Chapter 3
Common Responses

3.1 Introduction

This chapter provides the 15 Common Responses for the for the Long-Term Operations of the State Water Project (SWP) facilities in the Sacramento–San Joaquin Delta (Delta) Draft Environmental Impact Report. Common Responses are broad technical or policy discussions that cover a specified range of issues. The purpose of a Common Response is to inform the public about key issues related to the project and address commonly raised topics, concerns, and themes found in public comments. The California Department of Water Resources (DWR) crafted Common Responses for similar comments received from multiple agencies, organizations, entities, or members of the public, or because multiple but related subtopics could be addressed by one topical Common Response. Table 3-1 summarizes the Common Response numbers, their titles, and the topics they cover.

Individual comment responses in Volume 2, Chapter 4, "Response to Comments Tables," sometimes refer readers to Common Responses.

Table 3-1. Summary of Master Responses

Common Response Number	Common Response Title	Topics Addressed
1	Scope of Analysis	• Scope of analysis overview • Geographic scope • Treatment of Oroville Complex • Oroville operations and one-time water commitment for Delta Outflow • Treatment of Coordinated SWP/CVP Operations • Treatment of COA Addendum
2	CEQA Environmental Baseline	• Overview on CEQA environmental baseline • Treatment of historical conditions • Treatment of Yolo Notch Project • Treatment of Interim Operations Plan
3	CEQA Process	• Substantive mandate of CEQA • Procedural requirements effectuating substantive policy • CEQA requirements regarding the scope of alternatives • Reasonable range of alternatives • The purpose of discussing alternatives when there are no significant impacts • Public participation in the development of alternatives

Common Response Number	Common Response Title	Topics Addressed
4	CEQA and CESA Legal Standards	• CEQA and CESA legal standards overview • Standards of judicial review for CEQA and CESA determinations • CEQA vs CESA mitigation requirements • CEQA mitigation requirements • CESA's "fully mitigate" standard • Feasible mitigation and funding commitments • How CEQA and CESA address existing environmental conditions
5	Delta Reform Act	• Background on Delta Reform Act • Early actions under the Delta Reform Act • The Delta Stewardship Council's Delta Plan • Covered Actions • Adaptive Management Plan
6	Other State Efforts	• Relation to new facilities and other projects • Improper piecemealing under CEQA • The proposed Delta Conveyance project is not covered by the ITP • State Water Project Delta Field Division Operations and Maintenance Habitat Conservation Plan
7	Relationship to Healthy Rivers and Landscapes Program	• Operational scenarios without Healthy Rivers and Landscapes Program • Modeling runs with various scenarios • Delta Outflow and SWP • Bay-Delta Water Quality Control Plan • CEQA and Water Quality Control Plan update
8	Climate Change	• Climate change sensitivity analysis • Impact analysis modeling for Chapter 9 • Water quality challenges from climate change
9	Relationship to the 2023 Biological Assessment and NEPA	• Overview • 2023 Biological Assessment (BA) and the Federal Endangered Species Act (ESA) • NEPA vs CEQA processes and requirements
10	Public Trust	• Overview of public trust law • Public trust considerations associated with the proposed project • The relationship between public trust considerations and CEQA requirements • Public trust obligations
11	Application of CESA Standards	• Overview of relevant CESA standards • Applications of CESA standards to the project • Incidental to otherwise lawful activity • Minimize and fully mitigate the impacts of the authorized take • Rough proportionality • Provide adequate funding for implementation, compliance and effectiveness monitoring • Jeopardize the continued existence of the species

Common Response Number	Common Response Title	Topics Addressed
12	Drought Conditions	• Modeling of drought conditions • The use of a temporary urgency change petition (TUCP) during extreme drought conditions • Minimum export rate
13	Water Rights Time Extension	• Water rights time extension approval process • CEQA compliance for water rights time extension
14	Tribal Cultural Resources	• State policies and actions that affect California Indian Tribes • The adequacy of the California Department of Water Resources' (DWR) efforts to engage California Indian Tribes (Tribes). • The methods that DWR employed to identify Tribal cultural resources. • How DWR evaluated potentially significant impacts on Tribal cultural resources.
15	Real-Time Operations	• Implementing real-time operations • Proposed process and risk assessment for implementing real-time operations • Potential impacts on Delta Smelt and Longfin Smelt • Models and methods to determine Longfin Smelt entrainment risk

Chapter 3.1
Common Response 1: Scope of Analysis

3.1.1 Overview

The California Environmental Quality Act (CEQA) requires that an Environmental Impact Report (EIR) describe the existing environmental conditions in the vicinity of a proposed project, which is referred to as the "environmental setting."[1] CEQA places special emphasis on describing sensitive environmental resources in the project vicinity, while other characteristics of the environmental setting need be discussed only to the extent necessary to provide an understanding of the significant effects of the project and of the alternatives analyzed in the EIR.[2] Existing conditions that are not relevant to the impact analysis need not be discussed in the environmental setting.[3]

3.1.2 Geographic Scope

To analyze the full range of potential environmental impacts, the Draft EIR (DEIR) identified the geographic area in which potential direct and reasonably foreseeable indirect impacts could occur. As explained in DEIR Chapter 2, "Project Description," Section 2.1.2, "Project Location," the geographic area for evaluation of potential direct and indirect impacts of the Proposed Project is delineated by the following waters:

- Sacramento River from its confluence with the Feather River downstream to the legal Sacramento–San Joaquin Delta (Delta) boundary at the I Street Bridge in the city of Sacramento
- State Water Project (SWP) Facilities in the Delta
- Waters of the Delta
- SWP Facilities in Suisun Marsh and Suisun Bay
- Waters of Suisun Marsh and Suisun Bay

Although the SWP is a statewide system, the Proposed Project is limited to a set of updates to SWP long-term operations that would not cause environmental impacts beyond these boundaries.[4]

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[1] CEQA Guidelines, § 15125, subd. (a).

[2] *Id.*, subd. (c).

[3] *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 316.

[4] The analysis of growth-inducing effects contained within DEIR Chapter 10, "Other CEQA Discussions," Section 10.2, "Growth-Inducing Impacts," is an exception. That analysis addresses potential indirect effects in the SWP service area.

To determine the geographic scope of analysis, the California Department of Water Resources (DWR) considered: (1) the geographic scope of SWP operations' influence (i.e., the "zone of influence"), particularly with respect to the operations affected by the Proposed Project; and (2) whether, in light of SWP and Central Valley Project (CVP) coordinated operations, the Proposed Project would cause a reasonably foreseeable response by the U.S. Bureau of Reclamation (Reclamation) that could result in changes in CVP operations outside the SWP zone of influence. DWR concluded that the analysis of flow-related impacts was appropriately focused on the SWP zone of influence (the Sacramento River below the confluence of the Feather River, the legal Delta, and the Suisun Marsh and Bay) and does not include areas that are affected only by CVP actions.

DEIR Appendix 2D, "Geographic Scope of Project's Influence on Flow," provides additional information.

3.1.3 Treatment of Oroville Complex

As described in DEIR Appendix 2D, there are two major components of the SWP that influence flow in the natural waterways. The first major component is the SWP Delta facilities, including the Clifton Court Forebay, Barker Slough Pumping Plant, and Suisun Marsh Salinity Control Gates. The Proposed Project includes operational changes to some of the Delta facilities, and potential effects on those facilities are included in the DEIR. The second major component is the Oroville-Thermalito Hydroelectric Complex (Oroville Complex), which DWR uses to manage runoff from the Feather River watershed. Water from the upper Feather River watershed flows into Lake Oroville and the Oroville Complex, then into the lower Feather River and into the Sacramento River, which then drains into the Delta.

Operations at the Oroville Complex are governed by separate legal authorizations. A Federal Energy Regulatory Commission (FERC) license, FERC License 2100, governs the Oroville Complex. In addition, parties to the FERC relicensing process executed a Settlement Agreement in March 2006 through which the parties agreed that performance under the Agreement would fulfill existing statutory and regulatory obligations associated with the Oroville Complex relicensing, except to the extent that situations involving material new information arose in the future. The National Marine Fisheries Service has also issued a final Biological Opinion for the Oroville Complex FERC relicensing. The State Water Resources Control Board also issued a water quality certification on December 15, 2010 for the Oroville Complex. Thus, the Oroville Complex is already covered by existing permits and legal authorities and is not included in the scope of this Project.

Please refer to DEIR Appendix 2D, Section 2D.3 "SWP Zone of Influence" for more information on the treatment of the Oroville Complex.

3.1.4 Oroville Operations and One-Time Water Commitment for Delta Outflow

As described in DEIR Chapter 2, Section 2.3.6.3 "One-Time Commitment for Delta Outflow," the SWP will provide up to 100 thousand acre-feet (taf) of water for additional outflow in the summer or fall (June through September or the October immediately following the end of that water year [WY]) of WY 2025 if it is a Wet or Above Normal WY, as defined by the Sacramento Valley WY type classification. This additional outflow could be used in WY 2025 or October of WY 2026. This additional outflow will be used for the purpose of achieving favorable habitat conditions for Delta Smelt as part of the Summer-Fall Action Plan. The additional outflow will be provided through SWP water stored in Oroville Reservoir. This volume would have otherwise been exported, the operation of which is covered by existing FERC License 2100 and associated governing documents. Instead of exporting at Banks Pumping Plant, that volume of water would be redirected to provide additional outflow. In practice and consistent with authorized FERC operations, the SWP would identify the available water supply in Oroville Reservoir for SWP export, but instead of exporting all of that identified volume, the portion needed to complete the 100-taf contribution to additional outflow would instead be redirected to Delta outflow. Thus, the one-time water commitment for Delta outflow would not affect Oroville Complex operations; only the ultimate downstream use of the water (i.e., export or Delta outflow) would change.

DWR will coordinate with CDFW to determine best strategies for deploying the 100 TAF and hydrological conditions where it would be subject to spill.

3.1.5 Treatment of Coordinated SWP/CVP Operations

The Coordinated Operations Agreement (COA) governs how the SWP and federal CVP share water under their water rights and operate to meet specific water quality and outflow requirements in the Delta. The COA is based on negotiated principles of equitable sharing, arising from the requirement that their operations be coordinated and, as a matter of practical necessity, for two large projects to be able to operate together in a complex tidal estuary.

The long-term operations of the SWP assumes the continued implementation of the COA. The COA calls for periodic review and adjustment as appropriate over time. The 2018 COA Addendum resulted in no substantial change to hydrology and water quality of the Delta or other affected waterways. The Proposed Project would not alter the terms or provisions of the COA. DWR will continue to coordinate with Reclamation regarding SWP and CVP operations following project approval.

The Proposed Project identifies operations that are applicable to the SWP, not to the CVP. Although the SWP and CVP will continue to have many consistent operational requirements pursuant to applicable legal requirements, the Project identifies some operations that would be SWP-only obligations under the requested California Endangered Species Act Incidental Take Permit, such as White Sturgeon Protection Measures and the one-time water commitment for Delta outflow. DWR would take appropriate action so these actions would not negatively affect CVP operations, such as seeking agreement with Reclamation regarding adjustments to water accounting mechanisms.

DWR considered whether the long-term operations of the SWP would result in a reasonably foreseeable response by Reclamation that could result in changes in CVP operations that would cause environmental impacts outside the SWP zone of influence. As explained in DEIR Appendix 2D, although the SWP and CVP coordinate operations, DWR and Reclamation independently decide how to operate the individual projects to best meet applicable requirements. The COA does not define what actions DWR or Reclamation will take in any given set of circumstances and DWR does not control CVP operations. These decisions occur in real time, allowing operators to account for constantly changing conditions such as tides, accretions and depletions, and hydrology. Therefore, whether Reclamation would alter its operations of the CVP in response to the Proposed Project in a way that would cause environmental impacts outside of the SWP zone of influence is speculative. Under long-standing CEQA principles, speculative analysis is considered not to be meaningful or informative, and thus is not required.[5]

Further, although the SWP and CVP systems are operated in coordination, DWR and Reclamation have operational control over separate components, which they independently decide how best to operate. For example, DWR essentially has two "knobs" in operating the SWP: (1) releases from the Oroville Complex, and (2) exports from the SWP Delta facilities (see discussion above). Reclamation, on the other hand, controls operation of the CVP through releases at multiple reservoirs, including Shasta, Trinity, and Folsom, through flows in other conveyances, like the Delta Cross Channel, and CVP exports. Reclamation has discretion and manual control over multiple potential combinations of actions with respect to operation of the CVP. The EIR does not try and predict how Reclamation will exercise this discretion in real time because such an effort would be speculative. For this reason, the EIR does not analyze Reclamation's operation of CVP facilities, including releases from Lake Shasta, Trinity Lake, etc. and the potential effects of any changes in federal operations on hydrology, water quality and aquatic biological resources.

3.1.6 Treatment of COA Addendum

DWR and Reclamation operate the SWP and CVP pursuant to the COA, which governs how the SWP and CVP share water under their water rights and operate to meet specific water quality and outflow requirements in the Delta. The COA does not establish any of the regulatory requirements applicable to the SWP and CVP.

DWR executed the Addendum to the COA (COA Addendum) with Reclamation on December 12, 2018. The COA Addendum is not a part of this project. On December 14, 2018, DWR filed a Notice of Exemption (NOE) with the State Clearinghouse covering the COA Addendum, citing California Public Resources Code 21169 and CEQA Guidelines 15261(a).

This EIR incorporates the COA (including the 2018 COA Addendum) in the baseline environmental conditions. Please see Common Response 1, "CEQA Environmental Baseline," for more information regarding the conditions included in the baseline.

[5] See CEQA Guidelines, § 15145; *Rodeo Citizens Assn. v. County of Contra Costa* (2018) 22 Cal.App.5th 214, 225-226.

Chapter 3.2
Common Response 2: CEQA Environmental Baseline

3.2.1 Overview

For a detailed discussion of the California Environmental Quality Act (CEQA) baseline used in the Draft Environmental Impact Report (DEIR), please refer to DEIR Chapter 3, "Scope of Analysis," Section 3.3, "Environmental Baseline."

An EIR must include a description of the physical conditions in the project's vicinity, often referred to as the "baseline." Lead agencies refer to the baseline when determining whether a project's impact is significant. Pursuant to CEQA Guidelines 15125(a), the baseline should generally consist of conditions that exist at the time the Notice of Preparation (NOP) is published. Where existing conditions change or fluctuate over time and where necessary to provide the most accurate picture practically possible of the project's impacts, a lead agency may define existing conditions by referencing historic conditions or conditions expected when the project becomes operational, or both, that are supported with substantial evidence. The purpose of this requirement is to give the public and decision makers the most accurate and understandable picture practically possible of the project's impacts.

The purpose of an EIR is to analyze the potential effects of changes in the physical environment caused by a proposed project compared to baseline conditions. Environmental problems that already exist are part of the baseline conditions, and the EIR analyzes whether changes to those conditions caused by a proposed project are considered significant under CEQA.

As explained in DEIR Chapter 3, the baseline used in this EIR consists of the physical conditions that existed at the time of the NOP was published on June 16, 2023 plus the Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project (Yolo Notch Project). Modeling was used to identify the baseline by incorporating existing operational requirements and conditions affecting the resources analyzed in the EIR, rather than using an actual snapshot of actual conditions on June 16, 2023 plus the Yolo Notch Project.

Environmental conditions relevant to the Proposed Project, specifically flows and hydrologic conditions, fluctuate regularly, so a snapshot of conditions that existed at a single point in time would not reflect actual conditions or provide an appropriate basis for analyzing impacts. The baseline also needed to capture variations in existing conditions, including different water year types. The modeling is generally based on data spanning several years to account for such fluctuations and the variations in the types of impacts that could occur under different scenarios. The modeling also includes conditions, agreements, and regulations that determine how the SWP is currently operated see Appendix 4A, "Model Assumptions", Attachment 1 "Model Assumptions", for a comprehensive discussion on assumptions for the baseline conditions.

3.2.2 Treatment of Historical Conditions

Some commenters have suggested that the proper baseline for the EIR should have been conditions that existed prior to the commencement of the State Water Project (SWP). Similar contentions have been rejected by the courts. For example, in *Citizens for East Shore Parks v. California State Lands Commission*,[1] the court rejected the notion that an EIR for a 30-year lease renewal for a marine terminal should have included an environmental baseline that assumed the absence of terminal facilities that had been in place for many decades. As the court explained, "[t]he plaintiffs claim the baseline here should reflect conditions that have not existed at the locale for more than a century. This is so, say plaintiffs, because if the baseline does not exclude current conditions, there will never be full environmental review of the marine terminal, since it predates CEQA."[2] In rejecting this contention, the court reasoned that "neither the statute, nor any CEQA case, supports plaintiffs' revisionist approach to the baseline. To the contrary, the CEQA Guidelines require a 'description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation [of an EIR] is published' and specify '[t]his environmental setting will normally constitute the baseline….' (CEQA Guidelines 15125, subd. (a), italics added.) The cases further make clear the baseline must include existing conditions, even when those conditions have never been reviewed and are unlawful."[3] As another court said in another case, "[t]his baseline principle means that a proposal to continue existing operations without change would generally have no cognizable impact under CEQA."[4]

Here, the SWP was already lawfully in place and operational at the time CEQA was enacted in 1970. The SWP is thus considered an "ongoing project" for purposes of CEQA Guidelines 15261. CEQA documents assessing changes in SWP operations therefore must focus solely on modifications with the potential to cause new significant environmental effects above and beyond those associated with ongoing operations.

As these principles make clear, CEQA is not a remedial environmental statute by which public agencies are charged with enhancing or improving existing conditions from an environmental standpoint.

Rather, CEQA is focused on minimizing new environmental harm going forward in time. In this respect, CEQA differs from other environmental statutory schemes in which statutory objectives include improvements over existing conditions (e.g., air quality laws that address means of reducing existing air pollution).

3.2.3 Treatment of Yolo Notch Project

The Yolo Notch Project is a joint project between the California Department of Water Resources (DWR) and U.S. Bureau of Reclamation (Reclamation) that works to reconnect the floodplain for fish during the winter season and improve connectivity within the bypass and to the Sacramento River. The project provides seasonal inundation that mimics the natural process of the Yolo Bypass floodplain. For more information, see the Reclamation website: https://www.usbr.gov/mp/bdo/yolo-bypass.html.

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[1] (2011) 202 Cal.App.4th 549, 558-561.

[2] *Id.* at p. 560 (footnote omitted).

[3] *Ibid.*

[4] *North Coast Rivers Alliance v. Westlands* Water District (2014) 227 Cal.App.4th 832, 872-873.

The Yolo Notch Project is operated seasonally between the periods of November 1 and March 15 each year. It had not yet been operated as of June 16, 2023, the date that DWR issued the NOP of this EIR. Construction on the Yolo Notch Project began in Fall 2021, continued through Summer 2024, and is expected to be completed by November 1, 2024. Limited operations are anticipated to commence and then ramp up as final entitlements are received during Winter 2024–2025. The Yolo Notch Project will be operational for nearly the entire period of the Proposed Project and other projects have already included the Yolo Notch Project as an assumption for modeling purposes. DWR determined that inclusion of the Yolo Notch Project in all modeling runs for this Project would provide the most accurate and understandable picture practically possible of impacts. Therefore, the baseline includes operation of the Yolo Notch Project.

3.2.4 Treatment of Interim Operations Plan

In 2019, the U.S. Fish and Wildlife Service and National Marine Fisheries Service issued biological opinions under Section 7 of the federal Endangered Species Act covering SWP and Central Valley Project operation. As a part of ongoing litigation, a federal court has issued orders temporarily modifying certain Endangered Species Act operational requirements for recent years. The operations ordered by the court are referred to as interim operations plans (IOPs). The 2023 IOP was in effect when DWR issued the NOP on June 16, 2023 and altered what was required for spring outflow purposes. To reflect the operational requirements in the Project area that existed at the time of the NOP, DWR incorporated spring outflow from the 2023 IOP spring outflow in the baseline conditions in addition to the other applicable endangered species requirements set forth in the 2019 biological opinions and the 2020 incidental take permit.

DWR acknowledges that inclusion of 2023 IOP spring outflow requirement in the IOP deviates from Reclamation's modeling of "no action" in its National Environmental Policy Act (NEPA) document. The CEQA definition of "baseline" is not the same as the NEPA definition of "no action alternative" so it is logical that these modeling runs would not be identical. DWR understands, however, that the public might be interested in how the analyses described in each document compare. Therefore, DWR has developed an additional modeling run in coordination with Reclamation, CalSim Study 4 that reflects Reclamation's NEPA "no action alternative". DWR incorporated CalSim Study 4 in this EIR in Appendix 4E for informational purposes, but it was not incorporated for the purpose of analyzing Project effects. The CEQA "baseline," represented by CalSim Study 1, was used for the CEQA analysis in this EIR.

Chapter 3.3
Common Response 3: The CEQA Process

3.3.1 Substantive Mandate of CEQA

Although the California Environmental Quality Act (CEQA) is primarily a procedural statute, it does contain a "substantive mandate" requiring public agencies to refrain from approving projects with significant environmental effects if "there are feasible alternatives or mitigation measures" that can substantially lessen or avoid those effects.[1] A basic purpose of CEQA is to "[p]revent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds the changes to be feasible."[2] As the Legislature found and declared with respect to CEQA:

> [I]t is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by [CEQA] are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects. The Legislature further finds and declares that in the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof. (Pub. Resources Code, § 21002)

As the California Supreme Court has explained, "alternatives and mitigation measures have the same function—diminishing or avoiding adverse environmental effects. The chief goal of CEQA is mitigation or avoidance of environmental harm."[3]

3.3.2 Procedural Requirements Effectuating Substantive Policy

Among the purposes of environmental review are "(a) Sharing expertise, (b) Disclosing agency analyses, (c) Checking for accuracy, (d) Detecting omissions, (e) Discovering public concerns, and (f) Soliciting counter proposals."[4] These purposes are served through lead agencies' solicitation of input from both the general public and from agencies with authority over the project and with technical scientific expertise.

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[1] California Native Plant Society v. City of Santa Cruz (2009) 177 Cal.App.4th 957, 978 (CNPS), quoting County of San Diego v. Grossmont–Cuyamaca Community College Dist. (2006) 141 Cal.App.4th 86, 98.

[2] CEQA Guidelines, § 15002, subd. (a)(3); see also id. at § 15021, subd. (a) ("CEQA establishes a duty for public agencies to avoid or minimize environmental damage where feasible").

[3] Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 403.

[4] CEQA Guidelines, § 15200.

A number of procedural requirements effectuate the substantive mandate of CEQA while involving the public and agencies other than lead agencies in decision-making affecting the environment. One crucial step is to consider whether a proposed project requires an environmental impact report (EIR) because there is "substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment[.]"[5] This "low threshold" evidentiary standard for triggering the obligation to prepare an EIR is commonly known as the "fair argument" standard. It provides that "if a lead agency is presented with a *fair argument* that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect."[6] In this context, "substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact."[7] It is possible that, under this "low threshold" trigger, a lead agency may prepare an EIR and ultimately conclude that substantial evidence supports the conclusion that a proposed project will *not* have any significant environmental effects. This was the outcome for the Proposed Project.

The California Department of Water Resources (DWR) determined that an EIR was required under the fair argument standard based on DWR's assessment of its factual record as it existed on June 16, 2023, when DWR published the Notice of Preparation (NOP) for the Proposed Project. DWR was aware that its proposal was likely to be of great public interest, and that the preparation of a proposed negative declaration would be controversial and perhaps less informative in light of the number of technical comments the Proposed Project was likely to inspire through the public review process.

In general, where the lead agency determines that an EIR is required for a proposed project, the agency must take several additional procedural steps to effectuate CEQA's substantive mandate: (i) undertake the "scoping" process to obtain input from responsible and trustee agencies, as well as from the general public; (ii) prepare a Draft Environmental Impact Report (DEIR) meeting the CEQA requirements for such documents, taking into account input received through scoping; (iii) publish a DEIR that includes, among many other things, a reasonable range of potentially feasible alternatives; (iv) accept input from responsible agencies, trustee agencies, other agencies, and the general public; (v) prepare a Final Environmental Impact Report (FEIR) meeting the CEQA requirements for such documents, taking into account input received through comments on the DEIR; and (v) proceed to decision-making against the backdrop of CEQA's substantive mandate. For some projects, a lead agency's decision-making process may involve an application for regulatory approval from an agency that functions as a responsible agency for CEQA purposes. In such circumstances, the lead agency's action will likely reflect input received through scoping and on the DEIR from that responsible agency.

In a process commonly known as "scoping,"[8] a lead agency typically determines the proper "scope" of an EIR by consulting with responsible agencies, trustee agencies, the Governor's Office of Planning and Research (OPR), and any federal agency whose approval or funding is needed for the proposed project.[9] According to the CEQA Guidelines, "[s]coping has been helpful to agencies in identifying the

[5] Pub. Resources Code, § 21080, subd. (d).

[6] CEQA Guidelines, § 15064, subd. (f)(1) (italics added); No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 83.

[7] Pub. Resources Code, § 21080, subd. (e)(1).

[8] See CEQA Guidelines, § 15083.

[9] Pub. Resources Code, § 21080.4, subd. (a); CEQA Guidelines, § 15082.6. CEQA also encourages ongoing informal

range of actions, alternatives, mitigation measures, and significant effects to be analyzed in depth in an EIR and in eliminating from detailed study issues found not to be important."[10] In addition, "[s]coping has been found to be an effective way to bring together and resolve the concerns of affected federal, state, and local agencies, the proponent of the action, and other interested persons including those who might not be in accord with the action on environmental grounds."[11]

The NOP is the procedural device used to initiate formal interagency dialogue. Once the lead agency decides to prepare an EIR, the lead agency must send a copy of its NOP to all responsible agencies, trustee agencies, OPR, and "federal agenc[ies] involved in approving or funding the project."[12] The State Clearinghouse ensures that the involved state agency or agencies reply to the NOP within the required time.[13] The NOP also must be sent to "any person who has filed a written request for notices with either the clerk of the governing body or, if there is no governing body, with the director of the agency."[14]

After receiving the NOP, each responsible agency, each trustee agency, and OPR has 30 days in which to respond.[15] The responses must contain specific details regarding how, in terms of scope and content, the EIR should treat environmental information germane to the statutory responsibilities of the responsible agency or other public agencies consulted. Each response must state whether the responding agency is a responsible agency, a trustee agency, or some other public agency.[16]

The DEIR, as published by the lead agency, reflects input received from responsible agencies, trustee agencies, various other agencies, and the general public. Among the required topics for the document are a project description and a "a reasonable range of potentially feasible alternatives."[17] In the project description, "[t]he precise location and boundaries of the proposed project shall be shown on a detailed map, preferably topographic," and should provide (among other things) "[a] general description of the project's technical, economic, and environmental characteristics, considering the principal engineering proposals if any and supporting public service facilities."[18] "There is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason."[19]

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consultation between lead agencies and responsible and trustee agencies. (See, e.g., Pub. Resources Code, § 21080.3.)

[10] CEQA Guidelines, § 15083, subd. (a); see also Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal. 3d 553, 569.

[11] CEQA Guidelines, § 15083, subd. (b).

[12] CEQA Guidelines, § 15082, subd. (a); Pub. Resources Code, § 21080.4.

[13] CEQA Guidelines, § 15082, subd. (d).

[14] Pub. Resources Code, § 21092.2.

[15] Pub. Resources Code, § 21080.4, subd. (a); CEQA Guidelines, § 15082, subd. (b).

[16] CEQA Guidelines, § 15082, subds. (b)(1)–(b)(3).

[17] CEQA Guidelines, § 15126.6, subd. (a).

[18] CEQA Guidelines, § 15124, subds. (a),(c).

[19] CEQA Guidelines, § 15126.6, subd. (a).

In preparing its FEIR, the lead agency must respond in writing to timely "comments raising significant environmental issues[.]"[20] Before approving a project for which an EIR has been required, a lead agency decisionmaker must (i) certify a FEIR,[21] (ii) adopt CEQA Findings addressing any significant effects of the proposed project,[22] (iii) adopt a mitigation monitoring or reporting program for any adopted mitigation measures,[23] and, if necessary, (v) adopt a statement of overriding considerations. This last step is only needed where the project would have significant unavoidable environmental effects, despite all feasible mitigation and the consideration of potentially feasible alternatives.[24]

3.3.3 CEQA Requirements Regarding the Scope of Alternatives

For a detailed discussion of the alternatives analysis in the DEIR, please refer to DEIR Chapter 11, "Alternatives to the Proposed Project."

Pub. Resources Code, Section 21100(b)(4) states that an EIR shall include a detailed statement setting forth alternatives to the project. Under the CEQA Guidelines, the range of alternatives to the proposed project should include those that could feasibly accomplish most of the basic objectives of the project and could avoid or substantially lessen one or more significant effects.[25] In this DEIR, however, the Proposed Project does not result in significant effects, thus the need to lessen such effects does not exist. Nevertheless, the DEIR discusses three alternatives to the Proposed Project, in addition to the No Project Alternative. The DEIR compared the potential environmental effects of the Proposed Project to the potential effects of each alternative, in relation to the Baseline Conditions.

3.3.4 "Reasonable Range of Alternatives"

Under the CEQA Guidelines, the lead agency must consider a reasonable range of alternatives that would feasibly attain all or most of the project objectives but would avoid or substantially lessen any of the significant impacts of the proposed project.[26] An EIR need not consider all potential alternatives to the project. Rather, CEQA requires that the EIR discuss only a "reasonable range" of alternatives.[27] CEQA does not require that the EIR study specific alternatives proposed by the public or other agencies.[28] The lead agency must make a good faith effort to identify and study a reasonable range of appropriate alternatives to the proposed project.[29]

The requirements regarding the selection of alternatives under CEQA are laid out in CEQA Guidelines Section 15126.6.

Subdivision (a) of that section provides:

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[20] CEQA Guidelines, § 15088, subd. (a).
[21] CEQA Guidelines, § 15090.
[22] CEQA Guidelines, § 15091, subd. (a).
[23] CEQA Guidelines, § 15097.
[24] CEQA Guidelines, § 15093.
[25] CEQA Guidelines, § 15126.6, subd. (a).
[26] CEQA Guidelines, § 15126.6, subd. (a).
[27] CEQA Guidelines, § 15126.6, subd. (a).
[28] Center for Biological Diversity v. Department of Fish and Wildlife (2015) 234 Cal.App.4th 214, 256.
[29] City of Maywood v. Los Angeles Unified Sch. Dist. (2012) 208 Cal.App.4th 362, 420.

> Alternatives to the Proposed Project. An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. An EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decision making and public participation. An EIR is not required to consider alternatives which are infeasible. The lead agency is responsible for selecting a range of project alternatives for examination and must publicly disclose its reasoning for selecting those alternatives. There is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason.

Subdivision (b) provides:

> Because an EIR must identify ways to mitigate or avoid the significant effects that a project may have on the environment (Public Resources Code §21002.1), the discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly.

Subdivision (c) further provides:

> Selection of a range of reasonable alternatives. The range of potential alternatives to the proposed project shall include those that could feasibly accomplish most of the basic objectives of the project and could avoid or substantially lessen one or more of the significant effects. The EIR should briefly describe the rationale for selecting the alternatives to be discussed. The EIR should also identify any alternatives that were considered by the lead agency but were rejected as infeasible during the scoping process and briefly explain the reasons underlying the lead agency's determination. Additional information explaining the choice of alternatives may be included in the administrative record. Among the factors that may be used to eliminate alternatives from detailed consideration in an EIR are: (i) failure to meet most of the basic project objectives, (ii) infeasibility, or (iii) inability to avoid significant environmental impacts.

And lastly, subdivision (f) emphasizes the "rule of reason" applicable to the selection of alternatives:

> Rule of reason. The range of alternatives required in an EIR is governed by a "rule of reason" that requires the EIR to set forth only those alternatives necessary to permit a reasoned choice. The alternatives shall be limited to ones that would avoid or substantially lessen any of the significant effects of the project. Of those alternatives, the EIR need examine in detail only the ones that the lead agency determines could feasibly attain most of the basic objectives of the project. The range of feasible alternatives shall be selected and discussed in a manner to foster meaningful public participation and informed decision making.

Under these principles, alternatives to be included in an EIR must: (1) be potentially feasible, (2) attain most of the basic objectives of the project, and (3) avoid or substantially lessen any of the significant effects of the project. Under CEQA, a lead agency may structure its alternatives analysis around a reasonable definition of a fundamental underlying purpose, and need not study alternatives that cannot achieve that basic purpose.[30] An EIR need not consider alternatives that are infeasible.[31] CEQA defines "feasible" as capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors.[32]

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[30] In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings (2008) 43 Cal.4th 1143, 1165.

[31] CEQA Guidelines, § 15126.6, subd. (a).

[32] Pub. Resources Code, § 21061.1; CEQA Guidelines, § 15364.

Because CEQA establishes no legal imperative as to the scope of alternatives to be analyzed in an EIR, there is no set number of alternatives that must be analyzed to fulfill the requirements of CEQA.[33] Rather, as stated in the CEQA Guidelines and supported by abundant CEQA case law,[34] the range of alternatives required in an EIR is governed by the "rule of reason," which requires the EIR to set forth only those alternatives necessary to permit a reasoned choice.[35]

Furthermore, according to CEQA case law, where the alternatives analyzed in the EIR allow for a wide range of choices with varying degrees of environmental impacts, the document may support the ultimate approval not only of the fully developed alternatives, but also what might be called hybrid alternatives whose features and impacts occur within the analytical continuum between the least-impactful and most-impactful alternatives.[36]

3.3.5 Purpose of Alternatives When There Are No Significant Impacts

Although both the Legislature, in enacting CEQA, and the California Natural Resources Agency, in promulgating the CEQA Guidelines, assumed that projects requiring EIRs would generally cause one or more significant environmental effects, and thereby required that *all* EIRs discuss in some fashion alternatives that could reduce the severity of such effects, there are instances in which proposed projects for which EIRs are prepared actually do *not* cause any significant environmental effects. This typically occurs where a project likely would not qualify for a negative declaration or mitigated negative declaration because substantial evidence suggests that significant effects *may* occur. EIRs are required in such circumstances[37] even though once a lead agency opts to undertake an EIR, a lead agency may ultimately find itself persuaded by substantial evidence that significant effects would *not* occur. That is what happened for the Proposed Project. The Project was not one for which *all* conceivable substantial evidence would show an absence of significant effects. Thus, DWR exercised prudence to prepare an EIR despite its finding, supported by substantial evidence, that the Proposed Project would not cause any significant effects. DWR issued its NOP in June 2023 based on this sense of the potential effects of the Proposed Project.

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[33] See, e.g., Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553, 566; Save San Francisco Bay Association v.
San Francisco Bay Conservation and Development Commission (1992) 10 Cal.App.4th 908, 919; Mann v. Community
Redevelopment Agency (1991) 233 Cal.App.3d 1143, 1151.

[34] See, e.g., Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553, 566; In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings (2008) 43 Cal.4th 1143; California Native Plant Soc. v. City of Santa Cruz (2009) 177 Cal.App.4th 957, 980.

[35] CEQA Guidelines, §15126.6, subds. (c), (f).

[36] See, e.g., Village Laguna of Laguna Beach, Inc. v. Board of Supervisors (1982) 134 Cal.App.3d 1022, 1028–1029; California Oak Foundation v. Regents of University of California (2010) 188 Cal.App.4th 227, 274-277; Cherry Valley Pass Acres and Neighbors et al. v. City of Beaumont (2010) 190 Cal.App.4th 316, 353-356; South of Market Community Action Network v. City and County of San Francisco (2019) 33 Cal.App.5th 321, 334-336.

[37] Pub. Resources Code, § 21080, subd. (d).

One of the primary purposes of an EIR, under any circumstance, is to serve as an informational document.[38] Indeed, an "important purpose" of an EIR is to "provid[e] other agencies and the public with an informed discussion of impacts, mitigation measures, and alternatives."[39] To satisfy the requirements of CEQA, an EIR must include a reasonable range of alternatives that would "feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives."[40] CEQA also requires that an EIR analyze a No Project Alternative.[41] These purposes can still be served even where a proposed project would not cause any significant environmental effects. For these reasons, comments that contend that DWR violated CEQA or otherwise acted inappropriately in including alternatives within the EIR are incorrect.

The DEIR evaluates the applicable resource areas and determines that, with respect to each resource area, the Proposed Project has either no impact or a less-than-significant impact on the environment. Because the Project would not result in any significant impacts, no mitigation is required under CEQA. Consistent with a literal application of the law, the DEIR also analyzes three project alternatives in addition to the No Project Alternative. Pursuant to CEQA, the DEIR includes sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the Project. Importantly, under CEQA, an EIR need not address alternatives at the same level of detail as a proposed project. Rather, "[t]he EIR shall include sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project. A matrix displaying the major characteristics and significant environmental effects of each alternative may be used to summarize the comparison."[42]

The discussion of alternatives in DEIR Chapter 11 included more than enough information and analysis for a meaningful comparison of the alternatives with the Proposed Project. The DEIR contained large amounts of analysis and quantitative information (including numerous tables and graphics), allowing readers and decision-makers to assess the comparative merits of the alternatives against those of the Proposed Project. Key topics involving effects on California Endangered Species Act (CESA)-listed species are addressed in considerable detail, including hydrology, surface water quality, and aquatic resources.

The alternatives analysis is also intended to cover the range of actions that may be considered by the California Department of Fish and Wildlife (CDFW) as a part of the CESA incidental take permit process. By embodying scenarios that might reduce the environmental effects of the Proposed Project (even though they were not significant), these alternatives serve the purposes of CEQA.

[38] Banning Ranch Conservancy v. City of Newport Beach (2017) 2 Cal.5th 918, 940.

[39] Ibid.

[40] CEQA Guidelines, § 15126.6, subd. (a). See also Pub. Resources Code, § 21100, subd. (b)(4) (EIRs shall include "Alternatives to the proposed project").

[41] CEQA Guidelines, § 15126.6, subd. (e).

[42] CEQA Guidelines, § 15126.6, subd. (d); see also Laurel Heights Improvement Association v. The Regents of the University of California (1988) 47 Cal. 3d 376, 406.

3.3.6 Public Participation in the Development of Alternatives

Although an NOP need not identify any proposed alternatives to a proposed project, the development or refinement of alternatives frequently takes place during the CEQA scoping process. The scoping process invites public comment during a public review period. As part of that process, DWR, pursuant to CEQA Guidelines Section 15063, Subdivision (c)(3), used the conclusions in the initial study to focus the analysis in the DEIR. Pursuant to CEQA Guidelines Section 15082, DWR also published a NOP on June 16, 2023 and provided copies of the NOP to (1) local, state, and federal agencies; (2) city and county clerk offices; and (3) other interested parties. The NOP was circulated for comment for 31 days, ending on July 17, 2023. The NOP included a description of the Project background, Project objectives, a description of the Proposed Project, and a summary of environmental topics to be considered in the DEIR.

A virtual public scoping meeting was held on June 27, 2023.[43] The purpose of the public scoping meeting was to provide a forum for the public to learn about the Proposed Project and make verbal and written comments on the proposed scope and content of the DEIR.

Numerous comments were received in response to the NOP that was issued at the onset of this DEIR preparation. Many of these comments identified various issues, including technical questions, procedural inquiries, and some matters that were found to be outside the scope of this analysis. The public and other agencies raised issues relating to the alternatives analysis, including alternatives that incorporate actions to reduce demand for water from the Sacramento–San Joaquin Delta and/or actions to reduce impacts on fish species. Comments received in response to the NOP were considered in the preparation of the DEIR.

There is no requirement in CEQA or the CEQA Guidelines that the project description in an EIR be an exact match to the proposed project as described in the NOP. Also, indications of possible analytical methodology in an NOP should not be treated as binding on a lead agency if new information emerges later suggesting the need for a change of approach. The NOP is prepared in the absence of formal input from responsible and trustee agencies, and is designed to facilitate such input. A project might be somewhat conceptual at the time of the NOP. For this reason, the NOP need only include a relatively general description of the project, focusing on its location and its probable environmental effects.[44]

A key goal of the NOP is to "provide the responsible and trustee agencies, and the Office of Planning and Research, and county clerk with sufficient information describing the project and the potential environmental effects to enable the responsible agencies to make a meaningful response."[45] The solicited agencies' responses should include "specific detail about the scope and content of the environmental information related to the responsible or trustee agency's area of statutory responsibility that must be included in the DEIR."[46] Such information should identify the "significant environmental issues and reasonable alternatives and mitigation measures that the responsible or trustee agency, or the Office of Planning and Research, will need to have explored in the DEIR."[47]

[43] See CEQA Guidelines, § 15083.
[44] CEQA Guidelines, § 15082, subd. (a)(1).
[45] CEQA Guidelines, § 15082, subd. (a).
[46] CEQA Guidelines, § 15082, subd. (b).
[47] CEQA Guidelines, § 15082, subd. (b)(1)(A).

After receiving input from these other agencies, and from the public at large, lead agencies are free, as they prepare their DEIRs, to make reasonable modifications to the proposed project as set forth in the NOP. Such changes are to be encouraged where the input received from other agencies and the public has allowed a lead agency to formulate its proposed project in more refined and sophisticated terms than was possible earlier. Thus, some variation is allowed between what a lead agency expects to address in an EIR at the time it issues an NOP and what the lead agency actually addresses in the DEIR it publishes.

Some reasonable level of project evolution is to be expected based on the scoping and following environmental analysis process. Such evolution may be especially likely where, as here, the lead agency, as applicant for a regulatory approval, maintains periodic informal contact with a responsible agency poised to act as decisionmaker for that regulatory approval. Changes are especially likely to arise where, as here, the agency functioning as the lead agency is the applicant for a permit and one of the responsible agencies is the decision-maker for the lead agency's permit application. In such instances, the lead agency does not control the final form of the permit to be issued by the responsible agency functioning as decision-maker. Rather, the responsible agency (here, CDFW) controls the final outcome, often based on factors other than the general CEQA principle that significant environmental effects should be mitigated where feasible. Here, CDFW's ultimate decision will be based in part on CEQA considerations but in greater part on CESA requirements.

Chapter 3.4
Common Response 4: CEQA and CESA Legal Standards

3.4.1 Overview

[Placeholder] For a detailed discussion of the existing regulatory setting, please refer to Draft Environmental Impact Report (DEIR) Chapter 2, "Project Description," Section 2.2, "Existing Regulations," and Section 7.2, "Regulatory Setting" (for Tribal Cultural Resources).

The Proposed Project includes proposed changes to the long-term operation of State Water Project facilities and application for an incidental take permit (ITP) issued by the California Department of Fish and Wildlife (CDFW) for long-term operations. As stated in DEIR Chapter 1, "Introduction," the California Department of Water Resources (DWR) is the lead agency for compliance with the California Environmental Quality Act (CEQA), though CDFW is expected to rely on this Environmental Impact Report (EIR) when issuing a decision on DWR's ITP application. Thus, CDFW's role under CEQA is that of a responsible agency.[1]

The primary purpose of this EIR is to provide DWR, as the lead agency, and the public with sufficient information about the Proposed Project, its potential environmental effects, and the ways that those effects can be minimized, whether through mitigation measures or project alternatives, so that DWR can make an informed and reasoned decision on whether to approve the Project.[2] Similarly, the EIR is intended to provide CDFW, as a responsible agency, with adequate information about the parts of the Project that CDFW is responsible for, the potential environmental effects of those parts of the Project, and the way that those effects can be minimized. DWR consulted with CDFW as a responsible agency under CEQA during the CEQA process and CDFW received the DEIR for review and comment. Additionally, CDFW will review the EIR, along with the information submitted in DWR's ITP application, to determine if DWR take that is incidental to the long-term operation of the State Water Project will meet the legal standards under CESA.[3] CEQA does not limit or restrict the power or authority of any public agency in the enforcement or administration of any provision of law that the agency is specifically permitted or required to enforce or administer.[4]

[1] See CEQA Guidelines, § 15096; Cal. Code Regs., tit. 14, div. 1, § 783.3.

[2] Pub. Resources Code, § 21061; CEQA Guidelines, § 15003.

[3] CEQA Guidelines, § 15096; Cal. Code Regs., tit. 14, § 783.4.

[4] Pub. Resources Code, § 21174.

3.4.2 Standards of Judicial Review for CEQA and CESA Determinations

The standard of judicial review in a CEQA action is abuse of discretion.[5] "An agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence. [Citation.] Judicial review of these two types of error differs significantly: While [courts] determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements' [Citation], [courts] accord greater deference to the agency's substantive factual conclusions. In reviewing for substantial evidence, the reviewing court 'may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable,' for, on factual questions, our task is 'not to weigh conflicting evidence and determine who has the better argument.' [Citation.]"[6] An abuse of discretion, by itself, is not enough for a court to set aside a CEQA document and the project approvals based on the document. Rather, a *prejudicial* abuse of discretion must be shown.

"Insubstantial or merely technical omissions are not grounds for relief."[7] Instead, a "prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process."[8]

Similarly, "[a] CESA challenge is brought under Code of Civil Procedure § 1094.5."[9] Judicial review "of agency decisions in connection with regulatory approvals is generally one of abuse of discretion. 'Abuse of discretion is established if the respondent [agency] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by substantial evidence.'"[10] Thus, legal challenges to CDFW's decision on DWR's ITP application are generally reviewed under the abuse of discretion standard. CDFW is "entrusted with the statutory obligation of balancing the needs of human populations with those of endangered plants and animals" and is "guided by the expertise of their scientific staff and independent consultants. [Courts] cannot supplant their decisions because we find the views of other experts and other policy options more appealing."[11] However, the interpretation of CESA and its application to undisputed facts present issues of law, reviewed de novo.[12]

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[5] Pub. Resources Code, §§ 21168, 21168.5, 21005.

[6] *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512, quoting *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

[7] *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 463 (*Neighbors for Smart Rail*) (citing *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 485-486.

[8] *Neighbors for Smart Rail*, *supra*, 57 Cal.4th at p. 463, quoting *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712.

[9] *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1029 (*ECOS*).

[10] *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2007) 44 Cal.4th 459, 478 (*EPIC v. CalFire II*), quoting *Sierra Club v. Stat Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236.

[11] *ECOS*, *supra*, 142 Cal.App.4th at p. 1042.

[12] *San Bernardino Valley Audubon Society v. City of Moreno Valley* (1996) 44 Cal.App.4th 593, 600.

3.4.3 CEQA vs. CESA Mitigation Requirements

CEQA and CESA both generally require that public agencies mitigate the harmful environmental effects of proposed projects, though the requirements and standards under the two statutes differ substantially.[13] Because impacts caused by the Proposed Project were determined to be less than significant in the EIR, CEQA does not require mitigation. Because of the different standard imposed under CESA, however, DWR has proposed additional measures as part of its ITP application to fully mitigate impacts from the take of listed species.

3.4.4 CEQA Mitigation Requirements

Under CEQA, an agency may not approve a project with significant environmental impacts if there are feasible mitigation measures (or alternatives) that would substantially lessen the significant impacts. Thus, if an impact is considered significant under CEQA, the agency must mitigate the impact to the extent necessary to render the impact less than significant, unless the agency finds that doing so is not feasible. If an impact is less than significant, either with or without mitigation, an agency is not required to mitigate the impact further, even though some level of adverse environmental change will occur.[14] The goal of mitigation under CEQA is not to eliminate the impact of a proposed project, but to reduce the impact to a less-than-significant level.[15] In assessing the significance of impacts under CEQA, lead agencies normally compare the expected environmental effects of proposed projects against the backdrop of a baseline consisting of the existing environmental setting as it exists at the time of issuance of the Notice of Preparation.[16] See Common Response 2, "CEQA Environmental Baseline."

[13] See Pub. Resources Code, § 21081; Fish & Game Code, § 2081.

[14] CEQA Guidelines, § 15126.4, subd. (a)(3); see *San Franciscans for Responsible Growth v. City and County of San Francisco* (1989) 209 Cal.App.3d 1502, 1517; *North Coast Rivers Alliance v. Marin Municipal. Water Dist.* (2013) 216 Cal.App.4th 614, 649; *Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503, 529 (*Save Panoche Valley*); *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1233.

[15] *Save Panoche Valley*, *supra*, 217 Cal.App.4th at p. 529 see also *San Diego Navy Broadway Complex Coalition v. California Coastal Commission* (2019) 40 Cal.App.4th 563, 606.

[16] CEQA Guidelines, § 15125, subd. (a).

3.4.5 CESA's "Fully Mitigate" Standard

Fish and Game Code, Section 2081(b)(2) requires impacts of the incidental take to be minimized and fully mitigated, and that mitigation measures be capable of successful implementation and roughly proportional to the impact of the take on the species.[17] The California Supreme Court has interpreted this language to require that an applicant "bear no more—but also no less—than the costs incurred from the impact of its activity on listed species."[18] Where various measures are available to meet this obligation, the measures required shall maintain the applicant's objectives to the greatest extent possible. All required measures shall be capable of successful implementation. For purposes of this section only, impacts of taking include all impacts on the species that result from any act that would cause the proposed taking."[19]

3.4.6 Feasible Mitigation and Funding Commitments

Fish and Game Code, Section 2081(b), and California Code of Regulations, Title 14, Section 783.4(a), both require that measures to minimize and fully mitigate impacts of the take must be "capable of successful implementation."[20] The implementing regulations provide additional guidance for determining whether measures are capable of successful implementation, requiring CDFW to "consider whether the measures are legally, technologically, economically and biologically practicable."[21] New measures or measures without an established record of successful implementation may be used where there is a "reasonable basis for utilization and a reasonable prospect of success."[22]

The applicant must also "ensure adequate funding to implement the measures required under the permit to minimize and fully mitigate the impacts of the taking, and to monitor compliance with, and the effectiveness of, the measures."[23] That finding will be upheld, so long as there is substantial evidence in the record before CDFW to support it.[24] As part of the ITP application, DWR has submitted to CDFW both "[a] proposed plan to monitor compliance with the minimization and mitigation measures and the effectiveness of the measures" and "[a] description of the funding source and the level of funding available for implementation of the minimization and mitigation measures."[25]

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[17] In full, subdivision (b)(2) reads: "The impacts of the authorized take shall be minimized and fully mitigated. The measures required to meet this obligation shall be roughly proportional in extent to the impact of the authorized taking on the species. Where various measures are available to meet this obligation, the measures required shall maintain the applicant's objectives to the greatest extent possible. All required measures shall be capable of successful implementation. For purposes of this section only, impacts of taking include all impacts on the species that result from any act that would cause the proposed taking." (See also Cal. Code Regs., tit. 14, § 783.4, subd. (a)(2).)

[18] *EPIC v. CalFire II*, *supra*, 44 Cal.4th at p. 511.

[19] Cal. Code Regs., tit. 15, § 783.4, subd. (a).

[20] The implementing regulations also place the burden to minimize and fully mitigate the impacts of the take on the applicant. (Cal. Code Regs., tit. 14, § 783.4, subd. (a)(2).

[21] Cal. Code Regs., tit. 14, § 783.4, subd. (c).

[22] *Ibid*.

[23] Fish & Game Code, § 2081, subd. (b)(3); Cal. Code Regs., tit. 14, § 783.4, subd. (a)(4).

[24] *ECOS*, *supra*, 142 Cal.App.4th at p. 1044.

[25] Cal. Code Regs., tit. 14, § 783.2, subd. (a).

3.4.7 How CEQA and CESA Address Existing Environmental Conditions

While CEQA's mitigation requirements apply to any significant environmental impacts, CESA requires mitigation for the take of protected species.

Unlike CEQA, under which agencies assess the significance of impacts against the backdrop of existing conditions, CESA allows CDFW to consider the degraded status of existing environmental conditions insofar as they are currently adversely affecting a listed species. In addition to ensuring that the impacts of take are minimized and fully mitigated in a manner that is roughly proportional to the extent of the impact, CDFW may not issue the ITP without considering whether "issuance of the permit would jeopardize the continued existence of the species."[26] The posing of this question, of necessity, requires CDFW to consider the extent to which existing environmental conditions may already be degraded or problematic. This is evident from the fact that CDFW's determination regarding the possibility of jeopardy must be "based on the best scientific and other information that is reasonably available" in light of "the species' capability to survive and reproduce, and any adverse impacts of the taking on those abilities in light of (1) known population trends; (2) known threats to the species; and (3) reasonably foreseeable impacts on the species from other related projects and activities."[27]

Other CESA provisions also reference the need to account for the relationship between existing conditions and listed species. Fish and Game Code Section 2052 states generally that "it is the policy of the state to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat[.]" Fish and Game Code Section 2055 proclaims that "it is the policy of this state that all state agencies, boards, and commissions shall seek to conserve endangered species and threatened species[.]" To conserve in this context means to use "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary."[28] As these passages demonstrate, how well existing conditions protect or sustain a listed species is an important consideration under CESA.

In light of the respective differences in approaches required under CEQA and CESA, it is possible for a lead agency such as DWR to reach different mitigation conclusions under CEQA and CESA for the same activity. Specifically, in assessing impacts on listed species under CEQA in light of existing conditions, the lead agency may find an absence of any significant impacts triggering mitigation obligations under CEQA, but CDFW, in assessing known population trends and known threats to the same species, may still find a need for mitigation under CESA.

[26] Fish & Game Code, § 2081, subd. (c)

[27] *Ibid*.

[28] Fish & Game Code, § 2061

Chapter 3.5
Common Response 5: Delta Reform Act

3.5.1 Overview

This common response discusses a variety of issues related to the Sacramento–San Joaquin Delta Reform Act of 2009 (Delta Reform Act), the Delta Stewardship Council (DSC), and the requirements of the Delta Plan, which the DSC adopted in May 2013. Specific elements of this common response include:

- Application of the Delta Reform Act to California Department of Water Resources (DWR) and to State Water Project (SWP) operations
- Overview of the Delta Plan and requirements for covered actions subject to DSC review for consistency with the Delta Plan
- Purpose and limitations of the California Department of Fish and Wildlife's (CDFW's) 2010 Flow Criteria (Early Actions)
- Delta Reform Act policy goal of "reduced reliance" and the role of water conservation
- A description of the Adaptive Management Program (AMP) proposed as part of the Proposed Project

3.5.2 The Delta Reform Act

In the Delta Reform Act, created by Senate Bill (SB) 1X7, the Legislature declared that the Sacramento–San Joaquin Delta (Delta) "serves Californians concurrently as both the hub of the California water system and the most valuable estuary and wetland ecosystem on the west coast of North and South America."[1] "The economies of major regions of the state depend on the ability to use water within the Delta watershed or to import water from the Delta watershed. More than two-thirds of the residents of the state and more than two million acres of highly productive farmland receive water exported from the Delta watershed."[2] Yet "existing Delta policies are not sustainable."[3]Accordingly, the Delta Reform Act seeks to achieve the sustainable management of the Delta. The Delta Reform Act also established the coequal goals for the Delta of "providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem."[4] These coequal goals must be achieved "in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place."[5] The following objectives, among others, "are inherent in the coequal goals":

[1] Wat. Code, § 85002.
[2] Wat. Code, § 85004.
[3] Wat. Code, § 85001.
[4] Pub. Resources Code, § 29702; Wat. Code, § 85054.
[5] Wat. Code, § 85054.

- Manage the Delta's water and environmental resources and the water resources of the state over the long term
- Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem
- Promote statewide water conservation, water use efficiency, and sustainable water use
- Improve water quality to protect human health and the environment consistent with achieving water quality objectives in the Delta
- Improve the water conveyance system and expand statewide water storage[6]

In light of the environmental challenges facing the Delta and the vital importance of water conveyed through and diverted from the Delta to the state's economy, the Legislature stated that its intentions in enacting the Delta Reform Act were:

> to provide for the sustainable management of the Sacramento-San Joaquin Delta ecosystem, to provide for a more reliable water supply for the state, to protect and enhance the quality of water supply from the Delta, and to establish a governance structure that will direct efforts across state agencies to develop a legally enforceable Delta Plan.[7]

The long-term operations of the SWP described in the Final Environmental Impact Report (FEIR) (Proposed Project) will support the coequal goals. The Proposed Project's purpose is to obtain incidental take authorization from CDFW, pursuant to the California Endangered Species Act (CESA) to allow DWR to continue the long-term operation of the SWP consistent with applicable laws, contractual obligations, and agreements. The Proposed Project will improve water-supply reliability by continuing the operations and improving the operational flexibility of the SWP, and it will protect the Delta ecosystem by protecting fish and wildlife based on the best available scientific information.

The Delta Reform Act also includes a state policy to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency:

> The policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency. Each region that depends on water from the Delta watershed shall 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 supply efforts.[8]

Because the Proposed Project relates only to DWR's state-level operations of existing SWP infrastructure in accordance with existing water rights, the Delta Reform Act's "reduce reliance" policy does not apply to the Proposed Project. The Proposed Project would not directly affect regional efforts to improve "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 supply efforts."[9]

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[6] Wat. Code, § 85020, subds. (a)–(f).
[7] Wat. Code, § 85001, subd. (c).
[8] Wat. Code, § 85021.
[9] Wat. Code, § 85021.

3.5.3 Early Actions Under the Delta Reform Act

The Delta Reform Act required that certain actions be taken in the relative short term by both CDFW (then California Department of Fish and Game) and the State Water Resources Control Board (State Water Board).

Among the "early actions" coming out of the 2009 legislation was the requirement that, within 12 months of the passage of the Act (i.e., by late 2010), CDFW, in consultation with U.S. Fish and Wildlife Service and the National Marine Fisheries Service, and based on the best available science, develop and recommend to the State Water Board "Delta flow criteria and quantifiable biological objectives for aquatic and terrestrial species of concern dependent on the Delta."[10] In August 2010, CDFW (then California Department of Fish and Game) published a document entitled "Quantifiable Biological Objectives and Flow Criteria for Aquatic and Terrestrial Species of Concern Dependent on the Delta."

With this input from CDFW, the State Water Board was required, "pursuant to its public trust obligations, [to] develop new flow criteria for the Delta ecosystem necessary to protect public trust resources." The State Water Board was to "review existing water quality objectives and use the best available scientific information. The flow criteria for the Delta ecosystem shall include the volume, quality, and timing of water necessary for the Delta ecosystem under different conditions."[11] These flow criteria were to be developed "[f]or the purpose of informing planning decisions for the Delta Plan and the [Bay-Delta Conservation Plan]."[12] The State Water Board understood this directive to require the development of proposed flows based solely on biological criteria, with no regard to economic consequences and without regard to existing water rights or the balancing of competing interests that the State Water Board undertakes in making decisions on water rights. In August 2010, the State Water Board completed the "Development of Flow Criteria for the Sacramento–San Joaquin Delta Ecosystem" (State Water Resources Control Board 2010a, 2010b). The final report presented flow criteria to protect the Delta and its ecological resources.

In developing these recommended flows, the State Water Board did not consider the competing needs for water or other public trust resource needs such as the need to manage coldwater resources in tributaries to the Delta. Implementing such a flow would also likely affect water users beyond just Central Valley Plan and SWP south-of-Delta deliveries. More specifically, as explained on page 3 of the final report:[13]

> [n]one of the determinations in this report have regulatory or adjudicatory effect. Any process with regulatory or adjudicative effect must take place through the State Water Board's water quality control planning, water rights processes, or public trust proceedings in conformance with applicable law. In the State Water Board's development of Delta flow objectives with regulatory effect, it must ensure the reasonable protection of beneficial uses, which may entail balancing of competing beneficial uses of water, including municipal and industrial uses, agricultural uses, and other environmental uses. The State Water Board's evaluation will include an analysis of the effect of any changed flow objectives on the environment in the watersheds in which Delta flows originate, the Delta, and the areas in which Delta water is used. It will also include an analysis of the economic impacts that result from changed flow objectives.

[10] Wat. Code, § 85084.5.

[11] Wat. Code, § 85086, subd. (c)(1).

[12] Wat. Code, § 85086, subd. (c)(1).

[13] https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/final_rpt080310.pdf

> Nothing in either the Delta Reform Act or in this report amends or otherwise affects the water rights of any person. In carrying out its water right responsibilities, the State Water Board may impose any conditions that in its judgment will best develop, conserve, and utilize in the public interest the water to be appropriated. In making this determination, the State Water Board considers the relative benefit to be derived from all beneficial uses of the water concerned and balances competing interests.
>
> The State Water Board has continuing authority over water right permits and licenses it issues. In the exercise of that authority and duty, the State Water Board may, if appropriate, amend terms and conditions of water right permits and licenses to impose further limitations on the diversion and use of water by the water right holder to protect public trust uses or to meet water quality and flow objectives in Water Quality Control Plans it has adopted. The State Water Board must provide notice to the water permit or license holder and an opportunity for hearing before it may amend a water right permit or license.

The recommended flow criteria do not have regulatory effect. The Delta Reform Act specifically provides that "[t]he flow criteria shall not be considered predecisional with regard to any subsequent board consideration of a permit…" Rather, the recommended flow criteria provide information to the State Water Board that the State Water Board may use in the development of future flow and water quality objectives and water rights decisions, including updates to the Bay-Delta Plan Update. Although by statute the State Water Board must consider its August 2010 flow recommendations should DWR and the U.S. Bureau of Reclamation seek to amend their existing water rights permits to include new authorized points of diversion, the State Water Board's final August 2010 report makes it clear (on pages 3 and 4) that the State Water Board's ultimate determinations regarding what Delta flow criteria to impose as part of such permit amendment must take into account a variety of factors, including ramifications for "all beneficial uses of water." Thus, there is no legal mandate that the 2010 flow recommendations be translated directly into actual Delta outflows that must be "funded" (with water) from the SWP alone.

The State Water Board is currently updating the 2006 Water Quality Control Plan through two separate plan amendment processes. The State Water Board completed the first plan amendment phase in 2018, but that first-phase amendment has not been implemented and currently is the subject of litigation. The State Water Board has not completed its second plan amendment phase.

DWR will continue to operate the SWP in compliance with the terms and conditions contained in its water rights permits and licenses issued by the State Water Board, including any flow criteria imposed by the State Water Board under those permits and licenses.

For information on the Water Quality Control Plan process please see Common Response 7, "Relationship to Healthy Rivers and Landscapes Program."

3.5.4 The Delta Stewardship Council's Delta Plan

In addition to setting the policies and requiring the reports described above, the Delta Reform Act also created the DSC, which is tasked with furthering the state's coequal goals for the Delta through development of a Delta Plan.[14] The Delta Plan is a comprehensive, long-term resource management plan for the Delta, containing both regulatory policies and recommendations, aimed at furthering the coequal goals and promoting a healthy Delta ecosystem.[15] While the Delta Reform Act and the Delta Plan are often referred to interchangeably, the Delta Reform Act contains a variety of directives for multiple agencies, whereas the Delta Plan, as discussed in more detail below, is limited to regulating "covered actions"—i.e., new "land use action[s] as defined in the [Delta Reform] Act"—undertaken by state or local agencies within the Delta or Suisun Marsh.[16] Covered actions do not include operation of the existing State Water Project. [17]

Under the Delta Reform Act, the state or local agency undertaking an action has discretion to determine whether the action is a covered action as defined by the Act.[18] This determination by the state or local agency is subject to judicial review.[19] Courts must defer to agencies' covered action determinations, however, unless, in light of the entirety of the record before the agency at the time that it made its determination, a reasonable person could not have reached the agency's conclusion.[20]

If an agency determines that a proposed plan, program, or project is not a covered action, that determination is not subject to review by the DSC.[21] If the state or local agency determines that its project does constitute a covered action, then, prior to initiating that action, the agency must prepare a written certification of consistency with detailed findings as to whether the covered action is consistent with applicable Delta Plan policies and must submit that certification to the DSC.[22]

The Delta Plan became effective on September 1, 2013, and is updated periodically by the DSC.

3.5.5 Covered Actions

The DSC and the Delta Plan only regulate "land use action[s]" that qualify as "covered actions."[23] An activity may be a covered action if: (i) it meets specific criteria set forth in the Delta Reform Act, and (ii) it does not fall within a statutory exception.[24]

A covered action is a land use action that "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment", that is

[14] Wat. Code, § 85300, subd. (a), 85302, subd. (a).

[15] Wat. Code, §§ 85059, 85300, subd. (a), 85302, subd. (a).

[16] *Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1042; see also Wat. Code, §§ 85022, 85057.5.

[17] Planning and Conservation League, et al v. Department of Water Resources, et al, etc. (2024) 98 Cal.App.5th 726, 766-67.

[18] CCR, tit. 23, § 5001, subd. (j)(3); see also Delta Stewardship Council Cases (2020) 48 Cal.App.5th 1014, 1042.

[19] CCR, tit. 23, § 5001, subd. (j)(3).

[20] See *Patterson Flying Serv. v. California Dept. of Pesticide Regulation* (2008) 161 Cal.App.4th 411, 426; see also CCR, tit. 23, § 5001, subd. (j)(3).

[21] See Wat. Code, § 85225. 17.

[22] Wat. Code, § 85225. 17.

[23] *Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1042; see also Wat. Code, §§ 85022, 85057.5.

[24] Wat. Code, § 85057.5.

"directly undertaken by any public agency", and "that (i) will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh, (ii) will be carried out, approved, or funded by the state or a local public agency, (iii) is covered by one or more provisions of the Delta Plan, and (iv) will have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta."[25] Significant impact is defined as "a substantial positive or negative impact… that is directly or indirectly caused by a project on its own or when the project's incremental effect is considered together with the impacts of other closely related past, present, or reasonably foreseeable future projects."[26] Projects that are not considered to have a significant impact on the coequal goals generally include ministerial, emergency, other projects exempted from CEQA, and "[t]emporary water transfers of up to one year in duration."[27] If an activity does not meet all of the above criteria it cannot be a covered action for which a consistency determination is required. Additionally, even if an activity meets the above-stated criteria, it cannot be a covered action if it falls within a statutory exemption or if is not a land use action.[28] Covered action does not include, for example, either "[a] regulatory action of a state agency" or "(2) [r]outine maintenance and operation of the State Water Project or the federal Central Valley Project."[29]

Whether an activity is a covered action subject to the requirements of the Delta Plan is a discretionary decision by the agency undertaking the activity, and must be reasonable and made in good faith.[30] In the exercise of its discretion, DWR has made a reasonable and good-faith determination that the long-term operations of the SWP, as analyzed in the FEIR for purposes of CEQA, is not a covered action.[31] The long-term operations will use existing SWP infrastructure to exercise DWR's existing water rights to fulfill existing obligations, in accordance with the requirements of an incidental take permit (ITP) issued by CDFW. The vast majority of the elements that are encompassed within the Proposed Project are consistent with those that have occurred historically under State Water Board Decision 1641 (D-1641), and other state and federal environmental requirements, including constraints derived from CESA and the federal Endangered Species Act (ESA). Together with the long-standing contractual commitments under which DWR operates, the overall regulatory framework created by D-1641, CESA, ESA, and other operative environmental standards and laws sets the physical and legal boundaries within which DWR routinely operates and maintains its facilities. Because of ongoing short-term variations in weather and hydrology, SWP operators are inevitably required to respond to changing conditions in real time in order to continue to achieve the SWP's purpose while still complying with all mandated requirements and modifications thereto.

DWR will continue to evaluate individual elements as they move toward implementation and, should any be determined in the future to meet the definition of a covered action and not fall within an exemption, DWR will submit separate consistency determinations for those elements at the

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[25] *Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1042; PRC, § 21065; Wat. Code, § 85057.5.

[26] CCR, tit. 23, § 5001, subd. (dd).

[27] CCR, tit. 23, § 5001, subd. (dd).

[28] See Wat. Code, § 85057.5.

[29] Wat. Code, § 85057.5; see also *Planning and Conservation League, et al v. Department of Water Resources, et al, etc.* (2024) 98 Cal.App.5th 726, 766-67[Delta Reform Act's exemption for "routine maintenance and operation of the State Water Project . . . exempt[s] the existing State Water Project from a covered action."]

[30] CCR, tit. 23, § 5001, subd. (j)(3); see also *Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1042.

[31] See Planning and Conservation League, et al v. Department of Water Resources, et al, etc. (2024) 98 Cal.App.5th 726, 766-67.

appropriate time. DWR will continue to seek guidance from the DSC in evaluating the individual elements.

3.5.6 Adaptive Management

The AMP, which will be incorporated into the ITP for Long-Term Operations of the SWP, and which is included in DWR's EIR (see Appendix 2B, "Adaptive Management Program,") is consistent with the three-phase and nine-step adaptive management framework adopted by the DSC.[32] The AMP will utilize adaptive management to inform operation of the SWP and related activities, consistent with the requirements of CESA. The Implementing Entities (DWR, CDFW, Reclamation, USFWS, and NMFS) intend to utilize adaptive management to inform the long-term operations of the SWP and the CVP and related activities described as a part of the AMP. The broad purposes of the AMP are to: (1) promote collaborative, participatory, accountable, relevant, innovative, and transparent science and documentation of the decision process; (2) guide (by identifying, prioritizing, and funding) the development and implementation of scientific investigations and monitoring for CVP and SWP management actions necessary to evaluate if management objectives are being achieved; (3) incorporate new information into decision support tools to gain insights to management decisions, actions, and constraints; and (4) maximize the effectiveness of an action toward achieving the management objectives for the operation of the CVP and SWP while considering potential tradeoffs.

The Implementing Entities will establish an Adaptive Management Steering Committee (AMSC) to implement the Program. Members of the AMSC will include one designated sub-director representative and one designated alternative each from DWR, CDFW, Reclamation, USFWS, and NMFS. The AMSC will provide direction and guidance for work under the AMP through Adaptive Management Technical Teams (AMTs), coordinate each agency's participation, and assign existing work groups to the extent possible (for example the Delta Coordination Group) to serve as AMTs, only creating new work groups if needed. The AMSC will utilize AMTs and outside experts (as needed) to develop adaptive management plans or work plans to implement Adaptive Management Actions (AMAs) identified in the AMP and track required monitoring, data collection, research, and publications that inform future decisions. Membership in individual AMTs will be open to technical staff from each of the Implementing Entities. AMTs will also be open to tribes, consultants, interested parties, other local, state, or federal agencies, or academic researchers, as described in the individual team charter. Generally, each AMT will:

- Utilize decision support tools to define relevant uncertainty, develop action alternatives, estimate expected consequences of the alternatives, and evaluate tradeoffs and preferences when making choices between alternative courses of action.
- As requested by the AMSC, prepare necessary documentation for independent reviews, and participate in post-review dialogue.
- Provide data to support the members of the AMSC to track Program implementation.
- Track other monitoring and research relevant to the subject of the AMA.
- Assure transparency in the implementation and investigation of the AMA.

[32] DSC 2015. Delta Plan Appendix 1B, available at http://www.deltacouncil.ca.gov/pdf/delta-plan/2015-appendix-1b.pdf.

- Prepare annual presentations of AMA implementation status to the AMSC and subsequently post presentations on a publicly available website.

The Implementing Entities commit to working collaboratively through the AMSC and AMTs to reach consensus on adaptive management changes (including decisions not to make changes) to the maximum extent feasible, and to elevate any disputes over decisions to the Directors for each Implementing Entity. In the event that resolution of the dispute cannot be reached by the AMSC, review of the issue in dispute may occur through the presentation of alternative viewpoints as part of an annual review, or a separate independent science review. Decision support tools will be used to provide a rational and organized framework for evaluating management objectives relative to each action's goal, as well as any alternative decisions.

Funding is anticipated from a variety of sources, including CDFW, DWR, USFWS, NMFS, and Reclamation. Federal funding is subject to appropriations. CDFW cannot fund DWR permit obligations but may allocate staff time to provide technical assistance and implement the Program.

It is expected that the AMP will require substantial resources to support the required evaluations and independent review. The specific level of support remains to be determined and will likely vary depending on the AMAs conducted each year.

Chapter 3.6
Common Response 6: Other State Efforts

3.6.1 Relation to New Facilities and Other Projects

The Proposed Project addressed in this Environmental Impact Report (EIR)—the long-term operations of the State Water Project (SWP)—does not include constructing or installing any new facilities. Rather, the Project includes operation of existing SWP facilities, modifications to ongoing programs being implemented as part of SWP operations, improvements to specific activities that would enhance protection of special-status fish species, and commitments to support ongoing studies and research on these special-status species to improve the basis of knowledge and management of these species.

As stated in Draft Environmental Impact Report (DEIR) Section 2.3, "Description of the Proposed Project," the California Department of Water Resources (DWR) is requesting an incidental take permit (ITP) that would provide discretion in operational decision-making to comply with the terms of its existing water supply and settlement contracts, and other legal obligations. In addition to these requests, DEIR Section 2.3 specifically identifies actions that are not to be covered by the ITP. The list of uncovered actions includes flood control, Oroville Dam and Feather River operations, execution of SWP contracts, Coordinated Operation Agreement, Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project, Suisun Marsh Habitat Management Preservation and Restoration, Suisun Marsh Preservation Agreement, actions identified in the Drought Toolkit, and Central Valley Project facilities, operations, and agreements.[1] These facilities and operations activities are already covered under existing permits or addressed by other legal authorities.

Some comments suggested that DWR abused its discretion under the California Environmental Quality Act (CEQA) by seeking approval of the ITP for long-term operations of the SWP without at the same time seeking approvals for other SWP-related undertakings. These comments suggest that DWR is piecemealing by preparing an EIR focused on the ITP and the long-term operations that it would authorize. These comments are mistaken.

As a general matter under CEQA, the fact that discrete projects may be related to one another in some fashion does not mean that an agency involved in multiple projects has no choice under CEQA but to treat them as a single, indivisible project that must be analyzed as a whole. Courts have found "improper piecemealing 'when the reviewed project legally compels or practically presumes completion of another action.'"[2] However, two projects may properly undergo separate environmental review (i.e., not piecemealing) when the projects have different proponents, serve different purposes, or can be implemented independently.[3] Thus, agencies have discretion to

[1] See DEIR Page 2-18.

[2] *Banning Ranch Conservancy v. City of Newport* (2012) 211 Cal.App.4th 1209, 1223-4.

[3] *Banning Ranch Conservancy v. City of Newport* (2012) 211 Cal.App.4th 1209, 1223. See also C*ommunities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 99, 108 Cal.Rptr.3d 478 (CBE) [refinery upgrade and construction of pipeline exporting excess hydrogen from upgraded refinery were "independently justified separate projects with different project proponents"]; *Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 237, 103 Cal.Rptr.3d 124 (Castaic Lake) [water transfer had "significant independent or local utility" from broader water supply agreement, and would be implemented with or without it].

process and approve related projects separately, as long as each project has "independent utility."[4] This is the case with the Proposed Project.

The public interest would not be served if DWR ignored the independent nature of long-term SWP operations and attempted to prepare a single, comprehensive EIR that attempted to treat all aspects of a wide range of related activities as a single project. The scale of the document would be impractical, and opportunities to look at alternatives to component parts of the massive project would be lost. Commenters would likely be overwhelmed with technical detail.

3.6.2 The Proposed Delta Conveyance Project is not Covered by the ITP

The Delta Conveyance Project consists of the construction, operation, and maintenance of new SWP water diversion and conveyance facilities in the Delta that would be operated in coordination with the existing SWP facilities. The new water conveyance facilities would divert up to a combined 6,000 cubic feet per second of water from two new north Delta intakes with state-of-the-art fish screens and convey it through a single tunnel directly to a new pumping plant and aqueduct complex in the south Delta, discharging it to the Bethany Reservoir for delivery through existing SWP export facilities. DWR released the Final EIR for the Delta Conveyance Project on December 8, 2023. For more information, please see DWR's website: https//water.ca.gov/deltaconveyance.

Some comments suggest that the Proposed Project should include the Delta Conveyance Project. While this EIR includes the Delta Conveyance Project in the cumulative discussion (DEIR Chapter 10, Table 10-1a), the Proposed Project is properly separated as a different project from Delta Conveyance and is not improperly piecemealed. Improper piecemealing only arises "when the reviewed project legally compels or practically presumes completion of another action, "in other words, when the project does not have independent utility from another project. Here, the Proposed Project described in this EIR is separate and independent from the Delta Conveyance Project. While both the Proposed Project and the Delta Conveyance Project relate to the SWP, this Proposed Project can proceed independent from the Delta Conveyance Project. The Proposed Project analyzes operations under a requested ITP that would be in place for 10 years, whereas construction of the Delta Conveyance Project is anticipated to be complete in 2040. Indeed, the operations of the SWP have proceeded for many years absent any Delta Conveyance Project. The Proposed Project continues operating the SWP consistent with existing laws, regulations, and contractual obligations, and does not rely on the construction or implementation of the Delta Conveyance Project to go forward. The Proposed Project would be implemented with or without any future approval of the

[4] See *Del Mar Terrace Conservancy, Inc. v. City Council of the City of San Diego* (1992) 10 Cal.App.4th 712, 732-733 (*Del Mar Terrace*) (court upholds an EIR that treated as the "project" one freeway segment within a long-term, multi-segment regional plan to expand the freeway system throughout San Diego County); *Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 237 (applying "independent utility" test derived from *Del Mar Terrace Conservancy* to a proposed water transfer); and *Rodeo Citizens Assn. v. County of Contra Costa* (2018) 22 Cal.App.5th 214, 224–225 (refinery's proposed project to recover propane was "independent" of any change to the type or quantity of feedstock processed at refinery).

Delta Conveyance Project.[5] In sum, the Proposed Project has independent utility from the Delta Conveyance Project.

3.6.3 State Water Project Delta Field Division Operations and Maintenance Habitat Conservation Plan

DWR plans to prepare an EIR covering State Water Project Delta Field Division (DFD) Operations and Maintenance Habitat Conservation Plan for the purpose of allowing for efficient and cost-effective maintenance, repair, and improvement activities within the DFD service area of the SWP while providing for the conservation of covered species to comply with the permitting criteria of federal Endangered Species Act Section 10(a)(1)(B), Fish and Game Code Section 2081 (i.e., California Endangered Species Act), and the permitting process for fully protected species established by California Senate Bill 147. For more information on this project see the DWR website at https://water.ca.gov/News/Public-Notices/2024/Jun-24/Notice-of-Preparation-EIR-for-SWP-Delta-Field-Division-HCP. Contrary to some comments on the DEIR, these projects are discrete and not piecemealed. The Proposed Project can proceed without the DFD Maintenance project, demonstrating that it has independent utility.

The Proposed Project would consist of the long-term operations of the SWP to supply water to downstream users and benefits to the environment, while complying with laws and contractual obligations. This EIR evaluates the potential impacts associated with updated operating criteria, including operations of SWP facilities in the Sacramento–San Joaquin Delta such as pumps, the Suisun Marsh Salinity Control Gates, and the North Bay Aqueduct and operational measures that may be adopted to avoid, minimize, or mitigate impacts on listed species resulting from SWP long-term operations pursuant to the California Endangered Species Act. DFD Maintenance of the SWP is not necessary for the Proposed Project. While the Proposed Project has the same proponents, their purposes are not the same; one is focused on updating operational criteria while the other is primarily for maintenance needed on the SWP. The Proposed Project can proceed without the DFD Maintenance project. Indeed, SWP operations have continued in some form (although with different operational rules) absent the DFD Maintenance project for decades. Thus, the Proposed Project is a separate project with independent utility, and both projects are properly proceeding under separate CEQA environmental review processes.

[5] Anderson v. Cnty. of Santa Barbara (2023) 94 Cal. App. 5th 554, 574; Banning Ranch Conservancy v. City of Newport Beach (2012) 211 Cal.App.4th 1209,1223; Yerba Buena Neighborhood Consortium, LLC v. Regents of Univ. of California (2023) 95 Cal. App. 5th 779, 808 ["'two projects may be kept separate when, although the projects are related in some ways, they serve different purposes or can be implemented independently'—i.e., have independent utility"].).

Chapter 3.7
Common Response 7: Relationship to Healthy Rivers and Landscapes Program (Previously Referred to as Voluntary Agreements)

Some commenters suggest that the Environmental Impact Report (EIR) should analyze an operational scenario that does not include implementation of Healthy Rivers and Landscapes Program (HRLP) because the HRLP has not yet been approved by the State Water Resources Control Board (State Water Board). The EIR incorporates modeling runs for the purpose of analyzing impacts of the Proposed Project. See Chapter 3, Section 3.6, "Model Scenarios Analyzed in the EIR." The modeling runs include various scenarios, including some that do not include HRLP implementation, consistent with the legal requirements.

The baseline modeling run represents the physical conditions in the Proposed Project's vicinity at the time of the Notice of Preparation plus the Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project. See Common Response 2, "CEQA Environmental Baseline." Lead agencies use the baseline as a reference point when determining whether a project's impact is significant. The baseline modeling run for this EIR does not include HRLP because HRLP has yet to be approved by the State Water Board and has not been implemented.

The Proposed Project modeling run (CalSim Study 9b_v2) as well as the project alternatives (CalSim Studies 7, 9b, and 7_v2), include a Sacramento–San Joaquin Delta (Delta) outflow action that incorporates State Water Project (SWP) export reductions and collection of diversion fees from SWP contractors per the terms of HRLP. This is consistent with the project description, which identifies the following HRLP flows as components of the Delta Outflow action[1]:

- SWP Forgone Exports
- Flow Purchases Acquired Through SWP Diversion Fees (implemented through forgone exports)
- Flow Purchases Acquired Through SWP Diversion Fees (implemented through tributary inflow from the fallowing program or to the extent flows are realized through market price purchases, from market price purchases)

Recognizing that the State Water Board has not yet approved HRLP, the California Department of Water Resources (DWR) included an alternate mechanism for Delta Outflow, "Early Voluntary Agreement Implementation," in the Project Description in the EIR (DEIR 2.3.5.2, "Early Voluntary Agreement Implementation"). Early implementation would be achieved either through implementation of Condition of Approval 8.17 of the 2020 ITP or actions to generate flow volumes equivalent to implementation of 2020 ITP Condition of Approval 8.17. The EIR includes modeling of the Proposed Project and Alternative 1 with the alternate "Early Voluntary Agreement Implementation" mechanism. See CalSim Study 9b_ITPSpring and 9a_v2a, respectively.

[1] See Draft Environmental Impact Report [DEIR] Section 2.3.5, "Spring Delta Outflow," Table 2-6.

Commenters have noted that the EIR does not analyze alternate outcomes of the Bay-Delta Water Quality Control Plan (WQCP) update process as a part of the scope of this Project. DWR is not proposing to incorporate the WQCP process into its Proposed Project. Similarly, some comments focus on the adequacy of the WQCP and HRLP; this Project is independent from the WQCP update, which is subject to a separate environmental review process by the State Water Board. This Project can and must move forward regardless of the pace or outcome of the WQCP update. The Proposed Project incorporates only specific flows from HRLP (as set forth in DEIR Section 2.3.5) as a part of its Delta outflow operations under the California Endangered Species Act. Unless and until HRLP is approved as a part of the WQCP update, under the Proposed Project the Delta outflow action would be achieved through 2020 ITP Condition of Approval 8.17 or actions to generate equivalent flow volumes.

The California Environmental Quality Act (CEQA) requires a lead agency to only analyze what is reasonably foreseeable, but not to speculate.[2] DWR cannot predict what the State Water Board—a separate state agency with its own processes and regulatory authority—will approve as a part of the WQCP update. The WQCP update process has been ongoing since February 2009 with many update options proposed by various interested parties. The proposed "unimpaired flow" regulatory approach described in the State Water Board's draft Staff Report is uncertain. The State Water Board's comment letter on the Proposed Project DEIR suggests analyzing a *range* of percent unimpaired flows, which demonstrates that the specific proposed flow volumes, or sources of those volumes, under this potential approach have not been identified. It would be unduly burdensome for DWR and confusing to the public if the EIR analyzed every operational outcome of the WQCP update, if such an approach were even possible.

Although DWR did not speculate about what the State Water Board will ultimately approve, this EIR includes both the HRLP and the WQCP update in the cumulative analysis. See Table 10-1a and Table 10-1d. The EIR describes the process and where to locate additional information. This information, along with the other reasonably foreseeable actions in the Project area, were qualitatively analyzed to assess cumulative impacts in Chapter 10, "Other CEQA Discussions," of the DEIR.

In addition to the qualitative analysis, the EIR also includes a modeling run to better inform the public about the environmental impacts associated with this Project in combination with the U.S. Bureau of Reclamation's proposed action and potential HRLP approval (see CalSim Study 12a_V2). While this informative modeling was provided, DWR need not undertake additional modeling to account for unknown outcomes of the WQCP update process. As explained above, CEQA does not require speculation.

[2] CEQA Guidelines 15145; *Rodeo Citizens Assn. v. County of Contra Costa* (2018) 22 Cal.App.5th 214, 225-227.

Chapter 3.8
Common Response 8: Climate Change

The impact evaluations conducted to address operations-related impacts on water quality (Draft Environmental Impact Report [DEIR] Chapter 5, "Surface Water Quality") and special-status species (DEIR Chapter 6, "Aquatic Biological Resources") also addressed differences in hydrology that could occur as a result of climate change and sea level rise. DEIR Appendix 4D, "Climate Sensitivity," described an analytical comparison of specific CalSim 3 outputs reflecting State Water Project (SWP) operations under Baseline Conditions that considered current and future climate conditions and Alternative 1 that considered current and future climate conditions. The DEIR climate change sensitivity analysis considered climate conditions using a 30-year climate period centered around year 2022 (2008–2037), with 15 centimeters (cm) of sea level rise. Alternative 1 and the Proposed Project are compared in Appendix 4J, "Proposed Project and Alternative 1 Comparison." Because the sensitivity analysis conducted in Appendix 4J concluded that incremental changes in monthly long-term average flows are largely identical under 2022 climate conditions and 15 cm of sea level rise for the Proposed Project and Alternative 1 for most parameters, the analyses conducted in Appendix 4D for Alternative 1 also apply to the Proposed Project.

The climate change sensitivity analysis concluded that the relative changes due to the Proposed Project as compared to Existing Conditions under the future climate and sea-level-rise scenarios are similar to those identified under the current climate scenario. Based on the results of the climate change sensitivity analysis, the impacts identified in the water quality and special-status species analyses conducted in the EIR would be similar to those under future climate projections. As such, the analyses conducted in the EIR addressed potential effects of climate change.

In addition to the sensitivity analyses conducted in Appendix 4D and Appendix 4J, the DEIR considers how climate change could influence the ability of the Proposed Project to fulfill its intended purpose. Chapter 9, "Climate Change Resiliency and Adaptation," analyzes how climate change is projected to affect the Project area, how anticipated resource impacts resulting from the Proposed Project could be affected by climate change, and how the Proposed Project might contribute to the Project area's resiliency and ability to adapt to projected changes in climate. Modeling conducted for the impact analysis in Chapter 9 is the same as described for the sensitivity analysis in Appendices 4D and 4J, which is considered representative of the Incidental Take Permit duration (i.e., a 10-year period). A midcentury time horizon (ranges centered around 2040 or 2050, depending on the data source) was chosen for discussion of climate change trends because it represents the nearest available climate projections.

Chapter 9 of the DEIR concluded that climate change presents challenges to water quality including elevated water temperatures and increased water temperature variability. Climate change is predicted to increase large flow events and sediment loading into the Delta, increasing turbidity and possibly affecting water quality and special-status fish species relative to baseline conditions under current climate conditions. Climate change analysis was conducted using the CalSim 3 model to estimate the changes in flow at various locations in the Project area. Based on these analyses, the relative difference in X2, SWP exports, Old and Middle River flows, Delta outflow, San Joaquin River flows at Vernalis, and Sacramento River flows at Freeport would be similar between Baseline Conditions and the Proposed Project under future climate conditions, relative to current climate conditions. These similar relative differences between Baseline Conditions and the Proposed Project show that climate change likely would alter hydrology, but the Proposed Project provides resiliency that limits climate-driven changes in hydrologic parameters evaluated.

Chapter 3.9
Common Response 9: Relationship to the 2023 Biological Assessment and NEPA

3.9.1 Overview

The Federal Endangered Species Act (ESA) and National Environmental Policy Act (NEPA) processes are underway and cover both the State Water Project (SWP) and Central Valley Project (CVP) long-term operations. The ESA and NEPA are federal laws with separate processes, whereas the California Environmental Quality Act (CEQA) and California Endangered Species Act (CESA) are state laws with their own distinct processes. This CEQA process and the ongoing CESA process only cover the SWP's long-term operations.

3.9.2 2023 Biological Assessment and the Federal Endangered Species Act

The Bureau of Reclamation (Reclamation), in coordination with the California Department of Water Resources (DWR), requested to reinitiate consultation on the long-term Operations of the CVP and SWP under ESA Section 7 in 2021. In 2023, Reclamation submitted a Biological Assessment to the National Marine Fisheries Service and U.S. Fish and Wildlife Service. These agencies, in turn, will issue Biological Opinions including incidental take statements for the continued long-term operations of the CVP and SWP. The Biological Opinions will cover the incidental take of Delta Smelt, Longfin Smelt, spring-run Chinook Salmon, winter-run Chinook Salmon, and steelhead associated with Reclamation's and DWR's respective operations of the projects.

DWR filed an application for a CESA Incidental Take Permit (ITP) with the California Department of Fish and Wildlife on November 1, 2023. The new ITP will cover listed and candidate aquatic species under CESA that are subject to incidental take from long-term operation of the SWP, including Delta Smelt, Longfin Smelt, spring-run Chinook Salmon, winter-run Chinook Salmon, and White Sturgeon. See Common Response 11, "Application of CESA Standards," for additional information on CESA.

3.9.3 NEPA vs. CEQA

As the federal lead agency under NEPA, Reclamation is preparing an environmental impact statement for the long-term operations of the CVP and SWP. DWR is the CEQA lead agency and is preparing this Environmental Impact Report pursuant to CEQA.

NEPA and CEQA are both laws governing environmental review for certain projects subject to government approval. NEPA is a federal law that applies to federal approvals, while CEQA (a state law) applies to state and local approvals. While the NEPA analysis is similar to CEQA in some respects, it has separate content and process requirements. For example, in CEQA, the environmental baseline provides the point of comparison for analyzing environmental impacts. See Common Response 2, CEQA Environmental Baseline, for further information. Under NEPA, however, effects are measured against the "no action alternative." (CEQA, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, Answer to Question 3.) Also, CEQA requires identification of significant effects on the environment (CEQA Guidelines 15064(a), 15126.4) whereas NEPA looks at a federal action's potential to significantly affect the quality of the *human* environment…." (42 U.S.C. 4332 [emphasis added].)

While statutory differences, such as the ones described above, govern how the agencies must carry out their respective environmental analyses, DWR and Reclamation have worked together to make their documents compatible and to present coordinated analyses. Central Valley Project (CVP) operations are included in the cumulative scenarios analyzed in the EIR. In addition, the EIR includes a modeling run representing Reclamation's "no action alternative," CalSim Study 4, for informational purposes.

Chapter 3.10
Common Response 10: Public Trust

3.10.1 General Overview of Public Trust Law

The guiding principle of California's water law and policy is contained in Article X, Section 2 of the California Constitution. This section requires that all uses of the state's water, including public trust uses, be both reasonable and beneficial.[1] This constitutional provision places a significant limitation on water rights by prohibiting the waste, unreasonable use, unreasonable method of use, and unreasonable method of diversion of water. In administering resources subject to the public trust, state agencies must act "with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare."[2]

National Audubon Society v. Superior Court (1983) 33 Cal.3d 419 is the seminal case articulating the common law public trust doctrine in California. In that case, the Supreme Court held that the state, as represented by the State Water Resources Control Board (State Water Board), holds the waters of the state in trust for the benefit of all Californians, and therefore "[t]he state has 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."[3] Public trust resources include "environmental and recreational values."[4] The doctrine does not require state agencies with public trust obligations to give greater weight to public trust values than other competing uses of such resources. The Supreme Court determined that to protect the "prosperity and habitability of much of" California, the State Water Board has the discretion to "grant nonvested usufructuary rights to appropriate water even if diversions harm public trust uses."[5] Accordingly, in the *State Water Resource Control Board Cases* (2006) 136 Cal.App.4th 674, 778, the court held that the State Water Board was required to balance competing interests to determine what level of protection for public trust resources was "feasible." Similarly, in *Carstens v. California Coastal Comm.* (1986) 182 Cal.App.3d 277, 293 (*Carstens*), the court held that the California Coastal Commission properly took the public trust into account consistent with the public trust doctrine and Coastal Act requirements when it issued permits for a nuclear power plant that blocked public access to a beach, given competing interests. In *Center for Biological Diversity v. Cal. Dept. of Forestry and Fire Protection* (2014) 232 Cal.App.4th 931, 953, the court held that the public trust doctrine did not require the state to oppose a permit for timber harvesting. Also, in *Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks.* (1967) 67 Cal.2d 408, 418-420, the court held that the state can choose to advance one public trust interest over another. Indeed, evaluating a project's environmental impacts under the California Environmental Quality Act (CEQA) has been held to be "sufficient 'consideration' for public trust purposes."[6]

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[1] *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446 (*National Audubon*).

[2] California Constitution, Article X, § 2.

[3] *National Audubon*, *supra*, 33 Cal.3d at p. 446.

[4] *Id.* at p. 425.

[5] *Id.* at p. 426.

[6] *Citizens for East Shore Parks v. Cal. State Lands Comm.* (2011) 202 Cal.App.4th549, 576-577 (*East Shore Parks*).

In summary, what constitutes feasible protection for public trust resources is a determination made by the responsible state agency after balancing public trust and competing interests and considering its statutory authority and responsibilities. To the extent that the California Department of Water Resources (DWR) has a duty to take public trust values into account before it approves a project, it has done so through the process of designing and studying the impacts of the Proposed Project, as documented by this Environmental Impact Report (EIR). The California Department of Fish and Wildlife (CDFW) also has "a public trust duty, derived from statute, specifically Fish and Game Code § 711.7, pertaining to fish and wildlife: 'The fish and wildlife resources are held in trust for the people of the state by and through the department.'"[7] CDFW, as the responsible CEQA state agency, is expected to rely on this EIR in considering DWR's incidental take permit application, and will consider its statutory public trust duty in making its decision on DWR's application.

3.10.2 Proposed Project Consideration of Public Trust

The objectives of the Proposed Project are to store, divert, and convey water in accordance with DWR's existing water rights to deliver water pursuant to water contracts and agreements up to full contract quantities and to optimize water supply and improve operational flexibility while protecting fish and wildlife based on the best available scientific information. The EIR fully analyzes the potential environmental impacts of the Proposed Project and alternatives designed to ensure continued long-term operation with improved operational flexibility while protecting the health of fish and wildlife. DWR has balanced the benefits of the Proposed Project against potential adverse environmental impacts and concluded that the Proposed Project is in the public's interest consistent with the public trust doctrine. DWR intends to make findings regarding the public trust when determining whether to approve the Project.

A hallmark of the public trust doctrine is that water-related projects must provide benefits to the public and be in the public interest instead of befitting purely private interests. As proposed, the Proposed Project meets the constitutional requirement that water resources be put to beneficial use to the fullest extent of which they are capable.

In addition to the constitutional obligations in administering resources subject to the public trust, the California Supreme Court in the *National Audubon* decision recognized two distinct public trust doctrines: one derived from the common law and the other derived from statute.[8] Actions by state agencies involving the planning and allocation of water resources implicate the common law public trust doctrine.[9] The doctrine "is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."[10] The "traditional triad" of public trust values is navigation, commerce, and fishing on navigable waters.[11] The doctrine could extend to actions that affect non-navigable tributaries of navigable

[7] *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 515 (*EPIC v. CalFire II*).

[8] *EPIC v. CalFire II*, *supra*, 44 Cal.4th at p. 515.

[9] *National Audubon*, *supra*, 33 Cal.3d at p. 446.

[10] *Id.* at p. 441.

[11] *Id.* at p. 434.

waters if those effects also affect public trust resources in those navigable waters.[12] The protection of recreational and ecological values "is among the purposes of the public trust."[13]

The *National Audubon* court, as well as subsequent court decisions related to public trust, cited early common law to support the state's responsibilities.[14] The public trust doctrine, which is traceable to Roman law, rests on several related concepts. First, that the public rights of commerce, navigation, fishery, and recreation are so intrinsically important and vital to free citizens that their unfettered availability to all is essential in a democratic society. "An allied principle holds that certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace… Finally, there is often recognition, albeit one that has been irregularly perceived in legal doctrine, that certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate.

The best-known example is found in the rule of water law that one does not own a property right in water in the same way he owns his watch or his shoes, but that he owns only an usufruct—an interest that incorporates the needs of others. It is thus thought to be incumbent upon government to regulate water uses for the general benefit of the community and to take account thereby of the public nature and the interdependency which the physical quality of the resource implies."[15]

Importantly, the public trust doctrine does not operate as an absolute protection of the resources that come under its ambit. Under the doctrine, the state has an "affirmative duty to protect public trust uses *whenever feasible*."[16]

[B]oth the public trust doctrine and the water rights system embody important precepts which make the law more responsive to the diverse needs and interests involved in the planning and allocation of water resources. To embrace one system of thought and reject the other would lead to an unbalanced structure, one which would either decry as a breach of trust appropriations essential to the economic development of this state or deny any duty to protect or even consider the values promoted by the public trust.[17]

Thus, "[a]s a matter of practical necessity, the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust," and "to preserve, so far as consistent with the *public interest*, the uses protected by the trust."[18]

Although the legal principles are well established, "[t]here is no set 'procedural matrix' for determining state compliance with the public trust doctrine."[19] In general, however, "evaluating project impacts within a regulatory scheme like CEQA is sufficient 'consideration' for public trust

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[12] *Id.* at p. 437.

[13] *Id.* at p. 435.

[14] *Id.* at p. 434-435.

[15] *Zack's Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1175–1176 (Zack's), quoting *Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L.Rev. 471, 484–485, citations, paragraph breaks, and footnotes omitted.

[16] *National Audubon*, *supra*, 33 Cal.3d at p. 446, italics added.

[17] *Id.* at p. 445.

[18] *Ibid.*, italics added.

[19] *San Francisco Baykeeper, Inc. v. State Lands Commission* (2015) 242 Cal.App.4th 202, 234 (*SF Baykeeper*), quoting *East Shore Parks*, *supra*, 202 Cal.App.4th at p. 576.

purposes."[20] Notably, CEQA requires the imposition of all feasible means of reducing the severity of significant environmental effects, including those on water-related resources, including fish, and on wildlife species and their habitats.[21] Where governmental action authorizes the private use of public trust resources, however, CEQA compliance alone may not be enough; specific findings separately addressing public trust considerations may be necessary.[22]

Regarding the statutory public trust doctrine, two examples of statutes that impose a public trust duty are Fish and Game Code §711.7 and §1801. Subdivision (a) of §711.7 provides that "fish and wildlife resources are held in trust for the people of the state by and through the [D]epartment [of Fish and Wildlife]." Fish and Game Code §1801 declares that it is "the policy of the state to encourage the preservation, conservation, and maintenance of wildlife resources under the jurisdiction and influence of the state," and sets forth several objectives consistent with that policy. Among them are "[t]o provide for economic contributions to the citizens of the state, through the recognition that wildlife is a renewable resource of the land by which economic return can accrue to the citizens of the state, individually and collectively, through regulated management." Notably, though, the general policy set forth in §1801 "is not intended [to] … provide any power to regulate natural resources or commercial or other activities connected therewith, except as specifically provided by the Legislature." To find such authority, courts "will look to the statutes protecting wildlife to determine if DF[W] or another government agency has breached its duties in this regard."[23] One such statute is Fish and Game Code §2081, which authorizes the issuance of incidental take permits for endangered and threatened species.

This EIR analyzes proposed changes to SWP operations through the Proposed Project and its alternatives and includes in depth analysis on a number of resources, including affects on water quality, hydrology, aquatic resources, climate change, and environmental justice. Thus, this EIR provides sufficient analyses for DWR, as lead agency, to meaningfully consider impacts on public trust resources and to make an informed decision on the Project. CDFW, as a responsible agency, will use the information in this EIR to consider the aspects of the Proposed Project for which it is responsible and weigh the impacts of those aspects to satisfy its obligations.

Compliance with CEQA, with its mandate to mitigate significant environmental impacts to the extent feasible,[24] tends to ensure compliance with the public trust doctrine, at least with respect to public projects involving public use of public trust resources.[25] This is because the public trust doctrine essentially gives the state the same duty to protect public trust uses whenever feasible.[26]

The Proposed Project, as detailed in this EIR, includes environmental protective measures that would offset, reduce, or otherwise mitigate potential impacts on special-status species. The Proposed Project would comply with all applicable laws. DWR, as the lead agency, has gone to

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[20] *East Shore Parks*, *supra*, 202 Cal.App.4th at pp. 576-577, citing *National Audubon*, *supra*, 33 Cal.3d at p. 446, fn. 27, and *Carstens*, *supra*, 182 Cal.App.3d at pp. 289-291.

[21] Pub. Resources Code, § 21002; CEQA Guidelines, §§ 15002, subd. (a)(3), 15021, subd. (a)(2).

[22] *SF Baykeeper*, *supra*, 242 Cal.App.4th at pp. 241-242 [leases authorizing a private lessee to mine sand from the San Francisco Bay].

[23] *EPIC v. CalFire II*, *supra*, 44 Cal.4th at p. 515.

[24] Pub. Resources Code, § 21002; CEQA Guidelines, §§ 15002, subd. (a)(3), 15021, subd. (a)(2).

[25] *East Shore Parks*, *supra*, 202 Cal.App.4th at pp. 576-577, citing *National Audubon*, *supra*, 33 Cal.3d at p. 446, fn. 27, and *Carstens*, *supra*, 182 Cal.App.3d at pp. 289-291.

[26] *National Audubon*, *supra*, 33 Cal.3d at p. 446.

considerable lengths to address potential environmental effects, and particularly those effects on public trust resources in the development of the Proposed Project and in the drafting of the EIR.

As described in this EIR, the project will not have any significant environmental effects under CEQA, and incorporates environmental protective measures intended to minimize impacts to special-status species. Moreover, the EIR includes alternatives intended to cover the range of actions that may be considered as part of the CESA ITP process.

3.10.3 Public Trust Obligations

As discussed above, when the potential public trust impacts of an action have not previously been considered, state agencies, such as DWR, may have a duty to individually consider the public trust when allocating water resources or taking other actions that directly impact public trust resources.[27] The obligation not only extends to consideration of the "traditional triad" of public trust uses (navigation, commerce, and fishing) but also to recreational and ecological values.

DWR analyzed impacts on these public trust resources in the Initial Study (see DEIR Appendix A) and in the environmental impact chapters of this EIR. As stated in the DEIR, the Initial Study concluded that the project would not have any potentially significant environmental effects with respect to:

- Aesthetics
- Agriculture and Forestry Resources
- Air Quality
- Biological Resources (Terrestrial)
- Cultural Resources
- Energy
- Geology and Soils
- Greenhouse Gas Emissions
- Hazards and Hazardous Materials
- Land Use and Planning
- Mineral Resources
- Noise
- Population and Housing
- Public Services
- Recreation
- Transportation/Traffic
- Utilities and Service Systems
- Wildlife

Because implementation of the Proposed Project would alter existing hydrology, such changes could result in impacts to resources dependent upon existing hydrologic conditions. For this reason, this EIR analyzes potential impacts to the following resource areas: Surface Water Hydrology, Surface Water Quality, Aquatic Biological Resources, Tribal Cultural Resources, and Environmental Justice. The EIR also discusses the effects of climate change on SWP operations and the SWP's resiliency to climate change. In addition, the EIR addresses the potential for the Proposed Project to result in growth-inducing impacts that may result in secondary, indirect environmental impacts. As stated above, the EIR concludes that the project would not have any significant environmental impacts on these resource categories. The EIR provides sufficient analyses for DWR, as lead agency, to meaningfully consider impacts on public trust resources and to make an informed decision on the proposed project. The analysis in this EIR demonstrates that the Proposed Project would have no significant impacts.

[27] *Planning and Conservation League v. DWR* (2024) 98 Cal.App.5th 726

Chapter 3.11
Common Response 11: Application of CESA Standards

3.11.1 Overview

As the lead agency, the California Department of Water Resources (DWR) considers the adequacy of the environmental impact report (EIR) for California Environmental Quality Act (CEQA) purposes. The California Department of Fish and Wildlife (CDFW) is the decision-making agency with the authority to issue an incidental take permit (ITP) and make associated determinations under the California Endangered Species Act (CESA), a separate statute. Although DWR does not make CESA determinations, this common response discusses the legal requirements under CESA and how CDFW might rely on the EIR when making its findings. DWR submitted an ITP application to CDFW on November 1, 2023, including further detailed information regarding the request for incidental take coverage under California Fish and Game Code Section 2081.

For a comparison between various CESA standards and CEQA standards, see Common Response 4, "CEQA and CESA Legal Standards."

3.11.2 Overview of Relevant CESA Standards

Fish and Game Code Section 2081, subdivision (b), allows CDFW to issue ITPs to allow the "take"[1] of endangered, threatened, or candidate species under CESA, where specific conditions are met:

- The take is incidental to otherwise lawful activity.
- The impacts of the take are minimized and fully mitigated.
- The measures required to meet the obligation to minimize and fully mitigate are roughly proportional in extent to the impact of the authorized taking on the species.
- The applicant ensures adequate funding to implement and monitor compliance with and the effectiveness of measures adopted to minimize and fully mitigate the take.

Additionally, subdivision (c) requires CDFW to determine, "based on the best scientific and other information that is reasonably available," whether issuing the ITP "would jeopardize the continued existence of the species."

CDFW also has regulations to aid in implementing Fish and Game Code Section 2081, subdivision (b). California Code of Regulations, Title 14, Section 783.4 includes "[i]ssuance criteria" for an ITP requiring CDFW to find:

[1] Fish and Game Code § 86 defines "take" to mean "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill."

(1) The take authorized by the permit will be incidental to an otherwise lawful activity.

The applicant will minimize and fully mitigate the impacts of the take authorized under the permit. The measures required to meet this obligation shall be roughly proportional in extent to the impact of the authorized taking on the species. Where various measures are available to meet this obligation, the measures required shall maintain the applicant's objectives to the greatest extent possible. All required measures shall be capable of successful implementation. For purposes of this section only, impacts of taking include all impacts on the species that result from any act that would cause the proposed taking.

(2) The permit will be consistent with any regulations adopted pursuant to Fish and Game Code Section 2112 and Section 2114.

(3) The applicant has ensured adequate funding to implement the measures required under the permit to minimize and fully mitigate the impacts of the taking, and to monitor compliance with, and the effectiveness of, the measures.[2]

California Code of Regulations, Title 14, Section 783.4, subdivision (b) provides that an ITP may not be issued if its issuance would jeopardize the continued existence of the species. Subdivision (c) further elaborates that, to ensure measures in an ITP are capable of successful implementation, CDFW must consider whether measures are "legally, technologically, economically and biologically practicable."

3.11.3 Application of CESA Standards to the Project

DWR is requesting an ITP for its long-term operation of the State Water Project (SWP). Section 3.3, "Description of the Proposed Project," of the ITP application identifies the activities involved in the long-term SWP operation for which DWR is seeking incidental take coverage under CESA.

- Existing Regulatory Requirements
- Minimum Export Rate
- Expansion of the Clifton Court Forebay Increased Winter Diversion Window
- Old and Middle River Flow Management
- Spring Delta Outflow
- Delta Smelt Summer-Fall Habitat
- John E. Skinner Delta Fish Protective Facility
- Delta Smelt Supplementation
- Water Transfers
- Agricultural Barriers
- Georgiana Slough Salmonid Migratory Barrier Operations
- Barker Slough Pumping Plant
- Clifton Court Forebay Weed Management
- Suisun Marsh Facilities

[2] Cal. Code Regs., tit. 14, § 783.4, subd. (a).

3.11.4 Incidental to Otherwise Lawful Activity

As stated in Draft Environmental Impact Report (DEIR) Section 2.3, "Description of the Proposed Project," DWR proposes changes to the long-term operation of the SWP that are intended to continue operation of the SWP and deliver up to the full contracted water amounts while minimizing and fully mitigating the take of listed species consistent with CESA requirements. The Proposed Project would operate in compliance with all applicable state and federal regulations and therefore represents an "otherwise lawful activity" for the purposes of Fish and Game Code Section 2081. Any take of the listed species is "incidental" to the long-term operation of the SWP, as the objective of the Project is to continue the long-term operation of the SWP consistent with applicable laws, contractual obligations, and agreements.

3.11.5 Minimize and Fully Mitigate the Impacts of the Authorized Take

Fish and Game Code Section 2081, subdivision (b)(2) requires that the impacts of the incidental take be minimized and fully mitigated, and that mitigation measures be capable of successful implementation but "roughly proportional" to the impact of the take on the species.[3] The California Supreme Court has interpreted this language to require that an applicant "bear no more—but also no less—than the costs incurred from the impact of its activity on listed species."[4] Operation of the SWP could result in the incidental take of special-status species, including Delta Smelt, Longfin Smelt, Winter-run Chinook Salmon, Spring-run Chinook Salmon, and White Sturgeon.[5] Accordingly, DWR currently operates the SWP in compliance with state and federal permits authorizing the take of those species, which impose measures to minimize and mitigate the impacts of the SWP on the special-status species.

The EIR analyzes the direct and indirect impacts of the proposed long-term operational conditions of the SWP (including the environmental measures) on special-status species, compared to Existing Conditions, and determined that no mitigation under CEQA is required because the Proposed Project would not have any significant environmental impacts.

In deciding whether to issue an ITP, CDFW must determine whether the project meets the CESA standards, which differ from CEQA's impact analysis and mitigation standards.[6] In making its decision, CDFW is expected to rely on the information in DWR's ITP application, as well as this EIR.[7]

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[3] In full, subdivision (b)(2) reads: "The impacts of the authorized take shall be minimized and fully mitigated. The measures required to meet this obligation shall be roughly proportional in extent to the impact of the authorized taking on the species. Where various measures are available to meet this obligation, the measures required shall maintain the applicant's objectives to the greatest extent possible. All required measures shall be capable of successful implementation. For purposes of this section only, impacts of taking include all impacts on the species that result from any act that would cause the proposed taking." (See also Cal. Code Regs., tit. 14, § 783.4, subd. (a)(2).)

[4] *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 511 (EPIC v. CalFire II).

[5] White Sturgeon are considered a CESA candidate species as of July 2024 and a final decision on whether they will remain protected as a listed species or not will be determined a year from candidacy listing, approximately July 2025.

[6] For detailed information regarding the different legal standards between CEQA and CESA, please refer to Common Response 4, "CEQA and CESA Legal Standards."

[7] See Cal. Code Regs., tit. 14, §§ 783.2, 783.5(c).

DWR's ITP application includes proposed measures to minimize and fully mitigate the proposed taking, and a proposed plan to monitor compliance with the minimization and mitigation measures and the effectiveness of the measures as required by CESA.[8] This EIR, as well as the ITP application, provides information that will aid CDFW in determining whether the proposed operational changes, including the environmental measures and other measures intended to minimize and fully mitigate incidental take, are "legally, technologically, economically and biologically practicable."[9] DWR submitted this information to show that it will minimize and fully mitigate the impacts of the proposed incidental take, but the decision whether to issue an ITP, and under what terms, lies with CDFW.

3.11.6 Rough Proportionality

Under CESA, a project applicant is only responsible for mitigating the impacts that would be caused by the activities proposed by the applicant, and not for impacts caused by others. Under Fish and Game Code Section 2081, subdivision (b)(2), CDFW, in imposing terms in a permit to minimize and fully mitigate the impacts of an anticipated incidental take, must take care that "[t]he measures required to meet this obligation shall be roughly proportional in extent to the impact of the authorized taking on the species."

Similar limitations are found in CEQA as well. CEQA Guidelines Section 15126.4, which is grounded in the U.S. Constitution, requires that there "must be an essential nexus (i.e., connection) between [a] mitigation measure and a legitimate governmental interest" and that mitigation measures "must be 'roughly proportional' to the impacts of the project."[10]

As explained in the DEIR, DWR operates the SWP in coordination with the Central Valley Project (CVP), under the Coordinated Operation Agreement between the federal government and the State of California. The Proposed Project analyzed in this EIR is DWR's long-term operation of the SWP only. DWR does not control CVP operations. Thus, DWR has identified the potential impacts attributable to the SWP, including the SWP's proportional share of impacts from coordinated CVP and SWP operations.

When possible, quantitative and qualitative analyses account for only the SWP portion of impacts by considering factors such as entrainment at SWP-only facilities (e.g., entrainment into the Clifton Court Forebay). In some cases, however, such as effects based on Delta outflow, the analyses reflect the combined effects of both SWP and CVP operations. In order to analyze effects that would be caused by the Proposed Project and alternatives, the analysis then determines the proportional share of effects that would be attributable to the SWP.

Modeling was performed using several models, including a reservoir-river basin planning model (CalSim 3, replacing CalSim II. See DEIR Section 3.5.1, "CalSim 3" for discussion of CalSim 3) developed by DWR and the Bureau of Reclamation (Reclamation) to simulate the operations of the CVP and SWP over a range of different hydrologic conditions. Modeling is used to perform planning analyses of long-term changes in the CVP and SWP system due to proposed changes. CalSim 3 includes a generalized and simplified version of a complex water resources system. DWR and Reclamation have extensively reviewed CalSim 3 performance through comparison to CalSim II and

[8] Cal. Code Regs., tit. 14, § 783.2, subd. (a).

[9] Cal. Code Regs., tit. 14, § 783.4, subd. (c).

[10] Fish & Game Code, § 2081(b)(2). See also Cal. Code Regs., tit. 14, § 783.4,(a)(2).

to recent historical observed data. CalSim 3 is considered the best available tool for performing planning studies and supporting environmental review of proposed projects and programs.

3.11.7 Provide Adequate Funding for Implementation, Compliance, and Effectiveness Monitoring

As with the other CESA standards found in Fish and Game Code Section 2081, CDFW is required to make an affirmative finding that DWR (the applicant) "has ensured adequate funding to implement the measures required under the permit to minimize and fully mitigate the impacts of the taking, and to monitor compliance with, and the effectiveness of, the measures."[11] That finding will be upheld if there is substantial evidence in the record before CDFW to support it.[12] As part of the ITP application, DWR has submitted to CDFW "[a] proposed plan to monitor compliance with the minimization and mitigation measures and the effectiveness of the measures," "[a] description of the funding source and the level of funding available for implementation of the minimization and mitigation measures," and a memorandum that elaborates on the ITP funding assurances.[13] CDFW will determine whether those submissions are adequate to support for the required finding.

3.11.8 Jeopardize the Continued Existence of the Species

The Fish and Game Code and CDFW's implementing regulations require that CDFW's jeopardy determination be "based on the best scientific and other information that is reasonably available."[14] The "best scientific and other information that is reasonably available" must include information on "the species' capability to survive and reproduce, and any adverse impacts of the taking on those abilities in light of (1) known population trends; (2) known threats to the species; and (3) reasonably foreseeable impacts on the species from other related projects and activities."[15] DWR's ITP application includes an analysis of potential for jeopardy and addresses each of these categories of information as required.

Though this EIR analyzes the Proposed Project for compliance with CEQA, the information in the EIR, including DEIR Chapter 3, "Scope of Analysis," also includes reasonably available scientific and other information that will aid CDFW in determining whether the ITP would "jeopardize the continued existence of the species."

This EIR includes an analysis of the Proposed Project's potential impacts on special-status species and includes up-to-date, available information on population trends, threats to special-status species (e.g., predation, entailment), and a cumulative impact analysis pursuant to CEQA, which provides information on reasonably foreseeable impacts from other related projects and activities.[16] CDFW decides whether the information in the ITP application, along with the information in this EIR, is sufficient to support the required affirmative finding.

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[11] See Fish and Game Code, § 2081 (b)(3); Cal. Code Regs., tit. 14, § 783.4(a)(4).

[12] *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1044 (ECOS).

[13] See ITP Application for LTO SWP submitted November 1, 2023 and attachments thereof.

[14] Fish & G. Code, § 2081 (c); Cal. Code Regs., tit. 14, § 783.4(b).

[15] Ibid.

[16] See DEIR Chapter 3, "Scope of Analysis," Section ES.4, "Summary of Environmental Consequences," and Section 10.1, "Cumulative Impacts."

Chapter 3.12
Common Response 12: Drought Conditions

3.12.1 Modeling of Drought Conditions

The hydrologic modeling completed for the Proposed Project includes hydrology represented by years spanning 1922 to 2021. This sequence of years provides a representative sampling of some of the most extreme conditions, both wet and dry, in the last 100 years, including the historical droughts of 1929 to 1934, 1976 to 1977, and 1987 to 1992. The model simulates the upstream operations of the State Water Project (SWP) and the Central Valley Project (CVP) with the goal of meeting all contractual and regulatory obligations under these hydrological conditions. Only after these obligations are met does the model calculate the export of water for the SWP and CVP. Even in the driest of years, when water supplies are limited, the model simulates meeting the regulatory and contractual obligations by drawing on storage in the upstream reservoirs, since this is within the discretion of the two projects, while maintaining a minimum level of export for health and safety.

In recent years, there have been conditions under which the regulatory and contractual obligations were reduced in response to extreme drought conditions and to buffer against future dry conditions. For example, in some years between 2014 and 2023, regulatory obligations were reduced following approval of a temporary urgency change petition (TUCP) to the State Water Resources Control Board (State Water Board) for relaxation of the Sacramento–San Joaquin Delta (Delta) standards to help protect storage for instream fisheries and protect water supply in the event of continuing drought conditions. These were conditions that DWR and Reclamation brought to the State Water Board and coordinated with federal and state resource agencies. It was determined that relaxation of standards was appropriate in those specific conditions. In 2015 and 2021–2022, physical modifications were made by installing a temporary salinity rock barrier in the Delta to further protect valuable storage. This physical barrier reduced the amount of outflow needed to hold back salinity from intruding deep into the Delta. In addition to these actions, some senior water right holders voluntarily reduced demand to help reduce the burden on the overall water supply. The combination of all these actions helped minimize potential significant reservoir depletions.

The hydrologic modeling does not include reductions in regulatory and contractual obligations because Reclamation and DWR cannot effect those changes as discretionary actions. The model does not assume that salinity barriers would be installed, that senior water right holders would reduce demand, or that TUCPs would be submitted or approved. Such actions involve real-time coordination with many agencies, and it would be speculative to predict the conditions under which each agency might pursue actions or issue approvals. For example, it would be speculative to predetermine when TUCPs would be requested or the conditions approved by the State Water Board, which could include limiting export levels, require meeting other standards, or curtailing diverters. Instead, the model simulates the discretionary actions that are available to the SWP and CVP to meet their obligations, which generally include releases from reservoirs, allocation to contractors (within contractual limits), and export levels.

3.12.2 Minimum Export Rate

The model assumes a minimum export rate that varies depending on the situation. The applicable situations reflect regulatory conditions and minimums for health and safety. The model assumes a minimum combined export limit no less than 1,500 cubic feet per second (cfs) when regulatory restrictions like Old and Middle River management are constraining the exports. This combined export level, shared by the SWP and CVP, is identified in D1641, 2019 U.S. Fish and Wildlife Service Biological Opinion, and 2019 National Marine Fisheries Service Biological Opinion.

In addition to the regulatory minimum 1,500 cfs limit, extreme dry conditions export levels are also assumed for health and safety. For example, when water supply is limited, the modeling assumes a minimum SWP export of 600 cfs. This assumption is roughly the rate that would be required to maintain health and safety supplies for the SWP South Bay Contractors. The South Bay Contractors do not have access to San Luis Reservoir storage and are reliant on the SWP Delta export facility for SWP supply.

Chapter 3.13
Common Response 13: Water Rights Time Extension

The Draft Environmental Impact Report (DEIR) states that it "may be used by the State Water Resources Control Board, as a responsible agency as defined by CEQA, in its discretionary approval process and consideration to issue a water rights time extension for DWR's Feather River / Delta water rights permits 16478, 16479, 16481, 16482, 16477, and 16480 to allow long-term operations consistent with the diversion rates and quantities evaluated in this EIR" (DEIR Section 1.1, "Purpose of the Draft Environmental Impact Report"). Since publication of the DEIR on June 18, 2024, the California Department of Water Resources has decided to remove the water rights time extension from this EIR and to pursue California Environmental Quality Act (CEQA) compliance separate from State Water Project (SWP) long-term operations. Such an approach is permissible under CEQA because the SWP long-term operations and the water rights time extension can individually move forward regardless of the other project's progress or approvals. Neither project is dependent upon the other's approval for implementation. Indeed, the operations of the SWP have proceeded for multiple years absent a final decision on the water rights time extension. In other words, both projects have independent utility.[1]

Some commenters raised questions or concerns about the water rights time extension or analyses supporting the time extension; those comments are no longer relevant to the current project or this EIR. The time extension will be addressed at a later date in a water rights process before the State Water Resources Control Board and in a separate process for CEQA compliance.

[1] *Paulek v. Dep't of Water Res.* (2014) 231 Cal. App. 4th 35.

Chapter 3.14
Common Response 14: Tribal Consultation

3.14.1 Overview

This common response addresses the common themes and topics raised in public comments regarding Tribal engagement and Tribal cultural resources, including the following:

- State policies and actions that affect California Indian Tribes (Tribes).
- The adequacy of the California Department of Water Resources' (DWR) efforts to engage Tribes.
- The methods DWR employed to identify Tribal cultural resources.
- How DWR evaluated potentially significant impacts on Tribal cultural resources.

Given the importance of consultation to DWR's identification and analysis of potential impacts on Tribal cultural resources, this common response also addresses the consultation process and DWR's approach to the identification of Tribal cultural resources.

3.14.2 Consistency with Current State Policies Regarding California Tribes

Several comments stated the connection Tribes have to water and fish and the importance of these resources to their livelihood. Several comments also included the rights of Native American Tribes. Many comments asked for Tribes to be included in discussions about the timeframe and operation/flow to address potential impacts on Tribal ceremonies and for consultation and engagement with Tribes to continue beyond the release of the Final Environmental Impact Report (FEIR).

As described in Executive Order N-15-19, issued by Governor Gavin Newsom on June 18, 2019, the State of California recognizes that the State historically sanctioned over a century of depredations and prejudicial policies against California Native Americans. This Executive Order apologized on behalf of the citizens of the State of California to all California Native Americans for the many instances of violence, maltreatment, and neglect California inflicted on Tribes. Executive Order N-15-13 established the Truth and Healing Council and reaffirmed and incorporated by reference the principles of Executive Order B-10-11, issued by Governor Edmund G. Brown Jr. on September 19, 2011, regarding communication and government-to-government consultation with Tribes on policies that may affect Tribal communities.

The California Natural Resources Agency (CNRA) Final Tribal Consultation Policy, adopted November 12, 2012, was developed in response to Executive Order B-10-11, which states, "[t]he purpose of this policy is to ensure effective government-to-government consultation between the Natural Resources Agency, its Departments…and Indian Tribes…to provide meaningful input into the development of regulations, rules, policies, programs, projects, plans, property decisions, and activities that may affect Tribal communities."

DWR adopted its Tribal Engagement Policy, effective March 8, 2016, to strengthen DWR's commitment to improving communication, collaboration, and consultation with California Native American Tribes. This policy is consistent with Executive Order B-10-11, the CNRA's Tribal Consultation Policy, and the California Environmental Quality Act (CEQA), and includes principles that facilitate early and meaningful Tribal engagement with California Native American Tribes.

The State of California, including DWR, is committed to strengthening and sustaining effective government-to-government relationships between the State and Tribes. DWR recognizes that Tribal engagement is an important component of every major project led by the State of California, providing an opportunity for government-to-government consultation, collaboration, and coordination between Tribal governments and the State. Guided by the Executive Orders and other state policies described above, the long-term operation of the State Water Project (SWP) planning process included Tribal engagement and outreach. For more information on the Tribal consultation and engagement conducted for the Proposed Project, please see Chapter 7, "Tribal Cultural Resources," Section 7.1.1.3, "Consultation and Engagement with Tribes." Additionally, Appendix 7A, "Tribal Consultation and Engagement Log," presents a nonconfidential table that lists the Tribal consultations that have occurred for the Proposed Project to date.

As the CEQA lead agency, DWR must assess the Project's potential impacts on Tribal cultural resources as they are defined under Public Resources Code Section 21074. DWR recognizes the expertise of Tribes regarding their histories and cultures and the importance of meaningful consultation about the significance of resources from Tribal perspectives. For the long-term operation of SWP, DWR sought to conduct meaningful and culturally sensitive consultation with Tribes in the CEQA process for the purpose of identifying potential Tribal cultural resources.

During consultation with DWR, Tribes have expressed that waterways and surrounding areas are highly culturally sensitive, including for ceremonial, trade, and subsistence activities as well as for encountering archaeological resources.

The Tribes have an interest in the criteria, timing, and volume of water for operations coinciding with Tribal ceremonies. These ceremonies may take place during the runs of salmon and other fish species that are important to the Tribes. The Tribes will be included in the future discussions about the timeframe of operations/flows to consider Tribal ceremonies.

DWR is committed to ongoing consultation under the CNRA and DWR Tribal policies throughout implementation of the Proposed Project, which could result in the identification of additional Tribal cultural resources for the Proposed Project.

3.14.3 Role of Tribal Consultation in DWR's Identification and Evaluation of Tribal Cultural Resources

Several comments reiterated the need for consultations and opportunities to protect Tribal cultural resources. These comments also questioned DWR's Tribal consultation activities for the Proposed Project and how consultations are not just a check box for the process and require meaningful discussions with Tribes. DWR made a good-faith effort to foster meaningful consultation with Tribes in a manner that recognizes that Tribal designated representatives bring special expertise to the consultation process due to their unique cultural and geographical affiliation with the Proposed Project footprint.

3.14.3.1 Tribal Consultation Conducted by DWR

Meaningful consultation was more than an abstract goal. DWR engaged in continuous consultation with five Tribes pursuant to Public Resources Code Section 21080.3.1 or DWR's Tribal Engagement Policy. As explained in Section 7.1.1.3, DWR sent notification letters to all Tribes traditionally and culturally affiliated with the geographic Project area identified in the Notice of Preparation that had submitted a written request for notification to DWR in accordance with the Public Resources Code, inviting these Tribes to consult on the Proposed Project pursuant to the Public Resources Code. DWR also sent notification to additional Tribes traditionally and culturally affiliated with the geographic Project area as identified in the Notice of Preparation, inviting these Tribes to consult on the Proposed Project pursuant to DWR's Tribal Engagement Policy.

DWR reached out to 32 Tribes in total with invitations to consult on the Proposed Project and received responses from five Tribes requesting consultation on the Proposed Project. Some of these Tribes chose to have sustained engagement with DWR. Consultation meetings were conducted by video conference. Tribal leaders, Tribal Historic Preservation Officers, and other Tribal representatives attended these meetings at the Tribe's discretion. DWR engaged in consultation meetings as often as requested and solicited Tribal feedback, which was incorporated into the Draft Environmental Impact Report (DEIR) and FEIR. DWR frequently reached out to consulting Tribes to provide Project updates and request consultation to discuss Project information. Specifically, DWR provided information about the Proposed Project to each of the consulting Tribes and invited each Tribe to provide DWR with information about resources of concern, including their location and significance, what impacts might occur from Project activities, and ways that impacts could be avoided or mitigated. In addition, DWR provided interested consulting Tribes the opportunity to review advanced chapters of the DEIR. DWR continued to engage in outreach and consultation with Tribes following publication of the DEIR to discuss any additional information Tribes chose to share.

3.14.4 Consideration of Tribal Perspectives on Identification of Tribal Cultural Resources

DWR's role in the identification of Tribal cultural resources is to apply the criteria outlined in Public Resources Code Section 21074 and its approach for this process, including consideration of the significance of a resource to a Tribe, which is discussed in Section 7.1.1, "Methods for Resource Identification." DWR's regulatory responsibility for identifying and determining whether a resource is a Tribal cultural resource under CEQA is described in Section 7.1.1.1, "Application of the Requirements for Identification of Tribal Cultural Resources." DWR engaged in consultation with Tribes, as described in Section 7.1.1.3 and as documented in Appendix 7A, to inform the identification of Tribal cultural resources and to fulfill DWR's statutory obligation to engage in government-to-government consultation with Tribes that request it.[1]

[1] Pub. Resources Code § 21080.3.1.

3.14.5 Consideration of Tribal Perspectives in the Analysis of Impacts on Tribal Cultural Resources

Tribal consultation informed DWR's analysis of potential impacts on Tribal cultural resources. As discussed in Chapter 7, the thresholds for impacts and analysis approaches are based on Public Resources Code Sections 21084.1 and 21084.2. These thresholds and impact analysis approaches are applied in Section 7.3.3, "Impact Analysis."

DWR provided information about the Proposed Project to each of the consulting Tribes and invited each Tribe to provide DWR with information about resources of concern, including their location and significance, what impacts might occur from Project activities, and ways that impacts could be avoided or mitigated. Through consultation with the Tribes information presented in other resource chapters (e.g., surface water quality, surface water hydrology) was summarized and provided to the Tribes for consideration. Upon receiving a summary of the information, Tribes did not identify or express concerns for impacts on culturally important waterways or fish species. Any information consulting Tribes chose to share with DWR regarding Tribal resources of concern and potential impacts factored into DWR's Tribal cultural resource findings under CEQA, and ultimately supported DWR's no impact determination for the Delta Tribal Cultural Landscape (TCL) and individual Tribal cultural resources.

Tribal consultation that encompassed Tribes' spiritual and cultural perspectives also meaningfully informed DWR's identification of Tribal cultural resources. Continued engagement and collaboration with Tribes will ensure that, if the Proposed Project is approved, the Proposed Project is implemented in a manner that considers Tribal knowledge and Tribal perspectives.

3.14.6 Impact Analysis

Comments regarding the DEIR's conclusion that the Proposed Project would result in no impact on Tribal cultural resources expressed some commenters' position that construction is not the only impact that can negatively affect Tribal cultural resources.

3.14.6.1 Recognition of No Impact

As explained in Chapter 7, impact mechanisms that could involve Tribal cultural resources consist of:

- Activities that materially impair character-defining features of a Tribal cultural resource by disturbing, damaging, or destroying it. This may include activities such as ground disturbance that physically displaces buried cultural materials, burials or grave goods, or habitats that support important plant or animal species. This can also include activities that reduce the abundance or distribution of culturally important species or their habitats (terrestrial or aquatic biological resources) in such a way that affiliated Tribes' ability to perform ceremonies associated with the plant or animal species or gather the plant or animal for traditional medicinal or other uses is materially impaired.

- Activities that physically alter character-defining features of a Tribal cultural resource in ways that materially impair an affiliated Tribe's spiritual or ceremonial experience even if the character-defining feature is not destroyed or otherwise physically damaged. This may include limiting access to the resource, changing a character-defining feature in a way that disassociates the feature from its cultural meaning, or introducing a barrier between features that are meant to be experienced together.
- Activities that would be visible from character-defining features of a Tribal cultural resource that introduce incongruent features to, or remove important visual cues from, the surrounding setting in ways that interfere with the ability to understand or experience the full meaning of the feature may materially impair the character-defining feature.

The Proposed Project would not require construction of any new facilities and long-term SWP operations would not affect the water rights of any other legal user of water. Therefore, the impact analysis does not evaluate construction impacts, but rather focuses on the short- and long-term direct and indirect operations-related impacts compared to existing conditions.

The Tribal cultural resources impact analysis incorporates the information and results presented in Chapter 4, "Surface Water Hydrology;" Chapter 5, "Surface Water Quality;" and Chapter 6, "Aquatic Biological Resources." CEQA requires that a project's impacts on Tribal cultural resources be considered as part of the overall analysis of project impacts.[2]

California Native American Tribes are considered experts with respect to Tribal cultural resources. Thus, the analysis of whether Proposed Project impacts may result in a substantial adverse change to the significance of a Tribal cultural resource depends heavily on consultation between the lead agency and culturally affiliated California Native American Tribes during the CEQA process.

As stated in Section 7.3.2, "Thresholds of Significance," CEQA defines a significant impact on a Tribal cultural resource as a "substantial adverse change in the significance" of that resource, but does not provide a specific definition. Instead, it refers to a similar definition for historical resources, where a substantial adverse change involves physical demolition, destruction, or alteration that materially impairs the resource's historical significance. This concept of "material impairment" means that a change must be more than minor and affect the resource's characteristics such that its historical significance is lost. While Tribal cultural resources are distinct from historical resources, the guidance for historical resources can help assess impacts on Tribal cultural resources.

The criteria defined in Public Resources Code Section 21074 were used to determine whether the Proposed Project would cause a substantial adverse change in the significance of a Tribal cultural resource.

DWR used input from the Tribes during consultation to analyze the nature of how the Proposed Project could materially impair character-defining features of the Delta TCL. The Proposed Project would not cause any impacts on the character-defining features of the Delta TCL, and based on consultation and input received by the Tribes to date, the Proposed Project would have no impact on the Delta TCL Tribal cultural resource.

[2] Pub. Resources Code §§ 21080.3.1(a), 21084.2, and 21084.3.

The ongoing Tribal consultation for the Proposed Project might reveal additional cultural sites or features of significance to the Tribes, which could lead to reevaluation of their eligibility for listing on the California Register of Historical Resources. Assembly Bill 52 consultation and consultation for the CEQA process concluded with DWR sending consultation closure letters via certified mail and email (as detailed in Appendix 7A) to the five consulting Tribes dated September 11, 2024. DWR is committed to ongoing consultation under the CNRA and DWR Tribal policies, which could result in the identification of additional Tribal cultural resources for the Proposed Project. If new resources are identified, their significance and potential impacts would need to be assessed. Currently, the only identified individual Tribal cultural resources in the Proposed Project area are recorded by the United Auburn Indian Community, who have confirmed that these resources would not be affected by the Proposed Project. However, as consultation continues, there remains a possibility that new resources could be identified that might be affected. Based on current consultations and information received from the Tribes to date, the Proposed Project would have no impact on individual Tribal cultural resources.

DWR appreciates the investments made by consulting Tribes to build a relationship with DWR leading to finalization of the EIR. DWR is committed to extending these relationships beyond CEQA review of the long-term operations of the SWP through close collaboration on and engagement during the implementation of the Proposed Project.

Chapter 3.15
Common Response 15: Real-Time Operations

The California Department of Water Resources (DWR) proposes to implement real-time operations to provide a timely response to changes in Sacramento–San Joaquin Delta (Delta) water quality and surface water flows. Weather conditions combined with tidal action can quickly affect Delta salinity conditions and the Delta outflow required to maintain joint salinity standards under D-1641.

The Proposed Project includes real-time Old and Middle River (OMR) management to minimize entrainment and aquatic species loss during water operations at the Banks Pumping Plant.

Draft Environmental Impact Report (DEIR) Section 2.3.22, "Governance", describes the real-time water operations process for coordination with the U.S. Bureau of Reclamation (Reclamation), California Department of Fish and Wildlife (CDFW), DWR, U.S. Fish and Wildlife Service (USFWS), and National Marine Fisheries Service (NMFS). DWR proposes a governance structure for real-time operation of the State Water Project that includes compliance and performance reporting, monitoring, and drought and Dry year actions. The process for real-time operations would utilize the currently accepted science to minimize the effects of Project operations.

DEIR Section 2.3.22.4, "Delta," describes the collaborative, real-time risk assessment process proposed as part of the Proposed Project. The proposed process includes the following components:

- Weekly meetings of the Water Operations Management Team during the OMR management period (October–June) to discuss and resolve operational questions and technical issues.
- Weekly meetings of the Smelt Monitoring Team and Salmon Monitoring Team during the OMR management period to consider survey data, salvage data, and other pertinent biological and abiotic factors.
- Identification of any decision points that would trigger, or off-ramp, an OMR flow requirement or an export constraint.
- A risk assessment to determine whether a requirement is triggered or can be off-ramped.

The risk assessment would be developed by DWR, CDFW, Reclamation, NMFS, and USFWS technical staff based on the monitoring data and operations forecast.

Monitoring data would be used to evaluate potential for entrainment of Delta Smelt and Longfin Smelt. The potential entrainment impacts on fish in Old and Middle Rivers, relative to their estuarine-wide distribution would be evaluated using a number of evaluation tools, including Particle Tracking Model runs weighted by the distribution in the surveys. In addition, DWR would use real-time hydrological conditions, salvage data, forecast models (e.g., statistics-based models of historical data), other potential hydrodynamic models, and water quality to assess entrainment risk and to determine appropriate OMR flow targets to minimize entrainment or entrainment risk, or both. In coordination with CDFW, Reclamation, NMFS, and USFWS, DWR would determine the best available models, the model inputs, and the assessment methods for determining larval and juvenile Longfin Smelt entrainment risk.

As part of the Salmon Monitoring Team (SaMT), a juvenile production estimate and life cycle model for spring-run Chinook Salmon will be developed. Until these are developed, OMR management for spring-run Chinook Salmon will be based on detection of fall-run and late fall–run Chinook Salmon from Coleman National Fish Hatchery, which are used as surrogates for spring-run Chinook Salmon. DWR proposes to manage OMR if loss of hatchery surrogates for spring-run Chinook Salmon exceeds 0.25% for any of several release groups. The hatchery surrogates will be young-of-the-year spring-run and fall-run Chinook Salmon from the Feather River Hatchery or Coleman National Fish Hatchery, to be released at times and locations representative of wild young-of-the-year spring-run Chinook Salmon based on coordination with CDFW and in consideration of relevant historical information.