SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

CENTRAL DELTA WATER AGENCY, et al. **v.** **CALIFORNIA DEPARTMENT OF WATER RESOURCES, et al.**	Case Numbers: 34-2010-80000561 34-2010-80000703 (Cases Consolidated for Trial)
ALAMEDA COUNTY FLOOD CONTROL & WATER CONSERVATION DISTRICT ZONE 7, et al.	**JOINT RULING ON SUBMITTED MATTERS**
ROSEDALE-RIO BRAVO WATER STORAGE DISTRICT, et al. **v.** **CALIFORNIA DEPARTMENT OF WATER RESOURCES**	Date: September 5, 2014 Time: 9:00 a.m. Dept.: 29 Judge: Timothy M. Frawley
KERN WATER BANK AUTHORITY, et al.	

On September 4, 2014, the court issued a joint tentative ruling in the above-entitled proceedings. On September 5, 2014, at 9:00 a.m., the matters came on for hearing with counsel present as indicated on the record. The matters were argued and submitted. Having taken the matters under submission, the court now rules as follows:

Introduction

This is a joint ruling in two related cases: *Central Delta Water Agency, et al. v. California Department of Water Resources, et al.* ("*Central Delta*") and *Rosedale-Rio Bravo Water Storage District, et al. v. California Department of Water Resources, et al.* ("*Rosedale*"). Although the cases differ in scope, both cases involve CEQA challenges to the Environmental Impact Report ("EIR") for 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. The court consolidated the cases for purposes of trial.

The court held a hearing on the merits of the CEQA challenges in January 2014. In March 2014, the court issued its Rulings on Submitted Matters. The court concluded that a portion of the Monterey Plus EIR was defective in that it fails to adequately describe, analyze, and (as appropriate) mitigate the potential impacts associated with the anticipated use and operation of the Kern Water Bank, particularly as to potential groundwater and water quality impacts. The court granted the petitions on this basis. In all other respects, the court denied the petitions. The court instructed the petitioners to notice an additional hearing to discuss an appropriate remedy for the CEQA violation. This hearing followed.

All of the parties and this court agree that DWR cannot be subject to inconsistent commands and that the writ should be the same in both cases. The question is what it should require.

In advance of this hearing, the parties to the *Rosedale* case agreed on the form of a proposed writ to issue in that action. The essential terms of the proposed writ are as follows:

(1) The court will find that the transfer, operation, and use of the Kern Water Bank is severable from the remainder of the Project; that severance will not prejudice complete and full compliance with CEQA; and that the remainder of the Project is in compliance with CEQA.

(2) Respondent DWR will decertify only the portion of the EIR concerning the use and operation of the Kern Water Bank.

(3) DWR will prepare a supplemental, geographically-limited EIR focused on the potential impacts (particularly as to groundwater and water quality) of the use and operation of the Kern Water Bank in the immediate vicinity of the Kern Water Bank lands.

(4) All project approvals will remain in place and DWR will continue to operate the State Water Project pursuant to the Monterey Amendment plus the additional terms and conditions of the 2003 Settlement Agreement (i.e., the Monterey Plus Project).

(5) While DWR prepares the supplemental EIR, the Kern Water Bank Authority will operate the Kern Water Bank pursuant to restrictions set forth in an interim Operations Plan negotiated and agreed to by the *Rosedale* Petitioners and the Kern Water Bank Authority.

(6) Within 30 days of issuance of the writ, DWR will file an initial return setting its anticipated schedule for complying with the writ.

(7) The court shall retain jurisdiction to enforce compliance with the interim Operations Plan and to assess DWR's compliance with the writ upon DWR filing a final return to the writ.

The *Central Delta* petitioners object to the proposed writ on several grounds.

First, they object to partial decertification of the EIR. They contend that CEQA does not allow partial decertification of an EIR. According to the *Central Delta* petitioners, the only appropriate remedy when an EIR is found to violate CEQA is complete decertification of the EIR. Thus, they argue, DWR must prepare a new EIR.

Second, they object to the proposal to allow prior project approvals to remain in place. They contend that all prior project approvals relating to the Kern Water Bank must be voided, whether made in 1995, when DWR initially approved the transfer; in 2003, when DWR approved the Settlement Agreement; or in 2010, when DWR approved the Monterey Plus EIR.

The *Central Delta* petitioners are not opposed to severing the Kern Water Bank activities from the remainder of the Project. However, the *Central Delta* petitioners argue that since the use and operation of the Kern Water Bank was an intended consequence of its transfer, the use and operation of the Kern Water Bank cannot be severed from its transfer. Thus, the new environmental review must include both the use and operation of the Kern Water Bank and its transfer.

Third, the *Central Delta* petitioners object to the proposal to prepare a limited, supplemental EIR focused only on the potential impacts of the use and operation of the

Kern Water Bank in the immediate vicinity of the Kern Water Bank lands. They argue that the environmental review must include all impacts caused by the transfer, use, and operation of the Kern Water Bank, wherever they occur; the impacts analysis should not be geographically limited to the immediate vicinity of the Kern Water Bank lands.

Fourth, the *Central Delta* petitioners object to the continued use and operation of the Kern Water Bank pending completion of a new EIR. They contend that, to avoid prejudice to the consideration and/or implementation of mitigation measures and alternatives to the project, the court should enjoin all use and operation of the Kern Water Bank until DWR certifies a new EIR that complies with CEQA.

The *Central Delta* petitioners also argue that DWR should be required to file a return within 60 days after issuance of the writ showing that it has complied with the commands to decertify the EIR, void project approvals related to the Kern Water Bank, and suspend the use and operation of the Kern Water Bank as a water banking facility.

Finally, the *Central Delta* petitioners request a finding from the court that they are "prevailing parties" for purposes of an award of attorney fees under Code of Civil Procedure § 1021.5.

Discussion

The court here finds itself caught upon the fulcrum of a pointed dilemma, nearly twenty years in the making. The dilemma exists because DWR approved and completed transfer of the Kern Water Bank lands to KWBA in 1995-96, but did not complete its environmental review of the transfer until approximately fifteen years later, in 2010.

On one hand, as the *Central Delta* petitioners correctly point out, the fundamental purpose of an EIR is to provide public agencies and the public with information about the environmental consequences of project decisions before they are made. (*Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App.4th 238, 242.) When environmental review occurs after approval of a project, it is likely to become nothing more than a *post hoc* rationalization to support action already taken. (*POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 715.) Here, because the EIR was found to violate CEQA, the *Central Delta* petitioners zealously maintain that the only appropriate remedy is to decertify the EIR, void all project approvals, and order DWR to prepare a new EIR that complies with CEQA prior to deciding whether to approve the project. To do anything less, they argue, is to repeat the mistakes of the past.

On the other hand, as the *Rosedale* parties correctly point out, this is not a typical CEQA case. This case presents a highly unusual situation in which the parties agreed, and the court approved, a "remedial" EIR to analyze the impacts of existing contractual amendments that previously were approved, executed, implemented, and validated.

The *Central Delta* petitioners may object that the court erred in approving the Settlement Agreement and should have invalidated the project approvals as part of the PCL litigation. Perhaps they are correct. But neither the Central Delta petitioners, nor the PCL plaintiffs, nor any other person raised any objections to the court when the Settlement Agreement was presented, when the prior validation action was dismissed, or when the PCL writ was discharged.

The parties to the PCL litigation established a set of procedures to govern DWR's preparation of the EIR at issue in this case. The procedures included the creation of an "EIR Committee" to provide advice and recommendations to DWR, and a mediation process to settle disputes regarding compliance with CEQA. The PCL plaintiffs were members of the EIR Committee during the seven years it took DWR to prepare the EIR. As members of the EIR Committee, the PCL plaintiffs were involved in the preparation of the new EIR, yet they did not object when DWR filed its return and proposal to discharge the writ.[1] Rather, it was an entirely different group of petitioners, the *Central Delta* petitioners, who stepped in to challenge the new EIR.

Having arrived late to the party, the *Central Delta* petitioners seek to gain a "fresh start" by unwinding all that came before. The court, however, cannot ignore the history of this project merely because it disapproves with how events transpired.

The court concluded in the earlier phase of these proceedings that plaintiffs' challenges to the validity of the Kern Fan Element Transfer Agreement are barred. The agreement was fully approved and executed in 1995-96 and validated as part of the PCL litigation (and the Annual Validating Acts).[2] The plaintiffs unreasonably delayed challenging the validity of that agreement until many years later, after the real parties in interest made significant investments and expenditures, which would be extremely difficult to unwind.

Because of this unique history, the court is now mired in a zugzwang, where no move is pleasant, but still one is required. The court must choose between the Scylla of reversing a validated transfer of title, and the Charybdis of analyzing the environmental

[1] They consented to discharge of the PCL writ, albeit with a statement suggesting reservations about the EIR.

[2] The court stands by its previous rulings. The court takes the facts as they are. It cannot change the facts to make them convenient or make them conform to a preconceived notion of what should have happened.

impacts of a transfer that already was approved and implemented. Against this background, the court reaches the following conclusions.

1. The use and operation of the Kern Water Bank is severable from the remainder of the Project.

Public Resources Code section 21168.9 vests extensive equitable discretion in the courts to determine the appropriate remedy for a CEQA violation. Section 21168.9(a) states that after a CEQA violation is found, the court shall enter an order that includes "one or more" of three options: void the finding or decision, in whole or in part, under subdivision (a)(1); suspend any or all project activity under subdivision (a)(2); and/or mandate that the agency take specific action to bring the finding or determination into compliance with CEQA under subdivision (a)(3).[3] Under section 21168.9, the court need not order all three forms of relief. In deciding which mandates to include in its order, a trial court relies on equitable principles. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 287.)

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[3] Section 21168.9 states, in relevant part:

> (a) If a court finds, as a result of a trial, hearing, or remand from an appellate court, that any determination, finding, or decision of a public agency has been made without compliance with this division, the court shall enter an order that includes one or more of the following:
>
> > (1) A mandate that the determination, finding, or decision be voided by the public agency, in whole or in part.
> >
> > (2) If the court finds that a specific project activity or activities will prejudice the consideration or implementation of particular mitigation measures or alternatives to the project, a mandate that the public agency and any real parties in interest suspend any or all specific project activity or activities, pursuant to the determination, finding, or decision, that could result in an adverse change or alteration to the physical environment, until the public agency has taken any actions that may be necessary to bring the determination, finding, or decision into compliance with this division.
> >
> > (3) A mandate that the public agency take specific action as may be necessary to bring the determination, finding, or decision into compliance with this division.
>
> (b) Any order pursuant to subdivision (a) shall include only those mandates which are necessary to achieve compliance with this division and only those specific project activities in noncompliance with this division. The order shall be made by the issuance of a peremptory writ of mandate specifying what action by the public agency is necessary to comply with this division. However, the order shall be limited to that portion of a determination, finding, or decision or the specific project activity or activities found to be in noncompliance only if a court finds that (1) the portion or specific project activity or activities are severable, (2) severance will not prejudice complete and full compliance with this division, and (3) the court has not found the remainder of the project to be in noncompliance with this division. The trial court shall retain jurisdiction over the public agency's proceedings by way of a return to the peremptory writ until the court has determined that the public agency has complied with this division. (Pub. Res. Code § 21168.9.)

In *Preserve Wild Santee*, the plaintiffs argued that whenever a trial court finds an EIR inadequate, CEQA demands the trial court decertify the EIR and vacate all related project approvals. The Fourth Appellate District Court of Appeal flatly rejected this argument: "In our view, a reasonable, commonsense reading of section 21168.9 plainly forecloses plaintiffs' assertion that a trial court must mandate that a public agency decertify the EIR and void all related project approvals in every instance where the court finds an EIR violates CEQA." (*Id.* at p.288.) Other courts have reached similar conclusions. (See *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960-961 [court not required to set aside project approval for failure to provide notice to responsible agency]; *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1604-1605 [court not required to set aside heightened treatment standards pending preparation and certification of EIR]; *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1455 [County allowed to continue existing use of temporary detention facility pending certification of proper EIR]; *Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 423-424 [court allowed existing operations at new laboratory site to continue while proper EIR was prepared].)

Under section 21168.9, subdivision (b), the court's order shall be "limited to that portion of a determination, finding, or decision or the specific project activity or activities found to be in noncompliance" with CEQA, but only if the court finds that "(1) the portion or specific project activity or activities are severable, (2) severance will not prejudice complete and full compliance with this division, and (3) the court has not found the remainder of the project to be in noncompliance with this division." (Pub. Res. Code § 21168.9(b).)

In this case, all the parties agree that the Kern Water Bank activities are "severable" from the remainder of the Monterey Plus Project. The court agrees. The Kern Water Bank activities are severable. Severance will not prejudice complete and full compliance with CEQA, and the court has found the remainder of the Monterey Plus Project to be in compliance with CEQA.

The *Central Delta* petitioners argue that the use and operation of the Kern Water Bank cannot be severed from its transfer. Whether it can or cannot, the court agrees that DWR's environmental review should include the transfer, development, and operation of the Kern Water Bank. The terms of the Settlement Agreement require the EIR to

include such analysis. DWR is obligated to comply with the terms of the Settlement Agreement.[4]

2. The prior project approvals should remain in place.

While the court agrees with the petitioners that voiding approval of a project is a typical remedy for a CEQA violation, the court does not agree that it is required in all cases. (*Preserve Wild Santee, supra,* 210 Cal.App.4th at p.288; *County Sanitation Dist. No. 2, supra*, 127 Cal.App.4th at p.1605; *Golden Gate Land Holdings LLC, supra,* 215 Cal.App.4th at pp.371-80.) Section 21168.9 expressly authorizes courts to fashion a remedy that permits project approvals to remain in place while an agency seeks to remedy its CEQA violations. (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1181 [quoting *San Bernardino Valley Audobon Society v. Metropolitan Water Dist.* (2001) 89 Cal.App.4th 1097, 1104-05].)

In this case, the court agrees with the *Rosedale* parties that DWR's Project approvals should be allowed to stand during the period while DWR seeks to correct its CEQA violations.

As this court has recognized, the Monterey Plus EIR was prepared against a complicated and unique procedural history. The history includes: the execution in 1995 of a contract transferring the Kern Water Bank lands; the filing in 1995 of a reverse validation action challenging the validity of the transfer agreement; a 1996 trial court judgment dismissing the reverse validation action; the recording of a deed in 1996 transferring title of the Kern Water Bank lands; an appellate court decision in 2000 reversing the dismissal of the reverse validation action; a 2003 Settlement Agreement requiring, among other things, retention of the Kern Water Bank in local ownership; a 2003 court order approving the Settlement Agreement; a 2003 writ requiring CCWA and DWR to set aside their certifications of the initial EIR, but not requiring them to set aside project approvals; the PCL plaintiffs' voluntary dismissal of their reverse validation action; the PCL plaintiffs' consent to entry of discharge; and the court's discharge of the writ.

This court previously concluded that, as a result of this complicated history, the Monterey Amendment contracts, including the Kern Fan Element Transfer Agreement, were "validated" and are now immune from challenge. Because the State Water Project

[4] The court acknowledges that, for purposes of the EIR, the transfer of the Kern Water Bank is essentially a *fait accompli*. KWBA did not, and does not, require further DWR approval to effect the transfer of title. Nevertheless, DWR retains the discretion to seek to reverse the transfer and, in any event, the Settlement Agreement requires DWR to include the transfer in its environmental review, even if it feasibly cannot be reversed.

(SWP) 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 identified the "no project" alternative as a return to the pre-Monterey Amendment long-term water supply contracts.[5]

The *Central Delta* petitioners broadly challenged the sufficiency of DWR's EIR, including its project description, baseline, alternatives, and impact analysis. The court rejected all but one of these arguments, relating to the EIR's description, analysis and mitigation of the potential impacts associated with the use and operation of the Kern Water Bank. The court has since concluded that it is appropriate for the court to limit its remedy to the Kern Water Bank portion of the Project. As a result, the only "approvals" reasonably at issue here are the approvals to continue using and operating the Kern Water Bank.

Invalidating the Project approvals is unnecessary and would throw the entire SWP into complete disarray, smack in the middle of one of the most severe droughts on record. The circumstances of this case do not warrant that degree of judicial intervention, especially where, as here, the SWP has been operating under such approvals for years while DWR prepared the EIR.

However, while the court shall allow the Project approvals to remain in place on an interim basis pending preparation of an adequate EIR, the court's writ shall require DWR (as lead agency) and KWBA (as a responsible agency) to make a new determination regarding whether to continue the use and operation of the Kern Water Bank by KWBA, after compliance with CEQA.

3. The court shall not enjoin the use and operation of the Kern Water Bank pending compliance with CEQA.

The *Central Delta* petitioners argue that all operation and use of the Kern Water Bank must be suspended pending new environmental review. They argue that only those portions of the project found to be in compliance with CEQA may continue while the agency cures its CEQA violations. The court rejects Petitioners' argument.

Section 21168.9(a)(2) authorizes a court to issue an order suspending activity on a project if the court finds that the activity could result in an adverse change or alteration to the physical environment that would prejudice the consideration or implementation of particular mitigation measures or alternatives to the project. Although section 21168.9

[5] This is a highly unusual approach, but the court found it reasonable under the unique circumstances of this case.

grants a reviewing court the authority to suspend project activities, it does not require it to do so. (*City of Santee, supra*, 214 Cal.App.3d at p.1456; *Laurel Heights, supra*, 47 Cal.3d at p.423.) Courts rely on traditional equitable principles in deciding whether injunctive relief is appropriate. (*Laurel Heights, supra*, 47 Cal.3d at p.423; see also *San Bernardino Valley Audobon Society, supra*, 89 Cal.App.4th at p.1104.)

Courts have allowed noncomplying project activities to proceed despite deficiencies in an EIR where courts are persuaded the activities will not cause environmental harm or prejudice the agency's environmental review. (See *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1604; *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 697.)

Further, the statutes allow courts to tailor the remedy to the circumstances of each case. (*POET, LLC, supra,* 218 Cal.App.4th at p.697.) In determining a remedy, courts may consider the public interests at stake, including whether suspending project activities will result in more environmental harm than allowing them to remain in effect pending compliance with CEQA. (*Ibid.*)

Here, the court is persuaded that suspending the Kern Water Bank operations is contrary to the public interest. The point of having a water bank is primarily to provide water in times of shortage. As noted above, California currently is enmeshed in one of the most severe droughts on record. Calendar year 2013 was the driest year in recorded history for many parts of California and, to date, calendar year 2014 is no better. The State will be severely challenged to meet its water needs in the upcoming year. A growing number of communities in California could end up without any water. The Kern Water Bank is a nearly 20,000 acre underground reservoir capable of storing approximately one million acre-feet of water (or about 326 billion gallons of water). For the court to order the Kern Water Bank to suspend operations at this time, under these conditions, would be reckless and irresponsible.

In addition, the court is persuaded that shutting the Kern Water Bank down would result in more environmental harm than allowing it to remain operational. The evidence before the court shows that the continued ability to operate the Kern Water Bank, as provided in the Habitat Conservation Plan, is important to the continued conservation of endangered and threatened species in the San Joaquin Valley. In contrast, suspending its operations would potentially result in the fallowing of some 17,000 acres of land, which would, among other things, significantly increase airborne particulate matter.[6]

[6] "Dust bowl" is a term used to refer to a period of harmful dust storms brought about by severe drought in the 1930s.

The jointly proposed writ seeks to avoid potentially adverse environmental impacts by imposing additional limitations on Kern Water Bank recovery operations and by providing continued implementation of the existing Kern Environmental Permits. The court is persuaded that, with these additional measures in place, it is in the public interest to allow existing Kern Water Bank operations to continue pending the agency's compliance with CEQA.

Thus, having considered the equities, the court shall allow the existing Kern Water Bank operations to continue pending compliance with CEQA, subject to the following conditions: (1) existing Kern Water Bank operations shall be maintained, but not expanded; and (2) the Kern Water Bank shall be subject to and operated in compliance with the interim Operations Plan and the existing Kern Environmental Permits.

4. DWR's additional environmental review should not be geographically-limited to the impacts of the Kern Water Bank on neighboring lands.

The court does not agree that the scope of the additional environmental review can or should be limited to potential impacts within the boundaries of the Kern Water Bank lands. DWR must evaluate all of the potential groundwater, water quality, and other impacts of the operation of the Kern Water Bank, regardless of geographic location.

5. Although partial decertification is allowed, the court shall order the entire EIR decertified.

There is a conflict in the appellate courts as to whether CEQA allows for "partial decertification" of an EIR. In *LandValue 77, LLC v. Board of Trustees of California State University*, the Fifth District Court of Appeal rejected the idea of partial certification of an EIR. The Court held that "an EIR is either complete or it is not." (*LandValue 77, LLC v. Board of Trustees of California State University* (2011) 193 Cal.App.4th 675, 682-83.) If not, then the agency must set aside its certification of the EIR and take the action necessary to bring the EIR into compliance with CEQA prior to deciding whether to approve the project. (*Ibid.*; see also *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1441 [stating, without discussion, that because the EIR is invalid, a new EIR must be prepared].)

In *Preserve Wild Santee v. City of Santee*, the Fourth District Court of Appeal concluded that "a reasonable, commonsense reading of section 21168.9 plainly forecloses [the] assertion that a trial court must mandate a public agency decertify the EIR . . . in every instance where the court finds an EIR violates CEQA." (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 288.) The Court reasoned that such a "rigid

requirement" directly conflicts with the language in the statute, which specifically allows a court to void a determination, finding, or decision "in whole or in part." It also conflicts with the language in section 21168.9(b) stating that the court's order shall include only those mandates which are necessary to achieve compliance with CEQA, and only "that portion" of a determination, finding, or decision or "the specific project activity or activities" found to be in noncompliance with CEQA.[7] (*Ibid.;* see also *Golden Gate Land Holdings LLC v. East Bay Regional Park Dist.* (2013) 215 Cal.App.4th 353, 376 [citing the language in *Preserve Wild Santee* with approval]; *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1604 [order could mandate that County void all or part of its decision to approve the negative declaration and adopt the heightened treatment standards]; 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont. Ed. Bar 2014) Judicial Review, §§ 23.124, 23.125.)

The reasoning in *Preserve Wild Santee* is persuasive. The statute explicitly states that the agency's determination, finding, or decision may be voided "in part" and that a court's order may be limited to "that portion of a determination, finding, or decision or the specific project activity or activities found to be in noncompliance" with CEQA.

The *LandValue* Court considered this language but concluded that it should not apply to EIR certification decisions. However, this is contrary to the fundamental canon of statutory interpretation that courts must, if possible, give meaning to every word and phrase in the statute and avoid an interpretation making some words surplusage. (*Ceja v. J. R. Wood, Inc.* (1987) 196 Cal.App.3d 1372, 1375.) When interpreting statutory language, the court may neither insert language that has been omitted nor ignore language that has been inserted. (*People v. United States Fire Ins. Co.* (2012) 210 Cal.App.4th 1423, 1427.) Thus, the court may not ignore words in a statute to make it conform to an assumed intention which does not appear from its language. (See *McLaughlin v. Superior Court* (1983) 140 Cal.App.3d 473, 482.)

The court does not agree with the *Central Delta* petitioners that partial certification conflicts with the core purposes of CEQA. While CEQA is liberally construed for the protection of the environment, it also should be given a reasonable and practical construction. (*Martin v. City and County of San Francisco* (2005) 135 Cal.App.4th 392, 402.) The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. (*Laurel Heights*

[7] It might be possible to harmonize the *LandValue* and *Preserve Wild Santee* decisions. In reaching its decision that CEQA requires agencies to set aside the entire certification, the *LandValue* Court relied on a treatise for the proposition that, where an EIR is inadequate, CEQA requires the agency to set aside the certification of the EIR and all project approvals. However, the statement in the treatise is expressly limited to cases where severance is not proper. (See *LandValue, supra*, 193 Cal.App.4th at pp.681-82.) If *LandValue* is construed to mean that partial decertification is not allowed when severance is improper, arguably there is no conflict with *Preserve Wild Santee*.

Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 393.) Accordingly, the court concludes that where the defects in an EIR relate to discrete and severable parts of a project and its accompanying EIR, the court may partially decertify an EIR.

Although the court is persuaded that partial decertification of an EIR is allowed, the court is not persuaded that this is an appropriate case for its use. As the *Central Delta* petitioners argue, partial decertification will generate uncertainty about which parts of the EIR are certified and which are not.

Since there is no practical difference between an order partially decertifying the EIR and an order compelling DWR to revise and re-certify the existing EIR,[8] the court shall follow the more traditional route, ordering DWR to de-certify, revise, and re-certify the EIR.

The court expressly rejects the suggestion of the *Central Delta* petitioners that decertification of an EIR means the agency must prepare an entirely new EIR. This is allowed, but not required.

The California Supreme Court previously has cautioned that rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1132.) CEQA is sensitive to the particular need for finality and certainty in planning decisions. (See, e.g., *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 488 [discussing unusually short limitations period].)

The Legislature has expressed concern that CEQA challenges, with their obvious potential for financial prejudice and disruption, must not be permitted to drag on. (*Van de Kamps Coalition v. Bd. of Trustees of Los Angeles Community College Dist.* (2012) 206 Cal.App.4th 1036, 1051.) One fundamental purpose of the statutory scheme is to avoid delay and achieve prompt resolution of CEQA claims. (*Ibid.* [citing *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1987) 189 Cal.App.3d 498, 504].)

The *Central Delta* petitioners' interpretation – that any defect requires an agency to decertify and prepare an entirely new EIR – is contrary to CEQA's interests in achieving finality and certainty, since courts have held that a new EIR represents a "factually

[8] In either event, the petitioners will not be allowed to raise challenges that they raised or could have raised in the prior proceeding challenging the original EIR.

distinct attempt" to satisfy CEQA's mandates. (*Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 228.) To accept the *Central Delta* petitioners' interpretation, therefore, is to risk subjecting public agencies to a relentless carousel of CEQA challenges and environmental review.

This court simply cannot accept the premise that every CEQA violation requires the agency to start the EIR process anew. In appropriate cases, the agency must be allowed to correct the deficiencies and re-certify the EIR without re-opening the non-defective portions of the EIR to further challenge by the petitioners or other interested parties. Numerous appellate courts have reached the same conclusion. (See, e.g., *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1112; *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 463; see also *Sierra Club v. County of Fresno* (2014) 226 Cal.App.4th 704, 757.)

This is an appropriate case to allow the agency to correct the deficiencies and re-certify the EIR without re-opening the non-defective portions of the EIR. Upon re-certification, only those portions of the EIR that are new or changed shall be subject to challenge under CEQA.

6. The court shall order DWR to file an initial return indicating the steps it proposes to take to comply with the writ.

To ensure prompt CEQA compliance, the court's writ shall direct DWR to file an initial return by the end of this calendar year reporting to the court the steps and schedule it proposes to comply with the writ. Unless the court orders otherwise for good cause shown, DWR must correct the deficiencies and re-certify the EIR by the end of 2015.

7. Petitioners are prevailing parties for purposes of any request for attorney fees.

For purposes of any request for attorney fees, the court finds that the petitioners are "prevailing parties" for purposes of Code of Civil Procedure § 1021.5. The court reserves jurisdiction to consider an award of attorney fees pursuant to proper and timely motions by petitioners.

Disposition

The court shall enter judgment granting the *Rosedale* petition, granting in part and denying in part the First Cause of Action in the *Central Delta* action, and dismissing the Second and Third Causes of Action in the *Central Delta* action. Counsel for DWR is

directed to prepare a formal judgment and writ, consistent with this ruling and the court's prior rulings; submit the proposed judgment and writ to opposing counsel for approval as to form; and thereafter submit them to the court for signature and entry of judgment in accordance with Rule of Court 3.1312.

Dated: October 2, 2014

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

CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did send by electronic mail a copy of the foregoing RULING to each of the parties or their counsel of record as stated below.

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I, the undersigned Deputy Clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: October 2, 2014

By: Frank Temmerman
Deputy Clerk, Dept.29