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7 RESOURCES, an agency of the State of California,
LESTER SNOW, an individual in his official
8 capacity, RALPH TORRES, an individual in his
official capacity, DAVID STARKS, an individual
9 in his official capacity, DAVID DUVAL, an
individual in his official capacity, L.D. ELMORE,
10 an individual in his official capacity,
11

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF ALAMEDA

14 WATERSHED ENFORCERS, a project of
CALIFORNIA SPORTFISHING
15 PROTECTION ALLIANCE, a non-profit
corporation,
16
Petitioner,

17 v.
18

19 CALIFORNIA DEPARTMENT OF
WATER RESOURCES, an agency of the
20 State of California, LESTER SNOW, an
individual in his official capacity, RALPH
21 TORRES, an individual in his official
capacity, DAVID STARKS, an individual in
22 his official capacity, DAVID DUVAL, an
individual in his official capacity,
23 L.D. ELMORE, an individual in his official
capacity,
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Respondents.
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27
28

CASE NO. RG06292124

**CALIFORNIA DEPARTMENT OF
WATER RESOURCES'
OBJECTIONS TO PROPOSED
STATEMENT OF DECISION**

HEARING REQUESTED

Date: TBD
Time: TBD
Dept.: 31
Judge: Hon. Frank Roesch

**[NO FILING FEE REQUIRED
PURSUANT TO GOV'T CODE
§ 6103]**

I.

OBJECTIONS TO STATEMENT OF DECISION

Pursuant to Civil Procedure Code section 634, Rule of Court, Rule 3.1590, and this Court's April 2, 2007 order, Respondents California Department of Water Resources, Lester Snow, Ralph Torres, David Starks, David Duval, and L.D. Elmore (collectively "DWR") file the following objections to the Court's March 22, 2007 Proposed Statement of Decision.

1. Objection 1

DWR objects to the proposed Statement of Decision's statement at page 2, lines 12-13: "Following are the relevant undisputed underlying facts."

As set forth, in the following Objections 2 and 3, DWR disputes certain of the facts that the Court identifies as undisputed.

2. Objection 2

DWR objects to the proposed Statement of Decision's statement at page 2, line 19-20: "It is not hyperbole to describe as "massive" the amounts of water diverted to inland points south of the pumping plant from their natural flow to the ocean."

DWR objects that the use of the word "massive" is inaccurate and subject to misinterpretation. The evidence in the record shows that "the SWP provides an important source of water to approximately 750,000 acres in agricultural production and to some 23 million people." Declaration of Gerald E. Johns in Support of Respondents' Opposition to Verified Petition for Alternative Writ of Mandate, Writ of Mandate, Order to Show Cause, or Other Appropriate Relief ("Johns Decl."), ¶ 4; Petitioner's Verified Complaint, Exh. I at p. 31 (amount of water pumped by the Banks facility varies).

3. Objection 3

DWR objects to the proposed Statement of Decision's statement at page 3, lines 4-7: "Incident to the Harvey O. Banks Pumping Plant Operation is, among other things, the unfortunate entrainment and loss of life of significant numbers of fish, including the three species that are the subject of this Petition: (1) Winter-run Chinook Salmon; (2) Spring-run Chinook Salmon; and (3) Delta Smelt."

1 DWR objects that the use of the phrase “significant numbers of fish” is ambiguous
2 and inaccurate and omits the fact that through mitigation efforts DWR is replacing a substantial
3 number of fish and mitigating for the few losses that do occur. The evidence in the record shows
4 the actual number on fish losses on a yearly basis. Declaration of Stephani Spaar in Support of
5 Respondents’ Opposition to Verified Petition for Alternative Writ of Mandate, Writ of Mandate,
6 Order to Show Cause, or Other Appropriate Relief (“Spaar Decl.”), ¶¶ 17-20 & Exhs. K & N. In
7 addition, the evidence shows that DWR is currently mitigating over 10 years in advance of losses
8 for salmon and steelhead. Spaar Decl., ¶ 21.

9 **4. Objection 4**

10 DWR objects to the proposed Statement of Decision’s statement on pages 3-4,
11 lines 18-1: “Section 2081 establishes another exception to § 2080 authorizing certain takings,
12 within limitations, including that they be fully mitigated.”

13 DWR objects to the omission of the rest of the statutory language because, by that
14 omission, the proposed Statement of Decision misstates the legal standard under California Fish
15 and Game Code section 2081, specifically, that the “fully mitigated” language is defined by the
16 omitted language. Section 2081(b)(2) states as follows:

17 “The impacts of the authorized take shall be minimized and fully mitigated. The
18 measures required to meet this obligation shall be roughly proportional in extent to
19 the impact of the authorized taking on the species. Where various measures are
20 available to meet this obligation, the measures required shall maintain the
21 applicant’s objectives to the greatest extent possible. All required measures shall
22 be capable of successful implementation. For purposes of this section only,
23 impacts of taking include all impacts on the species that result from any act that
24 would cause the proposed taking.”

25 Fish and Game Code section 2052.1 also defines the mitigation standard contained
26 in section 2081(b)(2), stating:

27 The Legislature further finds and declares that if any provision of this chapter
28 requires a person to provide mitigation measures or alternatives to address a
particular impact on a candidate species, threatened species, or endangered
species, the measures or alternatives required shall be roughly proportional in
extent to any impact on those species that is caused by that person. Where various
measures or alternatives are available to meet this obligation, the measures or
alternatives required shall maintain the person’s objectives to the greatest extent
possible consistent with this section. All required measures or alternatives shall be
capable of successful implementation. This section governs the full extent of

1 mitigation measures or alternatives that may be imposed on a person pursuant to
2 this chapter. This section shall not affect the state's obligations set forth in Section
3 2052.

4 **5. Objection 5**

5 DWR objects to the proposed Statement of Decision's statement on page 4, lines
6 1-3: "Finally, central to the matter before the Court, are the provisions of § 2081.1, which permits
7 an exception to the requirements of § 2080 proscribing the killing of fish classified as
8 endangered/threatened species."

9 DWR objects to the use of the phrase "killing of fish" as ambiguous and
10 inaccurate. California Fish and Game Code section 2080 states:

11 No person shall import into this state, export out of this state, or take, possess,
12 purchase, or sell within this state, any species, or any part or product thereof, that
13 the commission determines to be an endangered or a threatened species, or attempt
14 any of those acts, except as otherwise provided in this chapter, the Native Plant
15 Protection Act (Chapter 10 (commencing with Section 1900) of this code), or the
16 California Desert Native Plants Act (Division 23 (commencing with Section
17 80001) of the Food and Agricultural Code).

18 Cal. Fish & Game Code § 2080. California Fish and Game code section 86 sets forth the
19 following definition of "take":

20 "Take" means hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue,
21 catch, capture, or kill.

22 Cal. Fish & Game Code § 86. An "incidental taking" under the California Endangered Species
23 Act ("CESA") is the taking of a protected species that will not jeopardize the continued existence
24 of the species that occurs in connection with an otherwise lawful activity. Cal. Fish & Game
25 Code § 2081(b). The proposed Statement of Decisions use of the phrase "killing of fish" is
26 inconsistent with the statutory definition of "take" and assumes all fish taken are killed when the
27 evidence showed various fish protection methods implemented by DWR and DFG to salvage and
28 transport for release elsewhere in the Delta fish entrained at the Harvey O. Banks Pumping Plant
Operation. *See, e.g.*, Verified Petition, ¶ 26.

6. **Objection 6**

DWR objects to the proposed Statement of Decision's statement at page 5, lines 1-
4: "In sum, CESA includes three procedures for obtaining permission to take a listed species:

1 (1) obtain a permit from DFG authorizing take (§ 2081); (2) obtain a consistency determination
2 (§ 2080.1); or (3) show that the grandfathering provision authorizes take (§ 2081.1).”

3 DWR objects that the proposed Statement of Decision omits one of the methods
4 for obtaining take authorization and the evidence in the record regarding that method. DWR may
5 also obtain take authorization through the process set forth under the Natural Community
6 Conservation Planning Act (“NCCPA”), California Fish & Game Code § 2800 *et seq.* See Cal.
7 Fish & Game Code § 2835. Under the NCCPA, DWR and DFG (along with numerous other
8 public and private entities) are currently developing for implementation the Bay-Delta
9 Conservation Plan (“BDCP”). DWR and DFG (along with numerous other public and private
10 entities) are currently developing the Bay-Delta Conservation Plan (“BDCP”). In the BDCP,
11 DWR intends to address SWP operations and species protection in a comprehensive, system-wide
12 manner that provides for mitigation of impacts on listed and non-listed species, as well as their
13 habitat. McDonnell Decl., ¶¶ 6-12; Johns Decl., ¶¶ 14-17. At the conclusion of this process,
14 DWR expects that the BDCP will satisfy the requirements of the NCCPA, and, based on the
15 BDCP, DFG will issue to DWR renewed incidental take authorization for operation of the SWP’s
16 facilities located within the Delta. See Cal. Fish & Game Code § 2835; Johns Decl., ¶¶ 16-17.

17 **7. Objection 7**

18 DWR objects to the proposed Statement of Decision’s statement at page 5, lines 6-
19 10: “By way of this proceeding, Petitioner seeks an order commanding Respondents to cease the
20 Harvey O. Banks Pumping Plant Operation on the ground Respondents have not satisfied the
21 mandatory requirement found in the CESA requiring authorization from the DFG for the
22 incidental take of the endangered/threatened species of Winter-run Chinook Salmon, Spring-run
23 Chinook Salmon and Delta Smelt.”

24 DWR objects to this characterization of Petitioner’s requested relief because it is
25 inaccurate. In its Petition, Petitioner prayed for the following:

26 1. Issue an alternative writ directing Respondents California Department of Water
27 Resources and Lester Snow, Ralph Torres, David Starks, David Duval, and L.D.
28 Elmore, their officers, agents, and all other persons acting on their behalf or
through their orders, (1) to immediately cease operation of the Clifton Court
Forebay, the Skinner Fish Protective Facility, and the Harvey O. Banks Pumping

1 Plant in a manner that catches, captures, kills or otherwise takes spring run
2 Chinook Salmon, winter run Chinook Salmon, and Delta smelt in violation of
3 CESA, Fish & Game Code §§ 2050 *et seq.*; or, (2) procure authorization from
4 DFG pursuant to CESA for the taking of spring run Chinook Salmon, winter run
5 Chinook salmon, and Delta smelt as a result of the operation of those facilities; or
6 show cause before this Court, at a time and place then or thereafter specified by
7 court order, why they should not do so and why a peremptory writ should not
8 issue; and

2. Upon return of the alternative writ and hearing on the order to show cause,
issue a peremptory writ of mandate or such other extraordinary relief as is
warranted, compelling Respondents to cease taking spring run Chinook Salmon,
winter run Chinook salmon, and Delta smelt as a result of the operation of the
Facilities unless properly authorized by DFG pursuant to CESA and to take
appropriate mitigation measures by a date to be set by this Court

9 Petition at pp. 35-36. As demonstrated by the prayer, Petitioner did not seek “an order
10 commanding Respondents to cease the Harvey O. Banks Pumping Plant Operation.” Moreover,
11 the characterization in the proposed Statement of Decision assumes that take continually occurs at
12 the Harvey O. Banks Pumping Plant Operation when, in fact, the facility often operates without
13 take of these species. *See* Petitioner’s Verified Complaint, Exh. K at p. 211 (smelt not present in
14 the Delta from late July to December); *id.*, Exh. J. at p. 104, 107 (Spring-run smolt migrating only
15 in winter months).

16 **8. Objection 8**

17 DWR objects to the proposed Statement of Decision’s conclusion on page 6, lines
18 12-14: “Petitioner’s members have an interest in the enforcement of the CESA as it relates to
19 Spring-run Chinook Salmon, Winter-run Chinook Salmon and Delta Smelt in the Sacramento/San
20 Joaquin Delta and in the San Francisco Bay.”

21 DWR objects because the phrase “have an interest” is ambiguous. The Petitioner
22 here is California Sportfishing Protection Alliance. The Petition alleges an interest in fishing,
23 particularly fishing for salmon. *See* Petition, ¶ 8. Petitioner’s members do not fish for delta
24 smelt, but Petitioner alleges that the delta smelt are part of the “ecological balance” that supports
25 other fish for which its members do fish. (*Id.*) However, there is a disconnect between this
26 alleged interest and the relief requested because there is no evidence in the record that granting
27 the writ will produce more fish for Petitioner’s members to catch.

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1 **9. Objection 9**

2 DWR objects to the proposed Statement of Decision’s statement at page 7, lines 4-
3 6: “In addition, while it appears clear that DFG would have standing to pursue a similar action,
4 there does not appear to be any legislative indication that DFG’s responsibility for the
5 enforcement of CESA is exclusive.”

6 DWR objects because the proposed Statement of Decision omits the significant
7 fact that the California Legislature modeled CESA after the federal Endangered Species Act
8 (“FESA”). *See San Bernardino Valley Audubon Society v. City of Moreno Valley*, 44 Cal. App.
9 4th 593, 604 (1996) (“As noted above, the Legislature followed FESA in many respects when it
10 enacted CESA.”). However, FESA contains an express private right of action and CESA does
11 not. Compare Cal. Fish & Game Code § 2080 *et seq.* with 16 U.S.C. § 1540(g) (FESA private
12 citizen suit provision). The Legislature’s decision not to include a citizen suit provision in CESA,
13 when such a provision is specifically provided in FESA, is strong evidence of an intent not to
14 create a private right of action. *Id.* (“The omission of a provision contained in a foreign statute
15 providing the model for action by the Legislature is a strong indication that the Legislature did
16 not intend to import such a provision into state statute.”). The proposed Statement of Decision
17 omits this evidence of legislative intent. Additionally, both Petitioner and DWR acknowledged
18 that Fish and Game Code section 2055 imposes a statutory duty on all state agencies to conserve
19 state endangered and threatened species. Cal. Fish & Game Code § 2055.

20 **10. Objection 10**

21 DWR objects to the proposed Statement of Decision’s statement at page 7, lines
22 15-18: “Here, the responding public agency and its officials have a ministerial duty to comply
23 with the prescriptions, both prohibitory and mandatory, found in the CESA and therefore
24 proceeding by Petition for Writ of Mandamus is proper.”

25 DWR objects to the finding that it has a “ministerial duty” because it is ambiguous
26 as to the basis for such a finding. As set forth in Intervenors’ brief, the broad duty to comply with
27 CESA is not a ministerial duty. *See Opposition of the San Luis & Delta-Mendota Water*
28 *Authority and Westlands Water District to Petition for Alternative Writ of Mandate*, pp. 5-6.

1 **11. Objection 11**

2 DWR objects to the proposed Statement of Decision’s statement on page 8, lines
3 2-3: “Respondents argue that § 2080 prohibits a “person” from taking an endangered species and
4 because DWR is not a “person”, it is not bound by CESA.”

5 DWR objects because use of the term “Respondents” is ambiguous. The argument
6 regarding who is a “person” under CESA was made by the State Water Contractors, not DWR.
7 *See State Water Contractors, et al.’s Memorandum of Points and Authorities in Opposition to*
8 *Petition for Writ of Mandate at pp. 10-19.*

9 **12. Objection 12**

10 DWR objects to the proposed Statement of Decision’s statement on page 9, lines
11 2-6: “After weighing the competing equities which bear on the issue of delay, the Court has
12 determined that Respondents and Intervenors have not demonstrated sufficient prejudice to
13 require that Petitioner be barred from seeking the relief sought.”

14 DWR objects because the phrase “competing equities which bear on the issue of
15 delay” is ambiguous and the proposed Statement of Decision omits the significant volume of
16 evidence establishing prejudice to the Respondents and Intervenors.

17 The evidence shows that Petitioner unreasonably delayed in bringing this action.
18 Petitioner asserted unequivocally that it has been extremely active over a long period of time in
19 various oversight and policy-making processes regarding endangered species, as well as
20 aggressively participating in numerous public proceedings and even litigation in connection with
21 water quality and endangered species issues in the Delta. *See Declaration of Bill Jennings in*
22 *Support of Petition for Alternative Writ of Mandate, ¶¶ 2-4; id. ¶ 2 (“For many years, CSPA has*
23 *been actively engaged in proceedings relating to the environmental impacts of the State Water*
24 *Project (“SWP”) as well as the federal Central Valley Project.”). Moreover, the evidence shows*
25 *that Petitioner itself, commented on the legislation that enacted California Fish and Game Code*
26 *section 2081.1, which conclusively establishes that Petitioner was aware of the Legislature’s*
27 *action. See RJN, Exh. 4, p. SP-6. However, there is no evidence explaining or justifying*
28 *Petitioner’s ten year delay in challenging DWR’s grandfathered take authorization.*

1 The evidence shows that allowing Petitioner to belatedly challenge DWR's
2 operations is prejudicial given DWR's extensive actions and efforts in collaboration with other
3 agencies during the last ten years to mitigate the impacts of the SWP and to comply with its legal
4 obligations to protect endangered species. *See* Johns Decl., ¶¶6-18; Spaar Decl., ¶¶ 7-22; Greene
5 Decl., ¶¶ 6-16; Sommer Decl., ¶¶ 4-12.

6 Moreover, the evidence establishes that 23 million Californians depend upon the
7 SWP for at least a portion of their water supply. Declaration of Terry Erlewine in Support of
8 Opposition to Petition for Writ of Mandate ("Erlewine Decl."), ¶ 7. Zone 7 Water Agency relies
9 on the SWP for 80% of its water supply. Declaration of Dale Myers in Support of Opposition to
10 Application for Writ of Mandate ("Myers Decl."), ¶ 5; Alameda County Water District depends
11 on the SWP for 40% of its water supply. Stinson Decl., ¶ 3.

12 In addition, the record contains voluminous evidence of the impacts of a shut
13 down of the SWP if the writ is granted and the prejudice that will be suffered by water users and
14 the public at large. *See* Declaration of James M. Beck in Opposition to Petition for Alternative
15 Writ of Mandate ("Beck Decl."), ¶¶ 7-11; Myers Decl., ¶¶ 5-14; Erlewine Decl., ¶¶ 9-10.

16 **13. Objection 13**

17 DWR objects to the proposed Statement of Decision's statement at page 9, lines 8-
18 12: "There is no dispute that DWR does, by the Harvey O. Banks Pumping Plant Operation,
19 "take" a substantial number of the three protected species of fish and that DFG has issued no
20 permit pursuant to § 2081, since the CESA was promulgated in 1984, for the general operation of
21 the facilities and for the incidental take of endangered or threatened species caused by the
22 operation."

23 13a. DWR objects to the use of the phrase "there is no dispute" because the
24 remainder of the sentence is ambiguous and, thus, depending on what it means, it may be subject
25 to dispute.

26 13b. DWR further objects to the use of the phrase "substantial number" because
27 it is ambiguous and imprecise. Indeed, the evidence shows that at various times of the year, fish
28 are not taken. *See* Petitioner's Verified Complaint, Exh. K at p. 211 (smelt not present in the

1 Delta from late July to December); *id.*, Exh. J. at p. 104, 107 (Spring-run smolt migrating only in
2 winter months).

3 13c. DWR further objects that the use of the phrase “general operation” and
4 “operation” in this sentence is ambiguous.

5 **14. Objection 14**

6 DWR objects to the proposed Statement of Decision’s statement at p. 9, lines 13-
7 15: “DWR submits, however, that its take is an incidental taking authorized under the provisions
8 of § 2081.1, a statute by which the Legislature grandfathered in agreements by DFG authorizing
9 the incidental take of endangered species.”

10 DWR objects to the use of the word “agreements” alone because it omits any
11 reference to “plans” and is inconsistent with DWR’s argument and the statutory language.

12 Section 2081.1 provides, in pertinent part:

13 Nothing in this chapter or any other provision of law prohibits the
14 taking or the incidental taking of any endangered, threatened, or
15 candidate species if the taking was authorized by [DFG] through a
16 permit or memorandum of understanding, or in a natural
17 communities conservation plan, habitat conservation plan, habitat
management plan, *or other plan or agreement* approved by or
entered into by [DFG], or in an amendment to such a permit,
memorandum of understanding, plan, or agreement and all of the
following conditions are met:

18 (a) The application process commenced on or before April 10,
19 1997.

20 (b) [DFG] approved the *permit, memorandum of understanding,*
21 *plan, agreement,* or amendment thereto within either of the
following time frames:

22 (A) On or before April 10, 1997. [. . .]

23 The *permits, memoranda of understanding, plan, agreements,* and
24 amendments thereto described in this section *are deemed to be in*
full force and effect, as of the date approved or entered into by the
parties insofar as they authorized the take of species. [. . .]

25 See Cal. Fish & Game Code § 2081.1 (emphasis added).

26 **15. Objection 15**

27 DWR objects to the proposed Statement of Decision’s statement at page 9, lines
28 15-17: “The factual underpinning of DWR’s position is that a series of five documents predating

1 April 1997 provide the required authorization of the DFG for the take of the three species relevant
2 herein.”

3 15a. DWR objects because this characterization of the “factual underpinning” is
4 ambiguous, narrow, and omits significant evidence regarding all of the mitigation efforts of DWR
5 that fully comply with FESA and CESA. *See* Spaar Decl., ¶¶ 7-24, Exhs. A-S; Spaar Supp. Decl.,
6 ¶¶ 3-9, Exhs. A-G; Sommer Decl., ¶¶ 2-13, Exhs. A-C; Johns Decl., ¶¶ 6-18, Exhs. A-I; Greene
7 Decl., ¶¶ 3-16, Exhs. A-I; McDonnell Decl., ¶¶ 2-19, Exhs. A-G.

8 15b. DWR further objects that DWR’s position, as stated in the above-quoted
9 language of the proposed Statement of Decision, is mischaracterized as it fails to include factual
10 information of past, present and future mitigation measures undertaken by DWR in concert with
11 numerous other public and private entities. Each of these mitigation programs/projects have been
12 in cooperation and coordinated with DFG, among others, on an ongoing basis based on many of
13 the documents submitted to the court. *See* Spaar Decl., ¶¶ 7-24, Exhs. A-S; Spaar Supp. Decl.,
14 ¶¶ 3-9, Exhs. A-G; Sommer Decl., ¶¶ 2-13, Exhs. A-C; Johns Decl., ¶¶ 6-18, Exhs. A-I; Greene
15 Decl., ¶¶ 3-16, Exhs. A-I; McDonnell Decl., ¶¶ 2-19, Exhs. A-G.

16 **16. Objection 16**

17 DWR objects to the proposed Statement of Decision’s statement at page 9, line 18:
18 “The five documents are.”

19 DWR objects because the use of the word “documents” is ambiguous given that
20 each of the documents is a plan or agreement. Spaar Decl., Exh. A (Four Pumps Agreement);
21 Spaar Supp. Decl., Exh. A (1990 Framework Agreement); Johns Decl., Exh. A (1994 CalFed
22 Framework Agreement); Johns Decl., Exh. B. (1994 Accord Agreement); Johns Decl., Exh. D
23 (1995 Article VII Agreement). Additionally, substantially more than five documents submitted to
24 the Court provided supporting information to the plans and agreements between DWR and DFG
25 on which DWR’s take authority was based, including substantial information regarding
26 mitigation. *See* Spaar Decl., ¶¶ 7-24, Exhs. A-S; Spaar Supp. Decl., ¶¶ 3-9, Exhs. A-G; Sommer
27 Decl., ¶¶ 2-13, Exhs. A-C; Johns Decl., ¶¶ 6-18, Exhs. A-I; Greene Decl., ¶¶ 3-16, Exhs. A-I;
28 McDonnell Decl., ¶¶ 2-19, Exhs. A-G.

1 **17. Objection 17**

2 DWR objects to the proposed Statement of Decision’s statement at page 10, lines
3 7-10: “The analysis of the issue must begin with a review of the five documents which form the
4 factual basis of DWR’s position as well as other pertinent documents relied on by the parties,
5 with an eye toward determining if they authorize an incidental take and, if they do, of what
6 species and under what limiting conditions, if any.”

7 17a. As in Objection 15, DWR objects to the phrase “the five documents which
8 form the factual basis of DWR’s position” because it omits significant facts relating to the
9 implementation of those plans and agreements that are relevant to DWR’s take authorization
10 pursuant to Fish and Game Code section 2081.1. Additionally, many documents beyond the five
11 cited by the court were submitted as a factual basis supporting DWR’s position that its plans and
12 agreements provide take authority as shown by the ongoing acknowledgement and participation
13 by DFG in implementing the plans, agreements and mitigation programs/projects.

14 17b. As in Objection 16, DWR objects to the use of the term “documents”
15 because it omits the fact that the documents are plans and agreements.

16 **18. Objection 18**

17 DWR objects to the proposed Statement of Decision’s discussion of the 1986 Four
18 Pumps Agreement at pages 10-12 because it omits critical evidence.

19 DWR submitted evidence demonstrating that the 1986 Four Pumps Agreement
20 would cover subsequently listed species. *See, e.g.,* Spaar Decl., ¶¶ 7-24; Department of Water
21 Resources Supplemental Brief in Opposition to Verified Petition for Alternative Writ of Mandate,
22 Writ of Mandate, Order to Show Cause, or Other Appropriate Relief, at pp. 5-8 and citations
23 therein.

24 **19. Objection 19**

25 DWR objects to the proposed Statement of Decision’s statement at page 12, lines
26 6-9: “In substance, the parties to the agreement agree that DWR will offset direct losses of striped
27 bass, chinook salmon and steelhead caused by the pumping operation by a undefined plan to

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1 evaluate losses, provide funding and set up a procedure to evaluate and implement proposals to
2 mitigate the take caused by the pumping operations.”

3 DWR objects to the phrase “undefined plan” because it is ambiguous and does not
4 reflect the evidence submitted demonstrating the specific actions taken to mitigate fish losses
5 pursuant to the terms of the 1986 Four Pumps Agreement. *See* Spaar Decl., ¶¶ 7-24, Exhs. A-S;
6 *id.*, Exh. A, pp. 4-10 (detailing the specific measures to be taken under the 1986 Four Pumps
7 Agreement to offset the loss of the identified species).

8 **20. Objection 20**

9 DWR objects to the proposed Statement of Decision’s statement on page 12, lines
10 15-19: “[1990 Framework Agreement] is an agreement that establishes a procedural mechanism
11 within which DFG, DWR and U.S. Bureau of Reclamation agree to discuss issues relating to the
12 ‘identifiable problems, affecting fish and wildlife resources in the estuary . . .’ Its substance is
13 entirely procedural and it contains no discussions of an incidental take of any species or an
14 authorization of any incidental take by DWR.”

15 DWR objects to the phrases “procedural mechanism” and “entirely procedural”
16 because they are ambiguous and do not reflect the evidence regarding the purpose of and
17 accomplishments under the agreement. *See* Supplemental Declaration of Stephani Spaar in
18 Support of Respondents’ Supplemental Brief in Opposition to Verified Petition for Alternative
19 Writ of Mandate, Writ of Mandate, Order to Show Cause, or Other Appropriate Relief (“Supp.
20 Spaar Decl.”), ¶ 2, Exh. A. For example, the 1990 Framework Agreement provides that “[t]he
21 purpose of this Framework Agreement is to expedite the implementation of measures to avoid,
22 eliminate, or offset identifiable problems affecting fish and wildlife resources in the Estuary. . .”
23 Supp. Spaar Decl., Exh. A, p. 2. To that end, the parties agreed to establish a “Comprehensive
24 Program” for the accomplishment of specific objectives. *Id.*, Exh. A, p. 2. The comprehensive
25 program envisioned by the parties to the 1990 Framework Agreement included commitments to
26 definite actions, including to “[i]dentify systemwide problems faced by fish and wildlife
27 resources in the Estuary[;]” “[i]dentify and evaluate measures that could solve the fish and
28 wildlife problems, regardless of responsibility for those problems[;]” and “[d]evelop an

1 implementation plan which shall include identification of needed authorizations and funding
2 sources, a timetable for implementation, provisions for evaluating and, if needed, revising the
3 Program as new information becomes available, and recruitment of other parties to participate in
4 the implementation of the plan.” *Id.*, Exh. A, pp. 2-3.

5 **21. Objection 21**

6 DWR objects to the proposed Statement of Decision’s statement on page 13-14,
7 lines 19-1: “This document [1994 CALFED Framework Agreement], like the earlier 1990
8 Framework Agreement, is one primarily concerned with procedure rather than substance of
9 compliance with any statutory requirements – either state or federal.”

10 DWR objects because the phrase “primarily concerned with procedure” is
11 ambiguous and does not accurately reflect the evidence submitted. The parties recognized in the
12 1994 CALFED Framework Agreement that a key factor in the success of the CALFED program
13 would be their commitment to achieving regulatory stability and addressing state and federal
14 regulatory compliance, including CESA and FESA compliance, through the coordinated
15 CALFED process. The parties stated:

16 3. We agree that a major goal of all State and Federal
17 regulatory processes affecting the Bay-Delta Estuary should be to
18 provide meaningful regulatory stability for beneficial uses of the
19 Bay-Delta Estuary’s resources. We believe that the best means to
20 this goal is to develop a single, cohesive program consisting of
21 water quality standards and other appropriate actions that meet all
22 requirements of State and Federal law and which will remain in
23 effect, absent unforeseen circumstances, for a period of years.

24 4. We agree that a primary component of providing regulatory
25 stability is to integrate current and future implementation of the
26 Federal and *State Endangered Species Acts* into a coordinated
27 approach to resources management in the Bay-Delta Estuary. This
28 can best be accomplished by taking a comprehensive ecosystem
approach to the problems of the Bay-Delta Estuary.

 5. We agree that it is essential for the State and Federal
agencies with regulatory and resources management responsibilities
in the Bay-Delta Estuary to reach consensus, consistent with
applicable procedural limitations, on the appropriate level of
protection to be achieved for the Bay-Delta Estuary.

Johns Decl., Exh. A, p. 4 (emphasis added). Resulting from the 1994 CALFED Framework
Agreement were substantive mitigation measures implemented with DFG and other agencies, and

1 those programs continue to date based on that agreement. Johns Decl., ¶ 6-13; McDonnell Decl.,
2 ¶¶ 4-5; Greene Decl., ¶¶ 11-16. For Example, the Environmental Water Account (“EWA”)
3 established under CALFED provides fish protection measures that continue to date. Johns Decl.,
4 ¶ 13; Greene Decl., ¶ 11.

5 **22. Objection 22**

6 DWR objects to the proposed Statement of Decision’s statement at page 15, line 5-
7 9: “Notwithstanding the absence of any statement of purpose or recital related to the CESA, the
8 agreement [1994 CALFED Framework Agreement] contains a provision in which the parties (the
9 Water Policy Council and the Fed) agree that they ‘endorse and concur in the points of the
10 agreement’ in the documents attached to the agreement – Exhibit B being the only one relevant to
11 this case.”

12 22a. DWR objects to the phrase “Notwithstanding the absence of any statement
13 of purpose or recital to the CESA” as ambiguous and not reflecting relevant evidence. On page 1
14 of the 1994 Framework Agreement, it states that “this Agreement is intended to provide for
15 increased coordination and communication with respect to . . . improved coordination of water
16 supply operations with endangered species protection . . .” Johns Decl., Exh. A at p. 1.

17 22b. DWR objects to the phrase “parties (the Water Policy Council and the
18 Fed)” because it is ambiguous. Both DFG and DWR were part of the Water Policy Council and
19 were parties to the 1994 Framework Agreement. Johns Decl., Exh. A at p. 6.

20 **23. Objection 23**

21 DWR objects to the proposed Statement of Decision’s statement at page 16, lines
22 3-6: “The thrust of Exhibit “B” relates to mutual promises between federal and state agencies to
23 communicate and coordinate the operations of the Central Valley Project and the State Water
24 Project with the requirements of the Federal and State Endangered Species acts.”

25 DWR objects to the characterization of Exhibit B as ambiguous and not reflecting
26 the relevant evidence. Exhibit B states in Paragraph 5:

27 A CVP/SWP Operations-Endangered Species Coordination Group (“Coordination
28 Group”) shall be established consisting of representatives of USFWS, USBR,
NMFS, EPA, DFG, DWR and staff of the SWRCB. The Coordination Group will

1 exchange information and facilitate the coordination of water project operations
2 with requirements of RPAs under the winter-run salmon and the delta smelt
3 biological opinions, the State and Federal water quality standards, and the CVPIA.

4 Johns Decl., Exh A at p. B-1. The proposed Statement of Decision is ambiguous in not
5 recognizing DFG as a party to the Framework Agreement and a party to the Coordination Group
6 specifically established for compliance with FESA and CESA.

7 **24. Objection 24**

8 DWR objects to the proposed Statement of Decision's statement at page 20, line 3:
9 "Unlike some of the other cited agreements, the parties to this agreement include DFG and
10 DWR."

11 DWR objects because the statement is ambiguous. DFG or its parent agency, the
12 California Resources Agency, was a party to all of the plans and agreements relied upon by DWR
13 for its take authorization under California Fish and Game Code section 2081.1. As discussed
14 above, the Accord was executed by the California Resources Agency, the California
15 Environmental Protection Agency, the United States Department of the Interior, the Department
16 of Commerce, and the Environmental Protection Agency, along with several private interested
17 organizations. Johns Decl., Exh. B at p. 8. Moreover, DWR and DFG were signatories to all the
18 other agreements and plans relied on by DWR pursuant to Fish and Game Code section 2081.1.
19 Spaar Decl., Exh. A (Four Pumps Agreement); Spaar Supp. Decl., Exh. A (1990 Framework
20 Agreement); Johns Decl., Exh. A (1994 CalFed Framework Agreement); Johns Decl., Exh. D
21 (1995 Article VII Agreement).

22 **25. Objection 25**

23 DWR objects to the proposed Statement of Decision's statement at p. 21, lines 10-
24 14: "The 1995 Article VII Agreement is, thus, an agreement that the parties have, over the 1986
25 to 1995 time period, satisfied the obligations to discuss the development of ways to offset adverse
26 fishery impacts, as that was the only obligation required by Article VII of the 1986 Four Pumps
27 Agreement and no increased diversions of water by DWR are mentioned in the 1995 Article VII
28 Agreement."

///

1 DWR objects that the characterization of the Article VII Agreement is ambiguous
2 and contrary to the relevant evidence. DWR and DFG (and USBR) in the Article VII Agreement
3 expressly acknowledged that *the mitigation measures and other actions* they had taken
4 subsequent to the 1986 Four Pumps Agreement satisfied the obligation they undertook in the
5 1986 Four Pumps Agreement to *identify and implement* additional mitigation measures to address
6 impacts on species not addressed in that agreement. Neither the parties' commitment nor their
7 subsequent actions were limited to discussing measures to offset fishery impacts. The 1986 Four
8 Pumps Agreement provided:

9 Measures to offset losses for fish species not covered in this
10 agreement *shall be included when information is obtained to*
11 *develop effective measures.* Measures provided under this
12 agreement will benefit some of these species.

13 [¶]

14 Upon execution of this agreement, the parties will begin discussions
15 on *developing ways to offset the adverse fishery impacts of the State*
16 *Water Project which are not covered in this agreement,* including
17 facilities needed to offset fishery impacts and provide more
18 efficient conveyance of water.

19 Spaar Decl., Exh. A, p. 11 (emphasis added). In the 1995 Article VII Agreement, the parties
20 acknowledged that their subsequent actions and agreements they had implemented satisfied, at
21 least in part, their obligation to develop additional mitigation measures for SWP operations under
22 the 1986 Four Pumps Agreement. *See* Johns Decl., Exh. D, p. 2 (“The [1994 Accord Agreement]
23 sufficiently addresses existing impacts in the Sacramento-San Joaquin Estuary to satisfy Article
24 VII of the 1986 [Four Pumps] Agreement . . . as they pertain to proceeding with the Interim South
25 Delta Facilities.”).¹

26 **26. Objection 26**

27 DWR objects to the proposed Statement of Decision's statement at page 23-24,
28 line 21: “It is unclear from the document whether DWR had sought a consistency determination
relating to all three species for the entire Harvey O. Banks Pumping Plant Operation or for the

¹ The 1994 Accord Agreement, among other things, established SWP operational standards for the protection of species. *See* Johns Decl., Exh. B.

1 limited scope of the 'project' described as an "increase in the maximum allowable daily diversion
2 rate into Clifton Court Forebay" during three months of the year."

3 DWR objects to this statement as ambiguous and does not reflect relevant
4 evidence. In 2000, within the CALFED program, DWR sought a consistency determination from
5 DFG with respect to DWR's proposed increase of the maximum allowable daily diversion rate
6 into the Forebay during the months of July, August and September from 2000 through 2002. *See*
7 Petitioner's Exhibit S-11. The effect of the increased diversion would be that SWP exports
8 pumped through the Banks Facility would increase by roughly 500 cubic feet per second. *Id.*
9 DFG issued the consistency determination with respect to the protection of Delta smelt. DFG
10 stated:

11 The Department of Fish and Game (Department) has reviewed the
12 proposed project description, the above-referenced USFWS
13 biological opinion for OCAP, the USFWS' concurrence that the
14 proposed action is covered by that opinion, and other relevant
15 documents. Based on this review, the Department has determined
16 that for the proposed action (increasing the allowed diversion rate
17 into [the Forebay] by 500 cfs in July through September, 2000-
2002) and the underlying operations of the SWP, the USFWS
OCAP opinion is consistent with CESA because the project and
mitigation measures meet the conditions set forth in Fish and Game
Code section 2081(b) and (c) for authorization of incidental take of
species protected under CESA.

18 *See* Petitioner's Exhibit S-11 at p. 3 (emphasis added). Whether or not DWR sought consistency
19 for the Salmon species was irrelevant because the consistency determination stated there was no
20 impact on Salmon during the time encompassed in the request. Specifically, DFG stated, "The
21 proposed project will not likely affect Sacramento River winter-run chinook salmon, or Central
22 Valley spring-run chinook salmon. The Department makes no findings pursuant to 2080.1 for
23 these races of salmon." *Id.* at p. 4.

24 **27. Objection 27**

25 DWR objects to the proposed Statement of Decision's statement at page 24, lines
26 3-8: "However, DFG's consistency determination was clear: it issued a determination that the
27 project would not increase the incidental take of either spring-run or winter-run Chinook Salmon
28 and thus, declined to issue a consistency determination "for the proposed action (increasing the

1 allowed diversion rate into CCF [Clifton Court Forebay] by 500 cfs in July through September,
2 2000-2002) and the underlying operations of the SWP (Id. at p. 3 second full ¶).”

3 DWR objects that the proposed statement omits the remaining language from that
4 sentence of the consistency determination, “the USFWS OCAP opinion is consistent with CESA
5 because the project and mitigation measures meet the conditions set forth in Fish and Game Code
6 section 2081(b) and (c) for authorization of incidental take of species protected under CESA.”

7 Petitioner’s Verified Petition for Writ of Mandate, Exh. S-11 at 3.

8 **28. Objection 28**

9 DWR objects to the proposed Statement of Decision’s statement on pages 24, lines
10 18-20: “In 1986, at the time of the 1986 Four Pumps Agreement, § 2081 permitted the DFG to
11 authorize, through a permit, an incidental taking of endangered, threatened or candidate species
12 upon a showing of minimizing the take and fully mitigating the take.”

13 DWR objects to the omission of the rest of the statutory language because it
14 misstates the legal standard under California Fish and Game Code section 2081. Section
15 2081(b)(2) states as follows:

16 “The impacts of the authorized take shall be minimized and fully mitigated. The
17 measures required to meet this obligation shall be roughly proportional in extent to
18 the impact of the authorized taking on the species. Where various measures are
19 available to meet this obligation, the measures required shall maintain the
20 applicant’s objectives to the greatest extent possible. All required measures shall
be capable of successful implementation. For purposes of this section only,
impacts of taking include all impacts on the species that result from any act that
would cause the proposed taking.”

21 **29. Objection 29**

22 DWR objects to the proposed Statement of Decision’s statement at page 25, lines
23 8-11: “It is Respondents’ position that the five agreements cited are interrelated and integrated
24 such that they comprise an integrated agreement and that, when considered as a whole, state an
25 authorization by DFG permitting the incidental take of Spring-run Chinook Salmon, Winter-run
Chinook Salmon and Delta Smelt.”

26 DWR objects to the proposed Statement of Decision’s use of the word
27 “agreement” and omission of the word “plan.” See Cal. Fish & Game Code § 2081.1. DWR
28 objects that the term “integrated agreement” as used above inaccurately characterizes DWR’s

1 position. DWR's implementation of measures under the individual plans and agreements to date
2 and as ongoing mitigation measures supports DWR's take authority.

3 **30. Objection 30**

4 DWR objects to the proposed Statement of Decision's statement at page 25, line
5 14: "the documents accept that fish will be killed in the Harvey O. Banks Pumping Plant
6 Operations and that the parties agree that mitigation measures will be undertaken."

7 DWR objects to the use of the phrase "fish will be killed" as ambiguous and
8 inaccurate. California Fish and Game Code section 2080 states:

9 No person shall import into this state, export out of this state, or take, possess,
10 purchase, or sell within this state, any species, or any part or product thereof, that
11 the commission determines to be an endangered or a threatened species, or attempt
12 any of those acts, except as otherwise provided in this chapter, the Native Plant
Protection Act (Chapter 10 (commencing with Section 1900) of this code), or the
California Desert Native Plants Act (Division 23 (commencing with Section
80001) of the Food and Agricultural Code).

13 Cal. Fish & Game Code § 2080. California Fish and Game code section 86 sets forth the
14 following definition of "take":

15 "Take" means hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue,
16 catch, capture, or kill.

17 Cal. Fish & Game Code § 86. An "incidental taking" under CESA is the taking of a protected
18 species that will not jeopardize the continued existence of the species that occurs in connection
19 with an otherwise lawful activity. Cal. Fish & Game Code § 2081(b). The proposed Statement of
20 Decisions use of the phrase "fish will be killed" is inconsistent with the statutory definition of
21 "take." Additionally, the statement assumes that fish will be taken at all times which is not
22 factually correct. See Petitioner's Verified Complaint, Exh. K at p. 211 (smelt not present in the
23 Delta from late July to December); *id.*, Exh. J. at p. 104, 107 (Spring-run smolt migrating only in
24 winter months).

25 **31. Objection 31**

26 DWR objects to the proposed Statement of Decision's at page 26, lines 9-12:
27 "Examining the documents advanced by DWR, it is clear that contrary to the assertion of
28 Respondent, they do not qualify as the carte-blanche authorization of incidental take at the

1 Harvey O. Banks Pumping Plant Operation for all species of endangered fish inspective [sic] of
2 the date of listing of the species as endangered.”

3 DWR objects to the phrases “carte-blanche authorization” and “all species of
4 endangered fish” because they are ambiguous and misstate the scope of the species put at issue by
5 the Petition. The Petition asserted that DWR purportedly lacked take authorization for Winter-
6 run Salmon, Spring-run Salmon and Delta Smelt and those were the species that were at issue in
7 the writ proceeding. *See* Verified Petition, Exh. A. Further, the phrase “carte-blanche”
8 mistakenly assumes that DWR asserted that it had unlimited take authorization under CESA.

9 **32. Objection 32**

10 DWR objects to the proposed Statement of Decision’s at page 27, lines 10-12:
11 “[The 1990 Framework Agreement] does not provide any substantive agreement on any subject
12 and appears to have been created to establish a process for DFG, DWR and the U.S. Bureau of
13 Reclamation to use when issues arose.”

14 DWR objects to the phrase “does not provide any substantive agreement” and
15 because it is ambiguous and does not reflect the evidence regarding the purpose and commitments
16 made under that agreement. *See* Supp. Spaar. Decl., ¶ 2, Exh. A. For example, the 1990
17 Framework Agreement provides that “[t]he purpose of this Framework Agreement is to expedite
18 the implementation of measures to avoid, eliminate, or offset identifiable problems affecting fish
19 and wildlife resources in the Estuary. . .” Supp. Spaar Decl., Exh. A, p. 2. To that end, the
20 parties agreed to establish a “Comprehensive Program” for the accomplishment of specific
21 objectives. *Id.*, Exh. A, p. 2. The comprehensive program envisioned by the parties to the 1990
22 Framework Agreement included commitments to definite actions, including to “[i]dentify
23 systemwide problems faced by fish and wildlife resources in the Estuary[;]” “[i]dentify and
24 evaluate measures that could solve the fish and wildlife problems, regardless of responsibility for
25 those problems[;]” and “[d]evelop an implementation plan which shall include identification of
26 needed authorizations and funding sources, a timetable for implementation, provisions for
27 evaluating and, if needed, revising the Program as new information becomes available, and
28 recruitment of other parties to participate in the implementation of the plan.” *Id.*, Exh. A, pp. 2-3.

1 **33. Objection 33**

2 DWR objects to the proposed Statement of Decision's statement at page 27, lines
3 15-16: "DFG is a part of the Water Policy Council but is not a party to the agreement."

4 DWR objects to the statement as ambiguous. Both DFG and DWR were part of
5 the Water Policy Council and thus, were parties to the 1994 Framework Agreement. Johns Decl.,
6 Exh. A at p. 6.

7 **34. Objection 34**

8 DWR objects to the proposed Statement of Decision's statement at page 29, line
9 11-16: "To say [the Article VII Agreement] evidences agreement that Article VII of the 1986
10 Four Pumps Agreement has been satisfied as DWR argues is no more than to say that the parties
11 agree that they have satisfied their obligations to discuss the development of ways to offset
12 adverse fishery impacts, and specifically, that they have done so with regard to the Interim South
13 Delta facilities, a different facility than the Harvey O. Banks Pumping Plant Operation."

14 DWR objects to this statement because it is ambiguous and is contrary to the
15 evidence in the record. DWR and DFG in the Article VII Agreement acknowledged that *the*
16 *mitigation measures and other actions* they had taken subsequent to the 1986 Four Pumps
17 Agreement satisfied the obligation they undertook in the 1986 Four Pumps Agreement to *identify*
18 *and implement* additional mitigation measures to address impacts on species not addressed in that
19 agreement. Neither the parties' commitment nor their subsequent actions were limited to
20 *discussing* measures to offset fishery impacts. The 1986 Four Pumps Agreement provided:

21 Measures to offset losses for fish species not covered in this
22 agreement *shall be included when information is obtained to*
23 *develop effective measures*. Measures provided under this
 agreement will benefit some of these species. [¶]

24 Upon execution of this agreement, the parties will begin discussions
25 on *developing ways to offset the adverse fishery impacts of the State*
26 *Water Project which are not covered in this agreement*, including
 facilities needed to offset fishery impacts and provide more
 efficient conveyance of water.

27 Sbaar Decl., Exh. A, p. 11 (emphasis added). In the 1995 Article VII Agreement, the parties
28 acknowledged that their subsequent actions and agreements satisfied, at least in part, their

1 obligation to develop additional mitigation measures for SWP operations under the 1986 Four
2 Pumps Agreement. *See* Johns Decl., Exh. D, p. 2 (“The [1994 Accord Agreement] sufficiently
3 addresses existing impacts in the Sacramento-San Joaquin Estuary to satisfy Article VII of the
4 1986 [Four Pumps] Agreement . . . as they pertain to proceeding with the Interim South Delta
5 Facilities.”). Further, the 1986 Four Pumps Agreement and the 1995 Article VII Agreement
6 provided for mitigation measures acknowledged by DFG. *See* Spaar Decl., Exh. A; Johns Decl.,
7 Exh. D.

8 **35. Objection 35**

9 DWR objects to the proposed Statement of Decision's statement at page 33, lines
10 5-9: “Either way, the 2005 Consistency Determination is not valid. If a distinct project, there is
11 no evidence of a separate federal Biological Opinion relating to the annual three month increased
12 diversions project upon which to found the DFG’s Consistency Determination and if the project is
13 an incremental change, Section 2080.1 does not provide statutory authority for such a parsing of
14 the permitted incidental take.”

15 DWR objects that the statement is ambiguous and contrary to the facts in the
16 record. The 2005 Consistency Determination specifically states that it is based on an existing and
17 valid federal biological opinion. *See* Verified Petition, Exh. S-15. The 2005 Consistency
18 Determination further states that the increased diversion of 500 cfs water during the identified
19 three months of the year is consistent with CESA pursuant to the terms of the federal biological
20 opinion on which it is based. *Id.* The 2005 Consistency Determination is accordingly properly
21 based on the federal biological opinion and incidental take statement with respect to the 500 csf
22 increased diversion. There is no basis in fact or law supporting the Court's conclusion that the
23 2005 Consistency Determination is invalid either as improperly addressing a "distinct project" not
24 addressed in the applicable federal biological opinion or because it is not based on a "separate
25 federal Biological Opinion relating to the annual three month increased diversions."

26 **36. Objection 36**

27 DWR objects to the proposed Statement of Decision’s statement at page 33, lines
28 11-16: “Respondents and all of them are commanded to cease and desist from further operation

1 of the Harvey O. Banks Pumping Plant Operation until and unless they have obtained
2 authorization in compliance with the California Endangered Species Act from the Department of
3 Fish and Game with regard to their incidental take of Chinook Salmon – Winter-run, Chinook
4 Salmon – Spring-run and Delta Smelt.”

5 DWR objects to this statement as being beyond the Court’s authority and because
6 it inaccurately assumes that any operation of the Harvey O. Banks Pumping Plant Operation will
7 result in “take” in violation of CESA. The record evidence establishes that at various times
8 during the year operation of the Harvey O. Banks Pumping Plant Operation does not result in the
9 “take” of protected fish. *See* Petitioner’s Verified Complaint, Exh. K at p. 211 (smelt not present
10 in the Delta from late July to December); *id.*, Exh. J. at p. 104, 107 (Spring-run smolt migrating
11 only in winter months). To the extent DWR’s operation of this facility does not result in the
12 actual “take” of species protected under CESA, DWR cannot be in violation of CESA when
13 operating the facility. The Court’s intended order commanding DWR to cease operation of the
14 Harvey O. Banks Pumping Plant Operation “until and unless they have obtained authorization in
15 compliance with [CESA]” disregards the record evidence that operation of the facility does not at
16 all times result in “take” and is contrary to DWR’s legal right to operate the facility when it will
17 not result in the “take” of protected species.

18 II.

19 **OBJECTION TO PROPOSED TIME TO COMPLY WITH ORDER**

20 DWR further objects to the limited time period that the order is stayed. The
21 proposed Statement of Decision states, “This order is stayed for sixty days to provide
22 Respondents the time needed to comply with CESA’s mandatory incidental take authorizing
23 requirements.” By only allowing sixty days to comply, the proposed Statement of Decision
24 divests DWR of its discretion in selecting the best method for compliance.

25 A writ of mandate cannot compel how DWR exercises its discretion. *U.S.*
26 *Ecology, Inc. v. State of California*, 92 Cal. App. 4th 113, 138 (2001). In addition to the
27 grandfathering provision of Fish and Game Code section 2081.1, DWR can obtain DFG’s
28 concurrence that DWR is compliant with CESA in three additional ways. Pursuant to Fish and

1 Game Code section 2080.1, DWR can obtain DFG's consistency determination that an existing
2 federal biological opinion and incidental take statement is consistent with the requirements of
3 CESA. Cal. Fish & Game Code § 2080.1. DWR may also obtain from DFG through an
4 application process an incidental take permit for the taking of species pursuant to Fish and Game
5 Code section 2081. *Id.* § 2081. Additionally, DWR can obtain DFG's take authorization through
6 the NCCPA process. *See id.* § 2835. DWR and DFG (along with numerous other public and
7 private entities) are currently developing the BDCP. In the BDCP, DWR intends to address SWP
8 operations and species protection in a comprehensive, system-wide manner that provides for
9 mitigation of impacts on listed and non-listed species, as well as their habitat. McDonnell Decl.,
10 ¶¶ 6-12; Johns Decl., ¶¶ 14-17. At the conclusion of this process, DWR expects that the BDCP
11 will satisfy the requirements of the NCCPA, and, based on the BDCP, DFG will issue to DWR
12 renewed incidental take authorization for operation of the SWP's facilities located within the
13 Delta. *See* Cal. Fish & Game Code § 2835; Johns Decl., ¶¶ 16-17.

14 The time required for DWR to obtain take authorization from DFG varies
15 depending on the method by which that authorization is obtained. Take authorization pursuant to
16 an incidental take permit or the NCCPA process require more time than the court has allowed
17 under its proposed Statement of Decision. In effect, the 60 day time limit provided in the
18 proposed Statement of Decision has limited DWR to a single option to obtain take authorization
19 from DFG, namely, to seek and obtain a consistency determination pursuant to Fish and Game

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Code section 2080.1. DWR objects that, contrary to *U.S. Ecology, Inc.*, by giving DWR only 60 days to comply, the court is directly limiting the exercise of DWR's discretion in obtaining authorization from DFG.

Dated: April 11, 2007

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DECLARATION OF SERVICE BY ELECTRONIC MAIL

I am more than eighteen years old and not a party to this action. My place of employment and business address is 400 Capitol Mall, Suite 3000 Sacramento, California, 95814.

On April 11, 2007, I served:

- **CALIFORNIA DEPARTMENT OF WATER RESOURCES' OBJECTIONS TO PROPOSED STATEMENT OF DECISION**

By transmitting a copy of the above-listed documents in PDF form via electronic mail to the following persons:

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I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed at Sacramento, California, on April 11, 2007.

Wanda Peters

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I deposited such envelopes with postage thereon fully prepaid in the United States mail at a facility regularly maintained by the United States Postal Service at Sacramento, California on the date indicated above.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed at Sacramento, California, on April 11, 2007.

Wanda Peters