SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

ROSEDALE-RIO BRAVO WATER STORAGE DISTRICT, a California Water Storage District; BUENA VISTA WATER STORAGE DISTRICT, a California Water Storage District,	Case Number: 34-2010-80000703 **RULING ON SUBMITTED MATTER**
v.	Date: January 31, 2014 Time: 9:00 a.m. Dept.: 29 Judge: Timothy M. Frawley
CALIFORNIA DEPARTMENT OF WATER RESOURCES, a California State Agency,	
KERN WATER BANK AUTHORITY, et al.	

Introduction

This action 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." Petitioners Rosedale-Rio Bravo Water Storage District and Buena Vista Water Storage District challenge the adequacy of the EIR solely as it relates to the use and operation of the "Kern Water Bank." Petitioners seek a writ commanding Respondent Department of Water Resources (DWR) to vacate its certification of the EIR as it relates to the use and operation of the Kern Water Bank and to suspend all water banking and recovery activities at the Kern Water Bank until DWR has complied with CEQA. For the reasons described below, the court shall grant the writ.

Background Facts and Procedure

The Kern Water Bank is an approximately 20,000 acre alluvial groundwater reservoir located in southern Kern County used and operated by the Kern Water Bank Authority for water banking and recovery purposes.

A detailed history of the development of the Kern Water Bank is set forth in the EIR. (See, e.g. AR 736-44, 12493-512.) The court shall briefly summarize that history here.

Beginning around the early 1980s, DWR began exploring the feasibility of developing a groundwater storage facility in southern Kern County, which it called the Kern Water Bank. As envisioned, the Kern Water Bank would consist of a series of "elements," the largest of which was called the "Kern Fan Element."

In 1986, DWR issued a program EIR ("1986 EIR") for the proposed Kern Fan Element project, entitled "Artificial Recharge, Storage, and Overdraft Correction Program, Kern County, California." As described in the 1986 EIR, the Kern Fan Element project included the potential acquisition of up to 46,000 acres of land for the purpose of recharging, extracting, and storing SWP water.

At the time DWR issued the 1986 EIR, there was no specific plan of operation for a groundwater storage project. Thus, the 1986 EIR focused broadly on the impacts of the acquisition of the land for use as a groundwater bank. The 1986 EIR concluded that a groundwater storage project could impact groundwater throughout the area, which impacts DWR proposed to mitigate. (AR 60:30510, 30519-23, 30533-34.) Overall, however, the 1986 EIR concluded that the project would have a beneficial impact on groundwater levels in that it would result in higher groundwater levels and less pumping and energy consumption. (AR 60:30519-23.)

In 1987, DWR and Kern County Water Agency (KCWA) signed a Memorandum of Understanding ("1987 MOU") for developing and operating a Kern Water Bank. The 1987 MOU constituted KCWA's agreement under Water Code §11258 for DWR to proceed with the purchase of the land for the project. (AR 2:739; see also 537:256793.)

In 1988, DWR purchased approximately 20,000 acres of land, which was to be developed as part of the Kern Fan Element. (This land is now commonly referred to as the "Kern Fan Element" property or, sometimes, as the "Kern Water Bank Lands.")

In 1989, DWR developed a plan for a scaled-down version of the Kern Water Bank project, and in December 1990 DWR released a draft supplemental EIR ("1990 DEIR") for the "Kern Water

Bank – First Stage Kern Fan Element." (AR 61:30796-809, 30812-15, 30853-60, 30877-87.) While the 1990 DEIR was never finalized, it discussed mitigation similar to the 1986 EIR. (AR 61:30877.)

DWR encountered many legal, institutional, and political impediments to its Kern Water Bank proposal, including proposed revisions to Delta water quality standards, measures to protect threatened and endangered species, and DWR's inability to obtain the approval of KCWA required under Water Code §11258 for operation of the groundwater bank. (AR 26:12493.) Ultimately, DWR determined that development of an SWP groundwater storage facility in the Kern Fan Element was infeasible.

In 1994, DWR and representatives of the agricultural and urban SWP contractors negotiated the "Monterey Agreement" to settle allocation disputes arising under the long-term water supply contracts. To implement the Monterey Agreement, the parties translated the Monterey Agreement principles into a standard amendment to the long-term water supply contracts. The standard amendment became known as the "Monterey Amendment," and the separate amendments to the long-term water supply contracts are sometimes referred to collectively as the "Monterey Amendments."

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 23:11152-53, 11158; see also 102:52327-28.)

As part of the Monterey Amendment, the parties agreed to transfer ownership of the Kern Water Bank Lands from the State to KCWA for development of a local groundwater bank. (See Articles 52 and 53 of the Monterey Amendment [reproduced at AR 26:12500].) In exchange for the transfer of the Kern Water Bank Lands, two agricultural contractors agreed to retire a total of 45,000 AF of "Table A" contractual water (entitlement) amounts.

In October 1995, anticipating the Kern Water Bank Lands transfer and development of a local groundwater bank, Real Parties in Interest, as member entities, entered into a joint powers agreement that formed the Kern Water Bank Authority (KWBA). The joint powers agreement

provides that KWBA would operate the Kern Water Bank project, subject to various agreements, including a Memorandum of Understanding among the KWBA member entities and five "adjoining entities" (including Petitioners). (AR 36:18087-107; 215:109817-19, 109844-45.)

The KWBA member entities and the "adjoining entities" executed the Memorandum of Understanding in October 1995 ("1995 MOU"). The stated purpose of the 1995 MOU was to insure that the beneficial effects of the Kern Water Bank project are maximized but that the project does not result in significant adverse impacts to water levels, water quality or land subsidence within the boundaries of adjoining entities, or otherwise interfere with the existing and ongoing programs of adjoining entities. (AR 36:18088.) To that end, the 1995 MOU sets forth objectives and minimum operating criteria. (*Ibid.*) Among other things, the MOU establishes a monitoring committee and requires a comprehensive monitoring program to monitor groundwater levels and quality. (AR 36:18095.) The monitoring committee is empowered to make recommendations to KWBA and the project participants for modifications in project operations to avoid or mitigate adverse impacts on adjoining entities. (AR 36:18098.) If the monitoring committee's recommendation does not resolve a factual dispute, the 1995 MOU provides for binding arbitration and/or litigation. (AR 36:18098-99.)

Also in October 1995, Central Coast Water Agency, as the lead agency, completed and certified a final EIR for the "Monterey Agreement" project (the "Monterey Agreement EIR"). The Monterey Agreement EIR describes, among other things, the environmental impacts of the transfer and development of the Kern Water Bank. KWBA approved the Monterey Agreement EIR as a responsible party.

In December 1995, the parties executed an agreement for the transfer of the Kern Water Bank Lands from DWR to KCWA. The agreement transferred the property and identified certain obligations, covenants, and agreements associated with the property, including KCWA's assumption of responsibility for compliance with endangered species requirements. Simultaneous with the execution of the agreement transferring ownership from DWR to KCWA, KCWA executed an agreement transferring ownership of the Kern Water Bank Lands to KWBA. The transfer from DWR to KCWA and then to KWBA was completed in August 1996.

Also in December of 1995, the Planning and Conservation League and others filed a lawsuit challenging the adequacy of the Monterey Agreement EIR (the "PCL Litigation"). The trial court ruled that Central Coast Water Agency improperly served as the lead agency, but that the Monterey Agreement EIR was adequate and the CEQA violation was not prejudicial. The PCL plaintiffs appealed.

In 1997, while the PCL Litigation was pending on appeal, KWBA prepared an Addendum to the Monterey Agreement EIR. The Addendum addresses and provides for implementation of a Habitat Conservation Plan / Natural Community Conservation Plan (developed by KWBA in cooperation with the California Department of Fish & Game and U.S. Fish & Wildlife Service) (collectively, the Habitat Conservation Plan") and analyzes the potential environmental impacts associated with implementation of the Habitat Conservation Plan. (AR 36:17980, 17984; see also 36:18047-48.)

The Addendum concluded that, as mitigated, the project would have no significant environmental effects. (AR 36:17981.) KWBA issued a Notice of Determination for the Addendum in June 1997. The Addendum was not challenged.

In September 2000, the appellate court reversed the trial court's judgment in the PCL Litigation. The appellate court ruled that DWR should have served as the lead agency and that the Monterey Agreement EIR was inadequate in at least one respect because it failed to analyze implementation of Article 18(b) of the SWP Contracts as a no-project alternative. The appellate court remanded the matter to the trial court, ordering it to issue a writ of mandate vacating certification of the Monterey Agreement EIR, and to retain jurisdiction until DWR, as the lead agency, certifies and EIR in accordance with CEQA.

In 2003, after the Court of Appeal ruling in the PCL case, the parties entered into a settlement agreement (the "Settlement Agreement"). The Rosedale Petitioners were not parties to the PCL Litigation and were not parties to the Settlement Agreement.

The parties agreed that the proposed "project" to be analyzed in the new EIR 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 Fan Element) 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 as part of the CEQA-mandated "no project" alternative analysis; and (ii) an analysis of

the potential environmental impacts of changes in SWP operations and deliveries relating to the implementation of the Monterey Plus Project.

The Settlement Agreement provides that the new EIR also shall include an "independent study by DWR, as the lead agency, and the exercise of its judgment regarding the impacts related to the transfer, development, and operation of the Kern Water Bank in light of the Kern Environmental Permits." (AR 25:12426.) The parties to the Settlement Agreement agreed that it would not affect the continuing effectiveness of the "Kern Environmental Permits," which were defined to include the Habitat Conservation Plan and other permits, approvals, and agreements relating to the Kern Water Bank, as set forth in the Addendum to the Monterey Agreement EIR, including the 1995 MOU. In the Settlement Agreement, the PCL parties acknowledged that the Kern Water Bank was operating under the Kern Environmental Permits entered into based upon the Addendum, and agreed not to challenge the Addendum or to rely on the Addendum for any new KWBA project. (AR 25:12425-26.)

The Settlement Agreement provides that: (1) KWBA shall retain title to the Kern Water Bank Lands and may continue to operate and administer the Kern Water Bank subject to the restrictions in the Agreement; (2) KWBA may continue to operate the Kern Water Bank; and (3) changes to the allowable uses of the Kern Water Bank Lands shall be subject to review under CEQA. (AR 25:12435, 12437.)

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 compliance of the new EIR with the requirements of CEQA and the terms and conditions of the Settlement Agreement.

Following execution, the trial court approved the Settlement Agreement and issued a peremptory writ of mandate commanding Central Coast Water Agency to set aside its certification of the EIR and commanding DWR to prepare and certify a new EIR in compliance with the Court of Appeal's decision, CEQA, and the Settlement Agreement. (AR 107:54996-97.) 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 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 "Monterey Plus EIR"). The Project includes all of the objectives and elements of the Monterey Amendment, *plus* the objectives and elements of the Settlement Agreement.

The Monterey Plus EIR considered the potential groundwater impacts of the Monterey Plus Project, and concluded that (1) the Project had a modestly beneficial impact on groundwater levels in the past due to the Project's facilitation of increased groundwater banking; (2) the Project will have a modestly beneficial impact on groundwater levels in the future for the same reason; and (3) the Project will not have an adverse cumulative groundwater impact because the Project itself does not have an adverse impact. (AR 23:11366-68; 24:11783.)

DWR concluded that the Kern Water Bank Lands transfer did not cause any significant adverse impact to any environmental resource during the period from 1995 to 2003. Because KWBA had plans to expand the Kern Water Bank by about 1,200 acres, DWR concluded that the Project had the potential to affect special-status biological resources and cultural and paleontological resources in the future, but, by applying the mitigation measures that KWBA is already required to undertake pursuant to the 1997 Addendum and Habitat Conservation Plan, those impacts would be mitigated to a less than significant level. (AR 22:10940-42; see also 24:11491-96, 11678-79.)

Appendix E to the EIR is entitled "Study of the Transfer, Development, and Operation of the Kern Water Bank." The stated purpose of Appendix E is to provide "independent study" of the impacts and DWR's exercise of independent judgment regarding the transfer, development, and operation of the Kern Water Bank. (AR 26:12493.) The Appendix concludes that the Kern Water Bank is operating as intended and within the confines of the Habitat Conservation Plan. (AR 26:12555.)

On May 1, 2010, DWR's Director elected to carry out the Project, made findings in support, adopted a statement of overriding considerations, and approved a mitigation, monitoring, and reporting program. (AR 22:10924-11006.) This petition followed.

Petitioners contend that the Monterey Plus EIR violates CEQA because the EIR fails to analyze the use and operation of the Kern Water Bank as a component of the Project and, if the EIR did analyze the use and operation of the Bank, it did so in insufficient detail. As a result, Petitioners contend the EIR also failed to adequately consider alternatives and mitigation measures to avoid and/or lessen the potential impacts of this component of the Project.

Because Petitioners' challenges are related solely to the use and operation of the Kern Water Bank Lands, and no other parts of the Project, Petitioners request a limited writ commanding DWR to vacate the certification of the EIR and Project approval only as they relate to the use and operation of the Kern Water Bank.

Respondent DWR and Real Parties in Interest (the "Kern Water Bank Parties") assert that Petitioners' claims should be dismissed because Petitioners failed to exhaust their administrative remedies[1] and waived their right to challenge the Kern Water Bank's "operating plan."

In the alternative, Respondent and Real Parties argue that Petitioners' claims should be denied on the merits because the EIR adequately analyzed the use and operation of the Kern Water Bank in compliance with CEQA, the Court of Appeal's ruling, and the 2003 Settlement Agreement.

While Petitioners may have preferred more detail regarding the future use and operation of the Kern Water Bank, Respondent and Real Parties contend that substantial evidence supports DWR's decision to not cover specific future operating parameters, and to instead use historical data as evidence of how the Bank would be operated and the effects it would have. Unlike the typical scenario in which the lead agency proposes and analyzes mitigation measures before implementation of a project, Respondent and Real Parties contend that here a court order required DWR to analyze a project that is already implemented and operating under an existing, enforceable mitigation program. Thus, in exercising its judgment, DWR properly considered the mitigation measures that are already in place by virtue of the PCL Settlement Agreement, the 1997 Addendum, and the "Kern Environmental Permits."

Further, Respondent and Real Parties contend that the Kern Water Bank's history of operations, subject to existing mitigation measures, supports DWR's conclusion that the Bank's future operations will have a less-than-significant impact.[2]

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[1] Among other things, Respondents and Real Parties contend that Petitioners failed to exhaust administrative remedies because they did not object to DWR's approval of the Project, as required by Public Resources Code § 21177(b).

[2] DWR concluded that the Kern Water Bank's operations have had and will have a less-than-significant impact on groundwater levels because more water is banked than is recovered, thereby increasing groundwater levels in the basin. (AR 23:11366-68.) DWR argues that this conclusion is supported by substantial evidence.

DWR concluded that the Kern Water Banks Lands transfer had no significant impacts from 1995 to 2003 and that the only potential impacts that the transfer had potential to cause in the future was on terrestrial biological resources and on cultural paleontological resources due to KWBA's planned expansion of the facility. (AR 22:10935, 10940-43; 23:11366-68; 24:11783; 26:12539) DWR ultimately concluded that

Since the EIR concluded there would be no adverse impacts from the Kern Water Bank, Respondent and Real Parties contend there was no need to consider mitigation measures or alternatives to the water bank component of the Project. Even so, they claim, the EIR considered both alternatives and mitigation measures.

Request for Judicial Notice

Real Parties in Interest have filed a December 27, 2013, Request for Judicial Notice seeking to take judicial notice under Evidence Code §452(h) of three agreements that are ostensibly relevant to their waiver affirmative defense and to the "credibility of Petitioners' arguments." Petitioners object to the Request for Judicial Notice, contending, among other things, that the agreements are not subject to judicial notice under § 452(h) and that the agreements are irrelevant extra-record evidence. The court agrees that the agreements are not subject to judicial notice under the "indisputable facts" provision of § 452(h). (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1145.) Accordingly, the Request for Judicial Notice is denied.

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*. (*Id.*) Although CEQA does not mandate technical perfection, CEQA's information disclosure provisions are scrupulously enforced. (*Id.*) 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*

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mitigation measures incorporated into the project will reduce the impacts to a less-than-significant level. (*Ibid.*)

Bakersfield (2004) 124 Cal.App.4th 1184, 1198; *Association of Irritated 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

As an initial matter, the court rejects the argument that Petitioners lack standing because they failed to comply with Public Resources Code section 21177(b).

Section provides that "[a] person shall not maintain an action or proceeding unless that person objected to the approval of the project . . . ." (Cal. Pub. Res. Code § 21177(b).) In this case, Petitioners submitted a comment letter expressly supporting approval of the Project, but raising "concerns" with those portions of the EIR addressing the past, present, and future use and operation of the Kern Water Bank Lands. (AR 6:2689.) Respondent and Real Parties contend that because Petitioners expressly supported the Project, they lack standing to maintain this action. Petitioners respond that they have standing because they properly objected to the EIR for the Project.

The court is persuaded that the "concerns" raised by Petitioners in their comment letter are properly construed as objections to the EIR. The question, therefore, is whether a party may comply with section 21177(b) by objecting to a project's environmental review, even if the party does not object (and even supports) the project itself. This appears to be an issue of first impression.

The court concludes that Petitioners satisfied the exhaustion requirement of section 21177(b) by timely presenting their objections to the adequacy of the Draft EIR, notwithstanding their express support for the "Monterey Settlement." (See *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1395-1396; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1121.) The court is persuaded that Petitioners' objections satisfied the purpose of the exhaustion doctrine, which is to provide the public agency with an "opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review." (*Mani Brothers, supra*, 153 Cal.App.4th at p.1396.)

The court also finds that Petitioners properly exhausted the "issues" raised in their lawsuit. The lawsuit alleges that DWR failed and refused to adequately discuss and analyze the use and operation of the Kern Water Bank, skewing the analysis of the Project's impacts and alternatives, mitigation measures, and the appropriateness of project approval. These are the same objections raised in Petitioners' comment letter. The objections are sufficiently specific that DWR had the opportunity to evaluate and respond to them.

Moreover, while every issue raised in the lawsuit must have been presented to the administrative agency, the petitioner need not have personally presented the issues; a party can litigate issues that were timely raised by others. (*Galante Vineyards, supra*, 60 Cal.App.4th at p.1119.) Here, the adequacy of the EIR's analysis of the use and operation of the Kern Water Bank was raised by others in comments on the Draft EIR. (See, e.g., AR 2:764-65, 769-70.) Thus, for both of these reasons, the court is persuaded that Petitioners exhausted their administrative remedies.

Real Parties contend that Petitioners waived their right to bring this lawsuit when they executed the 1995 MOU. The court rejects this contention. Even if Petitioners agreed to resolve disputes regarding the operation of the Kern Water Bank using the dispute resolution procedures of the MOU, Petitioners' CEQA challenge is not a dispute regarding the operation of the Kern Water Bank project within the meaning of the MOU; it is a dispute regarding the *environmental analysis* of the project. Accordingly, there was no waiver.

Turning to the merits, the court agrees with Petitioners that the EIR fails to adequately discuss, analyze, and mitigate the potential impacts -- particularly to groundwater hydrology and water quality -- associated with the use and operation of the Kern Water Bank Lands. The defects in the EIR stem, in part, from its incomplete description of the project.

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; see also *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193 [an accurate, stable, and finite project description is the *sine qua non* of an informative and legally sufficient EIR].) 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. Thus, to further the objectives of CEQA, the term "project" is defined broadly to include the "whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect change in the environment." (Cal. Code Regs., tit. 14, § 15378(a).)

The California Supreme Court has considered how to interpret the word "project" and concluded that CEQA is "to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1222, quoting *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.) This broad interpretation ensures that the requirements of CEQA cannot be avoided by chopping a large project into many little ones or by excluding reasonably foreseeable future activities that may become part of the project. (See *Rio Vista Farm Bureau Ctr. v. County of Solano* (1992) 5 Cal.App.4th 351, 370.) A complete description of a project must describe the "whole of the action" that is being approved, including all components of the project, all phases of the project, and future activities that are reasonably anticipated to become part of the project. (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82, 100-101; *Laurel Heights Improvement Assn. v. Regents of the Univ. of California* (1988) 47 Cal.3d 376, 396; Cal. Code Regs., tit. 14, § 15126.)

In this case, the use and operation of the Kern Water Bank was an intended consequence of the transfer of the Kern Water Bank Lands. The Kern Water Bank Lands were transferred from DWR to KCWA, and then to KWBA, for the express purpose of developing and operating a groundwater bank. (See AR 26:12499; 168:84281.) Indeed, the transfer was not simply a transfer of land, but a transfer of control. Thus, the use and operation of the Kern Water Bank cannot be isolated from the transfer of the Kern Water Bank Lands.

The 1995 Monterey Agreement EIR, which KWBA approved as a responsible agency, recognized the project as including the development and operation of a groundwater bank on the Kern Water Bank Lands. (AR 12:12501; 537:256630-35.) Likewise, in 1997, KWBA prepared an

Addendum to the Monterey Agreement EIR, which recognized the project as including the "construction, operation and maintenance of the Kern Water Bank."[3] (AR 36:17998.)

Moreover, DWR was required to analyze the impacts of the development and operation of the Kern Water Bank under the 2003 Settlement Agreement (and the court's prior order and writ enforcing the same). (AR 25:12426; 107:54994.)

However, the EIR's project description disregards the development and operation of the Kern Water Bank. The EIR describes the Project as the "Monterey Amendment and the Settlement Agreement," which is then further described as including the "[t]ransfer of property known as the 'Kern Fan Element property' in Kern County." (AR 23:11116, 11158, 11163-64.) The description of the Project omits any mention of the development and operation of the Kern Water Bank. Accordingly, the EIR's project description is deficient.

Respondent and Real Parties argue that the EIR was not required to analyze the operations of the Kern Water Bank because, due to the Settlement Agreement, DWR has no authority to "approve" the transfer, development, and operation of the Kern Water Bank. While the court agrees that the PCL Litigation and resulting Settlement Agreement had the effect of "validating" the Kern Water Bank transfer agreement, this did not relieve DWR of its obligation (under the Settlement Agreement and court-order enforcing the same) to prepare a new EIR analyzing the transfer, development, and operation of the Kern Water Bank.

DWR further argues that even if the project description is flawed, the EIR nevertheless contains an adequate description and analysis of the impacts of operating the Kern Water Bank, including its groundwater impacts. DWR relies on section 7.2.3 of the EIR and Appendix E to support its argument.

While it is true that section 7.2.3 and Appendix E discuss the Kern Water Bank's groundwater impacts, the discussion is general and non-specific, focusing on the impacts of groundwater banking in Kern County.[4] The discussion focuses almost exclusively on the impacts of storing water in the ground, with no discussion or analysis of potential impacts that may occur when the banked water is extracted. The body of the EIR lacks any meaningful discussion of how the

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[3] An addendum to a previously-certified EIR is prepared if some changes or additions are necessary but none of the conditions described in section 15162 calling for preparation of a subsequent EIR have occurred. (Cal. Code Regs., tit. 14, § 15164.) The decision-making body must consider the addendum with the final EIR prior to making a decision on the project.

[4] The EIR's conclusion that transfer of the Kern Water Bank did not have any significant effects is based largely on DWR's finding that, even if the Kern Water Bank had not existed, member entities could and would have stored the same amount of water in other water banks available to them, and therefore transfer of the Kern Water Bank Lands did not affect groundwater levels.

Kern Water Bank operates,[5] and the discussion in the Appendix is limited to a report on how the Kern Water Bank was operated between 1995 and 2005. There is no description, analysis, or discussion as to how the Kern Water Bank might be used or operated in the future, and the potential groundwater or water quality impacts that might result therefrom.

Petitioners contend 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, as operated, will continue to have the same impacts in the future. The court agrees.

The EIR's entire discussion of future groundwater impacts is contained in two paragraphs in section 7.2.3, which generally concludes that contractors are "expected" to continue to store water in Kern County in the future. Because contractors delivered more water than they withdrew during the period between 1996 and 2003, the EIR concludes the Project will also have a "modestly beneficial" impact on groundwater levels in the future. (AR 23:11367-68.) There is no discussion or analysis of the assumptions on which this conclusion is based, such as whether 1996-2003 is an appropriate period for predicting the impacts of future groundwater storage operations.[6] Nor is there any discussion or mention of the Kern Water Bank in the "future impacts" analysis.

DWR and the Real Parties argue that the Settlement Agreement (and court order) constrained DWR's discretion with respect to the scope of the new EIR, in that the Settlement Agreement required DWR to exercise its judgment regarding the impacts related to the transfer, development, and operation of the Kern Water Bank *"in light of the Kern Environmental Permits."* The Settlement Agreement defines the Kern Environmental Permits to mean the Habitat Conservation Plan and certain other permits, approvals, and agreements relating to the Kern Water Bank, as set forth in and contemplated by the Addendum to the 1995 Monterey Agreement EIR, including the 1995 MOU. (AR 25:12418, 12478-79.)

In the Settlement Agreement, the parties acknowledged that the Kern Water Bank was currently operating under the Kern Environmental Permits, which were entered into based upon the Addendum. Although KWBA agreed not to rely on the Addendum for any new projects, the parties agreed in the Settlement Agreement not to challenge the Addendum and

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[5] See AR 23:11366-68; AR 2:747, 755-56, 764 [conceding lack of detail]; Real Parties' Opposition Brief, at p.26; see also *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442 [finding that agency failed to proceed in manner required by CEQA in relying on information not actually incorporated or described and referenced in the EIR].)

[6] The evidence in the record strongly suggests it is not. (See AR 1:286 [describing 1996 to 2004 as an unusually wet period].)

that the Settlement Agreement would not affect the "continuing effectiveness" of the Kern Environmental Permits. (AR 25:12425-26.)

Because the Settlement Agreement required DWR to study the Kern Water Bank in light of the Kern Environmental Permits, and the MOU is expressly identified as one of the Kern Environmental Permits, Respondent and Real Parties contend that DWR properly relied on the MOU in evaluating the impacts of the Kern Water Bank. In essence, they contend, the MOU is part of the part of the project that DWR was required to evaluate in the EIR.

The MOU is significant, they assert, because it imposes operating parameters that mitigate the Kern Water Bank's groundwater and water quality impacts. For example, the MOU states that the Water Bank should be operated to maintain and, when possible, enhance the quality of groundwater, and imposes specific mitigation measures to control water quality. (AR 36:18089-90.) The MOU further states that the water bank should be developed and operated so as to prevent, eliminate, or mitigate significant adverse impacts, and to incorporate mitigation measures as necessary to prevent significant adverse impacts from occurring. (AR 36:18090, 18094.) In addition, the MOU states that the recovery of recharged of water shall be subject to the "golden rule" that, unless acceptable mitigation is provided, the water bank may not operate so as to create conditions that are worse than would have prevailed absent the project. (AR 36:18090.)

To enforce these measures, the MOU establishes a "monitoring committee" to determine and monitor groundwater and water quality information under project and non-project conditions. The monitoring committee is charged with establishing evaluation methodologies and criteria, to monitor and review data, and recommend operational modifications to avoid or mitigate adverse impacts. (AR 36:18095-98.) If a factual dispute exists regarding a recommendation of the monitoring committee, the MOU provides that the dispute shall be submitted to binding arbitration. (AR 36:18098-99.) Any other dispute may be pursued through court. (*Ibid.*)

With the MOU's mitigation measures in place, the Kern Water Bank did not have any significant adverse impacts in the past (1996 to 2003). Since the mitigation measures will remain in place, Respondent and Real Parties contend, the EIR justifiably concluded that the Water Bank's operations will not cause any significant adverse impacts in the future. (DWR's Opposition Brief, at pp.26-27.) The implication being that because the MOU's mitigation measures are in place to mitigate the project's impacts, there was no need for the EIR to describe or analyze the Kern Water Bank's operations. There are several problems with this.

First, the terms of the Settlement Agreement do not support the argument that DWR's CEQA responsibilities were constrained. While the Settlement Agreement required DWR to evaluate the Kern Water Bank in light of the Kern Environmental Permits, the parties agreed that nothing in the Settlement Agreement was intended to limit DWR's discretion, as the lead agency, to comply with the requirements of CEQA. (AR 25:12449.)

Second, mitigation measures are not a substitute for an adequate impact analysis. Adopting a mitigation measure to address a significant impact does not relieve the agency of its duty to disclose and evaluate the impact in the EIR. (*Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 195 [mitigation measure prohibiting project should adequate water not be available did not cure lack of analysis of long-term water supply]; *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 444 [same]; see also *Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comm'rs*. (2001) 91 Cal.App.4th 1344, 1371 [EIR cannot simply label an impact significant to avoid discussion and analysis].)

Third, an EIR must contain facts and analysis, not just an agency's bare conclusions or opinions. (See *Laurel Heights Improvement Ass'n. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 404.) Specific data must be presented when it is necessary for a meaningful analysis of a potentially significant impact and reasonably feasible to do so.

Fourth, the implication that all environmental impacts can and will be avoided by application of the mitigation measures in the MOU is not supported by substantial evidence.

As an initial matter, it is important to recognize that the EIR does not include any mitigation measures for groundwater impacts. Rather, it concludes that mitigation measures are not required because the project will not have any significant adverse groundwater impacts. (AR 23:11367-68.) The EIR does not explain how it reached this conclusion except to note that the project raised groundwater levels during the period between 1996 and 2003. (*Ibid.*)

Appendix E also does not impose any mitigation measures for groundwater impacts, but it does discuss the pre-existing mitigation measures imposed by the Kern Environmental Permits, including, notably, the MOU. DWR relies on this to argue that the EIR's finding of "no impacts" is supported by substantial evidence because the pre-existing mitigation measures imposed by the MOU will mitigate any potentially significant adverse impacts to a less-than-significant level. (DWR's Opposition Brief, at pp.26-27; AR 23:11367-68; 26:12507-08, 12539; see also 1:416 [applying the same reasoning to biological impacts].)

Petitioners contend that even if the EIR is deemed to include the MOU's "mitigation measures," those measures would be insufficient mitigation. The court agrees.[7] While DWR and KWBA portray the MOU as providing specific mitigation measures that will be undertaken at specific points in time to prevent adverse impacts to groundwater, this is not an accurate characterization of the MOU. The MOU sets generalized goals without identifying any discrete performance standards by which those goals can be judged. The MOU defers not only the task of devising specific mitigation measures to mitigate adverse impacts, but also the task of determining what constitutes an adverse impact. (See, e.g., AR 36:18094-96.) The MOU contains no clear performance standards. This is contrary to CEQA. (See *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1119; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 944.)

Moreover, the monitoring committee that is responsible for monitoring the Kern Water Bank's operations, has no real enforcement powers, being limited to making recommendations to the KWBA. If the KWBA does not accept the committee's recommendations, the matter must be resolved through arbitration (for factual disputes) and/or litigation. Thus, what the MOU actually provides is general operating goals and a dispute resolution process, not CEQA mitigation.

In an attempt to salvage the EIR, both DWR and Real Parties also attempt to rely on the environmental analysis performed in the 1997 Addendum. They claim that Petitioners cannot challenge the Addendum because the parties agreed in the Settlement Agreement not to challenge the Addendum and the statute of limitations has passed.

Petitioners argue that DWR cannot rely on the Addendum because it was rendered void when the court decertified the EIR upon which it was based. (See Petitioners' Opening Brief at pp.28-29 [citing *Friends of Santa Clara River v. Castaic Lake Water Agency* (2002) 95 Cal.App.4th 1373, 1384].) In any event, Petitioners deny they are challenging the Addendum for the purposes it was intended to serve, which was as an evaluation of the impacts of implementing the Habitat Conservation Plan. (AR 36:17998.)

Although the court is inclined to agree that an addendum cannot survive independently of the EIR to which it is added,[8] the court agrees with Petitioners that it makes no difference here.

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[7] In reaching this conclusion, the court is not finding that mitigation measures are required. Since DWR failed to adequately analyze the impacts, it is unclear if there are significant adverse impacts to be mitigated. However, if there are, the court agrees with Petitioners that the mitigation measures in the MOU cannot, by themselves, serve to mitigate any potentially significant impacts that may be identified.
[8] An "addendum" is, by definition, a thing to be added, or an addition, to something else. (See also AR 36:18000.)

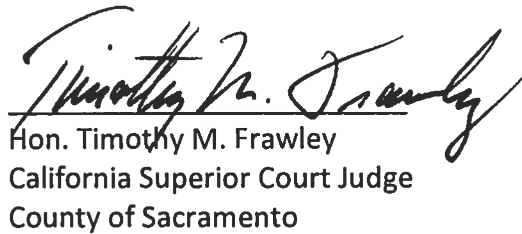
The Addendum does not supply, and DWR cannot rely on the Addendum to supply, the analysis that is missing from the EIR challenged here.

<u>Disposition</u>

The court concludes that DWR violated CEQA in the preparation of the EIR. 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, particularly as to potential groundwater and water quality impacts. 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.

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

Rosedale-Rio Bravo Water Storage District, et al. v. Department of Water Resources, et al.
Sacramento County Superior Court No.: 34-2010-80000703
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Updated 12-26-13

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