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24 *INSTITUTE*

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

25 SAN FRANCISCO BAYKEEPER, SHINGLE
26 SPRINGS BAND OF MIWOK INDIANS,
27 CALIFORNIA INDIAN ENVIRONMENTAL
28 ALLIANCE, RESTORE THE
DELTA, GOLDEN STATE SALMON
ASSOCIATION, and THE BAY INSTITUTE,

Petitioners,

vs.

CALIFORNIA DEPARTMENT OF
WATER RESOURCES,

Respondent.

Case No.: 24WM000017

**PETITIONERS' NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
INJUNCTIVE RELIEF; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: 5/31/2024

Time: 2:30 p.m.

Judge: Hon. Stephen P. Acquisto

Dept: 36

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TABLE OF CONTENTS

I. INTRODUCTION 2

II. LEGAL BACKGROUND 3

III. FACTUAL AND PROCEDURAL BACKGROUND..... 6

IV. STANDARD OF REVIEW 9

V. ARGUMENT 9

 a. Petitioners are Likely to Prevail on the Merits at Trial..... 10

 b. Petitioners will Suffer Irreparable Harm if an Injunction does not Issue. 12

VI. CONCLUSION..... 14

TABLES OF AUTHORITIES

State Cases

2710 Sutter Ventures, LLC v. Millis
(2022) 82 Cal. App.5th 842 11

Communities for a Better Environment v. City of Richmond
(2010) 184 Cal. App.4th 70 10

Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.
(1986) 42 Cal.3d 929 12

Delta Stewardship Council Cases
(2020) 48 Cal. App.5th 1014 passim

IT Corp v. County of Imperial
(1983) 35 Cal.3d 63 12

McCann v. City of San Diego
(2021) 70 Cal. App.5th 51 10

Merced Irrigation Dist. v. Superior Court
(2017) 7 Cal. App.5th 916 11

Nutro Products, Inv. v. Cole Grain Co.
(1992) 3 Cal. App.4th 860 9

Right Site Coalition v. Los Angeles Unified School Dist.
(2008) 160 Cal. App.4th 336 9, 10

Tulare Lake Canal Co. v. Stratford Public Utility Dist.
(2023) 92 Cal.App.5th 380 9, 12, 13

State Statutes

Pub. Resources Code, § 21065 4, 5, 10, 12

Pub. Resources Code, § 29101 2

Pub. Resources Code, §§ 21000 *et seq.* passim

Wat. Code, § 12220 2

Wat. Code, § 85022 3

Wat. Code, § 85057.5 4

Wat. Code, § 85058 2

1	Wat. Code, § 85088	11
2	Wat. Code, § 85200	3
3	Wat. Code, § 85225	2, 5, 11
4	Wat. Code, § 85225.10	5
5	Wat. Code, §§ 85000 <i>et seq</i>	passim
6	State Regulations	
7	Cal. Code Regs, tit. 14, § 15378	10
8	Cal. Code Regs., tit. 23, § 5034	6
9	Federal Regulations	
10	23 C.F.R. § 5001	5, 12
11	23 C.F.R. § 5002	5
12	Other Authorities	
13	Black’s Law Dict. (6th ed., Centennial Ed. (1891-1991)), 539	11
14		
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1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that, on May 31, 2024, or as soon thereafter as this matter may be
3 heard in the Sacramento County Superior Court, Petitioners will, and hereby do, move this Court to
4 enjoin Respondent California Department of Water Resources from continuing to implement the
5 Delta Conveyance Project unless and until it complies with the Sacramento-San Joaquin Delta
6 Reform Act of 2009, Water Code §§ 85000 *et seq.*, by filing a certification of consistency with the
7 Delta Stewardship Council. This motion is based on this Notice of Motion and Motion; supporting
8 Memorandum of Points and Authorities; supporting declarations of Harrison Beck, James
9 Sarmiento, Ivan Senock, Petee Ramirez, and Scott Artis, and the exhibits attached thereto; Request
10 for Judicial Notice; the files and records in this matter; and such argument as may be heard on this
11 matter by the Court.

12 DATED: May 3, 2024

AQUA TERRA AERIS LAW GROUP

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14 

15 Jason R. Flanders
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17 Attorneys for SAN FRANCISCO
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19 SPRINGS BAND OF MIWOK
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21 ENVIRONMENTAL ALLIANCE,
22 SAN FRANCISCO BAYKEEPER,
23 RESTORE THE DELTA, GOLDEN
24 STATE SALMON ASSOCIATION,
25 and THE BAY INSTITUTE
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Petitioners SHINGLE SPRINGS BAND OF MIWOK INDIANS, CALIFORNIA INDIAN
3 ENVIRONMENTAL ALLIANCE, SAN FRANCISCO BAYKEEPER, RESTORE THE DELTA,
4 GOLDEN STATE SALMON ASSOCIATION, and THE BAY INSTITUTE (“Petitioners”) bring
5 this Motion for Preliminary Injunctive Relief (“Motion”) against the California Department of
6 Water Resources (“DWR” or “Respondent”), on behalf of Petitioners’ interested members,
7 residents, and the public interest. In addition, Petitioners are also filing an amended Petition for
8 Writ of Mandate (“Petition”) amending their initial Petition to incorporate a standalone claim under
9 the Sacramento-San Joaquin Delta Reform Act of 2009 (“Delta Reform Act”), Water Code
10 §§ 85000 *et seq.*, in light of DWR’s recent actions to initiate implementation of the Delta
11 Conveyance Project (“Project”) without first complying with the Delta Reform Act as required.
12 (Petitioners’ First Amended Petition is being filed concurrently with this Motion.)

13 **I. INTRODUCTION**

14 Concerned about the state and health of the Sacramento-San Joaquin River Delta (“Delta”),¹
15 the California Legislature adopted the Delta Reform Act. The Act established an independent state
16 agency – the Delta Stewardship Council (“Council”) – to develop and implement a plan (the “Delta
17 Plan”) to further the Act’s coequal goals to (1) secure a reliable water supply for California and (2)
18 protect, restore, and enhance the Delta ecosystem and the fish, wildlife, and recreation it supports.
19 (*Delta Stewardship Council Cases* (2020) 48 Cal. App.5th 1014, 1028.) The Council adopted the
20 Delta Plan in 2013. (*Id.* at 1041.)

21 The Act requires any agency that “proposes” to undertake a “covered action” to prepare a
22 written statement certifying that the action is consistent with the Act’s coequal goals and with the
23 Delta Plan “prior to initiating the implementation of that covered action.” (*Id.* at 1044 [citing Wat.
24 Code § 85225].) As discussed below, it is undisputed that the Project is a “covered action” within
25 the ambit of the Delta Reform Act. However, beginning in May 2024, DWR plans to initiate

26 _____
27 ¹ The “legal” Delta is defined in Water Code section 12220; however, the definition of “Delta” in the Act includes the
28 definition in Water Code section 12220 “and the Suisun Marsh, as defined in Section 29101 of the Public Resources
Code. (Wat. Code, § 85058.)

1 implementation of the Project before submitting to the Council any written statement certifying the
2 consistency of the Project with the Delta Reform Act or the Delta Plan. Specifically, DWR plans to
3 undertake geotechnical investigations throughout the Delta and plans to continue to undertake such
4 actions moving forward. As a result, Petitioners now move for a preliminary injunction against
5 DWR to enjoin the agency from continuing these actions in violation of the Delta Reform Act
6 unless and until DWR files an application for certification of consistency with the Council in
7 accordance with the Act.

8 **II. LEGAL BACKGROUND**

9 The Delta “is the most valuable estuary and wetland ecosystem on the west coast of North
10 and South America, and is the hub of California’s water delivery system.” (*Delta Stewardship*
11 *Council Cases*, 48 Cal. App.5th at 1027.) Major regional economies rely on the Delta watershed or
12 import water therefrom and myriad endangered species live in and travel through the Delta on a
13 regular basis. (*Id.*) Moreover, and importantly, the Delta is also immensely valuable to local Tribes.
14 As a result, “[i]n 2009, after decades of conflict and unsuccessful efforts to comprehensively
15 address the many problems and challenges facing the Delta, the Legislature found and declared that
16 the Delta watershed and California’s water infrastructure are in crisis and existing Delta policies are
17 not sustainable, and that resolving the crisis requires fundamental reorganization of the state’s
18 management of Delta watershed resources.” (*Id.* at 1027-1028 [internal quotations omitted].) The
19 Delta Reform Act expressly states that “[t]he permanent protection of the Delta’s natural and scenic
20 resources is the paramount concern to present and future residents of the state and nation” and
21 asserts that, “[t]o promote the public safety, health, and welfare, and to protect public and private
22 property, wildlife, fisheries, and the natural environment, it is necessary to protect and enhance the
23 ecosystem of the Delta and prevent its further deterioration and destruction.” (Water Code § 85022.)

24 As part of the Delta Reform Act, the Legislature created the Council as an independent
25 agency of the state and charged it with adopting and implementing the Delta Plan to further the
26 coequal goals stated *supra* (*i.e.*, to secure a reliable water supply for California while also
27 protecting, restoring, and enhancing the Delta ecosystem and the fish, wildlife, and recreation it
28 supports). (*Id.* § 85200.) The Council adopted the Delta Plan in May 2013. (*Delta Stewardship*

1 *Council Cases*, 48 Cal. App. 5th at 1041.) “It is intended to be a foundational document that
2 prioritizes actions and strategies in support of key objectives, such as the requirement to reduce
3 reliance on the Delta to meet future water supply needs. It also restricts actions that may cause
4 harm; serves as a guidebook for all plans, projects, and programs that affect the Delta; and calls for
5 further investigation and focused study of specific issues.” (*Id.* at 1042.)

6 “Covered action” is defined as “a plan, program, or project as defined pursuant to Section
7 21065 of the Public Resources Code that meets all of the following conditions:

- 8 (1) Will occur, in whole or in part, within the boundaries of the Delta or Suisun marsh[;]
- 9 (2) Will be carried out, approved, or funded by the state or a local public agency[;]
- 10 (3) Is covered by one or more provisions of the Delta Plan[;] [and]
- 11 (4) Will have a significant impact on achievement of one or both of the coequal goals or the
12 implementation of government-sponsored flood control programs to reduce risks to people,
13 property, and state interests in the Delta.”

14 (Wat. Code § 85057.5.) The Delta Reform Act identifies various actions that do not qualify as a
15 “covered action,” including, among other things, a regulatory action of a state agency, routine
16 maintenance and operation of the Central Valley Project and State Water Project, 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. (*Delta Stewardship Council Cases*, 48 Cal. App. 5th at 1043-
19 1044.) In addition, the Council adopted regulations further defining “covered action” that state that
20 “covered actions” are plans, programs, or projects which meet all of the following criteria:

- 21 “(A) Is a ‘project,’ as defined pursuant to section 21065 of the Public Resources Code;
- 22 (B) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh;
- 23 (C) Will be carried out, approved, or funded by the State or a local public agency;
- 24 (D) Will have a significant impact on achievement of one or both of the coequal goals or the
25 implementation of government-sponsored flood control programs to reduce risks to people,
26 property, and State interests in the Delta; and
- 27 (E) Is covered by one or more provisions of the Delta Plan, which for these purposes, means
28 one or more of the regulatory policies contained in Article 3.”

1 (23 C.F.R. § 5001.) The agency must, in the first instance, determine if the “proposed action” is a
2 “covered action” within the meaning of the Act. (*Id.* § 5002.)

3 Section 21065 of the Public Resources Code defines “project” as “an activity which may
4 cause either a direct physical change in the environment, or a reasonably indirect physical change in
5 the environment, and which is any of the following:

6 (a) An activity directly undertaken by any public agency[;]

7 (b) An activity undertaken by a person which is supported, in whole or in part, through
8 contracts, grants, subsidies, loans, or other forms of assistance from one or more public
9 agencies[;] [or]

10 (c) An activity that involves the issuance to a person of lease, permit, license, certificate, or
11 other entitlement for use by one or more public agencies.”

12 Importantly, as noted, the Delta Reform Act requires agencies that “propose” to undertake a
13 “covered action” to prepare a written statement certifying that the action is consistent with the Act’s
14 coequal goals and with the Delta Plan “prior to initiating the implementation of that covered
15 action.” (Wat. Code § 85225.) And any person who claims that the proposed covered action is
16 inconsistent with the Delta Plan may appeal a certification of consistency to the Council. (*Id.* §
17 85225.10). If no appeal is filed, the state or local public agency may implement the covered action.
18 (*Id.*) If an appeal is filed, the Council must hold a hearing, unless it is determined that the issue
19 raised on appeal is not within the Council’s jurisdiction or does not raise an appealable issue. (*Id.*)

20 “After a hearing on an appealed action, the Council must make ‘specific written findings
21 either denying the appeal or remanding the matter to the state or local public agency for
22 reconsideration of the covered action based on the finding that the certification of consistency is not
23 supported by substantial evidence in the record before the state or local public agency that filed the
24 certification.” (*Delta Stewardship Council Cases*, 48 Cal. App. 5th at 1044-1045.) “Upon remand,
25 the state or local agency may determine whether to proceed with the covered action. If the agency
26 decides to proceed with the action or with the action as modified to respond to the findings of
27 the [C]ouncil, the agency [must], prior to proceeding with the action, file a revised certification of
28 consistency that addresses each of the findings made by the council and file that revised

1 certification with the council.” (*Id.*) Agencies cannot initiate implementation of the covered action
2 until the conclusion of the appeals process. (23 C.C.R. § 5034 [“A covered action that is the subject
3 of an appeal shall not be implemented unless at least one of the following conditions has been met:
4 (a) The council has found that no appellant has shown that the certification of consistency is not
5 supported by substantial evidence in the record on any appealed issue. (b) After remand, all of the
6 following have occurred: (1) The certifying agency has decided to proceed with the action as
7 proposed or modified. (2) The certifying agency has filed with the council a revised certification of
8 consistency addressing each of the findings made by the council and any changes made to the
9 proposed action. (3) Thirty calendar days have elapsed, and no person has appealed the revised
10 certification. (c) The appellant has withdrawn the appeal. (d) The council or its executive officer, or
11 delegee, has dismissed the appeal pursuant to this article. (e) If, after hearing an appeal, the council
12 has not adopted findings that the appellant has shown that the certification of consistency is not
13 supported by substantial evidence in the record.”].)

14 **III. FACTUAL AND PROCEDURAL BACKGROUND**

15 DWR initiated the California Environmental Quality Act (“CEQA”) review process for the
16 Project January 15, 2020, and issued the Draft Environmental Impact Report (“DEIR”) for public
17 comment on July 27, 2022. Petitioners submitted extensive comments on the DEIR for the Project
18 and participated orally at several hearings. Among other things, Petitioners’ comments criticized
19 DWR for failing to adequately analyze the Project’s likely impacts on federally endangered
20 Chinook salmon and other special-status fish species within the Delta, for failing to meaningfully
21 account for the Project’s likely impacts on affected Tribes, and for neglecting to sufficiently
22 evaluate the Project’s likely impacts on water quality. In addition, Petitioners and Petitioners’
23 members have kept abreast of DWR’s ongoing processes and implementation of the Project. (*See*
24 *generally* Sarmiento Decl.; Senock Decl.; Ramirez Decl. ¶ 10.)

25 To construct the Project, DWR plans to build and operate new water diversion and
26 conveyance facilities in the Delta that would be operated in coordination with existing facilities
27 associated with the State Water Project. (Request for Judicial Notice (“RJN”) Exhibit A at ES-13
28 [the Final Environmental Impact Report for the Project].) The new water conveyance facilities

1 would divert up to six-thousand (6,000) cubic-feet-per-second (“cfs”) of water from two new north
2 Delta intakes through fish screens and convey it via a single tunnel on an eastern alignment directly
3 to a new pumping plant and aqueduct complex between Byron Highway and Mountain House Road
4 near Mountain House in the south Delta, ultimately discharging it to the Bethany Reservoir for
5 delivery to existing SWP export facilities. (*Id.*) Moreover, and as relevant here, the Project involves
6 myriad soil and geotechnical investigations to identify and assess geotechnical, hydrogeologic,
7 agronomic, and other field conditions that will guide construction methods and monitoring
8 programs for engineering design and construction. (*See, e.g., id.* at 3-134.) Per the FEIR for the
9 Project, these investigations include but are not limited to those covered in a previous 2020
10 Mitigated Negative Declaration under CEQA. (*Id.*)

11 The vast majority of this new infrastructure would be constructed and operated on, near, and
12 around land sacred to the Shingle Springs Band of Miwok Indians as well as culturally significant
13 areas for other Tribes. Indeed, since time immemorial, the Delta has been the heart of traditional,
14 cultural, ecological, and subsistence practices and values of Tribal communities in the Delta region
15 and is central to the identity of many of these communities, including Petitioner Shingle Springs
16 Band of Miwok Indians. (Sarmiento Decl. ¶ 3.) Tribal communities look to the Delta for livelihood,
17 ecological knowledge, ceremony and spirituality, and heritage. (*Id.*) Impacts to fish, wildlife, and
18 water within the Delta are impacts to the traditional and cultural values of tribal communities, and
19 these impacts would materially impair these communities’ ability to experience character-defining
20 features of the Delta physically, spiritually, and ceremonially. (*Id.*; *see generally*, Ramirez Decl.)

21 Despite the widespread adverse impacts to people and the environment raised by Petitioners
22 and countless others during the CEQA review process, DWR released the FEIR on December 8,
23 2023, and finally authorized the Project on December 21, 2023, without meaningfully addressing
24 Petitioners’ critiques. (RJN Exhibit A at ES-1.) Accordingly, on January 22, 2024, Petitioners filed
25 this lawsuit challenging DWR’s approval of the Project and its certification of the FEIR for the
26 Project under CEQA and various other legal authorities. Among other things, Petitioners prayed for
27 “a temporary stay, temporary restraining order, and preliminary and permanent injunctions
28 restraining Respondent, and their agents, servants, and employees, and all others acting in concert

1 with them or on their behalf, from taking any action to implement, fund or construct any portion or
2 aspect of the Project,” pending the Project’s full compliance with applicable laws. In addition,
3 Petitioners prayed “[f]or a declaration that Respondent's actions in certifying the EIR and approving
4 the Project violated CEQA and the CEQA Guidelines, and that the certification and approvals are
5 invalid and of no force or effect, and that the Project is inconsistent with other applicable plans,
6 policies, or regulations, including the Public Trust Doctrine and Delta Reform Act.” Petitioners are
7 now filing an amended Petition with this Court raising a standalone Delta Reform Act claim. That
8 amended Petition is being filed concurrently with this Motion, and continues to seek preliminary
9 and permanent injunctive relief and declaratory relief that the Project is inconsistent with the Delta
10 Reform Act, among other laws.

11 On April 3, 2024, Petitioners’ counsel, and counsel for other petitioners in the related
12 actions, participated in a meeting with DWR’s counsel to discuss the geotechnical investigations
13 that DWR intends to undertake starting on May 1, 2024. (Beck Decl. ¶ 2.) Just before that meeting,
14 DWR sent a document titled “2024 Preconstruction Field Investigations – Environmental
15 Compliance, Clearance, and Monitoring Plan” (hereinafter “2024 Preconstruction Plan”) to the
16 meeting attendees. (*Id.*) (A copy of that document is attached to Mr. Beck’s Declaration.) The 2024
17 Preconstruction Plan states the preconstruction field investigations “are scheduled to begin in April
18 2023 (site clearance activities) and May 2024 (geotechnical investigations).” (*Id.*) The 2024
19 Preconstruction Plan states, among other things, that the FEIR contemplated that field investigation
20 work related to geotechnical, hydrogeologic, agronomic testing, and construction test projects
21 would occur during the preconstruction and construction periods following the adoption of the
22 FEIR. (*Id.*) These investigations are planned for May 2024 and beyond throughout the Project’s
23 footprint within the Delta. (*Id.*)

24 Per the FEIR, DWR’s investigation will drill hundreds of boreholes throughout the Delta,
25 many hundreds of feet deep, conduct vibration tests that involve shaking the surface of the Delta
26 (and mainland sites), and dredge massive trenches, some one thousand (1,000) feet long and twenty
27 (20) feet deep. (*See* RJN Exhibit A at 3-134 – 3-145.) In so doing, it is possible (if not likely) that
28 DWR will stir up the sediment resting on the bottom of the Delta, which may (and likely is) laden

1 with dangerous chemicals, thereby threatening fish and other species reliant on the Delta and the
2 fishing people who rely on them. (Senock Decl. ¶ 3; *see generally* Artis Decl.) And, further, DWR
3 may also destroy or otherwise impair buried cultural resources. (Sarmiento Decl. ¶ 3.)

4 Prior to initiating these invasive geotechnical investigations, DWR has not submitted to the
5 Council a written statement certifying that the Project is consistent with the Delta Reform Act, as
6 required. (Beck Decl. ¶ 2.) Accordingly, Petitioners now move this Court to enjoin DWR from
7 continuing these investigations unless and until it complies with the mandates of the Delta Reform
8 Act. (And, as noted, Petitioners are also submitting an amended Petition incorporating a standalone
9 Delta Reform Act claim challenging DWR’s failure here to comply with the Act’s requirement to
10 submit a written statement certifying that the Project is consistent with the Delta Reform Act and
11 Delta Plan.)

12 **IV. STANDARD OF REVIEW**

13 The purpose of preliminary injunctions is “to preserve the status quo until a final
14 determination following a trial.” (*Nutro Products, Inv. v. Cole Grain Co.* (1992) 3 Cal. App.4th 860,
15 865.) In exercising its discretion to issue a preliminary injunction, “the trial court must consider two
16 interrelated factors, specifically, the likelihood that plaintiffs will prevail on the merits at trial, and
17 the comparative harm to be suffered by plaintiffs if the injunction does not issue against the harm to
18 be suffered by defendants . . . if it does.” (*Right Site Coalition v. Los Angeles Unified School Dist.*
19 (2008) 160 Cal. App.4th 336, 341-342 [internal quotations omitted].) “The potential merit and
20 interim harm are described as *interrelated* factors because the greater the plaintiff’s showing on one,
21 the less must be shown on the other to obtain an injunction,” such that the court’s goal “is to
22 minimize the harm that an erroneous interim decision would cause.” (*Tulare Lake Canal Co. v.*
23 *Stratford Public Utility Dist.* (2023) 92 Cal.App.5th 380, 396-397.)

24 **V. ARGUMENT**

25 Petitioners seek a preliminary injunction on the discrete merits question of whether DWR
26 has unlawfully initiated implementation of the Project in violation of the Delta Reform Act. The
27 scope of the requested relief is thus quite narrow. The requested injunction would enjoin DWR from
28 initiating implementation of the Project only until DWR prepares the certification of consistency for

1 the Council. As explained below, Petitioners satisfy the standards for obtaining this relief.

2 As noted, courts reviewing requests for preliminary injunctions consider two interrelated
3 factors: the likelihood of the movant’s success on the merits at trial and the comparative harm to be
4 suffered by the parties if the injunction does not issue. (*The Right Site Coalition*, 160 Cal. App. 4th
5 at 341-342.) Accordingly, each of these issues is addressed in turn below.

6 **a. Petitioners are Likely to Prevail on the Merits at Trial.**

7 Petitioners are likely to prevail on the merits at trial with regard to their newly added Delta
8 Reform Act claim, because the geotechnical investigations being undertaken now and going
9 forward are an inextricable part of the Project itself and are being undertaken in clear and
10 unambiguous violation of the Act’s mandates. CEQA defines “project” broadly as the whole of the
11 action, even where separate governmental approvals are required. (14 C.C.R. § 15378; Pub.
12 Resources Code § 21065.) And California courts “have concluded a proposed project is part of a
13 larger project for CEQA purposes if the proposed project is a crucial functional element of the
14 larger project such that, without it, the larger project could not proceed.” (*Communities for a Better*
15 *Environment v. City of Richmond* (2010) 184 Cal. App.4th 70, 99.) The question of which acts
16 constitute the “whole of an action” for CEQA purposes is one of law which courts review *de novo*.
17 (*McCann v. City of San Diego* (2021) 70 Cal. App.5th 51, 84.)

18 Here, it is clear that the geotechnical studies relevant to this Motion are part of the Project.
19 For example, in the Notice of Determination for the Project, DWR identified “[e]fforts to identify
20 geotechnical, hydrogeologic, agronomic and other field conditions that will guide appropriate
21 construction methods and monitoring programs for final engineering design and construction” as
22 “key components and actions” of the Project. (RJN Exhibit B at 3 [the Notice of Determination for
23 the Project].) And those investigations are discussed in Section 3.15 of the FEIR, part of a chapter
24 titled “Description of the Proposed Project and Alternatives.” (RJN Exhibit A at 3-2.) Specifically,
25 this section of the FEIR states that, in addition to “soil investigations covered in the [2020 Mitigated
26 Negative Declaration] data collection and field work investigations would be conducted after
27 completion of the Delta Conveyance Project CEQA process and possible project approval. Work
28 related to geotechnical, agronomic testing, and construction test projects (geotechnical

1 investigations) would occur during the preconstruction and construction periods following adoption
2 of the Final EIR, identification of an approved project footprint, and acquisition of all required
3 permits.” (*Id.* at 3-134.) The geotechnical investigations scheduled to begin on May 1, 2024, are
4 therefore part of the Project.

5 Because it is undisputed that the Project is a “covered action” within the ambit of the Delta
6 Reform Act, DWR’s decision to move forward with project implementation (via the geotechnical
7 investigations scheduled to commence on May 1, 2024) clearly and unambiguously violates the Act.
8 (*Id.* at 8-3 [stating that the Project is a “covered action”].) Importantly, the Act and the Council’s
9 regulations do not define the phrase “initiate implementation,” courts instead rely on standard
10 definitions of the term. (*Merced Irrigation Dist. v. Superior Court* (2017) 7 Cal. App.5th 916, 926-
11 927.) And the First Appellate District has already defined “implement” within the context of
12 another statute to mean “to carry out; accomplish; to give practical effect to and ensure actual
13 fulfillment by concrete measures.” (*2710 Sutter Ventures, LLC v. Millis* (2022) 82 Cal. App.5th
14 842, 858.) Moreover, commonly used dictionaries define “initiate” as to “[c]ommence; start;
15 originate; introduce; inchoate.” (*See, e.g., Black’s Law Dictionary with Pronunciations, abridged*
16 6th ed., Centennial Ed. (1891-1991), 539.) Here, it is clear therefore that DWR has “start[ed]” to
17 “carry out” the Project within the context of these definitions and has thus “initiate[d]
18 implementation” within the scope of the Delta Reform Act and its implementing regulations.

19 By contrast, the Legislature chose not to use the phrase “commence construction” in Section
20 85225, even though it used that phrase in Section 85088 (another part of the Delta Reform Act). The
21 phrase “initiate implementation,” by its plain, dictionary meaning is broader than “commence
22 construction” insofar as “initiate implementation” incorporates actions that “give practical effect to”
23 the Project that do not necessarily involve the construction of Project-related structures while
24 “commence construction” would not. As a result, it is clear here that the Legislature intended for
25 agencies like DWR to submit consistency certifications to the Council prior to beginning pre-
26 construction activities like the geotechnical investigations at issue herein.

27 Moreover, given the fact that the Delta Reform Act’s implementing regulations cross-
28 reference the definition of “project” from CEQA, cases interpreting the scope and timing of covered

1 projects in that context is also illustrative here. (23 C.F.R. § 5001 [referencing Pub. Resources Code
2 § 21065].) And, importantly, in that context, the California Supreme Court has held that covered
3 activities (and therefore CEQA jurisdiction) begin at “the time a project is commenced.”
4 (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929,
5 939.) So too here. The Project began when DWR “initiate[d] implementation” by beginning the
6 geotechnical investigations contemplated by and analyzed in the Final Environmental Impact
7 Report for the Project. Petitioners’ First amended Petition and this Motion continue to seek
8 preliminary and permanent injunctive relief and declaratory relief that the Project is inconsistent
9 with the Delta Reform Act, among other laws.

10 **b. Petitioners will Suffer Irreparable Harm if an Injunction does not Issue.**

11 If an injunction does not timely issue and DWR is permitted to continue implementing the
12 Project without first complying with the Delta Reform Act process, Petitioners will suffer myriad
13 harms both procedural and physical, as discussed below. When considering whether to grant
14 injunctive relief, courts balance the competing interests of the movant if an injunction does not issue
15 with the non-movant if the injunction requested were to issue and, in doing so, must consider
16 established public policy relevant to that calculus. (*Tulare Lake*, 92 Cal. App. 5th at 398.) In
17 addition, the public’s interest in an agency’s informed decision-making must be considered when
18 evaluating the relative balance of harms that is likely to result from a decision to grant or deny a
19 preliminary injunction. (*Id.* at 415.) “Where a legislative body has enacted a statutory provision
20 proscribing a certain activity, it has already determined that [deviation from] such activity is
21 contrary to the public interest ... [and] has specifically authorized injunctive relief against the
22 violation of such a law.” (*IT Corp v. County of Imperial* (1983) 35 Cal.3d 63, 70.) Accordingly,
23 where a movant “seeking to enjoin the alleged violation of [a statute] establishes that it is
24 reasonably probable it will prevail on the merits, a rebuttable presumption arises that the potential
25 harm to the public outweighs the potential harm to the [non-movant].” (*Id.* at 72.)

26 Here, DWR is acting in clear and unambiguous violation of the Delta Reform Act by
27 “initiat[ing] implementation” the Project without first submitting to the Council a written
28 certification that the Project is consistent with the Delta Reform Act and Delta Plan. Like in *Tulare*

1 *Lake*, where the court issued a preliminary injunction enjoining a public utility from implementing a
2 project after it began to implement that project without first even attempting to comply with CEQA,
3 as required, DWR is here moving forward without even starting the Delta Reform Act process.
4 (*Tulare Lake*, 92 Cal. App. 5th at 396.) By failing to prepare the certification of consistency, DWR
5 not only undermines Petitioners’ ability to obtain an automatic stay of the covered action (as
6 explained *supra*), but it also undermines the Council’s authority to ensure compliance with the
7 Delta Reform Act and thereby effectuate the public’s interest as articulated by the California
8 Legislature. Indeed, if (and when) DWR finally submits to the Council a written certification
9 regarding the alleged consistency of the Project with the Delta Reform Act and 2013 Delta Plan,
10 Petitioners intend to participate in any subsequent Delta Reform Act proceedings potentially
11 challenging any subsequent decision by the Council holding that the Project is in fact consistent
12 with the Act and Delta Plan. (Sarmiento Decl. ¶ 5; Senock Decl. ¶ 5; Artis Decl. ¶ 13.)

13 Furthermore, DWR is also putting Petitioners’ interests in potential cultural resources in the
14 Delta at risk and further impairing Petitioners’ use and enjoyment of the Delta for cultural and
15 Tribal purposes. Tribal cultural resources in the Delta cannot be understated. The aboriginal
16 territory of the Shingle Springs Band of Miwok Indians encompasses the Delta, and the Tribe
17 relates to the Delta in countless ways. (Sarmiento Decl. ¶ 3.) The Delta itself is a Tribal cultural
18 resource and a cultural landscape, so the geotechnical investigations to be undertaken necessarily
19 will impair the Delta as such and will necessarily impact Tribal members’ ability to use and enjoy
20 the Delta for recreational and cultural purposes. (*Id.*) Tribal cultural resources in the Delta fall
21 generally within two categories: living cultural resources like fish, birds, the water, plants, and the
22 Delta itself, and buried cultural resources like relics, artifacts, and remains. And each of these
23 categories of resources are likely to be impacted negatively. (*Id.*) The Shingle Springs Band of
24 Miwok Indians regularly uses the Delta for ceremonial purposes and Tribal members harvest plants
25 and catch fish in the Delta, and each of these activities is likely to be impacted by the geotechnical
26 investigations at issue herein. (*Id.* ¶ 4.)

27 Likewise, the geotechnical investigations at issue may damage or even destroy irreplaceable
28 buried Tribal cultural resources, relics, sites, and remains. (*Id.*; Ramirez Decl. ¶¶ 2-17.) Although

1 the Tribe is aware of buried cultural resources in the Delta, there has been no comprehensive survey
2 of the Delta to pinpoint and identify the location and extent of Tribal cultural resources, sites,
3 remains, and relics. (*Id.* ¶ 5.) As a result, any of the geotechnical investigations to be undertaken
4 may inadvertently discover and thereby damage or destroy irreplaceable buried cultural resources.
5 (*Id.*; Ramirez Decl. ¶¶ 2-17.)

6 Moreover, by proceeding with the geotechnical investigations at issue, DWR is also putting
7 Petitioners' myriad interests in the fragile ecosystems and vulnerable species present in and reliant
8 on the Delta at risk. As noted, the Shingle Springs Band of Miwok Indians has longstanding cultural
9 ties to the plants and animals that rely on the Delta, so any harms thereto will inevitably be deeply
10 felt. (Sarmiento Decl. ¶ 3; Ramirez Decl. ¶ 2-17.) The geotechnical investigations at issue may
11 destroy or damage patches of plants the Tribe harvests and may stir up sediment from the Delta
12 floor laden with dangerous pollutants, thereby limiting the Tribe's ability to utilize the Delta, its
13 waters, and its fish for recreational and ceremonial purposes. (*Id.*) Further, by exposing the Delta to
14 pollutants that may be present in the sediment, the geotechnical investigations at issue may impair
15 non-Tribal community members' ability to fish in the Delta, many of whom rely on fishing the area
16 to feed themselves and their families. (Senock Decl. ¶ 3.) It is therefore critical that this Court
17 enjoin these activities until DWR complies with its obligations under the Delta Reform Act.

18 **VI. CONCLUSION**

19 DWR is "initiat[ing] implementation" of the Project in clear violation of the Delta Reform
20 Act. In doing so, DWR is causing (and will continue to cause) irreparable harm to Petitioners'
21 procedural and actual (or physical) interests in participating in the Delta Reform Act process and
22 protecting the Delta's sensitive ecosystems and cultural resources. Petitioners consequently request
23 this Court to issue a preliminary injunction enjoining DWR from continuing to implement the
24 Project unless and until it complies with the Delta Reform Act by filing a certification of
25 consistency with the Council.

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