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5 SIERRA CLUB, CALIFORNIA NATIVE PLANT  
SOCIETY, CENTER FOR BIOLOGICAL DIVERSITY,  
6 and FRIENDS OF THE RIVER

7  
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 IN AND FOR THE COUNTY OF STANISLAUS

10 SIERRA CLUB, CALIFORNIA NATIVE PLANT )  
SOCIETY, CENTER FOR BIOLOGICAL )  
11 DIVERSITY, and FRIENDS OF THE RIVER, )  
12 Petitioners and Plaintiffs, )

13 vs. )

14 DEL PUERTO WATER DISTRICT, and DOES I )  
through X, inclusive, )  
15 Respondents and Defendants, )

16 and )

17 SAN JOAQUIN RIVER EXCHANGE )  
18 CONTRACTORS WATER AUTHORITY, and )  
DOES XI through XX, inclusive, )  
19 Real Parties in Interest. )  
20

No.  
**VERIFIED PETITION FOR WRIT OF  
MANDATE AND COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF AND ATTORNEY’S FEES**  
**(CEQA CASE)**

21  
22 Petitioners SIERRA CLUB, CALIFORNIA NATIVE PLANT SOCIETY, CENTER FOR  
23 BIOLOGICAL DIVERSITY, and FRIENDS OF THE RIVER hereby petition this Court for a writ of  
24 mandate and declaratory and injunctive relief against respondent DEL PUERTO WATER DISTRICT and  
25 DOES I-X, inclusive (collectively, the “District”), and by this verified petition allege as follows:

26 **INTRODUCTION**

27 1. Just west of Patterson, there is a treasured place with a long and celebrated history that  
28 stretches back centuries. This place provides important habitat to protected plants and animals and is

1 valued by nearby residents as a place to hike, birdwatch, and bicycle. This place is called Del Puerto  
2 Canyon, and its entrance is known as the Gateway. The District plans to use the Gateway to dam Del  
3 Puerto Canyon.

4 2. Petitioners bring this action to challenge the District’s (1) approval of the Del Puerto  
5 Canyon Reservoir Project (the “Project”); and (2) certification of the Project’s Final Environmental  
6 Impact Report (“FEIR”). In taking these actions, the District violated the California Environmental  
7 Quality Act, Public Resources Code section 21000 *et seq.* (“CEQA”) in the respects set forth below.

8 3. The District’s FEIR concludes that the Project will substantially harm the environment.  
9 For example, the FEIR acknowledges that the Project would permanently destroy a prehistoric occupation  
10 site that contains information important in prehistory, concedes that the Project would eliminate habitat  
11 for special-status species and permanently obstruct habitat connectivity, and admits that the proposed  
12 project will contribute to global climate change because of its significant greenhouse gas emissions  
13 during construction and operation.

14 4. And yet, a member of the public who wades through the FEIR’s hundreds of pages seeking  
15 to understand the basis for its alarming conclusions will find only platitudes, unexplained conclusions,  
16 and vague promises of future action – not a detailed analysis calculated to truly inform the reader, nor one  
17 that enables meaningful public review.

18 5. In addition to the unduly murky analysis of the impacts it does disclose, the FEIR also  
19 completely ignores many environmental impacts. To list just a few omissions from one topic, the FEIR  
20 excludes Del Puerto Creek below the dam from the geographic scope of its analysis of every species  
21 except fish; it blinds itself to the question of whether building new water storage will lead to more water  
22 pumping in the Sacramento-San Joaquin River Delta (“the Delta”), even though the Delta’s ecosystem is  
23 teetering on the brink of collapse; and though it acknowledges the water pollution caused by agricultural  
24 return flows, the FEIR overlooks how increasing the District’s water supplies will affect the volume of  
25 those flows.

26 6. More than 40 years ago, the California Supreme Court sounded a note of caution to  
27 agencies intending to skirt their CEQA duties: “It is, of course, too late to argue for a grudging, miserly  
28 reading of CEQA . . . . [T]he Legislature intended CEQA ‘to be interpreted in such manner as to afford

1 the fullest possible protection within the reasonable scope of the statutory language.” *Bozung v. Local*  
2 *Agency Form. Com.* (1975) 13 Cal.3d 263, 283. The Court further reminded agencies not to treat CEQA  
3 compliance as simply another bureaucratic obstacle to overcome on the way to a predetermined outcome,  
4 observing that the “purpose of CEQA is not to generate paper, but to compel government at all levels to  
5 make decisions with environmental consequences in mind.” *Id.* at 283. But based on the abundance of  
6 platitudes and dearth of substance in its FEIR, it appears these warnings have yet to reach the District.

### 7 VENUE AND JURISDICTION

8 7. This Court has jurisdiction over this action pursuant to Code of Civil Procedure sections  
9 526 (injunctive relief), 1060 (declaratory relief), 1085 (traditional mandate), and 1094.5 (administrative  
10 mandate); Civil Code section 3422 (injunctive relief); and article VI, section 10, of the California  
11 Constitution (original jurisdiction of superior courts).

12 8. Venue is proper in this Court pursuant to Code of Civil Procedure sections 393-395, 1085,  
13 and 1094.5, in that the District’s offices are located in Stanislaus County, the Project site is located in  
14 Stanislaus County, and the Project’s environmental impacts will be felt in Stanislaus County.

15 9. This petition is timely filed within all applicable statutes of limitations, including Public  
16 Resources Code sections 21152 and 21167.<sup>1</sup>

17 10. Pursuant to Code of Civil Procedure section 388, petitioners are serving the California  
18 Attorney General with a copy of this Verified Petition and Complaint, and consistent with section  
19 21167.5, petitioners have served respondent by mail with notice of this suit.

### 20 PARTIES

21 11. Petitioner SIERRA CLUB was formed on May 28th, 1892. Its mission is to explore,  
22 enjoy, and protect the earth’s wild places; to practice and promote the responsible use of ecosystems and  
23 resources; to educate humanity and enlist help in protecting and restoring the quality of the natural and  
24 human environment; and to use all lawful means to carry out these objectives. Del Puerto Canyon is a  
25 treasured local wild place enjoyed by Sierra Club members, and to dam it up for use as a storage basin for  
26 water pumped from the Central Valley – thereby destroying an important ecosystem, while also depriving  
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28 <sup>1</sup> Undesignated references are to the Public Resources Code.

1 the Delta of much-needed water – runs counter to all the Sierra Club stands for. By doing so, the Project  
2 will harm the interests of Sierra Club and its members.

3 12. Petitioner CALIFORNIA NATIVE PLANT SOCIETY (“CNPS”) is a statewide,  
4 non-profit organization with more than 10,000 members distributed across 35 local chapters. The mission  
5 of CNPS is to conserve California native plants and their natural habitats, and to increase the  
6 understanding, appreciation, and horticultural use of native plants. CNPS works closely with  
7 decision-makers, scientists, and local planners to advocate for well-informed policies, regulations, and  
8 land management practices. CNPS’ members use Del Puerto Canyon for recreational purposes. The  
9 interests of CNPS and its members will be harmed by the Project’s environmental impacts.

10 13. Petitioner CENTER FOR BIOLOGICAL DIVERSITY (the “Center”) is a non-profit  
11 conservation organization dedicated to the protection of native species and their habitats through science,  
12 policy, and environmental law. The Center has approximately 74,000 members worldwide, including  
13 members who reside within communities in the vicinity of the Project. The Center has worked for many  
14 years to protect imperiled plants and wildlife, open space, air and water quality, and the overall quality of  
15 life for people in the region where the Project is proposed. Members of the Center will be directly and  
16 adversely affected by the approval and construction of the Project.

17 14. Petitioner FRIENDS OF THE RIVER was founded in 1973 during the struggle to save the  
18 Stanislaus River from New Melones Dam, and has grown to become California's statewide river  
19 conservation organization. Friends of the River is dedicated to preserving and restoring California’s  
20 rivers, streams, and their watersheds, as well as advocating for sustainable water management. Friends of  
21 the River is nationally recognized as an authority on the adverse impacts of dams on rivers and  
22 ecosystems, and has led successful campaigns for the permanent protection of many outstanding  
23 California rivers and streams – including the Kings, Kern, Merced, Tuolumne, upper Klamath, West  
24 Walker, East Carson, Sisquoc, and Big Sur Rivers, as well as Sespe Creek and Cache Creek. Friends of  
25 the River has 3,500 members, 10 staff, and a 12-member Board of Directors. The interests of Friends of  
26 the River and its members will be adversely affected by the inundation of Del Puerto Canyon and the  
27 Project’s water withdrawals.

28 15. Petitioners have authorized their attorney to file this lawsuit on their behalves to vindicate

1 their substantial beneficial interests and those of their members in securing the District’s compliance with  
2 the laws whose violation is alleged herein.

3 16. The DEL PUERTO WATER DISTRICT (“District”) is a special district located within  
4 Stanislaus, San Joaquin, and Merced Counties that provides water to farmland near the Delta-Mendota  
5 Canal. The District is charged by law with serving as the lead agency for the Project under CEQA, and  
6 assuring compliance with CEQA and the other laws whose violation is alleged herein. On October 21,  
7 2020, the District approved the Project and certified its EIR. The District has a duty to administer and  
8 assure compliance with the requirements of CEQA and Code of Civil Procedure sections 1085 and  
9 1094.5 before approving the Project. In purporting to approve the Project, the District failed to comply  
10 with these laws.

11 17. The true names and capacities of respondents DOES I-X, inclusive, are unknown to  
12 petitioners, who therefore sue said respondents by such fictitious names pursuant to Code of Civil  
13 Procedure section 474. Petitioners will amend this Verified Petition when the true names and capacities  
14 of said DOE respondents have been ascertained, with leave of court if necessary.

15 18. Real Party in Interest SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER  
16 AUTHORITY (the “Authority”) is comprised of four local water agencies: Central California Irrigation  
17 District, San Luis Canal Company, Firebaugh Canal Water District, and the Columbia Canal Company.  
18 The Authority is listed as a recipient of the District’s approval in the Notice of Determination filed by the  
19 District for the Project, and is therefore named as a real party in interest pursuant to section 21167.6.5(a).

20 19. Petitioners are unaware of the true names and capacities of real parties in interest DOES  
21 XI-XX, inclusive, and sue such real parties herein by fictitious names pursuant to Code of Civil  
22 Procedure section 474. Petitioners are informed and believe, and based on such information and belief  
23 allege, that the fictitiously named real parties are entities or individuals who have a direct and substantial  
24 economic interest in, or are the recipients of, respondents’ approval of the Project. When the true  
25 identities and capacities of these DOE real parties have been determined, petitioners will amend this  
26 Verified Petition to insert such identities and capacities, with leave of court if necessary.

27 **GENERAL ALLEGATIONS**

28 20. Petitioners have no plain, speedy, and adequate remedy in the ordinary course of law,



1 Report and Scoping Meeting (“NOP”) for the Project. In that notice, the District solicited comments and  
2 concerns from organizations and other interested parties about the Project’s environmental issues.

3 27. One of the many organizations responding to the NOP was the State Water Resources  
4 Control Board (“SWRCB”), which sent a responsive letter to the District by mail on July 26, 2019. In  
5 this letter, the SWRCB requested that the EIR provide specific information about the effects of the  
6 Project on the Delta, including whether the Project would affect salinity and water quality in the Delta,  
7 and whether the Project would result in more fish dying after becoming entrained in the Delta’s massive  
8 pumps. The EIR does not provide information on any of these topics – perhaps because, as the FEIR later  
9 conceded, the District completely failed to consider this comment during the scoping process. The EIR  
10 blames this omission on California’s CEQA Clearinghouse, which supposedly did not turn over the letter  
11 – but the letter was addressed to the District’s post office box, not the state CEQA Clearinghouse.<sup>2</sup>

12 28. On December 12, 2019, the District released the Draft EIR. Petitioners, other members of  
13 the public, and numerous state agencies submitted comments. Two petitions with a combined total of  
14 over 1,500 signatures were also submitted in opposition to the Project.

15 29. The FEIR was issued on October 9, 2020. It is three volumes and exceeds 1,500 pages.  
16 The District approved the Project and certified the EIR less than two weeks later.

17 30. Notwithstanding the extreme time pressures, petitioners collectively submitted over 30  
18 pages of detailed written comments about the FEIR’s inadequacies to the District prior to its approval of  
19 the Project. For example, for illustrative purposes only, and among other concerns too numerous to list  
20 here:

21 a. The Sierra Club and Friends of the River described the FEIR’s unlawful refusal to  
22 analyze the Project’s effects on the Delta, its improperly vague and conclusory analysis of traffic impacts,  
23 and its failure to mitigate the Project’s air quality and greenhouse gas emissions in an enforceable  
24 manner, as required. In addition to a variety of other comments, these organizations also pointed out that

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26 <sup>2</sup> The letter’s address is consistent with the practice described in the latest State Clearinghouse Handbook,  
27 which states, on page 6, “When a state agency comments on a [Notice of Preparation of an EIR], the  
28 original comment letter must be sent directly to the Lead Agency and a copy sent to the SCH.” (Office of  
Planning & Research, June 21, 2012; available at [https://opr.ca.gov/docs/SCH\\_Handbook\\_2012.pdf](https://opr.ca.gov/docs/SCH_Handbook_2012.pdf))

1 the Project site is popular with recreational hikers and wildlife enthusiasts, and noted that the FEIR uses  
2 an incorrect legal understanding of trespassing to ignore the Project’s impacts on recreational activities.

3           b.       CNPS noted that the additional plant surveys conducted after release of the Draft  
4 EIR were inadequate because they were timed during a dry year. CNPS observed that the fact that these  
5 surveys were conducted after release of the Draft EIR prevented the public from reviewing and  
6 commenting upon their significance and adequacy. CNPS further pointed out that many of the FEIR’s  
7 mitigation measures for biological resources are speculative and unenforceable.

8           c.       The Center noted that the absence of concrete information in the FEIR’s analysis of  
9 impacts to biological resources precluded meaningful review by the public and decision-makers. The  
10 Center pointed out that the FEIR ignores the Project’s impacts on downstream riparian habitat and what  
11 the FEIR terms terrestrial biological resources. The Center also provided a detailed demonstration of the  
12 deficiencies in the FEIR’s discussions of specific species, including vernal pool branchiopods,  
13 special-status amphibians, the western pond turtle, and numerous birds.

14       31.       Petitioners’ FEIR comments also requested that the District postpone its approval of the  
15 Project to the District’s next regularly scheduled meeting, based upon the quantity of additional  
16 information in the FEIR and the ongoing global pandemic, among other reasons. A postponement would  
17 have enabled the District to more fully consider public comment on the FEIR.

18       32.       The District declined to postpone certification of the EIR and chose not to respond to any  
19 of petitioners’ FEIR comments. Yet as observed by the court in *Bakersfield Citizens for Local Control v.*  
20 *City of Bakersfield* (2004) 124 Cal.App.4th 1128, “If the decision making body elects to certify the EIR  
21 without considering comments made at th[e FEIR certification] hearing, it does so at its own risk. If a  
22 CEQA action is subsequently brought, the EIR may be found to be deficient on grounds that were raised  
23 at any point prior to close of the hearing.”

24       33.       The District approved the Project on October 21, 2020.

25       34.       At the approval and certification hearing that day, the District’s general manager, Anthea  
26 Hansen, expressed gratitude to the District’s consultants for producing a “very succinct” EIR.

27       35.       Notwithstanding this apparent rush to complete the CEQA process, the District’s claimed  
28 approval of the Project does not actually authorize any earth-moving activity or otherwise commit the

1 District to a definite course of action on the Project.

2 **FIRST CAUSE OF ACTION**

3 **(Writ of Mandate, Declaratory and Injunctive Relief to Set Aside District’s**

4 **Approval of the Project as Contrary to Requirements of CEQA)**

5 36. The paragraphs set forth above and below this cause of action are realleged and  
6 incorporated herein by reference.

7 37. Petitioners bring this First Cause of Action pursuant to sections 21168 and 21168.5, on the  
8 grounds that the District committed a prejudicial abuse of discretion by failing to proceed in accordance  
9 with the law, and in making findings that are not supported by substantial evidence. The District  
10 considered and approved the Project without adequately describing, analyzing and mitigating its potential  
11 environmental impacts.

12 38. The District is a “public agency” and its actions in approving and carrying out the Project  
13 are subject to the requirements of CEQA. § 21063.

14 39. The Project is a “project” subject to CEQA. § 21065(c). “‘Project’ means the whole of an  
15 action, which has a potential for resulting in either a direct physical change in the environment, or a  
16 reasonably foreseeable indirect physical change in the environment,” and refers to the “activity which is  
17 being approved and which may be subject to several discretionary approvals by government agencies”  
18 rather than to the separate governmental approvals themselves. CEQA Guidelines [14 C.C.R.;  
19 “Guidelines”] § 15378(a), (c).

20 40. CEQA requires public agencies to conduct environmental review before approving any  
21 project that may have a significant impact on the environment. §§ 21002.1, 21061, 21100, 21151;  
22 Guidelines § 15004(a). The purpose of an EIR is to provide agencies and the public with information  
23 about a proposed project’s potential environmental effects, ways to minimize those effects, and potential  
24 alternatives to the project. § 21061.

25 41. The EIR is “the heart of CEQA” and “an environmental alarm bell whose purpose it is to  
26 alert the public and its responsible officials to environmental changes before they have reached ecological  
27 points of no return.” *Laurel Heights Imp. Ass’n v. Regents of Univ. of Calif.* (1988) 47 Cal.3d 376, 392  
28 (“*Laurel Heights*”) (internal quotation marks and citations omitted). It serves as “the primary means of

1 achieving the Legislature’s considered declaration that it is the policy of this state to ‘take all action  
2 necessary to protect, rehabilitate, and enhance the environmental quality of the state.’” *Id.* (quoting §  
3 21001(a)). As such, an EIR must “include a detailed statement” describing, *inter alia*, all of the proposed  
4 project’s significant effects on the environment, alternatives to the project, and potential mitigation  
5 measures. § 21100(b).

6 42. Agencies must file a “Notice of Determination” within 5 days after approving a project  
7 and certifying an EIR. Guidelines § 15094. It is contrary to CEQA for an agency to file a notice of  
8 determination before it commits to a definite course of action on a project. *County of Amador v. El*  
9 *Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 963.

10 43. In approving the Project and certifying its EIR, the District failed to proceed in the manner  
11 required by CEQA, or its approval is not supported by substantial evidence, in the following respects,  
12 among others.

13 **The Project Description Violates CEQA**

14 44. An EIR must include a “description of the project” that includes a map of the project’s  
15 location, its “technical, economic, and environmental characteristics,” and a statement of the project’s  
16 objectives. Guidelines § 15124.

17 45. “An accurate, stable, and finite project description is the *sine qua non* of an informative  
18 and legally sufficient EIR.” *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193. “Only  
19 through an accurate view of the project may affected outsiders and public decisionmakers balance the  
20 proposal’s benefit against its environmental costs, consider mitigation measures, assess the advantage of  
21 terminating the proposal (i.e., the ‘no project’ alternative) and weigh other alternatives in the balance.”  
22 *Id.* at 192-193; *County of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1454. By contrast, a  
23 “curtailed, enigmatic or unstable project description draws a red herring across the path of public input.”  
24 *County of Inyo*, 71 Cal.App.3d. at 192-193.

25 46. The FEIR’s description of the Project is precisely the type of “curtailed, enigmatic or  
26 unstable” description condemned in *County of Inyo*, 71 Cal.App.3d at 199. For example, and for  
27 illustrative purposes only, the FEIR’s description of how the new reservoir will interact with CVP  
28 operations is somehow both conclusory and impenetrable, and its descriptions of existing storage options

1 are contradictory. The FEIR implausibly asserts in the project description section that the Project would  
2 not increase available water supplies, and yet, in other sections, the FEIR simultaneously acknowledges  
3 the obvious fact that the proposed dam is indeed intended to provide farmers with additional water.  
4 Because it is contradictory, conclusory, and cryptic in these respects, among others, the FEIR’s project  
5 description violates CEQA.

6 47. The EIR’s description of the Project is further inadequate because, as discussed more fully  
7 in the portion of this cause of action relating to alternatives, the EIR fails to accurately describe the  
8 Project’s objectives.

9 48. The EIR also fails to include the required detailed and comprehensive map, contrary to  
10 Guidelines section 15124(a). Anyone wishing to get an overview of the Project’s location and vicinity is  
11 required to laboriously cross-reference multiple overlapping maps simply to get a comprehensive  
12 overview of Project’s location and vicinity. Such obfuscation violates CEQA. *San Joaquin Raptor*  
13 *Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 659 (“decision makers and [the] general  
14 public should not be forced to sift through obscure minutiae or appendices in order to ferret out”  
15 fundamental aspects of the project’s description).

16 49. Under CEQA, the “project” is defined as “the whole of an action” potentially causing  
17 direct or indirect “physical change in the environment.” Guidelines § 15378(a). This expansive  
18 definition of “project” mandates comprehensive environmental review at the earliest possible time, in  
19 service of CEQA’s mandate “that environmental considerations do not become submerged by chopping a  
20 large project into many little ones – each with a minimal potential impact on the environment – which  
21 cumulatively may have disastrous consequences.” *Bozung*, 13 Cal.3d at 284; *see Plan for Arcadia, Inc. v.*  
22 *City Council of Arcadia* (1974) 42 Cal.App.3d 712, 726 (CEQA’s “requirements cannot be avoided by  
23 chopping up proposed projects into bite-size pieces”); *Tuolumne County Citizens for Responsible Growth*  
24 *v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1230 (“if the two matters are analyzed in sequence . . .  
25 and the combined or interactive environmental effects are not fully recognized until the review of the  
26 second matter, the opportunity to implement effective mitigation measures as part of the first matter may  
27 be lost”).

28 50. CEQA specifically mandates that an EIR “include an analysis of the environmental effects

1 of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project;  
2 and (2) the future expansion or action will be significant in that it will likely change the scope or nature of  
3 the initial project or its environmental effects.” *Laurel Heights*, 47 Cal.3d at 396.

4 51. In this case, the “project” includes the construction and operation of the Del Puerto  
5 Canyon Reservoir, the corresponding increase in the District’s available water supplies, realignment of  
6 Del Puerto Canyon Road, and utility relocation.

7 52. But contrary to CEQA’s requirements, the District failed to analyze the whole of the  
8 Project in its FEIR. The FEIR segments the Project both temporally and geographically, and thereby fails  
9 to fully disclose the Project’s environmental impacts, in the following illustrative respects, among others:

10 a. The new planned road alignment analyzed in the Draft EIR was rejected by  
11 Stanislaus County. The particular alignment of the roadway will affect the Project’s environmental  
12 impacts; for instance, the FEIR concedes that the slope of the new roadway will affect impacts on special-  
13 status species. (The reason is that some nearby special-status species are unable to traverse steep slopes;  
14 the chance of such animals becoming roadkill is inversely proportional to the roadway’s steepness.) The  
15 design of the roadway will also affect fuel use, among other impacts. But rather than recirculate the FEIR  
16 with an acceptable alternative alignment to allow for meaningful public review, as CEQA requires, the  
17 FEIR instead promises that the District will choose a roadway alignment and complete associated  
18 environmental review at some unspecified future time.

19 b. Instead of analyzing the issue itself, the FEIR vaguely promises some unspecified  
20 type of future federal environmental review will consider the environmental impacts of any modifications  
21 to Delta pumping that the Project’s new reservoir may enable.

22 c. The FEIR improperly circumscribes the geographic scope of its analysis by  
23 omitting discussion of how the Project will affect downstream terrestrial biological resources and  
24 amphibians, and by failing to disclose or discuss the ways in which the Project’s intended increase in  
25 available water supplies will affect pumping in the Delta.

26 53. CEQA requires the impacts of these aspects of the Project to be disclosed in the FEIR  
27 before certification, not postponed until afterwards when bureaucratic momentum renders the later  
28 approvals a foregone conclusion. *Bozung*, 13 Cal.3d at 284; *Laurel Heights* 47 Cal.3d at 396. The

1 FEIR's failure to disclose the environmental impacts of the entire Project is a failure to comply with  
2 CEQA.

3 54. CEQA requires agencies to disclose, analyze, and, if possible, mitigate, inconsistencies  
4 between a proposed project and any applicable general, regional, or specific plans. Guidelines §  
5 15125(d); *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 782-85  
6 (EIR inadequate because it used the wrong traffic model and thereby was inconsistent with general plan,  
7 but EIR failed to disclose inconsistency); *see also FUTURE v. Board of Supervisors* (1998) 62  
8 Cal.App.4th 1332, 1341-42 (overturning project approval based on inconsistency with one policy in the  
9 land use element of the general plan). It is irrelevant whether the plan in question is in draft form. *Id.* at  
10 1336-1338.

11 55. Here, the FEIR fails to fully disclose all such inconsistencies, contrary to CEQA.  
12 Guidelines § 15125(d). For example, and for illustrative purposes only, the FEIR's failures include, but  
13 are not limited to:

14 a. In its Draft 2012 General Plan Update of the Parks and Recreation Element, the  
15 City of Patterson required the Project site "to be preserved" and identified it as "a special sensitive  
16 species habitat" where additional hiking, biking, and equestrian trails are planned. FEIR Chapter 10,  
17 comment 85-7. The Project is plainly inconsistent with these designations, yet the FEIR's only response  
18 is that the plan is an unadopted draft, a response contrary to law. *FUTURE*, 62 Cal.App.4th at 1336-  
19 1338.

20 b. The Project is plainly inconsistent with California's plan to eliminate carbon  
21 dioxide emissions. Although it acknowledges the Project's substantial greenhouse gas emissions, and  
22 finds them to be a significant impact under CEQA, the FEIR fails to clearly disclose the Project's  
23 inconsistency with the state's adopted climate change plan, and in fact affirmatively, and inexplicably,  
24 asserts that the Project would be consistent with that plan;

25 c. The Project would inundate, and thereby permanently destroy, at least 75 acres of  
26 designated "prime farmland and unique farmland." The Agriculture Element of the Stanislaus County  
27 General Plan prohibits the conversion of particularly productive agricultural land, and the Project is  
28 inconsistent with these requirements. But rather than disclose this blatant inconsistency, as required, the

1 FEIR simply asserts that “it can reasonably be argued that the proposed project would be consistent with  
2 the general agriculture zone despite the conversion of agricultural land within portions of the project  
3 area”; and

4 d. The FEIR fails to disclose the Project’s inconsistency with the Stanislaus County  
5 General Plan provisions that require the protection of riparian habitat.

6 56. “To decide whether a given project’s environmental effects are likely to be significant, the  
7 agency must use some measure of the environment’s state absent the project, a measure sometimes  
8 referred to as the ‘baseline’ for environmental analysis.” *Citizens for a Better Environment v. South  
9 Coast Air Quality Management District* (2010) 48 Cal.4th 310, 315. Using the wrong baseline, such as  
10 an “approach using hypothetical allowable conditions as the baseline[,] results in illusory comparisons  
11 that can only mislead the public as to the reality of the impacts and subvert full consideration of the actual  
12 environmental impacts, a result at direct odds with CEQA’s intent.” *Id.* at 322 (quotation omitted).

13 57. Here, the District’s use of the wrong baseline had precisely that pernicious effect. As the  
14 FEIR states repeatedly, the Project’s *raison d’être* is to provide the District and its partners with the  
15 ability to store excess CVP water that would otherwise be lost due to a shortage of storage capacity. For  
16 example, on page 9-129, the FEIR states, “Increasing storage allows the Project Partners to accept water  
17 when excess is available that would otherwise be lost due to a lack of means to store the water.” But the  
18 FEIR expressly refuses to analyze whether the approval of the Project would impact the Delta by  
19 increasing the amount of harmful pumping that occurs there, despite numerous requests for such a  
20 discussion from the public and from state agencies. The FEIR’s stated justification is that the Project will  
21 not affect the Delta or CVP or SWP operations because the CVP and SWP will continue to be operated  
22 within the parameters of existing approvals.

23 58. But as our Supreme Court noted, using “maximum permitted operational levels as a  
24 baseline,” as the FEIR does, “is not a realistic description of the existing conditions without the . . .  
25 Project.” Put differently, under CEQA, it is irrelevant whether or not the increased pumping that the  
26 Project will cause is within the maximum bounds of current CVP operations; what matters is whether  
27 approval of the Project will cause a change in baseline conditions. And here, the answer is indisputably  
28 yes: without the Project, some water portion of contracted water is “lost due to a lack of means to store

1 the water,” as the FEIR puts it, but if the Project is approved, this logistical barrier will be lifted. CEQA  
2 requires the District to consider the effects of this change.

3 **The EIR’s Impact Analysis Is Legally Inadequate**

4 59. The District’s review of the Project’s environmental impacts failed to proceed in the  
5 manner required by CEQA in the following respects, among others.

6 60. “An EIR must include detail sufficient to enable those who did not participate in its  
7 preparation to understand and to consider meaningfully the issues raised by the proposed project.”  
8 *Laurel Heights*, 47 Cal.3d at 405; *Sierra Club v. County of Fresno* (“*Sierra Club*”) (2018) 6 Cal.5th 502,  
9 516.

10 61. CEQA requires agencies to quantify environmental impacts where it is possible to do so.  
11 Guidelines § 15144 (“an agency must use its best efforts to find out and disclose all that it reasonably  
12 can”); *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 735-36. “The fact that  
13 precision may not be possible . . . does not mean that no analysis is required.” *Laurel Heights*, 47 Cal.3d  
14 at 399.

15 62. Under CEQA, the EIR “must . . . disclos[e] the analytic route the agency traveled from  
16 evidence to action.” *Id.* at 404. Put differently, an “EIR must contain facts and analysis, not just the bare  
17 conclusions of a public agency. An agency’s opinion concerning matters within its expertise is of  
18 obvious value, but the public and decision-makers, for whom the EIR is prepared, should also have  
19 before them the basis for that opinion so as to enable them to make an independent, reasoned judgment.”  
20 *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal. App. 3d 818, 831.

21 63. Contrary to these commands, the EIR’s discussion of the Project’s environmental impacts  
22 is so incomplete as to preclude meaningful public review, which renders the EIR legally inadequate.  
23 *Sierra Club*, 6 Cal.5th at 514 (“whether a description of an environmental impact is insufficient because  
24 it lacks analysis or omits the magnitude of the impact is not a substantial evidence question”). For  
25 example, and for illustrative purposes only, the deficient discussions in the EIR relate to the following  
26 consequences of the Project, among others:

- 27 a. Impacts to biological resources;
- 28 b. Water quality impacts, impacts to the Delta, and other environmental impacts

1 related to hydrology;

2 c. Impacts to recreation;

3 d. Air quality and greenhouse gas emissions impacts;

4 e. Interactions with the geology and soils surrounding the Project site;

5 f. The hazard of dam failure and its public safety implications;

6 g. Impacts to cultural resources;

7 h. Aesthetic impacts;

8 i. Impacts to energy use;

9 j. Impacts to agricultural resources;

10 k. Environmental justice impacts;

11 l. Impacts related to traffic and transportation, including – but not limited to – new or  
12 worse safety hazards, and the cognizable environmental effects of additional traffic delays (such as  
13 increased fuel use and emergency access conflicts);

14 m. The Project’s failure to comply with local land use plans, policies, or regulations;

15 n. Impacts related to utility construction;

16 o. Growth-inducing impacts; and

17 p. The cumulative impact of these and other environmental impacts.

18 64. To further illustrate a single one of these examples, again without limitation, the  
19 deficiencies in the EIR’s analysis of just one of these topics, biological resources, include (but are not  
20 limited to):

21 a. The FEIR *completely* omits an analysis of the Project’s impacts on “terrestrial”  
22 biological resources downstream of the Project, which will be affected by reduced flows in Del Puerto  
23 Creek. The “study area” for this portion of the FEIR, unlike the section concerning fish, includes *only*  
24 land that will be physically disturbed by Project construction. For example, and for illustrative purposes  
25 only, Least Bell’s vireo has been documented by DFW in Del Puerto Creek, but the FEIR states in  
26 response to comment that the reason the FEIR’s chapter on biological resources does not even mention  
27 that species is because supposedly “the likelihood that Least Bell’s vireo may nest *in the study area* is . . .  
28 considered to be low.” FEIR at 9-54 (emphasis added). *But the “study area” for “terrestrial” biological*

1 *resources does not include Del Puerto Creek downstream of the dam.* The same analytical failure is  
2 present for *every* species. This information is essential to a complete understanding of the Project’s  
3 environmental impacts, yet the EIR does not even acknowledge, much less explain, its omission.

4           b.       The FEIR’s combination of poor or nonexistent surveys and undefined mitigation  
5 measures makes it impossible to even understand which species the Project is going to affect, much less  
6 to what degree. The timing of the FEIR’s surveys seems almost deliberately designed to find as few  
7 protected species as possible. *No* wildlife surveys were conducted in the wet months, despite the  
8 Project’s potential effects on amphibians. The *only* springtime plant surveys were conducted during a dry  
9 year. Grasslands surveys were inconclusive – and a reader of the FEIR must ferret out a report unlawfully  
10 “buried in an appendix” to find out that the reason the FEIR deems those surveys inadequate is that they,  
11 like the others, were improperly conducted in especially dry conditions. *Vineyard*, 40 Cal.4th at 442.  
12 Meanwhile, the formulation of mitigation plans for *all* of the species that *were* identified during these few  
13 surveys was deferred until after Project approval, as discussed below. The FEIR’s combination of vague  
14 mitigation and poor surveys make it impossible for the public to discern how the most vulnerable species  
15 in our state will be affected by the Project.

16           c.       Relying exclusively on an expressly non-exhaustive regulatory checklist of  
17 environmental impacts, the FEIR improperly refuses to fully analyze impacts on species that are not of a  
18 “special” status. Public agencies requested an analysis of the Project’s impacts on Tule elk and the  
19 prairie falcon, but the FEIR refuses to provide a comprehensive analysis. The FEIR’s excuse appears to  
20 stem from CEQA Guidelines Appendix G, the “environmental checklist form,” but Appendix G is only a  
21 *guideline* to the topics that should be covered by an EIR. The ultimate question is not how the agency’s  
22 consultants should complete the checklist, but instead how the Project will affect the environment.  
23 *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1111.  
24 The mere fact that a potential impact on the environment is not listed in the checklist is an insufficient  
25 basis to refuse to fully analyze that impact.

26           65.       Alternatively, the EIR’s analyses of the environmental impacts listed two numbered  
27 paragraphs above are not supported by substantial evidence, as required. “Argument, speculation,  
28 unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of

1 social or economic impacts which do not contribute to or are not caused by physical impacts on the  
2 environment does not constitute substantial evidence.” Guidelines § 15384(a).

3 **The EIR’s Mitigation Measures Are Inadequate**

4 66. CEQA requires that agencies mitigate the potentially significant adverse impacts of  
5 projects through adoption of alternatives or mitigation measures. §§ 21002, 21002.1, 21081. The  
6 Guidelines further explain that “significant, avoidable damage to the environment” must be avoided  
7 through the use of feasible alternatives or mitigation measures. Guidelines § 15002(a)(3). Project  
8 approval should be withheld where such measures or alternatives exist and are ignored. Guidelines §  
9 15021(a)(2). An agency must make specific findings about the alternatives and mitigation measures  
10 considered for each significant impact identified in the EIR. Guidelines § 15091(a)(1). And it also must  
11 take specific action to adopt feasible alternatives and enforceable mitigation measures that would reduce  
12 a project’s significant effects to insignificance. Guidelines § 15091(d).

13 67. An EIR’s discussion of proposed mitigation measures must be sufficiently specific to  
14 enable the public to evaluate and comment about whether the mitigation measures are adequate and if  
15 they will themselves have any environmental impacts. Mitigation measures must not be remote and  
16 speculative, and they are inadequate where they are so undefined that it is impossible to gauge their  
17 effectiveness. *Federation of Hillside & Canyon Ass’ns v City of Los Angeles* (2000) 83 CA4th 1252,  
18 1260; *Preserve Wild Santee v City of Santee* (2012) 210 CA4th 260, 281. The formulation of mitigation  
19 measures also cannot be postponed until later: “[R]equir[ing] . . . the . . . adopt[ion of] mitigation  
20 measures recommended in a future study is in direct conflict with the guidelines implementing CEQA.”  
21 *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 306.

22 68. Contrary to these requirements, the FEIR is riddled with deferred mitigation measures.  
23 For example, and for illustrative purposes only, unlawfully deferred mitigation measures in the FEIR  
24 include, but are not limited to:

- 25 a. Future development of numerous plans to mitigate the Project’s impacts on  
26 special-status species;
- 27 b. Future development of a construction traffic management plan intended to mitigate  
28 the Project’s traffic impacts;

1 c. Future development of a plan to mitigate the Project’s impacts on cultural  
2 resources; and

3 d. Future development of air quality mitigation measures, which range from “on-site  
4 measures” to reduce NOx emissions, to an alternative plan to instead create a Voluntary Emissions  
5 Reduction Agreement, to the future development of an “Air Impact Assessment” for the local air quality  
6 district.

7 69. Because it precludes public comment on the adequacy and environmental impacts of these  
8 yet-to-be-developed mitigation measures, among others, the FEIR violates CEQA. *Preserve Wild Santee*,  
9 210 Cal.App.4th at 281; *Sundstrom*, 202 Cal.App.3d at 306; *Communities for a Better Environment v.*  
10 *City of Richmond* (2010) 184 Cal.App.4th 70, 92.

11 70. Mitigation measures must be “fully enforceable through permit conditions, agreements, or  
12 other measures.” § 21081.6(b). But the FEIR contains numerous mitigation measures that are entirely  
13 unenforceable. For example, and for illustrative purposes only, the FEIR’s primary mitigation measure  
14 for the Project’s greenhouse gas emissions is a vague promise to use renewable energy when feasible.  
15 Similarly, and also for illustrative purposes only, the FEIR traffic analysis includes a vague and  
16 unenforceable mitigation measure that will allow the City of Patterson and County of Stanislaus to decide  
17 whether to “choose” to implement “temporary traffic signals during dam and roadway realignment  
18 construction.” These standardless mitigation measures cannot be enforced, and thus violate CEQA.

19 71. The FEIR further fails to either mitigate the Project’s significant environmental impacts to  
20 insignificance or explain why doing so is infeasible, contrary to sections 21002 and 21002.1(b). For  
21 example, and for illustrative purposes only, although the FEIR concludes that the Project’s greenhouse  
22 gas emissions impacts would be significant, it *completely* fails to explain why, or if, it is impossible to  
23 mitigate this impact by using exclusively clean energy to power the Project. It cannot be said that the  
24 Project’s increase in greenhouse gas emissions is “unavoidable” when such an obvious mitigation  
25 measure was never even discussed.

26 **The EIR’s Alternatives Analysis Is Inadequate**

27 72. CEQA requires EIRs to consider and discuss a reasonable range of feasible alternatives  
28 that would reduce or avoid the Project’s significant impacts. Guidelines § 15126.6(a), (e). An EIR also

1 must identify an environmentally superior alternative, which must be adopted unless it is infeasible. §§  
2 21002, 21002.1(b), 21081; Guidelines §§ 15091(a), (b), 15092(b), 15093, 15126.6(e)(2). The discussion  
3 of alternatives is “the core of an EIR.” *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52  
4 Cal.3d 553, 564.

5 73. “A lead agency may not give a project’s purpose an artificially narrow definition.” *North*  
6 *Coast Rivers Alliance v. Kawamura* (2016) 243 Cal.App.4th 647, 668. The use of an improperly narrow  
7 statement of project objectives enables the lead agency to skew the alternatives analysis process by  
8 improperly “dismiss[ing] out of hand” all alternatives except the preferred one. *Id.*

9 74. The District’s FEIR violates CEQA because it uses an artificially narrow statement of the  
10 Project’s objectives. *Id.* Rather than the actual goal of increasing the reliability of the District’s water  
11 supplies, the FEIR states that the objective of the Project is to construct a dam with a capacity of at least  
12 80,000 acre-feet. It uses this narrow objective to dismiss potentially feasible alternatives. And yet it is  
13 not at all clear that an 80,000 acre-foot dam like the Project is either necessary or the optimal way to  
14 achieve reliable water supplies – for instance, the FEIR identifies only 70,000 acre-feet of unmet demand  
15 for storage; water cannot leave the reservoir during algal blooms; water is unlikely to be available during  
16 unusually long droughts; the reservoir must be dewatered every five years; evaporation and seepage total  
17 nearly 2,500 acre-feet annually; it is unknown whether the new reservoir capacity would actually be  
18 available when it is needed; and it is unknown whether and how often the three parties sharing the  
19 reservoir capacity actually require water storage simultaneously.

20 75. A broader set of objectives would have allowed the District to balance the various costs  
21 and benefits of different ways of achieving a more reliable water supply, instead of simply excluding  
22 everything except the predetermined outcome of a new 80,000 acre-foot dam. The 80,000 acre-foot  
23 requirement was used as a justification for refusing to provide a detailed analysis of numerous  
24 alternatives, including groundwater recharge. This artificially narrow analysis is contrary to CEQA.  
25 *NCRA*, 243 Cal.App.4th at 668.

26 76. CEQA further requires agencies to consider a “reasonable range” of alternatives that can  
27 reduce the Project’s environmental impacts, as determined by the “rule of reason.” Guidelines §  
28 15126.6(a).

1           77.     The FEIR fails this test. It analyzes only two alternative actions to the proposed Project,  
2 both of which are similar to the Project, rather than the required reasonable range. The FEIR also  
3 provides only conclusory assertions to support the dismissal of many other potentially feasible  
4 alternatives. The FEIR’s failure to consider the required “range of reasonable alternatives” that “would  
5 avoid or substantially lessen” the Project’s impacts (Guidelines § 15126.6(a)) is perhaps most  
6 dramatically illustrated by the fact that the FEIR *concedes* that *none* of the alternatives it analyzed are  
7 environmentally superior to the Project.

8           78.     The brief analysis of alternatives that the FEIR does include likewise fails to satisfy  
9 CEQA. The FEIR provides bare conclusions rather than facts and analysis, and fails to disclose the  
10 analytic route traveled to reach those bare conclusions. But conclusory platitudes do not satisfy CEQA’s  
11 requirement of enabling the public to meaningfully understand the Project’s environmental impacts.  
12 *Laurel Heights*, 47 Cal.3d at 399.

13                   **The EIR Fails to Satisfy CEQA’s Consultation and Coordination Requirements**

14           79.     CEQA requires the District, as the lead agency preparing the EIR, to “consult with, and  
15 obtain comments from” a variety of other agencies, including “each responsible agency [and] trustee  
16 agency,” multiple times throughout the CEQA process. §§ 21080.3, 21080.4, 21153. The duty to *obtain*  
17 comments is an affirmative duty placed upon the *lead* agency.

18           80.     Here, the District failed to discharge this duty by erroneously failing to identify the City of  
19 Patterson and County of Stanislaus as responsible agencies for the approval of the Project’s electrical  
20 transmission facilities. The FEIR claims that neither entity has a role in this regard because the District  
21 has intergovernmental immunity from local land use controls – but this immunity, which is provided by  
22 Government Code section 53091(d), expressly states that “zoning ordinances of a county or city *shall*  
23 apply to the location or construction of facilities for the storage or transmission of electrical energy by a  
24 local agency, if the zoning ordinances make provision for those facilities.”

25           81.     The Project includes the construction and relocation of electrical transmission facilities,  
26 and the City of Patterson and County of Stanislaus have made provision for electrical transmission  
27 facilities in zoning ordinances over which they possess approval and enforcement authority. As such, the  
28 City of Patterson and County of Stanislaus are responsible agencies with respect to the approval of

1 electrical transmission facilities, and comments from these two entities should have been obtained and  
2 considered but were not. This violates CEQA. § 21153.

3 82. The FEIR’s misrepresentations about the legal authority other local governments have  
4 over any power lines built by the District also precluded informed public review of the Project, and  
5 thereby independently violate CEQA.

6 83. Under CEQA, each lead agency is responsible for producing an environmental document  
7 that is sufficient for use by responsible and trustee agencies. *Habitat & Watershed Caretakers v. City of*  
8 *Santa Cruz* (2013) 213 Cal. App. 4th 1277, 1305. The EIR must provide sufficient information to enable  
9 the later agency to make an informed exercise of its discretion, and the EIR is inadequate if it does not do  
10 so. *Id.*

11 84. Because the FEIR does not include information sufficient to inform the exercise of the  
12 discretionary authority possessed by the City of Patterson and County of Stanislaus over the Project’s  
13 electrical transmission facilities, the FEIR is additionally inadequate under *Habitat & Watershed*  
14 *Caretakers, supra*, 213 Cal. App. 4th at 1305.

15 85. The District further violated CEQA by failing to sufficiently consult and coordinate with  
16 trustee agencies. The District *ignored* the SWRCB’s scoping comments, as noted above. The District  
17 also failed to meaningfully respond to the comments of trustee agencies about the FEIR’s inadequacies,  
18 as noted below, and made no pretense of accommodating those agencies’ concerns.

19 86. Because the District failed to discharge its coordination and consultation obligations, and  
20 because the FEIR does not contain sufficient information for the use of other agencies, the FEIR is  
21 inadequate and the District’s approval of the Project is unlawful. §§ 21080.3, 21080.4, 21153; *Habitat &*  
22 *Watershed Caretakers, supra*, 213 Cal. App. 4th at 1305.

23 **The EIR Fails to Meaningfully Respond to Comments**

24 87. CEQA requires agencies to provide detailed responses to comments raising significant  
25 environmental issues that are made prior to the end of the comment period on the draft EIR. Guidelines §  
26 15088. The responses must show a “good faith, reasoned analysis,” and must be supported by factual  
27 information. *Id.*

28 88. If a comment raises significant environmental issues and the agency chooses not to accept

1 its suggestions, the agency must explain why. Guidelines § 15088(c); *Flanders Foundation v. City of*  
2 *Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603, 615. Meaningful agency response to public comment is  
3 fundamental to CEQA’s informational purpose. For this reason, a failure to adequately respond to  
4 comments renders an EIR “fatally defective.” *People v. County of Kern* (1974) 39 Cal.App.3d 830, 842.

5 89. For example, and for illustrative purposes only, the Draft EIR comments of the California  
6 Department of Fish and Wildlife (“DFW”) reflect DFW’s serious concern about the adequacy of the  
7 Project’s mitigation measures for biological resources. DFW made numerous specific suggested  
8 improvements to those measures, but the FEIR does not meaningfully respond to any of them. In one  
9 such instance, DFW requested quadrupling the size of the 600-foot construction buffer zone around  
10 *active* hawk nests, but the FEIR responds by rejecting the request without any substantive explanation of  
11 why or how a 600-foot buffer zone is sufficient to protect nests in active use. *Compare* FEIR Chapter 10,  
12 Comment 5-3 (DFW states 600-foot buffer is insufficient and recommends a ½-mile buffer) *with* FEIR at  
13 9-51 (600-foot buffer is appropriate in Project biologists’ professional judgment, and also was used once  
14 before nearly a decade ago, in an unspecified project in a different county).

15 90. One additional illustrative example of the FEIR’s failure to respond to comment is its  
16 response to the California Department of Water Resources (“DWR”). DWR manages the State Water  
17 Project (“SWP”), a large state irrigation project that pumps water from the Delta. DWR commented that  
18 because Del Puerto Creek is an indirect tributary of the Delta, the Project’s “diversions from [Del Puerto]  
19 Creek contemplated in the DEIR could conflict with SWP[] operations, especially when DWR is  
20 releasing supplemental SWP . . . water to meet water quality flow objectives and water quality standards  
21 in the Delta, or diversions are limited to meet Endangered Species Act requirements.” FEIR Chapter 10,  
22 Comment 3-2. DWR specifically requested “a more detailed analysis of the Project’s potential effects on  
23 hydrology and water quality standards in the Delta.” *Id.* The FEIR’s response hardly even *acknowledges*  
24 DWR’s concerns about whether Project approval could result in modifications to the current pumping  
25 regimen that in turn could have significant environmental impacts, and certainly does not qualify as the  
26 good-faith and meaningful response to comment required by CEQA.

27 91. This lack of substantive response typifies the FEIR’s responses to many other public  
28 comments. By failing to give meaningful response to public comment, the District violated CEQA.

1 Guidelines § 15088.

2 **The EIR Was Not Recirculated**

3 92. CEQA requires recirculation of a draft EIR “when significant new information is added to  
4 the EIR after public notice is given of the availability of the draft EIR for public review under [CEQA  
5 Guidelines] Section 15087 but before certification.” Guidelines § 15088.5(a).

6 93. The Final EIR references and presents numerous examples of “significant new  
7 information” that was not contained within the draft EIR. For example, and for illustrative purposes only,  
8 this new and significant information includes, but is not limited to:

- 9 a. new information about golden eagles in the vicinity of the Project (FEIR at 3.4-17);
- 10 b. a new disclosure that pesticides may be present in the soil on the Project site (FEIR  
11 at 3.10-12);
- 12 c. newly quantified information about the Project’s impacts on flows in Del Puerto  
13 Creek (FEIR at 3.11-25);
- 14 d. information about new plant surveys, including photos and wholesale revisions to  
15 the species affected by the Project (FEIR at 3.4-7 to 3.4-10);
- 16 e. a new invasive species control protocol (FEIR at 9-74);
- 17 f. a new analysis of the environmental impacts of site alternatives (FEIR at 9-2 to 9-  
18 10); and
- 19 g. an extended discussion of how the purported infeasibility of groundwater recharge  
20 supposedly rendered dismissing that alternative from consideration appropriate (FEIR at 9-11 to 9-13).

21 94. Each of these additions prevented the public from commenting on a significant  
22 environmental issue and thereby constitutes “significant new information” requiring recirculation.  
23 Guidelines § 15088.5. For example, it was impossible for the public to comment on the Project’s effects  
24 on downstream flows in Del Puerto Creek, because the draft EIR contained no quantified information  
25 about that issue at all. Similarly, the draft EIR omitted specific information about many plants due to a  
26 dearth of surveys; the FEIR does include one series of spring plant surveys, but the belated addition  
27 prevented the public from commenting about their adequacy, results, and significance. Likewise, the  
28 public was not given an opportunity to respond to the FEIR’s new information about alternatives.

1 Recirculation was accordingly required under Guidelines section 15088.5(a)(1)-(2).

2 95. Recirculation is also required, under Guidelines section 15088.5(a)(3), where the FEIR  
3 declines to adopt suggested mitigation measures. Here, this criterion is met because the FEIR refused to  
4 adopt numerous specific new mitigation measures, including but not limited to those requested by DFW  
5 in its comments on the Draft EIR. *See* FEIR Chapter 10, Comments 5-2 to 5-10 & responses thereto.  
6 The public’s inability to comment on the FEIR’s failure to adopt these different and feasible mitigation  
7 measures warranted recirculation under Guidelines section 15088.5(a)(3).

8 96. Finally, recirculation is additionally required where the EIR is so fundamentally  
9 inadequate and conclusory in nature that meaningful public review is precluded. Guidelines §  
10 15088.5(a)(4). This criterion is met here because the EIR’s analysis is deficient in the respects described  
11 above.

12 97. The District’s failure to recirculate the FEIR violated CEQA.

13 **The District’s Findings and Statements of Overriding Considerations Are Inadequate**

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

- 17 (1) Changes or alterations have been required in, or incorporated into, the project which avoid  
18 or substantially lessen the significant environmental effect . . . .
- 19 (2) Such changes or alterations are within the responsibility and jurisdiction of another public  
20 agency and . . . have been adopted . . . or can and should be adopted by such other agency.
- 21 (3) Specific economic, legal, social, technological, or other considerations . . . make infeasible  
22 the mitigation measures or project alternatives identified in the final EIR.”

23 Guidelines § 15091(a); *see also* § 21081(a). The findings “shall be supported by substantial evidence in  
24 the record.” Guidelines § 15091(b). Where, as here, an agency approves a project that has significant  
25 environmental effects that “are not avoided or substantially lessened,” the agency must “state in writing  
26 the specific reasons to support its action.” Guidelines §§ 15093(b), 15096(h), 15064(a)(2). This  
27 “statement of overriding considerations shall be supported by substantial evidence” (Guidelines §  
28 15093(b)), and is to be made in addition to the findings required under section 15091. Guidelines §  
15091(f).

1 99. CEQA's requirements of recorded findings and statements of overriding considerations  
2 ensure that agencies carefully and transparently consider the proposed action's environmental effects.  
3 The "intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will  
4 randomly leap from evidence to conclusions." *Topanga Assn. for a Scenic Com. v. County of Los*  
5 *Angeles* (1974) 11 Cal.3d 506, 516-517. Because findings lay out the agency's rationale, they also help  
6 courts police agency compliance with CEQA's procedures. *Mira Mar Mobile Com. v. City of Oceanside*  
7 (2004) 119 Cal.App.4th 477, 496 ("findings must 'bridge the analytic gap between the raw evidence and  
8 ultimate decision,' so as to allow a reviewing court 'to trace and examine the agency's mode of  
9 analysis'").

10 100. To make the findings CEQA requires, the EIR must properly identify and fully analyze the  
11 Project's significant environmental impacts. As discussed at length above, the District's FEIR fails to do  
12 so in numerous respects. The District's findings and statements of overriding considerations flow out of  
13 the FEIR's deficient impacts analysis and are, in turn, necessarily defective themselves.

14 101. Additionally, the District's findings and statements of overriding considerations are not  
15 supported by substantial evidence, as required, and are defective for that reason as well. Guidelines §  
16 15093(b).

## 17 SECOND CAUSE OF ACTION

### 18 (Writ of Mandate, Declaratory and Injunctive Relief to Set Aside

#### 19 Project Approvals as Contrary to Code of Civil Procedure §§ 1085 and 1094.5)

20 102. The paragraphs set forth above and below this cause of action are realleged and  
21 incorporated herein by reference.

22 103. Respondent proceeded in excess of its jurisdiction and abused its discretion in purporting  
23 to approve the Project and certify its EIR because such approvals violate Code of Civil Procedure  
24 sections 1085 and 1094.5 in the following respects, among others:

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

28 104. Respondent failed to proceed in the manner required by law, in that the District violated

1 CEQA as alleged above.

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

5 **PRAYER FOR RELIEF**

6 WHEREFORE, petitioners pray for the following relief:

7 1. This Court's alternative and peremptory writs of mandate, declaratory judgment, and  
8 permanent injunction, setting aside and enjoining the District's actions purporting to (1) certify the  
9 Project's EIR and (2) approve the Project, on the grounds that all such approvals and certification violate  
10 CEQA;

11 2. This Court's temporary restraining order, stay order, preliminary injunction, and  
12 alternative and peremptory writs of mandate, enjoining and restraining the District, and the District's  
13 officials, agents, employees, representatives, and all persons acting in concert or participating with them,  
14 from taking any action to implement the Project that could result in any change or alteration to the  
15 physical environment pending the District's compliance with CEQA;

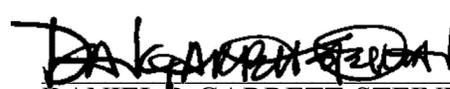
16 3. For attorney's fees under Code of Civil Procedure section 1021.5, in that petitioners'  
17 successful prosecution of this proceeding confers a significant benefit on the public, and an award of its  
18 attorney's fees is otherwise warranted and appropriate;

19 4. For costs of suit herein; and

20 5. For such other and further equitable or legal relief as the Court deems just and proper.

21 Dated: November 20, 2020

Respectfully submitted,

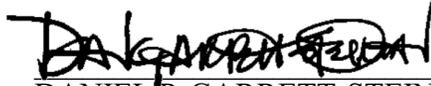
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24 DANIEL P. GARRETT-STEINMAN  
25 Attorney for petitioners and plaintiffs  
26 SIERRA CLUB, CALIFORNIA NATIVE PLANT  
27 SOCIETY, CENTER FOR BIOLOGICAL  
28 DIVERSITY, and FRIENDS OF THE RIVER

1 VERIFICATION

2 I, Daniel P. Garrett-Steinman, am the attorney for petitioners in this action. I make this  
3 verification on behalf of the petitioners because petitioners are absent from the City and County of San  
4 Francisco, in which my office is located. I have read the foregoing Verified Petition for Writ of Mandate  
5 and Complaint for Declaratory and Injunctive Relief and know its contents. The facts therein are true of  
6 my own knowledge, except for those matters that are stated on information and belief, and as to those  
7 matters I believe them to be true.

8 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
9 true and correct, and that this Verification was executed in San Francisco, California, on November 20,  
10 2020.

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12 \_\_\_\_\_  
13 DANIEL P. GARRETT-STEINMAN