed in detail in the Monitoring Well Standards. The Monitoring Well Standards are arranged in a format similar to the Water Well Standards.

These standards are not intended as a complete manual for monitoring well construction, alteration, maintenance, and destruction. These standards serve only as minimum statewide guidelines towards ensuring that monitoring wells do not constitute a significant pathway for the movement of poor quality water, pollutants, or contaminants. These standards provide no assurance that a monitoring well will perform a desired function. In most cases ground water monitoring practices and monitoring well performance, or functional requirements, fall under the purview of the various agencies mentioned earlier. ***Ultimate responsibility for the design and performance of a monitoring well rests with the well owner and/or the owner's contractor, and/or technical representative(s).***

STANDARDS

Part I. General

Section 1. Definitions[1].

A. Monitoring Well. The term "monitoring well" is defined in Section 13712 of the California Water Code as:

> "...any artificial excavation by any method for the purpose of monitoring fluctuations in groundwater levels, quality of underground waters, or the concentration of contaminants in underground waters."

B. Exploration Hole (or Boring). An uncased temporary excavation whose purpose is the immediate determination of hydrologic conditions at a site.

C. Enforcing Agency. An agency designated by duly authorized local, regional, or State government to administer and enforce laws or ordinances pertaining to the construction, alteration, maintenance, and destruction of monitoring wells.

Section 2. Application to Well Type.

These standards apply to all types of monitoring wells, except as prescribed in Sections 3, 4, and 5, below. Before a change in use of a well is made, any standards for the new use must be complied with.

Section 3. Exemptions for Unusual Conditions.

Under certain circumstances the enforcing agency may waive compliance with these standards and prescribe alternate requirements. These standards may be waived where they are impractical or ineffective because of unusual conditions or would result in an unsatisfactory condition or well function. In waiving any of these standards the enforcing agency shall, if at all possible, require measures be implemented to provide the same or greater level of water-quality protection that would otherwise be provided by these standards.

Section 4. Exclusions.

Most standards in Part II, "Monitoring Well Construction," page 41, do not apply to "exploration holes." However, provisions of Section 7, "Reports," below and Part III, "Destruction of Monitoring Wells," page 50, do apply directly to exploration holes.

Exploration holes for determining suitability of on-site domestic sewage disposal that are less than 10 feet in depth are exempt from the reporting and destruction requirements of these standards.

Large volume excavations for determining the suitability of on-site domestic sewage disposal, such as backhoe trenches, that exceed ten feet in depth are exempt from the requirements of Part III of these standards. However, such excavations shall be backfilled with the excavated material or other suitable fill material and the backfill compacted in lifts to attain at least 90 percent relative compaction in order to restore physical conditions in the excavation as much as possible. If a layer or layers of material that serve to impede the

[1] Selected technical terms are defined in Appendix A, page 77.

movement of poor-quality water, pollutants and contaminants are penetrated by the excavation, they shall be reestablished to the degree possible to provide protection for underground waters, unless otherwise approved by the enforcing agency. In some cases it may be necessary to backfill all or a portion of the excavation with sealing material meeting these standards to reestablish natural barriers to the movement of poor-quality water, pollutants, and contaminants.

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Section 5. Special Standards.

The enforcing agency may prescribe measures more stringent than standards presented here, where needed to protect public safety or protect water quality.

Section 6. Responsible Parties.

Pursuant to Section 13750.5 (Division 7, Chapter 10, Article 3) of the California Water Code; construction, alteration, and destruction of monitoring wells shall be performed by contractors licensed in accordance with the California Contractors' License Law (Division 3, Chapter 9, California Business and Professions Code), except where exempted by law. Construction, alteration, or destruction of monitoring wells to monitor hazardous waste facilities, other waste facilities, or underground storage tanks, shall be performed under the supervision of a California Registered Professional Engineer, California Registered Geologist, or California Certified Engineering Geologist, where specified by law.

Section 7. Reports.

Monitoring well construction, alteration, and destruction reports shall be completed on forms provided by the California Department of Water Resources. Other types of forms may be used for submission to the Department with the prior approval of the Department. The completed forms shall be submitted to the Department in accordance with relevant provisions of Sections 13750 through 13754 (Division 7, Chapter 10, Article 3) of the California Water Code. Information concerning completion and submission of well construction, alteration, and destruction reports is contained in *Guide to the Preparation of the Water Well Drillers Report*, Department of Water Resources, October 1977, or its latest revision.

Part II. Monitoring Well Construction

Section 8. Well Location With Respect to Pollutants and Contaminants, and Structures.

Monitoring wells are usually constructed to observe conditions at defined or required locations. Monitoring well locations are usually selected on the basis of known or expected hydrologic, geologic, and water quality conditions and the location of pollutant or contaminant sources. Monitoring wells frequently need to be located close to or within areas of pollution or contamination.

A. Separation. Monitoring wells shall be located an adequate distance from known or potential sources of pollution and contamination, including those listed in Section 8 of the Water Well Standards, unless regulatory or legitimate data requirements necessitate they be located closer.

B. Flooding and Drainage. Monitoring wells should be located in areas protected from flooding, if possible. Provisions for locating monitoring wells in areas of flooding and drainage are contained in Section 8 of the Water Well Standards.

C. Accessibility. All monitoring wells shall be located an adequate distance from buildings and other structures to allow access for well maintenance, modification, repair, and destruction, unless otherwise approved by the enforcing agency.

D. Disposal of Wastes When Drilling in Contaminated or Polluted Areas. Drill cuttings and wastewater from monitoring wells or exploration holes in areas of known or suspected contamination or pollution shall be disposed of in accordance with all applicable federal, State, and local requirements. The enforcing agency should be contacted to determine requirements for the proper disposal of cuttings and wastewater.

Section 9. Sealing the Upper Annular Space.

The space between the monitoring well casing and the wall of the well boring, usually referred to as the "annular space," shall be effectively sealed to prevent it from being a preferential pathway for the movement of poor quality water, pollutants, and contaminants. Since monitoring wells are often constructed to obtain water from discrete intervals, a secondary purpose of the annular seal can be to isolate the well intake section or screen to one water-bearing unit. The annular seal can also serve to protect the structural integrity of the well casing and to protect the casing from chemical attack and corrosion. Because monitoring wells are often located close to, or within areas affected by pollutants and contaminants, an effective annular seal is often critical for the protection of ground water quality.

General discussion of sealing methods and requirements for monitoring wells is contained in Section 9, Section 13, and Appendix B, of the Water Well Standards. Special requirements for monitoring wells include the following:

A. Minimum Depth of Annular Seal.

1. Water quality monitoring wells and monitoring wells constructed in areas of known or suspected pollution or contamination. The annular space shall be sealed from the top of the filter pack or monitoring zone to ground surface, unless otherwise approved by the enforcing agency. The top of the filter pack or monitoring zone shall not extend into another water-bearing unit above the single water-bearing unit being monitored unless otherwise approved by the enforcing agency. The filter pack or monitoring zone shall not extend into any confining layers that overlie or underlie the unit to be moni-

tored, unless otherwise approved by the enforcing agency. The annular surface seal shall be no less than 20 feet in length.

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Seal lengths less than 20 feet are permissible only if shallow zones will be monitored and approval has been obtained from the enforcing agency. If possible, special protection shall be provided where a reduced-length seal is used, as described in Section 8 of the Water Well Standards.

2. Other Monitoring Wells. The upper annular seal shall extend from ground surface to a minimum depth of 20 feet. An annular seal less than 20 feet in length is permissible if provisions in Item 1, above, are followed.

3. Sealing Off Strata. Additional annular sealing material shall be placed below the minimum depth of the upper annular seal, as is needed, to prevent the movement of poor-quality water, pollutants, and contaminants through the well to zones of good-quality water. Requirements for sealing off zones are in Section 13 of the Water Well Standards.

4. Shallow Water Level Observation Wells. Water level observation wells less than 15 feet in total depth that are used to assess root zone drainage in agricultural areas are exempt from an annular surface seal requirement, unless otherwise required by the enforcing agency.

5. Areas of Freezing. The top of the annular seal may be below ground surface in areas where freezing is likely. Such areas include those listed in Section 9 of the Water Well Standards. The top of the annular seal shall not be more than 4 feet below ground surface. The remainder of the space above the seal may be made an integral part of a vault, in accordance with Section 10, Subsection E, page 45, below.

6. Vaults. At the approval of the enforcing agency, the top of the annular seal and well casing can be below ground surface where traffic or other conditions require. In no case shall the top of the annular seal be more than 4 feet below ground surface.

   The top of the annular seal shall contact a suitable, watertight, structurally-sound subsurface vault, or equivalent feature, that encloses the top of the well casing in accordance with Section 10, Subsection E, page 45, below. The vault shall extend from the top of the annular seal to at least ground surface.

B. Sealing Conditions.

1. Temporary Conductor Casing. If "temporary" conductor casing is used during drilling, it shall be removed during the placement of the casing and annular seal materials, as described in Section 9 of the Water Well Standards. If the temporary conductor casing "cannot" be removed, as defined in Section 9 of the Water Well Standards, sealing material shall be placed between the conductor casing and borehole wall, and between the well casing and conductor casing, in accordance with methods described in Section 9 of the Water Well Standards. Sealing material shall extend to at least the depths specified in Subsection A of this section.

2. Permanent Conductor Casing. If a permanent conductor casing is to be installed, the monitoring well borehole diameter shall be at least 4 inches greater than the outside diameter of the conductor casing. The inner diameter of the permanent conductor

casing shall in turn be at least 4 inches greater than the outside diameter of the well casing.

Sealing material shall be placed between the permanent conductor casing and the borehole wall, and the conductor casing and the well casing. The sealing material shall extend to at least the depths specified in Subsection A of this section.

C. Radial Thickness of Seal. A minimum of two inches of sealing material shall be maintained between all casings and the borehole wall, within the interval to be sealed, except as noted in Section 9 of the Water Well Standards. At least two inches of sealing material shall also be maintained between all "casings" in a borehole, within the interval to be sealed unless otherwise approved by the enforcing agency. Additional space shall be provided, where needed, to allow casings to be properly centralized and spaced and allow the use of a tremie pipe during well construction (if required), especially for deeper wells.

D. Sealing Material. Sealing material shall consist of neat cement, sand-cement, or bentonite clay. Cement-based sealing material shall be used opposite fractured rock, unless otherwise approved by the enforcing agency. Concrete shall be used only with the approval of the enforcing agency.

Sealing material shall be selected based on required structural, handling, and sealing properties, and the chemical environment into which it is placed. Used drilling mud or cuttings from drilling shall not be used for any part of sealing material.

1. Water. Water used for sealing mixtures should generally be of drinking water quality, shall be compatible with the type of sealing material used, shall be free of petroleum and petroleum products, and shall be free of suspended matter. Good-quality water is necessary to ensure that sealing materials achieve proper consistency for placement and achieve adequate structural and sealing properties.

   Nonpotable water can sometimes be used for preparing cement-based sealing materials. In no case shall the concentration of chloride in water used in cement-based sealing material exceed 2,000 milligrams per liter. Sulfate shall not exceed 1,500 mg/l.

   Water used for sealing material shall be chemically analyzed if unknown. Only drinking-quality water of known composition should be used for preparing sealing mixtures for monitoring wells to be used for sensitive water-quality determinations.

2. Cement-Based Sealing Materials. Discussion and standards for cement-based sealing materials are contained in Section 9 of the Water Well Standards. Special considerations that apply to monitoring wells are:

   a. Additives. Care should be exercised in the use of special additives for cement-based sealing materials, such as those used for modifying cement setting times. Some additives could interfere with sensitive water quality determinations.

   b. Cooling Water. In the case of water quality monitoring wells, care should be exercised in the use of circulating cooling water to protect plastic casing from heat build-up during setting of cement-based sealing materials. Water introduced and/or circulated in a well for cooling could interfere with water quality determinations.

3. Bentonite-Based Sealing Materials. Discussion and standards for bentonite-based sealing materials are contained in Section 9 of the Water Well Standards.

E. Transition Seal. A bentonite-based transition seal, up to 5 feet in length, is often placed in the annular space to separate filter pack and cement-based sealing materials. The transition seal can prevent cement-based sealing materials from infiltrating the filter pack. A short interval of fine-grain sand, usually less than 2 feet in length, is often placed between the filter pack and the bentonite transition seal to prevent bentonite from entering the filter pack. Also, fine sand is sometimes used in place of bentonite as the transition seal material. SJC-2

Fine-grain forms of bentonite, such as granules and powder, are usually employed for a transition seal if a transition seal is to be placed above the water level in a well boring. Coarse forms of bentonite, such as pellets and chips, are often used where a bentonite transition seal is to be placed below the water level.

Transition seals should be installed by using a tremie pipe or equivalent. However, some forms of bentonite may tend to bridge or clog in a tremie pipe.

Bentonite can be placed in the well annulus in dry form or as slurry for transition seals. Water should be added to the bentonite transition seal prior to the placement of cement-based sealing materials where the bentonite is dry in the borehole. Care should be exercised during the addition of water to the borehole to prevent displacing the bentonite.

Water should be added to bentonite at a ratio of about 1 gallon for every 2 pounds of bentonite to allow for proper hydration. Water added to bentonite for hydration or to make a slurry shall be of suitable quality and free of pollutants and contaminants.

Sufficient time should be allowed for bentonite transition seals to properly hydrate before cement-based sealing materials are placed. Normally, 1/2 to 1 hour is required for hydration to occur. Actual time of hydration is a function of site conditions.

The top of the transition seal shall be sounded to ensure that no bridging occurred during placement.

F. Placement of Annular Seal Material. All loose cuttings and other obstructions shall be removed from the annular space before sealing materials are placed. Sealing may be accomplished by using pressure grouting techniques, a tremie pipe, or equivalent. Sealing materials shall be installed as soon as possible during well construction operations. Sealing materials shall not be installed by "free-fall" from the surface unless the interval to be sealed is dry and less than 30 feet deep.

Casing spacers shall be used within the interval(s) to be sealed to separate individual well casing strings from one another in a borehole of a nested monitoring well. The spacers shall be placed at intervals along the casing to ensure a minimum separation of 2 inches between individual casing strings. Spacers shall be constructed of corrosion-resistant metal, plastic, or other non-degradable material. Wood shall not be used as spacer material.

Any metallic component of a spacer used with metallic casing shall consist of the same material as the casing. Metallic spacer components shall meet the same metallurgical specifications and standards as the casing to reduce the potential for galvanic corrosion of the casing.

The spacing of casing spacers is normally dictated by casing materials used, the orientation and straightness of the borehole, and the method used to install the casing. Spacers shall not be more than 12 inches in length and shall not be placed closer than 10 feet apart along a casing string within the interval to be sealed, unless otherwise approved by the enforcing agency.

Casing spacers shall be designed to allow the proper passage and distribution of sealing material around casing(s) within the interval(s) to be sealed.

Additional discussion and standards for placement of the annular seal are contained in Section 9, Section 13, and Appendix B of the Water Well Standards.

Section 10. Surface Construction Features.

Surface construction features of a monitoring well shall serve to prevent physical damage to the well; prevent entrance of surface water, pollutants, and contaminants; and prevent unauthorized access.

A. Locking Cover. The top of a monitoring well shall be protected by a locking cover or equivalent level of protection to prevent unauthorized access.

B. Casing Cap. The top of a monitoring well casing shall be fitted with a cap or "sanitary seal" to prevent surface water, pollutants, or contaminants from entering the well bore. Openings or passages for water level measurement, venting, pump power cables, discharge tubing, and other access shall be protected against entry of surface water, pollutants, and contaminants.

C. Flooding. The top of the well casing shall terminate above ground surface and known levels of flooding, except where site conditions, such as vehicular traffic, will not allow.

D. Bases. Unless otherwise approved by the enforcing agency, a concrete base or pad shall be constructed around the top of a monitoring well casing at ground surface and contact the annular seal, unless the top of the casing is below ground surface as provided by Subsection E, below. The base shall be at least 4 inches thick and shall slope to drain away from the well casing. The base shall extend at least two feet laterally in all directions from the outside of the well boring, unless otherwise approved by the enforcing agency.

The base shall be free of cracks, voids, and other significant defects likely to prevent water tightness. Contacts between the base and the annular seal, and the base and the well casing must be water tight and must not cause the failure of the well casing or annular seal.

Where cement-based annular sealing material is used, the concrete base shall be poured before the annular seal has set, unless otherwise approved by the enforcing agency.

E. Vaults. At the approval of the enforcing agency, the top of the well casing may be below ground surface because of traffic or other critical considerations. A structurally-sound watertight vault, or equivalent feature, shall be installed to house the top of a monitoring well that is below ground surface. The vault shall extend from the top of the annular seal to at least ground surface. In no case shall the top of the annular seal be more than 4 feet below ground surface.

The vault shall contact the annular seal in a manner to form a watertight and structurally sound connection. Contacts between the vault and the annular seal, and the vault and the well casing, if any, shall not fail or cause the failure of the well casing or annular seal.

Where cement-based annular seal materials are used, the vault shall be set into or contact the annular seal material before it sets, unless otherwise approved by the enforcing agency. If bentonite-based sealing material is used for the annular seal, the vault should be set into the bentonite before it is fully hydrated.

Cement-based sealing material shall be placed between the outer walls of the vault and the excavation into which it is placed to form a proper, structurally sound foundation for the vault, and to seal the space between the vault and excavation. Bentonite-based sealing material may be used between the vault and excavation at the approval of the enforcing agency. SJC-2

Sealing material surrounding a vault shall extend from the top of the annular seal to ground surface, unless precluded in areas of freezing. If cement-based sealing material is used for both the annular seal and the space between the excavation and vault, the sealing material shall be placed in a "continuous pour." In other words, cement-based sealing material shall be placed between the vault and excavation and contact the cement-based annular seal before the annular seal has set.

The vault cover or lid shall be watertight but shall allow the venting of gases, unless otherwise approved by the enforcing agency. The lid shall be fitted with a security device to prevent unauthorized access. The lid shall be clearly and permanently marked "MONITORING WELL." The vault and its lid shall be strong enough to support vehicular traffic where such traffic might occur.

The top of the vault shall be set at or above grade so drainage is away from the vault. The top of the well casing contained within the vault shall be covered in accordance with requirements under Subsections A and B, above, so that water, contaminants, or pollutants that may enter the vault will not enter the well casing.

F. Protection From Vehicles. Protective steel posts, or the equivalent, shall be installed around a monitoring well casing where it is terminated above ground surface in areas of vehicular traffic. The posts shall be easily seen and shall protect the well from vehicular impact.

Additional requirements for surface construction features are in Section 10 of the Water Well Standards.

Section 11. Filter Pack.

Monitoring well filter pack material shall consist of nonreactive, smooth, rounded, spherical, granular material of highly uniform size and known composition. Filter pack material shall not degrade or consolidate after placement. The grain-size of the filter pack shall be matched to the slot size of the well screen so that any movement of filter pack material into the well will be limited to prevent significant voids in the filter pack that could ultimately destabilize the annular seal.

Filter pack material shall be obtained from clean sources. Filter pack material should be washed and properly packaged for handling, delivery, and storage, if used in monitoring wells constructed for sensitive water quality determinations.

Care should be exercised in the storage of filter pack materials at a drilling site to ensure the material does not come into contact with pollutants or contaminants. Care should also be exercised to prevent the introduction of foreign substances, such as clay or vegetative matter, that might interfere with the placement and function of the filter pack.

Filter pack material shall be placed in the well boring by use of a tremie pipe or equivalent. The depth of the top of the filter pack shall be carefully checked and the volume of emplaced filter pack material verified to determine that filter pack materials have not bridged during installation.

Section 12. Casing.

The term "casing" in its broadest sense includes all tubular materials that are permanent features of a well. Screens, collars, risers, liners, and blank casing in monitoring wells maintain the well bore and provide a passage for ground water level measurement and/or sample-collection devices.

Protective casing serves to prevent accidental or intentional damage to a well. Protective casing normally consists of heavy gauge metallic pipe placed over the portion of the well casing that extends above ground surface.

Conductor casing usually functions as a temporary means of shoring the walls of a well boring to allow drilling and the placement of well construction materials. If used, temporary conductor casing is usually driven into place during drilling and is withdrawn at the same time filter pack and annular seal materials are installed around the well casing. Sometimes conductor casing is left in place and is made a permanent feature of the completed well structure. Requirements for sealing permanent conductor casing in place are contained in Section 9.

For the purpose of these standards, the term "casing" applies to screens, collars, risers, and blank casing, and other specialized products used to maintain the well bore. General discussion and standards for casing materials are contained in Section 12 of the Water Well Standards. Special considerations that apply to monitoring well casing are described below:

A. Casing Material.

1. Chemical Compatibility. Special consideration shall be given to the selection of casing materials for monitoring wells installed in environments that are chemically "hostile". The selected casing shall resist chemical attack and corrosion.

   Special consideration should be given to the selection of casing materials for wells to be used for sensitive water-quality determinations. Chemical interaction between casing materials and pollutants, contaminants, ground water, filter pack material, and geologic materials could bias ground-water quality determinations.

2. Used Casing. Used casing may be acceptable in certain cases, at the approval of the enforcing agency.

3. Plastic and Steel Casing. Plastic and steel well casing materials are commonly used for monitoring wells. The principal plastics used for water-quality monitoring wells are thermoplastics and fluorocarbon resins.

   Standards for **thermoplastic** well casing are in Section 12 of the Water Well Standards. The principal thermoplastic material used for water quality monitoring wells is polyvinyl chloride (PVC).

   Fluorocarbon casing materials include fluorinated ethylene propylene (FEP) and polytetrafluoroethylene (PTFE). Fluorocarbon resin casing materials are generally considered immune to chemical attack. Fluorocarbon casing materials shall meet the following specifications, including the latest revisions thereof:

   a. ASTM D3296, *Standard Specification for FEP-Fluorocarbon Tube.*

   b. ASTM D3295, *Standard Specifications for PTFE Tubing.*

Stainless steel is the most common form of metallic casing used in monitoring wells constructed for sensitive water quality determinations. Stainless steel casing shall meet the provisions of ASTM A312, *Standard Specification for Seamless and Welded Austenitic Stainless Pipe*, and shall meet general requirements for tubular steel products in Section 12 of the Water Well Standards.

B. Multiple Screens. Monitoring well casing strings shall not have openings in multiple water-bearing units (multi-level monitoring wells), if poor-quality water, pollutants, or contaminants in units penetrated by the well could pass through the openings and move to other units penetrated by the well and degrade ground water quality, unless otherwise approved by the enforcing agency.

C. Bottom Plugs. The bottom of a monitoring well casing shall be plugged or capped to prevent sediment or rock from entering the well.

D. Casing Installation. Discussion and standards for the installation of casing materials are in Section 12 of the Water Well Standards. Special considerations for monitoring wells are:

1. Cleanliness. Casing, couplings, centralizers, and other components of well casing shall be clean and free of pollutants and contaminants at the time of installation.

2. Joining Plastic Casing. Depending on the type of material and its fabrication, plastic casing shall be joined (threaded or otherwise coupled) in a manner that ensures its water tightness. Organic solvent welding cements or glues should not be used for joining plastic casing if glues or cement compounds could interfere with water-quality determinations.

3. Impact. Casing shall not be subjected to significant impact during installation that may damage or weaken the casing.

Section 13. Well Development.

Monitoring well development, redevelopment, and reconditioning shall be performed with care so as to prevent damage to the well and any strata surrounding the well that serve to restrict the movement of poor-quality water, pollutants, and contaminants. Development, redevelopment, and reconditioning operations shall be performed with special care where a well has been constructed in an area of known or suspected pollution or contamination. Such special care is necessary to prevent the spread of pollutants and contaminants in the environment and to protect public health and safety.

Water, sediment, and other waste removed from a monitoring well for "development" operations shall be disposed of in accordance with applicable federal, State, and local requirements. The enforcing agency should be contacted concerning the proper disposal of waste from development operations.

Appropriate methods of well development vary with the type and use of a monitoring well. Development methods that may be acceptable under certain circumstances include:

A. Mechanical Surging. Plungers, bailers, surge blocks, and other surging devices shall incorporate safety valves or vents to prevent excessive pressure differentials that could damage casing or screen.

B. Overpumping and Pump Surging. Overpumping and surging may not be suitable for development of wells producing large amounts of sediment because of the potential for clogging or jamming of pumps.

C. Air Development. Some air development methods are not acceptable for monitoring wells to be used for sensitive water-quality determinations.

D. Water Jetting. Water used in jetting operations shall be free of pollutants and contaminants. Water-jetting methods are not always acceptable for monitoring wells used for sensitive water-quality determinations.

E. Chemical Development. Extreme care shall be exercised in the use of chemicals for monitoring well development. It is often unacceptable to use chemicals for developing monitoring wells to be used for water-quality determinations. Chemicals introduced for development shall be completely removed from the well, filter pack, and water-bearing strata accessed by the well immediately after development operations are completed.

The various methods described above are sometimes used in combination.

Section 14. Rehabilitation and Repair of Monitoring Wells.

For the purpose of these standards, "well rehabilitation" includes the treatment of a well to recover loss in yield caused by incrustation or clogging of the screen, filter pack, and/or water-bearing strata adjoining the well. Well rehabilitation methods that may, in certain cases, be acceptable for monitoring wells include mechanical surging, backwashing or surging by alternately starting or stopping a pump, surging with air, water jetting, sonic cleaning, chemical treatment, or combinations of these.

Rehabilitation methods shall be performed with care to prevent damage to the well and any barriers that serve to restrict the movement of poor-quality water, pollutants, or contaminants. Chemicals used for rehabilitation shall be completely removed from the well, filter pack, and water-bearing strata accessed by the well immediately after rehabilitation operations are completed. Chemicals, water, and other waste shall be disposed of in accordance with applicable federal, State, and local requirements. The enforcing agency should be contacted regarding the proper disposal of waste from rehabilitation operations.

Rehabilitation methods should be compatible with the use of the monitoring well. Special care should be given to the selection of rehabilitation methods for water-quality monitoring wells.

Materials used for repairing well casing shall meet the requirements of Section 12 of these standards.

Section 15. Temporary Cover.

The well or borehole opening and any associated excavations shall be covered at the surface to ensure public safety and to prevent the entry of foreign material, water, contaminants, and pollutants whenever work is interrupted by such events as overnight shutdown, poor weather, and required waiting periods to allow setting of sealing materials and the performance of tests. The cover shall be held in place or weighted down in such a manner that it cannot be removed except by equipment or tools.

Part III. Destruction of Monitoring Wells

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Section 16. Purpose of Destruction.

A monitoring well or exploration hole subject to these requirements that is no longer useful, permanently inactive or "abandoned" must be properly destroyed to:

(1) Ensure the quality of ground water is protected, and,

(2) Eliminate a possible physical hazard to humans and animals.

Section 17. Definition of "Abandoned" Monitoring Well.

A monitoring well is considered "abandoned" or permanently inactive if it has not been used for one year, unless the owner demonstrates intention to use the well again. In some cases regulatory agencies may require that an inactive monitoring well be maintained for future use.

In accordance with Section 24400 of the California Health and Safety Code, the monitoring well owner shall properly maintain an inactive well, as evidence of intention for future use, in such a way that the following requirements are met:

"(1) The well shall not allow impairment of the quality of water within the well and ground water encountered by the well.

(2) The top of the well or well casing shall be provided with a cover, that is secured by a lock or by other means to prevent its removal without the use of equipment or tools, to prevent unauthorized access, to prevent a safety hazard to humans and animals, and to prevent illegal disposal of wastes in the well. The cover shall be watertight where the top of the well casing or other surface openings to the well are below ground level, such as in a vault or below known levels of flooding. The cover shall be watertight if the well is inactive for more than five consecutive years. A pump motor, angle drive, or other surface feature of a well, when in compliance with the above provisions, shall suffice as a cover.

(3) The well shall be marked so as to be easily visible and located, and labeled so as to be easily identified as a well.

(4) The area surrounding the well shall be kept clear of brush, debris, and waste materials."

Section 18. General Requirements.

All permanently inactive or "abandoned" monitoring wells and exploration holes subject to these requirements shall be properly destroyed. The purposes of destruction are to eliminate the well structure and borehole as a possible means for the preferential migration of poor-quality water, pollutants, and contaminants; and, to prevent a possible hazard to humans and animals.

Section 19. Requirements for Destroying Monitoring Wells and Exploration Holes.

General requirements for destroying monitoring wells and exploration holes are contained in Section 23 of the Water Well Standards. Special considerations for monitoring wells and exploration holes are as follows.

A. Monitoring Wells. Monitoring wells shall be destroyed in accordance with the following requirements and Section 23 of the Water Well Standards, **irrespective of their original date of construction.**

1. Preliminary Work. A monitoring well shall be investigated before it is destroyed to determine its condition and details of its construction. The well shall be sounded immediately before it is destroyed to make sure no obstructions exist that will interfere with filling and sealing.

   The well shall be cleaned before destruction as needed so that all undesirable materials, including obstructions to filling and sealing, debris, oil from oil-lubricated pumps, or pollutants and contaminants that could interfere with well destruction, are removed for disposal.

   The enforcing agency shall be notified as soon as possible if pollutants or contaminants are known or suspected to be present in a well to be destroyed. Well destruction operations may then proceed only at the approval of the enforcing agency. The enforcing agency should be contacted to determine requirements for proper disposal of all materials removed from a well to be destroyed.

2. Sealing Conditions. The following minimum requirements shall be followed when various conditions are encountered.

   a. The monitoring well casing, and any other significant voids within the well, shall, at a minimum, be completely filled with sealing material, if the following conditions exist:

      - **The monitoring well is located in an area of known or potential pollution or contamination, and,**
      - **The well was constructed and maintained in accordance with these standards.**

      Sealing material may have to be placed under pressure to ensure that the monitoring well is properly filled and sealed.

   b. A monitoring well shall be destroyed by removing all material within the original borehole, including the well casing, filter pack, and annular seal; and the created hole completely filled with appropriate sealing material, if the following conditions exist:

      - **The well is located in an area of known or potential pollution or contamination, and,**
      - **The well's annular seal, casing, screen, filter pack, or other components were not constructed or maintained according to these standards so that well destruction by merely filling the well casing with sealing material, as in "a" above, would not prevent potential water-quality degradation from**

the movement of poor-quality water, pollutants, or contaminants through the destroyed well structure.

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Material to be extracted from the original borehole shall be removed by means of drilling, including overdrilling, if necessary. The enforcing agency should be contacted to determine requirements for proper disposal of removed materials.

Casing, filter pack, and annular seal materials may be left in place during sealing operations, if the enforcing agency agrees they cannot or should not be removed. In such a case, appropriate sealing material shall be placed in the well casing, filter pack, and all other significant voids within the entire well boring. Casing left in place may require perforation or puncturing to allow proper placement of sealing materials. Sealing material may have to be applied under pressure to ensure its proper distribution.

c. **Monitoring wells shall, at a minimum, be destroyed in accordance with the requirements of Section 23 of the Water Well Standards if located in an area free of any known or potential contamination or pollution.**

B. Exploratory Borings. Exploratory borings shall be completely filled with appropriate sealing material from bottom to top, if located in areas of known or suspected contamination or pollution. Borings located outside such areas shall, at a minimum, be filled with sealing material from ground surface to the minimum depths specified in Section 23 of the Water Well Standards. Additional sealing material shall be placed below the minimum surface seal where needed to prevent the interchange of poor-quality water, pollutants, or contaminants between strata penetrated by the boring.

Appropriate fill or sealing material shall be placed below and between intervals containing sealing material. Sealing material is often economical to use as fill material.

The boring shall be inspected immediately prior to filling and sealing operations. All obstructions and pollutants and contaminants that could interfere with filling and sealing operations shall be removed prior to filling and sealing. The enforcing agency shall be notified as soon as possible if pollutants or contaminants are known or suspected to be in a boring to be destroyed. Well destruction operations may then proceed only at the approval of the enforcing agency. The enforcing agency should be contacted to determine requirements for proper disposal of removed materials.

C. Placement of Material. The placement of sealing material for monitoring wells and exploratory borings is generally described in Section 23 and Appendix B of the Water Well Standards. The following additional requirements shall be observed when placing sealing material for monitoring well or exploratory boring destruction.

1. Placement Method. The well or exploratory boring shall be filled with appropriate sealing, and fill material where allowed, using a tremie pipe or equivalent, proceeding upward from the bottom of the well or boring.

Sealing material shall be placed by methods (such as the use of a tremie pipe or equivalent) that prevent freefall, bridging, and dilution of sealing materials, and/or prevent separation of aggregate from sealants. Sealing material may be placed by

freefall only where the interval to be sealed is dry and no more than 30 feet in depth. Fill material shall be placed by methods that prevent bridging and voids.

2. Timing of Placement. Sealing material shall be placed in one continuous operation (or "pour") from the bottom to the top of the well or boring, unless conditions in the well or boring dictate that sealing operations be conducted in a staged manner, and prior approval is obtained from the enforcing agency.

3. Ground Water Flow. Special care shall be used to restrict the flow of ground water into a well or boring while placing sealing and fill material, if subsurface pressure producing the flow is significant.

4. Sealing Pressure. Pressure required for the placement of cement-based sealing materials shall be maintained long enough for cement-based sealing materials to properly set.

5. Verification. It shall be verified that the volume of sealing and fill material placed during destruction operations equals or exceeds the volume to be filled and sealed. This is to help determine whether the well or boring has been properly destroyed and that no jamming or bridging of the fill or sealing material has occurred.

D. Sealing and Fill Materials. Materials used for sealing exploratory borings and monitoring wells shall have low permeabilities so that the volume of water and possible pollutants and contaminants passing through them will be of minimal consequence. Sealing material shall be compatible with the chemical environment into which it is placed, and shall have mechanical properties consistent with present and future site uses.

Suitable sealing materials include neat cement, sand-cement, and bentonite, all of which are described in Section 9 of these standards. Bentonite shall not be used as a sealing material opposite zones of fractured rock, unless otherwise approved by the enforcing agency. Drilling mud or drill cuttings are not acceptable as any part of sealing material for well destruction. Concrete may be used as a sealing material at the approval of the enforcing agency.

Fill material, if any, shall meet the requirements of Section 23 of the Water Well Standards. Fill material shall be free of pollutants and contaminants and shall not be subject to decomposition or consolidation after placement. Drilling mud or cuttings are not acceptable as any part of fill material.

E. Additional Requirements for Monitoring Wells and Exploratory Borings in Urban Areas. The following additional requirements shall be met for destroying monitoring wells and exploratory borings in urban areas, unless otherwise approved by the enforcing agency:

1. The upper surface of the sealing material shall end at a depth of 5 feet below ground surface; and,

2. If the well casing was not extracted during destruction and sealing operations, a hole shall be excavated around the well casing to a depth of 5 feet below ground surface after sealing operations have been completed and the sealing material has adequately set and cured. The exposed well casing shall then be removed by cutting the casing at the bottom of the excavation. The excavation shall be backfilled with clean, native soil or other suitable material.

F. Temporary Cover. The well or borehole opening and any associated excavations shall be covered at the surface to ensure public safety and to prevent the entry of foreign material, water, pollutants, and contaminants; whenever work is interrupted by such events as overnight shutdown, poor weather, and required waiting periods to allow setting of sealing materials and the performance of tests. The cover shall be held in place or weighted down in such a manner that it cannot be removed, except by equipment or tools. SJC-2

CATHODIC PROTECTION WELLS

CATHODIC PROTECTION WELL STANDARDS

INTRODUCTION

Most wells in California are constructed to extract ground water, inject water, or monitor ground water conditions. Other, less common types of wells include cathodic protection wells. Cathodic protection wells, sometimes called "deep groundbeds," house devices to minimize electrolytic corrosion of metallic pipelines, tanks, and other facilities in contact with the ground.

Electrolytic Corrosion

For the purpose of these standards, electrolytic corrosion is defined as the deterioration of metallic objects by electrochemical reaction with the environment. The electrolytic corrosion process is illustrated in Figure 4 for a metallic pipeline in a soil-water environment. This process gradually weakens the pipeline and can cause its failure.

In Figure 4, an electric potential is induced on the surface of the pipeline as a result of variations in the concentrations of salts in the soil and water surrounding the pipeline. This potential results in an electric current in the soil-water electrolyte. Current flows from an "anode area" on the pipeline to a "cathode area" on the pipeline. Metal is removed from the anode area by the current.

Cathodic Protection

"Cathodic protection" is a term used for certain measures taken to prevent or minimize electrolytic corrosion of metallic equipment and structures. Cathodic protection devices redirect current to flow from a "sacrificial" anode to the soil-water electrolyte, instead of from an anode area on a pipeline or other metallic structure to be protected. The protective anode's role is to corrode in place of the metallic object it is designed to protect, as shown in Figure 5. The protected facility is made to be a permanent cathode by use of cathodic protection devices. Thus, the facility is said to be "cathodically protected."

Protective or sacrificial anodes can be placed close to ground surface or at significant depth. Anodes have been placed at shallow depths in horizontal and vertical arrays for many years. Shallow arrays are often not well suited for metropolitan areas because of land requirements, or suited for areas where electrical interference may be high.

Deep vertical anode installations, usually referred to as "cathodic protection wells," were first developed and used during the 1940s. They were developed in response to the constraints of shallow anode arrays.

Cathodic Protection Wells

Cathodic protection wells are widely installed to protect metallic objects in contact with the ground from electrolytic corrosion. Such objects include petroleum, natural gas, and water pipelines, and related storage facilities; power lines; telephone cables; and switchyards. Cathodic protection wells are sometimes used to control electrolytic corrosion in large water wells.

Figure 4. ELECTROLYTIC CORROSION OF A BURIED PIPELINE

(NOTE: Schematic, not to scale)

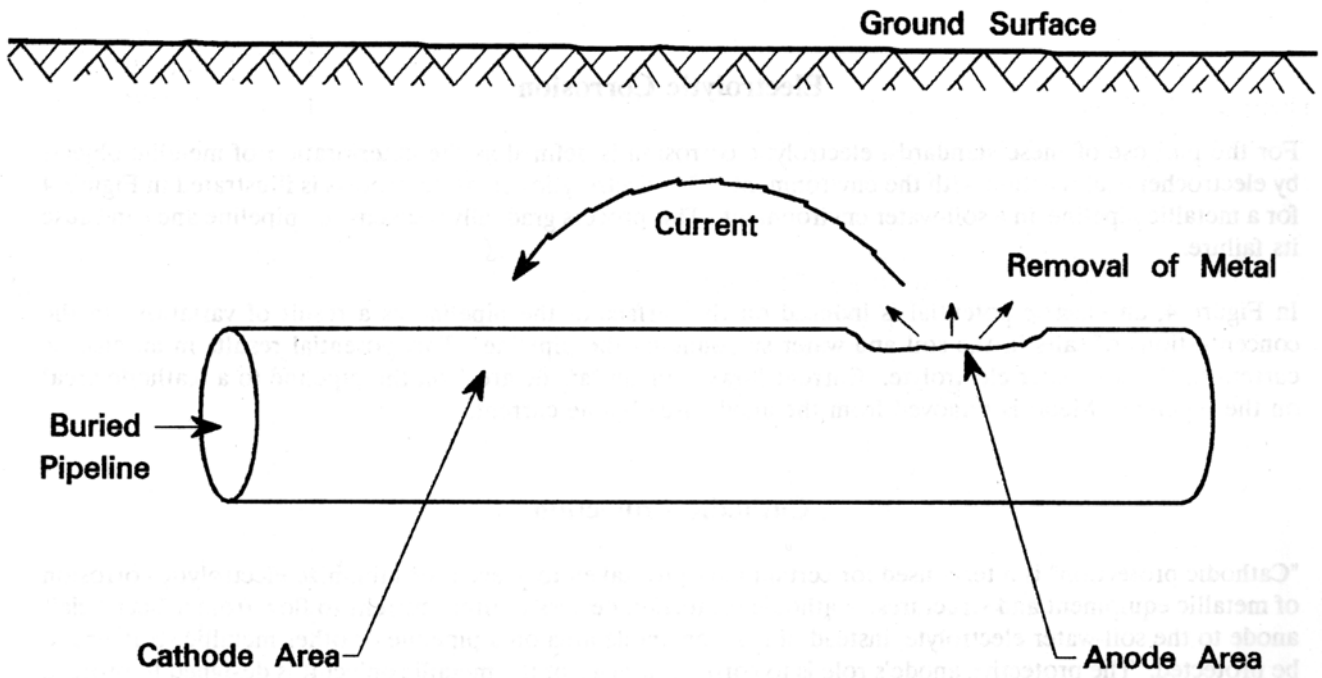
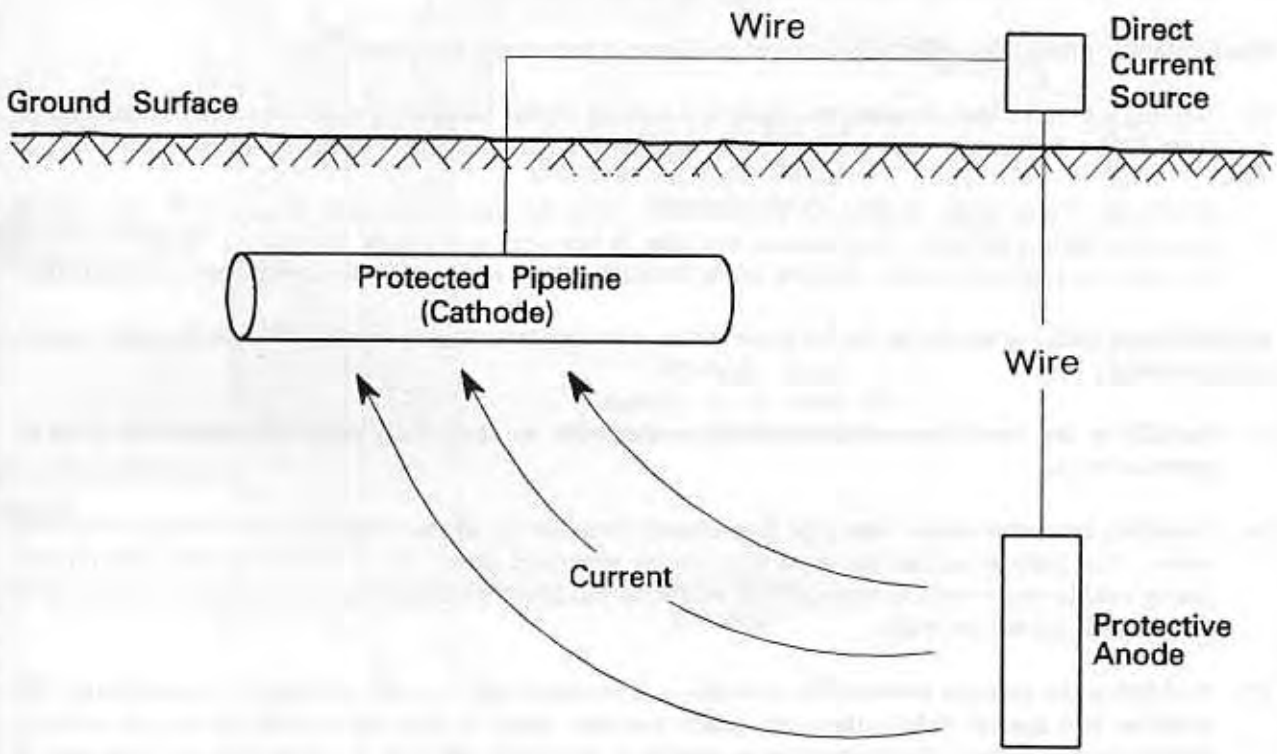


Figure 5. CATHODIC PROTECTION OF A BURIED PIPILINE

(NOTE: Schematic, not to scale)



Many cathodic protection wells have been constructed to protect pipelines that transport natural gas or other "hazardous" materials. The Natural Gas Pipeline Safety Act, Public Law 90-481 adopted by Congress in August 1968, provides requirements for cathodic protection of certain pipelines. SJC-2

Most cathodic protection wells in California are located in areas where underground pipelines or "conveyance" systems are numerous and must be protected. These areas include:

- South coastal region from San Diego to Santa Barbara,
- Oil-producing areas of the southern San Joaquin Valley and the Central Coast, and,
- San Francisco Bay Area.

Few cathodic protection wells exist in California north of Sacramento.

Many cathodic protection wells, as illustrated in Figure 6, have been constructed by:

(1) **Drilling a 6- to 12-inch diameter borehole to a desired depth.** Cathodic protection wells normally range from 100 to 500 feet in total depth. A few wells have been constructed to depths of 800 feet.

California Water Code Section 13711 defines a "cathodic protection well" as an anode installation exceeding 50 feet in depth. Installations less than 50 feet deep are "legally" considered "shallow anodes," not cathodic protection wells. Shallow anode installations are not specifically covered by these standards.

(2) **Placing a string of anodes in the borehole within a designated interval, usually referred to as the "anode interval."**

(3) **Backfilling the anode interval around the anodes with an electrically conductive material, such as granular coke.**

(4) **Installing a small-diameter vent pipe that extends from the top of the anode interval to land surface, or above.** The purpose of the vent pipe is to release generated gases. Medium to large-diameter pipe or casing used in water wells to maintain the well bore and house pumping equipment is not normally used for cathodic protection wells.

(5) **Backfilling the annulus between the vent pipe and borehole wall with an electrically non-conductive fill material to a specific height above the anode interval.** Such fill material usually consists of uniform, small-diameter gravel. Its purpose is to provide a permeable medium for migration of gases and to stabilize the walls of the borehole.

In the past this material was sometimes used to fill the annulus between the vent pipe and the borehole wall from the top of the anode interval to land surface. These standards require specific interval(s) of the upper annular space of a cathodic protection well be filled with sealing materials instead of gravel, to protect ground water quality.

(6) **Sealing the annulus between the vent pipe and the borehole wall, from the top of the non-conductive annular fill to land surface, with sealing material.**

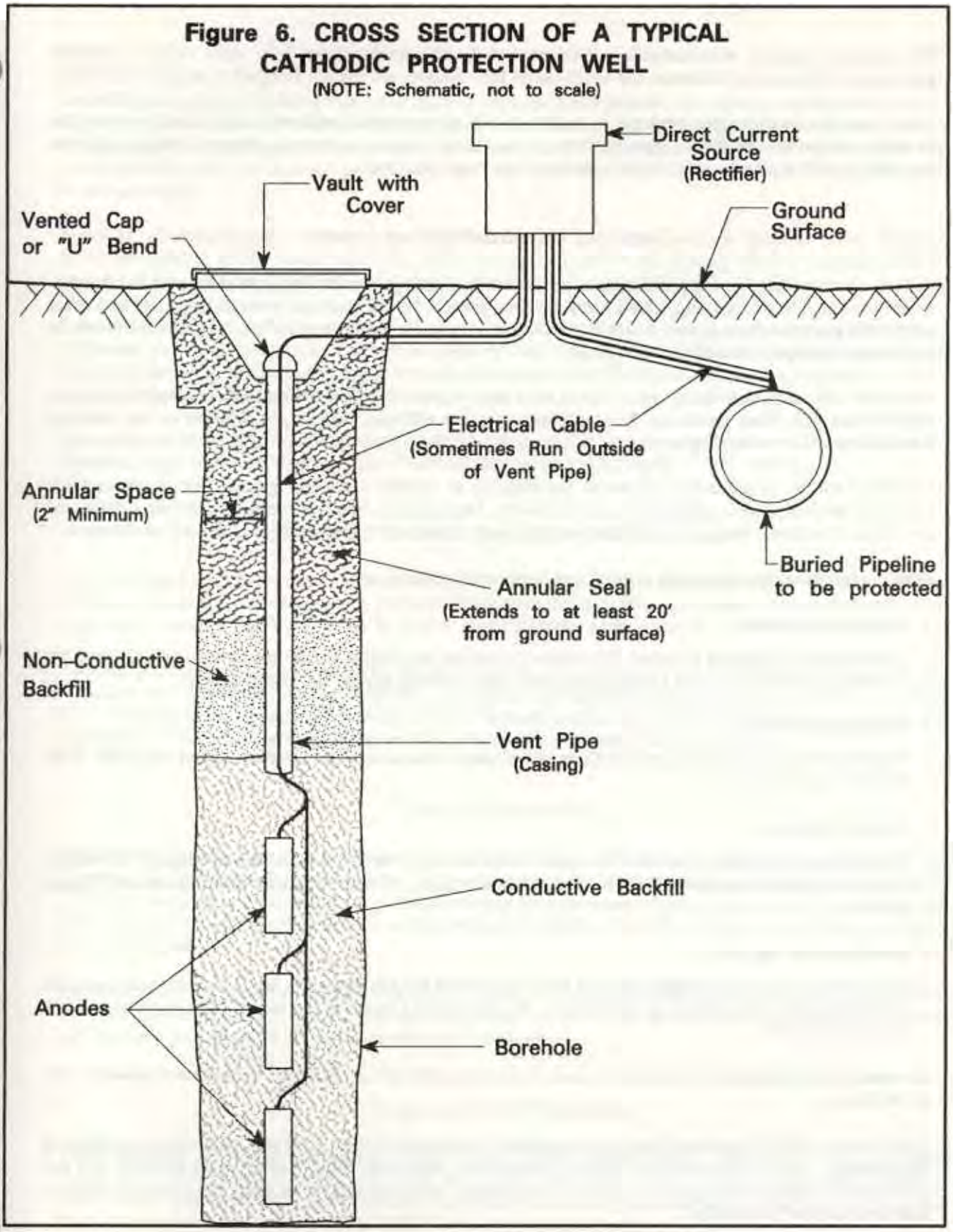
(7) **Installing a permanent cover over the well at ground surface.**

(8) **Connecting the anode leads to the facility to be protected, possibly through an electrical current source.**

Individual designs of cathodic protection wells vary.

Figure 6. CROSS SECTION OF A TYPICAL CATHODIC PROTECTION WELL

(NOTE: Schematic, not to scale)



The protective anodes of a cathodic protection well usually corrode away with time. Thus a cathodic protection well's anodes determine the well's useful life. Anodes are usually designed to last SJC20 years.

There has been an increasing tendency to construct cathodic protection wells with large diameter vent pipe or casing so that anodes can be replaced through the casing. Anode replacement through casing eliminates the need to drill replacement wells when anodes have been expended.

Corrosion Coordinating Committees

Serious electrical interference problems can occur where cathodic protection networks criss-cross one another or are too close to one another. Also, stray currents produced from electrical transmission lines and other equipment can sometimes interfere with the operation of cathodic protection systems. Interference problems are usually most pronounced in urban areas.

Corrosion control coordinating organizations have been formed in areas of California to overcome system interferences and other problems. Most organizations are affiliated with or are chapters of the National Association of Corrosion Engineers.

Corrosion control organizations represent the majority of utilities and other groups that install cathodic protection devices, including cathodic protection wells. Organization members coordinate the installation and operation of cathodic protection facilities with the goal of minimizing problems of electrical interference.

Four organizations that deal with Central and Southern California, are:

- **Southern California**

  The Southern California Cathodic Protection Committee is a formal committee covering all of Southern California south of San Luis Obispo, Kern, and Inyo counties, except San Diego County.

- **San Diego County**

  The San Diego County Underground Corrosion Control Committee is an informal organization that deals with the San Diego area.

- **Central California**

  The Central California Cathodic Protection Committee is a formal committee covering all of Central California plus Sacramento Valley counties, and western Sierra Nevada mountain counties south of Plumas County.

- **San Francisco Bay Area**

  The activities of the two committees that formerly covered the San Francisco Bay Area have been assumed by the San Francisco Section of the National Association of Corrosion Engineers. The committees were disbanded in 1985.

No coordinating organizations function in coastal counties north of San Francisco or in the northeastern part of the State.

Unfortunately, not all who install and operate cathodic protection facilities work with a corrosion coordinating organization. Those not associated with an organization are usually individuals or local agencies that are sometimes unaware of the existence of other installations. Non-coordinated facilities can seriously interfere with one another electrically.

Need for Cathodic Protection Well Standards

Cathodic protection wells, along with other types of wells, can allow ground water quality degradation to occur. Improperly constructed or destroyed cathodic protection wells can constitute a preferential pathway for the movement of poor-quality water, pollutants, and contaminants. Cathodic protection wells constructed with gravel backfill to land surface are particularly conducive to the movement of poor-quality water, pollutants, or contaminants.

Water and electrolytes are sometimes introduced into cathodic protection wells through vent pipes, or gravel fill in the annulus, to keep wells functional where natural electrolytes are lacking. Such a practice could be considered "waste disposal" and may be illegal if poor-quality water is used.

Permanently inactive cathodic protection wells pose a threat for the movement of poor-quality water, pollutants, and contaminants, and should be properly destroyed. Permanently inactive cathodic protection wells are a threat to ground water quality because they become dilapidated with time, are sometimes forgotten, and are sometimes used for waste disposal.

Many cathodic protection wells have small diameter vent pipes that prevent entry by persons and most animals. However, large vent pipe sizes can pose a serious safety threat if left open at land surface.

History of Cathodic Protection Well Standards

The California Legislature enacted legislation in 1949 directing the California Department of Water Resources to develop recommended water-quality protection standards for the construction and destruction of wells. The Legislature amended the Water Code in 1968 to require standards for cathodic protection wells.

Cathodic protection well standards for California were first published in 1973 as DWR Bulletin 74-1, *Cathodic Protection Well Standards: State of California*. Standards presented here replace those contained in Bulletin 74-1. Additional discussion on the history of well standards is contained in the "Introduction" section of this supplement (Bulletin 74-90) and Bulletin 74-81, *Water Well Standards: State of California*.

Scope of Standards

The following are recommended minimum standards for construction, alteration, maintenance, and destruction of cathodic protection wells in California. They only serve as minimum guidelines toward ensuring cathodic protection wells do not constitute a significant pathway for movement of poor-quality water, pollutants, and contaminants. These standards do not ensure a cathodic protection well will perform its corrosion protection function adequately.

The functional requirements of cathodic protection wells may conflict with the application of certain standards for the protection of water quality. Consequently, some compromise has been made between well function and resource protection in the development of these standards.

Organization of Standards

These standards are arranged in a format similar to the Water Well Standards. Since many of the standards that apply to water wells also apply to cathodic protection wells, many references are made in these standards to the Water Well Standards. Standards that apply only to cathodic protection wells or that require emphasis for cathodic protection wells, are discussed in detail in these standards.

Part I. General

Section 1. Definitions[1].

A. Cathodic Protection Well. A cathodic protection well is defined in Section 13711 of the California Water Code as:

> "...any artificial excavation in excess of 50 feet constructed by any method for the purpose of installing equipment or facilities for the protection electrically of metallic equipment in contact with the ground, commonly referred to as cathodic protection."

B. Enforcing Agency. An agency designated by duly authorized local, regional, or State government to administer and enforce laws or ordinances pertaining to the construction, alteration, maintenance, and destruction of cathodic protection wells.

C. Casing. All vent pipe, anode access tubing, electrical cable conduit, and other tubular materials that pass through the interval to be sealed.

D. Conductor Casing. A tubular retaining structure temporarily or permanently installed in the upper portion of the well boring between the wall of the well boring and the inner well casing. Conductor casing is often installed to keep the borehole open during drilling if caving conditions are expected. Despite its title, conductor casing does not normally serve an "electrical" function for cathodic protection wells.

Section 2. Exemptions Due to Unusual Conditions.

Under certain circumstances the enforcing agency may waive compliance with these standards and prescribe alternate requirements. These standards may be waived only where they are impractical or ineffective because of unusual conditions, or would result in unsatisfactory condition or well function. In waiving any of these standards, the enforcing agency shall, if at all possible, require that measures be implemented to provide the same or greater level of water-quality protection that would otherwise be provided by these standards.

Section 3. Special Standards.

The enforcing agency may prescribe measures more stringent than standards described here, where needed to protect public safety or protect water quality.

Section 4. Responsible Parties.

Corrosion control engineers are normally responsible for the design and supervision of corrosion control facilities incorporating cathodic protection wells. Pursuant to Section 13750.5 (Division 7, Chapter 10, Article 3) of the California Water Code, construction, alteration, and destruction of cathodic protection wells shall be performed by contractors licensed in accordance with the California Contractors' License Law

[1] Technical terms are defined in Appendix A, page 77.

(Division 3, Chapter 9, California Business and Professions Code), except where exempted by law. Above-ground electrical facilities for cathodic protection wells should be installed by an appropriately licensed contractor.

Section 5. Reports.

Cathodic protection well construction, alteration, and destruction reports shall be completed on forms provided by the California Department of Water Resources. Other types of forms may be used for submission to the Department with the prior approval of the Department. The completed forms shall be submitted to the Department in accordance with relevant provisions of Sections 13750 through 13754 (Division 7, Chapter 10, Article 3) of the California Water Code. Information concerning completion and submission of well construction, alteration, and destruction reports is contained in *Guide to the Preparation of the Water Well Drillers Report*, Department of Water Resources, October, 1977, or its latest revision.

Section 6. Well Location With Respect to Pollutants and Contaminants, and Structures.

A. Separation. Cathodic protection wells shall be located an adequate distance from known or potential sources of pollution or contamination, where site constraints and corrosion control considerations allow. Potential sources of pollution and contamination include those listed in Section 8 of the Water Well Standards.

As specified in Section 7 below, the length of the annular seal for a cathodic protection well shall be increased if the well is located in a congested urban area, or is located within 100 feet of any potential source of pollution or contamination.

B. Flooding and Drainage. Cathodic protection wells should be located in areas protected from flooding, if possible. Wells located in areas of flooding shall be protected from flood waters and drainage, including protective measures outlined in Section 8, below.

Ground surface surrounding a cathodic protection well shall slope away from the well. Drainage from areas surrounding a cathodic protection well shall be directed away from the well.

C. Accessibility. All cathodic protection wells shall be located an adequate distance from buildings and other structures to allow access for well maintenance, modification, repair, and destruction, unless otherwise approved by the enforcing agency.

Section 7. Sealing the Upper Annular Space.

The space between the cathodic protection well casing and the wall of the well boring, often referred to as the "annular space," shall be effectively sealed to prevent it from being a preferential pathway for the movement of poor-quality water, pollutants, or contaminants. In some cases, secondary purposes of the annular seal are to stabilize the borehole wall, protect casing from degradation or corrosion, and ensure the structural integrity of the casing.

General discussion of sealing requirements and methods is contained in Section 9, Section 13, and Appendix B of the Water Well Standards. Special requirements for sealing cathodic protection wells are:

A. Minimum Depth of Annular Seal.

1. Minimum Depth. The annular space shall be filled with appropriate sealing material from ground surface to a depth of at least 20 feet below land surface. The annular space shall be sealed to a depth of at least 50 feet below land surface in congested urban areas, or where a cathodic protection well is within 100 feet of **any** potential source of pollution or contamination. Additional annular sealing material shall be installed to greater depths where adverse conditions exist that increase the risk of pollution or contamination of ground water.

2. Fill. Any annular space existing between the base of the annular surface seal and the top of the anode and conductive fill interval shall be filled with appropriate fill or sealing material. Fill material should consist of washed granular material such as sand, pea gravel, or sealing material. Fill material shall not be subject to decomposition or

consolidation after placement and shall be free of pollutants and contaminants. Fill material shall not contain drill cuttings or drilling mud. Sealing material is often more practical and economical to use for filling the annular space than granular material.

3. Sealing-Off Strata. Additional annular sealing material shall be placed below the minimum depth of the annular surface seal, as needed, to prevent the movement of poor-quality water, pollutants, and contaminants through the well to zones of good-quality water. Requirements for sealing off zones are in Section 10, below.

B. Sealing Conditions. Requirements for sealing the annular space under varied conditions are detailed in Section 9, Subsection B of the Water Well Standards.

C. Radial Thickness of Seal. A minimum of 2 inches of sealing material shall be maintained between all casings and the borehole wall within the interval to be sealed, except where temporary conductor casing cannot be removed as noted in Section 9 of the Water Well Standards. At least 2 inches of sealing material shall be maintained between all casings in a borehole, within the interval to be sealed unless otherwise approved by the enforcing agency. Additional space shall be provided, where needed, to allow casings to be properly centralized and spaced and allow the use of a tremie pipe during well construction (if required), especially for deeper wells.

D. Sealing Material. Sealing material shall consist of neat cement, sand-cement, concrete, or bentonite clay as discussed in Section 9 of the Water Well Standards. Cement-based sealing material shall be used opposite zones of fractured rock used. Concrete shall only be used at the approval of the enforcing agency. Drill cuttings and used drilling mud shall not be used as any part of sealing material.

E. Placement of Seal. Standards for the placement of annular seals are described in Section 9 and Appendix B of the Water Well Standards.

Section 8. Surface Construction Features.

Surface construction features of a cathodic protection well shall serve to prevent physical damage to the well; prevent the entry of surface water, pollutants, and contaminants; and prevent unauthorized access.

A. Locking Cover. The top of a cathodic protection well shall be protected by a locking cover or equivalent level of protection to prevent unauthorized access. All such covers shall allow the venting of gases.

B. Casing Cap. The top of a cathodic protection well casing shall be fitted with a watertight cap, cover, "U" bend, or equivalent device to prevent the entry of water, pollutants, and contaminants into the well bore. All such covers shall allow venting of gases from the well.

C. Flooding. The top of the well casing shall terminate above ground surface and known levels of flooding, except where site conditions, such as vehicular traffic, will not allow.

D. Bases. A concrete base or pad shall be constructed around the top of a cathodic protection well casing at ground surface and contact the annular seal, unless the top of the casing is to be below ground surface as provided by Subsection E, below. The base shall be at least 4 inches thick and shall slope to drain away from the well casing. The base shall extend at least

2 feet laterally in all directions from the outside of the well boring, unless otherwise approved by the enforcing agency.

The base shall be free of cracks, voids, and other significant defects likely to prevent water tightness. Contacts between the base and the annular seal, and the base and the well casing must be water tight and must not cause the failure of the well casing or annular seal.

Where cement-based annular sealing material is used, the concrete base shall be poured before the annular seal has set, unless otherwise approved by the enforcing agency.

E. Vaults. At the approval of the enforcing agency, the top of a cathodic protection well may be below ground surface because of traffic or other critical considerations. A watertight, structurally-sound vault, or equivalent feature, shall be installed to house the top of the well casing if it terminates below ground surface.

The vault shall extend from the top of the annular seal to at least ground surface. In no case shall the top of the annular seal be more than 4 feet below ground surface.

The vault shall contact the annular seal in a manner to form a watertight and structurally-sound connection. Contacts between the vault and the annular seal, and the vault and the well casing (if any), shall not fail, or cause the failure of the well casing or annular seal.

Where cement-based annular sealing materials are used, the vault shall be set into or contact the annular sealing material before it sets, unless otherwise approved by the enforcing agency. If bentonite-based sealing material is used for the annular seal, the vault shall be set into the bentonite before it is fully hydrated.

Cement-based sealing material shall be placed between the outer walls of the vault and the excavation into which it is placed to form a proper, structurally sound foundation for the vault, and to seal the space between the vault and excavation.

Sealing material surrounding the vault shall extend from the top of the annular seal to ground surface, unless precluded in areas of freezing. If cement-based sealing material is used for both the annular seal and the space between the excavation and vault, the sealing material shall be emplaced in a "continuous pour." In other words, cement-based sealing material shall be placed between the vault and excavation and contact a cement-based annular seal before the annular seal has set.

The vault cover or lid shall be watertight but shall allow the venting of gases. The lid shall be fitted with a security device to prevent unauthorized access and shall be clearly and permanently labeled "CATHODIC PROTECTION WELL." The vault and its lid shall be strong enough to support vehicular traffic where such traffic might occur.

The top of the vault shall be set at grade, or above, so that drainage is away from the vault. The top of the casing contained within the vault shall be capped in accordance with requirements of Subsection B, above so that water, contaminants, and pollutants that may enter the vault will not enter the well casing.

F. Protection From Vehicles. Protective steel posts, or the equivalent, shall be installed around a cathodic protection well casing where it is terminated above ground surface in areas of vehicular traffic. The posts shall be easily seen and shall protect the well from vehicular impact.

Additional requirements for surface construction features are contained in Section 10 of the Water Well Standards.

Section 9. Casing.

Vent pipe, anode access tubing, and any other tubular materials that pass through the interval to be filled and sealed are all considered casing for the purpose of these standards. Materials used for cathodic protection well casing generally shall meet the requirements for casing materials and their installation in Section 12 of the Water Well Standards. Variance from the standards shall be at the approval of the enforcing agency. It is recommended that practices prescribed by the National Association of Corrosion Engineers also be followed in the design and installation of gas vents and electrical conduit.

Cathodic protection well casing should be at least 2 inches in internal diameter to facilitate eventual well destruction.

Section 10. Sealing-Off Strata.

If a cathodic protection well penetrates a stratum or strata below the minimum required annular surface seal depth specified in Section 7, above and that stratum contains poor-quality water, pollutants, or contaminants that could mix with and degrade water contained in other strata penetrated by the well, additional annular sealing material shall be placed below the minimum required annular surface seal to prevent mixing and water-quality degradation.

The following minimum requirements shall be observed for isolating zones containing poor-quality water, pollutants, or contaminants for various cases:

Case 1. Upper Stratum. If a stratum containing poor-quality water, pollutants, or contaminants lies above a stratum to be protected, annular seal material shall extend from the top of the stratum containing the poor-quality water, pollutants, or contaminants down to at least 10 feet into the confining layer separating the two strata, or through the entire thickness of the confining layer, whichever is least.

Case 2. Lower Stratum. If a stratum containing poor-quality water, pollutants, or contaminants lies below a stratum to be protected, the annular space opposite the stratum to be protected shall be sealed along its full length. The seal shall extend at least 10 feet into the confining layer separating the two strata, or through the entire thickness of the confining layer, whichever is least.

Case 3. Multiple Strata.

a. **Where two or more strata containing poor-quality water, pollutants, or contaminants are adjacent to one another and overlie a stratum to be protected,** the annular space opposite the strata containing poor-quality water, pollutants, or contaminants and opposite all interbedded confining layers shall be sealed. The annular seal shall extend at least 10 feet down into, or completely through, whichever is least, the confining layer separating the strata containing poor-quality water, pollutants, or contaminants and the underlying stratum to be protected.

b. **Where two or more strata containing poor-quality water, pollutants, or contaminants underlie a stratum to be protected,** the annular space opposite the stratum to be protected shall be sealed. The seal shall continue down at least 10 feet into, or completely through, whichever is least, the confining layer separating the stratum to be protected and the underlying strata containing poor-quality water, pollutants or contaminants.

c. **Where two strata containing poor-quality water, pollutants, or contaminants are separated by a stratum to be protected,** the annular space opposite the stratum to be protected, the confining strata underlying and overlying the stratum to be protected, and the upper stratum containing poor-quality water, pollutants, or contaminants shall be sealed off.

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The supplementary seals described in the cases above shall be extended up to and contact the base of the required minimum annular surface seal described in Section 7 above, if they are otherwise required to be within 10 feet of the surface seal. Sealing the entire annulus above the anode interval will often economically fulfill the conditions outlined above.

Requirements for sealing materials and their placement are described in Section 7, above.

Section 11. Repair of Cathodic Protection Wells.

Materials used for repairing cathodic protection well casing shall meet the requirements of Section 9, above.

Section 12. Temporary Cover.

The well or borehole opening and any associated excavations shall be covered at the surface to prevent the entry of foreign material, water, pollutants, and contaminants, and to ensure public safety whenever work is interrupted by such events as overnight shutdown, poor weather and required waiting periods to allow setting of sealing materials and the performance of tests. The cover shall be held in place or weighted down in such a manner that it cannot be removed except by equipment or tools.

Part III. Destruction of Cathodic Protection Wells

Section 13. Purpose of Destruction.

A cathodic protection well that is no longer useful, permanently inactive or "abandoned" must be properly destroyed to:

(1) Ensure the quality of ground water is protected, and,

(2) Eliminate a possible physical hazard to humans and animals.

Section 14. Definition of "Abandoned" Cathodic Protection Well.

A cathodic protection well is considered "abandoned" or permanently inactive when its anodes are exhausted and cannot, or will not, be replaced. A cathodic protection well is also considered "abandoned" or permanently inactive if it has not been used for one year, unless the owner demonstrates intention to use it again. To provide evidence of intention for future use of a well, the well owner, in accordance with Section 24400 of the Health and Safety Code, shall maintain the well in such a way that the following requirements are met:

"(1) The well shall not allow impairment of the quality of water within the well and ground water encountered by the well.

(2) The top of the well or well casing shall be provided with a cover, that is secured by a lock or by other means to prevent its removal without the use of equipment or tools, to prevent unauthorized access, to prevent a safety hazard to humans and animals, and to prevent illegal disposal of wastes in the well. The cover shall be watertight where the top of the well casing or other surface openings to the well are below ground level, such as in a vault or below known levels of flooding. The cover shall be watertight if the well is inactive for more than five consecutive years. A pump motor, angle drive, or other surface feature of a well, when in compliance with the above provisions, shall suffice as a cover.

(3) The well shall be marked so as to be easily visible and located, and labeled so as to be easily identified as a well.

(4) The area surrounding the well shall be kept clear of brush, debris, and waste materials."

Section 15. General Requirements.

All permanently inactive or "abandoned" cathodic protection wells shall be properly destroyed. The purpose of destruction is to prevent a possible safety hazard to humans and animals and to eliminate the well structure as a possible means for the preferential migration of poor-quality water, pollutants, and contaminants.

Section 16. Requirements for Destroying Cathodic Protection Wells.

General requirements for well destruction are contained in Section 23 of the Water Well Standards. Special considerations for cathodic protection wells are as follows:

A. Preliminary Work. A cathodic protection well shall be investigated before it is destroyed to determine its condition, details of its construction and whether conditions exist that will interfere with filling and sealing.

The well shall be sounded immediately before it is destroyed to make sure that no obstructions exist that will interfere with filling and sealing. The well shall be cleaned before destruction, as needed, to ensure that all undesirable materials, including obstructions to filling and sealing, debris, and pollutants and contaminants that could interfere with well destruction are removed for disposal. The enforcing agency shall be notified as soon as possible if pollutants and contaminants are known or suspected to be in a well to be destroyed. Well destruction operations may then proceed only at the approval of the enforcing agency. The enforcing agency should be contacted to determine requirements for proper disposal of materials removed from a well to be destroyed.

B. Filling and Sealing Conditions. The following minimum requirements shall be followed when various conditions are encountered.

1. Wells that only penetrate unconsolidated material and a single "zone" of ground water. At a minimum, the upper 20 feet of the well casing and the annulus between the well casing and borehole wall (if not already sealed) shall be completely sealed with suitable material. Sealing material shall extend to a minimum depth of 50 feet below land surface if the well to be destroyed is located in an urban area, or is within 100 feet of any potential source of pollution or contamination. Additional sealing material may be needed if adverse conditions exist. The remainder of the well below the minimum surface seal shall be filled with suitable granular fill material, such as clean sand or pea gravel, or with sealing material.

2. Wells that penetrate several water-bearing strata. The upper portion of the well casing and annular space shall be filled with sealing material as described in Item 1, above. Strata encountered below the surface seal that contain poor-quality water, pollutants, or contaminants that could mix with and degrade water in other strata penetrated by the well, shall be effectively isolated by sealing the well bore and annulus within intervals specified in Section 10, above. The remainder of the well shall be filled with suitable granular fill or sealing material.

3. Wells penetrating fractured rock. Sealing material shall be installed as outlined in Items 1 and 2, above. Cement-based sealing material shall be used opposite fractured rock. The remainder of the well shall be filled with fill or sealing material, as appropriate.

4. Wells in nonfractured consolidated strata. Sealing material shall be installed as outlined in Items 1 and 2, above. The remainder of the well shall be filled with fill or sealing material, as appropriate.

5. Wells penetrating water-bearing zones or aquifers of special significance. The enforcing agency may require that specific water-bearing zones be sealed off for well destruction.

C. Placement of Material. The placement of sealing materials for cathodic protection well destruction is generally described in Section 23 and Appendix B of the Water Well Standards. The following additional requirements shall be observed in destroying cathodic protection wells.

Casing, cables, anodes, granular backfill, conductive backfill, and sealing material shall be removed as needed, by redrilling, if necessary, to the point needed to allow proper placement of sealing materials within required sealing intervals. Removal of some or all well materials will likely be required for cathodic protection wells that were not constructed in accordance with

these standards, or standards adopted by the Southern California Cathodic Protection Committee in December 1969.

Casing that cannot be removed shall be adequately perforated or punctured at specific intervals to allow pressure injection of sealing materials into granular backfill and all other voids that require sealing.

The following requirements shall be observed in placing fill and sealing material in cathodic protection wells to be destroyed.

1. Placement Method. The well shall be filled and sealed with appropriate material upward from the bottom of the well using a tremie pipe or equivalent.

   Sealing material shall be placed by methods (such as by the use of a tremie pipe or equivalent) that prevent freefall, bridging, or dilution of the sealing materials, or separation of aggregates from sealants. Sealing materials shall not be installed by freefall unless the interval to be sealed is dry and no deeper than 30 feet below ground surface.

2. Timing of Placement. Sealing material shall be placed in one continuous operation (or "pour") from the bottom to the top of the well unless conditions in the well dictate that sealing operations be conducted in a staged manner and prior approval is obtained from the enforcing agency.

3. Ground Water Flow. Special care shall be used to restrict the flow of ground water into a well while fill and sealing material is being placed, if subsurface pressure causing the flow of water is significant.

4. Sealing Pressure. Pressure required for placement of cement-based sealing material shall be maintained long enough for the cement-based sealing material to set.

5. Verification. Verification shall be made that the volume of sealing and fill material placed in a well during destruction operations equals or exceeds the volume to be filled and sealed. This is to help determine that the well has been properly destroyed and that no jamming or bridging of the fill or sealing material has occurred.

D. Sealing Materials. Materials used for sealing cathodic protection wells for destruction shall have low permeabilities so that the volume of water and possible pollutants and contaminants passing through them will be of minimal consequence. Sealing material shall be compatible with the chemical environment into which it is placed and shall have mechanical properties compatible with present and future site uses.

Suitable sealing materials include neat cement, sand-cement, concrete, and bentonite, as described in Section 9 of the Water Well Standards. Sealing materials used for isolating zones of fractured rock shall be cement-based, as described in Subsection B, above. Drilling mud or drill cuttings shall not be used as any part of a sealing material for well destruction. Concrete may be used as a sealing material at the approval of the enforcing agency.

E. Fill Material. Many fill materials are suitable for destruction of cathodic protection wells. These include clean, washed sand or gravel or sealing material. Fill material shall be free of pollutants and contaminants and shall not be subject to decomposition or consolidation after placement. Fill material shall not contain drilling mud or cuttings.

F. Additional Requirements for Destruction of Cathodic Protection Wells in Urban Areas. The following additional requirements shall be met at each well site in urban areas, unless otherwise approved by the enforcing agency:

(1) The upper surface of the sealing material shall end at a depth of 5 feet below ground surface, and,

(2) If the casing was not extracted during destruction and sealing operations, a hole shall be excavated around the well casing to a depth of 5 feet below ground surface after sealing operations have been completed and sealing materials have adequately set and cured. The exposed well casing shall then be removed by cutting the casing at the bottom of the excavation. The excavation shall then be backfilled with clean, native soil or other suitable material.

G. Temporary Cover. The well borehole and any associated excavations shall be covered at the surface to prevent the entry of foreign material, water, pollutants, and contaminants and to ensure public safety whenever work on the well is interrupted by such events as overnight shutdown, poor weather, and required waiting periods to allow setting of sealing materials and performance of tests. The cover shall be held in place or weighted down in such a manner that it cannot be removed except by equipment or tools.

APPENDICES

APPENDIX A

Definition of Terms

Protective Anode - A metallic object designed to corrode in place of the object it is designed to protect.

Cathodic Protection[1] - A technique to prevent the corrosion of a metal surface by making that surface the cathode of an electrochemical cell.

Cement, Portland Cement - A cement that contains oxides of calcium, aluminum, iron, and silicon made by heating a mixture of limestone and clay in a kiln and pulverizing the resultant clinker, as defined in ASTM C150. Portland cement is also considered a hydraulic cement, because it must be mixed with water to form a cement-water paste with the ability to develop strength and harden, even under water.

Centralizer - A device that assists in centering tubular materials in a borehole.

Conductance, Specific - A measure of the ability of water to conduct electric current at 77 degrees Fahrenheit. It is related to the total concentration of ions in the water.

Corrosion[1] - The deterioration of a material, usually a metal, because of a reaction with its environment.

Drilling Fluid - A fluid (liquid or gas) used in drilling operations to remove cuttings from a borehole, to clean and cool the drilling bit, to reduce friction between the drill stem and the borehole wall, and, in some cases, to prevent caving or sloughing of the borehole.

Electrolyte[1] - A chemical substance or mixture, usually liquid, containing ions that migrate in an electric field. The term electrolyte refers to the soil or liquid adjacent to, and in contact with a buried or submerged metallic structure including the moisture and other chemicals contained therein.

Interference[1] - The situation that arises when a foreign substructure is affected in any way by a direct current source.

Rectifier[1] - An electronic device that changes alternating current to direct current.

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[1] Definition from National Association of Corrosion Engineers Standard RP-01-69 or RP-05-72.

APPENDIX B

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REFERENCES

Since Bulletin 74-81 was published in mid-1981 several new or revised publications have been issued that address ground water or well construction. This appendix lists publications issued or revised since 1981 and selected other publications that were reviewed during the preparation of this supplement. Publications that were used for Bulletin 74-81 that have since been revised are identified by a number in parentheses. These numbers refer to the publication's original position in the bibliography of Bulletin 74-81 (Appendix E, page 83).

Books and Pamphlets

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Western Water. Water Education Foundation. Published monthly since 1949.

Laws, Rules and Regulations

A. Pertinent laws and regulations of the State of California as contained in:

- California Code of Regulations
- California Business and Professions Code
- California Health and Safety Code
- California Public Resources Code
- California Water Code

B. The State Water Resources Control Board Model Water Well Ordinance.

C. Existing ordinances of the counties of California pertaining to the construction, alteration, and destruction of wells.

D. Laws, regulations, and recommendations of the various states pertaining to the construction, alteration, or destruction of wells.

EXHIBIT
SJC-3

Project No.
27459.000.001

November 7, 2024

Mr. Chris Neudeck
Kjeldsen, Sinnock & Neudeck, Inc
711 North Pershing Avenue
Stockton, CA 95203

Subject: Geotechnical Explorations
Sacramento/San Joaquin River Delta

DWR EXPLORATION ABANDONMENT STANDARDS

References:
1. DWR; California Well Standards, Bulletin 74-90; June 1991; https://water.ca.gov/Programs/Groundwater-Management/Wells/Well-Standards/Combined-Well-Standards.
2. DWR; 2024-2026 Preconstruction Field Investigations Environmental Compliance, Clearance, and Monitoring Plan; DWR Exhibit DCP.X2.1.00005.
3. MBK Engineers; Comments on IS/MND Soils Investigations for Data Collection in the Delta; Dated January 15, 2020; DWR Exhibit DCP.X1.1.00004, pdf pp. 554-556.

Dear Mr. Neudeck:

As requested, we have prepared this letter to summarize our review of the referenced documents and provide our opinion on the general applicability of the geotechnical exploration abandonment standards applicable to borings and CPTs, as provided in Reference 1.

Prior to commencing preconstruction field investigations, the Department of Water Resources (DWR) is required to prepare a Preconstruction Field Investigations Environmental Compliance, Clearance, and Monitoring plan in accordance with Reference 2. The geotechnical exploration abandonment standards provided in Reference 2 are as follows.

> *DWR shall follow the guidelines in its Bulletin 74-90 with respect to the method by which the exploratory borings will be sealed*

The Bulletin 74-90 guidelines were originally prepared for the purpose of protecting groundwater quality by reducing the potential for aquifer cross contamination from groundwater flow between aquifers as a result of a boring, well, or penetration. Although the original purpose of the guidelines was intended to protect groundwater quality, these guidelines also serve to reduce the potential to create detrimental seepage impacts, including impacts through and under levees in the vicinity of the explorations.

Geotechnical activities in the Delta require specific measures to reduce risk associated with mechanical collapse or piping failures of the borehole due to inadequate grouting techniques. The relatively unique geology and history of Delta levees allows them to be considered more as embankments or low-head dams. Additionally, complicating factors potentially present in the Delta can include, for instance, hydraulic head from the adjacent water bodies, localized elevated water tables, complex sand, gravel, and clay lenses as a result of natural overbank deposition, more modern placement of dredged channel materials, and contemporary, geotechnically designed structural improvements.

In our opinion, geotechnical explorations can safely be performed in the Sacramento/San Joaquin River Delta without creating substantive flood control and other risks, provided that both the exploration and exploration abandonment guidelines in Reference 1 are followed. However, improper exploration abandonment techniques in the Delta can create detrimental seepage conditions, particularly within, under, and/or adjacent to levees. If the detrimental impact is severe enough, the structural integrity of the levee could be compromised, leading to increased seepage, decreased slope stability, and potentially resulting in levee failure.

The attached letter from MBK, Reference 3, documents specific incidents of observed reductions in levee performance that were potentially attributed to improper abandonment of geotechnical explorations. It can be particularly difficult to reach the bottom of smaller diameter holes, and to fill holes in sandy materials where bridging can occur. In such cases, the original drilled hole path can be lost and sealing is not effective. Additionally, although there is no direct evidence that exploration abandonment techniques contributed to the recent levee damage at Victoria Island in October 2024, the event cited is an example of a similar situation in which adverse seepage nearly resulting in the failure of a levee.

Measures to reduce risk from each of these conditions can include implementation planning, local soil maps, locally experienced drilling crews, senior geologists and geotechnical engineers at the jobsite, careful documentation, and independent post-completion inspection to identify and correct any improper abandonment techniques.

We strive to perform our professional services in accordance with the generally accepted principles and practices currently employed in the area; there is no warranty, express or implied. If you have any questions or comments regarding this letter, please call and we will be glad to discuss them with you.

Sincerely,

ENGEO Incorporated



Josef J. Tootle, GE Mark Gilbert, GE

jjt/mg/dt

Attachment: MBK Engineers, Comments on IS/MND for Soils Investigations for Data Collection in the Delta January 15, 2020

MBK ENGINEERS
Water Resources • Flood Control • Water Rights

GILBERT COSIO, JR., P.E.
MARC VAN CAMP, P.E.
WALTER BOUREZ, III, P.E.
RIC REINHARDT, P.E.
DON TRIEL, P.E.
DARREN CORDOVA, P.E.
NATHAN HERSHEY, P.E., P.L.S.
LEE G. BERGFELD, P.E.
BEN TUSTISON, P.E.
THOMAS ENGLER, P.E., CFM
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1913-1985

CONSULTANTS:
JOSEPH I. BURNS, P.E.
DONALD E. KIENLEN, P.E.

January 15, 2020

Via email: Delta_Soil_ISMND@water.ca.gov

California Department of Water Resources
1416 Ninth Street
Sacramento, CA 95814
Attn.: Katherine Marquez

Subject: Comments on IS/MND for Soils Investigations for Data Collection in the Delta

Dear Ms. Marquez:

MBK Engineers is the District Engineer to 33 reclamation districts (RD's) in the Sacramento-San Joaquin Delta. As District Engineer, we assist RD's with all issues involving flood control and drainage, the 2 main responsibilities of RD's. We offer the comments below on behalf of our clients, within whose jurisdiction the DWR soils investigation will construct borings and cone penetration tests (CPT's). These RD's are Reclamation District No.'s 3, 150, 551, 755, 756, 813, 830, 999, 2025, 2026, 2028, 2029, 2033, and 2110.

Through our many years as District Engineer, we have experienced problems associated with borings and CPT's that have impacted the ability of RD's to perform their responsibilities. These problems, mainly artesian flow and seepage, have led to increased drainage costs, lost farm income, and levee damage. Even if sealed, as described in the IS/MND we have found that, over time, these seals become compromised and result in seepage. Also, the weight of drill rigs compresses the farm ground which reduces its productivity.

Therefore, we offer the following comments and suggested revisions to the IS/MND:

- All borings and CPT's shall be reviewed and approved by the local RD's. The RD's require DWR to obtain right of entry agreements with private landowners upon whose property these investigations will take place or to provide access to the proposed sites. All data collected shall be provided to the RD's for their use.
- All borings and CPT's within the rights-of-way of federal project levees for which the California Central Valley Flood Protection Board (CCVFPB) is the local sponsor, shall obtain permits from the CCVFPB and section 408 permits as required by the US Army Corps of Engineers.

- The IS/MND shall evaluate the impact and necessary preparations required to deal with artesian flow created due to pressurized aquifers through which the borings will penetrate.
- The IS/MND shall evaluate and describe how the borings and CPT's will be sealed. The current document is vague and does not indicate it will follow procedures dictated by the soil conditions and pressurized artesian flow. We also recommend that the sealing include completely filling the holes with a grout approved by the RD's.

We look forward to your response to our comments and concerns. If you have any questions, or would like additional information, please call me at (916) 456-4400, or email me at cosio@mbkengineers.com.

Sincerely,
MBK ENGINEERS

MBK Engineers
Gilbert Cosio, Jr., P.E.

GC/nl
8888.4 KATHERINE MARQUEZ 2020-01-15

Enclosure

cc: Ms. Suzanne Daggert, Reclamation District No. 3
Mr. Warren Bogle, Reclamation District No. 150
Mr. Carel Van Loben Sels, Reclamation District No. 551
Mr. Douglas Hemly, Reclamation District No. 755
Mr. David Forkel, Reclamation District No. 756; 2025; 2026; 2028
Mr. Thomas Herzog, Reclamation District No. 813
Mr. Tyson Zimmerman, Reclamation District No. 830
Mr. Tom Slater, Reclamation District No. 999
Mr. Alan Coon, Reclamation District No. 2029
Mr. Eric Merlo, Reclamation District No. 2033
Mr. Dawit Zeleke, Reclamation District No. 2110

Exhibit K

DECISION NO. D20242

STATE OF CALIFORNIA

DELTA STEWARDSHIP COUNCIL

San Francisco Baykeeper, Winnemem Wintu, Shingle Springs Band of Miwok Indians, Cal. Indian Environmental Alliance, Friends of the River, Center for Biological Diversity, Save California Salmon, California Sportfishing Protection Alliance, Golden State Salmon Association, and Restore the Delta _____ **South Delta Water Agency** _____ **County of Sacramento, Sacramento County Water Agency, Sacramento Area Sewer District, and City of Stockton** _____ **County of San Joaquin, Central Delta Water Agency, and Local Agencies of the North Delta** **Appellants,** **v.** **California Department of Water Resources,** **Respondent,**	(Appeal Nos. C20242-A1, C20242-A2, C20242-A3, C20242-A4) **In the Matter of the Department of Water Resources' Certification of Consistency for 2024-2026 Proposed Geotechnical Activities** DECISION No. D20242 BEFORE: Julie Lee, Chair; Gayle Miller, Vice-Chair; Diane Burgis; Frank C. Damrell, Jr.; Ben Hueso; Maria Mehranian; Daniel Zingale.

DECISION NO. D20242

DECISION

On December 19, 2024, the Delta Stewardship Council (Council) conducted a hearing on four appeals challenging the Department of Water Resources' (Department) Certification of Consistency Number C20242 (Certification) for 2024-2026 Proposed Geotechnical Activities (Proposed Geotech). The Council, acting pursuant to the authority vested in it by California Water Code sections 85225, et seq., having taken the appeals under submission, and after careful consideration of the certification, appeals, record, party arguments and submissions, finds that the Proposed Geotech fails to meet the requirements for a covered action under Water Code section 85057.5(a)(3) and Title 23, California Code of Regulation, section 5001, subd. (k)(1)(E). When the Council determines on the appeal of a certification of consistency that the proposed action is not a covered action, the Council's review authority at that point ends, and no further findings are made.[1] Accordingly, the Council hereby dismisses the appeals for lack of jurisdiction. Because the Council has reviewed the Proposed Geotech and determined that it is not a covered action subject to a Delta Plan policy, the Department of Water Resources need not resubmit the Proposed Geotech to the Council as part of the certification of consistency for the related Delta Conveyance Project.

SUMMARY OF FINDINGS

The Department submitted a Certification for a small subset of geotechnical activities described in the Department's California Environmental Quality Act (CEQA) Final Environment Impact Report (EIR) for the Delta Conveyance Project.[2] The Certification describes the Proposed Geotech as independent data collection activity necessary to inform the planning and design of the Delta Conveyance Project. (Certification, p. 1-1.) The Department explains that it will submit a subsequent certification of consistency for the Delta Conveyance Project based in part on the data collected. (*Ibid*., pp. 1-1 – 1-3.) Appellants each contend that all the activities described in the Final EIR for the Delta Conveyance Project constitute one covered action that must be submitted together in a single certification of consistency. Appellants point to regulations and case law under CEQA to argue that the Department cannot "chop the Delta Conveyance Project into bite-sized pieces and certify the pieces in complete isolation from the rest of the pieces." (Letter Attached to SDWA Appeal of Certification, p.1.) Appellants further argue that the Proposed Geotech is not a covered action and that the Council must reject the Certification. (Letter Attached to County of Sacramento et al.'s Appeal of Certification p.7.)

[1] Council has the authority to hear and decide appeals of certifications of consistency. This authority necessarily includes the power to determine on the appeal of a certification of consistency whether a proposed action that is the subject of a certification of consistency is a covered action in the first instance. (Wat. Code § 85225.20 [Council can determine whether issues raised on appeal are within the Council's jurisdiction or do not raise an appealable issue.])

[2] The Delta Conveyance Project is a large and complex infrastructure project that will add two new water intakes in the north Delta along the Sacramento River and convey water through an underground tunnel to a new pumping plant that will lift the water into the existing Bethany Reservoir south of the Delta. (Certification, p. 1-2.)

Thus, there are two threshold issues raised in the appeals that concern the Council's authority and appellate jurisdiction. The first issue is whether CEQA case law and Guidelines govern certifications of consistency and prohibit the Department from submitting a separate certification of consistency for the Proposed Geotech. The second and more critical issue is whether the Proposed Geotech is a covered action, in the first instance.

As to the first issue, the Council finds that the Department did not necessarily violate the Delta Reform Act by submitting a certification of consistency for the Proposed Geotech separate from other activities described in the Final EIR for the Delta Conveyance Project. CEQA is a separate process under a different statutory scheme that is regulated by another state agency. CEQA does not govern the certification of consistency process under the Delta Reform Act, except to the extent it is specifically incorporated by Council regulations. Council regulations do not prohibit the Department from submitting a separate certification of consistency for preliminary data collection activity included in a Final EIR for a project, so long as the Department's decision is reasonable and in good faith as required by section 5001, subdivision (k)(3), of Title 23 of the California Code of Regulations and does not otherwise violate the Delta Reform Act or Council regulations. Here, the Council need not determine whether the Department acted reasonably in submitting the Certification for the Proposed Geotech, if the Council finds that it is not a covered action subject to the Council's appellate authority.[3] There is no Delta Plan policy harm in separating the Proposed Geotech from the Delta Conveyance Project where the Council finds that the Proposed Geotech is not a covered action. The Proposed Geotech does not affect whether the Delta Conveyance Project is covered by a Delta Plan regulatory policy.

With respect to the second issue, the Council relies on a two-part test to determine whether an activity is a covered action. (Cal. Code Regs, tit. 23, § 5001, subd. (ee).) The Council first determines whether the activity is a "proposed action" as defined by section 5001, subdivision (ee), of Title 23 of the California Code of Regulations. The Council then determines whether the proposed action is covered by a Delta Plan regulatory policy. Having applied this two-part test, the Council finds that the Proposed Geotech is a "proposed action," but that it is not covered by a Delta Plan regulatory policy and therefore not a covered action. The specific findings are discussed in more detail below.

The Council therefore agrees with the Appellants that the Proposed Geotech is not a covered action. (Letter Attached to County of Sacramento et al.'s Appeal of Certification, pp. 7-8.) However, the Council does not reject or approve certifications. We do not exercise direct review and approval authority over certifications of consistency. (*Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1042.) Rather, the Council serves as an "appellate body" for a public agency's determinations of consistency. (*Ibid*.) The Council can either deny appeals or remand the matter to the

[3] The Council presumes that the Department acted in good faith in performing its official duty with respect to its determination. (Cal. Evid. Code § 664; see also *Crowe v. Boyle* (1920) 184 Cal. 117, 127 [all presumptions of law in favor of the good faith of public officials.])

public agency for reconsideration on a finding that the certification of consistency is not supported by substantial evidence in the record. (Wat. Code § 85225.25.) The Council may also dismiss appeals on specific grounds, including a lack of jurisdiction. (Wat. Code § 85225.20.) Whereas here the Council determines that a proposed action is not a covered action in the first instance, the appeals are dismissed for lack of jurisdiction and the Council makes no further findings. (Wat. Code § 85225.20; Cal. Code Regs, tit. 23, § 5034, subd. (d).) Accordingly, the appeals are dismissed.

This decision does not make any findings with respect to the Delta Conveyance Project (nor geotechnical activities that are not the subject of the Certification) and does not constitute approval or rejection of that project. Except as expressly provided herein, the Department must file a certification of consistency for the Delta Conveyance Project.

A. PROCEDURAL HISTORY

1. Certification of Consistency

The Department submitted its Certification for the Proposed Geotech on October 8, 2024. The Department states that this is not a certification of consistency for the Delta Conveyance Project and that the proposed activity as described only concerns data collection, independent of the implementation of the Delta Conveyance Project. (Certification, pp. 3-1 – 3-2.)

2. Brief Description of the Covered Action

In the Certification, the Department describes the Proposed Geotech as subsurface exploration and testing consisting of: 1) “Borings with small diameter (less than 8-inch diameter) augur and/or mud rotary drill and soil and rock sampling”; 2) “CPTs [cone penetration tests] utilizing a truck mounted rig equipped with one-to-two inch diameter cone”; and 3) 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.” (Certification p. 3-16.) Workspace at each site, not including staging areas, is expected to be approximately 0.022 acres, or 10 feet by 100 feet. (*Ibid*.) The Proposed Geotech will consist of up to 261 soil borings, which include 31 soil borings with water quality tests, and up to 15 CPTs. (*Ibid*.) Individual soil boring activity 250 feet deep can take an average of 9 working days (maximum 11 working days). (*Ibid*.) Borings less than 50 feet will take a maximum of 2 working days. (*Ibid*.) The CPTs take an average of 2 days to complete, up to a maximum of 4 days. (Certification, p. 3-17.) Once the boring, cone penetration tests and water quality tests are complete, the holes will be sealed using cement-bentonite grout in accordance with State of California Regulations and industry standards. (Certification, pp. 3-16 – 3-17.) The Proposed Geotech work will take place in parts of Sacramento, San Joaquin, Contra Costa, and Alameda Counties from north of the town of Hood to Bethany Reservoir in the south. (Certification, p. 3-1; *see* Figure 1, below.)

The Proposed Geotech does not include other geotechnical activities described in the Final EIR for the Delta Conveyance Project, such as work on levees, overwater activities, activities that involve trenching (e.g. “test trenches”), activities within the West Tracy Fault or Bethany Fault, pile driving, vibratory testing of dynamic properties, potholing, monument installation, test fills for settlement studies, 800-foot inclined boreholes, or ground improvement test zones.[4] (Certification, p. 3-16.)

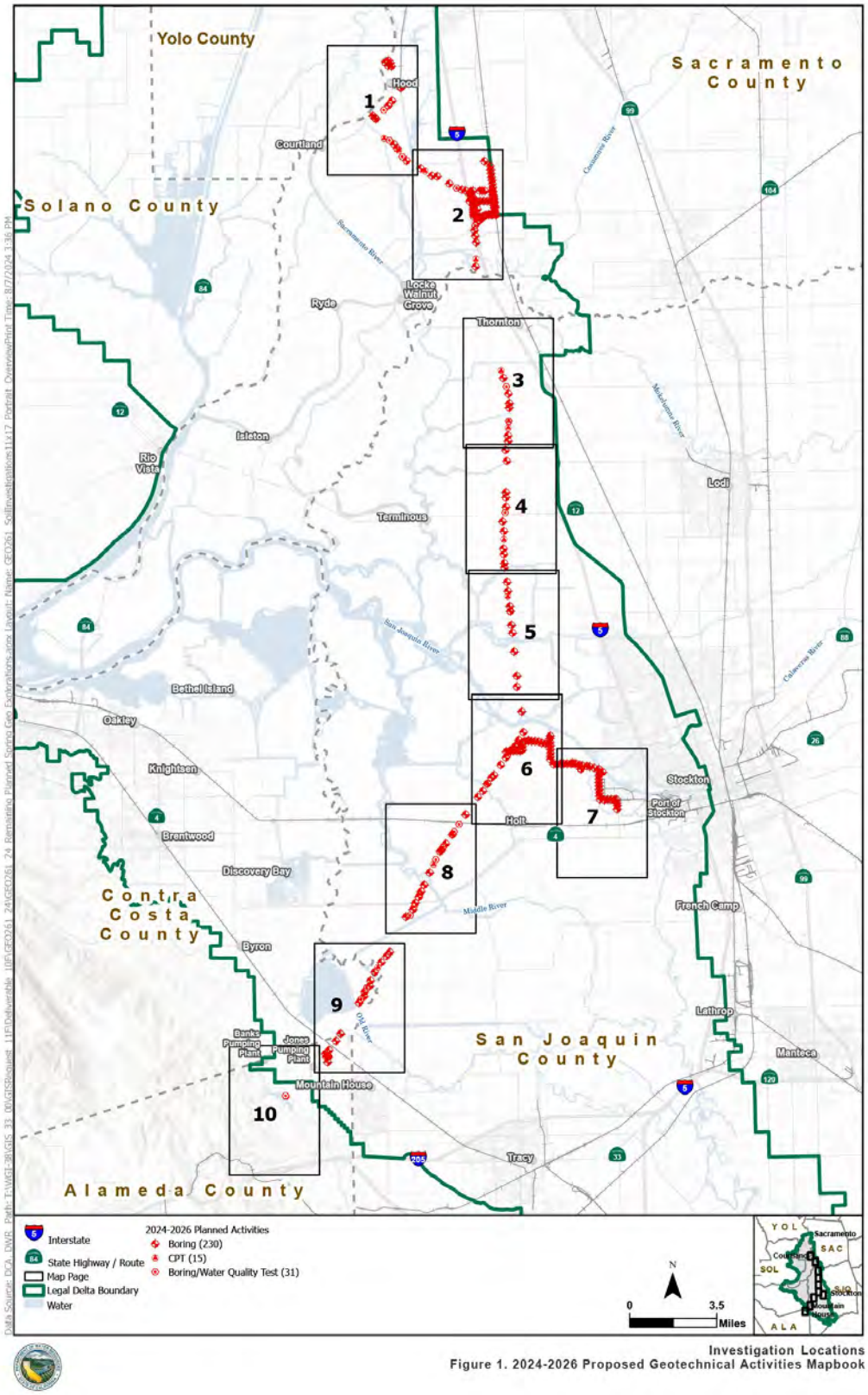
According to the Certification, the Proposed Geotech is “expected to yield important data about soil properties and water quality” that will inform planning and design of the Delta Conveyance Project. (Certification, p. 1-1.) The Certification states the data collected from these borings will provide information that will refine the layout and configuration of DCP plans, and support applications and requests to other agencies for permits, authorizations, or conditional approvals. (Certification, p. 3-13.)

> Soil and rock samples obtained from soil borings and soil data from CPTs will be analyzed to determine the engineering properties of the soil and rock to validate and, if needed, to determine modifications to the conceptual design and layout of Delta Conveyance Project features. Soil and water quality tests will be conducted to assess the potential for the presence of high concentrations of metals, organic compounds, dissolved gasses, or other constituents that may be designated as hazardous; this assessment will help determine whether such constituents can be avoided and otherwise ensure that Delta Conveyance Project features and infrastructure are designed, planned, and constructed to allow for required treatment or disposal methods in consideration of the constituents identified.

(Certification, p. 3-13.) The Certification states that the geotechnical data collected will inform the substantial evidence supporting the future certification of consistency for the Delta Conveyance Project. (Certification, p. 3-14.)

[4] These other geotechnical activities are not part of the proposed activity for this Certification and are therefore not the subject of the Council’s decision. These activities may or may not be a covered action. Absent a specific finding or determination that the activities are not a covered action or the filing of a certification of consistency (subject to appeal), DWR may not move forward with implementing these activities.

DECISION NO. D20242



Investigation Locations
Figure 1. 2024-2026 Proposed Geotechnical Activities Mapbook

3. The Department's Consistency Determination

In the Certification, the Department makes the following determinations:

1. The Proposed Geotech meets the definition of project per Public Resources Code section 21065 because it is being undertaken by a public agency and has a potential for resulting in either a direct change in the environment or a reasonably foreseeable indirect physical change in the environment. (Certification, p. 4-1.)
2. The Proposed Geotech will occur within the boundaries of the Delta, and therefore "will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh." (Certification, p. 4-1.)
3. The Proposed Geotech "will be carried out, approved, or funded by the State or a local public agency." The Department, a state agency, is the proponent of the proposed action. (Certification, p. 4-1.)
4. The Proposed Geotech "which involve only temporary activities at discrete locations to test soil and water quality conditions, would have no impact (and therefore would not have the potential to result in a significant impact) on the achievement of one or both of the coequal goals or on the implementation of a government-sponsored flood control program." (Certification, p. 4-2.)
5. The Proposed Geotech is "not covered by one or more regulatory *Delta Plan* policies contained in Article 3 of the [Council's] regulations codified at California Code of Regulations, Title 23, Sections 5003–5015." (*Ibid*.)

The Certification states that because the Proposed Geotech will have no impact on the achievement of the coequal goals or on the implementation of a government-sponsored flood control program and is not covered by one or more of the regulatory policies in Article 3, "an assessment of consistency" with policy G P1 (23. Cal. Code Regs., tit. 23, § 5002) is not required. (Certification, p. 4-20; *see also* Cal. Code Regs, tit. 23, § 5002.) Nevertheless, the Certification includes detailed findings with respect to G P1 sub-policies and concludes that the Proposed Geotech is consistent with G P1. (Certification, p. 4-20.)

4. Appeals

On November 7, 2024, the Council received four timely appeals[5] of the Proposed Geotech Certification from the following entities (collectively referred to as Appellants):

[5] Any person who claims that a proposed covered action is inconsistent with the Delta Plan and, as a result of that inconsistency, the action will have a significant adverse impact on the achievement of one or both of the coequal goals or implementation of government-sponsored flood control programs, may file an appeal of the certification of consistency. (Wat. Code, § 85225.10, subd. (a); Cal. Code Regs, tit. 23, § 5022, subd. (a).) An appeal must clearly and specifically set forth the basis for the claim that the covered action is inconsistent with the Delta Plan. (Wat. Code, § 85225.10, subd. (b); Cal. Code Regs, tit. 23, § 5022, subd. (c).) Specifically, an appeal must include a statement of the factual allegations upon which

- San Francisco Baykeeper, Winnemem Wintu, Shingle Springs Band of Miwok Indians, California Indian Environmental Alliance, Friends of the River, Center for Biological Diversity, Save California Salmon, California Sportfishing Protection Alliance, Golden State Salmon Association, and Restore the Delta (SF Baykeeper)
- South Delta Water Agency (SDWA)
- County of Sacramento, Sacramento County Water Agency, Sacramento Area Sewer District, and City of Stockton (County of Sacramento)
- County of San Joaquin, Central Delta Water Agency, and Local Agencies of the North Delta (County of San Joaquin)

The Council consolidated the appeals pursuant to California Code of Regulations, Title 23, section 5031. The Council issued a notice of hearing and briefing schedule for written submissions on November 14, 2024. Appellants submitted additional briefs supporting their respective appeals on November 27, 2024, along with requests to supplement the record with additional information. The Delta Protection Commission also submitted a letter brief on November 27, 2024, pursuant to California Code of Regulations, title 23, section 5028.[6] The Department submitted its response brief on December 13, 2024, along with its own request to supplement the record. The Council held a hearing on the appeals on December 19, 2024. The parties duly appeared at the hearing and presented their case to the Council.

The following is a brief summary of relevant issues raised in each appeal:

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the appeal is based, a list of the specific Delta Plan policies that the appellant alleges the proposed covered action is inconsistent with, and for each challenged policy a concise statement of the authority, evidence, and arguments relied on to support the appellant's claim that the proposed covered action is inconsistent with the Delta Plan policy, and how the claimed inconsistency will have a significant adverse impact on one or both of the coequal goals or the implementation of a government-sponsored flood control program to reduce risks to people and property in the Delta. (*Ibid*.) The Council may dismiss an appeal that fails to comply with these requirements. (Wat. Code § 85225.10, subd. (c).) Parties have 30 days from the submission of the certification of consistency to file an appeal with the Council. (Wat. Code, § 85225.15.) The Council provided a briefing schedule and specific deadlines for written submissions by the appellants. Given that the Council has determined the Proposed Geotech is not a covered action, the Council does not address the sufficiency of the appeals presented. The Council strongly encourages future appellants to carefully comply with the regulations governing appeals of certifications of consistency, to avoid a procedural dismissal. (*See* Cal Code Regs., tit. 23, §§ 5020-5035.)

[6] The Council considers comments of the Delta Protection Commission (Commission) *with respect to issues raised in an appeal* and whether the certification of consistency is supported by substantial evidence in the record. (Cal. Code Regs, tit. 23, § 5028, subd. (a)(1).) The Council considers the Commission's comments as those of an agency with expertise in matters that may affect the unique cultural, recreational, and agricultural values of the Delta ("Delta as place"), when preparing, considering, and adopting its findings. (Cal. Code Regs, tit. 23, § 5028, subd. (b).) The Commission's comment role is not that of a party, and it may not raise new issues or present legal arguments. To the extent the Commission did not address specific issues raised by an appellant concerning Delta as place, the Commission's comments are not considered.

SF Baykeeper[7] alleges in relevant part that the Certification is inconsistent with every Delta Plan regulatory policy.[8] (See SF Baykeeper Appeal, No. C20242-A1.) However, the basis for this contention is that the Certification fails to analyze the whole of the Delta Conveyance Project, which SF Baykeeper contends should be the covered action. (*Ibid*.) SF Baykeeper claims that DWR "arbitrarily reviewed only a portion of the covered action" and "failed to provide evidence that could support a reasonable determination that the proposed Tunnel project is consistent with the Delta Reform Act."[9] (*Ibid*, p. 2.) In effect, SF Baykeeper contends the project described in a CEQA Final EIR is necessarily the covered action that must be certified as one project to the Council. Appellant relies on CEQA regulations and case law. Notably the appeal does not allege that any of the Delta Plan regulatory policies are applicable to the Proposed Geotech described in the Certification and does not set forth the basis for why the Proposed Geotech is inconsistent with a specific regulatory policy, nor explains how that claimed inconsistency will have a significant adverse impact on one or both of the coequal goals or the implementation of a government-sponsored flood control program to reduce risks to people and property in the Delta.

SDWA alleges that the entirety of the Delta Conveyance Project as described in the Final EIR must be certified together in one certification. (Letter Attached to SDWA. Appeal of Certification p. 1.) Similar to SF Baykeeper, SDWA relies on CEQA regulations and case law. SDWA points out that under CEQA, "project" means the whole of an action. (*Ibid*., p. 2.) SDWA further alleges that a covered action cannot be "piecemealed", because "[i]f a project proponent could subdivide a covered action into as many bite-sized pieces as it desired, there would never be an assessment of the cumulative effect from all of the pieces together on the co-equal (sic) goals and the Delta Plan's policies." (*Ibid*., p. 4.) SDWA challenges the consistency determination with respect to Delta Plan regulatory policies ER P5 and DP P2. (*Ibid*., pp. 6-12.) SDWA also challenges consistency with policy GP 1. However, as further explained below, G P1 is a general policy that only applies to covered actions and governs the requirements for a certification of consistency. G P1 does not apply if none of the Article 3 policies (Cal. Code Regs., tit. 23, §§ 5003 through 5015) cover the proposed action. (Cal.Code Regs, tit. 23, § 5002, subd. (a).)

County of Sacramento contends that the Certification is improper and should be rejected because the Proposed Geotech activities as described is not a covered action. (County of Sacramento et al.'s Appeal Letter p. 5.) The appeal states that because the Department claims that the Proposed Geotech would not impact the achievement of

[7] For ease of reference, the Council will refer to the lead appellant for each appellant group.

[8] SF Baykeeper contends that any consistency determination must evaluate specific environmental justice and tribal interests prior to any approval from the Council. However, Baykeeper also recognizes that existing Delta Plan regulatory policies do not cover the specific considerations raised. As explained in this decision, the Council does not approve certifications. The Council has publicly released a draft Tribal and Environmental Justice Issues Report for public comment that contains multiple recommendations.

[9] A public agency is required to certify consistency *with the Delta Plan's regulatory policies*, not the Delta Reform Act generally nor the coequal goals. (Wat. Code § 85225.)

one or both of the coequal goals or a government-sponsored flood control program it cannot comprise a covered action. (*Ibid*., p. 7.) Accordingly, County of Sacramento requests that the Council reject the Certification. Like the other Appellants, County of Sacramento also claims that the Proposed Geotech is not a separate project from the Delta Conveyance Project. (*Ibid*., pp. 5-6.) County of Sacramento asserts that the covered action must be the project as described under CEQA. (*Ibid*.) Without conceding that the Proposed Geotech is not a covered action, County of Sacramento claims that the Proposed Geotech is inconsistent with Delta Plan regulatory policies G P1 (including mitigation measures and best available science requirements) and DP P2, as well as Delta Plan Recommendations DP R9 and WQ R2.[10]

County of San Joaquin claims that the Council lacks jurisdiction to consider the Proposed Geotech. (Letter Attached to County of San Joaquin et al.'s Appeal of Certification, "Introduction & Procedural Matters," p.4.) Appellant alleges that CEQA piecemealing and case law govern covered actions, so that the Proposed Geotech should be reviewed in one CEQA document and one covered action. (*Ibid*., pp. 4-6.) San Joaquin further alleges that the Department's mitigation measures are inadequate and inconsistent with G P1, subd. (b)(2), requirements. (County of San Joaquin et al.'s Appeal Letter, "GP 1(b)(2) Mitigations Measures," p. 1.) Appellant also claims that Delta Plan Regulatory Policy DP P2 applies to the Proposed Geotech because the grout for sealing borings is a permanent component and because the purpose of the geotechnical work is to support water management facilities. (County of San Joaquin Appeal Letter, "DP P2, Respect Local Land Use", p.1.) County of San Joaquin contends that the Proposed Geotech is inconsistent with DP P2. (*Ibid*.) Finally, County of San Joaquin objects to alleged ex parte communications to the Council due to purported early consultation activities.[11] (County of San Joaquin et al.'s Appeal Letter, "Introduction and Procedural Matters" p. 7.)

5. Administrative Record

The Council's appellate review is limited to the record before the state or local public agency that filed the Certification. (Wat. Code § 85225.25.) The record before the agency is composed of all the documents that the agency relied on or considered in

[10] Delta Plan recommendations are meant to provide guidance to public agencies and are not enforceable Delta Plan regulations. (*Delta Stewardship Council Cases*, *supra*, 48 Cal.App.5th 1014, 1042 [Delta Plan recommendations are nonregulatory and call out actions essential to achieving the coequal goals, however it is the policies that are regulatory in nature and must be complied with by covered actions.])

[11] Council staff engage in early consultation with project agencies prior to the filing of a certification of consistency to assist state and local public agencies in the preparing a certification of consistency per statute pursuant to the Delta Reform Act. (Wat. Code § 85225.5.) The early consultation team is firewalled and separate from staff that assist the Council in appeals of certification of consistency. Moreover, Councilmembers do not participate in early consultation. Here, there has been no early consultation on either the Proposed Geotech or the Delta Conveyance Project once the ex parte communication prohibition went into effect on November 7, 2024, upon the filing of the first appeal. (Cal. Code Regs, tit. 23, § 5024.) Appellants have not presented facts showing a single instance of a prohibited ex parte communication and the Council is unaware of any such violations.

making its determination, including public comments received concerning the certification or the proposed action's consistency with Delta Plan regulatory policies. No later than five calendar days after the Council posts notice of the appeals received, the certifying agency is required to submit to the Council the record that was before said agency at the time it made its certification and certify the record as "full and complete." (Cal. Code Regs, tit. 23, § 5022, subd. (e)(1).)

The Department certified the administrative record for the Proposed Geotech on November 13, 2024. The Council or its executive officer may supplement the record if the Council or its executive officer determines that additional information was part of the record before the Department but was not included in the record submitted to the Council. (Cal. Code Regs, tit. 23, § 5026.) The Council may also take official notice of any generally accepted technical or scientific matter within the Council's jurisdiction, and of any fact that may be judicially noticed by the courts of this State. (Cal. Code Regs, tit. 23, § 5032.) The parties may request that the Council supplement the record with additional documentation or information that was part of the record before the certifying agency but was not included in the certifying agency's submission to the Council.

The Department and the Appellants have requested that additional documents be added to the record because such documents are either: (a) part of the record before the Department but were not included in the Department's submission to the Council or, (b) generally accepted technical or scientific matter within the Council's jurisdiction.

Here, because the Council finds that the Proposed Geotech is not a covered action subject to the Council's jurisdiction, the Council will not rule on specific requests to supplement the record. The Council has reviewed and considered the record, and all the documents submitted by the parties in making this decision. None of the supplemental information submitted by the parties was material to the Council's determination of whether the Proposed Geotech is a covered action.

B. ANALYSIS

1. Standard of Review

The Council does not approve or reject certifications of consistency. "Instead, State or local agencies self-certify Delta Plan consistency, and the Council serves as an appellate body for those determinations." (*Delta Stewardship Council Cases*, supra, 48 Cal.App.5th 1014, 1042.) The Delta Plan's regulatory policies are enforced through "the Council's appellate authority and oversight over covered actions." (*Ibid*.)

The Delta Reform Act provides that the appropriate standard of review for the Council is whether an appellant has shown that the certification of consistency is not supported by substantial evidence in the record. (Wat. Code, § 85225.25.) Substantial evidence means evidence that is "reasonable in nature, credible, and of solid value." (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335.) It includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (*Cf*. Cal. Code Regs., tit. 14, § 15384.) Speculation or conjecture alone is not substantial evidence. (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly*

(2011) 199 Cal.App.4th 286, 308.) Under the substantial evidence standard of review, the Council decides whether there is enough relevant information and reasonable inferences so that a fair argument can be made to support the Department's conclusions, even though other conclusions may also be reached. (*See* Cal. Code Regs., tit. 14, § 15384.)

The Council reviews a certification of consistency to determine whether it is supported by the administrative record, rather than simply reviewing it for error. (*Sierra Club v. California Coastal Comm.* (1993) 19 Cal.App.4th 547, 557.) The entire record will be reviewed, including evidence detracting from the decision. (*Utility Reform Network v. Public Utilities Commission* (2014) 223 Cal.App.4th 945, 959.) However, the Council cannot substitute its own findings or inferences for the Department's. (*See Sierra Club v. California Coastal Comm.* (1993) 19 Cal.App.4th 547, 557.) In most if not all instances, evaluating the certification requires interpretation of Delta Plan regulations. The Council, as drafter and administrator of the Delta Plan and its policy regulations, will interpret the Plan pursuant to its expertise. The Council will consider interpretations that the parties offer but will ultimately arrive at an independent determination reflecting our expertise. (*See Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1234.)

In arguing that certain certification findings are not based upon substantial evidence, the appellant carries the burden of demonstrating that the administrative record does not contain sufficient evidence to support the certification's findings. (See *State Water Res. Control Bd. Cases* (2006) 136 Cal.App.4th 674, 749; *Ocean Harbor House v. California Coastal Comm*. (2008) 163 Cal.App.4th 215, 227.) "A recitation of only the part of the evidence that supports the appellant's position is not the demonstration contemplated under the above rule." (*Ibid.* [internal citation and quotation marks omitted].) Thus, if an appellant fails to set forth specific facts showing that a finding is not supported by substantial evidence in the record, its claim must be dismissed. (*Salas v. Cal. Dept. of Transportation* (2011) 198 Cal.App.4th 1058, 1074 [the Council is not required to search the record to ascertain whether it contains support for the appellant's contentions].) The Council may also determine that matters raised on appeal are not within the Council's jurisdiction or do not raise an appealable issue. (Wat. Code, § 85225.20.) Finally, the Council may grant the appeal and remand the matter to the agency if, after examining the entirety of the record, a reasonable person could not have reached the agency's conclusion(s) in its consistency determination. (See *Patterson Flying Serv. v. California Dept. of Pesticide Regulation* (2008) 161 Cal.App.4th 411, 426.)

2. The Council Has the Authority to Determine Whether a Project is a Covered Action When its Appellate Jurisdiction Has Been Invoked

As a threshold matter, the Council must address whether it has the authority to determine whether a proposed action is a covered action in the context of an appeal. It does.

The Delta Reform Act expressly contemplates that the Council may determine whether an appellant has properly invoked its jurisdiction. (See Wat. Code, § 85225.20 [requiring the Council to hold a hearing on an appeal within 60 days unless it "determines that the

issue raised on appeal is not within [its] jurisdiction or does not raise an appealable issue"].) To properly invoke the Council's jurisdiction, an appellant must claim that a "proposed *covered action* is inconsistent with the Delta Plan and, as a result of that inconsistency, the action will have a significant adverse impact" on one or both of the coequal goals. (Wat. Code, § 85225.10, subd. (a), italics added.) At the end of the day, the Council need not entertain appeals of certifications of consistency *unless* those appeals challenge covered actions. Moreover, the Council necessarily reviews the applicability of relevant Delta regulatory policies and may reach a different conclusion than the public agency or the appellants.[12] For these reasons, the Delta Reform Act empowers the Council to determine, on appeal, whether certified activity is a covered action.

3. The Council is an Independent Agency with the Power to Regulate Covered Actions

As a foundational matter, the Council is an independent state agency charged with adopting and implementing a legally enforceable Delta Plan.[13] (*Delta Stewardship Council Cases*, supra, 48 Cal.App.5th 1014, 1038; Wat. Code §§ 85200(a) and 85300(a).) To establish the Delta Plan and achieve the State's goals and objectives, the Legislature vested in the Council broad authority to adopt appropriate regulations and guidelines. (Cal. Wat. Code § 85210(i); *Delta Stewardship Council Cases*, *supra,* p. 1052.) As the California Court of Appeal explained in the seminal *Delta Stewardship Council Cases* decision:

> This case involves a statutory scheme that identifies a complex problem (sustainable management of the Delta's resources), sets forth general goals and policy objectives, identifies certain requirements that must be included in a plan adopted by the Council to achieve the goals and objectives, and then broadly empowers the Council to study the problem and to adopt appropriate regulations and guidelines as needed over time for state and local agencies that will achieve the goals and objectives. Given the language in the Act, it is clear to us that the Legislature chose to grant the Council broad authority to apply its expertise in determining how to accomplish the Legislature's goals and objectives[.]

(*Delta Stewardship Council Cases*, supra, 48 Cal.App.5th 1014, 1052.) The Court of Appeal further expressly recognized the Council's appellate authority and oversight over covered actions. (*Ibid*., p. 1042].) Consequently, regulatory authority over certifications

[12] For example, the Council could have determined that the Proposed Geotech is a covered action, if the Council disagreed with the Department and found that the activity was covered by a Delta Plan regulatory policy. In that case, the Council would proceed with its appellate review and either remand the covered action or substantively deny the appeals.

[13] The Council consists of seven voting members. Four members are appointed by the Governor and subject to Senate confirmation, one member is appointed by the Senate Committee on Rules, one member is appointed by the Speaker of the Assembly, and one member is the Chairperson of the Delta Protection Commission. (Wat. Code § 85200(b).) Councilmembers possess diverse expertise and reflect a statewide perspective. (Wat. Code § 85202.)

of consistency and the covered action process is vested solely within the Council, not another agency.

The California Natural Resources Agency (Resources Agency) and the Governor's Office of Land Use and Climate Innovation (formerly known as the Office of Planning and Research),[14] prepare and develop proposed guidelines for the implementation of CEQA by public agencies, including objectives and criteria for the orderly evaluation of projects and the preparation of environmental impact reports and negative declarations in a manner consistent with CEQA. (Pub. Res. Code § 21083, subd. (a) and subd. (e).) The Public Resources Code does not grant the Natural Resources Agency or the Office of Land Use and Climate Innovation any authority or purview over the Delta Reform Act, certifications of consistency or covered actions. In other words, these agencies do not have the authority to regulate covered actions, the certification of consistency process, the regulatory interpretation of the Delta Reform Act, or any authority over the Council or matters exclusively within the Council's jurisdiction (except to the extent that the Council, like other public agencies, is subject to CEQA compliance for its own projects). The Council's covered action authority is not subordinate to the regulatory authority of another agency.[15]

The Appellants point to a preliminary injunction order by the Sacramento Superior Court in litigation concerning the Delta Conveyance Project, to argue that CEQA requires a single certification of consistency for the Delta Conveyance Project. (See Sacramento County Superior Court, Tulare Lake Basin Water Storage District v. Cal. Dept. of Water Resources, Case No. 24WM000006, Ruling on Submitted Matter – Petitioner's Motions for Preliminary Injunction, filed June 20, 2024.) In the portion of the Superior Court's ruling stating that petitioners were likely to succeed on the merits, the court pointed to the Department's Final EIR defining the Conveyance Project as including geotechnical work, and then reasoned that "because the geotechnical work is part of the 'project' within the meaning of CEQA [California Environmental Quality Act; Pub. Resources Code, § 21065], it is necessarily part of a 'covered action' within the meaning of Water Code section 85225." However, that determination is not binding on the Council for several reasons. First, the Council is not a party to that litigation. Second, the ruling is

[14] It is important to note that the California Natural Resources Agency has a role in the adoption of CEQA guidelines, further confirming that the Council's independence would be compromised and Legislative intent (and the language of the Delta Reform Act) contradicted if the Council was to be subject to CEQA guidelines. The California Natural Resources Agency is the parent agency of the Department of Water Resources, the project proponent for many covered actions, including the Delta Conveyance Project, as well as the Proposed Geotech at issue in this appeal. (*See* Pub. Res. Code § 21083(e) ["The Office of Planning and Research shall develop and prepare the proposed guidelines as soon as possible and shall transmit them immediately to the Secretary of the Resources Agency. The Secretary of the Resources Agency shall certify and adopt the guidelines…"]; *see also* Pub. Res. Code § 21083(f) ["The Office of Planning and Research shall, at least once every two years, review the guidelines adopted pursuant to this section and shall recommend proposed changes or amendments to the Secretary of the Resources Agency. The Secretary of the Resources Agency shall certify and adopt guidelines, and any amendments thereto, at least once every two years…"].

[15] The Council may use its broad authority to further regulate in this area in the future as it deems necessary.

not a judgment; it is by its nature preliminary. Third, the Proposed Geotech as described in the Certification before the Council is a scaled-down version of the activities reviewed by the Court. For example, in the Certification DWR omits extensive test trenches, monuments and other features. Fourth, the Court did not consider or address the Council's Delta Plan regulatory policies, covered action process, or certification of consistency requirements. And, finally, the question of whether under the Delta Reform Act, the Proposed Geotech can be certified separately from the Delta Conveyance Project is not addressed in the ruling. For these reasons, the Court's injunction order does not prevent the Council from independently evaluating whether an agency's description of a project in its CEQA document must always be the same as its description of a project for covered action purposes.

4. The Council's Regulations Solely Govern Certifications of Consistency and Specifically Address Piecemealing Concerns for Covered Actions

Appellants argue that certain concepts set forth in CEQA regulations and case law are implied in the definition of project in the Delta Reform Act.[16] However, as the Court of Appeal explained, "[e]ven a cursory review of the statutory scheme and the record confirms that the Legislature was well aware of existing statutory law governing the management of water resources and enacted the Delta Reform Act in light thereof with the intent of granting the Council broad regulatory authority to achieve the coequal goals . . . ." (*Delta Stewardship Council Cases*, supra, 48 Cal.App.5th 1014, 1060; see also *id*. at 1070 ["As we have explained, the Legislature delegated broad authority to the Council to 'adopt regulations or guidelines as needed to carry out the powers and duties identified in this (Act).'"].) Consequently, as explained in more detail below, the CEQA concept of "piecemealing" does not apply to the certification of consistency process and cannot supersede or displace the Council's regulations. Importantly, where the Delta Reform Act and Council regulations intend to incorporate CEQA provisions, they do so expressly. (In addition to Pub. Res. Code, § 21065, *see* 23 Cal. Code Regs. tit. 23, § 5001(jj)(1-2) [incorporating three CEQA exemptions], and 23 Cal. Code Regs., tit. 23, § 5001(jj)(4) [incorporating, *but modifying*, a CEQA exemption].) Otherwise incorporating regulations from another agency without a clear grant of authority from the Legislature would be unlawful.

The Delta Reform Act and the Council's regulations focus on specific kinds of activities that a public agency will approve, fund or undertake. Specifically, the Legislature intended that "state and land use actions" that meet the definition of a "covered action"

[16] (*Citing People v. Overstreet* (1986) 42 Cal.3d 891, 897 ("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." ' [Citations.]") When the Delta Reform Act was adopted in 2009, case law pointed to CEQA regulations in recognizing a "mandate . . . 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 [citing former 14 CCR § 15069]; also see *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1222 [citing 14 CCR § 15378 (a)].)

be consistent with the Delta Plan. (Cal. Wat. Code § 85022(a).) The Delta Reform Act provides that an agency must submit a certification of consistency for a "covered action" prior initiating the implementation of that "covered action." (Cal. Wat. Code § 85225; see also 23 Cal. Code Regs., tit. 23, § 5034.)

To meet the definition of a covered action, an activity needs to be *not only* a plan, program, or project as defined in section 21065 of the Public Resources Code; it must also meet four additional elements required by the Delta Reform Act, including being "covered" by one or more Delta Plan regulatory policies and having a "significant impact" on one or both of the coequal goals or a specified flood control program. (Cal. Wat. Code § 85057.5(a).) Public Resources Code section 21065 simply states that a "project" is an "activity" that would cause a "direct physical change" or "reasonably foreseeable indirect physical change" in the environment. This is a very low bar and only the first element for what constitutes a covered action. The Delta Reform Act is silent as to whether a "covered action" must be certified together with all related activity in a single certification of consistency. It simply states that a covered action is a certain type of activity that satisfies the criteria set forth in the Delta Reform Act. (Cal. Wat. Code § 85057.5(a).) It is important to note that here, the Department concedes that the Proposed Geotech is a project as defined under Public Resources Code Section 21065. (Certification, p. 4-1.)

While the CEQA process also begins with the same threshold question under Section 21065, compliance with CEQA serves a different purpose and proceeds on a separate track pursuant to the CEQA statutory scheme and Guidelines. On the other hand, covered actions are subject to the Delta Reform Act and the Council's regulations, with a different compliance requirement: submittal of a certification of consistency. On its own, without reference to the additional requirements for a covered action, the Public Resources Code definition of project covers an extremely broad range of activities without geographical limitation within the State. A covered action may thus only be a subset of activity or multiple activities or sub-projects that constitute a single project for CEQA. For example, a CEQA project may straddle the legally defined Delta and have discrete activities occurring both within and outside those legal boundaries or a CEQA project may include discrete actions not covered by any Delta Plan regulatory policy. The Council has appellate review authority only over those activities that meet all the criteria for a covered action.

Appellants cite CEQA case law and guidelines and contend that "project" means the whole of an action, a concept that governs CEQA project descriptions for CEQA environmental review compliance purposes. While that may be true for CEQA purposes, the Council does not enforce CEQA and does not agree that the CEQA project description necessarily requires a single *certification of consistency*. The Public Resources Code has no bearing on Chapter 3 of the Delta Reform Act, governing *consistency of state and local public agency actions*. (*See* Wat. Code §§ 85225 et seq.) While a public agency should consider the "whole" of a project when making a covered

action determination[17], to make sure that all activities have been scrutinized, this does not compel the Council to accept or require a single certification for each CEQA project. It also does not expand the jurisdiction of the Council to activities that do not meet the criteria for a covered action.

The Council is mindful that the concept of piecemealing under CEQA was developed to ensure that projects do not evade CEQA review or diminish the significance of project impacts by segmenting the project into smaller parts. The Council's regulations directly address Appellants' concerns related to piecemealing in another way, specifically: 1) the Council's regulatory "significant impact" definition (Cal. Code Regs., tit. 23, § 5001, subd. (jj); and 2) the Council's regulatory process that governs an agency determination of whether an activity is a covered action. (Cal. Code Regs., tit. 23, § 5001, subd. (k)(3).)

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 "significant 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).)

In addition, the Council's regulations that govern an agency's covered action determination also address concerns raised by Appellants. Pursuant to the Council's regulations, a state or local public agency is responsible in the first instance for determining whether the proposed plan, program or project is a covered action. (Cal. Code Regs., tit. 23, § 5001(k)(3).) That determination must be made in good faith and reasonable. (*Ibid*.) The determination would be an agency decision and a public record subject to judicial review. (*Ibid*.)

Accordingly, CEQA does not govern how a public agency must make a covered action determination and whether it may only ever submit a single certification of consistency based on the CEQA project description. A project may have discrete phases, sub-projects and related activities, or encompass both covered action activities and non-covered action activities. Although in most cases, public agencies will submit a single certification, the Council's regulations have some built-in flexibility for a public agency making a covered action determination to submit more than one certification of consistency, so long as the decision does not violate the Delta Reform Act or Council

[17] A "covered action determination" means the public agency determination with respect to whether activity is a covered action. (Cal. Code Regs, tit. 23, § 5001, subd. (k)(3).) The requirement to make a covered action determination is distinct from the requirement to submit a certification of consistency.

regulations and is reasonable and made in good faith. The principal concern for the Council is that all activities that trigger a covered action analysis are subject to an agency's covered action determination, and that all covered action activity be certified as consistent with the Delta Plan's regulations. A public agency cannot ignore or evade this requirement.[18] Thus, where a public agency has a project that includes both activities that are a covered action and those that are not, that public agency must review all of the planned activities to determine which activities are a covered action, and which are not. (Cal. Code Regs., tit 23, § 5001, subd.(k)(3). The agency must submit a certification of consistency for those activities that are a covered action. (Wat. Code § 85225.) As, explained below, the Council finds that the Proposed Geotech is not a covered action.

5. Because the Proposed Geotech is Not Covered by an Applicable Delta Plan Policy, it is Not a Covered Action

The Delta Reform Act defines a covered action "as a plan, program, or project as defined pursuant to Public Resources Code 21065 that meets all of the following conditions:

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

(Wat. Code § 85057.5, subd. (a).) Public Resources Code section 21065 defines "project" as follows:

> "Project" means 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:
>
> (a) An activity directly undertaken by any public agency.
> (b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

[18] The Department could never proceed to implement any of the proposed Geotechnical Activities described in the Final EIR without first having made a determination as to whether the activity is a covered action. To the extent an activity is a covered action, the Department is always required to file a certification of consistency. Even if the Department did not understand the proposed Geotech to constitute initiating the implementation of the Delta Conveyance Project, that does not excuse the requirement to make a covered action determination with respect to these specific activities. With the present certification, the Department has now made a covered action determination with respect to the Proposed Geotech.

> (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

Accordingly, a covered action is an activity that will cause a direct or foreseeable indirect physical change in the environment, *and that meets additional specific conditions, such as having a significant impact on the achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs and being covered by a Delta Plan regulatory policy*.

The Council's regulations provide an analytical framework to determine whether an activity is a covered action in the form of a two-part test. Under this two-part test, an agency must first determine whether the activity is a "proposed action." (Cal. Code Regs, tit. 23, § 5001, subd. (ee).) The Council's regulations define "proposed action" as "a plan, program, or project" that 1) Is a "project," as defined pursuant to section 21065 of the Public Resources Code; 2) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh; 3) Will be carried out, approved, or funded by the State or a local public agency; and 4) Will have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and State interests in the Delta. (Cal. Code Regs, tit. 23, § 5001, subd. (ee).) If the activity is a "proposed action," the agency must then evaluate whether the proposed action is covered by one or more Delta Plan regulatory policies in Article 3 to determine whether the proposed action is a "covered action." (*Ibid*.) If a regulatory policy applies, the activity is a covered action that must submit a certification of consistency. The G P1 policy requirements for a certification of consistency then also apply. (Cal. Code Regs, tit. 23, § 5002.) The Council will apply this framework to the Proposed Geotech.

Here, the Department admits that the Proposed Geotech meets the definition of project "because they are being undertaken by a public agency and have a potential for resulting in either a direct change in the environment or a reasonably foreseeable indirect physical change in the environment." (Certification, p. 4-1.) This is a very low threshold that is not directly challenged by Appellants. Rather, Appellants challenge the scope of the project based on CEQA. Given the Department's admission, the Council finds that the Proposed Geotech is an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment (Wat. Code § 85057.5(a); Public Resources Code § 21065.)

As it is undisputed, the Council also finds that the Proposed Geotech will occur in whole or in part in the Delta, and that the Proposed Geotech will be undertaken by the Department, a state agency. (Certification, p. 4-1.)

The final factor for activity to qualify as a proposed action, is a significant impact on the achievement of one or both of the coequal goals or the implementation of a government-sponsored flood program to reduce risks to people, property, and state

interests in the Delta. The Council defines "significant impact" for the purpose of determining whether a project meets this requirement. (Cal. Code Regs, tit. 23, § 5001 (jj).) "Significant impact" means a substantial positive or negative impact on the achievement of one or both of the coequal goals or the implementation of a government-sponsored flood control program that is directly or indirectly caused by a project on its own or when the project's incremental effect is considered together with the impacts of other closely related past, present, or reasonably foreseeable future projects. (*Ibid*, emphasis added.) None of the parties, including the Department, address this regulation.

The Department contends that the Proposed Geotech, "which involve only temporary activities at discrete locations to test soil and water quality conditions, would have no impact (and therefore would not have the potential to result in a significant impact) on the achievement of one or both of the coequal goals or on the implementation of a government-sponsored flood control program." (Certification, p. 4-2.) However, the Council must consider the incremental effect of the Proposed Geotech together with the impact of any closely related project. The Delta Conveyance Project is clearly a closely related project. (Final EIR, Certification Record DCP.D.1.00010, p. 3-137.) The Proposed Geotech is specifically intended to inform the planning and design of the Delta Conveyance Project. (Certification, p. 1-1.) Thus, the Council must consider the impacts of the Delta Conveyance Project along with the impact of the Proposed Geotech. It cannot be disputed that the Delta Conveyance Project will have a significant impact on the coequal goal of providing a more reliable water supply for California. Indeed, the Department acknowledges that the Delta Conveyance Project will have a significant impact on the achievement of one or more of the coequal goals or the implementation of a government-sponsored flood control program. (Department's December 13, 2024, Letter, p. 2-3.) The Department explains that the Delta Conveyance Program is "essential" to ensuring California's existing water infrastructure can continue to meet Californians' water needs. (Certification., pp. 1-2 – 1-3.) Consequently, when 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. The Proposed Geotech is therefore a "proposed action." (Cal. Code Regs, tit. 23, § 5001, subd. (jj).)

Having determined that the Proposed Geotech is a "proposed action". The Council next considers whether any Delta Plan regulatory policies apply to the proposed action. This is done by reviewing each Delta Plan regulatory policy in Article 3 of Title 23 of the California Code of Regulations and determining whether the Delta Policy covers the proposed action.[19] The regulatory policies all include a provision that identifies the proposed actions that the policy covers. If one or more regulatory policy applies, the

[19] Policy G P1 does not determine whether a proposed action is a covered action. G P1 only applies if a proposed action is a covered action because it is covered by an Article 3 policy (section 5003 through 5015).

proposed action is a covered action, and the public agency must comply with the certification of consistency requirements and regulatory policy G P1. (Cal. Code Regs, tit. 23, § 5002.) If no regulatory policy applies, the proposed action is not a covered action.

In the present certification, the Department contends that none of the regulatory policies apply. The Appellants only substantively challenge Delta Plan regulatory policies ER P5, DP P2, and G P1. SF Baykeeper claims that the Proposed Geotech is inconsistent with every Delta Plan regulatory policy, but this claim is based on the argument that the covered action should be the Delta Conveyance Project and that the Department failed to provide evidence that the Delta Conveyance Project is consistent with each policy. SF Baykeeper does not present substantive arguments concerning the consistency of any policy with the Proposed Geotech, nor does their appeal contend that any specific regulatory policy applies to the Proposed Geotech. The County of Sacramento claims that the Proposed Geotech does not qualify as a covered action and ask that the Council reject the certification of consistency. The County of San Joaquin argues that the Council lacks jurisdiction to consider the covered action as submitted.

As explained in more detail below, the record supports the Department's determination that the Proposed Geotech is not covered by a Delta Plan regulatory policy. The proposed action therefore does not meet the requirements for a covered action under Water Code section 85057.5(a)(3) and Title 23, California Code of Regulation, section 5001, subdivision (k)(1)(E). Because the Proposed Geotech is not a covered action, the GP 1 policies in section 5002, subd. (b) do not apply. (Cal. Code Regs, tit. 23, § 5002, subd. (a)-(b).)

a. Policy WR P1 (Cal. Code Regs, tit. 23, § 5003): Reduce Reliance on the Delta Through Improved Regional Water Self-Reliance

Delta Plan policy WR P1 regulates the export, transfer through, or use of water in the Delta. The policy is designed to help reduce reliance on the Delta, provide a more reliable water supply for the state, and promote statewide water conservation, water use efficiency, and sustainable water use. (See Wat. Code §§ 85004, 85020-85021.) WR P1 ensures that urban and agricultural water suppliers take appropriate actions to contribute to the achievement of reduced reliance on the Delta and comply with certain requirements, such as the completion of an Urban or Agricultural Water Management Plan. (Cal. Code Regs, tit. 23, § 5003, subd. (c)(1).) The regulation describes the proposed actions that are covered by this policy:

> (b) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers a proposed action to export water from, transfer water through, or use water in the Delta, but does not cover any such action unless one or more water suppliers would receive water as a result of the proposed action. (Cal. Code Regs, tit. 23, § 5003, subd. (b).)

The regulation therefore covers a proposed action that exports, transfers, or uses water in the Delta in manner that will result in the receipt of water by a water supplier.[20]

In the Certification, the Department states that WR P1 does not apply: "[a]s described in Delta Plan Policy WR P1, Reduce Reliance on the Delta through Improved Regional Water Self-Reliance, this policy covers a proposed action to export water from, transfer water through, or use water in the Delta. This policy is not applicable to the 2024–2026 Proposed Geotechnical Activities, which do not include exporting water from, transferring water through, or using water in the Delta." (Certification, p. 4-6.) None of the appellants address the applicability of WR P1 to the Proposed Geotech.

Consequently, the Council finds that the Proposed Geotech does not transfer, export or use water in the Delta that will result in the receipt of water by a water supplier and therefore, WR P1 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department's determination that WR P1 does not apply to the proposed Geotech is not supported by substantial evidence in the record.

b. Policy WR P2 (Cal. Code Regs., tit. 23, § 5004): Transparency in Water Contracting

WR P2 regulates proposed actions to enter into, or amend, water supply or water transfer contracts related to the State Water Project and/or the Central Valley Project. The purpose of the regulation is to address the lack of accurate, timely, consistent, and transparent information on the management of California's water supplies. This policy is meant to improve public involvement and transparency in decision making processes. The screening criteria for the policy states:

> (b) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers the following:
>
> (1) With regard to water from the State Water Project, a proposed action to enter into or amend a water supply or water transfer contract subject to California Department of Water Resources Guidelines 03-09 and/or 03-10 (each dated July 3, 2003), which are attached as Appendix 2A; and
> (2) With regard to water from the Central Valley Project, a proposed action to enter into or amend a water supply or water transfer contract subject to section 226 of P.L. 97-293, as amended or section 3405(a)(2)(B) of the Central Valley Project Improvement Act, Title XXXIV of Public Law 102-575, as amended, which are attached as Appendix 2B, and Rules and Regulations promulgated by the Secretary of the Interior to implement these laws. (Cal. Code Regs, tit 23, § 5004, subd. (b).)

In the Certification, the Department states that WR P2 "is not applicable to the 2024–2026 Proposed Geotechnical Activities because the proposed action here does not include entering into or amending a water supply or water transfer contract."

[20] The Council defines "water supplier" in its regulations. (Cal. Code Regs, tit. 23, § 5001, subd. (pp).)

(Certification, p. 4-7.) The Proposed Geotech consists of subsurface exploration and testing, including borings, cone penetration tests, and installation and removal of PVC pipes. (Certification, p. 3-16.) Appellants do not claim that WR P2 covers the Proposed Geotech.

Consequently, the Council finds that the Proposed Geotech is not a proposed action to enter into or amend a water supply or water transfer contract and therefore WR P2 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department's determination that WR P2 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

c. Policy ER P1 (Cal. Code Regs., tit. 23, § 5005): Delta Flow Objectives

Delta Plan policy ER P1 regulates water flow in the Delta. (Cal. Code Regs, tit. 23, § 5005.) Water flow in the Delta is critical due to its impact on the reliability of water supplies and the health of the Delta ecosystem. ER P1 requires compliance with the State Water Resources Board's Bay Delta Water Quality Control Plan flow objectives for the Delta. (*Ibid*.) The policy covers a proposed action that will significantly affect flow in the Delta:

> (b) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, the policy set forth in subsection (a) covers a proposed action that could significantly affect flow in the Delta. (Cal. Code Regs., tit. 23, § 5005). (Cal. Code Regs, tit. 23, §5005, subd. (b).)

The Proposed Geotech consists of subsurface exploration and testing, including borings, cone penetration tests, and installation and removal of PVC pipes. (Certification, p. 3-16.) The Certification states that the proposed action does not include in-water work and will not affect flow in the Delta. (Certification, p. 4-7.) Appellants do not claim that this policy covers the Proposed Geotech.

Consequently, the Council finds that the Proposed Geotech is not a proposed action that could significantly affect flow in the Delta and therefore ER P1 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department's determination that ER P1 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

d. Policy ER P2 (Cal. Code Regs., tit. 23, § 5006): Restore Habitats at Appropriate Elevations

ER P2 requires that habitat restoration be carried out in a manner consistent with Appendix 3 to the Council's regulations, which is Section II of the Draft Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone and the Sacramento and San Joaquin Valley Regions (California Department of Fish and Wildlife 2011). (Cal. Code Regs, tit. 23, § 5006, subd. (a).) The policy further

requires the use of the elevation map attached as Appendix 4. (*Ibid*.) ER P2 covers proposed actions that include habitat restoration:

> (b) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers a proposed action that includes habitat restoration. (Cal. Code Regs., tit. 23, § 5006.)

The Proposed Geotech consists of subsurface exploration and testing, including borings, cone penetration tests, and installation and removal of PVC pipes. (Certification, p. 3-16.) The Certification states that the Proposed Geotech is not covered by ER P2 "because the proposed action here does not include habitat restoration". (Certification, p. 4-8.) None of the Appellants allege that ER P2 applies to the Proposed Geotech.

Consequently, the Council finds that the Proposed Geotech is not a proposed action that includes habitat restoration and therefore ER P2 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department's determination that ER P2 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

e. Policy ER P3 (Cal. Code Regs., tit. 23, § 5007): Protect Opportunities to Restore Habitat

ER P3 addresses the reduction of habitats supporting native species by requiring public agencies to avoid or mitigate significant impacts to the opportunity to restore habitats in priority habitat restoration areas. The regulation also furthers the goal of restoring large areas of interconnected habitats, establishing migratory corridors for fish, birds and other animals, and helping increase or restore migratory bird habitat. This policy covers proposed actions in priority habitat restoration areas:

> (d) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers proposed actions in the priority habitat restoration areas depicted in Appendix 5. It does not cover proposed actions outside those areas. (Cal. Code Regs., tit. 23, §5007).

The Certification states that the policy is not applicable to the Proposed Geotech because the proposed action does not include actions in the priority habitat restoration areas shown in Appendix 5 of the Council's regulations. (Certification, p. 4-8.) The Department provides an overlay map of the Proposed Geotech with the priority habitat restoration areas depicted in Appendix 5, which shows the Proposed Geotech will not occur in the priority habitat restoration areas. (Certification, Figure 4, p. 4-9.) Appellants do not claim that ER P3 applies to the Proposed Geotech.

Consequently, the Council finds that the Proposed Geotech will not occur in a priority habitat restoration area depicted in Appendix 5 and therefore ER P3 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department's determination that ER P3 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

f. ER P4 (Cal. Code Regs., tit. 23, §5008): Expand Floodplains and Riparian Habitats in Levee Projects

Policy ER P4 addresses the reduction of habitats supporting native species. Proposed actions to construct new levees or substantially rehabilitate or reconstruct existing levees must evaluate and incorporate feasible alternatives, including setback levees, to increase floodplains and riparian habitats. (Cal.Code Regs, tit 23, § 5008, subd. (a).) This policy covers proposed actions to construct new levees or substantially rehabilitate or reconstruct existing levees:

> (b) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers a proposed action to construct new levees or substantially rehabilitate or reconstruct existing levees. (Cal. Code Regs., tit. 23, §5008).

The Certification states that Policy ER P4 is not applicable to the proposed action: "[a]s described in Delta Plan Policy ER P4, Expand Floodplains and Riparian Habitats in Levee Projects, this policy covers a proposed action to construct new levees or substantially rehabilitate or reconstruct existing levees. This policy is not applicable to the 2024–2026 Proposed Geotechnical Activities because the "proposed action here does not include constructing new levees or substantially rehabilitating or reconstructing existing levees" (Certification, p. 4-10.) The Proposed Geotech consists of subsurface exploration and testing, including borings, cone penetration tests, and installation and removal of PVC pipes. (Certification, p. 3-16.) Appellants do not address the applicability of ER P4 to the Proposed Geotech.

Consequently, the Council finds that the Proposed Geotech is not a proposed action to construct new levees or substantially rehabilitate or reconstruct existing levees and therefore ER P4 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department's determination that ER P4 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

g. Policy ER P5 (Cal. Code Regs., tit. 23, § 5009): Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species

Policy ER P5 addresses the new introduction of a nonnative species and/or the improvement of habitat conditions for a nonnative invasive species. This is one of two Article 3 polices substantively challenged by the appellants. The policy states:

> "(a) The potential for new introductions of, or improved habitat conditions for, nonnative invasive species, striped bass, or bass must be fully considered and avoided or mitigated in a way that appropriately protects the ecosystem.

> (b) For purposes of Water Code Section 85057.5(a)(3) and Section 5001(k)(1)(E) of this Chapter, this policy covers a proposed action that has the reasonable probability of introducing, or improving habitat conditions for, nonnative invasive species. (Cal. Code Regs, tit. 23, § 5009.)

The Delta Plan defines "nonnative invasive species" for purposes of ER P5 as "species that establish and reproduce rapidly outside of their native range and may threaten the diversity or abundance of native species through competition for resources, predation, parasitism, hybridization with native populations, introduction of pathogens, or physical or chemical alteration of the invaded habitat." (Cal. Code Regs., tit. 23, § 5001, subd. (z).)

In the Certification, the Department states that ER P5 is not applicable to the Proposed Geotech because the activities would result in minor disturbances with temporary impacts and these impacts would be mitigated by environmental commitments and Best Management Practices set forth in Final EIR Appendix 3B, Environmental Commitments and Best Management Practices, and specifically the requirements in EC-14: Construction Best Management Practices for Biological Resources. Measures to be implemented include the requirement that "all equipment used during field investigations will be cleaned and inspected by the qualified biologist… prior to entering the work areas and before moving between work areas." (Delta Conveyance Project, Mitigation Monitoring and Reporting Program, Certification Record, CDP.C.1.00002.pdf, p.3-130)

SF Baykeeper and SDWA both allege that the Proposed Geotech is inconsistent with this policy. However, SF Baykeeper does not explain how the proposed action is inconsistent with ER P5 and does not even reference the policy in the memorandum submitted in support of the appeal or the additional brief. Rather, SF Baykeeper alleges that the Department did not provide evidence to show that the *Delta Conveyance Project* is consistent with ER P5. SF Baykeeper does not allege that ER P5 covers the Proposed Geotech.

In its appeal, SDWA does not claim that the Proposed Geotech could improve habitat conditions for nonnative species. Rather, SDWA argues that "DWR does not specify whether all vehicles will be so cleaned and inspected nor the clothing and footwear of personnel, both of which could reasonably result in the introduction of nonnative invasive species," (SDWA Appeal, No. C20242-A2, SDWA's November 27, 2024, letter, p.11.). SDWA does not cite the record or any evidence in support of its argument. Moreover, SDWA does not identify a nonnative species at issue or addresses how the concern expressed rises to the level of a "reasonable probability". Appellant further does not point to an invasive species standard concerning vehicles, clothing and footwear of personnel.

In the Department's subsequent brief, the Department clarifies that the reference to "equipment" in the Certification, includes work vehicles used as part of the Proposed Geotech. (Certification, DCP.X2.1.00020.pdf, p. 67). With respect to clothing, the Department argues that only a limited number of field personnel will access the proposed geotechnical investigation sites within the Delta and that the effectiveness of best management practices depends on existing land uses, the degree of human

disturbances, and other factors. In addition, the activities will generally occur on already disturbed areas with compacted soil (Certification, DCP.X2.1.00020.pdf, p. 38), and that sites will be restored as close to pre-project conditions as possible (Certification, DCP.X2.1.00020.pdf, p. 170), a team of qualified biologists will conduct pre- and post-activity surveys (Certification, DCP.X2.1.00020.pdf, p. 227), and that environmental awareness training is provided to all new field personnel prior to each workday (Certification, DCP.X2.1.00020.pdf, p. 230). Further, "Appellants merely speculate that clothing of visitors to the Delta may create the reasonable probability of introducing or improving habitat conditions for nonnative invasive species." (Department's December 13, 2024, Letter, p.4-1.)

Although the Council has not defined "reasonable probability" in its regulations, a "reasonable" probability is necessarily more than a "mere possibility". (*See e.g. People v. Watson* (1956) 46 Cal.2d 818, 837.) Therefore, to demonstrate a reasonable probability, there must be facts or evidence that establish a "reasonable chance and not merely an abstract possibility" that the proposed action will result in the introduction of a new nonnative invasive species or will improve the habitat conditions for nonnative invasive species. (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050-1051 [explaining "reasonable probability' standard under Penal Code § 1405.].) Appellant SDWA does no more than raise a mere possibility, without reference to the record or any supporting evidence.

Consequently, the Council finds that it has not been established that the Proposed Geotech has a reasonable probability of introducing, or improving habitat conditions for, nonnative invasive species and therefore ER P5 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department's determination that ER P5 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

h. Policy DP P1 (Cal. Code Regs., tit. 23, §5010): Locate New Urban Development Wisely

DP P1 restricts certain types of urban development outside of urban areas and rural communities to conserve farming and rural land use and to protect the unique character of Delta communities. This policy covers residential, commercial, and industrial development:

> (c) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers proposed actions that involve new residential, commercial, and industrial development that is not located within the areas described in subsection (a). In addition, this policy covers any such action on Bethel Island that is inconsistent with the Contra Costa County general plan effective as of May 16, 2013. This policy does not cover commercial recreational visitor-serving uses or facilities for processing of local crops or that provide essential services to local farms, which are otherwise consistent with this Chapter. (Cal. Code Regs., tit. 23, §5010).

The Department's Certification of Consistency states the Proposed Geotech is not covered by DP P1 because the proposed action does not include new residential, commercial, or industrial development. (Certification, p. 4-12.) The Proposed Geotech consists of subsurface exploration and testing, including borings, cone penetration tests, and installation and removal of PVC pipes. (Certification, p. 3-16.) Further, Appellants do not address the applicability of DP P1.

Consequently, the Council finds that the Proposed Geotech does not involve new residential, commercial, or industrial development and therefore DP P1 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department's determination that DP P1 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

i. DP P2 (Cal. Code Regs., tit. 23, §5011): Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats

DP P2 requires the avoidance or reduction of conflicts with existing or planned land uses in locating water management facilities, ecosystem restoration, or flood management infrastructure in the Delta. (Cal. Code Regs, tit. 23, § 5011.) The policy states:

> (a) Water management facilities, ecosystem restoration, and flood management infrastructure must be sited to avoid or reduce conflicts with existing uses or those uses described or depicted in city and county general plans for their jurisdictions or spheres of influence when feasible, considering comments from local agencies and the Delta Protection Commission. Plans for ecosystem restoration must consider sites on existing public lands, when feasible and consistent with a project's purpose, before privately owned sites are purchased. Measures to mitigate conflicts with adjacent uses may include, but are not limited to, buffers to prevent adverse effects on adjacent farmland. (Cal. Code Regs., tit. 23, §5011).
>
> (b) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers proposed actions that involve the siting of water management facilities, ecosystem restoration, and flood management infrastructure. (Cal. Code Regs., tit. 23, §5011).

The Certification states that DP P2 does not apply to the Proposed Geotech because the proposed action only includes temporary information collection activities and does not involve the physical placing (siting) of water management facilities, ecosystem restoration, and flood management infrastructure. The Certification further states that the proposed action does not commit DWR to site Delta Conveyance Project facilities in the specific investigation locations proposed[.] (Certification, pp. 4-12 – 4-13.)

None of the appellants allege that the Proposed Geotech involves ecosystem restoration or flood management infrastructure.

The County of San Joaquin contends that the proposed action includes the placement of permanent components, namely the grout used to seal the borings and that because the purpose of the Proposed Geotech is to support water management facilities, it is a "'water management facility that would conflict with existing land uses in the Delta." (County of San Joaquin Appeal Letter, "DP P2, Respect Local Land Use", p. 1.)

SDWA claims that because the Proposed Geotech is intended to investigate and confirm the suitability of sites for the Delta Conveyance Project's facilities, it is therefore a substantial factor in the ultimate siting of those facilities. (SDWA Appeal, No. 20242-A2, SDWA's Nov. 27, 2024, Letter, pp. 11-12.) SDWA further claims that there is no substantial evidence to support the Department's consistency determination. (*Ibid*.)

The County of Sacramento contends that the Proposed Geotech is required to determine the ultimate siting and alignment of Delta Conveyance Project water management and conveyance facilities and that the Proposed Geotech will conflict with local agricultural land uses and the SacSewer Harvest Water Program. (County of Sacramento Appeal Letter, p.21.)

DP P2 applies to the siting (or location) of proposed water management facilities, ecosystem restoration, or flood management infrastructure. The policy requires certifying agencies to site *water management facilities, ecosystem restoration, or flood management infrastructure* in a manner that avoids or reduces conflict with existing land uses. (Cal. Code Regs, tit. 23, § 5011, subd. (a).) The Council finds that the Proposed Geotech is not itself a water management facility, ecosystem restoration, or flood management infrastructure. The bore holes with PVC pipes used for water quality testing would not constitute a water management facility because the PVC pipes will be removed, and the bore holes will be filled after the activities are concluded. (Certification, pp. 3-16 – 3-17.) Material left behind (cement-bentonite grout) will not be used for ongoing water management. Although the data collected may ultimately inform the planning and design of the Delta Conveyance Project, the actual siting of the Delta Conveyance Project is not at issue in this certification.

Consequently, the Council finds that the Proposed Geotech does not involve the siting of a water management facility, ecosystem restoration, or flood management infrastructure and therefore DP P2 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department's determination that DP P2 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

j. Policy RR P1 (Cal. Code Regs., tit. 23, § 5012): Prioritization of State Investments in Delta Levees and Risk Reduction

This policy requires the prioritization of state investments in levee operation and maintenance of Delta project levees and nonproject levees based on categories listed in the regulation. The policy also requires an annual report. The policy applies to proposed actions that involve discretionary State investments in Delta levee operations, maintenance and improvements:

> (d) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers a proposed action that involves discretionary State investments in Delta flood risk management, including levee operations, maintenance, and improvements. Nothing in this policy establishes or otherwise changes existing levee standards. (Cal. Code Regs, tit. 23, § 5012, subd. (d).)

The Certification states that this policy is not applicable because the proposed action involves no investment in Delta levees or flood risk reduction. The Certification asserts that the Proposed Geotech would be funded through contributions from public water agencies that may participate in the Delta Conveyance Project. The Department also represents that the 2024–2026 Proposed Geotechnical Activities do not involve discretionary State investments in Delta flood risk management, including levee operations, maintenance, and improvements. (Certification, p.4-14.) The Proposed Geotech consists of the Proposed Geotech as subsurface exploration and testing consisting of, including borings, cone penetration tests, and installation and removal of PVC pipes. (Certification, p. 3-16.) Appellants do not contend that RR P1 applies.

Consequently, the Council finds that the Proposed Geotech does not involve discretionary State investments in Delta flood risk management, including levee operations, maintenance, and improvements and therefore RR P1 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department's determination that RR P1 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

k. Policy RR P2 (Cal. Code Regs., tit. 23, § 5013): Require Flood Protection for Residential Development in Rural Areas

RR P2 requires the floodproofing of new residential developments to a level 12 inches above the 100-year base flood elevation, in addition to sufficient elevation that would protect against a 55-inch rise in sea level at the Golden Gate. (Cal. Code Regs, tit. 23, § 5013, subd. (a).) The policy covers a proposed action that involves a new residential development of five or more parcels:

> (b) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers a proposed action that involves new residential development of five or more parcels that is not located within the areas described in subsection (a). (Cal. Code Regs, tit. 23, § 5013, subd. (b).)

The Department states that this policy is not applicable to the Proposed Geotech because the proposed action here does not involve new residential development of five or more parcels. (Certification, p. 4-15.) The Proposed Geotech consists of the Proposed Geotech as subsurface exploration and testing consisting of, including borings, cone penetration tests, and installation and removal of PVC pipes. (Certification, p. 3-16.) None of the Appellants address the applicability of RR P2.

Consequently, the Council finds that the Proposed Geotech does not involve new residential development of five or more parcels and therefore RR P2 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department's determination that RR P2 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

l. Policy RR P3 (Cal. Code Regs., tit. 23, § 5014): Protect Floodways

RR P3 restricts encroachments in floodways to reduce the risks to people, property, and state interests in the Delta, and to protect the carrying capacity of designated floodways. The policy covers proposed actions that would encroach in a floodway.

> (b) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers a proposed action that would encroach in a floodway that is not either a designated floodway or regulated stream. (Cal. Code Regs, tit. 23, § 5014, subd. (b).)

The Certification states that the policy is not applicable to the Proposed Geotech because the proposed action here would not include any in-water work and would not encroach in a floodway that is not either a designated floodway or regulated stream. (Certification, p. 4-15.) Appellants do not claim that RR P3 covers the Proposed Geotech.

Consequently, the Council finds that the Proposed Geotech would not encroach in a floodway that is not either a designated floodway or regulated stream and therefore RR P3 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department's determination that RR P3 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

m. Policy RR P4 (Cal. Code Regs., tit. 23, § 5015): Floodplain Protection

RR P4 protects against encroachments in designated floodplains. The policy covers proposed actions that would encroach in the floodplains identified in the regulation.

> (b) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers a proposed action that would encroach in any of the floodplain areas described in subsection (a). (Cal. Code Regs., tit. 23, § 5015, subd. (b).)

The Certification states that this policy is not applicable to the Proposed Geotech because the proposed action here would not encroach in any of the floodplain areas described in California Code of Regulations, Title 23, Section 5015(a). (Certification, p. 4-17.) Appellants do not claim that RR P4 covers the proposed action.

Consequently, the Council finds that the Proposed Geotech would not encroach in any of the floodplain areas described in subsection (a) of Section 5015 (RR P4) and therefore RR P4 does not cover the Proposed Geotech. The Council also finds that

Appellants have failed to show that the Department's determination that RR P4 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

CONCLUSION

The Appellants raised two primary issues in the appeals: 1) whether CEQA case law and Guidelines govern certifications of consistency and prohibit the Department from submitting a separate certification of consistency for the Proposed Geotech; and 2) whether the Proposed Geotech is a covered action subject to the Council's review. With respect to the first issue, the Council concludes that the Department is not necessarily precluded from submitting a separate certification of consistency for the Proposed Geotech due to CEQA's regulations. However, the Council finds on the second issue that the Proposed Geotech fails to meet the requirements for a covered action because it is not covered by one or more of the Delta Plan's regulatory policies. (Wat. Code § 85057.5(a)(3); Title 23, California Code of Regulation, section 5001, subd. (k)(1)(E).) Accordingly, the Proposed Geotech is not a covered action subject to the Council's appellate jurisdiction. The Council therefore dismisses the appeals for lack of jurisdiction.

Because the Council has reviewed the Proposed Geotech and determined that it is not a covered action subject to a Delta Plan regulatory policy, the Department of Water Resources need not re-submit the activities described in the Proposed Geotech certification, as part of a subsequent certification of consistency for the Delta Conveyance Project. This decision does not make any findings with respect to the Delta Conveyance Project (nor geotechnical activities that are not the subject of the Certification) and does not constitute approval or rejection of that project. Except as expressly provided herein, the Department must file a certification of consistency for the Delta Conveyance Project.