

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

CENTRAL DELTA WATER AGENCY, et al.

v.

**CALIFORNIA DEPARTMENT OF WATER
RESOURCES, et al.**

**ALAMEDA COUNTY FLOOD CONTROL &
WATER CONSERVATION DISTRICT ZONE 7,
et al.**

Case Number: 34-2010-80000561

RULING ON SUBMITTED MATTER

Date: January 31, 2014

Time: 9:00 a.m.

Dept.: 29

Judge: Timothy M. Frawley

This proceeding involves a challenge under the California Environmental Quality Act (CEQA) to the Environmental Impact Report (EIR) for the project known as the "Monterey Amendments to the State Water Project Contracts (Including Kern Water Bank Transfer) and Associated Actions as Part of a Settlement Agreement." The court shall grant the petition in part.

Background Facts and Procedure

This case involves the Department of Water Resources' (DWR's) review and approval of the "Monterey Plus Project," a wide-ranging re-working of the contracts governing the operation and management of the State Water Project long-term water supply contracts. A detailed history of the Monterey Plus Project is set forth in this court's Final Statement of Decision on Time-Bar Affirmative Defenses (January 31, 2013). The court shall summarize the key events below.

In the 1960s, California voters approved an initiative to fund the development of the State Water Project (SWP), one of the largest water, power, and conveyance systems in the world. The SWP consists of a complex system of dams, reservoirs, storage tanks, power and pumping plants, aqueducts, pipelines, and canals designed to capture, store, and convey water throughout the state. In general, water is captured and stored in reservoirs in the northern part of the State, and then transported to the central and southern areas of the State. The SWP delivers drinking water to about 24 million people and irrigates about 750,000 acres of farmland each year.

The cost of the SWP is paid primarily by public water agencies ("SWP contractors") that contract with the State to receive SWP water. Beginning in 1960, DWR, as the state agency charged with operating and managing the SWP, entered into similar (essentially standardized) long-term contracts with the SWP Contractors. These contracts set forth the parties' respective obligations concerning the sale, delivery, and use of the water made available by the SWP.

Attached to each contract is a table -- "Table A" -- setting forth the maximum annual amount of SWP water that the State will provide to each Contractor from the available water supply. This is referred to as the "Table A amount." For most contracts, the initial Table A amounts were low and then increased over time to reflect that the SWP's facilities and contractor demand would both increase over time.

The original long-term water supply contracts contemplated that additional SWP facilities would be constructed and that at full build-out the SWP would deliver about 4.2 million acre-feet (MAF) of water per year. However, because the additional facilities were not constructed, actual, reliable water supply from the SWP actually is in the vicinity of 2 to 2.5 MAF of water annually, which is only about one-half the 4.2 MAF contemplated by the contracts. DWR never reduced the original Table A Amounts to reflect the fact that the SWP was not fully built out.

Through the 1980s, DWR was able to satisfy all requests for Table A water because urban Contractor demands increased more slowly than originally anticipated. DWR was able to regularly pump and store more water than Contractors requested, and therefore regularly had "surplus" water available for delivery. Contractors could schedule deliveries of the surplus water up to five years in advance, hence it became known as "scheduled surplus" water.

By the late 1980s, however, contractors' Table A amounts and requests reached levels that usually exceeded the amount of water available for delivery, meaning there was no longer surplus water to schedule. Since that time, SWP's deliveries of surplus water have consisted only of "unscheduled surplus" water. Unscheduled surplus is water that unexpectedly

becomes available for delivery because of large storm runoff events and that is not required to meet contractors' Table A deliveries, SWP storage goals, or regulatory requirements.

Beginning in the 1990s, the SWP increasingly was unable to fulfill all of the Table A requests. In the early 1990's, a drought compounded the disparity between SWP supply and demand and disputes arose among the agricultural and urban SWP contractors about how the limited amount of water available should be allocated during shortages, particularly in drought years.

In 1994, DWR and SWP contractor representatives engaged in mediated negotiations in an attempt to settle allocation disputes arising under the long-term water supply contracts. The negotiations grew into an omnibus revision to the long-term water supply contracts. In December of 1994, a comprehensive agreement was reached in Monterey, California, which came to be known as the "Monterey Agreement." The parties then translated the Monterey Agreement principles into a standard amendment to the long-term water supply contracts, which became known as the "Monterey Amendment."¹

The Monterey Amendment had six principal objectives: (1) resolve conflicts and disputes among SWP contractors regarding water allocations and financial responsibilities for SWP operations; (2) restructure and clarify SWP water allocation procedures and delivery during times of shortage and surplus; (3) reduce financial pressures on agricultural contractors in times of drought and supply reductions; (4) adjust the SWP's financial rate structure to more closely match revenue needs; (5) facilitate water management practices and water transfers that improve reliability and flexibility of SWP water supplies in conjunction with local supplies; and (6) resolve legal and institutional issues related to storage of SWP water in Kern County groundwater basins, and in other areas. (AR 23:11158.)

To achieve these objectives, the Monterey Amendment required certain changes to the methodology of allocating water among contractors and in the operation and administration of SWP facilities. Prior to the Monterey Amendment, Article 18(a) of the water supply contracts provided that in the event of a *temporary* shortage in water supply, agricultural SWP contractors would have their deliveries cut back first, before any reduction in water deliveries to urban contractors. The contracts refer to this as the "ag-first deficiency," but it has come to be known colloquially as the "urban preference." In the event of a *permanent* shortage in water supply, Article 18(b) provided that, with certain exceptions, the entitlements of all SWP contractors would be reduced proportionately so that the sum of entitlements would be equal to the SWP's reduced water supply (or "yield").

¹ The separate amendments to the long-term water supply contracts are sometimes referred to collectively as the "Monterey Amendments."

In addition, prior to the Monterey Amendment, Article 21 of the long-term water supply contracts provided that surplus water would be offered first to agricultural SWP contractors, for agricultural use or groundwater replenishment, and its use for urban purposes was restricted. Article 21(g)(1) also provided that DWR “shall refuse to deliver such surplus water to any contractor . . . to the extent that the State determines that such delivery would tend to encourage the development of an economy within the area served by such contractor . . . which would be dependent upon the sustained delivery of surplus water.” (AR 25:12125, 12179.)

Among other things, the Monterey Amendment: (1) amended Article 18 by eliminating the "urban preference," mandating that deliveries to both agricultural and urban contractors would (with some exceptions) be reduced proportionately in times of shortage, regardless of whether the shortage was deemed temporary or permanent; (2) eliminated Article 18(b)'s permanent shortage provision, which became irrelevant after the amendments to treat all contractors equally in times of shortage; (3) amended Article 21 to eliminate “scheduled surplus” water and give urban contractors equal access to “unscheduled surplus” water when it is available; (4) eliminated, as unnecessary, the language in Article 21(g)(1) regarding the use of surplus water for permanent economies; (5) required certain agricultural contractors to permanently transfer 130,000 AF of their pre-Monterey Amendment Table A amounts to urban contractors; (6) required DWR to transfer the "Kern Water Bank" property to Kern County Water Agency in exchange for agricultural contractors' permanent retirement of 45,000 AF in Table A amounts;² (7) restructured water rates; and (8) implemented various other changes to the way the SWP is administered, including (A) allowing contractors to sell excess water to other contractors or DWR; (B) authorizing SWP contractors to store SWP water outside their service area without DWR's approval; (c) authorizing the transport of non-SWP water; and (D) authorizing certain contractors to borrow up to 50% of the stored water in the Castaic Lake and Lake Perris reservoirs. (AR 23:11160-66.)

² The Kern Water Bank is an approximately 20,000 acre alluvial groundwater reservoir in southern Kern County. DWR purchased the Kern Fan Element in 1988 as part of a plan to develop a state-owned groundwater storage "bank" for the State Water Project, which DWR called the "Kern Water Bank." DWR eventually determined it could not feasibly develop a state-owned water bank on the lands and, in 1993, DWR stopped work on the water bank project. As part of the Monterey Agreement, DWR agreed to sell or lease the Kern Fan Element property and related assets to "designated Ag Contractors" who believed in the water bank concept. In exchange, agricultural Contractors agreed to permanently retire 45,000 acre-feet of water entitlements. To effectuate this aspect of the Monterey Agreement, the Monterey Amendment added Articles 52 and 53 to the long-term water supply contracts. Article 52 required the State to convey the Kern Fan Element property from DWR to KCWA in accordance with a separate agreement between DWR and KCWA entitled "Agreement for the Exchange of the Kern Fan Element of the Kern Water Bank." Article 53 provided for the transfer and retirement of 45,000 acre-feet of water entitlements from KCWA (40,670 acre-feet) and Dudley Ridge Water District (4,330 acre-feet).

The Monterey Amendment project was not intended to, and did not, change how much SWP water DWR is permitted to pump from the Delta. (AR 22:10976.)

In October of 1995, Central Coast Water Agency completed and certified a final EIR for the "Monterey Agreement" project. DWR, as a responsible agency, approved the EIR two months later.

The Monterey Agreement EIR was appropriately focused on the project's environmental impacts. It was not intended to be a top-to-bottom review of the SWP's underlying purposes and impacts.

In December of 1995, the Planning and Conservation League and others filed a lawsuit challenging the sufficiency of the Monterey Agreement EIR (the "PCL litigation"). The PCL plaintiffs alleged that the EIR violated CEQA because DWR should have been designated as the lead agency for purposes of preparing the EIR. In addition, the PCL plaintiffs alleged the EIR was inadequate under CEQA because it failed to properly define the project, failed to assess the adverse impacts of the project, failed to identify and analyze feasible alternatives to the project, failed to identify adequate mitigation measures for the project, and failed to adequately respond to public comments about the EIR. The PCL plaintiffs sought a writ of mandate compelling Central Coast Water Agency to set aside its certification of the EIR, and declaratory and injunctive relief with regard to the implementation of the Monterey Agreement.

The trial court denied the petition, but the Court of Appeal reversed the judgment. The Court of Appeal upheld the trial court's determination that DWR was the proper lead agency, but rejected the trial court's finding that the error was not prejudicial. The Court of Appeal held that the EIR was defective in at least one respect due to its failure to discuss implementation of Article 18(b) of the SWP Contracts as a no-project alternative. The Court held that such errors mandated the preparation of a new EIR under the direction of DWR. The Court ordered the trial court to retain jurisdiction over the action until DWR, as lead agency, certifies an EIR meeting the substantive and procedural requirements of CEQA.

After remand, the parties entered into a settlement agreement (the "Settlement Agreement") governing how a new EIR would be prepared. The parties agreed that the proposed "project" to be analyzed would be specifically defined during the scoping process. However, at a minimum, the new EIR would evaluate as components of the project the Monterey Amendment (including the provisions relating to the transfer of the Kern Water Bank lands) plus certain additional amendments agreed to in the Settlement Agreement. This project came

to be known as the "Monterey Plus" project because it is comprised of the original Monterey Amendment plus the additional terms and conditions of the Settlement Agreement. (Where necessary to distinguish it from the Monterey Agreement EIR, this new EIR for this project is referred to as the "Monterey Plus EIR.")

Among other things, the parties agreed that the Monterey Plus EIR would include: (i) an analysis of the environmental effects of the pre-Monterey Amendment long-term water supply contracts; (ii) an analysis of the potential environmental impacts of changes in SWP operations and deliveries relating to the implementation of the Monterey Plus Project; and (iii) an analysis and determination regarding the impacts related to the transfer, development, and operation of the Kern Water Bank lands.

The parties also agreed to a set of procedures for DWR's preparation of the new EIR, including the creation of an "EIR Committee" to provide advice and recommendations to DWR in connection with the preparation of the new EIR, and a mediation process to settle disputes regarding the new EIR's compliance with the requirements of CEQA and the Settlement Agreement.

In May of 2003, following execution of the Settlement Agreement, the trial court approved the Settlement Agreement. The trial court ordered DWR to operate the SWP pursuant to the Monterey Amendment while the new EIR was being prepared.

The EIR committee reviewed administrative drafts of the EIR and met formally at least 25 times before DWR issued its October 2007 draft EIR. (AR 197:100128-131.) The PCL plaintiffs actively participated in the EIR Committee and in the subcommittee that provided advice on modeling issues.

On February 1, 2010, DWR, as the lead agency, prepared and certified a final EIR for the Monterey Plus Project. The Project includes all of the objectives and elements of the Monterey Amendment, *plus* the objectives and elements of the Settlement Agreement. (AR 23:11158-70.)

The baseline for the EIR was the continued operation of the SWP in accordance with the pre-Monterey Amendment long-term water supply contracts. Thus, the EIR used 1995, the year before the Monterey Amendment was implemented, as the "existing conditions" baseline. However, the EIR also provided analyses using 2003 and 2020 adjusted baseline conditions to account for certain Table A changes and transfers that were the result of decisions unrelated to the Project. (AR 1:250-254, 23:11174-77, 11221-32, 11240, 11250; 26:12604-05.) DWR

explained that without such adjustments, the environmental impacts of the proposed Project would be exaggerated in the EIR because they would include both the impacts of the Project and the impacts of decisions unrelated to the Project. (AR 1:253-256.)

To evaluate potential impacts, DWR conducted historical analyses of what actually occurred as the Monterey Amendment was implemented, and computer modeling to estimate the Project's impacts under existing and future demand conditions.

The historical analyses evaluated the impacts based on actual past conditions as the Monterey Amendment was implemented during the period from 1996 to about 2005. (1:250-51; 23:11178-11179, 11206.) This historical approach usually is not available to conventional EIRs, but it was available here because parts of the Monterey Amendment already had been implemented when DWR began preparing the EIR. Consequently, post-Monterey Amendment SWP operations are a matter of historical record.

In addition, DWR used "CALSIM II" – a planning model developed to simulate SWP operations – to estimate the proposed Project's impacts for a broad range of water year types (critically dry, average, and wet years) against both "existing" (2003) and expected "future" (2020) adjusted baseline conditions.³

By using actual historical data and CALSIM II modeling together, DWR contends the EIR comprehensively evaluates the impact that the Project had on Table A deliveries historically, and the impact it would have in 2003 and 2020 as compared to what deliveries would have been under the pre-Monterey Amendment contract provisions.

Because DWR was operating pursuant to the Monterey Amendment while the EIR was being prepared, the EIR states that approval of the proposed Project would result in DWR "continuing to operate" the SWP under the Monterey Amendment. The EIR stated that no permits or approvals were required for the Project. (See AR 23:11169.)

Since the proposed Project would result in "continuing to operate" under the Monterey Amendment, the EIR identified the "no project" alternative as a return to the pre-Monterey Amendment long-term water supply contracts. (AR 22:10966; 24:11832-33.) In the EIR, DWR explained that what it means for DWR to return to the pre-Monterey Amendment contracts is

³ DWR chose the year 2003 to reflect conditions at the time DWR filed its Notice of Preparation for the EIR, and the year 2020 to reflect future conditions assuming SWP Contractors request and accept delivery of their maximum Table A amounts. The 2003 scenario analyzed changes occurring between 1996 and 2003. The 2020 scenario included these changes as well as those additional changes anticipated to occur by 2020.

uncertain and subject to dispute. Thus, DWR elected to analyze four alternative “no project” scenarios: No Project Alternative 1, No Project Alternative 2, Court-Ordered No Project Alternative 3, and Court-Ordered No Project Alternative 4.

Under the first alternative, the Project would not be implemented and the Kern Fan Element property would remain in state ownership and a state owned but locally operated water bank would be developed.

Under the second alternative, all actions that took place between 1993 and 2003 would remain in place (including the Kern Water Bank transfer), but, beginning in 2003, water would be allocated in accordance with the pre-Monterey Amendment contracts and most of the amended water supply management practices would be discontinued. The Settlement Agreement and post-2003 Monterey Amendment Table A transfers would not take place.

Under the third alternative, the Monterey Amendment and Settlement Agreement would not be implemented and DWR would invoke former Article 18(b) to reduce the sum of Table A amounts from 4.23 million AF to 1.9 million AF. The Kern Water Bank would remain in state ownership and a state owned but locally operated water bank would be developed. In years when available supplies exceeded 1.9 million AF, surplus water would be allocated in proportion to contractors’ Table A amounts.

The fourth alternative is identical to the third alternative except that instead of allocating surplus water in proportion to Table A amounts, DWR would give priority to agricultural contractors for agricultural and groundwater replenishment use, in accordance with former Article 21.

In addition to the four no project alternatives, the EIR analyzed one project alternative (Alternative 5). Alternative 5 included all of the elements of the proposed Project except for the water supply management practices contained in Articles 54 through 56 of the Monterey Amendment.⁴ (AR 24:11834.) DWR ultimately concluded that Alternative 5 was infeasible because it did not meet all of the project objectives, was undesirable from a policy perspective, and would not achieve the benefits that DWR sought to achieve through the water supply management practices. (AR 22:10969-70.)

DWR also initially considered but ultimately screened out from further review two alternatives proposed by the PCL plaintiffs during the EIR Committee process: the proposed “Improved

⁴ DWR determined that most of the proposed Project’s potentially significant impacts could be traced to implementation of the water supply management practices in Articles 54 through 56.

Reliability through Environmental Enhancement Alternative” and the “Kern Fan Element Transfer with Trust Conditions Alternative.”⁵ (AR 2:562, 571-72; 183:92614-16; 24:11836-38; see also 1:222-23.)

The EIR determined that the Project did not have any significant impacts in the historical period of 1996 to 2003, but may cause some potentially significant impacts during the period from 2003 to 2020. (AR 22:10924-98.) Specifically, the Project may facilitate the development of additional groundwater recharge facilities in the Southern San Joaquin Valley, which could cause impacts to terrestrial biological, cultural, and paleontological resources. In addition, the Project could result in lower lake levels at Castaic Lake and Lake Perris, which could adversely affect terrestrial biological, riparian, visual, recreational, cultural and paleontological resources, and air quality. The EIR further concluded that watershed improvements in Plumas County could involve earthmoving projects, which may impact cultural and paleontological resources. Moreover, the EIR found that Table A transfers will cause the Project to deliver additional SWP water to urban contractors, which could have growth-inducing impacts. (AR 2:457-61; 24:11731, 11733.) DWR incorporated mitigation measures for these impacts. However, recognizing that its mitigation measures may not fully mitigate the impacts, DWR adopted a statement of overriding considerations for each impact.

The EIR also determined that the Project may have potentially significant impacts due to modest additional pumping from the Delta under certain scenarios, and due to possible construction of additional ponds on the Kern Water Bank lands, but DWR determined that mitigation measures would lessen those impacts to a less-than-significant level.

On May 4, 2010, DWR’s Director decided to carry out the Project by continuing to operate under the existing Monterey Amendment and Settlement Agreement. (AR 22:10932.) He adopted findings and determinations, a statement of overriding considerations, and a mitigation, monitoring, and reporting program. (AR 22:10924-1001.) On May 5, 2010, DWR recorded a "Notice of Determination" regarding its decision to carry out the project. (AR 22:11002-6.)

On June 3, 2010, the DWR filed a Return to Peremptory Writ of Mandate requesting the trial court to discharge the trial court’s 2003 writ of mandate. The following day, June 4, the PCL plaintiffs filed a Consent to Entry of Order Discharging Writ. On August 27, 2010, this court (Hon. L. Connelly) entered an order discharging the 2003 writ.

⁵ The Improved Reliability through Environmental Enhancement Alternative would allocate 50% of Article 21 water for environmental purposes. The Kern Fan Element Transfer with Trust Conditions Alternative would require that water banked in the Kern Water Bank be used for statewide environmental purposes.

On June 3, 2010, the same day DWR filed its Return, the Petitioners in this action filed their petition for writ of mandate and complaint for declaratory and injunctive relief. The following day, June 4, Petitioners filed their First Amended Petition.

Petitioners' first cause of action challenges the sufficiency under CEQA of DWR's new Monterey Plus EIR. Petitioners' second and third causes of action, for "reverse validation" and mandamus, challenge the validity of the agreement to transfer the Kern Water Bank property from DWR to KCWA and the consideration made in exchange for such transfer. Petitioners seek a declaration that the Authority violated CEQA by certifying the EIR and approving the Project; a peremptory writ of mandate ordering the Authority to set aside its certification of the EIR and approval of the Project; an injunction prohibiting the Authority from taking any further action in respect to the Project until it has complied with the requirements of CEQA; and an award of reasonable attorneys' fees.

On April 25, 2012, the Court granted DWR's motion to set a special trial on the statute of limitations and other time-bar affirmative defenses (laches and mootness) to Petitioners' second and third causes of action. After trial, the court issued a Final Statement of Decision finding that the second and third causes of action are barred by the statute of limitations and laches.

Standard of Review

In a mandate proceeding to review an agency's decision for compliance with CEQA, the court reviews the administrative record to determine whether the agency abused its discretion. Abuse of discretion is shown if the agency has not proceeded in the manner required by law, or the determination is not supported by substantial evidence. (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1106.) Judicial review differs significantly depending on whether the claim is predominantly one of improper procedure or a dispute over the facts. (*Ebbets Pass Forest Watch v. California Dept. of Forestry & Fire Prot.* (2008) 43 Cal.4th 936, 945.)

Where the alleged defect is that the agency has failed to proceed in the manner required by law, the court's review is *de novo*. (*ibid.*) Although CEQA does not mandate technical perfection, CEQA's information disclosure provisions are scrupulously enforced. (*ibid.*) A failure to comply with the requirements of CEQA which results in an omission of information necessary to informed decision-making and informed public participation constitutes a prejudicial abuse of discretion, regardless whether a different outcome would have resulted if the agency had complied with the disclosure requirements. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198; *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392.)

Where the alleged defect is that the agency's factual conclusions are not supported by substantial evidence, the reviewing court must accord deference to the agency's factual conclusions. The reviewing court may not weigh conflicting evidence to determine who has the better argument and must resolve all reasonable doubts in favor of the administrative decision. The court may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. (*Ebbets Pass, supra*, at p.945; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946.)

Regardless of what is alleged, an EIR approved by a governmental agency is presumed legally adequate, and the party challenging the EIR has the burden of showing otherwise. (*Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2007) 157 Cal.App.4th 149, 158; *Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 919.)

Discussion

1. Exhaustion of Administrative Remedies

As a threshold issue, the Kern Water Bank Authority and its member entities (“Kern Water Bank Parties”) and DWR contend that petitioners James Crenshaw and Center for Biological Diversity lack standing to maintain this action because they did not timely object to the project at the administrative level.

In respect to petitioner James Crenshaw, the court agrees with the Kern Water Bank Parties. Mr. Crenshaw did not object to the approval of the project during the public comment period or prior to the close of the public hearing on the project. Therefore, he did not exhaust his administrative remedies and lacks standing to pursue this CEQA action. (Pub. Res. Code § 21177(a).)

The Center for Biological Diversity, in contrast, appears to have timely objected to the project prior to the close of the public hearing on the project. It is noteworthy that the Center submitted its comments before the SWP contractors provided their final comments on the Final EIR, before the EIR Committee completed its process, and before DWR completed its review of the Final EIR. (AR 22:10924-27; 113:58264-65; 196:99649-71, 99691-768.) Accordingly, the court rejects the contention that the Center lacks standing to pursue this action.

2. Failure to Adequately Summarize the Record

Respondent Kern County Water Agency (KCWA) argues that Petitioners' CEQA claims should be dismissed because Petitioners failed to adequately summarize all of the material evidence in the record pertaining to the issues raised by them.

While the court acknowledges that Petitioners' summary of the material evidence could be better, in general, the court finds it sufficient for judicial review, with two exceptions: Petitioners' "paper water"⁶ and climate change arguments. Petitioners' fail to adequately address the EIR's lengthy discussion regarding "paper water," citing only one page from the EIR's "paper water" discussion, which is cumulatively 55 pages long. (AR 2:502-44; 24:11742-55.) Likewise, Petitioners fail to summarize the evidence in the record addressing the Project's climate change impacts. (AR 2:602-21; 14:6634-38; 24:11866-87; 40:19762-20100.)

Accordingly, the court summarily rejects Petitioner's "paper water" and climate change arguments. (See *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 540 [party challenging EIR for insufficient evidence must lay out the evidence favorable to the other side and show why it is lacking].)

3. Res Judicata and Laches

The Kern Water Bank Parties claim that Petitioners' action is barred by both res judicata and laches. For the reasons discussed in the court's previous ruling, this claim is rejected.

4. Project Description

Petitioners allege that DWR's EIR violates CEQA because it fails to provide an accurate description of the proposed Project.

An accurate, stable, and finite project description is the *sine qua non* of an informative and legally sufficient EIR. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.) An adequate project description is necessary to ensure that CEQA's goals of providing information about a project's environmental impacts will not be rendered useless. The description of a project in an EIR must be sufficient to provide public agencies and the public with detailed information about the effects the proposed project is likely to have on the environment. (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26.)

⁶ Petitioners' "paper water" argument is that Table A amounts by themselves cause a significant environmental effect by "inducing demand" for SWP water deliveries.

Here, the EIR describes the Project as “continuing to operate” under the Monterey Amendment, for which “no permits or approvals” are required, while describing the “no project” alternative as a return to the pre-Monterey Amendment contracts. (AR 1:1-2, 6-7, 95-98, 102, 194-95; 23:11116-17, 11158-69.)

Petitioners contend that the EIR’s project description is confusing because it is unclear whether the Monterey Amendment is the proposed “project” or the “status quo.” Petitioners argue that if the “no project” alternative is operation of the SWP *without* the Monterey Amendment, then the “project” necessarily must be operation of the SWP *with* the Monterey Amendment. By describing the Project as “continuing to operate” under the Monterey Amendment, Petitioners argue that DWR has concealed the true scope of the Project.

In addition, the CEQA Guidelines require EIRs to list the “approvals” required to implement the project. (14 C.C.R. § 15124(d)(1)(B).) Petitioners argue that the EIR violates this requirement because it erroneously states that no approvals were required for the Project. Petitioners argue that because the PCL litigation voided the prior approvals of the Monterey Amendment, a new project approval is required.

The court finds that contrary to Petitioners’ argument, the EIR adequately and appropriately described the Project under the unique circumstances of this case.

This case is unusual in that the proposed Project is a standardized contract amendment that previously was approved and executed. As part of the Settlement Agreement, the parties agreed that DWR would study and consider the impacts of the changes in SWP operations resulting from implementation of the Monterey Amendment. However, as this court previously concluded, the PCL litigation did not invalidate the contract amendments. To the contrary, the evidence shows that the parties “validated” the amended contracts as part of the Settlement Agreement. The parties also affirmed that the SWP would continue to be administered and operated under the Monterey Amendment while a new EIR was being prepared.

Because DWR was operating pursuant to the Monterey Amendment while the new EIR was being prepared, the EIR accurately described the practical result of carrying out the proposed Project as “continuing” to operate the SWP pursuant to the Monterey Amendment, and accurately described the “no project” alternatives as returning to operation of the SWP in accordance with the pre-Monterey Amendment long-term water supply contracts. Therefore, DWR correctly determined that it could carry out the Project simply by deciding to continue operating under the Monterey Amendment.

Petitioners argue that analyzing the impacts of a decision that has already been made undermines an EIR's effectiveness as an informational document and should not be allowed. In general, the court agrees.⁷ However, this case presents a highly unusual situation in which the parties agreed, and the court approved, a "remedial" EIR to analyze the impacts of the pre-existing contractual amendments.

Petitioners may argue that the trial court *should have* invalidated the Monterey Amendment approvals in the PCL litigation, and that the failure to do so undermines CEQA by transforming the new EIR into a "post hoc rationalization" to support action already taken. Yet, as this court found in its previous ruling, the problem with this argument is that even if Petitioners are correct, the time to object has long since passed. The time to object was when the Settlement Agreement was approved and the writ issued, and certainly no later than the discharge of the writ in the PCL litigation. Neither Petitioners, nor the PCL plaintiffs, nor any other person raised any objections and, therefore, the PCL writ was issued and discharged and the prior validation action was dismissed and became final.

The unique procedural posture of this case placed DWR into the unusual position of preparing an EIR for a "proposed project" that was already approved, implemented, and validated. The court acknowledges that this is a less-than-ideal way to conduct CEQA review. Still, the facts are what they are; the court cannot rewrite history.

Under the unique circumstances of this case, DWR did not abuse its discretion in describing the Project as continuing to operate under the Monterey Amendment and Settlement Agreement.

5. Environmental Baseline

The fundamental goal of an EIR is to inform decision makers and the public of any significant adverse effects a project is likely to have on the physical environment. To accomplish this goal, an EIR must compare the conditions expected to be produced by the project against the physical conditions existing without the project. Thus, before the impacts of a project can be assessed, the EIR must identify the environmental conditions prevailing absent the project, defining a "baseline." (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*

⁷ It is especially confusing that DWR is analyzing the environmental impacts of contract amendments that previously were validated, because DWR's compliance with CEQA was an issue subject to challenge in the validation action. (See *Protect Agricultural Land v. Stanislaus County Local Agency Formation Com.* (2014) 2014 Cal. App. LEXIS 80, *28-29; *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758; *Moorpark Unified Sch. Dist. v. Superior Court* (1990) 223 Cal.App.3d 954; see also *Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 848.)

(2013) 57 Cal.4th 439, 447.) It is only against this baseline that the project's significant environmental effects can be determined.

Here, Petitioners argue that the EIR's baseline is flawed because it omits components that were part of the existing conditions without the Project, namely, Article 18(b) [governing permanent shortages] and Article 21(g)(1) [limiting deliveries of surplus water] of the pre-Monterey Amendment contracts. Because the Project deleted these provisions from the water supply contracts, Petitioners argue the provisions must be included in the baseline so the EIR can evaluate the effects of deleting them. Petitioners are mistaken.

Case law establishes that the "environmental baseline," to which a project's impacts must be compared, is the "real conditions on the ground" in the affected area of the project. (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 321.) The baseline must be the actual environmental conditions existing before project approval, rather than the level of development or activity that could or should have been present according to an existing plan, permit, or regulation. (*Ibid.*) The baseline should not include potential changes to the operation of an existing project where the changes, though theoretically possible, had never occurred. (*Id.* at pp.326-27.) Using hypothetical "allowable" conditions as the baseline would result in an illusory comparison that is likely to mislead the public as to the real impacts of the project. (*Id.* at p.322.)

In this case, the "real conditions on the ground" in 1995, the year before the Monterey Amendment, did not include implementation of Articles 18(b) and 21(g)(1). DWR had not invoked Article 18(b) or 21(g)(1) prior to the Monterey Amendment, and there is nothing to indicate that DWR was likely to invoke them in the future. Thus, implementation of Articles 18(b) and 21(g)(1) was not part of the "existing physical conditions" that belonged in the environmental baseline.

DWR's approach is consistent with the Court of Appeal's opinion in the PCL litigation. The Court of Appeal concluded that Article 18(b) "might" be invoked in a manner that plausibly "could" affect planning decisions," and therefore its elimination should be considered as a "no project alternative."⁸ (*Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 915-16.) The Court of Appeal did not hold or even suggest that

⁸ The Court asked not whether Article 18(b) was likely to be implemented in the future, but what environmental consequences were reasonably foreseeable if it was.

implementation of Article 18(b) should have been part of the baseline of “existing physical conditions.”⁹

Consistent with the Court of Appeal’s opinion in the PCL litigation, DWR included Article 18(b) in a “no project” alternative, allowing DWR to evaluate the environmental consequences of removing Article 18(b) relative to the Project and the environmental baseline.¹⁰ Substantial evidence supports DWR’s decision that invocation of Articles 18(b) and 21(g)(1) were not “existing physical conditions” that belonged in the baseline.

Petitioners also contend that the EIR’s baseline improperly includes Project components that were not part of the existing physical conditions before the Project. However, the evidence in the record does not support Petitioners’ claim.¹¹ (See 23:11174-78; see also 1:253-55; 2:698.) Accordingly, this contention is rejected.

Petitioners criticize DWR for using a “future” baseline, when in fact the EIR employed both existing (1995 and 2003) and future baselines (2020) to provide a complete assessment of the Monterey Amendment’s past, present, and future impacts.¹² The EIR used historical studies to evaluate the impacts of implementation of the Monterey Amendment from 1996 to 2005, and computer modeling to evaluate conditions in 2003 to 2020, both with and without the Project.

DWR’s choice of baseline was reasonable and is supported by substantial evidence.

6. Alternatives

An EIR must evaluate a range of reasonable alternatives to the project or to the location of the project which would feasibly attain most of the basic objectives of the project but avoid or substantially lessen one or more of the project's significant environmental impacts. (14 C.C.R. § 15126.6.) A "no project" alternative shall also be evaluated along with its impact. (*ibid.*)

⁹ Such a holding would have flatly contradicted the defendants' position that Article 18(b) would not, and could not, be invoked to address deficiencies in SWP's minimum project yield. (See *Planning and Conservation League, supra*, 83 Cal.App.4th at pp. 913-15.)

¹⁰ The EIR concluded that if Article 18(b) were invoked, it would not significantly change the amount of water available to the SWP in any particular year. The reason for this is that the amount of water available to the SWP generally is not controlled by the Monterey Amendment, but instead by the capacity of DWR's facilities, the hydrologic availability of water, and regulatory/environmental standards. These limitations exist independently of the Project. (See discussion, *infra*.)

¹¹ DWR concedes that the Project includes one pre-existing out-of-area storage event in the baseline – a request by Metropolitan Water District to store up to 350,000 AF in the Semitropic groundwater facility – but this was properly included in the baseline because it was approved by DWR prior to the Monterey Amendment.

¹² Contrary to Petitioners' argument, only the year 2020 baseline assumed full Table A demands. (AR 1:250, 254-55; 26:12570-74.)

An EIR is required to include an in-depth discussion of those alternatives identified as at least potentially feasible. (*Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1350-1351; *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 569.) On the other hand, an EIR is not required to consider alternatives which are infeasible. (*Ibid.*) Thus, the lead agency must make an initial determination as to which alternatives are potentially feasible and merit in-depth consideration, and which do not. (*Citizens of Goleta Valley, supra*, at p.569.)

The EIR should briefly describe the rationale for selecting the potentially feasible alternatives considered in-depth in the EIR. (14 C.C.R. § 15126.6(c).) The EIR also should identify the alternatives that were rejected during the scoping process, and briefly explain the reasons underlying the agency's determination. (*Ibid.*) Evidence of infeasibility need not be found within the EIR itself. However, a finding of infeasibility must be supported by substantial evidence in the record. (*Citizens of Goleta Valley, supra*, at p.569.)

An EIR need not consider every conceivable alternative to a project. (*Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 491; *Village Laguna of Laguna Beach, Inc. v. Bd. of Supervisors* (1982) 134 Cal.App.3d 1022, 1029.) Rather, it must consider a reasonable range of potentially feasible alternatives sufficient to foster informed decisionmaking and public participation.

Petitioners argue that the EIR's analysis of project alternatives is deficient because it fails to include a reasonable range of feasible alternatives and because it fails to evaluate a true "no project" alternative.

The court finds that the range of alternatives analyzed in the EIR was reasonable under the circumstances.

The purpose of an EIR's discussion of alternatives is to identify ways to reduce or avoid a project's significant environmental effects. Thus, potential alternatives are reviewed to determine whether they (i) can substantially reduce significant environmental impacts, (ii) can attain all or most of the basic project objectives, (iii) are potentially feasible,¹³ and (iv) are

¹³ The Legislature has defined "feasible" for purposes of CEQA to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Cal. Pub. Res. Code § 21061.1; see also Cal. Code Regs., tit. 14, § 15364.) Among the factors that may be taken into account when assessing feasibility of alternatives are site suitability, economic viability, availability of infrastructure, general plan consistency, other plans or

reasonable and realistic. An EIR need not discuss alternatives that are unrealistic, infeasible, incapable of reducing the project's environmental impacts, or incompatible with the fundamental project objectives.

In this case, the nature of the Project – representing a negotiated compromise between DWR and urban and agricultural contractors – necessarily limits the objectives of the Project. The overall objective of the Project is to resolve the underlying issues that led to the Monterey Amendment and implement the Settlement Agreement. (AR 23:11158.)

The specific objectives of the Monterey Amendment are to resolve conflicts and disputes among SWP contractors regarding water allocations and financial responsibilities for SWP operations; restructure and clarify procedures for SWP water allocation and delivery during times of shortage and surplus; reduce financial pressures on agricultural contractors in times of drought and supply reductions; adjust the financial rate structure of the SWP to more closely match revenue needs; facilitate water management practices and water transfers that improve reliability and flexibility of SWP water supplies in conjunction with local supplies; and resolve legal and institutional issues related to storage of SWP water in Kern County groundwater basins and other areas. (AR 23:11159.) These objectives correspond to five elements of the Monterey Amendment, which are: changes in the procedures for allocation of Table A water and surplus water among the SWP contractors; approval of the permanent transfer of 130,000 AF and retirement of 45,000 AF of Table A amounts; transfer of the Kern Water Bank property; water supply management practices; and restructured rates. (*Ibid.*)

Because the Project represents a negotiated compromise, the Project's objectives are interdependent. Failing to achieve any of the objectives is likely to upset the negotiated balance of interests reflected in the compromise. In such cases, the California Supreme Court has recognized that the interdependent nature of a project's objectives may constrain the range of alternatives that can feasibly meet those objectives. (See *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1166-67; see also *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 199 [upholding EIR with detailed analysis of only project and no project alternatives]; *Marin Mun. Water Dist. V. KG Land Cal. Corp.* (1991) 235 Cal.App.3d 1652, 1665 [upholding EIR that considered one project alternative].) Such is the case here. DWR appropriately screened out the various alternatives that would not meet most, if any, of the Project's objectives, including those proposed by the PCL plaintiffs during the EIR Committee process. (See AR 1:222-23; 2:571-79, 774; 24:11834-38; 183:92614.)

regulatory limitations, jurisdictional boundaries, and whether the proponent reasonably can acquire, control, or otherwise have access to the alternative site. (Cal. Code Regs., tit. 14, § 15126.6(f)(1).)

Petitioners criticize the EIR for only considering one project alternative, but Petitioners fail to identify a different alternative that meets most of the Project's objectives and also lessens the Project's significant impacts.¹⁴ (See *Native Plant, supra*, 177 Cal.App.4th at p.987; see also *Save San Francisco Bay Assn. v. San Francisco Bay Conservation etc. Com.* (1992) 10 Cal.App.4th 908, 922.)

Petitioners also complain that the Project's objectives were too narrowly defined, and should have been expanded to include "environmental improvement" in the Delta. However, DWR correctly determined that CEQA did not require the Project's EIR to address these broader environmental goals. An EIR need not consider alternatives that would change the basic nature of the project. (See *Marin Mun. Water Dist., supra*, 235 Cal.App.3d at pp.1664-65.)

The scope of alternatives reviewed must be considered in light of the nature of the project, the project's impacts, and other material facts, and designed to foster informed decisionmaking and public participation. Here, the court is persuaded that the range of alternatives considered in the EIR, including four "no project" alternatives and one project alternative, was sufficient to permit a reasonable choice of alternatives for purposes of CEQA. The EIR presented sufficient information to explain the choice of alternatives and the reasons for excluding other proposed alternatives. There is sufficient evidence in the administrative record as a whole to support DWR's decisions concerning which alternatives to discuss in detail and which to omit.

In addition to challenging the range of alternatives considered in the EIR, Petitioners complain that the EIR fails to include a true "no project" alternative that evaluates the environmental impacts of implementing the *un-amended* water supply contracts.

Instead of having one "no project" alternative, the EIR contains four. Each alternative includes slightly different assumptions, ostensibly because there is disagreement over what a return to the pre-Monterey Amendment contracts would mean. Petitioners complain that the EIR's use of several variations, each relying on different assumptions, is confusing and ultimately fails to accurately identify the effects of not approving the proposed Project because none of the alternatives invoke or enforce *all* of the contract provisions in place prior to the implementation

¹⁴ At the same time, Petitioners also criticize DWR for including the one project alternative – Alternative 5 – arguing that it should not have been included because it was not potentially feasible. Petitioners may be correct that Alternative 5 was not potentially feasible. DWR itself acknowledged doubt as to whether Alternative 5 met most of the Project's objectives. Nevertheless, DWR included it in the EIR, presumably so that the EIR would include discussion of at least one project alternative. (AR 2:558-601.) The EIR ultimately rejects Alternative 5 because removing the water management practices would upset the balance of the Monterey Agreement and, as a result, it would not meet several key project objectives.

of the Monterey Amendment. Thus, Petitioners conclude, none of the variations of the “no project” alternatives present a clear picture of what would occur in the absence of the Project.

DWR defends its choice to analyze four “no project” alternatives. DWR notes that there is good faith disagreement about what it would mean to return to the 1995 pre-Monterey contracts – such as, for example, whether DWR could or should invoke Article 18(b) or Article 21(g)(1), and whether the transfer of the Kern Water Bank lands and Table A transfers could be undone. (See AR 197:9993-95.) Rather than pick and choose among the possible no project scenarios, DWR decided to analyze four different no project scenarios.

To comply with the Court of Appeal’s opinion in the PCL litigation, at least two variants of the “no project” alternative evaluated the environmental impacts of implementing Article 18(b): Court-Ordered No Project Alternatives 3 and 4. The EIR also analyzed a variant in which Article 18(b) would not be invoked: No Project Alternative 1. In addition, the EIR analyzed a “no project” alternative in which all of the actions completed under the Monterey Amendment from 1996 through 2003 would remain in place (No Project Alternative 2). The SWP contractors believe this is the most realistic “no project” alternative because it reflects the existing conditions at the time the notice of preparation was published and does not envision “unwinding” actions that the SWP contractors contend cannot be undone.

The court finds the EIR’s basic approach to the “no project” analysis to be reasonable under the circumstances. (See *Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 247 [EIR analyzed two variants of the no project alternative]; see also AR 197:99993-95.)

Petitioners fault Court-Ordered No Project Alternatives 3 and 4 because they do not analyze the implementation of Article 18(b) *in combination with* Article 21. This is not strictly true. Both alternatives analyzed the implementation of Articles 18 and 21 in tandem. DWR simply did not interpret or apply Article 21 in the same manner as Petitioners.

The EIR concluded that if Article 18(b) were invoked, it would not significantly change the amount of water available to the SWP in any particular year. The EIR stated that the amount of water available to the SWP is not generally controlled by the Monterey Amendment, but instead by the capacity of DWR’s facilities, the hydrologic availability of water, and regulatory/environmental standards. (AR 1:221; 23:11288.) These limitations exist independently of the Project.

The EIR concluded that if DWR invoked Article 18(b) to lower the sum of Table A amounts, DWR would use Article 21 to continue to try and deliver as much of the water requested by contractors as possible. (AR 2:566.) Invoking Article 18(b) would not reduce SWP deliveries because any decrease in Table A allocations would be counterbalanced by a commensurate increase in Article 21 allocations. (AR 2:521, 530-31, 566, 633-35; 23:11143.)

Petitioners argue that this interpretation relies on two faulty assumptions: that reductions to maximum Table A amounts do not affect demand, and that Article 21 water could be used to make up the difference. Petitioners argue that invoking Article 18(b) would reduce the “inflated demand” for so-called “paper water,” and that Article 21(g)(1) would require DWR to refuse delivery of “surplus” water in excess of the contractors’ (reduced) Table A amounts.

As described above, Petitioners forfeited their “paper water” arguments by failing to adequately summarize the extensive evidence in the record pertaining to that issue. (See AR 2:502-44; 24:11742-55; 167:84704-79.) In any event, substantial evidence supports DWR’s determination that invoking Article 18(b) would not reduce demand for water.

The EIR’s treatment of Article 21(g)(1) presents a more complicated issue. The parties spend a great deal of effort disputing whether DWR’s interpretation of Article 21(g)(1) is, or is not, correct and supported by substantial evidence.¹⁵ However, as the Court of Appeal held in the PCL litigation, this is not the proper question. It is not this court’s task to resolve such contractual disputes. (*Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 913.) If Article 21(g)(1) can be plausibly construed in a manner that would result in significant environmental consequences, its elimination should be considered and discussed as a “no project” alternative in the EIR. (*ibid.* [discussing the same principle for Article 18(b)].)

Without deciding whether Petitioners’ interpretation of Article 21(g)(1) is correct, the court is persuaded that their interpretation is a “plausible” construction that should have been included in the variants of the “no project” alternative described in the EIR.¹⁶

¹⁵ The EIR states that elimination of Article 21(g)(1) had little or no effect on water demand because that provision concerns “scheduled surplus water.” Article 21(g)(1) has no application to “unscheduled surplus” water because such water is, by its nature, not sustainable or reliable. The EIR states that scheduled surplus water had not been available for about nine years prior to the Monterey Amendment. The EIR also states that even if Article 21(g)(1) had not been eliminated, DWR would not prevent water agencies from storing surplus water. Further, even if Article 21(g)(1) was interpreted to apply to interruptible surplus supply, the EIR notes that Article 21(g)(1) would not prohibit delivery of surplus water to serve existing (already-developed) economies. (See AR 2:504-06, 509-12, 514-20.)

¹⁶ The court is cognizant that *the parties to the contracts* agree on the proper interpretation of Article 21(g)(1), and that it is a third-party that is raising the dispute. However, this was also true in the PCL litigation.

The invocation of Article 18(b) without Article 21 deliveries was not considered in detail in the Draft EIR because the Department concluded that it would not meet any of the objectives of the Monterey Amendment and because it would be in conflict with the basic terms of the long-term water supply contracts. (AR 2:521.) As the Court of Appeal explained in the PCL case, it is irrelevant whether a “no project” alternative meets project objectives, and an EIR is not the place to resolve complex contractual disputes. Accordingly, the court is persuaded that the EIR should have considered the invocation of Article 18(b) without Article 21 deliveries as a “no project” alternative, even if DWR was unlikely to have invoked Articles 18(b) and 21 in this manner.

However, a failure to comply with CEQA's information disclosure requirements is not per se reversible. When reviewing the adequacy of an EIR, the courts do not look for technical perfection, but for "adequacy, completeness, and a good faith effort at full disclosure." (Cal. Code of Regs., tit. 14, § 15151; *Sequoyah Hills Homeowners Ass'n v. City of Oakland* (1993) 23 Cal.App.4th 704, 712.) A prejudicial abuse of discretion occurs only if the failure to include relevant information precludes informed decision-making and informed public participation. (*County of Amador, supra*, 76 Cal.App.4th at p.946.)

Here, the court finds that the omission did not preclude informed decision-making and informed public participation because, in response to comments, DWR developed an analysis of the effects of operating the SWP with Article 18(b) invoked and with limited or no Article 21 water delivered to SWP contractors. (See AR 2:520-25.) This analysis provides additional information to the public and to decision-makers on the effects of not delivering water to SWP contractors that would otherwise be available under Article 21.

The analysis shows that under such a scenario, average annual SWP contractor deliveries would be reduced by about 1.2 MAF, or about 40%, with potentially significant (adverse and beneficial) impacts. The EIR's analysis of this scenario is not perfect, but it is sufficient to make an informed decision on the Project, particularly where, as here, all of the parties to the SWP contracts believe such interpretation is not reasonable or enforceable.

7. Impacts Analysis

Petitioners further allege that DWR's EIR fails to sufficiently analyze the Project's impacts on the Delta, the Project's impacts on climate change, the Project's growth-inducing impacts, and the impacts of the Kern Water Bank.

a. Impacts on the Delta

The EIR concludes that the Project could have a potentially significant impact on Delta aquatic life, but that such impacts will be reduced to a less-than-significant level by complying with Mitigation Measure 7.3-5, which committed SWP operations to comply with existing and future regulatory permits and processes. Petitioners argue that this mitigation measure violates CEQA's prohibition against deferred mitigation and is not adequate mitigation for the potentially significant impacts to the Delta.

The court disagrees that Mitigation Measure 7.3-5 improperly defers mitigation for the potentially significant impacts to the Delta.

Deferring the formulation of the details of mitigation is authorized where another regulatory agency will impose mitigation requirements independent of the CEQA process, so long as the agency commits itself to mitigation that will satisfy articulated performance standards. (*North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 647-48.) Courts have consistently held that "[a] condition requiring compliance with environmental regulations is a common and reasonable mitigating measure." (*Id.* at p.647; *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 236; *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 906.)

This is not a case where the agency relied on compliance with the law to avoid compliance with CEQA. The EIR conducted an impact analysis and determined that the proposed Project could cause significant impacts to the Delta. To mitigate this impact, DWR identified regulatory measures that could and would be implemented to protect the Delta, and committed to operate the SWP in compliance with these requirements. The regulatory requirements include applicable SWRCB Orders, Corps permits, Biological Opinions, take permits, habitat protection plans, and other regulatory constraints that are designed to minimize, reduce, and/or avoid potential effects on the Delta aquatic environment by, among other things, limiting the export of water from the Delta. DWR's exports from the Delta are subordinate to these laws. DWR is legally obligated to operate the SWP facilities in compliance with the regulatory requirements. (AR 1:7-11, 192, 350-52, 362-68, 377-78; 2:818-19; 22:10937-40.)

Under these circumstances, it was proper for DWR to rely on DWR's commitment to comply with applicable environmental laws to mitigate the Project's potentially significant environmental impacts. It was not necessary (or feasible) for DWR to propose additional mitigation measures on its own, separate from the existing regulatory scheme.

b. Impacts on Climate Change

Petitioners claim that the EIR's analysis of climate change impacts is inadequate. However, Petitioners forfeited this argument by mischaracterizing the EIR's climate change analysis and failing to adequately summarize the evidence in the record addressing the Project's GHG emissions and climate change. (AR 2:602-21; 14:6634-38; 24:11866-87; 40:19762-20100.) In any event, Petitioners failed to meet their burden of showing that DWR's climate change analysis is inadequate.

c. Growth-Inducing Impacts

Petitioners contend that the EIR fails to adequately analyze the Project's growth-inducing impacts. Petitioners assert two complaints: that the EIR's analysis of growth-inducing impacts is not sufficiently detailed, and that it focuses only on population growth and ignores other forms of growth, particularly the potential expansion of year-round agricultural crops.

The court does not agree that DWR was required to conduct additional, site-specific analyses of the Project's potential growth-inducing impacts. (See *Napa Citizens, supra*, 91 Cal.App.4th at p.369 [CEQA does not require more than a general analysis of projected growth].) DWR appropriately concluded that additional, site-specific analysis of local developments within the SWP service area was not feasible.

The court does not agree that other (project-specific) EIRs in the record provided DWR with sufficient information to estimate site-specific impacts with a great deal of accuracy. Although the EIRs discuss the Monterey Amendment in relation to various "projects," the EIRs do not describe the amount or type of growth that is specifically attributable to the Monterey Amendment.¹⁷ (See, e.g., AR 32:15944; 34:17178, 17198-202, 17258, 17263-46, 17318-46; 35:17480-84; 36:17496.) The EIRs do not specify how and for what purpose water made available under the Monterey Amendment has been (or will be) put to use.

A project opponent or reviewing court can always imagine some additional study or analysis that might provide helpful information. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 415.) The fact that additional studies might be helpful does not mean they were required. (*Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1396.)

¹⁷ Even if they did, CEQA does not require an agency to re-perform an analysis that was considered and approved in a prior EIR. (*Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 228.)

The EIR concluded that the Project has the potential to cause growth. It identified contractors that could receive additional water, calculated the amount of additional water that could be made available, and estimated the number of additional residents that this new water could support. (AR 24:11726, 11731, 11733, 11735-39, 11812-13; see also 2:455-56, 459-65.) The EIR notes that increases in population can result in new economic development that causes adverse impacts to the environment, which are discussed in the EIR. (See AR 24:11812-13.) The EIR concludes that some of the impacts are potentially significant and cannot be avoided. (*Ibid.*)

The circumstances here support the “generalized” level of detail in DWR’s analysis of the Project’s growth-inducing impacts. (See AR 24:11724-41; 2:454-501; 218:111972-96.)

The court also rejects the argument that the EIR failed to adequately discuss the possibility that the Project might cause agricultural land to be converted from annual to permanent crops. While the court agrees that the discussion of this potential impact is not set forth in a discrete section in the EIR, it is contained within the body of the EIR. (See, e.g., AR 23:11033, 11045, 11059, 11061, 11065, 11070, 11079, 11085; 1:137; 154, 418; 2:640-41, 759, 811; see also 23:11214.) The EIR states that while it is possible that additional land could be converted to permanent crops as a result of the Project, no clear trend can be attributed to the Project and the trend of replacing irrigated annual crops with permanent crops is expected to continue with or without the Project. The EIR also concludes that while replacing annual crops with permanent crops might reduce water contractors’ management flexibility during drought, the environmental impact was considered less-than-significant. Petitioners have failed to show that these findings are not supported by substantial evidence.

The court finds that the EIR contained a reasonable analysis of the Project’s growth-inducing impacts.

c. Impacts of the Kern Water Bank

Petitioners challenge the EIR for failing to adequately analyze the impacts of the transfer, development, and operation of the Kern Water Bank. Petitioners contend that the EIR is flawed because it (1) unreasonably assumed that the Water Bank would be locally controlled regardless of whether it was owned by the State, concealing the differences between state and local control; (2) improperly treated the transfer of the Water Bank as a *fait accompli*; and (3) failed to adequately analyze Water Bank operations.

The court rejects Petitioners' argument regarding the differences between state and local control. First, DWR's assumption of local control is supported by substantial evidence. In applying the substantial evidence standard, the reviewing court must resolve all "reasonable doubts" and any conflicts in the evidence in favor of the administrative findings and decision. A court may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. The power of the court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding. Here, there is substantial evidence in the record to support DWR's assumption of local control. (See e.g., AR 2:740, 746; 24:11865; 26:12493.)

Second, even if DWR's assumption of local control was not based on substantial evidence, Petitioners have failed to show how DWR's assumption of local control concealed the Project's environmental impacts. Petitioners argue strenuously that having the Kern Water Bank under local, rather than state, control will have significant adverse environmental impacts, but they identify none.

Petitioners suggest, without any evidentiary support, that a state-controlled water bank would have statewide "public trust" responsibilities, implying that a local-controlled water bank does not. This reflects a misunderstanding of the public trust doctrine, which holds that the state, as sovereign, retains continuing supervisory control over its navigable waters and the lands beneath those waters, preventing any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust." (*Nat'l Audubon Soc'y v. Superior Court* (1983) 33 Cal.3d 419, 445.) To the extent the public trust doctrine applies, it would not seem to make any difference whether the lands are controlled by the state or by a local public agency. Petitioners have failed to show otherwise. Petitioners have identified no other reason why the absence of "state control" will have significant environmental impacts.¹⁸

The EIR concluded that the change in control will not cause any significant environmental impacts, as DWR would have used the Water Bank for the same fundamental purpose: storing surplus water during years of abundant supply for extraction and use in dry years. This conclusion is supported by substantial evidence. (See AR 2:738-86; 22:10940-43, 10983-85.) Thus, for all these reasons, the court rejects the challenge to the assumption of local control.

The court likewise rejects the argument that the EIR improperly treated the Kern Water Bank Land transfer as a *fait accompli*. As previously discussed, the court agrees with DWR that for

¹⁸ Petitioners also make several claims related to an alleged "laundering" effect of Article 21 water that (ostensibly) would be mitigated or avoided with a state-operated water bank. However, this argument is premised on the "statewide trust" obligation. Moreover, the "laundering" argument is contradicted by the record.

purposes of the EIR the transfer was a *fait accompli*. KWBA did not, and does not, require further DWR approval to conduct its water banking operations. But whether it does or does not, the EIR analyzed the transfer in control in the same manner that it analyzed all of the other Project components.

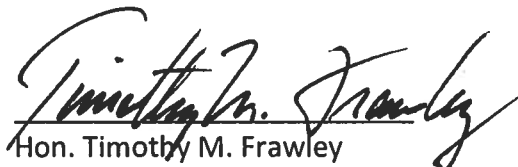
Finally, Petitioners claim that the EIR is deficient because it fails to sufficiently describe or analyze the Water Bank's future operations, limiting its analysis to the historical operation period from 1995 to 2004 – an unusually “wet” period, which is not necessarily representative of future activities and impacts. Petitioners contend that it was not reasonable for DWR to use this limited time period as evidence that impacts will never occur in the future. As discussed more fully in the court's ruling in the *Rosedale* case, the court agrees. The EIR's discussion of the Kern Water Bank's future impacts is insufficient to comply with CEQA because it is limited to a brief, generalized discussion of past impacts, and an unstated and unsupported assumption that the project will continue to have the same impacts in the future. There is essentially no analysis of potential future operational impacts.

Disposition

The court concludes that DWR violated CEQA in the preparation of the EIR in that the EIR fails to adequately describe, analyze, and (as appropriate) mitigate the potential impacts of the Project associated with the anticipated use and operation of the Kern Water Bank. The failure to include relevant information regarding Kern Water Bank operations precluded informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process. Accordingly, the court shall grant the petition on this basis. In all other respects, the petition is denied.

Petitioners are directed to notice an additional hearing to discuss an appropriate remedy for the CEQA violation.

Dated: March 5, 2014


Hon. Timothy M. Frawley
California Superior Court Judge
County of Sacramento

Central Delta Water Agency et al. v. Department of Water Resources et al.
 Sacramento Superior Court No. 34-2010-80000561
Service List

Plaintiffs / Petitioners:

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