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**EXEMPT FROM FILING FEES
PURSUANT TO GOV. CODE, § 6103**

14 SUPERIOR COURT OF CALIFORNIA

15 COUNTY OF SACRAMENTO

16 COUNTY OF SACRAMENTO, a California
17 county, and SACRAMENTO COUNTY
WATER AGENCY, a California water
18 district,

19 Petitioners and Plaintiffs,

20 v.

21 CALIFORNIA DEPARTMENT OF
WATER RESOURCES, a California state
22 agency,

23 Respondent and Defendant,

24 DOES 1 through 50,

25 Real Parties in Interest,

26
27 AND RELATED ACTIONS.

Case No. 24WM000014

(Related to 24WM000006; 24WM000008;
24WM000009; 24WM000010; 24WM000011;
24WM000012; 24WM000017; 24WM000062)

**Assigned to Hon. Stephen P. Acquisto
Department 36**

CALIFORNIA ENVIRONMENTAL QUALITY
ACT (CEQA) CASE

**COUNTY OF SACRAMENTO AND
SACRAMENTO COUNTY WATER
AGENCY'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
THEIR MOTION FOR PRELIMINARY
INJUNCTION**

DATE: May 31, 2024

TIME: 1:30 p.m.

DEPT: 36

Petition Filed: January 22, 2024

Amended Petition Filed: February 16, 2024

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Delta Stewardship Council Cases
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Tulare Lake Canal Co. v. Stratford Public Utility Dist.
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1 Wat. Code section
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3 85022(a) 7
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4 85022(c)(4)..... 7
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5 85058..... 5
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6 85225..... 5, 6, *passim*
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11 <https://www.merriam-webster.com/dictionary/initiate> 16
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Concerned about the state and health of the Sacramento-San Joaquin River Delta (Delta),¹
4 the Legislature adopted the Sacramento-San Joaquin Delta Reform Act of 2009 (Wat. Code,
5 § 85000 et seq.) (Act) and directed the Delta Stewardship Council (Council) to adopt and
6 implement a Delta Plan—a legally enforceable, comprehensive, long-term management plan for
7 the Delta that furthers coequal goals to: (a) secure a reliable water supply for California; and
8 (b) protect, restore, and enhance the Delta ecosystem and the fish, wildlife, and recreation it
9 supports. (*Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1028 (*DSCC*.) Per
10 the legislative directive, the Council adopted the Delta Plan in 2013. (*Id.* at p. 1041.)

11 Under the Act, “state and local land use actions that qualify as covered actions must be
12 consistent with the Delta Plan.” (*DSCC, supra*, 48 Cal.App.5th at p. 1044.)

13 The Act requires any state or local public agency that proposes to undertake a
14 covered action to prepare a written certification of consistency *prior to initiating*
15 *the implementation of that covered action*, with detailed findings as to whether the
covered action is consistent with the Delta Plan, and then to submit that
certification to the Council.

16 (*Ibid.*, emphasis added, citing Wat. Code, § 85225.) The filing of the certification of consistency
17 triggers the right of *any person* to appeal the consistency determination. (*DSCC, supra*, at
18 p. 1044.) During the pendency of any such appeal, the covered action “shall not be implemented”
19 unless certain conditions have been met. (Cal. Code Regs., tit. 23, § 5034.)

20 Petitioners and Plaintiffs County of Sacramento and Sacramento County Water Agency
21 (collectively, “Petitioners”) bring this Motion for Preliminary Injunction (Motion) against the
22 California Department of Water Resources (“DWR” or “Respondent”) to enjoin the geotechnical
23 activities that DWR is undertaking and plans to undertake pursuant to the Delta Conveyance
24 Project (“DCP” or “Project”) final environmental impact report (FEIR). DWR’s planned
25 geotechnical activities are, as expressly acknowledged by DWR in the FEIR, an inextricable part

26 _____
27 ¹ The term “Delta” in the Sacramento-San Joaquin Delta Reform Act of 2009 (Wat. Code, § 85000 et seq.) is defined
28 to include the definition in Water Code section 12220 “and the Suisun Marsh, as defined in Section 29101 of the
Public Resources Code.” (Wat Code, § 85058.)

1 of the Project. As also expressly acknowledged by DWR, the Project (including the geotechnical
2 activities) is a “covered action” within the meaning of the Act. DWR has not, however, filed the
3 requisite written certification of consistency with the Council prior to initiating implementation of
4 the Project. Based on these indisputable facts and the harm arising from DWR’s actions, as
5 described herein, Petitioners seek a preliminary injunction to enjoin DWR from initiating
6 implementation of the Project until DWR files a certification of consistency with the Council in
7 accordance with Water Code² section 85225 (Section 85225).

8 II. LEGAL BACKGROUND

9 A. The Legislature’s Concerns About the Delta

10 The Delta “is the most valuable estuary and wetland ecosystem on the west coast of North
11 and South America, and is the hub of California’s water delivery system” because it is “endowed
12 with many invaluable and unique resources of major statewide significance, including highly
13 productive agriculture, recreational assets, fisheries, and wildlife environment.” (*DSCC, supra*,
14 48 Cal.App.5th at p. 1027.) The economies of major regions in California also depend “on the
15 ability to use water within the Delta watershed or to import water from the Delta watershed.”
16 (*Ibid.*) “In 2009, after decades of conflict and unsuccessful efforts to comprehensively address
17 the many problems and challenges facing the Delta, the Legislature found and declared that the
18 ‘Delta watershed and California’s water infrastructure are in crisis and existing Delta policies are
19 not sustainable,’ and that ‘[r]esolving the crisis requires fundamental reorganization of the state’s
20 management of Delta watershed resources.’ ” (*Id.* at pp. 1027-28.)

21 In response to this crisis, the Legislature enacted the Act, finding, among other things,
22 that: “[t]he permanent protection of the Delta’s natural and scenic resources is the paramount
23 concern to present and future residents of the state and nation”; and “[t]o promote the public
24 safety, health, and welfare, and to protect public and private property, wildlife, fisheries, and the
25 natural environment, it is necessary to protect and enhance the ecosystem of the Delta and prevent
26

27 ² All further undesignated section references are to the Water Code unless otherwise specified. Any subdivisions
referenced immediately follow the code or regulation citation.

1 its further deterioration and destruction.” (§ 85022(c)(2)-(3).) The Legislature further found that
2 existing and future developments “that are carefully planned and developed consistent with the
3 policies of this division, are essential to the economic and social well-being of the people of this
4 state and especially to persons living and working in the Delta.” (*Id.*, subd. (c)(4).)

5 **B. The Council and the Delta Plan**

6 The Legislature created the Council as an independent agency of the state (§ 85200(a))
7 and charged it with adopting and implementing the Delta Plan to further the coequal goals.
8 (§ 85054; see also §§ 85001(c), 85059, 85300(a).) The Council adopted the Delta Plan in May
9 2013. (*DSCC, supra*, 48 Cal.App.5th at p. 1041.)

10 The Delta Plan, which spans nearly 300 pages, provides a detailed history,
11 description, and analysis of the various problems and challenges facing the Delta.
12 It is intended to be a foundational document that prioritizes actions and strategies
13 in support of key objectives, such as the requirement to reduce reliance on the
14 Delta to meet future water supply needs. It also restricts actions that may cause
15 harm; serves as a guidebook for all plans, projects, and programs that affect the
16 Delta; and calls for further investigation and focused study of specific issues.

17 (*Id.* at p. 1042.)

18 The working parts of the Delta Plan are 73 recommendations and 14 policies. The
19 recommendations are nonregulatory but call out actions essential to achieving the
20 coequal goals of the Delta Reform Act in a manner that protects and enhances
21 Delta values as an evolving place. By contrast, the policies are regulatory in
22 nature; state and local agencies proposing to undertake a “covered action”—a land
23 use action as defined in the Act—must comply with the policies.

24 (*Ibid.*, fn. omitted.)

25 **C. The Mandated Certification of Consistency Process**

26 State and local land use actions that qualify as “covered actions” must be consistent with
27 the Delta Plan. (§ 85022(a).) “ ‘In contrast to how many other governmental plans are
28 implemented, the Council does *not* exercise direct review and approval authority over covered
actions to determine their consistency with the regulatory policies in the Delta Plan. Instead,
State or local agencies self-certify Delta Plan consistency, and the Council serves as an appellate
body for those determinations.’ ” (*DSCC, supra*, 48 Cal.App.5th at p. 1042.)

“Covered action” is defined as “a plan, program, or project” defined under Public

1 Resources Code (PRC) section 21065 meeting the following conditions: “(1) Will occur, in whole
2 or in part, within the boundaries of the Delta or Suisun marsh[; ¶] (2) Will be carried out,
3 approved, or funded by the state or a local public agency[; ¶] (3) Is covered by one or more
4 provisions of the Delta Plan[;] [and] [¶] (4) Will have a significant impact on achievement of one
5 or both of the coequal goals or the implementation of government-sponsored flood control
6 programs to reduce risks to people, property, and state interests in the Delta.” (§ 85057.5(a).)

7 PRC section 21065 defines “project” as “an activity which may cause either a direct
8 physical change in the environment, or a reasonably indirect physical change in the environment,
9 and which is any of the following: [¶] (a) An activity directly undertaken by any public
10 agency[; ¶] (b) An activity undertaken by a person which is supported, in whole or in part,
11 through contracts, grants, subsidies, loans, or other forms of assistance from one or more public
12 agencies[; ¶] [or] (c) An activity that involves the issuance to a person of lease, permit, license,
13 certificate, or other entitlement for use by one or more public agencies.”

14 The Act further identifies various actions that do not qualify as a “covered action,”
15 including, among other things, a regulatory action of a state agency, routine maintenance and
16 operation of the Central Valley Project (CVP) and State Water Project (SWP), and routine
17 maintenance and operation of a facility located, in whole or in part, in the Delta, that is owned or
18 operated by a local public agency. (*DSCC, supra*, 48 Cal.App.5th at pp. 1044.)

19 In accordance with the Legislature’s directive for the Council “[t]o adopt regulations or
20 guidelines as needed to carry out the powers and duties identified in [the Act]” (§ 85210(i)), the
21 Council adopted a regulation that further defines “covered action” as “a plan, program, or
22 project” meeting all of the following criteria: “(A) Is a ‘project,’ as defined pursuant to section
23 21065 of the [PRC]; [¶] (B) Will occur, in whole or in part, within the boundaries of the Delta or
24 Suisun Marsh; [¶] (C) Will be carried out, approved, or funded by the State or a local public
25 agency; [¶] (D) Will have a significant impact on achievement of one or both of the coequal goals
26 or the implementation of government-sponsored flood control programs to reduce risks to people,
27 property, and State interests in the Delta; and [¶] (E) Is covered by one or more provisions of the

1 Delta Plan... .” (Cal. Code Regs., tit. 23, § 5001(k)(1)(A)-(E).) The state or local agency must,
2 however, first determine if the “proposed action” is a “covered action” under the Act. (*Id.*,
3 § 5002(a).)

4 Importantly, and as noted, the Act requires agencies that “propose” to undertake a
5 “covered action” to prepare a written statement certifying the covered action is consistent with the
6 Act’s coequal goals and the Delta Plan “prior to initiating the implementation of that covered
7 action[.]” (§ 85225.) After the agency files the written certification of consistency, “any person
8 who claims that a proposed covered action is inconsistent with the Delta Plan and, as a result of
9 that inconsistency, the action will have a significant adverse impact on the achievement of one or
10 both of the coequal goals ... may file an appeal” with the Council. (§ 85225.10(a).) If no appeal
11 is filed, the state or local public agency may proceed to implement the covered action.
12 (§ 85225.15.) If an appeal is filed, the Council must hold a hearing, unless the issue raised on
13 appeal is not within the Council’s jurisdiction or does not raise an appealable issue. (§ 85225.20.)

14 Following a hearing on an appealed action, the Council must “make specific written
15 findings either denying the appeal or remanding the matter to the state or local public agency for
16 reconsideration of the covered action based on the finding that the certification of consistency is
17 not supported by substantial evidence in the record before the state or local public agency that
18 filed the certification.” (§ 85225.25.) Section 85225.25 further prescribes that, if the agency on
19 remand “decides to proceed with the action or with the action as modified to respond to the
20 findings of the council, the agency shall, prior to proceeding with the action, file a revised
21 certification of consistency that addresses each of the findings made by the council and file that
22 revised certification with the council.”

23 Per Council regulation, a state or local public agency may not initiate implementation of
24 the covered action until the conclusion of the appeals process and unless and until (1) the Council
25 has found “no appellant has shown that the certification of consistency is not supported by sub-
26 stantial evidence in the record on any appealed issue,” (2) after a hearing, the Council has adopted
27 no finding the certification of consistency is not supported by substantial evidence, (3) certain

1 conditions on remand have been met, (4) the appellant has withdrawn the appeal, or (5) the
2 Council or its executive officer has dismissed the appeal. (Cal. Code Regs., tit. 23, § 5034.)

3 III. FACTUAL AND PROCEDURAL BACKGROUND

4 A. The Project Description in the FEIR Includes the Geotechnical Activities

5 After an agency decides to approve or carry out a project for which an environmental
6 impact report (EIR) has been prepared, the agency must file a notice of determination (NOD) that
7 includes an identification of the project. (PRC, § 21108(a); Cal. Code Regs, tit. 14, §§ 15094,
8 15373.) DWR’s NOD for the DCP states the Project will include the following five “key com-
9 ponents and actions”: (1) “[t]wo intake facilities along the Sacramento River in the north Delta
10 near the community of Hood with on-bank intake structures that would include fish screens”;
11 (2) a concrete-lined tunnel and associated vertical tunnel shafts to convey water from the intakes
12 “to the Bethany Reservoir Pumping Plant and Surge Basin at a location south of the existing SWP
13 Clifton Court Forebay”; (3) a “Bethany Reservoir Pumping Plant to lift the water from inside the
14 tunnel below ground into the Bethany Reservoir Aqueduct for conveyance to the Bethany
15 Reservoir Discharge Structure and into the existing Bethany Reservoir”; (4) other ancillary
16 facilities to support construction and operation of the conveyance facilities; and (5) “[e]fforts to
17 identify geotechnical, hydrogeologic, agronomic and other field conditions that will guide
18 appropriate construction methods and monitoring programs for final engineering design and
19 construction.” (Request for Judicial Notice in support of Petitioners’ Motion (RJN) p. 3[#1] &
20 Exh. A, pdf p. 4, emphasis added.) The Project “involve[s] the construction and operation of new
21 conveyance facilities for the movement of water entering the Delta from the Sacramento Valley
22 watershed to the existing [SWP] and, potentially, to [CVP] facilities in the south Delta, which
23 would result in a dual-conveyance system in the Delta.” (*Id.* p. 3[#3] & Exh. C 3-1:28-32.)

24 DWR explained in the NOD that “Chapter 3, *Description of the Proposed Project and*
25 *Alternatives* of the [FEIR] provides further information on the above components and actions and
26 related activities required as part of the Project[.]” (RJN, Exh. A pdf p. 4.) In the introduction
27 section of FEIR Chapter 3, DWR explained: “Section 3.15, *Field Investigations*, describes past

1 and future efforts to identify geotechnical, hydrogeologic, agronomic, and other field conditions
2 that will guide appropriate construction methods and monitoring programs for final engineering
3 design and construction.” (RJN p. 3[#3] & Exh. C at 3-2:22-26.) Section 3.15 of the FEIR
4 further provides:

5 [In addition to] soil investigations covered in the 2020 [Final Initial
6 Study/Mitigated Negative Declaration] ... data collection and field work
7 investigations would be conducted after completion of the [DCP] CEQA process
8 and possible project approval. Work related to geotechnical, agronomic testing,
9 and construction test projects (geotechnical investigations) would occur during the
preconstruction and construction periods following adoption of the Final EIR,
identification of an approved project footprint, and acquisition of all required
permits.

10 (*Id.* at 3-134:15-21.)

11 Section 3.15 identifies and sets forth the specifics as to the foregoing work. (RJN p. 3[#3]
12 & Exh. C at pp. 3-134 – 3-141.) DWR will drill hundreds of boreholes throughout the Delta,
13 many hundreds of feet deep; conduct “cone penetrometer tests” that involve shaking the surface
14 of the Delta (and mainland sites); and, in some cases will dredge massive trenches. (*Id.* at
15 pp. 3-134 – 3-141; see also Declaration of Louinda V. Lacey in Support of Petitioners’ Motion
16 (Lacey Decl.) ¶ 11 & Exh. 4 at pp. 1-4.) DWR estimates the geotechnical activities will be
17 completed in approximately two years. (RJN, Exh. B at p. 3-134.)

18 **B. The Litigation**

19 On December 21, 2023, DWR certified the FEIR for and approved the Project, and
20 adopted Findings of Fact, a Statement of Overriding Considerations, and a Mitigation Monitoring
21 and Reporting Program for the Project. (RJN p. 3[#2], Exh. B.) Petitioners filed an action
22 challenging DWR’s approval of the Project and its certification of the FEIR for the Project under
23 CEQA and various other legal authorities (Petition). (Lacey Decl. ¶ 7 & Exh. 1.) One of the
24 legal bases set forth in the Petition is that the Project conflicts with the coequal goals of the Act to
25 protect, restore, and enhance the Delta ecosystem. (*Id.*, Exh. 1 at pp. 13[subds. o & p.],
26 14[subd. q], 18-19[Fifth Cause of Action].) Petitioners attached to the Petition their comments
27 regarding the DCP’s inconsistency with the Delta Plan. (*Id.*, Exhs. 1 at p. 6[¶ 15]; 2 at pp. 17-

1 19[VI. A.], 46[XI.], 49-51 [XI. E.]; 3 at pp. 2-3.) Petitioners prayed for “issuance of a temporary
2 restraining order, preliminary injunction, and permanent injunction prohibiting any actions by
3 DWR pursuant to DWR’s approval of the Project and certification of the FEIR for the Project
4 until DWR has fully complied with all requirements of CEQA and all other applicable state and
5 local laws, policies, and regulations,” which include the Act, as alleged in the Petition. (*Id.*,
6 Exh. 1 at p. 21.)

7 During the Case Management Conference on February 16, 2024, Petitioners’ counsel and
8 counsel for other petitioners in the related cases raised concerns regarding rumors that DWR was
9 planning to undertake geotechnical activities under the DCP FEIR sometime over the summer.
10 (Lacey Decl. ¶ 10.) The trial court confirmed that motions for injunctive relief could be filed and
11 heard prior to the next Case Management Conference on May 31, 2024. (*Ibid.*)

12 **C. The Proposed Geotechnical Activities**

13 On April 3, 2024, Petitioners’ counsel and counsel for other petitioners in the related cases
14 participated in a meeting with DWR’s counsel to discuss the geotechnical activities that DWR
15 intended to undertake starting on May 1, 2024. (Lacey Decl. ¶ 11.) Approximately 1.5 hours
16 prior to the meeting, DWR sent a document titled “2024 Preconstruction Field Investigations –
17 Environmental Compliance, Clearance, and Monitoring Plan” (2024 Preconstruction Plan) to the
18 meeting attendees. (*Id.*, ¶ 11 & Exh. 4.) The 2024 Preconstruction Plan states the
19 preconstruction field activities “are scheduled to begin in April 2023 (site clearance activities)
20 and May 2024 (geotechnical investigations).” (*Id.*, Exh. 4 at p. 1.) The 2024 Preconstruction
21 Plan further states, among other things:

22 FEIR Chapter 3 – *Description of the Proposed Project and Alternatives* describes
23 the Project evaluated in the FEIR. Section 3.15 – Field Investigations explains that
24 ‘work related to geotechnical, hydrogeologic, agronomic testing, and construction
25 test projects (geotechnical investigations) would occur during the preconstruction
and construction periods following the adoption of the EIR, identification of an
approved project footprint, and acquisition of all required permits.’

26 (*Id.*, Exh. 4 at p. 2.)
27
28

1 During the April 3, 2024, meeting, DWR represented that the geotechnical activities
2 planned for May and June 2024 would be performed under a voluntary “temporary entry permit”
3 (Permit) with respective landowners. (Lacey Decl. ¶ 12.) The Permit states the owner’s property
4 is within the “study area” for the Project footprint and that DWR is requesting the Permit “to
5 conduct various surveys/studies to continue its planning and design efforts prior to implementing
6 and constructing a single tunnel water conveyance system” in the Delta. (Declaration of Dante J.
7 Nomellini, Jr. in Support of Petitioners’ Motion (Nomellini Decl.) ¶ 2 & Exh. 1, p. 2.)³ In
8 exchange for the right to enter the property and perform the activities, DWR offered to pay the
9 landowner \$1,000 as “an Acquisition Incentive Payment” and \$7,500 “which represents the
10 maximum amount of compensation for the probable damages (Probable Damages) resulting from
11 DWR and/or its contractors’ use” of the property.⁴ (*Id.*, Exh. 1, p. 6 [#4].) The landowner has 45
12 days to agree to the Permit. (*Id.*, Exh. 1, p. 6 [#4].)

13 The Permit further provides that DWR agrees to indemnify and hold the landowner
14 harmless “from any physical damage, including physical damage to the crops of [the landowner]
15 or its tenant, proximately caused by the activities authorized by th[e] Permit. DWR also agrees to
16 either reimburse [the landowner] for any damage to [the landowner’s] roads, fences, or other
17 personal property occurring due to the exercise of rights granted herein, or to replace or restore
18 said property.” (Nomellini Decl., Exh. 1, p. 6 [#6].)

19 Notably, not all geotechnical activities will occur in May and June 2024. The FEIR shows
20 the location of the anticipated work related to the Project and specifically states, “Geotechnical
21 investigations would also be conducted within all project feature construction boundaries.” (RJN
22 Exh. D.) A comparison of maps in the FEIR and the map in the NOD further shows the
23 geotechnical activities will be undertaken in the Delta. (RJN Exhs. A[*pdf*. p. 3(Fig.1)], D & F.)
24

25 _____
26 ³ The page references are to the physical pages in Exhibit 1 (*pdf* page) and not to the page numbers at the bottom of
the Permit because not all pages of Exhibit 1 are numbered.

27 ⁴ It is unclear and unknown whether DWR is offering each landowner the \$7,500 or whether the amount depends on
28 the proposed activities to be undertaken at the specific property.

1 **D. Meet and Confer**

2 On April 8, 2024, Petitioners and Plaintiffs City of Stockton, County of Sacramento,
3 Sacramento County Water Agency, and Sacramento Area Sewer District (SSD Parties) sent DWR
4 a letter stating their intent to file a motion to enjoin DWR from undertaking the geotechnical
5 activities. (Lacey Decl. ¶ 13 & Exh. 5.) DWR convened a call with the SSD Parties’ attorneys
6 and attorneys for petitioners in the related cases on April 12, 2024. (*Id.*, ¶ 14.) In the absence of
7 DWR agreeing to postpone the geotechnical activities until it files a certification of consistency
8 with the Council, the SSD Parties, along with San Francisco Baykeeper et al., County of Butte,
9 South Delta Water Agency et al., and County of San Joaquin et al., sent DWR follow-up
10 correspondence on April 15, 2024. (*Id.*, ¶ 15 & Exh. 6.) DWR responded to the correspondence
11 on April 22, 2024. (*Id.*, ¶ 16 & Exh. 7.) DWR has refused to postpone the geotechnical activities
12 until the Court rules on the motions for preliminary injunction. (*Id.*, ¶ 17.)

13 **IV. PRELIMINARY INJUNCTION STANDARD OF REVIEW**

14 The purpose of a preliminary injunction “is to preserve the status quo until a final
15 determination following a trial.” (*Nutro Products, Inc. v. Cole Grain Co.* (1992) 3 Cal.App.4th
16 860, 865, internal quotes omitted.) Code of Civil Procedure section 526 lists circumstances when
17 a preliminary injunction may be granted, including “when ‘the commission or continuance of
18 some act during the litigation would produce waste, or great or irreparable injury, to a party to the
19 action’ ” or “when a party is doing or is threatening to do some act in violation of the rights of
20 another party, which act would tend to render the judgment ineffectual.” (*Tulare Lake Canal Co.*
21 *v. Stratford Public Utility Dist.* (2023) 92 Cal.App.5th 380, 396 (*Tulare Lake*)).

22 In exercising its discretion to issue a preliminary injunction, “the trial court must consider
23 *two interrelated factors*, specifically, the likelihood that plaintiffs will prevail on the merits at
24 trial, and the comparative harm to be suffered by plaintiffs if the injunction does not issue against
25 the harm to be suffered by defendants ... if it does.” (*Right Site Coalition v. Los Angeles Unified*
26 *School Dist.* (2008) 160 Cal.App.4th 336, 341-342, internal quotes omitted.) “The potential merit
27 and interim harm are described as *interrelated factors* because the greater the plaintiff’s showing
28

1 on one, the less must be shown on the other to obtain an injunction”; the court’s goal is “to
2 minimize the harm that an erroneous interim decision would cause.” (*Tulare Lake, supra*,
3 92 Cal.App.5th at pp. 396-397.)

4 V. ARGUMENT

5 Petitioners seek a preliminary injunction on the discrete question whether DWR is
6 unlawfully initiating implementation of the Project in violation of Section 85225 by undertaking
7 geotechnical activities that form part of the Project, as described in the DCP FEIR. The scope of
8 the requested prohibitory injunction is thus quite narrow. The requested injunction would enjoin
9 DWR from initiating implementation of the Project only until DWR files the certification of
10 consistency with the Council. Petitioners satisfy the standards for obtaining this relief.

11 A. Petitioners Will Prevail on the Merits at Trial

12 Petitioners will prevail on the merits at trial because: (1) the geotechnical activities being
13 undertaken now and going forward are an inextricable part of the Project, a fact DWR has
14 admitted in the DCP FEIR and NOD; (2) the geotechnical activities will be undertaken in the
15 Delta; (3) DWR has affirmatively stated the Project, which includes the geotechnical activities, is
16 a “covered action” under the Act; and (4) it is undisputed DWR has not filed a certification of
17 consistency for the Project with the Council prior to initiating implementation of the geotechnical
18 activities, in violation of Section 85225.

19 The 2024 Preconstruction Plan explains the geotechnical activities are described in the
20 DCP FEIR and, consistent with the language in the NOD, describes the activities as “work related
21 to geotechnical, hydrologic, agronomic testing, and construction test projects (geotechnical
22 investigations)[.]” (Lacey Decl. Exh. 4, p. 2; RJN Exh. A, pdf. p. 4.) As shown by the maps in
23 the DCP FEIR and NOD, the geotechnical activities will take place in the Delta. (RJN Exhs. A,
24 D & F.) In Common Response 8 to the DCP FEIR, DWR affirmatively stated the Project
25 “meet[s] the definition of a covered action” (*id.*, Exh. E at p. 8-6) and “DWR will fully comply
26 with its obligations under the Delta Reform Act to certify consistency with the applicable policies
27 in the *Delta Plan* before initiating implementation” of the Project (*id.* at p. 8-3). The Project,

1 which includes the geotechnical activities currently being undertaken and implemented, is thus,
2 by DWR’s own admission, a “covered action” that requires a consistency determination. DWR
3 has not, however, filed a certification of consistency with the Council. (*Id.* at 8-6:12 – 8-7:10.)

4 While neither the Legislature nor the Council has defined the phrase “initiate
5 implementation” in Section 85225, the court may “appropriately refer to dictionary definitions to
6 ascertain the ordinary, usual meaning of a word.” (*Merced Irrigation Dist. v. Superior Court*
7 (2017) 7 Cal.App.5th 916, 926-927.) The First District Court of Appeal has already adopted a
8 dictionary definition of “implement” within the context of another statute to mean “to carry out:
9 accomplish; to give practical effect to and ensure actual fulfillment by concrete measures.” (2710
10 *Sutter Ventures, LLC v. Millis* (2022) 82 Cal.App.5th 842, 858.) And the word “initiate” is
11 further defined as “to cause or facilitate the beginning of” with synonyms that include begin,
12 commence, start, introduce, and usher in, with the implication of “taking a first step in a process
13 or series that is to continue.” (See <https://www.merriam-webster.com/dictionary/initiate>.)

14 Notably, the Legislature chose not to use the phrase “commence construction” in
15 Section 85225, even though it used that phrase in Section 85088 (another part of the Act). The
16 phrase “initiate implementation” by its plain, dictionary meaning is broader than “commence
17 construction” insofar as “initiate implementation” incorporates actions that give practical effect to
18 the Project and do not necessarily involve the construction of Project-related structures. It is thus
19 clear the Legislature intended for agencies like DWR to submit consistency certifications to the
20 Council prior to beginning preconstruction activities like the geotechnical activities at issue here.

21 Plainly, the geotechnical activities are intended to—and will—start, commence, and carry
22 out the Project by giving practical effect to the Project’s initial components. DWR has thus
23 “initiate[d] implementation” of the Project without first filing a certification of consistency, as
24 required by Section 85225. Had DWR filed the certification of consistency, Petitioners would
25 have filed an appeal, and the geotechnical activities would have automatically been stayed by
26 regulation. (Cal. Code Regs., tit. 23, § 5034.) Petitioners are thus via this Motion seeking relief
27 to which they would otherwise automatically have been entitled if DWR had followed the law.

1 **B. An Injunction Should Issue to Avoid Irreparable Harm**

2 Given the strength of Petitioners’ arguments on the merits, a limited showing of harm is
3 needed to support the issuance of the preliminary injunction. (*Tulare Lake, supra*,
4 92 Cal.App.5th at pp. 396-397.) That said, in the absence of an injunction, Petitioners and the
5 public will suffer myriad harms, both procedural and physical (or actual). An injunction will
6 further serve the public interest by ensuring that DWR does not implement a project that is
7 inconsistent with the Delta Plan and the coequal goals stated in the Act.

8 As shown in the DCP FEIR, the geotechnical activities will occur within Petitioners’
9 boundaries. (RJN Exh. D.) The geotechnical activities will undoubtedly result in damage to the
10 properties where the activities are undertaken. Indeed, DWR says it will drill hundreds of
11 boreholes throughout the Delta, many hundreds of feet deep; conduct “cone penetrometer tests”
12 that involve shaking the surface of the Delta (and mainland sites); and, in some cases, will dredge
13 massive trenches. (RJN Exh. C at pp. 3-134 – 3-145; (*Id.* at pp. 3-134 – 3-141; see also Lacey
14 Decl. ¶ 11 & Exh. 4 at pp. 1-4.) And DWR has essentially admitted the geotechnical activities
15 will cause physical harm to property. In the Permit that DWR is providing to landowners on
16 whose properties it intends to undertake the geotechnical activities, DWR agrees to provide
17 compensation for “probable damages” and other damages arising from its activities. (Nomellini
18 Decl. ¶ 2 & Exh. 1, pp. 3 [#4], 6 [#6].) Petitioners are further informed that San Francisco
19 Baykeeper, Shingle Springs Bank of Miwok Indians, California Indian Environmental Alliance,
20 Restore the Delta, Golden State Salmon Association, and The Bay Institute will be submitting
21 declarations in support of their related motion for preliminary injunction further detailing specific
22 harm that will result from the geotechnical activities.

23 DWR’s undertaking of the geotechnical activities also constitutes procedural harm. As
24 explained above, had DWR filed the certification of consistency as required under the Act,
25 Petitioners would have filed an appeal and implementation of the geotechnical activities would
26 have automatically been enjoined by regulation. (Cal. Code Regs., tit. 23, § 5034.) DWR is thus
27 usurping Petitioners’ procedural right to have the Council determine whether the Project is

1 consistent with the Delta Plan and the coequal goals of the Act to protect, restore, and enhance the
2 Delta ecosystem *before* DWR initiates implementation of the Project. Should the Council later
3 determine that the Project is inconsistent with the Delta Plan and the coequal goals, the harm
4 resulting from the geotechnical activities will have already occurred, despite the legally mandated
5 procedures in place to avoid such a result.

6 In addition, when balancing the interests of the movant if an injunction does not issue with
7 the competing interests of the non-movant if the injunction requested were to issue, the court
8 must consider established public policy. (*Tulare Lake, supra*, 92 Cal.App.5th at p. 398.) Where,
9 as here, the Legislature enacted a statutory provision proscribing a certain activity, it has already
10 determined the activity is contrary to the public interest. (*IT Corp v. County of Imperial* (1983)
11 35 Cal.3d 63, 70.) An activity contrary to the public interest is harm that may be enjoined by
12 issuance of an injunction. (*Id.* at pp. 70-71.) The geotechnical activities DWR is undertaking are
13 proscribed by Section 85225, and the Legislature has thus already determined that initiating
14 implementation of the Project without first certifying its consistency with the Council is contrary
15 to the public interest. Indeed, the Legislature enacted the Act for the very purpose to avoid
16 further harm to the Delta. (*DSCC, supra*, 48 Cal.App.5th at pp. 1027-28; § 85022(c)(2)-(3).) The
17 Council has likewise adopted a regulation staying implementation of a covered action when an
18 appeal is filed challenging a certification of consistency. (Cal. Code Regs., tit. 23, § 5034.) Like
19 the Legislature, the Council has thus determined that it is against public policy to allow an agency
20 to implement a covered action until the conclusion of the appeals process under the Act.

21 DWR's actions also constitute harm to the public's right to information. In *Tulare Lake*,
22 the court explained that an agency's failure to comply with CEQA is a harm to the public
23 generally because the public has an interest in informed decision-making about projects with
24 potentially significant environmental effects. (*Tulare Lake, supra*, 92 Cal.App.5th at p. 390.)
25 The same is true regarding violations of the Act. The requirement that an agency file a
26 certification of consistency for a covered action establishes a public process. It allows the public
27 the opportunity to review the information relied upon by the agency in determining whether the

1 covered action is consistent with the Delta Plan and the coequal goals, and then allows the public
2 to appeal that determination to the Council.

3 The Council must “make specific written findings either denying the appeal or remanding
4 the matter to the state or local public agency for reconsideration of the covered action based on
5 the finding that the certification of consistency is not supported by substantial evidence in the
6 record before the state or local public agency that filed the certification.” (§ 85225.25.) The
7 public has an interest in the agency’s informed decision-making about covered actions that may
8 cause harm in and to the Delta, and in the Council’s specific written findings regarding a covered
9 action’s consistency with the Delta Plan and coequal goals. By failing to file the certification of
10 consistency, DWR undermines the Council’s authority to ensure compliance with the Act and to
11 effectuate the public’s interest as articulated by the California Legislature.

12 The physical and procedural harm arising from DWR’s violation of Section 85225,
13 coupled with the public policy behind the Act and the public interest in informed decision-
14 making, support the issuance of a preliminary injunction until DWR complies with the Act.

15 VI. CONCLUSION

16 Petitioners’ arguments on the merits that DWR is initiating implementation of a covered
17 action in violation of Section 85225 are compelling because the Project is, as DWR concedes, a
18 covered action under the Act and the geotechnical activities are part of the Project. The relative
19 harm that will follow if DWR is not enjoined tips the scales of equity in favor of issuing a
20 preliminary injunction. Petitioners thus respectfully request that this Court enjoin DWR from
21 initiating implementation of the Project unless and until it files a certification of consistency with
22 the Council.

23 SOMACH SIMMONS & DUNN
A Professional Corporation

24 DATED: May 8, 2024

25 By:  _____

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