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**FILED**  
**Superior Court Of California,**  
**Sacramento**  
**01/25/2019**  
**hportalanza**  
**By \_\_\_\_\_, Deputy**  
**Case Number:**  
**34-2019-80003063**

6 Attorneys for Plaintiffs and Petitioners  
NORTH COAST RIVERS ALLIANCE, INSTITUTE FOR  
7 FISHERIES RESOURCES, PACIFIC COAST FEDERATION  
OF FISHERMEN'S ASSOCIATIONS, and the WINNEMEM  
8 WINTU TRIBE

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF SACRAMENTO

11 NORTH COAST RIVERS ALLIANCE, )  
INSTITUTE FOR FISHERIES RESOURCES, )  
12 PACIFIC COAST FEDERATION OF )  
FISHERMEN'S ASSOCIATIONS, and the )  
13 WINNEMEM WINTU TRIBE, )

14 Petitioners and Plaintiffs, )

15 v. )

16 STATE WATER RESOURCES CONTROL )  
BOARD, and DOES 1 through 20, )

17 Respondents and Defendants, )

18 DOES 21 through 200, )

19 Real Parties in Interest. )  
20 )  
21 )

Civ. No.

**VERIFIED PETITION FOR WRIT OF  
MANDATE AND COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF AND FOR ATTORNEYS' FEES**

**FILED BY FAX**  
by RiverCityProcessService.com

CEQA CASE

*FILED BY FACSIMILE*

22 Petitioners and Plaintiffs NORTH COAST RIVERS ALLIANCE, INSTITUTE FOR FISHERIES  
23 RESOURCES, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, and the  
24 WINNEMEM WINTU TRIBE (collectively "petitioners" or "Conservation Groups") hereby petition the  
25 Court for a writ of mandate against defendant and respondent STATE WATER RESOURCES  
26 CONTROL BOARD (the "Board") and by this Verified Petition for Writ of Mandate and Complaint for  
27 Declaratory and Injunctive Relief and for Attorney's Fees ("Verified Petition") hereby allege as follows:  
28 ///

1 **INTRODUCTION**

2 1. This is a public interest citizen suit to enforce the California Environmental Quality Act,  
3 Public Resources Code (“PRC”) section 21000 et seq. (“CEQA”), the federal Clean Water Act, 33  
4 U.S.C. section 1251 et seq., the Porter-Cologne Water Quality Control Act, Water Code section 13000 et  
5 seq. (the “Porter-Cologne Act”), and the Public Trust Doctrine. Petitioners bring this action to challenge  
6 the Board’s December 12, 2018 certification of the Final Substitute Environmental Document (“SED”)  
7 and approval of the San Joaquin River and South Delta Water Quality Bay-Delta Plan Amendments to  
8 the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (the  
9 “Project”) through its adoption of Resolution 2018-0059. In taking these actions the Board violated  
10 CEQA, the Clean Water Act, the Porter-Cologne Act, and the Public Trust Doctrine.

11 2. CEQA is California’s preeminent environmental law. It requires all public agencies to  
12 examine the potential adverse impacts of their actions before taking them. It is designed to protect  
13 California’s extraordinary environmental resources from uninformed and needlessly destructive agency  
14 actions.

15 3. CEQA requires the Board to fully examine the impacts of its actions and to carefully  
16 consider alternatives and mitigation measures that would reduce those impacts. “[I]f there are feasible  
17 alternatives or feasible mitigation measures available which would substantially lessen the significant  
18 environmental effects” of a project, then CEQA mandates that the Board cannot approve the project.  
19 PRC § 21002.

20 4. The Clean Water Act, Porter-Cologne Act, and Public Trust Doctrine require the Board to  
21 identify beneficial uses of navigable waters, including those dependent on public trust resources, and to  
22 establish and achieve the water quality standards necessary to protect them.

23 5. The Board improperly approved the Project without adequately examining the  
24 environmental impacts of doing so, without studying a reasonable range of alternatives, without  
25 adequately protecting public trust resources and uses, and without compliance with state and federal laws  
26 protecting the San Joaquin River, the South Delta, and their tributaries, including their public trust  
27 resources and uses.

28 ///

1 **VENUE AND JURISDICTION**

2 6. This Court has jurisdiction over this proceeding pursuant to Code of Civil Procedure  
3 (“CCP”) sections 526 (injunctive relief), 1060 (declaratory relief), and 1085 (traditional mandamus);  
4 PRC sections 21168 and 21168.5 (mandamus review); and article VI, section 10 of the California  
5 Constitution.

6 7. Venue is proper in this Court pursuant to CCP sections 393 (actions against public officers)  
7 and 395 (actions generally) because the Board’s offices are located in Sacramento.

8 8. Pursuant to CCP section 388, petitioners are serving the California Attorney General with a  
9 copy of this verified petition and complaint. Consistent with PRC section 21167.5, petitioners timely  
10 served the Board with notice of this suit.

11 **PARTIES**

12 9. Petitioner NORTH COAST RIVERS ALLIANCE (“North Coast Rivers”) is a non-profit  
13 unincorporated association with members throughout Northern California. North Coast Rivers was  
14 formed for the purpose of protecting California’s rivers and their watersheds from the adverse effects of  
15 excessive water diversions, ill-planned urban development, harmful resource extraction, pollution, and  
16 other forms of environmental degradation. Its members use and enjoy California’s rivers and watersheds  
17 for recreational, aesthetic, scientific study, and related non-consumptive uses. The interests of North  
18 Coast Rivers and its members have been, are being, and unless the relief requested herein is granted, will  
19 be adversely affected and injured by the Board’s certification of its inadequate SED and approval of the  
20 Project.

21 10. Petitioner INSTITUTE FOR FISHERIES RESOURCES (“IFR”) is a non-profit, tax-exempt  
22 organization that works to protect and restore salmon and other fish populations and the human  
23 economies that depend on them. IFR maintains its principal place of business in San Francisco,  
24 California. IFR both funds and manages many of fish habitat protection programs and initiatives. In that  
25 capacity, IFR advocates for reforms to protect fish health and habitat throughout the West Coast of the  
26 United States and has successfully advocated for dam removals, improved pesticide controls, better  
27 forestry stream protection standards, and enhanced marine and watershed conservation regulations  
28 throughout the West Coast. IFR has worked tirelessly for years to restore and enhance the Delta and its

1 beleaguered fish and wildlife. IFR and its members will be directly and indirectly injured by the Board's  
2 Project approval and its failure to adequately protect and restore the imperiled fisheries of the Delta and  
3 the San Joaquin River and their tributaries.

4 11. Petitioner PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS  
5 ("PCFFA") is a nonprofit membership organization incorporated in 1976 with headquarters located in  
6 San Francisco, California. PCFFA is composed of more than 14 separate commercial fishing and vessel  
7 owners' associations situated along the West Coast of the United States. By virtue of its combined  
8 membership of approximately 750 fishermen and women, PCFFA is the single largest commercial  
9 fishing advocacy organization on the West Coast. PCFFA represents the majority of California's  
10 organized commercial salmon fishermen and has been an active advocate for the protection of Pacific  
11 salmon and their spawning, rearing and migratory habitat for more than 30 years. PCFFA and its  
12 members would be harmed by the proposed Project because it allows continued excessive water  
13 diversions from the San Joaquin River and its tributaries, resulting in continued harm to their water  
14 quality and public trust resources and uses, including their commercial fisheries, which depend on  
15 sustainable management of the Delta and its connected ecosystems.

16 12. Petitioner WINNEMEM WINTU TRIBE is a Native American Tribe whose aboriginal  
17 territory encompasses the upper watersheds of the Sacramento River including the McCloud River. The  
18 Winnemem Wintu Tribe was traditionally dependent on salmon fishing for both subsistence and cultural  
19 purposes, and maintains a deep cultural, spiritual and recreational interest in the continued viability of  
20 California's salmon runs that pass through the Sacramento-San Joaquin River Delta, and restoration of  
21 those runs above Shasta Dam including in the McCloud River. The Winnemem Wintu Tribe is a strong  
22 proponent of Delta restoration, and will be harmed by the reduced Delta fresh water flows, degradation  
23 of water quality, destruction of fish and wildlife species, and other environmental harms that  
24 implementation of the Project will allow.

25 13. Respondent and defendant CALIFORNIA STATE WATER RESOURCES CONTROL  
26 BOARD ("Board") is a state agency charged with responsibility to determine water rights,  
27 manage water quality, and assure safe and reliable drinking water. Water Code § 174 et seq. The Board  
28 is also responsible for carrying out the requirements of sections 303(c) of the Clean Water Act. 33

1 U.S.C. §§ 1313(c); 40 C.F.R. §§ 130.3. Its certification of the SED and approval of the Project on  
2 December 12, 2018, was subject to and violated the requirements of CEQA, the federal Clean Water  
3 Act, the Porter-Cologne Water Act, the Public Trust Doctrine, and the CCP. The Board is the lead  
4 agency under CEQA for environmental review of the Project.

5 14. The true names and capacities of respondents DOES 1-20, inclusive, are unknown to  
6 petitioners who therefore sue such respondents by fictitious names pursuant to CCP section 474.  
7 Petitioners are informed and believe, and based on such information and belief allege, that the  
8 fictitiously named respondents are state or local officials or agencies who are responsible, in whole or in  
9 part, for the approval and implementation of the Project. Petitioners will, with leave of Court if  
10 necessary, amend this Verified Petition if and when the true names and capacities of said Doe  
11 respondents have been ascertained.

12 15. Petitioners are not aware that any specific real parties in interest exist. The true names and  
13 capacities of real parties in interest DOES 21-200, inclusive, are unknown to petitioners who therefore  
14 sue such real parties in interest by fictitious names pursuant to CCP section 474. Petitioners are  
15 informed and believe, and based on such information and belief allege, that the fictitiously named real  
16 parties in interest have a direct interest in approval of the Project. Petitioners will, with leave of Court if  
17 necessary, amend this Verified Petition if and when the true names and capacities of said Doe real parties  
18 in interest have been ascertained.

#### 19 GENERAL ALLEGATIONS

20 16. Petitioners have authorized their attorneys to file this lawsuit on their behalf to vindicate  
21 their substantial beneficial interest in securing the Board's compliance with the law.

22 17. Petitioners have performed any and all conditions precedent to the filing of this Verified  
23 Petition and Complaint and have exhausted any and all available administrative remedies to the extent  
24 required by law.

25 18. Petitioners have no plain, speedy, and adequate remedy in the ordinary course of law within  
26 the meaning of CCP section 1086 in that, unless this Court issues its writ of mandate setting aside the  
27 Board's Certification of the SED and approval of the Project, and ordering it to comply with the laws  
28 whose violation is alleged herein, the environmental interests of petitioners and the public that are

1 protected by those laws will be substantially and irreparably harmed. No monetary damages or other  
2 legal remedy could adequately compensate petitioners for the harm to their beneficial interests, and to the  
3 environment, occasioned by the Board's unlawful conduct.

4 19. Petitioners are entitled to declaratory relief under CCP section 1060 because an actual  
5 controversy exists between petitioners and the Board. Petitioners contend that the Board has acted in  
6 violation of applicable laws and must therefore vacate and set aside its approval of the Project.  
7 Petitioners are informed and believe that the Board disputes this contention. A judicial resolution of this  
8 controversy is therefore necessary and appropriate.

9 20. Petitioners are also entitled to injunctive relief under CCP section 526 because approval of  
10 the Project threatens irreparable environmental harm. Unless enjoined, the Board will implement the  
11 Project despite its lack of compliance with applicable laws, causing undue and unnecessary  
12 environmental degradation. Petitioners would thereby suffer irreparable harm due to the Board's failure  
13 to take the required steps to adequately protect the environment. Injunctive relief is thus warranted under  
14 CCP section 525 *et seq.* and PRC section 21168.9 to prevent irreparable harm to the environment.

## 15 LEGAL BACKGROUND

### 16 CEQA

17 21. CEQA is California's primary statutory mandate for environmental protection. It applies to  
18 all state and local agencies, and requires them to "first identify the [significant] environmental effects of  
19 projects, and then to mitigate those adverse effects through the imposition of feasible mitigation  
20 measures or through the selection of feasible alternatives." *Sierra Club v. State Board of Forestry*  
21 (1994) 7 Cal.4th 1215, 1233. Its most important substantive imperative requires "public agencies to  
22 deny approval of a project with significant adverse effects when feasible alternatives or feasible  
23 mitigation measures can substantially lessen such effects." *Sierra Club v. Gilroy City Council* (1990)  
24 222 Cal.App.3d 30, 41.

25 22. CEQA's mandate for detailed environmental review "ensures that members of the  
26 [governmental decision-making body] will fully consider the information necessary to render decisions  
27 that intelligently take into account the environmental consequences" of their proposed action. *Mountain*  
28 *Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 133; PRC §§ 21080.5(d)(2)(D),

1 21091(d)(2); 14 C.C.R. [CEQA Guidelines] (“Guidelines”) § 15088. The CEQA process thus “protects  
2 not only the environment but also informed self-government.” *Citizens of Goleta Valley v. Board of*  
3 *Supervisors* (1990) 52 Cal.3d 553, 564.

4 23. California “public agencies” must comply with CEQA when they approve discretionary  
5 projects. PRC § 21080(a).

6 24. The Board is a “public agency” and a “state agency” as defined in CEQA. PRC § 21063.

7 25. CEQA authorizes the Secretary of the Resources Agency to certify regulatory programs that  
8 provide sufficient information in lieu of an Environmental Impact Report (“EIR”). PRC § 21080.5(a).  
9 When a regulatory program is certified, projects prepared under that program are exempt “from [CEQA]  
10 Chapter 3 (commencing with Section 21100), Chapter 4 (commencing with Section 21150), and Section  
11 21167, except as provided in Article 2 (commencing with Section 21157) of Chapter 4.5.” PRC §  
12 21080.5(c). “Such programs are exempt from certain procedural aspects of CEQA because ‘they involve  
13 the same consideration of environmental issues as is provided by use of [Environmental Impact Reports  
14 (“EIRs”)] and negative declarations.’” *John R. Lawson Rock & Oil, Inc. v. State Air Resources Board*  
15 (2018) 20 Cal.App.5th 77, 95 (quoting *Poet, LLC v. State Air Resources Board* (2013) 218 Cal.App.4th  
16 681, 709). An agency approving a project that is part of a certified regulatory program must “conform  
17 not only to the detailed and exhaustive provisions of the [applicable regulatory program], but also to  
18 those provisions of CEQA from which it has not been specifically exempted by the Legislature.” *Sierra*  
19 *Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1229. Any “certified program remains subject to  
20 other provisions in CEQA, such as the policy of avoiding significant adverse effects on the environment  
21 where feasible.” Guidelines § 15250; *Pesticide Action Network North America v. Department of*  
22 *Pesticide Regulation* (“PANNA”) (2017) 16 Cal.App.5th 225, 241.

23 26. The Secretary of the Resources Agency has determined that the Board’s basin planning  
24 program is a certified regulatory program that does not require the preparation of an Environmental  
25 Impact Report (“EIR”), Negative Declaration or initial study. Guidelines §§ 15250, 15251(g). Instead,  
26 the Board is required to prepare a substitute environmental document that comports with the  
27 requirements of PRC section 21080.5(d)(3)(A) and Guidelines section 15252. In so doing, the Board is  
28 required to examine the cumulative impacts of its approval. *PANNA*, 16 Cal.App.5th at 248-251;

1 *Laupheimer v. State of California* (1988) 200 Cal.App.3d 440, 462. The Board’s regulations governing  
2 its certified regulatory program are contained within California Code of Regulations, Title 23, sections  
3 3775-3781.

4 27. In applying these CEQA procedures, an agency may not segment a project to avoid  
5 examining the entirety, or whole, of the project. Guidelines § 15378(a), (c), (d). CEQA’s “requirements  
6 cannot be avoided by chopping up proposed projects into bite-size pieces which, individually considered,  
7 might be found to have no significant effect on the environment or to be only ministerial.” *Plan for*  
8 *Arcadia, Inc. v. City Council of Arcadia* (1974) 42 Cal.App.3d 712, 726; *Tuolumne County Citizens for*  
9 *Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1230 (sequential review  
10 frustrates CEQA’s purposes if it “could result in mitigation measures being adopted in the second matter  
11 that are less effective than what would have been adopted if the matters had been analyzed as a single  
12 project”).

### 13 **The Sacramento-San Joaquin Delta Reform Act**

14 28. To address the indisputably perilous state of the Delta, in 2009 the California Legislature  
15 enacted the Sacramento-San Joaquin Delta Reform Act, Water Code section 85000 et seq. (“Delta  
16 Reform Act”), declaring that “[t]he Sacramento-San Joaquin Delta watershed and California’s water  
17 infrastructure are in crisis and *existing Delta policies are not sustainable.*” Water Code § 85001(a),  
18 emphasis added. The Legislature found that “‘the Delta’ . . . is a critically important natural resource for  
19 California and the nation. It serves Californians concurrently as both the hub of the California water  
20 system and the most valuable estuary and wetland ecosystem on the west coast of North and South  
21 America.” Water Code § 85002. “Resolving the crisis requires *fundamental reorganization* of the  
22 state’s management of Delta watershed resources.” Water Code § 85001(a), emphasis added.

23 29. The Delta Reform Act required the Board to “develop new flow criteria for the Delta  
24 ecosystem necessary to protect public trust resources. In carrying out this section, the [B]oard shall  
25 review existing water quality objectives and use the best available scientific information. The flow  
26 criteria for the Delta ecosystem shall include the volume, quality, and timing of water necessary for the  
27 Delta ecosystem under different conditions. The flow criteria shall be developed in a public process by  
28 the board within nine months of the enactment of this division.” Water Code § 85086(c)(1).



1                    **The Porter-Cologne Water Quality Control Act and the Federal Clean Water Act**

2                    30. Congress adopted the Clean Water Act “to restore and maintain the chemical,  
3 physical and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

4                    31. The Clean Water Act’s implementing regulations make clear that water quality “criteria  
5 must be based on sound scientific rationale and must contain sufficient parameters or constituents to  
6 protect the designated use. For waters with multiple use designations, the criteria shall support the most  
7 sensitive use.” 40 C.F.R. § 131.11(a).

8                    32. The Clean Water Act requires each state to develop water quality control standards that  
9 protect existing instream uses. A water quality control plan cannot lower or allow degradation of water  
10 quality standards. 40 C.F.R. § 131.12(a).

11                    33. The Clean Water Act’s antidegradation policy demands that “instream water uses and the  
12 level of water quality necessary to protect the existing uses shall be maintained and protected.” 40  
13 C.F.R. § 131.12(a)(1). “Where the quality of the waters exceeds levels necessary to support the  
14 protection and propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality  
15 shall be maintained” unless a number of specific requirements are met. 40 C.F.R. § 131.12(a)(2).

16                    34. The Porter-Cologne Act provides the Board with authority to oversee and regulate water  
17 quality and beneficial use. It governs the Board’s development and approval of water quality control  
18 plans. Each plan must designate or establish the beneficial uses of water to be protected, water quality  
19 objectives that will ensure the reasonable protection of the beneficial uses, and a program of  
20 implementation designed to achieve the objectives. Water Code §§ 13050(j), 13241.

21                    35. The Porter-Cologne Act mandates that state water quality standards be no less stringent  
22 than the Clean Water Act’s standards. Water Code § 13377. Under the authority provided by the Porter-  
23 Cologne Act, the Board adopted California’s antidegradation policy in Resolution No. 68-16.

24                    **The Public Trust Doctrine**

25                    36. Water Code section 85023 states, “the longstanding constitutional principle of reasonable  
26 use and the Public Trust Doctrine shall be the foundation of state water management policy and are  
27 particularly important and applicable to the Delta.”

28                    37. In *National Audubon Society v. Superior Court* (“*National Audubon*”) (1983) 33 Cal.3d

1 419, 426, the court noted that the public trust doctrine mandates that “before state courts and agencies  
2 approve water diversions they . . . consider the effect of such diversions upon interests protected by the  
3 public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.” The  
4 *National Audubon Society* Court went on to explain:

5 Just as the history of this state shows that appropriation may be necessary for efficient use of  
6 water despite unavoidable harm to public trust values, it demonstrates that an appropriative  
7 water rights system administered without consideration of the public trust may cause  
8 unnecessary and unjustified harm to trust interests. As a matter of practical necessity the state  
9 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.

10 *Id.* (citations omitted).

11 38. “Public trust easements are traditionally defined in terms of navigation, commerce and  
12 fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and  
13 general recreation purposes the navigable waters of the state, and to use the bottom of the navigable  
14 waters for anchoring, standing, or other purposes.” *Marks v. Whitney* (1971) 6 Cal.3d 251, 259. For  
15 nearly 50 years it has been settled law in California that public trust values also “encompass[] . . . the  
16 preservation of those lands in their natural state, so that they may serve as ecological units for scientific  
17 study, as open space, and as environments which provide food and habitat for birds and marine life, and  
18 which favorably affect the scenery and climate of the area.”

19 39. Although compliance with CEQA “may assist an agency in complying with its duties under  
20 the public trust doctrine . . . . [.] CEQA review of a project does not necessarily or automatically satisfy  
21 the agency’s affirmative duties to take the trust into account and protect public trust uses whenever  
22 feasible.” *San Francisco Baykeeper Inc. v. State Lands Com.* (“*Baykeeper II*”) (2018) 29 Cal.App.5th  
23 562, 571. “[A] public trust use is not any use that may confer a public benefit, but rather a use that  
24 facilitates public access, public enjoyment, or public use of trust land.” *Id.* at 570.

#### 25 **FACTUAL BACKGROUND**

26 40. “[T]he Sacramento-San Joaquin River Delta is a natural resource of statewide, national, and  
27 international significance, containing irreplaceable resources.” PRC § 29701. The Delta is the largest  
28 and most productive estuarine system on the West Coast of North and South America, but its future is in

1 peril. It is the State of California’s avowed policy “to recognize, preserve, and protect those resources of  
2 the delta for the use and enjoyment of current and future generations.” *Id.*

3 41. The Delta’s imminent ecologic collapse is well-recognized and indisputable. It has two  
4 principal causes. First, an unsustainable proportion of the Delta’s freshwater flows has been diverted for  
5 decades by the Central Valley Project (“CVP”) and the California (or “State”) Water Project (“SWP”).  
6 Second, for too long, agricultural diverters have discharged subsurface drainage and surface run-off  
7 contaminated with salt, selenium, and other toxic substances into groundwater and the rivers that are  
8 tributary to the Delta. This one-two punch of diminished freshwater flows and increased temperature,  
9 salinity, herbicides, pesticides, and heavy metals has pushed the Delta to the brink of ecologic collapse.

10 42. Due to excessive diversions of water for consumptive use, many species of fish endemic to  
11 the Delta have already gone extinct, including the Sacramento perch, formerly one of the most abundant  
12 fishes of the Delta, which disappeared in the 1970s. Just 12 indigenous species remain, and these are in  
13 grave danger. Since the SWP and CVP began operation, the Sacramento River winter and spring run  
14 Chinook salmon, Central Valley steelhead, North American green sturgeon and Delta smelt have been  
15 driven perilously close to extirpation.

16 43. Winter run Chinook salmon were declared threatened under the federal Endangered  
17 Species Act (“ESA”) in 1990 (55 Fed.Reg. 46515), and then due to continuing population declines,  
18 declared endangered in 2005 (70 Fed.Reg. 37160). Their critical habitat in the Sacramento River and its  
19 tributaries was designated in 1993. 58 Fed.Reg. 33212. Spring run Chinook salmon were declared  
20 threatened, and their critical habitat designated under the ESA in 2005. 70 Fed.Reg. 37160, 52488.  
21 Central Valley steelhead were declared threatened in 2000 (65 Fed.Reg. 52084) and their critical habitat  
22 was designated in 2005 (70 Fed.Reg. 52488). The Southern district population segment (“DPS”) of  
23 North American green sturgeon was declared threatened in 2006 (71 Fed.Reg. 17757) and its critical  
24 habitat was designated in 2008 (73 Fed.Reg. 2084). Delta smelt were declared endangered in 1993 (58  
25 Fed.Reg. 12854) and their critical habitat was designated in 1994 (59 Fed.Reg. 65256).

26 44. In addition to harming many fish species in the Delta, the excessive use of Delta water  
27 exports to irrigate contaminated soils in the San Joaquin Valley pollutes ground and surface waters that  
28 flow into the Delta. Irrigation leaches pollutants from the toxic soils underlying many of the areas

1 irrigated with Delta water. The subsurface drainage and surface run off from these contaminated soils  
2 contain pollutants including selenium, arsenic, boron, mercury, uranium, chromium, molybdenum and  
3 sodium chlorides and sulfates. The resulting pollution of the Delta and its San Joaquin Valley tributaries  
4 threatens the Delta's water quality and the fish and wildlife dependent on them.

5 45. The 1992 Central Valley Project Improvement Act, Pub.L. No. 102-575, 106 Stat. 4600,  
6 4715-16 ("CVPIA") acknowledged and attempted to remedy the decline of these fish populations.  
7 CVPIA Section 3406(b)(1) mandates that the "natural production of anadromous fish in the Central  
8 Valley rivers and streams will be sustainable, on a long-term basis, at levels not less than twice the  
9 average levels attained during the period of 1967-1991" by 2002.

10 46. In 1995, the United States Environmental Protect Agency ("USEPA") adopted a salinity  
11 standard of 0.44 dS/m (or milliMhos ("mmhos")/cm) electrical conductivity ("EC") on a 14-day running  
12 average in the Lower San Joaquin River in the reach from Jersey Point to Vernalis in wet, above normal,  
13 and below normal water years for the protection of estuarine spawning habitat using striped bass as the  
14 index species. In dry and critical water years, USEPA proposed the 0.44 mmhos/cm criteria for only the  
15 reach from Jersey Point to Prisoners Point. 60 Fed.Reg. 4664, 4696 (Jan. 24, 1995); 40 CFR § 131.37.  
16 This federal standard was established to protect both habitat and recreational beneficial uses including  
17 the sport fishery, and has never been withdrawn.

18 47. The Bay-Delta Water Quality Control Plan adopted by the Board in 1995 includes salinity  
19 objectives for the San Joaquin River at Vernalis, as well as three locations within the southern Delta.  
20 These objectives provide for a maximum 30-day running average of mean daily EC of 0.7 mmhos/cm  
21 from April through August and of 1.0 mmhos/cm from September through March for all water year  
22 types. These standards are less protective of public trust resources and uses than the federal salinity  
23 standards.

24 48. The Board's revised Decision 1641 ("D-1641") implements portions of the 1995 Bay-Delta  
25 Water Quality Control Plan. It sets requirements for Delta outflow that include numeric outflow  
26 requirements and the position of the low salinity zone where salinity is below two parts per thousand  
27 ("X2").

28 49. On or about February 13, 2009, the Board filed a Notice of Preparation with the Governor's

1 Office of Planning and Research, notifying the public that it proposed to “review and update [the] water  
2 quality objectives, including flow objectives and the program of implementation” of the Water Quality  
3 Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (“Bay-Delta Plan”) and  
4 “changes to water rights and water quality regulation consistent with the program of implementation.”  
5 2009 Notice of Preparation, p. 2. The Notice of Preparation states that the Board intended to “stage its  
6 environmental review” and that it “anticipates preparing substitute environmental documentation to  
7 support any water quality control plan updates, as appropriate and one or more Environmental Impact  
8 Reports (EIR[s]) to support any water right decision(s) or order(s) that may be needed to support changes  
9 to water rights to implement any changes to the Bay-Delta Plan.” *Id.*, p. 3. It also states that the Board  
10 “may alternatively choose to prepare one EIR to inform both the water quality control planning and  
11 water rights implementation described in this notice.” *Id.* The Project was assigned State Clearinghouse  
12 Number 2009022056.

13 50. The Board determined that the baseline for the Project would be “the physical conditions in  
14 2009 as they existed under the 2006 Bay-Delta Plan.” SED Volume 1, p. ES-51.

15 51. As required by the Delta Reform Act, Water Code section 85086, on or about August 3,  
16 2010, the Board adopted the Final Report on Development of Flow Criteria for the Sacramento-San  
17 Joaquin Delta Ecosystem (“Delta Flow Criteria Report”). The Delta Flow Criteria Report establishes a  
18 flow criteria of “60% of unimpaired San Joaquin River inflow from February through June.” Delta Flow  
19 Criteria Report, p. 4. The Board resolution adopting the Delta Flow Criteria Report acknowledges that  
20 the Delta Flow Criteria Report determines “flow criteria for the Delta ecosystem *necessary* to protect  
21 public trust resources.” Resolution 2010-0039, p. 1 (emphasis added).

22 52. On or about April 1, 2011, the Board filed a second Notice of Preparation for the Project  
23 with the Governor’s Office of Planning and Research. This Notice of Preparation states that “[t]he  
24 proposed project includes review of and potential amendments to water quality objectives for the  
25 protection of southern Delta agricultural beneficial uses; San Joaquin River flow objectives for the  
26 protection of fish and wildlife beneficial uses; and the program of implementation for those objectives  
27 included in the 2006 Bay-Delta Plan. The proposed project also includes potential changes to the  
28 monitoring and special studies program included in the 2006 Bay-Delta Plan.” 2011 Notice of

1 Preparation, p. 4. Thus, by 2011, the Board indicated it would divide the whole of its action into parts,  
2 addressing the Project separately from other portions of the Bay-Delta Plan amendment.

3 53. On or about January 1, 2013, the Board circulated a Draft SED and opened public comment  
4 on the adequacy of the draft SED. The Board conducted a public hearing to accept oral comments on the  
5 sufficiency of the draft SED on March 20 and 21, 2013. Petitioner PCFFA, among others, provided oral  
6 comments on the 2013 draft SED during this public hearing.

7 54. On or about September 15, 2016, the Board circulated a Draft Revised SED and proposed  
8 Project. The Board invited oral comments regarding the Draft Revised SED and proposed Project on  
9 November 29, 2016, December 16, 2016, December 19, 2016, December 20, 2016, and January 3, 2017.

10 55. The Draft Revised SED presented Lower San Joaquin River (“LSJR”) Alternatives and  
11 Southern Delta Water Quality (“SDWQ”) Alternatives. Alternative 1, the No Project Alternative, was  
12 the same for both LSJR and SDWQ Alternatives, and was modeled to reflect full compliance with D-  
13 1641 and existing southern Delta salinity objectives.

14 56. The LSJR Alternatives present a range of unimpaired flows: LSJR Alternative 2 would set  
15 the range of minimum flows between 20 and 30 percent of unimpaired flow in the Stanislaus, Tuolumne  
16 and Merced Rivers, with a minimum flow no less than 20 percent of unimpaired flow from February to  
17 June. LSJR Alternative 3, which the Revised Draft SED identifies as the recommended LSJR  
18 Alternative, sets the range of minimum flow between 30 and 50 percent of unimpaired flow, with a  
19 starting point of 40 percent of unimpaired flow. During the months of February to June, LSJR Alternative  
20 3 would set the minimum flow at no less than 30 percent of unimpaired flow. LSJR Alternative 4 would  
21 include a range of minimum flows of 50-60 percent of unimpaired flow, with a starting base flow of 60  
22 percent of unimpaired flow, and a minimum total flow from February to June of no less than 50 percent  
23 of the unimpaired flow for that period.

24 57. The SDWQ Alternatives address salinity objectives. SDWQ Alternative 2, which the  
25 Revised Draft SED identifies as the recommended alternative, would increase the numeric salinity  
26 objective to 1.0 dS/m as a maximum 30-day running average of mean daily EC for *all* months in the  
27 southern Delta, and change the locations used to measure compliance with that standard. SDWQ  
28 Alternative 3 would increase the salinity objective even more, to 1.4 dS/m for all months.

1           58. The Revised Draft SED failed to examine any other alternative that could reasonably  
2 achieve the fish doubling goals established in the CVPIA and incorporated into prior Bay-Delta Water  
3 Quality Control Plans.

4           59. Petitioners PCFFA and IFR provided oral comments to the Board on November 29, 2016.

5           60. Petitioners North Coast Rivers, PCFFA, and IFR, among others, submitted timely written  
6 comments on the Draft Revised SED and proposed Project on March 17, 2017. In addition, Chief  
7 Caleen Sisk submitted timely written comments on behalf of the Winnemem Wintu Tribe during the  
8 comment period. Conservation Groups notified the Board that the proposed Project did not adopt  
9 sufficient instream flow requirements to protect fish as detailed in the Board's Delta Flow Criteria  
10 Report, relied upon vague, ineffective and abuse-inviting "adaptive management," and relaxed salinity  
11 objectives in the South Delta in violation of antidegradation rules and the water quality standards  
12 adopted by the USEPA in 1995.

13           61. On or about July 6, 2018, the Board announced that it would address "the Sacramento  
14 River, its tributaries, Delta eastside tributaries (including Calaveras, Cosumnes, and Mokelumne rivers),  
15 Delta outflows, and interior Delta flows" in a separate update that it plans to consider as the  
16 "Sacramento/Delta Update" to the Bay-Delta Plan. July 2018 Framework for the Sacramento/Delta  
17 Update to the Bay-Delta Plan, p. 1.

18           62. On or about July 6, 2018, the Board released its Final SED and Proposed Final  
19 Amendments for public review.

20           63. The Board did not substantively amend the SED in response to comments it received on the  
21 Draft Recirculated SED, and instead it merely made clarifications and minor modifications. SED  
22 Volume 3, 1-3.

23           64. North Coast Rivers, PCFFA, and IFR submitted written comments regarding the Final SED  
24 and Proposed Final Amendments to the Water Quality Control Plan for the San Francisco  
25 Bay/Sacramento-San Joaquin Delta Estuary on July 27, 2018. These detailed comments addressed  
26 deficiencies in the proposed Project. In particular these comments noted the environmental superiority  
27 of a higher flow alternative, and its necessity to restore public trust resources and uses.

28           65. The Board originally calendared its hearing to consider whether to adopt the Project and

1 SED for its Board Meeting scheduled on August 21-22, 2018. The Board then continued the item to its  
2 November 2018 Board Meeting. In November, the Board voted to continue the item until its December  
3 2018 Board Meeting.

4 66. On December 12, 2018, the Board held a public hearing to consider the SED and Project.  
5 That morning, the California Department of Water Resources (“DWR”), and the California Department  
6 of Fish and Wildlife (“CDFW”) presented a voluntary settlement agreement framework that was entirely  
7 different from the Project and the Project alternatives presented in the SED. The parties that participated  
8 in developing this proposal included DWR, CDFW, Bureau of Reclamation, City and County of San  
9 Francisco, San Francisco Public Utility Commission, Modesto Irrigation District, Turlock Irrigation  
10 District, Friant Water Users Authority, Sacramento River Settlement Contractors, Tehama Colusa Canal  
11 Authority, Yuba Water Agency, American River Agencies, and Feather River Agencies. This so-called  
12 alternative proposal was prepared without public participation following private meetings between water  
13 users and state agencies that were not publicly noticed as required, and were expressly limited to parties  
14 with financial interests who signed confidentiality agreements. The proposal was presented long after  
15 the Board had closed its period for public comments addressing the sufficiency of the SED, denying the  
16 public’s – and petitioners’ – right to review and comment on the proposal as required by applicable law.

17 67. Petitioners are informed and believe that the Board determined that this proposal could not  
18 be an alternative to the Project because the SED did not examine the environmental impacts of the  
19 proposal in comparison to the Project and the Board and its staff lacked sufficient information to make  
20 conclusions regarding its environmental impacts.

21 68. On the evening of December 12, 2018, the Board voted to certify the SED and approve the  
22 Project with modifications. It adopted CEQA Findings and Statement of Overriding Considerations  
23 (“CEQA Findings”) for the Project addressing the Project’s significant and unmitigable impacts on: (1)  
24 aesthetics, including cumulative impacts (2) agricultural resources and forestry resources, including  
25 cumulative impacts (3) air quality, including cumulative impacts (4) biological resources – including  
26 cumulative impacts – on both aquatic and terrestrial resources (5) cultural resources, including  
27 cumulative impacts (6) geology and soils, including cumulative impacts (7) greenhouse gases and  
28 energy, including cumulative impacts (8) hazards and hazardous materials, including cumulative impacts



1 (9) hydrology and water quality, including cumulative impacts (10) groundwater resources, including  
2 cumulative impacts (11) land use and planning, (12) noise, including cumulative impacts (13) mineral  
3 resources, including cumulative impacts (14) public services, (15) recreational resources, including  
4 cumulative impacts (16) transportation and traffic, and (17) service providers and utilities and service  
5 systems, including cumulative impacts.

6 69. The Board’s CEQA Findings state that “alternatives with fewer significant environmental  
7 impacts than the Plan Amendments are infeasible.”

8 70. As approved, the Project adopts SDWQ Alternative 2’s year-round southern Delta numeric  
9 salinity objective, 1.0 dS/m as a maximum 30-day running average of mean daily EC for *all* months.

10 71. As approved, the Project adopted LSJR Alternative 3’s flow objectives. It sets LSJR flow  
11 objectives for February through June at “40 percent of unimpaired flow, based on a minimum 7-day  
12 running average, from each of the Stanislaus, Tuolumne, and Merced Rivers.” SED Appendix K, p. 29.  
13 “This required percentage of unimpaired flow, however, may be adjusted within the range allowed by the  
14 LSJR flow objectives through adaptive methods . . . .” *Id.*

15 72. As approved, the Project also states:

16 the LSJR base flow objective for February through June shall be implemented by  
17 requiring a minimum base flow of 1,000 cfs, based on a minimum 7-day running average,  
18 at Vernalis at all times. This minimum base flow, however, may be adjusted within the  
19 range allowed by the LSJR base flow objective through adaptive methods detailed below.  
20 When the percentage of unimpaired flow requirement is insufficient to meet the minimum  
21 base flow requirement, the Stanislaus River shall provide 29 percent, the Tuolumne River  
22 47 percent and the Merced River 24 percent of the additional total outflow needed to  
23 achieve and maintain the required base flow at Vernalis.

24 *Id.*

25 73. The Project’s minimum base flows are significantly lower than the flows identified in the  
26 Delta Flow Criteria Report as necessary to protect public trust resources, and consequently are  
27 insufficient to protect, let alone restore, those resources.

28 74. As approved, the Project establishes criteria for adaptive management adjustments. For the  
“required percentage of unimpaired flow” to be “adjusted to any value between 30 percent and 50  
percent, inclusive,” on an annual basis, the Executive Director and *all* members of the Stanislaus,  
Tuolumne, and Merced Working Group (“STM Working Group”) must agree to the change. *Id.*, p. 30.

1 Likewise, all members of the STM Working Group must agree for the Executive Director to approve, on  
2 an annual basis, changes to “the required base flow for February through June” pursuant to the Board’s  
3 approval, which allows that base flow to “be adjusted to any value between 800 and 1,200 cfs,  
4 inclusive.” *Id.*, p. 31.

5 75. As approved, the Executive Director may also implement changes when recommended by at  
6 least one member of the STM Working Group. These changes include:

7 The required percent of unimpaired flow for February through June may be managed as a  
8 total volume of water and released on an adaptive schedule during that period where  
9 scientific information indicates a flow pattern different from that which would occur by  
10 tracking the unimpaired flow percentage would better protect fish and wildlife beneficial  
11 uses. The total volume of water must be at least equal to the volume of water that would  
12 be released by tracking the unimpaired flow percentage from February through June.

13 The release of a portion of the February through June unimpaired flow may be delayed  
14 until after June to prevent adverse effects to fisheries, including temperature, that would  
15 otherwise result from implementation of the February through June flow requirements.  
16 The ability to delay release of flow until after June is only allowed when the unimpaired  
17 flow requirement is greater than 30 percent. If the requirement is greater than 30 percent  
18 but less than 40 percent under (a) above, the amount of flow that may be released after  
19 June is limited to the portion of the unimpaired flow requirement over 30 percent. (For  
20 example, if the flow requirement is 35 percent, 5 percent may be released after June.) If  
21 the requirement is 40 percent or greater under (a) above, then 25 percent of the total  
22 volume of the flow requirement may be released after June. (For example, if the  
23 requirement is 50 percent, at least 37.5 percent unimpaired flow must be released in  
24 February through June and up to 12.5 percent unimpaired flow may be released after June.

25 *Id.*, pp. 30-31.

26 76. The STM Working Group is expected to include water diverters, resource agencies, and  
27 other “persons or entities” with “appropriate expertise.” *Id.*, p. 32.

28 77. The Board has not yet filed a Notice of Determination with the Governor’s Office of  
Planning and Research.

## **FIRST CAUSE OF ACTION**

### **(Violation of CEQA)**

#### **(Alleged by All Petitioners Against All Respondents)**

78. The paragraphs set forth above and below are realleged and incorporated herein by  
reference.

79. Petitioners bring this First Cause of Action pursuant to PRC sections 21168 and 21168.5, on  
the grounds that the Board committed a prejudicial abuse of discretion, by failing to proceed in the

1 manner required by law, in approving a deeply flawed Project based on a legally inadequate SED.

2 80. The purpose of a SED is to provide agencies and the public with information about a  
3 proposed project’s potential environmental effects, ways to minimize those effects, and potential  
4 alternatives to the project. PRC § 21080.5(d)(3)(A). A Project described in an SED may not be  
5 “approved or adopted as proposed if there are feasible alternatives or feasible mitigation measures  
6 available that would substantially lessen a significant adverse effect that the activity may have on the  
7 environment.” PRC § 21080.5(d)(2)(a). The Board’s Project approval and certification of the SED  
8 violates CEQA in at least the following respects.

9 **The Project Is Improperly Segmented**

10 81. CEQA requires agencies to prepare environmental documents regarding the impacts of  
11 “projects” that may have significant environmental impacts. Guidelines § 15064(a)(1). CEQA defines  
12 “project” to mean “the whole of an action.” Guidelines § 15378(a). “The term ‘project’ refers to the  
13 activity which is being approved and which may be subject to several discretionary approvals by  
14 governmental agencies. The term ‘project’ does not mean each separate governmental approval.”  
15 Guidelines § 15378(c). Accordingly, agencies “must consider the whole of an action, not simply its  
16 constituent parts, when determining whether [the action] will have a significant environmental effect  
17 (*Citizens Assoc. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d  
18 151).” Guidelines § 15003(h); *see also* Guidelines § 15378(a), (c).

19 82. CEQA thus intends to ensure “that environmental considerations do not become submerged  
20 by chopping a large project into many little ones – each with a minimal potential impact on the  
21 environment – which cumulatively may have disastrous consequences.” *Bozung v. Local Agency*  
22 *Formation Com.* (1975) 13 Cal.3d 263, 283-284.

23 83. Here, instead of studying all of its interdependent actions together, the Board has improperly  
24 segmented its Project. The Board has split the amendments necessary to update the Bay-Delta Plan into  
25 parts. The Project addresses only the San Joaquin River and south Delta tributaries, and not the  
26 Sacramento/Delta update to the Bay-Delta Plan, despite the interconnected nature of the Delta  
27 ecosystem. By splitting the Project into parts, the Board has frustrated informed decisionmaking  
28 regarding the impacts of the combined actions on the Delta ecosystem, and mitigation measures to

1 alleviate those impacts.

2 84. This segmentation violates CEQA’s demand for unified and comprehensive environmental  
3 review:

4 Theoretical independence is not a good reason for segmenting the environmental analysis  
5 of the two matters. Doing so runs the risk that some environmental impacts produced by  
6 the way the two matters combine or interact might not be analyzed in the separate  
7 environmental reviews. Furthermore, if the two matters are analyzed in sequence . . . and  
8 the combined or interactive environmental effects are not fully recognized until the review  
of the second matter, the opportunity to implement effective mitigation measures as part  
of the first matter may be lost. This could result in mitigation measures being adopted in  
the second matter that are less effective than what would have been adopted if the matters  
had been analyzed as a single project.

9 *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214,  
10 1230. The Board’s segmented review subverts CEQA’s informational purposes.

11 **The Board’s Discussion of Alternatives Violates CEQA**

12 85. Under CEQA, an agency must focus on alternatives that would lessen significant effects,  
13 even if they “would impede to some degree the attainment of the project objectives, or be more costly.”  
14 Guidelines § 15126.6(b).

15 86. LSJR Alternative 4 calls for higher base flows that are more likely to provide the  
16 temperature benefits necessary for fish. SED Volume 1, ES-16, 19-20. The SED claims that LSJR  
17 Alternative 3 has fewer impacts than LSJR Alternative 4. Yet LSJR Alternative 3 has significant and  
18 unavoidable impacts in the same resource areas as those of LSJR Alternative 4: groundwater,  
19 recreational resources and aesthetics, agricultural resources, service providers, and energy and  
20 greenhouse gases. SED Volume 1, 18-5.

21 87. The Board failed to consider a reasonable range of alternatives in the SED, as none of the  
22 alternatives studied in the SED are sufficient to achieve fish recovery or the salmon doubling goals.

23 **The SED Was Unlawfully Approved Because Feasible Alternatives and**  
24 **Mitigations Exist that Would Substantially Lessen Project Impacts**

25 88. A Project described in an SED may not be “approved or adopted as proposed if there are  
26 feasible alternatives or feasible mitigation measures available that would substantially lessen a  
27 significant adverse effect that the activity may have on the environment.” PRC § 21080.5(d)(2)(a).

28 89. It is settled law that the environmental document must identify feasible mitigation measures

1 regardless of whether such mitigation falls within the Board’s – or some other agency’s – authority. *City*  
2 *of Marina v. Board of Trustees* (2006) 39 Cal.4th 355, 366; *City of San Diego v. Board of Trustees*  
3 (2015) 61 Cal.4th 945, 957-958; *Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213  
4 Cal.App.4th 1277, 1304-1305.

5 90. The SED’s discussion of the Project’s agricultural resource impacts declines to address how  
6 many of those impacts could be further mitigated through changes in farming techniques. SED Volume  
7 1, pp. 11-50, 11-55. The SED discloses that it left that issue unaddressed because the Board does not  
8 believe it has authority to order such mitigation as part of the plan amendment. SED Volume 1, p. 11-  
9 50. The SED’s failure to address ways in which impacts to agriculture may be reduced through  
10 improved irrigation practices allows the document to overstate the potential harms to agriculture  
11 associated with LSJR Alternative 4. This improperly skews the analysis in favor of LSJR Alternative 3’s  
12 less-protective flow regime, at the expense of Alternative 4, which is a feasible alternative that, unlike  
13 Alternative 3, requires minimum flows for fish that approach the flows recognized by the Delta Flow  
14 Criteria Report as necessary to protect public trust resources.

15 **The Project’s Adaptive Management Component Violates CEQA**

16 91. The Board included provisions to alter the Project’s implementation by allowing staff and  
17 the STM Working group to modify flow objectives. The Project has delayed the development of clear  
18 parameters that identify which environmental conditions can trigger or prevent implementation of these  
19 flow modifications or other adaptive adjustments. Because these parameters are undeveloped, the SED  
20 cannot adequately disclose the Project’s potentially significant impacts.

21 **The Board’s Findings and Statement of Overriding Considerations**  
22 **Are Not Supported by Substantial Evidence and Are Otherwise Invalid**

23 92. If a project will have “significant environmental effects,” CEQA requires the agency to  
24 make “one or more written findings for each of those significant effects, accompanied by a brief  
25 explanation of the rationale for each finding.” Guidelines § 15091(a). There are three “possible  
26 findings”:

- 27 (1) Changes or alterations have been required in, or incorporated into, the project which avoid  
28 or substantially lessen the significant environmental effect . . . .

- 1 (2) Such changes or alterations are within the responsibility and jurisdiction of another public  
2 agency and . . . have been adopted . . . or can and should be adopted by such other agency.
- 3 (3) Specific economic, legal, social, technological, or other considerations . . . make infeasible  
4 the mitigation measures or project alternatives identified in the final EIR.

5 Guidelines §15091(a). The findings “shall be supported by substantial evidence in the record.”

6 Guidelines § 15091(b).

7 93. Where, as here, an agency approves a project that has significant environmental effects that  
8 “are not avoided or substantially lessened,” the agency must “state in writing the specific reasons to  
9 support its action.” Guidelines §§ 15093(b); 15096(h), 15064(a)(2). This “statement of overriding  
10 considerations shall be supported by substantial evidence,” Guidelines section 15093(b), and is to be  
11 made in addition to the findings required under section 15091. Guidelines § 15091(f).

12 94. Requiring such findings and, when necessary, a statement of overriding considerations,  
13 ensures that the agency carefully considers the proposed action’s environmental effects and makes its  
14 decisionmaking process transparent. The “intended effect is to facilitate orderly analysis and minimize  
15 the likelihood that the agency will randomly leap from evidence to conclusions.” *Topanga Assn. for a*  
16 *Scenic Com. v. County of Los Angeles* (1974) 11 Cal.3d 506, 516-517. Since they lay out the agency’s  
17 rationale, findings also help courts to police agency compliance with CEQA’s required procedures. *Mira*  
18 *Mar Mobile Com. v. City of Oceanside* (2004) 119 Cal.App.4th 477, 496 (noting that “findings must  
19 ‘bridge the analytic gap between the raw evidence and ultimate decision,’ so as to allow a reviewing  
20 court ‘to trace and examine the agency’s mode of analysis’”) (citation omitted).

21 95. In order to make the findings required under CEQA, an environmental document must  
22 properly identify and fully analyze the Project’s myriad significant environmental impacts. As discussed  
23 above, the SED fails to do so. The Board’s CEQA findings, which are based on this impacts analysis,  
24 are therefore necessarily defective.

25 96. The Board’s Statement of Overriding Considerations is invalid for the following reasons  
26 among others: (a) it assumes that the significant effects of the Project cannot be mitigated to a less than  
27 significant level through the adoption of a feasible, less damaging alternative, despite the existence of  
28 several such alternatives, as alleged above; (b) its claims are not supported by substantial evidence; and  
(c) the Board identifies areas where significant and unavoidable Project effects might be mitigated by

1 approvals outside its control, yet it neither proposes any particular regulation that might mitigate such  
2 impacts, nor finds that the relevant agencies can and should adopt such a proposal, as required by PRC  
3 section 21081(a)(2). This violates CEQA. PRC §§ 21081(a)(2), 21081.5; Guidelines §§ 15091(b),  
4 15093(b); *Uphold our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 597-603.

5 **SECOND CAUSE OF ACTION**

6 **(Violation of Clean Water Act)**

7 **(Alleged by All Petitioners Against All Respondents)**

8 97. The paragraphs set forth above and below are realleged and incorporated herein by  
9 reference.

10 98. The Clean Water Act's antidegradation policy demands that "instream water uses and the  
11 level of water quality necessary to protect the existing uses shall be maintained and protected." 40  
12 C.F.R. § 131.12(a)(1). "Where the quality of the waters exceeds levels necessary to support the  
13 protection and propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality  
14 shall be maintained" unless a number of specific requirements are met. 40 C.F.R. § 131.12(a)(2).

15 99. Yet the Board's Project approval relaxes the salinity objectives – thereby allowing increased  
16 salinity – which will result in lower water quality and violate the Clean Water Act's antidegradation  
17 policy. SED Volume 1, pp. 23-2, 23-28; 40 C.F.R. § 131.12(a). The existing federal standard limits  
18 salinity to 0.44 dS/m EC, and the 2006 Bay Delta Plan's salinity water quality objective limited salinity  
19 to 0.7 dS/m EC during the months of April through August. As approved, however, the Project allows  
20 1.0 dS/m EC during those months – a *substantial* increase. SED Volume 1, p. 23-7.

21 100. The Board admits that "[w]ater quality conditions in the LSJR Watershed and southern  
22 Delta vary both seasonally and annually and are strongly affected by streamflow levels, due to dilution of  
23 the salt loads and other constituents in the affected areas." SED Volume 1, p. 23-28. It further  
24 acknowledges that "by raising the salinity water quality objective in the Southern Delta, the proposed  
25 plan amendments may appear to relax the objective and authorize a lowering of water quality." SED  
26 Volume 1, pp. 23-2, 23-7.

27 101. The Board claimed that the amendments will not degrade water quality. SED Volume 1, p.  
28 23-28. But this assertion is disingenuous. Despite the Board's adoption of the existing salinity standard

1 in D-1485 in 1978, the Board has continually delayed the compliance deadline and has therefore failed to  
2 enforce the current salinity standards. SED Volume 1, pp. 23-5 to 23-6. Now, 40 years later, the SED  
3 claims that relaxing the standard does not violate the Clean Water Act's antidegradation policies because  
4 the current standard is so often exceeded that relaxing it will not alter the water quality. This repeated,  
5 shameless relaxation of the existing standard strikes at the heart of the antidegradation requirements,  
6 which exist to restore and maintain water quality, not allow its repeated degradation. 40 C.F.R. §  
7 131.12(a).

8 102. The Board's Project approval violates the Clean Water Act's demand that water quality  
9 criteria protect the most sensitive use, as it fails to implement sufficient flow criteria to protect the  
10 imperiled salmon and other fish that depend on adequate flow for survival.

### 11 **THIRD CAUSE OF ACTION**

#### 12 **(Violation of Porter-Cologne Act)**

#### 13 **(Alleged by All Petitioners Against All Respondents)**

14 103. The paragraphs set forth above and below are realleged and incorporated herein by  
15 reference.

16 104. Pursuant to the Porter-Cologne Act's mandate that state water quality standards be no less  
17 stringent than the Clean Water Act's (Water Code § 13377), the Board adopted California's  
18 antidegradation policy in Resolution No. 68-16. *Asociation de Gente Unida por el Agua v. Central*  
19 *Valley Regional Water Quality Control Board* (2012) 210 Cal.App.4th 1255, 1278-1286 (citing Res. No.  
20 68-16 and the Board's Guidance Memorandum [Feb. 16, 1995] at pp. 4-6). Resolution No. 68-16  
21 demands that high quality waters "be maintained until it has been demonstrated to the State that any  
22 change will be consistent with maximum benefit to the people of the State, will not unreasonably affect  
23 present and anticipated beneficial use of such water and will not result in water quality less than that  
24 prescribed in the policies." *See also* SED Volume 1, p. 23-1.

25 105. The Board's proposed relaxation of salinity objectives contravenes California's  
26 antidegradation policy. Resolution 68-16 (October 28, 1968); Water Code § 13377. Relaxing the  
27 salinity objective from 0.7 dS/m to 1.0 dS/m will result in lower water quality, "unreasonably affect  
28 present and anticipated beneficial use of such water," and "result in water quality less than that



1 prescribed” in the current policies. *Id.*

2 106. The Board’s claim that the proposed amendments will not degrade water quality fails. SED  
3 Volume 1, p. 23-28. It is the Board’s own ongoing delay in enforcement of water quality standards that  
4 has led to the current standard repeatedly being exceeded. The SED’s claim that relaxing the standard  
5 will not violate the state’s antidegradation policy takes advantage of that ongoing failure to comply with  
6 current standards and negates the purpose of the antidegradation policy – “to achieve [the] highest water  
7 quality consistent with maximum benefit to the people of the State and . . . to promote the peace, health,  
8 safety and welfare of the people of the State.” Resolution 68-16 (October 28, 1968). The Project  
9 approval is contrary to the mandates of the Porter-Cologne Water Act and Resolution 68-16.

10 **FOURTH CAUSE OF ACTION**

11 **(Violation of the Public Trust Doctrine)**

12 **(Alleged by All Petitioners Against All Respondents)**

13 107. The paragraphs set forth above and below are realleged and incorporated herein by  
14 reference.

15 108. Water Code section 85023 states, “the longstanding constitutional principle of reasonable  
16 use and the Public Trust Doctrine shall be the foundation of state water management policy and are  
17 particularly important and applicable to the Delta.”

18 109. In *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 426, the court noted  
19 that the public trust doctrine mandates that “before state courts and agencies approve water diversions  
20 they . . . consider the effect of such diversions upon interests protected by the public trust, and attempt,  
21 so far as feasible, to avoid or minimize any harm to those interests.” The *National Audubon Society*  
22 Court went on to explain:

23 Just as the history of this state shows that appropriation may be necessary for efficient use of  
24 water despite unavoidable harm to public trust values, it demonstrates that an appropriative  
25 water rights system administered without consideration of the public trust may cause  
26 unnecessary and unjustified harm to trust interests. As a matter of practical necessity the state  
27 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.

28 *Id.* (citations omitted).

1 110. “Public trust easements are traditionally defined in terms of navigation, commerce and  
2 fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and  
3 general recreation purposes the navigable waters of the state, and to use the bottom of the navigable  
4 waters for anchoring, standing, or other purposes.” *Marks v. Whitney*, 6 Cal.3d at 259. For nearly 50  
5 years it has been settled law in California that public trust values also “encompass[] . . . the preservation  
6 of those lands in their natural state, so that they may serve as ecological units for scientific study, as open  
7 space, and as environments which provide food and habitat for birds and marine life, and which  
8 favorably affect the scenery and climate of the area.”

9 111. The Public Trust Doctrine “imposes an obligation on the state trustee [here, the Board] ‘to  
10 protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right  
11 of protection only in rare cases when the abandonment of that right is consistent with the purposes of the  
12 trust.’” *Baykeeper II*, 29 Cal.App.5th at 569, quoting *San Francisco Baykeeper, Inc. v. State Lands*  
13 *Com.* (“*Baykeeper I*”) (2015) 242 Cal.App.4th 202, 234 and *National Audubon*, 33 Cal.3d at 441. The  
14 Public Trust Doctrine “impose[s] an affirmative duty” on the Board “to take the public trust into  
15 account” before authorizing private parties to extract public resources – in this case, water from the  
16 public’s rivers tributary to the South Delta. *Baykeeper II*, 29 Cal.App.5th at 570-571. Although “the  
17 state trustee has broad discretion . . . to promote [one public trust use] over other legitimate trust uses,” it  
18 does not have discretion to promote *non*-public trust uses over “legitimate trust uses.” *Id.* at 577. But  
19 the Board did exactly that here. It allowed diversions of water for irrigation – a non-public trust use –  
20 that deprive the Delta of the flows that the Board has found to be “necessary” to protect public trust  
21 resources. Resolution 2010-0039, p. 1. The Delta Flow Criteria Report establishes the minimum flows  
22 necessary to protect trust resources, and the Project directly violates them.

23 112. The Project will adversely affect numerous public trust resources, including flows and  
24 habitat necessary for fish, wildlife, and recreation, because it sets base flow requirements significantly  
25 lower than the flows established in the Delta Flow Criteria Report. Even during adaptive management,  
26 the flows are likely to remain too low. The Project impermissibly promotes a non-public trust use –  
27 farmland irrigation – over the needs and at the expense (indeed, potential extirpation) – of the Delta’s  
28 imperiled fish and wildlife, as documented by the Delta Flow Criteria Report, found by the Board in

1 Resolution 2010-0039, and confirmed by experts during the years of public comment on the Project.

2 113. Feasible alternatives exist that would mitigate or avoid the Project’s significant adverse  
3 impacts on the Delta’s public trust resources and uses, including, but not limited to an alternative that  
4 sets higher base flows. Such an alternative would have beneficial effects on fish and wildlife, and attain  
5 most of the Project’s basic objectives.

6 114. By approving the Project despite the fact that feasible alternatives exist that would preserve  
7 public trust resources to a far greater extent than the Project, the Board abdicated its affirmative statutory  
8 and constitutional “duties to take the trust into account and protect public trust uses whenever feasible,”  
9 and impermissibly promoted a non-public trust use – farm irrigation – at the expense of public trust  
10 resources. *Baykeeper II*, 29 Cal.App.5th at 571, 577.

11 **FIFTH CAUSE OF ACTION**

12 **(Writ of Mandate, Declaratory and Injunctive Relief to Set Aside**

13 **Project Approvals as Contrary to CCP §§ 1085 and 1094.5)**

14 **(Alleged by All Petitioners Against All Respondents)**

15 115. The paragraphs set forth above and below are realleged and incorporated herein by  
16 reference.

17 116. The Board proceeded in excess of its jurisdiction and abused its discretion in purporting to  
18 approve the Project and to certify the SED thereon, because such approvals violate CCP sections 1085  
19 and 1094.5 in the following respects, among others:

- 20 a. such approvals were not granted in accordance with the procedures required by law;
- 21 b. such approvals were not based on the findings required by law; and
- 22 c. such approvals were not based on, or were contrary to, the evidence in the record

23 before the Board.

24 117. The Board failed to proceed in the manner required by law in the following respects, among  
25 others:

- 26 a. The Board violated CEQA as alleged hereinabove;
- 27 b. The Board violated the Clean Water Act as alleged hereinabove;
- 28 c. The Board violated the Porter–Cologne Act as alleged hereinabove; and

1 d. The Board violated the Public Trust Doctrine as alleged hereinabove.

2 118. The Board's actions in approving the Project without complying with the procedures  
3 required by CCP sections 1085 and 1094.5 exceeded the Board's jurisdiction and constitute a prejudicial  
4 abuse of discretion, and therefore are invalid and must be set aside.

5 **PRAYER FOR RELIEF**

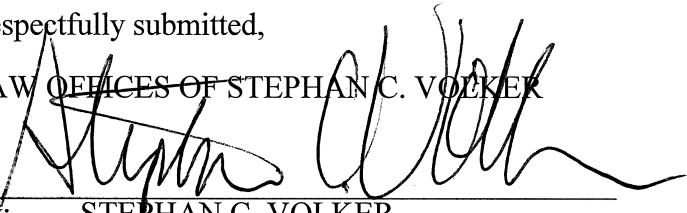
6 WHEREFORE, petitioners pray for relief as follows:

- 7 1. For interlocutory and permanent injunctive relief restraining the Board from taking any  
8 action to carry out the Project pending, and following, the hearing of this matter;
- 9 2. For a peremptory writ of mandate directing the Board to set aside and vacate its approval of  
10 the Project, and certification of its SED;
- 11 3. For declaratory relief declaring the Project, its approval, and its SED to be unlawful;
- 12 4. For a peremptory writ of mandate directing the Board to suspend all activity implementing  
13 the Project that could result in any change or alteration in the physical environment until it has taken all  
14 actions necessary to bring its approval of the Project and its SED into compliance with CEQA, the Clean  
15 Water Act, the Porter-Cologne Act, Public Trust Doctrine and the Code of Civil Procedure;
- 16 5. For attorneys' fees under Code of Civil Procedure section 1021.5;
- 17 6. For costs incurred in this action; and
- 18 7. For such other equitable or legal relief as the Court may deem just and proper.

19  
20 Dated: January 25, 2019

Respectfully submitted,

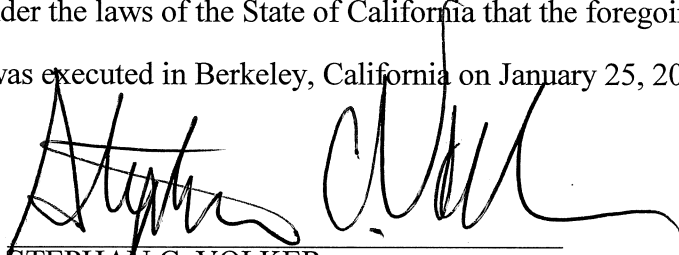
21 ~~LAW OFFICES OF STEPHAN C. VOLKER~~

22   
23 By: STEPHAN C. VOLKER  
24 Attorney for Conservation Groups  
25 NORTH COAST RIVERS ALLIANCE,  
26 INSTITUTE FOR FISHERIES RESOURCES,  
27 PACIFIC COAST FEDERATION OF  
28 FISHERMEN'S ASSOCIATIONS, and the  
WINNEMEM WINTU TRIBE

**VERIFICATION**

I, Stephan C. Volker, am the attorney for petitioners/plaintiffs in this action. I make this verification on behalf of the petitioners/plaintiffs because such parties and their representatives are absent from the county in which my office is located. I have read the foregoing Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and Attorneys' Fees and know its contents. The facts therein alleged are true and correct to the best of my knowledge and belief, and are based on documents within the public records underlying the approvals herein challenged.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Verification was executed in Berkeley, California on January 25, 2019.

  
STEPHAN C. VOLKER