

G. SETTLEMENT AGREEMENT ARTICLE III(H) DOCUMENTS

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August 13, 2009

Lester Snow, Director
Department of Water Resources
1416 Ninth Street, 11th Floor
Sacramento, CA 95814

Re: "Monterey Plus" Administrative Draft Final Environmental Impact Report: List of
Issues Referred for Director's Decision

Dear Director Snow:

The plaintiffs' representatives on the EIR committee have reviewed the Administrative Draft Final EIR (AFEIR) for the "Monterey Plus" project (SCH # 2003011118), for purposes of reference to the Director as specified in the Settlement Agreement. As requested in Department of Water Resources (DWR) counsel Katy Spanos' email note to us dated July 24, 2009, the plaintiff organizations (Planning and Conservation League, Citizens Planning Association of Santa Barbara County, and Plumas County Flood Control and Water Conservation District) in this letter refer the following mediation issues for the Director's personal review and correction, as anticipated by section III.H of the Settlement Agreement. These issues are described in greater detail in comments on the Draft EIR (DEIR).

We are disappointed that notwithstanding the years of DWR preparation of the EIR, and our significant comments both formally and informally through the "four by four" committee, the AFEIR now prepared for your personal review still perpetuates the fundamental flaws identified here. Realistically, we recognize the low probability that DWR will now change course and that the Director and his staff will fulfill their legal duties to exercise DWR's, and not the State Water Contractors' (contractors'), judgment about the most responsible way to conduct the State Water Project in the 21st century. Nonetheless, we would be remiss if we did not address our understanding of these duties.

The plaintiffs have been allocated less than three weeks to review and comment on the AFEIR, a document DWR has worked on for years and had an opportunity to review before its release. All issues identified here are familiar to DWR through extensive comment and discussion in the EIR committee, and in public comments on the Draft EIR. To ensure fairness and avoid delay, we ask and expect that the Director will no later than September 15 advise the Mediator and the affected parties

whether and to what extent the EIR will be changed before publication in final form. If no changes are identified by that date, we will be entitled to assume that our references have been denied and that we are free to present these issues pursuant to section III.H.2 of the Settlement Agreement to the Mediator for his review.

Prompt resolution of these issues is also compelled by the current water policy debate in California. The current State Administration has pressured the Legislature and public to reach an early accord on California water policy, while at the same time delaying for more than six years since the Settlement Agreement, its required decision on whether and to what extent the 1960 State Water Contracts should be modified. We believe that neither the Legislature nor the public can fairly evaluate or implement changes in state water policy without resolution of the State Water Contracts' future. If this Administration is truly committed to prompt development of new state water policy, it must no longer delay resolution the issues identified in this letter.

Public Participation

The AFEIR recognizes that the proposed Monterey Amendments constitute the "most substantial" changes in the history of the State Water Project (SWP). (AFEIR, 5-4.) Yet the AFEIR asserts that "CEQA does not require public participation in the decision-making process," and that DWR has no such requirement. (AFEIR, 4-8.) That statement, framing the EIR's disrespect of the plaintiffs' alternatives that could actually lead to meeting public as well as contractors' institutional interests, is phenomenally misguided. In *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892 ("*PCL v. DWR*"), the court noted "the contractors and the members of the public who were not invited to the table" in the negotiations that led to the Monterey Agreement, and affirmed that CEQA "protects not only the environment, but informed self-government." (*Id.* at pp. 905, 916.) In the Settlement Agreement (attachment D), DWR agreed "that public review of significant changes to these contracts is beneficial and in the public interest."

Project Objectives and Lead Agency Role

CEQA requires the "fullest possible protection" of the environment within the statute's reasonable scope. (CEQA Guidelines, § 15003.) In contrast, the AFEIR primarily measures the project based upon the ambitions of the contractors and DWR officials, while marginalizing public input to project formation or alternatives. For example, DWR is aware that "problems plaguing the Delta" helped precipitate the Monterey Amendments (*PCL v. DWR*, 83 Cal.App.4th at p. 908) and admits that Delta problems have grown severely since the 1990s. Yet the AFEIR summarily rejects the plaintiffs' attempts to more thoroughly integrate Delta protection into the assessment of impacts, mitigation, and alternatives, positing that this is a "broader" issue extraneous to the key project objectives. (AFEIR, 5-5, 5-6.) Conversely, the AFEIR states that the "fundamental purpose" of the project is to "resolve conflicts and disputes between and among" the SWP contractors and DWR (AFEIR, 4-4), ignoring the clear teaching of *PCL v. DWR* that "the threat of litigation cannot be allowed to derail environmental review." (83 Cal.App.4th at p. 913.)

The AFEIR's deference to the contractors, and marginalization of public criticism, also undermines DWR's court-mandated exercise of its lead agency duties. DWR limited project objectives to "issues and conflicts *between and among the Department and the contractors*," and claimed that "the Department *cannot make a unilateral decision* because contract changes are involved." (AFEIR,

5-5 (emphasis added).) DWR alone has the duty to manage and administer the SWP on behalf of the people of California, a task that cannot be left to local contractors. (Wat. Code, § 12930, *et seq.*) It is “incongruous to assert that any of the regional contractors simply by virtue of a private settlement agreement can assume DWR’s principal responsibility for managing the SWP.” (*PCL v. DWR*, 83 Cal.App.4th at p. 185.) Had the AFEIR recognized that the choice is not between Monterey or Monterey Plus and a different project, but instead a choice between the pre-Monterey 1960 contracts and a different project, then both DWR and the contractors might have the more open-minded approach to project alternatives that CEQA requires.

Uses of the EIR

Section III.C of the Settlement Agreement defines DWR’s Monterey Plus project as *both* the Monterey Amendments and the “additional actions” defined in the agreement (respectively, “Monterey” and “plus”). Yet despite repeated requests, DWR has failed to commit to rendering a new decision on the “Monterey Amendments” component of the project once it certifies the new EIR. The AFEIR (pp. 4-5, 4-6) evades answering whether DWR’s project decision requires new contracts. It falsely defines the task of lead and responsible agencies as “to decide whether to *continue operating* under the proposed project and whether to decide whether to implement one of the alternatives to the proposed project.” (AFEIR, 4-6 (emphasis added).) It also treats Kern Water Bank transfer and operation as *faits accompli* beyond DWR’s discretion. (AFEIR, 4-11.)

Defining the project decision in terms of “continued operation” is blatantly inappropriate. There has been no lawful decision to implement the Monterey Amendments. The Monterey Amendments (including the Kern Fan Element (KFE) transfer) are in effect only under the Superior Court’s *interim* order under Public Resources Code section 21168.9. (See also Settlement Agreement, §§ II, VII.) When that order expires, the contracts will revert to their pre-Monterey status unless DWR makes a new approval decision and files a return to the writ. Holding otherwise would compromise CEQA’s “interactive process of assessment and responsive modification that must be genuine.” (*County of Inyo v. City of Los Angeles (VI)* (1984) 160 Cal. App. 3d 1178, 1185.)

Assessment of Shortage and Surplus Provisions

Repeating the key errors identified in numerous public comments on the DEIR, the AFEIR’s assessment of the “no project” alternative once again fails to “fulfill its mandate” to “present a complete analysis of the environmental consequences” of enforcing the pre-Monterey permanent shortage provision, article 18(b). (*PCL v. DWR*, 83 Cal.App.4th at p. 915.) The AFEIR also failed to come to terms with the “related water delivery effects” of other Monterey changes, such as those in articles 18(a) and 21.

The “no project” assessment performs a classic “bait and switch.” Having recognized that implementation of article 18(b) would reduce table A amounts to less than half their original levels (1.9 million acre-feet), the AFEIR assumes that any resulting decreases in table A allocations would simply “commensurately increase” allocations of article 21 surplus water. (AFEIR, 9-3.) That rote assumption, which would virtually read article 18(b) out of the contracts, resurrects the discredited position in the decertified 1995 EIR. (*PCL v. DWR*, 83 Cal.App.4th at p. 919.) As discussed in the EIR comments, this approach ignores research showing other options were available. (Comment letter 30, ex. B.) It also slights the large increases in article 21 deliveries under the interim implementation of the

Monterey Amendments. In short, DWR rejects invoking article 18(b) as a “reasonable” way to protect the Delta and end local reliance on paper water only after redefining it to be meaningless.

The AFEIR misinterprets article 21(g)(1), proposed for removal in the Monterey Amendments, which protects against the building of permanent economies based upon surplus water. The provision, while covering “scheduled” agricultural surplus water, is not limited to that variety; it applies also to interruptible water. (AFEIR, p. 9-7.) The AFEIR improperly declines to fully analyze consequences of permanently changing article 21(g)(1) on the theory that impacts are “local.” (AFEIR, 6.1-10.) However, local decision-makers would lack any opportunity to restore that provision after it is deleted.

The AFEIR also presents a caricatured analysis of article 18(b) enforcement without increases in article 21 deliveries. That analysis does not simply retain the pre-Monterey terms; it *eliminates* the use of article 21 water. (AFEIR, 9-18.) This analysis does not address conservation and demand management strategies that could mitigate the need for article 21 deliveries. The AFEIR also fails to adequately respond to requests to disclose the water rights underlying export of water from the Delta under article 21. (AFEIR, 14-14.) In addition, although the AFEIR concedes that article 21 water, coupled with storage, may facilitate additional local development (AFEIR, 9-3), it refuses to study that development’s relationship to water supply reliability based on the erroneous premise that this solely involves a local decision. (AFEIR, 9-2.)

Project Baseline

The AFEIR’s baseline is defective in both timing and content. The AFEIR recognizes that SWP contracts will not expire until 2035 (AFEIR, 6.1-2), but it arbitrarily ends the period analyzed at 2020, which, given the lengthy delays in this review, is now only eleven years away. The AFEIR also analyzes individual project impacts over inconsistent periods.

The AFEIR lacks a credible explanation for its adjustment of the baseline to reflect anticipated events, such as anticipated population growth, urban development, increased water demand, and water transfers. That approach wrongfully conflates baseline and “no project” alternatives. (See CEQA Guidelines, §§15125(a); 15126.6.) The AFEIR’s defense of DWR’s approach—an analogy to “ongoing operations” cases—relies upon inaccurate definition, criticized above, of the project as a “continued operation.”

Kern Water Bank

Faulty assessment of the Kern Water Bank’s (KWB’s) operation is one of the foundational errors in the AFEIR. The Settlement Agreement requires DWR to provide an “independent study,” and “exercise of its judgment regarding the impacts related to the *transfer, development and operation* of the Kern Water Bank” in light of existing environmental permits. (Section III.F (emphasis added).) However, the AFEIR suggests that DWR lacks discretionary authority over the bank’s transfer and operation, positing that “once the transfer of the KFE property occurred, the KWBA (Kern Water Bank Authority) assumed the responsibilities of the property and the development of the KWB lands.” (AFEIR, 16-4 (opposing “Department re-evaluation”); 4-11.) Post-transfer, DWR suggests that bank operation became a “*locally-owned KWB lands project*” that DWR disclaims any duty to study. (AFEIR, 4-11 (emphasis added).) DWR refuses to study the KWB’s “specific operating parameters” or provide a “detailed assessment” of its storage or allocation. (*Id.*)

Those assumptions are false. The Kern Water Bank's transfer out of state control relies on the never-lawfully-approved Monterey Amendments, which are proceeding now only under the Sacramento Superior Court's interim implementation order. The Settlement Agreement's restrictions on this water bank also remain interim rather than final while DWR's project decision is still pending. (*Id.*, §V.F.)

PCL's comments on the Kern Water Bank (comment letter 30, comments 37-45) reveal other problems. DWR accepts contractors' speculation that they "could have" stored water under other programs (AFEIR, 16-34.) Yet as found by the *Los Angeles Times*' Mark Arax and the Public Citizen report *Water Heist* (comment letter 30, ex. G), KWBA is effectively controlled by a private entity, Paramount Farming/Roll International. The AFEIR avoids issues raised in these reports as "principally institutional, financial, economic, and social issues." (AFEIR, 16-34.) But the reports tied the bank's loss of statewide accountability to environmental impacts. Impacts include depletion of the Environmental Water Account (EWA), promotion of urban sprawl, constrained public uses during shortage, hardening of demand for Paramount's specialty crops, and intensifying demand for south-of-Delta exports. That the bank's governance and operation have tangible environmental consequences should come as no surprise. Rather than uncritically accepting the Kern agencies' assumptions, the AFEIR should have thoroughly analyzed whether private control of the Kern Water Bank helped facilitate two types of "commodity bubbles": suburban subdivision-building, and planting of "permanent crops in desert regions with interruptible junior water rights." (J. Michael, *Water Won't Wash Away Valley's Recession*, Sacramento Bee, May 1, 2009 (online) (describing Delta crisis and the Central Valley's "nut glut"); <http://www.sacbee.com/opinion/story/1825084.html>.)

Recent investigative reports by the *Oakland Tribune*'s and *Contra Costa Times*' Mike Taugher, attached as exhibit A, confirm that bank operation by the privately-controlled KWBA produces serious environmental as well as economic consequences, including manipulation of the EWA, over-reliance on article 21, and hardened demand for Delta pumping. In Taugher's words, "the environment lost while Kern County water agencies collected more than \$138 million in sales" to the EWA, "the vast majority of which was paid for with the proceeds from taxpayer-backed environment and water bonds."

By contrast, the AFEIR mistakenly asserts that the bank has the "same basic purpose" under statewide and KCWA ownership. (AFEIR, 5-4.) That premise is belied by comparison of DWR and KCWA's 1987 Memorandum of Understanding (MOU) and the 1995 KWBA joint powers agreement. These agreements demonstrate a shift in the principal benefits of bank operation from the SWP to local members of KWBA. In its cursory discussion of Water Code section 11464's non-alienation duty, the AFEIR ignores the millions of dollars the state spent on developing the bank prior to transfer. (AFEIR, 16-6.) So evasive is the AFEIR about the bank's governance that it describes Westside Mutual Water Company—the paper company that Paramount Farming/Roll International owner Stewart Resnick established to buy and sell water—as an entity that "may be composed of members that are private corporations, including Paramount Farming." (AFEIR, 17-41.) The website of the law firm representing Paramount Farming is more direct, describing that company as "a key participant in the Kern Water Bank transaction." (<http://www.nossaman.com/showrework.aspx?show=2655>.)

Lastly, the AFEIR states that the Sacramento Superior Court judgment in *PCL v. DWR* was entered on August 15, 1996, and "as a result of the trial court's ruling, the Department proceeded to

implement the Monterey Amendment, including transferring the KFE property to KCWA.” (AFEIR, 16-5 (emphasis added).) That statement is blatantly false: escrow closed on the transfer on August 9, 1996, *six days before* the Sacramento Superior Court’s judgment. That rush to implementation was only possible because KCWA and other contractors, not wishing to await what turned out to be a meritorious appeal, arranged secretly with DWR in summer 2006 to waive article 29(a) of the Monterey Amendments, which had until then imposed an automatic stay following a timely legal challenge to those amendments. DWR did not even inform the superior court of this waiver. (The present Director is asked, again, to appreciate the grave distrust earned by his predecessor, David Kennedy, and the contractors for this conduct unbecoming public officials -- a distrust that rightfully will continue unless recognized and corrected by the present Administration.)

Assumptions Limiting Project Impacts and Mitigation

The AFEIR’s assumptions improperly truncate assessment of direct, indirect and cumulative impacts. The AFEIR states that changes in allocation do not produce any new impacts (AFEIR, p. 4-3), but does not reconcile that statement with the assumption that the project would increase water to both urban and rural users. The AFEIR repeatedly disclaims impacts based on the premise that “the Monterey Amendment does not increase Delta exports beyond permitted limits.” (AFEIR 4-4; see also 7.2-17 (disclaiming Delta fisheries impacts).) However, ESA decisions on Delta fisheries, and subsequent new biological opinions, vitiate this assumption, casting doubt on whether DWR complies with permitted limits, and whether existing limits can adequately mitigate impacts. The over-pumping that contributed to the pelagic organism decline and decimated listed species in the Delta occurred during interim enforcement of the Monterey Amendments, in the many years that have passed since an adequate environmental review should have been prepared. CEQA involves not simply promises to follow the law, but a duty to “inform the public and responsible officials of the environmental consequences of their decisions before they are made.” (*PCL v. DWR*, 83 Cal.App.4th at p. 192.)

Since present “permitted limits” are far from sufficiently formed to protect the Delta ecosystem, the AFEIR also relies on “forthcoming” biological opinions and regulations. (AFEIR, 7.2-16.) However, the AFEIR does not come close to specifying performance standards to address Delta effects. Reliance on these future standards therefore amounts to impermissibly deferred mitigation. (CEQA Guidelines, § 15126.4(a)(1)(B).) The AFEIR also concedes that new or future regulatory constraints are likely to significantly reduce the potential for Delta exports compared to earlier periods (AFEIR 7.2-6), but it argues that this means the EIR has overstated project impacts. That is not the case for certain types of project impacts, such as induced reliance on paper water for development and hardening of demand for scarce Delta exports.

Growth-Inducing Impacts

The AFEIR recognizes that the project could support a new population in affected water agencies’ service areas of up to 495,451 people, based on both table A transfers and article 21 deliveries. (AFEIR, 8-41.) Considering the magnitude of growth involved, the AFEIR’s treatment of the issue is surprisingly vague and evasive. Growth analysis is predicated on a comparison between high and low years since the Monterey Amendments commenced interim operation (AFEIR, 2-36, 8-38). This is not precise or meaningful. The EIR recognizes that in California water history, the extremes (literally order of magnitude) are 1976 and 1982 (AFEIR, 2-16), and those natural extremes must be used (with adjustments for contemporary populations) to measure the potential of the project

to assuage severe water shortages and therefore foster more growth. It is artificial to confine the extremes analysis to the years since 1995.

Moreover, the AFEIR impermissibly defers growth assessment to local decision-makers (AFEIR, 8-8 to 8-11.) DWR's reliance on cases where the project made "no commitment" to specific development (AFEIR, 8-9) is misplaced. Here, DWR's project decision must address whether to *finally approve* changes to articles 18, 21 and 53 of the SWP contracts, each of which could induce growth. Article 53, which provides additional opportunities for agriculture-to-urban transfers, must be understood in light of article's 18(a)'s removal of the urban preference during temporary shortages. Even though DWR could have theoretically approved transfers under article 41 before the Monterey Amendments, only one such transfer was ever approved (Devil's Den), because it was impractical to base permanent development on agricultural water subject to article 18(a) cutbacks.

Lastly, the AFEIR fails even to assess the impacts of *known* Monterey Amendments-based transfers in sprawl-intensive areas north of Los Angeles (some relying upon the contested Kern-Castaic transfer), even though EIRs, Urban Water Management Plans, and other relevant documents were readily available. (AFEIR, 8-26.) DWR's claim to be outside the realm of local growth-related planning is also specious. When making decisions on projects and plans, and reviewing water supply assessments, local agencies can be expected to look to DWR's statewide guidance on SWP water supply reliability.

Paper Water

As the Supreme Court has recognized, "speculative sources and unrealistic allocations (paper water) are insufficient bases for decision-making under CEQA." (*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal. 412, 432.) Flaws in the assessment of articles 18 and 21, noted above, apply equally to the AFEIR's failure to disclose and analyze project-related paper water impacts. The AFEIR belatedly recognizes the "common sense connection between water supply reliability and growth" (AFEIR 9-2) and concedes that new table A and article 21 water, combined with storage, may facilitate "additional local development" (AFEIR, 9-3).

From there, the AFEIR defies common sense. First, while DWR denies the relevance of its mandatory article 18 duties (AFEIR, 9-2), the AFEIR refuses requests to incorporate in the EIR its alleged replacement, the biennial reliability reports DWR prepares pursuant to the Settlement Agreement. (Settlement Agreement, attachment A-3, ¶ 6.) The preparation of those reports is a subset of the project under review, not simply a "separate process." (AFEIR 9-23.) The public must have an opportunity to test in this project decision whether the reliability reports' water delivery probability curves—which still vastly exceed historic deliveries—create a new "cyber water" problem of inflated delivery expectations. DWR cannot avoid its recognition elsewhere that SWP deliveries are likely to be "substantially reduced" (AFEIR, 6.1-11), and that water exports must be subordinated to environmental considerations, such as adaptation to climate change and compliance with endangered species laws. (AFEIR, 11-11.)

Second, the AFEIR impermissibly defers to local assessment whether the Monterey Amendments' changes in articles 18(a), 18(b), 21, and 53 have facilitated new development and made demand for Delta exports more rigid, in effect creating a new "paper water" problem. Finally, the AFEIR disingenuously implies, without evidence, that factors such as SB 610 and SB 221 have now

removed the threat of paper water. But independent analysts continue to find that “many utilities are banking on ‘paper water’ already used by someone else within the state water system.” (E. HANAK, WATER FOR GROWTH: CALIFORNIA’S NEW FRONTIER (Public Policy Institute, 2005) p. vi.) The “gap between allocated ‘paper water’ and available ‘real water’ can be dramatic.” (ORANGE COUNTY GRAND JURY, PAPER WATER (2008-2009), p. 1.)

CALSIM II

For reasons exhaustively presented in the EIR comments of Steve Dunn and Arve Sjøvold (comment letter 22), incorporated here by reference, DWR continues to ignore critical flaws in the CALSIM II model, and major limitations on its application to this project. In the AFEIR, DWR not only ignored these concerns again, but refused to conduct any new modeling runs in response. Ironically, the AFEIR finally acknowledges that CALSIM II, as an optimization model, “effectively excludes the possibility of operating the SWP in a manner that would decrease exports.” (AFEIR, 6.3-34.)

The AFEIR relies upon a partial reference to the decision granting a Temporary Restraining Order (TRO) in the Intertie case (*PCL v. USBR* (2006) N. D. Cal. no. C 05-3527), reciting the truism that modeling perfection is not required. (AFEIR, 4-9.) But the AFEIR does not note the key holding in that ruling: non-disclosure of “relevant shortcomings” in data or models violates NEPA. As documented in the Dunn and Sjøvold letter, the EIR here has failed to disclose relevant shortcomings in CALSIM II and its application to the project.

Climate Change

The AFEIR concedes the profound effect climate change is having on State Water Project operations, noting that table A deliveries could “decrease by 10 to 25 percent” under both the baseline scenario and the project. (AFEIR, 12-8.) However, the AFEIR’s assessment of project-related climate impacts is limited to *statewide* greenhouse gas emissions, ignoring project-related effects on the location of development on the erroneous premise that this is solely a local matter. (AFEIR 12-4.) The AFEIR also refused requests to incorporate climate change analysis throughout the EIR.

DWR declined to study the climate effects of (1) the Monterey Amendments’ contribution to greenhouse gas-intensive sprawl development from new transfers and changed operating rules; (2) the effect on greenhouse gas emissions of eliminating article 18(a)’s urban preference; (3) whether retaining pre-Monterey shortage and surplus provisions would reduce SWP-related greenhouse gas emissions; and (4) investment in the Plumas Watershed Forum and Feather River Water Management Strategy to mitigate climate change impacts. DWR also failed to analyze how mitigation and alternatives could be framed in a climate-protective manner.

Environmental Consequences of Financial Restructuring

Financial restructuring under the Monterey Amendments would provide an enormous revenue stream to the State Water Project contractors. In 1995, the Environmental Defense Fund estimated the total distributed contractor savings as \$1.5 billion over the life of the project, or nearly \$37 million per year. (Comment letter 30, ex. I.) However, the AFEIR concedes that DWR did not even analyze article 51 for environmental impacts, based upon the theory that doing so would be “speculative.”

(AFEIR, 17-51.) That conclusion is untenable. The AFEIR should have compared the project's environmental consequences with enforcement of article 18(b), which might have eliminated reliance on paper water without imposing the high public costs of article 51. The AFEIR claims article 18(b) would not have provided more water from the environment (AFEIR, 17-52), but that conclusion rests on the false premise that "commensurate" increases in article 21 would have offset any water savings in article 18. The AFEIR should also have evaluated the environmental consequences of article 51's effect on water rates.

Project Alternatives

The AFEIR relies heavily on *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 42 Cal. 4th 1143, to vitiate DWR's duty to examine alternatives that meet most objectives, or that conflict with no project objectives. (AFEIR, pp. 5-9 to 5-10, 11-2; see also p. 2-31.) In *Bay-Delta*, the decision on the CALFED Programmatic EIR, the Court noted that with the CALFED program at a "relatively early stage of design," it satisfied CEQA's rule of reason to exclude a reduced exports alternative, as well as other alternatives that did not meet both ecosystem restoration goals and project water export demands. (*Id.* at p. 1168.) The Court explained that this conclusion was justified by the EIR's role as a program document and first-tier EIR.

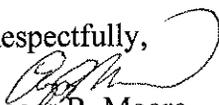
This conclusion from *Bay-Delta* does not apply to the Monterey EIR. First, unlike the CALFED policy decision addressed there, the Monterey program is far more specific and concrete. Indeed, the AFEIR here informs the *final project-specific choices* on such key project provisions as the Kern Fan Element transfer, certain water storage and management practices (flexible storage, turnback pool), and revised allocation methodology among the contractors; the project here proposes specific contract amendments. (AFEIR, 4-9.) Second, the only project alternative the AFEIR fully studied (alternative 5) was inadequate to address key issues raised by the plaintiffs, such as the operation of the Kern Water Bank or the changes in shortage and surplus rules; it merely consisted of the Monterey Amendments without the article 54 and 56 changes in water supply management practices.

Third, the AFEIR wrongly refuses to analyze at least two of the proposed alternatives on the erroneous premise that they would not meet most project objectives. PCL's EIR comments exhaustively demonstrated that the "Improved Reliability Through Environmental Enhancement" Alternative (IREE) would feasibly accomplish most of the project objectives, while also reducing injury to the Delta. In addition, the "Kern Fan Transfer with Trust Conditions" alternative would also meet project purposes devoting KFE to more than local use. The AFEIR's edits show that initially DWR understood that the Kern Fan Element was meant to address out-of-service-area storage, rather than purely local uses by Kern interests. (AFEIR, p. 2-34) Moreover, the AFEIR recognizes that the Kern Water Bank's primary use for transfers has been to profit from EWA sales (*Id.*, pp. 7.2-42, 43; 16-8, 17-42), whose sole local interest is private profit at the expense of the environment.

Lastly, measuring alternative feasibility solely by that which was secretly negotiated by the contractors deprives the public of the opportunity to propose and secure comparison of its alternatives. The AFEIR's alternatives assessment is therefore undermined by DWR's premise that it cannot make a "unilateral" decision, even for environmental review purposes, without the contractors' endorsement. (AFEIR, 5-5.) If that were the case, no alternative would ever be considered that was not sponsored by the contracting parties. This is not what the Supreme Court could have intended in *Bay-Delta*, but it

accurately reflects the dismissive approach of DWR and the contractors toward public participation. A more balanced approach is needed to restore the "meticulous" CEQA process that *PCL v. DWR* promised almost nine years ago.

Respectfully,


Roger B. Moore

Counsel for the Plaintiffs

cc: Honorable Daniel Weinstein, Mediator
Monterey Plus "Four by Four" Committee

EXHIBIT A

Gaming the water system

By Mike Taugher
Staff Writer
Contra Costa Times

Posted:05/25/2009 05:31:15 AM PDT

Just before Interstate 5 climbs the Grapevine out of the San Joaquin Valley is a massive underground reservoir that its owners say is the largest water banking project of its kind in the world.

Here among the tumbleweeds, sand and scrub, 15 miles west of Bakersfield, the gush of crystal-clear water appears as curiously out of place as the great blue herons cruising along the bank's six-mile canal.

The Kern Water Bank, which was owned by the state Department of Water Resources from 1988 to 1995, is now in the hands of Kern County interests and is 48 percent owned by Westside Mutual Water Company, a private water company controlled by Beverly Hills billionaire Stewart Resnick.

It is 32 square miles of desert where one natural river and two artificial ones pass: the Kern River, which originates in the southern Sierra Nevada; the California Aqueduct, which carries Delta water more than 400 miles to a reservoir in Riverside County; and the Friant-Kern Canal, which takes water to valley farmers from behind a dam on the San Joaquin River.

"We have lots of water conveyance facilities that bring water past the Kern Water Bank," said Jonathan Parker, general manager of the Kern Water Bank Authority. "That makes this location pretty unique."

In wet years, the water bankers deposit water from the rivers into ponds where it percolates into the Kern River's alluvial fan.

In dry years, they make withdrawals, which is why on a tour of the bank earlier this year water was gushing out of the ground from pipes and bubbling up into the canal from underground structures.

Kern County water users, thanks in part to local ownership of the Kern Water Bank, became the biggest source of water for Califed's "environmental water account" that cost taxpayers nearly \$200 million.

The account was in effect during a period when record amounts of water were pumped out of the Delta and fish populations staggered to record lows. One species, Delta smelt, could be near extinction in large part because of Delta water pumping.

Roughly one-fifth of all the money spent to buy water for the program went to companies owned or controlled by Resnick, one of the state's largest farmers.

More than half of Kern County's water sales to the environmental water account — and all of Westside Mutual's sales — came from the Kern Water Bank.

And thanks to the magic of paper water trades, less than half of the water sold from here was actually pumped out of the ground.

Representatives of Resnick's farm and water companies did not respond to repeated requests for interviews over a two-month period.

The state Department of Water Resources also declined to comment.

Deal's 'linchpin'

The deals worked by letting sellers trade the underground water they were selling at market prices for water the state was delivering to them at much lower prices.

Instead of going to Kern County, then, Delta water went to San Luis Reservoir east of Gilroy.

The state got the Delta water at the reservoir, while in Kern County the water was either pumped out of the ground for farmers' use or, more often, simply reclassified as if it were delivered from the Delta. The sellers then pocketed the price difference.

The exchanges made some sense because, by taking delivery of the water upstream, the state could deliver it almost anywhere it would want to without unnecessary pumping.

But it also meant that at a time when the state Department of Water Resources was pumping record amounts of water out of the Delta — in some cases exceeding conditions regulators had approved as safe for Delta fish — it was delivering some of that water to itself for a program that was supposed to protect the same fish populations that were damaged by the high pumping levels.

And it paid Kern County interests with taxpayer money for the ability to do so.

The general manager of the Kern County Water Agency, James Beck, said the program was a way for the state to ensure those buying water in Kern County got the water to which they were entitled.

"The environmental water account was a good example where water was provided to the state at a reasonable price... to assist the state to meet its contractual obligations to its contractors," Beck said.

For many sellers to the environmental water account, including Resnick's companies, the key was ownership of the Kern Water Bank.

The deal that transferred the Kern Water Bank from state ownership to Kern County interests has its roots in the last big California drought, from 1987 to 1992. As have been the past three dry years, the last drought featured water cutbacks and severe environmental strains in the Delta, where fish were being added to the lists of threatened and endangered species.

In Kern County, the last drought was particularly acute because contract rules at the time required Kern County's farmers to take deeper cuts to their Delta water supply than Southern California cities.

To avoid a court fight, water officials representing the state, Kern County and Southern California reached a deal with ramifications that linger today. Among other things, the deal transferred the Kern Water Bank from the state to local interests.

The "Monterey Agreement," named for the city where the negotiations took place, along with the CalFed plan that followed, laid much of the groundwork for how the state's water supplies would be managed and how the Delta environment would be protected.

The results were mostly good for big water users, and almost entirely bad for taxpayers and the environment.

"The environmental water account was in some respects the linchpin to close the deal for the CalFed plan," said Spreck Rosekrans, a co-author of a 2005 Environmental Defense Fund study that showed how the account lacked the resources it was expected to get while it also was required to do more than planned.

"It involved buying some of the water that had been overpromised. It allowed folks to game the system and gain profits that were unwarranted," Rosekrans said.

State denied

At the time of the last drought, Resnick was expanding his farm holdings near Bakersfield. Kern County property tax records show his companies appear to own more than 115,000 acres — nearly four times the size of San Francisco and more than all the parks in the East Bay Regional Park District combined.

The water supply for those farms and orchards, which his companies boast include the largest pistachio and almond growing and processing operations in the world, was secured in part by the Kern Water Bank.

With a capacity of at least 1 million acre-feet, it is like having a reservoir the size of Folsom Lake, near Sacramento, or 10 reservoirs the size of Los Vaqueros, near Brentwood.

There are other advantages too. Little water is lost to evaporation. Terrestrial habitat is not flooded.

The water is easy to get out of the ground: It only costs \$35 to \$40 to pump an acre-foot — nearly 326,000 gallons, Parker said.

Though the state invested a total of \$74 million in buying and developing the Kern Water Bank, it could never get the groundwater storage operations up and running, partly because of a state law that requires the Department of Water Resources to receive local approval for groundwater projects.

Kern County never granted that approval.

As a result of the negotiations in Monterey, the bank was transferred from the state to the Kern County Water Agency in exchange

for Kern County interests giving up a small portion of their claim to water. The agency immediately turned the bank over to a joint powers authority made up of a handful of water districts and Westside Mutual Water Company, which has a 48 percent stake.

Another 10 percent is owned by Dudley Ridge Water District, where Resnick's farming company, which owns more than 40 percent of the district's irrigated acreage, is the largest landowner.

Dudley Ridge's board president, Joseph MacIvaine, is also president of Resnick's farm company, Paramount Farms.

The agreement made in Monterey also forced Southern California cities to share equally with Kern County farmers in the pain of drought.

And it created a new program that allowed agencies in Kern County, Southern California and elsewhere to buy so-called surplus water for cheap — discount water that flowed so freely that, until the Delta ecosystem hit the skids, it amounted to more than the cut they took in their water contracts to obtain the water bank.

The U.S. Fish and Wildlife Service, in a December analysis, said delivery of "Article 21" water was also much more than what they approved when they issued a permit in 2004 meant to protect Delta smelt from the effects of Delta water pumping.

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Paper shuffle allows for vast supply of easy money

By Mike Taugher
Staff Writer

Posted: 05/23/2009 09:36:41 PM PDT
It must have seemed like easy money.

The state was delivering more water than ever to its customers, and in Kern County some of those customers sold some of it back, through a simple trade, at a higher price.

Tens of millions of dollars in sales to the "environmental water account" were little more than paper shuffles. It was all perfectly legal.

But the environment lost while Kern County water agencies collected \$138 million in sales to the program, the vast majority of which was paid for with the proceeds from taxpayer backed environment and water bonds.

Public water agencies in Kern County used money from sales to an environmental water account to fund an employee retirement plan, buy land and pay for miscellaneous repairs, documents and interviews show.

One document shows that the Kern County Water Agency used revenue from the sales to help finance a lawsuit against the Department of Water Resources — the same agency that wrote the taxpayer-backed check to the agency — to lower its water bills.

The head of the Kern County Water Agency, James Beck, denied the lawsuit was funded with the sales revenue, but he could not explain why the general manager of one of his agency's member districts

recounted that version of events to his board of directors.

Beck said revenues from the sales were used to cover the cost districts paid to buy, store and deliver the water. He also said funds were set aside to cover the cost of future purchases to replace water that was sold.

But documents and interviews show the sales were seen by the water agency's "member units," at least in some cases, as a source of revenue that could be used for a wide variety of purposes:

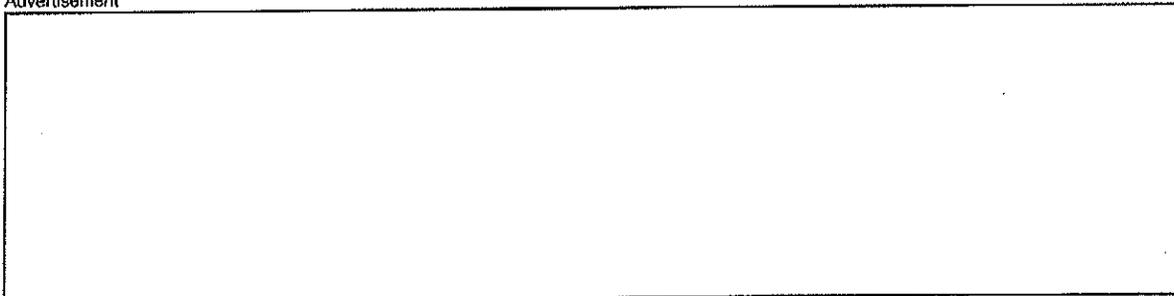
In 2003, the Buena Vista Water Storage District, based in Buttonwillow, put \$500,000 in revenues from the environmental water account sales into its employee retirement plan, documents show.

Water districts put environmental water account revenues into their coffers to offset miscellaneous repairs and other costs in order to keep customers' water bills down, said Dennis Atkinson, general manager of the Tejon Castaic Water District. "We take that money and apply it against our bills," Atkinson said.

One district participated only marginally — selling small amounts of water at a relatively low price to the account's precursor one year and participating as a partner to help other water districts complete their sales in another. The Rosedale-Rio Bravo Water Storage District, based in Bakersfield, still was able to buy land to expand its groundwater storage capacity and build facilities with the proceeds, said general manager Eric Averett. Increasing the groundwater banking capacity is arguably consistent with managing water for the account, although the district did not sell any water to the account after 2001.

MediaNews identified \$8.6 million worth of checks,

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refunds and credits, presumably to offset water purchases and pumping costs, including more than \$3 million to Paramount Farms, that were paid to landowners in public water districts that sold to the water account. Blackwell Land LLC also received more than \$3 million in refunds from the sales, while the remainder went to fewer than 10 other private landowners.

In 2003, Westside Mutual Water Company and the Wheeler Ridge-Maricopa Water Storage District negotiated a \$600,000 payment to the water company, controlled by Beverly Hills billionaire Stewart Resnick, after a change in circumstances shifted a portion of the sales from Westside Mutual to the water district. At a meeting of sellers to the account, there was "a plea from Westside MWC that some compromise be worked out to adjust for the windfall" to the Wheeler Ridge-Maricopa district, which gained a greater share of the sales at Westside's expense, according to a memorandum from the water district's general manager, William Taube.

Wheeler Ridge, which serves water to about 90,000 acres of farmland south of Bakerfield, shifted \$600,000 in sales to Westside Mutual, which still left the district with \$1.4 million in "net revenue."

The most unusual use of environmental water account money may have been its apparent use to sue the state Department of Water Resources — the agency that wrote the check for the purchases — to lower Kern County's water bills.

Beck denied that happened, but that is what Taube told his board of directors in May 2007.

In an interview, Taube said that while it was possible he was mistaken, the point he made was that Kern's "member units" would not have to contribute attorneys' fees because enough revenue

had been generated from the water sales.

The lawsuit, known as the "Hyatt-Thermalito litigation," is a dispute over how the state prices power from turbines at Lake Oroville. Kern County Water Agency and other water districts north of the Tehachapis, including Bay Area districts, want the prices to reflect market rates, which would increase the cost of water in Southern California — where it takes more electricity to deliver Delta water because of the greater distance and the need to pump the water over the Tehachapis.

The power sales are applied to contractors' debt for the State Water Project's dams, pumps and aqueducts, so raising the price of the electricity would reduce debt for contractors north of the Tehachapis at Southern California's expense.

In May 2007, Taube told his board that at the Kern agency's April board meeting he attended, the Kern board "directed that 2007 EWA sale proceeds accruing to the Agency would be used to fund the Hyatt-Thermalito litigation. This will reduce the litigation cost borne by Member Units and delay the time when Member Unit contributions to this litigation will be necessary," according to minutes of the Wheeler Ridge-Maricopa district's meeting.

Beck said that was incorrect but did not offer an explanation for how a misunderstanding might have occurred.

"That was my understanding at the time," Taube said. "If he (Beck) disagrees, maybe I misunderstood something."

Asked to clarify what his understanding was at the time, Taube said it was that, "They weren't going to need to call on member units ... because of the EWA."

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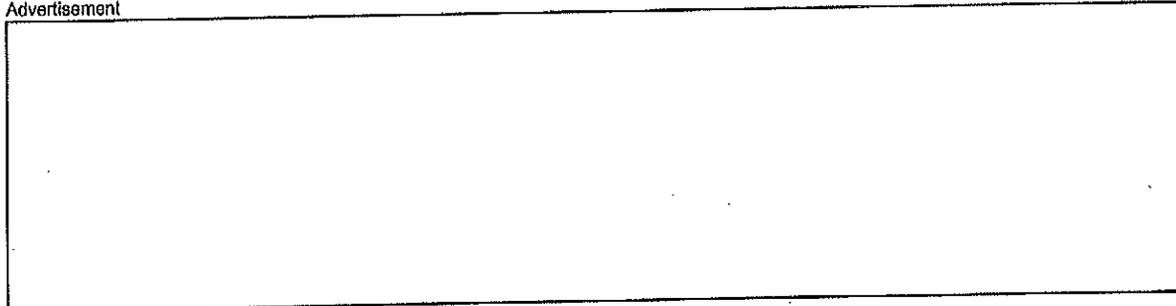
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Department of Water Resources Director Lester Snow, through a spokesman, declined to comment on the possibility that the proceeds from taxpayer-financed water sales to his agency may have been used to sue his agency.

In response to a formal request under the state Public Records Act, the Kern agency said it had no records showing environmental water account revenues being used to pay for lawyers. The official minutes of the Kern agency's April 2007 meeting contain no mention of the Hyatt-Thermalito lawsuit and its meetings are not recorded.

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MEDIANEWS INVESTIGATION

Pumping water and cash from Delta

By Mike Taugher
Staff Writer

Posted: 05/23/2009 09:34:58 PM PDT

Updated: 05/24/2009 03:26:51 PM PDT

As the West Coast's largest estuary plunged to the brink of collapse from 2000 to 2007, state water officials pumped unprecedented amounts of water out of the Delta only to effectively buy some of it back at taxpayer expense for a failed environmental protection plan, a MedinNews investigation has found.

The "environmental water account" set up in 2000 to improve the Delta ecosystem spent nearly \$200 million mostly to benefit water users while also creating a cash stream for private landowners and water agencies in the Bakersfield area.

Financed with taxpayer-backed environment and water bonds, the program spent most of its money in Kern County, a largely agricultural region at the southern end of the San Joaquin Valley. There, water was purchased from the state and then traded back to the account for a higher price.

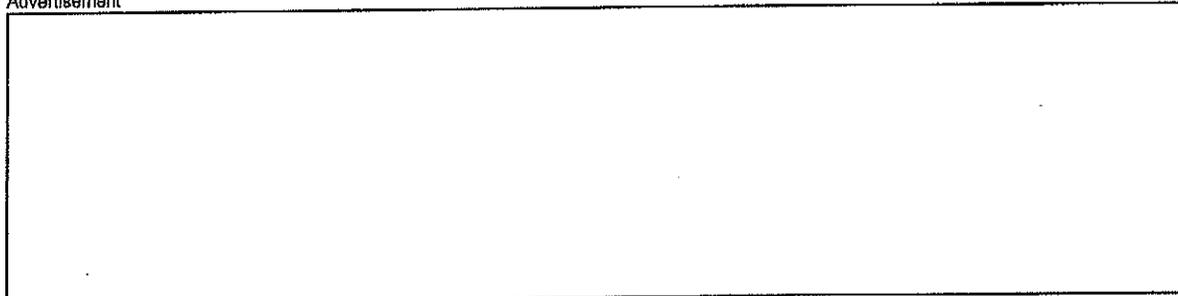
The proceeds were used to fund an employee retirement plan, buy land and groundwater storage facilities and pay miscellaneous costs to keep water bills low, documents and interviews show.

Revenues from those sales also might have helped finance a lawsuit against the Department of Water Resources, the same agency that wrote the checks, documents show.

No one appears to have benefitted more than companies owned or controlled by Stewart Resnick, a Beverly Hills billionaire, philanthropist and major political donor whose companies, including Paramount Farms, own more than 115,000 acres in Kern County. Resnick's water and farm companies collected about 20 cents of every dollar spent by the program.

Those companies sold \$30.6 million of water to the

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state program, participated as a partner in an additional \$16 million in sales and received an additional \$3.8 million in checks and credits for sales through public water agencies, documents show.

"For a program that was supposed to benefit the environment, it apparently did two things — it didn't benefit the environment and it appears to have enriched private individuals using public money," said Jonas Minton, a water policy adviser to the Planning and Conservation League, a California environmental advocacy group.

Representatives of Resnick's farm and water companies did not respond to repeated requests for interviews. A woman who answered the phone at the Resnick's holding company last week said, "We don't talk to the press. It's company policy." She transferred the call to a company official who did not respond for an interview request.

The state Department of Water Resources also declined to comment for this story.

A paper accounting thing

The idea behind the environmental water account was to protect the Delta ecosystem without taking water away from people, farms and agencies that held growing expectations — and contracts — for water. By setting aside water that could supplement flows from the Delta, biologists would be able to slow Delta pumps at sensitive times, thereby protecting imperiled fish such as Delta smelt.

The water account was meant to enhance existing environmental protections and protect water users from the possibility that regulators might force them to give up more water to protect fish.

Despite good intentions, however, the program

lacked the resources to provide the environmental benefits it promised. Traditional users got their water, but the environment suffered. Delta smelt dropped to levels near extinction. Even the backbone of the state's commercial salmon industry, Sacramento River fall-run chinook salmon, broke under the combined strain of ocean fluctuations and a variety of Delta-related problems, possibly including water management. That salmon fishery, which had never before been closed, is now off-limits to anglers for the second consecutive year, leaving supermarkets temporarily devoid of wild California salmon.

The way it was supposed to work was novel. If fish were in danger of being sucked into massive Delta pumping stations, for example, biologists could invoke the account to slow the pumps down. Then, contractors who would otherwise be deprived of water from the slowdown would be made whole with water from the account.

In order to provide that replacement water to contractors, the water account needed water stored south of Delta pumps. The underground water storage facilities in Kern County's aquifers and ancient river formations proved to be its most important source.

But the location at the southern end of the San Joaquin Valley was not ideal. It made more sense to store the water closer to the Delta, where distribution would be easier to a wider variety of places.

So the water in Kern County was "exchanged" for Delta water that was being pumped at record high — and environmentally damaging — rates. The Delta water was then deposited in the environmental water account at San Luis Reservoir near Gilroy.

The exchange legally moved the water that was

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stored underground in Kern County to San Luis, but the water was still there. To complete the trade, then, the underground water had to be treated as if it were being delivered from the Delta.

Sometimes, Kern County water agencies retrieved the "Delta" water from underground for irrigation, but in most cases, the state was delivering so much water they did not need to.

Instead, most of the time all they had to do was simply forego storing the excess Delta water and pocket the difference between the low rates they paid to the state and the higher market rates they collected from the sale to the water account.

"I wouldn't pump that water to sell the (environmental water account)," said Dennis Atkinson, general manager of the Tejon Castaic Water District, which sold about \$2 million worth of water to the account. "How are you going to make any money? ... It's a paper accounting thing. We never turned on a pump."

The price of water

The cost to taxpayers for Kern County water averaged \$196 per acre-foot. The price Kern County paid for Delta water varied, but in 2007, the last year the environmental water account was operating, Kern County water users paid an average of \$86 for Delta water. Some of that water was purchased for as little as \$28 from a discount program.

The environmental water account was administered by the state Department of Water Resources, which also operates the state-owned pumps near Tracy. It bought most of its water from the Kern County Water Agency, whose general manager insisted the prices charged to taxpayers were fair and necessary to offset the cost of buying, storing and managing the water.

"The prices were in line with what we felt were the appropriate costs," said general manager James Beck.

Still, Beck acknowledged, there was nothing in contracts to prevent sellers from making money.

Of course, selling reserves can be risky, and Beck said market prices this year are \$350 per acre-foot or more. Given this year's water shortages, he said that if Kern County landowners could go back in time and undo those sales, they would "in a heartbeat."

To Atkinson, of the Tejon-Castaic Water District, it made sense for water districts to reap a return on the sales because water contractors have been paying for the state's dams, pumps and canals since the 1960s, while the demand that more Delta water be dedicated to the environment is more recent.

"These guys have showed up lately and want something someone else has," Atkinson said. "Since they don't have infrastructure, they have to get it from the people who made the investment."

The vast majority of the financing for the nearly \$200 million program came from state environment and water bonds that will be repaid with interest over the coming years.

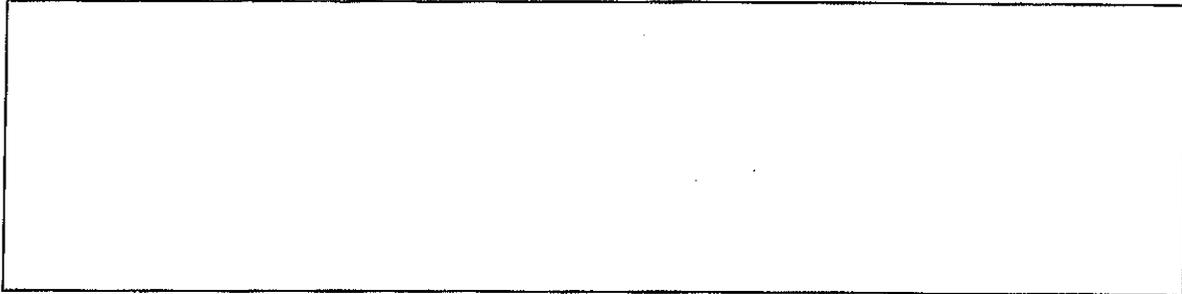
Of that total, about 70 percent was used to buy water from entities in Kern County.

And of the Kern County sales, the \$30.6 million sold directly by Resnick's Westside Mutual Water Company was more than twice the sales of any other entity, records show.

Open spigot

The environmental water account's effectiveness

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was hampered by the fact it was perpetually short of the 380,000 acre-feet a year envisioned when it was set up. In addition, a 2002 court decision favorable to water users reduced a separate source of environmental water, a cut that had to be made up by the environmental account, according to a 2005 report by the Environmental Defense Fund.

Also in 2005, three years into the fish collapse but the first year scientists could be sure that what they were seeing was a statistically valid plunge, the Contra Costa Times detailed how biologists worried about Delta smelt near the pumps were unable to get water managers to fully accept recommendations to slow the pumps because of concerns about driving the environmental water account into debt.

A study published last fall in the scientific journal *Environmental Management* concluded the account improved the reliability of water supplies for Delta water users but it was unclear whether it provided any meaningful environmental benefit.

Meanwhile, while the water account was meant to offset the environmental damage done by pumping water out of the Delta, it was being relied upon during a period when the state Department of Water Resources was ramping Delta water deliveries up to record levels. The environmental water account went into effect in 2000, and the five highest water deliveries from the Delta were 2000, 2003, 2004, 2005 and 2006, years in which, along with 2007, state water officials also sold large volumes of discount water that Kern County agencies would buy in 2007 for \$28 per acre-foot.

The sharp decline in fish populations began around the same time, starting in about 2002. And while there are likely numerous factors that caused the collapse, most scientists studying the problem believe pumping patterns contributed.

Water officials have argued that the increase in discount water deliveries through a program known as Article 21 made no difference, since the price of water has no biological effect and because the amount of water pumped annually was below the maximum authorized by the U.S. Fish and Wildlife Service.

But regulators disagree.

A permit from the Fish and Wildlife Service, first issued in 2004, contained restrictions that were supposed to protect Delta smelt from going extinct due to water pumping. It was issued based on regulators' understanding that the use of Article 21 would be much less than it turned out to be.

In a 400-page analysis accompanying a replacement permit issued in December, the service's biologists noted that the Article 21 program was used far more extensively than they had been told when they issued the 2004 permit.

And that, in turn, helped drive up overall pumping rates from the Delta, which regulators tied to the environmental decline.

A coalition points elsewhere

Most of the water sold through the Kern County Water Agency originated with about a dozen smaller public water district "member units" and a handful of private interests who previously stored water, mostly from the Delta, in underground reservoirs.

Several of those entities are members of the Coalition for a Sustainable Delta, a group that banded together to fight back against pumping restrictions imposed in late 2007 by courts and regulators.

The coalition has filed three lawsuits and

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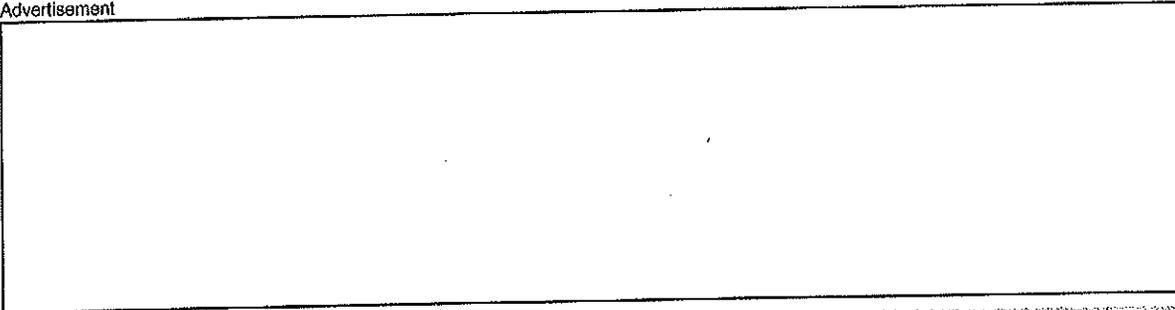
threatened to file several more to shift blame away from water pumping's role in the Delta's collapse. The group contends other environmental threats are also to blame for the Delta's demise, including housing development in Delta floodplains, pesticide use, dredging, power plants, sportfishing and pollution from mothballed ships near Benicia.

The Coalition for a Sustainable Delta's phone number is the same as Paramount Farms, and of the four coalition officers listed on tax documents, three are Resnick employees: William Phillimore, chief financial officer and executive vice president for Westside Mutual and Paramount Farming; Scott Hamilton, resource planning manager for Paramount Farming; and Craig B. Cooper, chief legal officer for Roll International, Resnick's holding company.

A spokesman for the coalition said that although it has an employee working out of the Paramount Farms office, the group is governed by dues paying members and not Resnick. He attributed the heavy presence of Resnick's companies on the group's tax returns to issues associated with getting the new coalition up and running.

"It's an ad hoc coalition. You have to organize that way," said spokesman Michael Boccadoro.

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Water ownership murky, complicated

By Mike Taugher
Staff Writer

Posted: 05/23/2009 09:32:01 PM PDT

Kern County water users who sold millions of dollars worth of water to a program meant to help the environment said the arrangement made sense because the water was rightfully theirs.

Few would dispute that water that was purchased and stored in Kern County could be sold to the environmental water account.

But the sales were made easier by the fact that the state Department of Water Resources was cranking up water deliveries to unprecedented heights at the same time it was buying water back for the environment.

The general manager of one of the agencies that sold water through the program, Dennis Atkinson of the Tejon-Castaic Water District, acknowledged that the sales only made sense to him if state pumps were delivering more water than his district could immediately use.

In other words, the higher pumping levels not only took an environmental toll on the Delta, they also made water available to buy back to protect the Delta.

Was the state required to deliver all that water or could it have pumped less and potentially saved the cost of buying it back? Put another way, does Delta water belong to contractors or do environmental needs have priority?

The answer is unclear.

Kern County water districts have a contract that awards them about 1 million acre-feet of water a year. And as customers of the State Water Project, they have to make the same payments on the project's dams, pumps and canals no matter how much water they get.

The state's water customers contend the contract obligates the state to make water available, and the contracts and simple fairness support that, at least to some degree.

On the other hand, a consolidated version of the full contract — which runs 348 pages and has nearly 40 amendments — appears to recognize that water shortages can develop "due to drought or any other cause whatsoever."

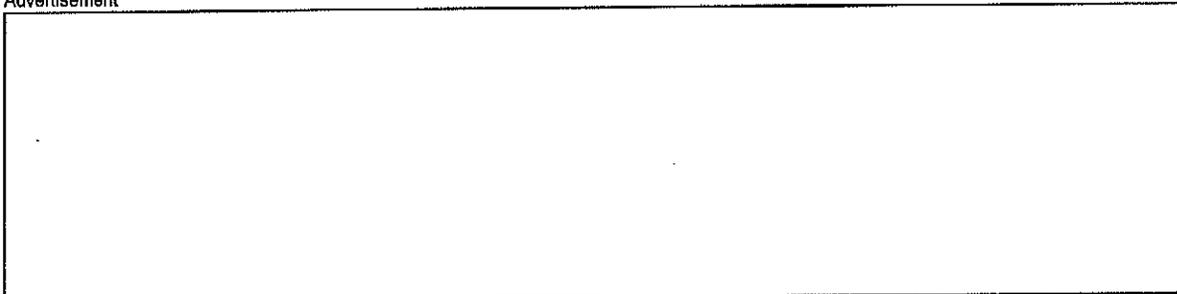
And the right to water in arid states is always conditional. The government can promise all the water it wants, but it can't make it rain.

Environmental laws, a constitutional requirement that water use be reasonable and beneficial and an ancient legal doctrine that ensures water is used in a way that considers public trust values — including the health of natural resources such as the Delta — further limit the use of water, making the question of who "owns" water complicated.

"Because it's called a right, people tend to think of it like the First Amendment," said Phil Isenberg, a former legislative leader and chairman of a Delta Vision task force appointed in 2007 by Gov. Arnold Schwarzenegger to figure out how to fix the Delta.

"The water rights system is a way of figuring out who is first in line when supplies aren't enough to satisfy all of the water needs."

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One of the state's biggest difficulties in delivering water to users while protecting the environment is the fact that water has been dramatically overpromised, Isenberg said.

As the Delta Vision committee was wrapping up its work last year, a memo arrived that members had requested from the state agency that administers water rights.

It carried this sobering comparison: The average natural flow of water in the Delta watershed is 29 million acre-feet per year, while the face value of water rights in the same watershed is 245 million acre-feet, or more than eight times the average flow.

"I was dumbfounded," Isenberg said.

Not all of the water in those rights is actually used, some of the rights are double-counted and much of the water that is used finds its way back into rivers where it can be used again.

Nevertheless, the figures are convincing evidence to Isenberg and others that the state has promised far more water than it can deliver.

Further complicating matters, the State Water Project signed contracts with Kern County, Southern California and others at a time when plans called for dams to be built on North Coast rivers that would produce millions of additional acre-feet a year to spill into the Delta for contractors to use. Those dams were never built.

Faced with overpromised water, population growth, a sensitive environment and periodic droughts, it is no surprise California has difficulties managing water.

Those difficulties also are not new.

After the last major drought ended in 1992 a series of deals were struck to fix the system, culminating in 2000 with a plan known as "CalFed."

There may not have been enough water to satisfy farmers, cities and the environment, but when the deal was signed in 2000, the state was awash in money thanks to soaring real estate, stocks and dot-com enterprises.

One of the keys to the CalFed deal was the environmental water account.

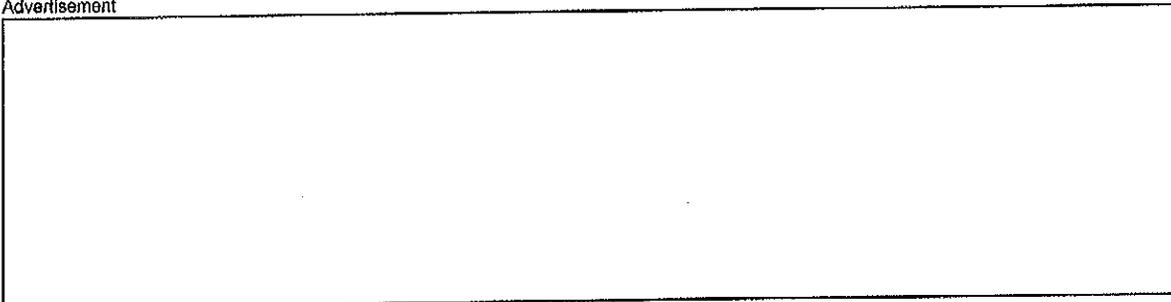
The idea was to use the market to strike a new balance between the needs of the environment and people. The account would be used by regulators to enhance the environment by buying water from willing sellers, thereby reducing conflicts that arise when regulators take it away from water users.

In the absence of an environmental water account, water users faced the possibility of additional environmental restrictions, according to a 2001 report by the Legislative Analyst's Office. For that reason, the LAO said water users should help pay for the program.

"Since compliance with endangered species laws is a responsibility of the state and federal water projects, (the environmental water account) in effect reduces the compliance burden for these projects," the LAO found.

Instead, the environmental water account ended up relying almost exclusively on taxpayer-backed bond funds, and most of that money was spent to buy water stored in Kern County.

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DEPARTMENT OF WATER RESOURCES

1416 NINTH STREET, P.O. BOX 942836
SACRAMENTO, CA 94236-0001
(916) 653-5791

**AUG 31 2009**

Re: Referral under Section III(H)(3) of the Settlement Agreement

Dear Parties to the Settlement Agreement:

DWR received the attached letter, dated August 13, 2009, from Roger Moore, Counsel for the Plaintiffs. The letter stated that plaintiffs' organizations refer specific "mediation issues for the Director's personal review and correction, as anticipated by section III.H of the Settlement Agreement." The EIR committee contractor representatives sent an e-mail saying that the State Water Contractors did not intend to refer any issues to mediation. Section III(H)(3) of the Settlement Agreement requires DWR to inform the Parties to the Settlement Agreement of any referrals made pursuant to Section III(H). This letter is intended to satisfy this requirement.

Mr. Moore states in his letter that the plaintiffs ask that I advise the Mediator and the affected parties by, September 15, 2009, whether and to what extent the EIR will be changed before publication in final form and that "if no changes are identified by that date, the plaintiffs will be entitled to assume that their references have been denied".

I believe the extensive nature of the issues raised in the letter merits my serious consideration. A thorough review of these issues will take longer than the time requested by Mr. Moore, but I believe that it will provide for a more thoughtful and reasoned response on my part. I anticipate issuing a written decision regarding the issues raised in Mr. Moore's letter by October 15, 2009. It is our understanding of the Settlement Agreement that after I issue the written decision the next step of the mediation process is governed by Section III(H)(2).

Please inform Katherine Spanos, DWR Senior Staff Counsel, at kspanos@water.ca.gov by September 4, 2009, if you wish to comment on the issues raised in Mr. Moore's letter and submit your comments to her by September 10, 2009.

Sincerely,

A handwritten signature in black ink, appearing to read "Lester A. Snow", with a long horizontal flourish extending to the right.

Lester A. Snow
Director

cc: (See attached list)

Katy Spanos
David Sandino
Rossmann and Moore, LLP
State Water Contractors
Deborah Wordham
Plumas County Flood Control and Water Conservation District
Citizens Planning Association of Santa Barbara County, Inc.
Alameda County Flood Control & Water Conservation District, Zone 7
Alameda County Water District
Antelope Valley-East Kern Water Agency
Castaic Lake Water Agency
City of Yuba
Coachella Valley Water District
County of Butte
County of Kings
Crestline-Lake Arrowhead Water Agency
Desert Water Agency
Dudley Ridge Water District
Kern County Water Agency
Littlerock Creek Irrigation District
Metropolitan Water District of Southern California
Mojave Water Agency
Napa County Flood Control & Water Conservation District
Oak Flat Water District
Palmdale Water District
San Bernardino Valley Municipal Water District
San Gabriel Valley Municipal Water District
San Geronio Pass Water Agency
San Luis Obispo County Flood Control & Water Conservation District
Santa Barbara County Flood Control and Water Conservation District
Santa Clara Valley District
Solano County Water Agency
Tulare Lake Basin Water Storage District
Ventura County Flood Control District
Central Coast Water Authority
Kern Water Bank Authority

KSpanos:macosta

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Spell Check: 8/31/09

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August 13, 2009

Lester Snow, Director
Department of Water Resources
1416 Ninth Street, 11th Floor
Sacramento, CA 95814

Re: "Monterey Plus" Administrative Draft Final Environmental Impact Report: List of
Issues Referred for Director's Decision

Dear Director Snow:

The plaintiffs' representatives on the EIR committee have reviewed the Administrative Draft Final EIR (AFEIR) for the "Monterey Plus" project (SCH # 2003011118), for purposes of reference to the Director as specified in the Settlement Agreement. As requested in Department of Water Resources (DWR) counsel Katy Spanos' email note to us dated July 24, 2009, the plaintiff organizations (Planning and Conservation League, Citizens Planning Association of Santa Barbara County, and Plumas County Flood Control and Water Conservation District) in this letter refer the following mediation issues for the Director's personal review and correction, as anticipated by section III.H of the Settlement Agreement. These issues are described in greater detail in comments on the Draft EIR (DEIR).

We are disappointed that notwithstanding the years of DWR preparation of the EIR, and our significant comments both formally and informally through the "four by four" committee, the AFEIR now prepared for your personal review still perpetuates the fundamental flaws identified here. Realistically, we recognize the low probability that DWR will now change course and that the Director and his staff will fulfill their legal duties to exercise DWR's, and not the State Water Contractors' (contractors'), judgment about the most responsible way to conduct the State Water Project in the 21st century. Nonetheless, we would be remiss if we did not address our understanding of these duties.

The plaintiffs have been allocated less than three weeks to review and comment on the AFEIR, a document DWR has worked on for years and had an opportunity to review before its release. All issues identified here are familiar to DWR through extensive comment and discussion in the EIR committee, and in public comments on the Draft EIR. To ensure fairness and avoid delay, we ask and expect that the Director will no later than September 15 advise the Mediator and the affected parties

whether and to what extent the EIR will be changed before publication in final form. If no changes are identified by that date, we will be entitled to assume that our references have been denied and that we are free to present these issues pursuant to section III.H.2 of the Settlement Agreement to the Mediator for his review.

Prompt resolution of these issues is also compelled by the current water policy debate in California. The current State Administration has pressured the Legislature and public to reach an early accord on California water policy, while at the same time delaying for more than six years since the Settlement Agreement, its required decision on whether and to what extent the 1960 State Water Contracts should be modified. We believe that neither the Legislature nor the public can fairly evaluate or implement changes in state water policy without resolution of the State Water Contracts' future. If this Administration is truly committed to prompt development of new state water policy, it must no longer delay resolution the issues identified in this letter.

Public Participation

The AFEIR recognizes that the proposed Monterey Amendments constitute the "most substantial" changes in the history of the State Water Project (SWP). (AFEIR, 5-4.) Yet the AFEIR asserts that "CEQA does not require public participation in the decision-making process," and that DWR has no such requirement. (AFEIR, 4-8.) That statement, framing the EIR's disrespect of the plaintiffs' alternatives that could actually lead to meeting public as well as contractors' institutional interests, is phenomenally misguided. In *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892 ("*PCL v. DWR*"), the court noted "the contractors and the members of the public who were not invited to the table" in the negotiations that led to the Monterey Agreement, and affirmed that CEQA "protects not only the environment, but informed self-government." (*Id.* at pp. 905, 916.) In the Settlement Agreement (attachment D), DWR agreed "that public review of significant changes to these contracts is beneficial and in the public interest."

Project Objectives and Lead Agency Role

CEQA requires the "fullest possible protection" of the environment within the statute's reasonable scope. (CEQA Guidelines, § 15003.) In contrast, the AFEIR primarily measures the project based upon the ambitions of the contractors and DWR officials, while marginalizing public input to project formation or alternatives. For example, DWR is aware that "problems plaguing the Delta" helped precipitate the Monterey Amendments (*PCL v. DWR*, 83 Cal.App.4th at p. 908) and admits that Delta problems have grown severely since the 1990s. Yet the AFEIR summarily rejects the plaintiffs' attempts to more thoroughly integrate Delta protection into the assessment of impacts, mitigation, and alternatives, positing that this is a "broader" issue extraneous to the key project objectives. (AFEIR, 5-5, 5-6.) Conversely, the AFEIR states that the "fundamental purpose" of the project is to "resolve conflicts and disputes between and among" the SWP contractors and DWR (AFEIR, 4-4), ignoring the clear teaching of *PCL v. DWR* that "the threat of litigation cannot be allowed to derail environmental review." (83 Cal.App.4th at p. 913.)

The AFEIR's deference to the contractors, and marginalization of public criticism, also undermines DWR's court-mandated exercise of its lead agency duties. DWR limited project objectives to "issues and conflicts *between and among the Department and the contractors*," and claimed that "the Department *cannot make a unilateral decision* because contract changes are involved." (AFEIR,

5-5 (emphasis added).) DWR alone has the duty to manage and administer the SWP on behalf of the people of California, a task that cannot be left to local contractors. (Wat. Code, § 12930, *et seq.*) It is “incongruous to assert that any of the regional contractors simply by virtue of a private settlement agreement can assume DWR’s principal responsibility for managing the SWP.” (*PCL v. DWR*, 83 Cal.App.4th at p. 185.) Had the AFEIR recognized that the choice is not between Monterey or Monterey Plus and a different project, but instead a choice between the pre-Monterey 1960 contracts and a different project, then both DWR and the contractors might have the more open-minded approach to project alternatives that CEQA requires.

Uses of the EIR

Section III.C of the Settlement Agreement defines DWR’s Monterey Plus project as *both* the Monterey Amendments and the “additional actions” defined in the agreement (respectively, “Monterey” and “plus”). Yet despite repeated requests, DWR has failed to commit to rendering a new decision on the “Monterey Amendments” component of the project once it certifies the new EIR. The AFEIR (pp. 4-5, 4-6) evades answering whether DWR’s project decision requires new contracts. It falsely defines the task of lead and responsible agencies as “to decide whether to *continue operating* under the proposed project and whether to decide whether to implement one of the alternatives to the proposed project.” (AFEIR, 4-6 (emphasis added).) It also treats Kern Water Bank transfer and operation as *faits accompli* beyond DWR’s discretion. (AFEIR, 4-11.)

Defining the project decision in terms of “continued operation” is blatantly inappropriate. There has been no lawful decision to implement the Monterey Amendments. The Monterey Amendments (including the Kern Fan Element (KFE) transfer) are in effect only under the Superior Court’s *interim* order under Public Resources Code section 21168.9. (See also Settlement Agreement, §§ II, VII.) When that order expires, the contracts will revert to their pre-Monterey status unless DWR makes a new approval decision and files a return to the writ. Holding otherwise would compromise CEQA’s “interactive process of assessment and responsive modification that must be genuine.” (*County of Inyo v. City of Los Angeles (VI)* (1984) 160 Cal. App. 3d 1178, 1185.)

Assessment of Shortage and Surplus Provisions

Repeating the key errors identified in numerous public comments on the DEIR, the AFEIR’s assessment of the “no project” alternative once again fails to “fulfill its mandate” to “present a complete analysis of the environmental consequences” of enforcing the pre-Monterey permanent shortage provision, article 18(b). (*PCL v. DWR*, 83 Cal.App.4th at p. 915.) The AFEIR also failed to come to terms with the “related water delivery effects” of other Monterey changes, such as those in articles 18(a) and 21.

The “no project” assessment performs a classic “bait and switch.” Having recognized that implementation of article 18(b) would reduce table A amounts to less than half their original levels (1.9 million acre-feet), the AFEIR assumes that any resulting decreases in table A allocations would simply “commensurately increase” allocations of article 21 surplus water. (AFEIR, 9-3.) That rote assumption, which would virtually read article 18(b) out of the contracts, resurrects the discredited position in the decertified 1995 EIR. (*PCL v. DWR*, 83 Cal.App.4th at p. 919.) As discussed in the EIR comments, this approach ignores research showing other options were available. (Comment letter 30, ex. B.) It also slights the large increases in article 21 deliveries under the interim implementation of the

Monterey Amendments. In short, DWR rejects invoking article 18(b) as a “reasonable” way to protect the Delta and end local reliance on paper water only after redefining it to be meaningless.

The AFEIR misinterprets article 21(g)(1), proposed for removal in the Monterey Amendments, which protects against the building of permanent economies based upon surplus water. The provision, while covering “scheduled” agricultural surplus water, is not limited to that variety; it applies also to interruptible water. (AFEIR, p. 9-7.) The AFEIR improperly declines to fully analyze consequences of permanently changing article 21(g)(1) on the theory that impacts are “local.” (AFEIR, 6.1-10.) However, local decision-makers would lack any opportunity to restore that provision after it is deleted.

The AFEIR also presents a caricatured analysis of article 18(b) enforcement without increases in article 21 deliveries. That analysis does not simply retain the pre-Monterey terms; it *eliminates* the use of article 21 water. (AFEIR, 9-18.) This analysis does not address conservation and demand management strategies that could mitigate the need for article 21 deliveries. The AFEIR also fails to adequately respond to requests to disclose the water rights underlying export of water from the Delta under article 21. (AFEIR, 14-14.) In addition, although the AFEIR concedes that article 21 water, coupled with storage, may facilitate additional local development (AFEIR, 9-3), it refuses to study that development’s relationship to water supply reliability based on the erroneous premise that this solely involves a local decision. (AFEIR, 9-2.)

Project Baseline

The AFEIR’s baseline is defective in both timing and content. The AFEIR recognizes that SWP contracts will not expire until 2035 (AFEIR, 6.1-2), but it arbitrarily ends the period analyzed at 2020, which, given the lengthy delays in this review, is now only eleven years away. The AFEIR also analyzes individual project impacts over inconsistent periods.

The AFEIR lacks a credible explanation for its adjustment of the baseline to reflect anticipated events, such as anticipated population growth, urban development, increased water demand, and water transfers. That approach wrongfully conflates baseline and “no project” alternatives. (See CEQA Guidelines, §§15125(a); 15126.6.) The AFEIR’s defense of DWR’s approach—an analogy to “ongoing operations” cases—relies upon inaccurate definition, criticized above, of the project as a “continued operation.”

Kern Water Bank

Faulty assessment of the Kern Water Bank’s (KWB’s) operation is one of the foundational errors in the AFEIR. The Settlement Agreement requires DWR to provide an “independent study,” and “exercise of its judgment regarding the impacts related to the *transfer, development and operation* of the Kern Water Bank” in light of existing environmental permits. (Section III.F (emphasis added).) However, the AFEIR suggests that DWR lacks discretionary authority over the bank’s transfer and operation, positing that “once the transfer of the KFE property occurred, the KWBA (Kern Water Bank Authority) assumed the responsibilities of the property and the development of the KWB lands.” (AFEIR, 16-4 (opposing “Department re-evaluation”); 4-11.) Post-transfer, DWR suggests that bank operation became a “*locally-owned KWB lands project*” that DWR disclaims any duty to study. (AFEIR, 4-11 (emphasis added).) DWR refuses to study the KWB’s “specific operating parameters” or provide a “detailed assessment” of its storage or allocation. (*Id.*)

Those assumptions are false. The Kern Water Bank's transfer out of state control relies on the never-lawfully-approved Monterey Amendments, which are proceeding now only under the Sacramento Superior Court's interim implementation order. The Settlement Agreement's restrictions on this water bank also remain interim rather than final while DWR's project decision is still pending. (*Id.*, §V.F.)

PCL's comments on the Kern Water Bank (comment letter 30, comments 37-45) reveal other problems. DWR accepts contractors' speculation that they "could have" stored water under other programs (AFEIR, 16-34.) Yet as found by the *Los Angeles Times*' Mark Arax and the Public Citizen report *Water Heist* (comment letter 30, ex. G), KWBA is effectively controlled by a private entity, Paramount Farming/Roll International. The AFEIR avoids issues raised in these reports as "principally institutional, financial, economic, and social issues." (AFEIR, 16-34.) But the reports tied the bank's loss of statewide accountability to environmental impacts. Impacts include depletion of the Environmental Water Account (EWA), promotion of urban sprawl, constrained public uses during shortage, hardening of demand for Paramount's specialty crops, and intensifying demand for south-of-Delta exports. That the bank's governance and operation have tangible environmental consequences should come as no surprise. Rather than uncritically accepting the Kern agencies' assumptions, the AFEIR should have thoroughly analyzed whether private control of the Kern Water Bank helped facilitate two types of "commodity bubbles": suburban subdivision-building, and planting of "permanent crops in desert regions with interruptible junior water rights." (J. Michael, *Water Won't Wash Away Valley's Recession*, Sacramento Bee, May 1, 2009 (online) (describing Delta crisis and the Central Valley's "nut glut"); <http://www.sacbee.com/opinion/story/1825084.html>.)

Recent investigative reports by the *Oakland Tribune*'s and *Contra Costa Times*' Mike Taugher, attached as exhibit A, confirm that bank operation by the privately-controlled KWBA produces serious environmental as well as economic consequences, including manipulation of the EWA, over-reliance on article 21, and hardened demand for Delta pumping. In Taugher's words, "the environment lost while Kern County water agencies collected more than \$138 million in sales" to the EWA, "the vast majority of which was paid for with the proceeds from taxpayer-backed environment and water bonds."

By contrast, the AFEIR mistakenly asserts that the bank has the "same basic purpose" under statewide and KCWA ownership. (AFEIR, 5-4.) That premise is belied by comparison of DWR and KCWA's 1987 Memorandum of Understanding (MOU) and the 1995 KWBA joint powers agreement. These agreements demonstrate a shift in the principal benefits of bank operation from the SWP to local members of KWBA. In its cursory discussion of Water Code section 11464's non-alienation duty, the AFEIR ignores the millions of dollars the state spent on developing the bank prior to transfer. (AFEIR, 16-6.) So evasive is the AFEIR about the bank's governance that it describes Westside Mutual Water Company—the paper company that Paramount Farming/ Roll International owner Stewart Resnick established to buy and sell water—as an entity that "may be composed of members that are private corporations, including Paramount Farming." (AFEIR, 17-41.) The website of the law firm representing Paramount Farming is more direct, describing that company as "a key participant in the Kern Water Bank transaction." (<http://www.nossaman.com/showrework.aspx?show=2655>.)

Lastly, the AFEIR states that the Sacramento Superior Court judgment in *PCL v. DWR* was entered on August 15, 1996, and "as a result of the trial court's ruling, the Department proceeded to

implement the Monterey Amendment, including transferring the KFE property to KCWA.” (AFEIR, 16-5 (emphasis added).) That statement is blatantly false: escrow closed on the transfer on August 9, 1996, *six days before* the Sacramento Superior Court’s judgment. That rush to implementation was only possible because KCWA and other contractors, not wishing to await what turned out to be a meritorious appeal, arranged secretly with DWR in summer 2006 to waive article 29(a) of the Monterey Amendments, which had until then imposed an automatic stay following a timely legal challenge to those amendments. DWR did not even inform the superior court of this waiver. (The present Director is asked, again, to appreciate the grave distrust earned by his predecessor, David Kennedy, and the contractors for this conduct unbecoming public officials -- a distrust that rightfully will continue unless recognized and corrected by the present Administration.)

Assumptions Limiting Project Impacts and Mitigation

The AFEIR’s assumptions improperly truncate assessment of direct, indirect and cumulative impacts. The AFEIR states that changes in allocation do not produce any new impacts (AFEIR, p. 4-3), but does not reconcile that statement with the assumption that the project would increase water to both urban and rural users. The AFEIR repeatedly disclaims impacts based on the premise that “the Monterey Amendment does not increase Delta exports beyond permitted limits.” (AFEIR 4-4; see also 7.2-17 (disclaiming Delta fisheries impacts).) However, ESA decisions on Delta fisheries, and subsequent new biological opinions, vitiate this assumption, casting doubt on whether DWR complies with permitted limits, and whether existing limits can adequately mitigate impacts. The over-pumping that contributed to the pelagic organism decline and decimated listed species in the Delta occurred during interim enforcement of the Monterey Amendments, in the many years that have passed since an adequate environmental review should have been prepared. CEQA involves not simply promises to follow the law, but a duty to “inform the public and responsible officials of the environmental consequences of their decisions before they are made.” (*PCL v. DWR*, 83 Cal.App.4th at p. 192.)

Since present “permitted limits” are far from sufficiently formed to protect the Delta ecosystem, the AFEIR also relies on “forthcoming” biological opinions and regulations. (AFEIR, 7.2-16.) However, the AFEIR does not come close to specifying performance standards to address Delta effects. Reliance on these future standards therefore amounts to impermissibly deferred mitigation. (CEQA Guidelines, § 15126.4(a)(1)(B).) The AFEIR also concedes that new or future regulatory constraints are likely to significantly reduce the potential for Delta exports compared to earlier periods (AFEIR 7.2-6), but it argues that this means the EIR has overstated project impacts. That is not the case for certain types of project impacts, such as induced reliance on paper water for development and hardening of demand for scarce Delta exports.

Growth-Inducing Impacts

The AFEIR recognizes that the project could support a new population in affected water agencies’ service areas of up to 495,451 people, based on both table A transfers and article 21 deliveries. (AFEIR, 8-41.) Considering the magnitude of growth involved, the AFEIR’s treatment of the issue is surprisingly vague and evasive. Growth analysis is predicated on a comparison between high and low years since the Monterey Amendments commenced interim operation (AFEIR, 2-36, 8-38). This is not precise or meaningful. The EIR recognizes that in California water history, the extremes (literally order of magnitude) are 1976 and 1982 (AFEIR, 2-16), and those natural extremes must be used (with adjustments for contemporary populations) to measure the potential of the project

to assuage severe water shortages and therefore foster more growth. It is artificial to confine the extremes analysis to the years since 1995.

Moreover, the AFEIR impermissibly defers growth assessment to local decision-makers (AFEIR, 8-8 to 8-11.) DWR's reliance on cases where the project made "no commitment" to specific development (AFEIR, 8-9) is misplaced. Here, DWR's project decision must address whether to *finally approve* changes to articles 18, 21 and 53 of the SWP contracts, each of which could induce growth. Article 53, which provides additional opportunities for agriculture-to-urban transfers, must be understood in light of article's 18(a)'s removal of the urban preference during temporary shortages. Even though DWR could have theoretically approved transfers under article 41 before the Monterey Amendments, only one such transfer was ever approved (Devil's Den), because it was impractical to base permanent development on agricultural water subject to article 18(a) cutbacks.

Lastly, the AFEIR fails even to assess the impacts of *known* Monterey Amendments-based transfers in sprawl-intensive areas north of Los Angeles (some relying upon the contested Kern-Castaic transfer), even though EIRs, Urban Water Management Plans, and other relevant documents were readily available. (AFEIR, 8-26.) DWR's claim to be outside the realm of local growth-related planning is also specious. When making decisions on projects and plans, and reviewing water supply assessments, local agencies can be expected to look to DWR's statewide guidance on SWP water supply reliability.

Paper Water

As the Supreme Court has recognized, "speculative sources and unrealistic allocations (paper water) are insufficient bases for decision-making under CEQA." (*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal. 412, 432.) Flaws in the assessment of articles 18 and 21, noted above, apply equally to the AFEIR's failure to disclose and analyze project-related paper water impacts. The AFEIR belatedly recognizes the "common sense connection between water supply reliability and growth" (AFEIR 9-2) and concedes that new table A and article 21 water, combined with storage, may facilitate "additional local development" (AFEIR, 9-3).

From there, the AFEIR defies common sense. First, while DWR denies the relevance of its mandatory article 18 duties (AFEIR, 9-2), the AFEIR refuses requests to incorporate in the EIR its alleged replacement, the biennial reliability reports DWR prepares pursuant to the Settlement Agreement. (Settlement Agreement, attachment A-3, ¶ 6.) The preparation of those reports is a subset of the project under review, not simply a "separate process." (AFEIR 9-23.) The public must have an opportunity to test in this project decision whether the reliability reports' water delivery probability curves—which still vastly exceed historic deliveries—create a new "cyber water" problem of inflated delivery expectations. DWR cannot avoid its recognition elsewhere that SWP deliveries are likely to be "substantially reduced" (AFEIR, 6.1-11), and that water exports must be subordinated to environmental considerations, such as adaptation to climate change and compliance with endangered species laws. (AFEIR, 11-11.)

Second, the AFEIR impermissibly defers to local assessment whether the Monterey Amendments' changes in articles 18(a), 18(b), 21, and 53 have facilitated new development and made demand for Delta exports more rigid, in effect creating a new "paper water" problem. Finally, the AFEIR disingenuously implies, without evidence, that factors such as SB 610 and SB 221 have now

removed the threat of paper water. But independent analysts continue to find that “many utilities are banking on ‘paper water’ already used by someone else within the state water system.” (E. HANAK, WATER FOR GROWTH: CALIFORNIA’S NEW FRONTIER (Public Policy Institute, 2005) p. vi.) The “gap between allocated ‘paper water’ and available ‘real water’ can be dramatic.” (ORANGE COUNTY GRAND JURY, PAPER WATER (2008-2009), p. 1.)

CALSIM II

For reasons exhaustively presented in the EIR comments of Steve Dunn and Arve Sjøvold (comment letter 22), incorporated here by reference, DWR continues to ignore critical flaws in the CALSIM II model, and major limitations on its application to this project. In the AFEIR, DWR not only ignored these concerns again, but refused to conduct any new modeling runs in response. Ironically, the AFEIR finally acknowledges that CALSIM II, as an optimization model, “effectively excludes the possibility of operating the SWP in a manner that would decrease exports.” (AFEIR, 6.3-34.)

The AFEIR relies upon a partial reference to the decision granting a Temporary Restraining Order (TRO) in the Intertie case (*PCL v. USBR* (2006) N. D. Cal. no. C 05-3527), reciting the truism that modeling perfection is not required. (AFEIR, 4-9.) But the AFEIR does not note the key holding in that ruling: non-disclosure of “relevant shortcomings” in data or models violates NEPA. As documented in the Dunn and Sjøvold letter, the EIR here has failed to disclose relevant shortcomings in CALSIM II and its application to the project.

Climate Change

The AFEIR concedes the profound effect climate change is having on State Water Project operations, noting that table A deliveries could “decrease by 10 to 25 percent” under both the baseline scenario and the project. (AFEIR, 12-8.) However, the AFEIR’s assessment of project-related climate impacts is limited to *statewide* greenhouse gas emissions, ignoring project-related effects on the location of development on the erroneous premise that this is solely a local matter. (AFEIR 12-4.) The AFEIR also refused requests to incorporate climate change analysis throughout the EIR.

DWR declined to study the climate effects of (1) the Monterey Amendments’ contribution to greenhouse gas-intensive sprawl development from new transfers and changed operating rules; (2) the effect on greenhouse gas emissions of eliminating article 18(a)’s urban preference; (3) whether retaining pre-Monterey shortage and surplus provisions would reduce SWP-related greenhouse gas emissions; and (4) investment in the Plumas Watershed Forum and Feather River Water Management Strategy to mitigate climate change impacts. DWR also failed to analyze how mitigation and alternatives could be framed in a climate-protective manner.

Environmental Consequences of Financial Restructuring

Financial restructuring under the Monterey Amendments would provide an enormous revenue stream to the State Water Project contractors. In 1995, the Environmental Defense Fund estimated the total distributed contractor savings as \$1.5 billion over the life of the project, or nearly \$37 million per year. (Comment letter 30, ex. I.) However, the AFEIR concedes that DWR did not even analyze article 51 for environmental impacts, based upon the theory that doing so would be “speculative.”

(AFEIR, 17-51.) That conclusion is untenable. The AFEIR should have compared the project's environmental consequences with enforcement of article 18(b), which might have eliminated reliance on paper water without imposing the high public costs of article 51. The AFEIR claims article 18(b) would not have provided more water from the environment (AFEIR, 17-52), but that conclusion rests on the false premise that "commensurate" increases in article 21 would have offset any water savings in article 18. The AFEIR should also have evaluated the environmental consequences of article 51's effect on water rates.

Project Alternatives

The AFEIR relies heavily on *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 42 Cal. 4th 1143, to vitiate DWR's duty to examine alternatives that meet most objectives, or that conflict with no project objectives. (AFEIR, pp. 5-9 to 5-10, 11-2; see also p. 2-31.) In *Bay-Delta*, the decision on the CALFED Programmatic EIR, the Court noted that with the CALFED program at a "relatively early stage of design," it satisfied CEQA's rule of reason to exclude a reduced exports alternative, as well as other alternatives that did not meet both ecosystem restoration goals and project water export demands. (*Id.* at p. 1168.) The Court explained that this conclusion was justified by the EIR's role as a program document and first-tier EIR.

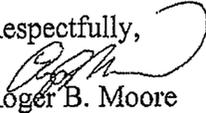
This conclusion from *Bay-Delta* does not apply to the Monterey EIR. First, unlike the CALFED policy decision addressed there, the Monterey program is far more specific and concrete. Indeed, the AFEIR here informs the *final project-specific choices* on such key project provisions as the Kern Fan Element transfer, certain water storage and management practices (flexible storage, turnback pool), and revised allocation methodology among the contractors; the project here proposes specific contract amendments. (AFEIR, 4-9.) Second, the only project alternative the AFEIR fully studied (alternative 5) was inadequate to address key issues raised by the plaintiffs, such as the operation of the Kern Water Bank or the changes in shortage and surplus rules; it merely consisted of the Monterey Amendments without the article 54 and 56 changes in water supply management practices.

Third, the AFEIR wrongly refuses to analyze at least two of the proposed alternatives on the erroneous premise that they would not meet most project objectives. PCL's EIR comments exhaustively demonstrated that the "Improved Reliability Through Environmental Enhancement" Alternative (IREE) would feasibly accomplish most of the project objectives, while also reducing injury to the Delta. In addition, the "Kern Fan Transfer with Trust Conditions" alternative would also meet project purposes devoting KFE to more than local use. The AFEIR's edits show that initially DWR understood that the Kern Fan Element was meant to address out-of-service-area storage, rather than purely local uses by Kern interests. (AFEIR, p. 2-34) Moreover, the AFEIR recognizes that the Kern Water Bank's primary use for transfers has been to profit from EWA sales (*Id.*, pp. 7.2-42, 43; 16-8, 17-42), whose sole local interest is private profit at the expense of the environment.

Lastly, measuring alternative feasibility solely by that which was secretly negotiated by the contractors deprives the public of the opportunity to propose and secure comparison of its alternatives. The AFEIR's alternatives assessment is therefore undermined by DWR's premise that it cannot make a "unilateral" decision, even for environmental review purposes, without the contractors' endorsement. (AFEIR, 5-5.) If that were the case, no alternative would ever be considered that was not sponsored by the contracting parties. This is not what the Supreme Court could have intended in *Bay-Delta*, but it

accurately reflects the dismissive approach of DWR and the contractors toward public participation. A more balanced approach is needed to restore the "meticulous" CEQA process that *PCL v. DWR* promised almost nine years ago.

Respectfully,


Roger B. Moore
Counsel for the Plaintiffs

cc: Honorable Daniel Weinstein, Mediator
Monterey Plus "Four by Four" Committee

EXHIBIT A

Gaming the water system

By Mike Taugher
Staff Writer
Contra Costa Times

Posted:05/25/2009 05:31:15 AM PDT

Just before Interstate 5 climbs the Grapevine out of the San Joaquin Valley is a massive underground reservoir that its owners say is the largest water banking project of its kind in the world.

Here among the tumbleweeds, sand and scrub, 15 miles west of Bakersfield, the gush of crystal-clear water appears as curiously out of place as the great blue herons cruising along the bank's six-mile canal.

The Kern Water Bank, which was owned by the state Department of Water Resources from 1988 to 1995, is now in the hands of Kern County interests and is 48 percent owned by Westside Mutual Water Company, a private water company controlled by Beverly Hills billionaire Stewart Resnick.

It is 32 square miles of desert where one natural river and two artificial ones pass: the Kern River, which originates in the southern Sierra Nevada; the California Aqueduct, which carries Delta water more than 400 miles to a reservoir in Riverside County; and the Friant-Kern Canal, which takes water to valley farmers from behind a dam on the San Joaquin River.

"We have lots of water conveyance facilities that bring water past the Kern Water Bank," said Jonathan Parker, general manager of the Kern Water Bank Authority. "That makes this location pretty unique."

In wet years, the water bankers deposit water from the rivers into ponds where it percolates into the Kern River's alluvial fan.

In dry years, they make withdrawals, which is why on a tour of the bank earlier this year water was gushing out of the ground from pipes and bubbling up into the canal from underground structures.

Kern County water users, thanks in part to local ownership of the Kern Water Bank, became the biggest source of water for CalFed's "environmental water account" that cost taxpayers nearly \$200 million.

The account was in effect during a period when record amounts of water were pumped out of the Delta and fish populations staggered to record lows. One species, Delta smelt, could be near extinction in large part because of Delta water pumping.

Roughly one-fifth of all the money spent to buy water for the program went to companies owned or controlled by Resnick, one of the state's largest farmers.

More than half of Kern County's water sales to the environmental water account — and all of Westside Mutual's sales — came from the Kern Water Bank.

And thanks to the magic of paper water trades, less than half of the water sold from here was actually pumped out of the ground.

Representatives of Resnick's farm and water companies did not respond to repeated requests for interviews over a two-month period.

The state Department of Water Resources also declined to comment.

Deal's 'linchpin'

The deals worked by letting sellers trade the underground water they were selling at market prices for water the state was delivering to them at much lower prices.

Instead of going to Kern County, then, Delta water went to San Luis Reservoir east of Gilroy.

The state got the Delta water at the reservoir, while in Kern County the water was either pumped out of the ground for farmers' use or, more often, simply reclassified as if it were delivered from the Delta. The sellers then pocketed the price difference.

The exchanges made some sense because, by taking delivery of the water upstream, the state could deliver it almost anywhere it would want to without unnecessary pumping.

But it also meant that at a time when the state Department of Water Resources was pumping record amounts of water out of the Delta — in some cases exceeding conditions regulators had approved as safe for Delta fish — it was delivering some of that water to itself for a program that was supposed to protect the same fish populations that were damaged by the high pumping levels.

And it paid Kern County interests with taxpayer money for the ability to do so.

The general manager of the Kern County Water Agency, James Beck, said the program was a way for the state to ensure those buying water in Kern County got the water to which they were entitled.

"The environmental water account was a good example where water was provided to the state at a reasonable price... to assist the state to meet its contractual obligations to its contractors," Beck said.

For many sellers to the environmental water account, including Resnick's companies, the key was ownership of the Kern Water Bank.

The deal that transferred the Kern Water Bank from state ownership to Kern County interests has its roots in the last big California drought, from 1987 to 1992. As have been the past three dry years, the last drought featured water cutbacks and severe environmental strains in the Delta, where fish were being added to the lists of threatened and endangered species.

In Kern County, the last drought was particularly acute because contract rules at the time required Kern County's farmers to take deeper cuts to their Delta water supply than Southern California cities.

To avoid a court fight, water officials representing the state, Kern County and Southern California reached a deal with ramifications that linger today. Among other things, the deal transferred the Kern Water Bank from the state to local interests.

The "Monterey Agreement," named for the city where the negotiations took place, along with the CalFed plan that followed, laid much of the groundwork for how the state's water supplies would be managed and how the Delta environment would be protected.

The results were mostly good for big water users, and almost entirely bad for taxpayers and the environment.

"The environmental water account was in some respects the linchpin to close the deal for the CalFed plan," said Spreck Rosekrans, a co-author of a 2005 Environmental Defense Fund study that showed how the account lacked the resources it was expected to get while it also was required to do more than planned.

"It involved buying some of the water that had been overpromised. It allowed folks to game the system and gain profits that were unwarranted," Rosekrans said.

State denied

At the time of the last drought, Resnick was expanding his farm holdings near Bakersfield. Kern County property tax records show his companies appear to own more than 115,000 acres — nearly four times the size of San Francisco and more than all the parks in the East Bay Regional Park District combined.

The water supply for those farms and orchards, which his companies boast include the largest pistachio and almond growing and processing operations in the world, was secured in part by the Kern Water Bank.

With a capacity of at least 1 million acre-feet, it is like having a reservoir the size of Folsom Lake, near Sacramento, or 10 reservoirs the size of Los Vaqueros, near Brentwood.

There are other advantages too. Little water is lost to evaporation. Terrestrial habitat is not flooded.

The water is easy to get out of the ground: it only costs \$35 to \$40 to pump an acre-foot — nearly 326,000 gallons, Parker said.

Though the state invested a total of \$74 million in buying and developing the Kern Water Bank, it could never get the groundwater storage operations up and running, partly because of a state law that requires the Department of Water Resources to receive local approval for groundwater projects.

Kern County never granted that approval.

As a result of the negotiations in Monterey, the bank was transferred from the state to the Kern County Water Agency in exchange

for Kern County interests giving up a small portion of their claim to water. The agency immediately turned the bank over to a joint powers authority made up of a handful of water districts and Westside Mutual Water Company, which has a 48 percent stake.

Another 10 percent is owned by Dudley Ridge Water District, where Resnick's farming company, which owns more than 40 percent of the district's irrigated acreage, is the largest landowner.

Dudley Ridge's board president, Joseph Macilvalne, is also president of Resnick's farm company, Paramount Farms.

The agreement made in Monterey also forced Southern California cities to share equally with Kern County farmers in the pain of drought.

And it created a new program that allowed agencies in Kern County, Southern California and elsewhere to buy so-called surplus water for cheap — discount water that flowed so freely that, until the Delta ecosystem hit the skids, it amounted to more than the cut they took in their water contracts to obtain the water bank.

The U.S. Fish and Wildlife Service, in a December analysis, said delivery of "Article 21" water was also much more than what they approved when they issued a permit in 2004 meant to protect Delta smelt from the effects of Delta water pumping.

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Paper shuffle allows for vast supply of easy money

By Mike Taugher
Staff Writer

Posted: 05/23/2009 09:36:41 PM PDT
It must have seemed like easy money.

The state was delivering more water than ever to its customers, and in Kern County some of those customers sold some of it back, through a simple trade, at a higher price.

Tens of millions of dollars in sales to the "environmental water account" were little more than paper shuffles. It was all perfectly legal.

But the environment lost while Kern County water agencies collected \$138 million in sales to the program, the vast majority of which was paid for with the proceeds from taxpayer backed environment and water bonds.

Public water agencies in Kern County used money from sales to an environmental water account to fund an employee retirement plan, buy land and pay for miscellaneous repairs, documents and interviews show.

One document shows that the Kern County Water Agency used revenue from the sales to help finance a lawsuit against the Department of Water Resources — the same agency that wrote the taxpayer-backed check to the agency — to lower its water bills.

The head of the Kern County Water Agency, James Beck, denied the lawsuit was funded with the sales revenue, but he could not explain why the general manager of one of his agency's member districts

recounted that version of events to his board of directors.

Beck said revenues from the sales were used to cover the cost districts paid to buy, store and deliver the water. He also said funds were set aside to cover the cost of future purchases to replace water that was sold.

But documents and interviews show the sales were seen by the water agency's "member units," at least in some cases, as a source of revenue that could be used for a wide variety of purposes:

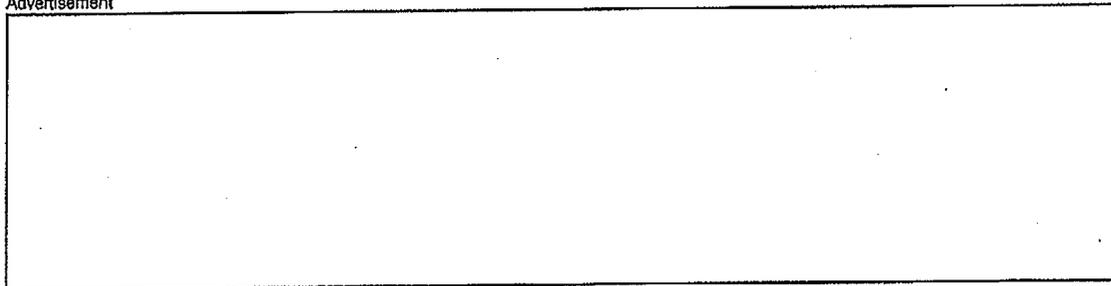
In 2003, the Buena Vista Water Storage District, based in Buttonwillow, put \$500,000 in revenues from the environmental water account sales into its employee retirement plan, documents show.

Water districts put environmental water account revenues into their coffers to offset miscellaneous repairs and other costs in order to keep customers' water bills down, said Dennis Atkinson, general manager of the Tejon Castaic Water District. "We take that money and apply it against our bills," Atkinson said.

One district participated only marginally — selling small amounts of water at a relatively low price to the account's precursor one year and participating as a partner to help other water districts complete their sales in another. The Rosedale-Rio Bravo Water Storage District, based in Bakersfield, still was able to buy land to expand its groundwater storage capacity and build facilities with the proceeds, said general manager Eric Averett. Increasing the groundwater banking capacity is arguably consistent with managing water for the account, although the district did not sell any water to the account after 2001.

MediaNews identified \$8.6 million worth of checks,

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refunds and credits, presumably to offset water purchases and pumping costs, including more than \$3 million to Paramount Farms, that were paid to landowners in public water districts that sold to the water account. Blackwell Land LLC also received more than \$3 million in refunds from the sales, while the remainder went to fewer than 10 other private landowners.

In 2003, Westside Mutual Water Company and the Wheeler Ridge-Maricopa Water Storage District negotiated a \$600,000 payment to the water company, controlled by Beverly Hills billionaire Stewart Resnick, after a change in circumstances shifted a portion of the sales from Westside Mutual to the water district. At a meeting of sellers to the account, there was "a plea from Westside MWC that some compromise be worked out to adjust for the windfall" to the Wheeler Ridge-Maricopa district, which gained a greater share of the sales at Westside's expense, according to a memorandum from the water district's general manager, William Taube.

Wheeler Ridge, which serves water to about 90,000 acres of farmland south of Bakersfield, shifted \$600,000 in sales to Westside Mutual, which still left the district with \$1.4 million in "net revenue."

The most unusual use of environmental water account money may have been its apparent use to sue the state Department of Water Resources — the agency that wrote the check for the purchases — to lower Kern County's water bills.

Beck denied that happened, but that is what Taube told his board of directors in May 2007.

In an interview, Taube said that while it was possible he was mistaken, the point he made was that Kern's "member units" would not have to contribute attorneys' fees because enough revenue

had been generated from the water sales.

The lawsuit, known as the "Hyatt-Thermalito litigation," is a dispute over how the state prices power from turbines at Lake Oroville. Kern County Water Agency and other water districts north of the Tehachapis, including Bay Area districts, want the prices to reflect market rates, which would increase the cost of water in Southern California — where it takes more electricity to deliver Delta water because of the greater distance and the need to pump the water over the Tehachapis.

The power sales are applied to contractors' debt for the State Water Project's dams, pumps and aqueducts, so raising the price of the electricity would reduce debt for contractors north of the Tehachapis at Southern California's expense.

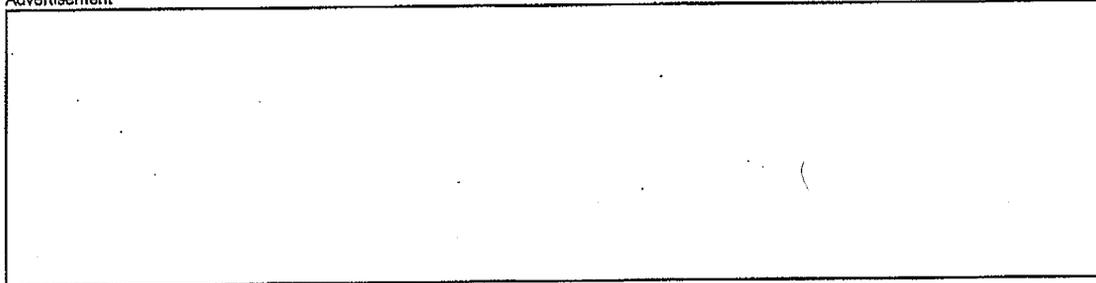
In May 2007, Taube told his board that at the Kern agency's April board meeting he attended, the Kern board "directed that 2007 FWA sale proceeds accruing to the Agency would be used to fund the Hyatt-Thermalito litigation. This will reduce the litigation cost borne by Member Units and delay the time when Member Unit contributions to this litigation will be necessary," according to minutes of the Wheeler Ridge-Maricopa district's meeting.

Beck said that was incorrect but did not offer an explanation for how a misunderstanding might have occurred.

"That was my understanding at the time," Taube said. "If he (Beck) disagrees, maybe I misunderstood something."

Asked to clarify what his understanding was at the time, Taube said it was that, "They weren't going to need to call on member units ... because of the EWA."

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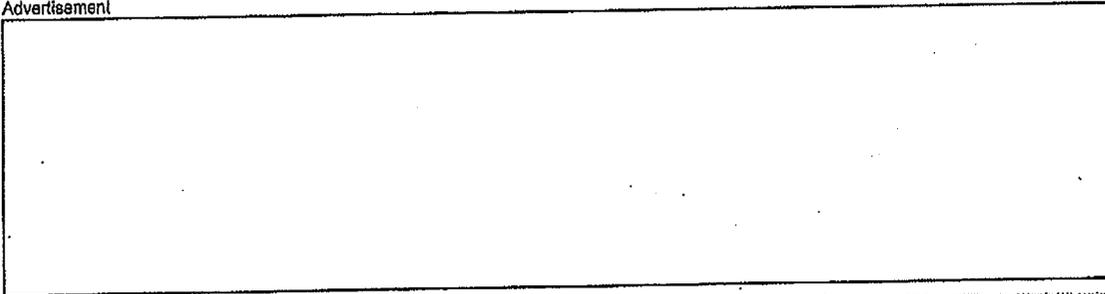
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Department of Water Resources Director Lester Snow, through a spokesman, declined to comment on the possibility that the proceeds from taxpayer-financed water sales to his agency may have been used to sue his agency.

In response to a formal request under the state Public Records Act, the Kern agency said it had no records showing environmental water account revenues being used to pay for lawyers. The official minutes of the Kern agency's April 2007 meeting contain no mention of the Hyatt-Thermalito lawsuit and its meetings are not recorded.

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MEDIANEWS INVESTIGATION

Pumping water and cash from Delta

By Mike Taugher
Staff Writer

Posted: 05/23/2009 09:34:58 PM PDT

Updated: 05/24/2009 03:26:51 PM PDT

As the West Coast's largest estuary plunged to the brink of collapse from 2000 to 2007, state water officials pumped unprecedented amounts of water out of the Delta only to effectively buy some of it back at taxpayer expense for a failed environmental protection plan, a MediNews investigation has found.

The "environmental water account" set up in 2000 to improve the Delta ecosystem spent nearly \$200 million mostly to benefit water users while also creating a cash stream for private landowners and water agencies in the Bakersfield area.

Financed with taxpayer-backed environment and water bonds, the program spent most of its money in Kern County, a largely agricultural region at the southern end of the San Joaquin Valley. There, water was purchased from the state and then traded back to the account for a higher price.

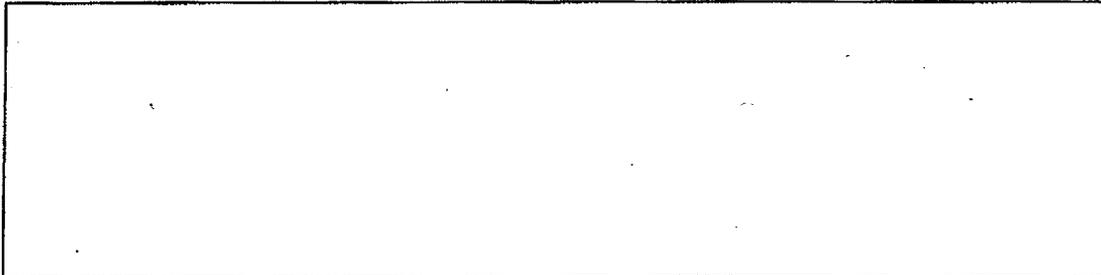
The proceeds were used to fund an employee retirement plan, buy land and groundwater storage facilities and pay miscellaneous costs to keep water bills low, documents and interviews show.

Revenues from those sales also might have helped finance a lawsuit against the Department of Water Resources, the same agency that wrote the checks, documents show.

No one appears to have benefitted more than companies owned or controlled by Stewart Resnick, a Beverly Hills billionaire, philanthropist and major political donor whose companies, including Paramount Farms, own more than 115,000 acres in Kern County. Resnick's water and farm companies collected about 20 cents of every dollar spent by the program.

Those companies sold \$30.6 million of water to the

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state program, participated as a partner in an additional \$16 million in sales and received an additional \$3.8 million in checks and credits for sales through public water agencies, documents show.

"For a program that was supposed to benefit the environment, it apparently did two things — it didn't benefit the environment and it appears to have enriched private individuals using public money," said Jonas Minton, a water policy adviser to the Planning and Conservation League, a California environmental advocacy group.

Representatives of Resnick's farm and water companies did not respond to repeated requests for interviews. A woman who answered the phone at the Resnick's holding company last week said, "We don't talk to the press. It's company policy." She transferred the call to a company official who did not respond for an interview request.

The state Department of Water Resources also declined to comment for this story.

A paper accounting thing

The idea behind the environmental water account was to protect the Delta ecosystem without taking water away from people, farms and agencies that held growing expectations — and contracts — for water. By setting aside water that could supplement flows from the Delta, biologists would be able to slow Delta pumps at sensitive times, thereby protecting imperiled fish such as Delta smelt.

The water account was meant to enhance existing environmental protections and protect water users from the possibility that regulators might force them to give up more water to protect fish.

Despite good intentions, however, the program

lacked the resources to provide the environmental benefits it promised. Traditional users got their water, but the environment suffered. Delta smelt dropped to levels near extinction. Even the backbone of the state's commercial salmon industry, Sacramento River fall-run chinook salmon, broke under the combined strain of ocean fluctuations and a variety of Delta-related problems, possibly including water management. That salmon fishery, which had never before been closed, is now off-limits to anglers for the second consecutive year, leaving supermarkets temporarily devoid of wild California salmon.

The way it was supposed to work was novel. If fish were in danger of being sucked into massive Delta pumping stations, for example, biologists could invoke the account to slow the pumps down. Then, contractors who would otherwise be deprived of water from the slowdown would be made whole with water from the account.

In order to provide that replacement water to contractors, the water account needed water stored south of Delta pumps. The underground water storage facilities in Kern County's aquifers and ancient river formations proved to be its most important source.

But the location at the southern end of the San Joaquin Valley was not ideal. It made more sense to store the water closer to the Delta, where distribution would be easier to a wider variety of places.

So the water in Kern County was "exchanged" for Delta water that was being pumped at record high — and environmentally damaging — rates. The Delta water was then deposited in the environmental water account at San Luis Reservoir near Gilroy.

The exchange legally moved the water that was

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stored underground in Kern County to San Luis, but the water was still there. To complete the trade, then, the underground water had to be treated as if it were being delivered from the Delta.

Sometimes, Kern County water agencies retrieved the "Delta" water from underground for irrigation, but in most cases, the state was delivering so much water they did not need to.

Instead, most of the time all they had to do was simply forego storing the excess Delta water and pocket the difference between the low rates they paid to the state and the higher market rates they collected from the sale to the water account.

"I wouldn't pump that water to sell the (environmental water account)," said Dennis Atkinson, general manager of the Tejon-Castaic Water District, which sold about \$2 million worth of water to the account. "How are you going to make any money? ... It's a paper accounting thing. We never turned on a pump."

The price of water

The cost to taxpayers for Kern County water averaged \$196 per acre-foot. The price Kern County paid for Delta water varied, but in 2007, the last year the environmental water account was operating, Kern County water users paid an average of \$86 for Delta water. Some of that water was purchased for as little as \$28 from a discount program.

The environmental water account was administered by the state Department of Water Resources, which also operates the state-owned pumps near Tracy. It bought most of its water from the Kern County Water Agency, whose general manager insisted the prices charged to taxpayers were fair and necessary to offset the cost of buying, storing and managing the water.

"The prices were in line with what we felt were the appropriate costs," said general manager James Beck.

Still, Beck acknowledged, there was nothing in contracts to prevent sellers from making money.

Of course, selling reserves can be risky, and Beck said market prices this year are \$350 per acre-foot or more. Given this year's water shortages, he said that if Kern County landowners could go back in time and undo those sales, they would "in a heartbeat."

To Atkinson, of the Tejon-Castaic Water District, it made sense for water districts to reap a return on the sales because water contractors have been paying for the state's dams, pumps and canals since the 1960s, while the demand that more Delta water be dedicated to the environment is more recent.

"These guys have showed up lately and want something someone else has," Atkinson said. "Since they don't have infrastructure, they have to get it from the people who made the investment."

The vast majority of the financing for the nearly \$200 million program came from state environment and water bonds that will be repaid with interest over the coming years.

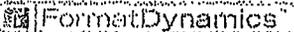
Of that total, about 70 percent was used to buy water from entities in Kern County.

And of the Kern County sales, the \$30.6 million sold directly by Resnick's Westside Mutual Water Company was more than twice the sales of any other entity, records show.

Open spigot

The environmental water account's effectiveness

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was hampered by the fact it was perpetually short of the 380,000 acre-feet a year envisioned when it was set up. In addition, a 2002 court decision favorable to water users reduced a separate source of environmental water, a cut that had to be made up by the environmental account, according to a 2005 report by the Environmental Defense Fund.

Also in 2005, three years into the fish collapse but the first year scientists could be sure that what they were seeing was a statistically valid plunge, the Contra Costa Times detailed how biologists worried about Delta smelt near the pumps were unable to get water managers to fully accept recommendations to slow the pumps because of concerns about driving the environmental water account into debt.

A study published last fall in the scientific journal *Environmental Management* concluded the account improved the reliability of water supplies for Delta water users but it was unclear whether it provided any meaningful environmental benefit.

Meanwhile, while the water account was meant to offset the environmental damage done by pumping water out of the Delta, it was being relied upon during a period when the state Department of Water Resources was ramping Delta water deliveries up to record levels. The environmental water account went into effect in 2000, and the five highest water deliveries from the Delta were 2000, 2003, 2004, 2005 and 2006, years in which, along with 2007, state water officials also sold large volumes of discount water that Kern County agencies would buy in 2007 for \$28 per acre-foot.

The sharp decline in fish populations began around the same time, starting in about 2002. And while there are likely numerous factors that caused the collapse, most scientists studying the problem believe pumping patterns contributed.

Water officials have argued that the increase in discount water deliveries through a program known as Article 21 made no difference, since the price of water has no biological effect and because the amount of water pumped annually was below the maximum authorized by the U.S. Fish and Wildlife Service.

But regulators disagree.

A permit from the Fish and Wildlife Service, first issued in 2004, contained restrictions that were supposed to protect Delta smelt from going extinct due to water pumping. It was issued based on regulators' understanding that the use of Article 21 would be much less than it turned out to be.

In a 400-page analysis accompanying a replacement permit issued in December, the service's biologists noted that the Article 21 program was used far more extensively than they had been told when they issued the 2004 permit.

And that, in turn, helped drive up overall pumping rates from the Delta, which regulators tied to the environmental decline.

A coalition points elsewhere

Most of the water sold through the Kern County Water Agency originated with about a dozen smaller public water district "member units" and a handful of private interests who previously stored water, mostly from the Delta, in underground reservoirs.

Several of those entities are members of the Coalition for a Sustainable Delta, a group that banded together to fight back against pumping restrictions imposed in late 2007 by courts and regulators.

The coalition has filed three lawsuits and

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threatened to file several more to shift blame away from water pumping's role in the Delta's collapse. The group contends other environmental threats are also to blame for the Delta's demise, including housing development in Delta floodplains, pesticide use, dredging, power plants, sportfishing and pollution from mothballed ships near Benicia.

The Coalition for a Sustainable Delta's phone number is the same as Paramount Farms, and of the four coalition officers listed on tax documents, three are Resnick employees: William Phillimore, chief financial officer and executive vice president for Westside Mutual and Paramount Farming; Scott Hamilton, resource planning manager for Paramount Farming; and Craig B. Cooper, chief legal officer for Roll International, Resnick's holding company.

A spokesman for the coalition said that although it has an employee working out of the Paramount Farms office, the group is governed by dues paying members and not Resnick. He attributed the heavy presence of Resnick's companies on the group's tax returns to issues associated with getting the new coalition up and running.

"It's an ad hoc coalition. You have to organize that way," said spokesman Michael Boccadoro.

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Water ownership murky, complicated

By Mike Taugher
Staff Writer

Posted: 05/23/2009 09:32:01 PM PDT

Kern County water users who sold millions of dollars worth of water to a program meant to help the environment said the arrangement made sense because the water was rightfully theirs.

Few would dispute that water that was purchased and stored in Kern County could be sold to the environmental water account.

But the sales were made easier by the fact that the state Department of Water Resources was cranking up water deliveries to unprecedented heights at the same time it was buying water back for the environment.

The general manager of one of the agencies that sold water through the program, Dennis Atkinson of the Tejon-Castaño Water District, acknowledged that the sales only made sense to him if state pumps were delivering more water than his district could immediately use.

In other words, the higher pumping levels not only took an environmental toll on the Delta, they also made water available to buy back to protect the Delta.

Was the state required to deliver all that water or could it have pumped less and potentially saved the cost of buying it back? Put another way, does Delta water belong to contractors or do environmental needs have priority?

The answer is unclear.

Kern County water districts have a contract that awards them about 1 million acre-feet of water a year. And as customers of the State Water Project, they have to make the same payments on the project's dams, pumps and canals no matter how much water they get.

The state's water customers contend the contract obligates the state to make water available, and the contracts and simple fairness support that, at least to some degree.

On the other hand, a consolidated version of the full contract — which runs 348 pages and has nearly 40 amendments — appears to recognize that water shortages can develop "due to drought or any other cause whatsoever."

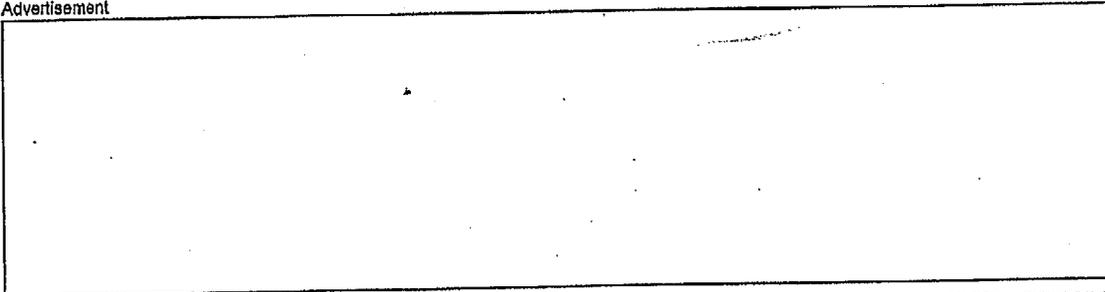
And the right to water in arid states is always conditional. The government can promise all the water it wants, but it can't make it rain.

Environmental laws, a constitutional requirement that water use be reasonable and beneficial and an ancient legal doctrine that ensures water is used in a way that considers public trust values — including the health of natural resources such as the Delta — further limit the use of water, making the question of who "owns" water complicated.

"Because it's called a right, people tend to think of it like the First Amendment," said Phil Isenberg, a former legislative leader and chairman of a Delta Vision task force appointed in 2007 by Gov. Arnold Schwarzenegger to figure out how to fix the Delta.

"The water rights system is a way of figuring out who is first in line when supplies aren't enough to satisfy all of the water needs."

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One of the state's biggest difficulties in delivering water to users while protecting the environment is the fact that water has been dramatically overpromised, Isenberg said.

As the Delta Vision committee was wrapping up its work last year, a memo arrived that members had requested from the state agency that administers water rights.

It carried this sobering comparison: The average natural flow of water in the Delta watershed is 29 million acre-feet per year, while the face value of water rights in the same watershed is 245 million acre-feet, or more than eight times the average flow.

"I was dumbfounded," Isenberg said.

Not all of the water in those rights is actually used, some of the rights are double-counted and much of the water that is used finds its way back into rivers where it can be used again.

Nevertheless, the figures are convincing evidence to Isenberg and others that the state has promised far more water than it can deliver.

Further complicating matters, the State Water Project signed contracts with Kern County, Southern California and others at a time when plans called for dams to be built on North Coast rivers that would produce millions of additional acre-feet a year to spill into the Delta for contractors to use. Those dams were never built.

Faced with overpromised water, population growth, a sensitive environment and periodic droughts, it is no surprise California has difficulties managing water.

Those difficulties also are not new.

After the last major drought ended in 1992 a series of deals were struck to fix the system, culminating in 2000 with a plan known as "CalFed."

There may not have been enough water to satisfy farmers, cities and the environment, but when the deal was signed in 2000, the state was awash in money thanks to soaring real estate, stocks and dot-com enterprises.

One of the keys to the CalFed deal was the environmental water account.

The idea was to use the market to strike a new balance between the needs of the environment and people. The account would be used by regulators to enhance the environment by buying water from willing sellers, thereby reducing conflicts that arise when regulators take it away from water users.

In the absence of an environmental water account, water users faced the possibility of additional environmental restrictions, according to a 2001 report by the Legislative Analyst's Office. For that reason, the LAO said water users should help pay for the program.

"Since compliance with endangered species laws is a responsibility of the state and federal water projects, (the environmental water account) in effect reduces the compliance burden for these projects," the LAO found.

Instead, the environmental water account ended up relying almost exclusively on taxpayer-backed bond funds, and most of that money was spent to buy water stored in Kern County.

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September 10, 2009

Katherine Spanos, Senior Staff Counsel
Department of Water Resources
1416 Ninth Street, 11th Floor
Sacramento, CA 95814

Re: SWC Comments on Mediation Issues Raised by Plaintiffs on Monterey Plus
Administrative Draft Final Environmental Impact Report

Dear Ms. Spanos:

The SWC representatives on the Monterey Plus EIR Committee have reviewed the plaintiffs' letter of August 13, 2009, in which, based on their review of the Monterey Plus Administrative Draft Final Environmental Impact Report (AFEIR), they have referred mediation issues to the Director of the Department of Water Resources (DWR) under Settlement Agreement Section III.H. We offer the following comments regarding the mediation issues raised by the Plaintiffs in their August 13, 2009 letter.

Public Participation

To constitute a mediation issue, an action taken by DWR with respect to the "new EIR" for the Monterey Amendments to the State Water Project Contracts must relate to noncompliance of the New EIR with "(a) the requirements of CEQA; (b) the direction of the courts in the underlying litigation; or (c) the terms and conditions of this Settlement Agreement (Settlement Agreement, section I.U. (Definitions)).

With respect to CEQA compliance, Plaintiffs apparently contend that DWR is required to render its post-EIR certification decision on the Monterey Plus project through some form of public process. DWR correctly points out that CEQA and its Guidelines deal exclusively with the process of preparing a draft EIR, circulating it for comments, and finalizing the document so that it may be used to inform the often larger decision making process. CEQA does not govern how or in what venue administrative decision makers should consider a final EIR and other economic and social factors so as to make the best overall quasi-legislative decision with respect to the project under consideration. As stated by the California Supreme Court in *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal 3d 553, 564: "[W]e may not ... substitute our judgment for that of the people and their local representatives." In *Western States Petroleum Association v Superior Court* (1995) 9 Cal.4th 559, 566, the court stated: "Judicial review of quasi-legislative administrative decisions [is] limited, "out of deference to the separation of powers between the Legislature and the Judiciary [and] to the legislative delegation of administrative authority to the agency [Citation]." Plaintiffs have not cited, nor can they cite, to a section of CEQA that mandates DWR, as an administrative agency of State government, to render its post-EIR decision in any particular manner.

With respect to the direction of the courts, there is no holding in *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal. App.4th 892 (*PCL v. DWR*) that requires DWR to make its decision in any particular manner. Plaintiffs' out-of-context quotes from the *PCL* decision are not helpful. The first quote is from a section of the opinion discussing an argument by defendants that deference should be given by the court to the decision appointing the Central Coast Water Agency as the CEQA lead agency. The second quoted passage dealt with the Court's finding that the original EIR was defective for not considering Article 18(b) of the SWP contracts as a potential no-project alternative. Neither of these quotes deal with the issue of whether CEQA requires some form of public participation in the decision making process, as contrasted to the public process required during preparation of an EIR.

Interestingly, in this case, the best evidence that the *PCL* decision is devoid of any such holding is found in the settlement agreement signed by Plaintiffs. It states that the parties agree that the *PCL* decision ordered the lower court to carry out only the following five actions: "(1) vacate the trial court's grant of the motion for summary adjudication of the Validation Cause of Action; (2) issue a writ of mandate vacating the certification of the 1995 EIR; (3) determine the amount of attorney fees to be awarded Plaintiffs; (4) consider such orders it deems appropriate under Public Resources Code Section 21198.9(a) consistent with views expressed in the Appellate Court's opinion; and (5) retain jurisdiction over the action until DWR, as lead agency, certifies an EIR in accordance with CEQA standards and procedures, and the Superior Court determines that such environmental impact report meets the substantive requirements of CEQA." (Settlement Agreement, p.2) Further, Article III establishes that DWR's duty under the Settlement Agreement is to prepare a new EIR that must include "the Monterey Amendment" (See *id.*, paragraph III.C), and the Agreement contains no requirements related to how DWR will proceed to make decisions after the EIR is completed.

Plaintiffs and the public received more open participation in the Monterey Plus CEQA process than perhaps has ever been accorded in any CEQA situation, and they cannot show that DWR has erred in that respect. But that does not seem to be Plaintiffs' objection. Plaintiffs appear to be seeking either a new Monterey Agreement negotiation in which they can participate or a public process during which the DWR Director decides what decision on the Monterey Amendment is appropriate under the circumstances. Whichever of those two Plaintiffs are seeking, they are not required under CEQA, the Settlement Agreement, or relevant court decisions.

Project Objective and Lead Agency Role

Plaintiffs claim that CEQA mandates that the lead agency formulate its projects principally for environmental benefit and to accommodate public comment. Plaintiffs claim that DWR improperly limited project objectives to issues and conflicts between and among DWR and the Contractors. This, Plaintiffs contend, violates CEQA.

Plaintiffs' comments on project objectives and the lead agency's role reflect a fundamental misunderstanding of CEQA. Importantly, CEQA is not triggered until *after* an agency has formulated a proposed project. (See, e.g., *Save Tara v. City of West Hollywood* (2008) 45 Cal.

4th 116, 130 [“CEQA [should] not be interpreted to require an EIR before the project is well enough defined to allow for meaningful environmental evaluation”].) After a proposed project has been defined and if potentially significant environmental effects of the proposed project require preparation of an EIR, the lead agency must evaluate available mitigation and alternatives *to* the proposed project to reduce the potentially significant impact *of* the proposed project. (Pub. Resources Code, § 21002.1, subds. (a), (b).) While public participation and comment is an important and essential element of the EIR process, its purpose is to “allow the lead agencies to identify ... potential environmental effects *of* a project, alternatives, and mitigation measures which would substantially reduce the effects.” (*Id.*, § 21003.1, subd. (a).) The purpose of public participation and comment is not to change the lead agency’s project objectives and reformulate the project to solve environmental harms unrelated to the project’s impacts. (See *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1167 [“The Court of Appeal erred also in failing to sufficiently distinguish between preexisting environmental problems in the Bay-Delta, on the one hand, and adverse environmental effects of the proposed CALFED Program. Under CEQA, the range of alternatives is defined in relation to the environmental effects of the proposed project.”].)

The final EIR prepared by DWR fully complies with CEQA. DWR formulated a proposed project of modifying the long-term water supply contracts following negotiations with the SWP Contractors in 1994. (DEIR, p. 3-3.) Its project was not then and is not now intended to address all environmental problems facing the Delta, but to address and resolve specific disagreements among the contractors and DWR regarding certain provisions of the water supply contracts. (*Id.*, pp. 3-1 – 3-5; AFEIR, pp. 5-5 – 5-8, 11-7 – 11-8.) “[T]he department [has] broad powers and discretion to enter into contracts and to do all things which in its judgment are necessary, convenient, or expedient for the accomplishment of the purposes of the State Water Resources Development System.” (*Metropolitan Water District v. Marquardt* (1960) 59 Cal. 2d 159, 185.) It is unremarkable and only logical that modification of the contracts could only be achieved through negotiations with the Contractors, the contracting parties who would have to approve the amendments and who also serve as Responsible Agencies under CEQA.

Further, Plaintiffs were fully aware that the new EIR was to evaluate the previously negotiated and executed Monterey Amendments and Settlement Agreement provisions, and not some broader program of Delta protection. As noted under the previous heading, the subject of the new EIR was defined by both the court and the Settlement Agreement, and with respect to SWP operations, that subject remains the Monterey contract amendments. Following the decision in *PCL v. DWR*, the project was revised in accordance with the negotiated settlement entered into among the Plaintiffs, DWR, and the Contractors. That modified project, Monterey Plus, did not substantively alter the original proposed contract amendments but rather added new amendments substituting “Table A Amount” for “Entitlement” and providing new procedures for disclosure of water delivery reliability. (DEIR, p. 4-9.) The Monterey Plus project resulting from the Settlement also includes other elements that are implemented outside of the water delivery contracts. (*Id.*, pp. 4-11 – 4-12.) Pursuant to CEQA and the Settlement Agreement, DWR prepared the DEIR to evaluate and disclose the environmental effects of the proposed Monterey Plus project and for those that are significant, to evaluate mitigation and identify alternatives to the project as proposed.

The DEIR evaluated alternatives to the project including all alternatives suggested by Plaintiffs. (DEIR, pp. 11-1 – 11-34.) The AFEIR further considered and responded to 50 comments concerning alternatives (AFEIR, pp. 11-1 – 11-41), including several that advocated, as Plaintiffs do now, for a fundamentally different project. (*Id.*, pp. 11-7 – 11-8.) Plaintiffs maintain that the choice of alternatives “is not between Monterey or Monterey Plus and a different project, but between the pre-Monterey 1960 contracts and a different project.” That assertion is incorrect and counter to CEQA, which is clear that alternatives are formulated around the project as proposed. “[A] lead agency may structure its EIR analysis around a reasonable definition of underlying purpose and need and need not study alternatives that cannot achieve that basic goal.” (*In re Bay-Delta, supra*, 43 Cal.4th at 1166.)

Uses of the EIR

Plaintiffs fault DWR and its EIR for “failing to commit to rendering a new project decision on the Monterey Amendments.”¹ Plaintiffs’ argument that the EIR must dictate the specific project decisions that DWR would make on the Monterey Amendments is flawed for three basic reasons: 1) the purpose of an EIR is to disclose environmental impacts – not to dictate agency decisions; 2) the agency decision-making process is a separate and distinct step from the EIR process; and 3) nothing in CEQA imposes requirements on the form that the agency’s decision may take.

Under CEQA, “[t]he purpose of an [EIR] is to identify significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided.” (Pub. Resources Code, § 21002.1, subd. (a).) Accordingly, the purpose of the Monterey Plus Project EIR is to identify the environmental impacts of the Monterey Amendments and the additional actions of the Settlement Agreement, as well as the CEQA-mandated No Project alternative. Only to the extent that impacts of the project as proposed are found to be significant must the EIR also identify mitigation measures and/or alternatives to lessen those significant effects, provided they are consistent with the project objectives and are feasible. Thus the Monterey Plus EIR is to inform DWR decision-makers about the significant environmental effects of the project (see, e.g., Guidelines, § 15002, subd. (a)(1)); not to set out and frame decisions unrelated to the proposed project and its significant environmental effects.

DWR is obligated by *PCL v. DWR, supra*, 83 Cal. App.4th at 926 to “... certify an EIR in accordance with CEQA standards and procedures that meets the substantive requirements of CEQA.” This step takes place separate from the completion of the final EIR, as do any decisions by the decision-making body based on the completed and certified EIR. (See, e.g., Guidelines, § 15092, subd. (a) [“*After* considering the final EIR and in conjunction with making findings under Section 15091, the lead agency may decide whether or how to approve or carry out the project.” Emphasis added.])

¹ Plaintiffs also contend the EIR “treats the Kern Water Bank transfer and operation as *faits accomplis* beyond DWR’s discretion.” This contention is addressed below under the Kern Water Bank heading.

Plaintiffs' position would reverse this logical chronology of the environmental review and decision-making process. In contravention of CEQA, they would have DWR establish its possible decisions *before* the environmental analysis is complete and *before* the project's significant effects have even been identified.

Finally, as previously noted, nothing in CEQA imposes requirements on the specific form that the agency's project decisions must take. Rather, any legal requirements for a particular form of project decision are found in other statutes, ordinances, or regulations governing the particular agency action in question. (1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2006) § 17.2, p. 801.)

The DEIR for the Monterey Project appropriately *does not* commit to a specific decision that DWR may take following certification of the EIR. Rather, it appropriately describes the possible decisions as "whether to continue operating under the proposed project ... or to decide to implement one of the alternatives to the proposed project", which includes the no project. (DEIR, p. 1-1.) Further, Public Resources Code section 21168.9, cited by Plaintiffs for the argument that "continued operations" are only allowed under interim order of court, authorizes the court to mandate only actions "which are necessary to achieve compliance with [CEQA]" and specifically precludes court from "direct[ing] any public agency to exercise its discretion in any particular way." Thus, continued operations pending completion of adequate CEQA compliance is proper and DWR is free to decide how to proceed after considering the new EIR. As accurately stated in the DEIR, "Once the EIR is complete, the Department will consider all options available to it under the law. Upon completion and certification of this EIR, the Department will make written findings and decisions and file a Notice of determination (NOD)." (DEIR, p. 1-1.)

Assessment of Shortage and Surplus Provisions

In their objections to the way DWR handled its lead agency responsibilities, Plaintiffs criticize DWR for failing to recognize that it "alone has the duty to manage and administer the SWP" In this section of their letter, when DWR exercises one of its key administrative duties by interpreting its own contracts, Plaintiffs give that interpretation no deference and simply assert that DWR's understanding of the SWP contracts must be incorrect. In fact, DWR's contractual interpretation is absolutely correct as a facial analysis of Articles 1(l), 6(b), 6(c) and 21 demonstrates. Project water is defined in Article 1(l) as all the water made available by the project facilities; Article 6(b) requires DWR to deliver the water amounts set out in Table A of the contracts whenever it is available; Article 6(c) requires DWR to use reasonable efforts to develop the facilities needed to provide the project water to the Contractors; and Article 21 requires that any additional project water available after Table A amounts have been delivered and other Contractor needs have been protected be delivered to those Contractors requesting the same.

It does not take higher mathematics to figure out that, if less Table A water were being delivered to the SWP Contractors due to the implementation of Article 18(b), there would be many years when more Article 21 "project water" would be "made available for delivery to the contractors by the project conservation facilities" (Article 1(l)) than would have been the case if Article

18(b) had not been implemented. The amount of water made available by the project conservation facilities is not controlled by the SWP contracts, but by natural hydrology. The key contract point, which DWR correctly interpreted and applied, is that whatever project water is hydrologically available after meeting regulatory requirements must be offered to the SWP Contractors under either Article 6(b) or Article 21.

From this premise, one needs to review the CEQA Guidelines to determine what DWR was required to analyze when examining a no-project alternative. Guidelines section 15126.6(e)(2) states:

The "no project" analysis shall discuss the existing conditions at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, *as well as what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services.* If the environmentally superior alternative is the "no project" alternative, the EIR shall also identify an environmentally superior alternative among the other alternatives.

(Emphasis added.)

In this case DWR has used its interpretation of the contract, as summarized above, to establish what the foreseeable future would be if the Monterey Amendment had not been adopted and Article 18(b) was implemented instead. This is what is required under CEQA and the result set out in the AFEIR is not in any way inconsistent with the *PCL* decision. The *PCL* decision did not dictate what the outcome of DWR's no-project analysis should look like, nor did the Court interpret the SWP contract provisions summarized above. It simply held that DWR, as the correct lead agency, should include a no-project analysis in its EIR that assumes that Article 18(b) would be implemented. The Court had no information before it that would have allowed it to, and it did not, judge what the results of that analysis would be in terms of water deliveries.

Plaintiffs' letter also asserts that DWR's contract interpretation and no-project approach "ignores research that shows that other options were available. (Comment 30, ex. B)" Options that would breach the water supply contracts are not legally available and DWR reasonably determined that the foreseeable future would not include diverting to other uses SWP project water to which the Contractors were legally entitled and for which they were paying.

Plaintiffs' letter also asserts that DWR has misinterpreted Article 21(g)(1) of the SWP contracts. Again, we would point out that this contract interpretation is being made by the entity most responsible for its implementation, which should be accorded far more weight than a one-sentence opinion of a stranger to the contract. The history of this provision fully supports DWR's interpretation, as does the fact that the article has never been implemented against any contractor taking and using Article 21 water. (AFEIR, pp. 9-14 – 9-16, p. 9-17.)

Plaintiffs assert that the analysis DWR presents in the AFEIR of invocation of Article 18(b) with no Article 21 deliveries is a “caricatured analysis.” They explain the use of that phrase by stating: “That analysis does not simply retain the pre-Monterey terms; it *eliminates* the use of Article 21 water.” The fallacy of this statement is derived from the contractual provisions that are summarized above. If one retains the pre-Monterey Article 21 terms, then the full amount of water that is available after the reduced Table A deliveries are made, is delivered to the Contractors as Article 21 water. This is the same no-project scenario that Plaintiffs objected to in the first part of their comments on the way DWR has handled shortages and surpluses. The only way one can avoid that outcome is by eliminating Article 21 and then analyzing the impacts of implementing Article 18(b).

Plaintiffs also contend that the “AFEIR fails to... disclose the water rights underlying export of water from the Delta under article 21.” However, SWP water rights, including for Article 21 water, are discussed on AFEIR pages 14-5 – 14-7.

Project Baseline

Plaintiffs claim the EIR’s baseline is defective for providing an analysis period that extends to 2020 instead of 2035 and for not providing a “credible explanation” for adjustments to the baseline. These concerns were thoroughly discussed in the AFEIR.

The AFEIR includes a section devoted to the issue of the 2020 analysis period. (AFEIR, pp. 6.2-5 – 6 [Section 6.2.2.3].) As explained in that section, a longer period of analysis would not identify any new impacts or define any increase in the severity of those impacts already analyzed. This is because impacts of the proposed project may decrease beyond 2020 because of increasingly stringent Delta export constraints and other changes, because Contractor requests are already at full Table A amounts by 2020 and thus cannot further increase, and because the project’s allocation methods and management measures are not anticipated to change over the period extending beyond 2020. (*Id.*)

The AFEIR also includes a section devoted to the issue of the baseline assumptions, which responds to 16 comments on this topic, many of which questioned the baseline adjustments. (AFEIR, pp. 6.1-1 – 6.1-18.) Adjustments to the baseline are within the lead agency’s discretion to determine an appropriate analytical methodology. (*Save Our Peninsula Comm. v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 125.) The AFEIR fully explains the rationale for the adjustments to the baseline. (AFEIR, pp. 6.1-1 – 6.1-18.) Further, the approach taken in the Monterey EIR of analyzing project impacts against an existing baseline and against an adjusted future, 2020 baseline is in keeping with guidance provided by a leading CEQA treatise; Kostka & Zischke’s *Practice Under the California Environmental Quality Act*. “Some EIRs avoid confusion on this issue (of what is analyzed against the environmental setting versus what is analyzed as a cumulative impact) by setting forth both an existing conditions baseline and a future conditions baseline.” (1 Kostka & Zischke, *Practice Under the Cal. Environmental Quality Act* (2d ed, Cont.Ed.Bar 2008) § 12.25, p. 603.) This is exactly the approach taken in the Monterey EIR.

Kern Water Bank

Plaintiffs make several claims regarding the alleged inadequacy of the AFEIR with respect to the Kern Water Bank (KWB). None have any merit.

First, Plaintiffs claim that the AFEIR does not comply with the Settlement Agreement because the AFEIR contains a faulty assessment of the KWB's "operation." The Settlement Agreement required DWR to (among other things) prepare an "independent study" and exercise "its judgment" regarding the "impacts related to the transfer, development, and operation of the KWB in light of the Kern Environmental Permits." DWR prepared a study of the KWB consisting of 66 pages, which is Appendix E to the DEIR. The study describes the Kern Environmental Permits (e.g., HCP/NCCP) and includes a thorough discussion of the KWB, including the Kern Fan Element (KFE) property transfer, and KWB development and "operations" in light of the same. (See, for example, DEIR Appendix E, at pages 15-17, 21-39 [operations].) In the study, DWR exercised its independent judgment and found the environmental impacts of KWB development and operations to be "less-than-significant." The AFEIR expressly references the study (AFEIR, p. 4-10). However, Plaintiff's letter completely ignores DWR's study, and fails to explain how DWR's study of KWB operations is not specific or detailed enough or sufficient to satisfy the requirements of the Settlement Agreement or CEQA.

Second, Plaintiffs claim that the AFEIR suggests DWR lacks discretionary authority over the KWB's property transfer and operation based on the following language from the AFEIR: "once the transfer of the KFE property occurred, the KWBA...assumed the responsibilities of the property and the development of the KWB lands (AFEIR, p. 16-4)," and the lands became a "locally-owned KWB lands project" (AFEIR, p. 4-11.) These statements are not in response to any comment concerning whether DWR has discretionary authority over KWB's property transfer and operation. Instead, they represent what in fact happened after the transfer of the KFE lands (DWR earlier concluded it could not feasibly develop into a State-owned water bank): KWBA complied with CEQA, its CEQA document was not challenged, KWBA prepared an HCP/NCCP plan, and KWBA developed and operated a locally-owned water banking project on the lands (AFEIR, pp. 4-10 - 4-11, p. 16-4).

Third, Plaintiffs suggest that DWR's transfer included the "Kern Water Bank" and that such transfer is only "interim." These suggestions are fundamentally flawed and inaccurate. As mentioned above and as explained in the DEIR and AFEIR (AFEIR, p. 17-37; DEIR, Appendix E, p. 1), DWR never developed a water bank on the transferred lands (KWBA did). Thus, DWR could not have conveyed any water bank to KWBA. DWR transferred lands. The Settlement Agreement acknowledges the completion and finality of the land transfer by stating that "KWBA shall retain title to the KWB Lands" (Settlement Agreement, ¶ V.A) without further action or additional approval by DWR or any other party. Thus, the land transfer is not interim or provisional.

Fourth, Plaintiffs argue that "DWR accepts contractors' speculation that they 'could have' stored water under other programs (AFEIR, p. 16-34)," and make a quantum leap to the conclusion that DWR ignored that "KWBA is effectively controlled by a private entity, Paramount Farming/Roll

International.” As recognized by the AFEIR, neither of these assertions is factually accurate. The AFEIR explains that DWR independently reviewed and determined whether water could have been stored under other programs, not once but twice: during preparation of the DEIR and again during preparation of the AFEIR (AFEIR, p. 17-39). The AFEIR also explains that KWBA is a public entity, a Joint Powers Authority (JPA), consisting of several public agencies in addition to Westside Mutual Water Company (WMWC), which the law authorizes to be a member of a JPA (AFEIR, 16-15, 17-41). Whatever Paramount Farming/Roll International’s (Paramount’s) interest in WMWC, DWR correctly recognized that Paramount is not a member of the KWBA and that WMWC does not have a controlling interest in KWBA (AFEIR, p. 15; DEIR Appendix E, Table 3).

Plaintiffs support their arguments and conclusions with several attached and cited online articles it refers to as “recent investigative reports.” However, in addition to not being part of the comments on the DEIR, the online articles are premised on incorrect assumptions about the KWB, are largely focused on the author’s view of the success or failure of the Environmental Water Account (EWA) including whether certain sellers should have participated (many of which were not even affiliated with the KWBA or Paramount (AFEIR, p. 7.2-42, Table 7.2-1)), and appear to have been written without any input or response from Paramount or Roll International. The incorrect assumptions include the faulty assumption that the KWB was owned and developed by DWR, at a cost of \$74 million, and then transferred to a privately-controlled entity. As explained above and in the AFEIR, DWR did not own, transfer or develop any water bank. Rather, DWR transferred “land” to KCWA which transferred to KWBA – “public” entities not owned or controlled by Paramount.

In addition, despite the authors’ apparent lack of understanding about the development and public agency control and operation of the KWB by KWBA, there is no credible evidence in these articles that the KWB has caused or may cause any significant environment effects due to sales to the EWA or otherwise. Plaintiffs place heavy reliance on a Sacramento Bee article as alleged evidence that the KWB helped “facilitate two types of ‘commodity bubbles’: suburban subdivision-building, and planting of ‘permanent crops in desert regions with interruptible junior water rights.’” However, that Sacramento Bee article deals with an entirely different topic -- whether the “regulatory drought” has led to reduced farm employment. Indeed, the article makes no mention or criticism of Paramount, the KWB, the Monterey Amendments or DWR’s Monterey Plus review including the then existing DEIR and DWR’s KWB study/Appendix E. In any case, as documented in DWR’s KWB study, the water stored in the KWB was not sold to municipalities, for subdivision-building or any other purpose (DEIR Appendix E, Figure 9 and Table 9). Additionally, water stored in the KWB is not junior interruptible water, and according to DWR’s analysis any trend of replacing annual crops with permanent crops would occur with or without the Monterey Amendments and cannot be attributed to the project (AFEIR, p. 13-17). Finally, the EWA previously underwent environmental review under CEQA and NEPA (AFEIR, p. 7.2-41), and that was the opportunity to make comments and objections regarding impacts of and permissible sellers of water to the EWA. DWR is not required to re-evaluate the EWA project in the AFEIR for the Monterey-Plus project.

Fifth, Plaintiffs argue that the AFEIR mistakenly asserts that the bank has the “same basic purpose” under statewide and KCWA ownership (AFEIR, p. 5-4). Plaintiffs have misconstrued

DWR's response. DWR did not say that the beneficiaries of a State-owned and a locally-owned water bank are basically the same. DWR clarified "same basic purpose" means that both types of banks would: "store surplus water ... during years of abundant supply for extraction in dry years ... subject to environmental use permits which regulate the terrestrial impacts of the use of the lands for this purpose" (AFEIR, p. 5-4, p. 17-7 - 17-8). Plaintiffs also incorrectly assert that the AFEIR ignores "the millions of dollars the state spent on developing the bank prior to transfer." As explained above and as DWR clearly explained in the AFEIR (p. 16-6), despite spending millions of dollars DWR did not (and determined it could not feasibly) develop a water bank on the KFE land and its transfer of "land" is not prohibited by Water Code section 11464. Under such circumstances, DWR can hardly be criticized for transferring land which it could not develop as intended in exchange for valuable consideration, e.g., retirement of 45,000 acre-feet of SWP Table A.

Lastly, Plaintiffs misconstrue DWR's response in the AFEIR regarding when DWR implemented the Monterey Amendment, including transfer of the KFE property to KCWA. Contrary to Plaintiff's claim, DWR did not state in the AFEIR that the transfer occurred after the Sacramento Superior Court's judgment on August 15, 1996. Rather, what DWR actually stated (correctly) was that DWR proceeded to implement the Monterey Amendment as "a result of the trial judge's [prior] ruling" pursuant to a hearing held on May 17, 1996 (AFEIR, p. 16-5). In addition, given that ruling, there was no reason to report any potential waiver of a condition, as between the contracting parties to the Monterey Amendment, to the superior court. Finally, there was nothing secret, impermissible, distrustful or underhanded about implementing the Monterey Amendments or KFE property transfer before appeals, and Plaintiffs' feeling to the contrary have no bearing on whether the AFEIR meets the requirements of CEQA and the Settlement Agreement.

Assumption Limiting Project Impacts and Mitigation

In this section of their letter, Plaintiffs begin by citing two passages from the AFEIR which they contend were made to "improperly truncate" the assessment of various impacts. First, they cite to page 4-3, where DWR points out that the Monterey Amendment changes in water allocations did not alter diversions from the Delta from what they were under baseline conditions. They then cite page 4-4, where DWR states that "[t]he Monterey Amendment does not increase Delta exports beyond permitted limits." Plaintiffs, in particular, object to this quoted sentence, contending that it results in repeated, improper disclaimers of project impacts. Nothing could be further from the truth. On the same page 4-4, DWR recognizes that changes in SWP operations resulting from the Monterey Amendment, even if they are within permitted limits, are considered to result in potentially significant impacts. Specifically, the AFEIR states:

The DEIR states on page 6-15 that a provision, or article, in the Monterey Amendment that could cause changes in the way SWP water is stored or conveyed was assumed to have the potential to produce a change in SWP or contractor operations. If a provision could alter operations then it was assumed to have potentially significant environmental impacts and was analyzed in detail in Chapter 7.

Plaintiffs' letter conveniently ignores this section of page 4-4. Instead Plaintiffs focus on an overview statement to the effect that the SWP, with or without the Monterey Amendment, always operates within the SWP permit limits, and on a summary of a factual finding that one of the Monterey Amendment elements, changes in water allocations, does not modify Delta operations. Based on that overly narrow focus, Plaintiffs then jump to the conclusion that DWR is disclaiming the existence of project impacts. As the above quotation makes clear, the exact opposite is true. Any time studies showed that implementation of a Monterey Amendment element had the potential to change SWP operations, DWR assumed that the change could cause potentially significant environmental impacts and a detailed environmental analysis followed. This is exactly what, if not more than, CEQA requires.

The balance of Plaintiffs complaints in this section of their letter is a confusing, somewhat obscure series of observations that seem more related to baseline conditions in the Sacramento-San Joaquin River Delta Estuary, than to what should be the focus – potentially adverse changes to that baseline that are caused by implementation of the Monterey Amendment. For, example, Plaintiffs state that “[t]he over-pumping that contributed to the pelagic organism decline and decimated listed species in the Delta occurred during interim enforcement of the Monterey Amendments, in the many years that have passed since an adequate environmental review should have been prepared.” This statement is made in the face of studies detailed in the AFEIR which demonstrate that, in the recent past, increases in Delta exports resulting from the Monterey Amendment are almost immeasurable. Thus, we can only conclude that Plaintiffs quoted statement is referring to baseline level pumping impacts as contrasted to impacts of the Monterey Amendment project. Plaintiffs continue by asserting that “the AFEIR does not come close to specifying performance standards to address Delta effects.” Note that this passage does not say “Delta effects caused by the Monterey Amendment,” but, instead seems to argue that the EIR is defective because it does not address the best way to fix all the Delta's historic ills.

The California Supreme Court recently addressed the obligation of a project EIR to consider alternatives that would address baseline conditions as well as project impacts. The Court specifically held that CEQA does not require a project sponsor to address environmental problems that are related to a degraded baseline. The Court stated:

The main thrust of the Court of Appeal's reasoning was that reducing Bay-Delta water exports would “be environmentally superior” because it would facilitate achievement of the ecosystem restoration component of the CALFED Program and thereby more effectively address the Bay-Delta's existing environmental problems. *But those problems would continue to exist even if there were no program, and thus under CEQA they are part of the baseline conditions rather than program-generated environmental impacts that determine the required range of program alternatives.*

(*In re Bay Delta*, *supra*, 43 Cal.4th at 1167-1168; emphasis added.)

Thus, Plaintiffs, in order to argue that the AFEIR does not comply with CEQA with respect to Delta conditions, must provide specific examples of where the AFEIR fails to properly address Delta impacts caused by implementing the Monterey Amendment. Broad generalizations about the plight of the Delta that do not distinguish baseline conditions from project impacts are insufficient. Similarly, Plaintiffs' belief that current ESA and other regulations do not adequately protect Delta species has little if anything to do with the adequacy of the AFEIR, as the fishery agencies believe that they are sufficient and they are the regulations that DWR must adhere to notwithstanding Plaintiffs' beliefs.

Finally, Plaintiffs remark about paper water is out of context. Paper water does not come into play simply because new regulations may reduce SWP water supplies. Paper water is not based on the amount of water that is available, but may come into existence if that amount is not properly communicated to planning agencies. There is no indication that such communication has not occurred in this case.

Growth-Inducing Impacts

Plaintiffs mistakenly criticize the growth inducing impacts methodology for comparing "high and low years since the Monterey Amendments commenced interim operation" and claim that historical extremes prior to 1995 must be considered. This criticism is both confusing and unfounded, as the methodology does not employ any comparison of "high and low years" or otherwise look at extremes of water availability; nor should it. The methodology is clearly explained in the DEIR and in the AFEIR and simply uses the average annual Table A and Article 21 deliveries to individual contractors that have already been computed for the overall impact analyses to determine the additional amount of water the project would make available under year 2020 conditions. (See DEIR pp. 8-6; 8-8; AFEIR p. 8-4.) That amount of additional water is then translated into the potential for additional population using water use rates derived from water demand scenarios from the *California Water Plan Update 2005*. (*Id.*) The AFEIR additionally computes the amount of additional water that could be made available from out-of-service area storage – the only project water management practice that could arguably support growth – and translates that to potential additional population growth. (AFEIR, pp. 8-6, 8-12 – 8-20.) Plaintiffs' comments that Articles 18, 21, and 53 must be analyzed for their growth inducing effects are also clearly addressed by the above cited DEIR and AFEIR discussion of methodology. Articles 18(a), 21 and 53 *are* analyzed (Article 53 transfers are included in the Table A delivery amounts), and as discussed in detail in the AFEIR at pages 8-12 – 8-14, the only other provision that could have the potential to induce population growth is Article 56(c), facilitating contractor storage outside the service area.

Plaintiffs claim the EIR's inability to assess specific impacts of specific developments at the local level is an impermissible deferral of growth assessment to local decision makers. Both the DEIR and AFEIR discuss in detail that both legal and practical considerations make a more detailed assessment of growth at the local level speculative and unwarranted. (DEIR, pp. 8-11, 8-15; AFEIR, pp. 8-8 - 8-12.)

Plaintiffs claim that the EIR's discussion of cases where the project made no commitment to specific development is misplaced, suggesting that the Monterey EIR *is* a commitment to

specific development requiring detailed analysis of that growth. As a threshold matter, except for *Napa Citizens*, the cases noted in the AFEIR's discussion of growth inducing impacts do not address CEQA's requirement to analyze growth inducing effects. *Vineyard Area Citizens v. City of Rancho Cordova* (2007) 40 Cal.4th 412 dealt with an EIR's analysis of water supply for future phases of development that were disclosed. *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182 also dealt with water supply for future project development phases. *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351 addressed whether a Program EIR for a waste facility siting plan was required to analyze in detail site specific impacts of the contemplated facilities even though there had been no commitment to those future facilities.

Stanislaus Audubon Society, Inc. v. County of Stanislaus (1995) 33 Cal.App.4th 144 is a case dealing with growth inducing impacts associated with a golf course and clubhouse project. The growth inducing issue was whether development of the project would set in motion market forces that would create economic pressure for residential growth around the proposed golf course. (*Id.*, pp. 156-157.) The court held the project might induce residential growth despite the fact that the area surrounding the project was zoned for agricultural use, and an EIR was required to analyze the impacts of that growth. (*Id.*) The case provides guidance on when a project may have the potential to induce growth. This is not at issue in the Monterey Plus EIR, as the project's growth inducing potential is acknowledged and analyzed.

The fact that an analysis of growth-inducing impacts necessarily involves a large number of variables, including the extent to which elements other than the proposed project contribute to growth, makes it difficult to predict the ways in which the project might foster or facilitate growth. This uncertainty led the court in *Napa Citizens* to conclude that requiring an EIR "to undertake a detailed analysis of the results of such growth" was not reasonable. (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 371; see also *Federation of Hillside & Canyon Ass'ns v. City of Los Angeles* (2000) 100 Cal.App.4th 1252, 1265 [EIR must analyze the growth-inducing impacts of a project, including reasonably foreseeable consequences, but not speculative effects]; *Marin Municipal Water Dist. v. KG Land Cal. Corp.*, 235 Cal.App.3d 1652, 1660-63 (1991) [an EIR for water moratorium was adequate in generally recognizing that the project could affect growth pressures outside the respondent water district's territory, even though the EIR did not attempt to predict exactly where redirected growth might occur].) Consistent with these cases, the Monterey Plus EIR provides a conservative estimate of the project's growth inducing potential and analyzes the impact of that growth in general terms. For future growth, any further degree of analysis would amount to sheer speculation as the specific locations of growth are unknown and all individual projects cannot be identified with enough specificity to be analyzed. (See AFEIR, p. 8-10.)

In addition, the DEIR identified previous CEQA documents prepared by various water agencies for specific Table A transfers that have already taken place and summarized the conclusions and environmental effects identified in those documents. (See DEIR pp. 8-2 – 8-5.)

Plaintiffs also contend that the AFEIR fails to "assess the impacts of *known* Monterey Amendment-based transfers in sprawl-intensive areas of north Los Angeles." To the extent this comment is focused on the effects of the transfers, the contention is wrong. The EIR's growth

inducing analysis specifically includes the effects of the Table A transfers. (AFEIR, p. 8-7.) Further, the summary of previous CEQA documents for Table A transfers specifically includes the transfer to Castaic Lake Water Agency and summarizes the effects identified in that document, as it does for seven other Table A transfers. To the extent Plaintiffs are arguing that the Monterey EIR must identify actual developments that may have been facilitated by the Table A transfers and disclose the specific resulting environmental effects, that argument has no merit. CEQA expressly refers to indirect impacts as those impacts which are “reasonably foreseeable.” (Guidelines, § 15358(a)(2).) While growth generally may be a reasonably foreseeable consequence of the Table A transfers, the specific development proposals and their specific impacts are not. Courts construe “reasonably foreseeable” narrowly to mean those indirect physical changes from a project that can be known with some certainty. (See e.g., *Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273 [construction of a Wal-Mart store outside of city limits due to a zoning ordinance was not reasonably foreseeable because there was no evidence in the record regarding any plans by Wal-Mart to actually build such a store].) Because developments within a particular service area would be expected to rely on a variety of water sources, it is beyond DWR’s ability to identify with any degree of certainty the actual developments that have been facilitated by the Table A Transfers, and further, to identify the actual environmental effects of those development. Also, it should be noted that the Settlement Agreement calls for the EIR to analyze “the potential environmental effects relating to (a) the Attachment E Transfers and (b) the Kern-Castaic Transfer, in each case as relating to the potential environmental impacts of approving the Monterey Amendments,” not the impacts of specific developments or developments generally. (Settlement Agreement, ¶ III.C.4.)

Finally, it should be noted that EIR’s evaluation of Table A transfers previously evaluated in other completed CEQA documents is in fulfillment of the Settlement Agreement provision noted above, and not an independent requirement of CEQA. Courts have held that a lead agency need not evaluate growth-inducing impacts if the growth is already planned and has already been evaluated in an EIR. In *Sierra Club v. West Side Irrigation District*, 128 Cal.App.4th 690 (2005), appellants argued that the CEQA initial studies for two water supply assignments to the City of Tracy failed to analyze whether the assignments would induce growth beyond that already approved in the general plan and analyzed in the general plan EIR. The court disagreed, finding that the initial study clearly stated that the water was to be assigned *only* to those areas already subject to the City’s general plan, and that even though the water from the assignments was to be commingled with the City’s existing supply, the water would merely provide “additional water for uses that [would] become established according to the City’s General Plan.” (*Id.* at 702.) Crucial to the court’s decision was the fact that there was “no evidence in the record that the assignments will induce growth not already planned and evaluated on a macro level in the general plan and the general plan EIR.” *Id.* at 703; *see also Friends of the Eel River v. Sonoma County Water Agency*, 108 Cal.App.4th 859, 877 (2003) (water agency properly relied on growth inducing analysis in general plan EIRs to describe the growth that an augmented water supply might facilitate).

The Monterey Plus EIR’s discussion of growth inducing impacts fully complies with CEQA. Like the EIR in *Napa Citizens*, this discussion need not be a “detailed analysis,” particularly given that growth throughout the SWP service areas involves an excessive “number of variables”

making it difficult to predict in any degree of detail the specific ways in which the project might foster or facilitate growth.

Paper Water

Plaintiffs claim the “AFEIR [fails] to disclose and analyze project-related paper water impacts,” apparently conflating the Monterey EIR’s analysis of “paper water” with a more general analysis of the relationship between water supply and growth. (“The AFEIR belatedly recognizes the ‘common sense connection between water and growth.’”) The DEIR devotes an entire 12-page chapter (Chapter 9) and the AFEIR devotes 42 pages to the subject of “Reliability of Water Supplies and Growth.” Although this topic probably could have been more accurately named, the discussion is clear that the purpose of the analysis is specifically “to explore whether planners in the SWP service area relied on full Table A amounts in the SWP long-term water supply contracts and, if so, whether that SWP “paper water problem could be ameliorated if Article 18(b) were retained and invoked.” (DEIR, p. 9-1.) This analysis is provided to respond directly to Plaintiffs’ argument in *PCL v. DWR* that planning agencies were overestimating SWP water availability by basing planning decisions purely on contractual Table A amounts, as well as to address the Court of Appeal’s footnote in its decision that ““there is certainly the possibility that local decision makers are seduced by contractual entitlements and approve projects dependent on water worth little more than a wish and a prayer.”” (*Id.*) The analysis does not purport to examine in detail the myriad factors involved in the relationship between water supply and growth generally nor is there any requirement in CEQA to do so; CEQA merely requires an analysis of the project’s growth inducing potential and that analysis is presented in Section 8 of the DEIR.

To address Plaintiffs’ fears that information on SWP water availability was not being made readily available, the Settlement Agreement with Plaintiffs requires that “[c]ommencing in 2003, and every two years thereafter, the [Department] shall prepare and deliver to all State Water Project (SWP) contractors, all city and county planning departments, and all regional and metropolitan planning departments within the project service area a report which accurately sets forth, under a range of hydrologic conditions, the then existing overall delivery capability of the project facilities and the allocation of that capacity to each contractor.” (Settlement Agreement, Attachment B.) Plaintiffs now complain that DWR, by carrying out this obligation of the Settlement, has somehow violated CEQA because the ‘biennial reliability reports’ should have been “incorporate[d] into the EIR” as “[t]he preparation of those reports is a subset of the project under review, not simply a separate project.” The biennial reports are disclosed as a component of the proposed project (DEIR p. 4-9), but their release should not have been delayed until publication of the DEIR because: 1) such a delay would have violated the Settlement Agreement and 2) the reports merely contain planning information the disclosure of which has no possibility of affecting the physical environment.

Plaintiffs contend that the “reliability reports’ water delivery probability curves—which still vastly exceed historic deliveries—create a new ‘cyber water’ problem of inflated delivery expectations.” That the reliability reports’ projections of future deliveries exceed historic deliveries is to be expected – historic deliveries were lower because Contractor demands were lower. Plaintiffs provide no credible evidence that the reliability reports overestimate supply

availability, and even if they had, deference is owed to DWR's determinations. (See, e.g., *Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559, 572; *Laurel Heights Improvement Assoc. v. Regents of University of California* (1988) 47 Cal.3d 376, 393 ["A court's task is not to weigh conflicting evidence and determine who has the better argument"].)

Plaintiffs also contend that "the AFEIR impermissibly defers to local assessment whether the Monterey Amendments' changes in articles 18(a), 18(b), 21, and 53 have facilitated new development and made demand for Delta exports more rigid." If Plaintiffs are suggesting that it is not within the discretion of local agencies to plan for growth and approve development, that assertion is thoroughly addressed by the AFEIR and is wrong as a matter of law. (AFEIR, pp. 9-3 – 9-4.)

Finally, Plaintiffs disagree with the DEIR and AFEIR's conclusion concerning the effect of SB 610 and SB 221, citing to Hanak (2005) and Orange County Grand Jury (2008-2009) for support that "paper water" continues to be a problem. First, the Monterey Plus Project and EIR do not set out to solve all problems that may exist in the local water supply and land use planning processes. That role is for the legislature and the local agencies. The Monterey EIR merely looked to see whether "land use planners and decision makers would base their decisions only on the Table A amounts in the SWP long-term water supply contracts." (DEIR, p. 9-11.) It found from the documents examined that not to be the case. (*Ibid.*) Second, the DEIR's conclusion regarding SB 610 and SB 221 is that "with passage of Senate Bills 610 and 221, and the biennial publication of the State Water Project Delivery Reliability Report by the Department, it is almost certain that future land use and water supply planning will be more closely linked than they had in the past." (*Id.*) This conclusion is clearly supported by the evidence; indeed by the Hanak report Plaintiffs cite. (*Id.*) (See also Orange County Grand Jury, Paper Water (2008-2009), p. 2 [Legislation was enacted within the past eight years to increase the responsible coordination between approval of projects that induce growth in population and identification of water supplies to support increased demand. ... [T]hese measure have helped to place a greater importance on responsible planning, identifying long-term water supplies preceding major development approvals.])

CALSIM II

Plaintiffs claim that "DWR continues to ignore critical flaws in the CALSIM II model, and major limitations on its application to this project," and as support for this claim refer to "reasons exhaustively presented" in the DEIR comments of Steve Dunn and Arve Sjovold (comment letter 22). Plaintiffs then go on to claim that, "in the AFEIR, DWR... ignored these concerns again." This is patently false. Issues regarding CALSIM II that Plaintiffs have continued to raise have been discussed and responded to multiple times: in many discussions during meetings of the Monterey Plus EIR Committee; in two written memorandums from DWR to the Monterey Plus EIR Committee during preparation of the DEIR (dated March 16, 2005, and September 22, 2005 [AFEIR, p. 6.3-12]); in the DEIR (pp. 5-9 – 5-11); and in the AFEIR (Section 6.3). The DEIR comments of Dunn and Sjovold are exhaustively responded to in the AFEIR in Section 6.3, particularly in Subsections 6.3.2.3 and 6.3.2.5 (pp. 6.3-12 – 6.3-15 and pp. 6.3-18 – 6.3-22, respectively), and in the individual responses to their comments (pp. 6.3-32 – 6.3-37).

Ironically, Plaintiffs complain that in the AFEIR, “DWR not only ignored these concerns again, but refused to conduct any new modeling runs in response.” Plaintiffs’ expressed concerns are that CALSIM II has “critical flaws,” and “major limitations on its application to this project.” Plaintiffs have not previously requested any new modeling runs, and it is unclear how new modeling runs using what they believe is a flawed model would satisfy their concerns.

Plaintiffs state that, “the AFEIR finally acknowledges that CALSIM II, as an optimization model, ‘effectively excludes the possibility of operating the SWP in a manner that would decrease exports.’ (AFEIR, 6.3-34.)” The plaintiffs’ quote of the AFEIR text here, from the individual response to Comment 22-6, is incomplete. The sentence quoted starts out by referring to the master response subsection that addresses this comment (“As noted in FEIR Subsection 6.3.2.3...”). However, the master response in Subsection 6.3.2.3 does not in fact describe CALSIM II as an optimization model. It restates a comment made on the DEIR on this issue (“Other comments state that because CALSIM II is an optimization model, it effectively excludes the possibility of operating the SWP in a manner that would reduce rather than [sic] increase exports from the Delta.”), and then goes on to explain why DWR disagrees with this comment. (AFEIR, p. 6.3-13.)

Plaintiffs claim that, “as documented in the Dunn and Sjovald letter, the EIR here has failed to disclose relevant shortcomings in CALSIM II and its application to the project.” First, the issues raised in the Dunn and Sjovald letter are for the most part misunderstandings (of use of operations simulation models such as CALSIM II, of SWP operations, and of SWRCB D-1641 regulatory requirements), and are not shortcomings of the CALSIM II model. As noted by DWR in its September 22, 2005, memorandum to the Monterey Plus EIR Committee, “CALSIM II is an important tool used by DWR and other State and federal agencies to study many technical and policy issues related to water supply reliability, environmental management and performance,” and other measures. In this same memorandum, DWR states that it “believes that CALSIM II will provide the essential and adequate data needed to allow decision-makers to make well-informed, intelligent decisions concerning some of the project’s environmental consequences.” (AFEIR, Appendix C) The Contractors agree and support its use in this EIR.

While CALSIM II is the best tool available for SWP operations analyses, “the Department recognizes that CALSIM II is not a perfect model.” (AFEIR, p. 6.3-6.) DWR has acknowledged a number of possible model shortcomings in the AFEIR that are relevant to its DEIR analyses, including that CALSIM II: is better used for comparative studies (as was done for this EIR) than for predictive studies (AFEIR, p. 6.3-3); does not model all of the provisions of the Monterey Amendment (AFEIR, p. 6.3-3); estimates Article 21 deliveries to individual contractors less accurately than Table A deliveries (AFEIR, p. 6.3-6); does not react to “real time” issues such as fish densities near pumps (AFEIR, p. 6.3-13); and loses some real-time daily variability with its monthly time step (AFEIR, p. 6.3-24).

Plaintiffs fail to acknowledge that, largely in response to their concerns about CALSIM II, DWR pursued alternative ways to analyze certain impacts of the Monterey Amendment. (AFEIR, p. 6.3-12.) Alternative analyses included conducting a number of studies using historical data since the Monterey Amendment was implemented to estimate actual impacts. These historical studies

were used to provide a check on CALSIM II allocation results (Study No. 1), and to evaluate provisions of the Monterey Amendment not modeled in CALSIM II (Study Nos. 2 and 3). (AFEIR, pp. 6.3-2 – 6.3-4, Table 6.3-1.) Plaintiffs also fail to recognize the limited use of CALSIM II in the DEIR. The DEIR only relies on CALSIM II to estimate: total deliveries by the SWP, base flows in the Sacramento and Feather Rivers, storage in Lake Oroville and San Luis Reservoir, and potential changes in Delta hydrodynamic conditions and water quality. (AFEIR, p. 6.3-3.) As indicated on this same page, DWR “determined that it was appropriate to use the model for these purposes.” Other analytical methods are used to determine the remaining operational and environmental effects of the proposed project.

In summary, DWR has more than adequately responded to Plaintiffs’ concerns about the CALSIM II model, has identified relevant shortcomings of the model in the AFEIR, and has gone to great lengths to include alternative quantitative analyses in the DEIR, largely in response to Plaintiffs’ concerns, so that CALSIM II is not the only analytic tool used to evaluate potential impacts of the proposed project.

Climate Change

Plaintiffs state that the AFEIR’s assessment of project-related climate impacts is limited to statewide greenhouse gas emissions, and assert that this “[ignores] project-related effects on the location of development on the erroneous premise that this is solely a local matter.” Here, they cite to AFEIR page 12-4, which says no such thing. In fact, page 12-4 states that “[the DEIR] recognized that the proposed project may result in changes in growth patterns at the local level, but would not have an effect on statewide population growth and thus ‘within the SWP service area as a whole, the proposed project would not result in any changes in GHG emission due to growth’.” So there is no premise that “this is solely a local matter.” Instead, the DEIR reasoned that the proposed project would have no effect on natural increase or net migration to the State, and thus no effect on statewide population, but that it could result in a shift in the location of growth at the local level. (DEIR, p. 8-6; p. 12-14.) Because the result would be merely a shift in growth within the State, there would be no discernible change in greenhouse gas emissions due to growth, and therefore no proposed-project induced growth impact on climate change.

Plaintiffs complain that the AFEIR “refused requests to incorporate climate change analysis throughout the EIR.” It is unclear what benefit doing so would provide, and Plaintiffs fail to provide any. Including additional duplicative layers of analysis and discussion throughout the EIR would generate a large amount of additional paper and unnecessarily complicate what is already a complex document, without adding any useful information beyond what the DEIR already contains (i.e., that the potential environmental impacts of the proposed project are relatively small, whether evaluated against a baseline using historic hydrology or a baseline that includes the effects of climate change; and that with climate change, potential impacts would likely be even smaller). The purpose of an EIR is to inform decision-makers and the public about the potential environmental impacts of a proposed project, not to generate additional paper as Plaintiffs request. (See, CEQA Guidelines, § 15003(g).)

Plaintiffs note that DWR “declined to study the climate effects” of the Monterey Amendment on greenhouse gas emissions from growth due to transfers, Article 18(a), of retaining pre-Monterey

allocation rules, and investment in the Plumas Watershed Forum to mitigate climate change impacts. Regarding the first three of these items, as discussed above, DWR reasoned that because the effect would be merely a shift in growth within the State, there would be no discernible change in greenhouse gas emissions due to growth. Therefore, there are no climate effects to study. Regarding the last item, the DEIR did not identify any climate change impacts that required mitigation, and thus there are no climate effects to study.

Environmental Consequences of Financial Restructuring

Plaintiffs claim that financial restructuring under Article 51 of the Monterey Amendment would provide “an enormous revenue stream” to the SWP Contractors. However, Article 51 does not provide a “revenue stream.” As explained in both the DEIR and AFEIR, under the financial restructuring, Contractors may receive a reduction in their annual charges if DWR revenues exceed specified needs. (DEIR, p. 4-8; AFEIR, p. 4-3, pp. 4-17 – 4-18.) To clarify, the “revenues” referred to here are the revenues from the Contractors that DWR would charge to them under the other, pre-Monterey Amendment payment provisions of the long-term water supply contract. Under Article 51, if those revenues (i.e., payments from the Contractors) would exceed DWR’s revenue needs (for payments for general obligations bonds, revenue bonds, maintenance, operation and replacement costs, reimbursement of the California Water Fund, and deposits into the State Water Facility Capital Account), then DWR may reduce the amount it charges to the Contractors by the amount of that excess, up to certain specified amounts. So there is no “revenue stream” to the Contractors, but a reduction in what would otherwise be overpayments by the Contractors. This is not state taxpayer money going to the Contractors. It is a reduction in charges to Contractors that would otherwise be paid by ratepayers, and in some cases local property taxpayers, within the Contractors’ service areas.

Plaintiffs also claim that the “AFEIR concedes” that DWR did not analyze Article 51 for environmental impacts, “based on the theory that doing so would be ‘speculative’.” This is a misleading characterization of what DWR did and stated, since it ignores the non-speculative step in DWR’s assessment. As indicated in both the DEIR and AFEIR, if DWR determined that an article could cause changes in the way SWP water is stored or conveyed, then it was assumed that it could have the potential to produce a change in SWP or Contractor operations, which might in turn have environmental effects. If an article did not produce an operational change, as was determined in the case of Article 51, it was not analyzed for environmental impacts. (DEIR, p. 6-15, Table 6-3; AFEIR, p. 4-18, p. 17-51.) So DWR did indeed assess Article 51, but in those areas in which DWR did not have to speculate (i.e., the way SWP water is stored or conveyed), DWR could not discern any operational or physical change caused by Article 51. It is the step beyond this that DWR has stated is speculative. DWR correctly noted that it “is not an auditing agency,” and does not have the ability to “trace where, how, and when the funds not given to [DWR] are distributed or used by each SWP contractor, and therefore [DWR] cannot identify or analyze physical changes or ‘environmental impacts that can be traced to such [economic or social] changes’.” (AFEIR, p. 4-18, p. 17-51.)

In fact, it would likely be difficult even for an individual Contractor to determine the disposition of funds it did not pay to DWR, just as it would be difficult for an individual person to determine the disposition of money not spent on a bill that was reduced. An M&I Contractor might use the

funds it would otherwise have paid to DWR in any number of ways, such as: putting the money in its own rate stabilization fund to draw upon in a future wet or water-short year when water sales and associated revenues are low; reducing or delaying a rate increase for its ratepayers; expanding its water conservation programs; increasing or offsetting costs of additional development of local supplies, such as water recycling or groundwater clean-up and recovery programs; pursuing storage programs or additional supplies to improve supply reliability; or increasing expenditures on facility maintenance or improvements in its service area. Each Contractor, through its public agency board of directors, makes its own decisions regarding the disposition of any funds not paid to DWR, depending on its own needs and mix of supplies, and its own political, economic, and other circumstances within its service area. In any given year, an individual Contractor might decide to use a portion of any funds not paid for several of these purposes. And that same Contractor might make different decisions from year to year, depending on year-to-year variations in supplies (e.g., it might increase spending on conservation or public education programs in drought years), temporary or long-term impacts to other service area supplies, or changes in direction by its board of directors. In any case, if a Contractor initiates new or expanded projects with potential environmental impacts, those projects would each be subject to CEQA, regardless of whether project costs are paid for or partially offset by the reduction in payments to DWR under Article 51.

In the case of the agricultural Contractors, the amount of any reduction in charges for them under Article 51 is instead deposited by these contractors into an Agricultural Rate Management Trust Fund that was established under this article. (DEIR, p. 4-9.) These deposits are then available to the agricultural Contractors for use in paying their SWP bills to DWR in years with less than full Table A supplies (and in the case of Tulare Lake Basin WSD, in years when irrigable land is flooded). Disbursements from the trust fund are limited to this purpose, so any charge reductions for the agricultural Contractors, who receive about 25 percent of total reductions in SWP charges under Article 51, are used solely to provide a degree of SWP rate stabilization from year to year for them, which was an important objective of the Monterey Amendment.

The Plaintiffs also contend that the AFEIR should have compared the proposed project's environmental impacts with "enforcement of Article 18(b)," which they claim might have eliminated reliance on paper water without imposing "the high public costs of Article 51." Such a comparison is included in the DEIR with Court-Ordered No Project Alternatives 3 and 4, which include invocation of Article 18(b) and no Monterey Amendment provisions, including no Article 51 rebates. The shift in SWP supplies between agricultural and M&I Contractors for the baseline, proposed project, and all alternatives is shown in DEIR Tables 11-3 through 11-6, and a comparison of environmental impacts between alternatives is included in DEIR Table 11-23. As discussed above, there are no "high public costs of Article 51," but instead, a reduction in charges to Contractors that would otherwise be paid by ratepayers, and possibly local property taxpayers, within the Contractors' service areas.

The Plaintiffs contend that the AFEIR should also have evaluated the environmental consequences of Article 51's effect on water rates. As discussed above, it would be difficult, if not impossible, for DWR or likely even for the Contractors, to try to trace the disposition of funds not paid to DWR due to charge reductions under Article 51. The exception is charge reductions to the agricultural Contractors, which are deposited into a trust fund used for paying

their SWP bills to DWR in water-short years, with the result being more stable water rates, not new projects with potential environmental impacts. For the M&I Contractors, the exercise becomes speculative. To the extent funds not paid to DWR are put in a rate stabilization fund, or are used to reduce or delay a rate increase, the result would be more stable rates from year to year, or slightly lower rates temporarily, but no new projects with potential environmental impacts. To the extent funds not paid to DWR are used instead for conservation programs, there would be no impact on water rates and no environmental impacts. To the extent funds not paid to DWR are used instead for new or expanded projects, there would be no impact on water rates, but potential environmental impacts. As noted above, however, any such projects would each be subject to CEQA, regardless of whether project costs are paid for or partially offset by the reduction in payments to DWR under Article 51.

Project Alternatives

Plaintiffs attempt to distinguish the California Supreme Court's ruling on alternatives in *In re Bay-Delta* on the basis that the Calfed EIR was a program document is unavailing. Plaintiffs' sole quotation from *In re Bay Delta* was made by the Court with respect to whether or not, in the Court's view, the Calfed EIR's co-equal goals of ecosystem restoration and water supply improvement were achievable in the long term. (*In re Bay-Delta, supra*, 43 Cal.4th at 1168.) In the case of the Monterey EIR, which incidentally is also a Program EIR for several project elements (see AFEIR pp. 1-1 - 1-2), there is no question that the project objectives can be achieved. This has been proven by historic operations since 1996 when the Monterey Amendment was first implemented. Thus, the fact the Monterey program's objectives are more specific and concrete than the Calfed program's, and arguably more achievable, tends to make the *In re Bay-Delta* decision more on point, not less.

Plaintiffs contend that the Monterey EIR somehow failed to comply with CEQA because it did not contain an alternative to "address key issues raised by the plaintiffs." Alternatives in CEQA are not a popularity contest and there is no requirement that a potential alternative be studied in detail merely because someone suggested it. As the AFEIR explains, under CEQA a "candidate alternative" must meet "most" of the proposed project's objectives; avoid or lessen the proposed project's significant adverse environmental impacts; and be feasible and implementable in a reasonable period of time. (AFEIR, p. 11-4.) (See also Guidelines, § 15126.6 (a) ["An EIR shall describe 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 would avoid or substantially lessen any of the significant effects of the project"].) All of Plaintiffs' proposed alternatives were considered, but were properly rejected for failing to meet most of the project objectives, failing to prove feasible, or failing to address a significant impact of the proposed project. (See DEIR, pp. 11-3 – 11-7; AFEIR, pp. 11-12 – 11-25.)

Plaintiffs contend that the EIR improperly rejected two alternatives – PCL's suggested "Improved Reliability Through Environmental Enhancement" and "Kern Fan Transfer with Trust Conditions" alternatives – on the grounds that they would not meet most project objectives. With respect to the basis for rejection, this is not entirely true, as these proposed alternatives were rejected on multiple grounds.

For the “Improved Reliability Through Environmental Enhancement” proposed alternative, the DEIR concluded that it would not meet *any* of the project objectives and would conflict with the basic terms of the long-term water delivery contracts. (DEIR, p. 11-6.) PCL’s comments argued that this proposed alternative could meet one of the six specific objectives for the Monterey Amendment – namely, improving reliability and flexibility of SWP supplies. In considering this comment, DWR disagreed that this proposed alternative could meet any of the project objectives, disagreed that it could restore the ecosystem or lessen the need to constrain water operations, and further found that it would “increase times of shortage and increase conflicts and disputes among the contractors and the Department,” “increase financial pressures on the agricultural contractors in times of drought and supply reductions,” and “reduce the benefits of the water supply management practices by reducing the amount of water available to contractors and reducing the flexibility of the SWP system.” (AFEIR, p. 11-19.) DWR also properly concluded that this and another alternative “are not only infeasible, but really different projects addressing different objectives.” (*Id.*)

In addition, in *In re Bay Delta*, the Supreme Court rejected a proposed alternative that was similarly advocated for its general environmental benefit and held that the pertinent question is whether the alternative would substantially lessen any adverse environmental impacts of the proposed project – not preexisting (baseline) environmental problems. (43 Cal.4th at 1167.)

Plaintiffs contend that the AFEIR should have analyzed their proposed “Kern Fan Transfer with Trust Conditions” alternative, because it would meet project purposes devoting KFE to more than local use. As previously noted, that is not the test under CEQA for a permissible alternative – it must meet most project objectives, be feasible, and reduce significant environmental impacts of the project. The AFEIR explains that Plaintiffs’ proposed alternative was rejected because it would require water stored by local authorities to be used for “statewide environmental benefits,” which does not meet any of the project objectives. (AFEIR, 11-14.) Rather, Plaintiffs’ alternative is an altogether different project with different objectives. (*Id.*) The AFEIR explained, further, that the California Supreme Court in *In re Bay Delta* held that a lead agency need not consider an alternative that cannot achieve the project’s underlying basic purpose or goal (43 Cal.4th at 1166), which in this case is to resolve conflicts and disputes regarding water (shortage) allocation between and among SWP Contractors and DWR and related issues pertaining to SWP management and financing (AFEIR, p. 11-11). A requirement that SWP water be stored in Kern County by local authorities, but be used for statewide environmental benefits would not meet the basic goal of the project. To the contrary, further reducing Contractor supplies would exacerbate, rather than resolve, conflicts and disputes about how to allocate SWP shortages among Contractors.

Furthermore, the AFEIR explained that Plaintiffs’ transfer with trust alternative would not be feasible because it would require finding additional funding sources and reaching agreement with the local authorities. (AFEIR, p. 11-14.) As provided in the AFEIR, prior to the Monterey Amendment, DWR had determined that it could not feasibly develop a water bank on the KFE property in part because it was unable to obtain an agreement with local authorities. (AFEIR, p. 16-4.) There is no substantial evidence that local authorities would have agreed to accept transfer of the KFE property, subject to requirement that water be stored for statewide environmental benefits.

Plaintiffs have also failed to explain how the alternative would eliminate or reduce significant impacts of the proposed project. Plaintiffs apparently contend that any alternative should be considered if it has statewide environmental benefits—a notion that was rejected by the Supreme Court in *In re Bay Delta*. (43 Cal.4th at 1167.) The AFEIR concludes that the KFE property transfer and development and operation of the KWB by local authorities have not resulted in any unmitigated significant environmental impacts. (E.g., Appendix E.) Instead, the AFEIR concludes that the proposed project’s potentially significant adverse impacts are all attributable to the water supply management measures. (AFEIR, p. 5-10.) There is no substantial evidence that storing water in Kern County for statewide environmental benefits would reduce the potentially significant impacts caused by the water supply management measures. Thus, DWR was also justified in not analyzing the Kern Fan transfer with trust alternative because it will not substantially lessen significant adverse project impacts.

With respect to Plaintiffs’ continuing complaint about the Contractors’ involvement in the formation of the underlying project—the Monterey Amendment—this complaint has been addressed under the heading “Project Objectives and Lead Agency Role.”

* * * * *

The Settlement Agreement is clear as to what constitutes a mediation issue and the party objecting to the AFEIR has the obligation to demonstrate that one or more elements of the document are contrary to CEQA, the Settlement Agreement, or relevant case law. The Plaintiffs have failed in all three respects and the Contractor’s request that Director Snow approve the AFEIR for final certification.

Sincerely,



Adam Kear

On behalf of SWC representatives on the
Monterey Plus EIR Committee

cc: Honorable Daniel Weinstein, Mediator
Monterey Plus EIR Committee
Terry Erlewine

DEPARTMENT OF WATER RESOURCES

1416 NINTH STREET, P.O. BOX 942836
SACRAMENTO, CA 94236-0001
(916) 653-5791



October 15, 2009

Re: Referral under Section III(H)(3) of the Settlement Agreement

Dear Settlement Agreement Parties:

By Roger Moore's letter of August 13, 2009, Plaintiffs' representatives to the EIR Committee have referred to the Director a number of potential mediation issues following their review of an Administrative Draft of the Final EIR on the Monterey Amendment to the SWP Contracts (Including Kern Water Bank Transfer) and Associated Actions as Part of a Settlement Agreement (Monterey Plus) (AFEIR). The SWP Contractor representatives to the EIR Committee stated in an August 14, 2009 e-mail that they did not intend to refer any issues to the Director. Plaintiffs requested a response to their letter by September 15, 2009. As stated in my letter, dated August 31, 2009, however, I felt more time was required to give the issues raised by Plaintiffs the serious consideration they merit, and to provide the EIR Committee with a thoughtful and reasoned response.

The Department has been working diligently for several years now with the EIR Committee established by the Settlement Agreement to prepare an environmental impact report (EIR) for the Monterey Amendment and the Settlement Agreement. The EIR Committee is sometimes called the 4x4 Committee because both Plaintiffs and SWP Contractors have four representatives on the Committee. Both Plaintiffs and SWP Contractor EIR Committee representatives have provided advice and recommendations to the Department and had substantial opportunity to provide input into the scope of the EIR. Throughout the process, the Department has considered both Plaintiffs' and SWP Contractors' comments, as well as comments from other responsible and trustee agencies and the general public. Over 24 meetings have been held with the EIR Committee. Many changes in the EIR were a result of input from the EIR Committee representatives.

The EIR Committee representatives were given ample opportunity to review and comment on the EIR, including a review of a preliminary administrative draft in June 2008 and a later administrative draft in January to March 2009. Although two weeks were originally allotted for review of the AFEIR in July and August 2009, the EIR Committee representatives ultimately had three weeks for review, with additional time available if Committee representatives felt this time was not sufficient. No request was made to extend the review period.

The Department appropriately defined the project subject to CEQA review as the Monterey Amendment and the Settlement Agreement (the proposed project).

While the Department could have proposed a different project that encompassed other, broader issues, such a proposed project was not necessary or required to meet the purpose and objectives of the proposed project. All recommendations made by Plaintiffs or the SWP Contractors were given due consideration. Where the Department did not agree with the recommendations, the Department set forth its reasons for not adopting those recommendations in the AFEIR. With respect to the specific issues raised by Plaintiffs in their August 13, 2009 letter, these reasons are set forth again below. The Department's disagreement with Plaintiffs' views regarding the analysis and/or conclusions in the AFEIR does not equate to a CEQA defect. On the contrary, differing views are common and are to be expected in a robust CEQA review.

The AFEIR does not, and was not intended or required to address under CEQA, the comprehensive water policy issues Plaintiffs identify. Resolution of other, broader issues concerning the SWP (including water for the protection of listed species) is being discussed in other forums, is beyond the scope of the proposed project, and need not be resolved as part of the proposed project.

Referral of Mediation Issues. Plaintiffs' August 13, 2009 letter raises issues pursuant to Section III(H) of the Settlement Agreement, which sets forth a process for review of Mediation Issues. Mediation Issues are defined in Section I(U) as "any issue relating exclusively to the compliance of the New EIR with any of the following requirements: (a) the requirements of CEQA; (b) the direction of the courts in the underlying litigation; or (c) the terms and conditions of this Settlement Agreement". Section III(H)(1) states that "if the Plaintiffs' or SWP Contractors' representatives of the EIR Committee, or both, disagree with DWR's proposed approach with respect to a Mediation Issue, such representative may refer the issue in writing to the Director or DWR."

Section III(H)(2) states that if two-thirds of the Plaintiffs' representatives "disagree with the Director's written decision with respect to a Mediation Issue... such representatives may refer the issues in writing for consideration to the Mediator." Section III(H)(4) states that "in the event of a referral, the Mediator will consider the views of the representatives of the EIR Committee and the DWR Director and will provide a written advisory opinion to the EIR Committee and the DWR Director." Section III(H)(5) states that "after receipt of an advisory opinion from the Mediator, the DWR Director shall make a final decision on the issue."

Director's III(H)(1) Decision

Summary

Plaintiffs identify a number of potential mediation issues. As Plaintiffs acknowledge, the issues are familiar to the Department as the result of the extensive EIR Committee process and public comments on the Draft EIR (DEIR). Nonetheless, as it has throughout this process, the Department thoroughly re-examined and evaluated each issue. For the reasons detailed below, the Department determined that the issues Plaintiffs identified have been adequately addressed in the DEIR and the AFEIR and that the analysis and conclusions in the AFEIR do not need to be revised, except for minor clarifications as discussed below. When the responses in this letter refer to the AFEIR, they include all information included in the AFEIR, the DEIR, and their respective appendices and any documents incorporated by reference. The responses in this letter are based on the analyses contained in the AFEIR; no new information is put forward in this letter that is not discussed in the AFEIR.

The following summary briefly addresses the main issues Plaintiffs set forth in their letter and the basis for the Department's response. A more detailed response is attached as Attachment 1.

- **Public Participation.** Plaintiffs, the SWP Contractors, and the public have been extensively involved from the outset in the development and preparation of the AFEIR. While Plaintiffs do not support all the conclusions that the Department reached, they and others have had significantly more participation in this process than is common or required under CEQA.
- **Scope of the AFEIR.** The proposed project evaluated in the AFEIR is the continued operation under the Monterey Amendment and the Settlement Agreement, on which the Department has been acting since 1995 and 2003, respectively. The Monterey Amendment addresses, in general terms, water allocation and management practices between and among the Department and the SWP Contractors, as well as financial provisions relating to the SWP. The proposed project does not encompass broader water policy and Delta issues. Correspondingly the AFEIR does not attempt to address or reach conclusions with respect to such issues.
- **Baseline.** Because the SWP had been operated under the Monterey Amendment for over seven years before issuance of the NOP, the AFEIR

analyzes two time periods – historical (1995-2003) and future (2003-2020). Both time periods have a baseline of 1995. Consistent with the scope of the proposed project, the baseline established in the AFEIR is the operation of the SWP in accordance with the pre-Monterey Amendment long-term water supply contracts adjusted to include certain specific events that are expected to occur over time and that are not related to the Monterey Amendment or the Settlement Agreement. This approach permitted a more thorough and relevant evaluation of potential proposed project impacts.

- **Methodology.** Throughout this process, and in the EIR Committee, in particular, the methodology of the AFEIR has been extensively discussed and debated. After considering all input, the Department utilized a combination of tools to identify and evaluate potential project-related impacts, including the CALSIM II model and historically-based analyses. The AFEIR identified both benefits and limitations of the analytical tools used in the AFEIR, including the CALSIM II model, and determined that they provided the best available evaluation and quantification of potential impacts related to the proposed project.
- **Delta Impacts.** The proposed project will not increase exports beyond levels authorized by the Department's water right permits, and as permitted or allowed by hydrological conditions and applicable legal restrictions and limitations imposed on SWP operations. Moreover, the AFEIR found that the proposed project did not result in significant, if any, increased Delta exports compared to the levels that would occur without the proposed project in effect. It also found that all potential Delta impacts were and will be mitigated by operation of the SWP in compliance with applicable legal restrictions.
- **Kern Water Bank Lands (KWB Lands).** The AFEIR analyzed the potential environmental impacts related to the transfer of the Kern Fan Element (KFE) property from state to local control (administered locally as KWB Lands). Among other conclusions, the AFEIR found that the transfer did not increase, and may decrease, the amount of water transferred out of the Delta, and that water sales resulting from the transfer did not stimulate growth in southern California.
- **Growth.** The AFEIR evaluated potential growth impacts and determined that the proposed project could create potentially significant impacts, including conversion of agricultural and wildlife habitat areas and other air and water quality, traffic and noise impacts associated with local urban

development. The AFEIR concluded, consistent with CEQA, that any *potential impacts resulting from local development were too speculative to be meaningfully evaluated in the AFEIR*. It also concluded that neither the Department nor most local water supply agencies have authority or control over local planning decisions and that local decision making agencies are the appropriate entities to make CEQA evaluations at the local level.

- **Water Supply Reliability.** The AFEIR addressed whether the proposed project would create adverse environmental impacts due to local planners' misunderstanding of SWP water supply reliability (or unreliability). The AFEIR found that the proposed project may, in fact, help alleviate the "paper water" issue due to the availability of better information regarding the variability of SWP water supplies, including the Department's biennial reliability reports issued pursuant to the Settlement Agreement.
- **Alternatives.** The AFEIR identified and evaluated several alternatives, including four no-project alternatives, consistent with CEQA and the court's decision in *Planning and Conservation League v. Dept. of Water Resources* (2000) 83 Cal. App.4th 892 (*PCL v. DWR*). The Department also considered and rejected other alternatives, some proposed by Plaintiffs, that were not feasible or did not meet the proposed project objectives. CEQA does not require that every conceivable alternative be evaluated. Rather, in accordance with CEQA, the AFEIR considered a reasonable range of alternatives.
- **Decision Following AFEIR Certification.** The form and nature of the Department's decision following certification of the AFEIR is not an issue affecting the adequacy of the AFEIR under CEQA. If the Department certifies the AFEIR, the Department will then make its decision whether, and how, to proceed with the proposed project, which is to continue operating under the Monterey Amendment and Settlement Agreement.

Parties to the Settlement Agreement
October 15, 2009
Page 6

Though the Department recognizes that Plaintiffs may disagree with the conclusions summarized above and the detailed discussion attached, the Department is confident that the AFEIR meets and exceeds the requirements of CEQA, the decisions in *PCL v. DWR*, the writ issued by the Sacramento County Superior Court, and the Settlement Agreement. As it has attempted to do with respect to this process and the AFEIR, the Department will continue to fulfill its duties and use its best efforts to operate and manage the SWP in the most responsible manner.

Sincerely,



Lester A. Snow
Director

Attachment:

cc: (See attached list)

Parties to the Settlement Agreement
October 15, 2009
Page 6

Though the Department recognizes that Plaintiffs may disagree with the conclusions summarized above and the detailed discussion attached, the Department is confident that the AFEIR meets and exceeds the requirements of CEQA, the decisions in *PCL v. DWR*, the writ issued by the Sacramento County Superior Court, and the Settlement Agreement. As it has attempted to do with respect to this process and the AFEIR, the Department will continue to fulfill its duties and use its best efforts to operate and manage the SWP in the most responsible manner.

Sincerely,

Lester A. Snow
Director

Attachments

cc: (See attached list)

Attachment 1
Director's Ill(H)(1) Decision
Detailed Response

A. Public Participation

Issue 1: Plaintiffs object, on page 2 of their letter, that Subsection 4.2.1.1 of the AFEIR (page 4-8) asserts that "CEQA does not require public participation in the decision-making process,' and that DWR has no such requirement."

Response: Plaintiffs' comments imply that CEQA requires public participation in the decision-making process or that there had been inadequate public participation in the review of the DEIR on the proposed project. Plaintiffs, however, misconstrue the Department's meaning and quote the AFEIR out of context. AFEIR Subsection 4.2.2.1 responds to comments received on the DEIR that complained about the alleged "secret" negotiations that led to the Monterey Agreement in 1994. The response to those comments explains that neither CEQA nor other laws, regulations or other rules required public input into those contract negotiations. More specifically, the AFEIR, at pages 4-7 and 4-8 explains:

CEQA establishes a process that provides for public input at several points. The main points are the initial scoping and the DEIR. Additional opportunities are provided for responsible and trustee agencies. CEQA does not require public participation in the decision-making process. Whether or not public participation is required during an agency's decision-making process depends on the requirements of laws, regulations, and other rules relating to that agency's own process. Some agencies, such as boards and commissions and most local agencies are required to conduct their decision-making in public. Others, such as departments like the Department of Water Resources, have no similar requirements.

The negotiations that led to the Monterey Agreement were conducted without public input. While some of the comments are critical of this process, it was not unusual and it was not illegal. Up until that time, discussions relating to the long-term SWP water supply contract amendments had never included public involvement. This was one of the issues that concerned the plaintiffs in *PCL v. DWR* and was one of the subjects of the Settlement Agreement which provides for public negotiations of permanent transfers of Table A amounts and principles for public participation in project-wide contract amendments and contract amendments relating to Table A transfers between existing SWP contractors.

Plaintiffs quote from the Court of Appeal decision in *PCL v. DWR* and appear to argue that the language quoted from the AFEIR is contrary to the these statements. The

court's language was not directed to whether the public should have had a role in the decision making of the Department in 1994 but rather to the review process for the EIR on the Monterey Agreement.

As described in the AFEIR, Plaintiffs have had the opportunity to participate, and did participate, in the development and preparation of the DEIR and AFEIR. This participation has been extensive, and the Department has at all stages taken such input into consideration. As discussed in the AFEIR, at page 4-9:

The Department has independently prepared, reviewed, analyzed and discussed all the issues raised in the EIR on the Monterey Agreement and other issues raised in the scoping meetings. In addition, the EIR has benefited from the advice and recommendations of the EIR Committee required by the Settlement Agreement. The EIR committee included four SWP Contractor Representatives and four Plaintiff representatives. Over 24 meetings were held, including a number of meetings to discuss input into the CALSIM II modeling to make it more useful for the DEIR. Both the contractor and the plaintiff representatives had the opportunity to provide input into the scope of the DEIR. Many changes were a result of input from the EIR Committee participants. See FEIR Subsection 6.3.2.2 for input from the EIR Committee on modeling, and Subsection 5.1.2.2 for changes made in the EIR.

The public also has had an opportunity to review and comment on the DEIR, consistent with the requirements of CEQA. Over 61 comment letters were received, totaling 257 pages. A total of 4,597 pages of comments, exhibits, and attachments were submitted. These include comments from PCL (51 pages of comments with 350 pages of attachments); from the California Water Impact Network (CWIN), co-plaintiffs with PCL in a related matter, *PCL v. Castaic Lake Water Agency*, on appeal in the 2nd District Court of Appeals (37 pages of comments with 1,910 pages of attachments); and from the SWP Contractors (33 pages).

The openness of this CEQA process, and in particular, the extensive involvement in the formulation and preparation of the DEIR by the public, including Plaintiffs' representatives on the EIR Committee, has been unprecedented.

B. Project Objectives

Issue 1: Plaintiffs assert, on page 2 of their letter, that "the AFEIR primarily measures the project based upon the ambitions of the contractors and DWR officials, while marginalizing public input to project formulation or alternatives."

Response: There is a disagreement between Plaintiffs and the Department with regard to what CEQA requires and the Department's choice to limit the project objectives largely to specific issues relating to the contractual relationships between and among the Department and the SWP Contractors. Under CEQA, the lead agency has discretion to determine the initial nature of the objectives and proposed project it wishes

to undertake and it is within that context that CEQA requires review focused on the “fullest protection” of the environment. Plaintiffs argue that the project objectives must consider all Delta issues and SWP operations, including “a choice between the pre-Monterey 1960 contracts and a different project.” The fact that the Department did not elect to pursue a different project as proposed by Plaintiffs does not constitute “marginalization of public input” and does not render CEQA review of the Department’s proposed project defective or misdirected. The Department considered the public input to project formulation and alternatives and the AFEIR explains why it did not adopt all of Plaintiffs’ points of view.

AFEIR Subsection 4.2.2.2.1 discusses Plaintiffs’ contention that CEQA and *PCL v. DWR* require the Department to look at a completely different and more comprehensive project or at different and more comprehensive project objectives - such as looking at ways of supplying a portion of available SWP water to the environment, or ways to reduce the demand for SWP water by the contractors, or using the KWB Lands for environmental purposes. The Department disagrees with this position. As discussed in the AFEIR at page 4-8:

The court in *PCL v. DWR* (page 920) found that the EIR on the Monterey Agreement was improperly prepared by a local agency and that the Department must prepare an entirely new EIR on the project as a whole. It did not rule on issues other than the failure to adequately discuss the elimination of Article 18(b) “because DWR, with its expertise on the statewide impacts of water transfers, may choose to address those issues in a completely different and more comprehensive manner”.

As explained in the AFEIR at page 4-9:

While the Department and the SWP contractors could have addressed different and more comprehensive changes to the SWP water supply contracts, neither CEQA, the court in *PCL v. DWR*, the Settlement Agreement, nor the Superior Court’s Order on remand, requires them to do so. This issue is discussed more fully in FEIR Chapter 5, Subsections 5.1.2.1.2 and 5.1.2.3.1....The Court in *PCL v. DWR* stated that the Department ‘may’ choose to address the issues raised in a completely different and more comprehensive manner. It did not say that the Department ‘must’ address the issues differently.

As discussed in the AFEIR at page 5-5, the California Supreme Court said in *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143 (*In re Bay-Delta*):

The lead agency has the authority and responsibility to initially frame the scope of its proposed purpose and objectives. The lead agency cannot make the objectives so narrow that there is only one project that meets the objectives. Beyond that caveat, however, the lead agency is free to limit its proposed objectives to the issues it wants to address and is not obligated to look at broader issues or concerns.

As explained in the AFEIR, at page 5-3:

After independently considering and reviewing the original Monterey Agreement objectives, with advice from the EIR committee established by the Settlement Agreement, the Department decided to characterize the Monterey Amendment objectives as those listed on pages 4-1 and 4-2 and further described in Chapter 4 of the DEIR. These objectives are very close to the goals of the Monterey Agreement.... The underlying fundamental purpose of the Monterey Amendment is similar to the underlying fundamental purpose of the Monterey Agreement which was to resolve conflicts and disputes between and among the urban and agricultural SWP contractors and the Department about water allocation and related issues pertaining to the management and financing of the SWP.

The Department's decision to describe the proposed project as an effort to resolve conflicts and disputes is not a case where "a threat of litigation...is allowed to derail environmental review," but rather a case where the Department, as lead agency, has appropriately chosen to define the "proposed project" to be the resolution of issues relating to contractual relationships among the Department and the contractors, i.e., those issues addressed in the Monterey Agreement and Monterey Amendment about water allocation and related issues pertaining to the management and financing of the SWP.

The *PCL v. DWR* court did not require the Department to look at other, broader issues. As noted, resolution of other, broader issues is being discussed in legislative, administrative and court arenas. This issue is discussed in AFEIR Subsection 5.2.1.2. On pages 5-5 and 5-6, the AFEIR explains:

Neither the Court in *PCL v. DWR* nor the Superior Court's Order on remand, nor the terms of the Settlement Agreement suggests that the Department is obligated to change the basic approach to the SWP to require the Department to consider such broad objectives. Although CEQA requires an agency to consider mitigation measures and alternatives that would meet its project objectives, it does not require an agency to examine a project and objectives that are completely different from the one it has chosen to pursue....Even if the Department could unilaterally impose changes of the nature suggested by the comments or the Department and the contractors could mutually change the water supply contracts in a way that would allocate or leave more water for the environment, CEQA does not require the Department to consider or make these changes within the context of this EIR. The Department has chosen in this EIR to keep the objectives limited to ones that deal with issues and conflicts between and among the Department and the contractors and leave resolution of broader issues relating to the health of the Delta and urban development to other established planning, legislative and regulatory processes. See discussion in FEIR Subsection 5.2.3.2.

See also AFEIR Subsection 5.2.1.1, discussing that the EIR is not an EIR on all the operations and impacts of the SWP or on all of the problems regarding the Delta or relating to land use and water supply. Citing to the decision in *In re Bay-Delta*, the AFEIR explained at page 5-3:

This EIR on the proposed project presents a similar situation. This EIR does not need to address all of the environmental impacts that may be associated with operation of the SWP or to address all of the Delta's existing problems that existed before the Monterey Amendment. It only needs to study in detail the adverse impacts generated by the proposed project and mitigation measures and alternatives that address project-generated impacts.

C. Lead Agency Role

Issue 1: Plaintiffs assert, on page 3 of their letter, that the "AFEIR's deference to the contractors and marginalization of public criticism, also undermines DWR's court-mandated exercise of its lead agency duties."

Response: The AFEIR, and the extensive process leading to it, show that the Department has taken seriously its responsibilities as a lead agency. As lead agency, however, the Department must be cognizant of the role of the SWP Contractors. The Monterey Amendment modified existing agreements (the 1960s long-term water supply contracts) and the SWP Contractors are parties to those agreements. This fact is the basis for the Department's statement that it could not make a unilateral decision because contract changes were involved. Similarly, SWP Contractors cannot and did not dictate to the Department unilateral changes to the SWP contracts.

As public agencies, the SWP Contractors are responsible agencies under CEQA. As responsible agencies, they have "special duties" set out in CEQA Guidelines 15096 that require them to participate in the EIR process and to reach their own conclusions on whether and how to approve the proposed project.

The AFEIR also explained that, even if it could be argued that the Department could make a unilateral contract change without breaching the contracts, it was not required to do so. As discussed in the AFEIR at pages 5-5 and 5-6, this recognition does not undermine the Department's lead agency role:

Although the Department is the lead agency, the Department cannot make a unilateral decision because the proposed project involves changes to a contract, i.e., the long-term water supply contract, and requires the concurrence of the other contracting parties. Even if the Department could unilaterally impose changes of the nature suggested by the comments or the Department and the contractors could mutually change the water supply contracts in a way that would allocate or leave more water for the environment, CEQA does not require the Department to consider or make these changes within the context of this EIR. The Department has chosen in this EIR to keep the objectives limited to ones

that deal with issues and conflicts between and among the Department and the contractors and leave resolution of broader issues relating to the health of the Delta and urban development to other established planning, legislative and regulatory processes. See discussion in FEIR Subsection 5.2.3.1.

Although the basic project purpose and objectives have not changed from the EIR on the Monterey Agreement (with the exception of those relating to the Settlement Agreement), the DEIR and this FEIR differ from the original EIR in many ways. The Department has addressed the issues in a completely different and more comprehensive manner and the DEIR reflects the updated and independent view of the Department as an agency with statewide knowledge and concerns. See the discussion in FEIR Subsection 5.2.2.

D. Uses of the EIR

Issue 1: Plaintiffs argue, on page 3 of their letter, that the AFEIR (4-6) “falsely defines the task of lead and responsible agencies as ‘to decide whether to continue operating under the proposed project and whether to decide whether to implement one of the alternatives to the proposed project.’” They contend that “[d]efining the project decision in terms of ‘continued’ operation is blatantly inappropriate” and that “[t]here has been no lawful decision to implement the Monterey Amendment.” Plaintiffs argue that the Monterey Amendment is in “effect only under the Superior Court’s *interim* order under Public Resources Code section 21168.9” and that when “that order expires, the contracts will revert to their pre-Monterey status unless DWR makes a new approval decision and files a return to the writ” and that that new approval decision “requires new contracts.”

Response: Plaintiffs appear to confuse the description of the proposed project - which is the Monterey Amendment and the Settlement Agreement - with the Department’s decision on how to carry out the proposed project if the AFEIR is certified. The baseline in the AFEIR is operation under the SWP long-term water supply contracts as they existed prior to the Monterey Amendment and the proposed project is the Monterey Amendment and the Settlement Agreement. The Department and the SWP Contractors have been operating under the Monterey Amendment since 1995/1996 and the Settlement Agreement since 2003.

Given the circumstance that the Department and the SWP Contractors have been operating under the Monterey Amendment for 14 years (and the Settlement Agreement for six years), and are presently doing so, the “proposed project” under CEQA is continuing to operate under the Monterey Amendment and the Settlement Agreement. It is appropriate under CEQA, where court intervention has occurred, that a subsequent environmental review may center on a project that is already underway. That result does not make the CEQA review defective or the Department’s role as lead agency deficient.

The AFEIR concludes that when the Department completes the FEIR, it will make its decision whether to proceed with the proposed project. The AFEIR at page 4-6 correctly makes the distinction between the EIR and the decision:

The DEIR states on page 1-1 that this EIR will be used by the Department, as lead agency, and the contractors, as responsible agencies, to evaluate the environmental impacts of the proposed project and to decide whether to continue operating under the proposed project or to decide whether to implement one of the alternatives to the proposed project. The DEIR states that, "[A]s part of its overall consideration, the Department will also review legal economic and social impacts. Once the EIR is complete, the Department will consider all options available to it under the law". Upon completion and certification of this EIR, the Department will make written findings and decisions and file a Notice of Determination.' In making its decision, the Department will consider the opinion in *PCL v. DWR*, the Superior Court's Order on remand in *PCL v. DWR*, and other appropriate legal sources.

E. Assessment of Shortage and Surplus Provisions

Plaintiffs dispute, on pages 3-4 of their letter, the Department's approach to what would occur under the pre-Monterey Amendment SWP long-term water supply contracts after invocation of Article 18(b), and claim that the AFEIR's assessment of the no project alternative "failed to come to terms with the 'related water delivery effects' of other Monterey changes, such as those in articles 18(a) and 21." As described below, the AFEIR's assessment of the no project alternatives complies with the requirements of *PCL v. DWR*, the Settlement Agreement and CEQA.

Issue 1: Plaintiffs object to the analysis of the Article 18(b) no project alternatives in the AFEIR that include deliveries of Article 21 water. Plaintiffs object that the AFEIR, "[h]aving recognized that implementation of article 18(b) would reduce table A amounts to less than half their original levels (1.9 million acre-feet). . . assumes that any resulting decreases in table A allocation would simply 'commensurately increase' allocations of article 21 surplus water." Plaintiffs contend that "this approach ignores research showing other options were available."

Response: As a general matter, the consideration of project alternatives in the AFEIR, including the no project alternatives, satisfies CEQA's requirement that a lead agency consider a reasonable range of alternatives. More specifically, the AFEIR, at page 11-5, explains that "[f]our versions of the no project alternative are examined in the DEIR because there is disagreement and uncertainty over how to characterize continued operation of the SWP in accordance with the pre-Monterey long-term water supply contracts." Two versions involve invocation of Article 18(b). The AFEIR, at page 11-6, explains that "[b]ecause the Department believes that failure to reach agreement on the Monterey Amendment would not necessarily have led to invocation of Article 18(b), other possibilities were examined in the DEIR."

As discussed in AFEIR Subsection 13.2.2, the Department concluded that if Article 18(b) had been invoked it would not change the total amount of water available to the SWP in any particular year, which depends on applicable hydrologic conditions, and regulatory and other legal requirements, including SWP water rights. The Department would continue to deliver as much water requested by the contractors as possible within these constraints, whether the contractor's request was made pursuant to its Table A allotment, or as Article 21 water. Invocation of Article 18(b) would primarily affect the classification the Department would apply to the water (i.e. Table A water or Article 21 water) and the amount allocated to individual contractors. The long-term water supply contracts do not authorize the Department to reduce total exports or unilaterally eliminate Article 21 deliveries if Article 18(b) was invoked.

The AFEIR, at page 13-10, describes how the Article 18(b) no project alternatives were determined:

Under these two alternatives none of the elements of the Monterey Amendment would be implemented. In years when available supplies are less than 1.9 million AF, water would be allocated in accordance with pre-Monterey Article 18(a) provisions for temporary shortages. In years when available supplies exceeded 1.9 million AF, surplus water would be delivered. The KFE property would remain in state ownership and a water bank would be developed as planned by the Department. The Settlement Agreement would not be implemented.

The only difference between CNPA3 and CNPA4 is how Article 21 water is allocated. In years when available water supplies exceeded 1.9 million AF, Article 21 water (or "surplus water") would be allocated proportional to contractor's Table A amounts for CNPA3. For CNPA4, Article 21 water was allocated based on the pre-Monterey Amendment preference to agricultural use and groundwater replenishment. Results are shown in DEIR Tables 11-3 and Table 11-4 on page 11-10.

The Department determined that the two versions of the no project alternative that include reducing the sum of the Table A amounts to 1.9 million acre-feet (CNPA3 and CNPA4) are reasonable possible alternatives of what might have happened if the proposed project had not been implemented and Article 18(b) of the pre-Monterey Amendment long-term water supply agreements had been invoked. AFEIR pages 13-10 to 13-11 explains:

As stated in FEIR Subsection 4.2.2.2, the court in *PCL v. DWR* recognized that the Department has a statewide perspective and with its expertise on the statewide impacts may choose to address issues raised in the 1995 EIR in a completely different and more comprehensive manner. It did not tell the Department how to address or analyze those issues. The Department does not agree with the claims that it should not deliver SWP water above Article 18(b) Table A amounts, if Article 18(b) were to be invoked. With the invocation of

Article 18(b), the Department assumed that the Department and the contractors would have tried to make up the difference between invoked-Article 18(b) Table A amounts and the planned yield of the SWP. This determination was based on the language of the long-term water supply contracts and the history of the period prior to 1995 when the Monterey Agreement was signed.

In addition, other potential options were considered. The AFEIR, on page 13-11, discusses some of these:

In the fall of 1987 in Water Service Contractor's Water Memorandum No. 1878, the Department compared the merit of four interpretations of the allocation procedure under Article 18(b). None of these interpretations considered a cap on water deliveries above Article 18(b) Table A amounts that would eliminate Article 21 deliveries. To cap such water deliveries would mean that the Department and the contractors would have had to jointly agree to eliminate Article 21 – an unreasonable and unlikely occurrence, considering the draconian effect such a decision would have on SWP water supplies. Some comments suggest that the Department could have eliminated Article 21 deliveries without agreement from the SWP contractors. The Department, however, concluded that its long-term water supply contracts with the 29 SWP contractors would not support such an arbitrary action that would severely restrict the export of water from the Delta that could otherwise be pumped according to water rights for the SWP, subject to environmental and other regulatory requirements.

Plaintiffs' position, in effect, is that invocation of Article 18(b) would operate to eliminate Article 21 and any potential Department obligations under Article 21. That conclusion is not supported by the terms of the water supply contracts, which the AFEIR correctly recognizes. The Department's consideration and analysis of such an alternative satisfied CEQA review standards.

Issue 2: Plaintiffs claim that the Department's position that invocation of Article 18(b) would include deliveries of Article 21 water "would virtually read article 18(b) out of the contracts" and "resurrects the discredited position in the decertified 1995 EIR".

Response: Plaintiffs' dispute is actually their disagreement with the proper interpretation of the pre-Monterey Amendment long-term water supply contracts. The alternatives analyzed in the AFEIR are based on invocation of Article 18(b). As discussed in Issue 1 above, invoking Article 18(b) does not result in a cap on SWP deliveries.

Nor does the Department's inclusion of Article 21 water in the Article 18(b) no project alternatives read Article 18(b) out of the contract. As discussed in AFEIR Subsections 13.2.1 and 13.2.2, the Department's interpretation has significant meaning with regard to the distribution of Article 21 water between agricultural and municipal water contractors in times of shortage. The long-term water supply contracts contain provisions specifying how the Department will curtail water to contractors during a temporary or permanent shortage of water supply. Prior to the Monterey Amendment,

Article 18(a) placed the initial burden of shortages on agricultural users. As the AFEIR describes at page 13-5:

Prior to the Monterey Amendment, Article 18(a) specified that reductions for agricultural contractors would take shortages in advance of M&I contractors. Reductions for agricultural use could not exceed 50 percent in any one year nor exceed an aggregate limit of 100 percent in any series of seven consecutive years before reducing water deliveries for other purposes. If additional reductions were necessary, Article 18(a) stated that further reductions were to be allocated proportionately among all contractors....The pre-Monterey Amendment also provided that in the event the Department declared a permanent shortage under Article 18(b), the Department would proportionally reduce Table A amounts so that the sum of the Table A amounts equaled the reduced SWP minimum yield.

As explained in the AFEIR at page 13-8:

To understand the history behind Article 18(b), it is essential to recognize that the contracts before Monterey were products of negotiations between the Department and the SWP contractors, as is the Monterey Amendment. Decisions about Article 18(b) fit into the context of those earlier negotiations and the earlier balancing of interests in those negotiations.

The history of the development of the SWP and the role of Article 18(a) and 18(b) are discussed in the AFEIR in Subsections 13.2.1 and 13.2.2.1. The AFEIR summarizes this history at page 13-2:

The limited supplies available during the drought [of 1987-1993] highlighted the differences between the views of the Department, M&I contractors, and agricultural contractors on interpretation and application of SWP contract shortage provisions. Some agricultural contractors argued that the Department must invoke Article 18(b) to eliminate the SWP allocation disparities or face the possibility of judicially mandated Article 18(b) invocation. If all contractors' Table A amounts were reduced proportionally as would be required under Article 18(b), the amount of water to be pumped as Table A water would be reduced. However, the total amount of water pumped would remain about the same. In some years, due to higher flows in the Delta, more water would be available for pumping beyond the amounts needed to meet the reduced Table A amounts. This extra water would go first to agricultural users under Article 21. The M&I contractors were concerned that the overall result of implementing an 18(b) reduction in Table A amounts and following the then-existing contract provisions on extra water availability would be a shift in water deliveries from urban users to agricultural users. While the water shift would favor agricultural users, the majority of costs would still be borne by the urban users. As a result, some urban contractors might file a lawsuit challenging a decision by the Department to implement Article 18(b).

The AFEIR, at pages 13-2 and 13-3, explains how the Monterey Amendment resolves the issue by allocating all shortages equally among agricultural and M&I contractors:

The Monterey Amendment revised Article 18(a) so that whenever the supply of Table A water is less than the total of all contractors' requests, the available supply of Table A water is allocated among all contractors in proportion to each contractor's annual Table A amount. The Monterey Amendment also eliminated Article 18(b). The reason for eliminating Article 18(b) is not described in the Monterey Agreement. However, once the agriculture first shortage provision was eliminated, it no longer mattered whether a shortage was a temporary one or a permanent one, since the allocation of the available supply would be the same in either situation.

The Department is unclear what Plaintiffs mean by stating that the Department's assumptions with regard to Article 18(b) resurrect a discredited position in the decertified 1995 EIR. The Department's approach is consistent with the court's holding in *PCL v. DWR* which required the Department to analyze the implementation of Article 18(b) as a no project alternative, which the Department has done. The court did not instruct the Department how to *interpret* the implementation of Article 18(b) in connection with the other terms and obligations under the pre-Monterey water supply contracts, properly leaving that task to the Department's discretion. The AFEIR provides this analysis based on "DWR's statewide perspective and expertise" as the "agency with principal responsibility for implementation of an agreement that substantially restructures distribution of water throughout the state." (See *PCL v. DWR*, pages 904 and 920). Plaintiffs' contrary contractual interpretation does not mean that the Department's alternatives analysis does not comply with CEQA.

Issue 3: Plaintiffs contend that "DWR rejects invoking article 18(b) as a 'reasonable' way to protect the Delta and end local reliance on paper water only after redefining it to be meaningless."

Response: The Department disagrees with the position that invocation of Article 18(b) is a reasonable way to protect the Delta and end reliance on paper water. As the AFEIR explains at page 13-10:

The analysis of the Article 18(b) scenarios shows several theoretical examples of what might have occurred if Article 18(b) had been invoked and Table A amounts (i.e. the contractual firm yield of the SWP) were decreased. However, as noted in FEIR Subsection 13.2.2.3, for over a decade prior to the Monterey Amendment, SWP water supply decisions have not been based on the yield of the SWP but rather on the probability of delivering a predicted amount of Table A water.

AFEIR Subsection 13.2.2.3 discusses the current concept of delivery probability in comparison to the past concept of firm yield. The AFEIR page 13-14 explains:

As noted in DEIR Section 2.5.1, the total of maximum Table A amounts was originally important to the SWP because this number was intended to be the firm

yield of the SWP. As discussed in FEIR subsection 13.2.2.3, because of the recognition that some anticipated facilities have not been built and that the reliability of SWP water supplies fluctuates for many reasons, including physical and regulatory causes, the Department now considers the probability of an amount of water being delivered annually rather than firm yield when discussing reliability of SWP water supplies. As a result of this water delivery probability procedure, Table A amounts now serve primarily as a way of allocating supply shortages and surplus among the contractors and as a way of allocating costs of the SWP. Reducing the Table A amounts through invocation of Article 18(b) is not relevant in calculating total available SWP water supply, given current day operations and planning based on water delivery probability curves, and given the fact that all contractor shortages are allocated on a pro-rata basis under the provisions of Article 18(a) of the Monterey Amendment.

The AFEIR at page 13-15 explains:

Like most other surface water supplies, SWP water supplies fluctuate, so in some years more water may be available and in other years less water may be available. The Department has determined that invocation of Article 18(b) and returning to the application of the concept of safe or firm yield in determining the amount of Table A that can be reliably allocated each year, except in extreme droughts, is not a reasonable way to protect the Delta or to make local government aware of the variability and limitations of SWP water supply. Such an action would not alter Delta exports, would not alter water supply reliability, nor would it alter the total amount of SWP water allocated to contractors. The action would decrease Table A allocations and commensurately increase Article 21 allocations, both as scheduled surplus and as unscheduled (interruptible) supplies. As discussed in FEIR Chapter 7, subsection 7.2.2.1.3, the Department considers current regulatory processes and evolving Delta constraints to be the appropriate means of protecting the Delta and other environmental resources. As discussed in FEIR Chapter 9, Subsections 9.2.4 and 9.2.6, the Department considers processes such as the Reliability Report (which addresses the impact of climate change and Delta pumping restrictions) and other means of urban water management planning to be a more effective means of making local government aware of the variability and limitations of the SWP water supply.

The Department has noted throughout the EIR process that this is not an EIR on the entire SWP and that the Monterey negotiations were intended to resolve particular issues, primarily, to settle allocation disputes among the SWP Contractors. While the health of the Delta and the relationship between growth and water supply are of critical concern and importance to the Department, the AFEIR, at page 5-11 explains:

Application of the Monterey Amendment is not inconsistent with other water policy actions. As stated in FEIR Subsection 5.2.1.2, the primary focus of the Monterey Amendment is on how the Department will allocate and how the contractors may be able to increase the flexibility and reliability of the available

SWP water. The Monterey Amendment does not increase Delta exports beyond permitted limits. Physical, legislative, administrative or judicial changes that affect water supply or benefit the environment may impact how the Monterey Amendment is applied. See FEIR Subsection 11.2.4....

The DEIR concluded that the Monterey Amendment is not an appropriate tool for mandating the suggested changes. It also recognized that there were administrative and legislative efforts that could address these concerns as part of other comprehensive statewide processes. (DEIR pages 11-5 through 11-7). The Department considers these issues to be of the highest statewide importance and is taking a leadership role and is actively involved in many of these efforts.

Issue 4: Plaintiffs contend that the Department's approach "slights the large increases in article 21 deliveries" under the Monterey Amendment.

Response: Plaintiffs' meaning with regard to this statement is unclear. Changes in both Table A and Article 21 water deliveries as a result of invocation and implementation of Article 18(b), and two other no project alternatives, are considered in the alternatives analysis in Chapter 11 of the DEIR and can be compared to the changes in Table A and Article 21 water deliveries resulting from the proposed project in Chapter 6 of the DEIR. The AFEIR also analyses changes in water deliveries if Article 21 water was not delivered under an Article 18(b) invocation. See AFEIR Subsection 9.2.5.3.

In addition, as discussed in Subsection 15.2.3.3, although pumping of SWP water, including Table A and Article 21 water deliveries increased since the Monterey Amendment, most of these increases were not the result of the Monterey Amendment. The AFEIR explains at page 15-10:

These increases in pumping are related primarily to increased requests for more water to meet increased service area needs. As discussed in FEIR Subsections 6.3.2.1 and 14.2.2.3, the increased requests or demands for full Table A deliveries are one reason. Most demand increases result from the interrelationship of SWP supplies with other imported and local supplies, and increasing demand in the service area as a result of population growth, increased groundwater banking programs (not Monterey-induced) and reduced water supplies from other sources....

In addition, the SWP is usually able to pump much more water in wet years due to the availability of more exportable water in wet years than in dry years. The period 1996 through 2004 was an unusually wet period and as a result pumping rates were high. All but a cumulative total of 44,000 AF of the increased exports between 1996 and 2004 would have occurred without the Monterey Amendment. The Monterey Amendment changed some of the rules for allocating available water supplies once they were exported, like those noted above, but it did not change the general operation of the SWP. The analysis in the DEIR determined that the contract changes contained in the Monterey Amendment can affect Delta

export pumping rates only for limited time periods. This conclusion is documented in DEIR Section 7.2.

The Department both recognized and addressed differences in water deliveries between the baseline and the proposed project and, more importantly, discussed from where the differences derived. The variances in deliveries were not "slighted," as Plaintiffs suggest; they were more than adequately addressed.

Issue 5: Plaintiffs contend that the AFEIR misinterpreted Article 21(g)(1) in explaining that the limitations of 21(g)(1) were intended to apply to "scheduled" water. Plaintiffs state that the "provision, while covering 'scheduled' agricultural surplus water, is not limited to the variety; it also applies to interruptible water."

Response: Article 21(g)(1) stated: "In providing for the delivery of surplus water pursuant to this article, the State shall refuse to deliver such surplus water to any contractor or noncontractor 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 or noncontractor which would be dependent upon the sustained delivery of surplus water."

AFEIR Subsection 9.2.5.2.1 discusses the historical reasons why the words "sustained delivery of surplus water" originally applied to scheduled surplus water. Because scheduled surplus water could be pre-scheduled for up to five years, it was important to make it clear to the agricultural users pre-scheduling this water that it would not be available in the long term and they should not rely on it for "sustained delivery."

The Department agrees with Plaintiffs' statement that Article 21(g)(1) also applied to interruptible water (now called Article 21 water). As discussed on page 9-15, the AFEIR points out that interruptible water is not scheduled and has never been reliable due to hydrology, and therefore, it was appropriate to delete Article 21(g)(1):

As FEIR Table 9-1 shows, Article 21 water was seldom delivered after April each year, and no Article 21 water of any type was delivered in the months of July through December from 1987 through 1997 – years which covered the Monterey Agreement negotiation period.... Article 21(g)(1) was designed to prevent the establishment of permanent agricultural crops based on Article 21's provision for delivery of scheduled surplus water. It was considered reasonable to delete it from the contracts as part of the Monterey Amendment when the "scheduled surplus water" provisions were deleted. Scheduled surplus water had not been available for about nine years prior to the Monterey Amendment. Unscheduled (interruptible) water was infrequently available in that same period (1987 to 1995) and it was unlikely that anyone thought that intermittent Article 21 water would be used to support development of an economy in agricultural or M&I areas.

Issue 6: Plaintiffs claim that the AFEIR, on page 6.1-10, "improperly declines to fully analyze potential consequences of permanently changing Article 21(g)(1)" because the

Department purportedly concluded that any impacts would be "local." Plaintiffs also contend that "although the AFEIR concedes that article 21 water, coupled with storage, may facilitate additional local development (AFEIR, 9-3), it refuses to study that development's relationship to water supply reliability based on the erroneous premise that this solely involves a local decision (AFEIR, 9-2)." They also assert, with regard to Article 21(g)(1), that "local decision-makers would lack any opportunity to restore that provision after it is deleted." The Department is not sure what point is made by the last statement regarding local decision-makers and restoration of Article 21(g)(1), but assumes that it relates to the ability of local decision makers to understand the interruptible nature of Article 21 water which is discussed in the response to this issue.

Response: The quote cited by Plaintiffs on page 6.1-10 is taken from AFEIR Subsection 6.1.2.3.4 and does not constitute a decision by the Department not to analyze the consequences of permanently changing Article 21(g)(1) because it would have only local impacts. Subsection 6.1.2.3.4 discusses a baseline issue of whether Article 21(g)(1) should be included in the baseline and discusses the difficulty of determining whether Article 21(g)(1) had historically had much effect on water demand. As explained on page 9-16, the Department has never refused to deliver water based on Article 21(g)(1). To determine whether Article 21(g)(1) had an effect on local water demand would be speculative and require consideration of many factors. For example, the AFEIR, in Subsection 6.1.2.3.4, refers to a discussion in AFEIR Subsection 8.2.2.2 that identifies the difficulties facing the Department in trying to make a detailed analysis of individual decisions. As discussed in the AFEIR at page 9-16:

Even if the Department were to conduct such an analysis, it would need to consider that current economic activity requires a significant water supply. Based on current water demands, with SWP actual annual deliveries at or below a maximum of 3.6 million AF, and most contractors requesting full Table A deliveries of 4.173 million AF, it would be difficult for the Department to distinguish whether any of that current demand would encourage future economic development. A strong case could be made that full deliveries of SWP water up to current delivery volumes, regardless of classification of the water, would support existing economic development, not new development.

To the extent that the Plaintiffs' comments express concern that local government today is relying on Article 21 water to support permanent development, the AFEIR provides information that shows that this concern is unlikely to occur, at present or in the future. Subsection 9.2.5.2.2, entitled Understanding the Unreliable Nature of Interruptible Article 21 Water, discusses a number of Department documents that are accessible and directed to local government and users of SWP water which describe the interruptible and unreliable nature of Article 21 water. These documents, and others like them, make it clear to water suppliers and local government that they should not rely on Article 21 water on an annual basis, for any purpose. These documents also acknowledge, however, that Article 21 water can be stored for later use and that wet water that has actually been previously stored can constitute a source of water that can be relied upon in local water supply planning. See further discussion on the issue of water supply reliability and local decision-making under Subject J. on Paper Water.

The AFEIR does not refuse to study the relationship between storage of Article 21 water and local development, nor does the AFEIR disregard such analysis based on the premise that this solely involves a local decision. The AFEIR, at page 9-17 explains:

In the absence of storage, interruptible Article 21 water is not likely to contribute to local water supply reliability because of its intermittent and unpredictable nature. With storage, agencies could provide a drought buffer that would support some added economic activity, but not within the context of Article 21(g)(1), as explained above. Ultimately, incorporating Article 21 water into the assessment of water supply reliability is a local decision based on specific local circumstances and facts. Although the Department is aware of storage of Table A and Article 21 water which may lead to additional local development due to the drought "buffer" from additional stored supplies, the Department is not aware of any local water supplier or local governmental agency that relies upon "the sustained delivery of surplus water" to support the development of a local economy.

To the extent that Plaintiffs' comments suggest that the AFEIR ignores the effect of Article 21 on local growth, they are wrong. The potential for growth from additional deliveries of both Table A and Article 21 water to those SWP contractors that received additional water is discussed in Chapter 8 of the DEIR and AFEIR. AFEIR Subsection 8.2.4.2 includes an expanded analysis which clarifies the growth impacts of Table A and Article 21 water stored in groundwater storage programs as a supplement to dry-year supplies. Thus, the AFEIR does address this issue and correctly recognizes that storage of Article 21 water may contribute to local development, but that such development is not derived from the localities' misapprehension that the interruptible supply is reliable.

The local development analysis is performed on a regional basis and does not include a detailed analysis at the local level with respect to specific local decision-making actions. AFEIR Subsection 8.2.2.2 identifies the difficulties facing the Department in trying to make a detailed analysis of individual decisions (page 8-11):

Even though the Department could identify some of the local decisions that may rely on water made available from the proposed project, these decisions require extensive information about local facilities, local water resources and local water use and it is questionable whether the Department has the ability or the authority to identify and monitor or regulate each individual decision made by local government.

As the AFEIR explains, analyzing local development at a local level is beyond the reasonable or required scope of the AFEIR. The Department's consideration of this issue complies with CEQA. See further discussion on this issue under the Subject I. on Growth.

Issue 7: Plaintiffs contend that the "AFEIR presents a caricatured analysis of article 18(b) enforcement without increases in article 21 deliveries" because the analysis eliminates the use of Article 21 water. Plaintiffs further contend that the analysis of

implementation of Article 18(b) should include “conservation and demand management strategies that could mitigate the need for article 21 deliveries.”

Response: Plaintiffs appear to misunderstand the purpose of the discussion in Subsection 9.2.5.3 on the invocation of Article 18(b) with no or limited Article 21 water. Article 18(b) is not something that the Department views as being “enforced.” “Invocation” of Article 18(b) is discussed as an alternative in the DEIR and AFEIR. As explained in the AFEIR on pages 9-17 to 9-18:

Some comments on the DEIR, including ones from Plaintiffs, suggested that the Department could have invoked Article 18(b) and interpreted Article 21(g)(1) in a way that would have limited or precluded Article 21 deliveries. They state that this invocation would result in reduced exports that would reduce reliance on SWP water for development purposes, and thus result in less growth and more water for in-Delta uses....

During the preparation of the DEIR, and in trying to determine how to comply with the court’s order on Article 18(b), the Department reviewed various ways to invoke Article 18(b) including invocation of Article 18(b) with no delivery of Article 21 water to SWP contractors. The invocation of Article 18(b) without Article 21 deliveries was not considered in detail in the DEIR 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. See discussion on pages 11-5 and 11-6 in the DEIR. The Department also determined, after considerable discussion, that it would not have invoked Article 18(b) in this manner at any time in the past, nor into the near-term future. However, in response to comments, the Department has 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. Although the Department believes that Article 18(b) would not have been invoked in this way, nevertheless, 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. This analysis is not presented as an alternative or as a modification of any alternatives discussed in the DEIR, but as clarification of why the Department rejected the approach as an alternative.

Thus, the Department disagrees with Plaintiffs’ statement of the issue because invocation of Article 18(b), with no or limited Article 21 deliveries, was determined not to be a feasible alternative that met project objectives. Even so, as the above quote points out, the AFEIR analyzes the effects of invocation of Article 18(b) and no or limited Article 21 deliveries in response to requests from Plaintiffs and others. Plaintiffs’ disagreement with the Department’s conclusion is not a CEQA defect. For more discussion on the suggestion that the EIR should discuss reduced deliveries through water conservation and other demand management strategies, see Subject N. on Alternatives.

Issue 8: Plaintiffs contend that the “AFEIR also fails to adequately respond to requests to disclose the water rights underlying export of water from the Delta under article 21.”

Response: AFEIR Subsection 14.2.2.2 discusses the water rights regarding the SWP and related restrictions for pumping water from the Delta. As discussed on AFEIR page 14-6, water pumped from the Delta includes Article 21.

F. Project Baseline

Plaintiffs assert, on page 4 of their letter, that the AFEIR’s baseline is defective in both timing and content. The Department disagrees. The baseline approach used in development of the AFEIR is appropriate and adequately identifies potentially adverse environmental impacts.

Issue 1: Plaintiffs, citing to page 6.1-2 of the AFEIR, assert that the period of analysis, which goes to 2020, is too short, pointing out that the AFEIR recognizes that the SWP contracts will not expire until 2035.

Response: The analysis time period extending to 2020 is appropriate, as it was chosen at a time when 2020 was the primary future analysis horizon for other Department environmental documents, as noted in AFEIR Subsections 6.1.2, Baseline Master Response, and 6.2.2.3, Changed Conditions. The AFEIR also concluded that new modeling studies based on the year 2035 would not produce a better or more thorough environmental review. As explained at AFEIR pages 6.2-5 and 6.2-6:

If the Department were beginning the proposed project analysis now, it would probably use the year 2035 instead of 2020 since this is the time frame for Department environmental documents begun within the past year. However, the Department believes the time frame selected for analysis is adequate for full analysis and disclosure of the impacts of the proposed project and a new analysis to 2035 is not necessary. A longer period of analysis would not identify any new impacts or define any increase in the severity of those impacts already analyzed. As noted in AFEIR Subsection 6.2.2 and addressed in Subsection 6.4.5 of the DEIR on page 6-65, the impacts of the proposed project may decrease in the future below those levels evaluated in the DEIR and AFEIR because of increasingly stringent Delta export constraints and other changes, although the magnitude by which impacts would decrease and the rate of such decreases are not readily predictable.

Extending the timeframe of the EIR analysis would not make a difference in determining the effect of the altered water allocation procedures or water supply management practices. The Monterey Amendment provides a method to allocate water and it provides various management measures regarding where water may go if it is available. These allocation methods and management measures will not change over a longer period of time, even though the quantity of water to which they are applied may vary considerably.

The 2020 modeling assumptions assume that the demands of the SWP contractors are for their full Table A deliveries in all but the wettest years plus added water (Article 21 water) when available (DEIR Table 5-3). In 2001 and from 2003 to the present, all SWP contractors have been requesting delivery of their entire Table A amounts every year and these full requests are likely to prevail through 2020 and beyond. This demand increase is independent of the changes that are a part of the proposed project. DEIR Subsection 2.4 (page 2-9) and 6.3.1 (page 6-12). See also FEIR Subsection 14.2.2.3. This situation is likely to prevail through 2035 (when the SWP long-term water supply contracts expire) and demand for SWP supplies is unlikely to decrease considering the consistent increase in population within the SWP service area and reduced water supplies from other sources. See FEIR Subsection 15.2.3 for more discussion on SWP demand.

Issue 2: Plaintiffs note that inconsistent time periods are used for some analyses.

Response: Plaintiffs are correct that different time periods are used for some analyses, but the different time periods were used for good reason. These isolated variations were used to provide more comprehensive information, where available, and correspondingly more thorough review. The period of analysis for each study is stated in AFEIR Table 6.3-1, which explains the periods used for the historical analyses. As noted in the AFEIR, different periods of historical record were used, depending on when the analyses were initiated, with the purpose of using the longest available historical period of record. Although the NOP was published in 2003, data were available through 2004 for some analyses and through 2005 for other analyses. The Department elected to use the longer period of historical record in each case, where possible, to strengthen the analyses. In response to Plaintiffs' comment, the text on page 15-6 has been revised and expanded and the same text has been added at Page 6.3-6, just prior to Table 6.3-1 to provide greater clarity. See Attachment A for the revised text.

Historical analyses 1, 2, 3, 6, and 7, designed to identify the actual historical impacts of implementing the proposed project and define the differences between those operations and the no-project baseline, use one or two years of actual data beyond 2003 to strengthen the analysis and results.

The studies based on CALSIM II output (Studies 4, 5, and the future analysis portion of Study 6) were developed from the 73-year modeling period model output, and thus rely on a longer hydrologic sampling period than the historical analysis studies, which are based on actual operations for nine or ten years, depending on the study. Thus, Studies 4, 5, and the future analysis portion of Study 6 were based on the 2003 baseline assumed for the 73-year CALSIM II analyses. The version of CALSIM II used for the analyses covers the 1922-1994 hydrologic period, and therefore does not allow direct comparison of the historical data used in the DEIR studies with CALSIM II output. In all cases, the Department relied on the best data and analysis reasonably available and appropriate for the analysis conducted.

Issue 3: Plaintiffs contend that the “AFEIR lacks a credible explanation for its adjustment of the baseline to reflect anticipated events, such as anticipated population growth, urban development, increased water demand, and water transfers.”

Response: Plaintiffs’ comment does not provide any specific criticism regarding the assumptions used for these elements in the baseline. The AFEIR appropriately explains each event or element in the baseline. The AFEIR, at page 6.1-3 explains:

The baseline scenario assumed that none of the elements of the Monterey Amendment were implemented in 1996, none of the elements of the Settlement Agreement were implemented in 1996 or 2003, and that the SWP would continue to be operated from 1996 onward in accordance with the provisions of the pre-Monterey Amendment long-term water supply contracts. Because the baseline in this case occurs over time – from 1995 to 2020, the DEIR includes certain assumptions about actions or changes that will happen over time that are not related to the Monterey Amendment or the Settlement Agreement.

These assumptions include:

- use of full Table A requests by all contractors in the baseline for the 2003 to 2020 period (explained in Subsection 6.1.2.3.3 at page 6.1-7);
- participation by Metropolitan Water District of Southern California as a banking partner in the Semitropic Water Bank up to a potential storage capacity of 350,000 acre feet in the 1995 baseline because this participation had been approved by the Department prior to the Monterey Amendment (explained in Subsection 6.1.2.3.2 at pages 6.1-5 and 6.1-5); and
- increased Table A transfers in the baseline for 2003 and 2020 from MWDSC to Coachella Valley Water District and Desert Water Agency pursuant to the Colorado River Quantitative Settlement Agreement, and transfers from Tulare Lake Basin Water District to other SWP contractors, because these transfers also were the result of decisions unrelated to the Monterey Amendment and were not facilitated by the Monterey Amendment (explained in Subsection 6.1.2.3.2 at pages 6.1-6 and 6.1-7).

The AFEIR also described in detail various other elements of, and reasons for, the baseline established for this CEQA analysis. See Subsection 6.1, pages 6.1-1 through 6.1-18.

Issue 4: Plaintiffs contend that the approach in the AFEIR “wrongfully conflates baseline and ‘no project’ alternatives” and relies upon “inaccurate definition, criticized above, of the project as ‘continued operation.’”

Response: Consistent with the requirements under CEQA and the Settlement Agreement, the baseline in the AFEIR is operation under the SWP long-term water supply contracts as they existed prior to the Monterey Amendment. Since 1995 and 2003, respectively, the Department has been operating under the Monterey Amendment

and Settlement Agreement. The Department cannot disregard that historical fact for purposes of CEQA review.

The AFEIR includes four no project alternatives, as described on pages 11-15 and 16:

Three of the DEIR no project alternatives show different possibilities of what might have happened if the Monterey Amendment had not been implemented in 1995. NPA1, CNPA3, and CNPA4 all assume that none of the elements of the proposed project would ever have been implemented and examine the impacts of each alternative under those assumptions from 1995 through 2020. NPA2 takes a different approach and analyzes the results of a no project alternative starting from the present. It therefore assumes that actions completed under the Monterey Amendment from 1995 through 2003 would stay in place. Therefore in the 2003 to 2020 analysis, it leaves in place the transfer of the KFE property as well as contractual transfers of Table A amounts and storage programs outside the contractor's service area that were in place before 2003. It assumes that all other parts of Monterey would be rescinded. See FEIR Subsection 11.2.3 for more discussion on no project alternatives.

While Plaintiffs prefer a different alternative as the proposed project, it is the Department's role as Lead Agency to determine what proposed project it plans to carry out. As addressed above in Subject D. on Uses of the EIR, the determination of how carry out a decision to continue to operate under the proposed project does not change the analysis of the proposed project as continuing to operate under the Monterey Amendment and the Settlement Agreement. The approach in the AFEIR which relies upon "ongoing operations" is correct.

G. Kern Water Bank

Plaintiffs contend that "[f]aulty assessment of the Kern Water Bank's operation is one of the foundational errors of the AFEIR" and identify a number of points to illustrate their argument (pages 4-6 and various newspaper articles included in Exhibit A of their letter).

As background, the AFEIR, at page 16-5 explains the following:

The May 2003 Settlement Agreement set forth a process for including the plaintiffs and the contractors in the development of the new EIR and set forth some specific items that were to be included in the content of the EIR. The Settlement Agreement is included in Appendix D of the DEIR. The Superior Court approved the Settlement Agreement on May 20, 2003. As part of the Project Description, the Settlement Agreement provides that the parties acknowledge: 1) that the KWBA Lands is currently operating under the Kern Environmental Permits, which were entered into based on an Addendum to the 1995 Monterey Agreement EIR; 2) the parties agree not to challenge the Addendum; and 3) that the KWBA agrees not to rely on the Addendum for any new KWBA project to the

extent that such reliance is based on data or analysis incorporated into the Addendum. In addition, the new EIR must include an independent study by the Department, as the lead agency, and the exercise of its judgment regarding the impacts related to the transfer, development, and operation of the KWB Lands in light of the Kern Environmental Permits. The Settlement Agreement also states that KWBA shall retain title to the KWB Lands and that KWBA may continue to operate and administer the KWB Lands including the water bank subject to the certain restrictions (see FEIR Subsections 16.2.9 and 16.2.10).

The discussions below refer at different times to the Kern Fan Element (KFE) property and to the Kern Water Bank (KWB) Lands. As noted on pages 16-1 and 16-2 of the AFEIR:

The property should be called the "KFE property" when owned by the Department and called the "KWB Lands" after it was acquired by the KWBA. This is consistent with the Settlement Agreement which defines the KWB Lands as the KFE property after it was transferred and recorded in Kern County. The footnote in Section III of DEIR Appendix E clarifies the name used by the Department during its activities to develop a multi-element groundwater program in Kern County in the 1980's, which was the "Kern Water Bank" ("KWB"), as distinguished from the term "KWB Lands" used by this FEIR.

Issue 1: Plaintiffs argue that the "Kern Water Bank's transfer out of state control relies on the never-lawfully-approved Monterey Amendments" and therefore apparently contend that the AFEIR should not describe the proposed project as including the transfer of the KWB to local control. Although it is not clear, their criticism, apparently, is that the AFEIR improperly characterizes the KWB transfer because, in Plaintiffs' opinion, the KFE property transfer from the Department to KCWA was only temporary.

Response: As Plaintiffs note, the AFEIR states at page 16-4 (and page 4-11) that "once the transfer of the KFE property occurred, the KWBA assumed the responsibilities of the property and development of the KWB Lands" and "that post-transfer, the bank operation was a locally-owned KWB Lands project." The transfer of the KFE property occurred in 1996 and the AFEIR accurately describes what has already happened. Since the proposed project includes transfer of the KFE property to local ownership, these statements are appropriate.

Plaintiffs argue that current operation of the KWB Lands project is authorized only on an interim basis. As addressed above in Subject D. on Uses of the EIR, the determination of how carry out a decision to continue to operate under the proposed project does not change the analysis of the proposed project as continuing to operate under the Monterey Amendment and the Settlement Agreement.

Issue 2: Plaintiffs appear to claim that the Department did not provide an independent study of the transfer, development, and operation of the KWB Lands in light of existing environmental permits, as required by the Settlement Agreement. Plaintiffs also assert

that the Department "refused" to study the KWB Lands' "specific operating parameters" or provide a "detailed assessment" of its storage or allocation.

Response: The Department prepared an independent study as required by the Settlement Agreement, entitled "Study of Transfer, Development and Operation of Kern Water Bank" (Kern Water Bank Study), which is included in the DEIR as Appendix E. The Kern Water Bank Study, along with the additional information included in the DEIR, supplemented by the AFEIR, analyzed the impacts of the transfer of the KFE property in accordance with CEQA. The analysis studied both the impacts of the transfer on the Delta and on terrestrial biological resources. Key parts of the Kern Water Bank Study include:

- Subsection V, which includes a specific discussion of the transfer, including corresponding ownership allocations (Table 3) in the KWB Lands project.
- Subsection VI, which includes considerable information about the operation of the KWB Lands project, including sources of water to the KWB Lands, recharge and recovery operations, storage balances, maintenance, and groundwater monitoring.
- Table A, which presents an accounting summary of water stored, sold, exchanged, and recovered for participants' use.

In its monthly classification of all water moved through the SWP, the Department tracks SWP water delivered to the KWB Lands by participant; it does not track other types of water delivered to the KWB Lands such as Friant-Kern water or Kern River Water. The analysis of the KWB Lands project provided in the DEIR, including the Kern Water Bank Study, and the AFEIR identifies all the potential environmental impacts of the transfer of the KFE property and complies with CEQA. As explained in the AFEIR at pages 16-9 and 16-10:

The DEIR analyzed the impacts of the transfer of land in the relevant sections of Chapter 7. It concluded that although there could be significant adverse impacts from development and operation of the KWB Lands on terrestrial and cultural resources, they would be mitigated under the existing mitigation agreements. See DEIR page ES-5 and Table ES-1 for summary of impacts and mitigation....

As discussed on page 4-12 of the DEIR, the Settlement Agreement required the Department to include, in addition to the CEQA analysis, an independent study of the impacts of the transfer, development, and operation of the KWB Lands "in light of the Kern environmental permits that have been issued" (federal ESA permits issued for the KWB). This study is included in Appendix E. The analysis concluded that the "KWB is operating as intended and within the confines of the HCP/NCCP." See Appendix E, page 63. The development of the KWB Lands by the KWBA is discussed in Section V.C. in Appendix E of the DEIR.

Plaintiffs have not identified any impacts or types of impacts that were not evaluated or might be identified as a result of additional analysis. Plaintiffs' allegation that some

impacts, which were analyzed in the Kern Water Bank Study and elsewhere in the DEIR and AFEIR, were analyzed incompletely, are discussed below.

Issue 3: Plaintiffs claim that the fact that the AFEIR did not discuss KWB Lands ownership issues resulted in a failure to examine certain environmental impacts caused by the transfer of the KFE property. These purported impacts are: (a) manipulation and/or depletion of the Environmental Water Account (EWA), (b) promotion of urban sprawl, (c) constrained public uses during shortage, (d) over-reliance on Article 21 water, (e) hardening of demand for Paramount's specialty crops, and (f) hardened demand for Delta pumping and intensifying demand for south-of-the Delta exports.

Response: As discussed below, the AFEIR addressed each of these potential environmental impacts.

Issue 3(a): Environmental Water Account (EWA). Plaintiffs claim that the transfer of the KFE property resulted in manipulation and/or depletion of the EWA.

Response: The AFEIR analyzed the sales of EWA water from the KWB Lands and found that there was no adverse impact on the environment as a result of the Monterey Amendment and the transfer of the KFE property. The Kern Water Bank Study identifies the amount of water from the KWB Lands project that was sold to the EWA. Plaintiffs appear to argue that some private interests benefited financially in a way that was contrary to the public interest. However, even if true, this is not an environmental impact that requires analysis under CEQA. As discussed in the response to Comment 30-43 in AFEIR Chapter 7.2, the environmental impacts of the EWA are not due to the Monterey Amendment or the transfer of the KWB Lands. Those impacts were analyzed in different environmental documents (incorporated by reference into the AFEIR as permitted by CEQA Guidelines, section 15150) prepared specifically for the EWA. AFEIR Subsection 16.2.11 discusses, on page 16-18, the sales to the EWA from the KWB Lands:

Water transferred out of the KWB has been primarily for EWA purposes. See Response to Comment 30-43 in FEIR Section 7.2, for a summary of EWA's actual purchases from 2001 to 2007. The EWA Agencies were required to purchase water from willing sellers, and expected the selling agencies to price the water in a way that would recover the expenses and losses associated with the banking and withdrawal of the water plus a profit. While these sellers of water benefited from the EWA water, the EWA Agencies faced a limited market of willing sellers, especially in the export service area. Surface reservoir supplies are not available from the export service area, leaving established groundwater banks as the primary available source. Because of limitations in cross-Delta transfer capacity in most years, purchases from Kern County groundwater banks made sense from the EWA buyer's perspective because there were no carriage losses or other risks to EWA from moving water through the Delta. Purchase efforts were made so that the benefits of the EWA water were shared among all SWP contractors and CVP Delta export contractors in proportion to EWA pumping curtailments, knowing that EWA funds were limited. From 2002 to 2005, and again in 2007, the EWA Agencies purchased water from KCWA and allowed

KCWA to enter into its own subsequent negotiations with its member agencies. Thus the EWA Agencies did not engage in the negotiations that determined the sharing of the responsibilities and benefits of the EWA transactions at the local level within Kern County. Similarly, the Department did not examine how KCWA and its member agencies used the proceeds of the EWA sales, what reliance they placed on the revenues, or what infrastructure improvements were funded by the proceeds within Kern County. The Department made sure that the EWA received the water that the EWA Agencies had purchased, and that the water was used as prescribed within the EWA Program. Impacts of the purchases were discussed in environmental documents prepared for the EWA. See Response to Comment 30-127 in FEIR Section 7.2. There is no plan at this time to provide for additional public funding to continue EWA. Since 2008, public funding has been insufficient to provide replacement water to compensate for reductions in Delta pumping to protect Delta fish species as has been the case in prior years. See FEIR Subsection 7.2.2.1.5.

The AFEIR adequately addresses the KWB Lands with respect to the EWA. No further or alternative analysis was required to comply with CEQA.

Issue 3(b): Urban Sprawl. Plaintiffs claim that the transfer of the KFE property has contributed to urban sprawl in southern California.

Response: As described in AFEIR Subsection 16.2.11, the KWB Lands are used by local participants within Kern County (except for Dudley Ridge Water District, who uses its water solely for agriculture), and other than EWA water, no water has been exported out of the service area and no water was used for urban development. Plaintiffs appear to have confused the KWB Lands with other groundwater banking programs within Kern County, such as the Semitropic Groundwater Banking and Storage Program. These programs involve SWP participants that are located in southern California and the Bay Area. These programs could result in urban growth and are discussed in AFEIR in Chapters 8 and 15.

The analysis and conclusions in the AFEIR with respect to storage and the potential for urban sprawl as a result of the KFE property transfer complied with CEQA.

Issue 3(c): Constrained public uses during shortage. Plaintiffs assert that transfer of the KFE property includes “constrained public uses during shortages.” While Plaintiffs do not give examples of what they mean by “constrained public uses”, the concern appears to be similar to suggestions raised by comments on the DEIR that the KFE property could have been used for public purposes other than water supply.

Response: The AFEIR addresses this issue, on page 16-9, in AFEIR Subsection 16.2.5:

Some comments suggest that the purpose of the KFE property should have been to serve as a drought mitigation bank or to help balance the State’s water supply to cities, farms, and fish, or to manage water resources for a variety of public purposes, including drought storage for emergency preparedness, urban uses,

environmental protection, river restoration, and water quality. The Department does not agree. At the time of the Monterey Amendment, the Department owned the KFE property. It had purchased the property with the idea of storing surplus water during years of abundant supply for extraction and use in dry years by developing a water recharge and recovery facility. It had considered a number of options for the lands including the option of transferring the lands to local control. It had not considered using the lands for other purposes such as environmental protection or drought storage for emergency preparedness. At the time of the transfer there was no operation of the lands as a water bank except for a pilot project and there were serious questions about the economic feasibility of operating the KWB as an SWP facility and about whether the Department and KCWA could agree on an operating agreement as required by Water Code Section 11258. While the Department could have chosen a broader project and objective such as a variety of uses of a State-owned KFE, it did not and it was under no obligation to do so. See FEIR Subsection 5.2.3.1. regarding the fact that the EIR does not need to consider broader objectives. See FEIR Subsections 16.2.1 and 16.2.5 on the history and purposes of the KWB Lands.

As the AFEIR explains, the Department evaluated the appropriate use of the KFE property and decided to transfer the property to KWBA for water storage purposes. The environmental review in the AFEIR of potential impacts related to the transfer satisfies CEQA. Plaintiffs' view that the property could have or should have served other public purposes is a complaint over a policy decision, and does not affect CEQA compliance.

Issue 3(d): Over-reliance on Article 21 water. Plaintiffs appear to argue that transfer of the KFE property will allow more Article 21 water to be delivered to the KWB Lands participants than they would have been able to receive without the KWB Lands.

Response: Table A and Article 21 water delivered to KWBA and its member units under the Monterey Amendment is described in Chapter 6 of the DEIR and the impacts on resources are discussed in relevant Resource Subsections of Chapter 7 of the DEIR. The AFEIR identifies the amount of Article 21 water delivered to the KWB Lands participants and discusses the impacts of that delivery. The AFEIR, at pages 16-8 to 16-9, explained:

As a locally-owned bank, KCWA would request SWP water and bank a portion of such amount in the KWB Lands, typically in wetter years. However, as noted in DEIR Appendix E, Section VII, KCWA could have delivered all SWP water stored in the KWB Lands from 1995 through 2004, absent the KWB Lands, in other Kern groundwater storage projects. This conclusion, while based on information received from the KWBA, was independently reviewed and confirmed by the Department. Additionally, in the case of allocating Article 21 water in wet years, KCWA would only receive 25 percent of the total Article 21 supply with a locally-owned bank; whereas in the case of a State-owned water bank, the Department would deliver available water for storage in the bank, before offering it to the SWP contractors. Therefore, there could be more water exported and therefore

greater potential impacts on the Delta from a state-owned KFE water bank in comparison to a locally-owned KWB Lands. The terrestrial impacts would be of a similar magnitude for either a locally-owned or State-owned project.

Plaintiffs attempt to argue that the increase in pumping of water from the Delta in the years following the Monterey Amendment was not just correlated with the adoption of the Monterey Amendment and the KWB Lands project, but in fact was caused by the Monterey Amendment and the KWB Lands project. In response to Comment 30-129, the AFEIR explains at page 16-40:

As noted in DEIR Subsection 6.4.2.1, the hydrology from 1996 to 2005 was very wet, and pumping to groundwater storage projects did increase pumping from the Delta. DEIR Table 6-7 shows that the SWP allocated 100 percent of Table A amounts from 1996 to 1999. However, the available increase in supply was not caused by the Monterey Amendment, but by changes in hydrologic conditions (see FEIR Subsection 14.2.2.3 for pumping restrictions and Subsection 14.2.4 for operational conditions for Article 21 pre- and post- Monterey).... See FEIR Subsections 15.2.2 and 15.2.3.3 for increases in pumping due to the Monterey Amendment from water supply management practices, including storage outside the service area and regarding how most increases in SWP export pumping since the Monterey Amendment are not the result of the Monterey Amendment.

Issue 3(e): Hardening of demand of specialty crops. Plaintiffs claim that the transfer of the KFE property hardened demand for Paramount's specialty crops.

Response: It is not clear what Plaintiffs mean by "hardening of demand" for a particular crop or what the adverse environmental impact of this would be. There is no substantial evidence that the proposed project will cause the replacement of irrigated annual crops with permanent crops. The AFEIR addressed the potential for Drought Hardening on page 13-17 in AFEIR Subsection 3.2.4.1:

It is not clear whether the transfers from agricultural contractors to M&I contractors would reduce the flexibility of agricultural contractors in a drought period. Since the agricultural contractors were requesting full Table A supplies prior to the Monterey Amendment, it is doubtful that these supplies were used for drought relief. As discussed in the DEIR regarding Agricultural Resources Impact 7.6-1 (on pages 7.6-5 through 7.6-9), there is no strong evidence to support a conclusion that land was taken out of irrigated production as a result of the proposed project. As discussed in DEIR regarding Terrestrial Biological Resources Impact 7.4-1 (on pages 7.4-20 through 7.4-22), the trend of replacing irrigated annual crops with permanent crops is expected to continue in the future with or without the proposed project. While it is possible that additional land could be converted to permanent crops as a result of the proposed project, no clear trend can be attributed to the proposed project that can be discerned from the historical analysis period. Although the proposed project resulted in a reduction of agricultural contractors' share of SWP Table A amount on an annual average basis, the reliability of their Table A supplies increased during drought periods.

Issue 3(f): Hardened demand for Delta pumping. Plaintiffs' claim that the transfer of the KFE property hardened demand for Delta pumping and intensified demand for south-of-the Delta exports.

Response: As discussed above, water delivered to KWB Lands participants was water they could already have received prior to the KFE property transfer. The AFEIR explains on page 15-5:

The only change resulting from the Monterey Amendment that has the potential to cause increased exports and adverse impacts on Delta fisheries is the implementation of the water supply management practices. The DEIR identified an increase in exports up to a cumulative amount of 44,000 AF during the period from 1996 to 2004 compared to the baseline scenario. It also identified a potential in the future for an average annual increase of 50,000 AF in the future which would be partly offset by the decreases in Delta export pumping attributable to retirement of 45,000 AF of Table A.

See the discussion in Issue 3(d) of this Subject explaining that increased deliveries of Delta exports beyond these amounts were not the result of the Monterey Amendment.

Issue 4: Plaintiffs, citing the AFEIR at page 5-4, disagree that the water bank has the "same basic purpose" under statewide and local ownership, and assert that there has been a "shift in the principal benefits of bank operation from the SWP to local members of the KWBA."

Response: The Department agrees that there has been a shift in the principal benefits of bank operation from the SWP to members of the KWBA, but both entities share the "same basic purpose" for its operation. This issue is discussed in the AFEIR at page 16-8:

The DEIR provides two analyses of the KFE property transfer – one pursuant to CEQA and one pursuant to the Settlement Agreement. Under the CEQA analysis, the DEIR examined the impacts of local development of the KWB Lands (see FEIR Subsections 16.2.6 and 16.2.7). The DEIR also examined the impacts of developing and operating the same property for SWP use as part of several of the no project alternatives (i.e. the KFE property). The transfer did not alter a fundamental purpose of the KFE property when owned by the Department. See FEIR Subsection 5.2.1.2. The same land is involved for similar purposes – to store surplus water during years of abundant supply for extraction and use in dry years by developing a water recharge and recovery facility, which would provide intermittent wetlands. To the extent that the property is used to store local supply, it can be used to supplement KCWA's SWP supplies in times of shortage. To the extent that it could have been used for SWP supply, it could have provided more SWP water to all SWP contractors in times of shortage. The difference in the delivery impact of the water bank used for local purposes, or

used for SWP purposes can be seen by comparing the impacts of the proposed project with No Project Alternative 1. The only difference between these two projects is whether the KFE property is operated to improve reliability of local supplies or reliability of SWP supplies. As discussed at DEIR page 11-31 and FEIR Subsection 16.2.3, the existence of a bank would have no effect on total deliveries to contractors averaged over the 73-year period of hydrologic record.

The impacts of a state-owned KFE are described in AFEIR Subsection 16.2.6 and the impacts of a locally-owned KWB Lands project are described in AFEIR Subsection 16.2.7. The AFEIR explains that under the state-owned water bank, water would have been stored for later use by the SWP contractors. It also explains that the KCWA could have delivered all SWP water stored in the KWB Lands from 1995 through 2004, absent the KWB Lands, in other Kern groundwater storage projects. Plaintiffs' citation to page 16-34 of the AFEIR correctly points out that this conclusion was based on information received from the KWBA. The AFEIR goes on to explain that this conclusion was independently reviewed and confirmed by the Department. The information and conclusions are discussed in Appendix E (the Kern Water Bank Study.) The main difference between a locally-owned and state-owned water bank is that the state-owned KFE could result in greater exports from the Delta. As explained in the AFEIR at pages 16-8 and 16-9:

As a locally-owned bank, KCWA would request SWP water and bank a portion of such amount in the KWB Lands, typically in wetter years. However, as noted in DEIR Appendix E, Section VII, KCWA could have delivered all SWP water stored in the KWB Lands from 1995 through 2004, absent the KWB Lands, in other Kern groundwater storage projects. This conclusion, while based on information received from the KWBA, was independently reviewed and confirmed by the Department. Additionally, in the case of allocating Article 21 water in wet years, KCWA would only receive 25 percent of the total Article 21 supply with a locally-owned bank; whereas in the case of a State-owned water bank, the Department would deliver available water for storage in the bank, before offering it to the SWP contractors. Therefore, there could be more water exported and therefore greater potential impacts on the Delta from a state-owned KFE water bank in comparison to a locally-owned KWB Lands. The terrestrial impacts would be of a similar magnitude for either a locally-owned or State-owned project.

Issue 5: Plaintiffs contend that the "AFEIR ignores the millions of dollars the state spent on developing the bank prior to transfer."

Response: Although the amount of money spent on developing the KWB does not have an impact on the environment, the AFEIR does discuss the activities carried out by the Department with regard to the KFE property prior to transfer. As discussed in AFEIR Subsection 16.2.1, these activities included feasibility studies, environmental studies and negotiations with the KCWA regarding local approval of a state project. The AFEIR also discusses some of the factors affecting the Department's decision not to continue with implementation of a state-owned water bank at page 16-4:

As stated in Appendix E of the DEIR (page 1) the Department encountered many legal, institutional, and political impediments to implementation of a groundwater storage facility on the KFE property. In 1993, uncertainties regarding the proposed groundwater facility ultimately convinced the Department to halt feasibility and design work on the project. These uncertainties included proposed revisions of Delta water quality standards and measures to protect threatened and endangered species, which would affect the SWP's ability to pump water from the Delta for recharge on the KFE property. Expected changes in arsenic standards or drinking water also raised questions regarding the ability of the project to meet water quality standards for pump-in to the California Aqueduct. In addition to environmental and water quality issues, the Department and KCWA could not reach agreement on measures to comply with Water Code Section 11258, which required approval of local agencies for development of State groundwater banks in their area. These difficulties led the Department to question proceeding with the development of a KFE groundwater storage facility. See also the Department's Bulletin 132-94.

The AFEIR also explains on page 16-7 that in exchange for the transfer of the property to KCWA, KCWA and DRWD permanently retired a total of 45,000 AF of agricultural Table A amounts.

Issue 6: Plaintiffs assert that the AFEIR, on page 17-41, is "evasive with regard to the bank's governance" because, the AFEIR describes Westside Mutual Water Company as an entity that "may be composed of members that are private corporations, including Paramount Farming." Plaintiffs further contend that "the website of the law firm representing Paramount Farm is more direct, describing that company as 'a key participant in the Kern Water Bank transaction.'"

Response: Plaintiffs appear to misunderstand the meaning of the sentence they quote. Some comments received on the DEIR expressed concern that a private corporation could receive water from the KWB Lands. The AFEIR clarifies that California law allows private corporations to become members of municipal water companies and that it also allows municipal water companies to become members of a joint powers authority such as the Kern Water Bank Authority. The Department is aware that Paramount Farming is a member of Westside Mutual Water Company and informed Plaintiffs and the general public of that fact in the AFEIR. As discussed in Issue 2 of this Subject, Appendix E, Table 3 identifies the corresponding ownership allocations in the KWB Lands project. The ownership issue raised by Plaintiffs does not equate to an adverse environmental effect, and its existence was adequately disclosed in the AFEIR.

Issue 7: Plaintiffs assert that the statement in the AFEIR that "the Sacramento Superior Court judgment was entered on August 15, 1996, and as a result of the trial court's ruling, the Department proceeded to implement the Monterey Amendment, including transferring the KFE property to KCWA" is false. Plaintiffs also imply that there was something wrong about proceeding to implement the Monterey Agreement pending an appeal of the trial court's ruling.

Response: These comments are not CEQA issues. Nonetheless, the AFEIR explained at page 16-5 that the trial court ruled in favor of the Department (and CCWA) following the hearing on May 17, 1996, and thereafter, the Department implemented the Monterey Amendment based on that ruling. Judgment was not entered until August 15, 1996. The Department's description of events in the AFEIR was, therefore, accurate. Although not a CEQA issue, there was nothing improper about the Department and SWP contractors executing the Monterey Amendment and transferring the KFE property once the court ruled in the Department's favor. The trial court's order did not prevent the parties from moving forward with the Monterey Amendment pending an appeal.

H. Assumptions Limiting Project Impacts and Mitigation

Plaintiffs contend, on page 6 of their letter, that the "AFEIR's assumptions improperly truncate assessment of direct, indirect and cumulative impacts." As discussed below, the assumptions used in the AFEIR are appropriate and supported by facts, and the AFEIR adequately evaluates and describes the impacts of the proposed project. The following discussion separates the impacts related to altered water allocation procedures and transfers (Issue 1), and impacts related to the Delta (Issues 2, 3 and 4).

Altered Water Allocation Procedures and Transfers (Transfers of Table A Amounts and retirement of Table A Amounts)

Issue 1: Plaintiffs assert that the AFEIR on page 4-3 "states that changes in allocation do not produce any new impacts" and that the AFEIR does not reconcile that "statement with the assumption that the project would increase water to both urban and rural users."

Response: As discussed below, in compliance with CEQA, the AFEIR addresses potential environmental impacts related to altered water allocation procedures. The AFEIR concludes that altered water allocation procedures and transfers would not increase water deliveries out of the Delta and would not increase water to agricultural contractors; it also concludes these practices could increase water to urban users.

Water to rural users. As explained in the DEIR at page ES-3, although agricultural contractors would increase their share of deliveries in critically dry years, average annual deliveries to agricultural contractors under 2020 conditions would decrease by about 5 percent. As discussed in the DEIR regarding Agricultural Resources Impact 7.6-1 (on pages 7.6-5 through 7.6-9), there is no strong evidence to support a conclusion that land was taken out of irrigated production as a result of the proposed project during the period from 1996-2003, and the proposed project would have little to no impact on the acreage of irrigated land in the future. As discussed in the DEIR regarding Terrestrial Biological Resources Impact 7.4-1 (on pages 7.4-20 through 7.4-22), the trend of replacing irrigated annual crops with permanent crops is expected to continue in the future with or without the proposed project. While it is possible that additional land could be converted to permanent crops as a result of the proposed project, no clear trend can be attributed to the proposed project that can be discerned from the historical analysis period.

Water to urban users. As explained in the DEIR at page ES-3, deliveries to municipal contractors collectively would increase by about 2 percent by 2020 as a result of the altered water allocation procedures. The AFEIR determined that the Monterey Amendment could support increased growth and associated impacts in some urban areas that receive increased water as a result of the agricultural to urban transfers. The potential impacts associated with increased growth are discussed in Chapter 8 of the DEIR and AFEIR. AFEIR Subsections 8.2.2.2 and 8.2.2.3 and the response to Comment 6-15 explain that the transfers could result in potentially significant impacts that cannot be avoided and that identification and mitigation of such impacts is not within the jurisdiction of the Department but is within the jurisdiction of local decision-making entities. The Department will change the language on page 4-3 to make it consistent with the conclusions in DEIR and AFEIR Chapters 8 to read as follows:

The changes in allocation of water (including altered water allocation procedures, transfers of Table A amounts and retirement of Table Amounts) did not result in any direct significant impacts. Transfers of Table A amounts may result in potentially significant indirect impacts resulting from increased growth at the local level.

Delta impacts

Issue 2: Plaintiffs assert that the AFEIR (page 4-4 and 7.2-17) “disclaims impacts based on the premise that ‘the Monterey Amendment does not increase Delta exports beyond permitted limits.’” They contend that ESA decisions on Delta fisheries, and subsequent new biological opinions, “cast doubt on whether DWR can comply with permitted limits and whether existing limits can adequately mitigate impacts.”

Response: The DEIR, at page ES-3, concluded that overall deliveries to contractors would increase by 1-2 percent under 2020 conditions as a result of the water supply management practices. It also concluded on page ES-5 that this could result in a potentially significant and mitigable impact on fisheries resources. This conclusion is discussed below.

Issue 2(a):Delta Deliveries. Plaintiffs apparently question the AFEIR’s statement that “the Monterey Amendment does not increase Delta exports beyond permitted limits.”

Response: Increases in deliveries from the Delta are not a result of the altered allocation procedures or Table A transfers; they are a result of the water supply management practices. As explained in the AFEIR at page 15-5, neither the altered water allocation procedures nor the transfers resulted in delivery increases:

Table A transfers from agricultural contractors to urban contractors were also analyzed to determine if they caused an added demand to the SWP. There was no change in total requests for Table A deliveries (except a small decrease prior to 2001 as the demand of the urban agencies that received Table A transfers caught up to the new supplies due to urban growth); therefore there are no delivery increases attributable to the Table A transfers or to altered allocation procedures. See FEIR Subsection 14.2.5.2.

AFEIR subsection 14.2.5.2, at page 14-12, also explains:

The Monterey Amendment Article 21 allocation procedures have not influenced total deliveries south of the Delta (i.e. Banks pumping) in comparison to the baseline. As noted previously, the SWP contractors had access to Article 21 water prior to the Monterey Amendment. The new allocation procedures for south of Delta SWP contractors have merely shifted the percentage distribution of Article 21 deliveries between the agricultural and M&I contractors (North Bay Article 21 deliveries are insignificant). This shift has also occurred with most of the Table A transfers, except for the Table A transfer from KCWA to Napa and Solano, which decreases the total Table A amounts south of Banks Pumping Plant. As can be seen in DEIR Table 6-19, this shift yields little change in total Table A and Article 21 deliveries to all SWP contractors (therefore little change in SWP Delta export pumping) under 2003 conditions with the proposed project and under the baseline scenario. DEIR Table 6-23 shows similar results for 2020 conditions. In summary, the DEIR does not show an increase in export pumping from the Delta as a result of the new allocation procedures for Article 21 water.

The impact of the Monterey Amendment on increased deliveries from the Delta is discussed in AFEIR Subsections 15.2.1 and 15.2.2 on water supply management practices. The effect of these increased deliveries on Delta fisheries and mitigation for these effects is discussed in AFEIR Subsection 7.2.2.1.3 on Delta fisheries impact analysis and mitigation. As explained at AFEIR page 15-15:

The only change resulting from the Monterey Amendment that has the potential to cause increased exports and adverse impacts on Delta fisheries is the implementation of the water supply management practices. The DEIR identified an increase in exports up to a cumulative amount of 44,000 AF during the period from 1996 to 2004 compared to the baseline scenario. It also identified a potential in the future for an average annual increase of 50,000 AF in the future which would be partly offset by the decreases in Delta export pumping attributable to retirement of 45,000 AF of Table A. The DEIR concluded that past implementation of the water supply management practices did not result in a significant impact; but there was a small, but potentially significant, impact from the proposed project on Delta fisheries due to future application of the water supply management practices as a result of increased Delta export pumping.

AFEIR page 7.2-11 discusses more fully the potential impact of future pumping on fishery resources:

The DEIR also concluded that there was a small, but potentially significant, impact from the proposed project on fisheries due to future application of the water supply management practices as a result of increased Delta export pumping even though this increased pumping would be in compliance with current and future regulatory requirements. Assuming hydrologic conditions in

the future are similar to those that occurred from 1996 to 2004, the DEIR (pages 6-63 and 7.3-69), concluded that water supply management practices could potentially increase SWP deliveries by a cumulative total of approximately 450,000 AF over a nine year period. This amounts to an average annual increase of about 50,000 AF per year (or 1.6 percent of the average annual SWP deliveries) based on assumed operations under the 2003 regulatory baseline. The estimate of future project-related export pumping was based on historical events that occurred in 6 out of 9 years ranging from 20,000 AF to 132,000 AF. The DEIR points out on pages 6-63 and 6-65 that this estimate may overstate the effects of the water management practices because of a number of factors.

See Issue 3 below for more discussion regarding operating within permitted limits.

Issue 2(b): Relationship of Monterey Amendment to Delta Issues, including the pelagic organism decline. Plaintiffs contend that the new biological opinions on Delta fisheries “cast doubt on whether DWR complies with permitted limits” and that “over-pumping that contributed to the pelagic organism decline and decimated listed species in the Delta occurred during the interim enforcement of the Monterey Amendments.”

Response: Plaintiffs’ statement oversimplifies very complex issues facing the Delta and appears to misunderstand the relationship between problems in the Delta and the Monterey Amendment.

With regard to the relationship between the SWP and the Monterey Amendment, the AFEIR, at page 7.2-3, recognizes that:

This EIR examines changes resulting from the proposed project (the Monterey Amendment and the Settlement Agreement) and its potential environmental impacts. It is not an EIR on all the operations and impacts of the SWP or on all of the problems regarding the Delta or relating to land use and water supply. The Monterey Amendment is an agreement between the Department and the SWP contractors primarily about how exported water that is available to the SWP is allocated and managed. The Department has and continues to export SWP water to the SWP contractors in compliance with all State and federal environmental laws and regulations. The Department recognizes that there are conflicts between the management of water supply and fisheries in the Delta and is actively participating in a number of programs that are focused on resolving those conflicts while benefiting the Delta ecosystem. The conflicts in the Delta between aquatic resources, particularly listed fish species, and water exports, would continue to exist even if there was no proposed project. This presents a situation similar to that confronted by the California Supreme Court in *In re Bay-Delta* regarding the CALFED program, where the Court found that conflicts in the Delta between aquatic resources, particularly listed fish species, and water exports, would continue to exist even if there was no proposed project and thus under CEQA they are part of the baseline conditions rather than program-generated environmental impacts that determine the required range of program alternatives. This EIR does not need to address all of the environmental impacts

that may be associated with operation of the SWP or to address all of the Delta's existing problems that existed before the Monterey Amendment. It only needs to study in detail the adverse impacts generated by the proposed project and mitigation measures and alternatives that address those project-generated impacts. See FEIR Subsection 5.2.1.1.

Subsection 7.2.2.2 of the AFEIR discusses the pelagic organism decline (POD) and explains at pages 7.2-21 and 7.2-22:

This section addresses comments requesting current POD scientific information. It also clarifies that this EIR analyzes potential impacts associated with the proposed project, not the SWP as a whole. Some comments have suggested that the proposed project is responsible for indirect effects associated with POD relating to water quality and habitat; however, the studies cited as support discuss changes in water quality resulting from SWP and CVP operations as a whole. As stated in this Master Response, this EIR does not analyze impacts of the SWP operations; it analyzes impacts related to the Monterey Amendment and the Settlement Agreement; it does not analyze impacts resulting from all SWP operations. Delta outflow changes resulting from the proposed project's water supply management practices project were minor, occurred over short periods of time, occurred during high Delta outflow periods, and, therefore, could not have caused the impacts suggested by these comments. However, this EIR provides some information and background on some of these issues so that the public and decision-makers can have a better understanding of the context in which the Monterey Amendment and the Settlement Agreement were negotiated and how they relate to the environmental issues discussed in the EIR. See FEIR Subsection 4.2.1.3.

The DEIR considered the relationship of the proposed project to POD on pages 7.3-24 to 7.3-27. New information is provided to clarify and amplify information in the DEIR and does not change the conclusions of the DEIR on page 7.3-71 that the proposed project in the future could have an impact on Delta fish species and that these impacts are mitigated. The DEIR recognized that there are multiple stressors currently thought to be responsible for the decline of POD species, including entrainment, food web changes, introduced species, and contamination and more recently, predation that may be responsible for the decline of POD species.

The DEIR recognized the existence of the POD, but the CALFED Bay-Delta program, using the best available science at the time, was based on the assumption that the SWP operations, in compliance with environmental regulatory restrictions and with voluntary pumping curtailments, compensated by EWA, would not adversely affect special status species and could prevent a further decline of the POD species. The DEIR recognized the multiple stressors currently thought to be responsible for the decline of POD species, including entrainment, food web changes, introduced species, contamination, and

predation. It also recognized that water project operations were being examined as a potential environmental stressor as part of the POD investigations. See page 7.3-25 of the DEIR.

Even though SWP and CVP operations in the Delta have become more constrained recently by the court and regulatory agencies, the populations of at-risk fish have not rebounded. While it is clear that multiple factors are causing these declines, there is concern that any increased impact or stress could contribute to their further decline. Although the relative contribution of each environmental stressor is currently unclear, it appears that entrainment at the CVP and SWP pumps, especially during peak salvage events, may be important in some years for some species of fish.

Therefore, additional environmental regulatory restrictions have been placed on SWP exports by both courts and regulatory agencies since publication of the DEIR based on their view that the best available science at this time requires minimizing the effects of pumping on fisheries populations in order to prevent further jeopardy of sensitive fish species and habitat. As a result, it is expected that estimated future exports will decrease and any resulting impacts will be less under the new regulatory restrictions than under the 2003 regulatory scenario described in the DEIR, and therefore no new environmental impact analysis is required. See FEIR Subsection 11.2.4.2 on reduced export pumping.

Issue 2(c): Duty to inform. Plaintiffs assert that “CEQA involves not simply promises to follow the law, but a duty to ‘inform the public and responsible officials of the environmental consequences of their decision before they are made.’”

Response: The AFEIR adequately discusses the laws affecting the operation of the SWP in the Delta and the Department’s responsibility to follow the law. The AFEIR adequately informs the public and responsible officials of the environmental consequences of the decisions relating to the proposed project. In fact, there likely have been few, if any, projects that have received the extensive scrutiny under CEQA that this project has received.

Issue 3: Plaintiffs contend that reliance on “‘forthcoming’ biological opinions and regulations . . . amounts to impermissibly deferred mitigation” and do not “come close to specifying performance standards to address Delta effects.”

Response: The proposed project at issue is the adoption of the Monterey Amendments and implementation of the Settlement Agreement. The proposed project does not define the amount of water that may be exported from the Delta; the amount of water available for export is controlled by other processes and factors, including hydrological conditions and regulations and other legal obligations and limitations adopted to protect listed species and preserve water quality, among other things. The proposed project largely concerns allocation of water available for export among the water contractors, after all other legal obligations are satisfied. Thus, for purposes of this proposed project, how much water will be available for export and issues related to

mitigation of the impacts of exporting such water is largely outside the scope of the AFEIR.

Despite the above, Subsection 7.2.2.1 of the AFEIR identifies a number of federal and state actions, including biological opinions, affecting SWP operations that were in process. In the DEIR and in early drafts of the AFEIR reviewed by Plaintiffs, these actions are identified as in the process of being developed and "forthcoming." The language in the AFEIR on page 7.2-16 cited in Plaintiffs' letter referred to comments that objected to reliance on forthcoming actions. The AFEIR correctly explains that reliance on the existing regulatory process (which includes "forthcoming" actions) is not improper deferral of mitigation. In addition, AFEIR Subsection 7.2.2.1 explains that all of these actions have become final and are, therefore, no longer forthcoming.

Subsection 7.2.2.1.3 of the AFEIR identifies a number of facts and conclusions which support the Department's determination that reliance on the existing regulatory system was not improper (pages 7.2-16 through 7.2-18). On page 7.2-16, the AFEIR summarizes the determination:

Some comments have stated they think that reliance on the continuing and ongoing regulatory process, including existing and forthcoming Biological Opinions and other regulatory requirements, is improper deferral of mitigation measures. Other comments have suggested that the Department should propose additional mitigation measures on its own, separate from the current Delta regulatory forums.

The Department has determined that relying on the requirements of the existing regulatory process is not improper deferral of mitigation. Mitigation measures discussed are not indefinite and vague possibilities; they are being imposed on the SWP right now in ways that include mitigation of the Monterey Amendment Delta impacts.

This mitigation approach is consistent with Section 15126.4 (a)(1)(B) of the CEQA Guidelines, which provides: "Where several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. Formulation of mitigation measures should not be deferred until some future time. However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way."

Moreover, and more importantly for purposes of this EIR, the regulatory processes referred to in the AFEIR address in large part Delta issues that are not related to or do not result from the proposed project. CEQA does not require that the Department propose or evaluate mitigation measures related to non-project impacts.

Issue 4: Plaintiffs assert that the "AFEIR concedes that new or future regulatory standards are likely to significantly reduce the potential for Delta exports compared to earlier periods, but it [the AFEIR] argues that this means the EIR has overstated project

impacts.” Plaintiffs assert that the argument that the AFEIR has overstated project impacts does not apply to “induced reliance on paper water for development and hardening of demand for scarce Delta exports.”

Response: The discussion regarding overstatement of impacts must be read in the proper context, namely, that as a result of regulatory and hydrological conditions, estimated future exports from the Delta, with or without the proposed project, are expected to decrease and any resulting Delta impacts will be less than under the 2003 regulatory scenario described in the DEIR.

Moreover, the AFEIR does address the potential impacts raised by Plaintiffs. The potential for increased growth is discussed in Chapter 8 of the DEIR and AFEIR, and the reliability of water supplies and growth, e.g., “paper water,” is discussed in Chapter 9 of the DEIR and AFEIR. These issues are also discussed more fully in Subjects I. and J. on Growth and Paper Water. “Demand hardening” is discussed in Subsection 13.2.4.1 of the AFEIR, and the question of whether the Monterey Amendment increased demand for water is discussed in Subsection 15.2.3.5 of the AFEIR. The AFEIR explains, on page 15-11:

In conclusion, as discussed in FEIR Subsection 15.2.1, because there was no change in total requests for Table A deliveries (except a small decrease prior to 2001 as the demand of the urban agencies caught up to the new supplies due to urban growth), there are no delivery increases attributable to the Table A transfers or to altered allocation procedures. However, under the proposed project there is a potential for increased demands by some urban agencies as a result of Table A transfers and the water supply management practice to store water outside of SWP contractor service areas. The potential changes in demand for SWP water and the growth-inducing potential resulting from the water supply management practices and the Table A transfers are reflected and analyzed in FEIR Subsection 8.2.4 where the added growth supported by out-of-service-area storage is estimated and Subsection 8.2 of the DEIR as updated in FEIR Subsection 8.4 where the growth supported by the Table A transfers is estimated. That added growth increment is the sole factor of the Monterey Amendment that increased SWP contractor demand. Study Number 3, Historical Operations Analysis, DEIR Appendix K, identifies the estimated increase in deliveries from the SWP due to the water supply management practices that have historically occurred and which could occur in the future to meet part of the increased demands within the SWP service area.

I. Growth Inducing Impacts

Plaintiffs assert, on pages 6 and 7 of their letter, that considering the AFEIR’s recognition, on page 8-41, that the proposed project could support a maximum population of up to 495,451 people, the AFEIR’s treatment of the issue of growth is “vague and evasive.” The Department disagrees. The AFEIR clearly identifies the

potential for growth and its impacts related to the proposed project. The issues raised by the Plaintiffs in their letter are discussed in more detail below.

Issue 1: Plaintiffs, citing pages 2-36 and 8-38 of the AFEIR, contend that the growth “analysis is predicated on a comparison between high and low years” that have occurred only since the SWP has been operated under the proposed project and that the analysis does not take into account drought periods and very dry water years that have occurred outside of this period and how that might effect the amount of water available for additional growth. Plaintiffs assert that the AFEIR recognizes on page 2-16 the extremes of 1976 and 1982 and state that “those natural extremes must be used (with adjustments for contemporary populations) to measure the potential of the project to ease severe water shortages and foster more growth.”

Response: The analysis of growth inducement based on average annual water supplies is found in Chapters 8 of the DEIR and AFEIR (see especially subsection 8.2 of the DEIR). The AFEIR updates the analysis to include dry year supplies in Subsection 8.2.4. The analyses take into account extreme water years and how that might affect the amount of water available for additional growth. Plaintiffs’ contention, that the AFEIR relies on “a comparison between high and low [water] years,” is based on DEIR and AFEIR descriptions of development of certain water use data for the Department’s Bulletin 160-05, not, as Plaintiffs imply, the analysis performed by the Department for the AFEIR. The DEIR and AFEIR used the gallons per capita per day (gpcpd) use rate that was calculated using the estimated water use and population project for 2030 under the three water demand scenarios presented in Bulletin 160-5 to analyze the potential impacts of growth based on average annual supplies and dry year supplies over a 73 year period.

Specifically, the AFEIR analysis of growth impacts for average annual year water supply is based on a full range of year types, using the 73-year CALSIM II hydrologic record that incorporates the wet and dry extremes of record, including the years of 1976 and 1982 cited by Plaintiffs. The analysis of growth impacts for dry year supplies for those agencies that banked water outside of their service areas under the Monterey Amendment is based on the actual water banked by those agencies and the assumption that 20 percent of it might be withdrawn each year during the extended six-year drought periods.

With respect to the water use data in Bulletin 160-05, which are used to develop the estimated ranges of population that could be supported by each acre-foot of available water supply, the data reflect current conservation and use trends in California as determined by Department research along with ranges representing more resource intensive and less resource intensive water use. Using the extreme water years of 1976 and 1982 as the basis for the analysis would not be representative of current trends and conservation practices. The data in Bulletin 160-05 are believed to be the most reliable per capita water use projections currently available. If per capita water use decreases below the “current trends” values reported in the AFEIR, then the supply values could support added population growth, as estimated in the “less resource intensive” columns and rows in Tables 8-3, 8-3A, 8-3B, and 8-3C of Section 8 of the AFEIR.

The years presented in Table 8-2 of the AFEIR (1998, 2000, and 2001) were the ones identified in Bulletin 160-05 to represent the range of actual water supplies and use based on a range of hydrologic conditions. The AFEIR analysis did not use the gpcpd information generated for those years in calculating the potential population that could be supported by the proposed project. The AFEIR used the gpcpd use rate that was calculated using the estimated water use and population projected for 2030 under each of the three water demand scenarios presented in Bulletin 160-05 (see AFEIR Subsection 8.2.1.1 for a discussion of methods used in the DEIR). The Department determined that the estimated water use and population projections for the 2030 were adequate for use in the DEIR even though the DEIR used a future year of 2020. Actual population in 2020 would be expected to be something less and therefore impacts would also be likely to be less. See DEIR, page 8-8. The 2030 gpcpd rate was then applied to the increased average annual SWP deliveries and supplemental drought supplies attributed to the water supply management practices (see FEIR Subsection 8.2.4) by contractor to calculate the population that could be supported by the proposed project under each of the three water demand scenarios – which is why there is a range in population presented.

As discussed in AFEIR Subsection 8.2.4 at page 8-13:

M&I contractors and local land use planning agencies assessing the ability to support new development look at the ability to meet water supply needs both under average conditions and under dry year conditions. As a result of the proposed project, the larger increase in M&I contractor water supplies occurs under average conditions, as shown in DEIR Chapter 6. Therefore, the more conservative (i.e., larger) estimate of the population that could potentially be supported would result from increases in average annual water supply. For this reason, the estimate of increased population growth presented in DEIR Chapter 8 was based on the net estimated increase in average annual deliveries to M&I contractors. That analysis showed the maximum potential local population that could be supported by the proposed project based on the assumption that average annual supplies were a constraint to growth, but dry year supplies were not.

Plaintiffs appear to assert that the growth inducement analysis is confined “to the years since 1995.” As noted above, the growth inducement analysis for average year water supply increases is based on water delivery data for a full range of year types, using the 73-year CALSIM II hydrologic record that incorporates the wet and dry extremes of record. The portion of the analysis that relies on the years since 1995 is the dry year analysis portion that evaluates the impacts on dry year supply of the water actually banked under the provisions of the proposed project from 1996-2003 assuming that 20 percent of it might be withdrawn each year during extended drought periods. There were no critically dry years from 1996 to 2003; however, the analysis is does not rely on these years, but is based on critically dry year supply as modeled in the CALSIM II analysis over the 73-year period.

With regard to the use of the critically dry year analysis to estimate future impacts on growth inducement, the AFEIR explains at page 8-20: "Any projection by the Department of which M&I contractors might implement such banking programs and use that supply to support population is speculative and is not evaluated in this response. If new programs were to be developed, subsequent CEQA analysis would occur." Future use of storage outside of contractors' service areas is likely to be more limited due to increased constraints on Delta exports. In addition, as described in AFEIR Subsection 8.2.1.2, and in more detail on page 8-6 of the DEIR, that analysis of average annual supplies provides a conservatively high estimate of the potential population supported by the proposed project and it is not anticipated that all the potential increases in water would go to support population. The population estimates are not intended to be an exact number used for planning purposes but are intended to present an order of magnitude. As explained in the AFEIR at page 6.2-5:

EIRs are expected to evaluate impacts that are reasonably foreseeable....If the DEIR overestimates deliveries, the consequence is that it also overestimates environmental impacts. In an environmental disclosure document such as an EIR, it is better to overstate than to understate the potential impact so that the public and decision makers can see the full environmental extent of their decisions.

Some comments appear to express a concern that local governments and other decision makers might rely on the EIR delivery estimates in determining the reliability of SWP water. Overstating the amount of water available could be a problem in documents that are relied upon for determining water reliability. The values in this EIR analysis should not be used to estimate current available SWP water or the reliability of future deliveries. There are other tools that are intended to help determine the reliability of water such as Urban Water Management Plans and the Reliability Report released by the Department. See FEIR Chapter 9 on water supply reliability.

Issue 2: Plaintiffs contend that on pages 8-8 to 8-11, the AFEIR "impermissibly defers growth assessment to local decision-makers."

Response: The AFEIR analysis does not defer the analysis of growth inducing impacts but instead evaluates them at the appropriate level given the Department's authority, the information available to the Department, and the nature of the proposed project under review.

AFEIR Subsection 8.2.2.2 discusses the relationship between the Monterey Amendment and local government land use decision-making. The AFEIR explains:

The analysis in the DEIR, on pages 8-14 through 8-15, concluded that some of the additional water supply made available by the Monterey Amendment could support additional growth and that increases in population within the contractor's service area can result in new development that causes adverse impacts to the

environment that are potentially significant and cannot be avoided. It then identified in a general way, on pages 8-12 and 8-14, certain adverse environmental impacts that could occur from growth-induced impacts and certain mitigation measures that local decision-makers could make that might avoid or minimize project-induced growth including locating the growth in areas where sensitive resources are absent, minimizing the losses of resources, or replacing any loss. The DEIR concluded on page 8-15, "...neither the Department nor local water supply agencies make local decisions regarding growth and where it will occur. Cities and counties in the contractor service areas affected by the increased population are responsible for considering the environmental effects of their growth and land use planning decisions. When new developments are proposed, the cities and counties prepare environmental documents pursuant to CEQA. Where appropriate, they must consider mitigation measures, alternatives and overriding considerations."

AFEIR Subsection 8.2.2.2 goes on to describe the considerations that prevent the Department from analyzing site-specific impacts and imposing limitations on the growth that may result from the availability of water, which are summarized at AFEIR page 8-11 and 8-12:

In summary, this EIR complies with CEQA by estimating the potential population that could be supported if the proposed project were implemented and by identifying potential impacts and mitigation measures that could result from local development decisions to accommodate that population in general terms. The level of detail contained in the DEIR for growth-inducing impacts and reliability analyses is consistent with the general level of review required for the Monterey Amendment. Even though the Department could identify some of the local decisions that may rely on water made available from the proposed project, these decisions require extensive information about local facilities, local water resources and local water use. The potential environmental impact of growth is subject to more detailed environmental review at the project level. Project-level EIRs prepared by local decision-makers are subject to an independent determination and disclosure of significant environmental impacts.

Under existing law, the Department does not have the authority to control land use decisions involving private activities or to oversee land use regulation by cities and counties. Even if the Department had the authority to make such decisions at this level of detail, it is not timely or practicable for the Department to analyze each individual decision made by local government that might rely upon increases in SWP water from the proposed project and then to monitor or second-guess each individual decision made by local government or to establish general rules that would govern these decisions. Nor would it meet most, if any, of the objectives of the Monterey Amendment.

Issue 3: Plaintiffs contend that the Department's reliance on "cases where the project made 'no commitment' to specific development (AFEIR 8-9) is misplaced" and that "DWR's project decision must address whether to *finally approve* changes to articles 18,

21, and 53 of the SWP contracts, each of which could induce growth.” (Emphasis in original.)

Response: The Department’s decision to continue to operate under the Monterey Amendment would only be a commitment to operate under the Monterey Amendment; it would not be a commitment to a specific “development” project approved by local decision-makers. Consistent with CEQA, the AFEIR provides a general analysis of the impacts of Articles 18, 21 and 53 on growth. It does not attempt to analyze the more specific impacts of actions of the SWP contractors or of local government agencies that may depend upon deliveries of SWP water affected by changes in these articles. This approach is consistent with CEQA and the cases relied upon in the AFEIR. Plaintiffs’ statement refers to a discussion on page 8-9 which provides:

[T]his case is much more similar to the CALFED EIR in *In re Bay-Delta Programmatic EIR Proceedings (2008)* 43 Cal. 4th 1143 or *Rio Vista Farm Bureau Center v. County of Solano (1992)* 5 Cal.App.4th 351 which dealt with the overall impact of a decision and made no commitment to a specific development decision. The approach used in the DEIR to analyze growth-inducing impacts of the proposed project is consistent with court decisions such as *Napa Citizens for Honest Government* (pages 369 through 372).

Napa Citizens for Honest Government v. Napa County Bd. of Supervisors (2001) 91 Cal.App.4th 342, 369, found:

It follows that an agency cannot avoid the EIR process simply because a project does not itself call for the construction of housing or other facilities that will be needed to support the growth contemplated by the project. It does not follow, however, that an EIR is required to make a detailed analysis of the impacts of a project on housing and growth. Nothing in the Guidelines, or in the cases, requires more than a general analysis of projected growth. The detail required in any particular case necessarily depends on a multitude of factors, including, but not limited to, the nature of the project, the directness or indirectness of the contemplated impact and the ability to forecast the actual effects the project will have on the physical environment. In addition, it is relevant, although by no means determinative, that future effects will themselves require analysis under CEQA.

The Department will clarify the language on page 8-9 to read as follows:

[T]his case is much more similar to the CALFED EIR in *In re Bay-Delta Programmatic EIR Proceedings (2008)* 43 Cal. 4th 1143 or *Rio Vista Farm Bureau Center v. County of Solano (1992)* 5 Cal.App.4th 351 which dealt with the overall impact of a general decision made by the lead agency which and made no commitment to a specific development project approved by local decision-makers decision.

Issue 4: Plaintiffs contend that the Department's project decision must address whether to approve changes to Articles 18, 21 and 53 of the SWP contracts because each of these changes could induce growth. Plaintiffs further contend that "Article 53, which provides additional opportunities for agriculture-to-urban transfers, must be understood in light of Article 18(a)'s removal of the urban preference during temporary shortages." Plaintiffs also contend that "even though DWR could have theoretically approved transfers under Article 41 before the proposed project, only one such transfer was ever approved ... because it was impractical to base permanent development on agricultural water subject to Article 18(a) cutbacks."

Response: The proposed project includes amendments to Articles 18, 21 and 53. The DEIR described in Chapter 6 that amendments to Articles 18, 21 and 53 would result in potential changes in SWP or SWP Contractor operations (see Table 6-3) and therefore, they were evaluated in the AFEIR analysis, including the growth analysis. Article 18 addresses water allocation, which includes deliveries of both Table A and Article 21 water. The growth analysis in the AFEIR identified potential population supported by additional deliveries of both Table A and Article 21 supplies under average annual and dry year conditions.

Plaintiffs claim that only one permanent transfer of Table A amounts had occurred prior to the Monterey Amendment because it was impractical to base permanent development on agricultural water subject to Article 18(a) cutbacks. There is no factual basis for Plaintiffs' claim. There may be many reasons permanent transfers of Table A amounts had not occurred prior to the Monterey Amendment. The following discussion of this issue on AFEIR pages 13-17 and 13-18 will be clarified as follows:

Comments claim that the pre-Monterey Article 18(a) served as a constraint on transfers that might have had growth inducing impacts because transfers of Table A water under the pre-Monterey long-term water supply contract would be provisions. The comment states that elimination of the agricultural shortage provision of the Table A transfers will increase urban use and reliance on SWP water and requests that this impact be disclosed. As noted in DEIR Subsection 2.5.2, under Article 15(a) of the pre-Monterey long-term water supply contracts, the Department has approved the transfer of SWP water from one SWP contractor to another SWP contractor. Additionally, Article 41 provides the Department with the authority to approve a proposed assignment or transfer of any part of the contracts. Prior to the Monterey Amendment, the Department also implemented various water management practices through SWP contract amendments or separate agreements on a case-by-case basis. There may be many reasons why more permanent transfers of Table A amounts had not occurred prior to the Monterey Amendment, including the fact that prior to the drought years of the late 1990s, most contractors were receiving most of the water they requested. More transfers might have taken place as water demand increased in M&I contractors' service areas and shortages became more frequent. Even though pre-Monterey transfers would be subject to Article 18(a) cutbacks, they could still be a valuable contribution to local water supply management.

Regardless of the reasons why permanent transfers of Table A amounts were not common prior to the Monterey Amendment, Article 53 of the Monterey Amendment facilitated the permanent transfer of up to 130,000 AF from agricultural to M&I contractors. The AFEIR analysis included the Article 53 Table A transfers, both those that had occurred between 1996 and 2003 and those that were expected to occur between 2003 and 2020. Therefore, the growth analysis considered the Article 53 transfers as part of the Table A deliveries.

Issue 5: Plaintiffs assert that the AFEIR fails to assess the impacts of known Monterey Amendment-based transfers in areas north of Los Angeles even though EIRs, UWMPs and other documents are available (AFEIR 8-26). Plaintiffs also assert that the Department's "claim to be outside the realm of local growth-related planning" is deceptive and that "[w]hen making decisions on projects and plans, and reviewing water supply assessments, local agencies can be expected to look to DWR's statewide guidance on SWP water supply reliability."

Response: AFEIR Subsection 8.2.2.1 describes the analysis of growth inducing impacts of the proposed project. As noted above under Growth Inducing Impacts Issue 4, the AFEIR evaluated the growth inducing impacts of the proposed project, which included up to 130,000 AF in permanent Table A transfers. Thus, Monterey Amendment-based transfers were built into the proposed project that was modeled and evaluated in the AFEIR.

With respect to the relationship between the Monterey Amendment and local decision making, see Growth Inducing Impacts Issue 2 above. The Department agrees that there are many documents available related to local planning decision-making. Relevant to the proposed project, the DEIR included Table 8-1 and a discussion on page 8-2 which addressed the EIRs prepared for Table A transfers and which identified the conclusions reached in those EIRs regarding growth impacts, as well as providing a summary of those impacts. As explained in the second paragraph on DEIR page 8-2, although the information in these earlier documents may corroborate conclusions of the DEIR, the DEIR provided an independent review of the transfers and the related provisions of the proposed project. The Department does not agree that analysis of the proposed project's potential environmental impacts require further review of these or the voluminous other documents that may be available but involve local decisions that are not related to the proposed project. As explained in the AFEIR at page 8-9:

First, the growth associated with the project has and will occur over a period of time and the specific location of growth is unknown and all individual projects cannot be identified with enough specificity to be analyzed. Even though the Department could identify some of the local decisions that may rely on water made available from the proposed project, it would be difficult, if not impossible, for the Department to identify all the decisions and then to monitor or second guess each individual decision made by local government or to establish general rules that would govern these decisions.

The approach in the AFEIR does not mean, however, that the Department claims to be outside the realm of local growth-related planning, as Plaintiffs assert. As explained in the AFEIR at page 8-12:

The Department rejects the idea that it should use its management of the SWP to manage or block future economic growth including housing that would serve the State's growing population. These decisions are within the authority and control of and properly deferred to local decision makers where specific projects can be more fully described and are ready for detailed analysis. This approach is consistent with the traditional legislative policy that fundamental decisions regarding land use and growth are made through the general planning process at regional and local levels. The Department's role in water reliability planning includes the issuance of the SWP Delivery Reliability Report every two years which informs local decision makers of water supply limitations of SWP water and is discussed in AFEIR Subsection 9.2.6.

Although the Department does not have statutory authorization to establish mandatory requirements regarding water reliability and growth, it supports local and regional water planning and conservation efforts through statewide planning and through grants and local assistance programs. Demand reduction and water conservation strategies are important tools in water management planning and the Department is involved in a number of legislative and administrative actions designed to provide a regional or statewide approach to these strategies. See DEIR pages 11-5 through 11-7. The Department is taking a leadership role and is actively involved in many of these efforts. See FEIR Subsection 5.2.3.2 for a discussion of the relationship of the proposed project to other water policy actions dealing with water supply reliability and growth, water conservation, and Delta protection. As discussed above, such measures are not alternatives to the Monterey Amendment and implementation of such measures would not be affected by the Monterey Amendment. See FEIR Subsection 11.2.4.

The issue of water supply reliability is further discussed below in the Subject Discussion on Paper Water.

J. Paper Water

Issue 1: Plaintiffs assert, on pages 7-8 of their letter, that the AFEIR fails to “disclose and analyze project-related paper water impacts” and that it “belatedly recognizes the ‘common sense connection between water supply reliability and growth’ (AFEIR, 9-2) and concedes that new Table A and Article 21 water, combined with storage, may facilitate ‘additional local development’” (AFEIR, 9-3).

Response: The connection between water reliability and potential growth was described and analyzed in Chapter 9 of the DEIR. The analysis in Chapter 9 was developed to respond to Plaintiffs' argument in *PCL v. DWR* that planning agencies were overestimating SWP water availability by basing decision on contractual Table A

amounts. As noted in Plaintiffs comment and in the response above to Subject I. on Growth Inducing Impacts, Issues 3 and 4, the DEIR's growth analysis took into consideration additional Table A and Article 21 supplies as a result of altered allocation procedures and Table A transfers from agricultural contractors to M&I contractors. In addition, the AFEIR included an analysis of growth based on dry year storage attributed to water supply management practices. Therefore, the growth analysis in the AFEIR identified potential population support by additional deliveries of both Table A and Article 21 supplies under average annual and dry year conditions and acknowledged that the additional supplies could support growth.

However, as discussed in the AFEIR and discussed is Issue 2 of Subject I. on Growth Inducing Impacts, local development decisions are within the authority and control of local decision makers where specific projects are involved. As the AFEIR explains at page 8-12, "[t]he Department's role in water reliability planning includes the issuance of the SWP Delivery Reliability Report every two years which informs local decision makers of water supply limitations of SWP water. . . ." Moreover, as discussed in detail below, the Department evaluated the potential that misplaced reliance on SWP delivery capabilities could result in growth based on "paper water," and while the Department found that "paper water" impacts were possible under certain circumstances, that analysis demonstrated that such impacts had not been and would not be created by the proposed project because there was little to no evidence that local decision-makers improperly relied on communications from the Department. See DEIR subsection 9.4.4 and AFEIR Subsection 9.2.6.

Issue 2: Plaintiffs contend that the Department "denies the relevance of its mandatory article 18 duties (AFEIR, 9-2)."

Response: It appears that this statement relates to the explanation in the AFEIR that invocation of Article 18(b) does not have relevance today with regard to the reliability of water supplies. Plaintiffs argued in their comments on the DEIR that if the Department invoked Article 18(b), it would result in a lower firm yield of the SWP (from 4.185 MAF to 1.9 MAF) and that therefore local entities would be more aware of the limitations of the SWP with regard to water supply reliability. The paragraph referred to by Plaintiffs on AFEIR page 9-2 is a summary of a larger discussion in AFEIR Subsection 9.2.3 regarding current delivery probability in comparison to past firm yield analysis. As explained on AFEIR page 9-7:

In responding to the comments applicable to Article 18, the Department here clarifies that Table A amounts are *not* used in the annual calculation of total available SWP water supply, but instead are used in the allocation of the available SWP water supply among the contractors. Some of the comments on the Article 18(b) invocation alternatives incorrectly assume that the Department makes use of the planned SWP firm yield in making decisions of available SWP water supply, or that local planning agencies responsible for growth decisions incorrectly use the planned SWP firm yield in making water planning decisions.

As noted in DEIR Section 2.5.1, the total of maximum Table A amounts was originally important to the SWP because this number was intended to be the firm yield of the SWP. As discussed in FEIR subsection 13.2.2.3, because of the recognition that some anticipated facilities have not been built and that the reliability of SWP water supplies fluctuates for many reasons, including physical and regulatory causes, the Department now considers the probability of an amount of water being delivered annually rather than firm yield when discussing reliability of SWP water supplies. As a result of this water delivery probability procedure, Table A amounts now serve primarily as a way of allocating supply shortages and surplus among the contractors and as a way of allocating costs of the SWP. Reducing the Table A amounts through invocation of Article 18(b) is not relevant in calculating total available SWP water supply, given current day operations and planning based on water delivery probability curves, and given the fact that all contractor shortages are allocated on a pro-rata basis under the provisions of Article 18(a) of the Monterey Amendment. See FEIR subsection 13.2.2.3.

The Department is not “deny[ing] the relevance of its mandatory article 18 duties” (to the extent it has any), but rather, as explained in the AFEIR Subsection 9.2.3, it recognizes that potential impacts related to reliability issues will not be created or prevented by the invocation or elimination of Article 18.

Issue 3: Plaintiffs appear to assert that the biennial reliability reports the Department prepares pursuant to the Settlement Agreement have replaced Article 18(b).

Response: Neither the Department nor the AFEIR describe the reliability reports as a replacement for Article 18(b). AFEIR Subsection 13.2.1 and 13.2.2 explain why Article 18(b) was no longer needed when Article 18(a) was amended to require all shortages to be shared equally by agricultural and M&I contractors. As discussed above in Issue 2 of this Subject, Plaintiffs appear to believe that if Article 18(b) were implemented, it would result in a firm yield number that would caution local government that SWP water supplies were less reliable than if the firm yield number were larger. The Department does not believe that one number is relevant to water supply planning today. As explained in the AFEIR at page 9-23:

Like most other surface water supplies, SWP supplies fluctuate, so in some years more water may be available and in other years less water may be available. The Department considers processes such as the Reliability Report (which addresses the impact of climate change and Delta pumping restrictions) and other means of urban water management planning to be a more effective means of making local government aware of the variability and limitations of the SWP water supply.

Issue 4: Plaintiffs assert that the “AFEIR refuses requests to incorporate in the EIR” the reliability reports. Plaintiffs contend that the reliability reports are a subset of the project under review and not a separate process (AFEIR 9-23), and that the “public must have an opportunity to test in this project decision whether the reliability reports’ water delivery

curves – which still vastly exceed historic deliveries – create a new ‘cyber water’ problem of inflated delivery expectations,” especially given the recognition that SWP deliveries are likely to be reduced in the future (AFEIR , 6.1-11) and that “water exports must be subordinated to environmental considerations such as adaptation to climate change and compliance with endangered species laws (AFEIR, 11-11).”

Response: The AFEIR did, in fact, evaluate whether the proposed project will result in a potentially significant impact on the environment due to local planners’ misunderstanding of the difference between contractual allotments (e.g., Table A amounts) and water that is likely to be delivered (which may be less than the contractors’ allotment.) The DEIR and AFEIR analyzed the issue and considered a number of factors, including the Department’s publication of the reliability reports and other current measures relating to water reliability and found that the reliability reports actually improve effective communication with local planning entities regarding available water supplies and, thus, decrease the risk of the “paper water” problem Plaintiffs raise. See Subsections 9.2.4 and 9.2.6, especially Subsections 9.2.4.3 and 9.2.4.4, and 9.2.6.4. See also the reports cited by Plaintiffs and discussed in Issue 7 below in this Subject. In short, the reliability reports provide better information to local decision makers than would the “firm yield” figure that would be established by invoking Article 18(b).

The AFEIR discussed the reliability reports in Subsection 9.2.6 stating:

As explained in DEIR Chapter 9 Reliability of Water Supplies and Growth (page 9-2), as part of the Settlement Agreement, the Department agreed to publish The State Water Project Delivery Reliability Report every two years and distribute it to all SWP contractors and all city, county, and regional planning departments within the SWP service area. As expressed in the Settlement Agreement, the purpose of the Reliability Report is to provide current information to SWP contractors and to planning agencies regarding the overall delivery capability of the existing SWP facilities under a range of hydrologic conditions and supply availability to each contractor in accordance with other provisions of the contractor’s contracts.

With respect to the information provided in the Reliability Report, the DEIR on page 9-9 noted that the Reliability Report discussed the ability of the SWP to deliver water. The *2005 State Water Project Delivery Reliability Report* defines water reliability as “...how much one can count on a certain amount of water being delivered to a specific place at a specific time”. Factors that contribute to water reliability include the availability of the water from the source, ability to convey water from the source to the desired point of delivery, and the magnitude of demand for the water. Public planning agencies, water providers and members of the public have access to the information contained in the Reliability Report.

Plaintiffs may disagree with the approach used by the Department for the reliability reports, but the Department has been consistently responsive to public input. The

Department accepts public comment on drafts of the reliability reports, including comments by Plaintiffs, and publishes response to those comments. The Department has issued three reliability reports since the Settlement Agreement and each shows changes from the other based on comments and changing conditions, including climate change and more stringent environmental laws. As explained in the AFEIR at page 9-23:

Some comments suggest that an opportunity for public review and the response to comments on the Reliability Report should be required by legislation or some other means. The publication of the Reliability Report, including public input, is a separate process from the DEIR process for the proposed project. Although not required by the Settlement Agreement or by any other legal mandate, all of the draft reports have been made available for public comment. The Department has reviewed the comments received on the draft reports, responded to all comments, and made modifications it considers appropriate in the final Reliability Report....

Several comments questioned the adequacy of the Reliability Report. As discussed in FEIR Subsection 9.2.6.2, members of the public have an opportunity to communicate with the Department any concerns they may have about the adequacy of the Reliability Report and the Department has responded to each comment received. In dealing with a report like the Reliability Report, it is not unusual that there would be differences of opinion on what should be in the Reliability Report and on the analysis and conclusions. The Department has considered the comments received, made changes as it deems appropriate and provided factual support for its decision not to make other changes.

The reliability reports also explain why the delivery curves discussed in the reliability reports are greater than historic deliveries. Factors affecting increased deliveries include increased request for full Table A and other water to meet increasing demands in contractor service areas and a series of unusually wet years during the period of 1996 to 2004.

Issue 5: Plaintiffs assert that the AFEIR “impermissibly defers to local assessment whether the Monterey Amendments’ changes in articles 18(a), 18(b), 21 and 53 have facilitated new development and made demand for Delta exports more rigid, in effect creating a new ‘paper water’ problem.”

Response: This issue has been discussed in the responses to Issues 2 and 5 in Subject I. on Growth Inducing Impacts and Issue 1 in this Subject. As discussed, the AFEIR analyzed the effect of the changes in Articles 18(a), 18(b), 21 and 53 on growth and the demand for Delta exports on a general basis appropriate to the level of the Monterey Amendments. The AFEIR does not analyze these effects for each specific local decision made by water agencies and land use planning agencies because, as explained on page 8-12, these decisions are within the authority and control of local decision makers where specific projects can be more fully described and are ready for detailed analysis. Nonetheless, as previously discussed, the analysis in the AFEIR

supports the conclusion that local decision makers are receiving more effective information regarding actual water availability.

Issue 6. Plaintiffs assert that the Monterey Amendments have created a “new ‘paper water’ problem.” Plaintiffs state that the AFEIR “disingenuously implies, without evidence, that factors such as SB610 and SB221 have now removed the threat of paper water.”

Response: The issue of water supply reliability is discussed in Chapter 9 in the DEIR and in Chapter 9 in the AFEIR. As noted above, the AFEIR does not conclude that a paper water problem does not or cannot exist; it concludes that the Monterey Amendment did not and will not create a paper water problem. The DEIR summarizes the issue of paper water at page 9-1:

The plaintiffs in *PCL v. DWR* argued that urban planning agencies might overestimate the amount of water available to support urban growth by basing decisions on the contractual Table A amount of an SWP contractor and not on a more realistic expectation of annual SWP water deliveries. The Court of Appeal noted that “[T]here is certainly the possibility that local decision-makers are seduced by contractual entitlements and approve projects dependent on water worth little more than a wish and a prayer.” The possibility of decision-makers approving urban developments that would not have been approved if they had a more realistic idea of water availability from the SWP was termed a ‘paper water’ problem because reliance is arguably placed on water that exists only on paper in the SWP long-term water supply contracts. As stated in the DEIR on page 9-11, for the Monterey Plus EIR, the “paper water” problem is really a question of whether local planners recognize the limitations on the reliability of SWP supplies and more specifically whether the Monterey Amendment contributed to misunderstandings of water reliability.

Subsection 9.2.4 of the AFEIR summarizes the issues relating to whether the Monterey Amendment contributed to misunderstandings of water reliability. On page 9-10, the AFEIR explains:

The DEIR did not conclude that growth based on “paper water” never existed, but, as stated on page 9-11, it did conclude that the review showed “little evidence that a ‘paper water’ problem was created by the contractual SWP Table A amounts or that it affected urban growth decisions.”

The AFEIR discussed current perceptions on page 9-11:

Comment 30-58 states that a “consistent body of CEQA case law, from *Kings County* through *Vineyard*, underscores the depth of the problem of decision-makers ignoring the reliability of water supplies.” The Department is familiar with this body of law. Over the last two decades, the concern of courts has been parallel to legislative and administrative concerns. The Kings County opinion was issued in 1990. The Monterey Amendment was executed in 1995. *PCL v. DWR*

was decided in 2000. SB 610 and 221 were passed in 2002. The Urban Water Management Planning Act was enacted in 1983 and amended several times including major changes in 2004. As part of the Monterey Settlement Agreement in 2003, the SWP contracts were amended to delete the term "entitlement" and the Department agreed to issue a biennial SWP Delivery Reliability Report. The California Supreme Court issued two cases recently that deal with water supply planning - the *Vineyard* decision in 2007 and the *In re Bay-Delta Programmatic EIR Coordinated Proceedings* decision in May of 2008. Other relevant state legislative and administrative actions relating to growth and water conservation are discussed in FEIR Subsection 5.2.3.2. All of these actions are evidence that the local and state decision makers are very aware of the relationship between the issues of water supply reliability and growth. The Department provides up-to-date information on the availability of SWP supplies both real time, and for future planning purposes. The Department does not approve local growth, nor does it provide advice to local governments concerning their growth decisions. See FEIR Subsection 8.2.2.2 for a discussion on the Department's responsibility with regard to local land use decision-making.

The AFEIR discussed the current measures relating to water supply reliability and summarized the issue at pages 9-11 and 9-12:

Some comments point to perceived deficiencies in some of the measures discussed in Chapter 9 of the DEIR such as the biennial reliability reports, Urban Water Management Plans, and SB 610/221 decisions and point to these instances as proof that these measures will not prevent growth based on paper water.

Chapter 9 of the DEIR does not say that these measures will prevent growth, or growth based on paper water. What it does say on pages 9-10 to 9-11 is that "it is unlikely that land use planners and decision-makers would base their decisions only on the Table A amounts in the SWP long-term water supply contracts," and that local planners today have "more detailed, realistic, and readily available SWP delivery information available to them."

Some of the comments appear to argue that because the measures above may not always work to prevent unrealistic expectation, the process is not working. They point to areas where there have been disagreements over the Department's assessment of water reliability, disagreements over information included in urban water management plans, and disagreements regarding local planning decisions. The DEIR did not maintain that these measures work perfectly and that future decisions would never be based on "paper water" or unrealistic expectations. Nor did the DEIR attempt to evaluate the accuracy of the information of specific urban water management plans or local decisions. See FEIR Subsection 8.2.2.2 for a discussion of the Department's responsibility with regard to local land use decision-making.

The DEIR points out that land use decisions are not made in a vacuum, such as relying only on a Table A number found in the long-term SWP water supply contracts. There are many other factors local decision-makers consider. The fact that there are disputes over the Department's analysis for the Reliability Report, that there are law suits challenging urban water management plans and local planning decisions, and that there are efforts being made in legislative and regulatory areas to improve decisions relative to land use and supply is evidence that local and state decision-makers recognize the "common sense" connection between water availability and growth and are making efforts to deal with it.

Plaintiffs have argued that making Article 21 water available to M&I contractors has increased their reliance on an uncertain water source and that invocation of Article 18(b) with a lower firm yield (see the response to Issue 1 in this Subject) would ensure local entities would be more aware of the limitations of the SWP with regard to water reliability. As explained in the AFEIR at pages 9-2 and 9-3:

A number of documents published by the Department make it clear to water suppliers and local government that they should not rely on Article 21 water on an annual basis. They all recognize, however, that Article 21 water can be stored for later use and that stored water can constitute a source of water that can be relied upon in local water supply planning. In the absence of storage, interruptible Article 21 water is not likely to contribute to local water supply reliability because of its intermittent and unpredictable nature. With storage, agencies could provide a drought buffer that would support some added economic activity, but not within the context of Article 21(g)(1). Ultimately, incorporating Article 21 water into the assessment of water supply reliability is a local decision based on specific local circumstances and facts. Although the Department is aware of storage of Table A and Article 21 water which may lead to additional local development due to the drought "buffer" from additional stored supplies, the Department is not aware of any local water supplier or local governmental agency that relies upon "the sustained delivery of surplus water" to support the development of a local economy....

As stated in the DEIR on page 9-11, for the Monterey Plus EIR, the "paper water" issue is really a question of whether local planners recognize the limitations on the reliability of SWP supplies and more specifically whether the Monterey Amendment contributed to misunderstandings of water reliability. Like most other surface water supplies, SWP water supplies fluctuate, so in some years more water may be available and in other years less water may be available. The Department has determined that invocation of Article 18(b) and returning to the application of the concept of safe or firm yield in determining the amount of Table A that can be reliably allocated each year, except in extreme droughts, is not a reasonable way to protect the Delta or to make local government aware of the variability and limitations of SWP water supply. Such an action would not alter Delta exports, would not alter water supply reliability, nor would it alter the total amount of SWP water allocated to contractors. The action would decrease Table A allocations and commensurately increase Article 21 allocations, both as

scheduled surplus and as unscheduled (interruptible) supplies. See FEIR subsection 13.2.2.3.

Issue 7: Plaintiffs contend that “independent analysts continue to find that ‘many utilities are banking on paper water already used by someone else within the state water system.’”

Response: The statements Plaintiffs quote must be viewed in the context of the studies cited. In actuality, these studies *support* the discussion in the DEIR and AFEIR that there is water reliability information available to local decision makers that better inform their decisions to approve new growth. Moreover, neither of the studies suggests that the Monterey Amendment or the Settlement Agreement have contributed to a lack of understanding of these issues.

Plaintiffs incorrectly quote the 2005 Public Policy Institute article. The correct statement is that “[M]any utilities seem to be (not “are” as stated by the Plaintiffs) banking on “paper water” that is already being used by someone else within the state’s water system.” However, the article goes on to note that the author’s (Hanak) survey of local land use planners suggested that the “disconnect” between water utilities and local government might not be as large as imagined or feared, and that 6 out of 10 land use agencies participate in the planning activities of at least some of their local utilities and are active in water policy groups concerning regional resource management. The article also notes that SB 610 and SB 221 implementation, along with court rulings, are “making their mark” in addressing concerns that the “disconnect” will lead local governments to approve new development without adequate long-term water supply reliability.

The Orange County Grand Jury report cited in Plaintiffs’ letter does make the statement quoted; however, the focus of the report is to address the Grand Jury finding that Orange County’s water supply is vulnerable to extended outages from catastrophic disruptions and other long-term system failures, including ways to strengthen government processes so that residents and decision makers will be knowledgeable about the County’s water supplies. With respect to the pertinent issue, the report acknowledges that there has been legislation enacted that has “helped to place a greater importance of responsible planning, identifying dependable, long-term water supplies preceding major development approvals.”

As discussed in Chapter 9 of the DEIR, and in particular Chapter 9.3.1, two surveys of General Plans, Specific Plans, and associated large-scale EIRs, indicated that local planners are addressing paper water issues in project-specific planning documents. As explained in the DEIR at section 9.4.2:

The surveys and literature review undertaken as part of this EIR show little evidence that a “paper water” problem was created by the contractual SWP amounts or that it affected urban growth decisions. However, even if a “paper water” problem did arise from land use planners relying on the Table A amounts, the passage of SB 610 and 221 and the State Water Project Delivery Reliability

Report have led to better information dissemination to local planners regarding the reliability of SWP supplies. Thus, the elimination of Article 18(b) by the proposed project would not have an effect on urban growth and would not create a continued "paper water" problem because planners either do not consider SWP water supplies when approving growth at the General Plan level, or have more detailed, realistic, and readily available SWP delivery information available to them to consider at the development approval level.

K. CALSIM II

Issue 1: On page 8 of their letter, Plaintiffs cite to comments on the DEIR from Steve Dunn and Arve Sjovold (Comment Letter 22) and claim that the Department "continues to ignore critical flaws in the CALSIM II model, and major limitations on its application to this project" and "refused to conduct any new modeling studies in response" to Plaintiffs' concerns.

Response: As explained in the AFEIR at pages 6.3-1 and 6.3-2:

The DEIR used two basic methods to analyze the effects of the proposed project and its alternatives on SWP operations and deliveries to SWP contractors: a historical data analysis from 1996 through 2005; and modeling using CALSIM II.

CALSIM II has attracted much scrutiny because the State and federal governments use the model to evaluate possible additions and improvements to California's water system. CALSIM II was reviewed by an external peer review panel in 2003 and the Department and Reclamation responded to the peer review report in 2004. Many of the elements of model development features outlined in the peer review response are in progress and will be implemented in the updated version of the model, CALSIM III. The current version of CALSIM II was used in support of the analyses in this EIR.

Early in the process of developing the DEIR, a modeling subcommittee of the EIR Committee of plaintiffs and contractors was formed to refine the methodology and review the assumptions that would be used in the model. As explained in the AFEIR on page 6.3-1:

Although the meetings were useful, it was apparent that the plaintiffs' representatives felt that CALSIM II was flawed and an unreliable tool for use in the environmental assessment. The Department and the contractors' representatives, on the other hand, expressed the view that while no mathematical model can simulate reality perfectly, CALSIM II was a valuable analytical tool, and one widely used by federal, state and local water agencies for planning purposes. As noted in Comment 31-2, because of this disagreement it was decided that other analytical methods would be investigated.

As a result, the Department used a number of analytical tools, including CALSIM II, spreadsheet analysis of certain CALSIM II output data, and historical analyses

based on actual operations under the Monterey Amendment from 1996 through 2004 or 2005.

Plaintiffs state on page 8 of their letter that the AFEIR on page 6.3-34 “finally acknowledges that CALSIM II as an optimization model, ‘effectively excludes the possibility of operating the SWP in a manner that would decrease exports.’” The complete excerpt from AFEIR page 6.3-34 is:

The comment claims that because the model is maximizing exports from the Delta rather than maximizing environmental qualities, it is inadequate to analyze the impacts of the proposed project, especially recent court rulings on endangered species regulations. The comment also notes that CALSIM II as currently configured is not well suited to help solve the environmental issues in the Delta. As noted in FEIR Subsection 6.3.2.3, CALSIM II is a simulation model through optimization, which effectively excludes the possibility of operating the SWP in a manner that would reduce rather than increase exports from the Delta. The DEIR does not use CALSIM II or the historical model to determine how the SWP should be operated to protect the environment. It is used to determine how the SWP can be operated given specific constraints. CALSIM II can model reduced Delta exports if the environmental constraints in the Delta are increased or contractor water demand is decreased.

Mr. Sjovold, the co-author of Comment Letter 22 was a member of the subcommittee that reviewed the modeling efforts for the DEIR and submitted a number of comments on this subject which were included in Comment Letter 30. The AFEIR responded to the criticism of the CALSIM II model asserted in Comment Letter 22 and Comment Letter 30 (See responses to these letters in AFEIR Subsection 6.3). As discussed on page 6.3-12 of the AFEIR:

Some comments state that comments and suggestions made at the EIR Committee are not reflected in the DEIR. The Department disagrees. While the Department did not adopt all the suggestions made by the participants, the analytical methods used in the DEIR were shaped to a considerable extent by the committee discussions. The Department believes that it worked extensively with the plaintiff representatives to the EIR Committee to develop alternative ways to analyze impacts of the Monterey Amendment. Many suggestions of the plaintiff representatives were accepted and modifications were made as a result of their input. Most, if not all, of these issues are discussed in response to specific comments contained in the FEIR. In addition, on September 22, 2005, the Department sent the plaintiffs a letter responding to some of the concerns raised about the use of CALSIM II. A copy of that letter is included in Appendix C to this Final EIR.

In sum, the Department extensively evaluated the validity and usefulness of the CALSIM II model, considered the substantial input both in support of and against the use of the model, modified the methodologies applied in the AFEIR in response to such input, and conducted a thorough impact analysis founded on those methodologies,

including the CALSIM II model. A difference of opinion regarding scientific method does not constitute a CEQA defect, especially where the Department has thoughtfully considered the countervailing views and reached a conclusion on the matter. On the contrary, the Department's extensive consideration of methodology, in which Plaintiffs participated, underscores that the AFEIR analysis complies with CEQA.

Issue 2: Plaintiffs contend that the AFEIR does not comply with the key holding in the *Intertie* case (*PCL v. US Bureau of Reclamation*) cited in the AFEIR on page 6.3-6 because the AFEIR failed to "disclose relevant shortcomings in CALSIM II and its application to the project."

Response: The AFEIR disclosed the benefits and limitations of CALSIM II and other analytical methods. AFEIR Subsection 6.3 discusses in detail the benefits and limitations of the CALSIM model and also discussed other analytical methods used so that the Department *would not* solely rely on the CALSIM II model. AFEIR Table 6.3-1 shows all analytical methods and their purposes, benefits and limitations. The Department agrees that no mathematical model can simulate reality perfectly. CALSIM II, however, was a valuable analytical tool, especially for comparative studies where a "without project" scenario is compared to a "with project" scenario. In the AFEIR, the CALSIM II model was used to compare SWP deliveries between the baseline (without project) and the proposed project (with project) scenarios resulting from the altered allocation procedures and the proposed project's Table A retirements and transfers (both those completed and those yet to be completed), and between the baseline and between the various alternatives. The AFEIR responded to the issue raised by Plaintiffs on page 6.3-6:

Other comments argue that CALSIM II should not be used in the DEIR because it is an imperfect model. The Department recognizes that CALSIM II is not a perfect model. CEQA does not require perfection, but rather adequacy, completeness, and a good faith effort at full disclosure. See CEQA Guidelines Section 15151. See also *PCL v. USBR*. After considering the strengths and shortcomings of the CALSIM II model, the Department determined that CALSIM II was an appropriate tool to analyze the effects of the proposed project and its alternatives on SWP operations and deliveries to SWP contractors. In addition to CALSIM II, analyses of historical data were also performed for a number of reasons, including the fact that the proposed project includes provisions not readily modeled by CALSIM, that the proposed project was implemented more than a decade ago and so actual data was available, and to supplement and provide a check for CALSIM results.

L. Climate Change

Issue 1: Plaintiffs asserts, at page 8 of their letter, that the AFEIR assessment of climate change ignores "project-related effects on the location of development on the erroneous premise that this is solely a local matter. (AFEIR 12-4)."

Response: The AFEIR did not ignore project-related effects on the location of development. Pages 12-3 to 12-5 of the AFEIR discuss climate change impacts relating to local development. As explained on pages 12-3 and 12-4:

Some comments suggest that the DEIR should have done an analysis of the location of where potential growth inducement might occur and the potential for more or less GHG emissions. Some also suggested that the DEIR should have analyzed the potential change in GHG emissions due to the change in Article 18(a) which allocates shortages on a pro rata basis instead of agriculture first. Others suggested that the nature and patterns of growth can significantly increase overall GHG emissions of a given population.

In general, urban water end use is more energy intensive than agricultural water end use, and, thus, depending upon the type of energy applied to water, a shift from agricultural to urban end use could result in more GHG emissions. The DEIR does not assert that location of growth bears no relationship to GHG emissions. It recognized that the proposed project may result in changes in growth patterns at the local level, but would not have an effect on statewide population growth and thus "within the SWP service area as a whole, the proposed project would not result in any changes in GHG emission due to growth." The EIR identifies potential increases in population that could be supported by the proposed project and it identifies potential impacts and mitigation measures that could result from local development decisions in general terms. See Chapters 8 in the DEIR and FEIR.

The comments appear to confuse the Department's role regarding the proposed project's impacts (over which the Department has some authority and control) with the role of individual municipalities or other local jurisdictions with lead agency status over land use planning (over which the Department does not have authority or control). As discussed in FEIR Subsection 8.2.2.2, the level of detail contained in the DEIR for growth-inducing impacts and reliability analyses is consistent with the general level of review required for the Monterey Amendment. Even though the Department could identify some of the local decisions that may rely on water made available from the proposed project, these decisions require extensive information about local facilities, local water resources and local water use. The potential environmental impact of growth is subject to more detailed environmental review at the project level.

This approach is consistent with other greenhouse gas strategies discussed on pages 12-5 and 12-6 of the AFEIR, including SB 375 (2008) (Steinberg) which requires the development of a sustainable communities strategy to reduce greenhouse gas emissions to be done at the regional level with state oversight. The Department is involved in this process. The Department has also identified two regional adaptation strategies relating to integrated regional water management planning and increasing water use efficiency at the regional level. With respect to Plaintiffs' specific comment, the AFEIR climate change analysis (as well as the growth inducing analysis) complies with CEQA.

Issue 2: Plaintiffs contend that DWR declined to study the climate effects of four aspects of the Monterey Amendment and the Settlement Agreement.

Response: As noted, the AFEIR's analysis of the proposed project's potential effect on climate change satisfied CEQA. In addition, the AFEIR addressed the issues raised by Plaintiffs. Chapter 12 of the DEIR analyzed SWP GHG emissions as a result of the proposed project and found that the Monterey Amendment would likely increase overall SWP GHG emissions from the level than would exist with the pre-Monterey contract provisions. The analysis included the impacts of the altered allocation procedures and transfers of Table A amounts from agricultural to M&I contractors. Plaintiffs' items (1), (2) and (3) all refer to changes regarding altered allocation procedures and Table A transfers. These items are covered above in the response to Issue 1 in this Subject and in the discussion on the Impacts of Increased SWP Power Use, including the Impacts of Changes on Local Development, AFEIR Subsection 12.2.1.1. Item (4), regarding investment in the Plumas Watershed Forum, is discussed in the response to Comments 13-1 and 13-2, which underscores the finding of the DEIR that there are no proposed project impacts on climate change that require mitigation, but recognizes the general value of watershed forests and meadow systems with respect to mitigating the potential impacts of climate change. See AFEIR, page 12-10 & 12-11.

Issue 3: Plaintiffs assert that the AFEIR fails to incorporate climate change analysis throughout the EIR and that the Department failed to analyze how mitigation and alternatives could be framed in a climate-protective manner.

Response: The effect of climate change on the proposed project is discussed in DEIR Chapter 12 and also in AFEIR Subsection 12.2.2. The issue raised by Plaintiffs is addressed in AFEIR Subsection 12.2.3. The AFEIR explains on pages 12-8 to 12-9:

Some comments suggested that the DEIR should incorporate climate change throughout all impact analyses. The effects of the Monterey Plus on operation of the SWP were described and analyzed in Chapter 6 of the DEIR, including analyses of Table A deliveries in the future (2020). The analysis of Climate Change in Chapter 12 of the DEIR builds upon this information and shows how deliveries could be changed based on climate changes. As discussed above, the DEIR showed that deliveries could be reduced by as much as 10 to 25 percent under the baseline and under the proposed project. It also showed the proposed project would not have an effect on the SWP's vulnerability to climate change. Tables A-4a through A-6f of DEIR Appendix F include quantified impacts of climate change as part of the CALSIM analysis of the revised allocation methods, Table A transfers, and Table A retirement. The tables indicate how deliveries would be affected by climate change in the five hydrologic year types evaluated in the EIR.

In the broader context of how operational actions under both existing and future conditions were evaluated in the DEIR, it is apparent that a sufficiently broad

range of potential future hydrologic conditions was in fact applied to analysis of the proposed project on hydrology and water supply. The hydrologic conditions applied appropriately reflect the extremes in annual climate variability, from very dry hydrologic cycles to very wet hydrologic cycles that could be expected over the next 20 years.

Operations modeling performed in support of the DEIR reflect the above variability – analyzing 73 different years throughout the SWP. This modeling covers a truly wide range of hydrologic conditions, from multi-year dry periods where releases were very restricted to wet periods. This modeling was designed to provide input to the environmental analyses to evaluate a broad range of potential future hydrologic conditions that reflect the expected variability in regional climate.

Over the coming decades, the Department expects rainfall, snowmelt, and runoff patterns to be different from year to year, just as they have historically varied significantly on an annual basis. As such, the measures included in the DEIR were formulated and analyzed to successfully operate the SWP under a very broad range of anticipated hydrologic conditions.

As Plaintiffs point out, the AFEIR notes that Table A deliveries could decrease by 10-25 percent under both the baseline scenario and the proposed project (AFEIR, 12-8). However, as discussed in AFEIR Subsection 12.2.3 and on page 6.2-4:

Other than the amount of water that would be allocated in any given year, the analysis of how these changes affect the SWP would not change. While there would be more years of lower available water supply, the allocation procedures remain the same. The only impact on the Delta from the Monterey Amendment comes from slightly increased average Delta exports attributable to the water supply management practices, particularly storage outside the service area. One of the results of more dry and critically dry years is that many of the impacts of the water supply management methods are likely to decrease as well. Although the impacts of the proposed project may decrease in the future below those levels evaluated in the EIR, the magnitude by which impacts would decrease and the rate of such decreases are not readily predictable.

In short, the analysis of the proposed project in the AFEIR with respect to potential impacts, alternatives and mitigation measures accounts for possible variations in conditions related to climate change, to the extent such variations are predictable or quantifiable.

M. Environmental Consequences of Financial Restructuring

Issue 1. Plaintiffs assert, on pages 8-9 of their letter, that financial restructuring under Article 51 of the Monterey Amendment “would provide an enormous revenue stream to

the State Water Project contractors” and that the AFEIR’s conclusion that environmental impacts associated with Article 51 are “speculative” is untenable. Plaintiffs also contend that the AFEIR should have evaluated the consequences of Article 51’s effect on water rates.

Response: The discussion in the AFEIR on these issues is appropriate and in compliance with CEQA. Article 51 does not create a “revenue stream,” it reduced charges to the contractors under certain conditions. The AFEIR addressed this issue in its response to Comment 30-54 on pages 4-17 to 4-19 (see also AFEIR, 17-52):

The comment claims that the DEIR does not analyze the environmental consequences of Article 51. Section 4.4.5 of the DEIR discusses the restructuring of the contractor rates pursuant to Article 51 of the Monterey Amendment. As noted on page 4-8, “contractors receive a reduction to their charges if the revenues exceed the payments for general obligation bonds, revenue bonds, maintenance, operation, and replacement costs, reimbursement of the California Water Fund, and deposits into the State Water Facilities Capital Account.”

If an article added or amended by the Monterey Amendment was found to change the way in which water is stored or conveyed, it was assumed that it could have the potential to produce a change in SWP or contractor operations, which might in turn have environmental effects. If it did not produce an operational change, it was not analyzed for environmental impacts. See DEIR page 6-15. The DEIR found that Article 51 did not have an effect on the SWP or contractor operations and therefore it was not analyzed for environmental effects. See DEIR Table 6-3. The comment says the EIR must analyze the relationship between Articles 18 and 51 and must compare the project to the no-project scenario in which Table A amounts are reduced without Article 51 rebates. The DEIR includes two no-project analyses in which Table A amounts are reduced and two no project analyses in which Table A amounts remain the same. Article 51 would not apply to any of the no project alternatives. The comment says that Article 51 changes the way that the Department address revenues exceeding the cost of the revenue system and says that the revenue stream returned to the contractors under Article 51 is enormous over the life of the project contracts. The comment is correct that Article 51 changes the way revenues exceeding costs are treated. It is part of a larger change that created a General Operating Account and a State Water Facilities Capital Account and provided a reduction in charges if the revenues exceeded certain specified costs. For agricultural contractors, the amount of the reduction in charges is deposited into a trust fund to help them in years when they receive less than their requested annual Table A amounts for that year. For M&I contractors, it means that they pay less money to the Department than they did before the Monterey Amendment.

The comment assert that, although CEQA does not require analysis of purely economic or social changes, *San Franciscans Upholding the Downtown Plan* requires analysis of environmental impacts that can be traced to such changes.

The comment contends that the EIR must also evaluate the environmental consequences of Article 51's effect on water rates, and consider the financial adjustments made in Article 51 when making its assessment of project alternatives and mitigation. In *San Franciscans Upholding the Downtown Plan*, the appellate court found that the social inconvenience of having to hunt for scarce parking spaces is not an environmental impact but that the secondary effect of scarce parking on traffic and air quality is an environmental impact. The court stated that under CEQA, a project's social impacts need not be treated as significant impacts on the environment. An EIR need only address the *secondary physical* impacts that could be triggered by a social impact.

The DEIR does not include an analysis of the environmental impacts caused by Article 51 either in the resource impact analyses or in the cumulative impact analysis because it is highly speculative to try to determine how the economic change would lead to a physical or environmental change. The Department cannot trace where, how, and when the funds not given to the Department are distributed or used by each SWP contractor, and therefore the Department cannot identify or analyze physical changes or "environmental impacts that can be traced to such [economic or social] changes". The Department is not an auditing agency and it does not have the ability to track such returns. Each contractor is a unique public agency operating in its own political, economic, environmental and cultural setting. Its decisions are determined by its independently elected board of directors. Prediction of future decisions of a broad range of agencies and municipalities would be highly speculative. See CEQA Guidelines Sections 15144 and 15145. Article 51 rate reductions have been in effect since 1996. As of 2009, the Department is not aware of the SWP contractors building new projects or making other physical changes that could be attributed to the net reductions in payments to the SWP. As public agencies, SWP contractors are subject to CEQA and will have to determine whether decisions to carry out projects with funds maintained because of the reduction in charges from Article 51 require environmental analysis and documentation. The comment also states that the *PCL v. DWR* court recognized the interrelationship between revised articles 18 and 51. As cited by the comment, the court discussed Article 51 as evidence that "fiscal and environmental pressures militate against completion of the project" (page 914, n.7). The *PCL v. DWR* court did not give any opinion regarding whether it thought Article 51 did or did not have any environmental impacts. See also FEIR Subsection 4.2.1.1 for further discussion of the scope of the EIR.

The AFEIR did not find any identifiable environmental impacts as a result of Article 51. Although Plaintiffs make a general statement that the AFEIR should have evaluated the potential environmental consequences of Article 51's effect on water rates, Plaintiffs have not identified any specific environmental impacts attributable to Article 51.

Issue 2: Plaintiffs argue that the AFEIR should have compared the proposed project's environmental consequences "with enforcement of article 18(b), which might have

eliminated reliance on paper water without imposing the high public costs of Article 51.” Plaintiffs also dispute the AFEIR’s conclusion (AFEIR, page17-52) that allocation of Article 21 water with invocation of Article 18(b) would not have provided any more water for the environment.

Response: Plaintiffs appear to see a relationship between the invocation of Article 18(b) and the absence of Article 51 that is not clear to the Department. As discussed in the response to Issue 1 in this Subject, the DEIR evaluated the proposed project with Article 51, as well as several no project alternatives which did not include Article 51 but did include the invocation of Article 18(b). Other than speculative impacts, which the Department appropriately did not quantify, the analysis did not show that cognizable impacts resulted from Article 51.

The Department’s response to Plaintiffs’ position regarding allocation of Article 21 water under the no project alternatives that include invoking Article 18(b) is discussed in the Subject E. on Assessment of Shortages and Surplus Provisions. As explained, the Department has determined that it would continue to deliver Article 21 water if Article 18(b) were invoked. Plaintiffs’ disagreement with the Department’s interpretation of a contract term is not a CEQA defect.

Plaintiffs also assert that Article 51 imposed high public costs. Although the amount of money involved is significant, Article 51 resulted in returning money to the contractors, which are themselves public entities. Thus, presumably members of the public benefitted. In any event, Article 51 did not result in any increased costs to the general public state-wide. Finally, any economic costs related to Article 51 do not raise a CEQA issue absent a valid causal connection to an environmental impact, which the AFEIR found did not exist. See the response to Issue 1 in this Subject.

N. Project Alternatives

Issue 1: Plaintiffs argue, at pages 9 and 10 of their letter, that the reliance of the AFEIR (pages 5-9 to 5-10, 11-2 and 2-31) on the California Supreme Court decision in *In re Bay-Delta* is misplaced, in part because the CALFED program that was the subject of that ruling was a programmatic and first-tier document at a “relatively early stage of design” while the Monterey Amendment includes project specific actions (AFEIR, 4-9).

Response: *In re Bay-Delta* reaffirmed that the evaluation of alternatives under CEQA is based on the rule of reason considering the applicable facts and circumstances. The type of EIR involved does not alter the standard by which an alternatives analysis must be judged under CEQA. In accordance with CEQA and the standard reaffirmed by the California Supreme Court, the AFEIR considered a reasonable range of alternatives. See AFEIR pages 11-1 through 11-41. In so doing, the AFEIR discussed the facts and circumstances considered in determining a reasonable range of alternatives for the proposed project. At pages 11-12 and 11-13, it explains:

The California Supreme Court recently reaffirmed in *In Re Bay Delta* (pages 1162-1169, see especially page 1165) that an EIR’s consideration of alternatives

is based on the rule of reason considering the facts and circumstances involved. The focus of the Supreme Court was not on whether a rejected alternative met some or most of the objectives but rather on whether the lead agency has reasonably determined that the rejected alternative cannot achieve the project's underlying fundamental purpose. The Supreme Court recognized that, in certain instances, when the proposed project reflects a negotiated solution to a problem that provides benefits for different parties, the CEQA analysis can reject alternatives that do not achieve all of the objectives concurrently.

The underlying fundamental purpose of the Monterey Agreement and the Monterey Amendment is to resolve conflicts and disputes between and among the urban and agricultural SWP contractors and the Department about water allocation and related issues pertaining to the management and financing of the SWP. One key objective of the Monterey Agreement and the Monterey Amendment is to facilitate water management practices and water transfers that improve reliability and flexibility of SWP water supplies in conjunction with local supplies. The primary focus of the Monterey Amendment is on how the Department will allocate and how the contractors may be able to increase the flexibility and reliability of the available SWP water. The Monterey Amendment does not increase Delta exports beyond permitted limits. See FEIR Subsection 5.2.1.2.

To paraphrase the court's decision on page 1165 regarding the CALFED process, the disagreements among the contractors and the Department in the mid-1990s over how the SWP water supply contracts were to be interpreted and water supply allocated between agricultural and M&I contractors had not yielded solutions. Difficulties also existed with regard to potential development of the planned KWB. As with the Monterey Agreement, the CALFED solution was established "to reduce the conflicts and provide a solution that competing interests could support....accordingly the PEIS/R describes its integrated approach to achieving all ...objectives concurrently as 'the very foundation of the Program.'....Nothing less can achieve the underlying fundamental purpose of reducing conflicts by providing a solution that competing interests can support."

In *In re Bay-Delta* the Supreme Court also recognized that Bay-Delta ecosystem restoration to protect endangered species is mandated by both state and federal endangered species laws, and for this reason water exports from the Bay-Delta ultimately must be subordinated to environmental considerations. This DEIR and FEIR both recognize that the Monterey Amendment actions are subject to the endangered species laws as well as other regulatory processes including State Water Resources Board Decision 1641. Any actions designed to resolve the water allocation and other issues among the Department and the SWP contractors, including the Monterey Amendment and the actions it facilitates, are subordinated to these legally binding environmental restrictions.

Even if the Monterey Amendment negotiations are considered to be fundamentally different from those of the CALFED process, and CEQA were to

require an alternative that does not meet all the project objectives, even though one party may lose some of its benefits, this EIR would satisfy such a requirement. Alternative 5 meets this requirement. The potentially significant impacts of the proposed project are all attributable to the water supply management measures. Alternative 5 is an alternative that could lessen the significant impacts of the proposed project, including any potential impact to the Delta, and still meet some of the objectives of the proposed project.

Issue 2: Plaintiffs argue that the only project alternative the AFEIR fully studied – Alternative 5 - was inadequate to address the key issues raised by Plaintiffs, such as the operation of the Kern Water Bank or the changes in shortage and surplus rules.

Response: The AFEIR considered a reasonable range of alternatives, consistent with CEQA, and addressed the issues Plaintiffs have asserted. In particular, the Department believes that Alternative 5 was a reasonable and appropriate alternative for analysis.

The AFEIR determined that water supply management practices could result in potential significant environmental impacts. The AFEIR also determined that operation of the Kern Water Bank and the changes in shortage and surplus rules did not result in any potential significant adverse environmental impacts. With respect to Alternative 5, the AFEIR described at pages 11-9 and 11-10:

Alternative 5 does not include the water supply management practices described in Articles 54 and 56 of the Monterey Amendment that are the cause of most of the potentially significant adverse impacts of the proposed project, including the impacts on Delta fisheries....

While it was recognized that there was doubt as to whether Alternative 5 meets most of the objectives of the Amendment or whether it was institutionally and legally feasible, it was analyzed at the same level of detail as were the proposed project and the no-project alternatives because it would lessen the potentially significant adverse impacts of the proposed project, would meet several of the proposed project's objectives and would provide the public and decision-makers with useful and more complete information on how it would affect different contractors and the environment.

Issue 3: Plaintiffs argue that the AFEIR “wrongly refuses to analyze at least two of the proposed alternatives on the erroneous premise that they would not meet most project objectives.”

Response: The alternatives Plaintiffs reference were suggested by the Planning and Conservation League, one of the Plaintiffs, in EIR Committee discussions during the formulation of the DEIR and again in its comments on the DEIR. These alternatives were properly excluded from the detailed analysis in the AFEIR. As explained at pages 11-12 and 11-13 of the AFEIR:

Some comments stated that numerous alternatives were presented and that the Department unreasonably rejected them. The DEIR provided an explanation of why the remaining six alternatives suggested by the Planning and Conservation League were eliminated from consideration and not analyzed in detail in Chapter 11. The following paragraphs summarize the process used to identify alternatives for detailed evaluation in the DEIR and explain why the six suggested alternatives were rejected. For a complete explanation of the alternatives evaluation process, see pages 11-2 through 11-7 of the DEIR.

Some of the comments raise questions about the DEIR's conclusions with regard to feasibility. For example Comment 21-50 challenges the determination that the Monterey Amendment is not an appropriate tool for mandating "local water enhancements" and that there are other forums where these concerns can be discussed as part of a comprehensive process. The comment states that the distinction is arbitrary and that nothing precludes the Department from evaluating an alternative of this nature and that in fact there is some authority that suggests analysis of just such an alternative is required. As the Supreme Court reaffirmed in *In re Bay-Delta* (page 1163), the lead agency must consider a range of reasonable alternatives which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen the significant impacts of the project alternatives. The court stated that the EIR does not need to consider every conceivable alternative to a project or projects. Feasible is defined as being "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors."

In the DEIR the Department did not reject alternatives arbitrarily because they required legislation or because they would reduce dependence on exports from the Delta as suggested by footnote 27 in comment 21-50. The Department considered a variety of factors including the nature of the alternative, its ability to achieve most of the project objectives and its ability to meet the fundamental purpose of the proposed project; its consistency with traditional legislative and administrative allocations of responsibility, the likelihood of achieving a state-wide or local consensus, whether the alternative was more appropriately considered in other forums and other factors. In *City of Del Mar* (909), the court found that "feasibility" under CEQA can encompass "desirability" [of a plan or action] to the extent that desirability is based on a reasonable balancing of the relevant economic, environmental, social, and technological factors. The court recognized that a finding of feasibility involves a balancing of factors and that the responsibility under CEQA was not whether the result was the right one but whether the proper consideration and balancing occurred. See discussion in FEIR 11.2.4 on factors considered in rejecting an alternative of reduced demand or water supply.

Further discussion on the two specific alternatives identified by Plaintiffs follows.

Plaintiff's' Proposed Improved Reliability through Environmental Enhancement Alternative. As the AFEIR explains, this alternative was properly rejected for detailed consideration. The AFEIR explains at page 11-13:

This alternative would result in a reduction in water pumped from the Delta either through a mandatory or theoretical demand reduction based on implementation of water use efficiency and other measures that would reduce demand. It was also suggested that this alternative allocate 50 percent of Article 21 water for environmental purposes. This alternative is also a different project with different objectives. This alternative was rejected because it would not meet any of the project objectives. It was also rejected because it would also be in conflict with the basic terms of the long-term water supply contracts and is, therefore, considered infeasible. See further discussion of this alternative in FEIR Subsection 11.2.4.2.

With regard to Plaintiffs' argument that this alternative would feasibly accomplish most of the project objectives, while also reducing injury to the Delta, the AFEIR explained at page 11-19:

As discussed in FEIR Subsections 5.2.1.1 and 5.2.1.2, this is an EIR on the Monterey Amendment and the Settlement Agreement, not an EIR on the SWP, and addresses fairly narrow changes to the long-term water supply contracts that arose primarily out of conflicts and disputes among the urban and agricultural contractors and the Department about water allocation and related issues pertaining to the management and financing of the SWP. The Department does not agree that the alternatives would "restore the ecosystem" or lead to "lessening the need to constrain water operations to protect those ecosystems". Even if those alternatives did so, the Department does not agree that they meet most of the proposed project objectives. Certainly in the short term, if not in the long term, the alternatives would most likely increase times of shortage and increase conflicts and disputes among the contractors and the Department. They would also increase financial pressures on agricultural contractors in times of drought and supply reductions. They could also reduce the benefits of the water supply management practices by reducing the amount of water available to contractors and reducing the flexibility of the SWP system.

Plaintiffs' Proposed Kern Fan Transfer with Trust Conditions Alternative. Similarly, the AFEIR explains, at page 11-14, that this alternative was appropriately not considered for detailed analysis:

This alternative would impose a requirement that water stored in the KWB would be used to provide statewide environmental benefits. This alternative is also a different project with different objectives. It would not meet any of the project objectives. Use of the KWB Lands for environmental purposes would require finding appropriate funding sources and reaching agreement with the local authorities.

Consistent with CEQA and *In re Bay Delta*, the AFEIR was not required to include alternatives that were infeasible or would not meet project objectives. Plaintiffs' preference for an alternative that was not evaluated in detail does not equate to a defect in the AFEIR.

Plaintiffs assert that the AFEIR (at page 2-34) recognizes that the Kern Fan Element was meant to address out-of-service-area storage, rather than the purely local uses by Kern interests. A Kern Water Bank operated for local use was part of the proposed project. A Kern Water Bank operated for SWP use was included in several of the no project alternatives. See AFEIR subsection 16.2.5 for more on the comparison of a water bank for SWP purposes or for local purposes and on why operation of the KWB Lands for environmental purposes was not considered as an objective.

Plaintiffs also assert that the AFEIR recognizes that the "Kern Water Bank's primary use for transfers has been to profit from EWA sales (AFEIR, 7.2-42 to 7.2-43, 16-8, 17-42), whose sole local interest is private profit at the expense of the environment." Plaintiffs misstate the findings of the AFEIR which described the EWA sales along with withdrawals for other purposes. See AFEIR Subsections 16.2.8 and 16.2.11. Financial gain may be an intended or incidental result of the Monterey Amendment, but it is only a CEQA issue if it could result in potential significant adverse environmental impact. The sale of EWA water was not a result of the Monterey Amendment, but a result of the EWA; the EWA was the subject of another EIR. Neither the EWA EIR nor the AFEIR identified adverse environmental impacts as a result of sales of water stored in the KWB Lands.

Issue 4: Plaintiffs assert that the AFEIR's alternatives assessment is "undermined by DWR's premise that it cannot make a 'unilateral' decision" to change the long-term water supply contracts (citing to AFEIR, page 5-5).

Response: As explained at page 13-8 of the AFEIR, "[I]t is essential to recognize that the contracts before Monterey were products of negotiations between the Department and the SWP contractors, as is the Monterey Amendment." The Monterey Amendment changed the terms of an existing contract between the Department and the SWP Contractors. Given that the long-term water contracts were (and are) bi-lateral contracts, the Department properly exercised its discretion in deciding not to consider making unilateral changes to the contracts as an alternative to consider. The Department's recognition that a unilateral contract amendment was not a feasible alternative did not "undermine" the analysis in the AFEIR. This determination is consistent with the holding of the Supreme Court in *In re Bay-Delta*.

Issue 5: Plaintiffs argue that measuring the feasibility of alternatives "solely by that which was secretly negotiated by the contractors deprives the public of the opportunity to propose and secure comparison of its alternatives."

Response: The Department disagrees with Plaintiffs characterization of the contract negotiations. Plaintiffs assert that the 1994 Monterey Agreement was “secretly negotiated;” however, there was no requirement prior to the 2003 Settlement Agreement to publicly negotiate any changes to the long-term water supply contracts. Nor had negotiations ever in practice been conducted publicly. As discussed in the AFEIR at page 4-8:

CEQA does not require public participation in the decision-making process. Whether or not public participation is required during an agency’s decision-making process depends on the requirements of laws, regulations, and other rules relating to that agency’s own process. Some agencies, such as boards and commissions and most local agencies are required to conduct their decision-making in public. Others, such as departments like the Department of Water Resources, have no similar requirements.

The negotiations that led to the Monterey Agreement were conducted without public input. While some of the comments are critical of this process, it was not unusual and it was not illegal. Up until that time, discussions relating to the long-term SWP water supply contract amendments had never included public involvement. This was one of the issues that concerned the Plaintiffs in *PCL v. DWR* and was one of the subjects of the Settlement Agreement which provides for public negotiations of permanent transfers of Table A amounts (Attachment C to the Settlement Agreement), and principles for public participation in project-wide contract amendments and contract amendments relating to Table A transfers between existing SWP contractors (Attachment D to the Settlement Agreement).

Moreover, CEQA allows a lead agency to choose the proposed project and objectives it wishes to consider. The AFEIR explains at page 5-5:

Some comments suggested that the Department was obligated to consider project objectives that would balance contractors’ and environmental objectives or allocate a portion of the water available to the SWP for environmental purposes. Neither the Court in *PCL v. DWR* nor the Superior Court’s Order on remand, nor the terms of the Settlement Agreement suggests that the Department is obligated to change the basic approach to the SWP to require the Department to consider such broad objectives. Although CEQA requires an agency to consider mitigation measures and alternatives that would meet its project objectives, it does not require an agency to examine a project and objectives that are completely different from the one it has chosen to pursue. See DEIR Subsection 11.2.3 and FEIR Subsections 11.2.3 and 11.2.4 for more discussion on alternatives that were rejected as different projects with different objectives than those of the Monterey Amendment.

Even if the Department could unilaterally impose changes of the nature suggested by the comments or the Department and the contractors could mutually change the water supply contracts in a way that would allocate or leave

more water for the environment, CEQA does not require the Department to consider or make these changes within the context of this EIR. The Department has chosen in this EIR to keep the objectives limited to ones that deal with issues and conflicts between and among the Department and the contractors and leave resolution of broader issues relating to the health of the Delta and urban development to other established planning, legislative and regulatory processes.

It is the purpose of CEQA to make sure that the public has an opportunity to review and comment on the environmental impacts of a proposed project and appropriate mitigation measures and alternatives. From the outset, Plaintiffs and the public have had extensive and direct involvement in this review process, far more than is required under CEQA, including with respect to alternatives. The AFEIR complies with both the letter and the spirit of CEQA.

Appendix A

The last two paragraphs on page 15-6 of the AFEIR have been expanded as follows; the same language will also be added to the text at the end of page 6.3-6;

When the analysis was begun in 2003, at the time of the NOP, it was decided that 1995 conditions would serve as the starting point for the analysis because 1995 was the last year before the Monterey Amendment came into effect. Two periods would be analyzed; 1995 through 2003, the period already experienced and for which historical data is available; and 2003 through 2020, the future viewed from 2003. Accordingly, CALSIM II was used to examine SWP deliveries under 1995, 2003 and 2020 conditions. See FEIR Subsection 6.1.2.1. Analyses in the Resource Impact Sections in Chapter 7 were divided into two time periods: 1996-2003 (past impacts) and Future Impacts.

In addition to the analysis using CALSIM II, which primarily served to characterize the effects of the Table A transfers and retirements, analysis of historical data was used to characterize the effects of the water supply management practices. ~~The various historical analyses undertaken could have used the same time frame as the CALSIM II analysis and only used data for the period 1995 through 2003.~~ The various historical analyses started in 1996 when the Department began implementation of the Monterey Amendment and the analyses could have ended in 2003, only using data for the period through 2003. However, because by the time the historical analyses were conducted, data from 2004, and sometimes 2005, were available, it was decided to use the data from the later years to strengthen the analyses of the historical period in estimating impacts. It was concluded that the advantages provided by the longer period of historical analysis outweighed any disadvantage associated with differences in the periods of analysis.

In addition, Studies 3 and 7 formed the basis for extrapolating certain future impacts of the water supply management practices, and the added period of record was perceived by the Department as providing a better basis for such estimates. Thus Studies 2, 3, and 7 covered the period 1996 to 2004, and Study 1 and the historical portion of Study 6 covered the period 1996 to 2005. The use of added years of historical data in no way alters the baseline of analysis in the EIR, nor is it inconsistent with the 2003 baseline. See FEIR Subsection 6.3.1, Table 6.3-1. Impacts analyzed based on the historical data are included in the 1996 to 2003 analyses in the Resource Impact Sections in Chapter 7 since they cover essentially the same period of time.