

State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS
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PROTEST – PETITION

**Petition for Changes in Water Rights of the Department of Water Resources for the Delta
Conveyance Project**

Based on Environmental Considerations, Public Interest, Public Trust, and Other Issues

We, Buena Vista Rancheria of Me-Wuk Indians, Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Little Manila Rising, California Indian Environmental Alliance, Restore the Delta, Golden State Salmon Association, Institute for Fisheries' Resources, Pacific Coast Federation of Fishermen's Associations, and San Francisco Baykeeper have read carefully a copy of, or the notice relative to, Petition for Changes in Water Rights of the Department of Water Resources for the Delta Conveyance Project.

We protest the above Petition based on the public interest, environmental considerations, the public trust, and other issues, including that the Proposed Project is contrary to law.

Addresses, email addresses and phone number of protestant or authorized agent:

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The Statement of Facts in support of this Protest follows, including Exhibits 1 to 10 attached hereto.

The Conditions under which this Protest may be disregarded or dismissed follow at page 46.

A true and correct copy of this Protest has been served upon the Applicant by electronic mail at the following address:

Delta Conveyance Project
Department of Water Resources
David Steffenson
David.steffenson@water.ca.gov

Signed this 13th day of May, 2024 by:



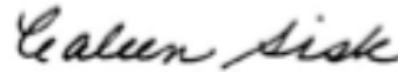
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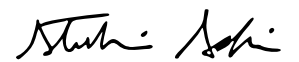
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**STATEMENT OF FACTS IN SUPPORT OF PROTEST OF
DELTA CONVEYANCE PROJECT PETITION**

Buena Vista Rancheria of Me-Wuk Indians, Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Little Manila Rising, California Indian Environmental Alliance, Restore the Delta, The Bay Institute, Golden State Salmon Association, Institute for Fisheries Resources, Pacific Coast Federation of Fishermen's Associations, and San Francisco Baykeeper hereby protest the Petition Requesting Changes in Water Rights of the Department of Water Resources ("DWR") for the Delta Conveyance Project.

I. INTRODUCTION

For sixty years, California politicians have proposed to divert water from the Bay-Delta and pump, tunnel, or transport it for other uses in other places throughout the state. And for sixty years, the science has demonstrated that such plans will harm fish and wildlife, communities, and people.

The current Delta Conveyance Project ("DCP," "Tunnel," or "Project") proposal is no different. Pushed forward by politicians in plain contravention of the best available science, the continued drive to take more and more from the Delta – more of its water, more of its history, more of its culture – must be rejected by the State Water Resources Control Board ("State Water Board" or "Board"), so that the fate of Tribes, communities, and ecosystems are not left to the whims of political power brokers.

The Board should deny the Petition because it is unlawful and not in the public interest. The Project would cause unreasonable impacts to water quality and to fish and wildlife in the Sacramento River and San Francisco Bay/Sacramento-San Joaquin Delta ("Bay-Delta") estuary, significant harm to the Bay-Delta environment, irreparable injury to tribal cultural resources and tribal beneficial uses, damage to public trust resources, further injury to already impacted coastal and inland fisheries, and a host of unacceptable adverse impacts to Delta Tribes and communities. It is also effectively a new water right application, as DWR has lost any entitlement to divert in the amount contemplated for the DCP under its 1972 permits. And it injures legal users of water, including unadjudicated reserved rights of Tribes.

The undersigned Protestors represent a diverse range of interests, from sovereign Tribes to a host of non-profit organizations representing environmental justice, environmental, fishing, and other public interests. The Bay-Delta ecosystem and the people and wildlife that live with and depend on it will be irreversibly harmed by construction and operation of the Tunnel; indeed, the impacts of the Tunnel will be felt throughout the state and for all time. The Water Board should reject the Petition.

II. SCOPE OF THE PROCEEDING AND LEGAL STANDARDS

The State Water Board has authority to approve a petition for change in point of diversion *only* if the petitioner establishes that the proposed change will neither in effect initiate a new water right nor injure any other legal user of water. 23 Cal. Code. Regs. § 791. Beyond these threshold

considerations, the Board must consider a range of factors in making its determination on a change petition.

Consistent with its obligations under state law, the Board is required to consider the Proposed Project's full range of impacts to fish and wildlife and to the public interest, not just the claimed benefits in the Petition. The Board has "an independent obligation to consider the effect of the proposed Project on public trust resources and to protect those resources where feasible," State Water Bd., *In the Matter of Permit 10477 (Application 12842)*, 2015 WL 4517569 at **9, 22 (Mar. 30, 2015), and must consider the public trust when conditioning or approving any diversion of water, State Water Bd., *In the Matter of License 7979 (Application 20301) of Irv Leen*, 2013 WL 596457 (Feb. 3, 2023) (citations omitted); *see also* Water Rights Order 2009-0033.

The Project must comply with applicable water quality objectives. *See In the Matter of Permit 10477*, 2015 WL 4517569 at *9. But the Board's review of impacts cannot be limited to consistency with existing water quality objectives for the Bay-Delta because, according to the Board and state and federal fish and wildlife agencies, the objectives in the operative Bay-Delta Water Quality Control Plan (the "Bay-Delta Plan") fail to protect public trust resources, including fish and wildlife, and designated beneficial uses. *See, e.g.*, State Water Bd., *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem* at 2 (Aug. 3, 2010) ("The best available science suggests that current flows are insufficient to protect public trust resources."); *id.* at 5 (acknowledging that "[r]ecent Delta flows are insufficient to support native Delta fishes for today's habitats"); State Water Bd. Resolution 2010-0039 ("In accordance with the Delta Reform Act, the State Water Board approves the report determining new flow criteria for the Delta ecosystem that are necessary to protect public trust resources."); State Water Bd., *Scientific Basis Report in Support of New and Modified Requirements for Inflows from the Sacramento River and its Tributaries and Eastside Tributaries to the Delta, Delta Outflows, Cold Water Habitat, and Interior Delta Flows ("2017 Final Report")* at 1-3 to 1-5, 1-21 to 1-22, 3-1, 5-1 to 5-3, 5-5, 5-7 to 5-8, 5-15, 5-25, 5-32 to 5-34, 5-41 to 5-42, 5-47; *see also* State Water Bd., *July 2018 Framework for the Sacramento/Delta, Update to the Bay-Delta Plan*. Rather, the Board must consider the Project's consistency with flows and other criteria necessary to protect beneficial uses and public trust resources. *See, e.g.*, Wat. Code §§ 85023, 85086(c)(2).

Similarly, the Board must ensure more than mere compliance with the California Endangered Species Act ("CESA") to avoid unreasonable impacts on fish and wildlife. Instead, in evaluating reasonable protection of fish and wildlife, the Board must protect species, like fall-run Chinook Salmon, White Sturgeon, Starry Flounder, and others that are not currently listed under CESA. And it must ensure stronger protections that meaningfully improve conditions for spring-run Chinook Salmon, Longfin Smelt, and other species that are CESA-listed. The Board must also find that approving the Petition will not conflict with or impair meeting the existing narrative objective for salmon protection (salmon doubling) in the Bay-Delta Plan, or the proposed "viability" objective being considered by the Board as part of its imminent update of the Sacramento River and Delta portions of the Bay-Delta Plan. These objectives are part of the Board's own definition of "reasonable protection" of beneficial uses; indeed, it is impossible for the Board to reasonably protect fish and wildlife beneficial uses if fish populations are not viable.

Finally, the Board must evaluate the availability of alternative water supplies, including water recycling, water conservation and efficiency, and urban stormwater capture, in evaluating the reasonableness of protections for fish and wildlife and other beneficial uses. *See* Decision 1485 at pp. 16-19; Decision 1631 at pp. 165-168, 176-177; Water Rights Order 2009-0034EXEC; *see also* Wat. Code § 13241(f). Relatedly, the Petitioner must demonstrate compliance with Water Code section 85021 and other provisions of the Delta Reform Act requiring agencies to reduce reliance on water supplies from the Bay-Delta and invest in regional self-sufficiency.

III. THE PETITION IS PREMATURE AND INCOMPLETE

A. The Petition Cannot be Decided Until the Board Completes the Pending Update to the Bay-Delta Plan

To act on the Petition, the State Water Board must determine that approving the requested changes would be consistent with state water quality standards for the Bay-Delta and would not unreasonably harm beneficial uses protected by water quality standards. In particular, the Delta Reform Act requires that the Board's consideration of any change in point of diversion for Delta conveyance "include appropriate Delta flow criteria," informed by the Board's 2010 Public Trust Flows report. Wat. Code § 85086(c)(2). And the Board has itself concluded that a change petition must "not unreasonably harm fish, wildlife and other instream beneficial uses" and that it "has an independent obligation to consider the effect of the proposed project on public trust resources and to protect those resources where feasible." *In the Matter of Permit 10477*, 2015 WL 4517569 at *9, 22 (Mar. 30, 2015). Thus, for instance, in Water Rights Order 2009-0015, the Board approved a petition to change the place of use, purpose of use, and points of diversion only after adding a new condition establishing minimum instream flows to prevent unreasonable harm to fish and wildlife and to protect public trust resources.

The Board cannot at this time make the requisite determination that approval of the Petition would be consistent with protection of instream beneficial uses and Delta flow criteria designed to protect them because the Board has not yet determined "appropriate Delta flow criteria." Wat. Code § 85086(c)(2). Rather, the Board is in the midst of a regulatory update to the Bay-Delta Plan to establish these criteria. This update must be completed and appropriately protective flow criteria established before the Board can proceed to adjudicate the Petition and make the requisite determination whether operation of the Tunnel will maintain flow and other conditions necessary to reasonably protect instream beneficial uses.

Water quality standards for the Sacramento River and its tributaries are currently governed by the 2006 Bay-Delta Water Quality Control Plan and Water Rights Decision 1641 ("D-1641"), adopted in December 1999 and revised in March 2000, which assigns primary responsibility to meet Bay-Delta water quality objectives to DWR and the Bureau of Reclamation. As early as 2008, the Board recognized that the 2006 Bay-Delta Plan and D-1641 were failing to protect fish and wildlife beneficial uses.¹ In Resolution 2009-0065, the Board approved a staff report on

¹ State Water Bd., Resolution No. 20008-0056: Strategic Workplan for Activities in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary 1 (2008),

periodic review of the Bay-Delta Plan, which again recognized that existing standards are failing to protect fish and wildlife beneficial uses and recommended numerous changes to existing flow and other water quality standards. *See, e.g.*, State Water Bd. Staff Report, Periodic Report on 2006 Bay-Delta Plan at 21 (2009) (“The available information indicates that new or changed export limits may be necessary to adequately protect beneficial uses in the Delta. Recent analyses of the impact of export pumping on Delta fish species of concern show that more restrictive limits may be required.”). The Board reaffirmed these findings in a 2010 report on Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem (“Public Trust Flows Report”), which concluded that “[t]he best available science suggests that current flows are insufficient to protect public trust resources.” *See also* State Water Bd. Resolution 2010-0039 (“In accordance with the Delta Reform Act, the State Water Board approves the report determining new flow criteria for the Delta ecosystem that are necessary to protect public trust resources.”). The State Water Board and multiple other state and federal agencies have since reaffirmed on numerous occasions that current Delta flow standards “have been inadequate to support fish and wildlife beneficial uses” and to protect public trust resources.² For instance, just this past fall, Board staff reiterated their conclusion that “[e]xisting regulatory minimum Delta outflows would not be protective of the ecosystem, and without additional instream flow protections, existing flows may be reduced in the future, particularly with climate change and additional water development absent additional minimum instream flow requirements that ensure flows are preserved in stream when needed for the reasonable protection of fish and wildlife.” State Water Bd., Staff Report and Substitute Environmental Document for the Sacramento/Delta Update (Sept. 2023) (hereafter, “Staff Report/SED”).³

In light of the current Bay-Delta Plan’s failings, the Board announced in 2008 that it would initiate a proceeding to review and revise Bay-Delta water quality standards. In July 2018, the Board released a Framework for the Sacramento/Delta Update to the Bay-Delta Plan, which concluded unequivocally that “current outflow volumes are inadequate to protect the ecosystem, and current outflow requirements are even lower and less protective.” July 2018 Framework at 15. The Board further concluded that “it is imperative that updated flow requirements be established in order to protect fish and wildlife beneficial uses in the Bay-Delta watershed.” *Id.* at 7.

In September 2023, the Board released a Staff Report and Substitute Environmental Document for the Sacramento/Delta Update. The Staff Report sets forth proposed Bay-Delta Plan amendments based on the 2018 Framework, which describes a 55 percent unimpaired flow

https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/strategic_plan/docs/bay_delta_workplan_final.pdf.

² *See, e.g.*, Cal. State Water Res. Control Bd., *Letter to Kristin White: Water Rights Decision 1641 San Joaquin River Flows Compliance* 2 (Apr. 7, 2021),

https://www.waterboards.ca.gov/waterrights/water_issues/programs/compliance_monitoring/sacramento_sanjoaquin/docs/2021/20210407_swbltr.pdf; *see also* Exhibit 5, Baykeeper et al. Comments DEIR, at 4-5 (citing state and federal letters).

³ *See also* DFW, Biological Goals and Objectives Flow Criteria Report (2010); USFWS, Longfin Smelt draft ESA Listing Rule (2022) (finding existing regulatory mechanisms are inadequate to prevent Longfin Smelt from going extinct).

objective for Sacramento River inflow to the Delta, with an adaptive range from 45 to 65 percent unimpaired flow. At the same time, the Staff Report is explicit that it “does not identify the preferred proposal for moving forward with the update to the Bay-Delta Plan, and all alternatives and variations described in this draft Staff Report are available for consideration and adoption during the public planning process.” Staff Report/SED at 1-20. This includes an alternative, which Staff described as being predicated on the Board’s own Public Trust Flow Criteria Report, which would set a numeric 65 to 75 percent unimpaired flow objective for the Sacramento/Delta tributaries. *Id.* at 7.24-24. Numerous comments, including those submitted by the undersigned, urged the State Water Board to expeditiously adopt flow criteria at least as protective as the proposed plan amendments. Likewise, the U.S. Environmental Protection Agency (“U.S. EPA”) wrote to the Board to “strongly recommend[] that the State Water Board include numeric flow objectives in its amendments the Bay-Delta Plan,” recognizing the substantial body of evidence compiled by the Board showing that “substantially more flow is needed in the Delta and Sacramento-San Joaquin watersheds to support aquatic life.” U.S. EPA Comment on Staff/Report SED at 1 (Exhibit 6).

Given that the Board is in the midst of proceedings to review and adopt appropriate flow criteria, it cannot approve the Petition consistent with section 85086(c)(2)’s directive to include appropriate flow criteria. Rather, the Board must defer consideration of the Petition until flow criteria are finalized and can be incorporated into any approval.

DWR’s arguments to the contrary fail. DWR first asserts that its Petition is consistent with D-1641, which “is protective of beneficial uses until replaced through the update process and constitutes the standard for determining injury to those beneficial uses when considering this Petition.” Petition (“Pet.”) at 14; *see also* Pet. At 13 (“The Project, by meeting D-1641 requirements, is protective of beneficial uses of water.”). This position is both wrong and revealing. As described above, the State Water Board, and every other state and federal agency to weigh in on the issue, has concluded unequivocally that D-1641 is failing to protect beneficial uses and public trust resources. The fact that the State Water Board has not yet formally superseded D-1641 does not negate the State Water Board’s own conclusion that D-1641 is *not* protective of beneficial uses and should not therefore serve as the standard to determine injury to those uses. If anything, the State Water Board should look in evaluating injury to public trust resources and beneficial uses not to the admittedly inadequate and outdated D-1641 framework, but instead to its own 2010 Public Trust Flow Criteria Report and the proposed plan amendments in its 2018 Framework and 2023 Staff Report and SED.

Furthermore, D-1641 remains on the books only because the State Water Board has delayed, unduly, in updating and implementing water quality standards for the Bay-Delta. In August 2023, U.S. EPA accepted for investigation a civil rights complaint against the State Water Board, filed by the Delta Tribal Environmental Coalition⁴ with Save California Salmon. Among the issues accepted for investigation is

⁴ The Delta Tribal Environmental Coalition, or “DTEC,” comprises Buena Vista Rancheria of Me-Wuk Indians, Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Little Manila Rising, and Restore the Delta – all of whom are parties to the instant Protest.

Whether the [Board’s] administration of the water quality standard setting program with respect to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta watershed (“Bay-Delta Region”), including *timeliness of rulemaking* and opportunities for public participation, subjects members of Native Tribes and Black, Asian and Latino residents of the Bay-Delta Region, particularly the South Stockton community, to discrimination based on race, color, and national origin.

U.S. EPA Letter Accepting Administrative Complaint (Aug. 8, 2023) (Exhibit 8) (emphasis added). On September 7, 2023, the State Water Board, through its general counsel Michael Lauffer, agreed to engage in negotiations with U.S. EPA toward the execution of an informal resolution agreement for the Complaint; the U.S. EPA accordingly suspended its 180-day timeframe to issue preliminary findings of discrimination under 40 C.F.R. section 7.115(c)(1) for the duration of the informal resolution process. Negotiations toward an informal resolution to the issues accepted for investigation – including timeliness of the State Water Board’s actions to update the Bay-Delta Plan – are ongoing.

In addition, DTEC with Save California Salmon filed a Petition for Rulemaking with the U.S. EPA on December 16, 2022, seeking an Administrator’s determination pursuant to section 303(c)(4)(B) of the Clean Water Act that the existing Bay-Delta water quality standards fail to meet Clean Water Act requirements, as well as promulgation of federal water quality standards setting forth instream flow objectives. This Petition remains pending. The State Water Board has also been explicit that it is considering adoption of Tribal Beneficial Uses for the Bay-Delta Plan, as also sought in the Petition for Rulemaking and Title VI Complaint. Formal recognition of Tribal Beneficial Uses is likely to influence the State’s consideration of appropriate flow criteria.

Proceeding to adjudicate the Petition based on compliance with D-1641 would evidence precisely the harms of the State Water Board’s delay that the Petition and Title VI Complaint document. It would, in other words, show that the Board and the State are proceeding to take advantage of the delay in the Bay-Delta Plan update to entitle major water storage and diversion infrastructure predicated on the outdated D-1641 standards. Doing so risks locking in a damaging status quo and hindering efforts to restore instream flows to levels necessary to protect beneficial uses and public trust resources.

Relatedly, DWR confirms that the Petition “does not seek any modifications to the requirements of D-1641.” Pet. At 14. But this is inconsistent with section 85068(c)(2)’s directive to include “appropriate Delta flow criteria” in any order approving a change in the point of diversion for Delta Conveyance. According to the Board’s own assessment of the best available science, D-1641 does not set forth appropriate flow criteria, and any order would need to be predicated on modifications to D-1641.

DWR also suggests that these problems could be resolved by including “flow criteria . . . in operations of the new intakes, which would be in addition to those requirements in D-1641.” Pet. At 15. But DWR does not specify what those flow criteria might be; nor can it, as the State Water Board is yet to determine appropriate flow criteria. Tellingly, DWR did not include in the EIR for the tunnel a single operational alternative that would decrease water diversions from the

Delta, not to mention one consistent with the proposed plan amendments and 2018 Framework or the 2010 Public Trust Flows Report. This is so despite CEQA scoping comments by the State Water Board asserting that “the EIR should evaluate a scenario that is consistent with the State Water Board’s efforts to update the Bay-Delta Plan to improve protections for native fish species.”⁵ See Exhibit 5 at p. 6, quoting State Water Bd., Comments to DWR at 4-5 (2020).

Finally, the State Water Board cannot cure these problems by ignoring DWR’s pleas to stick with the D-1641 framework and conditioning approval of the Petition on compliance with revised flow criteria once adopted by the Board. As the SED makes plain, the Board is considering a significantly modified water quality standard regime; revised standards are likely to increase outflow requirements well above levels required under D-1641 in addition to make further changes to water quality standards, such as recognition and protection of Tribal Beneficial Uses. DWR has not evaluated whether the DCP would be consistent with alternatives being considered by the Board. If it proves not to be, approving the DCP first would either effectively foreclose adoption of standards necessary to protect beneficial uses, or adoption of those standards would foreclose operation of the DCP, rendering these permitting proceedings and any expenditures to construct the DCP an unforgivable waste of public resources. For these and other reasons, the State Water Board should stay any action on the instant Petition until it has completed its update to the Bay-Delta Plan and replaced D-1641 with measures to implement revised standards.

B. The Board Should Stay Proceedings on the Petition Until Related Environmental Review and Permitting Processes are Complete

To approve the Petition, the Board must conduct a multi-faceted analysis, considering, among other things: potential injury to legal water users; effects of the DCP on public trust resources; the potential effects of the proposed changes on water quality, fish, wildlife, and other instream beneficial uses; the reasonableness of the proposed diversion and points of diversion; the Project’s potential adverse environmental impacts; potential effects on known users of water, including projected changes in reduction in return flows or availability of water within affected streams; avoidance of water quality degradation, consistency with governing law and policy, and general furtherance of the public interest. See Section II, *supra*; 23 Cal. Code Regs. §§ 745(b)-(c), 791, 794. The Board must reject the Petition if it finds that DWR has failed to provide the Board with the requisite information to support its determination on the Petition. See 23 Cal. Code Regs. § 794(d). The Board should do so here: Multiple environmental review and permitting processes remain pending, and DWR cannot adequately inform the Board about the Project’s potential effects until those processes have been completed.

Although DWR completed its environmental review for the Project in December 2023, related environmental reviews to inform federal and state permitting for the Project remain pending. For instance, the U.S. Army Corps of Engineers determined that the proposed Project would require the Corps’ authorization to alter levees under section 14 of the Rivers and Harbors Act, 33 U.S.C. § 408 (a “section 408 permit”), to place structures and conduct work in or affecting navigable

⁵ By contrast, the EIR for the California WaterFix included an operational alternative that resulted in increased Delta outflow and reduced water diversion (Alternative 8 in the Bay Delta Conservation Plan DIR/DEIS).

waters of the United States under section 10 of the Rivers and Harbors Act (33 U.S.C. § 403), and to discharge fill materials into waters of the United States under section 404 of the Clean Water Act (33 U.S.C. § 1344). The Army Corps determined that “construction of the proposed project has the potential to significantly affect the quality of the human environment through impacts to waters of the U.S., the Federal flood control project, navigation, and air quality.” Army Corps. Letter to DWR (June 26, 2020). The Army Corps is currently preparing an Environmental Impact Statement (“EIS”) for the Project as a standalone environmental document under NEPA to inform its permitting decisions, analyzing the environmental effects of construction of the entire project and maintenance of the new portions of the levee system. Although the Corps issued a draft EIS for public comment on December 16, 2022, the Corps has not yet issued a final EIS and is yet to provide a projected date for its issuance. The Project also requires section 7 consultation to inform compliance with the federal Endangered Species Act for both construction and operation and issuance of biological opinions for operation of the Tunnel’s new north Delta intakes, as well as an incidental take permit (yet to be requested) from the California Department of Fish and Wildlife (“CDFW”) under California Fish and Game Code section 2081(b). Pet. At 11-12.

Until these environmental reviews and approvals are complete, the State Water Board will not possess a complete picture of the environmental impacts of Project construction and operation and its consistency with the public interest, which the Board needs to inform its decision on the Petition. For instance, in considering issuance of a Section 408 permit, the U.S. Army Corp of Engineers (“Army Corps”) will need to confirm that the proposed use “will not be injurious to the public interest,” informed by the eventual EIS. 33 U.S.C. § 408(a). Without the EIS, the Board risks making an under-informed decision on the Petition, which may conflict with a public interest determination by the Army Corps. Likewise, to issue the Section 404 permit, the Army Corps and EPA will need to determine that, among other things, Delta waters will not be significantly degraded by the proposed discharge of dredge or fill material. In considering a Section 404 application for California WaterFix, the EPA expressed serious concerns that the “proposed discharge will have substantial and unacceptable effect on the Bay Delta ecosystem,” which has already “suffered significant degradation.” U.S. EPA Letter to Army Corps. (Nov. 9, 2015). The EPA recently extended these concerns to the DCP, explaining that “while modified,” the Project “includes the same impacted identified in the 2015 3(b) letter and thus remains a candidate for elevation to EPA Headquarters, Office of Water pursuant to the 1992 MOA.” EPA Letter to Army Corps RE DEIS for the Delta Conveyance Project (Mar. 16, 2023) (Exhibit 7).

As a consequence, the Board should withhold consideration of the Petition until the following permits and environmental review documents are completed and made available for Board and public review:

- The Army Corps EIS for DCP;
- New biological opinions issued by the U.S. Fish and Wildlife Service and National Marine Fisheries Service for the DCP;
- A new CESA incidental take permit issued by the CDFW;
- Clean Water Act section 404 permit issued by the Army Corps;
- Rivers and Harbors Act section 408 permit issued by the Army Corps;

- Rivers and Harbor Act section 10 authorization by the Army Corps for construction of structures in or over navigable waters of the United States; and
- The Record of Decision for the Project.

IV. THE PROPOSED PERMIT CHANGES WOULD EFFECTIVELY INITIATE A NEW WATER RIGHT

A change in point of diversion or redirection is allowed only if, *inter alia*, the petitioner establishes that the proposed changes would not “in effect initiate a new water right.” 23 Cal. Code. Regs. § 791. The petitioner – here DWR – bears the burden to make this showing. DWR has made no effort to do so. Nor can it, as any entitlement under existing permits to construct conveyance facilities and to use of the water DWR seeks to divert for the DCP expired well over a decade ago. Allowing DWR to divert water for the DCP in excess of amounts it has put to beneficial use under its existing permits would authorize the cold storage of water rights, in clear contravention of well-settled law and Board precedent. As a consequence, the Board should reject the Petition on its face and require DWR to resubmit its Petition as an application for a new water right, with an accompanying analysis showing availability of unappropriated water in the amounts that DWR seeks to appropriate for the DCP. *See, e.g.*, Wat. Code § 1261 (requiring water right applicant to submit “[s]ufficient information to demonstrate a reasonable likelihood that unappropriated water is available for the proposed appropriation”); *id.* § 695 (restricting issuance of permits to “unappropriated water”).

A. DWR has failed to apply for the new water right that would be required to develop the Project.

It is a fundamental feature of the prior appropriative rights doctrine, braided throughout California statutory law, that appropriative water rights are forfeited where the water claimed under the right is not put to full beneficial use. *See, e.g., Millview Cnty. Wat. Dist. v. State Wat. Resources Control Bd.*, 229 Cal.App.4th 879, 889 (2014) (“[A]ppropriators must ‘use it or lose it.’”); Wat. Code § 1241 (“If the person entitled to the use of water fails to use beneficially all or any part of the water claims by him or her, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of five years, that unused water may revert to the public and shall, if reverted, be regarded as unappropriated water.”).

For post-1914 appropriators like DWR here, appropriative water rights may only be secured through the permitting and licensing scheme set forth in the California Water Code and administered by the State Water Board and are circumscribed by the terms of the Board-issued permit. *See Millview*, 229 Cal.App.4th at 889; Wat. Code § 1225. Under the statutory scheme, a permittee, to perfect an appropriative water right secured under a Board-issued permit, must diligently commence and complete construction of the permitted project and apply the water to beneficial use in accordance with Division 2 of the Water Code, the Board’s rules and regulations, and the terms of the permit. Wat. Code. §§ 1396-97; *see also* Wat. Code § 1395 (“Actual construction work upon any project shall begin within the time specified in the permit.”). A permit is “effective for such time as water actually appropriated under it is used for a useful and beneficial purpose in conformity with [Division 2 of the Water Code], *but no longer.*” Wat. Code § 1390 (emphasis added). The period to begin or complete construction or to apply water to beneficial use specified under the permit may be extended by the Water Board for good

cause shown. Wat. Code § 1398(a). Absent an approved extension, the permit expires and the use secured under it is forfeited. Further, a permit is subject to revocation “if the work is not commenced, prosecuted with due diligence, and completed” or the water is not applied to beneficial use as contemplated in the permit. Wat. Code § 1410.

While a permit provides “legal authorization to develop the project and divert water in accordance with the terms and conditions and within a time schedule,” a water right is not perfected until the permitted establishes completion of the project and full application of the water to beneficial use.⁶ *See* Wat. Code §§ 1600-1675.2. And even then, the water right remains valid and effective only so long as license conditions are met and the beneficial use continues. *See, e.g.*, Wat. Code. § 1610 (providing for issuance of license for such permitted amount as is shown to be put to beneficial use); *id.* at § 1675 (providing for revocation of a license where the licensee has not put or ceases to put water to useful and or beneficial purpose).

Here, DWR petitions the State Water Board to modify permits 16478, 16479, 16481, and 16482 (collectively, “1972 permits”) to add points of diversion and redirection within the Delta to implement the Project, asserting that the DCP “will not exceed the terms of its permitted water rights.” Pet. at 2. The State Water Board issued each of the subject permits to DWR on September 26, 1972, authorizing DWR to divert and use up to 10,350 cubic feet per second (“cfs”) of water from the Feather River and Sacramento/San Joaquin River Delta channels for the purpose of operating the State Water Project. *See* DWR Petition for Extension of Time (Dec. 31, 2009). The permits originally required DWR to complete construction of specific diversion projects by December 1, 1980 and to apply water allotted under the permits to full beneficial use by December 1, 1990. DWR completed construction of initial conservation and transportation facilities in 1973 but sought to use the permits to complete construction of additional conveyance facilities – such as the Peripheral Canal, which was ultimately defeated by California voter initiative in 1982. On application by DWR, the State Water Board provided limited extensions to the permits subject to specific conditions, including that: (1) construction work must be completed by December 31, 2000 (Term 6), and (2) full application of the water to the proposed use must be completed by December 31, 2009 (Term 7).

On December 31, 2009, DWR filed a petition with the Board for a five-year extension of the subject permits. DWR’s extension request *conceded* that DWR had not put the water allocated under its permits to full beneficial use nor completed construction of contemplated SWP water conveyance facilities. *Id.* (“While DWR has at times diverted the maximum rate allowed under the Feather River/Delta Permits, due to various factors DWR has not directly diverted, rediverted, or diverted to storage the maximum amounts allowed annually under the Feather River/Delta Permits.”); *id.* ¶ 11 (“Completion of other potential elements of the SWP is too speculative to project prior to completion of the BDCP process.”). As grounds for the extension, DWR asserted that it was then considering a dual conveyance option to fully develop the State Water Project water supply. *Id.* ¶ 9. Central Delta Water Agency, California Sportfishing

⁶ State Water Bd., Water Rights Application: Permitting and Licensing Program, https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/#:~:text=A%20permit%20provides%20the%20legal,the%20permit%20conditions%20were%20met (last visited May 1, 2024).

Protection Alliance, California Water Impact Network, and AquaAlliance filed timely protests to the extension requests, which remain pending.

The State Water Board did not act on DWR's extension request,⁷ the dual conveyance project applications were withdrawn, and DWR has not filed for any further extension of the subject permits beyond the five-year extension applied for under its 2009 petition. Nor, as DWR conceded in its 2009 extension request, has DWR put water allocated under the 1972 Permits to full beneficial use or filed any reporting with the Board to secure a continuing license to divert at amounts contemplated under the permits. Further, DWR *completed* construction of the facilities contemplated in its 1973 Permits by 1997, when the Coastal Branch Phase 2 was completed. *See* Revised Testimony of Tim Stroshane, *Hearing in the Matter of Cal. Dept. of Water Res. And U.S. Bureau of Reclamation Request for a Change in Point of Diversion for California WaterFix* at ¶ 41 (Nov. 28, 2016) (describing SWP documentation).

Under these circumstances, it is evident that any entitlement DWR may have had to construct new conveyance facilities or divert additional amounts of water beyond that timely put to beneficial use under the 1972 permits has expired. *See* Wat. Code §§ 1390, 1396-97. Further, DWR makes no attempt to show that the 6,000 cfs it seeks to divert for the DCP would not increase diversions above the amount that DWR timely put to regular beneficial use under the 1972 permits; to the contrary, DWR is explicit that it seeks to divert up to an additional 6,000 cfs from the two new points of diversion and redirection. Pet. at 1; *id.* at 1-2 (asserting that total diversion with the DCP will remain within the 10,350 cfs limit under the 1972 permits). In sum, DWR has not shown and cannot show that its change Petition is not effectively one for a new water right.

Nor could the State Water Board approve the Petition by construing it as an application for a new water right. The State Water Board has authority to issue a permit to appropriate only so long as, among other conditions, there is "unappropriated water available to supply the applicant." Wat. Code § 1375(d). To obtain a new water right, DWR's application must, among other things, provide the Water Board with "[s]ufficient information to demonstrate a reasonable likelihood that unappropriated water is available for the proposed appropriation." Wat. Code §§ 1261. DWR has made no effort to show availability of the 6,000 cfs of water it seeks to divert through the DCP. Nor could it, as the State Water Board has already recognized that Delta flows are both fully appropriated and diverted in excess of levels necessary to protect beneficial uses and public trust resources. *See, e.g.,* State Water Bd., Bay-Delta Plan Draft Staff Report: Sacramento/Delta Update at 5-69 (Sept. 2023) (describing fully appropriated streams). This should be the beginning and end of the State Water Board's consideration of the Petition.

⁷ Nor has DWR shown exercise of due diligence that would be required to establish good cause for an extension of its Permits. *See* Wat. Code § 1398(a); Order WR 2009-0028-DWR at 3. Even if DWR had established cause for the five-year extension it sought in 2009 – which it has not – it certainly has not exercised due diligence for an extension beyond 2015.

B. Processing a change in point of diversion for the 1972 permits would unlawfully authorize cold storage of water rights

To the extent that DWR may claim that it retains the right to divert waters not put to beneficial use under its 1972 permits, such an argument is foreclosed by well-settled law barring cold storage of water rights. *See Cal. Trout, Inc. v. State Wat. Res. Control Bd.*, 207 Cal.App.3d 585, 618 (1989) (“[C]old storage is not permitted by law.”).

In *California Trout, Inc. v. State Water Resources Control board*, the Court of Appeal squarely rejected a similar argument, holding that L.A. Water and Power lost permitted entitlements to divert because the agency was physically incapable of putting water in amounts secured under the permits to full beneficial use without the construction of a new aqueduct, which was not completed within the period provided under the permits. *Id.* at 620 (“L.A. Water and Power gained no rights to appropriate the water at issue . . . because it was unable to use the water by which such rights might have been obtained.”). To hold otherwise, the court explained, “would permit an appropriator of water from a complex of sources to lock up artificially high ‘vested’ water rights from each of the sources by manipulating the sources from which it elected to draw its water levels despite the inability to apply such waters to beneficial use.” *Id.* at 618. As a consequence, the court refused to recognize the State Water Board’s nominal extension of L.A. Water and Power Authority’s permits, reasoning that that the term “‘extension’ was “a palpable misnomer” as the agency had failed to construct the facilities necessary to put the appropriated water to fully beneficial use and that the grant of a so-called extension had instead made it “the beneficiary of *new* permits authorizing or predicated upon an expanded project.” *Id.* at 619.

Just so here. DWR has not perfected its water right within the contemplated time, and application to construct new conveyance facilities and divert water beyond what was perfected under its 1972 permits must be treated as a new permit to appropriate. By the same token, should the Board proceed to adjudicate the Petition under the assumption that DWR’s 10,350 cfs limit under its 1972 permits remains in effect, it would effectively endorse DWR’s cold storage of water rights, contrary to the case law, the Water Code’s directive for diligent perfection of permitted appropriations, and the Board’s own precedents. *See, e.g., State Water Bd. Order WR 2008-0045 at 1-2* (“The requirement that an appropriation of water be completed within a reasonable time with the exercise of due diligence is a long-standing principle of California water law, intended to protect the public interest by preventing ‘cold storage’ of water rights.”); *State Water Bd. Order WR 2022-0165*.

V. THE PROJECT WOULD INJURE OTHER LEGAL USERS OF WATER

Even if it could show that approval of the Petition will not in effect initiate a new right, DWR still bears the burden to establish that the proposed changes will not “injure any other legal user of water.” 23 Cal. Code Regs. § 791(a). Absent a satisfactory showing of non-injury, the State Water Board does not have authority to approve the requested permit changes. DWR has not carried this burden here.

DWR’s conclusory assertion of non-injury in its Petition is baseless and falls well short of carrying its burden. DWR predicates its argument that legal uses of water are protected on the Project’s consistency with D-1641 requirements, which DWR asserts will guarantee that the

Project is “protective of beneficial uses.” Pet. at 13. But, as discussed above, the Board and other state and federal agencies have already conclusively established that D-1641 is *failing* to protect beneficial uses (and will continue to do so even where those requirements are supplemented by additional protections under federal and state endangered species laws, as they were when the 2008/2009 federal Biological Opinions were in effect). Avoidance of injury cannot therefore be established on this basis. DWR also asserts that the Petition makes no requested changes to permitted SWP quantity or timing of diversion, place of use, return flows, or consumptive uses of water for existing SWP facilities. *Id.* The paper limits under the 1972 permits are inapposite; DWR itself concedes that it has not put water allocated under the 1972 permits to full beneficial uses and seeks to divert up to 6,000 cfs more water through the DCP than under existing conditions. It is the changes that DWR will make to actual water appropriation and availability of water for other legal users that matters for this analysis. DWR also asserts without foundation that “all water quality objectives for the protection of beneficial uses currently enacted by the State Water Board will be met if this Petition is granted.” *Id.* The evidence, as discussed in Section VII below, is not in accord.

Finally, DWR asserts that it maintains an accounting system, which will incorporate the proposed new diversion points, to assure that its diversions to storage or export occur at times when sufficient unregulated flow is available to satisfy senior water rights holders. But, as discussed below, this accounting system neglects to account for the most senior water rights – Tribes’ federal reserved rights – and thus cannot assure non-injury. And DWR’s premise that unregulated flows will be available is likely to be undermined by more frequent climate-induced droughts and potential additional storage and conveyance projects – like the Sites Reservoir – which would remove unregulated flows.

As DWR has failed to carry its burden to show that approval of the Petition would not interfere with other legal users of water, the State Water Board should reject the Petition on its face. In addition, there is ample evidence that approval of the Petition would, in fact, interfere with tribal water rights, as well as community water systems and municipal water users.

A. The Project would interfere with unadjudicated tribal reserved rights

The Petition takes no account of the likely injury that construction of the DCP will cause to Tribal Nations that hold federal reserved rights. It is well settled that the federal government has the power to reserve rights to water and exempt water from appropriation under state law. *Winter v. United States*, 207 U.S. 564, 577 (1908). Pursuant to the U.S. Supreme Court’s decision in *Winters v. United States*, when the Federal Government reserves land for an Indian tribe, it “also implicitly reserves the right to use needed water from various sources – such as groundwater, rivers, streams, lakes, and springs – that rise on, border, cross, underlie, or are encompassed within the reservation.” *Arizona v. Navajo Nation*, 599 U.S. 555, 561 (2023). The amount of water reserved under the *Winters* doctrine is that necessary to “accomplish the purpose of the reservation.” *Id.* (quoting *Sturgeon v. Frost*, 139 S.Ct. 1066, 1078 (2019)). In addition, federal instruments may reserve to the tribes off-reservation rights to aquatic resources (such as reserved fishing rights), which could be impaired by poor water quality and excessive diversion of water. *See* U.S. EPA, Proposed Rule, Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights, 87 Fed. Reg. 74361, 74364 (Dec. 5, 2022) (proposing revisions to the

Clean Water Act water quality standards regulations to clarify and prescribe how water quality standards must protect aquatic and aquatic-dependent resources reserved to tribes).

The State of California has an acknowledged though infrequently spoken about history of trammeling on tribal water rights and off-reservation reserved rights. In a particularly egregious example, the California delegation to the U.S. Senate successfully lobbied the Senate to refuse to ratify 18 treaties negotiated with California Tribes between 1851-52, which would have reserved to the Tribes substantial water rights and rights to aquatic resources (like fishing) and secured seniority for these rights over all subsequent appropriations. Recognizing the injustice occasioned by its refusal to ratify the treaties, the federal government subsequently set aside lands in trust for California tribes through the Rancheria system and other instruments. Shingle Springs Band of Miwok Indians and Buena Vista Rancheria of Me-Wuk Indians are among Delta Tribes that hold land in reservation through the rancheria system.

Despite the breadth of likely water rights and rights to aquatic resources reserved to the 110 federally recognized tribes in California, the State Water Board has made little effort to ascertain the existence and extent of reserved rights and assure their protection in its water permitting system. To the contrary, the State Water Board has lobbied against efforts by the U.S. EPA to assure protection of federal reserved rights in state water quality standard setting, complaining of the “high cost and extensive time involved in evaluating tribal reserved rights.” State Water Bd., Comments to Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights; Docket ID EPA-HQ-OW-2021-0791 (Mar. 6, 2023).

The State’s failure to assure protection of tribal reserved rights in its permitting decision compounds the injustices experienced by California tribes. It should not repeat that mistake here. The State Water Board should not proceed to adjudicate the Petition until it can assure that the proposed changes and diversions for construction and use of the DCP will not injure tribal reserved rights.

B. The Project would interfere with small community water systems and municipal water users

DWR also ignores likely harms to municipal water users and small community water systems. Three municipal water agencies divert water directly from Delta Channels: Contra Costa Water District, the City of Antioch, and the City of Stockton’s Municipal Utilities Department. These agencies collectively serve about 750,000 water users through diversion of Delta waters. These agencies are likely to be harmed by construction and operation of the DCP, including from increased salinity, harmful cyanobacteria, and other water quality contaminants, which will increase the costs of treatment necessary to deliver safe and good quality drinking water. Motivated by concerns about impacts of the DCP on municipal water quality and supply for its customers, Contra Costa Water District reached a settlement agreement with DWR requiring a new interconnection for the District’s water system to convey to District customers alternate high-quality water unaffected by the DCP and other measures to offset DCP impacts.⁸ The other

⁸ Settlement Agreement Between Contra Costa Water District and the California Department of Water Resources (July 26, 2023), available at <https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Delta-Conveyance/Public-Information/Settlement-Agreement-CCWD--DWR->

municipal water agencies do not receive similar protections. The same is true for the nearly 80 Delta-based small community water systems, which stand to be harmed by increased salinity and other harms to water quality caused by the Project. DWR's Petition takes no account of the interests of these legal users of water and the likely injury they will face through construction and operation of the DCP.

VI. THE PROJECT IS CONTRARY TO LAW AND STATEWIDE WATER POLICY

In addition to the legal shortcomings discussed above, approval of the change Petition to authorize construction and operation of the DCP would conflict with a host of additional laws and statewide water policies.

A. Violations of the Delta Reform Act

The Delta Reform Act (Wat. Code § 85000 et seq.) focuses on the critical value of the Delta as a natural resource to California and the nation and the importance of preserving the Delta's vital features. Wat. Code § 85002. "The Delta is a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balanced estuary and wetland ecosystem of hemispheric importance." Wat. Code § 85022. Further, the legislature stated that the protection of the Delta is of "paramount concern." *Id.*

The Delta Reform Act established state policy to reduce reliance on water supplies from the Bay-Delta in meeting California's future water supply needs through a strategy of investing in improved regional supplies, conservation, and water use efficiency. Wat. Code § 85021. To carry out this mandate, the Legislature directed each region to "improve its regional self-reliance for water through investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supplies." *Id.* The Delta Reform Act established further state policy objectives to, *inter alia*, "[p]rotect and enhance the unique cultural, recreational and agricultural values of the California Delta as an evolving place," "[r]estore the Delta ecosystem, including its fisheries and wildlife," and "[i]mprove water quality to protect human health and the environment consistent with achieving water quality objectives in the Delta." Wat. Code § 85020; *see also id.* at § 85054 (directing that the "coequal goals" of "providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem" "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").

DWR has failed to demonstrate that approval of the Petition meets any of these state policy directives. The Project would take more water from the Delta, not less; it would increase reliance on the Delta, not reduce it; and it would forever change and devastate the cultural landscape of the Delta, not preserve this vital resource.

with-Exhibits-Docusigned-26JUL23508.pdf; *see id.* at ¶ H ("CCWD contended that WaterFix would result in significant water quality and water supply impacts to CCWD and its customers and CCWD has similar concerns regarding the Delta Conveyance Project and Conformity Project Alternatives")

Because the DCP is premised on consistency with legally and scientifically defective D-1641 water quality standards, it frustrates the State Water Board’s ongoing consideration of improved flow criteria and other water quality standards that could assure reasonable protection of beneficial uses and public trust resources. At the same time, it would worsen existing water quality in the Delta by disturbing sediments containing mercury and selenium, adversely impacting Delta salinity, exacerbating conditions causing the proliferation of harmful algal blooms, reducing Delta outflows, and causing further adverse environmental impacts discussed below. And rather than promoting restoration of the Delta ecosystem and investment in the cultural, recreational, agricultural and other values of the Delta as an evolving place, the Project will irreparably harm the Delta as a tribal cultural landscape, adversely impact recreational and agricultural opportunities, and generally trade away the integrity of the Delta for the interests of the beneficiaries of Delta water exports.

Moreover, the Board should find that the Proposed Project is not in the public interest because of the availability of millions of acre feet of sustainable water supplies from water recycling, urban stormwater capture, and improved agricultural and urban water use efficiency. *See* Pacific Institute / NRDC Report entitled *The Untapped Potential of California’s Water Supply* (2014); *see also* Pacific Institute Updated Report (2022).⁹ These sources of water were never considered by DWR in preparing and analyzing Project alternatives. Instead, everything DWR assumed and modeled in its Draft EIR would increase, not decrease, total exports of water from the Delta. This is inconsistent with the public interest and the Delta Reform Act.

The availability of these cost-effective, drought resilient water supplies demonstrates that reduced diversions from the Bay-Delta, and increased protections for fish and wildlife, are feasible, reasonable, and in the public interest. Demanding that DWR implement sustainable water supplies rather than syphon *more* water from the Delta to be transported south would benefit the public, water quality, and fish and wildlife. The opposite – diverting, storing, and shipping more water out of the Delta’s watershed – is not.

B. Conflict with State and Regional Flood Control Plans

“The Delta is an inherently floodprone area.” Delta Stewardship Council, Delta Plan at chp. 7, p. 5 (2024). As the Project Final EIR describes, the Delta estuary prior to the 1850s was a highly complex landscape characterized by seasonal wetlands crossed by rivers and sloughs that flood frequently. FEIR at ES-2. Since the 1850s, the estuary has been radically altered and simplified through a combination of reclamation projects, wetland drainage, discharge of large amounts of sediment from upstream mining, flood control projects, water storage and exports projects, and other hydrological modifications. “Today, flooding of the Delta’s complex labyrinth of islands and waterways is prevented by its levees,” many of which were initially constructed more than a century ago. Delta Plan at chp. 7, p. 5. The 1,330 miles of levees in the Delta and Suisin Marsh reduce flood risk for approximately 740,000 acres of land in the Delta. “A mass or even partial failure of the levee system would have real life-and-death impacts and property losses that could

⁹ These reports are available at <https://www.nrdc.org/resources/untapped-potential-californias-water-supply> and at <https://pacinst.org/publication/california-urban-water-supply-potential-2022/>.

total billions of dollars,” not to mention the incalculable trauma associated with widespread injury and displacement that could ensue. *Id.* at 5. For instance, a 1972 levee breach inundated the residential area of Isleton, Andrus Island, and Brannan Island, leading to evacuation of 2,900 residents and \$21.8 million in damage. *Id.* As DWR acknowledges, the risk of catastrophic flooding and levee breach will grow more severe as the impacts of climate change compound.

State and regional authorities have developed a number of programs and plans to improve levee integrity and protect against catastrophic Delta flooding. These include, for instance, the Central Valley Flood Protection Plan (and strategic plan to improve flood control projects on the Sacramento and San Joaquin rivers), the San Joaquin River Flood Control Project, the Sacramento River Flood Control Plan, and the Delta Plan’s policies and recommendations on flood management planning. *See id.* at 1, 12.

Approval of the change Petition would conflict with these state and regional flood control policies and projects. Among other things, it will divert desperately needed funding for levee upgrades and Delta flood control projects to decades-long construction of the DCP. For instance, DWR itself projects that a \$30 billion investment is needed to keep the Central Valley safe, but the State has only allotted \$3.5 billion in recent years.¹⁰ Diverting state funds to the DCP, particularly during a period of budget shortfalls, will make the work to finance flood control projects even harder. Further, heavy truck traffic and construction activities associated with the 12-14 years of DCP construction are likely to further degrade levee infrastructure and exacerbate both the needs and costs of flood control. *See* DCP Final Environmental Impact Report (“FEIR”) at 7-4 (explaining that construction of project facilities will “involve excavation, grading, stockpiling, soil compaction and dewatering that could result in alterations to runoff, drainage patterns, erosions, stream courses, and [water surface elevations] during construction of facilities”). And the DCP is likely to itself create new flood risks from sediment buildup at the north Delta intakes and by constricting the conveyance capacity of the Sacramento River along the length of each intake, resulting in a rise in water surface elevation upstream of the intakes. FEIR at 7-2; RTD Comments on DEIR at 42.

Rather than investing billions of dollars of public funds in a conveyance project that will exacerbate existing flood risks, the State should invest in shoring up its aging Delta levee system, restoring a Delta ecosystem that will mitigate flood risks, and fulfilling state and regional flood control policy to protect the Delta’s vulnerable communities. *See generally*, RTD Comments on DEIR at 35-43.

C. Impairment of Sacramento-San Joaquin Delta National Heritage Area

Designation of the Sacramento-San Joaquin Delta Heritage Area in 2019 by the 117th United States Congress made the Delta the first and only National Heritage Area in California. The goals of the designation are to protect, document, conserve, enhance, and ultimately tell the story of a cultural landscape that has great importance to the national history and identity of the shared landscape. The area is to be protected and conserved through the National Heritage System and

¹⁰ Raymond Zhong, *The Coming California Megastorm*, N.Y. Times (Aug. 12, 2022), <https://www.nytimes.com/interactive/2022/08/12/climate/california-rain-storm.html>.

special designation partnership with the National Park Service and the Delta Protection Commission. The protection of the Delta Landscape is the critical theme of the designation.

The Delta Conveyance Project jeopardizes the National Heritage Area protection, as well as conservation and management of the living resources in the Delta. Taking water out of the Delta Estuary removes a critical resource to the ecosystem of the Heritage area that will result in the destruction of a fundamental element to the area. If water is removed from the estuary the Heritage Area cannot function as an economic, cultural, and living landscape. Removal of water through diversions have occurred in the past but are still required to ensure the protection of the estuary. A new project that removes more water from the already damaged landscape as acknowledge by Federal and State Agencies will further injure the landscape resulting in economic damages to farmland, the city within the Heritage Area, and the ecosystem that has already been altered for the past 100 years.

The ecosystem of the Delta is the cornerstone of the National Heritage Area status. The unique landscape is comprised of a mosaic of waterways, farmlands, islands, cities, and urban connections. The changing climate is already exacerbating impacts of flooding and droughts within this landscape. The misdirection of funds to remove water resources from this landscape through a massive infrastructure project will damage the region and its fundamental structures thus undermining the integrity of the first and only National Heritage Area in California.

VII. THE PROJECT WILL EXACERBATE THE ECOLOGICAL AND HUMAN CRISIS IN THE DELTA AND CAUSE AN UNREASONABLE ARRAY OF ADVERSE ENVIRONMENTAL IMPACTS

The State of California has radically transformed the ecology and human tapestry of the Bay-Delta. The Bay-Delta estuary was once a place of natural abundance, teeming with fish and sustaining a broad array of wildlife that Native Tribes carefully stewarded for thousands of years. Decades of state-sponsored violence against Native Tribes dispossessed Tribes of their land and access to Bay-Delta waterways and headwaters. Excessive diversion and export of Bay-Delta waters has led to flows that are insufficient to sustain the fish, plant, and animal species that have adapted to the Bay-Delta's unique estuarine environment. The result is a watershed in a state of ecological and human crisis. Waterways have grown stagnant, fish stocks are plummeting, and harmful algal blooms ("HABs") are proliferating.

Current water quality objectives and regulations have failed to maintain viability of numerous native Bay-Delta fish species. Six native fish populations are listed as threatened or endangered under the California Endangered Species Act, the federal Endangered Species Act, or both. A Final Rule for listing of Longfin Smelt under the federal endangered species act is due, by court order, in July 2024, and petitions to list White Sturgeon are currently pending state and federal review.

Numerous other fish species native to the Bay-Delta are listed by the California Department of Fish and Wildlife ("CDFW") as species of special management concern (CDFW 2015). Even among fishes that are not officially imperiled, various fisheries have been closed or severely restricted in recent years, including the complete closure of California's Chinook Salmon fishery

for two years running. The common denominator for these impacts is the reduction and alteration of river flow into and through the Delta to San Francisco Bay.

Low flows have also driven the increasing proliferation of HABs across the Bay-Delta, posing health risks to exposed humans and animals, including respiratory burdens when hazardous cyanotoxins aerosolize. Native Tribes and disadvantaged communities of color in the Bay-Delta and its headwaters bear the brunt of environmental, socioeconomic, and cultural burdens continuing a perpetual cycle of discrimination. As the State Water Board has itself recognized, “[t]he overall health of the estuary is in trouble, and expeditious action is needed on the watershed level to address the crisis, including actions by [the State Water Board].”¹¹ Yet while the State slow-walks long-awaited updates to water quality standards for the Bay-Delta – a delay currently under investigation by the U.S. EPA for its discriminatory impacts on Native Tribes and Delta communities of color – it is proceeding with inexplicable haste to permit a massive infrastructure project that will exacerbate damage to the Delta ecosystem, Tribes, and already vulnerable communities.

The severity of harms to Tribes, disadvantaged communities, native fish and wildlife populations, fisheries, and ecosystem health – and the impairment of beneficial uses of Delta waters that results – makes approval of the Petition unreasonable and against the public interest.

A. Harms to Tribes and Disadvantaged Communities

i. Tribal Cultural Resources

Since their inception, the State Water Project, Central Valley Project, and other activities that have reengineered Delta hydrology have caused irreparable harm to tribal sovereignty, exercise of tribal culture, and tribal identity. Among other things, the State’s expansive water export infrastructure impairs access to sacred sites and compromises the integrity of the Delta as a tribal cultural landscape, while contributing to the decimation of native fish populations and riparian vegetation that are integral to exercise of tribal identity, ceremony, subsistence, and lifeways. In this way, the water diversion infrastructure compounds a history of “colonization, displacement, and genocide” perpetrated against California tribes, which “have contributed to the loss of water sources and watershed management practices that support Native American people’s traditional food sources and ways of life.” State Water Bd. Resolution No. 2021-0050 at ¶ 7(b). As the State Water Board has recognized:

Watersheds are now primarily managed through large-scale diversion of water for municipal, industrial, agricultural, and commercial beneficial uses to the detriment of traditional, local, and cultural uses and without compensation, recognition, or replacement.

¹¹ Cal. State Water Res. Control Bd., *July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan 4* (2018), https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/sed/sac_delta_framework_070618%20.pdf.

As a result, California Native American Tribes continue to face barriers to defining, quantifying, accessing, protecting, and controlling their ancestral lands, water rights, instream flows, cultural resources, and beneficial uses. Redistribution of water has reduced or eliminated access to healthy traditional food sources such as smelt, salmon, freshwater mussels, and freshwater plants. Disconnection from traditional ancestral land and water and the unavailability of traditional foods have been linked to serious and pervasive health issues. In addition, low or non-existent instream flows, and associated water quality problems, impair or prevent water-related cultural, spiritual, and subsistence practices. These injustices are exacerbated by climate change and complex water resource and watershed management processes.

Id. at ¶ 7(b)-(c). Despite the State’s commitment to learn from this history and to center environmental justice and tribal sovereignty in water governance, it is now considering a Project that, by DWR’s own admission, will cause irreparable damage to tribal interests. This alone makes approval of the Petition unacceptable and inconsistent with the State Water Board’s commitments to repairing its relationship with California Tribes.

The Project EIR appropriately recognizes the Delta as a “geographically defined cultural landscape, which meets the Public Resources Code criteria for a Tribal cultural resource” (the Delta Tribal Cultural Landscape, or “TCL”). DEIR at 32-3 (citing Cal. Pub. Res. Code § 21074(b)). As DWR explained, “[d]uring tribal consultation, Tribes repeatedly provided input on the relationship between natural and human-made features that, when taken together, constitute a geographically defined cultural landscape, and despite significant changes to the landscape from Euroamerican development, the landscape continues to retain culturally valuable physical, spiritual, and ceremonial features.” *Id.* DWR also concluded that the Project, and each Project alternative considered by DWR, “would materially impair character-defining features” of the TCL. This includes: impairing “the Delta as a Tribal homeland and place of origin;” impairing the river and waterways through physical construction of the new intake facilities and changes in hydrodynamics within the Delta TCL; impairing Tribes’ “ability to physically, spiritually, or ceremonially experience [] character-defining terrestrial species habitats” even with proposed mitigation; materially impairing the spiritual, cultural, and ceremonial values of sacred and historically important places for tribes, as well as archaeological resources; and impairing sense of place in the Delta TCL. *Id.* at 32-3 to 32-4.

Impacts to the TCL and tribal values and interests are even more severe than acknowledged in the Project EIR.¹² For instance, as Shingle Springs Band of Miwok Indians explained in comments to DWR, “[t]he study area relating to cultural/archaeological (Chp. 19) and tribal

¹² This is true of DWR’s assessment of impacts to individual archaeological and tribal cultural resources as well. Among other things, the EIR arbitrarily limits recognition of archaeological resources to ones that pre-date 1500 AD. And it makes no effort to comprehensively survey and identify individual resources prior to Project approval so that decisionmakers as well as the public can be timely informed of the full extent of the Project’s adverse impacts and take this into account in decisionmaking. *See generally*, Shingle Springs Band comments on DEIR at 4-5 (Exhibit 2).

cultural resources (Ch. 32) is too small and excludes many affected tribal communities who have interests in the Delta TCL. The study area improperly excludes areas upstream of the Delta or the south-of-Delta SWP and CVP service areas. DEIR, p. 32-8. The study area for affected resources should extend to all areas where there could be operational impacts, which include upstream areas such as the Klamath-Trinity watershed.” Shingle Springs Band Comments on DEIR at 3, Exhibit 2 hereto. Many other tribal commenters echoed concerns with the truncated Project study area. For instance, Buena Vista Rancheria of Me-Wuk Indians informed DWR that restricting its analysis to the “legal Delta” neither comports with CEQA’s directives to evaluate the full scope of direct and indirect impacts nor with Tribes’ relationship to the larger Delta watershed as an interconnected ecosystem. As BVR explained, “The Delta is a shared, co-managed, and expans[ive] landscape to the Indigenous communities who reside here. The idea of the boundary needs to be removed from any definition of the Delta and Indigenous knowledge conveyed in this document.” BVR Comments on DEIR at 11.

Winnemem Wintu Tribe, whose traditional territory does not extend into the legal Delta, also informed DWR that it too understands and experiences the larger Delta watershed as an interconnected ecosystem; for instance, the Winnemem Wintu Tribe’s identity and culture are intimately tied to the Nur, or salmon, whose migration connects the Winnemem Wintu territory with Delta waterways and the Pacific Ocean. Impacts to the integrity of the Delta, the quality of its waterways, and the vitality of native fisheries echo throughout the Delta’s headwaters. Delta tribes also called DWR’s attention to its minimization of the importance of individual tribal cultural resources by considering them meaningful only in the context of the Delta as a whole. As the Shingle Springs Band explained,

A resource can, at the same time, be important to the context of the Delta as a whole and also be significant on its own. As just one example, Stone Lake is a landscape feature that contributes to the Delta TCL but is also independently significant. There are other village sites, fishing sites, mound structures, and other traditional cultural places that have been identified in confidential reports which are independently significant. DWR has minimized the importance of these individual sites by simply asserting that they are only important in the context of the TCL as a whole.

Likewise, as Buena Vista Rancheria explained, “the Delta is more than one Known Tribal Cultural Resource. Thus, the impacts will occur to multiple resources cumulating in a very significant impact to the Landscape.” BVR Comments on DEIR at 10. By downplaying or ignoring impacts to individual resources and considering them important only in the context of impacts to the TCL as a whole, the EIR elides the full extent of irreparable harm to diverse tribal interests that the DCP will cause.

Compounding these problems, DWR has wholly failed to propose any meaningful mitigation to address impacts to the TCL as a whole. Rather, the four mitigation measures it outlines for material damage to the TCL focus on individual cultural resources and character-defining features. For instance, mitigation measure TCR-1a identifies “avoidance” as a mitigation measure but addresses avoidance only of individual physical resources, and then only to the extent “feasible” or “to the greatest extent possible” without hindering Project objectives. DEIR at 32-45 to 32-46. Mitigation measure TCR-1b calls for the future development of a Tribal

Cultural Resource Management Plan without objective performance standards to ensure its efficacy; this is unlawful deferral of mitigation under CEQA Guidelines section 15126.4(a) and again only addresses impacts on individual cultural resources rather than the integrity of the landscape as a whole. Mitigation Measure TCR-1c insultingly suggests that impacts can be offset by substituting tribal access to unspecified restored areas. And Mitigation Measure TCR-1d calls, appropriately, for incorporation of Tribal Knowledge into restoration activities but without explaining how impairment of the TCL at a landscape level would be meaningfully lessened as the landscape is further altered by significantly reduced Delta flows, displacement of habitat, interruption of visual integrity, and other landscape-scale impacts of DCP construction and operation.

Given DWR's acknowledgment that an already impaired Delta TCL will be irreparably harmed by the DCP even with this mitigation and given widespread Tribal opposition to the Project,¹³ the State Water Board cannot approve the requested change consistent with its commitments to Delta tribes.

ii. Harmful Algal Blooms

Seasonal blooms of harmful and toxic algal species in the Delta are increasingly common, long-lasting, and widespread. While a variety of factors influence the formation of HABs – including light, water temperatures, and nutrient concentrations – the scientific literature is clear that low flow (which produces high residence time and low suspended sediment levels) is the master variable driving HABs formation in the Delta. Light levels and water temperatures are almost always adequate to support blooms in the Delta between late spring to mid-fall, and nutrient loads are always high enough to support a bloom despite expensive upgrades to the region's largest water treatment facilities. Yet flows, which are significantly controlled by State Water Project operations and their coordinated operation with the Central Valley Project, are inadequate to repress HABs in the Delta in all but the wettest years. Indeed, the State Water Board itself has acknowledged that “low streamflow may be the most important factor for maintaining HABs, at least for *Microcystis*.”¹⁴

Peer reviewed scientific studies by DWR scientists have concluded that even small shifts in the location of the low salinity zone (X2), driven by reduced Delta outflow, increase harmful algal blooms. A recent study by P.W. Lehman et al. concluded that there was a “strong correlation of *Microcystis* abundance with the X2 index and water temperature,” with their model finding that outflow and water temperatures explained 58-78% of the variation in bloom surface biovolume and subsurface abundance. *Lehman et al., Impact of Extreme Wet and Dry Years on the Persistence of Microcystis Harmful Algal Blooms in San Francisco Estuary*, 621 *Quaternary Intl.* 16, 21 (May 30, 2022). The paper concludes that:

¹³ See, e.g., DEIR Comments by BVR, Shingle Springs Band, and CIEA.

¹⁴ State Water Bd., Draft Staff Report and SED on Phase II Bay-Delta Plan Update at 7.12.1-29; see also *id.* at 7.12.1-38 (“Several studies indicate that low flows through the Delta are associated with increased HAB formation. HABs are more frequent and more severe in dry years.”).

Importantly, relatively small changes in the location of the X2 index may be important. A shift of the X2 index by only 3 km was associated with a factor of 3 increase in the percent abundance of subsurface *Microcystis* cells in the cyanobacterial community between the extreme drought years 2014 and 2015 (Lehman et al., 2018). Similarly, the increase in the X2 index from 71 km in July to between 75 and 76 km in August and September may have facilitated retention of cells in the central Delta during the peak of the bloom in 2017.

Id. at 23. This finding is consistent with other research from the Bay-Delta, which has found that the frequency of these blooms is closely linked to water residence time (i.e., flow rates).¹⁵ Likewise, Lehman et al. concluded that X2 and water temperature predict much of the variation in *Microcystis* surface biovolume, that it was “not unexpected that the X2 index would account for most of the variation in the *Microcystis* bloom abundance” in the Delta, and that the *Microcystis* bloom in 2014 peaked when X2 was above 85 km. *Id.* at 22.

The Delta Conveyance Project threatens to exacerbate the already persistent HABs problem in the Delta. As discussed below, the DCP will reduce monthly Delta outflows by as much as 10%. As the Project EIR concludes, the Project will increase salinity at several locations in the Delta, including Emmaton and Three Mile Slough. And it will likely affect the X2 location by reducing Delta outflows. Exporting more water from the Delta would also contribute to reverse flows, increasing water residence time.

HABs cause a litany of harms to aquatic ecosystems and animals. The World Health Organization considers cyanobacterial toxins to be “among the most toxic naturally occurring compounds.”¹⁶ HABs consume oxygen and prevent light from reaching underwater plants. When the algal blooms die, their decomposition consumes even more dissolved oxygen. Reduced oxygen and light lead to dead zones and reduce key food sources for fish and wildlife higher up the food chain. HABs that produce cyanotoxins have also proven fatal to marine mammals, livestock, and pets.

Cyanotoxins are similarly dangerous to people, who may be exposed by drinking, swimming, or bathing in affected waters, eating contaminated fish or shellfish, or inhaling aerosolized particles. Symptoms of exposure to cyanotoxins can range from mild skin rashes to gastrointestinal and respiratory distress. High levels of exposure can have other severe health consequences, including damage to the central nervous system and liver. Recent research also shows that HABs may pose air quality risks at levels dangerous for human health. For instance, researchers at the University of North Carolina found a link between HABs-produced volatile organic chemical compounds and the formation of secondary organic aerosols, which can contribute to the

¹⁵ See Berg & Sutula, *Factors affecting the growth of cyanobacteria with special emphasis on the Sacramento-San Joaquin Delta*, Southern California Coastal Water Research Project, Technical Report 869 (Aug. 2015).

¹⁶ Ingrid Chorus & Martin Welker, *Introduction to Toxic Cyanobacteria in Water: A Guide to Their Public Health Consequences, Monitoring and Management 2* (Ingrid Chorus & Martin Welker eds., 2021).

formation of the fine particulate matter pollution, PM_{2.5}.¹⁷ Inhaling PM_{2.5} can lead to premature mortality, increased hospital admissions, asthma attacks, and respiratory symptoms. Aerosolization may be exacerbated by mitigations aimed at bolstering dissolved oxygen concentration, such as the Port of Stockton’s dissolved oxygen aerators discussed in the DEIR. *See* RTD Comments on DEIR at 44-45; DEIR at 9-13.

The presence of harmful algal blooms represents a particularly severe impact for Delta Tribes and disadvantaged communities. HABs, for instance, increasingly prevent tribal members from practicing culture and ceremony in Delta waterways and in contact with culturally important native riparian vegetation. HABs also prevent Delta residents from interacting with waterways and create health risks when they do. HABs impair recreational opportunities, particularly for disadvantaged community members who have less ability to shift their recreation elsewhere. And they contribute to already disproportionate air quality burdens experienced by disadvantaged Delta communities – a problem that, as the Army Corps recognizes, will also be exacerbated by the adverse impacts of DCP construction on air quality. *See* DCP Draft EIS at 3.9-20 (“Project construction would result in exposing sensitive receptors to substantial localized criteria pollutant emissions to substantial tox air contaminant emissions.”).

iii. Mercury and Selenium Contamination

Project construction and operation will disturb sediments, leading to increasing contamination of mercury and selenium in Delta waterways and bioaccumulation in the food chain.

Mercury is a legacy contaminant embedded in Delta channel sediments since the gold rush. Disturbance of mercury can lead to bacterial transformation of elemental or ionized mercury into methyl mercury. This form becomes bio-available and can be accumulated into tissues of a variety of aquatic organisms. Methyl mercury from disturbed sediments can be consumed by birds, mammals, and humans. In-channel construction and ecosystem restoration activities could mobilize methylmercury contamination if not properly and consistently mitigated. Of particular concern is the mobilization of methylmercury contamination from construction of the two Project intakes in the North Delta as well as construction activities associated with Bouldin Island’s “compensatory mitigation” actions.

Selenium contamination can also result from the DCP’s impacts on soil and sediment disturbance as well as water column partitioning in which elemental or ionic forms of aqueous selenium become bio-available and accumulate upward from the base of benthic food webs. While proximate selenium contamination risk is greatest during extended droughts, new levels of selenium are mobilized for deposition downstream by storm events causing erosion in selenium-rich soils of the western San Joaquin Valley; past hydrologic and selenium monitoring indicate that even with the Grassland Bypass Project capturing and diverting runoff away from Mud Slough and Salt Slough, such pulses of selenium loading supply new increments of available selenium to downstream San Joaquin River and south Delta channels where, once flow peaks subside and residence time of water increases, selenium partitioning resumes. Likewise, North

¹⁷ Haley E. Plaas, et al., *Secondary Organic Aerosol Formation from Cyanobacterial-Derived Volatile Organic Compounds*, 7 ACS Earth and Space Chemistry 1592 (2023) at p. 1807.

Delta intake operations will likely result in export of methylmercury and selenium contaminants downstream.

Increases in mercury and selenium concentrations in Delta waterways adversely impact the health of Delta residents, subsistence fishing practices, access to safe drinking water, and recreational and cultural opportunities. For instance, exposure to methylmercury through consumption of contaminated fish or drinking water poses a severe public health risk, particularly to women, fetal development, and young children. The State Water Board has recognized that mercury contamination affects a number of beneficial uses, including tribal subsistence fishing, subsistence fishing, commercial and sportfishing, wildlife and marine habitat, and rare, threatened or endangered species.¹⁸ Beyond the small doses required for biological functions, selenium is also toxic to animal life and can cause human health problems such as hair and nail loss, gastrointestinal distress, dizziness, and tremors.¹⁹ Changes in Delta hydrology caused by the DCP which will mobilize increasing amounts of methylmercury and selenium are likely to aggravate these damaging health risks and injury to beneficial uses.

iv. Subsistence Fishing Impacts

Construction and operation of the DCP will impair Delta subsistence fishing, a beneficial use particularly vital for Tribes and disadvantaged communities. In DWR's own 2021 environmental justice survey of the Delta, *Your Delta, Your Voice*, DWR concluded that 90% of survey respondents from disadvantaged Delta communities indicated that they eat fish from the Delta four or more times per week – a finding that DWR characterized as “a remarkable pattern.”²⁰ Subsistence fishing access and opportunities, as well as the health of Delta residents who regularly consume fish from the Delta, will be impaired by the DCP. For instance, the 12 to 14-year construction period for the North Delta intakes will destroy fishing access along the east bank of the Sacramento River between Hood and Courtland, which could generate congestion among anglers for remaining fishing spots or discourage fishing entirely in this area of the Delta. Lost access to locations for subsistence fishing will disproportionately affect disadvantaged community members, who rely on Delta fish for weekly protein intakes, adding travel costs for fishing or impairing it altogether. The DCP's risks to native fisheries, discussed below, and contribution to mercury and selenium contamination in fish tissue further impair subsistence fishing uses.

v. Further Environmental Justice Impacts

¹⁸ See, e.g., State Water Bd., Final Staff Report: Part 2 of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays and Estuaries of California – Tribal and Subsistence Fishing Beneficial Uses and Mercury Provisions, p. 80 (May 2, 2017),

https://www.waterboards.ca.gov/water_issues/programs/mercury/docs/hg_SR_final.pdf.

¹⁹ Cal. Office of Env'tl. Health Hazard Assessment, *Selenium in Fish and Shellfish*, <https://oehha.ca.gov/fish/selenium-fish-and-shellfish>.

²⁰ DWR, *Your Delta, Your Voice: Environmental Justice Community Survey* at p. 90 (May 28, 2021), https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Delta-Conveyance/Public-Information/DCP_EJ-Survey-Report-5-28-2021_Final_508.pdf.

Project construction and operation will cause additional severe environmental justice impacts in the Delta. According to the Army Corps, 61% of residents in census tracts and block groups intersected by the footprint of the Project are persons of color; residents in Project adjacent census block tracts in Stockton are more than 93% persons of color. U.S. Army Corps of Engineers, *Delta Conveyance Project: Draft Environmental Impact Statement* at 3.8-4 (Dec. 2022) (“DEIS”). Census tracts immediately around the North Delta intakes have an even larger proportion of non-white community members. RTD Comments on DEIR at 58. The Army Corps also concluded that “[l]ow-income residents are spread throughout the study area.” DEIS at 3.8-6.

Project construction alone is, according to the Army Corps, likely to result in a range of significant adverse environmental impacts, with a disproportionately high and adverse effect on minority and low-income communities. This includes loss of Delta farmland and related agricultural jobs; impairment of the region’s scenic beauty and aesthetics; injury to or destruction of Tribal cultural resources and cultural resources associated with the heritage of other ethnic communities; transportation impacts; air quality impacts; and noise impacts. For instance, the Army Corps’ Draft EIS concludes that the air quality effects of Project construction “would occur in areas with meaningfully greater minority and low-income populations and, therefore, represents a disproportionately high and adverse effect” on environmental justice. *Id.* at 3.8-20. It would also result in exceedance of maximum daily criteria pollutant thresholds, which would likely be possible to completely mitigate. *Id.* at 3.8-19 to 3.8-20.

Even with these acknowledgements, the EIS and EIR downplay the Project’s environmental justice impacts. For instance, the EIS excludes all operational impacts, which contribute additional stressors for vulnerable Delta communities and further alienation from Delta waterways and cultural resources. This includes impacts on HABs, other water quality contaminants like mercury and selenium, increasing salinity, harms to fisheries and degradation of aquatic beneficial uses, and further jeopardy to the integrity and health of the Delta ecosystem and all it sustains. In addition, Project construction and installation of new State Water Project facilities will reduce recreational opportunities for Delta residents and visitors. And air quality and resulting public health impacts from the years of construction will be concentrated in Hood, a largely Latinx community immediately adjacent to one of the Project’s massive new intake facilities, and are also likely to disproportionately impact environmental justice communities in Stockton and other Project-adjacent communities.

B. Many Native Fish of the Bay-Delta are at Risk of Suffering Irreversible Harm and Their Status will be Unreasonably Harmed by Operation of the Tunnel

Ample evidence demonstrates that fish and wildlife beneficial uses and water quality are not adequately protected in the Bay-Delta. To remedy this problem, substantial increases in river flow into and through the Delta to San Francisco Bay will be necessary to provide reasonable protection of fish and wildlife beneficial uses. Increased diversions as a result of the DCP will cause unreasonable and further harm to an ecosystem and fish species that are already in crisis. Detailed analysis of the current status of Delta Smelt, Longfin Smelt, Chinook Salmon, Central Valley Steelhead, White Sturgeon, Green Sturgeon, Starry Flounder, and estuarine habitat are

presented in Baykeeper, et al.'s comments on the 2023 Draft Staff Report on Sacramento / Delta Water Quality Control Plan Updates. These comments are attached as Exhibit 9.

i. Delta Smelt

Although they were formerly abundant, Delta Smelt are nearly undetectable in the wild. Recent research confirms strong relationships of Delta outflow with survival and/or recruitment of larvae. Because they live only one year and then die, Delta Smelt viability relies on flow and estuarine habitat conditions that support population growth in almost all years. Research demonstrates that to prevent extinction of Delta Smelt, flow improvements are urgently needed, particularly in the summer and fall. In addition, increased levels of water export and their impacts on Old and Middle River flow rates will continue to harm the ability of Delta Smelt to avoid extinction, given that the population is nearly undetectable in the wild and cannot withstand *any* additional loss to entrainment.

ii. Longfin Smelt

Once among the most abundant fishes in the Bay-Delta, the San Francisco Bay estuary Longfin Smelt population remains far below levels consistent with viability or long-term survival. Abundance indices for this population have been strongly, significantly, and persistently correlated with winter-spring outflow from the Delta (Bay Inflow) for over 50 years – no other environmental factor explains nearly as much of the long-term variation in Longfin Smelt population abundance. The population has been CESA-listed since 2009. The federal government proposed to list the population as “endangered” under the ESA. In evaluating the extinction risk for this Longfin Smelt population, the U.S. Fish and Wildlife Service concluded in 2022 that “the probability of quasi-extinction for the Bay-Delta DPS exceeds 20% for all survey time series over the next five years and reaches 50% by 2040. Applying the same assumptions over a longer time horizon (i.e., 2050–2065), the suite of surveys predicts that the probability of extinction for the Bay-Delta DPS under current conditions is roughly 50-80%.”²¹

Furthermore, in their proposed rule to list this distinct population segment as endangered, USFWS considered numerous efforts to conserve and regulate biological resources of the San Francisco Bay estuary, including through multiagency collaborations, endangered species listings and incidental take permits under both the federal Endangered Species Act and CESA, and the Board’s current water quality standards. Their conclusion was that, despite those existing regulatory mechanisms, “the current condition of the estuary and continued threats facing the estuary and Bay-Delta longfin smelt, such as reduced freshwater inflow, severe declines in population size, and disruptions to the DPS’s food resources have not been ameliorated.” 87 Fed. Reg. 60957, 60970 (Oct. 7, 2022). A Final Rule regarding Longfin Smelt under the federal Endangered Species Act is due in July 2024.

Moreover, the magnitude of flow reversal in the south Delta caused by existing water exports is strongly correlated with entrainment of pelagic fishes and has been implicated as an important

²¹ U.S. Fish and Wildlife Service. 2022a. Species Status Assessment for the San Francisco Bay-Delta Distinct Population Segment of the Longfin Smelt. Prepared by: E. Chen V. Tobias, M. Eakin J. Hobbs A. Roessler; Edited by: S. Detwiler & M. Nobriga.

factor in the demise of other endangered species in the San Francisco Estuary. Entrainment of Longfin Smelt adults and juveniles has been high episodically, particularly in years when spring Delta outflows are low or the magnitude of reverse flows is relatively high. This pattern probably reflects the effect of Delta outflow on Longfin Smelt distribution – as net Delta outflow decreases, the low salinity zone and Longfin Smelt spawning and early rearing also shift to the east, towards the pumps. Elevated direct mortality via entrainment during drier years likely depresses Longfin Smelt productivity in a way that reinforces the overall flow-abundance relationship. Given the timing of maximum detection of both adult and juvenile Longfin Smelt at the export facilities, it is highly likely that larval entrainment is elevated during dry years as well.

iii. Chinook Salmon

Each of the Sacramento Valley's four distinct Chinook Salmon populations once numbered in the tens or hundreds of thousands of adults. The massive decline and extremely low abundance of all Chinook Salmon life-stages relative to their historic abundance has had significant impacts on commercial, recreational, subsistence, and tribal fishing and the fish assemblage in the Sacramento River, the Delta, and San Francisco Bay.

In recent years, the viability and condition of Central Valley Chinook Salmon runs has continued to decline due to low flows and high river temperatures leading to low egg and juvenile survival. The fall-run Chinook Salmon fishery was closed in 2023, for only the third time in the State's history, and again in 2024. A wealth of published research documents strong flow-survival relationships for juvenile life stages of different Chinook Salmon runs in the Sacramento Valley. Several of these studies indicate that the threshold flow for protection of juvenile Chinook Salmon is much greater than that previously identified by the Board and vastly exceeds current regulatory requirements.

In addition, Central Valley Chinook Salmon eggs, juveniles, and spawning adults are exposed to lethally high water temperatures because dams block access to cold water habitats at higher elevation and because reservoir operations frequently release hot water (heated by the sun on the reservoir) into salmon spawning and rearing habitats. Temperature-related mortality was exceedingly rare historically for these fish; temperature dependent egg mortality should be close to zero in almost all years. Major advances in the understanding of the relationships between water temperatures, flow, and Chinook Salmon mortality have occurred since 2017, when the Board last reviewed these issues. The Board must update the temperature thresholds deemed to be protective of Chinook Salmon eggs and flow-survival relationships for juvenile salmon and apply these criteria consistently to all Central Valley Chinook Salmon runs. Flows and river temperatures that are consistent with the Chinook Salmon species-wide average egg-smolt survival of ~10% are necessary to restore and maintain Chinook Salmon fisheries.

Existing South Delta water export operations lead to direct entrainment-related mortality of salmon via pre-screen losses and salvage losses. It also contributes to indirect mortality – reduced survival – of juvenile Chinook Salmon attempting to migrate through and rear in the Delta. Salvage of juvenile salmonids at existing export facilities increase with water exports. In NMFS' 2009 Biological Opinion, the agency reported results of CDWR modeling which revealed that monthly loss of juvenile salmon at CVP and SWP pumping facilities increased

exponentially with increasingly negative Old and Middle River flows (reverse flows) between December and April. These analyses showed that Chinook Salmon loss accelerated as OMR flows became more negative than -5,000 cfs (State Water Bd. 2017 Final Scientific Basis Report, at Figures 2.4-15 and 3.4-16 at 3-40). Indeed, there is no evidence that it is safe for fish to allow OMR flows to reach as negative as -5,000 cfs. Estimates of salvage and related direct mortality impacts on salmonid populations indicate that they can be severe.

In 2023-24, mortality of endangered winter-run Chinook Salmon juveniles significantly exceeded the loss limits in place under the CVP and SWP's Incidental Take Permit and Biological Opinions.

Moreover, negative OMR flow rates lead to additional, undefined levels of mortality for fish that are not entrained, because of altered Delta flow patterns that lead fish to Delta environments where survival is low (e.g., due to predation or poor water quality). As the State Board explained in 2017: "More important than direct entrainment effects, however, may be the indirect effects caused by export operations increasing the amount of time salmon spend in channelized habitats where predation is high (USDOI 2010, 29)." State Water Bd., 2017 Final Scientific Basis Report at 3-47.

Constraints on SWP and CVP exports related to Delta hydrodynamics found in federal ESA biological opinions and the state's CESA incidental take permit have been weakened since 2009, to the detriment of Chinook Salmon and the fisheries for various Chinook Salmon runs.

iv. Central Valley Steelhead

Central Valley Steelhead are an imperiled anadromous (migratory) life-history form of *Oncorhynchus mykiss*; the resident form is known as Rainbow Trout. Both forms of this fish require protection of coldwater habitat and both have in the past provided beneficial uses in the form of recreational fishing. The Board should consider both life history forms as it develops, adopts, and implements new flow standards and coldwater habitat protections for the Bay-Delta and its watershed and as it evaluates the potential impacts of the DCP.

Central Valley Steelhead were listed under the federal ESA as threatened in 1998 (63 Fed. Reg. 13347); their status was reaffirmed in 2006 (71 Fed. Reg. 833). Migration success of Central Valley Steelhead is strongly correlated with river flow rates during their outmigration. Water export operations in the south Delta also have a negative effect on Central Valley Steelhead populations, both through the direct effect of salvage mortality and indirectly via alterations to Delta hydrodynamics that disorient juvenile fish during their seaward migrations.

Central Valley Steelhead remain in danger of extinction. In 2023-24, direct Steelhead mortality at the CVP and SWP's export facilities in the south Delta significantly exceeded the limits in place under the Incidental Take Permit and Biological Opinions.

v. White Sturgeon

The San Francisco Bay-Delta White Sturgeon population is imperiled and its viability is declining. Petitions to list this species under CESA and ESA have been submitted; CDFW has determined that the CESA petition warrants a full status review of this population. The fishery has been repeatedly constrained by declining White Sturgeon abundance and will almost certainly be severely restricted in future years.

Chronically low river flows and reductions in Delta outflow resulting from water diversion and storage operations have been implicated in the decline of White Sturgeon in the Bay-Delta watershed. Annual recruitment of White Sturgeon in California has decreased since the 1980s. Bay-Delta White Sturgeon only reproduce successfully when Sacramento River inflow to the Delta and Delta outflow are relatively high during spring and early summer. Flows that support successful reproduction occur less frequently now than they did just a few decades ago because of diversions and reservoir operations that capture rain and snowmelt runoff in the late spring and summer. As a result, the size of White Sturgeon cohorts has decreased and the time between successful cohorts has increased. Given the reproductive life-history of female White Sturgeon, flows that support spawning, incubation and larval recruitment should recur at least one out of four years to restore and support viability; and more frequent and greater magnitude exceedance of critical flow thresholds may be necessary to restore and maintain harvest in a recreational fishery.

Continued poor recruitment puts Bay-Delta's White Sturgeon population at risk. Yet the DCP proposes to divert river flows in the range of those required for larval/juvenile White Sturgeon survival. Thus, operation of the DCP is expected to reduce the frequency of years with successful White Sturgeon cohort formation and the magnitude of the cohorts that are successful.

Entrainment in the CVP and SWP south Delta water export infrastructure also impairs the Bay-Delta White Sturgeon population's viability, as do fishing pressure and harmful algal blooms in both the Bay and, separately, in the Delta. The proposed DCP intakes will be located in areas where the bulk of the Bay Delta's larval and early-stage juvenile White Sturgeon are expected to migrate and rear. The new diversion's fish screens were not designed specifically to limit harm to White Sturgeon larvae and juveniles. Thus, White Sturgeon populations are likely to be negatively impacted by the existence and operation of the DCP's screens.

vi. Green Sturgeon

The southern distinct population segment of North American Green Sturgeon (Green Sturgeon) remains imperiled in the Bay-Delta and its watershed. According to CDFW, a widespread, long-lasting harmful algal bloom in San Francisco Bay killed numerous Green Sturgeon in 2022; the exact number of fish lost in this catastrophic fish kill is unknown and unknowable.

The Bay-Delta watershed's population of Green Sturgeon is part of the Southern Distinct Population Segment ("DPS") of this species. The DPS was listed as threatened under the federal Endangered Species Act in 2006. NMFS inferred an ongoing decline in abundance of this imperiled fish based on the decline in the number of juvenile Green Sturgeon salvaged each year at SWP and CVP water export facilities in the South Delta. The most recent five-year review indicated no change in the threatened status of this DPS, and none of the recovery criteria have

been met. Green Sturgeon continue to be in danger of going extinct in the near term. Furthermore, NMFS considers existing regulatory mechanisms to be inadequate to protect the species.

Like White Sturgeon, ecological studies of Green Sturgeon indicate that reproduction is only successful in years with high river flow into and out of the Delta. Such flows have decreased in magnitude and frequency over the last several decades as a result of unsustainable water diversions from the Sacramento River and water exports from the Delta. Continued poor recruitment puts the southern Green Sturgeon DPS at risk. Yet the DCP proposes to divert river flows in the range of those required for migration and rearing success of juvenile Green Sturgeon. Thus, operation of the DCP is expected to reduce the frequency of years with successful Green Sturgeon cohort formation and the magnitude of the cohorts that are successful.

Entrainment in the CVP and SWP south Delta water export infrastructure also impairs the Bay-Delta Green Sturgeon population's viability, as do harmful algal blooms in both the Bay and, separately, in the Delta. The proposed DCP intakes will be located in areas where almost all early-stage juvenile Green Sturgeon in the Central Valley are expected to migrate and rear. The new diversion's fish screens and bypass flows were not designed specifically to limit harm to Green Sturgeon larvae and juveniles. Thus, Green Sturgeon populations are likely to be negatively impacted by the existence and operation of the DCP's screens.

vii. Starry Flounder

Starry Flounder, which contribute to the ocean flatfish fishery, have experienced significant population declines in recent decades. Their abundance as juveniles rearing in the estuary is strongly correlated with freshwater outflow from the Delta. And the abundance of juvenile Starry Flounder rearing in the estuary is positively correlated to subsequent catches in the ocean fishery. These two statistically significant relationships demonstrate that freshwater Delta outflow during the winter-spring has an important effect on the subsequent ocean fishery for Starry Flounder.

As indexed by the CDFW/IEP's Bay Study Otter Trawl, abundance of Age 1+ Starry Flounder rearing in the estuary has declined by >95% since the early 1980's.

Delta outflow affects two important aspects of Starry Flounder population viability – abundance and spatial distribution – in San Francisco Bay. Abundance of Age 1+ Starry Flounder in the San Francisco Bay-Delta is well correlated with Delta outflow in the prior year during the months of March through June. Abundance of Starry Flounder in the estuary is also correlated with catch of Starry Flounder in the ocean during subsequent years, indicating that San Francisco Bay serves as an important nursery for this fish and that conditions in the Bay affect the population as a whole. Also, juveniles occur closer to the Delta under drier conditions. This makes Starry Flounder more vulnerable to entrainment and, indeed, more of these fish are salvaged, in drier years compared to wet years, even though abundance of Starry Flounder in the estuary is higher in wet years.

viii. Estuarine Habitat

Phytoplankton productivity and densities of common and widespread zooplankton species have declined in the Bay-Delta, particularly in the low salinity zone that serves as a critical nursery area for larvae and juveniles of many native fish species. Impaired inflow to the estuary is a major factor in this decline.

Declines in phytoplankton productivity in the low salinity zone are strongly linked to increased freshwater exports. Abundance of key zooplankton species in the low salinity zone of the estuary respond positively and strongly to increases in seasonal Delta outflow, indicating that improvements in seasonal Delta outflow during spring, summer, and fall are essential to protecting and maintaining Bay-Delta estuarine habitat. Flows that stimulate estuarine habitat productivity are needed more frequently than what occurs under current conditions.

Most of the Bay-Delta's estuarine fish species rely on zooplankton prey during at least part of their life-cycle. And estuarine zooplankton populations are sensitive indicators of the condition of estuarine habitat. For this reason, the steep decline in density of formerly widespread and abundant zooplankton and native mysid shrimp indicates that Bay-Delta estuarine habitat conditions have deteriorated.

ix. Other Fish and Wildlife Species and Habitats

Numerous other fish and wildlife species, habitats and ecological processes of the estuary have been adversely impacted by the reduction and alteration of flow amounts and timing. The effect of reduced peak flows on sediment transport contributes to the degradation and loss of floodplain, wetland and beach habitats throughout the estuary. Coastal populations of forage fish, sea birds, and marine mammals have likely been decreasing due in part to reduced inflow to the estuary and nearshore coastal waters and associated flow-induced changes to the food web. For instance, studies document the effect of declining availability of salmon prey on reproductive success in the Southern Resident Killer Whale populations. And increasing rates of introduction and successful colonization by invasive non-native species are linked to reduced inflow to the estuary.

Given the host of fish species that are not currently viable, the decimation and official closure of fisheries, and the growing list of native Bay-Delta fish that are protected under state and federal Endangered Species Acts, any proposed project which reduces Delta inflow and outflow, increases water exports and future human reliance on the Delta's freshwater supply, or has the potential to increase entrainment and salvage, would cause unreasonable harms to these fish, wildlife, and ecosystems which are already at the brink of irreversible and extraordinary damage. The proposed DCP is no different. Increased diversions, reduced flows, and the associated environmental harms caused by the project are unreasonable.

C. Fisheries Which Are Also In Crisis Will Be Harmed by the Tunnel

The Project's construction and operations will significantly impact once commercially valuable fish species and contribute to the continued declines and potential extinction of the San Francisco Estuary population of Longfin Smelt (which is pending federal listing), endangered winter-run Chinook Salmon and spring-run Chinook Salmon, and other fish species listed as endangered or

threatened under the federal Endangered Species Act and CESA. It will also result in reduced survival of commercially critical fall-run Chinook Salmon and late-fall run Chinook Salmon; reduced recruitment in and increased peril to the estuary's White Sturgeon population, which currently supports a valuable recreational fishery) and is also pending listing under the CESA; and reduced productivity for Starry Flounder (which contribute to a valuable commercial fishery).

Fall-run Chinook Salmon have been devastated by high river temperatures and poor flow conditions for eggs and rearing and migrating juveniles. In fact, over the 2002-2020 time period, average egg-to-fry survival of fall-run Chinook salmon in the Sacramento River has been significantly worse than average egg-to-fry survival of winter-run Chinook salmon. As a result of extremely low egg-to-fry survival (8.1%) in brood year 2020 and persistent decline in freshwater conditions, the salmon fishery was closed in 2023. Both runs are regularly experiencing egg-to-fry survival rates that are not consistent with population viability. Due to poor adult returns in 2023 and population modeling indicating reduced numbers in the ocean, the 2024 California Chinook salmon fishery was closed for a second year in a row, and now for the fourth time in state history. Disastrous abundance numbers occurred despite the closure of commercial and recreational fishing in 2023.

When the California fishery for Chinook Salmon is open, it is increasingly supported by fish that originate in salmon hatcheries, rather than naturally produced (wild-spawned) fish. This means the population is even further from attainment of the existing state and federal goal for natural production of Central Valley Chinook Salmon, doubling of natural production against the baseline for the 1967-1991 period. Hatchery influence is also a major threat to the viability of Central Valley Chinook Salmon.

The economic impacts to the salmon fishing industry caused by excessive water diversions and ineffective regulation are often understated and do not adequately analyze the decline of the California recreational salmon fishing industry. The majority of Chinook Salmon caught off the Oregon coast are from the Bay-Delta ecosystem. In 2023, recreational and commercial Chinook Salmon fishing seasons on the Oregon coast were largely closed from Cape Falcon to the California/Oregon border. The Project's construction and operations will further reduce the salmon fishery's economic benefits in California and Oregon. For example, the average Chinook Salmon harvest in California from 1991-1995 was over 215,000 fish. More salmon were harvested in Oregon. The recreational harvest in both 2023 (California and Oregon) and in 2024 (California) will be zero.

One economic analysis concluded that, a fully functional California salmon fishing industry produced \$1.4 billion in annual economic activity (in 2012 dollars) and 23,000 jobs. The economic value of Oregon salmon fishing is additive to this amount. The total economic impact of fisheries closures also does not capture the depth of the effect on fishing businesses. Fishing closures mean that individual fishing businesses are completely closed, sometimes for more than a year. Furthermore, the full economic value of salmon fishing-related jobs off the water is not limited to commercial and recreational fishing boat operations but includes marina operators, equipment manufacturers and retailers, fish brokers, and a multitude of other off the water jobs that are dependent on the salmon fishing and tourism industries such as hotels, restaurants, and

retail stores. Maintaining businesses (e.g., fishing boats, bait shops, ice manufacturing and distributing facilities) that are frequently closed completely, and severely constrained in years when operations are possible, is very difficult and distressing for the many individual businesspeople who run the small businesses that depend on California's coastal salmon fishery. All parts of the salmon fishing economy have suffered enormous impacts from the decline and closures of Chinook Salmon fishing in California.

In addition to increased negative impacts to the commercially critical fall-run Chinook Salmon and late-fall run Chinook Salmon fisheries, other fish in the Delta, San Francisco Bay, and the Sacramento River watershed, whose numbers and vitality depend on an intact and healthy ecosystem in the Delta, San Francisco Bay, and the Sacramento River watershed, will be significantly and further harmed. For example, both the Sacramento River spring-run Chinook Salmon and winter-run Chinook Salmon once supported commercial, recreational, subsistence, and tribal subsistence fishing. These populations no longer support fisheries because they are currently imperiled and ESA-protected. The historic and ongoing decline of Bay-Delta-dependent Chinook Salmon fisheries represents a massive failure of trustee agencies to protect designated beneficial uses and the public trust.

“Longfin smelt ... were once harvested along with delta smelt in the Sacramento-San Joaquin estuary for Chinese markets in San Francisco. There is currently no longfin smelt fishery in California.” CDFW, True Smelts. In California's Living Marine Resources: A Status Report December 2001, at p. 476. Given its current extremely low abundance and persistent decline in productivity, the Longfin Smelt population clearly cannot support the additional mortality associated with a fishery.

Central Valley Steelhead historically support recreationally and economically valuable sport fisheries. Due to low numbers and their “threatened” status under the federal Endangered Species Act, California prohibits retention of natural origin Central Valley Steelhead. Harvest of hatchery-origin steelhead (which are marked for identification) is limited to one fish per angler per day.

White Sturgeon once supported a commercial fishery in San Francisco Bay. The commercial fishery was closed by the state legislature after 1917 and all possession of White Sturgeon was prohibited until 1953. A recreational Bay-Delta White Sturgeon fishery was opened in 1954 and continues to this day. Because of long-term declines in the Bay-Delta White Sturgeon population and the massive harmful algae bloom-related fish kill in 2022, CDFW staff recommended that the fishery be restricted to catch-and-release fishing temporarily, however, the Fish and Game Commission rejected CDFW's staff recommendation and adopted emergency fishing regulations that would allow harvest at levels higher than those necessary to stabilize the population. The next year, CDFW wrote that “the Department has determined that there is sufficient scientific information to indicate that the petitioned action to list White Sturgeon as threatened under CESA may be warranted. Therefore, the Department recommends that the [California Fish and Game] Commission accept the petition for further consideration pursuant to CESA.” CDFW, Report to the Fish and Game Commission. Evaluation of the petition from San Francisco Baykeeper, The Bay Institute, Restore the Delta, and California Sportfishing Protection Alliance

to list White Sturgeon (*Acipenser transmontanus*) as threatened under the California Endangered Species Act (2024).

Although Green Sturgeon are not prized as a game fish or food item like White Sturgeon, there was historically a fishery for Green Sturgeon in the Bay-Delta watershed. The commercial, sport, and tribal fisheries for Green Sturgeon in the Columbia River estuary were likely dependent on fish that migrated from California, as there is no evidence of Green Sturgeon spawning near the Columbia River. Fishing for Green Sturgeon is now prohibited because of its “threatened” listing and its imperiled status.

In the ocean, thousands to tens of thousands of metric tons of Starry Flounder are harvested as part of the California coastal flatfish fishery, but catch has been declining precipitously.

VIII. THE PROJECT IS AN UNREASONABLE DIVERSION AND METHOD OF DIVERSION AND IS NOT IN THE PUBLIC INTEREST

A. DWR Has Not Established that the Project is Economically Viable or that Its Purported Benefits Would Exceed Its Substantial Costs

The Petition falls well short of providing sufficient information to support the Board’s consideration of the change request. In addition to the shortcomings discussed above, the Petition fails to include any financial feasibility analysis or information to support a benefit-cost analysis for the DCP. It is well-known that Delta water conveyance facilities are among the most costly and controversial water infrastructure proposals in California history, and every iteration of the concept over the years has been impacted by major cost and financing problems. The Board should not consider the Petition without a realistic financing plan showing that the Project can pencil without shifting costs onto taxpayers or increasing water rates, and a benefit-cost analysis that accounts for the full range of impacts expected from the DCP.

First, there are compelling reasons to doubt the financial viability of the DCP. During the Brown administration, DWR leadership made multiple public statements and arguments that single tunnel alternatives were not cost-effective. The Central Valley Project and multiple State Water Project contractors have already withdrawn from the DCP due to excessive costs relative to value and none have made a firm commitment of resources to the Project. In particular, the Metropolitan Water District, which would be a major source of Project funds, has not committed to supporting the Project, and its public statements are clear that it will rely on cost-benefit analysis to inform its ultimate decision. For instance, the Metropolitan Water District’s current official position on the Project is that “Metropolitan’s board and water leaders across the state will use the state’s Environmental Impact Report for the Delta Conveyance Project, along with additional information to be developed in the months ahead, including a cost estimate and a project cost-benefit analysis, to determine how to best invest our resources”²²

²² Metropolitan Water District, *The Proposed Delta Conveyance Project* (last visited May 8, 2023), <https://www.mwdh2o.com/planning-for-tomorrow/securing-our-imported-supplies/delta-conveyance/>; see also Statement by Metropolitan Water District General Manager Adel Hagekhalil on release of final Environmental Impact Report for Delta Conveyance Project (Dec. 8, 2023), <https://www.mwdh2o.com/press-releases/metropolitan-issues-statement-on-release-of->

The financial viability of the DCP is called into particular question by the massive costs of the Project, coupled with state budget shortfalls. In 2020, the Delta Conveyance Design and Construction Authority released a DCP cost estimate, which concluded that Project costs would amount to \$15.9 billion dollars based on a 2020-dollar value.²³ The majority of these costs (\$12.1 billion) would be for construction alone, accompanied by \$3.4 billion in “soft costs” for DWR design, oversight, coordination, and land acquisition, and \$400 million for an environmental mitigation program. In constant dollars, the DCP cost assessment provides only a 10% cost savings compared to the two-tunnel WaterFix project, which was estimated to cost \$16.7 billion in 2017 dollars.

Further, construction costs have inflated significantly since the 2020 DCP cost estimate was released. The California Department of General Services Construction Cost Index estimates that construction cost inflation has averaged 10.7% annually since 2020, compared to an average 2.5% annual increase in the prior decade. Assuming that DCP costs have increased at the same rate as the California Department of General Services Construction Costs Index, the current cost estimate for the DPC would be slightly above \$22 billion. The cost estimate for the Bethany alignment alternative selected by DWR would likely be even higher than \$22 billion because the Bethany alignment tunnel is about 10% longer than alignments that informed the 2020 cost estimate and make less use of existing State Water Project facilities.

Adding to the likely cost inflation of the Project, major infrastructure projects like the DCP are financed by bonds and sensitive to interest rates. The low interest rate environment that characterized the DCP planning stages ended in 2022; interests are not expected to return to the low levels that characterized that period.

On the other side of the equation, the state is facing long-term budget deficits upward of \$28 billion and legal limitations on its bonding authority that may compromise its ability to finance the Project. DWR recently announced that it will issue revenue bonds to finance the Project, which will be repayable from State Water Project revenue provided only by participating State Water Project public water agencies.²⁴ But the County of Sacramento Superior Court has already determined that DWR exceeded the scope of its delegated authority under section 11260 of the Water Code in adopting resolutions to finance the Project with bonds. *See* Final Statement of

[final-environmental-impact-report-for-delta-conveyance-project/](#) (“We look forward to reviewing the findings in the environmental documents released today, along with additional information that will be provide in the future including a cost-benefit analysis. All of this will inform Metropolitan’s Board of Directors in determine how best to invest our resources in response to the change climate.”).

²³ Delta Conveyance Program Cost Assessment Update: Presentation to the Board at p. 11(Aug. 2020), Delta Conveyance Design & Construction Authority Board of Directors Meeting Agenda, Item 7.c (Aug. 20, 2020), <https://www.dcdca.org/wp-content/uploads/2020/09/2020-08-20-DCABoardPkgVF-1.pdf>.

²⁴ DWR, *Understanding Costs, Benefits, Funding and Financing for the Delta Conveyance Project* (Spring 2024), available at https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Delta-Conveyance/Public-Information/DCP_CostFunding_FAQ_2024.pdf.

Decision, *Sierra Club et al. v. Cal. Dept. of Water Resources*, Case No. 34-2020-80003517 (Jan. 16, 2024). This is because state law limits the revenue bond financing authority DWR asserts to finance the DCP to components of the Feather River Project described in three reports issued in the 1950s, none of which contemplated subsurface conveyance facilities. According to the Superior Court, DWR’s definition of the Delta Project under which the DCP will be constructed is “untethered to the objectives, purposes, and effects of the Feather River Project unit” and thus beyond DCP’s bonding authority. *Id.* at 28 (“Since DWR lacks the authority to adopt the Delta Program – as DWR defined the ‘Delta Program’ in the General Resolution – as a ‘further modification’ of the Feather River Project unit under the [Central Valley Project Act], it necessarily follows that DWR lacks the authority to issue revenue bonds to finance the Delta Program.”). Financing the Project through bonds, as DWR intends, would thus likely require a significant change to longstanding state law. Ultimately, it is apparent that taxpayers stand to shoulder the cost of this massive infrastructure Project, at the expense of other much needed capital projects that promote true climate resiliency and meet other critical statewide needs.

Compounding financial viability concerns are equally serious concerns about effects of the Project on water rates. Agricultural profit margins, which underly the willingness-to-pay for water supplies, have fallen from the record highs of the last decade. California’s net farm income has declined 35% since 2014 as revenues for key commodities such as nuts have fallen from record highs and costs have escalated. Further, calls for Delta conveyance often rely on projections of California population growth to justify such large capital investments, as impacts on future water rates can be mitigated if the costs are spread over a bigger rate base. But California’s population is no longer projected to grow substantially and has even declined in recent years. The foreseeable upshot of population stagnation and unprecedented capital expenditure in water conveyance will be significantly increased water rates for current residents already burdened by California’s high cost of living– presenting serious equity concerns and hindering the State’s efforts to meet its statutory obligation to fulfill the human right to water for all Californians.

Given the open questions about DCP’s financial viability, it is in the public interest for the State Water Board to wait to process the Petition until it has received and the public has had an opportunity to review a viable financing plan for the Project that fully discloses the sources of DCP capital funds and assures that taxpayers will be protected from these costs.

Second, the lack of a financing plan for the Project makes its description unstable and its environmental impacts and likelihood and costs of effective mitigation hard to predict. The history of WaterFix is illustrative. While the Board’s hearings for the WaterFix change petition were pending, the project itself underwent a number of financially-driven changes. Among them:

- Westlands Water District and subsequently the Central Valley Project rejected financing their share and withdrew from the project. Even if the State Water Project could absorb the full cost, removing Central Valley Project diversions from the tunnels would have required a major change in operations not included in the petition submitted to the Board.
- DWR temporarily shifted its plan to a “phased” single-tunnel plan.
- As part of its effort to convince State Water Project contractors to increase their cost share, DWR put out economic studies that boosted projected water supply from the

WaterFix by removing the critical OMR operating provisions from the project description – the most critical operating constraint underlying the WaterFix environmental and water quality findings being considered by the Board at its hearings.

- A financial plan where Metropolitan Water District would pay for and receive the water from “unsubscribed capacity” was revealed, resulting in a shift in State Water Project supplies from Central Valley agriculture to urban uses, which substantially changed the public interest on statewide water distribution.
- DWR ultimately withdrew its petition motivated largely by these financial challenges and the incoming Governor’s preference for a smaller, more cost-effective conveyance plan.

During the course of these shifts, the Board was in the untenable position of evaluating a permit change for a project that was neither stable nor clearly financially viable. Requiring DWR to provide a financial feasibility study, financing plan, and benefit-cost analysis with its petition submittal would have revealed these vulnerabilities at the outset and prevented the significant waste of Board and public resources that ensued.

The same holds true here. In addition to creating uncertainty about the Project scope, the lack of a financing plan makes any promises of mitigation, Delta benefits, and safety enhancements speculative at best. Again, State Water Project history is instructive. The original State Water Project dropped or modified numerous elements that proved too costly. At the Oroville Dam, the State selected an erodible earthen emergency spillway in lieu of a safer concrete design to keep costs down. This decision contributed to the emergency evacuation in 2017 of nearly 200,000 people throughout the Feather River Basin due to concerns about downhill erosion threatening the emergency spillway structure and a massive human and environmental catastrophe if it failed.²⁵ Likewise, insufficient financial planning for the DCP may result in shortcuts that heighten risks for Delta communities. The Board needs to require sound financial analysis to be assured that the Project would be built and operated and its risks mitigated as proposed.

Second, benefit-cost analysis is necessary to allow the Board to make an informed determination whether the Project is in the public interest. Benefit-cost analyses are a routine part of infrastructure planning processes, as evident in numerous state and federal guidelines. The analysis sheds light on trade-offs inherent in project design, and often informs refinements in design that increase public benefits. As a benefit-cost analysis overlaps with a financial feasibility analysis, it is efficient and customary to complete them together. Financial feasibility analysis is focused more narrowly on willingness to pay and cost allocation to the entities that pay for a project, whereas benefit-cost analysis includes additional societal impacts and is this critical to informing public interest.

Importantly a benefit-cost analysis must not be narrowly limited to direct Project economics. Rather, the Board must provide equal consideration to impacts of the Project on, for instance: protection and restoration of Delta fish and wildlife populations and Bay-Delta ecosystem productivity more broadly, ecosystem services such as maintenance of clean water, coastal

²⁵ California Governor’s Office of Emergency Services, *CalOES Revisits the Oroville Dam Spillway Incident and Its Impacts Five Years Later*, <https://news.caloes.ca.gov/cal-oes-revisits-the-oroville-dam-spillway-incident-and-its-impacts-five-years-later/>.

commercial and recreational fishing sectors, subsistence fishing, Delta recreation and economic development opportunities, public health, and other critical non-use values such as tribal cultural resource protection and the impacts of comprising the integrity of a vitally important tribal cultural landscape.

Just as it did in proceedings on the WaterFix project, DWR has left financial and benefit-cost analysis to the end of the planning process for the DCP. This backwards approach is disrespectful of the limited budgets and resources of other agencies such as the State Water Board and interested parties, including Tribes, and fishing, community, and environmental organizations that participate in review of the Project. It undermines a fulsome public interest evaluation of the Petition. And it repeats the mistakes of the planning process for WaterFix, which was withdrawn after the Board and other agencies and organizations spent years of effort on its evaluation. The expenditure of substantial resources to evaluate the WaterFix petition, even though the project proved to be financially infeasible, came at the expense of progress on other critical Board programs, including review and update of the Bay-Delta Plan. This outcome could have been avoided had the Board required financial feasibility and benefit-cost studies at the outset, a modest ask given that such assessments are routine in water infrastructure design and planning. The Board should avoid repeating the mistakes of the WaterFix experience and insist on obtaining at the outset the analyses necessary to inform evaluation of the public interest and to ensure that the Project is financially viable as proposed.

B. The Project is an Unreasonable Diversion and Change in Point of Diversion

Article X, Section 2 of the California Constitution limits “[t]he right to water or to the use or flow of water in or from any natural stream or water course in this State” to “such water as shall be reasonably required for the beneficial use to be served” and bars water rights from extending to “unreasonable use or unreasonable method of use or unreasonable method of diversion of water.” Cal. Const., art. X, § 2; *see also* Wat. Code § 100. The “reasonable use doctrine” established by Article X, section 2 is “an overriding constitutional limitation” that is “superimposed on [the] basic principles defining water rights” in California. *United States v. State Water Bd.*, 182 Cal.App.3d at 105. The diversion and export of 6,000 cfs of water from the Sacramento for the DCP does not meet this constitutional standard; nor is the DCP itself a “reasonable method of diversion” in light of its vast array of adverse impacts and the availability of less deleterious solutions for ensuring local and regional water supply availability south of the Delta.

It is beyond dispute that operation of the DCP would substantially reduce flows in the lower Sacramento River. New diversions, like those requested by DWR, will divert flows in a way that will negatively impact spawning, migration, and recruitment of the native fish species discussed above. *See* Baykeeper et al., Comments on 2023 Draft Staff Report at 72.

According to DWR, operation of the Tunnel will reduce the monthly average flow in nearly all months in all water year types. (DWR’s modelling predicts a 1-2% increase in flow in April in Below Normal, Dry, and Critical years, and a 2% increase in flow October in Critical years.) Given that the insufficiency of the current flows have led to an ecological crisis, inadequate water quality, the imminent extirpation of several native fish species, and the closure of

recreational and commercial fisheries, further reductions necessarily cause unreasonable harm to fish and wildlife and to other beneficial uses.

Table 5C-42 from DWR’s Draft EIR for the DCP shows the downward effect on flow that operation of the Tunnel would cause:

California Department of Water Resources Simulated Monthly Flows

1 **5C.3.6.7 Alternative 5**

2 **Table 5C-42. Alternative 5, Percent Change from Existing Conditions for Sacramento River at Hood**

3 **(Near the Proposed North Delta Intakes), Mean Monthly Flow**

Statistic	Percent Change from Existing Conditions											
	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep
Average												
Long-Term Average ^a	-2%	-6%	-6%	-7%	-6%	-6%	-1%	-3%	-4%	-6%	-2%	-5%
Water Year Types												
Wet Years	-3%	-6%	-7%	-6%	-4%	-3%	-2%	-3%	-6%	-5%	-2%	-2%
Above Normal Years	0%	-6%	-7%	-10%	-9%	-9%	-3%	-4%	-10%	-10%	-3%	-1%
Below Normal Years	-2%	-9%	-6%	-9%	-9%	-13%	1%	-1%	-1%	-11%	-3%	-14%
Dry Years	2%	-5%	-4%	-7%	-8%	-9%	1%	0%	0%	-1%	2%	-5%
Critical Years	-2%	-3%	-4%	-8%	-4%	-5%	2%	0%	0%	0%	2%	0%
Dry/Critical Years ^b	0%	-4%	-4%	-7%	-7%	-7%	1%	0%	0%	-1%	2%	-3%

4 CalSim 3 output variable: C_SAC041.

5 ^a Long-Term Average is the average monthly flow for the period of October 1921 through September 2015 simulated in

6 CalSim 3.

7 ^b Water year types are State Water Resources Control Board Water Right Decision 1641 40-30-30 water year types as

8 computed in CalSim 3 for the period October 1921–September 2015. Dry/critical year averages are for those two water

9 year types combined.

There is no serious dispute that the Tunnel would divert much needed water from the Delta and its tributaries, and would reduce fresh-water flow from the Delta into San Francisco Bay. There is also no serious dispute that these additional diversions and reductions of freshwater flow will harm the Bay-Delta’s ecosystem, the San Francisco Estuary, and the fish, wildlife, and people that depend on them. Details about the harms likely to be caused by the DCP operations are discussed above and contained in significant detail in the attached comments on the DEIR, incorporated by reference into this Protest. These include: pages 3-9 of comments on the DEIR by Shingle Springs Band of Miwok Indians (Exhibit 2), pages 2-12 of comments on the DEIR by Buena Vista Rancheria of Me-Wuk Indians (Exhibit 1), pages 30-50 of comments on the DEIR by Baykeeper et al. (Exhibit 5), pages 3-7 of comments by California Indian Environmental Alliance (Exhibit 3), and pages 8-61 of comments by Restore the Delta (Exhibit 4).

In sum, DWR admits the Tunnel will cause harm; fails to utilize the best available science in determining the magnitude of the harm, resulting in a significant underestimate of the impacts on fish and wildlife; and fails to require or ensure mitigation that is supported by evidence and science. For species, fisheries, and an ecosystem already in crisis, the additional diversions and further reduced flows, especially in critical times and in wetter water years will further devastate

fish, wildlife, and the Bay-Delta. And as the State learns hard lessons about the importance of investing in restoration of complex watershed dynamics and ecological integrity, nature-based solutions, and sense of place – particularly in a changing climate – its commitment to developing new conveyance infrastructure on an unprecedented scale appears wildly misguided and misaligned with the State’s expressed values.

IX. THE PROJECT POSES UNREASONABLE RISKS TO PUBLIC TRUST RESOURCES AND INTERESTS

The Board must safeguard public trust resources. This includes “an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.” *Nat’l Audubon Soc’y v. Superior Court* 33 Cal.3d 419, 446 (1983); *see also* Wat. Code § 1243.5.

“The public trust doctrine, as recognized and developed in California decisions, protects navigable waters from harm caused by diversion of nonnavigable tributaries.” *Nat’l Audubon*, 33 Cal.3d at 437 (citations omitted). This includes groundwater hydrologically connected to navigable surface waters. *Id.* at 436-37; *see also S.F. Baykeeper, Inc. v. State Lands Com.*, 242 Cal.App.4th 202, 233 (2015); *Envtl. Law Found. v. State Water Res. Control Bd.* 26 Cal.App.5th 844 (2018).

“Wild fish have always been recognized as a species of property the general right and ownership of which is in the people of the state” – they are quintessential public trust resources. (*Cal. Trout v. State Wat. Res. Control Bd.*, 207 Cal.App.3d 585, 630 (1989). “The title to and property in the fish within the waters of the state are vested in the state of California and held by it in trust for the people of the state.” *Id.* (quoting *People v. Monterey Fish Products Co.*, 195 Cal. 548, 563 (1925)]).

Beyond water and wild fish, the public trust secures a host of other uses and values, including navigation, commerce, fishing, hunting, swimming, and the protection of waters, lands, and wildlife for ecological, aesthetic, and spiritual benefits. *See, e.g., S.F. Baykeeper*, 242 Cal.App.4th at 233; *Marks v. Whitney*, 6 Cal.3d 251, 259-60 (1971). The Delta Reform Act memorializes the “particular[] importan[ce] and applicab[ility]” of the public trust and other constitutional principles to the Bay-Delta. Wat. Code § 85023.

As discussed in detail above, Project would harm public trust resources already on the brink of collapse by reducing Delta inflow and outflow and increasing diversions and export of water from the Delta.

CONDITIONS FOR WITHDRAWAL OF PROTEST

General Conditions

1. Withdrawal of the Petition until after the State Water Board completes, and EPA approves, an updated Bay-Delta Plan
2. Withdrawal of the Petition until after the State Water Board completes designations of Tribal Beneficial Uses
3. Withdrawal of the Petition until a survey of Tribal Cultural Resource Locations is completed
4. Withdrawal of the Petition and refiling the Application as a water rights application supported by showing of water availability
5. A prohibition on the diversion at any time harmful algal blooms are documented in the Delta.
6. A prohibition on diversions when any Temporary Urgency Change Order for Bay-Delta water quality is in effect.

Flow Conditions

7. A prohibition on diversions between December 1 and June 30 when Delta Outflow is less than 65% of unimpaired flow.
8. A prohibition on diversions September 1 and June 30 unless flows at Freeport are greater than 35,000 cfs.
9. A prohibition on the diversions between January 1 and March 31 and from June 1 to June 30 unless Delta outflow is greater than 42,800 cfs, and between April 1 and May 31 unless Delta Outflow is greater than 44,500 cfs.
10. A prohibition on diversions between April 1 and June 30 when the 7-day average of Sacramento River discharge to the Delta is between 30,000 cfs and 55,000 cfs.
11. A prohibition on diversions during pulse flow events that are significant to Green Sturgeon migration from the Sacramento River to the Delta.

Exhibit List

1. Buena Vista Rancheria of Me-Wuk Indians Comments on DEIR
2. Shingle Springs Band of Miwok Indians Comments on DEIR
3. California Indian Environmental Alliance Comments on DEIR
4. Restore the Delta Comments on DEIR
5. Baykeeper et al. Comments on DEIR
6. EPA Comments on Staff Report and Substitute Environmental Document for Bay-Delta Plan Update
7. EPA Letter to U.S. Army Corps of Engineers RE DEIS for Delta Conveyance Project (Mar. 16, 2023)
8. EPA Letter Accepting Title VI Complaint for Investigation (Aug. 2023)
9. Baykeeper et al., Comments on Staff Report and Substitute Environmental Document for Bay-Delta Plan Update
10. Delta Tribal Environmental Coalition, Comments on Staff Report and Substitute Environmental Document for Bay-Delta Plan Update